

No.

In the Supreme Court of the United States

KAREN BROOKINS, INDIVIDUALLY AND AS ADMINISTRATRIX
OF THE ESTATE OF MARCUS RICHARD BOONE, PETITIONER,

v.

CITY OF PHILADELPHIA, ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT*

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

When a government actor's conduct "shocks the conscience" it violates Due Process, full stop. *Rochin v. California*, 342 U.S. 165 (1952). That single element—conscience-shocking conduct—has always been the only element of a shocks-the-conscience claim. *See Johnson v. Glick*, 481 F.2d 1028, 1033 (2d Cir. 1973) (Friendly, J.).

Here, the Third Circuit held that what Officer Culver did to petitioner and her family shocks the conscience: Culver took graphic photographs of petitioner's son as he lay dying after jumping from a highway overpass, and sent them to colleagues as a joke. By 2-1 vote, however, the panel affirmed the grant of qualified immunity to Culver on the theory that petitioner failed to prove a second element: that she had a clearly established "protected liberty interest" in "control over a loved one[s] death-scene images."

The Seventh, Tenth, and Eleventh Circuits recognize conscience-shocking executive misconduct as enough for substantive-due-process liability, without requiring a separate showing that the official infringed a fundamental right. *Sandra T.E. v. Grindle*, 599 F.3d 583, 589 (7th Cir. 2010); *Seegmiller v. LaVerkin City*, 528 F.3d 762, 767 (10th Cir. 2008); *DeMarcus v. University of South Alabama*, 133 F.4th 1305, 1316 (11th Cir. 2025).

The question presented is:

Whether a plaintiff who sues an executive official under the Due Process Clause must prove only that the official's conduct shocks the conscience, or must also prove that the conduct invaded a fundamental right deeply rooted in this Nation's history and tradition.

**PARTIES TO THE PROCEEDING AND RULE 29.6
STATEMENT**

Petitioner is Karen Brookins, individually and as Administratrix of the Estate of Marcus Richard Boone.

Respondents are the City of Philadelphia; Detective Walsh; Captain Luca; and Police Officer Christopher Culver. Petitioner is an individual; no publicly held corporation has any interest in petitioner, and no corporate disclosure is required under this Court's Rule 29.6.

RELATED PROCEEDINGS

United States Court of Appeals for the Third Circuit:

Brookins v. City of Philadelphia, No. 25-1041
(opinion and judgment entered May 29, 2026;
mandate issued June 22, 2026), 2026 WL 1507402.

United States District Court for the Eastern District of
Pennsylvania:

Brookins v. City of Philadelphia, No. 2:24-cv-00470-
MAK (Kearney, J.) (order entered Dec. 9, 2024;
memorandum entered Dec. 10, 2024), 2024 WL
5057606.

TABLE OF CONTENTS

	Page
Opinions Below	1
Jurisdiction	1
Constitutional and Statutory Provisions	
Involved	1
Introduction	1
Statement of the Case.....	4
Reasons For Granting The Petition.....	10
I. Courts Of Appeals Are Divided Over Whether Conscience-Shocking Executive Conduct Is Itself Sufficient To Violate Due Process.	11
A. County of Sacramento v. Lewis left the lower courts in acknowledged disarray over what, if anything, must be shown after conduct shocks the conscience.	11
B. The Seventh, Tenth, and Eleventh Circuits agree with petitioner: conscience-shocking executive conduct supplies an independent basis for substantive-due-process liability.....	15
C. The First, Third, and Sixth Circuits require both conscience-shocking conduct and invasion of an independently protected interest.	17
II. The Decision Below Is Wrong.....	19
A. This Court’s cases require one element, and the concession satisfied it.....	19
B. The two-element rule is inconsistent with both lines of the Court’s substantive due process cases.	23
III. The Question Is Important, And This Case Is An Ideal Vehicle.....	24
Conclusion	28

Appendix A: Opinion of the United States Court of Appeals for the Third Circuit, No. 25-1041 (May 29, 2026).....	1a
Appendix B: Memorandum Opinion of the United States District Court for the Eastern District of Pennsylvania (Kearney, J.) (Dec. 10, 2024)	20a
Appendix C: Summary-Judgment Order of the United States District Court for the Eastern District of Pennsylvania (Dec. 9, 2024).....	109a
Appendix D: Judgment and Mandate of the United States Court of Appeals for the Third Circuit (judgment entered May 29, 2026; mandate issued June 22, 2026).....	111a
Appendix E: Constitutional and Statutory Provisions Involved	113a

TABLE OF AUTHORITIES

Cases	Page(s)
<i>Braley v. City of Pontiac</i> , 906 F.2d 220 (6th Cir. 1990)	12
<i>Brittain v. Hansen</i> , 451 F.3d 982 (9th Cir. 2006)	23
<i>Brookins v. City of Philadelphia</i> , 2026 WL 1507402 (3d Cir. May 29, 2026)	1
<i>Brookins v. City of Philadelphia</i> , 2024 WL 5057606 (E.D. Pa. Dec. 10, 2024)	1
<i>Chavez v. Martinez</i> , 538 U.S. 760 (2003)	10, 12, 13
<i>Cooper v. Dupnik</i> , 963 F.2d 1220 (9th Cir. 1992)	12
<i>County of Sacramento v. Lewis</i> , 523 U.S. 833 (1998)	10, 11, 12, 13, 15, 17, 21, 22
<i>Cruz-Erazo v. Rivera-Montañez</i> , 212 F.3d 617 (1st Cir. 2000)	13
<i>Dacosta v. Nwachukwa</i> , 304 F.3d 1045 (11th Cir. 2002)	14
<i>Daniels v. Williams</i> , 474 U.S. 327 (1986)	25
<i>DeMarcus v. University of South Ala- bama</i> , 133 F.4th 1305 (11th Cir. 2025)	3, 16, 17
<i>Doe v. Woodard</i> , 912 F.3d 1278 (10th Cir. 2019)	16
<i>Dr. Bonham’s Case</i> , 8 Co. Rep. 107a, 77 Eng. Rep. 638 (C.P. 1610)	24

