No. 09-15836

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JERRY VALDIVIA, et al.,

Petitioners-Appellees,

vs.

ARNOLD SCHWARZENEGGER, et al.,

Respondents-Appellants.

On appeal from the United States District Court
for the Eastern District of California,
The Honorable Lawrence K. Karlton, District Judge

BRIEF AMICI CURIAE OF CRIMINAL JUSTICE LEGAL FOUNDATION, CRIME VICTIMS UNITED OF CALIFORNIA, AND SENATOR GEORGE RUNNER IN SUPPORT OF APPELLANT AND SUPPORTING REVERSAL

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CORPORATE DISCLOSURE STATEMENT
(Rule 26.1)

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SUMMARY OF FACTS AND CASE

In 1994, the Plaintiffs filed a class action challenging the constitutionality of parole revocation procedures as then conducted by the California Board of Prison Terms and the California Department of Corrections. *Valdivia v. Schwarzenegger*, 603 F. Supp. 2d 1275, 1277 (E.D. Cal. 2009) (stipulated order for permanent injunction). The class was certified in 1994 to include (1) California parolees who are at large; (2) California parolees in custody as alleged parole violators who are awaiting revocation of their state parole; and (3) California parolees who are in custody, having been found in violation of parole and sentenced to custody. *Id.* After discovery, the District Court for

the Eastern District of California granted the Plaintiffs' motion for partial summary judgment, reasoning that Plaintiffs' due process rights under *Morrissey v. Brewer*, 408 U.S. 471 (1972) and *Gagnon v. Scarpelli*, 411 U.S. 778 (1973), were violated by California's then-existing system for revocation of parole. *Valdivia v. Davis*, 206 F. Supp. 2d 1068, 1078 (E.D. Cal. 2002). The court concluded that California's parole revocation system violated due process by "allowing a delay of up to forty-five days or more before providing the parolee an opportunity to be heard regarding the reliability of the [system's] probable cause determination . . . ." *Id.*

Plaintiffs' primary complaint under the old system was that they were not afforded a preliminary hearing to verify whether probable cause to hold the parolee existed prior to the revocation proceeding. *Id.* at 1075. They argued due process required such a hearing. *Id.* The district court agreed, and reasoned that the Supreme Court's discussion of parolee rights in *Morrisey v. Brewer* "contemplated a 'hearing' rather than some ex-parte process for confirming probable cause." *Id.*

Plaintiffs and Defendants entered into a stipulated order to resolve Plaintiffs' complaint on November 24, 2003. *See* Appellant's Opening Brief ("AOB") 6. It was approved by the court on March 9, 2004. *Id.* The order as approved is referred to in the district court opinion as Permanent Injunction. The Permanent Injunction outlined the procedural requirements for parole revocation procedures and hearings. *Id.* These requirements were vastly in excess of what Supreme Court precedent requires. Among other things, the Permanent Injunction provided for appointment of counsel for all

parolees in custody following an alleged violation, a probable cause hearing within 13 business days of custody following a parole hold, and a final revocation proceeding within 35 days of the hold. AOB 7.

On November 4, 2008, California voters amended the California Constitution and statutes to strengthen the rights of crime victims in parole revocation proceedings. *See* The Victims' Bill of Rights Act of 2008: Marsy's Law (Proposition 9), 2008 West's Cal. Leg. Serv. A-117 to A-125. The need for this law and its purpose are described in Part I, *infra*. To further the goals of the initiative, Penal Code § 3044 was added to California's laws on parole revocation. The new section provides for (1) a probable cause hearing within 15 days of arrest; (2) a final hearing within 45 days of arrest; (3) state-funded counsel throughout revocation proceedings if the parolee is indigent and lacks capacity, given the complexity of the charges, to defend himself effectively; and (4) a requirement that the reasons for denying counsel be succinctly stated on the record. Cal. Penal Code § 3044(a)(1)-(a)(4) (2009). The new section states that it applies only to those "paroled . . . following incarceration for an offense committed on or after" November 4, 2008. However, the California Department of Corrections and Rehabilitation takes the position that it applies to those who are (a) paroled on or after November 5, 2008 for a term of imprisonment, and those (b) going through the parole revocation process because of an alleged violation. *See* AOB 9-10.

