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 *AMICI CURIAE* NATIONAL TROOPERS COALITION, ARKANSAS ASSOCIATION OF CHIEFS OF POLICE, CALIFORNIA POLICE CHIEFS ASSOCIATION, CONNECTICUT POLICE CHIEFS ASSOCIATION, FLORIDA POLICE CHIEFS ASSOCIATION, KENTUCKY ASSOCIATION OF CHIEFS OF POLICE, LOUISIANA ASSOCIATION OF CHIEFS OF POLICE, MICHIGAN ASSOCIATION OF CHIEFS OF POLICE, MICHIGAN ASSOCIATION OF POLICE ORGANIZATIONS, MICHIGAN STATE POLICE TROOPERS ASSOCIATION, ET AL, IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

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INTEREST OF *AMICI CURIAE*[1]

Amici Curiae are state and national law enforcement organizations, representing tens of thousands of members collectively. Their members interact with pretrial detainees in county jails, municipal detention facilities and in the course of transport from one custodial location to the next. Diverse in their missions, *Amici* have a unified interest in ensuring that individual officers are treated fairly and equitably across the Circuits with clear legal guidance regarding the scope of potential constitutional liability when faced with claims of inadequate medical care by pretrial detainees.

The National Troopers Coalition represents state troopers and highway patrol nationally. Its mission is to assist state associations with national representation and cooperation, develop standards and policies, improve benefits and programs, advocate for training expansion, and advance the working conditions for its 42,000 members from 43 states.

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[1] In accordance with United States Supreme Court Rule 37.6, *Amici Curiae* state that no counsel for any party has authored this brief in whole or in part or has made any monetary contribution to fund the preparation or submission of this brief. Tokio Marine HCC—Public Risk Group has contributed monetarily to the preparation and submission of this brief. Under Rule 37.2, *Amici Curiae* state that all parties received written 10-day notice of the intent to file this brief and have consented in writing to its filing.

The following state associations of chiefs of police are comprised of each state's top law enforcement executives:

Arkansas Association of Chiefs of Police;
California Police Chiefs Association;
Connecticut Police Chiefs Association;
Florida Police Chiefs Association;
Kentucky Association of Chiefs of Police;
Louisiana Association of Chiefs of Police;
Michigan Association of Chiefs of Police;
Mississippi Association of Chiefs of Police;
Missouri Police Chiefs Association;
New Hampshire Association of Chiefs of Police;
New Jersey State Association of Chiefs of Police;
Oregon Association Chiefs of Police;
Pennsylvania Chiefs of Police Association;
Utah Chiefs of Police Association;
Virginia Association of Chiefs of Police and Foundation; and
Wisconsin Chiefs of Police Association, Inc.

Each state association is organized generally with the purpose of promoting the highest standards of the law enforcement profession. The state associations serve municipal police, state and county law enforcement officers, airport police, college and university police, tribal police, railroad and port authority police, and private business and security firms.

The Michigan Association of Police Organizations is a non-partisan coalition with the purpose of legal advocacy on issues that could impact the Michigan public safety community. It represents the interests of 10,000 members across fourteen law enforcement agencies.

The Michigan State Police Troopers Association, comprised of over 1,650 members, serves as the exclusive labor representative of troopers and sergeants of the Michigan State Police.

The Police Officers Labor Council is a Michigan organization created to improve the working conditions of its members in the law enforcement field. It represents over 327 law enforcement collective bargaining units throughout the state of Michigan, for a total of over 3,300 officers.

* * *

While this Court's decisions as to the scope of liability under 42 U.S.C. § 1983 have consistently recognized that an individual may be liable only for the individual's own actions, the Second, Sixth, Seventh and Ninth Circuits have adopted a purely objective standard for Fourteenth Amendment claims of inadequate medical care that seeks to hold an individual officer liable without any intentional act, including under circumstances where the officer was indisputably unaware of any need to act. This presents officers with no reasonable way to guard against individual liability or mitigate personal risk.

Amici are gravely concerned that this expansion of personal liability by the Second, Sixth, Seventh and Ninth Circuits, untethered to any traditional Fourteenth Amendment standard, poses dangerous consequences to the law enforcement profession. Accordingly, *Amici* urge this Court to address the proper standard to be applied to claims of inadequate medical

care by pretrial detainees and ensure that officers are held to a uniform standard of liability, adequately addressed through the traditional deliberate indifference standard.

