

No. _____

In the Supreme Court of the United States

CHILDREN'S HOSPITAL LOS ANGELES; CHILDREN'S
HOSPITAL LOS ANGELES MEDICAL GROUP,

Petitioners,

v.

N. L., a minor, by and through his Guardian ad litem
and all others similarly situated
Guardian Ad Litem Jacqueline Arce,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a private hospital and medical group become “state actors” by examining a child, to assess for evidence of abuse, at the behest of government officials who took the child from parents’ custody pursuant to a state statute.

PARTIES TO THE PROCEEDING

1. Children's Hospital Los Angeles, petitioner on review, was the defendant-appellee below.

2. Children's Hospital Los Angeles Medical Group, petitioner on review, was the defendant-appellee below.

3. N.L., a minor, by and through his guardian ad litem, his mother, Jacqueline Arce.

Children's Hospital Los Angeles and Children's Hospital Los Angeles Medical Group (collectively CHLA) respectfully petition for a writ of certiorari to review the decision of the United States Court of Appeals for the Ninth Circuit in this case.

RULE 29.6 DISCLOSURE STATEMENT

Children's Hospital Los Angeles is a California Corporation, and a 501(c)(3) nonprofit institution, that has no parent corporation, and no publicly held company owns 10% or more of its stock.

Children's Hospital Los Angeles Medical Group is a California Corporation that has no parent corporation, and no publicly held company owns 10% or more of its stock.

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PETITION FOR WRIT OF CERTIORARI
OPINIONS BELOW

The Ninth Circuit's decision (Case No. 16-56019) is submitted as Appendix A (App. 1-3) and is available at 711 F.App'x 433, 433 (9th Cir. 2018). The order of the Ninth Circuit denying the CHLA defendants' petition for rehearing is submitted as Appendix E (App. 31-32), and is available at 2018 U.S.App.LEXIS 5537, at *1 (9th Cir. Mar. 2, 2018).

The District Court's judgment and the decision granting the CHLA defendants' motion to dismiss are submitted as Appendices B and C (App. 4-5, 6-20).

JURISDICTION

The Ninth Circuit Memorandum Decision was entered on February 15, 2018. App. 1. The CHLA defendants' petition for rehearing was timely filed on March 1, 2018. Dkt. 48; FRAP 40(a)(1). The Ninth Circuit denied the petition for rehearing on March 2, 2018. App. 31-32.

This petition for certiorari is being filed within 90 days of the date rehearing was denied. Supreme Court Rule 13.3.

This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

INTRODUCTION

This case is about medical providers who examined a child for evidence of abuse while that child was in the custody of government officials. The petitioners, Children's Hospital Los Angeles and Children's

Hospital Los Angeles Medical Group (“CHLA”) did not have custody of the child and had no role in the actions of the government officials in the removal of the child from the custody of his parents. While those government officials had official custody of the child, the officials exercised their legal authority, as *parens patriae*, to request the examination by CHLA.

The government officials’ custody of the child was apparently lawful, as California Welfare and Institutions Code section 324.5, authorizes county social workers to take a child into protective custody based upon “allegations of physical or sexual abuse” and “as soon as practically possible, consult with a medical practitioner, who has specialized training in detecting and treating child abuse injuries and neglect, to determine whether a physical examination of the child is appropriate.” Welfare and Institutions Code section 306 authorizes “[a]ny social worker in a county welfare department” to “[t]ake into and maintain temporary custody of, without a warrant, a minor,” based upon the social worker’s “reasonable cause to believe” the child has suffered or is at risk to suffer abuse.

Analogous to private medical laboratories that run tests for blood-alcohol concentrations on blood samples obtained by government officials, including law enforcement agencies, CHLA applied its medical knowledge and skills to performing a medical examination at the request of the government officials who had apparently lawful custody of the child.

By performing a medical examination of plaintiff N.L., as a private medical provider who did not have control or custody over N.L., CHLA did not performed

a function that was “traditionally exclusively reserved to the State.” *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 352, 95 S. Ct. 449, 42 L. Ed. 2d 477 (1974).