On November 14, 2008, ten days after the voters enacted the Victims' Bill of Rights Act of 2008, Plaintiffs filed a motion asking the district court to bar

enforcement of the Act's changes to § 3044. On March 26, 2009, Judge Karlton granted Plaintiffs' motion to enforce 2004's Stipulated Order and Permanent Injunction. *Valdivia v. Schwarzenegger*, 603 F. Supp. 2d at 1291. Judge Karlton ruled that to the extent that the Permanent Injunction and amended California Penal Code § 3044 were inconsistent, the Permanent Injunction would supersede any of the voters' changes. *Id.* He also denied Defendants' motion to modify the Permanent Injunction. *Id.* Defendants appealed this decision on April 24, 2009.

SUMMARY OF ARGUMENT

Under *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367 (1992), the interests of persons who are not parties to the litigation call for a more flexible standard for modification of consent decrees in institutional litigation. That principle applies with even greater force in cases such as this one, where the victims of crime have specific interests in the proceedings being controlled by the decree, above and beyond their interests as members of the general public.

A change in state law can be a ground for modification of a consent decree under *Rufo*. The contrary holding of the district court is squarely in conflict with a precedent of the Seventh Circuit. It is also contrary to the principles underlying precedents of this court which hold that state-law limits on the executive also limit the authority of a court to enter consent decrees beyond the requirements of federal law.

The initiative was intended to contradict the permanent injunction in this case and to prompt a modification. If this court has any doubt of that interpretation, the proper course is to certify the question to the California Supreme Court, as this court did in *Southern California Edison Co. v. Lynch*, 307 F.3d 794 (9th Cir. 2002).

To the extent it exceeds the actual requirements of federal law, the Permanent Injunction should be modified to conform to Proposition 9. The Permanent Injunction should also be modified to clarify that it imposes no constraints whatever on the substantive criteria for revoking parole.

ARGUMENT

I. The effects of the injunction in this case extend beyond the parties to impact victims of crime.

In *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367, 381 (1992), the Supreme Court rejected the use of a rigid standard for modifying injunctions "in institutional reform litigation because such decrees 'reach beyond the parties involved directly in the suit and impact on the public's right to the sound and efficient operation of its institutions.' " Procedures for parole and its revocation not only affect the public's general rights, they have a dramatic, specific impact on individuals: the victim of the crime and the family of the victim.

Because they are not formal parties to the criminal action, the interest of victims have often been neglected. These interests are very real, however, and in recent years legislatures have enacted laws to protect them. In 2004,

Congress enacted 18 U.S.C. § 3771. That statute recognized a number of rights, including the rights to notice and an opportunity to be heard in parole proceedings. *See id.* § 3771(a)(2)-(3). Two years later, Congress amended § 3771 to extend victims' rights to federal habeas corpus proceedings. *See id.* § 3771(b)(2). While these enactments are not controlling of the present case, they are clear statements of policy of the national legislature that the interests of victims in proceedings involving the release of the offender are important and need to be considered.

Proposition 9 and its predecessor, Proposition 8 of 1982, are products of the same movement. Proposition 8, the Victims' Bill of Rights, was brought about by individuals who had suffered at the hands of the system. Believing that it would ensure the rights of victims, it was drafted, placed on the ballot, and passed into law by the voters. However, Proposition 8, although well intentioned, did not provide enforceability for the rights of victims. Proposition 9, Marsy's Law, was designed to close the loopholes of Proposition 8.

The existing law and the changes made by Proposition 9 were summarized by the Legislative Analyst in a ballot pamphlet distributed to the voters. *See* Cal. Secretary of State, Official Voter Information Guide, General Election 2008, pp. 58-61 (2008), available at http://voterguide.sos.ca.gov/past/2008/general/pdf-guide/vig-nov-2008-principal.pdf. Many of the reforms gave specific rights to victims, such as notification and participation in proceedings, *see id.* at 58, and privacy protections. *See id.* at 59. Other changes are directed to reducing the anxiety that comes with parole hearings

that may result in the release of the perpetrator of a crime of great violence. *See id*. at 60.

