No. _____

In the Supreme Court of the United States

COWLITZ COUNTY; MARIN FOX HIGHT, in her official capacity; JOHN DOES, 1-5; and CONMED, INC.,
Petitioners,

v.

JULE CROWELL, individually and as Personal Representative of the Estate of Stephanie Deal; and LISA SULLY, as Personal Representative of the Estate of Jenny Lynn Borelis,
Respondents.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a pretrial detainee alleging Fourteenth Amendment claims of deliberate indifference to serious medical needs under 42 U.S.C. § 1983 must show that an individual defendant had the subjective intent to deprive the plaintiff of needed medical care, as nine circuits continue to hold based upon Eighth Amendment precedent, or whether Fourteenth Amendment jurisprudence should be altered in cases relating to the provision of medical care, by replacing the well-established subjective intent requirement with the Fourth Amendment's "objective reasonableness" standard, traditionally used for excessive force claims, as was at issue in *Kingsley v. Hendrickson*, 135 S. Ct. 2466 (2015).

2. Whether the Ninth Circuit's vacation of the district court's summary judgment order, despite no proof of a policy or custom which posed a substantial risk of serious harm with respect to inmate medical care, conflicts with this Court's municipal liability precedent in *Monell v. Dep't of Social and Health Services,* 436 U.S. 658 (1978) and its progeny.

PARTIES TO PROCEEDING AND RULE 29.6 CORPORATE DISCLOSURE STATEMENT

Petitioners Cowlitz County, Marin Fox Hight (in her official capacity only), and Conmed, Inc. were appellees in the court of appeals. Respondents Jule Crowell, individually and as Personal Representative of the Estate of Stephanie Deal, and Lisa Sully, as Personal Representative of the Estate of Jenny Lynn Borelis, were appellants in the court of appeals. Appellants in the court of appeals included a third party, Kimberly Bush, as Personal Representative of the Estate of Daniel D. Bush, but dismissal of the Estate of Bush claims was affirmed by the Ninth Circuit and the Estate of Bush is not a party to this Petition.

Petitioner Conmed, Inc. certifies that Conmed Healthcare Management, Inc. is its parent company. Conmed Healthcare Management, Inc. is a wholly owned subsidiary of Jessamine Healthcare, Inc.. Conmed, Inc. is not owned in any part by a publicly held corporation.

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Petitioners Cowlitz County, Marin Fox Hight and Conmed, Inc. respectfully petition for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The Ninth Circuit issued an unpublished memorandum panel opinion. Appendix ("App.") at 1-5.

The United States District Court for the Western District of Washington issued an unpublished Order Granting in Part Defendants' Motions for Summary Judgment, Reserving Ruling in Part, and Requesting Parties to Show Cause. App. 6-19.

JURISDICTION

The judgment of the Ninth Circuit Court of Appeals was entered on June 7, 2018. A timely Joint Petition for Rehearing En Banc was denied on July 16, 2018. App. 20-21. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The relevant portions of the following statutes and Constitutional Amendments are as follows.

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . 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.

42 U.S.C. § 1983.

"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.

"Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const. amend. VIII.

"No state shall … deprive any person of life, liberty or property, without due process of law." U.S. Const. amend. XIV, § 1.

STATEMENT OF THE CASE

Cowlitz County and Conmed were granted summary judgment dismissal of Fourteenth Amendment municipal liability claims under 42 U.S.C. § 1983 for alleged inadequate medical care provided to three former Cowlitz County Jail pretrial detainees, Jenny Borelis, Stephanie Deal and Daniel Bush. Borelis, Deal and Bush jointly appealed to the Ninth Circuit Court of Appeals.[1] The matter was briefed and oral argument was held.

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[1] No disrespect is intended by using the names of deceased inmates "Borelis," "Deal," and "Bush." Each claim was brought by a personal representative of each inmate's estate, so the inmates' names are used for clarity in identifying the parties and explaining relevant facts in this Petition.

After oral argument, a different Ninth Circuit panel decided *Gordon v. County of Orange*, 888 F.3d 1118 (2018). *Gordon* misapplied this Court's decision in *Kingsley v. Hendrickson*, 135 S. Ct. 2466 (2015), a pretrial detainee excessive force case, by inserting a Fourth-Amendment based "objective reasonableness" standard specifically used in excessive force cases, in place of the well-established "subjective intent to harm" standard that has always applied to both Fourteenth and Eighth Amendment jurisprudence, in determining individual liability in cases of alleged deliberate indifference to a pretrial detainee's serious medical needs. *Gordon* included no discussion or analysis of municipal liability standards. A Petition for a Writ of Certiorari has been filed with this Court by the parties to that case, *County of Orange, California, et al, Petitioners, v. Mary Gordon, Respondent*, U.S. Supreme Court Case No. 18-337.

Nine circuits still require a showing of subjective intent in Fourteenth Amendment inadequate medical care claims brought by pretrial detainees. Under the Ninth Circuit's new standard, now also adopted by two other circuits, a pretrial detainee must only prove that corrections or medical staff acted in an "objectively unreasonable" manner to prevail on a Fourteenth Amendment inadequate medical care claim. Liability against corrections and medical staff in such cases is thus now contingent, in part, upon which circuit the claim against them is brought.

