No. 18-337

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

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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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.

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INTRODUCTION

This case does not present the question framed by Petitioners. The court of appeals did not apply a mere "unreasonableness" test, as the question presented states. Pet. App. i. Rather, the court of appeals derived a four-part test from this Court's decision in *Kingsley v. Hendrickson*, 135 S. Ct. 2466 (2015). The court of appeals' test requires an intentional decision by a defendant despite a high degree of risk and obvious consequences. Pet. App. 14.

The petition's interlocutory posture also makes this case a poor vehicle to resolve any question. The court of appeals remanded the case and did not decide whether Petitioners were entitled to summary judgment. The decision below held only that the district court applied the incorrect legal standard to the motion and should apply the correct standard on remand.

A threshold question compounds these vehicle problems. The court of appeals characterized Respondent's claims against certain correctional defendants as medical care claims, but they could readily be called failure to protect claims instead. Questions of taxonomy could complicate the Court's review, as evidenced by the arguments advanced by Petitioners and their amici, many of which are specific to medical care claims.

Aside from these vehicle problems, this Court's intervention in Petitioners' purported circuit split would be premature. The law governing conditions and treatment claims brought by pretrial detainees continues to evolve in the wake of this Court's 2015 decision in *Kingsley*. Before *Kingsley*, lower courts applied subjective standards of fault to conditions and

treatment claims brought by pretrial detainees, but *Kingsley* adopted an objective standard for pretrial detainees' excessive force claims.

Following *Kingsley*, the three appellate courts to decide the issue in a reasoned analysis—as opposed to an *ipse dixit* footnote—have concluded that an objective standard now applies to all Due Process conditions and treatment claims brought by pretrial detainees. The other side of the "split" that Petitioners assert consists of three footnotes in appellate decisions.

To the extent the footnotes create a split, that split is undeveloped and evolving as the courts of appeals continue to address the effects of *Kingsley* on pre-*Kingsley* circuit precedent. Further percolation of the issue in the courts of appeals would result in additional discussion of whether *Kingsley* requires objective standards for pretrial detainees' Due Process claims. Such analysis could aid this Court's consideration of the issue in a future case, should review become necessary.

STATEMENT OF THE CASE

I. Legal Framework

Conditions of confinement claims brought by convicted prisoners arise under the Eighth Amendment and are governed by subjective standards of fault.[1] In an excessive force claim, a convict must prove that an officer defendant acted "maliciously and sadistically to cause harm." *Hudson v. McMillian*, 503 U.S. 1, 6–7 (1992). A different standard—subjective

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[1] *Farmer v. Brennan*, 511 U.S. 825, 832 (1994); *Hudson v. McMillian*, 503 U.S. 1, 8 (1992); *Wilson v. Seiter*, 501 U.S. 294, 298 (1991); *Whitley v. Albers*, 475 U.S. 312, 318–19 (1986).

deliberate indifference—governs other conditions claims brought by convicts, including claims regarding inadequate medical care, failure to protect, and living conditions.[2] That standard requires showing that a defendant subjectively knew of, but nonetheless disregarded, a substantial risk of serious harm.[3]

Unlike convicts' conditions claims, pretrial detainees' conditions claims arise under the Due Process Clauses.[4] Prior to this Court's 2015 decision in *Kingsley v. Hendrickson*, the lower courts "borrowed" the subjective Eighth Amendment standards that apply to convicts' Eighth Amendment claims and applied those tests to Fourteenth Amendment conditions claims brought by pretrial detainees.[5]

In *Kingsley*, however, this Court held that when an officer uses force against a pretrial detainee, "the

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[2] *Farmer*, 511 U.S. at 828 (failure to protect claim); *Wilson*, 501 U.S. at 303 (living conditions claim); *Estelle v. Gamble*, 429 U.S. 97, 106 (1976) (medical care claim).

[3] *Farmer*, 511 U.S. at 839-40.

[4] *Kingsley v. Hendrickson*, 135 S. Ct. 2466, 2475 (2015); *Bell v. Wolfish*, 441 U.S. 520, 535–36 (1979); *Schall v. Martin*, 467 U.S. 253, 263–64 (1984); *Block v. Rutherford*, 468 U.S. 576, 591 (1984).

[5] *See Burrell v. Hampshire Cnty.*, 307 F.3d 1, 7 (1st Cir. 2002); *Caiozzo v. Koreman*, 581 F.3d 63, 72 (2d Cir. 2009); *Reynolds v. Wagner*, 128 F.3d 166, 174 (3d Cir. 1997); *Young v. City of Mount Ranier*, 238 F.3d 567, 575 (4th Cir. 2001); *Gibbs v. Grimmette*, 254 F.3d 545, 548 (5th Cir. 2001); *Spears v. Ruth*, 589 F.3d 249, 254 (6th Cir. 2009); *Minix v. Canarecci*, 597 F.3d 824, 831 (7th Cir. 2010); *Coleman v. Parkman*, 349 F.3d 534, 538 (8th Cir. 2003); *Clouthier v. Cnty. of Contra Costa*, 591 F.3d 1232, 1242 (9th Cir. 2010); *Barrie v.*

relevant standard" to determine excessiveness "is objective not subjective." 135 S. Ct. at 2472. In other words, "the defendant's state of mind is not a matter that a plaintiff is required to prove." *Id*. *Kingsley* explained that "the language of the two Clauses"—the Cruel and Unusual Punishments and Due Process Clauses—"differs." *Id*. at 2475. "[M]ost importantly," however, "pretrial detainees (unlike convicted prisoners) cannot be punished at all, much less 'maliciously and sadistically.'" *Id*. (quoting *Ingraham v. Wright*, 430 U.S. 651, 671–72, n. 40 (1977)). *Kingsley* therefore abrogated lower court precedent that applied a subjective standard to pretrial detainees' excessive force claims. *Id*. at 2472.

Kingsley did not expressly consider whether an objective standard of fault also governs non-use-of-force conditions claims brought by pretrial detainees. To date, the circuits to decide that question in a reasoned opinion have required an objective standard.[6]

II. Factual Background

On September 8, 2013, Matthew Gordon entered Petitioners' custody at the Orange County Jail. Pet App. 4. He was dead less than 30 hours later. Pet. App. 5.

