

No. 17-1305

In the Supreme Court of the United States

ANGELA BORRELL,

Petitioner,

v.

ARTHUR F. RICHER, ET AL.,

Respondents.

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

BRIEF IN OPPOSITION

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**COUNTERSTATEMENT OF QUESTION
PRESENTED FOR REVIEW**

The Third Circuit Court of Appeals applied well-established law. Its decision does not conflict with this Court's precedent or create a circuit split. Petitioner simply requests that this Court re-weigh the facts of the case in her favor. The question presented is:

Did the United States Court of Appeals for the Third Circuit properly determine that the facts of this case were insufficient as a matter of law to establish that Geisinger Medical Center (a private hospital) or Arthur Richer (its private employee) acted under color of state law in discharging Angela Borrell from the nurse anesthetist program when she violated the hospital's private drug policy by refusing to submit to a drug test following a report of cocaine use?

PARTIES

The parties to the appellate proceedings included: Angela Borrell, Geisinger Medical Center, Arthur F. Richer and Michelle Ficca.

**CORPORATE DISCLOSURE STATEMENT
PURSUANT TO RULE 29.6**

Geisinger Health, formerly known as Geisinger Health System Foundation, a Pennsylvania Nonprofit Corporation, is the parent corporation of Geisinger Medical Center, a Pennsylvania Nonprofit Corporation. Therefore, there are no publicly-held companies owning 10% or more of Geisinger Medical Center stock.

Arthur F. Richer is an individual.

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STATUTORY PROVISION AT ISSUE

Section 1983 states:

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 any 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, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

42 U.S.C. § 1983.

STATEMENT OF THE CASE

Geisinger Medical Center ("GMC") – a private, non-profit hospital – entered into a Collaboration Agreement ("Agreement") with Bloomsburg University ("Bloomsburg") to create a nurse anesthetist program ("NAP") so Bloomsburg students studying to become nurse anesthetists could get on-the-job training. Petitioner's Appendix ("App.") 3a. GMC discharged Petitioner Angela Borrell ("Borrell") from the NAP when she violated its long-standing Drug & Alcohol

Policy (“Drug Policy”) by refusing to submit to a drug test after a report of cocaine use. App. 5a-7a.

Following her discharge, Borrell sued Bloomsburg, Bloomsburg employee Michelle Ficca, GMC and Richer, alleging procedural due process violations. App. 7a. Unable to proceed against Bloomsburg on account of sovereign immunity, she sought to recover from GMC and the individual defendants. The United States District Court for the Middle District of Pennsylvania held those defendants liable as a matter of law. App. 7a. The United States Court of Appeals for the Third Circuit reversed and entered judgment for GMC and Richer on the grounds that there is no state action where the undisputed facts show Richer, a private actor, used his authority as a private hospital employee to discharge a nurse from one of the private hospital’s programs based on her violation of the hospital’s private Drug Policy. App. 1a-16a.

I. Factual Background

A. GMC is a private, non-profit hospital with established policies aimed at patient protection.

GMC is a part of Geisinger Health System (“GHS”). App. 24a. GHS promulgates and interprets policies aimed at preserving patient safety – such as the Drug Policy at issue here. The Drug Policy applies to everyone working for GMC, whether as an employee, independent contractor, or NAP participant, and allows GMC to demand a drug test when it receives information about drug use. App. 5a, 108a-109a. Individuals who refuse to submit to drug testing are terminated, and in recent years GMC has terminated

four registered nurses who refused a test upon request. App. 5a, 11a. No grievance procedure is available to those terminated for refusal to submit to testing. App. 5a.

B. The NAP accounts for approximately 1% of GMC's business and operates pursuant to the Agreement among distinct entities with distinct responsibilities.

In 2007, GMC and Bloomsburg entered into the Agreement for the NAP. App. 3a, 122a. The Agreement expressly provided that GMC and Bloomsburg remained separate entities, with neither having any "obligation or responsibility on behalf of or in the name of the other part[y]." App. 4a, 11a, 118a.

Pursuant to the Agreement, GMC was responsible for the "Clinical Training" portion of the NAP, while Bloomsburg provided the "Academic Training." App. 3a, 105a. At all times, GMC had the sole and unilateral authority to remove a person from the NAP for failure to comply with its policies. App. 4a, 12a, 108-109a. GMC did not, however, have the power to confer or deny graduate degrees. App. 4a.

