No. 23-259

In The Supreme Court of the United States

LEWIS COUNTY, KENTUCKY, ET AL.,
Petitioners,
V.

JULIE HELPHENSTINE,
Respondent.

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

BRIEF OF *AMICUS CURIAE* THE VIRGINIA SHERIFFS ASSOCIATION AND THE KENTUCKY JAILERS ASSOCIATION IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI CURIAE*[1]

The Virginia Sheriffs Association ("VSA") was established in 1977 as a 501(c)(6) organization dedicated to representation of sworn and unsworn Virginia Sheriffs Office personnel. VSA represents its membership in various ways through interaction with both federal and state legislative representatives on matters of interest to the membership and which pertain or relate to public safety and their working conditions. VSA is actively engaged in improving the working knowledge of its membership by sponsoring educational seminars on state and federal law and administers the Virginia Sheriff's Institute program which confers recognition on those select members who complete a rigorous course of study. Elected constitutional officers, Virginia Sheriffs are primarily responsible for the operation of jails which are manned by both sworn deputies and unsworn civilian staff to include medical and mental health staff, both employed and/or under contract. Many Virginia and Kentucky jails hold a combination of pretrial detainees and adjudged prisoners awaiting transfer to permanent correctional facilities. These Associations are concerned with any expansion of the *Kingsley* holding to conditions of confinement which sound in serious medical need as such have devolved into what are in reality state based malpractice torts in constitutional clothing. The objective standard applied below does not bear a relationship to the correct

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[1] Rule 37 Statement: All parties were timely notified in accordance with Rule 37.2 and no counsel for any party took any part in the preparation and presentation of this brief.

determination of the state of mind necessary to establish a constitutional due process injury. Quite apart from the deliberate and intentional application of force, the identification of the need for delivery of medical care to confined inmates, many of whom have serious compound medical issues, mental health and substance abuse issues,[2] cannot readily be defined without resort to the well-settled application of a two-part deliberate indifference standard. Such claims involve inaction not punishment. To "punish", however it is termed in the pretrial detention setting, still requires an elevated mental state given the well settled standard for measuring governmental conduct in weighing a due process based harm.

The Kentucky Jailers Association is a nonprofit association whose members include the constitutionally elected jailers and appointed jail administrators in the Commonwealth of Kentucky. The goal of the association is to support, educate and promote the best interest of jailers in the Commonwealth of Kentucky. Jails throughout the Commonwealth of Kentucky contain thousands of pretrial detainees as well as convicted prisoners awaiting transfer and the standards applicable to

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[2] Virginia Hospital & Healthcare Association, "Inmate Health Care: The Impact on Virginia's Health Care System, Focus, December 2008 Issue 2; Bronson, Jennifer, Ph.D., Jessica Stroop, Stephanie Zimmer, Marcus Berzofsky, Dr.P.H., "Drug Use, Dependence, and Abuse Among State Prisoners and Jail Inmates, 2007-2009," U.S. Department of Justice, Bureau of Justice Statistics Special Report, June 2017, Revised August 10, 2020; Maruschak, Laura M., "Medical Problems of Jail Inmates," U.S Department of Justice, Bureau of Justice Statistics Special Report, November 2006.

medical care in the constituitional context is of critical importance to guide them. Both Associations ask this Court to resolve significant splits within the circuit courts of appeal in the application of the standard for consideration of the due process claim of a pretrial detainee sounding in serious medical need.

