No. 23-05

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2023

CHESTER CAMPBELL,

Petitioner,

v.

ARTHUR SHELBY,

Respondent.

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

BRIEF FOR THE PETITIONER

February 2, 2023

Team 13
Counsels for Petitioner

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QUESTIONS PRESENTED

1. Does dismissal of a prisoner's civil action pursuant to *Heck v. Humphrey* constitute a "strike" under the Prison Litigation Reform Act since Congress added failure to state a claim to the statutory grounds for dismissal, which already included frivolity, and every circuit court addressing the issue has held the Three Strikes Rule to be constitutional?

2. Does *Kingsley v. Hendrickson* exempt a pretrial detainee from having to prove an officer's *punitive intent* in a deliberate indifference 42 U.S.C. § 1983 failure-to-protect claim alleging unconstitutional *punishment* under the Fourteenth Amendment when this Court has consistently held that negligence is insufficient to state a due process violation?

OPINIONS BELOW

The opinion of the District Court for the Western District of Wythe is reported at No. 2314-cr-2324 (W.D. Wythe 2023). The opinion of the Court of Appeals for the Fourteenth Circuit is reported at reported at No. 2023-5255 (14th Cir. 2023).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The relevant constitutional and statutory provisions appear in the attached appendix.

STATEMENT OF THE CASE

Statement of Facts

Despite accruing three "strikes" under the *in forma pauperis* statue of the Prison Litigation Reform Act ("PLRA"), Geeky Blinders gang member, Arthur Shelby ("Shelby"), petitions this Court to allow him to save $402.00 and bring a Fourteenth Amendment lawsuit under 42 U.S.C. § 1983 against Officer Chester Campbell ("Officer Campbell"). R. at 2, 7.

Pursuant to Marshall Jail's procedures, Officer Dan Mann ("Officer Mann") entered Shelby's paperwork into the jail database after he was arrested. R. at 4. Officer Mann "properly recorded all of Shelby's current information," including his gang affiliation. *Id*. at 4–5. Gang intelligence officers also added gang rivalry information into the database because they knew Shelby's brother had murdered the wife of the leader of the Bonucci gang and expected the Bonucci gang to target Shelby in revenge. *Id*. at 5. The intelligence officers noted Shelby's special status in his file, printed notices to post throughout the jail, and indicated his status "on all rosters and floor cards at the jail." *Id*. Additionally, the intelligence officers held a gang intelligence meeting notifying jail officers of Shelby's gang status and location–"in cell block A"–and the Bonucci's location–"between cell blocks B and C." *Id.* Intelligence officers advised that all Marshall Jail guards and officers "check the rosters and floor cards regularly to ensure that the rival gangs were not coming in contact in common spaces in the jail." *Id.*

Officer Chester Campbell is a trained, entry-level guard at the Marshall jail. *Id*. at 5. He oversees inmate transportation from the inmate cells to the jail's recreation center. *Id*. at 6. Roll call records indicate that Officer Campbell attended the gang intelligence meeting. *Id.* at 5. But timesheets note that Officer Campbell called in sick and did not arrive at the jail until the meeting was over. *Id*. Jail procedures require officers to review meeting minutes online when they miss a meeting. *Id*. at 6. However, there is no evidence that Officer Campbell reviewed the minutes, as a glitch in the system erased the records of officers who reviewed the minutes of the gang intelligence meeting. *Id*.

When Officer Campbell approached Shelby to transport him to the recreation center, Shelby was formally considered a "pretrial detainee." *Id*. at 6 n.1. At the time, Officer Campbell did not recognize Shelby or know of his special status because Officer Campbell had neither looked at the list he was carrying nor the jail's database. *Id*. at 6. While escorting Shelby, Officer Campbell witnessed an inmate shouting at Shelby, "I'm glad your brother Tom finally took care of that horrible woman," to which Shelby responded, "Yeah, it's what that scum deserved." *Id.* Officer Campbell silenced Shelby and continued collecting inmates: one inmate from cell block A, two from cell block B, and one from cell block C. *Id*. at 7. Three of these inmates were members of the Bonucci clan. *Id*.

The three Bonucci members attacked Shelby. *Id*. Officer Campbell tried to hold them back but was ultimately overpowered. *Id*. The attack lasted "several minutes" until other officers arrived. *Id.* Shelby suffered "life-threatening" injuries and was hospitalized for "several weeks" as a result. *Id*. Later, Shelby was found guilty of battery and possession of a firearm by a convicted felon and is currently incarcerated at Wythe Prison. *Id.*

Procedural History

Shelby filed a pro se action under 42 U.S.C. § 1983 against Officer Campbell in his individual capacity and a request to proceed *in forma pauperis* ("IFP"). *Id*. at 2. Subsequently, Officer Campbell filed a Rule 12(b)(6) Motion to Dismiss for failure to state a claim. *Id*.

The District Court for the Western District of Wythe denied Shelby's motion to proceed IFP based on his three prior dismissals pursuant to *Heck v. Humphrey*, 512 U.S. 477 (1994), which constituted three "strikes" under the PLRA's "Three Strikes Rule," 28 U.S.C. § 1915(g). *Id*. at 1. It ordered Shelby to pay the $402.00 filing fee, which he timely paid. *Id*. at 2, 7. Regarding his § 1983 claim, Shelby argued "Officer Campbell should have known" about—but was unaware of—the risk to Shelby. *Id*. at 8. The court did not extend *Kingsley v. Hendrickson*, 576 U.S. 389 (2015), and dismissed Shelby's due process claim, holding that Officer Campbell did not punish Shelby because Officer Campbell did not have "actual knowledge" of the threat to Shelby's safety under the subjective standard. *Id*. at 8–9.

The Fourteenth Circuit reversed and remanded the decision of the district court. *Id*. at 13. First, the court held that *Heck* dismissals did not automatically count as "strikes" under the PLRA. *Id*. at 14. Adopting the Seventh and Ninth Circuits' approach, the court reasoned that *Heck* functioned as an "affirmative defense subject to waiver," that favorable termination was not a "necessary element" for civil relief under § 1983, and that *Heck* dismissals did not always occur for failure to state a claim. *Id*. at 15. Second, the court held that Shelby "properly alleged" his § 1983 claim. *Id*. at 18–19. The Fourteenth Circuit relied on a Ninth Circuit case, which interpreted *Kingsley* to require an objective standard, and reasoned that Officer Campbell punished Shelby because "Officer Campbell failed to take reasonable measures to abate the risk [to Shelby] even though any reasonable officer would have acted otherwise." *Id*. at 16–17, 19.

This Court granted Officer Campbell's timely petition for writ of certiorari. *Id*. at 21.

SUMMARY OF THE ARGUMENT

Procedure protects prisoners. It shields qualifying prisoners from competing with meritless filers by providing courts a basis to eliminate claims ineligible for statutory and constitutional relief. This case is not about whether Shelby suffered an injury, but whether he qualifies for the privilege of proceeding *in forma pauperis* ("IFP") under a federal statute and for relief under the Fourteenth Amendment. He does not.

This Court should reverse and remand the decision of the Fourteenth Circuit for two reasons. First, congressional intent, statutory language, and the Constitution require that dismissals under *Heck v. Humphrey* are "strikes" within the meaning of the PLRA. Second, *Kingsley v. Hendrickson* does not overrule this Court's precedent requiring pretrial detainees to prove an officer's subjective punitive intent in a failure-to-protect claim, which protects officers from being held liable under the Due Process Clause for negligence.

I.

The PLRA plays no games. Three "strikes," and a prisoner "strikes out" of IFP eligibility under the Three Strikes Rule of the PLRA's IFP statute. The rule imposes "strikes" per prisoner suit "dismissed on the grounds that it was frivolous, malicious, or fails to state a claim upon which relief may be granted." Consistent with congressional intent, the statute itself, and the Constitution, this Court should hold that *Heck* dismissals are "strikes" under the PLRA.

Congress passed the PLRA to provide IFP status to indigent prisoners with meritorious claims. Under the original IFP statute, courts could only dismiss prisoner suits *sua sponte* for frivolity and maliciousness. But following a series of fruitless prisoner litigation flooding federal courts, Congress enacted the Three Strikes Rule. For the first time, courts could impose a

"strike" for a prisoner's failure to state a claim and dismiss the suit *sua sponte* on the same ground. Congress thus intended courts to broadly construe the Three Strikes Rule to impose "strikes" whenever a prisoner suit fails to state a claim or is frivolous.

Construing *Heck* dismissals as "strikes" comports with the statutory language of the Three Strikes Rule. *Heck* dismissals are automatically "strikes" because courts can only issue dismissals when a prisoner fails to plead favorable termination, an "essential element" to state a "cognizable" claim under § 1983. Alternatively, *Heck* dismissals are "strikes" for frivolity because they only occur when a prisoner files a civil challenge to his criminal conviction or sentence without first obtaining a judgment invalidating the underlying conviction or sentence. A few circuits misapply *Heck* by holding that favorable termination is an affirmative defense subject to waiver or a jurisdictional requirement. The Fourteenth Circuit erred by applying the waiver approach to hold that *Heck* dismissals do not automatically constitute "strikes."

Lastly, construing *Heck* dismissals as "strikes" is constitutional. Every circuit court addressing the issue has held that prisoners retain meaningful access to the courts, as "strikes" only affect IFP eligibility, not whether prisoners can file civil actions. As prisoners are not a protected class, applying the Three Strikes Rule to indigent prisoners does not violate due process. Moreover, common law tradition supports marrying care for the poor with prudential court procedures, which requires limiting IFP proceedings to meritorious claims.

II.

Shelby's failure-to-protect claim should be analyzed under a subjective standard. The Constitution protects prisoners from punishment, while tort law protects against negligence. The presence of punitive intent distinguishes punishment from negligence. In excessive force claims, this Court infers punitive intent when an officer intentionally acts in a manner not reasonably

related to a nonpunitive objective. In failure-to-protect claims, this Court requires a claimant to demonstrate an officer's express punitive intent by showing that the officer acted with the subjective intent to punish.

Kingsley's decision was narrowly tailored to excessive force claims. Punitive intent can be inferred from the use of objectively excessive force, which has no nonpunitive purpose. Punitive intent cannot be inferred from an officer's unintentional omission in a failure-to-protect claim. Nevertheless, some circuits misinterpret *Kingsley* to exempt pretrial detainees from proving express punitive intent in failure-to-protect claims. This is incorrect because *Farmer v. Brennan* controls in failure-to-protect claims and requires that prisoners establish subjective punitive intent. *Farmer*'s Eighth Amendment prisoner analysis applies to Shelby's Fourteenth Amendment pretrial detainee claim.

