

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, PENNSYLVANIA, ET AL.,
Respondents.

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

**BRIEF OF CONSTITUTIONAL LAW SCHOLARS
AS *AMICI CURIAE*
IN SUPPORT OF PETITIONER**

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF <i>AMICI CURIAE</i>	1
SUMMARY OF ARGUMENT	2
ARGUMENT	5
I. Only This Court Can Resolve The Entrenched Conflict Over What Victims Of Conscience-Shocking Executive Abuse Must Prove	5
II. The Decision Below Is Wrong Because Conscience-Shocking Executive Conduct Violates Due Process	8
A. From Its Origin, Due Process Has Barred Arbitrary Executive Depriva- tions Of Any Liberty	8
B. This Court’s Precedents Treat The Conscience Standard As An Indepen- dent Limit On Executive Power	11
C. The Third Circuit’s Rule Leads To Perverse Results—including In This Case	14
CONCLUSION	16

TABLE OF AUTHORITIES

	Page
CASES	
<i>Breithaupt v. Abram</i> , 352 U.S. 432 (1957).....	10
<i>Browder v. City of Albuquerque</i> , 787 F.3d 1076 (10th Cir. 2015).....	3, 6-7
<i>Brown v. Mississippi</i> , 297 U.S. 278 (1936)	3, 9
<i>Chavez v. Martinez</i> , 538 U.S. 760 (2003)	3, 6
<i>Collins v. City of Harker Heights</i> , 503 U.S. 115 (1992)	13
<i>County of Sacramento v. Lewis</i> , 523 U.S. 833 (1998)	2-6, 11-15
<i>Daniels v. Williams</i> , 474 U.S. 327 (1986)	14
<i>Dobbs v. Jackson Women’s Health Org.</i> , 597 U.S. 215 (2022)	8, 12
<i>Geinosky v. City of Chicago</i> , 675 F.3d 743 (7th Cir. 2012).....	14
<i>Graham v. Connor</i> , 490 U.S. 386 (1989)	11
<i>Hurtado v. California</i> , 110 U.S. 516 (1884)	9
<i>Johnson v. Glick</i> , 481 F.2d 1028 (2d Cir. 1973) ...	10-11
<i>Littlejohn v. School Bd. of Leon Cnty.</i> , 132 F.4th 1232 (11th Cir. 2025), <i>cert. denied</i> , 146 S. Ct. 2608 (2026)	6-7
<i>Monell v. Department of Soc. Servs.</i> , 436 U.S. 658 (1978)	10
<i>Monroe v. Pape</i> , 365 U.S. 167 (1961).....	10
<i>Moore v. Dempsey</i> , 261 U.S. 86 (1923)	9
<i>Morris v. Dearborne</i> , 181 F.3d 657 (5th Cir. 1999).....	11

<i>Murray's Lessee v. Hoboken Land & Improvement Co.</i> , 59 U.S. (18 How.) 272 (1856)	9
<i>Palko v. Connecticut</i> , 302 U.S. 319 (1937)	2
<i>Rimmer-Bey v. Brown</i> , 62 F.3d 789 (6th Cir. 1995).....	15
<i>Rochin v. California</i> , 342 U.S. 165 (1952)	2, 4, 9-10, 14, 16
<i>Rogers v. City of Little Rock</i> , 152 F.3d 790 (8th Cir. 1998).....	11
<i>Screws v. United States</i> , 325 U.S. 91 (1945)	9
<i>T.W. ex rel. Wilson v. School Bd. of Seminole Cnty.</i> , 610 F.3d 588 (11th Cir. 2010).....	14
<i>United States v. Salerno</i> , 481 U.S. 739 (1987).....	2
<i>Washington v. Glucksberg</i> , 521 U.S. 702 (1997)....	3-4, 12-13

CONSTITUTION AND STATUTES

U.S. Const.:

Amend. IV	11
Amend. XIV (Due Process Clause).....	1-3, 8, 12-13
42 U.S.C. § 1983.....	10

