No. 23-05

In the Supreme Court of the United States

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 40
Counsel of Record

Attorneys for Respondent

February 2, 2024

TABLE OF CONTENTS

TABLE OF AUTHORITIES

United States Supreme Court Cases

United States Courts of Appeals Cases

Statutes

Constitutional Amendments

Rules

Miscellaneous Authorities

QUESTIONS PRESENTED

1. Whether a prisoner with three prior dismissals under *Heck v. Humphrey* may still proceed *in forma pauperis* under the Prison Litigation Reform Act, 28 U.S.C. § 1915(g).

2. Whether the Court's decision in *Kingsley v. Hendrickson* eliminated the subjective intent requirement in failure to protect claims brought by a pretrial detainee under 42 U.S.C. § 1983.

OPINIONS BELOW

The Order denying Respondent's motion to proceed *in forma Pauperis*, entered by District Judge Michael Gray on April 20, 2022, is unreported but is reproduced in the record. R. at 1. The Order granting Appellant's motion to dismiss, entered by Judge Gray on July 14, 2022, is also unreported but is reproduced in the record. R. at 2–11. On December 1, 2022, the Fourteenth Circuit Court of Appeals reversed and remanded in an unpublished opinion, which is reproduced in the record. R. at 12–20.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the following constitutional and statutory provisions, the relevant portions of which are included in the Appendix:

U.S. Const. amend. VIII

U.S. Const. amend. XIV

28 U.S.C. § 1915(g)

42 U.S.C. § 1983

STATEMENT OF THE CASE

Respondent, Arthur Shelby, suffered life-threatening injuries when he was beaten by members of a rival gang, the Bonucci Clan. R. at 7. The Bonucci Clain attacked Mr. Shelby while he was still legally innocent, being held in pretrial detention at Wythe Prison. R. at 7. To recover relief for his injuries, Mr. Shelby, proceeding *in forma pauperis* under 28 U.S.C. § 1915(g), filed a civil suit under 42 U.S.C. § 1983 in the Western District of Wythe. R. at 2. The district court denied Mr. Shelby *in forma pauperis* status because he had commenced three separate 42 U.S.C. § 1983 actions during a prior detention. R. at 3. Each action was dismissed without prejudice pursuant to *Heck v. Humphrey* because the actions would have called into question Mr. Shelby's conviction or sentence. R. at 3.

I. THE GEEKY BINDERS VERSUS THE BONUCCI CLAN

Mr. Shelby is second-in-command of the Geeky Binders. R at 2. The organization traditionally managed a strong hold over the town of Marshall, with associates running a variety of businesses, owning most of the town's real estate, and sometimes holding public office. R. at 3. Over the last several years, the stronghold of the Geeky Binders has given way to the takeover of a rival gang led by Luca Bonucci, known as the Bonucci Clan. R. at 3. Bonucci rose to power by bribing Marshall police officers and jail officials and twisting the arms of local politicians. R. at 3.

Although his bribing power ran out and he is now held in the Marshall jail, Bonucci and his gang still exercise considerable power over the town of Marshall. R. at 3. After one of Mr. Shelby's brothers killed Bonucci's wife, Bonucci and his gang plotted revenge, making Mr. Shelby one of their prime targets. R. at 5.

II. MR. SHELBY'S ARREST AND PRETRIAL DETENTION

On December 31, 2020, Marshall police raided a boxing match that Mr. Shelby and his

brothers attended. R. at 3. The police had warrants for the arrest of all three of them. R. at 3. While his brothers managed to escape, Mr. Shelby was apprehended. R. at 3. Mr. Shelby was then transported to the Marshall jail. R. at 4.

Officials at the Marshall jail were promptly informed that Mr. Shelby was a member of the Geeky Binders upon his booking. R. at 4. First, as Officer Dan Mann immediately recognized, Mr. Shelby was wearing the distinct uniform of the Geeky Blinders, a three-piece tweed suit with a long overcoat. R. at 4. Second, Mr. Shelby had a custom-made ballpoint pen with an awl concealed inside, with "Geeky Binders" engraved on it. R. at 4. Finally, Mr. Shelby made several comments referring to his status as a "Geeky Binder" to Officer Mann. R. at 4. Documenting all this information, Officer Mann proceeded to follow protocol and enter Mr. Shelby's paperwork. R. at 4.

When Officer Mann entered Mr. Shelby into the database, he noticed that Mr. Shelby already had a page in the database from his previous time at the jail which clearly displayed Mr. Shelby's gang affiliation. R. at 5. Officer Mann then added Mr. Shelby's statements about being in the Geeky Blinders in his file under the gang affiliation tab. R. at 5. The gang intelligence officers at the Marshall jail reviewed and edited Shelby's file in the online database paying special attention to Mr. Shelby's file because of his high-ranking status in the Geeky Blinders. R. at 5. They were also aware that the Bonucci Clan was seeking revenge on the Geeky Blinders and that Mr. Shelby was one of their prime targets. R. at 5. A special note was made in Mr. Shelby's file, and paper notices were printed and posted in every administrative area in the jail. R. at 5. Mr. Shelby's status as high-risk was also displayed on all rosters and floor cards. R. at 5.

The morning after Shelby's booking, the gang intelligence officers held a meeting for all jail officials, where each officer was notified of Mr. Shelby's presence in the jail. R. at 5. At this

meeting, the intelligence officers explained that Mr. Shelby would be housed in cell block A of the jail, and that members of the Bonucci Clan were dispersed between cell blocks B and C. R. at 5. The intelligence officers instructed the prison guards to check the floor rosters and regularly ensure that the rival gangs were not coming in contact in the jail's common space. R. at 5.

III. MR. SHELBY'S ASSAULT

On January 8, 2021, over a week after Mr. Shelby's booking, Appellant Officer Chester Campbell oversaw the transfer of inmates, including Mr. Shelby, to and from the jail's recreation room. R. at 6. Appellant had not attended the gang intelligence officers' meeting about Mr. Shelby, but it was Appellant's duty, per the jail's policy, to review the meeting's minutes on the jail's online database. R. at 6. He did not do so. R. at 6. When Appellant retrieved Mr. Shelby for outdoor recreation time, Appellant knew that Mr. Shelby was a pretrial detainee, but Appellant allegedly did not know about Mr. Shelby's gang affiliations. R. at 6. Appellant failed to reference either the hard copy list of inmates with special statuses (which he carried on his person) or the online jail database, both of which explicitly indicated that Mr. Shelby was at risk of a possible attack by Bonucci and members of his gang. R. at 6.

While Appellant walked Mr. Shelby to the recreation area, an inmate in cell block A yelled out that he was glad that Mr. Shelby's brother "took care of that horrible woman," presumably Mr. Bonucci's wife, to which Mr. Shelby responded, "yeah, it's what the scum deserved." R. at 6. Appellant proceeded to walk Mr. Shelby through all of the cell blocks, including B and C where members of the Bonucci Clan were housed. R. at 7. Three members of the Bonucci clan then launched themselves at Mr. Shelby. R. at 7. Despite Mr. Shelby's attempts to seek cover, the Bonucci Clan members attacked Mr. Shelby before he could successfully do so. R. at 7. The Bonucci Clan members beat Mr. Shelby with their fists and improvised weapons. R. at 7. One Bonucci member fashioned a club from tightly rolled and mashed paper, which he

used to batter Mr. Shelby's head and ribcage. R. at 7. Appellant failed to interrupt the attack. R. at 7. The Bonucci Clan members continued to assault Mr. Shelby for several minutes before other officers finally stopped them. R. at 7.

