No. 20-1562

IN THE
Supreme Court of the United States

FAYE STRAIN, AS GUARDIAN OF THOMAS BENJAMIN PRATT,
Petitioner,
v.
VIC REGALADO, ET AL.
Respondents.

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

BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Whether a claim by a pretrial detainee for deliberate indifference to a medical need under the Fourteenth Amendment to the United States Constitution and 42 U.S.C. § 1983 will continue to require the jail or medical staff at a jail to act with a "deliberate" and an "indifferent" state of mind, or whether, without any change in the Constitution or Statute, a claim for deliberate indifference under the Fourteenth Amendment can be established by a less stringent "objective unreasonableness" standard that does not require any proof of a culpable state of mind.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Armor Correctional Health Services, Inc.; Curtis McElroy, D.O.; Patricia Deane, LPN; and Kathy Loehr, LPC. Armor Correctional Health Services, Inc. is not a publicly held corporation or other publicly-held entity. It does have a parent corporation, Armor Correctional Healthcare Holdings, LLC. No other publicly held corporation owns 10% or more of its stock. Fed. R. App. P. 26.1(g)

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutional Provisions and Statutes

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

Pursuant to the Fourteenth Amendment to the United States Constitution: "[n]o State…shall deprive any person of life, liberty, or property without due process of law; nor deny any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1.

Section 1983, codified as 42 U.S.C. § 1983, provides, in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress…

42 U.S.C. § 1983.

STATEMENT OF THE CASE

Legal Framework

The Tenth Circuit correctly held that claims of deliberate indifference concerning medical treatment of pretrial detainees require more than a disagreement in treatment or negligence. As a result, those claims require a plaintiff to sufficiently allege the subjective and objective components:

> The Fourteenth Amendment prohibits deliberate indifference to a pretrial detainee's serious medical needs. Disagreement about course of treatment or mere negligence in administering treatment do not amount to a constitutional violation. Rather, to state a claim for deliberate indifference, a plaintiff must allege that an official acted (or failed to act) in an objectively unreasonable manner and with subjective awareness of the risk. Indeed, the word deliberate makes a subjective component inherent in the claim.

Pet. App. at 4a.

The deliberate indifference standard has long required claimants prove both an objective and a subjective component. *Estelle v. Gamble*, 429 U.S. 97, 104-06 (1976); *Farmer v. Brennan*, 511 U.S. 825, 835 (1994). To establish the objective component, "the alleged deprivation must be 'sufficiently serious' to constitute a deprivation of constitutional dimension." *Self v. Crum*, 439 F.3d 1227, 1230 (10th Cir. 2006) (quoting *Farmer v. Brennan*, 511 U.S. 825, 834, 114 S.Ct. 1970, 128 L.Ed.2d 811 (1994)). Further, a

correctional facility official "must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference." *Farmer*, 511 U.S. at 837. The subjective component requires a plaintiff to establish that a medical "official knows of and disregards an excessive risk to inmate health or safety; the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and [s]he must also draw the inference." *Mata v. Saiz*, 427 F.3d 745, 751 (10th Cir. 2005) (alteration in original) (quoting *Farmer*, 511 U.S. at 837). "[D]eliberate indifference to serious medical needs of prisoners constitutes the 'unnecessary and wanton infliction of pain.'" *Estelle*, 429 U.S. 97, 104, 97 S.Ct. 285, 291, 50 L.Ed.2d 251 (1976) (citing *Gregg v. Georgia*, 428 U.S. 153, 173, 96 S.Ct. 2909, 2925, 49 L.Ed.2d 859 (1976) (joint opinion of Stewart, Powell, and Stevens, JJ.)).

A claim of deliberate indifference entails something more than unreasonableness or negligence. This Court and appellate courts have long held that "prison officials may not be held liable if they prove they were unaware of the risk, or if they responded reasonably to a known risk – even if the harm ultimately was not averted." *Farmer*, 511 U.S. 826; *see also Miller v. Neathery*, 52 F.3d 634 (7th Cir. 1995) (discarding the civil test for negligence in favor of the criminal recklessness standard for constitutional deliberate indifference cases); *Hare v. City of Corinth*, 74 F.3d 633 (5th Cir. 1996) (mandating the prisoner prove the official both knew of and disregarded "an excessive risk to inmate health or safety"); *Cottrell v. Caldwell*, 85 F.3d 1480 (11th Cir. 1996) (holding that *Farmer* requires "a great deal

more of the plaintiff than a showing that the defendants violated generally accepted customs and practices."). Differences in judgment between pretrial detainees and jail medical personnel regarding appropriate medical diagnoses or treatment are not sufficient to sustain a deliberate indifference claim. "[I]n the medical context, an inadvertent failure to provide adequate medical care cannot be said to constitute 'an unnecessary and wanton infliction of pain' or to be 'repugnant to the conscience of mankind.'" *Estelle*, 429 U.S. at 105-06.

