No. 23-317

In The
Supreme Court of the United States

OTIS CRANDEL, AS DEPENDENT ADMINISTRATOR OF, AND ON BEHALF OF BILLY WAYNE WORL, JR., EMILY GARCIA, JAMES MATTHEW GARCIA, AND JARED ANDREW GARCIA, individually, THE ESTATE OF BRENDA KAYE WORL, and BRENDA KAY WORL'S HEIRS-AT-LAW; BILLY WAYNE WORL, JR., individually,

Petitioners,

v.

VEGAS HASTINGS AND DANIEL PIPER,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF IN OPPOSITION

JON MARK HOGG
Counsel of Record
JON MARK HOGG PLLC
421 W. Concho Avenue
San Angelo, Texas 76903
(325) 777-0455
jmh@jmhogglaw.com

Counsel for Respondents Vegas Hastings and Daniel Piper

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

QUESTION PRESENTED

Whether the Court's holding in *Kingsley v. Hendrickson*, 576 U.S. 389 (2015), that a pre-trial detainee's excessive force claim need only show that the force applied was objectively unreasonable should be extended to claims for failure to protect a pre-trial detainee from suicide.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

INTRODUCTION

Hastings and Piper were police officers in the City of Clyde, Texas. They arrested and transported Brenda Worl to the Callahan County Jail. Shortly after arriving at the jail and before the book in process was completed, Mrs. Worl strangled herself on a phone cord in the visitation room where she had been temporarily placed by the county jailer.

The ultimate issue in this case is whether there was more than a scintilla of summary judgment evidence that Hastings and Piper knew Brenda Worl was a substantial risk for suicide. Both the trial and appeals courts agreed that Petitioners failed to meet their burden and held that Hastings and Piper were entitled to qualified immunity.[1]

Petitioners now invite the Court to grant certiorari to hold that a plaintiff is not required to prove that the jailers and police officers knew she was a substantial suicide risk. They contend they should only have to prove that a reasonable officer "should have known" she was a suicide risk.

There are five reasons why the Court should decline this invitation: (1) this Court should first address, in an appropriate case, whether a pre-trial detainee has a separate constitutional right to be protected from suicide; (2) there is no circuit split on the standard for deliberate indifference in a failure to protect from

---

[1] The *Monell* claim against Hastings and Piper's employer, the City of Clyde remain pending in the trial court.

suicide case; (3) this case is not a proper vehicle to address any circuit split that may exist; (4) the court below reached the correct result because the subjective deliberate indifference standard is appropriate in failure to protect from suicide cases; and (5) an objective test will not change the outcome of this case.

STATEMENT

1. Factual Background.

Officers Vegas Hastings and Daniel Piper of the City of Clyde Police Department were dispatched to a domestic disturbance at the home of Billy and Brenda Worl at 10:13 p.m. on April 2, 2019. Pet. App. 4a. Upon arrival Piper observed that Brenda Worl was under the influence of alcohol. ROA 473. Worl told Piper, "I can't leave I've been drinking." ROA 473. She stated that she drank two boxes of wine. ROA 446. She appeared to be frustrated but not belligerent. ROA 447. She reported that Mr. Worl had thrown her from one end of the trailer to the other. ROA 473. Piper saw no signs of injury on Brenda. ROA 473.

Billy Worl reported to the officers that he had pushed Brenda off his banjo to prevent her from breaking it. ROA 473. Brenda then slapped him in the face, and he slapped her back. ROA 473. Brenda tried kicking him in "the nuts" but he was able to block it. ROA 473. Billy Worl said that was when Brenda called the police. ROA 473.

The Petition claims that Billy Worl told Hastings and Piper that Brenda had a history of mental health issues. Pet. 9. That is incorrect. The undisputed summary judgment video evidence was that Officer Piper asked Billy Worl if Brenda had ever had any mental illness during the four years they had been together. ROA 484.[2] Worl answered "no." ROA 484.[3] Piper then asked if Brenda ever had any mental disability "like bipolar" and he answered, "in the past." ROA 484.[4] After further investigation and interviews, the officers decided to arrest Brenda Worl for Class C assault and take her to the Callahan County Jail. ROA 473.

Worl expressed gratitude to the Officers for taking her to jail. When she arrived at the jail she said, "I am happy to be here." ROA 484.[5] She also told Hastings, "thank you" at the jail, and "you got me out of a sit[ua]tion." ROA 484.[6]

At the county jail, Brenda Worl began arguing with the jailers during the book in process. ROA 474. She became frustrated and irritated when jail staff started asking her questions. ROA 452. Brenda Worl would not answer the jailer's book in questions. ROA 474. Hastings and Piper tried to tell Worl that if she didn't answer the questions, she would have to remain in the jail until the jailers could complete the book in

---

[2] MSJ Appx., Tab 2 Video at 4: 50.

[3] Id., at 4:57.

[4] Id., at 4:58-5:03.

[5] MSJ Appx., Tab 11 Video at 8:48-8:50.

[6] Id., at 9:05-9:11.

process. ROA 474. Worl continued to argue that the jail did not need her information, and she was not going to comply. ROA 474. The jailer told Worl that if she did not comply with answering the medical questions she would be placed in a holding cell. ROA 474. Worl said she would not answer the questions. ROA 474.

Jailer McGowen escorted Worl to a holding cell, which was the jail visitation room, and placed her inside. ROA 474. Before placing Worl in the room, McGowen asked Mrs. Worl if she had ever attempted suicide. Pet. App. 5a. Worl presented her bare arms and said, "I don't know, have I?" Pet. App. 5a. Hastings was present and did not see any scars or other indications of injury on Worl's arms. ROA 469-470.

