No. 09-15836

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JERRY VALDIVIA, et al.,
Plaintiffs and Appellees

v.

ARNOLD SCHWARZENEGGER, et al.,
Defendants and 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

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INTRODUCTION

After decades of returning thousands of persons to prison each year in violation of their federal constitutional rights to due process, California has moved toward a fair system of parole revocation hearings under the federal consent decree in the above-captioned case. In November 2008, a ballot initiative passed that substantially re-codified the parole revocation rules that existed before the consent decree. California state officials assert that the ballot initiative's passage overrides the consent decree and that the District Court erred in enforcing the decree and denying their motion to modify it. The District Court properly applied the law on modification of consent decrees and denied the motion. This Court should affirm.

The fundamental issue raised in this appeal is whether the District Court must modify a federal consent decree entered to remedy established due process violations upon the subsequent passage of a state initiative enacting procedures that conflict with those in the federal remedial scheme. The State contends that in such a situation it should no longer be obligated to comply with the federal consent decree, the federal court should no longer enforce the decree, and that a modification of the decree is warranted—indeed, required—under *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367 (1992). The State ignores both the preemptive effect of a federal

injunction under the Supremacy Clause and the District Court's discretion not to modify the consent decree where the State has not met its burden under *Rufo*.

JURISDICTIONAL STATEMENT

Plaintiffs-Appellees agree with the Statement of Jurisdiction in the Opening Brief.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

A. Did the District Court abuse its discretion in granting a motion to enforce a federal injunction and refusing to modify the injunction to incorporate language from a subsequently enacted state law based on the record presented?

B. Did the District Court abuse its discretion in its determination that California Penal Code section 3044(b) appears to conflict with the *Valdivia* Stipulated Injunction?

STATEMENT OF THE CASE AND FACTS

The Plaintiffs below (Appellees) are the class of all California parolees in the community, in custody pending revocation proceedings, and serving revocation terms. (ER 53.) They are hereinafter referred to as

"Plaintiffs." The Defendants below (Appellants) are the Governor of California, and other state officials in charge of parole supervision and parole revocation. (*Id.*) They are hereinafter referred to as "State" or "Defendants."[1]

Before the Supreme Court described the "minimum requirements of due process" for parole revocation in *Morrissey v. Brewer*, 408 U.S. 471, 488 (1972), California followed the view that parole was a privilege that could be revoked on a written report of the parole officer with little or no process. *In re Tucker*, 5 Cal. 3d 171, 176-78 (1971); *Pope v. Superior Court*, 9 Cal. App. 3d 636, 640 (1970); *Mozingo v. Craven*, 341 F. Supp. 296, 300-01 (C.D. Cal. 1972), *aff'd*, 475 F.2d 1254 (9th Cir. 1973).

After *Morrissey*, California established a parole revocation hearing system in which the arrested parolee was held with no finding of probable cause until a final revocation hearing 45 days after arrest. This practice

[1] The State erroneously asserts that the consent decree at issue here was agreed between "State executive officers" and "Plaintiffs' counsel." *See* Appellants' Opening Brief ("AOB") at 1, 24. This is a gross distortion of the facts. "Plaintiffs' counsel" is not a party to this action. The consent decree is between the Plaintiff class of approximately 120,000 state parolees and the Defendants below in their official capacities. (ER 198.) The State appears to adopt this formula to downplay the fact that the decree is more than a contract, it is a judicial decree entered on behalf of a statewide class after objections and a fairness hearing. (ER 52, 61, 201, 251-261; SER 1027-1028.)

systematically resulted in parolees being held for an average of over 5 weeks with no proper determination of probable cause, *Valdivia v. Davis*, 206 F. Supp. 2d 1068, 1071 (E.D. Cal. 2002), and parolees routinely being asked to waive all hearing rights before probable cause had been determined. *Id.* at 1077 n.16. In addition, California systematically failed to provide appointed counsel when fundamental fairness so required under *Gagnon v. Scarpelli*, 411 U.S. 778 (1973). Most parole revocation cases were resolved at a "screening offer" meeting with a parole agent, for which California never provided counsel, no matter how impaired the parolee, how complex the issues, or how compelling the claims of innocence. (SER 75-87, 421-438.) Moreover, the State's system for providing counsel at any point in the parole revocation proceedings had broken down under the weight of a growing population of parolees with mental illness, other functional impairments, and with minimal or non-existent English reading and writing skills. (SER 75-90, 122-126, 178-181, 230-236, 271, 297-302, 365, 391.) Parolees were systematically denied notice of charges , the evidence to be used against them, and the chance to confront adverse witnesses, all of which are elements of minimal due process. *Valdivia*, 206 F. Supp. 2d at 1070; *Morrissey*, 408 U.S. at 488-89.

In 1994, this lawsuit was brought to challenge the above identified systemic violations of due process and the resulting returns to prison of thousands of persons each year without reliable and accurate fact-finding. (ER 187-207); *Valdivia*, 206 F. Supp. 2d 1068, 1069, 1078.

The parties engaged in years of system-wide discovery, amassing an enormous quantity of data and examples from proceedings throughout the state, as well as deposition testimony of numerous state officials on every aspect of the parole revocation process, and expert reports analyzing the functioning of the process. (*See, e.g.*, SER 38-561, 562-579, 580-586, 587-591, 592-596; SSER 1-29.)

Based on this body of evidence, the District Court in June 2002, granted partial summary judgment in favor of the Plaintiff class and found that California's parole revocation procedures systemically violated the parolees' due process rights. *Valdivia*, 206 F. Supp. 2d at 1078. Although the summary judgment ruling focused on the failure to provide a prompt hearing on probable cause, the District Court found that the entire process undermined the interests in accuracy and reliability that are shared by both the parolee and the public. *Id.*

In the order granting summary judgment to the Plaintiff class, the District Court did not examine the preliminary hearing requirement in

isolation, but rather in the context of the overall revocation scheme, as the State had asserted that other parts of the scheme compensated for the lack of a preliminary hearing. *Valdivia*, 206 F. Supp. 2d at 1070. The Court found that the "screening offer" process by which the parolee was offered a set return to custody in exchange for a complete waiver of hearing rights before any finding of probable cause "places a severe strain on an accurate fact-finding process." *Id.* at 1078; *see also id.* at 1070; *id.* at 1077 n.16 (noting that "the effect of the screening offer in assuring reliable fact-finding bears on the *Mathews* [*v. Eldridge*, 424 U.S. 319 (1976)] balancing test").

In August 2002, the State moved in *Valdivia* for partial summary judgment on all claims involving attorney appointments under *Gagnon* based on the States' implementation of new procedures to provide attorneys to parolees with disabilities under a statewide injunction entered in an Americans with Disabilities Act class action, *Armstrong v. Davis*, 275 F.3d 849, 873 (9th Cir. 2001). (ER 270 (Docket No. 687).) Plaintiffs opposed summary judgment with overwhelming evidence of continued deficiencies even after the increase in attorney appointments under *Armstrong*. (*See* SER 40-105, 151-314, 396-466; ER 265 (Docket Nos. 755-757).)

While the State's summary judgment motion was under submission, and during final pre-trial preparations, the State represented that it was

prepared to submit a remedial plan to address all outstanding issues in the litigation, and on that basis the parties asked for a four-month stay of the action in December 2002. (SER 1056-1057.) At the end of the stay period, in March 2003, the State submitted a proposed remedial plan that added a probable cause hearing to the existing revocation procedures. (SER 1067-1079.)

On July 23, 2003, after briefing and oral argument, the District Court rejected the State's proposed remedial plan on the grounds that the proposed probable cause hearing was not prompt (SER 1044), and failed to provide parolees with an opportunity to present evidence and to confront adverse witnesses, (SER 1046). Responding to the State's request for "additional direction" on the precise timing requirements for the preliminary hearing (SER 1035), the Court ordered the State to submit a plan that included probable cause hearings with the *Morrissey* elements of notice, opportunity to appear and present evidence, a conditional right to confront adverse witnesses, an independent decision maker, and a written report of the hearing, to be held no more than 10 calendar days from the date the parolee is taken into custody for an alleged parole violation (SER 1046).

Further negotiations on a remedial plan followed the July 23, 2003 order, culminating in the submission of a revised remedial plan on

August 21, 2003. (ER 62-70.) The August 2003 remedial plan was based in part on the State's assertion that it would not be practical to provide tens of thousands of probable cause hearings throughout the state within 10 days of arrest. (SER 117-119.) Nor would it be practical to continue the extra step of interviewing each parolee to determine who needed counsel and who did not before parole proceedings took place.[2] (SER 129-130.) The state officials instead proposed a compromise to address the practical problems of both the probable cause hearing and screening thousands of parolees each month for appointment of counsel. Under the compromise, all parolees would receive appointed counsel, relieving the State of the burdensome review process. (ER 67; SER 116-117, 129-130.) The preliminary hearing would consist of the parolee, counsel and hearing officer, but no live witnesses, except in extraordinary circumstances. (ER 67-68.) At each stage of the proceeding, remedial sanctions in lieu of incarceration would be

[2] By 2002, the State had begun implementing new procedures for providing appointed counsel to certain accused parole violators with disabilities as part of compliance with an injunction in a class under the Americans Disabilities Act and the Rehabilitation Act. *Armstrong*, 275 F.3d at 873; (SER 129-130). The State's system of interviews and file reviews for identifying parolees who needed counsel was so burdensome and time-consuming that it drastically slowed down the revocation process. (SER 129-130; *Valdivia*, 603 F. Supp. 2d at 1278 n.2; SER 1033-1034 (by 2003 over 80% of hearings were late).)

considered, and could be advocated for by the parolee and counsel. (ER 64-65, 67-68; SER 127.)

