No.

In The

Supreme Court of the United States

JEFFREY R. GOLIN, ELSIE Y. GOLIN, AND

NANCY C. DELANEY, AS *GUARDIAN AD LITEM* FOR NANCY K. GOLIN

Petitioners,

v.

SAN ANDREAS REGIONAL CENTER, SANTI ROGERS, MIMI KINDERLEHRER, TUCKER LISKE, EDNA MANTILLAS DBA EMBEE MANOR, STANFORD HOSPITAL AND CLINICS, AND JAMIE BUCKMASTER

Respondents.

On Petition for Writ of Certiorari

To The California Court of Appeal

for the First District

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether persons who are not government officials and not performing governmental duties can claim qualified immunity from suit in a civil rights action pursuant to 42 U.S.C. § 1983.

2. Whether it is harmless error to submit to the jury the legal issue whether a defendant is entitled to qualified immunity.

3. Whether it is harmless error to submit to the jury for determination the legal standard whether the defendants' conduct, in light of U.S. Supreme Court precedent and historical understanding of the Constitution, meets the "shocks the conscience" standard for constitutional violations.

4. Whether, if the defendants' conduct did violate the Constitution, a governmental official in defendants' position could nevertheless reasonably believed their conduct was lawful.

5. Whether petitioners were entitled to a directed verdict when respondents acted jointly to involuntarily confine Petitioner Nancy Golin, an autistic, mentally retarded woman, at an undisclosed location for 11 months, without due process, or indeed, any process of law at all, or does the defendants' professed desire to keep Nancy Golin "safe" absolve them from liability?

THE PARTIES

Plaintiff **Nancy Golin** was a 31-year old developmentally disabled adult at the time this claim arose. She suffered from mental retardation, epilepsy, and autism. She was almost mute and had the mental capacity of a 2- or 3-year old.

Plaintiffs **Jeffrey Golin** and **Elsie Golin** are Nancy's parents.

Defendant **San Andreas Regional Center** ("SARC") is a not-for-profit corporation, which, like all regional centers, provides services to persons with developmental disabilities under contract with the State Department of Developmental Services.

Defendant **Santi Rogers** was Executive Director of SARC.

Defendant **Miriam "Mimi" Kinderlehrer** was the Director of Consumer Affairs for San Andreas Regional Center. She reported to Santi Rogers.

Defendant **Tucker Liske** was the District Manager for San Andreas Regional Center. He supervised approximately a dozen service coordinators.

Defendant **Jamie Buckmaster** was the Social Services Program Manager of Santa Clara County Adult Protection Services (APS), a county agency that is mandated by the Welfare and Inst. Code to receive and investigate reports of dependent adult abuse, neglect and exploitation. See Calif. Welfare & Institutions Code §§ 15751, 15766

Defendant **Stanford Hospital and Clinics** is a private hospital in Palo Alto, California.

Defendant Edna Mantillas d/b/a Embee Manor was the administrator of Embee Manor, a 6-bed residential care facility where Nancy was sent.

The City of Palo Alto and Detective Lori Kratzer were originally named as defendants, but were dismissed on their motions for summary judgment.

DIRECTLY RELATED PROCEEDINGS

- *Golin v. Allenby,* No. 06AS01743, California Superior Court of Sacramento County, venue transfer to Santa Clara County Superior Court entered, No. C054107, California Court of Appeal, Third District, judgment entered November 20, 2006; California Supreme Court No. S148450, judgment entered January 3, 2007; U.S. Supreme Court No. 06-1562, Petition for Writ of Certiorari, denied October 1, 2007
- *Golin v. Allenby,* 2007-1-CV-082823, California Superior Court of Santa Clara County, judgment entered December 11, 2007; California Court of Appeal, Sixth District, No. H032619 judgment entered November 30, 2010, 190 Cal. App. 4th 61, reversed and remanded, venue transferred to California Superior Court of San Mateo County No. 507159, transfer entered July 5, 2011.
- *Golin v. City of Palo Alto,* California Superior Court of San Mateo County, No. CIV 507159. California Court of Appeal, First District, No. A144680, judgment entered December 9, 2016; No. S239624, California Supreme Court, judgment entered February 22, 2017.

- *Kratzer v. Superior Court*, California Court of Appeal, First District, No. A143140, judgment entered January 14, 2015, San Mateo Superior Court No. CIV 507159
- *Buckmaster v. Superior Court*, California District Court of Appeal, First District, No. A143210, judgment entered December 30, 2014. San Mateo Superior Court No. CIV 507159
- *Mantillas v. Superior Court*, California District Court of Appeal, First District, No. A143279, DCA judgment entered December 30, 2014, San Mateo Superior Court No. CIV 507159.
- *San Andreas Regional Center v. Superior Court*, California District Court of Appeal, First District, No. A143810, judgment entered February 10, 2015.

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PETITION FOR A WRIT OF CERTIORARI

Jeffrey R. Golin and Elsie Y. Golin, as parents, and next friends to Nancy Golin, respectfully petition for a writ of certiorari to the California Court of Appeal. They ask that the Court reverse the state court decision affirming a jury's general verdict against them on all issues.

OPINIONS BELOW

The opinion of the California Court of Appeal appears as Appendix 1, and is unreported.

The order of the Court of Appeal denying rehearing appears as Appendix 2, and is unreported.

The order of the California Supreme Court denying discretionary review appears as Appendix 3, and is unreported.

JURISDICTION

The judgment of the California Court of Appeal was entered on March 26, 2019.

The Court of Appeal denied a timely petition for rehearing on April 22, 2019.

The California Supreme Court denied discretionary review on July 17, 2019.

Justice Kagan extended the time for filing this petition, upon two requests by petitioners, to December 14, 2020. Application No. 19A389.

This petition is filed within the extended time, and is timely pursuant to Rules 13.1 and 30.1 of this Court.

The jurisdiction of this court is invoked pursuant to 28 U.S.C. §1257(a), as a petition for a writ of certiorari to review the judgment of the highest court of a State.

