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 RESPONDENT

TEAM NO. 14

Attorneys for Respondent

QUESTIONS PRESENTED

I. Whether dismissals of civil actions under *Heck v. Humphrey* constitute strikes within the meaning of the Prison Litigation Reform Act.

II. Whether the requirements of a 42 U.S.C. § 1983 failure-to-protect claim brought by a plaintiff who was a pretrial detainee at the time of the incident are satisfied by showing that the state actor's intentional conduct created a risk of substantial harm and was objectively unreasonable.

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OPINIONS BELOW

The order of the United States District Court for the Western District of Wythe denying Respondent's motion to proceed in forma pauperis, issued by U.S. District Judge Michael Gray on April 20, 2022, is unreported and reproduced in the record. R. at 1. The opinion of the United States District Court for the Western District of Wythe, issued by District Judge Michael Gray on July 14, 2022, is unreported and reproduced in the record. R. at 2–11. The United States Court of Appeals for the Fourteenth Circuit reversed and remanded the district court in an unpublished opinion written by Circuit Judge Elizabeth Stark, issued December 1, 2022, and reproduced in the record. R. at 12–20.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. amend. VIII states:

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

U.S. Const. amend. XIV, § 1 states:

> 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.

42 U.S.C. § 1983 states:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any

rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Prison Litigation Reform Act, 28 U.S.C. § 1915

STATEMENT OF THE CASE

I. SUMMARY OF THE FACTS

The Marshall Jail and Gang Controversies. Gang-related corruption has recently shrouded the town of Marshall. R. at 3. The Marshall jail is no exception. R. at 3. In fact, several Marshall police officers and jail officials were accused and charged with taking bribes from the Bonuccis, a notorious street gang in Marshall. R. at 3. The jail fired and replaced multiple officers tied to the gang's illegal actions. R. at 3. Currently, and at the time of the events giving rise to this suit, gang leader Luca Bonucci and other Bonucci gang members are inmates at the jail. R. at 3. They still exercise considerable power over Marshall, even from jail. R. at 3.

For the past few years, the Bonuccis have been involved in an ongoing power struggle with another prominent gang, the Geeky Binders. R. at 3. After Luca Bonucci's wife was murdered by the leader of the Geeky Binders, Thomas Shelby, the Bonuccis sought revenge on their rivals. R. at 5. Thomas's brother is Respondent Arthur Shelby ("Arthur"). He was an obvious target for retribution. R. at 5. The Bonuccis got their chance when Arthur was booked in the Marshall jail. R. at 4.

Arthur Arrives at the Marshall Jail. On December 31, 2020, Marshall police executed an arrest warrant on the three leading members of the Geeky Binders: Thomas, Arthur, and John Shelby. R. at 3. Only Arthur was apprehended in the raid. R. at 3. Police arrested Arthur, who was under the influence of drugs and alcohol, and charged him with multiple crimes. R. at 3–4. He awaited trial at the Marshall jail. R. at 4.

Gang activity runs rampant in Marshall. R. at 4. Therefore, it is a high priority in the Marshall jail to collect gang information on inmates. R. at 4. Upon Arthur's admittance, the officer in charge of booking immediately recognized Arthur as a member of the Geeky Binders. R. at 4. His outfit was distinct: a tweed three-piece suit, a long overcoat, and a custom-made ballpoint pen with an awl concealed inside and the words "Geeky Binders" engraved on the outside. R. at 4. Arthur also indicated his involvement with the gang, stating: "The cops can't arrest a Geeky Binder!" and "My brother Tom will get me out of here, just you wait." R. at 4. All this was noted in the Marshall jail's online database. R. at 4. After booking, at around 11:30 PM, Arthur was placed in a holding cell apart from the jail's main entrance. R. at 5.

Gang intelligence officers reviewed and edited Arthur's file in the online database. R. at 5. The intelligence officers were aware of the recent dispute between the Geeky Binders and the Bonuccis. R. at 5. They were also aware that the Bonuccis sought revenge against Arthur and the Geeky Binders. R. at 5. They alerted other jail officers by making a special note in the online database and strategically placing paper notices in every administrative area of the jail. R. at 5. Arthur's high-risk status was also spotlighted on all rosters and floor cards. R. at 5.

The Gang Intelligence Meeting. The day after Arthur was booked, the intelligence officers held a meeting with all jail officials. R. at 5. They notified everyone of Arthur's presence in cell block A, and that the Bonuccis were in cell blocks B and C. R. at 5. Attending officers were

reminded to check rosters and floor cards regularly to ensure that rival gangs were separated in the jail's common spaces. R. at 5.

Roll-call records from the meeting indicate that Petitioner, Officer Chester Campbell ("Officer Campbell"), was present. R. at 5. Jail timesheets from that day indicate otherwise, as Officer Campbell called-in sick that morning and did not clock-in until after the meeting. R. at 5–6. The gang-intelligence officers required anyone absent to review the meeting minutes but, due to a glitch in the online database, it is unclear whether Officer Campbell did so. R. at 6. Officer Campbell had worked at the jail for several months, was properly trained, and consistently met job expectations. R. at 5.

Arthur Is Attacked. One week after the gang intelligence meeting, Officer Campbell oversaw the transfer of inmates to and from the jail's recreation room. R. at 6. He failed to reference both his hard-copy list of inmates with special statuses and the online database, and he apparently did not know or recognize Arthur. R. at 6. Officer Campbell asked Arthur whether he wanted to go to recreation, and Arthur responded that he did. R. at 6.

As Officer Campbell escorted Arthur to a guard stand, another inmate in cell block A yelled out to Arthur: "I'm glad your brother Tom finally took care of that horrible woman." R. at 6. Arthur responded, "yeah, it's what that scum deserved." R. at 6. After hearing this exchange and telling the inmates to be quiet, Officer Campbell collected four other inmates from cell blocks B and C, three of whom were Bonucci gang members. R. at 6–7.

Instantly, the Bonuccis attacked Arthur with fists and a homemade club. R. at 7. Officer Campbell failed to break up the attack. R. at 7. The skirmish lasted several minutes until other officers arrived to help. R. at 7. Arthur suffered life-threatening injuries, including a traumatic brain injury brought on by blunt force trauma, three fractured ribs, lung lacerations, acute

abdominal edema and organ laceration, and internal bleeding. R. at 7. For several weeks, he was hospitalized. R. at 7. After a bench trial, Arthur was acquitted of assault but found guilty of battery and possession of a firearm by a convicted felon. R. at 7.

II. NATURE OF PROCEEDINGS

The District Court. On February 24, 2022, Arthur, proceeding pro se, timely sued under 42 U.S.C. § 1983 in the U.S. District Court for the Western District of Wythe against Officer Campbell in his individual capacity. R. at 7. Along with his Complaint, Arthur moved to proceed in forma pauperis ("IFP"), 28 U.S.C. § 1915(a), this allows him to pay filing costs over time. R. at 1; *see* 28 U.S.C. § 1915(g). The court denied this motion, reasoning that Arthur had already accrued three "strikes" under the Prison Litigation Reform Act of 1995 ("PLRA").[1] R. at 7. Arthur was forced to pay the $402 filing fee. R. at 7.

Arthur alleges that Officer Campbell violated his constitutional rights by failing to protect a pretrial detainee, and that he is entitled to damages under § 1983. R. at 7–8. In response, Officer Campbell moved to dismiss under Rule 12(b)(6) for failure to state a claim. R. at 8. U.S. District Judge Michael Gray granted Officer Campbell's motion. R. at 11. The court found that Arthur failed to allege Officer Campbell's malicious intent or recklessness. R. at 11. Thus, his Complaint did not meet the pleading standard for failure-to-protect claims. R. at 10.