Several minutes later Jailer Hall went to check on Worl and she appeared fine. ROA 397, 427. McGowen went to check on Worl a second time some minutes later. ROA 469-470. She observed Worl sitting down but could not see what she was doing. ROA 469-470. McGowen went back to the dispatch room to get the key and reported that she couldn't see what Worl was doing. ROA 469-470. McGowen and Hastings returned to the visitation room to check on Worl. ROA 469-470. When McGowen opened the door, they discovered Worl sitting on the ground with the phone cord from one of the visitation phones wrapped around her neck. ROA 469-470. McGowen told Hastings to call EMS. ROA 469-470. Hastings went back to the dispatch office, told Officer Piper and Jailer Hall what had happened, and to call EMS. ROA 469-470. Hastings ran back to the room and started CPR. ROA 469-470. Hastings and

Piper continued to perform CPR on Worl until EMS arrived and took over. ROA 469-470. Worl was taken to the hospital but died the next day Pet. App. 6a.

2. Procedural History and Decision Below

Petitioners filed a civil action in the U.S. District Court for the Northern District of Texas against Callahan County Texas, County Jailers Hall and McGowen, the City of Clyde, Texas and City of Clyde Police Officers Hastings and Piper for failing to protect Brenda Worl from suicide. Pet. App. 6a. The individual Defendants filed Motions for Summary Judgment based on qualified immunity. Pet. App. 47a, 57a. Pet. App. 7a. Petitioners appealed to the Fifth Circuit Court of Appeals which consolidated the two appeals and affirmed the judgment of the trial court. Pet. App. 25a. Petitioners timely filed their Petition for Writ of Certiorari to this Court, joining with this case another unrelated jail suicide case from the Fifth Circuit, *Edmiston v. Borrego*, 75 F. 4th 551 (5th Cir. 2023). Pet. App. 26a.[7]

In the decision below, the Court of Appeals held that Petitioners, "fail to show genuine disputes of material fact regarding defendants' subjective knowledge of Worl's substantial risk of suicide," and "defendants are entitled to qualified immunity on the failure-to-protect claim." Pet. App. 8a.

---

[7] While the opinion in *Edmiston* was handed down the same day, it is important to point out that *Crandel* was decided on Motions for Summary Judgment, while Edmiston was a Motion to Dismiss under Fed. R. Civ. P. 12(b)(6).

Addressing Petitioners' assertion that "the objective-unreasonableness standard the Court adopted in *Kingsley v. Hendrickson for claims of excessive force (not failure to protect)* by officers against a pre-trial detainee" should apply, the Court of Appeals, noting the Circuit's precedent required a subjective deliberate indifference standard, held that it was bound under its rule of orderliness that one panel of the court may not overturn another panel's decision, absent an intervening change in the law, such as by statutory amendment, or the Supreme Court, or the court en banc." Pet. App. 11a (italics in original). The Fifth Circuit decided the case on the first prong of the qualified immunity analysis, whether there had been a violation of a constitutional right, and did not reach the second prong, as to whether the right was clearly established. Pet. App. 12a.

As to Hastings and Piper, the Court of Appeals held, "The summary-judgment record does not show a genuine dispute of material fact that either Officer perceived a substantial risk of suicide." Pet. App. 19a. The opinion goes on to say, "Although our court has acknowledged there is no constitutional right to screening, even if Worl's refusal to cooperate should have alerted the Officers to a substantial risk of suicide, the summary judgment record does not create a genuine dispute of material fact they perceived that risk. Absent evidence that the Officers formed the opinion that Worl was at a risk for suicide, knowledge that she was not screened does not establish a genuine dispute of material fact for the Officers' subjective knowledge

regarding Worl's risk of suicide. Pet. App. 20a (citations omitted).

REASONS TO DENY THE PETITION

1. The Court should first address, in an appropriate case, whether a pre-trial detainee has a separate constitutional right to be protected from suicide.

There are two types of potential pre-trial detainee claims that involve suicide or attempted suicide. First is suicide or attempted suicide that results from a failure to provide medical care. The Court has recognized the right of pre-trial detainees to be provided medical care. *Revere v. Massachusetts General Hospital*, 463 U.S. 239, 244 (1983) (citing *Bell v. Wolfish*, 441 U.S. 520, 534 (1979)). Quite often suicide cases arise from a failure to provide medical care. *See Short v. Hartman*, 2023 U.S. App. LEXIS 32521 (4th Cir. 2023).

But not all pre-trial detainee suicides result from a failure to provide medical care. In this case, for example, there was no evidence or indication that Brenda Worl needed medical care. In other words, the detainee may have been provided proper medical care, or, as in this case, there was no indication of a need for medical care before the suicide took place. Such claims are treated as a failure to protect from a known risk of suicide. *See Hare v. City of Corinth* (*Hare II*), 74 F. 3d 633, 644 (5th Cir. 1996).

The Court has recognized the constitutional right of a post-conviction inmate under the Eighth Amendment to be protected from the violence of other inmates. *See Farmer v. Brennan*, 511 U.S. 825, 833 (1994). The Court does not seem to have addressed whether the right to be protected is the same for pre-trial detainees, although the circuit courts have operated as if it does. *See Castro v. County of Los Angeles*, 833 F. 3d 1060 (9th Cir. 2016). As far as counsel can determine, the Court has never addressed whether a pre-trial detainee has a constitutional right to be protected from a known risk of suicide, even though circuit courts have.

