No. _____

In the Supreme Court of the United States

COUNTY OF ORANGE, CALIFORNIA, ET AL.,
Petitioners,

v.

MARY GORDON, successor in interest for decedent, Matthew Shawn Gordon, individually,
Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

S. FRANK HARRELL
Counsel of Record
NORMAN J. WATKINS
LYNBERG & WATKINS
1100 Town & County Road
Suite 1450
Orange, California 92868
sharrell@lynberg.com
Tel: (714) 937-1010

Attorneys for Petitioners
County of Orange, California, et. al.

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

QUESTION PRESENTED

Whether a pretrial detainee's "inadequate medical care" claim pursuant to 42 U.S.C. § 1983 requires a showing of a jail professional's subjective intent in delivering care or whether an objective "unreasonableness" standard is sufficient.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioners were appellees in the court of appeals. They are: the County of Orange, the Orange County Sheriff's Department, Orange County Sheriff-Coroner Sandra Hutchens, the Orange County Central Men's Jail, the Orange County Health Care Agency, Robert Denney, Brian Tunque, Brianne Garcia and Debra Finley. Respondent Mary Gordon was the appellant in the court of appeals. No party is a corporation.

TABLE OF CONTENTS

APPENDIX

TABLE OF AUTHORITIES

CASES

CONSTITUTION AND STATUTES

OTHER AUTHORITIES

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is reported at 888 F.3d 1118 and is reproduced in the appendix to this petition at App. 1 – 15. The judgment of the Central District of California is unpublished and is reproduced at App. 16 – 38.

JURISDICTION

The United States Court of Appeals for the Ninth Circuit entered judgment on April 30, 2018, App. 1, and denied Orange County's petition for rehearing *en banc* on June 14, 2018, App. 39. This Court consequently has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourth Amendment to the U.S. Constitution provides, in relevant part: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated.…" U.S. Const, amend. IV.

The Eighth Amendment to the U.S. Constitution provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const, amend. VIII.

The Fourteenth Amendment to the U.S. Constitution provides, in relevant part: "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.…" U.S. Const. amend. XIV, § 1.

The statutory provision involved is 42 U.S.C. § 1983, which provides in relevant part:

> 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….

STATEMENT OF THE CASE

The decision of the Ninth Circuit in this case represents one position of several in a split among the federal courts of appeals on the question of whether an "inadequate medical care" claim pursuant to 42 U.S.C. § 1983 brought by a pretrial detainee requires a showing of a jail medical professional's subjective intent in delivering care – or whether an objective "unreasonableness" standard is sufficient. Eight circuit courts have held that the plaintiff must establish a medical professional's subjective "deliberate indifference" to the detainee's health at the time the health care decisions in issue were made. The Ninth Circuit, along with two other circuits, however, has held that the plaintiff need only show the medical professional's conduct was objectively "unreasonable" -- without reference to the medical professional's mindset at the time they exercised their medical judgment.

As a result of these differing standards, a medical professional's ability to prevail in 42 U.S.C. § 1983

litigation depends, in part, on where the litigation against them is brought.

A. Factual Background

Decedent Matthew Gordon was arrested and booked as a pretrial detainee into the Orange County Jail in Santa Ana, California on September 8, 2013. (App., 17). That same evening, during his intake medical evaluation, Gordon advised jail Nurse Debra Finley at approximately 6:47 p.m. that he ingested "3 grams" of "heroin" intravenously on a daily basis. (App., 17 - 18)

Jail Doctor Thomas Le promptly responded by issuing medical "Opiate Withdrawal Orders" for Mr. Gordon's care. (App., 18). Specifically, Dr. Le found that Gordon should be given "Tylenol for pain, Zofran for nausea, Atarax for anxiety, and Imodium for diarrhea and abdominal pain." (*Id.*). Dr. Le also found that Gordon should "be given a 'nursing detox assessment' called CIWA for four days." (*Id.*)

Dr. Le chose the CIWA assessment protocol rather than another medical alternative – termed the "COWS protocol". (App., 18). Plaintiff contended Le's selection of the CIWA protocol was deficient as the COWS protocol was designed to "measure symptoms specific to opiate withdrawal. . .." (*Id.*) Based on his assessment, Dr. Le found that Gordon could "be placed in a regular housing unit rather than medical unit housing." (*Id.*).

