No. _____

In The
Supreme Court of the United States

RECOVERY INNOVATIONS, INC.;
SAMI FRENCH; JENNIFER CLINGENPEEL;
AND VASANT HALARNAKAR,

Petitioners,

v.

KENNETH RAWSON,

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

In *Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 378 (1995), this Court noted inconsistency in decisions determining whether a private party is a state actor for the purpose of 42 U.S.C. § 1983. Writing in dissent, Justice O'Connor expressed concern that this discontinuity in the law will allow the lower courts to continue to adopt differing approaches to this question of federal law, making it impossible to predict who will or will not be deemed a state actor in any particular case. *Lebron*, 513 U.S. at 408-09. In the decision below, the Ninth Circuit selected factors from different tests to hold that private medical professionals are state actors when providing mental health services pursuant to a state's involuntary commitment law, despite numerous decisions from other Circuit Courts of Appeals having previously applied different versions of the state action test to reach the opposite conclusion.

The question presented is:

Whether through the provision of mental health services, a private, non-profit hospital and private healthcare providers become state actors, subject to claims under 42 U.S.C. § 1983, when they provide mental health services to a person who was deemed to be "gravely disabled" and to "present[] a likelihood of serious harm to others" under the state's involuntary commitment law.

CORPORATE DISCLOSURE

All Petitioners are listed in the caption. The Petitioners that are not individuals have no parent corporations and no publicly held companies own 10% or more of their stock.

STATEMENT OF RELATED CASES

Rawson v. Recovery Innovations, Inc., et al., No. 3:17-cv-05342-BHS, U.S. District Court for the Western District of Washington. Judgment entered June 18, 2019.

Rawson v. Recovery Innovations, Inc., et al., No. 19-35520, U.S. Court of Appeals for the Ninth Circuit. Judgment entered September 9, 2020.

Rawson v. Recovery Innovations, Inc., et al., No. 19-2-08779-5, Superior Court of the State of Washington, Pierce County.

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PETITION FOR WRIT OF CERTIORARI

Recovery Innovations, Inc., Sami French, Jennifer Clingenpeel, and Vasant Halarnakar petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The decision of the United States Court of Appeals for the Ninth Circuit is available at 975 F.3d 742 (9th Cir. 2020) and reprinted at Pet. App. 1-30. The Ninth Circuit's order denying the petition for rehearing en banc is not published but is reprinted at Pet. App. 108-109. The decisions of the United States District Court for the Western District of Washington are not reported but are reprinted at Pet. App. 31-107.

JURISDICTION

The decision of the Ninth Circuit sought to be reviewed was issued on September 9, 2020. Pet. App. 1-30. On October 15, 2020, the Ninth Circuit denied Defendants' petition for panel rehearing and rehearing en banc. Pet. App. 108-109. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment to the Constitution provides, in relevant part, that no State shall "deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1.

42 U.S.C. § 1983 provides in relevant part:

> 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 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.

The relevant provisions of Washington's Involuntary Treatment Act, Chapter 71.05 Revised Code Washington (Rev. Code Wash.), are reproduced in an appendix to this petition (Pet. App. 110-144).

INTRODUCTION

This case raises an important question of federal law that has divided the lower federal courts: whether a private, non-profit hospital and private healthcare providers may be deemed "state actors" subject to liability under 42 U.S.C. § 1983 when they provide court-ordered evaluation and treatment services to an individual subject to a state's involuntary commitment law. Despite numerous decisions from the lower federal courts addressing this question, the answer remains uncertain and the outcome of each case unpredictable because, to date, this Court has not explained how its many distinct lines of state action precedent relate to each other or to articulate which line of cases governs in each circumstance. *Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 378 (1995) ("It is fair to say that 'our cases deciding when private action might be deemed that of the state have not been a model of consistency.'") (quoting *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 632 (1991) (J. O'Connor, dissenting)); *see also* Joan Kane, Note, *The Constitutionality of Redlining: The Potential for Holding Banks Liable as State Actors*, 2 Wm. & Mary Bill Rts. J. 527, 558 (1993) ("It is impossible to predict which standard will be used by a court examining the state actor doctrine.").

STATEMENT OF THE CASE

I. Legal Background: 42 U.S.C. § 1983 and the State Action Doctrine

Since 1883, this Court has held that the Fourteenth Amendment affords no protection against private behavior. *See*, *e.g.*, *The Civil Rights Cases*, 109 U.S. 3, 11 (1883) ("It is State action of a particular character that is prohibited. Individual invasion of individual rights is not the subject-matter of the amendment."). Thus, the Civil Rights Act, 42 U.S.C. § 1983, by its plain language, provides a cause of action only for constitutional injuries caused by a person "committed by a person acting under color of state law." *West v. Atkins*, 487 U.S. 42, 48 (1988); *see also Wyatt v. Cole*, 504 U.S. 158, 161 (1992); *Van Ort v. Estate of Stanewich*, 92 F.3d 831, 835 (9th Cir. 1996). A judicial determination of "state action," therefore, carries enormous import because it defines the outer limits on the Constitution's reach and expands the purposefully narrow scope of the Civil Rights Act.

Private parties are presumed not to be "state actors." *See Sutton v. Providence St. Joseph Med. Ctr.*, 192 F.3d 826, 835 (9th Cir. 1999) ("When addressing whether a private party acted under color of law, we therefore start with the presumption that private conduct does not constitute governmental action.") (citing *Harvey v. Harvey*, 949 F.2d 1127, 1130 (11th Cir. 1992) ("Only in rare circumstances can a private party be viewed as a 'state actor' for § 1983 purposes."); *Price v. Hawaii*, 939 F.2d 702, 707-708 (9th Cir. 1991) ("Private

parties are not generally acting under color of state law.")). And this presumption may only be overcome "if, *though only if*, there is such a 'close nexus between the State and the challenged action' that seemingly private behavior 'may be fairly treated as that of the State itself.'" *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 295 (2001) (citing *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 351 (1974) (emphasis added)); *West*, 487 U.S. at 48 (The burden of proving state action is on the plaintiff.).

