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

Team 33
Counsel for Petitioners

QUESTIONS PRESENTED

I. Under 28 U.S.C. § 1915(g), does a *Heck v. Humphrey* dismissal of a prisoner's 42 U.S.C. § 1983 claim constitute a strike when the action is dismissed for failure to state a claim or frivolousness?

II. Under 42 U.S.C. § 1983, does a pretrial detainee's deliberate indifference failure-to-protect claim fail without proving the official's subjective intent when the Supreme Court conclusively decided the deliberate indifference standard is subjective in *Farmer v. Brennan* and deliberate indifference claims are legally distinct from the excessive force claim in *Kingsley v. Hendrickson*?

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The opinion of the court of appeals is reported at No. 2023-5255. The opinion of the district court is reported at No. 23:14-cr-2324.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Section One of the Fourteenth Amendment to the Constitution provides:

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

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

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

Section 1915(g) of Title 28, United States Code, provides:

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

STATEMENT OF THE CASE

I. Factual Background

Petitioner Chester Campbell ("Campbell") is an entry-level guard at Marshall jail, a jail rippled with gang violence and disruption seeping in from the outside community. R. at 5. On January 8th, 2021, Campbell oversaw the transfer of Respondent Arthur Shelby ("Shelby") to the recreation room when Shelby was attacked and injured by fellow inmates. R. at 6–7. On February 24th, 2022, Shelby filed a motion to proceed in forma pauperis under 42 U.S.C. § 1983, alleging that Campbell violated his constitutional rights when he failed to protect him. R. at 7.

Shelby is the second-in-command of the well-known and influential gang, the Geeky Binders, that has historically run almost every sector of Marshall—businesses, real estate, and even public office. R. at 2. The Geeky Binders are infamous for injuring their enemies with sharp awls contained inside custom-made and engraved ballpoint pens. R. at 3. However, the Geeky Binders have lost substantial power in Marshall as a rival gang, the Bonuccis, have taken over. R. at 3. Led by Luca Bonucci, the Bonuccis infiltrated the Marshall police and jail by bribing several police and jail officers. R. at 3. Their bribing power quickly ran out, and Luca Bonnuci, along with several other gang members, are currently being held at the Marshall jail. R. at 3. The jail recently cracked down on the corruption, firing several officers who had been working with the Bonuccis and hiring new officers to replace them. R. at 3.

Shelby has several prior convictions in Marshall, including drug distribution, possession, and brandishing a firearm, that have led to him being in and out of prison throughout the last couple of years. R. at 3. While previously incarcerated, Shelby filed three separate 42 U.S.C. § 1983 actions that were subsequently dismissed without prejudice according to *Huck v. Humphrey* because they "would have called into question either his conviction or his sentence." R. at 3.

On December 21st, 2020, the police executed an arrest warrant for Shelby when they broke into a boxing match that he was attending. R. at 4. Shelby was arrested on charges of battery, assault, and possession of a firearm by a convicted felon and booked at the Marshall jail by Officer Dan Mann. R. at 4. Officer Mann recognized that Shelby was a Geeky Binders member and inventoried Shelby's Geeky Binders pen with an awl inside. R. at 4. Shelby, while under the influence of drugs and alcohol, also told Officer Mann that "The cops can't arrest a Geeky Binder! . . . My brother Tom will get me out of here, just you wait." R. at 4.

Officer Mann completed all the required paperwork for Shelby's arrest, uploaded it to the jail's digital database, and included a notation of his gang affiliation to be reviewed by the gang intelligence officers. R. at 4–5. The jail's online database contains a file for each inmate listing "charges, inventoried items, medications, gang affiliation, and other pertinent statistics and data that jail officials would need to know." R. at 4. The intelligence officers took extra notice of Shelby as he was a prime target for the Bonucci gang after Shelby's brother recently murdered Bonucci's wife. R. at 5. Consequently, the officers printed notices to be distributed at administrative areas in the jail and indicated Shelby's presence on the jail's roster and floor cards. R. at 5. Once Officer Mann finished the booking, officers placed Shelby in a holding cell separated from the main area of the jail. R. at 5.

The next day, the gang intelligence officers held a morning meeting at the jail to alert all staff that Shelby was booked the night before, highlighted his prominent gang affiliation, and reminded the staff to check the roster and floor cards to ensure that rival gang members were not in close proximity to one another. R. at 5. Shelby was placed in cell block A while Bonucci members were dispersed between cell blocks B and C. R. at 5.

Campbell has been working at Marshall jail for several months. R. at 5. He received proper training, and his performance has met all required expectations. R. at 5. It is unknown whether Campbell attended the morning meeting. R. at 5–6. On the one hand, the jail's time sheets indicate that Campbell was unable to attend because he was ill on the morning of January 1st, 2021, and did not arrive at work until later in the afternoon. R. at 5. On the other hand, the roll call records indicate that Campbell did attend the meeting. R. at 5. The gang intelligence officers require all absent staff to review meeting minutes, but the database crashed that day and deleted all information on who reviewed the meeting minutes on January 1st. R. at 6. Thus, the system did not record whether anyone, including Campbell, reviewed the meeting minutes. R. at 6.

On January 8th, 2021, Campbell instructed Shelby to wait at the guard stand before going to the recreation room. R. at 6. At He did not know or recognize Shelby, and thus, treated him no differently than the other inmates awaiting transfer to the recreation room. R. at 6. In this sense, Campbell did not check his handheld list of inmates with special statuses. R. at 6. He proceeded to gather other inmates at the guard stand when another inmate in cell block A said to Shelby "I am glad that your brother Tom took care of that horrible woman" and Shelby responded "yeah, it's what the scum deserved." R. at 6.

