No. 21-264

In the Supreme Court of the United States

COUNTY OF SAN DIEGO, ET AL.,

Petitioners,

v.

ANA SANDOVAL, RONNIE SANDOVAL, JR., AND JOSIAH SANDOVAL,

Respondent.

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

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. In light of *Kingsley*'s holding that pretrial detainees alleging excessive force state a Fourteenth Amendment claim by demonstrating that the force used was objectively unreasonable, does an officer violate the Fourteenth Amendment by providing inadequate care to a pretrial detainee when the officer's actions were objectively unreasonable?

2. Should the Court overturn the qualified immunity doctrine entirely?

3. Alternatively, when conduct has been clearly established as objectively unconstitutional, can officials nonetheless claim immunity for their actions under the theory that they were on notice that they could engage in such conduct so as long as they lacked a particular state of mind?

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BRIEF IN OPPOSITION

Ronnie Sandoval died in the San Diego Central Jail after the medical jail's staff left him unmonitored for eight hours, despite clear indications that he required medical attention.

Even after jail staff noticed Sandoval unconscious and seizing, they failed to call for adequate medical support, in violation of the jail's policy. In fact, one nurse affirmatively refused to call paramedics for more than a half hour. Sandoval died shortly after paramedics arrived—and a medical expert has opined that this delay was fatal.

In a thorough, fact-intensive opinion, the court of appeals concluded that disputed questions of material fact preclude a grant of summary judgment in favor of petitioners. Although Judge Collins dissented, claiming that there are differences in the legal approach, careful analysis confirms that both the panel and the dissent—like all the circuits across the country—apply the same pragmatic test, focusing on a defendant's objective knowledge. Review is thus not warranted, and that is especially so because *Kingsley* compels the result reached below.

Petitioners also ask for review of a narrow issue relating to qualified immunity—whether an asserted later change to the subjective element of a claim bears on the qualified immunity analysis. But before even entertaining that issue (or any other relating to qualified immunity), the Court should first revisit qualified immunity as a whole and overturn that doctrine. It lacks any basis in statutory text or common law, and it leads to baleful results. And even under prevailing qualified immunity law, petitioners' assertion lacks merit. The alleged disagreement is insignificant, it has no practical bearing on the outcome of cases,

and it is an academic issue that will sunset. What is more, the court of appeals was correct to focus on a defendant's conduct. There is no other way to fairly apply the qualified immunity doctrine.

STATEMENT

A. Factual Background.[1]

On February 22, 2014, deputies from the San Diego Sheriff's department performed a probation compliance check on Sandoval. Pet. App. 3. They discovered methamphetamine and drug paraphernalia, arrested him, and transported him to the San Diego Central Jail. *Ibid*.

At the jail, Deputy Matthew Chavez observed that Sandoval "was sweating and appeared disoriented

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[1] It is difficult—if not impossible—to respond to the factual statement provided by petitioners because, except for two quotations, petitioners fail to provide any record citations for the litany of factual assertions contained in the statement. See Pet. 2-4. This alone is reason enough to deny the petition: Not only does it frustrate the ability of respondents to meaningfully respond, but it denies this Court the ability to understand the basis for the factual assertions on which petitioners rely. We flag a handful of blatant errors contained in petitioners' statement. But, for the avoidance of all doubt, respondents contest the entirety of petitioners' factual background.

Indeed, before the district court, petitioners succeeded in a host of one-word "objections" to respondents' exhibits provided at summary judgment. Pet. 10-11; see also Dist. Ct. Dkt. No. 25-2 (objections). Although the district court summarily sustained these objections (Pet. App. 10), the court of appeals reversed, finding that petitioners' conduct was "meritless, if not downright frivolous." *Id*. at 11. The district court's ruling, the court of appeals concluded, was "an abuse of discretion." *Ibid*. Petitioners do not challenge that evidentiary holding here. But, because of the lack of factual citations in the petition, it is impossible to deduce whether petitioners are simply discounting respondents' evidentiary submissions.

and lethargic." Pet. App. 4. An hour later, when Sandoval's photo was taken, Chavez further "observed that Sandoval 'was still sweating a lot and appeared to be very tired and disoriented.'" *Ibid*. Sandoval reported that, despite the fact he was sweating, "he was very cold," indicating that he was suffering from a cold sweat. *Ibid*. After a deputy asked if Sandoval "had swallowed anything," Sandoval "became agitated and refused to answer further questions." *Ibid*.

Chavez then took Sandoval to the medical station on the second floor. Pet. App. 4. Chavez told Nurse Romeo de Guzman that, while Sandoval had been cleared by the medical staff downstairs, "he was sweating and appeared disoriented and lethargic." *Ibid*. Chavez thus told de Guzman that "there is still something going on with Sandoval, so you need to look at him more thoroughly.'" *Ibid*. (alteration omitted).

Shortly thereafter, de Guzman entered Medical Observation Cell No. 1 along with deputy Leonard Rodriguez. Pet. App. 5. Rodriquez observed "that Sandoval was 'shaking mildly' and 'appeared to be having withdrawals from drugs.'" *Ibid*. De Guzman then gave Sandoval a brief blood sugar test (to determine if Sandoval was having a diabetic seizure), and when it "came back normal," de Guzman "then left the cell without conducting any further examination." *Ibid*.

Recognizing that Sandoval was likely intoxicated, de Guzman suggested placing Sandoval in a sobering tank. Pet. App. 5. Instead, deputies placed him in a cell a mere 20 feet from the nursing bay where Nurse de Guzman was stationed, "presumably so that he would be subject to closer observation by the medical staff." *Ibid.* De Guzman, however, "did not check on Sandoval at any point during the remaining six hours

of his shift." *Ibid*. When asked why he failed to monitor Sandoval, de Guzman curtly responded, "I don't have to." *Ibid*.

When Nurse de Guzman's shift ended—six hours after placing Sandoval in the cell—he did not share his observations with the incoming staff. Pet. App. 5. Because the cell where Sandoval was placed was "mixed use"—some detainees there have medical issues and others do not—the incoming staff would attend to an inmates medical issues only if alerted to it by the outgoing staff. *Id*. at 6. As a result, Sandoval went unmonitored for about eight hours. *Ibid*.