INTRODUCTION AND SUMMARY OF ARGUMENT

Decades ago, this Court held that when state action, through the affirmative exercise of its power, so restrains an individual's liberty that it renders him unable to care for himself and at the same time fails to provide for his medical care, such action transgresses the substantive limits on state action set by the Eighth Amendment and the Due Process Clause of the Fourteenth Amendment .*DeShaney v. Winnebago Cnty. Dep't of Soc. Servs*., 489 U.S. 189, 200, 109 S. Ct. 998, 103 L. Ed 2d 249 (1989). A distinct class of cases considered by this Court since it first provided constitutional protection to incarcerated persons (*see Estelle v. Gamble*, 429 U.S. 97, 104, 97 S.Ct. 285, 50 L.Ed.2d 51 (1976)) have been decided under the general definition of "conditions of confinement." *Bell v. Wolfish,* 441 U.S. 520 (1979). One of these specific conditions of confinement has focused on serious medical need and prison or jail official's responses to those needs through the lens of due process. In *Farmer v. Brennan*, 511 U.S. 825, 828, 114 S.Ct. 1970, 1974, 128 L.Ed.2d 811 (1994), this Court established a standard of deliberate indifference in considering an Eighth Amendment claim and held that liability could not be found unless an official

knows or disregards an excessive risk to inmate health or safety and 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 in fact and to establish arbitrariness in that context the *mens rea* for such indifference was gleaned from the criminal law.[3]

The deliberate indifference standard took into consideration that degree of *mens rea* necessary to provide a clear dividing line between a state-based jailhouse malpractice claim and a constitutional tort sounding in a deprivation of due process. Importantly, in *Farmer, supra*, this Court flatly rejected an objective test for deliberate indifference conditions of confinement claims particularly excessive force. 511 U.S. at 839.

Federal courts around the country had for years utilized the deliberate indifference standard even in Fourteenth Amendment cases when addressing such claims given that the due process rights of a pretrial detainee are at least as great as the Eighth Amendment protections available to convicted prisoners. *Revere v. Mass. Gen. Hosp.*, 463 U.S. 239, 244-46, 103 S.Ct. 2979, 77 L.Ed. 2d 605 (1983); *Mays v. Sprinkle*, 992 F.3d 295, 300 (4th Cir. 2021). It is here where the sufficiently culpable state of mind standard provides a bright line between a constitutional due process-based harm and a state tort. For decades, this analysis controlled conditions of confinement claims sounding in deliberate indifference to serious medical need. It was also

[3] 1 W.LaFave and A. Scott, Substantive Criminal Law, §§3.4, 3.5 pp.296-300, 313-314 (1986).

understood that mere disagreements between an inmate and prison medical staff over the inmate's proper medical care were insufficient to establish a constitutional harm including inadvertence. *Scinto v. Stansberry*, 841 F.3d 219, 225 (4th Cir. 2016). In fact, in order to ensure that distinct nature of this harm is contrasted with a state-based cause of action sounding in medical negligence, federal circuit courts of appeal have stated that such treatment "must be so grossly incompetent, inadequate or excessive as to shock the conscience or to be intolerable to fundamental fairness." *Miltier v. Beorn*, 896 F.2d 848, 851 (4th Cir. 1990). *See also Stevens v. Holler*, 68 F.4th 921, 933 (4th Cir 2023).

It is against this significant precedential backdrop that *Kingsley v Hendrickson*, 576 U.S. 389, 135 S. Ct.2466, 192 L.Ed2d 416 (2015) was decided by this Court considering a narrow and limited issue of whether federal courts should consider a state actor's subjective intent in the specific context of the interpretation of that degree excessive force utilized in claims brought by pretrial detainees. 576 U.S. at 402. Notwithstanding the limited nature of *Kingsley*'s holding to that species of intentional and deliberate conduct, some circuit courts, including the *Helphenstine* Court, accepted an invitation never extended. That is to expand this limited holding to displace a subjective deliberate indifference standard with a new objective standard untethered to the necessary evaluation of the subjective intent of the state actor when considering a pretrial detainees' serious medical need case. The significant split in the circuit courts justifying this Court's intervention has been amply framed in the Petitioner's request for a

grant of certiorari and will not be duplicated here. It will be suggested herein that such a standard duly limited by this Court in *Kingsley* and affirmed in both prior and subsequent opinions as "excessive force" jurisprudence recognized the varying contexts in which due process-based claims may be reviewed. Inaction by state actors in the medical need context implicates an entirely different analysis that is not suited to the excessive force scenario whether on the street or in a correctional setting. The volitional and deliberate application of physical force by state actors in and out of such facilities stands in stark contrast to the complexities of medical diagnoses and treatment of a population of inmates with myriad serious and preexisting medical conditions including mental health issues and the medical judgments applied or not applied. It is suggested that in *Kingsley* this Court limited its holding because it previously held in *Farmer* that the deliberate indifference standard utilized for conditions of confinement claims is inappropriate when officials stand accused of using excessive physical force. The court below erred in expanding the objective test to this context and the significant split in the circuits has created arbitrary applications of due process analysis simply based upon the geographical location of detainees. There is one Fourteenth Amendment Due Process Clause and there should be one decisional test in a serious medical need case.