The agreement by CHLA to provide the medical examination, by a contract for services and for payment, did not “convert” them “into public actors.” *Brentwood Academy v. Tennessee Secondary School Athletic Assn.*, 531 U.S. 288, 299 (2001); citing *Rendell-Baker v. Kohn*, 457 U.S. 830, 839-843 (1982). The firmness of this important principle is shown by the dissenting opinion in *Brentwood Academy*, agreeing that a private party’s provision of a service to a state government or “fiscal relationship with the State is not different from that of many contractors performing services for the government,” and is regarded as insufficient grounds to subject the private party to scrutiny as a state actor. *Brentwood Academy, supra*, 531 U.S. at 311 (Justice Thomas’ dissent); citing *Rendell-Baker, supra*, at 843.

The Ninth Circuit’s conclusion that CHLA could be considered to have acted under color of state law merely based upon such alleged “collaboration,” medical providers performing a medical examination of a child in government custody, is out of step with this Court’s decisions. Even a private entity’s “close relationship with the State,” including as shown by funding, regulation, and function, are not enough to support a claim that the private entity is subject to scrutiny as a state actor. *Rendell-Baker, supra*, 457 U.S. 830, 836.

The facts plainly asserted in the operative complaint clearly refute any characterization of the CHLA defendants as state actors, acting under color of

state law. Therefore, this Court's intervention is needed now to correct the Ninth Circuit's erroneous interpretation of an important federal question.

Petitioners ask this Court to grant review on a writ of certiorari because the Ninth Circuit Court of Appeals has decided the above-stated issue, an important federal question, in a way that conflicts with relevant decisions of this Court. FRAP 10(c).

STATEMENT OF THE CASE

1. The District Court correctly concluded that Plaintiff failed to establish that Defendants were state actors under any of the tests applicable to private entities. App. 6 (ECF 60).

2. The District Court correctly decided that Plaintiff "failed to allege an injury in fact," and that "Without an injury in fact, Plaintiff lacks standing to advance a claim against Defendants." App. 21 (ECF 49), citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). (The order finding no injury in fact was incorporated by reference in the District Court's order dismissing the second amended complaint, with prejudice, App. 6 (ECF 60).)

3. In its Memorandum decision, the Ninth Circuit stated: "The pleading plausibly alleges that, in performing an intrusive forensic examination of N.L., CHLA was not providing medical treatment but instead was exercising its discretion to collaborate with county government in the laudable endeavor of investigating child abuse, a potential crime," citing as examples *West v. Atkins*, 487 U.S. 42, 54-55 (1988), and *Dennis v. Sparks*, 449 U.S. 24, 27 (1980). App. 1-2.

4. The Ninth Circuit summarily denied a petition for rehearing. App. 31.

5. This petition follows.

REASONS FOR GRANTING THE PETITION

The Decision Below Conflicts with this Court's Precedents and Was Incorrect

A. State Action Not Attributable to CHLA

The state action element of 42 U.S.C. § 1983 excludes from its coverage “merely private conduct, however discriminatory or wrongful.” *American Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 50 (1999) (internal quotation marks omitted).

“Careful adherence to the ‘state action’ requirement” thus “preserves an area of individual freedom by limiting the reach of federal law and federal judicial power.” *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 936 (1982). The state-action doctrine also promotes important values of federalism, “avoiding the imposition of responsibility on a State for conduct it could not control.” *National Collegiate Athletic Assn. v. Tarkanian*, 488 U.S. 179, 191 (1988).

This Court’s precedents reflect that although different tests may be applied to identify state action, the goal in every case is to determine whether an action “can fairly be attributed to the State.” *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982); *American Mfrs.*, *supra*, at 52.

The operative complaint set forth that the County of Los Angeles, through its Department of Child and Family Services (“DCFS”) unilaterally, without any

involvement of CHLA, “seized” the minor plaintiff, placed him in foster care, and filed a juvenile dependency petition in state court, pursuant to a California statute.

The operative complaint alleged, “DCFS phoned the Hospital to schedule an appointment for N.L. to have an investigatory forensic medical examination,” which took place while N.L. was in DCFS custody. While DCFS had the authority to make decisions for the minor, N.L., it exercised the authority of a parent to arrange and consent to the examination to assess for child abuse.