Nurse Finley completed a CIWA evaluation for Gordon before lights-out on September 8, 2013. (App., 19). Gordon was thereafter moved to "Module C, Tank 11 in the Jail at approximately 8:30 a.m. on September 9." (*Id.*). On September 9, nursing staff "administered the

medicine Dr. Le prescribed three times." (App., 21). Nurse Brianne Garcia administered Gordon's third round of medication at "approximately 8:30 p.m." (*Id.*)

On September 9, Orange County Sheriff's Deputy Robert Denney conducted a "welfare check" on the Module C inmates at 6:47 p.m. (App., 21). Deputy Denny conducted two other welfare checks "after lights out on September 9, one at 8:31 p.m. and one at 9:29 p.m." (*Id.*) Given his physical distance from the inmates, Deputy Denney acknowledged that "from the corridor where he performed the check, he could not see whether an[y] inmate was breathing, alive. . .or had any potential indicators of a physical problem." (App., 22).

At about 10:35 p.m. on September 9, Module C inmates made a "man down" call to their attending deputies. (App., 22). Deputy Denney promptly responded to the scene and found Mr. Gordon to be "unresponsive". (*Id.*) Neither Deputy Denney, other deputies, jail medical staff, paramedics or hospital personnel were subsequently able to revive Mr. Gordon. (*Id.*) This litigation by Mr. Gordon's heir at law (his mother) followed. (App., 17.)

B. Proceedings Below

Plaintiff filed suit pursuant to 42 U.S.C. § 1983 alleging that Orange County and its jail employees -- Nurse Finley, Nurse Garcia and Deputy Denney -- provided deficient medical care to Mr. Gordon in violation of his due process rights as a pretrial detainee. (App., 17.) After vigorous discovery efforts by all parties, the County and its employees moved for summary judgment. (*Id.*)

The County Defendants' motion pointed out that the then-extant Ninth Circuit test in pretrial detainee medical care cases did not mirror the objective "knew or should have known" state tort law test for malpractice liability. (App., 26)(due process "entails something more than negligence. . ..") Rather, the Ninth Circuit test included a "subjective component" that "is met if the claimant shows that the detention official's state of mind is one of deliberate indifference to the inmate's health or safety." (App., 26; *see*, *id.* ("The test for deliberate indifference is 'a subjective test that the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference.'))

The trial court found that Plaintiff's evidence failed to establish a jury-worthy due process claim against any Defendant. Specifically, the trial court found that Plaintiff presented insufficient evidence of "deliberate indifference" as regards Nurse Finley. (App., 27)("Nurse Finley implemented the CIWA protocol as [non-party] Dr. Le instructed. There is nothing in the record indicating – with respect to the subjective indifference standard – that Nurse Finley knew that applying the CIWA protocol rather than the COWS protocol would put Mr. Gordon in danger.")

Plaintiff also offered insufficient evidence of "deliberate indifference" as regards Nurse Garcia. (App., 28)(Nurse Garcia "had no interaction with Mr. Gordon other than giving him his over-the-counter medication during the last pill call. . ..There is no indication in the record that Nurse Garcia . . .learned of and then ignored a danger to Mr. Gordon.") And

Plaintiff's "deliberate indifference" showing as regards Deputy Denney was also inadequate. (App., 28-29)("There is no testimony or other evidence in the record indicating that [Denney] saw Mr. Gordon in trouble and then ignored him.")

On appeal to the Ninth Circuit, Ms. Gordon argued for a change in the then-extant subjective standard governing due process "inadequate medical care" cases. Specifically, Ms. Gordon argued for a Fourth Amendment – style "objective unreasonableness" / "knew or should have known" standard. Ms. Gordon's argument was based on the objective "unreasonableness" test announced in *Kingsley v. Hendrickson*, 135 S. Ct. 2466, 2473 (2015) for judging jail guards' intentional "uses of force" against pretrial detainees.

The Ninth Circuit agreed with Ms. Gordon's position and changed circuit law. Specifically, the *Gordon* panel rejected the subjective "deliberate indifference" standard for "medical care" claims in favor of a new objective standard. (App. 14, n.4)(Under pre-existing law, "[a] prison official cannot be found liable . . .unless the official knows of and disregards an excessive risk to inmate health or safety."); (*Id.*) (Under the Ninth Circuit's new standard, "a pretrial detainee need not prove those subjective elements about the officer's actual awareness of the level of risk.") Instead, the circuit found that "defendant's conduct" need only be "objectively unreasonable". (App. 14). The circuit otherwise described the level of objectively-judged fault that would be sufficient under its new standard as being "something akin to reckless disregard" to the inmate's health. (*Id.*) The matter was thereafter

remanded to the trial court for application of the new "objective reasonableness" standard. (App. 15).