The Court of Appeals. Arthur appealed to the Fourteenth Circuit Court of Appeals, which reversed and remanded the district court's judgment. R. at 19. The circuit court first held that dismissals under *Heck* do not constitute strikes under the PLRA. R. at 14. It reasoned that *Heck*

[1] Arthur has been arrested multiple times in recent years, and during his prior detentions, he commenced three separate civil actions under 42 U.S.C. § 1983. R. at 3. All three actions were dismissed without prejudice under *Heck v. Humphrey*. R. at 3.

dismissals do not constitute failures to state a claim absent an obvious bar to securing relief, which was not present in Arthur's case. R. at 15. The circuit court therefore allowed him to proceed with in forma pauperis status on appeal. R. at 13. The court also ruled that failure-to-protect claims must be analyzed using an objective, rather than subjective, standard. R. at 16. Confronting an issue of first impression in the Fourteenth Circuit, the court followed other circuit courts and extended the *Kingsley v. Hendrickson* objective standard to this failure-to-protect claim. R. at 16. The court found that Officer Campbell's actions were intentional, regardless of his actual knowledge of danger. R. at 17. Officer Campbell acted in an objectively unreasonable manner, and Arthur pleaded facts that supported his claim. R. at 18–19. Circuit Judge Alfred Solomons dissented—arguing that the majority impermissibly expanded *Kingsley*. R. at 20. Judge Solomons opined that Arthur merely stated a claim for Officer Campbell's negligence. R. at 20. And because the Constitution does not protect against negligent acts, in his opinion, the subjective deliberate-indifference standard should apply. R. at 20.

This Court then granted certiorari. R. at 21.

SUMMARY OF THE ARGUMENT

This Court should affirm the judgment of the Fourteenth Circuit Court of Appeals.

I.

This Court and Congress have recognized an individual's right to access the courts, regardless of their ability to pay. The modern IFP statute allows indigent parties to pay in installments what is, for them, a cost-prohibitive filing fee. Later, Congress limited this right when it enacted the "three-strikes provision" under § 1915(g) of the PLRA. This prevents prisoners, and pretrial detainees, from bringing a civil action or appeal IFP if three or more civil actions or appeals

they filed were previously dismissed as "frivolous," or "malicious," or for "failure to state a claim" unless the prisoner is under imminent danger of serious physical injury.

A strike accrues if and only if the action or appeal was dismissed on grounds enumerated in the statute. In *Heck v. Humphrey*, this Court created a doctrine requiring district courts to screen and sometimes dismiss a prisoner or detainee's § 1983 claims. When a prisoner brings a civil claim challenging the constitutionality or validity of all or part of his ongoing criminal case, the court must dismiss it unless the prisoner can prove it has been invalidated. Sometimes lower courts label their *Heck* dismissals as "frivolous," or "malicious," or for "failure to state a claim."

The statute does not define these three bases for dismissal, but it uses familiar legal phrases with well-established meanings. *Heck* dismissals do not equate to a "failure to state a claim" because they are not dismissed for a defect on the face of the pleading. The Court in *Heck* could not change and did not change the pleading requirements under § 1983 or the Federal Rules of Civil Procedure. *Heck* dismissals are more like affirmative defenses or jurisdictional dismissals. The favorable termination requirement from *Heck* acts like a ripeness determination that strips a court of Article III jurisdiction because it keeps the merits of one case in front of one court at a time. Further, because dismissals for lack of jurisdiction are never "failures to state a claim," they are not strikes.

Alternatively, similar to affirmative defenses, *Heck* dismissals are mandatory despite not having to plead favorable termination in a complaint. Plaintiffs are not obligated to anticipate or address affirmative defenses in their complaint, but the action can still be dismissed when they are raised—as with *Heck* dismissals. Moreover, *Heck*-barred claims are not inherently dismissed as frivolous or malicious because the prisoner makes a legitimate claim. Rather there is a separate,

independent ground for removing the case from the docket. Therefore, *Heck* dismissals do not constitute strikes under any of the three enumerated grounds.

Finally, what constitutes a strike must be read narrowly because the accumulation of three strikes may block indigent prisoners' and pretrial detainees' fundamental right of access to the courts. Because this Court seeks to avoid interpreting a statute in a way that places its constitutionality in doubt, this Court should refrain from expanding the language of the PLRA, and find that *Heck* dismissals do not qualify as strikes.

II.

Pretrial detainee status is wholly distinct from convicted prisoner status. Until a pretrial detainee has been found guilty in a court of law, they are innocent. This Court has recognized the important distinction, and in *Kingsley v. Hendrickson* it held that pretrial detainees can state a claim for excessive force without proving a jail officer's subjective intent. Instead, it is sufficient to prove that an officer objectively *should have known* of the risk of harm to the detainee when they intentionally acted to introduce potentially harmful circumstances.

Since *Kingsley*, most circuit courts confronting detainees' § 1983 claims have extended *Kingsley*'s objective standard to similar claims like failure to protect, inadequate medical care, and other unsafe conditions of confinement. Other courts have inappropriately grafted a subjective intent standard, one developed to determine whether a convicted prisoner's punishment was "cruel and unusual" under the Eighth Amendment, onto detainees' Fourteenth Amendment claims. This Court has repeatedly recognized that such an application is improper, since detainees cannot be punished at all, much less cruelly and unusually. In the interest of judicial uniformity, this Court should reaffirm its promise of due process to pretrial detainees.

The subjective standard imposes an undue burden on detainees claiming a constitutional deprivation, one that offends the basic notion of due process. It allows offenders to escape any semblance of accountability, which, in turn, reduces public trust in the criminal justice system and enables corruption. The Marshall jail is a perfect representation, and Arthur is the unlucky example.

Arthur, a pretrial detainee, was the victim of violent retribution and a questionable jail operation. When Officer Campbell intentionally introduced three rival gang members to the same common area, Arthur was viciously attacked. Officer Campbell should have known the risk of introducing inmates from cell blocks B and C into the same common area as Arthur. All the information was placed prominently, right in front of Officer Campbell. The gang intelligence officers explicitly required him to take notice of the risks. But he did not, so Arthur was nearly beaten to death. All before his day in court. The Court should extend *Kingsley* to all pretrial detainees' § 1983 claims, to prevent other innocent detainees from meeting the same fate.

ARGUMENT AND AUTHORITIES

Standard of Review. Whether *Heck* dismissals constitute strikes within the meaning of the Prison Litigation Reform Act is a question of law. Whether this Court's decision in *Kingsley* eliminates the requirement for pretrial detainees to prove a defendant's subjective intent in a failure-to-protect claim for violation of Fourteenth Amendment Due Process rights in a § 1983 action is also a question of law. This Court reviews questions of law *de novo. U.S. Bank N.A. v. Vill. at Lakeridge, LLC*, 583 U.S. 387, 393 (2018). This means that the court reviews the issue without any deference to the lower court's decision. *Id.*

I. DISMISSALS UNDER *HECK V. HUMPHREY* DO NOT CONSTITUTE "STRIKES" UNDER THE PLRA.

The Fourteenth Circuit concluded that when a court dismisses a prisoner or pretrial detainee's action pursuant to *Heck v. Humphrey*, those dismissals do not count as strikes under the PLRA's three strikes provision. R. at 15. This judgment was correct.

There are three enumerated grounds for what can constitute a strike. If a prisoner or pretrial detainee accrues three strikes, they are prevented from filing IFP, effectively blocking their civil claims from going to court unless they are in imminent danger. *See* 28 U.S.C. § 1915(g). Under the statute, strikes are claims that are dismissed as "frivolous," "malicious," or for "failure to state a claim." *Id.* The Fourteenth Circuit held that dismissals pursuant to the Supreme Court's *Heck* doctrine are "not per se 'frivolous' or 'malicious.'" *See Washington v. L.A. Cnty. Sheriff's Dep't*, 833 F.3d 1048, 1055 (9th Cir. 2016); R. at 15. The court also held that *Heck* dismissals are not categorically dismissals for "failure to state a claim" R. at 15. That is because *Heck* does not require a court to dismiss based on a missing element or other deficiency on the face of the complaint; *Heck* dismissals are a closer cousin to jurisdictional dismissals or affirmative defenses subject to waiver.

A. Courts Cannot Simply Label *Heck* Dismissals as Strikes Because the PLRA Requires Strike-Counting Courts to Review the Grounds for Dismissal, and Those Grounds Differ from Those of Strikes.

