No. 16-1406

IN THE

Supreme Court of the United States

CORRECTIONAL MEDICAL SERVICES, INC.,

Petitioner,

v.

ALMA GLISSON, PERSONAL REPRESENTATIVE OF THE ESTATE OF NICHOLAS L. GLISSON,

Respondent.

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

BRIEF OF *AMICUS CURIAE* COOK COUNTY IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

TABLE OF CITED AUTHORITIES

Page

CASES

Cited Authorities

CONSTITUTIONAL PROVISIONS

STATUTES AND RULES

Cited Authorities

INTEREST OF *AMICUS CURIAE*

Amicus is the County of Cook, Illinois ("Cook County"), the second largest county in the United States. The State's Attorney of Cook County is the chief legal officer for Cook County and is constitutionally and statutorily charged with representing the County in all civil litigation. *County of Cook ex rel. Rifkin v. Bear Stearns & Co.*, 215 Ill. 2d 466, 831 N.E.2d 563 (Ill. 2005). Cook County is responsible for paying settlements and judgments arising from constitutional and common law tort actions against county officials, including the Sheriff of Cook County (the "Cook County Sheriff"). *Carver v. Sheriff of La Salle County,* 203 Ill. 2d 497, 787 N.E.2d 127 (Ill. 2003).

The outcome of this case will impact public officials throughout the nation who operate county jails and who provide medical care for inmates and detainees. Under Illinois law, the Cook County Sheriff operates the Cook County Department of Corrections (the "Cook County Jail"). *See* 55 ILCS 5/3-6017 (2017) (stating that sheriffs in Illinois "have the custody and care of the courthouse and jail of his or her county").

The Cook County Jail has a medical facility, Cermak Health Services, that Cook County operates. In this case, the Seventh Circuit reversed a district court granting summary judgment on an Eighth Amendment claim brought pursuant to *Monell v. Department of Social Services*, 436 U.S. 658 (1978) even though the plaintiff did not establish causation or corporate fault. *See Glisson v. Indiana Dep't of Corrections*, 849 F.3d 372, 383 (7th Cir. 2017) (*en banc*) (Sykes, J., dissenting). In so doing, the

Seventh Circuit continued down a legal path that has effectively blurred the lines between a State law claim for medical negligence and a Section 1983 claim under the Eighth or Fourteenth Amendments for deliberate indifference to a serious medical need. *See, e.g., Petties v. Carter*, 836 F.3d 722, 726 (7th Cir. 2016) (*en banc*) (holding that a doctor's decisions regarding care for an Achilles tendon injury could form the basis for a Section 1983 claim for deliberative indifference to a serious medical need); and *Glisson*, 849 F.3d at 383 (Sykes, J., dissenting) (recognizing that the majority endorsed "liability without evidence of corporate fault or causation" for a *Monell* claim alleging that the healthcare provider's decision not to enact centralized treatment protocols for chronically ill inmates led to Glisson's death).

In this matter, this Court will decide whether to clarify when a health care provider may incur Section 1983 liability for deliberate indifference to a serious medical need by not enacting centralized treatment protocols, even if no causal link exists between the absence of such protocols and an alleged injury. *Id*. Cook County operates one of the largest public health care systems in the nation and provides health care services at the Cook County Department of Corrections, one of the largest jails in the nation. Cook County has a strong interest in the resolution of this issue.

Amicus is the legal representative of a unit of state government. As a result, Supreme Court Rule 37 allows *Amicus* to file a supporting brief without permission of the parties. Cook County, therefore, respectfully submits this brief as *Amicus Curiae* in support of petitioner in accordance with Supreme Court Rule 37.

STATEMENT OF THE CASE

Amicus adopts the Statement of the Case that petitioner Correctional Medical Services, Inc. ("Corizon") presented.

SUMMARY OF ARGUMENT

The plaintiff in *Petties* and the plaintiff's decedent in *Glisson* received medical treatment during their incarceration. Thereafter, the plaintiffs in both cases took issue with the quality of the medical care provided. Both filed Section 1983 actions alleging deliberate indifference to a serious medical need in violation of the Eighth Amendment. *Petties*, 836 F.3d at 726. Both cases belonged in State court as medical malpractice claims.

