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 United States Court of Appeals for the Tenth Circuit

MOTION FOR LEAVE TO FILE AND BRIEF OF FORMER CORRECTIONS OFFICIALS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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MOTION FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE*

Pursuant to Rule 37.2(b) of the Rules of this Court, Dan Pacholke, Phil Stanley, Dick Morgan, Eldon Vail, and Steve J. Martin respectfully move for leave to file the accompanying brief as *amici curiae* in support of petitioner. All parties were timely notified of *amici*'s intent to file a brief in accordance with Rule 37.2(a). Petitioner consented to the filing of the brief, but Respondents did not.

This case presents an important question regarding the rights of pretrial detainees under the Fourteenth Amendment's Due Process clause. It asks whether the objective standard articulated under *Kingsley* v. *Hendrickson*, 576 U.S. 389 (2015) for excessive force claims by pretrial detainees should also apply to their deficient medical care claims.

Amici are former corrections officials who have substantial first-hand experience overseeing secure detention facilities. In those roles, *amici* considered how to efficiently administer those facilities while preserving the constitutional rights of detainees. In the experience of *amici*, objective standards of conduct for detention facility personnel are necessary for detention facilities to function properly.

In the attached brief, *amici* offer the Court additional detail regarding the current state of the pretrial detention system, including the numbers of detainees who cycle through the system each year and information about the special characteristics of pretrial detainees that make the provision of competent medical care more important. The proposed brief explains that a subjective standard can create perverse incentives which increase the risk of constitutional harms

to pretrial detainees, while an objective standard promotes cost savings to detention facilities and mitigates the chance of egregious violations.

For these reasons, the Court should grant *amici curiae* leave to file the attached *amicus* brief in support of Petitioner.

Respectfully submitted,

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TABLE OF AUTHORITIES

Page(s)

CASES:

Bell v. *Wolfish*,
441 U.S. 520 (1979).. 4

Harlow v. *Fitzgerald*,
457 U.S. 800 (1982).. 22

Horton v. *California*,
496 U.S. 128 (1990).. 18

Kingsley v. *Hendrickson*,
576 U.S. 389 (2015).....................................4, 20, 22

Nunez v. *City of New York*,
No. 11 Civ. 5845 (LTS)(JCF),
2015 U.S. Dist. LEXIS 176190
(S.D.N.Y. July 10, 2015) 2, 3

OTHER AUTHORITIES:

Azza AbuDagga et al., Pub. Citizen & Treatment Advoc. Ctr., *Individuals With Serious Mental Illnesses in County Jails: A Survey of Jail Staff's Perspectives* (July 14, 2016), https://www.citizen.org/wp-content/uploads/migration/2330.pdf.. 8

Elizabeth Brico, *What It's Like to Detox in Jail*, Vice (Nov. 20, 2018, 11:06 AM), https://www.vice.com/en/article/5988q3/what-its-like-to-detox-in-jail 14

Jennifer Bronson et al., U.S. Dep't of Just., Bureau of Just. Stats., *Drug Use, Dependence, and Abuse Among State Prisoners and Jail Inmates, 2007–2009* (rev. Aug. 10, 2020), https://www.bjs.gov/content/pub/pdf/dudaspji0709.pdf 9

TABLE OF AUTHORITIES—Continued

Page(s)

Jennifer Bronson & Marcus Berzofsky, U.S. Dep't of Just., Bureau of Just. Stats., *Indicators of Mental Health Problems Reported by Prisoners and Jail Inmates, 2011-12* (June 2017), https://www.bjs.gov/content/pub/pdf/imhprpji1112.pdf 7, 14

E. Ann Carson, U.S. Dep't of Just., Bureau of Just. Stats., *Mortality in Local Jails, 2000–2018 – Statistical Tables* (Apr. 2021), https://www.bjs.gov/content/pub/pdf/mlj0018st.pdf 9, 11, 12

E. Ann Carson & Mary P. Cowhig, U.S. Dep't of Just., Bureau of Just. Stats., *Mortality in Local Jails, 2000-2016 – Statistical Tables* (Feb. 2020), https://www.bjs.gov/content/pub/pdf/mlj0016st.pdf?utm_content=mci&utm_medium=email&utm_source=govdelivery 7, 8

Steve Coll, *The Jail Health-Care Crisis*, New Yorker (Feb. 25, 2019), https://www.newyorker.com/magazine/2019/03/04/the-jail-health-care-crisis...... 16, 20

Columbia Univ., Nat'l Ctr. on Addiction & Substance Abuse, *Behind Bars II: Substance Abuse and America's Prison Population* (Feb. 2010) 14, 16

Ryan Cooper, *How Your Local Jail Became Hell: An Investigation*, Week (Apr. 2, 2015), https://theweek.com/articles/540725/how-local-jail-became-hell-investigation 17

TABLE OF AUTHORITIES—Continued

Page(s)

Peter Eisler et al., *Dying Inside: The Hidden Crisis in America's Jails, Part One*, Reuters (Oct. 16, 2020, 11:00 AM), https://www.reuters.com/investigates/special-report/usa-jails-deaths/ 11, 12, 17

Blake Ellis & Melanie Hicken, *CNN Investigates: 'Please Help Me Before It's Too Late,'* CNN (June 25, 2019), https://www.cnn.com/interactive/2019/06/us/jail-health-care-ccs-invs/........ 16, 17

Fed. Bureau of Prisons, *Detoxification of Chemically Dependent Inmates* (Feb. 2014), https://www.bop.gov/resources/pdfs/detoxification.pdf 20

Erin Fuchs, *The Shocking Story of a Bipolar Woman Stuck for Years in Jail Without Ever Being Convicted of a Crime*, Bus. Insider (Feb. 17, 2014, 8:46 PM), https://www.businessinsider.com/jan-greens-solitary-confinement-nightmare-2014-2 22

Brandon L. Garrett, *Constitutional Reasonableness*, 102 Minn. L. Rev. 61 (2017) 19, 22

Lindsay M. Hayes, U.S. Dep't of Just., Nat'l Inst. of Corr., *National Study of Jail Suicide 20 Years Later* (Apr. 2010), https://s3.amazonaws.com/static.nicic.gov/Library/024308.pdf... 8, 15, 22

TABLE OF AUTHORITIES—Continued

Page(s)

