No. _____

In the
Supreme Court of the United States

SCOTT COUNTY, TENNESSEE,
Petitioner,
v.
TAMMY BRAWNER,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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February 28, 2022

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QUESTION PRESENTED

Whether this Court should apply the subjective test for deliberate indifference set forth in *Farmer v. Brennan* to claims by pretrial detainees of inadequate medical care where the application of the solely objective standard in *Kingsley v. Hendrickson* to these claims fails to consider the difference between action and inaction, results in the constitutionalization of medical malpractice, and creates the only situation in which a person can be held personally liable for violating the constitutional rights of another without committing any intentional act.

PARTIES TO THE PROCEEDING

Pursuant to Rule 14.2(b), the following list identifies all of the parties appearing here and before the United States Court of Appeals for the Sixth Circuit:

Scott County, Tennessee, Petitioner on review, was Defendant-Appellee below.

Tammy Brawner, Respondent on review, was Plaintiff-Appellant below.

No nongovernmental corporations are parties to the present proceedings.

RELATED PROCEEDINGS

This case arises from the following proceedings:

United States Court of Appeals for the Sixth Circuit: *Brawner v. Scott Cty., Tennessee*, Case No. 19-5623, decided September 22, 2021, reported at 14 F.4th 585 (6th Cir. 2021)

United States District Court for the Eastern District of Tennessee, Northern Division: *Brawner v. Scott Cty., Tennessee*, Case No. 3:17-CV-00108-JRG-HBG, decided May 21, 2019, unreported but available at 2019 WL 2195234 (E.D. Tenn., May 21, 2019).

There are no other proceedings in state or federal trial or appellate courts, or in this Court, directly related to this case within the meaning of this Court's Rule 14.1(b)(iii).

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The opinion of the U.S. Court of Appeals for the Sixth Circuit, dated December 1, 2021, denying petitioner's petition for en banc rehearing, including Judge Readler's dissent from said denial is reported at 18 F.4th 551 and is reproduced at App. 89.

The Order of the U.S. District Court for the Eastern District of Tennessee, Northern Division, dated May 21, 2019, granting defendant-petitioner's motion for judgment as a matter of law is officially reported at 2019 WL 2195234, and is reproduced at App. 53.

STATEMENT OF JURISDICTION

The judgment of the U.S. Court of Appeals for the Sixth Circuit was entered on September 22, 2021. Petition for rehearing en banc was denied on December 1, 2021. This Petition is timely filed pursuant to 28 U.S.C. § 2101(c) and Supreme Court Rule 13.1. Accordingly, this Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution provides in relevant part:

> No State shall * * * deprive any person of life, liberty, or property without due process of law.

U.S. Const. amend XIV.

The Eighth Amendment to the United States Constitution provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

U.S. Const. amend XIII.

42 U.S.C. § 1983, "Section 1983," provides in pertinent part as follows:

> 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. 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.

INTRODUCTION

This case provides this Court with an ideal vehicle to ensure adherence to the Fourteenth Amendment's original meaning, which is not to constitutionalize claims of medical malpractice but to prevent abuses of government authority.

On September 22, 2021, the Sixth Circuit joined the Second, Seventh and Ninth Circuits in departing from the deliberate indifference standard traditionally used in evaluating constitutional claims of inaction in the context of a claim by a pretrial detainee for inadequate medical care. Rather than adhering to the two-pronged objective and subjective evaluation set forth in *Farmer v. Brennan*, 511 U.S. 825, 834 (1994) to evaluate whether a jail official acted deliberately to deprive a pretrial detainee of adequate medical care, the court held that an individual may be held liable for a Fourteenth Amendment constitutional violation merely for failing to act with due care: "'more than negligence but less than subjective intent—something akin to reckless disregard.'" App. 21 (quoting *Castro v. County of Los Angeles*, 833 F.3d 1060, 1071 (9th Cir. 2016 (en banc)).

