No. 12-1142

IN THE

Supreme Court of the United States

October Term, 2012

HANNAH JASPER, individually on behalf of all others similarly situated,

Petitioner/Cross-Respondent,

v.

SPRINGFIELD MUNICIPAL HEALTH & WILLIAM DALY, in his individual and official capacities as Chief Information Officer,

Respondent/Cross-Petitioner,

On Writ of Certiorari to the
Twelfth Circuit Federal Court of Appeals

BRIEF FOR RESPONDENT

Attorneys for Respondent
Team 2123

QUESTIONS PRESENTED

I. Whether the Due Process Clause of the Fourteenth Amendment confers a right of confidentiality in patient medical information that was voluntarily given to a municipal health clinic when the inadvertent disclosure did not threaten another fundamental liberty interest.

II. Whether a municipal health clinic's inadvertent disclosure of patient medical information can constitute a violation of the Due Process Clause when the clinic had no malice and owed no special duty of care.

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CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional provision at issue, the Due Process Clause of the Fourteenth Amendment, is located at Appendix A. The statute at issue, section 1983 of volume 42 of the United States Code, is located at Appendix B.

STATEMENT OF THE CASE

This case involves a dispute over whether the accidental disclosure of patient medical records by a municipal health clinic as a result of a security breach violates the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

Springfield Municipal Health Clinics

The city of Springfield, Illinoza operates six health clinics, which provide primary care to Springfield's residents. (R. at 2.) Each clinic provides comprehensive non-emergency healthcare services including monitoring chronic illness, testing for sexually transmitted diseases, and providing post-hospital rehabilitation, family planning, dental care, and blood and urine exams. (R. at 2.) Hannah Jasper (the "Petitioner") received care from the Clinics sometime between January 3, 2003, and October 16, 2009. (R. at 1.)

Health Information Technology

In his role as Chief Information Technology director for Springfield Municipal Health Clinics (the "Clinics"), William Daly managed the Clinics' information systems and the security of the Clinics' patient data. (R. at 3.) Mr. Daly held this role from 2007 until recently. (R. at 2.) On February 2, 2009, Daly implemented SpaceMed, an electronic medical records software, in all six clinics in an effort to manage patient files, enable authorized users to access the medical records, and secure the health data from unauthorized access. (R. at 3.) The SpaceMed system housed all files of patients who had visited any of the Clinics since January 1, 2003. (R. at 3.) Daly instructed all clinic physicians and staff to create strong passwords, consisting of at least eight characters, including at least one number and one capital letter, for their SpaceMed user accounts. (R. at 3.) The default password for the system administrator's account, which had more privileges than other accounts for purposes of modifying, copying, and deleting medical records, was not changed from "password" before the system became operational. (R. at 3.)

SpaceMed Security Breaches

On February 14, 2009, a hacker breached SpaceMed's security system. (R. at 3.) The hacker, a self-described "hactivist," revealed the details of the attack to a popular technology blog journalist, but it appears the hacker had no intention to use or otherwise distribute the information. (R. at 3.) The hacker likely used a password-guessing attack to gain access, and such attacks are often successful.

(R. at 11.) The Clinics subsequently issued a public apology, and Daly changed the system administrator password. (R. at 3.)

On October 17, 2009, a different hacker attacked the SpaceMed program and accessed patient health data through the system administrator account. (R. at 3, 4.) After discovering that the hacker downloaded and deleted files, the Clinics immediately hired an outside data security consulting firm to investigate the breach. (R. at 4.) The consulting firm concluded that at the time of the second attack the system administrator account's password had been set to "11111." (R. at 4.) Daly chose this password to ensure that the entire information technology department had easy access to the administrator account. (R. at 4, 12.) The Information Technology department used this account to ensure that SpaceMed was always accessible to the staff and physicians. (R. at 4, 12.) The hacker likely used a brute-force attack by systematically trying combinations of letters, numbers, and symbols until one of them worked. (R. at 11.) All web-based systems that require a password are susceptible to brute-force attacks. (R. at 11.)

Daly explained that he did not set the accounts to lock after successive failed login attempts because such a setting would have made the system vulnerable to "denial of service" attacks. (R. at 12.) Denial of service attacks shut authorized users out of the system, potentially causing serious problems for staff, physicians, and patients. (R. at 12.) The security breach did not disrupt the Clinics' ability to provide care because the Clinics retained a backup copy of all the deleted files and restored their information systems quickly. (R. at 4.) No patient files were

permanently lost. (R. at 4.) The Petitioner's complaint speculates as to potential harms that could result from the security breaches, but to date, no one knows the identity of the hacker nor how, if at all, the medical files have been used. (R. at 4, 8.)

Procedural History

Petitioner filed a complaint in the United States District Court for the District of Illinoza, on her own behalf and on behalf of all similarly situated persons who received care at the Clinics between January 1, 2003 and October 16, 2009. (R. at 1.) Petitioner brought her claim pursuant to 42 U.S.C. § 1983 and alleged that the Clinics and Mr. Daly (the "Respondent") violated her substantive due process rights. (R. at 1.) The Respondent filed a motion to dismiss because Petitioner failed to state a claim upon which relief could be granted. (R. at 1.) The District Court chose to treat the motion to dismiss as a motion for summary judgment because both parties had submitted affidavits that went beyond the pleadings. (R. at 2.) On February 28, 2011, the District Court granted the Respondent's motion for summary judgment. (R. at 9.) Petitioner appealed the District Court's decision to the United States Court of Appeals for the Twelfth Circuit. (R. at 10.) On July 2, 2012, the Twelfth Circuit affirmed the District Court's grant of summary judgment. (R. at 17.) Petitioner appealed the Twelfth Circuit's holding that Respondent's unintentional conduct did not meet the standard for "egregious" behavior required to show a violation of substantive due process. (R. at 11.) Subsequently, Respondent cross-appealed the holding that the Due Process Clause imposes a duty on municipal health clinics to protect against the disclosure of private medical

information. (R. at 11.) This Court granted certiorari on July 16, 2012, and limited review to two issues: (1) whether there is a constitutional right to confidentiality in patient medical records maintained by a municipal government, and if so, what is the scope of that right; and (2) whether the inadvertent release of private patient medical records violate the patient's substantive due process rights. (R. at 23.)

SUMMARY OF ARGUMENT

I. There is no constitutional right to nondisclosure of patient medical records.

According to this Court, the intent and purpose of the Due Process Clause is to limit the power of government such that the government cannot oppress citizens or intrude into a private sphere. Therefore, this Court has carefully carved out areas of one's private life into which the government cannot tread without first balancing the private and public interest. This Court has never, however, held that the Due Process Clause imposes an affirmative duty on government entities, like municipal health clinics, to protect information that they maintain. Petitioner's claim requires this Court to find a substantive due process right that falls outside of this Court's existing due process precedent and contradicts the intent of the Due Process Clause. In fact, this Court has found that without threatening a fundamental liberty interest, the disclosure of private information does not violate an individual's substantive due process rights. The inadvertent disclosure of Petitioner's medical records did not threaten any fundamental liberty interests. Finding in favor of Petitioner would set a dangerous precedent by imposing a

constitutional burden on municipal healthcare providers, which are already subjected to extensive federal and state privacy laws.

II. An inadvertent disclosure of patient medical records does not violate substantive due process.

Even if there is a constitutional right to confidentiality in patient medical records, and even if that right covers situations where no fundamental liberty interest is violated, Respondent's motion for summary judgment was properly granted because the accidental disclosure of this information did not include any conduct which "shocks the conscience." Without malice, the inadvertent disclosure of medical records maintained by the Clinics did not violate the Due Process Clause because the Clinics were not infringing on any of the patients' constitutional rights. Even if this Court decides that malice is not required, executive conduct must be at least deliberately indifferent to the rights of citizens to constitute a constitutional violation, and Daly's actions do not meet this standard. Additionally, this Court should not turn the Due Process Clause into a "font of tort law," and finding that inadequate data-security measures can violate the Constitution would do just that. Therefore, Daly did not violate Petitioner's constitutional rights, and the Twelfth Circuit properly granted Daly's motion for summary judgment.

