No. 17-1702

IN THE
Supreme Court of the United States

MANHATTAN COMMUNITY ACCESS CORPORATION, DANIEL COUGHLIN, JEANETTE SANTIAGO, & CORY BRYCE,

Petitioners,

v.

DEEDEE HALLECK & JESUS PAPOLETO MELENDEZ,

Respondents.

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

BRIEF OF THE NATIONAL POLICE ACCOUNTABILITY PROJECT AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Authorities

INTEREST OF AMIUS CURIAE[1]

The National Police Accountability Project (NPAP) was founded in 1999 by members of the National Lawyers Guild to address allegations of misconduct by law-enforcement and detention-facility officials through coordinating and assisting civil-rights lawyers representing their victims. NPAP has approximately six hundred attorney members practicing in every region of the United States. NPAP provides training and support for these attorneys and other legal workers, public education and information on issues related to law-enforcement and detention-facility misconduct and accountability, and resources for non-profit organizations and community groups involved with victims of such misconduct. NPAP supports legislative efforts aimed at increasing law-enforcement and detention-facility accountability and appears regularly as amicus curiae in cases such as this one presenting issues of particular importance for its member lawyers and their clients, who include protesters and victims of police misconduct. NPAP's members regularly represent prisoners and detainees in civil rights litigation.

SUMMARY OF ARGUMENT

Chicago Access Corporation (CAC), amicus curiae supporting the Petitioners, appears to argue for a rule that a party cannot be subject to the Constitution if: (1) the party is not a state official, and (2) the party's

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[1] The parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no counsel for a party (nor a party itself) made a monetary contribution intended to fund the preparation or submission of this brief. No person other than amici or their counsel made a monetary contribution to its preparation or submission.

challenged conduct violates state law. CAC Amicus Br. at 2, 10. The Court should reject that position. Although this case does not address constitutional limitations on confinement, CAC's argument, if accepted, would have substantial impact on that area of law. CAC's test would contravene settled precedent and have disastrous consequences, unleashing private prison contractors from constitutional restraint whenever they violate state law and the Eighth Amendment simultaneously. Neither the Petitioners nor the Respondents advocates CAC's test.

When prison staff deprive a prisoner of a constitutional right, the same act often breaches state law as well. For example, a guard who savagely beats a compliant prisoner violates state law and the Eighth Amendment with the same conduct. Under CAC's test, if the guard is a contractor rather than a state employee, the Eighth Amendment would not apply to the beating. The contractor has gained an exemption from the Constitution. All he had to do was break state law.

Settled precedent forecloses this proposal. The State cannot contract away its constitutional obligation to refrain from inflicting cruel and unusual punishment. "Contracting out prison medical care does not relieve the State of its constitutional duty to provide adequate medical treatment to those in its custody, and it does not deprive the State's prisoners of the means to vindicate their Eighth Amendment rights." *West v. Atkins*, 487 U.S. 42, 56 (1988). The proposition that a party who violates state law does not act under color of state law was conclusively rejected decades ago in *Monroe v. Pape*, 365 U.S. 167, 183–84 (1961).

West involved a prison medical contractor alleged to have provided deficient treatment to an inmate. 487 U.S. at 45. The same conduct would have constituted negligence and malpractice under state law, but that did not matter. *Id.* at 48 n.8. The prison contractor engaged in action fairly attributable to the State. *Id.* at 56–57.

CAC's rule would not only upend *West* but exempt an enormous proportion of prison medical care—and prison conditions more broadly—from the Eighth Amendment. The results would be catastrophic. With prison medical care entirely privatized in 20 States and partially privatized in another eight, a massive share of the prison population would find itself excluded from constitutional protection. And with 8.5% of prisoners incarcerated in institutions managed by contract wardens and patrolled by contract guards, the implications would extend far beyond medical care. Rape and torture by prison guards would not offend the Constitution so long as it violated state law.

This prospect is not a hypothetical parade of horribles. Privatization of prison medical care has often resulted in systematically inadequate treatment. Federal courts enforcing the Constitution have played a critical role in remedying such abuses.

