No. 10-848

In the Supreme Court of the United States

EDMUND G. BROWN, JR.,
Governor of California, *et al.*,
Petitioners,

v.

JERRY VALDIVIA, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION

MICHAEL W. BIEN
ERNEST GALVAN
Counsel of Record
SHIRLEY HUEY
ROSEN, BIEN & GALVAN, LLP
315 Montgomery Street, Tenth Floor
San Francisco, CA 94104
(415) 433-6830
egalvan@rbg-law.com

Attorneys for Respondents

January 31, 2011

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

Blank Page

COUNTERSTATEMENT OF QUESTION PRESENTED

Did the Ninth Circuit err when it construed the *Valdivia* Stipulated Injunction's standards governing California parole revocation hearings to require balancing the parolee's right to confrontation under the Fourteenth Amendment against the State's good cause for denying it?

LIST OF PARTIES

The parties to the proceeding in the court whose judgment is sought to be reviewed are the following:

Edmund G. Brown, in his official capacity as Governor of the State of California, and the officials in charge of the California Department of Corrections and Rehabilitation.

Plaintiff class of California parolees who are (1) at large, (2) in custody as alleged parole violators, and awaiting revocation of state parole, and (3) who are in custody, having been found in violation of parole and sentenced to prison custody.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

CONSTITUTION

RULES

CONSTITUTIONAL PROVISION INVOLVED

> The Fourteenth Amendment to the United States Constitution as it provides: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law."

Respondents dispute the State's assertion that this case presents an issue involving the right of confrontation under the Sixth Amendment.

STATEMENT OF THE CASE

A. Introduction

This case is not about setting nationwide standards for parole revocation; no such standards are required or appropriate under the limited and flexible due process requirements of the Fourteenth Amendment. *See Morrissey v. Brewer*, 408 U.S. 471 (1972). Rather, this case is about the highly fact-bound circumstances regarding a remedy for proven constitutional violations in California's parole revocation system. The Ninth Circuit properly affirmed the relief ordered by the district court for the purpose of ending long-standing constitutional violations and thereby hastening an end to continued federal court supervision.

B. Adjudicated Constitutional Violations and *Valdivia* Stipulated Injunction

In 1972 and 1973, this Court clarified the Fourteenth Amendment due process rights of parolees to an informal administrative hearing before they could be returned to prison on alleged parole violations. *See Morrisey*, 408 U.S. at 480-490; *Gagnon*

v. Scarpelli, 411 U.S. 778 (1973). For decades thereafter, however, the State of California continued to return parolees to prison without the minimal due process required.

The class of California parolees therefore brought this action for injunctive relief in 1994. In 2002, the district court found that the State's parole revocation hearing system violated parolees' procedural due process rights and granted partial summary judgment in favor of Plaintiffs. *Valdivia v. Davis*, 206 F. Supp. 2d 1068, 1078 (E.D. Cal. 2002). The district court found that California's then-existing parole revocation system undermined both the public's and the parolees' interests in accurate fact-finding. *Id.*

The State responded to its loss on summary judgment by asking the district court to stay further litigation, so that it could develop a comprehensive remedial plan for parole revocation proceedings. CR[1]-759. The State asked for an order setting forth the basic features needed in a remedial plan. CR-796 at 3-4. The district court accommodated the State and issued such an order. CR-796. The district court then further accommodated the State by approving a remedial plan that differed radically from the set of requirements that the district court had set out. CR-891; CR-1044.

The State's remedy is embodied in a Stipulated Order for Permanent Injunctive Relief ("Stipulated

[1] Documents in the District Court Clerk's Record of Case No. 94-671 LKK-GGH (E.D. Cal.) are cited as "CR-XXXX," according to the Docket Entry Number in the PACER system, unless they are included in the Appendix to this Opposition or the Petition.

Injunction" or "Injunction"). The Stipulated Injunction includes a number of measures to prevent "having parole revoked because of erroneous information[.]" *Morrissey,* 408 U.S. at 484. The measure at issue in this petition for *certiorari* is the right to confront adverse witnesses.

In the two-hearing system outlined by *Morrissey,* the parolee receives a "preliminary hearing" close in time and place to the arrest, at which he may request that a "person who has given adverse information on which the parole revocation is to be based is to be made available for questioning in his presence." *Morrisey*, 408 U.S. at 487. There is one exception: "However, if the hearing officer determines that an informant would be subjected to risk of harm if his identity were disclosed, he need not be subjected to confrontation and cross-examination." *Id. Morrissey* also requires a "revocation hearing," including "the right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation)." *Id.* at 487, 489; *see also Gagnon*, 411 U.S. at 781-82, 786-87 (reaffirming *Morrissey's* confrontation rule).