Like the federal law, 18 U.S.C. § 3771, Proposition 9 recognizes that victims of crime, including the families of direct victims have a strong, important interest in parole decisions. When parole has been granted and the perpetrator engages in new criminal conduct or violates other conditions of parole, victims have a unique interest in the disposition of the charges. Both previous and new victims of the parolee have personalized interest, sometimes the compelling interest of personal or family safety, in the outcome of parole revocation hearings. Often, the proceeding causes victims to relive the underlying crime. In cases where the offender has benefitted by early release credits or the erroneous confidence of the parole authority, victims suffer with the knowledge that but for the prior early release of the offender, the new offense would not have occurred.

Finally, some provisions of Proposition 9 are aimed at reducing unnecessary costs to the system so that justice for crime victims will not be too costly to sustain. While at first blush one might think that victims of crime have no interest in the cost of the system, other than the generic concern all taxpayers share in governmental efficiency, political reality forces prioritization of competing interests. All costs of government are in competition with each other in the annual budget battles. The cost of corrections is inevitably compared to the cost of education and not in a favorable way. If the procedural conditions and cost of parole revocation hearings remain more burdensome than the Constitution requires, risk to the

process itself grows. The more any procedure costs, the less likely the government is to invoke it. The provisions of Proposition 9 give a little more flexibility in the scheduling of parole revocation hearings and limit state-paid counsel to cases where the Constitution actually requires counsel. These cost-saving measures are designed to facilitate parole revocation hearings in all cases where review is essential. In cases on the margin, the savings will reduce the possibility that a felon whose conduct on parole warrants revocation will be allowed to remain on parole due to the cost of the process.

Rufo's modification of the standards for modifying injunctions, based on the interests of nonparties, applies with special force in this case. Not only are the interests of the general public involved, as in *Rufo*, but also the more specific and very strong interests of the victims of individual crimes and their families are involved. The district court failed to give any weight at all to these interests.[1] Amici suggest that these interests should be in the forefront as this court considers the present appeal.

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1. Indeed, in referring to the families of victims, the district court noted the definition in Cal. Const. art. I, § 28(e) and then made the snide, sarcastic comment that the definition "apparently does not include uncles or neighbors." 603 F. Supp. 2d at 1283 n. 6; cf. Code of Conduct for United States Judges, Canon 3(A)(3); 18 U.S.C. § 3771(a)(8).

II. A change in state law, limiting authority previously exercised by the executive, is a change meeting the initial burden for a modification of an injunction under Rule 60(b)(5) and *Rufo*.

A. State Law and Federal Decrees.

"A party seeking modification of a consent decree may meet its initial burden by showing a significant change either in factual conditions or in law." *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367, 384 (1992). In the present case, the district court stated, "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 circumstances that renders continued enforcement of a consent decree inequitable." *Valdivia v. Schwarzenegger*, 603 F. Supp. 2d 1275, 1289 (E.D. Cal. 2009) (emphasis added).

The Court of Appeals for the Seventh Circuit has held the exact opposite.

> Moreover, the [district] court thought, only a change in federal substantive law matters. That is not what *Rufo* holds; indeed, the district court's approach is redolent of the losing side's contentions in *Rufo*. According to the Supreme Court, "a party seeking modification of a consent decree bears the burden of establishing that a significant change in circumstances warrants revision of the decree. If the moving party meets this standard, the court should consider whether the proposed modification is suitably tailored to the changed circumstance." 502 U.S. at 383 (footnote omitted). The Court did not distinguish between legal and factual circumstances, *or between state and federal law*; change in any of these things may justify modification under Fed. R. Civ. P. 60(b)(5).

David B. v. McDonald, 116 F.3d 1146, 1149 (7th Cir. 1997) (emphasis added).

On several occasions, this court has recognized that the limit of state officials' authority under state law is an important consideration in the framing of a federal consent decree, not a pesky inconvenience to be swatted away, as the district court apparently believed. *Keith v. Volpe*, 118 F.3d 1386, 1392 (9th Cir. 1997) considered "whether a contractual consent decree entered by a federal district court can override valid state laws regulating outdoor advertising that are not in conflict with any federal law." (Footnote omitted). The state law in question required the California Department of Transportation to issue a permit for a billboard upon the applicant's compliance with certain conditions. *See id*.

This court's resolution of that question in *Keith* fits the present case like a glove. "The district court correctly interpreted the Consent Decree as purportedly banning the displays but it ultimately concluded, improperly, that the decree prevailed over state law . . . . The district court, in the case at hand, simply lost sight of its limitations. Under the Constitution, the district court could not supersede California's law unless it conflicts with any federal law." *Id*. at 1393.