Unfortunately, the federal courts have struggled to find any clear test for distinguishing "state action" from "private action," resulting in a large body of confusing and frequently conflicting caselaw.[1] Indeed, legal scholars note that, by 2011, this Court had considered the "state action" question more than seventy times, without arriving at a clear and predictable test. *See* John Dorsett Niles et al., *Making Sense of State Action*, 51 Santa Clara L. Rev. 885, 886 (2011); *see also* G. Sidney Buchanan, *A Conceptual History of the State Action Doctrine: The Search for Governmental Responsibility (pt. 1)*, 34 Hous. L. Rev. 333 (1997); *id*. (pt. 2), 34 Hous. L. Rev. 665 (1997) (providing a detailed

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[1] *See*, *e.g.*, Thomas D. Rowe, Jr., *The Emerging Threshold Approach to State Action Determinations: Trying to Make Sense of Flagg Brothers, Inc. v. Brooks*, 69 Geo. L.J. 745, 769 (1981) (likening a workable distinction between state action and private action to "at least a piece of the Holy Grail that has eluded state action theorists for decades"); David H. Topol, Note, *Union Shops, State Action, and the National Labor Relations Act*, 101 Yale L.J. 1135, 1142 (1992) ("Making sense of the state action doctrine is not an easy task.").

history of the Court's state action cases). Instead, this Court's "state action" precedents have taken several different approaches to the question, relying on an inconsistent array of case-specific factors and analogies to determine when private conduct may be deemed "state action." *Lebron*, 513 U.S. at 378 (J. O'Connor, dissenting).

The wide and inconsistent array of factors considered by this Court when evaluating a state action claim—and the weight given to those factors—has made predictability in this area of the law increasingly difficult for practitioners and the lower courts. Niles, 51 Santa Clara L. Rev. at 886-887. Prior to the decision below, for example, the Circuit Courts of Appeals were generally in agreement that private parties providing mental health services under an involuntary commitment statute are typically not state actors. *Jensen v. Lane County*, 222 F.3d 570, 575 (9th Cir. 2000) ("When purely private actors obtain the help of a private physician to bring about the involuntary admission and detention of an allegedly mentally ill person for psychiatric examination, courts that have addressed this scenario in the § 1983 context have held that there is no state action."); *see also*, *e.g.*, *Doe v. Rosenberg*, 996 F. Supp. 343, 349 (S.D.N.Y. 1998), *affirmed*, 166 F.3d 507 (2d Cir. 1999); *S.P. v. City of Takoma Park, Md.*, 134 F.3d 260 (4th Cir. 1998); *Pino v. E.P. Higgs*, 75 F.3d 1461 (10th Cir. 1996); *Ellison v. A.J. Garbarino, M.D.*, 48 F.3d 192 (6th Cir. 1995); *Rockwell v. Cape Cod Hosp.*, 26 F.3d 254, 257-260 (1st Cir. 1994); *Harvey v. Harvey*, 949 F.2d 1127 (11th Cir. 1992); *Janicsko v. Pellman*,

774 F. Supp. 331 (M.D. Pa. 1991), *affirmed without opinion*, 970 F.2d 899 (3d Cir. 1992); *Spencer v. Lee*, 864 F.2d 1376 (7th Cir. 1989) (*en banc*); *Briley v. California*, 564 F.2d 849, 855-856 (9th Cir. 1977) (noting that courts routinely dismissed § 1983 claims against private hospitals, physicians and staff because they are not within the color of state law).

But, as discussed below, the Ninth Circuit reached the opposite conclusion in this case, based on near-identical fact patterns, by applying a different array of factors to the state action inquiry. Pet. App. 1-30. This conflict highlights the widespread confusion among the lower courts and practitioners about how to reconcile the numerous different state action tests, and the circumstances in which each divergent test is applicable. *See*, *e.g.*, *Wang v. Blue Cross Blue Shield Ass'n*, 55 F. App'x 802, 803 (9th Cir. 2003) (noting that there are at least "seven approaches to the issue"); *Keeling v. Schaefer*, 181 F. Supp. 2d 1206 (D. Kan. 2001) (four tests); *Sabeta v. Baptist Hosp. of Miami, Inc.*, 410 F. Supp. 2d 1224 (S.D. Fla. 2005) (three tests).

II. Factual Background

A. Petitioners/Defendants are Private Health Care Providers Who Provide Mental Health Services to Involuntarily Committed Individuals

Recovery Innovations, Inc. is a non-profit corporation incorporated in Arizona that is licensed to do business in Washington. Pet. App. 34. Sami French,

Jennifer Clingenpeel, and Vasant Halarnakar, M.D. were each employees of Recovery Innovations. *Id.* Ms. French is a mental health professional who had extensive experience working with individuals facing mental health and substance-abuse crises. Ms. Clingenpeel is a psychiatric Advanced Registered Nurse Practitioner with extensive experience in involuntary treatment settings. Dr. Halarnakar is a psychiatrist and the Medical Director of Recovery Innovations' facility, who also had years of experience evaluating and treating involuntarily detained patients.

In 2014, Recovery Innovations contracted with Optum Pierce Regional Support Network to open and operate a facility in Lakewood, Washington to provide evaluation and treatment services. *Id.* Recovery Innovations has no direct contractual relationship with the City of Lakewood, Pierce County, or the State of Washington. SER 177-178.

B. Recovery Innovations Provides Emergency Mental Health Care to Individuals Suffering From Severe Behavioral Health Disorders

Recovery Innovations provides evaluation and treatment services to individuals who are suffering from behavioral health disorders that present an imminent risk of harm to themselves or to the public. Like all healthcare, the mental health services provided by Recovery Innovations are regulated by numerous state and federal laws, including Washington's

Involuntary Treatment Act (ITA), which sets forth a comprehensive scheme for evaluating and treating to individuals subject to involuntary commitments. *See generally* Chapter 71.05 Rev. Code Wash.; *In re Det. of V.B.*, 104 Wash. App. 953, 965 (2001) (concluding that "the procedures in the involuntary civil commitment statutes provide adequate protection against erroneous detention.").

Among other procedural safeguards, the ITA requires that an individual experiencing serious behavioral health issues undergo independent evaluation by mental health professionals, and has an opportunity to address the evaluation findings at a court hearing. *In re Det. of V.B.*, 104 Wash. App. at 965. Under the ITA, the process usually begins when a "designated crisis responder" (also known as a Designated Mental Health Professional (DMHP)) receives information alleging that a person, as the result of a behavioral health disorder, presents an imminent likelihood of serious harm, or is in imminent danger because of being gravely disabled. The DMHP must then conduct an investigation and evaluation before referring the individual into 72-hour "emergency custody in an evaluation and treatment facility." Rev. Code Wash. § 71.05.153. Thereafter, mental health professionals at the facility must exercise independent judgment by conducting their own evaluation of the person's condition "and admit, detain, transfer, or discharge such person in accordance with [Rev. Code Wash. §] 71.05.210." *Id*. § 71.05.170. If a person is admitted or accepted to an evaluation and treatment facility, that person

"[s]hall receive such treatment and care as his or her condition requires including treatment on an outpatient basis for the period that he or she is detained, ..." *Id*. § 71.05.210(1)(b).