1. Upon intake, Petitioner Debra Finley, a nurse, was responsible for assessing Gordon's medical

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Grand Cnty., Utah, 119 F.3d 862, 868 (10th Cir. 1997); *Goebert v. Lee Cnty.*, 510 F.3d 1312, 1326 (11th Cir. 2007).

[6] *Castro v. Cnty. of Los Angeles*, 833 F.3d 1060, 1070–71 (9th Cir. 2016) (en banc); *Darnell v. Pineiro*, 849 F.3d 17, 34–35 (2d Cir. 2017); *Miranda v. Cnty. of Lake*, 900 F.3d 335, 350 (7th Cir. 2018).

condition. Pet. App. 5. Gordon informed Nurse Finley that he was accustomed to taking three grams of heroin intravenously each day. Pet. App. 6. Nurse Finley memorialized that fact on an intake and triage sheet. Pet. App. 17.

Gordon did not give any indications that he was an alcoholic. His intake screening form stated that he did not consume alcohol regularly. ER 203. A blood test performed after Gordon's death did not find alcohol in his system. ER 237.

The jail used separate assessment protocols designed for opiate withdrawal and alcohol withdrawal: the Clinical Opiate Withdrawal Scale (COWS) and the Clinical Institute Withdrawal Assessment for Alcohol (CIWA). Pet. App. 6. Of the two protocols, the Clinical Opiate Withdrawal Scale is "more rigorous." Pet. App. 24.

Nonetheless, Nurse Finley chose not to administer the Clinical Opiate Withdrawal Scale. Pet. App. 6. Instead, she administered the Clinical Institute Withdrawal Assessment for Alcohol, which is "designed for alcohol withdrawal." Pet. App. 6. She recommended housing Gordon in general population, rather than the jail's Medical Observation Unit, a pod where detainees are closely monitored. Pet. App. 6.

Respondent presented evidence that Gordon would not have died if Nurse Finley had used the right protocol to assess Gordon. Pet. App. 6. Specifically, a nursing expert opined that if Nurse Finley assessed Gordon with the Clinical Opiate Withdrawal Scale, Gordon would have been housed in the Medical Observation Unit. Pet. App. 6. In that unit, jail staff would have detected Gordon's medical distress hours before he died. Pet. App. 6.

Instead of being housed in the Medical Observation Unit, Gordon waited nearly ten hours to be moved to a general population cell. Pet. App. 7. During this period, he curled up in a ball and vomited continuously for 30–45 minutes. Pet. App. 7.

2. Gordon was eventually sent to Module C, Tank 11, a general population unit. Pet. App. 7. The deputies in Module C received a "module card" for Gordon that indicated "Medical Attention Required." Pet. App. 20. Petitioner Denney, a deputy at the jail, was responsible for conducting welfare checks on Gordon. Pet. App. 7.

According to written jail policy, "[t]he purpose of the safety checks is to maintain the safety and health of the inmates and the security of the facilities." Pet. App. 23. Consistent with the policy, Deputy Denney testified that a function of his welfare checks was to "make sure inmates are breathing" and that "they're alive." Pet. App. 21–22. To that end, the policy specifies that "[a] safety check is a *direct visual observation* of each inmate located in an area of responsibility to provide for their health and welfare." Pet. App. 23 (emphasis added).

Contrary to written policy, Deputy Denney did not perform a direct visual observation of Gordon. Instead, when Denney "checked" on Gordon, Denney's vantage point to the cell was obscured by (1) a corridor twelve to fifteen feet long separating Denney from Gordon's bunk, (2) the fact that this corridor was elevated six feet above the tank that contained Gordon's cell, and (3) a second corridor, this one made of glass. Pet. App. 7. Denney admitted that from this vantage point, he could not tell if a detainee like Gordon displayed "indicators of a physical problem."

Pet. App. 7. He could not even tell if a detainee was "breathing," "drooling," "sweating," or "alive." Pet. App. 7, 22.

When Gordon became unresponsive, it was other detainees—not Denney—who perceived a crisis and shouted "man down." Pet. App. 7–8. Denney arrived within a couple of minutes. Pet. App. 8. Denney testified that by the time he arrived, Gordon's "face was blue, he was unresponsive and his skin was cold to the touch." Pet. App. 8. He had soaked his sheets with a "10-inch pool of sweat." Pet. App. 22–23. Gordon was taken to a hospital and pronounced dead. Pet. App. 8.

III. Proceedings Below

1. Mary Gordon, the Respondent, is Gordon's mother and successor in interest. Pet. App. 17. She brought suit under 42 U.S.C. § 1983 in the United States District Court for the Central District of California against Petitioners Nurse Finley, Nurse Garcia, Deputy Denney, and Sergeant Tunque. Pet App. 4. Respondent alleged that Petitioners caused Gordon's death by failing to provide constitutionally adequate medical care. Pet App. 4. She also sued Petitioners Orange County and associated entities responsible for operating the jail under *Monell v. Department of Social Services*, 436 U.S. 658 (1978). Pet App. 4. She alleged that the jail had a policy or custom of performing inadequate welfare checks of detainees and of using the protocol intended for alcohol withdrawal to evaluate detainees experiencing opiate withdrawal. Pet. App. 31.

The district court granted Petitioners' motions for summary judgment. Pet. App. 17. As to the individual defendants, the court relied on the standard used by

the Ninth Circuit in *Clouthier v. Cnty. of Contra Costa*, 591 F.3d 1232, 1242 (9th Cir. 2010), to evaluate claims that jail staff failed to adequately protect and provide medical and mental health care to a pretrial detainee who later committed suicide. Pet. App. 26.

In *Clouthier*, a pre-*Kingsley* decision, the Ninth Circuit extended the subjective deliberate indifference test, which this Court applied to a convict's Eighth Amendment claim in *Farmer v. Brennan*, 511 U.S. 825 (1994), to a pretrial detainee's Due Process claims. *Clouthier*, 591 F.3d at 1242–44. Under that test, the plaintiff must establish both that he suffered an objectively serious risk of harm and that the defendant was subjectively aware of the risk. *Id.* at 1242.

