No. 20-1562

IN THE

Supreme Court of the United States

FAYE STRAIN, as guardian of Thomas Benjamin Pratt,

Petitioner,

v.

VIC REGALADO, in his official capacity; ARMOR CORRECTIONAL HEALTH SERVICES, INC.; CURTIS MCELROY, D.O.; PATRICIA DEANE, LPN; KATHY LOEHR, LPC,

Respondents.

On Petition for a Writ of Certiorari to the Tenth Circuit Court of Appeals

MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF AND BRIEF OF 21 LAW PROFESSORS AS AMICI CURIAE IN SUPPORT OF PETITIONER

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MOTION FOR LEAVE TO FILE AMICUS BRIEF

Pursuant to Supreme Court Rule 37.2(b), *amici curiae* respectfully request leave to file the following brief in support of petitioner. Counsel of record for all parties received notice at least ten days prior to the due date of the amicus curiae brief. Respondents Vic Regalado and Armor Correctional Health Services, Inc. withheld consent. Petitioner consented to the filing of this brief.

Amici are legal scholars who teach and write on incarceration, criminal justice, civil rights, and constitutional law. Their interest in submitting this brief is to call attention to how the courts of appeals aligned with the court below are failing to properly apply this Court's precedents, a problem only this Court can resolve. More broadly, amici seek to offer guidance on the proper resolution of the merits of this case, and they urge this Court to grant the petition for a writ of certiorari and hold that the objective standard outlined in *Kingsley v. Hendrickson*, 576 U.S. 389 (2015), applies to conditions of confinement cases brought by pretrial detainees.

Amici respectfully request that the Court grant leave to file this brief.

Respectfully submitted,

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INTEREST OF AMICI CURIAE[1]

Amici are legal scholars who teach and write on incarceration, criminal justice, civil rights, and constitutional law. They submit this brief to call attention to how the court below and the other courts of appeals aligned with it are failing to properly apply this Court's precedents, a problem only this Court can resolve. More broadly, amici seek to offer guidance on the proper resolution of the merits of this case, and they urge this Court to grant the petition for a writ of certiorari and hold that the objective standard outlined in *Kingsley v. Hendrickson*, 576 U.S. 389 (2015), applies to conditions of confinement cases brought by pretrial detainees.

The *amici* subscribing to the brief are listed in an Appendix.

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[1] No counsel for any party authored this brief in whole or in part, and no person or entity, other than amici curiae or their counsel, contributed money to fund the brief's preparation or submission. Counsel of record for each party received timely notice of the intent to file the brief, and consent was withheld by respondents Armor Correctional Health Services, Inc. and Vic Regalado. Petitioner consents to the filing of this brief.

SUMMARY OF ARGUMENT

I. In *Kingsley v. Hendrickson*, 576 U.S. 389, 391-92 (2015), this Court held that "to prove an excessive force claim [under the Fourteenth Amendment], a pretrial detainee must show that the . . . officers' use of that force was *objectively* unreasonable," as opposed to "show[ing] that the officers were *subjectively* aware that their use of force was unreasonable." The courts of appeals have split on whether *Kingsley* applies beyond the use of force context to Fourteenth Amendment conditions of confinement claims made by pretrial detainees. Only this Court can resolve that fundamental disagreement over the meaning of its decisions. The Court should do so in this case because the decision below is irreconcilable with *Kingsley* and this Court's other Due Process precedents.

Kingsley's reasoning necessarily requires applying an objective test to conditions of confinement claims. The Court in *Kingsley* interpreted *Bell v. Wolfish*, 441 U.S. 520 (1979), a Fourteenth Amendment conditions of confinement case, as standing for the proposition that, "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." *Kingsley*, 576 U.S. at 398. That reasoning leads to only one conclusion—pretrial detainees can prevail in conditions of confinement cases without having to prove that jail officials acted with culpable subjective intent. Other aspects of *Kingsley*, including its broad language and focus on the pretrial versus post-

conviction status of the plaintiff, bolster that conclusion.

