165A21 TENTH JUDICIAL DISTRICT

SUPREME COURT OF NORTH CAROLINA
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ROCKY DEWALT, ROBERT PARHAM, ANTHONY MCGEE, and SHAWN BONNETT, individually and on behalf of a class of similarly situated persons, Plaintiff-Appellants, v. ERIK A. HOOKS, in his official capacity as Secretary of the North Carolina Department of Public Safety, and the NORTH CAROLINA DEPARTMENT OF PUBLIC SAFETY, Defendant-Appellees.	)	From Wake County 19 CVS 14089

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BRIEF OF PROFESSORS SHARON DOLOVICH, ALEXANDER A. REINERT, MARGO SCHLANGER, AND JOHN F. STINNEFORD AS *AMICI CURIAE* SUPPORTING PLAINTIFF-APPELLANTS

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BRIEF OF PROFESSORS SHARON DOLOVICH, ALEXANDER A. REINERT, MARGO SCHLANGER, AND JOHN F. STINNEFORD AS *AMICI CURIAE* SUPPORTING PLAINTIFF-APPELLANTS[1]

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[1] No person or entity—other than *amici curiae* and their counsel—directly or indirectly wrote the brief or contributed money for its preparation.

INTRODUCTION AND INTERESTS OF *AMICI CURIAE*

The trial court, on its way to holding that the subjective deliberate indifference standard currently applicable to federal conditions-of-confinement challenges arising under the Eighth Amendment should be adopted wholesale by the North Carolina courts, committed four significant errors. First, it misinterpreted the original meaning of the cruel and unusual punishment clauses. As originalist scholars have documented, objective considerations reigned at common law and at the founding. Second, it failed to account for the modern history of federal Eighth Amendment jurisprudence. The subjective deliberate indifference standard is a relatively recent innovation not long-settled doctrine, and a recent U.S. Supreme Court decision may preview a return to an objective approach. Third, it neglected widespread administrability problems with the subjective deliberate indifference standard. Subjective intent is difficult to ascertain under the best of cases, nearly impossible to divine in the context of systemic challenges, and incentivizes dangerous conduct. Fourth, it apparently mistook the superior objective standard proposed by plaintiffs for a negligence standard that is inapplicable to constitutional claims. But adopting an objective standard would not constitutionalize accidents or negligent conduct.

Amici are professors widely recognized as constitutional law experts. They have published extensively on the laws governing conditions-of-

confinement claims brought in state and federal courts. Through their extensive research, *amici* have concluded that the U.S. Supreme Court erred in adopting a subjective deliberate indifference standard. That doctrinal error has rendered federal law governing conditions-of-confinement claims unworkable and counterproductive. *Amici* respectfully offer their expertise to this Court with the hope that the North Carolina courts will not replicate a significant federal doctrinal error. *Amici* are:

1. Sharon Dolovich is Professor of Law at the UCLA School of Law and founding director of the UCLA Prison Law and Policy Program. She has published widely on prison conditions and the law governing prisoners' rights. Her work has been published by the *Harvard Law Review*, the *New York University Law Review*, and the *Duke Law Journal*, among others.

2. Alexander A. Reinert is the Max Freund Professor of Litigation and Advocacy and the Director of the Center for Rights and Justice at the Benjamin N. Cardozo School of Law. He has published widely on prison conditions and the rights of incarcerated people. His work has been published by the *North Carolina Law Review*, the *Northwestern University Law Review*, the *Stanford Law Review*, the *University of Pennsylvania Law Review*, and the University of *Virginia Law Review*, among others.

3. Margo Schlanger is the Wade H. and Dores M. McCree Collegiate Professor of Law at the University of Michigan. She is the lead author of

Incarceration and the Law, Cases and Materials (West Academic, 10th ed. 2020). Her scholarship frequently addresses the law governing conditions of confinement in civil and criminal detention. Her work has been published by the *Michigan Law Review*, the *Harvard Law Review*, the *Northwestern Law Review*, and the *New York University Law Review*, among others.

4. John F. Stinneford is the Edward Rood Eminent Scholar Chair, Professor of Law at the University of Florida Levin College of Law. He has written extensively on the history of the Eighth Amendment and, in particular, the original meaning of the Cruel and Unusual Punishments Clause. His work has been published in the *Georgetown Law Journal*, the *Northwestern Law Review*, the *Virginia Law Review*, and the *Notre Dame Law Review*, among others. Recently, in interpreting the original meaning of the Eighth Amendment, the U.S. Supreme Court relied upon his work. *See Bucklew v. Precythe*, 139 S. Ct. 1112, 1123 (2019).[2]

[2] The institutional affiliations of *amici curiae* are provided for purposes of identification only.

