No. 13-1056

In the Supreme Court of the United States

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

v.

JOHN ARMSTRONG, et al.,
Respondents.

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

BRIEF IN OPPOSITION

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QUESTION PRESENTED

California places some of its prisoners and parolees known to have serious disabilities in county jails that have a history of violating the Americans with Disabilities Act ("ADA") and the Rehabilitation Act of 1973 ("RA"). The State has a scheme for notifying county jails about the disability accommodation needs of such inmates; it has a scheme for notifying some disabled jail inmates about how to ask for accommodations they need; and it has a scheme for investigating ADA/RA violations in the county jails. Did the Ninth Circuit err in affirming a narrow injunction requiring the State – an adjudicated wrongdoer found liable for the same federal violations on multiple previous occasions – to take these same minimally burdensome steps to address egregious, uncontested ADA and RA violations of class members' rights when held in county jails under State authority as part of California's unique parole system, when neither this Court's nor any circuit court of appeals' precedent presented a conflict?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

RULE

ADDITIONAL STATUTES INVOLVED

In relevant part, the Rehabilitation Act of 1973, 29 U.S.C. § 794, states:

> No otherwise qualified individual with a disability in the United States … shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance ….

INTRODUCTION

This petition arises out of the State of California's longstanding and continuing violations of the rights of disabled State prisoners and parolees under the Americans with Disability Act ("ADA"), 42 U.S.C. §§ 12131-34, and the Rehabilitation Act of 1973 ("RA"), 29 U.S.C. § 794.

Despite multiple prior orders finding the State liable for systemic violations of class members' rights in county facilities, the lower courts here once again in 2011 faced "overwhelming and disturbing evidence" of horrific denials of class members' rights while housed in county jails as part of California's parole process. App. 77.[1] Mobility-impaired parolees needing wheelchairs were forced to crawl to parole hearings. Deaf parolees had no sign language interpreters to enable them to understand what was happening at critical medical and mental health appointments.

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[1] "App." refers to the appendix to the petition for certiorari. "Pet." refers to the petition itself.

Blind parolees were denied tapping canes they needed to safely navigate the jails.

The State "played a significant role in causing" the violations. App. 12 (emphasis removed). The State knew the parameters of each parolee's disability and precisely tracked each accommodation he needed. Yet the State refused to provide the jails with this information, and when State agents went into the jails to meet with parolees about parole issues, those agents refused to discuss disability problems class members were having in the jails, and failed even to provide class members with any information about how to ask for the accommodations they need.

The State has never contested any of the evidence showing widespread violations of class members' rights in the county jails, nor has it contested the evidence showing its own failure to comply with prior remedial orders. Indeed, the State admits it is responsible for violating the ADA and RA rights of some class members in the jails, and pursuant to court order it has implemented a plan to address those violations. But the State nonetheless claims that a change to one provision of California's complex, highly unique parole scheme eliminated any obligation it has to one narrow subset of the *Armstrong* class, who are incarcerated under State authority in the county jails – non-life-term parolees. The State is wrong.

The Ninth Circuit here correctly found that, despite the change in law, the State must abide by the ADA and RA when it incarcerates parolee class members in California's jails because "both the instigation of parole revocation and the service of any jail time for revocations enforce state-imposed requirements and

serve essentially state purposes." App. 12. Because the State did not actually relinquish authority over parolee class members to the counties despite the change in law, the State remains liable for its own violations of class members' federal rights in the jails.

The narrow injunction upheld by the Ninth Circuit does not require the State to compel the counties to do anything. Nor does it punish the State if the counties continue to violate the ADA and RA. It simply requires the State – an intransigent wrongdoer found liable for systemic violations of class members' rights in county facilities on multiple prior occasions – to take limited steps entirely within its own control, such as informing the county jails of class members' known disabilities, notifying jail officials if it learns class members are not being accommodated in the jails, and providing a way for class members to alert the counties and the State to problems.

The Ninth Circuit's decision in this case, arising out of numerous prior remedial orders, addresses a fact-bound dispute concerning California's unique, complex parole scheme. It affects only a small portion of California's parole population and has no practical or legal consequences outside of the state. And despite the State's grandiose claims, the decision fully respects core federalism principles and raises no square conflict with any ruling of this Court or the Fourth Circuit. The petition should be denied.

