No. 20-1287

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

REPLY BRIEF OF PETITIONERS

LORY R. LYBECK, *Counsel of Record*
BENJAMIN R. JUSTUS
LYBECK PEDREIRA & JUSTUS, PLLC
Fifth Floor—Chase Bank Building
7900 SE 28th Street
Mercer Island, WA 98040
(206) 687-7805
lory@lpjustus.com
ben@lpjustus.com
Attorneys for Petitioners

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COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

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REPLY BRIEF OF PETITIONERS

The Ninth Circuit's decision in this case starkly illustrates Justice O'Connor's concern that discontinuity in the tests employed to determine whether a private party is a state actor for purposes of 42 U.S.C. § 1983 will allow the lower courts 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 v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 408-409 (1995) (J. O'Connor dissenting); *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 632 (1991) (J. O'Connor dissenting).

The confusion and unpredictability engendered by the state action doctrine is manifest in the procedural history of this very case. Below, the parties' respective arguments before the District Court focused entirely on the Ninth Circuit's "close nexus/joint action" test, set out by *Jensen v. Lane County*, 222 F.3d 570, 575 (9th Cir. 2000), as well as the "exclusive public function" test[1] endorsed by this Court and many other lower courts. The District Court, accordingly, ruled in favor of Recovery Innovations and its employees in an opinion that addressed only those tests. *See* Pet. App., at 6. In their subsequent briefing to the Ninth Circuit, the parties again argued only those two tests. The Ninth Circuit, however, chose to disregard the parties' arguments and lower court's decision, devising an entirely

[1] Although Rawson maintained his "exclusive public function" arguments before the Ninth Circuit, he has partially abandoned them in his opposition brief here. *See* Opp. Br., at 3, 23.

different state action test—one featuring an array of novel factors that neither the parties nor the District Court had addressed. *See*, *e.g.*, Pet., at 17-18. This case, therefore, shows that, under the doctrine's current unsettled state, it is both "impossible to predict which standard will be used by a court examining the state actor doctrine." Joan Kane, Note, *The Constitutionality of Red- lining: The Potential for Holding Banks Liable as State Actors*, 2 Wm. & Mary Bill Rts. J. 527, 558 (1993), and "unclear which facts truly matter, how much they matter, or why they matter." Christian Turner, *State Action Problems*, 65 Fla. L. Rev. 281, 290 (2013).

In his opposition brief, Rawson attempts to marginalize the importance of the question presented by trying to turn the case into a factual dispute. But Petitioners are not seeking fact-bound error correction. Instead, they request that this Court provide much-needed guidance on how and when to apply the various and wildly inconsistent tests developed under state action doctrine. Resolution of this issue is particularly important here where, based on the exact same set of facts, the trial court court applying two iterations of the state action test found no state action, while the appellate court applying a newly created hybrid test found state action. There is simply no explanation for these divergent conclusions. The consequences for private individuals who find themselves subject to liability under § 1983 under the lower courts' highly unpredictable state action tests are severe.

This question warrants resolution by this Court.

I. The Petition Raises an Important Question of Federal Law that Should be Settled by this Court

Rawson does not contest the importance of the question presented. Indeed, Rawson's opposition does not dispute Justice O'Connor's criticism of the state action doctrine in *Lebron* and *Edmonson v. Leesville Concrete Co.*, and ignores the ballooning number of state action tests and hybrid versions thereof. *See Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 296 (2001) (noting that the Court had articulated at least seven different tests for state action); Julie K. Brown, *Less Is More: Decluttering the State Action Doctrine*, 73 Mo. L. Rev. 561, 568 (2008) (noting the proliferation of hybrid tests by the courts of appeal that cobble together pieces of various state action tests).