ARGUMENT

I. A Subjective Intent Standard Is Inconsistent With Both The Original Meaning Of The Cruel And Unusual Punishment Clauses And Recent Federal Jurisprudential Developments.

A subjective deliberate indifference standard cannot be reconciled with the original meaning of the cruel and unusual punishment clauses. It is a recent and misguided innovation—this Court should not reproduce the error.

A. Examining The United States And North Carolina Constitutions Through An Originalist Lens Shows That The Subjective Deliberate Indifference Standard Is Contrary To The Original And Correct Meaning Of The Cruel And Unusual Punishment Clauses.

Both the federal and North Carolina constitutional texts are inconsistent with an "intent-based" or subjective deliberate indifference framework for answering whether conditions of confinement are cruel and unusual punishment. *See*, *e.g.*, Margo Schlanger, *The Constitutional Law of Incarceration, Reconfigured*, 103 Cornell L. Rev. 357, 428 (2018) (collecting originalist scholarship); John F. Stinneford, *The Original Meaning of "Cruel,"* 105 Geo. L.J. 441, 474 (2017) (similar).

Start with the words "cruel and unusual." The phrase "cruell and unusuall punishments" first appeared in the 1689 English Bill of Rights. Stinneford, *The Original Meaning of "Cruel," supra*, at 474; *see also* Alexander A. Reinert, *Eighth Amendment Gaps: Can Conditions of Confinement Litigation Benefit from Proportionality Theory?*, 36 Fordham Urb. L.J. 53, 56

(2009). The historical record contains ample evidence that the very Parliament that drafted the "cruell and unusuall punishments" provision of the English Bill of Rights defined the terms objectively. Stinneford, *The Original Meaning of "Cruel," supra*, at 475-77. Cruel and unusual punishments were those of "unprecedented harshness." *Id*. The subjective intent of the party imposing such punishment was not a consideration. *Id*. William Blackstone's writings likewise indicate an objective focus—the scholar with unsurpassed influence on both sides of the Atlantic defined cruel and unusual punishments by focusing on "cruel effect, not cruel intent." *Id*. at 476-78.

The "cruell and unusuall punishments" clause of the English Bill of Rights was the model for the Virginia Declaration of Rights' prohibition of cruel and unusual punishments in 1776, and later for the Eighth Amendment's Cruel and Unusual Punishments Clause. Stinneford, *The Original Meaning of "Cruel," supra*, at 466; *see also* Reinert, *supra*, at 56. With Parliament and Blackstone as their guides, the "drafters of all [these] provisions considered themselves to be restating a longstanding common law prohibition that was common to both England and the United States." Stinneford, *The Original Meaning of "Cruel," supra*, at 474. When each of these texts was adopted, the phrase "cruel and unusual" was a legal term of art referring to punishment that was "unprecedented[ly] harsh" or "unjustly harsh

in light of longstanding prior practice." *Id.* at 476, 502. Cruel intent was not part of the original meaning of the clause.

Consider the two most prominent founding-era dictionaries, each of which defines "cruel" in two ways. One definition "applied to persons or their dispositions," and another related to the effect or experience of cruelty, including "barbarous" and "causing pain, grief or distress." *Id.* at 467 (*quoting* 1 Noah Webster, An American Dictionary of the English Language (New York, S. Converse 1828)); *see also id.* (noting a substantially similar set of definitions in 1 Samuel Johnson, A Dictionary Of The English Language (London, W. Strahan 1755)). Nearly every originalist scholar to examine the question has concluded that "cruel" was understood by courts at the founding to connote "excessive," "disproportionate," or "unjustly harsh" rather than a reference to the state actor's mindset. *See*, *e.g.*, Stinneford, *The Original Meaning of "Cruel," supra*, at 452-53; Anthony F. Granucci, *"Nor Cruel and Unusual Punishments Inflicted:" The Original Meaning*, 57 Calif. L. Rev. 839, 844-60 (1969). The term "unusual" provides no more reason to look to the intent of a public official. Rather, "unusual" was its own term of art, simply meaning "contrary to long usage." *See Bucklew v. Precythe*, 139 S. Ct. 1112, 1123 (2019) (*citing* John F. Stinneford, *The Original Meaning of "Unusual": The Eighth Amendment as a Bar to Cruel Innovation*, 102 Nw. U. L. Rev. 1739, 1770–71, 1814 (2008)). Mindset was not part of the equation.