STATEMENT OF THE CASE

A. The Prior Orders Finding the State Liable For Rights Violations In County Facilities

In 1994, Respondents – all present and future California state prisoners and parolees with certain disabilities – sued the California Department of Corrections and Rehabilitation ("CDCR"), the then-Board of Parole Terms ("BPT"), and certain state officials – including the Governor and the heads of CDCR and BPT – responsible for operating California's prison and parole systems (collectively, "the State") for violations of the ADA, RA and the Due Process Clause of the Constitution.

In a series of decisions, the district court and Ninth Circuit concluded that the State's policies and procedures violated the federal rights of prisoners and parolees with disabilities, and that the State was liable for the violations. *See Armstrong v. Davis*, 275 F.3d 849, 854-58, 879 (9th Cir. 2001), *cert. denied*, 537 U.S. 812 (2002); *Armstrong v. Wilson*, 124 F.3d 1019, 1020-21 (9th Cir. 1997), *cert. denied*, 524 U.S. 937 (1998); *see also Penn. Dep't of Corr. v. Yeskey*, 524 U.S. 206 (1998). Of particular relevance here, the Ninth Circuit affirmed the district court's ruling, after a ten-day trial, that the State violates the federal rights of prisoners and parolees with disabilities that it places in county jails. *See Davis*, 275 F.3d at 854, 879.

Nonetheless, "defendants have resisted complying with their federal obligations at every turn" over the course of this case, resulting in ongoing, largely uncontested denials of "basic necessities of life for disabled prisoners and parolees, such as wheelchairs,

sign language interpreters, accessible beds and toilets, and tapping canes for the blind." App. 3.

B. The Current County Jail Dispute and the State's County Jail Plan

In August 2011, Respondents moved to enforce the permanent injunction as to the narrow subclass of State prisoners and parolees with disabilities housed in county jails. In so moving, Respondents "extensively documented" the "systemwide and extensive" ADA and RA violations class members continued to suffer in the jails, as well as the State's direct role in causing the violations. *See* App. 10; *see also* App. 75-80, 90-91.

The evidence supporting the motion – which the State never contested – showed the State knew class members needed disability accommodations in county jail, but stood by while the jails routinely denied those crucial accommodations, resulting in extraordinary suffering and degradation. Class members with mobility impairments were refused wheelchairs and other assistive devices, requiring them to crawl to parole hearings held in the jails. App. 77. Class members were denied accessible housing and assistive devices in the jails, making it difficult, dangerous, and sometimes impossible for them to shower and toilet, or to attend meals, meetings with their attorneys, and parole proceedings. App. 77-78. Some class members slept on the floor for weeks because they were denied an accessible bed. App. 77-78. Class members with severe hearing impairments routinely were denied sign language interpreters for important medical and mental health appointments while in county jails. App. 78-79. Deaf class members were not permitted to use accessible telecommunication devices (TDD/TTY

telephones) to prepare their legal defenses and communicate with family, and missed meals, appointments, and other events because they could not hear announcements in the jails. App. 79-80. Class members with vision impairments were denied tapping canes to help them safely navigate the jails. App. 80. And class members who attempted to file grievances requesting accommodations in the jails typically were either told no such procedure existed or never received a response. App. 80.

The evidence of outrageous violations of class members' ADA and RA rights in the jails was not new to the State in 2011. Respondents had already secured a prior remedial order in 2009 requiring the State to take steps to protect the rights of class members incarcerated in the jails under State authority. The Ninth Circuit agreed that the ADA and RA prevent the State from "shirk[ing its] obligations to plaintiffs under federal law by housing them in facilities operated by the third-party counties." *Armstrong v. Schwarzenegger*, 622 F.3d 1058, 1072 (9th Cir. 2010). The State did not petition this Court for certiorari of the 2010 decision, but it did not sufficiently take steps to ameliorate its role in the ADA and RA violations in the jails either. Instead, the State continued its attempts to evade liability for the narrow subset of the *Armstrong* class held under State authority in the county jails.