Rawson also overlooks decades of legal scholarship attempting to make sense of the inconsistent state action tests and their unpredictable application. *See*, *e.g.*, Brookes Brown, *A Conceptual Disaster Zone Indeed: The Incoherence of the State and the Need for State Action Doctrine(s)*, 75 Md. L. Rev. 328, 329 (2015) (summarizing criticism of the state action doctrine as "unintelligible, purposeless, and meaningless"); *Developments in the Law, State Action and the Public/Private Distinction*, 123 Harv. L. Rev. 1248, 1250 (2010) ("[T]he state action doctrine [is] one of the most complex and discordant doctrines in American jurisprudence."); Brown, *supra*, 73 Mo. L. Rev. at 581 ("The state action doctrine is slowly descending into utter confusion.");

Daniel J. Gifford, *Federalism, Efficiency, the Commerce Clause, and the Sherman Act: Why We Should Follow a Consistent Free-Market Policy*, 44 Emory L.J. 1227, 1229 n.5 (1995) ("case law [on the doctrine] exhibits a remarkable lack of coherence."); 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) (A workable method of identifying state actors has been called the "Holy Grail that has eluded state action theorists for decades."); Laurence H. Tribe, *American Constitutional Law* 1149 (1978) (concluding that the doctrine is in a state of bankruptcy); Charles L. Black, Jr., *Foreword: 'State Action,' Equal Protection, and California's Proposition*, 81 Harv. L. Rev. 69, 95 (1967) (criticizing the doctrine as "a torchless search for a way out of a damp echoing cave.").

Rawson's attempt to diminish the importance of this case, due to the factual nature of the Ninth Circuit's decision, merely begs the question presented. This line of argument fails to acknowledge that the state action inquiry, by its very nature, will always involve a unique set of facts. And in regard to those facts, courts have reached little agreement as to "which facts truly matter, how much they matter, or why they matter." Turner, *supra*, 65 Fla. L. Rev. at 290; *see also Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 939 (1982) (explaining "no one fact can function as a necessary condition across the board for finding state action; nor is any set of circumstances absolutely sufficient."). Indeed, the appellate decision below contains

no explanation why the facts of this case warrant the creation of a different test than had been applied by numerous other courts when faced with similar fact patterns. *See*, *e.g.*, Pet., at 6, 27-28, and cases cited therein. And, as illustrated by the decisions below, the lack of guidance from this Court "has left lower courts to determine each case based on the specific facts before the bench and also to choose between this wide variety of tests." Brown, *supra*, 73 Mo. L. Rev. at 567-568. This, in turn, has resulted in a body of appellate case law creating new hybrid tests, making the state action doctrine even more complicated, inconsistent, and confusing. *Id*. at 568.

The proliferation of state action tests, and hybrid versions thereof, has resulted in wildly inconsistent decisions, including, without limitation, the various competing Circuit Court decisions cited in the Petition and those discussed in the several law review articles cited herein. As a result, there are two prevalent—and equally unacceptable—trends among the lower courts. In the first, the state action doctrine is applied mechanically by emphasizing only those facts that fit a case into a pre-established rule. Under that approach, if a current case does not "fit" an earlier mold, no state action is found. *See* David E. Lust, *What to Do When Faced with a Novel State Action Question? Punt: The Eighth Circuit's Decision in* Reinhart v. City of Brookings, 42 S.D. L. REV. 508 (1997). In the second, courts that are inclined to find state action feel free to create novel, hybrid tests designed to depart from prior decisions and allowing the court to emphasize some facts

while deemphasizing others in order to reach the preferred result. Brown, 73 Mo. L. Rev. at 578. The Ninth Circuit decision below falls within this second category.

II. The Brief in Opposition Makes Misleading Citation to Facts that are Irrelevant to the Decision Below and the Question Raised by the Petition.

Rawson's opposition focuses on the factual nature of the underlying case without explaining how any of the supposedly unique facts justify the Ninth Circuit's decision to create a new hybrid state action test. Nor does he adequately address the ultimate issue raised by Recovery Innovations: that the exact same set of facts resulted in two divergent conclusions under three different iterations of the state action test in this case.

Rawson's opposition instead simply recites facts that are either irrelevant to the Petition and the lower court's decision, or facts that were not argued below and cannot therefore comment on the advisability of review.