Campbell brought three other inmates to the guard stand who happened to be Bonucci gang members. R. at 7. Unfortunately, the Bonucci members attacked Shelby with their fists and a handmade club made out of tightly rolled and mashed paper. R. at 7. Campbell immediately tried to break up the attack but was outnumbered by the Bonucci members and the attack continued for a few minutes until backup arrived. R. at 7. Shelby was severely injured and remained in the hospital for several weeks. R. at 7. He suffered from fractured ribs, lung

lacerations, traumatic brain injury, internal bleeding, acute abdominal edema, and organ laceration. R. at 7. Shelby was convicted of battery and possession of a firearm by a convicted felon after a bench trial. R. at 7. He is now an inmate at Wythe Prison. R. at 7.

II. Procedural Background

Shelby filed suit against Campbell in his individual capacity in the District Court for the Western District of Wythe on February 24th, 2022, and accompanied the Complaint with a motion to proceed in forma pauperis. R. at 7. In his Complaint, Shelby alleged that Campbell violated his constitutional rights by failing to protect him from the attack. R. at 7. Shelby was a pretrial detainee at the time of the incident as he was awaiting trial and yet to be convicted. R. at 7. On April 20th, 2022, the District Court denied Shelby's motion to proceed in forma pauperis because he had accrued "three strikes" under § 1915(g) of the Prison Litigation Reform Act. R. at 1. Consequently, Shelby was ordered to pay the filing fee of $402.00, which he completed within the deadline of thirty days. R. at 7. Campbell responded to the Complaint on May 4th, 2022, by filing a motion to dismiss for failure to state a claim under Rule 12(b)(6) of the Federal Rules of Civil Procedure. R. at 2. The District Court granted Campbell's motion and dismissed the case two months later. R. at 2.

Shelby appealed the District Court opinion on July 25th, 2022, and the Fourteenth Circuit reversed and remanded the case on both issues raised on appeal—whether a dismissal under *Heck v. Humphrey* constitutes a "strike" under the Prison Litigation Reform Act, and whether the deliberate indifference standard for pretrial detainees is objective or subjective. R. at 19. The Honorable Judge Solomon dissented from the Fourteenth Circuit's opinion, finding that a subjective standard, not the *Kingsley v. Hendrickson* objective standard, is appropriate for

deliberate indifference failure-to-protect claims. R. at 20. The Supreme Court of the United States granted certiorari on both issues. R. at 21.

SUMMARY OF THE ARUGMENT

The Fourteenth Circuit improperly reversed the District Court for the Western District of Wythe's grant of Campbell's motion for failure to state a claim under Federal Rules of Civil Procedure 12(b)(6).

First, a dismissal under *Heck v. Humphrey* of a prisoner's 42 U.S.C. § 1983 claim constitutes a strike within the meaning of § 1915(g) of the Prison Litigation Reform Act because a claim is dismissed under *Heck* for failure to state a claim or frivolousness. Under *Heck*, a prisoner's § 1983 claim that calls into question their underlying conviction or sentence can only proceed once the underlying conviction or sentence has been favorably terminated. A plain reading of *Heck* supports the conclusion that favorable termination of a prisoner's underlying conviction or sentence is a necessary element of a § 1983 claim. The favorable termination requirement is not an affirmative defense that is subject to waiver because this impermissibly departs from the language and reasoning articulated in *Heck*. When a prisoner fails to meet the favorable termination element, the prisoner's cause of action automatically fails for failure to state a claim. Alternatively, even if a *Heck* dismissal is not for failure to state a claim, a prisoner's § 1983 claim that fails to meet the favorable termination requirement is frivolous because the plaintiff does not have an arguable legal issue. Further, a *Heck* dismissal does not implicate a federal court's jurisdiction because *Heck* governs when and how a § 1983 action accrues, not where. Shelby's three prior civil actions under § 1983 necessarily questioned his underlying conviction or sentence, and thus, were properly dismissed under *Heck*. Because a claim filed in forma pauperis that is dismissed for failure to state a claim or frivolousness accrues

a strike under § 1915(g) of the Prison Litigation Reform Act, the District Court properly denied Shelby's motion to proceed in forma pauperis.

Second, Shelby failed to state a claim because a pretrial detainee's § 1983 deliberate indifference failure-to-protect claim cannot succeed unless the official had actual knowledge of the risk and Campbell did not know that Shelby was a member of the Geeky Binders, or that he was at risk of an attack by Bonucci members in the jail. Campbell must have had actual knowledge because *Farmer v. Brennan* established liability under the deliberate indifference standard only when an official knew of and disregarded a substantial risk to the detainee's safety. The Respondent argues that the objective reasonableness standard established in *Kingsley v. Hendrickson* should be extended to deliberate indifference claims to find Campbell liable under § 1983. However, the *Kingsley* objective standard does not apply to this scenario as *Kingsley* only addressed an excessive force claim, the majority of circuits successfully apply *Farmer* to deliberate indifference claims by both detainees and prisoners, and the definition of deliberate necessarily infers a subjective component. Even if this Court concludes that an objective standard applies, Campbell's actions were merely negligent and did not rise to the level of deliberate indifference. Negligence is never actionable under the Constitution, and therefore, Campbell's actions, or inaction, fail to satisfy both the subjective and objective standard necessary for a finding of deliberate indifference under § 1983.

The district court correctly decided both issues. Shelby's motion to proceed in forma pauperis was properly denied and Campbell's 12(b)(6) motion for failure to state a claim was properly granted.

ARGUMENT

STANDARD OF REVIEW

On appeal, a lower courts grant of a motion to dismiss for failure to state a claim under Federal Rules of Civil Procedure 12(b)(6) is reviewed *de novo*. *Strain v. Regaldo*, 977 F.3d 984, 989 (10th Cir. 2020). Dismissal under Federal Rules of Civil Procedure 12(b)(6) is appropriate when the Complaint fails to articulate "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). While the Court must accept all factual allegations alleged in the Complaint to be true, "threadbare recitals of the elements of a cause of action, supported by mere conclusory statements" need not be accepted as true. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

I. Dismissals under *Heck v. Humphrey* are strikes under § 1915(g) because they are dismissed on grounds that the case is frivolous or fails to state a claim.

