NO. 23-1204

In the Supreme Court of the United States

DANIEL KINSINGER,

Petitioner,

v.

SHERELLE THOMAS, ADMINISTRATOR OF THE ESTATE OF TERRELLE THOMAS, ET AL.,

Respondents.

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

BRIEF OF AMICUS CURIAE NATIONAL POLICE ASSOCIATION IN SUPPORT OF PETITIONER

Robert S. Lafferrandre
Counsel of Record
Jeffrey C. Hendrickson
PIERCE COUCH HENDRICKSON BAYSINGER & GREEN, L.L.P.
1109 North Francis Avenue
Oklahoma City, OK 73106
(405) 235-1611
rlafferrandre@piercecouch.com

June 10, 2024 *Counsel for Amicus Curiae*

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INTEREST OF THE AMICUS CURIAE[1]

The NATIONAL POLICE ASSOCIATION ("NPA") is an Indiana non-profit corporation founded to provide educational assistance to supporters of law enforcement and support to individual law enforcement officers and the agencies they serve. The NPA seeks to bring important issues in the law enforcement realm to the forefront of public discussion in order to facilitate remedies and broaden public awareness.

SUMMARY OF THE ARGUMENT

This Court's treatment of the deliberate-indifference standard, since its creation in *Estelle v. Gamble*, is marked by an expectation that judges will apply it rigorously and narrowly. Rigorous in that the facts which purport to show deliberate indifference must be specific, unimpeachable, and material; limited in that courts applying it must take great care *not* to call deliberate indifference that which is simply negligence. Doing otherwise would serve as a massive, unwarranted expansion of substantive due process

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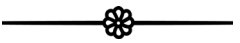
[1] Under Rule 37.6 of the Rules of this Court, *amicus curiae* states that no counsel for a party has written this brief in whole or in part and that no person or entity, other than *amicus curiae*, its members, or its counsel, has made a monetary contribution to the preparation or submission of this brief. Under Rule 37.2(a), *amicus curiae* states that all parties received notice of its intention to file this amicus brief at least 10 days before the due date.

claims in an arena—arrest and pre-trial detention—that most cautions against it.

From *Estelle v. Gamble* to *Farmer v. Brennan* to *County of Sacramento v. Lewis*, this Court has taken great pains to craft the deliberate-indifference standard into a workable constitutional regime while maintaining the separation of those claims from the realm of brand-new substantive-due-process rights. But the Third Circuit's decision in this case subverts this Court's well-settled precedent to a significant degree. The Circuit both misapprehends the deliberate-indifference standard and, in so doing, creates a substantive due process claim premised only on allegedly negligent conduct. Neither are proper, and both counsel toward this Court accepting this case for review.



ARGUMENT

I. THE COURT SHOULD REVIEW THIS CASE BECAUSE THE DECISION BELOW STRETCHES SUBSTANTIVE DUE PROCESS BEYOND ACCEPTABLE BOUNDS.

In affirming the denial of qualified immunity to Officer Kinsinger, the Third Circuit sidestepped Chief Justice Marshall's warning to "never forget that it is *a constitution* we are expounding." *McCulloch v. Maryland*, 4 Wheat. (17 U.S.) 316, 407, 4 L.Ed. 579 (1819) (emphasis in original). For when it concluded that Officer Kinsinger, as alleged, acted deliberately indifferent to Mr. Thomas's serious medical need, the Third Circuit returned every jurisdiction in its ambit to a time when substantive due process covered not

only intentional acts but negligent ones. To put it simply, we have moved past that era.

The fact is, even as alleged, Mr. Kinsinger and his fellow officers responded reasonably to the information they both observed and heard from Terrelle Thomas in December 2019. But if any part of Officer Kinsinger's decision-making was wrong, it was only negligently so. As this Court reasoned in *DeShaney v. Winnebago County Department of Social Services*, perhaps "the most that can be said of the state functionaries in this case is that they stood by . . . when suspicious circumstances dictated a more active role for them." 489 U.S. 189, 203 (1989).[2] And maybe so it is here. But by misidentifying such inaction as deliberately indifferent when it was at most unreasonable, the Third Circuit's opinion conflicts with relevant decisions from this Court which hold that mere negligence does not violate the Fourteenth Amendment's substantive due process guarantee (or any other constitutional guarantee, for that matter). *See Daniels v. Williams*, 474 U.S. 327, 332 (1986); *Davidson v. Cannon*, 474 U.S. 344, 347-48 (1986). As things stand in the Third Circuit, one could credibly argue the United States Constitution provides federal redress for a universe of acts that, until 2024, fell within the exclusive confines of state tort regimes. That is simply not the law, and this Court should grant certiorari to say so.