Cases—Continued	Page(s)
<i>EJS Properties, LLC v. City of Toledo</i> , 698 F.3d 845 (6th Cir. 2012)	14
<i>Halley v. Huckaby</i> , 902 F.3d 1136 (10th Cir. 2018)	3, 16, 18
<i>Hawkins v. Freeman</i> , 195 F.3d 732 (4th Cir. 1999)	23, 24
<i>Johnson v. Glick</i> , 481 F.2d 1028 (2d Cir. 1973)	2, 11, 20
<i>Littlejohn v. School Board of Leon County</i> , 132 F.4th 1232 (11th Cir. 2025)	14, 15, 24
<i>Maddox v. Stephens</i> , 727 F.3d 1109 (11th Cir. 2013)	14
<i>Martínez v. Cui</i> , 608 F.3d 54 (1st Cir. 2010)	12, 13, 14, 17, 23
<i>Meyer v. Nebraska</i> , 262 U.S. 390 (1923)	15, 23
<i>Palko v. Connecticut</i> , 302 U.S. 319 (1937)	11, 19
<i>Pierce v. Society of Sisters</i> , 268 U.S. 510 (1925)	12, 15, 17, 23
<i>Pittsley v. Warish</i> , 927 F.2d 3 (1st Cir. 1991)	12
<i>Range v. Douglas</i> , 763 F.3d 573 (6th Cir. 2014)	14
<i>Rochin v. California</i> , 342 U.S. 165 (1952)	2, 3, 11, 12, 15, 17, 19, 20, 21, 23, 24, 25, 26, 27
<i>Sandra T.E. v. Grindle</i> , 599 F.3d 583 (7th Cir. 2010)	3, 15, 18
<i>Seegmiller v. LaVerkin City</i> , 528 F.3d 762 (10th Cir. 2008)	3, 15

Cases—Continued	Page(s)
<i>Siefert v. Hamilton County</i> , 951 F.3d 753 (6th Cir. 2020)	14, 17, 18, 23
<i>Slusarchuk v. Hoff</i> , 346 F.3d 1178 (8th Cir. 2003)	12
<i>Smith v. Albany County School District</i> <i>No. 1 Board of Trustees</i> , 174 F.4th 1235 (10th Cir. 2026)	16
<i>United States v. Salerno</i> , 481 U.S. 739 (1987)	10, 11, 19, 22
<i>Vargas v. City of Philadelphia</i> , 783 F.3d 962 (3d Cir. 2015)	8, 18
<i>Waldman v. Conway</i> , 871 F.3d 1283 (11th Cir. 2017)	3, 14, 16, 18
<i>Washington v. Glucksberg</i> , 521 U.S. 702 (1997)	3, 13, 16, 25
<i>Weiler v. Purkett</i> , 137 F.3d 1047 (8th Cir. 1998)	12
Constitutional Provisions	
U.S. Const. amend. XIV	1, 2, 8, 10, 14, 15, 17, 18, 19, 22, 24
Statutes	
28 U.S.C. § 1254(1)	1
42 U.S.C. § 1983	1, 7
Rules	
Sup. Ct. R. 30.1	1
Other Authorities	
16B Am. Jur. 2d Constitutional Law §§ 958-960 (Aug. 2026 update)	20, 21
Jane R. Bambauer & Toni M. Massaro, <i>Outrageous and Irrational</i> , 100 Minn. L. Rev. 281 (2015)	22

Other Authorities—Continued	Page(s)
Robert Chesney, <i>Old Wine or New? The Shocks-the-Conscience Standard and the Distinction Between Legislative and Executive Action</i> , 50 Syracuse L. Rev. 981 (2000)	13
Rosalie Berger Levinson, <i>Reining in Abuses of Executive Power Through Substantive Due Process</i> , 60 Fla. L. Rev. 519 (2008)	21
Toni M. Massaro & Ellen Elizabeth Brooks, <i>Flint of Outrage</i> , 93 Notre Dame L. Rev. 155 (2017)	22
Martin A. Schwartz, <i>Section 1983 Litigation</i> (Fed. Judicial Ctr. 3d ed. 2014)	21
Timothy M. Tymkovich, Joshua Dos Santos & Joshua J. Craddock, <i>A Workable Substantive Due Process</i> , 95 Notre Dame L. Rev. 1961 (2020)	13

PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The nonprecedential opinion of the court of appeals, 2026 WL 1507402, is reproduced at Pet. App. 1a-9a. Judge Roth’s opinion concurring in part and dissenting in part is reproduced at Pet. App. 10a-19a. The memorandum opinion of the district court, 2024 WL 5057606, is reproduced at Pet. App. 20a-108a.

JURISDICTION

The court of appeals entered judgment on May 29, 2026. On August 19, 2026, Justice Alito extended the time to file this petition to September 26, 2026, making it due September 28, 2026, under Rule 30.1. No. 26A215; Sup. Ct. R. 30.1. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Section 1 of the Fourteenth Amendment provides in relevant part that no State shall “deprive any person of life, liberty, or property, without due process of law.”

Title 42 U.S.C. § 1983 provides in relevant part that any person who, under color of state law, “subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured.”

INTRODUCTION

A Philadelphia police officer photographed a dying man on a public roadway and sent the picture to nine fellow officers thinking it would be funny. J.A. 11, 439. The photo spread widely—so widely that a Facebook friend sent the image to the man’s grief-stricken mother nine days later. J.A. 11, 419-21. The officer did not dispute that

his conduct shocked the conscience. He conceded it. The district court called his conduct “reprehensible,” “inexcusabl[e],” and a “shocking departure from what we expect of our police,” and observed that there were “few things we can think of more outrageous than a police officer taking a photograph of a near-dead individual post suicide attempt and circulating this private photo amongst friends in his police department.” J.A. 3, 4, 22, 73. The majority below accepted the officer’s concession, calling it “sensibl[e],” and described the conduct as “reprehensible” and “deplorable.” Pet. App. 3a n.2, 8a.

Under the Fourteenth Amendment, that should have ended this case. For more than half a century this Court has recognized that the Due Process Clause is violated when a government official subjects a person to “conduct that shocks the conscience.” *Rochin v. California*, 342 U.S. 165, 172 (1952). One question, about what the official did. As Judge Friendly explained, the test is “not one that can be applied by a computer,” nor is it easy to satisfy, but once conscience-shocking conduct is shown, a complainant has “stated a claim.” *Johnson v. Glick*, 481 F.2d 1028, 1033 (2d Cir. 1973) (Friendly, J.).

Both courts below required a second showing. Beyond proving that Officer Culver subjected her to conscience-shocking conduct, they required petitioner to identify a discrete “liberty interest”—here, a liberty interest the court of appeals defined as “control over a loved one[’s] death-scene images”—and to locate that interest in prior decisional law or in historical tradition. Pet. App. 8a. Neither court found controlling precedent recognizing the interest. The court of appeals assumed the tradition sufficient and denied relief anyway. Both therefore denied relief. “Officer Culver avoids personal liability for his consci[ence]-shocking conduct,” the district court explained, because “we are the first court in this Circuit to reach this conclusion.” Pet. App. 38a.