Once the 72-hour period expires, the facility may petition the court to order additional involuntary treatment and evaluation for a period of time not to exceed 14 days. *Id*. § 71.05.230(1). The petition must be based upon the professional judgment of a qualified mental health professional whose credentials meet the state's standards. *Id*. § 71.05.230(4)(a)(i). And the petition must demonstrate the mental health professional's independent judgment and must "state facts that support the finding that such person, as a result of a behavioral health disorder, presents a likelihood of serious harm, or is gravely disabled and that there are no less restrictive alternatives to detention in the best interest of such person or others." *Id*. § 71.05.230(4)(b).

At the expiration of the 14-day treatment period, a person may be committed for further court-ordered treatment on one of several bases. *Id*. § 71.05.280, *id*. § 71.05.320. These grounds include:

> (1) Such person after having been taken into custody for evaluation and treatment has threatened, attempted, or inflicted: (a) Physical harm upon the person of another or himself or herself, or substantial damage upon the property of another, and (b) as a result of a behavioral health disorder presents a likelihood of serious harm; or

> (2) Such person was taken into custody as a result of conduct in which he or she attempted or inflicted physical harm upon the person of another or himself or herself, or substantial damage upon the property of others, and continues to present, as a result of a behavioral health disorder, a likelihood of serious harm; or
>
> . . .
>
> (4) Such person is gravely disabled;

Id. § 71.05.280. Again, a petition for further treatment must also be prepared and supported by a qualified mental health professional. *Id*. § 71.05.290.

Before a period of commitment longer than 14 days may be ordered by the court, the person subject to involuntary treatment may request a jury trial, which trial must occur within 10 days unless continued by the court. *Id*. § 71.05.310. While the jury trial is pending, "the person named in the petition shall continue to be treated until released by order of the superior court or discharged by the behavioral health service provider." *Id.*

Through the ITA, the Legislature has consistently set forth an express intent "[t]o encourage the full use of all existing agencies, professional personnel, and public funds to prevent duplication of services and unnecessary expenditures;" and "[t]o encourage, whenever appropriate, that services be provided within the community." *Id*. § 71.05.010(f), (g); 1973 1st ex.s. c 142 § 6 (5), (6). Indeed, the ITA's definition of "evaluation

and treatment facility" also shows the Legislature's intent that both public and private actors may operate evaluation and treatment facilities and offer the same kind of services.[2] Chapter 388-865 Washington Administrative Code (Wash. Admin. Code), which governed community involuntary treatment under the ITA at times pertinent to this case, also made an important distinction between evaluation and treatment facilities and state or federal psychiatric hospitals.[3]

Further, since the original enactment of the ITA in 1973, the State has expressly recognized a distinction between private and public entities who perform evaluation and treatment services. *See* Rev. Code Wash. § 71.05.020 (41) (definition of "private agency"), *id*. § 71.05.020 (46) (definition of "public agency"); *see also*

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[2] "(22) 'Evaluation and treatment facility' means *any facility which can provide directly, or by direct arrangement with other public or private agencies*, emergency evaluation and treatment, outpatient care, and timely and appropriate inpatient care to persons suffering from a mental disorder, and which is certified as such by the department. . . . . *A physically separate and separately operated portion of a state hospital may be designated as an evaluation and treatment facility. A facility which is part of, or operated by, the department or any federal agency will not require certification*." Rev. Code Wash. § 71.05.020 (22) (emphasis added).

[3] "Inpatient evaluation and treatment facilities. (1) The mental health division certifies facilities to provide involuntary inpatient evaluation and treatment services for more than twenty-four hours within . . . inpatient evaluation and treatment facility. . . . (3) *This chapter does not apply to state psychiatric hospitals as defined in chapter 72.23 [*Rev. Code Wash. *§] or facilities owned or operated by the department of veterans affairs or other agencies of the United States government.*" Former Wash. Admin. Code § 388-865-0500 (emphasis added; alteration supplied).

1973 1st ex.s. c 142 § 7 (6), (7). Since 1973, the ITA definition of "public agency" has required that it be "*operated directly by federal, state, county, or municipal government, or a combination of such governments.*" *Id*. § 71.05.020 (46) (emphasis added); 1973 1st ex.s. c 142 § 7 (6). As noted above, the ITA definition of "private agency" has always recognized that private entities remain private *"whether or not financed in whole or in part by public funds*, ..." Rev. Code Wash. § 71.05.020 (41) (emphasis added); 1973 1st ex.s. c 142 § 7 (7).

Contrary to the Ninth Circuit's "prison doctor" analogy, the ITA specifically provides that "[n]o correctional institution or facility, or jail, shall be an evaluation and treatment facility within the meaning of this chapter . . . ." Rev. Code Wash. § 71.05.020 (22)

Critically, the ITA provides a statutory remedy for individuals who are subjected to excessive detention. "Any individual who knowingly, willfully or through gross negligence violates the provisions of [the ITA] by detaining a person for more than the allowable number of days shall be liable to the person detained in civil damages." *Id*. § 71.05.510

C. Rawson Was Referred to Evaluation and Treatment at Recovery Innovations After Making Serious Threats to a Bank Teller About a Mass Shooting

On March 4, 2015, Plaintiff Kenneth Rawson visited a bank in Vancouver, Washington and made

alarming statements to a teller, alluding to a mass shooting and to his AK-47-style rifle. Pet. App. 35-36. This so troubled bank staff that when Rawson returned the next day, they called the Clark County Sheriff's Office. *Id.* Rawson's delusional and threatening behaviors caused the responding officers to detain him, and he was brought to a hospital for emergency evaluation. Pet. App. 37. At the hospital, a Clark County DMHP evaluated Rawson and filed a petition in state court for a 72-hour involuntary commitment. *Id.* The court issued such an order and on March 6, 2015, Rawson was transferred to Recovery Innovations' facility for further evaluation and treatment. *Id.*

The Sheriff's subsequent search of Rawson's apartment found a weapons cache, including the AK-47 he had mentioned, along with copious amounts of ammunition and eight "double stacked" magazines. SER 191-217. This information was later reported to Recovery Innovations. SER 231-232.