As a result of the assault, Mr. Shelby suffered life-threatening injuries. R. at 7. He was admitted to the hospital for an extended stay in which doctors identified that he had penetrative head wounds from blunt force trauma resulting in traumatic brain injury. R. at 7. Mr. Shelby also suffered three rib fractures, lung lacerations, acute abdominal edema, organ laceration, and internal bleeding. R. at 7.

On February 24, 2022, Mr. Shelby filed a claim in the district court under 42 U.S.C. § 1983 against Appellant in his individual capacity. R. at 7. The district court granted Appellant's motion to dismiss, which Mr. Shelby subsequently appealed to the Fourteenth Circuit Court of Appeals. R. at 12. The Fourteenth Circuit reversed and remanded the decision of the district court. R. at 19. This appeal follows.

SUMMARY OF ARGUMENT

A dismissal of a prisoner's case pursuant to *Heck v. Humphrey*, 512 U.S. 477 (1994), does not count as a strike under the Prison Litigation Reform Act (PLRA), 28 U.S.C. § 1915(g). That is because, regardless of how *Heck* is categorized, it does not impose an additional pleading requirement on the prisoner and therefore does not fall under the categories of frivolousness, maliciousness, or failure to state a claim. There are two alternative ways *Heck*-barred claims can be classified, neither of which counts as a strike under the PLRA.

First, *Heck*'s favorable termination requirement is jurisdictional in nature. In other words, *Heck* merely emphasizes the order of operations that a prisoner should follow before bringing a § 1983 damages action in federal court. One of the first items in this order requires the prisoner to establish that their underlying conviction or sentence was favorably terminated. If they do not show this, then the court must dismiss their claim. Importantly, however, the court does not draw any conclusions about the legal or factual basis of the prisoner's claim before dismissing it under *Heck*. This differentiates a *Heck*-barred claim from one which is "frivolous, malicious, or fails to state a claim" under the PLRA's three-strikes provision, 28 U.S.C. § 1915(g).

In contrast to *Heck* dismissals, claims that accrue strikes under the PLRA require courts to review the factual allegations and legal theories in the complaint and conclude that the claims are insufficient or repetitive. Additionally, *Heck* dismissals more closely resemble other jurisdictional doctrines—such as Pullman abstention, Younger abstention, and ripeness—all of which impact the ability of a federal court to hear a plaintiff's claim. *Heck* dismissals are therefore jurisdictional and dissimilar to pleading requirements.

Alternately, the *Heck* bar can be viewed as an affirmative defense. This is because *Heck*'s favorable termination requirement is not a necessary element that a prisoner must plead to bring his § 1983 claim. Under the Federal Rules of Civil Procedure, any requirements which are not

necessary elements of a claim serve as affirmative defenses that the defendant must argue. *See* Fed. R. Civ. P. 8(b)–(c). Alternately, courts can raise *sua sponte* the issue of a lack of favorable termination. But if neither the court nor the defendant addresses the plaintiff's failure to show favorable termination, the issue is waived, and the prisoner's § 1983 suit may proceed. Previous attempts to construe *Heck* as imposing a necessary element of a § 1983 claim have been misguided because of an overextension of *Heck*'s analogy to malicious prosecution and the overreliance on common law principles in lieu of statutory construction. As such, *Heck* once again does not impose a pleading requirement.

But even if *Heck* were neither jurisdictional nor an affirmative defense, Mr. Shelby should still be able to proceed in forma pauperis pursuant to the PLRA's imminent danger exception. This exception allows a prisoner with three strikes to maintain in forma pauperis status if they are "under imminent danger of serious physical injury." 28 U.S.C. § 1915(g). When passing this statute, Congress did not explicitly define what constitutes "imminent danger." And by leaving this interpretation up to judicial discretion, which require a prisoner to be in imminent danger at the time they file suit or make an appeal, the exception has essentially been rendered a nullity. This does not comport with our system of constitutional law, which recognizes that even indigent prisoners have a right to be heard under the Due Process Clause of the Fourteenth Amendment. The Court should therefore interpret the PLRA to allow prisoners with three strikes to bring *in forma pauperis* suits if they have recently suffered serious physical injury and have filed their claim within the applicable statute of limitations. This would allow prisoners like Mr. Shelby to seek redress for their injuries after suffering harm.

Mr. Shelby has met his burden of proving his failure-to-protect claim under 42 U.S.C. § 1983. That is because, under the standard propounded by the Court in *Kingsley v. Hendrickson*,

576 U.S. 389 (2015), Mr. Shelby has shown that Appellant acted in an objectively unreasonable manner when he failed to protect him from a rival gang attack. *Kingsley*'s objective standard is the correct standard because it reconciles the Eighth Amendment, the Fourteenth Amendment, and the presumption of innocence. Further, *Kingsley* best balances the interests of both the prison official and the pretrial detainee. Under the objective *Kingsley* approach, Mr. Shelby prevails. However, even if the Court chooses to apply a standard which looks to subjective intent, Mr. Shelby still meets his burden.

First, presumptively innocent pretrial detainees should only be required to show that the prison officer acted in an objectively unreasonable manner in failure-to-protect claims. The Eighth Amendment is intended to apply to claims brought by convicted prisoners, whereas the Fourteenth Amendment applies to claims brought by pretrial detainees. Applying *Kingsley* to failure-to-protect claims comports with the Fourteenth Amendment and avoids offending the Eighth Amendment. The *Kingsley* objective approach also follows the trend followed by most circuit courts who have reached the question. The *Kingsley* approach provides a uniform standard for prison guards to follow which promotes accountability. By promoting accountability, pretrial detainees are afforded the protection they deserve as they await adjudication of their innocence.

Mr. Shelby satisfies all four elements of the test established by the circuit courts that have extended *Kingsley*'s objective standard to failure-to-protect claims. First, Mr. Shelby has proven that Appellant made an intentional decision to move Mr. Shelby from the safety of his cell to a waiting area near the danger of a rival gang. Second, making the intentional decision to move Mr. Shelby put him at substantial risk of suffering serious harm. Third—and most importantly—Appellant failed to take reasonable measures to abate the risk to Mr. Shelby, even though a

reasonable officer in that position would have appreciated the high degree of risk involved. Finally, because Appellant failed to take such reasonable measures, Mr. Shelby was severely injured.

Even if the Court elects not to apply a purely objective standard, Mr. Shelby still has a successful claim under any standard that incorporates a subjective prong. If the Court were to apply an objective-subjective hybrid standard, Mr. Shelby is able to show that the risk to him was so obvious that Appellant's disregard of the risk showed a subjective intent to cause harm. Yet, even if the Court applied a purely subjective standard, Mr. Shelby can still prove that his injuries were sufficiently serious and that Appellant had a sufficiently culpable state of mind.

ARGUMENT

I. MR. SHELBY MAY PROCEED *IN FORMA PAUPERIS* BECAUSE DISMISSAL OF A CIVIL ACTION PURSUANT TO *HECK V. HUMPHREY* DOES NOT CONSTITUTE A STRIKE WITHIN THE MEANING OF THE PRISON LITIGATION REFORM ACT.

Because Respondent Arthur Shelby is the nonmoving party to a Fed. R. Civ. P. 12(b)(6) motion to dismiss, all factual allegations in Mr. Shelby's complaint must be accepted as true. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

Mr. Shelby did not accrue strikes under the Prison Litigation Reform Act (PLRA) when his prior suits were dismissed pursuant to *Heck v. Humphrey*, 512 U.S. 477 (1994). That is because *Heck* dismissals are not due to "frivolous[ness], malicious[ness], or fail[ure] to state a claim." 28 U.S.C. § 1915(g). Rather, a *Heck* dismissal is more accurately characterized as jurisdictional or an affirmative defense—neither of which constitutes a strike. But even if *Heck* were neither jurisdictional nor an affirmative defense, Mr. Shelby may proceed *in forma pauperis* under the PLRA's imminent danger exception. Therefore, while Appellant would weaponize filing fees, Mr. Shelby's position properly interprets the PLRA and governing cases. As such, Mr. Shelby respectfully requests the Court affirm the judgment of the Fourteenth Circuit and ensure that the injuries of the indigent receive redress.

