

No.

In the Supreme Court of the United States

ANGELA BORRELL,

Petitioner,

v.

ARTHUR F. RICHER, MICHELLE FICCA, AND
GEISINGER MEDICAL CENTER,

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The Fourteenth Amendment's Due Process Clause governs state action. 42 U.S.C. § 1983, moreover, renders liable those who violate constitutional rights "under color of" law.

In the Second and Eighth Circuits, demonstrating that public and private entities have engaged in "joint action" or are "pervasively entwined" is a sufficient basis to render the resulting conduct state action. The Third Circuit, however, disagrees. It holds that, notwithstanding "joint action" or "pervasive entwinement" between public and private, the Constitution applies only when the state directly coerced the conduct at issue.

The question presented is:

Whether "joint activity" or "pervasive entwinement" between a public and private entity is a sufficient basis to demonstrate that resulting conduct is state action.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Angela Borrell respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-17a) is reported at 870 F.3d 154. The district court's opinion (App., *infra*, 23a-99a) is reported at 63 F. Supp. 3d 418.

JURISDICTION

The court of appeals denied a timely-filed petition for rehearing *en banc* on November 9, 2017. App., *infra*, 102a-103a. Justice Alito extended the time for the filing of this petition until March 9, 2018. The Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATEMENT

A public university (Bloomsburg University) and a private hospital (respondent Geisinger Medical Center) created a joint degree program—the Nurse Anesthetist Program (the Program). Students take classes at the university, and they engage in practical training at the hospital.

Bloomsburg agreed “to collaborate with Geisinger to support the Academic Training portion of the Program.” Pet. App. 105a. Geisinger, likewise, agreed “to collaborate with [Bloomsburg] to support the Clinical Training portion of the Program.” *Ibid*.

The university confers a degree on Program graduates. The university and the hospital jointly

employed the Program's director, respondent Arthur Richer.

Respondent Richer dismissed petitioner Angela Borrell from the Program.

The district court held that respondents' decision to dismiss petitioner qualified as state action: it was joint action by the public and private entities, and the Program, moreover, was a pervasive entwinement of public and private. Because respondents provided petitioner none of the basic protections that due process demands (such as notice of the charges, a description of the evidence, and an opportunity to present her side of the story), the court granted summary judgment to petitioner on liability. A jury entered a damages verdict.

The court of appeals reversed. It reasoned that neither joint action nor pervasive entwinement was a sufficient basis to hold that respondents' conduct qualified as state action. Instead, it held that the Constitution governs only those specific actions that a public entity affirmatively coerces its private partner to undertake. On this basis, the court of appeals held that respondent Richer was wearing his Geisinger "hat" when he terminated petitioner, and thus none of his conduct constituted state action.

That led to a bizarre result in this case. When a public university dismisses a student from a degree program, constitutional protections attach. In creating the Program, Bloomsburg and Geisinger authorized their joint employee, respondent Richer, to remove students from the Program. When Richer exercised that power here, he dismissed petitioner from the public university's degree program. That is inescapably state action.

The lower court’s holding to the contrary is manifestly wrong. As other circuits have held, a showing that the Program was either “joint activity” or the product of “pervasive entwinement” is a sufficient basis to render resulting conduct state action. That conclusion, moreover, is compelled by *Brentwood Academy v. Tennessee Secondary School Athletic Association*, 531 U.S. 288 (2001).

Ultimately, the holding below eviscerates core constitutional protections when public institutions collaborate with private entities. The court of appeals acknowledged that its decision has “important ramifications for private hospitals that partner with public universities.” App., *infra*, 3a. In fact, this decision has enormous consequences for *all* public-private partnerships—affiliations which are ubiquitous in the modern economy.