SUMMARY OF THE ARGUMENT

Until 2016, the Circuits uniformly applied the familiar deliberate indifference test set forth by this Court in *Farmer v. Brennan* to claims of inadequate medical care by all individuals in custody, whether convicted or awaiting trial. Under the *Farmer* standard, individual officers could be held constitutionally liable for deliberately disregarding a known serious risk to inmate health or safety. This subjective-objective standard appropriately aligns with this Court's interpretation of the Fourteenth Amendment as prohibiting "punishment" of pretrial detainees.

However, in a flawed attempt to expand this Court's excessive force decision in *Kingsley v. Hendrickson* to claims of inadequate medical care, the Sixth Circuit has joined the Second, Seventh and Ninth Circuits in holding that evidence of deliberateness is no longer required. Adopting a purely objective test, these circuits have tossed aside all subjective considerations to hold an officer liable for what they did *not*, but purportedly *should have* known.

In so doing, the Second, Sixth Seventh and Ninth Circuits fail to recognize that use-of-force claims addressed by *Kingsley* are categorically different.

Inherent in the use of force is an intentional act with anticipated consequences. That same intent and knowledge is not inherent in a medical care claim where an officer took no affirmative action and was never aware that action was needed. An expansion of the *Kingsley* into this context defies this Court's historical interpretation of the Fourteenth Amendment and its reasoning surrounding medical care claims, generally.

While *Estelle v. Gamble* began by addressing Eighth Amendment considerations of cruel and unusual punishment, this Court's jurisprudence surrounding claims of inadequate medical care is not necessarily so limited. Expounding upon *Estelle*, this Court in *Farmer* addressed, more broadly, concerns of "punishment," explaining that "an official's failure to alleviate a significant risk that he should have perceived but did not, while no cause for commendation, cannot under our cases be condemned as the infliction of punishment."

"Punishment" is not an exclusively Eighth Amendment consideration. This Court has long held that, if an officer's failure to act cannot be condemned as punishment, it cannot amount to a violation of a pretrial detainee's Fourteenth Amendment rights. Anything less would amount to a constitutionalization of medical malpractice.

Ultimately, local jails were never intended to be healthcare facilities, and officers are not, by default, doctors educated in providing nuanced medical care.

Yet, providing medical care to the millions of people booked into local jails each year, while maintaining order and security, has become a monumental task. The way in which each local facility balances concerns of medical care, security, staffing, and training is a matter of institutional policy, outside of the control of the individual officer. In holding individual officers constitutionally liable for what they "should have known" but undisputedly did not, the objective standard faults individuals for the training and staffing decisions of their entity, carving out a new area of vicarious liability, traditionally prohibited under 42 U.S.C. § 1983.

As it currently stands, custodial employees are subjected to disparate levels of civil liability based upon the state in which they are employed. *Amici* urge this Court to restore uniformity in the application of the Fourteenth Amendment and ensure that all defendants are held to the appropriate constitutional standard, regardless of the court in which they happen to find themselves.

REASONS TO GRANT THE PETITION

I. The Circuits Are Sharply Divided in an Acknowledged 4-4 Split on the Standard for Claims of Inadequate Medical Care by Pretrial Detainees.

The past six years have brought about a tremendous shift in potential liability for officers in the

context of claims for inadequate medical care. This was not always so.

Beginning with *Estelle v. Gamble*, 429 U.S. 97 (1976), and solidified by *Farmer v. Brennan*, 511 U.S. 825, 834 (1994), this Court has long applied an objective-subjective test of deliberate indifference to Eighth Amendment claims of inadequate medical care. This familiar test asks whether an officer knew of an excessive risk to inmate health or safety and deliberately disregarded that risk. *Id.* at 836.