Whether a *Heck* dismissal constitutes a strike under the PLRA is a question of law entailing interpretation of a federal statute and is therefore reviewed de novo. *Tafari v. Hues*, 473 F.3d 440, 442 (2d Cir. 2007); *Jackson v. Johnson*, 475 F.3d 261, 265 (5th Cir. 2007).

A. *Heck* Dismissals Are Jurisdictional in Nature and Therefore Do Not Accrue a Strike Under the PLRA.

Heck dismissals are jurisdictional because determining whether a claim is *Heck*-barred

precedes adjudication on the merits of a prisoner's claim.[1] As the Court held in *Heck*, a judge must dismiss a prisoner's claim for damages resulting from an invalid conviction if the prisoner has not first proven that the underlying conviction or sentence was "favorably terminated" by a direct appeal, state tribunal, executive order, or federal writ of habeas corpus. *Heck*, 512 U.S. at 486–87. This standard is therefore based on the timeliness or order of operations of a prisoner's claim, rather than its merits. Further supporting this interpretation, *Heck* dismissals closely resemble various other jurisdictional doctrines. Accordingly, *Heck* dismissals are jurisdictional and do not constitute a strike.

1. *Heck* Dismissals Regard the Timeliness or Order of Operations of a Prisoner's Claim—Not the Merits of Its Pleadings—and Therefore Are Jurisdictional.

When the district court dismissed Mr. Shelby's prior three suits pursuant to *Heck*, the district court did so because Mr. Shelby had not first shown favorable termination before bringing claims that "called into question his conviction or sentence." R. at 3. Mr. Shelby's claims were not dismissed on grounds of frivolousness, maliciousness, or failure to state a claim. *See id.*; 28 U.S.C. § 1915(g). These three categories of lawsuits—the only ones which the PLRA penalizes with a strike—each require scrutiny of the merits of a prisoner's claims. In contrast, *Heck* dismissals turn not on the merits of a suit, but only on whether a prisoner has followed the order of operations when raising certain § 1983 claims. *See Heck*, 512 U.S. 486–87.

First, because frivolous claims are those that lack "an arguable basis in law or fact," *Neitzke v. Williams*, 490 U.S. 319, 325 (1989), a court must analyze the pleadings and decide whether they contain either baseless factual allegations or clearly meritless legal theories. *See* 32 Am. Jur. 2d *Federal Courts* § 424 (2023).

[1] As emphasized in Part II, Mr. Shelby was a pre-trial detainee at all times relevant to his § 1983 claim. *Infra* Part II. For purposes of Part I, however, the difference between a pretrial detainee and prisoner is immaterial since this issue concerns Mr. Shelby's prior lawsuits. *See* R. at 3, 21.

Second, because malicious claims occur when a plaintiff has filed multiple "identical or closely similar suits [in which] the issues have already been determined," 32 Am. Jur. 2d *Federal Courts* § 427 (2023), a court must necessarily perform multiple examinations of the pleadings—once to conclude on the merits, and at least once more to determine whether a subsequent suit raises sufficiently similar issues. *See id.*

Third, because failure to state a claim occurs when the pleadings lack "sufficient factual matter" which would state a plausible claim to relief if accepted as true, *Iqbal*, 556 U.S. at 678; *see also Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007),[2] a court must review the pleadings to determine if they are sufficient or merely conclusory. *See Iqbal*, 556 U.S. at 678; *Twombly*, 550 U.S. at 570.

In contrast to the previous three categories, *Heck* dismissals are jurisdictional, so the analysis never reaches the pleadings. That is because a court must only determine two things when performing a *Heck* analysis: whether a judgment in favor of the prisoner "would necessarily imply the invalidity of his conviction or sentence," and, if so, the whether the prisoner first obtained favorable termination. *Heck*, 512 U.S. at 487. Both determinations are merely "fact[s] that must exist for a court to properly exercise its jurisdiction over a case, party, or thing." *Jurisdictional Fact*, *Black's Law Dictionary* (11th ed. 2019).

Indeed, because a court must dismiss the prisoner's suit without reaching the merits if there is no favorable termination, *Heck* dismissals are jurisdictional. *See Heck*, 512 U.S. at 487; *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94–95 (1998) (stating that courts must dismiss cases without reaching the merits if they lack jurisdiction). Several circuit courts have

[2] Because the text of § 1915(g) of the PLRA ("fails to state a claim upon which relief may be granted") mirrors the text of Fed. R. Civ. P. 12(b)(6) ("failure to state a claim upon which relief can be granted"), the two standards are seen identically. *See* 32 Am. Jur. 2d *Federal Courts* § 422 (2023).

already adopted this reasoning. *O'Brien v. Town of Bellingham*, 943 F.3d 514, 529-30 (1st Cir. 2019) (noting that whether *Heck* bars § 1983 claims is a "jurisdictional question" that "can be raised *sua sponte* by the court"); *Dixon v. Hodges*, 887 F.3d 1235, 1237 (11th Cir. 2018) (stating that *Heck* "strips a district court of jurisdiction" if a favorable judgment for plaintiff would imply the invalidity of his punishment).

2. *Heck* Dismissals Closely Resemble Various Other Jurisdictional Doctrines and Should Therefore Be Similarly Understood.

Further supporting the interpretation of *Heck* dismissals as jurisdictional, *Heck* dismissals mirror other jurisdictional doctrines and should therefore be similarly understood. That is because, like other doctrines, *Heck* constrains a court's power to adjudicate a claim until a prerequisite condition (in this case, favorable termination) has been satisfied. These parallel doctrines include ripeness, *Younger* abstention, and *Pullman* abstention.

When a court issues a *Heck* dismissal, the court does so because the prisoner did not first show favorable termination. *Heck*, 512 U.S. at 487. Hence, a *Heck* dismissal occurs when a prisoner's claim is premature, not when it lacks merit. In other words, if a prisoner has not followed the proper order of operations, then the prisoner's claim is "unripe" for adjudication. *McDonough v. Smith*, 139 S. Ct. 2149, 2158 (2019). And just like with an unripe claim, a prisoner whose claim was dismissed pursuant to *Heck* may later return with identical pleadings once favorable termination has been obtained. *See* 32 Am. Jur. 2d *Federal Courts* § 422 (2023) (noting that merit-based dismissals typically bar a plaintiff from refiling the same complaint).

Heck dismissals also mirror the jurisdictional doctrines of *Younger* and *Pullman* abstention. As the Court held in *Younger v. Harris*, a federal court cannot enjoin a pending state court prosecution unless the party being prosecuted shows irreparable injury. 401 U.S. 37, 53–54 (1971). Similarly, as the Court held in *Railroad Commission of Texas v. Pullman*, a federal court

should abstain from hearing a case if there is both an important and unresolved question of state law and a federal constitutional question at issue. 312 U.S. 496, 501 (1941).

Because both *Younger* and *Pullman* establish prerequisite conditions before a federal court may issue an injunction, both *Younger* and *Pullman* abstention are considered jurisdictional doctrines. *See* Richard H. Fallon, Jr. et al., *The Federal Courts and the Federal System* 1094 (7th ed. 2015). *Heck* should be similarly labeled. Just like *Younger* and *Pullman* abstention, *Heck* also establishes a prerequisite condition (favorable termination) before a federal court may hear a prisoner's claim. *Heck*, 512 U.S. at 487. As such, because each doctrine curtails the power of a court to hear a case until the party bringing the suit meets a particular threshold requirement, *Younger*, *Pullman*, and *Heck* are all examples of jurisdictional doctrines.