Applying the subjective component of the *Clouthier* test, the district court determined as a matter of law that Petitioners were not subjectively aware that their actions would place Mr. Gordon in danger. Pet. App. 27–29. The district court also granted summary judgment as to Respondent's other federal and state claims. Pet App. 38.

2. After the district court granted summary judgment, and while Respondent's appeal was pending in the court of appeals, *see* Pet. App. 38, the en banc Ninth Circuit partially overruled *Clouthier* on the basis of *Kingsley* in *Castro v. Cnty. of Los Angeles,* 833 F.3d 1060, 1070 (9th Cir. 2016) (en banc). In *Castro*, jail staff placed the plaintiff in a sobering cell with a combative detainee, who repeatedly stomped on the plaintiff's head after guards ignored the plaintiff's pleas for help. *Id.* at 1064-66.

In *Castro*, the en banc court concluded that *Kingsley* had "cast [*Clouthier*'s] holding into serious

doubt." *Id.* at 1068. The court reasoned that *Kingsley* underscored the differing protections afforded by the Due Process and Cruel and Unusual Punishments Clauses and that pretrial detainees "cannot be punished at all." *Id.* at 1069–1070 (quoting *Kingsley*, 135 S. Ct. at 2475). "[B]oth categories of claims" at issue in *Kingsley* and *Castro*—failure to protect and excessive force claims brought by pretrial detainees—"arise under the Fourteenth Amendment's Due Process Clause, rather than under the Eighth Amendment's Cruel and Unusual Punishment Clause." *Id.*

Castro therefore modeled its standard for failure to protect claims on this Court's two-step inquiry in *Kingsley*. *Castro*, 833 F.3d at 1070-71. First, *Kingsley* required that the act itself—such as a "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"—must be intentional. *Kingsley*, 135 S. Ct. at 2472. That requirement means that "if an officer's Taser goes off by accident or if an officer unintentionally trips and falls on a detainee, causing him harm, the pretrial detainee cannot prevail in an excessive force claim." *Id.* Second, to determine whether the force used is excessive, *Kingsley* held that "the appropriate standard . . . is solely an objective one." *Id.* at 2473. The fact finder must decide whether the force used on the pretrial detainee was "objectively unreasonable." *Id.*

Observing that *Kingsley*'s first step required an intentional act of force, *Castro* first required intentional conduct that resulted in failure to protect a detainee. *Castro*, 833 F.3d at 1070. Thus, a defendant in a failure to protect case could not be held liable if, for example, he lost consciousness due to an

"accident or sudden illness." *Id.* Rather, the defendant must make "an intentional decision with respect to the conditions under which the plaintiff was confined." *Id.* at 1071.

Castro then turned to the application of *Kingsley*'s second step, the defendant's state of mind with respect to his intentional conduct. *Id.* The court reasoned that "the test to be applied under *Kingsley* must require a pretrial detainee who asserts a due process claim for failure to protect to prove more than negligence but less than subjective intent." *Id*. Because *Kingsley* required an objective inquiry as to this step, *Castro* reasoned that the second step in a failure to protect claim must also be "purely objective." *Id.* at 1070-71. At the same time, the court rejected mere negligence or "lack of due care" as the governing objective standard because negligence cannot make out a Due Process claim under this Court's precedent. *Id.* at 1071 (citing *Daniels v. Williams*, 474 U.S. 327, 330–31 (1986); *Davidson v. Cannon*, 474 U.S. 344 (1986)).

The full test established by *Castro* is as follows:

> (1) The defendant made an intentional decision with respect to the conditions under which the plaintiff was confined;
>
> (2) Those conditions put the plaintiff at substantial risk of suffering serious harm;
>
> (3) The defendant did not take reasonable available measures to abate that 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; and

> (4) By not taking such measures, the defendant caused the plaintiff's injuries.

Id. This standard is "akin to reckless disregard.'" *Id.*

3. In this case, the court of appeals held that *Castro*'s standard also applies to Due Process medical care claims brought by pretrial detainees. The court reasoned that Respondent's medical care claims, like the excessive force claim in *Kingsley* and the failure to protect claim in *Castro*, "arise under the Fourteenth Amendment's Due Process Clause, rather than under the Eighth Amendment's Cruel and Unusual Punishment Clause," and that this Court's language in *Kingsley* "did not limit its holding to 'force' but spoke to 'the challenged governmental action' generally." Pet. App. 12 (quoting *Kingsley*, 135 S. Ct at 2473–74, and *Castro*, 833 F.3d at 1070). As in *Castro*, the court of appeals emphasized that this standard precludes claims based on "mere lack of due care." Pet. App. 14 (quoting *Castro*, 833. F.3d at 1071). The court held that the "plaintiff must 'prove more than negligence but less than subjective intent—something akin to reckless disregard.'" Pet. App. 14 (quoting *Castro*, 833. F.3d at 1071).

The court of appeals explicitly declined to decide whether any of Respondent's federal claims against the individual defendants could survive Petitioners' motion for summary judgment under the objective standard. Pet. App. 15. Instead, it "le[ft] th[at] question for the district court to address in the first instance" on remand. *Id.* The court also remanded the Respondent's *Monell* claim, "leav[ing] the question for the district court to address in the first instance using the proper standard." Pet. App. 15.

REASONS FOR DENYING THE PETITION

This case does not concern the question presented. The court of appeals did not adopt a mere "unreasonableness" standard, as the petition suggests. Pet. i. Rather, the standard employed by the court of appeals requires an "intentional decision" that creates a "substantial risk" of "serious harm" despite "obvious" consequences. Pet. App. 14.

The Court should also deny the petition because interlocutory review is disfavored. The court of appeals did not decide whether or not Petitioners are entitled to summary judgment. Rather, the court remanded the case to the district court, holding only that the district court should adjudicate Petitioners' summary judgment motion under *Castro*'s objective standard. In the absence of a final judgment in the district court, this Court's intervention would be premature.

A threshold question compounds the vehicle problems: Are the claims against the correctional defendants, like Denney, medical care claims? The decision below assumes so, Pet. App. 4, but the answer is not clear. Many of the arguments advanced by Petitioners and amici are specific to medical care, suggesting that taxonomy issues would complicate review of the merits.