Now turn to the word "punishment." Its original meaning is also inconsistent with an intent-based or subjective standard. At the founding, unintended aspects of a criminal sentence were understood as cruel and unusual punishment whenever they "significantly enhance[d] the risk of severe harm, as compared to longstanding prior practice." Stinneford, *The Original Meaning of "Cruel," supra*, at 502. Subjective intent was not a component of the analysis. The eighteenth-century case *Jones v. Commonwealth* is illustrative. 5 Va. (1 Call) 555, 557-58 (1799). In *Jones*, a Virginia court held that a joint fine—imposed on three criminal defendants convicted and sentenced in unison—was cruel and unusual punishment because the joint nature of the fine created a risk that the burden on any given defendant could be enhanced by the failure of the other defendants to pay. *Id.* The court explained that "the makers of the constitution . . . contemplated, that no addition, under any pretext whatever was to be imposed, upon the offender, beyond the real measure of his own offence." *Id.* at 558. This was the case even though the potential harm would not be the result of any culpable intent of government officials.

Considering this history, it is little surprise that "[r]esearch has revealed no instance" at the founding "in which anyone claimed that the cruel intent of the punisher was part of the criteria for determining whether a punishment was cruel and unusual." Stinneford, *The Original Meaning of "Cruel," supra*,

at 464. In the context of adjudicating conditions claims, subjective intent is unnecessary—well-intentioned people may run unconstitutional prisons just as surely as those with a cruel "disposition."

This understanding of "cruel and unusual punishment" as meaning unprecedentedly harsh, without regard to the subjective intent of any official, comports with early explications of the North Carolina Constitution. The authoritative treatise on the history and meaning of the state constitution observes that "the most usable touchstone [of the meaning of Section 27] was indicated as long ago as 1911"—"[W]hatever is greater than has ever been prescribed, or known, or inflicted, must be excessive, cruel and unusual." John Orth & Paul Newby, *The North Carolina State Constitution* 69 (Oxford Second Edition, 2013). The North Carolina Supreme Court echoed this wording in *State v. Driver*, holding that a five-year term of imprisonment in a county jail for the conviction of assault and battery was unconstitutional under the state prohibition on cruel or unusual punishments not because of the length of imprisonment, but because of the excessively harsh conditions in the county jail. 78 N.C. 423, 426-27 (1878). In reaching this decision, this Court explained, "[n]ow, it is true, our terms of imprisonment are much longer, but they are in the Penitentiary, where a man may live and be made useful; but a County jail is a close prison [i.e., solitary conditions], where life is soon in jeopardy. . .").

Id. In *Driver*, this Court undertook an objective inquiry, squarely rejecting the notion that the mindset of jail and prison officials was necessary to consider.

The historical evidence all points in one direction: Prison conditions constitute cruel and unusual punishment when they are objectively harsh or excessive in light of longstanding practice.[3] Subjective intent is unnecessary.

B. The Federal Deliberate Indifference Standard Is A Recent And Misguided Innovation—*Kingsley v. Hendrickson* May Portend A Wholesale Rejection Of The Subjective Standard.

The U.S. Supreme Court's early conditions cases were inconsistent, sometimes embracing wholly objective standards and sometimes embracing a subjective component. In *Estelle v. Gamble*, for example, the Court held that only those extreme conditions imposed with a "wanton" mindset or "deliberate indifference" were actionable. 429 U.S. 97, 107 (1976). In *Hutto v. Finney*, however, the Court described conditions of confinement in Arkansas as "constitut[ing] cruel and unusual punishment" solely by emphasizing the objectively awful conditions incarcerated people were forced to endure. 437 U.S. 678, 685-88 (1978). Likewise, in *Rhodes v. Chapman*, the Court upheld

[3] This Court has not hesitated to honor and implement the original intent of the Framers, even when the U.S. Supreme Court has adopted different standards. *See*, *e.g.*, *Comm. to Elect Dan Forest v. Emps. Pol. Action Comm.*, 376 N.C. 558, 591 (2021) ("Because the federal concept of standing is textually grounded in terms which are not present in the North Carolina Constitution, we see that the framers of the North Carolina Constitution did not, by their plain words, incorporate the same federal standing requirements.").

double-celling in an Ohio prison against an Eighth Amendment challenge and, in so doing, evaluated the conditions entirely objectively. 452 U.S. 337, 348 (1981).