For decades, the circuits unanimously applied the same test to Fourteenth Amendment claims by pretrial detainees as well, isolating for liability those who "inflict punishment." *Brawner v. Scott Cty., Tennessee*, 14 F.4th 585, 605 (6th Cir. 2021) (Readler, J., dissenting); *see also*, *e.g.*, *Cope v. Cogdill*, 3 F.4th 198, 207 (5th Cir. 2021); *Gomez v. Cty. of Westchester*, 649 F. App'x 93, 95 (2d Cir. 2016); *Coscia v. Town of Pembroke*, 659 F.3d 37, 39 (1st Cir. 2011); *Clouthier v. Cty. of Contra Costa*, 591 F.3d 1232, 1241 (9th Cir. 2010); *Scarbro v. New Hanover Cty.*, 374 F. App'x 366, 371 (4th Cir. 2010); *Butler v. Fletcher*, 465 F.3d 340, 344 (8th Cir. 2006); *Sylvester v. City of Newark*, 120 F. App'x 419, 423 (3d Cir. 2005); *Martinez v. Beggs*, 563 F.3d 1082, 1088 (10th Cir. 2009); *Bd. v. Farnham*, 394 F.3d 469, 477 (7th Cir. 2005); *Cook ex rel. Estate of Tessier v. Sheriff of Monroe County*, 402 F.3d 1092, 1115 (11th Cir. 2005).

However, in *Brawner*, the Sixth Circuit joined the Second, Seventh and Ninth Circuits in departing from the deliberate indifference standard. 14 F.4th at 597.

These circuits, driven by a misreading of this Court's excessive force decision in *Kingsley v. Hendrickson*, 576 U.S. 389 (2015), now require that all Fourteenth Amendment claims by pretrial detainees be judged according to some version of objective reasonableness.

The Ninth Circuit was the first to apply *Kingsley* outside of the excessive force context. In *Castro v. Cty. of Los Angeles*, 833 F.3d 1060, 1071 (9th Cir. 2016), the Ninth Circuit disregarded the subjective test of *Farmer* in favor of a purely objective test in a Fourteenth Amendment failure-to-act claim. Ironically and without much explanation, *Castro* recognized the critical infirmity in applying *Kingsley* in the failure-to-act context: "An excessive force claim, like the one at issue in *Kingsley*, differs in some ways from a failure-to-protect claim, like the one at issue here. An excessive force claim requires an affirmative act; a failure-to-protect claim does not require an affirmative act." *Id.* at 1069. For this reason, the dissent expressed "dismay" at the court's expansion of *Kingsley* into the context of an alleged failure to act: "the mere failure to act does not raise the same inference" of intent as a claim of excessive force. *Castro*, 833 F.3d at 1084. 1086 (Ikuta, J., dissenting). Nonetheless, the Ninth Circuit went on to apply the objective standard to claims of inadequate medical care in *Gordon v. Cty. of Orange*, 888 F.3d 1118 (9th Cir. 2018).

In 2017, the Second Circuit followed suit in *Darnell v. Pineiro*, 849 F.3d 17 (2d Cir. 2017), imposing liability where the defendant "recklessly failed to act with reasonable care to mitigate the risk that the

condition posed to the pretrial detainee even though the defendant-official knew, or should have known, that the condition posed an excessive risk to health or safety." *Id*. at 35; *see also Charles v. Orange Cty.* 925 F.3d 73 (2d Cir. 2019) (applying the test to an inadequate medical care claim). And, a year later, the Seventh Circuit rejected the subjective prong of deliberate indifference in the context of the Fourteenth Amendment in *Miranda v. Cty. of Lake*, 900 F.3d 335 (7th Cir. 2018), which held that claims by pretrial detainees for inadequate care "under the Fourteenth Amendment are subject only to the objective reasonableness inquiry identified in *Kingsley*." *Id.* at 352 (7th Cir. 2018).

Yet, while the Second, Sixth, Seventh and Ninth Circuits were upending the long-standing meaning of deliberate indifference under the Fourteenth Amendment, the Fifth, Eighth, Tenth, and Eleventh Circuits have recognized that *Kingsley* presents an inherently different context which cannot logically translate to claims of inadequate medical care.

In *Nam Dang by & through Vina Dang v. Sheriff, Seminole Cty. Fla.*, 871 F.3d 1272 (11th Cir. 2017), the Eleventh Circuit recognized that claims of excessive force are not akin to claims of inadequate medical care and that "*Kingsley* itself notes that even when it comes to pretrial detainees, 'liability for *negligently* inflicted harm is categorically beneath the threshold of constitutional due process.'" *Id*. at 1279 n. 2, quoting *Kingsley*, 135 S. Ct. at 2472 (emphasis in *Kingsley*).