ARGUMENT

To prevail under 42 U.S.C. § 1983, Petitioner must establish that Respondent deprived her of a right secured by the Constitution or laws of the United States. *Am. Mfg. Ins. Co. v. Sullivan*, 526 U.S. 40, 49–50 (1990). Both the District Court

and the Twelfth Circuit Court of Appeals held that the Petitioner failed to allege a violation of her constitutional rights. (R. at 2, 11.) When evaluating § 1983 claims, courts have discretion to address the underlying constitutional allegations as an initial matter. *Pearson v. Callahan*, 555 U.S. 223, 238 (2009). Petitioner failed to establish any underlying constitutional violation because 1) the Due Process Clause does not confer a right to confidentiality of patient medical records maintained by a municipal healthcare provider, and 2) the inadvertent disclosure of private medical records does not violate the patient's substantive due process rights. Without any constitutional violation, Petitioner's claim cannot succeed. Therefore, the Twelfth Circuit properly granted Respondent's motion for summary judgment.

I. STANDARD OF REVIEW

This Court is reviewing the Twelfth Circuit's grant of summary judgment in favor of the Respondent. (R. at 17.) This Court reviews an appeal for summary judgment *de novo*. *Celotex v. Catrett*, 477 U.S. 317, 322 (1986). Where the pleadings, depositions, answers to interrogatories, admissions on file, and affidavits demonstrate that there is no genuine issue of a material fact, this Court must grant summary judgment and award the movant a judgment as a matter of law. Fed. R. Civ. P. 56(c). This Court construes the record in the light most favorable to the non-moving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986).

II. THE TWELFTH CIRCUIT INCORRECLY HELD THAT RESPONDENT VIOLATED PETITIONER'S CONSTITUTIONAL RIGHTS BECAUSE THIS COURT HAS NEVER FOUND A CONSTITUTIONAL RIGHT TO NONDISCLOSURE OF PRIVATE INFORMATION UNDER THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT.

The Twelfth Circuit incorrectly found that the Constitution confers a right to nondisclosure of medical records maintained by a municipal government. This Court has never found a right to nondisclosure of private information. *Albright v. Oliver*, 510 U.S. 266, 269 (1994). Substantive due process rights limit the government's ability to intrude into the private lives of its citizens, but this Court has never found that the Due Process Clause imposes a duty on government entities to protect private information it houses. This Court should not expand the Due Process Clause beyond its original purpose because "the guideposts for responsible decisionmaking [sic] in this unchartered area are scarce and open-ended." *Collins v. Harkers Heights, Tex.,* 503 U.S. 115, 125 (1992). A disclosure of private information does not usually violate substantive due process, but it may do so, however, where that disclosure threatens a fundamental liberty interest. *Bishop v. Wood*, 426 U.S. 341, 350 (1976). The Clinic's inadvertent disclosure of private medical information did not violate a fundamental liberty interest. Finally, imposing a constitutional requirement on municipal healthcare providers would increase costs to municipalities and create an undue burden given the already comprehensive federal and state privacy laws.

A. The Due Process Clause of the Fourteenth Amendment Does Not Impose a Constitutional Duty on Municipal Health Clinics to Protect Patient Health Information from an Inadvertent Disclosure.

The Due Process Clause is a tool to limit the arbitrary power of the government and prevent governmental oppression. *DeShaney v. Winnebago Cnty. Dept. of Social Servs.*, 489 U.S. 189, 196 (1989). It is not a mandate that the government must provide security measures for private medical information. See *id.* (holding that the Due Process Clause does not create an affirmative duty in municipalities). Petitioner asks this Court to expand the Due Process Clause to include the inadvertent disclosure of electronic medical records maintained by municipalities acting as a healthcare provider. Such a holding would expand the Due Process Clause well beyond its purpose and this Court's existing precedent.

1. Respondent Did Not Violate a Right Guaranteed by the Constitution.

The Due Process Clause limits the government's power; it does not impose a duty on the government to ensure that no harm comes to an individual's rights. *Collins*, 503 U.S. at 127. This Court has refused to extend the Due Process Clause to situations in which an individual insists on security controls because such a holding would create an affirmative duty rather than limit abusive government action. *Id.* (citing *DeShaney,* 489 U.S. at 194). In cases where an individual voluntarily interacted with the government, the Constitution does not require proper safety measures. *Id.* (holding that municipal employers do not need to provide a secure working environment because employees voluntarily accepted employment and at no point were deprived of their liberty).

In this vein, this Court has recognized that the Due Process Clause confers certain privacy rights such that the government cannot use its power to interfere in an individual's private life. *Paul v. Davis,* 424 U.S. 693, 713 (1976). By creating specific areas of one's life into which the government cannot intrude, the Due Process Clause serves to prevent the government from using its power to oppress individuals with whom the government does not agree. *Daniels v. Williams,* 474 U.S. 327, 331 (1986). This Court has found that there are certain areas of the private sphere that society believes to be sacred, and thus the Due Process Clause limits the State's ability to interfere. See *Lawrence v. Texas*, 539 U.S. 558 (2003) (finding a constitutional right to privacy in sexual relations with a person of the same sex); *Roe v. Wade*, 410 U.S. 113 (1973) (holding, under the Due Process Clause, that the government could not intervene in a woman's decision to abort a pregnancy); *Eisenstadt v. Baird*, 405 U.S. 438 (1972) (finding a couple had a constitutional right to use contraceptives); *Loving v. Virginia*, 388 U.S. 1 (1967) (striking down a statute prohibiting interracial marriage on the basis of substantive due process rights).

This Court has refused, however, to extend privacy rights to impose a duty on the government to keep confidential or provide proper security of information it maintains. *Paul*, 424 U.S. at 713. In *Paul*, a police department released an individual's photo with the caption "active shoplifter", and this Court held that a local police department's disclosure of that information, even if defamatory, did not violate the Due Process Clause. *Id.* This Court held as such because the disclosure

of information is "far afield" this Court's substantive due process cases which restrict the government's ability to intrude into an individual's private life. *Id.*

In the case at hand, the government did not use its power to infringe on an individual's privacy. Petitioner did not ask this Court to limit the Clinics' power, but rather to impose a constitutional duty on the Clinics to keep information that it maintains confidential. This Court has never imposed such a duty on another governmental entity. To allow Petitioner's claim to succeed would apply the Due Process Clause in a way that this Court vigilantly guards against because it runs counter its purpose.

2. Respondent's Disclosure of Petitioner's Medical Records Did Not Violate the Due Process Clause Because the Disclosure Did Not Threaten Her Fundamental Liberty Interests.

The Twelfth Circuit inappropriately relied on *Whalen v. Roe* and its progeny to hold that Petitioner had a constitutionally protected right to nondisclosure. The *Whalen* line of cases did not alter this Court's holdings that the Due Process Clause does not impose a duty on government entities to protect information it possesses. *J.P. v. DeSanti*, 653 F.2d 1080, 1089 (6th Cir. 1981). *Whalen* assumed without deciding that a right to informational privacy exists when the government intrudes into an individual's private life and collects information. *Whalen v. Roe*, 429 U.S. 589, 600 (1977). The lower courts have struggled to apply *Whalen,* and therefore, there is no test that is consistently applied for determining if a government has violated an individual's informational privacy. Compare *U.S. v. Westinghouse*, 638 F.2d 570, 580 (3d Cir. 1980) (balancing governmental interests with individual

interests); *Walls v. City of Petersburg*, 895 F. 188, 192 (4th Cir. 1990) (applying strict scrutiny); *Borucki v. Ryan*, 827 F.2d 836, 840 (1st Cir. 1987) (finding that the Due Process Clause only protects information that is "clearly established" as having a right to privacy). The Sixth Circuit has aptly read this Court's existing precedent to hold that in cases where an individual seeks to impose a duty on the government to protect information, a disclosure violates the Due Process Clause only in cases where another fundamental harm is threatened. *DeSanti*, 653 F.2d at 1089.

a. This Court Has Never Imposed a Duty on Government Entities to Provide Proper Security for Private Information They Maintain.