The Petition asks the Court to change the Fifth Circuit's standard for failure to protect from a known risk of suicide claim without the Court having first addressed whether such a right exists. This approach to the problem is wrong.

The Court should not step into this debate until it first has the opportunity, in a case where the issue is clearly presented, to address whether such a constitutional right exists, and then establish the appropriate scope, parameters and standards for the lower courts to apply. This case is not a proper vehicle for that sort of a decision.

The only issue presented in this case is the application of the Court's decision in *Kingsley* to a failure to protect a pre-trial detainee from a known risk of suicide claim. *Kingsley* addressed an excessive force claim brought by a pre-trial detainee under the Fourteenth

Amendment. 576 U.S. at 391.[8] The Court observed that excessive force cases involve "two separate state-of-mind questions. The first concerns the defendant's state of mind with respect to his physical acts—i.e., his state of mind with respect to the bringing about of certain physical consequences in the world. The second question concerns the defendant's state of mind with respect to whether his use of force was 'excessive.'" *Id*., at 395. The Court did not address the first question because it was undisputed that the officers had deliberately used force against the detainee. *Id*., at 396. As to the second question, the Court held that a detainee must show that the force applied was objectively unreasonable. *Id*., at 396-97.

In support of its holding, the Court analogized Due Process Clause-based excessive force cases to general conditions of confinement cases, under which courts employ an objective standard to evaluate whether conditions for pre-trial detainees are "'rationally related to a legitimate nonpunitive governmental purpose'" or "'appear excessive in relation to that purpose.'" *Id.*, at 398 (quoting *Bell*, 441 U.S. at 561).

The Court explained that an objective standard regarding the reasonableness of the application of force was suitable in excessive force cases brought by a person who has been accused, but not convicted, of a crime,

---

[8] One important aspect of *Kingsley* that is often overlooked is that it can be read as doing nothing more than creating a consistent standard for excessive force used pre-trial against suspects, arrestees, and detainees no matter whether the right asserted is under the Fourth or Fourteenth Amendment.

because officers in such cases must already be shown to have engaged in an "intentional and knowing act." *Id.*, at 400. In other words, where subjective intent is already effectively part of the analysis, an objective standard for the level of force applied is appropriate. *Id.* The Court did not, however, purport to change the fundamental proposition that "liability for negligently inflicted harm is categorically beneath the threshold of constitutional due process." *Id*., at 396.

Excessive force is a long recognized constitutional right that has its origin in the text of the Fourth Amendment and this Court's decisions. A constitutional right to be protected from suicide has no textual basis in the Constitution, rises out of substantive due process and is much more recent in origin. For example, it was not recognized in the Fifth Circuit until the 1980s and finally articulated in 1996. *See Hare II*, 74 F. 3d 633. The Court has never directly addressed the question. The closest it came was when it held there was no clearly established right to suicide prevention screenings or protocols in *Taylor v. Barkes*, 575 U.S. 822 (2015) (per curiam).

In *Taylor* an old suicide screening form was used, and the inmate was neither classified as suicidal nor were any suicide prevention measures taken. *Id*., at 823. The inmate Barkes hanged himself with a sheet. *Id*. The Third Circuit held that the law was clearly established at the time of Barkes death that an incarcerated individual had an Eighth Amendment right to the proper implementation of adequate suicide prevention protocols. *Id*., at 824. This Court granted certiorari and

reversed because there was no violation of clearly established law. *Id*. In reversing, the Court stated, "No decision of this Court establishes a right to the proper implementation of adequate suicide prevention protocols. No decision of this Court even discusses suicide screening or prevention protocols." *Id*., at 825. Additionally, the Court found that circuit court precedent did not establish that a "robust consensus of cases" of persuasive authority exists that such a right was clearly established. *Id*.

The Fifth Circuit recognizes a pre-trial detainee's constitutional right to be protected from a known risk of suicide. *Converse v. City of Kemah*, 961 F. 3d 771, 774 (5th Cir. 2020) (citations omitted). Here the Court is asked to step in and expand that right from being protected from a "known" risk to being protected from a risk the jailers and officers "should have known." Altering the standard of a right by the Court without first addressing the more fundamental issue of whether that right exists will not lead to greater clarity in this area of law. It will only make it more confusing and disjointed.

Additionally, because the Court in *Kingsley* did not purport to change the rule that more than mere negligence is required for a pre-trial detainee to make out a claim of a Fourteenth Amendment violation, it follows that, in the context of the claim at issue in this case, there is no basis to simply step in and pronounce an "objective" standard.

To make out a Fourteenth Amendment claim under Fifth Circuit precedent, a plaintiff must show that an officer had subjective awareness of the risk of suicide and was deliberately indifferent to that risk of harm. Cutting and pasting a new "objective" standard in this context—where there is no preliminary requirement that a detainee show that an officer engaged in an "intentional and knowing act," as there is in the excessive force context, not only would be recognizing a new constitutional right by this Court, it also would erode the deliberate indifference requirement and the distinction between constitutional claims under 42 U.S.C. § 1983 and mere negligence claims. *See Daniels v. Williams*, 474 U.S. 327, 332 (1986) (noting that the Fourteenth Amendment is "not a font of tort law to be superimposed" on state systems and that its protections "are not triggered by lack of due care by prison officials"). This case does not present the Court with an opportunity to address these fundamental issues and it should deny the Petition.

