No. 19-1138

In the

Supreme Court of the United States

DeWayne D. 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

REPLY BRIEF FOR PETITIONER

Emily J. Greb
Counsel of Record
Michelle M. Umberger
Michael R. Laing
PERKINS COIE LLP
33 East Main Street, Suite 201
Madison, WI 53703-3095
EGreb@perkinscoie.com
(608) 663-7460

Counsel for Petitioner
DeWayne D. Knight

TABLE OF CONTENTS

Page(s)

TABLE OF AUTHORITIES

Page(s)

CASES

OTHER AUTHORITIES

REPLY BRIEF FOR PETITIONER

INTRODUCTION

Respondent's brief in opposition obfuscates the issues requiring this Court's guidance and demonstrates why the Seventh Circuit's decision renders the Fourteenth Amendment right to informed consent meaningless given the established right to refuse medical treatment. These two rights, though corollaries, are distinct. The right to informed consent is a right to obtain medical information reasonably necessary for the patient to make an informed decision regarding medical treatment; the right to refuse medical treatment is a right for the patient to thereafter make the decision whether to receive the medical treatment.

Deepening the circuit split, the Seventh Circuit adopted the framework of a lone outlier circuit requiring (1) deliberate indifference, and (2) proof that the patient would have refused the treatment. The Seventh and Second Circuits' (hereinafter "the minority circuits") framework is untenable for two separate reasons. First, it imports a deliberate indifference requirement, which analyzes the physician's state of mind, to the Fourteenth Amendment right to informed consent, which analyzes from the patient's perspective the information reasonably necessary to make an informed decision whether to proceed with a given treatment. Second, it requires proof that the patient would have refused the treatment despite never receiving the necessary information to make that decision, which renders the right to informed

meaningless given the separate right to refuse medical treatment.

On the other hand, the Third, Fourth, Fifth, Ninth, and Tenth Circuits (hereinafter "the majority circuits") balance the information reasonably required for a patient to make an informed decision against valid state interests. Pet. for Cert. at 7.

ARGUMENT

Contrary to Dr. Grossman's assertions, this case is an appropriate vehicle to address the question presented, which seeks to correct the Seventh Circuit's adoption of a framework that abrogates, rather than supports, a Fourteenth Amendment right to informed consent. The Seventh Circuit's decision to adopt the framework of the Second Circuit, as opposed to a form of analysis used in the majority of other circuits solidifies a circuit split that necessitates this Court's guidance.

I. This Case is a Clean Vehicle Through Which to Address the Question Presented

Dr. Grossman's recharacterization of Petitioner's "question presented" aside, the proper question presented is whether the Seventh Circuit correctly adopted a minority analysis that requires a showing of deliberate indifference and proof of refusal to establish a violation of a prisoner-patient's Fourteenth Amendment right to informed consent. Pet. for Cert. at i. It is readily apparent that a court in the Second and Seventh Circuit would reach a different result in nearly all cases than a court in the Third, Fourth, Fifth, Ninth, and Tenth Circuits, because the Second and Seventh currently require

the patient-plaintiff to prove (1) the mental state of the defendant, and (2) that the plaintiff would have refused the treatment (despite never receiving the information necessary to decide whether to undergo the treatment). This is a high burden. Thus, a total of seven circuits have recognized the right to informed consent and, in doing so, articulated analyses for determining whether this right was violated. However, only two require deliberate indifference. The difference is ripe for this Court's resolution as it relates to adjudication of harms to a constitutional liberty interest. *Cruzan v. Dir., Mo. Dep't of Health,* 497 U.S. 261, 278 (1990).