For the year at issue in this case – 2012 – the Clinical Training portion of the NAP accounted for less than 1% of GMC's total business. App. 28a-29a. (GMC's overall 2012 operating budget was \$65,485,379, with approximately \$870,979 invested in the NAP). App. 29a. GMC's net loss on its NAP investment is approximately \$749,979 annually, and it makes no profit from the NAP. App. 29a.

C. Richer was the long-term GMC employee who: (i) was tasked with administering the NAP, (ii) requested that Borrell submit to a drug test upon receiving a report of cocaine use, and (iii) discharged Borrell from the NAP when she refused.

Richer joined GMC in 1976 as a certified registered nurse anesthetist. When the clinical portion of the NAP began nearly 35 years later, Richer maintained his status as a full-time GMC employee and became a temporary employee of Bloomsburg. App. 28a. Richer received no additional pay for this temporary employee role, though Bloomsburg paid a fraction of his salary (less than 25%) for three years. App. 5a, 28a. Richer reported to GHS' Executive Vice President and Chief Nursing Officer Susan Hallick ("Hallick"). App. 33a.

Borrell worked as a registered nurse at GMC prior to enrolling in the NAP. App. 5a. In September 2012, during the clinical portion of her NAP training, Richer learned that another student reported Borrell for cocaine use and inappropriate behavior. App. 5a-6a.

To determine how GMC should proceed, GMC's Richer and Hallick consulted with Brion Lieberman of GHS' Human Resources Department. App. 6a, 34a. GMC decided a drug test was warranted and, to that end, Richer and Lieberman met with Borrell. App. 6a, 34a. Over the course of the hour-long meeting, Borrell consulted with her mother and asked several questions – but ultimately refused to take the test. App. 6a. When GMC explained that there was no option to test later, Borrell said she would "face the consequences." App. 6a.

After again consulting with GMC's Human Resources Department, Richer decided to discharge Borrell from the NAP for violating the Drug Policy by refusing to test. App. 6a. In making this decision, Richer was acting for GMC as the Director of the Clinical Training portion of the NAP. App. 6a, 10a, 12a. He informed Bloomsburg of the decision, although Bloomsburg had no authority to challenge or change it. App. 6a, 12a, 14a-15a. He signed Borrell's termination letter on behalf of GMC.

Following Borrell's discharge from the NAP, Bloomsburg provided her with information about other graduate programs available to her, but she "did not want to hear about those options." App. 38a

II. Procedural Background

The District Court granted summary judgment in Borrell's favor with respect to her due process property interest claim. At trial, the jury found that Borrell would have been dismissed from the NAP even had she received additional process. Despite this finding, the jury awarded Borrell a total of \$1,515,000, which the District Court later remitted. App. 7a-8a.

GMC and Richer timely appealed. App. 8a. The Third Circuit reversed and denied rehearing. App. 1a-17a, 102-103a.

REASONS FOR DENYING THE PETITION

In its unanimous panel decision below, the United States Court of Appeals for the Third Circuit held that the facts of this case are insufficient as a matter of law to establish that either GMC or Richer acted under color of state law in discharging Borrell from the NAP when she violated the hospital's Drug Policy by refusing a drug test. Borrell now seeks to have this Court re-weigh the facts in her favor. She fails, however, to identify any issue worthy of this Court's review. The Third Circuit plainly applied well-established law. *Brentwood Academy* does not require a different result. There is no circuit split.

I. The Third Circuit plainly applied well-established law.

Section 1983 does not reach private conduct, and this Court has repeatedly instructed that – when a plaintiff seeks to recover from a private actor under § 1983 – courts must conduct a highly-individualized and fact-intensive inquiry to determine whether there is a nexus between the thing complained of and the state such that the conduct may be “fairly attributable” to the state. *Brentwood Acad. v. Tennessee Secondary Sch. Athletic Ass’n*, 531 U.S. 288, 295 (2001) (there can be no state action unless the facts show a “close nexus between the State and the challenged action”); *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 50 (1999) (private actors will not be subject to § 1983 unless the plaintiff can prove “both an alleged constitutional deprivation caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the State or by a person for whom the State is responsible, *and* that the party

charged with the deprivation must be a person who may fairly be said to be a state actor”) (emphasis in original); *see also Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 929-31 (1982) (extending Fourteenth Amendment state action standard to color of law analysis under § 1983).

