No. 23-05

In The

Supreme Court of the United States

October Term 2023

CHESTER CAMPBELL,

Petitioner,

v.

ARTHUR SHELBY,

Respondent.

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

BRIEF FOR RESPONDENT

Team 8
Counsel for Respondent

QUESTIONS PRESENTED

1. Whether the dismissal of a prisoner's civil action under *Heck v. Humphrey*, 512 U.S. 477 (1994), categorically does not constitute a strike according to the meaning of 28 U.S.C. § 1915(g).

2. Does the *Kingsley v. Hendrickson*, 576 U.S. 389 (2015), decision applying an objective standard to an excessive force claim apply to deliberate indifference claims by a pretrial detainee for the failure to protect him from the risk of harm of other inmates in violation of his Due Process rights under the Fourteenth Amendment in a 42 U.S.C. § 1983 action, without any showing of subjective intent?

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The opinion of the United States Court of Appeals for the Fourteenth Circuit, written by Judge Elizabeth Stark, has not yet been reported but is reproduced in the record. R. at 12-20. The order and opinion of the United States District Court for the Western District of Wythe, issued by District Judge Michael Gray on July 14, 2022, is unreported but is reproduced in the record. *Id*. at 2-11. The district court's order, issued on April 20, 2022, is unreported but reproduced in the record. *Id.* at 1.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

U.S. Const. amend. VIII provides:

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

U.S. Const. amend. XIV provides, in relevant part:

> 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.

28 U.S.C. § 1915(g) provides:

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

42 U.S.C. § 1983 provides, in relevant part:

> 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 . . . .

STATEMENT OF THE CASE

I. STATEMENT OF FACTS

This case arose out of the severe injuries Arthur Shelby, Respondent, suffered as a pretrial detainee at the Marshall jail from the hands of other detainees. R. at 6-7. The town of Marshall has experienced a history of tension with two rival gangs, the Bonucci clan and the Geeky Binders. *Id.* at 3. On December 31, 2020, Shelby was arrested and charged with battery, assault, and possession of a firearm by a convicted felon. *Id.* at 3-4. Upon Shelby's booking at the Marshall jail, Officer Mann quickly identified Shelby as a member of the Geeky Binders. *Id.* at 4.

Marshall jail protocol requires all officers to make paper and digital copies of forms to file and upload into the jail's online database. *Id.* Following protocol, Officer Mann entered Shelby's information and statements into the jail's database, which maintains files for each inmate with information regarding their charges, gang affiliation, and other information that jail officials would need to know. *Id.* Due to the town's prevalent gang activity, the database also tracks any knowledge of a hit placed on an inmate and any gang rivalries. *Id.* Once the information is imputed, the gang intelligence officers review the file in the database. *Id.*

The database had a record of Shelby's previous arrests and gang affiliation. *Id.* Despite the existing information, Officer Mann recorded Shelby's current information in the gang affiliation tab, including Shelby's identifying statements made during booking. *Id.* at 5. After completing the paperwork, Shelby was placed in cell block A, separated from the central part of the jail. *Id.* Following protocol, the gang intelligence officers reviewed Shelby's file, highlighting his high-ranking status within the Geeky Binders. *Id.* These intelligence officers were aware of the heightened threat posed by the Bonucci clan after Shelby's brother's murder of Luca Bonucci's

wife. *Id.* As such, a special note was made in Shelby's file regarding a possible hit on Shelby by the Bonucci clan. *Id.*

Given this risk, Shelby's high-ranking status was explicitly indicated on all rosters and floor cards. *Id.* Notices about Shelby were also placed in every administrative area of the jail. *Id.* The morning after Shelby was booked, the intelligence officers held a meeting, which every officer was required to attend. *Id.* 5-6. The intelligence gang officers notified all jail officials of Shelby's presence and the threats against him. *Id.* at 5. At the meeting, it was emphasized to all officers that Shelby was placed in block A of the jail, and the Bonucci clan members were placed in cell blocks B and C. *Id.* The intelligence officers explicitly reminded everyone to check the rosters and floor cards regularly to ensure that rival gangs were not coming in contact in common spaces in the jail. *Id.*

Discrepancies exist regarding whether Officer Chester Campbell ("Officer Campbell"), Petitioner, who was employed at the Marshall jail for several months, actually attended the briefing—as roll call records indicate he attended the meeting while the jail time sheets indicate he had arrived after the meeting. R. at 5. The database typically indicates whether an officer has viewed a specific page, but a system glitch prevented confirmation of whether Officer Campbell viewed the minutes. *Id.* at 6. The intelligence officers held all officers responsible for staying informed, requiring anyone absent from the meeting to review the meeting minutes on the jail's online database. *Id.*

On January 8, 2021, Officer Campbell, carried a hard copy of the list that indicated inmates with special statuses within the Marshall jail, including Shelby. *Id.* Within this list, it specifically noted inmates with violent tendencies, gang affiliations, and an inmate's risk of attack by rival gang members. *Id.* The list indicated that Shelby was a target of the Bonucci clan because of his

affiliation with the Geeky Binders. *Id.* Despite all the accessible information, before removing Shelby from his cell, Officer Campbell failed to check the hard copy list he was carrying and failed to reference the jail database. *Id.*

Nonetheless, Officer Campbell retrieved Shelby from his cell and led him to the guard stand to wait for other inmates to be gathered for recreation. *Id.* On the way to the guard stand, one inmate yelled to Shelby that he was glad that Shelby's brother "took care of that horrible woman." *Id.* Shelby responded, "yeah, it's what the scum deserved." *Id.* Officer Campbell disregarded the conversation and merely told Shelby to be quiet. *Id.* Officer Campbell then continued to remove two inmates from cell block B and one inmate from cell block C—the cells where all officers were explicitly notified that the Bonucci clan members had been placed—to go to the same guard stand as Shelby. *Id.* All three inmates were part of the Bonucci clan. *Id.*

At the sight of Shelby, the Bonuccis attacked him. While Shelby attempted to protect himself by hiding behind another inmate from his cell block, this did not stop the Bonucci clan members. *Id.* The Bonucci clan members immediately sought after Shelby and attacked him. *Id.* The inmates punched Shelby and continued to hit him. *Id.* Meanwhile, Officer Campbell unsuccessfully tried to stop the attack. *Id.* Officers eventually managed to break up the fight, but not before Shelby suffered life-threatening injuries, including a traumatic brain injury. *Id.* The resulting injuries from the attack left Shelby in the hospital for multiple weeks. *Id.*

II. PROCEDURAL HISTORY

On February 24, 2022, Arthur Shelby, proceeding pro se, filed a civil rights action against Officer Campbell seeking damages—under 42 U.S.C. § 1983—for violations of his civil rights, alleging that Officer Campbell failed to protect him as a pretrial detainee. R. at 7-8. Shelby also filed a motion to proceed in forma pauperis. *Id.* at 7. On April 20, 2022, the District Court denied

Shelby's motion to proceed in forma pauperis and ordered him to pay the $402 filing fee or face dismissal of his complaint. *Id.* at 1. The district court asserted that Shelby had accrued three "strikes" under the Prison Litigation Reform Act's ("PLRA") three-strike provision for three prior actions dismissed without prejudice pursuant to *Heck v. Humphrey*, 512 U.S. 477 (1994). *Id.* The dismissals occurred because the 42 U.S.C. § 1983 pro se actions would have called into question his conviction or sentencing. *Id.* Petitioner subsequently filed a motion to dismiss for failure to state a claim, which was granted by the District Court. *Id.* at 8, 13.

Shelby then appealed to the United States Court of Appeals for the Fourteenth Circuit, which reversed the judgment of the District Court. *Id.* at 13. In reversing the district court's ruling, the Fourteenth Circuit found that "*Heck* recognizes the prematurity, not the invalidity, of a prisoner's claim. Therefore, the District Court erred in counting Shelby's prior *Heck* dismissals as "strikes" under the PLRA." *Id.* at 15. Further, the Court of Appeals held "that *Kingsley's* objective standard extends beyond excessive force claims and to failure-to-protect claims like Shelby's." *Id.* at 16. Petitioner subsequently appealed the decision of the Court of Appeals, and this Court granted certiorari. *Id.* at 21.