In *Heck*, this Court required district courts to screen a prisoner or detainee's § 1983 claim challenging the constitutionality of their conviction or sentence. *Heck v. Humphrey*, 512 U.S. 477, 487 (1994). If a judgment in their favor necessarily implies the invalidity of an underlying criminal conviction or sentence, which has not yet been invalidated when the civil action is filed, the district court must dismiss the action. *Id.* The *Heck* rule prevents "collateral attack[s] on [a] conviction through the vehicle of a civil suit." *Id.* Hence, when a prisoner brings a civil claim that challenges

all or part of his ongoing criminal case, the court must dismiss the claim. *Id.* If the plaintiff can demonstrate his sentence has already been invalidated, there is no conflict between the criminal and civil systems and, thus, no dismissal.

There are multiple disagreements among the circuits concerning whether dismissing a complaint under *Heck* is a strike under any of the three categories. *Garrett v. Murphy*, 17 F.4th 419, 427 (3d Cir. 2021) (noting the circuit splits). Thus, while dismissing and strike-counting courts may characterize a *Heck* dismissal as one for failure to state a claim, frivolousness, or maliciousness, that does not make it so. *See, e.g.*, *Simons v. Washington*, 996 F. 3d 350, 354 (6th Cir. 2021).

Rather than passively accepting the dismissing court's label, a strike-counting court must look to see if those grounds, in fact, equate to strikes. *See, e.g.*, *Fourstar v. Garden City Grp., Inc.*, 875 F.3d 1147, 1153 n.2 (D.C. Cir. 2017) (Kavanaugh, J.) ("The [strike-counting] court must independently determine whether the dismissal in the earlier case occurred on grounds enumerated in the PLRA . . . ."). And doing so is not "relitigating the underlying *merits* of those past dismissals." *Id.* In fact, under the PLRA, a strike is only that which is actually "dismissed *on the grounds*" enumerated. *Id.* Calling a strike thus depends exclusively on the grounds for dismissal and a court order is not enough to determine said grounds. After all, the "grounds" for dismissal are "the reason[s] or points[s] that something relies on for validity." *Ground*, *Black's Law Dictionary* (11th ed. 2019). Because the reasoning for dismissals are usually found in accompanying opinions, a strike-reviewing court should look there.

This makes sense, considering the PLRA does not require district courts to label their dismissals as strikes. *See* 28 U.S.C. § 1915(g); *see, e.g.*, *Dooley v. Wetzel*, 957 F.3d 366, 377 (3d

Cir. 2020) ("This practical reality reinforces the natural reading of the statute, requiring that later courts make the strike determination only when the issue has become ripe for adjudication.").

Thus, even if a *Heck* dismissal is labeled as a strike, the grounds for a *Heck* dismissal do not fall under the meaning of one of the three categories. *See Meija v. Harrington*, 541 F. App'x 709, 710 (7th Cir. 2013) (mem.) (rejecting a district court's characterization of *Heck* dismissals as strikes). This is true for the following reasons.

B. *Heck* Dismissals Are Not Strikes Because They Do Not Fail to State a Claim, nor Are They Inherently Frivolous or Malicious.

Even if a court labels *Heck* dismissals as a strike, they still fail to fall into one of the enumerated categories. The statute does not define these three bases, nor do its accompanying congressional reports. However, the statute uses familiar legal phrases with well-established meanings. When a statute does not define a term, this Court construes it in accordance with its ordinary or natural meaning. *Smith v. United States*, 508 U.S. 223, 228 (1993). Under the plain understanding of what it means to fail to state a claim and for an action to be frivolous or malicious, *Heck* dismissals are a square peg in a round hole. Further, even if this Court finds the statute's language ambiguous, the grounds for *Heck* dismissals are functionally different from those that are for frivolousness, maliciousness, or failure to state a claim.

1. *Heck* dismissals are not for failure to state a claim.

Congress borrowed the phrase "failure to state a claim" from Federal Rule of Civil Procedure 12(b)(6), and courts have interpreted the statute's language to have the same meaning and boundaries. *See, e.g.*, *Thompson v. DEA*, 492 F.3d 428, 438 (D.C. Cir. 2007); *see also Lomax v. Ortiz-Marquez*, 140 S. Ct. 1721, 1726 (2020) (not explicitly endorsing the view that 12(b)(6) standards are controlling, but rejecting the argument that "failure to state a claim" is to be viewed

with anything other than its ordinary meaning). This Court also presumes that Congress is aware of existing law when it passes legislation. *Miles v. Apex Marine Corp.*, 489 U.S. 19, 33 (1990) abrogated in part on other grounds by *Coleman v. Tollefson*, 575 U.S. 532 (2015). Hence, the "failure to state a claim" category only covers dismissals where the plaintiff has failed to allege facts in the complaint that plausibly make out a prima facie case entitling him to relief. *See Wisniewski v. Fisher*, 857 F.3d 152, 155–56 (3d Cir. 2017). This determination is limited to the complaint itself.

A prima facie case under § 1983 creates a cause of action against any "person who, under the color of . . . [state law] . . . causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights . . . secured by the Constitution and [federal] laws." 42 U.S.C. § 1983. By the plain language of the statute, if everything a complainant alleges is taken as true, all elements are satisfied without the favorable termination requirement. *Heck* did not and could not change the pleading requirements under the Federal Rules of Civil Procedure. "Specific pleading requirements are mandated by the Federal Rules of Civil Procedure, and not . . . through case-by-case determinations of the federal courts." *Hill v. McDonough*, 547 U.S. 573, 582 (2006). Therefore, a complaint that fails to allege favorable termination should not be called a strike under the ordinary meaning of failure to state a claim.

a. **Heck***'s favorable termination requirement is a ripeness determination that strips a court of Article III jurisdiction, and jurisdictional defects cannot be dismissed for failure to state a claim.*

Heck dismissals are, by their nature, jurisdictional and not merit-based. Under *Heck*, the cause of action does not "accrue" until the conviction or sentence has been invalidated and is not "cognizable" until then. 512 U.S. at 487, 490. In the same term *Heck* was decided, this Court defined "cognizable" when reviewing another constitutional tort claim. *See FDIC v. Meyer*, 510

U.S. 471, 477 (1994). Relying on the ordinary meaning from *Black's Law Dictionary*, "cognizable" was defined as "capable of being tried or examined before a designated tribunal; within the jurisdiction of a court or power given to a court to adjudicate the controversy." *Id.* (internal quotations and alterations omitted).

The term "jurisdiction" is key. So are the terms "comity," "federalism," "consistency," and "judicial economy" that this Court used in *McDonough* to describe the reasoning behind *Heck* dismissals. *McDonough v. Smith*, 139 S. Ct. 2149, 2158, (2019). Also, in *McDonough*, this Court characterized civil actions barred by criminal proceedings as "dormant" and "unripe[.]" *Id.*

Ripeness, unlike factual pleading deficiency, is analyzed separately from the merits. "A claim is not ripe for adjudication if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all." *Texas v. United States*, 523 U.S. 296, 300 (1998) (internal quotation marks omitted). Ripeness, then, is "peculiarly a question of timing." *Anderson v. Green*, 513 U.S. 557, 559 (1995). *Heck* dismissals are also a question of timing since the claim is contingent on the disposition of the underlying criminal proceeding. In fact, the statute of limitations only begins to run after the criminal case has been decided and in the prisoner's favor. *Heck*, 512 U.S. at 487, 490.

Further, "[t]he ripeness doctrine is drawn both from Article III limitations on judicial power and from prudential reasons refusing to exercise jurisdiction." *Nat'l Park Hosp. Ass'n v. Dep't of Interior*, 538 U.S. 803, 808 (2003) (internal quotation marks omitted). Subject-matter jurisdiction is comprised of both Article III jurisdiction and statutory subject-matter jurisdiction. Thus, if *Heck* dismissals are unripe, the Court lacks Article III subject-matter jurisdiction over the claim, which looks like a 12(b)(1) dismissal for lack of jurisdiction. Additionally, "[i]n a long and venerable line of cases, this Court has held that, without proper jurisdiction, a court cannot proceed" to merits

as is done on a 12(b)(6) motion. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 84 (1998). The court "can *only note the jurisdictional defect* and dismiss the suit." *Id.* (emphasis added).