However, "[t]he guarantee of due process has never been understood to mean that the State must guarantee due care on the part of its officials." *Davidson v. Cannon*, 474 U.S. 344, 348 (1986). To be held individually liable for a constitutional violation, a jail officer must have acted *deliberately* to deprive a person of life, liberty, or property. While deliberateness may be inferred through the use of objectively unreasonable force in keeping with *Kingsley v.*

Hendrickson, 576 U.S. 389 (2015), in the context of an alleged failure to act, a deliberate deprivation can only be shown by subjective evidence, aptly done through the traditional standard of deliberate indifference set forth in *Farmer*. Anything less would result in the unintended constitutionalization of negligence.

This Court's review is necessary to resolve what is now a clear and entrenched 4-4 circuit split on the question presented and determine whether the narrow holding in the excessive force case of *Kingsley*, in which this Court adopted a solely objective standard, should be broadly extended to claims by pretrial detainees for inadequate medical care. In departing from any subjective inquiry, the Second, Sixth, Seventh and Ninth Circuits have failed to consider the differences between cases premised on action, such as excessive force, and those premised on inaction, such as a lack of adequate medical care alleged here. The differences between these types of cases make applying the same standard for both troubling. Without the subjective component of the deliberate indifference evaluation, there is no basis to infer that mere inaction is "punishment," historically the sine qua non of a pretrial detainee's claim. Ultimately, this would create the sole area of the law in which a defendant may be held individually liable for a constitutional violation without any intentional act.

This issue is profoundly important as more than 71,000 "prisoner civil rights" and "prison condition" claims have been appealed since 2008. Federal Judicial Center, *IDB Appeals 2008-present*, https://www.fjc.gov/research/idb/interactive/21/IDB-

appeals-since-2008 (last visited Feb. 15, 2022). Estimates indicate that of that number, up to a quarter of such claims concern medical treatment. However, by misapplying *Kingsley*, which is premised on an action theory, to pretrial detainee deliberate indifference to medical care claims, these Circuits have attempted to "transform[] constitutional prohibitions against punishment into a 'freestanding right to be free from jailhouse medical malpractice;'" App. 92 (quoting *Brawner v. Scott County, Tennessee*, 14 F.4th 585, 610 (Readler, J., concurring in part and dissenting in part); thus reverting back to the specter of "unbounded liability for prison officials." *Farmer*, 511 U.S. at 860 (Thomas, J., concurring in the judgment). Only this Court's intervention will settle this issue.

STATEMENT OF THE CASE

A. Factual Background

Tammy Brawner was taken into custody and detained in the Scott County Jail following the revocation of her bail on June 29, 2016. App. 4. Upon her arrival to the jail, Brawner completed a medical screening where she alleged she was taking the following prescription medications[1]: Suboxone, Clonazepam, Gabapentin, and Escitalopram. *Id.* She also denied having a serious medical condition that required attention and denied having epileptic seizures. *Id.*

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[1] Brawner failed to submit an iota of proof, however, that she ever possessed a prescription for any of the medications listed at the time of the incident, during discovery, or at trial.

On July 7, eight days after her booking, Brawner suffered multiple seizures and was taken to a local hospital where she was diagnosed with epilepsy. App. 5. She was then prescribed Phenobarbital and it was recommended that she see a physician within two days. *Id.* Upon her return to the jail, Brawner was seen by Nurse Massengale, who was instructed by Dr. Capparelli, the jail's doctor, to discontinue the Phenobarbital and administer daily doses of Dilantin instead. *Id*.

Four days later, on July 11, Brawner suffered another seizure in the early morning hours when the nurse was not present. *Id.* A corrections officer called the jail doctor, who directed the officer to record Brawner's vitals and administer Dilantin. *Id*.

On July 12, which was within the state-required fourteen days from intake, Brawner was given a physical by Nurse Massengale. *Id.* During the physical, it was noted that Brawner suffered from a "seizure disorder or cerebral trauma." *Id.* The examination was reviewed and signed off on by the jail physician. App. 5-6.