I. THE COURT SHOULD REJECT THE RULE PROPOSED BY CHICAGO ACCESS CORPORATION.

A. The Actions of Private Contractors Performing Correctional Functions Are Fairly Attributable to The State.

1. Settled law establishes that the actions of prison contractors in carrying out constitutional obligations to prisoners are fairly attributable to the State. *See West v. Atkins*, 487 U.S. 42, 55–57 (1988). While a State may entrust some portion of its prison system to a private contractor, the constitutional obligation to avoid barbaric conditions remains.

In *West*, this Court unanimously held that a private medical provider at a North Carolina prison engaged in state action by treating inmates. *Id.* at 55–58. The Court reasoned: "Contracting out prison medical care does not relieve the State of its constitutional duty to provide adequate medical treatment to those in its custody, and it does not deprive the State's prisoners of the means to vindicate their Eighth Amendment rights." *Id.* at 56.

Justice Scalia concurred in part and concurred in the judgment in *West*, opining that the Fourteenth Amendment, rather than the Eighth, protects prisoners against deliberately indifferent medical care. *Id.* at 58 (Scalia, J., concurring in part and concurring in the judgment). On the question at hand, he agreed with the majority that "a physician who acts on behalf of the State to provide needed medical attention to a person involuntarily in state custody (in prison or elsewhere) and prevented from otherwise obtaining it," violates the Constitution when the

physician "causes physical harm to such a person by deliberate indifference." *Id.*

The rule of *West*, without more, disposes of this case. A government cannot avoid its constitutional responsibilities by delegating them to someone else. Nothing in Petitioners' argument undermines the holding of *West* or its applicability to the facts herein.

2. The rule of *West* is consistent with the more general body of law on the public function test, which holds that the Constitution extends to state powers "traditionally associated with sovereignty." *Jackson v. Metropolitan Edison Co.*,419 U.S. 345, 353 (1974). As *West* implies, ensuring compliance with constitutional requirements for persons incarcerated by government order is a core public function. *West*, 487 U.S. at 55–56; *see also Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 55 (1999) (stating that in *West*, "the State was constitutionally obligated to provide medical treatment to injured inmates, and the delegation of that traditionally exclusive public function to a private physician gave rise to a finding of state action" (citing *West*, 487 U.S. at 54–56)). After all, "when the State takes a person into its custody and holds him there against his will, the Constitution imposes upon it a corresponding duty to assume some responsibility for his safety and general well-being." *DeShaney v. Winnebago Cty. Dept. of Social Servs.*, 489 U.S. 189, 199–200 (1989).

B. Chicago Access Corporation's Proposal Would Reverse the Established Rule that the Constitution Extends to Prison Contractors.

1. A rule that the conduct of contractors who breach state law cannot be fairly attributed to the

State would upend the settled precedent discussed in the previous section, most notably *West v. Atkins*. The medical contractor in *West* characterized the respondent's claim as state law "negligence" or "medical malpractice," arguing the petitioner's allegations fell short of deliberate indifference, the higher standard of fault required by the Eighth Amendment. 487 U.S. at 48 n.8. The possibility of a state law violation, however, had no bearing on the Court's conclusion: the Constitution applied to the contractor's actions. *Id.* at 57.

CAC's rule does not square with *West*. Under CAC's rule, if the medical contractor's treatment of the patient contravened state negligence or malpractice law, it could not be attributable to the State. But the Court decided *West* the other way. CAC's rule therefore cannot be the law.

More broadly, CAC's rule would allow prison medical contractors to disregard the Constitution because what was true in *West* will be true in virtually every case: if a prison doctor's treatment violates the Eighth Amendment, the same treatment will also violate state tort law. *See West*, 487 U.S. at 48 n.8. That is so *by this Court's design*—under the Court's precedent, the deliberate indifference test for constitutionally inadequate medical care requires a higher standard of fault than negligence or malpractice. *See Estelle v. Gamble*, 429 U.S. 97, 105–06 (1976). "Medical malpractice does not become a constitutional violation merely because the victim is a prisoner." *Id*. at 106. The care must reflect "deliberate indifference," which is far more than a mere "inadvertent failure." *Id*. at 105–06. A deliberately indifferent defendant *knows of and disregards* a substantial risk of harm. *Farmer v. Brennan*, 511 U.S.