B. Even If *Heck* Dismissals Were Not Jurisdictional, *Heck* Dismissals May Alternatively Be Characterized as an Affirmative Defense and Therefore Do Not Accrue a Strike.

As established above, *Heck* dismissals are jurisdictional in nature. But even if *Heck* dismissals were not jurisdictional, the Court may alternatively conceptualize *Heck* as an affirmative defense. That is because favorable termination is not a necessary element to § 1983 claims. And if favorable termination is not a necessary element to § 1983 claims, then it is an affirmative defense. Because *Heck* creates an affirmative defense, a claim dismissed pursuant to *Heck* cannot be labeled as frivolous, malicious, or failure to state a claim. *See* 28 U.S.C. § 1915(g). As a result, a *Heck* dismissal does not accrue a strike, and, therefore, Mr. Shelby may proceed *in forma pauperis*.

1. Favorable Termination is Not a Necessary Element of Civil Damages Claims Under § 1983.

Favorable termination is not a necessary element of a § 1983 claim. That is because § 1983 merely requires a prisoner to show "the deprivation of any rights, privileges, or immunities secured by the Constitution and laws" by someone acting under color of law. 42

U.S.C. § 1983. Whether a prisoner's conviction has been favorably terminated "is *not* an element of the claim at issue." *Washington v. L.A. Cnty. Sheriff's Dep't*, 833 F.3d 1048, 1056 (9th Cir. 2016). This line of reasoning has not only been adopted by several circuits, but it also comports with Justice Souter's explanatory concurrence in *Heck*.

The Seventh and Ninth Circuits have explicitly indicated that favorable termination is not a necessary element of a prisoner's § 1983 claim. *Polzin v. Gage*, 636 F.3d 834, 837-38 (7th Cir. 2011) ("[T]he *Heck* defense is subject to waiver"); *Washington*, 833 F.3d at 1056 ("We do not hold . . . that a successful challenge to the criminal proceedings, *i.e.*, "favorable termination," is a necessary element of a civil damages claim under § 1983."). The Tenth Circuit, following suit, has held that courts "retain discretion to ignore the three-strikes rule and reach the merits of an appeal" (albeit in "extraordinary circumstances"). *Smith v. Veterans Admin.*, 636 F.3d 1306, 1309–10 (10th Cir. 2011). Each of these holdings illustrate that proving favorable termination is not mandatory under *Heck*; rather, the lack of favorable termination is a separate, optional method for dismissing a claim.

Legitimating these circuits' rationales, Justice Souter counsels against treating favorable termination as a necessary element of § 1983 claims. *Heck*, 512 U.S. at 492–503 (Souter, J., concurring). Treating favorable termination as necessary, Justice Souter cautions, would endanger "the rights of those . . . not 'in custody' for habeas purposes," since these individuals, by dint of having served their sentence, can no longer obtain favorable termination. *Id.* at 500 (Souter, J., concurring). Indeed, to misconstrue favorable termination as a necessary element would upend § 1983, transforming what once served as a vehicle for justice into a gatekeeper from the same. As Justice Souter emphasized, "reading § 1983 to exclude claims from federal

court would run counter to '§ 1983's history' and defeat the statute's 'purpose.'" *Id.* at 501 (Souter, J., concurring) (quoting *Wyatt v. Cole*, 504 U.S. 158, 158 (1992)).

2. If Favorable Termination is Not a Necessary Element of Civil Damages Claims Under § 1983, Then *Heck* Is an Affirmative Defense.

Since favorable termination is not a necessary element under § 1983, *Heck* is an affirmative defense. That is because if a prisoner's complaint is not otherwise deficient for the reasons stipulated under the PLRA, and the district court does not issue a *Heck* dismissal *sua sponte*, then it is the defendant's burden in the civil suit to raise the lack of favorable termination as an affirmative defense. *See Washington*, 833 F.3d at 1056. If the defendant fails to raise the lack of favorable termination, then the defendant waives the *Heck* defense. *Polzin*, 636 F.3d at 837–38 ("[T]he *Heck* defense is subject to waiver"); *see also* Fed. R. Civ. P. 8(b)(6); Fed. R. Civ. P. 8(c)(1). As an affirmative defense, a *Heck* dismissal does not accrue a strike under the PLRA.

Although some circuits have attempted to distinguish *Heck* from other affirmative defenses by likening a *Heck* dismissal to failure to state claim, *see Smith*, 636 F.3d at 1311–12; *Garrett v. Murphy*, 17 F.4th 419, 427 (3d Cir. 2021); *Hamilton v. Lyons*, 74 F.3d 99, 103 (5th Cir. 1996); *In re Jones*, 652 F.3d 36, 38 (D.C. Cir. 2011), their rationale is misguided. According to these circuits, the best analogy to a *Heck* dismissal is the tort of malicious prosecution since both mandate the "termination of the prior criminal proceeding in favor of the accused." *Heck*, 512 U.S. at 484. Once again, however, Justice Souter's concurrence is illuminating.

As Justice Souter notes, while a common law analogy can be a helpful starting point, it should only be relied upon for § 1983 inquiries "when doing so [is] consistent with ordinary rules of statutory construction." *Id.* at 492 (Souter, J., concurring). He further states that the common law was only used to help interpret § 1983 provisions that either contained common-law principles with "textual support in other provisions of the Civil Rights Act of 1871," or

principles which were "so fundamental and widely understood at the time § 1983 was enacted that . . . Congress could not be presumed to have abrogated them silently." *Id.* (Souter, J., concurring). In other words, the Court has long declined to analogize common law rules over performing traditional statutory analysis. *Id.* (Souter, J., concurring).

In keeping with the Court's tradition, Justice Souter states that it would be a mistake for the Court to rely too heavily upon common law analogies for the § 1983 inquiry at issue in *Heck*. *Id.* at 493 (Souter, J., concurring). That is because, unless the Court has the ability to cherry pick which common-law requirements apply, the Court would have to adopt *all* elements of malicious prosecution as part of a § 1983 cause of action, including elements which "cannot coherently be transplanted," such as malice or a lack of probable cause. *Id.* at 493–94 (Souter, J., concurring). But choosing to import the favorable termination requirement of malicious prosecution and not the probable cause requirement would be a strange solution, "since it is from the latter that the former derives." *Id.* (Souter, J., concurring). As such, while analogizing *Heck* dismissals to malicious prosecution is misguided, following the Seventh and Ninth Circuits by likening *Heck* to an affirmative defense would receive Justice Souter's blessing.[3]

C. Even If *Heck* Dismissals Were Neither Jurisdictional Nor an Affirmative Defense, Mr. Shelby Should Be Permitted to Proceed *In Forma Pauperis* Under the PLRA's Imminent Danger Exception.

As established above, a *Heck* dismissal may be viewed either as jurisdictional or as an affirmative defense. But even if *Heck* dismissals were neither, Mr. Shelby may still proceed *in forma pauperis* pursuant to the PLRA's imminent danger exception. That is because, as the PLRA states, a prisoner who has accrued three strikes may nonetheless maintain *in forma*

[3] In a related context, a unanimous Court held that the PLRA's exhaustion provision, 42 U.S.C. § 1997e(a), constituted an affirmative defense. *Jones v. Bock*, 549 U.S. 199, 211–16 (2007). The Court did so even though the exhaustion provision, like favorable termination, was treated as mandatory. *Id.*

pauperis status if the prisoner "is under imminent danger of serious physical injury." 28 U.S.C. § 1915(g). In part because Congress did not explicitly define "imminent danger," the currently predominant interpretation all but shuts the courthouse doors to prisoners seeking to vindicate their constitutional rights. Such a result is incongruent with our system of democracy. That is why the imminent danger exception should be extended to include those prisoners who have recently experienced serious physical injury while incarcerated.

