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 KAYE WORL'S HEIRS-AT-LAW; BILLY WAYNE WORL, JR., individually,

Petitioners,

v.

DALENA HALL and CARI RENEA MCGOWEN,

Respondents.

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

RESPONSE OF OSCAR BORREGO, SR., OSCAR E. CARRILLO, AND PETER E. MELENDEZ IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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(Additional Caption Information On Inside Cover)

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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 KAYE WORL'S HEIRS-AT-LAW; BILLY WAYNE WORL, JR., individually,

Petitioners,

v.

VEGAS HASTINGS and DANIEL PIPER,

Respondents.

SHANON EDMISTON, individually; HELEN HOLMAN, as dependent administrator of, and on behalf of LISA WILLIAMS a/k/a LISA SCHUBERT, E.S., J.S. #1, J.S. #1; SHANON EDMISTON, the ESTATE OF JOHN ROBERT SCHUBERT, JR. and JOHN ROBERT SCHUBERT, JR.'S HEIRS-AT-LAW,

Petitioners,

v.

OSCAR BORREGO, SR., OSCAR E. CARRILLO, and PETER E. MELENDEZ,

Respondents.

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INTRODUCTION

The Court should deny the petition for writ of certiorari because Petitioners advocate a position which would not change the outcome in the *Edmiston* case, and because the Fifth Circuit's decision in *Edmiston* was correct.

The *Edmiston* case arose after a detainee, John Robert Schubert, Jr., died by suicide within 2½ hours of arriving at the jail and within an hour of being placed in a cell. Prior to his detention, Schubert had sought assistance from three people, claiming that someone was trying to kill him. By all indications, Schubert was focused on self-preservation, not self-destruction.

After responding to Schubert's requests for assistance, Respondent Deputy Peter Melendez arrested Schubert due to an outstanding warrant for a parole violation which the deputy discovered upon identifying Schubert. At no time during his interactions with the deputy or during his detention did Schubert express any suicidal ideation or any intention of harming himself. Schubert had never received any treatment for any mental health issues, and Petitioners do not contend that Schubert ever previously attempted suicide.

The Fifth Circuit Court of Appeals properly granted qualified immunity to Respondents Deputy Melendez, Sheriff Oscar Carrillo, and Jailer Oscar Borrego in connection with Petitioners' substantive due process claims under the Fourteenth Amendment, alleging that Respondents failed to protect Schubert from

suicide. The Fifth Circuit correctly found that Petitioners had not plausibly alleged that Schubert did or said anything to indicate he was suicidal or otherwise intended to harm himself. Indeed, it would require a significant leap of logic to conclude that an individual who had repeatedly expressed concern that someone else wanted to harm him, who had never expressed suicidal ideation, and who had never received mental health treatment, in fact, intended to kill himself.

The *Edmiston* opinion is not an appropriate vehicle for addressing whether the liability standard this Court narrowly applied to a different type of claim in *Kingsley v. Hendrickson*, 576 U.S. 389 (2015), should be expanded to Fourteenth Amendment substantive due process claims for failure-to-protect a detainee from suicide because: (1) the petition demonstrates the existence of an unchallenged, independent basis for affirming dismissal based on the "clearly established" prong of qualified immunity analysis; (2) Respondents would be entitled to qualified immunity even under the *Kingsley* standard because Petitioners did not sufficiently plead a constitutional violation; (3) the Fifth Circuit correctly decided the *Edmiston* case, in keeping with this Court's precedents related to officials' potential liability for failing to protect individuals who are in custody; and (4) given the nature of their allegations, the *Edmiston* Petitioners are—at best—asking this Court to impose negligence-based liability and—at worst—strict liability to claims for failure-to-protect a detainee from suicide.

BACKGROUND

From 11:05-11:12 p.m. on Saturday, July 6, 2019, Jailer Borrego received three calls—one from Schubert himself, one from an off-duty trooper, and one from someone at a local hotel—saying that Schubert needed assistance and that Schubert thought someone was trying to kill him. Pet. App. 28a. Borrego directed Deputy Melendez to respond, and, at 11:15 p.m., the deputy located Schubert at a nearby hotel. Pet. App. 28a-29a.

When Melendez spoke with Schubert, he appeared nervous and said people were trying to kill him. Pet. App. 29a. During their conversation, Schubert demonstrated that he was properly oriented as to time and location, as he accurately stated the day of the week, the approximate time, and his location in the town. *Id*. Schubert provided Melendez with his date of birth, but he gave an incorrect year.[1] Pet. App. 29a. Melendez took Schubert to a border patrol station for identification,

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[1] Petitioners' contention, made for the first time in their petition, that Schubert "was unable to accurately recall the year of his birth" is without support in the record. *Cf*. Petition at 8; Pet. App. 29a. It is not reasonable to infer that an individual who is otherwise properly oriented as to time and location, who knows the day and month of his birth, but who provides an inaccurate birth year "was unable to accurately recall the year of his birth" or that such conduct in any way demonstrates mental illness or a proclivity toward self-harm. To the contrary, Schubert's failure to provide a law enforcement officer with the correct year of his birth is consistent with a rational attempt at self-protection, given the fact that Schubert had an active warrant outstanding which, when discovered based on Schubert's actual birthdate, caused his arrest. Pet. App. 29a; Petition at 8.

discovered that Schubert had an active warrant outstanding, arrested Schubert, and transported him to the jail, arriving at 12:14 a.m. on Sunday, July 7, 2019. *Id*.