2. There is no circuit split.

Although broadly stated in the Petition, the question presented is really a very narrow one. That question is: should the objective standard for Fourteenth Amendment excessive force cases set out in *Kingsley v. Hendrickson* apply to a claim for failure to protect a pre-trial detainee from suicide? In other words, can a law enforcement officer or jailer be liable for failing to prevent a detainee's suicide when they did not have

actual knowledge the detainee was a substantial suicide risk?

But the Petition suffers from a fundamental problem. There is no split among the circuits on this issue. Alternatively, any disagreement that may exist is not of such weight or importance and has not been sufficiently examined in the lower courts to warrant review.

Since *Kingsley*, four circuits have limited *Kingsley's* application to excessive force cases. *See Alderson v. Concordia Parish Corr. Facility*, 848 F. 3d 415, 419 n. 4 (5th Cir. 2017) per curiam; *Cope v. Cogdill*, 3 F. 4th 198, 205 n. 4 (5th Cir. 2021), cert. denied, ___ U.S. ___, 142 S.Ct. 2573 (2022); *Whitney v. City of St. Louis*, 887 F. 3d 857, 860 n. 4 (8th Cir. 2018); *Strain v. Regalado*, 977 F. 3d 984, 990-93 n. 4 (10th Cir. 2020), cert. denied, ___ U.S. ___, 142 S.Ct. 312 (2021); *Nam Dang v. Sheriff, Seminole Cnty*. 871 F. 3d 1272, 1279 n. 2 (11th Cir. 2017).

The Ninth Circuit, on the other hand, was the first to apply *Kingsley's* objective standard beyond excessive force claims, in the context of a failure to protect Castro from the violence of a fellow detainee. *Castro v. County of Los Angeles*, 833 F. 3d 1060 (9th Cir. 2016).

Castro was arrested for public drunkenness. *Id*. The officers took him to the police station and placed him in the station's "sobering cell." *Id*. Several hours later officers arrested Gonzalez who was charged with a violent felony for shattering a glass door at a nightclub with his fist. *Id*. He was described by officers as acting "bizarre" and "combative." *Id*. He was placed in

the same sobering cell as Castro. *Id*. There Gonzalez severely beat Castro, and jail staff did not timely respond to Castro's call for help. *Id*., at 1065. Upon entering the cell, officers found Gonzalez stomping on Castro's head where he lay unconscious in a pool of blood. *Id.* Castro's injuries resulted in severe memory loss and other cognitive difficulties. *Id*.

The jury returned a verdict in favor of Castro. *Id*. Defendants appealed. *Id*. A three-judge panel affirmed the judgment as to the individual Defendants but reversed as to the entity Defendants. *Id*., citing *Castro v. County of Los Angeles*, 797 F. 3d 654 (9th Cir. 2015). The full Court voted to rehear the case en banc. *Id*.

The Ninth Circuit, sitting en banc, first addressed the individual officer's qualified immunity defense. *Id*., at 1066. The Court found sufficient evidence that the officers knew that placing Gonzalez in the sobering cell with Castro could lead to serious violence against Castro and the right to be protected from inmate violence was clearly established. *Id.*, at 1067 The individual officers were not entitled to qualified immunity. *Id*.

The Ninth Circuit could have stopped there, but it went on to consider the proper standard for deliberate indifference in light of the Court's decision in *Kingsley*. *Id*.[9]

The majority opinion stated the Supreme Court's holding in *Kingsley* cast its previous case law requiring

[9] Judge Watford joined the majority opinion, but dissented from section A.2, the discussion of deliberate indifference.

a subjective standard into "serious doubt." *Id*., at 1068. Acknowledging that *Kingsley* did not squarely address whether the objective standard applies to all kinds of claims by pre-trial detainees, it still overruled its own precedent "to the extent that it identified a single deliberate indifference standard for all § 1983 claims and to the extent it required a plaintiff to prove an individual defendant's subjective intent to punish in the context of a pre-trial detainee's failure to protect claim." *Id.*, at 1070. The Ninth Circuit then held that the objective standard in *Kingsley* applied to "failure to protect claims as well." *Id*., at 1070.

The opinion goes on to state, "Because of the differences between failure to protect claims and claims of excessive force, though, *Kingsley's* holding to failure to protect claims requires further analysis." *Id*. The decision reasoned that this new standard must require something "more than negligence but less than subjective intent—something akin to reckless disregard." *Id.* Therefore, it stated, the elements of a pre-trial detainee's Fourteenth Amendment due process claim are: "(1) The defendant made an intentional decision with respect to the conditions under which the plaintiff was confined; (2) those conditions put the plaintiff at substantial risk of suffering serious harm; (3) the defendant did not take reasonable available measures to abate that risk even though a reasonable officer in the circumstances would have appreciated the high degree of risk involved—making the consequences of the defendant's conduct obvious; and (4) by not taking such measures, the defendant caused the plaintiff's

injuries." *Id*., at 1071. Judges Ikuta, Callahan and Bea dissented. Judge Ikuta wrote a separate dissenting opinion regarding the majority's misinterpretation of *Kingsley*.

The Second Circuit followed the Ninth's lead in *Darnell v. Pineiro*, 849 F. 3d 17 (2d Cir. 2017). *Darnell* was a conditions-of-confinement case regarding detainees being held pre-arraignment in appalling conditions. *Id*., at 20. These conditions were open and obvious conditions such as overcrowding, unusable toilets, garbage and inadequate sanitation, infestation, lack of toiletries and other hygienic items, inadequate nutrition, sleep deprivation, crime and intimidation. *Id*., at 23-25.

