**No. 23-05**

# In the Supreme Court of the United States

**October Term 2023**

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CHESTER CAMPBELL,

*Petitioner*,

*v.*

ARTHUR SHELBY,

*Respondent.*

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

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## BRIEF FOR PETITIONER

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Brief Cover: Blue

## QUESTIONS PRESENTED

1. Whether the Court should carve an exception into the clear language of the Prison Litigation Reform Act's three strike provision for dismissals under *Heck v. Humphrey*.

2. Whether, in a 42 U.S.C. § 1983 claim, this Court's standard for deliberate indifference, established in *Farmer v. Brennan,* should be abrogated by an excessive force case, *Kingsley v. Hendrickson.*

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## OPINIONS BELOW

The dismissal order, entered by District Judge Michael Gray on April 20, 2022, is unreported but is reproduced in the record. R. at 1-11. The Fourteenth Circuit Court of Appeals, Circuit Judges  Elizabeth Stark, and Ada Thorne reversed and remanded (Judge Alfred Solomons dissenting) in an unpublished opinion, reproduced in the record. R. at 12-20; (Judge Alfred Solomons dissenting).

## CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

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

U.S. Const. amend. XIV.

42 U.S.C. § 1915(g)

42 U.S.C. § 1983

## STATEMENT OF THE CASE

Respondent Arthur Shelby [Respondent] is a known member of the infamous street gang, the Geeky Binders. R. at 2. While the Geeky Binders have historically exerted undue control over the town of Marshall, over the past several years that position has been usurped by a rival gang, the Bonnucis. R. at 3. Tensions between the gangs were particularly high because Respondent's brother had murdered Luca Bonucci's wife. R. at 5.

Respondent Shelby was arrested by Marshall police in a raid on December 31, 2020 and charged with battery, assault, and possession of a firearm by a convicted felon. R. at 3-4. Following his arrest, Respondent was booked at the Marshall jail,[1] which stored Respondent's membership in the Geeky Binders on their database. R. at 4. Respondent was housed in Block A.[2] R. at 5. Gang intelligence held a meeting the morning Respondent was booked regarding the increased risk of gang retaliation against Respondent, and required all absent officers to review notes of the meeting. R. at 5-6.

Petitioner Officer Chester Campbell [Officer Campbell] is an entry level guard, new to the job and was meeting all job expectations in employment and training at Marshall jail. R. at 5. On January 8, 2020, Officer Campbell collected Shelby for a routine transfer of detainees from their cells to recreation. R. at 6. Officer Campbell was unfamiliar with Respondent on meeting.[3]R. at 6.

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[1] While the Bonucci clan still holds some influence over the jail, recently many officers who had been tainted by the Bonucci clan have been replaced with new, untainted officers. R. at 3.

[2] Members of the Geeky Binders were grouped here for the purposes of gang segregation. R. at 5.

[3] The record is unclear as to the extent that Officer Campbell gained knowledge of Respondent's gang affiliation and risk status through prison resources. Roll call for the security meeting held concerning Respondent shows that Officer Campbell was present, but Officer Campbell's time card demonstrates he was out sick for the morning of the meeting. R. at 5-6. While the prison maintains a system that tracks whether or not officers read minutes from those meetings, a glitch in the system wiped out any record of the meeting in question. R. at 6. While Officer Campbell

Officer Campbell then retrieved three inmates from two other blocks, and at this point, Respondent was attacked by the three other inmates. R. at 7. Despite Officer Campbell's immediate attempts to intervene, respondent suffered serious injuries and was hospitalized. R. at 7.

Following these events, Respondent brought a 42 U.S.C. § 1983 deliberate indifference "failure to protect" claim against Officer Campbell. R. at 7. When Respondent attempted to file *in forma pauperis* (IFP), the district court found that Respondent had accumulated three strikes under 42 U.S.C. § 1915(g), and was precluded from a fourth IFP filing. R. at 1. In regards to the substantive claim, Respondent argued at the district court level that the proper standard for deliberate indifference claims should be objective following the Supreme Court's opinion in *Kingsley v. Hendrickson*, 576 U.S. 389 (2015). R. at 8. Respondent failed to make any argument under the controlling subjective standard established in *Farmer v. Brennan*, 511 U.S. 833 (1994). The district court ruled against Respondent and dismissed the case holding that *Farmer* controlled and Respondent had failed to make a showing. R. at 11.

Respondent filed a timely appeal contesting the district court's denial of Respondent's motion to proceed IFP as well as contesting the dismissal. R. at 12. The Fourteenth Circuit held in favor of the Respondent on both issues.[4] R. at 15-16. Officer Campbell petitioned for a writ of certiorari, claiming the Fourteenth Circuit erred both in exempting *Heck* dismissals from 42

carried a reference card that included the relevant information, the record reflects that Officer Campbell did not reference this card or any other roster prior to this encounter. R. at 6.

[4] The Fourteenth Circuit ruled that because *Heck* is not a jurisdictional issue and that it is a matter of "the prematurity, not the invalidity, of a prisoner's claim" it did not constitute a PLRA strike. R. at 15; *Heck v. Humphrey*, 512 U.S. 477 (1994). In regards to deliberate indifference, the court held that pretrial detainees should be afforded greater protections than prisoners, so therefore *Kingsley* applied. R. at 16-17.

U.S.C. § 1915(g)'s three strike provision, as well as in extending *Kingsley's* objective standard to deliberate indifference cases. This Court granted a writ of certiorari. R. at 21.

## SUMMARY OF ARGUMENT

1. The Fourteenth Circuit incorrectly created an exception for *Heck* dismissals within the three strike provision of the Prison Litigation Reform Act (PLRA). 42 U.S.C. § 1915(g). In failing to apply Supreme Court precedent, the Fourteenth Circuit weakened the IFP three strike provision of section 1915(g), fundamentally misunderstanding the legislative intent of Congress. Correct application of precedent and statutory interpretation principles both dictate that Heck dismissals must constitute PLRA strikes for failure to state a claim. This maintains a consistent and workable judicial standard.

The Supreme Court's holding in *Lomax* mandates that all dismissals are PLRA strikes. *Lomax v. Ortiz-Marquez*, 140 S. Ct. 1721 (2020). By failing to even address *Lomax*'s holding—that the three strikes provision of section 1915(g) encompasses "any dismissal for failure to state a claim"—the Fourteenth Circuit inappropriately created a categorical exception for *Heck* dismissals. *Id*. at 1723. This exception is unsupported by a majority of circuits and rests on faulty analysis. The Fourteenth Circuit's holding ignores and undermines the legislative intent of Congress and the preferred plain-meaning statutory interpretation of the PLRA championed by the Supreme Court.

A proper analysis of section 1915(g), based on Supreme Court precedent and the support of a majority of circuits, demands that *Heck* dismissals be considered strikes within the meaning of the PLRA. Maintaining consistency across all forms of IFP dismissals establishes a workable judicial standard according to Congress's legislative intent. This streamlines the prison litigation process and ensures that meritorious litigation receives prompt court attention.

2. The proper test for 42 U.S.C. § 1983 deliberate indifference "failure to protect" claims is subjective. That is because the Fourteenth Amendment Due Process rights of pretrial detainees extend from the Eighth Amendment's Cruel and Unusual Punishment clause. *Hare v. City of Corinth*, 74 F.3d 633, 639 (5th Cir. 1996) (en banc). While pretrial detainees have a right to be protected, it is not absolute. *Farmer*, 511 at 833-34. Because the limits of these protections stem from the Eighth Amendment, a prison official must have the sufficiently culpable state of mind established in *Farmer*—subjective deliberate indifference. *Id.* at 837; *see also Hare*, 74 F.3d at 648 ("[*Farmer's*] subjective definition of deliberate indifference provides the appropriate standard for measuring the duty owed to pretrial detainees under the Due Process Clause."). That is because, unlike excessive force, deliberate indifference cannot be evaluated objectively. *See Castro v. Cnty. of L.A.*, 833 F.3d 1060, 1086 (9th Ci 2016) (Ikuta, J., dissenting).

