

1 Michael Romano, SBN 232182
2 THREE STRIKES PROJECT
3 Stanford Law School
4 559 Nathan Abbott Way
5 Stanford, CA 94305
6 Phone: 650.736.7757
7 Fax: 650.723.8230
8 e-mail: mromano@stanford.edu

9 Attorneys for Amicus Curiae

10 IN THE UNITED STATES DISTRICT COURTS
11 FOR THE EASTERN DISTRICT OF CALIFORNIA
12 AND THE NORTHERN DISTRICT OF CALIFORNIA
13 UNITED STATES DISTRICT COURT COMPOSED OF THREE JUDGES
14 PURSUANT TO SECTION 2284, TITLE 28 UNITED STATES CODE

15 RALPH COLEMAN, et. al.,
16 Plaintiffs,
17 v.
18 ARNOLD SCHWARZENEGGER,
19 et. al.,
20 Defendants.

NO. CIV S90-0520 LKK JFM P
THREE-JUDGE COURT

21
22 MARCIANO PLATA, et. al.
23 Plaintiffs,
24 v.
25 ARNOLD SCHWARZENEGGER,
26 et. al.,
27 Defendants.
28

NO. C01-1351 THE
THREE-JUDGE COURT

**NOTICE OF MOTION AND
MOTION BY AMICUS CURIAE
NAACP LEGAL DEFENSE AND
EDUCATIONAL FUND, INC. FOR
LEAVE TO FILE AN AMICUS
CURIAE BRIEF**

TABLE OF CONTENTS

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

STATEMENT OF INTEREST 1

STATEMENT OF FACTS..... 2

ARGUMENT 12

I. DEFENDANTS CAN AND SHOULD EXERCISE THEIR
AUTHORITY TO EXPEDITE THE IMPLEMENTATION OF
PROPOSITION 36 12

 A. Defendants Have Independent Authority To Expedite Resentencing
 Hearings For Prisoners Eligible For Relief Under Proposition 36.....13

 B. Defendants Can And Should Exercise Supervisory Authority
 Over District Attorneys To Expedite Resentencing Hearings For
 Prisoners Eligible For Relief Under Proposition 36. 15

II. DEFENDANTS CAN AND SHOULD PROVIDE REENTRY
SERVICES TO PRISONERS RELEASED UNDER
PROPOSITION 36 18

CONCLUSION 23

TABLE OF AUTHORITIES

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

California Constitutional Provisions

Cal. Const., Art. 5, § 13 14, 16, 17, 24
Cal. Const., Art. V, § 8 16

Cases

Alexander v. Louisiana, 405 U.S. 625 (1972) 2
Batson v. Kentucky, 476 U.S. 79 (1986)..... 2
Farrakhan v. Gregoire, 590 F.3d 989 (9th Cir. 2010) 2
In re Randolph, 215 Cal.App.3d 790 (1989)..... 22
Johnson v. California, 545 U.S. 162 (2005)..... 2
Miller-El v. Dretke, 545 U.S. 231 (2005) 2
People v. Honig, 48 Cal. App. 4th 289 (Cal.App. 3 Dist. (1996)) 18
People v. Superior Court (Kaulick), 215 Cal. App. 4th 1279 (2013)..... 8
Sonoma Falls Developers, LLC v. Nevada Gold & Casinos, Inc.,
272 F. Supp. 2d 919 (N.D. Cal. 2003) 4
Turner v. Fouche, 396 U.S. 346 (1970)..... 2

Statutes

Cal. Code § 2900 22
Cal. Code § 2900.5 22
Cal. Penal Code § 1170.12(c)(2)(C)..... 6, 15

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Cal. Penal Code § 3000.08 5, 20, 21

Cal. Penal Code § 667(e)(2)(C), 6, 15

Cal. Penal Code § 1170 (d)..... 14, 16

Cal. Penal Code §1170 (d) (1) 15, 16

Cal. Penal Code §1170.126 7, 20

Cal. Penal Code §1170.126 (b)..... 7

Cal. Penal Code § 1170.126 (f). 7, 8, 9

Cal. Penal Code §§ 3450-3465 5, 20, 21

California Rules

Cal. Rule of Court 4.551 (c) 7

Federal Rules

Federal Rule of Appellate Procedure 29(c) 4

California Regulations

Cal. Gov’t Code § 12550 14, 16, 17

1 PLEASE TAKE NOTICE that pursuant to Rule 7-11 of the Local Rules of
2 Practice in Civil Proceedings before the United States District Court for the
3 Northern District of California, the NAACP Legal Defense and Educational Fund,
4 Inc., by and through counsel at the Three Strikes Project at Stanford Law School,
5 seek leave to file the following *amicus curiae* brief in the above captioned matter.
6