CONSTITUTIONAL PROVISIONS INVOLVED

The First Amendment provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

The Fourth Amendment provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Section 1 of the Fourteenth Amendment provides:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

INTRODUCTION AND

STATEMENT OF THE CASE

On November 14, 2001 Nancy Golin, an autistic, 31-year old intellectually disabled woman, lived with her parents Elsie and Jeffrey Golin, spoke only few words (5 RT 867),[1] and had the mental capacity of perhaps a 3-year old. (5 RT 745.) That evening she and Elsie were parked in Elsie's van, in front of Elsie's workshop in Mountain View, California, watching a video of Beauty and the Beast. (2 RT 153, 154-155.) Elsie had to go inside to use the bathroom, and tried to get Nancy to come with her, but Nancy pulled a blanket over her head, declining to go. (4 RT 573-574.) When Elsie returned a few minutes later, Nancy was gone. (4 RT 573-574.) Elsie and Jeffrey called the police and searched all night for her, but she could not be found. (3 RT 353, 4 RT 571, 577, 580.)

The next day about 11:00 a.m., while several Palo Alto police officers were at the scene (4 RT 584), Nancy walked up the driveway. (3 RT 368, 4 RT 595.) Detective Kratzer testified Nancy's clothes were dirty, but she had a smile on her face. (3 RT 369.)

Detective Kratzer sent Nancy to Stanford Hospital's psychiatric ward on a 72-hour "hold" for evaluation and treatment (3 RT 374, 380-381), pursuant to Calif. Welfare & Institutions Code §5150, part of California's Lanterman-Petris-Short (LPS)

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[1] References are to the record on appeal in the California court, e.g., Volume 5 of the Reporter's Transcript, at p. 867.

Act, a statute which authorizes involuntary commitment, without a warrant or other court order, if a person is a danger to herself or others, or is gravely disabled. A medical professional at the facility must then make a determination whether the person needs to be detained. See Calif. Welfare & Institutions Code § 5150(e).

Nancy suffers from autism, which is a form of developmental delay. (8 RT 1534.) However, developmental delay is not a "mental disorder" that satisfies the requirement of section 5150. (8 RT 1514.)

Nevertheless, the Medical Director at Stanford Psychiatry, Dr. Robert Hayward, accepted her on the basis of the "5150 hold." (8 RT 1487-1488.) When Stanford tried to extend the "hold" for 14 days of "intensive treatment" pursuant to Welf. and Inst. §5250, this necessitated a court hearing, and the hearing officer dismissed the hold because these "holds" do not apply to the developmentally disabled. (8 RT 1555; App. 9.)

During Nancy's 13-day stay at the hospital, respondents (except Edna Mantillas, who was not yet involved) concluded that Nancy's parents were unfit and that Nancy should not be returned to them. But instead of instituting a guardianship or conservatorship for Nancy,[2] they ultimately agreed they would send Nancy to a locked

[2] Calif. Probate Code § 1801(d), for example, allows a limited conservatorship of a developmentally disabled adult. The petition may be filed by any interested person or friend. Calif. Probate Code § 1820(a)(5). A temporary conservator may be appointed on five days' notice, or even less if the court finds good cause. Calif. Probate Code § 2250(c).

residential care facility for an indefinite period, and her whereabouts would be kept hidden from her parents.

The day after Nancy was taken to Stanford Hospital, Jamie Buckmaster, the manager of Santa Clara County Adult Protective Services, explained to Mimi Kinderlehrer, SARC's Director of Consumer Affairs (6 RT 1135, 14 RT 2648), why getting a conservatorship was "so important." (6 RT 1087-1088.) Santi Rogers, Executive Director of SARC (7 RT 1212), testified that at SARC they thought seeking the conservatorship was the best way to protect Nancy in the near future. (7 RT 1249.) He knew that Tucker Liske of SARC was looking for a living arrangement for Nancy, and that Nancy was not conserved. (7 RT 1246.) Dr. Hayward thought that without a temporary conservatorship, it might be impossible to have Nancy legally placed. (8 RT 1591.) Otherwise, said Dr. Hayward, "who would have the authority to place her, if there wasn't a court order conservator to do that?" (8 RT 1592.)

Throughout the time Nancy was at Stanford, Dr. Hayward testified he and other Stanford staff members were working integrally with people from SARC and APS, with the goal to find placement "someplace where she would be safe." (8 RT 1607.) On November 27, 2001 Tucker Liske reported to APS that he had found board and care for Nancy at Embee Manor. He called Jeannie Lutticken at Stanford and said to tell Stanford's staff not to disclose Nancy's whereabouts. (12 RT 2325.)

On November 27, 2001, the hospital transferred Nancy to Embee Manor, a facility that SARC had arranged for her to reside in (8 RT 1602-1603), and which, Dr. Hayward said, the hospital trusted to provide appropriate care and keep her safe. (8 RT

1598.) A note in Adult Protective Services' file said Detective Kratzer left a voice message, confirming that Nancy Golin was moved by SARC to residential care. (6 RT 1099.)

According to Mimi Kinderlehrer, a SARC "consumer" like Nancy can be kept in a placement indefinitely, for the rest of her life, without a court order. (14 RT 2692.)

Buckmaster testified she was aware that after November 27th, "nobody had custody of Nancy." (5 RT 720.) But she said it didn't matter to APS whether she was conserved or not, because APS wanted to keep her safe. (5 RT 721.)

Santi Rogers testified that he approved of everything his staff did, and he approves of it now [at trial]. (7 RT 1266-1267; 1315.)

Edna Mantillas of Embee Manor knew Nancy had no conservator. (10 RT 1751.) Exhibit 21 is the admission agreement with Embee, which was prepared by SARC. (10 RT 1750.) Where it says "consumer signature" [Nancy is the "consumer"] there is written "cannot sign," and the line for signature by a parent or conservator is blank. (10 RT 1751.) There is also a space for the "authorized representative" to sign, but no name is written there. (10 RT 1752.) The agreement is dated December 3, 2001, shortly after Nancy arrived. (10 RT 1756.) The form also has an authorization for consent for medical treatment, but where there is a signature line for the consumer, a signature line for father and mother, and another line for legal guardian, no signatures appear in those boxes. (10 RT 1761-1763.) Although no signatures appear on

the consent form, Mantillas took Nancy to various medical doctors for medical treatment. (10 RT 1764.)