The Prison Litigation Reform Act's (PLRA) three strike provision allows courts to filter out frivolous and meritless prisoner claims. *See Jones v. Bock*, 549 U.S. 199, 204 (explaining that Congress intended the PLRA "to filter out the bad claims and facilitate consideration of the good"). Under the PLRA three strike provision, a prisoner who accumulates three strikes is permitted from filing future claims in forma pauperis. 28 U.S.C. § 1915(g). A prisoner gains a strike when they have "brought an action or appeal in a court of the United States that was dismissed on the ground that it is frivolous, malicious, or fails to state a claim upon which relief may be granted." *Id.*

When a pretrial detainee or prisoner believes their constitutional rights, privileges, or immunities have been violated, they may bring a suit under § 1983 for declaratory or injunctive relief. 42 U.S.C. § 1983. In *Heck v. Humphrey*, the Supreme Court held that a court must dismiss a prisoner's § 1983 claim for monetary damages if "judgment in favor of the plaintiff would

necessarily imply the invalidity of his conviction or sentence" unless the underlying conviction or sentence has already been invalidated. 512 U.S. 477, 487 (1994). A prisoner bringing a claim under § 1983 that calls into question their conviction or sentence "must prove that the conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court's issuance of a writ of habeas corpus." *Id.* at 486–87. This is known as *Heck*'s favorable termination rule. *See Heck*, 512 U.S. at 492 (Souter, J., concurring). The Court did not explicitly state whether favorable termination is a required element under *Heck*. *See Heck*, 512 U.S. at 486–91 (discussing the favorable termination rule broadly).

The Court has not addressed whether a dismissal under *Heck* when a prisoner files a § 1983 claim in forma pauperis counts as a strike under § 1915(g). A *Heck* dismissal is only malicious under § 1915(g) if it is "filed with the intention or desire to harm another," and thus, is not at issue here. *Washington v. Los Angeles Cnty. Sherriff's Dep't*, 833 F.3d 1048, 1055 (9th Cir. 2016); R. at 3. Therefore, in this case, whether a dismissal under *Heck* constitutes a strike under § 1915(g) of the PLRA hinges on whether the case was dismissed for failure to state a claim or frivolousness.

A. Under *Heck*, claims are dismissed for failure to state a claim because favorable termination is an implicit element of a prisoners § 1983 claim.

Dismissals for failure to state a claim under § 1915(g) are adjudicated under the same standard as failure to state a claim under Federal Rule of Civil Procedure 12(b)(6). *Thompson v. Drug Enf't Admin.*, 492 F.3d 428, 438 (D.C. Cir. 2007); *Moore v. Maricopa Cnty. Sheriff's Off.*, 657 F.3d 890, 893 (9th Cir. 2011). Under Rule 12(b)(6), dismissal is warranted when the complaint does not allege all elements of the claim. *Chamberlain v. Am. Honda Fin. Corp.*, 931 A.2d 1018, 1023 (D.C. Cir. 2007).

A plain reading of *Heck* supports the finding of an implicit favorable termination element. In establishing the rule in *Heck*, the Court analogized to the common-law action for malicious prosecution, which has a required favorable termination element. *Heck*, 512 U.S. at 484. The Court highlighted that, like the rule announced in *Heck*, malicious prosecution necessarily requires favorable termination to avoid "parallel litigation over the issues of probable cause and guilt." *Id.* at 484–85. The Court declined to rely on *Preiser v. Rodriguez*, which does not have a favorable termination requirement. *See id.* at 481 (distinguishing between suits where prisoners seek immediate or speedier release, which are covered by *Preiser*, and suits where prisoners seek monetary damages). The Court's reliance on malicious prosecution as a basis for the holding in *Heck* and the time spent outlining why both the *Heck* rule and malicious prosecution require favorable termination implies that favorable termination is a necessary element under *Heck*.

Justice Souter's concurrence in *Heck* further highlights the majority's understanding of an implicit favorable termination element under *Heck*. Discussing the majority's opinion, Justice Souter writes "the Court appears to take the position that . . . § 1983 requires (and, presumably, has always required) plaintiffs seeking damages for unconstitutional conviction or confinement to show the favorable termination of the underlying proceeding." *Heck*, 512 U.S. at 492 (Souter, J., concurring). Justice Souter disagreed with the majority's reliance on the tort of malicious prosecution, arguing that it would "require the Court to accept *not only the malicious prosecution favorable termination requirement*, but *all other elements* of the tort as elements of a § 1983 claim." *Id.* at 493 (emphasis added). Justice Souter's reading of the majority's opinion to include a favorable termination element lends considerable support to this reading of *Heck*.

Further, the Supreme Court's subsequent interpretations of *Heck* confirm this plain reading. In *Spencer v. Karma*, the Court analyzed whether Spencer's writ for habeas corpus was

moot because Spencer had completed his prison sentence. 523 U.S. 1, 3 (1998). Justice Souter's concurrence, joined by Justices O'Connor, Ginsburg, and Breyer, is again poignant to understanding how the Court understood the favorable termination requirement in *Heck*. *See id*. at 18–19 (Souter, J., concurring) (forming a majority with Justice Scalia, who delivered the opinion of the Court). Reiterating his understanding that *Heck* suggested that favorable termination is a required element in a § 1983 claim, Justice Souter argues that *Heck* created an exception to the favorable termination requirement for the factual situation presented in *Spencer*. *Id.* at 21. Explicitly creating an exception where the favorable termination requirement does not apply necessarily implies that favorable termination is a necessary element under *Heck* in all other factual scenarios.

