**No. 23-05**

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In the

# Supreme Court of the United States

CHESTER CAMPBELL,

*Petitioner*,

v.

ARTHUR SHELBY,

*Respondent*.

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**On Writ of Certiorari**
**to the United States Court of Appeals for the**
**Fourteenth Circuit**

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**BRIEF FOR RESPONDENT**

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Team 12

Counsel for Respondent

February 2, 2024

## QUESTIONS PRESENTED

**I.** Whether a dismissal of a plaintiff's claim solely based on *Heck v. Humphrey* constitutes a strike within the Prison Litigation Reform Act when such a dismissal does not fall within the enumerated grounds of the act and is not within the underlying policies of PLRA.

**II.** Whether this Court's decision in *Kingsley* eliminates the requirement for a pretrial detainee to prove a defendant's subjective intent in a 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.

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## OPINIONS BELOW

The order denying Respondent's motion to proceed *in forma pauperis* of the United States District Court for the District of Wythe appears in the record on page 1. The opinion of the District Court for the District of Wythe appears in the record on pages 2-11. The opinion of the United States Court of Appeals for the Fourteenth Circuit appears in the record on pages 12-19. The dissent from the United States Court of Appeals for the Fourteenth Circuit opinion appears in the record on pages 19-20.

## CONSTITUTIONAL PROVISIONS INVOLVED

This case concerns the Fourteenth Amendment to the United States Constitution, which provides, in part: "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 any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV § 1.

This case also concerns the Eighth Amendment to the United States Constitution, which provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const. amend. VIII.

## STATUTES INVOLVED

This case concerns the Prison Litigation Reform Act, Proceedings in Forma Pauperis, 28 U.S.C. § 1915(g), which 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." 28 U.S.C. § 1915(g).

This case also concerns Civil action for deprivation of rights, 42 U.S.C. § 1983, which provides: "Every person who, under color 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. 42 U.S.C. § 1983

## STATEMENT OF THE CASE

### I. Factual background

Arthur Shelby (Respondent) is a member of the street gang, the Geeky Binders. (R. 2). Before his current confinement, Shelby has been previously incarcerated for various charges. (R. 3). During his prior sentences, Shelby commenced three separate civil actions under 42 U.S.C. § 1983 against various state entities. (R. 3). However, each of these previous actions was dismissed *without prejudice* pursuant to *Heck v. Humphrey*, 512 U.S. 477 (1997) because his right to sue had not yet accrued. (R. 3).

Although once prominent in business and various other enterprises in Marshall, the Geeky Binders have recently lost considerable power. (R. 3). Another gang, the Bonucci clan, has risen to popularity in more recent years. (R. 3). The Bonucci clan has taken over major influence over local politics and other areas, including bribing jail officials. (R. 3). The Bonucci clan's leader, Luca Bonucci, and several other gang members were recently arrested on assault and armed robbery charges. (R. 3). However, this detainment has not stopped the Bonucci clan from exercising considerable power both in and out of the jail. (R. 3).

Shelby was arrested on December 31, 2020, for battery, assault, and possession of a firearm by a convicted felon. (R. 3-4). After his arrest, Shelby was taken to the Marshall jail to await his trial. (R. 4).

Marshall jail protocol requires that officers make both paper and digital copies of forms. (R. 4). Because of the regularity of gang activity in Marshall, the gang affiliation subset of the page is especially important. (R. 4). This portion of the paperwork ensures that all known information about gang members is documented, including known hits placed on any inmates and any gang rivalries. (R. 4). Additionally, Marshall's jail has specialized gang intelligence officers

who review this information once inputted. (R. 4). Officer Dan Mann, a well-trained jail official, followed all necessary protocols while booking and conducting Shelby's preliminary paperwork. (R. 4). Officer Mann inventoried all of Shelby's personal belongings using the Marshall jail's online database. (R. 4). Officer Mann also made sure to make note of Shelby's gang member status he gleaned from Shelby's possessions and statements. (R. 4). Upon further inspection, Officer Mann noticed that Shelby already had a page on the database from his previous confinement. (R. 4-5). The previous files showed Shelby's gang affiliation and other information. (R. 5). Mann recorded updated information. (R. 5). Shelby was subsequently placed in a holding cell apart from the main area of the jail. (R. 5).

Next, the gang intelligence officers reviewed Shelby's file. (R. 5). These officers paid special attention to Shelby's file because of his gang affiliation. (R. 5). These officers were also aware of a tense dispute between Shelby's gang and the Bonucci clan. (R. 5). The dispute arose from another member of Geeky Binders murdering Luca Bonucci's wife. (R. 5). Shelby, despite not being involved in the murder, was a particular target for the Bonucci clan. (R. 5). The officers found Shelby to be at high risk and implemented special protocols throughout the jail. (R. 5). Officers placed specialized paper notices to be left in every administrative area in the jail, noted Shelby's status on all rosters and floor cards at the jail, and, most significantly, held a special meeting with all jail officials to review the procedures set in place for Shelby. (R. 5). The officials ensured Shelby was placed in cell block A of the jail, and the Bonuccis were in either block B or block C. (R. 5). There was even a requirement that any officers absent from the meeting to review the meeting minutes to ensure they were informed. (R. 5-6).

Officer Chester Campbell (Petitioner), though not a gang intelligence officer, was properly trained on all Marshall jail procedures. (R. 5). While roll call records indicate that Officer

Campbell attended the meeting, the jail's time sheets show that he called in sick that morning and did not arrive until later in the afternoon. (R.5-6). Because of a glitch in the system, the records of the meeting minutes do not indicate whether Campbell viewed the minutes. (R. 6).

A week after Shelby's booking, Campbell asked Shelby if he wanted to go to recreation. (R. 6). Shelby responded that he did. (R. 6). During this interaction, Campbell made no effort to reference any of the multiple records, including the hard copy on his person, that indicated Shelby's gang status and the Bonucci clan's target on him. (R. 6). Campbell led Shelby from his cell through the jail. (R. 6). During the walk, an inmate yelled out to Shelby, referencing the murder of Luca Bonucci's wife. (R. 6). Still, Campbell took no note of the remarks and continued through the jail. (R. 6). Campbell proceeded to retrieve known members of the Bonucci clan from blocks B and C of the jail and place them within proximity of Shelby. (R. 7). Shelby attempted to hide from the two gang members; however, the two gang members immediately charged Shelby and beat him on the head and ribs with hands and homemade clubs. (R. 7). Campbell could not break up the attack, and as a result, the attack lasted multiple minutes. (R. 7).

Shelby spent several weeks in the hospital following the attack. (R. 7). Doctors treated Shelby for life-threatening injuries, including penetrative head wounds from external blunt force trauma resulting in traumatic brain injury, three fractured ribs, lung lacerations, acute abdominal edema, organ laceration, and internal bleeding. (R. 7).

