

1 Paul Arons, State Bar # 84970
LAW OFFICE OF PAUL ARONS
2 685 Spring Street, #104
Friday Harbor, WA 98250
3 Tel: (360) 378-6496
4 Fax: (360) 378-6498
lopa@rockisland.com

5 Deepak Gupta, D.C. Bar # 495451
(*pro hac vice*)
6 PUBLIC CITIZEN LITIGATION GROUP
7 1600 20th Street, NW
Washington, DC 20009
8 Tel: (202) 588-1000
9 Fax: (202) 588-7795
dgupta@citizen.org

10 *additional counsel on signature page*
Attorneys for Plaintiffs

11
12 UNITED STATES DISTRICT COURT
13 FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

14 ELENA DEL CAMPO on behalf of herself 15 and all others similarly situated,	Civ. No. 01-21151 JW
<i>Plaintiffs,</i>	CLASS ACTION
17 v.	PLAINTIFFS' OPPOSITION TO MOTIONS TO DISMISS BASED ON ELEVENTH AMENDMENT OF AMERICAN CORRECTIVE COUNSELING SERVICES AND GEORGE KENNEDY
18 GEORGE KENNEDY, AMERICAN CORRECTIVE COUNSELING 19 SERVICES, INC., BRUCE RAYE, DONALD R. MEALING, LYNN R. 20 HASNEY and DOES 1 through 20.	Date: July 10, 2006 Time: 9:00 a.m. Courtroom 8
<i>Defendants.</i>	
22 AND CONSOLIDATED ACTION	Civ. No. 03-02691 JM

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

TABLE OF AUTHORITIES iii

INTRODUCTION 1

STATEMENT 1

 A. Statutory Framework 1

 B. The Contract..... 2

ARGUMENT 5

I. THE DISTRICT ATTORNEY ACTS AS A COUNTY POLICYMAKER WHEN HE PERFORMS ADMINISTRATIVE FUNCTIONS WITH RESPECT TO A LOCAL PROGRAM 5

 A. The Diversion Program Is A Local Program 7

 B. This Lawsuit Concerns Administrative Functions Performed In The Name Of The County 12

II. ACCS IS NOT ENTITLED TO STATE SOVEREIGN IMMUNITY 18

III. EVEN IF THE DEFENDANTS WERE ENTITLED TO STATE SOVEREIGN IMMUNITY, THEY WOULD NEVERTHELESS REMAIN IN THIS LAWSUIT 21

CONCLUSION..... 23

1 **TABLE OF AUTHORITIES**

2 **CASES**

3 *Beentjes v. Placer County Air Pollution Control District,*
4 397 F.3d 775 (9th Cir. 2005)21

5 *In re Byrd,*
6 256 B.R. 246 (Bankr. E.D.N.C. 2000).....7, 15

7 *Ceballos v. Garcetti,*
8 361 F.3d 1168 (9th Cir. 2004)5, 6, 12, 13, 14

9 *Davis v. Municipal Court,*
10 46 Cal. 3d 64 (Cal. 1988).....1, 8, 9, 10, 16, 21

11 *Green v. Baca,*
12 306 F. Supp. 2d 903 (C.D. Cal. 2004)14

13 *Moor v. County of Alameda,*
14 411 U.S. 693 (1973).....11

15 *Lake Country Estates, Inc. v. Tahoe Reg’l Planning Agency,*
16 440 U.S. 391 (1979).....11

17 *Laurie Q. v. Contra Costa County,*
18 304 F. Supp. 2d 1185 (N.D. Cal. 2004)7, 11, 12

19 *McMillian v. Monroe County,*
20 520 U.S. 781 (1997).....6, 8

21 *Mitchell v. Los Angeles Community College District,*
22 861 F.2d 198 (9th Cir. 1988)20

23 *Mt. Healthy City School District v. Doyle,*
24 429 U.S. 274 (1977).....5

25 *Pennhurst State Sch. and Hospital v. Halderman,*
26 465 U.S. 89 (1984).....7

People v. Padfield,
136 Cal. App. 3d 218 (1982)9

People v. Superior Court of Santa Clara County (Skoblov),
195 Cal. App. 3d 1209 (Cal. Ct. App. 1987)2, 3, 4, 5, 8, 11, 15

1	<i>Pitts v. County of Kern</i> ,	
	17 Cal. 4th 340 (Cal. 1998).....	12,13, 17
2		
3	<i>Regents of the University of Cal. v. Doe</i> ,	
	519 U.S. 425 (1997).....	21
4	<i>Richardson v. McKnight</i> ,	
5	521 U.S. 399 (1997).....	19, 20, 21
6	<i>Savage v. Glendale Union High Sch.</i> ,	
	343 F.3d 1036 (9th Cir. 2003)	21
7	<i>Shands Teaching Hosp. v. Beech Street Corp.</i> ,	
8	208 F.3d 1308 (11th Cir. 2000)	18, 19
9	<i>In re Baublitt</i> ,	
10	15 Fed. Appx. 30 (2d Cir. 2001).....	15
11	<i>In re Reisen</i> ,	
	2004 WL 764628, at 5 (N.D. Iowa 2004).....	15, 21
12	<i>In re Simonini</i> ,	
13	272 B.R. 604 (Bankr. W.D.N.C. 2002).....	15
14	<i>Streit v. County of Los Angeles</i> ,	
	236 F.3d 552 (9th Cir. 2001)	6, 7, 8, 14
15	<i>United States ex rel. Ali v. Daniel, Mann, Johnson & Mendenhall</i> ,	
16	355 F.3d 1140 (9th Cir. 2004)	19, 20, 21
17	<i>United States ex rel. Barron v. Deloitte & Touche, L.L.P.</i> ,	
18	381 F.3d 438 (5th Cir. 2004)	19, 20, 21
19	<i>Venegas v. County of Los Angeles</i> ,	
	32 Cal. 4th 820 (Cal. 2004).....	14, 17
20	<i>Weiner v. San Diego County</i> ,	
21	210 F.3d 1025 (9th Cir. 2000)	12
22	<i>Williams v. Vidmar</i> ,	
	367 F. Supp. 2d 1265 (N.D. Cal. 2005)	22
23	<i>Ex Parte Young</i> ,	
24	209 U.S. 123 (1908).....	22
25		
26		