Kil Huh et al., Pew Charitable Trs., *Jails: Inadvertent Health Care Providers* (Jan. 2018), https://www.pewtrusts.org/-/media/assets/2018/01/sfh_jails_inadvertent_health_care_providers.pdf 15, 21

Incarceration and Health: A Family Medicine Perspective (Position Paper), Am. Acad. Fam. Physicians, https://www.aafp.org/about/policies/all/incarceration.html (Apr. 2017) 7

Michael P. Jacobson et al., Harv. Kennedy Sch., *Less Is More: How Reducing Probation Populations Can Improve* (Aug. 2017), https://www.hks.harvard.edu/sites/default/files/centers/wiener/programs/pcj/files/less_is_more_final.pdf 10, 21

Alexi Jones, Prison Pol'y Initiative, *New BJS Report Reveals Staggering Number of Preventable Deaths in Local Jails* (Feb. 13, 2020), https://www.prisonpolicy.org/blog/2020/02/13/jaildeaths/ 8, 15

Jennifer C. Karberg & Doris J. James, U.S. Dep't of Just., Bureau of Just. Stats., *Substance Dependence, Abuse, and Treatment of Jail Inmates, 2002* (July 2005), https://www.bjs.gov/content/pub/pdf/sdatji02.pdf 9

TABLE OF AUTHORITIES—Continued

Page(s)

Ziba Kashef, *Novel Healthcare Program for Former Prisoners Reduces Recidivism*, Yale News (May 2, 2019), https://news.yale.edu/2019/05/02/novel-healthcare-program-former-prisoners-reduces-recidivism 21

Martin Kaste, *The 'Shock of Confinement': The Grim Reality of Suicide in Jail*, NPR (July 27, 2015, 5:59 PM), https://www.npr.org/2015/07/27/426742309/the-shock-of-confinement-the-grim-reality-of-suicide-in-jail 20

Dana Liebelson & Ryan J. Reilly, *Sandra Bland Died One Year Ago and Since Then, At Least 810 People Have Lost Their Lives in Jail*, Huffington Post (July 13, 2016), https://highline.huffingtonpost.com/articles/en/sandra-bland-jail-deaths/ 8, 9, 12

Ross MacDonald et al., *The Rikers Island Hot Spotters: Defining the Needs of the Most Frequently Incarcerated*, 105 Am. J. Pub. Health 2262 (2015), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4605192/... 11, 21

James S. Marks & Nicholas Turner, *The Critical Link Between Health Care and Jails*, 33 Health Affs. 443 (2014) 5

TABLE OF AUTHORITIES—Continued

Page(s)

Karin D. Martin, Sandra Susan Smith & Wendy Still, U.S. Dep't of Just., Nat'l Inst. Just., *Shackled to Debt: Criminal Justice Financial Obligations and the Barriers to Re-Entry They Create* (Jan. 2017), https://www.ojp.gov/pdffiles1/nij/249976.pdf........ 10

Mental Illness, Nat'l Inst. Mental of Health (Jan. 2021), https://www.nimh.nih.gov/health/statis-tics/mental-illness#part_154788 7

Anne Milgram et al., Harv. Kennedy Sch., *Integrated Health Care and Criminal Jus-tice Data — Viewing the Intersection of Public Safety, Public Health, and Public Policy Through a New Lens: Lessons from Camden, New Jersey* (Apr. 2018), https://www.hks.harvard.edu/sites/de-fault/files/centers/wiener/pro-grams/pcj/files/integrated_healthcare_crim-inaljustice_data.pdf 10

Nat'l Insts. of Health, Nat'l Inst. on Drug Abuse, *Drug Facts: Criminal Justice* (June 2020), https://www.drugabuse.gov/sites/de-fault/files/drugfacts-criminal-justice.pdf 9

Margaret Noonan, Harley Rohloff & Scott Ginder, U.S. Dep't of Just., Bureau of Just. Stats., *Mortality in Local Jails and State Prisons, 2000–2013 - Statistical Tables* (Aug. 2015), https://www.bjs.gov/con-tent/pub/pdf/mljsp0013st.pdf 7

TABLE OF AUTHORITIES—Continued

Page(s)

Press Release, Alexi Jones & Wendy Sawyer, Prison Pol'y Initiative, *Arrest, Release, Repeat: How Police and Jails Are Misused to Respond to Social Problems* (Aug. 2019), https://www.prisonpolicy.org/reports/repeatarrests.html 6, 11

Press Release, Wendy Sawyer & Peter Wagner, Prison Pol'y Initiative, *Mass Incarceration: The Whole Pie 2020* (Mar. 24, 2020), https://www.prisonpolicy.org/reports/pie2020.html... 6 , 10

Bernadette Rabuy, Prison Pol'y Initiative, *The Life-Threatening Reality of Short Jail Stays* (Dec. 22, 2016), https://www.prisonpolicy.org/blog/2016/12/22/bjs_jail_suicide_2016/... 12

Michael Roberts, *The Agonizing, Unnecessary, Day-Plus Jail Death of Denny Lovern*, Westword (Oct. 12, 2018, 6:01 AM), https://www.westword.com/news/the-agonizing-unnecessary-day-plus-jail-death-of-denny-lovern-10886362 21

Joe Russo, Nat'l Inst. of Just., *Caring for Those In Custody* (Aug. 1, 2019), https://nij.ojp.gov/topics/articles/caring-those-custody 12

Grant Smith, *Jail Deaths in America: Data and Key Findings of* Dying Inside, Reuters (Oct. 16, 2020, 11:00 AM), https://www.reuters.com/investigates/special-report/usa-jails-graphic/ 11

TABLE OF AUTHORITIES—Continued

Page(s)

State-by-State Data, Sent'g Project, https://www.sentencingproject.org/the-facts/#detail (last visited June 7, 2021) 5

Ram Subramanian et al., Vera Inst. of Just., *Incarceration's Front Door: The Misuse of Jails in America* (July 2015) 6, 13

Jason Szep et al., *Dying Inside: The Hidden Crisis in America's Jails, Part Two*, Reuters (Oct. 26, 2020, 11:00 AM), https://www.reuters.com/investigates/special-report/usa-jails-privatization/ 16

TASC, Ctr. for Health & Just., *Safe Withdrawal in Jail Settings: Preventing Deaths, Reducing Risk to Counties and States* (Jan. 2018), https://www.centerforhealthandjustice.org/tascblog/Images/documents/Publications/Safe%20Withdrawal%20in%20Jail_010918.pdf 19