In 1991, the Court resolved this inconsistency, holding that subjective intent was an element of an Eighth Amendment conditions case. *Wilson v. Seiter*, 501 U.S. 294, 302-03 (1991). That approach was not without its detractors even then. In *Wilson*, four Justices agreed that "the majority's intent requirement [was] a departure from precedent" and that the Court should "examine only the objective severity, not the subjective intent of government officials." *Id*. at 309 (White, J., concurring). Not only was the subjective standard at odds with precedent, but as these Justices rightly noted, it would likely prove "impossible to apply in many cases" because "[i]nhumane prison conditions often are the result of cumulative actions and inactions by numerous officials," and "it is far from clear whose intent should be examined[.]" *Id*. at 310. Justices Blackmun and Stevens continued to object to the subjective standard in subsequent cases. *See*, *e.g.*, *Farmer v. Brennan*, 511 U.S. 825, 851 (1994) (Blackmun, J., concurring) ("[I]nhumane prison conditions violate the Eighth Amendment even if no prison official has an improper, subjective state of mind."); *id*. at 858 (Stevens, J., concurring) ("I continue to believe that a state official may inflict cruel and unusual punishment without any improper subjective motivation[.]").

The Supreme Court's most recent pronouncement on the issue suggests a revitalization of the objective standard. In *Kingsley v. Hendrickson*, the Court held that, to succeed on an excessive force claim, a pretrial detainee "must show only that the force purposely or knowingly used against him was objectively unreasonable." 576 U.S. 389, 389 (2015). *Kingsley*'s rationale necessarily extends to all conditions-of-confinement cases. After all, conditions-of-confinement claims require a *less* demanding subjective standard than excessive force claims in the post-conviction context. *See Whitley v. Albers*, 475 U.S. 312, 320-21 (1986); *see also Wilson*, 501 U.S. at 302-03. So, a swing toward an objective standard for excessive force claims would logically seem to spell the end of the subjective standard for all conditions claims. Indeed, after *Kingsley*, several federal courts of appeals have adopted objective standards for conditions-of-confinement claims brought by pretrial detainees. *See Miranda v. Cnty. of Lake*, 900 F.3d 335, 352 (7th Cir. 2018) (adopting objective standard); *Darnell v. Pineiro*, 849 F.3d 17, 35 (2d Cir. 2017) (same); *Castro v. Cnty. of Los Angeles*, 833 F.3d 1060, 1070 (9th Cir. 2016) (en banc) (same).

And though *Kingsley* concerned a pretrial detainee, the Court specifically "acknowledge[d] that [its] view that an objective standard is appropriate in the context of excessive force claims brought by pretrial detainees . . . may raise questions about the use of a subjective standard in the context of excessive force claims brought by convicted prisoners." *Kingsley*, 576 U.S. at 402.

II. The Application Of A Subjective Deliberate Indifference Standard Is Impracticable To Administer And Causes Cruel And Unusual Conditions To Proliferate.

Experience has proven the subjective deliberate indifference standard to be a failed experiment. It is difficult to decipher subjective intent even in claims against individual officers. And application of such a standard to systemic problems in a prison system is particularly unworkable, because it is nearly impossible to divine the subjective motivation of a large organization comprised of numerous individuals. In addition, the subjective standard has been shown to create prison environments where the proliferation of cruel and unusual conditions is guaranteed.

A. The Subjective Standard Is Impracticable To Administer.

The subjective standard suffers from serious practical flaws, especially where, as here, the subjective standard is applied to claims challenging system-wide policies and practices.

Even cases against individuals suffer from serious administrability problems under a subjective intent framework. "When liability has a subjective focus, the central factual issue—the officer's state of mind—is extremely difficult to adjudicate accurately."[4] Schlanger, *supra*, at 402. To start,

[4] For this reason, one *amicus* has suggested that courts may consider incorporating objective proportionality principles into conditions-of-confinement analyses. Reinert, *supra*, at 76. "[T]here is no consideration of the state of mind of the entity imposing punishment—the only concern is whether the experience of the prisoner fits the offense of conviction." *Id*.

