No. _____

In the
Supreme Court of the United States

SNODGRASS-KING PEDIATRIC DENTAL ASSOCIATES, P.C. AND DAVID J. SNODGRASS, D.D.S.,
Petitioners,

v.

DENTAQUEST USA INSURANCE CO., INC.,
Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Petitioners Snodgrass-King Pediatric Dental Associates, P.C., and David J. Snodgrass, D.D.S., (collectively, "Snodgrass-King") sued Respondent DentaQuest USA Insurance Co., Inc. ("DentaQuest") because it excluded Snodgrass-King from Tennessee's state Medicaid program ("TennCare") in retaliation for Snodgrass-King's exercise of its First Amendment rights in violation of 42 U.S.C. § 1983 ("Section 1983"). The jury determined that DentaQuest acted "under color of state law," *i.e.*, engaged in state action, because TennCare "significantly encouraged" DentaQuest's exclusion of Snodgrass-King, a longtime political enemy of TennCare and DentaQuest. The jury's conclusion was based on internal DentaQuest emails that recounted a private meeting in which TennCare directed DentaQuest that it needed to "keep [Snodgrass-King] out" of TennCare if DentaQuest wanted to be awarded a lucrative contract with TennCare.

The district court set aside the jury's verdict, and the Sixth Circuit affirmed that decision in a 2-1 decision.

The question presented is:

1. Whether a government directive made to a private contractor while the contractor is bidding on a lucrative and admittedly important government contract can constitute "significant encouragement," and, thus, state action under *Blum v. Yaretsky*, 457 U.S. 991 (1982), or whether the government must require the decision or otherwise take away the free-

will choice of the private actor to create state action, as held by the Sixth Circuit majority below.

PARTIES TO THE PROCEEDING

Petitioners Snodgrass-King Pediatric Dental Associates, P.C., and David J. Snodgrass, D.D.S., were the plaintiffs in the district court and the appellants in the Sixth Circuit.

Respondent DentaQuest Insurance Co., Inc. was the defendant in the district court and the appellee in the Sixth Circuit.

LIST OF DIRECTLY RELATED PROCEEDINGS

There are no proceedings that are directly related to this case.

CORPORATE DISCLOSURE STATEMENT

Pursuant to SUP. CT. R. 29.6, Petitioners disclose as follows:

1. Are any of the parties to this petition a subsidiary or affiliate of a publicly owned corporation? No.

2. Is there a publicly owned corporation, not a party to this petition, that has a financial interest in the outcome? No.

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This case is an ideal vehicle for the Court to resolve conflicting interpretations of this Court's test for state action in *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982), which provides that a private actor's decision may be considered state action where the State "has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice [of a private actor] must in law be deemed to be that of the State." The Court left open how narrowly or widely such language should be interpreted, recognizing that "the factual setting of each case will be significant." *Id*.

Since *Blum* was decided, state and local governments increasingly have relied on private contractors rather than government employees to administer important government programs. In this case, for instance, TennCare contracted with DentaQuest to administer the entirety of Tennessee's dental Medicaid program, including selection of the only dental providers who would be allowed to provide care to TennCare patients. The growth in government contracts has raised new situations where courts must determine whether a private contractor's actions should be deemed state action. This case provides a perfect example of why the state action test described above should remain strong with the widespread growth of government contracting – to ensure that the government cannot use the allure of lucrative contracts to convince private contractors to carry out unconstitutional goals. This question is especially important where, as in this case, the constitutional right is that of free speech, and specifically the right to

criticize the government about the way that it administers its programs.

The question here is whether the "significant encouragement" discussed in *Blum* includes a covert governmental directive to exclude a critic from a government program when such directive is given to a contractor during a meeting to discuss the contractor potentially obtaining a multimillion-dollar contract to run that same government program.

The jury in this case found that such a directive, made at a meeting between high-ranking TennCare and DentaQuest employees while discussing an admittedly important contract to DentaQuest, significantly encouraged DentaQuest's exclusion of Snodgrass-King from TennCare, and, thus, constituted state action.

