

No. 17-1638

IN THE SUPREME COURT OF THE UNITED STATES

NICOLE SANCHEZ, CASY SIMPSON, AND EDWARD
LARROY SIMPSON, II, INDIVIDUALLY AND AS THE
REPRESENTATIVES OF THE ESTATE OF DIANA LYNN
SIMPSON, *Petitioners*,

v.

YOUNG COUNTY, TEXAS AND YOUNG COUNTY
SHERIFF'S DEPARTMENT, *Respondents*.

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

**RESPONDENTS' OPPOSITION TO PETITION FOR A
WRIT OF CERTIORARI**

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QUESTION PRESENTED

Petitioners failed to raise the question presented in the courts below until they sought en banc review by the U.S. Court of Appeals for the Fifth Circuit. Instead, Petitioners raised a different question: whether the summary judgment evidence was sufficient to sustain the trial court's decision that Respondents were not deliberately indifferent to Mrs. Simpson's serious medical needs. This is a fundamentally different inquiry from the question presented by Petitioners and illustrates why this case is not the proper vehicle to decide the question presented.

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**RESPONDENTS' OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI**

INTRODUCTION

This case concerns the death of a pre-trial detainee, a registered nurse who apparently ingested some pills before being arrested by city police for public intoxication. Emergency medical services personnel cleared the arrestee before she was delivered to the Young County Jail. The district court granted summary judgment in Respondents' favor, concluding that Petitioners failed to raise a fact issue as to whether Respondents acted with deliberate indifference to the detainee's serious medical needs. The Fifth Circuit affirmed but remanded the case for consideration of a "conditions of confinement" claim. The case is presently pending in the Northern District of Texas for determination of the alternative claim.

Petitioners have waived the question presented in their petition. They raised the application of *Kingsley v. Hendrickson* for the first time in their petition for rehearing en banc to the Fifth Circuit, which denied the petition without discussion. 135 S. Ct. 2466 (2015). Despite that fact, they ask the Court to use this case to resolve a circuit split that is only a month old, without the benefit of any analysis from the Fifth Circuit. This case is not only the wrong vehicle to resolve the split but was correctly decided below.

A. Factual Background

After receiving a report of a missing person, police officers for the City of Graham located Diana Simpson sleeping in the driver's seat of her parked Jeep Cherokee around 5:00 p.m. on May 19, 2013. Pet. App. at 3. Officer Kyle Ford questioned Mrs. Simpson and observed signs of her possible impairment. *Id.* Mrs. Simpson advised Officer Ford that she'd had a drink the night before to help her sleep, but she denied taking any medication at that time. *Id.* She also told Officer Ford that she was not diabetic and had no medical conditions. *Id.*

Officer Ford summoned medics with the City of Graham to evaluate Mrs. Simpson's condition. *Id.* EMT Jarod Cook asked Mrs. Simpson if she was trying to hurt herself, which she denied. *Id.* She also told Cook that she was not depressed. *Id.* After examining Mrs. Simpson, Cook advised Officer Ford that her "vital signs were fine," her blood sugar was normal, and that she was not dehydrated or suffering from heat stroke. *Id.* Mrs. Simpson had slightly elevated blood pressure and a slightly low pulse, but she confirmed to Cook that "she normally has high blood pressure and a low pulse." *Id.* She also told Cook that she did not want to be taken to the hospital. *Id.* at 4. Cook described Mrs. Simpson as "impaired but not altered." *Id.* at 3.

After Mrs. Simpson consented to a search of her vehicle, Officer Ford found several partially empty blister packs of medication. *Id.* at 4. Officer Ford asked Mrs. Simpson if she was trying to hurt

herself, which she once more denied. *Id.* When Officer Ford asked her again whether she had taken any medication, Mrs. Simpson replied that she took all the missing medication that morning. *Id.* Mrs. Simpson declined Officer Ford's offer to go to the hospital. *Id.* Officer Ford arrested Mrs. Simpson for public intoxication and took her to the Young County Jail. *Id.* at 5.