1. Courts' Current Interpretation of the PLRA's Imminent Danger Exception Dilutes Prisoners' Ability to Vindicate Their Constitutional Rights.

The Due Process Clause of the Fourteenth Amendment "assures that no person will be denied the opportunity to present to the judiciary allegations concerning violations of fundamental constitutional rights." *Wolff v. McDonnell*, 418 U.S. 539, 579 (1974). And the Court has long recognized that this guarantee extends to inmates because prison walls do not separate them from constitutional protections. *Turner v. Safley*, 482 U.S. 78, 84 (1987); *see also Lewis v. Casey*, 518 U.S. 343, 350–51 (1996) (stating that prisoners have a right of access to courts with which prison officials may not interfere). As such, when prisoners are denied access to the courts to articulate their complaints, their rights are "diluted." *Wolff*, 418 U.S. at 579. Yet, some circuit courts' interpretation of the imminent danger exception commits the very dilution of rights the Court has sought to eliminate.

Relying on the present-tense language of the statute, some circuit courts have ruled that for the imminent danger exception to apply, the prisoner must be in imminent danger at the time they file a complaint or appeal. *See, e.g., Abdul-Akbar v. McKelvie*, 239 F.3d 307, 311–13 (3d Cir. 2001); *Baños v. O'Guin*, 144 F.3d 883, 884 (5th Cir. 1998); *Ashley v. Dilworth*, 147 F.3d 715, 717 (8th Cir. 1998); *Andrews v. Cervantes*, 493 F.3d 1047, 1053 (9th Cir. 2007); *Medberry v. Butler*, 185 F.3d 1189, 1193 (11th Cir. 1999). Where these circuits err, however, is that such an

interpretation renders the imminent danger exception superfluous and illusory. That is because this interpretation of imminent danger cripples the very exception itself.

Given the time-consuming nature of preparing a lawsuit, a prisoner who is truly in imminent danger will likely not have time to file their complaint before the danger materializes, resulting in serious physical injury. *See* B. Patrick Costello, Jr., *"Imminent Danger" Within 28 U.S.C. § 1915(g) of the Prison Litigation Reform Act: Are Congress and Courts Being Realistic?*, 29 J. of Legislation 1, 15 (2002). Then, when the prisoner finally *can* file a complaint, it is already too late, as the danger is no longer "imminent." *Id.* Because of this draconian limitation, prisoners who are abused, injured, or otherwise physically mistreated due to the acts or omissions of prison officials lack a meaningful avenue for redress.

Beyond rendering the imminent danger exception meaningless, this interpretation also has a chilling effect on prisoners who wish to raise their constitutional claims in court. That is because prisoners without three strikes fear that they will be assessed a strike and lose the ability to proceed *in forma pauperis* in the future. *See* 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, 497–98 (1997).[4] Without the imminent danger exception as a safeguard, the PLRA thus becomes overinclusive, deterring both frivolous and meritorious litigation alike. *See id.*

[4] For many prisoners, the ability to proceed *in forma pauperis* is invaluable. That is because a large proportion of prisoners are indigent and unable to pay the full filing fee, as evidenced by the fact that many prisoners were unable to pay for their own attorneys at trial. *See Defender Services*, United States Courts, https://www.uscourts.gov/services-forms/defender-services (noting that federal defenders represent "the vast majority of individuals" prosecuted in federal courts); Marea Beeman et al., *At What Cost?: Findings from an Examination into the Imposition of Public Defense System Fees*, National Legal Aid & Defender Association 10 (2022) (noting that approximately eighty percent of state court defendants qualify for indigent defense).

2. Because the PLRA's Current Structure Unconstitutionally Limits Prisoners' Rights, the Imminent Danger Exception Should Be Interpreted to Include Recently Suffered Injuries.

As established above, the current state of the imminent danger exception imperils prisoners' abilities to remedy violations of their constitutional rights. Because of this constitutional encroachment, the imminent danger exception ought to be reinterpreted to better harmonize with the original intent of the *in forma pauperis* statute: to ensure the indigent are not barred from bringing meaningful claims. *Denton v. Hernandez*, 504 U.S. 25, 31 (1992). There are two options to cure the ills of the imminent danger exception.

One option is that the Court could interpret the imminent danger exception to allow prisoners with three strikes to bring an *in forma pauperis* suit for any alleged constitutional violation. *See* Kasey Clark, *You're Out!: Three Strikes Against the PLRA's Three Strikes Rule*, 57 Ga. L. Rev. 779, 799 (2023). While this interpretation would certainly promote the broad purpose of the *in forma pauperis* statute, *see Denton*, 504 U.S. at 31, Mr. Shelby recognizes that this interpretation may be too broad and therefore undermine the PLRA's purpose of preventing a "'flood of nonmeritorious' prisoner litigation." *Lomax v. Ortiz-Marquez*, 140 S. Ct. 1721, 1723 (2020) (quoting *Jones v. Bock*, 549 U.S. 199, 203 (2007)). The Court need not go so far.

Alternatively, the Court could interpret the imminent danger exception to include prisoners with three strikes who (1) recently suffered injury,[5] and (2) filed their claim within the applicable statute of limitations. This interpretation not only harmonizes the purpose of both the *in forma pauperis* statute and the PLRA generally, *see Denton*, 504 U.S. at 31; *Lomax*, 140 S. Ct. at 1723, but it also carries several additional benefits.

[5] To avoid confounding the imminent danger inquiry with adjudication on the merits of a prisoner's claim, the Court can frame this prong as requiring only a prima facie showing that the injury plausibly occurred—a standard akin to Fed. R. Civ. P. 12(b)(6). *Iqbal*, 556 U.S. at 678.

First, this interpretation corrects the constitutional concerns accompanying the current imminent danger exception framework. *See supra* Part I-C-1. Second, this interpretation restores bite to the imminent danger exception, thereby conforming with general principles of statutory interpretation. *See McDonnell v. United States*, 579 U.S. 550, 569 (2016) (noting the presumption that the language of a statute is not merely superfluous). Finally, this interpretation reinforces the Due Process guarantee that all people—even indigent prisoners—have the right to their day in court. *See Wolff*, 418 U.S. at 579.

Whichever line the Court chooses to draw, Mr. Shelby qualifies for the imminent danger exception. That is because Mr. Shelby brought the current suit immediately after completing his recovery from the life-threatening injuries he experienced. R. at 6–7 (noting that Mr. Shelby was attacked on January 8, 2021, "remained in the hospital for several weeks," and then filed his current § 1983 suit within the statute of limitations on February 24, 2022). Therefore, Mr. Shelby respectfully requests that, if *Heck* dismissals are to constitute strikes under the PLRA, the Court reinterpret the imminent danger exception and permit Mr. Shelby to proceed *in forma pauperis*.

II. Mr. Shelby Has Doubly Proven His 42 U.S.C. § 1983 Failure-to-Protect Claim Because He Can Satisfy Both Objective Intent and Subjective Intent Standards.

