No. 23-426

In The
Supreme Court of the United States

RALPH LISBY, as the Personal Representative of the Estate of ASHLYNN LISBY, deceased,

Petitioner,

v.

JONATHAN HENDERSON, individually and in his official capacity, and CITY OF INDIANAPOLIS,

Respondents.

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

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the Court of Appeals properly affirmed the District Court's Order Granting Motion for Partial Judgment on the Pleadings regarding the Lisby Estate's 42 U.S.C. § 1983 claim asserting that Officer Henderson violated Lisby's Fourteenth Amendment substantive due process rights when the court relied exclusively on the well-pleaded facts and reasonable inferences in the Estate's Amended Complaint to determine that such facts and inferences, assumed to be true, were nevertheless insufficient to establish the criminally reckless behavior required by settled law.

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STATEMENT OF THE CASE

A. Material facts alleged in the Lisby Estate's Amended Complaint

Just before 9:30 p.m. on May 6, 2020, Marcus Lewis Jr. and Ashlynn Lisby were walking northbound along the shoulder of State Road 37, also known as Harding Street, in Indianapolis, returning to the motel where they had been staying. *Dkt. 1*, ¶ 8; *Lisby Dkt. 1-2*, ¶ 9.[1] Lisby was eight months pregnant with Lewis's child. *Dkt. 1*, ¶ 4, 8.

Meanwhile, Officer Jonathan Henderson of the Indianapolis Metropolitan Police Department was driving his cruiser northbound on Harding Street approaching the intersection with Thompson Road. *Id.* at ¶ 9; *Lisby Dkt. 1-2*, ¶ 10. Immediately north of the intersection of Harding Street and Thompson Road, two left turn lanes lead to the on-ramp of I-465 West, two through lanes allow motorists to continue northward passing under the I-465 overpass, and one right turn lane leads to the on-ramp to I-465 East. *Dkt. 105* at 2. Posted signs imposed a forty-five mile per hour speed limit for vehicles traveling on this part of Harding Street. *Dkt. 1*, ¶ 24.

Officer Henderson passed through the intersection of Harding Street and Thompson Road with his vehicle in the rightmost through lane. *Dkt. 105* at 2.

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[1] "Dkt."refers to the docket in the case from which this appeal was taken (1:21-cv-01186). "Lisby Dkt."refers to the docket in the Lisby Estate's original, pre-consolidation case (1:22-cv-00010).

Traveling at a speed of seventy-eight miles per hour, Officer Henderson shifted lanes and crossed into the right turn lane leading to the I-465 East on-ramp. *Id*. Officer Henderson slowed to fifty-five miles per hour as he approached the interstate on-ramp and glanced at his right rear-view mirror. *Id.* at 3.

Still walking on the shoulder of northbound Harding Street, Lewis and Lisby had reached the area of the on-ramp. *Id*. Without seeing Lewis or Lisby, Officer Henderson continued toward the on-ramp and unfortunately struck Lisby with his vehicle. *Id*. An unilluminated streetlight in the vicinity may have contributed to Officer Henderson's inability to see either pedestrian on the shoulder of the road near the on-ramp. *Id*.

An ambulance transported Lisby to Eskenazi Hospital, where she was pronounced dead. *Id*. Physicians delivered her baby by emergency Cesarean section, but he survived only until 10:36 p.m. that same evening. *Id*.

There is no dispute Officer Henderson was acting within the course and scope of his employment as a police officer employed by the City of Indianapolis at the time of the accident. *Id*. The Indianapolis Metropolitan Police Department prepared an "Indiana Officer's Standard Crash Report" concluding that "pedestrian's action" was the primary cause of the accident. *Id*.

The report also stated that none of Officer Henderson's actions contributed to the accident, excluding any mention of speeding, improperly shifting lanes, or driving partially on the shoulder of Harding Street. *Id*.