The same was true of the Eighth Circuit in *Whitney v. City of St. Louis, Missouri*, 887 F.3d 857, 860 (8th Cir. 2018), and the Tenth Circuit in *Strain v. Regalado*, 977 F.3d 984, 991 (10th Cir. 2020), *cert. denied*, 142 S. Ct. 312 (2021), both of which recognized the inherent difference between excessive force claims, in which punitive intent may be inferred by the action itself, and those involving the provision of medical care, for which punitive intent may not be obviously and objectively inferred.

In *Cope*, the Fifth Circuit rejected the extension of *Kingsley* into the medical care context. It explained, "[d]eliberate indifference specifically requires that an officer have subjective awareness not only of the risk of harm but also that his response to that risk is inadequate . . . Deliberate indifference cannot be inferred from a prison official's mere failure to act reasonably . . . " *Cope*, 3 F.4th at 218, n. 6, *cert. denied*, 142 S. Ct. 2573 (2022). This is a recurring issue that can only be settled with guidance from this Court.

This growing divide within the circuits has been well-acknowledged as each new court addresses the question at hand. *See*, *e.g*., *Brawner*, 14 F.4th at 593; *Miranda*, 900 F.3d at 352; *Est. of Vallina v. Cty. of Teller Sheriff's Off.*, 757 F. App'x 643, 646 (10th Cir. 2018). However, since 2018, this Court has declined to weigh in, resulting in an increasing and unpredictable patchwork of legal tests.

This unpredictability is highlighted even more so by the recent decision of a different panel of the Sixth

Circuit in *Trozzi v. Lake County, Ohio, 29 F.4th 745 (6th Cir. 2022)*. In that case the court held that the Sixth Circuit's extension of *Kingsley* did not abrogate the subjective intent element necessary for deliberate indifference claims. Instead, in ostensible conflict with *Brawner*, the panel held that a defendant faced with a detainee manifesting an objectively serious medical need, "must possess a purposeful, a knowing, or possibly a [criminally] reckless state of mind to be deliberately indifferent." *Trozzi* at 755 (quoting *Kingsley* at 396, internal quotations omitted).

The panel below contends that *Trozzi's* interpretation was "irreconcilable with *Brawner*." *Helphenstine v. Lewis County*, 60 F. 4th 305, 316 (6th Cir 2023). This result leaves us with more confusion and as J. Readler points out, "[w]ith signs pointing in all directions, even the most careful reader would likely find herself at a crossroads." *Helphenstine*, 60 F. 4th at ___ (dissenting). How possibly could corrections officers or prison officials navigate this confusion to govern their everyday conduct? If ever there was a need for this Court's intervention, this is it.

What was once a uniform interpretation of the Fourteenth Amendment now leaves individual officers at the mercy of vastly different standards governing personal liability based upon the location of their employer. It is time for this Court to unite the circuits in the application of a consistent legal standard. The officers represented by *Amici* anxiously await this Court's answer, which defines the scope of potential

civil liability with which officers are faced each day as they clock in to work.

II. The Second, Sixth, Seventh and Ninth Circuits Erred in Extending *Kingsley* to Claims of Inadequate Medical Care.

The decisions of the Second, Sixth, Seventh and Ninth Circuits are wrong and fail to recognize the inherent distinction between claims of excessive force which involve an overt act and claims of inadequate medical care involving an alleged failure to act. Unlike an affirmative use of force in *Kingsley*, "a person who unknowingly fails to act—even when such a failure is objectively unreasonable—is negligent at most. And the Supreme Court has made clear that 'liability for negligently inflicted harm is categorically beneath the threshold of constitutional due process.'" *Castro*, 833 F.3d at 1086 (Ikuta, J., dissenting).

Amici fully recognize the distinction between the Fourteenth and Eighth Amendments, one prohibiting all punishment, the other prohibiting only those punishments deemed "cruel and unusual." That distinction may be relevant in assessing the constitutionality of a use of force, which may serve a legitimate purpose in the custodial context. However, it defies "contemporary standards of decency," *Estelle*, 429 U.S. at 102, to suggest that even prisoners may be intentionally deprived of medical care as a punitive measure. Punishment alone is the appropriate consideration under both the Eighth and Fourteenth Amendments in

considerations of medical care. There is no reason to draw a distinction. It is perhaps for this reason that the Court in *Farmer* did not do so, addressing concerns of punishment unhindered by the "cruel and unusual" consideration peculiar to the Eighth Amendment. Accordingly, the traditional deliberate indifference framework remains the appropriate test for assessing Fourteenth Amendment claims of inadequate medical care.

