Court of Appeals Docket No. 12-15457 and No. 12-15492

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JERRY VALDIVIA, et al.,

Plaintiffs-Appellees/Cross-Appellants

v.

EDMUND G. BROWN, JR., et al.,

Defendants-Appellants/Cross-Appellees

On Appeal from the United States District Court for the
Eastern District of California
The Hon. Lawrence K. Karlton, Presiding

MOTION FOR LEAVE TO FILE BRIEF OF AMICI CURIAE IN SUPPORT OF PLAINTIFFS-APPELLEES/CROSS-APPELLANTS

WENDY MUSELL – SBN 203507
ELISA STEWART – SBN 219557
STEWART & MUSELL, LLP
351 California Street, Suite 700
San Francisco, CA 94104
Telephone: (415) 593-0083
Fax: (415) 520-0920
wmusell@stewartandmusell.com
estewart@stewartandmusell.com

CATHERINE WEISS
MICHAEL T.G. LONG
ELLIOTT Z. STEIN
LOWENSTEIN SANDLER PC*
65 Livingston Avenue
Roseland, NJ 07068
Telephone: (973) 597-2500
Fax: (973) 597-5727
-and-
1251 Avenue of the Americas
New York, NY 10020
Telephone: (212) 262-6700
cweiss@lowenstein.com
mlong@lowenstein.com
estein@lowenstein.com

Attorneys for Amici Curiae in Support of Plaintiffs-Appellees/Cross-Appellants

Pursuant to Federal Rule of Appellate Procedure 29, Amici Curiae respectfully move for leave to file the accompanying amicus brief.

Amici Curiae are national and statewide nonprofit organizations and academics with expertise in criminal justice policy and practice, and include the following: The American Civil Liberties Union of Northern California; The Brennan Center for Justice at New York University School of Law[1]; California Attorneys for Criminal Justice; International CURE (Citizens United for Rehabilitation of Errants); The Justice Policy Institute; Legal Services for Prisoners with Children; The National Council on Crime and Delinquency; The Sentencing Project; Jeremy Travis; Jonathan Simon; Hadar Aviram; W. David Ball; Sharon Dolovich; Malcolm M. Feeley; Philip Genty; Barry Krisberg; Michael Pinard; and Bruce Zucker (collectively, "Amici").

Amici are familiar with the issues presented in this case. As a result of their extensive study of the correctional system, in particular parole and reentry policies and procedures, Amici are able to inform the Court with regard to areas that may not otherwise be addressed adequately in the briefing. Specifically, Amici are able to advise the Court on issues such as the functioning of California's parole system prior to the *Valdivia* Injunction, the disparities between the parole systems in California and other states, and leading parole practices and reforms.

Because of their unique perspective and their interest in the issues now before the Court, Amici respectfully request permission from the Court to file the accompanying amicus brief.

---

[1] The amicus brief does not purport to convey the position of N.Y.U. School of Law.

WENDY MUSELL – SBN 203507
ELISA STEWART – SBN 219557
STEWART & MUSELL, LLP
351 California Street, Suite 700
San Francisco, CA 94104
Telephone: (415) 593-0083
Fax: (415) 520-0920
wmusell@stewartandmusell.com
estewart@stewartandmusell.com

Date: July 26, 2012

By: /s/ Wendy Musell

Local Counsel for Amici Curiae in Support of Plaintiffs-Appellees/Cross-Appellants

and

CATHERINE WEISS
MICHAEL T.G. LONG
ELLIOTT Z. STEIN
LOWENSTEIN SANDLER PC
65 Livingston Avenue
Roseland, NJ 07068
Telephone: (973) 597-2500
Fax: (973) 597-5727
-and-
1251 Avenue of the Americas
New York, NY 10020
Telephone: (212) 262-6700
mlong@lowenstein.com
estein@lowenstein.com

Lead Counsel for Amici Curiae in Support of Plaintiffs-Appellees/Cross-Appellants

CERTIFICATE OF SERVICE

U.S. Court of Appeals Docket Number: 12-15457 and 12-15492

I hereby certify that on July 26, 2012, I electronically filed the foregoing:

MOTION FOR LEAVE TO FILE BRIEF OF AMICI CURIAE IN SUPPORT OF PLAINTIFFS-APPELLEES/CROSS-APPELLANTS

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: July 26, 2012 By: /s/ Wendy Musell

Court of Appeals Docket No. 12-15457 and No. 12-15492

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JERRY VALDIVIA, et al.,

Plaintiffs-Appellees/Cross-Appellants

v.

EDMUND G. BROWN, JR., et al.,

Defendants-Appellants/Cross-Appellees

On Appeal from the United States District Court for the
Eastern District of California
The Hon. Lawrence K. Karlton, Presiding

BRIEF OF AMICI CURIAE IN SUPPORT OF PLAINTIFFS-APPELLEES/CROSS-APPELLANTS

WENDY MUSELL – SBN 203507
ELISA STEWART – SBN 219557
STEWART & MUSELL, LLP
351 California Street, Suite 700
San Francisco, CA 94104
Telephone: (415) 593-0083
Fax: (415) 520-0920
wmusell@stewartandmusell.com
estewart@stewartandmusell.com

CATHERINE WEISS
MICHAEL T.G. LONG
ELLIOTT Z. STEIN
LOWENSTEIN SANDLER PC*
65 Livingston Avenue
Roseland, NJ 07068
Telephone: (973) 597-2500
Fax: (973) 597-5727
-and-
1251 Avenue of the Americas
New York, NY 10020
Telephone: (212) 262-6700
cweiss@lowenstein.com
mlong@lowenstein.com
estein@lowenstein.com

Attorneys for Amici Curiae in Support of Plaintiffs-Appellees/Cross-Appellants

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 Brennan Center for Justice at New York University School of Law, California Attorneys for Criminal Justice, International CURE (Citizens United for Rehabilitation of Errants), The Justice Policy Institute, Legal Services for Prisoners with Children, The National Council on Crime and Delinquency, and The Sentencing Project are non-profit public interest organizations, none of which has parents or stockholders.

