No. 21-235

IN THE

Supreme Court of the United States

GARY HEIDEL, *et al.*,

Petitioners,

v.

ANTHONY MAZZOLA, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

REPLY BRIEF

J. KEITH KILLIAN
Counsel of Record
KILLIAN DAVIS RICHTER
& KRANIAK, PC
202 North Seventh Street
Grand Junction, CO 81501
keith@killianlaw.com

Counsel for Petitioners

308474

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

TABLE OF CONTENTS

Page

TABLE OF CONTENTS. i

TABLE OF CITED AUTHORITIES iii

REPLY 1

I. This case presents an opportunity for the Court to prevent pretrial detention suicides by addressing a division in the circuit courts. 1

A. The Court's denial of the Strain petition does not address the merits of this Petition 1

B. Petitioner has provided adequate reasoning to grant this Petition 2

II. The standard for Fourteenth Amendment deliberate indifference to a pre-trial detainee's medical condition is an objective test 2

III. The order below was incorrect 6

A. The Sheriff's Office was deliberately indifferent to a high risk of jailhouse suicide 6

B. There is a due process right to medical care while in detention 8

Table of Contents

Page

C. Ms. Rowell suffered a constitutional injury. 10

D. Petitioner's claim survives summary judgment under an objective standard 10

E. General knowledge of a particular harm can satisfy the *Canton* obviousness test. 11

TABLE OF CITED AUTHORITIES

Page

CASES:

Daniels v. Williams,
474 U.S. 327 (1986) 4, 6

Farmer v. Brennan,
511 U.S. 825 (1994) . . . . . *passim*

Canton v. Harris,
489 U. S. 378 (1989) . . . . . *passim*

Cox v. Glanz,
800 F.3d 1231 (10th Cir. 2015). 9

Garcia v. Salt Lake Cty.,
768 F.2d 303 (10th Cir. 1985) 9

Kingsley v. Hendrickson,
576 U.S. 389, 135 S. Ct. 2466,
192 L. Ed. 2d 416 (2015). 4, 5, 6, 10

Revere v. Massachusetts General Hospital,
463 U.S. 239, 103 S.Ct. 2979,
77 L.Ed.2d 605 (1983) 9

Rock v. McCoy,
763 F.2d 394 (CA10 1985) 10

Page

Strain v. Regalado,
977 F.3d 984 (10th Cir. 2020),
cert. denied, No. 20-1562,
2021 WL 4509029 (U.S. Oct. 4, 2021) 1, 2

Taylor v. Barkes,
135 S. Ct. 2042 (2015). 8, 9

Watt v. Alaska,
451 U.S. 259 (1981) 2

STATUTES AND OTHER AUTHORITIES:

U.S. Const. Amend. VIII . . . . . *passim*

U.S. Const. Amend. XIV . . . . . *passim*

42 U.S.C. § 1983. . . . . *passim*

REPLY

I. This case presents an opportunity for the Court to prevent pretrial detention suicides by addressing a division in the circuit courts.

Petitioners identified at least four distinct reasons for granting the petition: (1) there is a circuit split regarding the applicable legal standard; (2) the split is especially important in cases involving pretrial-detainee suicide; (3) this case involves numerous reckless behaviors on behalf of the sheriff and his deputies and a history of similar incidents; and (4) this case was decided improperly.

A. The Court's denial of the Strain petition does not address the merits of this Petition.

Respondents argue that the Petition should be denied because the writ of certiorari in *Strain v. Regalado*, No. 20-1562, was denied. Petitioners do not have the burden of proving that the Court should have granted a petition in a different case. Nevertheless, Petitioners went into great depth discussing the importance of this area of law as it relates to jailhouse suicide, which was not implicated in *Strain*. See Petitioners' Petition for Writ of Certiorari ("Petition"), 17. The plaintiff in *Strain* alleged an *inadequate* response to alcohol withdrawal. "Staff admitted [the detainee] to the Jail's medical unit, conducted a mental health assessment, and documented his withdrawal symptoms." *Strain v. Regalado*, 977 F.3d 984, 987 (10th Cir. 2020), cert. denied, No. 20-1562, 2021 WL 4509029 (U.S. Oct. 4, 2021). *Strain* did not involve the complete lack of proper suicide detection and prevention training and procedure involved in the present case.

B. Petitioners have provided adequate reasoning to grant this Petition.

Respondents note that the Court's "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). Petitioners agree and presented three other distinct reasons. Petitioners identified opinions from three other circuits that conflict with the Tenth Circuit's standard. See Petition, 21. In *Strain*, the Tenth Circuit expressly acknowledges, "the circuits are split on whether *Kingsley* eliminated the subjective component of the deliberate indifference standard by extending to Fourteenth Amendment claims outside the excessive force context." *Strain v. Regalado*, 977 F.3d 984, 990 (10th Cir. 2020), cert. denied, No. 20-1562, 2021 WL 4509029 (U.S. Oct. 4, 2021).