The Second Circuit held that *Kingsley* overruled its prior decisions, "to the extent it determined that the standard for deliberate indifference is the same under the Fourteenth as it is under the Eighth Amendment." *Id.*, at 34. The court went on to state that since an officer's appreciation of his application of excessive force against a pre-trial detainee should be viewed objectively, "The same objective analysis should apply to an officer's appreciation of the risks associated with an unlawful condition of confinement in a claim for deliberate indifference under the Fourteenth Amendment." *Id*., at 35.

Therefore, to establish a claim for deliberate indifference to conditions of confinement under the Due Process Clause of the Fourteenth Amendment, the pretrial detainee must prove that the defendant-official

acted intentionally to impose the alleged condition, or recklessly failed to act with reasonable care to mitigate the risk that the condition posed to the pre-trial detainee even though the defendant-official knew, or should have known, that the condition posed an excessive risk to health or safety. In other words, the "subjective prong (or "mens rea prong") of a deliberate indifference claim is defined objectively." *Id*., at 35.

Next came the Seventh Circuit in *Miranda v. County of Lake*, 900 F. 3d 335 (7th Cir. 2018). *Miranda* was about a pre-trial detainee who was not eating or drinking and had been diagnosed with an unspecified psychotic disorder that prevented her from understanding the importance of eating and drinking. She was moved to the medical pod and placed on a hunger strike protocol. *Id*., at 341. Ultimately, she was taken to the hospital too late where she died of starvation and dehydration. Her manner of death was listed as a suicide although it was contested whether it was a suicide or whether her psychosis prevented her from realizing the importance of eating and drinking. *Id*., at 349. The court of appeals held that *Kingsley's* objective standard applied to all pre-trial detainee deliberate indifference cases and not just excessive force cases. *Id*., at 352

The Sixth Circuit addressed *Kingsley* in *Brawner v. Scott County*, 14 F. 4th 585 (6th Cir. 2021). *Brawner* was a *Monell* liability case about whether the seizures Brawner suffered were the result of the County's unconstitutional policies or practices related to the failure to provide Brawner prescription medications. Brawner

argued that *Kingsley* eliminated the subjective element of a pre-trial detainee's deliberate indifference claims. *Id*., at 591. The Sixth Circuit panel divided on this issue 2-1.

The majority agreed with the other circuits that held *Kingsley* required modification of the deliberate indifference test for pre-trial detainees. *Id*., at 596. It went on to adopt a reckless standard as the Ninth Circuit did in *Castro*. *Id*. Judge Readler concurred in part and dissented in part because he did not believe that *Kingsley* abrogated the subjective standard for deliberate indifference claims brought by pre-trial detainees.

The most recent circuit to apply *Kingsley* outside of the excessive force context, and the only one to do so in the context of a jail suicide, is the Fourth Circuit. *Short v. Hartman*, 2023 U.S. App. LEXIS 32521 (4th Cir. 2023). *Short* was not a failure to protect from suicide case, but a claim for failure to provide medical care.

Mrs. Short attempted suicide in jail and died of her injuries two weeks later. *Id*., at 10. The trial court dismissed her surviving husband's lawsuit and he appealed. *Id*., at 13. On its own motion, the Fourth Circuit asked the parties to submit supplemental briefing on whether the *Kingsley* objective standard of deliberate indifference applied. *Id*. It held *Kingsley* abrogated the circuit's precedent. *Id*., at 18. The court explained that "pre-trial detainees can state a claim for deliberate indifference to a serious risk of harm on the purely

objective basis that the "governmental action" they challenge is not "rationally related to a legitimate non-punitive governmental purpose" or is "excessive in relation to that purpose." *Id*., at 19.

Therefore, the court wrote, "to state a claim for deliberate indifference to a medical need, the specific type of deliberate indifference claim at issue in this case, a pre-trial detainee must plead that (1) they had a medical condition or injury that posed a substantial risk of serious harm; (2) the defendant intentionally, knowingly, or recklessly acted or failed to act to appropriately address the risk that the condition posed; (3) the defendant knew or should have known (a) that the detainee had that condition and (b) that the defendant's action or inaction posed an unjustifiably high risk of harm; and (4) as a result, the detainee was harmed. *Id*., at 19.

Since *Short v. Hartman* is the only case to expand the holding of *Kingsley* involving suicide, the facts in that case are worth examining in detail. The evidence in *Short* is in marked contrast to the lack of evidence in this case.

On July 6, 2016, Victoria Short attempted suicide. *Id*., at 10. A deputy who had been dispatched to her home called EMS and had Mrs. Short transported to the hospital for emergency mental health treatment. *Id*. At the hospital, it was determined that Mrs. Short had taken between 50 and 100 prescription medicine pills during her suicide attempt. *Id*. She remained in

the hospital for four days for in-patient treatment before being released. *Id*.

Six weeks later, on August 22, 2016, two officers in the Sheriff's Department responded to another call at the Short's home—this time because of a domestic disturbance between Mrs. Short and her husband. *Id*. Mrs. Short told one of the officers that "she used a syringe found in the kitchen to 'shoot up on Xanax pills,'" that "she was having withdraw[al]s from shooting up," and that "she had not shot up since yesterday." *Id*. The deputy's report also noted that Mrs. Short was "extremely upset and appeared to be on some type of narcotic as she was shaking uncontrollably, twitching from the neck area, and had needle marks all down both her arms." *Id*.

