

No. 19-1138

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In The  
**Supreme Court of the United States**

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DEWAYNE KNIGHT,

*Petitioner,*

v.

THOMAS GROSSMAN, JR., M.D.,

*Respondent.*

—◆—  
**On Petition For A Writ Of Certiorari  
To The United States Court Of Appeals  
For The Seventh Circuit**

—◆—  
**BRIEF FOR RESPONDENT  
DR. THOMAS GROSSMAN, JR. IN OPPOSITION**

—◆—  
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**QUESTION PRESENTED**

The Seventh Circuit endorsed a patient's limited right to receive medical information under the Fourteenth Amendment as a corollary to the patient's right to refuse unwanted medical treatment, and adopted the standard articulated by the Second Circuit in *Pabon v. Wright*, 459 F.3d 241 (2006). Is the standard adopted by the Seventh Circuit, which requires a showing of something more than negligence or gross negligence, as well as actual injury to the patient's right to refuse medical treatment in order to prove a violation of the patient's right to medical informed consent, consistent with due process jurisprudence under the Fourteenth Amendment?

**CORPORATE DISCLOSURE STATEMENT**

Appellate Court No. 19-1740

Short Caption: DeWayne Knight v. Thomas Grossman, Jr., M.D.

- (1) The full name of every party that the attorney represents in the case:

Thomas Grossman, Jr., M.D.

- (2) The names of all law firms whose partners or associates have appeared for the party in the case or are expected to appear for the party in this court:

Otjen Law Firm, S.C.

- (3) If the party or amicus is a corporation: N/A

- i) Identify all its parent corporations, if any; and  
N/A

- ii) List any publicly held company that owns 10% or more of the party's or amicus' stock:

N/A

**CORPORATE DISCLOSURE STATEMENT**  
– Continued

Please indicate if you are Counsel of Record for the above listed parties pursuant to Circuit Rule 3(d).

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**STATEMENT OF RELATED PROCEEDINGS**

DeWayne D. Knight v. Thomas Grossman, Jr.,  
M.D., No. 2:16-cv-01644, U.S. District Court for the  
Eastern District of Wisconsin. Judgment entered  
March 21, 2019.

DeWayne D. Knight v. Thomas W. Grossman, Jr.,  
M.D., No. 19-1740, U.S. Court of Appeals for the Sev-  
enth Circuit. Judgment entered October 31, 2019.

Petition for Rehearing En Banc denied December  
17, 2019.

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## **JURISDICTION**

The judgment of the Seventh Circuit Court of Appeals was entered on October 31, 2019. The Seventh Circuit's order denying Appellant DeWayne Knight's request for rehearing en banc was entered on December 17, 2019. The Petition for a Writ of Certiorari was filed on March 13, 2020. Respondent's request for an extension of time to file a response to the petition was made on April 3, 2020, and was granted by the Office of the Clerk of the United States Supreme Court on April 6, 2020, extending the time for the filing of a response to the Petition for Certiorari to and including June 17, 2020. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).



## **CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED IN THE CASE**

The Fourteenth Amendment to the United States Constitution (U.S. Const. amend. XIV) provides, in pertinent part:

“No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”



**STATEMENT OF THE CASE****A. DeWayne Knight's Treatment with Dr. Grossman.**

While serving a sentence at the Waupun Correctional Institution, DeWayne Knight sought treatment in 2009 for a basketball injury to his left knee. App. 20a. Prison staff referred Knight to Dr. Thomas Grossman, who worked at a hospital that contracted with the Wisconsin Department of Corrections (DOC) to provide medical services to state prisoners. App. 19a-20a. Dr. Grossman diagnosed Knight with a tear in his anterior cruciate ligament and performed reconstruction surgery on July 26, 2010. This surgery was successful and is not at issue in this petition. App. 20a-21a.

Knight subsequently reinjured his knee and was returned by the DOC to Dr. Grossman for treatment in 2003. App. 21a. Dr. Grossman examined Knight, ordered x-rays, and diagnosed him with a torn ACL revision. App. 21a. Dr. Grossman offered Knight the option of undergoing a revision procedure to repair the tear. App. 21a. In doing so, he issued a series of disclaimers, explaining that the surgery was elective and not strictly necessary, involved certain risks, and did not carry with it a guarantee that it would resolve Knight's pain. App. 21a-22a. Knight agreed to the surgery and opted for a type of reconstruction procedure that would require Dr. Grossman to open both knees and to transplant tissue from Knight's healthy right knee into his damaged left knee. App. 23a-24a.

On the day of the surgery, Knight signed a consent form authorizing a “[r]evision left anterior cruciate reconstruction with donor site from right knee.” App. 23a. The form also provided that if unforeseen conditions arose during the surgery which, in Dr. Grossman’s judgment, required additional or different procedures, he had Knight’s consent to take any further steps “deemed necessary and advisable.” App. 23a.

Upon opening Knight’s left knee, Dr. Grossman encountered a different condition than he had anticipated – Knight’s ACL was intact, not torn. App. 24a. Dr. Grossman, however, observed other issues with Knight’s left knee, including surface damage to the cartilage (grade three changes to the trochlea), narrowing of the space between the two bumps at the end of the thigh bone (dense stenosis on the lateral side on the intercondylar notch, with a small bone fragment), and bony overgrowths on the kneecap (patellar osteophytosis). App. 24a. Dr. Grossman determined that what he was seeing was consistent with degenerative joint disease, or arthritis, and would explain why Knight was experiencing pain in his left knee. App. 24a.