In a 2-1 decision, the Sixth Circuit majority disagreed. While the majority acknowledged that internal DentaQuest emails showed that TennCare had told DentaQuest that it wanted Snodgrass-King kept out of the TennCare program, it nonetheless concluded that such a directive legally was not the sort of "significant encouragement" referred to in *Blum* because (1) the incentive of a prospective contract is not sufficient to show significant encouragement; and (2) TennCare did not "require" the exclusion or otherwise prevent DentaQuest from making a "free-will choice." (App. 18-23).

This Court should grant *certiorari* because the Sixth Circuit majority's decision abrogates the "significant encouragement" portion of the state action standard set

forth in *Blum*. In effect, the majority's decision permits a finding of state action only where a party presents direct evidence that the government ***required*** a private actor to take the unlawful action at issue. Such a rule is not only contrary to the plain language from *Blum* and the application of *Blum*'s test in other Circuits, but also runs afoul of the very purpose of the state action inquiry, which is to prevent the government from using a private actor to accomplish unconstitutional goals. Because the Sixth Circuit has deviated from the rule in *Blum* and many of the other Circuits' interpretation of *Blum*, and because the question of when a private contractor should be deemed a state actor is a matter of national significance, the Court should grant *certiorari* to resolve the now conflicting standards and to ensure the uniform resolution of potential constitutional violations.

OPINIONS BELOW

The Sixth Circuit's opinion is unreported and reproduced at App. 1-26, and its order denying Snodgrass-King's petition for panel rehearing and rehearing en banc is unreported and reproduced at App. 86-87. The district court's order granting DentaQuest's Motion for Judgment as a Matter of Law is reported at 295 F. Supp. 3d 843 and reproduced at App. 27-85.

JURISDICTION

The Sixth Circuit's judgment became final on August 29, 2019, when it denied Snodgrass-King's petition for panel rehearing and rehearing *en banc*. App. 86-87. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL & STATUTORY PROVISIONS

The First Amendment provides, in relevant part: "Congress shall make no law ... abridging the freedom of speech ... or the right of the people ... to petition the Government for a redress of grievances." U.S. Const. amend. I.

42 U.S.C. § 1983 provides, in relevant part: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State ... subjects, or causes to be subjected, any citizen of the United States ... to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law...."

STATEMENT OF THE CASE

A. Factual Background and Trial

1. Snodgrass-King operates a group of five multi-specialty pediatric dentistry locations in the Nashville, Tennessee area. (App. 29). As relevant to this case, Tennessee's Medicaid program, referred to as TennCare, provides dental services to indigent and special needs children. (App. 2-3). Rather than administering the program itself, the dental portion of

TennCare is wholly run by a single, statewide private company, a so-called dental benefits manager ("DBM"). (App. 2). The DBM runs all aspects of TennCare's dental program and is granted the authority and responsibility for doing so through a contract with TennCare. In exchange for running TennCare's dental program, the DBM receives two types of payment: a fixed administrative fee based on the number of eligible TennCare enrollees, and a potentially huge bonus annually based on the total amount of money the DBM saves from the amount that was budgeted for the dental portion of the TennCare program. (R. 478-11, PID# 14310-12).

2. One aspect of the DBM's job is contracting with a network of dentists who will be entitled to treat TennCare children for reimbursement. If the DBM does not include a dental provider in its network, that dental provider cannot treat TennCare children for reimbursement in the State of Tennessee. (App. 2-3). From 1994 to 2003, and then again from 2009 until the exclusion at issue in this case in 2013, the TennCare benefits manager contracted with Snodgrass-King to provide dental care. (App. 2-3). In 2013, however, after being awarded the contract to serve as the DBM, DentaQuest, at the direction of TennCare, excluded Snodgrass-King from its network because of Snodgrass-King's past political speech against TennCare and DentaQuest.