Petties constitutionalized what was essentially a State law dispute over appropriate medical treatment. *Id.* at 735-736 (Easterbrook, J., dissenting). *Glisson* held that plaintiff's decedent could bring a *Monell* claim for an Eighth Amendment violation against a health care provider for not having centralized treatment protocols even though the plaintiff did not show that: (1) the medical provider Corizon "was deliberately indifferent to a known or obvious risk that its failure to adopt [such] formal protocols . . . would likely lead to constitutional violations" or (2) "that this alleged gap in corporate policy caused Glisson's death." *Glisson*, 849 F.3d at 390 (Sykes, J., dissenting).

The dissenting judge in *Petties* noted that the plaintiff claimed that his doctors "exercised *bad* medical judgment, leading to inferior care." *Petties*, 836 F.3d at 736

(Easterbrook, J., dissenting) (emphasis in the original). As a result, under *Estelle v. Gamble*, 429 U.S. 97 (1976), Petties' claim should have been a medical malpractice claim and not a Section 1983 action. *See Petties*, 836 F.3d at 734 (Easterbrook, J., dissenting) (stating that under *Estelle*, "medical malpractice is a problem under state law rather than the Constitution"). *Glisson* echoes *Petties*.

The dissenting judge in *Glisson* noted that "[s]ome of Corizon's medical professionals may have been negligent in his care . . . and their negligence may have hastened his death." *Glisson*, 849 F.3d at 390 (Sykes, J., dissenting). Judge Sykes further noted that if that were the case, the appropriate cause of action would be a "state medical-malpractice suit" and not a *Monell* claim against Corizon absent the requirements of corporate fault or causation. *Id.*

The plaintiff's decedent in *Glisson* complained about the medical decisions of his treating physicians. Instead of finding that the appropriate claim was a medical malpractice claim in State court, the majority of the Seventh Circuit gave plaintiff's decedent the proverbial "green light" to proceed with an Eighth Amendment claim against a medical provider for not having centralized treatment protocols. *Glisson*, 849 F.3d at 382. This decision distorted the law in two ways: (1) it improperly federalized medical malpractice claims, *see Petties*, 836 F.3d at 736 (Easterbrook, J., dissenting), and (2) it improperly removed the elements of causation and fault from a *Monell* claim alleging a custom, policy or practice that amounts to deliberate indifference to a serious medical need. *Glisson*, 849 F.3d at 383 (Sykes, J., dissenting).

This Court should grant Corizon's petition for a writ of certiorari, reverse the decision of the Seventh Circuit majority below and affirm the decision of the district court granting summary judgment to Corizon.

ARGUMENT

As recently as 2014, "United States penitentiaries housed 2,224,400 prisoners." *See* Meaghan A. Sweeney, *Civil Rights Law: The Achilles' Heel Of The Seventh Circuit's "Deliberate Indifference" Analysis,* 12 Seventh Circuit Rev. 62 (hereinafter "Sweeney") at *62. Indeed, "[t]his prison population suffers from higher rates of mental illness, chronic medical conditions, and infectious diseases compared with the general United States population due to factors such as substance and alcohol abuse, poverty, and poor preventative healthcare." *Id.*

The law regulating the provision of health care in prisons comes from two sources: (1) State tort law and (2) the Eighth and Fourteenth Amendments. State law tort claims and Eighth Amendment claims have different legal standards and, in fact, regulate different conduct. *See Petties*, 836 F.3d at 728 (noting that "showing mere negligence is not enough" to establish an Eighth Amendment violation but rather the plaintiff must show "that an official *actually* knew of and disregarded a substantial risk of harm") (emphasis in the original); *Petties*, 836 F.3d at 735-736 (Easterbrook, J., dissenting) (noting that tort law regulates whether medical judgment was competent and the Eighth Amendment regulates whether the withholding of medical services was cruel and unusual punishment).

The Seventh Circuit, to be sure, has stated on multiple occasions that an "important difference [exists] between ordinary, or even aggravated, medical malpractice, and an Eighth Amendment violation." *Cesal v. Moats*, 851 F.3d 714, 725 (7th Cir. 2017). *See also McGee v. Adams*, 721 F.3d 474, 481 (7th Cir. 2013) (noting that "[d]eliberate indifference is not medical malpractice"); and *Duckworth v. Ahmad*, 532 F.3d 675, 679 (7th Cir. 2008) (recognizing that "the Eighth Amendment does not codify common law torts").

Nonetheless, two recent *en banc* decisions from the Seventh Circuit in the past two years have substantially muddled the distinction between a claim alleging medical malpractice and one alleging deliberate indifference to a serious medical need.

1. The Eighth And Fourteenth Amendments Concern Claims Of Deliberate Indifference To Serious Medical Needs And Not Tort Claims Of Medical Negligence.