Around the same time that Mrs. Simpson was being evaluated by medics and Graham police officers, LaRoy Simpson called the Graham Police Department to inform them that his wife was suicidal. *Id.* at 6. Mr. Simpson was told that an ambulance had been called to examine his wife. *Id.*

Later, Mr. Simpson called the Police Department again and was transferred to the Young County Jail. *Id.* Mr. Simpson told the jailer that a BOLO ("be on the lookout") report had been issued for the safety of Mrs. Simpson's life. *Id.* The jailer informed Mr. Simpson that EMTs were evaluating his wife at that time. *Id.* Mr. Simpson did not know that his wife had taken any drugs or overdosed on any substance, and he did not tell anyone at the County Jail that she had. *Id.*

Mrs. Simpson arrived at the Young County Jail at approximately 6:30 p.m., having been detained and examined by City police and medical personnel some one-and-a-half hours earlier. (*Compare* ROA.100; ROA.105, *with* ROA.152, at ¶3). Officer Ford and another officer escorted Mrs. Simpson into the Jail. (ROA.101). After being advised by a jailer that she had to walk through the

metal detector, Mrs. Simpson did so unassisted. (*Compare* ROA.101, *with* ROA.152, at ¶4).

Gaylon Rich—a County jailer—interviewed Mrs. Simpson and completed the self-report questions portion of the intake Screening Form for Suicide and Medical and Mental Impairments. Pet. App. at 5, 78–80. Mrs. Simpson did not indicate any behaviors or conditions indicative of suicide. *Id.* In addition, she was responsive, spoke coherently, and advised jailer Rich that she did not want to hurt herself. *Id.* In response to the screening form questions, Mrs. Simpson indicated she was not depressed, was not thinking about killing herself, and had never attempted suicide.¹ *Id.*

After her medical screening, Mrs. Simpson was taken to a women’s holding cell to allow her to sleep before finishing the booking process. Pet. App. at 5. Although she was able to walk to the holding cell unassisted, jailer Rich escorted her according to jail procedures. (ROA.101; ROA.153 at ¶6).

Mr. Simpson called the Graham Police Department again at approximately 6:42 p.m. and asked that Mrs. Simpson be transported to a hospital for medical attention. *See* Pet. App. at 6. Mr. Simpson was informed again that his wife had been evaluated by medical personnel and that she had refused to go to the hospital. *Id.* Mr. Simpson

¹ The Texas Commission on Jail Standards imposed no sanction against the County Jail in regards to the intake assessment of Mrs. Simpson and the completion of the screening form. (ROA.464, at 158:10–22).

asked if the Department of Mental Health and Mental Retardation (“MHMR”) could assist her, but he was advised that MHMR would not see Mrs. Simpson until she was sober. *Id.*

The court of appeals noted a dispute concerning how often jail staff checked on Mrs. Simpson while she was in the holding cell. *Id.* at 5. There was evidence that she was observed every 25 to 30 minutes. (*Compare* ROA.153, at ¶7, *with* ROA.425, at 119:12–25). In addition, when another female arrestee was placed in the holding cell, Mrs. Simpson was observed to be “fine.” (ROA.153, at ¶8). Mrs. Simpson was also seen “moving around” and breathing during the periodic cell checks. (ROA.153, at ¶9; ROA.473, at 167:17–19).

At approximately 2:40 a.m., some eight hours after Mrs. Simpson’s arrival at the Young County Jail, jailer Rich entered the holding cell to wake Mrs. Simpson in order to finish the booking process, but found her unresponsive. Pet. App. at 6. Another jailer assisted Rich and called EMS. (ROA.153 at ¶10). They began CPR on Mrs. Simpson until paramedics arrived. (ROA.153 at ¶¶10–11). Mrs. Simpson was subsequently transported to the hospital where she was pronounced dead. Pet. App. at 6. Mrs. Simpson’s autopsy identified the cause of death as mixed drug intoxication, and the manner of death was consistent with and highly suspicious of suicide. *Id.* at 6, 85.