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[2] *DeShaney* deals with the government's duty to protect (or lack thereof) under a state-created danger substantive due process theory, but the principles relieving a state actor's failure to do more there sound in similar tones to the principles that should relieve Officer Kinsinger's conduct here.

A. Pretrial Detention Denial-of-Medical-Care Claims Arise from the Fourteenth Amendment's Substantive Due Process Clause.

To fully appreciate the infirmity of the decision below, one must start with first principles. The phrase "deliberate indifference" entered this Court's lexicon in *Estelle v. Gamble*, the 1976 opinion which held that the Eighth Amendment's ban on cruel and unusual punishments carried with it an obligation for the government to "provide medical care for those whom it is punishing by incarceration." *Estelle*, 429 U.S. 97, 103 (1976). In locating that obligation, this Court reasoned that the Eighth Amendment—which in pertinent part protects only those convicted of crimes[3]—proscribed not only "physically barbarous punishments," but also penal measures "which are incompatible with 'the evolving standards of decency that mark the progress of a maturing society,'" *id.* at 102 (quoting *Trop v. Dulles*, 356 U.S. 86, 100-101 (1958)), or which "'involve the unnecessary and wanton infliction of pain.'" *Id.* at 103 (quoting *Gregg v. Georgia*, 428 U.S. 153, 169-173 (1976)). Because inmates "must rely on prison authorities to treat [their] medical needs," *id.*, the Court concluded that an official's failure to so treat—which it referred to as "deliberate indifference to serious medical needs"—could, amount to the "unnecessary and wanton infliction of pain" barred by the Eighth Amendment. *Id.*

Unfortunately, the *Estelle* Court did little to further describe what it meant by "deliberate indifference," though what it did say made the nascent

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[3] *See Ingraham v. Wright*, 430 U.S. 651, 671, 672 n. 40 (1977).

standard sound like it barred intentional conduct. *Id.* at 104 ("indifference" could be "manifested by prison doctors in their response to the prisoner's needs, or by prison guards in *intentionally* denying or delaying access to medical care or *intentionally* interfering with treatment once prescribed") (emphasis added). The Court was careful, at least, to carve out "accidents," "inadvertent failures," and "negligence in diagnosing or treating a medical condition" from its description, *id.* at 105-06, as those events would not be "repugnant to the conscience of mankind" such that the Eighth Amendment would bar them. *Id.*; *see also Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459, 471 (1947). Such acts, like deciding "not to order an x-ray," were best left to the state courts. *Id.* at 107.

Thus, deliberate indifference was borne into the Eighth Amendment. It would not stay there for long. The seeds of expansion beyond the carceral context emerged three years later in *Bell v. Wolfish*, 441 U.S. 520 (1979), where this Court concluded that the proper inquiry into whether pretrial conditions of confinement violated the Fifth Amendment's Due Process Clause was "whether those conditions amount to punishment of the detainee."[4] *Id.* at 535. The deportation of

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[4] This holding in *Bell*—which expressly rejected a lower court's decision that the Due Process Clause required better conditions of confinement for pretrial detainees than it did for convicted inmates—is central to the present case. It is the baseline for the conclusion that pretrial detainees do not obtain a higher constitutional standard than convicted inmates for either medical care or confinement conditions simply because pretrial detainees' protections stem from the Due Process Clause as opposed to the Cruel and Unusual Punishments Clause. *See also County of Sacramento v. Lewis*, 523 U.S. 833, 849 (1998) ("Since it may suffice for Eighth Amendment liability that prison officials were

standards from incarceration-after-conviction to another form of detention occurred once more two years later in *Youngberg v. Romeo*, 457 U.S. 307 (1982). In ruling on the due-process constitutionality of conditions in a mental health facility to which the petitioner had been involuntarily committed, the *Youngberg* Court reasoned that if it was "cruel and unusual punishment to hold convicted criminals in unsafe conditions, it must be unconstitutional to confine the involuntarily committed—who may not be punished at all—in unsafe conditions."[5]

The next year, however, saw the explicit expansion of *Estelle*'s generalized right to medical care (and the accompanying deliberate-indifference standard) to the Fourteenth Amendment Due Process Clause's ambit. In an unusual case that did not involve a dispute between a citizen and the state over the *quality* of mandatory care, but instead centered on a dispute between the state and a hospital over who had to *pay* for mandatory care, this Court held that at the very least, the Fourteenth Amendment's Due Process Clause required "the responsible government or governmental agency to provide medical care to

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deliberately indifferent to the medical needs of their prisoners . . . it follows that such deliberately indifferent conduct must also be enough to satisfy the fault requirement for due process claims based on the medical needs of someone jailed while awaiting trial") (citations omitted).