This Court has specifically stated, that "liability for negligently inflicted harm is categorically beneath the threshold of constitutional due process." *Kingsley v. Hendrickson*, 576 U.S. 389, 396, 135 S.Ct. 2466, 2472, 192 L.Ed.2d 416 (2015) (citing *County of Sacramento v. Lewis*, 523 U.S. 833, 849, 118 S.Ct. 1708, 140 L.Ed.2d 1043 (1998)). When bringing a suit under Section 1983, a plaintiff must still prove a violation of the underlying constitutional right and, depending on the right, merely negligent conduct may not be enough to state a claim. *See Daniels v. Williams*, 474 U.S. 327 (1986); *see also, e.g., Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 97 S.Ct. 555, 50 L.Ed.2d 450 (1977); *Estelle*, 429 U.S. 97 (1976). The subjective requirement establishes the state of mind/*mens rea* requirement that necessarily separates constitutional claims brought pursuant to 42 U.S.C. § 1983 from claims of professional negligence. Justice Scalia warned against conflating negligence with constitutional claims when dissenting in *Kingsley,* 576 U.S. 389, 408, 135 S.Ct. 2466, 2479 (2015) ("The Due Process Clause is not 'a font of tort law to be superimposed upon' [a state's statutory and common law] system.

Today's majority overlooks this in its tender-hearted desire to tortify the Fourteenth Amendment.") (Scalia, J., dissenting) (internal citations omitted); *see also Castro v. Cty. of Los Angeles*, 833 F.3d 1060 (9th Cir. 2016), (Ikuta, J. dissenting) ("[T]he majority has simply dressed up the *Farmer* test in *Kingsley* language for no apparent reason; it conflates the two standards only to end up where we started.").

The Tenth Circuit has properly and consistently followed this Court's guideposts on the issue in holding that negligence alone does not state a constitutional claim under 42 U.S.C. § 1983 for deliberate indifference to medical needs. *See Green v. Branson*, 108 F.3d 1296, 1303 (10th Cir. 1997). "Where the necessity for treatment would not be obvious to a lay person, the medical judgment of the physician, even if grossly negligent, is not subject to second-guessing in the guise of an Eighth Amendment claim." *Mata*, 427 F.3d at 751 (citing *Green*, 108 F.3d at 1303. If medical care was provided, and there is only a disagreement as to whether the proper care was provided, the case sounds in tort and does not rise to the level of a civil rights claim. *Smart v. Villar*, 547 F.2d 112 (10th Cir. 1976).

Additionally, the burden that a plaintiff must demonstrate when claiming deliberate indifference "is a very high standard," *Grayson v. Peed*, 195 F.3d 692, 695 (4th Cir. 1999), which "make[s] it considerably more difficult for [an inmate] to prevail than on a theory of ordinary negligence," *Correctional Servs. Corp. v. Malesko*, 534 U.S. 61, 73, 122 S.Ct. 515, 151 L.Ed.2d 456 (2001). It is a subjective standard that requires an inmate to prove "that the prison official had actual knowledge of an excessive

risk to [his] safety." *Danser v. Stansberry*, 772 F.3d 340, 347 (4th Cir. 2014).

In this case, Petitioner failed to plead facts sufficient in her Complaint to meet this high standard. Instead, Petitioner's claims amount to nothing more than a disagreement over the adequacy of the treatment provided, which this Court, and others, has determined is not enough to assert an actionable claim of a violation of a pretrial detainee's rights under the Fourteenth Amendment. To this end, if the subjective prong is removed from a claim for deliberate indifference, all that would remain would be a purely objective unreasonableness standard. This would result in constitutional claims being analyzed under the same standard as ordinary medical negligence claims. Consequently, the use of a purely objective standard would essentially create a constitutional cause of action for medical negligence. As *Kingsley* advised, "liability for negligently inflicted harm is categorically beneath the threshold of constitutional due process." *Kingsley*, 576 U.S. at 396 (quoting *County of Sacramento*, 523 U.S. at 849). Thus, the use of an objective unreasonableness standard is inappropriate for the evaluation of constitutional claims of deliberate indifference for medical needs.

In medicine a decision to not provide a specific treatment or medication is often the most appropriate course of treatment, and therefore the best form of medical treatment a patient can receive for a particular ailment. The inverse, which is suggested by Petitioner (that a medical provider's intentional decision to not provide a specific course of treatment is sufficient to satisfy the subjective component of a deliberate indifference claim), would result in medical

providers unnecessarily medicating and treating patients just for the sake of taking affirmative action. If Petitioner were to succeed in her quest to change the standard by which deliberate indifference claims are analyzed, the consequence would be a system of judicially imposed and often medically unnecessary and harmful patient care wherein medical providers are stripped of their autonomous ability to treat patients according to their best judgment. In considering the best course of treatment for their patients, medical providers are constantly balancing the potential harms with the potential benefits of a course of action or treatment, and they must remain free to do so without being pressured into unnecessary action, solely for the sake of action, to avoid liability.

