

No. 17-1305

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**

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

The circuits are divided over the nature of the causation inquiry necessary to demonstrate that a nominally private individual or entity is acting in a public capacity, thus triggering constitutional protections. The Third Circuit held below that, to demonstrate state action, a plaintiff must prove that the public entity purposefully coerced the specific conduct at issue. But other circuits, most notably the Second and Eighth, have held that a plaintiff may prove that a public entity caused particular behavior—rendering it subject to constitutional protections—through a showing of “pervasive entwinement” or “joint activity.” This case thus squarely presents a question of substantial practical consequence.

Respondents offer no meaningful basis to deny review. Their skeletal opposition asserts that the decision below “comport[ed] with well-established principles of constitutional law.” Opp. 8. But respondents do not address the legal rule the court of appeals actually adopted. Respondents’ analysis (*ibid.*) of *Brentwood Academy v. Tennessee Secondary School Athletic Ass’n*, 531 U.S. 288 (2001), obstinately focuses on the entirety of *Geisinger*, but that is not—and never has been—our argument. And respondents misunderstand (Opp. 9) how the decisions of the Second and Eighth Circuits conflict with the holding issued below.

Respondents, moreover, do not deny that the question presented is—as the Third Circuit itself recognized (Pet. App. 3a)—exceptionally important. Nor do respondents contest that the issue is cleanly presented by this case. Further review is therefore warranted.

A. The court below held that state action is limited to circumstances where the public entity purposefully coerces the specific conduct at issue.

Respondents assert that the court of appeals “applied well-established law” (Opp. 6) and that it conducted the “requisite factual analysis” (Opp. 7). But respondents do not so much as acknowledge, let alone meaningfully address, the reasoning of the lower court.

As we explained (see Pet. 11-12, 12-13), the court of appeals held that to prove state action a plaintiff must in all cases demonstrate that the state intentionally coerced the *specific* conduct at issue. That is, “the state must have ‘exercised control over the particular conduct that gave rise to the plaintiff’s alleged constitutional deprivation.’” Pet. App. 12a. According to the court of appeals, petitioner therefore had to prove that petitioner’s dismissal from the Program was commanded by or directly resulted from some exercise of public authority. *Ibid.*

It was not sufficient, the Third Circuit held, to show that the public and private entities had entered into “joint activity.” Pet. App. 10a. Nor was pervasive entwinement enough; “the relevant question is *not* whether the private actor and the state have a close relationship generally.” *Id.* at 9a (emphasis added).

For their part, respondents do not address the critical language from the court of appeals. Nor do they confront our analysis. Respondents cannot escape the lower court’s faulty reasoning by simply disregarding it.

B. The Second and Eighth Circuits disagree.

By contrast, the Second and the Eighth Circuits do not require a plaintiff to show that the public entity purposefully coerced the specific conduct at issue. Those circuits embrace broader theories of causation—including “joint activity” and “pervasive entwinement.” The law of those circuits would result in a different outcome here.

1. In *Horvath v. Westport Library Ass’n*, 362 F.3d 147, 153-154 (2d Cir. 2004), the Second Circuit embraced causation theories beyond the narrow rule adopted below. See Pet. 13-15. Respondents do not disagree.

Instead, respondents’ sole argument is that *Horvath* focused on the fact that the library association was a stand-alone, quasi-public entity. Opp. 9. But that is a distinction without a difference. The Program is of the very same character: it was established by Bloomsburg and Geisinger; it was created—at least in part—to further Bloomsburg’s educational mission; and Bloomsburg held a majority of seats on the admissions committee. See Pet. 5-6, 8-9.

For present purposes, the crucial holding of *Horvath* is that “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.” *Horvath*, 362 F.3d at 154 (quoting *Brentwood*, 531 U.S. at 303). It is this holding that blatantly conflicts with the decision below. Respondents do not disagree.

2. The Eighth Circuit’s decision in *Wickersham v. City of Columbia*, 481 F.3d 591, 599 (8th Cir. 2007),

also conflicts with the holding below. Respondents' sole attempted distinction is that the use of police power in *Wickersham* makes that case different from this one. Opp. 9.