A. Legal background.

The Fourteenth Amendment governs “such action as may fairly be said to be that of the States.” *Blum v. Yaretsky*, 457 U.S. 991, 1002 (1982). And, “[i]f a defendant’s conduct satisfies the state-action requirement of the Fourteenth Amendment, the conduct also constitutes action ‘under color of state law’ for § 1983 purposes.” *Brentwood*, 531 U.S. at 295 n.2.

To ensure that “the Fourteenth Amendment is not to be displaced,” this Court has long held that “its ambit cannot be a simple line between States and people operating outside formally governmental organizations.” *Brentwood*, 531 U.S. at 295. Instead, to prevent circumvention of core constitutional protections, “the deed of an ostensibly private organization or individual” may qualify as state action. *Ibid*. Thus, “constitutional standards are invoked ‘when it

can be said that the State is *responsible* for the specific conduct of which the plaintiff complains.” *Ibid.* (quoting *Blum*, 455 U.S. at 1004).

Brentwood identified seven circumstances in which the Court had previously found that a nominally private actor may be shown to have engaged in state action: (1) when the conduct “results from the State’s exercise of ‘coercive power;” (2) “when the State provides ‘significant encouragement, either overt or covert;” (3) “when a private actor operates as a ‘willful participant in joint activity with the State or its agents;” (4) when “a nominally private entity * * * is controlled by an ‘agency of the State;” (5) “when it has been delegated a public function by the State;” (6) “when it is ‘entwined with governmental policies;” and (7) “when government is ‘entwined in its management or control.” 531 U.S. at 296.

Brentwood focused on the last consideration—entwinement of the state with the management or control of the nominally private entity. The Court concluded that the conduct of a statewide athletic association, made up of public and private high schools, was state action. The Court reasoned that “[t]he nominally private character of the Association is overborne by the pervasive entwinement of public institutions and public officials in its composition and workings,” and, moreover, “there is no substantial reason to claim unfairness in applying constitutional standards to it.” *Brentwood*, 531 U.S. at 298.

Because of this finding of pervasive entwinement, the plaintiff was not required to additionally show that the specific conduct of the Association at issue was caused by the state: “it avails the Association nothing to stress that the State neither coerced nor encouraged the actions complained of.” *Brent-*

wood, 531 U.S. at 303. That is because “[c]oercion’ and ‘encouragement’ are like ‘entwinement’ in referring to kinds of facts that can justify characterizing an ostensibly private action as public instead.” *Ibid.* Thus, when “the relevant facts show pervasive entwinement to the point of largely overlapping identity, the implication of state action is not affected by pointing out that the facts might not loom large under a different test.” *Ibid.*

B. Factual background.

1. In 2007, respondent Geisinger Medical Center, a private hospital, partnered with Bloomsburg University of Pennsylvania, a public institution, to establish the Nurse Anesthetist Program (the Program). App., *infra*, 3a. Students receive classroom instruction at Bloomsburg, and they participate in clinical training at respondent Geisinger. *Id.* at 3a-4a. Bloomsburg confers “Master of Science degrees to students who complete both the coursework and the clinical component.” *Id.* at 4a.

Geisinger and Bloomsburg cooperatively formed the Program by “establishing a joint admissions committee, staffing an advisory committee, agreeing on how many students to admit, approving guidelines for clinical training, and promoting and marketing the Program.” App., *infra*, 3a-4a.

A written “Collaboration Agreement” (App., *infra*, 104a-132a) governed the Program. *Id.* at 3a-4a. It requires a “Program Director,” who is “approved and employed by both [Bloomsburg] and Geisinger to oversee the Program and serve as the liaison between Geisinger and [Bloomsburg] relative to the Program.” *Id.* at 105a-106a. The Collaboration Agreement underscores that the Program Director is

“an employee of both Geisinger and [Bloomsburg].” *Id.* at 106a. Indeed, it requires that the “University shall hire the Program Director as a full-time tenure track graduate faculty member of the Department of Nursing.” *Id.* at 111a. Respondent Arthur Richer was the Program Director at all relevant times. *Id.* at 5a.