REASONS FOR GRANTING THE PETITION

I. A Deep Split Divides The Circuits On The Applicable Standard Governing Pretrial Detainees' "Inadequate Medical Care" Claims

The courts of appeals are fractured on the elements of an "inadequate medical care" claim brought by a pretrial detainee under 42 U.S.C. § 1983. Specifically, the courts do not agree as to whether the governing test requires evidence of a medical professional's subjective state of mind in delivering patient care -- or whether proof of some sort of objective "unreasonableness" is sufficient.

Eight circuits - the First, Third, Fourth, Fifth, Sixth, Eighth, Tenth and Eleventh Circuits - require a pretrial detainee plaintiff in a medical care case to show the defendant's subjective "deliberate indifference" to the detainee's health at the time the health care decisions in issue were made. *See*, *Whitney v. City of St. Louis*, 887 F.3d 857, 860 (8th Cir. 2018)("To prevail on his deliberate indifference claim, [plaintiff] must show that (1) [defendant] had actual knowledge that [a pretrial detainee] had a substantial risk of [medical harm] and (2) [defendant] failed to take reasonable measures to abate that risk."); *Nam Dang by & through Vina Dang v. Sheriff, Seminole Cty.*, 871 F.3d 1272, 1280 (11th Cir. 2017) ("Subjective knowledge of the [medical] risk requires that the defendant be 'aware of facts from which the inference could be drawn that a substantial risk of serious harm

exists, and he must also draw the inference.'")(citations omitted.); *Miller v. Steele-Smith*, 713 F. App'x 74, 76 n.1 (3d Cir. 2017) (subjective standard applies to "Fourteenth Amendment claim for inadequate medical care . . .."); *Alderson v. Concordia Par. Corr. Facility*, 848 F.3d 415, 419 n.4 (5th Cir. 2017) (in jail medical care cases, "the Fifth Circuit . . .appl[ies] a subjective standard . . .."); *Guy v. Metro. Gov't of Nashville & Davidson Cty.*, 687 F. App'x. 471, 477–78 (6th Cir. 2017)("A pretrial detainee's claim for deliberate indifference to a serious medical need" requires proof "that the defendant 'perceived facts from which to infer substantial risk to the prisoner, that he did in fact draw the inference, and that he then disregarded that risk' ([a] subjective component).")(citations omitted.); *Miranda-Rivera v. Toledo-Dávila*, 813 F.3d 64, 74 (1st Cir. 2016)(applying subjective "deliberate indifference" standard to "inadequate medical care" claims: "Deliberate indifference requires (1) that 'the official . . . be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists,' and (2) that he draw that inference.")(citations omitted.); *Miller v. Steele-Smith*, 713 F. App'x 74, 76 n.1 (3d Cir. 2017) (applying subjective standard to "Fourteenth Amendment claim for inadequate medical care . . .."); *Duff v. Potter*, 665 F. App'x 242, 244–45 (4th Cir. 2016) (affirming trial court's dismissal of detainee's medical-need claim under subjective standard on forfeiture grounds.); *United States v. Brown*, 654 F. App'x. 896, 906, n.6 (10th Cir. 2016), *cert. denied*, 137 S. Ct. 237 (2016)(in circumstances involving pretrial detainee medical care, subjective standard provides "the benchmark for such claims.").

By contrast, three circuits - the Second, Seventh and Ninth Circuits - require proof only of objectively unreasonable medical care; they do not require the pretrial detainee to prove the jail medical professional's subjective intent at the time their treatment decisions were made. *See*, *Bruno v. City of Schenectady*, 727 F. App'x. 717, 719-720 (2d Cir. 2018) (asking "whether a 'reasonable person' would appreciate the [medical] risk to which the detainee was subjected" and asking "what a 'reasonable person' would have believed under the circumstances."); *Miranda v. Cty. of Lake*, No. 17-1603, 2018 WL 3796482, at *11 (7th Cir. Aug. 10, 2018) ("We . . . conclude . . . that medical-care claims brought by pretrial detainees under the Fourteenth Amendment are subject only to [an] objective unreasonableness inquiry . . .."); (App., 14, n. 4) ("[C]laims for violations of the right to adequate medical care 'brought by pretrial detainees against individual defendants under the Fourteenth Amendment' must be evaluated under an objective . . . standard"; In medical care claims, "a pretrial detainee need not prove . . . subjective elements about the officer's actual awareness of the level of risk.")(citations omitted.)