This court applied the principle of *Keith* in *Southern California Edison Co. v. Lynch*, 307 F.3d 794 (9th Cir. 2002). After rejecting a host of objections to a stipulated judgment based on federal statutory and constitutional law, the court noted,

> There is, however, a serious question of whether the agreement between the [Public Utilities] Commission and SoCal Edison violated state law, both in substance and in the procedure by which the Commission agreed to it. If so, then the Commission lacked capacity

> to consent to the Stipulated Judgment, and we would be required to vacate it as void. *State officials cannot enter into a federally-sanctioned consent decree beyond their authority under state law*. *See Keith v. Volpe*, 118 F.3d 1386, 1393 (9th Cir. 1997) (consent decree could not be interpreted to supplant California Outdoor Advertising Act because state agency would not have had authority to agree to such a decree); *Wash. v. Penwell*, 700 F.2d 570, 573 (9th Cir. 1983) (vacating a consent decree that required the state of Oregon to fund a prisoners' legal services program because the state Attorney General acted beyond his authority and therefore "the consent decree was void to the extent that it exceeded defendants' authority").

Id. at 809 (emphasis added).

The italicized sentence has been criticized as sweeping too broadly, *see* David W. Swift, A State's Power to Enter into a Consent Decree That Violates State Law Provisions: What "Findings" of a Federal Violation Are Sufficient to Justify a Consent Decree That Trumps State Law?, 10 Tex. J. on C.L. & C.R. 37, 41-42 (2004), and it does require some qualification. State law can be superseded, and a state official can agree to violate it, "if such supersession is necessary to remedy a violation of federal law . . . ." *Cleveland County Assn. for Gov't by the People v. Cleveland County Bd. of Comm'rs*, 142 F.3d 468, 477 (D.C. Cir. 1998). If no exception applies, though, a "consent decree must comply with state law; [if] it does not, it must be vacated." *Id*.

Keith, *Southern California Edison*, and *Cleveland County* all involve limitations on the executive's authority under state law, not inconsistent with federal law, at the time a federal consent decree is initially entered. The question presented in this case is whether a subsequent change in the

executive's authority under state law, rendering unauthorized an agreement which previously was neither required nor forbidden by state or federal law, is a "significant change . . . in law" within the meaning of *Rufo*. The Seventh Circuit held squarely that it is in *David B.*, *supra*. Plaintiffs ask this court to create a circuit split. The court should decline. *David B.* is correct.

B. Principals and Agents.

The reasons why a change in state law mattered in *David B.* are closely analogous to the reasons that change matters in the present case. It is one thing for private parties to agree in a settlement to something the law does not require; it is quite another for elected officials to place a question of policy beyond the reach of the people in perpetuity through the mechanism of a consent decree. Referring to the plurality opinion in *Evans v. City of Chicago*, 10 F.3d 474 (7th Cir. 1993) (en banc), the *David B.* court noted that such decrees involve "powerful considerations of political legitimacy—such as the fact that in a democracy the people may vote out politicians whose acts displease them, and elect new representatives who promise change. *See* 10 F.3d at 477-480. The Rehabilitation Act does not authorize politicians who hold office in one year to prevent their successors from charting a different course." 116 F.3d at 1150.

In the present case, the people of California did not vote out of office the administration that entered into this ill-considered bargain. After all, 2008 was not a gubernatorial election year. What the people did, though, is equivalent for this purpose. Using their retained power of legislation, *see* Cal. Const. art. II, § 8; *id.* art. IV, § 1, the people rescinded the authority of

the executive branch to adopt certain procedures that were neither required nor forbidden by prior state or federal law.

The executive power under the California Constitution, as in most American constitutions, is to "see that the law is faithfully executed." Cal. Const. art. V, § 1; cf. U. S. Const. art. II, § 3. The essence of the legislative power is to make the laws that the executive must execute and that the courts must apply in deciding cases, provided those laws do not conflict with a higher law. By enacting legislation, the legislative authority removes a question of law or policy from the interstitial authority of the other branches. If a question of law or policy otherwise within the control of the legislative authority can be removed by the executive and judiciary through the mechanism of a consent decree, the constitutional division of powers has been fundamentally altered.