Here, Petitioner did not, and cannot, allege that medical care was not provided to Thomas Pratt (hereinafter "Pratt"). Instead, she merely disagrees with the adequacy of the medical care that was allegedly provided. Analysis under both a subjective and objective standard was appropriate for the District Court and the Tenth Circuit, and both courts appropriately found the Petitioner failed to allege facts sufficient to state a claim against the Respondents based on the Fourteenth Amendment. Accordingly, this Court should deny Petitioner's Petition for a Writ of Certiorari and thereby allow the proper legal standard for deliberate indifference to remain as it is, and has been for decades, in the Tenth Circuit. To the extent that other circuits are now applying a new, less stringent standard for deliberate indifference cases, this Court should consider righting those wrongs when the opportunity arises in a properly appealed decision from one of those circuits.

This case was properly analyzed and decided by the lower courts, and those decisions should be allowed to stand.

Factual Background

The factual allegations in the Complaint concerning the medical care of Pratt by employees of Armor Correctional Health Services, Inc. (hereinafter "Armor"), including individual Respondents, Deane, McElroy, and Loehr as considered by the lower courts, fail to rise to the level required to establish a violation of Pratt's Fourteenth Amendment rights. The Complaint alleges Pratt was booked into the jail on December 11, 2015, and on December 12, 2015, Pratt submitted two medical sick call requests wherein he allegedly complained of alcohol withdrawal and requested detoxification medications. Pet. App. 51a, ¶¶ 14-16. At approximately 1:05 p.m. the same day, according to the face of the Complaint, an Armor nurse conducted a drug and alcohol withdrawal assessment on Pratt. *Id.* at 51a-52a, ¶ 17. Within the following hour, Armor's providers admitted Pratt to the jail's medical unit for closer observation, and upon such admission, a nurse performed a mental health assessment of Pratt and took his blood pressure. *Id.* at 52a, ¶ 18. Notably, Pratt's diagnosis upon admission to the medical unit was "Detox." *Id.* Armor's providers placed Pratt on seizure precautions on December 13, 2015. *Id.* at ¶ 19.

Petitioner's allegations further show Armor's providers placed Pratt on Librium protocol for alcohol withdrawal in response to his complaints. *Id.* at 55a, ¶ 26. Librium is a sedative medication frequently used to treat alcohol withdrawal. The Complaint does not allege the exact day on which this protocol was initiated; however, it is clear Pratt was placed on said

protocol prior to the early morning hours of December 14, 2015. *See id.* Petitioner does not allege any Respondent failed to administer Librium to Pratt, nor does Petitioner claim Pratt did not receive such treatment. Further, Petitioner alleges Nurse Deane performed a drug and alcohol assessment on Pratt at approximately 2:08 a.m. on December 14, 2015, and this assessment indicated a worsening in Pratt's withdrawal symptoms. *Id.* at 52a-53a, ¶ 20. Shortly thereafter, Pratt's treatment protocol was changed from Librium to Valium—evidencing a shift in treatment to better serve Pratt's medical needs as Valium is a stronger medication. *Id.* at 55a ¶ 26. Petitioner does not allege any Respondents failed to administer Valium to Pratt, nor does Petitioner claim Pratt did not receive such treatment. On the contrary, Petitioner alleges Pratt began receiving Valium the morning of December 14, 2015, in response to Pratt's medical complaints. *Id.* at 55a, ¶ 26.

The Complaint further alleges Dr. McElroy assessed Pratt on December 14, 2015, shortly after Pratt's shift from the Librium protocol to the Valium protocol, at which time Dr. McElroy observed a small cut on Pratt's forehead. *Id.* No person witnessed the cause or origin of the cut. *Id.* at 55a-56a, ¶ 26. During the afternoon of December 14, 2015, another nurse assessed Pratt, observing symptoms like those previously diagnosed as alcohol withdrawal. *Id.* at 57a, ¶ 28. Pratt's medical care continued through the morning of December 15, 2015, at which time, according to the Complaint, LPC Loehr, a Licensed Professional Counselor and mental health professional, assessed Pratt; determined he was experiencing alcohol withdrawal; confirmed such withdrawal and associated symptoms were being

treated with Valium (and therefore no additional treatment by LPC Loehr was needed at that time); observed the cut on Pratt's forehead; and determined the cut was likely unintentional as opposed to self-inflicted. *Id.* at 57a-58a, ¶ 30. Dr. McElroy again assessed Pratt the afternoon of December 15, 2015. *Id.* at 59a, ¶ 32.