7 STATEMENT OF INTEREST

8
9 The NAACP Legal Defense and Educational Fund, Inc. (“LDF”) is the
10 nation’s first civil rights law firm. LDF was founded as an arm of the NAACP in
11 1940 by Charles Hamilton Houston and Thurgood Marshall to redress injustice
12 caused by racial discrimination and to assist African Americans in securing their
13 constitutional and statutory rights. Through litigation, advocacy, public education,
14 and outreach, LDF strives to secure equal justice under law for all Americans, and
15 to break down barriers that prevent communities of color from realizing their basic
16 civil and human rights.
17
18
19

20 LDF has a longstanding concern with racial discrimination in the
21 administration of criminal justice. LDF has served as counsel of record or *amicus*
22 *curiae* in federal and state court litigation challenging such issues as the role of
23 race in capital sentencing, *McCleskey v Kemp*, 481 U.S. 279 (1987); *Furman v.*
24 *Georgia*, 408 U.S. 238 (1972), the influence of race on prosecutorial discretion,
25 *United States v. Armstrong*, 517 U.S. 456 (1996); *United States v. Bass*, 266 F.3d
26
27
28

1 532 (6th Cir. 2001), the correlation between felon disenfranchisement and racial
2 bias and disproportionality in the criminal justice system, *Farrakhan v. Gregoire*,
3 590 F.3d 989 (9th Cir. 2010), the discriminatory use of peremptory challenges,
4 *Miller-El v. Dretke*, 545 U.S. 231 (2005); *Johnson v. California*, 545 U.S. 162
5 (2005); *Batson v. Kentucky*, 476 U.S. 79 (1986), and the discriminatory selection
6 of grand jurors, *Alexander v. Louisiana*, 405 U.S. 625 (1972); *Turner v. Fouche*,
7 396 U.S. 346 (1970).
8
9

10 LDF was the official sponsor of the California campaign committee “Yes on
11 36, Three Strikes Reform,” which advocated for passage of the Three Strikes
12 Reform Act of 2012 (“Proposition 36”).¹
13
14

15 STATEMENT OF FACTS

16 Proposition 36 amended several sections of California’s Penal Code and
17 added new Penal Code Section 1170.126. This provision provides an opportunity
18 for certain prisoners sentenced to life in prison for non-serious, non-violent crimes
19 to petition for early release. To date, over 1,000 prisoners have been released under
20 the initiative. See “Progress Report: Three Strikes Reform (Proposition 36), 1,000
21 Prisoners Released,” co-published by the Stanford Law School Three Strikes
22 Project and NAACP Legal Defense and Educational Fund, Inc. (Sept. 10, 2013)
23 (“Prop. 36 Progress Report”), at 5-6, available at
24
25
26

27 ¹ No party to this action drafted or paid for this brief. See Federal Rule of Appellate
28 Procedure 29(c).

1 <http://www.law.stanford.edu/sites/default/files/child->
2 [page/441702/doc/slspublic/Three%20Strikes%20Reform%20Report.pdf](http://www.law.stanford.edu/sites/default/files/child-page/441702/doc/slspublic/Three%20Strikes%20Reform%20Report.pdf).

3
4 As indicated in its September 24, 2013 Order, this Court has directed
5 the defendants in the instant matter “to reduce the state prison population to no
6 more than 137.5% design capacity by December 31, 2013.” Order to Meet and
7 Confer, filed Sept. 24, 2013 (Docket No. 2719) at 1. In response, the defendants
8 “informed the Court that, absent an extension, they will begin sending additional
9 prisoners to out-of-state facilities on September 30, 2013.” Id. Thus, this Court
10 ordered the parties to meet and confer to “explore how defendants can comply with
11 this Court’s” Order and achieve a “durable solution” to the prison overcrowding
12 problem at the heart of this litigation. Id. at 2. The Court indicated that these
13 discussions “shall specifically include” the “three strikers.” Id.
14
15
16
17

18 This is not the first time that the three strikes population has been discussed
19 in the context of the instant prison overcrowding litigation. On several other
20 occasions this Court and the parties have referred specifically to Proposition 36 as
21 a potential partial solution to reducing the prison population. See, e.g., Defendants’
22 Request for an Extension of December 31, 2013 Deadline, filed Sept. 16, 2013
23 (Docket No. 2713), at 6. However, some of the representations that have been
24 made to this Court regarding the Three Strikes law and the implementation of
25 Proposition 36 have been inaccurate and incomplete. Thus, Amicus seeks to
26
27
28

1 provide this Court with accurate information about the Proposition 36 and the
2 Three Striker population in the hope of assisting this Court in understanding the
3 role that the Three Strikes law might play in the current litigation, including how
4 timely implementation of Proposition 36 can help remedy the constitutional
5 violations at issue. See *Sonoma Falls Developers, LLC v. Nevada Gold & Casinos,*
6 *Inc.*, 272 F. Supp. 2d 919 (N.D. Cal. 2003) (“[C]ourts frequently welcome amicus
7 briefs from non-parties concerning legal issues that have potential ramifications
8 beyond the parties directly involved or if the amicus has unique information or
9 perspective that can help the court beyond the help that the lawyers for the parties
10 are able to provide.”) (Punctuation and citations omitted).

