No. 13A57

IN THE

SUPREME COURT OF THE UNITED STATES

GOVERNOR EDMUND G. BROWN JR., *et al.*,
Applicants-Appellants,

vs.

MARCIANO PLATA AND RALPH COLEMAN, *et al.*,
Appellees.

MOTION TO FILE *AMICI* BRIEF, MOTION TO FILE UNDER RULE 33.2, AND BRIEF *AMICI CURIAE* OF FORMER GOVERNORS PETE WILSON, GEORGE DEUKMEJIAN, GRAY DAVIS, AND ARNOLD SCHWARZENEGGER IN SUPPORT OF THE APPLICATION FOR STAY

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MOTION TO FILE *AMICI* BRIEF

Amici curiae, Pete Wilson, George Deukmejian, Gray Davis, and Arnold Schwarzenegger, the four living Former Governors of California, respectfully move for leave to file the attached brief in support of Appellants' application for stay.

Appellant has consented to the filing of this brief. Appellee has not consented as of the time of filing. Under the circumstances, it was not possible to give the 10 days notice normally required by Rule 37.2(b).

Amicus briefs in support of an application for stay are not expressly provided for in this Court's rules and are not commonly filed, but they have been allowed at times. In *Leal Garcia* v. *Texas*, 564 U. S. ___ (No. 11-5001 (11A1), July 7, 2011), for example, the United States applied to file an *amicus* brief in support of the stay request while not supporting the underlying certiorari petition. See *id*., slip op. at 2. The Court granted the motion to file. See *id*., slip op. at 4, n. *.

As former governors, the *amici*, like Appellant Brown, have carried the burden of the constitutional duty to "see that the law is faithfully executed." See Cal. Const., Art. V, § 1. Along with all citizens of California, they share the common interest in effective law

enforcement for the protection of innocent people against felonious attack. See Cal. Const., Art. I, § 28(a)(4). *Amici* therefore have an interest in this case.

July, 2013

Respectfully submitted,

KENT S. SCHEIDEGGER
Attorney for Amici Curiae

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MOTION TO FILE UNDER RULE 33.2

Amici curiae, Former Governors Pete Wilson, George Deukmejian, Gray Davis, and Arnold Schwarzenegger, move to file their brief in the format provided in Rule 33.2 (8½ x 11) rather than the booklet format of Rule 33.1.

The application for stay is exempt from the printing requirement under Rules 22, 23, and 33.1(a). Rule 37.2 normally requires that *amicus* briefs be printed in booklet format, even when the petition being supported has been submitted in 8½ x 11 format. This rule contemplates the usual certiorari or jurisdictional statement process where such printing is feasible. Given the accelerated briefing of the present application, the time needed to print this brief as a booklet would cause it to be untimely. In *Leal Garcia* v. *Texas*, 564 U. S. ___ (No. 11-5001 (11A1), July 7, 2011), an *amicus* brief supporting a stay was accepted in 8½ x 11 format. *Amici* therefore also ask leave to file this brief in 8½ x 11 format.

July, 2013

Respectfully submitted,

KENT S. SCHEIDEGGER
Attorney for Amici Curiae

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

State Constitution

United States Statute

Secondary Authorities

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BRIEF *AMICI CURIAE*

SUMMARY OF ARGUMENT

The failure of the three-judge court to adequately reconsider the population cap threatens the people of California with grave and irreparable harm from increased crime. The FBI's recently released preliminary data for 2012, the first full year of the prison reduction measures, shows a sharp spike in California crime in a year when national crime rates were flat. If the reductions made already are a substantial cause of this spike, as is entirely possible, then further releases of even more dangerous inmates will cause additional and irreparable harm.[1]

The order in this case violates the constitutional rights of Californians under the California Constitution to enforcement of the criminal law "so that the public safety is protected and encouraged as a goal of the highest importance." Federal courts have no authority to order state officials to violate state law unless strictly necessary to enforce

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1. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person made a monetary contribution to its preparation or submission.

federal law, and the three-judge court failed to give adequate consideration to whether this remains strictly necessary. The order should be stayed until this Court can give the matter full consideration on the merits.

ARGUMENT

I. The people of California face irreparable harm from increased crime.

Appellants note, "Irreparable harm not only is likely to result from the denial of the stay . . . , it already has occurred and will be compounded as long as the three-judge court's order remains in effect." Application for Stay 34. Most of the harm they discuss is to the State as a political entity, see *id*., at 34-37, but at the end they touch on the greatest and most irreparable harm of all—the harm to innocent people of crimes that could have been prevented.

In the first round of this litigation, this Court noted that the question of the impact on public safety involved "difficult predictive judgments regarding the likely effects of court orders." *Brown* v. *Plata*, 563 U. S. __ (No. 09-1233, May 23, 2011) (slip op., at 37). The three-judge court credited the predictions of experts that the reductions would "not increase crime to a significant degree," *id*. (slip op., at 38), and this Court reviewed that finding deferentially. See *id*. (slip op., at 39, n. 11). But such predictions are little more than educated guesses. Actual experience is the true test.