---

* Counsel wish to acknowledge Alexandra Sperling, a summer associate at Lowenstein Sandler PC, for her invaluable contributions to this brief.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Pages

CASES

STATUTES

SPECIAL MASTER REPORTS

OTHER AUTHORITIES

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/Cross-Appellants to request (i) reversal of the district court only with respect to that portion of the Decision concerning the 45-day period for parole revocation hearings (Injunction ¶¶ 11(b)(iv) and 23), and (ii) affirmance of the district court with respect to the remainder of the Decision.

The district court has now twice recognized the *Valdivia* Injunction's critical role in reforming a severely dysfunctional parole system. For decades prior to the Injunction, California's parole system was catastrophically deficient: California's parolee population is and has been, by a wide margin, the largest in the country; California has experienced some of the highest recidivism rates on record; and the State's counterproductive parole revocation process too often released high risk inmates while incarcerating those least likely to reoffend. With parole revocations accounting for more than 60% of new prison admissions in California by 2006, these deficiencies contributed to unprecedented levels of prison overcrowding and inadequate prison medical and mental health care delivery systems so appalling that, as the United States Supreme Court recently agreed, they constituted the imposition of cruel and unusual punishment. *See Brown v. Plata*, 131 S. Ct. 1910, 1947 (2011).

California's parole revocation system additionally suffered from numerous constitutional infirmities, including lengthy delays, inadequate access to counsel, and unconstitutional evidentiary practices. It was only *after* the district court found that the State's parole revocation process was unconstitutional that the State consented to the Injunction, which made the process comply with the

Constitution by placing specific time limits on each stage of parole revocation, appointing counsel to all parolees at hearings, and limiting the use of hearsay consistent with parolees' constitutional rights of confrontation. These remedial measures promote more reliable outcomes at probable cause and revocation hearings, which in turn increase public safety by allowing the State to focus incarceration efforts at the most dangerous parolees while offering non-incarceration alternatives for non-violent and technical violators. Following implementation of the Injunction, California has begun to show improvement not only in a reduced rate of parole revocations, but also, for the first time in years, a reduction in the State prison population.

Amici are compelled to voice their concerns on three important issues that Proposition 9 would impact adversely. First, guaranteeing counsel to parolees not only is necessary to safeguard parolees' constitutional rights but is also sound policy that promotes reliable outcomes and increases public safety. Second, implementing Proposition 9 and setting aside the Injunction would reverse significant reforms the State is making as part of the remedial plan. Third, the district court's modification of the Injunction to extend to 45 days the time limit for a revocation hearing represents an undue imposition on parolees pulled away from their jobs, families, and lives.

The Injunction should be enforced in its entirety so that California may continue on its road to ensuring a parole system that is functional, transparent, accountable, fair, and constitutional.

AMICI CURIAE STATEMENTS OF INTEREST

Amici include a number of nonprofit organizations and academics with 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 Brennan Center for Justice at New York University School of Law[1] is a non-partisan public policy and law institute that focuses on improving the systems of democracy and justice, including by ending unnecessary incarceration, securing full legal representation for the poor, and ensuring equal access to the courts while eradicating racial disparities. California Attorneys for Criminal Justice is a statewide organization of criminal defense lawyers formed in 1973 to defend the rights of persons as guaranteed by the United States Constitution, the Constitution of the State of California and other applicable law. International CURE (Citizens United for Rehabilitation of Errants) is a prison reform organization of people formerly and presently incarcerated as well as their families and others concerned. The Justice Policy Institute is a Washington, D.C.-based organization dedicated to creating fairer systems of justice and to reducing society's reliance on incarceration as a response to social problems. 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.

[1] This brief does not purport to convey the position of NYU School of Law.

Amici also include Jeremy Travis, the President of John Jay College of Criminal Justice, 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 University of California, Berkeley School of Law, 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, teaches criminal justice classes and focuses her research 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 NYU School of Law, has researched and written extensively on the law, policy, and theory of prisons and punishment. Professor Malcolm M. Feeley, Claire Sanders Clements Dean's Professor in the Jurisprudence and Social Policy Program at the University of California, Berkeley School of Law, has authored dozens of articles and fifteen books in criminal courts and criminal justice reform. Professor Philip Genty, the Everett B. Birch Innovative Teaching Clinical Professor in Professional Responsibility at Columbia Law School, directs the law school's Prisoners and Families Clinic and has done extensive research, writing, and advocacy on parole and other prison-related issues. Professor Barry Krisberg, University of California, Berkeley School of Law, teaches classes in the Law of Corrections and Parole, and has been involved in several key cases concerning prison reform, including *Brown v. Plata*. Professor Michael Pinard, University of

Maryland Francis King Carey School of Law, has written on the reentry of individuals with criminal records and the collateral consequences of criminal convictions. Professor Bruce Zucker, Department of Business Law at California State University – Northridge, focuses his research on post-conviction matters, including parole issues in California, and has represented indigent parolees in revocation and lifer hearings before the Board of Parole Hearings since 2001, through appointments from the Board and the California Parole Advocacy Program at McGeorge School of Law.