OTHER MATERIALS

Jane R. Bambauer & Toni M. Massaro, <i>Outrageous and Irrational</i> , 100 Minn. L. Rev. 281 (2015)	12, 15
Erwin Chemerinsky, <i>Substantive Due Process</i> , 15 Touro L. Rev. 1501 (1999)	12

Liberty of Subject, 28 Edw. 3 c. 3 (1354) (Eng.)	9
Magna Carta, 25 Edw. 1 c. 29 (1297) (Eng.)	8
Toni M. Massaro & Ellen Elizabeth Brooks, <i>Flint of Outrage</i> , 93 Notre Dame L. Rev. 155 (2017)	12-13
David Rudovsky, <i>Running in Place: The Para- dox of Expanding Rights and Restricted Remedies</i> , 2005 U. Ill. L. Rev. 1199	10
The Petition of Right, 3 Car. c. 1, §§ III-IV (1627) (Eng.)	8-9

INTEREST OF *AMICI CURIAE*¹

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¹ No counsel for a party authored this brief in whole or part. No person or entity other than *amici* or their counsel made a monetary contribution to the preparation or submission of this brief. Counsel for petitioner and for respondents City of Philadelphia, Det. Thomas Walsh, and Capt. Anthony Luca received timely notice of *amici*'s intention to file this brief. Respondent Police Officer Christopher Culver's counsel received that notice on October 26 and waived the failure to comply with the notice requirement the same day.

Amici list their institutional affiliations for identification only.

Amici's work bears directly on the question this case presents: what a person must prove under the Due Process Clause when an executive official abuses power in a way that shocks the conscience. *Amici* submit this brief to explain why the courts of appeals need this Court's guidance. They also draw on history and this Court's precedents to show that conscience-shocking abuse of executive power violates the Due Process Clause, even when the liberty it invades is not a fundamental right.

SUMMARY OF ARGUMENT

This Court has recognized that, beyond guaranteeing fair procedures, the Due Process Clause imposes two distinct limits on government. Government may not engage in conduct that "shocks the conscience," and it may not interfere with fundamental rights, those "implicit in the concept of ordered liberty." *United States v. Salerno*, 481 U.S. 739, 746 (1987) (quoting *Rochin v. California*, 342 U.S. 165, 172 (1952), and *Palko v. Connecticut*, 302 U.S. 319, 324-26 (1937)). The courts of appeals disagree about how the two limits apply to executive officials. Some circuits treat conscience-shocking conduct and the invasion of a fundamental right as two types of claims, so that a plaintiff may prevail by proving either. Other circuits apply a two-element rule, under which a plaintiff who proves that an official's conduct shocked the conscience still loses unless she also proves that the conduct invaded a fundamental right deeply rooted in this Nation's history and tradition.

The courts of appeals remain divided because this Court has never decided which approach is correct. In *County of Sacramento v. Lewis*, the Court described whether an official's conduct shocks the conscience as "the threshold question" in a challenge to executive

action. 523 U.S. 833, 848 n.8 (1998). But the Court expressly reserved whether a plaintiff who satisfies the conscience standard must also offer “historical examples of enforcement of the right claimed.” *Id.* Five years later, in *Chavez v. Martinez*, 538 U.S. 760 (2003), the Court divided without resolving that question. As then-Judge Gorsuch observed of the opinions in *Chavez*, “[p]erhaps it is impossible to know what such a splintered Court meant.” *Browder v. City of Albuquerque*, 787 F.3d 1076, 1079 n.1 (10th Cir. 2015). Because the conflict concerns what this Court’s own decisions require, only this Court can resolve it.

The question also warrants review because the two-element rule is wrong. The Due Process Clause gives heightened protection to fundamental rights, but it also sets a baseline: the government may not deprive a person of any liberty without some justification. Rational-basis review enforces the requirement of some justification against legislatures, *see Washington v. Glucksberg*, 521 U.S. 702, 728 (1997), and the conscience standard enforces the same requirement against executive officials. But the two-element rule exempts executive officials from the requirement of some justification unless a fundamental right is at stake.