Following his stay in the hospital, Shelby was found guilty of battery and possession of a firearm by a convicted felon but acquitted of his assault charge. (R. 7). Shelby is currently incarcerated in Wythe Prison. (R. 7).

## II. Proceedings Below

### a. District Court

Arthur Shelby filed a motion to proceed *in forma pauperis* ("IFP"). The district court denied Shelby's motion (R. 1). Shelby had accrued three "strikes" under the Prison Litigation Reform Act ("PLRA") from a prior detention. (R. 1). Shelby contested that these prior claims were dismissed because the actions would have called into question either his conviction or his sentence, pursuant to *Heck v. Humphrey*, 512 U.S. 477 (1997) ("*Heck*"), and accordingly should not be considered "strikes" under the PLRA. (R. 1). The district court disagreed with the differentiation and denied his motion to proceed IFP. (R.7). Shelby proceeded to pay the filing fee in full. (R. 7).

Shelby brought a 42 U.S.C. § 1983 claim for failure-to-protect, pro se, against Officer Chester Campbell in his individual capacity, alleging that Officer Campbell should have been on notice of the risk Shelby faced in the jail, therefore could be held responsible for Shelby's injuries. (R. 2). Campbell subsequently filed a Rule 12(b)(6) Motion to Dismiss for failure to state a claim. (R. 2). The district court granted Campbell's motion. (R. 2).

In granting Campbell's motion, the district court reasoned that in evaluating a failure-to-protect § 1983 claim, a subjective standard, requiring an officer to have actual knowledge of the risk, not an objective one applies to pretrial detainees, just as it does to convicted persons. (R. 8). The district court stated that nothing in the record indicated that Campbell had actual knowledge of Shelby's gang affiliation and, therefore, was negligent at worst, which is below the threshold for a due process violation. (R. 11).

**b. The Court of Appeals**

Shelby filed an appeal. (R. 12). The Fourteenth Circuit Court of Appeals reversed and remanded the district court's judgment. (R. 13).

The majority of the court disagreed with the district court, holding that Shelby's dismissals pursuant to *Heck* did not constitute strikes under PLRA because *Heck* dismissals are not frivolous,

malicious, or for failure to state a claim upon which relief may be granted, the codified requirements under PLRA. (R. 14). The Fourteenth Circuit held that *Heck* recognizes the prematurity of claims, not their invalidity. (R. 15).

The majority also held that an objective standard should apply to pretrial detainees' failure-to-protect claims, considering *Kingsley v. Hendrickson*, 576 U.S. 389 (2015) other circuits' adoption of the same standard, and because pretrial detainees are entitled to stronger constitutional protections than convicted persons. (R. 16). The court found that Campbell acted in an objectively unreasonable manner and thus, Shelby properly alleged his complaint. (R. 18-19).

The dissent disagreed with the majority but agreed with the district court's holding. (R. 19-20). The dissent reasoned that a subjective deliberate indifference standard served as the proper means for assessing such failure-to-protect claims, delineating them from excessive force claims because they do not involve affirmative acts, and accidents do not constitute punishment. (R. 20). The dissent would have affirmed the district court's decision. (R. 20).

The Petitioner filed a writ of certiorari, which this Court granted. (R.21).

## SUMMARY OF ARGUMENT

### I.

This Court should affirm the Fourteenth Circuit's holding that a dismissal pursuant to *Heck v. Humphrey* ("*Heck*"), does not constitute a strike under the Prison Litigation Reform Act ("PLRA") and therefore, Shelby may proceed *in forma pauperis* ("IFP"). First, a *Heck* dismissal is not included within the enumerated grounds for a strike under PLRA. A *Heck* dismissal is not frivolous, malicious, or a failure to state a claim upon which relief may be granted. Alternatively, this Court should find that a *Heck* dismissal is jurisdictional in nature, thus, a court lacks authority to view the merits of a case; therefore, it is not a strike. Second, a *Heck* dismissal is not the type

of dismissal that PLRA was designed to address. Congress designed PLRA to curb wasteless claims so the courts could reach a greater number of meritorious claims. A *Heck* dismissal is not wasteless, it is just a cause of action that has not yet accrued.

**II.**

This Court should affirm The Fourteenth Circuit's holding which applied Kingsley v. Hendricks ("Kingsley") to pretrial detainees' 42 U.S.C § 1983 claims of failure-to-protect, affording them the lower burden of proving an officer's actions violated an objective standard of culpability rather than a subjective one.

First, under the Fourteenth Amendment's Due Process Clause, pretrial detainees are afforded heightened protections than convicted persons under the Eighth Amendment. Second, while Kingsley addresses a claim of excessive force and not failure-to-protect, prior precedent already necessitates a lower standard of culpability for claimants. Lastly, the objective standard was incorrectly interpreted as equivalent to negligence by the district court and the Fourteenth Circuit's dissent. Instead, an objective standard it is closer to recklessness and not precluded by established law concerning § 1983 claims.

This Court should affirm the Fourteenth Circuit's holding.

**ARGUMENT**

This appeal presents two purely legal questions regarding whether a dismissal pursuant to *Heck v. Humphrey*, 512 U.S. 477 (1997), is a strike under the Prison Litigation Reform Act and whether an objective standard applies to failure-to-protect claims. This Court should apply the *de novo* standard of review to all questions of law. *Pierce v. Underwood*, 487 U.S. 552, 558 (1988).

## I. A Dismissal Pursuant To *Heck v. Humphrey* Should Not Be Considered A Strike Under The Prison Litigation Reform Act Therefore Shelby May Proceed In Forma Pauperis.

This Court should hold that a *Heck* dismissal does not constitute a "strike" within the meaning of the Prison Litigation Reform Act ("PLRA"). Congress enacted PLRA "to deter frivolous prisoner lawsuits that needlessly wasted judicial resources." *Kelly v. Wengler*, 822 F.3d 1085, 1098 (9th Cir. 2016) (quoting *Woods v. Carey*, 722 F.3d 1177, 1182 (9th Cir. 2013)). Congress enacted PLRA to "reduce the quantity and improve the quality of prisoner suits . . . ." *Porter v. Nussle*, 534 U.S. 516, 524 (2002). To aid in the filtering of claims, Congress implemented a "variety of reforms designed to filter out the bad claims and facilitate the consideration of the good." *Jones v. Bock*, 549 U.S. 199, 204 (2007).

Among those was a three-strike provision. *See* 28 U.S.C. § 1915(g). PLRA's three-strike provision provides that prisoner may not proceed *in forma pauperis* ("IFP") in a civil suit,

> [I]f 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 was frivolous, malicious, or fails to state a claim upon which relief may be granted, unless the prisoner is under imminent danger or serious physical injury.

*Id.* "[I]f a case was not dismissed on one of the specific enumerated grounds, it does not count as a strike under § 1915(g)." *Harris v. Harris*, 935 F.3d 670, 673 (9th Cir. 2019).

