No. 20-1287

In the Supreme Court of the United States

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

Petitioners,

v.

KENNETH RAWSON,

Respondent.

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

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BRIEF IN OPPOSITION

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*Timothy K. Ford
Jesse Wing
MacDONALD, HOAGUE & BAYLESS
705 Second Avenue, #1500
Seattle, Washington 98104
(206) 622-1604
timf@mhb.com
jessew@mhb.com

Sam Kramer
MADIA LAW LLC
323 Washington Avenue N., #200
Minneapolis, Minnesota 55401

Attorneys for Respondent
Counsel of Record

QUESTION PRESENTED

The Court of Appeals panel below found that the petitioners acted under color of state law because of several unusual aspects of their role in the involuntary commitment process prescribed by the applicable state law in 2015. Because of that, and because the relevant record was not fully developed, the panel "declined to resolve" the broader issue of whether ostensibly "private medical professionals involved in longer term, court-ordered involuntary commitment perform a public function, either in general terms or specifically in the State of Washington." Pet. App. 16n.8. The petition presently before the Court nonetheless seeks review of that broader issue: "[w]hether … private healthcare providers become state actors … when they provide mental health services to a person … under the state's involuntary commitment law." Petition i. The question thus presented is:

> Whether the Court should grant review to address a broad legal issue that the court below did not reach because the case was resolved on narrower, case-specific grounds.

STATEMENT OF ADDITIONAL RELATED CASE

In re Detention of K.R., (Washington Court of Appeals No. 47320–8–II), reported at 195 Wn. App. 843, 381 P.3d 158 (2016) (Resp. App. A1-A6).

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INTRODUCTION

There is no compelling reason to review the unanimous panel decision below. It neither creates a circuit split, nor conflicts with this Court's decisions, nor presents a novel or important federal question. Rule 10. Washington's involuntary commitment system is unusual if not unique, and the functions within it that petitioner Recovery Innovations, Inc. ("RII") and its employees performed differed significantly from those of the truly private defendants in the allegedly conflicting lower court cases the petition cites.

Washington law gave the petitioners the authority to initiate and prosecute court proceedings like the one that led to respondent Kenneth Rawson's prolonged wrongful confinement in the name of "the State." *See In re Detention of K.R.*, 195 Wn. App. 843 (2016). Petitioners did so through, and in consultation with, a county-employed Deputy Prosecuting Attorney who was assigned by statute to work with them and represent them on such matters. Two of the individual petitioners were trained in this work by the Deputy Prosecuting Attorney; the third was a full-time state employee moonlighting as RII's medical director.

Petitioner RII and its employees also executed the court orders they obtained, confining Mr. Rawson in a locked facility that RII leased from the State of Washington for that purpose—with government funds—on the grounds of the historic, state-owned Western State Hospital. While Mr. Rawson was so confined, RII and its employees were wholly responsible for

his medical care, which he alleges they provided with deliberate indifference to his rights and safety.

None of the mental health systems involved in the lower court decisions cited in the petition were like Washington's involuntary commitment system in these respects. The defendants in those cases were truly private hospitals or physicians who authorized or supported initial short-term detentions for psychiatric evaluation. Mr. Rawson's complaint against RII involves only the longer term, additional 14- and 90-day commitments that its employees sought and obtained after he was placed in its custody for evaluation. Washington law does not allow people to be deprived of their liberty for such extended periods without a court order, and it does not allow private individuals or physicians—or anyone other than county officers or employees of state- authorized and -funded "evaluation and treatment" facilities like RII—to seek or carry out such court orders.

Moreover, none of the plaintiffs in the cases cited in the petition claimed, as Mr. Rawson does, that they received constitutionally deficient medical treatment while being held in custody under court order, unable to get medical treatment themselves. The panel's judgment that *West v. Atkins*, 487 U.S. 42 (1988) "unquestionably supports a finding of state action" with respect to that aspect of Mr. Rawson's claims (Pet. App. A-19n.10) is clearly correct and not in conflict with any decision of another circuit.

Having found that the petitioners acted under color of state law on these grounds, the panel below found it unnecessary to decide "whether nominally private medical professionals involved in longer term, court-ordered involuntary commitment perform a public function, either in general terms or specifically in the State of Washington." Pet. App. 17n.8. That left in place Ninth Circuit authority that, in general, "mental health commitments *do not* constitute a function 'exclusively reserved to the State,'" *see Jensen v. Lane County*, 222 F.3d 570, 574 (9th Cir. 2000) (emphasis added), belying petitioners' claim of a split on that issue (Pet. 22-23, 35-36).

In sum, the Court of Appeals' decision is a correct application of settled law to a unique set of facts that provides no occasion for this Court's review.

ADDITIONAL OPINION BELOW

In addition to the decisions cited in the petition and set out in its appendix, the following decision of the Court of Appeals of the State of Washington involves this case: *In re Detention of K.R.*, 195 Wn. App. 843, 381 P.3d 15 (Wash. Ct. App. No. 47320–8–II, August 16, 2016). A copy of this decision is appended to this brief. Resp. App. A1-A6.

ADDITIONAL STATE STATUTES INVOLVED

The provisions of the Revised Code of Washington set out in the petition appendix (Pet. App. 110-144) are the current versions of those statutes. However, all of them have been amended—some several times—since the events in this case. *See, e.g.*, Pet. App. 110-11 (RCW 71.05.010, as amended by Wash. Laws 2020 c 302 § 1); Pet. App. 111-125 (RCW 71.05.020, as amended by Wash. Laws 2020 c 256 § 302, c 302 §12). The statutes as they read in early 2015 are appended to this brief. Resp. App. A7-A21.

In addition to these statutes, this case involves the following provisions of the Revised Code of Washington:

RCW 71.05.130 (2014), which provided in relevant part:

> In any judicial proceeding for involuntary commitment or detention, or in any proceeding challenging such commitment or detention, the prosecuting attorney for the county in which the proceeding was initiated shall represent the individuals or agencies petitioning for commitment or detention and shall defend all challenges to such commitment or detention: PROVIDED, That … the attorney general shall represent and provide legal services and advice to state hospitals or institutions … except in proceedings initiated by such hospitals and institutions seeking fourteen day detention.