B. Procedural history and dismissal of claim against Officer Henderson

On August 17, 2020, Ralph Lisby, as the personal representative of the Estate of Ashlynn Lisby ("Estate"), filed a complaint asserting one count of simple negligence in Indiana state court against Officer Henderson and the City of Indianapolis. *Dkt. 105* at 3. On May 12, 2021, Lewis filed his own action in the United States District Court for the Southern District of Indiana against Officer Henderson and the City of Indianapolis, alleging: (1) a 42 U.S.C. § 1983 claim against Officer Henderson on behalf of his prenatal child, (2) a state law wrongful death claim against Officer Henderson and the City of Indianapolis for the death of his prenatal child, and (3) a state law negligent infliction of emotional distress claim against Officer Henderson and the City of Indianapolis for having witnessed the death of his prenatal child. *Id.* at 3-4.

On December 7, 2021, the Estate amended its state court complaint to add a 42 U.S.C. § 1983 claim. *Id*. at 4. On January 4, 2022, Officer Henderson and the City of Indianapolis removed the Estate's suit to the United States District Court for the Southern District of Indiana, which, then consolidated the two matters into a single cause of action on February 14, 2022. *Id*.

On February 24, 2022, Officer Henderson and the City of Indianapolis requested partial judgment on the pleadings, arguing in material part that the facts of Plaintiff's Complaints failed to support a claim that

Lisby's constitutional due process rights had been violated. *Id*.

In response, Lewis submitted his First Amended Complaint, dismissing Officer Henderson and all of Lewis's previously asserted federal claims and rendering the Motion for Partial Judgment on the Pleadings moot as to Lewis. *Dkt. 105* at 5. The Estate, however, challenged the Motion and argued that its Amended Complaint properly stated a cognizable 42 U.S.C. § 1983 claim alleging deprivation of Lisby's due process rights guaranteed by the Fourteenth Amendment.

Recognizing that "the Fourteenth Amendment is not 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) and that "[t]he Due Process Clause is violated by executive action only when it 'can properly be characterized as arbitrary, or conscience shocking, in a constitutional sense,'" *Collins v. Harker Heights*, 503 U.S. 115, 128 (1992), the District Court engaged in a detailed analysis and application of controlling precedent and rejected the Estate's argument. *Pet. App.* 17a. In granting partial judgment and dismissing the Estate's 42 U.S.C. § 1983 claim against Officer Henderson, the court determined that "Officer Henderson's actions sound in negligence, and as such, the Estate has failed to allege a constitutional violation on that basis." *Pet. App.* 21a.

The United States Court of Appeals for the Seventh Circuit affirmed the District Court's entry of partial judgment on the pleadings, applying settled

principles of Fourteenth Amendment law to find that "Lisby's complaint was properly dismissed" because "the mere knowledge that driving at high speed at night could have fatal consequences is not enough to allege a constitutional violation." *Pet. App.* 6a.

REASONS FOR DENYING CERTIORARI

I. The District Court's Exercise of Discretion in Not Converting a Motion for Judgment on the Pleadings to a Motion for Summary Judgment Does Not Present a Conflict or Profoundly Important Issue

The Petition for a Writ of Certiorari fails to include argument addressing the first issue it purports to present: "Whether, in light of the procedural posture of this case, the Court should convert Respondents' Motion for Partial Judgment on the Pleadings to a Motion for Summary Judgment." *Pet.* at i. Petitioner's failure to argue the issue underscores the absence of any conflict or profound importance that might otherwise warrant this Court's review.

Federal Rule of Civil Procedure 12(d) permits, but does not require, a district court to convert a motion for judgment on the pleadings into a motion for summary judgment. Therefore, a district court maintains judicial discretion as to whether a motion for judgment on the pleadings should be treated as a motion for summary judgment.

If the court chooses to consider materials outside the pleadings, the discretion ends, and the court is required to treat the motion as one for summary judgment. Even then, however, failure to convert a motion for judgment on the pleadings "will not necessarily mandate reversal unless the record discloses the existence of unresolved material fact issues, or the parties represent they would have submitted specific controverted material factual issues to the trial court if they had been given the opportunity." *United States v. Rogers Cartage Co*., 794 F.3d 854, 861 (7th Cir. 2015).