Mr. Shelby has successfully proven his failure-to-protect claim under 42 U.S.C. § 1983. That is because Mr. Shelby has satisfied the objective standard for failure-to-protect claims brought by pretrial detainees as established in *Kingsley v. Hendrickson*, 576 U.S. 389 (2015). In contrast to the district court's decision which erroneously applied a subjective standard from *Farmer v. Brennan*, 511 U.S. 825 (1994), *Kingsley*'s objective standard is both legally and prudentially appropriate. But even if *Kingsley* were not the correct standard, and even if Mr. Shelby were unable to satisfy *Kingsley*, Mr. Shelby's failure-to-protect claim is still valid because he satisfies various alternative standards the Court could adopt. Therefore, while

Appellant seeks to skirt the presumption of innocence and hold Mr. Shelby to the standard of a convicted criminal, Mr. Shelby's position properly interprets case law and promotes pragmatic principles. As such, Mr. Shelby respectfully requests the Court affirm the judgment of the Fourteenth Circuit and hold that pretrial detainees may not be presumptively deprived of due process.

Whether a pretrial detainee's § 1983 failure-to-protect claim should be adjudicated under an objective standard is a question of law that is reviewed de novo. *Elder v. Holloway*, 510 U.S. 510, 516 (1994).

A. Failure-to-Protect Claims Brought by Pretrial Detainees Should Be Governed by *Kingsley*'s Objective Intent Standard.

When a pretrial detainee brings a § 1983 failure-to-protect claim, that claim should be adjudicated under *Kingsley*'s objective intent standard. As the Court held in *Kingsley*, § 1983 excessive force claims brought by innocent, pretrial detainees are judged by ascertaining "the defendant's state of mind with respect to whether his use of force was 'excessive,'" evaluated from the "perspective of a reasonable officer at the scene." 576 U.S. at 395, 397. In contrast, the district court erroneously followed *Farmer*, which requires a convicted prisoner to establish an officer's subjective awareness of risk to advance a § 1983 claim. 511 U.S. at 837. Rather, *Kingsley*'s objective standard should extend to a pretrial detainee's failure-to-protect claim because *Kingsley*'s objective standard not only upholds constitutional principles, but also advances the interests of pretrial detainees and prison officials alike.

1. *Kingsley*'s Objective Standard Harmonizes the Eighth Amendment, the Fourteenth Amendment, and the Presumption of Innocence.

When considering between competing statutory standards, such as *Kingsley*'s objective standard and *Farmer*'s subjective standard, the Court weighs heavily an interpretation's constitutional conformity. *Clark v. Martinez*, 543 U.S. 371, 380–81 (2005) ("If one [standard]

would raise a multitude of constitutional problems, the other should prevail . . . ."). Pursuant to this guidance, *Kingsley*'s objective standard is preferable for a pretrial detainee's § 1983 claim. That is because *Kingsley*'s objective standard harmonizes the Eighth Amendment, the Fourteenth Amendment, and the presumption of innocence.

First, applying *Kingsley*'s objective standard to Mr. Shelby's claim accords with the Eighth Amendment. As the Court noted in *Kingsley*, the Eighth Amendment's cruel and unusual punishment clause cannot govern a class of individuals that is unpunishable. 576 U.S. at 401 ("[P]retrial detainees . . . cannot be punished at all . . . ."). And because a pretrial detainee is unpunishable, their claim arises under the Fourteenth Amendment. *See Bell v. Wolfish*, 441 U.S. 520, 545 (1979). As such, applying a subjective standard to a pretrial detainee's claim would impermissibly infringe upon the Eighth Amendment's domain. *See* Kyla Magun, *A Changing Landscape for Pretrial Detainees?*, 116 Colum. L. Rev. 2059, 2091 (2016) ("[T]he Supreme Court has only applied a subjective analysis for failure-to-[protect] claims because it has only heard such claims in Eighth Amendment cases[.]").

Indeed, the Court has never applied a subjective test to a case involving a claim brought by an innocent, pretrial detainee. *See Farmer*, 511 U.S. at 838–39 (applying a subjective test only because the claim was brought by a convicted prisoner). Mr. Shelby's case provides no reason to depart from that precedent. Subjective tests, such as *Farmer*'s, emanate from the Eighth Amendment's prohibition against wanton punishment, which is inapplicable in this context. *Brawner v. Scott Cnty.*, 14 F.4th 585, 595 (6th Cir. 2021) ("We also reject any argument that *Farmer* controls here . . . because *Farmer* cannot fairly be read to require subjective knowledge where the Eighth Amendment does not apply. . . .").

Second, applying *Kingsley*'s objective standard to Mr. Shelby's claim comports with the Fourteenth Amendment. That is because pretrial detainees, whose actions arise under the Fourteenth Amendment, are subject to less rigorous standards than their convicted counterparts, whose actions are confined within the Eighth Amendment. *See Bell*, 441 U.S. at 545 ("[P]retrial detainees, who have not been convicted of any crimes, retain *at least* those constitutional rights that we have held are enjoyed by convicted prisoners.") (emphasis added). As the Court underscored in *Kingsley*, "*Bell* itself shows (and as our later precedent affirms), a pretrial detainee can prevail by providing only objective evidence . . . ." 576 U.S. at 398.

This approach has already been adopted by several circuits. *See e.g.*, *Darnell v. Piniero*, 849 F.3d 17 (2d Cir. 2017); *Westmoreland v. Butler Cnty.*, 29 F.4th 721 (6th Cir. 2022); *Miranda v. Cnty. of Lake*, 900 F.3d 335 (7th Cir. 2018); *Castro v. Cnty. of L.A.*, 833 F.3d 1060 (9th Cir. 2016). Although one circuit declined to extend *Kingsley* by distinguishing injuries inflicted by inmates from those inflicted by guards, *see Strain v. Regalado*, 977 F.3d 984, 991 (10th Cir. 2020), that court created a distinction without a difference, *Farmer*, 511 U.S. at 833 ("[P]rison officials have a duty . . . to protect prisoners from violence at the hands of other prisoners."); *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.").[6]

Third, applying *Kingsley*'s objective standard to Mr. Shelby's claim respects the presumption of innocence. As the Court held in *Estelle v. Williams*, the presumption of innocence afforded to pre-trial detainees is a bedrock principle of the Fourteenth Amendment. 425 U.S.

[6] Other circuits that have declined to extend *Kingsley* did so only because *Kingsley* was inapplicable to the question at hand, *Whitney v. City of St. Louis*, 887 F.3d 857, 860 n.4 (8th Cir. 2018); *Nam Dang v. Sheriff*, 871 F.3d 1272, 1280 n.2 (11th Cir. 2017), or because of a procedural barrier, *Crandel v. Hall*, 75 F.4th 537, 544–45 (5th Cir 2023).

501, 503 (1976) ("The presumption of innocence, although not articulated in the Constitution, is a basic component of a fair trial under our system of criminal justice."); *Coffin v. U.S.*, 156 U.S. 432, 453 (1895) ("The principle that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law.").

When the Court applied a subjective standard in *Farmer*, the Court did so because the subjective standard "comport[ed] best with the text of the [Eighth] Amendment as [the Court's] cases have interpreted it." 511 U.S. at 837. And as established above, the Eighth Amendment only governs claims by convicted inmates, not pretrial detainees. *See infra* Part II-A-1. In other words, the prisoner in *Farmer* was required to show subjective intent only because he was already convicted. *See Farmer*, 511 U.S. at 837. Pretrial detainees are not convicted prisoners. Therefore, holding pretrial detainees and convicted prisoners to the same standard would corrode the presumption of innocence into nothing more than a hollow cry.

2. *Kingsley*'s Objective Standard Protects the Safety of Pretrial Detainees While Simultaneously Limiting Liability for Prison Officials Who Act in Good Faith.

Further supporting applying *Kingsley*'s objective standard to Mr. Shelby's claim, *Kingsley*'s objective standard not only promotes the safety of pretrial detainees, but also protects prison officials who act in good faith. *Kingsley*'s objective standard promotes the safety of pretrial detainees by establishing accountability for officers who depart from best practices. *Kingsley*'s objective standard also protects officers who act in good faith by considering the precarious (and often dangerous) circumstances that precipitate a prison guard's actions.

