No.

IN THE SUPREME COURT OF THE UNITED STATES

NANCY DELANEY, as Guardian ad Litem for NANCY GOLIN,

Petitioner,

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, FIRST DISTRICT

PETITION FOR WRIT OF CERTIORARI

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THE 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 purely 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 Petitioner, a 31-year old autistic, mentally retarded woman living with her parents, was entitled to a directed verdict when the evidence showed that respondents acted jointly to involuntarily confine her at a residential care facility for 11 months, her whereabouts kept secret from all but those working with respondents, without due process, or indeed, any process of law at all, or does the defendants professed desire to keep Petitioner safe absolve them from liability?

THE PARTIES

Plaintiff **Nancy Golin** was a 31-year old developmentally disabled adult at the time her 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 California Welfare and Institutions 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 Petitioner 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 WRIT OF CERTIORARI

Nancy Golin, by Nancy Delaney, her *Guardian ad litem*, asks that this court grant her petition for a writ of certiorari to the California Court of Appeal, and reverse the state court decision affirming a jury's general verdict against her 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 Petitioner, 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 PROVISION 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 to the United States Constitution 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.

STATEMENT OF THE CASE

On November 14, 2001 Petitioner, 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 Petitioner to come with her, but Petitioner pulled a blanket over her head, declining to go. (4 RT 573-574.) When Elsie returned a few minutes later, Petitioner 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), Petitioner walked up the driveway. (3 RT 368, 4 RT 595.) Detective Kratzer testified Petitioner's clothes were dirty, but she had a smile on her face. (3 RT 369.)

Detective Kratzer sent Petitioner 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) 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).

Petitioner 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

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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.

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 Petitioner's 13-day stay at the hospital, respondents (except Edna Mantillas, who was not yet involved) concluded that Petitioner's parents were unfit and that Petitioner should not be returned to them. But instead of instituting a guardianship or conservatorship for Petitioner,[2] they ultimately agreed they would send Petitioner to a locked residential care facility for an indefinite period, and her whereabouts would be kept hidden from her parents.

The day after Petitioner 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 Petitioner in the near future. (7 RT 1249.) He knew that Tucker Liske of SARC was looking for a living arrangement for Petitioner, and that Petitioner was not conserved. (7 RT 1246.) Dr. Hayward thought that without a temporary conservatorship, it might be impossible to have Petitioner 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 Petitioner was at Stanford, Dr. Hayward testified he and other Stanford staff members were working integrally with people from

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[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).

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 Petitioner at Embee Manor. He called Jeannie Lutticken at Stanford and said to tell Stanford's staff not to disclose Petitioner's whereabouts. (12 RT 2325.)

On November 27, 2001, the hospital transferred Petitioner 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 Petitioner 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 Petitioner 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" [Petitioner 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 Petitioner 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 Petitioner to various medical doctors for medical treatment. (10 RT 1764.)

Jeffrey and Elsie were arrested for adult abuse on November 30, 2001. 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.

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

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

Petitioner asserted a violation of her Fourth Amendment right to be secure against an unreasonable and warrantless seizure of her person, her Fourteenth Amendment right not to be deprived of her liberty without due process of law, and a violation of her 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. Petitioner's motions for a directed verdict on the issue of liability and on the defense of qualified immunity were denied. The trial court, over petitioner's 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:

1.
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 Petitioner's 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 Petitioner 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 that is 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.

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 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.

2.
The Error of Submitting Two Critical Questions of Law to the Jury to Determine Was Not 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 simply not equipped to make a determination of the applicable law, and the argument that the 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, not the trial court, 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,

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[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."

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." *Jackson, supra* 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 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.

3.

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 petitioner was 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.
Petitioner'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 circumstances 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 during Petitioner'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 Petitioner in a locked facility." (8 RT 1579.) Lutticken testified Petitioner'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 Petitioner 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).

In view of this clearly established law, no reasonable person could think it lawful to involuntarily seize and confine Petitioner for 11 months, even to keep her safe. The California Court of Appeal decision is contrary to the law as established by this Court

B.
Petitioner'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 her too much; it is that they deprived her of her liberty without due process of law, or indeed without any process at all.

Nor does the fact that years ago Petitioner had utilized SARC's services and was still "eligible for services" make it reasonable for SARC to conclude that they could involuntarily confine her 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 Petitioner off to a secret location without anyone's consent was

lawful, or that wanting to keep her "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 the evidence established liability as a matter of law. The need for a conservator was discussed repeatedly while Petitioner 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.
Petitioner's Right 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 Petitioner 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, Petitioner's case was not an emergency situation similar to an urgent threat to public safety. Petitioner 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 her 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 Petitioner 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 Petitioner was "placed," Edna Mantillas was aware she was not conserved, but she willingly cooperated with the other respondents to hold Petitioner 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.

5.
The Split Between State and Federal Decisions on Qualified Immunity Has Serious, Widespread Ramifications for the Disabled.

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.

By eliminating due process in a procedure like this, the government can disregard evidence that does not support it's objective, thereby ensuring that the outcome will be exactly what it wants it to be, free from any oversight by the judicial branch of government or objectons by people like Nancy Golin. For example, in the case at bar, Jamie Buckmaster of Adult Protective Services testified that she related to Detective Kratzer APS records of complaints against Petitioner's parents, but she did not mention tat a police welfare check showed Petitioner to be in good health, because, Buckmaster said, she and Kratzer were only "talking about complaints we had received. (6 RT 1076-1077.) She also told Kratzer that Petitioner had burn scars, but did not mention that APS had previously investigated the scars, or that they were old and healed and were the result of an accident; she "just reported the burn scars." (17 RT 3011.) This is the kind of decision-making one might call arbitrary. "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 [Petitioner] to have SARC "coordinate" their services. (14 RT 2653.)

The day after Petitioner 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 Petitioner 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 Petitioner 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 Petitioner, 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 somewhat cynically 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 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 the petition for a writ of certiorari.

Respectfully submitted,

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APPENDICES

Filed 3/26/19 Golin v. San Andreas Regional Center CA1/1

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

JEFFREY R. GOLIN et al., Plaintiffs and Appellants, v. SAN ANDREAS REGIONAL CENTER, et al., Defendants and Respondents	A145752 (San Mateo County Super. Ct. No. CIV507159)

In November 2001, Jeffrey and Elsie Golin's developmentally disabled adult daughter, Nancy Golin,[1] wandered off and went missing for over 15 hours before returning home. During the investigation of Nancy's disappearance, the police learned Jeffrey and Elsie had a history of alleged neglect and abuse of their daughter. Believing Nancy to be gravely disabled and a danger to herself, the police placed Nancy on a Welfare and Institutions Code section 5150[2] hold at

[1] Because Jeffrey, Elsie, and Nancy share the same last name, we refer to them by their first names. We mean no disrespect in doing so.

[2] All further statutory references are to the Welfare and Institutions Code unless otherwise stated. Under section 5150, which is part of the Lanterman-Petris-Short Act. (Welf. & Inst. Code, § 5000 et seq.; LPS Act), a peace officer may, with probable cause, take into custody any person who "as a result of a mental health disorder, is a danger to others, or to himself or herself, or gravely disabled," and to place such a person in a

Stanford Hospital and Clinics, Inc. (Stanford) and obtained emergency protective orders (EPO's) giving temporary custody. of Nancy to Stanford, San Andreas Regional Center (SARC), or adult protective services (APS), and barring Jeffrey and Elsie from contacting their daughter. When the EPO's expired, Nancy was transferred to a residential care facility called Embee Manor, but Jeffrey and Elsie were not immediately notified of their daughter's whereabouts. Three days later, Jeffrey and Elsie were arrested for felony dependent adult abuse. In 2003, the California Department of Developmental Services (DDS) was appointed Nancy's permanent limited conservator.

Jeffrey, Elsie, and Nancy, through her guardian ad litem (collectively plaintiffs), filed suit under section 1983 of title 42 of the United States Code (section 1983) against SARC, Stanford, Edna Mantillas, doing business as Embee Manor, and several other governmental and private parties involved in Nancy's placement and conservatorship.

They alleged, among other things, defendants violated Nancy's constitutional rights to be free from unreasonable seizure and deprivation of liberty without due process, and unreasonably interfered with plaintiffs' rights of familial association. After a three-week trial, the trial court denied plaintiffs' motion for a directed verdict, and the jury returned general verdicts in favor of defendants. The trial court then denied plaintiffs' motions for judgment notwithstanding the verdict (JNOV). On appeal, plaintiffs contend the trial court committed reversible error in denying their motions because the evidence required a determination of all issues in their favor as a matter of law.

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county-designated facility for an initial 72-hour treatment and detention. (§ 5150, subd. (a).)