The Court more recently affirmed this reading of *Heck* in *McDonough v. Smith*. *McDonough v. Smith*, 139 S. Ct. 2149, 2161 (2019) (holding that the statute of limitations period for a prisoner's § 1983 claim did not begin until a prisoner's acquittal). Following the analogy to common-law malicious prosecution, the Court held that McDonough could only bring a § 1983 claim once his prosecution was favorably terminated because there would not a be a "complete and present cause of action" until that time. *Id.* at 2156, 2158. In reaching that conclusion, the Court repeatedly refers to favorable termination as a "requirement" under *Heck*. *Id.* at 2157–58. A requirement is "something that must be done because of a law or rule." *Requirement*, Black's Law Dictionary (11th ed. 2019). Through this reference, the Court again implied that favorable termination is a necessary element of a prisoner's § 1983 claim.

The only compatible conclusion is that a failure to meet this necessary element is a strike under § 1915(g) for failure to state a claim. *Garrett v. Murphy*, 17 F.4th 419, 427 (3d Cir. 2021); *see Colvin v. LeBlanc*, 2 F.4th 494, 499 (5th Cir. 2021) (finding that "[b]y its own language. .

.*Heck* implicates a plaintiff's ability to state a claim"). Suits failing to meet *Heck'*s favorable termination necessary element are dismissed because the prisoner "lacks a valid cause of action under § 1983." *Murphy*, 17 F.4th at 427 (citing *Heck v. Humphrey*, 512 U.S. 477, 489 (1994)); *see Chamberlain*, 931 A.2d at 1023 (noting that dismissal for failure to state a claim is warranted when a claimant fails to allege all elements of a claim). Cause of action is synonymous with claim. *Cause of Action*, Black's Law Dictionary (11th ed. 2019). Thus, a failure to allege a required element under § 1983 constitutes a failure to state a claim under § 1915(g) of the PLRA.

A majority of the circuits have correctly followed this interpretation. *Hamilton v. Lyons*, 74 F.3d 99, 102 (5th Cir. 1996) (citing *Heck v. Humphrey*, 512 U.S. 477 (1994)); *Garrett v. Murphy*, 17 F.4th 419, 426 (10th Cir. 2021) (noting *Heck's* favorable termination requirement). For example, in concluding that *Heck* dismissals are a strike under the PLRA, the Court of Appeals for the District of Columbia Circuit focused on the Court's analogy to malicious prosecution in *Heck*. *In re Jones*, 652 F.3d 36, 38 (2011). The court reasoned that because favorable termination is an element that must be "alleged and proved" in a malicious prosecution, the same must be true under *Heck*, and thus, if a plaintiff does not meet this element, then they have failed to state a claim. *Id.*; *see Smith v. Veterans Admin*, 636 F.3d 1306, 1312 (10th Cir. 2011) (holding a plaintiff's *Heck* dismissal as premature for failure to state a claim under § 1915(g)).

Additionally, that prisoners may refile a § 1983 claim once they meet the favorable termination requirement does not invalidate a *Heck* dismissal from being categorized as failure to state a claim. The Supreme Court held that a strike under § 1915(g) is accrued when a case is dismissed for failure to state a claim either with or without prejudice. *Lomax v. Ortiz-Marquez*, 140 S. Ct. 1721, 1727 (2020). *Heck* dismissals are dismissed without prejudice because a

prisoner may refile their claim once the underlying conviction or sentence has been favorably terminated. *Heck*, 512 U.S. at 489–90 (implying that a prisoner may refile once their cause of action has accrued); *Without Prejudice*, Black's Law Dictionary (11th ed. 2019) (defining without prejudice as a dismissal of a claim that allows the plaintiff to refile the lawsuit within the statute of limitations). Therefore, when a claim is dismissed under *Heck* for failing to meet the favorable termination element, the claimant accrues a strike under § 1915(g) of the PLRA.

B. Even if *Heck* dismissals are not for failure to state a claim, they are dismissed for frivolousness, and thus, constitute a strike under § 1915(g) of the PLRA.

Under § 1915, a complaint filed in forma pauperis is dismissed on the grounds that the claim is frivolous "if the petitioner cannot make any rational argument in law or fact which would entitle him or her to relief." *Neitzke v. Williams*, 490 U.S. 319, 322–23, 325 (1989) (defining frivolous under § 1915(d)). This definition is appropriately applied to the term frivolous in § 1915(g). *See Lomax*, 140 S. Ct. at 1724 (explaining that "[i]n all but the most unusual situations, a single use of a statutory phrase must have a fixed meaning across a statute") (internal quotations omitted); *cf. Coleman v. Tollefson*, 575 U.S. 532, 538-39 (2015) (determining the definition of dismissal in § 1915(g) by looking to the use of the term in other subsections of § 1915).

A claim that falls under *Heck* is legally frivolous unless the conviction or sentence has been favorably terminated. *Lyons*, 74 F.3d at 102. When a prisoner's § 1983 claim falls under *Heck*, the court *must* ask whether the underlying conviction or sentence has been favorably termination. *Heck*, 512 U.S. at 486–87 (emphasis added). If the underlying conviction has not been favorably terminated, the case must be dismissed. *Id.* at 487. Thus, when a complaint is dismissed for failing to meet the favorable termination requirement, the prisoner "cannot make any rational argument in law . . . which would entitle him to relief" because the court cannot

address the merits of the complaint until the underlying conviction or sentence has been favorably terminated. *Neitzke,* 490 U.S. at 322–23, 325; *Davis v. Whyce*, 763 F. App'x 348, 349 (5th Cir. 2019) (holding a claimant's § 1983 claim as frivolous under *Heck* for lack of favorable termination because the claimant does not have arguable legal issue); *see Davis v. Kan. Dept. of Corr.*, 507 F.3d 1246, 1249 (10th Cir. 2007) (holding the claimants *Heck* dismissal as frivolous under § 1915(g) because it is "based on an indisputably meritless legal theory").