For example, throughout his opposition, Rawson cites a single provision of Washington's Involuntary Treatment Act (ITA) that refers to "the state" when referencing the Petition process (*see* Opp. Br., at 4, 12-14, 27, 29), though neither court below mentioned this fact in their opinions. Similarly, Rawson has appended a copy of the Washington Court of Appeals decision, *In re Det. of K.R.*, 381 P.3d 158 (Wash. Ct. App. 2016),

essentially just to cite one sentence of the decision which reads: "The State filed a Petition to detain [Kenneth Rawson] and for a 14–day involuntary treatment." Opp. Br., at 21. But again, neither decision below referenced this stray fact, and the Washington Court of Appeals' reference to "the State" is most likely mistaken, as the Court also stated in error that "on March 9, *the DMHP* filed a Petition for Fourteen Day Involuntary Treatment." 381 P.3d at 159 (emphasis added). Even so, at most this is dicta, as the decision did not consider any question of state action under § 1983, nor any alleged conduct of Recovery Innovations.

In attempt to distinguish some of the Circuit Court decisions cited in the Petition, Rawson argues that Recovery Innovations' facility "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." Opp. Br., at 24. But yet again, this distinction was never mentioned by the courts below, nor does Rawson provide any meaningful reason why such a distinction should result in the creation of a different state action test. Further, Rawson's argument ignores that under the ITA, an "evaluation and treatment facility" is quite broadly defined and may specifically include "[a] physically separate and separately operated portion of a state hospital. . . ." *See* Pet. App., at 115; Rev. Code Wash. § 71.05.020(20).

Rawson undermines his efforts to paint Washington's ITA as an "outlier" by repeatedly acknowledging a common fact shared among all such statutes: that it

was only upon the orders of third-party government actors—namely, the DMHP and the Superior Court—that Rawson was authorized to be detained and treated at Recovery Innovations' treatment facility. *See*, *e.g.*, Opp. Br., at 2, 7, 18, 19, 24, 27. As was noted in the Petition, the Ninth Circuit's conclusion that the fact of court oversight supported a finding of state action put it directly at odds with the First Circuit's decision in *Estades-Negroni*, which 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." *Estades-Negroni v. CPC Hosp. San Juan Capestrano*, 412 F.3d 1, 6 (1st Cir. 2005) (citations omitted).[2] Only late in his opposition brief does Rawson contradict himself on this point, wrongly asserting that "petitioners . . . were also the ones who locked him up." Opp. Br., at 22. Clearly, Recovery Innovations could not and did not do so.

More important, Rawson's broader suggestion that the ITA is distinct from other such statutes in that it authorizes involuntary treatment to be rendered pursuant to court or administrative orders is just wrong. To the contrary, this is a central feature of

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[2] Rawson attempts to evade this pellucid holding from *Estades-Negroni* through a misleading claim that "[n]one of the plaintiffs in the cases petitioners cite alleged that the defendants there acted pursuant to a court or administrative order." He frames this point in terms of what "the plaintiffs . . . alleged" so as to avoid the First Circuit's plain statement that "*In Puerto Rico, an individual can be involuntarily committed only pursuant to a court order.*" *Estades-Negroni*, 412 F.3d at 3 (emphasis added).

virtually every state involuntary commitment and treatment scheme. As was stated in a recent comprehensive study of such laws, "[a]s with emergency evaluation, all states have laws authorizing involuntary admission to a hospital for mental health treatment. These inpatient commitment laws empower a court to order a person with mental illness to be held over their objection for a period of care and treatment." *See* Treatment Advocacy Center, *Grading the States: An Analysis of U.S. Psychiatric Treatment Laws* (2020), at 9.