Plaintiffs further contend the trial court committed instructional error by directing the jury to determine questions of law as to whether (1) SARC, Stanford, and Mantillas were entitled to the defense of qualified immunity, and (2) defendants' conduct "shocked the conscience" for purposes of substantive due process. For the reasons set forth below, we will affirm the judgment.

I. BACKGROUND

A. Factual Background

The following facts were established at trial.

1. Nancy Is a Developmentally Disabled Adult

Nancy is an autistic adult, developmentally disabled since birth. She suffers from profound mental retardation and epilepsy. She has the mental abilities of a very young child and must be constantly monitored and protected. Although she was able to speak a few simple words when she was a child, her speech deteriorated over time, and by her 30's, Nancy was mute. She has been prescribed phenobarbital for her seizures.

2. Jeffrey and Elsie's History of Suspected Abuse and Neglect

In the mid-1980's, police were called after Jeffrey left Nancy home alone in a locked bedroom on the second floor with a pot for a toilet and a bowl of dried banana slices. On previous occasions when Jeffrey left Nancy in that bedroom, she had used a second-floor ledge to escape. In 1986, Nancy burned herself with a lighter discarded by Elsie and was hospitalized for several weeks. Less than 10 years later, Nancy got too close to a barbeque at Jeffrey's workplace and sustained second and third degree burns over 50 percent of her body. Nancy was hospitalized for several months and received numerous skin grafts.

During her childhood, Nancy became a "consumer" of SARC, a private nonprofit corporation that contracts with DDS to coordinate services for individuals with developmental disabilities.[3] SARC prepared an individual program plan (IPP) for Nancy—a comprehensive "whole person assessment" that spelled planned course of action for her. However, Jeffrey and Elsie never participated in any of Nancy's IPP's, and they declined services from SARC for many years.

In May 1999, APS received a report expressing concerns about Nancy's medications and seizures, stating Nancy was disheveled and in need of a bath, and claiming Jeffrey and Elsie were not monitoring her medications or providing her with a safe home environment.

Between January and June 2001, several incidents were reported to APS of suspected neglect and abuse concerning Nancy. A January 2001 report noted during the preceding six months, Nancy had been hospitalized repeatedly because of Jeffrey and Elsie's failure to comply with doctors' orders regarding Nancy's antiseizure medication. A March 2001 report stated after Jeffrey and Elsie were arrested on felony

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[3] Under the LPS Act, "the Legislature has fashioned a system in which both state agencies and private entities have functions. Broadly, DDS, a state agency, 'has jurisdiction over the execution of the laws relating to the care, custody, and treatment of developmentally disabled persons' [citation], while 'regional centers,' operated by private nonprofit community agencies under contract with DDS, are charged with providing developmentally disabled persons with 'access to the facilities and services best suited to them throughout their lifetime.' " (*Association for Retarded Citizens v. Department of Developmental Services* (1985) 38 Cal.3d 384, 389.) SARC is one of 21 regional centers in California that coordinates services for individuals with developmental disabilities. SARC coordinates services for individuals and families in the counties of Monterey, San Benito, Santa Clara, and Santa Cruz.

domestic violence charges, Nancy was placed on a section 5150 hold (5150 hold) because there was no one left to feed and care for her.

In April 2001, APS requested SARC's assistance in investigating a complaint involving possible abuse of Nancy. Two nurses from SARC, along with SARC district manager Tucker Liske, visited the Golins. One of SARC's nurses described arriving at a "storage unit" with no windows and saw Nancy with burn scars and poor overall body hygiene.

APS also received several reports about Nancy wandering off. According to an April 2001 report, Nancy wandered away from Jeffrey and Elsie and was found taking donuts away from customers at a donut shop. APS received two reports in June 2001 that Nancy had been placed on a 5150 hold after she was found wandering around a restaurant late at night.

3. Nancy Goes Missing and Returns the Next Morning

On the evening of November 14, 2001, Elsie left Nancy alone in a van to use a bathroom, and when Elsie returned, Nancy was gone. Jeffrey and Elsie called the Palo Alto Police Department (PAPD) and reported Nancy missing. The parents searched all night for their daughter but she could not be found.

The next morning, PAPD officers, including Detective Lori Kratzer, arrived at the scene where Nancy had gone missing. Jeffrey told Kratzer his family had been living out of a van because they were having difficulty finding housing. The van smelled strongly of body odor and urine, and when Kratzer asked about the odor, Jeffrey and Elsie said Nancy spent a lot of time in the van watching videos and sometimes wet herself.

Kratzer contacted SARC to determine if it had any record of Nancy. A SARC case manager told Kratzer both SARC and APS had been attempting to

offer Nancy services but her parents were resistant to agency intervention. SARC also reported Nancy and her parents had no stable residence and their last known address was a U-Haul storage space. Kratzer also spoke with Jamie Buckmaster, program manager at APS. Buckmaster informed Kratzer there were numerous reports of suspected dependent adult abuse regarding Nancy. In a note by Buckmaster introduced into evidence at trial, Buckmaster wrote that after her telephone call with Kratzer, "It was decided that I would speak to SARC about conservatorship of client." While Kratzer was questioning Jeffrey and Elsie, Nancy returned. She had been missing for 15 hours. Her clothes were dirty, her hair was oily, and she had body odor, and according to Kratzer, Nancy's poor hygiene was not simply the result from being gone overnight. Kratzer also noticed a large wound covering the top of Nancy's foot that looked partially infected and scabbed over.

4. Nancy Is Taken to Stanford on a 5150 Hold

Believing Nancy to be a risk to herself and gravely disabled, Kratzer and her supervisors decided to place Nancy on a 72-hour hold under section 5150. When Kratzer informed Jeffrey and Elsie of the decision, Jeffrey called Kratzer "the evil one" and Elsie started telling Nancy that Stanford "was going to kill her." Elsie took Nancy inside a commercial space where they appeared to be living. Kratzer went inside and found Nancy lying on a sleeping bag on the floor. Patrol officers transported Nancy to the Stanford emergency department for a welfare check. Dr. Robert Hayward, a member of Stanford's medical staff, accepted Nancy on the 5150 hold. Upon her arrival at Stanford, Nancy had a level of phenobarbital in her system that exceeded therapeutic and even critical dosage levels. Stanford's emergency department social

worker supervisor, Scott Skiles, spoke on the phone with Kratzer, who said the police were considering bringing criminal charges against Jeffrey and Elsie. Buckmaster asked Stanford not to let Jeffrey and Elsie visit Nancy. She told Stanford Social Worker Jeannie Lutticken that until all legal efforts were in place, Nancy was only safe at Stanford. Stanford decided it would not permit Jeffrey and Elsie to see Nancy. Nancy was kept in a locked psychiatric ward at Stanford.

5. Defendants Discuss Residential Placement and Conservatorship for Nancy

According to the testimony of SARC's district manager, Liske, and SARC's director of consumer services, Miriam "Mimi" Kinderlehrer, APS asked SARC to coordinate a residential placement for Nancy, and SARC worked with APS to find her a placement. Kinderlehrer testified APS had strong concerns about the ability of Jeffrey and Elsie to care for their severely disabled adult child, and "APS felt that [Nancy] should be placed in a residential placement because they felt going back with her family was unsafe. And she was a consumer of [SARC's], she had been a consumer of ours many years before. Her case was reopened and we went forward to place her in what we thought was a safe placement." APS and SARC also discussed obtaining a permanent and temporary conservatorship for Nancy. Kinderlehrer told Buckmaster time was of the essence because "if somehow the clients found out where Nancy [was] placed by SARC and showed up, the RCF [(residential care facility)] manager would have a hard time keeping them away and keeping them from taking Nancy if Nancy wanted to go with them. [¶] I told her that was why conservatorship was so important." However, Kinderlehrer and SARC executive director Santi Rogers

acknowledged a conservatorship was a lengthy process that "usually takes many months," even for a temporary conservatorship.

When APS called SARC asking for a coordinated placement, SARC treated it as an emergency. Rogers testified Nancy's case was "an exceptional situation" and there was an "urgency at the moment" because Nancy's parents had been previously arrested for dependent adult abuse. When a consumer's parents are in jail, SARC does not usually contact them to involve them in placement.

6. Emergency Protective Orders Are Issued

On November 16, 2001, Kratzer referred Jeffrey and Elsie's case to the district attorney's office for prosecution for dependent adult abuse, and she obtained EPO's granting temporary care and custody over Nancy to Stanford, APS or SARC, and barring Jeffrey and Elsie from contacting Nancy. The EPO's were set to expire at 5:00 p.m. on November 27, 2001.