"[p]laintiffs will rarely have direct evidence," *id.*, while jail and prison officials "can nearly always claim that they did not intend for the harm to occur," leaving the "nearly impossible burden" to "prove otherwise . . . on the prisoner plaintiff." Alice Ristroph, *State Intentions and the Law of Punishment*, 98 J. Crim. L. & Criminology 1353, 1404 (2008). The problem is not just that incarcerated people lack evidence of prison officials' intentions, but rather "that judgments about intentions are inevitably contestable." *Id.* And incarcerated people contending with inequitable access to evidence will nearly always lose that contest.

The standard is even less workable in system-wide challenges. "[I]ntent simply is not very meaningful when considering a challenge to an institution, such as a prison system," *Wilson,* 501 U.S. at 310 (White, J., concurring), because "[i]nstitutions, as complex organizations, lack the unified psychology of natural persons." Sharon Dolovich, *Cruelty, Prison Conditions, and the Eighth Amendment*, 84 N.Y.U. L. Rev. 881, 925 (2009). Since Plaintiffs allege that North Carolina solitary confinement protocols, taken as a whole, constitute cruel and unusual punishment in violation of Section 27, assessing their claims under a subjective standard raises questions about *whose* intent to examine. Perhaps it is for these reasons that in claims against municipalities, where plaintiffs must show deliberate indifference to succeed, deliberate indifference is defined objectively. *See Farmer*, 511 U.S. at 841

(*describing Canton v. Harris*, 489 U.S. 378 (1989)) ("It would be hard to describe . . . deliberate indifference . . . as anything but objective").

These administrability problems exist not only in the context of court proceedings, but also in the context of prison administration where "a subjective standard erode[s] staff accountability." Brief of Former Corrections Administrators as *Amici Curiae*, *Kingsley v. Hendrickson*, 576 U.S. 389 (2015) (No. 14-6368), 2015 WL 1045423, at *21. As the former corrections officials, put it: "Unlike the question whether conduct was reasonable given the circumstances, jail administrators have an exceedingly difficult time examining a staff member's subjective intentions." *Id*.

B. The Subjective Standard Incentivizes Undesirable Conduct And Achieves Undesirable Outcomes.

Beyond administrability concerns, applying a subjective standard incentivizes problematic conduct. All too often, dangerous and deadly outcomes are the result.

First, subjective deliberate indifference encourages systemic failures of care. Prisons are bureaucracies "and as with all bureaucracies, inertia and negligence can create the potential for enormous harm." Dolovich, *supra*, at 946. Yet, an intent standard not only forgives bureaucratic negligence and inertia, but it actually "create[s] incentives for those responsible" for prevailing conditions of confinement "not to know about or investigate the possibility of

even system-wide inadequacies that could cause serious harm." *Id*. at 947. Likewise, "job functions are highly compartmentalized" in "[m]odern prison systems" such that no individual "in the system may have actual awareness of an unjustifiable risk of harm." Stinneford, *The Original Meaning of "Cruel," supra*, at 499. An intent requirement exacerbates this trend by "giv[ing] officials a powerful incentive to bureaucratize and compartmentalize" job duties even further "in order to defeat" claims. *Id*. at 501.

Second, by "holding officers liable only for those risks they happen to notice," an intent requirement "creates incentives for officers not to notice—despite the fact that when prison officials do not pay attention, prisoners may be exposed to the worst forms of suffering and abuse." Dolovich, *supra*, at 892; *see also* Stinneford, *The Original Meaning of "Cruel," supra*, at 501 (similar). In fact, former corrections officials explained that a subjective standard interferes with correctional administration by enabling staff to evade liability simply "by saying that [they] did not behave recklessly or with malice." Brief of Former Corrections Administrators, *supra*, at *21.

Third, the intent standard "creates arbitrary distinctions between offenders who suffer the same harm." Stinneford, *The Original Meaning of "Cruel," supra*, at 500. For instance, consider the following two individuals: Two incarcerated people "are placed into the same type of prison setting, and suffer the same beatings and rape, but one was 'lucky' enough to have a

demonstrably malevolent or reckless jailer while the other was simply caught in the maw of a mindless bureaucracy." *Id.* at 501. Only the former could succeed under a subjective intent standard. *Id.*; *see also* Schlanger, *supra*, at 399 (positing a similar hypothetical).