Sheriff Carrillo arrived at the jail at approximately 1:00 a.m. on July 7, 2019 to check on Schubert and jail personnel. Pet. App. 29a. Carrillo interviewed Schubert, who explained how he arrived in town. *Id*. During this interview, Schubert was not wearing a shirt, because, he explained, it was wet. Pet. App. 29a-30a.[2] Schubert appeared to be cooperative and truthful in his responses to the sheriff's questions. Pet. App. 30a. Borrego and the sheriff did not complete a "Screening Form for Suicide and Medical/Mental/Developmental Impairments" for Schubert and did not put him on suicide watch. *Id*.[3]

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[2] Petitioners' contention that Schubert was wandering around town shirtless is without support in the record. Petition at 2, 7 (purporting to rely on ROA.19 and ROA.24). ROA.19 makes no mention of Schubert being shirtless. ROA.24 contains portions of a statement in which Sheriff Carrillo said that, *during his interview with the detainee*, Schubert answered the sheriff's questions, explained that he was not wearing his shirt because it was wet, and put on the jail-issued pants and shirt without incident. This does not support the contention that Schubert was shirtless before he arrived at the jail, nor does it demonstrate mental illness or any tendency toward self-harm.

[3] Petitioners' contention that "Texas state law requires officers to either complete a screening form for suicide and medical, mental, and developmental impairments for a detainee or, if the form cannot be completed, place the detainee on suicide watch" is without support in the record. Petition at 8 (purporting to rely on Pet. App. 30a). Pet. App. 30a merely acknowledges that plaintiffs *allege* that the screening form is required by the Texas Commission

Jail personnel provided Schubert with jail-issued clothing and a mattress and, at 1:42 a.m., escorted him to a cell. Pet. App. 30a. Jail personnel sought additional information about Schubert, and their inquiry about prior mental health treatment returned no records of Schubert ever having received any such treatment. Pet. App. 30a-31a; ROA.31 (¶45); ROA.36 (noting that the Continuity of Care Query ("CCQ") "came back as 'no match' on July 7, 2019 at approximately 0227 hours").

At 2:42 a.m., when another jail employee, Zambra, checked on Schubert, she found him "half-kneeling with a white sheet mangled on his neck and tied to a top grey shelf." Pet. App. 31a (quotation omitted). After Schubert did not respond to Zambra calling out to him, Zambra immediately called Carrillo and Melendez. *Id*. Carrillo arrived first, removed the sheet from Schubert's neck, laid him on a bunk, and performed CPR on him. *Id*. At 2:50 a.m. Zambra called a rescue team, and the EMTs arrived at the jail at 2:59 a.m. *Id*. Schubert was not breathing and did not have a pulse. *Id*. He was pronounced dead. *Id*.

Petitioners asserted claims under 42 U.S.C. §1983 against Respondents Carrillo, Melendez, and Borrego under the substantive due process provisions of the Fourteenth Amendment, alleging that they failed to protect Schubert from suicide. Pet. App. 31a. Respondents

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on Jail Standards and that, after Schubert repeated to the deputy that someone was trying to kill him, Schubert was not placed on suicide watch.

filed motions to dismiss, asserting their entitlement to qualified immunity. *Id*. The district court denied Respondents' assertions of qualified immunity from Schubert's failure-to-protect claims. Pet. App. 31a-32a.

In a published opinion,[4] a unanimous panel of the Fifth Circuit reversed, finding no constitutional violation, and noting that Petitioners did not plausibly allege that Schubert did or said anything to indicate he was suicidal or otherwise intended to harm himself. Pet. App. 37a-38a, 42a, 46a. The Fifth Circuit rejected Petitioners' contention that the court should "apply the objective-unreasonableness standard the Court adopted in *Kingsley v. Hendrickson* for *claims of excessive force* (*not failure to protect*) by officers against a pretrial detainee." Pet. App. 36a-37a (emphasis in original) (citing *Kingsley*, 576 U.S. at 389). The Fifth Circuit noted that it was bound by a prior panel's determination that *Kingsley* did not abrogate the circuit's deliberate indifference precedent for failure-to-protect claims. Pet. App. 37a.[5]

[4] *Edmiston v. Borrego*, 75 F.4th 551 (5th Cir. 2023).

[5] Citing, *inter alia*, *Cope v. Cogdill*, 3 F.4th 198, 207, n.7 (5th Cir. 2021), *cert. denied*, 142 S. Ct. 2573 (2022) ("Since *Kingsley* discussed a different type of constitutional claim, it did not abrogate our deliberate-indifference precedent.").