Nor is there a split among reasoned decisions in the courts of appeals. Three circuits have issued reasoned decisions addressing whether *Kingsley* requires an objective standard in non-use-of-force cases challenging conditions of pretrial detention. *Castro v. Cnty. of Los Angeles*, 833 F.3d 1060 (9th Cir. 2016); *Darnell v. Pineiro*, 849 F.3d 17 (2d Cir. 2017); *Miranda v. Cnty. of Lake*, 900 F.3d 335, 350

(7th Cir. 2018). All three hold that *Kingsley* indeed requires an objective standard in such cases. *Castro*, 833 F.3d at 1069–70; *Darnell*, 849 F.3d at 34–35; *Miranda*, 900 F.3d at 352. The other side of the asserted "split" consists of three brief, conclusory footnotes that dismiss the effect of *Kingsley* in an *ipse dixit* manner. *Whitney v. City of St. Louis*, 887 F.3d 857, 860 n.4 (8th Cir. 2018); *Alderson v. Concordia Par. Corr. Facility*, 848 F.3d 415, 419 n.4 (5th Cir. 2017); *Nam Dang v. Sheriff, Seminole Cnty. Fla.*, 871 F.3d 1272, 1279 n.2 (11th Cir. 2017).

At a minimum, the Court should allow the issue to percolate further in the courts of appeals. Only three years have passed since the Court decided *Kingsley*, and the lower courts are still exploring whether *Kingsley* requires an objective standard of fault in non-use-of-force cases brought by pretrial detainees. Additional analysis in the lower courts could aid this Court's consideration of that question, should review become necessary in a future case.

Finally, the court of appeals decided this case correctly. This Court's jurisprudence makes it clear that the state-of-mind standards that govern a convict's claims about prison conditions emanate from the Cruel and Unusual Punishments Clause of the Eighth Amendment, which prohibits "wanton" punishment. *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459, 463 (1947). Pretrial detainees, however, are entitled to greater protection. The Fourteenth Amendment shields pretrial detainees not only from cruel, unusual, or wanton punishment, but from *all* punishment.

I. THIS CASE IS A POOR VEHICLE TO CONSIDER PETITIONERS' QUESTION PRESENTED.

A. This Case Does Not Involve The Question Presented.

Petitioners frame the question as whether a pretrial detainee must make a "showing of a jail professional's subjective intent in delivering care, or whether an objective 'unreasonableness' standard is sufficient." Pet. i. The court of appeals did not hold, however, that a mere showing of "unreasonableness" establishes a Due Process violation.

1. Petitioners' phrasing of the question suggests that the court of appeals created a negligence standard, but in fact, the court explicitly refused to do just that. Pet. App. 14. The court stated: "[t]he mere lack of due care by a state official does not deprive an individual of life, liberty, or property under the Fourteenth Amendment." Pet. App. 14 (internal quotation marks omitted)).

Instead of a negligence test, the court of appeals set forth the following test, which it derived from *Kingsley* and *Castro*:

> (i) the defendant made an intentional decision with respect to the conditions under which the plaintiff was confined; (ii) those conditions put the plaintiff at substantial risk of suffering serious harm; (iii) the defendant did not take reasonable available measures to abate that risk, even though a reasonable official in the circumstances would have appreciated the high degree of risk involved—making the consequences of the defendant's conduct

> obvious; and (iv) by not taking such measures, the defendant caused the plaintiff's injuries.

Pet. App. 14.

Under this test, there must be an intentional decision by the defendant that creates a risk of serious harm, and the risk must be obvious. Pet. App. 14. As the court of appeals explained, "the plaintiff must prove more than negligence but less than subjective intent—something akin to reckless disregard." Pet. App. 14. (internal quotation marks omitted).

Because the court of appeals' standard requires "the consequences of the defendant's conduct" to be "obvious," Pet. App. 14, the test is similar to civil law recklessness. Civil law recklessness encompasses cases where the "high risk of harm" is "so obvious that it should be known." *Farmer*, 511 U.S. at 836. In other words, civil law recklessness requires more than mere negligence—a defendant must ignore the *obvious* consequences of his actions, although he need not be subjectively aware of those consequences. *See id.* at 836-37; *Darnell v. Pineiro*, 849 F.3d 17, 38 (2d Cir. 2017).[7]

Thus, there are at least two respects in which the court of appeals' test is more exacting than mere negligence. First, there must be an intentional act. Pet. App. 14. Second, as in civil law recklessness, "the consequences of the defendant's conduct" must be "obvious." Pet. App. 14. Negligence, in contrast,

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[7] In *Farmer*, this Court held that convicts bringing Eighth Amendment conditions claims must show criminal law recklessness or subjective deliberate indifference. 511 U.S. at 837. *Farmer* did not consider the standard for conditions claims brought by pretrial detainee. *Id.*

requires neither an intentional act nor reckless disregard. Restatement (Second) of Torts § 282 (1965).

2. Petitioners' concerns about "constitutionalizing" medical malpractice claims or creating a constitutional cause of action for negligence, *see* Pet. 20–22, result from misunderstanding the court of appeals' decision and misstating the question presented.

First, Petitioners state that the court of appeals standard encompasses *unintentional* acts or decisions by the defendant. Pet. 20–21. Not so. The first element of the test requires that "the defendant made an intentional decision with respect to the conditions under which the plaintiff was confined." *Castro*, 833 F.3d at 1071; Pet. App. 14.

The "akin to reckless disregard" language upon which Petitioners fixate does not negate the requirement of an intentional act or decision, which is plainly part of the test. *Castro*, 833 F.3d at 1071; Pet. App. 14. Rather, "akin to reckless disregard" refers to the standard of fault. *See Castro*, 833 F.3d at 1071; Pet. App. 14. In other words, the defendant's decision must be both (1) intentional and (2) reckless in the sense that it ignores an "obvious" risk. *See Castro*, 833 F.3d at 1071; Pet. App. 14.