Enacting *Kingsley's* objective standard constitutionalizes liability based on negligence. Without a subjective intent, a failure to act is only negligence. *Nam Dang ex rel. Vina Dang, v. Sherriff, Seminole Cnty. Fla.*, 871 F.3d 1272, 1280 (11th Cir. 2017). Because of the need to expressly stipulate the duties of jail officials, evaluating a jail official's performance for reasonableness functions more closely to negligence per se than civil recklessness. Constitutionalizing negligence goes against basic principles of constitutional liability. The safety of pretrial detainees should not be taken lightly, but neither should the gratuitous expansion of constitutional rights.

Making an intentional choice to ignore a known risk is inherent to the concept of *deliberate* indifference. The needs of the public and the principles of *stare decisis* demand that this Court refuse to mechanically apply *Kingsley's* objective test where *Farmer's* subjective properly test controls.

## ARGUMENT

### I. A *HECK* DISMISSAL MUST CONSTITUTE A STRIKE UNDER THE PLRA ACCORDING TO SUPREME COURT PRECEDENT, PLAIN-MEANING STATUTORY INTERPRETATION, AND CONGRESSIONAL INTENT

The Fourteenth Circuit ruled in error that a *Heck* dismissal does not constitute a strike under section 1915(g) of the PLRA. R. at 15. Ruling against both Supreme Court precedent and a majority of circuits, the Fourteenth Circuit took a simple statute and inserted an exception that undermines the legislative intent of Congress. As an issue of law, the standard of review for the application and interpretation of the PLRA's IFP three strikes provision is *de novo. Ray v. Lara*, 31 F.4th 692 (9th Cir. 2022).

The Fourteenth Circuit's holding cannot stand against Supreme Court precedent, plain-meaning statutory interpretation, and the legislative intent of Congress. First, the Fourteenth Circuit failed to consider the Supreme Court's holding in *Lomax*, which found that all dismissals for failure to state a claim are PLRA strikes, inherently encompassing *Heck* dismissals. *Lomax*, 140 S. Ct. at 1723. Additionally, the Fourteenth Circuit's *Heck* exception ignores traditional principles of statutory interpretation and relies on faulty analysis of incompatible circuit court case law. Thorough analysis demonstrates that *Heck* dismissals must be strikes within the meaning of the PLRA to achieve a consistent, workable judicial standard. This standard complies with PLRA statutory interpretation performed by the Supreme Court and a majority of circuit courts. Finally, Congress's clear legislative intent to financially deter non-meritorious litigation through section 1915(g) requires holding that *Heck* dismissals constitute strikes under the PLRA.

A. The Supreme Court's Holding in *Lomax* Necessitates Finding That All Dismissals for Failure to State a Claim Constitute PLRA Strikes

The Fourteenth Circuit erred when ruling that *Heck* dismissals do not constitute PLRA strikes. That is because the Fourteenth Circuit failed to apply *Lomax's* holding. *Lomax*, 140 S. Ct. at 1723 (holding "Section 1915(g)'s three-strikes provision refers to *any* dismissal for failure to state a claim.") (emphasis added). *Lomax* addressed a circuit court split on the effect of prejudice in IFP dismissals. *Compare In re Jones*, 652 F.3d 36, 38 (D.C. Cir. 2011) (holding *Heck* dismissals for failure to state a claim count as PLRA strikes) *with Meija v. Harrington*, 541 F. App'x. 709, 710 (7th Cir. 2013) (holding *Heck* dismissals are ripeness issues, and therefore not PLRA strikes). While a circuit court split on whether *Heck* dismissals constitute PLRA strikes remains, the holding in *Lomax* that all dismissals for failure to state a claim are strikes neatly resolves the *Heck* issue.

Creating an exception for *Heck* dismissals cannot be reconciled with *Lomax*. This Court found that the "broad language" of section 1915(g) applies to all dismissals for failure to state a claim. *Lomax*, 140 S. Ct. at 1724. Because excepting certain types of dismissals from section 1915(g) strikes would require "inserting words" in the statute that "Congress chose to omit," it is inappropriate for the Fourteenth Circuit to create this exception out of whole cloth. *Id.* at 1724-1725.

Not only did the Fourteenth Circuit fail to apply the relevant precedent of *Lomax*, but it also based its conclusion on an unreasonable application of law. While it is true that the Ninth Circuit held that complaints dismissed under *Heck* are not "per se 'frivolous' or 'malicious'," the holding in *Washington* cannot be the basis for the Fourteenth Circuit's blanket *Heck* exception. *Washington v. L.A. Cnty.*, 833 F.3d 1048, 1055 (9th Cir. 2016) (finding it dispositive that the entire complaint had not been dismissed under *Heck* and therefore could not count as a PLRA strike for failure to state a claim). Even if a *Heck* complaint is not malicious or frivolous under *Washington*, it still

constitutes a PLRA strike if the entire case is dismissed for failure to state a claim. *Id*. at 1057 ("When we are presented with multiple claims within a single action, we assess a PLRA strike only when the 'case as a whole' is dismissed for a qualifying reason under the Act.").

Contrary to the Fourteenth, the majority of circuits that have reached the issue agree that *Heck* dismissals are strikes under the PLRA. Even prior to *Lomax*, most Circuits adopted the principle that *Heck* dismissals based on failure to state a claim constitute strikes under the PLRA. See *Hamilton v. Lyons*, 74 F.3d 99, 103 (5th Cir. 1996) (holding claims barred under *Heck* due to a failure to show favorable termination are legally frivolous); *In re Jones,* 652 F.3d at 36; *Smith v. Veterans Admin.*, 636 F.3d 1306, 1312 (10th Cir. 2011); *Washington*, 833 F.3d at 1056.

Post-*Lomax*, the only circuit court to address the issue[5] held that a *Heck* dismissal without favorable termination is a failure to state a claim which must be a strike under the PLRA. *Garrett v. Murphy*, 17 F.4th 419, 424 (3d Cir. 2021). Finding that any other outcome would be "incompatible with *Heck*," the Third Circuit concluded that *Heck* dismissals constitute a failure to state a cause of action. *Id.* at 427-28.

A dismissal under *Heck* is a dismissal nonetheless. This Court must follow *Lomax*'s holding "Section 1915(g)'s three-strikes provision refers to *any* dismissal for failure to state a claim." *Lomax,* 140 S. Ct. at 1723 (emphasis added). But plain-meaning statutory interpretation also

[5] District Courts to consider the question generally follow the lead of the Third Circuit post-*Lomax*, agreeing that *Heck* dismissals are PLRA strikes. *See, e.g.*, *Burk v. Davis*, 2023 U.S. Dist. LEXIS 229968, at *3 (E.D. Penn, Dec. 27, 2023); *Kurtenbach v. Reliance Tel. Servs.*, 2021 U.S. Dist. LEXIS 233828, at *12 (Minn. D.C., Dec. 7, 2021); *Diaz v. R. I.*, 2021 U.S. Dist. LEXIS 218903, at *10 (R.I. D.C., Nov. 12, 2021). When other circuit courts have been presented with the question, they have opted to leave it open until the circuit split is resolved. *Pitts v. S*.C., 65 F.4th 141, n. 3 (4th Cir. 2023); *Wallace v. All Pers. Liab. Carriers Underwriters of Land*, 2023 U.S. Dist. LEXIS 171656, at *16 (Dist. R.I, Sept. 25, 2023.

provides a clear picture of why *Heck* dismissals are strikes within the meaning of the PLRA, and how the Fourteenth Circuit conducted faulty analysis.

B. The Fourteenth Circuit's *Heck* Exception Needlessly Complicates a Simple Statute, Contradicts Circuit Court Precedent, and Misinterprets Cited Cases

As established above, *Lomax*'s holding should extend to *Heck* dismissals. But adherence to principles of statutory analysis and circuit precedent also shows that the Fourteenth Circuit ruled in error. That is because the ruling fundamentally interferes with the simple application of section 1915(g). Not only does the ruling needlessly complicate a simple statute, it also goes against a majority of circuits holding dismissals under *Heck* constitute strikes. *See, e.g., In re Jones*, 652 F.3d at 38; *Ray*, 31 F.4th at 698; *Garrett*, 17 F.4th at 427. Citing irrelevant legal principles, the Fourteenth Circuit inappropriately bases its categorical *Heck* exception on case law calling for individual analysis.