Likewise, *Heck* dismissals recognize only the prematurity of a § 1983 claim, not the lack of its elements. The plaintiff then has the opportunity to "demonstrate that the conviction or sentence has already been invalidated," but then it would not be a *Heck* dismissal. *Heck*, 512 U.S. at 487, 490. Thus, with *Heck* dismissals, the case cannot be determined yet because the underlying conviction needs to be determined by the court with proper jurisdiction first.

Drawing on comity and prudential concerns, something must be said for the fact that Heck dismissals refuse to take a prosecutor's Article I executive power into the hands of Article III courts. Not only is it entirely possible for the civil court to adjudicate the same part of the claim as the criminal court, but like most jurisdictional questions, *Heck* dismissals operate to keep the merits of one case in front of one court at a time.

Indeed, several circuits have recently recognized this. The First Circuit recently held that "whether *Heck* bars § 1983 claims is a jurisdictional question that can be raised at any time during the pendency of litigation." *O'Brien v. Town of Bellingham*, 943 F.3d 514, 529 (1st Cir. 2019). The Eleventh Circuit has followed suit. *See Harrigan v. Metro Dade Police Dep't Station #4*, 977 F.3d 1185, 1191 (11th Cir. 2020) (recognizing that *Heck* dismissals flow from a lack of jurisdiction); *see also Abella v. Rubino*, 63 F.3d 1063, 1065 (11th Cir. 1995) (describing the *Heck*-barred claims as not ripe); *Dixon v. Hodges*, 887 F.3d 1235, 1237 (11th Cir. 2018) (per curiam) (*Heck* bars strip a district court of jurisdiction). The Seventh Circuit also found *Heck* bars to be jurisdictional in an unreported decision. *See Meija*, 541 F. App'x at 710 (mem.).

Because dismissals for lack of jurisdiction are proper under 12(b)(1) and not 12(b)(6), counting *Heck* dismissals as strikes would conflict with the statute's text.

b. Alternatively, **Heck** *dismissals are like affirmative defenses, which are not dismissals for failure to state a claim.*

Other grounds that typically cannot be invoked with a 12(b)(6) motion are affirmative defenses. This Court stated that *Heck*'s "favorable-termination requirement" is grounded in avoiding "parallel criminal and civil litigation over the same subject matter" and "conflicting civil and criminal judgments." *McDonough v. Smith*, 139 S. Ct. at 2156–57. It also "avoids allowing collateral attacks on criminal judgments through civil litigation." *Id.* Thus, this rule protects the party against whom the civil claim is brought, and tends to operate like an affirmative defense.

First, similar to affirmative defenses, *Heck* dismissals are mandatory despite not having to plead favorable termination in a complaint. With respect to affirmative defenses, plaintiffs are not obligated to anticipate or address affirmative defenses in their complaint, but the action can still be dismissed when they are raised. *Gomez v. Toledo*, 446 U.S. 635, 640 (1980). *But see Polzin v. Gage*, 636 F.3d 834, 837–38 (7th Cir. 2011) (finding *Heck* bars are affirmative defenses subject to waiver). Similar to *Heck* bars, is the affirmative defense for failure to exhaust under the PLRA. It is mandatory under the PLRA for prisoners to exhaust their administrative remedies before bringing suit in federal court. *Jones v. Bock*, 549 U.S. 199, 203 (2007). This Court held that because Congress did not require exhaustion to be pleaded in the complaint, it must be raised as an affirmative defense. *Id.* at 215–16.

Second, an affirmative defense can be raised in a 12(b)(6) motion in lieu of an answer, but that does not necessarily turn *Heck* dismissals into dismissals for failure to state a claim. "Dismissal under Rule 12(b)(6) on the basis of an affirmative defense is proper only if the defendant shows some obvious bar to securing relief on the face of the complaint." *ASARCO, LLC v. Union Pac. R.R. Co.*, 765 F.3d 999, 1004 (9th Cir. 2014).

A *Heck* dismissal *can* be dismissed under rule 12(b)(6) when the complaint on its face reveals the *Heck* bar, but this does not make it any less an affirmative defense. For example, if the allegations in a complaint show that relief is barred by the statute of limitations, the complaint would be subject to dismissal for a 12(b)(6) motion if the defendant brings it, or it could be asserted the traditional way, in the answer. *See Bell v. Famiglio*, 726 F.3d 448, 459 (3d Cir. 2013). The *Heck* bar burden of proof operates the same way. *See Washington v. L.A. Cnty. Sheriff's Dep't*, 833 F.3d at 1056 n.5.

It also does not mean that every *Heck* dismissal fails to state a claim just because it may be asserted on a 12(b)(6) motion. An argument that favorable termination should be alleged in a complaint just because it can be dismissed on those grounds "proves too much; the same could be said with any affirmative defense." *Jones v. Bock*, 549 U.S. at 215–16 (rejecting exhaustion as an element under the PLRA and maintaining its status as an affirmative defense). The reasoning in *Jones* parallels here: just because something *can* be dismissed as an affirmative defense and failure to state a claim provides "no basis for concluding that Congress implicitly meant to transform [it] from an affirmative defense to a pleading requirement." *Id.* If a *Heck* defense is ever dismissed for failure to state a claim, it is not by nature of being a *Heck* dismissal that makes it such.

Furthermore, in most circumstances, a judge will need to look at more than just the facts alleged in the complaint to determine if an underlying conviction has not been invalidated, which cannot be done on a 12(b)(6) motion. *See Rinaldi v. United States*, 904 F.3d 257, 261 n.1 (3d Cir. 2018) (noting that considering evidentiary materials outside the complaint, including prison records, may turn a 12(b)(6) motion into a motion for summary judgment). In contrast, when the facts alleged in the complaint alone clearly reveal that an underlying cause of action is still pending or not invalidated, it may constitute failure to state a claim. However, because favorable

termination is not an element required in the pleadings, and affirmative defenses are not required to be argued in anticipation, this situation is unlikely, and *Heck* dismissals in themselves are not for failure to state a claim.

2. *Heck* dismissals are not inherently frivolous or malicious.

"Frivolous" and "malicious" are left undefined under the statute. This Court has concluded that under the PLRA, frivolous is more limited than failure to state a claim, and a complaint is frivolous only "where it lacks an arguable basis either in law or in fact." *Neitzke v. Williams*, 490 U.S. 319, 325 (1989). Frivolous claims are those that "should have never been brought at the outset." *Id.* at 329. While not directly addressed by this Court, it has characterized malicious claims within the meaning of the PLRA as "abusive." *Lomax v. Ortiz-Marquez*, 140 S. Ct. 1721, 1726 (2020).

If *Heck* dismissals are jurisdictional, they are not strikes, absent frivolousness or maliciousness. *Fourstar v. Garden City Grp., Inc.*, 875 F.3d 1147, 1150–51 (D.C. Cir. 2017); *accord Harris v. Harris*, 935 F.3d 670, 674 (9th Cir. 2019); *Escalera v. Samaritan Village*, 938 F.3d 380, 383–84 (2d Cir. 2019).

Heck-barred claims are not inherently dismissed as frivolous or malicious because favorable termination is not an element that is required to be pleaded in a § 1983 cause of action. The prisoner makes a legitimate claim, but there is a separate, independent ground for removing the case from the docket. A *Heck* dismissal could become frivolous or malicious when, for example, the same *Heck*-barred claim is refiled with no changes.

Therefore, *Heck* dismissals do not constitute strikes under any of the three enumerated grounds.

C. What Constitutes a Strike Must Be Read Narrowly to Avoid Blocking Prisoners' Fundamental Right of Access to the Courts.

Finally, indigent prisoners' right to access the courts hinges on how the "three strikes" rule is interpreted. With three strikes, all of an indigent prisoner's civil claims—even winning claims—are shut out of the courthouse because they may no longer pay the filing fee over time. Unless a prisoner can prove they are in imminent danger of serious physical harm, or they suddenly have hundreds of dollars to dispose of, their ability to defend themselves in court is unrealistic. *See* Samuel B. Reilly, Comment, *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, 758 (2021).