3. This was not the first time that DentaQuest and TennCare worked together to harm their common enemy, Snodgrass-King. In 2003, after Snodgrass-King raised issues with the administration of the TennCare

program that caused TennCare political difficulties, a former corporate iteration of DentaQuest that was then serving as the DBM terminated Snodgrass-King from TennCare without cause. (App 31-33). In 2008 litigation related to that termination, Snodgrass-King learned that DentaQuest terminated Snodgrass-King because TennCare secretly pressured DentaQuest to do so. (App. 33-34). The 2008 litigation ended with a settlement agreement that reinstated Snodgrass-King's membership in the TennCare network and provided for DentaQuest's payment of settlement proceeds to two dental schools. (App. 35-36).

In 2009, before the ink on the aforementioned settlement was dry, TennCare and its long-standing dental director, Dr. James Gillcrist ("Gillcrist"), initiated efforts to undermine the 2008 settlement. Specifically, shortly after becoming aware of the settlement, TennCare covertly urged DentaQuest to delay the process of reinstating Snodgrass-King into the TennCare network. (App. 35-36). During the delay, Gillcrist and TennCare developed and instituted a purportedly statewide policy that only affected one provider, Snodgrass-King, and that was described by DentaQuest as "a policy directly related to Snodgrass-King" that was "designed to keep him [Snodgrass-King] out [of TennCare] or we [DentaQuest] incur penalties." (App. 36). TennCare's sham policy against Snodgrass-King resulted in a second lawsuit, which was filed in 2010. (App. 37-38).

By the time the second lawsuit settled, DentaQuest had lost a competitive bidding process and was no longer the DBM, and Snodgrass-King remained in

TennCare throughout the time that the new DBM was under contract with TennCare. (App. 38).

4. By 2012, Gillcrist and TennCare had decided to replace the new DBM that was allowing Snodgrass-King to participate in the program. In December 2012, TennCare invited DentaQuest officials to a closed-door meeting with Gillcrist and Wendy Long ("Long"), TennCare's medical director, to discuss their intentions regarding the new TennCare contract. (App. 6).

The contract being discussed at the December 2012 meeting was one that DentaQuest "absolutely" wanted to get. (R. 404, PID# 11629-34). First, TennCare told DentaQuest that one reason for replacing the then-DBM was that it would "let anyone" into the "network." (App. 44). Then, while discussing this new, multimillion-dollar contract, Gillcrist and Long made it clear that DentaQuest needed to "keep [Snodgrass-King] out" of the program. (App. 6-7).

The jury did not have to make a credibility determination regarding TennCare's "keep out" directive because it was evidenced by the plain language of DentaQuest emails that repeatedly discussed TennCare's "position" from right after the December 2012 meeting until after DentaQuest won the TennCare contract and began implementing the directive in May 2013:

- **December 20, 2012**: Cheryl Polmatier – a DentaQuest employee – documents TennCare's directive shortly after the December meeting.

> "[W]e can have an internal discussion based upon concerns that ***Todd, Mark and Bob [of DentaQuest and who met with TennCare]*** shared about ***the State's position on*** large groups, ***Snodgrass*** and others that ***we need to 'keep out'*** of the network." (App. 6).

- **December 27, 2012**: Polmatier reiterates that the directive to keep Snodgrass-King out came from TennCare.

> "There are certain providers and large provider groups that ***TennCare would prefer that we not have in our network***....Let me know who knows which offices (***besides Snodgrass***)...." (App. 7).

- **January 2, 2013**: A December 2012 meeting participant reviews a prior Snodgrass settlement as part of implementing the State's directive.

> "Also, Ron has sent me [Bob Lynn, a December 2012 meeting participant,] the ***Snodgrass settlement*** and I need to review ***to make sure we don't have problems with his settlement language***." (App. 7).

- **January 8, 2013**: Polmatier documents DentaQuest's intent to follow TennCare's directive to exclude Snodgrass-King.

> "If we wanted to amend any CoverKids provider, ***with the exception of Snodgrass*** (33 providers), we'd be amending

> approximately 720 unique providers to participate in TennCare....But if we're going to amend the entire CK network, ***everyone but Snodgrass***, I think it wouldn't hurt to start now....
>
> [W]e ***don't know who the other providers are specifically that the State is not interested in***....If we want to take our time...then we should await...any ***further information*** from the ***state/Gilcrist*** (sic) on who they ***don't want to work with***." (App. 41-42).