*1. Creating a Heck Exception Unnecessarily Complicates the Simple Application of Section 1915(g)*

As a general rule of statutory interpretation, the Supreme Court requires that "identical words" share "the same meaning" when employed in "different parts of the same statute." *IBP, Inc. v. Alvarez*, 546 U.S. 21, 34 (2006); *see also Lomax*, 140 S. Ct. at 1725 ("In all but the most unusual situations, a single use of a statutory phrase must have a fixed meaning . . ." (quoting *Cochise Consultancy, Inc. v. U.S. ex rel. Hunt*, 139 S. Ct. 1507, 1512 (2019)). Since *Heck* dismissals are for failure to state a claim, they fall within the scope of the statutory language of section 1915(g). *In re Jones*, 652 F.3d at 38. Stated plainly, the "broad language" of section 1915(g) "covers all [dismissals for failure to state a claim]." *Lomax*, 140 S. Ct. at 1724. That is because any other holding would improperly "narrow [section 1915(g)'s] reach by inserting words Congress chose to omit." *Id.* at 1725 ("To [narrow section 1915(g)] we would have to read the

simple word 'dismissed' in Section 1915(g) as 'dismissed with prejudice.'"). To narrow section 1915(g) according to the Fourteenth Circuit's holding would require a convoluted addition to statutory language that can and should be read plainly.[6]

With "dismissals for failure to state a claim" appearing three times in section 1915, the meaning should remain consistent across all three uses. 42 U.S.C. §§ 1915(e)(2)(B)(ii), 1915(g); 1915A(b); s*ee Lomax*, 140 S. Ct. at 1725. If the Fourteenth Circuit's interpretation of dismissals for failure to state a claim were extended across all of section 1915(g) it would preempt the dismissal of improperly pled cases.[7] If it were not applied to all three uses, this exception would be "strangely free-floating, transforming ordinary meaning in one place while leaving it alone in all others." *See Lomax*, 140 S. Ct. at 1726. By instead following the plain meaning of "dismissal for failure to state a claim," the *Lomax c*ourt harmonized with other Supreme Court precedent on the PLRA. *See e.g.*, *Coleman v. Tollefson*, 575 U.S. 532, 537 (2015) ("A prior dismissal on a statutorily enumerated ground counts as a strike . . . That, after all, is what the statute literally says."). A dismissal is a dismissal. The Fourteenth Circuit's categorical exception for *Heck* dismissals undermines plain-meaning statutory interpretation of the PLRA.

Applying the Fourteenth Circuit's new exception for *Heck* dismissals produces a "leaky filter," which allows litigious prisoners to escape section 1915 restrictions put in place by

[6] The Fourteenth Circuit's extra-statutory interpretation of § 1915(g) would read something akin to "dismissed on grounds that it is frivolous, malicious, or fails to state a claim upon which relief may be granted (unless the dismissal for failure to state a claim is due to failure to show evidence of favorable termination when the prisoner's claim necessarily challenges the constitutionality of the prisoner's conviction or sentence)."

[7] For example, extending the exception to 42 U.S.C. § 1915(e)(2)(B)(ii) prevents courts from dismissing complaints for failure to state a claim when that failure stems from *Heck's* holding. This keeps the language consistent throughout the PLRA, but inverts the effects and intent of *Heck*'s holding.

Congress. *See Coleman*, 575 U.S. at 539 ("To refuse to count a prior dismissal because of a pending appeal would produce a leaky filter . . . "). Reinforcing the plain meaning of section 1915(g) preserves the integrity of the PLRA and prevents judicial inefficiencies that would result from a *Heck* exception. Not only does the Supreme Court recognize this interpretation of section 1915(g), a majority of circuits to face the question also support consistent interpretation of *Heck* dismissals as PLRA strikes.

*2. A Majority of Circuits Treat Heck Dismissals as PLRA Strikes to Maintain a Consistent and Workable Standard*

Even before *Lomax*, most circuits to survey the question adopted the principle that *Heck* dismissals constitute strikes under the PLRA. See *Hamilton*, 74 F.3d at 103; *In re Jones*, 652 F.3d at 38; *Smith*, 636 F.3d at 1312. These decisions recognized that treating *Heck* dismissals as strikes is a matter of consistency and maintains a workable standard.

Without proof of favorable termination, courts have held that claims barred by *Heck* are inherently invalid or legally frivolous. *See Smith*, 636 F.3d at 1312; *Hamilton*, 74 F.3d 99 at 103. Going further, the District of Colombia Circuit Court holds that not only are *Heck* dismissals strikes, but subsequently obtaining favorable termination on the underlying conviction does not reverse that strike. *In re Jones*, 652 F.3d at 38-39. Because the original claim was premature, it therefore failed to state a claim upon which relief could be granted. *Id*. Each of these circuits recognize that by nature of being legally invalid at the time of filing, claims dismissed under *Heck* are PLRA strikes because they are either frivolous or fail to state a claim.

In the only other circuit decision post-*Lomax*, the Third Circuit held that *Heck* dismissals must be PLRA strikes because "any other rule is incompatible with *Heck*." *Garrett*, 17 F.4th at 427. Without favorable termination, claims dismissed under *Heck* lack a legally cognizable claim. *Id.* at 427-28. Without a legally cognizable claim, those dismissals must be treated as strikes—

either as frivolous or for failing to state a claim. Applying the exact words of section 1915(g) in their plain meaning as encouraged by the Supreme Court delivers a consistent and workable standard for judges confronting a variety of prison litigation cases. But the Fourteenth Circuit not only failed to consider answers from circuits in the majority, its analysis of *Washington* and *Polzin* also falls apart after thorough consideration. *Polzin v. Gage*, 636 F.3d 834 (7th Cir. 2011).

*3. The Fourteenth Circuit Adopts a Minority Position Using Faulty Analysis*

As established above, a majority of circuits to reach the issue have correctly held that *Heck* dismissals are strikes. In ruling against the majority approach, the Fourteenth Circuit only relies on two irrelevant issues: the fact that *Heck* does not raise jurisdictional issues and the fact that favorable termination is not an inherently essential element of a section 1983 claim. R. at 14-15. While the Fourteenth Circuit has accurately repeated these rules of law, it failed to cogently state why either means a *Heck* dismissal should not count as a strike. *See Polzin*, 636 F.3d at 837–38; *Washington*, 833 F.3d at 1055.

*Polzin* may allow courts to peer past the *Heck* bar and decide the merits of individual dismissals, but the Fourteenth Circuit failed to evaluate the true effect of that holding as applied to this case. *Polzin*, 636 F.3d at 837-838. That is because courts invariably only bypass *Heck* using *Polzin* in order to rule against prisoners making section 1983 claims.[8] *See, e.g.*, *James v. Melke*, No. CV412-115, 2012 WL 2153798, at *2, (S.D. Ga. June 13, 2012), ("But there must be claims worth staying. To that end, courts reach the merits despite [*Heck*] where claims are otherwise demonstrably baseless."). It does not follow that *Heck* dismissals do not constitute strikes because

[8] A review of the 22 cases citing this point of law in Westlaw reveals that in all the decisions where *Polzin* was applied courts determined there was a fatal defect in the underlying claims and terminated the action, most often for failure to state a claim.

a court can ignore *Heck* to issue a strike-worthy dismissal. *See Albright v. Wood*, No. CV419-298, 2021 WL 5862094, at *3 n.6 (S.D. Ga. June 16, 2021).

Despite being the sole other case the Fourteenth Circuit's opinion rests on, R. at 15, *Washington*'s holding specifically allows *Heck* dismissals to be counted as strikes. *Washington*, 833 F.3d at 1055 (requiring that *Heck*'s "bar to relief [be] obvious from the facts of the complaint" to constitute a strike). It may be true that *Washington* required the satisfaction of another element to constitute a strike, but such a holding is inapposite to support a categorical ban on *Heck* dismissals counting as strikes. *Washington* explicitly rejected a categorical rule for *Heck* dismissals and its holding should not be distorted by the Fourteenth Circuit to support one now. *Id.* at 1055 ("[A] complaint dismissed under *Heck*, standing alone, is not a per se 'frivolous' or 'malicious' complaint."). Both cases the Fourteenth Circuit relies upon call for further scrutiny into the merits of individual cases, but neither come close to a categorical ban on *Heck* strikes.