The plaintiff in *Petties* was a prisoner who complained about the medical treatment he received in prison for a ruptured Achilles tendon. The plaintiff in *Glisson* was the estate of a deceased prisoner which likewise complained of the medical care that he received for various ailments, including laryngeal cancer. And while the complaints in both cases were styled as Section 1983 actions alleging violations of the Eighth Amendment, both claims were really state law negligence claims wrapped in a Section 1983 label. Certiorari should be granted to reinforce the important difference between medical negligence and Eighth Amendment claims and to clarify that lawsuits

challenging the reasonableness of medical decisions are not Section 1983 claims but rather negligence claims that belong in state court.

A. *Petties*.

In *Petties*, the plaintiff, who sustained a debilitating rupture in his Achilles tendon, filed a Section 1983 action alleging deliberate indifference to his foot injury. The majority of the Seventh Circuit held that "even if a doctor denies knowing that he was exposing a plaintiff to a substantial risk of serious harm, evidence from which a reasonable jury could infer a doctor knew he was providing deficient treatment is sufficient to survive summary judgment." *Petties,* 836 F.3d at 726.

In dissent, Judge Easterbrook took issue with the majority's analytical framework:

> My colleagues take it as established that the Constitution entitled Petties to an orthopedic boot, or some other means to immobilize his foot, immediately after his injury. They remand for a trial at which a jury must determine whether the defendants were deliberately indifferent to the pain his ruptured Achilles tendon caused. This approach effectively bypasses one of the two issues that matter to any claim under the Cruel and Unusual Punishments Clause: first there must *be* a cruel and unusual punishment, and only then does it matter whether the defendant acted with the mental state necessary for liability in damages.

Petties, 836 F.3d at 734 (Easterbrook, J., dissenting) (emphasis in the original). Judge Easterbrook also noted that the majority's approach could not be reconciled with *Estelle* and that *Estelle*, this Court's "sole decision addressing the question whether palliative medical treatment (pain relief without an effort at cure) violates the Eighth Amendment, holds that palliation suffices even if the care is woefully deficient." *Id.*

Judge Easterbrook observed that *Estelle* provides a workable solution to determining whether a complaint about medical treatment is a State court medical malpractice claim or an Eighth Amendment action:

> Notes 10 and 12 of *Estelle* suggest a potential way to distinguish malpractice from a violation of the Constitution: whether the prison's staff exercised medical judgment. Petties does not pursue this possibility; he does not deny that the defendants exercised medical judgment. Instead he insists that they exercised *bad* medical judgment, leading to inferior care. And *Estelle* holds that a claim of poor care must be classified under the law of medical malpractice. (Petties complains that Carter and Obaisi deemed surgery and rehabilitative therapy too expensive, but asking whether a potential treatment is cost-justified is part of professional judgment. Outside of prisons, solvent patients and their insurers, as well as physicians, routinely consider whether a particular drug or medical procedure is worth the price.)

Id. at 735-736 (Easterbrook, J., dissenting) (emphasis in the original).

Despite *Estelle*, the majority in *Petties* found that the plaintiff's claim of bad medical care established a deliberate indifference claim under the Eighth Amendment. *Id.* at 734. Subsequent to *Petties*, the Seventh Circuit decided *Glisson* and further jumbled the difference between Eighth Amendment and medical negligence claims.

B. *Glisson*.

In his dissent in *Petties*, Judge Easterbrook asked:

> And if we were authorized to find a "competent medical judgment" standard in the Constitution, why should we *want* to federalize the law of medical malpractice?

Petties, 836 F.3d at 736 (Easterbrook, J., dissenting) (emphasis in the original). *Petties* blurred the line between the Eighth Amendment and tort law. *Glisson* blurred it even further.

In *Glisson*, the Seventh Circuit majority found that Corizon's decision to not create centralized treatment protocols for chronically ill inmates led to the death of plaintiff's decedent. *Glisson*, 849 F.3d at 373. In dissent, Judge Sykes stated that:

> Today the court endorses *Monell* liability without evidence of corporate fault or causation. That contradicts long-settled principles of municipal liability under Section 1983. The doctrinal shift is subtle but significant.

Id. at 383 (Sykes, J., dissenting). Indeed, the *Glisson* majority held that the simple absence of treatment

protocols was enough to defeat Corizon's motion for summary judgment on a *Monell* custom, policy and practice claim. *Id.* at 382. The plaintiff did not present evidence to show that Corizon officials acted with the requisite state of mind or that the lack of protocols caused injury. *Id.* at 383 (Sykes, J., dissenting) ("Mrs. Glisson produced no evidence to support the fault and causation elements of her claim. My colleagues identify none, yet they hold that a reasonable jury could find in her favor. I do not see how, without evidence on two of the three elements of the claim").

