No. 22-614

In the Supreme Court of the United States

TROY CHRISMAN, ET AL.,

Petitioners,

v.

ESTATE OF SETH MICHAEL ZAKORA, ET AL.,

Respondents.

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

BRIEF OF *AMICI CURIAE* STATES OF OHIO, KENTUCKY, AND TENNESSEE IN SUPPORT OF PETITIONERS

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STATEMENT OF *AMICI* INTEREST AND SUMMARY OF ARGUMENT*

In its decision below, the Sixth Circuit held that prisoners have a clearly established Eighth Amendment right to be protected from illegally using illegal drugs illegally smuggled into prison. In reaching this conclusion, the Sixth Circuit misconstrued the Eighth Amendment, skirted the qualified-immunity standard, and endorsed an "oddhanded application of waiver principles." *Dart Cherokee Basin Operating Co., LLC v. Owens*, 574 U.S. 81, 101 (2014) (Scalia, J., dissenting).

Chief Judge Sutton's dissent, and the petition for a writ of certiorari, ably address the legal flaws in the Sixth Circuit's decision. The *amici* States will not belabor those points. Instead, they submit this brief to show that this Court's failure to reverse the decision below would have devastating effects on the States within the Sixth Circuit. The decision below exacerbates the confusion and incoherence that already plague the Sixth Circuit's deliberate-indifference caselaw. If left in place, the decision will sow further confusion, frustrate the States' efforts to combat the scourge of drugs in prisons, and likely leave inmates themselves worse off. To prevent these harms from coming to pass, the Court should summarily reverse. Failing that, it should grant certiorari to decide this case after full briefing and argument.

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* The *amici* States provided all parties with the notice required by Rule 37.2(a).

ARGUMENT

The Eighth Amendment prohibits the government from inflicting "cruel and unusual punishments." This Court has held that officials can violate this prohibition by failing to "take reasonable measures to guarantee the safety of the inmates." *Farmer v. Brennan*, 511 U.S. 825, 832 (1994) (quotation omitted). More precisely, this Court has held that prison officials violate the Eighth Amendment when they act with "deliberate indifference" to "a substantial risk of serious harm." *Id.* at 828.

The Sixth Circuit held that prison officials can exhibit deliberate indifference, violating the Eighth Amendment, by failing to prevent an inmate from illegally consuming illegal drugs that were illegally smuggled into prison. Pet.App.52a (Sutton, C.J., concurring in part and dissenting in part). On this basis, the Sixth Circuit concluded that Seth Zakora's estate plausibly alleged an Eighth Amendment violation based on officials' failure "to prevent" Zakora "from voluntarily engaging in prohibited conduct—ingesting opioids—while serving his sentence for second degree criminal sexual conduct." *Id.* "Two wrongs—committing an initial felony outside of prison then consuming contraband in prison—apparently make a constitutional right." *Id.*

The Sixth Circuit erred. Pet.App.52a–66a (Sutton, C.J., concurring in part and dissenting in part). Its errors amplify the confusion and incoherence of the Sixth Circuit's deliberate-indifference jurisprudence. Further, if not corrected, the court's errors will seriously hamper the ability of States and local governments within the Sixth Circuit to address the

problem of illegal drugs in prisons and jails. For these reasons, the Court should summarily reverse.

I. Summary reversal is appropriate to clarify the standard for deliberate indifference claims.

The Sixth Circuit's decision below further muddles an already-muddled area of jurisprudence.

Begin with first principles. The Eighth Amendment prohibits cruel and unusual "punishments." Deliberate-indifference caselaw "rests on the premise that deprivations suffered by a prisoner constitute 'punishment' for Eighth Amendment purposes, even when the deprivations have not been inflicted as part of a criminal sentence." *Helling v. McKinney*, 509 U.S. 25, 37 (1993) (Thomas, J., dissenting) (brackets omitted). As an original matter, that premise is wrong. "At the time the Eighth Amendment was ratified, the word 'punishment' referred to the penalty imposed for the commission of a crime." *Id.* at 38. "That is also the primary definition of the word today." *Id.* "And this understanding of the word, of course, does not encompass a prisoner's injuries that bear no relation to his sentence." *Id.* "[J]udges or juries—but not jailers—impose 'punishment.'" *Id.* at 40; *see also Farmer*, 511 U.S. at 859 (Thomas, J., concurring); *Wilkins v. Gaddy*, 559 U.S. 34, 41 (2010) (Thomas, J., concurring in the judgment).