Based on this compromise proposal by the State, the parties agreed to submit a "Stipulated Order for Permanent Injunctive Relief" (hereinafter "Injunction") for a Rule 23 fairness hearing in the District Court. (*See* ER at 51-73.) Notice of the settlement was published on December 30, 2003. (ER 261 (Docket Nos. 824-826).) Numerous class members lodged objections with the Court, (SER 1027-28), which the District Court reviewed, along with the parties' briefs and supporting evidence, at the fairness hearing, after which the Court entered the Injunction on March 9, 2004. (ER 51, 61.)

The Injunction gave the State several months to develop detailed policies and procedures for implementation (ER 54), and over a year, until July 1, 2005, to establish the procedures and infrastructure needed to provide thousands of probable cause hearings each month throughout California. (ER 55.) The policies, procedures and infrastructure that the State developed rely heavily on appointed counsel for day-to-day operations, and to ensure that the accused parole violator receives notice and an opportunity to be heard. (SER 116 at ¶ 8 (counsel are "fundamental" to the new system); *id* at ¶ 10 (system depends on counsel to provide parolee with notice of charges and evidence); SER 873-74, 1013 (same); SER 861 (system relies

on counsel where witnesses might be traumatized by presence of parolee during questioning); SER 981, 989 (listing the functions for which the system depends on counsel, including communicating contents of violation report to parolee, communicating revocation rights to parolee, communicating Board's offer in lieu of hearing, identifying potential witnesses or evidence to be presented at a hearing).)

The 225 pages of policies and procedures that the State filed with the District Court in compliance with the Injunction included 24 pages of policies and procedures to be administered by the Institute for Administrative Justice at the University of the Pacific, McGeorge School of Law, as the contract administrator of the attorney panel established under the Injunction. (SER 791-819; 820-1015.) The Institute for Administrative Justice established the California Parole Advocacy Project, known as "CalPAP." (SER 8, 721, 738, 744, 750-751, 754-759, 763, 766-767, 769, 775-777, 781, 794.) The Special Master appointed in this case in 2005 has repeatedly noted the central role that CalPAP plays in making California's very large parole revocation hearing system operable. (*See* SER 750.) CalPAP operates a system of regional offices located near the State's main revocation hearing hubs. (SER 750, 796). CalPAP provides staff at these offices who assist the State and parolees in the scheduling and logistics for

over 90,000 parole proceedings throughout the state. (SER 126-127, 131-132, 513, 796-801.)

Practical implementation of the Injunction has confirmed the central role that was anticipated for appointed counsel and for the CalPAP administration in operating the system. The system relies on appointed counsel to identify disabilities and special communication needs. (SER 129). It relies on counsel to address complex issues regarding the parolee's conditional right to confront witnesses under *Morrissey*. (SER 128-129, 755-756.) It relies on counsel to protect vulnerable witnesses from direct questioning by the accused parolee in cases where such questioning would traumatize the witness. (SER 128-129.) It relies on attorneys to assist the parolee in deciding whether to invoke hearing rights or to accept a negotiated disposition for a set return to custody or a remedial sanction. (SER 127-128.)

Numerous studies have confirmed that California uses parole revocation differently than other states do. California uses parole revocation more often than other states, accounting for over half of all state parole revocations nationwide in 2007.[3] (SER 148.) California differs from other

[3] The amici in support of the State appear to be unfamiliar with the facts regarding California's unique parole revocation practices. *See* Brief of

(continued . . .)

states in that it uses parole revocation as a parallel criminal justice system to secure short returns to prison not only for violating non-criminal parole conditions, but also for new crimes, some of which are quite serious. (SER 506-507; 511-512.) Under California practice, revocation for even minor technical violations can have very serious consequences, such as lifetime imposition of residency restrictions. (SER 132-133.) California's parole revocation system depends on the appointment of counsel to address these

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(. . . continued)
Amici Curiae Criminal Justice Legal Foundation, Crime Victims United of California, and Senator George Runner In Support of Appellant and Supporting Reversal (hereinafter "CJLF Brief"). The CJLF Brief asserts erroneously that California parole revocation proceedings mainly involve persons who were granted discretionary parole and released early from prison. (CJLF Brief at 7 (discussing purported "prior early release of the offender").) Amici falsely imply that the Plaintiff class members are largely persons who were released on discretionary parole before completing their terms. In fact, California abandoned discretionary parole for almost all offenders in the late 1970s, with the passage of the Determinate Sentencing Law. Witkin, *Cal. Crim. Law* (3d ed. 2000) Punishment § 610, p. 809 ("With the passage of the Determinate Sentencing Law, the concept of parole has changed. Rather than interrupting imprisonment, parole now occurs after the completion of a certain period of incarceration and is intended, not as a reward for good behavior, but to prepare the freed prisoner for the transition that he or she faces."); (SER 130-131, 505.) California prisoners who complete their terms face at least a three-year mandatory parole period. Cal. Penal Code § 3000(b). Numerous studies have confirmed that this unusual use of parole and parole revocation for all persons released from prison impedes the functioning of the criminal justice system and harms public safety. (SER 354, 355, 512.)

unique complexities and risks of the State's peculiar revocation proceedings. (SER 132-133; 534-536.)

On November 4, 2008, California voters passed Proposition 9, the Victims' Bill of Rights Act of 2008, also known as "Marsy's Law." (SER 676-682.) Proposition 9 added a section (Section 3044) to the California Penal Code setting forth new parole revocation procedures. (SER 680.) Section 3044(a) provides that parolees shall not "be entitled to procedural rights other than the following": (1) A "probable cause hearing no later than 15 days" from the date of arrest for violation of parole (Cal. Penal Code § 3044(a)(1); ER 120); (2) An "evidentiary revocation hearing" no later than 45 days" from the date of arrest for violation of parole; (Cal. Penal Code § 3044(a)(2); ER 120); (3) "A parolee shall, upon request, be entitled to counsel at state expense only if, considering the request on a case-by-case basis, the board or its hearing officers determine: (A) The parolee is indigent; and (B) Considering the complexity of the charges, the defense, or because the parolee's mental or educational capacity, he or she appears incapable of speaking effectively in his or her own defense" (Cal. Penal Code § 3044(a)(3); ER 120); (4) Grounds for denial of appointed counsel to be stated on the record (Cal. Penal Code § 3044(a)(4); ER 120); (5) Revocation decisions to be based on evidence including "documentary

evidence, direct testimony, or hearsay evidence offered by parole agents, peace officers, or a victim" (Cal. Penal Code § 3044(a)(5); ER 120); and, (6) "Admission of the recorded or hearsay statement of a victim or percipient witness shall not be construed to create a right to confront the witness at the hearing." (Cal. Penal Code § 3044(a)(6); ER 120).

Section 3044(b) provides that the Board of Parole Hearings "is entrusted with the safety of victims and the public and shall make its determination fairly, independently, and without bias and shall not be influenced by or weigh the state cost or burden associated with just decisions." (Cal. Penal Code § 3044(b); ER at 120).

On October 24, 2008, prior to the date of the election, Plaintiffs' counsel contacted the State's counsel to discuss the State's plan for implementing Proposition 9. (SER 617.) The State refused to discuss the matter. (SER 617-618.) On November 6, 2008, shortly after the election, Plaintiffs' counsel again asked for the State's implementation plan for Proposition 9. (SER 618.) The State responded that it would implement Proposition 9 as soon as possible, with full implementation no later than 60 days from November 4, 2008. (*Id.*)

On November 14, 2008, Plaintiffs moved to enforce the *Valdivia* Injunction. (ER 143-166.) On December 2, 2008, the State asked for an

extraordinarily long extension of time to file its Opposition to Plaintiffs' Motion to Enforce, pushing the issue into the next spring, March of 2009. (ER 213 (Docket Entry No. 1491).) In February 2009, the State filed its opposition to the motion to enforce, and cross-filed a motion to modify the Injunction by removing its substantive provisions and replacing them with the text of California Penal Code section 3044(a). (ER at 121, 142.) The only evidence the State presented in support of its modification motion was the text of Proposition 9 and its accompanying Voter Information Guide analysis. (ER 113-120.)

Plaintiffs opposed the motion to modify, providing declarations and evidence regarding the status of implementation of the revocation system in comparison with the system it replaced, and the continued need for the Injunction terms that the State sought to remove. (SER 38-596; SSER 1-29.)

After hearing argument, the District Court denied the State's motion to modify because the State defendants "ha[d] not borne their burden to show that the Permanent Injunction should be modified due to a significant change in factual circumstances." *Valdivia v. Schwarzenegger*, 603 F. Supp. 2d 1275, 1290 (E.D. Cal. 2009). The District Court found that "the provisions of Proposition 9 addressing the parole revocation procedures, see Prop. 9 § 5.3, do not supercede those set forth in the Permanent Injunction."