In plotting the line between public and private conduct, this Court has considered factors such as whether: the action complained of was a traditionally public function; the action complained of required governmental authority; the action complained of was taken pursuant to state statute, state regulation or private rule; the individual responsible for the action complained of was acting in an official capacity; the purportedly private entity responsible for the action complained of was actually comprised of public entities. *See e.g., Brentwood Acad. v. Tennessee Secondary Sch. Athletic Ass’n*, 531 U.S. 288, 298-301 (2001); *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 50-58 (1999); *Nat’l Collegiate Athletic Ass’n v. Tarkanian*, 488 U.S. 179, 192-97 (1988); *West v. Atkins*, 487 U.S. 42, 51-58 (1988); *Blum v. Yaretsky*, 457 U.S. 991, 1002-12 (1982); *Rendell-Baker v. Kohn*, 457 U.S. 830, 837-43 (1982); *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 939-42 (1982); *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 350-59 (1974); *Evans v. Newton*, 382 U.S. 296, 299-302 (1966).

The Third Circuit conducted the requisite factual analysis here, found the connection to be lacking, and concluded there was no state action where the undisputed facts showed a private actor used his authority as a private hospital employee to discharge a nurse from one of the hospital’s programs based on

her violation of the hospital's private Drug Policy. The court did not discard well-established legal principles in favor of a new test. To the contrary, both the court's analysis and its conclusion comport with well-established principles of constitutional law and this Court's precedent.

II. *Brentwood Academy* does not require a different result.

In *Brentwood Academy*,¹ the Court conducted the requisite factual analysis and found the connection to be sufficient for a finding of state action where the facts showed the purportedly private defendant was composed (to the tune of 84%) of public entities, governed by public officials acting in their official capacity, recognized by the state as responsible for carrying out a function of public schooling, and – as a practical matter – would fail to exist without the public entities. The holding there in no way conflicts with the Third Circuit's ability to reach a different conclusion based on the drastically different facts of this case, where the decision makers were private actors and the NAP accounts for no more than 1% of GMC's business. Borrell concedes this point in her Petition, noting that even if the record and *Brentwood Academy* are read in her favor – the facts are simply insufficient to render “all of” GMC² a state actor. Pet. at 9.

¹ *Brentwood Academy v. Tennessee Secondary School Athletic Association*, 531 U.S. 288 (2001), was thoroughly briefed and considered at the Third Circuit, both during the proceedings on the merits and in Borrell's petition for rehearing.

² Despite her concession that it is improper to hold “all of” GMC a state actor, Borrell tries time and time again to make “all of” GMC

III. There is no circuit split.

Borrell’s attempt to manufacture a circuit split in order to get another bite at the apple falls flat. The cases Borrell cites do not turn on *Brentwood Academy* or rely on *Brentwood Academy* for their findings of state action. Rather, the cases turn on the purportedly private actor’s status as a state-created and controlled entity, role in carrying out a public function, or invocation of the police power – none of which are at issue here. *Horvath v. Westport Library Ass’n*, 362 F.3d 147, 153 (2d Cir. 2004) (a “corporate entity qualifies as a state actor: only if (1) the government created the corporate entity by special law, (2) the government created the entity to further governmental objectives, and (3) the government retains permanent authority to appoint a majority [of] the directors of the corporation”); *Lee v. Katz*, 276 F.3d 550 (9th Cir. 2002) (because “regulating free speech within [a public forum]” is “an exclusively and traditionally public function,” the court declined to consider any other basis for state action); *Wickersham v. City of Columbia*, 481 F.3d 591, 597-98 (8th Cir. 2007) (the “one unyielding” prerequisite to a finding of state action is a “close nexus not merely between the state and the private party, but between the state and the alleged deprivation itself” and the invocation of the state’s police power “provided the critical nexus, absent in other cases, between the challenged conduct and the exercise of state authority”).

pay for her alleged due process deprivation. This is improper, and – to the extent she now tries to argue that only the NAP is a state actor – it bears repeating that the NAP is neither an entity nor a defendant in this case.

CONCLUSION

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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