No. 23-05

In the Supreme Court of the United States

CHESTER CAMPELL, PETITIONER

v.

ARTHER SHELBY, RESPONDENT

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

BRIEF FOR PETITIONER

TEAM 31
Counsel of Record

QUESTIONS PRESENTED

1. Does dismissal of a prisoner's civil action under *Heck v. Humphrey* constitute a "strike" within the meaning of the Prison Litigation Reform Act?
2. Does this Court's decision in *Kingsley* eliminate the requirement for a pretrial detainee to prove a defendant's subjective intent in a deliberate indifference failure-to-protect claim for a violation of the pretrial detainee's Fourteenth Amendment Due Process rights in a 42 U.S.C. § 1983 action?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Rules

OPINIONS BELOW

The opinion of the court of appeals may be found at R.3. The opinion of the trial court may be found at R.12.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Eight Amendment of The Constitution provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Section 1 of the Fourteenth Amendment of the Constitution provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 1983 of Title 42, United States Code, provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Section 1015(g) of Title 28, United States Code, provides:

> In no event shall a prisoner bring a civil action or appeal a judgment in a civil action or proceeding under this section if the prisoner has, on 3 or more prior occasions, while incarcerated or detained in any facility, brought an action or appeal in a court of the United States that was dismissed on the grounds that it is frivolous, malicious, or fails to state a claim upon which relief may be granted, unless the prisoner is under imminent danger of serious physical injury.

STATEMENT OF THE CASE

Respondent Arthur Shelby was arrested and held in jail on December 31, 2020, on charges of battery, assault, and possession of a firearm by a convicted felon. R.3–4. Shelby is a high-ranking official of the Geeky Binders, a violent gang operating in the town of Marshall. R.2–3. While booking Shelby, Officer Dan Mann made note of Shelby's affiliation with the Geeky Binders in the jail's database. R.4. Officer Mann recorded Shelby's possessions, including signature Geeky Binders paraphernalia, and statements, including Shelby's references to his Geeky Binders' membership, into the database. R.4–5. Marshall's gang intelligence officers reviewed Shelby's file and held a meeting the following day to notify jail personnel that Shelby would be held in cell block A while members of a rival gang, the Bonuccis, would be held in blocks B and C. R.5. The intelligence officers were concerned that, due to continuing violent conflict between the two gangs, the Bonnucis might target Shelby for violence. *Id.*

Officer Chester Campbell did not arrive at the jail for work until the afternoon following the meeting, though roll call records show that he was present for the morning meeting. R.5–6. Officer Campbell had only been working at the jail for a few months prior to Shelby's booking but had been meeting job expectations during his employment. R.5. Jail officials who did not attend the meeting were instructed to review the meeting minutes on the jail's database, but the records of which officers actually viewed the meeting minutes were erased by a system glitch.

R.6. Gang intelligence officers printed notices about Shelby's status to be posted at jail administrative areas and added Shelby's name to the list of inmates with special statuses. R.5–6.

On January 8, 2021, Officer Campbell retrieved Shelby from his cell to take him to the jail's recreation room. R.6. Officer Campbell did not know or recognize Shelby, and he did not check the list of inmates with special statuses that he carried with him. *Id*. While Officer Campbell led Shelby to the guard stand, another inmate yelled, "I'm glad your brother Tom finally took care of that horrible woman," and Shelby responded, "yeah, it's what that scum deserved." *Id*. Officer Campbell told the inmates to be quiet before collecting one more inmate from block A, two inmates from block B, and one inmate from block C. R.6–7. The inmates from blocks B and C were members of the Bonucci clan, and upon seeing Shelby attacked him with their fists and a club made from tightly rolled paper. R.7. Officer Campbell tried unsuccessfully to intervene, and the attack lasted for several minutes until other officers were able to break up the altercation. Shelby suffered serious injuries including a traumatic brain injury, several rib fractions, and organ lacerations, and he spent several weeks in the hospital recovering. *Id.*

Following his hospital stay, Shelby was convicted of battery and possession of a firearm by a convicted felon. *Id*. He was and remains incarcerated at Wythe Prison. *Id*.

On February 24, 2022, Shelby filed a claim against Officer Campbell under 42 U.S.C. § 1983 alleging that Officer Campbell failed to protect Shelby from the attack. *Id*. At the same time, Shelby filed a motion to proceed *in forma pauperis* under 28 U.S.C. § 1915(g). R.1, 7. During a previous detention, Shelby had filed three separate actions under § 1983 that were dismissed pursuant to *Heck v. Humphrey* as improperly calling into question his conviction or sentence. R.3. The District Court ruled that these dismissals constituted "strikes" under the Prison Reform Litigation Act and denied Shelby's motion to proceed in forma pauperis on April

20, 2022. R.1. On May 4, 2022, Officer Campbell filed a motion to dismiss for failure to state a claim. R.8. The District Court granted the motion to dismiss on July 14, 2022, reasoning that a pretrial detainee's failure to protect claim requires a showing that the defendant had actual, subjective knowledge of the risk of harm to the detainee and that Shelby had failed to make that showing. R.8–11.