This Court should not abolish the punitive intent requirement for failure-to-protect claims under a misinterpretation of *Kingsley*, because doing so holds officers liable under the Due Process Clause for mere negligence. Circuit courts that misapply *Kingsley* in this manner are forced to unconstitutionally conflate negligence with punishment. In this vein, the Fourteenth Circuit erred in holding Officer Campbell liable under the Due Process Clause for failing to take certain precautions that a reasonable officer would have taken under similar circumstances (a.k.a. negligence). In contrast, the district court properly applied the subjective standard and did not hold Officer Campbell liable because he had no actual knowledge that Shelby was in danger and thus lacked express punitive intent. Although Shelby may have a tort claim, he was not unconstitutionally punished by Officer Campbell's negligence.

ARGUMENT

I. CONGRESSIONAL INTENT, STATUTORY LANGUAGE, AND THE CONSTITUTION REQUIRE THAT *HECK* DISMISSALS ARE AUTOMATICALLY "STRIKES" UNDER THE THREE STRIKES RULE OF THE PRISON LITIGATION REFORM ACT ("PLRA") FOR FAILURE TO STATE A CLAIM, OR ALTERNATIVELY, FOR FRIVOLITY.

The PLRA plays no games. *See* Pub. L. No. 104-134, §§ 801-810, 110 Stat. 1321-66, (1996) (codified as amended in scattered sections). Indigent prisoners can effectively sue for free by proceeding IFP. 28 U.S.C. § 1915; *Coleman v. Tollefson*, 575 U.S. 532, 535 (2015). But after three "strikes," prisoners "strike out" of eligibility to proceed IFP under the Three Strikes Rule unless they can show "imminent danger of serious physical injury." 28 U.S.C. § 1915(g). Congress enacted the Three Strikes Rule upon realizing "that prisoner suits . . . represented a disproportionate share of federal filings" to "filter out the bad claims filed by prisoners and facilitate consideration of the good." *Coleman*, 575 U.S. at 535 (quoting *Jones v. Bock*, 549 U.S. 199, 204 (2007)) (alteration omitted). Accordingly, prisoners only receive "strikes" if their suit is dismissed "on the grounds that it is frivolous, malicious, or fails to state a claim upon which relief may be granted." 28 U.S.C. § 1915(g).

A *Heck* dismissal occurs when prisoners file a § 1983 suit "challenging the validity of [their] outstanding criminal judgments" but cannot "prove that the conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid. . . or called into question by a federal court's issuance of a writ of habeas corpus." *Heck v. Humphrey*, 512 U.S. 477, 487 (1994) (citing 28 U.S.C. § 2254). Prisoners must plead favorable termination or face a *Heck* dismissal. *See id.* (requiring courts to dismiss a civil case where favorable judgment "would necessarily imply the invalidity of [the prisoner's] criminal conviction or sentence" unless the prisoner could show that "the conviction or sentence has already been invalidated"). Consistent with congressional intent, statutory language, and the Constitution, this Court should

hold that *Heck* dismissals are automatically "strikes" under the Three Strikes Rule for failure to state a claim, or alternatively, for frivolity.

A. Congress passed the PLRA to reserve *in forma pauperis* only for meritorious prisoner claims.

The PLRA safeguards the ability of indigent prisoners to bring "legitimate claims," 141 Cong. Rec. S18,136 (daily ed. Dec. 7, 1995) (statement of Sen. Hatch), but also serves to "reduce the number of meritless prisoner lawsuits," *id.* at S14,413 (daily ed. Sept. 27, 1995) (statement of Sen. Dole), and "free up judicial resources for claims with merit," *id.* at S19,114 (daily ed. Dec. 21, 1995) (statement of Sen. Kyl). Congress passed the PLRA to cut the "sharp rise" in federal prisoner litigation, *Woodford v. Ngo*, 548 U.S. 81, 84 (2006), and create "fewer and *better* prisoner suits," *Jones*, 549 U.S. at 203 (emphasis added). Federal courts were facing an "endless flood of frivolous litigation" from prisoners proceeding IFP. 141 Cong. Rec. S14.418 (daily ed. Sept. 27, 1995) (statement of Sen. Hatch). Congress passed the PLRA to reserve IFP for meritorious claims, encouraging prisoners to think before filing and discouraging reflexive filing at taxpayer cost. *Id.*[1]

1. Congress intended to discourage fruitless, thoughtless filing.

The Three Strikes Rule furthered the PLRA's goals by economically incentivizing "prisoners to stop and think before filing a complaint." *Abdul-Akbar v. McKelvie*, 239 F.3d 307, 318 (3d Cir. 2001), *cert. denied*, 533 U.S. 953 (2001) (internal quotation marks omitted). Discouraging meritless filings is "a rational deterrent mechanism, forcing potential prisoner litigants to examine whether their filings have any merit before they are filed, and disqualifying

[1] "Unlike other prospective litigants who seek [IFP] status, prisoners have all the necessities of life supplied, including the materials required to bring their lawsuits . . . . [T]here is no cost to bring a suit and, therefore, no incentive to limit suits to cases that have some chance of success." 141 Cong. Rec. S7526 (daily ed. May 25, 1995) (statement of Sen. Kyl).

frequent filers who have failed in the past to carefully evaluate their claims prior to filing." *Id.* The PLRA has been quite successful in this regard. In 1995, prior to the PLRA's enactment, 63,550 out of 248,335, or 25.6%, of filings in federal courts resulted from prisoner petitions. Admin Office of the U.S. Courts, *Judicial Facts and Figures 2022*, Table 4.4, https://www.uscourts.gov/statistics-reports/judicial-facts-and-figures-2022 (last updated Sept. 30, 2022). As of 2022, 46,941 out of 274,771 filings, or 17.1%, of federal civil cases have resulted from prisoner petitions. *Id.* Thus, in no small part due to the Three Strikes Rules, prisoner petitions have decreased by 8.5% over twenty-seven years.

2. Congress intended to broaden statutory grounds for "strikes."

Congress broadened the IFP statute in response to this Court's decision in *Neitzke v. Williams*, 490 U.S. 319 (1989). Brief for the United States as Amicus Curiae Supporting Respondent at 10, *Lomax v. Ortiz-Marquez*, 140 S. Ct. 1721 (2020) (No. 18-8369), 2020 WL 429425, at *10. The *Neitzke* Court held that, under the previous IFP statute, courts could not use their *sua sponte* power to dismiss a complaint that failed to state a claim under 12(b)(6) on the ground of frivolity. *Id.*; *Neitzke*, 490 U.S. at 331. In response, Congress not only expanded the *sua sponte* grounds for dismissal, *compare* 28 U.S.C.A. § 1915(d) (listing *sua sponte* grounds as either "malicious" or "frivolous"), *with* 28 U.S.C. § 1915(e) (adding "failure to state a claim"), but also added "failure to state a claim" as a required screening inquiry, 28 U.S.C. § 1915A(a). Congress enacted the Three Strikes Rule mandating a "strike" on the same ground. 28 U.S.C. § 1915(g). The legislative response to this Court's interpretation of the former IFP statute demonstrates congressional intent to broaden grounds of prisoner IFP ineligibility to include "failure to state a claim upon which relief may be granted." *Id.*

Consistent with congressional intent, this Court has declined to read limits into the Three Strikes Rule. *Coleman*, 575 U.S. at 537 ("A prior dismissal on statutorily enumerated grounds counts as a strike even if the dismissal is the subject of an appeal. That, after all, is what the statute literally says."); *Lomax v. Ortiz-Marquez*, 140 S. Ct. 1721, 1724–25 (2020) ("A strike . . . thus hinges exclusively on the basis for the dismissal, regardless of the decision's prejudicial effect."). Congress and this Court agree that the purpose of the Three Strikes Rule is to relieve overburdened federal courts from meritless prisoner litigation so they can devote judicial resources and taxpayer money to "fewer and better prisoner suits." *Jones*, 549 U.S. at 203. Imposing "strikes" per the Three Strikes Rule's plain language furthers these goals.

B. Construing *Heck* dismissals as "strikes" fits the Three Strike Rule's plain language for failure to state a claim and frivolity.

Even if this Court does not hold that *Heck* dismissals are "strikes" for failure to state a claim, this Court should hold that *Heck* dismissals are "strikes" for frivolity. 28 U.S.C. § 1915(g). Although clarifying that the Three Strikes Rule applies to dismissals with and without prejudice, *Lomax*, 140 S. Ct. at 1724, this Court has not yet addressed whether *Heck* dismissals automatically count as "strikes," *id.* at 1724 n.2. Circuit courts are split on the issue. *See id.* The Third Circuit summarized the divergent approaches as follows:

> The Fifth, Tenth, and D.C. Circuits have held that dismissals for failure to meet *Heck*'s favorable-termination requirement count as dismissals for failure to state a claim. *Colvin v. LeBlanc*, 2 F.4th 494, 499 (5th Cir. 2021); *Smith v. Veterans Admin*., 636 F.3d 1306, 1311–12 (10th Cir. 2011); *In re Jones*, 652 F.3d 36, 38 (D.C. Cir. 2011). The Seventh and Ninth Circuits, however, have characterized Heck's favorable-termination requirement as an affirmative defense subject to "waiver," analogous to an exhaustion requirement. *Polzin v. Gage*, 636 F.3d 834, 838 (7th Cir. 2011); *Washington v. L.A. Cnty. Sheriff's Dep't*, 833 F.3d 1048, 1056 (9th Cir. 2016). The First and Eleventh Circuits have described Heck's favorable-termination requirement as both "jurisdictional" and as an "element" of a claim for damages arising from a conviction or sentence under § 1983. *Compare O'Brien v. Town of Bellingham*, 943 F.3d 514, 529 (1st Cir. 2019), *with Figueroa*

v. Rivera, 147 F.3d 77, 81 (1st Cir. 1998); *see also Harrigan v. Metro Dade Police Dep't Station* #4, 977 F.3d 1185, 1191 n.4 (11th Cir. 2020).

Garrett v. Murphy, 17 F.4th 419, 427 (3d Cir. 2021).