Buckmaster spoke on the telephone with Kratzer, who informed her the EPO's were issued, and "'The judge, upon hearing the situation, recommends conservatorship.'" Kratzer also told Buckmaster about Jeffrey's and Elsie's criminal history, including their arrests for assaulting a police officer, and Kratzer said she would be seeking felony charges against Jeffrey and Elsie. This news caught Buckmaster's attention because it was the first time she had heard a police officer say "felony" in a physical abuse and neglect case. Buckmaster called Liske of SARC and "'explained to him the critical need for conservatorship [for] Nancy in order to keep her safe.'" She also informed Liske about the EPO's and PAPD's intent to arrest Nancy's parents on felony dependent adult abuse charges. She asked Liske to "'contact the RCF [¶] . . . [¶] . . . which was holding a bed for Nancy and

ask them to hold it longer.' " Liske told Buckmaster " 'they had several vacancies and it wouldn't be a problem.' "

7. Stanford Unsuccessfully Attempts to Extend Nancy's Treatment

On November 18, 2001, Stanford applied to extend Nancy's 5150 hold for intensive treatment under section 5250 (5250 hold).[4] At the November 26, 2001 certification hearing, the hearing officer, Judith Ganz, ruled the LPS Act does not apply to those who are developmentally disabled and dismissed the 5250 hold. Ganz noted, however, the EPO's remained in place until November 27, 2001 at 5:00 p.m.

8. A Meeting Is Held at Stanford to Coordinate Placement for Nancy

Following the dismissal of the application for a 5250 hold, a meeting was held on November 26, 2001 at Stanford. Among the meeting participants were Dr. Hayward and Social Worker Lutticken of Stanford, Liske of SARC, and Buckmaster of APS. They discussed Nancy's behavior problems and inability to sleep, the denial of the 5250 hold, the upcoming expiration of the EPO's, and Kratzer's communication to Dr. Hayward about obtaining an extension of the EPO's. They also discussed SARC's effort to obtain a temporary conservatorship.

9. Nancy Is Discharged from Stanford and Transferred to Embee Manor

On November 27, 2001, around 3:00 p.m., Liske contacted Lutticken and informed her he had found

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[4] Under section 5250, after a person has been detained for 72 hours on a 5150 hold and has received an evaluation, he or she may be certified for not more than 14 days of involuntary intensive treatment related to the mental health disorder, under certain specified conditions.

board and care for Nancy at Embee Manor, an adult residential facility owned and operated by Edna Mantillas and vendored by SARC. Lutticken said she would tell Stanford staff not to release information as to where Nancy was going. At 5:00 p.m., the EPO's expired, and Nancy was discharged from Stanford and transferred to Embee Manor. At trial, Stanford's expert, Dr. Stephen Hall, testified it was within the standard of care for Stanford to transfer Nancy to a facility chosen by SARC.

Elsie testified she was at the door of the Stanford psychiatric ward promptly at 5:00 p.m. when the EPO's expired, and an unnamed man and woman told her Nancy had already left, and they refused to tell her where Nancy had been taken. Mantillas received the discharge summary from Stanford and signed the paperwork for Nancy's admission at Embee Manor. Mantillas knew Nancy had no conservator, but it was her understanding SARC had authority to place clients at vendor facilities like Embee Manor.

APS and SARC were aware there was no court order giving custody or control of Nancy to SARC after November 27, 2001. However, Kinderlehrer testified it was SARC's practice they did not need a judge's signature for someone like Nancy to remain with SARC. If SARC felt the person's parents were not capable of taking care of her and keeping her safe, SARC would take responsibility for not letting the person go back to her parents. Kinderlehrer further testified there is no requirement an adult be conserved before services are provided to him or her, and the vast majority of SARC's customers are unconserved. Kinderlehrer was aware of no statutory provision requiring SARC to obtain a court order before coordinating a residential placement for an unconserved adult like Nancy.

10. Jeffrey and Elsie Are Arrested and Charged with Dependent Adult Abuse

The same day Nancy was discharged from Stanford, the district attorney charged Jeffrey and Elsie with felony dependent adult abuse, and arrest warrants were issued the next day. On November 30, 2001, Jeffrey and Elsie were arrested.

Elsie testified that from November 27, 2001 to January 3, 2002, she was extremely concerned about Nancy and called DDS and the Department of Justice trying to learn of her daughter's whereabouts, but nobody would tell her where her daughter was.

At Jeffrey and Elsie's arraignment hearing on January 3, 2002, the criminal court issued a no-contact order barring Jeffrey and Elsie from any contact with Nancy. Later, in March 2002, the criminal court issued an order permitting Jeffrey and Elsie to have supervised visits with Nancy. APS volunteered to supervise these visits and Buckmaster attended them.

In early 2003, the criminal charges against Elsie were dismissed, and the nocontact order was dissolved. Jeffrey pled no contest to misdemeanor dependent adult abuse, and after completing six months' probation, his conviction was expunged in August 2003.

11. DDS Is Appointed Nancy's Conservator

Beginning in December 2001, SARC attempted to secure a conservatorship for Nancy by inquiring with the Santa Clara Office of the Public Guardian and DDS. At that time, both agencies declined. However, in April 2002, DDS initiated conservatorship proceedings for Nancy, and in October 2002, the court appointed a temporary private conservator.

After a three-week conservatorship trial, the court issued a statement of decision in October 2003, in which it found, by clear and convincing evidence,

Jeffrey and Elsie were unable to provide for the best interests of their daughter. The court concluded Jeffrey's and Elsie's "difficult personalities" and "mistaken overconfidence in their limited medical knowledge" had exposed Nancy to "dangerous noncompliance with physicians' directions as to medication and care for [Nancy's] very serious seizure disorder and other medical problems." The court was also concerned about Jeffrey and Elsie's history of marital strife, as well as their past abuse and neglect of Nancy. Based on these and other numerous findings in support, the court appointed DDS as Nancy's permanent limited conservator. Jeffrey and Elsie were granted reasonable visitation with their daughter.

B. Procedural Background

The long procedural history of this case need not be recounted here in full. In short, the case was initially filed in 2006 in Sacramento County Superior Court but was transferred to Santa Clara County Superior Court. (*Golin v. Allenby* (2010) 190 Cal.App.4th 616, 626 (*Golin I*).) After Jeffrey and Elsie appealed a ruling finding them to be vexatious litigants, the Sixth District Court of Appeal remanded and transferred the case to San Mateo County Superior Court. (See *Golin v. Allenby* (Sept. 18, 2015, A140652) [nonpub. opn.] (*Golin II*).)

1. The Parties and Claims

Numerous defendants were named in plaintiffs' lawsuit, including SARC and its agents Rogers, Liske, and Kinderlehrer; the City of Palo Alto and Kratzer; Stanford; Buckmaster of APS; Mantillas; former DDS directors Clifford B. Allenby and Therese Delgadillo; and the attorney for DDS in the conservatorship proceedings, H. Dean Stiles. (See *Golin I*, *supra*, 190 Cal.App.4th at p. 626, fn. 9.)

In the operative fourth amended complaint, the first cause of action under section 1983 alleges defendants, acting under color of law, violated Nancy's Fourth Amendment right to be free from unreasonable seizures, her Fourteenth Amendment right not to be deprived of liberty without due process of law, and her First and Fourteenth Amendment rights to be free from unreasonable interference with parent-child relationships. The second cause of action under section 1983 alleges defendants violated Jeffrey's and Elsie's First and Fourteenth Amendment rights to be free from unreasonable interference with parent-child relationships.

Plaintiffs also asserted causes of action for section 1983—civil conspiracy, intentional infliction of emotional distress, negligence and negligence per se, false imprisonment, chemical battery, and elder abuse.

2. Pretrial Dismissals

Before trial, the claims against Allenby, Delgadillo, and Stiles were dismissed by demurrer, and we affirmed that ruling. (See *Golin II*, *supra*, A140652.) The City of Palo Alto and Kratzer successfully moved for summary judgment, which we affirmed. (See *Golin v. City of Palo Alto* (Dec. 9, 2016, A144680) [nonpub. opn.].) In so ruling, we found Kratzer had probable cause to initiate the 5150 hold of Nancy and was entitled to qualified immunity from plaintiffs' section 1983 claim.

Prior to trial, plaintiffs voluntarily dismissed most of their causes of action, except for the first and second causes of action under section 1983, and the false imprisonment claim against Stanford.

3. Trial

Trial commenced in March 2015 and lasted for approximately three weeks. After the close of evidence, the court granted a partial directed verdict in favor of Stanford, holding it was immune from civil liability for its decision to detain Nancy under sections 5150 and 5250 based on the immunity provided by section 5278.[5] The court also held Stanford could not be liable for its compliance with the EPO's, and its conduct did not fall below the standard of care. The only remaining issue was whether Stanford violated Nancy's constitutional rights and/or falsely imprisoned her after the EPO's expired at 5:00 p.m. on November 27, 2001.[6]

Plaintiffs moved for a directed verdict against all defendants on their first and second causes of action under section 1983. The motion was denied.

