No. 19-127

In The Supreme Court of the United States

ANMARIE CALGARO,

Petitioner,

vs.

ST. LOUIS COUNTY; LINNEA MIRSCH, Individually and in Her Official Capacity as Interim Director of St. Louis County Public Health and Human Services; FAIRVIEW HEALTH SERVICES, a Minnesota Nonprofit Corporation; PARK NICOLLET HEALTH SERVICES, a Nonprofit Corporation; ST. LOUIS COUNTY SCHOOL DISTRICT; MICHAEL JOHNSON, Individually and in His Official Capacity as Principal of the Cherry School, St. Louis County School District; and E.J.K.,

Respondents.

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

RESPONDENT PARK NICOLLET HEALTH SERVICES' OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, respondent Park Nicollet Health Services states that it is a non-public, non-profit Minnesota corporation. No publicly-held corporation owns 10% or more of Park Nicollet. Park Nicollet is part of the HealthPartners, Inc. family of organizations. HealthPartners has no parent corporation and no publicly-held corporation owns 10% or more of HealthPartners.

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STATEMENT OF THE CASE

A. The Parties.

Anmarie Calgaro is the biological mother of E.J.K. (Docket No. 1, Complaint at ¶ 3.) E.J.K. was born on July 6, 1999, and turned 20 years of age on July 6, 2019. (*Id.*) While E.J.K. was a minor, Calgaro had sole physical custody and joint legal custody of E.J.K. (*Id.* at ¶ 44.)

Park Nicollet Health Services ("Park Nicollet") is a Minnesota non-profit corporation that provides medical services. (*Id.* at ¶ 10.) It operates a Gender Services Clinic in Minneapolis, Minnesota. (*Id.*) Park Nicollet is required to comply with federal and state law. (*Id.*) Calgaro's lawsuit alleged that Park Nicollet operated "under the color of state law," but offered no facts to support that contention. (*Id.* at ¶ 11.)

B. E.J.K. Lives Apart From Calgaro.

Calgaro attached to her Complaint a June 29, 2015 letter from a legal aid attorney, which stated that E.J.K. had lived apart from Calgaro since approximately the beginning of 2015, when E.J.K. was still a minor. (Docket No. 1-1 at pp. 1-2.) The letter explained that E.J.K. had been supporting herself financially since at least the beginning of 2015. (*Id.*) According to the letter, Calgaro knew where E.J.K. lived but took no legal action to return E.J.K. to Calgaro's home. (*Id.*)

Calgaro asserted in her lawsuit that the letter "does not accurately reflect" her relationship with

E.J.K., but did not identify any factual inaccuracies in the letter. (Docket No. 1, Complaint at ¶ 58.) For example, Calgaro's lawsuit does not allege that E.J.K. actually lived with Calgaro or that Calgaro managed E.J.K.'s financial affairs at any time relevant to this case. In fact, Calgaro expressly alleged that she did not provide for her daughter financially and that "St. Louis County provided . . . funds and/or approved funding for medical services and other living expenses." (*Id.* at ¶ 6.) Calgaro also admitted that E.J.K. did not live with her when she filed this case. (*Id.* at ¶ 53.)

C. E.J.K. Seeks Medical Care.

Beginning no later than January 15, 2016, E.J.K. received care from Park Nicollet's Gender Services Clinic. (Docket No. 1-1 at p. 8.) She apparently received medically necessary treatment consistent with guidelines established by the World Professional Association for Transgender Health. (*Id.*)

Under Minnesota law, Park Nicollet was not required to obtain Calgaro's consent to treat E.J.K. because E.J.K. was able to provide effective consent for her own medical decisions. Minn. Stat. § 144.341 (2016). Under Section 144.341, a "consent of minors for health services" statute, a minor may give consent for her own medical care if she lives apart from her parents and is "managing [her] personal financial affairs." *Id.* Calgaro does not dispute that, when E.J.K. received care from Park Nicollet, E.J.K. did not live with, and was financially independent from, Calgaro.