Meanwhile, at the Recovery Innovations facility, Ms. Clingenpeel, the attending provider at the time, conducted an independent psychiatric evaluation of Rawson, determining that his condition required further treatment. Pet. App. 37. Recovery Innovations staff then began a course of continuing evaluation and treatment that ultimately lasted several weeks.

On March 9, 2015, as the initial 72-hour commitment period was set to expire, Ms. French and Ms. Clingenpeel filed a petition with the state court to involuntarily commit Rawson for an additional 14 days.

Pet. App. 37-38. Rawson and his counsel appeared at a hearing where the court ordered the 14-day commitment on March 10, 2015. *Id.*

Thereafter, on March 19, 2015, Ms. French and Dr. Halarnakar filed another petition with the court recommending that Rawson receive an additional 90 days of treatment at the facility. Pet. App. 39. Rawson opposed the petition and requested a jury trial. Pet. App. 40. Trial was continued several times due to court scheduling matters and requests from Rawson's attorney—events beyond Defendants' control. SER 228-229. Rawson was released from treatment before the hearing took place, so the hearing was cancelled.

Throughout this entire process, Recovery Innovations staff acted according to their own independent medical judgments. No governmental agent coerced, encouraged, or jointly participated in their decisions to recommend that Rawson receive extended evaluation, treatment, and commitment.

III. Proceedings Below

A. Rawson Filed a Civil Rights Lawsuit Naming Only the Private Mental Health Providers as Defendants

Years after his release, Rawson filed a civil rights lawsuit in the Federal District Court for the Western District of Washington naming only Recovery Innovations and its staff members as defendants. Despite the fact that the complaint alleged violations of the Fourth

and Fourteenth Amendments, Rawson chose not to name any government officials, including officers from the Clark County Sheriff's Office, hospital staff, or the Clark County DMHP, as additional defendants. Pet. App. 145. Instead, Rawson's complaint alleged that the ITA's petition process converted Recovery Innovations and its staff into de facto state actors. Pet. App. 159-160.

B. Summary Dismissal

On November 27, 2018, the District Court entered an order on the parties' cross-motions for summary judgment which granted in part and denied in part the parties' various requested relief. Pet. App. 31-67. At the District Court's request, the parties submitted supplemental briefing on Rawson's § 1983 claims, and in two separate orders entered in May 2019, the District Court concluded that Recovery Innovations and its staff were not state actors and dismissed Rawson's constitutional claims.[4] Pet. App. 68-107. The District Court then issued final judgment on June 18, 2019. ER 1.

[4] Following Rawson's motion for voluntary dismissal, on May 31, 2019, the District Court dismissed Rawson's remaining state law claims without prejudice and granted Rawson leave to refile them in state court pursuant to 28 U.S.C. § 1367(d). ER 2.

C. The Ninth Circuit Overruled the District Court Based on a Newly Devised State Action Test

Rawson appealed the District Court's orders to the Ninth Circuit, which reversed the trial court's conclusion that Recovery Innovations and its staff were not state actors, reinstated the constitutional claims, and remanded for further proceedings. Pet. App. 1-30. In reaching this conclusion the Ninth Circuit reasoned that the state action question called for "normative judgment," which allowed the court to diminish the importance of several factors that had previously supported decisions finding no state actor, such as the fact that Recovery Innovations and its staff were nominally private actors, had exercised independent professional medical judgment, and were not statutorily required to petition for additional commitment. *Id.* at 8, 28-29. Then, rather than following past precedents involving similar statutory schemes, the Ninth Circuit broadly analogized "the arrangement the State has devised for involving private actors in long-term involuntary commitments" to the situation of "private contract physicians rendering treatment services for prisoners at a state prison." *Id*. at 29.

Based on its "prison doctor" analogy, the Ninth Circuit chose to focus on an entirely different set of factors than had previously been applied by other federal courts in this circumstance. Making matters worse, the Ninth Circuit stated its determinative factors so broadly that they could apply to any private action that requires judicial oversight and/or involves

involuntary commitment, including " . . . the necessity of state imprimatur to continue detention, the affirmative statutory command to render involuntary treatment, the reliance on the State's police and *parens patriae* powers, [and] the applicable constitutional duties . . . ." *Id*. (alteration supplied).

Recovery Innovations and the other Defendants filed a petition for panel rehearing and rehearing en banc based upon the patent conflicts of law within the Ninth Circuit's state action case law and conflicts with other Circuit Courts of Appeals. The Ninth Circuit denied the petition on October 15, 2020. Pet. App. 108-109. Thereafter, Petitioners timely filed this Petition for Writ of Certiorari.

REASONS FOR GRANTING THE PETITION

The Ninth Circuit's conclusion that a private mental healthcare provider's exercise of independent, professional judgment will constitute state action where that judgment may result in a court order committing an individual to a care facility raises an important and highly consequential question of federal law upon which the lower federal courts are divided. Establishing uniformity of constitutional doctrines is a core basis for the exercise of this Court's jurisdiction, and the circumstances of this petition clearly satisfy that fundamental criterion. *See* R. 10(a), Rules of the Supreme Court of the United States.

Although this Court has been reluctant to announce any one rule for determining state action, *Lebron*, 513 U.S. at 378, a long line of Supreme Court precedent confirms that, at the very minimum, private actors are not state actors when exercising their own judgment in private settings, even if they follow state procedures or take actions against another's will. *Blum v. Yaretsky*, 457 U.S. 991, 1008 (1982). A private actor at a private healthcare facility making independent decisions based on his or her professional judgment is not employing state power. The fact that this exercise of professional judgment may result in a commitment order does not transform that purely private conduct into state action.

