Case No. 21-235

In The
Supreme Court of the United States

GARY HEIDEL, ET AL.,

Petitioners,

v.

SHERIFF ANTHONY MAZZOLA, 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

The Estate claimed that the Sheriff, in his official capacity. was deliberately indifferent to Catherine Rowell's serious medical needs (substantial risk of suicide) in violation of the Fourteenth Amendment.

The issue raised on appeal was whether the district court erred in dismissing the Estate's municipal liability claim based on the Estate's failure to establish the elements of violation of a constitutional right and of state of mind. The Tenth Circuit affirmed dismissal on both bases.

The question presented is:

Whether certiorari should be granted to consider adopting the *Kingsley v. Hendrickson*, 135 S. Ct. 2466 (June 22, 2015) Fourteenth Amendment excessive force objective standard as the standard for Fourteenth Amendment deliberate indifference to serious medical needs claims, when this issue was recently before the Court in another petition and denied, and the resolution of which will not alter the judgment.

Whether certiorari should be granted on the state of mind element of municipal liability when the only issue raised is that the Tenth Circuit erred in applying well-settled legal authority to the particular facts of this case, and petitioner has not demonstrated that any special and important reasons required to trigger this Court's review are implicated.

Rule 14.1.(b)(i) Statement

For purposes of the scope of the appeal to the Tenth Circuit Court of Appeals (No. 20-1067) and this petition:

The Plaintiff-Petitioner is Michael Rowell, as the personal representative of the Estate of Catherine Rowell ("Estate").

The Defendant-Respondent is Sheriff Anthony Mazzola, in his official capacity ("Sheriff").

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INTRODUCTION

This case is a particularly poor vehicle for this Court's review.

Utilizing the subjective deliberative indifference test set forth in *Farmer v. Brennan*, 511 U.S. 825 (1994), both the district court and Tenth Circuit Court of Appeals concluded that petitioner failed to satisfy the constitutional violation element of the municipal liability claim.

The propriety of adopting the *Kingsley* excessive force objective standard as the deliberate indifference to serious medical needs standard was recently before this Court in *Strain v. Regalado*, No. 20-1562, dated May 7, 2021, and denied October 4, 2021 ("*Strain* petition"). This petition brings nothing special or important to the discussion which warrants consideration in lieu of the *Strain* petition. In addition, no decision this Court issues will alter the result in this case.

The district court also dismissed the municipal liability claim on the basis that the Estate failed to prove the state of mind element as well. The Tenth Circuit applied well-settled legal authority in specifically affirming dismissal based on the state of mind element. Petitioner's quibble is that the factual determination was error, which is not a proper basis for this Court's jurisdiction, and petitioner has not otherwise identified any special and important reason that would justify the Court's consideration of this issue.

Having failed to identify an issue that warrants consideration, the petition for writ of certiorari should be denied.

STATEMENT OF THE CASE

A. Course Of Proceedings Below.

Plaintiff-Appellant, Michael Rowell, Personal Representative of the Estate of Catherine Rowell ("Estate"), sued Sheriff Anthony Mazzola, in his official capacity ("Sheriff"), for violation of Catherine Rowell's Fourteenth Amendment rights based on the claim that the Sheriff was deliberately indifferent to Catherine Rowell's serious medical need of substantial risk of suicide.

In its summary judgment Order, the district court concluded there was no municipal liability because there was no underlying constitutional violation committed by any of the Defendants, individually or collectively. The district court further concluded that, even if any of the individual Defendants had violated Ms. Rowell's constitutional rights, the Sheriff was not aware that the deficiencies claimed by the Estate were substantially certain to result in a constitutional violation in the form of suicide, and the Sheriff did not consciously and deliberately choose to disregard the risk (state of mind).

Summary judgment was affirmed on appeal to the Tenth Circuit Court of Appeals. Pet. App. 1a-9a. The Tenth Circuit held "the Estate cannot establish an underlying constitutional violation by any of the

jail's officers because they did not have subjective awareness of Ms. Rowell's risk of suicide." *Id*. at 5a.

The Tenth Circuit also held that "the Estate cannot show state of mind, an essential element of a municipal-liability claim[,]" Pet. App. 8a, because the Estate failed to show "a pattern of conduct that would establish actual notice of a substantially high risk of suicide", or, that this case involved the "rare circumstances where the jail's operating procedures were so deficient, or the risk of the telephone cord was so obvious, that it would be liable under § 1983 without proof of a pre-existing pattern of violations." *Id*. at 9a (internal quotation, citation omitted).

B. Factual Background.

In February 2016, Catherine Rowell was fifty-eight years old. In a one-year period, Ms. Rowell was held in custody at the Rio Blanco County Detention Center ("Jail") four times – in February 2015, August 2015, and two separate times in February 2016. Pet. App. 3a; Answer Brief in Tenth Circuit (hereinafter, "AB"), 3.

On February 12, 2016, Ms. Rowell was arrested and taken to Jail for violation of a restraining order entered for the protection of Plaintiff-Petitioner Gary Heidel, Ms. Rowell's purported common-law husband. AB, 3; Pet. App. 2a, 3a, 12a-13a.

The Jail is located in Meeker, Colorado and

was a very small facility.[1] A total of eight to twelve inmates were being housed in the Jail during Ms. Rowell's February 12-15, 2016 confinement. A minimum of two detention officers were on duty at all times, for a ratio of only 4-6 inmates per officer. AB, 4; Pet. App. 13a.

The Jail was divided into four general population pods, one of which was designated for female inmates only. The female pod had a couple of different cells with sleeping bunks and an adjacent dayroom which were interconnected. The dayroom had a sink, shower, toilet, counter with bench, television, and a telephone with a braided cord mounted on the wall above the sink. AB, 4; Pet. App. 13a-14a.

Anthony Mazzola was elected as Sheriff and took office in January 2015. The Sheriff's Office had written policies in place which had been adopted in 2002. Sheriff Mazzola began working to update the policies and procedures for the Jail after becoming Sheriff. AB, 4; Pet. App. 19a.