For example, claims of egregious physical abuse or medical neglect will not qualify as an exception unless the physical harm is still ongoing at the time the claim is brought.[2] And even if the prisoner has the facts to prove this, at such an early stage of litigation, they often proceed *pro se* with no appointed counsel, so they often don't qualify.[3] Moreover, violations of intangible rights, such as First Amendment religious freedom claims, no matter how egregious, categorically fall outside of the imminent danger category.[4]

Yet, if they are unable to clear the imminent danger bar, an indigent prisoner returns to square one—they can forget about IFP status, and they must pay the entire filing fee at once. An

[2] *See* John Boston, *25 Years of the Prison Litigation Reform Act*, Prison Legal News (Aug. 1, 2021), https://www.prisonlegalnews.org/news/2021/aug/1/25-years-prison-litigation-reform-act/; *see, e.g.*, *Brown v. Edinger*, No. 1:17-cv-02321, 2018 WL 527421, at *2–3 (M.D. Pa. Jan. 24, 2018) (barring claim where staff-permitted assault of prisoner resulted in traumatic injuries).

[3] *See* Boston, *supra* note 2 (discussing *pro se* prisoners' difficulty proving critical facts such as medical issues).

[4] *Id.*

incarcerated individual can work towards their filing fee in prison, but only in the case they are medically able. The rate of pay is twelve to forty cents per hour.[5] If the inmate were able to save every penny earned while working full-time, they may be able to afford the fee after twenty-five to eighty-four weeks. *See* Reilly, *supra*, at 794. But that calculation does not account for the other fees the Federal Bureau of Prisons requires prisoners to pay before saving for their filing fee. *See id.* These delays turn statutes of limitations into an obstacle. *See id.*

An indigent plaintiff's access to the courts is not only *fundamental* in the context of prisoners, *see Lewis v. Casey*, 518 U.S. 343, 346 (1996), but is dependent upon the court's "waiv[ing] of a fee to open the courthouse door[,]" *Christopher v. Harbury*, 536 U.S. 403, 413 (2002).

Even adopting Justice Thomas' observation on limits of this right, this Court would have to shut its eyes not to see the different burden here. *See Lewis*, 518 U.S. at 365 (Thomas, J., concurring) ("While the Constitution may guarantee . . . inmates an opportunity to bring suit to vindicate their federal constitutional rights, I find no basis in the Constitution . . . for the right to have the government finance the endeavor."). In *Lewis* the claim appeared to assert a right to excellent law libraries, legal assistants, and law clerks. *Id.* at 356. But IFP status is a deferred cost system where the prisoner pays his fees, just on a monthly basis. *See* 28 U.S.C. § 1915(b)(1)–(4). "To provide indigent prisoners with a law library, pens, pads, postage and even qualified legal assistance" pursuant to *Lewis*, "and then deny them the ability to actually file a complaint renders the other tools otherwise useless." Joseph T. Lukens, *The Prison Litigation Reform Act: Three Strikes and You're Out of Court—It May Be Effective, but Is It Constitutional?*, 70 Temp. L. Rev. 471, 482 (1997).

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[5] *Work Programs*, Fed. Bureau of Prisons, https://www2.bop.gov/inmates/custody_and_care/work_programs.jsp (last visited Jan. 28, 2021).

Moreover, where an indigent prisoner's fundamental right of access to the courts is at stake, the benefit of curbing claims based on the possibility they are meritless seems relatively minimal. "A statute should be interpreted in a way that avoids placing its constitutionality in doubt." Antonin Scalia & Bryan Garner, *Reading Law: The Interpretation of Legal Texts* 247 (2012). But a broad reading of the three strikes provision actually encourages future litigation over the potentially unconstitutional deprivation. Further, this Court has never directly addressed the constitutionality of the "three-strikes" provision. Thus, this Court should refrain from expanding the language of the PLRA, and find that *Heck* dismissals do not qualify as strikes.

II. THE COURT SHOULD EXTEND THE *KINGSLEY* OBJECTIVE STANDARD TO ALL PRETRIAL DETAINEE CLAIMS ARISING UNDER THE FOURTEENTH AMENDMENT.

In the eyes of justice, the convicted prisoner stands as the "symmetrical, inverted figure of the King." Michel Foucault, *Discipline and Punish* 29 (Alan Sheridan trans., Vintage Books 2d ed. 1995) (1977). Having been provided his rightful day in court, and found guilty, he faces perhaps the most extreme turning point of his life. Suddenly, he is subject to punishment for his actions. Pretrial detainees, however, stand in a different position: not quite free, but not guilty or punishable. *See Kingsley v. Hendrickson*, 576 U.S. 389, 400 (2015).

Arthur, a pretrial detainee, awaited his day in court on the cold floor of the Marshall jail, beaten and bloodied. R. at 7. Arthur was the victim of retribution, and a controversial jail operation. R. at 3. Before Arthur entered the jail, he was a king in his own world. R. at 2–4. But his arrest did not relieve him of his right to be free from bodily harm; a right which, under this Court's jurisprudence, should have been safeguarded by officers at the Marshall jail. *See Farmer v. Brennan*, 511 U.S. 825, 833 (1994). It is the duty of these officers, including Officer Campbell, to ensure that pretrial detainees safely see their day in court. *Id.* By intentionally placing Arthur in a

room with rival gang members, Officer Campbell failed to protect Arthur from his attackers. R. at 6–7.

This situation is tragic, and all too familiar. Pretrial detainees occupy a peculiar space in the criminal justice system. They no longer have some of the basic freedoms they enjoyed on the outside. *Bell v. Wolfish*, 441 U.S. 520, 537 (1979) ("Loss of freedom of choice and privacy are inherent incidents of confinement [for pretrial detainees]."). Placed in an unfamiliar environment, and unable to properly defend themselves, they are forced to navigate a community of individuals with often-checkered histories. While some inmates may be innocent, others are violent, or mentally ill, or simply the product of social inequity. Thus, pretrial detainees must rely on the professionalism of prison officers to ensure their safety. *See Farmer*, 511 U.S. at 833 ("P]rison officials have a duty . . . to protect prisoners from violence at the hands of other prisoners.").

The Bonuccis had a violent, high-profile vendetta against Arthur. R. at 5. It is undisputed that the jail was well-aware of their malicious intentions. R. at 5. It is also undisputed that the Bonuccis had recently exerted significant corruptive control over officers in the jail. R. at 3. One would assume that, in light of these circumstances, any properly-trained jail officer would be aware of the Bonuccis' movements. Officer Campbell claims he was not. R. at 8. But this purported absent-mindedness should not leave a pretrial detainee like Arthur with no legal recourse.

In *Kingsley*, this Court demonstrated its solidarity with pretrial detainees. It held that "the relevant standard is objective not subjective." *Kingsley*, 576 U.S. at 395. Thus, to state a claim for excessive force, "a pretrial detainee must show only that the force purposely or knowingly used against him was objectively unreasonable." *Id.* at 396–97.[6]

[6] The Second Circuit offered a helpful elaboration in *Darnell v. Pineiro*: "the pretrial detainee must prove that the defendant-official acted intentionally to impose the alleged condition, or recklessly

The Court clarified that "[a] court (judge or jury) cannot apply this standard mechanically[,]" and the determination "turns on the facts and circumstances of each particular case." *Kingsley*, 576 U.S. at 397 (internal quotation marks omitted). Courts are directed to analyze the case "from the perspective of a reasonable officer on the scene, including what the officer knew at the time, not with the 20/20 vision of hindsight." *Id.* Further, courts must "account for the 'legitimate interests that stem from [the government's] need to manage the facility in which the individual is detained,' appropriately deferring to 'policies and practices [that] are needed to preserve internal order and discipline and to maintain institutional security.'" *Id.* (quoting *Bell v. Wolfish*, 441 U.S. 520, 540 (1979)).