11
12
13
14
15 Since the inception of this litigation, California has dramatically reduced its
16 prison population. Indeed, between October 2011 and June 2013, California’s
17 prison population has decreased by some 24,000 inmates. The great majority of
18 this decrease was the product of a reduction in the rate of new prison commitments
19 and the expiration of old prison terms. *See* Cal. Penal Code Sections 3450-3465;
20 3000.08; California Department of Corrections and Rehabilitation 2011 Public
21 Safety Realignment Fact Sheet (April 15, 2013) *available via* www.cdcr.ca.gov.
22 This significant reduction in the size of California’s prison population
23 unquestionably diminishes the level of overcrowding, but, as this Court is well
24
25
26
27
28

1 aware, the State prison system nonetheless remains dangerously overcrowded and
2 constitutional violations are ongoing.²

3
4 Historically, one of the primary sources of California's overcrowding
5 problem was the 1994 "Three Strikes and You're Out" law which required
6 extremely long—and sometimes lifetime—prison sentences for repeat offenders.
7
8 According to the California Department of Corrections, as of June 30, 2013, over
9 42,000 of California's current prison inmates are serving enhanced sentences
10 pursuant to the Three Strikes law. *See* Dept. of Corrections and Rehabilitation,
11 Data Analysis Unit, "Second and Third Striker Felons in the Adult Institution
12 Population," (June 30, 2013), at Table 1, *available at*
13 [www.cdcr.ca.gov/Reports_Research/Offender_](http://www.cdcr.ca.gov/Reports_Research/Offender_Information_Services_Branch/Quarterly/Strike1/STRIKE1d1306.pdf)
14 [Information_Services_Branch/Quarterly/Strike1/STRIKE1d1306.pdf](http://www.cdcr.ca.gov/Reports_Research/Offender_Information_Services_Branch/Quarterly/Strike1/STRIKE1d1306.pdf).

15
16
17
18 Approximately 34,000 of these inmates are serving "second strike" sentences (*i.e.*
19 double the ordinary sentence for their crime) and over 8,000 are serving "third
20 strike" indeterminate life sentences. *Ibid.*; *see also* Cal. Penal Code Sections
21 667(e)(2)(C), 1170.12(c)(2)(C). In aggregate, the inmates sentenced under the
22 Three Strikes law constitute approximately 35 percent of the current prison
23 population. The majority of these inmates are serving prison terms for non-violent
24
25
26
27

28 ² *See* Order to Meet and Confer, filed Sept. 24, 2013 (Docket No. 2719).

1 crimes. *See* Dept. of Corrections, “Second and Third Striker Felons in the Adult
2 Institution Population,” at Table 1.

3
4 In November of 2012, over 69 percent of California voters supported the
5 Three Strikes Reform Act of 2012 (“Proposition 36”) and adopted important
6 reforms designed to ameliorate some of the problems created by California’s
7 famously harsh recidivist sentencing law. As stated explicitly in the preamble to
8 Proposition 36, the measure was designed, in part, to help alleviate prison
9 crowding and relieve the State of long-term health care costs. Proposition 36,
10 Findings and Declarations (2012). Specifically, Proposition 36 provides an
11 opportunity for the early release of prisoners who were sentenced to life in prison
12 under the Three Strikes law for certain non-serious, non-violent crimes and who no
13 longer pose a threat to public safety. *See* Cal. Penal Code Section 1170.126.³
14
15
16
17

18 This new law works as follows: an inmate who meets the eligibility criteria
19 in the statute may file a petition for recall of sentence in the county Superior Court
20 where he or she was originally convicted. *See* Cal. Penal Code Section 1170.126
21

22 ³ Proposition 36 was the first voter initiative since the Civil War to approve the
23 reduction of sentences of inmates currently behind bars. *See generally*, David
24 Mills, Michael Romano, “The Passage and Implementation of the Three Strikes
25 Reform Act of 2012 (Proposition 36),” 25 Federal Sentencing Reporter 265 (2013).
26 Official proponents of the initiative included Steve Cooley, then District Attorney
27 of Los Angeles County; George Gascón, former Police Chief and current District
28 Attorney of San Francisco; Jeff Rosen, District Attorney of Santa Clara County;
and Charlie Beck, Police Chief of Los Angeles. *See* Cal. Secretary of State, Voter
Information Guide, “Proposition 36: Arguments and Rebuttals” (2012) *available at*
<http://vig.cdn.sos.ca.gov/2012/general/pdf/36-arg-rebuttals.pdf>.

