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

BRIEF IN OPPOSITION OF RESPONDENT VIC REGALADO, IN HIS OFFICIAL CAPACITY

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QUESTION PRESENTED FOR REVIEW

In every circuit, courts must accept well-pleaded allegations as true, the conduct alleged must be "intentional," and that "liability for negligently inflicted harm is categorically beneath the threshold of constitutional due process." *Kingsley v. Hendrickson*, 576 U.S. 389, 396, (2015) (emphasis added) (quoting *Cty. of Sacramento v. Lewis*, 523 U.S. 833, 849 (1998)); *see also Estelle v. Gamble*, 429 U.S. 97, 104-05 (1976).

Petitioner's case does not present the question as framed. The question is not "[w]hether a detainee can prevail" or what one "must prove" but what is required to state a claim under 42 U.S.C. § 1983 for inadequate medical care in a jail setting. The answer is the same in all circuits. The plaintiff must allege conduct that is "deliberate," "purposeful or knowing," or "intentional." The Tenth Circuit's examination of *Kingsley* does not stray from this well-worn path. Petitioner's poorly pleaded complaint, twice dismissed on motion and affirmed on appeal, does not present an opportunity to resolve any alleged split in the Circuits that has yet to develop. Petitioner merely disagrees with the type and quality of the medical care provided. Such claims do not rise to a constitutional violation under the Eighth or Fourteenth Amendments—objective or subjective, under *Farmer*[1] or *Kingsley*. The petition for a writ of certiorari should be denied.

THE QUESTION PRESENTED IS:

Whether a pretrial detainee's complaint for inadequate medical care which fails to allege "deliberate," "purposeful or knowing," or "intentional" conduct states a substantive due process claim.

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[1] *Farmer v. Brennan*, 511 U.S. 825 (1994).

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The Tenth Circuit opinion in *Strain v. Regalado* is published at 977 F.3d 984 (10th Cir. 2020). Petitioner's Appendix ("Pet.App.") at 3a-26a. The district court's second opinion dismissing Plaintiff's *refiled* Complaint is unpublished. Pet.App.27a-44a. The district court's first opinion dismissing Plaintiff's *initial* Complaint is also unpublished. Respondent's Appendix ("Res.App.") at 15a-42a.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const., amend. XIV § 1

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. § 1983

> 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 . . . .

INTRODUCTION

This case presents a flawed vehicle to resolve any alleged split that may exist after *Kingsley v. Hendrickson*, 576 U.S. 389 (2015), concerning its application outside of excessive force cases brought by pretrial detainees. Plaintiff's Complaint comes to the Court after being twice dismissed by the district court for failing to state a claim. All courts reviewing Plaintiff's Complaint found it deficient, as it only alleges negligent conduct. It does not allege deliberately indifferent conduct and therefore fails to state a claim under the *Farmer* framework (objective/subjective). This glaring omission is also fatal under the *Kingsley* framework (subjective/objective) as it fails to allege "deliberate," "purposeful or knowing," or "intentional" conduct. Thus, it would be improvident to grant review to resolve an alleged circuit split where neither affirmance nor reversal would save Plaintiff's Complaint. The Court should deny Petitioner's request for certiorari.

COUNTER-STATEMENT OF THE CASE

A. Posture of the Case

Respondent Vic Regalado, named in his official capacity, is the duly elected sheriff of Tulsa County. As recognized by the Tenth Circuit, his liability depends

"on the existence of an underlying constitutional violation by one of the named, individual Defendants." Pet.App.24a. Further, "Plaintiff [did not] allege a systemic failure, under which the combined actions of multiple officers could constitute a violation even if no one individual's actions were sufficient." *Id.* Petitioner does not challenge these determinations.

Petitioner seeks review of the Tenth Circuit's affirmance of the district court's dismissal of her *refiled* Complaint. Petitioner filed her *initial* Complaint in the U.S. District Court for the Northern District of Oklahoma, *Strain v. Regalado, et al.*, (N.D. Okla. 2017), Case No. 4:17-cv-00488-CVE-FHM. Res.App.1a-14a. On March 1, 2018, Judge Claire Eagan dismissed the *initial* Complaint without prejudice because it failed to state a claim. Res.App.15a-42a. Under the Oklahoma Savings Statute, Okla. Stat. tit. 12 § 100, Petitioner *refiled* her Complaint on November 13, 2018. *Strain v. Regalado, et al.*, (N.D. Okla. 2018), Case No. 4:18-cv-00583-TCK-FHM. Pet.App.45a-76a.