Jeffrey and Elsie were arrested for adult abuse on November 30, 2001, right after the decision was made by defendants to hold Nancy without court order and after Nancy was transferred to Embee from Stanford. They were bailed out overnight. The claims against them were vague and unspecific. In 2003 the charges against Elsie were dismissed and Jeffrey pled no contest to a misdemeanor, and after six months of probation, his conviction was expunged and exonerated. App. 11 (5 RT 899-900).

Jeffrey testified that the DA admitted at trial he had no viable theory of abuse to pursue, and Jeffrey only accepted the plea offer at start of trial to protect his family, on the condition it not affect the conservatorship and there would be an exoneration. (5 RT 900-903)

Georgianna Lamb, a friend of the Golin family, was appointed temporary conservator of Nancy on October 15, 2002, some 11 months after Nancy was seized by the police. (7 RT 1324.) Prior to that date, no legal process justified Nancy's involuntary confinement.

Petitioners filed suit pursuant to 42 U.S.C. § 1983.

Nancy asserted a violation of her Fourth Amendment right to be secure against an unreasonable and warrantless seizure of her person, and her Fourteenth Amendment right not to be deprived of her liberty without due process of law. All three

petitioners asserted a violation of their First and Fourteenth Amendment rights to family association without unreasonable government interference.

Only the defendant Jamie Buckmaster was a governmental official, but all defendants asserted an affirmative defense of qualified immunity.

The case was tried before a jury. Petitioners' motions for a directed verdict on the issue of liability and on the defense of qualified immunity were denied. The trial court, over petitioners' objection, submitted the determination of qualified immunity to the jury.

The jury returned general verdicts in favor of the respondents. Petitioners' motion for a judgment notwithstanding the verdicts and a motion for new trial were denied.

REASONS FOR GRANTING THE PETITION

I. This Court Has Consistently Said the Interests of Justice Would Not Be Served by Extending Qualified Immunity to Private Individuals and Entities. The California Court's Ruling Is Contrary to the Precedents of This Court.

The California appellate court rejected petitioners' assertions that the defense of qualified immunity is not available to private individuals or entities. The court specifically addressed its decision as applied to the San Andreas Regional Center (SARC), the entity that made the arrangements to place Nancy Golin at the

residential care facility, but the court's decision stated it was addressing "Qualified immunity for private parties" (App. 28), so it can be inferred that the court's reasoning was intended to apply as well to SARC's employees, to the operator of the care facility, and to Stanford Hospital.

This Court has thus far refused to extend qualified immunity to private persons and entities. The decision of the California court is in conflict with this Court's decisions.

In *Wyatt v. Cole*, 504 U.S. 158 (1992) the Court held that private litigants who conspired with state officials to invoke state statutes later declared unconstitutional would not be entitled to the qualified immunity accorded to government officials. *Id.* at 168. The Court observed that the tradition of the immunity that developed into the doctrine of qualified immunity was "so firmly rooted in the common law" and was supported by such strong policy reasons that Congress would have specifically said it was abolishing the doctrine had it wished to do so. *Id.* at 164. But the Court concluded that "the rationales mandating qualified immunity for public officials are not applicable to private parties." *Id.* at 167.

In *Richardson v. McKnight*, 521 U.S. 399 (1997) the Court refused to extend qualified immunity to prison guards employed by a private prison management firm. Looking to the history and purpose of qualified immunity, the Court pointed out that correctional services have traditionally been performed by both public and private entities. *Id.* at 405. The fact that the private guards performed the same functions as state prison guards was beside the point, for the Court has never held that the

mere performance of a governmental function could result in qualified immunity. *Id.* at 408. And because government officials are elected or appointed, immunity for them may ensure the "vigorous exercise of official authority," *id.* at 408, whereas if private agents perform poorly, competitive "marketplace pressures" mean they face replacement by others who will do a safer and more effective job. *Id.* at 409. Finally, it is less likely that lawsuits will threaten to distract private individuals from other duties they owe the public. *Id.* at 411.

The closest this Court has come to granting qualified immunity to a private person was *Filarsky v. Delia*, 566 U.S. 377, 132 S.Ct. 1657 (2012), where a municipality that had no employment lawyer on their staff hired Filarsky, an employment specialist, to conduct an official investigation into an employee's potential wrongdoing. *Id.*, 132 S.Ct. at 1667. The court compared Filarsky's function to that of typical local public officials in 1871, at the time Congress passed the Civil Rights Act (42 U.S.C. § 1983), when much of local government was administered by members of society who served the public on a temporary basis while maintaining their own regular occupation. *Id.*, at p.1662. The court afforded Filarsky the same immunity that was historically afforded to part-time government employees. The Court's opinion is peppered with phrases that make clear that qualified immunity in this context applies only to those who carry out the government's official business in their own right—someone, for example, who accepts a "government assignment," or performs "government duties," *id.*, 132 S.Ct., at 1666, or who is "working for the government in pursuing government objectives." *Id.* at 1667. In the case at bar SARC and its employees were not

part-time employees "working for the government." But Filarsky was; the City had actually hired him to handle a specific case.

The California Court of Appeal decision is also in conflict with Supreme Court decisions holding that a defendant claiming immunity must plead and prove the defense. The California appellate court noted the absence of evidence that SARC was working for the government and noted that the parties' briefs did not address the "firmly rooted tradition" factor. (App. 31) At that point the opinion should have cited *Gomez v. Toledo*, 446 U.S. 635, 640 (1980) for the principle that qualified immunity is an affirmative defense, and *Dennis v. Sparks*, 449 U.S. 24, 29 (1980) for the principle that "the burden is on the official claiming immunity to demonstrate his entitlement," and reversed the judgment; see also *Martinez v. County of Los Angeles*, 47 Cal.App.4th 334, 342 (1996) ["Qualified immunity is an affirmative defense against section 1983 claims"]. As this Court has observed, nothing in the language or legislative history of §1983 suggests that a plaintiff must allege (let alone prove) bad faith to state a claim for relief. *Gomez v. Toledo, supra* 446 U.S. at 639

Instead of reversing the judgment, the appellate court reversed the imposition of the burden requiring a defendant to show entitlement to the defense, and placed a burden on the plaintiffs to *dis*prove it: "Because it is plaintiffs' burden to provide an adequate record on appeal showing error, the consequence for these inadequacies falls squarely upon them." (App. 31, 32, & n. 13.)