Here, in keeping with the *Morrissey* command of flexibility, the district court accepted the State's remedial plan that omits all witness confrontation at the preliminary hearing, and allows witnesses to be examined only at the final revocation hearing. Resp. App. 9b, ¶ 22. In addition, the district court permitted the State greater leeway to deny confrontation than *Morrissey's* preliminary hearing confrontation language would allow. While *Morrissey* would limit such denials of confrontation to cases with "informant[s]" whose safety would be at risk if their

identity were disclosed, 408 U.S. at 487, the district court here approved a much looser standard, which allows the hearing officer to balance confrontation rights against a whole range of state interests for not producing the witness, including in some cases, "mere inconvenience or expense." *See United States v. Comito,* 177 F.3d 1166, 1172 (9th Cir. 1999).

This more flexible confrontation requirement is embodied in the following paragraph of the Stipulated Injunction to which the State agreed:

> The use of hearsay evidence shall be limited by the parolees' confrontation rights in the manner set forth under controlling law as currently stated in *United States v. Comito,* 177 F.3d 1166 (9th Cir. 1999). The Policies and Procedures shall include guidelines and standards derived from such law.

Resp. App. 10b.

The district court entered the Stipulated Injunction including this provision, hereinafter referred to as "Paragraph 24," although it received submissions from objectors who contended that the State's remedial plan had watered down the *Morrissey* requirements. *See, e.g.,* CR-891 at 5-6.

C. Problems in Implementing Injunction Paragraph 24, and Special Master Findings

In 2005, the State moved for the appointment of a Special Master, contending that the appointment was necessary to assist in resolving disputes arising under the Stipulated Injunction. CR-1198. The district court

granted the State's motion, over the objections of the Plaintiff class. CR-1205, 1213.

The Special Master found continued problems with the confrontation remedy. Resp. App. 27b-30b. During negotiations over the adequacy of confrontation policies and procedures to address the ongoing confusion in application, including improving the training of relevant hearing officers, the State notified Plaintiffs that it intended to rewrite its policies based on a new legal theory that certain technical hearsay exceptions always trump confrontation rights. The parties agreed to submit the matter to the Special Master for fact-finding and a recommendation to the district court. Pet. App. 34a.

After briefing and hearing, the Special Master made nineteen factual findings, including that the State had promulgated inaccurate policies and procedures to its hearing officers, that all parties had reported deficiencies in application of confrontation rights, and that "confusion and inconsistency" in observing confrontation rights was continuing three years into implementation of the remedy. Pet. App. 34a-44a. The Special Master found that

> [c]onfusion, inconsistency, incorrect application of standards, and failure to apply the required tests have been known for a prolonged period. Yet Defendants have taken no action to identify the scope of the problem and have not taken adequate steps to address the conditions that perpetuate potential misapplications of the law.

Pet. App. 68a. The Special Master recommended a series of further remedial steps, including revision of

policies and procedures regarding confrontation, and the development by the State of a plan for training, hearing officer standards and assessment. Pet. App. 68a-73a. The Special Master, however, recommended that further relief requested by the Plaintiff class be denied. Pet. App. 73a-74a.

The district court received responses from both the State and the Plaintiffs. Pet. App. 77a. The district court reviewed the Special Master's legal conclusions and factual findings, and found that the recommendations were "well-calculated to ensure the due process protections as expressed by the Supreme Court and the Ninth Circuit are respected." Pet. App. 77a-78a. The district court ordered that the State undertake the further remedial actions recommended by the Special Master. Pet. App. 78a. The State moved for a stay, which the district court denied, in a written order, finding, among other things, that "there is significant danger that the due process protections to which the plaintiffs are entitled are not being respected by the defendants, as evidenced by the systemic deficiencies in training and the accuracy of written materials." Resp. App. 44b. The State appealed to the Ninth Circuit.

D. Ninth Circuit Appeals

In March 2010, the Ninth Circuit's decision in *Valdivia v. Schwarzenegger,* 599 F.3d 984 (9th Cir. 2010), affirmed the pertinent part of the district court's order. Pet. App. 1a-32a. The Ninth Circuit's ruling disposed of two appeals regarding the *Valdivia* Stipulated Injunction. The second appeal is also relevant here to show one of the reasons that *certiorari* is not appropriate. The second appeal, No. 09-15836,

concerned whether the district court should consider modifying the Injunction in light of a successful state ballot initiative enacting a new parole revocation statute. Showing extreme deference to the State's federalism interests, the Ninth Circuit vacated the district court's denial of the State's motion to modify the Injunction and remanded for further findings. Pet. App. 22a-25a. No party has petitioned for *certiorari* from this second appeal.

