No. 20-____

In the

Supreme Court of the United States

PASADENA REPUBLICAN CLUB,
Petitioner,

v.

WESTERN JUSTICE CENTER, JUDITH CHIRLIN, AND CITY OF PASADENA,
Respondents.

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

PETITION FOR WRIT OF CERTIORARI

ANTHONY T. CASO
Counsel of Record
Center for Constitutional
Jurisprudence
Claremont Institute
1317 W. Foothill Blvd., Ste 120
Upland, CA 91786
(877) 855-3330
tcaso@claremont.org

Counsel for Petitioner

QUESTIONS PRESENTED

The City of Pasadena entered into a lease with the Western Justice Center, which including the option to renew runs for 99 years, to operate a center for dispute resolution on property owned by the City. City funds were used to purchase the property from the United States General Services Administration – only a governmental entity could legally purchase the property – and revenue from city bonds was given to the Western Justice Center to pay for the refurbishment of the property. The property was purchased to carry out the public purposes of the City and the City limited its use to purposes stated in a Plan of Public Use. The City relied on rent payments from the Western Justice Center to repay the City's treasury for the cost of the purchase and the refurbishment financed by the sale of municipal bonds.

The Western Justice Center exercised its delegated authority over that City-owned property to cancel an event by the Pasadena Republican Club because Center disagreed with the view of the speaker chosen by the Club

The questions presented for review is under these circumstances are:

1. While it is managing the city-owned property, is the Western Justice Center a State Actor for purposes of the First and Fourteenth Amendments and 42 U.S.C. §§ 1983 and 1985(3)?

2. Consistent with the Court's ruling in *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961), is a government agency liable for civil rights violations where the agency, through "inaction has not only

made itself a party to the [viewpoint discrimination] but has elected to place its power, property and prestige behind" that discrimination?

PARTIES TO THE PROCEEDING

Petitioner Pasadena Republican Club was the plaintiff in the District Court and the appellant before the Ninth Cirtcuit Court of Appeals. Repondents Western Justice Center, Judith Chirlin, and City of Pasadena, California defendants in the District Court proceedings and appellees in the Court of Appeals.

RELATED CASES

- *Pasadena Republican Club v. Western Justice Center*, 424 F. Supp.3d 861 (CD Cal. 2019)
- *Pasadena Republican Club v. Western Justice Center*, 985 F.3d 1161 (9th Cir. 2021)

CORPORATE DISCLOSURE STATEMENT

Petitioner is not a corporation and has not issued shares of stock to any person

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PETITION FOR WRIT OF CERTIORARI

Petitioner Pasadena Republican Club respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The opinion of the Circuit Court of Appeals for the Ninth Circuit is reported at 985 F.3d 1161 (9th Cir. 2021) and is reproduced in the Appendix at pages App. 1-24. The decision of the District Court is reported at 424 F. Supp.3d 861 (CD Cal. 2019) and is reproduced in the Appendix at pages App. 25-68.

STATEMENT OF JURISDICTION

The judgment of the court below affirming the judgment of the District Court was entered on on January 21, 2021. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

PERTINENT STATUTORY AND CONSTITUTIONAL PROVISIONS

The First Amendment to the United States Constitution provides, in relevant part: "Congress shall make no law … abridging the freedom of speech"

Section 1983 of Title 42 of the United States Code provides, in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof

> to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Section 1985(3) provides, in pertinent part:

> If two or more persons in any State or Territory conspire … for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws; … in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators.

STATEMENT OF THE CASE

In *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961), this Court held:

> By its inaction, the Authority, and through it the State, has not only made itself a party to the refusal of service, but has elected to place its power, property and prestige behind the admitted discrimination. The State has so far insinuated itself into a position of inter-

> dependence with Eagle that it must be recognized as a joint participant in the challenged activity, which, on that account, cannot be considered to have been so 'purely private' as to fall without the scope of the Fourteenth Amendment.