- **January 23, 2013**: TennCare's directive becomes a DentaQuest company goal, right behind winning the TennCare contract.

> "***Network Goals***:
>
> - Win the TennCare RFP
> - Amend or Recontract a right-sized network for TennCare
>   - ***Keep Dr. Snodgrass out of the network"*** (App. 9).

- **February 5, 2013:** DentaQuest states why TennCare was terminating the previous DBM, Delta Dental, and stresses the importance of both obtaining the TennCare contract and following TennCare's network instructions in order to do so.

> "***State is very unhappy with Delta***– said that they ***let anyone in the network*** and do not manage the network (***This is where we can shine***)…This RFP [for the TennCare Contract] is a ***big deal to DQ – one that we must win back***."
>
> "...**[N]*eed to win! If we win we hit our numbers for 2013***." (App. 44).

- **May 2, 2013:** Two days after winning the TennCare contract, DentaQuest implements TennCare's directive, going so far as to say that the only issue with a potential network plan is that it would include Snodgrass-King in the network.

> "What do you think about the following [selection] process [describes process]...***The only problem is that we'd have to figure out a way to justify excluding Snodgrass due to the fact that he would be allowed to stay in the network using this criteria***...we may need to get a ***little more creative***." (App. 10).

5. These internal emails about TennCare's directive were not contradicted by the rules and analyses DentaQuest used to build its network. Indeed, as shown by DentaQuest's internal network documents and Snodgrass-King's expert witness, because Snodgrass-King provided efficient and high-quality care, it was undisputed that Snodgrass-King should have been included in the TennCare network under the quality and efficiency measures that otherwise were

used by DentaQuest to select which providers to include. (App. 13-14; App. 51-54).

6. Recognizing that its own analyses did not justify excluding Snodgrass-King, DentaQuest's "creative" solution was to simply declare, after the lawsuit was initiated, that Snodgrass-King was excluded because it was a "large provider," a reason not found in the written network selection policy that it contractually was required to follow and that it sent to providers. (App. 13-14; 50-51). In fact, even though DentaQuest's selection criteria were required to be in writing by the TennCare contract, there was no documentation or evidence submitted at trial to support the validity or existence of this so-called "Large Provider Rule," as DentaQuest referred to it. (App. 12). What is more, DentaQuest admitted at trial that of the hundreds and hundreds of dentists who applied for inclusion in TennCare, Snodgrass-King was the ***only*** provider in the State excluded by the purported "Large Provider Rule." (App. 12).

7. At trial, Snodgrass-King presented evidence of its past disputes with TennCare and DentaQuest, the emails described above demonstrating that TennCare had instructed DentaQuest to exclude Snodgrass-King from participation in TennCare, proof of the pretextual nature of the so called "Large Provider Rule," and the lack of any medical reason for the exclusion. Snodgrass-King also presented evidence that TennCare still had leverage over DentaQuest if it did not carry out its directive – it could cancel the TennCare contract at any time for any reason. (R. 478-13, PID# 14313).

In contrast, DentaQuest offered no testimony from Gillcrist, Long, or any other TennCare or DentaQuest employee who attended the December 2012 meeting to rebut the plain language of the emails stating that TennCare told DentaQuest to "keep out" Snodgrass-King.

The jury was instructed that DentaQuest could be found to have acted "under color of state law," *i.e.*, engaged in "state action," if the jury found that TennCare had "coerced or significantly encouraged" the exclusion of Snodgrass-King from the program. (App. 24-25). The jury determined just that, returning a verdict in favor of Snodgrass-King and awarding $7.4 million in compensatory damages and $14.8 million in punitive damages. DentaQuest then filed a Motion for Judgment as a Matter of Law seeking to overturn the jury verdict.

B. The District Court Finds No State Action.

1. The district court had subject matter jurisdiction over this case pursuant to 28 U.S.C. § 1331. The district court granted DentaQuest's Motion for Judgment as a Matter of Law and vacated the jury verdict solely on the issue of state action. (App. 54-66). In so doing, the district court ignored the plain language of the December 20, 2012 "keep out" email, as well as the context in which TennCare gave that directive – while DentaQuest was trying to win the important contract – and simply declared that there was no "direct or circumstantial evidence to link the 'keep out' phrase [or] other equivalent language to TennCare." (App. 62-63).