On May 6, 2013, the Federal Bureau of Investigation released its preliminary statistics on crime in the United States for 2012. This is the first full year after the principal measures to reduce California's prison population took effect. The findings are discussed in more detail in K. Scheidegger, The California Crime Spike: An Analysis of the Preliminary 2012 Data (2013) (by counsel for *amici*), available online at http://www.cjlf.org/publications/CalCrime2012 Prelim.pdf. The preliminary report does not give statewide totals, but only totals for cities over 100,000 in population. Even so,

by comparing the changes in the total crimes for these cities with the national changes in the same period, we can get a preliminary indication of the direction of crime rates in California, controlled for overall national trends.

The 2011-2012 changes in violent crime for California cities and national totals are given in Table 1. Murder, the ultimate irreparable harm, increased only 1.5% nationally but 10.5% in California. Rape, another extreme and irreparable harm, declined 0.3% nationally but increased 6.4% in California cities. Only in one category, aggravated assault, is the difference small.

TABLE 1

Percent Change in Violent Crime 2011-2012				
	Murder	**Rape**	**Robbery**	**Aggravated**
National	1.5	-0.3	0.6	1.7
Cal. Cities	10.5	6.4	3.5	2.0

Property crime changes are given in Table 2. California rates are sharply higher in every category. Auto theft is up a stunning 15% in one year. As explained in Scheidegger, *supra*, at 5, auto theft is a "regressive" crime that falls more harshly on people of limited means.

TABLE 2

Percent Change in Property Crime 2011-2012				
	Burglary	**Theft**	**Auto Theft**	**Arson**
National	-3.6	0.0	1.3	-1.2
Cal. Cities	7.9	9.0	15.0	6.3

These preliminary numbers do not, by themselves, prove that prisoner releases pursuant to the order of the three-judge panel are necessarily the cause of the increased victimization. Crime is a complex phenomenon with no one cause or one cure. They do, however, raise the very substantial possibility that the experts' "difficult predictive judgments" were wrong and that innocent people are being victimized in large numbers as a result. If so, then further releases of criminals who are even more dangerous, see Application for Stay 38, will cause even greater increases in victimization.

Given the irreparable harm of criminal victimization, the likelihood that further releases will cause more victimization, and the dramatic improvements in California prison health care since the original trial in this case, no further reductions should be ordered without a full examination of the case on the merits by this Court.

II. The constitutional rights of law-abiding Californians are threatened by the order in this case.

The foundation of the plaintiffs' case is an alleged violation of their rights under the Cruel and Unusual Punishments Clause of the Eighth Amendment. That is not the only right involved in this case, and indeed it is not the only constitutional right involved.

Justice Clark, dissenting in *Fay* v. *Noia*, 372 U. S. 391, 447 (1963), overruled in *Coleman* v. *Thompson*, 501 U. S. 722, 750 (1991), noted that the "struggle for personal liberty" cannot be considered in isolation. "But the Constitution comprehends another struggle of equal importance and places upon our shoulders the burden of maintaining it—the struggle for law and order. I regret that the Court does not often recognize that each defeat in that struggle chips away inexorably at the base of that very personal liberty which it seeks to protect."

In 2008, the people of California recognized the equal importance of law enforcement in the text of the state constitution. The state's fundamental law now recognizes "the expectation . . . that persons who commit felonious acts causing injury to innocent

victims will be . . . sufficiently punished so that the public safety is protected and encouraged as a goal of *highest importance*." Cal. Const., Art. I, § 28(a)(4) (emphasis added).

The United States Constitution is far more difficult to amend, and it does not yet have a victims' rights amendment to make explicit the principle noted by Justice Clark. However, the Constitution and the system of federalism it establishes embrace this principle. States must exercise their own judgment in balancing the competing interests of criminal justice and fiscal responsibility, both areas "to which States lay claim by right of history and expertise." *United States* v. *Lopez*, 514 U. S. 549, 583 (1995) (Kennedy, J., concurring). If a State determines that harsh criminal sanctions are necessary and wise to deter crimes, its reserved powers are sufficient to this purpose. See *id*., at 581. Moreover, Congress has established this principle in the statute governing this case. Congress has required that public safety be given substantial weight and that prisoner release orders be used only if no other remedy is available. See 18 U. S. C. § 3626, subds. (a)(1)(A) and (a)(3)(E)(ii).

Of course, the United States Constitution would prevail over a state constitution or an act of Congress to the extent they were actually inconsistent. In this case, however, actual inconsistency is extremely doubtful, as the Appellants have explained in their Application for Stay. Federal courts have no authority to order state officials to violate state law unless federal law *actually* requires that result. Where a prior injunction is contrary to state law, the two must be reconciled if possible. See *Valdivia* v. *Schwarzenegger*, 599 F. 3d 984, 995 (CA9 2010). Whether that is possible is a matter warranting this Court's full attention, particularly in light of how little effort the three-judge panel made in that regard. See Application for Stay 25-31.

CONCLUSION

The stay requested by Appellants should be granted.

July, 2013

Respectfully submitted,

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