On motions to dismiss filed by all defendants, the district court, after examining the *refiled* Complaint, concluded that Petitioner's allegations, taken as true, establish that Mr. Pratt received medical treatment but merely challenges its efficacy. The allegations only "arguably" state a claim for negligence. Pet.App.42a-43a. After a full review of the *refiled* Complaint, the Tenth Circuit agreed and affirmed the district court's dismissal. Pet.App.26a.

B. Legal Framework

"In order to state a cognizable claim, a prisoner must allege acts or omissions sufficiently harmful to evidence deliberate indifference to serious medical

needs." *Estelle v. Gamble*, 429 U.S. 97, 106 (1976): "[A] complaint that a physician has been negligent in diagnosing or treating a medical condition does not state a valid claim of medical mistreatment" and "[m]edical malpractice does not become a constitutional violation merely because the victim is a prisoner." *Id.* Deliberate indifference to serious medical needs may be "manifested by prison doctors in their response to the prisoner's needs or by prison guards in intentionally denying or delaying access to medical care or intentionally interfering with the treatment once prescribed." *Id.* at 104-05 (emphasis added). Neither *Strain* nor *Kingsley* depart from these essential holdings concerning constitutional violations.

Kingsley reaffirms that "liability for negligently inflicted harm is categorically beneath the threshold of constitutional due process." *Kingsley*, 576 U.S. at 396 (emphasis added) (quoting *Cty. of Sacramento v. Lewis*, 523 U.S. 833, 849 (1998)). "Historically, this guarantee of due process has been applied to deliberate decisions of government officials to deprive a person of life, liberty, or property." *Id.* (quoting *Daniels v. Williams*, 474 U.S. 327, 331 (1986)). *Kingsley* requires that plaintiffs allege "deliberate," "purposeful or knowing," or "intentional" conduct to survive a motion to dismiss. *Id.* Petitioner overlooks the first prong of *Kingsley*, as recognized by the Ninth Circuit in *Castro v. Cty. of Los Angeles*, 833 F.3d 1060 (9th Cir. 2016), in setting up a straw man argument that "some courts require the plaintiff to prove the defendant's subjective state of mind to establish fault." Petition at 5. All circuits require the Plaintiff to allege something about the defendant's state of mind. It is apparent in excessive force cases that, absent accidental contact,

the force is intentional. The Ninth Circuit has manifested a *Kingsley* heuristic to identify the intent of the state actor. *Gordon v. Cty. of Orange*, 888 F.3d 1118, 1124-25 (9th Cir. 2018).

The Tenth Circuit's opinion does not apply *Kingsley* in this context but instead applies the familiar *Farmer* heuristic to identify the intent of the state actor given *Kingsley*'s expressed limitations. Pet.App.9a-12a. Absent allegations concerning intentional conduct, the lower courts looked to the constant guideposts of constitutional torts: liability for negligently inflicted harm is categorically beneath the threshold of constitutional due process. "Our precedent is clear that 'a misdiagnosis, even if rising to the level of medical malpractice, is simply insufficient under our case law to satisfy the subjective component of a deliberate indifference claim.'" Pet.App.23a (quoting *Self v. Crum*, 439 F.3d 1227, 1234 (10th Cir. 2006)). There is nothing extraordinary or novel about the Tenth Circuit's conclusions regarding Petitioner's Complaint. It does not depart from this Court's precedent concerning the parameters of a constitutional claim. Against this longstanding legal framework, Petitioner's Complaint was measured and determined to lack the necessary allegations to rise above negligently inflicted harm.

C. Factual Background

Thomas Pratt received medical treatment. Petitioner's *refiled* Complaint outlines the medical treatment he received for his condition – "alcohol detox." Mr. Pratt's subjective complaint was heard, responded to, and confirmed by medical providers. After that, he was placed in the medical unit for continued observation, evaluation, and treatment. As pleaded by the

Petitioner, the individual defendants recognized his suffering and treated him in the medical unit. Petitioner's *refiled* Complaint does not state a claim that rises to the threshold for constitutional liability. Petitioner merely disagrees with the type and quality of the medical care provided.