As this suggests, the Court's deliberate-indifference caselaw has no basis in "the text of the Constitution." *Farmer*, 511 U.S. at 859 (Thomas, J., concurring). It rests on the view that the Eighth Amendment prohibits penal-related state action that is "incompatible with 'the evolving standards of decency that mark the progress of a maturing society.'"

Estelle v. Gamble, 429 U.S. 97, 102 (1976) (quoting *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (plurality)). This malleable standard gives courts tremendous leeway to find Eighth Amendment violations. Indeed, without some meaningful limit, it would "transform federal judges into superintendents of prison conditions nationwide." *Farmer*, 511 U.S. at 860 (Thomas, J., concurring).

To keep the deliberate-indifference theory from extending even further beyond the Constitution's text, this Court has adopted a test aimed at confining the theory's application. Under this test, "a prison official violates the Eighth Amendment only when two requirements are met." *Farmer*, 511 U.S. at 834 (majority). "First, the deprivation alleged must be, objectively, sufficiently serious"; in other words, the "prison official's act or omission must result in the denial of the minimal civilized measure of life's necessities." *Id.* (quotations omitted). Second, the prison official must act with a "sufficiently culpable state of mind." *Id.* (quotation omitted). This occurs only if "the official knows of and disregards an excessive risk to inmate health or safety." *Id.* at 837.

This test focuses the inquiry, but still leaves a great deal of uncertainty. Predictably, opinions from appellate judges all over the country note the confusion surrounding the application of the deliberate-indifference standard. *See, e.g.*, *Westmoreland v. Butler Cnty.*, 35 F.4th 1051, 1052 (6th Cir. 2022) (Bush, J., dissenting from denial of rehearing *en banc*); *Hoffer v. Sec'y, Fla. Dep't of Corr.*, 973 F.3d 1263, 1275–76 (11th Cir. 2020); *Dean ex rel. Harkness v. McKinney*, 976 F.3d 407, 427 (4th Cir. 2020) (Richardson, J., dissenting); *Dyer v. Houston*, 964

F.3d 374, 383 (5th Cir. 2020); *Gunther v. Castineta*, 561 F. App'x 497, 500 (6th Cir. 2014).

To illustrate the confusion, consider the Sixth Circuit's cases involving plaintiffs who seek to establish deliberate indifference "by a showing of grossly inadequate [medical] care." *Terrance v. Northville Reg'l Psychiatric Hosp.*, 286 F.3d 834, 843 (6th Cir. 2002) (quotation omitted). In these cases, does the question of gross inadequacy bear on the level of care (the objective prong of the deliberate-indifference test) or the doctor's mental state (the subjective prong)? The circuit's published cases are inconsistent. Some treat this standard as governing the objective prong. *See, e.g.*, *Perez v. Oakland Cnty.*, 466 F.3d 416, 424 (6th Cir. 2006); *Rhinehart v. Scutt*, 894 F.3d 721, 737 (6th Cir. 2018); *Phillips v. Tangilag*, 14 F.4th 524, 535 (6th Cir. 2021). Others apply the standard in assessing the subjective prong. *See, e.g.*, *Terrance*, 286 F.3d at 844 (6th Cir. 2002); *Berkshire v. Dahl*, 928 F.3d 520, 536 (6th Cir. 2019).