1 (b) (“Any person serving an indeterminate term of life imprisonment imposed
2 [under the relevant statutes] . . . may file a petition for a recall of sentence . . .
3 before the trial court that entered the judgment of conviction in his or her case[.]”).
4

5 If the inmate sets forth a *prima facie* case of eligibility for relief, the Superior
6 Court must issue an Order to Show Cause to the county District Attorney why the
7 petition should not be granted. *See* Cal. Penal Code Section 117.126 (f); Cal. Rule
8 of Court 4.551 (c); Richard Couzens and Tricia A. Bigelow, *The Amendment of the*
9 *Three Strikes Sentencing Law*, 23-27 (Judicial Counsel of California, 2013)
10 *available at* <http://www.courts.ca.gov/20142.htm> (discussing resentencing
11 procedures under Prop. 36). If the People oppose the petitioner’s release, the
12 burden of proof falls on the People to establish by a preponderance of the evidence
13 that the petitioner remains an “unreasonable risk of danger to public safety.”
14 *People v. Superior Court (Kaulick)*, 215 Cal. App. 4th 1279, 1301-05 (2013); Cal.
15 Penal Code Section 1170.126(f). It is then up to the Superior Court judge to
16 determine whether the People have met their burden. *Ibid.*
17
18
19
20
21

22 Given the substantial potential impact of the Three Strikes law on the size of
23 California’s prison population, this Court has correctly recognized that the
24 implementation of Proposition 36 “should result in substantial reduction in the
25 prisoner population,” Opinion and Order Denying Defendants’ Motion to Vacate
26 or Modify Population Reduction Order, filed April 11, 2013 (Docket No. 2590) at
27
28

1 17, n.17, and indicated that consideration should be given to the “three strikers”
2 during the process of negotiating a “durable solution” to the prison overcrowding
3 problem at the heart of this litigation. Order to Meet and Confer, filed Sept. 24,
4 2013 (Docket No. 2719). *Amicus* agrees.

6 To date, over 1,000 prisoners have been released under Proposition 36. In
7 each of these cases, a judge has conducted an individual review of the prisoner’s
8 criminal history and record of prison rehabilitation and discipline, and, pursuant to
9 Cal. Penal Code Section 1170.126 (f), concluded that releasing the inmate would
10 not pose “an unreasonable risk of danger to public safety.” According to data
11 provided by the Department of Corrections, judges have granted over 95 percent of
12 the Proposition 36 petitions adjudicated to date. *See* Prop. 36 Progress Report, at 5-
13 6.
14
15
16
17

18 The recidivism rate of inmates released under Proposition 36 is remarkably
19 low. Of those inmates who have been resentenced and released under Proposition
20 36 to date, fewer than two percent have been charged with a new crime (as of
21 August 31, 2013). *See* Prop. 36 Progress Report, at 7. By comparison, the average
22 recidivism rate for inmates released statewide over a similar time period is 16
23 percent. *See* Joan Petersilia, Ryken Grattet, Jeffrey Lin, and Marlene
24 Beckman, “Assessing Parole Violations and Revocations in California: Finding
25 Strategies for the Future,” 33 APPA Perspectives 42 (2009).
26
27
28

1 Approximately 2,000 additional prisoners are eligible for relief under
2 Proposition 36. Prop. 36 Progress Report, at 5-6. Many of these prisoners also
3 appear ready to reintegrate into society. According to “Static Risk Assessment”
4 projections conducted by the Department of Corrections, approximately 45 percent
5 of the prisoners awaiting resolution of their Proposition 36 petitions are considered
6 a “low risk” of committing any new crime if released from custody; 36 percent
7 qualify as “moderate” risk; and only 7 percent qualify as “high risk” of committing
8 a crime of violence if released.⁴ On average, the 2,000 inmates awaiting review of
9 their Proposition 36 petitions are 48 years old and have already served over 9 years
10 in prison. Compared to the general prison population, inmates sentenced to life
11 under the Three Strikes law for non-serious, non-violent crimes are
12 disproportionately African American, disproportionately physically disabled, and
13 disproportionately mentally ill.
14
15
16
17
18

19 Despite the relative success of inmates released under Proposition 36 to date,
20 the rate of releases is trailing off and expected to slow dramatically in the coming
21
22

23 ⁴ Data provided by the Department of Corrections. No risk data was available for
24 212 of the inmates awaiting resolution of their Proposition 36 petitions. The
25 Department of Corrections calculates recidivism risk using an actuarial called the
26 California Static Risk Assessment (CSRA) instrument. *See generally* Susan
27 Turner, et. al., “Development of the California Static Risk Assessment Instrument
28 (CSRA),” University of California, Irvine, Center for Evidence-Based Corrections,
November 2009.

1 months as prosecutors begin to oppose a larger percentage of recall petitions filed
2 under the reform. *See* Prop. 36 Progress Report, at 1.

3
4 At the same time, the state prison population is on the rise. Between June
5 2013 and September 2013 the state prison population climbed from a low of
6 118,989 inmates to just over 120,000 inmates (*i.e.* 147.1 percent of design
7 capacity). *See* Defendants' Status Report, filed Sept. 16, 2013 (Docket No. 2713-
8 1). This data suggests that the reforms that have been undertaken to address this
9 Court's orders⁵ are no longer effectively reducing the prison population.

