No. 22-

In the Supreme Court of the United States

J.R.,

Petitioner,

v.

NORTH CAROLINA,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of North Carolina

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether, when a person's liberty is at stake, the right to an impartial judge guaranteed by the Due Process Clause is violated where the trial judge also performs the role of the advocate for incarceration.

RELATED PROCEEDINGS

Supreme Court of North Carolina:

In the Matter of J.R., No. 313A21 (Dec. 16, 2022)

Court of Appeals of North Carolina:

In the Matter of J.R., No. COA20-457 (July 20, 2021)

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PETITION FOR A WRIT OF CERTIORARI

J.R. respectfully petitions for a writ of certiorari to review the judgment of the Supreme Court of North Carolina.

OPINIONS BELOW

The opinion of the Supreme Court of North Carolina is published at 881 S.E.2d 522 (N.C. 2022). The opinion of the Court of Appeals of North Carolina is unpublished and is available at 2021 WL 3043392 (N.C. Ct. App. 2021). The opinion of the Court of Appeals in the companion case, *In re C.G.*, is published at 863 S.E.2d 237 (N.C. Ct. App. 2021).

JURISDICTION

The judgment of the Supreme Court of North Carolina was entered on December 16, 2022. On February 8, 2023, the Chief Justice extended the time in which to file a certiorari petition to April 17, 2023. No. 22A722. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment to the U.S. Constitution provides in relevant part: "nor shall any State deprive any person of life, liberty, or property, without due process of law."

Section 122C-268 of the North Carolina General Statutes provides in relevant part:

§ 122C-268. Inpatient commitment; district court hearing

(a) A hearing shall be held in district court within 10 days of the day the respondent is taken into law enforcement custody pursuant to G.S. 122C-261(e) or G.S. 122C-262. If a respondent temporarily detained under G.S. 122C-263(d)(2) is subject to a series of successive custody orders issued pursuant to G.S. 122C-263(d)(2), the hearing shall be held within 10 days after the day that the respondent is taken into custody under the most recent custody order. A continuance of not more than five days may be granted upon motion of any of the following:

(1) The court.

(2) Respondent's counsel.

(3) The State, sufficiently in advance to avoid movement of the respondent.

(b) The attorney, who is a member of the staff of the Attorney General assigned to one of the State's facilities for the mentally ill or the psychiatric service of the University of North Carolina Hospitals at Chapel Hill, shall represent the State's interest at commitment hearings, rehearings, and supplemental hearings held for respondents admitted pursuant to this Part or G.S. 15A-1321 at the facility to which he is assigned.

In addition, the Attorney General may, in his discretion, designate an attorney who is a member of his staff to represent the State's interest at any commitment hearing, rehearing, or supplemental hearing held in a place other than at one of the

State's facilities for the mentally ill or the psychiatric service of the University of North Carolina Hospitals at Chapel Hill.

STATEMENT

The right to an impartial judge is among the most fundamental rights guaranteed by the Due Process Clause. In our adversary system, when a person's liberty is at stake, the judge and the government's advocate are always two different people. If a single person wore both hats at once—first presenting the state's case for incarceration and then deciding whether the evidence he or she has just presented satisfies the burden of proof—there would be no doubt that the proceeding would be inconsistent with due process. A judge can hardly be impartial when the judge is also an advocate for one side.

A few years ago, however, North Carolina took away this basic constitutional protection in involuntary commitment proceedings—trials that can force people to be incarcerated in psychiatric hospitals against their will. In these proceedings, the judges now wear two hats. First, they present the state's case for incarceration. Then they decide whether the case they have just presented satisfies the state's burden of proof. Below, in a 4-3 decision, the state supreme court held that this dual role for judges does not violate the Due Process Clause. As a result, the law in North Carolina is now contrary to the law in other states.

The Court should grant certiorari and reverse.

A. Statutory background

In North Carolina, as in other states, a person who has a mental illness and who is "dangerous to self" or "dangerous to others" may be involuntarily committed to a psychiatric hospital. N.C. Gen. Stat. § 122C-261(a). The process begins when "[a]nyone who has knowledge" of such a person files an affidavit in court. *Id.* The court then orders the person who is alleged to be mentally ill and dangerous—who is designated by statute as the "respondent"—to be taken into custody for an examination. *Id.* § 122C-261(b). If the examining physician recommends involuntary commitment, a hearing must be held in the district court within ten days. *Id.* § 122C-268(a). At the hearing, the respondent is represented by counsel, who is usually an attorney at the state's Office of Indigent Defense Services. *Id.* § 122C-268(d). The court may order the respondent to be involuntarily confined in a psychiatric hospital if the court finds, by clear and convincing evidence, that the respondent is mentally ill and dangerous to self or others. *Id.* § 122C-268(j). In these respects, North Carolina's procedure resembles the procedure used by other states.