The Ninth Circuit properly reviewed whether the district court acted within its remedial authority. The district court had "found that California's parole revocation hearing system violated Plaintiffs' procedural due process rights." Pet. App. 14a n.6. The district court therefore had authority to issue orders to enforce the remedy that the State itself had agreed to. *Id.*; Pet. App. 4a. The Court of Appeals held that the district court had not abused its discretion in ruling that the State must continue to use a balancing test for hearsay statements introduced against parolees, as the State had agreed to do in the Stipulated Injunction. Pet. App. 14a-15a. The Ninth Circuit also affirmed the parts of the remedial order directing the development of new policies and procedures, trainings, and standards for assessment of hearing officers. Pet. App. 19a-20a.

REASONS FOR DENYING THE PETITION

I. THIS CASE IS NOT THE PROPER VEHICLE THROUGH WHICH TO DEVELOP THE LAW ON DUE PROCESS CONFRONTATION RIGHTS.

A. The Order Addresses Enforcement of a Remedy the State Proposed, and Which is Currently Subject to Further Litigation Under the Ninth Circuit's Remand.

The decision below is not about setting nationwide standards for parole revocation. The decision is about what remedies are necessary for California's long-standing violation of due process rights in parole revocation. The State agreed to use a *Comito* balancing test as part of that remedy. The district court found that the remedy remains necessary, and that further steps were necessary to bring the State into compliance. Even this part of the remedy, however, remains a moving target, because the Ninth Circuit has directed the district court to consider modification of the entire remedy based on a new state law regarding parole revocation. Pet. App. 22a-25a.

The Petition suggests that the "Ninth Circuit approached the issue as constitutional, not contractual." Pet. at 21. The Petition, however, fails to acknowledge that the parties set the contractual bounds of the Injunction's provision on confrontation and that following *Comito* was the approach to which the State voluntarily agreed. Resp. App. 39b. The district court's order is grounded not only in the parties' contract, but also in the district court's proper determination, based on facts found by the Special Master after a hearing, that a clarifying remedial

order was necessary to ensure that the case proceeded toward constitutional compliance, and eventual termination.

The district court and the Ninth Circuit were properly mindful of the limited role that federal due process plays in state parole revocation procedures. The ruling below concerns only procedural rights. It does not trench in any way on the substantive results of any parole hearing. It does not command that any items of evidence be admitted or excluded in parole revocation hearings. It merely enforces the minimum procedural right to have the hearing officer find good cause before denying cross-examination of an adverse witness. *Cf. Swarthout v. Cooke,* No. 10-333, 2011 U.S. LEXIS 1067, at *6 (562 U.S. ____ (2011)) (holding that federal courts may not engage in substantive review of parole consideration decisions, stating that "[w]hen, however, a State creates a liberty interest, the Due Process Clause requires fair procedures for its vindication—and federal courts will review the application of those constitutionally required procedures").

To the extent that the current litigation raises any federalism issues, those issues are not ripe for review by this Court because the Ninth Circuit, in the same order challenged here, has directed the district court to consider whether the entire remedial scheme should be modified based on a change in state law. The new state law, Proposition 9, would change the confrontation rules in parole revocations. *Valdivia v. Schwarzenegger,* 603 F. Supp. 2d 1275, 1283-84 (E.D. Cal. 2009), *vacated and remanded,* 599 F.3d 984 (9th Cir. 2010). By the time this Court could resolve this appeal, the remedial scheme will have undergone a

thorough review by the district court, including possible modification, and further review by the Ninth Circuit. If *certiorari* were granted now, it is likely that this Court would have to dismiss *certiorari* as improvidently granted based on the further litigation taking place in the district court. *See Nike, Inc. v. Kasky*, 539 U.S. 654, 660 (2003) (Stevens, J., concurring); *Odom v. United States,* 400 U.S. 23 (1970).

B. The Petition Presents Questions of Differing Confrontation Rights for "Testimonial" and "Non-testimonial" Hearsay That Were Not Litigated Below.

This Court "ordinarily will not decide questions not raised or litigated in the lower courts." *Springfield v. Kibbe*, 480 U.S. 257, 259 (1987) (*per curiam*). The Petition attempts to concoct a cert-worthy question by pressing an issue that was never litigated below—whether due process confrontation rights apply to non-testimonial hearsay. This was not litigated below because the problem does not come up in the informal settings of parole revocation. California parole revocations remain informal matters, taking place around a table in small prison meeting rooms or cubicles, and presided over not by judges but by hearing officers, many of whom are not attorneys. *See* Pet. App. 38a. Hearsay statements are introduced informally, usually when a parole agent reads from his file. Rules of evidence and fine distinctions such as "testimonial" versus "non-testimonial" statements are not parsed in these informal settings. Rather, the hearing officer makes common sense decisions based on fundamental fairness, and considers "evidence including letters, affidavits, and other material that

would not be admissible in an adversary criminal trial." *Morrissey*, 408 U.S. at 489.