Based solely upon *Gordon's* new standard for proving a pretrial detainee inadequate medical care claim against an individual, the Ninth Circuit below affirmed the summary judgment order dismissing the

claims of Bush, noting he had been convicted of a felony and was serving a sentence at the time of his death and was therefore asserting rights under the Eighth Amendment, due to a lack of evidence to support a municipal liability claim. However, the Ninth Circuit vacated the summary judgment order dismissing the Fourteenth Amendment municipal liability claims brought by pretrial detainees Borelis and Deal, and remanded the Borelis and Deal cases back to the district court for further proceedings, including a recommendation that the district court determine whether to reopen discovery and/or amend their pleadings to permit new claims to be brought under the new standard for individual liability. It is only as to the claims of Borelis and Deal that Petitioners seek review by this Court.

A. Factual Background.

1. Jenny Borelis.

Borelis was arrested on May 12, 2013. Borelis's head struck the ground during arrest, so she was taken to St. John Medical Center emergency room, examined, and cleared for booking, with discharge instructions for return to the emergency department if certain symptoms appeared. App. 9. Upon arrival at the Cowlitz County Jail, Borelis informed the booking officer she would be detoxing from heroin. As a result of her medical status and health history, she underwent a neurological examination and was placed on a detox protocol. *Id*. A physician's orders called for continuous care, including vital signs assessment every eight hours, and observation for certain symptoms of heroin withdrawal. *Id*. Borelis was put in an observation cell in medical housing, observed every half

an hour, and awoken every two hours, based on instructions from the emergency room. R. 592, 608. Neurological exams were performed at four-hour intervals from booking through the next day. R. 601-04. The exams were normal. R. 603. Borelis' vital signs were assessed approximately every eight hours as ordered App. 9-10, and up until the last assessment were generally normal, other than an elevated temperature and heart rate, symptoms consistent with heroin withdrawal. R. 610.

On May 15, 2013 jail staff called medical staff to Borelis' cell because she was reported to have fallen off her bunk. App. 10. Medical staff found Borelis lying on the floor, complaining of pain. Borelis had a temperature of 102.1, was in a stupor, had jumbled speech, and had vomited. A nurse verified that Borelis was on a detox protocol and noted that she would consult the physician for review. At 2:30 pm the nurse contacted the physician who ordered a urinalysis for possible urinary tract infection and Tylenol for fever. *Id*. At 2:55 pm, jail staff again called the nurse to Borelis' cell, where she was found non-responsive with no detectable pulse. Staff called 911, and Borelis was transported to the hospital, where she was pronounced dead the next day. *Id*.

Autopsy revealed that Borelis had multiple sites of infection and resulting blood clots. R. 643-47. Necrotic tissue stretched from her arm vein, where she used needles to shoot heroin, down to her organs. *Id*. A container filled with heroin was found in her stomach. R. 646. Toxicology was positive for opiates and methamphetamine. R. 649-51. The cause of Borelis's death was internal infection caused by chronic

intravenous heroin abuse that spread through her body. S.R. 257-65, 643, 982-85, 993-98, 1069-71.

2. Stephanie Deal.

On August 3, 2013, Deal was booked into Cowlitz County Jail. The next day, Deal submitted a sick request claiming she was detoxing from heroin and methamphetamine. A doctor prescribed a detox protocol, which was similar to Borelis's protocol. App. 10.

Beginning August 6, 2013, Deal exhibited symptoms of withdrawal, including unconsciousness and stomach problems, *id*., for which she received medications and treatment. R. 176-77; S.R. 1484-86, 1494.

On August 7, 2013, a doctor attending Deal noted acute heroin withdrawal and gave directions to continue the detox protocol. App. 10-11.

On August 10, 2013, a nurse checked on Deal, who was slurring her words. The nurse had difficulty obtaining a pulse, and Deal's mental status had significantly changed. The nurse asked the jail staff to call an ambulance, and the ambulance arrived shortly thereafter. App. 11.

Deal was awake when the EMTs arrived, was able to move without assistance, and answer questions with slurred speech. She was transferred to a gurney, and resisted efforts by the EMTs to give her an IV. Deal vomited while strapped to the gurney face up, but the EMTs did not have a portable suction unit available to remove the blockage and had to retrieve it from their vehicle. Deal suffered cardiac arrest and lost consciousness. App. 11. The EMTs began giving Deal

chest compressions, ventilating her with oxygen, and began driving her to the hospital. Deal was pronounced dead shortly after arriving at the hospital. *Id*. The cause of death was listed as cardiac arrest. R. 1507-11; R. 764-65.

B. Proceedings Below.

On February 6, 2014, the *Deal* lawsuit was filed against Cowlitz County and Cowlitz County Jail Director Marin Fox Hight for alleged deficient medical care, asserting claims for violation of federal civil rights under 42 U.S.C. § 1983 and state law negligence. App. 7.