In removing the subjective state of mind roadblock, this Court allowed pretrial detainees to proceed to trial with their constitutional claims of excessive force without the undue burden of proving a defendant-officer's actual knowledge. *Id.* at 395. While that case concerned the actions of jail officers, as opposed to the inaction at issue here, the harm sought to be prevented remains the same. Harm is harm, regardless of whether it is inflicted by inmates or officers, is the result of inadequate medical attention, or arises from other conditions of confinement. *See Darnell*, 849 F.3d at 35. Most circuit courts confronting this issue have agreed and extended the *Kingsley* objective standard to pretrial detainees' other § 1983 claims.[7] This Court should follow suit.

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failed to act with reasonable care to mitigate the risk that the condition posed to the pretrial detainee even though the defendant-official knew, *or should have known*, that the condition posed an excessive risk to health or safety." 849 F.3d 17, 35 (2d Cir. 2017) (emphasis added).

[7] *Hardeman v. Curran*, 933 F.3d 816, 823 (7th Cir. 2019) ("*Kingsley*'s objective inquiry applies to all Fourteenth Amendment conditions-of-confinement claims brought by pretrial detainees."); *Castro v. County of Los Angeles*, 833 F.3d 1060, 1070 (9th Cir. 2016) (applying *Kingsley* to pretrial detainees' failure to protect claims); *Darnell v. Pineiro*, 849 F.3d 17, 35 (2d Cir. 2017) ("The same objective analysis should apply to an officer's appreciation of the risks associated with an unlawful condition of confinement . . . ."); *Westmoreland v. Butler County*, 29 F.4th 721, 729 (6th Cir. 2022)

Arthur's case presents this Court with an opportunity to hold our government to its promise of due process to pretrial detainees. The question is whether we view the pleadings of pretrial detainees' claims through the lens of objective reasonableness or subjective intent.

A. The Objective Standard Is More Consistent with the Demands of the Fourteenth Amendment and Supreme Court Precedent.

The fundamental purposes of due process are fairness and protection against arbitrary government action; or, government abuses of power. *County of Sacramento v. Lewis*, 523 U.S. 833, 845 (1998). § 1983 provides citizens with a cause of action when such abuses occur. 42 U.S.C. § 1983. The doctrine of due process flows from three different sources in the U.S. Constitution. The Fourth Amendment applies to searches and seizures of free citizens. *Graham v. Connor*, 490 U.S. 386, 394 (1989). The Eighth Amendment applies to prisoners after an adjudication of guilt. *Farmer*, 511 U.S. at 832. The Fourteenth Amendment applies to pretrial detainees. *Bell*, 441 U.S. at 535–37 & n.16.

Here, both the district court and the dissenting appellate judge erroneously relied on *Farmer*, which involved a failure-to-protect claim brought by a *convicted prisoner*. R. at 9, 19. That claim arose out of the Eighth Amendment. *Farmer*, 511 U.S. at 832. In *Farmer*, the Court established a subjective state of mind inquiry to be applied. *Id.* at 837. It held that to state a claim under § 1983, prisoners must show that the defendant-officer either acted maliciously and sadistically or was "deliberately indifferent" to a substantial risk of serious harm to the inmate. *Id.* at 828–29. This entails pleading facts which show that the officer was subjectively aware of the risks and made a conscious decision to do nothing. *Id.* at 837.

(applying *Kingsley* to pretrial detainee's failure to protect claim against individual defendant); R. at 16.

As the district court noted, "Deliberate indifference is an extremely high standard to meet." R. at 10 (quoting *Leal v. Wiles*, 734 F. App'x 905, 910 (5th Cir. 2018)). In the context of convicted prisoners, this high standard makes sense, but not for pretrial detainees. While "[b]eing violently assaulted in prison" is not part of their punishment, this Court made clear that "not every injury suffered by one prisoner at the hands of another . . . translates into constitutional liability for prison officials . . . .'' *Farmer*, 511 U.S. at 834 (internal quotation marks omitted). This principle derives from the distinction between punishment and discipline, and "due regard for prison officials' unenviable task of keeping dangerous men in safe custody under humane conditions." *Id.* at 844–45 (internal quotation marks omitted).

When a person is found guilty of a crime, he is dispossessed of some of the rights he enjoyed as an innocent civilian; namely, he loses his right to be free from any form of punishment. Kate Lambroza, Note, *Pretrial Detainees and the Objective Standard After* Kingsley v. Hendrickson, 58 Am. Crim. L. Rev. 429, 440–41 (2021). He is, however, protected from malicious, sadistic, or deliberately indifferent punishment by the Cruel and Unusual Punishment Clause of the Eighth Amendment. *Farmer*, 511 U.S. at 835–36. Therefore, jail officers accused of imposing cruel and unusual punishment on a prisoner certainly deserve a higher standard of judicial deference. This concept forms the basis of the subjective intent requirement. *See id.* at 837–38. If Arthur had been found guilty before the attack, his claim would arise under the Eighth Amendment, and it would be necessary for him to demonstrate that his attack constituted "cruel and unusual" punishment. However, because Arthur is a pretrial detainee, he cannot be punished at all. *Kingsley*, 576 U.S. at 400–01. So, application of the subjective standard serves no real purpose.

For this reason, *Kingsley* was an important step in this Court's criminal justice jurisprudence. It clarified that pretrial detainees' due process claims arise under the Fourteenth Amendment, not

the Eighth Amendment, because pretrial detainee status is completely different from prisoner status. *Id.* at 400–01 ("The language of the two clauses differs, and the nature of the claims often differs. And, most importantly, pretrial detainees (unlike convicted criminals) cannot be punished at all, much less "maliciously and sadistically.").

This Court made clear that cases arising from the Eighth Amendment, such as *Farmer*, have no bearing on their Fourteenth Amendment counterparts and are only relevant "insofar as they address the practical importance of taking into account the legitimate safety-related concerns of those who run jails." *Id.* at 401. Due to this distinction, pretrial detainees are not tied to the subjective intent standard that was designed for Eighth Amendment claims. *See Bell*, 441 U.S. at 535–37. Therefore, the Court held the proper standard for Fourteenth Amendment excessive force claims is one of objective reasonableness. *Kingsley*, 576 U.S. at 396–97.

The subjective intent standard stems from the Eighth Amendment's focus on punishment. *Miranda v. County of Lake*, 900 F.3d 335, 350 (7th Cir. 2018); *Farmer*, 511 U.S. at 837–38. So, contrary to the district court's opinion, R. at 9, a subjective inquiry does not serve the same purpose as an objective inquiry. The subjective intent standard is meant to determine whether a specific punishment is cruel and unusual. *Farmer*, 511 U.S. at 834. However, punishment of any kind is *explicitly prohibited* for pretrial detainees. *Id.* In Eighth Amendment cases, because liability for negligently-imposed harm is "categorically beneath the threshold of constitutional due process[,]" *Lewis*, 523 U.S. at 849, it is necessary to determine whether the accused officer acted "maliciously and sadistically for the very purpose of causing harm[,]" a state of mind which requires some level of subjective awareness, *Farmer*, 511 U.S. at 835–36.

Critics of extending *Kingsley* to all pretrial detainee claims, such as the dissenting appellate judge below, argue that the objective standard does not protect officers who acted negligently but

in good faith. R. at 20. But that concern is misplaced, as the *Kingsley* standard incorporates a subjective component for this very purpose: the unsafe condition must have been created by an intentional physical act of the officer. *Kingsley*, 576 U.S. at 395–96. For that reason, the district court in the present case was incorrect; the objective standard does not transform the inquiry into one of negligence. R. at 9–10. It merely allows the presumedly-innocent victims of harmful government action, or inaction, to state a claim when their rights may have been violated. Whether the violation actually occurred is best determined at trial. *See Miranda*, 900 F.3d at 354.

At the time of his attack, Arthur was innocent. R. at 4, 6–7. The range of judicial deference to law enforcement officers' actions may best be visualized as a spectrum, with the least deferential being the objective standard for searches and seizures under the Fourth Amendment, and the most deferential being the Eighth Amendment subjective standard for prisoners. The pretrial detainee sits somewhere in the middle, in a type of temporal limbo. Not quite free; but not yet guilty.