While this Court has declined to extend the holding in *Burton* beyond the "joint participant" theory of state action, neither has it overruled *Burton*. This case tests whether the "joint action" test of *Burton* is still the law of the land.

The Western Justice Center and the City of Pasadena.

A group of federal judges from this Ninth Circuit "initiated" the Western Justice Center "as an appropriate use" of the buildings adjacent to the Federal Building on Grand Avenue in Pasadena. App. 161. The Ninth Circuit judges that created the concept envisioned a campus setting for nonprofits pursuing law reform activities to interact with each other. *Id*. Although the property was already owned by the federal government, neither the Ninth Circuit itself nor any other agency of the federal government approved that use for the property. The Western Justice Center, as a private organization, was not qualified to purchase the property. App. 96. Only a governmental entity, such as a state or a political subdivision of the state, could legally purchase the property. 40 U.S.C. § 484(e)(3)(H). Instead, the judge-initiated Western Justice Center proposed a joint project with the City of Pasadena for the property (hereafter Maxwell House property). App. 169.

In order to pursue this project with the Western Justice Center, the City put together a proposal to submit to the General Services Administration along with a proposed agreement to lease the Maxwell House property to the Western Justice Center. App. 167-76. The lease listed the chambers of Ninth Circuit Judge Dorothy Nelson at the federal courthouse as the address for notices to the Western Justice Center. App. 150.

In the lease, the City specifically disclaimed any commercial justification for the transaction. App. 96. Instead, the City noted that it was pursuing the public purposes of acquiring the property for historic preservation and to promote alternative dispute resolution. App. at 95-96. Thus, the City limited the uses to which the Western Justice Center could put the property. App. 101-02, 160-65. Those limitations were included in the proposal for purchase of the property that the City submitted to the General Services Administration. App. 183. The limitations were also spelled out in the lease and the attached "Plan of Public Use" identifying the public purposes to which the property could be put. App. 101-02, 160-65. The offer to purchase, including the Plan of Public Use, was also submitted to Congress. App. 174.

The statement of public purposes limited and defined how Western Justice Center could use the property. The uses envisioned for the property in the Plan of Public Use included space for the Department of Justice's research of alternative forms of dispute resolution, the Institute of Judicial Administration, American Law Institute-American Bar Association Committee on continuing Professional Education, and

the California Commission of Lawyer Competence and Legal Education, among others. App. 164-65.

The lease between the City and the Western Justice Center was very clear that the City intended the transaction to fulfill the public purposes of the City and expressly noted that the lease was not entered into for commercial purposes. App. 96. Indeed, for-profit commercial activity on the Maxwell House property was prohibited in the lease agreement. App. 102. The lease allowed the Western Justice Center to sublet portions of the property, but only to "tax exempt organizations providing law related services, and for no other purposes whatsoever." *Id*. The Western Justice Center kept the funds it received from subletting the City-owned property. *Id*.

The General Services Administration approved the City's proposal and sold the Maxwell House property to the City (through the City's Surplus Property Authority) for the sum of $412,000. App. 216-17. Western Justice Center paid the City advance rent in the amount of $82,400 to cover the down payment to the federal government for the purchase. *Id*. The City contracted with the federal government to pay the balance over 10 years. App. 217.

On April 4, 1989, the City, acting through its Surplus Property Authority, executed the original lease for the Maxwell House property with the Western Justice Center for a term of 55 years with an option for a renewal term of an additional 44 years. App. 96-97. Initial rent was set at an amount that would reimburse the City for payments to the federal government for purchase of the property. App. 171. However, in the event that Western Justice Center defaulted on its

rental obligation, the City would have been liable for the remaining loan payments to the federal government.

Although the City wanted the property for its own public purposes, it did not want spend any of its own money to make the purchase or to refurbish the property. App. at 95-96. Instead, at the time it made the purchase, it relied 100 percent on Western Justice Center to pay for the purchase and refurbishment of the property. App. at 98-100, 103.