The Collaboration Agreement, as amended, established a “joint Admissions Committee” that consisted of the Program Director, two employees of Geisinger, and three employees of Bloomsburg. App., *infra*, 127a-128a. Thus, public employees formed a majority of the committee. *Ibid.*

2. Petitioner Angela Borrell was a student in the Program. App., *infra*, 3a. On September 21, 2012, another student accused petitioner of using cocaine months earlier, in July 2012, while she was off duty. *Id.* at 33a. Petitioner asserts that the student fabricated the incident. *Ibid.*

Three days later, on September 24, 2012, petitioner reported for clinical work and, “[u]nder the supervision of a certified registered nurse anesthetist,” she administered anesthesia for “three to five hours.” App., *infra*, 33a. Respondents did not, accordingly, preclude petitioner from administering anesthesia that day.

Later that morning, respondent Richer met with petitioner and informed her “that there were concerns about changes in her appearance and demeanor, as well as suspicions of drug use.” App., *infra*, 34a. Respondent Richer thus demanded that petitioner submit to an immediate drug test. *Id.* at 6a. Petitioner declined to take the test on the spot, unless the others in the class also took a drug test, stating that she “did not want her record to show that

she submitted to a drug/urine screen.” *Ibid.* See also C.A. App. 1382. Petitioner was concerned that “she was being discriminated against.” App., *infra*, 34a-35a.

By day’s end, respondent Richer decided to dismiss petitioner from the Program. App, *infra*, 36a.

The next day, petitioner “attempted to contact Richer and others at both Geisinger and Bloomsburg * * * to state her willingness to submit to a drug test.” App., *infra*, 37a. Her request to take a drug test was denied. *Ibid.*

Instead, respondent Richer circulated a draft dismissal letter to respondent Michelle Ficca, Bloomsburg’s Chair of Nursing. App., *infra*, 5a, 28a, 36a. He also sent it to two joint Bloomsburg-Geisinger employees, Dr. Brenda Wands and Debra Minzola. *Id.* at 28a, 36a. Respondent Ficca and Dr. Wands both edited the letter. *Id.* at 36a.

Richer signed the final letter dismissing Borrell, which “was printed on joint [Geisinger]/Bloomsburg stationary,” in his capacity “as the ‘Director of the [Program].’” App., *infra*, 6a-7a. Respondent Ficca also signed the letter, “indicating that she ‘reviewed the above information and agree[d] with the decision to terminate [petitioner] from the . . . Program.’” *Id.* at 7a.

To justify petitioner’s termination, the dismissal letter referenced Geisinger’s drug and alcohol policy, as well as “the Bloomsburg University Department of Nursing Student Handbook,” which contained the “Departmental Code of Academic and Professional Conduct.” App., *infra*, 37a.

After receiving the dismissal letter, petitioner sent an “email indicating that she wished to appeal her termination from the [Program],” in part because she was never informed that she “would be terminated from the program” if she refused the on-the-spot drug test. App., *infra*, at 38a. Her request was denied. *Id.* at 7a.

C. Proceedings below.

Petitioner sued, contending that respondents violated her due process rights. App., *infra*, 7a.

1. The district court granted (in relevant part) petitioner’s motion for summary judgment as to liability. App., *infra*, 23a-99a. In particular, the court held that respondents Geisinger and Richer both acted “under color of state law.” App., *infra*, 46a-55a.

Relying on *Brentwood*, the court explained “that private activity may be deemed state action when ‘a private actor operates as a ‘willful participant in joint activity with the State or its agents.’” App., *infra*, 49a (quoting *Brentwood*, 531 U.S. at 296). A private entity acts under the color of law, moreover, when it “is entwined with government policies or management.” *Id.* at 47a. The court recognized that petitioner “relie[d] on the joint action and entwinement tests to establish state action.” *Id.* at 49a.