SUMMARY OF THE ARGUMENT

Dismissals under *Heck v. Humphrey* cannot categorically constitute a "strike" pursuant to 28 U.S.C. § 1915(g). The text of the three strikes provision, 28 U.S.C. § 1915(g), explicitly lists the three types of claims that warrant a strike: malicious, frivolous, or failure to state a claim upon which relief can be granted. Since *Heck* dismissals are not expressly enumerated in the PLRA—a *Heck* dismissal is not automatically a dismissal for "frivolous" or "malicious" or an action that "fails to state a claim upon which relief may be granted." Although some claims dismissed under *Heck* could warrant dismissal for one of these three reasons, categorically,

dismissals under *Heck* do not warrant a strike. A *Heck* dismissal is not a strike because *Heck's* favorable termination is not an element for a claim brought under 42 U.S.C. § 1983. This recognizes the judiciary cannot add elements that Congress has not included, nor does *Heck* create an additional element because *Heck* is a judicially created rule that allows courts to dismiss a § 1983 complaint until the cause of action has accrued by virtue of a favorable termination of a criminal conviction or sentence.

Moreover, the purpose of § 1915(g) reflects that Congress intended to impose a strike only for an action without merit while allowing meritorious claims to proceed. Whereas a *Heck* dismissal does not establish whether the § 1983 action was frivolous, malicious, or failed to state a claim upon which relief may be granted, it only recognizes the prematurity of the claim. Thus, treating a *Heck* dismissal as a strike would contravene the plain language and purpose of § 1915(g) and harm vulnerable prisoners, creating an additional barrier to justice for prisoners who may face challenges in pursuing legitimate claims.

The *Kingsley* objective standard applies to pretrial detainees' failure-to-protect claims under the Fourteenth Amendment. Multiple circuit courts have misinterpreted this Court's prior precedent by treating the Eighth and Fourteenth Amendments the same and applying the subjective deliberate indifference standard to each. Unlike convicted prisoners under the Eighth Amendment, pretrial detainees are presumed innocent and have a Fourteenth Amendment right not to be punished at all by the government. As such, *Kingsley v. Hendrickson*, 576 U.S. 389 (2015), makes it clear that they are entitled to greater protections than convicted prisoners.

It logically follows that the *Kingsley* objective standard was intended to apply to all pretrial detainees' 42 U.S.C. § 1983 claims alleging a violation of their Fourteenth Amendment due process rights. The broad language in the *Kingsley* decision signals that it was intended to apply

to other § 1983 claims. These claims are uniform, arising from the same constitutional provision and resulting in the same harm. Thus, the focus is on the violation of the constitutional provision rather than the particular § 1983 claim. While the objective standard may be irreconcilable with prior circuit courts' precedent, it is consistent with this Court's precedent. Additionally, the objective standard balances the rights of pretrial detainees and jail officers. Not only is the objective standard consistent with precedent and encourages that proper protection be provided, but it is also workable and furthers this country's values in instilling justice. Therefore, this Court should affirm the Fourteenth Circuit Court of Appeals.

ARGUMENT

I. A DISMISSAL UNDER *HECK v. HUMPHREY* IS NOT CATEGORICALLY A STRIKE UNDER 28 U.S.C. § 1915(g) BECAUSE IT IS NOT A DISMISSAL FOR BEING FRIVOLOUS, MALICIOUS, OR A FAILURE TO STATE A CLAIM.

The PLRA's "three strikes" provision limits the imposition of strikes to three enumerated grounds: dismissal as (1) frivolous, (2) malicious, or (3) for failure to state a claim. 28 U.S.C. § 1915(g). Here, the statutory language and purpose are clear—if a case was not dismissed on one of the specific enumerated grounds, it does not count as a strike under § 1915(g). Therefore, the Fourteenth Circuit properly held that a dismissal under *Heck v. Humphrey* is not a strike.

A. Dismissals Under *Heck* Are Not Strikes Based on the Plain Language of § 1915(g).

In any statutory construction cases, the starting point is the language of the statute, "giving the words used their ordinary meaning." *Artis v. District of Columbia*, 583 U.S. 71, 83 (2018). And where the statutory language "provides a clear answer, it ends there as well." *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 438 (1999). As such, when addressing a prisoner's ability to proceed under in forma pauperis ("IFP") status, the "three-strikes" provision of the Prison Litigation Reform Act provides that:

> 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.

28 U.S.C. § 1915(g) (emphasis added). Thus, a prisoner who has three or more prior dismissals that have been "dismissed on the grounds that it is frivolous, malicious, or fails to state a claim upon which relief may be granted" may be barred from bringing a civil action without first paying the filing fee, despite their ability to pay. *Id.*

Recently, however, courts have erroneously misinterpreted *Heck* and the PLRA, holding that dismissals pursuant to *Heck* categorically constitute a strike under the PLRA. *See, e.g.*, *Hamilton v. Lyons*, 74 F.3d 99, 102 (5th Cir. 1996) ("A § 1983 claim which falls under the rule in *Heck* is legally frivolous."); *Garrett v. Murphy*, 17 F.4th 419, 423 (3d Cir. 2021) ("A suit dismissed under *Heck* is dismissed for failure to state a claim and counts as a strike."). This reading of the statute contradicts the plain and ordinary language of the PLRA. In § 1915(g), it does not mention dismissals under *Heck*.

In *Coleman*, the Court held that a dismissal that fits the statute's terms is to be counted as a strike when entered, whether or not it is appealed. *Coleman v. Tollefson*, 575 U.S. 532, 536-37 (2015). In doing so, this Court repeatedly emphasized that it was interpreting the statute literally, applying its plain language. *Id.* at 537. Thus, consistent with the central interpretive principle of plain meaning, this Court is to interpret the statute according to its plain terms, without embellishment or enhancement. Under a plain reading of the PLRA, there are only three grounds that constitute a strike within the meaning of the statute—if the dismissal was frivolous, malicious, or a dismissal for failure to state a claim upon which relief may be granted. If a case was not dismissed on one of the three specific enumerated grounds, it does not count as a strike under §

1915(g). *Daker v. Comm'r, Ga. Dep't of Corr.*, 820 F.3d 1278, 1283-84 (11th Cir. 2016) ("Three specific grounds render a dismissal a strike: frivolous, malicious, and fails to state a claim upon which relief may be granted. Under the negative-implication canon, these three grounds are the only grounds that can render a dismissal a strike."). Because dismissals under *Heck* are not expressly enumerated in the PLRA, they should be limited to those in the statute. Therefore, the PLRA's "three-strikes" provision does not apply when a case is dismissed under *Heck* because the PLRA's plain language applies only to dismissals on the grounds that the action is frivolous, malicious, or fails to state a claim.

B. Dismissals Under *Heck* Are Not Categorically Strikes Based on the PLRA as a Whole.

When construing the plain text of the statute, the Court does not construe each phrase in insolation, rather the Court reads the statute as a whole, looking at the design of the statute in its entirety and taking into consideration the policy and purpose behind it at the time of enactment, "since the meaning of statutory language, plain or not, depends on context." *King v. St. Vincent's Hosp.*, 502 U.S. 215, 221 (1991); *McCarthy v. Bronson*, 500 U.S. 136, 139 (1991). Moreover, the Court "assum[es] that the ordinary meaning of [the statutory] language accurately expresses the legislative purpose." *Hardt v. Reliance Standard Life Ins. Co.*, 560 U.S. 242, 251 (2010); *see also Nat'l Archives & Records Admin. v. Favish*, 541 U.S. 157, 169 (2004) ("We can assume Congress legislated against [the relevant] background of law, scholarship, and history . . . .").

A reading of *Heck v. Humphrey* distinguishes dismissals under *Heck* from those listed in § 1915(g). In *Heck*, the Court held that a federal court may *not* entertain a prisoner's suit for damages in a § 1983 suit if "a judgment in favor of the plaintiff would necessarily imply the invalidity of his conviction or sentence." *Heck v. Humphrey*, 512 U.S. 477, 487 (1994) (emphasis added). That is, until the conviction or sentence has been terminated in the plaintiff's favor, the § 1983 action

remains "not cognizable" or "unripe" for judicial consideration, and a court must defer its consideration of the merits of the action until the favorable termination threshold is overcome. *Id.* at 489-90; *McDonough v. Smith*, 139 S. Ct. 2149, 2158-59 (2019). Accordingly, district courts must dismiss § 1983 claims brought before a conviction or sentence has been invalidated. *Heck*, 512 U.S. at 489-90. As the Ninth Circuit has recognized, in their nature, "*Heck* dismissals do not reflect a final determination on the underlying merits of the case," but instead "reflect a matter of 'judicial traffic control,' and prevent civil actions from collaterally attacking existing criminal judgments." *Washington v. L.A. Cnty. Sheriff's Dep't*, 833 F.3d 1048, 1056 (9th Cir. 2016).