This Court should affirm the understanding of the Third, Fifth, Tenth, and D.C. Circuits by holding that *Heck* dismissals are "strikes" for failure to state a claim. Alternatively, it should hold, like the Third, Fourth, Fifth, Tenth, and D.C. Circuits, that *Heck* dismissals are "strikes" for frivolity. Finally, this Court should reject the Seventh and Ninth Circuits' waiver analysis of *Heck*'s favorable termination requirement and the First and Eleventh Circuits' jurisdictional understanding of the same.

1. *Heck* dismissals always indicate failure to state a claim.

As the Third, Fifth, Tenth, and D.C. Circuits have recognized, *Heck* dismissals automatically indicate a failure to state a claim because *Heck* mandates district courts to *allow* an action to proceed so long as, "even if successful, [the action] will not demonstrate the invalidity of any outstanding criminal judgment against the plaintiff." *Jones*, 652 F.3d at 37 (quoting *Heck*, 512 U.S. at 487). For example, when the D.C. Circuit analyzed a prisoner's response to an order to show cause regarding his IFP eligibility, the court held that he had "struck out" by receiving *Heck* dismissals, issued for failure to allege the "essential element" of favorable termination and thus failure to state a §1983 claim. *Id.* at 38; *see also* 28 U.S.C. § 1915(g) (listing failure to state a claim as grounds for a "strike"). Because courts can only issue a *Heck* dismissal when prisoners challenge their criminal conviction *and* cannot show the "essential element" of favorable termination, the D.C. Circuit explained that a *Heck* dismissal automatically indicates failure to state a claim for relief under § 1983. *See id.*

The Third Circuit similarly held that a pretrial detainee[2] "struck out" of IFP eligibility under the Three Strikes Rule because he had three prior suits "dismissed for failure to meet *Heck*'s favorable-termination requirement." *Garrett*, 17 F.4th at 427–28 (explaining that such failure indicated lack of a § 1983 "cause of action," a term contextually "synonymous" with a "claim under the PLRA"). In holding that the detainee's prior suits were dismissed for failure to state a claim under the PLRA, the Third Circuit affirmed this Court's "consistent interpretation" that "*Heck*'s favorable-termination requirement [is] *necessary* to bring 'a complete and present cause of action' under § 1983." *Id.* at 428 (emphasis added) (quoting *McDonough v. Smith*, 139 S. Ct. 2149, 2158 (2019)). Like the D.C. Circuit, the Third Circuit held that *Heck* dismissals necessarily indicated a prisoner had not alleged favorable termination and were therefore "strikes" as dismissals for "fail[ure] to state a claim upon which relief may be granted." 28 U.S.C. § 1915(g).

Even the Ninth Circuit acknowledged that *Heck* dismissals "may" constitute "strikes" for failure to state a claim. For example, the court noted that Three Strikes Rule "tracks the language of Rule 12(b)(6), and that dismissals under Rule 12(b)(6) *may* constitute strikes within the meaning of the PLRA." *Washington*, 833 F.3d at 1055 (emphasis added) ("*Heck* dismissals may constitute Rule 12(b)(6) dismissals for failure to state a claim when the pleadings present an 'obvious bar to securing relief'") (quoting *ASARCO, LLC v. Union Pac. R.R.*, 765 F.3d 999, 1004 (9th Cir. 2014).[3]

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[2] Mr. Shelby is also a pretrial detainee. R. at 9. Therefore, Justice Souter's concerns that favorable termination would deny § 1983 relief to "individuals not 'in custody' for habeas purposes" is not implicated. *Heck*, 512 U.S. at 501 (Souter, J., concurring).

[3] *E.g.*, *Quinlan v. Maleng*, No. 221CV01146RSLDWC, 2021 WL 6066013, at *1 (W.D. Wash. Nov. 23, 2021, *report and recommendation adopted*, No. 2:21-CV-1146-RSL-DWC, 2021 WL 6062640 (W.D. Wash. Dec. 22, 2021) ("[D]ismissal of Plaintiff's claims as *Heck*-barred qualifies

The Ninth Circuit errs by holding that *Heck* dismissals "may" constitute "strikes" for failure to state a claim. Its reasoning is premised on a judgment of what the Court *should* have required, rather than what it did. *Id.* at 1055–56 (rejecting the idea that "favorable termination is a necessary element of a civil damages claim under § 1983" and opting to define favorable termination as a "threshold legal determination, made by the court") (internal quotation marks omitted). *Heck* states that "a § 1983 plaintiff *must prove*" favorable termination such as by reversal, expungement, or writ of habeas corpus." *Heck*, 512 U.S. at 477 (emphasis added). Section "1983 requires . . . plaintiffs seeking damages for unconstitutional conviction or confinement to show the favorable termination of an underlying proceeding." *Id.* at 492 (Souter, J., concurring).[4] As a result, courts can only issue *Heck* dismissals when a prisoner fails to allege favorable termination and thereby fails to state a § 1983 claim. *Id.* at 477.

This Court should hold that *Heck* dismissals are automatically "strikes" for failure to state a claim, as *Heck* dismissals only occur when a prisoner fails to allege favorable termination and thus "fails to state a claim upon which relief may be granted." 28 U.S.C. § 1915(g).

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as a dismissal for failure to state a claim because, based on Plaintiff's allegations, *Heck* 'present[s] an obvious bar to securing relief.'") (quoting *Washington*, 833 F.2d 1048 at 1055–56); *Hill v. Dozer*, No. 118CV00326LJOEPGPC, 2018 WL 1418412, at *2 (E.D. Cal. Mar. 22, 2018)*, report and recommendation adopted,* No. 118CV00326LJOEPGPC, 2018 WL 1919950 (E.D. Cal. Apr. 24, 2018) (holding that "because the entire action was *Heck*-barred" based "only on the face of the complaint," the action constituted a "strike" for failure to state a claim).

[4] Moreover, if only some *Heck* dismissals "may" constitute "strikes," district courts must analyze whether their *Heck* dismissal implicates the Three Strikes Rule to assist appellate courts. *See Snider v. Melindez*, 199 F.3d 108, 115 (2d Cir. 1999) (requiring orders of dismissals to "clearly state the reasons for the dismissal" including whether the dismissal met the grounds for a "strike"). Despite *Heck*'s holding, the Ninth Circuit unnecessarily requires district courts to state additional legal theory underlying their *Heck* dismissals. *Knapp v. Hogan*, 738 F.3d 1106, 1109 (9th Cir. 2013) ("It is well settled that, in determining a § 1915(g) "strike," the reviewing court looks to the dismissing court's action and the reasons underlying."). Per this approach, this Court would need to reverse and instruct the District Court of Wythe to do the same. *See* R. at 1.

2. Alternatively, *Heck* dismissals indicate frivolity.

In the alternative, this Court should affirm the understanding of the Third, Fourth, Fifth, Tenth, and D.C. Circuits in holding that *Heck* dismissals are "strikes" for frivolity. *See, e.g.*, *Ruth v. Richard*, 139 F. App'x 470, 471 (3d Cir. 2005) (affirming that a *Heck* dismissal was "legally frivolous" because the prisoner had not invalidated her conviction prior to filing suit); *Hazel v. Reno*, 20 F. Supp. 2d 21, 24 (D.D.C. 1998) (holding that, where complaints are barred by *Heck* "it is appropriate—if not mandatory—for the district court to dismiss the action . . . because the plaintiff's action has been shown to be legally frivolous") (internal quotation marks and citation omitted). Frivolity under the PLRA means that a complaint "lacks an arguable basis either in law or in fact." *Neitzke*, 490 U.S. at 325. *Heck* dismissals indicate the pleading was frivolous because they occur when prisoners file civil suits prematurely, without the ability to prove favorable termination. *See Ruth,* 139 F. App'x at 471.

Construing *Heck* dismissals as "strikes" for frivolity encourages prisoners to "think twice about the case and not just file reflexively." 141 Cong. Rec. S7526 (daily ed. May 25, 1995) (statement of Sen. Kyl). "[T]he *Heck* bar is well known among prison litigants." Brief for the United States as Amicus Curiae Supporting Respondent at 29, *Lomax v. Ortiz-Marquez*, 140 S. Ct. 1721 (2020) (No. 18-8369), 2020 WL 429425, at *29 (listing open-access jailhouse manuals on the topic). For example, one open-access jailhouse manual conspicuously warns prisoners about the *Heck* doctrine under the section entitled, "Do NOT Use Section 1983 to Challenge Your Original Criminal Conviction, Your Sentence, Loss of Good Time, or Denial of Parole." Colum. Hum. Rts. L. Rev., *A Jailhouse Lawyer's Manual* 469, 469 n.15 (12th ed. 2020). When prisoners are forced to reflect on whether they can prove the requisite *Heck* elements prior to filing suit to avoid incurring a "strike," the purposes of the PLRA are fulfilled. *See id.*

The Fourteenth Circuit erred in holding that *Heck*'s recognition of "prematurity" meant a *Heck* dismissal did not constitute a "strike" under the PLRA. Per the frivolity rule applied by the Third, Fourth, Fifth, Tenth, and D.C. Circuits, Shelby accrued a "strike" for filing a suit barred by *Heck* because he filed before invalidating his underlying conviction or sentence. This Court should reverse and remand the decision of the Fourteenth Circuit by holding that Shelby's *Heck* dismissals were "strikes" for being legally frivolous filings.

Despite this Court's precedent, some circuit courts have erroneously conflated frivolity with failure to state a claim. *E.g.*, *Kastner v. Texas*, 332 F. App'x 980, 981 (5th Cir. 2009) (affirming dismissal of the complaint as frivolous pursuant to *Heck*). While frivolity and failure to state a claim may "both counsel dismissal," the "considerable common ground between these standards does not mean that one invariably encompasses the other." *Neitzke*, 490 U.S. at 328. "[F]ailure to state a claim does not invariably mean that the claim is without merit." *Id.* at 329. Accordingly, this Court should explicitly hold that *Heck* dismissals are "strikes" for frivolity *because* they lack a legal basis for relief, not because the prisoner failed to state a claim.