Review is additionally warranted because the state action test adopted by the Ninth Circuit threatens the mental health profession in a manner that could have a profound impact on the availability of private metal health care, particularly in emergent circumstances. The lower court wrongly concluded that a private mental health facility and its staff act as *parens patriae* when evaluating and treating individuals subject to a commitment order; it is undisputed, however, that these professionals have no ability or power to "affirmatively command" individuals to receive evaluation and treatment. They are exercising independent professional judgment and presenting their findings to a court, which is the sole body with authority to order commitment, evaluation and treatment. That is not *parens patriae* under any definition of the term. Nor does a private healthcare provider

exercise any sovereign power when providing treatment; it is merely making decisions based on the expertise of its professional staff, as the ITA's regulatory scheme permits it to do. A contrary understanding of the ITA would sweep in countless aspects of regulated industry, subjecting ordinary private decisions to constitutional attacks. The Ninth Circuit's state action holding is so starkly at odds with this Court's state action caselaw, and so harmful to the public, that reversal is necessary and the petition should be granted.

I. Whether Private Actors Are Acting "Under Color of Law" When Providing Professional Mental Healthcare Services to an Individual Subject to Involuntary Commitment is an Important and Unsettled Question

The Ninth Circuit's decision below relied on an array of factors that circumvent and undermine the central question posed by the state action doctrine: whether there is a sufficient nexus between the challenged action (here, evaluation and treatment of an individual's mental health) and the government such that the private action should be treated as if that of the state. *Brentwood*, 531 U.S. at 295 ("[S]tate action may be found if, though only if, there is such a 'close nexus between the State and the challenged action' that seemingly private behavior 'may be fairly treated as that of the State itself.' ") (citation omitted). The Ninth Circuit justified its departure from its own past precedents, and those of other Circuits, by explaining that "[t]he determination of whether a nominally

private person or corporation acts under color of state law 'is a matter of normative judgment, and the criteria lack rigid simplicity.'" Opinion, at 8 (citing *Brentwood*, 531 U.S. at 295–96).

It is true that *Brentwood* appeared to open the door to case-specific factors by recognizing that, due to the "range of circumstances that could point toward the State behind an individual face, no one fact can function as a necessary condition across the board for finding state action; nor is any set of circumstances absolutely sufficient, for there may be some countervailing reason against attributing activity to the government." *Id.* However, the Ninth Circuit's decision below demonstrates how, by selectively mixing and matching factors from an assortment of state action "tests" promulgated by divergent precedents, and by emphasizing "normative judgment," it has fundamentally frustrated the basic need "to plot a line between state action subject to Fourteenth Amendment scrutiny and private conduct (however exceptionable) that is not." *Brentwood*, at 295 (citing *National Collegiate Athletic Ass'n v. Tarkanian*, 488 U.S. 179, 191 (1988); *Jackson*, 419 U.S. at 349).

As the Opinion notes, the Ninth Circuit has "recognized at least four different general tests that may aid us in identifying state action: '(1) public function; (2) joint action; (3) governmental compulsion or coercion; and (4) governmental nexus'"—each of which has its own set of factors. Pet. App. 8 (citing *Kirtley v. Rainey*, 326 F.3d 1088, 1092 (9th Cir. 2003) (citation omitted)). But to liberate itself from the balancing

required by these tests, the Ninth Circuit pointed at the still-undecided aspect of this Court's state action jurisprudence: "[w]hether these different tests are actually different in operation or simply different ways of characterizing the necessarily fact-bound inquiry that confronts the Court in such a situation need not be resolved here." Pet. App. at 8 (citing *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 939 (1982)). This, the court concluded, allowed it to devise its own unique test for state action.

The Ninth Circuit's understanding of the state action inquiry, therefore, resulted in a test that avoided key aspects of each articulation of the test. Under the "public function" analysis, for example, this Court has explained that the "relevant question is not simply whether a private group is serving a 'public function,'" but rather it "is whether the function performed has been 'traditionally the *exclusive* prerogative of the State.'" *Rendell-Baker v. Kohn*, 457 U.S. 830, 842 (1982) (citations omitted; italics in original). "The Court has stressed that 'very few' functions fall into that category." *Manhattan Cmty. Access Corp. v. Halleck*, 139 S. Ct. 1921, 1929 (2019) (citing *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 158 (1978)).[5] This critical

[5] "The Court has ruled that a variety of functions do not fall into that category, including, for example: running sports associations and leagues, administering insurance payments, operating nursing homes, providing special education, representing indigent criminal defendants, resolving private disputes, and supplying electricity." *Manhattan Cmty. Access Corp.*, 139 S. Ct. at 1929 (citations omitted).

factor, however, was diminished by the Ninth Circuit's decision.

The central question posed by the governmental compulsion inquiry, for further example, holds that coercion may exist where the State "has exercised coercive power or has provided such significant encouragement, either overt or covert, [such] that the choice must in law be deemed to be that of the State." *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982). This factor, too, was not given any weight in the lower court's decision.

Likewise, the joint action test holds that a § 1983 claim may lie against a private party who "is a willful participant in joint action with the State or its agents." *Dennis v. Sparks*, 449 U.S. 24, 27-28 (1980) (citations omitted); *Lugar*, 457 U.S. at 941 (accord). Again, this factor was provided no weight below.

Like the tests discussed above, this Court's "close nexus" test shows the importance of weighing competing factors when determining state action.[6] Under *Blum*, "[t]he complaining party must [] show that 'there is a sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the latter may be fairly treated as

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[6] Confusing the matter even further, the Ninth Circuit has collapsed the nominally separate "joint action" and "governmental nexus" tests into a hybrid "close nexus/joint action" test. *See Jensen*, 222 F.3d at 575 (describing a " 'close nexus/joint action' test"). Notably, this Court in *Blum* described the "joint participation" inquiry of *Lugar* as a "decidedly different question of 'state action' " from that facing the *Blum* court. *See Blum*, 457 U.S. at 1013, n. 2.

that of the State itself.'" 457 U.S. at 1004 (citing *Jackson*, 419 U.S. at 351) (quotations omitted; emphasis supplied). The Court explained that the "purpose of this requirement is to assure that constitutional standards are invoked *only* when it can be said that the State is responsible for the specific conduct of which the plaintiff complains." *Id*. (emphasis added).

In determining whether state action exists, the reviewing court must, therefore, first identify "the specific conduct of which the plaintiff complains," paying "careful attention to the gravamen of the plaintiff's complaint." *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 51 (1999) (quotation omitted). "Whether such a 'close nexus' exists . . . depends on whether the State 'has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed that of the State.'" *Id.* at 52 (citation omitted); *see also Duffield v. Robertson Stephens & Co.*, 144 F.3d 1182, 1202 (9th Cir. 1998), *overruled on other grounds by EEOC v. Luce, Forward, Hamilton & Scripps*, 345 F.3d 742 (9th Cir. 2003) ("The touchstone of state action in the context of governmental oversight is whether the government has moved beyond mere approval of private action into the realm of 'encouragement, endorsement, and participation' of that action.") (citation omitted). Conduct "by private entities with the mere approval or acquiescence of the State is not state action." *Am. Mfrs.*, 526 U.S. at 52. Nor does "[p]rivate use of state-sanctioned private remedies or procedures rise to the level of state action."