STATUTES

1
2
3
4
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Cal. Gov't Code § 2530317

Cal. Penal. Code § 1001..... 1-2, 8

Cal. Penal Code § 1001.60.....2, 8, 11, 12, 17

Cal. Penal Code § 1001.65.....5

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2
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INTRODUCTION

Defendants George Kennedy (the District Attorney of Santa Clara County), and American Corrective Counseling Services, Inc. (ACCS), have separately moved for dismissal on the basis of the Eleventh Amendment. Both of their motions fall victim to a basic principle of sovereign immunity jurisprudence: States, not counties, are entitled to immunity under the Eleventh Amendment. Where, as here, a county official claims immunity on the basis that he or she is acting in the name of the state, the inquiry can sometimes be difficult, requiring a weighing of various indicia of state and local authority that may point in opposite directions. This case, however, is easy—everything points in the same direction. State law unambiguously delegates authority over whether and how to operate diversion programs to local government; the contract creating and defining the program confirms that it is manifestly a local program; and under both controlling federal precedent and state law, this suit challenges administrative functions performed in the name of the county rather than prosecutions performed in the name of the state.

STATEMENT

A. Statutory Framework

When it authorized pretrial diversion programs, California’s Legislature “did not intend to mandate a statewide misdemeanor diversion program or to require every locality to adopt such a program.” *Davis v. Municipal Court*, 46 Cal. 3d 64, 75 (Cal. 1988). Instead, in section 1001 of the Penal Code, “the Legislature made plain its intention to leave to local entities and officials both the decision whether to implement such a program and the authority to fashion a misdemeanor program to meet local needs and resources.” *Id.*

1 Under California Penal Code section 1001.60, *et seq.*, a county district attorney in
2 California may decide to create and implement a pretrial diversion program for fraudulent check
3 violations. The statute specifies that the district attorney may create such a program only
4 “[u]pon the adoption of a resolution by the board of supervisors.” *Id.* § 1001.60. The program
5 “may be conducted by the district attorney or by a private entity under contract with the district
6 attorney.” *Id.*

7 The effect of this language is to “leave to local option the decision whether or not to
8 establish diversion for misdemeanor defendants.” *People v. Superior Court of Santa Clara*
9 *County (Skoblov)*, 195 Cal. App. 3d 1209, 1213-14 (Cal. Ct. App. 1987). The statute “delegates
10 this authority to the county board of supervisors in so many words; there is no ambiguity. With
11 similar directness the statute requires the district attorney’s approval of a program.” *Id.*; *see id.* at
12 1218 (discussing “the extensive power of a state legislature to delegate power to local agencies”
13 and explaining that section 1001 “delegate[s] to the counties” decisions concerning pretrial
14 diversion). This lawsuit challenges the actions of District Attorney George Kennedy, as a
15 policymaker for the County of Santa Clara, in approving and implementing such a program.

17 **B. The Contract**

18 The serious illegalities identified in this lawsuit are all facilitated by the contract between
19 the Santa Clara County District Attorney’s Office and ACCS, which operates the challenged
20 program. The contract confirms that the program is purely a creature of local government.
21 ACCS and the Santa Clara District Attorney are the only parties to the contract. Neither the
22 State of California, nor any agency or department of the State of California, is a party. Contract

23 ¶ 1.¹

24
25 ¹ The contract is attached to the Declaration of Brett Stohlton, filed by ACCS in support
26 of its motion to dismiss.

1 ***The Contract is Enacted Pursuant to the District Attorney’s Administrative Authority.***

2 The contract states that the diversion program “shall be operated by ACCS under the
3 administrative authority of the District Attorney.” *Id.* at ¶ 2.

4 ***ACCS is Obligated to Indemnify the County of Santa Clara.*** The contract’s
5 indemnification provision makes clear that the program is under the authority of the County of
6 Santa Clara, not the State of California. The contract obligates ACCS to “defend, indemnify,
7 and hold the County harmless against and from any and all claims” arising out of the contract. *Id.*
8 at ¶ 17. The State of California is not mentioned.

9 ***The Contract’s Insurance Provisions Are Created for and Regulated by the County.***

10 The contract’s insurance provision states that ACCS must provide insurance to protect the
11 County, not the State, and must follow County, not State, insurance requirements. Although the
12 provision meticulously describes County supervision of every aspect of the insurance process—
13 from obligating ACCS to receive authorization from County officials to requiring ACCS to use
14 County forms—it never mentions the State of California, its procedures, or its officials. *Id.* at ¶
15 15.
16 15.

17 “Without limiting ACCS indemnification of Santa Clara County,” the contract requires
18 ACCS to meet “specified County insurance requirements.” *Id.* at ¶ 15.D.4.c. The contract
19 obligates ACCS to provide evidence of coverage “on the County’s own form, or form provided
20 by the County’s Insurance Manager.” *Id.* at ¶15.A. It prohibits ACCS from commencing work
21 until “such insurance has been approved by the County.” *Id.* It gives the County’s
22 Insurance/Risk Manager the power to approve the insurer, and it permits insurance to be changed
23 or cancelled only upon notice to the County. *Id.* at ¶¶ 15.B, 15.C.

1 The contract gives the County, not the State, the power to require ACCS to purchase
2 additional personal injury coverage and requires ACCS to “notify the County Project Manager
3 promptly of all losses or claims over \$25,000.” *Id.* at ¶ 15.D.2.d. It gives the County, not the
4 State, the power to waive certain coverage and the County, not the State, “the right to withhold
5 payments to ACCS in the event of material non-compliance.” *Id.* at ¶¶ 15.D.6, 15.D.8.d.
6 Although the contract specifically notes that “[i]nsurance afforded by this policy shall also apply
7 to the County of Santa Clara and member[s] of the Board of Supervisors of the County of Santa
8 Clara, and the officers, agents and employees of the County of Santa Clara,” it never once
9 suggests that the insurance will apply to a state agency or official. *Id.* at ¶ 15.D.4.a