This Court's other decisions point in the same direction. The Court has previously made clear that if any category of civil rights cases brought by incarcerated plaintiffs was going to require special proof of culpable subjective intent, it would be cases challenging uses of force, which, unlike conditions of confinement, often involve split-second decisions. And yet, *Kingsley* made clear that even use of force claims made by pretrial detainees are adjudicated with an objective standard. This Court's Due Process Clause jurisprudence more broadly does not typically require a subjective inquiry, and the related qualified immunity doctrine does not either. Finally, the lower court's contrary reasoning lacks merit.

II. An objective standard is also more administrable and consistent with the underlying purposes of the Due Process Clause.

Subjective mental states are very hard to prove and judge accurately, and pro se plaintiffs in particular will have a hard time presenting evidence of subjective intent. Given that, subjective intent inquiries are likely to lead to arbitrary outcomes, and unscrupulous defendants could abuse that standard to evade responsibility for unconstitutional conduct by persuasively lying about their subjective beliefs.

Second, an objective standard is far more likely to promote appropriate conditions for detainees. A subjective test would encourage ignorance on the part of jail officials in order to avoid future liability. It would also fail to account for the fragmented decision-making typical of complex organizations like jails, and

it could make it very difficult to obtain needed injunctive relief to fix inhumane jail conditions. An objective standard, by contrast, provides jail officials with incentives to monitor the condition of those in their care and put in place systems to ensure their facilities meet constitutional standards.

III. An objective test will sufficiently protect officers and staff who act in good faith. For one thing, more than mere negligence will still be required to sustain a constitutional claim. Unintentional conduct, such as a Taser going off by accident or a physician inadvertently mixing up two patients' charts, will not be actionable. Instead, liability will exist only when an official chooses the unconstitutional action or inaction. Further, courts will examine claims from the perspective of the officers with the knowledge those officers had at the time, and not with 20/20 hindsight. And qualified immunity still offers its regular protections.

ARGUMENT

I. The Court Should Grant Certiorari To Clarify That *Kingsley*'s Objective Test Applies To Conditions Of Confinement Claims Brought By Pretrial Detainees.

In *Kingsley v. Hendrickson*, 576 U.S. 389, 391-92 (2015), this Court held that "to prove an excessive force claim, a pretrial detainee must show that the . . . officers' use of that force was *objectively* unreasonable," and need not "show that the officers were *subjectively* aware that their use of force was unreasonable." In the wake of that decision, the courts of appeals have split on whether *Kingsley*'s rejection of a subjective test applies beyond the use of force context to conditions of confinement claims made by pretrial detainees.[2] *See* Pet. 10-13; Pet. App. 10a-11a ("And the circuits are split on whether *Kingsley* eliminated the subjective component of the deliberate indifference standard by extending to Fourteenth Amendment claims outside the excessive force context."). Only this Court can resolve that conflict over the meaning of its own cases. It should do so here and hold that *Kingsley*'s objective test applies to condition of confinement claims.

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[2] Conditions of confinement claims "include, for example, claims relating to medical and mental health care; failure to protect a prisoner from other prisoners; problems relating to nutrition, vermin, ventilation; and so on." Margo Schlanger, *The Constitutional Law of Incarceration, Reconfigured*, 103 Cornell L. Rev. 357, 363 (2018).

A. *Kingsley*'s Rationale Necessarily Extends To Conditions Of Confinement Cases.

1. In *Bell v. Wolfish*, 441 U.S. 520 (1979), a conditions case challenging a jail's practice of "double-bunking" pretrial detainees, the Court held that "[i]n evaluating the constitutionality of conditions or restrictions of pretrial detention that implicate only the protection against deprivation of liberty without due process of law, we think that the proper inquiry is whether those conditions amount to punishment of the detainee." *Id.* at 535. The Court reasoned that the Due Process Clause forbids punishing someone at all without first finding him guilty of a crime. So, the Government can "detain him to ensure his presence at trial and may subject him to the restrictions and conditions of the detention facility so long as those conditions and restrictions do not amount to punishment, or otherwise violate the Constitution." *Id.* at 536-37.