Tulsa Prof'l Collection Servs., Inc. v. Pope, 485 U.S. 478, 485 (1988); *Lugar*, 457 U.S. at 937.

Applying the "close nexus" test in *Blum*, this Court held that decisions made by doctors and administrators to transfer patients to nursing homes, thereby terminating their Medicaid benefits, did not constitute state action. Critically, the Court found that the decisions at issue turned "on medical judgment made by private parties according to professional standards that are not established by the State." *Blum*, 457 U.S. 991 at 1008. Because state officials did not have the power to approve or disapprove the nursing home decisions, the Court held that the decisions were not state action. *Id.* at 1010.

In sum, this Court reiterated the one common factor that is present throughout its state action tests: a private party's "exercise of the choice allowed by state law where the initiative comes from it and not from the State, does not make its action in doing so 'state action' for purposes of the Fourteenth Amendment." *Jackson*, 419 U.S. at 357 (footnote omitted). " . . . [P]ermission of a private choice cannot support a finding of state action." *Am. Mfrs.*, 526 U.S. at 53 (emphasis added).

This Court has reliably applied that central rule for decades to enforce the "critical boundary" between private and governmental conduct, "thereby protect[ing] a robust sphere of individual liberty." *Manhattan Cmty. Access Corp.*, 139 S. Ct. at 1934. "Faithful application of the state action requirement in these cases ensures that the prerogative of regulating

private business remains with the States and the representative branches, not the courts." *Am. Mfrs.*, 526 U.S. at 52. On this basis alone, certiorari should be granted.

II. The Lower Federal Courts Are Divided on What Factors to Employ When Determining Whether a Private Party is a State Actor

The Ninth Circuit's decision emphasizes the highly unsettled nature of the state action inquiry in the lower federal courts and its consequential impact. Indeed, the decision below, by adopting a very different array of "state action" factors, reached an opposite conclusion than those reached by numerous other federal courts when presented with the same "state action" question under similar state involuntary commitment laws. *See Rosenberg*, 996 F. Supp. at 349 (citing cases). These starkly different results, alone, warrant review because a wrongful application of the state action doctrine exposes private persons to liability for constitutional injuries—a result that the Legislature and Constitution's Framers forbade when enacting § 1983 and drafting the Fourteenth Amendment. *Civil Rights Cases*, 109 U.S. at 11. But there is more.

The Ninth Circuit's adoption of a "normative" inquiry, moreover, eliminated the long-settled presumption that private medical providers are not state actors when exercising independent professional judgment. *See Blum*, 457 U.S. at 1008 (There can be no state action when the challenged private acts "ultimately turn

on medical judgments made by private parties according to professional standards that are not established by the State."); *see also Sutton*, 192 F.3d at 835; *Harvey*, 949 F.2d at 1130; *Price*, 939 F.2d at 707-708. The Ninth Circuit's radical shift in the factors applicable to the state action inquiry creates numerous conflicts with other federal courts and warrants review.

Most notably, the decision below was made even though the Ninth Circuit's earlier decision in *Jensen* had expressly recognized that "[w]hen purely private actors obtain the help of a private physician to bring about the involuntary admission and detention of an allegedly mentally ill person for psychiatric examination, courts that have addressed this scenario in the § 1983 context have held that there is no state action." *Jensen*, 222 F.3d at 575.[7] This observation is consistent

[7] As the Ninth Circuit here recounted, the *Jensen* court did conclude that the conduct of a private psychiatrist working at a county hospital in Oregon "'constituted state action' under the close nexus/joint action test." Pet. App. 13. However, the psychiatrist's conduct at issue in *Jensen*, was notably different from the conduct of Recovery Innovations' employees here. In a second opinion from the Ninth Circuit regarding the same dispute, it clarified that the psychiatrist was part of a "mental health team" along with government agents: "Lane County's procedure in such cases employed a mental health team of which the private contract psychiatrist was only one member. . . . During the second and third day of Jensen's custody, other members of the team consulted and exchanged views on the Jensen case." *Jensen v. Lane County*, 312 F.3d 1145, 1148 (9th Cir. 2002). Further the *Jensen* plaintiff was held at "a county facility that has a contract with private Sacred Heart General Hospital ("SHGH") under which the hospital provides administration and hospital staff to the county." *Jensen*, 222 F.3d at 573. Here, there was no public-private "mental health team", nor any consultation between

with numerous other federal court decisions, which—although they applied a variety of tests including "state compulsion," "close nexus/joint action," and "public function" formulations—have consistently rejected as a general proposition that state-law involuntary commitments by private parties gives rise to "state action:"

> These three tests have been employed by various courts of appeals to determine whether involuntary commitment by private parties pursuant to state statute converts private conduct into state action for purposes of § 1983. The First, Third (by affirming the district court opinion), Fourth, Sixth, Seventh, Tenth, and Eleventh Circuits all agree that such action does not constitute state action.

Rosenberg, 996 F. Supp. at 349 (citations omitted).

Indeed, after *Jensen*, other Circuits held that even extensive private involvement in involuntary commitments does not give rise to "state action." In *Estades-Negroni v. CPC Hosp. San Juan Capestrano*, 412 F.3d 1 (1st Cir. 2005), for example, the First Circuit affirmed the dismissal of the plaintiff Estades' § 1983 claims against a private hospital, a private healthcare services provider, and several private physicians after she was involuntarily committed to the hospital. According to Estades' allegations, when one of defendant physicians brought her to the hospital, she "expressed a

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county mental health staff and Recovery Innovations about Rawson's case.

desire to leave. However, she was forcibly restrained, injected with medication, and placed in a secluded room." *Estades-Negroni*, 412 F.3d at 3. Acting pursuant to Puerto Rico laws, her son then filed a petition with "the local trial court, requesting that it authorize Estades' involuntary hospitalization. In Puerto Rico, an individual can be involuntarily committed only pursuant to a court order. One or more [defendants] also filed documents with the Court . . . in support of [the] petition," pursuant to the same state-law scheme. *Id.* Then:

> Estades remained involuntarily committed at [the] Hospital for a period of nineteen days. During that time, she alleges that she was secluded from other patients, physically restrained, injected with medication against her will, physically assaulted by an employee of [the] Hospital, and physically and emotionally mistreated by other Hospital employees. At the end of the nineteen days, and as a condition of her discharge, Estades claims that she was coerced into agreeing that her commitment had been voluntary.