As an experienced orthopedic surgeon, Dr. Grossman knew immediately that there were several procedures that were less invasive than the one to which Mr. Knight consented in writing, and that could be used to address the pathology that he was observing. App. 24a. He could continue operating by using the two small incisions that had already been made to Knight’s left knee to perform a series of arthroscopic surgical procedures. App. 24a. A procedure known as a chondroplasty

would remove the damaged tissue and a second procedure, a notchplasty, would enlarge the narrowed gap to address the thigh-bone issue. App. 4a. On the kneecap, Dr. Grossman could perform an abrasion arthroplasty – a procedure, as described in the medical literature, that required shaving the bone to a degree that stimulated the bone marrow to generate new cartilage. App. 4a.

At this point, Dr. Grossman found himself with a choice to make: with Knight unconscious on the operating table, he could close Knight's knee and end the operation, which would leave Mr. Knight's symptoms unaddressed. Alternatively, Dr. Grossman could move forward with the procedures he had not discussed with Knight, but believed would help him. Dr. Grossman chose to keep operating. App. 25a. He later explained that he did so because he believed the alternative procedures would address Knight's condition, and also because it was unclear if or when Knight, as a prisoner, would be made available by the DOC for surgery again. App. 25a.

Knight woke up in the recovery room to find that only his left knee had been operated on. App. 5a. Upon Knight's discharge from the hospital, Dr. Grossman sent his operative note and recovery instructions to the prison's medical unit. App. 5a. The note explained what Dr. Grossman had observed, including Knight's intact ACL, and identified the procedures he had performed. App. 5a.

## **B. Proceedings Below**

Following his surgery, Knight brought suit against Dr. Grossman under 42 U.S.C. § 1983, claiming that the surgery that Dr. Grossman had performed upon his knee violated his Eighth and Fourteenth Amendment rights. Dr. Grossman moved for summary judgment on both claims, and the District Court granted summary judgment on each. App. 31a-32a; App. 37a-38a.

Knight appealed the District Court's grant of summary judgment to the Seventh Circuit, arguing that the District Court had improperly granted summary judgment on both the Eighth Amendment claim and on Knight's informed consent claim under the Fourteenth Amendment. The Seventh Circuit upheld summary judgment on Knight's Eighth Amendment claim, a conclusion that Knight does not challenge in his Petition for Certiorari.

On Knight's Fourteenth Amendment claim, the Seventh Circuit joined all other circuits that have considered the question, and held that prisoners have a right to informed consent under the Fourteenth Amendment. App. 11a. In doing so, the Seventh Circuit adopted the standard articulated by the Second Circuit in *Pabon v. Wright*, 459 F.3d 241 (2d Cir. 2006), for evaluating a prisoner's claim alleging a violation of his right to informed consent under the Fourteenth Amendment.

The *Pabon* standard requires a prisoner, in order to establish a violation of his right to informed consent under the Fourteenth Amendment, to prove that: 1) he

was deprived of information that a reasonable patient would deem necessary to make an informed decision about his medical treatment; 2) the defendant acted with deliberate indifference to the prisoner's right to refuse treatment; and 3) if the prisoner had received the information, he would have refused the treatment. App. 15a. If the prisoner establishes these three elements, thus proving that his right to informed consent has been violated, the *Pabon* standard includes a second and final step, which requires the court to balance the prisoner's right to informed consent against countervailing state interests. App. 15a.

The Seventh Circuit, below, stopped short of making a determination one way or another as to whether Dr. Grossman had acted with deliberate indifference to Mr. Knight's right to refuse treatment. Instead, the Seventh Circuit upheld the District Court's grant of summary judgment on an alternative basis, i.e., that Knight had failed to show that he would have refused the surgical procedure even had he been fully informed. App. 16a.

Knight subsequently petitioned the Seventh Circuit for a rehearing en banc, which was denied. App. 41a.

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### SUMMARY OF ARGUMENT

DeWayne Knight's Petition for Certiorari should be denied. First, the question presented in Knight's petition is whether a claim alleging a violation of a

patient's Fourteenth Amendment right to informed consent requires a showing of deliberate indifference. In the instant case, however, the Seventh Circuit pointedly stopped short of resolving Knight's appeal upon a determination that Dr. Grossman had or had not acted with deliberate indifference to Knight's right to refuse treatment. Instead, the Seventh Circuit upheld summary judgment on an alternative basis – Knight had not established that he would have refused the surgical procedure even had he been fully informed. Because the Seventh Circuit did not reach the issue of deliberate indifference in upholding summary judgment, this petition does not squarely present the primary question upon which Knight seeks the intervention of this Court.

Second, Petitioner contends that the standard adopted by the Seventh Circuit, which incorporates a requirement that he demonstrate that he would have refused the surgery in question had he been fully informed, was improper. This contention, however, fails to recognize that a patient's right to medical information is not an independent right, but is instead derivative of the patient's right to refuse treatment. *Pabon*, 459 F.3d 241, 251 (2d Cir. 2006). Because Knight's right to receive information was merely derivative of his right to refuse medical treatment, his failure to establish that he would have refused the surgery in question, even if he had been given all pertinent information, necessarily means that he could not prove that his right to refuse treatment had been impaired. In the absence of proof that Knight's right to refuse

medical treatment had been impaired, the alleged deprivation of medical information was of no consequence. *Lewis v. Casey*, 518 U.S. 343, 349, 116 S. Ct. 2174, 2179 (1996).