Given this rationale, the lower courts were uncertain whether *Bell* had adopted an objective or a subjective test. *See, e.g.*, *Castro v. County of Los Angeles*, 833 F.3d 1060, 1068 (9th Cir. 2016) (en banc) ("We interpreted *Bell* to require proof of punitive intent for failure-to-protect claims, whether those claims arise in a pretrial or a post-conviction context.").

The Court resolved that debate in *Kingsley*. It held that *Bell* established that "a pretrial detainee can . . . prevail by showing that the [challenged] actions are not 'rationally related to a legitimate nonpunitive governmental purpose' or that the actions 'appear excessive in relation to that purpose,'" even "in the absence of an expressed intent to punish." 576 U.S. at

398 (quoting *Bell*, 441 U.S. at 561). The Court explained that "*Bell*'s focus on 'punishment' does not mean that proof of intent (or motive) to punish is required for a pretrial detainee to prevail on a claim that his due process rights were violated." *Ibid*. "Rather, as *Bell* itself shows (and as our later precedent affirms), 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." *Ibid.* In applying this standard, *Kingsley* explained, *Bell* "did not consider the prison officials' subjective beliefs about the [double-bunking] policy" challenged in that case. *Ibid*. "Rather, the Court examined objective evidence, such as the size of the rooms and available amenities, before concluding that the conditions were reasonably related to the legitimate purpose of holding detainees for trial and did not appear excessive in relation to that purpose." *Ibid.* The Court even went so far as to refer to "*Bell*'s objective standard." *Id.* at 399.

2. *Kingsley*'s holding and rationale thus necessarily extend to all conditions of confinement cases. Although *Kingsley* directly considered a use of force claim, it adopted a rule—chiefly founded on a conditions of confinement precedent—that applies universally to the treatment of pretrial detainees, holding that "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." 576 U.S. at 398 (emphasis added).

The breadth of *Kingsley*'s holding is dictated by the Court's underlying rationale. The Court distinguished between claims brought under the Eighth and Fourteenth Amendments, noting that the "language of the two Clauses differs, and the nature of the claims often differs. And, most importantly, pretrial detainees (unlike convicted prisoners) cannot be punished at all." *Kingsley*, 576 U.S. at 400. It was therefore the distinction between pretrial and post-conviction status (and thus the distinction between the Eighth and Fourteenth Amendments) that drove the Court's analysis in *Kingsley*, not the type of Fourteenth Amendment claim that happened to be at issue.

Accordingly, as the Seventh Circuit noted in *Miranda v. County of Lake*, 900 F.3d 335, 352 (7th Cir. 2018), there is "nothing in the logic the Supreme Court used in *Kingsley* that would support [any] kind of dissection of the different types of claims that arise under the Fourteenth Amendment's Due Process Clause." The Second and Ninth Circuits agree. *Darnell v. Pineiro*, 849 F.3d 17, 35 (2d Cir. 2017) ("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."); *Castro*, 833 F.3d at 1069-70 ("Both [failure to protect and excessive force] categories of claims arise under the Fourteenth Amendment's Due Process Clause, rather than under the Eighth Amendment's Cruel and Unusual Punishment Clause.").

B. There Is No Basis For Applying A More Demanding Standard In Conditions Of Confinement Cases.

The lower court's rule is also impossible to square with this Court's broader treatment of use of force and conditions of confinement claims in correctional settings. In the Eighth Amendment context, the Court has distinguished between use of force and conditions of confinement cases in order to impose a *more demanding* standard for plaintiffs alleging excessive use of force. It would be anomalous to impose the exact opposite distinction for pretrial detainees.