On August 25, 2014, the *Borelis / Bush* lawsuit was filed against Cowlitz County for alleged deficient medical care, asserting claims for violation of federal civil rights under 42 U.S.C. § 1983 and state law negligence. *Id*.

On November 21, 2014 the County's contract correctional medical care provider, Conmed Inc., was granted intervenor status, and the cases were consolidated. App. 8.

In September and October of 2015, after extensive discovery and several prior continuances, Cowlitz County and Conmed each separately moved for summary judgment seeking dismissal of all federal and state claims in the Borelis, Deal, and Bush cases. *Id*.

On December 8, 2015, the district court entered an Order Denying Plaintiffs' Motion to Continue, Granting in Part Defendants' Motions for Summary Judgment, Declining to Exercise Supplemental Jurisdiction, and Remanding / Dismissing State Law Claims. App. 6-19.

The district court granted the summary judgment motions to the extent they sought dismissal of each claimant's § 1983 claims for inadequate medical care, citing as controlling law the two-part deliberate indifference standard established under the Eighth Amendment that there be proof of confinement under conditions posing a risk of "objectively, sufficiently serious" harm and a subjective "sufficiently culpable state of mind" in denying proper medical care, citing, among other cases, *Estelle v. Gamble*, 429 U.S. 97 (1976) and *Farmer v. Brennan*, 511 U.S. 825 (1994). App. 16.

In their motions, the County and Conmed cited then-controlling Ninth Circuit authority establishing that Fourteenth Amendment and Eighth Amendment inadequate medical care claims were governed by the same deliberate indifference standard. *See Frost v. Agnos*, 152 F.3d 1124, 1128 (9th Cir. 1998). Borelis, Deal, and Bush cited the same authorities and standards as controlling in their combined summary judgment responding brief. App. 23-28.

Under this undisputed standard, the district court found that the claimants (1) failed to assert claims against any specific individual, instead arguing a generic form of group liability; (2) failed to submit evidence showing that a particular person acted with deliberate indifference toward either inmate even if a specific person had been identified; and (3) failed to identify any applicable exception to the rule that if there is no constitutional violation shown by an individual, there can be no municipal liability. App. 14-18.

Borelis, Deal, and Bush jointly appealed the district court's decision. On appeal, they abandoned claims based on individual liability, and asserted solely municipal liability.

During the pendency of this appeal, a different panel of the Ninth Circuit decided *Gordon*. Based solely upon an erroneous extension of this Court's opinion in *Kingsley*, the *Gordon* panel rejected the subjective component of the deliberate indifference standard for Fourteenth Amendment "medical care" claims against individuals in favor of a new purely objective standard. *See, Gordon*, 888 F.3d at 1124-25, and 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." … Under the Ninth Circuit's new standard applicable to claims against individuals, "a pretrial detainee need not prove those subjective elements about the officer's actual awareness of the level of risk.")

Following oral argument, the Ninth Circuit requested supplemental briefing addressing the effect of *Gordon* on this case, if any. App. 29-30. The County and Conmed argued that, while *Gordon* had erroneously extended *Kingsley's* purely objective standard for determining whether force used was excessive into cases involving claims against individuals for allegedly inadequate medical care, *Gordon* should have no impact on this case, since no claims against individuals remained. The County and Conmed further argued that *Gordon* did not address municipal liability standards anywhere in the decision, and the Ninth Circuit panel in that case did not, and

could not, change the basis for municipal liability set forth by the United States Supreme Court in *Monell v. Dep't of Social and Health Services*, 436 U.S. 658 (1978), *City of Canton, Ohio v. Harris*, 489 U.S. 378 (1989) and *Connick v. Thompson*, 563 U.S. 51 (2011), among other cases.

The Ninth Circuit affirmed dismissal of Bush's claims, finding in part that he "has not pointed to evidence that would allow a reasonable trier of fact to conclude that his death was caused by a policy or custom of Defendants that posed a substantial risk of serious harm to him." App. 3-4. Yet as to Borelis and Deal, the Ninth Circuit held as follows:

> In light of our recent decision in *Gordon v. County of Orange*, 888 F.3d 1118 (9th Cir. 2018), we vacate the district court's entry of summary judgment in favor of Defendants on the § 1983 claims brought by Plaintiffs Borelis and Deal. Defendants are correct that *Gordon* changed only the individual liability standard for § 1983 medical-needs claims brought by pretrial detainees. But *Gordon* still bears on this case because, under its newly-announced standard for individual liability, Borelis and Deal may be able to show that one or more individuals violated their rights by exhibiting "reckless disregard" for their well-being, *Gordon*, 888 F.3d at 1125, and that those violations are attributable to Defendants.

App. 4 (Emphasis in original).

The Ninth Circuit also recommended that the district court should determine whether to allow

additional discovery and/or permit Borelis and Deal to amend their pleadings in light of *Gordon*. App. 4.