By the end of the eight hours, Sandoval's condition had become critical. A passing guard who was not assigned to monitor Sandoval—Sergeant Shawcroft—happened to observe that Sandoval's "eyes 'weren't tracking'" and that Sandoval's skin "wasn't a fleshy color." Pet. App. 6. Shawcroft watched as Sandoval slumped over and began seizing. *Ibid.* As Shawcroft called for help, Sandoval "hit his head on the wall and slid[] down to the floor." *Ibid.* Four individuals—Deputies Nolan Edge and Matthew Andrade and Nurses Dana Harris and Maria Llamado—joined Shawcroft in responding to the emergency. *Id.* at 6-7. Nurse Harris, as the first nurse on the scene, became the team leader. *Id.* at 7. Everyone except Nurse Harris "agree[s] that Sandoval was unresponsive and having a seizure or 'seizure-like activity.'" *Ibid.*[2]

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[2] In asserting that Harris allegedly observed Sandoval act "responsive," the petition (at 3) disregards that multiple other individuals present recount the events differently. See Pet. App. 7. Especially given that the facts at this summary judgment stage are viewed in the light most favorable to Sandoval, the Court should disregard wholesale petitioners' selective presentation of the factual underpinnings of this case.

These first responders had two options for more advanced medical support. Pet. App. 7. *Ibid.* Emergency medical technicians (EMTs) provide basic life support measures. *Ibid.* Paramedics, by contrast, may perform more advanced procedures, and paramedics are required to transport unresponsive patients to the hospital. *Ibid.* San Diego County Jail policy requires calling paramedics for unresponsive, seizing patients. *Id.* at 23. This crucial distinction between EMTs and paramedics "was common knowledge among the nurses." *Id.* at 8.

Despite the jail's policy and a seizing, unresponsive Sandoval, thirty-seven minutes[3] elapsed before anyone called paramedics. Dist. Ct. Dkt. No. 24, at 11. Nurse Harris initially called only EMTs. Pet. App. 8. Deputy Andrade—himself a trained EMT—asked Nurse Harris multiple times to call paramedics instead. *Id.* at 7-8. Nurse Llamado "directly told Harris" the same. *Id.* at 8. Nurse Harris, however, responded "No, EMT"—directing a call to EMTs. *Ibid*.

The supervising nurse, upon learning that only EMTs had been called, directed Llamado to tell Harris to call paramedics. Pet. App. 8. The supervising nurse "said he has to go now 9-1-1." *Ibid*. Again, Harris continuously refused to call paramedics. *Ibid.*

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[3] The petition's unsourced claim (at 3-4) that the period of time elapsed was fifteen minutes presents—at very best for Harris—a disputed question of material fact. Dist. Ct. Dkt. No. 24, at 11. In fact, given that several of these times are known without any material dispute, petitioners' claims are utterly implausible. And, in all, petitioners mistake the prevailing standard.

Ultimately, it was the EMTs—not Nurse Harris,[4] nor any of the other jail staff—who called the paramedics. Dist. Ct. Dkt. No. 24, at 11. Later, Nurse Llamado "admitted that she should have called paramedics herself when Harris refused to do so." Pet. App. 23.

Paramedics finally arrived at 1:42 a.m., forty-seven minutes after Sandoval began seizing and became unconscious. Pet. App. 8. Though Sandoval had a pulse when the paramedics arrived, he died as they attempted to transfer him to a gurney. *Ibid.* He was pronounced dead at 2:11 a.m. *Ibid.* Respondents' medical expert has opined that, "[i]f Mr. Sandoval had been taken to an emergency department at any time during the time he was in Central up to the time that he lost his pulse and went into cardiac arrest, more likely than not his life would have been able to be saved by appropriate medical interventions." Dist. Ct. Dkt. No. 24, at 12.

B. Proceedings Below

1. Sandoval's wife brought this Section 1983 lawsuit, claiming that the nurses' and county's deliberate indifference to Sandoval's medical needs violated the Fourteenth Amendment. Respondents also asserted additional state law claims. In February 2018, the district court granted summary judgment to petitioners.

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[4] Petitioners' (again unsourced) claim (at 3-4) that Nurse Harris escalated from EMTs to paramedics based on her own independent judgment is incorrect. The district court did employ Nurse Harris' version of this event (Pet. App. 88), but only after sustaining an evidentiary objection to the relevant exhibit, as we described. *Id.* at 83 n.1. See also Dist. Ct. Dkt. No. 25-2 at 2 (objecting to Exhibit 15). But this evidentiary ruling was overturned by the court of appeals. Pet. App. 10-15. Exhibit 15 is thus properly in the record—and petitioners have raised no challenge to it here.

It reasoned that Sandoval undoubtedly "had a serious medical need." Pet. App. 93. Yet, the court granted summary judgment, examining "whether the circumstantial evidence offered presents a triable issue of material fact as to any of the individual [petitioners'] knowledge of Sandoval's serious medical need." *Id*. at 100. The court alternatively granted qualified immunity to the individual defendants. *Id*. at 113-116. And it granted summary judgment for the county on the *Monell* claims. *Id*. at 116-122.

2. The court of appeals reversed. Prior to argument, another panel issued *Gordon* v. *County of Orange*, 888 F.3d 1118 (9th Cir. 2018), applying *Kingsley*'s reasoning to deliberate indifference claims by pretrial detainees and clarifying the lack of a subjective element in the constitutional claim.

First, the court concluded that petitioners' evidentiary objections—including the one-word objection to Exhibit 15—"were meritless, if not downright frivolous." Pet. App. 11. The Court thus overturned the broad range of evidentiary objections that had been sustained below. *Id*. at 10-15.

Second, the court identified the prevailing legal framework for a claim that medical care was deliberately indifferent in violation of the Fourteenth Amendment: A plaintiff must plead and approve that (1) the defendant "made an intentional decision with respect to the conditions under which the plaintiff was confined," (2) these conditions "put the plaintiff at substantial risk of suffering serious harm," (3) the defendant failed to "take reasonable available measures to abate that risk," yet "a reasonable official in the circumstances would have appreciated the high degree of risk involved," and (4) by not taking the measures at issue, "the defendant caused the plaintiff's injury."

Pet. App. 20. This limits liability to those circumstances where the "consequences of the defendant's conduct" are "obvious." *Ibid*.