Given the uncertainty that plagues this area of the law, any bright lines are to be treasured. Before the Sixth Circuit issued its decision below, one line shone especially bright: no prisoner could "sue for harm suffered as a result of his own misconduct." Pet.App.62a (Sutton, C.J., concurring in part and dissenting in part). "No case holdings" suggested otherwise. *Id.* "None at all." *Id.* Until the decision below, courts could confidently say that inmates may not bring deliberate-indifference claims relating to risks they could "reasonably" have been "expected to avoid on [their] own." Pet.App.60a (Sutton, C.J., concurring in part and dissenting in part). An inmate "who is jailed with a violent cellmate," "required to use hazardous facilities," or "subjected to

dangerously low temperatures" might have a claim. *Id*. The inmate who injured himself would not. The only arguable exception extended to suicide—a risk that only *arguably* constitutes an exception, because jailhouse suicides often result from mental illnesses that inmates cannot be reasonably expected to treat on their own. Pet.App.63a–64a (Sutton, C.J., concurring in part and dissenting in part).

The Sixth Circuit's decision below erases this bright line, holding that prison officials can be held liable for "inflict[ing]" a "cruel and unusual punishment[]" on a prisoner by failing to stop him from overdosing on illegal drugs. U.S. Const. amend. VIII. This holding, in addition to being farcically wrong, will sow further confusion regarding one aspect of deliberate-indifference jurisprudence with respect to which the rules were previously clear.

To spare courts and litigating parties the confusion the majority's ruling is sure to impose, the Court should summarily reverse. Alternatively, it should set the case for argument and issue a decision after full merits briefing. The latter option would give the Court greater leeway to clarify deliberate-indifference jurisprudence. The Court might even consider asking counsel to "brief whether … cases that have abandoned the historical understanding of the Eighth Amendment, beginning with *Trop*, should be overruled." *Glossip v. Gross*, 576 U.S. 863, 899 (2015) (Scalia, J., concurring).

II. The decision below will frustrate the ability of States within the Sixth Circuit to address the issue of drugs in prisons.

The Sixth Circuit's holding promises to spark more litigation—and more lengthy litigation—than

anything existing precedent allows. On the majority's theory, virtually any overdose claim is guaranteed to survive to summary judgment because a prisoner can always allege that the prison administrators did too little to stop the flow of drugs into prisons. This oncoming wave of litigation will seriously impair States in their management of prisons in at least two ways.

First, permitting money damages for overdose creates a perverse incentive to smuggle drugs into prison. If a prisoner can get ahold of illegal drugs (the stronger the better), he now has the added benefit of a lucrative claim against the State for any harm he brings on himself. Given the prevalence of drug smuggling into prisons—on which, more below—this will probably happen with alarming frequency. So the Sixth Circuit's new rule threatens to make the drug problem worse, not better.

Second, constant litigation—complete with discovery demands—will distract prison officials from their duty to safely and securely manage prisons.

Begin by considering the difficulty of combatting the drug problem in prisons. As is true of many destructive tendencies exhibited by prisoners, drug abuse is "inevitable no matter what the guards do unless all prisoners are locked in their cells 24 hours a day and sedated." *Farmer*, 511 U.S. at 858–59 (Thomas, J., concurring in judgment) (quotation and ellipses omitted). Prisoners and their conspirators show great ingenuity; every time the State discovers a new smuggling technique, the illicit industry takes a new tack, and the State has to "build a better mouse-trap for the next thing." Andrew Welsh-Huggins, *Ohio prisons ramping up fight against flow*

of contraband, Associated Press (Apr. 12, 2022), https://perma.cc/NP7R-R69Y.

Ohio's experience illustrates the problem. Drug smugglers routinely attempt to smuggle drugs into prison through the mail. The opioid Suboxone is particularly hard to catch because it can be manufactured as a small strip that fits "underneath stamps" and "inside legal papers." John Caniglia, *Suboxone, an addiction treatment drug, seeps into Ohio prisons as contraband*, Cleveland.com (Sept. 17, 2013), https://perma.cc/2VYX-FGHP. Or it can be "attached to the adhesive strips in packages." *Id.* It can also be crushed into a paste and smeared on mail—sometimes disguised as coloring on a child's drawing. Abby Goodnough and Katie Zezima, *When Children's Scribbles Hide a Prison Drug*, N.Y. Times (May 26, 2011), https://archive.is/oHt7f.