Second, both the intentionality requirement and the disregard of obvious risk requirement weed out malpractice claims. A few examples of unintentional malpractice that would fail under the court of appeals' intentionality requirement include: accidentally writing a medication order for "100 mg" rather than "10 mg," accidentally switching the medications of two detainees in a "pill call" line (where prisoners in a pod line up to receive their medication from a nurse), or

inadvertently leaving a sponge in a patient's anatomy after surgery. In addition, a malpractice claim does not require that a defendant ignore an *obvious* risk. *E.g., Milano v. Freed*, 64 F.3d 91, 95 (2d Cir. 1995).

B. The Petition's Interlocutory Posture Makes It A Poor Vehicle

The court of appeals' decision—a vacatur of the district court's summary judgment order and remand of the case for further proceedings—is interlocutory. The court did not decide whether Petitioners' motion for summary judgment should be granted. Rather, it held that Petitioners' summary judgment motion should be adjudicated by the district court under the correct standard. Pet. App. 15. The court of appeals declined, however, to apply that standard to the facts in the first instance. Thus, on remand from the court of appeals, the first order of business for the district court will be to determine whether to grant summary judgment under the objective standard set forth in the decision below.

This Court disfavors interlocutory grants of certiorari. *See Mount Soledad Mem'l Ass'n v. Trunk*, 567 U.S. 944 (2012) (Alito, J., concurring in denial of certiorari) ("The current petitions come to us in an interlocutory posture. . . . Because no final judgment has been rendered and it remains unclear precisely what action the Federal Government will be required to take, I agree with the Court's decision to deny the petitions for certiorari."); *Virginia Military Inst. v. United States*, 508 U.S. 946 (1993) (Scalia, J., concurring in denial of certiorari) ("We generally await final judgment in the lower courts before exercising our certiorari jurisdiction."); *Bhd. of Locomotive Firemen & Enginemen v. Bangor &*

Aroostook R.R. Co., 389 U.S. 327, 327–28 (1967) (per curiam) ("[B]ecause the Court of Appeals remanded the case, it is not yet ripe for review by this Court."). The Court's usual practice of waiting until final judgment helps to prevent piecemeal litigation. *See* Eugene Gressman, et al., *Supreme Court Practice* Ch. 4.4(h) 249 (9th ed. 2007).

In this case, the interlocutory nature of the petition makes it unlikely that a decision of the Court would be outcome-determinative. After all, it is possible on remand that the district court will grant summary judgment to Petitioners under the objective standard.

In addition, Respondent argued at length that the Ninth Circuit should reverse the grant of summary judgment even under the subjective deliberate indifference test. Appellants' Br. 44–57. The appellate court did not reach that question. Pet. App. 1. Therefore, if this Court were to adopt Petitioners' standard, the court of appeals would need to apply that standard to the facts, possibly reaching the same result—vacatur of the district court's grant of summary judgment.

C. The Hybrid Nature of the Claims Creates A Threshold Issue That Would Complicate Review.

The Due Process claims against some of the Petitioners can be characterized as either medical care claims or failure to protect claims. For example, Deputy Denney is not a medical professional. See Pet. App. 7-8. The gravamen of his misconduct consists of failing to perform meaningful visual checks of detainees, a violation of written policy. See Pet. App. 7-8. It is at least arguable that his actions fit the

"failure to protect" category more neatly than the "inadequate medical care" category.

Nonetheless, the court of appeals viewed the case as one that involved only "Gordon's right to adequate medical care." Pet. App. 4. That characterization is accurate as to the medical defendants, such as Nurse Finley, but is not straightforward as to the correctional defendants, such as Deputy Denney.

At minimum, then, this case contains a lurking threshold question: As to the correctional defendants, is this a medical care case or a failure to protect case?

The taxonomy is not academic. Petitioners' own arguments make it clear that the Court's analysis could turn on the category of claim at issue. In the court of appeals, Petitioners sought to distinguish the Ninth Circuit's decision in *Castro*, arguing that *Castro* involved only failure to protect claims, not medical care claims. Appellees' Br. 30-31. In this Court, Petitioners repeatedly argue that the decision below imposes constitutional liability for medical malpractice. Pet. 5, 13, 15, 20, 21. One group of amici have an entire section captioned: "Applying An Objective Unreasonableness Standard To Fourteenth Amendment Inadequate Medical Care Claims Brought by Pretrial Detainees Creates A Constitutional Medical Malpractice Claim." Amicus Brief for the California Association of Counties, et al. at 19-23. The other group of amici have two subsections that specifically address "inadequate-medical-care claims." Amicus Brief for the State of Indiana, et al., at 19-24. At a minimum, then, a

preliminary debate about the type of claims at issue could complicate the Court's review of this case.

II. THERE IS NO SPLIT AMONG REASONED DECISIONS, JUST CONCLUSORY FOOTNOTES.

Every reasoned decision of the federal courts of appeals considering the impact of *Kingsley* on non-excessive-force claims brought by pretrial detainees has reached the same result: *Kingsley* requires a purely objective standard of fault. The cases Petitioners rely on for the other side of the asserted split either do not address the question at all or do so only in a conclusory footnote. The upshot is that any split of authority is superficial and evolving, rendering the Court's intervention unwarranted at this time.

1. Three circuits have considered *Kingsley*'s effect on non-force Due Process claims brought by pretrial detainees in a reasoned decision. All three have concluded that *Kingsley* requires an objective standard in such cases.

In *Darnell v. Pineiro*, 849 F.3d at 34–35, the Second Circuit recognized that *Kingsley* had overruled *Caiozzo v. Koreman*, 581 F.3d 63 (2d Cir. 2009), which had applied the subjective deliberate indifference standard to Due Process medical care claims brought by pretrial detainees. The court concluded that "[a]fter *Kingsley*, it is plain 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 court reasoned that *Kingsley* extended to pretrial detainees' conditions of confinement claims because "[a] pretrial detainee may not be punished at all under the Fourteenth Amendment, whether

through the use of excessive force, by deliberate indifference to conditions of confinement, or otherwise." *Id.*

The Seventh Circuit applied *Kingsley* to non-force claims brought by pretrial detainees in *Miranda v. Cnty. of Lake*, 900 F.3d 335, 350 (7th Cir. 2018). The court reasoned that under *Kingsley*, "[p]retrial detainees stand in a different position: they have not been convicted of anything, and they are still entitled to the constitutional presumption of innocence." *Id.* Accordingly, the court concluded, "along with the Ninth and Second Circuits, that medical-care claims brought by pretrial detainees under the Fourteenth Amendment are subject only to the objective unreasonableness inquiry identified in *Kingsley*." *Id.* at 352.