In *Heck*, 512 U.S. at 486, this Court addressed civil causes of action under § 1983 that sought to challenge the constitutionality of a conviction or sentence. The Court held that such a cause of action does not accrue until that sentence has been "reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court's issuance of a writ of habeas corpus." *Id.* at 487. The Court

stated that district courts must dismiss *without prejudice* § 1983 claims brought before the sentence had been invalidated. *Id.* (emphasis added).

The issue in front of this Court is whether a *Heck* dismissal should count as a strike under PLRA's three strike provision. The answer to that question should be no. The Court should not consider a *Heck* dismissal a strike under PLRA because it does not per se fall into one of the specifically enumerated grounds for a strike under § 1915(g), and a *Heck* dismissal is not the type of claim PLRA is meant to address. All three of Shelby's prior claims were dismissed in full pursuant to *Heck.* Therefore, Shelby may proceed IFP.

### A. A *Heck* Dismissal Should Not Be Considered A Strike Under The Prison Litigation Reform Act Because Such A Dismissal Does Not Fit Within The Specifically Enumerated Grounds Of The Statute.

A *Heck* dismissal is not automatically "frivolous, malicious, or [a] fail[ure] to state a claim upon which relief may be granted . . . ." 28 U.S.C. § 1915(g). While a *Heck* dismissal may constitute one of these enumerated grounds if the courts bypass the doctrine of *Heck* and reach the merits, this is rare, and typically, courts will detail the reason outside of *Heck* for the dismissal. Therefore, this Court should hold that a *Heck* dismissal alone is not a strike under § 1915(g).

#### 1. A *Heck* dismissal is not per se "frivolous" or "malicious."

A "complaint dismissed under *Heck*, standing alone, is not a per se 'frivolous' or 'malicious' complaint." *Washington v. L.A. County*, 833 F.3d 1048, 1055 (9th Cir. 2016).

PLRA does not explicitly define "frivolous" or "malicious." Therefore, courts should look "to their ordinary contemporary meaning, common meaning." *Andrews v. King*, 398 F.3d 1113, 1121 (9th Cir. 2005) (citation omitted). "[A] case is frivolous if it is 'of little weight or importance: having no basis in law or fact.'" *Id.* (quoting *Webster's Third New International Dictionary* 913

(1993); *see also Denton v. Hernandez*, 504 U.S. 25, 25 (1992) (holding that a claim is dismissed as frivolous when the "facts alleged rise to level of irrational or wholly incredible."). Similarly, a claim is considered malicious if the courts find that the complaint was "filed with 'intention or desire to harm another.'" *Andrews*, 398 F.3d at 1121 (quoting *Webster's Third New International Dictionary* 1367 (1993)).

A *Heck* dismissal implicates that the court has not yet considered the merits of the case. Therefore, it follows that a *Heck* dismissal is not "frivolous" or "malicious" because both of those determinations implicate the substance of the complaint itself, not the prematurity, like a *Heck* dismissal does.

In the Seventh Circuit, courts occasionally waive the *Heck* doctrine and reach the merits. *See Polzin v. Gage*, 636 F.3d 834, 839 (7th Cir. 2011) (holding that a court may bypass the *Heck* doctrine and reach the merits of the case). But it is important to note that when a court finds a complaint is frivolous or malicious, it explicitly states so in the opinion. *See Daker v. Comm'r, Ga. Dep't of Corr.*, 820 F.3d 1278, 1284 (11th Cir. 2016) (holding that to dismiss a complaint as frivolous, the dismissing court must make "some express statement to that effect."). Therefore, even if a *Heck* dismissal is considered "frivolous or "malicious," it is not from a determination using *Heck* alone.

**2. A *Heck* dismissed claim does not "fail to state a claim upon which relief may be granted" because "favorable termination" is not an element of a Section 1983 claim.**

A *Heck* dismissed complaint is not per se a complaint that "fails to state a claim upon which relief may be granted;" therefore, this Court should not consider it a strike under § 1915(g).

The language in § 1915(g) is nearly identical to the language of Federal Rules of Civil Procedure Rule 12(b)(6). *Compare* 28 U.S.C. § 1915(g) ("fails to state a claim upon which relief may be granted) *with* Fed. R. Civ. P. 12(b)(6) ("failure to state a claim upon which relief can be granted"). By matching the language, the Court should infer that Congress intended § 1915(g) to have the same impact as Rule 12(b)(6). *See Knapp v. Hogan*, 738 F.3d 1106, 1109 (9th Cir. 2013) (holding that PLRA's "fail[ure] to state a claim" language is "synonymous" with Rule 12(b)(6)); *Moore v. Maricopa Cnty. Sherriff's Office*, 657 F.3d 890, 893 (9th Cir. 2011) ("Congress chose to mirror the language of Federal Rule of Civil Procedure 12(b)(6) . . .").

The purpose of a 12(b)(6) motion is to assess the legal feasibility of a complaint. *See generally Ashcroft v. Iqbal*, 556 U.S. 662 (2009) (laying out the standard of a Rule 12(b)(6) dismissal). A Rule 12(b)(6) dismissal is warranted when a complaint is nothing "more . . . than . . . a statement of facts that merely creates a suspicion [of] a legally cognizable right of action." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (citing 5 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1216 (3d ed. 2004)). While a court cannot dismiss a complaint pursuant to 12(b)(6) simply because the court does not believe the allegations, a complaint must include "more than labels and conclusions, and a formulaic recitation of the elements of the cause of action." *Twombly*, 550 U.S. at 555. A complaint that lacks an element of a claim, therefore, is subject to dismissal pursuant to Rule 12(b)(6). *See Fin. Sec. Assurance Inc. v. Stephens, Inc.*, 500 F.3d 1276, 1282-83 (11th Cir. 2007) (holding that to survive 12(b)(6), a plaintiff must include "either direct or inferential allegations respecting *all material elements necessary* to sustain a recovery under some viable legal theory.") (emphasis added).

"Section 1983 creates a 'species of tort liability' 'for the deprivation of any rights, privileges or immunities secured by the Constitution.'" *Manuel v. City of Joliet, Ill.*, 580 U.S. 357,

362 (2017) (citation omitted). Section 1983's elements are that a plaintiff alleges (1) "deprivation of any rights, privileges, or immunities secured by the Constitution and laws," and (2) that such deprivation happened "under the color of [state law]." 42 U.S.C. § 1983. Nowhere is there an element requiring the pleading of "favorable termination," before a litigant may assert a claim. A litigant whose complaint was dismissed subject to *Heck* has not per se failed to state a claim because "favorable termination" is not an element of a § 1983 claim. This Court should hold that by not attaining "favorable termination" before filing, a litigant has not "fail[ed] to state a claim upon which relief may be granted." A "favorable termination" is not the equivalent to failure to state a claim, in fact, the litigant may very well have a meritorious claim, but their right to sue has not yet accrued.