And even the three circuits that fall on the objective side of the split cannot agree on what level of fault is sufficient; the spectrum ranges from "possible" recklessness to "something akin" to "recklessness" to "recklessness" itself. *See*, *Bruno v. City of Schenectady*, 727 F. App'x. 717, 720 (2d Cir. 2018)(plaintiff must prove from an objective standpoint that medical professional "recklessly failed to act with reasonable care . . .even though the defendant-official . . .should have known, that the condition posed an excessive risk

to health or safety.'")(citations omitted.); *Miranda*, 2018 WL 3796482 at *12 (court "leav[es] open the possibility that recklessness would . . . suffice. . .") (citing *Kingsley v. Hendrickson*, 135 S. Ct. 2466, 2474 (2015)); (App., 14) ("the plaintiff must 'prove . . .something akin to reckless disregard.'")(citations omitted.)

Had the subject incident occurred in the First, Third, Fourth, Fifth, Sixth, Eighth, Tenth or Eleventh Circuits, the medical professionals in this case would be judged with reference to their subjective mindset in delivering inmate medical care. The Ninth Circuit, along with two other circuits, however, significantly lowers the constitutional standard by eliminating the subjective element in favor of an objective "reasonable person" standard. The outcome of medical care claims against similarly situated medical professionals should not hinge on the jurisdiction in which the claims are brought. The Court should grant review to resolve this split and to define the contours of jail medical care liability as regards pretrial detainees.[1]

---

[1] The high volume of cases concerning this issue is unsurprising given the numbers of individuals involved. While an exact count of pretrial detainees is not available, it is known that America's local jails admitted 10.6 million individuals during 2016. *See*, Zhen Zeng, Bureau of Justice Statistics, U.S. Dep't of Justice, Jail Inmates in 2016, p. 1 (2018), available at https://www.bjs.gov/content/pub/pdf/ji16.pdf. At the end of 2016, 65.1% of those held in local jail facilities were unconvicted. *Id.* at p.4, tbl. 3. *See*, *DeShaney v. Winnebago Cty. Dep't of Soc. Servs.*, 489 U.S. 189, 194 (1989)(granting certiorari because of "the importance of the issue to the administration of state and local governments. . .")

II. The Courts Of Appeals Are Split On Whether The Standard For Medical Care Claims Brought By Pretrial Detainees Should Track The Eighth Amendment Or The Fourth Amendment.

Jail medical professionals' delivery of medical care to pretrial detainees is governed by the Fourteenth Amendment due process clause. *See*, *Bell v. Wolfish,* 441 U.S. 520, 535 n.16 (1979). The level of official misconduct that must be shown to support an "inadequate medical care" claim, however, is a question that this Court has expressly reserved. *See, e.g., City of Canton v. Harris,* 489 U.S. 378, 388 n.8 (1989); *City of Revere v. Massachusetts Gen. Hosp.,* 463 U.S. 239, 244 (1983).

In the absence of a ruling from this Court, the circuits have fashioned "inadequate medical care" tests by looking to different Constitutional sources. In adopting a subjective test for pretrial detainee "inadequate medical care" claims, the First, Third, Fourth, Fifth, Sixth, Eighth, Tenth and Eleventh Circuits have looked to this Court's Eighth Amendment precedent. These courts have noted that this Court has already developed an "inadequate medical care" test under the Eighth Amendment for use in cases brought by convicted prisoners against jail medical professionals.

Specifically, this Court has held that liability for inadequate medical attention attaches when a prison official's failure to act amounts to subjective "deliberate indifference" to the convicted prisoner's health. *Estelle v. Gamble*, 429 U.S. 97, 104 (1976). Under this "deliberate indifference" standard, a jail medical

professional "cannot be found liable . . .unless the official knows of and disregards an excessive risk to inmate health or safety; the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference." *Farmer v. Brennan*, 511 U.S. 825, 837 (1994). As the standard is subjective, "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" constitute actionable "deliberate indifference". *Id.* at 838.

Citing this Court's decisions, courts adopting the *Farmer* subjective "deliberate indifference" standard for pretrial detainee "medical care" cases have found it workable for both substantive due process and Eighth Amendment purposes. *See, Cty. of Sacramento v. Lewis*, 523 U.S. 833, 849–50 (1998)("Since it may suffice for Eighth Amendment liability that prison officials were deliberately indifferent to the medical needs of their prisoners, . . . it follows that such deliberately indifferent conduct must also be enough to satisfy the fault requirement for due process claims based on the medical needs of someone jailed while awaiting trial.")(internal citations omitted); *City of Revere v. Massachusetts Gen. Hosp.*, 463 U.S. 239, 244 (1983) ("[T]he due process rights of a [pretrial detainee] are at least as great as the Eighth Amendment protections available to a convicted prisoner.")