In arguing that *Heck* only recognizes the prematurity and not the invalidity of a prisoner's claim, the Fourteenth Circuit elevates an irrelevant issue. R. at 15. That is because the Fourteenth Circuit has made no argument as to how a claim that is premature could possibly be valid. It rather follows that if a claim is premature, it is inherently invalid. Further, in describing the claim as premature, the Fourteenth Circuit assumes favorable termination will occur in the first place.[9] This misunderstanding could be because the Fourteenth Circuit conducted no statutory analysis of section 1915(g), nor a merits review of Respondent's three *Heck* dismissals. Without clarification as to why this distinction between prematurity and invalidity is important, there is no reason not

[9] In fact, it is a rare prisoner indeed who finds favorable termination. *See e.g.*, Carol G. Kaplan & Bureau of Just. Stat., *Habeas Corpus – Federal Review of State Prisoner Petitions* (1984) ("The data show that of the 1,899 total petitions filed, 60 or 3.2% were granted in whole or in part and that 33, or 1.8% of the total petitions filed, resulted in any type of release of the petitioner.").

to follow controlling cases such as *Lomax*. Rather than create a categorical exception, the Fourteenth Circuit should have at the very least conducted a review of the underlying circumstances of Respondent's three *Heck* dismissals as required by *Washington*. *Washington,* 833 F.3d at 1055.

The Fourteenth Circuit should have instead consulted *Lomax,* where prematurity had already been addressed. *Lomax,* 140 S. Ct. at 1724 (holding that section 1915(g) encompasses all dismissals, regardless of "plaintiff's ability to reassert his claim in a later action"). The only relevant question regarding *Heck* dismissals is whether they fit the definition of section 1915(g) as "frivolous, malicious, or fail[ing] to state a claim." *Id*. ("This case begins, and pretty much ends, Section 1915(g)'s text."). As evidently clear from Supreme Court precedent and a majority of circuits, the only consistent interpretation of section 1915(g) in line with the rest of the PLRA requires finding that *Heck* dismissals are strikes. This accords with Congress's intentions behind the creation of the PLRA and section 1915(g).

C. Exempting *Heck* Dismissals from Counting as Strikes is Antithetical to Congress's Intent and Goals When Passing the PLRA

Crafting an exception to the PLRA for *Heck* dismissals takes the courts a step backwards in the long fight against meritless litigation.[10] The Fourteenth Circuit makes no argument to assert that previously dismissed cases falling under its categorical *Heck* exemption did not "tie up the courts, waste valuable judicial and legal resources, and affect the quality of justice." 141 CONG. REC. S7,524 (daily ed. May 25, 1995) (statement of Sen. Robert Dole). Allowing the Fourteenth Circuit's holding to stand creates cracks in the levees erected by the PLRA and section 1915(g)

[10] Between 1975 and 1994, yearly filing of prison litigation increased from 6,000 to 39,000 suits. 141 CONG. REC. 14,570 (1995) (statement of Sen. Robert Dole).

against the flood of non-meritorious prison litigation that continually threatens to overwhelm federal courts.

Crafting a new exception upsets the delicate balance sought by sponsoring legislators between judicial efficiency and ensuring meritorious litigation received appropriate attention from courts. 141 CONG. REC. S14,626–27 (statement of Sen. Orrin Hatch that "[the PLRA] will not prevent [legitimate claims] from being raised"). Exempting these premature claims, which are destined for dismissal, undermines the economic disincentives against frivolous litigation Congress enacted in section 1915(g). Because Congress intentionally expanded prior iterations of section 1915(g) to include failure to state a claim,[11] it would be inappropriate to abrogate that language now. This is especially true because an exception is far more likely to decrease judicial efficiency than ensure that meritorious litigation receives proper attention. As written, the statute already provides ample opportunities to prisoners bringing meritorious litigation through section 1915(g)'s three strikes rule.[12]

These concerns were analyzed closely in *Lomax*, which should control. *See supra* § I(A); *Lomax*, 140 S. Ct. at 1723. If Congress had wanted to limit the PLRA to merely "abusive" prisoner

[11] Prior to the passage of the PLRA, only frivolous or malicious claims were limited. *See Neitzke v. Williams*, 490 U. S. 319, 324 (1989) (discussing §1915(d), which limited frivolous or malicious prisoner litigation before 1995).

[12] The three strikes rule received no objections in either the House or Senate, despite concerns about suppressing meritorious litigation. *See* Kasey Clark, *You're Out!: Three Strikes Against the PLRA's Three Strikes Rule*, 57 Ga. L. Rev. 779, 789 (2023); Molly Guptill Manning, *Trouble Counting to Three: Circuit Splits and Confusion in Interpreting the Prison Litigation Reform Act's 'Three Strikes Rule,' 28 U.S.C. § 1915(G)*, 28 Cornell J. of L. & Pub. Pol'y 207 (2018). *Cf.* 141 CONG. REC. 14,628 (1995) (statement by Sen. Joseph Biden, "we must not lose sight of the fact that some of these lawsuits have merit - some prisoner's rights are violated.").

litigation as the Fourteenth Circuit suggests,[13] it would not have expanded the scope to encompass meritless suits. *Id*. As explained previously, *Heck* dismissals speak directly to the non-meritorious nature of a litigant's claim. *See supra* § I(B). A section 1983 claim that challenges the circumstances of a prisoner's conviction is inherently without merit because it fails to state a claim upon which relief may be granted without undermining the Sixth Amendment.

Despite understanding Congress's intent behind the PLRA's three strikes rule, the Fourteenth Circuit undermined this goal by creating an exception for "meritless, wasteful" *Heck* dismissals. R. at 15. *Heck* dismissals are inherently meritless and wasteful when the plaintiff fails to state a claim upon which relief may be granted. The Fourteenth Circuit's prematurity argument fails to acknowledge this reality. *Heck* dismissals, whether frivolous, malicious, or failing to state a claim, are exactly the type of non-meritorious claim Congress sought to financially disincentivize through the three strikes rule. It is impossible to weaken these disincentives without equally weakening Congress's barrier against non-meritorious litigation, causing prison litigants and others with genuine claims to lose the benefit of prompt justice. 141 CONG. REC. S7,524 (daily ed. May 25, 1995) (statement of Sen. Robert Dole). Instead, the Court today should accept the plain, purposeful language Congress drafted into the PLRA and hold that *Heck* dismissals are strikes.

***

This Court can maintain the current appropriate and efficient standard by holding that *Heck* dismissals constitute strikes under section 1915(g) of the PLRA. This holding accords with the Supreme Court's precedent in *Lomax* and reinforces Congress's intent to limit non-meritorious

[13] In choosing to make an irrelevant distinction between "invalidity" and "prematurity," R. at 15, the Fourteenth Circuit misunderstands that Congress was concerned with stemming the "flood of non-meritorious claims," *Lomax*, 140 S.Ct. at 1726.

litigation through the PLRA. By reaffirming the plain-meaning, simple statutory interpretation used by a majority of circuits, this Court can establish a consistent and manageable judicial standard that allows meritorious prison litigation to be addressed efficiently.

## II. THE FOURTEENTH CIRCUIT ERRED WHEN IT ADOPTED A PURELY OBJECTIVE STANDARD TO EVALUATE FOURTEENTH AMENDMENT CLAIMS SEEKING TO HOLD AN OFFICER LIABLE WITHOUT ANY DELIBERATE ACT

The district court correctly held that Fourteenth Amendment Due Process requires that pretrial detainees "must allege that public officials knew of and disregarded a substantial risk of serious harm." R. at 10. As an issue of law, the standard of review of Fourteenth Amendment Due Process claims is *de novo*. *Darnell v. Pineiro*, 849 F.3d 17 (2d Cir. 2017).

This Court's jurisprudence on deliberate[14] indifference has long required a subjective component. *Estelle v. Gamble*, 429 U.S. 97, 104-06 (1976); *Farmer*, 511 U.S. at 835. In *Farmer*, this Court rejected the argument that an objective analysis alone is sufficient to establish constitutional liability for deliberate indifference. *Farmer*, 511 U.S. at 837 ("[T]he official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference."). Further, "deliberate indifference… constitutes the 'unnecessary and wanton infliction of pain.'" *Estelle*, 429 U.S. at 104 (citing *Gregg v. Georgia*, 428 U.S. 153, 173 (1976) (joint opinion of Stewart, Powell, and Stevens, JJ.)). For this reason, deliberate indifference claims require specific intent from the public official. *Farmer*, 511 U.S. at 839.