Petitioner alleges at approximately midnight on December 16, 2015, a nurse observed Pratt, who would not get up (i.e., Pratt was sleeping), and the nurse did not disturb Pratt to obtain his vital signs. *Id.* at ¶ 33. Approximately one hour later, a detention officer found Pratt unresponsive. *Id.* at ¶ 34. Upon discovering Pratt was unresponsive, Armor providers immediately began resuscitative efforts, called emergency responders, and successfully resuscitated Pratt. *Id.* Petitioner's allegations, even if taken as true, show Armor's providers recognized Pratt was undergoing alcohol withdrawal and took affirmative steps to treat Pratt's withdrawal. These are the facts as alleged by Petitioner and taken as true by the district and appellate courts below. Pet. App. at 32a-35a, 51a-59a.

In its Opinion, the Tenth Circuit distinguished the subjective standards for an excessive force claim from a medical needs claim under the Fourteenth Amendment and correctly decided that Petitioner's factual claims in her Complaint fail to rise to the level of a constitutional violation, "[b]ecause the two categories of claims protect different rights for different purposes, the claims require different state-of-mind inquiries. . . . Although [Petitioner's] claims may smack of negligence, we conclude that they fail to rise to the high level of deliberate indifference against any Defendant." Pet. App. at 13a, 25a.

SUMMARY OF THE ARGUMENT

This is a factually unremarkable case that raises a narrow issue that does not require intervention by this Court. Deliberate indifference, as a constitutional claim under Section 1983, requires an individual to allege intentional conduct that is "so egregious as to subject the aggrieved individual to a deprivation of constitutional dimensions." *Martin v. Creek County Jail,* 2010 WL 4683852, 3 (N.D. Okla. 2010) (quoting *Wise v. Bravo*, 666 F.3d 1328, 1333 (10th Cir. 1981). Moreover, this Court's ruling in *Kingsley* considered only excessive force claims, not those of deliberate indifference towards pretrial detainees. *Kingsley v. Hendrickson*, 576 U.S. 389 (2015). The two situations could not be more opposite: "Excessive force requires an affirmative act, while deliberate indifference often stems from inaction." *Castro v. City of Los Angeles,* 833 F.3d 1060, 1069 (9th Cir. 2016) (en banc). Accordingly, to assess both excessive force and deliberate indifference by the same standard is inappropriate.

Petitioner urges this Court to abandon and overrule decades of extensive precedent and align itself with a minority of circuits that have extended the markedly limited holding pronounced by *Kingsley* to claims of deliberate indifference to serious medical needs brought under the Fourteenth Amendment. Adoption of the standard urged by Petitioner would represent a watershed moment in pretrial detainee Fourteenth Amendment deliberate indifference claims for medical needs and upend the standard set forth by the majority of circuit courts that have limited Kingsley to its narrow holding.

Finally, even if the objective unreasonableness standard espoused in *Kingsley* for excessive force claims were to be applied to the facts as alleged on the face of Petitioner's Complaint in this case, the outcome would be identical. Therefore, this Court should deny Petitioner's Petition for a Writ for Certiorari.

REASONS TO DENY CERTIORARI

I. THE *KINGSLEY* STANDARD IS INAPPLICABLE TO DELIBERATE INDIFFERENCE CASES INVOLVING MEDICAL NEEDS

The plaintiff in *Kingsley* was a pretrial detainee who refused to comply with law enforcement officers' orders to remove a piece of paper from a light fixture. *Kingsley*, 576 U.S. at 392. In response, the officers handcuffed the detainee; moved the detainee to a different cell; and placed the detainee face-down on a bed with his hands handcuffed behind him. *Id.* An officer then placed a knee in the detainee's back; allegedly slammed the detainee's head against a concrete bunk; and ultimately stunned the detainee with a Taser for approximately five seconds. *Id.* at 392-3. Each of these alleged actions were deliberate, intentional, and purposeful; as alleged, these acts were not accidental or unknowing failures to act. On appeal, this Court in *Kingsley* considered a patently narrow issue: "whether, to prove an excessive force claim, a pretrial detainee must show that the officers were *subjectively* aware that their use of force was unreasonable, or only that the officers' use of force

was *objectively* unreasonable." *Id.* (emphasis in original).