The same report shows that Rawson is not even correct as to his related claim that the ITA is somehow unique in permitting only a narrow class of designated professionals to Petition a court for involuntary commitment (as opposed to ordinary citizens). In truth, the laws of at least seventeen other states provide that only specified professionals can Petition for involuntary commitment. *Id.*, at 38; *see also* Alaska Stat. § 47.30.730(a); Ariz. Rev. Stat. § 36-531(B); Cal. Welf. & Inst. Code § 5251; Colo. Rev. Stat. §§ 27-65-107, 27-65-108; 16 Del. C. §§ 5007, 5008; Fla. Stat. § 394.463(2)(g)(4); 405 ILCS 5/3-701; Me. Rev. Stat. tit. 34-B, § 3863(5-A); Md. Code Ann., Health-General § 10-632; Mass. Gen. Laws Ann. ch. 123, § 7(a); Mo. Ann. Stat. § 632.330(1); Mont. Code Ann. § 53-21-121(1); Neb. Rev. Stat. § 71-921(1); N.J. Stat. § 30:4-27.6(b); N.M. Stat. Ann. § 43-1-11(G); N.Y. Mental Hyg. Law § 9.27(a); N.C. Gen. Stat. § 122C-266(a)(1).

Finally, trying to suggest that this case is not a good candidate for review, Rawson appends an alternative set of selected ITA provisions, broadly asserting

that "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." Opp. Br., at 28. That fact, however, has no bearing on the question presented or the decisions issued in this case. Indeed, none of the ITA provisions cited by the decisions below have been changed in a manner that would alter the lower courts' state action analyses. The only explanation Rawson offers as to how recent amendments could have "potential significance" to the question presented is a footnoted argument which explains that "[i]n 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." *Id.*, at 15 n.4. Thus, if anything, this recent amendment to the ITA demonstrates the Washington Legislature's ongoing intention to allow purely private parties (including family members concerned about an individual's behavior) to participate in ITA Petition processes, which would tend to diminish, rather than bolster, the Ninth Circuit's conclusions regarding state action.

III. A Summary Judgment Order on a Controlling Point of Federal Law Presents a Good Vehicle for this Court's Review.

Rawson claims that the Court should deny review because this case, which was resolved in favor of Recovery Innovations on cross-motions for summary judgment, might need further proceedings on the

merits of the § 1983 claims. But this case is not interlocutory in any way that matters and there are strong reasons to resolve the state action question now, rather than after a full trial and appeal. Indeed, the underlying appeal sought review of a district court opinion that had effectively ended the litigation. *See Richardson-Merrell, Inc. v. Koller*, 472 U.S. 424, 429-430 (1985). Final resolution of this issue now will advance the interests of judicial economy because Rawson is currently maintaining both a federal civil rights lawsuit under the theory that Recovery Innovations and its employees were state actors *and* a separate state court lawsuit asserting a variety of statutory and tort claims under the theory that the same defendants are private parties and are therefore not entitled to the defenses provided to government defendants. *See* Pet., at 37-39.

As the leading treatise on this Court explains, "the interlocutory status of [a] case may be no impediment to certiorari where the opinion of the court below has decided an important issue, otherwise worthy of review, and Supreme Court intervention may serve to hasten or finally resolve the litigation." Eugene Gressman et al., Supreme Court Practice, § 4.18 (Bloomberg edition 2020).

Finally, Rawson's claim that this issue is not suitable for review because the decision below was made on summary judgment "without the benefit of a fully developed factual and legal record," Opp. Br., at 28, flies in the face of: (1) his decision below to file a cross-motion for summary judgment; and (2) his argument

here that "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." *Id.*, at 3. Either the existing record was sufficient to warrant the Ninth Circuit's decision *and higher review*, or it was not. Rawson cannot have it both ways.

This Petition cleanly presents an important question of federal law. The lower courts are divided. Indeed, the Ninth Circuit itself is inconsistent. Only this Court can resolve the debate and provide much needed clarity and certainty to impacted individuals across the nation.

CONCLUSION

This Court should take this opportunity to finally enunciate a clear state action standard in order to inform private parties of the actions sufficient to make them public actors. A lack of clear directive on this question may result in private parties greatly restricting their public activities and interaction with government entities, including the provision of critically important health care services, out of fear of unwittingly invoking the unpredictable and incoherent state

action doctrine. The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

LORY R. LYBECK, *Counsel of Record*
BENJAMIN R. JUSTUS
LYBECK PEDREIRA & JUSTUS, PLLC
Fifth Floor—Chase Bank Building
7900 SE 28th Street
Mercer Island, WA 98040
(206) 687-7805
ben@lpjustus.com

Attorneys for Petitioners

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