There were delays in the transfer of possession and the lease was amended to grant Western Justice Center more time to complete the repairs. App. 183-85. As of this amendment, Western Justice Center was responsible for raising the funds necessary for the repairs. App. 191. Western Justice Center was unable to meet this revised schedule and the lease was amended a second time to allow more time for fundraising and an extended schedule for the repairs. App. 200. The City agreed to this extension because the Center would provide "an institutional center of national repute for study and research in the areas of law reform, improvements to judicial administration and lawyer competency, law-related education and services to the community with respect to improvement in legal processes." *Id*.

Even with the extensions, fundraising for the project proved to be too difficult for the Western Justice Center. In the third amendment to the lease, the City borrowed money through Certificates of Participation in order to "assist on the rehabilitation" of the property. App. 217-18. The City loaned its credit to the Western Justice Center for the repair of the property.

Because the City was now using money from the Certificates of Participation to provide funds to the Western Justice Center for repair and refurbishment of the property, in addition to using its credit for the purchase of the property, a third amendment to the lease was executed adjusting the rent to the amount necessary to reimburse taxpayers. App. 209-10. After all of the funds borrowed through the use of the City's credit had been repaid by Western Justice Center, rent for the property was reduced to $1.00 per month. App. 76.

As noted above, the lease agreement allowed the Western Justice Center to sublet portions of the property to other organizations that fit within the Plan of Public Use. App. 101-02. The lease required notice of subleases to the City of Pasadena, but did not require the Western Justice Center to turn over the rent it received on these subleases of City-owned property to the City. App. 132-34. While subletting was strictly controlled, the lease gave Western Justice Center unrestricted freedom to rent the premises outside of business hours. App. 102. Nothing in the lease prohibited discrimination in these after-hour rental agreements. *Id*.

The Western Justice Center's decision to discriminate in after-hours rentals.

The Western Justice Center used its delegated authority under the lease to rent out the Maxwell House for various purposes outside of normal business hours. Prior to April 20, 2017, the Pasadena Republican Club rented the Maxwell House for meetings in the evening. App. 76. The Club planned to use the

facility again and executed a contract with the Western Justice Center to rent the Maxwell House the evening of April 20, 2017, for a meeting at which Dr. John Eastman, a noted constitutional scholar and former dean of the law school at Chapman University, was the scheduled speaker. App. 76-78. Retired California Judge Judith Chirlin was the executive director of the Western Justice Center and knew that Dr. Eastman (whom she described as a "professor and author") was the scheduled speaker for the meeting. App. 79. The event was planned to open for registration at 6:30 pm with the program to begin at 7:00 pm. *Id*.

At 3:43 pm on the day of the event (less than three hours before the event was to begin), Judith Chirlin sent an email to Lynn Gabriel, the president of the Pasadena Republican Club, cancelling the contract for use of the City-owned Maxwell House property. *Id*. Ms. Chirlin's cancellation notice explained "we learned today that [Dr. Eastman] is the President [sic] of the National Organization for Marriage (NOM). NOM's positions on same-sex marriage, gay adoption, and transgender rights are antithetical to the values of the Western Justice Center." App. 79-80. Ms. Chirlin further explained "Through these efforts we have built a valuable reputation in the community, and allowing your event in *our facility* would hurt our reputation in the community." *Id*. (Emphasis added. The facility in question was the City-owned property known as the Maxwell House.). Ms. Chirlin confirmed that this was the decision of the Western Justice Center's executive committee, which included

federal judges. App. 73, 80. The president of the Western Justice Center was copied on Chirlin's email.

The National Organization for Marriage is a national organization that works to defend marriage and the faith communities that sustain it at the local, state, and national levels. It does not advocate bias of any type. App. 80.