Third, the *Pabon* standard adopted by the Seventh Circuit is consistent with this Court's jurisprudence addressing the conduct required in order to establish a claim under the Due Process Clause of the Fourteenth Amendment. This Court has long recognized that the touchstone of due process is protection from arbitrary governmental action, and that only the most egregious official conduct is "arbitrary" in a constitutional sense. *Cty. of Sacramento v. Lewis*, 523 U.S. 833, 842, 845, 118 S. Ct. 1708, 1714 (1998). Liability for negligently inflicted harm is beneath the threshold of constitutional due process. *Id.* at 849. A showing of deliberate indifference in a prison health care context is necessary in order to demonstrate conduct that rises to the necessary "conscience-shocking" level, thereby preserving the constitutional proportions of substantive due process. *Id.*

Fourth, there is no "circuit split" on the standard governing a patient's right to medical information under the Fourteenth Amendment. The Seventh Circuit's conclusion that an individual has a limited right to medical information necessary to make an informed decision on medical matters is consistent with the conclusion of all courts that have considered the issue, and none of the cases cited by Petitioner from the Third, Fourth, Fifth, Ninth, or Tenth Circuits articulates any formal "standard" that is contrary to, or irreconcilable



with, the standard articulated by the Second Circuit in *Pabon*, and adopted by the Seventh Circuit in this case.

For all of these foregoing reasons, the Court should deny certiorari.

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## ARGUMENT

### **I. This Case Is an Inappropriate Vehicle Through Which to Address the Issues Advanced by the Petitioner.**

#### **A. The Seventh Circuit’s Decision Resolved Petitioner’s Appeal on an Alternative Ground That Did Not Require the Court to Reach the Issue of Deliberate Indifference, and Thus Does Not Squarely Present the Issue that Petitioner Now Urges This Court to Address.**

The primary question presented, as framed by the Petitioner, is “whether a claim for violation of a prisoner-patient’s Fourteenth Amendment right to informed consent requires a showing of deliberate indifference. . . .” Petitioner argues that the Seventh Circuit improperly imported a “deliberate indifference” requirement into the standard governing a patient’s claim alleging a violation of his/her right to medical informed consent under the Fourteenth Amendment.

The Seventh Circuit’s resolution of Petitioner’s appeal, however, did not pivot upon a determination that Dr. Grossman had or had not acted with deliberate

indifference to Mr. Knight's right to refuse treatment. Instead, the Seventh Circuit expressly resolved Petitioner's appeal on a different ground, i.e., that Petitioner Knight had failed to establish that he had suffered actual injury to his right to refuse medical treatment:

We question whether Knight has sufficiently shown that Dr. Grossman was deliberately indifferent to his right to refuse treatment, particularly given the scope of the consent form. But we can stop short of answering that question because, at the very least, Knight failed to show that he would have refused the only procedure he contests (the abrasion arthroplasty) had he been fully informed. . . .

App. 16a.

Petitioner invites this Court to decide "whether a claim for violation of a prisoner-patient's Fourteenth Amendment right to informed consent requires a showing of deliberate indifference." Deciding the question that the Petitioner wants the Court to address, however, would not change the outcome of the appeal, because the Seventh Circuit's decision was expressly based on other grounds. The Seventh Circuit resolved Petitioner's appeal without ever reaching the question of whether Dr. Grossman acted with deliberate indifference to Knight's right to refuse treatment. The instant petition does not squarely present the issue that Petitioner wishes this Court to decide, and is therefore not an appropriate vehicle through which to address

the issue urged by the Petitioner. Certiorari should be denied.

**B. The Seventh Circuit's Adoption of a Standard Incorporating a Requirement That a Patient Would Have Refused the Proposed Treatment Had He Been Fully Informed Is Consistent With This Court's Longstanding Jurisprudence.**

Petitioner perfunctorily challenges the Seventh Circuit's adoption of a requirement that a patient claiming a violation of his right to informed consent under the Fourteenth Amendment establish that he would have refused the treatment in question had he been fully informed. *See* Petition for Certiorari, p. 14.

The Seventh Circuit, below, recognized a patient's right under the Fourteenth Amendment to informed consent and adopted the standard articulated by the Second Circuit in *Pabon v. Wright* to assess a patient's claim that his right to informed consent under the Fourteenth Amendment had been violated. The Second Circuit, in *Pabon*, recognized that a patient's right to medical information is not, in and of itself, an independent right. *Pabon*, 459 F.3d 241, 251 (2d Cir. 2006). Instead, it is a right that is derivative of the patient's underlying right to refuse medical treatment. Therefore, the right to medical information extends only to those circumstances in which it will effectuate the patient's exercise of his underlying right to refuse treatment. *Id.* Relying upon the rationale articulated

by this Court in its decision in *Lewis v. Casey*, 518 U.S. 343, 116 S. Ct. 2174 (1996), the Second Circuit, in *Pabon*, concluded:

. . . [A] prisoner must be able to establish that the underlying right at stake – the right to refuse treatment – actually was impaired by the state’s failure to impart necessary information to the prisoner-patient. If a prisoner still would have accepted the proposed treatment, even if he had been given all of the necessary information regarding that treatment, then his right to refuse treatment has not been impaired, and the deprivation of medical information is of no consequence.

*Pabon*, 459 F.3d at 251-52. The Seventh Circuit’s adoption of the standard articulated in *Pabon*, which requires that a patient establish an impairment of his right to refuse treatment before he can state a violation of his limited, derivative right to medical information, is fully consistent with this Court’s jurisprudence.