825, 837 (1994). Deliberate indifference requires negligence and then some. Therefore, under CAC's rule that the Constitution does not apply to a private party who violates state law, the Eighth Amendment would have nothing to say about deliberately indifferent medical care by prison contractors.

2. *Lugar v. Edmondson Oil Co.*, 457 U.S. 922 (1982), does not support CAC's approach. CAC reads *Lugar* in a manner that would undermine a core principle of *Monroe v. Pape*. *See* 365 U.S. 167, 183 (1961). "The federal remedy is supplementary to the state remedy . . . . Hence the fact that Illinois by its constitution and laws outlaws unreasonable searches and seizures is no barrier to the present suit in the federal court." *Id.* When the Constitution is violated, "[i]t is no answer that the State has a law which if enforced would give relief." *Id.* Similarly, the existence of a state law violation is "no answer," *id.*, when a private party, delegated public functions and constitutional duties by the State, contravenes the Eighth Amendment.

CAC takes an overly restrictive view of the first prong of the analysis in *Lugar*. As CAC states, *Lugar* sets forth a two-part test. "First, the deprivation must be 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*." 457 U.S. at 937 (emphasis added). "Second, the party charged with the deprivation must be a person who may fairly be said to be a state actor." *Id.*

The Court's full articulation of the first prong appears on page 937 of *Lugar*, but CAC quotes a truncated version from a subsequent page. *See* CAC Amicus Br. at 5 ("The first requirement is that 'the

claimed deprivation has resulted from the exercise of a right or privilege having its source in state authority.'") (quoting *Lugar* 457 U.S. at 939). Critically, the truncated version omits that when the actor is "a person for whom the State is responsible," the first prong is satisfied. *Lugar*, 457 U.S. at 937.

That portion of the first prong did not matter much in *Lugar* because the actor was a private oil company seeking to attach a debtor's property. *See id.* at 924–25. There was no suggestion that the oil company, unlike a prison medical provider, had an ongoing connection to the State or performed a public function. *See id.* Indeed, it would have been obvious that an oil company employee would not qualify as "a person for whom the State is responsible." *Id.* at 937.

Lugar therefore focused on the *remainder* of the first prong—whether "the claimed deprivation has resulted from the exercise of a right or privilege having its source in state authority." *Id.* at 939. The Court concluded a private party's action does not "hav[e] its source in state authority" when the conduct violates state law. *Id.* But *Lugar* did not suggest that a violation of state law disposes of the first prong where the actor is "a person for whom the State is responsible." *Id*. at 937.

If the State delegates constitutional obligations to a contractor such as a private prison medical provider, the contractor, while performing those duties, becomes "a person for whom the State is responsible." *Id.* That core principal animates *West* and explains why "[c]ontracting out prison medical care does not relieve the State of its constitutional duty to provide adequate medical treatment to those in its custody." *West*, 487 U.S. at 56.

Thus, whether or not a private party's violation of state law can ever "hav[e] its source in state authority" under *Lugar*, this much is clear: *Lugar* does not address whether a state law breach disqualifies a private actor as "a person for whom the State is responsible." *Lugar*, 457 U.S. at 937. *West*, however, answers that question plainly: when the State delegates correctional duties to a contractor, the contractor's actions are fairly attributable to the State, even when the contractor's actions contravene state law. *See West*, 487 U.S. at 48 n.8, 57.

C. Chicago Access Corporation's Proposal Would Cause Sweeping, Catastrophic Results.

1. Private providers are responsible for inmate medical care in most states, 20 of which contract out *the entirety* of health care in their prisons. THE PEW CHARITABLE TRUSTS, PRISON HEALTH CARE: COSTS AND QUALITY 11 (2017). Therefore, in large swaths of the nation, CAC's rule would eviscerate the long-standing Eighth Amendment floor for medical care in prison. *See Estelle v. Gamble*, 429 U.S. 97, 104 (1976). In state prison systems with private medical care, "deliberate indifference to serious medical needs of prisoners" would no longer "constitute[ ] the 'unnecessary and wanton infliction of pain,' proscribed by the Eighth Amendment." *Id.* (citation omitted) (quoting *Gregg v. Georgia*, 428 U.S. 153, 173 (1976)).