B. Proceedings Below

Petitioners filed this action against Young County, Texas and the Young County Sheriff's Department alleging violations of 42 U.S.C. § 1983 and the Texas Tort Claims Act. Pet. App. at 6, 45. After removing the case from state court, Respondents² eventually filed a motion for summary judgment on all of Petitioners' claims. *Id.*

Petitioners' claims against the County under Section 1983 invoked alternative theories of liability: for alleged unconstitutional "conditions of confinement" and for alleged "episodic acts or omissions" of County jailers. *Id.* at 7–8. During the discovery phase of the case, Petitioners deposed the Young County Sheriff and ultimately offered his testimony into the summary judgment record. Petitioners deposed no other witnesses and did not offer into the summary judgment record (i) any testimony of Young County jailers or other deputies who had contact with or might have observed Mrs. Simpson while she was detained in the Young County Jail; (ii) any testimony of the City police officers or the medics who examined Mrs. Simpson on the roadside; (iii) any testimony of the dispatchers who took phone calls from Mr. Simpson; or (iv) any documents from the County relating to the monitoring of Mrs. Simpson, such as observation logs or documentation of cell checks.

² Petitioners do not appeal their claims against the Young County Sheriff's Department, leaving Young County as the only Respondent remaining.

In their summary judgment brief to the district court, Petitioners never cited *Kingsley v. Hendrickson* or any other case for the proposition that an objective standard, rather than a subjective standard, should be applied in assessing the alleged deliberate indifference of Young County jail personnel. Petitioners did not advance this argument in the district court at all. Instead, Petitioners argued that, collectively, the “jail staff” had actual knowledge of but acted (or failed to act) with deliberate indifference to Mrs. Simpson’s serious medical needs. See Pet. App. at 94–99; see also ROA.171–78.

In its summary judgment order, the district court concluded that Petitioners’ “conditions of confinement” claim was more properly characterized as an “episodic acts or omissions claim,” in part because “state actors were [] ‘interposed between the detainee and the municipality, such that the detainee complains first of a particular act of, or omission by, the actor and then points derivatively to a policy, custom, or rule (or lack thereof) of the municipality that permitted or caused the act or omission,’ constituting a classic episodic acts or omissions claim.” Pet. App. at 50–51 (citation and internal quotations omitted). And, based on the sparse state of the summary judgment record, the district court concluded that Petitioners failed to demonstrate a genuine dispute of material fact on this claim. *Id.* at 51–67. The district court dismissed Petitioners’ claims and entered a final judgment.

Petitioners timely filed a notice of appeal. In their opening and reply briefs to the Fifth Circuit,

Petitioners once again failed to cite *Kingsley v. Hendrickson* or argue that an objective standard, rather than a subjective standard, should apply to their episodic acts or omissions claim. Contrary to their assertions, Petitioners explicitly acknowledged that the acts or omissions of individual jailers are judged by a subjective standard. The only objective standard to which Petitioners referred was the test for municipal liability based on an official custom or policy which causes a constitutional violation. See Pet. App. at 103 (“Unlike the [subjective] deliberate indifference standard applied to individual employees, this standard is an objective one; it considers not only what the policymaker knew, but what he *should have known*, given the facts and circumstances surrounding the official policy and its impact on plaintiffs’ rights.”) (internal quotations omitted) (emphasis added). Moreover, as in their briefing to the district court, the thrust of Petitioners’ argument rested on the collective knowledge of jail staff whose individual acts or omissions allegedly subjected the County to liability. *Id.* at 104–06.

A divided panel of the Fifth Circuit rejected Petitioners’ arguments in a per curiam opinion. Although the entire panel vacated and remanded the district court’s decision concerning Petitioners’ “conditions of confinement” claim, the court affirmed the district court’s summary judgment on the “episodic acts or omissions” claim in a 2–1 decision, with Judge Barksdale dissenting. See Pet. App. at 1–12.

Judge Barksdale's dissent diverged from the majority's analysis in several respects. The dissent, however, did not take issue with the majority's application of a subjective standard to Petitioners' episodic acts or omissions claim. The dissent neither cites nor discussed *Kingsley v. Hendrickson*.