In the conclusion of her dissent, Judge Sykes found that:

> Nicholas Glisson arrived in Indiana's custody suffering from complicated and serious medical conditions. Some of Corizon's medical professionals may have been negligent in his care, as Dr. Sommer maintains, and their negligence may have hastened his death. That's a tragic outcome, to be sure; if substantiated, the wrong can be compensated in a state medical-malpractice suit. Under traditional principles of *Monell* liability, however, there is no basis for a jury to find that Corizon was deliberately indifferent to a known or obvious risk that its failure to adopt formal protocols in compliance with [INDOC Directive] HCSD-2.06 would likely lead to constitutional violations. Nor is there a factual basis to find that this alleged gap in corporate policy caused Glisson's death.

Id. at 390 (Sykes, J., dissenting).

In lieu of bringing a medical malpractice claim against the physicians who treated Nicholas Glisson, Mrs. Glisson filed a *Monell* claim against Corizon on the grounds that not having treatment protocols for chronically ill inmates violated the Eighth Amendment. And according to the Seventh Circuit majority, that *Monell* claim may advance to trial even though plaintiff has offered no evidence of corporate fault or causation.

Glisson effectively removed two of the three elements (the third being the identification of a custom, policy or practice) for bringing a *Monell* claim for deliberate indifference to a serious medical need. In so doing, the Seventh Circuit further displaced the State law medical malpractice claims as the proper method for seeking redress for the negligent medical care of inmates.

II. Medical Decisions Of Doctors Treating Inmates and Detainees Should Be Subject To State Law Medical Malpractice Remedies.

By analogy, this Court's decision in *Van de Kamp v. Goldstein*, 555 U.S. 335 (2009) illustrates the analytical flaws in the Seventh Circuit's majority opinion in *Glisson* and further shows that the modified *Monell* claim that the Seventh Circuit majority endorsed is not a proper substitute for a State law tort suit to redress medical negligence.

In *Goldstein*, the plaintiff Thomas Lee Goldstein ("Goldstein") was convicted of murder. Goldstein alleged that the prosecutors in his case violated *Brady v. Maryland*, 373 U.S. 83 (1963) and *Giglio v. United States*, 405 U.S. 150 (1972) by not disclosing that Edward

Fink, the witness who testified against Goldstein, was a jailhouse informant. Subsequent to a successful *habeas corpus* petition, Goldstein filed Section 1983 claims against several defendants, including Van De Kamp, the Los Angeles district attorney, and Livesay, his chief deputy. Goldstein did not sue the attorneys who prosecuted his criminal case, presumably because those attorneys had absolute immunity from civil suit under *Imbler v. Pachtman*, 424 U.S. 409, 430-431 (1976).

In an attempt to sidestep the holding in *Imbler* and the doctrine of absolute prosecutorial immunity, Plaintiff instead sued the attorneys' supervisors on the theory that they violated Goldstein's constitutional rights when they purposefully or with deliberate indifference failed to create a system that would satisfy prosecutors' obligations under *Brady* and *Giglio*. The Ninth Circuit found that the supervisors were not entitled to immunity from Goldstein's claims. *Van de Kamp*, 555 U.S. at 340.

This Court disagreed, *id*., finding that:

> to permit this suit to go forward would create practical anomalies. A trial prosecutor would remain immune, even for *intentionally* failing to turn over, say *Giglio* material; but her supervisor might be liable for *negligent* training or supervision. Small prosecution offices where supervisors can personally participate in all of the cases would likewise remain immune from prosecution; but large offices, making use of more general office wide supervision and training, would not. Most important, the ease with which a plaintiff could restyle a complaint

> charging a trial failure so that it becomes a complaint charging a failure of training or supervision would eviscerate *Imbler*.