Shelby appealed both the District Court's denial of his *in forma pauperis* status and the granting of Officer Campbell's motion to dismiss, and the United States Court of Appeals for the Fourteenth Circuit submitted argument on December 1, 2022. R.12. The Fourteenth Circuit reversed the denial of Shelby's motion to proceed in forma pauperis, reasoning that the dismissals of previous cases under *Heck v. Humphrey* reflected judgments only that those claims were brought prematurely and therefore did not count as "strikes" under the Prison Litigation Reform Act. R.14–15. The Fourteenth Circuit also reversed the motion to dismiss on the grounds that the Supreme Court's decision in *Kingsley v. Hendrickson* modified the proper standard for pretrial detainee failure to protect claims, and under an objective standard Shelby properly alleged that Officer Campbell acted unreasonably in failing to protect him from the Bonuccis' attack. R.16-19. Officer Campbell appealed and was granted certiorari on both issues. R.21.

SUMMARY OF THE ARGUMENT

I. Prisoners' claims dismissed under *Heck* are strikes under the Prison Litigation Reform Act. Through the Act's "three-strikes" rule, Congress sought to "staunch 'a flood of non-meritorious prisoner litigation," *Lomax v. Ortiz-Marquez,* 140 S.Ct. 1721, 1723 (2020) (quoting *Jones v. Bock,* 549 U.S. 199, 203), by prohibiting prisoners from proceeding *in forma pauperis* after filing three suits dismissed as "frivolous, malicious, or fail[ing] to state a claim upon which relief may be granted" while incarcerated or detained. 28 U.S.C. § 1015(g).

Dismissals of claims made by prisoners under *Heck* are strikes because such dismissals are for failure to state a claim. *Heck*'s plain language compels such a finding, as the case held that plaintiffs in suits dismissed under the case lack "cause of action," a synonym of "claim." *Cause of Action, Black's Law Dictionary* (7th ed. 1999). Even if *Heck*'s language was ambiguous, the case's underlying reasoning necessitates this interpretation. *Heck* imposed a favorable termination requirement for claims of wrongful state imprisonment or conviction because this requirement was an element of the most analogous common law tort—malicious prosecution. *Heck*, 512 U.S. at 484. Given this rationale, it would be incongruous read the favorable termination requirement as anything but an element of a successful 42 U.S.C. § 1983 claim for wrongful state imprisonment or conviction. Failure to plead an element results in dismissal for failure to state a claim. *See Jones v. Bock*, 549 U.S. 199, 215 (2007). Alternative interpretations of the favorable termination requirement as an affirmative defense or a jurisdictional rule cannot be correct because they would render the holdings *Heck* and *Lomax*, respectively, procedurally incorrect.

Further, the language of statutes must be read in context. *King v. Burwell*, 576 U.S. 473, 498 (2015). And in the context of the of the PLRA's purpose to "reduce the quantity and improve the quality of prisoner suits" *Jones v. Bock*, 549 U.S. 199, 203–04 (2007) (quoting *Porter v. Nussle*, 534 U.S. 516, 524, 122 (2002)), it would make little sense to interpret the text of the § 1015(g) as allowing a prisoner to bring an infinite number of claims, all of which certain to be dismissed under *Heck*, *in forma pauperis*.

II. The subjective standard for deliberate indifference claims by pretrial detainees remains unaltered by *Kingsley v. Hendrickson*. State officials violate a pretrial detainee's due process rights when they "punish" that detainee. *Bell v. Wolfish*, 441 U.S. 520, 535 (1979). A state

official's deliberate indifference constitutes punishment when that official subjectively knows of and disregards a risk to an inmate's safety. *Farmer v. Brennan*, 511 U.S. 825, 837 (1994).

Kingsley held that a pretrial detainee claiming that an official's excessive force violated their Fourteenth Amendment rights need only show that the force used was objectively unreasonable. *Kingsley v. Hendrickson*, 576 U.S. 389, 391–92 (2015). The *Kingsley* court framed the question before it narrowly and gave no indication that it intended its decision to extend to deliberate indifference claims. Moreover, *Kingsley's* analysis presumed that a state official *intended* to use the force at issue, and this critical assumption does not hold in a deliberate indifference claim premised on a state official's *failure* to act.

Courts that have extended *Kingsley* to deliberate indifference claims have failed to adequately address this distinction. An official who is unaware that a detainee is at risk of harm cannot be said to have punished them when that harm occurs. Some courts have attempted to solve this problem by fashioning tests that ask whether the official failed to take "reasonable and available measures" to mitigate the risk of harm to a detainee. *Castro v. County of Los Angeles*, 833 F.3d 1060, 1070 (9th Cir. 2016). However, this solution contradicts the longstanding rule that negligence cannot support constitutional liability. *Kingsley*, 576 U.S. at 395–96. Using supposedly heightened standards like reckless disregard or excessive risk have either been rejected by the Court, *id.* at 403–04, or proved unworkable, *see e.g., Westmoreland v. Butler County, Kentucky*, 29 F.4th 721, 734-35 (6th Cir. 2022) (Bush, J., dissenting).

Kingsley also relied on the split-second decision making involved in excessive force claims that is absent in deliberate indifference claims. 576 U.S. at 399–400. Unlike deliberate indifference claims, excessive force claims have generally relied on objective standards. *See Graham v. Connor*, 490 U.S. 386 (1989).