Applying this framework, the court of appeals concluded that—taking the record in the light most favorable to respondents—a jury *could* hold each of the defendants liable. As for petitioners Harris and Llamado, the court started from the proposition "[t]here can be no debate that a reasonable nurse would understand that an individual who is unresponsive and seizing faces a substantial risk of suffering serious harm." Pet. App. 22. At this stage, the court accepted "the extensive evidence that all reasonable nurses would know that only paramedics, not EMTs, had the training necessary to allow them to transport patients in Sandoval's condition." *Id*. at 23.

As for petitioner de Guzman, the court found that a jury could conclude "that de Guzman suspected Sandoval was under the influence of drugs or alcohol." Pet. App. 21. Despite awareness of the risks that Sandoval faced, de Guzman did not check on him for a period of *six hours*—and then he failed to convey information he knew about Sandoval's conduct to the next shift. *Ibid*.

As for qualified immunity, the court of appeals explained that, for a deliberate indifference claim, a central inquiry is "whether it would be clear to a reasonable officer that his *conduct* was unlawful in the situation he confronted." Pet. App. 27. This comports with the fundamental issue underpinning qualified immunity—whether the defendant "had fair notice that her conduct was unlawful." *Id*. at 31 (quoting *Kisela* v. *Hughes*, 138 S. Ct. 1148, 1152 (2018)). Applying that established law, the court examined precedent establishing that prison officials must provide adequate medical care to unresponsive detainees—and it

concluded that there are triable questions of fact that preclude a grant of summary judgment. Pet. App. 41-46.

The court further recognized a *Monell* claim is appropriately submitted to a jury (Pet. App. 46-52)—a conclusion that petitioners do not challenge here. In particular, the use of a "mixed" holding cell with sick and well detainees—coupled with no way of indicating to prison staff whether a detainee is under medical watch—created an enormous risk. *Id*. at 46. The cell's lack of safeguards allowed it to become "a veritable no man's land, where deputies believed the cell was being monitored by nurses, and nurses believed it was being monitored by deputies." *Id.* at 47.

Judge Collins concurred in part and dissented in part. Pet. App. 53-81. Judge Collins agreed that petitioners Harris and Llamado were not entitled to summary judgment, and thus concurs with the judgment as to those parties. Judge Collins, however, would have found de Guzman entitled to qualified immunity (*id*. at 71-74), and he would have granted judgment for the County (*id*. at 78-81).

3. The court of appeals denied petitioners' request for rehearing en banc without any judge requesting a poll. Pet. App. 124.

REASONS FOR DENYING THE PETITION

The Court should deny review. As to the application of *Kingsley* to medical deliberate indifference, the question presented here has no bearing on the resolution of the claims in this case. Nor do the differing formulations of the standard have any significant impact generally. Rather, as a review of case law confirms, whatever standard may be used, the cases broadly reduce to an examination of what an officer knew and

how he acted. Review is further unwarranted because the decision below is plainly correct.

As to qualified immunity, the Court should reverse qualified immunity in the whole. In any event, the narrow question posed here is not institutionally significant and is not an issue with any practical significance. Finally, the decision below correctly applied this Court's precedent.

I. *KINGSLEY*'S APPLICABILITY TO DELIBERATE INDIFFERENCE DOES NOT WARRANT REVIEW IN THIS CASE.

A. This case does not turn on whether *Kingsley* applies to deliberate indifference claims.

Further review is unwarranted for a simple and straightforward reason—resolution of the applicable legal standard will have no bearing on the outcome here. As to all three individual individuals, the court of appeals made plain that it would have resolved the claim the same way, regardless of the governing rule.

The court of appeals unanimously agreed that—regardless of the governing standard—claims may proceed against petitioner Harris. As Judge Collins explained:

> Although Harris insisted that no one told her to call 911 or paramedics, Plaintiff presented competing evidence that: (1) Deputy Matthew Andrade (who had himself been trained as an EMT) told Harris two or three times that paramedics should be called; (2) very early into the emergency, Nurse Llamado concluded that "9-1-1 should be called," and she said out loud to Harris and the others multiple times that Sandoval "has to go out 9-1-1"; (3) after

> consulting with the supervising nurse (Shirley Bautista), Llamado told Harris that "Shirley said he has to go now 9-1-1"; and (4) Llamado confirmed that calling paramedics was "[s]tandard nursing protocol" at the jail in the case of a prolonged seizure. Based on this evidence, a rational jury could readily conclude that Harris well knew that she needed to call 911 and inexplicably failed to do so.

Pet. App. 76.

Judge Collins reached the same conclusion as to petitioner Llamado:

> For substantially similar reasons, I concur in the judgment reversing the district court's grant of summary judgment to Nurse Maria Llamado. Indeed, [respondents'] evidence as to Llamado is, if anything, even stronger than as to Harris. Llamado's own deposition testimony confirms that she was subjectively aware that Harris was wrong in summoning only EMTs and not paramedics. Llamado also admitted at her deposition that she should have called paramedics herself, stating that she had "learned [her] lesson."

Pet. App. 77-78. Judge Collins thus agreed with the panel that, regardless the standard, the claims against Llamado may proceed.

The majority certainly saw it the same way, identifying evidence that Llamado and Harris, "trained medical professionals, knew that Sandoval was unresponsive and seizing but failed to promptly summon paramedics." Pet. App. 41. They failed to do so even though calling paramedics was "standard nursing protocol" for seizures of this sort. *Id*. at 41-42. (alteration

omitted). It is what "every reasonable nurse, knowing what Llamado and Harris knew," would have understood to do. *Id*. at 42.

What is more, the majority below explained that its conclusion as to de Guzman was independent of the formulation of the applicable standard. At the outset, the court observed that "a reasonable nurse in de Guzman's position—i.e., a nurse who was told that Sandoval was sweating, tired, and disoriented, and that 'there was still something going on' that needed to be 'look[ed] at ... more thoroughly'—would understand that Sandoval faced a substantial risk of serious harm." Pet. App. 42. Against that backdrop, the court concluded that the question is whether what de Guzman did—perform a 10-second blood sugar test and, after a normal result ruling out diabetes as the cause of Sandoval's distress, fail to monitor him for six hours—violated Sandoval's constitutional rights. *Ibid*.

Looking at the specific facts of this case, the court determined that a jury could find a constitutional violation:

> We emphasize that this is not a case where a nurse mistakenly misdiagnosed a patient after reasonably attempting to ascertain the cause of unexplained symptoms. Instead, viewing the evidence in the light most favorable to Plaintiff, Nurse de Guzman made essentially no effort to determine why Sandoval was suffering the symptoms reported by Deputy Chavez, nor did he attempt to treat those symptoms. He then abandoned Sandoval for the remaining six hours of his shift and failed to pass along any information to the nurses who relieved him.