The Ninth Circuit’s decision ignored the statutory authority held by DCFS to take N.L. into custody and arrange for his examination. California statutes authorized DCFS to take custody of N.L. and have him examined. The Lance Helms Child Safety Act, California Welfare and Institutions Code section 324.5(a) provides authorized county social workers, to take a child into protective custody based upon “allegations of physical or sexual abuse” and “as soon as practically possible, consult with a medical practitioner, who has specialized training in detecting and treating child abuse injuries and neglect, to determine whether a physical examination of the child is appropriate.” Further, Welfare and Institutions Code section 306 authorizes “[a]ny social worker in a county welfare department” to “[t]ake into and maintain temporary custody of, without a warrant, a minor ... who the social worker has reasonable cause to believe is a person described in subdivision (b) [e.g., ‘The child has suffered, or there is a substantial risk that the child will suffer, serious physical harm or

illness’] or (g) [‘The child has been left without any provision for support’] of Section 300....”

Moreover, demonstrating that CHLA did not abuse some position given to it by the State, CHLA’s examination reached a conclusion conflicting the DCFS’ allegedly improper assertion of custody over N.L., as CHLA reported “normal” findings “and indicated that he was not the victim of sexual abuse or physical abuse,” as plaintiff has acknowledged.

In its Memorandum decision, the Ninth Circuit concluded that mere allegations that the petitioners-defendants, Children’s Hospital Los Angeles and Children’s Hospital Los Angeles Medical Group (CHLA) performed an examination “exercising its discretion to collaborate with county government in the laudable endeavor of investigating child abuse, a potential crime,” constitute allegations sufficient to subject CHLA to suit under 42 U.S.C. § 1983. App. 2. Although in reaching that conclusion, the Ninth Circuit cited *West v. Atkins*, 487 U.S. 42, 54-55 (1988), and *Dennis v. Sparks*, 449 U.S. 24, 27 (1980), its conclusion and description of those authorities decides an important federal question, in the context of a putative class action, in way that conflicts with this Court’s decisions.

This Court’s decisions firmly establish that a private party’s collaboration with the government is not enough to support a claim that the private person acted under color of law and is subject to scrutiny as a state actor, forced to defend against constitutional claims asserted pursuant to 42 U.S.C § 1983.

Moreover, the Ninth Circuit's decision failed to genuinely address the salient facts, by describing the operative complaint as alleging "that CHLA violated N.L.'s constitutional rights by conducting an invasive forensic medical examination for signs of child abuse without judicial authorization and without his parents' knowledge or consent." App. 2. In actuality, the operative complaint set forth that the County of Los Angeles, through its Department of Child and Family Services ("DCFS") unilaterally, without any involvement of CHLA, "seized" the minor plaintiff, placed him in foster care, and filed a juvenile dependency petition in state court, pursuant to a California statute.

The operative complaint alleged, "DCFS phoned the Hospital to schedule an appointment for N.L. to have an investigatory forensic medical examination," which took place while N.L. was in DCFS custody. While DCFS had the authority to make decisions for the minor, N.L., it exercised the authority of a parent to arrange and consent to the examination to assess for child abuse.

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and treating child abuse injuries and neglect, to determine whether a physical examination of the child is appropriate.” Further, Welfare and Institutions Code section 306 authorizes “[a]ny social worker in a county welfare department” to “[t]ake into and maintain temporary custody of, without a warrant, a minor ... who the social worker has reasonable cause to believe is a person described in subdivision (b) [e.g., ‘The child has suffered, or there is a substantial risk that the child will suffer, serious physical harm or illness’] or (g) [‘The child has been left without any provision for support’] of Section 300....”

Moreover, demonstrating that CHLA did not abuse some position given to it by the State, CHLA’s examination reached a conclusion conflicting the DCFS’ allegedly improper assertion of custody over N.L., as CHLA reported “normal” findings “and indicated that he was not the victim of sexual abuse or physical abuse,” as plaintiff has acknowledged.

The facts plainly asserted in the operative complaint clearly refute any characterization of the CHLA defendants as state actors, acting under color of law. Therefore, this Court’s intervention is needed now to correct the Ninth Circuit’s erroneous interpretation of an important federal question.