This court, in *Lewis v. Casey*, 518 U.S. 343, addressed the question of prison inmate access to the courts. The case involved allegations that the prison law library provided for the use of the petitioner inmates was inadequate, and therefore violated the petitioners’ constitutional right of access to the courts. This Court recognized, however, that a prison law library is not an end in itself, but is instead a means to ensure that inmates are provided with constitutionally adequate access to the courts. This Court, in *Lewis*, noted

that it was not sufficient for the petitioner inmates to merely prove that their prison law library was “inadequate.” Instead, an inmate “must go one step further and demonstrate that the alleged shortcomings in the library or legal assistance program hindered his efforts to pursue a legal claim.” *Lewis v. Casey*, 518 U.S. at 351. In making this observation, this Court drew an analogy that is particularly apt in the present case:

. . . If – to take another example from prison life – a healthy inmate who had suffered no deprivation of needed medical treatment were able to claim violation of his constitutional right to medical care . . . , simply on the ground that the prison medical facilities were inadequate, the essential distinction between judge and executive would have disappeared: it would have become the function of the courts to assure adequate medical care in prisons.

*Id.* at 350.

This analogy is on point in the context of the instant Petition for Certiorari. Petitioner’s right to medical information under the Fourteenth Amendment is not an end in itself, but is instead simply a means to facilitate his ability to knowledgeably exercise his underlying right to accept or decline medical treatment. An inmate who would not have refused the proposed medical treatment even if fully informed has suffered no deprivation or injury to his right to refuse treatment. In the absence of a deprivation of an inmate’s right to refuse treatment, the inmate’s allegation that

he had been deprived of medical information is of no consequence.

As this Court stated in *Lewis v. Casey*:

“It is the role of courts to provide relief to claimants, in individual or class actions, who have suffered, or will imminently suffer, actual harm; it is not the role of courts, but that of the political branches, to shape the institutions of government in such fashion as to comply with the laws and the Constitution.”

*Id.* at 349. The requirement adopted by the Seventh Circuit that a patient must establish an impairment of his right to refuse treatment (by showing that he would have refused treatment if he had been fully informed) in order to make out a violation of the patient’s right to medical information under the Fourteenth Amendment, is both consistent with, and crucial to, this Court’s longstanding requirement that an individual establish “actual injury” in order to state a claim. Certiorari should be denied.

## **II. The Standard Adopted by the Seventh Circuit Is Consistent With This Court’s Fourteenth Amendment Due Process Jurisprudence.**

Petitioner argues that the standard adopted by the Seventh Circuit to govern a patient’s informed consent claim under the Fourteenth Amendment is improper because that standard requires a patient to prove that the defendant physician acted with “deliberate indifference” to the patient’s right to refuse

treatment. Contrary to the petitioner’s contention, however, the “deliberate indifference” standard is consistent with this Court’s jurisprudence on the Fourteenth Amendment, particularly in the context of prison medical care.

This Court has long noted that the touchstone of due process is protection from arbitrary action. *Cty. of Sacramento v. Lewis*, 523 U.S. 833, 845, 118 S. Ct. 1708 (1998). Only the most egregious conduct is “arbitrary” in a constitutional sense. *Id.* at 846. For half a century, this Court has recognized that the cognizable level of conduct necessary in a Fourteenth Amendment analysis is conduct that “shocks the conscience.” *Id.* Due Process does not entail a body of constitutional law imposing liability whenever any individual cloaked with state authority causes harm. *Id.* at 848. The Fourteenth Amendment is not a font of tort law to be imposed upon systems already administered by the states, and the United States Constitution does not guarantee due care on the part of state officials. *Id.* at 848-49.

This Court has held unequivocally that injury caused by merely negligent conduct is not a “deprivation” under the Fourteenth Amendment. *Daniels v. Williams*, 474 U.S. 327, 333, 106 S. Ct. 662, 666 (1986).<sup>1</sup> A simple lack of due care does not approach the level of abusive government conduct that the Due Process

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<sup>1</sup> Even *gross negligence* is not sufficient to support a substantive Due Process Claim. *McDowell v. Vill. of Lansing*, 763 F.3d 762, 766 (7th Cir. 2014); citing *Archie v. Racine*, 847 F.2d 1211, 1219-20 (7th Cir. 1988) (en banc).

Clause was designed to prevent. *Davidson v. Cannon*, 474 U.S. 344, 347-48, 106 S. Ct. 668, 670 (1986). A holding that injury caused by merely negligent conduct constitutes a “deprivation” under the Fourteenth Amendment would trivialize the principle of due process. *Daniels*, 474 U.S. at 333. The Constitution deals with large concerns of governors and governed, and does not supplant traditional tort law. *Id.*

The standard articulated by the Second Circuit in *Pabon*, 459 F.3d 251, and subsequently adopted by the Seventh Circuit in this case, was built directly upon this Court’s repeated recognition of the importance of preserving the constitutional proportions of substantive due process. The Second Circuit, in *Pabon*, specifically relied upon the principles espoused by this Court in *Daniels v. Williams*; *Davidson v. Cannon*; and *Cty. of Sacramento*. See *Pabon*, 459 F.3d at 250-51.

In *Cty. of Sacramento v. Lewis*, this Court stated:

To recognize a substantive due process violation in these circumstances when only mid-level fault has been shown would be to forget that liability for deliberate indifference to inmate welfare rests upon the luxury enjoyed by prison officials of having time to make unhurried judgments, upon the chance for repeated reflection, largely uncomplicated by the pulls of competing obligations. When such extended opportunities to do better are teamed with protracted failure to even care, indifference is truly shocking. . . .