Petitioner's assertion that a litigant must receive "favorable termination" before proceeding and therefore analogizes such requirement as an element is misplaced. The Court, in *Heck* itself, stated that it was not adding a special pleading requirement into a § 1983 claim. 512 U.S. at 489. Instead, a *Heck* dismissal temporarily stops a court from addressing the merits of a litigant's § 1983 claim. Rather, as stated in *Washington*, "favorable termination" is a "threshold legal determination" made by a court. 833 F.3d at 1056. A *Heck* dismissal closely resemble the administrative exhaustion requirement of PLRA claims "which constitutes an affirmative defense and not a pleading requirement." *Id*.; s*ee also Ross v. Blake*, 578 U.S. 632 (2016) (requiring an inmate to exhaust administrative remedies before suing under § 1983). Like "favorable termination," PLRA does not require the pleading of exhaustion specifically. *See Jones*, 549 U.S. at 200 (holding that inmate is not required to plead exhaustion specifically). Instead, failure to exhaust administrative remedies prevents a court from hearing a claim. *Woodford v. Ngo*, 548 U.S. 81, 92 (2006). This means that before a litigant must receive "favorable termination" of their earlier

confinement or sentence before a court may begin to review the merits of the case. Therefore, this Court should similarly hold that a lack of "favorable termination" is akin to a failure to exhaust administrative remedies that a court may raise as an affirmative defense.

Additionally, a court's requirement to dismiss a complaint on *Heck* grounds *without prejudice* implicates that "favorable termination" is not a missing element but rather an affirmative defense. The dismissal without prejudice implicates that a plaintiff may bring his § 1983 claims again if favorable termination is acquired. *See Trimble v. City of Santa Rosa*, 49 F.3d 583, 586 (9th Cir. 1995) (holding that the dismissal is without prejudice so that the litigant may reassert his claims if he successfully invalidates his conviction).

Finally, the fact that "favorable termination" is not an element of a § 1983 claim is further evidenced by the fact that in limited circumstances, a court may "bypass the impediment of the *Heck* doctrine" and reach the merits of a case. *Polzin,* 636 F.3d at 837. "The *Heck* doctrine is not a jurisdictional bar." *Id.* When those limited occurrences happen, a *Heck* dismissal may constitute a failure to state a claim because there, courts reach the merits of the claim itself. *Heck* is a method of "judicial traffic control" to prevent the collateral attack of a criminal conviction by a civil action. *Albino v. Baca*, 747 F.3d 1162, 1170 (9th Cir. 2014) (citation omitted). *Heck* is not the result of a plaintiff failing to assert all elements of a claim.

When bypassing *Heck*, courts have recognized that if the pleadings present an "obvious bar to securing relief," a dismissal under *Heck* may constitute a 12(b)(6) dismissal; therefore, a strike for failure to state a claim, not solely for lack of "favorable termination." *Washington*, 833 F.3d at 1055-56 (citing *ASARCO, LLC v. Union Pac. R.R. Co.*, 765 F.3d 999, 1004 (9th Cir. 2014)); *Ray v. Lara*, 31 F.4th 692, 697 (9th Cir. 2022) (holding that a *Heck* dismissal may implicate a failure to state a claim where the defect is plain on the complaint's face). However, categorically,

*Heck* dismissals are not failures to state claims. Instead, *Heck* dismissals simply lack a favorable termination of a litigant's prior conviction or sentence. When a *Heck* dismissal does constitute a failure to state a claim, courts specifically denote the deficiency of the complaint beyond lacking "favorable termination." *See Washington*, 833 F.3d at 1056 (containing the court giving specifics into the deficiencies of the claim beyond the *Heck* dismissal itself). Occasionally, circumstances may exist that warrant a dismissal akin to a Rule 12(b)(6) dismissal, but that is not true in most cases. A *Heck* dismissal, therefore, does not categorically fall into any of the specifically enumerated strike categories in § 1915(g). Therefore, this Court should hold that a *Heck* dismissal is not a strike within the meaning of PLRA.

**3. A prisoner civil rights action should not be analogized to malicious prosecution because the two claims are distinctly different causes of actions.**

The petitioner relies on the *Heck* Court's analogy of a §1983 claim to the "common-law cause of action for malicious prosecution," to assert that "favorable termination" is akin to an element in a § 1983 action. 512 U.S. at 484. This Court should clarify that analysis because the Court in *Heck* was merely illustrating an example, not implementing a new pleading requirement into §1983 claims.

The *Heck* Court illustrated that "[o]ne element that must be alleged and proved in a malicious prosecution action is the termination of the prior criminal proceedings in favor of the accused." 512 U.S. at 484 (citing W. Keeton, D. Dobbs, R. Keeton, & D. Owen, *Prosser and Keeton on the Law of Torts*, 874 (5th ed. 1984)). The express elements of common-law malicious prosecution include that the prosecution ended in a "termination of the proceeding in favor of the accused . . ." *Manuel*, 580 U.S. at 371. The *Heck* Court stated, "malicious prosecution provides

the closest analogy." *Heck*, 512 at 484. The *Heck* Court did not state that the malicious prosecution elements were mirrored in § 1983.

Unlike in malicious prosecution, there is no "favorable termination" element in a §1983 action. The Court, in *Heck* was making a comparison between the two causes of action. While malicious prosecution and §1983 actions for civil damages are similar because they may call into question the validity of a criminal proceeding, the fact is, that the two are still different causes of action. The Court should not take this illustration and stretch it further than intended.

This Court should adopt the reasoning of the concurrence in *Heck* to stop any lingering confusion regarding the malicious prosecution illustration. Favorable termination is not and never has been an express element of a § 1983 claim. Litigants need not specifically plead favorable termination.

Favorable termination, while a piece of a § 1983 claim, is not an element; therefore, by not specifically pleading or proving favorable termination, a litigant should not be considered to "have failed to state a claim" therefore, receiving a strike under § 1915(g).

**B. Alternatively, A *Heck* Dismissal Should Be Considered Jurisdictional; Therefore, Until "Favorable Termination" Is Met, The Courts Lack The Authority To Reach The Merits.**

Alternatively, this Court should hold that a *Heck* dismissed complaint is "jurisdictional in nature," and thus, courts cannot reach the merits of the case unless the litigant has acquired "favorable termination." In the Eleventh and First Circuit, a *Heck* dismissal is considered "jurisdictional in nature." *See O'Brien v. Town of Bellingham,* 943 F.3d 514, 529 (1st Cir. 2019) (stating that *Heck* is a jurisdiction issue); *Dixon v. Hodges*, 887 F.3d 1235, 1237 (11th Cir. 2018) (same). Therefore, courts lack the authority to reach the merits of the complaint.

While the Supreme Court has cautioned that "'[j]urisdiction' . . . 'is a word of many, too many, meanings.'" *Steel Co. v. Citizens for a Better Env't.*, 523 U.S. 83, 90 (1998) (citation omitted), that warning is not implicated here. "It is firmly established . . . that the absence of a valid cause of action does not implicate subject-matter jurisdiction." *Id.* at 89. As stated, a *Heck* dismissed complaint does not fail to state a valid cause of action under § 1983, therefore despite petitioner's claims, this wording does not apply to a *Heck* dismissed complaint. Favorable termination is not and has never been an element of a § 1983 claim. Favorable termination is a threshold determination by a court before it reaches the merits.