To the extent this Petition is based upon alleged error in *Gordon's* extension of the objective unreasonableness standard to claims against individuals, sections A-C of the reasons for granting the petition below track those in the Petition in *Gordon*, with permission from counsel.

REASONS FOR GRANTING THE PETITION

A. The circuits are split on the applicable standard for a pretrial detainee's § 1983 claim for deliberate indifference to medical needs.

For decades, this Court and all courts of appeal unanimously sought to prevent § 1983 claims based on an inmate's medical treatment from devolving into a federal medical malpractice statute. *See Farmer v. Brennan*, 511 U.S. 825, 836 (1994) (a prisoner must show more than negligence to prevail in a claim of Constitutional deprivation under § 1983); *Estelle v. Gamble*, 429 U.S. 97 (1976) ("[m]edical malpractice does not become a constitutional violation merely because the victim is a prisoner).

However, as a result of an apparent misunderstanding by some courts as to this Court's decision in *Kingsley*, the courts of appeals are now split on 42 U.S.C. § 1983 claims for inadequate medical care brought by pretrial detainees. Specifically, the courts do not agree as to whether the governing test requires evidence of a jail's corrections or medical staff member's subjective state of mind in providing inmate health care or whether proof of some sort of objective unreasonableness is sufficient.

Claims of use of excessive force traditionally use the Fourth Amendment's objective reasonableness standard. *See Plumhoff v. Rickard*, 134 S. Ct. 2012, 2020 (2014) ("[a] claim that law-enforcement officers used excessive force to effect a seizure is governed by the Fourth Amendment's "reasonableness" standard"); *Graham v. Connor*, 490 U.S. 386, 388 (U.S. 1989) (excessive force claims "are properly analyzed under the Fourth Amendment's "objective reasonableness" standard, rather than under a substantive due process standard").

In 2015, this Court issued its decision in *Kingsley*. In *Kingsely*, a pretrial detainee brought an action under § 1983 based on a claim of use of excessive force when a Taser was used upon him by jail officials. 135 S. Ct. at 2470–71. As such, it was unsurprising that this Court applied an objective reasonableness standard to a pretrial detainee's § 1983 claim under the Fourth Amendment.

Thus, the question in *Kingsley* was whether the same test should be used for both pretrial detainees and inmates incarcerated after an adjudication of guilt, or whether the standard for excessive force should be changed for pretrial detainees. This Court's decision maintained the same standards for the same constitutional violation. There does not appear to be any other constitutional violation that applies different standards based on the same constitutional provision. In applying an objective reasonableness standard to excessive force claims, this Court was merely maintaining consistency in Fourth Amendment jurisprudence. *Kingsley,* 135 S.Ct. at 2474 (citing *Graham v. Connor*, 490 U.S. 386, 396 (1989)).

Subsequent to *Kingsley*, nine circuits (the First, Third, Fourth, Fifth, Sixth, Eighth, Tenth, Eleventh, and DC Circuits) continue to require a pretrial detainee in a medical care case to show the defendant's subjective intent to deliver substandard medical care. Some, but not all, of the post-*Kingsley* cases continuing to use this test include the following:

- *Miranda-Rivera v. Toledo-Dávila*, 813 F.3d 64, 74 (1st Cir. 2016) (applying *Kingsley's* objective standard to excessive force claim, but subjective standard to claims of inadequate medical care).

- *Miller v. Steele-Smith*, 713 F. App'x 74, 76 n1 (3rd Cir. 2017); *Banda v. Adams*, 674 F. App'x 181, 184 (3d Cir. 2017); *Edwards v. Northampton Cty.*, 663 F. App'x 132, 136-37 (3d Cir. 2016).

- *Duff v. Potter*, 665 F. App'x 242, 244–45 (4th Cir. 2016).

- *Alderson v. Concordia Parish Corr. Facility*, 848 F.3d 415, 419 n4 (5th Cir. 2017) (declining to extend *Kingsley* beyond excessive force claims); *Mason v. Lafayette City-Par. Consol. Gov't*, 806 F.3d 268, 279 (5th Cir. 2015).[2]

- *Winkler v. Madison Cty.*, 893 F.3d 877, 891 (6th Cir. 2018); *Hopper v. Phil Plummer*, 887 F.3d 744, 756 (6th Cir. 2018) (same).

- *Whitney v. City of St. Louis*, 887 F.3d 857, 860 n4 (8th Cir. 2018).

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[2] *See also Dyer v. Fyall*, -- F. Supp. 3rd -- , 2018 WL 2739025, at *8 (N.D. Tex. June 6, 2018) (rejecting *Gordon* and adhering to the subjective intent requirement in *Farmer*).

- *Clark v. Colbert*, 895 F.3d 1258, 1267 (10th Cir. 2018); *Rife v. Oklahoma Dep't of Pub. Safety*, 854 F.3d 637, 647 (10th Cir. 2017), *cert. denied sub nom. Dale v. Rife*, 138 S. Ct. 364 (2017), *and cert. denied sub nom. Jefferson v. Rife*, 138 S. Ct. 364 (2017) ("Fourteenth Amendment's Due Process Clause entitles pretrial detainees to the same standard of medical care owed to convicted inmates under the Eighth Amendment")

- *Melton v. Abston*, 841 F.3d 1207, 1223 (11th Cir. 2016); *Dang v. Sheriff, Seminole Cnty.*, 871 F.3d 1272, 1280 (11th Cir. 2017).