SUMMARY OF FACTS AND CASE

Plaintiffs-Appellees/Cross-Appellants are a class of current and future parolees who filed this action in May 1994, challenging the constitutionality of California's parole revocation procedures. (ER 222.) In 2002, the district court granted partial summary judgment to Plaintiffs, ruling that California violated parolees' due process rights under the Fourteenth Amendment of the United States Constitution and requiring the State to implement a remedial plan that addressed these constitutional violations. *Valdivia v. Davis*, 206 F. Supp. 2d. 1068, 1078 (E.D. Cal. 2002); (SER 775-777.)

In November 2003, the parties consented to an Injunction that provided for 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 77-95.) On March 9, 2004, the district court approved the Injunction. (*Id.*)

In the ensuing years, a Special Master monitored compliance with the Injunction and reported in detail about the imperfect but encouraging reform

process. For the first time in decades, California's parole system featured procedures that complied with the constitution and exhibited signs of functionality by employing non-incarceration remedial sanctions and evidence-based decision-making practices. (SER 249-256.)

However, in November 2008, California enacted Proposition 9, severely abridging parolees' rights to counsel and threatening other reform elements. (SER 675-681.) Plaintiffs moved to enforce the Injunction and enjoin the enforcement of Proposition 9. (SER 1096-1119.) The district court granted Plaintiffs' motion, ordering that the Injunction superseded Proposition 9 to the extent the two conflicted. (SER 1121-22.) On the State's appeal, this Court held that the district court correctly found that the State had not met its burden of demonstrating a change in circumstance warranting modification of the Injunction. *Valdivia v. Schwarzenegger*, 599 F.3d 984, 994 (9th Cir. 2010). However, the Court remanded to allow the district court to determine whether the Injunction was necessary to remedy federal constitutional violations and whether California parole revocation procedures, as modified by Proposition 9, violated basic constitutional rights. *Id.*

On remand, the district court again denied the State's motion to enforce Proposition 9, and granted Plaintiffs' motion to enforce the Injunction, with the lone exception of modifying the Injunction at the State's request to provide a revocation hearing no later than 45 days after the commencement of a parole hold, rather than the 35-day period under the Injunction. *Valdivia v. Brown*, No. CIV. S–94–671 LKK/GGH, 2012 WL 219342 (E.D. Cal. Jan. 24, 2012) [hereinafter "Order"]. Defendants appealed, and Plaintiffs cross-appealed.

ARGUMENT

Implementation of Proposition 9 would represent a return to a severely dysfunctional parole system in a number of respects. Amici wish to focus on three failures of Proposition 9 that are particularly troublesome: 1) the failure to guarantee counsel for all parolees, 2) the failure to continue implementation of the Injunction's remedial sanctions, and 3) the failure to guarantee a timely evidentiary hearing.

I. THE INJUNCTION'S APPOINTMENT OF PAROLEE COUNSEL IS NECESSARY TO ENSURE CONSTITUTIONAL COMPLIANCE UNDER *MORRISSEY* AND *GAGNON*.

A. Implementing Proposition 9 Would Return California To A Broken Parole Revocation System.

To appreciate the value of the Injunction, and because implementation of Proposition 9 would unwind many of its provisions, it is worth recalling the context of the *Valdivia* litigation and the Injunction. Prior to *Valdivia*, California's parole revocation process was mired in decades of gross violations 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.

California's pre-*Valdivia* parole revocation system relied on a combination of statutes and administrative regulations, and near-automatic parole supervision for every released prisoner, resulting in a disproportionately large parolee population. Unlike many states that relied on a parole board or similar body to determine a prisoner's release date by assessing a prisoner's specific characteristics, California's determinate sentencing scheme resulted in automatic

release of prisoners 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: A Policy Research Program Report*, xii (2006), *available at* http://ucicorrections.seweb.uci.edu/pdf/Understanding CorrectionsPetersilia20061.pdf; *see also* Ryken Grattet, Ph.D., Joan Petersilia, Ph.D. & Jeffrey Lin, Ph.D., *Parole Violations and Revocations in California*, at 5, 44 (2008), *available at* https://www.ncjrs.gov/pdffiles1/nij/ grants/224521.pdf.

As a result, the State's parole revocation process was an outlier in relation to other states and the nation by nearly every metric. For example, in 2006, nearly 64% of all entrants to California prisons were parolees. *Grattet*, *supra*, at 29. By contrast, in Texas, a state with a prison population of comparable size, only 20% of entrants to prison were parolees. *Id.* By 2007, California represented 12% of the United States population, U.S. Census Bureau, *Population Estimates: Vintage 2007 National Tables* (2007), *available at* http://www.census.gov/popest/data/historical/2000s/vintage_2007/state.html, but accounted for a grossly disproportional 48% of all parole revocations in the country. Lauren E. Glaze & Thomas P. Bonczar, U.S. Dep't of Justice, *Bureau of Justice Statistics: Probation and Parole in the United States, 2007 Statistical Tables*, at 8, *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/ppus07st.pdf.