In addition to cancelling this event, the Western Justice Center adopted a policy banning the Pasadena Republican Club from future rentals of the City-owned Maxwell House. App. 77. This policy was adopted by the executive committee of the Western Justice Center. *Id*. Although Ms. Chirlin stated this policy banned rentals to all political groups, the Western Justice Center continued to sublet City-owned property on the Maxwell House campus to the League of Women Voters of Pasadena Area and allowed the League to use portions of the Maxwell House for its events. *Id*. Although the League of Women Voters of Pasadena Area claims to be nonpartisan, it generally adopts political positions on issues contrary to the positions of the Pasadena Republican Club. *Id*.

Procedural History

The Pasadena Republican Club filed this action in November of 2018 and filed a First Amended Complaint in February of 2019. The First Amended Complaint pleads causes of action against the City, the Western Justice Center, and Judith Chirlin for viewpoint discrimination, religious belief discrimination, and violation of the free exercise of religion in violation of the First Amendment and 42 U.S.C. §1983. A fourth cause of action was pled against Judith Chirlin

under 42 U.S.C. §1985(3) for conspiracy to deny civil rights. The City filed a Motion for Summary Judgment and Western Justice Center and Judith Chirlin filed a Motion to Dismiss. The District Court granted those motions and entered judgment of dismissal.

The Decision of the Ninth Circuit Court of Appeals.

The Ninth Circuit affirmed the District Court's judgment dismissing the complaint. Based on prior Ninth Circuit precedent, the court below held that *Burton* only applies where a private actor renders a service that is indispensable to the financial viability of the government agency. App. 14, 19 ("the Club fails to plead that WJC's nonprofit operations are indeispensable to the City's continued viability"). The lower court also distinguished this case from *Burton* because the City did not pay for utilities at the Western Justice Center and did not provide maintenance. App. 17. Finally, the lower court ruled that *Burton* did not apply because there was no allegation that the City participated in or had knowledge of the Western Justice Center's viewpoint and religious discrimination. App. 20. The court upheld the dismissal of the section 1985(3) claims because of the holding that the Western Justice Center was not a state actor. App. 21.

REASONS FOR GRANTING THE PETITION

The City of Pasadena purchased property from the federal government and granted exclusive use of the City-owned property to the Western Justice Center for just one year short of a century. The Western Justice Center was an organization "initiated" by judges of

the Ninth Circuit Court of Appeals, and the address specified in the lease for notices to the Center is the chambers of Ninth Circuit Judge Dorothy Nelson. In making the purchase, the City represented to the General Services Administration and, through the GSA, Congress, that the property, which by law could only be sold to a governmental entity (40 U.S.C. § 484(e)(3)(H)) would be used for public purposes outlined in the Plan of Public Use attached to the proposed lease with the Western Justice Center.

In ruling that the Western Justice Center was not a state actor in its management of City-owned property, the Ninth Circuit issued a decision on an important question of federal law which conflicts with the decisions of this Court and the decisions of other Circuit Courts of Appeals.

I. The Decision of the Ninth Circuit Conflicts with Decisions of this Court and other Circuit Courts of Appeals on Important Question of Federal Law

Whether a putatively "private party" is a state actor for purposes of the Constitution and Section 1983 is an important question of federal law as witnessed by the number of decisions of this Court examining that question. *See, e.g.*, *Manhattan Community Access Corp. v. Halleck*, 139 S.Ct. 1921 (2019); *San Francisco Arts & Athletics, Inc. v. United States Olympic Committee*, 483 U.S. 522 (1987); *Nat'l Collegiate Athletic Ass'n v. Tarkanian*, 488 U.S. 179 (1988); *Blum v. Yaretsky*, 457 U.S. 991 (1982); *Rendell-Baker v. Kohn*, 457 U.S. 830 (1982); *Jackson v. Metro. Edison Co.*, 419 U.S. 345 (1974); *Gilmore v. City of Montgomery, Ala.*, 417 U.S. 556 (1974); *Moose Lodge No. 107 v. Irvis*, 407

U.S. 163 (1972); *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961).