At some point during 2016, Calgaro learned that E.J.K. had been receiving medical care from Park Nicollet. (Docket No. 1, Complaint at ¶ 78.) Calgaro did not thereafter provide for E.J.K. financially or return E.J.K. to Calgaro's home. As a result, E.J.K. continued to have the ability to consent to her own medical care under Minn. Stat. § 144.341.

D. Calgaro Contacts Park Nicollet.

In 2016, Calgaro requested E.J.K.'s medical records from Park Nicollet and asked to participate in E.J.K.'s medical decisions. (*Id.* at ¶ 113.) But Calgaro had no factual basis to contest E.J.K.'s independent medical decision-making under Minn. Stat. § 144.341 because E.J.K. continued to live independently from Calgaro.

Calgaro was not provided E.J.K.'s Park Nicollet medical records because, under Minn. Stat. § 144.346, Park Nicollet was not required to provide such information to Calgaro. (*Id.* at ¶ 78.) Despite admitting that she never received E.J.K.'s medical records, Calgaro's Complaint suggested that E.J.K. had consented to a sex change procedure. (*Id.* at ¶¶ 101, 104, 108.) The Court is not required to accept those allegations are true because Calgaro has no foundation to make such assertions. Calgaro's counsel conceded at the district court that Calgaro did not object to any surgical procedure in this case and E.J.K.'s counsel explained that "there are no surgical procedures that she is currently

seeking or that are contemplated." (Docket No. 93, Transcript at 39, 41.)

E. Proceedings Before the District Court.

In response to Calgaro's lawsuit, Respondents either moved to dismiss or moved for judgment on the pleadings. Concerning Park Nicollet's motion to dismiss, the district court relied on the long-standing rule that, to state a claim under 42 U.S.C. § 1983, a plaintiff must show that she was deprived of a right secured by the Constitution or laws of the United States "and that the deprivation was committed under color of state law." (Petitioner's Appendix at 15 (*citing Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 49 (1999).) The district court noted that a private party may be found to have acted under color of state law when it is a willful participant in joint activity with the state. (Petitioner's Appendix at 16.)

Consistent with *Sullivan*, the district court rejected Calgaro's argument that Park Nicollet was a state actor. It noted that Park Nicollet was a private, non-profit corporation. The district court also rejected the notion that a medical provider engaged in joint activity with the state merely by being regulated by the state or receiving state funds. (*Id.*) Finally, the district court carefully applied the Court's *Sullivan* decision and found that Park Nicollet was not willfully participating in a joint activity with the state by providing medical services that are consented to under Minn. Stat. § 144.341. (*Id.*)

F. Proceedings Before the Circuit Court.

The Eighth Circuit reviewed the district court's decision and affirmed. Relying on *Sullivan*, the circuit court noted that, to establish a claim, Calgaro was required to show that Park Nicollet acted "under color of state law." (Petitioner's Appendix at 6.) Accepting E.J.K.'s consent to medical care, in accordance with Minn. Stat. § 144.341, did not transform Park Nicollet into a state actor. (*Id.*)

The circuit court rejected Calgaro's argument that Park Nicollet exercised a "public function" by supposedly terminating her right to make healthcare decisions:

> Section 144.341 states that certain minors may give effective consent to medical services, but a provider does not terminate parental rights by recognizing a minor's consent, even if the provider is mistaken. Only a Minnesota court can terminate parental rights. *See* Minn. Stat. § 260C.301.

(*Id.* at 6-7.) Far from even remotely suggesting that a private medical provider is able to emancipate a minor, the circuit court made clear that private medical providers are not making such decisions when they accept consent consistent with Minn. Stat. § 144.341. (*Id.*)

LEGAL STANDARD

Review on a writ of certiorari is not a right, and the Court grants Petitions "only for compelling reasons."

Sup. Ct. R. 10. The Supreme Court rules identify factors considered by the Court when deciding whether to grant a Petition for a Writ of Certiorari:

> (a) United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power;
>
> (b) a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals;
>
> (c) a state court or 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, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

Id.