The reason that the district court gave for this conclusion was that the Sixth Circuit Court had held that a financial incentive did not establish significant encouragement, and, thus, financial incentives categorically are ***never*** relevant to the state action inquiry. (App. 63). In this regard, the district court relied on *Campbell v. PMI Food Equipment Group, Inc.*, 509 F.3d 776 (6th Cir. 2007). There is no precedent from this Court that endorses such a categorical rule.

The district court further determined that, to establish coercion or significant encouragement, Snodgrass-King had to show that TennCare and DentaQuest were "intimately involved" at the time DentaQuest ultimately ***notified*** Snodgrass-King of their exclusion in 2013. (App. 65-66). However, nothing about the gap in time between the December 2012 TennCare-DentaQuest decision to exclude Snodgrass-King from TennCare and DentaQuest's notifying Snodgrass-King of that decision justified rejecting the jury's verdict. Indeed, the district court even admitted that the only reason DentaQuest gave for the exclusion – "Large Provider Rule" – was pretextual and unsupported by any evidence. (App. 46).

C. The Sixth Circuit Affirms, Holding that DentaQuest Did Not Engage in State Action.

1. Snodgrass-King appealed, and the Sixth Circuit had appellate jurisdiction under 28 U.S.C. § 1291. The Sixth Circuit affirmed the judgment of the district court in a split, 2-1 decision.

In concluding that there was no state action, the majority did not deny that the emails above showed TennCare had instructed DentaQuest to exclude Snodgrass-King while discussing the possibility of DentaQuest obtaining a multimillion-dollar contract. (App. 19-20). Nor did it deny that the jury was correctly instructed, in language requested by DentaQuest and that state action could be found if the jury believed there was "coercion or significant encouragement."

Yet the majority held that no reasonable jury could find that the test for state action was met. In so holding, the majority stated that Snodgrass-King's claims failed because DentaQuest was not "required" by the State to exclude Snodgrass-King from a government program, but instead made a "free-will choice." (App. 20, 22). The majority reached that conclusion by adding to the state action test a number of "requirements" from Sixth Circuit cases that run contrary to the Supreme Court's "significant encouragement" standard set forth in *Blum* as well as the application of that standard by other Circuits. (App. 19-23).

D. Circuit Judge Ralph B. Guy, Jr. Dissents.

1. Circuit Judge Guy dissented from the majority's decision. Judge Guy determined that the district court and Sixth Circuit majority did not properly apply the deferential standard of review of a jury's verdict. Instead, he concluded, as the district court had at summary judgment, that a reasonable inference could be drawn from DentaQuest's internal emails that TennCare "covertly pressured or provided significant encouragement to [DentaQuest] to formulate its

provider network in such a way as to exclude [Snodgrass-King]." (App. 25).

Judge Guy reasoned that:

> Ultimately, the evidence detailed by the district court and the parties on appeal is sufficient to support a reasonable inference that TennCare pressured DentaQuest in the past, said it wanted to replace [DentaQuest's predecessor] in part because it "let anyone into the network," and conveyed in a closed door pre-bid meeting that DentaQuest was to do whatever was necessary to keep Snodgrass-King out of the coveted contract. Although more than one reasonable inference may be drawn from DentaQuest's emails, a reasonable jury could also conclude that DentaQuest understood TennCare's position vis-à-vis Snodgrass-King; made pre-bid plans to exclude Snodgrass-King from any future network at TennCare's request; and, after being awarded a contract that could be terminated for any reason, excluded Snodgrass-King under circumstances that a jury could find were pretextual. (App. 25-26).

E. Proceedings after decision.

1. Snodgrass-King timely moved for rehearing *en banc*. On August 29, 2019, the Sixth Circuit rejected the motion for rehearing. (App. 86-87). On November 25, 2019, Snodgrass-King timely filed this petition for certiorari. *See* SUP. CT. R. 13(1), (3) (petition for certiorari must be filed within 90 days of the denial of a petition for rehearing).