A. The Fourteenth Amendment Addresses Abuses of Government Authority, Evidenced by Deliberate Decisions to Deprive Individuals of Constitutional Rights, Not Common Law Negligence.

The Fourteenth Amendment prohibits an individual from being deprived of liberty without due process of law. U.S. Const. Amend. XIV. In the case of a pretrial detainee, this Court has interpreted the Fourteenth Amendment to include a prohibition on *punishment*:

> In evaluating the constitutionality of conditions or restrictions of pretrial detention that implicate only the protection against deprivation of liberty without due process of law, we think that the proper inquiry is whether those conditions amount to punishment of the detainee.

Bell v. Wolfish, 441 U.S. 520, 535 (1979); *see also Block v. Rutherford*, 468 U.S. 576, 583 (1984) ("the dispositive inquiry is whether the challenged condition, practice, or policy constitutes punishment, '[f]or under the Due

Process Clause, a detainee must not be punished prior to an adjudication of guilt in accordance with due process of law.' ").

As determined in *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963), relied upon in *Bell*, punishment requires "*scienter*," the intent or knowledge that the act, or in this case, inaction, was wrong. *Kennedy*, 372 U.S. at 168-169; "Scienter." *Webster-dictionary.org, Legal Dictionary*, Webster's 1913 Dictionary, https://www.webster-dictionary.org/definition/Scienter, accessed 4 Feb. 2022. There is no basis to make the leap from a prohibition on punishment to the common law tort standard of objective reasonableness.

Indeed, in *Daniels v. Williams*, 474 U.S. 327 (1986), this Court flatly rejected the notion that the Fourteenth Amendment should embrace the tort law concept adopted by the Second, Sixth, Seventh and Ninth Circuits, implicated each time a custodial official objectively fails to exercise due care. *Id*. at 335-336. In overruling *Parratt v. Taylor*, 451 U.S. 527 (1981), this Court held that a "mere lack of due care by a state official" cannot be understood to "'deprive' an individual of life, liberty, or property under the Fourteenth Amendment." *Daniels*, 474 U.S. at 330–31; *see also Davidson v. Cannon*, 474 U.S. 344, 348 (1986) (confirming that "[t]he guarantee of due process has never been understood to mean that the State must guarantee due care on the part of its officials.").

In a historical analysis of the Due Process Clause, *Daniels* recognized that the right to due process has

"been applied to *deliberate* decisions of government officials to *deprive* a person of life, liberty, or property." 474 U.S. at 331 (emphasis in original). Requiring a *deliberate deprivation* comports with the notion that the Due Process Clause, like its predecessor, the Magna Carta, was designed to prevent abuses of government power, not simply a lack of due care. *Id*. at 331-332.

> Far from an abuse of power, lack of due care suggests no more than a failure to measure up to the conduct of a reasonable person. To hold that injury caused by such conduct is a deprivation within the meaning of the Fourteenth Amendment would trivialize the centuries-old principle of due process of law.

Id. at 332.

The *Daniels* Court was concerned that, in applying an objective standard to Fourteenth Amendment claims by pretrial detainees, courts would divert from the purposes of the Constitution in dealing "with the large concerns of the governors and the governed" and would supplant traditional tort law in any situation in which a government actor is involved in a system administered by the states. *Id*. at 332. This is precisely what the Second, Sixth, Seventh and Ninth Circuits have done.

As Chief Justice Marshall admonished, "we must never forget, that it is *a constitution* we are expounding," *Id*., quoting *McCulloch v. Maryland*, 4 Wheat. (17 U.S.) 316, 407 (1819). Those alleging medical malpractice are not without redress. Emphasizing that the

"Constitution is not the only source of American law," Justice Scalia reminded that "[t]here is an immense body of state statutory and common law under which individuals abused by state officials can seek relief." *Kingsley*, 576 U.S. at 408 (Scalia, J., dissenting). However, the Fourteenth Amendment is not a "font of tort law to be superimposed on whatever systems may already be administered by the States." *Paul v. Davis*, 424 U.S. 693, 701 (1976).