Underlying the *Kingsley* Court's ruling and analysis were the specific considerations dictated by the unique nature of excessive force claims as compared to other claims under the Fourteenth Amendment. Such claims indisputably involve overt actions by officers, such as "the swing of a fist that hits a face, a push that leads to a fall, or the shot of a Taser that leads to the stunning of its recipient." *Id.* at 2472. By their very nature, such actions demonstrate "intentional and knowing act[s]." *Id.* at 2474. These actions are not accidental but rather intentional, purposeful, or made with a reckless state of mind. *Id.* Therefore, excessive force claims require an affirmative, intentional, purposeful or reckless act by a law enforcement officer – i.e., the decision and act to apply force intentionally to a detainee. The swing of a fist, a push that leads to a fall, and the shot of a Taser are intentional, affirmative actions committed by an officer who knowingly makes an affirmative act. Such affirmative acts are not present in a medical provider's alleged failure to act or provide additional care and treatment. Therefore, in all cases of excessive force, an intentional element inherently exists which is often absent from medical needs cases.

Like *Kingsley*, intent of the conduct is the focus of the Tenth Circuit's analysis in *Strain*:

> [A] deliberate indifference claim presupposes a subjective component. After all, deliberate means intentional, premeditated, or fully considered. And as an adjective, deliberate modifies the noun indifference. (An adjective that modifies a noun element usually

> precedes it.). So a plaintiff must allege that an actor possessed the requisite intent, together with objectively indifferent conduct, to state a claim for *deliberate* indifference.
>
> ***
>
> Removing the subjective component from deliberate indifference claims would thus erode the intent requirement inherent in the claim.

Pet. App. at 15a-16a (internal quotation marks and citation omitted) (emphasis in original)

In this case, Petitioner failed to allege subjective knowledge and disregard to a known and serious risk of harm on the part of any Respondent in her Complaint or any appellate brief filed in the Tenth Circuit. Pet. App. 45a-77a. Now, for the first time in this case, Respondent attempts to sidestep the Tenth Circuit's well-reasoned holding by arguing that an unstated subjective component was actually pleaded in her Complaint through the guise of Prattt's medical providers' "intentional decisions" not to act. In her Petition for a Writ of Certiorari, the Petitioner claims the "Respondents made an intentional decision not to send Pratt to a hospital and not to provide additional care." Pet'r's Pet. at 20. By her reasoning, regardless of all the care and treatment that was provided to care for a pretrial detainee's medical needs, a constitutional deprivation may be properly pleaded whenever there is any additional treatment that could possibly be – but was not – provided. Likewise, when no action is taken because the medical provider is completely unaware of an underlying problem or the severity of the underlying problem, according to the Petitioner's reasoning, there would be a valid

claim of deliberate indifference. This argument is neither practical nor consistent with the purpose and protections provided by the Fourteenth Amendment and 42 U.S.C. § 1983. Petitioner has merely substituted "intentional decision" for subjective knowledge in an attempt to create a new legal standard. Of course, the truth of the matter is that Petitioner ultimately just disagrees with the care that was provided to Pratt, which at most amounts to negligence but fails to rise to the level of a violation of Pratt's Fourteenth Amendment rights. If this Court were to remove the subjective component to a medical needs case under the Fourteenth Amendment, the logical outcome would be the courts forcing health care providers in jail settings to unnecessarily medicate, operate, or perform all available medical and nursing interventions to avoid the possibility of liability even when the most appropriate and beneficial course of action for the patient would be no action at all. Petitioner's argument ignores that no action can be a form of treatment.

Additionally, Petitioner's proposed "intentional decision" rubric fails on a basic level when considering this Court's analysis in *Kingsley*. Petitioner cites to the examples stated in *Kingsley* involving an accidental Taser discharge and an unintentional trip and fall. Pet'r's Pet. at 16. However, these examples include intentional decisions with unintended outcomes: an officer must choose to reach for his Taser before accidentally setting if off, and an officer must choose to take a step before accidentally falling on a detainee. The subjective state of mind must remain the critical part of the analysis. With the Court's examples in *Kingsley*, these would be the intent to use force. In this case, or any medical needs case involving

deliberate indifference, a state of mind decision not to act with the intent or knowledge that the alleged inaction puts the patient at serious risk of harm is required. In this case, Petitioner's Complaint alleges no such state of mind basis for the alleged failure to provide more or different treatment than Pratt was allegedly provided for his known ailments. It is unreasonable and unfounded to suggest that the Respondents had a duty to utilize every known course of treatment available to them – regardless of potential utility. As predicted by Judge Ikuta in *Castro*, Petitioner seeks to dress up the *Farmer* test with the *Kingsley* language, only to create the same standard and analysis.

Kingsley solely addressed excessive force claims by pretrial detainees, which are separate and distinct from claims of deliberate indifference to serious medical needs. As such, this Court should not follow the minority of Circuits that have expanded the limited *Kingsley* holding beyond the confined analysis upon which it rests. Instead, this Court should deny the Petitioner's Petition for a Writ of Certiorari and allow the two-prong analysis established in *Estelle* and *Farmer*, which has been utilized consistently and extensively by the Tenth Circuit, to remain. Elimination of the subjective prong of the analysis would tortify the Fourteenth Amendment in the context of deliberate indifference claims for medical needs; impermissibly lower the constitutional deliberate indifference standard to one akin to mere negligence; and, as a result, undoubtedly open the floodgates of litigation. Accordingly, this Court should not grant the Petitioner's Petition for a Writ of Certiorari.