In contrast, the PLRA came into effect in 1996, Pub. L. No. 104-134, Tit. VIII, § 804, 110 Stat. 1321-73, "in the wake of a sharp rise in prisoner litigation in the federal courts." *Woodford v. Ngo*, 548 U.S. 81, 83 (2006). The purpose of the PLRA "was plainly to curtail what Congress perceived to be inmate abuses of the judicial process . . ." *Ortiz v. McBride*, 380 F.3d 649, 658 (2d Cir. 2004). This broadly conceived purpose was only meant "[t]o help staunch the flood of nonmeritorious prisoner litigation." *Lomax v. Ortiz-Marquez*, 140 S. Ct. 1721, 1723 (2020). As such, Congress carefully enumerated the categories of dismissals that count as strikes. *See Cano v. Taylor*, 739 F.3d 1214, 1219 (9th Cir. 2014). Thus, in light of existing canons of construction, since *Heck* dismissals do not bear on the merits of the underlying claims and dismissal under *Heck* is not a dismissal under an enumerated ground for a strike, they categorically are not strikes under the PLRA.

Moreover, a ruling that all *Heck* dismissals count as a strike would, by judicial decree, add to the statute. Courts presume that Congress knows the law when it enacts a statute. *Miles v. Apex Marine Corp.*, 498 U.S. 19, 32 (1990). The "law" also includes judicial decisions. *Avocados Plus, Inc. v. Veneman*, 370 F.3d 1243, 1249 (D.C. Cir. 2004). The Supreme Court decided *Heck* in 1994,

whereas the three-strikes provision was added to the PLRA in 1996. *See Heck,* 512 U.S. at 477; *see also* 28 U.S.C. § 1915(g). Therefore, this Court should presume that Congress knew of and considered *Heck* while drafting the three-strikes provision and *intentionally* omitted it when drafting § 1915(g). *See Butler v. Dep't of Justice*, 492 F.3d 440, 444 (D.C. Cir. 2007) ("Had Congress wanted to include dismissals for failure to prosecute among the strikes listed in § 1915(g), it could have done so."). Such a ruling would not only give insufficient deference to Congress's intent as expressed in the statutory language, but also would give inadequate deference to district courts in assessing whether a claim is frivolous, malicious, or fails to state a claim. Thus, since the PLRA does not provide that dismissals under *Heck* are to be considered strikes, that result must be obtained, if at all, by amending § 1915(g), and not by judicial interpretation.

1. A *Heck* dismissal is not categorically frivolous or malicious within the meaning of § 1915(g).

Dismissals under *Heck* are not frivolous or malicious and thus not categorically strikes. As the Ninth Circuit explained, "a complaint dismissed under Heck, standing alone, is not a per se 'frivolous' or 'malicious' complaint" under § 1915(g) "because plaintiffs may have meritorious claims that do not accrue until the underlying criminal proceedings have been successfully challenged." *Washington*, 833 F.3d at 1055; see also *Mejia v. Harrington*, 541 F. App'x 709, 710 (7th Cir. 2013) (stating that "*Heck* and *Edward*s deal with timing rather than the merits of litigation" and thus "do not concern the adequacy of the underlying claim for relief."). Thus, a dismissal under *Heck* is not categorically frivolous—that is, having "no basis in law or fact,"—because plaintiffs may have meritorious claims that do not accrue until the underlying criminal proceedings have been successfully challenged.

Nor is a *Heck* dismissal categorically malicious unless "it was filed with intention or desire to harm another." *Andrews v. King*, 398 F.3d 1113, 1121 (9th Cir. 2005). Instead, at best, on its

face, a dismissal under *Heck* tells us only that a "judgment in favor of the plaintiff would necessarily imply the invalidity of his conviction or sentence." *See Heck,* 512 U.S. at 486-87. To hold otherwise would undermine this Court's holding in *Lomax*, that a "strike-call" is determined by the basis of the dismissal as required by § 1915(g). *Lomax*, 140 S. Ct. at 1725. Thus, dismissals under *Heck* are not frivolous or malicious and thus not categorically strikes.

2. A *Heck* dismissal is not categorically a dismissal for failure to state a claim under § 1915(g) because they are fundamentally different.

Likewise, a dismissal under *Heck* is not a dismissal for failure to state a claim and, thus, not a strike under §1915(g). Procedurally, a dismissal under *Heck* differs fundamentally from a dismissal under Rule 12(b)(6). The purpose of a 12(b)(6) motion is to test the sufficiency of the claim which is limited to the content of the complaint. *Lomax,* 140 S. Ct. at 1726 (2020); Fed. R. Civ. P. 12(b)(6); *see also Ashcroft v. Iqbal*, 556 U.S. 662 (2009); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007). This ". . . mirror[s] the language of Federal Rule of Civil Procedure 12(b)(6), not 12(b)(1)." *Thompson v. Drug Enf't Admin.*, 492 F.3d 428, 437 (D.C. Cir. 2007). But when Congress uses the language of one statute in another statute, the courts interpret the language to have the same meaning and boundaries. *Avocados Plus Inc.*, 370 F.3d. at 1249. Thus, this Court can infer that Congress intended the phrase to refer only to the dismissal of meritless prisoner suits based on the insufficiency of the complaint's factual allegations. *See Moore v. Maricopa Cnty. Sheriff's Office*, 657 F.3d 890, 893 (9th Cir. 2011) (holding that jurisdictional dismissals are not strikes and stating "[o]ther than verb tense, that text is identical to the text of [FRCP] 12(b)(6).").

But, as discussed earlier, a *Heck* dismissal does not address the merits of the prisoner's claim that the defendant violated his or her constitutional rights nor does it address the sufficiency of the pleadings. Instead, *Heck* dismissals reflect the fact that the prisoner brought the suit sought prematurely because the cause of action has not accrued yet, because the action was dismissed

based on a finding that "a judgment in favor of the plaintiff would necessarily imply the invalidity of his conviction or sentence . . . and that the conviction or sentence has *not* already been invalidated." *Heck*, 512 U.S. at 487 (emphasis added). Thus, dismissals under *Heck* are more akin to dismissals for lack of subject matter jurisdiction because *Heck* is a matter of "timing," *Mejia*, 541 Fed. App'x at 710, and a form of "judicial traffic control." *Washington*, 833 F.3d at 1056. The crucial difference is that a *Heck* dismissal does not address the plausibility of the underlying factual allegations, whereas a dismissal under failure to state a claim under § 1915(g) does.

3. *Heck* dismissals deal with the timing of the action, rather than the merits of the suit.

A *Heck* dismissal is about the timing of the filing and, thus, does not constitute one of the enumerated dismissals contemplated by § 1915 (g) to receive a strike. "Ripeness is more than a mere procedural question; it is determinative of jurisdiction. If a claim is unripe, federal courts lack subject matter jurisdiction and the complaint must be dismissed." *Bigelow v. Mich, Dep't of Nat. Res.*, 970 F.2d 154, 157 (6th Cir. 1992). "Unripe claims should be dismissed under Rule 12(b)(1), not 12(b)(6)." *Young v. Wells Fargo Bank*, No. EDCV 11-00526 VAP (OPx), U.S. Dist. LEXIS 170074, at *20 (C.D. Cal. Oct. 18, 2011); *see also* Fed. R. Civ. P. 12(b)(1). Under *Heck*, ripeness, is the basis for dismissal. A claim dismissed for lack of jurisdiction "is not a determination of the claim[s merits], but rather a refusal to hear it." *Sewell v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 94 F.3d 1514, 1518 (11th Cir. 1996). This is precisely what occurs in a dismissal under *Heck*. But § 1915(g) does not mention lack of subject-matter jurisdiction or the text of 12(b)(1).