Pet. App. 45-46. This held true regardless of the standard applied, as the court of appeals specifically found that de Guzman's knowledge of Sandoval's condition—at least as respondents' evidence shows—would support the conclusion that "de Guzman himself *subjectively* understood that Sandoval had a serious condition requiring medical treatment." *Id*. n.16.

In fact, as we describe in more detail below (see pages 14-15, *infra*), the divergence between the panel opinion and the dissent is ultimately not a *legal* distinction—but a disagreement as to the inferences a jury could draw from this specific factual record. Such case specific application of fact to law is no basis for further review.

Finally, the petition does not raise or otherwise address the *Monell* claim. The questions presented thus would not obviate continuing claims against the County of San Diego. Indeed, the petition's failure to articulate any argument on this score waives it.

In all, whether *Kingsley* applies in these circumstances—and provides for an objective deliberative indifference test—is ultimately immaterial to the dispositions reached below. Regardless of the answer to the questions presented, the Section 1983 claim will proceed against all petitioners. Certiorari, accordingly, is unwarranted.

B. Review is unwarranted because there is no disagreement carrying practical legal consequences.

The Court has repeatedly declined to review this question, and for good reason.[5] It is far from clear that

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[5] See*, e.g., Strain* v. *Regalado*, 977 F.3d 984 (10th Cir. 2020), cert. denied, No. 20-1562, 2021 WL 4509029 (Oct. 4, 2021); *Mays* v. *Dart*, 974 F.3d 810 (7th Cir. 2020), cert. denied, No. 20-990,

the supposed distinction between the *Kinglsey* approach to a Fourteenth Amendment claim and the *Farmer* approach to an Eighth Amendment claim makes any practical difference. Indeed, that much is evident from the dueling opinions below regarding petitioner de Guzman.

1. To start with, in conducting the qualified immunity inquiry below, the panel majority and Judge Collins purported to apply different standards. The majority applied an objective deliberate indifference standard, which it contrasted with "the dissent's subjective standard." Pet. App. 45 n.16.

Yet, both the majority and the partial dissent sought to answer what was functionally the same question—whether de Guzman *knew* that his decision to ignore Sandoval for six hours and fail to pass on information to the next shift would impose a substantial risk of harm to Sandoval.

The panel majority framed the question as whether "a reasonable nurse, knowing what * * * de Guzman knew, would have understood that * * * failing to check on Sandoval for hours and failing to pass in information about his condition * * * presented such a substantial risk of harm to Sandoval that the failure to act was unconstitutional." Pet. App. 41 (alterations omitted). Here the evidence as to de Guzman's knowledge was clear: a deputy *told* de Guzman that Sandoval need to be evaluated more thoroughly,

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2021 WL 4507625 (Oct. 4, 2021); *Gordon,* 888 F.3d 1118, cert. denied, 138 S. Ct. 794 (2019); *Saunders* v. *Sheriff of Brevard Cty*., 735 F. App'x 559 (11th Cir. 2018), cert. denied, *Saunders* v. *Ivey*, 139 S. Ct. 1325 (2019); *Castro* v. *Cty. of Los Angeles*, 833 F.3d 1060 (9th Cir. 2016), cert. denied, 137 S. Ct. 831 (2017); *Bailey* v. *Feltmann*, 810 F.3d 589 (8th Cir. 2016), cert. denied, 137 S. Ct. 60 (2016).

and de Guzman himself recommended placing Sandoval in a sobering cell. See Pet. 44-45 & n.16.

Although purporting to apply a different question, Judge Collins sought to answer the same fundamental question—whether the facts presented could allow a jury to conclude that de Guzman was "aware that Sandoval" had "a serious medical need." Pet. App. 72 (emphasis omitted). Judge Collins just draw different inferences from the evidence. For example, he was of the view that de Guzman's suggestion that Sandoval be placed in a sobering tank would tend to *negate* the inference that de Guzman was "aware that Sandoval was under the influence *in a manner that presented a serious medical need*." *Ibid*. The majority, by contrast, explained why a jury *could* draw the inference that de Guzman in fact was aware of Sandoval's serious medical needs. *Id*. at 45 n.16.

In all, while the panel and partial dissent employed different labels to govern their analysis, it is far from clear that there is any material *legal* distinction. Rather, the divide here was the far more prosaic determination of what inferences could be fairly drawn from *this* evidentiary record.

2. This is hardly a surprise: It is far from clear that there is any material distinction between an objective deliberate indifference test and a subjective one. There are two overlapping reasons for this. Baked into the objective deliberate indifference test is a focus on the defendant's *knowledge*—a defendant is obligated to refrain from placing a detainee in conditions that "a reasonable official in the circumstances would have appreciated" created a "high degree of risk." Pet. App. 20. Meanwhile, because the subjective beliefs of defendants are generally unknowable directly, inferences as to a defendant's *subjective*

knowledge are routinely drawn from objective evidence as to what a defendant did know. However one slices it, the standard always reduces to what a defendant knew and what he or she did in response.

Indeed, the same evidence usually establishes liability under both the objective and subjective standards. Absent a direct admission from the defendant regarding their conscious thoughts during the incident, judges and juries seeking to apply the subjective deliberate indifference test must *infer* that defendant's level of awareness. See*, e.g.*, *Hope* v. *Pelzer*, 536 U.S. 730, 738 (2002) ("We may infer the existence of this subjective state of mind from the fact that the risk of harm is obvious."). Under the subjective deliberate indifference test, courts may infer subjective awareness from evidence that a detainee's medical needs were brought directly to the defendant's attention. See*, e.g.*, *Mays* v. *Sprinkle*, 992 F.3d 295, 305 (4th Cir. 2021) (finding that a jury could determine an officer had subjective knowledge of the plaintiff's medical condition based on the evidence that the official "*noticed* the prescription pills in [the plaintiff's] truck * * *.") (emphasis added); *Meier* v. *County of Presque Isle*, 376 Fed. Appx. 524, 529 (6th Cir. 2010) (declining to hold the official liable because the plaintiff's "intoxication by itself—even at the extreme level indicated by the BAC—was *insufficient to put [the official] on notice* that [the plaintiff] needed medical attention.") (emphasis added).