This Court has applied the Eighth Amendment "with due regard for differences in the kind of conduct against which an Eighth Amendment objection is lodged." *Whitley v. Albers*, 475 U.S. 312, 320 (1986). In the use of force context, the Court asks "whether force was applied in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm." *Id.* at 320-21 (quoting *Johnson v. Glick*, 481 F.2d 1028, 1033 (2d Cir. 1973)). In contrast, in evaluating claims of inadequate medical care, the Court has applied a less demanding "deliberate indifference" standard, which does not require proof that the defendant intended to harm the prisoner. *Id*. at 320; *see also Wilson v. Seiter*, 501 U.S. 294, 302-03 (1991) (declining to apply the "very high state of mind prescribed by *Whitley*" to conditions cases).

The Court has justified the more stringent standard for excessive force claims by pointing to an "appropriate hesitancy to critique in hindsight decisions necessarily made in haste, under pressure, and frequently without the luxury of a second chance."

Whitley, 475 U.S. at 320. In contrast, decisions about inmate medical care "can typically be established or disproved without the necessity of balancing competing institutional concerns for the safety of prison staff or other inmates." *Ibid.*

It would be anomalous to apply the opposite approach in the Fourteenth Amendment's pretrial detention context, setting the bar to liability higher for medical care or other conditions of confinement claims than for allegations of excessive force. There is nothing about the difference between pretrial and post-conviction confinement to justify such a reversal. Indeed, even the dissent in *Kingsley* seemed to acknowledge that the case for a subjective liability test was weaker for ordinary conditions of confinement cases than in excessive force cases. *See* 576 U.S. at 406 (Scalia, J., dissenting) (pointing out that unlike use of force, conditions of confinement "are the result of considered deliberation by the authority imposing the detention.").

This case illustrates the point. Mr. Pratt was booked into the county jail on December 11. He began experiencing alcohol withdrawal the next day. "Over the next *four days*, medical records show that Pratt experienced severe tremors" and a host of other disturbing symptoms, including a "'large hematoma'" on his head that "left him 'non-verbal and lethargic.'" Pet. 5-6 (quoting Pet. App. 35a, 60a) (emphasis added). Yet, the respondents "personally observed these serious symptoms and injuries" and "decided not to send Pratt to the hospital or provide additional care, such as neurological testing or a neurological consult." Pet. 6. Finally, on December 16, he was found motionless, had to be resuscitated, and was rushed to

the hospital where he suffered a cardiac arrest. Pet. App. 7a. Mr. Pratt, just 35 years old at the time, "suffered cardiac arrest, a seizure disorder, renal failure, paralysis, and a brain injury. He remains unable to work, requires assistance with everyday activities, cannot live safely on his own, and has been homeless." Pet. 7 (internal citation omitted). Those consequences were not the result of a split-second life-or-death decision by an officer confronting an unsafe situation. Rather, they were the product of considered choices by government actors, made over days, to allow Mr. Pratt to deteriorate before their very eyes until it was too late.

There is no reason in law or logic to make petitioner's challenge to that conduct more difficult to sustain than it would be if he had sustained his injury while officers were attempting to break up a prison riot.

C. An Objective Test Is More Consistent With The Court's Interpretation Of The Due Process Clause In Other Contexts.

The court of appeals' subjective test is also out of sync with how the Due Process Clause is applied in other contexts, where subjective intent is generally irrelevant.

The Due Process Clause is violated whenever the government takes a person's life, liberty or property without due process of law, regardless of the subjective intent of the officials responsible for the deprivation. The Constitution is violated, for example, whenever a sheriff seizes and auctions off someone's home without any judicial process. *See, e.g.*, *United States v. James*

Daniel Good Real Prop., 510 U.S. 43, 46 (1993). The sheriff's intentions have nothing to do with it. Moreover, what constitutes due process rarely turns on anyone's subjective intent. For example, when the Court in *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 574 (1996), held that a punitive damages award was grossly excessive under the due process clause, no one polled the jury to discern their subjective intent when setting the damages award. Similarly, when the Court held that a state "justice's denial of [a] recusal motion and his subsequent judicial participation violated the Due Process Clause of the Fourteenth Amendment," the Court applied an "objective standard" that "avoids having to determine whether actual bias is present." *Williams v. Pennsylvania*, 136 S. Ct. 1899, 1903, 1905 (2016). The Court likewise embraced objective tests in *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-69 (1963), to determine whether a sanction was "punitive," and therefore required due process protections, citing objective factors such as "whether [the sanction] has historically been regarded as a punishment," and "[w]hether the sanction involves an affirmative disability or restraint." *See also* Alice Ristroph, *State Intentions and the Law of Punishment*, 98 J. Crim. L. & Criminology 1353, 1397-98 (2008) ("Purely accidental conduct (a prison official's stumble over a prisoner's foot) would not satisfy the *Mendoza-Martinez* test, but a deliberate state action (the indefinite confinement of sex offenders) might qualify as punishment even if the state claimed to act without punitive intent.").