10 ***ACCS Is Subject To Audit By The County Treasurer.*** The records, disclosure and
11 auditing provisions all make clear that ACCS’s operation of the program is under the authority of
12 the County, not the State. For instance, ACCS’s books are specifically made subject to
13 inspection or audit by the District Attorney or the County Treasurer-Controller. *Id.* ¶ 10.D. (The
14 provision permits these two County officials to assign some “other designated State or County
15 auditor,” but does not name any such officials; notably, this provision is the only one in the
16 contract that refers to a State official.) The contract also sets conditions—underpayment or
17 failure to maintain records—under which the “full cost of said audit, determined by the County
18 Treasurer-Controller or designated agent shall be borne by ACCS.” *Id.* “Otherwise, the County
19 shall bear the cost of said audit. Upon request of the County Treasurer-Controller, ACCS shall
20 promptly provide, at its own expense, all necessary data to enable the County to fully comply”
21 with any requests for information from the state or federal governments. *Id.*

22 ***The County Alone Has the Power to Terminate ACCS.*** The County, not the State, can
23 terminate the contract with ACCS. The contract gives a private corporation (ACCS) and a local
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1 policymaker (the District Attorney of Santa Clara County, acting pursuant to his “administrative
2 authority”) the power to terminate the agreement. *Id.* ¶ 11. It does not give the State of
3 California the power to terminate, or even modify, the contract in any way.

4 ***ACCS and the County Share the Revenues.*** The contract provides that the County, not
5 the State, will share the “administrative fee revenues” with ACCS. *Id.* at ¶ 4.D. “ACCS shall
6 receive 60% of and the District Attorney shall receive 40% of all administrative fee revenues.”
7 *Id.* ¶ 6.A.2. No provision in the contract or in the statutory provision to which the contract refers
8 (Cal. Penal Code § 1001.65) suggests that the State will receive any share of the revenue.

9 ARGUMENT

10 **I. THE DISTRICT ATTORNEY ACTS AS A COUNTY POLICEMAKER WHEN** 11 **HE PERFORMS ADMINISTRATIVE FUNCTIONS WITH RESPECT TO A** 12 **LOCAL PROGRAM.**

13 “Counties are not entitled to sovereign immunity.” *Ceballos v. Garcetti*, 361 F.3d 1168,
14 1182 (9th Cir. 2004), *rev’d on other grounds*, 126 S. Ct. 1951 (2006); *see Mt. Healthy City*
15 *School District v. Doyle*, 429 U.S. 274, 280 (1977) (describing “counties and similar municipal
16 corporations” as quintessential non-state entities that cannot claim Eleventh Amendment
17 protection). An official who is denominated a county official—like a district attorney in
18 California—is presumptively treated as a county official regardless of the particular function he
19 or she is performing. *Ceballos*, 361 F.3d at 1182 (“Ordinarily, an official designated as an
20 official of a county—as is the District Attorney of County of Los Angeles—is a county official
21 for all purposes.”).

22 That presumption, however, can be overcome. “Some officials . . . serve two masters.
23 Among them are California’s 58 district attorneys. While these officers are elected by and for
24 the counties, they prosecute cases on behalf of the state.” *Id.* In such circumstances, courts must
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1 follow the analytical framework supplied by *McMillian v. Monroe County*, 520 U.S. 781 (1997),
2 which looks to “state law to determine whether *particular acts the official is alleged to have*
3 *committed* fall within the range of his state or county functions.” *Ceballos*, 361 F.3d at 1182
4 (emphasis added). Two principles in particular guide this inquiry. *See Streit v. County of Los*
5 *Angeles*, 236 F.3d 552 (9th Cir. 2001). First, *McMillian* cautioned against employing a
6 “categorical, all or nothing” approach. 520 U.S. at 785. Rather, courts must inquire “whether
7 governmental officials are final policymakers for the local government in a *particular area or on*
8 *a particular issue.*” *Id.* (emphasis added). Second, the court’s “understanding of the actual
9 function of a governmental official, in a particular area, will necessarily be dependent on the
10 definition of the official’s functions under relevant state law.” *Id.* at 786 (emphasis added). The
11 question of whether the official is entitled to Eleventh Amendment immunity, however, is a
12 question of federal law. *Streit*, 236 F.3d at 560.

13
14 In this case, the “particular acts the official is alleged to have committed,” *Ceballos*, 361
15 F.3d at 1182, are entering into a contract with a private independent contractor to operate a local
16 pretrial bad check diversion program; permitting the contractor to operate the program with
17 virtually no supervision in a manner that deviates from constitutional norms, federal law, and the
18 very statute that authorizes the program in the first place; and splitting the profits with the private
19 contractor. *See* Complaint ¶¶ 26, 30, 77, 82-88. As explained below, (1) the relevant California
20 statute, its legislative history, the case law interpreting the statute, and the contract out of which
21 the allegations in this lawsuit arise, all indicate that the challenged program is a local, not a state,
22 program; and (2) the District Attorney, in connection with that local program, performs an
23 administrative function as a local policymaker, not prosecution in the name of the State of
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1 California. Accordingly, defendant Kennedy must be treated as a county policymaker and not as
2 a state employee for purposes of this suit.