RCW 71.05.237 (1998), which provides:

> In any judicial proceeding in which a professional person has made a recommendation regarding whether an individual should be committed for treatment under this chapter, and the court does not follow the recommendation, the court shall enter findings that state with particularity its reasoning, including a finding whether the state met its burden of proof in showing whether the person presents a likelihood of serious harm.

STATEMENT OF THE CASE

Ken Rawson was confined and involuntarily medicated at petitioner RII's Western State facility after he complained to a teller at his bank about an error in the deposit of his veterans' benefits. *See In re Detention of K.R.*, 195 Wn. App. at 845 (Resp. App. A2). Mr. Rawson allegedly said to the teller "I wonder if there is, like, people that go around messing with somebody and that is what may be cause [sic] the—the shooting in Colorado." *Id.* at Resp. App. A3. The teller asked him to come back the next day to complete paperwork, but when he did, he was approached by two sheriff's deputies. The deputies found he was carrying a handgun, which he had a permit to carry concealed. *Id.* Although he had committed no crime and "did not display or threaten anyone with his handgun" (*id.*), the deputies transported him to a local hospital.

At the hospital, he was seen by a Clark County Designated Mental Health Professional (DMHP) who—based on an investigation the Washington Court of Appeals later held was statutorily inadequate—decided to have him detained for a 72-hour evaluation. *Id.* The Court of Appeals' decision below describes the lengthy ordeal that followed:

> The DMHP arranged for Rawson to be taken to RII's Lakewood facility in neighboring Pierce County. RII is a private nonprofit corporation. It leases its Lakewood evaluation and treatment facility from the State of Washington on the grounds of one of the State's main psychiatric hospitals, Western State Hospital. RII's Medical Director at Lakewood, [petitioner Dr. Vasant] Halarnakar, is a full-time physician at Western State Hospital. Once at RII, Rawson was evaluated by [petitioners] Clingenpeel and French, who prescribed medication and completed a

> petition for an additional 14 days of intensive treatment, certifying that Rawson was both "gravely disabled" and "presents a likelihood of serious harm to others." See RCW §§ 71.05.170, .210, .230.
>
> They based these conclusions on their evaluations of Rawson and information in the police report. The petition also stated that Rawson "den[ied] [having] any problem other than the bank and police misunderstanding."
>
> The court held a probable cause hearing and granted the 14-day petition on March 10. During the 14-day commitment, Dr. Halarnakar met with Rawson. Dr. Halarnakar's notes indicate that Rawson was calm, cooperative, and polite, but had pressured speech. Though Rawson reported no symptoms of schizophrenia, Dr. Halarnakar wrote that Rawson needed to keep taking his medication. In his second evaluation of Rawson, Dr. Halarnakar documented only that Rawson was argumentative and denied having a mental illness, denied needing antipsychotic medications, and denied having suicidal or homicidal ideations. Dr. Halarnakar nevertheless concluded that Rawson was paranoid, had no insight, and needed further treatment.

Rawson v. Recovery Innovations, Pet. App. 3-4. During this two-week period, Mr. Rawson was held at the RII facility under a court order which required that he be "involuntarily detained …for not more than 14 days involuntary treatment at Recovery Innovations E&T, or Clark County E&T." Order dated March 10, 2015, 9th Cir. ER 1320).

> Dr. Halarnakar and French then petitioned for an additional 90-day commitment, alleging that Rawson had "threatened, attempted, or inflicted physical harm" upon a person or property "during the period in custody." See RCW §§ 71.05.230(8), .290. They recommended that the court involuntarily commit Rawson to Western State Hospital. In response to a later request for the specific statements that were threatening, French conceded Rawson had made no "threatening statements."
>
> Rawson exercised his right to request a jury trial, which was continued multiple times while he remained involuntarily committed at RII. See RCW § 71.05.300.
>
> In preparation for the trial, Dr. Halarnakar and French communicated extensively with the Pierce County Deputy Prosecuting Attorney regarding discharge possibilities, current treatment methods, the

> strength of the evidence against Rawson, and the theory to argue to the jury. See RCW § 71.05.130.

Rawson v. Recovery Innovations, Pet. App. 4-5.

> Meanwhile, a court-appointed expert psychiatrist evaluated Rawson and concluded that he was not dangerous, his frustrations were not unreasonable, and he had no symptoms related to psychosis or a mood disorder.
>
> On April 29, almost two months after Rawson's arrival, RI finally released Rawson pursuant to an attorney-negotiated agreement.

Id. Although the 14-day commitment order expired and the 90-day petition was never acted upon, Mr. Rawson was held during this additional month under a series of court-issued continuance orders which required him to remain under treatment at RII's Western State facility. *See* Pet. App. 5, 103; RCW 71.05.310 (Resp. App. A18).

The year after Mr. Rawson's release, the state Court of Appeals reversed the commitment orders because of the DMHP's failure to consult with the doctors who had examined him at the hospital. *In re the Detention of K.R.*, 195 Wn. App. 847-48 (Resp. App. A6). Mr. Rawson then filed the lawsuit below. His complaint made both federal and state claims. *See* Pet. App. 160-62. His federal claims alleged that the petitioners had deprived him of rights under the Fourth and Fourteenth Amendments by making false or misleading statements in their petitions to extend his confinement, physically confining him without legal cause, and forcibly injecting him with psychoactive medications with deliberate indifference to his rights and safety, all under color of state law. Pet. App. 145, 158-160.

After several rounds of summary judgment briefing, the District Court dismissed Mr. Rawson's federal claims, holding that the defendant/ petitioners did not engage in the challenged conduct under color of state law because their judgment was not "overcome" by the Deputy Prosecuting Attorney they worked with. Pet. App. 106-107. However, it denied the defense motions for summary judgment of dismissal of Mr. Rawson's state law claims, which included claims of false imprisonment, medical malpractice, and violation of the state Involuntary Treatment Act. Pet. App. 62, 64. The District Court then exercised its discretion under 28 U.S.C. 1367(c) to dismiss the pendant state claims without prejudice. Those claims were then refiled in state court, where they have been held in abeyance pending this appeal. *See* Pet. 39.