Respondent also argues that because the Seventh Circuit's decision stopped short of answering the question of whether Petitioner met the deliberate indifference element of the *Pabon* framework, resolving the appeal on the proof-of-refusal question, the issue of "deliberate indifference" presented in Mr. Knight's petition is not squarely presented. But Respondent again misses the real issue—whether deliberate indifference should be a requirement in a Fourteenth Amendment informed consent analysis, which the Seventh Circuit held that it is. If this Court eliminates the minority *Pabon* framework, the Seventh Circuit's opinion adopting the *Pabon* framework (i.e., including deliberate indifference) must be reversed even though the Seventh Circuit stopped short of answering whether Dr. Grossman was deliberately indifferent. This is a legal question, not a factual question. The "deliberate indifference" issue is squarely presented to this Court.

This case is a succinct vehicle by which this Court may determine that this incongruity is unjust, improper, and need be addressed, for it abrogates

the right to informed consent altogether as demonstrated by the facts of this case.

II. The Minority Circuits' Framework Is Inconsistent with This Court's Jurisprudence

A. "Proof-of-Refusal" Sanctions a Departure from the Accepted and Usual Course of Judicial Proceedings

The Seventh Circuit should be reversed on its injection of the deliberate indifference standard adopted from the unworkable *Pabon* framework in the Fourteenth Amendment context, including its inclusion of requiring a proof of refusal.

Petitioner received a non-emergency operation for which he was never consulted, of which he did not need, without any notice or available alternative treatment options by the treating physician—Respondent's own expert admitted that the surgery Dr. Grossman unilaterally performed is typically the *last* resort if all other, more conservative treatment fails. And yet, the Seventh Circuit held that such unilateral action does not violate the patient's right to informed consent. As Dr. Grossman points out, the Seventh Circuit has done so on the grounds that Petitioner failed to produce sufficient evidence of his would-be refusal to the surgery he was unaware of, despite it deriving from the unrelated case law of another circuit, despite him being the nonmoving party at summary judgment, and despite the fact that the only evidence on the question was that Petitioner's brief stated he "may well have" elected to undergo the

surgery *had he been informed*. ECF No. 28 at 13. This "evidence" is not sufficient to abrogate his entire claim.

In other words, the Second and Seventh Circuit apply a "no harm, no foul" rule to the right to informed consent—under their framework, the patient must *prove* they would have refused the treatment otherwise their rights were not violated. But this rule contradicts the very purpose of informed consent and is more properly applied to the right to refuse medical treatment. If a patient never receives the necessary information to determine whether to consent to a procedure, for example, because the patient is under anesthesia, how could the patient know *for certain* after the procedure that they would have refused the treatment prior to the procedure? Even a patient who is miraculously healed by a procedure with a success rate of one-in-a-million might have refused the treatment prior to the procedure if given the opportunity to choose. And the flipside is possible—a typical patient would not likely refuse a routine, noninvasive procedure with a near-100% success rate, but if harmful complications arise during the procedure, the patient would probably allege, in hindsight, they would have refused the treatment.

Even if the "proof of refusal" requirement is proper in the right to informed consent analysis, requiring an affirmative demonstration of refusal to meet a standard of which the plaintiff is not on notice violates the standards of review at summary judgment. *See Williams v. City of Chi.*, 733 F.3d 749, 755 (7th Cir. 2013) ("We have often explained that district courts may not grant summary judgment on grounds not argued by the moving party, at least not without giving notice so that the non-moving party

has a full opportunity to present relevant evidence and argument.") (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 326 (1986)). District courts may only enter summary judgment on issues a moving party has not briefed so long as the losing party "was on notice that she had to come forward with all of her evidence." *Id.* Dismissal in contravention to this legal bulwark is a drastic departure from the "accepted and usual course of judicial proceedings" and warrants exercise of this Court's supervisory powers. S.C.R. 10. The Seventh Circuit ignored this argument on appeal.

In an argument that contradicts Dr. Grossman's own assertion that "proof of refusal is not the question at hand," Dr. Grossman contends that Petitioner's right to medical information is "derivative of the patient's right to refuse treatment," and that Petitioner's "failure to establish that he would have refused the surgery in question" renders his "alleged deprivation of medical information [to be] of no consequence." Resp. Br. in Opp. at 7-8, 11.