*Cty. of Sacramento v. Lewis*, 523 U.S. at 853. The Second Circuit’s inclusion of a “deliberate indifference” requirement in the standard that it articulated in *Pabon* was consciously based upon the rationale espoused by this Court in *Cty. of Sacramento v. Lewis*, *supra*:

. . . In establishing this dichotomy, *County of Sacramento* strongly suggests that in those circumstances when actual deliberation is possible, a showing of deliberate indifference will establish Fourteenth Amendment liability. . . . Following the reasoning of *County of Sacramento*, we hold that in order to incur liability a prison official’s failure to adequately inform a patient regarding that patient’s proposed medical treatment must be done with, at a minimum, deliberate indifference to the prisoner’s right to refuse treatment and that simple negligence will not suffice.

*Pabon*, 459 F.3d at 251. The Seventh Circuit, below, adopted the standard articulated by the Second Circuit in *Pabon*, which was, itself, based upon the considered rationale earlier laid out by this Court in *Daniels v. Williams*, *Davidson v. Cannon*, and *Cty. of Sacramento v. Lewis*.

Petitioner’s argument, on the other hand, pays no heed to this Court’s concern for protecting the constitutional proportions of substantive due process under the Fourteenth Amendment. Petitioner’s argument that a Fourteenth Amendment right to informed consent should be assessed solely under a generic “balancing test” which weighs a state’s interest against a

prisoner patient’s “right to information” leaves open the possibility that merely negligent conduct might be deemed a Fourteenth Amendment violation, if, for example, a prisoner patient’s “right to information” were determined to outweigh the state’s interests. Such an outcome would be contrary to this Court’s precedents, which hold unequivocally that merely negligent conduct cannot rise to the level of a Fourteenth Amendment violation. *See Daniels*, 474 U.S. at 333; *see also Davidson*, 474 U.S. at 347-48.

Petitioner’s argument appears to conflate a patient’s right to medical information under the Fourteenth Amendment with an “informed consent” claim under state tort law. The hypothetical example provided in the Petition for Certiorari proves as much. That hypothetical is presented as follows:

As an example to illustrate how a deliberate indifference requirement is untenable, under the framework adopted by the Second and Seventh Circuits, a doctor who accidentally performs the wrong surgery on a patient, of which the patient is unaware, has somehow preserved the patient’s right to informed consent to that same procedure. This conclusion is incongruous with the right to informed consent.

*See* Petition for Certiorari, p. 12.

This hypothetical proffers an example of negligent conduct by a physician (i.e., “a doctor who *accidentally* performs the wrong surgery”). Negligent conduct is not sufficient to support a Fourteenth Amendment

violation. *Daniels*, 474 U.S. at 333; *Davidson*, 747 U.S. at 347-48. This hypothetical conduct could, however, potentially support a claim for medical malpractice, or an informed consent claim under Wisconsin state law. A physician's failure to obtain a patient's informed consent is a species of medical malpractice under Wisconsin law. *Hannemann v. Boyson*, 2005 WI 94, ¶ 40, 282 Wis. 2d 664, 688, 698 N.W.2d 714, 726. A patient's right to medical informed consent under Wisconsin state tort law is addressed under § 448.30 of the Wisconsin statutes.<sup>2</sup>

The patient in Petitioner's hypothetical is not without remedy. The remedy under the proffered hypothetical, however, lies not under the Fourteenth Amendment, but under Wisconsin state tort law. Petitioner Knight chose to bring suit in federal court under the Eighth and Fourteenth Amendments, and in doing so, he elected not to assert any claim for medical malpractice under Wisconsin state tort law. Petitioner's strategic choice to advance his claim under the Fourteenth Amendment rather than under Wisconsin state law, however, does not obviate the duty of federal courts to preserve the constitutional proportions of a due process claim brought under the Fourteenth Amendment. Simply because a patient in Mr. Knight's position cannot prove that a physician's conduct rose to the level of "deliberate indifference," the federal

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<sup>2</sup> § 448.30 Wis. Stats. provides, in relevant part: "Any physician who treats a patient shall inform the patient about the availability of reasonable alternate medical modes of treatment and about the benefits and risks of these treatments. . . ."

judiciary is not thereby granted dispensation to accommodate the patient's claim by simply ignoring established Due Process jurisprudence, which plainly requires conduct that "shocks the conscience" to support a Due Process claim.

The deliberate indifference requirement incorporated into the standard adopted by the Seventh Circuit, below, is consistent with this Court's precedent. See *Daniels*, 474 U.S. 327; *Davidson*, 474 U.S. 344; *Cty. of Sacramento*, 523 U.S. 833. Certiorari should be denied.

**III. There Exists No "Split" Amongst the Circuits on the Showing Required in Order to Prove a Violation of a Patient's Right Under the Fourteenth Amendment to Information Sufficient to Allow the Patient to Knowledgeably Exercise His Right to Refuse Medical Treatment.**

The Petitioner attempts to manufacture a "split" between the circuits where none exists on the standard governing a patient's right under the Fourteenth Amendment to information necessary for the patient to knowledgeably exercise his right to decline medical treatment. The Petitioner asserts that "the majority of circuits" have addressed a prisoner-patient's Fourteenth Amendment right to informed consent under a "balancing test" laid out by this Court in *Cruzan v. Dir., Mo. Dep't of Health*, 497 U.S. 261, 110 S. Ct. 2841 (1990). Petitioner contends that this alleged "majority circuit approach" weighs, on the one hand, the state's

interest in providing for the basic needs of prisoners versus, on the other hand, the prisoner's right to such information as is reasonably necessary to make an informed decision to accept or reject proposed treatment. See Petition for Certiorari, pp. 4-5. On the other side of the ledger, Petitioner places the Second Circuit, which articulated the standard set forth in *Pabon v. Wright*, 459 F.3d 241 (2d Cir. 2006), and the Seventh Circuit, which adopted the *Pabon* standard in this case.