3 **A. The Diversion Program Is A Local Program.**

4 Where, as here, a lawsuit involves a systemic constitutional challenge to a particular
5 program, the courts have repeatedly emphasized the importance of determining whether the
6 official sued is implementing a state or a local program. Where the challenged program is purely
7 local, there can be no Eleventh Amendment immunity. *See Streit*, 236 F.3d at 565 (“examining
8 the precise function at issue in conjunction with the state constitution, codes, and case law” to
9 conclude that a California Sheriff’s Department acted “as the final policymaker for the county
10 when administering the County’s release policy”); *Laurie Q. v. Contra Costa County*, 304 F.
11 Supp. 2d 1185, 1200-01 (N.D. Cal. 2004) (Patel, J.) (holding that that Contra Costa County’s
12 foster care program, although mandated by California law, was a local program for purposes of
13 the Eleventh Amendment). At least one federal court, faced with a claim of Eleventh
14 Amendment immunity made by a County District Attorney’s Office arising out of the operation
15 of its “Bad Check Diversion Unit,” has held that the case did not “qualify as a suit against one of
16 the United States.” *In re Byrd*, 256 B.R. 246, 250, 256 (Bankr. E.D.N.C. 2000). By contrast, in
17 cases in which courts have concluded that local programs are really creatures of the state, those
18 programs have had heavy state involvement, oversight, and funding. *See Pennhurst State Sch.*
19 *and Hosp. v. Halderman*, 465 U.S. 89, 123 (1984) (affording Eleventh Amendment immunity to
20 state and county officials where relief “substantially concern[ed]” an arm of the State, the State
21 funded the program almost entirely, and State cooperation was essential to the program). Here,
22 an examination “of the precise function at issue in conjunction with the state constitution, codes,
23 and case law,” *Streit*, 236 F.3d at 566, demonstrates that the challenged program is purely local.
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1 1. Diversion programs in California, including the program challenged in this lawsuit,
2 are authorized by section 1001 of the Penal Code. Section 1001.60, which was adopted in 1985,
3 permits a district attorney to create and implement a pretrial diversion program for fraudulent
4 check writers only “[u]pon the adoption of a resolution by the [county] board of supervisors” and
5 permits the program to be run either “by the district attorney or by a private entity under contract
6 with the district attorney.” Cal. Penal Code § 1001.60. The California courts have consistently
7 recognized that the Legislature’s intent in Section 1001 was “to leave to local option the decision
8 whether or not to establish diversion.” *People v. Superior Court of Santa Clara County*
9 (*Skoblov*), 195 Cal. App. 3d 1209, 1213-14 (Cal. Ct. App. 1987) (The statute “delegates this
10 authority to the county board of supervisors in so many words; there is no ambiguity.”); *see also*
11 *McMillian*, 520 U.S. at 791 (emphasizing the authority of the county board of supervisors or
12 commissioners *vis-a-vis* the state in determining whether an official is performing a state or
13 county function).²

14
15 The seminal case concerning California diversion programs, *Davis v. Municipal Court*,
16 46 Cal. 3d 64 (Cal. 1988), involved a constitutional challenge on state separation-of-powers
17 grounds to “one of the central features of these misdemeanor diversion statutes—a provision
18 granting a local district attorney the authority to approve or disapprove a local diversion
19 program,” as well as to a “particular local rule” of a diversion program adopted in San Francisco.
20 *Id.* at 69-70. Although the defendants cite *Davis* (Defs.’ Br. 16; ACCS Br. 6), they

21
22 ² The legislative history confirms that the final version of the bill was intended to
23 authorize diversion only “on a county option” basis. *See* Cal. Sen. Rules Comm. Rep. on S.B.
24 1101. Acknowledging that the program would neither be uniformly adopted nor uniform even in
25 those counties that chose to adopt it, the Assembly committee report questioned how a
26 “subsequent and different county” would “know if a person had been previously diverted.”
Assembly Comm. on Pub. Safety Rep. on S.B. 1108. (All legislative history cited in this brief is
attached as Exhibit A to the defendants’ request for judicial notice in support of their motion to
dismiss based on abstention, filed on March 3, 2006).

1 conspicuously fail to confront the decision’s most salient feature: its emphasis on localism.
2 *Davis* begins by explaining that the first iteration of the diversion statute, passed in 1977, was
3 designed to endorse “experimental local diversion programs” that had been operated by “local
4 police departments and district attorneys in California” without statutory authorization. *Id.* That
5 legislation “did not establish a general, state-mandated diversion program, but rather expressly
6 declared that the Legislature did not intend to preempt the pretrial diversion field”; it “neither
7 compelled a local jurisdiction to establish a diversion program nor limited a local entity’s
8 discretion in designing or implementing the eligibility requirements of such a program.” *Id.*

9 *Davis* recounts that, in 1982, California adopted “two separate but related pretrial
10 diversion statutes,” both of which, like section 1001.60, “condition[ed] the implementation of . . .
11 a diversion program on the district attorney’s approval.” *Id.* at 75. Again, the Legislature
12 “clearly did not intend to mandate a statewide misdemeanor diversion program or to require
13 every locality to adopt such a program,” but instead “made plain its intention to leave to local
14 entities and officials both the decision whether to implement such a program and the authority to
15 fashion a misdemeanor diversion program to meet local needs and resources.” *Id.*; *see also*
16 *People v. Padfield*, 136 Cal. App. 3d 218, 230-31 (1982). Rejecting the separation of powers
17 challenge, *Davis* explains that the “district attorney’s approval or disapproval of a diversion
18 program can accurately be described as a ‘quasi-legislative’ policy decision” falls squarely
19 within the district attorney’s executive powers. *Davis*, 46 Cal. 3d at 78 (concluding that in
20 conditioning diversion on “the district attorney’s approval of a local diversion program, the
21 Legislature simply chose to retain the district attorney’s executive control over the establishment
22 and design of such programs”). The upshot of *Davis*, then, is that diversion programs are local
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1 programs and that district attorneys’ role in creating and implementing them is within the scope
2 of their executive authority as local officials.

3 2. The defendants’ briefs gloss over the critical distinction between state versus local
4 authority, incorrectly asserting that the challenged program operates at the “behest” of the State
5 of California. *See, e.g.*, ACCS Br. 8 (“California controls ACCS by requiring ACCS to work
6 under contract with district attorneys.”); *id.* (“ACCS is an administrator acting at the behest of
7 the State of California.”). These unsupported statements are wrong on at least three counts.
8 First, as discussed above, California has delegated to the counties the choice of *whether* to
9 implement diversion to the counties. *Davis*, 46 Cal. 3d at 75. Second, California has left to the
10 counties, within certain parameters set by state law, the choice of *how* to operate diversion
11 programs. *Id.* Third, defendants’ arguments are belied by the overwhelming confirmation in the
12 contract itself—including ACCS’s indemnification of the County (§ 17) and the County’s
13 extensive insurance requirements (§15) and auditing procedures (§ 10)—that the challenged
14 program is within the County’s, not the State’s, authority. Indeed, the contract makes over *forty-*
15 *five* independent references to the County and only *two* independent references to the State, *see*
16 Contract § 5.B.3 (“bad check offenders according to State law”); § 6.B (“ACCS shall process and
17 distribute such payments through a federally-insured financial institution with branch locations
18 located in the State of California”).