Valdivia, 603 F. Supp. 2d at 1286. The Court found that Penal Code sections 3044(a), (a)(2), and (a)(3) directly conflict with the Injunction. *Id.* at 1282. The Court also found that Penal Code sections 3044(a)(5) and (a)(6) "could be construed to contradict the Permanent Injunction, but may equally validly be interpreted so as to avoid the conflict" because "these sections of Proposition 9 § 5.3 could also reasonably be construed as being in accord with the terms of the Injunction." *Valdivia*, 603 F. Supp. 2d at 1283. The Court found that Section 3044(b) "appears to conflict" with the Injunction to the extent it bars consideration of remedial sanctions. *Id.* at 1283.

SUMMARY OF THE ARGUMENT

The District Court did not abuse its discretion in rejecting the State's motion to modify the Injunction and granting the motion to enforce it. A federal court order vindicating federal law supersedes a contrary provision of a subsequently enacted conflicting state law. *See Cooper v. Aaron*, 358 U.S. 1, 17-18 (1958) (holding that the Supremacy Clause did not permit a state law to interfere with a federal desegregation order); *see also Stone v. City & County of San Francisco*, 968 F.2d 850, 861 n.20 (9th Cir. 1992) ("When the defendants chose to consent to a judgment … the result was a fully enforceable federal judgment that overrides any conflicting state law or

state court order"). The parties agreed to the terms of the Injunction to remedy the State's unconstitutional parole revocation procedures. A negotiated Injunction or consent decree may include terms that exceed the bare minimum of what federal law requires, and still be enforceable. *Frew ex. rel. Frew v. Hawkins*, 540 U.S. 431, 438-40 (2004); *Rufo*, 502 U.S. 367, 389.

The District Court properly reviewed the motion to modify the Injunction under the *Rufo* standard governing such relief.[4] Under *Rufo*, a party moving for modification bears the burden of establishing that a "significant change in facts or law warrants revision of the decree." 502 U.S. at 393. The State did not meet its burden under *Rufo*, and the district court properly determined that a modification was not presently warranted.

Even if the State had met its burden to show significantly changed circumstances, the modification they offered was not "suitably tailored to the changed circumstance" but instead would have prematurely terminated a complex statewide implementation whose purpose is to bring California

[4] Subsequent to the District Court decision, the United States Supreme Court decided *Horne v. Flores*, 129 S. Ct. 2579 (2009), affirming the vitality of the *Rufo* standard and clarifying certain aspects of a proper *Rufo* analysis. As further discussed below, *Horne* does not alter the appropriateness of the district court's decision regarding Defendants' motion to modify the *Valdivia* Injunction.

revocation processes into compliance with the Constitution. *Rufo* does not allow modification under such circumstances. "[A] modification must not create or perpetuate a constitutional violation.… A proposed modification should not strive to rewrite a consent decree so that it conforms to the constitutional floor." *Rufo*, 502 U.S. at 391.[5]

The State and its amici argue that a modification must be granted if a subsequently enacted conflicting state law has not been found unconstitutional. (AOB at 24; CJLF Brief at 20.) This argument ignores the operation of the Supremacy Clause. The Supremacy Clause commands that the conflicting state law that interferes with the operation of a federal court order must yield, and the District Court's decision below properly relied on this principle. It also ignores the District Court's proper use of the

[5] It is "[w]ithin these constraints" that *Rufo* notes "considerations based on the allocation of powers within our federal system require that the district court defer to local government administrators" with primary responsibility for solving the problems of institutional reform. 502 U.S. at 392 (internal quotations, citation omitted). *Horne v. Flores*, 129 S. Ct. 2579, does not alter this calculus. *Horne*'s admonition that a "flexible approach" to modification under *Rufo* allows a court "to ensure that responsibility for discharging the State's obligations is returned promptly to the State and its officials when the circumstances warrant," (*id*. at 2594-95 (internal citations omitted)), does not alter a basic premise under the *Rufo* analysis: that "[n]o deference [to local government administrators] is involved in th[e] threshold inquiry" of whether the moving party has met its burden of establishing a "significant change in circumstances" warranting a modification. *Rufo*, 502 U.S. at 393 n.14.

avoidance doctrine to construe the new state law in a manner that does not violate federal law. Use of the avoidance doctrine is only necessary when there is something to avoid; that is, an unconstitutional construction. The construction urged by the State and its amici, placing the new California Penal Code Section 3044 in direct conflict with the Injunction and *Morrissey*, is unconstitutional, and thus must be preempted by the federal remedy here.

The District Court's denial of modification of the Injunction was not an abuse of discretion, and the decision below should be affirmed.

STANDARD OF REVIEW

Motions for relief from judgment under Federal Rule of Civil Procedure 60(b) are reviewed for abuse of discretion. *See United States v. Asarco Inc.*, 430 F.3d 972, 978 (9th Cir. 2005); *SEC v. Coldicutt*, 258 F.3d 939, 941 (9th Cir. 2001) (denial of 60(b)(5) relief-motion to terminate injunction). "A district court abuses its discretion if it does not apply the correct law or if it rests its decision on a clearly erroneous finding of material fact." *Asarco*, 430 F.3d at 978 (internal quotations marks omitted).

Abuse of discretion is "a plain error, discretion exercised to an end not justified by the evidence, a judgment that is clearly against the logic and effect of the facts as are found." *Rabkin v. Oregon Health Sci. Univ.*, 350

F.3d 967, 977 (9th Cir. 2003). Deference to the district court is heightened where "the court has been overseeing complex institutional reform litigation." *Jeff D. v. Kempthorne*, 365 F.3d 844, 850 (9th Cir. 2004).

An exception for *de novo* review exists for questions of law underlying the district court's decision on a Rule 60(b) motion. *Jeff D.*, 365 F.3d at 850-51; *F.D.I.C. v. Aaronian*, 93 F.3d 636, 639 (9th Cir. 1996). In reviewing the district court's fact-based decisions, the court of appeals may not presume legal error "where the order is equally susceptible of a correct reading particularly where the applicable standard of review is deferential." *Sprint/United Mgmt. Co. v. Mendelsohn*, 128 S. Ct. 1140, 1146 (2008).

ARGUMENT

I. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN CONCLUDING THAT DEFENDANTS FAILED TO SATISFY THEIR BURDEN UNDER *RUFO* TO ESTABLISH A SIGNIFICANT CHANGE IN FACTUAL CIRCUMSTANCES OR GOVERNING LAW.

The Supreme Court has set forth clear standards to apply when a party claims that changed circumstances require a change in a consent decree pursuant to Rule 60(b). *Rufo*, 502 U.S. 367. These are the standards that the District Court properly applied in concluding that Defendants did not meet their burden to establish that a modification was warranted. *Valdivia*, 603 F. Supp. 2d at 1287-91.

First, the "party seeking modification of a consent decree bears the burden of establishing that a significant change in circumstances warrants revision of the decree." *Rufo*, 502 U.S. at 383. The party "may meet its initial burden by showing a significant change either in factual conditions or in law." *Id*. at 384. If the moving party meets that initial burden, "the district court should determine whether the proposed modification is suitably tailored to the changed circumstance." *Id*. at 391. Here, Defendants do not even address their burden and do not satisfy it.

A. Defendants have the Burden under *Rufo/Horne* to Establish that a Significant Change in Factual Circumstances or Law Warrants Modification of the Stipulated Injunction.

Rufo describes the types of changed factual circumstances that might satisfy the moving party's initial burden and warrant the modification of a consent decree. "Modification of a consent decree may be warranted when changed factual conditions make compliance with the decree substantially more onerous." *Id*. at 384. "Modification is also appropriate when a decree proves to be unworkable because of unforeseen obstacles." *Id*.

Modification may also be appropriate "when enforcement of the decree without modification would be detrimental to the public interest." *Id*. As an example, the *Rufo* Court cited *Duran v. Elrod*, 760 F.2d 756, 759-61 (7th Cir. 1985), in which a minor modification in a consent decree was

permitted, delaying for seven weeks a prohibition on double bunking in a jail while renovations and construction of jail facilities were completed, to avoid the pretrial release of 500 accused violent felons. *Rufo*, 502 U.S. at 384-85.

Rufo also discussed when it may be appropriate to modify a consent decree where there has been a change in the law:

> A consent decree must of course be modified if, as it later turns out, one or more of the obligations placed upon the parties has become impermissible under federal law. But modification of a consent decree may be warranted when the statutory or decisional law has changed to make legal what the decree was designed to prevent.

Id. at 388.

The Supreme Court recently confirmed the governing principles articulated in *Rufo*. In *Horne*, the Court observed that "the Court of Appeals should have conducted the type of Rule 60(b)(5) inquiry prescribed in *Rufo*" and remanded for such an analysis because the lower court's analysis under *Rufo* had been too narrow. *Horne*, 129 S. Ct. at 2596-97. *Horne* also reaffirmed that the burden to establish changed circumstances rests on the party seeking relief under Rule 60(b). *Id*. at 2593.[6]

[6] On July 1, 2009, the State submitted a Federal Rule of Appellate Procedure 28(j) letter stating that it intends to address *Horne* in its optional reply brief. As *Horne* did not change the *Rufo* standard and is factually distinct from this case on numerous grounds, Plaintiffs cannot reasonably anticipate the

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B. The District Court Did Not Err In Ruling that the Enactment of California Penal Code Section 3044, Standing Alone, Does Not Require Modification of the Injunction.

The State contends that the enactment of California Penal Code section 3044, standing alone, constitutes "changed circumstances," mandating modification of the Injunction. (AOB at 24-26.) The text of Proposition 9 and the Voter Information Guide analysis were the only evidence that the State presented in support of its motion to modify. (ER 113-120.) Despite repeated requests from Plaintiffs' counsel, the State presented no details on how it would implement the new Penal Code sections.[7] (SER 551-553, 617-618.)