E. Fuller Torrey et al., Treatment Advoc. Ctr. & Nat'l Sheriff's Ass'n, *The Treatment of Persons With Mental Illness in Prisons and Jails: A State Survey* (Apr. 8, 2014), https://www.treatmentadvocacycenter.org/storage/documents/treatment-behind-bars/treatment-behind-bars.pdf 13, 14

Thomas W. White & Dennis J. Schimmel, *Suicide Prevention in Federal Prisons: A Successful Five-Step Program*, *in* U.S. Dept. Just., Nat'l Inst. Corr., *Prison Suicide: An Overview and Guide to Prevention* (Nov. 8, 1995) 15

TABLE OF AUTHORITIES—Continued

Page(s)

Timothy Williams, *A Psychologist as Warden? Jail and Mental Illness Intersect in Chicago*, N.Y. Times (July 30, 2015), https://www.nytimes.com/2015/07/31/us/a-psychologist-as-warden-jail-and-mental-illness-intersect-in-chicago.html 13

Michael Winerip & Michael Schwirtz, *Rikers: Where Mental Illness Meets Brutality in Jail*, N.Y. Times (July 14, 2014), https://www.nytimes.com/2014/07/14/nyregion/rikers-study-finds-prisoners-injured-by-employees.html 14

World Health Org. & Int'l Ass'n for Suicide Prevention, *Preventing Suicide in Jails and Prisons* (2007), https://www.who.int/mental_health/prevention/suicide/resource_jails_prisons.pdf 13

Zhen Zeng & Todd D. Minton, U.S. Dep't of Just., Bureau of Just. Stats., *Jail Inmates in 2019* (Mar. 2021), https://www.bjs.gov/content/pub/pdf/ji19.pdf 5, 6, 14

STATEMENT OF INTEREST

Former corrections officials Dan Pacholke, Phil Stanley, Dick Morgan, Eldon Vail, and Steve J. Martin respectfully submit this brief as *amici curiae* in support of granting the writ.[1] *Amici* have an interest in seeing that these issues are decided on the merits.

Dan Pacholke has a long tenure as an officer for the Washington State Department of Corrections. Among other positions, he has served as Secretary of the Department of Corrections (October 2015–March 2016), Deputy Secretary (April 2014–October 2015), Director of Prisons (July 2011–April 2014), and Deputy Director of Prisons (July 2008–July 2011). He also served as the Superintendent of a number of individual correction centers. He has over 33 years' experience in the field of corrections.

Phil Stanley is a long-time officer serving both the New Hampshire Department of Corrections and the Washington State Department of Corrections. In New Hampshire, he was Commissioner of Corrections (May 2000–November 2003). In Washington, he served as Director of a 400-bed jail from 2007 to 2012. He has also served as a Probation Officer (2004–2017), Regional Administrator (1997–2000), and Superintendent (1992–1997) in Washington. He has about 51 years' experience in the field of corrections.

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[1] No party or counsel for a party authored this brief in whole or in part. No party, counsel for a party, or person other than *amici curiae*, their members, or counsel made any monetary contribution intended to fund the preparation or submission of this brief. All parties were notified of *amici curiae*'s intent to submit this brief at least 10 days before it was due, but only Petitioner consented to the filing of this brief.

Dick Morgan is a veteran officer and administrator for the Washington State Department of Corrections. He served as Secretary of the Department (March 2016–January 2017), Director of Prisons (2008–2010), and Assistant Deputy Secretary of Prisons (2006–2008). He also served as Superintendent of three different prisons. He was appointed to Washington State's Parole Board and elected to the Walla Walla City Council, and he has served on the Board of the Washington State Coalition to Abolish the Death Penalty since 2012. He has over 35 years' experience in the field of corrections.

Eldon Vail is a long-serving corrections official for the Washington State Department of Corrections. He was Secretary of the Department (2007–2011), Deputy Secretary (1999–2006), and Superintendent of three institutions (1987 and 1989–1994). He has opined on jail conditions eighteen times in multiple jurisdictions, which is about one third of the cases in which he has been retained as an expert. He has over 35 years' experience in the field of corrections.

Steve J. Martin is the former General Counsel/Chief of Staff of the Texas prison system (1981–1985) and has served in gubernatorial appointments in Texas on both a sentencing commission and a council for prisoners with mental impairments. He coauthored Texas Prisons: The Walls Came Tumbling Down, and has written numerous articles on criminal justice issues. He is also currently the Federal Court Monitor for the New York City Department of Corrections in *Nunez* v. *City of New York*, where he provides oversight of New York jails' compliance with the settlement agreement with federal prosecutors. No. 11 Civ. 5845 (LTS)(JCF), 2015 U.S. Dist. LEXIS 176190, at

*14 (S.D.N.Y. July 10, 2015). He has over 49 years' experience in the field of corrections.

As former corrections officials with over 220 years of collective experience, *amici* have substantial first-hand experience administering secure detention facilities that maintain minimum constitutional standards for detainees. In the experience of *amici*, requiring objective standards of conduct for detention facility personnel serves to enhance the health and safety of *everyone* in the detention facility. *Amici* assert that an objective standard promotes transparency and proper functioning which lead to significant cost savings. On the other hand, a subjective standard creates perverse incentives and undermines security within jails. *Amici* respectfully submit this brief to set forth the basis for those views.

INTRODUCTION AND SUMMARY OF ARGUMENT

Across the country, people cycle through jails millions of times a year. Removed from their communities, inmates—who are commonly prone to severe medical and mental health conditions—are at the mercy of jails to provide competent medical care during their stays. But oftentimes, jails fail to provide that care and, as a result, federal courts hear claims in which jail inmates allege that jail medical staff have failed to provide constitutionally sufficient medical care.

While the United States maintains the highest incarceration rate in the world, there remains a crucial distinction between pretrial detention and post-conviction imprisonment. This is why the Fourteenth Amendment's Due Process Clause—not the Eighth Amendment's Cruel and Unusual Punishments

Clause—governs treatment of claims brought by pretrial detainees. *See Bell* v. *Wolfish*, 441 U.S. 520, 535 n.16 (1979). The distinction is substantive because different legal standards apply: For example, excessive force claims under the Eighth Amendment require proof of a defendant's state of mind, while those under the Fourteenth Amendment do not. *See Kingsley* v. *Hendrickson*, 576 U.S. 389, 395 (2015).