The history of due process shows that the requirement of some justification has always bound executive officials, whatever liberty is at stake. Due process began as a restraint on the Crown, and this Court enforced it against official brutality decades before the Court began requiring a “careful description” of asserted fundamental rights. *Id.* at 721. The Court set aside convictions resting on confessions that a deputy sheriff and others had extracted by whipping, *see Brown v. Mississippi*, 297 U.S. 278, 281-86 (1936),

and a conviction resting on evidence forcibly pumped from a suspect's stomach, *see Rochin*, 342 U.S. at 166, 172-74. In neither case did the Court ask whether history protected a right against whipping or stomach pumping. And in *Lewis*, the Court acknowledged that none of its prior cases had considered whether a plaintiff must show that history protected the right she claims. 523 U.S. at 848 n.8. The demand for a fundamental right in addition to conscience-shocking conduct comes from the lower courts, not from this Court.

The lower courts borrowed the fundamental-rights inquiry from challenges to legislation. In that context, this Court insists on historical support before recognizing a fundamental right because recognition largely places an issue “outside the arena of public debate and legislative action.” *Glucksberg*, 521 U.S. at 720. But holding an official liable for conscience-shocking abuse takes no issue away from the people or their legislatures; liability enforces an existing limit on executive power.

The two-element rule also produces perverse results. Because the conscience standard already excludes ordinary torts, the demand for a fundamental right changes the outcome only for plaintiffs who have proved conscience-shocking conduct, and it defeats their claims whenever history has not specifically addressed the abuse they suffered. Officials who find new ways to abuse their power are the most likely to escape liability.

Officer Culver found one. He leaned over an overpass and photographed Ms. Brookins's son, Marcus Boone, who lay dying on the road below. Officer Culver then texted the photograph to nine fellow officers in what he later called an attempt at humor. Pet. 5.

He does not dispute that his conduct shocked the conscience. App. 3a n.2. Yet Ms. Brookins lost because too few courts had recognized a constitutional right to control images of a loved one's death. App. 4a-8a. She should not have had to prove more.

This case presents the question cleanly. Officer Culver's concession means that this Court need not decide what shocks the conscience; it need decide only whether Ms. Brookins also had to establish a fundamental right. The question has divided the courts of appeals since *Lewis*, and it will keep arising until this Court answers it. This Court should grant certiorari.

ARGUMENT

I. Only This Court Can Resolve The Entrenched Conflict Over What Victims Of Conscience-Shocking Executive Abuse Must Prove

The courts of appeals disagree about the elements of a due process claim against an executive official. Some treat conscience-shocking executive conduct as an independent basis for liability; others require a separate showing that the official invaded a fundamental right. Pet. 11-19. Several circuits have taken both positions at different times. Pet. 13-15. The split is entrenched, and nearly three decades of percolation have only deepened it.

This Court has not decided which position is correct. In *County of Sacramento v. Lewis*, the Court described conscience-shocking conduct as “the necessary condition” of a claim against executive action. 523 U.S. 833, 848 n.8 (1998). To satisfy that condition, a plaintiff must show that the official's conduct was “so egregious, so outrageous” as to “fairly be said to shock the contemporary conscience.” *Id.* The Court added that this judgment “may be informed by a history of liberty protection.” *Id.* But the Court left open whether a

plaintiff who satisfies that condition must also offer “historical examples of enforcement of the right claimed.” *Id.* So the Court said that history matters but did not explain how.

Nor did the Court settle the question in *Chavez v. Martinez*, 538 U.S. 760 (2003). There, a police officer questioned a man in a hospital while he was being treated for gunshot wounds another officer inflicted. *Id.* at 764 (opinion of Thomas, J.). Justice Thomas, writing for three Justices, asked two questions: whether the interrogation shocked the conscience, and whether it violated a fundamental liberty interest. *Id.* at 774-76. The plurality answered no to both, so it had no need to decide whether conscience-shocking conduct alone would have sufficed. And it did not explain how the two questions relate. A majority remanded the due process claim without addressing that issue. *Id.* at 779-80 (majority opinion).