REASONS TO DENY THE PETITION

1. Petitioners' Question Presented is Not Outcome-Determinative.

The Court should deny the petition because the *Edmiston* case involves only the question of whether three law enforcement officials are entitled to qualified immunity from Petitioners' substantive due process claims alleging that they failed to protect Schubert from suicide. Even if the Court were to recognize a relevant split among circuit courts of appeals, this would merely demonstrate that the relevant law was not clearly established at the time of Schubert's suicide. A finding that the applicable law was not clearly established would present an unchallenged, independent basis for affirming dismissal of Petitioners' claims, rendering this an inappropriate vehicle for addressing the substantive question of the applicable liability standard for claims alleging that officials failed to protect a detainee from suicide.

Additionally, even if the Court were to adopt Petitioners' arguments advocating expansion of the Court's narrow holding in *Kingsley*, Respondents would be entitled to qualified immunity because: (1) as discussed more fully below, the new standard would have been established *after* the events in question and, therefore, would not have provided the fair notice required to deny an official's entitlement to qualified immunity; and (2) Petitioners' allegations would not establish a constitutional violation under the expanded objective unreasonableness standard which some circuit courts

have applied in cases involving pretrial detainees because Petitioners have failed to allege facts which, if proven, would be sufficient to support a claim under Petitioners' proposed standard, *i.e.*, the facts alleged do not indicate any risk of self-harm.

Petitioners admit that petitions which seek review of cases in which the applicable liability standard "may not . . . have been outcome-determinative" do not cleanly present the *Kingsley* question for this Court's review. Petition at 21. By Petitioners' reasoning, the Court should deny review in this case, because it does not cleanly present the *Kingsley* question for review, given Respondents' entitlement to qualified immunity.

A. The Petition Demonstrates an Independent Basis for Affirming Dismissal.

Governmental officials are entitled to qualified immunity from §1983 claims unless they violated a federal statutory or constitutional right and the unlawfulness of their conduct was clearly established at the time.[6] "Clearly established" means that, at the time of the officer's conduct, the law was sufficiently clear that every reasonable official would understand that what he is doing is unlawful in the particular circumstances confronting the official.[7] In other words,

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[6] *D.C. v. Wesby*, 583 U.S. 48, 62-63 (2018) (citing *Reichle v. Howards*, 566 U.S. 658, 664 (2012)).

[7] *Id.* at 63 (citing *Ashcroft v. al-Kidd*, 563 U.S. 731, 735 (2011)).

existing law must have placed the constitutionality of the officer's conduct "beyond debate."[8]

Petitioners' arguments concerning a purported circuit split as to the relevant liability standard demonstrate, at the very least, that an expanded application of the *Kingsley* standard was not clearly established law at the time of Schubert's death. Petition at 12-16.[9] Indeed, Petitioners expressly contend that the relevant law is not clearly established because they argue that "Jails that confront [issues concerning detainee suicide and mental illness] have a pressing need to understand the constitutional baseline of care and the scope of their obligations to pay attention to the risks to detainee health posed in confinement." Petition at 18.

If, as Petitioners suggest, this need for a better understanding of the constitutional requirements is indeed pressing, it cannot be the case that the law was sufficiently clear in July of 2019 that every reasonable official would have understood that Respondents' alleged conduct was unlawful in the circumstances they

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[8] *Id.*; *al-Kidd*, 563 U.S. at 741.

[9] *See also*, *e.g.*, *Hare v. City of Corinth, Miss.*, 74 F.3d 633, 643-50 (5th Cir. 1996) (en banc) (explaining that the deliberate indifference standard from *Farmer v. Brennan*, 511 U.S. 825 (1994) applies equally to claims alleging failure-to-protect a detainee from suicide); *Cope*, 3 F.4th at 207 n.7 ("Since *Kingsley* discussed a different type of constitutional claim, it did not abrogate our deliberate-indifference precedent."); *cf. Castro v. County of Los Angeles*, 833 F.3d 1060, 1070 (9th Cir. 2016) (en banc) (applying *Kingsley's* liability standard to failure-to-protect claims by detainees).

faced.[10] Thus, even if the Court were to adopt Petitioners' arguments advocating expansion of the *Kingsley* liability standard, Respondents would remain entitled to qualified immunity because the relevant law was not clearly established at the time of their challenged conduct.

Petitioners admit that a case which is subject to disposition based on the clearly established prong of qualified immunity analysis is a poor vehicle for review of the breadth of the *Kingsley* liability analysis. Petition at 21-22 (citing Pet. Writ Cert., *Cope v. Cogdill*, No. 21-783 (U.S. Nov. 22, 2021)).[11] Because Respondents

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[10] *Wesby*, 583 U.S. at 63.

[11] In her dissent from denial of the petition for writ of certiorari in *Cope*, Justice Sotomayor expressly noted that the respondent jail officials were aware of the detainee's risk of suicide, thus intimating that a jailer's actual knowledge is relevant to the analysis of a Fourteenth Amendment claim for failure to protect a detainee from suicide. *Cope v. Cogdill*, 142 S. Ct. 2573, 2576 (2022) (Sotomayor, J., dissenting).