This finding would mean that a court cannot bypass *Heck* and reach the merits of the complaint as the Seventh Circuit has previously permitted. *See Polzin*, 636 F.3d at 837 (bypassing *Heck* to reach the merits of a case). Therefore, until a litigant receives favorable termination, the court may not even consider the complaint's substance under any circumstance. The litigant brought the suit prematurely. This prematurity does not implicate any facts or legal conclusions of a complaint.

The Court would create a bright line by holding a *Heck* dismissal is jurisdictional in nature. Categorically, a *Heck* dismissal would not fall into any of § 1915(g)'s enumerated classifications for strikes. Such a holding would implicate that a *Heck* dismissal operates like other jurisdictional dismissals and threshold determinations by courts. For example, a dismissal for defects to a complaint such as lack of jurisdiction, is not considered a strike under § 1915(g). *See Daker*, 820 F.3d at 1278 (holding that a dismissal for lack of jurisdiction does not constitute a strike); *Paul v. Marberry*, 658 F.3d 702, 705-06 (7th Cir. 2011) (a plaintiff's illegible "complaints for failure to prosecute did not count as 'strikes' under" § 1915(g)); *Haury v. Lemmon*, 656 F.3d 521, 522 (7th Cir. 2011) (holding dismissals for lack of jurisdiction does not account for a strike); *White v.*

*Gittens*, 121 F.3d 803 (1st Cir. 1997) (holding that it did not have jurisdiction to review a *Heck*-barred claim).

A *Heck* dismissed claim's lack of favorable termination implicates that a court does not have the authority to reach the merits of the action, this does not mean it "fails to state a claim," therefore, it should not count as a strike.

### C. A *Heck* Dismissal Should Not Be Considered A Strike Under The Prison Litigation Reform Act Because The Three-Strike Rule Is Meant To Stop Baseless And Wasteless Claims, Not Premature Claims.

A *Heck* dismissal is not the type of claim Congress intended to limit when enacting PLRA, therefore it should not be considered a strike. PLRA was designed to regulate litigation of incarcerated persons in federal courts. *Woodford*, 548 U.S. at 84. However, PLRA was not implemented to stop all litigation. *See McLean v. United States*, 566 F.3d 391, 396 (4th Cir. 2009) ("The purpose of the Prison Litigation Reform Act (PLRA) was not to impose indiscriminate restrictions on prisoners' access to the federal courts . . .") (overruled on other grounds). Instead, Congress hoped to stop "the flood of non-meritorious claims" from "submerge[ing] and effectively preclude[ing] consideration of the allegations with merit." *Jones,* 549 U.S. at 203. Congress designed a variety of provisions to implement safeguards in the process. *See id.* (detailing the exhaustion of administrative remedies). While petitioner may argue that unripe claims still flood the courts, that argument is misplaced. Again, the purpose of PLRA was not to stop all litigation; instead, it was meant to prevent non-meritorious claims from distracting the courts.

In *Green v. Young*, 454 F.3d 405 (4th Cir. 2006) a complaint was dismissed for failure to exhaust administrative remedies. The court held that such a dismissal did not qualify as a strike for the purposes of PLRA. *Id.* at 408. The court relied on PLRA itself to determine that Congress

"declined to include a dismissal on exhaustion grounds as one of the types of dismissals that should be treated as a strike." *Id.* at 409. Also, in *Richey v. Dahne*, 807 F.3d 1202, 1206 (9th Cir. 2015), the court held that a plaintiff did not receive a strike when he was "asked . . . to rewrite [his] grievance without 'objectionable language.'" However, in *Blakely v. Wards*, 738 F.3d 607, 611 (4th Cir. 2013), the Fourth Circuit stated that when a litigant had three prior suits explicitly dismissed as frivolous, malicious, or failure to state a claim, the litigant had three strikes.

Like in *Green*, where the court held that a dismissal to exhaust administrative remedies did not constitute a strike, a *Heck* dismissal should not constitute a strike. Like a failure to exhaust administrative remedies, a *Heck* dismissal does not relate to a complaint's merits. Instead, a *Heck* dismissal, like not exhausting administrative remedies, is a procedural defect that should not be a strike. Also, like in *Richey*, where a litigant's complaint was imperfect, a *Heck* dismissal indicates that a litigant's complaint lacks favorable termination. Therefore, like in *Richey*, once the litigant receives favorable termination, they may be able to rewrite their complaint. Unlike in *Blakely*, where a litigant expressly received an enumerated strike, A *Heck* dismissal, as established is not an enumerated strike. A *Heck* dismissal is a judge's way of curbing a claim until favorable termination is acquired.

Additionally, plaintiffs proceeding pro se proceed without full knowledge of the legal system. *See Estelle v. Gamble,* 429 U.S. 97, 106 (1976) (citation omitted) (holding that pro se civil rights complaint of prisoner was to be "liberally construed" and must be held to a "less stringent standards than formal pleadings by lawyers . . ."). Holding that a *Heck* dismissal is a strike is inequitable. Such a holding would make it more likely that such plaintiffs would "strike out" due to procedural defects. The point of PLRA and the "three-strike" provision specifically is not to disservice incarcerated litigants or shut them off from the courts. The point is to help regulate the

process to enable a more just system. Holding a *Heck* dismissal as a strike goes against PLRA's purpose because a *Heck* dismissal is not the type of claim PLRA was designed to reduce.

Congress enacted the three-strike provision "to disincentivize frivolous prisoner litigation." *Hoffman v. Pulido*, 928 F.3d 1147, 1149 (9th Cir. 2019). The three-strike provision prevents a plaintiff filing a §1983 action from proceeding IFP if they have previously acquired "three-strikes." Congress decided to impose strikes for complaints that "have no merit." *Id.*

A complaint that potentially does have merit, such as a *Heck* dismissal, is not the type of case that the Court should consider a strike under § 1915(g). In a *Heck* dismissal, the merits of a case have never even been addressed by the court. Therefore, a *Heck* dismissal should not constitute a strike. There is no way to assess whether a claim is "bad" because the merits have never been reached. A *Heck* dismissal is not dismissed for stating "labels" or "conclusions" or mere "recitation[s] of the elements of the cause of action. Rather, a *Heck* dismissal is used by a court when the right to sue has not yet accrued; namely because he had not yet received favorable termination on his sentence or conviction. A *Heck* dismissal is not the type of complaint that PLRA was designed to combat.

A *Heck* dismissal should not be considered a strike under § 1915(g). A *Heck* dismissal does not fall into § 1915(g)'s enumerated categories for strikes, and a *Heck* dismissal does not fall within the underlying policies of PLRA.