Ignoring the Court's statement in *Richardson v. McKnight* that this Court has never held that "mere performance of a governmental function" entitles a private

person to qualified immunity, 521 U.S. at 408, and the statement in *Wyatt v. Cole* that "the rationales mandating qualified immunity for public officials are not applicable to private parties," 504 U.S. at 167, the California appellate court concluded the purposes of qualified immunity would be furthered by what it deemed the "extension" of the defense to SARC and its employees. (App. 31.) Because the appellate court placed the burden on plaintiffs to disprove entitlement to qualified immunity, the court did not bother to address the fact that when Congress adopted § 1983, there was no "firmly rooted" tradition of immunity for private placement agencies; indeed, we have found no evidence such agencies even existed in 1871. The appellate court's decision to *extend* the scope of qualified immunity is in direct conflict with the precedents of this Court, for example, the statement in *Wyatt v. Cole*, 504 U.S. at 167 that "the rationales mandating qualified immunity for public officials are not applicable to private parties."

Is it time to overrule the rule in *Dennis v. Sparks* that the burden of showing entitlement to the defense of qualified immunity is on the government official? Does the history and purpose of qualified immunity fit better with a rule requiring the plaintiff in a civil rights case to disprove that a defendant believed he or she was acting lawfully? The Court should grant the petition to resolve the conflict between the decision in this case and decisions by this Court.

II. The Error of Submitting Two Critical Questions of Law to the Jury to Determine Could Not Have Been Harmless.

Qualified immunity shields defendants in civil rights actions if a reasonable person, in light of clearly established law, could have believed their actions to be lawful. Defendant Jamie Buckmaster, the manager of Adult Protective Services for the County was a government official, and as such she was the one defendant who was entitled to assert a defense of qualified immunity.

Who decides "in light of clearly established law" whether a defendant could reasonably believe her conduct was lawful? In *Hunter v. Bryant*, 502 U.S. 224 (1991) the Ninth Circuit had stated that the issue of immunity "is a question for the trier of fact." This Court, however, characterized this statement of law as simply "wrong," because "[i]mmunity ordinarily should be decided by the court long before trial." *Id.* at 228.

In the context of a similar issue, reviewing courts have sometimes analyzed defendants' standard of conduct in a substantive due process context by asking whether the conduct "shocks the conscience." In *County of Sacramento v. Lewis*, 523 US 833 (1998) Justice Kennedy, in concurrence, wrote to explain how the test is used to mark the beginning point "in asking whether or not the objective character of certain conduct is consistent with our traditions, precedents, and historical understanding of the Constitution and its meaning." *Id.*, at 856; see also *Armstrong v. Squadrito*, 152 F.3d

564, 581 (7th Cir. 1998) [a court analyzes "precedent, long-standing state and federal statutes, and specific textual rights"].

Remarkably, the trial court submitted both these questions of law to the jury, thereby requiring the jury to determine whether a defendant's good faith belief was reasonable "in light of clearly established law," and whether the defendants' conduct was "consistent with our traditions, precedents, and historical understanding of the Constitution and its meaning."

The decision of the California Court of Appeal agreed that both these issues were matters for the trial court, not the jury, to decide. (App. 39)

But, said the appellate court, submitting these issues to the wrong decisionmaker was mere "procedural error," the kind of error which requires the party aggrieved by the error to show "it is reasonably probable a result more favorable to the appealing party would have been reached absent the error." The appellate court rejected plaintiffs' argument that the jury is not equipped to make a determination of the applicable law, and the argument that a jury was not "instructed how to assess how a reasonable official in defendants' position could think the challenged conduct was lawful." This "speculation," as the decision characterized the petitioners' contentions, "falls short of demonstrating a reasonable probability of a more favorable result absent the error." (App. 40.) That is so, said the court, first, because the jury was capable of understanding the "factual circumstances" underlying the conduct, and second, because when plaintiffs moved for a new trial, they raised these two issues, and the trial court therefore "did have the opportunity to make the final

determination on these questions of law, rendering the earlier instructional error harmless." (App. 41-42.)

The appellate decision, it will be noted, did not address the question of the jury's capacity to understand how to apply relevant legal principles to the "factual circumstances," or the trial court's failure to provide the jury with legal standards to guide their determination. "Jurors are not experts in legal principles; to function effectively, they must be adequately instructed in the law." *Carter v. Kentucky*, 450 U.S. 288, 300 (1981). The appellate court's decision is in conflict with this statement.

We suppose in a sense it could be said the trial court had an "opportunity" to make a "final determination" of the issues when plaintiffs moved for a new trial and a judgment notwithstanding the verdict. But it had the same opportunity when the plaintiffs objected to presenting these issues to the jury in the first place. In neither circumstance did the trial court actually *take* that opportunity to decide the issues, because, as its original decision to submit the issues to the jury shows, it erroneously believed they were matters for the jury to decide.

Is submitting a question of law to the wrong decisionmaker the kind of "trial error" that can be quantitatively assessed in the context of other evidence? Or is it a structural defect in the trial mechanism itself, which makes the trial itself unfair and defies analysis by "harmless-error" standards? See *Arizona v. Fulminante*, 499 U. S. 279, 309 (1991). Can it ever be harmless to submit a question of law to an entity that has no knowledge of the applicable law? If it were somehow *possible* that such an error could be harmless, how does a reviewing court compare the effect of rulings on

questions of law by an unqualified decisionmaker with the outcome of a hypothetical error-free trial that never took place, as the appellate court did here? Would not the fact that if the trial court had an understanding of, and actually decided, the applicable legal principles mean there was a reasonable probability of a result more favorable than the result of a decision by an entity with no knowledge of what the clearly established law is?[3]

In *Jackson v. Denno*, 378 U. S. 368 (1964) the Court held unconstitutional the New York procedure leaving to the trial jury alone the issue of the voluntariness of a challenged confession. The procedure, said the Court, "did not afford a reliable determination" of the issue and did not adequately protect the defendant's right to be free from a conviction based on a coerced confession, and for that reason violated the Due Process Clause, requiring reversal of the conviction. *Id.* at 377.