19
20 Nor can defendants transform the challenged program into a state program through vague
21 references to the State of California’s “interests” and “policy.” *See* Def’s Br. 16 (“The California
22 Legislature believed bad-check diversion would advance important state interests”); ACCS Br. 8
23 (“The diversion programs are a manifestation of California’s criminal law enforcement policy.”).
24 Every state law, of course, is a manifestation of some policy. But, to reiterate, California’s
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1 policy concerning diversion is a “county option” policy, under which “California has chosen to
2 delegate” a slice of state power “to the several counties.” *Laurie Q.*, 304 F. Supp. 2d at 1200; *see*
3 *Skoblov*, 195 Cal. App. 3d 1209, 1213-14. But the Supreme Court “has consistently refused to
4 construe the [Eleventh] Amendment to afford protection to political subdivisions such as
5 counties and municipalities, even though such entities have a slice of state power.” *Lake Country*
6 *Estates, Inc. v. Tahoe Reg’l Planning Agency*, 440 U.S. 391, 401 (1979). The fact that a local
7 program is inevitably subject to state law in no way transforms it into a state program. As a
8 recent decision from this Court explains, to qualify for Eleventh Amendment immunity, “[a]
9 local official (or body) must do more than operate under the auspices of a structure of mandatory
10 state rules and imperatives.” *See Laurie Q.*, 304 F. Supp. 2d 1185. “A contrary rule would carve
11 out an enormous exception from the heart of section 1983 jurisprudence, effectively immunizing
12 all local law enforcement officers from suit in their official capacities. Indeed, defendant’s
13 position knows no logical bounds. California counties—like the counties of nearly all states—
14 are creatures of state law, created by the state Constitution and endowed with only the powers
15 granted to them under state law.” *Id.*; *see Moor v. County of Alameda*, 411 U.S. 693, 719 (1973)
16 (undertaking a “detailed examination of California law” and concluding that California counties
17 are not arms of the state; they are independent bodies, not “mere agent[s] of the State of
18 California”).

19
20 Defendants’ attempt to hide behind state “policy” is particularly astonishing because
21 many of the allegations of this lawsuit involve defendants’ *subversion* of state law—from the
22 lack of the required probable cause determination, Cal. Penal Code § 1001.60, to collection fees
23 that are well in excess of the limits set by state law, *id.* §§ 1001.64, 1001.64(b). “The state did
24 not formulate the ‘policy’ that led to the unlawful activity. Just as *respondeat superior* liability
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1 does not lie against the County for acts of individual non-policymaking officers, it does not lie
2 against the state for the actions of disobedient counties.” *Laurie Q.*, 304 F. Supp. 2d at 1201.

3 **B. This Lawsuit Concerns Administrative Functions Performed**
4 **In The Name Of The County.**

5 Despite the overwhelmingly local nature of the challenged program, defendants argue,
6 with little analysis, that the District Attorney is entitled to state sovereign immunity because the
7 actions challenged here amount to “prosecutorial conduct” in the name of the State of California.
8 Defs.’ Br. 16; ACCS Br. 5. In a broad sense, of course, virtually anything a district attorney does
9 could be deemed prosecutorial. Defendants, however, do not discuss the most recent precedent
10 concerning whether actions by California district attorneys are deemed prosecutorial conduct for
11 Eleventh Amendment purposes. That precedent, *Ceballos*, 361 F.3d 1168, is controlling here.

12 1. *Ceballos* teaches that, although district attorneys “prosecute cases on behalf of the
13 state,” they are in all other respects county officials, 361 F.3d at 1182. A district attorney “is at
14 once the law officer of the county and the public prosecutor. While in the former capacity he
15 represents the county and is largely subordinate to, and under the control of, the [county] board
16 of supervisors, he is not so in the latter. In the prosecution of criminal cases he acts by the
17 authority and in the name of the people of the state.” *Pitts v. County of Kern*, 17 Cal. 4th 340,
18 359 (Cal. 1998) (claim that a district attorney had committed prosecutorial misconduct in
19 connection with sex offense charges that were filed in court, but ultimately dismissed, was a
20 claim against the state) (internal citation omitted); see *Weiner v. San Diego County*, 210 F.3d
21 1025 (9th Cir. 2000) (claim that a district attorney had wrongfully prosecuted the plaintiff for
22 murder and hid blood evidence from the plaintiff’s defense team was a claim against the state).

23 The question “whether the District Attorney acted on behalf of the county or the state
24 thus turns on whether” the actions alleged “are part of the District Attorney’s prosecutorial
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1 functions or whether he was performing *administrative or other non-prosecutorial duties*.”
2 *Ceballos*, 361 F.3d at 1183 (emphasis added). Because the “California courts have not defined
3 the precise characteristics that distinguish a district attorney’s prosecutorial function from his
4 other functions,” *Ceballos* holds that it is appropriate to look to cases addressing whether a
5 prosecutor was acting in his prosecutorial capacity as opposed to an administrative capacity for
6 purposes of absolute prosecutorial immunity. *Id.* at 1183; *see also Pitts*, 18 Cal. 4th at 363
7 (suggesting that a district attorney acts as a county policymaker when performing an
8 administrative, rather than a prosecutorial, function).

9 Under this approach, a prosecutor is entitled to immunity “when he or she engages in
10 activities ‘intimately associated with the *judicial phase* of the criminal process,’” but not for
11 “administrative functions.” *Ceballos*, 361 F.3d at 1183 (internal citation omitted). “While the
12 line between the functions is not entirely clear, it is clear that absolute prosecutorial immunity [is
13 justified] only for actions that are connected with the *prosecutor’s role in judicial proceedings*,
14 not for every litigation-inducing conduct.” *Id.* at 1184 (citations omitted) (emphasis added).
15 “Actions that do not directly relate to the judicial process do not give rise to absolute immunity,
16 even if they occur after a prosecution is initiated.” *Id.*