Thus, whether a *Heck* dismissal is unripe or warrants a strike for being frivolous, malicious, or failure to state a claim was implicitly resolved by this Court when it stated,

> [u]nder our analysis the statute of limitations poses no difficulty while the state challenges are being pursued, since the § 1983 claim *has not yet arisen*. Just as a cause of action for malicious prosecution does not accrue until the criminal proceedings have terminated in the plaintiff's favor, so also a § 1983 cause of action for damages attributable to an unconstitutional conviction or sentence *does not accrue* until the conviction or sentence has been invalidated.

Heck, 512 U.S. at 489-90 (emphasis added); *see also Wallace v. Kato*, 549 U.S. 384, 392-93 (2007) (explaining "deferred accrual"). The legal definition of "accrue" means "to come into existence as a legally enforceable claim." *Accrue*, Merriam-Webster Dictionary (11th ed. 2024). Its use in *Heck* signifies that this Court sees such dismissals as merely unripe claims. Therefore, because *Heck* dismissals are more akin to being unripe or having a lack of subject matter jurisdiction and because dismissals under *Heck* are not expressly included in the text of the statute, dismissals under *Heck* are not categorically strikes under § 1915(g).

4. Even if a dismissal under *Heck* could give rise to a PLRA strike, a review of the dismissal is required before giving rise to strike.

Even if a dismissal under *Heck* could give rise to a PLRA strike, it would not permit a strike here. Although the Ninth Circuit, has expressly held that a dismissal may constitute a PLRA strike for failure to state a claim when *Heck*'s bar to relief is obvious from the face of the complaint, and the entirety of the complaint is dismissed for a qualifying reason under the PLRA[,]" *Washington*, 833 F.3d at 833, what constitutes a "strike" is not always easy to ascertain. This Court in *Lomax* held that "[a] strike-call under § 1915(g) . . . hinges *exclusively on the basis for the dismissal*, regardless of the decision's prejudicial effect." *Lomax*, 140 S. Ct. at 1724-25 (emphasis added). "By using the phrase 'was dismissed' in the past tense and the phrase 'on the grounds that,'" the PLRA instructs courts "to identify the reasons that the court gave for dismissing" a prior action. *Daker*, 820 F.3d at 1284. Accordingly, §1915(g) should be given careful application, and strikes should be assessed only for dismissals that clearly fall within an enumerated ground.

Moreover, reviewing any dismissal under *Heck* prior to giving a PLRA strike is consistent with the concern of the Court regarding preventing collateral attacks on criminal convictions or sentences through § 1983 by requiring claimants to wait until they have received favorable termination of those convictions or sentences. *See Heck*, 512 U.S. at 485-86 (This Court's opinion in *Heck* referred to "concerns for finality and consistency [as being grounds for] declin[ing] to expand opportunities for collateral attack"); *see also Smith v. Holtz*, 87 F.3d 108, 113 (3d Cir.1996) ("The express objectives of [*Heck's* holding] were to preserve consistency and finality, and to prevent "a collateral attack on [a] conviction through the vehicle of a civil suit."). It also ensures that pro se litigants are fairly given access to the justice system, because a *Heck* dismissal on its face only communicates that the plaintiff's claim was brought too early, prior to the conviction being terminated, and therefore, cannot establish whether the § 1983 action was frivolous, malicious, or failed to state a claim upon which relief could be granted under § 1983. To hold otherwise would undermine this Court's holding in *Lomax* that a strike is determined by the basis of the dismissal as required by § 1915(g).

Thus, this Court should only apply a strike after the "reviewing court looks to the dismissing court's action and the reasons underlying it. *Knapp v. Hogan*, 738 F.3d 1106, 1109-10 (9th Cir. 2013). This is because while "the procedural mechanism or Rule by which the dismissal is accomplished, while informative, is *not* dispositive. Each dismissal . . . must be assessed independently." *Id.* at 1110 (emphasis added). "[T]he fact that an action was dismissed as frivolous, malicious, or failing to state a claim, and not the case's procedural posture at dismissal, determines whether the dismissal constitutes a strike under section 1915(g)." *Blakley v. Wards*, 738 F.3d 607, 610 (4th Cir. 2013).To do so otherwise is contrary to the true inquiry that the law

requires. Thus, a *Heck* dismissal does not, without more constitute a strike, without evaluating the dismissal on a case-by-case basis.

Additionally, the issue before this Court is not whether any *Heck* dismissal constitutes a strike but whether *every Heck* dismissal warrants a strike. Although some cases dismissed under *Heck* may meet one of the three ways to be considered a strike, every *Heck* dismissal does not warrant a strike. Ruling that any dismissal under *Heck* warrants a strike not only ignores the plain and ordinary meaning of the statute, but it would also neglect the purpose of the PLRA. *Coleman*, 575 U.S. at 533. (The "three strikes" provision was "designed to filter out the bad claims and facilitate consideration of the good."). Therefore, since dismissals under *Heck* are neither expressly included in the text of the statute, dismissals under *Heck* are not categorically strikes under § 1915(g).

C. Favorable termination is Not an Element That a Prisoner Must Allege in His or Her Complaint Under § 1983.

Heck's rule did not make favorable termination an element of a 42 U.S.C. § 1983 claim. *Spencer v. Kemna*, 523 U.S. 1, 20 (1998); 42 U.S.C. § 1983. Rather, as Justice Souter explained, *Heck* had not made favorable termination of criminal proceedings an element of any § 1983 action alleging unconstitutional conviction; rather, *Heck's* rule applied only to prisoners 'in custody' to whom habeas was available because the Court had adopted the *Heck* rule in order to prevent a conflict between the habeas statute and § 1983. *Spencer*, 523 U.S. at 19-20 (Souter, J., concurring); *Heck*, 512 U.S. at 497-98 (Souter, J., concurring in judgment). Additionally, in *Heck*, this Court stated its "teaching that § 1983 contains no exhaustion requirement beyond what Congress has provided." *Heck*, 512 U.S. at 483. This Court stated it was not "engrafting an exhaustion requirement to bring a claim under § 1983," instead it was too early to bring the claim since the plaintiff had not yet received a favorable termination of his conviction or sentence. *Id.* at 489.

Despite the specific requirements laid out in judicial decisions and language of § 1915(g), the Third Circuit erroneously held that a suit barred because of *Heck's* favorable termination requirement fails to state a cause of action under § 1983. *Garrett*, 17 F.4th at 428. The court reasoned that favorable termination is a required element of a 42 U.S.C. § 1983 claims because favorable termination is an element of malicious prosecution that must be proved prior to the criminal proceeding to bring malicious prosecution claim.

Although exhaustion of administrative remedies was a centerpiece of the PLRA, *see* 42 U.S.C. § 1997e, Congress did not add a dismissal on exhaustion grounds as one of the dismissals that should be treated as a strike under §1915(g), *Jones*, 549 U.S. at 213; *Green v. Young*, 454 F.3d 405, 409 (4th Cir. 2006), nor did it add a dismissal for failure to receive a favorable termination as a grounds for a strike. While it is true that favorable termination is an element for malicious prosecution claims, it has not been added as an element for a valid cause of action under 42 U.S.C. § 1983, which means it is not grounds for dismissal and thus not an element for a claim brought under § 1983. Adding this additional requirement is inconsistent with this Court's rulings that it cannot and should not add to qualifications to bring a valid claim. *See Leatherman v. Tarrant Cnty. Narcotics Intel. & Coordination Unit*, 507 U.S. 163 (1993). In *Leatherman*, this Court unanimously reversed a decision that imposed a heightened pleading standard for § 1983 against municipalities. *Id.* at 168. Likewise, this Court reasoned that "if the rules were rewritten today," an additional requirement could be added on, however, this process could only be done by "amending the Federal Rules, and *not by a judicial interpretation of them*." *Jones*, 549 U.S. at 212-13 (emphasis added). Therefore, only Congress, not the judiciary, can impose additional requirements to plead a plausible cause of action under § 1983. Thus, *Heck* has nothing to do with the requirements of a § 1983 claim and everything to do with preventing courts from extending

their jurisdiction on a case and to prevent "a collateral attack on [a] conviction through the vehicle of a civil suit." *Smith*, 87 F.3d at 113.

