No. 19-127

In The
Supreme Court of the United States

ANMARIE CALGARO,

Petitioner,

v.

ST. LOUIS COUNTY, *et al.,*

Respondents.

On Petition For A Writ Of Certiorari To The United States Court of Appeals For The Eighth Circuit

BRIEF FOR RESPONDENT FAIRVIEW HEALTH SERVICES IN OPPOSITION

PAUL C. PETERSON
Counsel of Record
WILLIAM L. DAVIDSON
JOÃO C.J.G. DE MEDEIROS
LIND JENSEN SULLIVAN & PETERSON, P.A.
901 Marquette Ave. S.
Suite 1300
Minneapolis, MN 55402
(612) 333-3637
paul.peterson@lindjensen.com

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

QUESTION PRESENTED

Whether the United States Court of Appeals for the Eighth Circuit correctly held that a medical provider who honors a minor's effective medical consent under state law is not subject to a 42 U.S.C. § 1983 claim as a state actor. Pet. App. 6.

RULE 29.6 STATEMENT

Fairview Health Services, a Minnesota nonprofit corporation, has no parent corporation and no publicly-held corporation owns 10% or more of its stock.

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The opinion of the United States Court of Appeals for the Eighth Circuit (Pet. App. 1–9) is reported at 919 F.3d 1054. The memorandum and order of the United States District Court for the District of Minnesota (Pet. App. 10–26) is unreported, but is available at 2017 WL 2269500.

JURISDICTION

The judgment of the United States Court of Appeals for the Eighth Circuit was filed on March 25, 2019. On June 21, 2019, Justice Gorsuch granted Petitioner's application for an extension of time within which to file a petition for writ of certiorari to and including July 24, 2019. The petition for writ of certiorari was filed on July 24, 2019. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT

Anmarie Calgaro is the mother of E.J.K.. Although E.J.K. is now an adult, she was a 17-year-old minor, albeit one who was living independently and supporting herself, when Calgaro commenced the action that is the subject of this petition. Fairview Health Services ("Fairview") is a private, nonprofit healthcare provider whom Calgaro alleges provided services to E.J.K.[1]

[1] Fairview declines to confirm whether it provided healthcare services to E.J.K. for medical privacy reasons. Nevertheless, the allegation that Fairview treated E.J.K. was not contested in the lower courts because the case was disposed of via Fed. R. Civ. P. 12.

Calgaro claims that providing healthcare services to E.J.K. without prior parental consent violated the Fourteenth Amendment's Due Process Clause. Calgaro's allegation that Fairview provided healthcare services to E.J.K. does not raise a constitutional claim because Fairview is a private, nonprofit corporation.

Specifically, Calgaro asserted a claim under 42 U.S.C. § 1983. As this Court recently reiterated in *Manhattan Cmty. Access Corp. v. Halleck*, 139 S. Ct. 1921, 1928–29 (2019), Section 1983 does not apply to the conduct of a nongovernmental defendant unless the defendant can be considered a "state actor" under the state-action doctrine. The lower courts disposed of the claim against Fairview because Calgaro's allegations could not establish it was a state actor.

Calgaro's petition does not even attempt to address whether Fairview is a state actor, skipping ahead to her constitutional argument. Because Calgaro does not seek review of the threshold question that defeated her claim against Fairview, which the lower courts decided correctly, this Court should deny the petition.

A. Factual Background

E.J.K. is the adult child of Anmarie Calgaro. Pet. App. 3, 8. She resides on her own and has not resided with Calgaro since early 2015. Pet. App. 11–12. When Calgaro commenced the lawsuit, E.J.K. was a minor who was living on her own without parental support. Pet. App. 12.

Fairview is a private, nonprofit corporation that provides healthcare services. Pet. App. 16. Calgaro alleges that Fairview provided such services to E.J.K. while she was a minor, at E.J.K.'s request

and with E.J.K.'s consent. Specifically, Calgaro alleged that Fairview prescribed medication for E.J.K. Pet. App. 4. Calgaro did not allege that Fairview provided gender transition services, but alleged that E.J.K. received such services from a different medical provider. *See id.* Calgaro alleges that Fairview provided services without Calgaro's knowledge or consent. Pet. App. 15.