II. THE *KINGSLEY* HOLDING WAS EXPRESSLY LIMITED TO EXCESSIVE FORCE CLAIMS BROUGHT BY PRETRIAL DETAINEES UNDER THE FOURTEENTH AMENDMENT

In 1994, this Court defined for the first time the subjective component applicable to deliberate indifference claims against law enforcement officers. *Farmer*, 511 U.S. at 835-37. In doing so, the Court rejected the petitioner's request that the Court adopt a purely objective standard and, instead, held that liability of a prison official under the Eighth Amendment can only occur when the official "knows of and disregards an excessive risk to inmate health or safety; the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference." *Id.* at 837. Awareness of the risk and the drawing of the requisite inference that a substantial risk of serious harm exists are grounded in the state of mind of the person acting or failing to act. Since this holding, the Tenth Circuit has applied this analysis to claims of deliberate indifference to medical needs brought under the Eighth Amendment as those brought under the Fourteenth Amendment.

Simply because a minority of circuit courts have stepped beyond this Court's application of *Kingsley* by applying it to non-excessive force claims, does not warrant this Court's intervention in this case. Such intervention could be appropriate in a case that originates from a circuit that has applied *Kingsley* beyond its limited holding. Additionally, the Tenth Circuit applied a "properly stated rule of law" consistent with its own jurisprudence, and that of this

Court, in declining to expand *Kingsley* to medical needs cases, which weighs against a grant of review:

> The Fourteenth Amendment prohibits deliberate indifference to a pretrial detainee's serious medical needs. Disagreement about course of treatment or mere negligence in administering treatment do not amount to a constitutional violation. Rather, to state a claim for deliberate indifference, a plaintiff must allege that an official acted (or failed to act) in an objectively unreasonable manner and with subjective awareness of the risk. Indeed, the word deliberate makes a subjective component inherent in the claim.

Pet. App. at 4a.

As recited by the Petitioner, the Second, Seventh, and Ninth Circuits have opted to change the well-settled standards for establishing deliberate indifference claims by expanding *Kingsley*'s limited holding. Pet'r's Pet. at 8. However, the First, Fourth, Fifth, Sixth, Eighth, Tenth, and Eleventh Circuits have either squarely rejected requests to expand the *Kingsley* holding to deliberate indifference claims or the have continued to apply the traditional standard to deliberate indifference claims following this Court's ruling in *Kingsley*. *See Miranda-Rivera v. Toledo-Davila*, 813 F.3d 64 (1st Cir. 2016) (acknowledging that *Kingsley* changed the standard for excessive force claims and applying an objective unreasonableness standard to the plaintiffs' excessive force claim but not his deliberate indifference claim); *Moore v. Luffey*, 767 Fed. Appx. 335, 340 (3d Cir.

2019) (acknowledging that plaintiff raised a *Kingsley* argument and declining to address it, holding that the outcome would be identical under the traditional deliberate indifference standard or the objective unreasonableness standard); *Duff v. Potter*, 665 Fed. Appx. 242, 244-45 (4th Cir. 2016); (applying Kingsley to pretrial detainee's excessive force claim while declining to apply Kingsley to pretrial detainee's medical needs claim); *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*); *Cope v. Cogdill*, 19-10798, 2021 WL 2767581, at *5 (5th Cir. July 2, 2021) (finding that the Supreme Court held that plaintiffs alleging excessive force must show that the force was objectively excessive, and because *Kingsley* discussed a different type of constitutional claim, it did not abrogate the deliberate-indifference precedent to non-use-of-force 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); *Whitney v. City of St. Louis*, 887 F.3d 857, 860 n.4 (8th Cir. 2018) (denying application of *Kingsley* to a deliberate indifference claim involving alleged failure to monitor and provide medical care to a pretrial detainee stating, "*Kingsley* does not control because it was an excessive force case, not a deliberate indifference case."); *Nam Dang v. Sheriff Seminole County Florida*, 871 F.3d 1272 (11th Cir. 2017) (refusing to apply *Kingsley* in the context of a deliberate indifference claim because *Kingsley* involved an excessive force claim and therefore was not "squarely

on point" or in conflict with Eleventh Circuit precedent defining the proper standard for claims of deliberate indifference to a serious medical need).