History has shown that these perverse incentives all too often result in catastrophe. The case of *Grieveson v. Anderson* is particularly illustrative. 538 F.3d 763 (7th Cir. 2008). Over a four-month period, the plaintiff was violently attacked on seven different occasions resulting in a broken nose, "a broken left eye socket, damage to his optic nerve, and injuries to his ribs, face, jaw, and nose." *Id.* at 767-70. He alerted correctional officers to the attacks and the continued risk, as did his family from the outside. *Id.* at 769. Before the final and "by far the worst" attack, he filed a complaint, explaining that he had been "beaten and assaulted" and was "scared [for his] life." *Id.* Nevertheless, the court held that he failed to show prison officials possessed the requisite subjective knowledge to be liable for failing to stop this attack (and others). *Id.* at 775-79. This reasoning makes plain the perverse incentives of the deliberate indifference standard: An unresponsive and compartmentalized prison system left the plaintiff at risk of violence and then denied him redress. Unfortunately, *Grieveson* is not anomalous.

C. An Objective Standard Will Not Create Liability For Negligence.

The court below suggested that adopting an objective standard could result in liability for unintentional actions such as negligently inflicted harm and accidents. (R. at 986). It would not. The U.S. Supreme Court explicitly addressed—and rejected—this concern. *Kingsley*, 576 U.S. at 395-96. Instead, the objective inquiry proceeds "from the perspective of a reasonable officer on the scene, including what the officer knew at the time, not with the 20/20 vision of hindsight." *Id*. As one *amicus* has explained, "objective reasonableness does not require perfection" and thus corrections officials need not act with "surgical precision when they deal with threats to safety and security." Schlanger, *supra*, at 401.[5]

To demonstrate that the objective standard has not ushered in an era of constitutionalizing negligence and accidents, we need look no further than the federal courts of appeals. Every federal circuit to apply an objective standard to conditions-of-confinement claims raised by pretrial detainees has rejected the notion that officials could be held liable for negligent acts. *See, e.g.*, *Miranda*, 900 F.3d at 353 (noting that courts applying *Kingsley* have

[5] Of course, to establish liability, a plaintiff still must show that a defendant acted volitionally. But the volition necessary to establish liability for purposes of Section 1983 is distinct from the issue presented here, namely the defendant's state of mind with respect to whether the plaintiff has been exposed to a substantial risk of harm. *See Kingsley*, 576 U.S. at 395-96.

"recognize[d] that it will not be enough to show negligence"); *Darnell*, 849 F.3d at 36 (rejecting argument that objective standard encompasses negligence); *Castro*, 833 F.3d at 1071 (same). Rather, an objective standard requires plaintiffs "to prove more than negligence but less than subjective intent—something akin to reckless disregard." *Id.* at 1071. Courts have required plaintiffs to show that "[t]he defendant did not take reasonable available measures to abate th[e] risk, even though a reasonable officer in the circumstances would have appreciated the high degree of risk involved—making the consequences of the defendant's conduct obvious." *Id.* The objective test asks whether a defendant disregarded an obvious risk of substantial harm to a plaintiff, irrespective of whether the defendant actually knew of the risk. *See Miranda*, 900 F.3d at 353; *Darnell*, 849 F.3d at 36; *Castro*, 833 F.3d at 1071.

* * *

The objective standard strikes an appropriate balance. On the one hand, it ensures that correctional officials receive more protection in constitutional claims than in mere tort actions. On the other hand, it ensures the reasonable safety of incarcerated people, who are exposed to danger as an incident of their incarceration. Ultimately, "[t]he state, having chosen to put [a prisoner] in a dangerous environment, is obliged to keep him safe." Dolovich, *supra*, at 960; *see also DeShaney v. Winnebago Cty. Dep't of Soc. Servs.*, 489 U.S. 189, 199-

200 (1989) ("[W]hen the State takes a person into its custody and holds him there against his will, the Constitution imposes upon it a corresponding duty to assume some responsibility for his safety and general well-being."). An objective standard strives for that goal: It "incentivizes reasonable behavior, allocates loss to the party more responsible for the loss, and implements the moral insight that everyone's welfare matters." Schlanger, *supra*, at 421.

CONCLUSION

This Court should hold that an objective standard applies to conditions-of-confinement claims arising under Section 27.

Respectfully submitted this 30th day of June 2021.

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