As described more fully above, *see supra* pp. 8–11, the en banc Ninth Circuit reached the same conclusion in *Castro v. Cnty. of Los Angeles.* 833 F.3d 1060, 1070 (2016) (en banc), overruling circuit precedent that had previously extended the subjective deliberate indifference standard to failure to protect claims brought by pretrial detainees, *see Clouthier v. Cnty. of Contra Costa*, 591 F.3d 1232, 1242 (9th Cir. 2010).

2. Most of the cases that Petitioners believe create a split with these decisions in fact do not consider whether *Kingsley* requires an objective standard in non-force cases brought by pretrial detainees.

The First Circuit case Petitioners cite does not address whether *Kingsley* requires an objective standard for medical care claims brought by pretrial detainees. *Miranda-Rivera v. Toledo-Dávila*, 813 F.3d 64, 74 (1st Cir. 2016) (discussing *Kingsley* only in the

context of the excessive force claim). In that case, the plaintiff did not argue that *Kingsley* should apply. Brief for Appellant at 32–34, *Miranda-Rivera v. Toledo-Dávila*, 813 F.3d 64 (1st Cir. 2016) (No. 14-1535). Thus, without mention of *Kingsley*, the court applied pre-*Kingsley* case law to the plaintiff's medical care claim. *Miranda-Rivera*, 813 F.3d at 74.

The unpublished Third Circuit order Petitioners cite does not consider *Kingsley* in analyzing a pretrial detainee's medical care claim. *See Miller v. Steele-Smith*, 713 F. App'x 74, 76 n.1 (3d Cir. 2017). In fact, the plaintiff did not argue that *Kingsley* should apply to this claim. Brief for Appellant at 17–18, *Miller v. Steele-Smith*, 713 F. App'x 74 (3d Cir. 2017). Thus, the court applied the subjective deliberate indifference standard required by pre-*Kingsley* circuit law without considering the effect of *Kingsley*. *Miller*, 713 F. App'x at 76 n.1.

The unpublished Fourth Circuit order Petitioners cite affirms a grant of summary judgment for the defendant on a claim of deliberate indifference to a serious medical need. *Duff v. Potter*, 665 F. App'x 242, 244–45 (4th Cir. 2016). The pro se plaintiff failed to argue the deliberate indifference claim entirely. *Id*. at 245. The court held plaintiff had forfeited the claim and did not address the standard. *Id*.

The unpublished Sixth Circuit order Petitioners cite also does not consider whether *Kingsley* applies to a pretrial detainee's medical care claim. *See Guy v. Metro. Gov't of Nashville & Davidson Cnty.*, 687 F. App'x. 471, 477–78 (6th Cir. 2017). Here again, the plaintiff did not argue that *Kingsley* required an objective standard for pretrial detainees' medical care claims. Brief for Appellee at 12–16, *Guy v. Metro.*

Gov't of Nashville & Davidson Cnty., 687 F. App'x. 471 (6th Cir. 2017) (No. 16-6100). The court therefore applied pre-*Kingsley* law without discussion. *Guy*, 687 F. App'x at 477–78.

The Sixth Circuit has stated in a more recent published decision that "whether *Kingsley* [] abrogates the subjective intent requirement of a Fourteenth Amendment indifference claim" remains an open question. *Richmond v. Huq*, 885 F.3d 928, 938 n.3 (6th Cir. 2018).

The unpublished Tenth Circuit order Petitioners cite is a criminal case that addressed *Kingsley* only tangentially and in a footnote. *United States v. Brown*, 654 F. App'x. 896, 906 n.6 (10th Cir. 2016), *cert. denied*, 137 S. Ct. 237 (2016). In upholding the criminal convictions of two jail administrators, the court noted that the legal standards are similar for conditions of confinement claims brought under the Eighth and Fourteenth Amendments, but specifically explained, "[f]or our purposes here, we need not flesh out the extent to which the two standards differ." *Id.*

More recently, the Tenth Circuit stated that it has not yet resolved the impact of *Kingsley* on pretrial detainees' Due Process claims: "We haven't yet addressed *Kingsley*'s impact on Fourteenth Amendment claims like this one. And in the absence of briefing from either party, we decline to do so here, where resolution of the issue would have no impact on the result of this appeal." *Perry v. Durborow*, 892 F.3d 1116, 1122 n.1 (10th Cir. 2018).

3. Petitioners' three remaining post-*Kingsley* cases each address *Kingsley* only in a conclusory footnote.

The Fifth Circuit addressed *Kingsley* in a footnote in *Alderson v. Concordia Par. Corr. Facility*, 848 F.3d 415, 419 n.4 (5th Cir. 2017). The panel stated it was constrained by pre-*Kingsley* circuit law applying the subjective deliberate indifference standard. *Id.* (citing *Hare v. City of Corinth*, 74 F.3d 633 (5th Cir. 1996) (en banc)). The footnote suggested that the case would be a poor vehicle for the en banc court to consider the effect of *Kingsley* on pre-*Kingsley* circuit law because the plaintiff, a pro se detainee, would lose under either a subjective standard or an objective standard. *Id.*

The Eleventh Circuit also considered the effect of *Kingsley* on pretrial detainees' medical care claims in a footnote. *Nam Dang v. Sheriff, Seminole Cnty. Fla.*, 871 F.3d 1272, 1279 n.2 (11th Cir. 2017). Just as in *Alderson*, the panel thought itself constrained by circuit precedent, and, in any case, the plaintiff would have lost under either standard. *Id.* Thus, rather than addressing the effect of *Kingsley* head on, the panel stated, "[w]e cannot and need not reach this question." *Id.*

The Eighth Circuit's analysis is also cursory. It consists of two sentences in a footnote in *Whitney v. City of St. Louis*, 887 F.3d 857 (8th Cir. 2018). The entire discussion reads: "[Plaintiff] asserts that the Supreme Court's conclusion in *Kingsley v. Hendrickson*, that 'the relevant standard is objective not subjective' should apply here. *Kingsley* does not control because it was an excessive force case, not a deliberate indifference case." *Id.* at 860 n.4 (quoting *Kingsley*, 135 S. Ct. at 2472).