At no point did this Court direct the application of its objective unreasonableness standard to non-excessive force claims under the Fourteenth Amendment. *See Kingsley*, 576 U.S. 389. In fact, this Court has expressly placed, and with good reason, claims of excessive force in a category separate and distinct from claims of deliberate indifference:

> [A]pplication of the deliberate indifference standard is inappropriate' in one class of prison cases: when 'officials stand accused of using excessive physical force.' In such situations, where the decisions of prison officials are typically made 'in haste, under pressure, and frequently without the luxury of a second chance,' an Eighth Amendment claimant must show more than 'indifference,' deliberate or otherwise.

Farmer, 511 U.S. at 835 (internal citations omitted).

In *Strain*, the Tenth Circuit addressed *Kingsley* "head on," and remained consistent with its own jurisprudence, and that of this Court, in declining to expand it to deliberate indifference to medical needs cases by stating:

> *Kingsley* involved an excessive force claim, not a deliberate indifference claim. By its own words, the Supreme Court decided that an objective standard is appropriate in the context of excessive force claims brought by pretrial detainees pursuant to the

> Fourteenth Amendment—nothing more, nothing less.

Pet. App. at 12a (internal citations and quotations omitted).

In short, the Tenth Circuit correctly recognized that *Kingsley's* application is not "readily apparent" outside of the context of excessive force. *Id.*

Since *Kingsley*, the Tenth Circuit, has had occasion to decide cases other than this one involving pretrial detainees' claims of deliberate indifference to a serious medical need and has consistently opted to follow this Court's holding in *Kingsley*. *See Christensen v. Burnham*, 788 Fed. Appx. 597, 602 (10th Cir. 2019) (reiterating that the Tenth Circuit "conduct[s] a two-pronged inquiry, composed of an objective and subjective component" to claims of deliberate indifferent to a serious medical need); *Burke v. Regalado*, 935 F.3d 960 (10th Cir. 2019) (applying both an objective and subjective standard when determining whether prison officials and jail medical providers violated a pretrial detainee's constitutional rights); *Crocker v. Glanz*, 752 Fed. Appx. 564, 569 (10th Cir. 2018) (finding that a failure to provide adequate medical care fails to state a constitutional claim where there is no intentional action).

This Court has urged caution when applying its new decisions, noting, "[i]t is of course contrary to all traditions of our jurisprudence to consider the law on this point conclusively resolved by broad language in cases where *the issue was not presented* or even envisioned." *R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377, n.5 (1992) (emphasis added). In *Kingsley*, this Court made clear that it was only addressing excessive force claims:

> We acknowledge that our view that an objective standard is appropriate in the context of excessive force claims brought by pretrial detainees pursuant to the Fourteenth Amendment may raise questions about the use of a subjective standard in the context of excessive force claims brought by convicted prisoners. We are not confronted with such a claim, however, so we need not address that issue today.

576 U.S. at 402.

Despite this cautionary instruction, a small minority of circuit courts have changed the standards in their circuits to apply *Kingsley's* holding beyond the excessive force claims brought under the Fourteenth Amendment. The First, Fourth, Fifth, Sixth, Eighth, Tenth, and Eleventh Circuits have remained consistent in their application of the correct and well-settled standard for deliberate indifference cases.

Petitioner claims that a circuit court split exists that has created arbitrary distinctions that produces circumstances of unequal treatment of pretrial detainees based solely on geography. Res. App. at 24. However, to the extent that any geographic disparity exits, it is the result of a minority of circuits courts that, without direction or order from this Court, and in defiance of this Court's explicit proclamation that *Kingsley* only addressed excessive force claims, expanded this Court's narrow ruling in *Kingsley* and ultimately changed the state of the law in their circuits. If, as the Petitioner claims, a geographic disparity exists, it only exists in the minority of

circuits that, unlike the Tenth Circuit, have failed to follow this Court's instructions and holding in *Kingsley*. The Tenth Circuit has been consistent in its deliberate indifference jurisprudence for decades, and it appropriately applied that law in its Opinion in this case.

That a small minority of circuit courts have applied *Kingsley* beyond the issues presented should not compel this Court to intervene and review this case. The Tenth Circuit applied a "properly stated rule of law", consistent with its own long-standing jurisprudence, and that of this Court, and came to the appropriate conclusion based off the facts as alleged by the Petitioner. Accordingly, the Petition for a Writ of Certiorari should be denied.

III. EVEN IF THE OBJECTIVELY UNREASONABLE STANDARD WERE APPLICABLE, DISMISSAL OF THIS CASE WAS STILL THE APPROPRIATE OUTCOME

Even if the objective unreasonableness standard discussed in *Kingsley* applied to claims of deliberate indifference to medical needs, the application of that standard to the facts alleged in Petitioner's Complaint would warrant the exact same outcome, dismissal for failure to state a claim. In particular, Petitioner has failed to allege that the Respondents acted purposefully, knowingly, or recklessly in bringing about the alleged physical consequences to Pratt. *See Kingsley*, 576 U.S. at 396. The facts, as alleged in the Complaint, show that the medical providers intentionally *provided treatment* to Pratt; they did

not intentionally deny him treatment or intentionally refuse to transfer him to an outside medical facility.