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arguments that the State will derive from *Horne*. Plaintiffs therefore reserve the right to request leave to file an additional brief addressing any new arguments that State raises in its optional reply based on *Horne*.

In *Horne*, unlike here, the parties seeking modification presented evidence—in an eight-day evidentiary hearing covering 1,684 pages of transcript—to show that the purposes of the injunction at issue had been attained, and that the modifications sought would not perpetuate violations of federal rights. *Horne*, 129 S. Ct. at 2613 (Breyer, J., dissenting). Here, by contrast, the party seeking modification has presented no evidence except for a 7-page request for judicial notice of a ballot initiative.

[7] The State provided Plaintiffs' counsel with a short draft procedure, which they promptly withdrew and which was not submitted to the District Court with the motion to modify. This draft procedure, however, if implemented would restore the constitutional vices of the prior system. *See, infra*, Section II.C.

The State asserts that the District Court ruled that a change in state law could *never* require modification of a consent decree, and that this ruling should be reversed on *de novo* review as an error of law. (AOB at 19.) The State, however, is erecting a straw man in order to secure *de novo* review where it is not warranted. The District Court did not categorically rule that changes in state law can never rise to "changed circumstances" under *Rufo*. If that had been the District Court's ruling, most of its 33-pages of analysis would have been unnecessary. Contrary to the State's sweeping assertion, the District Court carefully analyzed this particular change in state law, in light of the particular circumstances of this Injunction and the evidence presented by the parties regarding the state of implementation, and ultimately ruled that in this particular instance the State did not meet its burden. *Valdivia*, 603 F. Supp. 2d at 1290.

There is no dispute that the District Court's decision to enforce the Injunction rather than to modify it is reviewed under the abuse of discretion standard. *Jeff D.*, 365 F.3d at 850; *Hook v. Ariz. Dep't of Corr.*, 107 F.3d 1397, 1402 (9th Cir. 1997). While determinations of law are subject to *de novo* review, "[a]n appellate court should not presume that a district court intended an incorrect legal result when [its decision] is equally susceptible of

a correct reading, particularly when the applicable standard of review is deferential." *Sprint/United Mgmt. Co.*, 128 S. Ct. at 1146.

The State takes the following sentence from the District Court's opinion out of context, in a strained attempt to create legal error where none exists: "In light of the rule described in *Rufo*, it is apparent that a change in state law standing alone is not the type of change in factual circumstance that renders continued enforcement of a consent decree inequitable." *Valdivia*, 603 F. Supp. 2d at 1288. The State attempts to paint this single sentence as a sweeping statement that would preclude "modification of a federal consent decree where a state's citizens change state law to cure the constitutional violation that was the subject of the consent decree." (AOB at 19.) The District Court made no such ruling.

Indeed, citing *Rufo*, the District Court expressly recognized that a change in state law could warrant a consent decree modification if the change made compliance "substantially more onerous, unworkable, or otherwise no longer in the public interest," but the State made no such showing here. *Valdivia*, 603 F. Supp. 2d at 1290. The District Court properly concluded that by pointing only to the enactment of Proposition 9 "[w]ithout more," the State failed to establish a significant change warranting modification. *Id.* It properly based its decision on the *Rufo*

standards and not on a sweeping statement of law that the State incorrectly ascribes to this single sentence.

The District Court's conclusion is squarely within the governing law on consent decree modification. In *Hook*, 107 F.3d 1397, the district court had entered a series of injunctions to protect prisoners' constitutional rights and appointed a special master to monitor compliance with its orders. *Id.* at 1399. The state legislature then enacted a statute that prohibited payments to a special master appointed by a federal court unless the legislature first appropriated funds for such payment, and made no such appropriation for this case. *Id*. at 1399-1400. The defendants moved to modify the injunction, arguing—like the State here—that the new state law "raises federalism concerns and requires the requested modification to the injunctions and consent decree." *Id*. at 1402. This Circuit rejected this argument and held that the Supremacy Clause precluded the application of the state law. *Id.* at 1402-03. The injunctions were imposed to vindicate federal constitutional rights, and the state could not point to a new state law that interfered with the federal injunctions as a basis for modification of those injunctions. *Id*. at 1403. There was no need to inquire whether the conflicting state law independently violated federal law; the injunction and appointment of the special master were to vindicate federal constitutional rights, and a new state

law that simply interfered with the court's orders could not support a modification under *Rufo*. *Id*. This Court even affirmed a finding of contempt for the defendants' violations of the court orders in reliance on the state law. *Id*. at 1403-04.

C. The District Court Did Not Have to Find That California Penal Code Section 3044 Independently Violates Federal Law In Order to Enforce the Injunction and Deny the Motion to Modify.

The Supreme Court's *Rufo* decision properly reflects principles of federalism in rejecting the stricter standard of *United States v. Swift & Co.*, 286 U.S. 106 (1932), and setting forth a flexible standard for modifying injunctions. *Rufo*, 502 U.S. at 378-84. The Supreme Court reaffirmed the *Rufo* standard and the federalism principles inherent in the analysis in *Frew*, 540 U.S. at 441-42, as this Court had previously done in *Hook*, 107 F.3d at 1402.

The State ignores the *Rufo* standard and does not satisfy its burden to establish changed circumstances warranting a modification of the Injunction. Instead, the State proposes, and seeks a modification under, a new rule for which it cites no authority, articulated as follows: "Since the new state law has not been found to violate federal law, it must supersede the stipulated injunction to the extent the stipulated injunction conflicts with it." (AOB at 26.)

Not only is the State's proposed new rule unsupported by any authority, it would turn the Supremacy Clause on its head and accordingly has been uniformly rejected by the courts. The State contends that when a government entity passes a new law which narrows or conflicts with a consent decree, the court must modify the consent decree to correspond to the narrower state law unless it first finds that the new statute itself violates federal law. Numerous decisions hold precisely to the contrary and uphold an injunction or consent decree in the face of a new conflicting state law.

Contrary to Defendants' assertion, a federal court need not first identify, at the enforcement stage, a violation of federal law before enforcing a consent decree. *Frew*, 540 U.S. at 438-39. In *Frew*, the Supreme Court rejected an argument parallel to Defendants' assertion, noting that a consent decree is "a federal-court order that springs from a federal dispute and furthers the objectives of federal law." *Id*. at 438 (citing *Local No. 93, Int'l Ass'n of Firefighters v. City of Cleveland ("Firefighters")*, 478 U.S. 501, 525 (1986)). "[A] federal consent decree must spring from, and serve to resolve, a dispute within the court's subject-matter jurisdiction; must come within the general scope of the case made by the pleadings; and must further the objectives of the law upon which the complaint was based." *Id*. at 437 (citing *Firefighters*, 478 U.S. at 525). As with the consent decree in *Frew*,

"[w]e can assume … that the state officials could not enter into a consent decree failing to satisfy the general requirements of consent decrees outlined in *Firefighters*." *Id.* at 439. Where a federal consent decree is designed to implement federal constitutional guarantees, enforcement of the decree vindicates an agreement made to comply with federal law. *Id.*

Amici fail in their attempt to distinguish this Court's decision in *Hook*, 107 F.3d 1397. (CJLF Brief at 14-15.) They claim that in *Hook* "modification of the consent decree would have resulted in continuing constitutional violations," and argue that "modifying the consent decree in the case at hand to conform to Proposition 9 would leave the decree sufficient to vindicate the parolees' constitutional rights." (CJLF Brief at 15.) Amici assert that the District Court erred in concluding that the State's suggestion that "'Proposition 9 offers a constitutionally adequate alternative for remedying the deficiencies in the parole revocation process that the court held were present in 2002,'" is not enough to merit modification without more.[8] (CJLF Brief at 15 (quoting *Valdivia*, 603 F. Supp. 2d at 1290).)

[8] Amici artfully misquote this part of the District Court's opinion, joining the State's attempts to distort what the District Court said to create legal error where none exists. Contrary to the amici's brief, the District Court did not rule that "even if 'Proposition 9 offers a constitutionally adequate alternative for remedying the deficiencies in the parole revocation process" no modification would be warranted. (CJLF Brief at 15.) The District Court

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Amici ignore the record before the District Court, which amply demonstrated that a return to the old revocation procedures as modified by California Penal Code section 3044 would have resulted in continuing constitutional violations. Plaintiffs presented compelling evidence in opposition to the State's motion to modify of the abuses of the old system that would be restored under the State's proposal. (SER 38-561, 562-579, 580-586, 587-591, 592-596.) The State, on the other hand, refused to present any evidence of how they would change a statewide system that adjudicates 100,000 cases a year, and replace all the due process functions in the *Valdivia* implementation that are completely dependent on the work of appointed counsel. *See supra*, pp. 14-15.

In any event, *Rufo* expressly rejected amici's flawed reasoning in holding that "[a] proposed modification should not strive to rewrite a consent decree so that it conforms to the constitutional floor." *Rufo*, 502 U.S. at 391. Amici's argument was also expressly rejected by this Court in *Jeff. D.*, in holding that the state failed to justify a consent decree

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wrote that this would not be enough "*[w]ithout more.*" *Valdivia*, 603 F. Supp. 2d at 1290 (emphasis added).

modification by seeking to show there currently was no longer any continuing violation of federal law. *Jeff D.*, 365 F.3d at 854.