On July 14, officers observed Brawner exhibiting bizarre behavior, such as drinking water out of the toilet, and acting erratically. App. 6. Believing this behavior could be related to Brawner's history of mental health issues, Nurse Massengale contacted the Mobile Crisis Unit. *Id.* Brawner was evaluated by a licensed social worker who was made aware that the Plaintiff had been suffering from seizures and concluded that Brawner's symptoms were likely due to drug withdrawal. *Id.*

Early the next morning, officers observed Brawner experiencing another seizure, followed by an additional seizure an hour later. *Id.* Following the second seizure, the jail officers took Brawner's blood pressure and pulse and noted that they appeared to be normal. *Id.* The officers gave Brawner her daily dose of Dilantin. *Id.*

Brawner's cellmates reported yet another seizure. *Id.* By this point, Nurse Massengale had arrived at the jail and placed Brawner on a fifteen-minute medical watch. *Id.* Within an hour, Brawner had six more seizures. *Id.* Nurse Massengale called the jail doctor, who instructed her to give Brawner a dose of valproic acid. *Id.* Ultimately, Massengale determined it was necessary to call 911 as Brawner had three more seizures. *Id.* Brawner was taken to the hospital and later transferred to another hospital's intensive care unit. Id.

B. Procedural Background

Brawner sued Scott County, Tennessee[2] under 42 U.S.C. § 1983, alleging violations of her Fourteenth Amendment right to adequate medical care.[3] App. 7. Brawner claimed that she was provided inadequate medical care, and that as a result of prolonged seizure

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[2] Brawner also sued various jail staff, but the parties stipulated to the dismissal of the individual defendants prior to trial. App. 7.

[3] Brawner also sued under an excessive force theory as well as state law claims. However, those were not of great issue on appeal. App. 7.

activity, she suffered permanent and debilitating injuries. *Id.*

Defendant Scott County moved for Judgment as a Matter of Law pursuant to Fed. R. Civ. P. 50(a) at the close of the Plaintiff's proof. *Id.* The district court held that while Brawner's medical need was sufficiently serious to satisfy the objective component of a deliberate indifference claim, she failed to satisfy the subjective component because she failed to show that the staff was actually aware of facts from which an inference could be draw that there was a substantial risk of serious harm and, further, failed to show that any jail staff drew that inference. App. 7-8. The district court therefore concluded that Brawner's medical care claim against the County could not succeed because she had not established that any individual had violated her constitutional rights. App. 8.

A divided Sixth Circuit panel reversed on the deliberate indifference claim. Despite stating that its determination would have been the same under the *Farmer* subjective standard, the panel majority determined that the deliberate indifference standard required alteration in light of this Court's holding in *Kingsley*. App. 12, 21. The panel majority determined that in light of *Kingsley*, the proper standard when evaluating Fourteenth Amendment claims of deliberate indifference should be something "'more than negligence but less than subjective intent—something akin to reckless disregard.'" App. 21.

Judge Readler provided a thorough dissent, explaining that he does "not believe that *Kingsley v. Hendrickson's* excessive force holding abrogates the

subjective standard for deliberate indifference claims brought by pretrial detainees." App. 31. Judge Readler acknowledged that putative intent can typically be inferred with most affirmative acts which amount to excessive force. App. 47. However, he distinguished this from deprivations of adequate medical care, "which often rests on an unwitting failure to act, making one's subjective intent critical in understanding the chain of events." *Id.* Judge Readler went on to note that inquiry into a party's intent as to deliberate indifference claims is necessary because without it, "courts cannot fairly distinguish negligent deprivation of care—which does not give rise to a constitutional claim—from an intentional deprivation of care that amounts to punishment which violates the Fourteenth Amendment." App. 48. Judge Readler concluded by cautioning that the Sixth Circuit's decision is "taking further steps to 'tortify the Fourteenth Amendment,'" which would not be consistent with the meaning and purpose of the Fourteenth Amendment. App. 52.