The record demonstrates that the District Court did not consider any materials beyond the pleadings and therefore had no obligation to treat a Rule 12(d) motion as one for summary judgment. The record also discloses that the District Court accepted the "well-pleaded factual allegations from both of the First Amended Complaints" as true, "along with all inferences in favor of Plaintiffs as the non-moving parties." *Pet. App.* 9a. With all facts and reasonable inferences alleged by the Estate accepted as true, no unresolved issues of material fact could have existed to require or justify further proceedings under Rule 56, and the Estate has failed to identify any specific controverted material issue of fact that would have prevented the District Court from properly determining the sufficiency of the Fourteenth Amendment claim asserted in the Estate's First Amended Complaint.

Instead, without detailing the material issue of fact requiring resolution or citing supporting legal authority, Petitioner suggests the "procedural posture of

the case" required the District Court to convert Respondents' Motion for Partial Judgment on the Pleadings to a Motion for Summary Judgment. *Pet.* at i. But with the District Court having already agreed to accept all facts pleaded by Petitioner as true, along with all reasonable inferences to be drawn therefrom, and having considered no materials beyond the pleadings, there was no need to convert Respondents' motion.

In deciding a Rule 12(c) motion for judgment on the pleadings, a court does not consider the plaintiff's ability to develop the factual allegations supporting its legal claim with sufficient admissible evidence obtained through discovery, as Petitioner seems to suggest by referencing the procedural posture of the case. Rather, "[a] motion for judgment on the pleadings under Rule 12(c) of the Federal Rules of Civil Procedure is governed by the same standards as a motion to dismiss for failure to state a claim under Rule 12(b)(6)." *Adams v. City of Indianapolis*, 742 F.3d 720, 727-28 (7th Cir. 2014) (internal citation omitted). To survive, "a complaint must 'state a claim to relief that is plausible on its face.'" *Adams*, 742 F.3d at 728 (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). In turn, "[a] claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

In ruling on Officer Henderson's Motion for Partial Judgment on the Pleadings, the District Court did not consider whether the Estate would be able to develop

its factual allegations with sufficient admissible evidence obtained through discovery to meet its burden of proof. Rather, the court presumed those facts to have been proved conclusively and limited its analysis to whether such facts, and any reasonable inferences to be drawn from them, were sufficient as a matter of law to establish that Officer Henderson's conduct on the night in question met the legal standard of criminal recklessness required to support the Estate's claim of a Fourteenth Amendment due process violation. The District Court properly exercised the discretion afforded by Rule 12(c), and the Court of Appeals correctly affirmed the District Court's decision.

II. The Petition for a Writ of Certiorari Raises Only a Purported Misapplication of Settled Fourteenth Amendment Law

Pursuant to Supreme Court Rule 10(a), "[a] petition for a writ of certiorari is rarely granted when the asserted error consists of . . . the misapplication of a properly stated rule of law." However, Petitioner's argument in this case relies exclusively upon an alleged misapplication of a properly stated rule of law without offering any extraordinary circumstances that would warrant a rare grant of certiorari.

A. The Fourteenth Amendment's Criminal Recklessness Standard is a Settled Principle of Constitutional Law

The Fourteenth Amendment is not 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). Accordingly, "the substantive component of the Due Process Clause is violated by executive action only when it 'can be properly characterized as arbitrary, or conscience shocking, in a constitutional sense." *County of Sacramento v. Lewis*, 523 U.S. 833, 847 (1998). "Conduct intended to injure in some way unjustifiable by any government interest is the sort of official action most likely to rise to the conscience-shocking level." *Id.* at 848.

While a plaintiff alleging a due process violation may seek to substitute recklessness for intent, "[f]or a defendant to be reckless in constitutional sense, he must be criminally reckless." *Hill v. Shobe*, 93 F.3d 418, 421 (7th Cir. 1996) (citing *Archie v. City of Racine*, 847 F.2d 1211, 1222 (7th Cir. 1988), *cert. denied*, 489 U.S. 1065 (1989)). "For this reason, the Supreme Court teaches, the test for 'criminal recklessness' is subjective, not objective." *Hill*, 93 F.3d at 421 (citing *Farmer v. Brennan*, 511 U.S. 825, 837 (1994); *Miller v. Neathery*, 52 F.3d 634, 638 (7th Cir. 1995)). "Under the subjective standard, it is not enough to show that a state actor should have known of the danger his actions created. Rather, a plaintiff must demonstrate that the defendant had actual knowledge of impending harm which he consciously refused to prevent." *Hill*, 93 F.3d at 421 (citing *Miller*, 52 F.3d at 639).