Instead, *Heck* closely resembles abstention, which is a judge-made vehicle designed to prevent interference with state litigation. *See Washington*, 833 F.3d at 1058 (holding that abstention dismissal is not covered by § 1915(g)). Just as abstention is a federal court's decision to "decline to exercise or postpone the exercise of its jurisdiction," *Allegheny Cnty. v. Frank Mashuda Co.*, 360 U.S. 185, 188 (1959), *Heck* dictates that district courts should decline to exercise their jurisdiction under § 1983 until the prisoner "succeeds in invalidating his conviction." *Heck*, 512 U.S. at 489-90. Given the similarity, it follows that a *Heck* dismissal, like an abstention dismissal, is not for failure to state a claim but rather is similar to a dismissal under Rule 12(b)(1) for lack of subject-matter jurisdiction, which is not a strike under the PLRA. *Thompson*, 492 F.3d at 437; *Dixon v. Hodges*, 887 F.3d 1235, 1237 (11th Cir. 2018) (per curiam). To ignore the similarities between abstention and *Heck* would be flawed. Like abstention doctrines, *Heck* creates a threshold and mandatory question that must be resolved before a plaintiff has access to a federal court. Therefore, *Heck* is not a pleading requirement.

To the extent that *Heck's* favorable termination prerequisite is not a jurisdictional barrier, favorable termination resembles an affirmative defense since it is not an element of a § 1983 claim, that is a § 1983 plaintiff need not plead facts in his compliant demonstrating that his prior conviction has been invalidated. *See* Fed. R. Civ. P. 8(a); *see also Washington*, 833 F.3d at 1056. Thus, under the PLRA, prisoners are not required to plead around affirmative defenses in their complaints. *See Jones*, 549 U.S. at 216; *Schmidt v. Skolas*, 770 F.3d 241, 248-9 (3d Cir. 2014). Instead, favorable termination must be raised by the defendant as an affirmative defense under the PLRA. Thus, the plaintiff has no obligation to negate affirmative defenses to have a valid claim.

See Fed. R. Civ. P. 8(c)(1). Thus, since favorable termination is not an element missing from the claim, similar to the ruling that a dismissal for failure-to-exhaust all administrative remedies does not warrant a strike under the PLRA, neither does favorable termination.

D. *Heck* Dismissals Automatically Constituting a Strike Does Not Fulfill the PLRA's Purpose.

Turning to the "purpose" of the PLRA as a guide for construction, *Dolan v. U.S. Postal Service,* 546 U.S. 481, 486 (2006), a *Heck* dismissal constituting a strike contradicts the PLRA's goal of allowing valid claims to proceed because it is not the conduct targeted by the statute. *Heck* dismissals not categorically being a strike serves the purpose of the PLRA's competing objectives—deterring frivolous lawsuits and encouraging meritorious ones.

1. The PLRA aims to deter frivolous and malicious lawsuits by prisoners while allowing meritorious claims to proceed.

The legislative history of the PLRA demonstrates that Congress enacted it to reduce the amount of prisoner litigation by deterring frivolous and malicious lawsuits brought by prisoners, e.g., suits over 'insufficient storage locker space,' 'a defective haircut,' or 'being served chunky peanut butter instead of the creamy variety[,]'" *Porter v. Nussle,* 534 U.S. 516, 522 (2002), while allowing meritorious litigation to proceed. *Lomax*, 140 S. Ct. at 1723. For instance, "Senator Orrin Hatch, emphasized that he "d[id] not want to prevent inmates from raising legitimate claims" and that the PLRA would not do so." Melissa Benerofe, *Collaterally Attacking the Prison Litigation Reform Act's Application to Meritorious Prisoner Civil Litigation*, 90 Fordham L. Rev. 141, 154 (2021). However, this purpose is served only by applying strikes to claims dismissed for being frivolous and malicious, as well as claims dismissed for failure to state a claim.

2. Applying "strikes" for *Heck* dismissals could inadvertently hinder meritorious claims that have not reached the favorable termination necessary for *Heck*, contradicting the PLRA's goal of allowing valid claims to proceed.

Applying "strikes" for *Heck* dismissals automatically could inadvertently hinder meritorious claims that simply have not reached the favorable termination necessary for *Heck.* This contradicts the PLRA's goal of allowing valid claims to proceed. Consequently, the purpose of the PLRA negates the interpretation that a *Heck* dismissal should constitute a strike. *King v. Burwell*, 576 U.S. 473, 492-493 (2015) (Courts "cannot interpret federal statutes to negate their own stated purposes."). This is because dismissals under *Heck* serve a different purpose: ensuring the finality of judgments and preventing collateral attacks on valid convictions. They do not necessarily reflect the merit of the underlying claims. *See Snider v. Melinzdez*, 199 F.3d 108, 112 (2d Cir. 1999) ("We do not think that Section 1915(g) was meant to impose a strike upon a prisoner who suffers a dismissal because of the prematurity of his suit but then exhausts his administrative remedies and successfully reinstitutes it.").

As such, *Heck* dismissals serve *only temporarily to prevent* courts from addressing the claim, while malicious, frivolous, and incomplete claims do not have this Court's permission to be brought back into court. *Washington*, 833 F.3d at 1058 (emphasis added). The PLRA was "designed to stem the tide of egregiously meritless lawsuits, not those temporarily infected with remediable procedural . . . flaws." *Tafari v. Hues*, 473 F.3d 440, 443 (2d Cir. 2007). While Congress enacted this statute to limit the use of judicial resources being wasted on malicious, frivolous, and incomplete claims, it still provides prisoners the opportunity to bring legitimate claims. However, this does not negate the import of allowing "a civil rights plaintiff to seek to vindicate important civil and constitutional rights." *City of Riverside v. Rivera*, 477 U.S. 561, 574

(1986). Our nation's judicial system "remains committed to guaranteeing that prisoner claims of illegal conduct by their custodians are fairly handled according to the law." *Jones*, 549 U.S. at 203. Thus, applying "strikes" for *Heck* dismissals could inadvertently hinder meritorious claims that simply have not reached the favorable termination necessary for claims dismissed under *Heck* to be heard, contradicting the PLRA's goal of allowing valid claims to proceed.

E. Important Policy Considerations Favor Avoiding "Strikes" for *Heck* Dismissals.

A finding that all *Heck* dismissals constitute a strike could harm the most vulnerable people, creating an additional barrier to justice for prisoners who may face challenges in pursuing legitimate claims. *See Abdul-Akbar v. McKelvie*, 239 F.3d 307, 319 (3d Cir. 2001) (en banc) (Mansmann, J., dissenting) (explaining that the "three strikes" provision "bar[s] the doors of our courts against a disfavored group—indigent prisoners who have resorted unsuccessfully to civil litigation—even with respect to meritorious litigation that may be their sole means of vindicating a fundamental right"). A prisoner's right to access the court includes the ability to bring civil rights actions "concerning violations of fundamental constitutional rights." *Wolf v. McDonnell*, 418 U.S. 539, 579 (1974). As such, the Court has long guarded that access by removing barriers prisoners have faced in reaching the courts, *see Ex parte Hull*, 312 U.S. 546 (1941), while also protecting against financial barriers, because "interpos[ing] any financial consideration between an indigent prisoner of the State and his exercise of a state right to sue for his liberty is to deny that prisoner the equal protection of the laws." *Smith v. Bennett*, 365 U.S. 708, 709 (1961).

Although the three strikes rule does not necessarily block a prisoner's actions to access the courts, it prohibits them from enjoying in forma pauperis status. Thus, erecting a barrier to vindicate fundamental constitutional rights by requiring them to pay upfront all fees associated with filing their claim, while potentially preventing a prisoner from forever obtaining IFP status to

file future constitutional claims in federal court. Thus, as the Founding Fathers recognized every violation of the law is a cause of action, and every person who has been wronged by someone violating the law has a right to bring their claim into the courts. *Marbury v. Madison*, 5 U.S. 137, 163 (1803) ("it is a general and indisputable rule, that where there is a legal right, there is also a legal remedy by suit or action at law, whenever that right is invaded" (quoting Blackstone)). Including *Heck* dismissals in the group that warrants a strike not only ignores the purpose and plain meaning of the PLRA, but it also ignores the principles that both this nation and the courts have fought for over a century to try to protect—the right to obtain justice. Therefore, interpreting the "three strikes" provision expansively to include a *Heck* dismissal threatens indigent prisoners' rights to access the courts and undermines the fundamental principle of access to justice. Thus, an automatic strike for all *Heck* dismissals is overbroad and would deny prisoners meaningful access to the courts.