10
11
12 As this Court is aware, on September 16, 2013, Defendants moved for a
13 three-year extension of time to comply with this Court's June 20, 2013 Order
14 directing them to reduce the prison population by an additional 10,000 inmates, to
15 a total population 110,150 inmates (or 137.5 percent of design capacity) by the end
16 of 2013. Defendants assert that they need more time to implement additional prison
17 population reduction reforms. One of the reforms cited by Defendants is
18 Proposition 36. *See* Defendant's Request for Extension, filed Sept. 16, 2013
19 (Docket No. 2713) at 6.

20
21
22 Although Proposition 36 has the potential to dramatically reduce the size of
23 California's prison population, it is not being effectively or consistently
24 implemented throughout the state and has not, therefore, produced as many

25
26
27 ⁵ *See* Defendant's Request for Extension, filed Sept. 16, 2013 (Docket No. 2713) at
28 6 (describing the State's effort to reduce the prison population).

1 prisoner releases as it can or should. *See* Prop. 36 P Report at 5-6. This is because
2 in some counties, Proposition 36 cases are processed expeditiously, while in other
3 counties there are long backlogs. And it appears that in many counties, inconsistent
4 standards and inadequate resources are applied in Proposition 36 cases. *See* Prop.
5 36 Progress Report at 6; *see also* Hamed Aleaziz, “LA lags behind on three strikes
6 resentencing: County has most eligible inmates and slowest pace of petition
7 processing.” *Daily Journal*, (Sept. 6, 2013).
8
9

10
11 Furthermore, although Defendants assert that they are doing everything
12 within their legal authority to promptly implement Proposition 36 and that “[t]he
13 release of inmates via Proposition 36 is entirely outside Defendants’ control,”
14 Defendants’ Response to April 11, 2013 Order, filed May 2, 2013 (Docket No.
15 2609) at 16, *Amicus* contend that this is not correct. Defendants have considerable
16 authority over the implementation of Proposition 36 and they can and should be
17 required to exercise that authority to facilitate the prompt and safe release of
18 appropriate prisoners without delay.
19
20
21

22 //

23 //

24 //

25 //

26 //

ARGUMENT

1
2 In light of the fact that Proposition 36 offers a legitimate and significant
3 response to this State's prison overcrowding crisis, this Court should order
4 Defendants to expedite implementation of Proposition 36. Such an order would be
5 consistent with this Court's prior orders, the United States Constitution, current
6 state law, and the will of California voters.
7
8

9 **I. DEFENDANTS CAN AND SHOULD EXERCISE THEIR**
10 **AUTHORITY TO EXPEDITE THE IMPLEMENTATION OF**
11 **PROPOSITION 36.**

12 Defendants assert that they are doing everything within their legal authority
13 to implement Proposition 36 as quickly and fairly as possible and that "the release
14 of inmates via Proposition 36 is entirely outside Defendants' control." Defendants'
15 Response to April 11, 2013 Order, filed May 2, 2013 (Docket No. 2609), at 16.
16 They assert that they have no authority over the Proposition 36 process because the
17 reform is implemented entirely within California's Superior Court system, which is
18 administered independently by each of the state's 58 county governments. *Ibid.*
19 They claim that their role in this process is peripheral and primarily involves
20 ensuring that prison records maintained by the Department of Corrections are made
21 available to the parties on the county level. *See* Defendants' Response to April 11,
22 2013 Order, filed May 2, 2013 (Docket No. 2609), at 15-16. "The State has no
23 input as to whether the inmate should be resentenced [pursuant to Proposition 36].
24
25
26
27
28

1 Thus the State cannot ‘expedite’ resentencing, as Plaintiffs propose, and certainly
2 cannot ensure that the courts will decide to resentence all of the eligible third-strike
3 petitioners.” *Id.* at 16.

4
5 Defendants’ assertions are misleading: while they do not *decide* whether a
6 particular prisoner is, or is not, appropriate for resentencing under Proposition 36,
7 they can and should expedite the process by requesting a recall of sentence for
8 Proposition 36 eligible prisoners pursuant to subsection (d) of California Penal
9 Code 1170; and/or by exercising their supervisory authority over county District
10 Attorneys, *see* Cal. Const., Art. 5, Sec. 13; Cal. Gov’t Code Section 12550, to
11 ensure that the Proposition 36 process is administered fairly and effectively.
12
13

14
15 **A. Defendants Have Independent Authority To Expedite**
16 **Resentencing Hearings For Prisoners Eligible For Relief**
17 **Under Proposition 36.**

18 Defendants have the legal authority to expedite review of resentencing
19 hearings under Proposition 36.

20 Under subsection (d) of California Penal Code 1170, the Secretary of the
21 Department of Corrections may “at any time” request that a Superior Court recall
22 almost any state prison sentence (including the sentences of prisoners eligible for
23 relief under Proposition 36). The Department of Corrections Operations Manual
24 states that the Secretary’s authority to request a recall of sentence under Penal
25 Code Section 1170 is extremely broad. For example, the Secretary may
26
27
28

1 recommend a recall of sentence “if conditions have changed to the extent that the
2 inmate’s continued incarceration is not in the interest of justice.” Cal. Department
3 of Corrections and Rehabilitation Operations Manual, Article 6, Section 62020.6
4 (2013).