The Sixth Circuit denied Scott County's motion for rehearing en banc, with Judge Readler once again filing another dissent to the same. App. 89-103. This petition follows.

REASONS FOR GRANTING THE PETITION

I. The Decision Below Solidifies an Acknowledged and Intractable 4-4 Circuit Split on the Standard to Be Applied to Claims by Pretrial Detainees for Inadequate Medical Care.

In the decision below, the Sixth Circuit explicitly acknowledged the deep split within the circuits on the question presented, explaining that "[t]he Second, Seventh and Ninth Circuits have held that *Kingsley* requires modification of the subjective component for pretrial detainees in bringing Fourteenth Amendment deliberate-indifference claims." *See Darnell v. Pineiro,* 849 F.3d 17, 34-35 (2nd Cir. 2017); *Miranda v. County of Lake*, 900 F.3d 335, 352 (7th Cir. 2018); *Gordon v. County of Orange*, 888 F.3d 1118, 1124-25 (9th Cir. 2018). This breaks with the Fifth, Eighth, Tenth and Eleventh Circuits, which have retained the subjective component set forth in *Farmer v. Brennan* for deliberate indifference Fourteenth Amendment claims. App. 14; *see Cope v. Cogdill*, 3 F.4th 198, 207 & n.7 (5th Cir. 2021); *Whitney v. City of St. Louis*, 887 F.3d 857, 860 n.4 (8th Cir. 2018); *Strain v. Regalado*, 977 F.3d 984, 991 (10th Cir. 2020); *Dang by & through Dang v. Sheriff, Seminole Cty.*, 871 F.3d 1272, 1279 n. 2 (11th Cir. 2017). The Fourth Circuit, while acknowledging the split between the circuits, has not ruled on the application of *Kingsley* to a pretrial detainee's claim of inadequate medical care. *Mays v. Sprinkle*, 992 F.3d 295, 302 n.4 (4th Cir. 2021); *Sams v. Armor Corr. Health Servs., Inc.*, No. 3:19-cv-639, 2020 WL 583510 at *19 n. 19 (E.D. Va. Sept. 30, 2020). The case at hand

squarely presents this Court with the question presented and the opportunity to resolve the deep division between the circuits on an issue of such grave constitutional importance.

Here, the court below has acknowledged that the subjective inquiry, while directly applicable to Eighth Amendment claims, has historically been extended to also apply to Fourteenth Amendment deliberate indifference claims brought by pretrial detainees. *Richmond v. Huq*, 885 F.3d 928, 937 (6th Cir. 2018). However, in applying a new objective standard, the Second, Sixth, Seventh and Ninth Circuits have all extended *Kingsley* to disregard the state of mind requirement for medical care claims brought by pretrial detainees.

Specifically, prior to *Kingsley*, the Second Circuit "concluded that the elements for establishing deliberate indifference under the Fourteenth were the same as under the Eight Amendment." *Darnell*, 849 F.3d at 29-30. Yet, following *Kingsley*, it held that "punishment has no place in defining the *mens rea* element of a pretrial detainee's claim under the Due Process Clause." *Id.* at 35. The Second Circuit reasoned that "*Kingsley* held that an officer's appreciation of excessive force against a pretrial detainee in violation of the detainee's due process rights should be viewed objectively" and thus "[t]he same objective analysis should apply to an officer's appreciation of the risks associated with an unlawful condition of confinement in a claim for deliberate indifference under the Fourteenth Amendment." *Id.* The Second Circuit has since used this same reasoning to apply a solely

objective standard to claims of constitutionally inadequate medical care. *See Bruno v. Schenectady*, 727 F. App'x 717 (2nd Cir. 2018); *Charles v. Orange Cty.*, 925 F.3d 73 (2nd Cir. 2019).