Accepting the well-pleaded allegations in the refiled Complaint, the district court summarized these pertinent allegations concerning the medical care of Thomas Pratt by Armor employees, including individual defendants, Deane, McElroy, and Loehr:

> Pratt was booked into the Tulsa County Jail on December 11, 2015. *Id.*, ¶ 15. On December 12, 2015, at 7:39 a.m., Pratt submitted a medical sick call note requesting to speak to a nurse about "detox meds." *Id.* At 12:10 p.m., he submitted a second sick call note, stating:
>
> MY NAME IS TOMMY PRATT I CAME IN YESTERDAY AND STARTED HAVING WITHDRAWLS [sic] I NEED TO TRY AND GET SOME DETOX MEDS
>
> THANKYOU
>
> *Id.* At 1:05 p.m., Nurse Karen Canter, an employee of defendant Armor—a private corporation responsible, in part, for providing medical and mental health services to Pratt while he was in custody of the Tulsa County Sheriff's Office ("TCSO")—conducted a drug and alcohol assessment of Pratt. *Id.* Pratt advised the nurse that he had a habit of drinking 15-20 beers for at least the previous ten years. *Id.* The assessment tool indicates that he was experiencing constant nausea,

frequent dry heaves and vomiting, moderate tremors, anxiety, restlessness, drenching sweats and severe diffuse aching of joints and muscles. *Id.* at 5-6. Based on this assessment, he was placed on a "Librium protocol" and "seizure precautions" were ordered. *Id.* at 6. At 1:48 p.m., Pratt was admitted to the jail's medical unit, where Nurse Gracie Beardon, an Armor employee and agent of TCSO, conducted a "mental health infirmary admission assessment." *Id.* at 7. Nurse Beardon noted that Pratt was nauseated, slumped over, anxious, fearful, and "unsteady on his feet," and that he posed a "risk for injury" due to his detoxification and "high blood pressure." *Id.*

On December 13, 2015, Pratt was again placed on seizure precautions, which included an order that his vital signs be taken every eight hours. *Id.* On December 14, 2015, at approximately 2:08 a.m., Nurse Patricia Deane conducted another drug and alcohol assessment of Pratt. *Id.* The assessment tool indicated that he was experiencing constant nausea, frequent dry heaves and vomiting, severe tremors even with arms not extended, "acute panic stats as seen in severe or acute schizophrenic reactions," restlessness, drenching sweats, continuous hallucinations and disorientation for "place or person." *Id.*

On December 14, 2015, at approximately 3:44 a.m., an unidentified ARMOR employee attempted to take Pratt's vital signs. *Id.* at 8. The ARMOR employee noted that when he/

she encountered Pratt, he was "tearing up" his cell and deliriously stating that he was "locked in the store." *Id.* In a note dated December 14, 2015, and placed in the Armor medical chart, defendant Curtis McElroy, D.O., stated:

> Pt seen and evaluated. Came in 12/11/15 with alcohol abuse and placed on Librium protocol for alcohol withdrawal. Pt switched to valium and received first dose this morning. Pt reported to be found on floor pulling up tile with approximately 2 cm forehead laceration. Small, < 1 cm laceration left lateral elbow area and a laceration < 1 cm on right mid right posterior forearm. Some scratches on dorsum of nose. No other facial injury. Pt awake, confused, talking about what movie are we watching tonight. No history of witnessed fall or pt inflicting injury to himself. Pool of blood under sink in cell.

Id. at 8-9.

Nurse Margarita Brown, an ARMOR employee, encountered Pratt in the medical unit at around 4:07 p.m. on December 14. *Id.* at 11. Nurse Brown reported that he was "angry," "anxious" and confused;" and was staring and "reaching into space." She noted that he lacked judgment and had "impaired short-term memory" and charted that he needed assistance with "activities of daily living." On December 15, 2015, Licensed Professional Counselor Kathy Loehr conducted an