Judges have openly acknowledged the confusion. Attempting to make sense of *Lewis* and *Chavez*, then-Judge Gorsuch called the meaning of the *Chavez* plurality opinion “unclear” and added that “[p]erhaps it is impossible to know what such a splintered Court meant.” *Browder v. City of Albuquerque*, 787 F.3d 1076, 1079 n.1 (10th Cir. 2015). Nothing in the decade since has clarified matters. Just last year, Judge Newsom called the Eleventh Circuit’s case law a “mess” and a “jurisprudential dumpster fire,” and he found this Court’s own cases “[n]ot much better.” *Littlejohn v. School Bd. of Leon Cnty.*, 132 F.4th 1232, 1283, 1285 (11th Cir. 2025) (Newsom, J., concurring), *cert. denied*, 146 S. Ct. 2608 (2026).

The confusion also runs in the other direction. Some courts require a plaintiff to prove conscience-shocking conduct even when an executive official has violated

her fundamental rights, a showing they would not demand of a plaintiff challenging a statute. Pet. 23-24. In *Littlejohn*, for example, the Eleventh Circuit assumed without deciding that parents had invoked fundamental rights, then rejected their claim against school officials because the officials' conduct did not shock the conscience. 132 F.4th at 1238-45. Judge Newsom called the resulting liability regime "totally bizarre" because it gives executive officials "more leeway" than legislatures "to violate constitutional rights." *Id.* at 1286 (Newsom, J., concurring).

Judges were puzzling over the distinction long before *Littlejohn*. In *Browder*, then-Judge Gorsuch asked why this Court has "devised different tests" for executive and legislative action that burdens fundamental rights. 787 F.3d at 1079 n.1. He suggested that the answer might lie in the fact that "legislation touching on fundamental rights is clearly state action and clearly affects the liberty of an entire class of persons while executive action infringing fundamental rights can often come by way of isolated and unauthorized conduct by individual rogue executive agents against individual citizens." *Id.* But he offered that answer only tentatively, and he acknowledged that "some question lingers about all this." *Id.*

This case squarely presents the question. Officer Culver does not dispute that his conduct shocked the conscience. App. 3a n.2. Ms. Brookins lost anyway because too few courts had recognized a constitutional right to control images of a loved one's death. App. 4a-8a. The sole question presented is whether Ms. Brookins needed to establish a fundamental right at all.

II. The Decision Below Is Wrong Because Conscience-Shocking Executive Conduct Violates Due Process

The decision below also warrants review because it is wrong. Under the Third Circuit’s rule, a plaintiff who proves that an executive official’s conduct shocks the conscience still loses unless she proves a second element: that the official deprived her of a “protected liberty interest.” App. 3a n.2, 8a. The correct rule is simpler. A plaintiff must show that the official deprived her of life, liberty, or property, and that he did so in a way that shocks the conscience. She need not also show that the asserted right is “‘deeply rooted in our history and tradition.’” App. 5a (quoting *Dobbs v. Jackson Women’s Health Org.*, 597 U.S. 215, 237 (2022)).

A. From Its Origin, Due Process Has Barred Arbitrary Executive Deprivations Of Any Liberty

The baseline that the Due Process Clause sets for executive conduct is as old as the guarantee itself: an official may not arbitrarily deprive a person of any liberty. The guarantee began as a restraint on the Crown; this Court enforced it against official brutality in criminal cases; and the courts of appeals applied it in the civil-rights suits that followed. At each stage, the question was what the official did, not whether history protected a right against the particular abuse.