The case went to the jury on May 8, 2015. As relevant here, the jury was instructed on the responsibilities of a regional center, the circumstances where the director of a regional center or his or her designee may consent to medical treatment of a client, and the absence of a California statute "which specifically and explicitly gives authority for a regional center to require a developmentally disabled adult to take or

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[5] Under section 5278, "[i]ndividuals authorized under this part to detain a person for 72-hour treatment and evaluation pursuant to Article 1 (commencing with Section 5150) . . . or to certify a person for intensive treatment pursuant to Article 4 (commencing with Section 5250) . . . shall not be held either criminally or civilly liable for exercising this authority in accordance with the law."

[6] Plaintiffs provided no substantive arguments in their briefs challenging the trial court's partial directed verdict for Stanford other than the cursory statement, "Plaintiffs assert this was error." We decline to advance an argument plaintiffs failed to fully make. (See *Julian v. Hartford Underwriters Ins. Co.* (2005) 35 Cal.4th 747, 761, fn. 4.)

accept services or the coordination of services by a regional center without the consent of that developmentally disabled adult or the consent of a person appointed by judicial order as his or her conservator." The jury was also instructed on the constitutional right against deprivation of liberty without due process of law; the right to family association and integrity between parent and child, including adult offspring; the state actor requirement and four circumstances where a private person may be a state actor; the defense of qualified immunity; and the "shocks the conscience" standard for constitutional violations of the right to family association and deprivation of liberty without due process of law.

The jury returned a general verdict the same day in favor of all defendants. Following the verdict, plaintiffs filed motions for JNOV, arguing the evidence received at trial was insufficient as a matter of law to support the verdict in defendants' favor. The motions were denied.

Plaintiffs appealed.

II. DISCUSSION

Plaintiffs contend the trial court erred in denying their motions for a directed verdict and for JNOV on their section 1983 claims. Plaintiffs argue the private-party defendants (SARC, Stanford, and Mantillas) acted under color of state law for purposes of section 1983 because they willingly participated in joint activity with the state or its agents. Defendants were not entitled to qualified immunity, plaintiffs argue, because the law was clearly established in 2001 that a developmentally disabled person could not be taken from her parents or involuntarily confined without a court order, and defendants were aware Nancy was unconserved and there was no court order giving anyone authority to make decisions on her behalf after the

EPO's expired. Plaintiffs further contend the trial court erred by instructing the jury to decide whether defendants were entitled to qualified immunity for their actions, and whether their actions shocked the conscience or offended the community's sense of fair play and decency. Plaintiffs argue these were questions of law for the trial court to decide.[7]

As we shall explain, plaintiffs were not entitled to a directed verdict or JNOV because substantial evidence supported the judgment. On the issue of state action, we conclude Mantillas did not act under color of state law. While SARC acted under color of state law by willfully participating in joint action with an agent of the state (Buckmaster), SARC was entitled to assert the defense of qualified immunity under the multifactor test set forth in *Richardson v. McKnight* (1997) 521 U.S. 399, 403–404, 407–408 (*Richardson*). Furthermore, plaintiffs were not entitled to a directed verdict or JNOV against SARC and Buckmaster on their qualified immunity defenses because their conduct amounted to judgment calls made in a legally uncertain environment. Nor were plaintiffs entitled to a directed verdict or JNOV against Stanford because the challenged conduct did not shock the conscience or offend the community's sense of fair play and decency. Finally, even if the trial court erred in directing the jury to decide questions of law, these were nonconstitutional procedural errors for which prejudice is not presumed, and plaintiffs failed to demonstrate prejudice.

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[7] Conversely, Buckmaster does not dispute she acted under color of state law as program manager for APS, a county agency providing protective services to elderly and dependent adults who may be subject to neglect, abuse, or exploitation, or who are unable to protect their own interest. (§ 15751.)

A. Standard of Review

"[A] motion for a directed verdict is in the nature of a demurrer to the evidence. [Citations.] In determining such a motion, the trial court has no power to weigh the evidence, and may not consider the credibility of witnesses. It may not grant a directed verdict where there is *any* substantial conflict in the evidence. [Citation.] A directed verdict may be granted only when, disregarding conflicting evidence, giving the evidence of the party against whom the motion is directed all the value to which it is legally entitled, and indulging every legitimate inference from such evidence in favor of that party, the court nonetheless determines there is no evidence of sufficient substantiality to support the claim or defense of the party opposing the motion, or a verdict in favor of that party." (*Howard v. Owens Corning* (1999) 72 Cal.App.4th 621, 629–630 (*Howard*).) An appeal from the denial of a directed verdict is "functionally equivalent to contending there was insufficient evidence to support the jury verdict," and thus, error will only be shown if there was no substantial evidence in support of the verdict. (*Id.* at p. 630.)

A motion for judgment notwithstanding the verdict is "'absolutely the same'" as the power to direct a verdict. (*Beavers v. Allstate Ins. Co.* (1990) 225 Cal.App.3d 310, 327.) The motion "may be granted only if it appears from the evidence, viewed in the light most favorable to the party securing the verdict, that there is no substantial evidence in support." (*Sweatman v. Department of Veterans Affairs* (2001) 25 Cal.4th 62, 68.) "On appeal from the denial of a motion for judgment notwithstanding the verdict, we determine whether there is any substantial evidence, contradicted or uncontradicted, supporting the jury's verdict. [Citations.] If there is, we must affirm the

denial of the motion. [Citations.] If the appeal challenging the denial of the motion for judgment notwithstanding the verdict raises purely legal questions, however, our review is de novo." (*Wolf v. Walt Disney Pictures & Television* (2008) 162 Cal.App.4th 1107, 1138.)

B. Section 1983

"A [section] 1983 plaintiff must demonstrate a deprivation of a right secured by the Constitution or laws of the United States, and that the defendant acted under color of state law. [Citation.] While generally not applicable to private parties, a [section] 1983 action can lie against a private party when 'he is a willful participant in joint action with the State or its agents.'" (*Kirtley v. Rainey* (9th Cir. 2003) 326 F.3d 1088, 1092 (*Kirtley*).)

1. "Under Color of State Law"

Federal law governs whether a private party acted under color of state law, and we start with the presumption that conduct by private actors is not state action. (*Julian v. Mission Community Hospital* (2017) 11 Cal.App.5th 360, 395–396.) "[Courts] recognize at least four different criteria, or tests, used to identify state action: '(1) public function; (2) joint action; (3) governmental compulsion or coercion; and (4) governmental nexus.' [Citations.] Satisfaction of any one test is sufficient to find state action, so long as no countervailing factor exists." (*Kirtley*, *supra*, 326 F.3d at p. 1092.) "'While these factors are helpful in determining the significance of state involvement, there is no specific formula for defining state action.' [Citations.] Instead, 'contemporary decisions stress the necessity of a *close nexus* between the state and the challenged conduct rather than application of a mechanistic formula.' [Citations.] 'Under any formula, however,

the inquiry into whether private conduct is fairly attributable to the state must be determined based on the circumstances of each case.' [Citation.] 'Only by sifting facts and weighing circumstances can the nonobvious involvement of the State in private conduct be attributed its true significance.'" (*Sutton v. Providence St. Joseph* Medical Center (9th Cir. 1999) 192 F.3d 826, 836, italics added by *Sutton*.)

"The extent of state involvement in the action is a question of fact." (*Lopez v. Dept. of Health Services* (9th Cir. 1991) 939 F.2d 881, 883.) However, the ultimate question of whether a private party is a state actor for section 1983 purposes "is a mixed question of fact and law and is thus subject to our *de novo* review." (*Taylor v. Charter Medical Corp.* (5th Cir. 1998) 162 F.3d 827, 830–831; *Duke v. Smith* (11th Cir. 1994) 13 F.3d 388, 392.)

There is no dispute SARC, Stanford, and Mantillas are private parties.[8] Plaintiffs contend these defendants were nevertheless state actors under the joint action and governmental nexus tests because they conspired and acted jointly with APS and PAPD and used court procedures to coordinate Nancy's placement.[9] Plaintiffs also argue APS provided significant encouragement to the other defendants to place

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[8] Conversely, Buckmaster does not dispute she acted under color of state law as program manager for APS, a county agency providing protective services to elderly and dependent adults who may be subject to neglect, abuse, or exploitation, or who are unable to protect their own interest. (§ 15751.)

[9] Plaintiffs also contend SARC is a state actor under the public function test because the care and protection of developmentally disabled persons is a state obligation. However, plaintiffs abandoned this theory at trial and cannot revive it on appeal. (Carmichael v. Reitz (1971) 17 Cal.App.3d 958, 969.)

Nancy in a residential care facility, and the defendants cooperated with APS to achieve that end.

