No. 20-1562

In The Supreme Court of the United States

FAYE STRAIN, as guardian of Thomas Benjamin Pratt,

Petitioner,

v.

VIC REGALDO, 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

BRIEF OF AMICUS CURIAE THE VIRGINIA SHERIFF'S ASSOCIATION IN SUPPORT OF RESPONDENTS

Deputy Michael F. Imprevento
Staff Attorney
Norfolk Sheriff's Office
Administration
140 East Street
Norfolk, VA 23510
(757) 664-4344
Michael.Imprevento@Norfolk-Sheriff.com
Counsel for Amicus Curiae

LANTAGNE LEGAL PRINTING
801 East Main Street Suite 100 Richmond, Virginia 23219 (800) 847-0477

QUESTION PRESENTED

Whether this Court's holding in *Kingsley v. Hendrickson,* 576 US 389, 135 S. Ct. 2466, 192 L.Ed. 2d 416 (2015), which was expressly limited to the excessive force context, would apply to a claim of a pre-trial detainee alleging a Fourteenth Amendment due process violation as a result of an allegation that an official disregarded and failed to act upon a serious medical need.

INTEREST OF *AMICUS CURIAE*[1]

The Virginia Sheriff's Association ("VSA") was established in 1977 as a 501(c)(6) organization dedicated to representation of sworn and unsworn Virginia Sheriff's Office personnel. VSA represents its membership in various ways through interaction with both federal and state legislative representatives on matters of interest to the membership and which pertain or relate to public safety and their working conditions. VSA is actively engaged in improving the working knowledge of its membership by sponsoring educational seminars on state and federal law and administers the Virginia Sheriff's Institute program which confers recognition on those select members who complete a rigorous course of study. Elected constitutional officers,

[1] Rule 37 Statement: All parties were timely notified and consented to the filing of this brief. No part of this brief was authored by any parties' counsel, and no person or entity other than amici funded its' preparation or submission.

Virginia Sheriffs are primarily responsible for the operation of jails which are manned by both sworn deputies and unsworn civilian staff to include medical and mental health staff, both employed and/or under contract. Many Virginia jails hold a combination of pretrial detainees and adjudged prisoners awaiting transfer to permanent correctional facilities. The VSA is concerned with any expansion of the *Kingsley* holding to conditions of confinement which sound in serious medical need as such would devolve into a state based tort standard which does not bear a relationship to the appropriate state of mind necessary to establish a constitutional due process injury. Quite apart from the deliberate and intentional application of force, the identification of the need for delivery of medical care to confined inmates, many of whom have serious compound medical issues, mental health and substance abuse issues, cannot readily be defined without resort to the well-settled application of a two-part deliberate indifference standard. These health conditions complicate response by jail and medical staff. To "punish" still requires an elevated mental state even in the pretrial detention setting.

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Fourteenth Amendment substantive due process requires the government to provide adequate medical care to pretrial detainees. *City of Revere v. Mass General Hospital*, 463 U.S. 239, 103 S.Ct. 2979, 77 L.Ed.2d 605 (1983). Given the distinct nature of a claim involving a failure to address a serious medical need, a critical component of the constitutional analysis has been and must always be an evaluation of the state of mind of the actor. *Farmer v. Brennan*, 511 U.S. 825, 828, 114 S.Ct. 1970, 1974, 128 L.Ed.2d 811, 828 (1994). The culpable state of mind required to establish a constitutional tort can only be viewed through the two-part analysis that has traditionally been applied in both Fourteenth and Eighth Amendment cases because invariably such cases involve a failure to act as opposed to the intentional and deliberate application of force that was examined in *Kingsley* and similar cases involving that species of claim. The framework for the application of the two-part test in this context is well established and has in the majority of instances been analyzed identically to the deliberate indifference test applicable to Eighth Amendment violations and which essentially sets forth that an inmate "must demonstrate that the officers acted with deliberate indifference to the inmates' serious medical needs." *Iko v. Shreve*, 535 F.3d 225 (4th Cir. 2008)(quoting *Estelle v. Gamble*, 429 U.S. 97, 104, 97 S.Ct. 285, 50 L.Ed.2d 51 (1976). A prison official is deliberately indifferent if he has actual knowledge of and purposely disregards "the risk posed by the serious medical needs of the inmate." *Farmer*, 511