Moreover, the type of evidence usually at issue does not consist of business records and documents. Such material is almost always admitted under the flexible *Comito* balancing. The evidence that matters to parolees are statements by witnesses to the police or parole agent, which the parole agent tries to read to the hearing officer without the witness present. That was the situation in *Comito*, and is the historical abuse that the Injunction seeks to remedy. It does not raise questions of "testimonial" versus "non-testimonial" hearsay.[2]

Because distinctions between "testimonial" and "non-testimonial" hearsay do not arise in informal parole revocation hearings, both parties answered in the negative when the Special Master specifically asked whether the distinction mattered to the resolution of this dispute. At the hearing on Plaintiffs' motion to enforce Paragraph 24, the Special Master asked whether "[a]s we are thinking about the effect of hearsay exceptions, should we be distinguishing documents from testimonial evidence from other types of out-of-court statements?" *Valdivia v. Schwarzenegger*, 548 F. Supp. 2d 852, 987 (2008). The

[2] The hypothetical offered by the dissent in the *en banc* decision, regarding a 911 caller exclaiming "My husband Bob just shot me!" would not require application of the testimonial/non-testimonial distinction for proper resolution in an informal parole revocation hearing. Pet. App. 82a. The *Comito* balancing takes full account of indicia of reliability, such as those surrounding an excited utterance of this type. The statement would be deemed so reliable, that the State would be required to show very little or nothing in the way of good cause to excuse confrontation.

State's counsel responded in the negative. The State's counsel elaborated that there was no need to inquire into such distinctions because the parties had agreed in the Injunction to be bound by the Ninth Circuit's *Comito* balancing test, and that test recognized no distinction between testimonial and non-testimonial evidence. *Id.* at 992-93 ("*Comito* itself doesn't make a distinction between the two at all. And so tying the obligation to *Comito*, which it must be because of the injunction, there's nothing in *Comito* itself that says there should be a distinction between the two").

The Ninth Circuit opinion only mentions the distinction in order to respond to a point made by the dissent. Pet. App. 13a. As the matter was not pressed by the parties in the district court, and was not necessary for the Ninth Circuit to decide, it formed no part of the Ninth Circuit's holding.

Petitioners' new legal theory—that due process confrontation does not apply at all to "non-testimonial" statements—may be an interesting one, but it was not litigated and decided in the court below. If *certiorari* were granted, the Court would be proceeding without the benefit of a developed record below on this question.

II. THERE IS NO CIRCUIT SPLIT THAT WARRANTS *CERTIORARI* REVIEW.

What the Petition characterizes as a "circuit split" is merely the natural result of this Court's flexible due process jurisprudence. Pet. App. at 16-19. States (and the federal supervised release system) remain free to experiment and innovate with the limits of minimal due process. *Gagnon*, 411 U.S. at 782 n.5. Indeed,

that is what California has done here, devising a system that, among other variations, omits all witnesses from the preliminary hearing. Given the inherent flexibility of federal due process, it is no surprise that the circuits must use a variety of analytical frameworks to address the specific procedures in front of them. There is no need for this Court to impose uniformity; to do so would undermine the flexibility at the core of administrative due process. The various analytic frameworks, moreover, are not in practical conflict, but simply amount to different ways of expressing the same individualized balance between the parolee's interest in cross-examining a particular witness, and the government's interest in not producing the witness.

Due process requires a balancing of the respective government and individual interests at stake. *Mathews v. Eldridge,* 424 U.S. 319, 348-49 (1976). Therefore, the First, Second, Third, Fifth, Sixth, Eighth, Ninth and Eleventh Circuits have described the confrontation inquiry as a balancing test. *See, e.g.*, *United States v. Taveras*, 380 F.3d 532, 536-37 (1st Cir. 2004); *United States v. Williams*, 443 F.3d 35, 45-46 (2d Cir. 2006) (finding government's good cause in failing to produce witness outweighed probationer's right to confront); *United States v. Chin,* 224 F.3d 121, 124 (2d Cir. 2000); *United States v. Lloyd*, 566 F.3d 341, 344-45 (3d Cir. 2009) ("[A] district court should apply a balancing test when considering the releasee's asserted right to cross examine adverse witnesses."); *Barnes v. Johnson*, 184 F.3d 451, 454 (5th Cir. 1999); *Williams v. Johnson,* 171 F.3d 300, 306 (5th Cir. 1999); *United States v. Waters*, 158 F.3d 933, 940 (6th Cir. 1998); *United States v. Martin*, 382 F.3d 840, 844 (8th Cir. 2004) (district court must balance probationer's