SARC and Mantillas raise several arguments as to why they did not act under color of state law.[10] SARC argues the public function, government compulsion, and government nexus tests are not met merely because a private business is subject to state regulation. Even where the state directs a regional center like SARC to coordinate services, SARC contends the state does not control how SARC exercises its judgment as to the coordination of those services. SARC further argues the joint activity test was not met because (1) there was no evidence of a conspiracy, as plaintiffs dismissed their conspiracy claim before trial; (2) the evidence showed, at most, mere cooperation among SARC and the public actors, which does not rise to the level of state action as a matter of law; and (3) there was ample evidence for the jury to conclude the public actors did not insinuate themselves into positions of interdependence with SARC in its selection of placement for Nancy, or in SARC's continued monitoring of Nancy at Embee Manor.

Mantillas argues she did not act under color of state law because there was no evidence of a conspiracy involving her, nor any joint action between her and the public actors. Mantillas contends she had no involvement in securing the 5150 hold, the EPO's, or in making the determination as to whether Nancy should have any contact with her parents or needed to be conserved. Rather, Mantillas claims she merely entered into a contract with SARC, a nonprofit corporation, to provide services to Nancy.

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[10] Stanford also argues it was not a state actor and adopts the arguments of SARC and Mantillas.

Both SARC and Mantillas rely on the unpublished federal court decision in *McHone v. Far Northern Reg'l Ctr.* (N.D.Cal. Jan. 5, 2015, Case No. 14-cv-03385-EDL) 2015 U.S.Dist. Lexis 1239 (*McHone*), which held a regional center that contracted with DDS to provide services and support to developmentally disabled individuals was not a state actor. *McHone* found the regional center was not engaged in an exclusive government function for purposes of the public function test because there was a division of labor between the state and private entities in the provision of services and care to developmentally disabled individuals. (*Id.* at pp. *14–*25.) The court further held the manner in which the regional center performed its obligations was not compelled by the state for purposes of the government compulsion test, and either the receipt of state funds nor extensive regulation by the state was sufficient to convert the regional center into a state actor. (*Id.* at p. *28.)

Notably, *McHone* did not address the joint activity test, which plaintiffs principally rely upon here. Furthermore, in *McHone*, "there [were] no allegations that the state had any involvement in [the patient's] admission to [the residential care facility] or any other of the alleged acts that occurred there." (*McHone*, *supra*, 2015 U.S.Dist. Lexis 1239 at p. *28.) By contrast (as we explain more fully below), the undisputed evidence in this case shows the direct involvement of APS, through Buckmaster, in the efforts to find placement and initiate conservatorship proceedings for Nancy. Thus, *McHone*, even if persuasive in all other respects, does not dispose of all the issues raised by plaintiffs in this case.

"Under the joint action test, 'courts examine whether state officials and private parties have acted in concert in effecting a particular deprivation of

constitutional rights.' [Citation.] The test focuses on whether the state has '"so far insinuated itself into a position of interdependence with [the private actor] that it must be recognized as a joint participant in the challenged activity."' [Citation.] A plaintiff may demonstrate joint action by proving the existence of a conspiracy or by showing that the private party was 'a willful participant in joint action with the State or its agents.'" (*Franklin v. Fox* (2002) 312 F.3d 423, 445 (*Franklin*).)[11]

"Mere cooperation" between private and public actors will not support a finding of state action. (See *Lansing v. City of Memphis* (6th Cir. 2000) 202 F.3d 821, 831 (*Lansing*).) The law requires, "at a minimum, some overt and significant state participation in the challenged action" (*Hoai v. Vo* (D.C. Cir. 1991) 935 F.2d 308, 313) or "a substantial degree of cooperation before imposing civil liability for actions by private individuals that impinge on civil rights" (*Franklin*, *supra*, 312 F.3d at p. 445). In *Franklin*, a defendant who was convicted of murder alleged his daughter conspired with the district attorney to violate his constitutional rights. (*Id.* at p. 428.) In concluding the daughter was not a state actor under the joint action test, the court found no evidence of any conspiracy or joint action between the daughter and the district attorney. "Franklin offers no evidence that [his daughter] made repeated requests or solicited [the district attorney's] input on the types of questions she should ask her father. It is also undisputed that the jailhouse visit was [his daughter's] idea, and not a state-

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[11] Plaintiffs' dismissal of their conspiracy cause of action did not foreclose their ability to prove state action, as the joint action test can be satisfied by proving conspiracy or willful participation in joint action with the state. (*Franklin*, supra, 312 F.3d at p. 445.)

initiated effort to use her to extract her father's confession. . . . [T]he government did not sufficiently insinuate itself into [the daughter's] jailhouse visit to transform her private actions into ones fairly attributable to the state." (*Id.* at p. 445.) The *Franklin* court distinguished the case of *Howerton v. Gabica* (9th Cir. 1983) 708 F.2d 380, where a landlord was engaged in joint action with police officers to evict a tenant. The court in *Howerton* found there was "more than a single incident of police consent to 'stand by' in case of trouble" and the 11 Plaintiffs' dismissal of their conspiracy cause of action did not foreclose their ability to prove state action, as the joint action test can be satisfied by proving conspiracy *or* willful participation in joint action with the state. (*Franklin*, *supra*, 312 F.3d at p. 445.) defendants "repeatedly requested aid by the police to effect the eviction, and the police intervened at every step." (*Id.* at pp. 384, 385.)

In light of these legal authorities, we have no trouble concluding Mantillas was not a state actor. The evidence at trial established Mantillas was contacted by SARC, a nonprofit corporation, to provide residential placement for Nancy, and plaintiffs cite no evidence of cooperation or coordination between Mantillas and any state agent in making these arrangements. Nor do plaintiffs cite any evidence of Mantilla's involvement in the discussions and meetings between SARC, Stanford, Kratzer, and Buckmaster prior to Nancy's transfer to Embee Manor. That Mantillas permitted visits (supervised by Buckmaster) between Nancy and her parents merely demonstrates cooperation by Mantillas with a court order, which does not satisfy the joint action test. (*Lansing*, *supra*, 202 F.3d at p. 831.) We conclude, as a matter of law, Mantillas did not act under color of state law.

We reach a different conclusion for SARC because, on the record before us, we think its private conduct is fairly attributable to the state. It was undisputed APS initially asked SARC to coordinate residential placement for Nancy. Thereafter, APS, PAPD, and SARC worked together to coordinate a plan for Nancy, and Buckmaster was in frequent contact with representatives from SARC, informing the regional center of the EPO's, the trial court's recommendation of a conservatorship for Nancy, and the police's intent to charge and arrest Jeffrey and Elsie for felony dependent adult abuse. During their deliberations, Buckmaster emphasized to Kinderlehrer and Liske the importance of obtaining a conservatorship for Nancy, and Kinderlehrer agreed to request that DDS initiate conservatorship proceedings. Finally, Buckmaster participated in the November 26, 2001 meeting at Stanford, at which Liske of SARC was present, and supervised the visits between Nancy and her parents at Embee Manor after the arrests.

Even under the deferential standard of review applicable here, there is simply no denying the overt and continuing involvement of Buckmaster in the efforts to obtain placement and a conservatorship for Nancy. Nor is there any dispute SARC willfully participated in deliberations and planning with Buckmaster. Therefore, Buckmaster must be recognized as a joint participant in the challenged activity. (See *Jensen v. Lane County* (9th Cir. 2000) 222 F.3d 570, 575 (*Jensen*) [finding state action where doctor and county were involved in significant consultation regarding "complex and deeply intertwined process of evaluating and detaining individuals who are believed to be mentally ill and a danger to themselves or others"].)

SARC argues no state actors were involved in its selection of Embee Manor as Nancy's placement facility or in its periodic monitoring of Nancy after her placement. But this argument conspicuously ignores Buckmaster's significant prior involvement, which we have outlined above. And furthermore, it cannot be said Buckmaster was no longer involved after Nancy's placement, since she supervised the visits between Nancy and her parents at Embee Manor.

Stanford argues it was not involved in any state action after 5:00 p.m. on November 27, 2001. We need not decide whether Stanford acted under color of state law, nor assuming it was a state actor whether it was entitled to qualified immunity, because the conduct of Stanford's personnel was not a constitutional violation as it did not "shock the conscience."

The challenged conduct, as limited by the partial directed verdict in Stanford's favor, was the refusal of two unnamed Stanford employees to disclose Nancy's whereabouts to Elsie on November 27, 2001.