The County of Los Angeles removed Plaintiff N.L. from the custody of his parents and placed him in foster care. While in foster care, the County exercised its custodial authority to have N.L. examined at Children’s Hospital Los Angeles, by a physician employed by Children’s Hospital Los Angeles Medical Group, the defendant-petitioners, collectively referred to as CHLA herein.

By a detailed order, the District Court correctly concluded that Plaintiff's allegations did not support a cause of action asserting that the CHLA defendants could be held liable under section 1983 as "state actors," finding "that Plaintiff has not established that Defendants acted under color of law under the four tests applied by courts ((1) the public function test, (2) the joint action test, (3) the state compulsion test, and (4) the governmental nexus test.) APP. 6 (ECF 60); citing *Franklin v. Fox*, 312 F.3d 423, 444–45 (9th Cir. 2002). Further, District Court concluded that Plaintiff "failed to allege an injury in fact" and , therefore, "lack[ed] standing to advance a claim against Defendants." APP. 6 (ECF 60), referring to APP. 21 (ECF 49), citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992).

In a Memorandum decision, the Ninth Circuit stated: "The pleading plausibly alleges that, in performing an intrusive forensic examination of N.L., CHLA was not providing medical treatment but instead was exercising its discretion to collaborate with county government in the laudable endeavor of investigating child abuse, a potential crime," citing as examples *West v. Atkins*, 487 U.S. 42, 54-55 (1988), and *Dennis v. Sparks*, 449 U.S. 24, 27 (1980). The Ninth Circuit's conclusion and its description of cited authorities overlooked and misapprehended points of law and fact.

B. *West v. Atkins* Actually Supports Affirming District Court's Dismissal

Relative to *West v. Atkins*, 487 U.S. 42, 54-55 (1988), the Ninth Circuit described that decision as “concluding that a private physician who assists the state in carrying out a governmental function is a state actor.” App. 2. But, *West* did not reach such a conclusion. This description fails to consider the aspects of *West* that explain that a private party’s provision of assistance to the state in carrying out a governmental function, alone, does not subject the private party to liability as a “state actor.”

Defendants did not become state actors because they examined Plaintiff “at the behest of DCFS.” Appellee’s brief, pp. 74-81, pp. 27-33.

In reaching a conclusion that a contracted prison doctor acted under color of law, in *West v. Atkins* 487 U.S. 42 (1988), the Supreme Court first observed that allegations against the doctor in that case sufficiently alleged that the doctor violated the plaintiff’s rights by “deliberate indifference to a prisoner’s serious medical needs.” *Id.* at 48-49. Going on, the Court explained, “[t]o constitute state action, ‘the deprivation must be caused by the exercise of some right or privilege created by the State ... or by a person for whom the State is responsible,’ and ‘the party charged with the deprivation must be a person who may fairly be said to be a state actor.’” *Id.* at 49-50; citation omitted.

While *West* observed that “[s]tate employment is generally sufficient to render the defendant a state actor,” it also instructed that liability under § 1983 may be found only “when he abuses the position given

to him by the State.” *Ibid.* Here, Plaintiff made no allegations of abuse against CHLA.

Rather, Plaintiff’s Complaint, and the matters subject to judicial notice, established that defendants’ performance of their professional obligations cast them as “an adversary of the State,” as they applied their independent medical judgment to report “normal” findings that “indicated that he was not the victim of sexual abuse or physical abuse.” ECF 52, 8:18-19 (¶38); *West v. Atkins*, 487 U.S. 42, 51-52.

In *West*, the Court cited *Polk Cty. v. Dodson*, 454 U.S. 312, 102 S. Ct. 445, 70 L.Ed.2d 509, 518 (1981), wherein the court described “adversarial functions” relative to which it would be “peculiarly difficult to detect any color of state law in such activities. *Id.* at 320. While CHLA’s professional status may not by itself preclude a claim under § 1983, and CHLA was not obligated to take an adversarial function, its actions were adversarial to what plaintiff alleged was the government’s purpose, to interfere with plaintiff’s relationship with his parents. Cf., *West* at 52.