3. Courts misapply *Heck*'s favorable termination requirement as an affirmative defense or jurisdictional bar.

If *Heck* dismissals indicate lack of subject matter jurisdiction, this Court has no standing to hear this case. The Fourteenth Circuit correctly held that *Heck* is "not a jurisdictional bar." R. at 15. "By its own language . . . *Heck* implicates a plaintiff's ability to state a claim, not whether the court has jurisdiction over that claim." *Colvin*, 2 F.4th at 499. *Heck* "contains no jurisdictional language," but rather states under which theory a prisoner must state a cause of action. *Vuyanich v. Smithton Borough*, 5 F.4th 379, 389 (3d Cir. 2021); *Teagan v. City of McDonough*, 949 F.3d 670, 678 (11th Cir. 2020) (dictum). Moreover, this Court has "firmly established . . . that the absence of a valid (as opposed to arguable) cause of action does not

implicate subject-matter jurisdiction." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 89 (1998). This Court should therefore hold that *Heck* is not a jurisdictional bar, but rather a pleading requirement to state a "cognizable" § 1983 claim. *Heck,* 512 U.S. at 477.

Yet, the Fourteenth Circuit counterintuitively erred by adopting the Seventh and Ninth Circuits' waiver interpretation. R. at 15. These courts misapply the law by applying *Heck* as an affirmative defense akin to the PLRA's exhaustion of administrative remedies requirement. *See Carr v. O'Leary*, 167 F.3d 1124, 1126 (7th Cir. 1999) ("The failure to plead the *Heck* defense in a timely fashion was a waiver."); *Washington*, 833 F.3d at 1056 (analogizing that "compliance with Heck" was akin the PLRA's mandatory exhaustion requirement, "which constitutes an affirmative defense and not a pleading requirement"). This interpretation is wrong twofold. First, favorable termination is the plaintiff's burden, not an affirmative defense. *See Heck*, 512 U.S. at 487–88 (requiring that the plaintiff "prove" favorable termination to state a "cognizable" § 1983 claim). Consistent with this Court's malicious prosecution analogy, *Heck*, 512 U.S. at 489, the Third Circuit correctly rejected the waiver approach because [f]avorable termination is (and has always been) a necessary element of a malicious prosecution claim," *Garrett*, 17 F.4th at 428. Second, this Court explicitly rejected the notion that it was creating an exhaustion requirement in the *Heck* decision. *Heck*, 512 U.S. at 489 ("We do not engraft an exhaustion requirement upon § 1983, but rather deny the existence of a cause of action.").

This Court should reject the jurisdictional and waiver analyses of *Heck* dismissals.

C. Construing *Heck* dismissals as "strikes" is constitutional.

A prisoner's right to access the courts is not "an abstract, freestanding" right. *Lewis v. Casey*, 518 U.S. 343, 351 (1996) (abrogating *Bounds v. Smith*, 430 U.S. 817 (1977)). Rather, IFP status is a statutory privilege. *See Rivera v. Allin*, 144 F.3d 719, 724 (11th Cir. 1998), *cert.*

dismissed, 524 U.S. 978 (1998), *abrogated on other grounds by Jones v. Bock*, 549 U.S. 199 (2007). The Three Strikes Rule is constitutional because it does not hinder a prisoner's ability to file a civil action but merely his "ability to proceed IFP." *Roller v. Gunn*, 107 F.3d 227, 231 (4th Cir. 1997) (quoting *United States v. Kras*, 409 U.S. 434, 450 (1973)). Likewise, the *Heck* decision is constitutional, even "consistent with both federalism . . . and the state of the common law at the time § 1983 was granted." *Heck*, 512 U.S. at 491 (Thomas, J., concurring). This Court should hold that construing *Heck* dismissals as "strikes" is constitutional because prisoners retain meaningful access to the courts and due process rights, and common law favors such construction.

1. Prisoners maintain meaningful access to the courts.

Proceeding IFP is not an "unlimited right," and denial of that "privilege" does not preclude meaningful access to the courts. *Roller*, 107 F.3d at 231 (quoting *Kras*, 409 U.S. at 450). As IFP is a statutory right, "Congress is no more compelled to guarantee free access to federal courts than it is to provide unlimited access to them." *Id.* Every circuit court addressing whether the Three Strikes Rule infringes on a prisoner's right to access the courts has held that the rule does not inhibit a prisoner's meaningful access to the courts.[5] Additionally, this Court

[5] *See, e.g.*, *Polanco v. Hopkins*, 510 F.3d 152, 156 (2d Cir. 2007) (per curiam) (holding that IFP status is "not a constitutional right" and that the Three Strikes Rule does not unconstitutionally burden "a prisoner's access to the courts"); *Abdul-Akbar*, 239 F.3d at 318 (holding that the Three Strikes Rule survives rational basis review); *Carson v. Johnson*, 112 F.3d 818, 821 (5th Cir. 1997) (noting that the Three Strikes Rule "does not prevent a prisoner with three strikes from filing civil actions" but "merely prohibits him from enjoying IFP status"); *Wilson v. Yaklich*, 148 F.3d 596, 605 (6th Cir. 1998), *cert. denied*, 525 U.S. 1139, 605 (1999) (holding the Three Strikes Rule is constitutional as written and as applied in that case); *Lewis v. Sullivan*, 279 F.3d 526, 528 (7th Cir. 2002) ("The Supreme Court has never held that access to the courts must be free; it has concluded, rather, that reasonably adequate opportunities for access suffice."); *Higgins v. Carpenter*, 258 F.3d 797, 800 (8th Cir. 2001) (per curiam), *cert. denied*, 535 U.S. 1040 (2002) ("We conclude that an inmate's right of access to the courts, as that right is defined in *Lewis v.*

has implied that prisoners lack standing to allege a violation of their right to access the courts unless a meritorious claim has actually been impeded by the statute. Kasey Clark, Note, *You're Out!: Three Strikes against the PLRA's Three Strikes Rule*, 57 Ga. L. Rev. 779, 796 (2023) (proposing how prisoners can bring a meritorious § 1983 claims in compliance with *Lewis* despite being denied IFP status for accruing three "strikes" under the Three Strikes Rule). The Three Strikes Rule in no way hinders constitutional claims but simply clears away the meritless ones, thereby freeing courts to hear prisoner claims that allege tangible, actual injury. *Lewis*, 518 U.S. at 351.

The Three Strikes Rule also preserves other due process protections. "Treating indigent prisoner litigants differently from indigent non-prisoner litigants" comports with due process because prisoners are not a "suspect class." *See* Jody L. Sturtz, *A Prisoner's Privilege to File in Forma Pauperis Proceedings: May It Be Numerically Restricted*, 1995 Det. Cl. Rev. 1349, 1376–78 (1995) (proposing a numerical limitation to prisoner IFP proceedings prior the passage of the Three Strikes Rule); *Abdul-Akbar*, 239 F.3d at 317 ("Neither prisoners nor indigents are suspect classes."). Far from robbing indigent prisoners from the chance of bringing meritorious claims, the Three Strikes Rule protects them from competing with frequent filers who "monopoliz[e] a court's time and resources," and "diminish the legitimacy of valid [IFP] suits."

Casey, is not impeded."); *Rodriguez v. Cook*, 169 F.3d 1176, 1180 (9th Cir. 1999) (holding that the Three Strikes Rule "does not infringe upon an inmate's meaningful access to the courts" as long as a fundamental right is not at stake); *White v. Colorado*, 157 F.3d 1226, 1233 (10th Cir. 1998), *cert. denied*, 526 U.S. 1008 (1999) ("Congress is no more compelled to guarantee free access to federal courts than it is to provide unlimited access to them.") (quoting *Roller*, 107 F.3d 227, 231 (4th Cir.), *cert. denied*, 522 U.S. 874, 118 S.Ct. 192, 139 L.Ed.2d 130 (1997)); *Rivera*, 144 F.3d at 723–24, (noting that prisoners retain meaningful access to the courts though section despite that the Three Strikes Rule disqualifies them from partial fee waiver).

Sturtz, *supra*, at 1370. The rule "protects innocent defendants" from being dragged into abusive, meritless litigation. *Id.* at 1371.

2. Common law favors upholding prudential procedures.

Lastly, the Three Strikes Rule is consistent with common law tradition, which married compassion and care for the poor with wise court administration. *See generally* John MacArthur Maguire, *Poverty and Civil Litigation*, 36 Harv. L. Rev. 361 (1922-1923). Prisoners originally retained no rights as persons termed "civilly dead." Harry David Saunders, *Civil Death - A New Look at an Ancient Doctrine*, 11 Wm. & Mary L. Rev. 988, 988–89 (1970). But the idea that indigents deserve equal access to the courts existed as early as the Magna Carta. Wayne A. Kalkwarf, *Petitions to Proceed In Forma Pauperis: The Effect of In Re McDonald and Neiztke v. Williams,* 24 Creighton L. Rev. 803, 803–04 (1991). As IFP proceedings "can afford substantial relief only when geared to a judicial machine that performs its functions with efficiency and dispatch," England later required judges to analyze "the practical merits of [an indigent's] claim" under its IFP statute. *Id.* at 392–93

The United States travels a similar trajectory today. This Court can protect the poor by upholding prudential procedures. Therefore, this Court should hold that *Heck* dismissal are automatically "strikes" for failure to state a claim—or alternatively, for frivolity—thereby fulfilling the purpose of the Three Strike Rule to "filter out frivolous inmate claims and filter in meritorious claims" within constitutional bounds. *See* Samuel B. Reilly, *Where Is the Strike Zone? Arguing for A Uniformly Narrow Interpretation of the Prison Litigation Reform Act's "Three Strikes" Rule*, 70 Emory L.J. 755, 764 (2021) (arguing that "narrower, text-based" interpretation of the Three Strikes Rule would be constitutional).

II. THE SUBJECTIVE STANDARD GOVERNS SHELBY'S CLAIM BECAUSE DUE PROCESS PUNISHMENT CLAIMANTS MUST ALWAYS DEMONSTRATE PUNITIVE INTENT, OR ALTERNATIVELY, BECAUSE OBJECTIVELY ANALYZING FAILURE-TO-PROTECT CLAIMS UNCONSTITUTIONALLY RESULTS IN LIABILITY FOR NEGLIGENCE.