The Court should reject Petitioners' contention that the instant petition presents "strikingly similar circumstances" to those at issue in *Cope*. Petition at 22. Justice Sotomayor explained that, in *Cope*, the jail officials knew that the detainee: (1) had twice recently attempted suicide by strangulation; (2) had admitted during book-in that he wished he had a way to kill himself that day; (3) had received psychiatric services; and (4) had been diagnosed with "some sort of schizophrenia." *Id*. at 2573. Petitioners made no remotely similar allegations in the *Edmiston* case, arguing instead that an individual who had never received any mental health treatment, who never previously attempted suicide, who never expressed suicidal ideation, and who repeatedly expressed concern that someone wanted to harm him, demonstrated a need to be protected from suicide. ROA.11-80; Petition at 18, 22. Having

would remain entitled to dismissal under the clearly established prong of qualified immunity analysis, this case would be a poor vehicle for review of substantive questions concerning applicability of this Court's decision in *Kingsley*. The Court should deny the petition.

B. Even Under an Expanded Application of the *Kingsley* Standard, Respondents Would Be Entitled to Qualified Immunity.

Circuit courts which have expanded the *Kingsley* liability standard to pretrial detainees' failure-to-protect claims apply the following elements:

> (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.[12]

Petitioners' allegations in the *Edmiston* case do not show a constitutional violation under this standard because: (1) Petitioners did not demonstrate any

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denied review in the *Cope* case, the Court should also deny review in the case at bar.

[12] *Kemp v. Fulton County*, 27 F.4th 491, 496 (7th Cir. 2022) (citing *Castro*, 833 F.3d at 1071) (emphasis in *Kemp*).

reason for Respondents to take any action relating to protecting Schubert from suicide; and (2) a reasonable officer in the circumstances would *not* have appreciated that Schubert presented a high degree of risk of suicide.[13] By all outward indications, Schubert was focused on self-preservation, not self-destruction.

Petitioners' contention that, in the *Edmiston* case, "the precarious mental health condition of [the] detainee [was] apparent to the jailers" is unsupported. Petition at 18. To the contrary, Respondents received no indication that Schubert had ever received treatment for any mental health condition. Pet. App. 30a-31a; ROA.31 (¶45); ROA.36. In his communications with Respondents, Schubert never expressed any suicidal ideation or any intent to harm himself. *Supra* at 3-6; Pet. App. 37a-38a, 42a, 46a. Instead, Schubert sought help because he believed that someone else was trying to harm him. Pet. App. 28a. Respondents received no indication that Schubert had ever previously attempted suicide. *Supra* at 1, 5; Pet. App. 42a.

Under these circumstances, a reasonable officer would not have appreciated that Schubert faced a high degree of risk of suicide,[14] and it was not objectively unreasonable for Respondents to provide Schubert with comfortable housing for the remaining hours of

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[13] "Suicide is inherently difficult for anyone to predict, particularly in the depressing prison setting." *Domino v. Tex. Dep't of Criminal Justice*, 239 F.3d 752, 756 (5th Cir. 2001) (citing *Collignon v. Milwaukee Co.*, 163 F.3d 982, 990 (7th Cir. 1998)).

[14] *Kemp*, 27 F.4th at 496.

the late night.[15] Indeed, even if a reasonable official would have perceived Schubert's comments about somebody trying to kill him as abnormal behavior, this Court has recognized that: (1) abnormal or idiosyncratic behavior often does not indicate mental illness or a need for compelled mental health treatment;[16] and (2) individuals who are in custody retain due process protections against correctional officers classifying them as mentally ill and subjecting them to involuntary mental health treatment.[17] The wooden approach which Petitioners suggest would deny the reality that jailers must, in good faith, weigh and balance a myriad of circumstances as they attempt to care for the well-being of pretrial detainees in their charge. Petitioners would replace that balancing with an unworkable one-size-fits-all rule that could actually strip pretrial

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[15] *E.g.*, *Jump v. Village of Shorewood*, 42 F.4th 782, 793-94 (7th Cir. 2022) (knowledge that a detainee: (1) had overdosed on drugs a few days earlier; (2) was crying; (3) had previously received psychiatric treatment; (4) demonstrated distress by slamming his body against the cell bars; and (5) never told the jailers that he was suicidal, "would not have made a reasonable [jail official think the detainee] was a suicide risk," so it was not objectively unreasonable to take no precautions against suicide); *id*. at 793 (citing *Pulera v. Sarzant*, 966 F.3d 540, 555 (7th Cir. 2020) for the proposition that "when an officer has no reason to think a detainee is suicidal, it is not objectively unreasonable to take no special precautions"); *id*. at 794 (same).

[16] *Addington v. Texas*, 441 U.S. 418, 426-27 (1979) ("At one time or another every person exhibits some abnormal behavior which might be perceived by some as symptomatic of a mental or emotional disorder, but which is in fact within a range of conduct that is generally acceptable. Obviously, such behavior is no basis for compelled treatment. . . .").

[17] *Vitek v. Jones*, 445 U.S. 480, 492-94 (1980).

detainees of their rights, dignity, and constitutional protections simply because their behavior did not meet someone's idea of "normal."