That was error. A substantive due process claim against an executive official has one element: did the official subject the person to conduct that shocks the conscience? Officer Culver has conceded the claim’s only element. Pet. App. 3a n.2. The court of appeals added a second one, and petitioner lost for failing to prove that second, nonexistent element was clearly established. Pet. App. 3a-8a. This Court has never required a plaintiff victimized by conscience-shocking conduct to identify, in addition, a separately catalogued liberty interest “deeply rooted in this Nation’s history and tradition” against being subjected to that misconduct. *See Washington v. Glucksberg*, 521 U.S. 702, 721 (1997).

On the reasoning below, *Rochin* was wrongly decided. The *Rochin* Court cited no historical tradition recognizing a protected liberty interest against the forcible pumping of a stomach. Instead, it held that the officers’ conduct shocked the conscience, and stopped.

In cases from the Seventh, Tenth, and Eleventh Circuits, courts have recognized that plaintiffs can state a substantive-due-process claim against executive officials by proving one thing: that the official’s conduct shocked the conscience. *Sandra T.E. v. Grindle*, 599 F.3d 583, 589 (7th Cir. 2010); *Seegmiller v. LaVerkin City*, 528 F.3d 762, 767 (10th Cir. 2008); *Halley v. Huckaby*, 902 F.3d 1136, 1153 (10th Cir. 2018); *Waldman v. Conway*, 871 F.3d 1283, 1292-93 (11th Cir. 2017); *DeMarcus v. University of South Alabama*, 133 F.4th 1305, 1316 (11th Cir. 2025). The decision below required petitioner to establish a “protected liberty interest” independently—and denied relief because it was not clearly established. Pet. App. 3a-8a.

The consequence of the rule below is that a plaintiff can prove everything the Constitution requires and still

lose.¹ Whether this Nation has a clearly established tradition protecting a family's control over a decedent's death-scene images is a substantial question. But it was not one petitioner should have had to answer in this case. She proved that a police officer subjected her to conduct so repulsive that Officer Culver's own lawyer opened his oral argument below by "mak[ing] two concessions": "There is no genuine dispute that Officer Culver took this photograph and there's no dispute that what he did was repugnant" and "conscience-shocking behavior." Every court to consider the matter agreed. Ms. Brookins should have been granted summary judgment based solely on the facts he conceded.

Officer Culver conceded the whole of petitioner's claim. Nothing else was required of her, and nothing else has ever been required. The Court should grant certiorari and reverse.

STATEMENT OF THE CASE

A. Marcus Boone.

On March 18, 2022, Marcus Boone went to the Knights Road overpass in Northeast Philadelphia. J.A. 5. He had struggled with mental illness and addiction for years, had received treatment, J.A. 216, and had attempted suicide at least six times before that morning. J.A. 179.

He stood on the overpass for nearly three hours, much of it outside the safety fence with nothing between him and Woodhaven Road below. J.A. 3, 5. Twenty to thirty Philadelphia police officers responded. J.A. 5. Marcus talked with several of them. He told them he had not taken his medication. He described hallucinations and

¹ That is even more disheartening in a case like this one where, as Judge Roth explained in dissent below, even the second step is obviously satisfied. Pet. App. 10a.

said he believed the police wanted to kill him. At one point, at an officer's request, he handed over a knife. J.A. 6-7, 9.

He asked repeatedly to speak to his mother. No one from the Department called her. J.A. 6, 230, 362.

Eventually he said again that he wanted to die, and he jumped headfirst onto Woodhaven Road. J.A. 10, 232. He did not die immediately upon impact. J.A. 10, 16. He was pronounced dead later, at a hospital, of catastrophic injuries. J.A. 11, 424-29.

B. Officer Culver photographs him and sends the picture to nine other officers.

Officer Christopher Culver was at the scene. His assignment had been to assist with traffic control. J.A. 6. As Marcus lay on the road below, Officer Culver took out his personal cellular telephone, leaned over the overpass, and photographed Marcus as he lay dying. J.A. 11, 16; Pet. App. 2a.

The district court described the photograph. It “capture[d] graphic details of Mr. Boone’s appearance on the ground,” and “reveal[ed] a great deal about how he died and his suffering in his final moments.” J.A. 17.

Officer Culver then sent the photograph by text message to nine fellow police officers. J.A. 11, 219, 233, 462. He later characterized what he had done as “an attempt at humor.” J.A. 379, 439. Someone—the record does not establish who, J.A. 11—then posted the photograph to social media.

Taking the photograph, or sending it, served no law-enforcement purpose. J.A. 22. In the Philadelphia Police Department’s internal affairs investigation, Culver acknowledged that he had not been authorized to take the photograph. J.A. 439.

Departmental policy prohibited what he did. The Philadelphia Police Department bars officers from

photographing crime scenes with their personal phones absent exigent circumstances. Pet. App. 2a.

Several officers deposed in the case testified that they knew officers could not use personal cell phones to take photographs like this one, let alone share the photographs. J.A. 29 (Bachmayer, DeBlasis, Luca, and Andrews); J.A. 391 (Miller). Sergeant Rodden put it simply: “That’s not something that we do.” Dist. Ct. ECF No. 107, at 303 (Rodden Dep. 41:14-15); *see also id.* at 322 (Harris). One officer, asked about his reaction to the photograph, said he was “shocked and upset about anyone who would take it to that level of taking a photograph.” *Id.* at 333.

The photograph existed only because a police officer took it. The Department had cordoned off a wide perimeter, on the overpass and below it. J.A. 65. Marcus jumped in public, but not within the direct or camera view of members of the public. *Id.*

The City disciplined Officer Culver for his conduct. J.A. 69, 391.

C. Ms. Brookins encounters the photograph, repeatedly.

Ms. Brookins learned that the photograph had been posted on social media. J.A. 220. The person who told her said it must have been taken by a police officer—because of its perspective, and because whoever took it had been standing atop the overpass inside the police perimeter. J.A. 420-21. That person sent it to her. So did at least one other person. J.A. 298; Pet. App. 2a.

At a gas station near the scene, an attendant brought up the photograph and then showed it to her, not knowing that she was Marcus’s mother. J.A. 297-98.

Her medical records document the distress this caused, separately from her grief at her son’s death. Her clinician’s intake notes from the first session record her

“reporting she received photos and videos from bystanders.” J.A. 463. Months later she described her distress at “the picture taken as if [his] life ‘didn’t matter.’” J.A. 509. In early 2024 her provider noted distress “caused by picture of her son’s death and how [he] was ‘mishandled.’” J.A. 518. During this litigation, the same clinician recorded her account of the “lack of empathy with taking picture and sharing it” and the “frustration/anger associated.” J.A. 535.

D. The district court finds a violation and grants immunity because it is the first court to say so.

Ms. Brookins sued Officer Culver under 42 U.S.C. § 1983 for violating her substantive due process rights, and under Pennsylvania law for intentional infliction of emotional distress. Pet. App. 2a.