1. Magna Carta promised that no free man would be imprisoned, dispossessed, or otherwise destroyed except “by lawful judgment of his Peers, or by the Law of the Land.” Magna Carta, 25 Edw. 1 c. 29 (1297) (Eng.). The Petition of Right later reaffirmed that protection, invoking a 1354 statute’s requirement of “due p[ro]cesse of Lawe.” Petition of Right, 3 Car. c. 1,

§§ III-IV (1627) (Eng.) (reciting Liberty of Subject, 28 Edw. 3 c. 3 (1354) (Eng.)).

This Court has explained that the Constitution’s words “due process of law” were “intended to convey the same meaning as the words, ‘by the law of the land,’ in *Magna Charta*.” *Murray’s Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272, 276 (1856). Those guarantees were “[a]ppplied in England only as guards against executive usurpation and tyranny”; in America, “they have become bulwarks also against arbitrary legislation.” *Hurtado v. California*, 110 U.S. 516, 532 (1884).

2. This Court enforced that restraint against shocking executive abuse long before it gave the conscience test its name. In *Moore v. Dempsey*, the Court held that a conviction produced by a mob-dominated trial, which the State had done nothing to correct, would deny due process. 261 U.S. 86, 91 (1923). In *Brown v. Mississippi*, the Court reversed convictions resting on confessions that a deputy sheriff and others had extracted by whipping, declaring that “[t]he rack and torture chamber may not be substituted for the witness stand.” 297 U.S. 278, 281-82, 285-86 (1936). And in *Screws v. United States*, a plurality of this Court explained that a sheriff and two other officers who beat a handcuffed prisoner to death had deprived him of “the trial which due process of law guarantees him.” 325 U.S. 91, 92-93, 106 (1945) (plurality).

The Court later framed that inquiry as whether official conduct “shocks the conscience.” *Rochin v. California*, 342 U.S. 165, 172 (1952). In *Rochin*, deputies who suspected a man of selling narcotics forced their way into his room, jumped on him to extract capsules he had swallowed, and then had a doctor force an emetic through a tube into his stomach

against his will. *Id.* at 166. The Court held that the deputies' methods were "too close to the rack and the screw to permit of constitutional differentiation." *Id.* at 172. It did not ask whether history recognized a right against forcible stomach pumping. To the contrary, it explained that due process "precludes defining, and thereby confining," the relevant "standards of conduct" more precisely than by asking whether official methods offend a sense of justice. *Id.* at 173.

Five years later, the Court used the same approach to reject a claim. It held that drawing blood from an unconscious driver did not shock the conscience because blood tests had "become routine in our everyday life." *Breithaupt v. Abram*, 352 U.S. 432, 435-36 (1957). Here, too, the Court measured the conduct against contemporary practice, not a historical catalogue of rights.

3. Each case arose from a criminal prosecution. The conscience standard moved into civil litigation after this Court held in *Monroe v. Pape* that 42 U.S.C. § 1983 gives a remedy to those deprived of constitutional rights by "an official's abuse of his position." 365 U.S. 167, 172 (1961), *overruled in part on other grounds by Monell v. Department of Soc. Servs.*, 436 U.S. 658 (1978). Section 1983 soon became "the fulcrum of constitutional tort litigation." David Rudovsky, *Running in Place: The Paradox of Expanding Rights and Restricted Remedies*, 2005 U. Ill. L. Rev. 1199, 1207.

The courts of appeals applied the conscience standard in those suits. In *Johnson v. Glick*, Judge Friendly applied it to a guard's beating of a pretrial

detainee. 481 F.2d 1028, 1032-33 (2d Cir. 1973).² He asked about the need for force, the amount used, the injury inflicted, and whether the guard acted “maliciously and sadistically for the very purpose of causing harm.” *Id.* at 1033. He did not ask whether history recognized a right against that kind of beating. And courts have since applied the standard to new forms of abuse. *See, e.g., Rogers v. City of Little Rock*, 152 F.3d 790, 797 (8th Cir. 1998) (police officer’s on-duty rape of a woman he had stopped for a traffic violation); *Morris v. Dearborne*, 181 F.3d 657, 668 (5th Cir. 1999) (teacher’s fabrication of sexual-abuse allegations that separated a young child from her father for years).