Respondent Geisinger Medical Center and Bloomsburg jointly created the Program as “a collaboration.” App., *infra*, 50a. The court identified several material facts, including:

- **Jointly-employed director.** A joint employee of the two entities, respondent Richer, was the Program Director. *Id.* at 51a.

- **Joint accreditation.** “[B]oth parties assisted with meeting the accreditation standards for the [P]rogram.” *Id.* at 50a.
- **Joint admissions.** “The admissions criteria for entrance into the [Program] was developed jointly by Bloomsburg and Geisinger.” *Ibid.* “For each class entering the [Program], Bloomsburg and Geisinger mutually agree as to the size of the class.” *Ibid.*
- **Joint curricula.** “[B]oth parties shall develop and approve the curricula for Students while they are participating in Clinical Training at Geisinger.” *Id.* at 50a-51a.
- **Joint marketing.** “[T]he parties were both obligated to jointly promote and market the [Program].” *Id.* at 51a.
- **Joint expenses.** Bloomsburg paid Geisinger “fifty percent * * * of the billed tuition and related fees.” *Ibid.* The parties also “equally share the expenses of the promotional and marketing materials and services.” *Ibid.*

Taking these facts together, the court concluded that the Program was a “joint activity” between respondent Geisinger Medical Center and Bloomsburg University, rendering respondent Geisinger “a state actor” for purposes of petitioner’s termination. App., *infra*, 51a-52a.

The court was careful to note that this holding did not render “all of” respondent Geisinger a state actor. App., *infra*, 52a n.6. Rather, the court focused on “the collaborative” Program and conduct stemming from it. *Ibid.*

As to respondent Richer, the court identified that he “was a ‘full-time employee of Bloomsburg University’” and that, “as Program Director,” he “was required to ‘oversee the Program and serve as the liaison between Geisinger and [Bloomsburg] relative to the Program.’” App., *infra*, 54a.

The facts of petitioner’s dismissal, moreover, underscored that it constituted state action. Respondent Richer (a joint employee) made the decision to dismiss petitioner from the program in collaboration with, among others, respondent Ficca (a Bloomsburg employee) and Dr. Wands (a joint Bloomsburg-Geisinger employee). App., *infra*, 55a. The dismissal letter was on “joint Bloomsburg-Geisinger letterhead.” *Ibid.* And Richer identified himself in the letter as “Director, Nurse Anesthesia Program.” *Ibid.*

In total, respondent Richer “dismissed Borrell from the [Program] while acting as Program Director, *i.e.*, as a joint employee of Geisinger and Bloomsburg.” App., *infra*, 55a. Thus, “[h]is action is properly attributable to the state, and he acted under color of state law for purposes of § 1983.” *Ibid.*

On the merits, the court held that there was no material dispute that respondents violated petitioner’s due process rights. App., *infra*, 64a-99a. Petitioner had, at minimum, a right to “notice of the charges against her,” an explanation of the “evidence underlying the charges,” and “an opportunity to present her side of the story.” *Id.* at 77a. Because respondents denied petitioner those safeguards—and provided no adequate alternative remedy—the court concluded that “there is no genuine issue that [petitioner’s] dismissal from the [Program] occurred without due process of law.” *Ibid.*

A jury returned a damages verdict, and, following a remittitur, the district court entered judgment in favor of petitioner. App., *infra*, 18a-19a.

2. The court of appeals reversed. App., *infra*, 1a-17a. As to respondents Geisinger and Richer, the court held that they had not acted “under the color of law.” *Id.* at 9a-13a.