Whalen is inapplicable to Petitioner's claim because it addresses the government's ability to intrude into an individual's private life, and not the duty a government has to protect private information. On three occasions, this Court assumed without deciding that in cases where the State seeks to collect confidential information from individuals, an individual has a substantive due process right to keep this information private from the government. *Whalen,* 29 U.S. at 599 (allowing New York to collect prescription drug information in order to track the prescription and use of Schedule II drugs); *Nixon v. Adm'r of Gen. Servs.,* 433 U.S. 425, 457 (1977) (rejecting President Nixon's claim that the federal government's collection of tape recordings for preservation purposes was an unconstitutional invasion of privacy); *NASA v. Nelson*, 131 S. Ct. 746, 751 (2011) (permitting NASA to conduct broad sweeping background checks on independent contractors as well as employees). *Whalen* and its progeny addressed the limits on the government's

ability to intrude into confidential information, but did not impose a duty on the State to properly protect confidential information. In fact, this Court refused to decide any question presented relating to the unwarranted disclosure of private information. *Whalen*, 429 U.S. at 606; *Id.* at 609 (Stewart, J., concurring) (writing separately to concur in the opinion provided that the majority opinion did not hold that there exists a general interest in the avoidance of disclosure).

While this Court has never imposed a constitutional duty on the government to protect private medical information voluntarily given, it has recognized a right to nondisclosure insofar as the disclosure threatens a fundamental liberty interest. *Paul,* 424 U.S. at 701 (rejecting a claim that the government violated the Constitution by disclosing an individual's criminal record because "reputation alone, apart from some more tangible interests such as employment, is [not] either 'liberty' or 'property' by itself sufficient to invoke the procedural protection of the Due Process Clause"); *Bishop v. Wood*, 426 U.S. 341, 350 (1976) (holding that an employer's disclosure of a former employee's employment record to potential new employer did not violate employee's constitutional right because there is no constitutional guarantee against stigma alone). Additionally, that a disclosure may potentially harm future interests is not sufficient to constitute a violation of the Due Process. *Seigert v. Galley*, 500 U.S. 226, 233 (1991) (conceding that a defamatory letter written by a former employer may affect the individual's future job prospects, but hypothetical future job prospects were not enough to assert that the employer violated a fundamental liberty interest).

b. Without Threatening a Fundamental Liberty Interest, a Governmental Entity Does Not Violate an Individual's Substantive Due Process Rights.

The Sixth Circuit recognized the distinction between a right to confidentiality where the State wishes to intrude and collect that information, and a right to nondisclosure of information maintained by the State. *DeSanti*, 653 F.2d at 1090. The Sixth Circuit applies the "state-created danger" test and finds a violation of the Due Process Clause only in situations where a fundamental liberty interest is clearly threatened. See *Kallstrom v. City of Columbus*, 136 F.3d 1055 (6th Cir. 1998) (prohibiting the release of the identities of undercover police officers because the release of such information would almost certainly result in harm to the police officers or their families). The Sixth Circuit narrowly applies the "state-created danger" test when determining if a fundamental liberty interest is threatened. See *Barber v. Overton*, 496 F.3d 449, 456 (6th Cir. 2007) (distinguishing an accidental disclosure of prison guards' social security numbers from *Kallstrom* because, unlike the gang in *Kallstrom,* it was not clear that the prisoners who had the social security numbers intended to use them to harm the prison guards).

As the District Court correctly determined, Petitioner's claim lacks any evidence that the disclosure threatened a fundamental liberty interest, like her life. (R. at 8.) Petitioner fails to allege that the disclosure of her medical information caused harm, even a hypothetical harm, to her liberty interests found in the Due Process Clause. (R. at. 4.) Petitioner relies on a misguided belief that a disclosure alone violates an individual's substantive due process. As in *Barber*, Petitioner cannot show that the hacker is nearly certain to use her information to harm her.

(R. at 4.) In fact, in the three years since the security breach occurred, there has been no evidence that the hacker did anything with the information. (R. at 4.)

Even those circuits that do not apply the "state-created" danger test are hesitant to find a violation. *Riley v. St. Louis Cnty. of Mo.*, 153 F.3d 627, 631 (8th Cir. 1998) (rejecting a mother's claim that a public display of her son's autopsy photographs at an event regarding gang activity violated her substantive due process right to privacy); *Eagle v. Moran*, 88 F.3d 620, 627 (8th Cir. 1996) (holding that the public disclosure of an individual's expunged criminal history at a city council meeting in an effort to discredit his research did not violate his substantive due process rights); *Davis v. Bucher*, 853 F.2d 718, 720 (9th Cir. 1988) (finding that a prison guard's disclosure of nude pictures of an inmate's wife was abhorrent and likely tortious, but not a constitutional violation of privacy).

c. It is Unnecessary to Consider Private Interests Where the Government Has Not Intruded into an Individual's Life.

The Twelfth Circuit inappropriately relied on the Third Circuit to find that a balancing test was the proper test for determining if Petitioner's substantive due process rights were violated. Specifically, the Twelfth Circuit relied on *U.S. v. Westinghouse*, which addressed the government's forcible collection of information from a confidential source. *Westinghouse*, 638 F.2d at 577 (holding that the government's interest in collecting information on the effect that working conditions have on public health outweighed the individuals' interest in keeping the information confidential). In *Westinghouse*, like in *Whalen*, a government entity intruded into an individual's private life and collected information to which it did

not already have access. *Id.* If the Due Process Clause extends to protect against government intrusion into private information then in those cases a balancing test may be applicable. *Whalen*, 429 U.S. at 597. However, even this is not clear because those courts addressing questions of informational privacy have applied different tests. See *Am. Fed'n of Gov't Emps., AFL-CIO v. Dep't of Hous. and Urban Dev.*, 118 F.3d 786, 793 (D.C. Cir. 1997) (finding that public employer can collect employee health information because this Court failed to establish a right to informational privacy); *Walls*, 895 F.2d at 192 (applying strict scrutiny to find that an employer could require an employee to fill out a questionnaire asking about the employee's sexual orientation).

The Twelfth Circuit improperly relied on *Whalen* to hold that the Constitution imposed a duty on the Clinics to properly protect the patient health information it maintained. Petitioner does not claim that the Clinics attempted to intrude into her private health information. Rather, Petitioner seeks to impose a constitutional duty on municipal healthcare providers to ensure the use of specific security measures. (R. at 12.) Therefore, the Third Circuit's balancing test is not the appropriate test for Petitioner's claim. The Clinics did not collect information that Petitioner wished to keep confidential from the government. (R. at 2.) Rather, she willingly gave her private information to the Clinics, but also asserts that it was bound by a constitutional duty to protect that information. (R. at 1.) Certainly, Respondent is required by state and federal privacy law to protect private health information, but this Court has never imposed a constitutional duty to protect

private information willingly given to the State. Therefore, Petitioner's claim must fail, and this Court should affirm the grant of summary judgment for the Clinics.

3. This Court Should Not Rely on *Whalen* and Its Progeny Because Those Cases Do Not Include a Substantive Due Process Analysis of a Confidentiality Right.