A disaster would ensue. After all, private contractors have monetary incentives to provide constitutionally deficient care. As Judge Hamilton, joined by Judge Posner, wrote: "Private prisons and prison medical providers are subject to market pressures. Their employees have financial incentives to save money at the expense of inmates' well-being

and constitutional rights." *Shields v. Illinois Dep't of Corr.*, 746 F.3d 782, 794 (7th Cir. 2014). A prison contract nurse made the same point in starker terms: "We save money because we skip the ambulance and bring them right to the morgue."[2]

Wexford Health Sources ("Wexford") treats inmates in Illinois, Indiana, Alabama, Arizona, West Virginia, Pennsylvania, Florida, and Maryland. *Our Locations*, Wexford Health Sources, Inc.[3] All told, Wexford is responsible for providing healthcare to 97,000 prisoners in 270 prisons and jails. *History*, Wexford Health Sources, Inc.[4] Wexford's failure to provide constitutionally adequate health care is the subject of countless lawsuits. *See, e.g.*, Dan Christensen, *Florida prison healthcare providers sued hundreds of times*, Miami Herald (Oct. 2, 2013).[5]

One systemic illustration of Wexford's disregard for its patients appears in a 2014 neutral expert report prepared to "'assist the court in determining whether the Illinois Department of Corrections ("IDOC") is

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[2] Paul Von Zielbauer, *As Health Care in Jails Goes Private, 10 Days Can Be a Death Sentence*, N.Y. TIMES (Feb. 27, 2005), http://www.nytimes.com/2005/02/27/nyregion/as-health-care-in-jails-goes-private-10-days-can-be-a-death.html. *See also* Sharon Dolovich, *State Punishment and Private Prisons*, 55 DUKE L.J. 437, 484 (2005) ("Prison operators wishing to save money on medical care might, for example, create a deliberately unwieldy process for prisoners wishing medical attention, as has apparently been the strategy of Correctional Medical Services (CMS), a for-profit prison medical services company operating in prisons and jails in twenty-seven states.").

[3] https://jobs.wexfordhealth.com/locations/locations.

[4] http://www.wexfordhealth.com/About-Us/History.

[5] http://www.miamiherald.com/news/state/article1955813.html. Alan Mills, one of the attorneys for amici in this case, is also among the counsel for the plaintiff class in *Lippert*.

providing health care service to the offenders in its custody that meet the minimum constitutional standards of adequacy.'" Final Report of the Court Appointed Expert, Ron Shansky, MD et al., at 3, *Lippert v. Godinez*, No. 1:10-cv-04603 (N.D. Ill. Dec. 2014) [hereinafter "*Lippert* Report"].[6] That answer is no: the court-appointed experts reported that Wexford "has been unable to meet minimal constitutional standards with regards to the adequacy of its health care program for the population it serves." *Id.* at 45.

Across more than 400 pages, the neutral experts described the impact of Wexford's irresponsibility. Delay and neglect were endemic. *Id.* at 28–31. The experts reported "numerous examples" of patients presenting with life-threatening conditions who were not transported to a hospital, a failure that often resulted in catastrophic avoidable harm. *Id.* at 32. "[O]ne or more significant lapses in care" played a role in 60% of non-violent deaths, the experts reported. *Id.* at 42. "It was obvious that once patients signed DNR (do not resuscitate) orders, they were often no longer treated for even simple reversible illness," a chilling practice that compelled the experts to advise Wexford that "'do not resuscitate' does not mean, 'Do not treat.'" *Id.* at 43.