The State relies heavily on *Clark v. Coye*, 60 F.3d 600 (9th Cir. 1995), to argue that a federal court must first determine that the subsequently enacted state law conflicts with applicable federal law before a federal consent decree may be enforced over the state statute. *Clark* does not support the State's position, for the reasons discussed below.

First, contrary to the State's contention, *Hook* does not "rel[y] upon" *Clark v. Coye* to draw a conclusion that state law is only void if it is found to conflict with the federal Constitution or a federal statute. (AOB at 22.) Under the heading "Federalism Concerns," the Ninth Circuit in *Hook* explicitly stated that:

> [A] state law is void if it actually conflicts with the United States Constitution or a federal statute. *See Clark [v. Coye]*, 60 F.3d at 603. A state statute, however, need not directly violate the Constitution or a federal statute to be in violation of the Supremacy Clause. '[O]therwise valid state laws … cannot stand in the way of a federal court's remedial scheme if the action is essential to enforce the scheme.'

Hook, 107 F.3d at 1402 (omission in original) (quoting *Stone v. City and County of San Francisco*, 968 F.2d 850, 862 (9th Cir. 1992)). Because "otherwise valid state laws" may nevertheless fall afoul of the Supremacy

Clause if they conflict with or impede a consent decree, it necessarily cannot be the case that the consent decree must accommodate that state law unless it has been found to violate federal law.

Second, *Clark* held that the change in state law did not even conflict with the injunction at issue. In *Clark*, the state law change completely removed certain actions (dental care that was not a "medical necessity due to a special medical disorder") from the ambit of a federal injunction that regulated reimbursement rates under the Medicaid system. *Clark*, 60 F.3d at 603. Translated to the parole revocation context, such a change could include making certain misdeeds ineligible for parole revocation, thus removing them entirely from the ambit of the *Valdivia* Injunction. California Penal Code section 3044 does not take certain violations out of the revocation process mandated by the Injunction; it changes the process itself. The *Clark* Court held that the injunction there had never restricted the state's ability to define eligibility for dental care; it only reached reimbursement rates. *Id*. at 604-05. This Court therefore held that the district court's enjoining of the eligibility change was itself a modification of the injunction to reach new conduct not previously enjoined, making it first necessary to ascertain whether the eligibility change violated federal law under the operative complaint. *Id*. *Clark* did not even mention the *Rufo*

standard governing the instant appeal. It stands for no more than the unremarkable proposition that a court may not enjoin a statute where it is not inconsistent with an existing injunction and no determination has been made that the statute violates any federal law.

Third, the decree at issue in *Clark* was an injunction imposed on the state after trial, not a consent decree. *Id.* at 602. The federalism concerns raised by a negotiated settlement in which the parties agree to provisions that go beyond what the Constitution requires do not require the same level of scrutiny as an injunction imposed on an unwilling state actor by a federal court. As the District Court noted, *see Valdivia*, 603 F. Supp. 2d at 1289-90, *Rufo* expressly recognized that a defendant may agree to a consent decree that is broader than the minimum necessary to remedy a constitutional violation, even though a judicially imposed injunction could not be so broad:

> [W]e have no doubt that, to save themselves the time, expense, and inevitable risk of litigation, petitioners could settle the dispute over the proper remedy for the constitutional violations that had been found by undertaking to do more than the Constitution itself requires (almost any affirmative decree beyond a directive to obey the Constitution necessarily does that), but also more than what a court would have ordered absent the settlement.

Rufo, 502 U.S. at 389 (internal quotation marks and citations omitted).

Thus, contrary to the State's position, the terms of a consent decree—as opposed to a court-imposed injunction—are not limited to those "necessary to remedy a federal constitutional violation." (AOB at 8, 14.) As this Court recently stated in declining to modify a consent decree:

> *Rufo* makes clear that a party seeking to enforce a consent decree does not need to show a continuing violation of federal law. To hold otherwise would completely eviscerate the central purpose of consent decrees, which is to enable parties to avoid the expense and risk of litigation while still obtaining the greater enforceability (compared to an ordinary settlement agreement) that a court judgment provides.

Jeff D., 365 F.3d at 852. The Fifth Circuit recently confirmed this principle: "Because the object of the consent decree is not mere compliance with federal law, the objects of the decree have not been attained." *Frazar v. Ladd*, 457 F.3d 432, 439 (5th Cir. 2006) (rejecting argument that consent decrees must be modified or dissolved if defendants come into minimal compliance with federal law); *see also United States v. Wayne County*, 369 F.3d 508, 515 (6th Cir. 2004) (change in state law did not warrant modification of consent decree because changes did not make compliance more onerous or impermissible under federal law).

Similarly, *David B. v. McDonald*, 116 F.3d 1146 (7th Cir. 1997), which is heavily relied upon by the State's amici, does not conflict with the

District Court's decision and involved materially distinct facts from those at issue here. Like *Clark*, the state law change in *David B.* involved a change in the ambit of state procedures governed by a federal decree, not a change in the terms of the decree itself. In *David B.*, the heads of three Illinois agencies settled an action brought under the Rehabilitation Act by signing a consent decree promising to provide "appropriate" services to certain children aged 17 or less. *Id.* at 1147. Fourteen years later, the legislature enacted a statute curtailing the state agencies' authority to provide services to certain children over the age of 13 who had been adjudicated as delinquents due to certain crimes. *Id.* The state then moved the district court to modify the consent decree to remove any obligation to provide services to delinquents over the age of 13. *Id.* The district court denied the motion. *Id.*

The Seventh Circuit Court of Appeals vacated the order and remanded, citing a number of errors. First, the court held that the consent decree did not obligate the state specifically to provide any services at all to delinquents over age 13, but only directed the three agencies collectively to "provide some assistance under a 'comprehensive service plan' (whatever that may be)." *Id*. at 1148. Second, the court held that the district court had used the incorrect standard under *Rufo*: "The district court believed that

modification is proper only when 'the substantive law … has so clearly and dramatically changed as to render continued enforcement of the Consent Decree inequitable.'" *Id.* at 1149 (omission in original) (quoting district court order). Third, the Seventh Circuit noted that the district court misapplied the *Rufo* standard when it incorrectly "thought [that] only a change in federal substantive law matters." *Id*.

Amici focus only on the third basis for the Seventh Circuit's decision, ignoring the other grounds. However, as discussed above, the District Court's decision in the instant case was not based on the premise that only a change in federal substantive law matters. It properly applied *Rufo* and merely determined that Proposition 9, "[w]ithout more," failed to establish a significant change warranting modification. *Valdivia*, 603 F.3d at 1290. Furthermore, the *David B.* Court premised its analysis on its "substantial doubt" that there was even an Article III "case or controversy" at the time of the original consent decree because the parties appeared not to be adverse and the state law processes did not appear to conflict with the Rehabilitation Act. 116 F.3d at 1148-49. The Seventh Circuit therefore directed the district court to make that determination on remand. *Id*. at 1150. There is no dispute in the present case that a substantial constitutional claim existed and continues to exist; indeed, the District Court found systemwide due

process violations in a ruling that was not appealed. *David B.* is inapposite. Affirming the District Court's exercise of discretion in this case will not "create a circuit split," contrary to amici's assertion. (CJLF Brief at 12.)

D. The Injunction Terms That the State Seeks to Remove Are Essential to the Federal Remedy In This Case.

This Court has recognized that a state law need not directly violate the Constitution or a federal statute if it interferes with essential parts of a federal court order designed to vindicate federal rights. *Hook*, 107 F.3d at 1402; *see also Stone*, 968 F.2d at 862. The State attempts to avoid this principle by repeatedly asserting that the District Court never found that the requirements of the stipulated injunction were necessary to remedy a federal constitutional violation. (AOB at 1, 4, 8, 14.) This is a gross distortion of the record. On June 13, 2002, the District Court in this case held that California's entire parole revocation scheme was unconstitutional due to ongoing systemic violations of parolees' due process rights as described in *Morrissey v. Brewe*r, 408 U.S. 471 (1972), and *Gagnon v. Scarpelli*, 411 U.S. 778 (1973). *Valdivia*, 206 F. Supp. 2d at 1078. In so doing, the District Court did not parse out certain aspects of the scheme as constitutionally adequate and others as constitutionally deficient. The court evaluated the process due under the balancing test outlined in *Mathews v. Eldridge*, 424 U.S. 319 (1976), and *Morrissey*, and ruled that the process as

a whole failed to prevent parole from being revoked because of "'erroneous information or because of an erroneous evaluation,'" and failed to ensure that "parolees are not detained without some sort of assurance that there is probable cause to suspect a parole violation." *Valdivia*, 206 F. Supp. 2d at 1074, 1078.

After the District Court found that the State's existing parole revocation process, as a whole, violated Plaintiffs' due process rights under the Constitution—either as compelled by *Morrissey* or by virtue of a *Mathews* balancing test (*id*. at 1078)—it ordered a remedy, and the parties then entered into negotiations. They ultimately agreed on the Injunction to address the systemic and unconstitutional procedural deficiencies identified in the litigation and discussed in the District Court's order. (SER at 127-130; *see also* ER at 52 (noting that the District Court held that California's parole revocation system "violates the due process rights of the Plaintiff class under *Morrissey v. Brewer*, 408 U.S. 481 (1972), *Gagnon v. Scarpelli*, 411 U.S. 778 (1973), and related authority….[and] violated the due process clause of the Fourteenth Amendment"); ER at 59 ("This stipulated order resolves all the claims in this case [with two specified exceptions]").) The specific procedures in the Injunction work together as an integrated whole to move the State toward a minimally constitutional system. (SER 115-118,

127-130.) Removing any one component, especially the "fundamental" component of attorney appointment, (*see*, *supra*, pages 9-10), would plunge California's system well below the minimum constitutional floor.