Even if this Court decides that *Whalen* is applicable to Petitioner's claim, it is inappropriate to rely on *Whalen* and its progeny because the cases rely on improper precedent and do not conduct a substantive due process analysis. In *Whalen*, this Court assumes without deciding that there is a right to confidentiality of private information based on two cases which found a right to privacy under the First Amendment, and not the Due Process Clause of the Fourteenth Amendment. *Whalen,* 429 U.S. at 599 (citing *Stanley v. Georgia*, 394 U.S. 557, 567 (1969); *Griswold v. Connecticut*, 381 U.S. 479, 483 (1965)). *Nixon* and *NASA* rely on *Whalen* without correcting *Whalen's* analysis or conducting a substantive due process analysis. *Nixon,* 433 U.S. at 460 (making a single reference to *Whalen* before conducting a Fourth Amendment analysis of President Nixon's right to privacy); *NASA*, 131 S. Ct. at 751 (assuming for sake of ease, based on *Whalen* and *Nixon*, that there existed a constitutional right to privacy). *Whalen* set no precedent by which future courts must abide. *NASA,* 131 S. Ct. at 766 (Scalia, J., concurring). If Petitioner asserted a claim to privacy based on the First or Fourth Amendments then *Whalen* and its progeny may have been applicable. Petitioner asserts a right based solely on the Fourteenth Amendment, and therefore, *Whalen* is not persuasive.

If Petitioner's claim were to succeed, this Court would need to expand the Due Process Clause to include a right to avoiding disclosure of medical information. When expanding substantive due process rights, this Court "exercises utmost care" and "judicial self-restraint." *Collins*, 503 U.S. at 125. The Due Process Clause protects only those rights deeply rooted in the Nation's history, legal traditions, and practices. *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997). The right must be so ingrained in society's "concept of ordered liberty" that "neither liberty nor justice would exist if they were sacrificed." *Id.*

In *Washington*, this Court found that ban on assisted-suicide was deeply rooted in this nation's history because even the earliest United States' statutes included this ban. *Id.* Unlike assisted suicide bans, a legal concept to privacy has only existed since the Twentieth Century. *Olmstead v. United States,* 277 U.S. 438, 478 (1928) (Brandeis. J., dissenting). Further, not until 1965 did this Court officially recognize and articulate a right to privacy. *Griswold*, 381 U.S. at 483. The right to privacy of information has divided the circuits, and some have stated a doubt to the right's existence entirely. *AFL-CIO,* 118 F.3d at 791. Given the extensive and unresolved debate regarding informational privacy, it cannot be said it is ingrained in our concept of an ordered society. Finding that there is a right to nondisclosure of medical records maintained by a municipal government would be unprecedented expansion of the Due Process Clause beyond those "concrete examples found to be deeply rooted in our legal tradition." *Washington*, 521 U.S. at 721.

B. Health-Information Privacy Law Is Well-Developed, and Adding a Constitutional Duty Would Increase Litigation and Unduly Burden Government Healthcare Providers.

Respondent does not dispute that the protection of medical information is a necessary and important exercise, and neither do the courts that have found no constitutional right to nondisclosure. *DeSanti*, 653 F.2d at 109; *Bishop,* 496 F.3d at 457; *NASA,* 131 S. Ct. at 764 (Scalia, J., concurring). Nondisclosure of medical information is not, however, protected by the Constitution. It is inappropriate to use the Due Process Clause to regulate all important aspects of society. *Washington,* 521 U.S. at 727; *Bishop*, 426 U.S. at 350; *NASA*, 131 S. Ct. at 764 (Scalia, J., concurring). In refusing to extend the Constitution to cover a right to nondisclosure, many courts acknowledged that any government collecting private information should carefully guard this information, but that this regulation is best left to the legislature. *Whalen*, 429 U.S. at 605; *DeSanti*, 653 F.2d at 109; *Barber*, 496 F.3d at 457.

Congress has passed legislation to ensure that health information technology becomes more pervasive in the practice of medicine. Health Information Technology for Clinical and Economic Health ("HITECH"), 42 U.S.C. § 201 (2012) (appropriating approximately $33 billion for health information technology); Patient Protection and Affordable Care Act ("PPACA"), Pub. L. No. 111-148, §3002(d) (2010) (incentivizing providers to implement health information technology in their practices by offering reimbursement bonuses for demonstration of meaningful use of health information technology). The federal government has emphasized and incentivized health information technology because of its ability to reduce medical

errors and bend the healthcare cost curve. PPACA at §2717(a)(1)(C). Unfortunately, technology is not error-proof and with the growth of technology comes the potential for inadvertent disclosures. *Whalen*, 429 U.S. at 601. Aware of the changing landscape, Congress has, in fact, enacted an extensive and comprehensive statute for protecting health information. Health Insurance Portability and Accountability Act of 1996 ("HIPAA"), Pub. L. No. 104-191, 110 U.S. Stat. 1936. Further, Congress has amended HIPAA on several occasions to reflect the growth of health information technology. American Recovery And Reinvestment Act of 2009, Pub. L. No. 111-5 §13410(d).

HIPAA is a national standard that all healthcare providers must follow, but state legislatures can build upon HIPAA, and many have. John C. McKenney, *Managing Information Privacy and Security in Healthcare: Privacy and Security Solutions for Interoperable Health Information Exchange*, Healthcare Information and Management Systems 1 (Apr. 2007), available at http://www.himss.org/content/files/CPRIToolkit/version6/v7/D23_HISPC_Overview.pdf. Additionally, Congress entrusted the United States Department of Health and Human Services ("HHS") with the duty of enforcing HIPAA, including granting HHS the power to levy civil monetary penalties on the gravest offenders. HIPAA, 45 C.F.R. § 79.3 (2012). Further, the federal government and state governments work together to efficiently and effectively implement health privacy laws. *HIPAA Enforcement Training for State Attorney Generals*, United States Department of Health and Human Services, http://www.hhs.gov/ocr/privacy/hipaa/enforcement/

sag/sagmoreinfo.html (last visited Sept. 20, 2012). In 2010, HHS resolved 9,158 complaints of HIPAA violations, and investigated 4,229 complaints. *Enforcement Results by Year*, United States Department of Health and Human Services, http://www.hhs.gov/ocr/privacy/hipaa/enforcement/data/historicalnumbers.html#eighth (last visited Sept. 20, 2012). The number of complaints and resolutions has grown each year since the enactment of HIPAA. *Id.* Further, HHS provides extensive technical assistance to providers to minimize the likelihood of inadvertent disclosures. *OCR's Mission and Vision*, United States Department of Health and Human Services, http://www.hhs.gov/ocr/office/about/mission-vision.html (last visited Sept. 20, 2012).

If this Court imposed a constitutional duty on top of an already extensive health privacy regulatory landscape and a vastly changing healthcare field, litigation like Petitioner's would increase exponentially and overwhelm the federal court system. *Bishop*, 426 U.S. at 349 (explaining that federal court system is an impractical forum for resolving accidental disclosures); *NASA*, 131 S. Ct. at 768 (Scalia, J., dissenting) (expressing a concern for the ability of the courts to handle the flood of litigation that will occur if the Court recognizes a general constitutional right to privacy). Further, Congress is better equipped than the federal court system to amend the requirements imposed on healthcare providers and respond to changes in healthcare. State legislatures, HHS, and Congress have proven themselves well-equipped to address the importance of health information privacy.

Additionally, a constitutional requirement to protect health information would unduly burden municipalities acting as a healthcare provider. In this case, the government was not acting in its official capacity to interfere into the private lives of individuals. Rather, Respondent used its resources to fill a gap in healthcare in its community. In this context, Respondent acted in the same manner as private hospitals or physician offices, and not as the government. *NASA*, 131 S. Ct. at 757 (explaining that NASA permissibly collected background information because it was merely acting as a private employer would, and thus, its status as a government entity was immaterial). Finding that a constitutional duty exists to protect health information would unfairly burden government providers over private providers by adding another system of redress on top of HIPAA and state law.