5
6 Upon receipt of such a request from the Secretary, the Superior Court may
7 recall the prisoner’s sentence and “resentence the defendant in the same manner as
8 if he or she had not previously been sentenced.” Cal. Penal Code Section 1170 (d)
9 (1). “The court resentencing under this subdivision shall apply the sentencing rules
10 of the Judicial Council so as to eliminate disparity of sentences and promote
11 uniformity of sentencing.” *Ibid.*

12
13
14
15 Thus, any current prisoner whose sentence was recalled under Penal Code
16 1170(d), and who was eligible for retroactive relief under Proposition 36, would be
17 resentenced under current law and *automatically* receive a reduced sentence
18 because the sentencing rules for non-serious, non-violent convictions have been
19 amended by Proposition 36. *See* Penal Code Sections 667(e)(2)(C),
20 1170.12(c)(2)(C). The reduced sentence would be roughly equal to twice the
21 ordinary sentence for the prisoner’s crime. *Ibid.* Because the remaining roughly
22 2,000 prisoners who are eligible for resentencing under Proposition 36 have
23 already served over 9 years, on average, for non-serious, non-violent crimes, the
24 vast majority of prisoners resentenced under the process proscribed herein would
25
26
27
28

1 be released immediately. *See* Cal. Penal Code Section 1170(d)(1) (“Credit shall be
2 given for time served [to any inmate re-sentenced under this subsection].”)

3
4 In addition, unlike the process established under Proposition 36, any
5 litigation under the Penal Code 1170(d) recall process is conducted by the Office
6 of the Attorney General, representing the Secretary of the Department of
7 Corrections, not the local District Attorney. *See* Cal. Department of Corrections
8 and Rehabilitation Operations Manual, Section 1410.4 (2013). Thus contrary to
9 their assertions, Defendants do have considerable ability to exercise control over
10 (and expedite) resentencing hearings for prisoners eligible for relief under
11 Proposition 36.⁶

12
13
14
15 **B. Defendants Can And Should Exercise Supervisory**
16 **Authority Over District Attorneys To Expedite**
17 **Resentencing Hearings For Prisoners Eligible For Relief**
18 **Under Proposition 36.**

19 Defendants possess supervisory authority over county District Attorneys.
20 *See* Cal. Const., Art. 5, Sec. 13; Cal. Gov’t Code Section 12550. Thus, any
21 argument that the Proposition 36 process is entirely controlled by local prosecutors
22 and judges (not state officeholders), is unavailing.

23
24
25 ⁶ The Governor of California also has constitutional authority to pardon state
26 prisoners. *See* Cal. Constitution, Art. V, Section 8. However, that power is severely
27 constrained in this context because, “[t]he Governor may not grant a pardon or
28 commutation to a person twice convicted of a felony except on recommendation of
the Supreme Court, 4 judges concurring.” *Ibid.*

1 The California Constitution, state statutes, and case law give the Governor
2 and Attorney General broad supervisory authority over county District Attorneys,
3 including the authority intervene in litigation in any court in the state. The
4 California Constitution provides in relevant part:
5

6 Subject to the powers and duties of the Governor, the
7 Attorney General shall be the chief law officer of the
8 State. It shall be the duty of the Attorney General to see
9 that the laws of the State are uniformly and adequately
10 enforced. . . . *The Attorney General shall have direct*
11 *supervision over every district attorney . . . in all matters*
12 *pertaining to the duties of their office Whenever in*
13 *the opinion of the Attorney General any law of the State*
14 *is not being adequately enforced in any county, it shall be*
15 *the duty of the Attorney General to prosecute any*
16 *violations of law of which the superior court shall have*
17 *jurisdiction, and in such cases the Attorney General shall*
18 *have all the powers of a district attorney. When required*
19 *by the public interest or directed by the Governor, the*
20 *Attorney General shall assist any district attorney in the*
21 *discharge of duties of that office.*

22 Cal. Const., Art. 5, Sec. 13 (emphasis added); *see also* California Government
23 Code Section 12550 (“The Attorney General has direct supervision over the district
24 attorneys of the several counties of the State When [s]he deems it advisable or
25 necessary in the public interest, or when directed to do so by the Governor, [s]he
26 shall assist any district attorney in the discharge of his duties[.]”).