To plausibly allege a substantive due process violation under the Fourteenth Amendment, a plaintiff must plead conduct in which the defendant "knows the risk of death is significant but 'does not care whether

the other person lives or dies.'" *Hill*, 93 F.3d at 421 (quoting *Archie*, 847 F.2d at 1219). "A lesser degree of knowledge does not violate the due process clause." *Hill*, 93 F.3d at 421.

As a result, unintended loss of life resulting from a government official's lack of due care does not implicate the Due Process Clause. *Davidson v. Cannon*, 474 U.S. 344, 347 (1986). With respect to the Estate's claim in this case, "motor vehicle accidents caused by public officials or employees do not rise to the threshold of a constitutional violation actionable under § 1983, absent a showing that the official knew an accident was imminent but consciously and culpably refused to prevent it." *Hill*, 93 F.3d at 421. To state a plausible Section 1983 claim against Officer Henderson, the Estate was required to allege that Officer Henderson knew his conduct created a special risk of harm to Lisby specifically rather than a general risk to the public at large. *Martinez v. California*, 444 U.S. 277, 285 (1980).

B. The Court of Appeals Applied Settled Fourteenth Amendment Principles to the Specific Facts Alleged without Inconsistency

Petitioner argues that the Court of Appeals' decision in this case conflicts with its opinion in *Flores v. City of South Bend*, 997 F.3d 725 (7th Cir. 2021), and represents a broader inconsistency regarding the application of the Fourteenth Amendment's criminal recklessness standard among federal courts. Neither

argument merits a grant of certiorari. Rather, Petitioner has merely identified cases with different outcomes based on different facts.

In this case, the Estate itemized its material factual allegations against Officer Henderson in just one paragraph of its Appellant's Brief:

> In the Amended Complaint, Plaintiff-Appellant alleged that Henderson's speed reached 78 miles per hour, exceeding the speed limit by 33 miles per hour prior to striking and killing Ashlynn Lisby. He illegally changed lanes over a solid white lane to enter an on-ramp for a highway at excessive speeds for no legitimate reason. Henderson was not responding to any type of emergency situation and did not have his sirens activated.

(Appellant's Br. at 10 (citing to the Record)). By its own admission, the Estate alleged nothing more than excess speed and an improper lane change in a non-emergency setting. The Estate characterized Officer Henderson's speeding and lane changing as "done willfully, wantonly, and maliciously, and with such reckless disregard of the consequences so as to reveal a conscious and deliberate indifference to the lives of those around him," but a "conclusory allegation of recklessness . . . is insufficient to defeat a motion to dismiss," *Hill*, 93 F.3d at 421 (citing *Palda v. General Dynamics Corp.*, 47 F.3d 872, 875 (7th Cir. 1995)), and district courts are "not bound by the nonmoving party's legal characterization of the facts" in deciding whether the facts actually pleaded are sufficient to support the

associated legal theory of recovery. *Nat'l Fidelity Life Ins. Co. v. Karaganis*, 811 F.2d 357, 359 (7th Cir. 1987).

In *Flores*, however, the defendant officer drove 78 miles per hour in a 30 mile per hour zone through a residential area while responding to a routine traffic stop for which his response had not been requested. *Id*. at 728. The officer's speed reached as high as 98 miles per hour while still in a residential area—more than three times the posted limit. *Id*. The officer also disregarded a red light at an intersection with an obstructed view and crashed into a car which was proceeding lawfully on a green light, killing the driver. *Id*. The *Flores* court found that "[u]nlike the minimally detailed complaint in *Hill*, which . . . was limited to an accusation of speeding," allegations of "rac[ing] through a residential area with a posted speed limit of 30 miles per hour at rates of speed between 78 and 98 miles per hour, two-to-three times the limit" and blindly charging through a red light at an intersection with an obstructed view "paints a far more troubling picture" that could support a finding of criminal recklessness. *Id*. at 730.