[14] Deliberate means "intentional," "premeditated," or "unimpulsive; slow in deciding." *Deliberate, Black's Law Dictionary*, 539 (11th ed. 2019). This Court defined deliberate as "purposeful" or "knowing." *Kingsley*, 576 U.S. at 396. The phrase "deliberate indifference" should then be read as indifference that is knowing, purposeful, intentional, pre-meditated, or unimpulsive. In short, deliberate indifference requires deliberation.

*Kingsley* analyzed punishment of pretrial detainees through excessive use of force, which is not present in deliberate indifference "failure to protect" cases. In *Farmer*, this Court made clear that a failure to act is not inherently a punishment unless conscious disregard is shown. *Farmer,* 511 U.S. at 837-38. *See also Wilson v. Seiter*, 501 U.S. 294, 298-300 (1971) (holding that an explicit "intent requirement" is inherent to claims involving "punishment"); *Bell v. Wolfish*, 441 U.S. 520, 538 (1979). Failing to act without intent or knowledge amounts to negligence. *See Nam Dang*, 871 F.3d at 1280 ("An official disregards a serious risk by more than mere negligence when [they know of a risk to an inmate and fail or refuse to address it].") (internal quotations omitted) (citation omitted). Negligence is not a due process violation. *Kingsley*, 576 U.S. at 396.

Plaintiffs bringing 42 U.S. § 1983 claims against jail officials must prove a violation of an underlying constitutional right.[15] Because negligence is not actionable under the Fourteenth Amendment, a jail official "may not be held liable if they prove they were unaware of the risk." *Farmer*, 511 U.S. at 826; s*ee also Miller v. Neathery*, 52 F.3d 634, 639 (7th Cir. 1995) (requiring evidence the defendants had "actual knowledge of impending harm that they consciously and culpably refused to prevent") (internal quotations and citations omitted); *Hare*, 74 F.3d at 633 (mandating a prisoner complainant prove the official both knew of and disregarded "an excessive risk to inmate health or safety"); *Cottrell v. Caldwell*, 85 F.3d 1480 (11th Cir. 1996) (holding that *Farmer* requires "a great deal more of the plaintiff than a showing that the defendants violated generally accepted customs and practices").

A subjective test also is consistent with the protections enacted by Fourteenth Amendment Due Process. That is because due process jurisprudence traditionally "is intended to prevent

[15] "The Due Process Clause is not 'a font of tort law to be superimposed upon' [a state's statutory and common law] system." *Kingsley*, 576 U.S. 389 at 408 (2015) (Scalia, J., dissenting).

government 'from abusing [its] power, or employing it as an instrument of oppression.'" *DeShaney v. Winnebago City. Dep't of Soc. Servs.*, 489 U.S. 189, 196 (1989) (citation omitted). "Historically, this guarantee of due process has been applied to *deliberate* decisions of government officials to deprive a person of life, liberty, or property." *Daniels v. Williams*, 474 U.S. 327 (1986) (emphasis in the original). "[The Court has] spoken of the cognizable level of executive abuse of power at what which shocks the conscience. . . . Conduct intended to injure in some way unjustifiable by any government interest is the sort of official action most likely to rise to the conscious-shocking level." *Cnty. of Sacramento v. Lewis*, 523 U.S. 833, 846, 849 (1998). Because a subjective test is inherent to deliberate indifference claims, it must be applied.

A. *Kingsley* Was Expressly Limited to Excessive Force Cases Brought by Pretrial Detainees Under the Fourteenth Amendment

*Kingsley* should not be extended to "failure to protect" claims made by pretrial detainees. That is because intentional actions performed by government officials can be evaluated to be demonstrably "excessive in relation" to any "legitimate government objective." *Bell*, 441 U.S. at 537-39. At that point, a court "permissibly may infer" that the actions rise to the level of unconstitutional punishment. *Id*. But deliberate indifference does not turn on the same analysis as intentional actions by public officials, and it cannot be measured objectively. *Strain v. Regalado,* 977 F.3d 984, 990 (10th Cir. 2020) ("[T]he nature of a deliberate indifference claim infers a subjective component."). *Contra Darnell,* 849 F.3d at 35.

Because excessive force cases invariably require an affirmative act by the officer, *Kingsley* is clear: an objective test is only appropriate for claims requiring an affirmative act. *Kingsley,* 576 U.S. at 396 ("[T]he defendant must possess a purposeful, a knowing, or possibly a reckless state of mind."). For that reason, *Kingsley* specifically excludes accidental actions. *Id.* Without the

analysis provided by a subjective test, "failure to protect" claims lack the affirmative, deliberate component that *Kingsley* considered an essential element. *Id*.

In light of the fact that *Kingsley's* holding was decided based on precedent specific to excessive force claims, it is inappropriate to extend its holding to deliberate indifference. *Id.* at 398 (citing *Graham v. Connor*, 490 U.S. 386, 395 n.10 (1989) ("[T]he Due Process Clause protects a pretrial detainee from the use of excessive force that amounts to punishment."). Though both claims may start with an analysis of "whether the situation at issue amounts to a punishment of the detainee," after that point the proper tests diverge. *Castro*, 833 F.3d at 1086 (Ikuta, J., dissenting); *see also Strain*, 977 F.3d at 991-92 ("An excessive force claim, on the other hand, does not consider an official's "state of mind with respect to the proper interpretation of the force."" (quoting *Kingsley*, 576 U.S. at 396)). That is because, unlike a deliberate indifference claim, a pretrial detainee may prevail on an excessive force claim "in the absence of an expressed intent to punish" if an official's actions "appear excessive in relation to [a legitimate government] purpose." *Kingsley*, 576 U.S. at 398 (quoting *Bell*, 441 U.S. at 561). By its nature, force can be measured to be *excessive* against what is objectively *necessary*. When the force is intentional and evaluated to be excessive, the force can be considered punishment regardless of subjective intent. *Kingsley*, 576 U.S. at 398. In the absence of an intentional action, a similar analysis cannot be used on deliberate indifference claims. *See id.* at 396 (emphasizing the defendant acted "deliberately (not accidentally or negligently)"); *Farmer*, 511 U.S. at 837-38. So, absent any intentional action, an essential element of punishment is missing. The subjective intent requirement establishes this element in deliberate indifference claims.

1. *With the Controlling Standard for Deliberate Indifference Established in Farmer, the Fourteenth Circuit Erred by Extending Kingsley's Holding on Excessive Force*

This Court should adhere to the *Farmer* and *Estelle* standards for failure to act and reject a purely objective test. Instead, the Fourteenth Circuit erred when it did not follow direct precedent. *Agostini v. Felton*, 521 U.S. 203, 237 (1997) ("[I]f a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls . . . ") (internal quotations omitted) (alterations omitted) (citations omitted). Without a subjective test, constitutional protections will be inappropriately expanded past the appropriate 'punishment' threshold. *Brawner v. Scott Cnty., Tenn.*, 14 F.4th 585, 595 (6th Cir. 2021) ("[T]he subjective component of the test for deliberate indifference under the Eighth Amendment [was adopted] based on the language and purposes of that amendment, focusing particularly on 'punishments,' and not on any intrinsic meaning of the term.").

*Farmer*'s standard has been correctly extended past Eighth Amendment cases. The courts of appeal consistently applied *Farmer*'s subjective Eighth Amendment standard to Fourteenth Amendment claims prior to *Kingsley*. *See, e.g.*, *Upham v. Gallant*, 99-2224, 2000 WL 1425759, at *1 (1st Cir., Sept. 15, 2000); *Caiozzo v. Koreman*, 581 F.3d 63, 66 (2d Cir. 2009); *Serafin v. City of Johnstown*, 53 F. App'x 211, 213-14 (3d Cir. 2002); *Martin v. Bowman*, No. 94-6246, 1995 WL 82444 (4th Cir., Feb 24, 1995); *Hare v. City of Corinth*, 74 F.3d 633, 636 (5th Cir. 1996); *Polk v. Parnell*, No. 96-5711, 1997 WL 778511 at *1 (6th Cir., Dec. 8, 1997); *Henderson v. Sheahan*, 196 F.3d 839, 844-45 (7th Cir. 1999); *Crow v. Montgomery*, 403 F.3d 598, 601 (8th Cir. 2005); *Schell v. Richards*, No. 97-15743, 1997 WL 664988, at *1 (9th Cir., Oct. 24, 1997); *Dean v. Hamblin*, No. 95-2088, 1995 WL 623650, at *2 (10th Cir., Oct. 13, 1995); *Cottrell* 85 F.3d at 1490. Because a pretrial detainee's rights extend from the Eighth Amendment, it should also

inform the limit of Fourteenth Amendment Due Process rights. *See City of Revere v. Mass. Gnl. Hosp.*, 463 U.S. 239, 244 (1983) ("[T]he due process rights of a [pretrial detainee] are at least as great as the Eighth Amendment protections available to a convicted prisoner." (citing *Bell*, 411 U.S., at 545 n.16)).