This court recognized the importance of respecting state-law limitations on the authority of state officers in *League of Residential Neighborhood Advocates v. City of Los Angeles*, 498 F.3d 1052, 1055 (9th Cir. 2007):

> A federal consent decree or settlement agreement cannot be a means for state officials to evade state law. *See Keith v. Volpe*, . . .; *Perkins v. City of Chicago Heights*, 47 F.3d 212, 216 (7th Cir. 1995) (" 'Some rules of law are designed to limit the authority of public officeholders . . . . They may chafe at these restraints and seek to evade them,' but they may not do so by agreeing to do something state law forbids.") (internal citation and alteration omitted).

The State of California and its people are not parties to the Permanent Injunction. The State is immune from this suit under the Eleventh

Amendment. The theory for federal court jurisdiction to enjoin a state officer from enforcing a state law is set forth in *Ex parte Young*, 209 U.S. 123, 159-160 (1908):

> The act to be enforced is alleged to be unconstitutional, and if it be so, the use of the name of the State to enforce an unconstitutional act to the injury of complainants is a proceeding without the authority of and one which does not affect the State in its sovereign or governmental capacity. It is simply an illegal act upon the part of a state official in attempting by the use of the name of the State to enforce a legislative enactment which is void because unconstitutional. If the act which the state Attorney General seeks to enforce be a violation of the Federal Constitution, the officer in proceeding under such enactment comes into conflict with the superior authority of that Constitution, and he is in that case stripped of his official or representative character and is subjected in his person to the consequences of his individual conduct. The State has no power to impart to him any immunity from responsibility to the supreme authority of the United States.

This theory is inapplicable to a state statute which is *not* contrary to anything in the Constitution or laws of the United States. In *Frew v. Hawkins*, 540 U.S. 431 (2004), the Supreme Court rejected a broad Eleventh Amendment attack on any enforcement of consent decrees against state officials, but in that case there was no argument that the injunction was inconsistent with *Young*. *See id*. at 439. No state statute forbade compliance with the decree. When a court orders a state officer to disobey a state statute, it crosses a threshold where stronger justification is required.

The difference can be seen by comparing *League of Residential Neighborhood Advocates*, *supra*, with *Hook v. Arizona Dept. of Corrections*, 107 F.3d 1397 (9th Cir. 1997). In *Hook*, the district court found that the

Arizona Department of Corrections ("DOC") had a "history of non-compliance" with its consent decree, and the appointment of Special Masters was necessary to ensure compliance because court monitoring had proven insufficient. *Id.* at 1400. The court ordered the DOC to establish a fund to pay for the use of the Special Masters. The Arizona legislature then passed a statute denying the funding of Special Masters without legislative approval and refused to pay the bills accrued under the consent decree. *Id.* Based on the new statute, the DOC moved to modify the consent decree under Rule 60(b) to eliminate the provision appointing Special Masters. *Id.* The district court denied the motion. *Id.* On appeal, this court noted that "[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" and that "[i]n light of this history [of non-compliance], the district court found that retention of the special masters was *necessary* to vindicate the prisoners' constitutional rights." *Id.* (emphasis added, citations omitted). That necessity rendered the state statute unconstitutional as applied.

Unlike *Hook*, where modification of the consent decree would have resulted in continuing constitutional violations, 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. The district court erred when it stated that even if "Proposition 9 offers a constitutionally adequate alternative for remedying the deficiencies in the parole revocation process that the court held were present in 2002 . . . this does not merit modification of the decree." *Valdivia*, 603 F. Supp. 2d at 1290. Under the

flexible standard established in *Rufo*, state and local authorities are permitted to adopt alternative methods to remedy constitutional violations. *See*, *e.g.*, *Frew*, 540 U.S. at 442 ("The basic obligations of federal law may remain the same, but the precise manner of their discharge may not."); *Reynolds v. McInnes*, 338 F.3d 1221, 1226 (11th Cir. 2003) (modification of the decree is permissible if it is one of several means of accomplishing the "basic purpose" of the decree); *Evans v. City of Chicago*, 10 F.3d 474, 479 (7th Cir. 1993) (en banc) (plurality opinion) (faced with modification requests, federal courts are duty-bound to preserve the interests of democratic governance and resolve all doubts "in favor of leeway for the political branches"). Consequently, the passage of Proposition 9 is a change of law that warrants modification of the consent decree.