Petitioners also rely on pre-*Kingsley* appellate decisions in arguing for a split. The Court should disregard these cases. *See* Pet. 13–16. A "split"

between circuits that have addressed the effects of *Kingsley* and circuits that have yet to do so does not warrant this Court's review.

4. Petitioners' remaining split does not exist. Petitioners claim that circuits differ on whether pretrial detainees' Due Process conditions and treatment claims should "track" the Fourth or Eighth Amendment. Pet. App. 11. In fact, it is well-settled that pretrial detainees' conditions and treatment claims arise under neither the Fourth Amendment nor under the Eighth Amendment. They arise under the Due Process Clauses, as this Court has repeatedly stated, *Kingsley*, 135 S. Ct. at 2475; *Bell v. Wolfish*, 441 U.S. 520, 535–36 (1979); *Schall v. Martin*, 467 U.S. 253, 263–64 1984; *Block v. Rutherford*, 468 U.S. 576, 591 (1984). The circuits that have overruled their pre-*Kingsley* precedent and applied objective standards under the Due Process Clause have not relied on the Fourth Amendment. *Castro*, 833 F.3d at 1067–68; *Miranda*, 900 F.3d at 350; *Darnell*, 849 F.3d at 21.

III. THE QUESTION PRESENTED SHOULD PERCOLATE FURTHER IN THE COURTS OF APPEALS.

As the previous section demonstrates, circuit law remains in a state of evolution after *Kingsley*. That ongoing evolution calls for further percolation in the lower courts, which "may yield a better informed and more enduring final pronouncement by this Court." *Arizona v. Evans*, 514 U.S. 1, 23 n.1 (1995) (Ginsburg, J., dissenting). Additional percolation is especially important "in the context of constitutional adjudication, where the Court's decisions cannot be overruled by statutory amendments." STEPHEN M.

SHAPIRO, SUPREME COURT PRACTICE 506 (Stephen M. Shapiro et al. eds., 10th ed. 2013).

While the courts of appeals have thoroughly developed the argument that *Kingsley*'s objective standard applies to non-force claims brought by pretrial detainees, they have yet to develop the argument that *Kingsley* does *not* apply to such claims. *See supra* at 21–23. Indeed, the only appellate precedent supporting that position consists of three conclusory footnotes. *See supra* at 23–25. If this Court elects to consider the question presented in a future case, it could benefit from fuller analysis by the lower courts.

IV. THE DECISION BELOW IS CORRECT.

This Court developed the subjective deliberate indifference standard in the unique context of claims brought by convicts under the Cruel and Unusual Punishments Clause of the Eighth Amendment. In a long line of cases, the Court grounded that standard in the Eighth Amendment's prohibition of "wanton" punishment—and it has never applied the Eighth Amendment or the wantonness standard to a conditions claim brought by a pretrial detainee. On the contrary, this Court has drawn a sharp distinction between Eighth Amendment conditions claims brought by convicted prisoners and Fourteenth Amendment conditions claims brought by pretrial detainees. The wantonness standard, and the subjective tests derived from it, have no place in a case about pretrial detainees.

1. Culpable state of mind tests govern convicts' Eighth Amendment conditions claims. This Court has long held that the Eighth Amendment's Cruel and Unusual Punishments Clause forbids the "wanton

infliction of pain." *See Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459, 463 (1947). By definition, a "wanton" state of mind is akin to subjective deliberate indifference. Black's Law Dictionary (10th ed. 2014) (defining "wanton" as "[u]nreasonably or maliciously risking harm while being utterly indifferent to the consequences").

Accordingly, the Court applies subjective state of mind tests to every species of Eighth Amendment conditions claim brought by a convicted prisoner. In *Estelle v. Gamble*, the Court derived a subjective deliberate indifference standard for medical care claims brought by convicted prisoners from the Eighth Amendment's prohibition of "wanton" punishment: "We . . . conclude that deliberate indifference to serious medical needs of prisoners constitutes the 'unnecessary and wanton infliction of pain,' proscribed by the Eighth Amendment." 429 U.S. 97, 104 (1976) (quoting *Gregg v. Georgia*, 428 U.S. 153, 173 (1976)). In *Whitley v. Albers*, the Court applied another culpable state of mind requirement—the "malicious[] and sadistic[]" test—to excessive force claims brought by convicted prisoners. 475 U.S. 312, 320 (1986). The Court again derived this subjective test from the Eighth Amendment's wantonness requirement. *Id*. at 319. In *Farmer v. Brennan*, the Court considered an Eighth Amendment failure-to-protect claim brought by a convicted prisoner, who alleged that prison officials had failed to protect her against obvious risks of being raped. 511 U.S. at 829–30. The Court applied a subjective state of mind standard, which reflected "the principle that 'only the unnecessary and wanton infliction of pain implicates the Eighth Amendment.' . . . To violate the Cruel and Unusual Punishments Clause, a prison official must have a 'sufficiently

culpable state of mind.'" *Id.* at 834 (quoting *Wilson v. Seiter*, 501 U.S. 294, 297, 302–03 (1991)).

2. By contrast, objective tests govern pretrial detainees' Due Process conditions claims. The Court has never applied a subjective test to a Due Process claim challenging conditions of pretrial detention. Rather, the Court has differentiated sharply between pretrial detention and the incarceration of convicts, noting that pretrial detainees "have been charged with a crime but . . . have not yet been tried on the charge." *Bell v. Wolfish*, 441 U.S. 520, 523 (1979). This critical distinction in legal status is reflected in different legal standards that govern pretrial detainees' Fourteenth Amendment claims and convicted prisoners' Eighth Amendment claims. *See Kingsley*, 135 S. Ct. at 2475. Pretrial detainees must meet objective standards, not the onerous subjective state of mind tests that govern suits by convicts. *See id.* at 2472.