Nevertheless, courts oftentimes fail to make such a distinction. Even though medical care claims are governed by the same two constitutional provisions, circuit courts frequently apply the subjective legal standard under both the Eighth and Fourteenth Amendments. The question presented in this case is therefore whether the subjective state of mind inquiry under the Eighth Amendment should govern pretrial detainee Due Process claims. It should not.

An objective standard is vitally important to ensure the rights of pretrial detainees. There is an outsized risk of constitutional violations for pretrial detainees given the frequency with which people experience pretrial detention. A subjective standard immunizes serious lapses in medical treatment by allowing jail officials to claim ignorance. Currently, the state in which a person is arrested determines which standard defines his or her constitutional rights in jail. The Court must intervene to rectify this untenable inconsistency.

ARGUMENT

I. CERTIORARI IS NECESSARY BECAUSE THE CONSTITUTIONAL RIGHTS OF PRETRIAL DETAINEES ARE IN CONSTANT JEOPARDY.

The pretrial detainee population is one that is particularly afflicted with health issues.[2] This is troubling given pretrial detention facilities across the country are inadequate to guarantee basic medical needs for pretrial detainees. The confluence of these two realities results in serious risk of pretrial detainees suffering harm while in jail—harm that the Fourteenth Amendment guards against. The inconsistency in how the Fourteenth Amendment is applied is therefore an obstacle to ensuring the constitutional rights of pretrial detainees.

A. Jail Populations Are More Prone to Poor Health and Preexisting Conditions.

There are over 725,000 people in jail at any given time in the United States.[3] Of this number, the Department of Justice estimates that two-thirds are

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[2] *See* James S. Marks & Nicholas Turner, *The Critical Link Between Health Care and Jails*, 33 Health Affs. 443, 443–444 (2014).

[3] *See State-by-State Data*, Sent'g Project, https://www.sentencingproject.org/the-facts/#detail (last visited June 7, 2021) (listing 745,2000 total jail population in 2019); Zhen Zeng & Todd D. Minton, U.S. Dep't of Just., Bureau of Just. Stats., *Jail Inmates in 2019*, at 5 (Mar. 2021), https://www.bjs.gov/content/pub/pdf/ji19.pdf (listing 734,500 total jail inmates at midyear 2019).

unconvicted and awaiting pending court action.[4] Over the course of a year, at least 4.9 million individuals are arrested and jailed.[5] Because over a fourth of these individuals are jailed again within the year, the actual number of trips to jail totals 10.6 million times each year.[6] On average, inmates spend an estimated 26 days in jail.[7] And the weekly inmate turnover rate is about 53%.[8]

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[4] Zeng & Minton, *supra* note 3, at 6. While the jail population includes post-conviction detainees, jail data most often do not distinguish between pretrial and post-conviction populations. *See, e.g.*, Ram Subramanian et al., Vera Inst. of Just., *Incarceration's Front Door: The Misuse of Jails in America* 10 (July 2015) ("[T]he national data on length of stay do not distinguish between those held pretrial and those sentenced to a term in jail . . . ."). Nevertheless, because pretrial detainees are housed in jails, and because they form the majority of the jail population, statistics on the jail population as a whole remain highly relevant. *See also id.* ("[T]he proportion of jail inmates that are being held pretrial has grown substantially in the last thirty years—from about 40 to 62 percent . . . ."). If jail capacity that is rented out to other agencies is not included, the proportion of pretrial detainees in jails increases to seventy-four percent. *See* Press Release, Wendy Sawyer & Peter Wagner, Prison Pol'y Initiative, *Mass Incarceration: The Whole Pie 2020* (Mar. 24, 2020), https://www.prisonpolicy.org/reports/pie2020.html.

[5] Press Release, Alexi Jones & Wendy Sawyer, Prison Pol'y Initiative, *Arrest, Release, Repeat: How Police and Jails Are Misused to Respond to Social Problems* (Aug. 2019), https://www.prisonpolicy.org/reports/repeatarrests.html.

[6] *Id.*; Sawyer & Wagner, *supra* note 4.

[7] Zeng & Minton, *supra* note 3, at 8 & tbl.8.

[8] *Id.*

Inmates in jails exhibit significantly more health risks than the general population.[9] Nearly half the people held in jails suffer from a professionally diagnosed mental disorder, with a quarter of that population meeting the threshold for what is classified as "serious psychological distress."[10] This is in contrast with the general population, in which less than one in five adults live with a mental illness.[11] Notably, the incidence of serious psychological distress among the jail population is five times higher than that of the general population.[12]

Mental health issues are widespread in jails. Suicide has been the leading cause of death in jails every year since 2000.[13] This problem has not gone

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[9] *See generally*, Jennifer Bronson & Marcus Berzofsky, U.S. Dep't of Just., Bureau of Just. Stats., *Indicators of Mental Health Problems Reported by Prisoners and Jail Inmates, 2011-12*, at 1 (June 2017), https://www.bjs.gov/content/pub/pdf/imhprpji1112.pdf; *Incarceration and Health: A Family Medicine Perspective (Position Paper)*, Am. Acad. Fam. Physicians, https://www.aafp.org/about/policies/all/incarceration.html (Apr. 2017) ("Studies have shown that . . . people in prison exhibit a high burden of chronic and noncommunicable diseases (e.g., hypertension, diabetes, and asthma), as well as communicable diseases (e.g., hepatitis, HIV, tuberculosis), mental health problems, and substance abuse disorders." (footnotes omitted)).

[10] Bronson & Berzofsky, *supra* note 9, at 1.

[11] *Mental Illness*, Nat'l Inst. Mental of Health (Jan. 2021), https://www.nimh.nih.gov/health/statistics/mental-illness#part_154788.

[12] Bronson & Berzofsky, *supra* note 9, at 3 & fig.2.