First, *Kingsley*'s objective standard creates accountability by setting a uniform standard for prison guards to adhere to and for courts to use when adjudicating failure-to-protect claims by pretrial detainees. *See* Noah Speitel, *Holding the Big House Accountable: The Sixth Circuit*

Concludes a Pretrial Detainee's Fourteenth Amendment Deliberate Indifference Claim Is a Wholly Objective Determination, 68 Vill. L. Rev. 699, 727 (2023).

That is because under an objective standard, prison guards are on notice that their behavior is judged by that of a reasonable officer. Brief of Former Corrections Administrators and Experts as Amici Curiae in Support of Petitioner, Kingsley v. Hendrickson, 576 U.S. 389 (2015), 2015 WL 1045423 ("Clear, enforceable standards ensure that jail staff members know what they can and cannot do, and they guarantee that officers who use excessive force can be held accountable for their actions."). As such, they are incentivized to conduct themselves according to established protocol, thereby increasing the quality of protection provided to pretrial detainees.

Indeed, the Court's duty to settle the law and create uniformity is of the utmost importance. *See Marbury v. Madison*, 5 U.S. 137, 177 (1803) ("It is emphatically within the province and duty of the judicial department to say what the law is."). While this issue remains undecided, over 450 people per year die in pretrial detention. *See* Abby Dockum, *Kingsley, Unconditioned: Protecting Pretrial Detainees with an Objective Deliberate Indifference Standard in § 1983 Conditions of Confinement Claims*, 53 Ariz. St. L. J. 707, 733 (2021) ("In the pretrial context specifically . . . from 2008 to 2019, at least 4,998 people died in jail . . . despite not having been convicted of the offense for which they were being held and being constitutionally entitled to freedom from punishment."). The risk of harm particularly affects communities of color and the impoverished. Speitel, 68 Vill. L. Rev. at 724 ("Nearly seventy percent of pretrial detainees are people of color . . . . [And] over one-third of defendants are detained pretrial due to an inability to afford money bail.").

Second, *Kingsley*'s objective standard shields prison officials who act in good faith from unlimited liability. As the Court emphasized in *Kingsley*, "it is unlikely . . . that a plaintiff [could establish liability] where an officer acted in good faith." 576 U.S. at 400. That is because evaluating from the standpoint of a reasonably objective officer accounts for the "inordinate[] difficult[ies]" of running a prison, *id.* at 399 (quoting *Turner*, 482 U.S. at 84–85 (1987)), and the "split-second judgments" that prison officials are often forced to make, *id.* (quoting *Graham v. Connor*, 409 U.S. 386, 397 (1989)).

As a result, *Kingsley*'s objective standard encourages prison officials to conduct themselves according to best practices, and it shields them if—acting in good faith—they happen to fall just short. *See* Kate Lambroza *Pretrial Detainees and the Objective Standard After Kingsley v. Hendrickson*, 58 Am. Crim. L. Rev. 429, 455 (2021) ("*Kingsley*'s first prong protects officials from liability for negligence even in failure-to-protect cases . . . ."); Dockum, 53 Ariz. St. L. J. at 745 ("[O]bjective deliberate indifference categorically bars liability for negligent acts, instead requiring an officer to be at least reckless."). As a result, *Kingsley*'s objective standard provides superior protection than *Farmer*'s subjective standard—both physically and legally—to pretrial detainees and prison officials alike.

B. Mr. Shelby—a Pretrial Detainee—Meets *Kingsley*'s Objective Standard.

As established above, Mr. Shelby's failure-to-protect claim is governed by *Kingsley*'s objective standard. Applying that standard, Mr. Shelby has successfully met all the elements under § 1983. That is because Mr. Shelby has proven that Appellant made an intentional decision to put Mr. Shelby into specific conditions, that those conditions carried a substantial risk of harm, that Appellant did not act as a reasonable prison officer would have to mitigate that risk, and that Appellant's failure to reasonably act caused Mr. Shelby's injuries.

1. Meeting *Kingsley*'s Objective Standard Requires Satisfying the Circuit Courts' Four-Element Test.

Applying the logic of *Kingsley*, the Ninth Circuit established a four-element test for a plaintiff to successfully advance a failure-to-protect claim:

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

Castro, 833 F.3d at 1071. This test was subsequently adopted by the Second, Sixth, and Seventh Circuits. *Darnell*, 849 F.3d at 35; *Westmoreland*, 29 F.4th at 728–29, *Miranda*, 900 F.3d at 353.

Adopting this four-element test for all the circuits respects the spirit of both the Eighth and Fourteenth Amendments. *Castro*, 833 F.3d at 1071; *see supra* Part II-A-1. That is because the four-element test accounts for the threshold of constitutional due process by "requir[ing] a pretrial detainee who asserts a due process claim for failure to protect to prove more than negligence but less than subjective intent." *Castro*, 833 F.3d at 1071; *Cnty. of Sacramento v. Lewis*, 523 U.S. 833, 849 (1998) ("Liability for negligently inflicted harm is categorically beneath the constitutional due process threshold.").

2. Mr. Shelby Satisfies Each of the Four Elements.

Mr. Shelby satisfies each of the four elements. First, Appellant's conduct towards Mr. Shelby's conditions was intentional. *Castro*, 833 F.3d at 1071. That is because Appellant knowingly and willfully chose to move Mr. Shelby from his cell to a waiting area with other inmates. R. at 7; *Westmoreland*, 29 F.4th at 729 (finding the plaintiff satisfied the first element because a prison official chose to move him from one area to another); *cf. Kingsley*, 576 U.S. at

396 ("[I]f an officer unintentionally trips and falls on a detainee . . . the pretrial detainee cannot prevail . . . .").

Second, Appellant's intentional decision to move Mr. Shelby placed Mr. Shelby at a substantial risk of suffering serious harm. *Castro*, 833 F.3d at 1071. That is because the history of animosity between the Geeky Binders and their rival gang the Bonucci Clan, R. at 3, created "a climate of tension, violence, and coercion." *Florence v. Bd. of Chosen Freeholders of Cnty. of Burlington*, 566 U.S. 318, 331 (2012) (citing Prison and Jail Administration: Practice and Theory 142 (P. Carlson & G. Garrett eds., 2d ed.2008)).

As several circuits have previously found, the culture of resentment towards jailhouse snitches constitutes a substantial risk. *Westmoreland*, 29 F.4th at 729–30 (citing *Dale v. Poston*, 548 F.3d 563, 569–70 (7th Cir. 2008)). If the culture of resentment towards jailhouse snitches is a substantial risk, then the culture of violence between rival gangs is even more so. *See Florence*, 566 U.S. at 318; *Johnson v. California*, 543 U.S. 499, 512 (2005) (affirming that preventing prison gang violence is a compelling governmental interest). Even the prison housing Mr. Shelby itself emphasized the critical importance of keeping the rival gangs separate to avoid violence. R. at 5. As such, the risk that Mr. Shelby faced by being placed alongside inmates from the Bonucci Clan was substantial.

Third and fourth, Appellant acted in an objectively unreasonable manner when he failed to abate the substantial risk Mr. Shelby faced, and, as a result, Mr. Shelby suffered injuries. *Castro*, 833 F.3d at 1071. At best, Appellant recklessly disregarded information that would have dissuaded him from moving Mr. Shelby, and, at worst, Appellant blatantly ignored said information. *See* R. 4–7. In contrast, a reasonable officer would have given proper consideration to the information provided and followed the prison's broadly distributed guidelines. *See Castro*,

833 F.3d at 1072 ("[T]he officers knew of the substantial risk of serious harm to [the plaintiff], which necessarily implies that . . . a reasonable officer would have appreciated the risk").