The court stated that it was “[o]f seminal importance” that “the relevant question is not whether the private actor and the state have a close relationship generally.” App., *infra*, 9a. Thus, a showing of “joint activity” between the public and private entities “should have been the beginning of the inquiry, not the end of it.” *Id.* at 10a. Neither joint action nor pervasive entwinement between public and private entities was sufficient, the court found. *Id.* at 9a-10. On this basis, the court rejected petitioner’s entwinement argument.¹

Rather, the court found that it had to examine each individual action of the Program, determining whether it was public or private: “the pertinent question is whether Richer was wearing his Geisinger hat or his Bloomsburg hat when he decided to terminate [petitioner].” App., *infra*, 10a. The court repeated that “the question boils down to which entity—the

¹ Petitioner’s argument rested heavily on *Brentwood’s* entwinement and joint action analysis. See, e.g., C.A. Br. of Appellee/Cross-Appellant Angela Borrell at 26-35. State action is proper in the face of “pervasive entwinement” (*id.* at 27), petitioner argued, given that it is hard to imagine a more “‘entwined’ relationship” than the joint Bloomsburg-Geisinger collaboration. *Id.* at 28.

hospital or the university—exercised the authority to terminate [petitioner].” *Id.* at 11a.

Ultimately, the court of appeals held that, for respondent Richer’s decision to qualify as state action, “the state must have ‘exercised control over the particular conduct that gave rise to the plaintiff’s alleged constitutional deprivation.” App., *infra*, 12a. The court reasoned that respondent Geisinger’s internal policies were a sufficient cause for petitioner’s termination, and thus the conduct was not state action. *Id.* at 10a.²

The *en banc* court of appeals denied a petition for rehearing. App., *infra*, 102a-103a.

REASONS FOR GRANTING THE PETITION

A. The circuits are divided.

1. Below, the Third Circuit held that neither joint action nor pervasive entwinement between public and private is a sufficient basis to find the resulting conduct state action. Instead, the court held that a public-private partnership engages in state action only when the public entity affirmatively coerces the specific action at issue.

The court of appeals recognized—and did not dispute—the district court’s factual conclusion that respondent Geisinger “was a willful participant in joint activity, the [Program], with Bloomsburg.” Pet. App. 10a. But a finding of “joint activity,” the court

² The court of appeals also reversed the judgment against respondent Ficca. App., *infra*, 13a-16a. It reasoned that existing case law did not “speak to the right of a clinical student at a private hospital to a hearing or comparable process before termination.” *Id.* at 13a-14a. This reasoning assumes that the dismissal from the Program does not qualify as state action.

held, “should have been the beginning of the inquiry, not the end of it.” *Ibid.*

Likewise, as to pervasive entwinement, the court held that it was “[o]f seminal importance to this appeal * * * that the relevant question is *not* whether the private actor and the state have a close relationship generally.” App., *infra*, 9a (emphasis added).

Rather, the court held, the public entity must coerce the very conduct at issue for that conduct to qualify as state action. That is, “the state must have ‘exercised control over the particular conduct that gave rise to the plaintiff’s alleged constitutional deprivation.’” App., *infra*, 12a. Petitioner therefore had to prove public authority was necessary to “effectuate [petitioner’s] dismissal from the [Program].” *Ibid.*

The court thus sought out to determine “whether Richer was wearing his Geisinger hat or his Bloomsburg hat when he decided to terminate [petitioner].” App., *infra*, 10a. Because the court found that Geisinger’s policies were an independent basis for Richer to dismiss petitioner, it concluded that the public university was not the direct cause of respondent Richer’s decision. *Id.* at 11a-12a.

Altogether, in the Third Circuit’s view, neither a demonstration of “joint activity” nor proof of pervasive entwinement suffices to show that a public-private partnership engaged in state action. Rather, the state must have exercised some measure of coercion as to the specific conduct at issue.

2. The Second Circuit reached a different result in *Horvath v. Westport Library Association*, 362 F.3d 147, 153-154 (2d Cir. 2004). There, after Horvath was fired from her job at the Westport Library Association, she asserted a due process claim. *Id.* at 148.

The library association was itself a private non-stock corporation; its director was appointed by a board of trustees. *Horvath*, 362 F.3d at 149. But the library association was pervasively entwined with the town of Westport, Connecticut; the town appointed half of the library association's trustees, and it provided a substantial portion of its operating budget. *Id.* at 149-150.