> initial mental health evaluation of Pratt. *Id.* at 11-12. Pratt reported that he was "detoxing from alcohol." *Id.* at 12. Loehr charted that Pratt "present[ed] with a wound on his forehead from a self-inflicted injury yesterday" and that the wound "[a]ppear[ed] unintentional" as Pratt was "detoxing and did not appear oriented yesterday." *Id.* She noted his memory, insight, judgment and concentration were "poor." *Id.* In a "Medical Sick Call" noted dated December 15, 2015, Dr. McElroy noted Pratt was reported to "have been found underneath sink [in his cell] with laceration [on] mid forehead." *Id.* at 12-13.
>
> On December 16, 2016, at approximately 12 a.m., Nurse Lee Ann Bivins, an Armor employee, observed that Pratt "would not get up. . . . " *Id.* at 13. However, she did not check Pratt's vital signs. *Id.* Just before 1 a.m., a detention officer discovered Pratt lying on his bed and not moving; he called for a nurse. *Id.* Upon entering Pratt's cell, she found that he had no pulse or respiration and was completely unresponsive. *Id.* She initiated CPR and called a "medical emergency" at around 1:00 a.m. *Id.* Shortly thereafter, first responders arrived and continued CPR. *Id.* Pratt was resuscitated at around 1:15 a.m. and was rushed to St. John Medical Center in Tulsa. *Id.*

Pet.App.32a-35a. These are the facts as alleged by Plaintiff and taken as true by the district and appellate courts below.

D. Proceedings Below

The District Court: On motions to dismiss filed by all defendants, Judge Terrence Kern, after examining the *refiled* Complaint, concluded:

> Notwithstanding its minor revisions, the Complaint in this case suffers the same fatal flaw as the Amended Complaint in the earlier case: Taken as true, the facts alleged establish that Pratt received medical treatment, although Plaintiff challenges its efficacy. For instance, on December 12—the day after Pratt was booked into Jail—he was seen by a nurse who conducted a "mental health infirmary admission assessment" and was admitted to the Jail's medical unit (Complaint ¶ 18). According to the Complaint, on December 11, 2015, he was placed on Librium protocol for alcohol withdrawal. *Id.*, ¶ 26. He was switched to valium on December 14, 2015. *Id.* Thus, although the allegations arguably state a claim for negligence, they do no[t] [sic] establish that defendants intentionally denied or delayed access to treatment or intentionally interfered with the treatment once prescribed.

Pet.App.42a-43a.

The Tenth Circuit: After a full review of the *refiled* Complaint, the Tenth Circuit echoed the findings of the district court: "Although Plaintiff's claims may smack of negligence, we conclude that they fail to rise to the high level of deliberate indifference against any Defendant. Thus, the district court correctly dismissed Plaintiff's federal claims in full." Pet.App.25a.

Petitioner's claims amount to no more than a disagreement about the quality of the medical care provided. Such claims do not rise to the level of a constitutional violation under the Eighth or Fourteenth Amendments, objective or subjective, *Farmer* or *Kingsley*.

The petition for a writ of certiorari should be denied.

REASONS FOR DENYING THE PETITION

I. THIS CASE IS A POOR VEHICLE TO CONSIDER PETITIONER'S QUESTION PRESENTED.

Petitioner seeks review of the Tenth Circuit's affirmance of the district court's dismissal of her *refiled* complaint. There is no factual record other than Plaintiff's *refiled* Complaint. Factual questions concerning the "intentional decisions" of the medical providers are not present because Plaintiff failed to plead a case that meets either standard. There is no developed record from which this Court could discern whether the *Kingsley* standards could be applied and whether it would make a difference in the outcome.

All courts that have reviewed this matter have come to a single conclusion about Plaintiff's Complaints: the allegations, taken as true, establish that Mr. Pratt received medical treatment but merely challenges its efficacy. The allegations only "arguably" state a claim for negligence. Pet.App.42a-43a. After a *de novo* review of the *refiled* Complaint, the Tenth Circuit agreed and affirmed the district court's dismissal under the same rationale. "Although Plaintiff'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.25a. While the Tenth Circuit set out its position on *Kingsley*, it did so in a case where the application of *Kingsley* would not result in a different outcome. Thus, applying *Farmer*'s traditional deliberate indifference standard or *Kingsley*'s objective deliberate indifference standard does not affect the outcome. Both standards require allegations of conduct

that meet the well-established constitutional threshold.

The Tenth Circuit's opinion hews to this Court's clear declaration that "liability for negligently inflicted harm is categorically beneath the threshold of constitutional due process." *Kingsley*, 576 U.S. at 396 (quoting *Cty. of Sacramento v. Lewis*, 523 U.S. 833, 849 (1998)). Petitioner's writ is an invitation to engage in an academic exercise which this Court should reject. The case is a poor vehicle to consider the Petitioner's question presented.