Mr. Rawson appealed from the dismissal order, and a panel of the Ninth Circuit unanimously reversed. It began its discussion of the color of law issue by focusing on the specific conduct the lawsuit challenged.

> Before we can answer the question of whether Defendants acted under color of law, we must identify the "specific conduct of which the plaintiff complains." *Caviness v. Horizon Cmty. Learning Ctr., Inc.*, 590 F.3d 806, 812 (9th Cir. 2010) (quoting *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 51 (1999)). Here, Rawson seeks to hold Defendants liable for certain actions relating to the 14-day and 90-day petitions, as well as his detention and forcible medication pursuant to the authority provided by those petitions. The specific alleged conduct Rawson challenges includes involuntarily committing him without legal justification, knowingly providing false information to the court, and forcibly injecting him with antipsychotic medications without his consent. The relevant inquiry is therefore whether Defendants' role as custodians, as litigants, or as medical professionals constituted state action.

Pet. App. 7-8 (footnote omitted). The decision specifically noted that Mr. Rawson's claims did not challenge "his initial 72-hour confinement" pursuant to the order of the county DMHP. Pet. App. 7n.3.

Applying and analyzing "four different general tests that may aid us in identifying state action," derived from this Court's decisions, the panel concluded:

> Given 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, the applicable constitutional duties, the extensive involvement of the county prosecutor, and the leasing of their premises from the state hospital, we conclude that "a sufficiently close nexus between the state and the private actor" existed here "so that the action of the latter may be fairly treated as that of the State itself."

Pet. App. 29 (quoting *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 350 (1974), and *Jensen v Lane County*, 222 F.3d 570, 575 (9th Cir. 2000)). Because it so concluded on these bases, the panel found it unnecessary to reach the far broader question of whether involuntary commitment in Washington and elsewhere always constitutes state action: "[G]iven 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 (citations omitted, emphasis added).

Petitioners sought rehearing, but the panel unanimously denied it, and no circuit judge requested a vote on petitioner's alternative petition to have the case reheard by the full court *en banc*. Pet. App. 108.

REASONS FOR DENYING THE WRIT

I. THE DECISION BELOW NEITHER CREATES NOR REVEALS ANY CONFLICT AMONG THE CIRCUITS, BECAUSE THE DEFENDANTS' ACTIONS IN THIS CASE DIFFERED SIGNIFICANTLY FROM THOSE OF THE DEFENDANTS IN THE CASES PETITIONERS CITE.

The Court of Appeals panel below reached its decision by reciting, considering, and applying principles and tests for state action derived directly from this Court's opinions.

> We have 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."

Pet. App. 8. Petitioners call this "an entirely different set of factors than had previously been applied by other federal courts," the Ninth Circuit's "own unique test," and "a very different array of 'state action' factors" from those applied elsewhere. Pet. 17, 22, 26. That is beyond hyperbole. Although there are some "semantic variations," *Rodriguez v. Plymouth Ambulance Serv.*, 577 F.3d 816, 823 (7th Cir. 2009), essentially the same tests are applied in other circuits, in the cases cited in the petition and many others.[1]

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[1] *Compare, McGugan v. Aldana-Bernier*, 752 F.3d 224, 229 (2d Cir. 2014) ("the 'compulsion test' … the 'close nexus test' or 'joint action test', or … the 'public function test'"); *Estades-Negroni v. CPC Hosp. San Juan Capestrano*, 412 F.3d 1, 4–5 (1st Cir. 2005) ("the state compulsion test, the nexus/joint action test, and the public function test…. "); *Doe v. Rosenberg*, 996 F. Supp. 343, 349 (S.D.N.Y. 1998), *aff'd*, 166 F.3d 507 (2d Cir. 1999) ("These three tests have been employed by various courts of appeals …."). *Accord, U.S. v. Miller*, 982 F.3d 412, 422 (6th Cir. 2020) ("the Supreme Court has stated that what is fairly attributable is a matter of normative judgment.… It … uses different factors or tests in different contexts …. a "function" test … a "compulsion" test … a "nexus" test …."); *Davison v. Randall*, 912 F.3d 666, 679–80 (4th Cir. 2019) ("a matter of normative judgment, and the criteria lack rigid simplicity"); *U.S. v. Esquenazi*, 752 F.3d 912, 926–27 (11th Cir. 2014) (state action is "a matter of normative judgment [whose] criteria lack rigid simplicity," and relevant factors include "significant encouragement" and "public purpose …."); *Sykes v. Bank*

Petitioners rest their case on a partial handful of decisions from other circuits—*McGugan, Estades-Negroni, and Rosenberg*—where the involuntary mental health evaluation or treatment of the plaintiff was found not to have involved state action, on the facts presented there. Pet. 26-34. They don't mention that other courts have reached different results applying essentially the same tests to different facts and circumstances.

> Other district courts have found state action in the context of involuntary commitment where there was more significant interdependence or entwinement between the state and hospital or doctors than in the cases holding to the contrary. *See, e.g., Ruhlmann v. Ulster County Dep't of Soc. Servs.*, 234 F.Supp.2d 140, 165, (N.D.N.Y. 2002) (finding material issue of fact as to whether state action issue was satisfied under the compulsion test); *Tewksbury v. Dowling*, 169 F.Supp.2d 103, 109 (E.D.N.Y. 2001) (finding that medical defendants acted jointly with state actors and the decision to commit was not made pursuant to "independent medical judgment"); *Moore v. Wyo. Med. Ctr.*, 825 F.Supp. 1531 (D.Wyo. 1993); *Rubenstein v. Benedictine Hosp.*, 790 F.Supp. 396 (N.D.N.Y. 1992) (finding state action where the defendant hospital had a contract with the county to provide the involuntary commitment services at issue).

Schorr v. Borough of Lemoyne, 265 F. Supp. 2d 488, 494–95 (M.D. Pa. 2003): *see also* *Jensen v. Lane* County, 222 F.3d at 575-76 and federal cases cited at note 12, below.