The Second Circuit concluded that, when the library director fired Horvath, she acted under the color of state law. *Horvath*, 362 F.3d at 153-154. This was so even though there was no evidence that the town had coerced the decision to terminate Horvath. *Id.* at 154.

The Second Circuit recognized this Court's holding in *Blum* that "a finding of state action must be premised upon the fact that 'the State is *responsible* for the *specific conduct* of which the plaintiff complains.'" *Horvath*, 362 F.3d at 154 (quoting *Blum*, 457 U.S. at 1004). But pervasive entwinement was alone *sufficient*, in the Second Circuit's view, to satisfy this requirement:

In *Brentwood Academy*, * * * the Supreme Court has cautioned that the concept of responsibility is not to be read narrowly in the context of the state action inquiry. That is, the State need not have coerced or even encouraged the events at issue in the plaintiff's complaint if "the relevant facts show pervasive entwinement to the point of largely overlapping identity" between the State and the entity that the plaintiff contends is a state actor.

Ibid. (quoting *Brentwood*, 531 U.S. at 303).

Thus, entirely unlike the Third Circuit, the Second Circuit does not require demonstration that the public entity coerced the specific conduct at issue. *Brentwood*, the Second Circuit holds, obviated that inquiry.

3. In *Wickersham v. City of Columbia*, 481 F.3d 591, 599 (8th Cir. 2007), the Eighth Circuit reached the same result in considering a joint action theory. There, the City of Columbia temporarily leased a public airfield to a private, non-profit corporation, Salute, for an annual air show. *Id.* at 593-594. Salute barred individuals from campaigning, leafleting, petitioning, or bringing “unauthorized” signs to the show. *Id.* at 594. And Salute directed local police to enforce its private policy. *Id.* at 594-595.

The Eighth Circuit concluded that Salute was a state actor for purposes of operating the air show—and thus was subject to the First Amendment. There was a substantial “degree of entanglement between the City of Columbia and Salute.” *Wickersham*, 481 F.3d at 598. Indeed, the “direct role of the Columbia police in enforcing Salute’s speech restrictions provided the critical nexus.” *Ibid.*

The court ultimately reasoned that “[w]hen a private entity has acted jointly and intentionally” with a public entity, “it is proper to hold that [private] entity accountable for the actions which it helped bring about.” *Wickersham*, 481 F.3d at 599.

The court reached that conclusion even though the City plainly did not coerce or direct the action: the City of Columbia had nothing at all to do with Salute’s creation of the policy which limited speech rights. Rather than creating the policy, the city police merely “enforced Salute’s rules.” *Wickersham*,

481 F.3d at 598-599. But the joint activity between Salute and the City rendered Salute’s conduct joint action all the same.

4. The decision below is also incompatible with the reasoning of the Ninth Circuit. That court recognized that, “in *Brentwood*, the Court determined that the nominally private entity whose conduct was challenged was a State actor solely on the basis that the entity was entwined with the State.” *Lee v. Katz*, 276 F.3d 550, 554 (9th Cir. 2002). In the court’s view, *Brentwood* “held that satisfaction of this single test was sufficient, so long as no countervailing factor existed.” *Ibid.* (After acknowledging the effect of *Brentwood*, the court rested on the public function analysis to show state action, as that was a sufficient basis for a Section 1983 claim. *Ibid.*)

B. The decision below is wrong.

The lower court’s conclusion that, notwithstanding proof of “joint activity” or pervasive entwinement (App., *infra*, 10a), “the state must have ‘exercised control over the particular conduct that gave rise to the plaintiff’s alleged constitutional deprivation’” (*id.* at 12a) is irreconcilable with *Brentwood*.