[13] Margaret Noonan, Harley Rohloff & Scott Ginder, U.S. Dep't of Just., Bureau of Just. Stats., *Mortality in Local Jails and State Prisons, 2000–2013 - Statistical Tables* 3 (Aug. 2015), https://www.bjs.gov/content/pub/pdf/mljsp0013st.pdf; *see also* E.

unnoticed: ninety-one percent of jails reported that seriously mentally ill detainees must be watched more closely for possible suicide.[14] The jail suicide rate is not only far higher than that of the general population, but also far higher than that of state prisoners.[15] This phenomenon is attributed to the uniqueness of jails: pretrial detainment comes as a shock to many, which is then combined with the lack of certainty for pending court action, as well as existing substance abuse or erratic behavior that may have led them to jail in the first place.[16] The combination of factors renders jail detainees particularly at risk of suicide. And even short jail stays can be life threatening: In 2016, the Huffington Post found that one-quarter of suicides occurred within the first three days.[17]

Ann Carson & Mary P. Cowhig, U.S. Dep't of Just., Bureau of Just. Stats., *Mortality in Local Jails, 2000-2016 – Statistical Tables* 1 (Feb. 2020), https://www.bjs.gov/content/pub/pdf/mlj0016st.pdf?utm_content=mci&utm_medium=email&utm_source=govdelivery (finding that suicide remained the leading cause of death through 2016).

[14] Azza AbuDagga et al., Pub. Citizen & Treatment Advoc. Ctr., *Individuals With Serious Mental Illnesses in County Jails: A Survey of Jail Staff's Perspectives* 12 (July 14, 2016), https://www.citizen.org/wp-content/uploads/migration/2330.pdf.

[15] Alexi Jones, Prison Pol'y Initiative, *New BJS Report Reveals Staggering Number of Preventable Deaths in Local Jails* (Feb. 13, 2020), https://www.prisonpolicy.org/blog/2020/02/13/jaildeaths/.

[16] *See* Lindsay M. Hayes, U.S. Dep't of Just., Nat'l Inst. of Corr., *National Study of Jail Suicide 20 Years Later* 1–2 (Apr. 2010), https://s3.amazonaws.com/static.nicic.gov/Library/024308.pdf (describing how "certain features of the jail environment enhance suicidal behavior").

[17] Dana Liebelson & Ryan J. Reilly, *Sandra Bland Died One Year Ago and Since Then, At Least 810 People Have Lost Their Lives*

Substance addiction is also a major problem amongst those entering jail, and withdrawal poses a disproportionate risk to jail detainees. It is estimated that two-thirds of jail inmates were found to be dependent on alcohol or drugs.[18] This was more than *ten times* the general population.[19] Over sixty percent of incoming jail detainees have participated in some form of substance abuse treatment program already.[20] For someone who is already struggling with sobriety, the added shocks of being jailed exacerbates the effects of withdrawal and addiction.[21] Indeed, the number of deaths in jails due to drug or alcohol intoxication quadrupled between 2000 and 2018.[22]

It is no surprise that many of the most afflicted members of the jail detainee population are also the most frequent members. Many detainees who are released face conditions of release so restrictive they are

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in Jail, Huffington Post (July 13, 2016), https://highline.huffingtonpost.com/articles/en/sandra-bland-jail-deaths/.

[18] *Cf.* Nat'l Insts. of Health, Nat'l Inst. on Drug Abuse, *Drug Facts: Criminal Justice* 1 (June 2020), https://www.drugabuse.gov/sites/default/files/drugfacts-criminal-justice.pdf; Jennifer C. Karberg & Doris J. James, U.S. Dep't of Just., Bureau of Just. Stats., *Substance Dependence, Abuse, and Treatment of Jail Inmates, 2002* 1 (July 2005), https://www.bjs.gov/content/pub/pdf/sdatji02.pdf.

[19] Jennifer Bronson et al., U.S. Dep't of Just., Bureau of Just. Stats., *Drug Use, Dependence, and Abuse Among State Prisoners and Jail Inmates, 2007–2009*, at 4–5 (rev. Aug. 10, 2020), https://www.bjs.gov/content/pub/pdf/dudaspji0709.pdf.

[20] Karberg & James, *supra* note 18, at 8 & tbl.9.

[21] *See supra* note 12 and accompanying text.

[22] E. Ann Carson, U.S. Dep't of Just., Bureau of Just. Stats., *Mortality in Local Jails, 2000–2018 – Statistical Tables* 1 (Apr. 2021), https://www.bjs.gov/content/pub/pdf/mlj0018st.pdf.

virtually guaranteed to have their release revoked. These conditions include being unable to afford supervision fees or missing curfew requirements.[23] Of course, the individuals expected to meet these onerous requirements face higher rates of poverty and serious health conditions.[24] This "revolving door" serves to keep the most vulnerable jail detainees coming back to jail.[25] Indeed, data from New York's Rikers Island jail system—among the largest in the world—show that when compared against the general jail populace, the most frequently incarcerated "were significantly older (42 vs 35 years), and more likely to have serious mental illness (19% vs 8.5%) and homelessness (51.5% vs 14.7%) in their record" along with "highly prevalent

[23] *See* Sawyer & Wagner, *supra* note 4.

[24] *See* Karin D. Martin, Sandra Susan Smith & Wendy Still, U.S. Dep't of Just., Nat'l Inst. Just., *Shackled to Debt: Criminal Justice Financial Obligations and the Barriers to Re-Entry They Create* 1–2 (Jan. 2017), https://www.ojp.gov/pdffiles1/nij/249976.pdf.

[25] *See* Anne Milgram et al., Harv. Kennedy Sch., *Integrated Health Care and Criminal Justice Data — Viewing the Intersection of Public Safety, Public Health, and Public Policy Through a New Lens: Lessons from Camden, New Jersey* 5–8 (Apr. 2018), https://www.hks.harvard.edu/sites/default/files/centers/wiener/programs/pcj/files/integrated_healthcare_criminaljustice_data.pdf; *cf.* Michael P. Jacobson et al., Harv. Kennedy Sch., *Less Is More: How Reducing Probation Populations Can Improve Outcomes* 1–2 (Aug. 2017), https://www.hks.harvard.edu/sites/default/files/centers/wiener/programs/pcj/files/less_is_more_final.pdf ("[P]robation is a punitive system that attempts to elicit compliance from individuals primarily through the imposition of conditions, fines, and fees that in many cases cannot be met . . . . [I]ndividuals who cannot meet those obligations cycle back and forth between probation and incarceration . . . .").