Even former Governor Schwarzenegger recognized that the parole system was "broken," not in "alignment with other states," had an "unacceptably high recidivism rate" and "jeopardize[ed] public safety." Gov. Arnold Schwarzenegger, *Transcript of Press Conference to Unveil Comprehensive Prison Reform Proposal*, *available at* http://gov.ca.gov/news.php?id=7175. As an independent State oversight organization noted at the time: "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 i (2003) [hereinafter *Safe & Sound*], *available at* http://www.lhc.ca.gov/lhc/172/report172.pdf.

By 2008, the California prison system was in excess of 190% of design capacity, a level described as "extraordinary" and "almost unheard of," and ultimately found to be unconstitutional. *Coleman* v. *Schwarzenegger*, No. CIV S-90-0520 LKK JFM P, 2009 WL 2430820, at *31 (E.D. Cal. Aug. 4, 2009); *see also Plata*, 131 S. Ct. at 1947. Notably, the three-judge panel in *Coleman* specifically identified parole reform as a significant source of necessary reduction in the prison population. *Coleman*, 2009 WL 2430820, at *114; *see also Grattet*, *supra*, at 90 ("[A]ny examination of prison crowding in California must account for the role of parole revocation in contributing to the problem."). The Supreme Court too recognized that the State "could reduce the prison population by punishing technical parole violations through community-based programs," with little or no impact on public safety. *Plata*, 131 S. Ct. at 1943.

B. Implementation of the *Gagnon* Case-by-Case Analysis For Appointing Counsel is Impracticable in California.

The Injunction's provision of counsel is only one element of reform among many that the State instituted, but its elimination would represent a retrenchment with broader consequences. Prior to the Injunction, California purported to follow the standard for appointing parolee counsel under *Gagnon v.*

Scarpelli, 411 U.S. 778 (1973), and *Morrissey v. Brewer*, 408 U.S. 471 (1972). *Gagnon* requires, among other things, that parolee counsel be provided presumptively to those who have colorable defenses to the alleged violation or mitigating factors that make revocation inappropriate. *Gagnon*, 411 U.S. at 790-91. But, as applied in California, the *Gagnon* case-by-case analysis proved itself to be impracticable and incapable of safeguarding constitutional rights in the state.

During the negotiations that precipitated the Injunction, the State revealed that the administrative burden of determining which parolees were entitled to counsel under *Gagnon* and the appointment process itself had significantly contributed to the State's inability to meet *Morrissey*'s requirement of prompt revocation hearings. (SER 251-252.) The lack of counsel contributed to a system in which parolees were systematically denied notice of charges, the evidence to be used against them, and the chance to confront adverse witnesses. (SER 550-565.) Furthermore, most parole revocation cases were resolved at a "screening offer" meeting with a parole agent, at which the parolee had no counsel no matter how impaired the parolee, how complex the issues, or how compelling the claims of innocence. (*Id.*) The extensive negotiations between Plaintiffs and State officials resulted in the provision of counsel to all parolees in custody as a practical solution to bring the State into compliance with *Morrissey*.[2]

[2] The State argues that the Injunction's provision of counsel to non-indigents is not required under *Gagnon*, increases costs, and prolongs the decision making process. (Appellant's Opening Brief, at 30.) But the State overlooks its history of failures under the administrative burdens of *Gagnon*. Furthermore, any individualized procedure would generate much higher administrative costs than it would save in disqualifying the occasional non-indigent parolee. *See also infra*, at Section I.D.

The district court likewise found that appointing counsel to all parolees at the Return to Custody Assessment ("RTCA") stage is necessary "because under California's scheme, implementation of the *Gagnon* case-by-case analysis determination is impracticable." (Order, at 9.) The court's determination drew upon evidence including testimony from parolees who had been held for *more than 200 days* without a hearing because of the backlog created by case-by-case determinations for appointment of counsel. (*Id.*) The evidence further included a 2003 Inspector General's report stating that "adding another time-consuming procedure," such as the *Gagnon* analysis, "into an already cumbersome and convoluted process could cause significant additional delays." (*Id.*)

The State does next to nothing to address these difficulties, but simply asserts that Proposition 9 comports with *Gagnon*. (Appellant's Opening Brief, at 34.) As an initial matter, Proposition 9 does not comport with *Gagnon*, including *Gagnon's* requirement to consider mitigating factors. Furthermore, the State itself highlights the complex nature of the *Gagnon* analysis, describing the Proposition 9 test as a "multi-factor, individualized inquiry" that is "to be made on a case-by-case basis" that "entitles a parolee to counsel at state expense when the parolee is indigent and '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.'" (*Id.* at 27-28.) The State effectively concedes, as it must, the risk that the district court found necessary to avoid – namely, that a case-by-case determination requires complex analysis leading to unduly delayed probable cause hearings.