The deputies took both Mr. and Mrs. Short into custody and transported them to the jail. *Id*. On the way to the jail, Mrs. Short's brother and Mr. Short told the deputies that Mrs. Short was suicidal and had recently attempted suicide. *Id*. Mrs. Short appeared before a magistrate upon arriving at the jail, and he placed her on a forty-eight-hour domestic hold. *Id*. Mr. Short was released from custody after approximately four or five hours. *Id*., at 11.

At 12:09 a.m. on August 23 (approximately half an hour after the deputies responded to the Shorts' home), Mrs. Short was examined by licensed practical nurse Linda Barnes. *Id*. Following the examination, Nurse Barnes placed Mrs. Short on the jail's withdrawal protocol, which included detoxing medications and

heightened monitoring by jail staff. *Id*., at 5. However, jail staff did not comply with the protocol monitoring requirements, which included checking on the inmate every fifteen minutes. *Id*. Instead, a member of the jail staff conducted walk-by observations, usually lasting only a few seconds, 30 minutes or more apart. *Id*.

Also, in the early morning hours of August 23, Sergeant Teresa Morgan completed two forms evaluating Mrs. Short's health. *Id*. One question, directed at the inmate, asked whether the inmate ever considered or attempted suicide. *Id*. The response states "yes," and the comment "last month" was added. *Id*. In response to the question of whether she used drugs and, if so, how much, Mrs. Short responded "yes" and "whatever can [sic] get my hands on." *Id*. With respect to alcohol, she commented that she uses alcohol "every other day." *Id*. Another question, directed at the officer, asks, "does the inmate appear to be under the influence of, or withdrawing from drugs or alcohol? If yes explain." *Id*., at 6. The response states "yes" and "drugs." *Id*.

The second form required Mrs. Short to check "yes" or "no" in response to several questions relating to her mental health. *Id*. She checked "yes" for questions 5 and 6: "Do you currently feel like you have to talk or move more slowly than you usually do?" and "Have there currently been a few weeks when you felt like you were useless or sinful?" *Id*. She checked "no" for "have you ever been in a hospital for emotional or mental health problems?" (question 8), but in the adjacent comment box she wrote, "when I tried to com[mit] suicide stayed in hospital [sic] 4 days." *Id*.

The second section of the form provided a space for the officer's comments and impressions, including a line to indicate whether the detainee was under the influence of alcohol or drugs, but nothing was marked in this section. *Id*. The form then stated that the detainee "should be referred for further mental health evaluation" if they answered "yes" to question 7, "yes" to question 8, or "yes" to at least two of questions 1 to 6. *Id*. Based on these instructions, Mrs. Short should have been referred, but was not. *Id*. The next line of the form, which provides space for an officer to indicate whether the detainee was referred, is blank, but Sergeant Morgan signed on the appropriate signature line at the bottom of the page. *Id*. At the conclusion of these evaluation processes, in the early morning hours of August 23, Mrs. Short was placed in an isolation cell. *Id*.

Detention Officer Sarah Cook arrived for her shift at around 6:45 a.m. on August 24. *Id*. She overheard Deputy Michael Brannock tell another detention officer that he had responded to the Shorts' home in July following Mrs. Short's first suicide attempt. *Id*. Based on what she overheard, Officer Cook realized that Mrs. Short was at risk of attempting suicide and, upon learning that Mrs. Short was in an isolation cell and was not being observed as often as the jail policy mandated, asked why Mrs. Short was in isolation. *Id*., at 7. She was told that Lieutenant Dana Recktenwald had ordered that Mrs. Short be placed in isolation because she was "being mouthy." *Id*.

At 9:30 a.m. on August 24, Detention Officer Matthew Boger conducted a walk-by observation in the

female isolation unit to check on Mrs. Short. *Id*. He observed her sitting on her bed in the cell. *Id*. The CCTV footage showed that Mrs. Short attempted suicide by hanging herself from the cell door with a bedsheet between 9:49 and 9:56 a.m. *Id*. During his next walk-by observation at 10:10 a.m., Officer Boger discovered Mrs. Short hanging from the door. *Id*. She was rushed to Wake Forest Baptist Medical Center and died on September 7. *Id*., at 12.

The Fourth Circuit used the *Kingsley* objective standard in analyzing *Short* and stated, "The objective test we adopt today differs from our prior subjective test in one respect only. The plaintiff no longer has to show that the defendant had actual knowledge of the detainee's serious medical condition and consciously disregarded the risk that their action or failure to act would result in harm. That showing remains sufficient, but it is no longer necessary. Now it is sufficient that the plaintiff show that the defendant's action or inaction was, in *Kingsley's* words, "objectively unreasonable," (citation omitted), "that is, the plaintiff must show that the defendant should have known of that condition and that risk, and acted accordingly." *Id*., at 19.

Instead of remanding for the trial court to consider the case under an objective standard, the Fourth Circuit concluded that the allegations in the complaint were sufficient to state a claim under any test, including, the subjective Eighth Amendment deliberate indifference test, and could proceed beyond the pleadings stage. *Id*., at 19-20.

None of the cases cited by Petitioners considered the appropriate standard in a failure to protect from suicide claim. Even *Short v. Hartman*, which was a failure to provide medical care case, simply accepted that the objective test in *Kingsley* should apply to every type of pre-trial detainee claim without considering the unique nature of failure to protect from suicide claims. *Short* had not been decided at the time the Petition in this case was filed. Even if we ignore the distinction between a failure to provide medical care claim and a failure to protect from suicide, one decision does not a circuit split make.