In opposing Respondents' 2011 enforcement motion, the State did not contest that class members housed in county jails are suffering from serious ADA and RA

violations,[2] or contend its previous compliance efforts were sufficient under federal law. *See* App. 9-10, 75-81, 90-91. And the State agreed it was obligated to address those violations for two out of three categories of class members it incarcerates in the jails – "out to court" inmates and life-term parolees. *See* App. 15-16, 27, 71. The State challenged its responsibility under the ADA and RA only as to a third category of the *Armstrong* class – non-life-term State parolees with disabilities incarcerated in the jails.

For non-life-term State parolee class members, the State pointed to a change in California law enacted in October 2011 as part of realignment, the State's plan to ameliorate unconstitutional prison crowding levels in the wake of this Court's decision in *Brown v. Plata*, 131 S. Ct. 1910 (2011). App. 4. In particular, the State claimed that an amendment to California Penal Code section 3056(a) (West 2011) ("§ 3056"), declaring that non-life term State parolees housed in the jails ("§ 3056

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[2] The State's ex post facto defense of its failure to contest the extensive evidence of ongoing violations rings false. *See* Pet. 13 n.4. The State complains that the district court failed to hold an evidentiary hearing "to determine whether the alleged violations even occurred" even though the State never asked for one or contested Respondents' factual showing. *See* Pet. 13 n.4. And while the State pretends it had no knowledge of the violations, Pet. 13 n.4, Respondents provided the State with all of the evidence months before filing the enforcement motion. As with the evidence supporting the first jail enforcement in 2009, however, the State never sought to depose a single declarant. App. 86. Most significantly, the State never contested that its own deficient policies and procedures and ongoing failures to train, supervise, and monitor its employees played a direct role in the documented violations. *See* App. 80-81, 90-91.

class members") were "under the legal custody and jurisdiction of local county facilities," absolved them of any responsibility for non-life-term parolees with disabilities.

The district court disagreed, and granted Respondents' enforcement motion in April 2012. App. 57-101. After making extensive factual findings based on the record and California's unique parole system, the district court held that the State continued to incarcerate class members in county jails under its authority, despite the change to § 3056. App. 72-75. It also held that the State's wrongful acts and failures to act violated the ADA and RA rights of class members in the jails, and issued a narrow order requiring the State to come up with a plan to address its ongoing federal rights violations. App. 90-91, 94-101. The State appealed.

While the appeal was pending, the State worked with Respondents and the court expert to develop a plan to address its ADA and RA violations in the jails ("the Plan"), which covers all three categories of class members held in the jails under State authority. App. 5. The Plan – now ordered by the court – provides for the following: (1) when placing a class member in a county jail, the State sends an automated email to the county providing it with disability information already known to the State (App. 48); (2) State employees, who under a separate mandate already must go to the jails to interview class members within three business days of their arrival, must now ask class members if they need any disability accommodations in the jails and, if so, inform the jails (App. 49-50; *see also* App. 16); (3) during the same interview, State employees inform

class members how to request accommodations or grieve disability discrimination (App. 49-50); (4) if a class member requests the State's help in obtaining an accommodation, the State responds to the grievance and forwards it to the jail (App. 50-51); and (5) if the State discovers a pattern of denials of class members' rights in a particular jail, the State must notify the county, investigate "to the extent possible," and "determine what steps, if any, can be taken to remedy the situation" (App. 54-55).

Shortly after the district court's April 2012 order, the State again amended § 3056 in July 2012 to declare non-life-term State parolees "shall be under the sole legal custody and jurisdiction of local county facilities" while incarcerated in county jails. Cal. Pen. Code § 3056(a) (West 2012).

After the July 2012 amendment to § 3056, the State agreed to roll out the Plan to address its federal rights violations against all "out to court" and life-term parolee class members in the jails. App. 34. It refused, however, to implement the Plan as to § 3056 class members – that is, it refused to tell the counties what it knows about those class members' needs for accommodation – even though the district court once and the Ninth Circuit twice denied the State's request to stay the April 2012 order requiring it to do so. App. 7.

Accordingly, Respondents filed a further motion to enforce, which the district court granted on August 28, 2012 by ordering the State to roll out the parties'

agreed-upon Plan in full.[3] *See* App. 40; *see also* App. 17 n.11.