- *Oladokun v. Corr. Treatment Facility*, 5 F. Supp. 3d 7, 15, n8 and n10 (D.C. Cir. 2013) (holding that in the D.C. Circuit pretrial detainees' claims for deliberate indifference to serious medical needs fall under the Fifth Amendment, not the Fourteenth Amendment, and the subjective standard applies).

By contrast, three circuits (the Second, Seventh, and Ninth Circuits) do not require the pretrial detainee to prove the corrections official or healthcare provider's subjective intent at the time medical care is rendered, but require only proof of "objectively unreasonable" medical care. *See Bruno v. City of Schenectady*, 727 Fed. Appx. 717, 719-720 (2nd Cir. 2018) (using a "reasonable person" standard); *Miranda v. Cty. of Lake*, 900 F.3d 335, 353-54 (7th Cir. 2018) (adopting the reasoning in *Gordon*); *Gordon*, 888 F.3d at 1124–25, n4 ("[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").

The circuits that fall on the "objective reasonableness" side of the split cannot even agree on what level of fault is sufficient to support liability; with the spectrum ranging from "possible" recklessness to reckless disregard. *See Bruno*, 727 Fed. Appx. at 720 (plaintiff must prove from an objective standpoint that medical professional "recklessly failed to act with reasonable care"); *Miranda*, 900 F.3d 335 (7th Cir. 2018) (court "leav[es] open the possibility that recklessness would … suffice"); *Gordon*, 888 F.3d at 1125 ("plaintiff must prove … something akin to reckless disregard").

If the events in this case had occurred in the First, Third, Fourth, Fifth, Sixth, Eighth, Tenth or Eleventh Circuits, the corrections and medical staff in this case would be judged with reference to their subjective intent in delivering medical care, and dismissal of the claims would have been affirmed on appeal. But the Ninth Circuit significantly lowers the standard for constitutional violations by eliminating the subjective element in favor of a "reasonable person" standard. Medical care claims against similarly situated corrections or medical staff should not hinge on the jurisdiction in which the claims against them are brought. Review is warranted to resolve this split and define the contours of jail medical care liability for pretrial detainees, which is an issue of importance to the administration of state and local governments. *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").[3]

B. The majority of circuits continue to apply an Eighth Amendment analysis to Fourteenth Amendment claims alleging inadequate medical care, while a minority of circuits have adopted a Fourth Amendment analysis.

The Due Process Clause of the ***Fourteenth Amendment*** provides: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law." Historically, this guarantee of due process has been applied to ***deliberate decisions*** of government officials to deprive a person of life, liberty, or property.

Daniels v. Williams, 474 U.S. 327, 331 (1986) (emphasis added).

> Not only does the word "deprive" in the Due Process Clause connote more than a negligent act, but we should not "open the federal courts to lawsuits where there has been no affirmative abuse of power." *Id*., at 548–549, 101 S.Ct., at 1919–1920; *see also id*., at 545, 101 S.Ct., at 1917 (Stewart, J., concurring) ("To hold that this kind of loss is a deprivation of property within

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[3] The high volume of cases concerning this issue is unsurprising given the numbers of persons involved. While an exact count of pre-trial detainees is not available, local jails admitted 10.6 million individuals in 2016, and 65.1% of those held were did not have convictions. *See* Zhen Zeng, Bureau of Justice Statistics, U.S. Dep't of Justice, Jail Inmates in 2016, p. 1, 4, tbl.3 (2018), https://www.bjs.gov/content/pub/pdf/ji16.pdf.

> the meaning of the Fourteenth Amendment seems not only to trivialize, but grossly to distort the meaning and intent of the Constitution"). Upon reflection, we agree and overrule *Parratt* to the extent that it states that mere lack of due care by a state official may "deprive" an individual of life, liberty, or property under the Fourteenth Amendment.

Daniels, 474 U.S. at 330–31.

Jail corrections' and medical staff's delivery of medical care to pre-trial detainees is governed by the Fourteenth Amendment due process clause. *Bell v. Wolfish*, 441 U.S. 520, 537, 99 S. Ct. 1861, 1873, 60 L. Ed. 2d 447, n16 (1979). The level of official misconduct that must be shown to support a claim for deliberate indifference to serious medical needs is a question that this Court has expressly reserved. *City of Canton, Ohio v. Harris*, 489 U.S. 378, 389, n8 (1989) (citing *City of Revere v. Massachusetts General Hospital*, 463 U.S. 239, 243–245 (1983)).