To be sure, individual defendants sued in their personal capacities for alleged due process violations have a qualified immunity defense. *See Pearson v.*

Callahan, 555 U.S. 223, 231 (2009). But even that defense, intended to shield officers who act in good faith, is implemented through an objective test. *See Kingsley*, 576 U.S. at 400; *Crawford-El v. Britton*, 523 U.S. 574, 587-89 (1998).

D. The Court of Appeals' Contrary Reasoning Has No Merit.

Despite all of this, some courts of appeals have refused to apply *Kingsley* to conditions of confinement claims. One reason the court offered in this case is that medical care claims can sometimes involve intentional inaction (as opposed to affirmative actions) on the part of the defendants. *See* Pet. App. 14a ("[T]he force of *Kingsley* does not apply to a deliberate indifference context, where the claim generally involves inaction divorced from punishment."); *see also Castro*, 833 F.3d at 1086 (Ikuta, J., dissenting) ("While punitive intent may be inferred from affirmative acts that are excessive in relationship to a legitimate government objective, the mere failure to act does not raise the same inference."). But that distinction makes no difference.

Even in the Eighth Amendment context, this Court has rejected the premise that a prisoner's constitutional right to medical care can be violated only by affirmative acts. While incarcerated, the Court has explained, "[a]n inmate must rely on prison authorities to treat his medical needs; if the authorities fail to do so, those needs will not be met." *Estelle v. Gamble*, 429 U.S. 97, 103 (1976). As a consequence, prison officials are under an affirmative duty to provide adequate health care to those in their custody. *Ibid*. That duty can be violated by deliberate

inaction, no less than intentional mistreatment. *See id*. at 104-05 (holding that "intentionally denying or delaying access to medical care" can violate Eighth Amendment).

At the same time, *Kingsley*'s objective test does not rest liability on bare "inaction." The test still requires an affirmative decision by the officer. Here, for example, petitioner would have no claim if he simply alleged that he fell ill and was not provided medical care. He must show that the defendants made an intentional decision not to provide him additional care when other objectively reasonable staff in their position, knowing what respondents knew, would have provided further treatment.

The court of appeals was also wrong to conclude that *Kingsley*'s objective test could not apply because the word "deliberate" in "deliberate indifference," "makes a subjective component inherent in the claim." Pet. App. 4a; *see also id.* at 15a. To start, there is no basis for simply assuming that all deliberate indifference standards are purely subjective. *See Farmer v. Brennan*, 511 U.S. 825, 841 (1994) ("It would be hard to describe the *Canton* understanding of deliberate indifference, permitting liability to be premised on obviousness or constructive notice, as anything but objective.") (citing *City of Canton v. Harris*, 489 U.S. 378 (1989) (establishing deliberate indifference standard for municipal liability)); *Castro*, 833 F.3d at 1076 ("The Supreme Court has strongly suggested that the deliberate indifference standard for municipalities is always an objective inquiry.").

But in any event, the court of appeals was reasoning in circles. "Deliberate indifference" is the standard in the *Eighth Amendment* context for

medical care claims. *Farmer*, 511 U.S. at 828. This Court has never applied that test to claims by pretrial detainees. The question presented here is whether it should. The Tenth Circuit simply assumed the answer to that question, and then reasoned from that assumption that *Kingsley* must be limited to use of force claims because the test for medical claims in the pretrial context is subjective.