REASONS FOR GRANTING THE WRIT

I. The Sixth Circuit's Decision Improperly Abrogates the "Significant Encouragement" Portion of the *Blum* Standard and Creates Varying Standards for State Action Amongst the Circuits.

Under *Blum*, a private contractor's actions constitute "state action" if the State 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 (emphasis added). While *Blum* set forth a standard for state action, it also cautioned that "the factual setting of each case will be significant." *Id.* This is consistent with this Court's repeated statement that the state action question is a "necessarily fact-bound inquiry." *Lugar v. Edmondson Oil Co., Inc.* 457 U.S. 922, 939 (1982); *Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 722 (1961) ("Only by sifting facts and weighing circumstances can the nonobvious involvement of the State in private conduct be attributed its true significance.").

Since *Blum*, this Court consistently has included "significant encouragement" as an independent circumstance that can warrant a finding of state action, specifically delineating "significant encouragement" as something different than the "coercive power" portion of the test. *See Brentwood Academy v. Tenn. Secondary School Athletic Ass'n*, 531 U.S. 288, 296 (2001); *see also San Fancisco Arts & Athletics, Inc. v. U.S. Olympic Committee*, 483 U.S. 522, 546-47 (1987) (no state action where there was "no evidence that the Federal Government "coerced *or* encouraged" the private action

at issue"). For instance, when dealing with the state action question in the Fourth Amendment context, the Court stated that "the fact that the Government has not compelled a private party to perform a search does ***not***, by itself, establish that the search is a private one." *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 615 (1989) (emphasis added). Thus, under this Court's precedents it is exceedingly clear that government encouragement of a private decision alone, if significant, can make the decision state action.

A majority of the Circuits have interpreted *Blum*'s language to mean that government encouragement alone can render a private decision to be state action. Some Circuits, like the Second, Third, Fourth, Ninth, and Tenth, have interpreted the "significant encouragement" standard to require mere "encouragement," "facilitation," "direction," or "endorsement" of a private decision. *See Roberts v. AT&T Mobility LLC*, 877 F.3d 833, 842 (9th Cir. 2017); *Wasatch Equality v. Alta Ski Lifts Co.*, 820 F.3d 381, 389-90 (10th Cir. 2016); *Harvey v. Plains Tp. Police Dept.*, 635 F.3d 606, 609-10 (3d Cir. 2011); *Tancredi v. Metropolitan Life Ins. Co.*, 316 F.3d 308, 313 (2d Cir. 2003); *Mentalovos v. Anderson*, 249 F.3d 301, 318 (4th Cir. 2001). The First Circuit has found that the "significant encouragement" test can be met with a showing of "strong encouragement." *Sanchez v. Pereira-Castillo*, 590 F.3d 31, 51-52 (1st Cir. 2009). And other Circuits, like the Fifth and Eighth, simply have looked for "significant encouragement," without giving the term any additional interpretation. *See Chernin v. Lyng*, 874 F.2d 501, 507-08 (8th Cir. 1989);

Howard Gault Co. v. Texas Rural Legal Aid, Inc., 848 F.2d 544, 555 (5th Cir. 1988).

Unlike the above Circuits, the Sixth Circuit majority in this case failed to interpret the "significant encouragement" portion of *Blum* as an independent basis for state action, instead requiring a much higher standard of conduct. The Sixth Circuit substituted for "significant encouragement" a requirement that TennCare have "***participated in*** the [private actor's] decision making." (App. 18) (emphasis added). It also said there was nothing to show that the state "***required*** [DentaQuest] to take any...actions against Snodgrass," (App. 22) (emphasis added). Finally, it added language that TennCare did not deprive DentaQuest of its ability to make a "***free-will choice***." (App. 20) (emphasis added). Such language did not originate with the Sixth Circuit majority in this case, it was taken from multiple Sixth Circuit cases that together demonstrate the continued narrowing of the *Blum* standard in the Sixth Circuit. *See Wilcher v. City of Akron*, 498 F.3d 516 (6th Cir. 2007) (origin of the "participated in" language); *Campbell v. PMI Food Equip. Grp., Inc.*, 509 F.3d 776, 784 (6th Cir. 2007) (origin of the "required" language); *S.H.A.R.K. v. Metro Parks Serving Summit Cnty.*, 499 F.3d 553, 565 (6th Cir. 2007) (origin of "free-will" language). While each of these glosses would independently create state action, the Sixth Circuit majority listed these glosses as the floor for state action, not the ceiling. In doing so, it ignored *Blum*'s inclusion of "significant encouragement" as a separate, sufficient circumstance.