The policies specify that "[a] medical screening shall be done as a part of the booking procedure by the Jail Deputy." Under the policies and procedures, individuals with obvious medical or mental health issues were required to be medically cleared prior to being allowed in the Jail. If an incoming inmate had mental health issues, Jail staff contacted the mental health organization in Meeker, and a representative

[1] A new jail was being completed at the time of the incident and the Sheriff moved into the new jail shortly after the incident.

would go to the Jail to conduct an evaluation. Jail staff would also contact the organization if an inmate asked to speak with that organization or appeared to staff to be in crisis during their confinement. AB, 4-5; Pet. App. 15a-16a.

The Sheriff utilized a computerized booking program at the Jail, which included a series of intake questions and documented whether the individual indicated if they had any medical issues, including mental health. The Jail had a standard procedure for screening inmates for suicide risk by asking the medical and mental health questions on the list, by observing their conduct, and taking further action depending on the answer to the questions or the conduct observed. AB, 5-6; Pet. App. 15a-16a.

Staff was trained that, as part of the booking process they were to manually input onto the booking form "no med issues" if none of the medical conditions on the list of intake questions were answered in the affirmative, or, "no comments" under the officer observation section of the form if the specified medical conditions were not observed, and that is how it could be determined after the fact that the questions were actually asked. All the Jail staff had on-the-job training to ask the inmate if they were suicidal and to look for any signs of suicidal tendencies, and the suicide question was always asked. AB, 6; Pet. App. 15a-16a.

Information on the "Medical Information – Medical Detail" section of the booking report and under the "Officer Visual Observation – Visual Observation Notes" section of the report had to be

manually entered into the Jail's computer booking program. Manual entries were made under both sections of Ms. Rowell's Feb. 12, 2016 booking report. AB, 6-7; Pet. App. 16a.

On February 12th, Deputy Cook, who booked Ms. Rowell into Jail, asked her the series of medical intake questions listed on the computer program. These questions included whether Ms. Rowell was taking any medications, was under a doctor's care, had recently been hospitalized, needed medical attention, and "are you or have you been suicidal." Ms. Rowell answered "no" to all these questions. AB, 7; Pet. App. 15a.

Consequently, Deputy Cook manually input "No Med Issues" under the Medical Information category and "No Comments' under the Officer Visual Observation category. Even though some of the questions were general, they would also elicit mental health information, for example, if the inmate responded that she was under the care of a psychiatrist to the question of whether she was under a doctor's care. AB, 7; Pet. App. 15a-16a.

Deputy Cook was also the booking deputy for Tina Gonzales, who was arrested at Gary Heidel's residence along with Ms. Rowell and was transported to Jail with Ms. Rowell. Ms. Gonzales' booking report reflects that medical questions were also asked of Ms. Gonzales. Ms. Gonzales was identified as taking medication for bi-polar, manic-depressive, and high anxiety conditions as well as asthma and bronchitis. Ms. Gonzales bonded out shortly after her booking that afternoon and so she was not kept

in custody in the female pod during February 12-15, 2016. AB, 8.

Deputy Cook had also processed Ms. Rowell's release two days earlier (on February 10th) at the conclusion of her one-week confinement. Ms. Rowell appeared to be acting the same to Deputy Cook on February 12th when he booked her into the Jail as she had upon her release on February 10th. Deputy Cook was not surprised that Ms. Rowell did not have any medical issues at the time of her booking on February 12th because she did not have any medical issues the previous week while she was in Jail. AB, 8; Pet. App. 13a.

While Ms. Rowell was being booked, she answered questions properly and was cooperative. During booking, Ms. Rowell did not exhibit any signs of impairment from either alcohol or drugs, she did not have red eyes, slurred speech, staggered walk, or any other signs indicative of impairment. AB, 7; Pet. App. 15a.

There was no evidence presented that Ms. Rowell was addicted to drugs or experiencing withdrawals at the time of her booking on February 12, 2016, or during her confinement the week prior to this booking. AB, 13; Pet. App. 15a.

To the extent Ms. Rowell was isolated at the Jail, it was because she was the only female being housed during this period. At all times Ms. Rowell was allowed to move between the dayroom and her sleeping cell. AB, 6-7; Pet. App. 14a.

Ms. Rowell had been housed in the female-only general population pod three prior times within the preceding twelve months without incident, including the week immediately prior to this incident. AB, 7; Pet. App. 3a.

Sgt. Muxlow had previously worked as a patrol deputy and had encountered Ms. Rowell in that capacity. Sgt. Muxlow was working the evening shifts (7:00 p.m. – 7:00 a.m.) on February 13th and 14th, and Ms. Rowell's reserved demeanor was the same during his shifts as when he had previously encountered her as a patrol deputy. Sgt. Muxlow's observations of Ms. Rowell's demeanor were also consistent with Ms. Rowell's common-law husband's description that Ms. Rowell was normally quiet and not very talkative. AB, 9; Pet. App. 16a.

During one of Sgt. Muxlow's night shifts Ms. Rowell ate her dinner, but initially did not eat her pie. Because inmates usually eat the dessert, Sgt. Muxlow opened Ms. Rowell's door to make sure she was doing okay and to find out why she was not eating her dessert. Ms. Rowell ended up eating her pie after this interaction. AB,10.

Deputy Michael Largent[2] worked the night shift on Saturday and Sunday (February 13th and 14th). Nothing stood out to Deputy Largent about Ms. Rowell during his cell checks. Deputy Largent indicated Ms. Rowell seemed like she was in decent spirits, the same as she always was when she was housed in the Jail. AB, 10.

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[2] Deputy Largent was not named as a defendant.

Deputy Murray worked the day shifts of February 12-15, 2016. Deputy Murray had routine conversations with Ms. Rowell such as how she was doing, did she want something to eat, did she need a blanket, did she want to go to the rec yard, things of that nature. Deputy Murray noticed Ms. Rowell was not eating a lot and asked her why she was not eating, to which she responded she was not hungry. AB, 10; Pet. App. 17a-18a.