Thus, the constitutional question of whether the Eleventh Amendment holding of *Washington v. Penwell*, 700 F.2d 570, 574 (9th Cir. 1983) survives *Frew* need not be answered in this case. The case can be resolved on the nonconstitutional basis of applying Rule 60(b)(5) with appropriate sensitivity to federalism concerns, as *Frew* directs. *See* 540 U.S. at 441-442.

In discussing the kinds of changes in law that warrant a modification of a consent decree, *Rufo* states,

> "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."

502 U.S. at 388 (emphasis added). Neither of these kinds of changes is involved in the present case, as the district court noted, *Valdivia v. Schwarzenegger*, 603 F. Supp. 2d 1275, 1288 (E.D. Cal. 2009), but nothing in the *Rufo* opinion indicates that these two are exclusive.

As the cases discussed above demonstrate, the authority of the executive under state law is an important factor in determining whether a consent decree is valid. If state law is important at the time of entry of the decree, then a change in subsequent state law is a "significant change" for the purpose of *Rufo*.

III. If there is any doubt that Proposition 9 was intended to contradict the Permanent Injunction, that question should be certified to the California Supreme Court.

In the district court, the plaintiffs proffered and the court accepted a strained interpretation of the parole revocation provisions of Proposition 9 to strip them of any practical effect. That is, the district court accepted the plaintiffs' argument that Proposition 9 "articulates the due process requirements for parole revocation proceedings, under state law only." 603 F. Supp. 2d at 1285. This is not a plausible interpretation of the initiative, and the analogy to the provision of the 1982 Victims' Bill of Rights rescinding the state exclusionary rule is inapposite.

Comparing the text of the initiative with Supreme Court precedent and the Permanent Injunction, it is obvious that the purpose was to contradict the Permanent Injunction to the extent that it exceeds what the Supreme Court has said the Constitution actually requires. For example, in *Gagnon v.*

Scarpelli, 411 U.S. 778, 787 (1973), the Supreme Court unequivocally rejected the proposition "that the State is under a constitutional duty to provide counsel for indigents in all probation or parole revocation cases." Instead, the high court recognized that such a rule "would impose direct costs and serious collateral disadvantages without regard to the need or the likelihood in a particular case for a constructive contribution by counsel." *Id*. The Permanent Injunction requires precisely what the Supreme Court unmistakably held is *not* required by the Constitution. Proposition 9 instead codifies the *Gagnon* standard. *Compare id.* at 790-791 with Cal. Penal Code § 3044(a)(3)(B), (a)(4).

A state statute limiting the appointment of counsel in parole revocation proceedings would be completely superfluous if it left intact a federal court order requiring appointment in every case. It is a fundamental principle of statutory interpretation that the legislative authority is presumed not to enact superfluous provisions, and all language in the statute should have some effect. *See*, *e.g.*, *TRW, Inc. v. Andrews*, 534 U.S. 19, 31 (2001).

The situation with the exclusionary rule in 1982 was entirely different. In its decisions under Article I, section 13 of the California Constitution, the California Supreme Court had declined to follow United States Supreme Court Fourth Amendment precedent on both the scope of reasonable searches and seizures and the scope of the exclusionary remedy, excluding evidence in state courts that would have been admissible under the federal rule. *See*, *e.g.*, *California v. Greenwood*, 486 U.S. 35, 44 (1988) (search of trash); *In re Lance W.*, 37 Cal. 3d 873, 883-884, 694 P.2d 744, 750 (1985) (third-party

standing). Elimination of the independent state exclusionary rule, even though state courts remained bound to follow *Mapp v. Ohio*, 367 U.S. 643 (1961), had a large and beneficial effect in state courts. In addition, there was no doubt that a state constitutional amendment could not have any effect on a requirement of the United States Constitution as construed by the United States Supreme Court, so the presumed intent not to enact a futile act weighed in favor of the state-law-only interpretation.

In contrast, the counsel provision of Proposition 9 would have no effect unless it provided a ground to modify the Permanent Injunction to bring it into line with what the United States Constitution actually requires, in lieu of the grossly inflated requirements of the 2004 injunction. The expansive federal court order had rendered state grounds for appointing counsel irrelevant, and nothing would have been achieved by amending them. In contrast to the futility of a state enactment contradicting *actual* federal constitutional requirements, there is substantial reason to believe that a state statute *is* a ground for modifying a federal court order which exceeds those requirements. As described in Part II, *supra*, there is a United States Court of Appeals precedent expressly saying so.