And circuit courts adopting the *Farmer* subjective "deliberate indifference" standard have also been mindful of this Court's repeated admonition that "the Due Process Clause of the Fourteenth Amendment was intended to prevent the government from *abusing* its

power," *DeShaney v. Winnebago Cty. Dep't of Soc. Servs.*, 489 U.S. 189, 196 (1989) (internal quotation marks omitted; emphasis added), but not to "transform every tort committed by a state actor into a constitutional violation." *Id.* at 202; *see*, *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.")(emphasis added.)

Indeed, this Court has "emphasized time and again that the touchstone of due process is protection of the individual against *arbitrary action* of government" and "that *only* the *most egregious* official conduct can be said to be *arbitrary* in the constitutional sense." *Lewis*, 523 U.S. at 846 (internal quotation marks omitted; emphasis added). Thus, "liability for negligently inflicted harm is categorically beneath the threshold of constitutional due process." *Id.* at 849; *see*, *Daniels*, 474 U.S. at 332 (the Fourteenth Amendment is not a "font of tort law to be superimposed upon whatever systems may already be administered by the States.")(internal quotation marks omitted) And this Court has specifically emphasized as much with regard to jail medical care claims. *See*, *Estelle v. Gamble*, 429 U.S. 97, 106 (1976) ("[m]edical malpractice does not become a constitutional violation merely because the victim is a prisoner.")

In the wake of the forgoing decisions from this Court, all circuits found that pretrial detainee "inadequate medical care" claims should be analyzed under *Farmer*'s subjective "deliberate indifference"

standard.[2] *See*, *Miller v. Steele-Smith*, 713 F. App'x 74, 76 n.1 (3d Cir. 2017) ("a Fourteenth Amendment claim for inadequate medical care is analyzed pursuant to the same [subjective] standard applied to an Eighth Amendment claim."); *Gerholt v. Orr*, 624 F. App'x. 799, 801 n.3 (3d Cir. 2015)("'the Due Process rights of a pretrial detainee are at least as great as the Eighth Amendment protections available to a convicted prisoner.' . . ..Thus, even though the constitutional protections afforded prisoners and pretrial detainees against inadequate medical care arise from different textual sources, the [subjective] standards governing the provision of medical care to each class are similar.")(citations omitted.); *Clouthier v. Cty. of Contra Costa*, 591 F.3d 1232, 1244 (9th Cir. 2010)(evaluating pretrial detainee's medical care "due process rights under the deliberate indifference standard articulated in *Farmer* . . ..")[3]; *Caiozzo v. Koreman*, 581 F.3d 63, 65

---

[2] "All circuits (except for the D.C. Circuit) have issued decisions applying the Eighth Amendment's subjective deliberate indifference test to pretrial detainees' medical care claims." Catherine T. Starve, *The Conditions of Pretrial Detention*, 161 U. Pa. L. Rev. 1009, 1027 (2013). "While the Supreme Court has not explicitly stated that the *Farmer* holding and analysis applies outside the context of Eighth Amendment failure to protect claims, every federal circuit has assumed this to be the case and has applied *Farmer*'s definition of recklessness to other types of constitutional tort claims, including claims made by pretrial detainees under the Fourteenth Amendment." Michael S. DiBattista, *A Force to Be Reckoned with: Confronting the (Still) Unresolved Questions of Excessive Force Jurisprudence After Kingsley*, 48 Colum. Hum. Rts. L. Rev. 203, 225–26 (2017).

[3] As discussed *infra*, the Ninth Circuit overruled the decision in *Clouthier* with its holding in this case.