Government providers play an important role in filling the gap in available healthcare services. See Leighton Ku, et. al., *Strengthening Primary Care to Bend the Cost Curve: The Expansion of Community Health Centers Through Health Reform*, RCHN Community Health Foundation (June 30, 2010); see also Illinois Counties Code, 55 ILCS 5/5-37002 (1990). If faced with increasing litigation costs due to § 1983 claims, like that of Petitioner, many municipalities would have fewer resources to devote to patient care, which could result in a reduction of providers or number of patients treated. The country currently faces a provider shortage that is only expected to grow. *Recent Studies and Reports on Physician Shortages in US,* Center for Workforce Studies, Association of American Medical Colleges (Aug. 2011). Therefore, this Court should support and encourage government entities

providing healthcare, rather than burden them with a constitutional right for which there is little support in the history of substantive due process cases.

III. THE TWELFTH CIRCUIT CORRECTLY HELD THAT RESPONDENT'S UNINTENTIONAL DISCLOSURE OF MEDICAL INFORMATION DID NOT VIOLATE PETITIONER'S SUBSTANTIVE DUE PROCESS RIGHTS.

Even if this Court finds that Petitioner has a constitutional interest in the confidentiality of her medical records, her claim can only succeed if this Court also finds that Respondent's conduct was "egregious" enough to violate the Due Process Clause. *Collins*, 503 U.S. at 129. Substantive due process bars arbitrary government actions. *Daniels*, 474 U.S. at 331. However, executive action is only arbitrary when it "shocks the conscience," thereby violating the "decencies of civilized conduct." *Cnty. of Sacramento v. Lewis*, 523 U.S. 833, 846 (1998) (quoting *Rochin v. California*, 342 U.S. 165, 172–73 (1952)). Without malice, or intent to harm, the accidental disclosure of medical information that was voluntarily given to a healthcare provider cannot shock the conscience of a civilized society. *O'Connor v. Pierson*, 426 F.3d 187, 202–03 (2d Cir. 2005). Even if this Court decides that malice is not required, executive conduct must be at least deliberately indifferent to the rights of citizens in order to violate the Due Process Clause, and Daly's actions do not meet this standard. See *Daniels*, 474 U.S. at 328. Further, this Court has repeatedly warned against turning substantive due process into a "font of tort law," and finding that inadequate data-security measures can violate the Constitution would do just that. *Id.* at 332 (citing *Paul*, 424 U.S. at 701). Therefore, Daly did not

violate Petitioner's constitutional rights, and the Twelfth Circuit properly granted Daly's motion for summary judgment.

A. Without Malice, Accidental Disclosure of Medical Records Voluntarily Given to the Government Cannot Violate Substantive Due Process.

Substantive due process limits what the government may do in both its legislative and executive capacities, but for executive conduct, only the most "egregious" official conduct is "arbitrary in the constitutional sense." See *Lewis*, 523 U.S. at 846 (explaining that a government official's conduct is less likely to violate the Constitution than a legislative decision). As a limit, this Court stated that negligently inflicted harm is categorically beneath the threshold of constitutional due process. *Id.* at 849 (citing *Daniels*, 474 U.S. at 328). Conversely, this Court found that government action that intentionally injured a party would most likely rise to a conscience-shocking level. *Id.* However, when the government official acted with more than negligence but less than malice, substantive due process is only violated in limited circumstances. *Id.*

This Court recognized only one situation where culpability of less than malice violated an individual's substantive due process, and that involved the government's affirmative deprivation of a prisoner's liberty. See *id.* (explaining that deliberate indifference by a prison guard violates the substantive due process rights of a prisoner) (citing *Whitley v. Albers,* 475 U.S. 312, 320 (1986)). When patients voluntarily report medical information to municipal health clinics, the government has not forcibly restricted their life, liberty, or property, meaning no special relationship exists between the State and the individual. When an individual has no

special relationship with a government official, malice must be established before finding a violation of the Due Process Clause. *O'Connor*, 426 F.3d at 202–03. Additionally, in instances where the government has not forced individuals to act, thereby not implicating their individual rights, allowing conduct with anything less than malice to violate the Fourteenth Amendment would replace substantive due process with tort law, something this Court refuses to allow. *Paul*, 424 U.S. at 701.

1. When a Government Official Owes No Special Duty of Care to an Individual, Only Acting with Malice Will Violate Substantive Due Process Rights.

While malice is generally required for an executive action to violate substantive due process, this Court found that deliberate indifference may be sufficient where the government official had some special power over the individual, thereby implicating other constitutional rights in addition to substantive due process. See *Lewis*, 523 U.S. at 848. (differentiating a police officer's high speed chase that killed a bystander from a prison guard's inadequate medical treatment of an inmate because the State affirmatively acted to restrain the prisoner, making him unable to care for himself, while the bystander's constitutional rights were not impaired). Where the government takes no affirmative steps to impair the constitutional rights of citizens, any unintentional harm it causes cannot violate substantive due process rights.

When a government official owes no special duty of care to an individual, the disclosure of personal medical information does not violate the Constitution unless the official acted with intent to harm. *O'Connor*, 426 F.3d at 203. In *O'Connor*, a

public school placed a teacher on sick leave due to his failure to release his past medical records. *Id.* at 193–94. The court found that this conduct could "shock the conscience" only if by requesting the medical records, the school board intended to harm the school teacher. *Id.* at 203. If the board was merely careless or deliberately indifferent to the privacy rights guaranteed to the school teacher, the conduct did not violate his substantive due process rights. *Id.* For the violation of one's informational privacy rights to shock the conscience, intent to harm is required, and nothing short of this level of culpability can lead to liability. *Id.* at 204.

Alternatively, when the government owes an individual a special duty of care, conduct that did not intentionally harm an individual can violate substantive due process. *Youngberg v. Romeo*, 457 U.S. 307, 312 (1982). In *Youngberg*, a mentally disabled man involuntarily committed to a state mental institution repeatedly injured himself while in the care of the state, and his mother filed an action seeking damages under § 1983 for an alleged violation of the Fourteenth Amendment. *Id.* at 309. The trial court instructed the jury that only if the defendants were deliberately indifferent to the medical needs of the patient could they have violated the Due Process Clause of the Fourteenth Amendment. *Id.* at 312. This Court explained that because the State already restrained the patient against his will, culpability of less than malice could lead to a substantive due process violation. *Id.* at 325. Otherwise, intent to harm must be found before liability can attach. *Id.*

In fact, even in cases where the government merely threatens to disclose private information, a court still required that the government official acted with malice in order to find a violation of the Due Process Clause. See *Sterling v. Borough of Minersville,* 232 F.3d 190 (3d Cir. 2000) (holding that a police officer's threat to disclose that the decedent was a homosexual was sufficiently egregious to violate the Due Process Clause). Implicit in any threat is that the actor actually intends to harm the other party, because without any intent to harm, a threat would have no impact at all. The court's holding had the practical effect of limiting, not expanding, the scope of substantive due process rights. Without malice in the government actor, no substantive due process violation can be found.

While the Ninth Circuit Court of Appeals found that executive action without malice could violate an individual's substantive due process rights, the court focused on violations beyond just the disclosure of private information. See *Marsh v. Cnty. of San Diego*, 680 F.3d 1148, 1154 (9th Cir. 2012) (holding that a prosecutor's disclosure of a child's autopsy images violated the well-established substantive due process right to family integrity). The Ninth Circuit correctly found a substantive due process violation without first requiring malice because the prosecutor infringed on the mother's substantive due process rights to familial integrity. *Id.* at 1154–55. However, had there not been an infringement of a secondary constitutional right in *Marsh*, the court could not have found a violation of the Due Process Clause.