This Court's holding in *Daniels* appears to compel the imposition of a subjective intent requirement to a pretrial detainee's claims under the Fourteenth Amendment for inadequate medical treatment. Yet, in the absence of a specific ruling from this Court on the subject, the circuits have fashioned tests by looking to different Constitutional sources. In adopting a subjective test, the First, Third, Fourth, Fifth, Sixth, Eighth, Tenth and Eleventh Circuits have continued to look to this Court's Eighth Amendment precedent, which shares a subjective intent requirement with Fourteenth Amendment jurisprudence. These circuits have noted that this Court has already developed an

appropriate test under the Eighth Amendment for use in cases brought by convicted prisoners against jail corrections or medical officials for allegedly inadequate medical care.

This Court has held that liability for inadequate medical care arises when a prison official's failure to act amounts to subjective deliberate indifference to the convicted prisoner's health. *Estelle*, 429 U.S. at 105. Under this standard, a jail corrections or medical official:

> … 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, 511 U.S. at 837.

Citing this Court's decisions, courts adopting the *Farmer* subjective "deliberate indifference" standard for pre-trial detainee medical care cases have found it workable for both substantive due process and Eighth Amendment purposes. *Cty. of Sacramento v. Lewis*, 523 U.S. 833, 850 (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"). *See also City of Revere*, 463 U.S. at 244; *Bell*, 441 U.S. at 545.

Circuit courts adopting the *Farmer* subjective deliberate indifference standard have also been mindful of this Court's admonitions that "the Due Process Clause of the Fourteenth Amendment was intended to prevent the government from abusing its power," not to "transform every tort committed by a state actor into a constitutional violation." *DeShaney*, 489 U.S. at 196, 202. *See also 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").

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 849 (internal quotation marks omitted). Thus, "liability for negligently inflicted harm is categorically beneath the threshold of constitutional due process." *Id.* *See also Daniels*, 474 U.S. at 331 ("Historically, this guarantee of due process has been applied to deliberate decisions of government officials to deprive a person of life, liberty, or property").

In the wake of the forgoing decisions from this Court, all circuits had at one time held, and most continue to hold, that pre-trial detainees' claims of inadequate medical care should be analyzed under a subjective deliberate-indifference standard. In addition to the current cases in the First, Third, Fourth, Fifth, Sixth, Eighth, Tenth, Eleventh, and DC Circuits cited in Section VIII(A) above, even the current minority of circuits in the split of authority (the Second, Seventh, and Ninth Circuits) previously applied a subjective

standard for claims of deliberate indifference to serious medical needs, as shown by the following, now overruled, cases:

- *Caiozzo v. Koreman*, 581 F.3d 63, 71 (2nd Cir. 2009) ("an injured state pretrial detainee, to establish a violation of his Fourteenth Amendment due process rights, must prove, inter alia, that the government-employed defendant disregarded a risk of harm to the plaintiff of which the defendant was aware").

- *Whiting v. Marathon Cty. Sheriff's Dep't*, 382 F.3d 700, 703 (7th Cir. 2004) ("the legal standard for a § 1983 claim is the same under either the Cruel and Unusual Punishment Clause of the Eighth Amendment or the Due Process Clause of the Fourteenth Amendment").

- *Clouthier v. Cty. of Contra Costa*, 591 F.3d 1232, 1244 (9th Cir. 2010) ("we must evaluate [plaintiff's] claim that [the defendants] violated Clouthier's due process rights under the deliberate indifference standard articulated in *Farmer* and applied by our cases in the context of pretrial detainees").

Despite this prior adherence to this Court's precedent, the Second, Seventh, and Ninth Circuits took *Kingsley* as a cue to completely revise how their courts treat Fourteenth Amendment claims, in a manner in which its usage is inconsistent. *See Bruno*, 727 Fed. Appx. at 720 ("we recognize[e] 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*, 900 F.3d at 353-54 ("medical-care claims brought by pretrial

detainees under the Fourteenth Amendment are subject only to the objective unreasonableness inquiry identified in *Kingsley*"); *Gordon*, 888 F.3d at 1124 ("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).

As noted above, however, most circuits have found the objective test endorsed in *Kingsley* for analyzing excessive use of force in the jail setting to be inappropriate for use in medical care cases. *See e.g.*, *Dang*, 871 F.3d at 1279, n2 ("*Kingsley* involved an excessive-force claim, not a claim of inadequate medical treatment due to deliberate indifference"); *Whitney*, 887 F.3d at 860 n4 ("Kingsley does not control because it was an excessive force case, not a deliberate indifference case"); *Alderson*, 848 F.3d at 419 n4 (in jail medical care cases following *Kingsley*, "the Fifth Circuit has continued to … apply a subjective standard").

The circuits begin their analysis from different places, so they have produced varying due process standards based on the language of Fourth or Eighth Amendment jurisprudence. *See Kedra v. Schroeter*, 876 F.3d 424, 437 (3rd Cir. 2017) ("one 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 the threshold inquiry as to the proper standard used in Fourteenth Amendment claims to ensure uniformity among the circuits on the elements of claims of "deliberate indifference to serious medical needs" brought by pretrial detainees against jail correctional or medical personnel.

C. The Ninth Circuit's approach falls on the wrong side of the split and this case and *Gordon* are ideal vehicles to address the question.