An Illinois River Correctional Center patient repeatedly complained of constipation and weight loss, but was not administered a rectal exam for nearly a year, by which point he had lost more than thirty pounds. *Id.* at. 29. Even then, the physician failed to notice a large, easily detectable tumor in the rectum. *Id.* Four more months elapsed before Wexford

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[6] https://www.clearinghouse.net/chDocs/public/PC-IL-0032-0007.pdf.

ordered a colonoscopy. *Id.* at 30. By then, it was too late—"he survived less than a year." *Id.*

A patient at Hill Correctional Center began complaining about chest and neck pain. *Id.* Three months later, he reported that he was coughing up blood and had lost thirty pounds. *Id.* A physician observed a tumor at that time, and ordered a chest x-ray, which noted abnormalities. *Id.* Nevertheless, several more months passed before Wexford ordered a CT scan, which "showed 'a very large carcinoma.'" *Id.* By that time, the patient weighed a mere 127 pounds, at least 30 pounds less than he had before. *Id.* He died several months later. *Id.*

Several years after successful pre-incarceration surgery to remove a brain tumor, a prisoner entered the Pontiac Correctional Center. *Id.* Within three months, physicians discontinued his maintenance chemotherapy. *Id.* Four months later, the patient was diagnosed with a "recurrence of a low grade" cancer. *Id.* Physicians waited more than two months to schedule surgery, by which time he had suffered a stroke and other neurological damage. *Id.* His cancer was no longer operable, and he died shortly after. *Id.*

A Menard Correctional Center patient suffering from cirrhosis presented with a severe gastrointestinal bleed. *Id.* at 32. Notwithstanding "evidence of substantial blood loss," physicians delayed admitting him to the hospital. *Id.* He died two days later. *Id.*

An Illinois River patient was admitted to the infirmary with "rapidly progressive paralysis of the lower half of his body." *Id.* When the patient could no longer "move his legs," he requested transfer to the hospital. *Id.* at 32–33. Physicians did not act on that

request for two weeks. *Id.* at 33. The patient now requires a wheelchair. *Id.*

A thirty-seven-year-old diabetic at Illinois River reported "symptoms highly suggestive of an acute stroke." *Id.* Physicians have consistently failed to send him to "an outside hospital for proper diagnosis or treatment." *Id.* He no longer has the "[]ability to function independently[.]" *Id.*

The quality of care Wexford provides in Illinois did not improve after the *Lippert* Report issued in 2014. A monitor appointed in connection with a class action alleging dangerously inadequate psychiatric care across all IDOC facilities released his first annual report in May 2017. *See* First Annual Report of Monitor Pablo Stewart, MD at 4, 7–8, *Rasho v. Walker*, No. 07-cv-1298 (C.D. Ill. May 22, 2017).[7] The monitor, a nationally recognized correctional healthcare expert, reported numerous systemic deficiencies, including those that expose patients to "great risk of harm." *Id.* at 31. When notified of these grave shortcomings, Wexford submitted a remedial plan that was "exceedingly insufficient." *Id.*

In Arizona, prisoners treated by Wexford charged that they were provided with abysmal healthcare throughout the Arizona Department of Corrections ("ADC"). *See Parsons v. Ryan*, 754 F.3d 657, 662 (9th Cir. 2014). Bolstering these allegations are ADC's own complaints about "serious and systemic deficiencies in Wexford's provision of health care to ADC inmates." *Id.* at 668. ADC has criticized Wexford for non-compliance with Department policies including: "[a] 'quantitative decrease in routine institutional care'";

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[7] https://www.clearinghouse.net/chDocs/public/PC-IL-0031-0026.pdf.

"'[i]nadequate staffing levels'"; and "'[i]ncorrect, incomplete, inconsistent medication administration or documentation of care provided[.]'" *Id.*

In a separate incident, a Wexford provider contaminated an Arizona prison's insulin supply, thereby exposing more than 100 inmates to hepatitis C. Caroline Isaacs, American Friends Service Committee—Arizona, *Death Yards: Continuing Problem's with Arizona's Correctional Health Care*, 9 (Oct. 2013) [hereinafter *Death Yards*].[8] Notwithstanding this widespread danger, Wexford did not alert government health officials for more than a week. *Id.* And at one Arizona prison, patients were forced to "lick powdered medication from their own hands after Wexford ran out of plastic cups and did not attempt to resupply them." *Id.*

An audit in Mississippi was "harshly critical" of Wexford for "failing to provide timely, adequate medical care." *See* Bob Ortega, *Critics cast doubt on new Arizona prison health-care contractor*, The Arizona Republic (Apr. 6, 2012).[9] A New Mexico audit reported "extensive medical-staff shortages." *Id.* Virginia officials also criticized Wexford for staff shortages. *Death Yards*, *supra*, at 9. And in Florida, Wexford was fined for delaying the provision of medical care. *Id.*

Corizon Health, the "foremost provider of correctional healthcare in the United States," operates in 22 states, serving 220,000 patients

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[8] https://www.afsc.org/sites/default/files/documents/DeathYardsFINAL.pdf.