2. When Petitioner Voluntarily Gave Her Medical Information to Respondent, the Unintentional Disclosure of Medical Records Did Not Violate the Due Process Clause Because Respondent Owed No Special Duty of Care.

Similar to the defendants in *Lewis* and *O'Connor*, Respondent in this case owed no special duty of care to Petitioner. Unlike the prison guards described in *Lewis*, who could be liable for being deliberately indifferent to their prisoners' medical needs, Daly in this case owed no special duty of care to Petitioner because he did not infringe upon any other constitutionally protected right. And, unlike in *Whalen*, where this Court discussed the importance of governmental security measures relating to patient medical records, the government actor in this case did not forcibly take private medical information from citizens. See *Whalen*, 429 U.S. at 600–02 (holding that the State could only require citizens to disclose private medical information when the State provided adequate security against accidental public disclosure). Instead, the Clinics merely obtained this medical information through its ongoing, gratuitous function as a healthcare provider. The Clinics did not restrain the Petitioner or her property in any way, nor did the Clinics require the Petitioner to disclose private information. (R. at 2–3.) Therefore, any unintentional violation of Petitioner's potential right to privacy did not violate the Fourteenth Amendment.

In both this Court and the Second Circuit Court of Appeals, cases involving alleged violations of substantive due process have hinged on the specific circumstances in each case because "[d]eliberate indifference that shocks in one environment may not be so patently egregious in another . . ." *Lewis*, 523 U.S. at

850; *Benzman v. Whitman*, 523 F.3d 119, 127 (2d Cir. 2008) (holding that without malice, government officials' conduct could not have violated the Due Process Clause when the official had no constitutionally special relationship to the individuals). Conduct in one situation may "shock the conscience," but in others, where the government official was in no special relationship with the individual, a higher level of culpability is required. *Lewis*, 523 U.S. at 834.

Additionally, incidental conditions or regulations on individuals do not create special relationship that would lower the required level of culpability below malice. See *Walton v. Alexander*, 44 F.3d 1297, 1300–01 (5th Cir. 1995) (stating that malice was required because no special relationship existed between the State and a public school student, even though the student lost some freedom due to the school's behavior restrictions); *de Jesus Benavides v. Santos*, 883 F.2d 385, 387–88 (5th Cir. 1989) (noting that no special relationship existed between corrections officers injured by inmates during an escape attempt because officers were voluntarily employed by the state); *Upsher v. Grosse Pointe Pub. Sch. Sys.*, 285 F.3d 448, 453 (6th Cir. 2002) (finding that, in the public-employment context, the employer's deliberately indifference did not constitute a violation of substantive due process). Only when a state, by an affirmative exercise of its power, has custody over an individual involuntarily does a special relation exist. *Walton*, 444 F.3d at 1303. Respondent in this case did not exercise any affirmative governmental power over Petitioner. Because Petitioner voluntarily gave her medical information to the Clinics, no special relationship existed between the two parties. (R. at 2.) While the

Clinics did maintain patient medical records, thereby having a minor connection to the Petitioner, Respondent never used its state powers to forcibly interfere with Petitioner's rights. Without a special relationship between the Respondent and Petitioner, Daly's actions did not violate the Due Process Clause.

Further, even when a government official owes a special duty of care to an individual, the conduct at issue must be directly related to that special relationship in order for an official's deliberate indifference to violate the Due Process Clause. *Whitley*, 475 U.S. at 326–27. In *Whitley*, this Court held that a guard who shot a prisoner in his leg did not violate the Due Process Clause because the guard acted in good faith to quell the prison riot. *Id.* at 320. Even though the State was infringing on the plaintiff's liberty interests by imprisoning him, the guard's actions were not directly related to that special relationship. *Id.* Courts narrowly apply the special duty requirement, and thus, almost always require malice before finding a substantive due process violation. *Id.* Just as the prison guard in *Whitley* took necessary steps to end a prison riot, Daly in this case took necessary steps to ensure that the SpaceMed program remained accessible to staff at all time. (R. at 12.) Any deliberate indifference by Daly was directly related to his need to protect the stability of SpaceMed. Therefore, Daly's conduct did not violate Petitioner's substantive due process rights.

While Judge Decker, in his dissent from the Twelfth Circuit's majority opinion, argued that this Court in *Whalen* envisioned a standard lower than malice when government officials disclose private medical information, he failed to

differentiate how the State in *Whalen* received the data from how Respondent in this case received the data. See (R. at 20.) (stating that *Whalen* "recognized an affirmative duty on the government's part to provide security for personal information in the government's possession"). While this Court in *Whalen* discussed the importance of the State's security plans, it did this only because the State was infringing on its citizen's rights by requiring them to disclose medical information. *Whalen*, 429 U.S. at 605. Because the government infringed on its citizens' rights by forcefully taking their private information, a lower level of culpability could have violated the Due Process Clause. But, where the Clinics did not force individuals to disclose their personal information, malice is required for any constitutional violation because the government did not interfere with the patients' right to be let alone. Where no secondary constitutional right is implicated, the Constitution only prohibits government action which intentionally harms an individual.

In this case, Daly never acted with any intent to harm the Petitioner. Respondent has never alleged intent, and there is no evidence to support it. Daly did not release the files of someone he disliked, nor did he disclose the medical records of any individual person. (R. at 3, 4.) Instead, the hackers accessed all of the files in SpaceMed, making it clear that these were general failures of the program's security measures. (R. at 4.) While Daly was arguably careless in determining an appropriate password, failure to act reasonably does not "shock the conscience" for purposes of constitutional law. *Lewis*, 523 U.S. at 855 ("Regardless whether [defendant's] behavior offended the reasonableness held up by tort law or the

balance struck in law enforcement's own codes of sound practice, it does not shock the conscience.").

When an individual voluntarily gives private medical information to the state, only conduct that intentionally harmed that individual violates the Due Process Clause. Without malice, Daly's good faith precludes any violation because no secondary right was previously implicated by the government actor. While imprisoning citizens or requiring that they disclose private medical information may lower the level of culpability under the Due Process Clause, when neither of these factors is present, intent is required. Because Daly did not intend to disclose any medical information, the Petitioner's substantive due process rights were not violated.

3. Without Requiring Malice, Issues of Causation and Duty Would Transform the Due Process Clause into a Font of Tort Law.

Beyond the discussion of culpability in *Lewis*, this Court also explained that the Constitution cannot be used to supplant traditional tort law in regulating liability for injuries between two parties. *Lewis*, 523 U.S. at 848 (citing *Daniels*, 474 U.S. at 332). However, this is best left to state tort law, not to constitutional governance. *Lewis*, 523 U.S. at 864 (Scalia, J., concurring). Additionally, several Circuit Courts of Appeal have expressly limited substantive due process claims to situations where no state remedies are available. See, e.g., *Waybright v. Frederick Cnty.,* 528 F.3d 199, 204–06 (4th Cir. 2008) (dismissing a substantive due process claim where state tort law allowed parents to recover when their son died in a fireman training class that was too strenuous); *Moore v. Willis Indep. Sch. Dist.*,

233 F.3d 871, 874–75 (5th Cir. 2000) (stating that injuries from excessive corporal punishment do not give rise to substantive due process claims if adequate state remedies exist to redress the harm); *Dacosta v. Nwachukwa*, 304 F.3d 1045, 1048–49 (11th Cir. 2002) (finding that battery did not shock the conscience because state tort law provides remedies for such conduct). The unauthorized disclosure of nonpublic medical information is an independent tort, best handled by state law. See *Biddle v. Warren Gen. Hosp.,* 715 N.E.2d 518, 523 (Ohio 1999) (recognizing the independent tort of unauthorized disclosure of confidential medical information after finding that at least 11 other jurisdictions already adopted it). Requiring malice for substantive due process claims prevents individuals from using constitutional law to bring claims best left to state tort law.