The Ninth Circuit wrongly adheres its Fourteenth Amendment medical care standard to a Fourth Amendment "objective reasonableness" test, developed for judging unquestionably intentional uses of force. 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." *Lewis*, 523 U.S. at 849.

By contrast, Respondents in this case and *Gordon* never even claimed that the attending correctional and medical staff "intended" to injure the inmates. 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. Correctional Healthcare Companies, Inc., 2018 WL 2414865, at *8 (D. Colo., 2018) (citing *Estelle*, 429 U.S. at 106 ("a complaint that a physician

has been negligent in diagnosing or treating a medical condition does not state a valid claim of medical mistreatment under the Eighth Amendment").

Many circuit courts have warned against changing the standard for constitutional violations to a negligence standard from the need to show intentional conduct. *See e.g., Comstock v. McCrary*, 273 F.3d 693, 703 (6th Cir. 2001) ("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. County of Bucks*, 455 F.3d 418, 428 n.5 (3rd Cir. 2006) (an "objective standard" would improperly "move the concept of deliberate indifference ... closer to the pole of negligence"); *Hare v. City of Corinth, Miss.*, 74 F.3d 633, 648–50 (5th Cir. 1996) (rejecting "objective standard offered for [inadequate medical care] liability" as being "redolent with negligence and its measures"); *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 this Court authorized in *Kingsley*, but also on a novel type of misconduct the circuit labeled conduct "akin to recklessness". *Gordon*, 888 F.3d at 1125. *Kingsley* did not endorse such a loosely-worded standard which, on its face, raises void for vagueness concerns, and risks serving as a proxy for medical-malpractice style liability – a result that runs afoul of many decades of this Court's due process

jurisprudence. *See e.g., Daniels*, 474 U.S. at 330–31; *DeShaney*, 489 U.S. at 196-202; *Lewis*, 523 U.S. at 845-846.

The "subjective intent" traditionally used as a standard for medical care decisions employed by all circuits over many decades sensibly acknowledges this important principle. In contrast, federal courts have recognized that the standard for negligent acts is an "objective reasonableness" standard.[4] If this Court

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[4] *See e.g., La Plante v. Am. Honda Motor Co.*, 27 F.3d 731, 739 (1st Cir. 1994) ("the negligence inquiry measures behavior against an objective standard, without reference to the defendant's state of mind"); *Andrasko v. Chamberlain Mfg*. Corp., 608 F.2d 944, 949 (3rd Cir. 1979) ("contributory negligence is measured by an objective standard, while assumption of risk is based on a subjective determination"); *Taylor v. Kellogg Brown & Root Servs., Inc*., 658 F.3d 402, 405 (4th Cir. 2011) ("contributory negligence is a complete defense to such a claim, based on the objective standard of whether a plaintiff failed to act as a reasonable person would have acted"); *Messick v. Gen. Motors Corp*., 460 F.2d 485, 489 (5th Cir. 1972) ("The test in 'no duty' and *volenti*, however is subjective: did plaintiff know and appreciate. … In this it differs from the objective standard which is applied to contributory negligence"); *Jones v. Wittenberg Univ*., 534 F.2d 1203, 1211 (6th Cir. 1976) ("Normally evidence of an actor's subjective state of mind is irrelevant to the issue of negligence because his conduct is evaluated according to the objective standard of a reasonably prudent person under the circumstances"); *Flaminio v. Honda Motor Co*., 733 F.2d 463, 467 (7th Cir. 1984) ("[t]here is liability only if a product is defective or unreasonably dangerous, and the concepts of "defect" and "unreasonableness" bring into play factors of cost and risk similar to those that determine negligence, an objective standard that is independent of what the particular defendant knew or could have done"); *Lambert v. Will Bros. Co*., 596 F.2d 799, 802 (8th Cir. 1979) ("[t]he standard to be applied [for assumption of risk] is a subjective one, of what the particular

does not address the issue, the application of an "objective reasonableness" standard to Fourteenth Amendment claims risks the transformation of Fourteenth Amendment jurisprudence by lowering the standard from what is normally required to show a constitutional deprivation, to one that would convert the Fourteenth Amendment into a vehicle for bringing a federal medical malpractice claim.

This case and *Gordon* are ideal vehicles 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 in *Gordon*, and was raised *sua sponte* by the Ninth Circuit in this case by its reliance upon *Gordon* on appeal. Neither this case nor *Gordon* is encumbered by procedural anomalies, 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.

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plaintiff in fact sees, knows, understands and appreciates. In this it differs from the objective standard which is applied to contributory negligence"); *United States v. Twine*, 853 F.2d 676, 680 (9th Cir. 1988) (holding that the intent needed for 18 U.S.C. §§ 875(c) and 876, "not only requires proof of culpability, but implies that the level of culpability must exceed a mere transgression of an objective standard of acceptable behavior (e.g., negligence, recklessness)"); *Smith v. Singletary*, 170 F.3d 1051, 1054 (11th Cir. 1999) ("[b]ecause a lawyer's performance must be evaluated under prevailing professional norms, cases involving allegations of attorney negligence-also evaluated based on an objective standard of reasonableness - can be useful to our analysis"); *Weil v. Seltzer*, 873 F.2d 1453, 1458 (D.C. Cir. 1989) ("contributory negligence is determined by an objective standard (knew or should have known) whereas assumption of the risk requires evidence of a subjective nature (actually knew)").