(96.9% vs 55.6%)" substance abuse.[26] Generally speaking, people with three or more arrests were more likely to have chronic health conditions and were significantly more likely to use emergency rooms multiple times within the past year.[27]

These factors culminate in detainees dying in jails at an alarming rate. In 2018, a total of 1,120 inmates died in local jails.[28] This represented a 2% increase from the prior year and the highest number of deaths reported in local jails since the Bureau of Justice Statistics ("BJS") started reporting mortality data in 2000.[29] A recent Reuters investigation documented 7,571 inmate deaths at 523 American jails from 2008 to 2019.[30] Over the last decade, death rates in jails have risen 35%.[31]

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[26] Ross MacDonald et al., *The Rikers Island Hot Spotters: Defining the Needs of the Most Frequently Incarcerated*, 105 Am. J. Pub. Health 2262, 2262 (2015), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4605192/.

[27] *See* Jones & Sawyer, *supra* note 5 (finding that chronic conditions when compared to those with no arrests include "heart conditions (15% vs. 10%), HIV (4.12% vs. 0.15%), cirrhosis (3.47% vs. 0.21%), and hepatitis B or C (2.43% vs. 1.04%)" and that "36% of frequent utilizers [of jail] had used the emergency 2 or more times in the past year, compared to 11% of people with no arrests").

[28] Carson, *supra* note 22, at 1.

[29] *Id.*

[30] Grant Smith, *Jail Deaths in America: Data and Key Findings of* Dying Inside, Reuters (Oct. 16, 2020, 11:00 AM), https://www.reuters.com/investigates/special-report/usa-jails-graphic/.

[31] Peter Eisler et al., *Dying Inside: The Hidden Crisis in America's Jails, Part One*, Reuters (Oct. 16, 2020, 11:00 AM),

About 40% of inmate deaths in 2018 occurred within the first seven days of admission to jail.[32] And about three-quarters of all inmates who died in local jails were not convicted at the time of their death.[33] Compared to prisons, local jails experience much higher proportions of unnatural deaths, including for suicide, drug or alcohol intoxication, homicides, and accidents.[34] For example, in 2014, 11% of deaths in state and federal prisons were due to unnatural causes compared to 49% of deaths in jails due to unnatural causes.[35]

All told, jails are especially disruptive places involving a segment of the American population disproportionately prone to medical issues. And this population has no choice but to rely on medical care provided by

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https://www.reuters.com/investigates/special-report/usa-jails-deaths/.

[32] Carson, *supra* note 22, at 1; *see also* Liebelson & Reilly, *supra* note 17 (finding that in 2016 at least one-third of people died within the first three days of being booked); Joe Russo, Nat'l Inst. of Just., *Caring for Those In Custody* (Aug. 1, 2019), https://nij.ojp.gov/topics/articles/caring-those-custody ("Addressing these needs at the earliest opportunity can not only enhance inmate health while reducing inmate mortality, but research indicates it can also reduce crime and ultimately incarceration.").

[33] Carson, *supra* note 22, at 1; *see also* Eisler et al., *supra* note 31 ("At least two-thirds of the dead inmates identified by Reuters, 4,998 people, were never convicted of the charges on which they were being held.").

[34] Bernadette Rabuy, Prison Pol'y Initiative, *The Life-Threatening Reality of Short Jail Stays* (Dec. 22, 2016), https://www.prisonpolicy.org/blog/2016/12/22/bjs_jail_suicide_2016/.

[35] *Id.*

jail officials.[36] In light of these realities, the standards governing medical care claims should not discourage diligence among jail personnel that could otherwise facilitate potentially life-saving interventions.[37]

B. The Current Jail System Is Inadequate for Meeting Constitutional Standards of Detainee Health.

Structural shifts in the role of the jail system contribute to the shortcomings of the jail system. The explosion of incarceration in the last three decades and the deinstitutionalization of people with serious mental illness in the 1970s have turned jails into "de facto mental hospitals."[38] There are currently *ten times* more individuals with serious mental illness in prisons and jails than in state mental hospitals.[39]

[36] *See generally*, World Health Org. & Int'l Ass'n for Suicide Prevention, *Preventing Suicide in Jails and Prisons* 9 (2007), https://www.who.int/mental_health/prevention/suicide/resource_jails_prisons.pdf ("Correctional officers are often the only staff available 24 hours a day; thus, they form the front line of defense in preventing suicides. Correctional staff . . . cannot detect risks of, make an assessment, nor prevent a suicide for which they have no training.").

[37] *Id.*

[38] Subramanian et al., *supra* note 4, at 7–12; *see* Timothy Williams, *A Psychologist as Warden? Jail and Mental Illness Intersect in Chicago*, N.Y. Times (July 30, 2015), https://www.nytimes.com/2015/07/31/us/a-psychologist-as-warden-jail-and-mental-illness-intersect-in-chicago.html ("Some wardens complain that their jails have become little more than makeshift mental asylums, and that they lack the money and expertise needed to deal with the problem.").

[39] E. Fuller Torrey et al., Treatment Advoc. Ctr. & Nat'l Sheriff's Ass'n, *The Treatment of Persons With Mental Illness in Prisons and Jails: A State Survey* 101 (Apr. 8, 2014),

Similarly, the criminalization of drugs in the same era without addressing drug use as a public health issue turned jails into addiction clinics.[40] Given that jail detainees spent on average twenty-six days in jail in 2019,[41] the nature of jail as transient pretrial, preconviction, or even precharge detention makes it a poor fit for addressing addiction needs.[42]

These structural shifts may explain why the incidence of serious psychological distress in jail detainees is *greater* than that of convicted prisoners.[43] As a result, jail personnel are not only unable to provide adequate care, they also become conditioned to treat detainees with disproportionate violence and indifference.[44] It is not uncommon that "jail staff display indifference toward incarcerated people's lives, often refusing to take their health concerns seriously and

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https://www.treatmentadvocacycenter.org/storage/documents/treatment-behind-bars/treatment-behind-bars.pdf.

[40] *See generally* Columbia Univ., Nat'l Ctr. on Addiction & Substance Abuse, *Behind Bars II: Substance Abuse and America's Prison Population* (Feb. 2010).

[41] Zeng & Minton, *supra* note 3, at 8 & tbl.8.

[42] *See* Elizabeth Brico, *What It's Like to Detox in Jail*, Vice (Nov. 20, 2018, 11:06 AM), https://www.vice.com/en/article/5988q3/what-its-like-to-detox-in-jail (detailing the various challenges and failures of withdrawal treatment in jails).