The crux of Petitioner's contention is that the Third, Fourth, Fifth, Ninth, and Tenth Circuits have each allegedly recognized and adhered to a formal standard for assessing a patient's right to medical information under the Fourteenth Amendment that is both different from, and irreconcilable with, the standard articulated in *Pabon*. As exemplars of this alleged "circuit split," the Petitioner points to *White v. Napoleon*, 897 F.2d 103 (3d Cir. 1990); *United States v. Charters*, 829 F.2d 479 (4th Cir. 1987); *Sama v. Hannigan*, 669 F.3d 585 (5th Cir. 2012); *Benson v. Terhune*, 304 F.3d 874 (9th Cir. 2002); and *Bee v. Greaves*, 744 F.2d 1387 (10th Cir. 1984).

Petitioner's faulty dichotomy is apparent from the outset. Petitioner's "circuit split" argument presupposes that the Third, Fourth, Fifth, Ninth, and Tenth Circuits (which Petitioner characterizes as the "majority approach"), have established that a patient's Fourteenth Amendment right to medical information should be assessed under a "balancing test" in which a court simply weighs the patient's right to information against the state's countervailing interests, while the

Second Circuit and the Seventh Circuit (characterized by Petitioner as the “minority approach”), follow a different path, requiring a determination of “deliberate indifference.” This argument, however, fails to recognize that the *Pabon* standard also incorporates a balancing of a prisoner’s right to informed consent against countervailing state interests – as the second step of a two-step inquiry. Petitioner’s contention that the approach of the Third, Fourth, Fifth, Ninth, and Tenth Circuits irreconcilably differs from that of the Second and Seventh Circuits (under the false assumption that the former group of circuits applies a “balancing test” between a patient’s right to information and the state’s countervailing interests, while the latter two circuits do not) is fundamentally flawed. Even if it were assumed that the Third, Fourth, Fifth, Ninth, and Tenth Circuits adhere to a “test” which requires a balancing of a patient’s right to information against countervailing state interests, such does not represent a distinction from the standard articulated in *Pabon*, which also specifically incorporates such a balancing. See *Pabon*, *supra*, at 252; see also App. 15a.

Moreover, Petitioner’s argument at its base, simply assumes that this Court, in *Cruzan*, 497 U.S. 261, laid out a specific formal “balancing test” that was intended henceforth to govern any claim asserting a violation of a patient’s right to medical information necessary to that patient’s exercise of his/her right to refuse medical treatment. Petitioner’s argument also assumes that the Third, Fourth, Fifth, Ninth, and Tenth Circuits have consistently employed a formal

“balancing test” drawn from *Cruzan*, to address claims alleging a violation of a patient’s right under the Fourteenth Amendment to information necessary to allow the patient to exercise his right to refuse medical treatment. Petitioner’s assumptions are faulty, and he mischaracterizes the cases upon which he relies in his attempt to manufacture a purported “circuit split” where none exists.

As an initial matter, this Court in *Cruzan*, 497 U.S. 261, never took up the question of the appropriate standard to govern a patient’s right under the Fourteenth Amendment to information sufficient to allow that patient to exercise his right to refuse medical treatment. The Petitioners in *Cruzan* were parents suing on their own behalf and on behalf of their incapacitated adult daughter, who requested a court order directing the withdrawal of their daughter’s artificial feeding and hydration equipment after she had been rendered vegetative in an auto accident. This Court, in *Cruzan*, recognized the principle that a competent person has a constitutionally protected liberty interest in refusing unwanted medical treatment. *Cruzan*, 497 U.S. at 278. The *Cruzan* decision, however, never purported to enshrine a formal or exclusive “test” that was intended to henceforth govern the federal courts’ consideration of a patient’s right to medical information under the Fourteenth Amendment. The boundaries of a patient’s constitutional right to medical informed consent was not an issue that was before the Court in *Cruzan*. The Petitioner’s contention that *Cruzan* promulgated an exclusive, formal “balancing test” that was

intended to govern subsequent federal court consideration of the parameters of a patient's constitutional right to informed consent under the Fourteenth Amendment has no foundation.

The Petitioner's arguments also suggest that the Second Circuit articulated a standard in *Pabon* that somehow runs counter to *Cruzan*, as well as the decisions of other courts that Petitioner claims have followed *Cruzan*. The Second Circuit, in *Pabon*, however, specifically recognized *Cruzan* for the proposition that a "person has a constitutionally protected liberty interest in refusing unwanted medical treatment." *Pabon*, 459 F.3d at 249 (quoting *Cruzan*, 497 U.S. at 278). The Second Circuit also specifically analyzed and agreed with two of the very cases held up by Petitioner as ostensible evidence of a "circuit split" – the Third Circuit's decision in *White v. Napoleon*, 897 F.2d 103, and the Ninth Circuit's decision in *Benson v. Terhune*, 304 F.3d 874. *Pabon*, 459 F.3d at 249. The standard articulated by the Second Circuit in *Pabon* (and subsequently adopted by the Seventh Circuit in this case) was not developed in opposition to *Cruzan*, *White v. Napoleon*, or *Benson v. Terhune*, but was instead built upon these decisions.