II. The standard for Fourteenth Amendment deliberate indifference to a pretrial detainee's medical condition is an objective test.

Respondents state, "Utilizing the subjective [deliberate] indifference test set out 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." Respondents' Brief in Opposition ("Brief in Opp."), 1. *Farmer* involved an Eighth Amendment claim, not a Fourteenth Amendment claim. The *Farmer* Court went into great depth distinguishing the test that was applied in *Canton v. Harris*, 489 U. S. 378 (1989) (a Fourteenth Amendment case) and that which should be applied in an Eighth Amendment case:

Because "deliberate indifference" is a judicial gloss, appearing neither in the Constitution nor in a statute, we could not accept petitioner's argument that the test for "deliberate indifference" described in *Canton* . . . must necessarily govern here. **In *Canton*, interpreting . . . § 1983, we held that a municipality can be liable for failure to train its employees when the municipality's failure shows a deliberate indifference to the rights of its inhabitants.** . . . In speaking to the meaning of the term, we said that "it may happen that in light of the duties assigned to specific officers or employees the need for more or different training is so obvious, and the inadequacy so likely to result in the violation of constitutional rights, that the policymakers of the city can reasonably be said to have been deliberately indifferent to the need." *Id.*, at 390; see also *id.*, at 390, n. 10 (elaborating). **JUSTICE O'CONNOR'S separate opinion for three Justices agreed with the Court's "obvious[ness]" test and observed that liability is appropriate when policymakers are "on actual or constructive notice" of the need to train**, *id.*, at 396 (opinion concurring in part and dissenting in part). **It would be hard to describe the Canton understanding of deliberate indifference, permitting liability to be premised on obviousness or constructive notice, as anything but objective.**

Canton's objective standard, however, is not an appropriate test for determining

> **the liability of prison officials under the Eighth Amendment as interpreted in our cases.** Section 1983, which merely provides a cause of action, "contains no state-of-mind requirement independent of that necessary to state a violation of the underlying constitutional right." *Daniels v. Williams*, 474 U. S. 327, 330 (1986). And while deliberate indifference serves under the Eighth Amendment to ensure that only inflictions of punishment carry liability . . . **the term was used in the Canton case for the quite different purpose of identifying the threshold for holding a city responsible for the constitutional torts committed by its inadequately trained agents, . . . a purpose the Canton Court found satisfied by a test permitting liability when a municipality disregards "obvious" needs. Needless to say, moreover, considerable conceptual difficulty would attend any search for the subjective state of mind of a governmental entity, as distinct from that of a governmental official**. . . .

Farmer, at 840-842 (internal quotation marks and citations omitted). The test for § 1983 liability for the purpose of establishing a violation of the Fourteenth Amendment has been objective since at least as far back as *Canton*. The *Farmer* Court confirmed this.

The Court granted certiorari in *Kingsley* to further solidify that an objective standard should be used in the context of a § 1983 Fourteenth Amendment claim. *See Kingsley v. Hendrickson*, 576 U.S. 389, 395, 135 S. Ct.

2466, 2472, 192 L. Ed. 2d 416 (2015). Respondents and the Tenth Circuit attempt to limit *Kingsley's* objective standard to § 1983 Fourteenth Amendment *excessive force* claims. *Canton*, however, was a § 1983 Fourteenth Amendment *inadequate medical care* claim. *Canton* even involved the claim "that police officers were inadequately trained in diagnosing the symptoms of emotional illness." *Canton*, at 396 (O'Connor concurring in part and dissenting in part). *Canton* had already introduced an objective standard into the medical care context.

Despite 30 years of Supreme Court precedent supporting an objective standard under these facts, some circuit courts continue to apply a more stringent subjective component, including the Tenth Circuit. In direct defiance of the Court, the Tenth Circuit states, "we apply the same deliberate indifference standard no matter which amendment provides the constitutional basis for the claim." *Strain*, at 989.

Kingsley did not have to supersede or overturn *Farmer*, because *Kingsley* was a Fourteenth Amendment case and *Farmer* was an Eighth Amendment case. *Canton* set the standard for Fourteenth Amendment claims. *Farmer* specifically set the standard for Eighth Amendment claims and distinguished it from that of the objective standard set out in *Canton*. *Kingsley* confirmed *Canton* and applied a similar objective standard to a Fourteenth Amendment excessive force claim. The issue here is not about expanding the *Kingsley* holding. As applied to a claim under the Fourteenth Amendment involving a lack of medical care, *Canton's* objective test has controlled since 1989.