[5] Many of this Court's deliberate-indifference rulings stem not from cases involving denials of medical care but more generalized failures to maintain constitutional conditions of confinement. Though there certainly are differences in context, *see, e.g., Whitley v. Albers*, 475 U.S. 312, 320 (1986), much of the language used between the two lines of cases has cross-applicability.

persons . . . who have been injured while being apprehended by the police." *See City of Revere v. Massachusetts General Hosp.*, 463 U.S. 239, 244 (1983). Though the Court declined to rule on the applicable standard (because it was irrelevant), it nonetheless found that pretrial detainees had Fourteenth Amendment substantive due process rights to state-provided medical care that were "at least as great as the Eighth Amendment protections available to a convicted prisoner." *Id.*; *accord*. *DeShaney*, 489 U.S., at 199. These substantive due process rights stem from the Fourteenth Amendment Due Process Clause's guarantee of freedom from "unjustified intrusions on personal security," *see Ingraham*, 430 U.S., at 673-674, and are triggered by the "State's affirmative act of restraining the individual's freedom to act on his own behalf[.]"*DeShaney*, 489 U.S. at 200.

Regardless of whatever clarity the above-discussed cases wrought, many years—nearly 15—passed before the Court filled in *City of Revere*'s ambiguity about what standard applies when a pretrial detainee alleges a violation of their right to medical care. Echoing *Bell v. Wolfish*, *see* fn 4, *supra*, at 5, this Court explained in *County of Sacramento v. Lewis* that because deliberate indifference afforded Eighth Amendment liability for prisoners, "it follows that such deliberately indifferent conduct must also be enough to satisfy the fault requirement for due process claims based on the medical needs of someone jailed while awaiting trial." *See County of Sacramento*, 523 U.S. at 850.

* * *

So, in sum, the Fourteenth Amendment's Due Process Clause, and specifically the substantive due process guarantees afforded by it, provide pretrial detainees with a right to a state-provided general level of medical care (and the accompanying deliberate-indifference standard). That the relevant constitutional guarantee here is substantive due process provides the foundation for why the Third Circuit's opinion in this case is, likewise, so profoundly incorrect.

B. Substantive Due Process Should Be Tightly Circumscribed, and at the Very Least Not Expanded to Include Acts That Amount at Most to Negligence.

In cases under 42 U.S.C. § 1983 that involve qualified immunity as a defense, parties (and courts) routinely disagree as to whether a constitutional provision was violated, and if so, whether that violation was "clearly established" at the time of the act such that liability could be imposed. *See Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011). The semantics of the "clearly established" battle often ask whether the allegedly violated "law" was clearly established, or whether the allegedly violated "right" was clearly established. These are coterminous, and they operate to the same end: defining "rights" under particular constitutional provisions. *See*, *e.g.*, *Taylor v. Barkes*, 575 U.S. 822, 826 (2015) ("No decision of this Court establishes a[n] [Eighth Amendment] right to the proper implementation of adequate suicide prevention protocols"); *see also Fisher v. Moore*, 73 F.4th 367, 369 (5th Cir. 2023) (signaling reluctance to find a clearly established right which would thereby expand the concept of substantive due process); *Maddox v. Stephens*, 727 F.3d 1109, 1120 (11th Cir. 2013) ("[i]n determining

whether the plaintiff has alleged an actual deprivation of a constitutional violation, we must 'treat lightly' because '[b]y extending constitutional protection to an asserted right or liberty interested, we, to a great extent, place the matter outside the arena of public debate and legislative action"). For less esoteric constitutional provisions, like the Fourth or Eighth, the battle over whether a "right" exists is rarely postured against the background of whether the right's constitutional authority is legitimate. Everyone agrees that the Fourth Amendment provides a right to be free from unreasonable seizures; the debate is over how it applies in a particular fact scenario. Here, however, the constitutional firmity of the very authority (substantive due process) for the right at issue is in question.