Most notably, however, a closer look at the cases from the Third, Fourth, Fifth, Ninth, and Tenth Circuits upon which the Petitioner relies as evidence of an ostensible "circuit split" reveals that there does not exist any "circuit split" on the standard governing a patient's right under the Fourteenth Amendment to



information necessary to allow the patient to exercise his right to refuse medical treatment.

The case from the Third Circuit that is relied upon by the Petitioner, *White v. Napoleon*, 897 F.2d 103 (3d Cir. 1990), does not reference *Cruzan*, and does not articulate a formal “balancing test” for assessing a patient’s constitutional right to information necessary for the patient to exercise his right to refuse medical treatment. The Third Circuit, in *White v. Napoleon*, stated that “. . . a prisoner’s right to know must be balanced against valid State interests,” but did not enshrine this statement as a formal or exclusive “balancing test” to govern a patient’s right to medical information under the Fourteenth Amendment, as the Petitioner contends. In fact, the actual standard elucidated by the Third Circuit in *White v. Napoleon* relative to an inmate’s right to medical information is essentially identical to the “deliberate indifference” standard. The Third Circuit stated in relevant part:

. . . The medical care of prison inmates is entrusted to prison doctors, to whose judgment and training courts owe substantial deference. Courts are ill-equipped to specify the medical information that must be provided to prison patients. As in the case of forced treatment of mental patients, courts must exercise a limited form of review. *A prison doctor’s decision to refuse to answer an inmate’s questions about treatment will be presumed valid unless it is such a substantial departure from professional judgment, practice or standards*

*as to demonstrate that the doctor did not base the decision on such a judgment. . . .*

*White v. Napoleon*, 897 F.2d at 113 (emphasis added).

This standard, articulated by the Third Circuit in *White v. Napoleon*, is virtually identical to the “deliberate indifference” standard:

To infer deliberate indifference on the basis of a physician’s treatment decision, *the decision must be so far afield of accepted professional standards as to raise the inference that it was not actually based on a medical judgment. . . .*

*Norfleet v. Webster*, 439 F.3d 392, 396 (7th Cir. 2006) (emphasis added).

. . . A medical professional acting in his professional capacity may be held to have displayed deliberate indifference only if “*the decision by the professional is such a substantial departure from accepted professional judgment, practice, or standards, as to demonstrate that the person responsible actually did not base the decision on such a judgment.*” . . .

*Sain v. Wood*, 512 F.3d 886, 895 (7th Cir. 2008) (citations omitted) (emphasis added). The standard laid out by the Third Circuit in *White v. Napoleon* to govern a prison doctor’s disclosure of medical information to his patient is not contrary to *Pabon’s* “deliberate indifference” requirement at all. It is, in fact, essentially identical.

The case relied upon by Petitioner from the Fourth Circuit, *United States v. Charters*, 829 F.2d 479 (4th Cir. 1987), likewise does not support Petitioner's contention that a "circuit split" exists. The plaintiff in *Charters* was a mentally incompetent prisoner who challenged an order of the District Court for the Eastern District of Virginia which allowed plaintiff to be forcibly medicated with antipsychotic medications. The question on appeal to the Fourth Circuit in *Charters* involved a determination as to the conditions under which a patient in a federal treatment facility may be unwillingly medicated with antipsychotic drugs. *Charters*, 829 F.2d at 484. The Fourth Circuit concluded that a mentally ill pretrial detainee has a constitutionally protected interest in deciding for himself whether to accept or forego medical treatment. *Id.* at 489.

The question before the Fourth Circuit in *Charters* arose out of the government's quest for an order permitting the forcible medication of a pretrial detainee with antipsychotic drugs. Plaintiff Charters never contended that he was not given information that was necessary in order for him to knowledgeably exercise his right to refuse medical treatment. The *Charters* case was not an "informed consent" case at all. No question was presented to the Fourth Circuit on the patient's right under the Fourteenth Amendment to information necessary for the patient to exercise his right to accept or refuse medical treatment.

The *Charters* case thus does not support the Petitioner's insinuation of circuit discord on the question of a patient's right under the Fourteenth Amendment

to information necessary to allow the patient to knowledgeably exercise his right to refuse medical treatment. The Fourth Circuit, in *Charters*, never considered that issue, much less did it approve a formal “balancing test” to govern a patient’s right to medical information under the Fourteenth Amendment, as Petitioner contends.

The case from the Fifth Circuit relied upon by the Petitioner is *Sama v. Hannigan*, 669 F.3d 585 (5th Cir. 2012). Contrary to Petitioner’s contention, however, the Fifth Circuit in *Sama* did not apply a “balancing test” to assess the plaintiff patient’s right under the Fourteenth Amendment to information sufficient to allow her to exercise her right to refuse medical treatment. In fact, the *Sama* case came to the Fifth Circuit on the issue of the defendants’ claim to qualified immunity. The question before the Fifth Circuit in *Sama* was whether, at the time of the defendants’ conduct, the law was clearly established that a reasonable official in the defendants’ position would understand that their conduct had violated Sama’s Fourteenth Amendment due process rights. *Sama*, 669 F.3d at 594. The Fifth Circuit ultimately dismissed Sama’s Fourteenth Amendment claim on the basis that she had not established that the completion of the surgical procedure performed upon her by the defendant physicians, under the circumstances presented, had violated clearly established law. *Id.* at 593. The Fifth Circuit thus resolved Sama’s appeal by concluding that the defendants were entitled to qualified immunity. *Id.* at 595. The *Sama* case does not support plaintiff’s contention

that a “circuit split” exists relative to the standard governing a patient’s right under the Fourteenth Amendment to information necessary to allow him to knowledgeably exercise his right to refuse medical treatment.