While the Eighth Amendment prohibits "wanton" punishment of convicted prisoners, the Court held some 40 years ago in *Bell* that the Due Process Clauses prohibit *all* punishment of pretrial detainees. 441 U.S. at 535; *see also Kingsley*, 135 S. Ct. at 2475. The Eighth Amendment applies "only after the State has complied with the constitutional guarantees traditionally associated with criminal prosecutions." *Bell*, 441 U.S. at 535 n.16. On the other hand, "[w]here the State seeks to impose punishment without such an adjudication, the pertinent constitutional guarantee is the Due Process Clause of the Fourteenth Amendment." *Id.*

Because of that critical distinction, *Kingsley*'s logic forbids adjudicating pretrial detainees' Due Process

claims via tests designed for convicted prisoners' harder-to-establish Eighth Amendment claims. 135 S. Ct. at 2475. In *Kingsley*, the Court concluded that Eighth Amendment culpable state of mind rules arising out of the prohibition of "wanton" punishment cannot be extended to pretrial detainees, who have a Fourteenth Amendment right to be free from all punishment. *Id*. "The language of the two Clauses differs," the Court reasoned, "and the nature of the claims often differs. And, most importantly, pretrial detainees (unlike convicted prisoners) cannot be punished at all . . . ." *Id*.

Because there is no requirement that a pretrial detainee demonstrate the wanton infliction of pain, "a pretrial detainee can prevail by providing only objective evidence that the challenged governmental action is not rationally related to a legitimate governmental objective or that it is excessive in relation to that purpose." *Id*. at 2473–74. Thus, "the appropriate standard for a pretrial detainee's excessive force claim," *Kingsley* held, "is solely an objective one." *Id*. at 2473.

3. The logic of *Kingsley* is not limited to claims of excessive force. While it is true that the narrow issue in *Kingsley* involved an excessive force claim, the reasoning of the decision dictates that subjective standards designed for claims brought by convicted prisoners cannot be applied to a conditions claim brought by a pretrial detainee. In this case, the court of appeals correctly applied an objective standard of fault to Respondent's Due Process claim regarding medical care.

First, as explained above, *Kingsley*'s rejection of a subjective standard for pretrial detainees turns on a

distinction between the legal status of pretrial detainees and convicted prisoners, and a distinction between the protections afforded by the Eighth and Fourteenth Amendments. *See supra* at 28. Thus, Gordon had the same legal status at the time of his death that Kingsley had when officers allegedly attacked him—both were pretrial detainees. Because of their status as pretrial detainees, both men shared in the guarantee of the Due Process Clauses, not the narrower protection afforded to convicts by the Eighth Amendment.

Second, the logic of *Kingsley* cannot be restricted to force claims alone because *Kingsley* explicitly interprets *Bell* to mandate the use of an objective standard for a broad range of claims brought by pretrial detainees: "The *Bell* Court applied [an] objective standard to evaluate a *variety* of prison conditions . . . In doing so, it did not consider the prison officials' subjective beliefs . . ." 135 S. Ct. at 2473 (emphasis added) (citing *Bell*, 441 U.S. at 541–43).

Third, limiting objective standards to detainees' use of force claims would produce an illogical result: If detainees can win use-of-force cases with objective evidence alone, but must provide state of mind evidence in all other types of conditions cases, jail staff will enjoy the *least* deference and insulation from suit in use-of-force litigation. That cannot be right. This Court has stated that corrections personnel must have the *most* deference in the use-of-force context, where guards must act "quickly and decisively," *Hudson v. McMillian*, 503 U.S. 1, 6 (1992), making split-second decisions "in haste, under pressure, and frequently without the luxury of a second chance." *Whitley*, 475 U.S. at 320.

4. Amici's arguments in support of the petition also lack merit. Amici contend that applying the subjective deliberate indifference standard to pretrial detainees' medical care claims will create a financial burden for state and local governments. Amicus Brief for the State of Indiana, et al., at 13–17. That claim is false because the total liability that governments and their employees face for the conditions and treatment of incarcerated men and women is tiny. "In fiscal year 2012, for instance, the median damages award in a prisoner-civil-rights action litigated to victory (i.e., not settled or decided against the prisoner) was a mere $4,185." *Murphy v. Smith*, 138 S. Ct. 784, 793 (2018) (Sotomayor, J., dissenting). In fact, "nationwide litigated damages" in jail and prison conditions and treatment cases for the full year "totaled a mere $1,000,000." *See* Margo Schlanger, *Trends in Prisoner Litigation, as the PLRA Enters Adulthood*, 5 U.C. IRVINE L. REV. 153, 168-69 (2015). That figure refers to all species of treatment and conditions claims by both convicted prisoners and pretrial detainees. *Id.* Liability for medical care claims brought by pretrial detainees surely constitutes a small fraction of the total.

Amici's speculation that fear of liability would deter doctors from working at state prisons, Amicus Brief for the State of Indiana, et al., at 16, also lacks support. Not only is liability for incarceration treatment and conditions de minimis, but even when a court holds a law enforcement official personally liable for a constitutional violation, the government in fact picks up an average of 99.98% of the cost. Joanna C. Schwartz, *Police Indemnification*, 89 N.Y.U. L. REV. 885 (2014).

Nor is it likely, as amici posit, that an objective standard would increase discovery burdens on defendants. The Prison Litigation Reform Act[8] contains an array of barriers to prisoner litigation that have dramatically reduced its frequency. *See* Schlanger, *Trends in Prisoner Litigation*, 5 UC IRVINE L. REV. at 156. As the Court stated in *Kingsley*, the Act applies to jail detainees as well and prevents "a relative flood of claims." 135 S. Ct. at 2476.

If anything threatens to open the door to broader discovery, it is the subjective inquiry championed by Petitioners. Whereas an objective standard confines the inquiry to a defendant's actions, plaintiffs litigating under a subjective standard could justify more intrusive discovery. Inquiries into a litigant's "state of mind" tend to "invite[ ] long and complicated discovery." *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 774 (1985) (White, J., concurring). "That kind of litigation is very expensive." *Id.*

CONCLUSION

The petition for a writ of certiorari should be denied.

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[8] Prison Litigation Reform Act, 11 U.S.C. § 523 (2012); 18 U.S.C. §§ 3624, 3626 (2012); 28 U.S.C. §§ 1346, 1915, 1915A, 1932 (2012); 42 U.S.C. §§ 1997a-c, e-f, h (2012).

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