The Court has historically distinguished constitutional liability from tort liability because the harms borne from constitutional injury are different from those properly accounted for by tort law. The Fourteenth Amendment protects pretrial detainees from being punished by state officials, while other harms suffered by detainees during their incarceration are better regulated under state tort law. Adopting an objective standard risks "tortifying" the Fourteenth Amendment, but keeping a subjective standard properly retains the focus on whether the state official punished the detainee. *Kingsley*, 576 U.S. at 408 (Scalia, J., dissenting).

ARGUMENT

I. A DISMISSAL OF A PRISONER'S CLAIM UNDER *HECK* IS INVARIABLY A "STRIKE" UNDER THE PLRA

This question here is whether a prisoner can, without ever having to pay full filing fees up-front, file an unlimited number of claims under 42 U.S.C. § 1983 that have no chance of success.

In *Heck v. Humphrey*, 512 U.S. 477 (1994), the Court held that when a prisoner brings a civil action under § 1983 seeking damages for an allegedly unconstitutional conviction, imprisonment, or other unlawfulness under color of state law, they must show the underlying conviction or sentence has been reversed on via direct appeal, collateral attack, or executive clemency. *Heck*, 512 U.S. at 486–87. This requirement is referred to as "favorable termination." *E.g.*, *Washington v. Los Angeles Cnty. Sheriff's Dep't*, 833 F.3d 1048, 1055–56 (9th Cir. 2016).

Two years later, in response to a "flood of non-meritorious," prisoner litigation, Congress enacted a "three strikes rule" in the Prison Litigation Reform Act (PLRA). *Lomax v. Ortiz-Marquez*, 140 S. Ct. 1721, 1723 (2020) (citing *Jones v. Bock*, 549 U.S. 199 (2007)). The three strikes rule prohibits prisoners from proceeding *in forma pauperis* (IFP) after they bring three or

more actions that are dismissed for being "frivolous, malicious, or fail[ing] to state a claim upon which relief may be granted."[1] 28 U.S.C. § 1015(g). In other words, once a prisoner records three "strikes" by filing claims dismissed on the aforementioned grounds, they must pay normal court fees up-front in any subsequent lawsuits. *Lomax v. Ortiz-Marquez*, 140 S.Ct. 1721, 1723 (2020).

Congress did not enact a statute that allows prisoners to bring an unlimited number of claims IFP that are certain to be dismissed under *Heck*. When prisoners bring a claim that is dismissed for failing to meet *Heck*'s favorable termination requirement, this dismissal counts as a "strike" under the PLRA, 28 U.S.C. § 1015(g) because (A) such claims fail to state a claim upon which relief may be granted, (B) the opposite interpretation would undermine the purpose of the statute.

A. Dismissals Under *Heck* are Dismissals for Failure to State a Claim

Two independently sufficient justifications provide support for finding *Heck* dismissals as a flavor of dismissals for failure to state a claim: (1) *Heck*'s plain text states failure to meet the favorable termination requirement indicates the plaintiff has no "claim," (2) *Heck*'s early termination requirement is an element of a § 1983 claim arising out of a state conviction or confinement, and failure to plead an element results in a dismissal for failure to state a claim. *See, e.g.*, *Garrett v. Murphy*, 17 F.4th 419, 427 (3d Cir. 2021); *Colvin v. LeBlanc*, 2 F.4th 494, 498–99 (5th Cir. 2021); *Smith v. Veterans Admin.*, 636 F.3d 1306, 1312 (10th Cir. 2011); *In re Jones*, 652 F.3d 36, 38 (D.C. Cir. 2011).

[1] The statute carves out an exception, inapplicable in this case, to this rule when the prisoner is "the prisoner is under imminent danger of serious physical injury."

1. The plain language of *Heck* compels a finding that dismissals under the case are for failure to state a claim

Heck plainly held that dismissals under the case's favorable termination requirement are dismissals for failure to state a claim. *Heck*, 512 U.S. at 489–90; *Garret*, 17 F.4th at 427. *Heck* held that dismissals of claims due to the plaintiff's failure to show favorable termination are appropriate because a plaintiff lacks a "§ 1983 cause of action" when they fail to meet the requirement. *Heck*, 512 U.S. at 489–90. "Cause of action" is synonymous with "claim." *Garrett*, 17 F.4th at 428 (citing Cause of Action, Black's Law Dictionary (7th ed. 1999)). Therefore, *Heck* "by its own language" holds that the dismissals it requires are for failure to state a claim. *Colvin v. LeBlanc*, 2 F.4th 494, 498–99 (5th Cir. 2021).