A jury only returns a general verdict. "It is impossible to discover whether the jury found the confession voluntary and relied upon it, or involuntary and supposedly ignored it. Nor is there any indication of how the jury resolved disputes in the evidence concerning the critical facts underlying the coercion issue. Indeed, there is nothing to show that these matters were resolved at all, one way or the other." *Id.* at 379-380. A defendant is entitled to a fair hearing at which the facts and the voluntariness of his confession are actually and reliably determined. "But did the jury in

[3] In *Strickland v. Washington*, 466 U.S. 668, 694 (1988) the Court defined a "reasonable probability" as "a probability sufficient to undermine confidence in the outcome."

Jackson's case make these determinations, and if it did, what were these determinations?" *Id.* at 380. Moreover, there is a danger that matters pertaining to guilt will infect the jury's findings bearing on voluntariness, as well as the conclusion on the issue itself, dangers which are "sufficiently serious to preclude their unqualified acceptance upon review in this Court." *Id.* at 383. "And it is only a reliable determination on the voluntariness issue which satisfies the constitutional rights of the defendant." *Id.* at 387. The court reversed the conviction, without requiring the defendant to show the likelihood of a more favorable result absent the error.

We submit that submitting a legal question to an entity the law does not permit to decide makes the trial unfair and unamenable to harmless error analysis. But this Court has never specifically answered these questions. The constitutional questions presented are substantial, and the Court should grant the petition and answer them.

III. No Reasonable Person Could Believe It Was Lawful to Seize An Autistic, Mentally Retarded Woman and Involuntarily Confine Her at a Secret Location for Months Without a Hearing of Any Kind.

The remaining claims of error, relating to whether petitioners were entitled to a directed verdict on the issue of liability as a matter of law and on the issue of the defense of qualified immunity are related, and can be addressed together.

The California court recognized that there is no doubt that the law in 2001 established that a civil commitment in the mental health context was a significant deprivation of liberty requiring due process, citing *Addington v. Texas*, 441 U.S. 418, 426

(1979), and that parents and children have a right to family association without unreasonable governmental interference. App. 33. Petitioners submit that the purported good intentions of the government and its cohorts does not excuse a violation of these rights.

A. Nancy's Fourth Amendment Claim: A Warrantless Seizure of the Person Is Per Se Unreasonable

A person has been "seized" within the meaning of the fourth Amendment if, in view of all the circum-stances surrounding the incident, a reasonable person would have believed that he or she was not free to leave. *California v. Hodari D.* 499 U.S. 621, 627-628 (1991); *Kaupp v. Texas*, 538 U. S. 1, 3 (2003); see also *Brendlin v. California*, 551 U. S. 249, 254 (2007) ["A person is seized" whenever officials intentionally "restrain the person's freedom of movement" or when "a reasonable person would have believed he was not free to leave"].. If the detention is unlawful, it is a "seizure" that violates of the Fourth Amendment. *People v. Takencareof*, 119 Cal.App.3d 492, 496 (1981). That legal principle defines Nancy's circumstance.

The evidence here was largely undisputed, and the law applicable to seizure of the person has been clearly established since the Fourth Amendment was ratified in 1791. "A motion for a directed verdict may be granted upon the motion of the plaintiff, where, upon the whole evidence, the cause of action alleged in the complaint is supported and no substantial support is given to the defense alleged by the defendant." *Newing v. Cheatham*, 15 Cal.3d 351, 359 (1975). The federal rule is virtually the same; "the trial judge must direct a verdict if, under the governing law, there can be

but one reasonable conclusion as to the verdict." *Anderson v. Liberty Lobby, Inc.*, 447 U.S. 242, 249 (1986).

The respondents relied on Calif. Welfare & Institutions Code §§ 5150 and 5152 to establish probable cause, but as the hearing officer ruled when she dismissed the "5250 hold," those statutes authorize the detention of the mentally disordered, not the mentally retarded. (App. 7-8.) The back of the 5150 form itself was designed to prevent any confusion about the process; it says that "mental disorder" does not include mental retardation. (8 RT 1660.) Justice Liu explained this long-standing distinction in his dissenting opinion in *People v. Barrett*, 54 Cal.4th 1081, 1126-1127(2012).

The record is replete with conversations among SARC, APS and Stanford Hospital both many months before and during Nancy's stay at the hospital about the need for a conservatorship. Jeannie Lutticken, a social worker at Stanford Hospital, testified it was her responsibility to coordinate the agencies (Palo Alto Police, SARC, and Adult Protective Services) that were helping Nancy out. (11 RT 2155.) On November 26th, after the "5250 hold" had been dismissed, a meeting was held at Stanford Hospital "in regard to placement for Nancy in a locked facility." (8 RT 1579.) Lutticken testified Nancy's discharge was being handled by San Andreas Regional Center, and the "team" at the hospital was the "facilitator." (12 RT 2303.) Dr. Hayward testified that throughout the time Nancy was in Unit H-2, he and the other Stanford staff members were working integrally with people from SARC and APS, with the goal to find placement "where she would be safe." (8 RT 1539, 1607.)

California Probate Code § 2250(c) allows appointment of a temporary conservator upon five days' notice (see footnote 2, *supra*, p. 4). But respondents elected to confine Nancy outside the judicial process.

"Time and again, this Court has observed that searches and seizures conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment — subject only to a few specifically established and well delineated exceptions." *Minnesota v. Dickerson*, 508 U.S. 366, 372 (1993) [internal quotes omitted]. The seizure of a mentally disturbed person is analogous to a criminal arrest and must be supported by probable cause. *Bias v. Moynihan*, 508 F.3d 1212, 1220 (9th Cir., 2007).

We are repeatedly confronted in this case with the question, "*what* was *the supposed emergency*?" The Appellate opinion is replete with innuendo implying such an emergency existed. "Police learned that Jeffrey and Elsie had a *history* of *alleged* neglect and abuse of their daughter." (App-1). A "history" is *per se* not an emergency. Allegations, without proof, are mere hearsay and gossip.

Obtaining "emergency protective orders (EPO[]s) giving temporary custody of Nancy to Stanford" (App. 1) are not *per se* evidence of an emergency, without any supporting post-deprivation due process hearing, which defendants assiduously avoided. When they did start a probate conservatorship petition, five months later in April 2002, they initially kept the Golins from learning about it, to try to keep the probate court from hearing their side of these allegations.