II. THE OBJECTIVE STANDARD SET FORTH IN *KINGSLEY V. HENDRICKSON* APPLIES TO FOURTEENTH AMENDMENT DELIBERATE INDIFFERENCE FAILURE-TO-PROTECT CLAIMS.

The constitutional rights of pretrial detainees are protected by the Fourteenth Amendment rather than the Eighth Amendment. *Kingsley v. Hendrickson*, 576 U.S. 389, 400-01 (2015). This Court's jurisprudence and decision in *Kingsley* demonstrates that the objective standard applies to pretrial detainee claims. Since *Estelle* and *Farmer*, it has been axiomatic that a prisoner proves an official's "subjective deliberate indifference" to establish a constitutional violation. *See Estelle v. Gamble*, 429 U.S. 97, 104 (1976); *see also Farmer v. Brennan*, 511 U.S. 825, 835 (1994). But in *Kingsley*, this Court held in a 42 U.S.C. § 1983 claim, based on a jail official's misconduct brought under the Fourteenth Amendment's Due Process Clause, "the defendant's state of mind is not a

matter that a [pretrial detainee] is required to prove." *Id.* at 395. Rather, "the appropriate standard for a pretrial detainee's excessive force claim [was] solely an objective one." *Id.* at 397.

Since then, much tension has arisen among the circuit courts on whether the *Kingsley* decision extends to other § 1983 claims brought for a violation of the Due Process Clause. However, the *Kingsley* decision implies that the implementation of this objective standard was not intended to apply only to excessive force claims, but also extends to other claims as well. Failure-to-protect claims fall within this umbrella. Thus, the *Kingsley* objective standard must be applied to failure-to-protect claims. Doing so not only ensures that pretrial detainees' rights are fully protected under the Fourteenth Amendment, but also follows this Court's precedent.

A. Applying The *Kingsley* Objective Standard to Other § 1983 Claims Acknowledges the Difference Between the Fourteenth and Eighth Amendment Protections, Consistent With This Court's Jurisprudence.

"[D]ifferent constitutional provisions, and thus different standards govern depending on the relationship between the state and the person in the state's custody." *Currie v. Chhabra*, 728 F.3d 626, 630 (7th Cir. 2013); *Kingsley*, 576 U.S. at 400. Accordingly, treating those standards without distinction is an error. "The language of the two clauses differs, and the nature of the claims often differs." *Kingsley*, 576 U.S. at 400.

The Eighth Amendment protects prisoners from "cruel and unusual punishments." U.S. Const. amend. VIII. This requires an inquiry into a prison official's state of mind, because the Eighth Amendment bans "cruel and unusual punishment"—punishment imposed maliciously, sadistically, or with deliberate indifference. *Wilson v. Seiter*, 501 U.S. 294, 299-300 (1991). As such, this Court established that officers have a duty to "protect [inmates] from violence at the hands of other prisoners." *Farmer*, 511 U.S. at 833. This right applies with equal force to pretrial detainees under the Due Process Clause of the Fourteenth Amendment, which provides that a state

may not "deprive any person of life, liberty, or property, without due process of law," U.S. Const. amend. XIV. When pretrial detainees challenge their treatment in custody, however, the Eighth Amendment and its textually driven requirements do not apply. Pretrial detainees (unlike convicted prisoners), have not been convicted and therefore cannot be punished at all, much less "maliciously and sadistically." *Id.* at 400. In light of this distinction, this Court confirmed in *Kingsley* that under the Due Process Clause, the appropriate standard for a pretrial detainee's claim is "solely an objective one." *Kingsley*, 576 U.S. at 397.

Consistent with the fact that different statuses of inmates in the prison system receive different constitutional protections, this Court has never applied a subjective test to a case about treatment in pretrial detention. Kate Lambroza, *Pretrial Detainees and the Objective Standard After Kingsley v. Hendrickson*, 58 Am. Crim. L. Rev. 429, 451-52 (2021) (Noting that the Fourteenth Amendment "protects pretrial detainees from all acts intended to punish because pretrial detainees are entitled to the constitutional presumption of innocence."). Instead, the "[protections for pretrial detainees under the Fourteenth Amendment] are at least as great as the Eighth Amendment protections available to a convicted prisoner." *City of Revere v. Mass. Gen. Hosp.* 463 U.S. 239, 244 (1983). This stems from the fact that pretrial detainees' rights are shaped by the Fourteenth Amendment, not by the particular claim the detainee brings. Rather, the scope of the constitutional protection derives from the prisoner's status within the criminal justice system. *Lewis v. Downey*, 581 F.3d 467, 473 (7th Cir. 2009). When compared to convicted prisoners, pretrial detainees stand in a different position: they have not been convicted of anything, and they are still entitled to the constitutional presumption of innocence. *Kemp v. Fulton Cnty.*, 27 F.4th 491, 495 (7th Cir. 2022).

But the reasoning of circuit courts who have erroneously extended *Farmer*'s deliberate indifference standard for convicted prisoners to claims brought by pretrial detainees, fail to recognize the difference between the Eighth and Fourteenth Amendments.[1] Importing the Eighth Amendment standards to pretrial detainees who are protected under the Fourteenth Amendment disregards the fundamental difference that this Court has long acknowledged and improperly narrows the protection to which detainees are entitled; rather than protection from all punishment, it strictly narrows the protection to only cruel and unusual punishment. Thus, applying the *Kingsley* objective standard is proper and necessary in ensuring that pretrial detainees' Fourteenth Amendment Due Process rights are protected. *Short v. Hartman*, 87 F.4th 593, 610 (4th Cir. 2023) ("The only way to respect the distinction *Kingsley* drew between the Eighth and Fourteenth Amendments is to recognize that *Kingsley*'s objective test extends to all pretrial detainee claims under the Fourteenth Amendment claims for deliberate indifference to an excessive risk of harm."). This is because the objective standard is more consistent with the demands of the Fourteenth Amendment and Supreme Court precedent. Any standard other than the objective standard would inhibit the rights of pretrial detainees and fails to acknowledge the difference between the Eighth and Fourteenth Amendment.

[1]As a pretrial detainee, pretrial detainee's claims are governed by the Due Process Clause of the Fourteenth Amendment. However, under Tenth Circuit precedent, the same Eighth Amendment standard governs claims brought by pretrial detainees. *Goss v. Bd. of Ctnt. Comm.*, 645 F. App'x 785, 792 (10th Cir. 2016) ("[T]he protections given to pretrial detainees are the same as those given to prisoners under the Eighth Amendment.").

B. The *Kingsley* Decision Implies That an Objective Standard Must Be Applied to Failure-to-Protect Claims Brought By Pretrial Detainees for Violation of Their Fourteenth Amendment Due Process Rights.

A reading of this Court's decision in *Kingsley* clarifies that the deliberate indifference inquiry in the pretrial detainee context is objective. In *Kingsley,* this Court held that in a Fourteenth Amendment § 1983 claim based on a jail official's excessive force against a pretrial detainee, a pretrial detainee need not prove the defendant-officers subjective intent. *Kingsley,* 576 U.S. at 395-97. Instead, contrary to the subjective prong of *Farmer's* Eighth Amendment analysis, the Court explained that "the defendant's state of mind is not a matter that a [pretrial detainee] is required to prove. *Id.* at 391, 395. The Court explained that "[the *Bell* Court's] focus on 'punishment' does not mean that proof of intent (or motive) to punish is required for a pretrial detainee to prevail on a claim that his due process rights were violated." *Id.* at 398 (citing *Bell v. Wolfish*, 441 U.S. 520 (1979)). Rather, observing that *Bell*, a § 1983 case involving a Due Process claim, employed "[an] objective standard to *evaluate a variety of prison conditions*, including a prison's practice of double-bunking," the Court recognized that the objective standard predates *Kingsley. Id.* at 398 (emphasis added). In applying the objective standard, this Court concluded that the *Bell* Court or its progeny had never "suggest[ed] . . . that its application of *Bell's* objective standard should involve subjective considerations." *Id.* at 399. Thus, this Court's decision in *Kingsley* requires the use of an objective standard for failure-to-protect claims brought by pretrial detainees.

1. The logic in *Kingsley* shows that the objective standard was not intended to apply exclusively to excessive force claims.