The Respondent may argue that *Heck* dismissals are not per se frivolous because they are dismissed without prejudice and may have a rational argument in law once a claimant's underlying conviction or sentence has been favorably terminated. However, the Supreme Court has stated that courts can dismiss a frivolous action without prejudice and that such cases count as a strike under § 1915(g). *Lomax*, 140 S. Ct. at 1726. Thus, whether a case is dismissed with or without prejudice is not determinative of whether it is frivolous and is equally not determinative of whether the dismissal constitutes a strike under § 1915(g). Because a prisoner has no rational argument in law when they fail to meet the favorable termination requirement, *Heck* dismissals are frivolous and accrue a strike under § 1915(g) of the PLRA.

C. Holding the favorable termination requirement to be an affirmative defense rather than an element of a § 1983 claim impermissibly departs from the Supreme Court's holding in *Heck*.

The Seventh and Ninth Circuits hold that the favorable termination requirement functions as an affirmative defense because it only temporarily prevents courts from hearing a prisoner's § 1983 claim, and thus, *Heck* dismissals are not dismissed for a failure to state a claim. *Polzin v. Gage*, 636 F.3d 834, 838 (7th Cir. 2011); *Washington v. Los Angeles Cnty.*, 833 F.3d 1048, 1055 (9th Cir. 2016). In doing so, the Seventh and Ninth Circuits make an unpersuasive analogy to the

affirmative defense of mandatory administrative exhaustion of PLRA claims and deviate from the language in *Heck*.

First, the analogy to the affirmative defense of mandatory administrative exhaustion is misplaced. The Ninth Circuit argues that *Heck* dismissals are synonymous with dismissals for lack of administrative exhaustion because they are not final determinations as they do not address the underlying merits of the case. *Washington*, 833 F.3d at 1056. However, in its decision in *Heck*, the Court explicitly analogized to the common-law malicious prosecution tort. *Heck*, 512 U.S. at 484. The Court clearly indicated in *Heck* that it was not adding an exhaustion requirement to a § 1983 claim because even a prisoner who has fully exhausted state remedies has no claim under § 1983 until their underlying conviction has been favorably terminated. *Heck*, 512 U.S. at 489; *Murphy*, 17 F.4th 419 at 429 (noting favorable termination is "not an exhaustion defense that must be anticipated by the defendant's answer"). If the Court envisioned *Heck* dismissals to mirror administrative exhaustion claims more closely, it would have placed the basis for the *Heck* rule in exhaustion claims. *See Heck*, 512 U.S. at 484. In fact, Justice Souter concurred that *Heck* should have been based on the PLRA's exhaustion requirement, giving the Court ample opportunity to support this analogy. *Heck*, 512 U.S. at 503 (Souter, J., concurring).

Second, defining the favorable termination requirement as an affirmative defense that is subject to waiver overlooks the language employed by the Court in *Heck*. In establishing the favorable termination rule, the Court states that a plaintiff "must prove" that their underlying conviction or sentence has been favorably terminated and a complaint "must be dismissed" if a plaintiff's underlying conviction or sentence has not been favorably terminated. *Heck*, 512 U.S. at 486–87. Must is "used to say that something is necessary or very important, sometimes involving a rule or a law" while may is "used to say that something is possible." *Must*, *May*,

Oxford Advanced American Dictionary (2011). If the Court envisioned the favorable termination requirement to act as an affirmative defense that is subject to waiver it would have more aptly used the word may in articulating the rule in *Heck*. Additionally, the ability of a prisoner to refile their § 1983 claim does not support departing from the Court's definition of favorable termination as a requirement and recategorizing it as an affirmative defense. Both dismissals without prejudice for frivolousness and failure to state a claim accrue a strike, when applicable, under the § 1915(g) of the PLRA. *Lomax*, 140 S. Ct. at 1726–27. It would be contrary to the Court's articulation of the rule in *Hec*k to determine that a district court can waive the favorable termination requirement and address the merits of the case.

The purpose of the Court's decision in *Heck* was to uphold the "strong judicial policy against the creation of two conflicting resolutions arising out of the same or identical transaction" that occurs when there are parallel litigations. *Heck*, 512 U.S. at 484. At the same time, § 1915(g) of the PLRA was enacted to combat the sharp rise in prisoner litigation because Congress realized that a litigant filing in forma pauperis "lacks an economic incentive to refrain from filing frivolous, malicious, or repetitive lawsuits." *Coleman v. Tollefson*, 575 U.S. 532, 536 (2015). The main purpose of section 1915(g) is to "filter out the bad claims . . . and facilitate consideration of the good." *Id.* (internal citations omitted). A § 1983 claim which fails to meet the favorable termination element is necessarily a bad claim. To categorize favorable termination as an affirmative defense, and thus, a *Heck* dismissal as not accruing a strike under § 1915(g), goes against both the stated purpose of the *Heck* decision and § 1915(g) of the PLRA.

D. *Heck* barred claims are not dismissed for lack of subject matter jurisdiction but rather for failure to state a claim or frivolousness.

Heck's favorable termination requirement does not implicate a federal court's jurisdiction. *Polzin v. Gage*, 636 F.3d 834, 837 (7th Cir. 2011). The implications of *Heck* affect

when and how a § 1983 action accrues, not whether a court can hear the § 1983 claim. *Colvin v. LeBlanc*, 2 F.4th 494, 498–99 (5th Cir. 2021).