The arrest of Jeffrey and Elsie on groundless felony dependent adult abuse was not proof of abuse or neglect but only based on unspecified *suspicions* of abuse and neglect. The arrests took place on November 30, pursuant to SARC, Stanford and APS discovering they could not hold Nancy legally beyond the 5150 detention date, and decided to go ahead and do it illegally without a hearing, hopefully without family interference.

A "*history* of *suspected* abuse and neglect" going back to "the mid-80s" (App. 3) is again, is the *antithesis* of an emergency, implied in "history" (i.e., exceedingly tenuous and remote) and "alleged," (i.e., unproven hearsay).

The record is replete with disparaging references to the Golins supposedly "refusing services" from SARC, also one of the underlying claims Det. Kratzer based her warrant on (App. 3). Apparently, this was considered by all to be the Golins' cardinal sin. Declining services from SARC is not abuse and neglect, because under the Lanterman Developmental Disabilities Services Act (LDDS), Calif. Welfare & Institutions Code §§4500 *et seq*,[4] all regional center services are "voluntary," a fact SARC boasted, requiring *someone's* consent, which was not given, a fact that was freely acknowledged by SARC's Tucker Liske (5 RT 806-807) and Mimi Kinderlehrer (6 RT 135) to be required, but not consented.

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[4] Distinguished from the Lanterman Petris Short (LPS) Act, Calif. Welfare & Institutions Code, §§5000 *et seq*, permitting involuntary detention.

Declining services from 1992 to present was also remote and tenuous, not an emergency. The LDDSA is notably distinguished from the Lanterman Petris Short (LPS) Act, Calif. Welfare & Institutions Code, §§5000 *et seq*, *supra*, justifying involuntary detention.

The Court admonished the jury to disregard Lt. Kratzer's testimony regarding hearsay from APS: "You can not accept this for a fact that any of this happened and that any of this is true...it is not evidence that any of these things actually happened." (3 RT 459) The allegations and "concerns" reported to APS were all investigated by APS investigators and found to be without substance. Again, no emergency.

That claim of refusing services is misleading because it is also brutally untrue. Elsie testified at great length and detail that from the early '70s up to the early '90s she *did* tirelessly participate in Nancy's IPP and sought SARC services for many years, but eventually gave up in 1992 when provided services were doing more harm than good (2 RT 174-201, 252-265).

Nancy was found to be in good condition, after police staged her supposedly solo return, intentionally feigning her disappearance for the entire 15 hours while she was actually in their custody. (App. 6, 4 RT 604, 5 RT 875-876, Exh. 601, 14 RT 2641-2645). She was examined at Stanford's ER and found to be in good health. No emergency there. The real emergency began at Stanford after she was admitted and placed into the locked psych ward, to "keep her safe."

Being "disheveled" (App. 4) does not constitute an emergency. Elsie testified that she had showered Nancy in the past few days and had been given a salon style haircut. The newly purchased van they had traveled in together had just been professionally detailed (2 RT 154) and did not smell of urine (2 RT 155). Elsie and Jeff both testified that Nancy was not living in a van but in a fully equipped Class A motor home with her mother (5 RT 871-872, 929). Nancy was not found sleeping on a bare floor in a sleeping bag (5 RT 877-878). Elsie testified Nancy was never in a "U-Haul storage unit" as Lisa Wendt testified, but they worked in a fully equipped office-industrial workshop which she identified from photographs (17 RT 2942-2945).

No evidence was offered to support the hearsay allegation that Jeffrey and Elsie failed to comply with doctors' orders regarding Nancy's anti-seizure medication. Elsie testified at great length and detail that the reverse was true, in spite of difficulties (2 RT 204-222). APS workers repeatedly investigated this claim and never were able to find any evidence of it (2 RT 270-271). Nancy was not having seizures at the time of her detention, was happy to be reunited, and thus no credible emergency was present on the day she was seized by police. Her seizures *started* after she was admitted to Stanford's psychiatric ward and her medications were changed. Her seizure frequency never got better and at critical times got worse after SARC and APS placed her.

A well-treated and healed foot injury referred to as looking partially infected (App. 6), shown in Stanford's medical records, was explained by Jeffrey to police as caused by Stanford Hospital months earlier at the scene, but disregarded. (5 RT 880)

Elsie testified that this was caused by an IV burn at Stanford, not due to her neglect (17 RT 2948).

Nancy's abduction in 2001 based on long past allegations was more than anything else SARC's relentless effort to illegally *force* unhelpful non-consensual services on the Golin family after they failed even if it had to be done illegally, to fulfill what they misperceived as their higher calling. That does not constitute an immediate emergency.

No reasonable person could think it lawful to involuntarily seize and confine Nancy for 11 months, even to keep her safe, based solely on long past "histories," "allegations," or "concerns." If that were true, and even non-governmental entities could be extended the novel right assert it, no one would be truly safe from authorities. The California Court of Appeal decision is contrary to the law as established by this Court.

B. Nancy's Fourteenth Amendment Claim: Involuntary Commitment to a Residential Care Facility Is a Deprivation of Liberty That Requires Due Process of Law.

"This Court repeatedly has recognized that civil commitment for any purpose constitutes a significant deprivation of liberty that requires due process protection." *Addington v. Texas, supra* 441 U.S. 418, 425; see also *Humphrey v Cady*, 405 US 504, 509 (1972) [describing civil commitment for compulsory psychiatric treatment as a "massive curtailment of liberty"].

In *O'Connor v. Donaldson,* 422 U.S. 563 (1975) Donaldson was civilly committed to a Florida mental institution, where he was kept confined for 15 years despite his

requests to be released and despite the fact that he was capable of surviving safely outside if he had the help of family or friends. He may have been confined to ensure him a higher living standard than he had had in the outside community, but this violated Donaldson's "constitutional right to freedom." *Id.* at 576; see also *Shelton v. Tucker*, 364 U. S. 479, 488 (1960) [the government's purpose may be legitimate, but that purpose cannot be pursued by means that broadly stifle fundamental personal liberties].

In *Addington*, the appellant was committed to a mental hospital on a "preponderance of the evidence" standard of proof. The court held that due process required more substantial proof under a "clear and convincing" standard. *Addington* at 431-432.

If commitment proceedings held in a civil court require due process of law, can the State avoid problems with the Due Process Clause by simply eliminating the court proceedings altogether, like in Nancy's case? We suggest that if the law is clear that court proceedings require due process of law, *a fortiorari* any reasonable defendant would conclude that deprivation of liberty without any proceedings at all also violates the Due Process Clause.