Deputy Kilduff worked the day shifts on February 13-15, 2016. Deputy Kilduff asked Ms. Rowell if she wanted her one-hour of outside recreation time and each day Ms. Rowell declined. Ms. Rowell was confined in February, the daytime temperature was in the 20's, the outdoor recreation area was just an empty yard without any exercise equipment, and other inmates did not go outside for exercise either. Ms. Rowell declining outdoor recreation time in sub-freezing temperatures was not strange behavior. AB, 11; Pet. App. 18a-19a.

Ms. Rowell asked Deputy Kilduff on the morning of February 15th why breakfast was not being served, and he explained the inmates were receiving brunch instead because the 15th was a holiday (President's Day). Ms. Rowell ate most of the egg casserole provided at brunch along with her cottage cheese and sweet bread. Ms. Rowell did not eat the pears or potatoes. AB, 11; Pet. App. 18a.

At approximately 12:07 p.m. on February 15th, Deputy Kilduff found Ms. Rowell asleep and he woke her up to see if she wanted her outside recreation time, to which she responded "No, thank you." Ms.

Rowell was on her bunk in her sleeping cell during this exchange, not in the dayroom. On previous days, Deputy Kilduff had observed Ms. Rowell watching television in the dayroom for part of the time. AB, 11-12; Pet. App. 20a.

The policies state that Jail checks were to be performed every 60 minutes. Over the course of her stay, Ms. Rowell was checked a total of 116 times from the time of her booking on February 12th until her death on February 15th, which equates to a cell check on average every 6/10th of an hour. The Estate contends that events such as delivering meals and retrieving trays do not constitute a cell check because it is not specifically denominated as a cell check on the log. AB, 12; Pet. App. 3a.

Because of Ms. Rowell's four confinements at the Jail within an approximately one-year period, Defendants were generally familiar with Ms. Rowell. Ms. Rowell never complained of being suicidal, never requested counseling, or gave any other indication that she may wish to harm herself. Ms. Rowell's conduct during this particular confinement was no different than her three prior confinements within the previous year. AB, 12-14; Pet. App. 3a, 13a.

Independent from her confinement in Jail, Ms. Rowell had never previously attempted to commit suicide or been treated for suicidal tendencies. Ms. Rowell was briefly treated for depression in 2013 as part of her course of treatment for a stroke she had suffered. All the individual Plaintiffs, who are Ms. Rowell's purported common-law husband and her four adult children, were surprised that Ms. Rowell

had committed suicide. None of these individuals had ever communicated any information or just general concern to Defendants at any time about Ms. Rowell's mental or medical health. AB, 14.

Ms. Rowell was with Gary Heidel on the day she got arrested and, despite the restraining order, had been staying with Mr. Heidel from the time of her release on February 10th to the time of her re-arrest on February 12th. Mr. Heidel indicated the two days between Ms. Rowell's release and her arrest were probably the best couple of days he and Ms. Rowell had had since her stroke in 2013. Ms. Rowell appeared normal to Mr. Heidel at the time she was arrested on February 12th. AB, 14.

Only one other suicide has occurred at the Jail, which happened in the early 1980's or 90's, and no inmate had previously attempted to harm themself with the braided telephone cord. An attempted suicide in 2015 involved an inmate trying to drown herself in the toilet. Jail staff had no information to indicate that Ms. Rowell may be suicidal during this confinement or that she would use the telephone cord to harm herself. AB, 13.

REASONS FOR DENYING THE PETITION

The issue on appeal was whether petitioner satisfied all elements of municipal liability. Determining whether the holding in *Kingsley v. Hendrickson*, 135 S. Ct. 2466 (2015) was so broad that it should be applied outside of the Fourteenth Amendment excessive force context and interjected into the deliberate indifference to serious medical

needs context was recently reviewed by the Court in the *Strain* petition, which was denied. And, even if it were to be considered here, it still would not resolve whether petitioner established the state of mind element of a municipal liability claim – one of the two elements petitioner failed to satisfy – even if adoption of the standard and remand resulted in determining Ms. Rowell's constitutional rights were violated.

Petitioner's disagreement with the Tenth Circuit's application of well-settled municipal liability "state of mind" legal authority to the facts of the case does not present a special and important reason sufficient to trigger this Court's review.

I. THERE ARE NO SPECIAL AND IMPORTANT REASONS TO CONSIDER THIS PETITION.

Petitioner has not identified any special and important reason that would justify consideration of its petition. The petition should be denied.

A. The Petition Is Duplicative Of A Recently Denied Petition On The Exact Same Issue And Does Not Present An Independent Basis Justifying This Court's Review.

A petition for writ of certiorari was considered in *Strain v. Regalado*, No. 20-1562, which was denied on October 4, 2021. The predicate for the *Strain* petition was to resolve a purported circuit split as to whether the objective standard in excessive force cases set forth in *Kingsley v. Hendrickson*, 135 S. Ct.

2466 (June 22, 2015) should be extended into the Fourteenth Amendment deliberate indifference to serious medical needs context. More specifically, the question presented was:

> Whether a pretrial detainee can prevail against a jail official who disregarded an obvious risk of serious harm or whether the pretrial detainee must prove that the official subjectively knew of and disregarded a serious risk of harm.

The *Strain* petition was distributed for conference on September 27, 2021, and denied on October 4, 2021.

Both the present petition and the *Strain* petition involve the claim that jail officials failed to provide medical care to a pretrial detainee as considered under the Fourteenth Amendment. *Strain* involved the lack of physical medical care, whereas the present matter involved the lack of mental health care. That distinction is wholly irrelevant to whether the *Kingsley* objective standard should be extended into the deliberate indifference to serious medical needs arena and therefore does not warrant consideration of this petition in lieu of *Strain*.