Claims are dismissed under *Heck* because they fail to meet the favorable termination requirement, and thus, do not present a valid cause of action, not because a court lacks subject matter jurisdiction to hear the case. *LeBlanc*, 2 F.4th at 499; *Heck*, 512 U.S. at 489–90 (holding that a § 1983 cause of action for damages does not accrue until the underlying conviction has been favorably terminated). The Supreme Court firmly established that "the absence of a valid . . . cause of action does not implicate subject matter jurisdiction." *Steel Co. v. Citizens for a Better Env't*, 523 U.S 83, 89 (1998). Additionally, the Court has warned against extending the meaning and use of the word jurisdiction beyond its application over "classes of cases a court may entertain . . . and the persons over whom the court may exercise adjudicatory authority." *Murphy*, 17 F.4th at 428-29 (quoting *Fort Bend County v. Davis*, 139 S. Ct. 1843, 1848 (2019)) (internal quotations omitted). Converting *Heck* into a jurisdictional rule would be contrary to its holding and extend jurisdiction beyond its stated applications.

Shelby's three prior civil actions under § 1983 called into question his underlying conviction or sentence, and thus, were properly dismissed under *Heck* for failure to state a claim or frivolousness. R. at 3. Because a *Heck* dismissal is a strike under § 1915(g) of the PRLA, the District Court properly denied Shelby's motion to proceed in forma pauperis.

II. A pretrial detainee's 42 U.S.C. § 1983 deliberate indifference failure-to-protect claim will fail unless the detainee proves that the official had actual knowledge of the risk and disregarded it.

Pretrial detainees' 42 U.S.C. § 1983 claims arise under the Due Process Clause of the Fourteenth Amendment as opposed to the Cruel and Unusual Punishment Clause of the Eighth Amendment. *Bell v. Wolfish*, 441 U.S. 520, 535 (1979). The Due Process Clause prohibits the use

of *any* punishment for pretrial detainees as they have yet to be convicted of a crime. *Id.* (emphasis added); *see Darnell v. Pineiro*, 849 F.3d 17, 29 (2d Cir. 2017) (noting the difference between the prohibition of any punishment under the Fourteenth Amendment versus only cruel punishment under the Eighth Amendment). A detainee may allege a constitutional violation under § 1983 by showing that an officer acted with deliberate indifference by failing to protect them from an excessive risk to their health or safety. *Strain v. Regaldo*, 977 F.3d 984, 987 (10th Cir. 2020). Circuit courts split on whether to apply an objective or subjective standard to pretrial detainees deliberate indifference claims under the Fourteenth Amendment. *Compare Nam Dang v. Sheriff, Seminole Cnty. Fla.*, 871 F.3d 1272, 1280 (11th Cir. 2017) (subjective standard), *with Castro v. County of Los Angeles*, 833 F.3d 1060, 1071 (9th Cir. 2016) (objective standard). The subjective standard requires that the official had actual knowledge of the risk to the detainee while the objective standard only requires that a reasonable officer should have known of the risk to the detainee. *Farmer v. Brennan*, 511 U.S. 825, 837 (1994) (subjective standard); *Kingsley v. Hendrickson*, U.S. 389, 392–93, 395 (2015) (objective standard).

In *Farmer v. Brennan*, the Supreme Court established the foundation for the subjective deliberative indifference standard. 511 U.S. 825, 837 (1994). Specifically, the Court declared a three-pronged test requiring that: (1) "the official knows of and disregards an excessive risk to inmate health and safety, (2) the official [is] both . . . aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and (3) [] must also draw the inference." *Id.*

In contrast, the Court established an objective standard for pretrial detainee's excessive force claims in *Kingsley v. Hendrickson*. U.S. 389, 392–93, 395 (2015). The test is two-pronged: (1) the official must subjectively intend to bring "certain physical consequences into the world,"

and (2) must use an objectively “excessive” use of force. *Id.* at 395. The official’s state of mind need not be proved by the plaintiff. *Id.* The important distinction between the two tests is that *Farmer* requires that the official must have actual knowledge of the risk, while *Kingsley* only requires that a reasonable officer should have known of the risk.

A. The *Farmer* subjective standard, not the *Kingsley* objective reasonableness standard, controls deliberate indifference failure-to-protect claims.

The subjective standard established in *Farmer v. Brennan* controls deliberate indifference claims regardless of whether they are brought by a prisoner under the Eighth Amendment or a pretrial detainee under the Fourteenth Amendment. *Farmer* was a prisoner’s conditions of confinement § 1983 claim brought under the Cruel and Unusual Punishment Clause of the Eighth Amendment. 511 U.S. 825 (1994). The complaint alleged that officers failed to protect the prisoner when placing her in the general prison population despite knowledge that the prisoner, a biological male in the process of transitioning to a woman, would be extremely prone to a sexual attack by other inmates. *Id.* at 831. The prisoner was beaten and raped in her cell by another inmate within two weeks of transferring to the general prison population. *Id.* at 830. The Court created the three-pronged test and established that prison officials are only liable for prisoner injuries sustained at the hands of other inmates when the official “disregards [a substantial] risk by failing to take reasonable measures to abate it.” *Id.* at 847–50.

In contrast, in *Kingsley v. Hendrickson* a pretrial detainee initiated a § 1983 claim after officers forcibly removed him from his cell, handcuffed him, placed him face down on a bunk, and forcibly tased his back for five seconds. 576 U.S. 389, 392–93 (2015). Importantly, the detainee’s claim was one of *excessive use of force* by the officers. *Id.* (emphasis added). The officer’s actions were undoubtably intentional under the first prong of the *Kingsley* standard as the officer purposefully tased his back after he refused to comply with the officers’ orders to

remove a piece of paper covering his light fixture. *Id.* at 392. Under the second prong, the officer was to be held liable if his actions were objectively "excessive." *Id.* at 404.