Id. at 347 (emphasis in the original). The options available to an inmate bringing suit over medical care pose some of the same anomalies that existed in *Van de Kamp*. Just as Goldstein did not sue the trial prosecutors in his case to avoid litigation hurdles (in Goldstein's case, prosecutorial immunity), an inmate unhappy with medical treatment in prison may be reluctant to sue his treating physicians for medical malpractice due to other litigation problems, such as the difficulty in securing a medical expert to testify that the doctor failed to conform to the applicable standard of care. *See* Sweeney, 12 Seventh Circuit Rev. 62 at *89. Another litigation problem for inmates contemplating a suit regarding the provision of health care is the issue of attorney's fees. As the Seventh Circuit has recognized, "the prevailing party in tort litigation must bear 100% of his own attorneys' fees; that's the American Rule." *Johnson v. Daley*, 339 F.3d 582, 588 (7th Cir. 2003) (*en banc*). In contrast, a prevailing party in a Section 1983 claim can recover his attorney's fees from the losing party. *See* 42 U.S.C. Section 1988. As Judge Easterbrook recognized in *Petties*, "Section 1988 is not a good reason to constitutionalize tort law." *Petties*, 836 F.3d at 736 (Easterbrook, J., dissenting). Just as *Van de Kamp* shows that difficulty bringing a lawsuit does not justify watering down prosecutorial immunity, difficulty bringing a medical malpractice case does not justify watering down *Monell* or constitutionalizing tort law.

Under *Van de Kamp*, a plaintiff's inability to sue a prosecutor due to prosecutorial immunity for failing to disclose *Giglio* material did not justify an exception

to the immunity doctrine to facilitate suits against the prosecutor's supervisors. *Van de Kamp*, 555 U.S. at 347. In a similar vein, a prisoner's inability or difficulty in securing an attorney who would have to find (and advance costs) for an expert witness and who would be paid on a contingent basis to bring a state law medical malpractice claim does not justify that prisoner bringing instead a *Monell* claim for failure to institute treatment protocols for chronically ill inmates without having to prove corporate fault or causation. *Glisson*, 849 F.3d at 390 (Sykes, J., dissenting).

The type of *Monell* claim that the Seventh Circuit majority endorsed in *Glisson* certainly makes it easier for a prisoner to bring a Section 1983 claim for substandard health care. But Section 1983 was not supposed to provide an alternative or diluted vehicle for what are really medical malpractice cases. It is, instead, supposed to provide a remedy for situations where a prison staff fails to provide medical treatment as punishment against inmates or detainees. *Petties*, 836 F.3d at 735-736 (Easterbrook, J., dissenting). *See also Collins v. Al-Shami*, 851 F.3d 727, 731 (7th Cir. 2017) (applying the deliberate indifference standard derived from the Eighth Amendment to "Due Process claims of inadequate medical care" that detainees in jails have brought against medical providers).

Moreover, the *Glisson* majority's endorsement of a *Monell* claim against a healthcare provider for deliberate indifference to serious medical needs without proof of causation or corporate fault poses other problems, such as undermining the type of legal inquiry that State court medical malpractice suits are poised to make and discouraging physicians from staffing prison hospitals. As one commentator has noted:

> In disputes concerning adequacy of treatment, federal courts are generally reluctant to second guess medical judgments and to constitutionalize claims which sound in state tort law. State medical malpractice laws are often better equipped to evaluate these claims by requiring the support of an expert familiar with the specialty. The policy underlying this requirement is that experts familiar with the field are able to testify that the defendant failed to conform to the applicable standard of care for that field. . .
>
> There is no expert witness affidavit requirement for federal claims of deliberate indifference under 42 U.S.C. § 1983. Unfortunately, this leads to many frivolous and unwarranted lawsuits against prison health care workers that have no support in law or medicine. Furthermore, prison physicians facing potential liability under the deliberate indifference standard risk being held personally financially accountable for the judgment, as insurers often do not cover deliberate or intentional acts. The prospect of facing personal financial liability may, in turn, serve as a dis-incentive for competent physicians, seeking to protect themselves from liability, to avoid working in the prison health care system. In the long term, dis-incentivizing competent physicians from practicing in prisons may create lower quality and less efficient prison healthcare system.

Sweeney, 12 Seventh Circuit Rev. 62 at *89-*90 (footnotes omitted).

In his dissent in *Petties*, Judge Easterbrook noted that "*Estelle* told the courts of appeals to relegate bad-treatment situations to state law . . ." *Petties*, 836 F.3d at 736 (Easterbrook, J., dissenting). Nonetheless, the majority in *Glisson* failed to heed that admonition and negated two of the three elements of *Monell* to boot. The majority opinion in *Glisson* will not facilitate redress for negligent medical care and will discourage doctors from staffing prison hospitals.

This Court should re-affirm *Estelle* and reverse the decision of the Seventh Circuit majority in *Glisson*.

CONCLUSION

For the foregoing reasons and those stated in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted,

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