I. THE SPLIT IN THE CIRCUIT COURTS OF APPEAL IS COMPOUNDED BY A FURTHER INCONSISTENCY AMONG THESE COURTS IN THE APPLICATION OF THE OBJECTIVE STANDARD NEVER MANDATED BY *KINGSLEY*

A. Certiorari has been granted in the face of much less confusion especially in an area where consistency is imperative not only to protect from erosion of principles of due process into state-based torts but also to safeguard the limited jurisdiction of federal courts.

In *Farmer v Brennan*, 511 U.S. 825,828-829 the Court granted certiorari because;

> "Courts of Appeal had adopted inconsistent tests for "deliberate indifference." Compare, for example, *McGill v. Duckworth*, 944 F.2d 344,348 (CA7 1991)(holding that "deliberate indifference" requires a "subjective standard of recklessness"), cert. denied, 503 U.S. 907,117 L.Ed 2d 493, 112 S.Ct. 1265 (1992), with *Young v. Quinlan*, 960 F.2d 351,360-361(CA 3 1992) ("[A] prison official is deliberately indifferent when he knows or should have known of a sufficiently serious danger to an inmate.")

The instant substantive field is further crowded with free-lance assertions of the test utilized to weigh the actions of an official in a serious medical need setting. These courts, acting upon a non-issued "mandate" from this Court in *Kingsley* and rejecting the well

settled *Farmer* formulation utilized for Fourteenth Amendment Due Process claims as well as Eighth Amendment claims in serious medical needs cases, have created an impossible and confusing scenario for those responsible for the care of pretrial detainees. This also has eroded the constitutional due process tort and its associated threshold analysis into nothing more than jailhouse malpractice claims with a negligence-based foundation regardless of the labeling. This is contrary to the long-declared statements of this Court which have heretofore framed the parameters of a true due process violation by the executive and its associated intent and arbitrariness. *See Collins v. City of Harker Heights*, 503 U.S. 115,112 S.Ct 1061,117 L.Ed 2d 261 (1992). Compare *Gordon v. County of Orange*, 888 F. 3d 1118,1125 (9th Cir. 2018)(framing the inquiry as "objective reasonableness"), and *Charles v. Orange County*, 925 F.3d 73,87(2nd. Cir. 2019 (similar), with *Fraihat v. ICE*, 16 F.4th 613,636-637(9th Cir 2021) (requiring more than an "inadvertent failure to provide adequate medical care"); and *Darby v. Grenman*, 14 F.4th 124,129 (2d. Cir 2021)(requiring a conscious disregard of a substantial risk of serious harm'); *Pittman ex rel. Hamilton v. County of Madison*, 970 F.3d 823,827-28(7th Cir. 2020) (framing the post-*Kingsley* inquiry into objective reasonableness of a prison official's action as separate from whether the defendant acted "purposefully, knowingly, or…recklessly," the latter of which is shown when a prison official "strongly suspect[s] that [her] actions would lead to harmful results'); *McGee v. Parsano* 55 F.4th 563,569 (7th Cir. 2022)(imposing a "reason to know" standard for non-medical jail staff). The foregoing was noted by Circuit Judge Readler in

his dissent from the denial of rehearing in the case at bar. *Helphenstine,* 65 F.4th at 796. The foregoing cases establish the need for this Court to reinforce the essential and limited coverage of such a cause of action when derived from the Due Process Clause, namely, that such protection was designed to protect the individual from arbitrary executive action that shocks the conscience. *Rochin v. California*, 342 U.S. 165,172, 96 L.Ed. 183, 72 S.Ct. 205 (1952), *Daniels v. Williams*, 474 U.S.327,331,88 L. Ed. 2d 662, 106 S. Ct. 662 (1986). Tort based formulations in constitutional disguise do not meet the traditionally high threshold for such claims. In *Davidson v. Cannon*, 474 U.S.344,347, 106 S.Ct.668, 88 L.Ed.2d 677 (1985) the Court affirmed that:

> …In *Daniels* we held that the Due Process Clause of the Fourteenth Amendment is not implicated by the lack of due care of an official causing *unintended* injury to life, liberty or property in other words where a government official is merely negligent in causing the injury, no procedure or compensation is constitutionally required (*emphasis ours*).

This stringent standard of fault and proof that a state actor disregarded a known or obvious consequence of his action requires courts to separate, not merge, omissions that result from intentional choice from those that are merely or unintentionally negligent. In fact, subjective recklessness as that term is used in the criminal law is the appropriate test for deliberate indifference. *Farmer* 511 U.S. at 840. *See also Norton v. Dimazana* 122 F3d 286,291 (5th Cir 1997.) The detour from these principles by utilizing civil

negligence based standards should be reviewed by this Court as guardian of the strict constitutional parameters of this cause of action.

B. The objective standard erroneously applied below is not compatible with cases wherein it is alleged that a state actor failed to act as opposed to the knowing and purposeful application of force to such a degree that it is tantamount to punishment. *Kingsley* involved an excessive force claim not a deliberate indifference claim.

The Court in *Strain v. Regalado*, 977 F3d 984 (10th Cir. 2020) cert. denied, 142 S. Ct. 312 (2021), squarely addressed the differences between the intentional action of excessive force volitionally applied and the inaction that characterizes most if not all cases of serious medical need. In the former scenario, the official's state of mind with respect to the proper interpretation of the force is not considered. *Id.*at 992 citing *Kingsley* 576 U.S. at 396. However, the Court noted that *Farmer* had already distinguished deliberate indifference cases- where an official's subjective intent behind objectively indifferent conduct matters- from the distinct class of cases involving excessive force which does not require that an official intended for force to be excessive. *Id.*, at 992 citing *Farmer* 511 U.S. at 835 (explaining that the "application of the deliberate indifference standard is inappropriate in one class of prison cases: when officials stand accused of using excessive physical force"). Removing the subjective component from the other classes of claims would thus erode the intent requirement inherent in such cases. *Id.*at 993. The

Court therefore declined to extend *Kingsley* to deliberate indifference claims. *Id*. at 993.

A pretrial detainee can establish that a restriction or condition of confinement, such as a strip search requirement, is not reasonably related to a legitimate government purpose, which indicates that the purpose behind the condition is punishment. "[I]f a restriction or condition is not reasonably related to a legitimate goal—if it is arbitrary or purposeless—a court permissibly may infer that the purpose of the governmental action is punishment that may not constitutionally be inflicted upon detainees *qua* detainees." *Bell*, 441 U.S. at 539.

In most if not all cases involving medical treatment, a pretrial detainee can show that a governmental official's failure to act in the face of a sufficiently serious medical need constituted punishment if the detainee can establish that the official was deliberately indifferent to a substantial risk of harm. *Farmer* 511 U.S. at 837-838. This Court has made clear that a failure to act is not punishment at all unless the government official actually KNEW of a substantial risk and consciously disregarded it. *Farmer, Id. at 837-838*. This standard follows from the "intent requirement" implicit in the word "punishment," *Wilson v. Seiter*, 501 U.S. 294, 298-300, 111 S. Ct. 2321, 115 L. Ed. 2d 271 (1991). *Kingsley* adopted an objective standard for the nature and duration of the force used as an interpretative tool but in fact rejected the notion that liability could attach without intent by the state actor to use force in the first place. 507 U.S. at 395-396. It is submitted that in divining "punitive intent" in either a pretrial setting,

or "punishment" in the case of a convicted prisoner, in the factual context at issue the actor's intent is critical to be determined subjectively. In the excessive force scenario the intent is evident from the blows landed or the instrumentalities of force wielded volitionally. Not so with the complexities of medical treatment in all but the most egregious cases.