2. *Heck*'s favorable termination requirement is an element of a § 1983 claim arising out of state confinement or conviction, and dismissal for failure to plead an element is a dismissal for failure to state a claim

Circuits have interpreted *Heck*'s favorable termination requirement as (a) an element of the claim, *e.g.*, *Smith v. Veterans Admin.*, 636 F.3d 1306, 1312 (10th Cir. 2011), (b) an affirmative defense, *e.g.*, *Washington v. Los Angeles Cnty. Sheriff's Dep't.*, 833 F.3d 1048, 1055–56 (9th Cir. 2016), or (c) a jurisdictional requirement, *e.g.*, *O'Brien v. Town of Bellingham*, 943 F.3d 514, 529 (1st Cir. 2019). The first interpretation—that favorable termination is an element of the claim and that dismissals under *Heck* are therefore dismissals for failure to state a claim—is correct. The second interpretation—interpreting lack of favorable termination as an affirmative defense—is incorrect, but still yields the result of *Heck* dismissals counting dismissals for failure to state a claim. The third interpretation—that favorable termination is a jurisdiction requirement—finds

no support in *Heck* itself and was foreclosed by the Court in *Lomax v. Ortiz-Marquez,* 140 S.Ct 1721 (2020).

Interpreting *Heck's* early termination requirement as anything but an element of the § 1983 claim would be inconsistent with the Court's reasoning in that case. Because § 1983 creates a type of tort liability, the elements of a successful § 1983 claim mirror the most analogous common law tort claim. *See Heck*, 512 U.S. at 483–86; *cf. Thompson v. Clark*, 142 S.Ct 1332, 1338 (2022) ("In accord with the elements of the malicious prosecution tort, a Fourth Amendment claim under §1983 for malicious prosecution requires the plaintiff to show a favorable termination of the underlying criminal case against him."). Where a § 1983 claim relates to a state conviction or confinement, as all suits dismissed under *Heck* do, the most analogous common law tort claim is malicious prosecution. *Heck*, 512 U.S. at 484. Favorable termination of the criminal proceeding for the accused is an element of the common law tort of malicious prosecution. *Id.* (citing Prosser and Keeton on Law of Torts 888 (5th ed. 1984)). Therefore, favorable termination is also an element of any § 1983 claim dismissed under *Heck.*

Interpreting *Heck's* favorable termination requirement as an affirmative defense is wrong, but even if it were right, failure to overcome such a defense in a pleading would amount to a failure to state a claim. There are two independently sufficient reasons *Heck*'s favorable termination requirement is not an affirmative defense.

First, *Heck*'s imposition of the burden of proof for favorable termination on the plaintiff is inconsistent with the requirement being an affirmative defense. To avoid dismissal under *Heck* "plaintiff must prove" favorable termination. *Heck*, 512 U.S. at 486–87. § 1983 plaintiffs, like plaintiffs in civil suits generally, need not anticipate affirmative defenses and prove their inapplicability. *Gomez v. Toledo*, 446 U.S. 635, 640 (1980). Rather, that burden rests with the

defense. *Id.* The Ninth Circuit's interpretation expounded in *Los Angeles Cnty. Sheriff's Dep't*, 833 F.3d at 1056 n.5, which requires defendants to raise and prove lack of favorable termination as an affirmative defense, is therefore inconsistent with the burden *Heck* imposes on plaintiffs.

Second, *Heck's* holding given its procedural posture necessitates a finding that the favorable termination requirement is not an affirmative defense. Federal courts may not invoke affirmative defenses not raised by litigants to dismiss a case. *See Gray v. Netherland*, 518 U.S. 152, 165–66 (1996). In *Heck*, the state relied on an exhaustion defense that is both narrower and broader than the favorable termination rule the Court ultimately adopted to affirm the dismissal of the case. *Heck*, 512 U.S. at 488–89. If the favorable termination requirement were an affirmative defense, the Court would not have affirmed the dismissal of the case because the defendants only presented the exhaustion defense that the Court rejected. *Id.* However, the Court in *Heck* did affirm the dismissal of the case based on the favorable termination requirement not raised, indicating that the favorable termination requirement is not an affirmative defense.

Further, even if *Heck*'s favorable termination requirement were an affirmative defense, the presence of such a defense would present an "obvious bar to securing relief on the face of the complaint" that would render dismissal under Fed. R. Civ. P. 12(b)(6) for failure to state a claim necessary. *Los Angeles Cnty. Sheriff's Dep't*., 833 F.3d at 1056 (quoting *ASARCO v. Union Pac. R.R.*, 765 F.3d 999, 1004 (9th Cir. 2014)). Where a § 1983 claim rests on a state conviction or confinement, any complaint concerning it will necessarily need to mention that conviction or confinement, allowing the court presented with the claim to examine whether the proceeding leading to such conviction or confinement terminated favorably. *Cf Jones v. Bock*, 549 U.S. 199, 215 (2007) (noting dismissals under the PLRA's exhaustion requirement are dismissals for

failure to state a claim despite the requirement being an affirmative defense rather than a pleading requirement).

Heck's favorable termination requirement is also not a jurisdictional rule, contrary to what the First and Eleventh Circuits have suggested. *O'Brien v. Town of Bellingham*, 943 F.3d 514, 529 (1st Cir. 2019); *Dixon v. Hodges*, 887 F.3d 1235 (11th Cir. 2018).