The Eight Amendment and the Fourteenth Amendment's Due Process Clause share a common purpose: protecting prisoners from punishment. *Bell v. Wolfish*, 441 U.S. 520, 537–39 (1979); U.S. const. amend XIV; U.S. const. amend. VIII. The constitutional prohibition on punishment serves two purposes: it (1) restrains prison officers from, for example, excessive force and (2) imposes a duty on officers to "provide humane conditions of confinement" including protection from violence. *Farmer v. Brennan*, 511 U.S. 825, 832 (1994) (quoting *Hudson v. Palmer*, 468 U.S. 517, 526–527 (1984)). A prison officer punishes a prisoner when his actions or omissions are motivated by an intent to punish. *Bell*, 441 U.S. at 538; *Wilson v. Seiter*, 501 U.S. 294, 298–300 (1991) (explaining that there is an "intent" requirement implicit in the word "punishment"). Punitive intent differentiates punishment from negligence, which is "categorically beneath the threshold of constitutional due process." *Kingsley v. Hendrickson*, 576 U.S. 389, 396 (2015); *Salazar v. City of Chicago*, 940 F.2d 233, 238 (7th Cir.1991) (concluding that negligence "does not respond to the due process clause's function, which is to control abuses of government power" because "an error is not an abuse of power").

There is no principle so central to the doctrine of punishment—yet so misunderstood by lower courts—as punitive intent. *See* Alice Ristroph, *State Intentions and the Law of Punishment*, 98 J. Crim. L. & Criminology 1353, 1356 (2007). Recently, in *Kingsley v. Hendrickson*, this Court reaffirmed the importance of establishing punitive intent by holding that an officer's punitive intent can be *inferred* from his deliberate choice to use objectively excessive force against a pretrial detainee. 576 U.S. at 403. Circuit courts have routinely misunderstood *Kingsley*, attempting to interpret this Court's precedent as if in a proverbial game of telephone.

Compare Crandel v. Hall, 75 F.4th 537, 544 (5th Cir. 2023) (rejecting a pretrial detainee's argument that this Court abolished the punitive intent requirement for pretrial detainees in *Kingsley*), *with Castro v. Cty. of Los Angeles*, 833 F.3d 1060, 1069 (9th Cir. 2016) (claiming that *Kingsley* abolished the punitive intent requirement for all pretrial detainees). Today, this Court has the opportunity to reaffirm that pretrial detainees must establish an officer's subjective punitive intent to bring valid due process claims.

This Court should reverse the Fourteenth Circuit's decision and affirm the decision of the District Court for the Western District of Wythe by holding that the *Kingsley* Court did not abolish the punitive intent requirement for a pretrial detainee's failure-to-protect claim for two reasons. First, this Court's precedent–including *Kingsley*–has consistently required punitive intent to demonstrate punishment. Second, repealing the subjective punitive intent requirement for failure-to-protect claims would force courts to hold officers liable under the Due Process Clause for mere negligence.

A. Prisoners can prove *inferred* punitive intent in excessive force claims but must prove *express* punitive intent for failure-to-protect claims.

A claimant must always demonstrate an officer's punitive intent in due process punishment claims. *See Bell*, 441 U.S. at 537–39. Punitive intent may be demonstrated in one of two ways: (1) expressly, by an officer's subjective intent to punish, or (2) impliedly, by an officer's action that is objectively "not reasonably related to a 'nonpunitive governmental objective.'" *Id.* at 538–39; *Kingsley*, 576 U.S. at 405 (Scalia, J., dissenting).

In excessive force claims, this Court employs an "objective standard" to infer punitive intent from an officer's intentional use of objectively excessive force because there is no legitimate *nonpunitive* purpose to use such force. *Kingsley*, 576 U.S. at 399. In other words, when an officer's intentional acts have no possible nonpunitive purpose, a punitive purpose is

implied by process of elimination. *Id.* at 406 (Scalia, J., dissenting); *United States v. U.S. Gypsum Co.*, 438 U.S. 422, 430 (1978) ("The law presumes that a person intends the necessary and natural consequences of his acts."). But when evaluating an officer's *failure to act*, this Court applies a "subjective standard" to establish the officer's express punitive intent. *Farmer*, 511 U.S. at 837–38; *Barnes v. Ahlman*, 140 S. Ct. 2620, 2622 (2020) (Sotomayor, J., dissenting from the grant of stay) (categorizing the subjective test as "well-established law" for pretrial detainees' failure-to-protect claims). This distinguishes cases when an officer *intends* his omission to punish a detainee from an officer's mere negligence, which "do[es] not rise to the level of egregious abuse of government power that violates citizens' constitutional rights." *Murguia v. Langdon*, 61 F.4th 1096, 1120 (9th Cir. 2023) (Ikuta, J., dissenting); *Farmer*, 511 U.S. at 835.

The objective standard, which was applied in *Kingsley*, does not abolish the punitive intent requirement but rather applies this Court's precedent establishing that punitive intent can be inferred by an officer's decision to use objectively excessive force but cannot be inferred by an officer's failure to act.

1. In *Kingsley*, this Court employed the objective standard to establish an officer's inferred punitive intent.

This Court's application of the objective standard in *Kingsley* is consistent with—and does not abolish—the punitive intent requirement. The subjective and objective standards used to assess punitive intent originated from *Bell v. Wolfish*, where this Court defined punishment as either (1) an officer's actions taken with the express intent to punish or (2) "absent a showing of an *expressed* intent to punish," a "condition or restriction [that] is [not] reasonably related to a legitimate nonpunitive governmental objective," from which the officer's punitive intent may be *inferred*. 441 U.S. at 539 (emphasis added). *Kingsley* referred to *Bell's* express intent

requirement as the "subjective standard" and to *Bell's* inferred intent requirement as the "objective standard." *Kingsley*, 576 U.S. at 398.

Some circuit courts failed to see that the objective standard in *Kingsley* referenced *Bell's* holding that punitive intent can be inferred from government action that is not reasonably related to a nonpunitive governmental purpose. *See, e.g.*, *Castro*, 833 F.3d at 1069; *Darnell v. Pineiro*, 849 F.3d 17, 34–35 (2d Cir. 2017). These circuits erroneously read the *Bell* test as being disjunctive: that punishment requires *either* a showing of expressed punitive intent *or* an objectively unreasonable outcome. *Castro*, 833 F.3d at 1069, *Darnell*, 849 F.3d at 34–35. Under this misunderstanding, circuit courts then read *Kingsley*'s objective standard to reaffirm this principle by finding an unconstitutional punishment *whenever* an officer's conduct is objectively unreasonable regardless of whether the officer acted with punitive intent. *Castro*, 833 F.3d at 1069; *Darnell*, 849 F.3d at 34–35.

Circuits that interpret *Bell* and *Kingsley* as abolishing the punitive intent requirement are incorrect. It is indisputable that *Bell* required a showing of punitive intent to demonstrate a punishment, evidenced by its holding that the conditions of a pretrial detainee's confinement did *not* constitute a punishment because the prison officers neither expressed punitive intent nor implied it from their conduct, which *had* "legitimate *nonpunitive* governmental purpose[s]," including "[e]nsuring security and order at the institution." *Bell*, 441 U.S. at 561 (emphasis added). In doing so, this Court rejected the detainee's argument "that the restrictions were [objectively] greater than necessary to satisfy [the prison's] legitimate interest in maintaining security," because this argument analyzed whether the officers' actions were objectively reasonable (i.e., whether the officer's actions were *negligent*) and not the officer's punitive

intent. *Id.* Therefore, "*Bell* makes intent to punish the focus of its due-process analysis." *Kingsley*, 576 U.S. at 406 (Scalia, J., dissenting).

Kingsley's excessive force holding is consistent with *Bell's* inferred punitive intent standard. *Id.*; *cf. Hudson v. Palmer,* 468 U.S. 517, 548 (1984) (Stevens, J., concurring in part and dissenting in part); *Rhodes v. Chapman*, 452 U.S. 337, 347 (1981). The *Kingsley* Court did not need to explicitly analyze the issue of the officer's punitive intent; this intent was appropriately inferred because the officers *deliberately* used objectively excessive force, and there is no nonpunitive governmental purpose for using such force. *Kingsley*, 576 U.S. at 406 (Scalia, J., dissenting)) ("Objective reasonableness of the force used is nothing more than a heuristic for identifying this intent."); *see also id.* at 396 ("[Officers] must possess a purposeful, a knowing, or possibly a reckless state of mind."). Therefore, *Kingsley* did not abolish the punitive intent standard but rather expounded upon the implied punitive intent doctrine. *See, e.g.*, *Trozzi v. Lake Cnty.*, 29 F.4th 745, 757 (6th Cir. 2022) (concluding that *Kingsley* does not abolish the punitive intent requirement); *Helphenstine v. Lewis Cnty.*, 65 F.4th 794, 798 (6th Cir. 2023) (same); *Greene v. Crawford Cnty.*, 22 F.4th 593, 614 (6th Cir. 2022) (same); *Dang v. Sheriff*, 871 F.3d 1272, 1278 n.2 (11th Cir. 2017) (same).

Even if *Kingsley* modified *an* intent requirement, it did not abolish *the* conventional punitive intent requirement. *Kingsley* bifurcated the punitive intent inquiry into the officer's state of mind regarding (1) "bringing about [] certain physical consequences in the world" and (2) "whether [the officer's] use of force was 'excessive.'" *Kingsley*, 576 U.S. at 396. Conceding that a claimant must always prove the officer's subjective "intent to commit the *acts* in question," this Court applied an objective standard only to the second inquiry: the officer's "state of mind with respect to the proper *interpretation* of the force" used. *Id.* at 396, 401 (citing *County of*

Sacramento v. Lewis, 523 U.S. 833, 849 (1998). After *Kingsley*, a pretrial detainee with a failure-to-protect claim must still demonstrate that an officer's punitive intent motivated his failure to protect the detainee, just as the detainee in *Kingsley* had to show that the officer subjectively intended to use punitive (objectively excessive) force. *Id.* at 396.