Id. Notwithstanding these allegations (which were presumed to be true), the First Circuit held that the various private parties involved in her involuntary commitment and treatment could not be state actors, as a matter of law. *Id.* at 4-9.

Similarly, in *McGugan v. Aldana-Bernier*, 752 F.3d 224 (2d Cir. 2014), *cert. denied*, 575 U.S. 938 (2015), the Second Circuit affirmed the dismissal of § 1983 and other claims brought by plaintiff McGugan against a

private hospital "licensed by the New York State Office of Mental Health [ ] to provide psychiatric services," as well as several of its private medical and nursing employees. *McGugan*, 752 F.3d at 226-227. After being detained by police, McGugan was sedated and transferred by ambulance to the hospital, where she woke up restrained to a hospital bed. *Id.* at 227. At the hospital, a defendant physician entered orders permitting McGugan to be forcibly medicated and she was injected multiple times with anti-psychotics. *Id.* at 228. The following day, a second defendant physician performed an evaluation and "certified McGugan as having a mental illness likely to result in substantial harm to herself or others, thus rendering McGugan subject to involuntary admission to the [hospital] under New York Mental Hygiene Law § 9.39." *Id.* at 229. Later, another defendant physician "certified McGugan for further confinement under § 9.39, concluding that McGugan was a danger to herself or others . . . ." *Id.* McGugan thus remained confined in the hospital for several more days. *Id.* The Second Circuit, following the rationale of its prior *Rosenberg* decision and declining several invitations from McGugan to discard it, held that McGugan did not establish state action necessary to support her § 1983 claims against those involved in her involuntary commitment and treatment. *Id.* at 229-231.

When also factoring in the opinions of the First Circuit in *Estades-Negroni* and the Second Circuit in *McGugan*, the resultant fact is that a majority of Circuits have generally held that involuntary

commitment by private parties pursuant to state statute does not amount to state action. Even presuming that some of these decisions were on grounds of the "public function" test alone, at minimum, this state of affairs should have represented "a countervailing reason against attributing activity to the government," *Brentwood*, 531 U.S. at 295-296, that should have been openly acknowledged by the Ninth Circuit.

The inter-Circuit conflict engendered by the Ninth Circuit's decision is brought into even greater tension when it is understood that the majority of the factors cited by the Ninth Circuit in support of its finding state action were previously considered and rejected by the First Circuit in *Estades-Negroni* and the Second Circuit in *McGugan*. The decision below, for example, relied on *West v. Atkins*, 487 U.S. 42 (1988), for the proposition that " . . . any deprivation effected by Defendants here was in some sense caused by the State's exercise of its right, pursuant to both its police powers and *parens patriae* powers, to deprive Rawson of his liberty for an extended period of involuntary civil commitment." Pet. App. 18 (citations omitted).

However, the Second Circuit in *McGugan* reached the opposite conclusion regarding the same exercise of power, holding that "[h]ere, as in *Rosenberg*, the state endowed Defendants with the authority to involuntarily hospitalize (and medicate) the plaintiff, but it did not compel them to do so." *McGugan*, 752 F.3d at 229. In other words, the mental healthcare providers exercised independent professional judgment, which cannot be attributed to the state.

The Ninth Circuit's second factor argued that "the State's particular Fourteenth Amendment duties toward persons involuntarily committed weighs toward a finding of state action in this case." Pet. App. 21. This of course refers to the requirement that such persons be afforded due process protections, and in this case whether such protections are implemented in practice was and is a matter of state law and procedure.

As such, the Ninth Circuit's reliance on this factor is in tension with the First Circuit's *Estades-Negroni* opinion, which rejected Estades' argument "that [the defendants] should be regarded as state actors 'because they relied upon an unconstitutional state statutory scheme to involuntarily hospitalize' her," explaining that "even though 'the procedural scheme created by [a] statute . . . is the product of state action,' a private party normally does not become a state actor merely by invoking it." 412 F.3d at 7 (citing *Lugar*, 457 U.S. at 939 n. 21 (internal citation omitted)); *see also Spencer*, 864 F.2d at 1381 ("The statutes authorizing . . . private activities may or may not be constitutional; the activities themselves remain private." (internal citations omitted)).

The Ninth Circuit cited as an additional supporting factor "the role of state authorization and approval," specifically referencing the ITA court petition process and the fact that "the reviewing state court here unquestionably has the power to disapprove a petition for involuntary commitment and treatment." Pet. App. 25.

This is in glaring contrast with *Estades-Negroni*, where the First Circuit plainly held that the fact that "[the defendants] sought court authorization for Estades' commitment," could not "justify a finding that [the defendants] are state actors." 412 F.3d at 6 (citing *Bass v. Parkwood Hosp.*, 180 F.3d 234, 243 (5th Cir. 1999) ("The fact that the defendants . . . invoked the assistance of the courts . . . is not sufficient to show a nexus or joint effort between the defendants and the state.") (additional citations omitted). In addition, this Court has clearly held that "[m]erely 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." *Dennis*, 449 U.S. at 28.

Finally, and based on an abbreviated and somewhat vague discussion, the Ninth Circuit found support for state action because "Defendants are charged with applying state protocols and criteria in making evaluation and commitment recommendations, and are 'affirmatively command[ed]' by the state to render treatment without informed consent in many circumstances." Pet. App. 26 (citations omitted).