B. Deliberate Indifference is the Proper Test to Be Applied to Fourteenth Amendment Claims of Inadequate Medical Care.

Recognizing that claims of medical malpractice are categorically beyond the constitutional reach, *Estelle* first held that a prison official violates an inmate's Eighth Amendment rights in connection with a need for medical care only where the official is deliberately indifferent to the inmate's serious medical needs. 429 U.S. at 104, 106. Not "every claim by a prisoner that he has not received adequate medical treatment states a violation of the Eighth Amendment. An accident, although it may produce added anguish, is not on that basis alone to be characterized as wanton infliction of unnecessary pain." *Id*. at 105. Thus, a complaint that a physician was negligent in diagnosing or treating a medical condition is insufficient to state a claim. *Id*. at 106.

To ensure that courts did not constitutionalize claims of medical malpractice—"an inadvertent failure

to provide adequate medical care"—*Farmer* clarified that the deliberate indifference standard is akin to the "subjective recklessness" standard of criminal law. 511 U.S. at 834. Setting forth what is now the familiar deliberate indifference framework, *Farmer* held that an inmate may demonstrate deliberate indifference only where the inmate proves that the officer knew of an excessive risk to inmate health or safety and deliberately disregarded that risk. *Id*. at 836.

The key factor in *Farmer* was whether the respondent "knew of the risk of harm [Farmer] confronted as a transsexual" placed in the general prison population. In rejecting the petitioner's request that this Court adopt an objective standard, the Court recognized that *any* assessment of "punishment" demands that the officer have subjective knowledge of the inmate's medical condition *and* the excessive risk posed by inaction. *Farmer*, 511 U.S. at 834.

Thus, while addressing claims in an Eighth Amendment context, *Farmer* was not confined to an Eighth Amendment analysis. Deliberate indifference was designed to ensure that the defendant possessed a sufficiently culpable state of mind. *Farmer*, 511 U.S. at 834. The Court analyzed whether a purely objective recklessness standard of the type advanced by the Second, Sixth, Seventh and Ninth Circuits here could determine whether an act amounted to "punishment." It could not.

> An act or omission unaccompanied by knowledge of a significant risk of harm

> might well be something society wishes to discourage, and if harm does result society might well wish to assure compensation. The common law reflects such concerns when it imposes tort liability on a purely objective basis. See Prosser and Keeton §§ 2, 34, pp. 6, 213–214; see also Federal Tort Claims Act, 28 U.S.C. §§ 2671–2680; *United States v. Muniz*, 374 U.S. 150 [] (1963). *But an official's failure to alleviate a significant risk that he should have perceived but did not, while no cause for commendation, cannot under our cases be condemned as the infliction of punishment*.

Farmer, 511 U.S. at 837–38 (emphasis added). Under the Fourteenth Amendment, if an action cannot be condemned as punishment, it cannot amount to a violation of a pretrial detainee's constitutional rights. *Bell*, 441 U.S. at 535.

Given this Court's reasoning in *Farmer* and the Fourteenth Amendment jurisprudence addressing a failure-to-act, there is no reason to distinguish between the standard to be applied to claims of inadequate medical care by prisoners and those of pretrial detainees. This is not to say that pretrial detainees do not deserve the utmost constitutional protection, but only that this Court in *Farmer* did not afford Eighth Amendment prisoners with anything less in the context of medical care. No court has advanced the position that intentionally withholding medical care is an appropriate "punishment" subject only to the "cruel and unusual" prohibition of the Eighth Amendment. Punishment alone, is the appropriate measure under

both the Eighth and Fourteenth Amendments. *Kingsley* did not alter this analysis.

C. Use of Force, at Issue in *Kingsley*, is Categorically Different from a Failure to Provide Adequate Medical Care.

Kingsley is not a medical care case; it is "excessive force" precedent. *Lombardo v. City of St. Louis, Missouri*, 141 S. Ct. 2239, 2241 (2021). As explained by the *Brawner* dissent, the circuits "should not be enlisting a case about excessive force to disturb [their] deliberate indifference to medical needs jurisprudence." *Brawner*, 18 F.4th 551 (Readler, J., dissenting). *Kingsley* has no application to an alleged failure to act concerning detainee medical needs where officers may be assessing the need for medical referral or relying upon trained professionals to evaluate detainee medical needs.

Kingsley concerned a case by a pretrial detainee for excessive force under the Fourteenth Amendment's Due Process Clause. 576 U.S. at 389. It was undisputed that the officers intended to apply force, but the parties disagreed as to whether the force was excessive. *Id.* at 392.