Appellant had ample opportunity to learn of the substantial risk Mr. Shelby faced, yet he unreasonably failed to do so. Appellant neither attended the meeting notifying officers of the target on Mr. Shelby's back, nor reviewed the meeting's minutes after his absence (something all officers are expected to do). R. at 5–6. Furthermore, Appellant unreasonably overlooked (or ignored) the floor cards noting the substantial likelihood that Mr. Shelby could be attacked, which were located on every floor and roster. R. at 5.

Continuing Appellant's unreasonable behavior, before moving Mr. Shelby, Appellant "did not reference the hard copy list of inmates with special statuses . . . nor did he reference the jail's database before taking [Mr. Shelby] from his cell." R. at 6. Notably, both the list and database delineated all "inmates with gang affiliations and their corresponding risk of attack from other gang members in the jail." R. at 6. Finally, while transporting Mr. Shelby, Appellant had one final chance to realize his mistake when another inmate loudly identified Mr. Shelby, which should have alerted Appellant to Mr. Shelby's high-risk status. R. at 6. Because Appellant failed to act as a reasonable officer should have, Mr. Shelby suffered severe injuries. R. at 7.

C. Even If *Kingsley*'s Objective Intent Standard Were Not Applied, and Even If Mr. Shelby Were Unable to Meet That Standard, Mr. Shelby's Failure-to-Protect Claim Is Still Valid Because He Satisfies Alternative Standards.

As established above, Mr. Shelby satisfies the four-element test necessary to meet *Kingsley*'s objective standard for § 1983 failure-to-protect claims. But even if *Kingsley*'s objective standard were not applied, and even if Mr. Shelby failed to meet that standard, Mr. Shelby's failure-to-protect claim may nonetheless proceed. That is because Mr. Shelby satisfies alternative standards for § 1983 failure-to-protect claims, including *Farmer*'s fully subjective standard.

1. The Court Could Adopt an Objective-Subjective Hybrid Standard, Which Mr. Shelby Satisfies.

As the Court has repeatedly underscored, claims brought by innocent pretrial detainees under the Fourteenth Amendment are subject to less rigorous standards than claims brought by convicted prisoners under the Eighth Amendment. *Bell*, 441 U.S. at 545; *supra* Part II-A-1. Should the Court reject the dichotomy of *Kingsley* and *Farmer*, the Court may alternatively adopt an objective-subjective hybrid standard. As promulgated by the Third Circuit in *Kedra v. Schroeter*, "even under a subjective test, 'the fact that the risk of harm is obvious' is relevant, among other pieces of evidence, to 'infer the existence of this subjective state of mind.'" 876 F.3d 424, 441 (3d Cir. 2017) (quoting *Hope v. Pelzer*, 536 U.S. 730, 738 (2002)).

Under this approach, the obviousness of the risk can inform a subjective state-of-mind inquiry. *Id.* In other words, if a risk is so obvious that an objectively reasonable person should have appreciated it, then one can infer that the defendant possessed the requisite subjective intent. *Kedra*, 876 F.3d at 438 ("[D]eliberate indifference might exist without actual knowledge of a risk of harm when the risk is so obvious that it should be known" (quoting *Sanford v. Stiles*, 456 F.3d 298, 309 (3d Cir. 2006))); *See* 3d Cir. Model Civ. Jury Instr. § 4.14 (Mar. 2017) (A jury is "entitled to infer from the obviousness of the risk that [the state actor] knew of the risk."). Although *Kedra* arose in the context of the state-created danger doctrine, the standard is nonetheless applicable to Mr. Shelby's case because both feature deliberate indifference claims from individuals who are innocent in the eyes of the law.

If the Court adopts the objective-subjective hybrid approach, then Mr. Shelby has submitted a successful failure-to-protect claim. As the Third Circuit found in *Kedra*, a risk is sufficiently obvious to establish subjective intent where "a firearms instructor skip[ped] over each of several safety checks designed to ascertain if the gun [wa]s unloaded, point[ed] the gun

at a trainee's chest, and pull[ed] the trigger . . . .” 876 F.3d at 442. Here, the risk to Mr. Shelby was similarly obvious (if not more so) given the several avenues disseminating the information. *See supra* Part II-B-2. As such, Appellant's failure to acquire and appreciate the risk speaks to his subjective intent, therefore satisfying the *Kedra* standard.

2. Even If the Court Were to Choose *Farmer*'s Fully Subjective Standard, Mr. Shelby Has Still Proven a Valid Failure-To-Protect Claim.

Even if the Court were to adopt *Farmer*'s fully subjective standard, Mr. Shelby has still advanced a valid failure-to-protect claim by establishing Appellant's subjective intent. That is because Mr. Shelby can show both that his injuries were “sufficiently serious” and that the prison guard had a “sufficiently culpable state of mind.” *Farmer*, 511 U.S. at 834 (internal quotation marks omitted) (quoting *Wilson v. Seiter*, 501 U.S. 294, 297–98 (1991)). As the Court further explained, a prison official has a sufficiently culpable state of mind when they act with “a knowing willingness that a harm will occur.” *Id.* at 835–36. Mr. Shelby can show both requirements.

First, Mr. Shelby's injuries were “sufficiently serious.” *Id.* at 834. Appellant's failure to protect Mr. Shelby caused Mr. Shelby to suffer several injuries, including but not limited to “penetrative head wounds from external blunt force trauma resulting in traumatic brain injury,” lung lacerations, and internal bleeding. R. at 7. As the district court conceded, these injuries were “life-threatening,” R. at 7.[7] Therefore, Mr. Shelby satisfies *Farmer*'s first prong.

Second, Appellant acted with “knowing willingness that a harm” would occur. *Farmer*, 511 U.S. at 835–36. While missing a single meeting could be branded as simple negligence, Appellant's repeated, intentional behavior of forgetting or disregarding crucial information about

[7] Supporting the district court's recognition of the severity of Mr. Shelby's injuries, experts have documented that “[c]ivilian penetrating head injuries are a leading cause of morbidity and mortality in the United States.” Nelson Valena, *Penetrating Head Injury: A Perspective Study of Outcomes*, 76 Am. J. of Physical Med. and Rehab. 163, 163 (1997).

Mr. Shelby's high-risk status constitutes a knowing willingness for harm to occur. *See supra* Part II-B-2 (detailing several moments in which Appellant seemingly ignored to heed warnings that explained the high likelihood that Mr. Shelby would be the target of an attack). Therefore, Mr. Shelby satisfies *Farmer*'s subjective standard and, as such, Mr. Shelby has proven a valid § 1983 failure-to-protect claim.

CONCLUSION

Ultimately, this case is about the ability to vindicate one's constitutional rights. Appellant seeks to prevent this by weaponizing filing fees and asking the Court to discard the presumption of innocence. But the Constitution does not allow for such a subversion of due process. Because Mr. Shelby's three prior *Heck* dismissals do not prevent him from proceeding *in forma pauperis*, and because *Kingsley* eliminated the subjective intent requirement in failure-to-protect claims brought by a pretrial detainee, Mr. Shelby respectfully requests the judgment of the Fourteenth Circuit Court of Appeals be affirmed.

Respectfully submitted,

_____
Team #40
Attorneys for Respondent

APPENDIX

Constitutional and Statutory Provisions

U.S. Const. amend. VIII.

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

***

U.S. Const. amend. XIV.

> "No State shall . . . deprive any person of life, liberty, or property, without due process of law."

***

28 U.S.C. § 1915(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.

***

42 U.S.C. § 1983.

> 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.