When given the opportunity to extend *Kingsley* over *Farmer* in deliberate indifference cases, a majority of the circuits applied the well-settled subjective standard.[16] *See Miranda-Rivera v. Toledo-Davila*, 813 F.3d 64 (1st Cir. 2016) (applying an objective standard to excessive force claims while continuing to apply a subjective standard to deliberate indifference claims in a mixed action); *Moore v. Luffey*, 767 F. App'x 335, 340 n. 2 (3d Cir. 2019) (applying the subjective standard and declining to address an argument based on *Kingsley*); *Cope v. Cogdill*, 3 F.4th 198, 207 (5th Cir. 2021) ("Since *Kingsley* discussed a different type of constitutional claim, it did not abrogate our deliberate-indifference [sic] precedent."); *Whitney v. City of St. Louis*, 887 F.3d 857, 860 n.4 (8th Cir. 2018) ("*Kingsley* does not control because it was an excessive force case, not a deliberate indifference case."); *Nam Dang*, 871 F.3d at n. 2, (declining to extend *Kingsley* to a deliberate indifference to a serious medical need claim because *Kingsley* involved excessive force and not deliberate indifference). Even when accepting the objective test, courts craft an exception for unintentional actions. *Castro*, 833 F.3d at 1070 ("[*Kingsley*'s state-of-mind] factor would not be satisfied in the failure to protect context if the officer's inaction resulted from something totally unintentional.").

[16] The Fourth, Sixth, and Seventh Circuits extend *Kingsley* to deliberate indifference cases involving medical harm or suicide risk, but not for "failure to protect" claims for injuries caused by other inmates. *See Short v. Hartman*, 87 F.4th 593, 594 (4th Cir. 2023); *Brawner*, 14 F.4th at 585; *Miranda-Rivera*, 900 F.3d at 335.

Extending *Kingsley* to deliberate indifference claims abrogates existing on-point precedent based on "broad language in [a case] where *the issue was not presented* or even envisioned." *R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377, n.5 (1992) (emphasis added). *See also Landgraf v. USI Film Prod.*, 511 U.S. 244, 265 (1994) ("[T]he maxim not to be disregarded those general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used.") (citation omitted) (internal quotation omitted); *United States v. Stanley*, 483 U.S. 669, 680 (1987) ("[N]o holding can be broader than the facts before the court.") (citations omitted) (internal quotations omitted). Applying *Kingsley* subjects due process rules to "mechanical application in unfamiliar territory." *Lewis*, 523 U.S. at 850 ("[T]he need to preserve the constitutional proportions of substantive due process demands an exact analysis of context and circumstances before deliberate indifference is condemned . . . "). Such hasty judicial action can and will cause more problems than it solves. *See infra* §§ II(B),(C).

Principles of *stare decisis* demand that *Farmer* controls. Judge Pierre N. Leval, *Judging Under the Constitution: Dicta About Dicta*, 81 N.Y. UNIV. L. REV. 1259 (2006); *see also United States v. Rubin*, 609 F.2d 51, 69 (2d Cir. 1979) (Friendly, J., concurring) ("A judge's power to bind is limited to the issue that is before him; he cannot transmute dictum into decision by waving a wand and uttering the word 'hold.'"). By extending *Kingsley* past the point of this Court's consideration, new problems will arise from hastily created doctrine. Leval, *supra*, at 1255. ("[C]ourts are more likely to exercise flawed, ill-considered judgement, more likely to overlook salutary cautions and contraindications, more likely to pronounce flawed rules, when uttering dicta than when deciding their cases."). Unlike in *Farmer*, deliberate indifference was not at issue in *Kingsley* and therefore was not "investigated with care, and considered in its full extent." *Cohens v. Virginia*, 19 U.S. 264 (1821). But the existence of a controlling standard is not the only reason

*Kingsley* should not be extended; the nature of affirmative acts also makes *Kingsley's* objective standard untenable.

*2. Affirmative Acts Are Distinct from Deliberate Indifference, so Kingsley Should Not Be Extended to "Failure to Protect" Claims*

As established above, *Farmer* sets out the controlling standard. But even *Farmer* did not apply, the Fourteenth Circuit still erred in extending *Kingsley.* At no point in *Kingsley* does this Court suggest that the objective reasonableness standard extends to non-excessive force claims under the Fourteenth Amendment. *See Kingsley*, 576 U.S. at 389; *Castro*, 833 F.3d at 1069. Excessive force actions, like the one addressed in *Kingsley*, are categorically distinct from deliberate indifference "failure to protect" claims. *See Strain*, 977 F.3d at 991 ("Excessive force requires an affirmative act, while deliberate indifference often stems from inaction. . . . *Kingsley* relies on precedent specific to excessive force claims.") (citations omitted); *see also Castro*, 833 F.3d at 1086 (Ikuta, J., dissenting) ("[P]unitive intent may be inferred from affirmative acts that are excessive in relationship to a legitimate government objective, the mere failure to act does not raise the same inference."). As such, it is inappropriate to extend *Kingsley* to claims outside of excessive force.

*Kingsley* itself draws a distinction between intentional and accidental acts. *Kingsley*, 576 U.S. at 396 ("Thus, if an officer's Taser goes off by accident or if an officer unintentionally trips and falls on a detainee, causing him harm, the pretrial detainee cannot prevail on an excessive force claim. But if the use of force is deliberate—i.e., purposeful or knowing—the pretrial detainee's claim may proceed."); *see also Daniels*, 474 U.S. at 331 ("Historically, this guarantee of due process has been applied to deliberate decisions of government officials to deprive a person of life, liberty, or property."). However, other courts have misapplied this hypothetical to deliberate indifference claims, leading to courts to evaluate any related intentional act instead of the specific failure to act in question. *See Castro*, 833 F.3d at 1070 ("In the failure-to-protect [sic] context, in

which the issue is usually inaction rather than action, the equivalent is that the officer's conduct with respect to the plaintiff was intentional."); R. at 17 ("[T]he act to be examined is Officer Campbell's placing of several detainees in the same area to await transfer to recreation. Officer Campbell's acts in doing so prove intentional, as no outside force, illness, or accident rendered Officer Campbell unable to make this conscious decision.").

The proper analysis is not whether the officer's initial conduct was intentional, but whether the failure to "take reasonable available measures to avert" was intentional or accidental. R. at 18; *see Strain*, 977 at 991 ("[P]unitive intent may be inferred from affirmative acts that are excessive in relationship to a legitimate government objective, the mere failure to act does not raise the same inference.") (citing *Castro*, 833 F.3d at 1069) (Ikuta, J., dissenting). An examination of the failure to take steps to avert is more reasonable because, like *Kingsley's* tripping hypothetical, it examines the (in)action that was the proximate cause to the harm.[17] Many situations will arise in "failure to protect" cases where a normally safe and routine matter has become dangerous.[18] While danger is always present during the performance of routine duties in jail, danger is not intrinsically present as it is in the intentional application of force. For this reason, the subjective standard for deliberate

[17] For example, in the current case the correct object of analysis is Officer Campbell's failure to segregate rival gang members, rather than transferring multiple detainees for recreation at once as the Fourteenth Circuit asserts. R. at 17. The failure to segregate is the true proximate cause of the harm. This analysis directly correlates with the *Kingsley* hypothetical. The (in)action causing the harm (use of force/failure to segregate) can be evaluated to be intentional (use of force for compliance/subjective knowledge of risk of harm) or unintentional (accidentally tripped/unaware of risk requiring segregation) in regards to the desired outcome (compliance with instructions/allowing inmates recreation time).