Prisons are constantly adapting to these new methods. For example, Ohio prison officials started to meticulously remove stamps from mail, or burn the envelopes altogether; officials wash incoming clothes repeatedly; and they refuse letters with perfume or glitter. *Id.* Eventually, Ohio started digitizing all non-legal mail after it discovered that inmates were receiving letters with drugs soaked into the paper itself. Associated Press, *Ohio prisons to digitally scan mail to thwart drug smuggling*, Spectrum News (Aug. 12, 2021), https://perma.cc/87FZ-U4RJ. It was no small decision—the contract for the scanning equipment costs taxpayers $22.7 million per year. *Id.* And even that proved to be only a partial solution for mail-based smuggling, as the drugs soon began showing up in the paper of the exempted legal correspondence. Welsh-Huggins, *Ohio Prisons*. In response, Ohio implemented the legal-mail program,

which requires counsel to register for a control number and be vetted by department staff. *See* Legal Mail, Ohio Department of Rehabilitation and Correction, https://archive.is/0iPJA. While this innovation has been largely effective for now, it still does not perfectly seal off the prison, and it also takes resources to implement and maintain.

Mail is only one way smugglers move drugs into prisons; the methods are virtually limitless and largely unpredictable. Inmates have smuggled drugs by sewing pills into clothing seams. Goodnough, *When Childen's Scribbles*. Family members have transferred drugs via kisses in visiting areas. Caniglia, *Suboxone*. In 2016, Ohio stopped its milk-farming operation, in part to limit opportunities for smuggling contraband. Laura A. Bischoff, *End of an era: Ohio phases out its prison farms*, Dayton Daily News (June 11, 2016), https://perma.cc/72JR-LJB9. Officials determined it would be best to have the milk delivered. Two years later, the milk deliveryman had smuggled thousands of dollars of cell phones and drugs into the prison before being caught. Andrew Welsh-Huggins, *Milkman charged with smuggling drugs, phones into Ohio prison*, Columbus Dispatch (Feb. 28, 2018), https://perma.cc/G3QQ-MFVZ.

Attempted solutions are sometimes costly or experimental. After drones became more widely available, Ohio prisons had to grapple with unauthorized flyovers. Lorenzo Ferrigno, *Ohio prison yard free-for-all after drone drops drugs*, CNN (Aug. 5, 2015), https://perma.cc/9R73-GZ6D. One drone dropped "144.5 grams of tobacco, 65.4 grams of marijuana and 6.6 grams of heroin" into a crowded prison yard. *Id.* Ohio then bought "anti-drone technology," which

costs $1.5 million to operate. Welsh-Huggins, *Ohio Prisons*. But even that relatively simple response raises issues of federal aviation law and crash-caused collateral damage. Jim Otte, *Drones dropping drugs into prisons; Ohio fights back*, Dayton Daily News (Nov. 7, 2017), https://perma.cc/9VJJ-M34U.

To stop smugglers with drugs on their bodies, some States have started using "X-ray body scanners." Welsh-Huggins, *Ohio Prisons*. But the scanners cost $1.7 million per machine, *id.*, and sometimes inmates can still smuggle bags of drugs inside body cavities, John Lynch and D.K. Wright, *Ohio man smuggled drugs into jail; could have killed other inmates*, *WTRF.com* (Aug. 23, 2022), https://perma.cc/SQH3-7NUD; Angie Jackson, *Woman accused of smuggling drugs into Wexford County jail in her vagina pleads guilty*, MLive (Aug. 21, 2014), https://perma.cc/J62C-FWL7.

And of course, there is the problem of complicit prison staff. Corrections officers smuggling drugs can sometimes be so pervasive that even strictly regulating the mail and shutting down visitation altogether does nothing to stem the flow of drugs. Jolie McCullough and Keri Blakinger, *Texas prisons stopped in-person visits and limited mail. Drugs got in anyway*, Texas Tribune (Mar. 29, 2021), https://perma.cc/UDZ5-MX2Z. But staffing improvements implicate difficult policy decisions, including considerable funding increases. *Id.*

Around the world, drug smuggling continues to evolve in bizarre ways. In New Zealand, the government has wrestled with drugs smuggled in visitors' eye sockets, in baby diapers, and in dead birds thrown over prison fences. *'Dead birds' used to*

smuggle drugs into NZ jails, Sydney Morning Herald (Jan. 18, 2007), https://perma.cc/Y8S5-ER6A.