In one respect, however, North Carolina diverges from other states. In other states, someone—typically a government attorney—appears in court to represent the state as the party seeking involuntary commitment. Most states require this appearance by statute.[1] In the states with statutes that do not re-

[1] Ala. Code § 22-52-5 (attorney appointed by court); Ariz. Stat. § 36-503.01 (attorney general or county attorney); Ark. Code § 20-47-208 (prosecuting attorney); Cal. Welf. & Inst. Code § 5256.2 (person designated by the hospital director); Colo.

quire an attorney to appear on the state's behalf, government attorneys nevertheless normally appear to make the case for involuntary commitment. Linda Tashbook, *Family Guide to Mental Illness and the Law* 59 (New York: Oxford Univ. Press, 2019) ("The patient is represented by a court-appointed lawyer and the state is represented by a state attorney who is responsible for civil commitments."); Michael L. Perlin, *Mental Disability Law: Civil and Criminal* § 6-10 (Lexis ed. 2023) (text at notes 721-22) ("[T]he county counsel or other such government official is responsible for prosecuting civil commitment mat-

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Stat. § 27-65-111(6) (district attorney or county attorney); Fla. Stat. § 394.467(6)(a)(2) (state attorney); Haw. Stat. § 334-60.5(e) (attorney general, attorney general's designee, or private counsel retained by person seeking commitment); 405 Ill. Comp. Stat. § 5/3-101(a) (state's attorney); Ind. Code § 12-26-2-5 (counsel or other person designated to represent person seeking commitment); Iowa Code § 229.12(1) (county attorney); Kan. Stat. § 59-2959(c) (county or district attorney); Ky. Stat. § 202A.016 (county attorney); Me. Stat. tit. 34-B, § 3864(5)(F) (testimony must be submitted by the party seeking commitment); Mich. Comp. Laws § 330.1457 (county prosecuting attorney); Minn. Stat. § 253b.08(5a) (county attorney); Mo. Stat. § 632.405 (county prosecuting attorney); Neb. Stat. § 71-921(1) (county attorney); Nev. Stat. § 433A.270(4) (district attorney); N.H. Stat. § 135-C:21 (attorney general); N.J. Stat. § 30:4-27.12(b) (county counsel); N.D. Code § 25-03.1-19(2) (state's attorney, private counsel, or counsel designated by the court); Ohio Code § 5122.15(A)(10) (attorney general or attorney designated by county board of mental health services); Or. Stat. § 426.095(3) (individual representing state's interest); S.D. Codified Laws § 27A-11A-4 (state's attorney); Vt. Stat. tit. 18, § 7615(d) (attorney for the state); Va. Code § 37.2-817(B) (designee of community services board); Wash. Code § 71.05.130 (prosecuting attorney); W. Va. Code § 27-5-1(c) (prosecuting attorney); Wis. Stat. § 51.20(4)(a) (corporation counsel); Wyo. Stat. § 25-10-110(c) (county attorney).

ters, even where the individual patient is hospitalized in a private psychiatric facility.").

The government attorney at the hearing presents the case for forcibly committing the respondent to a psychiatric hospital—for example, by calling and examining the medical witnesses who recommend commitment, by introducing documentary evidence supporting commitment, and by cross-examining witnesses offered by the respondent. The person who represents the state's interest in seeking involuntary commitment is analogous to the prosecutor in a criminal case, who likewise represents the state's interest in securing a conviction by presenting the evidence necessary to deprive the opposing party of his or her liberty.