1. *Brentwood* considered “whether a statewide association incorporated to regulate interscholastic athletic competition among public and private secondary schools may be regarded as engaging in state action when it enforces a rule against a member school.” 531 U.S. at 290. There, Brentwood Academy, a private school, sued the Association, asserting that the Association was subject to constitutional limitations. *Id.* at 293.

The Court reiterated the longstanding principle that “constitutional standards” may be “invoked

‘when it can be said that the State is *responsible* for the specific conduct of which the plaintiff complains.’” *Brentwood*, 531 U.S. at 295. State responsibility may be demonstrated on “a host of facts”—including when a state uses its coercive power, when the state provides significant encouragement, when a private actor operates as a willful participant in state activity, or when a private entity has been delegated a public function. *Id.* at 296.

Brentwood focused on a different, additional basis for finding that a nominally private actor engages in state action—when the public and private entities have entwined. Where a private actor “is ‘entwined with governmental policies’ or when government is ‘entwined in its management or control,’” the private entity acts under the color of state law. *Brentwood*, 531 U.S. at 296 (alterations in original omitted). When the “nominally private character” of an entity is “overborne by the pervasive entwinement of public institutions and public officials in its composition and workings,” then “constitutional standards” apply to the *whole* entity. *Id.* at 298. That is, “[e]ntwinement will support a conclusion that an ostensibly private organization ought to be charged with a public character and judged by constitutional standards.” *Id.* at 302.

Because there was entwinement in *Brentwood*, the Association’s entire conduct was state action—regardless of whether the state coerced the *particular* action at issue. The Supreme Court thus rejected the Association’s assertion that its decisions as to Brentwood Academy should not constitute state action because “the State neither coerced nor encouraged the actions complained of.” *Brentwood*, 531 U.S. at 303. State causation of the specific act, the Court

held, is not required in the face of public-private entwinement. “‘Coercion’ and ‘encouragement’ are like ‘entwinement’ in referring to kinds of facts that can justify characterizing an ostensibly private action as public instead.” *Ibid.* As the Court explained, “no one criterion must necessarily be applied.” *Ibid.* “[P]ervasive entwinement” of public and private is thus *sufficient* to show state action. *Ibid.*

2. The decision below is incompatible with that holding. The Third Circuit here was of the view that public coercion was *necessary* to render respondents’ conduct state action. App., *infra*, 12a. But proof of joint action or pervasive entwinement is sufficient to show state conduct.

Brentwood, moreover, compels a finding of joint action and pervasive entwinement here. In *Brentwood*, the Association was managed in large measure by public school employees, and it received significant funding from the public entity. 531 U.S. at 290-291.

The Program is of the same character. Its director and assistant director were employed by both Geisinger and Bloomsburg. App., *infra*, 7a, 28a. Bloomsburg holds a majority of seats on the admissions committee. *Id.* at 127a-128a. Geisinger and Bloomsburg share the revenue and expenses of the program. *Id.* at 55a. They called the Program, formally, a “collaboration.” *Id.* at 104a. *Every* aspect of the Program is a joint undertaking of the public and private entities. See pp. 5-8, *supra*.

The district court thus concluded that “Bloomsburg and Geisinger jointly participated in operating the [Program].” App., *infra*, 50a. Taking account of all evidence, respondent “Geisinger was a willful par-

ticipant in joint activity, the [Program], with Bloomsburg.” *Id.* at 51a. The court of appeals did not disagree—it just held that this finding was legally insufficient to find state action. *Id.* at 10a-12a.