B. Similar To The *Strain* Petition Being Denied, There Is No Special And Important Reason To Consider This Petition.

Petitioner's "second question presented [is] to correct the Tenth Circuit's error." (Petition, p 28) This Court has noted that "our certiorari jurisdiction is designed to serve purposes broader than the correction of error in particular cases." *Watt v. Alaska*, 451 U.S. 259, 275 fn.5 (1981)(Stevens, J., concurring).

There is no special and important reason to consider this petition in lieu of the *Strain* petition. Resolution of a circuit split purportedly created by *Kingsley* as to the standard for determination of whether a constitutional violation occurred does not resolve this appeal because the state of mind element of municipal liability also was not proven and petitioner has not elucidated a special and important reason to consider the second question.

To establish municipal liability, the Estate was required to "show (1) an official government policy or custom, (2) that caused a constitutional injury, and (3) requisite state of mind." Pet. App. 4a (citing *Schneider v. City of Grand Junction Police Dep't*, 717 F.3d 760, 769 (10th Cir. 2013)).

The appeal involved whether the district court's holding was in error that the Estate failed to establish all elements of municipal liability. The district court held, which the Tenth Circuit affirmed, that the Estate failed to demonstrate Ms. Rowell's

constitutional rights were violated, and, even if they were violated, the Estate failed to establish the state of mind element of municipal liability.

So, even if the *Kingsley* objective standard is extended into the Fourteenth Amendment deliberate indifference to serious medical needs context, and, on remand one or more of the individual Defendants are determined to have violated Ms. Rowell's constitutional rights under that new standard, that still does not disturb the judgment because the Estate failed to establish the state of mind element of municipal liability.

As to the state of mind element of municipal liability, petitioner has not demonstrated that the character of the reasons for granting certiorari enumerated under U.S. Sup. Ct. Rule 10 are implicated here.

Petitioner did not identify decisions of other United States court of appeals on the same important matter which are in conflict with the Tenth Circuit Court of Appeals' decision. There is not a conflict among the circuits as to what constitutes the elements of municipal liability generally, or analysis of the state of mind element specifically.

The Tenth Circuit Court of Appeals did not decide an important federal question in a way that conflicts with a decision by a state court of last resort, a Colorado supreme court decision, which is the court of last resort in Colorado. *Colorado Constitution, Art. VI, Section 1*; *C.R.S. § 13-1-111(1).*

The Tenth Circuit Court of Appeals' March 23, 2021 Order and Judgment (Pet. App. 1a-9a) did not so far depart from the accepted and usual course of judicial proceedings or sanction such a departure by a lower court as to call for an exercise of this Court's supervisory power. The state of mind element was a factual determination and both the district court and the Tenth Circuit Court of Appeals applied well-settled law to the specific facts of the case. No clear and convincing showing has been made that the factual decisions were not supported by the record, or that the district court or Tenth Circuit misapplied the applicable law to those facts.

The Tenth Circuit Court of Appeals did not decide an important question of federal law that has not been, but should be, settled by this Court. What does or does not comprise municipal liability generally, or state of mind specifically, is not unsettled law. There is not a disparity among the various circuits as to the meaning or application of this settled authority. The present matter does not raise a newly undecided aspect on this issue, rather, the present matter simply involves petitioner's disgruntlement with factual determinations having been decided against it.

Lastly, the Tenth Circuit Court of Appeals did not decide an important federal question in a way that conflicts with relevant decisions of this Court.

1) The State Of Mind Cases Cited By The Estate Do Not Establish A Certiorari-Worthy Controversy.

The Tenth Circuit identified the legal authority and analysis required to determine whether the state of mind element of municipal liability had been satisfied. Pet. App. 7a-8a. The cases cited by petitioner do not establish authority that is in conflict with the authority identified by the Tenth Circuit. Rather, petitioner's cases merely represent application of the same well-settled authority to different sets of facts. The existence of different conclusions reached based on different sets of facts is not a valid reason for triggering this Court's jurisdiction.

The Tenth Circuit cited *Connick v. Thompson*, 563 U.S. 51, 64 (2011), *Schneider v. City of Grand Junction Police Dep't*, 717 F.3d 760, 769 (10th Cir. 2013) and *Barney v. Pulsipher*, 143 F.3d 1299, 1307 (10th Cir. 1998) as legal authority as to what must be proven to establish the state of mind element of a municipal liability, official capacity claim. Pet. App. 7a-8a. The Tenth Circuit then applied the legal authority to the specific facts of this case and concurred with the district court that, under the circumstances of this case, petitioner did not satisfy the state of mind element of municipal liability.

Connick, 563 U.S. 51, involved a municipal liability claim for failure to train the prosecutor's staff on exculpatory evidence disclosure obligations under *Brady v. Maryland*, 373 U.S. 83 (1963). *Connick* identified the requirement that a claimant

must prove the municipality was deliberately indifferent, which "is a stringent standard of fault, requiring proof that a municipal actor disregarded a known or obvious consequence of his action." *Id.* *Connick* noted that a pattern of similar constitutional violations is ordinarily necessary to demonstrate deliberate indifference. *Id.* at 62.

Like the present matter, *Connick* held that the claimant failed to establish a pattern of prior constitutional violations, and further held that the circumstances of the case did not fall within the narrow range of circumstances in which proof of a pattern of prior constitutional violations was not necessary. *Id.* at 63-68. In the present matter, the Tenth Circuit applied the same legal principles to a different set of facts and reached a similar conclusion.

Schneider, 717 F.3d 760, involved municipal liability claims for a police officer accused of sexually assaulting a woman. In the present matter, the Tenth Circuit quoted the standard of proof identified in *Schneider* which is required to establish the state of mind element of municipal liability. Pet. App. 8a. Like the present matter, the municipal liability claim in *Schneider* was rejected due to a lack of evidence of deliberate indifference. *Id.* at 773.