The State appealed the August 2012 order. It also fully implemented the Plan, which has functioned smoothly in the year and a half since it was rolled out, resulting in no further litigation.

C. The Ninth Circuit Decision

The Ninth Circuit consolidated the appeals from the April and August 2012 orders, and issued a single decision on October 4, 2013 affirming the district court. It held that the State directly contributed to the uncontested "systemwide and extensive" violations of class members' rights in the jails, but had improperly refused to take action despite prior court orders requiring remediation. App. 10-11, 13-14. The Ninth Circuit concluded the State maintains authority over the parole revocation process – and therefore the class members held in county jails pursuant to that process – despite the change to § 3056, and that the State therefore cannot evade its ADA and RA obligations to those class members simply by placing them in the jails. App. 11-12; *see also* App. 72-75. The Ninth Circuit also addressed *Bacon v. City of Richmond*, 475

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[3] The State's petition misleadingly details provisions of the April 2012 order that it claims require the State to "supervis[e]" the counties and to "ensure" class members are immediately accommodated in the jails or to transfer them elsewhere. Pet. 6. But the provisions to which the State refers were not included in the Plan, are not in effect, and were in fact mooted by the August 2012 order, as the Ninth Circuit held and the State does not contest. App. 14 n.9, 17 n.11; *see* App. 40.

F.3d 633 (4th Cir. 2007), finding it factually distinguishable. App. 13 n.8.

The Ninth Circuit then reviewed the scope of the August 2012 order requiring the State to implement its Plan, given that the district court's earlier injunction was mooted by the August order. App. 14-17 & nn.9, 11. The court found the operative injunction comported with federalism because it obligates the State only to take minimal measures within its control to address the violations, and does not require the State to do anything to remediate the counties' violations in the jails. App. 15. Finally, the Ninth Circuit reviewed the injunction and determined it was minimally burdensome. App. 14-15.

The State moved for en banc consideration. No judge voted to grant the petition, which was denied on December 3, 2013. App. 102-04. The State then filed the instant petition for certiorari.

REASONS FOR DENYING THE WRIT

I. The Ninth Circuit's Correct Application of Well-Established Principles of Law to the Unusual Circumstances of this Case Does Not Warrant Review

A. The Ninth Circuit's Decision Is Narrow, Fact-Bound, Limited to California, and Correct

The decision below concerns a very limited, California-specific situation: The propriety of a narrow injunction tailored to the State's continuing responsibility for longstanding violations of some parolees' rights under the ADA and RA, due to the

State's unusual parole scheme and the unique relationship between the State and its counties under § 3056. The Ninth Circuit's inquiry accordingly was restricted to the facts on the ground, as developed through the lengthy record and remedial history. App. 11-12. The decision affects only a small subset of the State's parolees – those non-life-term parolees with disabilities incarcerated in county jails pursuant to § 3056 for "brief and intermittent periods" of time. App. 9. And the injunctive provisions at issue are narrowly tailored to address the particular factual contours of the State's own violations and its employees' ongoing interactions with parolees in the jails and jail officials. App. 12, 14-17. Finally, the decision arises out of a complex series of prior enforcement orders, resulting in a highly contextualized analysis that can have no widespread application. App. 58-68; *see* App. 3-4, 12-13; *see also Schwarzenegger,* 622 F.3d at 1062-63, 1074; *Davis*, 275 F.3d at 854.

The on-the-ground experience shows the State's Plan to address the rights violations in the jails has proven workable and effective in the year and a half it has been in effect. The Plan has been the subject of no further litigation, and Respondents, Petitioners, and the counties have all easily adapted to its limited requirements. The State already concedes that it must comply with the injunction as to some class members it sends to the jails – life-term parolees and "out to court" inmates. *See* App. 15-16, 27, 71. And the core of the remedial provisions are either fully automated (such as the daily email the State sends to the county jails alerting them to class members' known disability accommodation needs), or incorporated into in-person

interviews the State is already required by California law and policies to conduct shortly after class members arrive in county jails. *See* App. 16. The practical result of a grant of certiorari here would be to sow confusion in a narrow but fully functioning remedial scheme that the parties and the counties utilize on a daily basis to ensure class members' federal rights are respected.