Petitioners filed a petition for rehearing en banc where, for the first time, they cited *Kingsley v. Hendrickson* and argued that the majority incorrectly applied a subjective deliberate indifference standard to Petitioners' episodic acts or omissions claim. Pet. App. at 111–12. Even then, this was not Petitioners' lead argument in seeking en banc review. Instead, Petitioners first argued that the majority erred in applying the appropriate summary judgment standards to affirm the district court's judgment. Pet. App. at 109–10. On March 5, 2018, the Fifth Circuit issued a summary denial of that petition. Pet. App. at 71–72.

REASONS FOR DENYING THE PETITION

The Court should deny the petition for writ of certiorari for the following reasons:

I. Petitioners have waived the question presented.

Petitioners have waived their right to argue the question presented. Petitioners did not argue in the district court that an objective standard should apply to claims for deliberate indifference to a serious medical need. Nor did Petitioners raise the issue on appeal to the Fifth Circuit. It was not until

their motion for rehearing en banc that Petitioners argued that the objective standard articulated in *Kingsley v. Hendrickson* should extend beyond excessive force cases to claims for inadequate medical care brought under the Fourteenth Amendment. 135 S. Ct. 2466 (2015). Because Petitioners did not raise this argument until their motion for rehearing en banc, it is waived. *United States v. Hernandez-Gonzalez*, 405 F.3d 260, 261 (5th Cir. 2005) (“Absent extraordinary circumstances, this court will not consider issues raised for the first time in a petition for rehearing.”), *cert. denied*, 126 S. Ct. 202 (2005); *accord United States v. Levy*, 379 F.3d 1241, 1242 (11th Cir. 2004); *Powell v. Collins*, 332 F.3d 376, 406 (6th Cir. 2003); *United States v. Cross*, 308 F.3d 308, 314 (3d Cir. 2002).

Here, there is nothing “extraordinary” about Petitioners’ circumstances: they simply failed to raise an argument that was available to them. Petitioners filed their appellants’ brief in the Fifth Circuit in May 2016—nearly a year after the Court issued its June 2015 opinion in *Kingsley*. If Petitioners believed that the district court should have been bound by the standard announced in *Kingsley*, then they had every opportunity to say so.³

³ Petitioners argue that they *did* say so. But rather than cite their own briefing, they reference Judge Barksdale’s dissent, which chides Petitioners for mis-citing *Lawson v. Dallas Cty.*, 286 F.3d 257, 264 (5th Cir. 2002). Petitioners’ own briefing cites *Lawson* only once, and uses the phrase “constructive notice” only once. In that brief, Petitioners argued that “constructive notice” would be sufficient to impose liability on the County based on what the Sheriff, as policymaker, should have known in formulating policy. *See*

Instead, Petitioners argued that the evidence was insufficient to sustain the district court's award of summary judgment. As a consequence, the Fifth Circuit's opinion below focused entirely on the evidence—whether the district court had erred in granting summary judgment. There is no mention of *Kingsley* in the panel's opinion. Nor is there mention in the dissenting judge's opinion. The Fifth Circuit's summary order denying Petitioners' motion for rehearing en banc is likewise devoid of discussion.

Even if the issue were not waived—which it is—Petitioners would be asking the Court to resolve a purported circuit split without the benefit of any opinion from the court below. That leaves the Court to review how *Kingsley* might affect this type of claim without the assistance of the Fifth Circuit. For those reasons alone, the Court should deny the petition.