[9] http://www.azcentral.com/arizonarepublic/news/articles/2012/04/05/20120405arizona-prison-health-contractor-critics-cast-doubt.html.

annually. *See About Corizon Health – Who We Are*, Corizon Health;[10] *About Corizon Health – Partner Locations*, Corizon Health.[11] Corizon currently has $2 billion in contracts in Missouri and Kansas alone. Andy Marso, *What is $2 billion buying Kansas and Missouri in prison health care? Few people know*, The Kansas City Star (Jan. 21, 2018).[12] Corizon, like Wexford, is beset with charges that it provides substandard care to its patients across the nation.

In Florida, for example, shortly after Corizon began providing care for the vast majority of the State's prisoners, "inmate deaths spiked to a 10-year high" and the "number of seriously ill prisoners sent for outside hospital care . . . drop[ped] by 47 percent." Pat Beall, *Privatizing Prison Health Care Leaves Inmates in Pain, Sometimes Dying*, Palm Beach Post (Sept. 27, 2014).[13] Florida Department of Corrections Secretary Michael Crews warned Corizon that "[t]he level of care continues to fall below the contractually required standard." *Id.*

Corizon did not diagnose a patient with cancer, even as lumps formed on her arm and back, and excruciating pain prevented her from dressing or bathing. David Reutter, *Florida Prisoner Deaths Spike with Privatized Prisoner Health Care*, Prison Legal News (Apr. 25, 2017).[14] In response to

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[10] http://www.corizonhealth.com/index.php/S=0/About-Corizon/Who-We-Are-History-and-Today.
[11] http://www.corizonhealth.com/About-Corizon/Locations.
[12] http://www.kansascity.com/news/politics-government/article195673934.html.
[13] https://www.mypalmbeachpost.com/news/privatizing-prison-health-care-leaves-inmates-pain-sometimes-dying/dL1RshgbLhhXvwnv1ov31H/.
[14] https://www.prisonlegalnews.org/news/2017/apr/25/florida-prisoner-deaths-spike-privatized-prisoner-health-care/.

complaints of pain so intense that the patient wanted to cut off her own arm, Corizon prescribed self-massage, rest, Tylenol, and warm compresses. *Id.* Corizon did not even bother to test for cancer until the prisoner was near death. *Id.* By that time, it was too late—she died days later. *Id.*

When another patient complained of excruciating pain from bone cancer, Corizon prescribed over-the-counter painkillers. Pat Beall, *Privatized care: Ibuprofen as bone cancer destroys inmate's spine*, The Palm Beach Post (Sept. 27, 2014).[15] When the pain did not abate, the patient was instructed to "come back after [you are] paralyzed . . . 'because there's nothing wrong with you.'" *Id.*

A prisoner without a hip joint was denied a hip replacement. Pat Beall, *No hip joint or painkiller, inmate lives in a wheelchair*, The Palm Beach Post (Sept. 27, 2014).[16] And then a Wexford doctor stopped his pain medication cold turkey. *Id.* The pain was so intense that the patient was forced to sleep in a wheelchair; he could not bear the pain of climbing into his bunk. *Id.* The prisoner confessed to "'wish[ing] God would take [him].'" *Id.*

The story is much the same in Idaho where Dr. Marc Stern, a nationally recognized correctional healthcare expert, "found serious problems with the delivery of medical and mental health care . . . resulting in serious harm" to prisoners. *See* Special Master Report at 3, *Balla v. Idaho State Bd. Of Corr.*,

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[15] https://www.mypalmbeachpost.com/news/privatized-care-ibuprofen-bone-cancer-destroys-inmate-spine/DGSMNTIfBD1QzQqhFB5jjN/.