Petitioners' reliance on the district court's comments about Schubert's "statements regarding an unidentified assailant" and the district court's characterization of "Schubert's fragile psychological state"[18] is unavailing. Petition at 19-20. The Fifth Circuit properly overturned the district court's findings. Pet. App. 39a, 46a. After acknowledging: (1) Petitioners' allegations that Schubert repeatedly said that someone was trying to kill him; and (2) Petitioners' naked assertions about Respondents' purported knowledge that Schubert was mentally ill, the Fifth Circuit concluded that Petitioners did "not plausibly allege Schubert did or said anything to indicate he was suicidal or otherwise intended to harm himself." Pet. App. 42a.[19] Petitioners' allegations are, therefore, insufficient to show that "a reasonable officer in the circumstances would have appreciated" that Schubert presented *any* risk of suicide, much less a high degree of risk.[20]

Given the lack of any information pointing to a risk of suicide, it was not objectively unreasonable for Respondents not to place Schubert on suicide watch, as suicide protocols not only tax jailers' ability to manage

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[18] Petition at 20 (citing Pet. App. 32a).

[19] *See also id*. at 39a ("The well-pleaded allegations do not give rise to a plausible inference that Schubert had previously experienced suicidal tendencies, nor that he acted in a way to alert officials of a substantial risk of suicide."); *id*. at 41a-46a.

[20] *Kemp*, 27 F.4th at 496.

the correctional facility, they also create discomfort for detainees, who are not provided with ordinary bedding and clothing, and may stigmatize detainees in a manner that interferes with their due process rights.[21] Indeed, even while applying an expanded *Kingsley* standard, the Seventh Circuit repeatedly found that it is not objectively unreasonable to take no special precautions when an officer has no reason to think a detainee is suicidal.[22]

Petitioners did not plausibly plead a constitutional violation under the *Kingsley* liability standard because: (1) they did not plausibly plead allegations showing that a reasonable officer in the circumstances Respondents faced would have appreciated that Schubert presented a high degree of risk of suicide; and (2) it was not objectively unreasonable for Respondents to provide Schubert with comfortable housing for the remaining hours of the late night during which he was detained. Thus, Respondents would be entitled to qualified immunity even if the Court were to expand the

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[21] *See Bell v. Wolfish*, 441 U.S. 520, 547 (1979) (noting the "wide ranging deference" courts owe to correctional administrator's decisions about management of their facilities); *id*. at 538 (noting that restrictions which are not rationally connected to a purpose or are excessive to that purpose could constitute punishment in violation of the Due Process Clause); *see also Vitek*, 445 U.S. at 492-93. This Court has repeatedly expressed discomfort about federal court involvement in or oversight of the administration of correctional facilities, reflecting concerns about federalism and the propriety of local control. *See*, *e.g.*, *Shaw v. Murphy*, 532 U.S. 223, 230-31 (2001); *Lewis v. Casey*, 518 U.S. 343, 386 (1996) (Thomas, J., concurring); *Turner v. Safley*, 482 U.S. 78, 89 (1987).

[22] *Jump*, 42 F.4th at 793-94; *Pulera*, 966 F.3d at 555.

Kingsley standard to failure-to-protect claims by detainees. The Court should deny the petition.

2. The Fifth Circuit Correctly Applied This Court's Precedents.

The Court should also deny the petition because, in light of this Court's precedents concerning potential liability for claims alleging failure-to-protect individuals who are in governmental custody, the Fifth Circuit's analysis was correct. This Court's narrow holding in *Kingsley* did not abrogate circuit court precedent which, reflecting the common concerns underlying certain types of claims by those in custody, applies the *Farmer* deliberate indifference analysis to failure-to-protect claims by prisoners and by pretrial detainees.[23]

A. This Court Issued a Narrow Decision in *Kingsley*.

Kingsley presented this Court with a narrow issue, expressly tied to the type of claim presented therein.

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[23] Judge Readler's opinion that this Court "should soon grant certiorari in a case involving allegedly unconstitutional deliberate indifference toward a pretrial detainee" does not support Petitioners' arguments for review in the instant case, in which the Fifth Circuit correctly held that the Respondents did not demonstrate deliberate indifference, given the absence of any well-pled allegation demonstrating that any of them had any knowledge that Schubert presented any risk of suicide. *Cf.* Petition at 26 (quoting *Helphenstine v. Lewis County, Kentucky*, 65 F.4th 794, 801 (6th Cir. 2023) (Readler, J., dissenting from denial of rehearing en banc); Pet. App. 37a-38a, 42a, 46a.

"The question before us is whether, *to prove an excessive force claim*, a pretrial detainee must show that the officers were subjectively aware that their use of force was unreasonable, or only that the officers' use of that force was objectively unreasonable."[24] This Court's task in *Kingsley* was to decide the appropriate standard for courts to use in determining "whether the force deliberately used is, constitutionally speaking, 'excessive.' "[25] This Court explained that "[i]t is with respect to *this* question that we hold that courts must use an objective standard."[26]

B. *Kingsley* Does Not Abrogate Circuit Court Deliberate Indifference Precedent.

Petitioners mistakenly argue that *Kingsley's* limited decision about the liability standard for pretrial detainees' excessive force claims applies broadly to all Fourteenth Amendment substantive due process claims by detainees. Petition at 23-26. Petitioners' argument violates this Court's consistent directives against expansion of substantive due process concepts.