The Ninth Circuit's conclusory decision on this factor defies a litany of sister Circuit opinions in the involuntary commitment context. *See Estades-Negroni*, 412 F.3d at 6 (that "state statutes provide the mechanism for involuntary commitment" and "the state extensively regulates such commitment" could not "justify a finding that [the defendants] are state actors.") (citations omitted); *Rosenberg*, 996 F. Supp. at 352 ("Compliance with the procedures of the MHL, a

statute that neither forces nor encourages involuntary commitments, does not convert private action into state action. New York's involuntary commitment scheme puts in place due process safeguards for the protection of the person confronted with involuntary confinement—hence, the requirement of evaluations by more than one physician and the reminder to physicians that they consider alternate routes of treatment. The actual decision of whether commitment is warranted, however, is left entirely to the sound medical judgment of physicians"); *McGugan*, 752 F.2d at 11 ("McGugan has not, however, alleged a meaningfully different scheme than the one at issue in *Rosenberg*. In *Rosenberg*, the plaintiff was involuntarily hospitalized pursuant to a scheme where hospitals, subject to extensive regulation by the state, were permitted to detain patients certified to require involuntary treatment."); *Harvey*, 949 F.2d at 1131 ("Mrs. Harvey cannot seriously allege that the relevant provisions of the Mental Health Code were enacted because the state wants to encourage commitments . . . .") (citing *Spencer*, 864 F.2d at 1379; internal quotation marks omitted)).

For the foregoing reasons, the Ninth Circuit's decision on the "color of law" issue has created an inter-Circuit conflict with authoritative decisions of other Courts of Appeals that must be resolved by this Court.

A. The Ninth Circuit's Test is Too Broad and Flexible to Provide Guidance as to What Might Constitute State Action

The shifting and consequential effect of the Ninth Circuit's decision is best demonstrated by its incomplete iteration of the "public function" test. Applying that test, the Ninth Circuit had previously determined that there can be no state action "[w]hen purely private actors obtain the help of a private physician to bring about the involuntary admission and detention of an allegedly mentally ill person for psychiatric examination." *Jensen*, 222 F.3d at 575. In the decision below, however, the Ninth Circuit disposed of this critical factor in favor of its "normative judgment" approach, explaining in a footnote that " . . . given that the historical evidence was not directly evaluated by the district court, and that the remainder of our analysis is sufficient to support a judgment in Rawson's favor, we decline to resolve the historical exclusivity question." Pet. App. 16, n. 8. At no point did the Ninth Circuit acknowledge that other Circuit decisions cut against "the remainder of [its] analysis."

Then, in a subsequent footnote regarding its citation of *West v. Atkins*, the Ninth Circuit acknowledged that "[i]n a now-vacated opinion we previously assumed that *West* was decided under the 'public function' test." Pet. App. 19, n. 10 (citing *Pollard v. The GEO Grp., Inc.*, 629 F.3d 843, 856 (9th Cir. 2010), *rev'd sub nom. Minneci v. Pollard*, 565 U.S. 118 (2012)). After rationalizing its reluctance "to peg *West* to one of our four recognized tests," the Ninth Circuit nevertheless

concluded that even "understood as undertaking a 'public function' analysis . . . *West* unquestionably supports a finding of state action here." *Id.* Thus, through circular reasoning, the Ninth Circuit found "unquestionable support" from a "'public function' analysis" that it had expressly declined to perform.

This troubling result is the latest and most radical consequence of the amorphous state action jurisprudence. The Ninth Circuit now superficially "recognizes" the existence of established "tests," but follows its own unguided "normative judgment." Under this regime, reviewing courts are free to loosely apply whichever factors will lead to a desired outcome, while disregarding factors that militate against that result. This arbitrary approach to serious questions of private liability for an alleged constitutional injury means that courts are completely free to avoid applying or considering any given test, even where such a test would otherwise predictably lead to a clear result on the state action question. This selective application of factors means that private parties are left without any reasonably foreseeable basis to evaluate their potential future risk for § 1983 claims and to harmonize their risk management policies and practices accordingly. Coupled with the attendant deprivation of qualified immunity for such claims, private actors are now in uniquely unfavorable position as a result of the Ninth Circuit's decision.

III. This Case Provides an Excellent Vehicle to Resolve an Important Question of Broad Public Importance

This case presents an excellent vehicle for resolving the question presented and providing guidance in this critical area of federal law. The issue of whether a private healthcare provider is a state actor when providing mental health services to an individual subject to involuntary commitment is clearly raised and there are no other threshold or jurisdictional questions that would frustrate this Court's ability to reach the question presented. The record has been fully developed below, allowing this Court to consider the issue in a specific, non-abstract setting. Nor, given the existing split of authority, is there any need for further percolation of the issue.

Indeed, if allowed to stand unreviewed, the Ninth Circuit's decision would threaten a large number of private healthcare providers who operate under similar regulatory schemes. Healthcare professionals depend on clear rules with regard to their duties under the numerous state and federal statutes that require some interaction with or reporting to the government. The Ninth Circuit's decision in this case could chill the profession by holding each healthcare professional potentially liable for civil rights judgments for simply prescribing a course of treatment in emergent circumstances. Private health providers are especially at risk in this circumstance because they do not benefit from the same qualified immunity protection as government employees and do not have the means to engage in

continuous constitutional litigation. *See*, *e.g.*, *Jensen*; *Richardson v. McKnight*, 521 U.S. 399 (1997) (holding that employees of privately operated state prisons are not entitled to qualified immunity).

This problem extends beyond Washington State. Obviously, the Ninth Circuit's decision is binding throughout that Court's jurisdiction. Further, as noted during oral argument below, the various states' involuntary commitment schemes are remarkably similar. As such, there is good reason to expect that the Ninth Circuit's conclusions regarding "the necessity of state imprimatur to continue detention, the affirmative statutory command to render involuntary treatment, the reliance on the State's police and *parens patriae* powers, [and] the applicable constitutional duties," Pet. App. 29 (alteration supplied), will be urged by virtually any formerly involuntarily detained person in the nation who seeks to recover the relatively generous remedies afforded by a § 1983 claim. Therefore, the Ninth Circuit's decision affects a rule of national application in which there is an overriding need for national uniformity.

Finally, it should be noted that had the Ninth Circuit affirmed the District Court, Rawson would not have been left without adequate alternative remedies. *See*, *e.g.*, *Pollard*, 629 F.3d at 870 (no justification for *Bivens* claim where "ordinary state tort remedies for negligence or medical negligence against the [private defendant] employees are an adequate, alternative, existing process for protecting [the plaintiff's] interest.") (Restani, J., concurring in part and dissenting in part).

Here, Rawson has not only adequate state law tort remedies, but also a special statutory claim under the ITA itself. *See* Rev. Code Wash. § 71.05.510. Indeed, Rawson has in fact availed himself of all these state law claims, which are now pending in the Pierce County Superior Court.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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