Barney, 143 F.3d 1299, involved claims of sexual assault and conditions of confinement against the sheriff in his official capacity. *Barney* detailed the deliberate indifference standard necessary to establish the state of mind element of a municipal liability claim, *Id.* at 1307-08, which was similarly

detailed in the Tenth Circuit's Mar. 23, 2021 Order and Judgment. Pet. App. 7a-8a. Like the present matter, in *Barney* no pattern of violations existed to put the officials on notice. *Id*. at 1308. Also like the present matter, in *Barney* it was concluded the facts of the case did not fall within the narrow range of circumstances justifying a finding of deliberate indifference absent a pattern of violations. *Id*.

Petitioner argues that "as was cited to the Tenth Circuit below, the courts addressing this legal issue appear to have all reached the opposite conclusion. *Woodward*, 368 F.3d at 929; *Perry for Brooks*, 399 F. Supp. 3d at 882 n.15; accord *J.K.J. v. Polk*, 960 F.3d 367, 381 (7th Cir. 2020) . . . ."[3] Pet. 27. First of all, the "courts addressing this legal issue" only include two cases from the 7th Circuit and a single district court case. More importantly, petitioner's argument makes clear that there is not a split among the circuits as to the appropriate legal standard for the state of mind element in a municipal liability claim. Rather, these three other courts simply reached different conclusions on their specific set of facts than was reached in the present matter. As set forth in Part I.B. above, petitioner's argument does not establish that any special and important reason for granting certiorari are implicated.

Contrary to petitioner's argument, the Tenth Circuit distinguished the facts of *Woodward*, 368 F.3d 917, from the present matter. Pet. App. 7a-8a.

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[3] *Woodward v. Corr. Med. Servs. of Ill., Inc.*, 368 F.3d 917 (7th Cir. 2004); *Perry v. City of St. Louis*, 399 F. Supp. 3d 863 (E.D. Mo. 2019).

Also contrary to petitioner's argument, the Tenth Circuit's decision was not contrary to the holding in *Olsen v. Layton Hills Mall*, 312 F.3d 1304 (10th Cir. 2002). *Olsen* involved consideration of municipal liability as to two separate municipalities. *Id*. at 1318-20. Based on the particular facts of that case, *Olsen* concluded one municipality was not deliberately indifferent whereas a question of fact existed as to whether the other municipality was. In reaching that conclusion, *Olsen* applied the same deliberate indifference analysis as was utilized in the present matter. Just because the Tenth Circuit reached a different conclusion here based on the unique facts of this case does not render its decision contrary to *Olsen*. *McBride v. Toledo Terminal R. Co.*, 354 U.S. 517, 519 (1957)(Frankfurter, J., dissenting)("This Court has said again and again that a difference of opinion in weighing evidence is not included among "special and important reasons' for granting certiorari.")

With petitioner having failed to establish a basis for consideration of the propriety of the Tenth Circuit affirming summary judgment on the state of mind element of municipal liability, there also is no special and important reason to consider adoption of the *Kingsley* standard on the constitutional violation element since summary judgment will stand regardless. *Lawrence v. Chater*, 516 U.S. 163, 173-74 (1996)(respect for lower courts and the public's interest in finality of judgments dictate that the Court's authority to grant certiorari, vacate the judgment, and remand for further review should be used sparingly.)

II. THE STANDARD FOR FOURTEENTH AMENDMENT DELIBERATE INDIFFERENCE TO AN INMATE'S MEDICAL CARE IS A SUBJECTIVE TEST, NOT OBJECTIVE.

Whether or not an objective standard or a subjective standard should be applied in deliberate indifference to an inmate's health or safety cases was addressed in *Farmer v. Brennan*, 511 U.S. 825, 837 (1994), in which it was concluded a subjective standard is applicable. ("We reject petitioner's invitation to adopt an objective test for deliberate indifference.") *Kingsley* did not purport to overturn or supercede *Farmer*.

"[C]laims based on a jail suicide are considered and treated as claims based on the failure of jail officials to provide medical care for those in their custody." *Barrie v. Grand County*, 19 F.3d 862, 866 (10th Cir. 1997). For the Estate to substantiate Ms. Rowell had a constitutional right to adequate medical care, it must prove that Defendants were deliberately indifferent to her serious medical needs. *Farmer*, 511 U.S. 825; *Estate of Hocker v. Walsh*, 22 F.3d 995, 998 (10th Cir. 1994).

Because none of the Defendants were medical personnel, deliberate indifference only occurs if Defendants delayed or prevented Ms. Rowell from access to medical personnel capable of evaluating the need for treatment. *Sealock v. Colorado*, 218 F.3d 1205, 1211 (10th Cir. 2000).

"[A] prison official cannot be found liable . . . unless 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." *Farmer,* 511 U.S. at 837. The Tenth Circuit simply followed the precedent of *Farmer* on the specific issue at hand.

Contrary to petitioner's argument, the holding in *Kingsley* was not broad and did not purport to depart from *Farmer*. By its express terms, the scope of *Kingsley* was limited to a pretrial detainee's Fourteenth Amendment due process claim based on excessive use of force. *Kingsley,* 135 S. Ct. at 2476. The *Kingsley* court specifically declined to expand the objective standard to apply to even Eighth Amendment excessive force claims brought by convicted prisoners. *Id*. There was no discussion, much less holding, extending the *Kingsley* standard into denial of medical care claims.

The panoply of reasons for the Court to decline taking up this issue have already been fully elucidated in the *Strain* petition, which was denied October 4, 2021.

III. THE ORDER BELOW WAS CORRECT.

In order to impose municipal liability, a plaintiff must prove: (1) the existence of an official government policy or custom (2) which caused the constitutional injury, and (3) the policy or custom was enacted or maintained with deliberate

indifference to an almost inevitable constitutional injury (state of mind). *Schneider v. City of Grand Junction Police Dep't*, 717 F.3d 760, 770 (10th Cir. 2013).

The Sheriff was not liable because there was no underlying violation of Ms. Rowell's constitutional rights. However, even if there was an underlying constitutional violation, both the district court and Tenth Circuit also concluded the Estate failed to establish the state of mind element of municipal liability.