17 The facts in *Ceballos* presented a closer question of Eleventh Amendment immunity than
18 does this case. Richard Ceballos, a Deputy District Attorney in Los Angeles, alleged that he was
19 retaliated against for raising concerns about a search warrant in a case then being prosecuted by
20 the District Attorney’s Office. Ceballos alleged that the District Attorney took several retaliatory
21 actions against him, including demoting him from his position as calendar deputy, forcing him to
22 choose between reassignment to a remote location or reassignment to filing misdemeanors,
23 removing him from prosecuting the only murder case he was handling at the time, precluding
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1 him from handling future murder cases, and denying him a promotion. The Ninth Circuit held
2 that “[a]mong these alleged acts of retaliation, only the removal of Ceballos from the particular
3 murder case he was handling fell within the District Attorney’s prosecutorial function, because it
4 alone is ‘intimately associated with the judicial phase of the criminal process.’” *Id.* at 1028. The
5 other actions, however, were not “part of a prosecution” and instead fell “squarely within the
6 District Attorney’s administrative function.” *Id.* Thus, the “the District Attorney’s Office and its
7 then-head, Garcetti, were carrying out their county functions” and were “not entitled to Eleventh
8 Amendment immunity.” *Id.*³

9 This is a far easier case than *Ceballos*. Here, the District Attorney is not even arguably
10 being sued for any conduct relating to his role in the “judicial phase of the criminal process.” *Id.*
11 Instead, the case concerns the District Attorney’s decision, under the administrative authority of
12 Santa Clara County, to hire an independent contractor to operate a local diversion program and
13 permit the contractor to perform in a particular manner—acts that fit “squarely within the District
14 Attorney’s administrative function,” *id.*, and that have been expressly delegated to the counties
15 by the Legislature. *Skoblov*, 195 Cal. App. 3d at 1218. Indeed, this is not even a case in which a
16 prosecuting attorney is being sued for investigating, preparing to prosecute, or exercising the
17 prosecutorial function of deciding whether or not to prosecute a particular individual once
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20 ³ *Venegas v. County of Los Angeles*, 32 Cal. 4th 820, 832 (Cal. 2004), which concerned
21 sheriffs rather than district attorneys, does not compel a different result in this case. In holding
22 that sheriffs are state officers when they are performing investigatory functions, *Venegas*
23 emphasized the importance of weighing three of the *McMillian* factors—the role of sheriffs
24 under state law, their enforcement authority, and the lack of similar authority by counties—all of
25 which indicate that District Attorney Kennedy is a county actor. To the extent that *Venegas*
26 indicates a tension between the Ninth Circuit and the California Supreme Court, that tension
concerns the investigatory functions of sheriffs and is thus not implicated here. In any event,
Ceballos is the precedent binding on this Court. *See Streit*, 236 F.3d at 560 (clarifying that
“federal law provides the rule of decision”); *Green v. Baca*, 306 F.Supp.2d 903, 907 n.31 (C.D.
Cal. 2004) (same).

1 probable cause has been found. When District Attorney Kennedy gave “blanket authorization to
2 ACCS to conduct the Bad Check Restitution program in [his] name, without providing any
3 meaningful supervision of, or control over, ACCS’s actions,” (Complaint ¶ 16), he was not
4 prosecuting. When the district attorney allowed ACCS to send out form letters in his name
5 “without specifically knowing what the letters say, or when and how they are used,” he was not
6 prosecuting. *Id.* When the district attorney decided, as a policy matter, to refer all payee
7 inquiries to ACCS, he was not prosecuting. *Id.*⁴

8 Long before this litigation began, moreover, both the District Attorney and ACCS
9 recognized that the challenged program fell within the District Attorney’s administrative
10 authority as a county policymaker. The contract states that “the Bad Check Restitution Program
11 shall be operated by ACCS under the *administrative authority* of the District Attorney.”
12 Contract ¶ 2 (emphasis added). Along the same lines, ACCS’s brief concedes that it acts in an
13 “*administrative role* with respect to the daily management and administration of the diversion
14 program.” ACCS Br. at 8 (emphasis added).

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16 Ironically, the only authority that defendants cite for the proposition that the actions at
17 issue here are “prosecutorial conduct” is an isolated passage in *Davis*, 46 Cal. 3d at 77,

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19 ⁴ Indeed, several federal courts—confronted with the question whether District Attorney
20 Bad Check Diversion Programs constitute prosecution—have concluded that such programs are
21 really debt collection, not prosecution. See *In re Baumblit*, 15 Fed. Appx. 30 (2d Cir. 2001)
22 (District Attorney’s Bad Check Unit did not constitute criminal prosecution; it “administers a
23 program that attempts to collect payment of bad checks through the threat of prosecution. A
24 different unit of the District Attorney’s Office must make a decision whether to prosecute and a
25 separate criminal complaint must be drafted by the prosecutor if a decision is made to prosecute .
26 . . . The mere fact that the BCU is a collection program associated with a local district attorneys’
office does not make its actions a criminal proceeding.”); *In re Simonini*, 272 B.R. 604, 614-18
(Bankr. W.D.N.C. 2002) (“The [Bad Check Diversion Unit’s] prosecution is debt collection in
sheep’s clothing.”); *In re Reisen*, 2004 WL 764628, at * 5 (N.D. Iowa 2004) (ACCS-run
diversion program “is not an instrumentality of the Dubuque County Attorney,” but “a collection
agency” that “exists to facilitate the payment of bad checks” and “operates under typical debt
collection rules.”); *In re Byrd*, 256 B.R. 246 (Bankr. E.D.N.C. 2000) (same).

1 describing diversion as “a subset of the prosecutor’s broad charging discretion.” One need only
2 read *Davis* to see that this passage has no bearing on which side of the
3 administrative/prosecutorial line the challenged program falls for Eleventh Amendment
4 purposes. Read in context, the passage is part of a discussion of diversion as falling within a
5 district attorney’s “quasi-legislative authority,” which the court described as an appropriate
6 component of the “inherent executive authority” of the office. 46 Cal. 3d at 77-78. That
7 language, standing alone, does nothing to address whether this “quasi-legislative authority” is
8 exercised on behalf of a county or the state.⁵

9 The rest of the opinion, however, *does* help to answer that question. As explained above,
10 *Davis* holds that the Legislature decided to “leave to *local entities and officials* both the decision
11 whether to implement such a program and the authority to fashion [it] to meet local needs and
12 resources.” *Id.* at 75 (emphasis added). Defendants’ reading is thus wholly at odds with the
13 holding and reasoning of *Davis*.