[43] Bronson & Berzofsky, *supra* note 9, at 1.

[44] *See* Michael Winerip & Michael Schwirtz, *Rikers: Where Mental Illness Meets Brutality in Jail*, N.Y. Times (July 14, 2014), https://www.nytimes.com/2014/07/14/nyregion/rikers-study-finds-prisoners-injured-by-employees.html ("What emerges is a damning portrait of guards on Rikers Island, who are poorly equipped to deal with mental illness and instead repeatedly respond with overwhelming force to even minor provocations.").

cutting off access to healthcare—with fatal consequences."[45]

Even when resources are available and standards are in place to address known problems, jail staff often fail to implement them. For example, jail administrators have known that suicide is a major problem for years.[46] Better mental health treatment and staff training can be highly effective in preventing suicide among inmates.[47] Jail facilities that have wrestled with detainee suicide have had written policies and intake screening processes in place, but "the comprehensiveness of programming remains questionable."[48] As the data shows, suicide rates remain steadily high. And despite the prevalence of drug abuse and withdrawal in the jail population, jail operators do not request treatment resources even when they are available.[49] Those that do "continue to employ approaches not grounded in research, despite a considerable body

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[45] Jones, *supra* note 15 (citations omitted).

[46] *See* Hayes, *supra* note 16, at 3–5 (describing the various federal studies and initiatives to address jail suicide).

[47] *See, e.g.*, Thomas W. White & Dennis J. Schimmel, *Suicide Prevention in Federal Prisons: A Successful Five-Step Program*, *in* U.S. Dept. Just., Nat'l Inst. Corr., *Prison Suicide: An Overview and Guide to Prevention* 46 (Nov. 8, 1995).

[48] Hayes, *supra* note 16, at 43.

[49] *See* Kil Huh et al., Pew Charitable Trs., *Jails: Inadvertent Health Care Providers* 1–2 (Jan. 2018), https://www.pewtrusts.org/-/media/assets/2018/01/sfh_jails_inadvertent_health_care_providers.pdf ("Yet few of the [requests for proposals] requested medication-assisted treatment (MAT), a proven method for treating addiction. And of the 11 that did request this service, all but three restricted the use of this treatment option to pregnant women.").

of evidence to guide effective treatment in correctional settings."[50]

Moreover, there has been an increase in the privatization and outsourcing of detainee healthcare.[51] By 2010, nearly half of jails surveyed by Reuters had turned to privatized medical care, and by 2018, the number had increased to 62%.[52] But jails with healthcare overseen by private companies incur higher death rates than those with healthcare overseen by the government.[53] Additionally, it is well documented that the two largest correctional-health-care companies—Wellpath and Corizon Health—face constant accusations of abhorrently substandard care.[54] Sometimes the government does notice, and counties have called Wellpath's performance "morally reprehensible" and accused Wellpath of turning a jail into a "sinking submarine."[55] Former employees have gone public, for example, describing how "constitutional rights were violated when a nurse stuffed their

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[50] Nat'l Ctr. on Addiction & Substance Abuse, *supra* note 40, at 42–44.

[51] Jason Szep et al., *Dying Inside: The Hidden Crisis in America's Jails, Part Two*, Reuters (Oct. 26, 2020, 11:00 AM), https://www.reuters.com/investigates/special-report/usa-jails-privatization/.

[52] *Id.*

[53] *Id.*

[54] *See, e.g.*, Steve Coll, *The Jail Health-Care Crisis*, New Yorker (Feb. 25, 2019), https://www.newyorker.com/magazine/2019/03/04/the-jail-health-care-crisis.

[55] *See* Blake Ellis & Melanie Hicken, *CNN Investigates: 'Please Help Me Before It's Too Late,'* CNN (June 25, 2019), https://www.cnn.com/interactive/2019/06/us/jail-health-care-ccs-invs/.

unanswered medical requests into a shredder box."[56] However, little to no change has come from these public statements. Alabama, for example, renewed its contract with Corizon Health despite state auditors giving Corizon failing marks.[57]

On top of all these deficiencies, there is a broken system of federal oversight. There are no enforceable national standards to ensure jails meet constitutional requirements for inmate health and safety.[58] Only 28 states have adopted their own standards.[59] Although BJS has collected inmate mortality data for the past two decades, statistics for individual jails are withheld from the public, government officials, and oversight agencies under a 1984 law that limits the release of BJS data.[60] Instead of releasing jail-by-jail mortality figures, BJS's practice has been to publish aggregated statistics every few years. But these statistics may not be accurate as some jails fail to inform BJS of deaths. And in recent years, BJS has been much slower to report this data: the 2016 report was not issued until 2020. A Department of Justice spokesman told Reuters there were "no plans" to issue any future reports containing even aggregated data on inmate deaths.[61]

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[56] *Id.*

[57] Ryan Cooper, *How Your Local Jail Became Hell: An Investigation*, Week (Apr. 2, 2015), https://theweek.com/articles/540725/how-local-jail-became-hell-investigation.

[58] Eisler et al., *supra* note 31.

[59] *Id.*

[60] *Id*.

[61] *Id.*

II. RESOLVING THE SPLIT ALLOWS UNIFORM ENFORCEMENT OF CONSTITUTIONAL RIGHTS AND SIGNIFICANT COST SAVINGS ACROSS SOCIETY.

A subjective standard for jail detainees' medical care claims creates perverse incentives and allows egregious abuses to go unchecked. On the other hand, a uniform, objective standard mitigates many problems that plague the jail system. It incentivizes proper quality control and leads to significant, system-wide cost savings.

A. A Subjective Standard Exacerbates Current Problems Plaguing Jails.

The problem with a subjective standard is that it is always dependent on what a defendant *actually* knew; the less well-trained and informed jail staff are, the less likely they can be held accountable for mistreatment. Liability is therefore dependent on specific facts that may or may not come to light post-hoc. This means that the same harm suffered in the same situations can produce different outcomes in each case. In recognition of that exact concern, the United States Supreme Court wrote in the Fourth Amendment context that "objective standards of conduct" allow for more "evenhanded law enforcement" than "standards that depend upon the subjective state of mind of the officer." *Horton* v. *California*, 496 U.S. 128, 138 (1990). Such a standard is not a novel approach: The

Court employs an objective standard based on reasonableness all throughout constitutional law.[62]

The distinction between an objective and subjective standard has practical consequences. A subjective standard disincentivizes proper training and accurate determinations of conditions afflicting jail detainees, both of which are crucial to detainee health safety. A subjective standard also incentivizes ignorance: Making intake screening less thorough for example can insulate jails from liability if jail staff are simply unaware—and are not trained to become aware—of serious health symptoms and proper responses.