C. Provision of Counsel To All Parolees Is Essential To Achieve Constitutional Compliance.

Given the State's dismal record of compliance with *Gagnon* and the spillover impact with respect to *Morrissey*, it is not surprising that the parties included in the Injunction, and the district court approved, reforms that go beyond the strict confines of the problem itself. Indeed, the Supreme Court has a long tradition of employing prophylactic measures when other remedies are by themselves inadequate.[3] Tracy A. Thomas, *Understanding Prophylactic Remedies Through the Looking Glass of Bush v. Gore*, 11 WM. & MARY BILL RTS. J. 343, 393 (2002). A prophylactic rule is "designed to operate as a preventative measure; its purpose is to safeguard against a potential constitutional violation." Wayne R. LaFave, Jerold H. Israel & Nancy J. King, *Criminal Procedure* § 2.9(e), at 672-73 (2d ed. 1999). Prophylactic remedies are particularly appropriate when "predicated on a judicial judgment that the risk of a constitutional violation is sufficiently great that simple case-by-case enforcement of the core right is insufficient to secure that right." Yale Kamisar, *Miranda Thirty-Five Years Later: A Close Look at the Majority and Dissenting Opinions in Dickerson*, 33 ARIZ. ST. L.J. 387, 428 (2001) (internal quotation marks omitted). In short, judicial creation

[3] A classic example is *Miranda v. State of Arizona*, 384 U.S. 436 (1966), in which a prophylactic remedy -- *i.e.*, the "*Miranda* warning" -- was determined to be necessary to vindicate the accused's Fifth Amendment right against self-incrimination. It is no coincidence that the Court found that a specific warning concerning *the right to counsel* was a key protection of the accused's other constitutional rights. *Rufo* too recognizes that parties may agree to a consent decree broader than what the Constitution requires in order to remedy a constitutional violation. *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367, 389 (1992).

of prophylactic remedies is a necessary tool that makes "constitutional guarantees more meaningful and more effective." *Id.*

The impracticability of the *Gagnon* case-by-case analysis lends itself neatly to a prophylactic remedy. The district court has twice found, and indeed the State itself has conceded, that a case-by-case enforcement of the right to counsel delays revocation proceedings to the point of unconstitutionality under *Morrissey*. Only the prophylactic remedy of guaranteeing counsel to all parolees – including non-indigents, given the State's past failures – at the RTCA stage can adequately preserve parolees' rights to counsel *and* the avoidance of unnecessary lengthy delays.

D. Parolee Counsel Greatly Improves The Parole Revocation System.

The need for a prophylactic remedy is further underscored by the practical and legal difficulties that arise from *pro se* parolee representation. Counsel's involvement, by contrast, improves the parole revocation process and supports much-needed reforms.

It is axiomatic that the involvement of defense counsel at critical junctures of the criminal process (which include re-incarceration for the violation of parole conditions) serves important due process and policy interests. The Supreme Court has long recognized that "the accused is guaranteed that he need not stand alone against the State at any stage of the prosecution, formal or informal, in court or out, where counsel's absence might derogate from the accused's right to a fair trial." *United States v. Wade*, 388 U.S. 218, 226 (1967). Indeed, the right to counsel is one of the hallmarks of the American justice system, helping "to define who we are as a free people and distinguish[ing] this country from totalitarian regimes." The Constitution Project, *Justice Denied: America's*

Continuing Neglect of Our Constitutional Right to Counsel: Report of the National Right to Counsel Committee, at 2 (April 2009), *available at* http://www.constitutionproject.org/ pdf/139.pdf.

The Injunction's provision for guaranteeing counsel to all parolees recognizes the vital role that counsel play in the parole revocation system. Parolee counsel: (i) address complex issues concerning parolees' conditional rights to confront witnesses under *Morrissey* (SER 251-252, 1060-1061); (ii) help parolees decide whether to invoke hearing rights or to accept negotiated dispositions (ER 93, SER 250-251); (iii) identify parolees with disabilities and special communication needs (SER 251); and (iv) protect vulnerable witnesses from the trauma of direct questioning by accused parolees (SER 251-252). Even the simplest cases often involve highly technical and complex issues that can only be understood by competent counsel experienced in California revocation proceedings. In addition, rather than perpetuating the long delays attendant to individualized determinations of the right to counsel, the Injunction requires appointment of counsel early in the process, at the RTCA stage. (Injunction, ¶ 11(b)(i).) Upon appointment, counsel can invoke an "expedited probable cause" hearing in appropriate cases. (*Id.*) In all cases, counsel can begin evaluating the case, the defenses, and the witnesses. (*Id.* at ¶¶ 16, 21.)

Guaranteeing counsel not only ensures that parolees' interests are protected, but further ensures that the system produces reliable outcomes, thereby resulting in fewer parolees returning to prison in the absence of evidence that they actually committed a parole violation. Proposition 9, on the other hand, would have the opposite effect. By failing to guarantee counsel to all parolees, Proposition 9 increases the likelihood that non-violent parole violators are

incarcerated when alternative sanctions are warranted, a result that runs contrary to both the Supreme Court's decision in *Plata* and the State legislature's intent under Realignment. Furthermore, incarcerating parolees for non-violent parole violations reduces public safety by misallocating resources that the State could otherwise use to incarcerate violent offenders who should be in prison.