"To establish a substantive due process violation, [plaintiffs] must demonstrate that a fundamental right was violated and that the conduct shocks the conscience." (*Akins v. Epperly* (8th Cir. 2009) 588 F.3d 1178, 1183.) "'Conduct intended to injure will generally rise to the conscience-shocking level, but negligent conduct falls 'beneath the threshold of constitutional due process.' [Citation.] Deliberate indifference or recklessness falls somewhere between negligent and intentional actions. [Citation.] This middle ground is 'a matter for closer calls.' [Citation.] [¶] The Supreme Court has adopted a context-specific approach in determining whether deliberately indifferent or reckless conduct is egregious enough to state a substantive due process claim." (*Ibid.*)

In fast-paced circumstances, such as a police officer's response to an urgent threat to public safety, the purpose-to-harm standard applies. (*Porter v. Osborn* (9th Cir. 2008) 546 F.3d 1131, 1139.) "At the other end of the spectrum are situations . . . where 'extended opportunities to do better are teamed with protracted failure even to care.' [Citation.] Then, 'indifference is truly shocking.' [Citation.] Similarly, we have held that where officers have ample time to correct their obviously mistaken detention of the wrong individual, but nonetheless fail to do so, the suspect's family members need only plead deliberate indifference to state a claim under the due process right to familial association." (*Ibid.*)

Substantial evidence supported the conclusion Nancy's case was an emergency situation subject to the purpose-to-harm standard, as opposed to circumstances in which Stanford had ample time to take less drastic measures but acted with protracted and deliberate indifference. As the testimony established at trial, there was a sense of "urgency" due to Jeffrey's and Elsie's prior run-ins with the law and their impending arrest, and there was insufficient time to obtain even a temporary conservatorship for Nancy. There was no evidence suggesting the two unnamed Stanford employees intended to harm Nancy and her parents, or were even aware, in the moment, that refusing to disclose Nancy's whereabouts to Elsie would result in an extended separation between Nancy and her parents. Even if the unnamed employees knew they were furthering Nancy's placement at Embee Manor by refusing to disclose her whereabouts to Elsie, Dr. Hall's testimony that it was within the standard of care for Stanford to transfer Nancy to a facility chosen by SARC was substantial evidence supporting the nonconscience-shocking nature of their actions.

Thus, under the appropriate context-specific approach, we conclude plaintiffs were not entitled to a directed verdict or JNOV because it did not shock the conscience for Stanford Hospital personnel to refuse, in the urgency of the moment, to divulge to Elise Nancy's whereabouts.

To summarize, we conclude, as a matter of law, SARC acted under color of law because it was a willful participant in joint action with the state or its agents. Mantillas, however, did not act under color of law and was therefore not liable under section 1983. And Stanford's conduct did not "shock the conscience." Next, we discuss whether SARC, as a private party, was entitled to qualified immunity.[12]

2. Qualified Immunity

Qualified immunity shields government officials from liability for civil damages "insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." (*Harlow v. Fitzgerald* (1982) 457 U.S. 800, 818.) It "strikes a balance between compensating those who have been injured by official conduct and protecting government's ability to perform its traditional functions. [Citations.] Accordingly, we have recognized qualified immunity for government officials where it was necessary to preserve their ability to serve the public good or to ensure that talented candidates were not deterred by the threat of damages suits from entering public service." (*Wyatt v. Cole,* 504 U.S. 158, 167 (1992) (*Wyatt*).)

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[12] There is no dispute Buckmaster, as program manager for APS, is entitled to assert qualified immunity in this case.

a. Qualified immunity for private parties

In denying plaintiffs' motions for directed verdict and JNOV, the trial court implicitly found SARC to be entitled to the defense of qualified immunity. In determining whether qualified immunity should be extended to private parties performing public or quasi-public functions, two factors are considered: (1) whether there is a "'firmly rooted'" tradition of applicable immunity, and (2) whether the purposes underlying government employee immunity (e.g., protecting the public from unwarranted timidity on the part of public officials, and ensuring talented candidates were not deterred by the threat of damage suits from entering public service) warrant extension of immunity. (*Richardson*, *supra*, 521 U.S. at pp. 404–405, 407–408.)

In *Wyatt*, the Supreme Court held individuals who used a state replevin law to compel the local sheriff to seize disputed property from a former business partner were not entitled to seek qualified immunity. The court held the reasons for extending qualified immunity were not furthered in that case because the private parties "hold no office requiring them to exercise discretion; nor are they principally concerned with enhancing the public good." (*Wyatt, supra*, 504 U.S. at p. 168.) The court concluded extending immunity to them would "have no bearing on whether public officials are able to act forcefully and decisively in their jobs or on whether qualified applicants enter public service." (*Ibid.*)

Wyatt was followed in *Richardson*, supra, 521 U.S. 399, where the Supreme Court held private prison guards employed by a private prison management firm were not entitled to qualified immunity. The court concluded there was no firmly rooted tradition of immunity for a private prison guard (id. at p.

407), and the special policy considerations justifying government employee immunity were not present because (1) the threat of competition from other private corrections firms would prevent unwarranted timidity by the guards, (2) insurance coverage requirements (which increase the likelihood of employee indemnification) reduces the employment-discouraging fear of unwarranted liability, (3) private firms can offset any increased employee liability risk with higher pay or extra benefits, and (4) the distraction of litigation alone was insufficient to justify immunity (*id.* at pp. 409–412). *Richardson* expressly limited its holding to the factual context in which it was brought, e.g., "a private firm, systematically organized to assume a major lengthy administrative task (managing an institution) with limited direct supervision by the government, undertak[ing] that task for profit and potentially in competition with other firms." (*Id.* at p. 413.)

In *Filarsky v. Delta,* 566 U.S. 377 (2012) (*Filarsky*), the Supreme Court held a private attorney hired part-time by the city to conduct an internal investigation was entitled to qualified immunity. As to the firmly rooted tradition factor, the court observed that at the time section 1983 was enacted, "private lawyers were regularly engaged to conduct criminal prosecutions on behalf of the State," and because the court found many examples of individuals receiving immunity while engaged in public service even on a temporary or occasional basis, "immunity under § 1983 should not vary depending on whether an individual working for the government does so as a full-time employee, or on some other basis." (*Filarsky*, at pp. 385, 389.) The court also found the purposes of governmental immunity would be furthered by extending immunity to the private attorney in that case because it would protect the government's ability to perform

its traditional functions by avoiding unwarranted timidity in the performance of public duties and not deterring talented candidates from public service. (*Id.* at pp. 388–391.) *Filarsky* distinguished *Wyatt* as a case involving defendants "who were using the mechanisms of government to achieve their own ends," as opposed to "individuals working for the government in pursuit of government objectives [who] are 'principally concerned with enhancing the public good.'" (*Filarsky*, at p. 392.) The court also distinguished *Richardson* as "a self-consciously 'narrow[ ]' decision" that "was not meant to foreclose all claims of immunity by private individuals." (*Filarsky*, at p. 393.)

With these cases in mind, we turn to the parties' arguments regarding qualified immunity for SARC. Plaintiffs mainly rely on *Wyatt* to contend private persons who conspire with state officials to violate civil rights are not entitled to qualified immunity. However, *Wyatt* involved the "very narrow" question of whether qualified immunity "is available for private defendants faced with § 1983 liability for invoking a state replevin, garnishment, or attachment statute." (*Wyatt*, *supra*, 504 U.S. at pp. 168–169.) As made clear in *Filarsky*, *Wyatt*'s limited holding does not prevent the extension of qualified immunity to private individuals working for the government. (*Filarsky*, *supra*, 566 U.S. at p. 392.)

Still, confining *Wyatt* to its facts does not necessarily resolve the question of whether SARC is entitled to qualified immunity. We must also consider the relevant factors identified in *Richardson*. The parties' briefing in this regard is woefully inadequate because they fail to address the firmly rooted tradition factor. The history of service providers for the developmentally disabled in California and the robustness of market competition in SARC's field are not readily

ascertainable from the record or briefing on appeal. Because it is plaintiffs' burden to provide an adequate record on appeal showing error, the consequence for these inadequacies falls squarely upon them. (See *Foust v. San Jose Construction Co., Inc.* (2011) 198 Cal.App.4th 181, 186–187; see also *Sain v. Wood* (7th Cir. 2008) 512 F.3d 886, 893 [no plain error in district court's implied finding physician was entitled to qualified immunity given absence of record addressing *Richardson* factors].)

The record otherwise discloses SARC is a nonprofit corporation under contract with DDS to provide services and support to the developmentally disabled. This is substantial evidence supporting the inference SARC works in pursuit of state government objectives and is principally concerned with enhancing the public good. (See § 4501[declaring California's responsibility and obligation to provide services and supports to persons with developmental disabilities].) There was no contrary evidence suggesting SARC acted to achieve its own ends in placing Nancy at Embee Manor.