14 **2.** In any event, the administration of the diversion program cannot, as a matter of law,
15 be part of a district attorney’s prosecutorial authority in the name of the State. If it were, the
16 board of supervisors’ authority over the program would violate California’s Government Code.
17 As discussed above, authority over local diversion programs is unmistakably delegated to the

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20 ⁵ Even assuming that this language defines the “prosecutorial function” in a way that
21 clarifies the line between state and local authority (a dubious proposition, given that *Davis*
22 precedes *McMillian* and does not involve immunity), discretion of the type discussed in *Davis* is
23 utterly lacking here. The passage refers to the decision whether to prosecute “an individual when
24 there is probable cause to believe he has committed a crime,” *id.* at 77, and *Davis* involved a
25 specific person for whom the district attorney had found probable cause and did in fact charge.
26 *Id.* at 69. But, as the legislative history acknowledges, the bad check programs—unlike the
program in *Davis*—are “precomplaint program[s],” meaning that “the district attorney’s decision
to refer a bad check writer to the program occurs prior to any criminal charges being filed.”
Assembly Comm. Rep. at 2. And the ACCS/Santa Clara program is one further step removed
because when a collection letter is sent out, there is *no* determination of probable cause at all:
Returned checks go straight from merchants to ACCS, without ever crossing a prosecutor’s desk.

1 county board of supervisors. *See* Cal. Penal Code § 1001.60. But California has long recognized
2 that county boards of supervisors may not exercise authority over county district attorneys’
3 prosecutorial function. The Code specifically provides that boards of supervisors may not
4 “affect the independent and constitutionally and statutorily designated investigative and
5 prosecutorial functions of the sheriff and district attorney of a county.” Cal. Gov’t Code § 25303;
6 *see Venegas*, 32 Cal. 4th at 832 (county board of supervisors “cannot affect the district attorney’s
7 independent investigative and prosecutorial functions”). The statute authorizing the diversion
8 program recognizes this point, providing that “this chapter does not limit the power of the district
9 attorney to prosecute bad check complaints,” Cal. Penal Code § 1001.61, thus drawing a clear
10 distinction between the initiation of a diversion program—which, under the statute, is subject to
11 the board of supervisors’ approval—and the initiation of criminal prosecutions of fraudulent
12 check-writing, which are not.

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14 **3.** A final, crucial, distinction between prosecution and the challenged diversion program
15 is that the latter is operated in the name of the County, while the former is brought in the name of
16 the State. In *Pitts*, the California Supreme Court relied on the fact that criminal prosecutions are
17 brought in the name of the State of California to conclude that the District Attorney was acting as
18 a state official when he prosecuted. 17 Cal. 4th at 359 (“[W]hen prosecuting criminal violations
19 of state law, a district attorney acts in the name of the people of the state. In criminal
20 prosecutions, [t]he style of all process shall be ‘The People of the State of California,’ and all
21 prosecutions shall be conducted in their name and by their authority.”). Unlike prosecutions,
22 the District Attorney’s collection program operates in the name of the County. The District
23 Attorney’s name and “Santa Clara County” appear throughout the collection notices. These
24 notices do no appear ever to have been sent in the name of the State, nor would there be statutory
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1 authority for doing so. District Attorney Kennedy is therefore a local official for purposes of this
2 suit and is not entitled to state sovereign immunity.

3 **II. ACCS IS NOT ENTITLED TO ELEVENTH AMENDMENT IMMUNITY.**

4 ACCS’s request that it be shielded with state sovereign immunity is largely predicated on
5 the same arguments made by the District Attorney. *See* ACCS Br. 5-6. Because the District
6 Attorney does not enjoy state sovereign immunity for his administrative decisions with respect to
7 a local program, ACCS is not vicariously entitled to immunity.

8 **1. ACCS also argues that it is immune “independent of the District Attorney,”** (ACCS Br.
9 7), relying exclusively on the Eleventh Circuit’s decision in *Shands Teaching Hosp. v. Beech*
10 *Street Corp.*, 208 F.3d 1308 (11th Cir. 2000). *Shands* extended state sovereign immunity to two
11 private corporations—a private administrator of a state employee health insurance program and
12 its subcontractor—sued by a hospital alleging that it had not been paid for medical services it
13 provided. Although the court “found no case directly on point that has accorded Eleventh
14 Amendment immunity to a private corporation,” *id.* at 1311, it nevertheless found immunity
15 based on the fact that, unlike here, the contract between the hospital and the State, under which
16 the hospital agreed to provide care for state employees, “expressly provides that the penalty for
17 the failure to reimburse claims within thirty days is payment of the full amount of the claims.
18 Such payment for medical services rendered is an *obligation of the state.*” *Id.* at 1313 (emphasis
19 added). Thus, the state would have been legally liable for any judgment rendered under the plain
20 terms of the contract. *Id.*

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22 *Shands* is the *only* decision by any circuit to confer state sovereign immunity on a private
23 corporation. Yet ACCS’s motion asks this Court to go even further than *Shands* and extend
24 immunity to a private corporation operating a *county* program under a contract that does *not*
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1 specifically make any money judgment against it “an obligation of the state,” *Shands*, 208 F.3d
2 at 1313—or even an obligation of the county, for that matter. *See United States ex rel. Barron v.*
3 *Deloitte & Touche, L.L.P.*, 381 F.3d 438 (5th Cir. 2004) (expressly distinguishing *Shands*).

4 2. ACCS does not mention that the Ninth Circuit takes a markedly different, and more
5 skeptical, approach to private corporations seeking to cloak themselves in state sovereign
6 immunity. *See United States ex rel. Ali v. Daniel, Mann, Johnson & Mendenhall*, 355 F.3d 1140,
7 1146-48 (9th Cir. 2004) (“*DMJM*”). In *DMJM*, an architecture firm contracting with a
8 California state university argued that sovereign immunity should be extended to corporations
9 under a government-contractor-defense theory. The Ninth Circuit flatly “decline[d] the
10 invitation to expand state sovereign immunity dramatically by extending it to corporate actors.”
11 *Id.* at 1147.