The presence of counsel also alleviates the numerous practical and legal problems that *pro se* parolees face. For instance, as this Court affirmed previously in this case, hearsay evidence that the State seeks to introduce is subject to a balancing test under *United States v. Comito*, 177 F.3d 1166 (9th Cir. 1999). *Schwarzenegger*, 599 F.3d at 987. Under the *Comito*-balancing test, hearsay may only be admitted if the government establishes good cause for denying the right to confront the declarant. The *Comito*-balancing test also applies to hearsay used to corroborate proffered hearsay. As even seasoned practitioners will attest, hearsay and the various applicable exceptions are complicated subjects that can take years to master. It strains credulity to expect parolees, or any layperson, to learn and understand the hearsay rule and *Comito*, let alone present these concepts in a revocation proceeding.

Moreover, even today, despite the appointment of counsel, there remain flaws in the system that would be demonstrably exacerbated in the absence of counsel. As recently as February 2012, the Special Master reported that probable cause hearings were still not being conducted properly because they "are conducted solely as negotiations and do not invite probable cause argument or make probable cause findings aloud." (*Twelfth Report of the Special Master on the Status of the Conditions of the Remedial Order*, at 19 (February 15, 2012), *Valdivia* (No. CIV-94-671 LKK/GGH) [hereinafter "*SM12*"].) In a previous

report, the Special Master noted that "of the nine hearing officers the Special Master's team observed conducting probable cause hearings during the Round, three did not invite probable cause argument, make probable cause findings, or in any other way indicate that probable cause was involved in this meeting." (*Eleventh Report of the Special Master on the Status of the Conditions of the Remedial Order*, at 26 (December 15, 2011), *Valdivia* (No. CIV-94-671 LKK/GGH) [hereinafter "*SM11*"].) As the Special Master put it, these problems are "nearing the point that a court order is warranted." (*SM12*, at 19 (quoting a prior Special Master Report).)

The Special Master also found due process problems at the revocation hearing stage. The Special Master's most recent report suggests that "due process problems may be occurring in up to 9% of revocation hearings" and that an unknown percentage of written records are insufficient under *Morrissey*. (*Id.* at 21.) As the Special Master concluded, these problems have "an impact on fairness" (*Id.* at 23) but "the universal appointment of attorneys provides an important safeguard to prevent due process violations and to mitigate the effect of any that may occur." (*Id.* at 16.)

The failure to guarantee counsel for parolees raises similar problems with respect to parolees' purported right under Proposition 9 to confront victims. The district court found that Proposition 9 "does not strip a parolee of his Constitutional confrontation right," including as to testifying victims. (Order at 12.) But, from a simple practical perspective, the State has failed to explain how such a confrontation would work in the absence of counsel. It remains unclear, for example, precisely *who* would question the victim on the parolee's behalf. Indeed, implementation of Proposition 9 would lead to alleged offenders examining the purported victims, a situation that poses the dual problem of being ineffective for

the parolee and traumatic for the victim/witness. This problem is further compounded by Proposition 9's definition of "victim" which, in theory, could result in a parolee directly questioning a victim's child. Victims' Bill of Rights Act of 2008, § 4.1(e) ("The term 'victim' also includes the person's spouse, parents, children, siblings, or guardian").

The State posits that providing counsel to all parolees is an unnecessary cost. (Appellant's Opening Brief, at 30.) But providing counsel at the RTCA stage is cheaper than not providing counsel and suffering additional costs later in the process, and worsening the conditions found unconstitutional in *Plata*, by re-incarcerating parolees unnecessarily. Far from being an unnecessary cost, the guarantee of parolee counsel is among the most pivotal reforms of California's parole revocation system. Proposition 9, in contrast, would bring about the return of past unconstitutional practices and would represent an enormous step backward for the State of California.

E. The State Has Made No Showing That Proposition 9 Comports With *Gagnon* And *Morrissey*.

Although advocating for implementation of Proposition 9, the State offers no plan as to how Proposition 9's limited provision of counsel would comply with *Gagnon* or overcome the resulting infirmity under *Morrissey*. This is a recipe for disaster. The current system relies heavily on counsel to assist in: identifying disabilities and effective communication needs; providing notice of charges, evidence and offers of settlement to parolees in jails; locating and subpoenaing witnesses; and questioning victims. The State has not proposed how to maintain any of these safeguards in the absence of counsel. Nor has the State explained how, in the absence of counsel, "indigency" would be determined, which is a threshold criterion under *Gagnon*.

The State's recently enacted corrections realignment legislation ("Realignment") does not obviate the need to guarantee counsel to all parolees. Assembly Bill (AB) 109. Under Realignment, individuals sentenced to non-serious, non-violent or non-sex offenses ("non non non" offenders) will serve their sentences in county jails instead of state prison. Darby Kernan, Assistant Secretary, Office of Legislation, *Overview of Assembly Bill 109 – the 2011 Public Safety Realignment*, *available at* http://www.cdcr.ca.gov/realignment/docs/AB_109-PowerPoint-Overview.pdf. Similarly, revocation sanctions will be served in county jail rather than state prison, and local courts will bear the responsibility of parole revocations for inmates released to county supervision. Cal. Dep't of Corr. & Rehabilitation website, *Public Safety Realignment: Parole Revocations, available at* http://www.cdcr.ca.gov/realignment/Parole-Revocations.html.