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of America, 723 F.3d 399, 406 (2d Cir. 2013) ("a matter of normative judgment" so "no one fact can function as a necessary condition … nor is any set of circumstances absolutely sufficient."); *Rodriguez,* 577 F.3d at 823–24 (there are "several tests for … the "range of circumstances" that might constitute state action. …. We … describe these tests as the symbiotic relationship test, the state command and encouragement test, the joint participation doctrine and the public function test."); *Conner v. Salina Reg'l Health Ctr.,* 56 F. App'x 898, 902 (10th Cir. 2003) ("'[w]hat is fairly attributable is a matter of normative judgment …. [W]e have utilized … a variety of approaches … the close nexus, symbiotic relationship, joint action, and public function tests."); *S.P. v. City of Takoma Park*, Md., 134 F.3d 260, 269 (4th Cir. 1998) (noting that private entities may be "regulated by the state acts under color of state law (1) when there is close nexus, or joint action … (2) when the state has, through extensive regulation, exercised coercive power over, or provided significant encouragement … or (3) when the function performed … has traditionally been an exclusive public function."); *Ellison v. Garbarino*, 48 F.3d 192, 195 (6th Cir. 1995) ("the public function test, the state compulsion test, and the nexus test.") (Citations, footnotes, and internal punctuation omitted throughout).

Similarly, in this case, the panel reached the result it did because of substantial, material differences between the functions performed by the petitioners and those of the defendants whose status was at issue in the cases petitioners cite. It was not "an entirely different set of factors" but an entirely different set of facts that produced the decision below.

The differences stem in large part from significant differences between Washington law and the laws and procedures of other states—although the unusual facts surrounding Mr. Rawson's detention distinguish his claims case even from others in Washington itself. *See* Pet. App. 14-15 (distinguishing *Hood v. King County*, 743 F. App'x 79 (9th Cir. 2018)).

Mr. Rawson's complaint alleges that the petitioners violated his constitutional rights in three ways, as to each of which their conduct, and their authority, differed from that of the defendants in the cases relied on in the petition. They acted on behalf of "the State," with and through a state deputy prosecuting attorney, in petitioning for orders that prolonged Mr. Rawson's confinement for almost two months beyond the 72- hour evaluation for which he was originally committed. They held him in custody pursuant to those orders. And while he was so held they were solely responsible for his medical care, which they provided with deliberate indifference to his rights and safety. *See* Amended Complaint, Pet. App. A-158-59.

A. Petitioners acted as "the State," jointly with a state official.

Unlike the defendants in the other-circuit cases petitioners cite, the petitioners here actually initiated and prosecuted the court proceedings that were required to hold Mr. Rawson for the last 52 days of his confinement. Petitioners Clingenpeel and French were the named petitioners on the 14-day confinement petition; Halarnakar and French were named on the 90-day petition; both petitions identified them as agents of "Recovery Innovations Evaluation and Treatment, a facility certified by the Department of Social and Health Services." *See* Petitions, 9th Cir. ER 1511, 1516.

In initiating these proceedings, the panel below noted that petitioners were "required to apply state-promulgated criteria." Resp. App. 29n.15 (contrasting *Blum v. Yaretsky*, 457 U.S. 991, 1006 (1982)).[2] They also acted in the name of "the State". *See In re Detention of K.R.,* 195 Wn. App. at 844 (Resp. App. A1) ("The State filed a petition to detain [Kenneth Rawson] and for a 14–day involuntary treatment."); RCW 71.05.237 (requiring findings regarding "whether the state met its burden of proof" in commitment proceedings). That designation gave them the standing to go to court on a matter in which they had no personal interest. *See Herrold v. Case*, 42 Wn. 2d 912, 916, 259 P.2d 830 (1953) (party whose "interests in the right asserted does not differ from that of the public generally" lacks standing to sue).

[2] The panel also recognized that petitioners "exercised professional medical judgment, and were not statutorily required to petition for additional commitment," but it held that the numerous countervailing "facts weigh toward a conclusion that they were nevertheless state actors." Resp. App. 28-29.

Consistent with their appearance as "the State," petitioners were represented in these proceedings by a Pierce County Deputy Prosecuting Attorney who was assigned to them pursuant to statute for that purpose. *See* RCW 71.05.130 (1998). The prosecutor, Ken Nichols, had previously trained petitioners French and Clingenpeel and other RII employees on petitioning for involuntary commitments. 9th Cir. ER 1462-63. He started working with petitioners to secure Mr. Rawson's continued confinement the day after Mr. Rawson arrived at RII, filing the 14-day and 90-day petitions for petitioners, and then representing them on those petitions in court.

When the lawsuit was filed below, petitioners initially claimed their conversations with Mr. Nichols about Mr. Rawson were protected by attorney client privilege. When that claim was withdrawn, it was learned that Mr. Nichols had weighed in on petitioners' decisions regarding Mr. Rawson's treatment and potential discharge and discussed with them legal and medical theories that could justify holding Mr. Rawson despite the absence of evidence he was dangerous. *See* Pet. App. 38-43.[3] Petitioner Halarnakar testified in deposition that he sought Mr. Nichols' "expert" opinion when deciding whether to release Mr. Rawson, and when asked in deposition whether it was "up to Nichols whether to release" Mr. Rawson, he testified

[3] This joint effort was spelled out, among other places, in e mail exchanges between Prosecutor Nichols' and petitioners. *See, e.g.*, Nichols to French 4/9/15: "If he would be agree[able] to [Less Restrictive Alternative] conditions, would that work for us?" (9th Cir. ER 1551). Nichols to Halarnakar 4/15/15 (after outside examiner found Rawson was no danger): "We didn't allege grave disability? Perhaps we should?" (9th Cir. ER 1552).

that the decision was "a combination of that and consultation with … the treatment team." 9th Cir. ER 916-917.