12 As support for this statement, *DMJM* relied on the Supreme Court’s decision in
13 *Richardson v. McKnight*, 521 U.S. 399 (1997), which declined to extend qualified immunity to
14 guards employed by a private corporation managing a prison. *Richardson* “answered the
15 immunity question . . . in the context,” as here, “in which a private firm, systematically
16 organized to assume a major lengthy administrative task (managing an institution) with limited
17 direct supervision by the government, undertakes that task for profit and potentially in
18 competition with other firms.” *Id.* at 413. Notably, *Richardson* rejected a purely functional
19 approach to immunity questions involving private corporations, explaining that the Court “never
20 has held that the mere performance of a governmental function could make the difference”
21 between liability and immunity, “especially for a private person who performs a job without
22 government supervision or direction.” *Id.* at 408-09. Instead, the Court stressed “certain
23 important differences that, from an immunity perspective, are critical,” including the “ordinary
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1 marketplace pressures” that are present when a “firm is systematically organized to perform a
2 major administrative task for profit.” *Id.* at 409. Given these “marketplace pressures,” the Court
3 concluded that the “employees before us resemble those of other private firms and differ from
4 government employees.” *Id.* at 410. More recently, in distinguishing *Shands* and denying
5 Eleventh Amendment immunity to a private corporation, the Fifth Circuit cited both *DMJM* and
6 *Richardson*, explaining that “performance of state functions alone is insufficient to create
7 immunity. Indeed, the Supreme Court has demonstrated its willingness to allow disparate
8 treatment for state and private employees performing the same functions.” *Barron*, 381 F.3d at
9 443 n.7.

10 In relying on Eleventh Circuit case law, ACCS also neglects to mention that the Ninth
11 Circuit has its own, separate, test for determining whether an entity is an arm of the state for
12 purposes of sovereign immunity. *See Mitchell v. Los Angeles Cmty. Coll. Dist.*, 861 F.2d 198,
13 201 (9th Cir. 1988). That test examines five factors: (1) whether a money judgment would be
14 satisfied out of state funds; (2) whether the entity performs central governmental functions; (3)
15 whether the entity may sue or be sued; (4) whether the entity has the power to take property in its
16 own name or only in the name of the state; and (5) the corporate status of the entity. *Id.*

17 Under the *Mitchell* test, “whether a money judgment would be satisfied out of state funds
18 is the most important factor for sovereign immunity.” *DMJM*, 355 F.3d at 1147. Here, as in
19 *DMJM*, “[t]here is no evidence suggesting that” the State of California—which is not even a
20 party to the contract—“would have a legal obligation to pay any judgment against” ACCS. *Id.* at
21 1147-48; *Barron*, 381 F.3d at 444. Not only would a money judgment against ACCS *not* be
22 “satisfied out of state funds,” but ACCS has *specifically agreed to pay any judgment* against the
23 County. *See Richardson*, 521 U.S. at 411 (noting that presence of “comprehensive insurance
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1 coverage requirements” and “indemnification” counsel against extending immunity to private
2 contractors). ACCS rightly does not contend that the State of California would have a legal
3 obligation to pay any judgment, but it speculates that a judgment “would affect California
4 financially, or at a minimum it would interfere with the administration of [the] diversion
5 programs.” ACCS Br. 9. Such speculation provides no basis for immunity. The Supreme Court
6 has made clear that the focus is on whether a state will be *obligated* to a judgment obtained
7 against an entity. In *Regents of the Univ. of Cal. v. Doe*, 519 U.S. 425, 431 (1997), the Court
8 firmly rejected focusing on the potential economic or practical impact of denying an entity
9 immunity and instead looked to whether the state would be *legally liable* for a judgment obtained
10 against the entity. Accordingly, ACCS is not entitled to Eleventh Amendment immunity merely
11 because the State could decide to fund the challenged program in the future “in the event that a
12 money judgment threatens the [program’s] survival.” *Beentjes v. Placer County Air Pollution*
13 *Control Dist.*, 397 F.3d 775, 780 (9th Cir. 2005).

15 Next, the Ninth Circuit looks to whether the entity performs central government
16 functions, “assess[ing] the extent to which *the state* exercises centralized governmental control
17 over the entity.” *Savage v. Glendale Union High Sch.*, 343 F.3d 1036, 1044 (9th Cir. 2003)
18 (emphasis added). This factor, too, weighs against immunity because California leaves all
19 authority over the program “to local entities and officials,” *Davis*, 46 Cal.3d at 77, and because
20 ACCS’s “function is more similar to private debt collection than a typical government function.”
21 *In re Reisen*, 2004 WL 764628, at *5 (discussing ACCS). With respect to the remaining factors,
22 ACCS, as in *DMJM*, “is a private corporation, it may sue or may be sued, and it has the power to
23 take property in its own name.” 355 F.3d at 1148. These factors all weigh against immunity.

1 Because none of the *Mitchell* factors are satisfied, ACCS is not entitled to Eleventh Amendment
2 immunity.

3 **III. EVEN IF THE DEFENDANTS WERE ENTITLED TO STATE SOVEREIGN**
4 **IMMUNITY, THEY WOULD NEVERTHELESS REMAIN IN THIS LAWSUIT.**

5 Finally, both the District Attorney’s and ACCS’s motions make an elementary error in
6 asserting that a finding of state sovereign immunity would result in their complete dismissal from
7 this lawsuit. *See* Defs’ Br. at 16; ACCS Br. at 10. They ignore the fact that plaintiffs seek
8 prospective injunctive relief against both defendants—relief they would be unquestionably
9 permitted to seek even if the defendants were deemed shielded by state sovereign immunity. *See*
10 *Ex Parte Young*, 209 U.S. 123, 162 (1908); *Williams v. Vidmar*, 367 F. Supp. 2d 1265, 1277
11 (N.D. Cal. 2005). Thus, both ACCS and the District Attorney will remain in this lawsuit either
12 way.

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CONCLUSION

Both the District Attorney’s and ACCS’s motions to dismiss based on Eleventh Amendment immunity should be denied.

Respectfully submitted,

/s/

Deepak Gupta
Counsel for Plaintiffs

Additional Plaintiffs’ Counsel:
Ronald Wilcox, State Bar #176601
2160 The Alameda, 1st Floor, Suite F
San Jose, CA 95126
(408) 296-0400

O. Randolph Bragg, IL Bar # 066221983
Horwitz, Horwitz & Associates
25 East Washington, Suite 900
Chicago, IL 60602
(312) 372-8822

Of Counsel:
Brian Wolfman
Public Citizen Litigation Group
1600 20th Street, NW
Washington, DC 20009
(202) 588-1000⁶

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