The preservation of a federal remedy against conflicting state law is as much a part of our federalism as are the democratic values repeatedly asserted by the State in its opening brief. Under the Supremacy Clause, U.S. Const. art. VI, cl. 2, state officials must follow federal law in the face of conflicting state law. The supremacy of federal law extends to federal court orders and injunctions, which supersede any conflicting state law. *Cooper*, 358 U.S. 1, 18 (state law may not interfere with a federal desegregation order); *Stone*, 968 F. 2d at 861 n.20 ("When the defendants chose to consent to a judgment … the result was a fully enforceable federal judgment that overrides any conflicting state law or state court order").

In *N.C. State Bd. of Educ. v. Swann*, 402 U.S. 43 (1971), the district court had ordered a school district to remedy unlawfully segregated school assignments by, among other actions to consider, instituting student busing and other school attendance changes. *Id*. at 43-44. The state then enacted an "Anti-Busing Law" that "forbid[] assignment of any student on account of race or for the purpose of creating a racial balance or ratio in the schools." *Id*. at 45. The Supreme Court affirmed the lower court holding that such an

effort to obstruct the remedies granted by the District Court is prohibited by the Supremacy Clause. *Id*. at 45-46. The conflicting state law did not compel the court to modify the injunction, as the State contends here. To the contrary, the Supreme Court confirmed that if a state law contradicts or impedes a federal court order remedying constitutional violations, "it must fall; state policy must give way when it operates to hinder vindication of federal constitutional guarantees." *Id*. at 45.

In *Cooper*, 358 U.S. 1, the Court similarly addressed a state's attempt to circumvent a federal court order via a contrary state law, upholding a plan to desegregate unlawfully segregated public schools. The state law purported to oppose the Supreme Court's desegregation decisions and "reliev[ed] school children from compulsory attendance at racially mixed schools[.]" *Id*. at 8-9. The Court held that the Supremacy Clause did not permit a state law to block a plan mandated by the Constitution or a federal court order upholding such a plan. *Id*. at 18. The *Cooper* Court cogently articulated the relevant constitutional principles establishing why state officials cannot simply ignore federal laws and federal court orders with which they might disagree based on contrary state law:

> No state legislator or executive or judicial officer can war against the Constitution without violating his undertaking to support it.… A Governor who asserts a power to nullify a federal court order is

> similarly restrained. If he had such power, said Chief Justice Hughes, in 1932, also for a unanimous Court, "it is manifest that the fiat of a state Governor, and not the Constitution of the United States, would be the supreme law of the land; that the restrictions of the Federal Constitution upon the exercise of state power would be but impotent phrases …." *Sterling v. Constantin*, 287 U.S. 378, 397-398.

Id. at 18-19. Indeed, attempts like the State's to supplant a federal court injunction with a contrary state law have been uniformly rejected for over two hundred years. As Chief Justice Marshall explained in an 1809 foundational constitutional ruling holding that state legislation could not supplant a federal court judgment:

> If the legislatures of the several states may, at will, annul the judgments of the courts of the United States, and destroy the rights acquired under those judgments, the constitution itself becomes a solemn mockery; and the nation is deprived of the means of enforcing its laws by the instrumentality of its own tribunals.

United States v. Peters, 9 U.S. (5 Cranch) 115, 136 (1809).

The Supreme Court confirmed in *Washington v. Wash. State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658 (1979), that the rule of law is the exact opposite of that suggested by the State. In *Washington*, the District Court entered an injunction preserving Indian fishing rights under a series of treaties and ordering the state Department of

Fisheries to adopt regulations protecting the Indians' treaty rights. *Id*. at 671-72. The state challenged this ruling by arguing, *inter alia*, that the state agency had no authority to comply as ordered and that such action would be unlawful under state law. *Id*. at 693. The U.S. Supreme Court once again rejected the argument that state law restrictions could permit a state agency to ignore the mandates of a federal court decree, reiterating that a "[s]tate-law prohibition against compliance with the District Court's decree cannot survive the command of the Supremacy Clause of the United States Constitution." *Id*. at 695. The Court held not that the federal injunction must be modified to accommodate state law, as Defendants propose here, but to the contrary, the state agency "may be ordered to prepare a set of rules that will implement the Court's interpretation of the rights of the parties even if state law withholds from them the power to do so." *Id*. This Court has repeatedly affirmed these basic principles. *See Hook*, 107 F.3d 1397, 1402-03.

These decisions, spanning a period of two centuries, uniformly hold that a state may not evade a federal court injunction by pointing to a contrary state law. Defendants' proposed new rule—that a federal court must modify an injunction if a new state law conflicts with it and has not been expressly found to violate federal law—is not only unsupported and contrary to

controlling precedent, it would eradicate the preemptive effect of a federal injunction and contradict Supremacy Clause precedent dating back to the earliest days of the republic.

E. The District Court's Invocation Of the Avoidance Doctrine to Preserve California Penal Code Section 3044 As a Statement of Independent State Law Rights Does Not Support the State's Assertion That Section 3044 Represents An Acceptable Substitute for Minimum Due Process.

On its face, if construed as the exclusive set of rights to be provided to accused parole violators, California Penal Section 3044 conflicts with the Stipulated Injunction and the requirements set forth in *Morrissey v. Brewer*, and the District Court explicitly identified these conflicts. *See Valdivia*, 603 F. Supp. 2d at 1282-83. Among other things, Section 3044 purports to limit the procedural rights afforded to the parolee to those expressly listed therein. Section 3044 omits the most basic element of due process—notice—as well as other elements identified by *Morrissey* and *Gagnon*. (SER at 680 ("no person paroled from a California correctional facility … shall, in the event his or her parole is revoked, be entitled to procedural rights other than the following …").)

Having found that California Penal Code section 3044, if construed as an exclusive statement of rights, conflicts with both the federal Constitution and the Stipulated Injunction, the District Court construed Proposition 9

narrowly to define a set of procedural rights that spring from California state law, independent of the federal Constitution, precisely to avoid a finding of conflict with federal due process. 603 F. Supp. 2d at 1286.

The State had urged the District Court to refrain from finding Section 3044 unconstitutional, but now the State presents an argument that would mandate a finding of unconstitutionality, despite the District Court's obligation to adopt an interpretation of a statute that avoids constitutional problems. *I.N.S. v. St. Cyr*, 533 U.S. 289, 299-300 (2001). No decision so requires. The Supremacy Clause provides that a conflicting state law impeding compliance with a federal court order must yield. *See, e.g.*, *Washington*, 443 U.S. at 695 (holding that a "[s]tate-law prohibition against compliance with the District Court's decree cannot survive the command of the Supremacy Clause of the United States Constitution"). The Supremacy Clause compels enforcement of the *Valdivia* Injunction.

If, however, any finding of unconstitutionality were required in order to support denial of the State's motion to replace the substantive terms of the Injunction with those of California Penal Code section 3044, the District Court's identification of the direct conflicts between the state statute and the federal Constitution suffice to meet any such requirement, even though the district court prudently refrained from striking down the law.

F. The State Did Not Satisfy Its Burden to Justify the Requested Modification Based on a New Statute that Simply Echoes Existing Statutes and Regulations

The enactment of Proposition 9 did not present a material change from the California statutory and regulatory scheme covering the parole revocation system in place at the time the parties entered into the *Valdivia* Injunction. The statutory and regulatory framework for parole revocation remains largely the same today as it did at the time of the Injunction.

In 2003, California Penal Code sections 3056 and 3060 permitted the State to summarily revoke parole at any time and to return to prison any prisoner on parole; these provisions remain in force today. Cal. Penal Code §§ 3056 and 3060. The State attempts to play down these broad provisions by characterizing these governing statutes as "broad grants of power and discretion … rather than mandates to exercise that authority in a particular manner." (AOB at 25.) That is a distinction without a difference. California Penal Code Sections 3056 and 3060 formed the basis for California's pre-*Morrissey* decisions holding that a parolee's liberty was a matter of the grace of state, and could be taken away with no process at all. *In re Tucker*, 5 Cal. 3d at 176-178; *Pope*, 9 Cal. App. 3d at 640. Section 3056 has not been amended since 1957; Section 3060 has been amended

only cosmetically. Cal. Penal Code sections 3056 and 3060, Historical and Statutory Notes (West's Ann. Cal. Penal Code 2009).

The State freely negotiated and agreed to the Injunction while Penal Code Sections 3056 and 3060 remained on the books, and the Injunction, as well as *Morrissey*, squarely conflicts with Sections 3056 and 3060. The State cannot now be heard to say that there is anything new about the existence of a state statute that conflicts with the Injunction. Moreover, the State ignores the specific, governing regulations in place at the time of the Injunction and still in effect. *See Scott v. County of Los Angeles*, 27 Cal. App. 4th 125, 145 (1994) (California regulations have the force of law); Cal. Penal Code § 5076.2 (authorizing Defendants to promulgate regulations governing parole revocation procedures). In 2003, state regulations provided that a "parole revocation hearing should be held within 45 days of the date the parole hold is placed." 15 Cal. Code Regs. § 2640. They also provided that "[a]ll evidence relevant to the charges or disposition," without limitation, is admissible in a parole revocation proceeding. 15 Cal. Code Regs. § 2665. These regulations have remained in force from the time of Proposition 9's passage to the present. State regulations in 2003 provided for attorney representation only under limited circumstances, and in those

cases, only for indigent prisoners and parolees; these regulations also remain in force. 15 Cal. Code Regs §§ 2690-2699.