Moreover, to be a “state actor,” with liability under § 1983, there must be some action “to fulfill the under-color-of-state-law requirement.” *West* at 53, fn. 11; *Polk* at 319-320. Even a government official will not have § 1983 liability if there was no action under-color-of-state-law. *Ibid.*

C. *Dennis v. Sparks* Also Supports Affirming Dismissal

Relative to *Dennis v. Sparks*, 449 U.S. 24, 27, the Ninth Circuit described it as “holding that a private defendant can act under color of state law if it is a ‘willful participant in joint action with the State or its agents.’” But, that interpretation fails to consider the definition of “joint action,” and the applicable standards for assessment. Taking into consideration those standards, the decision actually supports dismissal.

In *Dennis*, the Court admonished: “Of course, merely resorting to the courts and being on the winning side of a lawsuit does not make a party a co-conspirator or a joint actor with the judge.” *Id.* at 28.

Rather, the “joint action” pertains to the private party acting under color of state law to abuse rights. In *Dennis*, the Court observed: “here the allegations were that an official act of the defendant judge was the product of a corrupt conspiracy involving bribery of the judge,” supporting the conclusion that “the private parties conspiring with the judge were acting under color of state law.” *Dennis* at 28. Emphasizing that point, the Court stated: “Private parties who corruptly conspire with a judge in connection with such conduct are thus acting under color of state law within the meaning of § 1983 as it has been construed in our prior cases.” *Id.* at 28-29.

Relative to the abuse of power, acting under color of state law, to support claims of liability as a state actor, *Dennis* did not just describe voluntary joint action with the state, it recounted that an oil company had

obtained an injunction against a competitor, that “enjoined the production of minerals from certain oil leases,” an injunction that had been “corruptly issued as the result of a conspiracy between the judge and the other defendants, thus causing a deprivation of property, *i.e.*, two years of oil production, without due process of law.” *Dennis* at 25-26. Under such circumstances, the Court explained, § 1983 provides “a remedy against those private persons who participate in subverting the judicial process and in so doing inflict injury on other persons.” *Dennis* at 31-32.

In contrast to the facts alleged in *Dennis v. Sparks*, here there are no allegations of corruption on the part of CHLA to conspire with government officials to deprive Plaintiff of any rights – and no action on the part of CHLA deprived Plaintiff of any rights.

**D. CHLA Cannot Be Deemed a State Actor,
Acting Under Color of State Law –
Plaintiff’s Allegations Refute Such a
Conclusion**

The progeny of *West* and *Dennis*, and other authorities, demonstrate that CHLA should be dismissed, as Plaintiff’s allegations fail to demonstrate that CHLA was a state actor, acting under color of state law.

Regarding the standard for review of a motion to dismiss, *Iqbal* explained, “a complaint must contain sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009); quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570, 127 S.Ct. 1955, 1974, 167 L.Ed.2d 929, 949 (2007). “A claim has facial

plausibility when the Plaintiff pleads factual content that allows the court to draw the reasonable inference that the Defendant is liable for the misconduct alleged.” *Iqbal* at 678; citing *Twombly* at 556. That pleading standard requires “more than a sheer possibility that a Defendant has acted unlawfully “[w]here a complaint pleads facts that are ‘merely consistent with’ a Defendant’s liability, it ‘stops short of the line between possibility and plausibility of ‘entitlement to relief.’”” *Iqbal* at 678; *Twombly* at 557.

The dismissal should be affirmed when a claim has not sufficiently been pled and is based upon “bare assertions” that “amount to nothing more than a ‘formulaic recitation of the elements’ of a constitutional [] claim.” *Iqbal* at 681; *Twombly* at 555. Indeed, when a plaintiff has failed to “plausibly suggest an entitlement to relief,” the dismissal should be affirmed because it would be “unfair to require the opposing party to be subjected to the expense of discovery and continued litigation.” *Eclectic Props. E., Ltd. Liab. Co. v. Marcus & Millichap Co.*, 751 F.3d 990, 996 (9th Cir. 2014); quoting *Starr v. Baca*, 652 F.3d 1202, 1216 (9th Cir. 2011).

E. The Standards to Be Deemed a State Actor, Acting Under Color of State Law, Requires Some Exercise of Authority of Abuse of Power by a Private Party

Courts are required to “start with the presumption that conduct by private actors is not state action.” *Florer v. Congregation Pidyon Shevuyim*, 639 F.3d 916, 922 (9th Cir. 2011); *Sutton v. Providence Saint Joseph Medical Center*, 192 F.3d 826, 836 (9th Cir. 1999).