B. Procedural History

Calgaro sued Fairview, asserting a claim under 42 U.S.C. § 1983 for the violation of Calgaro's rights under the Due Process Clause of the Fourteenth Amendment. *Id.*

Fairview moved for dismissal, noting that it is not a state actor whose conduct is subject to a Section 1983 claim. Calgaro opposed the motion by arguing that Fairview was a state actor because it had exercised delegated authority from the State of Minnesota to perform the traditional public function of adjudicating the emancipation of E.J.K. Pet. App. 11, 15–16.

The District Court for the District of Minnesota rejected this argument. Pet. App. 16–17. The Eighth Circuit affirmed, rejecting the argument that Fairview "exercised a 'public function' by terminating [Calgaro's] parental rights concerning health care decisions." Pet. App. 6–7.

REASONS FOR DENYING THE PETITION

Calgaro argues that the Court should grant the Petition for Certiorari under Rule 10(c), which provides for review by this Court when "a United States court of appeals has decided an important question of federal law that has not been, but should

be, settled by this Court." The Petition does not meet the standard of Rule 10(c) because this Court has settled the question Calgaro raises.

The question Calgaro propounds is whether the Due Process Clause of the Fourteenth Amendment applies to the conduct of a private healthcare provider, specifically in the context of constitutional limitations on governmental interference with parental decisions regarding minor children. *See generally*, *Troxel v. Granville*, 530 U.S. 57, 64–65, 120 S. Ct. 2054, 2059–60 (2000) (plurality). Stated thusly, Calgaro's question is divisible into a broad, general question, and a specific contextual sub-question. This Court has answered the broad question of federal law repeatedly; and has recently reiterated the general rule. Therefore, it should decline the request to address the broad question again with respect to the narrow context Calgaro invokes because the petition fails to suggest any exception to the general rule that might apply to the contextual sub-question.

The general rule that the Due Process Clause of the Fourteenth Amendment does not regulate the conduct of the parties is drawn from the language of the amendment. *Lugar v. Edmondson Oil Co., Inc.*, 457 U.S. 922, 924, 102 S. Ct. 2744, 2747 (1982). The Due Process Clause of the Fourteenth Amendment provides: "[N]or shall *any State* deprive any person of life, liberty, or property without due process of law." (Emphasis added.) The plain language of the Amendment is thus "directed at the States," not at private parties. *Lugar*, 457 U.S. at 924, 102 S. Ct. at 2747. The Fourteenth Amendment simply offers no shield to the conduct of a private party. *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 349, 95 S. Ct. 449, 453 (1974).

To effectuate the State-oriented text and structure of this and other Amendments, this Court has developed the state-action doctrine, which "distinguishes the government from individuals and private entities" and "enforc[es] [the] constitutional boundary between the governmental and the private." *Manhattan Cmty. Access Corp.*, 139 S. Ct. at 1928. As this Court only recently reiterated, "the state-action doctrine enforces a critical boundary between the government and the individual, and thereby protects a robust sphere or individual liberty." *Id.* at 1934.

Section 1983 was passed with the purpose of enforcing the Fourteenth Amendment. *Lugar*, 457 U.S. at 935, 102 S. Ct. at 2752. Section 1983 reaches conduct that is undertaken under color of state law. As with the state-action requirement of the Fourteenth Amendment, "the under-color-of-state-law element of § 1983 excludes from its reach merely private conduct, no matter how discriminatory or wrongful." *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 50, 119 S. Ct. 977, 985 (1999) (quotations omitted).

Under these principles, a private actor is a "state actor" whose conduct is subject to constitutional regulation in only a few limited circumstances, such as "(i) when the private entity performs a traditional, exclusive public function; (ii) when the government compels the private entity to take a particular action; or (iii) when the government acts jointly with the public entity." *Manhattan Cmty. Access Corp.*, 139 S. Ct. at 1928 (citations omitted).

Calgaro advanced an argument as to one of these limited exceptions to the lower courts: The traditional-public-function exception. She argued

that Minn. Stat. § 144.341 had delegated to Fairview the traditional public function of adjudicating a termination of parental rights to a minor. Pet. App. 6.