Nor is there any merit to the suggestion that *Kingsley* adopted an objective test only because objectively excessive force supports an inference of punitive intent, such that intent to punish is still the ultimate test for liability. Pet. App. 13a. The Court's opinion is simply inconsistent with that analysis. As already explained, *Kingsley* specifically embraced *Bell*'s application of an objective test in a conditions of confinement case without suggesting that objectively unjustified double-bunking would be indirect proof of an illicit punitive intent. *See* 576 U.S. at 398. Instead, the *Kingsley* Court was clear that intent is not dispositive.

II. An Objective Standard Is Superior To A Subjective Standard.

As explained, an objective test is required in this case as a matter of legal precedent. The reasoning and logic of *Kingsley*, this Court's Eighth Amendment pronouncements that prisoner challenges to force face a higher bar to liability than analogous challenges to conditions, and this Court's other, related areas of law make that clear. But on top of all that, an objective test is preferable as a practical matter—providing another reason for this Court to grant certiorari and correct the lower court's legal error.

1. An objective test is far more administrable than a subjective test because subjective standards are very hard to prove and judge accurately. "Plaintiffs will rarely have direct evidence, and officers will nearly always be able to argue that even if the force they used was objectively excessive, they were honestly (if unreasonably) mistaken, rather than malicious, sadistic, or reckless." Schlanger, *supra*, at 402. And the hurdle of finding evidence of subjective intent will be particularly burdensome on the many incarcerated litigants who bring this type of litigation pro se.

Moreover, because subjective intent is hard to prove, a test requiring that showing will lead to arbitrary results. Even when detainees are subjected to the same harm, inflicted with unlawful intent, some will get a remedy and others will not, depending randomly on the availability of subjective intent evidence and the vagaries of how individual juries evaluate it. Moreover, a subjective test would allow unscrupulous defendants to evade liability by lying persuasively about their intentions, while punishing honest officers who did the same thing but were forthcoming with the truth. *See* Brief of Former Corrections Administrators and Experts as *Amici Curiae* in Support of Petitioner at 21, *Kingsley*, 576 U.S. 389 (No. 14-6368), ("a subjective standard would erode staff accountability" given that "a jail staff member can cure an otherwise unreasonable use of force by saying that he did not behave recklessly or with malice").

On the other hand, the *Kingsley* Court already recognized that "an objective standard is workable" as it is "consistent with the pattern jury instructions used

in several Circuits," and facilities often "train officers to interact with all detainees as if the officers' conduct is subject to an objective reasonableness standard." 576 U.S. at 399. And six years of practice after *Kingsley* have confirmed that theory. Given that this test is workable in the force context, there is no reason it would not also be preferable here.

2. An objective test would also better encourage humane conditions for pretrial detainees.

Telling jail officials that the best way to avoid liability is to avoid knowing about the serious needs of the people in their care is no way to promote appropriate treatment of pretrial detainees. A subjective test could encourage intentional ignorance of a pretrial detainee's condition, or at the least would diminish officers' incentives to determine whether a pretrial detainee is in need of assistance. *See* Sharon Dolovich, *Cruelty, Prison Conditions, and the Eighth Amendment*, 84 N.Y.U. L. Rev. 881, 892 (2009) (discussing importance of considering incentives created by the Court's choice of test). And it should be remembered that unlike some other contexts, in jails and prisons "forethought about an inmate's welfare is not only feasible but obligatory." *County of Sacramento v. Lewis*, 523 U.S. 833, 851 (1998). An objective test provides an incentive for jail officials to be proactive in identifying and remedying dangerous conditions before they cause serious harm.

A subjective test would also frequently prevent relief for egregiously inhumane conditions simply as a consequence of how jails are actually run. Take, for example, a failure to protect claim in which

> the person assigned by the organization to understand the facts on the ground—. . . the officer who sees evidence of a particular inmate's need for protection from a violent cellmate (e.g., a line-level correctional officer)—may not be the person who makes housing assignments (e.g., a unit administrator), much less the person who decides *how* housing assignments are made (e.g., a deputy warden or warden). Thus the officer who knows of the risk may lack authority or opportunity to alleviate that risk, while the officer who creates the risk may lack specific knowledge about it.