Subjective awareness can also be inferred by the factfinder through circumstantial evidence tending to show the "obviousness of the risk," departure from "accepted professional judgment," or persistence in an ineffective course of treatment. *Whiting* v. *Wexford Health Sources*, 839 F.3d 658, 663 (7th Cir. 2016) (citing *Petties* v. *Carter*, 836 F.3d 772, 730-731 (7th Cir.

2017)). These same types of evidence would establish objectively unreasonable behavior.

3. Against this backdrop, petitioners' claim of a circuit conflict carrying a material distinction in the resolution of cases unravels. Review of petitioners' preferred cases confirm that there is no material distinction.

The Tenth Circuit, in the case that petitioners principally feature, evaluated "whether Plaintiff alleged facts supporting the notion that Mr. Pratt's condition of delirium tremens was so obvious that any Defendant should have recognized it and escalated the course of treatment accordingly." *Strain*, 977 F.3d at 994. That standard is not materially distinct from that applied here—here, the court applied the facts to find that "a jury could conclude that Ronnie Sandoval would not have died but for the defendants' unreasonable response to his obvious signs of medical distress." Pet. App. 52. That is, although the courts affix different labels to the inquiry—the actual standard is not materially different.

In *Kedra* v. *Schroeter*, for example, the Third Circuit expressly acknowledged that the objective evidence created an inference that satisfied the subjective standard. 876 F.3d 424, 442 (3d Cir. 2017) ("The risk of lethal harm * * * is glaringly obvious, and this obviousness supports the inference that the instructor had actual knowledge of the risk of serious harm.").

The Eighth Circuit rejected a deliberate indifference claim because "[t]he complaint contains a legal conclusion that Sharp was deliberately indifferent but fails to make any allegation about Sharp's knowledge." *Whitney* v. *City of St. Louis*, 887 F.3d 857, 860 (8th Cir. 2018). That same result would be compelled by the holding below, which plainly focused on

what a "reasonable nurse, knowing what Llamado, Harris, and de Guzman knew, would have understood" at the time. Pet. App. 40-41.

In all, petitioners fail to show that the putatively different standards have any significant repercussions as to how cases are resolved. In the absence of this showing, there is no basis whatsoever to resolve a question that appears solely academic.

4. There is universal agreement that a deliberate indifference claim is not—and will not become—a mere negligence or medical malpractice claim. The court here was clear that a claim requires "a showing of 'more than negligence but less than subjective intent—something akin to reckless disregard.'" Pet. App. 20.

That is, however the standard is formulated, all courts agree that the challenged condition or medical need to be "sufficiently serious to constitute objective deprivations of the right to due process." *Darnell* v. *Pineiro*, 849 F.3d 17, 29 (2d Cir. 2017). Allegations of negligence are insufficient to meet any possible test.

Circuits that have adopted the objectively unreasonable standard following *Kingsley* have maintained an identical requirement. When applying the objectively unreasonable test in a suit alleging deliberate indifference after a detainee "died from a doctor's over-prescription of methadone," the Seventh Circuit concluded that "[t]he allegation on this score, the district court rightly recognized, sounds in negligence, which is insufficient to support a claim for inadequate medical care under the Fourteenth Amendment." *McCann* v. *Ogle County*, 909 F.3d 881, 884, 887 (7th Cir. 2018). Similarly, in *James* v. *Hale*, 959 F.3d 307, 318 (7th Cir. 2020), the court held that the evidence offered by the plaintiff was insufficient to bring a

claim of objective unreasonableness, writing that "more than negligence or even gross negligence is required for a viable section 1983 claim for inadequate medical care."

In fact, since the decision below issued, a district court bound by it has plainly distinguished between mere negligence and deliberate indifference. See *Cole* v. *McAllister*, 2021 WL 2917094 at *6-8 (D. Idaho July 12, 2021) (granting summary judgment to the defendant because the objectively unreasonable standard "requires a showing of 'more than negligence but less than subjective intent' * * *. Were this a medical malpractice claim, that would be sufficient to deny summary judgment. But this is a claim of [objective] deliberate indifference under the 14th Amendment * * *." (quoting Pet. App. 20)).

In sum, there is no material, practical disagreement among the circuits warranting review. However the standard is formulated, the issues reduce to what a defendant knew, and whether the conduct so far transgressed that of a reasonable officer that there is a constitutional violation.

C. The decision below properly applies *Kingsley* and the Due Process Clause.

Further, the lower courts have appropriately concluded that *Kingsley* dictates the outcome here. A Fourteenth Amendment claim, regardless of its form, does not require a showing of subjective deliberate indifference, beyond the objective requirement.

1. Under *Kingsley*, to prove an excessive force claim, a pretrial detainee must demonstrate that the officers' use of that force was objectively unreasonable; a detainee does not need to show that the officers were subjectively aware that their use of force was unreasonable. The Court justified its decision on four

grounds. First, an objective standard is "consistent with * * * precedent." *Kingsley* v. *Hendrickson*, 576 U.S. 389, 397 (2015). Second, the test best accords with the text of the Due Process Clause. *Id.* at 400. Third, "experience suggests that an objective standard is workable." *Id.* at 399. Finally, an "objective standard adequately protects an officer who acts in good faith." *Ibid.* None of the Court's reasons are limited to excessive force cases; rather, they apply broadly to all claims brought by pretrial detainees.

As *Kingsley* explains, precedent supports an objective standard to determine the constitutional rights of pretrial detainees. In *Graham* v. *Connor*, the Court concluded that the Due Process Clause protects pretrial detainees from conduct that "amounts to punishment." 490 U.S. 386, 395, n.10 (1989). And in *Bell* v. *Wolfish*, a conditions of confinement case, the Court explained that even "absent a showing of an expressed intent to punish," the Due Process Clause prohibits a prison official acting in a way that is not reasonably related to a legitimate, nonpunitive governmental purpose or acting in a way that "appears excessive in relation to the alternative purpose." 441 U.S. 520, 538 (1979).

The objective framework for evaluating pretrial detainees' claims, which predates *Kingsley*, was not confined to excessive force claims. For instance, *Bell* used the objective standard to evaluate a variety of prison conditions, including a prison's practice of double-bunking inmates. In its analysis, the *Bell* court "examined objective evidence, such as the size of the rooms and available amenities." *Kingsley,* 576 U.S. at 398.