right to confront witness against the grounds asserted by the government for not requiring confrontation); *United States v. Reynolds,* 49 F.3d 423, 426 (8th Cir. 1995); *United States v. O'Meara*, 33 F.3d 20, 21 (8th Cir. 1994); *United States v. Zentgraf,* 20 F.3d 906, 909-10 (8th Cir. 1994); *United States v. Bell*, 785 F.2d 640, 642-43 (8th Cir. 1986); *United States v. Comito*, 177 F.3d 1166, 1170 (9th Cir. 1999); *United States v. Frazier*, 26 F.3d 110, 114 (11th Cir. 1994) ("the court must balance the defendant's right to confront adverse witnesses against the grounds asserted by the government for denying confrontation . . . the hearsay must be reliable"); *United States v. Penn,* 721 F.2d 762, 764 (11th Cir. 1983).[3]

A minority of three circuits, the Second, Seventh, and Tenth, have held that where the proffering hearsay falls within a firmly rooted exception, there is no need to consider the government's reasons for not producing the witness. *See United States v. Jones*, 299 F.3d 103, 113 (2d Cir. 2002); *Prellwitz v. Berg,* 578 F.2d 190, 192 (7th Cir. 1978); *Curtis v. Chester,* 626 F.3d 540, 545-46 (10th Cir. 2010). In addition, the Third Circuit did not hold but noted in *dicta* that a showing of cause may not be necessary where the hearsay's reliability is overwhelming. *Lloyd*, 566 F.3d at 345. The Fourth Circuit's published decisions have addressed only reliability as a factor in admitting hearsay in parole revocation hearings. *See United*

[3] *See also* Fed. R. Crim. P. 32.1(b)(2)(C) & Advisory Committee Note to 2002 Amendment ("[T]he court should apply a balancing test at the hearing itself when considering the releasee's asserted right to cross-examine adverse witnesses. The court is to balance the person's interest in the constitutionally guaranteed right to confrontation against the government's good cause for denying it.").

States v. McCallum, 677 F.2d 1024, 1026 (4th Cir. 1982).

The Sixth Circuit has, in one case, analyzed hearsay statements only for reliability, without balancing the reasons for not producing the witnesses, though not based on hearsay exceptions. *United States v. Kirby,* 418 F.3d 621, 628 (6th Cir. 2005). In *Kirby,* there is no discussion of the district court's failure to balance reasons for not producing the witnesses, making it likely that the issue was not raised there. In an earlier case, *Waters*, 158 F.3d at 940, the Sixth Circuit expressly stated that the "trial court may consider reliable out-of-court statements in a final revocation hearing provided that the defendant's need for confrontation is outweighed by the government's ground for not requiring confrontation." Thus, when the issue is squarely discussed, the Sixth Circuit has endorsed balancing even if the evidence is deemed "reliable."

There is no practical distinction, however, between these minority rulings and the balancing test employed by the majority of circuits, including the Ninth Circuit. The Ninth Circuit's test works on a sliding scale—the more reliable the evidence, the less showing of good cause is necessary to excuse confrontation. At the extreme end of the reliability scale, the necessary showing of good cause is reduced to little or nothing.[4] In practice, the Ninth Circuit's

[4] "Whether a particular reason is sufficient cause to outweigh the right to confrontation will depend on the strength of the reason in relation to the significance of the releasee's right. In some instances, mere inconvenience or expense may be enough; in others, much more will be required." *Comito*, 177 F.3d at 1172. Since producing a witness always involves some inconvenience or

balancing test should almost always reach the same result as the test used by circuits that completely excuse any showing of good cause based on reliability of the out-of-court statement. *See United States v. Hall,* 419 F.3d 980, 987 (9th Cir. 2005) (noting in *dicta* that "exceptions to the hearsay rule that meet the more demanding requirements for criminal prosecutions should satisfy the lesser standard of due process accorded the respondent in a revocation proceeding").

The Tenth Circuit, discussing the variety of balancing tests used in the circuits, recognized this practical overlap among the tests. *Curtis,* 626 F.3d at 546. The Tenth Circuit, however, lost sight of the practicalities, when it wrote that "[o]nly the Ninth Circuit has expressly held highly reliable evidence (such as a hearsay exception) cannot be used in a revocation hearing unless it passes a balancing test." *Id.* The Ninth Circuit's complete test, as noted above, calibrates the balancing test according to reliability, so that the necessary showing of good cause vanishes to little or nothing if the evidence is reliable enough. *Comito*, 177 F.3d at 1172.