Finally the Legislative Analyst's analysis in the ballot pamphlet expressly notes the conflict between the Permanent Injunction and the initiative. *See* Cal. Secretary of State, Official Voter Information Guide, General Election 2008, p. 60. The voters were aware of the conflict and approved the measure anyway.

If this court were to accept the district court's dubious interpretation of Proposition 9 and resolve the case on that basis, the resolution would probably be only temporary. This court is not the final authority on the meaning of California law. *See Southern California Edison Co. v. Lynch*, 307 F.3d 794, 812 (9th Cir. 2002). The case would come back if and when the state courts resolved the interpretation question the other way. "Resolution of the state law issues involved in this litigation will have a substantial effect on California law and the citizens of California. Accordingly, principles of comity suggest that those decisions should be made by California courts." *Id*.

In the present case, the purpose of the initiative to contradict the Permanent Injunction is so plain that there should be no doubt. However, if the court does consider the alternative interpretation plausible, then amici suggest that the court certify the issue, as it did in *Southern California Edison*.

IV. To the extent it exceeds constitutional requirements, the Permanent Injunction should be modified to eliminate all conflicts with Proposition 9.

A. Procedural Requirements.

"The federal court must exercise its equitable powers to ensure that when the objects of the decree have been attained, responsibility for discharging the State's obligations is returned promptly to the State and its officials." *Frew v. Hawkins*, 540 U.S. 431, 442 (2004). The system for parole revocation that existed prior to the commencement of this suit is long gone.

California has operated under the terms of the Permanent Injunction since 2004. Ideally, in the absence of any indication of continuing, systemic violations of constitutional rights, federal court involvement should simply be terminated. However, the defendants have not asked for that remedy, yet, so the question is only what modifications to the Permanent Injunction need to be made.

By its terms, the Permanent Injunction governs certain aspects of the procedure for parole revocation. For the reasons discussed in Part II, *supra*, the range of a permissible consent decree lies in the gap between what federal law requires and what state law forbids. Both a federal court's authority to order a violation of state law and a state official's capacity to agree to such an order are limited to the necessity of complying with the overriding federal law. To the extent that the procedural requirements of the Permanent Injunction exceed that necessity, they must be modified.

B. Substantive Requirements.

The Permanent Injunction has no substantive requirements. The plan attached to the Injunction requires that alternative sanctions be considered, *see* 603 F. Supp. 2d at 1282-1283, but not what factors go into that consideration. The district court would deny the people of California their sovereign right to legislate on the latter point merely because the plan attached to the injunction *suggests* the factors that need to be considered. *See id*. at 1283. It is bad enough that the people's right of self-government may be impacted by what executive officials of the state actually agreed to, but on top of that the district court would deprive them of that precious right by

mere penumbras and emanations, *cf*. *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965), from what the officials agreed to.

The Permanent Injunction should be modified to reflect what should have been clear enough on its face. The Permanent Injunction imposes no requirements whatever on the factors the Board of Parole Hearings should consider, which remain governed by state law.

CONCLUSION

The decision of the district court should be reversed.

June 29, 2009

Respectfully submitted,

s/KENT S. SCHEIDEGGER
Attorney for Amici Curiae

CERTIFICATE OF COMPLIANCE

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

I, Kent S. Scheidegger, attorney for amici Criminal Justice Legal Foundation, Crime Victims United of California, and Senator George Runner hereby certify that, pursuant to Fed. R. App. P. 29(d) and 9th Cir. R. 32-1, the attached amicus brief is proportionally spaced, has a typeface of 14 points or more and contains 7,000 words or less.

June 29, 2009 s/KENT S. SCHEIDEGGER

CERTIFICATE OF SERVICE

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

I hereby certify that I electronically filed the foregoing:

BRIEF AMICI CURIAE OF CRIMINAL JUSTICE LEGAL FOUNDATION, CRIME VICTIMS UNITED OF CALIFORNIA, AND SENATOR GEORGE RUNNER IN SUPPORT OF APPELLANT SUPPORTING REVERSAL

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 are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Dated: June 29, 2009 s/Irma H. Abella