First, as the Seventh Circuit described, the right to informed consent is one part right to refuse treatment and the other part a right to information required to do so, which "[t]ogether . . . constitute a right to informed consent." Pet. for Cert. at 11a. The right to informed consent is then violated when there is either (1) a breach of a patient's right to refuse treatment; or (2) a breach of a patient's right to receive the necessary information. The Seventh Circuit explained: "Without crucial information about the risks and benefits of a procedure, the right to refuse would ring hollow." Pet. for Cert. at 11a. But the Seventh Circuit's adoption of the lone outlier circuit's framework contradicts that reasoning.

Dr. Grossman asks this Court to ignore the right to receive necessary information, arguing instead that, if this Court skips over half the analysis to simply assume there *was* no violation of the right to adequate information, Petitioner would have refused the treatment and therefore an "alleged deprivation of medical information [is] of no consequence." Resp. Br. in Opp. at 8. This argument severs the half of the informed-consent analysis which causes the right to refuse to ring hollow.

In most circuits, a patient has *both* the right to be "informed" (i.e. the right to receive medical information reasonably necessary) and the right to "consent" (i.e. choose whether to accept or refuse the treatment). In the Second and Seventh Circuits, however, a patient has the right to be "informed, but only if the patient's right to consent is violated" and the right to "consent." A patient's "right to informed consent" is therefore not necessarily violated even though the patient received *no* information whatsoever. In the minority circuits, a patient truly has only the right to consent, not the right to be informed.

Moreover, it is clearly good public policy to maintain a framework that errs on the side of obtaining consent to perform surgery on a patient. The framework created by *Pabon* is that a physician need not inform the patient nor obtain a patient's consent before performing a surgery if (1) the patient will be unable to prove in court that they would refuse the surgery, or (2) the physician claims they had "good intentions." There is no justification to categorically allow physicians to treat patients without obtaining consent on the basis that such consent could be assumed. In the event such treatment is warranted, such is the purpose of

balancing the state interest against the right, as in the majority of circuits. Proof of refusal, previously foreign to informed consent analysis, is a backdoor that deflates the right of informed consent.

B. A "Deliberate Indifference" Requirement Renders the Fourteenth Amendment Right to Informed Consent Meaningless

Requiring proof of refusal deflates the Fourteenth Amendment right to informed consent, but a deliberate indifference standard abrogates it altogether. This is illustrated perfectly by Respondent's own recitation of the facts:

> 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.

Resp. Br. in Opp. at 4.

Under the minority circuits' framework, there can never be a violation of a patient's right to informed consent absent evidence of malintent. This simply cannot be the law. A person's right to bodily integrity is too sacred to be defeated by the supposed intentions of the physician. It is hard to imagine there are many doctors in the world who intend harm to their patients. But that is not the point. Mr.

Knight was deprived of the information reasonably necessary to decide whether he wanted that procedure.

Dr. Grossman is incorrect that imposition of a deliberate indifference standard comports with traditional due process analysis, as is evidenced by the discordant cases upon which his opposition relies. Citing *Daniels v. Williams*, Dr. Grossman claims that "[a] simple lack of due care does not approach the level of abusive government conduct that the Due Process Clause was designed to prevent." Resp. Br. in Opp. at 15-16. First, it is a far leap from "lack of due care" required for a due process violation to "reckless disregard" or "shocking the conscious" required of the deliberate indifference standard. Simply because something "more than negligence" is required for a constitutional violation does not mean the defendant's culpability must rise all the way to the level of "reckless," especially in the context of protecting one's own bodily integrity. Second, *Daniels* involved a lawsuit from a prisoner who slipped on a pillow. 474 U.S. 327, 328 (1986). In contrast, Dr. Grossman chose to perform an unnecessary surgery on a prisoner without their informed consent. Dr. Grossman's celebration of the "luxury enjoyed by prison officials of having the time to make unhurried judgments," fails to square with his own actions. Resp. Br. in Opp. at 16.