Petitioners claim that *Kingsley* mandates the same test for deliberate indifference for all pre-trial detainee claims. Although some of the opinions cited in the Petition state that, not every circuit opinion cited goes that far. The Petition argues that the only factor that matters as to the proper standard is the status of the person, whether a pre-trial detainee, or a post-conviction inmate. This is a misreading of *Kingsley* that it did not say.

Kingsley does discuss the distinction between post-conviction Eighth Amendment claims, and Fourteenth Amendment pre-trial detainee claims. But nowhere in that decision did the Court hold that the type of pre-trial detainee claim asserted did not matter at all in determining what standard applied. In *Kingsley* the Court held that it found the objective standard was "appropriate" for an excessive force case. This indicates that there might be certain types of pre-trial detainee claims for which an objective standard might not be

appropriate. Even the Ninth Circuit in *Castro* recognized that *Kingsley* overruled its circuit precedent, "to the extent that it identified a single deliberate indifference standard for all § 1983 claims." *Castro*, 833 F. 3d at 1070.

For there to be a circuit conflict of sufficient importance to warrant this Court's intervention, there should be a clear conflict among the circuits on the proper standard in the particular type of claim at issue.

The decisions cited by Petitioners to demonstrate the circuit split deal with all manner of pre-trial detainee claims other than suicide: conditions of confinement, failure to provide medical care and failure to protect a pre-trial detainee from violence by another detainee. None of the cases address suicide. *Short* involves suicide but is a claim for failure to provide the medical care and attention Mrs. Short should have received. There is no circuit conflict on the standard for failure to protect from suicide. Even if there is, that dispute has not matured enough through the circuit courts and ripened to a point where it is necessary for this Court to grant review.

3. This case is not a proper vehicle to address any circuit split.

Regardless of the alleged circuit split, this case is still not an appropriate one for the Court to decide the issue presented. This case is not about the difference between subjective evidence and objective evidence. It

is a case where Petitioners presented no evidence to overcome Hastings and Piper's entitlement to qualified immunity.

There was no evidence presented indicating to any of the jailers and officers involved that Mrs. Worl was a substantial risk for suicidal thoughts or behaviors. There was no report to Hastings and Piper that Mrs. Worl had been having suicidal thoughts, that she had ever attempted suicide before, or that she was planning on committing suicide soon. She was intoxicated, but police officers arrest intoxicated individuals every day. Intoxication by itself is not an indication the person is a suicide risk. No mental illness or medical disability was reported. Worl was cooperative with Hastings and Piper. She thanked the officers for getting her out of a bad situation. She was not crying or otherwise distraught. She simply refused to provide personal information to the county jailers to be booked in. She was asked if she had ever committed suicide and her only reply was to show her naked, and uninjured arms, and say, "I don't know. Have I?"

In the trial court and court of appeals, Petitioners argued, as they do here, that Brenda Worl's refusal to answer the screening questions at book in should have alerted the jailers and the arresting officers to the need to put her on a suicide watch. In essence, they argue that this by itself was enough objective evidence to raise a fact issue on the qualified immunity claim. As recognized by the Fifth Circuit in its opinion, this argument runs up against the fundamental problem identified earlier—this Court has never held that there

is a constitutional right to screening protocols for risk of suicide. *Taylor*, 575 U.S. at 825. How can Hastings and Piper have violated a right that neither this Court, nor the Fifth Circuit has ever recognized? At most, not placing Worl on a suicide watch would be negligence. This does not make it a constitutional violation.

Even if there were a constitutional right to proper suicide screening, Hastings and Piper were the arresting officers and had no authority to dictate to the jail personnel how to do their jobs, to conduct the book in, to ask the screening questions, to tell the jailers how to handle Brenda Worl or where to place her in the jail. If Worl's refusal to answer the screening questions is the only "objective evidence" Petitioners can present, then to adopt an objective standard in this case would be de facto recognition by this Court of a constitutional right to suicide prevention and screening and recognize a right of an arrestee to be treated as suicidal if they refuse to answer screening questions.

Then the Court would be called upon to define what those suicide prevention protocols should be and what sort or level of screening passes constitutional muster and what does not. It would also require the Court to set out what specific procedures should be used by jailers in all 50 states and territories to protect "potentially" suicidal detainees regardless of the facts or circumstances in any given case. Broad and general rules of law are great in a law school classroom, but are often unhelpful in dealing with the dynamic and constantly changing world of the criminal justice system. The Court would have to become a legislature deciding

what the law ought to be, not interpreting existing law and applying law to a set of facts.

For all these reasons, this case is a poor vehicle to consider the question presented.

4. A subjective standard is appropriate in failure to protect from suicide cases.

The circuit courts that limit *Kingsley* to excessive force are correct in their reading and application of *Kingsley*. The Fifth Circuit was also correct in applying a subjective deliberate indifference standard in this failure to protect from suicide case. A subjective standard is necessary and appropriate in a failure to protect from suicide claim. There is no reason to grant certiorari in this case. The Fifth Circuit got it right.

An in-custody suicide is an act of the detainee, not the government or its employees. The act that results in the harm is initiated by the detainee, not the officers, jailers, medical personnel, other detainees, or even the conditions of confinement themselves. Apart from self-reporting that the detainee is thinking about suicide, has attempted suicide recently, or plans to commit suicide soon, there is nothing from which a reasonable officer can determine if a detainee or prison inmate is a substantial suicide risk. There is no other reliable predictor, so a subjective standard is appropriate.