"A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." *Id.* Put differently, certiorari is granted only "in cases involving principles the settlement of which is of

importance to the public as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the circuit courts of appeal." *NLRB v. Pittsburgh S.S. Co.*, 340 U.S. 498, 502 (1951) (*citing Layne & Bowler Corp. v. Western Well Works, Inc.*, 261 U.S. 387, 393 (1923)).

REASONS FOR DENYING THE PETITION

Calgaro has not identified a compelling reason for the Court to review this matter. This is particularly so given the fact that, at least as to Park Nicollet, the Eighth Circuit applied existing legal principles to Calgaro's Complaint and correctly found that she failed to state a viable claim.

A. The Petition Does Not Raise An Issue Of Nationwide Importance.

Calgaro's sole ground for seeking review is that the Eighth Circuit "decided an important constitutional question of nationwide importance, which the Court has not answered." (Petition at 5-6.) In fact, as to Park Nicollet, the Eighth Circuit did not decide a constitutional question at all. It applied existing law, including *Sullivan*, to Calgaro's claim and found that, under existing law, Calgaro's claim failed.

Calgaro brought a claim under 42 U.S.C. § 1983 for damages, declaratory relief and injunctive relief. "To

state a claim for relief in an action brought under § 1983, [Calgaro] must establish that [she was] deprived of a right secured by the Constitution or laws of the United States, and that the alleged deprivation was committed under color of state law." *Sullivan*, 526 U.S. at 49-50. "[T]he under-color-of-state-law element of § 1983 excludes from its reach 'merely private conduct, no matter how discriminatory or wrongful.'" *Id.* at 50 (*quoting Blum v. Yaretsky*, 457 U.S. 991, 1002 (1982) *and Shelley v. Kraemer*, 334 U.S. 1, 13 (1948)).

The Eighth Circuit did not reach Calgaro's constitutional question because it correctly concluded that Park Nicollet was not a state actor. (Petitioner's Appendix at 6-7.) While Calgaro claims that the "Eighth Circuit's decision casts into doubt whether the federal courts still have a consistent, nationwide commitment to parental rights," the Eighth Circuit was not required to – and therefore did not – address any constitutional issue with respect to Park Nicollet. Instead, it correctly found that, based on a long line of cases (including *Sullivan*), no state action by Park Nicollet had been alleged, and Calgaro's § 1983 claim failed.

Calgaro does not contend otherwise in her Petition. She argued at length about the state actor requirement before the district court and the Eighth Circuit, but makes no such argument in her Petition. The closest Calgaro comes to addressing the state actor requirement is to mischaracterize Park Nicollet as a "government-authorized medical service provider." (Petition at 36.) But that manufactured concept does not address the state actor requirement. If action

taken by a private entity, even with the "approval or acquiescence of the State[,] is not state action," *Sullivan*, 526 U.S. at 52, then actions permitted under state statute do not transform a private entity into a state actor.

Calgaro's claim fares no better under a public function analysis. Private entities that engage in a public function may, under certain circumstances, be considered state actors "when the challenged entity performs functions that have been traditionally the exclusive prerogative of" the State. *San Francisco Arts & Athletics, Inc. v. U.S. Olympic Comm.*, 483 U.S. 522, 544 (1987) (internal quotations omitted). Thus, in *West v. Atkins*, 487 U.S. 42 (1988), the Court held that a private physician who provided medical care to prison inmates was a state actor because his function fulfilled the State's obligation "to provide adequate medical care to those whom it has incarcerated." *Id.* at 54. In doing so, the Court emphasized that, "the provision of medical services is a function traditionally performed by private individuals," but this particular physician "perform[ed] these services for the State," which distinguished the inmate's and physician's relationship "from the ordinary physician-patient relationship." *Id.* at 56 n.15. *See also Sullivan*, 526 U.S. at 55 (explaining that, in *West*, "the State was constitutionally obligated to provide medical treatment to injured inmates, and the delegation of that traditionally exclusive public function to a private physician gave rise to a finding of state action").