Likewise, before this Court's decision in *Kingsley*, the Ninth Circuit "read *Farmer* and *Bell* to create a single 'deliberate indifference' test for plaintiff's who bring a constitutional claim –whether under the Eighth Amendment or the Fourteenth Amendment ...." which included the subjective test articulated in *Farmer*. *Castro*, 833 F.3d at 1068. Afterward, the court held that not only does *Kingsley* mandate an objective evaluation of all condition cases brought by pretrial detainees, *Castro*, 833 F.3d 1060, but also specifically held that "logic dictates" that this purely objective standard is applied medical care cases brought by pretrial detainees, *Gordon*, 888 F.3d at 1124. Following suit, the Seventh Circuit also explained that because "pretrial detainees (unlike convicted prisoners) cannot be punished at all," a purely objective standard must govern their claims. *Miranda v. Cty of Lake*, 900 F.3d 335, 351 (7th Cir. 2018).

However, in maintaining adherence to the traditional test of deliberate indifference, the Fifth, Eighth, Tenth and Eleventh Circuits have held that *Kingsley* only applies to excessive force claims; in the context of a failure to act, pretrial detainees must demonstrate that jail staff subjectively knew of and disregarded a substantial risk of serious harm. *See* App. 14, *Cope v. Cogdill*, 3 F.4th 198, 207 & n.7 (5th Cir. 2021); *Alderson v. Concordia Parish Corr. Facility*, 848 F.3d 415, 419 n.4 (5th Cir. 2015); *Whitney v. City of*

St. Louis, 887 F.3d 857, 860 n.4 (8th Cir. 2018)("*Kingsley* does not control because it was an excessive force case, not a deliberate indifference case); *Briesemeister v. Johnston*, 827 Fed. Appx. 615 at *1 n.2 (8th Cir. 2020); *Strain v. Regalado*, 977 F.3d 984, 991 (10th Cir. 2020); *Dang by & through Dang v. Sheriff, Seminole Cty.*, 871 F.3d 1272, 1279 n. 2 (11th Cir. 2017)(declining to apply a solely objective standard because "*Kingsley* involved an excessive force claim, not a claim of inadequate medical treatment due to deliberate indifference"). As the court concluded in reaching the correct result in *Strain*, the same deliberate indifference standard must be applied no matter which amendment provides the constitutional basis for the claim. *Strain,* 977 F.3d at 989.

Certainly, this case and *Cope v. Cogdill*, 3 F.4th 198 (5th Cir. 2021), presently before this Court on a petition for writ of certiorari, demonstrate a fundamental disagreement between the majority of circuits as to whether the Court's holding in *Kingsley* can be expanded to claims by pretrial detainees for insufficient medical care thereby removing any inquiry into intent on claims based on an inaction theory. Because this split reflects conflicting interpretations of this Court's precedent, only this Court can definitively pronounce which interpretation is correct on an issue of such grave constitutional importance.

II. The Decision Below Failed to Consider the Difference Between Action and Inaction Theories in Evaluating Pretrial Detainee Cases, Adopting a Standard Divorced from Fourteenth Amendment Precedent.

When deciding deliberate indifference cases for pretrial detainees, the circuits have historically applied the same test used for Eighth Amendment cases as set forth in *Farmer v. Brennan*, 511 U.S. 825 (1994). In changing the standard for Fourteenth Amendment pretrial detainees, the Sixth Circuit and concurring circuits failed to appreciate that the subjective component articulated in *Farmer* is essential to determine whether an individual was subjected to punishment under an inaction theory.