The Petition tries to bolster the impression of a circuit split by quoting out of context the portion of the Special Master recommendations that prohibits the State from adopting policies and procedures under the Stipulated Injunction that would double-count "reliability" on both sides of the balancing test. Pet. at 13-14. This was a remedial measure to deal with the

---

expense, the practical effect is that in some cases, a statement will be deemed so reliable as to excuse any real showing of good cause for not producing the witness.

rampant confusion and inconsistency that the Special Master observed in the field, with hearing officers applying all sorts of distorted versions of a balancing test, including completely inverted tests. Pet. App. 35a-36a.

The Special Master reasonably and correctly saw the need for the State to formulate a clear and workable version of the test for hearing officers, including non-attorney hearing officers, to apply. This remedial measure in no way undermines the centrality of reliability of the evidence to the due process confrontation analysis. On the contrary, the Special Master specifically stated that the Injunction policies and procedures should incorporate the principle that "[i]f the proffered evidence would be admitted in civil or criminal proceedings under a hearsay exception, this increases its reliability and makes it more likely to be admitted because the parolee's interest is lessened." Pet. App. 69a. And, therefore, under the Ninth Circuit's *Comito* balancing test, the necessary showing of good cause for not producing the witness is also lessened. *Comito,* 177 F.3d at 1172.

The question may be asked, if the practical difference among the circuits' tests are so minor, why did the Plaintiff class pursue this issue at all? The answer is that the issues that the parties litigated below are not the issues presented in the Petition. The Plaintiff class sought to maintain the hearing officer's discretion to ensure fundamental fairness in the unpredictable and wide variety of circumstances that arise in parole revocation hearings. The State sought to hamstring the hearing officer with an inflexible rule that once a hearsay exception was identified, all analysis must stop, and no other factors may be

considered.[5] In these informal proceedings, however, the parolee receives no protection from federal or state rules of evidence. The only protection against imprisonment on innuendo or rumor is the hearing officer's flexible application of the confrontation right. The Plaintiff class resisted what the State sought below—which was the imposition of a one-size-fits-all rule, applying only hearsay exceptions but no hearsay exclusions, in a way that would prevent the hearing officer from looking at the totality of the facts before him, and ensuring that due process and fundamental fairness are respected.

The need for flexibility, unfettered by the determinative weight that the State would place on technical hearsay exceptions, is all the more important here, where the hearing officer corps contains no judges and many non-lawyers. Pet. App. 38a. It may be appropriate for the circuit courts to demand that district judges in federal supervised release proceedings put determinative weight on technical hearsay rules. It was reasonable, however, for the district court to maintain the non-judge hearing officer's flexibility to consider all factors regarding the admission of hearsay in revocation proceedings as part of the *Valdivia* remedy.

---

[5] The State's counsel, however, represented at the hearing before the Special Master that the hearing officers would have the option of using a balancing test even where a hearsay exception applied. *Valdivia,* 548 F. Supp. 2d at 990-92. The Special Master reasonably concluded, however, that adding a reliability-only standard on top of the balancing test at this stage of the remedial process would "undermine[] the administrative ease and flexibility meant to attach to these less formal proceedings." Pet. App. 62a.

Flexibility is needed so that the hearing officer can consider circumstances such as whether the matter sought to be proved by the hearsay statement is really in dispute, or whether the hearsay statement is the only evidence that would send the parolee back to prison. In the informal revocation setting, these highly individualized circumstances have a bearing on whether any particular cross-examination is necessary. Such practical factors are more important in ensuring fundamental fairness of an informal hearing than are formalistic debates about precisely how the balancing test is expressed. The results of cases applying the balancing test demonstrate this flexibility, and do not show any tendency to hold the government to any rigid standard of good cause. *Compare United States v. Simmons,* 812 F.2d 561, 564-65 (9th Cir. 1987) (affirming revocation under balancing test where probationer had not challenged reliability of hearsay records, and they bore indicia of reliability), *and United States v. Walker,* 117 F.3d 417 (9th Cir. 1997) (same), *with United States v. Martin,* 984 F.2d 308 (9th Cir. 1993) (reversing revocation where denial of confrontation went to the only item of evidence supporting the charge and where releasee disputed the underlying facts, but still according government flexibility to provide substitutes for live witness).

This need for flexibility to account for unusual circumstances is recognized even by the circuit court decisions that the Petition characterizes as rejecting all balancing where hearsay exceptions apply. For example, in *Jones,* 299 F.3d at 113, the Second Circuit double-checked its confrontation holding by examining the validity of the government's stated reasons for not bringing the witnesses, holding that it would have

reached the same result even under a balancing test. *See also United States v. Aspinall,* 389 F.3d 332, 346 (2d Cir. 2004) (conducting balancing test under guise of harmless error analysis); *Curtis*, 626 F.3d at 547-48 "We would reach the same result if we applied a balancing test.").