Kingsley recognizes that the objective deliberate indifference test applies to all pretrial detention

claims. For one, it frames its objective deliberate indifference standard as an extension of *Bell*'s objective framework. And *Kingsley* does not limit its discussion to excessive force cases when it cites precedent to support its objective deliberate indifference test. For example, it cites *Block* v. *Rutherford,* which is a conditions of confinement case. *Ibid*.

All this together confirms the propriety of the lower court determination that *Kingsley* properly requires use of an objective unreasonableness standard here.

2. The text of the Due Process Clause compels the same conclusion. Pretrial detainees are not convicted of any crimes and are presumed innocent. As such, they base their claims on the Fourteenth Amendment's Due Process Clause because they may not be punished at all before an adjudication of their guilt. Accordingly, *Kingsley* derived its objective deliberate standard from the Due Process Clause. Convicted prisoners, however, can be punished. And courts evaluate their claims under the Eighth Amendment's Cruel and Unusual Punishments Clause, which regulates their punishment. Understandably, courts interpreting different constitutional Amendments have come up with different standards.

The text of the Due Process Clause does not support a subjective requirement. There is nothing in the text that suggests an inquiry into a prison official's state of mind, as the subjective deliberate indifference test requires. By contrast, the Court found that the Eighth Amendment's text required the subjective deliberate indifference standard. In *Wilson* v. *Seiter,* the Court claimed that "inquiry into a prison official's state of mind" is necessary "when it is claimed that the official has inflicted cruel and unusual punishment." 501 U.S. 294, 299 (1991). According to the

Court, the state of mind inquiry is necessary because only the "unnecessary and wanton infliction of pain implicates the Eighth Amendment." *Id.* at 297. (emphasis omitted). *Farmer* v. *Brennan* repeatedly emphasized that only subjective deliberate indifference can "violate the Cruel and Unusual Punishments Clause." 511 U.S. 825, 834 (1994). According to the Court, the subjective deliberate indifference test "comports best with the text of the [Eighth] Amendment as our cases have interpreted it." *Id. a*t 837. The Due Process Clause lacks this textual basis to justify a subjective deliberate indifference standard.

The Due Process Clause operates differently than the Cruel and Unusual Punishment Clause. The Eighth Amendment creates an outer bound on permissible punishment for convicted prisoners, who can be punished by the state. *Farmer* further justified the mental state component of the test because of the Eighth Amendment's focus on punishment. The Court reasoned that "an official's failure to alleviate a significant risk that he should have perceived but did not . . . cannot under our cases be condemned as the infliction of punishment." *Id.* at 838. The same logic cannot apply to the Due Process Clause because "the State does not acquire the power to punish with which the Eighth Amendment is concerned until after it has secured a formal adjudication of guilt in accordance with due process of law." *Bell*, 441 U.S. at 535 n.16 (quoting *Ingraham* v. *Wright*, 430 U.S. 651, 671, n.40 (1977)). So, pretrial detainees, presumed innocent, "cannot be punished at all, much less 'maliciously and sadistically.'" *Kingsley*, 576 U.S. at 400 (quoting *Graham*, 430 U.S. at 371-372).

3. Finally, if *Farmer* were to supply the governing framework for a Fourteenth Amendment claim, the Court should overturn *Farmer*'s subjective test.

Farmer's subjective deliberate indifference standard rests on unsteady ground.[6] The standard creates an unusual situation where prisoners facing the same form of punishment are treated differently by the Constitution based on the motivation of their punisher. The rule should be rejected. Instead, "the constitutional standard * * * should turn on the character of the punishment rather than the motivation of the individual who inflicted it." *Estelle* v. *Gamble*, 429 U.S. 97, 116 (1976) (Stevens, J., dissenting).

Farmer bases the subjective standard, in part, on the definition of punishment. But punishment "does not necessarily imply a culpable state of mind on the part of an identifiable punisher." *Farmer*, 511 U.S. at 854 (Blackmun, J., concurring). Rather, "[a] prisoner may experience punishment when he suffers 'severe, rough, or disastrous treatment' * * * regardless of whether a state actor intended the cruel treatment to chastise or deter." *Id.* at 854-855. (citing Webster's Third International Dictionary 1843 (1961)).

A dividing line based on a jailor's intent does not comport with the purpose of the Cruel and Unusual Punishments Clause. "A punishment is simply no less cruel or unusual because its harm is unintended." *Farmer* at 856. And "there is no reason to believe that, in adopting the Eighth Amendment, the Framers intended to prohibit cruel and unusual punishments only when they were inflicted intentionally." *Ibid.* The

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[6] See*, e.g.,* Sharon Dolovich, *Cruelty, Prison Conditions, and The Eighth Amendment*, 84 N.Y.U L. REV. 881 (2009); John Stinneford, *The Original Meaning of 'Cruel,'* 105 GEO. L.J 441 (2017) (arguing that the word "cruel" in the Cruel and Unusual Punishment Clause means "unjustly harsh," referring to the effect of punishment, as opposed to "motivated by cruel intent," referring to the intent of the punisher).

Eighth Amendment was adopted to protect prisoners. It was "not adopted to protect prison officials with arguably benign intentions from lawsuits." *Id.* at 857.

II. THE QUALIFIED IMMUNITY QUESTION DOES NOT WARRANT REVIEW.

The Court should similarly decline to review any issue of qualified immunity here. If anything, the Court should abolish the doctrine altogether.

A. The Court should abolish qualified immunity.

The qualified immunity doctrine was created by this Court, and now operates to shield government officials from accountability for a wide range of misconduct. Prior to applying or expanding upon qualified immunity—which is what petitioners here request—the Court should first revisit and reverse qualified immunity in the whole. The doctrine has no support in the text of Section 1983; it has no footing in the common law or history; it is contrary to Congress's intent; and it has been impossible for the lower courts to apply a consistent manner.

As Justice Thomas flatly put it, "[t]here likely is no basis for the objective inquiry into clearly established law that our modern cases prescribe." *Baxter* v. *Bracey*, 140 S. Ct. 1862, 1864 (2020) (Thomas, J., dissenting from denial of certiorari). To the contrary, "the Court adopted the test not because of 'general principles of tort immunities and defenses,' but because of a 'balancing of competing values' about litigation costs and efficiency." *Ibid.* (quoting *Malley* v. *Briggs*, 475 U.S. 335, 339 (1986), and *Harlow*, 457 U.S. at 816). Because the Court's "analysis is no longer grounded in the common-law backdrop against which Congress" drafted Section 1983, the Court no longer is "interpreting the intent of Congress in enacting the Act."