A. The Eighth Amendment Standard for deliberate indifference has been correctly extended to Fourteenth Amendment pretrial detainee cases

Persons in custody awaiting trial are afforded protections under the Due Process Clause of the Fourteenth Amendment. *See City of Revere v. Mass. Gen. Hosp.*, 463 U.S. 239, 244 (1983)(quoting *Ingraham v. Wright*, 430 U.S. 651, 671-72 n.40 (1977)). The Due Process Clause provides that "[n]o State shall … deprive any person of life, liberty, or property without due process of law." U.S. Const. amend XIV. As this Court recognized in *DeShaney v. Winnebago Cty. Dept. of Soc. Servs.*, 489 U.S. 189 (1986):

> The Clause is phrased as a limitation of the State's power to act, not as a guarantee of

> certain minimal levels of safety and security. It forbids the State itself to deprive individuals of life, liberty or property without 'due process of law,' but its language cannot fairly be extended to impose an affirmative obligation on the State to ensure that those interests do not come to harm through other means. Nor does history support an expansive reading of the constitutional text.

489 U.S. at 195.

Therefore, when "evaluating the constitutionality of conditions or restrictions of pretrial detention that implicate only the protection against deprivation of liberty without due process of law," the "proper inquiry is whether those conditions amount to a punishment of the detainee." *Bell v. Wolfish* 441 U.S. 520, 535 (1979). That is because, under the Due Process Clause, "a detainee may not be punished prior to an adjudication of guilt in accordance with due process of law." *Id.* Determining whether a restraint or deprivation "imposed during pretrial detention amounts to 'punishment' in the constitutional sense," requires inquiry into whether the restrictions evince a punitive purpose or intent. *Id.* at 538-39; *see also Daniels v. Williams*, 474 U.S. 327, 331 (1986)("Historically, this guarantee of due process has been applied to *deliberate* decisions of government officials to deprive a person of life, liberty, or property.")

The Supreme Court has long explained the meaning of "punitive intent" in the context of Eighth Amendment claims. It is well established that the Eighth Amendment prohibits cruel and unusual

punishments. "The Amendment embodies 'broad and idealistic concepts of dignity, civilized standards, humanity, and decency . . .,' against which we must evaluate penal measures." *Estelle v. Gamble*, 429 U.S. 97, 102 (1976)(internal citations omitted). These principles therefore establish that the government has a duty to provide medical care for those it incarcerates, and thus the "deliberate indifference to serious medical needs of prisoners constitutes the 'unnecessary and wanton infliction of pain,' under the Eighth Amendment." *Id.* at 104.

However, without scrutinizing the "cruelty" or unusualness of the punishment for Eighth Amendment purposes, this Court has made clear that a failure to act is not a punishment at all unless the government official actually knew of a substantial risk and consciously disregarded it. *Farmer*, 511 U.S. at 837-38. When analyzing whether an officer inflicted punishment on a prisoner, the Court therefore looks at whether the deprivation was "sufficiently serious" and that the prison official acted with a "sufficiently culpable state of mind" which here is determined to be "'deliberate indifference' to inmate health or safety." *Farmer*, 511 U.S. at 834.

Given that the Fourteenth Amendment is also analyzing whether an individual has inflicted punishment, *Bell*, 441 U.S. at 535, it is only logical to apply the *Farmer* test to claims by pretrial detainees for inadequate medical care. Ultimately, "[t]his standard follows from the 'intent requirement' implicit in the word 'punishment,' *Wilson v. Seiter*, 501 U.S. 294, 298-300 (1991); the unintentional or accidental

infliction of harm amounts at most to negligence, which is not a due process violation, *Kingsley* 135 S.Ct. at 2472." *Castro v. Cty. of Los Angeles.* 833 F.3d at 1085 (Ikuta, J., dissenting). Therefore, in order to determine if a pretrial detainee was subjected to inadequate medical care, the claim should be evaluated using both the objective and subjective components as set forth in *Farmer*.

B. The subjective component is necessary to properly distinguish claims based on inaction theories versus action theories

In making its determination that the subjective component is no longer applicable in cases by pretrial detainees for allegedly insufficient medical care, the Sixth Circuit, as well as the other circuits who have departed from *Farmer*, fail to consider and appreciate the differences between excessive force and inadequate medical care claims. The former is based on an action theory, while the latter is oftentimes based on inaction, as is the case at hand.