[18] The case below represents one such example, as most pretrial detainees are routinely taken to recreation without harm. R. at 17; *see also Leal*, 734 F. App'x at 906 (evaluating "failure to protect" claim after prisoner was attacked while being taken to recreation).

indifference is appropriately high. *See Leal v. Wiles*, 734 F. App'x 905, 909 (5th Cir. 2018) ("[C]ircumstantial evidence does not meet the high standard of deliberate indifference.").

*Kingsley* itself inserts a covertly subjective analysis into its objective standard by requiring the analysis be performed based on "the perspective of a reasonable officer on the scene, *including what the officer knew at the time*, not with the 20/20 vision of hindsight." *Kingsley*, 576 U.S. at 397 (emphasis added). Otherwise, the objective standard would be applied "mechanically" instead of "turn[ing] on the facts and circumstances of each particular case." *Id.* This is consistent both with *Farmer* and the courts that have recognized an objective standard is inappropriate for deliberate indifference. *See Farmer*, 511 U.S. at 838 ("[A]n official's failure to alleviate a significant risk that he should have perceived but did not, while no cause for commendation, cannot under our cases by condemned as the infliction of punishment."); *Leal*, 734 F..App'x at 909 ("[L]iability attaches only if [the officer] knew—not merely should have known—about the risk.").

Under *Farmer*, the Court even provided avenues where actual knowledge would not be required for a pretrial detainee to obtain relief:

> [W]hen a prison official is aware of a high probability of facts indicating that one prisoner has planned an attack on another but resists opportunities to obtain final confirmation; or when a prison official knows that some diseases are communicable and that a single needle is being used to administer flu shots to prisoners but refuses to listen to a subordinate who strongly he strongly suspects will attempt to explain the associated risk of transmitting disease.

*Farmer*, 511 U.S. at 843, n.8. *Farmer*'s evaluation more adequately protects officers acting in good faith while already allowing liability when the risk should have been obvious.[19] *Id.* at 842

[19] In *Kingsley*, the court states that the objective standard "adequately protects an officer who acts in good faith by acknowledging that judging the reasonableness of the force used from the perspective and with the knowledge of the defendant officer is an appropriate part of the analysis." *Kingsley*, 576 U.S. at 390. Because the standard that has developed from this excludes

("[A] factfinder may conclude that a prison official knew of a substantial risk from the very fact that the risk was obvious."). *Farmer*'s standard already has accounted for both constructive knowledge and obviousness, leaving no real need for a standard change.[20] *Id.* at 840, 842 ("And even if 'deliberate' is better read as implying knowledge of a risk, the concept of constructive knowledge is familiar enough that the term 'deliberate indifference' would not, of its own force, preclude a scheme that conclusively presumed awareness from a risk's obviousness."). But not only is eliminating the subjective standard against precedent, it also would impermissibly serve to constitutionalize negligence.

B. Eliminating the Subjectivity Requirement Impermissibly Constitutionalizes Negligence

As established above, the Fourteenth Circuit erred by applying the wrong standard. But even if *Farmer* does not control, applying an objective standard improperly extends constitutional protections to negligence. Because an objective test does not differentiate between accidents and reckless behavior, it assigns constitutional liability to negligence. Even if the objective test were able to account for accidents, it functions more closely to negligence per se than civil recklessness. In constitutionalizing negligence, the Fourteenth Circuit goes against hundreds of years of precedent.

*1. A Failure to Act Without Subjective Knowledge Only Rise to the Level of Negligence*

The failure to perform an action is fundamentally different than an intentional action, especially in regards to the intentional application of force. *See supra* § II(A)(2). That is because

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the subjective knowledge of the officer and substitutes it for knowledge an officer should have known, good faith is no longer protected. *See infra* § II(B).

[20] In the present case, Respondent failed to argue the subjective standard at all leading to a dismissal. R. at 5. Respondent instead seeks to change the established standard, presumably to circumvent the appropriately high bar put in place by *Farmer*. R. at 8.

intentional actions are done with the aim of carrying out an act, while a failure to act happens most often without conscious thought.[21] *Intentional, Black's Law Dictionary* (11th ed. 2019). Deliberate indifference occurs when the failure to act is either intentional or reckless.[22] *See Farmer*, 511 U.S. at 840 ("[D]eliberate indifference lying somewhere between the poles of negligence at one end and purpose or knowledge at the other, the Courts of Appeals have routinely equated deliberate indifference with recklessness."). An objective standard is unable to differentiate between these differences, because subjective knowledge inherently weighs in on whether the failure to act was affirmative or accidental. *Id.* at 837 ("[O]ur cases mandate inquiry into a prison official's state of mind . . . " (quoting *Wilson*, 501 U.S. at 299-302)). Accidental failures to act only rise to the level of negligence. *See Strain*, 977 F.3d at 991 ("[A] person who unknowingly fails to act—even when such a failure is objectively unreasonable—is negligent at most . . . " (quoting *Castro*, 833 F.3din at 1085 (Ikuta, J. dissenting)); *Nam Dang*, 871 F.3d at 1280 ("An official disregards a serious risk by more than mere negligence when [they know of a risk to an inmate and fail or refuse to address it].") (internal quotations omitted) (citation omitted).

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[21] "Failing to act" supposes the possibility of another set of actions that could have been taken. In this way, an infinite number of "failures to act" can be presumed to happen at nearly every instant. However, as in the present case, the "failure to act" needing examination is generally easy to identify.

[22] Suppose, unlikely as it sounds, that the warden has decided to send the pretrial detainees out for a day at the beach. Worried about sunburn causing liability under "failure to protect" claims, the warden instructs Officers A, B, and C to bring sunscreen. Officer D was also assigned to the trip. Officer A hates that the inmates are being taken to the beach, and intentionally leaves behind sunscreen to "teach them a lesson." (Intent to punish) Officer B, having heard and understood what the warden said, still chooses not to bring sunscreen, thinking "things will be fine." (Criminal recklessness) Officer C was at the store attempting to purchase sunscreen when he received a call about an emergency at the prison. In his haste to return, he accidentally purchased sun tan lotion, which was similarly packaged and on the same shelf. (Negligence) Officer D was not at the meeting and did not bring sunscreen, despite society's general awareness of the risks involved with sun exposure. (Civil recklessness) Due to the lack of sunscreen, pretrial detainees suffered serious sunburns. Under *Kingsley's* objective test, all four of these officers would incur liability for deliberate indifference.

In both *Farmer* and *Kingsley*, the Court recognized the need to exempt accidents. *Farmer*, 511 U.S at 840*; Kingsley*, 576 U.S. at 396. The Fourteenth Circuit, however, does not distinguish whether an accident failure led to their intentional act, only whether a reasonable officer would have acted similarly. In only assessing whether the official acted reasonably, the third element of the Fourteenth Circuit's test overlaps neatly with a basic negligence definition. *Compare* R. at 18 ("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.") *with Negligence, Black's Law Dictionary*, (11th ed. 2019) ("The failure to exercise the standard of care that a reasonably prudent person would have exercised in a similar situation.") No court extending *Kingsley* to deliberate indifference has properly distinguished this test from a negligence test. Similarly, no court has provided an example of what an accidental failure to act would look like.[23]

The objective standard evaluates the recklessness and the negligence based on the same standard, without regard to personal knowledge or subjectivity. Because of this, the objective test will lump those who fail to act negligently in with those fail to act recklessly and intentionally. In so doing, this test attaches constitutional liability to negligence. But even if the test were able to distinguish accident and inadvertence, in practice the test functions more closely to negligence per se than civil recklessness.

[23] *Kingsley* provides the example of an accidental Taser discharge following a fall. *Kingsley*, 576 U.S. at 396. *Farmer*'s subjective test explicitly allows for a showing of inadvertence. *Farmer*, 511 U.S. at 844 ("[P]rison officials who lacked knowledge of a risk cannot be said to have inflicted punishment, it remains open to the officials to prove that they were unaware even of an obvious risk to inmate health or safety."). In contrast, *Short* specifically exempts both negligence and accident, but fails to provide any examples of how someone can accidentally fail to act negligently. *See Short*, 87 F.4th at 611-612.