According to the Special Master, Realignment poses its own risks. "Realignment will result in a significant decrease in both Board and Paroles Division staff." (*SM12*, at 9.) Realignment is also predicted to result in an increase in jurisdictional questions for hearing officers to address. (*SM11*, at 9.) In the face of staffing cuts, the presence of defense counsel is especially critical to ensure that parolees do not fall through the cracks of an understaffed system. Attorney involvement will ensure that jurisdictional issues are addressed properly and promptly, thereby making the system more efficient. Finally, because parole revocation proceedings for the most serious offenders are not subject to Realignment and will continue to be processed at the state level, it remains as crucial as ever to safeguard those parolees' constitutional rights to counsel.

II. PROPOSITION 9 WOULD REVERSE REFORMS IMPLEMENTED UNDER THE INJUNCTION.

As discussed above, prior to *Valdivia*, California's parole revocation system relied upon a determinate sentencing scheme and near-automatic parole supervision for every released prisoner, resulting in a high frequency of revocations and re-incarceration, including for parolees for whom non-incarceration alternatives were more appropriate. The Injunction included a "remedial plan" that was effective in advancing parole procedures that offered non-incarceration alternatives, where appropriate, such as remedial sanctions and community-based treatment options. Such alternatives, particularly when coupled with a rational, evidence-based decision-making process, allow the State to focus incarceration efforts at the most dangerous parolees while offering non-incarceration alternatives where appropriate, such as for non-dangerous parolees and technical violators. By implementing these changes, the State is enacting real reform that protects the public at a reduced cost. Proposition 9 fails to implement the remedial plan and its attendant reforms.

Parole experts consider non-incarceration remedial sanctions to be the cornerstone of a functional system that, through rational policies based on hard evidence, reduces recidivism, protects public safety, and saves taxpayer dollars. According to the American Correctional Association (the "ACA"), the preeminent correctional accreditation organization, 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." Am. Corr. Assoc., *Public Correctional Policy on Parole* (Jan. 14, 2009) [hereinafter "*ACA Policy Statement*"], *available at* http://www.aca.org/government/policyresolution/

view.asp?ID=32. The California Department of Corrections and Rehabilitation (CDCR) itself commissioned a report that recommended that California adopt alternative remedial measures, including vocational education, community supervision programs, and rehabilitation treatment services. Cal. Dep't of Corr. & Rehabilitation, *A Roadmap for Effective Offender Programming in California*, at 1 (2007), *available at* http://sentencing.nj.gov/downloads/pdf/articles/2007/July2007/document03.pdf.

Another critical component of leading parole practices is an evidence-based approach to decision-making. This approach seeks to evaluate and respond to the individualized circumstances of a parolee, as well as to standardize the reactions of the system's decision-makers to encourage non-incarceration alternatives when appropriate. *See Grattet, supra*, at 22; David Fialkoff, *Standardizing Parole Violation Sanctions*, NIJ J. No 263, at 18 (June 2009), *available at* http://www.ncjrs.gov/pdffiles1/nij/226873.pdf. The ACA's policy statement includes the concept of objective decision-making 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 encourage the use of a "parole violation matrix," a powerful tool for guiding parole revocation policy toward effective interim steps and outcomes. *Grattet*, *supra*, at 22.

The Injunction's emphasis on alternative remedial sanctions has increased both the availability and utilization of community-based rehabilitative programs in California. (*SM12*, at 35; *SM11*, at 35; *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 "*SM6*"]; *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).) As of February 2012, the Special Master reported no fewer than 10 programs the State is using for remedial sanctions, including many community-based and substance abuse centers. (*SM12*, at 35.)

The Special Master further reported that the State had created a website that provides a vast array of services available in each county that parole agents, parolees and their families can easily and readily access. (*Id*. at 37.) The State's website supplements the State's database that provides parole revocation decision-makers with current information concerning community resources that offer alternative sanctions. (*Third Report of the Special Master on the Status of the Conditions of the Remedial Order*, at 20 (November 13, 2007), *Valdivia* (No. CIV-94-671 LKK/GGH, Dkt. No. 1388) [hereinafter *"SM3"*].) Both the website and the database are 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.*)

As noted above, the decision-makers in California's parole system—the Parole Board and agents—have in the past received almost no guidance as to what corrective action to impose in response to a violation. Kara Dansky, Exec. Dir., Stanford Crim. Justice Ctr., *Contemporary Sentencing Reform in California: A Report to the Little Hoover Commission*, at 7 (2006), *available at* http://sentencing.nj.gov/downloads/pdf/articles/2006/Sept2006/document02.pdf.

Since 2007, however, the parties have made this aspect of reform a main focus of the remedial measures intended to effectuate the Injunction. 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 Injunction. (*SM3*, at 18-19; *SM12*, at 42.)

Test programs show sufficiently positive results from the application of the matrix statewide. (*SM6*, 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.) Use of the matrix continues to be of critical importance in order to encourage the State "to make adjustments where necessary to ensure appropriate diversion from revocation" and to avoid situations, such as those that the Special Master recently observed, "where it is difficult to comprehend why a parolee is in the revocation process." (*SM12*, at 42.)

As these developments demonstrate, California has taken and continues to take significant steps toward implementation of leading parole practices that Amici expect will lead to an effective parole revocation system that is transparent, accountable, and protective of fundamental rights, and allows the State to distinguish between parolees who should be incarcerated and those who would benefit from non-incarceration alternatives. It is only through continued commitment to the remedial plan that such a system can be created and sustained.

Proposition 9, conversely, would put a halt to these reforms by sacrificing the remedial plan.