While *Kingsley* did not necessarily answer the broader question of whether the objective standard applies to all § 1983 claims brought under the Fourteenth Amendment against individual defendants, its logic and language dictates extending the objective deliberate indifference standard to other failure to protect claims, rather than just excessive force claims. *See, e.g., Hardeman v.*

Curran, 933 F.3d 816, 823 (7th Cir. 2019) (applying the objective standard to condition of confinement claims); *Darnell v. Pineiro*, 849 F.3d 17 (2d Cir. 2017) (same); *Miranda v. County of Lake*, 900 F.3d 335, 352 (7th Cir. 2018) (applying the objective standard to medical care claims); *Gordan v. Cnty. of Orange*, 888 F. 3d 1120, 1124 (9th Cir. 2018) (same); *Castro v. Cnty. Of Los Angeles*, 833 F.3d 1064, 1070 (9th Cir. 2016) (en banc) (applying *Kingsley* to failure-to-protect claims by pretrial detainees). Thus, properly upholding this Court's decision means applying this objective standard to all such claims brought forth by pretrial detainees.

First, the broad terminology in the *Kingsley* decision implicates that the objective standard extends to all § 1983 claims. *Castro*, 833 F.3d at 1070-71. In interpreting *Kingsley*, the Ninth Circuit observed the broad wording of Kingsley, particularly, how this Court "did not limit its holding to 'force' but spoke to 'the challenged governmental action' generally" when determining that pretrial detainees must prove *scienter* objectively. *Id* (quoting *Kingsley*, 135 S. Ct. at 2473). As such, *Kingsley* did not limit its holding to excessive force but spoke to "the challenged governmental action generally." Neither *Kingsley's* logic, nor its language suggest that the objective standard is not exclusive to excessive force claims. Thus, there is no reason to fail to apply the objective standard to failure to protect claims.

However, the Tenth Circuit, like the district court, erroneously declined to extend *Kingsley* to a pretrial detainee's deliberate indifference claim. *See Strain v. Regaldo*, 977 F.3d 984, 991 (10th Cir. 2020). The court relied on precedent specific to excessive force claims under the Eighth Amendment. However, these narrow interpretations of *Kingsley* fail to recognize that an objective standard was used to analyze condition of confinement claims in *Bell*, before either *Farmer* or *Kingsley*. Further, *Strain* precludes the possibility that simply because *Kingsley* did not expressly expand the objective standard, it could have *implied* it. However, such rigid adherence to *Farmer*

is not proper. This is at odds with this Court's precedent, which has never applied the subjective standard to pretrial detainee's claims under the Fourteenth Amendment.[2] Rather, consistent with this Court's jurisprudence, the Seventh Circuit characterized failure-to-protect claims as "a subspecies of a conditions-of-confinement claim." *Jones v. Williams*, No. 18-cv-03686, 2021 U.S. Dist. LEXIS 145363, at *11 (N.D. Ill. Aug. 4, 2021). Consequently, "the medical care a prisoner receives is just as much a 'condition' of his confinement as the food he is fed, the clothes he is issued, the temperature he is subjected to in his cell, and the protection he is afforded against other inmates." *Wilson*, 501 U.S. at 303. Thus, it follows that "the objective standard could not plausibly be limited to excessive force claims because the Fourteenth Amendment guarantees the protections of the objective standard, regardless of the claim pleaded." *Lambroz, supra*, at 443. Thus, if the foundation for which these claims arise are under the Fourteenth Amendment and the standard to which they are applied are uniform, then adopting the objective standard for excessive force claims logically extends to adopting this standard for §1983 claims.

2. Applying the *Kingsley* objective standard to failure-to-protect claims and excessive force claims is proper because they are foundationally the same.

Failure-to-protect claims must be evaluated under the *Kingsley* objective standard. Even if the implementation of the standard slightly differs, it is the proper standard to apply to failure-to-protect claims brought under a § 1983 claims because they are rooted in the same foundational principles as excessive force claims. The Ninth Circuit in applying *Kingsley* to failure-to-protect claims by pretrial detainees compared excessive force and failure-to-protect claims. *Castro,* 833

[2] The Court has only applied the subjective deliberate indifference standard to Eighth Amendment claims. *Estelle*, 429 U.S. at 104-05 (subjective deliberate indifference standard for medical care claims brought by convicted prisoners from the Eighth Amendment's prohibition of "wanton" punishment); *Wilson*, 501 U.S. at 303 (subjective standard applies living conditions claim under the Eighth Amendment).

F.3d. at 1069-70. In looking at excessive force and failure-to-protect claims, the court emphasized that while specific elements necessary for the claims may differ, excessive force claims and failure-to-protect claims exist under the same underlying federal right: the Fourteenth Amendment Due Process Clause, rather than under the Eighth Amendment's Cruel and Unusual Punishment Clause. *Id.* at 1069-70. In addition, the court explained that the "nature of the harm suffered" by the pretrial detainees for excessive claims and failure-to-protect claims are the same. *Id.* Thus, the rudimentary purpose of the two claims is uniform.

While pretrial detainees § 1983 claims for excessive force and failure to protect are foundationally the same, each arises from different causes of action, thus provoking modification of the *Kingsley* objective standard to measure the intentionality and objective unreasonableness of the conduct accurately. More particularly, failure-to-protect claims require a more extensive analysis. The Ninth Circuit observed that within the context of a failure-to-protect claim, the first issue is whether "the officer's inaction with respect to the plaintiff was intentional." *Id.* at 1069 Additionally, for the second issue, "the test to be applied under *Kingsley* must require a pretrial detainee who asserts a due process claim for failure to protect to prove more than negligence but less than subjective intent—something akin to reckless disregard." *Id.* at 1071.

Conversely, the *Kingsley* decision portrayed two state-of-mind issues that the court must consider when examining excessive force claims. *Kingsley*, 576 U.S. at 395. The first issue to be addressed is the "defendant's state of mind with respect to his physical acts." *Id.* at 395. The second issue the court must contemplate is whether the pretrial detainee showed "that the force purposefully or knowingly used against him was objectively unreasonable.'" *Id.* at 396-97. Notably, the second prong was tailored toward excessive force claims. Therefore, even though the

application of the *Kingsley* standard appears different on its' face, it has continued to measure the intentionality of the conduct and the objective unreasonableness of that conduct.

Thus, when two distinct claims arise from the same fundamental harm and purpose, the same standard must be applied to them. If the purpose of a standard is to prevent a violation of a pretrial detainee's Fourteenth Amendment Due Process rights, then the standard must extend to all claims in which the pretrial detainee can experience that harm. A failure to do so undermines the purpose of the standard entirely. Despite the modifications to the *Kingsley* standard, the purpose of determining objective unreasonableness remained consistent.

Indeed, there must be flexibility to modify the standard to the context of the particular claim if doing so fulfills the standard's intended purpose. In light of the special constitutional protections afforded by the Due Process Clause, applying the *Kingsley* objective standard to all individuals seeking to challenge the conditions of their confinement under § 1983 creates uniformity and consistency in Fourteenth Amendment jurisprudence for all pretrial detainees who believe their Fourteenth Amendment Due Process rights have been violated. A consistent legal standard for all pretrial detainees' § 1983 claims promotes the foundation of our judicial system written within the walls of this Court: equal justice under the law. Thus, the same standard should apply if excessive force and failure-to-protect claims have the same consequences. A violation of the Fourteenth Amendment logically requires the same analysis across all contexts of due process, including failure-to-protect claims under §1983.

C. Important Policy Justifications Support the Application of *Kingsley's* Objective Standard to Failure-to-Protect Claims.

Excessive force and failure-to-protect claims implicate the same underlying right to be free from harm while in state custody. An objective standard encourages preventive measures and deters deliberate indifference, while ensuring the interests of pretrial detainees and officers is

balanced. Conversely, holding officials accountable based on an objective standard of reasonableness creates a workable and predictable framework for both detainees and officials. Therefore, the *Kingsley* objective standard should apply to failure-to-protect claims.

1. The *Kingsley* objective standard provides adequate protection to pretrial detainees by holding officers accountable and protecting police officers from purely negligent conduct.

