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

REPLY TO OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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ARGUMENT

Petitioner Anmarie Calgaro on behalf of herself and her minor children submit this reply to the opposition briefs filed against her Petition for Writ of Certiorari.

I. Despite the opposition briefs, the fact remains that the Eighth Circuit has "decided an important question of federal law that has not been, but should be, settled by this Court."

In the Petition, Calgaro argued that the Petition should be granted under Rule 10(c) because a "United States court of appeals decided an important question of federal law that has not been, but should be, settled by this Court." Pet. at 24. To meet this criteria, Calgaro must show (1) "important question[s] of federal law that ha[ve] not been, but should be, settled by this Court" and (2) that the "United States court of appeals decided [those] important question[s] of federal law." She satisfies this criteria, despite four opposition briefs arguing otherwise, as detailed below.

A. The opposition briefs do not overtly contest that the Petition's questions presented are "important questions of federal law that have not been, but should be settled by this Court."

The opposition briefs do not overtly contest that the Petition's two questions presented—relating to the

applicability of the Due Process Clause when local governments and medical providers end parental rights—are "important questions of federal law that have not been, but should be settled by this Court."

The Court has never had the opportunity to opine on the Due Process Clause rights of fit parents as presented in question no. 1:

> 1. Whether parents' Due Process Clause rights apply to local governments and medical providers ending parental rights, responsibilities or duties over their minor children's welfare, educational, and medical care decisions without a court order of emancipation.

The lack of a clear principle of law has resulted in lower court confusion about whether fit parents have any Due Process Clause rights at all.

For example, in absence of U.S. Supreme Court guidance, the district court felt free to disregard Calgaro's claim of what occurred as she alleged in her complaint. The district court asserted through its order to dismiss that the "Defendants' emancipation determinations did not terminate Calgaro's parental rights. Only a court order can do so."[1] But, as Calgaro alleged, the collective actions of the respondents under color of state law were to deprive her of parental rights. Nonetheless, the court went so far as to find allegations

[1] App. 15.

within Calgaro's complaint[2] that the "Defendants determined [E.J.K.] emancipated" as "distracting."[3]

In this way, a district court ignored or at best, found inconsequential, a fit parent's Due Process Clause claims in the context of the government and medical providers facilitating a minor child receiving gender-transitioning medical services—a non-emergency, life-altering elective medical procedure—without parental notice, without parental hearing, and without a court order. The lack of a steadfast principle of law—this vacuum of law—has caused confusion for the lower courts in the clash of constitutional interests between parents and minor children who claim to be emancipated. If the Court were to resolve these important questions of federal law in this case, there would then exist the necessary guidance for the lower courts to assess, evaluate, and adjudicate fit parents' Due Process Clause rights.

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[2] The complaint's length reflected the factual complexity to sufficiently assert claims for relief as a direct result of *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) and *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). Dckt. No. 1.

[3] *Id.* at 4; App. 14. Under *Black's Law Dictionary* 560 (Bryan A. Garner ed., 8th ed., West 2004), emancipation is defined as "1. The act by which one who was under another person's power and control is freed. 2. A surrender and renunciation of the correlative rights and duties concerning the care, custody, and earnings of a child. . . ."

B. The Eighth Circuit did decide the "important questions of federal law" presented.

The opposition briefs argue in various ways that the Eighth Circuit did not determine the "important questions of federal law" covered in the two questions presented. However, a review of the proceedings shows it did. App. 1-9.

To begin, the opposition briefs fail to fairly present the record of the case. Due to the urgency of the situation in which E.J.K. placed herself, Calgaro immediately moved for summary judgment. Dckt. Nos. 1, 6. The Respondents responded with their motions to dismiss and the County's cross-motion for summary judgment. Dckt. Nos. 15, 24, 28, 31, 34. The district court denied Calgaro's motion for summary judgment, granted the respondents' motions to dismiss and granted the County's motion for summary judgment. App. 25-26. Calgaro appealed. App. 1, 25-26.

For the purposes of the record, the denial of Calgaro's summary judgment motion is significant in at least two ways. First, the appellant's record is broader because the declarations supporting and opposing the motions for summary judgment are included in the record. Dckt. Nos. 39, 44, 46, 47, 48, 56, 57, 58, 60, 61, 63, 66, 67. If the district court ruled only on the motions to dismiss, the declarations would not be part of the record. But, that did not happen. Second, there was a whole round of briefing on the two summary judgment

motions which are also included in the record. See, e.g., Dckt. Nos. 37, 46, 55, 59, 62, 64.

In all instances, the respondents' briefs and declarations on the summary judgment motions argued that the respondents' denial of notice and hearing to Calgaro before ending her parental rights was constitutionally warranted.