In *Lewis*, this Court explained that the constitutional concept of "shocks the conscience" does not follow in any traditional category of common law fault. *Lewis*, 523 U.S. at 848. If a level of culpability below malice can generally lead to a constitutional violation, the Fourteenth Amendment will be implicated in all potential tort claims. Allowing any level of culpability below malice would federalize tort law, superimposing itself upon the individual laws of the states. *Id.* at 863–64 (Scalia, J., concurring). The Constitution deals with concerns of government actions against individuals; it does not supplant tort law to regulate how individuals act in society. *Id.* The Due Process Clause does not make every tort committed by a state actor a constitutional violation. *Id.* (citing *Deshaney*, 489 U.S. at 202). Requiring malice for constitutional violations, unless the government actor is simultaneously

impacting other rights, prevents substantive due process from encroaching on tort law. *Id.* at 848 (majority opinion).

Several U.S. Circuit Courts of Appeal refuse to recognize substantive due process violations when state remedies may be available. See Rosalie Berger Levinson, *Time to Bury the Shocks the Conscience Test*, 13 Chap. L. Rev. 307, 322 (2010) (discussing cases where courts have dismissed substantive due process claims where state remedies were available). For example, the Fourth Circuit dismissed a § 1983 substantive due process claim that overlapped with state tort law, citing available state law remedies as a better way for the plaintiff to proceed. *Waybright* 528 F.3d at 204–06 (4th Cir. 2008). Additionally, the Seventh Circuit held that when a substantive due process claim involves merely property damage, the plaintiff must show the inadequacy of state law remedies before recovering on the due process claim. See *Lee v. City of Chi.*, 330 F.3d 456, 467 (7th Cir. 2003) (finding that where a city impounds a car and partially destroys it, the plaintiff could assert a violation under the Fourteenth Amendment only after establishing that state-law remedies were unavailable).

In this case, the dissent by Judge Decker continually argues for a lower level of culpability while using tort law concepts to find liability. For example, Judge Decker repeatedly discussed the affirmative *duty* owed by the government once it has possession of private medical information. (R. at 20, 21.) Additionally, Judge Decker discussed whether Daly ever took an actual action, because, as the majority opinion points out, the hackers were the parties that caused the real damage. (R. at

16, 18). But, looking at whether the hacker caused the harm, or whether Daly's password caused the harm, implicitly requires a discussion of causation. Whether a court should consider proximate causation, intervening causes, or proportional liability, all depends on questions of tort law. As Justice Scalia explained in *Lewis*, these may be interesting questions of tort law, but deciding them based on constitutional law is inappropriate. *Lewis*, 523 U.S. at 864 (Scalia, J., concurring); see also *Town of Castle Rock, Colo. v. Gonzales,* 545 U.S. 748, 761, 768 (2005) (stating that evaluating a party's duty to act under the Fourteenth Amendment would impermissibly convert the Constitution into a font of tort law) (citing *Paul,* 424 U.S. at 701).

Allowing anything less than malice to implicate the Due Process Clause in situations other than where the government is already infringing other constitutional rights would transform the Fourteenth Amendment into federal tort law. This Court requires extreme levels of culpability in these types of cases precisely to avoid implicating tort law considerations in constitutional questions. Daly did not intentionally disclose any information to anyone. Additionally, Daly did not infringe upon any other constitutional right of the Petitioner. With no deprivation of a constitutional right, and with no malice on behalf of Daly, there was no violation of the Due Process Clause. Therefore, the Twelfth Circuit properly granted Respondent's motion for summary judgment.

B. Even if Deliberate Indifference to Voluntarily Obtained Medical Records Constitutes a Violation of the Due Process Clause, Respondent was Not Deliberately Indifferent to Petitioner's Substantive Due Process Rights.

Even if malice is not required in this situation, Petitioner must establish that Respondent was at least deliberately indifferent, or reckless, because negligent actions cannot violate the Due Process Clause. *Daniels*, 474 U.S. at 332 (holding that a prison guard who negligently left a pillow on jail stairs which caused a prisoner to slip and fall could not constitute a substantive due process violation). While legislative conduct may receive less deference, executive action only "shocks the conscience" when the government official acted without any competing concerns or against the training he was required to follow. When officials act quickly to favor certain needs over others, good faith precludes a finding of deliberate indifference or recklessness. Respondent in this case acted in good faith to ensure that SpaceMed was stable and accessible to the doctors who relied upon it, and he was never deliberately indifferent to patients' rights.

1. Executive Action Rarely Violates the Due Process Clause Because It Requires Significant Flexibility and Must be Viewed in Context with All of the Surrounding Facts.

Even if this Court chooses to apply a standard lower than malice to this case, Daly's actions do not rise to the level of deliberate indifference or recklessness. Deliberate indifference requires the actor to have actual, subjective appreciation of an excessive risk of harm. *Schieber v. City of Phila.*, 320 F.3d 409, 418 (3d Cir. 2003) (citing *Farmer v. Brennan,* 511 U.S. 825, 837 (1994)). An analysis of all the circumstances must be conducted before evaluating the conduct on which the

complaint is based because a government official can be deliberately indifferent only when actual deliberation was practical. *Lewis*, 523 U.S. at 850 ("Deliberate indifference that shocks in one environment may not be so patently egregious in another . . . "); *Schieber*, 320 F.3d at 418 (*citing Whitley*, 475 U.S. at 320). Considering all the circumstances relating to the accidental disclosure of the private information in this case, Respondent was not deliberately indifferent to the safety of Petitioner's medical records.

When government officials make difficult choices in the line of duty, courts must look to the circumstances surrounding the actions at the time they were made, not with the perfect vision that hindsight creates. *Schieber*, 320 F.3d at 421. The defendant police officers in *Schieber* chose not to break down the decedent's door after her neighbor reported hearing screams because they saw no signs of forced entry and did not want to illegally enter private property. *Id.* at 420. While in hindsight the officers may have been guilty of negligently failing to protect the victim from danger, the officers were not deliberately indifferent to the victim's constitutional rights because they acted with competing interests—the interest in ensuring safety against the right to be free from warrantless entry by government officials. *Id.* at 421. Additionally, the court explained that a government official is only deliberately indifferent after consciously disregarding a substantial risk of a significant harm. *Id.* at 423. The police officers appreciated that there was some level of risk, but a single report of a scream from a house was unreliable to ignore.

Therefore, the police officers did not violate the decedent's substantive due process rights. *Id.* at 424.

In the case at hand, the risk of substantial harm before the first hacking incident was small because the system had only been in place for twelve days. (R. at 3.) And, after that, while Daly would have been on notice of the danger of password-guessing attacks, such an attack is completely different from the harm that actually occurred because the second hacker used a brute-force attack. (R. at 11.) In hindsight, it may be clear that a password of "11111" could easily be hacked into, or that the default password would be uncovered after only twelve days in operation. But, at the time of Daly's actions, he had no conscious understanding of any substantial risk of improper access to the medical records. Therefore, his conduct was not deliberately indifferent to the patients' medical information.