A. The Sheriff Was Not Deliberately Indifferent To An Almost Inevitable Constitutional Injury.

The Sheriff can be held responsible for a constitutional violation only if a Sheriff's policy or custom caused the constitutional injury. *Monell v. Dep't of Social Services*, 436 U.S. 658 (1978).

To establish municipal liability, "rigorous standards of culpability and causation must be applied," which requires a showing of deliberate indifference. *Bd. of County Comm'rs of Bryan County, Okl. v. Brown*, 520 U.S. 397, 405 (1997). The term "deliberate indifference" has a different meaning in the context of municipal liability than in the context of whether an individual committed a constitutional violation. *Barney v. Pulsipher*, 143 F.3d 1299, 1307, n.5 (10th Cir. 1998).

To prove deliberate indifference in the municipal liability context, the Estate was required to establish the following:

> The deliberate indifference standard may be satisfied when the municipality has actual or constructive notice that its action or failure to act is substantially certain to result in a constitutional violation, and it consciously or deliberately chooses to disregard the risk of harm. In most instances, notice can be established by proving the existence of a pattern of tortious conduct. In a narrow range of circumstances, however, deliberate indifference may be found absent a pattern of unconstitutional behavior if a violation of federal rights is a highly predictable or plainly obvious consequence of a municipality's action or inaction.

Schneider, 717 F.3d at 771. "A pattern of similar constitutional violations by untrained employees is ordinarily necessary to demonstrate deliberate indifference for purposes of failure to train." *Connick v. Thompson*, 563 U.S. 51, 62 (2011).

Although the knowledge of risk required for establishing deliberate indifference has been modified for unique settings such as sexual assault in prison, this does not alter the clear guidance of cases involving jail-suicide because "a substantial risk of suicide may be impossible to discern unless the particular inmate reveals indicia of that risk to prison officials." *Cox v. Glanz*, 800 F.3d 1231, 1251 n. 11 (10th Cir. 2015).

A substantial risk is well-known when the risk is (1) longstanding; (2) pervasive; (3) well-documented or expressly noted by the jail in the past; and (4) the circumstances suggest that the jail had been exposed to information concerning the risk and thus must have known about it. *Farmer v. Brennan,* 511 U.S. at 842-43. There was no evidence that any inmate had used a telephone cord in the Jail before to harm themself, or others, and that it presented a well-known substantial risk to Ms. Rowell's safety. As noted by the district court, the telephone cord is analogous to items routinely present in jail such as sheets and clothing. Pet. App. 39a-40a.

The evidence did not support the conclusion that the Sheriff had actual or constructive notice that its actions were substantially certain to result in a constitutional violation. The Jail had only experienced one prior suicide, which was remote in time (1980's or 90's), and did not involve an inmate hanging themself with a telephone cord. The attempted suicide in 2015 involved an inmate trying to drown herself in the toilet. So, the Sheriff did not have notice that placing Ms. Rowell in a general population cell in which she had access to a telephone was substantially certain to result in Ms. Rowell using the telephone cord to kill herself.

The Estate argued to the district court that the Jail should have had more surveillance cameras monitoring the inmates. While the lack of a surveillance camera may be evidence of the tort of negligent design, a state remedy, it is not a constitutional violation. *Bame v. Iron County*, 566 Fed. Appx. 731, 740 (10th Cir. 2014) (unpublished).

The Jail manual was not inadequate. As required by the policies, Jail staff checked on Ms. Rowell 116 times over the course of the approximately seventy-two hour period of time from when she was brought to Jail and when she died, which equates to a cell check on average every 6/10th of an hour. Acknowledging that the Estate disputed the frequency of the checks, the district court nonetheless held that "staff routinely checked on Ms. Rowell". Pet. App. 14a.

Defendants spoke to and interacted with Ms. Rowell, asked how she was doing, whether she needed anything such as blankets or wanted to go outside to exercise, brought her meals, retrieved her food tray. Jailors have no constitutional duty to monitor inmates constantly. *Bame*, 566 Fed. Appx. at 740. The failure to monitor Ms. Rowell as frequently as argued by the Estate did not amount to deliberate indifference. *Id.*

The manual had adequate protocols for taking extra security measures for inmates who are suicidal. However, under the circumstances of this case those protocols were not triggered.

The Estate also argued to the district court that the Jail should have employed medical staff to conduct suicide evaluations. "Absent a constitutional requirement that only licensed physicians or psychiatrists may conduct suicide evaluations", "and we are aware of none", "it cannot be said that the jail was deliberately indifferent to the risk of [the inmate's] suicide". *Ernst v. Creek Cty. Pub. Facilities Auth.*, 697 Fed. Appx. 931, 934 (10th Cir. 2017)

(unpublished). As discussed in Part III.B. below, Ms. Rowell had no constitutional right to specialized suicide screening protocols.

The evidence also did not establish that the Sheriff engaged in a pattern of tortious conduct. There was no evidence that there was a history of Jail staff ignoring inmates' needs for mental health treatment in general, or suicide in particular. The only instance of purported tortious conduct identified by the Estate was the present matter.

Nor did The Sheriff consciously or deliberately choose to disregard the harm. To disregard the harm, the Sheriff would first have to be aware of a substantial risk of harm. No evidence supporting this predicate requirement was provided by the Estate.

Even if, arguendo, evidence was presented of the Sheriff's awareness, the Estate presented no evidence that the Sheriff consciously or deliberately chose to disregard the risk. To the contrary, the Sheriff had policies, procedures and training in place for processing incoming inmates, for utilizing the computerized program which included medical and mental health and suicide questions which required manually inputing inmate information, for regular cell check requirements, for suicide-specific safety protocols, for mental health evaluation and counseling. The Sheriff's conduct evidenced conscious regard, not disregard.

This single instance does not denote a repeated pattern of noncompliance such that it could be

considered a custom. The undisputed evidence was that no one had previously utilized a telephone cord to harm themself at the Jail, so a violation of federal rights was not highly predictable or a plainly obvious consequence.