"[I]nterpretation and application of the Due Process Clause are intensely practical matters[.]" *Goss v. Lopez*, 419 U.S. 565, 577 (1975). The Petition asserts a circuit split that is far-removed from the practical issues actually litigated below. This is a case where the differences among the circuits are largely a matter of the way that the balancing tests are expressed, not how they are carried out. This Court has stated that where differences among the circuits would not result in a "significant legal difference" there is no need to resolve the dispute. *Klehr v. A.O. Smith Corp.*, 521 U.S. 179, 193 (1997).

III. THE NINTH CIRCUIT'S DECISION IS FAITHFUL TO *MORRISSEY* AND RAISES NO SPECTER OF PAROLEES RECEIVING MORE PROCESS THAN CRIMINAL DEFENDANTS.

The flexible hearing process envisioned by *Morrissey* allows for the admission of hearsay at parole revocation hearings. The Ninth Circuit and district court decisions below do not change that understanding. After *Valdivia*, parolees facing revocation will continue to have their cases heard informally, without the application of any formal rules of evidence, without a Sixth Amendment confrontation right, and without the right to exclusion of hearsay as a rule.

Every circuit to rule on the issue after *Crawford v. Washington,* 541 U.S. 36 (2004), has determined that the due process confrontation right recognized in *Morrissey* is separate from the Sixth Amendment confrontation right enjoyed by criminal defendants. *See* Pet. App. 8a-9a; *United States v. Lloyd*, 566 F.3d 341, 343 (3d Cir. 2009); *United States v. Ray,* 530 F.3d 666, 668 (8th Cir. 2008); *United States v. Kelley,* 446 F.3d 688, 691-92 (7th Cir. 2006); *Ash v. Reilly,* 431 F.3d 826, 829-30 (D.C. Cir. 2005); *United States v. Rondeau,* 430 F.3d 44, 47-48 (1st Cir. 2005); *United States v. Kirby,* 418 F.3d 621, 627-28 (6th Cir. 2005); *United States v. Aspinall,* 389 F.3d 332, 342-43 (2d Cir. 2004).

The Petition asks this Court to abandon the well-established distinction between the due process confrontation right and the Sixth Amendment confrontation right. It has presented no good reason for doing so in contravention of this Court's instruction that specific constitutional rights be analyzed according to the specific constitutional text at issue, and not by free-range construction from other parts of the Constitution. *See Graham v. Connor*, 490 U.S. 386, 393-95 (1989).

The Petition, as well as the dissent from the denial of *en banc* review, incorrectly asserts that requiring revocation hearing officers to apply a balancing test to all witness statements sought to be proved by hearsay will somehow elevate parolees' rights above those of criminal defendants. Even after *Crawford*, there is no such risk. Unlike criminal defendants, parolees are unprotected by the Sixth Amendment's absolute bar on testimonial hearsay, as well as by any formal rules of evidence barring non-testimonial hearsay. And they

remain unprotected by the other criminal trial guarantees. *Morrissey*, 408 U.S. at 480, 483, 489; *Gagnon*, 411 U.S. at 789; Pet. App. 12a, 13a.

Petitioners would selectively incorporate Sixth Amendment standards into parole revocation due process. This Court's extensive procedural due process jurisprudence does not direct that the way to determine what process is due is to start with constitutional criminal procedure, line up each procedural step, and then start subtracting until a satisfactorily low point is reached.[6] To the contrary, this Court has directed a practical and flexible analysis, carefully weighing the respective government and individual interests. *See Hamdi v. Rumsfeld,* 542 U.S. 507, 528-29 (2004); *Mathews*, 424 U.S. at 334-35. Determining what process is due is not an exercise of wooden comparison between greater and lesser proceedings, but rather "is flexible and calls for such procedural protections as the particular situation demands." *Mathews*, 424 U.S. at 334 (quoting *Morrissey*, 408 U.S. at 481).

Here, the particular situation is that the parolee's liberty is decided in an informal hearing. No rules of evidence apply. There is no reasonable doubt standard. There is no right to jury trial. There is no right to a reporter's transcript. (In California, there is no court reporter, just a hearing officer with a pocket

---

[6] *Morrissey* did not determine what minimal process is due by starting with the Sixth Amendment and working down. On the contrary, it examined the requirements of due process independent of constitutional criminal procedure rights. This Court "emphasize[d] that there is no thought to equate this second stage of parole revocation to a criminal prosecution in any sense." *Morrissey,* 408 U.S. at 489.

cassette recorder.) All hearsay, both testimonial and non-testimonial, is potentially admissible. Documents are read from files with no consideration of authentication or foundation.