2. This Court established that the subjective standard governs due process failure-to-protect claims in *Farmer*.

Courts arguing that *Kingsley* abolished the punitive intent requirement for failure-to-protect claims ignore *Farmer v. Brennan*, a failure-to-protect case holding that punitive intent cannot be inferred from omissions. 511 U.S. at 826. In *Farmer*, this Court held that an officer's failure to protect a prisoner only constituted a punishment if the officer actually knew of a "substantial risk of serious harm" to the prisoner and *deliberately* disregarded the risk. *Id.* Unlike in excessive force claims, "intentionality is no longer a given" when an officer fails to act, and the prisoner must expressly establish the officer's punitive intent. *Hare v. City of Corinth*, 74 F.3d 633, 645 (5th Cir. 1996). *Farmer* reasoned that this rule comports best with the definition of "punishment" as distinguished from tortious negligence. *Farmer*, 511 U.S. at 844 ("[P]rison officials who lacked knowledge of a risk cannot be said to have inflicted punishment.). Essentially, *Farmer* is consistent with precedent establishing that subjective punitive intent must be expressly demonstrated in failure-to-protect claims. [6]

[6] The only part of *Farmer* that *could* be construed to endorse an objective test for pretrial detainees was when the Court explained that deliberate indifference could be demonstrated by "less than acts or omissions for the very purpose of causing harm or with knowledge that harm will result." *Farmer*, 511 U.S. at 835. However, this Court clarified that this sentence merely differentiated the subjective intent required in *Farmer* (*actual* knowledge) from the subjective intent standard used in Eighth Amendment excessive force claims (*sadistic and malicious intent* to cause harm). *See id.* at 861 (Thomas, J., concurring).

The *Kingsley* decision did not change the *Farmer* test for failure-to-protect claims. *Kingsley's* reasoning was conditioned on the fact that the officer's *intentional* act must have had a punitive purpose because the action had no legitimate nonpunitive government purpose. *Westmoreland v. Butler Cnty.*, 29 F.4th 721, 731 (6th Cir. 2022) (Bush, J., dissenting); *see Porter v. Nussle*, 534 U.S. 516, 523 (2002) (distinguishing excessive force claims from other types of claims, specifically as it pertains to the proof requirements). In contrast, *Farmer*'s standard governs when an officer *fails to act*. *See Farmer*, 511 U.S. at 826. To ask whether an officer's *omission* had a nonpunitive government purpose begs the question of whether the officer intentionally or mistakenly subjected the prisoner to violence. *Hare*, 74 F.3d at 645; *Salazar*, 940 F.2d at 238 ("[A]n error is not a [due process violation]."). Therefore, in failure-to-protect cases, the claimant must demonstrate an officer's subjective punitive intent to differentiate negligent omissions from omissions driven by punitive intent. *See Farmer*, 511 U.S. at 835, 839.

The *Kingsley* decision should be narrowly interpreted because it explicitly declined to address situations in which an officer's *failure to act* constitutes a punishment. *Kingsley*, 576 U.S. at 396 ("It is with respect to [the] question [of whether force *deliberately* used was excessive] that we hold that courts must use an objective standard."). *Kingsley* neither mentioned nor overturned *Farmer*. R. at 19 (Solomons, J., dissenting); *Strain v. Regalado*, 977 F.3d 984, 993 (10th Cir. 2020); *see Rodriguez de Quijas v. Shearson/Am. Exp., Inc.*, 490 U.S. 477, 484 (1989) ("[We must] leav[e] to this Court the prerogative of overruling its own decisions."). This Court has cautioned lower courts not to make sweeping legal conclusions based on broad language, especially by applying its holdings to issues this Court did not address. *RAV v. City of St. Paul*, 505 U.S. 377, 386 n.5 (1992); *Mullenix v. Luna*, 577 U.S. 7, 12 (2015) (explaining that courts may not "define clearly established law at a high level of generality" but should rather

apply precedent "in light of the specific context of the case"). In *Kingsley*, this Court conceded that it was addressing an officer's *deliberative* action and not a negligent or accidental action. *Kingsley*, 576 U.S. at 396. Despite this, circuit courts that interpret *Kingsley* to abolish the punitive intent requirement have relied on its *broad* language about pretrial detainees to apply its holding to failure-to-protect claims. *See Strain*, 977 F.3d at 993.

Consistent with Supreme Court precedent, the Fifth, Eighth, Tenth, and Eleventh Circuits have correctly understood that *Kingsley* does not modify the existing subjective standard for assessing pretrial detainee's failure-to-protect claims. *See, e.g.*, *Leal v. Wiles*, 734 F. App'x 905, 911–12 (5th Cir. 2018) (requiring a detainee to demonstrate an officer's subjective punitive intent in a failure-to-protect claim); *Cope v. Cogdill*, 3 F.4th 198, 207 n.7 (5th Cir. 2021) ("Since *Kingsley* discussed a different type of constitutional claim[, excessive force], it did not abrogate our [failure-to-act] precedent."); *Whitney v. City of St. Louis*, 887 F.3d 857, 860 n.4 (8th Cir. 2018) (same); *Dang*, 871 F.3d at 1278 n.2 (same); *Strain*, 977 F.3d at 991 (same).

3. Eighth Amendment analogies are relevant to Fourteenth Amendment due process claims.

Respondent may argue that *Kingsley*'s objective standard for excessive force claims should control, rather than *Farmer*'s subjective standard for failure-to-protect claims. Respondent may attempt to make this distinction because *Farmer* arose under the Eighth Amendment, while *Kingsley*—like Shelby's claim—arose under the Fourteenth Amendment. *Farmer*, 511 U.S. at 828; *Kingsley*, 576 U.S. at 391; R. at 9. But Eighth Amendment analogies *are* binding when determining whether a pretrial detainee was unconstitutionally punished for three reasons.

First, the State has a duty to protect all prisoners, including both pretrial detainees and convicted criminals, from violence because imprisonment restrains an inmate's liberty and

thereby prevents an inmate from protecting himself. *Estelle v. Gamble*, 429 U.S. 97, 98–104 (1976); *DeShaney v. Winnebago Cnty.*, 489 U.S. 189, 200 (1989). Although pretrial detainees are afforded additional protections under the Fourteenth Amendment, they are not "entitled to greater protection of rights *shared in common* with convicted inmates," such as the right to basic protection from violence. *Hare*, 74 F.3d at 649 (emphasis added). Second, the "presumption of innocence" afforded to pretrial detainees under the Fourteenth Amendment—but not to convicted criminals under the Eighth Amendment—only governs evidentiary tools for trials and "has no application" to pretrial confinement. *Bell*, 441 U.S. at 529, 533 (emphasis added). Third, the crux of *Farmer*'s holding was not that intentional omissions are "cruel and unusual" under the Eighth Amendment, but rather that failure to act, even if unreasonable, is mere negligence and lacks punitive intent. *Farmer*, 511 U.S. at 837–38; *id.* at 841 ("[D]eliberate indifference serves under the Eighth Amendment to ensure that only inflictions of punishment carry liability.").

The subjective standard is not a punishment meted out to convicted criminals under the Eighth Amendment, nor does it "scale back the constitutional rights of pretrial detainees;" it is a procedural requirement to distinguish punishment from negligence in failure-to-protect claims. *Hare*, 74 F.3d at 643. This Court has always applied the subjective standard to deliberate indifference prison conditions cases, *see Farmer*, 511 U.S. at 834; *Wilson,* 501 U.S. at 302–303; *Helling v. McKinney*, 509 U.S. 25, 34–35 (1993); *Hudson v. McMillian,* 503 U.S. 1, 5 (1992); *Estelle,* 429 U.S. at 106, including failure-to-protect claims, *Wilson,* 501 U.S. at 303 (describing "the protection [an inmate] is afforded against other inmates" as a "conditio[n] of confinement" subject to the strictures of the Eighth Amendment). Circuit courts only departed from the *Farmer* standard after *Kingsley*, a decision that does not govern failure-to-protect claims. *See Castro*, 833

F.3d at 1084 (Ikuta, J., dissenting). Because punitive intent cannot be inferred from an officer's failure to act, this Court should reaffirm its precedent requiring that prisoners alleging a failure-to-protect due process violation must establish an officer's subjective punitive intent.

B. Applying an objective standard to failure-to-protect claims forces courts to hold officers liable under the Fourteenth Amendment for mere negligence.

Even if this Court adopts circuit courts' misapplication of *Kingsley* to abolish the punitive intent requirement for a pretrial detainee with an *excessive force* claim, this Court should still apply a subjective standard in this case because punitive intent cannot be inferred in a *failure-to-protect* claim. A pretrial detainee must always establish an officer's subjective punitive intent in a failure-to-protect claim to differentiate an officer's *negligent* failure to protect from his *punitive* failure to protect. *See Kingsley*, 576 U.S. at 395–96. Victims of negligence have a rightful remedy under tort law "because these mistakes do not rise to the level of egregious abuse of government power that violates citizens' constitutional rights." *Murguia*, 61 F.4th at 1120 (Ikuta, J., dissenting); *see Hudson*, 503 U.S. at 28–29 (Thomas, J., dissenting); Federal Tort Claims Act, 28 U.S.C. §§ 2671–2680 (providing relief for prisoner victims of negligence under an *objective* standard); *see also United States v. Muniz*, 374 U.S. 150, 165 (1963) ("The Federal Tort Claims Act provides much-needed relief to [prisoners] suffering injury from the negligence of government [officers]."). Failing to apply a subjective standard to deliberate indifference failure-to-protect claims "tortif[ies] the Fourteenth Amendment," causing officers to be unconstitutionally held liable under the Due Process Clause for mere tortious negligence. *Kingsley*, 576 U.S. at 408 (Scalia, J., dissenting); *County of Sacramento*, 523 U.S. at 842–43.

1. The Ninth Circuit improperly applied *Kingsley* to a pretrial detainee's failure-to-protect claim and held an officer guilty of a constitutional violation for mere negligence.

Circuits improperly extending *Kingsley*'s objective standard have opened the door for officers to be held liable under the Fourteenth Amendment for mere negligence. *Castro v. County of Los Angeles* is one of the formative cases misapplying *Kingsley*'s objective standard to a failure-to-protect claim. *Castro*, 833 F.3d at 1084; *Contreras ex rel A.L. v. Dona Ana Cnty. Bd. of Cnty. Comm'r*, 965 F.3d 1114, 1130 n.3 (10th Cir. 2020) (describing *Castro* as "imaginatively interpret[ing] *Kingsley* [by] h[olding] an objective standard also governs failure-to-protect claims of pretrial detainees"). In *Castro*, the Ninth Circuit insisted that excessive force and failure-to-protect claims are so analogous that the same legal standard should govern both. *Castro*, 833 F.3d at 1070. Ironically, the court immediately contradicted itself by fabricating a new *Kingsley* framework to account for the fundamental differences between excessive force and failure-to-protect claims. *Id.* That the Ninth Circuit needed to modify *Kingsley's* standard to apply it to a failure-to-protect claim demonstrates that *Kingsley* must be limited to excessive force claims. *See Contreras*, 965 F.3d at 1130 n.3.