The "far more troubling picture" visible in *Flores* never appears in the scenario painted by Petitioner in this case. While the officer in *Flores* reached speeds of 98 miles per hour in a 30 mile per hour zone, Officer Henderson is alleged to have reached 78 miles per hour in a 45 mile per hour zone, and his speed upon impact is alleged to have been just 55 miles per hour. Meanwhile, Officer Henderson did not drive through a blind intersection in a residential neighborhood while

ignoring the commands of a traffic signal. Instead, Officer Henderson was driving his cruiser northbound on a road with five lanes of northbound traffic at 9:30 p.m. near an on-ramp to a major interstate without actual knowledge or reasonable expectation that pedestrians would be present and without the benefit of a normally operable streetlight. None of the facts alleged, even if true, reasonably support the conclusion that Officer Henderson "was willing to let a fatal collision occur." *Flores*, 997 F.3d at 730 (quoting *Hill*, 93 F.3d at 421).

The Court of Appeals unanimously agreed. Rather than avoiding or ignoring its previous decision in *Flores*, the Court of Appeals consistently applied the guiding legal standard while drawing a factual distinction between the two cases:

> Unlike the officer in *Flores*, Officer Henderson was not racing through a residential area at speeds tripling the posted speed limit, but was merging onto an on-ramp of a major highway. Allegations of Officer Henderson's highway speeding and illegal lane change, when coupled with the allegation that he never saw Lisby before the fatal collision, do not suggest that he disregarded extreme or obvious risks and was "willing to let a fatal collision occur." *Id.* at 730 (quoting *Hill*, 93 F.3d at 421). We agree with the district court that Officer Henderson's actions, as alleged in the complaint, are grounded in negligence rather than criminal recklessness. As such, Lisby failed to allege a constitutional violation.

Pet. App. 7a.

The Third Circuit case and Tenth Circuit case cited by Petitioner as evidence of a supposed inconsistent Fourteenth Amendment standard "all over the country" likewise represent nothing more than consistent application of settled law to factually divergent cases. The pleadings in *Sauers v. Borough of Nesquehoning* "describe a police officer driving at speeds over 100 miles-per-hour on a two-way, undivided road to catch someone who had committed a minor traffic infraction." 905 F.3d 711, 716 (3d Cir. 2018). Several members of the public were in close enough proximity to observe the officer's erratic driving before he "lost control of his police car going around a curve . . . began to spin, crossed the centerline into southbound traffic," and killed a passenger in oncoming vehicle. *Id*. The officer pled guilty to vehicular homicide, and the Third Circuit found that "[e]ngaging in a high-speed pursuit on public roadways at speeds of over 100 miles-per-hour threatened 'all those within . . . range [of the pursuit], be they suspects, their passengers, other drivers, or bystanders' " could give rise to a constitutional claim. *Id*. at 718 (citing *Lewis*, 523 U.S. at 853).

In the Tenth Circuit case, *Browder v. City of Albuquerque*, the defendant officer finished his shift and, for no reason beyond his own entertainment, jumped into his police cruiser, flipped on the emergency lights, and raced on city streets through ten different intersections. 787 F.3d 1076, 1077 (10th Cir. 2015). The officer's off-duty escapade extended over an 8.8-mile stretch of surface roads at an average speed of 66 miles per hour

before "he reached an eleventh intersection" where the "light was red" and the officer "pressed the gas pedal, ignored the light, and the result was a terrible crash." *Id*. Once again, the officer faced criminal charges of vehicular homicide, and the court found the officer's conduct, as alleged in the complaint, violative of substantive due process rights. *Id*.