Not so, said the California court. The legal standard of cases like Addington is of too high a level of generality to allow an assessment of the reasonableness of SARC and Buckmaster's conduct. App. 34. It is true, as the opinion says, that petitioners did not cite any cases that said "efforts to protect" a developmentally disabled adult from parental abuse violates clearly established law. But petitioners claim is not that

the respondents protected Nancy too much; it is that they deprived her of her liberty without due process of law, or indeed any process at all.

Nor does the fact that years ago Nancy had utilized SARC's services and was still "eligible for services" make it reasonable for SARC to conclude that they could involuntarily confine Nancy without any court process—for the rest of her life, according to SARC's Director of Consumer Affairs (14 RT 2692)—because, said the California court, they were only "temporarily" withholding her whereabouts from her parents. App. 35.

Being eligible for "services" does not mean those "services" can deprive a helpless mentally retarded woman of her liberty without due process of law. And eleven months is not "temporary." See *McNeil v. Director, Patuxent Institution*, 407 U.S. 245, 249 (1972) [rejecting State off Maryland's assertion of its power to confine petitioner indefinitely "for observation" without obtaining a judicial determination that such confinement is warranted], citing *Jackson v. Indiana*, 406 U. S. 715 (1972).

"The touchstone of due process is protection of the individual against arbitrary action of government." *Wolff v. McDonnell*, 418 U.S. 539, 558 (1974) [due process applies to prison disciplinary proceedings which may result in loss of good-time credits]. This is so even when the State is motivated by concerns for the good of the person whose rights they are violating.

The insight of a constitutional scholar is not necessary to conclude that involuntarily detaining a person and holding them incommunicado implicates that person's

liberty interests. *Walters v. Western State Hospital*, 864 F.2d 695, 699 (10th Cir. 1988). "It would be hard to find an American who thought people could be picked up by a policeman and held incommunicado, without the opportunity to let anyone know where they were, and without the opportunity for anyone on the outside looking for them to confirm where they were." *Halvorsen v. Baird*, 146 F.3d 680 (9th Cir. 1998).

The precedents of this court establish that a warrantless seizure is *per se* unreasonable and that a person may not be involuntarily committed without any process at all. Those precedents are not "too general" for a defendant to understand. Nor could a reasonable person in Jamie Buckmaster's place believe that spiriting Nancy off to a secret location without anyone's consent was lawful, or that wanting to keep Nancy "safe" nullifies the protections enshrined in the Bill of Rights and Due Process Clause.

The opinion of the California Court of Appeal does not directly refute plaintiffs' contention that they were entitled to a directed verdict on the issue of liability, other than to say that "substantial evidence supported the judgment." App. 16. However, the same principles that apply to the conclusion that it was unreasonable for Buckmaster or SARC to think their actions were lawful also govern plaintiffs' contention that liability was established as a matter of law. The need for a conservator was discussed repeatedly while Nancy was at the hospital, and good intentions are not a substitute for the protections afforded by the Constitution. Any reasonable defendant would know that a conservatorship (whether temporary or permanent) or

some other court authorization, after notice and a right to be heard, is necessary to involuntarily confine a mentally retarded woman indefinitely.

The Court should grant the petition and resolve the conflict between Supreme Court precedent and the decision in this case.

C. Petitioners' Rights to Family Association: The Right to Family Association Is Protected Against Arbitrary Governmental Interference by the Due Process Clause.

Freedom of personal choice in matters of family life is a fundamental liberty interest protected by the Fourteenth Amendment, and state intervention to terminate the relationship between a parent and child "must be accompanied by procedures meeting the requisites of the Due Process Clause." *Santosky v. Kramer*, 455 U.S. 745, 753 (1982), citing *Lassiter v. Department of Social Services*, 452 U. S. 18 (1981). This Court has also recognized that the association between family members is protected by the First Amendment. *Board of Directors v. Rotary Club*, 481 U.S. 537, 545 (1987).

This right of family association applies not just to parents and their minor children, but to the family itself. *Moore v. East Cleveland*, 431 U.S. 494, 500 (1977) (plurality opinion). This is "because the institution of the family is deeply rooted in this Nation's history and tradition." *Id.* at 503; see also *Lee v. City of Los Angeles*, 250 F.3d 668, 686 (2000) [parent and disabled adult offspring have the constitutional right of familial association protected under Section 1983].)

The liberty interest of parents in the care, custody and control of their children "is perhaps the oldest of the fundamental liberty interests recognized by this Court." *Troxel v. Granville*, 530 U.S. 57, 65 (2000). This fundamental liberty interest does

not evaporate simply because the mother or father have not been model parents. "If anything, persons faced with forced dissolution of their parental rights have a more critical need for procedural protections than do those resisting state intervention into ongoing family affairs. When the State moves to destroy weakened familial bonds, it must provide the parents with fundamentally fair procedures." *Santosky v. Kramer, supra* 455, 753-754. The evidence in the case at bar is undisputed that neither the State nor any of the defendants provided Nancy Golin and her family with any procedural protections at all.

"Parents and children have a well-elaborated constitutional right of family association to live together without governmental interference. That right is an essential liberty interest protected by the Fourteenth Amendment's guarantee that parents and children will not be separated by the state without due process of law except in an emergency." *Wallis v. Spencer*, 202 F.3d 1126, 1136 (9th Cir. 2000) [citations omitted].