The Ninth Circuit's new pseudo-*Kingsley* test is fundamentally different from *Kingsley's* original test. *See Castro*, 833 F.3d. at 1086 (Ikuta, J., dissenting) ("[The *Kingsley*] test simply doesn't fit a failure-to-act claim."). The first prong in *Kingsley's* test asks whether an officer intentionally used force against a detainee. *Kingsley*, 576 U.S. at 395–96. The Ninth Circuit improperly analogized the *Kingsley* officer's intentional use of excessive force with the *Castro* officer's intentional choice to house individuals together. *Castro*, 833 F.3d at 1070. The second prong in Kingsley asks whether the force was objectively excessive. *Kingsley*, 576 U.S. at 395. The Ninth Circuit entirely replaced this prong with a negligence inquiry, asking whether there

was "a substantial risk of serious harm to the [prisoner] that could have been eliminated through reasonable and available measures that the [officer] did not take, thus causing the injury that the plaintiff suffered." *Castro*, 833 F.3d at 1070. Instead of using the *Kingsley* standard to determine whether force *deliberately* used was objectively *excessive*, the Ninth Circuit determined whether an *unintentional* failure to act was objectively *unreasonable* (a.k.a. negligent). *Id.*

Castro's second prong forces courts to unconstitutionally conflate negligence with punishment. A person is negligent when they "do[] not exercise reasonable care under all the circumstances," "reasonable care" meaning "conduct that avoids creating an 'unreasonable risk of harm.'" Restatement (Third) of Torts: Liability for Physical & Emotional Harm § 3 (Am. L. Inst. 2010). Under *Castro*, an officer punishes a detainee when he fails to take "reasonable and available measures" to avoid a "substantial risk of serious harm to the plaintiff." *Castro*, 833 F.3d at 1070. *Castro* thus holds that mere negligence violates the Due Process Clause, contrary to this Court's explicit instruction. *See Farmer*, 511 U.S. at 826 ("A]n officer's failure to alleviate a significant risk that he should have perceived but did not . . . cannot under our cases be condemned as the infliction of punishment."); *id* at 860 (Thomas, J., concurring) (explaining that the "'should have known' standard is nothing but a negligence standard"); *Davidson v. Cannon*, 474 U.S. 344, 348 (1985) ("[T]he protections of the Due Process Clause . . . are just not triggered by lack of due care by prison officials."). [7]

[7] The Ninth Circuit attempted to remedy the negligence issue by arguing that the test requires proof of "more than negligence but less than subjective intent—something akin to *reckless disregard*." *Castro*, 833 F.3d at 1071 (emphasis added). However, the legal distinction between reckless disregard and negligence is that the former requires a perpetrator to *deliberately* disregard a risk, whereas the latter merely requires a failure to exercise objectively reasonable care. *State v. Olsen*, 462 N.W.2d 474, 476 (S.D. 1990). Here, the Ninth Circuit tacitly recognized that a failure-to-protect claim must establish an officer's subjective punitive intent to differentiate an officer's negligent failure to act from his punitive failure to act.

Castro's misapplication of *Kingsley* has detrimental ramifications. "Pretrial detainees in every case will now argue that jailers 'should have known' some harm would materialize." *Westmoreland*, 29 F.4th at 735 (Bush, J., dissenting). Since prisons are inherently risky places, detainees will have no trouble prevailing on the claim that officers always "should have known" of some potential harm to them. *Id.* (citing Press Release, U.S. Dep't of Just., Off. of Inspector Gen. M. Horowitz, Top Management and Performance Challenges Facing the Department of Justice–2021 (Nov. 16, 2021)). Thus, "the standard collapses into de facto negligence." *Id.* Moreover, *Castro* counterintuitively enables courts to micro-manage jails even though the "safety and order at [prisons] requires the expertise of correctional officials, who must have substantial discretion to devise reasonable solutions to the problems they face." *Florence v. Bd. of Chosen Freeholders*, 566 U.S. 318, 326 (2012) ("[C]ourts are particularly ill equipped to deal with the[ ] problems of jail administration.").

Castro has led other circuits astray. *See, e.g., Darnell.*, 849 F.3d at 35 (citing *Castro* to replace the subjective standard for failure-to-protect claims with an objective test). These circuits are not applying *Kingsley*, *Farmer*, or any binding Supreme Court precedent; they are applying the Ninth Circuit's unilateral rewriting of *Kingsley* to hold officers liable under the Due Process Clause for mere negligence. *Compare* Restatement (Third) of Torts: Liability for Physical & Emotional Harm § 3 (Am. L. Inst. 2010) (describing "negligence" as when a "person does not exercise reasonable care under all the circumstances"), *with Brawner v. Scott Cnty.*, 14 F.4th 585, 598 (6th Cir. 2021) (citing *Castro* to hold that an officer violated the Due Process Clause by "recklessly fail[ing] to act reasonably to mitigate the risk that the serious medical need posed to [the detainee]").

2. The Fourteenth Circuit erroneously held Officer Campbell guilty of a due process violation for mere negligence.

The Fourteenth Circuit is the most recent victim of *Castro's* pseudo-*Kingsley* test. First, the court cited *Castro* to argue that *Kingsley's* intent element was met because "Officer Campbell's acts in [placing of several detainees in the same area] prove intentional, as no outside force, illness, or accident rendered Officer Campbell unable to make this conscious decision." R. at 17 (citing *Castro*, 833 F.3d at 1070). Second, the court cited *Castro* to posit that the second *Kingsley* element was met because "Officer Campbell failed to take reasonable measures to abate ['a substantial risk of serious harm'] even though any reasonable officer would have acted otherwise." *Id.* at 18–19 (quoting *Castro*, 833 F.3d at 1070). By analyzing Shelby's failure-to-protect claim under *Castro's* test, the Fourteenth Circuit found that Officer Campbell's mere negligence constituted a due process violation.

The Fourteenth Circuit blurred the line between punishment and negligence. *See id.* at 18. An officer who fails to act—even if unreasonably—has only acted negligently, not punitively. *Farmer*, 511 U.S. at 837–38. Despite this, the Fourteenth Circuit argued that Shelby only needed to allege that "Officer Campbell failed to take reasonable measures to abate the risk even though any reasonable officer would have acted otherwise" to prevail in his due process claim. R. at 19. The District Court for the Western District of Wythe properly identified that *Castro's* standard would establish a negligence inquiry. *Id.* at 10 (concluding that asking "whether Officer Campbell failed to act as a reasonable person under the same circumstances in failing to recognize the risk to Shelby" determines whether Officer Campbell acted *negligently* towards Shelby, not whether he *punished* Shelby).

3. Applying the subjective standard to failure-to-protect claims properly holds officers liable for due process violations rather than negligence.

Under the subjective standard, Officer Campbell's failure to protect Shelby does not constitute a due process violation because the record is devoid of facts demonstrating that Officer Campbell was both "aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and" that Officer Campbell actually "dr[e]w the inference." *Farmer*, 511 U.S. at 837. Shelby conceded this when he argued that "Officer Campbell *should have known*" about the risk to his safety but was unaware. R. at 8 (emphasis added). Officer Campbell's lack of punitive intent can also be demonstrated by his attempt to defend Shelby against the Bonucci gang members. *Id.* at 7. It is illogical that Officer Campbell would intentionally place the Bonucci gang members in Shelby's presence to punish him, but then place himself between Shelby and the gang members to protect Shelby from harm. Additionally, Officer Campbell did not recognize Shelby or know of his protected status because Officer Campbell looked at neither the list he was carrying nor the jail's database, both of which indicated Shelby's protected status. *Id.* at 6. Neither could Officer Campbell have deduced this information from overhearing an inmate's out-of-context remark about "Tom finally t[aking] care of that horrible woman," as Officer Campbell did not know the identity of "Tom," the "horrible woman," or Shelby. *Id.*

Shelby only alleged facts that could lead a jury to believe that Officer Campbell was negligent, meaning he should have known about the risk to Shelby but was unaware. *Id.* at 5–6. Officer Campbell *should have* attended the gang intelligence meeting, reviewed the post-meeting minutes, or checked his file or the jail's database indicating Shelby's protected status. *Id.* Officer Campbell's failure to adhere to these procedures was a negligent omission for which Shelby has a remedy under tort law. *Helphenstine*, 65 F.4th at 798 (citing *Kingsley*, 576 U.S. at 408 (Scalia,

J., dissenting)) ("No one condones mistreating prisoners, no matter their underlying offense. But state law can easily account for that mistreatment, with both causes of action and remedies."); *see* Federal Tort Claims Act, 28 U.S.C. §§ 2671–2680.

The operative question raised by Shelby's claim is whether Officer Campbell's conduct constituted unconstitutional punishment or mere negligence. Negligence is never sufficient to demonstrate a constitutional punishment under either the Eighth or the Fourteenth Amendments. *See Farmer*, 511 U.S. at 837–38 (explaining that the Constitution protects against *punishments*, not "an [officer's] failure to alleviate a significant risk that he should have perceived but did not" and that "[tort] law reflects such concerns when it imposes tort liability on a purely objective basis"). Therefore, this Court should remand Shelby's failure-to-protect claim with instructions to analyze his claim under the subjective standard set forth by *Farmer*.

CONCLUSION

Procedure is protection, not punishment. Shelby is procedurally noncompliant, ineligible for both IFP status per the Three Strikes Rule and due process relief under the Fourteenth Amendment. Accordingly, this Court should reverse and remand the decision of the Fourteenth Circuit, with instructions to reinstate the District Court's holding that Shelby's *Heck* dismissals were "strikes" and that the subjective standard applies to Shelby's failure-to-protect claim.

Dated February 2, 2024.

Respectfully submitted,

/s/ Team 13
Counsels for Petitioner

APPENDIX

28 U.S. Code § 1915 - Proceedings in forma pauperis

(a)

(1) Subject to subsection (b), any court of the United States may authorize the commencement, prosecution or defense of any suit, action or proceeding, civil or criminal, or appeal therein, without prepayment of fees or security therefor, by a person who submits an affidavit that includes a statement of all assets such prisoner possesses that the person is unable to pay such fees or give security therefor. Such affidavit shall state the nature of the action, defense or appeal and affiant's belief that the person is entitled to redress.