The district court held that Officer Culver had violated her rights, depriving her of a protected liberty interest in “non-interference with a family’s remembrance of a decedent.” Pet. App. 2a. It rejected Culver’s argument that the claim failed because Marcus was still alive when the photograph was taken. J.A. 15-17.

Across its opinion the court described the conduct as “inexcusabl[e],” J.A. 3; “reprehensible,” J.A. 4, 13; “consci[ence]-shocking,” J.A. 13; a “shocking departure from what we expect of our police,” J.A. 22; and “wrong,” J.A. 30. It wrote that there were “few things we can think of more outrageous than a police officer taking a photograph of a near-dead individual post suicide attempt and circulating this private photo amongst friends in his police department.” J.A. 73.

It granted Officer Culver qualified immunity anyway. “But we are the first court in this Circuit to reach this conclusion. The lack of clear guidance in March 2022 entitles Officer Culver to qualified immunity notwithstanding his reprehensible conduct.” Pet. App.

38a. And: “Officer Culver avoids personal liability for his consci[ence]-shocking conduct.” *Id.*

On the state-law claim, the court acknowledged that Ms. Brookins had identified ten treating medical and mental health professionals and produced more than 1,500 pages of medical records, J.A. 30-31, and that treating clinicians could supply the medical evidence Pennsylvania law requires, J.A. 32-33. It granted judgment because her summary-judgment papers had not cited those records with enough specificity to separate the distress caused by the photograph from the distress caused by her son’s death. J.A. 34.

E. The court of appeals affirms.

Ms. Brookins argued in the court of appeals that her right was clearly established, and argued in the alternative that Officer Culver’s violation was obvious regardless. C.A. Br. 35 (“Even if none of the foregoing were true, Officer Culver’s violation was obvious.”); *id.* at 38 (“Officer Culver cannot benefit from qualified immunity for obvious, conscience-shocking violation of rights, clearly established or not.”); C.A. Reply Br. 6-10.

Officer Culver did not dispute that his conduct was conscience-shocking. Pet. App. 3a n.2. The City argued that “even if Officer Culver acted in a conscience shocking manner, he could not have understood from the caselaw that his conduct was unconstitutional.” C.A. Br. of City Appellees 26.

The court of appeals affirmed. It stated at the outset that it would “discuss only the asserted Fourteenth Amendment interest because Culver (sensibly) does not dispute that his conduct was conscience-shocking,” citing *Vargas v. City of Philadelphia*, 783 F.3d 962, 973 (3d Cir. 2015), for the proposition that a substantive due process violation by non-legislative action “requires deprivation of

[a] protected interest in [a] conscience-shocking manner.” Pet. App. 3a n.2.

The court held that the interest was not clearly established—finding no controlling authority, Pet. App. 4a-6a, no robust consensus of persuasive authority, Pet. App. 6a-8a, and no obvious violation, Pet. App. 8a. It concluded:

[N]o constitutional rule clearly proscribes Culver’s conduct, deplorable as it was. The generally established rule is that officers may not deprive individuals of protected liberty interests in a conscience-shocking manner. . . . Nothing about that general rule makes obvious that control over a loved one[’s] death-scene images is a protected liberty interest.

Pet. App. 8a. In the preceding paragraph: “It is not enough that Culver’s conduct was reprehensible; it must have clearly been proscribed by the Constitution’s guarantee of substantive due process.” *Id.*

Judge Roth concurred in part and dissented in part. She would have held precedentially that Ms. Brookins holds a constitutionally protected privacy interest, and would have denied immunity because Officer Culver’s conduct “was so obviously wrongful that he should have been on notice that his actions were impermissible.” Pet. App. 10a. She noted that the photograph “required Culver to take a series of intentional steps,” and that he “then chose to send the photos to members of his unit, a deliberate decision he was not compelled to make under any time constraints.” Pet. App. 18a. And she observed that an officer is not entitled to the “benefit of one liability-free violation simply because the circumstance of his case is not identical to that of a prior case.” Pet. App. 16a.

REASONS FOR GRANTING THE PETITION

The Court should grant the petition. A substantive due process claim against an executive official has one element, and Officer Culver conceded it. The court of appeals held that petitioner had to prove a second: a “protected liberty interest” deeply rooted in this Nation’s history and tradition. This Court has never imposed that requirement. And the courts of appeals cannot agree whether the Court’s decision in *County of Sacramento v. Lewis*, 523 U.S. 833 (1998), did.

The same Due Process Clause cannot simultaneously make conscience-shocking executive misconduct an independent constitutional violation in one circuit and merely the first element of a different constitutional violation in another. The uncertainty originates in this Court’s cases, the courts of appeals openly acknowledge it, and only this Court can resolve it.

The disagreement is unusually stark. Several courts of appeals expressly describe conscience-shocking executive misconduct as an independent ground of substantive-due-process liability. Others require both conscience-shocking conduct and invasion of an independently protected fundamental right. Still others have said both things at different times. Courts confronting the question have openly acknowledged the inconsistency in their own precedents. Scholars have recognized the conflict too. Yet the only three opinions of this Court to discuss the claims together described them disjunctively. *United States v. Salerno*, 481 U.S. 739, 746 (1987); *Lewis*, 523 U.S. at 847; *Chavez v. Martinez*, 538 U.S. 760, 774 (2003) (plurality opinion).

The elements decide this case. If a shocks-the-conscience claim requires only that a plaintiff show that she was the victim of conscience-shocking executive misconduct, Ms. Brookins wins. If it requires, in addition,

infringement of a separately established fundamental right, Officer Culver does. This Court should resolve which rule governs this case and determine the scope and extent of executive branch officials' power to subject people to conscience-shocking abuse.

I. COURTS OF APPEALS ARE DIVIDED OVER WHETHER CONSCIENCE-SHOCKING EXECUTIVE CONDUCT IS ITSELF SUFFICIENT TO VIOLATE DUE PROCESS.

A. *County of Sacramento v. Lewis* left the lower courts in acknowledged disarray over what, if anything, must be shown after conduct shocks the conscience.

For decades after this Court's recognition of shocks-the-conscience claims in *Rochin v. California*, 342 U.S. 165 (1952), courts understood a shocks-the-conscience claim to turn only on whether the challenged executive conduct shocked the conscience. Judge Friendly understood *Rochin* to ask only that. *Johnson v. Glick*, 481 F.2d 1028, 1032-33 (2d Cir. 1973).