Kingsley reaffirms that "liability for negligently inflicted harm is categorically beneath the threshold of constitutional due process." *Kingsley*, 576 U.S. at 396 (quoting *Cnty. of Sacramento v. Lewis*, 523 U.S. 833, 849 (1998)). The "'mere lack of due care by a state official does not deprive an individual of life, liberty, or property under the Fourteenth Amendment." *Id.* (quoting *Daniels v. Williams*, 474 U.S. 327, 330-31 (1986)). Thus, the plaintiff must "prove more than negligence but less than subjective intent—something akin to reckless disregard." *Castro*, 833 F.3d at 1071. Under the objective standard, it is sufficient that the officer knew of the risk or *should have known*, which is a higher standard than negligence. *Darnell*, 849 F.3d at 35. As such, there is an unfounded fear that *Kingsley*'s objective standard purports to "tortify the Fourteenth Amendment." *Kingsley*, 576 U.S. at 408 (Scalia, J., dissenting). But the objective standard has been applied by multiple courts and "tortification" of the Fourteenth Amendment has not been realized. An objective standard ensures a baseline level of protection regardless of an individual officer's subjective awareness. Ensuring the reasonable safety of pretrial detainees, who have not been convicted of any crime, but who are exposed to danger as an incident of their incarceration: because "when the State takes a person into its custody and holds him there against his will, the Constitution imposes upon it a corresponding duty to assume some responsibility for his safety and general well-being." *Deshaney v. Winnebago Cnty. Dep't of Soc. Servs.*, 489 U.S. 189, 199-200 (1989).

Consequently, this Court should recognize that to hold otherwise would be axiomatic to the protections offered to whom have not yet been convicted. *See* Sharon Dolovich, *Cruelty, Prison Conditions, and The Eighth Amendment,* 84 N.Y.U.L. Rev. 881, 892 (2009) (The recklessness standard from *Farmer* was problematic because "[i]t holds officers liable only for those risks they happen to notice—thereby creat[ing] incentives for officers not to notice—despite the fact that when prison officials do not pay attention, prisoners may be exposed to the worst forms of suffering and abuse."). While *Farmer* pertained to the Eighth Amendment, continuing to apply the same standard to the Fourteenth Amendment would invoke the same response. Further, "[i]ncarcerated people have a clearly established right to be free from physical harm inflicted by others in the institution," and under § 1983 they may sue jail or prison staff who fail to protect them. *Kemp*, 27 F.4th at 494.

A standard that encourages intentional ignorance of a pretrial detainee's condition would be detrimental. A standard as such would directly conflict with this Court's prior stance in *County of Sacramento v. Lewis.* This Court stated that "[a] forethought about an inmate's welfare is not only feasible but obligatory under a regime that incapacitates a prisoner to exercise ordinary responsibility for his own welfare." *Cnty. of Sacramento,* 523 U.S. at 851. This Court further reasoned that "a deliberate indifference standard does not adequately capture the importance of such competing obligations, or convey the appropriate hesitancy to critique in hindsight decisions necessary made in haste, under pressure, and frequently without the luxury of a second chance." *Lewis*, 523 U.S. at 852 (quoting *Whitley v. Albers*, 475 U.S. 312, 320 (1986)). While it is essential that an inmate's welfare be prioritized, it is even more essential that a pretrial detainee's welfare be prioritized. Therefore, if the subjective deliberate indifference test fails to protect inmates adequately and cultivates neglect, then this test should not be applied to pretrial detainees.

Likewise, "[t]he framework for the objective standard…protects officials from liability for negligence even in the more difficult failure-to-protect context." *Lambroz*, *supra*, at 443. From this, officers are "shielded from liability for negligence, [because the objective standard] also considers legitimate interests in managing a jail." *Bell*, 441 U.S. at 547. Unlike the deliberate indifference standard, the *Kingsley* objective standard fosters officers to be attentive, as they know that by doing their job, the law is also protecting them and their judgment. Thus, the *Kingsley* objective standard protects officers, which encourages an environment that will protect pretrial detainees' rights under the Fourteenth Amendment Due Process Clause.

2. *Kingsley* and its progeny are consistent with this Court's jurisprudence across a variety of contexts.

Further consistency with this Court's precedent across a variety of contexts support applying the *Kingsley* objective standard to other pretrial detainee claims. The Due Process Clause is violated whenever the government takes a person's "life, liberty, or property without due process of law," regardless of the subjective intent of the officials responsible for the deprivation. U.S. Const. amend. XIV. For example, the Court has applied an objective standard to determine whether a sanction was punitive, and therefore required due process protections. *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963). Similarly, the Court held that a state "justice's denial of [a] recusal motion and his subsequent judicial participation violated the Due Process Clause of the Fourteenth Amendment." *Williams v. Pennsylvania*, 579 U.S. 1, 4, 8 (2016). The Court applied an "objective standard" that "avoids having to determine whether actual bias is present." *Id.* Most similarly, this Court has applied the objective standard in Fourth Amendment excessive-force cases. *Graham v. Connor*, 490 U.S. 386, 397 (1989). Thus, this Court's existing precedent supports an objective standard in a variety of contexts.

3. The *Kingsley* objective standard is workable.

Beyond consistency with other decisions, a relevant factor that offers special justification for applying the objective standard to failure-to-protect claims is the workability of the rule. *Kingsley*, 576 U.S. at 398-401. Judicially created rules should be useful, practically applicable, consistent, and clear. *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2272 (2022). The *Kingsley* objective standard is often criticized as unworkable; however, *Kingsley* is more workable than the subjective standard. *Westmoreland v. Butler Cnty.*, 29 F.4th 721, 728 (6th Cir. 2022) (Most Circuit Courts have agreed with *Kingsley* that "applying the same [subjective] analysis to these constitutionally distinct groups is no longer tenable."). Additionally, this Court has already determined that *Kingsley's* objective standard is workable, many facilities "train officers to interact with all detainees as if the officers' conduct is subject to an objective reasonableness standard." *Kingsley*, 576 U.S. at 399.

Additionally, the subjective standard's inconsistency with the Due Process Clause suggests that the objective standard should extend to other § 1983 claims brought by pretrial detainees. A subjective approach requires courts to continually question the state of mind of each defendant, but a subjective test is inconsistent with the constitution because "[b]y its terms, the Due Process Clause focuses on the nature of deprivations, not on the persons inflicting them." *Bell*, 441 U.S. at 567 (Marshall, J., dissenting). In contrast, *Kingsley*'s objective standard focuses on the conditions actually experienced.

Additionally, as Justice White acknowledged, a subjective intent is inconsistent with due process "because conditions [endured] are often the result of cumulative actions and inactions by . . . officials." *Wilson*, 501 U.S. at 310 (White, J., concurring in the judgement). Similarly, Justice Stevens explained that the Court has long taken the view that "evenhanded law enforcement is best

achieved by the application of objective standards of conduct, rather than standards that depend upon the subjective state of mind of the officer." *Horton v. California*, 496 U.S. 128, 138 (1990).

Moreover, the objective standard provides a variety of factors that help guide courts in analyzing cases against police and avoids the difficulties of proof that often accompany the subjective standard. Instead, the objective standard protects officers who act in good faith and takes into account the "legitimate interests in managing a jail, acknowledging as part of the objective reasonableness analysis that deference to policies and practices needed to maintain order and institutional security is appropriate." *Kingsley*, 576 U.S. at 399-401. While also acknowledging that officials should not avoid liability by pointing to a nonpunitive government purpose, the Second Circuit acknowledged a due process violation can occur without meting any punishment and can occur with omissions that have subjected a pretrial detainee to a substantial risk of harm. *Darnell*, 849 F.3d at 35.

Thus, the objective standard is not only proper for failure-to-protect claims, but its workability extends to create uniformity, uphold constitutional protections, and safeguard police officers and inmates alike. For a standard that has continually proven to be just and consistent, applying the subjective deliberate indifference standard would be unjustifiable.

CONCLUSION

According to the plain meaning and purpose of § 1915(g), a *Heck* dismissal does not categorically warrant a strike. Moreover, the *Kingsley* objective standard properly extends to failure-to-protect claims as it instills the greater protections of the Fourteenth Amendment's Due Process Clause guaranteed to pretrial detainees. When the opportunity is presented to maintain the integrity of the judicial and criminal justice systems, the reflexive reaction is to capitalize on the opportunity. Thus, if an individual is truly innocent before proven guilty, they must have the right

to bring forth their claims and receive the adequate protection they are guaranteed under the Due Process Clause. Therefore, Respondent respectfully requests that the judgment of the Fourteenth Circuit Court of Appeals be affirmed.