1. The Eighth Circuit did decide important questions of federal law presented in Calgaro's Petition.

The Eighth Circuit decided the important question of federal law in the Petition's questions presented as they relate to the governmental respondents, County and School District.

First, the County's Brief in Opposition is mistaken in stating that the Eighth Circuit and district court did not "decide the merits of the due process questions identified in the petition" because the Eighth Circuit affirmed the district court's denial on the merits of Calgaro's summary judgment motion which was based on the due process questions later identified in the Petition's questions presented. The County's Brief in Opposition at page 2 incorrectly claims that "[n]either court had occasion to . . . decide . . . the merits of the due-process questions identified in the petition." To the contrary, the district court decided the merits when it denied Calgaro's summary judgment motion on the very same questions that Calgaro presents to this Court:

CONCLUSION

> Calgaro has failed to plausibly allege any § 1983 claims against Defendants. Accordingly, IT IS HEREBY ORDERED that:
>
> 1. Calgaro's Motion for Summary Judgment (Docket No. 6) is DENIED.

App. 25. The Eighth Circuit acknowledged Calgaro's summary judgment motion and the district court's dismissal before affirming the lower court's judgment. *Id.* at 5, 9. Since the Eighth Circuit affirmed the district court's denial on the merits of Calgaro's summary judgment motion, both courts did decide Calgaro's claims on the merits.

Second, the County's and School District's Briefs in Opposition mistakenly argue that the Petition should be denied because the lower courts did not "consider" the merits of Calgaro's Due Process Clause claims against them. Cty. Br. at 2-3; Sch. Br. at 4-7. However, both written decisions of the district court and the Eighth Circuit contain pages of consideration of the merits of Calgaro's constitutional claims under *Monell's* policy-or-custom requirement. App. 5-7, 17-22; *Monell v. New York City Department of Social Services*, 436 U.S. 658, 690-92 (1978). As this Court has stated, *Monell's* policy-or-custom requirement is a part of the § 1983 cause of action, not a jurisdictional bar:

> [I]t is when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the

> injury that the government as an entity is responsible under § 1983. . . . We have attempted only to sketch so much of the § 1983 cause of action against a local government as is apparent from the history of the 1871 Act and our prior cases, and we expressly leave further development of this action to another day.

Id. at 695-96. Therefore, because Calgaro's summary judgment motion was denied on the *Monell* policy-or-custom requirement, Calgaro's claims were considered on the merits. Apparently, the district court agreed, because after considering Calgaro's constitutional claims against the School District (App. 17-18) and against the County (App. 19-22), the court summarily addressed the merits:

> Because her claims are meritless, Calgaro is not entitled to summary judgment.

App. 25. Similarly, the Eighth Circuit, after considering Calgaro's constitutional claims against the School District (App. 5-6) and against the County (App. 7), affirmed the dismissal of Calgaro's claims.

2. As to the medical respondents, the Eighth Circuit did decide important questions of federal law presented.

The Eighth Circuit decided the important question of federal law in Calgaro's questions presented as they relate to the medical respondents as Fairview and Park Nicollet acknowledge in their respective briefs.

The issue the medical respondents raised is whether they are liable under § 1983 liability for acting "under color of state law" when they end fit parents' rights regarding minor children's health care. The Eighth Circuit found the medical providers were not liable under § 1983 for acting "under color of state law."

Fairview's Brief at page 1 offers a supplemental question which is appropriate, and is already incorporated in the Petition's questions 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.

Fairview's Brief at pages 3 through 6 provides as a reason to deny the Petition that this question has previously been answered by the Court in the negative. Similarly, Park Nicollet's Brief at pages 7 through 11 provides that the Petition is not important because existing law had been applied to determine the medical providers were not "acting under color of state law" for § 1983 liability.

Yet, Park Nicollet and Fairview fail to adequately explain why Calgaro's claims against them are not adequately covered in the Petition's questions presented which address § 1983 liability for Due Process Clause violations when medical providers end parental rights

over minor children's health care. For example, the first question presented states in relevant part:

> Whether parents' Due Process Clause rights apply to . . . medical providers ending parental rights, responsibilities or duties over their minor children's . . . medical care decisions without a court order of emancipation.

The district and appellate courts adjudicated that the elements of a § 1983 cause of action against the medical providers were not satisfied because they were not acting "under color of state law" which would make them subject to liability—a decision on the merits.

Here, Fairview and Park Nicollet contest again that they are not "acting under color of state law." But, nothing has changed. The decisions of the district court and the Eighth Circuit determined that they are not "acting under color of state law."

In response, Calgaro consistently claims that Fairview and Park Nicollet are acting "under the color of state law" for purposes of § 1983 because Minnesota Statutes § 144.341 authorizes medical providers to perform a traditional public function of ending parental rights—specifically ending parental rights concerning a minor child's health care decisions.