North Carolina, by contrast, requires an attorney to perform this role only where the psychiatric hospital to which the respondent would be committed is a state-run hospital. *Id.* § 122C-268(b). This attorney must be "a member of the staff of the Attorney General," who "shall represent the State's interest" in seeking involuntary commitment. *Id.* If the hospital is a private hospital, however, representation by the Attorney General's office is optional. *Id.* In such a case, "the Attorney General may, in his discretion, designate an attorney who is a member of his staff to represent the State's interest." *Id.*

For many years this distinction made no difference because North Carolina's district attorneys routinely appeared at all involuntary commitment hearings, regardless of whether the hospital involved was public or private. Beginning in 2020, however, the district attorneys' offices in a few of the state's most populous counties, apparently for budgetary reasons,

stopped sending lawyers to hearings in cases involving private hospitals. In these counties, there is no one who appears in court to present the case for involuntary commitment. This role has been taken up by North Carolina's trial judges, who now perform the tasks that in other states are the responsibility of advocates.

B. Facts and trial court proceedings

Petitioner J.R. is a man in his sixties who lives in Durham, North Carolina.[2] In December 2019, a physician at Duke University Medical Center petitioned to have J.R. involuntarily committed, after he was found unconscious on a Durham street. App. 3a. A public defender was appointed to represent J.R. and his hearing was scheduled for January 2020. *Id.*

At the hearing, no one appeared to present the case for involuntary commitment. The trial court explained that "[t]he District Attorney's Office of Durham County has notified this Court that they will not be participating in these hearings as [they did] in prior years." *Id.* J.R.'s counsel objected to proceeding with the hearing, and to the trial court's questioning of witnesses for the state, in the absence of an appearance by a party on the other side. *Id.* The trial court responded that "this Court intends to go forward with this hearing, and the Respondent is more than welcome to appeal this Court's decision." *Id.* at 3a-4a.

With only one of the two parties present in court, the trial court assumed the role that in previous

[2] North Carolina law bars the public disclosure of J.R.'s name. N.C. Stat. § 122C-52. Both sides in this case have accordingly used his initials in all filings accessible to the public.

years had been performed by the District Attorney's office. The court called and conducted the direct examination of the lone witness who testified in favor of involuntary commitment, a Duke psychiatrist named Sandra Brown. *Id.* at 4a. Dr. Brown testified that J.R. suffered from chronic obstructive pulmonary disease, alcohol use disorder, hyponatremia (low sodium level in the blood), and bipolar disorder. *Id.* She explained that J.R. had begun treatment for these conditions but that he had left the hospital against medical advice. *Id.* She added that J.R. spent his retirement income inappropriately and that he was homeless and drinking regularly. *Id.*

After J.R.'s counsel cross-examined Dr. Brown, the trial court conducted a redirect examination in which the court elicited Brown's opinion that the state had satisfied its burden of proof:

> [Trial Court]: Dr. Brown, is it your testimony that the Respondent is a danger to himself?
>
> [Dr. Brown]: Yes.
>
> [Trial Court]: All right. And what about whether or not he's a danger to others?
>
> [Dr. Brown]: I believe, at this time, he is not a direct danger to others, but in the past he has been intoxicated in public, and it's hard to predict what someone like that might do.

Id. at 5a.

J.R.'s counsel then called J.R. to the stand. *Id.* at 6a. He explained that he understood his mental health problems and that he wished to receive treatment, but that he did not pose a threat to himself or to others. *Id.* He noted that he was willing to work with the guardian who had been appointed to

make sure he was taking his medications. *Id.* The trial court did not cross-examine J.R., but merely asked whether there was anything else J.R. wanted the court to know. *Id.*

At the conclusion of the hearing, the trial court determined that the case it had just presented satisfied the state's burden of proof. *Id.* The court found that J.R. had a mental illness and that he was a danger to himself. *Id.* The court ordered J.R. involuntarily committed for thirty days. *Id.*[3]

C. North Carolina Court of Appeals decision

A divided Court of Appeals affirmed. *Id.* at 33a-36a. J.R.'s case was one of six cases raising the same issue that were heard by the same three-judge panel on the same day. *Id.* at 35a. The panel published full majority, concurring, and dissenting opinions in one of the other cases, *In re C.G. Id.* at 37a-80a. In J.R.'s case, the two-judge majority affirmed for the reasons stated in *In re C.G.*, while Judge Griffin dissented for the reasons stated in his dissenting opinion in *In re C.G. Id.* at 35a-36a.

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[3] As was correctly found below, App. 34a n.1, and as the state did not contest below, this case is not moot despite the expiration of the thirty-day period. Under North Carolina law, an involuntary commitment can "form the basis for a future commitment, along with other obvious collateral legal consequences" of an official determination that a person is mentally ill. *In re Hatley*, 231 S.E.2d 633, 635 (N.C. 1977). Some of these collateral consequences are discussed in the dissenting opinion below. App. 20a-21a. In this respect an involuntary commitment order is analogous to a criminal conviction, which is likewise not mooted by the expiration of a prison sentence. *Sibron v. New York*, 392 U.S. 40, 50-58 (1968).