The decision below is also correct. The Ninth Circuit properly applied this Court's federalism precedents by holding the State responsible for taking limited steps, purely within its own control, to remediate its ADA and RA violations against class members held under State authority in county jails. As the Ninth Circuit correctly held, § 3056 did not delegate full authority for non-life-term parolees to the counties, because the State maintains control over the parole revocation scheme that causes those class members to be in, and stay at, the jails, thereby "enforc[ing] state-imposed requirements and serv[ing] essentially state purposes."[4] App. 11-12.

In light of California's unique parole system, the State remains responsible for addressing its "ongoing failure to train, supervise, and monitor" its employees and its "ongoing failure to communicate with county

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[4] Specifically, even after realignment, the State sets conditions of parole, violations of which result in parolees' revocation to county jails. App. 11. The State alone can elect to initiate revocation proceedings and in some cases controls the length of revocation terms served in the jails. App. 11. It also maintains the power to incarcerate parolees in county jails for short periods even without revoking parole, and requires the jails to return full authority over parolees to the State after revocation sentences are over. App. 11-12.

jails regarding the known needs of class members," both of which the Ninth Circuit found directly contributed to the uncontested violations of class members' rights in the jails. App. 12 (quoting district court factual findings). The State refused, for example, to provide counties with information about class members' known disabilities, or to make sure class members had a way to inform the county jails or the State of their needs for reasonable accommodations. App. 10-11. Had the State complied with its obligations to do so – which were already required by previous court orders – the State could have prevented violations in the jails or ensured they were promptly addressed. App. 10-11.

Given its findings, based on the factual record, that the State continues to violate the ADA and RA rights of class members held in county jails pursuant to its authority, the Ninth Circuit properly fulfilled its obligation to "vigilantly enforce" federal law while still respecting the State's sovereignty. *See Horne v. Flores*, 557 U.S. 433, 450 (2009); *see also Bell v. Hood*, 327 U.S. 678, 684 (1946) ("[W]here federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief."). The injunction here addresses only the State's wrongdoing – not the counties'. App. 15; *see* App. 47-56. As the Ninth Circuit held, the order is carefully and narrowly crafted to impose on the State's prerogatives just the minimum amount necessary to vindicate class member rights: At its core, the injunction merely requires the State to provide disability notifications, collect disability data, and issue reports to the counties. App. 15.

Furthermore, the injunction imposes a de minimus burden. The order simply requires the State to include a third small category of class members in the existing remedial scheme it designed and already employs to remediate its ADA and RA violations against "out to court" and life-term parolees. App. 15-16. And that remedial plan is designed around the State's existing disability tracking system and its particular parole procedures, which already require State employees to go to the county jails to interview class members in person promptly after their arrival. App. 16.

In short, the Ninth Circuit properly balanced the State's prerogative to manage its internal affairs against its entrenched refusal, in the face of multiple prior remedial orders, to take minimal steps solely within its own power to address its role in the egregious longstanding violations of class members' federal rights. In any event, the propriety of the narrow and limited remedy here is both fact-bound and state-specific, and thus does not warrant this Court's review.

B. There Is No Conflict With Any Of This Court's Cases

In its petition, the State argues that that the Ninth Circuit's decision is "out of step with" this Court's federalism precedents. Pet. 10. Nowhere, however, does the State identify an actual conflict, because this Court has never addressed the narrow, fact-bound situation here. *See* Sup. Ct. R. 10(c).

Because this Court has never addressed the question at issue here, the State's arguments boil down to a disagreement with how the Ninth Circuit weighed

established federalism standards in light of the detailed evidentiary record and numerous prior remedial orders in the case. This is little more than a call for error correction where, as set forth above, the decision is narrow, fact-specific, and correct.