Long ago, the Minnesota Supreme Court understood the effect on the parent-child relationship caused by determinations of emancipation:

> When we consider that complete emancipation involves *an absolute destruction of the filial relation*, it is quite clear that it should not be inferred from the fact alone that the parent gives the child the right to hire out and collect and disburse his earnings.

Lufkin v. Harvey, 154 N.W. 1097, 1098 (Minn. 1915) (emphasis added). In *Lufkin*, a case involving liability for medical and surgical services furnished to a minor son, the Minnesota Supreme Court also stated that:

> Emancipation is not, however, to be presumed. It must be proved. * * * A minor may be emancipated by an instrument in writing, by verbal agreement, or by implication from the conduct of the parties. * * * There may be complete emancipation, even though the minor continues to reside with his parents. . . . Emancipation may, however, be partial.

Id.

In Minnesota, it is the court that must consider all of the facts and circumstances of the case:

> This court is satisfied that the trial court, as sole arbiter of the facts and circumstances, committed no error. . . .

In re Fiihr, 184 N.W.2d 22, 25 (Minn. 1971).

Here, the district court in its memorandum and order did not disagree:

> Whether a child has been emancipated *must be determined* largely upon the particular facts and circumstances of each case and is ordinarily *a question for the jury.*

Id. (emphasis added.)

Notably, here, the district court also noted that only a court order can terminate parental rights. However, the Minnesota Supreme Court decisions reveal that a court determination of ending the parent-child relationship goes to the heart of the *filial relationship.* Therefore, when private entities make a determination of a partial or complete ending of fit parents' rights under any statutory scheme, they do so as fact finders acting in a judicial function, making both a *legal* determination of emancipation directly affecting the parent-child relationship and an implicit determination that the parents are unfit terminating parental rights.

When *Lufkin* was decided in 1915, the Court had not explicitly recognized the *Troxel*[4] constitutional presumption of a "fit parent" and "parental rights" concerning the care, custody, and welfare of a minor child; however, in the context expressed under common law, procedurally, the determination of ending of fit parents' rights must necessarily be a function of the court when it affects the filial relationship as it presently exists involving *Troxel* constitutionally-protected parental rights.

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[4] *Troxel v. Granville*, 530 U.S. 57 (2000).

Therefore, here, the private entities *acted* and *were delegated* (as each has proclaimed to have acted in accordance with state statutory law) a public function—that of the judiciary. *West v. Atkins*, 487 U.S. 42, 56 (1988) (when a private entity has been delegated a public function by the state); *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 627-28 (1991) (when a private entity is "entwined with governmental policies"). Here, the acts of Nicollet and Fairview as private parties are fairly attributed to the State so as to be deemed under "color of state law" for § 1983 purposes.

Conversely, the same legal effect, but with a constitutional process, can be reached under Minnesota Statute § 144.341 if a teenager first brings a petition for emancipation in state court; under state common law and court rules for emancipation, the parents would receive notice and an opportunity to be heard. As the Minnesota judicial website confirms:

> Minnesota Statutes define who is a minor and who is an adult at MN Statutes § 645.451. Generally, being "emancipated" means that a *minor has the same legal responsibilities as an adult.* Minnesota Statutes do not specifically define a process by which a minor can become emancipated.
>
> Courts will review "Petitions for Emancipation" and decide on a case-by-case basis if there is sufficient evidence to find that a minor may live "independently" of his/her parents or guardian. However, the courts *do not*

> publish forms or instructions to petition for "emancipation." The Legal Fact Sheet on Emancipation published by Mid-Minnesota Legal Aid explains the basics on this area of law. To get legal advice on your situation, you should talk with a lawyer.[5]

In sharp contrast, under Minnesota Statutes § 144.341, it is the medical providers alone—not the state court—who determine whether the fit parents' rights regarding a minor child's health care decisions are terminated. It is the medical providers—not the state courts—who adjudicate the facts as to emancipation and implicitly the "unfitness" of the parents to make decisions for the child.

While there are other categories under which a private entity may act to be deemed under the "color of state law," those categories need not be considered here. Instead, the "public function" test is sufficient under the circumstances of this case to show the medical providers are potentially liable under § 1983.

In response to Calgaro's analysis, the Eighth Circuit considered it and then disagreed. App. 6-7. The Eighth Circuit decided that the medical providers were not liable for a § 1983 claim when minor children give effective legal consent under Minnesota law. *Id.*

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[5] Compl. ¶ 16; Dckt. 1; website: http://www.mncourts.gov/Help-Topics/Emancipation.aspx (emphasis added.)

So, the Eighth Circuit did decide the important questions of federal law in the Petition's questions presented.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Dated: September 6, 2019

Respectfully submitted,

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