Plaintiffs' allegations for the state wrongful death claims were also instructive. Nowhere in the Second Amended Complaint did the Estate allege that any of the Defendants' actions were willful or wanton or even reckless. Rather, the state claims were based on negligence only. Aplt. App. Vol. II at 285-286, Part VI; Aplt. App. Vol. I at 19-37. Mere negligence is insufficient to establish *§ 1983* deliberate indifference liability. *Verdecia v. Adams,* 327 F.3d 1171, 1177 (10th Cir. 2003).

B. There Was No Constitutional Right To Suicide Screening Or Prevention Protocols.

In February 2016, there was no constitutional right to suicide screening or prevention protocols. "No decision of this Court establishes a right to the proper implementation of adequate suicide prevention protocols. No decision of this Court even discusses suicide screening or prevention protocols." *Taylor v. Barkes*, 135 S. Ct. 2042, 2044 (2015) (per curiam). Nor had the clear weight of authority among the circuits established that such a right exists. *Id.*; see also *Cox*, 800 F.3d at 1247 ("an inmate's right to proper prison suicide screening procedures during booking – wasn't clearly established.").

C. Ms. Rowell Did Not Suffer A Constitutional Injury.

Both the district court and the Tenth Circuit concluded Ms. Rowell did not suffer a constitutional injury.

"[A] prison official cannot be found liable . . . unless 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." *Farmer v. Brennan*, 511 U.S. 825, 837 (1994).

If a city is sued based on its responsibility for a police officer's actions and it is concluded the officer did not inflict a constitutional injury, then "it is inconceivable that [the city] could be liable to [the plaintiff]." *City of Los Angeles v. Heller*, 475 U.S. 796, 799 (1986); *Hinton v. City of Elwood*, 997 F.2d 774, 782 (10th Cir. 1993) (A municipality may not be held liable where there was no underlying constitutional violation by any of its officers).

1) Defendants Were Not Deliberately Indifferent To Ms. Rowell.

All individual claims were voluntarily dismissed by the Estate during summary judgment, except as to Sgt. Muxlow, who was also dismissed on summary judgment. Nonetheless, the Estate argued that the Sheriff is liable for the collective acts of the Defendants. Even if the Estate's argument was

assumed to be correct, it still does not evidence a constitutional violation.

To establish deliberate indifference in a prison suicide case, Plaintiffs must show "that the detainee exhibited strong signs of suicidal tendencies, that the jail officials had actual knowledge of, or were willfully blind to, the *specific* risk that the detainee in question would commit suicide and that the jail officials then failed to take steps to address that known, specific risk." *Estate of Hocker by Hocker v. Walsh*, 22 F.3d at 1000 (10th Cir. 1994). A jailer's knowledge is viewed under the totality of the circumstances. *Cox,* 800 F.3d at 1253. When an inmate's observable symptoms are susceptible to a number of interpretations, with suicide being one possibility, a jailer is not deliberately indifferent unless it is established that the inmate presented a substantial risk of suicide. *Id*. at 1253-54.

Although a defendant's knowledge of substantial risk may be proven by evidence the risk was obvious, "the threshold for obviousness is very high." *Gaston v. Ploeger*, 229 Fed. Appx. 702, 710 (10th Cir. 2007)(unpublished). For example, "a request to see a crisis counselor . . . is not sufficient to put a defendant on notice that an inmate poses a substantial and imminent risk of suicide." *Id*.

2) There Was No Historical Or Current Evidence To Support A Finding Of Deliberate Indifference.

There was no evidence that Ms. Rowell exhibited suicidal ideation in any manner during her

three prior confinements within one year of this incident, including the one-week confinement just days before. Ms. Rowell was placed in the same female general population pod with the same access to the dayroom without incident in all three prior confinements.

During the Feb. 12-15 confinement, there was no evidence Ms. Rowell ever indicated she was suicidal and no evidence that she asked for mental health treatment or medical treatment of any nature. Ms. Rowell was behaving in the same manner as before and Defendants had no information which led them to believe Ms. Rowell would harm herself on this occasion.

Ms. Rowell was arrested, transported to Jail, and processed at the same general time as another female (Tina Gonzales). It is undisputed that the booking deputy (Cook) went through the computer questionnaire with Ms. Gonzales and specified numerous medical issues identified by her. There was no evidentiary support for the Estate's argument that the booking deputy failed to go through the same process with Ms. Rowell, for whom the deputy specifically noted on the booking form that there were no med issues identified by Ms. Rowell or observed by him. The fact that prior bookings had noted high blood pressure and dentures, but did not reflect that on the February 12th booking, is evidence that prior forms were not simply copied and pasted.

Ms. Rowell was the only female being housed, and there is no evidence of disciplinary, security or medical reasons to confine Ms. Rowell to her sleeping

cell only or to place her in an isolation cell. Defendants routinely performed cell checks, observed and interacted with Ms. Rowell. On the day of her death, at worst, there was an interval of approximately an hour and fifty minutes between the last contact with Ms. Rowell while she was still alive and when she was discovered.

Ms. Rowell's common law husband, Gary Heidel, described Ms. Rowell as quiet and reserved. The behavior observed by Defendants was consistent with that description.

For the two-day period between Ms. Rowell's release on February 10th and her return to Jail on February 12th, Mr. Heidel described their time together as the best time they had had since Ms. Rowell suffered a stroke three years earlier in 2013. Ms. Rowell appeared normal to Mr. Heidel on the day she was arrested (February 12th) and taken back to Jail. So, the Estate's argument that it was obvious that Ms. Rowell was so despondent that she would take her own life is inconsistent with the observations of the individual that knew her the best.

There also was no factual basis for the Estate's argument that Ms. Rowell was despondent and therefore suicidal because she was going through withdrawals. There was no evidence that Ms. Rowell was addicted to either alcohol or drugs in February 2016. Deputy Cook's observations during the February 12 booking that Ms. Rowell did not exhibit any signs of impairment from either alcohol or drugs, she did not have red eyes, slurred speech, staggered walk, or other signs indicative of impairment

contradicts the Estate's argument. Similarly, there was no evidence that Ms. Rowell exhibited withdrawal symptoms at any time during her confinement Feb. 12-15, or even the week previously when she was confined.