## II. Under *Kingsley v. Hendrickson*, Failure-To-Protect Claims Must Be Analyzed Using An Objective Standard.

This Court should affirm the Fourteenth Circuit's assertion of an objective standard in failure-to-protect claims because it appropriately accounts for the distinct differences between pretrial detainees and convicted persons' rights, the Court's established interpretation of past

precedent regarding officer inaction and alternatives to definitions of punishment, and the difference between negligence and objective unreasonableness.

In *Kingsley v. Hendrickson*, 576 U.S. 389, 400-01 (2015) ("*Kingsley*") the Court addressed the standard for a pretrial detainee's 42 U.S.C. § 1983 use-of-force claim, holding that an objective standard appropriate, which does not require the detainee to show that an office used force "maliciously and sadistically to cause harm[,]" only that the action itself was an intentional one and the force was objectively unreasonable, unlike than the subjective state-of-mind element used previously. (citation omitted). With this two-pronged test, pretrial detainees can succeed on excessive force claims by first showing that the action itself was intentional and second, by showing that the force itself was objectively unreasonable given the circumstance. *Kingsley*, 576 U.S. at 397.

While *Kingsley* did not explicitly expand the standard to failure-to-protect claims, the Supreme Court's disapproval of any punishment for pretrial detainees in conjunction with the underlying nature of the federal right at issue which is protected and the nature of the harm suffered being ultimately the same, an expansion is reasonable and justified. *See Bell v. Wolfish*, 441 U.S. 520, 535 (1979).

**A. The Heightened Protections Afforded To Pretrial Detainees By The Fourteenth Amendment Necessitate The Application Of The Objective Standard In Failure-To-Protect Claims.**

Pretrial detainees bring § 1983 claims under the Fourteenth Amendment's Due Process Clause because they are detained but not yet convicted; therefore, constitutional violations are an infringement of their due process rights. *Kingsley*, 576 U.S. at 393; U.S. Const. amend. XIV, §1. The Fourteenth and Eighth Amendments protect separate and discrete fundamental rights, for

pretrial detainees and convicted persons, respectively. Therefore, separate, and discrete standards for claims arising under each properly account for those fundamental differences. *Kingsley*, 576 U.S. at 400-01.

The Eighth Amendment protects convicted criminals from cruel and unusual punishment, which is punishment that possesses a prerequisite of either malicious and sadistic intent or deliberate indifference. Alternatively, the Due Process Clause of the Fourteenth Amendment instead "protects a detainee from certain conditions and restrictions of pretrial detainment." *Bell*, 441 U.S. at 533 (considering conditions of confinement claims brought by pretrial detainees as opposed to already convicted persons); *see also Graham v. Connor*, 490 U.S. 386, 395 n.10 (1989) (the Fourteenth Amendment "protects a pretrial detainee from use of excessive force that amounts to punishment."); *Estelle*, 429 U.S. at 104 (establishing a subjective indifference standard for medical care claims brought by convicted prisoners). The *Bell* Court makes clear that while the Eighth Amendment protects against "wanton" punishment of convicted prisoners, the Fourteenth Amendment prohibits *all* punishment of pretrial detainees. 441 U.S. at 535 (quoting *Gregg v. Georgia*, 428 U.S. 153, 173 (1976)).

In the Fourteenth Circuit's opinion Judge Solomons criticizes the majority's lack of reference to *Farmer v. Brennan* in his dissent. 511 U.S. 825 (1994); *see* (R. 19) ("the Court never referenced, alluded to, or cited *Farmer v. Brennan*, the flagship case on the subjective deliberate indifference standard."). In *Farmer*, this Court analyzed the case of a transgender woman, a convicted person, who was beaten and raped by fellow inmates when housed in a men's prison. *Id.* Judge Solomons' attack on the majority is misguided. This Court in *Kingsley* rejected the notion protections offered for pretrial detainees under the Fourteenth Amendment are the same as those offered to convicted persons under the Eighth Amendment. 576 U.S. at 400-01. The Court in

*Farmer* did not even speak to the Fourteenth Amendment context at all. 511 U.S. at 825. The *Kingsley* Court went further, prohibiting an officer from taking actions that are not "rationally related to a legitimate nonpunitive governmental purpose," or actions which "appear[] excessive in relation to [that] purpose.'" *Bell*, 441 U.S. at 561. While *Farmer* works to create guideposts around what kind of punishment qualifies as cruel or unusual, its standards lose relevance in the Fourteenth Amendment context, where the State is not authorized to inflict *any* punishment at all without a finding of guilt.

**B. Established Precedent Already Supports A Lower State-Of-Mind Requirement For Claims Involving Officer Inaction.**

**1. Moving towards an objective standard for claims of failure-to-protect is well-aligned with established precedent because it is already recognized as a lower bar than claims of excessive force.**

Even *Farmer* calls for a lowered standard of culpability necessary in § 1983 claims not involving an officer's use of force. 511 U.S. at 832. The standard for subjective deliberative indifference standard in a failure-to-protect claim for a convicted person was set forth by *Farmer*. *Id*. The Court held that for a convicted person to prevail on a conditions-of-confinement claim, or claims that involve officer inaction rather than action, they must show that the officer "[knew] of and disregard[ed] an excessive risk to inmate health or safety." *Id*. at 837. While that standard has never been explicitly extended to pretrial detainees, in the case of convicted person, the Court did draw an interesting line between claims of force and those of confinement.

For claims of use of force, the Court maintained its standard set in *Whitely v. Albers*, holding that a plaintiff may prevail if they establish that the officer's action was conducted "maliciously and sadistically for the very purpose of causing harm." 475 U.S. 312, 320-21 (1986)

(when a convicted prisoner was shot in the leg by the officer during a prison riot, the Court held that a heightened mental-state requirement was necessary in light of exigent circumstances). At the same time, the Court reasoned instead that for conditions of confinement claims for convicted persons, "the very high state of mind prescribed by *Whitley* does not apply to prison conditions." *Farmer*, 511 U.S. at 835 (quoting *Wilson v. Seiter*, 501 U.S. 294, 302-03 (1991)); *Id.* (finding the standard should be lower because an officer is not acting quickly and decisively, as they may be in a use of force case, and instead could consider their action or inaction).

Justice Scalia's dissent in *Kingsley*, again, points toward the logic of a lower standard for proving punitive intent in claims regarding "[t]he conditions in which pretrial detainees are held, and the security policies to which they are subject," arguing that those things "are the result of considered deliberation by the authority imposing the detention." 576 U.S. at 406 (Scalia, J., dissenting). Even the Justices in opposition to the precedent set in *Kingsley* argue for an objective standard in analyzing conditions of confinement and failure-to-protect claims. *Id.*

Considering the already existing heightened protections for Fourteenth Amendment claimants and the support for a lower standard of culpability needed for claims of conditions of confinement and failure-to-protect, expanding the objective standard established in *Kingsley* to failure-to-protect claims is the reasonable, logical conclusion to this line of debate.