The Sixth Circuit majority further demonstrated its neglect of the "significant encouragement" portion of *Blum* through its conclusion that even though the government's "keep out" directive was given simultaneously with the incentive of what the Sixth Circuit majority called a "lucrative contract," such an incentive simply was "not sufficient to find state action," as a matter of law. (App. 22). Again, the Sixth Circuit majority's reasoning in this regard relied upon prior Sixth Circuit precedent. *See Wolotsky v. Huhn*, 960 F.2d 1331, 1335 (6th Cir. 1992). Yet, such reasoning is directly contrary to other Circuits' recognition that "significant encouragement" under *Blum* can include incentives or economic pressure. *See Chernin v. Lyng*, 874 F.2d 501, 507-08 (8th Cir. 1989) (economic pressure placed on private actor by USDA sufficient to turn employee termination by private actor into state action).

At bottom, the Sixth Circuit majority's decision abrogates the "significant encouragement" portion of *Blum*, instead apparently requiring evidence that the government "required" the decision, took away a private actor's "free-will," or actually "participated in the [private actor's] decision making process." The overly-strict standard employed by the Sixth Circuit majority here is not, however, exclusive to this case. Instead, the standard was drawn from a line of published Sixth Circuit decisions.

Yet, the plain language of *Blum* and numerous decisions from other Circuits indicate that "significant encouragement" is a standalone circumstance that can create state action just like an action that is "required"

by the government. For instance, the Third Circuit has specifically reversed a district court where the jury was instructed that an "order" from the government was required to create state action. *See Harvey v. Plains Tp. Police Dept.*, 635 F.3d 606, 610-11 (3d Cir. 2011) (where policeman "encouraged" repossession, it was reversible error to instruct jury that a direct order was required).

And, the fact that a private actor makes a "free-will choice" also cannot be dispositive because a "significant[ly] encourage[ed]" choice is still a free-will choice; it is merely informed by the encouragement given. Recognition that a "free-will choice" still can be state action is readily apparent from the other Circuit decisions cited above.

Finally, that the private actor makes the final decision (*i.e.,* TennCare was not in the room when the decision to exclude Snodgrass-King ultimately was made), is in no way dispositive of whether state action exists. This Court has stated as much in describing the "typical case raising a state-action issue [in which] a private party has taken the decisive step that caused the harm to the plaintiff, and the question is whether the State was sufficiently involved to treat the decisive conduct as state action." *National Collegiate Athletic Ass'n v. Tarkanian*, 488 U.S. 179, 192 (1988).

In plain language, this Court in *Blum* stated that "significant encouragement" can be sufficient to deem a private contractor's actions to be those of the government. As demonstrated above, the Sixth Circuit majority's decision, and the Sixth Circuit precedent it relied upon in reaching such decision, departs from

that standard and runs contrary to decisions from numerous other Circuits by substituting "significant encouragement" for other, more stringent circumstances. In other words, the bar for state action has been set too high in the Sixth Circuit.

Constitutional rights, especially freedom from the government's use of a private actors to retaliate against free speech, should not vary based on the part of the country in which a person resides. Nor should such important rights be rendered uncertain or malleable by the existence of varying standards. As a result, this Court should grant Snodgrass-King's petition and review the district court's decision in a manner consistent with *Blum* and the majority of Circuits.

CONCLUSION

This Court should grant Snodgrass-King's petition for a writ of certiorari.

Respectfully submitted,

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Dated: November 25, 2019