Park Nicollet did not perform a public function that has traditionally been the exclusive prerogative of the State when it accepted a minor's consent to medical treatment. Healthcare providers – not government – are typically responsible for providing information about treatment options and obtaining informed consent. *See Cornfeldt v. Tongen*, 295 N.W.2d 638, 640 (Minn. 1980). In Minnesota, healthcare providers are permitted (but not required) under Minn. Stat. § 144.341 to accept consent provided by a minor if that minor lives apart from her parents and is managing her own financial affairs. As the Eighth Circuit concluded, Minn. Stat. § 144.341 is a narrow medical consent statute, not an emancipation statute. (Petitioner's Appendix at 6-7.)

Far from making an emancipation decision, Park Nicollet simply accepted E.J.K.'s consent to medical care, as allowed under the law. No other entity, including any other medical provider, was bound by Park Nicollet's decision. Indeed, Park Nicollet itself was not required in the future to accept E.J.K.'s consent, particularly if E.J.K. had simply returned to Calgaro's home or if Calgaro had begun to provide financially for E.J.K. For whatever reason, Calgaro did not compel E.J.K. to return to Calgaro's home or provide financially for E.J.K. prior to her turning 18 years of age on July 6, 2017. Because Park Nicollet did not, by accepting E.J.K.'s consent to medical care, engage in a function that has traditionally been the exclusive prerogative of the State, the Eighth Circuit correctly concluded that Calgaro had failed to state a claim.

While Calgaro does not explicitly assert a state actor argument, the Foundation for Moral Law, which submitted an *amicus curiae* brief, attempted one. It argues that Park Nicollet participated in "joint activity with the state" such that Park Nicollet should be considered a state actor. (*Amicus* brief at 16.) Minnesota law "allowed but did not mandate" Park Nicollet to accept E.J.K.'s consent, as the *amicus curiae* brief concedes. Nevertheless, Park Nicollet supposedly performed a public function by determining that E.J.K. was emancipated and by accepting government money for the medical services provided to E.J.K. (*Id.* at 16-17.)

The *amicus curiae* argument does not support granting the Petition. Even when a private business is subject to state regulation, its actions are not necessarily attributable to the State. Rather, "[t]he complaining party must also show that 'there is a sufficiently close nexus between the State and the challenged action of the regulated entity.'" *Blum*, 457 U.S. at 1004 (*quoting Jackson v. Metro. Edison Co.*, 419 U.S. 345, 351 (1974)); *see also Manhattan Cmty. Access Corp. v. Halleck*, 139 S. Ct. 1921, 1932 (2019) ("Put simply, being regulated by the State does not make one a state actor."). Typically, a State is responsible for private decisions "only when it has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the State." *Blum*, 457 U.S. at 1004. "Medical judgments made by private parties according to professional standards" are "in no way dependent on

state authority." *Id.* at 1008. Therefore, the courts below properly rejected Calgaro's argument that Park Nicollet was a state actor by reason of state regulation, funding or operation of Minn. Stat. 144.341.

B. The Petition Does Not Raise Any Other Grounds For Granting A Writ Of Certiorari.

Rule 10 also provides that the Court will consider granting a Petition for a Writ of Certiorari when a circuit court has entered a decision that conflicts with another circuit court, or has decided an important federal question in a way that conflicts with a state court of last resort or has departed from or sanctioned a departure from the accepted and usual course of judicial proceedings. Sup. Ct. R. 10(a). Calgaro does not claim that Rule 10(a) supports her Petition.

Nor could Calgaro reasonably make such an argument. The district court and Eighth Circuit considered the issues in this case after full briefing and public oral argument. Nothing in the record even remotely suggests that the district court or the Eighth Circuit departed from ordinary practice. And Calgaro does not claim that the Eighth Circuit applied the state-actor requirement in a novel or unusual manner.

Finally, the Court considers whether a state court of last resort has decided an important federal question in a way that conflicts with another state court of last resort or circuit court. Sup. Ct. R. 10(b). That provision does not apply because this case does not involve

any decision by a state court of last resort or any conflict among the circuit courts.

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

Date: August 26, 2019

Respectfully submitted,

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