The *Kingsley* Court was thus tasked with considering the necessary "state of mind with respect to the proper *interpretation* of the force (a series of events in the world) that the defendant deliberately (not accidentally or negligently) used." *Id*. at 395-396. In so doing, this Court held that, in an excessive force claim, "a

pretrial detainee must show only that the force purposely or knowingly used against him was objectively unreasonable." *Id*. at 396-397. Always keeping in mind that negligence is not sufficient to establish a constitutional violation, this Court explained that "the defendant must possess a purposeful, a knowing, or possibly a reckless state of mind." *Id*. The majority drew from the excessive force precedent of *Graham v. Connor*, and balanced force—which is inherently harmful—with the need to maintain order and discipline to preserve institutional security. *Id*.

Kingsley is not "at odds with our settled traditional deliberate indifference jurisprudence." *Brawner*, 14 F.4th at 608–09 (Readler, J., dissenting). *Kingsley* differentiated between the intentional act—purposefully hitting a detainee in the face—and the negligent act—where "an officer's Taser goes off by accident." *Id*., citing *Kingsley*, 576 U.S. at 395-396. In keeping with *Bell*, *Kingsley* observed:

> when a detainee shows deliberate acts to be "excessive in relation" to any "legitimate governmental objective," a court may infer that those acts are punitive in nature "without proof of intent (or motive) to punish," [*Kingsley*, 576 U.S. at] 398, 135 S. Ct. 2466. For it is the unique case in which an officer harms a prisoner with objectively excessive force but nonpunitive intent.

Brawner, 14 F.4th at 608. Force, by its very nature, is inherently punitive if not done for some legitimate reason.

The same is not true for a failure to provide adequate medical care, which requires a different state-of-mind inquiry. *Id.*, citing *Strain*, 977 F.3d at 989. While the dissent in *Kingsley* did not carry the day as to a claim involving the intentional use of force, its reasoning applies with greater force here. It remains critical that an "intent to punish means taking a 'deliberate act intended to chastise or deter.'" *Kingsley*, 576 U.S. at 405 (Scalia, J., dissenting). Perhaps deliberateness may be inferred by the very act of physical force; no more than common sense may be required to understand the consequences of "the swing of a fist that hits a face, a push that leads to a fall, or the shot of a Taser that leads to the stunning of its recipient." *Id*. at 395. Inaction does not raise the same inference.

The failure to provide medical care "often rests on an unwitting failure to act, making one's subjective intent critical in understanding the chain of events." *Brawner*, 14 F.4th at 608. Unlike the intent to impose force by striking a person in the face, the intent to *deliberately* fail to act can be understood only where there is evidence that a custodial official *subjectively knew* of a need to act. *See Castro*, 833 F.3d at 1086 (Ikuta, J., dissenting) ("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.") (citing *Farmer*, 511 U.S. at 837-838). "[A] person who unknowingly fails to act—even when such a failure is objectively unreasonable—is negligent at most. And the Supreme Court has made clear that 'liability for

negligently inflicted harm is categorically beneath the threshold of constitutional due process.'" *Castro*, 833 F.3d at 1086 (Ikuta, J., dissenting).

The Sixth, Seventh and Ninth Circuits attempt to escape this Court's prohibition on constitutionalizing negligent conduct by framing the test as one of "recklessness." *Brawner*, 14 F.4th at 596; *Castro*, 833 F.3d at 1071. However, *Farmer* recognized that even criminal law "generally permits a finding of recklessness only when a person disregards a risk of harm of which he is aware." *Farmer*, 511 U.S. at 837, citing 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); American Law Institute, Model Penal Code § 2.02(2)(c), and Comment 3 (1985). There is no reason that a lesser standard would apply here.

The deliberate indifference test properly isolates those with punitive intent engaged in an abuse of government power as prohibited by the Fourteenth Amendment from those who unknowingly fail to live up to the objective standard of care. *See Daniels*, 474 U.S. at 331. Therefore, *Amici* urge this Court to grant certiorari to ensure that this same standard applies to claims against officers nationwide.

III. The Proper Standard to Be Applied to Fourteenth Amendment Medical Care Claims Presents an Issue of Grave Constitutional Importance for *Amici*'s Membership.