In *In re C.G.*, the Court of Appeals held that the Due Process Clause was not violated when the trial court simultaneously performed the roles of adjudicator and prosecutor. *Id.* at 48a-52a. The Court of Appeals determined that it was bound by state supreme court precedent to reach this conclusion. *Id.* at 50a-51a. Judge Dillon, concurring, added that "[i]t may be that the Attorney General's Office simply did not have the resources or the desire to appear. However, this decision does not divest the trial court from the ability to seek the truth." *Id.* at 60a. Judge Griffin dissented. *Id.* at 62a-80a. In his view, "[t]he trial court impermissibly assumed the role of Respondent's adversary by calling and examining the State's witnesses on the State's behalf." *Id.* at 69a.

All six cases were appealed to the North Carolina Supreme Court. *Id.* at 7a & n.2. J.R.'s case was designated as the lead case. *Id.* at 7a-8a.

D. North Carolina Supreme Court decision

The North Carolina Supreme Court affirmed by a vote of 4-3. *Id.* at 2a-32a.

The state supreme court's majority held that the Due Process Clause allows the trial court to present the case for involuntary commitment. *Id.* at 8a-15a. The majority acknowledged that one "element of due process protection is the presence of an independent decisionmaker." *Id.* at 10a. The majority also acknowledged that "involuntary commitment proceedings are adversarial in nature." *Id.* at 11a. But the majority concluded that "a trial court does not, and cannot as a matter of practicality, automatically cease to be impartial when it merely calls witnesses

and asks questions of witnesses which elicit testimony." *Id.* at 12a.

The majority emphasized that judges "do not preside over the courts as moderators," but also ask questions of witnesses, a role expressly allowed by the state's rules of evidence. *Id.* at 10a-11a. In J.R.'s case, "[t]he trial court did not ask questions designed or calculated to impeach any witnesses." *Id.* at 13a. The majority determined that "the trial court remained an independent decisionmaker" who "did not advocate for any particular resolution and did not exceed constitutional bounds with its questions even though the responses supported involuntary commitment." *Id.* at 13a-14a.

Justice Earls, joined by Justices Hudson and Morgan, dissented. *Id.* at 16a-32a.

The dissenters concluded that the trial court violated J.R.'s right to due process by "abandoning [its] role as an impartial decisionmaker" when it "commingle[d] adjudicatory and prosecutorial functions by eliciting the testimony of witnesses and building the record that then is the basis to support the individual's involuntary commitment." *Id.* at 18a. The dissenters recognized that the trial court was "placed in a difficult position" by the district attorney's decision not to participate in the hearing, which was "the functional equivalent of a party failing to appear at all." *Id.* As the dissenters observed, "[i]t is one thing for a trial court to proceed when a party appears but is unrepresented by counsel," but "it is quite another thing for a trial court to proceed when a party with the burden of proof fails to appear." *Id.*

The dissenters noted that "[a]t least two other states have held that in the context of involuntary

commitment proceedings, a due process violation exists when the judge takes on the role of the prosecutor and questions the witnesses in support of commitment." *Id.* at 27a (citing *In re Raymond S.*, 623 A.2d 249 (N.J. App. Div. 1993), and *In re S.P.*, 719 N.W.2d 535 (Iowa 2006)). They concluded that "in civil involuntary commitment proceedings in which a petitioner fails to appear, a trial judge cannot put on the case for them, eliciting and then evaluating all the evidence." *Id.* at 32a. By doing so, the dissenters explained, "the trial court inevitably commingles the separate and distinct functions of prosecutor and neutral decisionmaker and denies the respondent in the proceeding important procedural due process guarantees." *Id.*

REASONS FOR GRANTING THE WRIT

It is "a massive curtailment of liberty" to confine a person in a psychiatric hospital against his or her will. *Humphrey v. Cady*, 405 U.S. 504, 509 (1972). "The loss of liberty produced by an involuntary commitment is more than a loss of freedom from confinement," as the Court has noted, because it also entails the "stigma" and the "adverse social consequences" of an official determination that a person is mentally ill. *Vitek v. Jones*, 445 U.S. 480, 492 (1980) (internal quotation marks omitted). For these reasons, involuntary commitment "requires due process protection." *Addington v. Texas*, 441 U.S. 418, 425 (1979).