III. The order below was incorrect.

The Appellate Court based its decision on an improper legal standard. The Tenth Circuit, to find liability, required proof that the officers involved had actual knowledge of Ms. Rowell's risk of suicide. See Petition, 5a (Tenth Circuit Opinion). The Tenth Circuit applies "the two-part Eighth Amendment inquiry when a pretrial detainee alleges deliberate indifference to serious medical needs." *Quintana*, at 1028. As discussed above, this statement is in direct opposition to the Supreme Court's precedent. It is not § 1983 that creates the state-of-mind requirement but the Fourteenth Amendment. *See Farmer; Kingsley; Daniels*. A lack of subjective knowledge on behalf of the individual officers is not dispositive of the issue in this case.

A. The Sheriff's Office was deliberately indifferent to a high risk of jailhouse suicide.

The proper test, under these facts, is set forth in *Canton*. The *Canton* Court held "that the inadequacy of police training may serve as the basis for § 1983 liability only where the failure to train amounts to deliberate indifference to the rights of persons with whom the police come into contact." *Canton*, at 388. Justice O'Connor clarified in her separate opinion, "Where a § 1983 plaintiff can establish that the facts available to city policymakers put them on actual or constructive notice that the particular omission is substantially certain to result in the violation of the constitutional rights of their citizens, the dictates of *Monell* are satisfied." *Id.*, at 395. She goes on:

> In my view, it could be shown that the need for training was obvious in one of two ways.

> First, a municipality could fail to train its employees concerning a clear constitutional duty implicated in recurrent situations that a particular employee is certain to face. As the majority notes, . . . the constitutional limitations established by this Court on the use of deadly force by police officers present one such situation. The constitutional duty of the individual officer is clear, and it is equally clear that failure to inform city personnel of that duty will create an extremely high risk that constitutional violations will ensue.

Id., at 396. Regarding Justice O'Connor's first way to prove obviousness, she, at the time, did not feel that "the diagnosis of mental illness" was "one of the usual and recurring situations with which the police must deal." *Ibid.* (internal quotations omitted). Petitioners assert that suicide is a situation that had become obvious at the time of this incident. It is the leading cause of death in jails. The jailers in the present case were given sole discretion as to when to order a psychological evaluation. They faced the recurrent situation of evaluating the mental health concerns of inmates without any formal training. The need to properly identify suicidal behavior and prevent suicide in the jail was clear, and the lack of training and proper procedure created an extremely high risk that a jailhouse suicide would occur.

As for Justice O'Connor's second way to prove obviousness, she states,

> Second, I think municipal liability for failure to train may be proper where it can be shown that policymakers were aware of, and acquiesced in,

> a pattern of constitutional violations involving the exercise of police discretion. In such cases, the need for training may not be obvious from the outset, but a pattern of constitutional violations could put the municipality on notice that its officers confront the particular situation on a regular basis, and that they often react in a manner contrary to constitutional requirements.

Canton, at 397. If not obvious by the nature of the jailer's role, the need for proper suicide prevention training and procedure should have become obvious after the history of suicide at the jailhouse, the available literature in the possession of the sheriff, and the well-known suicides committed in Colorado jails at the time of the incident. There had been a suicide and an attempted suicide at the Meeker jailhouse. The intake officer even admitted that he had thought the phone cord could be used to hang oneself.

Applying the proper test to the present case reveals how a reasonable factfinder could find that the Sheriff's Office acted with deliberate indifference to the substantial risk of jailhouse suicide. Petitioners should have the opportunity to prove their case beyond this briefing.

B. There is a due process right to medical care while in detention.

Respondents assert that there is "no constitutional right to suicide screening or prevention protocols." Brief in Opp., 28 (capitalization altered). To support this statement, Respondents cite to *Taylor v. Barkes*, 135 S. Ct. 2042, 2044 (2015) (per curiam). *Ibid.* That is not the holding in *Taylor*. In *Taylor*, the Court held that the

right to suicide screening and prevention protocol was not "clearly established" for the purpose of overcoming qualified immunity in the context of a § 1983 individual capacity claim. *Taylor*, at 2044. The only other authority Respondents cite to support its proposition is *Cox v. Glanz*, 800 F.3d 1231 (10th Cir. 2015), which also involved a § 1983 individual capacity claim. The *Cox* court explicitly did not address the accompanying official capacity claim. *See Cox*, at 1237. In an official capacity claim, as is presented in the present case, the plaintiff does not need to prove that the constitutional right in question was clearly established.