U.S. at 837. Even though a pretrial detainee may not be punished at all, *Kingsley, supra*, the requisite *mens rea* has led the majority of courts to apply the deliberate indifference standard in the context of that specific claim of a pretrial detainee. In examining whether any conduct is focused upon a pretrial detainee that is tantamount to punishment, the analysis is necessarily different than that which involves an intentional and excessive use of force. The intentional infliction of punishment that may result from excessive force is in no way conceptually equal to the diagnosis and treatment of an inmate medical condition or the failure of jail officials to recognize such need. It does not conceptually fit with the circumstance of a jail official failing to recognize serious medical need for follow up. To establish punishment as contemplated under either the Fourteenth or Eighth Amendments, there must be a showing of intent to punish, taking or making a deliberate act intended to "chastise or deter." *Wilson v Seiter*, 501 U.S. 294, 111 S.Ct. 2321, 115 L.Ed.2d 271 (1991). Those who wield force in the environment in which such force is deliberately wielded, intend the consequences of their actions. It is submitted that the reason why this Court in *Kingsley* limited its holding to excessive force claims is that in other contexts, an objective standard is simply constitutionally inappropriate. The VSA writes to explain that in jail facilities where both pretrial detainees and convicted prisoners are housed, the treatment and identification of serious medical needs while interacting with a population with myriad and compound medical issues, cannot and should not amount to punishment unless a very specific mental state is demonstrated. Certain state

based remedies sounding in elevated levels of negligence and gross negligence are available to claimants. The constitutional deprivation of due process when evaluating medical need demands a much different and higher level examination of mental state. An objective standard simply does not reliably apply in this setting. The writ should be denied given this record.

ARGUMENT

The Petitioner misstates the nature of a medical decision upon the record below, conflating a failure to act with an "intentional" act in an attempt to conceptually equate such an action with deliberately applied force so as to improperly implicate *Kingsley*'s limited test.

A. Notwithstanding the fact that a pretrial detainee cannot be "punished" at all, it is still necessary to divine the *mens rea*, and the limited nature of the *Kingsley* holding simply does not lend itself to the instant context.

In *Lombardo v. St Louis*, 594 U.S. ____ (2021), in remanding for reconsideration by the Eighth Circuit Court of Appeals a case involving alleged excessive force by police focused upon a detainee, this Court expressly referred to *Kingsley* as "*excessive force*" precedent also citing its precedent in *Graham v. Conner*, 490 U.S. 386, 397, 109 S.Ct. 1865 (1989), a case considering the sole issue of the use of force pursuant to both the Fourth and Fourteenth Amendments in a pre-conviction investigatory stop setting. This Court specifically stated in *Lombardo*

at FN 2, "Whatever the source of law, in analyzing an excessive force claim, a court must determine whether the force was objectively unreasonable…" This case does not represent or present a factual basis sufficient to impose an objective standard for all conditions of confinement claims of pretrial detainees, especially in the instant context. It is not conceptually analogous to a specific use of force scenario, which is far more amenable to an objective standard previously used in the Fourth Amendment context. *Graham, supra*. The use of the term "objectively unreasonable" in the context of testing both jail officials' and medical officials' response to a serious medical need invites confusion and an impermissible detour into the realm of state based tort law. The Due Process Clause is not a font of tort law to be superimposed upon a state system of jurisprudence. *Daniels v. Williams*, 474 U.S. 327, 332, 106 S.Ct. 662, 88 L.Ed.2d 662 (1986). An objective standard sounding in any species of "reasonableness" has no application in the episodic serious medical needs context. *Daniels, supra*. Whether it is the jail officials' assessment of the need for a medical referral, or the response to the medical referral by jail or contract medical personnel, mere negligence, malpractice or incorrect diagnosis is not actionable under 42 U.S.C. §1983. *Estelle*, 429 U.S. at 106. To establish deliberate indifference the prison official must have acted with a sufficiently culpable state of mind and the subjective state of mind required is that of deliberate indifference to inmate health or safety. *Farmer*, 511 U.S. at 834. And finally, deliberate indifference in that the official had actual subjective knowledge of both the inmate's serious medical condition and the excessive risk posed by the official's action or inaction. *Scinto*