D. The Ninth Circuit's decision vacating an order dismissing exclusively municipal liability claims, despite the absence of proof of any policy or custom which posed a substantial risk of serious harm with respect to inmate medical care, conflicts with this Court's municipal liability decisions in *Monell* and its progeny.

Deal, Bush, and Borelis did not sue any named individual, and, by the time of appeal, voluntarily limited their claims to those based upon municipal liability. This Court's precedent requires that a plaintiff alleging § 1983 municipal liability make a showing that:

1. Action pursuant to official municipal policy caused their injury. *Connick v. Thompson*, 563 U.S. 51, 60-61 (2011);

2. "Official municipal policy includes the decisions of a government's lawmakers, the acts of its policymaking officials, and practices so persistent and widespread as to practically have the force of law," *Id*.;

3. Municipal liability may not be based on respondeat superior or vicarious liability. *City of Canton,* 489 U.S. at 385; and

4. "[The] first inquiry in any case alleging municipal liability under § 1983 is the question whether there is a direct causal link between a municipal policy or custom and the alleged constitutional deprivation." *Id*.

Plaintiffs who seek to impose liability on local governments under § 1983 must prove that

> action pursuant to official municipal policy caused their injury. Official municipal policy includes the decisions of a government's lawmakers, the acts of its policymaking officials, and practices so persistent and widespread as to practically have the force of law.

Connick, 563 U.S. at 60-61 (citations/quotation marks omitted).

> In *Monell* [], [the Supreme Court] decided that a municipality can be found liable under § 1983 only where the municipality itself causes the constitutional violation at issue. Respondeat superior or vicarious liability will not attach under § 1983. It is only when the execution of the government's policy or custom inflicts the injury that the municipality may be held liable under § 1983.
>
> Thus, our first inquiry in any case alleging municipal liability under § 1983 is the question whether there is a direct causal link between a municipal policy or custom and the alleged constitutional deprivation.

City of Canton, 489 U.S. at 385 (citations, quotation marks, and ellipses omitted).

To adopt lesser standards of fault and causation would open municipalities to unprecedented liability under § 1983. *Id*. at 391–92.

The Ninth Circuit abandoned these principals by vacating the summary judgment orders entered in the *Deal* and *Borelis* cases because, when Bush, Deal, and Borelis jointly opposed summary judgment in the

district court, they did not argue that any policy existed, let alone that such was the cause of their injury. Their combined summary judgment response in the district court did not present evidence or testimony from any decision-maker reflecting that they knew about, let alone condoned or ignored any policy or custom. Their combined summary judgment response also failed to show that such non-existent policy caused their injury.

In affirming summary judgment with regard to Bush's claims, the Ninth Circuit correctly found that Bush, by his participation in the joint summary judgment response and briefing on appeal, "has not pointed to evidence that would allow a reasonable trier of fact to conclude that his death was caused by a policy or custom of Defendants that posed a substantial risk of serious harm to him." App. 3-4. By their participation with Bush in the same combined summary judgment response and joint briefing on appeal, the claims against Deal and Borelis should have been judged under the same custom or policy requirements, and summary judgment dismissal of the Deal and Borelis claims should have been affirmed due to the same failure of proof that led to affirmance of the dismissal of Bush's claims. The Ninth Circuit's failure to affirm summary judgment dismissal of the Deal and Borelis municipal liability claims is internally inconsistent with its affirmance of summary judgment dismissal of the Bush claims, and conflicts with the above-cited precedent of this Court.

E. If certiorari is granted in this case and in *Gordon*, this appeal should be consolidated with *Gordon*.

When appropriate, this Court consolidates cases for hearing when granting certiorari. *See e.g., Safeco Ins. Co. of Am. v. Burr*, 551 U.S. 47, 56 (2007) ("[w]e consolidated the two matters and granted certiorari to resolve a conflict in the Circuits as to whether § 1681n(a) reaches reckless disregard of FCRA's obligations, and to clarify the notice requirement in § 1681m(a)"); *Texaco Inc. v. Dagher*, 547 U.S. 1, 5 (2006) (consolidating Texaco's and Shell Oil's separate petitions and granted certiorari to determine the extent to which the per se rule against price-fixing applies to joint ventures).

Because the core issues in this case are the same as those in *Gordon v. County of Orange*, 888 F.3d 1118 (2018), Conmed and the County request that, if certiorari is granted in both cases, the cases be consolidated for hearing.

CONCLUSION

For the foregoing reasons, Conmed and the County request that this Court grant their Petition for Writ of Certiorari.

RESPECTFULLY SUBMITTED this 10th day of October, 2018.

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