III. THE 45-DAY PERIOD UNTIL THE FIRST EVIDENTIARY HEARING WOULD IMPOSE AN UNDUE BURDEN ON PAROLEES.

Amici respectfully disagree with the Court's finding that the Injunction should be modified to reconcile with Proposition 9's 45-day time limit for a revocation hearing. (Order, at 13.) The 45-day period that a parolee might endure between arrest and an evidentiary revocation hearing not only deprives parolees of the minimum due process guaranteed under *Morrissey*, but is impractical and inconsistent with the State's Realignment program. *Morrissey*, 408 U.S. at 488 (revocation hearing must take place within a "reasonable time after the parolee is taken into custody").

The *Morrissey* Court's statement that "a lapse of two months would not appear to be unreasonable" does not control here because *Morrissey* presumed a full probable cause hearing with witnesses, which is not part of the California system under the Injunction or Proposition 9. As Judge Karlton found, the probable cause hearing contemplated by Proposition 9 is abbreviated and excludes the right, required under *Morrissey*, to "present documentary evidence and witnesses." (Order, at 6.) The 45-day time limit under Proposition 9 before an evidentiary hearing on revocation – during which period the parolee is typically incarcerated – simply cannot be reconciled with the minimum due process required by *Morrissey.*

The 45-day time period also cannot be reconciled with *Plata* or Realignment. Increasing the number of days that parolees are incarcerated is in tension with the Supreme Court's mandate under *Plata* to reduce the overall

number of people behind bars in California. Under Realignment, the maximum parole revocation period is 180 days. *See* Cal. Dep't of Corr. & Rehabilitation, *Fact Sheet*, at 4 (July 12, 2012), *available at* http://www.cdcr.ca.gov/realignment/docs/Realignment-Fact-Sheet.pdf; *see also SM11*, at 7. When taking into account credit for good time/work time, the maximum parole revocation period is effectively 90 days. Allowing an evidentiary hearing to occur as late as halfway through the parole revocation period reflects a policy that is incoherent at best.

The Special Master has noted the risk this anomaly poses to the State's ability to meet hearing timeframes: "[A]s county jails have sole jurisdiction over people housed there, parolees may be released before their probable cause or revocation hearings, potentially making it more difficult to meet those timeframe requirements." (*SM11*, at 8.) That parolees are being released without any probable cause or revocation hearings shows that "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." *Safe & Sound,* at I.

In addition to guaranteeing swift and sure sanction, a shorter period between arrest and evidentiary hearing is particularly important to parolees for whom the parole revocation process is especially disruptive, such as those who are employed or have children. For these parolees, a lengthy 45-day period has not only constitutional ramifications, but real-world implications, potentially keeping parolees from their families and jobs for unnecessarily long periods. The problem is exacerbated by the fact that parolees cannot be granted bail, further underscoring the need to ground the parole revocation process on fair, accurate, and expedient

criteria to assure that the charged conduct actually occurred and that incarceration is the appropriate sanction.

CONCLUSION

The Injunction has produced significant positive change in California's parole revocation system. These changes have promoted public safety and the effective use of public resources, while simultaneously reducing California's prison population and helping to bring the entire system into constitutional compliance. Amici strongly oppose Proposition 9 because it would reverse these positive developments and return California's parole system to its prior unconstitutional status. Accordingly, we respectfully urge this Court to enforce the Injunction in its entirety, and specifically (i) to reverse the district court only with respect to that portion of the Decision concerning the 45-day period for parole revocation hearings (Injunction ¶¶ 11(b)(iv) and 23), and (ii) to affirm the district court with respect to the remainder of the Decision.

WENDY MUSELL – SBN 203507
ELISA STEWART – SBN 219557
STEWART & MUSELL, LLP
351 California Street, Suite 700
San Francisco, CA 94104
Telephone: (415) 593-0083
Fax: (415) 520-0920
wmusell@stewartandmusell.com
estewart@stewartandmusell.com

Date: July 26, 2012

By: /s/ Wendy Musell

Local Counsel for Amici Curiae in Support of Plaintiffs-Appellees/Cross-Appellants

and

CATHERINE WEISS
MICHAEL T.G. LONG
ELLIOTT Z. STEIN
LOWENSTEIN SANDLER PC
65 Livingston Avenue
Roseland, NJ 07068
Telephone: (973) 597-2500
Fax: (973) 597-5727
-and-
1251 Avenue of the Americas
New York, NY 10020
Telephone: (212) 262-6700
mlong@lowenstein.com
estein@lowenstein.com

Lead Counsel for Amici Curiae in Support of Plaintiffs-Appellees/Cross-Appellants

CERTIFICATE OF COMPLIANCE

U.S. Court of Appeals Docket Number: 12-15457 and 12-15492

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 foregoing Brief of Amicus Curiae in Support of Plaintiffs-Appellees/Cross-Appellants is proportionately spaced, has a typeface of 14 points, and contains 6,585 words.

Date: July 26, 2012 By: /s/ Wendy Musell

CERTIFICATE OF SERVICE

U.S. Court of Appeals Docket Number: 12-15457 and 12-15492

I hereby certify that on July 26, 2012, I electronically filed the foregoing:

BRIEF OF AMICI CURIAE IN SUPPORT OF PLAINTIFFS-APPELLEES/CROSS-APPELLANTS

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: July 26, 2012 By: /s/ Wendy Musell