Schlanger, *supra*, at 420-21. Because of the fragmented nature of decision-making, it may be difficult or impossible in some cases for a plaintiff to pinpoint one person with the requisite subjective intent. And in those cases, a subjective test would block constitutional liability even for "easily preventable harm." *Ibid.*

Importantly, in these circumstances, the consequence of a subjective test is not simply that individual officers would be immune from damages claims. Absent the required showing of illicit subjective intent, there would be no constitutional violation at all, and therefore no basis to enter an injunction to eliminate ongoing conditions no one could believe are consistent with the Constitution.

III. An Objective Test Would Sufficiently Protect Officers.

As in *Kingsley*, an objective test also adequately protects officers and staff from unfair liability. *See* 576 U.S. at 399-400.

To start, as petitioner explains, adopting an objective test does not mean that prison officials will be liable for mere negligence. Pet. 19. The *Kingsley* Court recognized as much when it reaffirmed the principle that "liability for *negligently* inflicted harm is categorically beneath the threshold of constitutional due process." 576 U.S. at 396 (quoting *Lewis*, 523 U.S. at 849). The Court then provided helpful examples in the use of force context. For example, "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 on an excessive force claim." *Ibid.* In other words, the "use of force" must be "deliberate," not accidental or unintentional. *Ibid.*[3]

The same concept readily applies to conditions of confinement cases. Indeed, the courts of appeals on the petitioner's side of the circuit split have successfully navigated between cases involving allegations of "mere negligence" and those involving the requisite deliberate choice. For example, in *Miranda*, the Seventh Circuit allowed a case to go forward that looks in many ways similar to this case. There, the court distinguished between (1) cases in

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[3] The Court in *Kingsley* also expressly left open the possibility that reckless actions could qualify, but did not decide that question. *See Kingsley*, 576 U.S. at 396, 400.

which "the medical defendants had forgotten that [the detainee] was in the jail, or mixed up her chart with that of another detainee, or if [one doctor] forgot to take over coverage for [another doctor] when he went on vacation;" and (2) the case at issue in which the detainee was on a hunger strike, and the medical defendants "deliberately chose a 'wait and see' monitoring plan, knowing that [the detainee] was neither eating nor drinking nor competent to care for herself." 900 F.3d at 354. The former would at most be negligence and not cognizable as a due process violation, but the court allowed the latter claim to move forward as the jury could determine that such an intentional failure to act violated the detainee's constitutional rights. *Ibid.* Accordingly, an objective due process test does not convert every allegation of medical malpractice into a constitutional claim.

In addition, as the *Kingsley* Court summarized, "the use of an objective standard adequately protects an officer who acts in good faith." *Kingsley*, 576 U.S. at 399. Not only is objective reasonableness considered "from the perspective of a reasonable officer on the scene, including what the officer knew at the time, not with the 20/20 vision of hindsight," *id.* at 397, it also takes into account "legitimate interests in managing a jail," *id*. at 399. So, while the proposed test does not ask what the subjective intent of the officer was, it also does not require either superhuman ability on the part of the officer to predict the future or to operate the jail perfectly. Moreover, institutions can limit the risk of liability by adopting and training staff in reasonable procedures which, when followed, will insulate officers from liability. Finally, "an officer enjoys qualified immunity and is not liable for

excessive force unless he has violated a 'clearly established' right, such that 'it would [have been] clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Id.* at 400 (quoting *Saucier v. Katz*, 533 U.S. 194, 202 (2001)) (brackets in original).[4]

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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[4] "The Prison Litigation Reform Act of 1995, 42 U.S.C. § 1997e, which is designed to deter the filing of frivolous litigation against prison officials, applies to both pretrial detainees and convicted prisoners," *Kingsley*, 576 U.S. at 402, and provides yet additional protections for officers.

APPENDIX

APPENDIX—LIST OF SIGNATORIES*

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