On this record, we believe the purposes of governmental immunity would be furthered by extension of qualified immunity to SARC because it would allow SARC employees to serve the state with the decisiveness and judgment required by the public good, which is especially important when the care of severely developmentally disabled persons calls for difficult decisions to be made. Extension of qualified immunity would also ensure talented candidates are not deterred from working for SARC by the threat of damage suits. And because SARC is a nonprofit corporation and there is no evidence in the record regarding market competition among regional centers in California, we cannot assume there are private market incentives

that would moderate the policy concerns regarding employee timidity or the employment-discouraging fear of unwarranted liability.[13] Accordingly, on this record, we find SARC is entitled to qualified immunity.

b. Plaintiffs were not entitled to a directed verdict or JNOV on SARC and Buckmaster's defense of qualified immunity

The qualified immunity inquiry turns on the "'objective legal reasonableness'" of the acts "assessed in the light of the legal rules that were 'clearly established' at the time [the action] was taken." (*Anderson v. Creighton* (1987) 483 U.S. 635, 639.) The court must determine whether there has been a violation of a constitutional right and whether the right was clearly established in the factual context of the case. (*Saucier v. Katz* (2001) 533 U.S. 194, 200–201, reversed on other grounds in *Pearson v. Callahan* (2009) 555 U.S. 223, 227.)

"'[C]learly established law' should not be defined 'at a high level of generality.'" (*White v. Pauly* (2017) ___ U.S. ___ [137 S.Ct. 548, 552] (*White*).) Rather, "the clearly established law must be 'particularized' to the facts of the case. [Citation.] Otherwise, '[p]laintiffs would be able to convert the rule of qualified immunity . . . into a rule of virtually unqualified liability simply by alleging violation of extremely

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[13] Notably, in *Halvorsen v. Baird* (9th Cir. 1998) 146 F.3d 680, the Ninth Circuit held a private, nonprofit detoxification firm under contract to the state to provide involuntary detoxification services was not entitled to qualified immunity. Despite the firm's nonprofit status, the court held concerns about employee timidity were moderated by market factors because "if a detox center does a bad job, more effective competitors can bid on the municipal contracts." (Id. at p. 686.) Given the record before us, we do not think Halvorsen is controlling because plaintiffs failed to provide a record showing the degree of market competition in SARC's field.

abstract rights.' " (*Ibid.*) " ' "[E]xisting precedent must have placed the statutory or constitutional question beyond debate." ' " (*Id.* at p. 551.) This standard gives officials " 'breathing room to make reasonable but mistaken judgments about open legal questions.' " (*Ziglar v. Abbasi* (2017) ___ U.S. ___ [137 S.Ct.1843, 1866].) Put simply, "[q]ualified immunity protects 'all but the plainly incompetent or those who knowingly violate the law.' " (*Sloman v. Tadlock* (9th Cir. 1994) 21 F.3d 1462, 1466.)

There is no doubt the law in 2001 clearly established that a civil commitment in the mental health context constituted a significant deprivation of liberty requiring due process (*Addington v. Texas* (1979) 441 U.S. 418, 426), and that the seizure of a mentally disturbed person must be supported by probable cause (*Maag v. Wessler* (9th Cir. 1992) 960 F.2d 773, 775). Also clearly established was the constitutional right of parents and children to family association without unreasonable governmental interference (*Wallis v. Spencer* (9th Cir. 1999) 202 F.3d 1126, 1136), and this right applied to parents and their disabled adult offspring (*Lee v. City of Los Angeles* (9th Cir. 2001) 250 F.3d 668, 685–686 (*Lee*)).

This high level of generality, however, is insufficient for assessing the objective legal reasonableness of SARC and Buckmaster's conduct in the particular factual context of this case. Plaintiffs have not cited any case holding or suggesting reasonable officials in the positions of SARC and Buckmaster would have understood their efforts to protect an unconserved, developmentally disabled adult from further parental abuse and neglect would constitute a violation of clearly established law. Nor have we found a case with similar facts which places the statutory or

constitutional questions raised in this case'"'beyond debate." ' " (*White*, *supra*, 137 S.Ct. at p. 551.)

Lee, cited by plaintiffs, is distinguishable. In that case, the Ninth Circuit held it was error to dismiss a complaint by the mother of a developmentally disabled man (Sanders) who was told by the police that her son's whereabouts were unknown, even though the police knew or should have known Sanders had been falsely arrested and extradited to another state. (*Lee*, *supra*, 250 F.3d at pp. 685–686.) Notably, the mother in *Lee* brought suit individually and as Sanders's conservator (*id.* at p. 677), whereas here, Jeffrey and Elsie were not Nancy's conservators. More importantly, *Lee* did not involve a situation where the police knew the parent of the developmentally disabled individual was accused of and about to be arrested for dependent adult abuse. Thus, *Lee* hardly provides clearly established law for the unique situation encountered by SARC and Buckmaster.

SARC's belief in its authority to unilaterally place Nancy at Embee Manor was not completely unmoored from supporting legal authority. SARC had a "continuing responsibility" to Nancy, "both in choice of placement and in initial decision of referral." (*In re Borgogna* (1981) 121 Cal.App.3d 937, 946.) Rogers confirmed in his testimony, "Once a consumer of services, always a consumer of services," even if the individual is not currently receiving services. Additionally, the LPS Act provides: "An individual who is determined by any regional center to have a developmental disability shall remain eligible for services from regional centers unless a regional center, following a comprehensive reassessment, concludes that the original determination that the individual has a developmental disability is clearly erroneous." (§ 4643.5, subd. (b).) Nancy was a SARC consumer since

childhood, and the original determination of her developmental disability has not been reversed. It was reasonable for SARC to conclude Nancy required residential care services in light of her then-current living conditions and her parents' impending arrest.

While a consumer's eligibility to continue receiving services from SARC is not the same thing as SARC's unilateral authority to decide on placement, in this case, the decision to place Nancy while temporarily withholding her whereabouts from her parents did not violate clearly established law. The LPS Act calls for participation from parents and families in the provision of services only where "appropriate" and "feasible" (§ 4501), and here, SARC reasonably concluded it was not appropriate or feasible to give Jeffrey and Elsie a decisionmaking role in Nancy's placement given their history of abuse and neglect and impending arrest. The constitutional right to familial association is not absolute and must yield to the state's interests in protecting a child from abusive parents. (*Caldwell v. LeFaver* (9th Cir. 1991) 928 F.2d 331, 333.) Even if SARC misjudged the balance of these competing interests, the evidence did not show plain incompetence or a knowing violation of the law.

Plaintiffs cite no evidence or authority rebutting the testimony of SARC's witnesses that they were aware of no statutory provision requiring SARC to obtain a court order before coordinating residential placement for an unconserved adult. Plaintiffs construe various portions of the testimony of Kinderlehrer, Buckmaster, Liske, and Dr. Hayward as demonstrating their awareness a court order was required. However, we must view this testimony, and all reasonable inferences drawn from it, in favor of SARC and Buckmaster. (*Howard*, *supra*, 72 Cal.App.4th at pp. 629–630.) Accordingly, the discussions about

conservatorship could have been attempts to find a long-term solution for Nancy, not admissions that her placement at Embee Manor without a conservatorship was unlawful. The discussions about extending the EPO's could have been efforts to formulate a contingency plan in case SARC could not obtain placement before the EPO's expired. When SARC found placement for Nancy at Embee Manor before the EPO's expired, this dispensed with the need for an extension.[14] Finally, Dr. Hayward's testimony that it was "impossible" to have Nancy placed without a temporary conservatorship must be viewed in context. His full testimony was placement "might" be impossible because "some facilities that [Nancy] might have been eligible for might have required a temporary conservatorship for her to go there." He went on to say it "could have been necessary; doesn't mean that it was absolutely necessary." As it turned out, Embee Manor did not require a temporary conservatorship to accept placement for Nancy.

As for Buckmaster, the statutory purpose of APS is to protect elder or dependent adults who cannot care for and protect themselves, and APS agencies are statutorily required to "take any actions considered necessary to protect the elder or dependent adult and correct the situation and ensure the individual's safety." (§ 15600, subd. (i).) Buckmaster testified when APS social workers investigate whether elder or dependent adults need protective services, they identify and coordinate appropriate services. Given Buckmaster's knowledge of Jeffery's and Elsie's past run-ins with the law, their alleged history of abuse and neglect

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[14] Lutticken testified as much, stating because Nancy "was placed before 5:00 p.m., . . . it wasn't necessary to extend the emergency protective restraining order."

of Nancy, and their impending arrest for felony dependent adult abuse, it was not unreasonable for Buckmaster to ask SARC to find placement for Nancy and to ask Stanford to temporarily prohibit contact between Jeffrey and Elsie and their daughter. Buckmaster's judgment, even if mistaken, did not amount to plain incompetence or a knowing violation of the law.