North Carolina is depriving some of its most vulnerable citizens of this protection by denying them the constitutional right to an impartial judge. In other states, people alleged to be mentally ill and

dangerous can take for granted that the judge is a neutral arbiter who will hear the presentations of both sides and come to an independent conclusion. Not so in North Carolina, where the judges themselves make the presentation in favor of commitment.

I. The decision below creates a lower court conflict.

The decision below creates a conflict with *In re S.P.*, 719 N.W.2d 535 (Iowa 2006), in which the Iowa Supreme Court confronted the identical issue and reached the opposite holding.

In *S.P.*, the respondent's relatives sought to have her involuntarily committed for substance abuse. *Id.* at 536. No attorney appeared to make the case for commitment. *Id.* at 536-37. The district court assumed the role that would normally be performed by such an attorney, by calling and questioning the witnesses in favor of commitment. *Id.* at 539.

The Iowa Supreme Court held that S.P. had been deprived of her due process right to an impartial judge. Instead, the court explained, "we have a district court judge trying to elicit testimony that will support the applicants' burden of proof." *Id.* The court noted that "[e]ven though the court did not become a cheerleader or partisan for the applicants, the court assumed an adversarial role in the process." *Id.*

The Iowa Supreme Court added that "[w]hen the court itself directs the case in this way it is marshaling or assembling the evidence" as an advocate, rather than acting as an impartial arbiter. *Id.* "Artfully crafted questions will not hide the court's role in the

proceedings at that point—the role of deciding what evidence is needed to prove the case and steering the case down that road." *Id.* at 539-40. The court concluded that "when the court takes an active role by examining witnesses on the applicant's behalf, it begins to take on the attributes of an advocate." *Id.* at 540.

The Iowa Supreme Court advised the state's trial judges that in this situation, when no one appears in court to advocate for commitment, they should not assume this role themselves. *Id.* Rather, they should "either appoint an attorney at the county's expense under [the relevant state statute] or warn the applicant at the outset that the applicant will have to prove his or her case without assistance from the court." *Id.*

Below, the North Carolina Supreme Court was aware of the Iowa Supreme Court's decision but only the dissenting opinion cited it. App. 27a-28a.

This conflict between the Iowa and North Carolina Supreme Court is replicated in the intermediate appellate courts. Some courts agree with the Iowa Supreme Court that a judge violates the Due Process Clause by assuming the role of the state's attorney in an involuntary commitment hearing. *See R.S. v. C.P.T.*, 333 So. 3d 1190, 1191 (Fla. Ct. App. 2022) ("[T]he trial judge departed from his role as a neutral arbiter by assisting Appellee in the presentation of her case and by actively participating in the hearing."); *In re Raymond S.*, 623 A.2d 249, 252 (N.J. App. Div. 1993) ("Clearly, proceedings conducted in this manner deprived Raymond of … procedural due process.").

Other intermediate appellate courts agree with the North Carolina Supreme Court that the Due Process Clause allows the judge to wear both hats at once in an involuntary commitment hearing. *See In re A.W.D.*, 861 N.E.2d 1260, 1264 (Ind. Ct. App. 2007) (no error because the judge's "examination was not hostile and the questions did not demonstrate bias"); *In re Miller*, 672 N.E.2d 675, 676 (Ohio Ct. App. 1996) (no error because the judge "did not act as an advocate").

If we broaden the inquiry to include other kinds of proceedings, the decision below creates another lower court conflict. Until this case, the federal courts of appeals and state supreme courts had drawn a sharp line: Where a person's liberty is at stake, a judge violates the Due Process Clause by taking on the role of the state's attorney.