Ziglar v. *Abbasi*, 137 S. Ct. 1843, 1871 (2017) (Thomas, J., concurring) (quoting *Malley*, 475 U.S. at 342) (quotation marks omitted; alteration incorporated). Justice Thomas has thus urged that, "[i]n an appropriate case, we should reconsider our qualified immunity jurisprudence." *Id*. at 1872; see also *Baxter*, 140 S. Ct. 1862, 1864 (2020) (Thomas, J., dissenting).

Justice Sotomayor has likewise expressed concerns regarding the current reaches of the doctrine. *Kisela*, 138 S. Ct. at 1162 (Sotomayor, J., dissenting). Because "[n]early all of the Supreme Court's qualified immunity cases come out the same way—by finding immunity for the officials," Justice Sotomayor cautioned that the current "one-sided approach to qualified immunity transforms the doctrine into an absolute shield for law enforcement officers." *Ibid*. In the Fourth Amendment context, the result is to "gut[]" its "deterrent effect." *Ibid*. More broadly, this "sends an alarming signal to law enforcement officers and the public"—"It tells officers that they can shoot first and think later, and it tells the public that palpably unreasonable conduct will go unpunished." *Ibid*.

Although qualified immunity is putatively defended as a common-law doctrine stemming from good faith, recent scholarship has roundly debunked this myth. See*, e.g.*, William Baude, *Is Qualified Immunity Unlawful?*, 106 CAL. L. REV. 45, 51 (2018). Additionally, qualified immunity is contrary to Congress's intent in passing section 1983. Justice Scalia noted as much when he wrote that "[a]pplying normal common-law rules" to Section 1983 "would carry us further and further from what any sane Congress could have enacted." *Crawford-El* v. *Britton*, 523 U.S. 574, 611 (1998) (Scalia, J., dissenting).

Qualified immunity also has necessarily resulted in inconsistent and unpredictable application by the

lower courts. The lower courts have struggled to determine whether a particular right has been "clearly established" because the Court has provided conflicting advice as to the level of specificity at which a law must be "clearly established." At one end of the spectrum, the Court has told the lower courts that "clearly established law must be particularized to the facts of the case." *White* v. *Pauly*, 137 S. Ct. 548, 552 (2017) (internal quotation omitted). At the other end, the Court has said that qualified immunity "does not require a case directly on point for a right to be clearly established," and that "general statements of the law are not inherently incapable of giving fair and clear warning." *Id.* at 551–552 (internal citations omitted). Navigating between these abstract, polar-opposite instructions has proved challenging for the lower courts, resulting in varied approaches.

Further complicating the practical application of qualified immunity, courts have discretion as to which prong of the qualified immunity analysis they apply first. *Pearson* v. *Callahan*, 129 S.Ct. 808, 821 (2009). When courts answer the second question first, they do not need to determine whether there was a constitutional violation to begin with. This prevents constitutional doctrine from developing, resulting in more confusion in the lower courts about what rights are "clearly established."

Judges across the lower courts have taken note—raising sharp concerns regarding the current calibration of qualified immunity. Judge Willett, for example, recently added his "voice to a growing, cross-ideological chorus of jurists and scholars urging recalibration of contemporary immunity jurisprudence." *Zadeh* v. *Robinson*, 902 F.3d 483, 499-500 (5th. Cir. 2018) (Willett, J., concurring dubitante). Judge Willett continued:

> To some observers, qualified immunity smacks of unqualified impunity, letting public officials duck consequences for bad behavior—no matter how palpably unreasonable—as long as they were the *first* to behave badly. Merely proving a constitutional deprivation doesn't cut it; plaintiffs must cite functionally identical precedent that places the legal question "beyond debate" to "every" reasonable officer.

Zadeh v. *Robinson*, 928 F.3d 457, 479 (5th Cir. 2019) (Willett, J., concurring in part and dissenting in part).

These concerns are broadly recognized. See *Morrow* v. *Meachum*, 917 F.3d 870, 874 n.4 (5th Cir. 2019) (Oldham, J.) ("Some—including Justice Thomas—have queried whether the Supreme Court's post-*Pierson* qualified-immunity cases are 'consistent with the common-law rules prevailing [when [Section] 1983 was enacted] in 1871.'") (alteration incorporated); *Rodriguez* v. *Swartz*, 899 F.3d 719, 732 n.40 (9th Cir. 2018) (Kleinfeld, J.) ("Some argue that the 'clearly established' prong of the analysis lacks a solid legal foundation."); *Thompson* v. *Cope*, 900 F.3d 414, 421 n.1 (7th Cir. 2018) (Hamilton, J.) ("Scholars have criticized [the qualified immunity] standard."); *Ventura* v. *Rutledge*, 2019 WL 3219252, at *10 n.6 (E.D. Cal. 2019) ("[T]his judge joins with those who have endorsed a complete re-examination of the doctrine which, as it is currently applied, mandates illogical, unjust, and puzzling results in many cases."); *Thompson* v. *Clark*, 2018 WL 3128975, at *10 (E.D.N.Y. 2018) (Weinstein, J.) ("The legal precedent for qualified immunity, or its lack, is the subject of intense scrutiny.").

In critiquing prevailing doctrine, Judge James Browning supplied a district court's perspective: "Factually identical or highly similar factual cases are not * * * the way the real world works. Cases differ. Many cases have so many facts that are unlikely to ever occur again in a significantly similar way." *Quintana* v. *Santa Fe Cty. Bd. of Comm'rs*, 2019 WL 452755, at *37 n.33 (D.N.M. 2019). In Judge Browning's view, the current "obsession with the clearly established prong" improperly "assumes that officers are routinely reading Supreme Court and [court of appeals] opinions in their spare time, carefully comparing the facts in these qualified immunity cases with the circumstances they confront in their day-to-day police work." *Ibid*. That is not how officers operate: "in their training and continuing education, police officers are taught general principles, and, in the intense atmosphere of an arrest, police officers rely on these general principles." *Ibid*. In requiring a "highly factually analogous case," this Court's jurisprudence "has either lost sight of reasonable officer's experience or it is using that language to mask an intent to create 'an absolute shield for law enforcement officers.'" *Ibid*.