Lomax forecloses any interpretation of *Heck*'s favorable termination requirement as jurisdictional. 140 S.Ct. 1721. Because they do not issue advisory opinions, federal courts must assess subject matter jurisdiction first, even where a claim could be more easily disposed of on substantive grounds. *Steel Co. v. Citizens for a Better Env't.*, 523 U.S. 83, 94–95 (1998). Therefore, if *Heck's* early termination requirement were a jurisdictional bar, a district court presented with a § 1983 claim would have to dismiss the case for lack of subject-matter jurisdiction under Fed. R. Civ. P. 12(b)(1)—it could not dismiss the case on the substantive ground it failed to state a claim under 12(b)(6). A dismissal on jurisdictional grounds, unlike a dismissal for failure to state a claim, would not count as a "strike" under the PLRA. 28 U.S.C. § 1015(g).

In *Lomax*, however, the district court counted two prior dismissals under *Heck* as "strikes." *Lomax*, 140 S.Ct. at 1724 n.2. By counting these dismissals as "strikes," the district court in *Lomax* held that the other federal courts had subject-matter jurisdiction to dismiss the other claims barred by *Heck* on the merits for failure to state a claim under Fed. R. Civ. P. 12(b)(6). Because "all courts, including the Supreme Court, must raise issues of subject matter jurisdiction *sua sponte*," *Foster v. Chatman*, 578 U.S. 488, 496 (2016), the Court in *Lomax* needed to overturn the district court's holding about the subject-matter jurisdiction if incorrect. While the Court in *Lomax* did note a circuit split on whether *Heck*'s early termination

requirement was an element of the § 1983 claim or an affirmative defense, it did not question the district court's subject-matter jurisdiction holding. *Lomax,* 140 S.Ct at 1724, n.2. By affirming the district court's holding—a holding which depended on federal courts having subject-matter jurisdiction to dismiss claims that fail to meet *Heck*'s favorable termination requirement on the merits rather than for lack of subject-matter jurisdiction—the court ruled out the possibility that *Heck* presents a jurisdictional rather than substantive bar to relief under § 1983.

B. Failing to Count *Heck* Dismissals as Strikes Would Undermine the Purpose of the "Three-Strikes" Rule

Interpreting the PLRA as to not include *Heck* dismissals as strikes would undermine the legislation's purpose. Because the text of the relevant PLRA section, 28 U.S.C. § 1015(g), unambiguously includes *Heck* dismissals as strikes, examining the purpose of the legislation is not necessary. *See King v. Burwell,* 576 U.S. 473 (2015). But even assuming the text of 28 U.S.C. § 1015(g) was ambiguous, the statute should still be constructed to count *Heck* dismissals as "strikes" because such an interpretation is the only one that is consistent with the statute's purpose. *See id.* at 498. The PLRA's three-strikes rule aims to help put a stop to the "flood of nonmeritorious" prison litigation that wastes judicial and public resources. *Lomax v. Ortiz-Marquez,* 140 S.Ct. 1721, 1723 (2020) (citing *Jones v. Bock*, 549 U.S. 199 (2007)). Interpreting *Heck* dismissals as strikes disincentives potential litigants from filing suits that have no possibility of success, serving this purpose. The alternative, in which prisoners could file an unlimited number of § 1983 suits that fail to meet an applicable favorable termination requirement at little to no up-front personal expense would undermine the purpose of the PLRA.

Further, the fact that prisoners may proceed IFP with litigation that is frivolous, malicious, or fails to state a claim three times limits the risk that a pro se litigant may lose their ability to proceed IFP due to a good-faith mistake.

II. *KINGSLEY* DID NOT MODIFY THE SUBJECTIVE STANDARD REQUIRED FOR PRETRIAL DETAINEE DELIBERATE INDIFFERENCE CLAIMS UNDER THE FOURTEENTH AMENDMENT

Officer Campbell had no subjective knowledge that Shelby was at risk of being attacked by other jail inmates. Under settled law, this fact forecloses Officer Campbell from being held liable on a claim of deliberate indifference under the Fourteenth Amendment.

The Fourteenth Amendment protects pretrial detainees from being punished by state officials. *Bell v. Wolfish*, 441 U.S. 520, 535–36 (1979). Because the Eighth Amendment protects convicted prisoners from cruel and unusual punishment, the due process rights of pretrial detainees are at least as great as those of convicted prisoners. *City of Revere v. Massachusetts General Hospital*, 463 U.S. 239, 244 (1983). Claims under either amendment revolve around a determination of whether the individual in custody was "punished," and courts have often used identical tests to determine an action's punitiveness regardless of which amendment the claim arises under. *See, e.g., Miranda-Rivera v. Toledo-Davila*, 813 F.3d 64, 74 (1st Cir. 2016); *Stevens v. Holler*, 68 F.4th 921, 930-31 (4th Cir. 2023); *Myrick v. Fulton County*, 69 F.4th 1277, 1304-05 (11th Cir. 2023). A governmental action constitutes punishment if it was imposed with the express intent to punish or if it is not reasonably related to a legitimate government objective. *Bell*, 441 U.S. at 538–39. A state official must have some sufficiently culpable state-of-mind before their actions can be understood as punishment proscribed by the Constitution. *Wilson v. Seiter*, 501 U.S. 294, 299–300 (1991) ("If the pain inflicted is not formally meted out *as*

punishment…some mental element must be attributed to the inflicting officer before it can qualify") (emphasis in original).