Thus, this Court, lower courts, and commentators recognized there were two distinct lines of due process cases. As the Court stated unequivocally in *United States v. Salerno*: "So-called substantive due process prevents the government from engaging in conduct that shocks the conscience, or interferes with rights implicit in the concept of ordered liberty." 481 U.S. 739, 746 (1987) (cleaned up) (citing *Rochin v. California*, 342 U.S. 165, 172 (1952); *Palko v. Connecticut*, 302 U.S. 319, 325-26 (1937)). The First Circuit, for example, understood this Court to have "enunciated two alternative tests": a plaintiff could identify a protected liberty or property interest, or she could establish that the State's conduct

shocked the conscience. *Pittsley v. Warish*, 927 F.2d 3, 6 (1st Cir. 1991).²

Thus, under cases like *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), due process protected individuals from violations of fundamental rights deeply rooted in our Nation’s history and tradition. Under *Rochin* it protected them from conscience-shocking government misconduct.

Then came *County of Sacramento v. Lewis*, 523 U.S. 833 (1998). *Lewis* rejected a substantive-due-process claim because the challenged executive conduct did not shock the conscience. *Id.* at 855. Justice Scalia, concurring in the judgment, urged the Court to abandon *Rochin*’s conduct-centered inquiry and recognize only historically established substantive rights. *Id.* at 860-65.

The Court declined to do that. Footnote 8 explained that in a challenge to executive action “the threshold question” is whether the officer’s conduct is sufficiently egregious to shock the conscience. *Lewis*, 523 U.S. at 847-48 n.8. Only after that “necessary condition” was satisfied, the Court said, would there be “a possibility of recognizing a substantive due process right to be free of such executive action,” and “only then might there be a debate” about historical examples protecting the asserted right. *Id.* The Court emphasized that “[i]n none of our prior

² Before *Lewis*, courts repeatedly described conscience-shocking conduct as an independent basis for substantive-due-process protection. See, e.g., *Weiler v. Purkett*, 137 F.3d 1047, 1051 (8th Cir. 1998) (en banc); *Braley v. City of Pontiac*, 906 F.2d 220, 224-25 (6th Cir. 1990) (Boggs, J.); *Cooper v. Dupnik*, 963 F.2d 1220, 1248-50 (9th Cir. 1992) (en banc), *abrogated on other grounds by Chavez v. Martinez*, 538 U.S. 760 (2003). Later decisions rejected the alternative-routes formulation in the First and Eighth Circuits. See *Martínez v. Cui*, 608 F.3d 54, 63-65 (1st Cir. 2010); *Slusarchuk v. Hoff*, 346 F.3d 1178, 1181-82 & n.2 (8th Cir. 2003).

cases” had it considered whether such historical examples were necessary. *Id.*

Lewis never said what happens on the other side of the “threshold question.” It did not hold that a plaintiff victimized by a government official whose conduct concededly shocked the conscience must then establish a second, independently sufficient *Glucksberg* right. See *Glucksberg*, 521 U.S. at 720-21. The Court had no occasion to decide because the conduct in *Lewis* failed at the threshold.

The result has been uncertainty. The lower courts have spent the ensuing quarter-century disagreeing over what *Lewis* means. Professor Chesney identified the collision almost immediately. See Robert Chesney, *Old Wine or New? The Shocks-the-Conscience Standard and the Distinction Between Legislative and Executive Action*, 50 Syracuse L. Rev. 981, 991-93, 999-1002, 1017 (2000). Judge Tymkovich and his coauthors later traced the same confusion through *Glucksberg*, *Lewis*, and *Chavez*. See Timothy M. Tymkovich, Joshua Dos Santos & Joshua J. Craddock, *A Workable Substantive Due Process*, 95 Notre Dame L. Rev. 1961, 1992 (2020).

The First Circuit illustrates the problem. Two years after *Lewis*, it reiterated that “[t]here are two theories” of substantive due process. Under one, the plaintiff identifies a protected liberty or property interest. Under the other, “a plaintiff is not required to prove the deprivation of a specific liberty or property interest,” but instead shows that the State’s conduct shocks the conscience. *Cruz-Erazo v. Rivera-Montañez*, 212 F.3d 617, 622 (1st Cir. 2000). The court proceeded on precisely that basis because the plaintiffs had identified no separate constitutional interest. *Id.*

Ten years later, that same court read *Lewis* the opposite way. *Martínez v. Cui*, 608 F.3d 54 (1st Cir. 2010),

declared the First Circuit’s alternative-routes formulation “not good law” and held that an executive-action plaintiff must establish both conscience-shocking conduct *and* violation of “a right otherwise protected by the substantive Due Process Clause.” *Id.* at 63-65. Yet even *Martínez* acknowledged that “[t]he precise relationship” between the two inquiries was “more complex” than its case required the court to resolve. *Id.* at 66 n.11.

The Sixth Circuit’s cases are similarly divided. In *Range v. Douglas*, the court stated that “government action may certainly shock the conscience or violate substantive due process without a liberty or property interest at stake.” 763 F.3d 573, 589 (6th Cir. 2014) (quoting *EJS Properties, LLC v. City of Toledo*, 698 F.3d 845, 861-62 (6th Cir. 2012)). Six years later, *Siefert v. Hamilton County*, 951 F.3d 753 (6th Cir. 2020), candidly acknowledged that the circuit’s cases point in both directions. “Sometimes,” it explained, Sixth Circuit cases say substantive due process comes in “two varieties”: deprivation of a constitutional guarantee “and” actions that shock the conscience. *Id.* at 765. “And other times, the court has suggested both prongs are required.” *Id.* The panel ultimately followed what it regarded as the circuit’s “[m]ost recent[]” formulation and required both. *Id.* at 765-66.

The Eleventh Circuit has confronted the same problem. Its cases have variously described the two standards as alternatives and as cumulative requirements. Compare *Dacosta v. Nwachukwa*, 304 F.3d 1045, 1048 (11th Cir. 2002), and *Waldman v. Conway*, 871 F.3d 1283, 1292-93 (11th Cir. 2017), with *Maddox v. Stephens*, 727 F.3d 1109, 1118-19 (11th Cir. 2013). Just last year, Judge Newsom catalogued those cases and described the circuit’s substantive-due-process precedents as, “to put it charitably, dissonant.” *Littlejohn*

v. School Board of Leon County, 132 F.4th 1232, 1282 (11th Cir. 2025) (Newsom, J., concurring).

This is not disagreement at the margins. Courts disagree about *what the elements even are*. They disagree about whether *Rochin* and *Pierce* supply alternative grounds of constitutional protection or cumulative requirements. And they trace both answers to the same footnote in the same decision of this Court.

B. The Seventh, Tenth, and Eleventh Circuits agree with petitioner: conscience-shocking executive conduct supplies an independent basis for substantive-due-process liability.

Several courts of appeals have expressly adopted petitioner’s understanding of *Rochin* even after *Lewis*: for executive misconduct, the conscience-shocking inquiry is itself a route to substantive-due-process protection, not merely an additional hurdle appended to a separately established fundamental right.