In *Lewis*, the Court rooted the conscience standard in this tradition. It explained that the Court had long “understood the core of the concept [of due process] to be protection against arbitrary action.” 523 U.S. at 845. For “half a century,” it added, the Court had measured “executive abuse of power” by whether that abuse “shocks the conscience.” *Id.* at 846. The Court also acknowledged that none of its prior cases had considered whether historical examples are necessary. *Id.* at 848 n.8.

B. This Court’s Precedents Treat The Conscience Standard As An Independent Limit On Executive Power

Two principles from this Court’s cases show that a victim of conscience-shocking abuse need not also invoke a fundamental right. *First*, the conscience

² This Court later moved force claims arising from arrests to the Fourth Amendment. *See Graham v. Connor*, 490 U.S. 386, 395 (1989). It kept the conscience standard for claims that no more specific provision covers. *See Lewis*, 523 U.S. at 843.

standard is a baseline requirement for all executive action, just as rational-basis review is for all legislation. *Second*, the fundamental-rights inquiry, with its demand for historical support, is designed for challenges to legislation. It has no work to do when a court asks whether an official abused his power.

1. Consider first the baseline that applies to legislation. A law that burdens a fundamental right usually triggers strict scrutiny. *See Washington v. Glucksberg*, 521 U.S. 702, 721 (1997). But even when no fundamental right is at stake, government action must still have some justification. *See* Erwin Chemerinsky, *Substantive Due Process*, 15 *Touro L. Rev.* 1501, 1533-34 (1999). For legislation, that means a rational relationship to a legitimate government interest. After holding that the Constitution does not protect a right to assistance in committing suicide, this Court still asked whether Washington’s ban on the practice had a rational basis. *See Glucksberg*, 521 U.S. at 728; *see also Dobbs*, 597 U.S. at 300-01 (analyzing Mississippi’s law for a rational basis after holding that the Constitution does not protect a right to abortion). The absence of a fundamental right lowers the level of scrutiny; it does not mean the Due Process Clause has no role to play.

The conscience standard is the corresponding baseline for executive action. This Court said as much in *Lewis*, which explained that due process “limits what the government may do in both its legislative and its executive capacities,” and that the “criteria to identify what is fatally arbitrary differ” between the two. 523 U.S. at 846 (citations omitted). Neither test requires a fundamental right to be at stake. *See* Jane R. Bambauer & Toni M. Massaro, *Outrageous and Irrational*, 100 *Minn. L. Rev.* 281, 306-07, 313-14 (2015); Toni M.

Massaro & Ellen Elizabeth Brooks, *Flint of Outrage*, 93 Notre Dame L. Rev. 155, 187 (2017).

This Court has asked the conscience question even after rejecting a claimed fundamental right. When a city sanitation worker died in a sewer and his widow sued, the Court first held that the Due Process Clause does not guarantee public employees a safe workplace. *See Collins v. City of Harker Heights*, 503 U.S. 115, 117, 126-28 (1992). It then asked whether the city’s alleged failure to train or warn its employees was nonetheless “arbitrary, or conscience shocking, in a constitutional sense.” *Id.* at 128.

2. The fundamental-rights inquiry is designed for legislation. As this Court has explained, the debate in *Glucksberg* concerned “the significance of historical examples of protected liberty in determining whether a given statute could be judged to contravene the Fourteenth Amendment.” *Lewis*, 523 U.S. at 847 n.8. The question was how much history is needed “to support the finding of a substantive due process right entitled to prevail over state legislation.” *Id.* A case challenging executive action, by contrast, “presents an issue antecedent to any question about the need for historical examples.” *Id.* History matters in the legislative setting because recognizing a fundamental right places a question “outside the arena of public debate and legislative action.” *Glucksberg*, 521 U.S. at 720. That caution is sensible when courts are asked to forbid legislatures to act. But holding an executive official liable for conscience-shocking abuse takes no question away from the legislature. It decides only that a particular official’s egregious abuse of a particular person went too far.