State officials violate the constitution when they are "deliberately indifferent" to a prisoner's serious medical needs. *Estelle v. Gamble*, 429 U.S. 97 (1976). *Farmer v. Brennan*, 511 U.S. 825 (1994), extended the deliberate indifference standard to failure-to-protect claims and clarified that the constitution is violated when a state official is subjectively aware of a great risk of harm to a prisoner but fails to prevent that harm. *Id.* at 837–38. For liability to attach under the Eighth Amendment, "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." *Id.* at 837. Where an official fails to perceive a risk they should have, their inaction "cannot…be condemned as the infliction of punishment." *Id.* at 838. Following *Farmer*, almost every circuit extended the subjective deliberate indifference test to Fourteenth Amendment claims. *Short v. Hartman*, 87 F.4th 593, 607 (4th Cir. 2023) (collecting cases). Adopting this Eighth Amendment analysis into Fourteenth Amendment Due Process analysis was appropriate because a test for deliberate indifference measures whether the official action is "punishment" or conducted pursuant to legitimate regulatory goals. *Griffith v. Franklin County*, 975 F.3d 554, 569 (6th Cir. 2020) ("the punitive intent required under *Wolfish* is the same 'punishment' governed by the Eighth Amendment").

A. The *Kingsley* Opinion Does Not Apply to Failure-to-Protect Claims

Kingsley v. Hendrickson, 576 U.S. 389 (2015), did not alter this well-established standard for deliberate indifference claims. In *Kingsley*, the Court reviewed a claim brought by a pretrial detainee under 42 U.S.C. § 1983 that alleged jail officials used excessive force against him in violation of the Due Process Clause of the Fourteenth Amendment. *Id.* at 391. When confronted

with an excessive force claim brought under the Fourteenth Amendment, courts should use an objective standard that asks whether the use of force was unreasonable rather than a subjective standard that asks whether the official intended their force to be excessive. *Id.* at 396–97. The Court reasoned that force used against a pretrial detainee that is not related to a legitimate governmental objective or is excessive in relation to that objective can be reasonably understood as punishment. *Id.* at 397–98 (Citing *Bell*, 441 U.S. at 561). Using an objective standard to measure when force is excessive aligns with Fourth Amendment excessive force doctrine, *see Graham v. Connor*, 490 U.S. 386 (1989), and adopting this standard for Fourteenth Amendment excessive force claims puts pretrial detainees on equal footing with individuals who are awaiting trial but are free on bail. *Kingsley*, 576 U.S. at 399.

1. By its own terms, *Kingsley* is limited to excessive force claims

Kingsley involved an excessive force claim, and the Court explicitly defined the question before it as addressing the proper state of mind standard for "the *interpretation* of the force…that the defendant deliberately (not accidentally or negligently) used." *Id.* at 396 (emphasis in original). The Court at several points noted the narrowness of its decision and suggested that if its decision had more expansive implications it would be in applying to Eighth Amendment excessive force claims brought by prisoners rather than other claims under the Fourteenth Amendment. *Id* at 395, 400, 402; *see also Strain v. Regalado*, 977 F.3d 984, 992 (10th Cir. 2020) (declining to apply *Kingsley* to deliberate indifference claim); *Nam Dang v. Sheriff, Seminole County*, 871 F.3d 1272, 1279 n.2 (11th Cir. 2017) (same); *Whitney v. City of St. Louis*, 887 F.3d 857, 860 n.4 (8th Cir. 2018) (same). *But see, e.g., Miranda v. County of Lake*, 900 F.3d 335, 352 (7th Cir. 2018) (extending *Kingsley* objective standard to deliberate indifference claim). A few circuits extending *Kingsley* have relied heavily on the Court's dicta that the "language of [the

Eighth and Fourteenth Amendments] differs, and the nature of the claims often differs." *Kingsley*, 576 U.S. at 400; *see, e.g.*, *Miranda*, 900 F.3d at 352; *Short*, 87 F.4th at 609–10. However, the Court made this statement while comparing *Kingsley* to a previous Eighth Amendment excessive force case rather than as a sweeping statement regarding all possible Eighth or Fourteenth Amendment claims. *Kingsley*, 576 U.S. at 400. Notably, the centerpiece of the Court's deliberate indifference jurisprudence, *Farmer v. Brennan*, was unmentioned throughout *Kingsley*, which suggests that the Court itself did not think it was modifying the standard for deliberate indifference.

2. The logic underpinning *Kingsley*'s abrogation of the subjective requirement in excessive force claims does not apply to deliberate indifference claims

The *Kingsley* court distinguished between a defendant's state-of-mind regarding their decision to use force and their state-of-mind regarding whether that force was excessive. 576 U.S. at 395. The court addressed only the second issue, presupposing that the defendant's decision to use force was made "purposeful[ly], [] knowing[ly], or possibly [] reckless[ly]." *Id.* at 395–96. In claims involving a defendant's failure to act, this key element of intentional decision-making is missing. Because the central question in Fourteenth Amendment claims is whether the detainee was punished, courts can reasonably infer an intent to punish when an official's affirmative act is unrelated to a legitimate governmental purpose or is excessive in relation to that purpose. *Bell*, 441 U.S. at 538–39. However, the same inference of punitive intent cannot arise where an official *unknowingly* failed to act. *See Castro v. County of Los Angeles*, 833 F.3d 1060, 1086 (9th Cir. 2016) (Ikuta, J., dissenting). The Due Process Clause cannot be violated by "an

innocent misadventure." *Estelle v. Gamble*, 429 U.S. 97, 105 (1976) (quoting *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459, 471 (1947) (Frankfurter, J., concurring)).