[16] https://www.mypalmbeachpost.com/news/hip-joint-painkiller-inmate-lives-wheelchair/5NZdpy3X0BZQbIKMLHWNjJ/.

No. 1:81-cv-01165-BLW (D. Idaho Feb. 2, 2012).[17] Corizon's failures were "frequent, pervasive, [and] long standing." *Id.* They included delayed or "substandard" responses to medical crises. *Id.* at 14. In sum, Corizon's irresponsibility resulted in "dangerous" conditions that effectively "deprive[d] patients of their constitutional right to access to care[.]" *Id.* After being informed that it had failed 23 of 33 categories in a 2010 audit, Corizon failed an additional three categories in 2011. *Id.* at 3.

In California, Corizon was twice ordered by a court to provide proper treatment to a pretrial detainee suffering from a respiratory condition. Simone Aponte, *2 Investigates: Inmate's Death at Santa Rita Jail Raises Questions About Private Medical Company*, KTVU (last updated Dec. 9, 2016, 10:39 AM).[18] Notwithstanding a recommendation to treat the condition surgically, Corizon elected to prescribe nasal spray and Claritin. *Id.* The patient died of an acute respiratory attack. *Id.*

In Arizona, Corizon replaced Wexford after the latter was accused of providing deficient care. *See Death Yards*, *supra*, at 4. After reviewing Corizon's performance, the authors of a report on correctional healthcare in Arizona noted "if anything, things have gotten worse" since Corizon replaced Wexford. *Id.* The report faulted Corizon for "system-wide dysfunction," including "delays and denials of care, lack of timely emergency treatment, failure to provide medication and medical devices, low staffing levels, failure to provide care and protection from infectious disease,

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[17] http://www.idahoprisonhealthreport.com/assets/documents/SternReport.pdf.

[18] http://www.ktvu.com/news/2-investigates-inmates-death-at-santa-rita-jail-raises-questions-about-private-medical-company.

denial of specialty care and referrals, and insufficient mental health treatment." *Id.*

Many of the treatment examples above are unlawful under the Eighth Amendment's deliberate indifference standard and also constitute negligence and malpractice under state law. Under CAC's test, however, the violation of state law would eliminate the possibility of both injunctive and monetary relief to correct the appalling treatment described above. That abuse would occur in a constitutional vacuum.

2. In the interest of brevity, the discussion above has been limited to medical care, but the effects of CAC's rule would not be restricted to prison health contractors. Many American prisons are wholly privatized, meaning not only medical providers but also guards, counselors, and wardens work as contractors rather than as state employees. Fully privatized facilities house 8.5% of all federal and state prisoners in the United States. U.S. DEPT. OF JUSTICE, BUREAU OF JUSTICE STATISTICS, PRISONERS IN 2016 at 22 (2018). Such institutions also incarcerate nearly three quarters of immigration detainees, THE SENTENCING PROJECT, PRIVATE PRISONS IN THE UNITED STATES (2018), who have a Due Process right against barbaric conditions of confinement, *see Youngberg v. Romeo*, 457 U.S. 307, 315–16 (1982) (Due Process Clause governs conditions of confinement pursuant to civil process).

In private prisons, CAC's rule would exempt far more than medical care from constitutional protection. The Eighth Amendment would have nothing to say about a contract guard who broke state civil and criminal laws by beating a prisoner to death. And if State law prohibited contractors from raping

prisoners, the Eighth Amendment necessarily would not.

The Court should not adopt CAC's rule because it would allow private prison contractors to evade the Constitution. After all, "[t]he fact that a person may have a state-law cause of action against a public official who tortures him with a thumbscrew . . . has nothing to do with the fact that such official conduct is cruel and unusual punishment prohibited by the Eighth Amendment." *Ingraham v. Wright*, 430 U.S. 651, 690–91 (1977) (White, J., dissenting). Working as a prison contractor does not license the thumbscrew either.

CONCLUSION

The Court should reject CAC's proposed test for state action.

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