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[24] *Kingsley*, 576 U.S. at 391-92 (emphasis added, original emphasis removed); *see also id*. at 395 ("Kingsley filed a petition for certiorari asking us to determine whether the requirements of a § 1983 *excessive force* claim brought by a pretrial detainee must satisfy the subjective standard or only the objective standard.") (emphasis added).

[25] *Id*. at 396 ("We now consider the question before us here—the defendant's state of mind with respect to the proper *interpretation* of the force . . . that the defendant deliberately . . . used.") (emphasis in original).

[26] *Id*. (emphasis in original).

This Court "has always been reluctant to expand the concept of substantive due process because guideposts for responsible decisionmaking in this unchartered area are scarce and open-ended."[27] Indeed, two Justices of this Court opined, well after the *Kingsley* decision, that *Farmer's* subjective deliberate indifference standard constitutes "well-established law" for measuring claims about health and safety risks for convicted prisoners and pretrial detainees.[28]

Several circuit courts of appeals have correctly recognized that this Court's narrow decision in *Kingsley*, holding only that an objective unreasonableness standard applies to a court's determination of whether force deliberately used against a pretrial detainee is excessive, did not abrogate circuit court precedent applying the *Farmer* deliberate indifference analysis to other types of claims by detainees, including failure-to-protect claims.[29]

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[27] *Collins v. City of Harker Heights, Tex.*, 503 U.S. 115, 125 (1992); *see also id*. ("The doctrine of judicial self-restraint requires [the Court] to exercise the utmost care whenever we are asked to break new ground in this field.") (citing *Regents of Univ. of Mich. v. Ewing*, 474 U.S. 214, 225-26 (1985)).

[28] *Barnes v. Ahlman*, 140 S. Ct. 2620, 2622 (2020) (Sotomayor, J., joined by Ginsburg, J., dissenting from grant of stay).

[29] *E.g.*, *Cope*, 3 F.4th at 207, n.7 (In *Kingsley*, this Court "held that plaintiffs alleging excessive force must show that the force was objectively excessive. Since *Kingsley* discussed a different type of constitutional claim, it did not abrogate our deliberate-indifference precedent.") (citing *Kingsley*, 576 U.S. at 396-97); *Whitney v. City of St. Louis*, 887 F.3d 857, 860, n.4 (8th Cir. 2018) ("*Kingsley* does not control because it was an excessive force case, not a deliberate indifference case."); *Strain v. Regalado*, 977 F.3d

In *Strain*, the Tenth Circuit recognized the limited scope of the *Kingsley* decision, explaining that "[b]y its own words, the Supreme Court decided that 'an objective standard is appropriate in the context of excessive force claims brought by pretrial detainees pursuant to the Fourteenth Amendment'—nothing more, nothing less."[30] Relying on precedent from this Court, the Tenth Circuit rejected the notion that broad language included elsewhere in the *Kingsley* opinion abrogated its deliberate indifference precedent, explaining that "[e]xtending *Kingsley* to eliminate the subjective component of the deliberate indifference standard . . . would contradict the Supreme Court's rejection of a purely objective test in *Farmer* and our longstanding precedent."[31]

984, 990 (10th Cir. 2020) (declining to extend *Kingsley* to Fourteenth Amendment deliberate indifference claims because: (1) *Kingsley* turned on considerations unique to excessive force claims, not on the status of the detainee; (2) the nature of a deliberate indifference claim implies a subjective component; and (3) "principles of *stare decisis* weigh against overruling precedent to extend a Supreme Court holding to a new context or new category of claims"); *id*. at 993 ("At no point did *Kingsley* pronounce its application to Fourteenth Amendment deliberate indifference claims or otherwise state that we should adopt a purely objective standard for such claims."); *Swain v. Junior*, 961 F.3d 1276, 1285, n.4 (11th Cir. 2020) (noting that *Kingsley* addressed only an excessive force claim and did not abrogate the circuit's deliberate indifference analysis for other claims by detainees).

[30] *Strain*, 977 F.3d at 991 (quoting *Kingsley*, 576 U.S. at 402).

[31] *Strain*, 977 F.3d at 993 (citing *Agostini v. Felton*, 521 U.S. 203, 237 (1997) and *R.A.V. v. City of St. Paul*, 505 U.S. 377, 386, n.5 (1992)).

Circuit court judges have also recognized a meaningful analytical distinction between a government official's intentional action and an official's inaction, which further supports the determination that *Kingsley* did not abrogate circuit courts' deliberate indifference precedent. The Tenth Circuit explained that this Court "has never suggested that we should remove the subjective component for claims addressing inaction," concluding that "the force of *Kingsley* does not apply to the deliberate indifference context, where the claim generally involves inaction. . . ."[32] Noting that "[e]xcessive force requires an affirmative act, while deliberate indifference often stems from inaction,"[33] the Tenth Circuit adopted Judge Ikuta's reasoning in his dissent in the Ninth's Circuit's *Castro* opinion, explaining that "[a]lthough 'punitive intent may be inferred from affirmative acts that are excessive in relationship to a legitimate government objective, the mere failure to act does not raise the same inference.'"[34] Indeed,

> 'the *Kingsley* standard is not applicable to cases where a government official fails to act' because 'a person who unknowingly fails to act—even when such a failure is objectively unreasonable—is negligent at most' and 'the Supreme Court has made clear that liability for negligently inflicted harm is categorically

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[32] *Strain*, 977 F.3d at 992 (citing *Castro*, 833 F.3d at 1086 (Ikuta, J., dissenting)).