B. Approaches to Applying a *Kingsley* Objective Standard to Deliberate Indifference Claims have Inherent Failings and Limitations

In the failure-to-protect context, there is no comparable distinction between two state-of-mind questions that doesn't run afoul of other limitations on constitutional liability. The Ninth Circuit attempted to apply *Kingsley* to a failure-to-protect claim, and its analysis highlights the shortcomings of this approach. *Castro v. County of Los Angeles*, 833 F.3d 1060 (9th Cir. 2016). In *Castro*, the court stated the first state-of-mind question, given the issue was inaction as opposed to action, as whether "the officer's conduct with respect to the plaintiff was intentional." *Id.* at 1070. This merely recharacterizes a failure to act as deliberate action without solving the underlying issue of discerning punitive intent. The distinction between action and inaction has deep roots in legal history, and any functioning test should confront this distinction and address it rather than sweep it under the rug. *See* Restatement (Second) of Torts § 314 cmt. c (Am. L. Inst. 1965) (explaining difference between "misfeasance" and "non-feasance" and clarifying that inaction is not a historical basis for liability).

The Seventh Circuit sought to solve this problem by specifying that the question is whether defendants acted "purposefully, knowingly, or perhaps even recklessly *when they considered the consequences of their [actions]*." *Miranda v. County of Lake*, 900 F.3d 335, 353 (7th Cir. 2018) (emphasis added). However, if a plaintiff establishes that a state official acted recklessly in considering whether their actions would risk harm to the plaintiff, we seem to arrive back at a subjective deliberate indifference standard. *Castro*, 833 F.3d at 1087 (Ikuta, J., dissenting). Moreover, this framing of the question goes beyond the parallel element described by

the *Kingsley* court which sorts out purely accidental uses of force. *Kingsley*, 576 U.S. at 396 ("Thus, if an officer's Taser goes off by accident or if an officer unintentionally trips and falls on a detainee, causing him harm, the pretrial detainee cannot prevail on an excessive force claim"). At least one district court has noted the difficulties in applying this objective deliberate indifference test in the medical-needs context. *See Terry v. County of Milwaukee*, 357 F.Supp.3d 732, 744-45 (E.D. Wis. 2019).

The second state-of-mind question, modified by *Kingsley*, would be whether there existed "a substantial risk of serious harm to the plaintiff that could have been eliminated through reasonable and available measures that the officer did not take." *Castro*, 833 F.3d at 1070. Most first year law students would recognize this as a classic formulation for negligence. However, negligence has repeatedly been held to fall below the standard for constitutional liability. *Kingsley v. Hendrickson*, 576 U.S. 389, 395-96 (2015); *County of Sacramento v. Lewis*, 523 U.S. 833, 849 (1998); *Daniels v. Williams*, 474 U.S. 327, 335-36 (1986); *Estelle v. Gamble*, 429 U.S. 97, 105-06 (1976). The Ninth Circuit tried to avoid this clearly established rule by setting the standard between negligence and subjective intent at "something akin to reckless disregard." *Castro*, 833 F.3d at 1071. Unfortunately, in *Kingsley* the court considered and rejected jury instructions that required a finding that the official acted with reckless disregard of the detainee's rights, reasoning that a reckless disregard instruction "suggest[s] the jury should weigh respondents' subjective reasons for using force and subjective views about the excessiveness of the force." *Kingsley*, 576 U.S. at 403–04. Moreover, the adoption of this reckless disregard standard has "provoked confusion" amongst some courts as to what exactly the standard entails. *See Westmoreland v. Butler County, Kentucky*, 29 F.4th 721, 734 n.2 (6th Cir. 2022) (Bush, J., dissenting).

A second way that some circuits have attempted to circumvent this problem is by requiring a showing that the detainee was exposed to a "serious" or "excessive" risk that a reasonable official would have recognized and mitigated. *See Darnell v. Pineiro*, 849 F.3d 17, 35 (2d Cir. 2017) (official recklessly failed to mitigate condition that "posed an excessive risk to health or safety"); *Griffith v. Franklin County*, 975 F.3d 554, 589 (6th Cir. 2020) (Clay, J., concurring in part and dissenting in part) (official recklessly failed to mitigate risk of "serious medical need"). However, it is unclear how "excessive risk" is to be distinguished from risk that is substantial but not excessive. This supposedly higher standard is especially ambiguous in a jail context given that jails are inherently dangerous and every detainee is at an elevated risk when compared to an individual released on bail pending trial. *See Westmoreland*, 29 F.4th at 735 (Bush, J., dissenting). Any pretrial detainee would argue they were exposed to an excessive risk that a reasonable official should have known about regardless of their individual situation. *Id*.