On this important question, the Ninth Circuit's decision conflicts with this Court's decisions in *Burton* and *Gilmore* and the decisions of other Circuit Courts of Appeals.

A. The decision of the Ninth Circuit conflicts this Court's decision in *Burton* on the meaning of financial indispensability.

The court below, based on prior Circuit precedent, held that this Court's decision in *Burton* does not apply unless the private actor is financially indepensable to the entire municipal government of the City of Pasadena. App. 19. In *Burton*, this Court ruled that the Wilmington Parking "Authority, and through it *the State*" were parties to the discrimination. *Burton*, 365 U.S. at 725. But this Court did not find that the Eagle Coffee Shoppe lease was financially indispensable to the entire state of Deleware, or even to the Wilmington Parking Authortity. The *Burton* case centered on a single parking garage. Burton, 365 U.S. at 719. When the Parking Authority discovered that revenues from parking would not pay for the construction of that garage, it entered into leases with "tenants for commercial use of some of the space." *Id*. The Eagle Coffee Shoppe was only one of those tenants. Other tenants included a bookstore, a jewelry store, and a food store. *Id*. at 720. The rent paid by the coffee shop defrayed only "a portion of the operating expense of an otherwise unprofitable enterprise." Id. at 723. The coffee shop was only one of several commercial enterprises and only accounted for a portion of what was

needed to run that one garage. It was not financially indispensable to the entire Wilmington Parking Authority and certainly not indispensable to the financial success of the State of Delaware!

The focus on a particular project was also recognized by this Court in *Rendell-Baker*. There, this Court noted that the *Burton* decision "stressed that the restaurant was located on public property and that the rent from the restaurant contributed to the support of the garage." *Rendell-Baker*, 457 U.S. at 842-43 (emphasis added).

The Ninth Circuit's decision changes the financial indispensability requirement in such a manner that *Burton* can never again apply to any situation – even one where a city grants exclusive use, under a 99-year lease, to an organization to accomplish the public purposes of the city. As a practical matter, there cannot be a situation where a lease to a nonpublic entity will be financially indispensable to an entire government agency. The decision of the Ninth Circuit effectively overrules *Burton* and this Court should grant review to determine whether *Burton* remains good law.

B. The decision of the Ninth Circuit conflicts with this Court's decision in *Burton* and the decisions of other Circuit Courts of Appeals on whether the City must be directly involved in the alleged unconstitutional action.

The Court below concluded that there was no liability for the City because "[t]he City did not participate in, or know in advance about, the initiation or the cancellation of the Club's speaking event." App. 20.

But this Court's decision in *Burton* does not require direct knowledge or involvement of the government agency in the illegal activity. Indeed, this Court did not find that either the State or the Parking Authority were directly involved in the Eagle Coffee Shoppe's discrimination. Rather, this Court ruled that the government could not abdicate its responsibilities by simply ignoring them.

The State could have required the Eagle Coffee Shoppe to comply with the requirements of the Equal Protection Clause, but failed to include such a requirement in the lease. *Burton*, 365 U.S. at 725. It was not any foreknowledge or direct discrimination by a public employee that made the State liable. Instead it was the State's "inaction." *Id*. By failing to prevent the discrimination, the State put its property, power, and prestige behind the discrimination.

Other Circuit Courts of Appeals agree with this reading of *Burton*. For instance, the Fifth Circuit ruled that where the *Burton* test is met, "any act of the private entity will be fairly attributable to the state even if it cannot be shown that the government played a direct role in the particular action challenged." *Frazier v. Bd. of Trustees of Nw. Mississippi Reg'l Med. Ctr.*, 765 F.2d 1278, 1288 n.22 (5th Cir. 1985), amended, 777 F.2d 329 (5th Cir. 1985).