While *Franklin v. Fox*, 312 F.3d 423 (9th Cir. 2002), generally observed that “[a] private individual may be liable under § 1983 if she conspired or entered joint action with a state actor,” it further explained that to support such a conspiracy a plaintiff “must show ‘an agreement or “meeting of the minds” to violate constitutional rights.’” *Id.* at 441; citation omitted. Going on, *Franklin* explained: “To be liable, each participant in the conspiracy need not know the exact details of the plan, but each participant must at least share the common objective of the conspiracy.” *Ibid.* The District Court correctly concluded that by application of such standards, § 1983 liability could not be asserted against CHLA.

Further, *Franklin* recounted, “Section 1983 liability attaches only to individuals ‘who carry a badge of authority of a State and represent it in some capacity.’” *Franklin* at 444; citing *Monroe v. Pape*, 365 U.S. 167, 172 (1961). Further, *Franklin* explained: “In the typical case raising a state-action issue, a private party has taken the decisive step that caused the harm to the plaintiff, and the question is whether the State was sufficiently involved to treat that decisive conduct as state action. This may occur ... sometimes if [the State] knowingly accepts the benefits derived from unconstitutional behavior.” *Ibid.*; quoting *Nat’l Collegiate Athletic Assn. v. Tarkanian*, 488 U.S. 179, 192 (1988). “Constitutional standards should be invoked only ‘when it can be said that the State is *responsible* for the specific conduct of which the plaintiff complains.’” *Ibid.*; quoting *Brentwood Acad. v. Tennessee Secondary Sch. Athletic Assn.*, 531 U.S. 288, 295 (2001) (emphasis in original).

Continuing, *Franklin* instructed: “A § 1983 plaintiff therefore must show that a defendant’s actions are ‘fairly attributable’ to the government.” *Ibid.*; citing *Collins v. Womancare*, 878 F.2d 1145, 1151 (9th Cir. 1989). “A private individual’s action may be ‘under color of state law’ where there is ‘significant’ state involvement in the action.” *Ibid.*; citing *Johnson v. Knowles*, 113 F.3d 1114, 1118 (9th Cir. 1997).

The state actor analysis is not done in a vacuum. To state a claim for relief under Section 1983, Plaintiff must allege “that the conduct deprived the claimant of some right, privilege, or immunity protected by the Constitution or laws of the United States.” *Leer v. Murphy*, 844 F.2d 628, 632-633 (9th Cir. 1988), citing *West v. Atkins*, 487 U.S. 42, 48.

Additionally, *Leer* explained, to assert liability against a private party as a state actor, a Plaintiff must show “that a person acting under color of state law committed the conduct at issue,” and that their action may be attributable to the state.” *Leer*, 844 F.2d at 632-33.

Further, *Leer* explained: “A person deprives another ‘of a constitutional right, within the meaning of section 1983, if he does an affirmative act, participates in another’s affirmative acts, or omits to perform an act which he is legally required to do that *causes* the deprivation of which [the plaintiff complains].” *Leer* at 633, emphasis added, citation omitted.

All CHLA did was perform an authorized exam, exercise medical judgment in assessing Plaintiff, and report the finding of no evidence of abuse. Considering Defendants had no role in taking custody away from

the parents and no role in deciding whether to do an examination (and was aware that Plaintiff's brother was at CHLA due to life-threatening physical abuse), Plaintiff cannot maintain a section 1983 claim against them.

F. Plaintiff's Allegations Are Inconsistent with the Pertinent Tests for Whether a Private Party May Be Considered a State Actor, Acting under Color of State Law

1. The Performance of a Medical Examination Is Not By Its Nature an Inherently Public Function

Generally, a private hospital and its employees are not state actors. *Bass v. Parkwood Hospital*, 180 F.3d 234, 241-43 (5th Cir. 1999). The performance of a medical examination is not an inherently public function. That's all that CHLA did.