C. Considerations Unique to the Excessive Force Context Have No Application in the Deliberate Indifference Context

Kingsley also explained that an objective standard is particularly appropriate in cases where officers must make split-second decisions in response to rapidly changing conditions. *Kingsley*, 576 U.S. at 399–400. An objective standard for determining whether force was excessive has deeper jurisprudential roots that help provide guidelines for the rule's workability. *See, e.g.*, *Graham v. Connor*, 490 U.S. 386 (1989). However, Justice Scalia in dissent critiqued this application of an objective standard in the Due Process context because it fails to properly evaluate whether the officer using force intended to punish the detainee or may have simply misjudged the amount of force needed to restore order. *Kingsley*, 576 U.S. at 406 (Scalia, J., dissenting). An objective standard might make a reasonable heuristic for determining punitive

intent when jailors have made considered decisions about conditions of confinement, but it is less applicable for the split-second decision making involved in excessive force claims. *Id*. This critique applies even more sharply in the deliberate indifference context. Under an objective rather than subjective deliberate indifference standard, liability would be expanded to include those situations where an official should have known but *did not in fact know* about a serious risk of harm to a detainee. In such circumstances there is no reason to ascribe punitive intent to an official's failure to act, and therefore the official falls short of the *Bell v. Wolfish* punishment standard.

In contrast to the historical use of an objective standard for excessive force claims, courts have successfully measured deliberate indifference against a subjective standard. *Farmer*, 511 U.S. at 839–40 ("subjective recklessness…is a familiar and workable standard…and we adopt it as the test for 'deliberate indifference' under the Eighth Amendment"). Respondents will argue that the Court recognized an objective test for deliberate indifference for municipalities in *City of Canton v. Harris*, 489 U.S. 378 (1989), and there are therefore roots for objective deliberate indifference. This argument misses the clear distinction between entity liability and individual liability. A municipality does not possess a single mind capable of either comprehending or failing to comprehend risks to a detainee or prisoner. *See Farmer*, 511 U.S. at 841 (noting that "considerable conceptual difficulty would attend any search for the subjective state of mind of a governmental entity"). It is unclear how a standard used to measure a municipality's deliberate indifference would be helpful in illuminating how to apply that standard to a natural person. Moreover, the deliberate indifference test for entity liability is not a test for whether a constitutional violation has *occurred*, but only a test for whether a municipality can be held liable once a constitutional violation has been established. *City of Canton*, 489 U.S. at 388 n.8. That

objective deliberate indifference test is for causation rather than constitutional violation, further stretching the usefulness of the analogy past its breaking point.

D. The Expansion of Deliberate Indifference Liability is Neither Wise nor Necessary to Protect the Interests of Pretrial Detainees Given the Existence of State Tort Law

A subjective standard properly sets the bar for constitutional liability higher than traditional negligence standards. *Daniels v. Williams*, 474 U.S. 327, 332 (1986) (constitution does not "supplant traditional tort law in laying down rules of conduct to regulate liability"). Constitutional liability based on a violation of due process rights is implicated "only at the ends of the tort law's spectrum of culpability." *County of Sacramento v. Lewis*, 523 U.S. 833, 848 (1998). The Fourteenth Amendment and its attendant civil rights statutes, including 42 U.S.C. § 1983, did not create a body of "general federal tort law" to remedy all injuries where the "State may be characterized as the tortfeasor." *Paul v. Davis*, 424 U.S. 693 (1976). Negligence is "categorically beneath the threshold of constitutional due process." *Kingsley v. Hendrickson*, 576 U.S. 389, 396 (2015) (quoting *Lewis*, 523 U.S. at 849).

The preceding propositions can be distilled into a clear principle distinguishing constitutional liability from tort liability. Constitutional liability for due process violations of pretrial detainees is founded only where a detainee has been *punished*. *Bell v. Wolfish*, 441 U.S. 520, 535 (1979). Any harm suffered by a detainee that was not punishment inflicted by a state official can be addressed through state tort law, while the unique constitutional harm at issue is that of a presumedly innocent individual being punished by state actors. Adopting an objective deliberate indifference standard risks losing sight of this central issue and "tortifying" the Fourteenth Amendment. *Kingsley*, 576 U.S. at 408 (Scalia, J., dissenting). Maintaining a

subjective standard keeps the focus of constitutional inquiry on whether a state official has impermissibly punished a detainee while allowing for state tort law to regulate situations where a detainee has been harmed by the negligence of a state official. *Lewis*, 523 U.S. at 854 n.14. This deference to state policy choices properly respects the balance of distribution of state and federal power while still protecting individuals who have suffered at state hands.

Denying Mr. Shelby's Fourteenth Amendment claim would not suggest that Mr. Shelby did not suffer great harm. Nor would it reflect a judgment that Mr. Shelby is undeserving of any form of compensation for his injuries. Such a holding would merely affirm that the *kind* of harm suffered by Mr. Shelby is not the kind of harm that the Fourteenth Amendment protects against. The Due Process Clause prevents state officials from punishing pretrial detainees, and a state official who was unaware of the risk of harm to an inmate, even through his own negligence, cannot fairly be understood to have punished that inmate. Where a pretrial detainee is injured not by impermissible punishment but through unfortunate accidents and vindictive inmates, remedies are better sought through state tort law that is more suited to this type of claim and able to be regulated with closer attention to local concerns.

CONCLUSION

This Court should reverse the judgment of the court of appeals and reinstate the judgment of the trial court.