To begin with, that contention disregards the core holding of *Wickersham*—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.” 481 F.3d at 599. That is precisely the issue here: Geisinger acted “jointly and intentionally” with Bloomsburg in creating and operating the Program.

In *Wickersham*, the police enforced Salute’s rules by removing the plaintiffs. Here, Bloomsburg enforced Geisinger’s rules—and joint-employee Richer’s decision—by removing petitioner from the degree program. That is, in both cases, while the conduct may have arguably begun as a private decision, it had a decidedly public effect and was carried out by public officials. In the Eighth Circuit, that is enough for constitutional protections to attach; the Third Circuit, however, disagrees.

If this case had arisen in either the Second or Eighth Circuits, a different result would have obtained.

C. The decision below is wrong.

Review is also warranted because the decision below is inescapably wrong. The court of appeals misapplied *Brentwood*, which respondents acknowledge was “thoroughly briefed and considered” below. Opp. 8 n.1.

We explained at some length (Pet. 16-20) how the decision below is incompatible with this Court’s

precedents. Respondent responds with one supposed distinction—that the Association in *Brentwood* was comprised of 84% public members, while respondent Geisinger as a whole receives “no more than 1%” of its business from the Program. Opp. 8. But this contention fails for two independent reasons.¹

First, respondents’ myopic focus on the factual particulars of *Brentwood* ignores the broader legal rule that the Court announced. *Brentwood* establishes a far more basic point—one which undermines the decision below. There, the Court held that a plaintiff need not show that the public entity coerced the *particular* conduct at issue; rather, “[c]oercion’ and ‘encouragement’ are like ‘entwinement’ in referring to kinds of facts that can justify characterizing an ostensibly private action as public instead.” *Brentwood*, 531 U.S. at 303. The court of appeals’ decision here—which searched for evidence that Bloomsburg purposefully coerced the particular conduct at issue—is necessarily wrong. While we made this argument in the petition, respondents again decline to respond.

¹ Many of respondents’ factual allegations are incorrect. For example, respondents assert that Geisinger and Bloomsburg “remained separate entities, with neither having any ‘obligation or responsibility on behalf of or in the name of the other part[y].” Opp. 3. But respondents take this quote badly out of context. It says in full: “No party has any express or implied rights nor authority to assume or create any obligation or responsibility on behalf of or in the name of the other parties, *except as may otherwise be set forth in this Agreement.*” Pet. App. 118a (emphasis added). And, as we explained, the Agreement creates a joint collaboration with shared responsibilities and duties. See, e.g., Pet. 1, 8-10, 18-20. In all events, respondents’ factual obfuscations have no bearing on the legal question presented here.

Second, respondents appear to operate under the view that petitioner’s burden on the merits is to demonstrate that the *entirety* of Geisinger is a state actor. But respondents offer no legal authority for that contention, and it makes little sense. Our contention is a far more narrow one: the Nurse Anesthetist Program—which is a joint program between Geisinger and Bloomsburg—is what qualifies as joint public-private action. Whether the conduct of individuals in the operation of that Program is state action is the question presented here. Respondents cannot avoid that question by asserting that other aspects of Geisinger remain private.

Finally, as we said earlier (Pet. 20), the decision below as to respondent Richer is obviously wrong. Richer, a full-time Bloomsburg employee, terminated petitioner from the Program, which meant that she was expelled from Bloomsburg University’s graduate degree program. Pet. App. 5a-7a. This was necessarily state action (see Pet. 20), and respondents offer no meaningful answer.²

CONCLUSION

The Court should grant the petition for a writ of certiorari.

² Respondents offer up a factual misdirection. They assert that Richer “signed [petitioner’s] termination letter on behalf of [Geisinger].” Opp. 5. That is not correct: the letter was written on *joint* Geisinger and Bloomsburg stationery; Richer signed it as “Director of the NAP,” which was a *joint* position; and Ficca (solely a Bloomsburg employee) also signed the letter. Pet. App. 6a-7a.

Respectfully submitted.

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