The conclusion drawn is that the cumulative effect of excessive force applied intentionally is tantamount to impermissible punishment. *Kingsley* is consistent with the Supreme Court cases establishing that where the government official's affirmative acts are shown to be "excessive in relation" to any "legitimate governmental objective," a court "permissibly may infer" that they are punitive in nature. *Bell*, 441 U.S. at 537-39. Multiple levels of force including a Taser were applied to the detainee in *Kingsley* well after he was objectively under control. In considering these facts the *Kingsley* Court relied upon significant precedent specific to excessive force claims while not expressly applying it to other conditions of confinement scenarios leaving significant precedent in place. In fact, later, in *Lombardo v. St Louis*, 141 S. ,Ct 2239, 210 L.Ed 2d 609,610, (2021) the Court further limited the reach of *Kingsley's* holding by stating "in assessing a claim of *excessive force*, courts ask whether the officer's actions are objectively unreasonable" without expanding the objective test further in considering actions directed toward a pretrial detainee in an arrest scenario. The Court reasoned that the Due Process Clause is particularly concerned with punishment of pretrial detainees, citing *Graham v. Conner*, 490 U.S. 386,397, 109 S. Ct. 1865, 104 L. Ed. 2d 443 (1989), concluding that the Due Process Clause protects a pretrial detainee from

the use of excessive force that is tantamount to punishment. *Kingsley*, 576 U.S. at 398.

But it is submitted that the *Kingsley* standard is not applicable to cases where a government official fails to act in a case of medical need requiring a grant of certiorari. In analyzing a pretrial detainee's Fourteenth Amendment claim, the key question is whether the situation at issue amounts to impermissible punishment. While punitive intent may be inferred from affirmative acts that are excessive in relationship to a legitimate government objective, the mere failure to act does not raise the same inference. *See Farmer*, 511 U.S. at 837-38. Rather, a person who unknowingly fails to act—even when such a failure is objectively unreasonable—is negligent at most. *Id.* And this Court has made clear that "liability for negligently inflicted harm is categorically beneath the threshold of constitutional due process." *Kingsley*, 135 S. Ct. at 2472 (citing *County of Sacramento v. Lewis*, 523 U.S. 833, 849, 118 S. Ct. 1708, 140 L. Ed. 2d 1043 (1998)). The clear pronouncements of the Court in *County of Sacramento* reinforces that the "mission creep" present in the case below as well as the cases following its reasoning is erroneous particularly where a state actor in assessing serious medical need fails to act or does not act consistent with a state defined standard of care. The Court stated:

> "…Our cases dealing with abusive executive action have repeatedly emphasized that only the most egregious official action can be said to be arbitrary in the constitutional sense."

112 S. Ct. at 1716 citing *Daniels, supra* at 332.

Kingsley itself maintained the foundational rule that a constitutional tort must take into consideration the subjective state of mind of the actor. 576 U.S at 395-96. The excessive force applied volitionally to a pretrial detainee on or off of the street is entirely conceptually distinct therefore from the actions or inactions of medical and non-medical personnel exercising judgements in dealing with a large population of inmates both pre and post-conviction in the same facility most of whom have myriad pre-existing and complex conditions, including substance abuse that compound and confound the judgments utilized. Only the long standing and well formulated deliberate indifference standard with its traditional subjective component can properly harmonize protected rights of such detainees with the scienter requirements necessary to invoke constitutional protections sounding in due process.

II. THE STANDARD UTILIZED BY THE *HELPHENSTINE* COURT IMPERMISSIBLY REMOVES ANY REAL EXAMINATION OF THE STATE ACTOR'S SUBJECTIVE INTENT AND SUBSTITUTES AN ILL-DEFINED CIVIL RECKLESSNESS STANDARD WHICH IS INCOMPATABLE WITH A DUE PROCESS HARM IN THE INSTANT CONTEXT AND REVIEW BY THIS COURT CAN OCCUR WITH A COMPLETE RECORD

Once the issue of serious medical need has been established upon the record, the court in *Helphenstine* required "proof that each defendant acted deliberately (not accidently) and also recklessly in the face of an

unjustifiably high risk of harm that is either known or so obvious that it should be known." 65 F.4th at 596.