Additionally, when a government official fails to address a danger, that inaction cannot constitute deliberate indifference when the official owes no special duty of care. See *Estate of Phillips v. District of Columbia*, 455 F.3d 397, 403 (D.C. Cir. 2006) (holding that because the Constitution does not require a public employer to protect employees from inherent job-related risks, a firefighter who died in a fire due to a failure to provide adequate training could not assert a substantive due process claim). In *Phillips*, the court determined that even though the inadequate training had previously led to a firefighter's death, the lack of subsequent training did not constitute deliberate indifference because the public employment context did not create any special relationship between the two parties. *Id.* at 405. Deliberate

indifference requires more than mere inaction by government officials. *Id.* In this case, the failure to replace the administrator password with a adequately secure password after the hacker's first breach of the security system cannot establish deliberate indifference on its own. Failing to prevent a hacker from using a sophisticated brute-force attack is not deliberate indifference. Just as the officer's failure to investigate in *Schieber* was not sufficient to violate substantive due process, Daly's inaction cannot constitute a violation of Petitioner's substantive due process rights.

However, only where executive actions that were planned for several months and included a clear substantial risk of harm can constitute a violation of substantive due process. *Brown v. Nationsbank Corp.*, 188 F.3d 579, 591 (5th Cir. 1999). In *Brown*, FBI agents planned an elaborate sting operation for several months, and the operation itself lasted almost two years and involved thousands of man hours while also causing significant physical and psychological harm to individuals who were the not the target of the operation. *Id.* at 583–84, 591. Because the FBI agents had the luxury of making unhurried judgments without the complicated pulls of competing obligations, combined with the substantial risk of danger created by their repeated affirmative actions, the court found that the individuals' injuries arose from the agents' deliberate indifference. *Id.* at 591.

Daly instructed all physicians and staff to create strong passwords, and merely failed to change his own password in the first twelve days that the system was in use. (R. at 3.) Additionally, when he learned of the security breach, Daly

changed his password. (R. at 3.) While Daly's new password was not very strong, this was the only affirmative act that he took. In fact, before the first hacking incident, Daly took no action at all, as the password in place was the default password. (R. at 3.) Daly did not plan his password-setting action for months. Instead, setting the password was merely one action that Daly took over the course of several months. (R. at 3.) Therefore, Daly was not deliberately indifferent to any substantial risk of harm, meaning he did not violate the Due Process Clause.

2. Respondent Was Concerned With the Accessibility and Stability of the SpaceMed Program, and, Therefore, It Did Not Violate Petitioner's Substantive Due Process Rights.

In addition to ensuring that executives have sufficient flexibility to conduct their duties, courts must recognize that government officials often have competing interests. See *Lewis*, 523 U.S. at 853 (noting executive officers' actions are less likely to violate individuals' substantive due process rights when the officers' decisions are complicated by the pulls of competing obligations). When the government official had competing concerns or had to act quickly, good faith actions are not deliberately indifferent. *Benzman*, 523 F.3d at 127–28. Even if an official's action results in some harm, if the official acted with respect to competing interests, then he was not deliberately indifferent to that resulting harm. *Id.* at 126–27 (citing *Lewis*, 523 U.S. at 848 n. 8). In *Benzman*, the Second Circuit found that the EPA Administrator was not deliberately indifferent to the health dangers from pollution when she told residents to return to their homes after the 9/11 attacks before she knew whether the air quality was safe. *Id.* at 123. Even though the Administrator

had several weeks to make her recommendation about air quality, she was not deliberately indifferent because she considered several competing options. *Id.* The Administrator acted to reassure a panicked public in a time of great national tragedy. *Id.* Even if the defendant incorrectly stated that the air quality was safe which caused harm in the residents, her actions were not deliberately indifferent. *Id.* Accordingly, the court held that the residents had no claim under the Due Process Clause. *Id.*

Similarly, Daly had several competing interests when he oversaw the SpaceMed program. First, Daly focused on ensuring that doctors and staff had access to the system whenever they needed it. (R. at 12.) This is perhaps the most important function of any online medical information system, as without it, important care may be delayed or denied entirely. Second, Daly needed to ensure that others in the IT department had access to the administrator account so they could monitor and protect the stability of the system. (R. at 4.) Choosing a complicated password could harm both of these interests, as the other IT employees would be less able to monitor the system to prevent problems from arising.

Additionally, adding other security measures, such as locking accounts after several successive incorrect passwords are entered, makes a computer system vulnerable to "denial of service" attacks. (R. at 12.) This too would dramatically impede the goals of the SpaceMed program, as that would make important medical information completely unavailable to the doctors who need it most. Daly's choice may have ultimately caused harm to Petitioner. But, because he weighed various

interests and acted with a good faith attempt to protect the information systems, he was not deliberately indifferent to the risk of improper disclosure of medical records. Just as the potentially damaging judgment by the Administrator in *Benzman* did not constitute deliberate indifference when she acted in consideration of competing interests, Daly acted while considering competing obligations. Therefore, Daly did not violate Petitioner's substantive due process rights.

C. The Due Process Clause Does Not Determine Whether the Password to an Electronic Medical Record Program is Sufficiently Secure.

Using the Fourteenth Amendment to establish liability for improperly setting a password would set a dangerous new precedent that this Court has repeatedly warned against. This Court limited substantive due process violations to prevent the Constitution from being applied subjectively by unelected judges. *Lewis*, 523 U.S. at 861 (Scalia, J., concurring) (citing *Washington*, 521 U.S. at 721). Additionally, Congress has acted several times to limit liability in circumstances involving accidental disclosure of private information by government workers. See HIPAA, 42 U.S.C. § 1320d-1320d-9.t (HIPAA provides no private right of action for violations); *F.A.A. v. Cooper*, 132 S. Ct. 1441, 1446 (2012) (noting that the Privacy Act of 1974, which sets requirements for management of confidential records held by Executive Branch agencies, only allows for damages when disclosure of private information was "intentional or willful").

The intricacies of computer security are best left to elected legislators who can weigh the competing concerns of all uses. Finding that the Constitution demands a minimum level of security for computer systems will allow almost any

decision by government employees to be challenged as a violation of the Due Process Clause, thereby opening the courts to endless litigation focused on the subjective preferences of judges. If Daly had instead made his password "11112" or "password!", would that have precluded him from being liable under the Due Process Clause? Courts are certainly capable of deciding these types of close calls, but it makes little sense to demand that they apply the Constitution to determine the outcome. Instead, concepts of tort law or statutes are most appropriate to determine when an accidental disclosure of personal medical information caused by hackers should lead to liability.

Beyond the impracticalities of applying the Constitution to determine what computer passwords are sufficiently secure, scholars warn against considering any one security measure completely impenetrable. See Ashoke S. Talukdar, *Electronic Signatures in E-Healthcare: The Need for A Federal Standard*, 18 J.L. & Health 95, 113 (2003) (discussing that most security systems suffer from serious security problems, including infiltration from keystroke monitoring, social engineering, man-in-the-middle attacks, network monitoring, and brute-force attacks). Given the threats that computer systems inevitably face, it makes little sense to find that a slightly more secure password would have been permissible under the Due Process Clause while "11111" was constitutionally prohibited. Daly focused his efforts on stability and maintenance of the medical records database to ensure doctors and patients alike would benefit from portable medical documents. With both the President of the United States and Congress acting to encourage electronic medical

records, it is clear that these intentions were commendable. While Daly failed to choose the best password possible, he also failed to deliberately act or intentionally cause any harm. Therefore, Daly did not violate the Due Process Clause of the Fourteenth Amendment.

CONCLUSION

For the foregoing reasons, Respondent respectfully requests that this Court 1) reverse the Twelfth Circuit Court of Appeals, and find there is no constitutional right of confidentiality in patient medical information, and 2) affirm the Twelfth Circuit Court of Appeals, and find the accidental disclosure of patient medical records does not violate the Due Process Clause.

Respectfully Submitted,

Team 2123
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APPENDIX A
Due Process Clause of the Fourteenth Amendment
United States Constitution

U.S. Const. amend. XIV, § 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

APPENDIX B
UNITED STATES CODE, SECTION 1983

42 U.S.C. § 1983 (2012)

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.