Calgaro has now abandoned this argument. The Petition concedes that Fairview "made a *non-judicial determination*" that E.J.K. could provide effective consent to receive medical services pursuant to Minn. Stat. § 144.341, and no longer contends that Fairview performed a traditional public function of adjudicating her parental rights.[2] Pet. at 16 (emphasis added). Nor does Calgaro suggest any other exception to the state-action requirement applies to E.J.K.'s consent to medical treatment under Minn. Stat. § 144.341. The petition simply ignores this issue.

Therefore, Calgaro fails to address the threshold obstacle to reaching the constitutional issue she asks the Court to decide: Fairview is a private entity. As a consequence, this Court need only cite a well-worn rule to resolve her appeal: The Due Process Clause of the Fourteenth Amendment and Section 1983 do not regulate the private conduct of a private entity. In sum, Calgaro does not raise a question of federal law that this Court has yet to settle. Accordingly, Calgaro failed to show review is warranted under Rule 10(c), and the Court should deny the petition.

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[2] Even though Calgaro abandoned the argument that Fairview "adjudicated" her parental rights, it is worth noting that this Court recently reiterated that "resolving private disputes" (such as through arbitration) is not a traditional public function. *Manhattan Cmty. Access Corp.*, 139 S. Ct. at 1929 (citing *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 157–63, 98 S. Ct. 1729, 1734–37 (1978)).

RULE 15(2) CORRECTIONS

1. Calgaro suggests that, under Minnesota law, a court order is required to emancipate a minor, and because no such order had issued, that E.J.K. was an unemancipated minor when she received services from Fairview. *See*, *e.g.*, Pet. at 4. This is an incorrect statement of Minnesota emancipation law.

Emancipation is an act of the parent releasing the parent's rights and responsibilities over a minor, not a judicial act performed by a court. When the parent performs this act, it relieves the child of some of the disabilities associated with infancy.

At common law, infancy is a "disability" that imposes "limitations on the legal capacity of infants, not for the defeat of their rights, but to shield and protect them from the acts of their own improvidence, as well as from the acts of others." *In re Davidson's Will*, 223 Minn. 268, 272, 26 N.W.2d 223, 225 (1947). Achieving the age of majority removes such disabilities. *Id.* at 272, 26 N.W.2d at 225. But reaching the age of majority is not the only event that removes such disabilities.

Emancipation is a status affecting the disabilities of minority and recognized under Minnesota's common law. *Lufkin v. Harvey*, 131 Minn. 238, 240–41, 154 N.W. 1097, 1098 (1915). It is effected by an act of a parent, which need not be in writing or in express words, but may be implied from the parent's conduct. *In re Fiihr*, 289 Minn. 322, 326, 184 N.W.2d 22, 25 (1971) (citing *City of Minneapolis v. Town of Orono*, 212 Minn. 7, 9, 2 N.W.2d 149, 150 (1942)). A parent emancipates the minor when the parent (1) waives the right to the services and earnings of the minor, and (2) surrenders the

parent's control over the minor. *Taubert v. Taubert*, 103 Minn. 247, 248–49, 114 N.W. 763, 764 (1908).

Thus, cases touching on emancipation merely recognize an already existing change of status. They do not judicially enact the emancipation of the minor. By the time the issue of emancipation comes before a court, the emancipation itself is fait accompli, and whether a parent has emancipated a minor is a question of fact—not an issue subject to judicial discretion. *See City of Minneapolis*, 212 Minn. at 9, 2 N.W.2d at 150 (stating that emancipation is a "fact issue"); *Taubert*, 103 Minn. at 249, 114 N.W. at 764 (same). By the time a court becomes involved, the parent has already relinquished her obligations to provide for the child, and in the process has released the child of her obligations to the parent.

In sum, emancipation is the private reordering of the relationship between a parent and her minor child. In this regard, it is analogous to contract formation, through which the contracting parties privately create or modify legal rights with respect to each other. The formation of a contract occurs outside of the courtroom, even though the existence of the contract may need to be resolved as a question of fact in a courtroom.

Therefore, Calgaro is incorrect to state that the lack of a judicial order affirmatively emancipating E.J.K. means that she was an unemancipated minor. Rather, Calgaro's allegations that E.J.K. was living independently with Calgaro's consent would have been sufficient to at least raise a question of fact as to whether Calgaro had emancipated E.J.K. had she overcome the threshold issue of showing Fairview was a state actor. Because

this issue turns entirely on state law, this matter is not a good candidate for review by this Court.