This Court, however, has long appreciated the dichotomy. When adopting the subjective standard in *Farmer*, this Court reiterated that the "'application of the deliberate indifference standard is inappropriate' in one class of prison cases: when 'officials stand accused of using excessive physical force.'" *Farmer*, 511 U.S. at 835 (quoting *Hudson v. McMillian*, 503 U.S. 1, 6-7 (1992)). That is because in those situations actions of prison officials are typically made "'in haste, under pressure, and frequently without the luxury of a second chance.'" *Id.* In other words, when prison officials are taking action, the evaluation of force use, which would

be the basis for the constitutional violation, is not based on deliberate indifference but whether the force was applied maliciously or sadistically for the purpose of causing harm. *Id.* Accordingly, such an evaluation does not require an exploration into the mindset of the person using the force.

This Court applied the same reasoning in *Kingsley*[4] when it found that excessive force cases should be evaluated using a solely objective component. 576 U.S. at 395. Part of the Court's reasoning for this is that the application of excessive force by an officer is most always predicated by an action, a series of physical events in the world such as "the swing of a fist that hits a face, a push that leads to a fall, or the shot of a Taser that leads to the stunning of its recipient." *Id.* The intentional or deliberate use of force is what is required to give rise to a constitutional claim. *Id.* at 396. The evaluation from there is whether the force used was constitutionally speaking, "excessive" or "objectively unreasonable." *Id.* It is unnecessary to determine what the defendant's state of mind as to the interpretation of the force used, because excessive force claims are predicated on a deliberate, affirmative action made by an officer rather than what the officer interpreted the force to be in his or her mind.

Conversely, the case below, like other inadequate medical care claims, is based on inaction, thus making

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[4] It should be noted that the result in *Kingsley* was heavily influenced by precedents analyzing force claims under the Fourth Amendment, which did not consider an officer's subjective intent. *See Kingsley*, 576 U.S. at 379-402; *Graham v. Connor*, 490 U.S. 386, 397 (1989).

an inquiry into the state of mind necessary. *See Bell*, 441 U.S. at 537-39 (explaining that the key question for a pretrial detainee's Fourteenth Amendment claim is whether the situation at issue amounts to punishment of the detainee). While intent can be inferred from affirmative acts that are excessive in relationship to a legitimate government objective, the failure to act does not raise the same inference. *See Farmer*, 511 U.S. at 837-38. Instead, if an individual unknowingly fails "to alleviate a significant risk that he [or she] should have perceived but did not," then that individual is negligent at most because they lack the requisite intent to punish. *Id.* at 838. And, as the Supreme Court has made clear, "liability for negligently inflicted harm is categorically beneath the threshold of constitutional due process." *Kingsley*, 576 U.S. at 396 (citing *Cty. of Sacramento v. Lewis*, 523 U.S. 833, 849 (1998)).

To allow this standard to survive on a purely objective theory would disregard the fact that, unlike excessive force cases, there will likely be no overt act, no one thing that is inherently intentional. Claims of inadequate medical care are premised on situations that can instead last hours, days, or weeks. The subjective component is necessary to truly distinguish whether an officer was more than negligent. These particular types of claims require an inquiry into how that situation was perceived and thus whether any individual defendant deliberately chose not to act to deprive a person of life, liberty or property under the Fourteenth Amendment.

III. By Eliminating the Subjective Component and Constitutionalizing Medical Malpractice, the Decision Below has Created an Issue of Profound Importance

By removing the subjective component from the analysis of a claim for inadequate medical care, the case below, as well as the concurring circuits, has essentially constitutionalized medical negligence in clear disregard for established precedent and the intent of this Court.