Washington Prosecuting Attorneys are state and county employees who are "attorneys authorized by law to appear for and represent the state and the counties thereof in actions and proceedings before the courts and judicial officers." RCW 36.27.005. The duties of prosecutors and their deputies include advising local legislators and other government officials as well as representing the state and county in court. *See* RCW 36.27.020. RCW 71.05.130 added an additional category of state representatives whom prosecutors are required to advise and represent: "individuals or agencies petitioning for commitment or detention" "[i]n any judicial proceeding for involuntary commitment or detention." The only "individuals or agencies" who can file petitions for 14- or 90-day involuntary commitments in Washington state are county DMHPs and the "professional staff of the facility providing evaluation services" like RII. *See* RCW 71.05.230(1), (4).[4]

[4] In 2016, RCW 71.05.201 was amended to let family members and guardians petition for a 72-hour evaluation (though not a 14- or 90-day commitment) when a county DMHP declines to do so. At the same time, RCW 71.05.130 was amended to exempt such cases from the mandate that prosecuting attorneys represent "all individuals … petitioning for commitment or detention." Although it postdates this case (and involves a different kind of petition), this underscores that, unlike the laws in the cases petitioners rely on, in 2015 Washington law did not allow anyone but a county DMHP or an employee of an Evaluation or Treatment Center like RII to petition for involuntary commitments of any length. It is also significant that when private petitions were authorized prosecuting attorneys could not support them but were assigned only to officially sanctioned petitions or detentions initiated by "the State" through DMHPs or Evaluation and Treatment Centers like RII.

The panel decision below properly found that the "complex and intertwined" relationship created by these laws was a mark of state action.

> The county prosecutor played an outsized role in the duration of Rawson's detention, particularly during the pendency of Rawson's jury trial on the 90-day petition…. The evidence even suggests that the prosecutor altered Dr. Halarnakar's medical diagnosis—from "likelihood of serious harm" to "gravely disabled"—after exposing Defendants' lack of evidence for the former and proposing the latter. Regardless of whether the prosecutor "overrode" any particular decision Dr. Halarnakar otherwise would have made, the evidence at minimum shows that the prosecutor was heavily involved in the decisionmaking process regarding Rawson's detention, diagnosis, and treatment.
>
> …. The ITA' s mandate that civil commitment petitions be argued only by the county prosecutor (or state attorney general), see RCW § 71.05.130, only strengthens the conclusion that the State is a joint participant in this enterprise. The ITA itself insinuates the State into the process of involuntary civil commitment at issue here, regardless of whether the treatment facility is nominally public or private….
>
> … The prosecutor here is not advocating for the private interests of the hospital or mental health professionals…. Instead, Defendants cooperate with the executive arm of the State to further the State's interest in protecting both the public and the patient[5]… Accordingly, the role played by the county prosecutor here, in practice and by statute, supports a finding of state action by the Defendants.

Pet. App. 22-23 (citations omitted).

The petition here omits mention of all of this. It says nothing about the Deputy Prosecutor's involvement and never refers to him by title or by name. In fact, it goes so far as to elide the panel's reference to "the extensive

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[5] *Cf. Willacy v. Lewis*, 598 F. Supp. 346, 350 (D.D.C. 1984):

> A physician who detains an individual "likely to injure himself or others" … is not simply availing himself of a "self-help" remedy with the acquiescence of the state; instead, the function he performs is more akin to the state's power and duty to protect against threats to the general public and to care for those unable to care for themselves.

involvement of the county prosecutor" from a purported quotation of the Court of Appeals' list of the "determinative factors" in its analysis.[6] This omission grossly distorts the petition's depiction of the decision below, which was based in large part on the fact that a state official was "a joint participant in the enterprise" that petitioners were involved in. Pet. App. 21 (quoting *Jackson*, 419 U.S. at 358, and *Jensen*, 222 F.3d at 575). "[W]hen the government acts jointly with the private party" is one of the core circumstances in which this Court has said that there is state action. *Manhattan Community Access Corp. v. Halleck*, 139 S. Ct. 1921, 1928 (2019) (citing *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 941–942 (1982)); *accord*, *Brentwood Academy v. Tennessee Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 311 (2001) (dissenting opinion of Justice Thomas).

Nothing like this kind of joint action with a government official was involved in any of the cases petitioners point to. *See, e.g., Estades-Negroni*, 412 F.3d at 2-3 (petition for involuntary hospitalization was filed by the plaintiff's son, who was not a defendant; the defendants were doctors who suggested he do so or filed "documents" in support); *McGugan,* 752 F.3d at 228 (involuntary treatment authorized by physician certification, no court or

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[6] *Compare* Petition 18 ("'. . . 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 . . .'" [sic]) *with* Pet. App. 29 ("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, the applicable constitutional duties, **the extensive involvement of the county prosecutor, and the leasing of their premises from the state hospital** …." (Emphasis added.)

official involvement); *Rosenberg,* 996 F. Supp. at 347 (same, no court or official involved in the confinement or treatment decision).[7] That alone belies the claim that a circuit split has resulted from the decision below.

B. Petitioners carried out government and court orders and performed a function for which the state was constitutionally responsible.

None of the plaintiffs in the cases petitioners cite alleged that the defendants there acted pursuant to a court or administrative order. In *Estades-Negroni*, the court noted that the plaintiff's "complaint [was] silent" regarding whether a court order actually authorized her confinement, and she signed a document "'agreeing that her commitment had been voluntary" (though she claimed she was coerced) …." 412 F.3d at 3 and n.6, 7 n.15.[8] Similarly, in *McGugan*, the plaintiff was held and treated pursuant to physicians' certifications, not a court or administrative order, because the

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[7] *See also, e.g., S.P. v. Takoma Park*, 134 F.3d 260, 264-65 (4th Cir. 1998) (defendant hospital and emergency room held plaintiff overnight for evaluation; no government attorney involvement); *Pino v. Higgs*, 75 F.3d 1461, 1463-64 (10th Cir. 1996) (defendant therapist called police and emergency room physicians authorized transport to evaluation center for two days; no government attorney involvement); *Ellison*, 48 F.3d at 194 (order for 4-day evaluation commitment obtained by plaintiff's wife); *Rockwell v. Cape Cod Hosp.*, 26 F.3d 254, 259 (1st Cir. 1994) (noting distinction under Massachusetts law between state action "'commitment' requir[ing] action by a judge" and private "temporary emergency admission" which is "left entirely to the discretion of the person seeking admission of the mentally ill person and the institution receiving the person ….").