Health care providers do not act under color of state law, and are not state actors, when their actions "ultimately turn on medical judgments made by private parties according to professional standards that are not established by the state." *Blum v. Yaretsky*, 457 U.S. 991, 1008 (1982).

Any medical examination is inherently investigative, necessarily involving a process of inspecting or testing, checking closely and carefully, for evidence of disease or abnormality. For example, "diagnose" is defined as including "any undertaking by any method, device, or procedure whatsoever, and whether gratuitous or not, to ascertain or establish whether a person is suffering from any physical or mental disorder." Cal. Bus. & Prof. Code § 2038.

“Examination” and “investigation” are synonyms – so allegations based upon “investigation” do nothing more to support a theory of color of state law than does the word examination. [[https://www.merriam-webster.com/thesaurus/examination.](https://www.merriam-webster.com/thesaurus/examination)]

The nature of medical examinations is such that indications of abuse may be observed when such examinations are done.

In recognition of that, California statutes require licensed health care providers, including physicians, residents, interns, nurses, and clinical social workers, to be observant for signs of child abuse and neglect as they are specified by statute as “mandated reporters” make reports to law enforcement, or other governmental agencies, regarding “suspected child abuse or neglect.” Penal Code §§ 11165.7(a)(21), 11165.9. In accordance with their professional capacity, health care providers are required to report suspicions of abuse when they form a “reasonable suspicion,” based on “training and experience, to suspect child abuse or neglect.” Penal Code § 11166(a)(1). Although health care providers must report suspicion, the mandated reporter statutes do not call for them to determine that abuse actually occurred. *Ibid.*

Moreover, “A physician and surgeon or dentist or their agents and by their direction may take skeletal X-rays of the child without the consent of the child’s parent or guardian, but only for purposes of diagnosing the case as one of possible child abuse or neglect and determining the extent of the child abuse or neglect.” Cal. Pen. Code § 11171.2(a).

The performance of a medical examination is not an inherently public function.

**2. CHLA's Performance of an Examination
"at the Behest" of the Government,
While N.L. Was in the Legal Custody of
the Government Was Not Joint Action**

In this action, Plaintiff's § 1983 claim arose from circumstances that occurred while he was in the legal custody of the Los Angeles County Department of Child and Family Services ("DCFS"). Plaintiff conclusorily alleged that "DCFS phoned the Hospital to schedule an appointment for N.L. to have an investigatory forensic medical examination," and that CHLA performed such examination. ECF 52, 7:5-7, 7:11-15. In conducting the examination, Plaintiff's allegations show that CHLA did not act under color of state law, such that CHLA cannot be subject to liability as a state actor. Rather, the following facts, alleged by Plaintiff, demonstrate that DCFS had custody of Plaintiff and legal authority to authorize the examination of Plaintiff. That authority was not the result of any actions by CHLA.

Without defendants' involvement, DCFS exercised its authority to take custody of Plaintiff. Plaintiff's allegations, and matters subject to judicial notice demonstrated that CHLA became involved after Plaintiff's brother, A.L. "sustained a serious brain injury" while at daycare and "was airlifted to Defendant Hospital for treatment." ECF 52, 4:8-10; ECF 35, 4:11-13. At CHLA, "a hospital social worker made a suspected child abuse referral to the Los Angeles County Child Abuse Hotline to report a suspected incident of child abuse by Ms. Downs," the

operator of the daycare facility. ECF 52, 4:10-13; ECF 35, 4:13-16.

In response to that report, Plaintiff alleged DCFS investigators seized A.L. from his parents' custody. ECF 52, 4:14-18; ECF 35, 4:17-22.

Then, as pertinent here, DCFS workers went to the home where N.L. was staying and seized him –without a warrant or court order, and without notifying his parents.” ECF 52, 5:10-15. Relative to County's exercise of its authority, Plaintiff alleged, “N.L. was placed in foster care” and “DCFS filed a juvenile dependency petition shortly thereafter,” alleging physical abuse of A.L. ECF 52, 5:23-24.