To determine the proper applicable standard for pretrial detainees' claims, it is helpful to compare their circumstances to claimants on both ends of the spectrum. An adjudication of guilt marks the hardest boundary on the spectrum. Until then, while the individual may be held in custody, they have not crossed the threshold to prisoner status. On this point, in *Albright v. Oliver*, Justice Ginsburg offered her theory of "continuing seizure." 510 U.S. 266, 277–78 (1994) (Ginsburg, J., concurring). Drawing on common law principles, Justice Ginsburg took the position that a government seizure lasts through the end of trial. *Id.* at 278 ("At common law, an arrested person's seizure was deemed to continue even after release from official custody."). This theory demonstrates that a pretrial detainee is more closely akin to a seized arrestee than they are to a convicted prisoner. Following this reasoning to its logical conclusion, the protections afforded to a pretrial detainee should more closely resemble those afforded to arrestees under the Fourth

Amendment. The Court indicated as much in *Manuel v. City of Joliet*, when it allowed Fourth Amendment challenges to pretrial detention even beyond the start of the legal process. 580 U.S. 357, 369–70 (2017). Pretrial detainees are not the same as convicted prisoners; they are innocent until proven guilty. *Coffin v. United States*, 156 U.S. 431, 453 (1895) ("The principle that there is a presumption of innocence in favor of the accused . . . lies at the foundation of . . . criminal law."). Applicable pleading standards should reflect that fact.

B. The Objective Standard Addresses Important Issues of Public Policy Like Protection Against Abuses of Power and Judicial Uniformity.

Pretrial detainees do not shed their right to be free from bodily harm at the jailhouse door. *See, e.g.*, *Castro v. County of Los Angeles*, 833 F.3d 1060, 1067 (9th Cir. 2016). The traditional purpose of pretrial detainment is to ensure the arrestee's appearance at trial. *Bell*, 441 U.S. at 536. Therefore, jails should take every precaution to get the detainee to the courthouse safely. Why, then, would the Court adopt a pleading standard which places a higher priority on protecting jail officers? Such officers, in their unenviable position, do deserve some protection for truly inadvertent errors. But the nature of their inaction does not reduce the harm that befalls the pretrial detainee, who is in a decidedly more-unenviable position. *See Castro*, 833 F.3d at 1070 ("Excessive force applied directly by an individual jailer and force applied by a fellow inmate can cause the same injuries, both physical and constitutional."). This conclusion applies with even greater force when the detainee is sick or mentally ill, a common problem,[8] which highlights the need to extend *Kingsley* beyond excessive force claims.

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[8] Police Executive Research Forum, *Managing Mental Illness in Jails: Sheriffs Are Finding Promising New Approaches* 5 (2018) ("[C]ounty jails have become the *de facto* mental health care system for large numbers of individuals in many communities."); Henry J. Steadman et al., *Prevalence of Serious Mental Illness Among Jail Inmates*, 60 Psychiatry Servs. 761, 761 (2009)

Jail accountability is perhaps the most important public policy concern underlying this issue. In recent years, increased accountability for law enforcement entities has been a lightning-rod debate. When jails are not held accountable, public trust in the criminal justice system diminishes.[9] And the subjective standard places a high burden on pretrial detainees, which makes it far too easy for courts, jails, and individual officers to "pass the buck." Under the subjective standard, willful ignorance becomes a comfortable fallback. That state of mind is difficult to prove. *See Global-Tech Appliances, Inc. v. SEB S.A.*, 563 U.S. 754, 769–70 (2011). This flies in the face of due process. The Court should consider the fundamental purpose of due process: protection against governmental abuse. *Lewis*, 523 U.S. at 845. *Kingsley* helps to level the playing field. Where there is no accountability, corruption is bound to occur. The Marshall jail is familiar with this result. R. at 3.

In the interest of judicial uniformity, the Court should extend the *Kingsley* standard to all pretrial detainees' claims. Since *Kingsley*, there has been a steady proliferation of circuit court cases involving application of the objective reasonableness standard to pretrial detainees' claims outside the context of excessive force. Eight circuit courts have confronted the issue so far. Five have extended the standard to other pretrial detainees' claims.[10] Four others have declined to extend *Kingsley*, instead confining Fourteenth Amendment claims to the subjective Eighth

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(stating that people in jail are five times more likely than the general population to suffer from serious mental illness).

[9] Exec. Order No. 14074, 87 Fed. Reg. 32,945, § 1 (May 25, 2022) ("Public safety . . . depends on public trust, and public trust in turn requires that our criminal justice system as a whole embodies fair and equal treatment, transparency, and accountability.") (ellipsis added).

[10] *Supra*, note 7 (listing circuit courts that have extended *Kingsley* to other pretrial detainee claims).

Amendment standard.[11] This circuit split reveals distinct variances in modalities of construing constitutional case law. It has created confusion as to which precedent controls the present issue. R. at 16. Such confusion can only work harm on the criminal justice system.

The importance of this decision should not be understated. Pretrial detainee civil rights cases "populate every docket across the federal courts." *Helphenstine v. Lewis County*, 65 F.4th 794, 801 (6th Cir. 2023) (Readler, J., respecting denial of rehearing en banc). In the last 14 years, over 76,000 "prisoner civil rights" and "prison condition" claims have reached federal courts of appeals—comprising almost 17% of all civil appeals.[12] It is important to note that almost two-thirds of jail inmates are "unconvicted."[13] These issues arise frequently, and the pleading standard applied to the claim is often outcome-determinative. *See Miranda*, 900 F.3d at 352.

And yet, circuit courts that confine the *Kingsley* standard to excessive force claims often do so without offering in-depth rationale. The confining courts mainly rely on two tenuous arguments. First, they argue that they are bound by circuit precedent, most of which does not confront Kingsley at all. *See Alderson v. Concordia Par. Corr. Facility*, 848 F.3d 415, 419 n.4 (5th Cir. 2017) ("Because the Fifth Circuit has continued to apply a subjective standard post-*Kingsley*, this panel is bound by our rule of orderliness."). This argument completely ignores the ramifications of the Court's broadly-worded decision in *Kingsley*.

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[11] *Whitney v. City of St. Louis*, 887 F.3d 857 (8th Cir. 2018); *Leal v. Wiles*, 734 F. App'x 905 (5th Cir. 2018); *Strain v. Regalado*, 977 F.3d 984 (10th Cir. 2020); *Nam Dang ex rel. Vina Dang v. Sheriff*, 871 F.3d 1272 (11th Cir. 2017).

[12] *IDB Appeals 2008–Present*, Fed. Jud. Ctr., http://www.fjc.gov/research/idb/interactive/21/IDB-appeals-since-2008 (last visited Feb. 1, 2024).

[13] Zhen Zeng, Bureau of Just. Stat., NCJ 251774, Jail Inmates in 2017, at 1 (2019); *see also U.S. Criminal Justice Data*, Sentencing Project, http://www.sentencingproject.org/the-facts/#detail (last visited Feb. 1, 2024) (at least 725,000 pretrial detainees are being held in jails across the U.S.).

The second argument is a hyper-textual reading of *Kingsley* which incorrectly concludes that, because *Kingsley* confronted an excessive force claim, the Court intended to restrict all other pretrial detainee claims to the Eighth Amendment subjective standard. *See Whitney v. St. Louis*, 887 F.3d 857, 860 n.4 (8th Cir. 2018) ("*Kingsley* does not control because it was an excessive force case, not a deliberate indifference case."); *see also Strain v. Regalado*, 977 F.3d 984, 991 (10th Cir. 2020) (declining to extend *Kingsley* because it "turned on considerations unique to excessive force claims" and thus did not reach beyond them). This conclusion is misguided. It is true that failure to protect differs from excessive force claims insofar as the former is based on inaction and the latter is based on action. *Castro*, 833 F.3d at 1070. But, as the Ninth Circuit has pointed out, even in the context of Eighth Amendment cases, "direct causation by affirmative action is not necessary: 'a prison official may be held liable . . . if he knows that inmates face a substantial risk of serious harm and disregards that risk by failing to take reasonable measures to abate it.'" *Clem v. Lomeli*, 566 F.3d 1177, 1182 (9th Cir. 2009) (quoting *Farmer*, 511 U.S. at 847).