[8] The *Estades-Negroni* opinion says in one of its footnotes that "whether the Court of the First Instance ultimately granted the petition does not affect our inquiry into whether Appellees are subject to suit under §1983." 412 F.3d at 3 n.6. But that is obviously *dictum*, and is contradicted by the court's later, crucial statement that the plaintiff was "in theory … free to seek treatment from [other] physicians from her Plan," *id.* at 7 n.15—which she plainly would not have been under court orders like the ones in this case, which required Mr. Rawson to be held in the locked facility at RII.

New York law applied there did not involve or require such orders. *See* 752 F.3d at 228; *Rosenberg*, 996 F.Supp. at 347 (describing New York physician-authorized commitment procedures); *see also id*. at 355 ("Unlike Plaintiff in the instant case, the prisoner in *West [v. Atkins*, 487 U.S. 42 (1988)], was not free to consult a physician of his choosing.")[9]

Mr. Rawson was not so free. He was confined to RII's Western State facility by orders issued by state officials—first, a county-employed "Designated Mental Health Professional" (DMHP) and then a state Superior Court judge. The "Authorization" issued by the DMHP mandated that "Any Peace Officer or Mental Health Professional" "Take or Cause [Respondent, Kenneth N. Rawson] To Be Taken Into Custody Forthwith" and placed in RII's Western State facility. *See* 9th Cir. ER 1485-86 (capitalization reduced). Under Washington law, this required petitioners to "immediately accept on a provisional basis the petition and the person" (RCW 71.05.170 (2000) [Resp. App. A14]) and "examine[] and evaluate[]" him and provide him "such treatment and care as his or … condition requires" for up to 72 hours (RCW 71.05.210(1), (2) (2009) [Resp. App. A14]).

[9] In addition, the medical care provided to the plaintiff in *Rosenberg* was not at issue there. *See id.* ("[i]t is not the care [the plaintiff] may have received after commitment that [was] at issue but the decision by the Hospital Defendants to commit [them] in the first instance."); *see also Ellison*, 48 F.3d at 197 ("Ellison is not complaining of the treatment which he received during his confinement"); *Spencer v. Lee*, 864 F.2d 1376, 1380 (7th Cir. 1989)("The issue here, it is true, is involuntary commitment rather than treatment.")

When the 72-hour period ran, this "Authorization" was replaced by a Superior Court Order that said "Respondent *shall* be involuntarily detained … for not more than 14 days of involuntary treatment" at RII (or an "Evaluation and Treatment Center" in Clark County). *See* 9th Cir. ER 1320 (emphasis added). When the defendants later sought to have Mr. Rawson held for 90 days beyond that date and he requested a jury trial, the Superior Court issued a series of continuance orders which similarly required him to remain under treatment at RII's Western State facility. *See* Pet. App. 3, 103; RCW 71.05.310 (Resp. App. A18).

On this record, the panel below correctly recognized the circumstances were indistinguishable from those of the prisoner-plaintiff in *West v. Atkins*, where this Court

> held that a private contract physician rendering treatment services for prisoners at a state prison acted under color of law. *Id.* at 57. Part of the Court's reasoning was that any deprivation effected by the private contract physician would be necessarily "caused, in the sense relevant for state-action inquiry, by the State's exercise of its right to punish [the plaintiff] by incarceration and to deny him a venue independent of the State to obtain needed medical care." *Id.* at 55.

Pet. App. 17. The panel held that *West's* relevance to this case was twofold. First, it meant that, "[a]s in *West*, 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. Second, the panel noted that "[t]he Supreme Court has … held that private parties may act under color of state law when they perform actions under

which the state owes constitutional obligations to those affected" and "the State has a Fourteenth Amendment obligation toward those whom it has ordered involuntarily committed" to provide medical care they cannot get on their own because of their lost liberty. Pet. App. 19-20.

This was clearly correct: "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" is, by virtue of that fact alone, a state actor. *West*, 487 U.S. at 58 (concurring opinion of Justice Scalia). Lower court cases uniformly so hold. *See, e.g.*, *Sanchez v. Oliver*, 995 F.3d 461, 466 (5th Cir. 2021) ("there is no question that … a medical professional treating a pretrial detainee on behalf of a governmental entity…was acting under color of state law"; *accord*, *Carl v. Muskegon Cty.*, 763 F.3d 592, 598 (6th Cir. 2014); *Currie v. Chhabra*, 728 F.3d 626, 629 (7th Cir. 2013); *Leeks v. Cunningham*, 997 F.2d 1330, 1333 (11th Cir. 1993); *Fialkowski v. Greenwich Home for Children, Inc.*, 683 F.Supp. 103, 105 (E.D.Pa. 1987) (states have a duty to provide care to institutionalized "retarded citizens"). No decision petitioners have cited holds otherwise. To the contrary, those decisions note and rely on the fact that the plaintiffs there were *not* prevented from seeking health care elsewhere.[10]

[10] *See Estades-Negroni,* 412 F.3d at 7n.15 ("[I]n *West*, … the plaintiff-prisoner was precluded by state law from seeking treatment from a physician of his own choosing…. Here, however, … in theory, Estades was free to seek treatment from physicians other than those associated with the Plan."); *Rosenberg*, 996 F. Supp. at 355 ("Unlike Plaintiff in the instant case, the prisoner in *West* was not free to consult a physician of his choosing.").

Moreover, petitioners not only treated Mr. Rawson while he was locked up pursuant to court order, as the private doctors did in *West*; they were also the ones who locked him up. In this respect they are indistinguishable from employees of private prisons who physically confine people, albeit pursuant to a different sort of court order. Although this Court has never held that private prisons operate under color of state law, it has assumed that they do, and most lower courts have concluded so as well.[11]

Based on this authority, Mr. Rawson argued below that confining persons found to be dangerous due to mental illness constitutes state action because it is a traditional "public function," in Washington and elsewhere. But the panel found it unnecessary to reach or rely on this argument.