The constitutional right in question is that of "medical care while in detention." *Canton*, at 388, n. 8. The *Canton* Court acknowledged this right but "reserved decision on the question whether something less than the Eighth Amendment's 'deliberate indifference' test may be applicable in claims by detainees asserting violations of their due process right to medical care while in custody." *Ibid.* (referring to the same reservation in *Revere v. Massachusetts General Hospital*, 463 U.S. 239, 243–245, 103 S.Ct. 2979, 2982–2983, 77 L.Ed.2d 605 (1983)). However, the *Farmer* Court clarified that the *Canton* "objective standard" for deliberate indifference was indeed less demanding than the "subjective state of mind" required to prove deliberate indifference under an Eighth Amendment claim. *See Farmer*, at 841. The Tenth Circuit acknowledges "a due process standard which protects pretrial detainees against deliberate indifference to their serious medical needs." *Garcia v. Salt Lake Cty.*, 768 F.2d 303, 307 (10th Cir. 1985). The constitutional right itself is unchallenged. The issue here is that the Tenth Circuit is applying a subjective requirement to § 1983 Fourteenth Amendment deliberate indifference claims in direct opposition to Supreme Court precedent. *See Farmer*, at

841 ("Needless to say, moreover, considerable conceptual difficulty would attend any search for the subjective state of mind of a governmental entity, as distinct from that of a governmental official.").

C. Ms. Rowell suffered a constitutional injury.

Respondents next claim, "Ms. Rowell did not suffer a constitutional injury." Brief in Opp., 29 (capitalization altered). Again, Respondents cite to *Farmer*, in which the Court explicitly states that it is establishing a higher, subjective, standard for Eighth Amendment liability. The appellate court's constitutional injury analysis applies the improper Eighth Amendment test. See Petition, 5a (Tenth Circuit Opinion) ("To start, 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."). Whether Ms. Rowell suffered a constitutional injury was thus inappropriately based on the subjective standard which Petitioners have rejected throughout this Reply Brief.

D. Petitioners' claim survives summary judgment under an objective standard.

Kingsley simply confirmed that an objective standard applied to a § 1983 Fourteenth Amendment claim for excessive force. The Court had already applied an objective standard to a § 1983 Fourteenth Amendment lack of medical care claim in *Canton*. Respondents' application of *Kingsley* to the facts of this case is inappropriate. The *Canton* Court even cited a Tenth Circuit case, *Rock v. McCoy*, 763 F.2d 394, 397-398 (CA10 1985), where a claim had succeeded on a lack of training/procedure theory. *See Canton*, at 387, n. 6. In the present case, a

reasonable juror could find (1) that the risk of suicide was obvious given the actual and constructive knowledge of the policymakers, (2) that the policymakers' failure to properly address that obvious risk showed deliberate indifference to a high likelihood that a detainee would not receive necessary medical attention, (3) inmates have a constitutional right to medical care while in detention, and (4) proper training and procedures would have prevented Ms. Rowell's suicide.

E. General knowledge of a particular harm can satisfy the *Canton* obviousness test.

The Brief in Opposition closes with a section entitled, "In a jail suicide case, knowledge must be based on a specific individual, not knowledge generally." Brief in Opp., 35. As Petitioners have emphasized in this Reply Brief, this statement is contrary to the holding in *Canton* that a lack of training alone can suffice to establish the deliberate indifference necessary for a § 1983 Fourteenth Amendment claim.

Training programs and procedures are implemented (or not) in advance of a particular medical risk to a particular individual. Therefore, the formulation of training programs and procedures is based on knowledge of general risks. Since a lack of training or proper procedure alone can be the basis for § 1983 liability, there cannot be a dispositive subjective knowledge requirement inherent in § 1983 Fourteenth Amendment liability. To be clear, if subjective knowledge of a medical risk to a particular individual was required for § 1983 liability, there could never be liability based on a lack of training or proper procedure alone, which is inconsistent with this Court's jurisprudence.

In fact, general knowledge was involved in both of Justice O'Connor's ways to prove obviousness as identified above. *Canton*, at 396. Specifically, the plaintiff could prove "a clear constitutional duty [is] implicated in recurrent situations that a particular employee is certain to face." *Ibid.* Alternatively, Justice O'Connor also identified general knowledge as the second way to prove obviousness. A plaintiff satisfies its burden "where it can be shown that policymakers were aware of, and acquiesced in, a pattern of constitutional violations involving the exercise of police discretion." *Id.* at 397. Nowhere in *Canton* did the Court claim knowledge of a specific individual's medical risk, on behalf of a municipal actor, is necessary to establish obviousness. Therefore, Respondents' position, that liability hinges on "knowledge about a specific individual," is inconsistent with Supreme Court precedent. The Court should grant the Petition in this case in order to indicate that its prior ruling in *Canton,* which implemented a Fourteenth Amendment objective test, is the rule to be followed in analyzing pretrial detention suicide prevention cases.

Respectfully submitted,

J. Keith Killian
Counsel of Record
Killian Davis Richter
& Kraniak, PC
202 North Seventh Street
Grand Junction, CO 81501
keith@killianlaw.com

Counsel for Petitioners