Other than minimal treatment for depression during Ms. Rowell's treatment for her stroke in 2013, Ms. Rowell had never been treated for depression or for being suicidal. To a person, Ms. Rowell's common law husband and all four of her children were surprised when they learned Ms. Rowell had committed suicide. None of these individuals ever provided any information to Defendants or other Jail personnel that Ms. Rowell had a history of depression and should be closely observed for suicidal tendencies, because Ms. Rowell had no such history. The Estate claimed without evidentiary support that Defendants should have divined a mental health condition of which no individual close to Ms. Rowell was even aware.

Contrast Ms. Rowell's circumstances with the inmate in *Cox*, 800 F.3d 1231. There, the inmate indicated that he felt paranoid, heard voices, saw things that others do not see, said he felt nervous or depressed in recent weeks, and was taking medication for an emotional or mental health problem. Jail employees were aware the inmate had been treated for paranoid schizophrenia. The inmate denied he was currently thinking about suicide. The court in *Cox* noted that the inmate's symptoms to some extent were consistent with a risk of suicide, but were also consistent with other conditions. Under those circumstances, the court held the jail

staff was not deliberately indifferent. Pet. App. 28a - 29a. The facts of the present matter were much more attenuated and ambiguous than the circumstances present in *Cox,* and *Cox* was cited as authority for support of summary judgment. Pet. App. 28a-31a.

D. Even Under The *Kingsley* Objective Standard, There Was No Constitutional Violation.

Even if, arguendo, *Kingsley* should be applied, it still is unhelpful. *Kingsley* itself notes that even when it comes to pretrial detainees, "liability for negligently inflicted harm is categorically beneath the threshold of constitutional due process." *Kingsley*, 135 S. Ct. at 2472. The district court concluded that, at worst, this incident amounted to no more than gross negligence and therefore it falls beneath the threshold of constitutional due process.

With respect to excessive force, *Kingsley* identified various factors which guide a court's consideration. Those factors include the requirement that the conduct undertaken must have been done purposely or knowingly and been objectively unreasonable. *Kingsley*, 135 S. Ct. at 2473. The objective standard requires that the "determination must be made from the perspective of a reasonable officer on the scene, including what the officer knew at the time", "from the [defendant officer's] perspective", and "not with the 20/20 vision of hindsight." *Kingsley*, 135 S. Ct. at 2468, 2473, 2474. The inmate must also show that the jailor was not acting in good faith. *Id*. at 2474.

Consideration of the *Kingsley* factors, if they were applicable, still supports the district court's dismissal. Inmates coming into the Jail were placed in the general population pod which afforded them access between their sleeping cell and an adjacent dayroom where basic necessities of water, toilet and a shower were provided along with having a place to sit, watch television, and contact family, friends, attorney or others. There was no reason to place an inmate in an isolation cell and institute suicide protocols unless there was information to indicate the inmate may harm him or herself.

With all the information known by Defendants, including Ms. Rowell's history as well as her then-conduct, the evidence did not support the necessity for implementing suicide protocol with Ms. Rowell. It simply was untenable to have an inmate with no suicidal history or tendencies placed under close observation 24-hours a day and this level of observation is not constitutionally required under those circumstances.

So, even if, arguendo, the *Kingsley* objective standard was adopted by the Tenth Circuit, Defendants' conduct still did not rise to the level of an unconstitutional deprivation.

E. In A Jail Suicide Case, Knowledge Must Be Based On A Specific Individual, Not Knowledge Generally.

The Estate argues that knowledge for deliberate indifference purposes can be predicated on suicide in inmate populations generally and does not

require knowledge about a specific individual. Contrary to the Estate's argument, Tenth Circuit precedent requires knowledge of suicide risk by a specific inmate, not the inmate population in general.

"[I]rrespective of the alleged deficiencies in the Jail's suicide-screening protocols, in order for any defendant, including Sheriff [Mazzola], to be found to have acted with deliberate indifference, he needed first to have knowledge that the specific inmate at issue presented a substantial risk of suicide." *Cox*, 800 F.3d at 1250. "[S]omething more than an inmate's gloomy affect is required to trigger a duty to inquire whether [she] is feeling suicidal". *Id*. at 1253 (internal quotation omitted). "[S]trange behavior alone, without indications that that behavior has a substantial likelihood of taking a suicidal turn, could not give rise to deliberate indifference liability." *Id*. at 1253-54 (internal quotation omitted).

Like any other medical condition, jail staff can only rely on the accuracy of the mental health information provided to them by each inmate as well as their observations of the inmate's conduct to ascertain whether mental health assistance is required. Ms. Rowell had never been treated for attempted suicide or suicide ideation, and had only been minimally treated for depression as part of her overall care for the stroke she suffered years prior to her confinement. Ms. Rowell's four adult children had no idea Ms. Rowell was suicidal and each of the children expressed shock that she had committed suicide.

Without evidentiary support, petitioner argues that Jail staff was aware that Ms. Rowell was having problems in her relationship. To the contrary, Ms. Rowell's common law husband had no inkling that Ms. Rowell was suicidal either, they had just spent their best days together in years, and Ms. Rowell was acting normally when she was arrested. There was no evidence that Ms. Rowell suddenly became suicidal in the short interval between her arrest and her booking, even if it is assumed the medical questionnaire was not administered to her.

Ms. Rowell was not an unknown individual to jail staff. The undisputed evidence was that Ms. Rowell was acting the same as she had acted during her three prior confinements within the preceding twelve months, including the week immediately preceding her arrest on February 12th.

The facts of this case bolster the Tenth Circuit's holding that the specific individual must show some definitive sign of suicidal tendency in order to trigger a duty to act by staff. Otherwise, according to petitioner's reasoning every jail inmate should be put in isolation on a suicide watch because it's theoretically possible that individual may someday try to harm themself for the sole reason that they are an inmate in a county jail. The constitution does not support that reasoning.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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