2. Calgaro suggests that no state common law or legal process was available to her to allow her to resolve the question of E.J.K.'s emancipation. Pet. at 7. This is an incorrect statement of Minnesota law.

Minnesota has adopted the Uniform Declaratory Judgments Act. *See generally* Minn. Stat. §§ 555.01–.16 (2018). Under the act, Minnesota courts "have power to declare rights, status, and other legal relations whether or not further relief is or could be claimed." Minn. Stat. § 555.01. A justiciable controversy under this statute does not require a party to assert a cause of action in the traditional sense. *Minneapolis Fed. of Men Teachers, Local 238 v. Bd. of Educators*, 238 Minn. 154, 157–58, 56 N.W.2d 203, 205 (1952). Rather, all that is required is "only a right on the part of the complainant to be relieved of an uncertainty and insecurity arising out of an actual controversy with respects to his rights, status, and other legal relations with an adversary." *Id.* at 157, 56 N.W.2d at 205, *quoted in Bicking v. Minneapolis*, 891 N.W.2d 304, 309 (Minn. 2017).

Calgaro has not explained why she could not have sought a state-law declaratory judgment resolving E.J.K.'s emancipation status. Because this issue turns entirely on state law, this matter is not a good candidate for review by this Court.

3. Calgaro suggests Fairview relied on a legal opinion letter by a legal-aid attorney to justify treating E.J.K.. Pet. App. at 8–9, 15. This suggestion is inaccurate. Fairview has not invoked Minnesota common-law emancipation as legal justification for

allegedly treating E.J.K. Rather, such treatment would have been appropriate under Minn. Stat. § 144.341 (2018), which provides:

> Notwithstanding any other provision of law, any minor who is living separate and apart from parents or legal guardian, whether with or without the consent of a parent or guardian and regardless of the duration of such separate residence, and who is managing personal financial affairs, regardless of the source or extent of the minor's income, may give effective consent to personal medical, dental, mental and other health services, and the consent of no other person is required.

Section 144.341 codifies a longstanding common-law principle. At common law, an infant has the legal capacity to contract for necessities. THE INFANTS LAWYER 165 (photo. reprint Lawbook Exch. 2007) (2d ed. 1712). This capacity includes the ability to contract for medical services. *Id.* at 170 (citing *Dale v. Copping*, 1 Bulst. 39, 39–40, 80 ER 743 (K.B. 1610)). But the capacity to contract for necessities exists only to the extent that the minor is living outside of the home of the minor's parent or guardian. 2 JAMES KENT, COMMENTARIES ON AMERICAN LAW *196 (1826). Minnesota historically applied this common-law rule, *e.g.*, *Johnson v. Nw. Mut. Life Ins. Co.*, 56 Minn. 365, 373–74, 59 N.W. 992, 993 (1894), which Minnesota's legislature has codified with respect to medical services. In sum, Section 144.341's key requirements, that the minor be living outside of the parental home and managing her own affairs, mirror the common-law rule.

Calgaro alleged E.J.K. was living outside of her parents' homes and was managing her own affairs. Pet. App. 12. Therefore, under Minn. Stat. § 144.341, she could consent to the medical services Fairview allegedly provided. The legal clinic's opinion letter is irrelevant to this analysis. Because this issue turns entirely on state law, this matter is not a good candidate for review by this Court.

4. Fairview objects to review of the merits of Calgaro's constitutional argument. This Court does not reach issues the lower courts did not decide. *Nat'l Collegiate Athletic Ass'n v. Smith*, 525 U.S. 459, 470, 119 S. Ct. 924, 930 (1999). Neither lower court reached the merits of Calgaro's constitutional argument because Fairview is not a state actor. The merits are not properly before this Court.

CONCLUSION

Calgaro does not raise important unsettled questions of federal law. Her claim turns largely on state law. The petition should be denied.

Respectfully submitted.

PAUL C. PETERSON
Counsel of Record
WILLIAM L. DAVIDSON
JOÃO C.J.G. DE MEDEIROS
LIND JENSEN SULLIVAN & PETERSON, P.A.
901 Marquette Ave. S
Suite 1300
Minneapolis, MN 55402
(612) 333-3637
paul.peterson@lindjensen.com

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