v. Stansberry, 841 F.3d 219, 225 (4th Cir. 2016), citing *Farmer,* 511 U.S. at 834. On the basis of the foregoing, punitive intent must be established regardless of whether the claim sounds under the Fourteenth Amendment or the Eighth Amendment. *Estelle,* 429 U.S. at 106 (applying the standard to claims involving medical care where such is challenged as a condition of confinement.) This Court has previously rejected a request to adopt a purely objective test of deliberate indifference, *Farmer* at 839, because in that context, an officials' intent matters such that the official must subjectively disregard a known or objective serious medical need. *Id* at 837. In *Kingsley*, three layers of force were applied to the inmate in connection with an attempt to restrain him. Physical force was directly applied to place him in the prone position. He was then handcuffed and while handcuffed, a Taser was applied to him for its full five-second designed deployment. The sequence of that event creates a circumstance that substantially differs from the actions or inactions of medical or jail officials in responding to an inmate's medical needs. As explained in *Bell v. Wolfish*, 441 U.S. 520, 99 S.Ct 1861, 60 L.Ed.2d 447 (1979), to analyze a pretrial detainees' Fourteenth Amendment claim, the key question is whether the situation at issue amounts to punishment of the detainee, while punitive intent may be inferred from affirmative acts that may be excessive in relationship to a legitimate government objective, the failure to act does not raise that same inference. *Farmer*, 511 U.S. at 837-838. A person who unknowingly fails to act which is invariably implicated in most if not all serious medical need claims, even when such failure is objectively unreasonable, is negligent at most and this Court in

Kingsley reiterated that liability for negligently inflicted harm is categorically beneath the threshold for constitutional due process. *Kingsley*, 135 S.Ct. at 2470. Petitioner realizes this and attempts to couch a failure to respond to the inmate's perceived alcohol related complications as somehow a "deliberate" or "intentional" act calculated to punish as opposed to a medical judgment that may be challenged as below an applicable standard of care, which is clearly and simply a tort beyond the reach of the Constitution. A jail official's response to the objective complaints or appearance of the inmate should similarly be judged in accordance with the same standard. All legal and medical decisions of jail and medical officials that may involve log or chart entries directing some response are "intentional," of course, but not in the sense that may easily be conceptually equated with that notion of "punishment" necessary to implicate substantive due process. The use of the deliberate standard to determine punitive intent should be left in place regardless of whether the standard is "punishment" pursuant to the Fourteenth Amendment or "cruel and unusual punishment" pursuant to the Eighth Amendment. Punishment in the specific constitutional sense requires a specific mental state not easily cabined into a singular "objective reasonableness" test when facing a medical need.

A subjective approach in a serious medical need fact pattern isolates those who inflict punishment. To act reckless in the constitutional sense, a person must consciously disregard a substantial risk of serious harm. *Farmer v. Brennan*, 511 U.S. at 828, citing Model Penal Code Section 2.02(2)(c).

A "one size fits all" objective standard for all pretrial detainees species' of claims would in fact implicate the necessity of overruling well-settled precedent of this Court. For instance, in *Block v Rutherford*, 468 U.S. 576, 104 S.Ct. 3227, 82 L.Ed.2d 438 (1984), this Court considered pretrial conditions that involved contact visits, and shake down searches of inmates' cells in a jail facility. In evaluating this species of claim, the Court's dispositive inquiry was whether the challenged practice or policy constituted punishment under the Fourteenth Amendment or was reasonably related to a legitimate government objective. *Bell supra.* To challenge a particular policy, a court must decide whether the disability is imposed for purpose of punishment or whether it is an incident of legitimate governmental purpose. *Block*, 468 U.S. at 584 citing *Bell* at 538. In making this evaluation the court stated that courts should play a limited role in the administration of detention facilities in the determination of whether a specific restriction is reasonably related to security interests or is punishment. 468 U.S. at 584. In a large category of policy based as opposed to episodic considerations like excessive force this Court has set forth different standards to determine whether due process was withheld. See also *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-169 (1963). Justice Blackmun concurring in the judgment of the Court in *Block, supra*, stated

> …a pretrial detainee who challenges the conditions of confinement on the ground that the amount of punishment is in violation of the Due Process Clause must show that the conditions are the

> product of punitive intent. *Bell* 441 U.S. at 538-539.

The traditional two-part standard for the determination of punitive intent is the only well-settled method to elevate a serious medical need claim into the constitutional realm. Other decisional analyses apply to different conditions and contexts.

B. In the wake of *Kingsley*, and in recognition of the distinct nature of excessive force and deliberate indifference claims, the majority of United States Circuit Courts of Appeal have declined to apply the *Kingsley* standard to serious medical need claims by either expressly rejecting it in that context, or simply declining to apply it to deliberate indifference claims while acknowledging *Kingsley*.