*2. An Objective Standard Constitutionalizes Negligence Per Se Based on Employee Performance*

Not only does this test constitutionalize negligence in the context of jails, *Kingsley*'s test also functions closer to negligence per se than civil recklessness. *Compare* Restatement (Third) of Torts: Phys. & Emot. Harm § 14 (2010) *with* Restatement (Second) of Torts § 500 (1965). Inherent to its nature, running a jail requires that even the most mundane tasks be strictly regulated. As a result of that requirement, jails implement far more rules and standards governing their employees when compared to general employment. Every time a jail official breaks a standard, negligently or otherwise, it can be proof of unreasonableness. After all, a reasonable officer follows policies and procedures dutifully. The very tools created to ensure efficiency and safety at the jail then will be used to blindly condemn those who preserve order within its walls.

These standards are necessarily omnipresent. When black and white standards are presented at trial, they provide little room for a nuanced assessment of reasonableness in the face of "failure to protect" claims.[24] *See Castro*, 833 F.3d at 1086-87. In essence, this attaches constitutional liability to the employee performance review. Courts will be forced to sift through employee handbooks and jail regulations to demonstrate that a sufficient number of regulations were broken, so the conduct was deliberate per se. Once it has been sufficiently determined that the employee was deliberate per se, judgment can be rendered against them—a "mechanical" application of the

[24] For instance, suppose there is an identical case to the one below. There are two possible extreme hypotheticals based on the fact pattern. On one side of the dichotomy, the officer could be a new, but well-performing employee working in good faith who, in a rare display of negligence, had no actual knowledge of Respondent or the dangers to him. On the other side, the officer could have direct knowledge of Respondent and the risks he faced in prison, and intentionally chose to place Respondent in that position for a nefarious purpose. Under the objective test, constitutional liability will attach to both figures. The only inquiry is whether there was a breach of reasonable care.

standard. *Kingsley*, 576 U.S. at 397. In creating a standard more akin to negligence per se, the Fourteenth Circuit has gone against a fundamental principle of constitutional liability.

*3. Constitutionalizing Negligence Upends Centuries of Precedent*

In creating a pseudo negligence per se standard, the Fourteenth Circuit embraces a rule fundamentally opposed by Court precedent. *Lewis*, 523 U.S. at 849 ("Liability for [negligence] is 'categorically beneath the threshold of constitutional due process.'"). The Court has created a high bar for deliberate indifference in order to prevent constitutionalizing negligence. *Compare* Prosser and Keaton on Torts §§ 2, 34, pp. 6, 213-214 (1984); Federal Tort Claims Act, 28 U.S.C. §§ 2671-2680; *United States v. Muniz*, 374 U.S. 150 (1963); *with Farmer*, 511 U.S. at 837-38; *Cope*, 3 F4th at 218, n.6 (2022) ("Deliberate indifference cannot be inferred from a prison official's mere failure to act reasonably."). As the Court stated in *Farmer,*

> An act or omission unaccompanied by knowledge of a significant risk of harm might well be something society wishes to discourage, and if harm does result society might well wish to assure compensation. The common law reflects such concerns when it imposes tort liability on a purely objective basis. *But an official's failure to alleviate a significant risk that he should have perceived but did not, while no cause for commendation, cannot under our cases be condemned as the infliction of punishment.*

*Farmer*, 511 U.S. at 837-38 (emphasis added).

"Failure to protect" claims should enforce liability for a specific act because of a specific, intentional omission. It logically follows that, to hold a defendant liable for actions they themselves did not perform in a specified instance, the plaintiff must show that the defendant knew of the risk of harm to plaintiff and deliberately ignored that risk. *See Nam Dang*, 871 F.3d at 1280; *Lancaster v. Monroe City., Ala.*, 117 F.3d 1419, 1425 (11th Cir. 1997). This is the deliberate indifference test from *Farmer*, which clearly requires a subjective intent. *See also Hare*, 74 F.3d at 645 (en banc) ("With episodic acts or omissions, intentionality is no longer a given . . . "). Pretrial detainees

should not be constitutionally entitled to the perfect job performance of their custodians. Therefore, the subjective test, which establishes *willful* indifference, should control.

C. In the Deliberate Indifference "Failure to Protect" Context, *Kingsley's* Objective Standard Threatens Jail Efficiency and Safety

Applying *Kingsley*'s objective "should have known" standard exposes individual jail officers to liability for making honest mistakes in the course of their duties. Jails are dangerous. Due to this danger, officers must make quick decisions in real time with limited information. *Farmer*, 511 U.S. at 835 ("[T]he decisions of prison officials are typically made "in haste, under pressure, and frequently without the luxury of a second chance . . . "" (quoting *Hudson v. McMillian*, 503 U.S. 1 (1992)). Exposing these decisions to excessive liability will force officers to second-guess their decisions, not only decreasing efficiency, but also creating dangerous conditions for other detainees and jail officials. If the standard of liability does not consider the good faith efforts of an officer, and instead holds everyone to the reasonable officer standard derived in litigation, qualified officials may fear entering the profession, leaving only the "most resolute or the most irresponsible," to oversee the detainee population. *Crawford-El v. Britton*, 523 U.S. 574, 590 n.12 (1998).

The level of abstraction at which an objective test operates cannot effectively evaluate the nuances present in deliberate indifference cases. *See Kingsley*, 576 U.S. at 397 ("A court must make this determination from the perspective of a reasonable officer on the scene, including what the officer knew at the time . . . "); *Castro*, 833 F.3d at 1086-87 (Ikuta, J. dissenting) (observing the test "simply doesn't fit" because it can relieve officials of liability despite their indifference). Instead, the test incentivizes overaccommodating detainee complaints and hesitation under pressure that puts lives in danger.

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In rejecting *Kingsley*'s inapplicable standard, this Court can reestablish the important distinction between intentional action and deliberate indifference. As the controlling authority, *Farmer* ensures a uniform standard, promoting fairness, coherence, and justiciability in assessment of an officer's conduct. Enacting *Kingsley* instead would improperly constitutionalize negligence, with the test functioning closer to negligence per se than civil recklessness. This upends basic principles of constitutional liability. By maintaining a robust subjective intent standard, officers are held accountable for intentional lapses in their duty to protect pretrial detainees, while also protecting officers who act in good faith—echoing the spirit of both *Kingsley* and the Constitution.

## CONCLUSION

Congress enacted the PLRA in an attempt to discourage frivolous litigation and encourage faster review for meritorious cases and included 42 U.S.C. § 1915(g). 42 U.S.C. § 1915(g) allows for three strikes and enacts a strike when a claim is dismissed for being malicious, frivolous, or for failing to state a claim. Dismissals under *Heck* are either frivolous or fail to state a claim. Creating an exception for *Heck* ignores precedent, principles of statutory interpretation, and the express intent of Congress. A dismissal is a dismissal.

The objective standard laid down in *Kingsley* was crafted specifically for claims involving excessive force. *Kingsley's* standard is inappropriate for deliberate indifference claims because, unlike the intentional application of force, a jail officials' failure to act cannot be evaluated objectively. Unless that failure to act was intentional or reckless, it only rises to the level of negligence. The objective test fails to adequately differentiate these levels of culpability. While some circuits hold that they are objectively evaluating using a theory analogous to civil recklessness, in practice the analysis functions more closely to negligence per se. Constitutional liability cannot rightfully rest on negligence. The Court's careful evaluation of the issue in *Farmer* determined a subjective evaluation was best. Deliberate indifference requires deliberation.

Because *Heck* dismissals constitute PLRA strikes, and because *Kingsley*'s holding does not extend to deliberate indifference claims, Petitioner respectfully requests that the judgment of the Fourteenth Circuit Court of Appeals be reversed.

Respectfully submitted,

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# APPENDIX
## Constitutional and Statutory Provisions

U.S. Const. amend. XIV.

Section 1.
All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2.
Representatives shall be apportioned among the several states according to their respective numbers, counting the whole number of persons in each state, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the executive and judicial officers of a state, or the members of the legislature thereof, is denied to any of the male inhabitants of such state, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such state.

Section 3.
No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any state, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any state legislature, or as an executive or judicial officer of any state, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4.
The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any state shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5.
The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

**APPENDIX (Cont'd)**

42 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.

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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. 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.

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