Like *Flores*, both *Sauers* and *Browder* involved specific, factual allegations of officer behavior well beyond the mere allegations of momentary speeding and one unlawful lane change that form the exclusive basis for the Estate's claim against Officer Henderson. The same is true of *Estate of Stinson v. Milwaukee County*, a District Court case from Wisconsin discussed at length in the Petition. *Estate of Stinson v. Milwaukee County*, No. 21-cv-1046-JPS, 2022 WL 1303279 (E.D. Wis. May 2, 2022). Rather than expressing concern or confusion regarding this Court's Fourteenth Amendment criminal recklessness standard, as applied by the Seventh Circuit, the Eastern District of Wisconsin demonstrated complete understanding of the law and appreciation that results of its application will necessarily vary with the facts to which it is applied:

> *Hill* and *Flores* stand as the Seventh Circuit's bookends for which allegations are sufficient to state a substantive due process claim arising from a death caused by a police officer's car crash. In *Hill*, the Seventh Circuit held that "motor vehicle accidents caused by public officials or employees do not rise to the threshold of a constitutional violation . . . absent a

showing that the official knew an accident was imminent but consciously and culpably refused to prevent it." 93 F.3d at 421. The plaintiff in *Hill* alleged that a police officer drove "well over" the speed limit at midnight with no headlights, flashers, or sirens; the court determined that this was insufficient to permit an inference that the police officer acted with intent to cause harm. *Id*. The court explained that it was not enough to allege that the officer, "like any reasonable person, knew that driving at high speed at night without lights could have potentially fatal consequences." *Id*. The court dismissed the complaint.

By contrast, in *Flores*, the Seventh Circuit found a plausible allegation of deliberate indifference where the complaint alleged that an officer, responding to a routine traffic stop for which nobody called backup, drove between fifty and eighty miles over the speed limit in a residential area just before dawn, only intermittently used his flashers and sirens, and drove through a red light at an intersection with an obstructed view of cross traffic, resulting in the death of the plaintiff, an innocent and law-abiding driver. *Flores*, 997 F.3d at 730. The court explained that "the law does not provide a shield against constitutional violations for state actors who consciously take extreme and obvious risks." *Id*. It concluded that the officer's conduct "reflected deliberate indifference to the obvious risk he created when he sped through residential areas and launched himself through an

> intersection, against the light, without the ability to see or adjust to cross-traffic." *Id*. at 734.

Estate of Stinson v. Milwaukee County, No. 21-cv-1046-JPS, 2022 WL 1303279 at *2 (E.D. Wis. May 2, 2022).

The *Stinson* court ultimately found that the allegations before it "[fell] somewhere between *Hill* and *Flores*" because the defendant officer was on patrol but not responding to an emergency, looked down at his computer for at least fifteen seconds as he continued driving at a speed of thirty miles per hour, disregarded a yellow light, a red light, cross-traffic present at the controlled intersection, and the fact that he was in a turn-only lane before driving directly into another vehicle, killing the driver. *Id.* at *3.

However, the Estate's allegations against Officer Henderson do not fall somewhere between *Hill* and *Flores*. Rather, the allegations of mere speeding and an improper lane change while traveling northbound on a road with five lanes of northbound traffic and approaching an interstate on-ramp at 9:30 p.m. in a non-residential area without knowledge or reasonable expectation of pedestrians walking on the shoulder fall neatly within *Hill*, bookending the end of the substantive due process spectrum where the factual allegations are insufficient to support a 42 U.S.C. § 1983 claim arising from a death caused by a police officer's car crash. As with *Flores*, the difference in outcomes between this case and *Stinson* resulted from entirely different facts, not inconsistent application of law.

Petitioner has failed to demonstrate a legitimate conflict among the federal courts of appeals warranting review by this Court. Instead, Petitioner has merely identified several cases applying settled principles of law emanating from this Court to different factual scenarios to ensure the Fourteenth Amendment does not become a "font of tort law to be superimposed upon whatever systems may already be administered by the States." *Paul*, 424 U.S. at 701. The Court of Appeals in this case consistently applied the same substantive law and the pleading requirements enshrined in *Twombly* and *Iqbal* to properly affirm the District Court's dismissal of the Estate's Fourteenth Amendment claim. There is no basis upon which to grant a writ of certiorari.

CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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