(2d Cir. 2009)(adopting a "subjective" standard for determining whether a defendant was "deliberately indifferent", which requires the plaintiff to show that the jail employee "disregard[ed] a risk of harm of which he [wa]s aware.")[4]; *Phillips v. Roane Cty.,* 534 F.3d 531, 540 (6th Cir. 2008)(holding that under the due process clause of the Fourteenth Amendment, a pretrial detainee asserting a claim of "deliberate indifference" to serious medical needs must demonstrate that " 'the official being sued subjectively perceived facts from which to infer substantial risk to the prisoner, that he did in fact draw the inference, and that he then disregarded that risk,' " reasoning that this approach " 'is meant to prevent the constitutionalization of medical malpractice claims'.")(citations omitted.); *Butler v. Fletcher,* 465 F.3d 340, 345 (8th Cir. 2006) (holding "that [subjective] deliberate indifference is the appropriate standard of culpability for all claims that prison officials failed to provide pretrial detainees with adequate . . . medical care. . .."), *cert. denied,* 550 U.S. 917 (2007); *Surprenant v. Rivas*, 424 F.3d 5, 18 (1st Cir. 2005) (in the context of a claim of unconstitutional conditions of confinement, "the parameters of [a pretrial detainee's Fourteenth Amendment interests] are coextensive with those of the Eighth Amendment[]" and that "[i]n order to establish a constitutional violation, a plaintiff's claim must meet . . . subjective criteria."); *Whiting v. Marathon Cty. Sheriff's Dep't,* 382 F.3d 700, 703 (7th Cir. 2004) (holding that the question of whether the plaintiff's deliberate indifference claim was based on the Eighth Amendment as a prisoner or

---

[4] As discussed *infra*, the Second Circuit overturned its decision in *Caiozzo* in *Darnell v. Pineiro*, 849 F.3d 17 (2d Cir. 2017)

the Fourteenth Amendment as a pretrial detainee was "immaterial" since "the legal standard ... is the same under either."); *Olsen v. Layton Hills Mall,* 312 F.3d 1304, 1315 (10th Cir. 2002)("Although '[p]retrial detainees are protected under the Due Process Clause rather than the Eighth Amendment, . . . this Court applies an analysis identical to that applied in Eighth Amendment cases brought pursuant to [42 U.S.C.] § 1983.' "); *Brown v. Harris*, 240 F.3d 383, 388 (4th Cir. 2001) ("we need not resolve whether [the decedent] was a pretrial detainee or a convicted prisoner because the standard in either case is the same."); *Lancaster v. Monroe County*, 116 F.3d 1419, 1425 n.6 (11th Cir. 1997)(concluding that "the minimum standard for providing medical care to a pretrial detainee under the Fourteenth Amendment is the same as the minimum standard required by the Eighth Amendment for a convicted prisoner" and that the standard is "violated by a government official's deliberate indifference to serious medical needs.")[5]; *Hare v. City of Corinth,* 74 F.3d 633, 648 (5th Cir.1996)(en banc)("Though *Farmer* dealt specifically with a prison official's duty under the Eighth Amendment to provide a convicted inmate with humane conditions of confinement, we conclude that its subjective definition of deliberate indifference provides the appropriate standard for measuring the duty owed to pretrial detainees under the Due Process Clause.").

By contrast, circuit courts adopting an objective standard for pretrial detainee medical claims have looked towards this Court's Fourth Amendment

---

[5] The Eleven Circuit's decision in *Lancaster* was overruled on other grounds by *LeFrere v. Quezada*, 588 F.3d 1317, 1318 (11th Cir. 2009).

jurisprudence. The circuit split on this point followed this Court's opinion in *Kingsley v. Hendrickson*, 135 S. Ct. 2466 (2015). In *Kingsley* this Court found that an objective "excessive force" standard – already developed for Fourth Amendment arrest cases – should also govern "excessive force" claims brought by pretrial detainees under the due process clause. *Id.* at 2474 (court adopts due process excessive force "standard [that] is . . . consistent with our . . . objective [Fourth Amendment] 'excessive force' standard . . .") (citing *Graham v. Connor,* 490 U.S. 386, 396 (1989) (announcing an objective "reasonableness" test for Fourth Amendment "excessive force" cases brought by arrestees in the field.))

Kingsley involved jail guards' undisputed use of intentional, deliberate force against a pretrial detainee (by using a Taser to incapacitate him). *See, Kingsley*, 135 S. Ct. at 2472 ("the officers do not dispute that they acted purposefully or knowingly with respect to the force they used . . ."). The only remaining issue was whether the standard for assessing the constitutionality of the guards' intentional use of force should be objective or subjective. *Id.* The *Kingsley* Court rejected an Eighth Amendment - style subjective test in favor of a Fourth Amendment – style objective "reasonableness" test. *Id.* at 2473 (holding "that a pretrial detainee must show only that the force purposely or knowingly used against him was objectively unreasonable.") (citing *Graham,* 490 U.S. at 396 (establishing an objective "reasonableness" test for Fourth Amendment "excessive force" cases.))