**2. Utilizing an objective standard in failure-to-protect claims is a natural evolution from the objective inquiry standard already relied on by the *Kingsley* Court.**

In making its analysis, the *Kingsley* Court mainly relied on an earlier case which was entirely centered around jail conditions. *See Bell*, 441 U.S at 561 (pretrial detainees bringing a § 1983 claim on the conditions of their confinement, including the double-bunking practice, access to books, receipt of packages, and more). *Bell* held that to establish a Fourteenth Amendment

violation, proof of an officer's intent to punish would suffice, but an action which is unrelated to a nonpunitive government goal or is excessive in relation to that goal could also constitute punishment. *Id*. ("the determination whether these restrictions and practices constitute punishment in the constitutional sense depends on whether they are rationally related to a legitimate nonpunitive governmental purpose and whether they appear excessive in relation to that purpose"). "The *Bell* Court applied [an] objective standard to evaluate a *variety* of prison conditions … [i]n doing so, it did not consider the prison officials' subjective beliefs about the policy." *Kingsley*, 576 U.S. at 398 (citing *Bell*, 441 U.S. 541-43) (emphasis added).

Indeed, the *Bell* Court laid the groundwork for an objective inquiry via its classification of an officer's action as punishment if it is not "rationally related to a legitimate nonpunitive government purpose." 441 U.S. at 561. That standard does not require any insight into the state of mind of an official, instead providing an analysis which is totally detached to their intent to harm, which is the reasoning that *Kingsley* relied on, even in a use-of-force claim. 576 U.S. at 398.

In expanding the definition of punishment from actions with an "expressed intent to punish" to also conditions which are not "rationally related legitimate governmental objective," the Court removed the necessary requirement of claims of punishment to include "proof of intent (or motive)." *Kingsley*, 576 U.S. at 389, 398 (quoting *Bell*, 441 U.S. at 541-43, 585-86). Similarly, the Court found in *Kingsley* that a detainee should not need to prove an officer's action or inaction was intentional to prevail, instead using objective tests that can operate as a heuristic for identifying intent. *Kingsley*, 576 U.S. at 397-98; *see Bell*, 441 U.S at 539 (stating that State action must be "reasonably related to a legitimate goal."); Abby Dockum, *Kingsley, Unconditioned: Protecting Pretrial Detainees with an Objective Deliberate Indifference Standard in § 1983 Conditions-of-Confinement Claims*, 53 Ariz. St. L.J. 707 (2021) (same).

### 3. The Court's narrow focus on excessive force claims do not preclude the application of an objective standard to other § 1983 causes of action.

In the proceedings below, the dissent in the Fourteenth Circuit confronts the issue of abrogating the subjective indifference claims for § 1983 causes of action outside of the scope of excessive force claims. *See* (R. 19) (Solomons, J., dissenting) ("considering 'the law on this point conclusively resolved by broad language in cases where the issue was not presented or even resolved' seems to put the cart before the horse.") (quoting *R.A.V. v. City of St. Paul*, 505 U.S. 377, 386 n.5 (1992); *Crandell v. Hall*, 75 F.4th 537, 544 (5th Cir. 2023) (discussing how *Kingsley* did not abrogate the circuit's deliberate indifference standard). While *Kingsley* analyzed a § 1983 claim of excessive force, the Court should not imbue prejudice against other causes of action (complaints of conditions of confinement, inadequate medical care, and failure-to-protect claims) brought under § 1983, from their lack of incorporation. *Kingsley* solely addressed claims of excessive force brought by pretrial detainees for the same reason that the Court did not address claims of excessive force brought by convicted persons: because they were not at issue in the matter. *Kingsley*, 576 U.S. at 402 ("[w]e are not confronted with such a claim, however, so we need not address that issue today."). The Court should not read prejudice against other § 1983 causes of action based on the Supreme Court addressing the questions presented by the claim in front of it.

Additionally, the Ninth Circuit in *Castro v. County of Los Angeles* aptly points out the Supreme Court's hesitance to limit their distinction between protections for pretrial detainees and convicted persons to use-of-force claims is not intended to preclude other § 1983 causes of action from being held to that standard. 833 F.3d 1060, 1070 (2016) (en banc). The Ninth Circuit noted that when the Court wrote "a pretrial detainee can prevail by providing only *objective* evidence

that *the challenged governmental action* … is excessive in relation to that purpose[,]" the Court "did not limit its holding to 'force' but spoke to 'the challenged governmental action' generally." *Id.* (quoting 576 U.S. at 398) (emphasis added)). Reasoning that while, "[e]xcessive force applied directly by an individual jailer and forced applied by a fellow inmate can cause the same injuries." *Castro*, 833 F.3d at 1070. But, "[j]ailers have a duty to protect pretrial detainees from violence at the hands of other inmates, just as they have a duty to use only appropriate force themselves[,]" the Ninth Circuit in *Castro* found that *Kingsley* should apply to failure-to-protect claims as well. *Id.*

### C. The Objective Standard Is Not Equivalent To Pure Negligence, Instead It Is Closer To Reckless Disregard Thereby Protecting Officers Acting In Good Faith.

Judge Solomons argues that *Kingsley* cannot apply to failure-to-protect claims because affirmative acts can be inferred to constitute punishment, but "inadvertent failures to act" cannot inflict punishment. (R. 20). Citing Judge Ikuta's dissent in *Castro*, it reads "a person who unknowingly fails to act-even when such failure is objective unreasonabl[e]- is negligent at most." 833 F.3d at 1086 (Ikuta, J., dissenting). Furthermore, Judge Solomons and the *Kingsley* Court were correct when they remind that, "liability for *negligently* inflicted harm is categorically beneath the threshold of constitutional due process." *Kingsley*, 576 U.S. at 396 (quoting *County of Sacramento v. Lewis*, 523 U.S. 833, 849 (1998)); *see also Leal v. Wiles*, 734 F. App'x 905, 910 (5th Cir. 2018) (holding that deliberate indifference requires more than negligence); *Strain v. Regalado*, 977 F.3d 984, 997 (10th Cir. 2020) (same).

The Eleventh Circuit mistakenly equates the objective standard with pure negligence in the case of *Nam Dang ex rel. Vina Dang v. Sheriff, Seminole County Florida*, 871 F.3d 1272 (2017). The court found that it did not need to determine whether the objective standard had displaced the

subjective standard in an inadequate medical care claim because the petitioner had only pleaded negligence, therefore would not meet the subjective deliberate indifference standard. *Id.* at 1289 n.2. But, because the court did not explore the claim further, it equated falling below the subjective indifference standard with a claim of negligence, when instead the true objective standard lies somewhere closer to "reckless disregard." (R. 18) (quoting *Castro*, 833 F.3d at 1071) ("A detainee asserting a due process failure-to-protect claim must allege something more than negligence, but less than subjective intent— 'something akin to reckless disregard.'").