The Seventh Circuit could hardly have stated the distinction more plainly. “There are two types of substantive due process violations,” it explained in *Sandra T.E. v. Grindle*, 599 F.3d 583, 589 (7th Cir. 2010). “The first occurs when the state actor’s conduct is such that it ‘shocks the conscience.’” *Id.* “The second occurs when the state actor violates an identified liberty or property interest protected by the Due Process Clause.” *Id.* The court thus placed *Rochin* and *Meyer v. Nebraska*, 262 U.S. 390 (1923), on opposite sides—two types of claims, not two elements of one.

The Tenth Circuit has been equally explicit. It initially stated the proposition in *Seegmiller v. LaVerkin City*: “By satisfying either the ‘fundamental right’ or the ‘shocks the conscience’ standards, a plaintiff states a valid substantive due process claim under the Fourteenth Amendment.” 528 F.3d 762, 767 (10th Cir. 2008). Later

decisions refined when each approach applies. The circuit has now “coalesced around a solution”: it applies “the fundamental-rights approach when the plaintiff challenges legislative action, and the shocks-the-conscience approach when the plaintiff seeks relief for tortious executive action.” *Halley v. Huckaby*, 902 F.3d 1136, 1153 (10th Cir. 2018) (emphasis omitted). And *Doe v. Woodard* repeated the rule: executive-action claims “are ‘shocks the conscience’ claims.” 912 F.3d 1278, 1300 (10th Cir. 2019). Under that framework, a plaintiff challenging what an executive official did does not first have to establish a *Glucksberg* fundamental right. The constitutional inquiry is whether the executive abuse shocks the conscience. The circuit applied that framework again this year, rejecting a fundamental-rights claim and then separately reaching “[t]he second strand of substantive due process,” which “protects against tortious executive action that shocks the conscience.” *Smith v. Albany County School District No. 1 Board of Trustees*, 174 F.4th 1235, 1252 (10th Cir. 2026).

The Eleventh Circuit likewise has said that the absence of a fundamental right does not end the inquiry. “Where a fundamental liberty interest does not exist,” *Waldman* explained, “substantive due process nonetheless protects against the arbitrary and oppressive exercise of government power.” 871 F.3d at 1292. For executive action, arbitrariness of constitutional dimension is measured by whether the conduct shocks the conscience. *Id.* at 1292-93.

And the Eleventh Circuit reiterated the point in 2025. In *DeMarcus v. University of South Alabama*, the parties disputed how the underlying substantive-due-process interest should be defined. 133 F.4th 1305, 1316-17 (11th Cir. 2025). The court concluded that the dispute did not control. “Regardless of the interest claimed,” it explained, the test for whether executive action violates substantive

due process “is whether it ‘shocks the conscience.’” *Id.* at 1316.

Those decisions answer the question presented the way petitioner does. *Rochin*’s shocks-the-conscience standard is not some kind of prerequisite to a *Pierce* claim. Conscience-shocking executive abuse is its own kind of substantive-due-process violation. The victim need not first identify a separately catalogued fundamental right and establish its historical pedigree before the Constitution cares how the officer behaved.

The distinction decides this case. Officer Culver does not dispute that his conduct shocked the conscience. Pet. App. 3a n.2. Under the Seventh Circuit’s two-types formulation, the Tenth Circuit’s executive-action rule, and the Eleventh Circuit’s rule that conscience-shocking executive abuse remains actionable even “[w]here a fundamental liberty interest does not exist,” that concession means petitioner wins. The decision below applies a fundamentally different rule.

C. The First, Third, and Sixth Circuits require both conscience-shocking conduct and invasion of an independently protected interest.

Other courts have converted *Lewis*’s “threshold” into the first half of a two-element test.

The First Circuit now holds that *Lewis* requires a plaintiff to establish “not only that the official’s actions shock the conscience, but also that the official violated a right otherwise protected by the substantive Due Process Clause.” *Martínez*, 608 F.3d at 64.

The Sixth Circuit has settled, at least for now, on the same formulation. After acknowledging that its cases have alternated between two independent “varieties” of substantive due process and a rule requiring “both prongs,” *Siefert* held that a plaintiff must establish, “as a predicate,” deprivation of a constitutionally protected

liberty or property interest and conscience-shocking conduct. 951 F.3d at 765-66.

And the Third Circuit applies that conjunctive rule, as it did in this case. Under *Vargas v. City of Philadelphia*, a substantive-due-process violation based on non-legislative conduct “requires deprivation of [a] protected interest in [a] conscience-shocking manner.” Pet. App. 3a n.2 (citing 783 F.3d 962, 973 (3d Cir. 2015)). The court below therefore stated that it would “discuss only the asserted Fourteenth Amendment interest because Culver (sensibly) does not dispute that his conduct was conscience-shocking.” Pet. App. 3a n.2. The concession did not establish the violation. It merely cleared the first obstacle.

The court then demanded the second showing. It asked whether petitioner possessed a constitutionally protected interest in “control over a loved one[’s] death-scene images,” Pet. App. 8a; required that interest to be “deeply rooted in our history and tradition” and “essential to our Nation’s scheme of ordered liberty,” Pet. App. 5a; and—even assuming that historical requirement satisfied—denied relief because no clearly established constitutional rule protected that separately defined interest, Pet. App. 3a-8a.

The conflict is direct. In the Seventh Circuit there are “two types” of substantive-due-process violations, one of which is conscience-shocking conduct. *Grindle*, 599 F.3d at 589. In the Tenth Circuit, executive misconduct is analyzed under the conscience-shocking approach rather than the fundamental-rights approach. *Halley*, 902 F.3d at 1153. In the Eleventh Circuit, substantive due process can protect against conscience-shocking executive action “[w]here a fundamental liberty interest does not exist.” *Waldman*, 871 F.3d at 1292. In the First, Third, and Sixth Circuits, by contrast, conscience-shocking conduct is

insufficient unless it also invades an independently protected interest.

II. THE DECISION BELOW IS WRONG.

A. This Court's cases require one element, and the concession satisfied it.

Since 1952 it has been settled that the Due Process Clause is violated when a government official subjects a person to “conduct that shocks the conscience.” *Rochin*, 342 U.S. at 172. The Court reached that conclusion by describing what the officers did—“[i]llegally breaking into the privacy of the petitioner, the struggle to open his mouth and remove what was there, the forcible extraction of his stomach’s contents”—and holding it “too close to the rack and the screw to permit of constitutional differentiation.” *Id.* It did not require *Rochin* to identify a separately catalogued interest matching the officers’ particular method.

Rochin’s rule decides this case. The concession establishes that what Officer Culver did to petitioner and her family shocks the conscience. *Rochin* established, seventy years before he acted, that such conduct violates the Due Process Clause.