Jail officers, responsible for managing detainee behaviors to "preserve internal order and discipline

and to maintain institutional security," *Bell*, 441 U.S. at 547, are not medical professionals. Yet, of the millions of individuals admitted to local jails over the course of the year[2], approximately half report suffering or having suffered from a chronic medical condition, with those in jail much more likely than the general population to report infectious disease or mental health concerns[3].

Detainee medical care has become an increasing focus, while short lengths of stay, constraints on resources, lack of access to accurate medical histories, and the reality of criminal behavior make providing health care extraordinarily difficult. With those concerns in mind, *Amici* understand that local entities are forced to make policy decisions regarding staffing and training that balance the need for security with constitutionally-required medical care and limited available resources.

However, the question presented to this Court is not about the propriety of institutional practices or policy decisions. At its core, the question presented concerns the constitutional liability for an individual officer who may have never engaged in a single intentional act and who, under a purely objective standard, is left without any avenue to effectively mitigate risk.

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[2] "Jail Inmates in 2020—Statistical Tables," U.S. Department of Justice, Bureau of Justice Statistics, Dec. 2021.

[3] Jails: Inadvertent Health Care Providers, p. 3; "Medical Problems of State and Federal Prisoners and Jail Inmates, 2011-2012, U.S. Department of Justice, Feb. 2015.

It is well-understood that an individual defendant can be held constitutionally liable only for the defendant's own unconstitutional acts. *Ashcroft v. Iqbal*, 556 U.S. 662 (2009). The traditional deliberate indifference standard upholds this bedrock principle by imposing liability only where a defendant officer was subjectively aware of a serious risk of harm.

Applying an objective "should have known" standard exposes individual officers to liability which cannot be anticipated. If a jail officer without a medical education "should have known" of a serious risk of harm caused by a course of inaction, but undeniably did not, the question remains: is the individual officer personally responsible for that shortcoming or able to guard against the same? Just as a municipality cannot be held constitutionally liable for the actions of its employees, *Monell v. Dep't of Soc. Servs. of City of New York*, 436 U.S. 658, 691 (1978), an employee should not be held liable for the decisions of the municipality. When disregarding an officer's subjective knowledge and intent in favor of a "should have known" standard, a court seeks to penalize individual officers for training and staffing decisions over which the individual has no control.

This concern is not an academic exercise but has real consequences for individual jail staff who may face career-ending personal liability through no real fault of their own.

An awareness by officers that every action will be judged against a mysterious reasonable jail officer

significantly raises the bar for officers who are required to make snap decisions in real time and with limited information. The "should have known" standard will force officers to constantly second-guess their understanding of a situation, knowledge, and training, resulting in inefficiency and delay that could pose dangerous consequences in a detention facility.

Constant second-guessing will similarly promote the distrust of trained medical professionals upon whom jailers were once entitled to rely. If constitutional liability is entirely untethered to personal awareness, jailers with no medical education will be required to scrutinize professional decisions out of fear that medical professionals may have missed a sign or symptom of which a "reasonable officer" should have been aware.

This will likewise disrupt the chain of command necessary for efficient functioning of a detention facility. Officers will fear trusting the observations or decisions of their superiors or of an earlier shift on the possibility that those officers were not but should have been aware of an inmate medical need. Indeed, if an officer is to be held personally liable for failing to recognize medical conditions, every officer must be always on alert for even the slightest possible medical symptoms. This far exceeds the level of medical attention available to free persons outside of a detention facility.

While *Amici* continuously advocate for effective training of custodial officials, it is unclear how even

additional training could prevent liability under a standard that does not consider the "good faith" or training of the officer, but a hypothetical objective officer known only through the litigation process. It is only logical that, if individual jailers are held to a medical malpractice standard while in the stressful and often dangerous jail environment not designed for medical treatment, qualified jail officers will fear entering the profession, leaving only the "most resolute or the most irresponsible." *Crawford-El v. Britton*, 523 U.S. 574, 590 n.12 (1998).

CONCLUSION

Since 2016, eight of the thirteen circuits have weighed in on the standard to be applied to claims of inadequate medical care by pretrial detainees. There is now an even divide on the proper application of the Fourteenth Amendment, developed and acknowledged by the courts. Unless this Court grants certiorari, half of the circuits will continue to issue faulty decisions affecting the lives of litigants, including the thousands of officers represented by *Amici*. *Amici* urge this Court to grant certiorari to provide clear guidance on the scope

of personal liability for individual officers under a consistent Fourteenth Amendment standard.

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