Against this stark evidence of joint action and pervasive entwinement, there is no “countervailing reason against attributing activity to the government.” *Brentwood*, 531 U.S. at 295-296. To the contrary, the public entity *was* closely involved with respondent Richer’s dismissal of petitioner:

- Respondent Richer wrote the letter dismissing petitioner on joint Geisinger/Bloomsburg letterhead. App., *infra*, 6a.
- Richer, himself a Bloomsburg employee, signed the letter in his capacity “as the ‘Director of the [Program].’” *Id.* at 6a-7a.
- Respondent Ficca, Bloomsburg University’s Chairperson of the Department of Nursing, reviewed, edited, and co-signed the letter, stating that “she ‘reviewed the above information and agree[d] with the decision to terminate [petitioner] from the . . . Program.’” *Id.* at 5a-7a.
- The letter stated that one basis for petitioner’s dismissal was “the Bloomsburg University Department of Nursing Student Handbook,” which contained “the Departmental Code of Academic and Professional Conduct.” *Id.* at 37a.

In sum, the decision below is irreconcilable with *Brentwood*’s holding that public-private joint action and pervasive entwinement are sufficient grounds to render the partnership’s conduct state action. See al-

so *Dennis v. Sparks*, 449 U.S. 24, 27-28 (1980) (“It is enough that [the defendant] is a willful participant in joint action with the State or its agents. Private persons, jointly engaged with state officials in the challenged action, are acting ‘under color’ of law for purposes of § 1983 actions.”).

3. While the foregoing analysis resolves the claims against both respondents Geisinger and Richer, the claim against Richer is easier yet.

It is established that “a graduate student has a property interest protected by procedural due process in the continuation of his or her course of study under Pennsylvania law.” App., *infra*, 65a (collecting Pennsylvania cases). See also *Board of Curators of Univ. of Mo. v. Horowitz*, 435 U.S. 78 (1978); *Goss v. Lopez*, 419 U.S. 565 (1975); *Board of Regents of State Colls. v. Roth*, 408 U.S. 564 (1972).

Bloomsburg authorized respondent Richer, who was a full-time Bloomsburg employee, to terminate petitioner from the Program. App., *infra*, 5a-6a. Terminating petitioner from the Program meant that she was expelled from Bloomsburg University’s graduate degree program. *Id.* at 7a.

In sum, a Bloomsburg employee dismissed a Bloomsburg student from a Bloomsburg degree program. That is obviously state action. It blinks reality to hold otherwise.

C. The question presented is important.

Review is warranted, moreover, because the nationwide proliferation of public-private partnerships makes this question significant. These collaborations now touch virtually every segment of municipal gov-

ernment, from education and law enforcement to public works and social services.

The court of appeals acknowledged that its decision has “important ramifications for private hospitals that partner with public universities.” Pet. App. 3a. But its holding is hardly limited to the confines of hospitals: it governs *all* public-private partnerships in the Third Circuit.

That is significant in light of the thousands of such partnerships that currently exist. “[P]ublic-private partnerships have been in existence in the United States for over 200 years and thousands are in existence today.” 57 Massachusetts Practice Series, *Construction Law* § 17:50. “These arrangements typically are used for wastewater treatment, transportation, urban development, and delivery of social services.” *Ibid.* See also *Testing Tradition: Assessing the Added Value of Public-Private Partnerships*, Nat’l Council for Pub.-Private P’ships 1 (2012), perma.cc/JK97-WNF7 (“[T]hese partnerships can address public needs in the areas of facilities, real estate development, energy, information technologies, transportation, education and healthcare, and water/wastewater.”). One study indicates that “the average American city works with private partners to deliver 23 out of 65 basic municipal services.” 57 Massachusetts Practice Series, *Construction Law* § 17:50 n.6.

Indeed, public-private partnerships will remain ubiquitous in light of the modern economic environment and drive for privatization. Commentators recognize that “[o]ne of the continuing trends in government contracting is the usage of public-private partnerships or P3s as a way to build true partnerships between the public and private sector.” Travis

Pearl, *5 Examples of Public-Private Partnerships (P3) in Action*, Onvia, Inc. (Oct. 23, 2013), perma.cc/26S9-579H.

It is thus critical to resolve the question in this case so that all stakeholders—public entities, private partners, and affected individuals—may understand the scope of applicable constitutional protections when public and private entities pervasively entwine.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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