II. THIS CASE DOES NOT INVOLVE THE QUESTION PRESENTED.

Petitioner posits that the question presented for review is "[w]hether a pretrial detainee can prevail against a jail official. . . . " Petitioner is not at the "prevailing" stage; she is at the "alleging" stage. The question is not "[w]hether a detainee can prevail" or what one "must prove." It's simply "what is required to state a Fourteenth Amendment claim for inadequate jail care under 42 U.S.C. § 1983?" The answer to that question is the same in all circuits: "deliberate," "purposeful or knowing," or "intentional" conduct. In every circuit, courts must accept the well-pleaded allegations of the plaintiff as true, the conduct alleged must be "intentional," and that "liability for negligently inflicted harm is categorically beneath the threshold of constitutional due process." *Kingsley*, 576 U.S. at 396 (quoting *Lewis*, 523 U.S. at 849); *see also Estelle*, 429 U.S. at 104-05.

The question presented by the Petition is not controversial. It does not represent a split of authority but simply asks, "whether a pretrial detainee's com-

plaint for inadequate medical care by jail medical personnel which fails to allege "deliberate," "purposeful or knowing," or "intentional" conduct meets the threshold for a constitutional violation of substantive due process under the Fourteenth Amendment and thus survive a motion to dismiss?

The answer to this question is clear: it does not.

III. THERE IS NO "ACKNOWLEDGED AND INTRACTABLE" SPLIT.

In taking *Kingsley* "head-on," the Tenth Circuit did not venture to guess the implications of *Kingsley* in the absence of specific guidance from this Court. The Tenth Circuit recognized that outside of the context of excessive force, *Kingsley*'s application is not "readily apparent." Pet.App.12a. Further, the Tenth Circuit declined to jettison forty-five years of precedent concerning the delivery of medical care in a jail facility. The Tenth Circuit sided with a majority of circuits who have hesitated to read and apply *Kingsley* outside of excessive force cases as *Kingsley* did not expressly consider or declare whether an objective standard of fault also governed other claims brought by pretrial detainees. Of those, the Fifth, Eighth, and Eleventh Circuits only address *Kingsley* in a conclusory fashion, which does not create a "split."

The Fifth Circuit addressed *Kingsley* in a footnote in *Alderson v. Concordia Par. Corr. Facility*, 848 F.3d 415 (5th Cir. 2017)[2], stating it was constrained by pre-*Kingsley* circuit law applying the subjective deliberate

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[2] Under Fifth Circuit precedent, a statement from a panel opinion that can be disregarded without upsetting the holding is *dicta*. *See United States v. Segura*, 747 F.3d 323, 328 (5th Cir. 2014).

indifference standard. *Alderson*, 848 F.3d at 419 n.4. The footnote also stated that under either standard, the plaintiff would lose. *Id.* The Eleventh Circuit also considered the effect of *Kingsley* on pretrial detainees' medical care claims in a footnote. *Nam Dang v. Sheriff, Seminole Cnty. Fla.*, 871 F.3d 1272, 1279 n.2 (11th Cir. 2017). Just as in *Alderson*, the panel considered itself constrained by circuit precedent, and the plaintiff would have lost under either standard. *Id.* Thus, rather than addressing the effect of *Kingsley*, the panel stated, "[w]e cannot and need not reach this question." *Id.* The Eighth Circuit's analysis is also cursory, consisting of two sentences in a footnote in *Whitney v. City of St. Louis*, 887 F.3d 857 (8th Cir. 2018) wherein the court simply declines the application of *Kingsley* outside of excessive force cases. *Whitney*, 887 F.3d at 860 n.4.

While the Tenth Circuit has addressed *Kingsley* in a more thoughtful approach, it has done nothing more than apply the bedrock principles that *Kingsley* affirms while staying within the confines of longstanding circuit precedent. When cases involving pretrial detainees arise under the Fourteenth Amendment, the conduct alleged must be "intentional" and that "liability for negligently inflicted harm is categorically beneath the threshold of constitutional due process." *Kingsley*, 576 U.S. at 396 (emphasis added) (quoting *Lewis*, 523 U.S. at 849). The analysis yields the very same result and reveals that no "acknowledged and intractable" split exists. *See Griffith v. Franklin Cty., Kentucky*, 975 F.3d 554, 570-71 (6th Cir. 2020) (reserving the question of applying *Kingsley* "for another day" because plaintiff "cannot prevail under either test").