Though the appeal in *Sama* was resolved on the issue of qualified immunity, the Fifth Circuit in that case did also recognize, relying upon this Court’s holding in *Cty. of Sacramento v. Lewis*, 523 U.S. 833 (1998), that negligent conduct is categorically insufficient to deprive an individual of due process protections. *Sama*, 669 F.3d at 594. The factual background of *Sama* is similar to that of Petitioner Knight’s case. It involved a patient who claimed that the defendant physicians had exceeded her pre-operative consent, and further involved defendant physicians who had discovered, intraoperatively, the existence of pathology that was not verifiable prior to the commencement of the surgery. Notably, the Fifth Circuit, in *Sama*, recognized:

. . . This is not the stuff of a substantive due process violation. No juror could find on this record anything more than negligence on behalf of the physicians, and negligence is categorically insufficient to deprive someone of substantive due process protection.

*Id.* This recognition that a violation of substantive due process requires a more substantial level of conduct than mere negligence is also a key rationale underlying the “deliberate indifference” requirement incorporated in the Second Circuit’s *Pabon* decision, adopted by the Seventh Circuit in this case.

Petitioner also relies upon the case of *Benson v. Terhune*, 304 F.3d 874 (9th Cir. 2002), from the Ninth Circuit. The question in *Benson* was whether a pretrial detainee’s ingestion of several medications while in custody during the course of her criminal trial was voluntary or involuntary. The Ninth Circuit in *Benson* did not set forth a formal “balancing test” purporting to weigh the state’s interest versus the patient’s right to information. In fact, the Ninth Circuit specifically approved the Third Circuit’s decision in *White v. Napoleon*, 897 F.2d 103, holding up that decision as “a reasonable application of Supreme Court precedent that would plainly extend to a pretrial detainee like Benson.” *Benson*, supra, at 885. The Third Circuit, in *White v. Napoleon*, of course, had articulated a standard governing the parameters of an inmate’s right to medical information under the Fourteenth Amendment that was virtually identical to the “deliberate indifference” standard. See *White v. Napoleon*, 897 F.2d at 113; and compare *Norfleet*, 439 F.3d at 396; *Sain v. Wood*, 512 F.3d at 895.<sup>3</sup>

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<sup>3</sup> A later California District Court case, *Lyons v. Traquina*, No. CV-06-2339RT, 2010 U.S. Dist. LEXIS 78527, 2010 WL 3069336 (E.D. Cal., August 3, 2010), involved a Fourteenth Amendment “informed consent” claim asserted under factual circumstances that were nearly identical to those in Petitioner Knight’s present case. The California District Court upheld summary judgment in the *Lyons* case, and in doing so, made no reference to *Benson*, nor to any “balancing test” that purported to require the weighing of the state’s interests versus the patient’s right to information.

The final case relied upon by the Petitioner in support of his contention that an alleged “circuit split” exists relative to the standard governing a patient’s right under the Fourteenth Amendment to information sufficient to allow that patient to knowingly exercise his right to refuse medical treatment is the Tenth Circuit case of *Bee v. Greaves*, 744 F.2d 1387 (10th Cir. 1984). The plaintiff in that case was a pretrial detainee who alleged that he was administered an antipsychotic drug, Thorazine, against his will while he was being detained prior to his criminal trial. The issue presented to the Tenth Circuit in *Bee v. Greaves* was whether a pretrial detainee has a constitutional right to refuse treatment with antipsychotic medications. The Tenth Circuit concluded that a mentally ill pretrial detainee does have a liberty interest derived from the constitution in avoiding unwanted medication with psychotropic drugs. *Bee v. Greaves*, 744 F.2d at 1394.

The *Bee* case is not an “informed consent” case. The patient in *Bee* never alleged nor claimed in any way that he had not been provided information about the drug Thorazine or its side effects sufficient to allow him to knowingly exercise his right to refuse medical treatment. The patient was well aware of the disabling side effects of the drug – indeed, he had personally experienced them – which caused him to refuse the medication in the first instance. *Id.* at 1390.

The Tenth Circuit, in *Bee v. Greaves*, was never faced with the need to articulate or adhere to a formal standard or “balancing test” to govern consideration of

a patient's right under the Fourteenth Amendment to information sufficient to allow that patient to knowledgeably exercise his right to refuse medical treatment. A patient's right to medical information under the Fourteenth Amendment was never at issue in *Bee v. Greaves*. That case cannot serve as an example of circuit discord, as Petitioner contends, on the standard governing a patient's informed consent right under the Fourteenth Amendment.

An analysis of the cases cited by Petitioner from the Third, Fourth, Fifth, Ninth, and Tenth Circuits reveal that they simply do not support his position that a "circuit split" exists on the issue of the standard applicable to a patient's right under the Fourteenth Amendment to information sufficient to allow that patient to knowledgeably exercise his constitutional right to refuse medical treatment. There being no "circuit split" to justify this Court's intervention, the Court should deny certiorari.





**CONCLUSION**

For the reasons set forth above, the Court should deny Petitioner DeWayne Knight's Petition for Certiorari.

Dated this 17th day of June, 2020.

Respectfully submitted,

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