A landmark psychological study in 2016 concluded that despite major advancements in medical and psychological science, there has been no improvement in

our ability to predict when a person is at risk of suicide. Franklin & Ribeiro, *Risk Factors for Suicidal Thoughts and Behaviors: A Meta-Analysis of 50 Years of Research*, Psychological Bulletin, 2017, Vol. 143 No. 2 pp. 187-232.

Discussing the release of that study, Joseph Franklin, PhD of Harvard University, who led the study said, "Our analyses showed that science could only predict future suicidal thoughts and behaviors about as well as random guessing. In other words, a suicide expert who conducted an in-depth assessment of risk factors would predict a patient's future suicidal thoughts and behaviors with the same degree of accuracy as someone with no knowledge of the patient who predicted based on a "coin flip. . . ." Sliwa, *After Decades of Research, Science Is No Better Able to Predict Suicidal Behaviors*, American Psychological Association Website, 2016, accessed December 31, 2023.

If a trained psychiatrist or psychologist with personal knowledge of the subject's diagnosis, history, and course of treatment, with almost unlimited time and information is not able to reasonably predict when a person is at risk of suicide, how are ordinary law enforcement officers and jailers to make such a determination based on much more limited information and without the luxury of time? The simple truth is they cannot.

In-custody suicides rarely if ever involve the actions or the intent of a third party causing the harm. It is the act of the detainee herself that is the ultimate

cause of the harm. Contrary to excessive force cases, it is the inaction of the jailers or detention officers that is primarily at issue in failure to protect from suicide cases.

Suicide is complex and unpredictable. It arises out of a toxic milieu of emotions, thought patterns, processes, circumstances, decisions and irrational and illogical beliefs, thoughts and actions of the individual. These are almost impossible for a reasonable person to identify in a person they know and love intimately let alone a stranger. Almost everyone can recount someone they know or have heard about who committed suicide. The question everyone asks is why? Almost always, it comes out that no one around them, not their spouse, parents, children, or closest friends, had any idea there was anything wrong or that they were a suicide risk. This is the sad truth about suicide.

Predicting and identifying potential suicidal persons is fraught with uncertainty—it is almost impossible to do under the best of conditions. That is why objective standards are inappropriate for failure to protect from suicide claims, why the Fifth Circuit standard is correct, and why this case is not appropriate for review. Courts should not impose any duty or standard on jailers or detention officers to protect a detainee from suicide when they do not have actual, subjective knowledge that the detainee is a substantial risk of suicide. An objective standard would be completely unrealistic and require jail officials and officers, under trying and difficult circumstances, to do something no one else can do.

The Fifth Circuit was correct in applying its longstanding circuit precedent requiring subjective deliberate indifference in this case. There is no need for the Court to grant the petition and review this case. It was rightly decided.

5. An objective test would not change the outcome of this case.

For similar reasons, accepting this case for review, and even adopting an objective test, would not change the outcome of this case. Hastings and Piper are entitled to qualified immunity under any test applied because Petitioners presented no evidence to create a fact issue to overcome summary judgment.

Under any test applied, Hastings and Piper were not the jailers that made the decision as to where to place Brenda Worl. They were officers of the City of Clyde, Texas Police Department. They were the officers who responded to the domestic disturbance call and who ultimately arrested Brenda Worl. Petitioners do not claim that Brenda Worl's arrest was unlawful or that the officers used excessive force while arresting her. Hastings and Piper transported Worl to the Callahan County Jail and were there only to turn her over to the custody of the County Jail as required by law. They had no say or control over the book in process or the handling of Worl while she was in the Callahan County Jail.

The outcome in this case would have been the same whether an objective or a subjective standard

was used. As the Fifth Circuit correctly noted the only evidence available to the officers when they arrested her was that Brenda Worl was intoxicated. Mr. Worl was asked if Mrs. Worl had any sort of mental illness. He answered no. Mr. Worl was asked a follow-up question as to whether Mrs. Worl had any sort of mental disability "like bipolar." His answer was, "a long time ago." No objectively reasonable officer would or should have known that this information indicated Brenda Worl was a substantial risk for suicide. Neither Brenda, nor Billy Worl ever expressed to Hastings or Piper that Brenda was thinking about killing herself, had previously tried to kill herself, or had any sort of plan or intention to cause herself harm.

The Petition argues that an objective standard "possibly" would have changed the outcome in this case, but it points to no evidence that a court could point to as justification for denying summary judgment. Therefore, even if the Court were to grant the Petition and adopt an objective standard, Hastings and Piper would still be entitled to qualified immunity.

CONCLUSION

While tragic, the death of Mrs. Worl is not a case the Court should accept. The Court has never addressed, or recognized, the right at issue. It should first take a case squarely addressing that issue, before digging into what sort of standard should apply to that right. There is no circuit split justifying review. Even if

there is, the unique facts of this case render it an inappropriate vehicle for this Court to address the question raised in the Petition. The courts below properly decided this case using the subjective deliberate indifference standard which is the appropriate standard for failure to protect from suicide. There was no objective or subjective evidence that Hastings and Piper ever perceived or knew that Brenda Worl was a substantial suicide risk. Respondents are entitled to qualified immunity. The Petition should be denied.

Respectfully submitted,

JON MARK HOGG
Counsel of Record
JON MARK HOGG PLLC
421 W. Concho Avenue
San Angelo, Texas 76903
(325) 777-0455
jmh@jmhogglaw.com

Counsel for Respondents
Vegas Hastings and
Daniel Piper

January 11, 2024