In the wake of *Kingsley*, and as noted above, three circuits have overruled their prior precedent and have

extended *Kingsley*'s objective approach to "inadequate medical care" cases brought by pretrial detainees under the due process clause. *See*, *Bruno v. City of Schenectady*, 727 F. App'x. 717, 720 (2d Cir. 2018)("we recognize[] that the Supreme Court's decision in Kingsley . . . mandate[s] that we use an 'objective' standard, *i.e.*, whether a 'reasonable person' would appreciate the risk to which the detainee was subjected."); *Miranda v. Cty. of Lake*, No. 17-1603, 2018 WL 3796482, at *11 (7th Cir. 2018)("We . . .conclude. . . that medical-care claims brought by pretrial detainees under the Fourteenth Amendment are subject only to the objective unreasonableness inquiry identified in *Kingsley*."); (App., 12)("While *Kingsley* did 'not necessarily answer the broader question of whether the objective standard applies to all Section § 1983 claims brought under the Fourteenth Amendment against individual defendants[,]' logic dictates extending the objective deliberative indifference standard . . .to medical care claims.")(citations omitted.)

But, as noted above, most circuits have found the objective test endorsed in *Kingsley* for analyzing intentional uses of force in the jail setting to be inappropriate for use in medical care cases. *See*, *e.g.*, *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."); *Nam Dang by & through Vina Dang v. Sheriff, Seminole Cty.*, 871 F.3d 1272, 1279 n.2 (11th Cir. 2017) ("*Kingsley* involved an excessive-force claim, not a claim of inadequate medical treatment due to deliberate indifference."); *Alderson v. Concordia Par. Corr. Facility*, 848 F.3d 415, 419 n.4 (5th Cir. 2017) (In jail medical care cases following *Kingsley*, "the Fifth

Circuit has continued to . . .apply a subjective standard . . ..")

As the circuit courts have begun their analysis from different places, they have produced varying due process standards based on the language of this Court's Fourth or Eighth Amendment jurisprudence. *See*, *Kedra v. Schroeter*, 876 F.3d 424, 437 (3rd Cir. 2017), *cert. denied*, 138 S. Ct. 1990 (2018)("[O]ne of the elusive aspects of deliberate indifference with which we and other Courts of Appeals have wrestled over time [is] whether deliberate indifference in the substantive due process context . . . may be satisfied using an objective test or only a subjective 'actual knowledge' test.") This Court should resolve this threshold inquiry in order to ensure uniformity among the circuits on the elements of "inadequate medical care" claims brought against jail medical personnel.

III. The Ninth Circuit's Approach Falls On The Wrong Side Of The Split And This Case Is An Ideal Vehicle To Address The Question.

The Ninth Circuit wrongly tethers its Fourteenth Amendment "inadequate medical care" standard to a Fourth Amendment - style objective "reasonableness" test developed for judging intentional uses of force in the jail setting. *See*, *Kingsley v. Hendrickson*, 135 S. Ct. 2466 (2015). The admittedly intentional nature of the use of force found actionable in *Kingsley* squares with this Court's holding that "liability for negligently inflicted harm is categorically beneath the threshold of constitutional due process." *Cty. of Sacramento v. Lewis,* 523 U.S. 833, 849 (1998).

By contrast, Plaintiff in this case has never even claimed that Mr. Gordon's attending medical team "intended" to injure him. In such circumstances, "removing the subjective component from deliberate indifference in the medical context comes very close to creating a federal constitutional cause of action simply for medical negligence — something against which the Supreme Court has counseled." *Estate of Walter v. Corr. Healthcare Companies, Inc.*, No. 16-CV-0629-WJM-MEH, 2018 WL 2414865, at *8 (D. Colo. May 29, 2018) (citing, *Gordon v. County of Orange*, 888 F.3d 1118, 1124 (9th Cir. 2018)); *see*, *Farmer v. Brennan*, 511 U.S. 825, 837–38 (1994)("We reject petitioner's invitation to adopt an objective test for deliberate indifference. . ..The common law . . . imposes tort liability on a purely objective basis."); *Comstock v. McCrary*, 273 F.3d 693, 703 (6th Cir. 2001)("The 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."); *Kaucher v. Cty of Bucks*, 455 F.3d 418, 428 n.5 (3d Cir. 2006)(an "objective standard" would improperly "move the concept of deliberate indifference . . . closer to the pole of negligence."); *Hare v. City of Corinth*, 74 F.3d 633, 650 (5th Cir. 1996)(rejecting "objective standard offered for [inadequate medical care] liability" as being "redolent with negligence and its measures. That will not do."); *Archie v. City of Racine*, 847 F.2d 1211, 1219 (7th Cir. 1988)(finding objective due process standard "would not adequately recognize the difference between constitutional and common law obligations.")