The First Circuit agrees with the Fifth Circuit's reading of this Court's decision in *Burton*. In *Gerena v. Puerto Rico Legal Servs., Inc.*, 697 F.2d 447 (1st Cir. 1983), the First Circuit noted that when the *Burton* test is met, "the plaintiff need not show how the government was particularly involved in the challenged

action. Rather, the government is charged with all actions of the private party." *Id.* 451.

The Ninth Circuit's decision is in conflict with both the Fifth Circuit's decision in *Frazier* and the First Circuit's decision in *Gerena.* Both the First and Fifth Circuits accurately followed this Court's ruling in *Burton*. The Ninth Circuit, however, altered the requirements of *Burton* to require direct knowledge or participation of the government agency before that agency can be held liable for the illegal activity of the putatively private group to which it delegated authority to manage city-owned property. This Court should grant review to resolve the conflict created by the Ninth Circuit's decision.

C. The decision of the Ninth Circuit conflicts the decisions of this Court and other Circuit Courts of Appeals on finding state action where the putatively private organization operates public property.

In *Gilmore v. City of Montgomery, Ala.*, *supra*, this Court noted that when a city makes city-owned property "available for use by private entities," courts should look to the analysis in *Burton* to determine whether the city is liable for the discrimination of the private entity. 417 U.S. at 573. The likelihood of finding a "symbiotic relationship" greatly increases when the city grants exclusive use of city-owned property to the private entity. *Id.* at 574.

This is also a case of exclusive use. Pursuant to the joint project of the city of Pasadena and judge-initiated Western Justice Center, the City has granted

the Center exclusive use of City property for just one year shy of a century. Like the situation in *Gilmore*, the City has given up the power to allow other private groups to use the property, delegating that authority to the Western Justice Center.

Further, in this case, the purpose behind the near century-long exclusive use of the property is to have the Center carry out the public purposes of the City as outlined in the Plan of Public Use attached to the Lease. This plan was presented to the General Services Administration and through the GSA to Congress, and was essential to compliance with the statutory requirement for sale of the property.

Unlike the Ninth Circuit, other Circuit Courts of Appeals give more searching scrutiny when the property at issue is owned by a public agency. For instance in *Fernandes v. Limmer*, 663 F.2d 619 (5th Cir. 1981), the Fifth Circuit found that ownership of a municipal airport by municipal governments is sufficient to trigger a finding of state action under *Burton*. *Fernandes*, 663 F.2d at 627. The mere fact that every square foot of the airport was leased out to private parties "does not remove from the realm of state action restrictions on the exercise of civil rights at the site." *Id.*; *see also Air Line Pilots Ass'n, Int'l v. Dep't of Aviation of City of Chicago*, 45 F.3d 1144 (7th Cir. 1995).

This Court should grant review to determine whether long-term exclusive use of public property of city property removes the property from the requirements of the Constitution.

CONCLUSION

The Ninth Circuit's decision below allows governmental agencies to wash their hands of viewpoint discrimination on public properties by delegating away their authority. This may be a welcome development for those entities concerned about liability in the current climate of "cancel culture." It is not, however, consistent with the Constitution. There is no "delegation exception" to the First Amendment.

The Ninth Circuit's ruling also effectively overrules this Court's decision in *Burton* by adding a requirement that can never be met. The court below further departed from this Court's ruling in *Burton* by requiring active participation or at least foreknowledge of the private group's illegal activities before finding public agency liability. This ruling also conflicts with the decisions of other Circuit Courts of Appeals. Petitioner prays that the petition be granted.

DATED: June 16, 2021

Respectfully submitted,

ANTHONY T. CASO
Counsel of Record
Center for Constitutional Jurisprudence
Claremont Institute
1317 W. Foothill Blvd., Ste 120
Upland, CA 91786
(877) 855-3330
tcaso@claremont.org

Counsel for Petitioner