The Court has restated the rule the same way ever since. The Due Process Clause “prevents the government from engaging in conduct that ‘shocks the conscience,’ *Rochin*, . . . or interferes with rights ‘implicit in the concept of ordered liberty,’ *Palko v. Connecticut*, 302 U.S. 319, 325-326 (1937).” *United States v. Salerno*, 481 U.S. 739, 746 (1987).

That formulation is disjunctive. Conscience-shocking government conduct is one type of violation; interference with a right implicit in ordered liberty is the other. The formula the court of appeals applied—deprivation of “protected liberty interests in a conscience-shocking manner,” Pet. App. 8a—rewrites *Salerno*’s “or” as an

“and.” It imports the history-and-tradition inquiry belonging to the second route into a claim arising under the first.

Judge Friendly’s opinion in *Johnson v. Glick* shows what the inquiry has always been. Applying *Rochin* to a detainee’s claim that a guard had beaten him simply to hurt him, Judge Friendly wrote that the test, “conduct that shocks the conscience,” “is not one that can be applied by a computer,” but “it at least points the way.” 481 F.2d 1028, 1033 (2d Cir.) (Friendly, J.), *cert. denied*, 414 U.S. 1033 (1973). He asked what the officer had done, and held the complaint “stated a claim.” *Id.* He did not ask whether the plaintiff held a separately catalogued interest in being free from beatings by prison guards. This Court has cited page 1033 for four decades and has never once suggested that what Judge Friendly did there—ask what the officer did, and stop—was incomplete.

This is black-letter law. American Jurisprudence puts it in the first sentence of the section devoted to the subject: “State conduct offends substantive due process when it shocks the conscience, constitutes a force that is so brutal as to offend even hardened sensibilities, or is offensive to human dignity.” 16B Am. Jur. 2d Constitutional Law § 960 (August 2026 update) (footnotes omitted). Offends when it shocks the conscience. Not when it shocks the conscience *and also invades a separately catalogued liberty interest*. The section is titled “Oppressive or shocking behavior as violating substantive due process,” and it sits under the heading “Types of Substantive Due-Process Claims”—a type of claim in its own right, listed alongside arbitrary action, *id.* § 958, and bias or bad faith, *id.* § 959. The treatise is explicit that this route does not depend on a separately established right. Due process, it explains, operates:

as a check on legislative enactments thought to infringe on fundamental rights otherwise not explicitly protected by the Bill of Rights, as a check on official misconduct which infringes on a fundamental right or as a limitation on official misconduct which, although not infringing on a fundamental right, is so literally conscience-shocking, and hence oppressive, as to rise to the level of a substantive due-process violation.

Id. § 960 (footnote omitted). Although not infringing on a fundamental right. That is the exact opposite of the test that the Third Circuit applies. The Federal Judicial Center’s manual for federal judges states the rule the same way: the “shocks the conscience” test “governs all substantive due process challenges to executive action not implicating a fundamental, constitutionally protected right.” Martin A. Schwartz, *Section 1983 Litigation* 40-41 (Fed. Judicial Ctr. 3d ed. 2014).

County of Sacramento v. Lewis, 523 U.S. 833 (1998), did not impose that additional requirement. *Lewis* rejected the claim because the challenged conduct did not shock the conscience. *Id.* at 855. Footnote 8 called conscience-shocking conduct a “necessary condition.” But it did not decide whether that condition was also a *sufficient* one. The Court expressly stated that it had not previously considered the necessity of historical examples in a shocks-the-conscience case and that “no such question is raised in this case.” *Id.* at 847-48 n.8. An unanswered question cannot be treated as a watershed holding that every *Rochin* plaintiff must also establish a fundamental right.

As Professor Levinson has explained, nothing in this Court’s cases holds that absent “identification of a fundamental right, substantive due process cannot be invoked to challenge abuses of power by the executive

branch.” Rosalie Berger Levinson, *Reining in Abuses of Executive Power Through Substantive Due Process*, 60 Fla. L. Rev. 519, 542-43, 546-47 (2008). “Nonetheless,” she acknowledges, “many lower courts have misconstrued these cases to mandate this requirement.” *Id.* at 546 & n.143 (collecting cases). Other scholars put the affirmative point directly: “[a] denial of rational or non-outrageous treatment is itself a deprivation of a due process liberty.” Jane R. Bambauer & Toni M. Massaro, *Outrageous and Irrational*, 100 Minn. L. Rev. 281, 313-14 (2015).

The demanding conscience-shocking standard already performs the limiting function *Lewis* identified as necessary to prevent the Due Process Clause from becoming a font of tort law. It separates ordinary wrongdoing from executive abuse of such extraordinary wrongfulness that it is of constitutional magnitude. Only the most egregious official conduct qualifies; substantive due process does not constitutionalize every injury inflicted by a government employee. *Lewis*, 523 U.S. at 846-49. It makes no sense to require a plaintiff to satisfy that exceptionally demanding standard for executive branch abuse, then also make her prove a second and different substantive-due-process claim. Under that approach, however brutal or degrading the abuse, its conscience-shocking character cannot itself bring the victim within the Constitution’s protection. What *Salerno* described as an independent ground of protection becomes an additional hurdle she must clear to even bring a basic fundamental-rights claim. 481 U.S. at 746. Commentators have made the same point, observing that the conscience-shocking test “would be unnecessary if it hinged on the threshold determination of a fundamental right, given that these already trigger elevated judicial scrutiny.” Toni M. Massaro & Ellen Elizabeth Brooks, *Flint of Outrage*, 93 Notre Dame L. Rev. 155, 187 (2017).

B. The two-element rule is inconsistent with both lines of the Court’s substantive due process cases.

The lower courts have decided that, as a consequence of footnote 8, *Lewis* adopted a more unforgiving rule than even Justice Scalia sought. The First Circuit now holds that a shocks-the-conscience showing is an “essential part of *any* substantive due process claim against a government actor.” *Martínez*, 608 F.3d at 65 (emphasis added). In *Siefert v. Hamilton County*, the Sixth Circuit concluded that parents adequately alleged deprivation of their fundamental liberty interest in their child’s care and custody, but held their claim failed because they needed to establish conscience-shocking conduct as well. 951 F.3d 753, 765-67 (6th Cir. 2020). Other circuits impose the same additional requirement. See *Hawkins v. Freeman*, 195 F.3d 732, 738 (4th Cir. 1999) (en banc); *Brittain v. Hansen*, 451 F.3d 982, 991 (9th Cir. 2006).

The two-element rule thus does not merely eviscerate *Rochin* claims; it eviscerates *Pierce* and *Meyer* claims as well. In *Meyer*, this Court reversed a teacher’s conviction for teaching German because the prohibition unjustifiably interfered with the liberty of teachers and parents. 262 U.S. 390, 399-403 (1923). In *Pierce v. Society of Sisters*, it invalidated compulsory public-school attendance because the law unreasonably interfered with parents’ liberty to direct their children’s education. 268 U.S. 510, 534-35 (1925). Neither decision involved a separate showing that the law was conscience-shocking in its operation.