Thankfully, the two-prong framework offered by *Kingsley* is one that distinguishes negligence from objective reasonableness. The first prong of *Kingsley* involves the officer's intent to act itself, "his state of mind with respect to the bringing about of certain physical consequence in the world." 576 U.S. at 395. This reasoning would protect an officer if, for example, he negligently or accidentally uses a taser on a detainee, for he did not intend to bring about that consequence.

In establishing objectiveness, the Court emphasized the importance of the "facts and circumstances of each particular case[,]" holding that "[a] court must make this determination from the perspective of a reasonable officer on the scene, including what the officer knew at the time, not with the 20/20 vision of hindsight." *Id*. at 397. Therefore, the Court must evaluate Officer Campbell's situation uniquely. Officer Campbell could only be held liable if he "made an intentional decision with respect to the conditions under which the [pretrial detainee] was confined." *Castro*, 833 F.3d at 1071-72; *see also Darnell v. Piniero*, 849 F.3d 17, 30 (2d Cir. 2017) ("A detainee must prove that an official acted intentionally or recklessly, and not merely negligently."). In the case of *Castro*, where the defendant intentionally placed Mr. Castro in a holding cell with a combative cellmate, and in *Miranda v. County of Lake*, where the defendants

intentionally took a "wait and see" approach in the treatment of an ill pretrial detainee, had the defendants accidentally taken either plan of action (the equivalent of accidentally dropping a taster that injures a detainee), they would not be held liable. 833 F.3d at 1071; 900 F.3d 335, 354 (7th Cir. 2018).

When applied to the actions of Petitioner, this prong is satisfied. There is no dispute in the record that Petitioner approached Shelby's cell and invited him out into a common space for recreation. (R. 6). Officer Campbell did not act negligently in his act, indeed he was aware of his actions at the time and did not intend to ask Shelby a different question, nor did he accidentally unlock his cell, nor did he accidentally retrieve other inmates, who consequently turned out to be members of the Bonucci clan, by accident. (R. 6-7). Quoting Judges Stark and Thorne, "no outside force, illness, or accident rendered Officer Campbell unable to make this conscious decision." (R. 17).

The second prong of *Kingsley* is whether the "defendant's physical acts in the world as involving that force was 'excessive[.]'" 576 U.S. at 395. The Court goes on to determine that the standard which is most appropriate for this inquiry is not a subjective one that requires an exploration of the officer's mind, but rather an objective one to determine "reasonableness." *Id.* at 396-97. Some of the considerations that should go into this determination are from the "perspective of a reasonable officer on the scene, including what the officer knew at the time." *Id*. at 397. Some of those things that a reasonable officer might know are the "'legitimate interests that stem from [the government's] need to manage the facility in which the individual is detained,'" and taking account of "'policies and practices … needed to preserve internal order and discipline to maintain institutional security.'" *Id*. at 397 (quoting *Bell*, 441 U.S. at 540, 547).

When assessing Officer Campbell's actions under that second *Kingsley* prong, he also violated this element. When considering the facility in question, the Marshall jail has an established protocol in question for the purposes of lawful operation which is heavily necessitated by the gang activity in Marshall. (R 3). In fact, the record reflects that the Marshall jail is still considerably influenced by the Bonucci gang, and that the town's gang activity was so substantial that "Marshall jail had several gang intelligence officers who reviewed each incoming inmate's entry in the online database." (R. 3-4).

A reasonable officer working at the Marshall jail would: (1) be expected to attend their required meeting with intelligence officers notifying each officer of Shelby's presence in the jail; (2) notifying them that he would be in block A of the jail because Bonucci gang members were housed in blocks B and C; (3) taken note of the written notice of Shelby's status on all rosters and floor cards of the jail; or (4) consulted the hard copy list of inmates with special statuses in his pocket. (R. 5-6). Each of Campbell's inactions, followed by his action to ostensibly place Shelby in the grip of Bonucci gang members to receive life-threatening injuries, were wholly unreasonable given the factors laid out to consider by the *Kingsley* court. (R. 7).

This can be distinguished from the Fifth Circuit's application in a similar circumstance in *Leal*. 734 F. App'x at 905. There, an officer who was in a hurry failed to check the gang affiliation status of a pretrial detainee, leading to the detainee's assault at the hands of rival gang members. In that instance, the Fifth Circuit refuted the allegation that the officer had "opportunity to confirm or … ultimately disregarded strong indications of a substantial risk to Leal's safety[,]" because the inference that an inmate was gang affiliated could not be drawn alone on something like that inmate's appearance or the location of his detention. *Id*. at 911.

Even accepting a deliberate indifference standard, in the instant case there are multiple factors inferences that Campbell could have drawn which would have attached liability to him. Firstly, a disconnect exists in the record as to whether Petitioner attended the meeting with gang intelligence officers or not. (R. 5-6). If Campbell attended the meeting, he undoubtedly meets even the deliberate indifference standard used in the Fifth Circuit. But, even if he had not, the record notes the shouting exchange between Shelby and another inmate in cell block A implicating some sort of criminal act between Shelby's brother and a woman, to which Petitioner's only response was telling Shelby to "be quiet." (R. 6). Under the subjective deliberative indifference standard, in conjunction with Petitioner's overall knowledge of the Marshall jail's gang problem, established by the numerous gang-related precautions taken in the prison, Campbell surely could have utilized this interaction to draw an inference that the detainee he was transporting was a gang-affiliated individual and at the very least, stopped to check the list in his pocket.

When evaluated under the *Castro*, 833 F.3d at 1071, proposal for the elements of a pretrial detainee's Fourteenth Amendment failure-to-protect claim, Petitioner is just as liable:

> (1)The defendant made an intentional decision with respect to the conditions under which the plaintiff was confined; (2) Those conditions put the plaintiff at substantial risk of suffering serious harm; (3) The defendant did not take reasonable available measures to abate that risk, even though a reasonable officer in the circumstances would have appreciated the high degree of risk involved—making the consequences of the defendant's conduct obvious; and (4) By not taking such measures, the defendant caused the plaintiff's injuries.

The objective standard set by *Kingsley*, and followed in *Castro*, still requires that each claim is explored uniquely and takes account for the difficulties and unforeseen circumstances which arise in detention facilities each day. The standard does not require officers to be perfect nor does it punish them for innocent mistakes. Instead, by holding officials to a standard in which they may not act with "reckless disregard," pretrial detainees are simply protected from all forms of

punishment, both at the hands of officers and other inmates, and from both actions and inactions which may causes undue and unnecessary harm.

## CONCLUSION

This Court should uphold the decision of the United States Court of Appeals for the Fourteenth Circuit and hold that a *Heck* dismissal does not constitute a strike under PLRA. Additionally, the Court should uphold the decision of the United States Court of Appeals for the Fourteenth Circuit and hold that this Court's decision in *Kingsley* warrants an objective standard in a failure-to-protect claim.

Respectfully submitted,

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Attorneys for Respondent