In a misdemeanor trial, for example, the judge cannot step in for an absent prosecutor by calling and questioning the witnesses. *Figueroa Ruiz v. Delgado*, 359 F.2d 718, 720-21 (1st Cir. 1966); *see also Giles v. City of Prattville*, 556 F. Supp. 612, 617 (M.D. Ala. 1983); *Wounded Knee v. Andera*, 416 F. Supp. 1236, 1240-41 (D.S.D. 1976). As the latter court acknowledged, "a fair trial cannot be had when the judge also has the duty of prosecuting." *Id.* at 1240. Or as the First Circuit observed of a judge trying to perform both roles at once,

> when interrogating a witness he is examining for the people, but when listening to the answer to the question he has propounded, he is weighing it as judge, and at the same time considering what question, as prosecutor, to ask next. Correspondingly, when he listens to the answer

> to a question put by the defense, he must, as judge, impartially evaluate the answer, but, simultaneously, as prosecutor, he must prepare the next question for cross-examination. The mental attitudes of the judge and prosecutor are at considerable variance. To keep these two personalities entirely distinct seems an almost impossible burden for even the most dedicated and fairminded of men.

Figueroa Ruiz, 359 F.2d at 720.

Likewise, a judge violates the Due Process Clause by taking on the absent prosecutor's role at a suppression hearing. *People v. Martinez*, 523 P.2d 120, 121 (Colo. 1974). "[T]his assumption of the role of advocate for the prosecution is inconsistent with the proper function of the judiciary and constitutes reversible error," the Colorado Supreme Court held. *Id.* "The duty to be impartial cannot be fulfilled where, by his active role in the presentation of the prosecution's case, a trial judge calls witnesses, presents evidence and cross-examines defense witnesses." *Id.*

A judge also violates the Due Process Clause by taking on the absent prosecutor's role in criminal contempt proceedings for an alleged contempt that took place out of court. *United States v. Neal*, 101 F.3d 993, 997-98 (4th Cir. 1996). As the Fourth Circuit explained, "[a]mong those procedures that are fundamental to our adversary system is the use of an independent prosecutor to pursue charges against a criminal defendant. It is axiomatic that the prosecution of crimes is not a proper exercise of the judicial function." *Id.* at 997. *See also Cromer v. Kraft Foods North America, Inc.*, 390 F.3d 812, 820-21 (4th Cir. 2004).

On the other side of this bright line, for traffic infractions, where a person's liberty is not at stake, the lower courts have allowed the judge to perform the role of the absent prosecutor. *State v. Moreno*, 58 P.3d 265, 269-70 (Wash. 2002); *People v. Carlucci*, 590 P.2d 15, 21-22 (Cal. 1979).

The decision below thus also creates a lower court conflict on the broader question of whether the Due Process Clause permits a judge to wear both hats at once in a proceeding in which someone's liberty is at stake. Until this case, every state supreme court and federal court of appeals to address the question had answered "no." The decision below upsets this consensus.

II. The decision below is wrong.

The decision below is also contrary to this Court's decisions, which draw the same bright line. In certain administrative proceedings, it can be consistent with due process to consolidate the roles of government attorney and judge. But where a person's liberty is at stake, the Due Process Clause forbids the judge from simultaneously serving as the government's advocate.

"The Due Process Clause entitles a person to an impartial and disinterested tribunal in both civil and criminal cases." *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242 (1980). This neutrality requirement "preserves both the appearance and reality of fairness." *Id.* As the Court has long recognized, "[f]airness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness." *In re Murchison*, 349 U.S. 133, 136 (1955). For this

reason, "an unconstitutional potential for bias exists when the same person serves as both accuser and adjudicator in a case." *Williams v. Pennsylvania*, 579 U.S. 1, 8 (2016).

This ban on wearing both hats hardly needs explaining. A judge must decide in an unbiased manner whether the government has satisfied its burden of proof. But where the judge is also the advocate for the government, the possibility of bias is obvious. Even if a highly principled person might judge fairly despite combining the roles of judge and government attorney, this combination of roles creates enough of a potential for unfairness, and a sufficient appearance of unfairness, that it violates the Due Process Clause.

> [T]he requirement of due process of law in judicial procedure is not satisfied by the argument that men of the highest honor and the greatest self-sacrifice could carry it on without danger of injustice. Every procedure which would offer a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear, and true between the state and the accused denies the latter due process of law.

Tumey v. Ohio, 273 U.S. 510, 532 (1927). *See also Wong Yang Sung v. McGrath*, 339 U.S. 33, 44 (1950) (quoting with approval the observation that "[a] genuinely impartial hearing, conducted with critical detachment, is psychologically improbable if not impossible, when the presiding officer has at once the responsibility of appraising the strength of the case and of seeking to make it as strong as possible").