The Complaint reflects, at all relevant times, Armor's providers believed Pratt experienced alcohol withdrawal. Pet. App. 51a-53a, 55a-58a, ¶¶ 16-20, 26, & 30. Once the medical providers recognized Pratt's alcohol withdrawal symptoms, they placed him on Librium protocol and admitted him to the jail's medical unit. *Id.* at 55a-56a, ¶ 26. To place Pratt on such a protocol required a purposeful and intentional decision by the medical providers – as did the decision to remove Pratt from the jail's general population for admission to the medical unit. Further, Petitioner's own allegations show that Pratt was assessed on December 14, 2015, at 2:08 a.m., and the nurse noticed Pratt's symptoms were becoming more severe. *Id.* at 52a-53a, ¶ 20. Pratt's treatment protocol was then changed from Librium to Valium to better treat his needs. *Id.* at 55a-56a, ¶ 26. Petitioner's allegations reflect that the nurse recognized Pratt's worsening alcohol withdrawal symptoms and that medical providers made the intentional decision to alter Pratt's alcohol withdrawal treatment accordingly. There is no allegation Pratt did not receive Librium or Valium for his condition. Petitioner's disagreement with Pratt's admission to the jail's medical unit, placement on Librium protocol, and placement on Valium protocol does not amount to a valid constitutional claim, as it is nothing more than a claim of mere negligence.

Petitioner's allegations further reflect Dr. McElroy assessed Pratt on multiple occasions beginning the morning Pratt began the Valium protocol. Pet. App. at 55a-56a, 59a, ¶¶ 25-26 & 32. During such assessments, Dr. McElroy observed Pratt's condition

and determined the course of treatment he believed best based upon his professional judgment. Petitioner does not allege Pratt's symptoms were inconsistent with alcohol withdrawal during Dr. McElroy's assessments or that Librium or Valium were improper medications to give to Pratt. Further, Petitioner does not allege Dr. McElroy deliberately or intentionally determined Pratt should not be transferred to an external medical facility. Instead, Petitioner claims Dr. McElroy negligently failed to transfer Pratt to a medical facility outside the jail for treatment – a claim that does not pass constitutional muster.

Further, Petitioner alleges that LPC Loehr conducted a mental health assessment on Pratt on December 15, 2015, at which time Pratt's symptoms remained consistent with alcohol withdrawal – a diagnosis already made by the time of LPC Loehr's assessment and a diagnosis for which Pratt was already receiving treatment. Pet. App. at 57a-58a, ¶ 30. Based on Petitioner's allegations against LPC Loehr, a reasonable inference can be drawn that LPC Loehr was aware of Pratt's ongoing treatment, and she encouraged Pratt to comply with existing treatment recommendations. LPC Loehr's monitoring of Pratt's condition by way of her assessment does not show she acted purposefully, knowingly, or recklessly in bringing about the alleged physical consequences to Pratt but, rather, that she acted intentionally in ensuring Pratt was receiving adequate treatment for his alcohol withdrawal. Medical providers also intentionally took Pratt's blood pressure on December 12, 2015 and intentionally attempted to take Pratt's vital signs on December 14, 2015, but Pratt refused. *Id.* at 52a, 54a, ¶¶ 18 & 23.

The Complaint alleges Pratt's medical providers decided not to send Pratt to the hospital or provide additional care. Pet. App. 5a-8a, 53a-55a. However, Petitioner fails to allege what different or additional care, if any, Pratt would have received if he had gone to a hospital. At the jail, according to Petitioner's Complaint, Pratt was under the care of nurses and physicians. His condition was monitored, and he was prescribed and administered medications. It stands to reason that had Pratt gone to a hospital, he would have been treated by nurses and physicians who would have observed his condition and prescribed and administered medications. Additionally, there is no allegation that the jail had a lack of resources by way of medical personnel or equipment. Where there is no allegation that better or different care would have been provided at the hospital, Petitioner's claims are reduced to a disagreement regarding the *location* of the treatment. Whether a disagreement over the efficacy of the treatment provided or the situs of the treatment provided, Petitioner's claims amount to a disagreement with the medical treatment rendered to Pratt or, at worst, mere negligence – neither of which are actionable constitutional claims under the Fourteenth Amendment, even under the objective unreasonableness standard outlined for excessive force claims in *Kingsley*. Accordingly, the Petition for a Writ of Certiorari should be denied.

CONCLUSION

For the foregoing reasons, Respondents respectfully request that the Petition for a Writ of Certiorari be denied.

Respectfully submitted,

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