1. The State's newly minted[5] primary argument is cobbled together from two inapplicable *Monell* cases and a line from *Milliken v. Bradley*, 433 U.S. 267 (1977), that fundamentally contravenes the State's claim. App. 10 (citing *McMillian v. Monroe Cty., Ala.,* 520 U.S. 781 (1997); *Jett v. Dallas Indep. Sch. Dist.,* 491 U.S. 701 (1989); *Milliken*, 433 U.S. at 282)). The State relies on language in *Jett* and *McMillian* requiring a party to identify a single government entity with "final policymaking authority," but that requirement is specific to claims of municipal liability for damages under 28 U.S.C. § 1983, and has no relevance to this ADA/RA injunctive relief case. *See Jett*, 491 U.S. at 737; *McMillian*, 520 U.S. at 784-85. Nothing in those cases prevents a federal court from finding the State liable for its role in perpetuating rights violations, even if the counties are liable as well.

More fundamentally, *Milliken*'s rule that only governmental bodies "involved in [or] affected by" federal rights violations may be held liable for remediation illustrates the propriety of the Ninth Circuit's decision here. 433 U.S. at 282. The State is an involved governmental entity within the meaning of *Milliken*: Both lower courts here found, based on the

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[5] The State never raised *Milliken* or *Jett* in either of the lower courts, and it cited *McMillian* only in passing for a different proposition.

evidentiary record, that the State itself violated class members' rights in the jails, and had done so for years. App. 10-14, 90-91; *see also* App. 77 (noting violations were "still occurring more than a decade after [the district court] first found that Defendants were failing to accommodate the needs of class members in County facilities"). Contrary to the State's implication, it is not an innocent third-party bystander to the uncontested ADA and RA violations occurring daily in California's jails. The State is itself perpetuating the violations. *Milliken* not only authorizes federal courts to act in such circumstances, it requires them to do so. *See Hills v. Gautreaux*, 425 U.S. 284, 296-97 (1976); *see also Plata*, 131 S. Ct. at 1928 (recognizing that "[p]risoners retain the essence of human dignity inherent in all persons," and that courts must act to remedy violations of their federal rights).

2. The State is also incorrect when it claims the Ninth Circuit failed to respect the State's right to divide authority among political subdivisions. Pet. 10-11. The State fails to identify any actual conflict between the Ninth Circuit's order and this Court's precedents. In fact, the Ninth Circuit recognized the State's right to divide authority, but found based on the precise circumstances here that the State *retained* authority over – and thus obligations to – class members the State puts in county jails. App. 11-12, 14. The court did not deny the State's right to delegate authority to political subdivisions; it simply found the State had not done so. The Ninth Circuit's fact-intensive decision thus reflects the proper balance of deference to the State's authority while still vindicating class members' federal rights.

The State's arguments to the contrary are unavailing. First, states cannot allocate responsibilities to local entities when doing so would have the effect of undermining federal rights. *Bacon*, 475 F.3d at 641; *see Gomillion v. Lightfoot*, 364 U.S. 339, 347 (1960) ("[S]tate power [cannot be] used as an instrument for circumventing a federally protected right."); *Griffin v. County Sch. Bd. of Prince Edward County*, 377 U.S. 218, 233 (1964) (otherwise unobjectionable exercise of state power is invalid when it has the effect of permitting the public entity "to avoid the effect of the law of the land"). The State's claim that § 3056 absolves it of responsibility would permit what *Bacon*, *Gomillion*, and *Griffin* would prohibit.

Moreover, the State's claim rests on a factual inaccuracy. The State did not actually delegate all authority over class members housed in the jails to the counties. As both lower courts found after an exhaustive review of the record and California's complex parole system, the State kept for itself significant authority and control despite the text of § 3056. Even after realignment, "both the instigation of parole revocation and the service of any jail time for revocations enforce state-imposed requirements and serve essentially state purposes," and State agents go into the jails on a daily basis to meet with parolees. *See* App. 11-12, 16; *see also* App. 39, 73-75. In other words, the State chooses whether a parolee goes to a jail and how long he stays there, and has reserved for itself the right to access the parolee even when he is supposedly in the "sole custody" of the county. The county merely houses the parolee while he awaits adjudication of the alleged violation of his State-imposed parole conditions or serves his revocation

sentence, and the State pays the county to do so through block grants. *See* App. 74. That is a far cry from the hands-off delegation to a third-party government entity the State claims realignment effectuated.