> Rawson argues that Defendants acted under color of law under the "public function" test, contending that … involuntary commitment was an exclusively governmental function in Washington prior to the

[11] *See, e.g.*, *Correctional Servs. Corp. v. Malesko*, 534 U.S. 61, 81 (2001) (dissenting opinion of Justices Stevens, *et al.*) ("Under 42 U.S.C. § 1983, a state prisoner may sue a private prison for deprivation of constitutional rights …."); *Richardson v. McKnight*, 521 U.S. 399, 413 (1997) (leaving open whether employees of a private corporation acted under color of state law); *id.* at 414 (dissenting opinion of Justice Scalia, *et al.*)("private prison management firms … perform the same duties as state-employed correctional officials … exercise the most palpable form of state police power, and … may be sued for acting "under color of state law."); *see also Pollard v. The GEO Grp., Inc.*, 629 F.3d 843, 857–58 (9th Cir. 2010) (dictum), *rev'd on other grounds sub nom. Minneci v. Pollard*, 565 U.S. 118 (2012); *Rosborough v. Mgmt. & Training Corp.,* 350 F.3d 459, 461 (5th Cir. 2003) (per curiam); *Smith v. Cochran*, 339 F.3d 1205, 1215-16 (10th Cir. 2003) ("[P]ersons to whom the state delegates its penological functions … can be held liable for violations of the Eighth Amendment."); *Street v. Corrections Corp. of America*, 102 F.3d 810, 814 (6th Cir. 1996) (private prison employees "perform[ ] the 'traditional state function' of operating a prison"); *Skelton v. Pri–Cor, Inc.*, 963 F.2d 100, 102 (6th Cir. 1991) (per curiam); *Ancata v. Prison Health Servs., Inc.*, 769 F.2d 700, 703 (11th Cir. 1985).

> passage of the ITA in 1973[12]…. We have not previously addressed whether nominally private medical professionals involved in longer term, court-ordered involuntary commitment perform a public function, either in general terms or specifically in the State of Washington…. However, 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 (emphasis added).

If the panel had reached the issue, and *if* it had overruled circuit precedent that, in general, "mental health commitments do not constitute a function 'exclusively reserved to the State'" and are *not* a "public function" (*see Jensen v. Lane County*, 222 F.3d at 574), it *might* have created an arguable circuit split. *See Estades-Negroni*, 412 F.3d at 8 ("involuntary commitment is not a function that is or has been reserved exclusively to the state in Puerto Rico"), and cases there cited. But it didn't, so there is no division among the circuits on the issue for this Court to resolve.

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[12] *See Beltran-Serrano v. Tacoma*, 193 Wn.2d 537, 550 n.9, 442 P.3d 608 (2019) (the "detention of a person suffering from a mental illness" is a "law enforcement related activity"); *In re Detention of S.E.*, 199 Wn. App. 609, 616-22 (2017) (describing history of civil commitment in Washington). Washington's territorial laws assigned the functions performed by petitioners to a state-employed Superintendent of the Western State "hospital for the insane." *See* Code of 1881 §§2248-49, 2264-67. In 1915, they were extended to "county physicians" in charge of county hospital "detention wards." Laws of 1915, c.105, § 1, at 303-04. In 1973, they were further extended to professionals at state regulated "Evaluation and Treatment" facilities like RII, represented by prosecuting attorneys. *See* Laws of 1973, c.142 §18. But when Mr. Nichols began commitment work in the early 2000s, the petitioners he represented were county employees. *See* 9th Cir. ER 632, 780.

Were review granted, respondent would respectfully submit in the alternative that commitment for prolonged periods is a public function, at least in Washington state. *See, e.g., Plain v. Flicker*, 645 F. Supp. 898, 905 (D.N.J. 1986); *Davenport v. Saint Mary Hosp.*, 633 F. Supp. 1228, 1234 (E.D. Pa. 1986); *Brown v. Jensen*, 572 F. Supp. 193, 197 n. 1 (D. Colo. 1983); *Ruffler v. Phelps Mem'l Hosp.*, 453 F. Supp. 1062, 1068-71 (S.D.N.Y. 1978); *see also Rockwell*, 26 F.3d at 259 (*dictum*).

C. Petitioners operated a facility whose purpose was the involuntary confinement and treatment of people pursuant to orders of state courts and officials; and they did so on the property of a state hospital where people have been confined under such orders for more than a century.

The facility where petitioners confined and allegedly mistreated Mr. Rawson was not a multifaceted public hospital that treated a variety of public and private patients and conditions, like the ones in the cases petitioners rely on.[13] Instead, the facility was created as an E&T facility specifically to fulfill the mandates of RCW 71.05. And petitioners "were not merely subject to extensive regulation or subsidized by state funds" like the physicians in *Blum*. Pet. App. 29. They ran a locked facility dedicated to the confinement, evaluation, and treatment of persons whose liberty has been taken by court or administrative orders. RII's premises were located on the grounds of Western State Hospital, where persons confined for mental illness have been held since before statehood. Pet. App. 4, 27-28. It leased the property from the state for that purpose, with government funds channeled through a

[13] The *Estades-Negroni* opinion describes the defendant corporations only as "CPC Hospital San Juan Capestrano … a private hospital and First Option Corporation Puerto Rico … a private healthcare services provider". 412 F.3d at 1-2. According to CPC Hospital's website, it is a nonprofit hospital that treats a variety of mental health conditions and accepts private health insurance. *See* HOSPITAL SAN JUAN CAPESTRANO, https://www.sanjuancapestrano.com (last visited 6/19/21). The opinion in *McGugan*, similarly, describes the Jamaica Hospital Medical Center as "a private hospital that receives federal funding and is licensed by the New York State Office of Mental Health … to provide psychiatric services. 752 F.3d at 227. Its website says it also "offers a full range of services, including pediatrics, internal medicine, family medicine, podiatry, surgery, gastroenterology, dermatology," and others. *See* https://jamaicahospital.org/about-us/ (last visited 6/19/2021). The defendant in *Rosenberg* was New York's Columbia Presbyterian Medical Center. 996 F. Supp. at 346.

nonprofit intermediary. 9th Cir. ER 655, 684-85. Its "director," petitioner Halarnakar, was a full-time employee of Western State Hospital who moonlighted at RII. *See* Pet. App. 22 n.12.