To complicate matters, a prison's effectiveness in detecting drugs will not necessarily correspond with its effectiveness in preventing overdoses. As a drug addict begins to detox, he may lose tolerance for the drug of addition over time. John Strang, et al., *Loss of tolerance and overdose mortality after inpatient opiate detoxification: follow up study*, 326 British Med. J. 959, 959 (May 3, 2003), https://perma.cc/52EH-97NW. An addict who has lost tolerance is more likely to overdose because he is unable to judge the impact that a given dose will have on his body. *Id.* That means that prisoners who lose access to drugs upon incarceration may be more likely to overdose, if they can get their hands on drugs, than prisoners who continued to use a drug at a relatively constant rate. Beth Schwartzapfel and Jimmy Jenkins, *Inside The Nation's Overdose Crisis in Prisons and Jails*, The Marshall Project (July 15, 2021), https://perma.cc/L7J3-NADM. So penalizing prisons for overdoses may tend to "catch" the prisons that are doing the best job rather than those that are doing the worst.

Consider one more complication. If prisons face liability from overdoses, they may wish to significantly curtail the degree to which inmates can interact with one another. That, at least, would reduce inmate-to-inmate drug exchanges. But such measures present risks of their own. For one thing, greater solitude may reduce drug use but increase mental distress. *See Davis v. Ayala*, 576 U.S. 257, 286–90 (2015) (Kennedy, J., concurring). Many inmates would likely bring Eighth Amendment claims challenging such confinement. *See id.*; *Hutto v. Fin-*

ney, 437 U.S. 678, 685 (1978). Those claims are meritless, but litigating will take time and effort—further distracting prison officials from more important tasks before them.

The bottom-line is this: States and local governments already expend tremendous resources combatting the flow of drugs in prisons. Over the past three years, Ohio averaged over 900 contraband-related incidents per month throughout twenty-eight institutions. The number has decreased under Ohio's newer policies, but Ohio must continually evaluate and address the changing risks of illegal conveyances into prisons. As a result, Ohio spends, every year, millions of taxpayer dollars and thousands of employee work hours combatting the illegal conveyance of illegal drugs into prisons. The threat of liability from the Sixth Circuit's decision will require States to expend resources addressing tasks that do not improve prisons—responding to discovery demands, for example. If prison officials are distracted by litigation, these suits will *impair* the States' ability to address the drug problem by depriving them of resources that could otherwise be put to the problem. And drugs are hardly the only problems prisons face; they must address inmates' medical needs, prevent escapes, stop violence, and more besides. Every minute of time spent litigating whether a prison did enough to stop the flow of drugs is a minute that cannot be spent on these important issues.

This interference with state prerogatives is as unnecessary as it is misguided. The "Constitution is not the only source of American law. There is an immense body of state statutory and common law under which individuals abused by state officials can seek relief." *Kingsley v. Hendrickson*, 576 U.S. 389, 408

(2015) (Scalia, J., dissenting). And the States can adopt criminal laws that harshly penalize individuals (including prison officials) who engage in drug smuggling. State policymakers are better suited than federal judges to craft solutions that address drug smuggling without unjustifiably sapping state resources. The Eighth Amendment is not—and should not be—the protection of first and last resort in this context. Its prohibition "sets a floor for the protection of individual rights"; States can, and often do, provide greater protection. *Am. Legion v. Am. Humanist Ass'n*, 139 S. Ct. 2067, 2094 (2019) (Kavanaugh, J., concurring). Justice Scalia believed that federal courts sometimes lose sight of this reality in their "tender-hearted desire to tortify" the Constitution. *Kingsley*, 576 U.S. at 408 (Scalia, J., dissenting). The Sixth Circuit seems to have fallen into this trap. The Court should free it—and the States subject to its edict—by reversing the judgment below.

CONCLUSION

This Court should grant certiorari and reverse.

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