Pabon is clearly an outlier given the Third, Fourth, Fifth, Ninth, and Tenth Circuits all hold that prisoners retain a limited right to refuse treatment *and* a right to be informed of the proposed treatment and viable alternatives, subject to legitimate countervailing state interests. Pet. for Cert. at 7-8. This simple framework, which flows from the analysis of this Court in *Cruzan*, is fully

practical and does not lead to justifying what is clearly and intuitively a deprivation of the right to informed consent for failure to establish ill-will of the physician or an *ex post facto* patient "decision."

The Seventh Circuit is, even if the *Pabon* framework is applied, wrong on being unable to find that the deliberate indifference standard was not breached. Even if this Court were to "ask whether the defendant was deliberately indifferent to the prisoner's right to refuse treatment," (Pet. for Cert. at 14a) it is difficult to imagine a scenario of clearer deliberate indifference to a right to refuse treatment than a physician who deliberately performs an unnecessary surgery on an unconscious patient. Resp. Br. in Opp. at 4.

As such, the Seventh Circuit's adoption of the *Pabon* framework disserves the Fourteenth Amendment, is so inconsistent with its jurisprudence that it emboldened the lone outlier of a circuit split, and even if applied warrants a reversal.

III. There Is a Clear Split Among the Circuits on an Important Constitutional Question

The Second and Seventh Circuits require both a showing of deliberate indifference and proof of refusal; the five other circuits that have addressed the exact same question do not require either. That is a circuit split.

Respondent argues that there is no such circuit split. Resp. Br. in Opp. at 20–32 (arguing that Petitioner "attempt[s] to manufacture a purported 'circuit split' where none exists" and "the Third,

Fourth, Fifth, Ninth, and Tenth Circuits have [not] . . . adhered to a formal standard for assessing a patient's right to medical information under the Fourteenth Amendment") is counterfactual. Indeed, Respondent cannot, and does not, deny that the Second and Seventh Circuits require a showing of deliberate indifference and proof of refusal. The Third, Fourth, Fifth, Ninth, and Tenth Circuits, on the other hand, do not.

Not only is there a circuit split, the varying evidentiary requirements on either side of the circuit split to establish a violation of a substantive due process right is astonishing. The Third, Fourth, Fifth, Ninth, and Tenth Circuits uniformly do not require deliberate indifference, but instead balance the fundamental right to refuse a procedure and corresponding right to information about the procedure against legitimate state interests, without imposing this disqualification on the right. Pet. for Cert. at 6-7. The Second and Seventh Circuit do require such a showing. Pet. for Cert. at 8. Until the split is resolved, the Fourteenth Amendment right of prisoner-patients to informed consent will starkly contrast depending on the circuit and a plaintiff in the Second and Seventh Circuits will have almost zero chance of success.

There is no doubting the existence of a circuit split. This Court is the sole body that can eliminate constitutional conflicts among the United States courts of appeals, *See Braxton v. United States*, 500 U.S. 344, 347–48 (1991). When unresolved, these conflicts result in incongruent individual rights, varying in nature and scope, based solely on geographic location. A patient in the Second or Seventh Circuit has a cruelly diminished, near-non-existent, right compared to a patient in equal

circumstances in other circuits. For many, these additional hurdles will be a total bar from relief in otherwise recoverable cases.

The scope of this important substantive due process right to informed consent direly needs guidance from this Court to unify the circuits.

CONCLUSION

For the foregoing reasons, Petitioner DeWayne Knight respectfully requests this Court grant his petition for writ of certiorari.

RESPECTFULLY SUBMITTED, this 29th day of June, 2020

Emily J. Greb
Counsel of Record
Michelle M. Umberger
Michael R. Laing
PERKINS COIE LLP
33 East Main St., Suite 201
Madison, WI 53703-3095
(608) 663-7460
EGreb@perkinscoie.com

Counsel for Petitioner
DeWayne D. Knight