[33] *Strain*, 977 F.3d at 991.

[34] *Id*. (quoting *Castro*, 833 F.3d at 1086 (Ikuta, J., dissenting)).

> beneath the threshold of constitutional due process.'[35]

In granting Respondents qualified immunity for their purported inaction with respect to Schubert, the Fifth Circuit properly held that *Kingsley* did not abrogate its precedent applying the *Farmer* deliberate indifference standard. Pet. App. 36a-37a. The Court should deny review because the petition does not present any error for this Court to correct.

C. The Nature of Failure-to-Protect Claims Does Not Vary by the Status of the Person in Custody.

In *Kingsley*, this Court noted that the language of the Eighth Amendment's Cruel and Unusual Punishment Clause and the Fourteenth Amendment's Due Process Clause "differs, and the nature of the claims *often* differs."[36] Some circuit courts have relied upon this statement to justify their expansion of *Kingsley's* objective unreasonableness standard for excessive force claims to other types of Fourteenth Amendment

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[35] *Id*. (quoting *Castro*, 833 F.3d at 1986 (Ikuta, J., dissenting)); *see also Kingsley*, 576 U.S. at 396 (quoting *County of Sacramento v. Lewis*, 523 U.S. 833, 849 (1998) for the proposition that " 'liability for *negligently* inflicted harm is categorically beneath the threshold of constitutional due process' ") (emphasis in *Kingsley*); *Hare*, 74 F.3d at 645 (noting "the fundamental rule that negligent inaction by a jail officer does not violate the due process rights" of a detainee).

[36] *Kingsley*, 576 U.S. at 400 (emphasis added).

claims by detainees.[37] These circuit courts err in doing so, because: (1) "often" does not mean always; (2) no constitutionally significant distinction exists between failure-to-protect claims by pretrial detainees and by convicted prisoners; and (3) this Court has long recognized that excessive force claims and failure-to-protect claims are subject to different analyses, even when such claims are brought under the same constitutional provision.

i. Failure-to-Protect Claims Arise From a Common Source.

The nature of failure-to-protect claims by individuals in governmental custody does not differ under the Eighth Amendment or the Fourteenth Amendment because such claims arise from the fact of custody, not the reason for it. Accordingly, the *Farmer* subjective deliberate indifference standard properly applies for both categories of claimants.

In 1989, this Court explained that its holdings in *Estelle*, *Youngberg*, and *Revere*, "stand *only* for the proposition that 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

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[37] *E.g.*, *Darnell v. Pineiro*, 849 F.3d 17, 34 (2d Cir. 2017); *Miranda v. County of Lake*, 900 F.3d 335, 352 (7th Cir. 2018); *Castro*, 833 F.3d at 1070.

well-being."[38] That these cases involved an Eighth Amendment claim by a convicted prisoner, a Fourteenth Amendment claim by an involuntarily committed mental patient, and a Fourteenth Amendment claim by a detainee did not affect this Court's analysis. This Court explained:

> The rationale for this principle is simple enough: when the State by the affirmative exercise of its power so restrains an individual's liberty that it renders him unable to care for himself, and at the same time fails to provide for his basic human needs—e.g., food, clothing, shelter, medical care, and reasonable safety—it transgresses the substantive limits on state action set by the Eighth Amendment *and* the Due Process Clause.[39]

Relying on *DeShaney*, the en banc Fifth Circuit explained that the government's responsibility with respect to protecting pretrial detainees from harm "springs from the fact of incarceration and the resulting obligation to provide for the detainee's basic human needs."[40] The appellate court found "no constitutionally significant distinction between the rights of pretrial detainees and convicted inmates to . . . protection from . . . suicide" and, therefore, concluded that

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[38] *DeShaney v. Winnebago County Dep't of Soc. Servs.*, 489 U.S. 189, 199-200 (1989) (emphasis added) (citing *Estelle v. Gamble*, 429 U.S. 97 (1976); *Youngberg v. Romeo*, 457 U.S. 307 (1982); and *City of Revere v. Massachusetts General Hospital*, 463 U.S. 239 (1983)).

[39] *DeShaney*, 489 U.S. at 200 (emphasis added).

[40] *Hare*, 74 F.3d at 644 (citing *DeShaney*, 489 U.S. at 200).

claims alleging failure-to-protect a detainee from suicide should be measured by the subjective deliberate indifference standard this Court enunciated in *Farmer*.[41]

The Fifth Circuit's reasoning in *Hare* remains valid even after *Kingsley*, as this Court did not therein purport to modify its holdings in *DeShaney* or *Farmer* but instead focused on distinctions between excessive force claims under different constitutional provisions.[42] Indeed, the Tenth Circuit emphasized that "*Kingsley* relies on precedent specific to excessive force claims."[43]

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[41] *Id*. at 643; *see also id*. at 649 (noting that, "despite the distinct constitutional sources of the rights of pretrial detainees and convicted inmates," jail and prison officials owe the same duty of protection to those they confine, and explaining, "[t]hat pretrial detainees may have more protections or rights in general . . . does not mean that they are entitled to greater protection of rights shared in common with convicted inmates"); *Farmer*, 511 U.S. at 837.