27 State courts interpreting these provisions have held that the Attorney
28 General’s authority, while not unlimited, is broad and nearly unreviewable by the

1 judicial branch. *See People v. Honig*, 48 Cal. App. 4th 289, 353-356 (Cal.App. 3
2 Dist. (1996)) (“[A]ssuming, without deciding, that a [party] may object to
3 prosecution by the Attorney General, it cannot be doubted that the superior court’s
4 authority to consider the objection would be very limited.”).

5
6 Several media reports have criticized prosecutors throughout the state,
7 particularly the District Attorney of Los Angeles County, for inefficient
8 administration of petitions filed under Proposition 36. *See, e.g.*, Hamed Aleaziz,
9 “LA lags behind on three strikes resentencing,” *Daily Journal*, (Sept. 6, 2013);
10 Jack Leonard, “Freed three strikers have low recidivism rate. study finds,” *Los*
11 *Angeles Times* (Sept. 9, 2013) (including response to from the Los Angeles District
12 Attorney). According to data provided by the Department of Corrections, as of
13 August 31, 2013, only 17 percent of the cases filed under Proposition 36 in Los
14 Angeles County have been adjudicated. By contrast, 73 percent of Proposition 36
15 cases filed in San Bernardino County were adjudicated in the same time period.
16 *See Prop. 36 Progress Report*, at 6.

17
18 The data demonstrates that application of Proposition 36 is inconsistent
19 throughout the state. Regardless of whether that problem is a result of
20 mismanagement, misapplication of law, or insufficient resources, Defendants can
21 and should exercise their supervisory authority over District Attorneys to ensure
22 swift and consistent implementation of Proposition 36 throughout the state.
23
24
25
26
27
28

1 **II. DEFENDANTS CAN AND SHOULD PROVIDE REENTRY**
2 **SERVICES TO PRISONERS RELEASED UNDER**
3 **PROPOSITION 36.**

4 The best way to reduce the prison population is to reduce the rate of crime—
5 particularly the recidivism rate of inmates released from prison under the reforms
6 implemented in the wake of this litigation (including Proposition 36). Defendants
7 undoubtedly appreciate the importance of reducing recidivism by providing certain
8 basic support services to inmates released from custody, including temporary
9 housing, drug treatment, case management, and employment support.
10
11

12 The availability of reentry services is a crucial component of the Proposition
13 36 process itself. An inmate leaving prison is substantially less likely to be a
14 danger to the community if he or she has stable housing, sobriety support, and
15 employment assistance upon release. *See* Tracey Kaplan, “Santa Clara County to
16 help pay freed three-strikers’ rent for a year,” *San Jose Mercury News* (Oct. 5,
17 2013) (“Research has always shown that housing is the linchpin for re-entry
18 success . . . Without housing . . . sobriety and employment don't happen. This is a
19 critically important project, and Santa Clara deserves a lot of credit for undertaking
20 it.” (quoting Joan Petersilia)). Because future risk to public safety is the core
21 determination under the Proposition 36 resentencing process, *see* Cal. Penal Code
22 Section 1170.126(f), Defendants can and should assist expedited implementation
23
24
25
26
27
28

1 of the initiative by ensuring that adequate reentry resources are available to eligible
2 inmates.

3
4 Unfortunately, prisoners released under Proposition 36 are excluded from
5 receiving the public reentry resources provided to other inmates leaving prison by
6 Defendants and other public agencies. This not only impedes the implementation
7 of Proposition 36 but also endangers California's public safety.
8

9
10 As this Court is aware, the enactment of AB 109, the Criminal Justice
11 Realignment Act, divided supervision and support services offered to inmates
12 released from prison between the State Division of Adult Parole Services and
13 county Probation Offices. *See* Penal Code Sections 3450-3465; 3000.08; California
14 Department of Corrections and Rehabilitation 2011 Public Safety Realignment
15 Fact Sheet (April 15, 2013) *available via* www.cdcr.ca.gov. Prior to AB 109, the
16 State Parole Division provided post-release supervision and support to all inmates
17 leaving prison. *See* Cal. Penal Code Section 3000(a)(1) (2009). The State Parole
18 Division is now responsible for prisoners released following convictions for
19 serious or violent crimes; and county Probation Offices are responsible for
20 prisoners released following convictions of non-serious, non-violent crimes. *See*
21 Penal Code Sections 3450-3465; 3000.08. On average, the Parole Division spends
22 \$6,000 per released inmate on post-release supervision and support services.
23
24 County Probation Offices average \$6,300 per released inmate. *See* Prop. 36
25
26
27
28

1 Progress Report at 9 (citing figures provided by the California Legislative
2 Analyst's Office).

3
4 However prisoners released under Proposition 36 are prevented from
5 receiving reentry support services from either county probation offices or state
6 parole, which is maintained by Defendants. This failure by Defendants and by the
7 executive branch to extend meaningful reentry services to a population in dire need
8 suggests a lack of seriousness on the part of those with the capacity to provide
9 reentry services. Were Defendants invested in finding a durable solution to the
10 prison crisis in California, one would expect to see some leadership on their part in
11 this crucial area of reentry.
12
13
14