In 2002, the District Court ruled that California's system of parole revocation was unconstitutional and ordered the State to devise a remedy to cure the due process violations. The State responded by negotiating and stipulating to the terms of the *Valdivia* Injunction, many of which conflicted—and continue to conflict—with the statutes and regulations governing parole revocation.[9]

In November 2008, Proposition 9 was passed. The enactment of Proposition 9 effectively purports to recreate many elements of the parole revocation process found unconstitutional in this case. Section 3044 and Proposition 9 merely restate the statutory and regulatory framework that was in place at the time of the *Valdivia* Injunction and do not represent a

[9] Defendants cite *Keith v. Volpe*, 118 F.3d 1386, 1394 (9th Cir. 1997), to argue that if the Injunction did conflict with state law at the time it was agreed upon and entered, it would be void "unless those state laws had been found to violate federal law." (AOB at 25-26.) But, of course, here the District Court did find that the Defendants' parole revocation system under the governing statutes and regulations violated the Due Process Clause of the Constitution, *Valdivia*, 206 F. Supp. 2d at 1078, a determination that was not challenged by appeal. *Keith v. Volpe* is inapposite.

"significant change" in factual circumstances—or any material change at all—warranting relief from the Injunction.[10]

Where the initial burden under *Rufo* is not met, no modification is warranted. The State has not established a "significant change," and the District Court did not abuse its discretion in denying the State's motion in light of its complete lack of any evidentiary showing.

II. THE STATE IS ATTACKING A STRAW MAN WHEN IT ERRONEOUSLY ASSERTS THAT THE DISTRICT COURT'S ORDER MAKES IT "FOREVER BOUND" TO THE TERMS OF THE INJUNCTION.

The District Court did not "conclude[] that the State is forever bound by the terms of the injunction, despite a significant subsequent change in State law." (AOB at 1.) The Court found that the Injunction should be enforced "unless and until the decree is modified." *Valdivia*, 603 F. Supp.

[10] Proposition 9 adds a provision for a probable cause hearing "no later than 15 days following his or her arrest for violation of parole." Cal. Penal Code § 3044(a)(1). Existing statutes and regulations did not include such a provision. Notably, however, this provision is not a material element of this appeal as it provides for a shorter time frame than the Injunction and thus does not conflict with it except in the exceedingly rare circumstance of a parolee entitled to an "expedited hearing" under ¶ 11(b)(i) of the Injunction where the three-day notice period and the 6- to 8-day expedited hearing following notice, calculated using business days, result in a hearing later than 15 calendar days as provided in Proposition 9. (ER 54-55.) Plaintiffs are not aware of this situation having ever arisen. Thus, this term cannot constitute a "significant change" warranting modification.

2d at 1286. The Court applied the *Rufo* test and found that the State in this instance did not meet its burden to show that the Injunction should be modified. *Id*. at 1290.

A. The District Court's Decision Does Not "Perpetually Infringe the Rightful Authority of a State's Citizens to Make Their Own Laws[.]"

The District Court decision recognized that the Injunction is subject to modification when it noted that California Penal Code section 3044 should be implemented consistent with the court's interpretation "unless and until the decree is modified." *Valdivia*, 603 F. Supp. 2d at 1286. The Court did not foreclose future modification should the State come forward with a modification that does not perpetuate the violations that the Injunction sought to remedy.

B. The District Court's Decision not to Modify the Injunction Does not Create a Separation of Powers Problem.

While "the choice among competing policy considerations in enacting laws is a legislative function[,]" (AOB at 18, quoting *Indep. Energy Producers Ass'n v. McPherson*, 38 Cal. 4th 1020, 1032 (2006)), it does not follow that the State violates principles of separation of powers in duly following the Constitution of the United States. The State does not act to choose among "policy considerations" when it is required to conform to the provisions of a consent decree to remedy federal constitutional deficiencies.

See Cal. Const. art. III, § 1 ("The State of California is an inseparable part of the United States of America, and the United States Constitution is the supreme law of the land"). The people of the State of California may exercise their political power to make public policy, so long as it does not interfere with the enforcement of a valid federal injunction operating to vindicate rights afforded under the federal Constitution. *See, e.g.*, *Missouri v. Jenkins*, 495 U.S. 33, 57 (1990) ("state policy must give way when it operates to hinder vindication of federal constitutional guarantees") (citation and internal quotation marks omitted); *Cooper*, 358 U.S. at 19 (noting that state authority "must be exercised consistently with federal constitutional requirements as they apply to state action").

C. The State is Subject to the Terms of the Stipulated Injunction Until It Can Prove that the State Warrants Relief from the Stipulated Injunction Under Fed. Rule Civ. P. 60(b).

The State's showing below did not meet *Rufo*'s initial burden of showing "changed circumstances." Furthermore, even if it had met that burden, Penal Code section 3044 does not address many of the issues remedied by the Injunction and in fact re-creates many of the procedures that were part of California's unconstitutional pre-*Valdivia* parole revocation scheme. The State failed to meet *Rufo*'s requirement that a proposed modification be "suitably tailored" to the changed circumstances, taking into

account *Rufo's* concerns that the modification "must not create or perpetuate a constitutional violation" and that the proposed modification "should not strive to rewrite a consent decree so that it conforms to the constitutional floor." *Rufo*, 502 U.S. at 391.

The District Court's ruling in July 2003 (SER 1032-1049), provided that, at minimum, due process required a live probable cause hearing with witnesses within 10 calendar days of arrest. Defendants contended that they could not implement this timeline because the process of determining on a case-by-case basis which parolees would or would not require attorneys resulted in significant delays in the hearing process. (SER 120.) Defendants proposed at the time that what they could do was provide attorneys in all cases at an early stage of the case. *Id.*

The resulting Injunction included the provision of attorneys to all parolees facing revocation, and the movement toward a minimally constitutional system under the *Valdivia* Injunction relies heavily on the appointment of counsel for all parolees. (SER 129, 750.) Proposition 9, however, would take away the provision of counsel to all parolees and instead re-introduce a case-by-case basis determination of whether a parolee is indigent and whether the parolee is incapable of speaking effectively in his or her defense. (ER 120.)

Despite the integral functions that a parolee's counsel currently performs to ensure due process in revocation, the State presented no evidence regarding how the implementation of Proposition 9—taking away counsel for all parolees—would allow the State to continue moving toward a minimally constitutional process, given the particular facts regarding California's massive statewide use of parole revocation, and its dependence on appointment counsel for core due process functions. For example, the current system relies on appointed counsel to assist in identifying disabilities and effective communication needs, (SER 129), but Proposition 9 would take away counsel without providing for, among other things, (1) a process by which parolees with disabilities and effective communication needs would be identified, (2) a standard for such identification and (3) a timeframe within which such need for accommodation would have to be identified in order to comport with due process.

The State also has not indicated how the notice of charges, evidence and offers of settlement (currently communicated by the attorney to the parolee) would be communicated to parolees in all jails and prisons where they await parole revocation proceedings; how parolees would subpoena witnesses to their hearings; or how witnesses found to be at a risk of trauma if questioned directly by the parolee would be examined in the absence of

counsel. The only evidence the State entered in support of its motion to modify the Injunction was the request for judicial notice of the text of Proposition 9 and the accompanying Voter Information Guide analysis. (ER 113-120.)

The brief glimpse that the State provided of its later withdrawn plan to implement Section 3044 establishes that the State would return to its constitutionally deficient pre-*Valdivia* process. The plan would have re-created a version of the pre-*Valdivia* "screening offer" process before the Probable Cause Hearing in which the parolee would be offered a set return to custody in return for waiving hearing rights. (SER 134, 554-561.) The "screening offer" procedure was heavily criticized by the court in its decision holding that California's parole revocation scheme was unconstitutional. *Valdivia*, 206 F. Supp. 2d at 1070, 1078. Re-instituting this process now would fly in the face of *Rufo*'s admonition against a modification that "create[s] or perpetuate[s] a constitutional violation." 502 U.S. at 391.

Providing no evidence as to how the parole revocation system as modified by the terms of Proposition 9 would function without the critical component of attorneys for parolees, the State failed to show that the modification is "suitably tailored" to the changed circumstances under *Rufo*.

III. THE DISTRICT COURT DID NOT ERR WHEN IT FOUND SECTION 3044(b) CONFLICTED WITH THE INJUNCTION.

Section 3044 (b) provides that "[t]he board is entrusted with the safety of victims and the public and shall make its determination fairly, independently, and without bias and shall not be influenced by or weigh the state cost or burden associated with just decisions." (ER 120.) Although Section 3044(b) recites the words "fair," "independent," and "without bias," it would institutionalize a pro-incarceration bias by barring the hearing officer from considering any statements in mitigation based on the "state cost or burden" of incarceration.