The only protection against imprisonment on innuendo or rumor is that the parolee may cross-examine persons who have provided adverse statements, unless the hearing officer finds good cause for denying cross examination. The Ninth Circuit, and the majority of the other circuits, did not err in deciding that due process requires some consideration of the government's reasons for not producing the witness, along with consideration of the reliability of the witness's statements. The decision below, which allows admission of all hearsay—subject to balancing—does no injury to *Morrissey*'s flexible approach. Pet. App. 12a-13a.

The suggestion of the Petitioner, and of the dissent from the denial of *en banc* review, that all due process confrontation rights should now be modified in light of *Crawford* would cause enormous and unnecessary disruption across a wide area of the law. Not just in parole revocation, but also in various civil and administrative settings, "the Supreme Court has stressed the critical nature of the right to confront and cross-examine adverse witnesses." *McNeill v. Butz,* 480 F.2d 314, 321 (4th Cir. 1973) (discharge from public employment). "In almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine witnesses." *Goldberg v. Kelly,* 397 U.S. 254, 269 (1970) (termination of welfare benefits). The flexible confrontation right recognized in these administrative settings arises from independent due

process considerations, not from any attempt to transplant a watered-down version of the Sixth Amendment. *Morrissey* analyzed the parolee's flexible confrontation right with reference to administrative cases such as *Goldberg*. *Morrissey,* 408 U.S. at 481, 485. *Morrissey* then formed part of the basis for this Court's further clarification of the balancing necessary to determine what process is due in particular administrative settings. *See Mathews,* 424 U.S. at 334, 341. There is no reason for the Court to now reverse course and replace its well-considered due process analysis with a selective grafting of the Sixth Amendment's separate confrontation jurisprudence.

IV. THERE IS NO JUSTICIABLE CONTROVERSY REGARDING FUTURE CRIMINAL DEFENDANTS' POTENTIAL RELIANCE ON DUE PROCESS RIGHTS UNDER THE FOURTEENTH AMENDMENT TO LIMIT NON-TESTIMONIAL OUT-OF-COURT STATEMENTS IN CRIMINAL TRIALS.

Article III of the Constitution limits the exercise of judicial power to "cases" and "controversies." *Aetna Life Insurance Co. v. Haworth*, 300 U.S. 227, 239 (1937). A justiciable controversy is "distinguished from a difference or dispute of a hypothetical or abstract character . . . . The controversy must be definite and concrete, touching the legal relations of parties having adverse legal interests." *Id.* at 240-41. The Petition contends that this Court should grant *certiorari* because the opinion below "threatens to extend to defendants in criminal cases, confrontation rights under the due process clause of the Fourteenth Amendment." Pet. at 19. This case, however, does not present that issue.

This case is about California parolees' right to confrontation in parole revocation hearings under the *Valdivia* Stipulated Injunction. Whether or not criminal defendants will seek to use the decision below to invoke the protections set forth under *Morrissey* is not a "controversy" raised in the instant matter and is not a question the resolution of which would affect the parties to this dispute. This Court should not grant *certiorari* to provide an advisory opinion on an issue that is "an abstract dispute about the law, unlikely to affect these plaintiffs. . . ." *Alvarez v. Smith*, 130 S. Ct. 576, 580 (2009). *See also Conway v. Cal. Adult Auth.*, 396 U.S. 107, 110 (1969) (dismissing grant of certiorari where court reaching merits "would . . . in effect be rendering an advisory opinion"). "While this Court decides questions of public importance, it decides them in the context of meaningful litigation. Resolution here . . . can await a day when the issue is posed less abstractly." *The Monrosa v. Carbon Black Export, Inc.*, 359 U.S. 180, 183 (1959).

As noted above, due process confrontation rights separate from the Sixth Amendment have been part of this Court's jurisprudence for many decades. *See, e.g.*, *Morrissey,* 408 U.S. at 487, 489; *Goldberg,* 397 U.S. at 269; *see also Greene v. McElroy,* 360 U.S. 474, 496-97 (1959). *Crawford's* re-examination of Sixth Amendment confrontation has been on the books for just under seven years. There is no evidence that the floodgates have opened for criminal defendants pressing due process confrontation rights under *Morrissey* or under the long-established balancing tests employed by the circuit courts.

CONCLUSION

For the foregoing reasons, the petition for a writ of *certiorari* should be denied.

Respectfully submitted,

Michael W. Bien
Ernest Galvan
Counsel of Record
Shirley Huey
Rosen, Bien & Galvan, LLP
315 Montgomery Street, 10th Floor
San Francisco, California 94104-1823
(415) 433-6830

Attorneys for Respondents

January 31, 2011