II. The circuit split over the question presented is nascent.

It is true that, broadly speaking, circuit courts hold different views of whether *Kingsley* should be confined to the context of excessive force or should be extended, and, if so, to which other claims. But this

Appellants' Brief at 48. This is fundamentally different from the question Petitioners attempt to raise here: whether the *jailers' actions or omissions* should be evaluated under a subjective or objective standard. As a result, the issue is waived altogether. At the very least, it is waived by inadequate briefing. *Castro v. McCord*, 259 F. App'x 664, 667 (5th Cir. 2007) (waiving an issue as inadequately briefed because party failed to make an argument in support).

broader divergence has only recently—in the last month—reached the discrete question presented: whether an objective standard should extend to claims ***for deliberate indifference to a serious medical need***. The Fifth Circuit has not taken a position on this question—not just in the opinion below, but in any opinion issued by that court. Moreover, there is no opinion offering a meaningful analysis of why *Kingsley* should not be extended to inadequate medical care claims. If this Court were to grant Petitioners’ request, it would be deciding a “split” in its infancy.

Petitioners cite *Alderson v. Concordia Parish Correctional Facility* for the proposition that the Fifth Circuit has taken a side in this dispute and limited *Kingsley* to excessive force cases. 848 F.3d 415 (5th Cir. 2017). But the opposite is actually true. In that case, Judge Graves, writing in dissent, urged the majority to consider whether *Kingsley* should extend to what he called “failure-to-protect claims.” *Id.* at 424–25. The majority, in a footnote, declined. *Id.* at 419 n.4. It observed that the Fifth Circuit’s rule of orderliness would require an en banc panel to implement such a sea change. *Id.* It also noted that, even if it had applied an objective standard, the outcome of that case would remain unchanged. *Id.* Contrary to Petitioners’ briefing, *Alderson* stands for little more than the proposition that the Fifth Circuit is aware of the disagreement and intends to resolve it when the proper case presents itself. *See id.* Both the majority’s footnote and the dissenting opinion are *obiter dicta*. *See Int’l Truck & Engine Corp. v. Bray*, 372 F.3d 717, 721 (5th Cir. 2004) (“A statement is *dictum* if it could

have been deleted without seriously impairing the analytical foundations of the holding, and, being peripheral, may not have received the full and careful consideration of the court that uttered it.” (cleaned up)). The Fifth Circuit has yet to take a position on the reach of *Kinglsey*. This Court should decline to pass judgment on the Fifth Circuit’s stance before it takes one.

The Court should also deny the petition because this divergence of opinion is only a month old. In 2017, the Second Circuit first held that *Kinglsey* should extend to claims for deliberate indifference to a serious medical need. *Darnell v. Pineiro*, 849 F.3d 17, 36 (2d Cir. 2017). The Seventh and Ninth Circuits have followed suit. *Miranda v. Cty. of Lake*, No. 17-1603, 2018 U.S. App. LEXIS 22229, at *30 (7th Cir. Aug. 10, 2018); *Gordon v. Cty. of Orange*, 888 F.3d 118, 1125 (9th Cir. 2018). But it was not until last month that the Eleventh Circuit explicitly held the opposite. *Johnson v. Bessemer*, No. 17-13122, 2018 U.S. App. LEXIS 18660, at *9 n.5 (11th Cir. July 10, 2018). The Eleventh Circuit’s reasoning (in a footnote) is all of one sentence long: “But *Kingsley* involved an excessive force claim, not a deliberate indifference to serious medical need claim.” *Id.*

While the Eleventh Circuit is not required to detail its reasoning, such an explanation would be of assistance to this Court. As it stands, Petitioners ask the Court to extend *Kingsley* to allegations of inadequate medical care without the benefit of any meaningful counter-analysis. No circuit court in the country has yet considered whether claims for

deliberate indifference to serious medical needs implicate different policies, facts, and concerns than those related to claims for the use of excessive force. But such an analysis is sure to come with time. This Court should suspend its judgment.⁴

III. The broader “circuit split” is also underdeveloped.

The broader “split” concerning what to do with *Kingsley*, generally, is also underdeveloped. Although Petitioners paint the differing views of the circuit courts as a fully mature “circuit split,” the reality is that the issue is still taking shape in federal jurisprudence. In fact, this lack of maturity was an additional reason the Fifth Circuit gave for not deciding the application of *Kingsley* in *Alderson*, where it noted that “the Ninth Circuit is the only circuit to have extended *Kingsley*’s objective standard to failure-to-protect claims.” 848 F.3d at 419 n.4. Upon closer examination of the cases cited by Petitioners, it becomes clear that the purported “split” is more of a fracture. Most of the circuit courts are still evaluating *Kingsley*’s effect, and have issued only *dicta* on the subject:

- *Kedra v. Schroeter*, 876 F.3d 424, 440 (3d Cir. 2017) (offering *dictum* in support of an objective standard for state-created

⁴ Petitioners raised *Johnson* in a supplemental brief to this Court one week before Respondents’ brief in opposition was due. That the jurisprudential landscape continues to evolve on a weekly basis only underscores Respondents’ point: it is too early for this Court to weigh in on the issue.

danger claims in the wake of *Kingsley*, but concluding that because the events in question pre-dated *Kingsley* the objective standard did not apply); *cf.* 876 F.3d at 454 (Fisher, J., dissenting) (concluding that *dictum* in support of *Kingsley* was unnecessary and arguing that *Kingsley* should not extend to state-created danger claims).

- *Richmond v. Huq*, 885 F.3d 928, 938 (6th Cir. 2018) (declining, in *dictum*, to consider the effect of *Kingsley* because the parties did not raise it but observing that “[w]e find no circuit applying *Kingsley* specifically to a deliberate indifference to a detainee’s serious medical needs claim.”).
- *Smego v. Jumper*, 707 F. App’x 411, 412 (7th Cir. 2017) (noting in *dictum* that “[w]e have not decided whether the reasoning in *Kinglsey* extends beyond claims of excessive force,” and declining to decide its application because appellee’s claim failed under either an objective or subjective standard.)
- *Clark v. Colbert*, 895 F.3d 1258, 1269 (10th Cir. 2018) (acknowledging in *dictum* that *Kingsley* might affect the standard of review for a medical needs claim, but not deciding the issue because appellant failed to argue that *Kingsley* “actually displaced any precedent”).

- *Nam Dang v. Sheriff, Seminole Cty. Fla.*, 871 F.3d 1272, 1279 n.3 (11th Cir. 2017) (observing in *dictum* that “Kingsley involved an excessive-force claim, not a claim of inadequate medical treatment due to deliberate indifference,” and declining to decide its application because appellee’s claim failed under any standard).

Leaving aside whether this case is the proper vehicle for a decision, the question presented is not ready for resolution by this Court. The Court has long valued the wisdom the circuit courts derive from considering varied factual scenarios. As the Court noted some thirty years ago:

Although one of the Court’s roles is to ensure the uniformity of federal law, we do not think that the Court must act to eradicate disuniformity as soon as it appears Disagreement in the lower courts facilitates percolation – the independent evaluation of a legal issue by different courts. The process of percolation allows a period of exploratory consideration and experimentation by lower courts before the Supreme Court ends the process with a nationally binding rule. The Supreme Court, when it decides a fully percolated issue, has the benefit of the experience of those lower courts. Irrespective of docket capacity, the Court should not be compelled to intervene to eradicate

disuniformity when further percolation or experimentation is desirable.⁵

Petitioners' brief merely shows that the broader issue of how to handle *Kinglsey* has begun to percolate up through the circuit courts. Before resolving this issue, the Court should have the benefit of circuit court opinions evaluating the effect of *Kingsley* in a variety of contexts, from state-created danger claims to failure-to-protect claims. The need is especially acute in inadequate medical care cases, where unique policy and factual concerns predominate. The ability to allege alternative theories of liability, at least in the Fifth Circuit, only adds to the complexity. As it stands, even the broader issues have only just begun to filter through the judiciary. It is too soon for the Court to elaborate on *Kingsley*.

IV. Even if the Court granted certiorari in this case, principles of judicial restraint would prevent it from discussing *Kingsley*.