These disincentives are especially concerning considering, as detailed above, the significant, systemic deficiencies in meeting minimal standards of treatment for detainees. On top of this, a strained jail system is being asked to do too much in addressing myriad societal challenges. The explosion of the opioid epidemic further underscores the need to disincentivize ignorance of detainees' healthcare requirements. There is an increasing number of opioid abusers who end up in jail, and their withdrawal syndromes can be fatal.[63] The push for jails to cope with the opioid epidemic is a nationwide effort, and objective standards

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[62] *See, e.g.*, Brandon L. Garrett, *Constitutional Reasonableness*, 102 Minn. L. Rev. 61, 62–63 (2017) (summarizing the various applications of a "reasonableness" standard across constitutional law, albeit noting that its use is "commonplace, but highly inconsistent").

[63] TASC, Ctr. for Health & Just., *Safe Withdrawal in Jail Settings: Preventing Deaths, Reducing Risk to Counties and States* 1 (Jan. 2018), https://www.centerforhealthandjustice.org/tascblog/Images/documents/Publications/Safe%20Withdrawal%20in%20Jail_010918.pdf.

are particularly suited to a united approach.[64] There is a more pressing need than ever for standardized, minimal competency of care, and an objective standard will only help facilitate that outcome.

Implementing an objective constitutional standard should have minimal impact on jails that follow best practices. As the Court has recognized, "many facilities . . . train officers to interact with all detainees as if the officers' conduct is subject to an objective reasonableness standard." *Kingsley* v. *Hendrickson*, 576 U.S. 389, 399 (2015). Standardized resources also already exist in abundance; for instance, the Federal Bureau of Prisons published a thorough guidebook on how to identify and handle withdrawal symptoms from prisoners.[65] Furthermore, jails have been making efforts to address detainee health and preventative care for some time now.[66] In this sense, clarifying an objective constitutional standard will only serve to hold the most egregious abuses accountable without actually causing disruptive or impractical shifts within the jail system.

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[64] *Cf.* Coll, *supra* note 54 (describing efforts of the National Commission on Correctional Health Care).

[65] Fed. Bureau of Prisons, *Detoxification of Chemically Dependent Inmates* (Feb. 2014), https://www.bop.gov/resources/pdfs/detoxification.pdf.

[66] *See* Martin Kaste, *The 'Shock of Confinement': The Grim Reality of Suicide in Jail*, NPR (July 27, 2015, 5:59 PM), https://www.npr.org/2015/07/27/426742309/the-shock-of-confinement-the-grim-reality-of-suicide-in-jail ("And in fact, horror stories aside, American jails have become better at handling mental illness. A generation ago, the suicide rate was a lot higher.").

B. A Subjective Standard Prevents Cost Savings.

The current jail system that recycles detainees in large part due to inadequate healthcare is inefficient. A study of the most frequent detainees in New York's Rikers Island jail compared against the average detainee showed that the repeated arrests represented $129 million in custody and health costs versus $38 million for the average group of jail detainees.[67] Ignorance of detainees' health needs only exacerbates the negative feedback loop that is the American jail system. Indeed, when Kentucky offered substance abuse treatment programs, the programs "showed a $4.29 return for each dollar of program cost across both jail and prison participants."[68] Aligning incentives with standardized care and improved diligence thus work towards breaking the jail cycle and leading to significantly lower costs.[69]

Deficient care creates significant costs. Lawsuits from the estates of detainees who died in jail regularly settle for millions of dollars.[70] Even if the deficiency does not result in litigation, an unaddressed condition

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[67] MacDonald et al., *supra* note 26, at 2262.

[68] Pew Charitable Trs., *supra* note 49, at 26 (footnote omitted).

[69] *Cf.* Jacobson et al., *supra* note 25, at 2 (describing probation as a factor of the negative feedback loop); Ziba Kashef, *Novel Healthcare Program for Former Prisoners Reduces Recidivism*, Yale News (May 2, 2019), https://news.yale.edu/2019/05/02/novel-healthcare-program-for-mer-prisoners-reduces-recidivism.

[70] Michael Roberts, *The Agonizing, Unnecessary, Day-Plus Jail Death of Denny Lovern*, Westword (Oct. 12, 2018, 6:01 AM), https://www.westword.com/news/the-agonizing-unnecessary-day-plus-jail-death-of-denny-lovern-10886362.

easily turns into a more serious—and disproportionately more expensive—health problem. A missed note to see a psychiatrist can lead to a $1.6 million settlement.[71] An objective standard disincentivizes wait-and-see approaches, and any fear of liability will only encourage jail staff to be proactive in uncovering such conditions.

The fear that litigation costs would increase as a result of an objective standard is unfounded. Circuits that use an objective standard do not see more litigation than those that use a subjective standard. *See Kingsley*, 576 U.S. at 402 ("Nor is there evidence of a rash of unfounded filings in Circuits that use an objective standard."). More importantly however, an "objective reasonableness standard permitted more judicial control over constitutional litigation, meaning fewer civil rights cases would go to trial."[72] Additionally, any fear of liability is offset by the internalized costs of actual liability: intervention before detainee suicide for example preempts financially devastating lawsuits in addition to preserving human life.[73] Overstated concerns about implementing an objective constitutional standard should not give the Court pause in reaching that correct outcome.

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[71] *Cf.* Erin Fuchs, *The Shocking Story of a Bipolar Woman Stuck for Years in Jail Without Ever Being Convicted of a Crime*, Bus. Insider (Feb. 17, 2014, 8:46 PM), https://www.businessinsider.com/jan-greens-solitary-confinement-nightmare-2014-2.

[72] Garrett, *supra* note 62, at 80 (citing *Harlow* v. *Fitzgerald*, 457 U.S. 800 (1982)).

[73] Hayes, *supra* note 16, at 2.

CONCLUSION

This Court should grant the writ.

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