"'Historically, this guarantee of due process has been applied to deliberate decisions of government officials to deprive a person of life, liberty, or property.'" *Kingsley*, 576 U.S. at 396 (quoting *Daniels v. Williams*, 474 U.S. 327, 331 (1986)). *Kingsley* recognized that there are two state-of-mind issues at play in an excessive force claim. First—the officer's state of mind regarding his physical acts—was undisputedly an intentional one because the officer had taken the affirmative act of using force knowingly and purposefully. *Castro v. Cty. of Los Angeles*, 833 F.3d 1060, 1070 (9th Cir. 2016). *Kingsley* requires the act itself—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"—be intentional. *Kingsley*, 576 U.S. at 596. In the rush to the second state of mind—objective deliberate indifference—the subjective nature of the first state of mind is minimized by advocates trying to expand the reach of *Kingsley*. "[T]he pretrial detainee must prove that the defendant-official acted intentionally to impose the alleged condition. . . . " *Darnell v. Pineiro*, 849 F.3d 17, 35 (2d Cir. 2017); *see also Bell v. Blaesing*, 844 F. App'x 924, 926 (7th Cir. 2021), *reh'g denied* (May 13, 2021)(citing *Miranda v. Cty. of Lake*, 900 F.3d 335 (7th Cir. 2018):

> The district court appropriately dismissed Bell's complaint for failure to state a claim. To state a claim of constitutionally inadequate medical care, Bell needed to allege that Blaesing "acted purposefully, knowingly, or perhaps . . . recklessly when [she] considered the consequences of [her] handling of [his] case." But Bell alleged that she reviewed his

> x-rays, examined his teeth, and "reached the wrong conclusion" that his condition did not necessitate treatment beyond the facility. Even if her judgment was mistaken, Bell's allegations highlight a difference in opinion over the course of treatment—a standard that suggests only negligence, which is not a constitutional violation.

Bell, 844 F. App'x at 926. The "intentionality" of the conduct is the focus of the Tenth Circuit's analysis in *Strain*.

In *Strain*, the Tenth Circuit began by defining the "intentionality" of "deliberateness." Citing *Farmer*, the court held that to state a claim, the plaintiff must allege a "subjective component" under the longstanding test of deliberate indifference. Pet.App.9a. Doing so, the court recognized the plain meaning of the word "deliberate," recognizing that "deliberate means 'intentional,' 'premeditated,' or 'fully considered.' BLACK'S LAW DICTIONARY 539 (11th ed. 2019). And as an adjective, 'deliberate' modifies the noun "indifference.' CHICAGO MANUAL OF STYLE § 5.79 (16th ed. 2010) ('An adjective that modifies a noun element usually precedes it.)." Pet.App.15a. Having defined "deliberate," the court said: "So a plaintiff must allege that an actor possessed the requisite intent, together with objectively indifferent conduct, to state a claim for deliberate indifference." *Id.*

Like *Kingsley* and the circuits which have applied it to jail medical cases, *Strain* affirms the subjective nature of "intentional conduct" as a necessary component of jail medical cases involving pretrial detainees. In ruling on a motion to dismiss, it is hard to discern any intractable split when all circuits focus on whether

allegations of intentional conduct are sufficiently pleaded to state a claim. And yet, the Tenth's continued application of the *Farmer* test for deliberate indifference allows for an examination of the actions of medical professionals wherein misjudgment is more likely an issue rather than the intended application of force and the interpretation of the outcome.

To many observers, there is no discernable difference between *Farmer*'s traditional deliberate indifference standard or *Kingsley*'s objective deliberate indifference. *Kingsley*, 576 U.S. at 406 (Scalia, J., dissenting) ("Objective reasonableness of the force used is nothing more than a heuristic for identifying intent."); *see also Castro*, 833 F.3d at 1070 (Ikuta, J., dissenting)("the 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.").