Contrary to the appellate court's decision, Nancy's case was not an emergency situation similar to an urgent threat to public safety. Nancy was confined at the hospital from November 15 to November 27, 2001, and her confinement at the Embee Manor residential care facility continued for 11 months before a temporary conservator was appointed. During her stay at the hospital, the hospital held Nancy as a 72-hour "5150 hold," see Calif. Welfare & Institutions Code § 5150, when the statute in question applies only to persons with a mental disorder, not to a person who is mentally retarded or otherwise developmentally disabled. Dr. Hayward, the Medical

Director of inpatient Psychiatry (8 RT 1385-1386) was well aware of this, because when the trial court itself questioned him if he had read on the back of Detective Kratzer's "5150 form" that accompanied Nancy to the hospital that "mental disorder" does not include mental retardation, epilepsy, or other developmental disabilities, he admitted he had. (8 RT 1660.) Nor does the term "gravely disabled" include a mentally retarded person by reason of their retardation alone. Calif. Welfare & Institutions Code § 5008(h). Indeed, the Emergency Department Record says the hospital's "objective" was "placement," not treatment. (8 RT 1500.) And once Nancy was "placed," Edna Mantillas was aware Nancy was not conserved, but she willingly cooperated with the other respondents to hold Nancy and keep her location secret from her parents. It is enough if a defendant "is a willful participant with the State or its agents." *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 941 (1982). It is no defense that Mantillas did not have positive knowledge all the details that went before. *United States v. Jewell,* 532 F.2d 697, 700 (9th Cir. 1976) [one is deemed to act knowingly when they "act with an awareness of the high probability of the existence of the fact in question"].

The respondents acted jointly to put a woman incapable of giving consent into a van and transport her to a strange location populated by strangers, for reasons unknown to her, her whereabouts to be kept secret from all but the people working with respondents, with the intent to hold her there for an indefinite period of time, all without a hearing, without an advocate, and without an opportunity for her or her parents to be heard or to contest her confinement.

The State undoubtedly has an interest in protecting those who are unable to protect themselves. For example, when if a social worker believes a child is in danger because of unfit parents, she will file a petition in the Dependency Division of the Juvenile Court, and the court will have a hearing, with the benefit of an investigation, an evaluation of the child, the parties' right to counsel for all parties, and presentation of evidence and arguments by all concerned, with a decision by the court that is made in the best interests of the child. Would anyone say that the government would be entitled to forego altogether the due process guarantees attendant to such proceedings, and instead allow the social worker to place the child with strangers at a secret location chosen by the social worker, because the government wants her to be "safe"? That was, after all, the substance of respondents' defense and the basis for the California court's decision that such a no-process methodology in Nancy's case did not violate any provisions of the Constitution. If in our hypothetical example the child and parents brought a civil rights action against the persons who removed the child without due process of law, would any reasonable jurist say that they were not entitled to a judgment as a matter of law? Would any reasonable jurist say a reasonable person in the defendants' position would think their actions were lawful, and therefore were immune from suit?

Similar reasoning applies to Nancy's case. The petitioners were entitled to a judgment as a matter of law, and qualified immunity, even if it were available to private persons, was no defense to the respondents' actions.

IV. The Federal-State Split on Qualified Immunity Has Serious, Widespread Ramifications on Due Process Litigation.

The story of Nancy Golin is one the reader would think could only happen in some repressive dictatorship on the other side of the world. No one would think anyone, even a criminal, could be taken into custody and transported to an undisclosed location with no hearing of any kind, no opportunity to be heard, and no opportunity to object. "The touchstone of due process is protection of the individual against arbitrary action of government." *Wolff v. McDonnell, supra* 418 U.S. 539, 558. Even a person with no specialized knowledge of the law could be expected to say, "The Due Process Clause would never permit something like that happen in this country!" The California Court of Appeal, however, says the Bill of Rights and the Due Process Clause afford no protection against such actions.

And the testimony at trial shows that such practices will continue.

Mimi Kinderlehrer, SARC's Director of Consumer Affairs, testified that it was "our practice" that if an unconserved adult needed to be kept safe, SARC "didn't need to go to court to do this." (6 RT 1143.) Keeping someone like Nancy at Embee Manor with no legal process for several months, "that's our practice, to keep people safe." (6 RT 1163.) But several months was nothing; it was SARC's understanding that they could keep her there with no court order for the rest of her life, "Absolutely." (14 RT 1692.) Adult Protective Services was "volunteering" the consumer [Nancy] to have SARC "coordinate" their services. (14 RT 2653.)

The day after Nancy was admitted to Stanford Hospital, Jamie Buckmaster, the Social Services Program Manager at Adult Protective Services, told Kinderlehrer that temporary conservatorships happen "all the time in Santa Clara County, all the time," and told her a conservatorship was "so important," because otherwise if the Nancy's parents found out where she was, the residential facility would have a hard time "keeping them from taking Nancy if Nancy wanted to go with them." (6 RT 1088.) SARC apparently took some steps to obtain a conservatorship, but nothing came of it. Buckmaster testified that she was aware that after Nancy left the hospital on November 27th, "nobody had custody of Nancy." (5 RT 720.) But she said it didn't matter to APS whether she was conserved or not, because APS wanted to keep her safe. (5 RT 721.) Nor did it bother Buckmaster that Nancy had been "disappeared from the family" without any visitation, because APS was obliged to make Nancy safe. (5 RT 729.)

Both the Palo Alto Police and Stanford Hospital knew that the procedure under § 5150 of the Welfare and Inst. Code did not apply to Nancy, because she was merely developmentally disabled, not mentally disordered, and "gravely disabled" has to be the result of a mental disorder. The trial court itself questioned Dr. Hayward if he read on the back of Detective Kratzer's "5150 form" "that 'mental disorder' does not include mental retardation or other developmental disabilities," and Dr. Hayward replied, "Yes." (6 RT 1660.) The court asked Dr. Hayward if he was "going off a definition other than what the statute says," and he replied, "Yes." (6 RT 1661.)

California's Lanterman-Petris-Short Act was intended "[t]o end the inappropriate, indefinite, and involuntary commitment of mentally disordered person, [and] developmentally disabled persons . . ." Calif. Welfare & Institutions Code § 5001 (a). The respondents here brazenly used the Act to achieve the very ends the law was enacted to prevent. Thus far the California courts have implicitly, but wholeheartedly, approved of such practices.

The errors in the trial were numerous and they were serious. The Appellate Court's opinion is so riddled with well-contested factual errors and smears contradicted by trial testimony it is hard to know where to begin. We cannot know what facts were actually found by the jury because it issued a general verdict.

The applicable principles of law have long been established by the Constitution and this Court's precedents, but the California court interpreted the law to mean something contrary to the law's plain meaning.

We urge the court to grant the petition and address the conflicts between decisions of this Court and the decision by the California Court of Appeal in this case and correct the California Court of Appeals' erroneous holding in this case.

CONCLUSION

For the foregoing reasons, the Court should grant a writ of certiorari.

Respectfully submitted,

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