Nor should either have required one. A prohibition on teaching German can be unconstitutional without being conscience-shocking. So can a requirement that children attend public rather than private schools. Neither has to resemble the forcible stomach-pumping in *Rochin* to violate the Constitution. The wrong in *Meyer* and *Pierce* was the unjustified interference with a fundamental protected liberty—not some additional brutality in the

manner of interference. Making relief depend on conscience-shocking conduct would mean those claims should never have been countenanced at all. *See Meyer*, 262 U.S. at 399-403; *Pierce*, 268 U.S. at 534-35.

The lower courts avoid that conclusion by distinguishing legislative from executive action—contending that the Constitution has a special more charitable rule for executive branch misconduct. A legislative restriction on a fundamental right receives ordinary fundamental-rights review; an executive restriction must additionally shock the conscience. *See Hawkins*, 195 F.3d at 738-39; *Littlejohn*, 132 F.4th at 1239-41. That distinction makes no sense. It acknowledges that interference with a fundamental right violates due process, then withholds that protection when the interference comes from an executive official. Constitutional rights are constitutional rights.

III. THE QUESTION IS IMPORTANT, AND THIS CASE IS AN IDEAL VEHICLE.

A. The question presented is important and warrants this Court’s review. The shocks-the-conscience standard exists to reach executive conduct so reprehensible that it transgresses the fundamental limits on governmental power over the individual. *Rochin* supplied the enduring formulation. 342 U.S. at 172. Some abuses of governmental power are so offensive to human dignity—so incompatible with the relationship between a government and the people subject to its power—that the Constitution condemns the conduct.

That principle is ancient. Its roots reach at least to *Dr. Bonham’s Case*, where Coke explained that when a government edict is “against common right and reason, or repugnant, or impossible to be performed,” the common law will “controul it, and adjudge such Act to be void.” *Dr. Bonham’s Case*, 8 Co. Rep. 107a, 118a, 77 Eng. Rep. 638,

652 (C.P. 1610). *Rochin* recognizes that the constitution enshrined that constraint in its text: some exercises of governmental power are so arbitrary, outrageous, or repugnant that the Due Process Clause forbids them even though no more specific constitutional provision does. This Court has traced the same constraint to Magna Carta, explaining that by barring certain government actions outright—citing *Rochin*—due process “serves to prevent governmental power from being used for purposes of oppression.” *Daniels v. Williams*, 474 U.S. 327, 331-32 (1986).

The decision below strips that principle of force. Under the Third Circuit’s rule, proving conduct so egregious that it shocks the conscience is only the beginning of a claim. The victim must then identify a second, narrower “protected liberty interest,” then establish that the precise interest infringed has a sufficiently specific historical pedigree, then show that the historically-pedigreed right was clearly established. If those additional showings are always required, *Rochin* does remarkably little work. A plaintiff who has established that executive misconduct is constitutionally repugnant—that it *shocks the conscience*—must nevertheless lose if a government official has discovered a way sufficiently novel to abuse someone that it finds no footing in “this Nation’s history and tradition.” *Glucksberg*, 521 U.S. at 721.

That is especially troubling because innovation in cruelty is often the *reason* no precise historical analogue exists. The consequence of the rule below: the newer the means of conscience-shocking abuse, the less likely there will be a deeply rooted tradition addressing that means at the required level of specificity, and thus the less likely the Constitution will provide a remedy. That cannot be right. The Constitution cannot protect only against indignities government has inflicted often enough, and for

long enough, to generate a tradition addressed to the exact method of abuse. Nor can a doctrine designed to police the outer limits of executive power become least effective when executive power is exercised in a new way. Novelty cannot be a constitutional safe harbor.

This case exemplifies the problem. It concerns the government's treatment of death-scene images—images bound up with the most intimate circumstances of death, human dignity, and a family's grief. Images that, for much of our Nation's first century, *could not have been produced at all*. Whatever label ultimately attaches to the liberty interest implicated by such images, the constitutional question here does not arise from ordinary negligence, an ill-considered governmental policy, or conduct near the margins of substantive due process. Officer Culver does not dispute that the conduct at issue was conscience-shocking. Pet. App. 3a n.2. That should be enough. Requiring petitioner, notwithstanding that concession, to prove a separately pedigreed “liberty interest” conferring a right to be free from this precise species of abuse strips *Rochin* of all of its protections.

The issue extends far beyond death-scene images. It will recur whenever executive misconduct takes a form sufficiently new that history has not separately catalogued the precise interest invaded. The Third Circuit's rule makes the Constitution's protection against outrageous executive abuse turn on chance: whether enough earlier officials committed substantially the same abuses over a sufficiently lengthy period that earlier courts had occasion to name the resulting abuse an invasion of a “liberty interest.” Nothing in *Rochin* suggests that the Constitution gives the first official to devise a conscience-shocking way to victimize a person one free bite.

B. This case is an ideal vehicle to resolve the question presented. Officer Culver does not dispute that his conduct was conscience-shocking. Pet. App. 3a n.2. No factual dispute bears on the question presented. The issue was pressed and passed upon at every stage: petitioner argued that she had proved the constitutional claim this Court’s cases define, C.A. Br. 35-38; C.A. Reply Br. 6-10, and the court of appeals rejected that argument, Pet. App. 8a. The court identified no alternative ground for affirmance. This Court therefore can decide a clean and antecedent question of law: once executive conduct satisfies *Rochin*’s conscience-shocking standard, must a plaintiff also establish infringement of a separately defined, deeply rooted liberty interest?

The consequences of leaving the decision below in place are difficult to reconcile with *Rochin* itself. An official may engage in conduct conceded to shock the conscience—conduct that, by definition, occupies the extreme end of governmental abuse—and yet defeat the constitutional claim because courts over the centuries have not previously recognized a sufficiently specific liberty interest arising from that particular method of abuse. A doctrine created to identify the point at which executive power becomes constitutionally intolerable cannot sensibly operate that way.

The decision below turns *Rochin* into a rule that matters only when a victim of conscience-shocking misconduct can prove her harm was of a kind entitled to a uniquely privileged historical status. If an official may concede that his conduct shocks the conscience and still prevail, the rule licenses the very thing substantive due process exists to protect against. The court of appeals’ step-two “protected liberty interest” element is not one this Court created, and it creates a square conflict between the Third Circuit and three others. The Court should grant the petition and reaffirm the principle Judge

Friendly drew from *Rochin*: conscience-shocking executive abuse is itself a ground of constitutional protection, not merely an additional obstacle to vindicating a fundamental right.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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