The *Kingsley* standard is not applicable when the pretrial detainee's alleged violation is one of deliberate indifference. In fact, *Kingsley* only addressed the narrow question of what the standard should be for intentional, affirmative actions. *Kingsley*, 576 U.S at 391–92 ("The question before us is whether, to prove an *excessive force claim*, a pretrial detainee must show that the officers were subjectively aware that their *use of force* was unreasonable, or only that the officers' *use of that force* was objectively unreasonable.") (emphasis added). The Court did not intend to create one universal standard for all § 1983 claims brought by pretrial detainees. *Kingsley*, 576 U.S. at 396. Instead, *Kingsley* itself noted that the standard may not apply to all factual scenarios. *Id.* ("Whether that standard might suffice for liability in the case of an alleged mistreatment of a pretrial detainee need not be decided here."). The circuit courts extending the *Kingsley* standard to deliberate indifference claims are improperly broadening the scope of the opinion. *See Miranda v. Cnty. of Lake*, 900 F.3d 335, 352–54 (7th Cir. 2018) (explaining the varying approaches taken by the Second and Ninth Circuits versus the Fifth, Eighth, and Eleventh Circuits).

Further, the definition of deliberate implies that subjective knowledge is a necessary component of the standard. Black's Law Dictionary defines deliberate as "intentional; premeditated; fully considered" and the Court in *Kingsley* similarly defines the term as "purposeful or knowing." *Kingsley*, 576 U.S. at 396; *Deliberate*, Black's Law Dictionary (11th ed. 2019). The combination of the terms deliberate and indifference creates a standard that lies "somewhere between the poles of negligence at one end and purpose or knowledge at the other." *Farmer*, 511 U.S. at 836 (1994). Regardless of exactly where deliberate indifference falls

between these two poles, a subjective analysis into an official's state-of-mind is necessary. In contrast, the official's intent to punish in *Kingsley* is easily determined because the facts present a deliberate use of force against another individual; the use of force itself speaks volume to the official's state-of-mind. *See Castro v. Cnty. of Los Angeles*, 833 F.3d 1060, 1086 (9th Cir. 2016) (en banc) (Ikuta, J., dissenting) ("While punitive intent may be inferred from affirmative acts that are excessive . . . the mere failure to act does not raise the same inference."). The Court in *Kingsley* reasoned that an objective standard is "workable" for excessive force claims because officers are trained to interact with inmates in an objectively reasonable manner, but it is not "workable" for allegations based on a failure to interact. *Kingsley*, 576 U.S at 399. An official's state-of-mind when failing to act cannot be accurately implied by the Court, and thus, a subjective analysis is necessary for deliberate indifference claims.

The *Farmer* standard is successfully applied to pretrial detainee claims by a majority of circuits and has proven to be much more suitable for deliberate indifference failure-to-protect claims. *See, e.g.*, *Allen v. York Cnty. Jail*, 213 F. App'x 13 (1st Cir. 2007); *Strain v. Regalado*, 977 F.3d 984 (10th Cir. 2020). For example, the First Circuit in *Allen v. York County Jail* utilized the *Farmer* standard to conclude that an officer was not deliberately indifferent after unknowingly placing the pretrial detainee in a cell with another inmate that had previously sexually assaulted him. 213 F. App'x 13, 14 (1st Cir. 2007) (per curium). The officer testified that she was unaware that the assault previously occurred and immediately removed the plaintiff from the cell upon his request. *Id.* In holding the officer not liable, the court cited to *Farmer* and reasoned that "the focus of a deliberate indifference claim is what the officers knew and what they did in response to a known risk." *Id.*; *see Burrell v. Hampshire Cnty.*, 307 F.3d 1, 8 (1st Cir.

2002) (establishing that the Eighth Amendment *Farmer* standard is to be applied to both prisoners and pretrial detainees).

Similarly, the Tenth Circuit in *Strain v. Regalado* declined to extend the *Kingsley* standard to deliberate indifference claims and held that the health official's actions did not rise to the level of deliberate indifference after underestimating the extent of plaintiff's alcohol withdrawal symptoms. 977 F.3d 984, 987 (10th Cir. 2020). In that case, the plaintiff alleged that the defendants, including the jail's nurses and doctors, were deliberately indifferent to his medical needs when their course of treatment proved ineffective, and his symptoms continued. *Id.* at 995. The court concluded that the defendant's actions did not rise to the level of deliberate indifference and that the *Kingsley* standard did not apply for three main reasons: (1) excessive force claims are unique in nature, (2) the definition of "deliberate" infers a subjective element, and (3) the principle of *stare decisis* does not support extending the *Kingsley* standard to a new set of facts not within the scope of the analysis. *Id.* at 991; *see RAV v. City of St. Paul*, 505 U.S. 377, 386 n.5 (1992) (explaining that it is "contrary to all traditions of our jurisprudence to consider the law . . . conclusively resolved by broad language in cases where the issue was not presented or even envisioned").

The Ninth Circuit erroneously extended the objective standard to all pretrial detainee's deliberate indifferent claims and argued that the broad language in *Kingsley* supported this conclusion. *Castro*, 833 F.3d at 1070. *Castro* specifically pointed to the Supreme Court's phrasing that "a pretrial detainee can prevail by providing only objective evidence that the *challenged governmental action* is . . . excessive in relation to [its] purpose" to support its application of the standard to facts outside the scope of the opinion. *Id.* (quoting *Kingsley*, 576 U.S. at 398) (emphasis added). However, the Court only used such "challenged government

action" language *once* in the entire lengthy opinion and when placed in the context of the case, it becomes abundantly clear that the Court is limiting its holding to excessive force claims. *Kingsley*, 576 U.S. at 391–92, 398 (stating that the issue of the case is whether or not a pretrial detainee must show that an officer knew their *use of force* was excessive) (emphasis added).