As the foregoing suggests, substantive due process, famously described by one member of this Court as a "legal fiction," *see McDonald v. City of Chicago*, 561 U.S. 742, 811 (2010) (Thomas, J., concurring in part and concurring in judgment), an "oxymoron that lack[s] any basis in the Constitution," *see Johnson v. United States*, 576 U.S. 591, 607-608 (2015) (Thomas, J., concurring), and "demonstrably erroneous," *see Ramos v. Louisiana*, 590 U.S. 83, 132 (2020) (Thomas, J. concurring), is a tenuous precipice on which to rest a constitutional right. Certainly the right to state-provided medical care for pretrial detainees exists thereunder, but any attempt—like the one implied by the Third Circuit's opinion here—to locate additional rights stemming from this "formless and unstructured" constitutional authority, *see Kowinski v. Village of Franklin Park*, No. 06-C-2205, 2007 WL 1703767, at *1 (N.D. Ill. June 11, 2007), must be tightly circumscribed, "lest the liberty protected by

the Due Process Clause be subtly transformed into the policy preferences of the Members of this Court." *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997) (citing *Moore v. East Cleveland*, 431 U.S. 494, 502 (1977)); *see also Collins v. City of Harker Heights*, 503 U.S. 115, 125 (1992) (this Court "has always been reluctant to expand the concept of substantive due process because guideposts for responsible decisionmaking in this unchartered area are scarce and open-ended").

Those admonishments demand an examination of the nature of substantive due process before expanding it to new realms. At its core, the concept protects against "arbitrary action." *County of Sacramento*, 523 U.S., at 833. Over a century ago, this Court explained that due process was, generally, "intended to secure the individual from the arbitrary exercise of the powers of government, unrestrained by the principles of private right and distributive justice." *See Hurtado v. California*, 110 U.S. 516, 527 (1884). Since then, this Court has repeatedly emphasized that principle across the spectrum of its potential application:

> We have emphasized time and again that "[t]he touchstone of due process is protection of the individual against arbitrary action of government," *Wolff v. McDonnell*, 418 U.S. 539, 558 (1974), whether the fault lies in a denial of fundamental procedural fairness, *see*, *e.g., Fuentes v. Shevin*, 407 U.S. 67, 82, (1972) (the procedural due process guarantee protects against "arbitrary takings"), or in the exercise of power without any reasonable justification in the service of a legitimate governmental objective, *see*, *e.g.*, *Daniels v.*

> *Williams*, 474 U.S. at 331, (the substantive due process guarantee protects against government power arbitrarily and oppressively exercised).

County of Sacramento, 523 U.S. at 845-846.

In the context of individual acts purporting to deprive one of their due process rights, this Court has likewise impressed that "only the most egregious official conduct can be said to be 'arbitrary in the constitutional sense.'" *Id.* (*citing Collins*, 503 U.S., at 129). Thus, "for half a century now," this Court has "spoken of the cognizable level of executive abuse of power as that which shocks the conscience." *Id.* at 846; *see also Breithaupt v. Abram*, 352 U.S. 432, 435 (1957) (reiterating that conduct that "'shocked the conscience' and was so 'brutal' and 'offensive' that it did not comport with traditional ideas of fair play and decency" would violate substantive due process).

As these opinions show, "the constitutional concept of conscience shocking duplicates no traditional category of common-law fault, but rather points clearly away from liability, or clearly toward it, only at the ends of the tort law's spectrum of culpability." *Id.* It is therefore plainly true that substantive due process cannot—as particularly relevant here—be a "font of tort law to be superimposed upon whatever systems may already be administered by the States." *Paul v. Davis*, 424 U.S. 693, 701 (1976). Said another way, the "Constitution deals with the large concerns of the governors and the governed, but it does not purport to supplant traditional tort law in laying down rules of conduct to regulate liability for injuries that attend living together in society." *See Daniels*, 474 U.S., at 332. This Court has "accordingly rejected the lowest

common denominator of customary tort liability as any mark of sufficiently shocking conduct, and have held that the Constitution does not guarantee due care on the part of state officials; liability for negligently inflicted harm is categorically beneath the threshold of constitutional due process." *Id.* at 328; *see also Davidson*, 474 U.S., at 348 (clarifying that *Daniels* applies to substantive, as well as procedural, due process).

* * *

The crux of these cases is that substantive due process protects against arbitrary government action, but only truly shocking behavior amounts to the sort of arbitrary acts that violate such protection. Negligent conduct, in no sense, violates any substantive due process rights. But it is precisely the Third Circuit's misapprehension of the deliberate-indifference standard that caused it to mistake what is—at most—simple negligent conduct for a substantive due process violation.