For all these reasons, prior to applying qualified immunity, the Court should first overturn the doctrine wholesale. Respondents thus raise this argument now to make plain that, should the Court nonetheless grant review, we will vigorously ask the Court to overturn qualified immunity in the whole. Of course, rejecting qualified immunity was an outcome the court of appeals was powerless to endorse.

B. The narrow question presented is unlikely to either recur or affect outcomes.

The qualified immunity question posed by petitioners does not warrant review in any event because

it is an issue that will soon sunset, and it has no practical importance.

1. Petitioner's discussion of the alleged circuit split misconstrues both their own question presented and the decision below to imply a broader and more important conflict. The issue is not broadly "the effect of authority that postdates the challenged conduct" (Pet. 23), but rather how qualified immunity applies in the unusual circumstance where courts tinker with the subjective elements of a claim. The decision below agrees with the premise that only pre-event case law can clearly establish conduct as being unlawful. Pet. App. 40. Accordingly, the disagreement here is the narrow issue whether qualified immunity only addresses the objective *conduct* or also the subjective mental state. *Id.* at 25–26. This is an unusual issue raised by *Kingsley* and its progeny.

Perhaps recognizing the narrow impact of this issue, petitioners pivot to an overly broad characterization of the legal issue presented to explain its importance. They assert the existence of both a continued use of the approach below in the Ninth Circuit and an ongoing intra-circuit split. Pet. 25 & n.5. Neither is true. None of their cited cases involve changed subjective elements—the basis of the opinion below. For example, they cite two cases about whether a court opinion occurring after the facts in the case but summarizing clearly established law at an earlier time is evidence of clearly established law—an unrelated issue. Pet. 25 (citing *Garcia* v. *McCann*, 833 F. App'x 69, 73 (9th Cir. 2020), petition for cert. filed May 17, 2021 (No. 20-1592); *Sampson* v. *County of Los Angeles*, 974 F.3d 1012, 1021-1022 (9th Cir. 2020)). For the alleged intra-circuit split, they cite a non-precedential memorandum opinion considering a constitutional claim without any subjective elements—much

less a changed subjective element. Pet. 25 n.5 (citing *Reyna* v. *County of Los Angeles*, 840 F. App'x 955, 959 (9th Cir. 2021)).

Focusing instead on the question presented here—how the objective qualified immunity analysis is affected by changing subjective elements—the qualified immunity issue is narrow and not prospectively important. This issue is rare historically. Petitioners do not identify any cases raising this issue prior to *Kingsley*. See Pet. 26–28 (citing only cases since 2015 for how to treat changed subjective elements). So far as we are aware, this issue matters, if at all—and it likely does not matter at all—for the small snapshot of cases where conduct pre-dates a circuit's evaluation of *Kingsley*. That is a narrow range of cases—and one that is rapidly sunsetting with the passage of time and distance from *Kingsley* itself.

2. Even then, for reasons overlapping with those discussed above, it is unclear whether this issue has any practical significance. As we demonstrated (see pages 14-15, *supra*), in addressing qualified immunity for petitioner de Guzman, both the panel and Judge Collins applied the same effective analysis—they just used different words. And that is unsurprising in the context of a deliberate indifference claim: An officers conduct is measured in view of the knowledge he or she acquires—which is one way that a litigant may prove subjective deliberate indifference.

The fleeting qualified immunity issue raised by *Kingsley* is both rare and unlikely to affect outcomes. It is, therefore, not a prospectively important legal issue.

C. The decision below correctly denied qualified immunity.

The court of appeals correctly focused on whether the officials' conduct violated clearly established law.

Qualified immunity is not some academic exercise, whereby officers parse specific theories of constitutional law. Rather, it turns on whether a reasonable officer would know that his or her *conduct* is impermissible.

That is to say, law is clearly established "[w]here an official could be expected to know that certain *conduct* would violate statutory or constitutional rights." *Harlow* v. *Fitzgerald*, 457 U.S. 800, 819 (1982) (emphasis added). Thus, the "salient question" for the "clearly established" prong of the qualified immunity test "is whether the state of the law at the time of an incident provided fair warning to the defendants that their *alleged conduct* was unconstitutional." *Tolan* v. *Cotton*, 572 U.S. 650, 656 (2014) (emphasis added) (quotation and alteration omitted).

A contrary rule would not advance the notice purposes of qualified immunity. Qualified immunity allows officials to act in the face of uncertainty and requires them to have notice of the applicable legal standard before bearing liability. *Saucier* v. *Katz*, 533 U.S. 194, 206 (2001) ("Qualified immunity operates in this case, then, just as it does in others, to protect officers from the sometimes 'hazy border between excessive and acceptable force * * * and to ensure that before they are subjected to suit, officers are on notice their conduct is unlawful") (citing *Priester* v. *Riviera Beach*, 208 F.3d 919, 926-927 (11th Cir. 2000)). See also *Kisela* v. *Hughes*, 138 S. Ct. 1148, 1153 (2018) (similar).

Here, there is no doubt that the *conduct* petitioners had a duty to undertake was well established. As the panel put it, "[t]here can be no debate that a reasonable nurse would understand that an individual who is unresponsive and seizing faces a substantial risk of suffering serious harm"—and thus the nurse has a duty to act if he or she is aware of those facts. Pet. App. 22. This inquiry already contains a knowledge requirement—for an official to be liable, he or she must be *aware of* that substantial risk. Adding further inquiry into the subjective state of mind at best adds nothing—and, at worst, would suggest to officers that they could avoid liability if they somehow refrain from making certain mental impressions.

When *Kingsley* clarified the lack of a subjective element in pretrial excessive force claims, the Seventh Circuit on remand highlighted the tenuous notice function served by considering the former understanding of the subjective element. It would require "the dubious proposition" that the officers "were on notice only that they could not have a reckless or malicious intent and that, as long as they acted without such an intent, they could apply any degree of force they chose." *Kingsley* v. *Hendrickson*, 801 F.3d 828, 833 (7th Cir. 2015). Adopting petitioners' approach in this case would imply that prison officials could avoid liability for past wrongful acts so long as they somehow avoided subjective awareness of those risks. That is no doubt a dubious proposition.

CONCLUSION

The Court should deny the petition.

Respectfully submitted.

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