The Ninth Circuit's standard is particularly troubling in this regard as it authorizes due process

lawsuits founded – not only on "intentional" acts (something the *Kingsley* Court authorized) – but also on a novel type of misconduct the circuit labeled acts "akin to recklessness". (App., 14.) Needless to say, *Kingsley* did not endorse such a loosely-worded due process standard.[6] And, on its face, this vague, unpoliceable phrase risks serving as a proxy for medical malpractice style liability – a result that runs afoul of long-standing due process principles that were forcefully reaffirmed in *Kingsley* itself. *See*, *Kingsley*, 135 S. Ct. at 2472 ("as we have stated, 'liability for *negligently* inflicted harm is categorically beneath the threshold of constitutional due process.'")(quoting *Lewis,* 523 U.S. at 849); *see also*, *DeShaney v. Winnebago Cty. Dep't of Soc. Servs.*, 489 U.S. 189, 196 & 202 (1989)("[T]he Due Process Clause of the Fourteenth Amendment was intended to prevent the government 'from *abusing* [its] power'" but not to "transform every tort committed by a state actor into a constitutional violation.")(emphasis added.); *Lewis*, 523

---

[6] The vague phrasing of a standard which forbids conduct "akin" to "recklessness" raises separate important concerns — especially since the level of "kinship" forbidden by the Ninth Circuit is unspecified and unknown. *See*, *Sessions v. Dimaya*, 138 S. Ct. 1204, 1212 (2018)("The void-for-vagueness doctrine, as we have called it, guarantees that ordinary people have 'fair notice' of the conduct a statute proscribes.") Vagueness concerns have particular importance in § 1983 litigation given the qualified immunity protections available to jail medical professionals. *See*, *Hope v. Pelzer*, 536 U.S. 730, 740 n.10 (2002)("[I]n effect the qualified immunity test is simply the adaptation of the fair warning standard to give [government] officials (and, ultimately, governments) the same protection from civil liability and its consequences that individuals have traditionally possessed in the face of vague criminal statutes.")

U.S. at 845 ("We have emphasized time and again that the touchstone of due process is protection of the individual against *arbitrary action* of government. . .") (internal quotation marks omitted; emphasis added); *id.* at 846 (court has repeatedly "emphasized that *only* the *most egregious official conduct* can be said to be *arbitrary* in the constitutional sense.")(internal quotation marks omitted; emphasis added).

The subjective "medical care" standard employed by all circuits over multiple decades sensibly acknowledges these important principles. *See*, *e.g.*, *Nam Dang by and through Vina Dang v. Sheriff, Seminole Cty.*, 871 F.3d 1272, 1280 (11th Cir. 2017)("An official disregards a serious risk by more than mere negligence 'when he [or she] knows that an inmate is in serious need of medical care, but he [or she] fails or refuses to obtain medical treatment for the inmate.'")(citations omitted); *Hare v. City of Corinth*, 74 F.3d 633, 645–46 (5th Cir. 1996)(in medical care cases, "[f]ormulating a gossamer standard higher than gross negligence but lower than deliberate indifference is unwise because it would demand distinctions so fine as to be meaningless. It would also risk endorsing an objective standard that is contrary to the Supreme Court's holding that the Due Process Clause was meant to prevent 'abusive government conduct.'")(quoting, *Davidson v. Williams,* 474 U.S. 327, 348 (1986)); *see also*, *Farmer*, 511 U.S. at 837–38 ("We reject petitioner's invitation to adopt an objective test for deliberate indifference. . ..The common law . . . imposes tort liability on a purely objective basis.")

The Orange County jail professionals' case is an ideal vehicle for this Court to consider the forgoing issues. The subjective versus objective due process issue was cleanly preserved in the trial court and on appeal. The case is not encumbered by procedural anomalies or alternate grounds of decision. And a majority of the circuits have ably laid bare the difficulties with the Ninth Circuit's objective approach. Because nearly every circuit has weighed in on the question, it is ripe for this Court's review.

CONCLUSION

For the foregoing reasons, the Court should grant this Petition for a Writ of Certiorari.

Respectfully submitted,

S. FRANK HARRELL
Counsel of Record
NORMAN J. WATKINS
LYNBERG & WATKINS
1100 Town & County Road
Suite 1450
Orange, California 92868
sharrell@lynberg.com
Tel: (714) 937-1010

Attorneys for Petitioners
County of Orange, California, et. al.