C. The Third Circuit's Decision Constitutionalizes Negligence and Must Be Reversed.

In the decision below, the Third Circuit concluded that Officer Kinsinger, as alleged, acted deliberately indifferent to Mr. Thomas's medical needs because Officer Kinsinger had reason to believe that Mr. Thomas had taken drugs and, despite this, Officer Kinsinger did not thereafter take Mr. Thomas to the hospital, but to the jail (which had a medical staff—*which cleared Mr. Thomas for incarceration*). By finding that the allegations plausibly showed Officer Kinsinger acted deliberately indifferent, and that this was "obvious" despite the total lack of authority in

support, the Third Circuit effectively found that all pretrial detainees who have *potentially* ingested drugs have a substantive due process right to *hospital* medical care even when non-hospital medical care is available. That is a complete miscomprehension of deliberate indifference as this Court most recently defined it.

Up until the mid-1990s, *Estelle* served as this Court's first and only effort at explaining deliberate indifference. *See* Section I(A), *supra*, at 8. Then, in 1994, the *Farmer v. Brennan* Court undertook for the first time to define it. *See* 511 U.S. 825, 835 (1994). While quickly identifying deliberate indifference as "something more than mere negligence" but "less than acts or omissions for the very purpose of causing harm or with knowledge that harm will result," the *Farmer* Court wrestled with how to handle cases that fell in between those two poles. *Id.* at 836. After recognizing that many lower courts had borrowed a generalized "recklessness" standard from tort law, the *Farmer* Court both endorsed recklessness as a standard but also clarified what *kind* of recklessness it had in mind. *Id.* at 837-838. In weighing competing options in light of the Eighth Amendment's ban on cruel and unusual "punishment," (as opposed to cruel and unusual "conditions"), the Court opted to define "deliberate indifference" as "subjective recklessness as used in the criminal law." *Id.* at 839-840. It thereby found that only an official who "knows of and disregards an excessive risk to inmate health or safety" violates the Eighth Amendment. *Id.* at 838. As the Court put it, "the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the

inference." *Id*. Recognizing that "an act or omission unaccompanied by knowledge of a significant risk of harm might well be something society wishes to discourage," the Court elected to leave those concerns to state tort law. *Id.*

Thus, after *Farmer*, "an official's failure to alleviate a significant risk that he should have perceived but did not, while no cause for commendation, cannot under our cases be condemned as the infliction of punishment." *Id.* While *Farmer's* gloss on deliberate indifference could be clarified further, the standard is quite routine. The problem in the Third Circuit's opinion is that it does not appear to have assessed "recklessness" in a manner consistent with this Court's definition. The Third Circuit placed significant emphasis on its view that a "layperson" would have known both that Mr. Thomas had ingested a significant amount of cocaine and that, by virtue of that fact alone, that a layperson would have known Mr. Thomas had a serious medical need. The Third Circuit also seemed to believe that a layperson would have known that someone who had used drugs for the purpose of concealing those drugs would lie about having done so.

Whether these are accurate or not, the Circuit Court's emphasis on those facts so as to affirm that the plaintiff stated a plausible Fourteenth Amendment substantive due process claim against Officer Kinsinger smacks of a flat misinterpretation of *Farmer*. Those allegations would be significant if, say, deliberate indifference meant one violated the Constitution when they "act or fail to act in the face of an unjustifiably high risk of harm that is either known or *so obvious that it should be known*." *Farmer*, 511 U.S. at 836 (emphasis added). But that is *not* the standard.

The standard is that "the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference." *Nothing* suggests that Officer Kinsinger actually drew the inference that Mr. Thomas was at substantial risk of serious harm. The "obviousness" is not relevant under *Farmer*.

The fact is, Officer Kinsinger's acts—as alleged—simply do not amount to deliberate indifference under the Fourteenth Amendment. Because the Third Circuit flatly misapprehended the applicable standard under *Farmer*, it effectively endorsed negligent conduct as a substantive due process violation. But in absolutely no sense did Officer Kinsinger do anything that could be fairly said to "shock the conscience," *see County of Sacramento*, supra at 12, or "was so 'brutal' and 'offensive' that it did not comport with traditional ideas of fair play and decency," *see Breithaupt*, *supra* at 12, or was "repugnant to the conscience of mankind," *see Resweber*, *supra* at 6. This heretofore unknown expansion of substantive due process flies in the face of this Court's line of decisions that expressly condemn the exact findings the Third Circuit made here. It is grounds for not only acceptance for review, but also summary reversal.

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

Robert S. Lafferrandre
Counsel of Record
Jeffrey C. Hendrickson
PIERCE COUCH HENDRICKSON
BAYSINGER & GREEN, L.L.P.
1109 North Francis Avenue
Oklahoma City, OK 73106
(405) 235-1611
rlafferrandre@piercecouch.com

Counsel for Amicus Curiae
National Police Association

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