Turning to this case, Campbell is not liable under 42 U.S.C. § 1983 because he did not have any actual knowledge of any risk to Shelby's health and safety. Applying the *Farmer* standard: (1) Campbell did not know of and disregard an excessive risk to Shelby's healthy and safety, (2) he was not aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and (3) he did not draw the inference. Farmer, 511 U.S. at 837. Just as the officer in *Allen*, the record clearly states that Campbell did not know or recognize Shelby at the time of their meeting, and thus, there is no way he could have known of any risk to Shelby's health and safety. R. at 6; *see Allen v. York Cnty. Jail*, 213 F. App'x 13, 14 (1st Cir. 2007) (finding no deliberate indifference when the jail officer had no knowledge that she put the defendant and his assailant in the same cell). Despite the unfortunate fact that Shelby was injured as a result of Campbell's inaction, the Fourteenth Amendment only prohibits punishment of pretrial detainees. *Bell v. Wolfish*, 441 U.S. 520, 535 (1979). It does not prohibit any harm as the result of an accident while detained. *See id.* Therefore, even when accepting all factual allegation as true, the District Court properly dismissed Shelby's claim as Campbell did not possess a sufficiently culpable state of mind.

The *Farmer* standard must apply to pretrial detainee's deliberate indifference claims as the official's state-of-mind cannot be accurately implied when the claim is based on a failure to protect. When applying the *Farmer* standard to this case, Campbell's actions did not reach the high standard of deliberate indifference.

B. Even if this Court finds that *Kingsley* applies, Campbell's actions were merely negligent, and thus, not actionable under 42 U.S.C. § 1983.

Campbell's failure to protect Shelby from Bonucci gang members was negligent at most, and even under the *Kingsley* objective standard, falls outside the scope of constitutional due process. *Kingsley,* 576 U.S. at 396. Under the first prong of the *Kingsley* standard, Campbell's instruction to Shelby to wait at the guard stand with the other inmates was intentional, as there is no indication that he was under any outside influence impacting his decision-making ability. *Id.*; R. at 6. However, the second prong of the *Kingsley* test, articulated by the Ninth Circuit in *Castro v. County of Los Angeles*, requires that the officers' actions be something more than just negligent. *Castro*, 833 F.3d at 1070 ("Was there a substantial risk of serious harm to the plaintiff that could have been eliminated through reasonable and available measures that the officer did not take, thus causing the injury that the plaintiff suffered?"). Negligence is defined as "a person's failure to exercise the degree of care that someone of ordinary prudence would have exercised in the same circumstance." *Negligent*, Black's Law Dictionary (11th ed. 2019). If an officer's inaction is nothing more than a failure to exercise the ordinary degree of care, the plaintiff's deliberate indifference claim necessarily fails. *See Castro*, 833 F.3d at 1086 (Ikuta, J., dissenting) ("A person who unknowingly fails to act—even when such a failure is objectively unreasonabl[e]—is negligent at most.").

In *Vasquez v. City of Santa Clara*, the Ninth Circuit held that a mental health professional was not deliberately indifferent, even under the objective *Kingsley* standard, after she wrongly concluded that the plaintiff's deceased son was not suicidal before he passed away. 803 F. App'x 100, 102 (9th Cir. 2020). The court reasoned that the mental health professionals' actions were, at most, negligent care but did not "raise a material issue of fact under a deliberate indifference standard." *Id.*; *see Wood v. Housewright*, 900 F.2d 1332, 1334 (9th Cir. 1999) (finding that a

prison official's inadequate medical care was negligent and "did not arise to the level of deliberate indifference"). Similarly, the Eleventh Circuit in *Nam Dang v. Sherriff, Seminal County Florida* noted that even if the court were to adopt an objective standard, Dang's claim that his health care providers were deliberately indifferent to his medical needs would still prove unsuccessful as the fact's present negligence at most. *Nam Dang v. Sheriff, Seminole Cnty Fla.*, 871 F.3d 1272, 1279 n.2 (11th Cir. 2017) (holding that jail official's failure to further investigate the source of Dang's headaches only amounted to negligent care); *see Alderson v. Concordia Par. Corr. Facility*, 848 F.3d 415, 419 n. 4 (5th Cir. 2019) (noting that Alderson's case would still fail under the objective standard set forth by the Ninth Circuit in *Castro*).

In this case, Campbell's actions were merely negligent and did not amount to the degree necessary for a Due Process violation under the Fourteenth Amendment. Campbell treated Shelby as he would any typical inmate when he instructed him to wait at the guard stand before going to recreation. R. at 6. Further, the record does not indicate that (1) the jail policy required Campbell to look at the list of inmates with special statutes before internally transferring inmates, (2) Campbell heard what the other inmate in cell block A said to Campbell about Bonucci's wife, or (3) Campbell had an opportunity to review the meeting minutes from the gang intelligence meeting on Shelby's status. R. at 6–7. In contrast, the record does indicate that Campbell immediately attempted to stop the attack on Shelby. R. at 7. This illustrates that Campbell's action of not independently transporting Shelby to recreation was merely negligent, and the consequences of his actions were not "obvious" to a reasonable officer. *See Castro*, 833 F.3d at 1071 (stating that the consequences of the official's actions must be "obvious" to the reasonable officer to meet the standard).

In conclusion, even if the Court opts to agree with the minority of circuit courts and apply the *Kingsley* objective standard to Shelby's deliberate indifference claim, Campbell's actions still do not reach past negligence to the necessary level of objective unreasonableness required for a finding of deliberate indifference under the Fourteenth Amendment.

CONCLUSION

First, a dismissal under *Heck v. Humphrey* constitutes a strike under § 1915(g) of the PLRA because favorable termination is an element of a prisoner's § 1983 claim, and not an affirmative defense that may be waived. Thus, a § 1983 claim dismissed under *Heck* is for a failure to state a claim or frivolousness, in accordance with § 1915(g). Additionally, a *Heck* dismissal does not implicate a federal court's jurisdiction. Secondly, Campbell did not possess the actual knowledge required to be held liable for a deliberate indifference claim under the *Farmer* standard, and even if the Court uses the objective *Kingsley* standard, Campbell's actions were merely negligent. For the foregoing reasons, the Petitioner respectfully requests that the Court reverse the decision of the Fourteenth Circuit and affirm the District Court's grant of Campbell's motion to dismiss.

Respectfully Submitted,

Team 33

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