15 As most, if not all, prisoners released under Proposition 36 are former
16 parolees (due to their prior incarcerations), it would appear that they remain
17 eligible for parole services offered by Defendants. *See* Cal. Department of
18 Corrections and Rehabilitation Operations Manual, Section 81080.6 (noting that
19 discharged parolees have continuing "eligibility to receive parole services").
20
21

22 Furthermore, because all prisoners released under Proposition 36 were
23 sentenced for non-serious, non-violent crimes, it would appear that county
24 probation offices should supervise their release, and that these prisoners should be
25 eligible for reentry services provided under the county-administered Post-Release
26 Community Supervision program. However, because almost all prisoners
27
28

1 resentenced under Proposition 36 have excess custody credits, which satisfy their
2 new reduced prison term *plus* an additional three years, they are not eligible for
3 Post-Release Community Supervision. *See* Code Sections 2900, 2900.5; *see In re*
4 *Randolph*, 215 Cal.App.3d 790, 795 (1989); *see also* Tracy Kaplan, “Released
5 ‘three strikes’ inmates have low repeat-offense rate, report says,” *San Jose*
6 *Mercury News*, Sept. 9, 2013 (“Unlike all other prisoners released from state
7 custody, strikers [released under Proposition 36] are not eligible for assistance with
8 housing, jobs or drug treatment because they are not on parole or probation.”).

9
10
11
12 Although Probation offices in most counties are refusing to provide services
13 to inmates released under Proposition 36, the Probation Offices for Santa Clara and
14 Marin counties are exceptions to this rule and have offered reentry services to
15 inmates released under Proposition 36 even though they are not required to do so.
16 *See* Prop. 36 Progress Report, at 8-10. In all other counties, inmates released under
17 Proposition 36 receive nothing more than \$200 in “gate money” to assist their
18 immediate reentry from the Department of Corrections. *Ibid.*

19
20
21
22 Defendants can and should make these post-release services available to
23 those resentenced under Proposition 36 in two ways.

24
25 First, Defendants have direct authority to offer support services currently
26 available through the Parole Division to prisoners released under Proposition 36.
27 Because of AB 109, and the reduction of the number of parolees, there should be
28

1 excess capacity in state reentry services, including the Substance Abuse Service
2 Coordination Agency and Residential Multi-Service Center programs. *See* Cal.
3 Department of Corrections and Rehabilitation Operations Manual, Section
4 11010.9.2.4 (2013).

5
6 Second, Defendants can and should exercise their supervisory authority over
7 county sheriffs and probation offices to adopt the reentry programs modeled in
8 Santa Clara and Marin counties, ensuring that prisoners released under Proposition
9 36 are not denied services under the Post-Release Community Supervision
10 program. *See* Cal. Const., Art. 5, Sec. 13 (“The Attorney General shall have direct
11 supervision over every . . . sheriff and over such other law enforcement officers as
12 may be designated by law[.]”)

13
14
15
16 Notably, the recidivism rate of those released so far is well below the state
17 average. As of August 31, 2013, fewer than two percent of inmates released under
18 Proposition 36 were charged with a new crime. On average, these inmates had
19 been out of custody for 4.4 months. By contrast, the average recidivism rate for all
20 inmates leaving prison in California is 16 percent over a similar time period. *See*
21 Joan Petersilia, et al. “Assessing Parole Violations and Revocations in California:
22 Finding Strategies for the Future,” 33 APPA Perspectives 42.

23
24
25
26 In order to maintain the low recidivism rate of inmates released under
27 Proposition 36, assist implementation of the initiative, maximize its effectiveness
28

1 at reducing the prison population, and help improve public safety throughout
2 California, Defendants should allow prisoners released under Proposition 36 to
3 receive public reentry support services and exercise their authority to ensure that
4 these inmates receive the same services available to all other prisoners leaving
5 state custody.
6

7
8 **CONCLUSION**

9 For the foregoing reasons, this Court should order Defendants to exercise
10 their authority to ensure consistent and expeditious implementation of Proposition
11 36. This Court should also order Defendants to make reentry services available to
12 inmates released under Proposition 36 at the same levels of service provided to
13 other inmates released from state custody.
14

15
16 *Amicus curiae* remain available to this Court for questions related to
17 implementation of Proposition 36 and the Three Strikes law generally.
18

19
20 DATED: October 10, 2013

Respectfully submitted,

21
22 /s/ Michael Romano
23 Director
24 Three Strikes Project
25 Stanford Law School
26 559 Nathan Abbott Way
27 Stanford, CA 94305
28 mromano@stanford.edu

/s/ Christina Swarns
Director, Criminal Justice Project
NAACP Legal Defense and
Educational Fund, Inc.
99 Hudson Street, 16th Floor
New York, NY 10013
cswarns@naacpldf.org