Because the State maintains the authority to put and keep State parolees in the jails, the Ninth Circuit's decision correctly requires the State to take only those narrow, minimally burdensome steps within its own power to protect class members' federal rights. App. 15. It does not require the State to "step in to correct situations when local governments do not fully comply with federal mandates," as the State claims without citation to any provision of the operative injunction. *See* Pet. 12. In fact, as the Ninth Circuit observed, the court-ordered Plan neither requires the State to compel the counties to do anything nor punishes the State if the counties continue to violate the ADA and RA. App. 15; *see* App. 47-56.

3. Finally, the State claims the Ninth Circuit's decision is "out of step with" this Court's Section 1983 vicarious liability law.[6] Pet. 12. That is a strained analogy, not an actual conflict with clearly applicable precedent. In any event, vicarious liability is irrelevant

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[6] The State also asserts for the first time in this litigation that it is not vicariously liable for any RA violations because it does not funnel federal funding to the jails through realignment. Pet. 9 n.3. That is a red herring. The State, which itself accepts federal funds, remains directly – not vicariously – liable for the deficient parole services provided to class members in county facilities, as it has since RA liability was first established in this case and then reaffirmed in 2009. *See Davis*, 275 F.3d at 854; *Schwarzenegger*, 622 F.3d at 1063, 1068 & n.3.

here, as the remedy the Ninth Circuit affirmed was predicated on the State's – not the counties' – wrongful acts and failures to act.

In sum, the State disagrees with the Ninth Circuit's balancing of federal and state interests in this highly fact-specific context, but identifies no actual conflict with this Court's precedents. That baseless disagreement does not warrant certiorari.

C. There is No Circuit Split

The Ninth Circuit was correct to conclude that its fact-bound, narrow decision does not conflict with the Fourth Circuit's decision in *Bacon v. City of Richmond*, 475 F.3d 633 (4th Cir. 2007). *See* App. 13 n.8. As the Ninth Circuit pointed out, *Bacon* answered a different question. App. 13 n.8. In *Bacon*, the defendant was entirely faultless. 475 F.3d at 639-40. *Bacon*'s holding, then, flows from *Milliken*'s uncontroversial principle that a party may not be forced to pay to remedy rights violations "in the express absence of fault and causation." *Id*. at 640. Here, by contrast, the defendants violated federal law.

Thus, the Ninth Circuit's decision is fully consistent with *Milliken*'s rule, as reiterated in *Bacon*. The State has repeatedly been found liable under the ADA and RA for its decision to hold class members in county facilities under State authority, where it is uncontested that the prisoners and parolees suffer egregious rights violations. App. 3-4, 12; *see Schwarzenegger*, 622 F.3d at 1063; *Davis*, 275 F.3d at 854. On the current record, the Ninth Circuit found that the State's "actions and culpable failures to act have played a significant role in causing the undoubted discrimination against

Armstrong class members in county jails," which "directly implicate [the State] in the violations of the ADA and Rehabilitation Act." App. 12 (emphasis removed); *see* App. 90-91. Because the defendant here is an adjudicated wrongdoer with responsibility for the ADA and RA violations, this case is unlike *Bacon*.

The State's second objection to the Ninth Circuit's treatment of *Bacon* also misses the point. The Ninth Circuit did not draw a false distinction between direct and indirect remedial costs, as the State claims. Pet. 17. Rather, the Ninth Circuit pointed out that the remedial order at issue was narrowly targeted at addressing the State's own role in the violations, while the broad funding mandate overturned by the Fourth Circuit was tethered to nothing. App. 13 n.8; *cf. Papasan v. Allain*, 478 U.S. 265, 278 (1986) (injunction against state officials appropriate if it "serves directly to bring an end to a present violation of federal law," even if it has ancillary effect on state budget).

Just as the Fourth Circuit abided by "the ancient maxim that an entity may not be made the subject of a remedial decree absent some finding of liability," *Bacon*, 475 F.3d at 638, the lower courts here were required to "vigilantly enforce federal law" against an intransigent, adjudicated wrongdoer – the State – to effectuate class members' rights. *See Horne*, 557 U.S. at 450. The Ninth Circuit's decision thus accords fully with *Bacon*.

CONCLUSION

For the foregoing reasons, this Court should deny the petition for a writ of certiorari.

Respectfully submitted,

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