The panel found these unique facts significant under *Burton v. Wilmington Parking Authority,* 365 U.S. 715 (1961), which it read to hold that "state action may exist when private parties operate on public property or in public facilities." Pet. App. 26.

> This case resembles *Burton* in that RII was leasing its Lakewood premises from the State on the grounds of Western State Hospital, which was not only clearly marked as a state hospital but was also historic and recognizable….
>
> While it is unclear how closely the facts of a particular case must match *Burton* to find state action on that basis alone, *Burton* remains instructive and there are enough similarities here to consider the leasing of state property as a factor weighing in favor of finding state action.

Pet. App. 27-28 (footnote omitted).

Again, petitioners try to make this factor disappear by ignoring it, going so far as to erase the Court of Appeals' reference to RII's "leasing of their premises from the state hospital" from what they represent as a list of its "determinative factors". Petition 18; *compare* Pet. App. 29; see note 6, above. This again misrepresents the decision below and adds to the illusion of a lower court conflict where there is none.

The panel was right to consider this a factor indicative of state action, as common sense indicates, and in doing so it created no circuit split.

II. THIS CASE IS NOT A GOOD VEHICLE THROUGH WHICH TO REEXAMINE OR REVISE THE LAW OF STATE ACTION.

In the absence of a true circuit split, there is no reason to grant review in this case. Most of the authorities that the petition cites in support of its complaint that the law in this area is too unclear and complex are more than twenty years old. *See* Petition 3, 5. *Jensen v. Lane County*, which set the "close nexus/joint action" precedent on which the panel below principally relied, was published in 2000. Nothing like the parade of horribles the petitioners forecast has emerged since.

Even if the Court sees a need to consider revising or clarifying some aspect of the law governing the determination of whether a private person acts under color of state law, this case would not be a good one in which to do so, for several reasons.

First, petitioners' suggestion that the Court should grant review here to "explain[] how its many distinct lines of state action precedent relate to each other or to articulate which line of cases governs in each circumstance" (Petition 3) is wholly unrealistic. The Court has long realized that the assessment of whether conduct occurs under color of state law is "necessarily fact-bound." *Lugar,* 457 U.S. at 939; *see Brentwood Academy*, 531 U.S. at 295, and cases there cited. That is because the variety of facts and circumstances on which the Court has had to make that assessment—let alone the far wider variety with which the lower federal courts have been faced—is much too great to be subsumed in a comprehensive rule. And even

if such a rule could be fashioned, it is highly unlikely to emerge from this case. As shown above, the petitioners here performed so many different functions which arguably constitute state action for so many different reasons that a decision examining all those functions and all those reasons would add more complexity and confusion to this area than it would remove.

Second, as shown above, Washington's law is an outlier. It has numerous features that are unusual if not unique, at least among the statutes that have been referenced in this case. Petitioners have pointed to no other jurisdiction that authorizes the employees of nominally private corporations to appear in court as "the state," by and through a state-employed prosecutor, and grants them the exclusive power to seek court orders extending involuntary confinements for weeks or months. Nor have they tallied the jurisdictions that require all commitments to be court-ordered or indicated how many of those assign the same people who seek such orders to act as their subject's jailors. And there are surely few if any other states that have outsourced their constitutional responsibilities as transparently as Washington has here, using an allegedly "private" facility set up on the very same state-owned grounds where the state has always performed that same function. *See* note 12, above. It is therefore unlikely that review of these unusual facts by this Court would resolve issues of broad application elsewhere.

Additionally, the Washington statutes that were in effect at the time of Mr. Rawson's detention have been amended numerous times and in numerous ways since then. Some of the amendments have potential significance to the issues potentially presented here. *See, e.g.*, note 4; above. And RII no longer operates its Western State facility. 9th Cir. ER 697. So, determining whether the petitioners acted under color of state law as it existed when they confined Mr. Rawson might not finally resolve the issue even for the State of Washington—or RII itself.

Third, the decision below is interlocutory, rendered on competing motions for summary judgment, without the benefit of a fully developed factual and legal record. The panel remanded the case for trial, not for judgment in Mr. Rawson's favor. In that trial, the petitioners would have ample opportunity to sharpen and preserve any specific questions about their role as state actors that might be worthy of this Court's consideration, if there were any.

Finally, there is nothing about the result reached in the decision below that is shocking or indicative that the law in this area has become confused or misdirected. It is hardly "radical" (Petition 27, 36) to hold that a corporation and its employees (including off-duty state employees) act under color of state law when they take over the state's responsibility to confine and treat people whom its courts have ordered to be held as disabled or dangerous—and they do so on state property, with state funding, appearing

in court as "the state" and working with a Deputy County Prosecuting attorney. Indeed, it would be much more shocking and radical to hold that the states can put people who have been deprived of their liberty because of alleged mental illness outside of the reach of the Fourteenth Amendment by consigning them to such corporations. And, as the Court of Appeals noted,

> To conclude that Defendants act under color of state law within this process does not cast blame on them. It simply charges Defendants with meeting the constitutional standards applicable to those whose actions are "made possible only because [they are] clothed with the authority of state law." *West*, 487 U.S. at 49 (quoting *[United States v.] Classic*, 313 U.S. at 326).

Pet. App. 23. Nothing about that conclusion requires this Court's review.

CONCLUSION

The petition for certiorari should be denied.

Respectfully submitted,

MacDONALD, HOAGUE & BAYLESS

s/ Timothy K. Ford

Timothy K. Ford, *Counsel of Record*
Jesse Wing
705 Second Avenue, #1500
Seattle, Washington 98104
(206) 622-1604
timf@mhb.com
jessew@mhb.com

Sam Kramer
MADIA LAW LLC
323 Washington Avenue N., #200
Minneapolis, Minnesota 55401
(612) 349-2720
sjkramer@madialaw.com

Attorneys for Respondent

July 9, 2021