So, even under the subjective standard, the distinction between action and inaction is inapposite. After all, "Section 1983 itself 'contains no state-of-mind requirement independent of that necessary to state a violation' of the underlying federal right[,]" which, along with the nature of the harm suffered, "is the same for pretrial detainees' excessive force and failure-to-protect claims." *Castro*, 833 F.3d at 1069. This principle applies also to conditions of confinement cases, where the nature of the challenged action differs, but the outcome remains the same. *Darnell*, 849 F.3d at 35. Harm is harm. In the absence of a proportional, legitimate government objective, *see Bell*, 441 U.S. at 561, the offender should not escape scrutiny based purely on semantics.

Courts adopting this reasoning also disregard the fact that *Kingsley* relied heavily on *Bell*, a conditions-of-confinement case. *Kingsley*, 576 U.S. at 397–98 (citing *Bell* for the foundational

principle that "a pretrial detainee can prevail by providing only objective evidence that the challenged governmental action is not rationally related to a legitimate governmental purpose or that it is excessive in relation to that purpose."). Importantly, both *Bell* and *Kingsley* use the general phrase "challenged government action," *id.*, instead of "challenged use of force," which indicates that the Court's intention was not so restrictive as the confining circuit courts, the district court, and Officer Campbell seem to believe it was.

Basically, the confining courts have inappropriately grafted an Eight Amendment solution onto a Fourteenth Amendment issue. These courts insist on the application of a "square the circle" standard on an entire body of distinct case law. *Miranda*, 900 F.3d at 350; *see also Brawner v. Scott County*, 14 F.4th 585, 595 (6th Cir. 2021). But "nothing in the logic the Supreme Court used in *Kingsley* . . . would support this kind of dissection of the different types of claims that arise under the Fourteenth Amendment's Due Process Clause." *Miranda*, 900 F.3d at 352 (alteration added).

Proponents of confining the objective standard may also argue that it is not workable, because it requires guards to remain actively aware of the differing statuses of every individual housed at the jail. But as the *Kingsley* Court noted, "many facilities . . . train officers to interact with all detainees as if the officer's conduct is subject to an objective reasonableness standard." 576 U.S. at 399. The Court also rejected assertions that the objective standard would open a floodgate of litigation. *Id.* at 402. It noted that "the Prison Litigation Reform Act of 1995, which is designed to deter the filing of frivolous litigation against prison officials, applies to both pretrial detainees and convicted prisoners." *Id.* (internal citation omitted). It found no evidence of a flood of frivolous lawsuits in circuits that use an objective standard. *Id.* So, workability concerns are misplaced.

The Fourteenth Circuit correctly ruled that Arthur's claim should not be dismissed, as the facts state a plausible failure to protect claim under the objective standard. This outcome would be the same in the Seventh, Ninth, Second, and Sixth circuits. But if another pretrial detainee brought the exact same claim, with the exact same facts, in the Fifth Circuit, for example, they would be summarily dismissed and left with no legal recourse. This disparity is simply untenable for something as vital as the fundamental guarantee of due process under the Fourteenth Amendment.

C. Officer Campbell's Actions Were Objectively Unreasonable, and Arthur Pleads Sufficient Facts to State a Claim for Failure-to-Protect.

Applying the *Kingsley* standard to the present case, the Fourteenth Circuit court was correct, R. at 18–19; Arthur states a plausible failure-to-protect claim.

1. Officer Campbell intentionally led inmates from cell blocks B and C into the common area with Arthur.

The first step in the *Kingsley* objective inquiry is to determine whether Officer Campbell acted intentionally with respect to the physical act that created Arthur's injury. Negligent acts cannot constitute a constitutional deprivation, *Lewis*, 523 U.S. at 849, so this subjective component safeguards officers acting in good faith. As an initial matter, it is necessary to identify the physical act that placed Arthur at risk of harm. Here, as the Fourteenth Circuit court correctly held, the physical act was Officer Campbell's intentional introduction of inmates from cell blocks B and C into the same common area as Arthur. R. at 17.

The act was intentional because "No outside force, illness, or accident rendered Officer Campbell unable to make this conscious decision." R. at 17. That fact distinguishes an intentional act from a negligent act. To demonstrate this concept, if Officer Campbell had tripped and accidentally opened the Bonuccis' cells, that would constitute negligence. But the facts of this case indicate no such accident. As it stands, all signs point to Officer Campbell being the intentional

actor. Thus, the Fourteenth Circuit court correctly held that Officer Campbell's intentional physical act created Arthur's harm. R. at 17.

2. Officer Campbell should have known of both Arthur's high-risk status and the presence of rival gang members in cell blocks B and C.

Arthur is second-in-command of a well-known street gang involved in a high-profile dispute with a rival gang. R. at 5. That rival gang is a staple in the Marshall jail. R. at 3. Its leader is currently incarcerated there, alongside several members of his clan. R. at 3.

Officer Campbell has worked at the Marshall jail for several months. R. at 5. It is reasonable to infer that he is aware of both the Bonuccis and the Marshall jail's recent controversy regarding gang-related corruption. R. at 3. Whether he attended the gang intelligence meeting or not, he was required to check the meeting minutes. R. at 6. Although a system glitch rendered the truth impossible to surmise, R. at 6, if Officer Campbell is properly trained and consistently meeting job requirements, as the district court found, R. at 5, he surely checked the minutes. And if he did not, he certainly should have.

The risk-status sheets should have been a fail-safe. They were clear and readily available in "every administrative area in the jail." R. at 5. The record makes clear that Officer Campbell carried a "hard copy list of inmates with special statuses[,]" and that he failed to reference that list before releasing the Bonuccis from their cell. R. at 6. A reasonable officer would have done so, as the gang intelligence officers directed, R. at 5, but Officer Campbell introduced the Bonuccis to the common area with blatant disregard to the well-known gang-related risks that presumably accompany inmates at the Marshall jail. R. at 6–7.

Even if Officer Campbell was somehow ignorant of Marshall's gang problem, he should have known something was wrong with Arthur. The record clearly states that, as Officer Campbell walked Arthur to the common area, another inmate in cell block A yelled out, "I'm glad your

brother Tom finally took care of that horrible woman." R. at 6. At this point, a reasonable officer likely would have taken the hint, and checked the risk-status sheets. The record states that Officer Campbell did not do so, despite clearly acknowledging the exchange between the two inmates. R. at 6–7.

An entire week passed between the meeting and the attack, R. at 3–7, making it highly unlikely that Officer Campbell was unaware of the gang activity. Even considering the fact that Officer Campbell was relatively new to the Marshall jail, R. at 5, a reasonable officer likely would not work a full week after a special gang intelligence meeting without consulting the readily available gang intelligence information in a gang-ridden town like Marshall. R. at 4. Simply put, Officer Campbell should have known the risks of bringing inmates together from different cell blocks. To this point, Arthur pleads sufficient facts to state a plausible claim.

3. But-for Officer Campbell's intentional physical act of leading the Bonuccis into the common area, Arthur would not have been attacked.

Even under the most stringent standards, guards do not need to be aware of which particular prisoners would attack a particular inmate to be held liable for the harm they caused. *Farmer*, 511 U.S. at 843. So, it does not matter if Arthur might have been attacked in the future; he was attacked on Officer Campbell's watch. R. at 6–7. Officer Campbell intentionally created the danger and was unable to protect Arthur from harm. R. at 7. There is no question that Officer Campbell caused Arthur's injury.

CONCLUSION

The Fourteenth Circuit court correctly determined that dismissals pursuant to *Heck v. Humphrey* do not fall into one of three categories that constitute a strike under the PLRA "three-

strikes" provision. It was also correct in applying the *Kingsley* objective reasonableness standard to Arthur's failure-to-protect claim and finding that he pleaded sufficient facts to state his claim.

For the foregoing reasons, the Court should AFFIRM the judgment of the Fourteenth Circuit Court of Appeals.

Respectfully submitted,

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ATTORNEYS FOR RESPONDENT

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APPENDIX "A"

STATUTORY PROVISIONS

Prison Litigation Reform Act, 28 U.S.C. § 1915

(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.