Circuit Judge Readler noted his concern in his dissent in the *Helphenstine* panel's denial of rehearing *en banc* that the traditional subjective standard was replaced with a "nebulous inquiry into the defendant's failure to take appropriate action" which would serve to cause the "relinquishing of any serious inquiry into the subjective intentions of the sued governmental official" since the plaintiff "would only have to show that the defendant was "objectively unreasonable" in not taking action to abate such a risk. This "replaced all subjective inquiries." He noted that this was part of a tendency of his circuit to "water down deliberate indifference claims into a more general right to be free from jailhouse malpractice." 65 F 4th at 794. Any decision to treat, for instance, withdrawal symptoms or symptoms that mask another more dangerous underlying pathology with a given method is of course "deliberate" but without any subjective awareness of resulting harm. What is then left is simply to determine "recklessness" for the trier of fact using a civil based hindsight without any further real examination of the actor's intentions. The lack of clarity requiring review by this Court is apparent lest every constitutional claim devolves into a battle of retained experts on the level of departure from what is, in reality, a state-based standard of care.

In fact, such a standard flies in the face of *Farmer*'s command that given the heightened scienter standard of punishment which must also apply when weighing a due process based harm, "prison officials who lacked knowledge of a risk cannot be said to have inflicted

punishment, it remains open to the officials to prove they were unaware even of an obvious risk to inmate health or safety…..Prison officials charged with deliberate indifference might show for example that they were therefore unaware of the danger or that they knew the underlying facts but believed (albeit unsoundly) that the risk to which the facts gave rise was insubstantial or insignificant" 511 U.S. at 844. The importance of subjective scienter was emphasized by *Farmer*:

> …. That does not, however, fully answer the pending question about the level of culpability deliberate indifference entails, for the term recklessness is not self-defining. The civil law generally calls a person reckless who acts or (if the person has a duty to act) fails to act in the face of an unjustifiably high risk of harm that is either known or so obvious that it should be known. *See* Prosser and Keeton § 34, pp. 213-214; Restatement (Second) of Torts § 500 (1965). The criminal law, however, generally permits a finding of recklessness only when a person disregards a risk of harm of which he is aware. *See* R. Perkins & R. Boyce, Criminal Law 850-851 (3d ed. 1982); J. Hall, General Principles of Criminal Law 115-116, 120, 128 (2d ed. 1960) (hereinafter Hall); American Law Institute, Model Penal Code § 2.02(2)(c).

Farmer, 511 U.S. 825, 836-837.

Any objective standard grounded in "recklessness" without more is in effect a negligence standard only in

degree which cannot stand given the stringent requirements for a due process violation whether controlled by the Fourteenth Amendment or the Eighth Amendment. The removal of any real inquiry into subjective intent and awareness of risk must be addressed by this Court. Whether labeled as "punishment," "punitive action" or arbitrary and egregious government action, only proof of and a real decisional evaluation of the state actor's subjective intent in the environment of medical care gives rise to what should be a limited constitutional remedy in a federal forum.

CONCLUSION

Justice Scalia duly noted in his dissent in *Kingsley*;

> … There is an immense …body of state statutory and common law under which individuals abused by state officials can seek relief. Kingsley himself, in addition to suing respondents for excessive force under 42 U.S.C. § 1983 brought a state law claim for assault and battery……"

576 U.S. at 408.

There is a blurred line between state-based torts sounding in degrees of medical negligence and the standards applied in the Circuit Courts of Appeal at issue here. Judicial fealty to the true parameters of a constitutional claim sounding in due process must be reinforced by this Court to reduce confusion, inconsistency and to protect the limited jurisdiction of federal courts. The writ of certiorari should be granted.

Respectfully submitted,

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