The Court should also decline to grant the petition because, even if the Court found the “extraordinary circumstances” necessary to hear this case, it would only be able to review for plain error. *United States v. Mares*, 402 F.3d 511, 521 (5th Cir. 2005), *cert. denied*, 126 S. Ct. 43 (2005). Because the district court’s grant of summary judgment can be upheld on independent grounds, any error in the

⁵ *California v. Carney*, 471 U.S. 386, 400 n.11 (1985) (citation and internal quotation marks omitted).

application of a subjective rather than objective standard did not affect Petitioners' substantial rights. *See id.* As a consequence, the Court would likely have to affirm the result below without reaching the application of *Kingsley*. The district court's award of summary judgment can be upheld on at least two independent grounds.

First, although Petitioners offer a long recitation of the facts here, they did not submit that evidence as part of the summary judgment record. At summary judgment, Petitioners did *not* offer: (i) any testimony of Young County jailers or other deputies; (ii) any testimony of the City police officers or City EMTs who examined Simpson on the roadside; (iii) any testimony of the dispatchers who took phone calls from Mr. Simpson; or (iv) a single document from the County relating to jailers' watch over Mrs. Simpson, such as observation logs or documentation of cell checks. At oral argument before the Fifth Circuit, counsel confirmed that the County had records showing when jailers performed cell checks and when they observed Simpson in her holding cell. But Petitioners never even requested the records.

"Unsubstantiated assertions, improbable inferences, and unsupported speculation are not sufficient to defeat a motion for summary judgment." *Brown v. City of Houston*, 337 F.3d 539, 541 (5th Cir. 2003). Here, Petitioners simply failed to carry their burden at summary judgment. The district court repeatedly recognized that the Petitioners had "no evidence" to substantiate their claims. *Sanchez v. Young Cty.*, No. 7:15-cv-00012-O, 2016 U.S. Dist.

LEXIS 84673, at *22–26 (N.D. Tex. Jan. 27, 2016). Whether a subjective or objective standard applies, it must be applied to evidence in the record. Petitioners did not submit that evidence, and the district court did not err in granting summary judgment in Respondents’ favor.

Second, the Fifth Circuit noted below that Petitioners had failed to bring any evidence that the county employee’s acts resulted from a municipal policy or custom adopted with objective deliberate indifference to a detainee’s constitutional rights. *Sanchez v. Young Cty.*, 866 F.3d 274, 280 (5th Cir. 2017). Simply put, Petitioners brought no evidence that the tragedy of Mrs. Simpson’s death was not an isolated incident, but part of a pattern. The Fifth Circuit’s analysis was succinct: “Plaintiffs offered no evidence about the alleged maltreatment of any other detainees at Young County’s jail.” *Id.* Such evidence is necessary to prevail on a claim under Section 1983. *See Peterson v. City of Fort Worth*, 588 F.3d 838, 847 (5th Cir. 2009) (“A municipality is almost never liable for an isolated unconstitutional action on the part of an employee.”).

Even if the Court concludes that the district court should have applied an objective standard to Petitioners’ claims, that error did not affect Petitioners’ substantial rights. In order to establish that the error *did* affect their substantial rights, Petitioners would be required to show that the error “must have affected the outcome of the district court proceedings.” *Mares*, 402 F.3d at 521 (citation and internal quotation marks omitted). To meet that standard, Petitioners would have to demonstrate a

probability “sufficient to undermine confidence in the outcome” of the case. *U.S. v. Dominguez Benitez*, 542 U.S. 74, 159 (2004). Because the district court’s award of summary judgment may be sustained on independent grounds, Petitioners cannot show that the application of *Kingsley* would have affected the outcome of the proceedings.

It follows that, should this Court grant certiorari, the most prudent course would be to affirm the judgment below without reaching the constitutional question presented. *See Three Affiliated Tribes of Fort Berthold Reservation v. Wold Eng’g*, 467 U.S. 138, 157 (1984) (“It is a fundamental rule of judicial restraint, however, that this Court will not reach constitutional questions in advance of the necessity of deciding them.”). Anything more would be an overreach. *Id.* The Court should deny the petition.

CONCLUSION

For the foregoing reasons, Respondents respectfully urge the Court to deny the Petition for a Writ of Certiorari.

Respectfully submitted,

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