Given the standard of review necessitated by the posture in which the issue of qualified immunity comes before us, we cannot conclude the evidence and reasonable inferences from the evidence, viewed in the light most favorable to SARC and Buckmaster, permit only a single conclusion that a reasonable official in their positions would have believed the challenged conduct to violate clearly established law. Rather, substantial evidence supports the conclusion that the legal contours of plaintiffs' 14 Lutticken testified as much, stating because Nancy "was placed before 5:00 p.m., . . . it wasn't necessary to extend the emergency protective restraining order." constitutional rights in the particular context of this case were uncertain, and SARC and Buckmaster made judgment calls to keep Nancy safe. Qualified immunity protects such "judgment calls made in a legally uncertain environment." (*Ryder v. United States* (1995) 515 U.S. 177, 185.) Thus, plaintiffs were not entitled to a directed verdict or JNOV on SARC and Buckmaster's defense of qualified immunity.

C. Plaintiffs Fail to Demonstrate Prejudice from the Claimed Instructional Errors

Plaintiffs contend the trial court committed reversible error in instructing the jury to decide whether defendants' conduct (1) was protected by qualified immunity, and (2) met the conscience-shocking standard

for substantive due process.[15] Plaintiffs argue these are matters of law for the court, not the jury, and under *Sandquist v. Lebo Automotive, Inc.* (2016) 1 Cal.5th 233 (*Sandquist*), a determination by the wrong decision maker results in a miscarriage of justice requiring reversal without further harmless error analysis.

We agree these matters were ultimately for the trial court's determination. "[Q]ualified immunity is a question of law, not a question of fact" (*King v. State of California* (2015) 242 Cal.App.4th 265, 289), and "[t]he threshold determination of whether the law governing the conduct at issue is clearly established is a question of law for the court" (*Act Up!/Portland v. Bagley* (9th Cir. 1993) 988 F.2d 868, 873). " 'The availability of qualified immunity after a trial is a legal question informed by the jury's findings of fact, but ultimately committed to the court's judgment.' " (*King*, at p. 289) Likewise, "[w]hether the alleged conduct shocks the conscience is a question of law." (*Akins v. Epperly*, *supra*, 588 F.3d at p. 1183.)

Reversal, however, is not automatic. Unlike the erroneous *denial* of a jury trial, which is reversible per

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[15] The jury instructions were phrased to direct the jury to make these determinations. The "Shock the Conscience Standard" instruction provided, in relevant part: "In order to be a constitutional violation of the right of family association or deprivation of liberty without due process of law, the state actor's harmful conduct must shock the conscience or offend the community's sense of fair play and decency. . . . [¶] In making this determination, you should consider whether the circumstances allowed the state actor time to fully consider the potential consequences of his, her or its conduct." (Italics added.) The "Qualified Immunity" instruction stated: "If you find that a Defendant is a state actor and that the Defendant acted in violation of 42 U.S.C. Section 1983 as to a particular Plaintiff, then you must decide whether that Defendant is excused from liability to that Plaintiff because of the affirmative defense of qualified immunity." (Italics added.)

se, "the improper *submission* of an issue to the jury is nothing more than a nonconstitutional procedural error," which requires a showing of actual prejudice under the traditional harmless error analysis. (*Beasley v. Wells Fargo Bank* (1991) 235 Cal.App.3d 1383, 1396, italics added.) Under the "traditional harmless error analysis for nonconstitutional error, . . . prejudice is not presumed. [Citations.] Rather, the presumption is indulged that [plaintiffs] had a fair trial, and [plaintiffs have] the burden of showing otherwise." (*Id.* at p. 1397.) To show prejudice, plaintiffs must show a miscarriage of justice, which should be declared only when the court, after examining the entire cause, including the evidence, is of the opinion it is reasonably probable a result more favorable to the appealing party would have been reached absent the error. (*Cassim v. Allstate Ins. Co.* (2004) 33 Cal.4th 780, 800, citing *People v. Watson* (1956) 46 Cal.2d 818, 836.)

Plaintiffs provide little substantive argument as to how they were prejudiced by the erroneous submission of these issues to the jury. They suggest the jury was not capable of determining these matters, were not instructed how to assess whether a reasonable official in defendants' position could think the challenged conduct was lawful, and may have decided the case on prejudice, passion, and gut feeling. This speculation, however, falls short of demonstrating a reasonable probability of a more favorable result absent the error. As we have discussed, the objective legal reasonableness of SARC and Buckmaster's conduct hinged largely on factual circumstances the jury was capable of understanding and taking into consideration, such as their awareness of Jeffrey's and Elsie's history of run-ins with the law and neglect of their daughter, and their impending arrest. The same goes

for the conscience-shocking analysis, which was based on evidence the jury was capable of appreciating regarding the emergency nature of the situation and the lack of evidence of intentional harm by Stanford personnel.

Plaintiffs cite several cases holding there is prejudice when an erroneous jury instruction may have been the basis for the verdict, and in those situations, the court should not speculate upon the basis of the verdict. (See *Seaman's Direct Buying Service, Inc. v. Standard Oil Co.* (1984) 36 Cal.3d 752, 774, overruled in part on other grounds in *Freeman & Mills, Inc. v. Belcher Oil Co.* (1995) 11 Cal.4th 85, 102–103.) But these authorities do not assist plaintiffs because the instant case does not involve a legally *erroneous* instruction. Rather, at issue here is the procedural error in having the jury, rather than the court, make the legal determinations set forth in the instructions, an error which requires a showing of actual prejudice. (*Beasley v. Wells Fargo Bank*, *supra*, 235 Cal.App.3d at p. 1396.)

Plaintiffs' reliance on *Sandquist* is also misplaced, as that case involved the factually and procedurally distinct context of a court denying the parties' right to have their contractually agreed-upon decision maker (the arbitrator) decide whether an arbitration agreement permitted classwide arbitration. Of note, all the cases cited by *Sandquist* as requiring automatic reversal involved the *denial* of the right to a jury trial. (See *Sandquist*, *supra*, 1 Cal.5th at p. 261, citing *People v. Blackburn* (2015) 61 Cal.4th 1113, 1135 [total deprivation of jury trial in mentally disordered offender commitment proceeding without valid waiver requires automatic reversal]; *People v. Collins* (2001) 26 Cal.4th 297, 311 [waiver of jury trial obtained by trial court's assurance of unspecified benefit was not

valid and error amounted to structural defect requiring reversal without determination of prejudice]; *Martin v. County of Los Angeles* (1996) 51 Cal.App.4th 688, 698 [denial of right to jury trial on equitable indemnity cause of action was reversible per se].) As we have stated, the improper submission of an issue to the jury is not reversible per se in the same way as the denial of the right to a jury determination. (See *Beasley v. Wells Fargo Bank*, *supra*, 235 Cal.App.3d at p. 1396.)

Finally, in our view, any error in having the jury make these determinations was remedied by plaintiffs' postverdict JNOV motions. The same issues regarding qualified immunity and the "shock the conscience" standard came before the trial court in the parties' briefing on the JNOV motions. Thus, the correct decision maker did have the opportunity to make the final determination on these questions of law, rendering the earlier instructional error harmless.

III. DISPOSITION

For the foregoing reasons, we conclude the trial court correctly denied plaintiffs' motions for a directed verdict and JNOV, and the claimed instructional errors were harmless. Accordingly, the judgment is affirmed. Each party shall bear their own costs on appeal.

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Margulies, Acting P. J.

We concur:

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Banke, J.

_____

Kelly, J.*

A145752

Golin v. San Andreas Regional Center

* Judge of the Superior Court of the City and County of San Francisco, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

Appendix 2
Order of the California Court of Appeal Denying Petition for Rehearing

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COURT OF APPEAL,
FIRST APPELLATE DISTRICT
350 MCALLISTER STREET
SAN FRANCISCO, CA 94102
DIVISION 1

JEFFREY GOLIN et al.,

Plaintiffs and Appellants,

v.

SAN ANDREAS REGIONAL CENTER et al.,

Defendants and Respondents.

A145752

San Mateo County Super. Ct. No. CIV507159

BY THE COURT:

The petition for rehearing is denied.

Date: 4/22/2019, Margulies, J., Acting P.J.

Appendix 3
Order of the
California Supreme Court
Denying Review

SUPREME COURT
FILED
July 17 2019
Jorge Navarrete clerk

_____
Deputy

Court of Appeal, First Appellate District, Division One
No. A145752

S255631

IN THE SUPREME COURT OF CALIFORNIA
En Banc

JEFFREY R. GOLIN et al.,
Plaintiffs and Appellants,
v.
SAN ANDREAS REGIONAL CENTER et al.,
Defendants and Respondents.

The petition for review is denied.

Liu and Cuellar, JJ., were recused and did not participate.

CANTIL-SAKAUYE
Chief Justice