This biasing of the hearing officer conflicts not only with the *Valdivia* Injunction, as explained by the District Court, *Valdivia*, 603 F. Supp. 2d at 1282-84, but also with *Morrissey*'s requirement that a hearing officer must be "neutral and detached." 408 U.S. at 489.

Morrissey requires that a neutral and detached hearing officer will ensure that a parolee has "an opportunity to be heard and to show, if he can, that he did not violate the conditions, or, if he did, that circumstances in mitigation suggest that the violation does not warrant revocation." *Id*. at 488. The *Valdivia* Injunction, which remedied long-standing systemic violations of due process to California parolees in parole revocation proceedings, provided that the parolee should be considered for placement in remedial

sanctions at the revocation hearing and in all parole revocation proceedings. (ER 55, 64.) Under *Morrissey* and the terms of the *Valdivia* Injunction, a parolee must be granted the opportunity to argue circumstances in mitigation.

Such circumstances properly may involve the consideration of the cost or burden to the State. For example, a parolee whose first alleged parole violation involves shoplifting a candy bar or drinking one beer may not be able to dispute guilt, but must be allowed to offer mitigation, including the fact that the cost of sending him back to prison vastly exceeds any purported benefit, and that public safety would be better served by a remedial sanction that is less burdensome to taxpayers and more effective for reintegration into society. *Morrissey,* 408 U.S. at 484 ("Society has a stake in whatever may be the chance of restoring him to normal and useful life within the law"). Section 3044(b) would improperly prohibit the parole board from hearing such facts in mitigation.

Section 3044(b) would restrain the hearing officer from performing in a neutral and detached capacity as required by *Morrissey*. To so function, a hearing officer must have the ability to weigh the facts presented by the State and the parolee. Section 3044(b), however, would place a thumb on the scales of justice by requiring that the parole board ignore facts in

mitigation that may involve, among other things, a lack of rational relationship between the violation and the costs and burdens of re-incarceration as opposed to lower-cost, more effective alternatives.

The *Valdivia* Injunction provided a remedy for constitutional violations of due process in parole revocation proceedings as required under *Morrissey* and *Gagnon*. The District Court below properly found that this provision conflicted with the *Valdivia* Injunction, 603 F. Supp. 2d at 1282-84, and this Court should affirm its decision.

IV. THE DISTRICT COURT WAS OBLIGATED TO AVOID CONSTITUTIONAL PROBLEMS, AND CERTIFYING THE ISSUE TO THE CALIFORNIA SUPREME COURT WOULD BE CONTRARY TO THE LAW AND POINTLESS

Amici—but not the State—complain that the District Court did not find that Proposition 9 was intended to override the Injunction, which would run afoul of the Supremacy Clause, and they make the odd request that the Court certify to the California Supreme Court the question of whether Proposition 9 "was intended to contradict the Permanent Injunction." Amici's request not only is contrary to controlling precedent and the rules of court, but it would be pointless. *See Stenberg v. Carhart*, 530 U.S. 914, 945 (2000).

The District Court's interpretation of the parole revocation provisions of Section 3044 to reflect state law and thus not supplant contrary provisions

of the Injunction was not only proper, it was compelled by a long line of federal and state precedent. In *I.N.S. v. St. Cyr*, 533 U.S. 289, the Supreme Court declined to adopt a broad interpretation of a statute that, if accepted, would result in an unconstitutional stripping of federal court jurisdiction. In adopting the narrower reading, the Court relied on a long-standing maxim of statutory construction: "if an otherwise acceptable construction of a statute would raise serious constitutional problems, and where an alternative interpretation of the statute is 'fairly possible,' we are obligated to construe the statute to avoid such problems." *Id*. at 299-300 (citation omitted); *see also Center for Bio-Ethical Reform, Inc. v. Los Angeles County Sheriff Dep't*, 533 F.3d 780, 792 (9th Cir. 2008). California's Supreme Court mandates the same rule of construction of state law. In *In re Lance W.*, 37 Cal. 3d 873, 879 (1985), the court construed a ballot initiative providing that "relevant evidence shall not be excluded in any criminal proceeding" not to apply to evidence excluded under the Fourth Amendment in order to avoid an unconstitutional interpretation. *Id*. at 890 n.11; *Young v. Haines*, 41 Cal. 3d 883, 898 (1986).

Amici point to the Legislative Analyst's analysis in the ballot pamphlet to support their contention that the electorate intended for Section 3044 to override contrary provisions in the Injunction. (CJLF Brief at 19.)

But the voters of California may not override federal law or a federal injunction by passing a contrary state law. *Hook*, 107 F.3d at 1402-03. Thus, even if the District Court did ascribe the interpretation proffered by amici, it would have had to deem section 3044 unenforceable under the Supremacy Clause. *Id*. Since reading section 3044 to mean the electorate intended to take away federal due process rights, as amici urge, would raise serious constitutional concerns, the District Court was correct to avoid this problem by construing the statute as it did.

Under *Stenberg v. Carhart*, 530 U.S. 914, 945, a federal court may certify a question of state law to the state's highest court where an authoritative construction is lacking. In order for such a certification to be useful, and even allowable when made to the California Supreme Court, the issue certified must be determinative of the outcome on appeal. California Rule of Court 8.548; *Stenberg*, 530 U.S. at 945 (holding that certification was not permitted for non-determinative issue under rule similar to California's); *Complaint of McLinn*, 744 F.2d 677, 681-82 (9th Cir. 1984) (same).

While not entirely clear, amici appear to argue that the question that should be certified to the California Supreme Court is whether the purpose of Section 3044 was to contradict the Injunction. (CJLF Brief at 17.) But

even if the Supreme Court did adopt this construction, that ruling would neither be helpful nor would it be determinative of the issue on appeal. Such a finding would simply compel the conclusion that Section 3044 is unenforceable under the Supremacy Clause. *See Cooper*, 358 U.S. at 18; *Stone*, 968 F.2d at 861 n.20. On the other hand, if the California Supreme Court agreed with the District Court's construction of Section 3044, this would still not decide the issue of whether the Injunction should be modified. Regardless of the California Supreme Court's response, it would have no impact on the instant appeal.[11]

Amici argue that the District Court's interpretation of the parole revocation provisions of Proposition 9 as a statement of state law due process requirements for parole revocation proceedings "strip[ped] them of any practical effect." (CJLF Brief at 17.) This is incorrect. First, Section 3044 provides for a probable cause hearing within 15 days of a parolee's arrest. This is a shorter time period than that provided by the Permanent Injunction, and prior state law provided for no probable cause hearing at all.

[11] Amici's argument that "[t]he case would come back if and when the state courts resolved the interpretation question" is simply wrong. (CJLF Brief at 20.) Defendants are under the Injunction, and even if there could be some occasion for a state court to consider the issue, which there is not, the District Court's Injunction would not be affected by it. A state court may not overturn a federal court order. *Washington*, 443 U.S. at 695.

Second, section 3044 provides a statutory attorney determination, whereas existing law included such a provision only in administrative regulations, which can more easily be changed or eliminated.[12] The District Court properly construed Section 3044 as a statement of state law. There is no requirement that a state statute be interpreted so as to unconstitutionally conflict with a federal injunction; indeed, the rule is exactly the opposite. Moreover, the federal Injunction supersedes a contrary state law under the Supremacy Clause. It is amici's flawed interpretation that would render section 3044 meaningless.

CONCLUSION

The State has not met its burden to show facts warranting modification under *Rufo*. The State is free to seek a modification of the Injunction when circumstances so warrant. In light of the State's burden to show circumstances warranting modification and the scant evidence put forth in support thereof, the District Court did not err in granting the motion to enforce and rejecting the motion to modify the *Valdivia* Injunction. For

[12] The attorney appointment provisions under the existing regulations and Section 3044 are unconstitutional under the Due Process Clause and *Gagnon*, 411 U.S. 778, an issue not reached by the District Court below and not raised in the instant appeal.

the reasons set forth herein, the Plaintiff class respectfully requests that the Court affirm the District Court's order below.

Dated: August 28, 2009

ROSEN, BIEN & GALVAN, LLP

By: */s/ Ernest Galvan*
Ernest Galvan

Attorneys for Plaintiffs-Appellees

STATEMENT OF RELATED CASES

Pursuant to Ninth Circuit Rule 28-2.6, this case is related to *Valdivia v. Schwarzenegger*, Case No. 08-15889.

Dated: August 28, 2009

ROSEN, BIEN & GALVAN, LLP

By: */s/ Ernest Galvan*
Ernest Galvan

Attorneys for Plaintiffs-Appellees

CERTIFICATE OF COMPLIANCE TO FED. R. APP. P. 32(a)(7)(C) AND CIRCUIT RULE 32-1 FOR CASE NUMBER 09-15836

Pursuant to Fed. R. App. P. 32(a)(7)(C) and Ninth Circuit Rule 32-1, I certify that this brief is proportionately spaced, has a typeface of 14 points or more and contains 13,806 words as counted by the Microsoft Word 2003 word processing program used to generate the brief, excluding the tables of contents and authorities as permitted by Fed. R. App. P. 32(a)(7)(B)(iii).

Dated: August 28, 2009

/s/ Ernest Galvan
Ernest Galvan

CERTIFICATE OF SERVICE
U.S. Court of Appeals Docket No. 09-15836

I hereby certify that I electronically filed the foregoing Appellees' Brief with the Clerk of the Court of the United States Court of Appeals for the Ninth Circuit by using the CM/ECF system on August 28, 2009.

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

/s/ *Ernest Galvan*