“Liberty” is what the Due Process Clause protects, while a “fundamental” liberty is what merits height-

ened scrutiny. When a claimed liberty is not fundamental, the question becomes what minimum protection due process can offer, not whether due process disappears completely.

C. The Third Circuit’s Rule Leads To Perverse Results—Including In This Case

The Third Circuit’s rule cannot be defended as a guard against tort claims dressed up as constitutional ones. The conscience standard already performs that function—rigorously.

The conscience-shocking standard is demanding by design. Mere negligence is not enough. *See Lewis*, 523 U.S. at 849. Courts must also weigh the circumstances the official faced, including the opportunity to deliberate and competing responsibilities. *Id.* at 848-54. The Constitution does not “supplant traditional tort law,” *id.* at 848 (quoting *Daniels v. Williams*, 474 U.S. 327, 332 (1986)), and a claim covered by a more specific constitutional provision proceeds under that provision, *id.* at 843. Nor does the standard turn on a judge’s personal sensibilities. Conduct that offends only “fastidious squeamishness or private sentimentalism” is not conscience-shocking. *Rochin*, 342 U.S. at 172.

In practice, courts rarely find the standard met, even in circuits that treat it as sufficient. *See, e.g., T.W. ex rel. Wilson v. School Bd. of Seminole Cnty.*, 610 F.3d 588, 602-03 (11th Cir. 2010) (holding that a teacher’s repeated use of force against an autistic student did not shock the conscience); *Geinosky v. City of Chicago*, 675 F.3d 743, 750 (7th Cir. 2012) (holding that a police unit’s issuance of 24 bogus parking tickets to the plaintiff did not shock the conscience). As the Sixth Circuit put it, “[a] plaintiff asserting a substantive due process claim faces a virtually

insurmountable uphill struggle” because he must show conduct “so reprehensible as to ‘shock the conscience’ of the court.” *Rimmer-Bey v. Brown*, 62 F.3d 789, 791 n.4 (6th Cir. 1995). Although the conscience standard applies narrowly, it serves an important function: it provides a constitutional floor to guard against “misconduct that nearly everyone would agree is wrong.” Bambauer & Massaro, *Outrageous and Irrational*, 100 Minn. L. Rev. at 290.

So the Third Circuit’s demand for a fundamental right does no screening work of its own. The only claims it eliminates are those that have already cleared the conscience bar: claims of abuse egregious enough to shock the conscience, but new enough that history has not addressed them.

This case illustrates the perverse results from that rule. Officer Culver photographed Ms. Brookins’s son as he lay dying on the roadway below an overpass. He then sent the image to members of his unit in what he called an attempt at humor. App. 2a. He acknowledged that he had no authorization to take the photograph, and neither taking nor sending it served any law-enforcement purpose. Pet. 5. And most important, he does not dispute that his conduct shocked the conscience. App. 3a n.2. Recognizing Officer Culver’s conduct as “deplorable,” App. 8a, the Third Circuit considered this concession “sensibl[e],” App. 3a n.2. The district court, for its part, held that Officer Culver had deprived Ms. Brookins of a protected liberty interest in “non-interference with a family’s remembrance of a decedent.” App. 42a.

But while she established conduct that shocks the conscience, she lost because Officer Culver’s abuse was new. A standard reserved for “the most egregious official conduct,” *Lewis*, 523 U.S. at 846, should not

turn on whether the official found a new way to commit it.

* * *

This Court has described due process as “a historic and generative principle.” *Rochin*, 342 U.S. at 173. Under the two-element rule, due process is no longer generative: a victim of executive abuse prevails only if history has already addressed the particular abuse, no matter how egregious it is. The rule’s cost will only grow as technology gives officials new ways to abuse their power. This Court should grant review before more victims of new abuses are turned away.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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