This Court has made clear that negligence, even medical negligence, does not state a valid claim for a constitutional violation. *See Estelle v. Gamble*, 429 U.S. 97, 106 (1976) ("Thus, a complaint that a physician has been negligent in diagnosing or treating a medical condition does not state a valid claim of medical mistreatment under the Eighth Amendment."). Accordingly, to be able to distinguish between negligence and a constitutional violation, this Court established the subjective component to examine how a prison official perceived and understood the situation. *See Farmer*, 511 U.S. at 837-38. Under the subjective component, to be deliberately indifferent to an inmate's medical needs, a person must be aware of and disregard an excessive risk of serious harm. *Farmer*, 511 U.S. at 837. Stated differently, when analyzing deliberate indifference to inmate medical needs, the Sixth Circuit earlier explained that:

> [t]he requirement that the official have subjectively perceived a risk of harm and then disregarded it is meant to prevent the constitutionalization of medical malpractice

> claims; thus, a plaintiff alleging deliberate indifference must show more than medical negligence or the misdiagnosis of an aliment. When a prison [official] provides treatment, albeit carelessly or inefficaciously, to a prisoner, he has not displayed a deliberate indifference to a prisoner's needs, but merely a degree of incompetence which does not rise to the level of a constitutional violation. On the other hand, a plaintiff need not show that the official acted for the very purpose of causing harm or with knowledge that harm will result. Instead, deliberate indifference to a substantial risk of serious harm to a prisoner is equivalent to recklessly disregarding that risk.

Comstock v. McCrary, 273 F.3d 693, 703 (6th Cir. 2001) (internal quotations omitted) (internal citations omitted). It is the inquiry into the subjective component that distinguishes a tort from a constitutional violation.

In explaining the differentiation between a tort and a constitutional violation, the *Farmer* Court gave this explanation:

> An act or omission unaccompanied by knowledge of a significant risk of harm might well be something society wishes to discourage, and if harm does result society might well wish to assure compensation. The common law reflects such concerns when it imposes tort liability on a purely objective basis. But an official's failure to alleviate a significant risk that he should have perceived but did not, while no cause for

> commendation, cannot under our cases be condemned as the infliction of punishment.

Id. at 837-38 (internal citations omitted). Thus, by removing the inquiry into what an official perceived, the Sixth and concurring Circuits have essentially transformed "constitutional prohibitions against punishment into a freestanding right to be free from jailhouse medical malpractice." App. 92. This standard shift fails to honor a plain meaning of what its name suggests: "that the conduct must be both 'deliberate,' that is, '[d]one with or marked by full consciousness of the nature and effects,' and 'indifferent,' in other words, uninterested or unconcerned. App. 99.

Importantly, this shift is also a clear deviation from this Court's precedent in *Daniels v. Williams*, 474 U.S. 327 (1986):

> [Our Constitution] does not purport to supplant traditional tort law in laying down rules of conduct to regulate liability for injuries that attend to living together in society. We have previously rejected reasoning that would make of the Fourteenth Amendment a font of tort law to be superimposed upon whatever systems may already be administered by the states.

Id. at 332. That is exactly what the Sixth Circuit has done. Without the subjective component, an individual in custody can now not only bring a state law tort claim for any negligent medical care received while in custody, but can also bring a constitutional claim under essentially the same standard without the

encumbrances of damages caps or limits on attorney's fees.

The Sixth Circuit and those concurring have let a "tender-hearted desire to tortify" the Constitution disregard not only the plain text and history of the Fourteenth Amendment but also the precedent of this Court by abolishing the subjective component necessary to determine intent in the context of a failure to act. *Kingsley*, 576 U.S. at 408 (Scalia, J. dissenting). This issue of serious constitutional importance and a deep and acknowledged split within the circuits is one that only this Court can resolve. With its sole issue being the standard for deliberate indifference to pretrial detainee medical care cases, this case presents this Court with the ideal vehicle render its decision.

CONCLUSION

For the reasons discussed above, the Court should grant certiorari.

Respectfully submitted,

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