CHLA was not involved in the taking of N.L. into DCFS custody. Rather, a DCFS official went to the family home and asserted her governmental authority by presenting “her DCFS badge and a letter from the State of California.” ECF 54, 12:19-13:4. Five days after N.L. was taken into County custody, DCFS filed Juvenile Dependency Petitions for A.L. and N.L., “under section 300 of the California Welfare and Institutions Code,” and filed “a Detention Report.” ECF 54, 14:27-15:16. Plaintiff's alleged that DCFS’ “maliciously fabricated allegations” against the parents. *Id.*, 14:27-15:11.

Defendants later performed the examination of N.L. “at the behest” of DCFS. ECF 52, 7:5-15. That examination occurred while Plaintiff was in DCFS custody. ECF 52, 7:23-26; APP. 21 (ECF 49), p. 5. The examination was done “at the specific request and direction of DCFS,” “at the behest of DCFS,” with no allegation that Defendants exceeded the scope of

examination that DCFS had asked them to perform. ECF 52, 7:5-7, 7:27-8:6, 8:27-9:6, 9:20-10:1, 10:12-17, 16:10-18.

Consistent with Plaintiff's assertion that he was not a victim of abuse, CHLA's examination resulted in "normal" findings "and indicated that he was not the victim of sexual abuse or physical abuse." ECF 52, 8:18-19.

G. Performing an Examination While Plaintiff was in DCFS Custody Was Not Action Under Color of State Law and Did Not Make CHLA a State Actor

California Welfare and Institutions Code section 324.5(a) authorizes county social workers to take a child into protective custody based upon "allegations of physical or sexual abuse" and, as *parens patriae*, "as soon as practically possible, consult with a medical practitioner, who has specialized training in detecting and treating child abuse injuries and neglect, to determine whether a physical examination of the child is appropriate."

Further, Welfare and Institutions Code section 306 authorizes "[a]ny social worker in a county welfare department" to "[t]ake into and maintain temporary custody of, without a warrant, a minor ... who the social worker has reasonable cause to believe is a person described in subdivision (b) [e.g., 'The child has suffered, or there is a substantial risk that the child will suffer, serious physical harm or illness'] or (g) ['The child has been left without any provision for support'] of Section 300...."

Plaintiff's theory of liability in this case is inconsistent with Penal Code § 11171(a), which states:

(1) The Legislature hereby finds and declares that adequate protection of victims of child physical abuse or neglect has been hampered by the lack of consistent and comprehensive medical examinations." The statute provides for "Enhancing examination procedures, documentation, and evidence collection relating to child abuse or neglect will improve the investigation and prosecution of child abuse or neglect as well as other child protection efforts." Penal Code § 11171(a)(2). If further requires governmental authorities and "child advocates" and "other appropriate experts" to "establish medical forensic forms, instructions, and examination protocols for victims of child physical abuse or neglect....

Penal Code § 11171(b).

The fact that CHLA performed an examination that DCFS had the statutory authority to authorize did not convert CHLA's medical examination into action under color of state law, it did not make CHLA state actor.

H. The Absence of Constitutional or Statutory "Injury" Defeats The Requirement to Show a "Deprivation" to Support a Claim Against CHLA as a State Actor, Acting Under Color of State Law

As explained at length in the appellee's brief, Plaintiff failed to assert a constitutional deprivation that would support a claim against CHLA as a state

actor, acting under color of state law. Appellees' brief, pp. 33-52.

The District Court correctly decided that Plaintiff "failed to allege an injury in fact," and that "Without an injury in fact, Plaintiff lacks standing to advance a claim against Defendants." APP. 6 (ECF 60), referring to APP. 21 (ECF 49), citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). (The order finding no injury in fact was incorporated by reference in the District Court's order dismissing the second amended complaint, with prejudice, APP. 6 (ECF 60).)

As pointed out in the appellees' brief, according to *Lugar v. Edmondson Oil Co.*, 457 U.S. 922 (1982), § 1983 "provides a remedy for deprivations of rights secured by the Constitution and laws of the United States when that deprivation takes place 'under color of any statute, ordinance, regulation, custom, or usage, of any State or territory.'" *Id.* at 924. That requirement was also stated in *West v. Atkins* 487 U.S. 42, 49-50, and *Dennis v. Sparks*, 449 U.S. 24, 25-26, 28-29, 31-32. Without a deprivation, there is no possible claim that a private party was a state actor, acting under color of state law, subject to a § 1983 claim.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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