The First, Fourth, Fifth, Sixth, Eighth, Tenth and Eleventh Circuits have either declined to extend *Kingsley* to deliberate indifference claims or while acknowledging *Kingsley* simply still apply the well-settled two-part standard to deliberate indifference claims . *Griffith v. Franklin County*, 975 F.3d 554 (6th Cir. 2020) (noting that post-*Kingsley* they have found it unnecessary to answer the question each time the issue has been confronted, holding the same result would obtain under either test), *Martinez v. City of North Richland Hills*, 846 Fed. Appx. 238 (5th Cir. 2021) (a medical inattention claim is judged by the deliberate indifference standard pursuant to the Fourteenth Amendment, which is a demanding and

extremely high standard requiring that the official both know the pretrial detainee faces a substantial risk of serious harm and disregards that risk by failing to take reasonable measure to abate it. *Farmer, supra.*); *Shover v. Chestnut*, 798 Fed. Appx. 760 (4th Cir. 2020) (applying the deliberate indifference standard to a pretrial detainee's medical claim without discussing *Kingsley*); *Miranda-Rivera v. Toledo-Davila*, 813 F.3d 64 (1st Cir. 2016) (applying two-part objective and subjective test to a deliberate indifference claim by a pretrial detainee. Notably, the *Miranda-Rivera* Court acknowledged that *Kingsley* changed the standard for excessive force claims and proceeded to apply an objective reasonableness standard to the plaintiffs' excessive force claim but did not apply it to his deliberate indifference claim. 813 F.3d at 70-71.); *Ryan v. Armstrong*, 850 F.3d 419-424, 426 (8th Cir. 2017)(although a serious medical need may be established objectively, the requisite mental state which must be akin to criminal recklessness must be judged on a subjective standard as neither negligence or gross negligence are insufficient.); *Thompson v. King,* 730 F.3d 742 (8th Cir. 2013); *Nam Dang v. Sheriff Seminole County Florida*, 871 F.3d 1272 (11th Cir. 2017)(to establish deliberate indifference, Dang must prove (1) subjective knowledge of risk of serious harm and (2) disregard of that risk (3) by conduct that is more than mere negligence.)

Of course, the case which is the subject of the Petitioner's requested writ expressly rejected the *Kingsley* test in the context of a deliberate indifference claim. It was the correct result. The fact that different

circuits have held differently regarding pretrial detainee conduct does not always require that this Court intervene for the sake of judicial uniformity pursuant to Rule 10. In *Block, supra*, the Court noted that the federal circuit courts disagreed regarding whether the Due Process Clause required contact visits for detainees. *Block*, 468 U.S. at 583 at note 6. It is not every question that therefore raises issues necessary for this Court's intervention pursuant to Rule 10 as "important." The Court of Appeals in the instant matter also applied a "properly stated rule of law", in fact a long standing rule of law in that context, to a particular factual record which should also weigh against a grant of review. Rule 10 of this Court. Qualified and sovereign immunity, given the current public climate, are under legislative siege in both Congress and the state legislatures. General Assembly of Virginia HB 2045 introduced in the 2021 Regular Session proposed the creation of a civil action against state actors that would abolish both qualified and sovereign immunity. A similar Bill was proposed in the previous session. HB 5013. It did not pass but will be reintroduced along with other measures. The United States Senate is currently considering law enforcement reform in connection with debate on a revised version of HR 7120 which includes a proposal to abolish qualified immunity or a compromise that will make it easier to reach law enforcement agencies. Sen Tim Scott www.scott.senate.gov, Scott, BookerBass Statement on Police Reform Negotiations June 30th 2021. Only a strict adherence to the necessary constitutional standards in cases involving serious medical need will serve to protect the good faith and well- intentioned decisions of jail officials and the medical personnel they work shoulder to shoulder with every day.

CONCLUSION

The writ of certiorari should be denied.

Respectfully submitted,

Deputy Michael F. Imprevento
Staff Attorney
Norfolk Sheriff's Office
Administration
140 East St'
Norfolk, VA 23510
(757)664-4344
Michael.Imprevento@Norfolk-Sheriff.com for
Virginia Sheriff's Association
901 East Byrd Street- Suite 1301
Richmond, Virginia 23219
(804) 225-7152