(2) A prisoner seeking to bring a civil action or appeal a judgment in a civil action or proceeding without prepayment of fees or security therefor, in addition to filing the affidavit filed under paragraph (1), shall submit a certified copy of the trust fund account statement (or institutional equivalent) for the prisoner for the 6-month period immediately preceding the filing of the complaint or notice of appeal, obtained from the appropriate official of each prison at which the prisoner is or was confined.

(3) An appeal may not be taken in forma pauperis if the trial court certifies in writing that it is not taken in good faith.

(b)

(1) Notwithstanding subsection (a), if a prisoner brings a civil action or files an appeal in forma pauperis, the prisoner shall be required to pay the full amount of a filing fee. The court shall assess and, when funds exist, collect, as a partial payment of any court fees required by law, an initial partial filing fee of 20 percent of the greater of—

(A) the average monthly deposits to the prisoner's account; or

(B) the average monthly balance in the prisoner's account for the 6-month period immediately preceding the filing of the complaint or notice of appeal.

(2) After payment of the initial partial filing fee, the prisoner shall be required to make monthly payments of 20 percent of the preceding month's income credited to the prisoner's account. The agency having custody of the prisoner shall forward payments from the prisoner's account to the clerk of the court each time the amount in the account exceeds $10 until the filing fees are paid.

(3) In no event shall the filing fee collected exceed the amount of fees permitted by statute for the commencement of a civil action or an appeal of a civil action or criminal judgment.

(4) In no event shall a prisoner be prohibited from bringing a civil action or appealing a civil or criminal judgment for the reason that the prisoner has no assets and no means by which to pay the initial partial filing fee.

(c) Upon the filing of an affidavit in accordance with subsections (a) and (b) and the prepayment of any partial filing fee as may be required under subsection (b), the court may direct payment by the United States of the expenses of (1) printing the record on appeal in any civil or criminal case, if such printing is required by the appellate court; (2) preparing a transcript of proceedings before a United States magistrate judge in any civil or criminal case, if such transcript is required by the district court, in the case of proceedings conducted under section 636(b) of this title or under section 3401(b) of title 18, United States Code; and (3) printing the record on appeal if such printing is required by the appellate court, in the case of proceedings conducted pursuant to section 636(c) of this title. Such expenses shall be paid when authorized by the Director of the Administrative Office of the United States Courts.

(d) The officers of the court shall issue and serve all process, and perform all duties in such cases. Witnesses shall attend as in other cases, and the same remedies shall be available as are provided for by law in other cases.

(e)

(1) The court may request an attorney to represent any person unable to afford counsel.

(2) Notwithstanding any filing fee, or any portion thereof, that may have been paid, the court shall dismiss the case at any time if the court determines that—

(A) the allegation of poverty is untrue; or

(B) the action or appeal—

(i) is frivolous or malicious;

(ii) fails to state a claim on which relief may be granted; or

(iii) seeks monetary relief against a defendant who is immune from such relief.

(f)

(1) Judgment may be rendered for costs at the conclusion of the suit or action as in other proceedings, but the United States shall not be liable for any of the costs thus incurred. If the United States has paid the cost of a stenographic transcript or printed record for the prevailing party, the same shall be taxed in favor of the United States.

(2)

(A) If the judgment against a prisoner includes the payment of costs under this subsection, the prisoner shall be required to pay the full amount of the costs ordered.

(B) The prisoner shall be required to make payments for costs under this subsection in the same manner as is provided for filing fees under subsection (a)(2).

(C) In no event shall the costs collected exceed the amount of the costs ordered by the court.

(g) 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.

(h) As used in this section, the term "prisoner" means any person incarcerated or detained in any facility who is accused of, convicted of, sentenced for, or adjudicated delinquent for, violations of criminal law or the terms and conditions of parole, probation, pretrial release, or diversionary program.

The Eighth Amendment

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

The Fourteenth Amendment

Section 1

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 2

Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice-President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3

No person shall be a Senator or Representative in Congress, or elector of President and Vice-President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4

The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5

The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

Federal Tort Claims Act

Section 2671.

Definitions. As used in this chapter and sections 1346 (b) and 2401 (b) of this title, the term- "Federal agency" includes the executive departments and independent establishment of the United States, and corporations primarily acting as, Instrumentalities or agencies of the United States but does not include any contractor with the United States. "Employee of the government" includes officers or employees of any federal agency, members of the military or naval forces of the United States, and persons acting on behalf of a federal agency in an official capacity, temporarily or permanently in the service of the United States, whether with or without compensation. "Acting within the scope of his office or employment", in the case of a member of the military or naval forces of the United States, means acting in line of duty. (June 25, 1948, ch. 646, 62 Stat. 982; May 24, 1949, ch. 139, § 124, 63 Stat. 106.)

Section 2672.

Administrative adjustment of claims of $1,000 or less. The head of each Federal agency, or his designee for the purpose, acting on behalf of the United States, may consider, ascertain, adjust, determine, and settle any claim for money damages of $1,000 or less against the United States accruing on and after January 1, 1945, for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while

acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred. Subject to the provisions of this title relating to civil actions on tort claims against the United States, any such award or determination shall be final and conclusive on all officers of the government, except when procured by means of fraud. Any award made pursuant to this section, and any award, compromise, or settlement made by the Attorney General pursuant to section 2677 of this title, shall be paid by the head of the federal agency concerned out of appropriations available to such agency. The acceptance by the claimant of any such award, compromise, or settlement shall be final and conclusive on the claimant, and shall constitute a complete release of any claim against the United States and against the employee of the government whose act or omission gave rise to the claim, by reason of the same subject matter. (June 25, 1948, ch. 646, 62 Stat. 983; Apr. 25, 1949, ch. 92, § 2 (b), 63 Stat. 62; May 24, 1949, ch. 139, § 125, 63 Stat. 106; Sept. 23. 1950, ch. 1010, § 9, 64 Stat. 987.)

Section 2673.

Reports to Congress. The head of each federal agency shall report annually to Congress all claims paid by it under section 2672 of this title, stating the name of each claimant, the amount claimed, the amount awarded, and a brief description of the claim. (June 25, 1948, ch. 646, 62 Stat. 983.)

Section 2674.

Liability of United States. The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages. If, however, In any case wherein death was caused, the law of the place where the act or omission complained of occurred provides, or has been construed to provide, for damages only punitive in nature, the United States shall be liable for actual or compensatory damages, measured by the pecuniary injuries resulting from such death to the persons respectively, for whose benefit the action was brought, in lieu thereof. (June 25, 1948, ch. 646, 62 Stat. 983.

Section 2675.

Disposition by federal agency as prerequisite; evidence. (a) An action shall not be instituted upon a claim against the United States which has been presented to a federal agency, for money damages for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of an employee of the government while acting within the scope of his authority, unless such federal agency has made final disposition of the claim. (b) The claimant, however, may, upon fifteen days written notice, withdraw such claim from consideration of the federal agency and commence action thereon. Action under this section shall not be instituted for any sum in excess of the amount of the claim presented to the federal agency, except where the increased amount is based upon newly discovered evidence not reasonably discoverable at the time of presenting the claim to the federal agency, or upon allegation and proof of intervening facts, relating to the amount of the claim. (c) Disposition of any claim by the Attorney General or

other head of a federal agency shall not be competent evidence of liability or amount of damages. (June 25, 1948, ch. 646, 62 Stat. 983; May 24, 1949, ch. 139, § 126, 63 Stat. 107.)

Section 2676.

Judgment as bar. The Judgment in an action under section 1346 (b) of this title shall constitute a complete bar to any action by the claimant, by reason of the same subject matter, against the employee of the government whose act or omission gave rise to the claim. (June 25, 1948, ch. 646, 62 Stat. 984.)

Section 2677.

Compromise. The Attorney General, with the approval of the court, may arbitrate, compromise, or settle any claim cognizable under section 1346 (b) of this title, after the commencement of an action thereon. (June 25, 1948, ch. 646, 62 Stat. 984.)

Section 2678.

Attorney fees; penalty. The court rendering a judgment for the plaintiff oursuant to section 1346 (b) of this title, or the head of the federal agency or his designee making an award pursuant to section 2672 of this title, or the Attorney General making a disposition pursuant to section 2677 of this title, may, as a part of such judgment, award, or settlement, determine and allow reasonable attorney fees, which, if the recovery is $500 or more, shall not exceed 10 per centum of the amount recovered under section 2672 of this title, or 20 per centum of the amount recovered under section 1346 (b) of this title, to be paid out of but not in addition to the amount of Judgment, award, or settlement recovered, to the attorneys representing the claimant. Any attorney who charges, demands, receives, or collects for services rendered in connection with such claim any amount in excess of that allowed under this section, if recovery be had, shall be fined not more than $2,000 or imprisoned not more than one year, or both. (June 25, 1948, ch. 646, 62 Stat. 984.)

Section 2679.

Exclusiveness of remedy. The authority of any federal agency to sue and be sued in Its own name shall not be construed to authorize suits against such federal agency on claims which are cognizable under section 1346 (b) of this title, and the remedies provided by this title in such cases shall be exclusive. (June 25, 1948, ch. 646, 62 Stat. 984.)

Section 2680.

Exceptions. The provisions of this chapter and section 1346 (b) of this title shall not apply to- (a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused. (b) Any claim arising out of the loss, miscarriage, or

negligent transmission of letters or postal matter. (c) Any claim arising in respect of the assessment or collection of any tax or customs duty, or the detention of any goods or merchandise by any officer of customs or excise or any other law-enforcement officer. (d) Any claim for which a remedy is provided by sections 741-752, 781-790 of Title 46, relating to claims or suits in admiralty against the United States. (e) Any claim arising out of an act or omission of any employee of the Government in administering the provisions of sections 1-31 of Title 50, Appendix. (f) Any claim for damages caused by the imposition or establishment of a quarantine by the United States. (g) Repealed. Sept. 26, 1950, ch. 1049, § 13 (5), 64 Stat. 1043. (h) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights. (1) Any claim for damages caused by the fiscal operations of the Treasury or by the regulation of the monetary system. (J) Any claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war. (k) Any claim arising in a foreign country. (1) Any claim arising from the activities of the Tennessee Valley Authority. (m) Any claim arising from the activities of the Panama Canal Company. (June 25, 1948, ch. 646, 63 Stat. 984; July 16, 1949, ch. 340, 63 Stat. 444; Sept. 26, 1950, ch. 1049, § 2 (a) (2), 13 (5), 64 Stat. 1038.)