There is no "acknowledged and intractable" split concerning the review of a pretrial detainee's complaint about inadequate medical care by jail medical personnel on a motion to dismiss. All circuits agree that a complaint that fails to allege "deliberate," "purposeful or knowing," or "intentional" conduct does not meet the threshold for a constitutional violation of substantive due process under the Fourteenth Amendment.

IV. THE QUESTION PRESENTED SHOULD PERCOLATE FURTHER IN THE COURTS OF APPEALS.

The preceding analysis is not meant to gloss over the fact that in *Strain*, the Tenth Circuit directly and thoughtfully refused to adopt *Kingsley*'s application of the objective standard for deliberate indifference for excessive force cases under the Fourteenth Amendment

in the context of jail medical cases arising under the Fourteenth Amendment.[3]

To the extent that the Tenth Circuit stands apart from the Second, Seventh, and Ninth Circuits, it is on firm legal ground. Only four circuits have thoughtfully taken on *Kingsley,* and other voices remain to be heard. Unless this Court is ready to end debate and remove the expressed restraints in *Kingsley* to cases outside the context of the use of force and other conditions of confinement claims, it should allow the matter to further percolate in the lower courts. Thoughtful opinions on both sides of the issue "may yield a better informed and more enduring final pronouncement by this Court." *Arizona v. Evans*, 514 U.S. 1, 23 n.1 (1995) (Ginsburg, J., dissenting); *see also California v. Carney*, 471 U.S. 386, 400-01 (1985) (cita-

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[3] Indeed, the Tenth Circuit is not deaf to the reasoning of *Kingsley* and has extended it to cases arising outside of the use of force context when its logic is applicable. *See* Pet.App.12a, n. 6.

> *Colbruno v. Kessler*, 928 F.3d 1155, 1163 (10th Cir. 2019) (applying the *Kingsley* standard to claims against law enforcement officers who punished a pretrial detainee by publicly displaying his nude body through the public areas of a hospital). Even if not a classic excessive force case, *Colbruno* may otherwise be categorized as a conditions of confinement case. *Id.* at 1162 (reiterating that a "detainee may not be punished prior to an adjudication of guilt in accordance with due process of law" (quoting *Bell*, 441 U.S. at 535 (emphasis added)). And because that case dealt with the appropriateness of punishment, we saw fit to apply the *Kingsley* standard to the plaintiff's claims. *Id.* at 1163; *see also Kingsley*, 576 U.S. at 405 (Scalia, J., dissenting) (explaining that *Bell* endorsed this proposition "in the context of a challenge to conditions of a confinement" (emphasis in original)).

tions omitted) (Stevens, J. dissenting) ("Deliberation on the question over time winnows out the unnecessary and discordant elements of doctrine and preserves 'whatever is pure and sound and fine.'"). Additional percolation is especially important "in the context of constitutional adjudication, where the Court's decisions cannot be overruled by statutory amendments." Stephen M. Shapiro, SUPREME COURT PRACTICE 506 (Stephen M. Shapiro, *et al.* eds., 10th ed. 2013); *Griffith v. Franklin Cty., Kentucky*, 975 F.3d 554, 570-71 (6th Cir. 2020) (reserving the question of applying *Kingsley* "for another day" because plaintiff "cannot prevail under either test.").

If this Court elects to consider the question presented in a future case, it could benefit from fuller analysis by the lower courts where the record is more fully developed and the allegations rise above the threshold for a constitutional violation of substantive due process under the Fourteenth Amendment. At this time, there is no need for further admonition that liability for negligently inflicted harm is categorically beneath the threshold of constitutional due process.

V. THE DECISION BELOW IS CORRECT.

The Tenth Circuit, while addressing *Kingsley*, reached the correct decision considering Petitioner's *refiled* Complaint. After a *de novo* review, the Tenth Circuit determined, under longstanding Supreme Court decisional law, that "[d]isagreement about course of treatment or mere negligence in administering treatment do not amount to a constitutional violation." Pet.App.4a. "Pretrial detainee Thomas Pratt exhibited alcohol withdrawal symptoms while in a county jail. Healthcare providers diagnosed and treated Mr.

Pratt's symptoms, but their course of treatment proved ineffective." *Id.* From the dawn of this body of law, it has always been clear that "[m]edical malpractice does not become a constitutional violation merely because the victim is a prisoner. *Estelle*, 429 U.S. at 106.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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JULY 12, 2021