In this respect, involuntary commitment proceedings are similar to criminal trials. Both require "adversary hearings," *Vitek*, 445 U.S. at 495, at which the government bears the burden of proof. *Jones v. United States*, 463 U.S. 354, 362 (1983) ("[T]he Due Process Clause requires the Government in a civil-commitment proceeding to demonstrate by clear and convincing evidence that the individual is mentally ill and dangerous."); *Foucha v. Louisiana*, 504 U.S. 71, 80 (1992) (same).

But a proceeding like the one countenanced by the decision below is not an adversarial proceeding. Rather, it is an inquisitorial proceeding, because a single person is simultaneously responsible for introducing the evidence and determining whether that evidence satisfies the government's burden of proof. "What makes a system adversarial rather than inquisitorial," the Court has explained, is "the presence of a judge who does not (as an inquisitor does) conduct the factual and legal investigation himself, but instead decides on the basis of facts and arguments pro and con adduced by the parties." *McNeil v. Wisconsin*, 501 U.S. 171, 181 n.2 (1991).

To be sure, in certain administrative proceedings where a person's liberty is not at stake, the Due Process Clause permits the blending of these roles that characterizes the inquisitorial system. In the benefits hearings conducted by the Social Security Administration, for example, a hearing examiner gathers the evidence and decides whether the claimant is entitled to benefits. This procedure does not deny claimants due process. *Richardson v. Perales*, 402 U.S. 389, 410 (1971). Nor does the similar procedure

employed by some state occupational licensing boards. *Withrow v. Larkin*, 421 U.S. 35, 47-52 (1975).

Below, the North Carolina Supreme Court relied on these administrative cases to conclude that the state's involuntary commitment procedure is consistent with the Due Process Clause. App. 12a, 14a. But a court proceeding to decide whether a person will be forcibly committed to a psychiatric hospital is nothing like an administrative hearing within the Social Security Administration. It is much more like a criminal trial. Involuntary commitment is a form of incarceration. It is "a significant deprivation of liberty." *Addington*, 441 U.S. at 425. "[A]n erroneous commitment is sometimes as undesirable as an erroneous conviction." *Id.* at 428. Involuntary commitment hearings are adversarial proceedings, just like criminal trials. If judges can't simultaneously serve as government attorneys in criminal trials, they can't simultaneously serve as government attorneys in involuntary commitment proceedings either.

Administrative agency hearings, by contrast, are often deliberately designed *not* to be adversarial. "[I]t is well settled that there are wide differences between administrative agencies and courts." *Shepard v. NLRB*, 459 U.S. 344, 351 (1983). For example, "Social Security proceedings"—the proceedings at issue in *Richardson v. Perales*—"are inquisitorial rather than adversarial. It is the ALJ's duty to investigate the facts and develop the arguments both for and against granting benefits." *Sims v. Apfel*, 530 U.S. 103, 110-11 (2000) (plurality opinion). The nonadversarial hearings conducted by the Social Security Administration are nothing like involuntary commitment proceedings.

The North Carolina Supreme Court also relied on the state's rules of evidence, which, like the federal rules, Fed. R. Evid. 614, allow the court to call and question witnesses. App. 11a. But these rules hardly authorize a court to replace our adversarial system with an inquisitorial one by filling in for an absent party who bears the burden of proof. If they did, they would violate the Due Process Clause.

III. This issue affects many people.

The importance of this issue is demonstrated by the sheer number of involuntary commitment petitions filed each year in North Carolina—more than 100,000 per year in each of the last two years for which data are available. Taylor Knopf, *NC Didn't Track the Data on Mental Health Commitments, So Some Advocates Did It Instead*, North Carolina Health News (Dec. 21, 2020).[4] Some of these petitions involve commitments to state hospitals, for which the state attorney general is required by statute to represent the state's interest in commitment. But the volume of petitions is so large that a considerable number must be like our case, involving commitments to private hospitals. Because the district attorneys in some counties now have a policy of not sending lawyers to *any* commitment hearing involving a private hospital, the issue in our case is arising frequently.

As we understand it, the new policy is driven by a desire to save money. If so, it bears remembering that other states manage to send lawyers to these

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[4] https://www.northcarolinahealthnews.org/2020/12/21/nc-didnt-track-the-data-on-mental-health-commitments-so-some-advocates-did-it-instead/

hearings, for public and private hospitals alike. In any event, the right to an impartial judge is not something that can be sacrificed for budgetary reasons. If it could, a state could stop sending prosecutors to criminal trials as well and let the judges handle the presentation of the government's case.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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