[42] *Kingsley*, 576 U.S. at 400-01. Three weeks before issuing its decision in *Kingsley*, this Court noted, without critique, that the Third Circuit applied the *Farmer* subjective deliberate indifference standard to a case involving a pretrial detainee's suicide attempt. *Taylor v. Barkes*, 575 U.S. 822, 826-27 (2015) (citing *Serafin v. City of Johnstown*, 53 Fed. App'x 211, 213-14 (3d Cir. 2002)).

[43] *Strain*, 977 F.3d at 991.

ii. Applying Different Standards to Excessive Force Claims and Failure-to-Protect Claims Comports With This Court's Precedent.

This Court has long imposed different liability standards under the Eighth Amendment depending upon whether a prisoner seeks recovery for a failure-to-protect claim or an excessive force claim because the nature of these claims differs. This Court applies subjective deliberate indifference to Eighth Amendment failure-to-protect claims but requires a showing of "force applied maliciously and sadistically for the purpose of causing harm" for Eighth Amendment excessive force claims.[44]

Just as this Court recognizes different liability standards under the Eighth Amendment depending upon the type of claim at issue, lower courts properly recognize different liability standards under the Fourteenth Amendment for excessive force claims and failure-to-protect claims because the nature of these claims also differs.

In *Kingsley*, this Court did not reject the subjective measure this Court identified in *Farmer*. The respondents in *Kingsley* did not propose that this Court apply

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[44] *Farmer*, 511 U.S. at 837; *id*. at 835 (explaining that the deliberate indifference standard is inappropriate for excessive force claims under the Eighth Amendment and that a prisoner asserting an Eighth Amendment excessive force claim "must show that officials applied force 'maliciously and sadistically for the very purpose of causing harm'") (quoting *Hudson v. McMillian*, 503 U.S. 1, 6 (1992)).

Farmer's subjective analysis for failure-to-protect claims, *i.e.*, whether the official had actual knowledge of a substantial risk of serious harm.[45] Instead, the *Kingsley* respondents proposed that this Court apply *Hudson's* subjective measure for Eighth Amendment excessive force claims, *i.e.*, whether the officer used force maliciously and sadistically to cause harm.[46] This Court's rejection of the *Kingsley* respondents' proposed subjective measure for excessive force claims does not constitute a wholesale rejection of the *Farmer* subjective measure for other claims by pretrial detainees.

The subjective prong of *Farmer's* deliberate indifference standard precludes liability for governmental officials' negligent conduct[47] and sets a threshold for identifying punishment per se in the context of a failure-to-protect claim; it does not identify when

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[45] *Farmer*, 511 U.S. at 837.

[46] *Kingsley*, 576 U.S. at 400 ("Respondents believe that the relevant legal standard should be subjective, *i.e.*, that the plaintiff must prove that the use of force was not 'applied in a good-faith effort to maintain or restore discipline' but, rather, was applied 'maliciously and sadistically to cause harm.' ") (quoting the *Kingsley* respondents' brief at 27); *Farmer*, 511 U.S. at 835 (quoting *Hudson*, 503 U.S. at 6, explaining that a prisoner asserting an Eighth Amendment excessive force claim "must show that officials applied force 'maliciously and sadistically for the very purpose of causing harm' ").

[47] *E.g.*, *Zinermon v. Burch*, 494 U.S. 113, 129, n.14 (1990) (explaining that, in *Daniels v. Williams*, 474 U.S. 327, 336 (1986), this Court ruled "that a negligent act by a state official does not give rise to § 1983 liability").

punishment is cruel and unusual.[48] *Farmer's* subjective deliberate indifference standard provides an appropriate threshold for failure-to-protect claims under the Eighth Amendment, because a prisoner cannot demonstrate cruel and unusual punishment if he cannot show punishment at all. *Farmer's* standard also provides an appropriate threshold for liability for detainees' failure-to-protect claims under the Fourteenth Amendment because the "Due Process Clause proscribes any punishment of pretrial detainees, cruel and unusual or otherwise," and *Farmer's* subjective deliberate indifference standard "purports to ask only whether an official 'punished' an inmate, not whether the punishment was cruel and unusual."[49]

The Court should deny the petition because the Fifth Circuit's reasoning in *Edmiston* comports with this Court's decisions.

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[48] *Farmer*, 511 U.S. at 837, 839. Because *Farmer's* subjective measure identifies punishment per se, not cruel and unusual punishment, Petitioners' arguments are inapposite inasmuch as they attempt to distinguish Eighth Amendment analysis based on the proposition that pretrial detainees cannot be punished at all. Petition at 24-25.

[49] *Hare*, 74 F.3d at 650; *see also id*. ("In essence, what *Farmer* says is that a state official who has subjective knowledge of the risk of serious injury to a convicted prisoner or a pretrial detainee and whose response is deliberately indifferent inflicts either cruel and unusual punishment or no punishment at all.").

3. Petitioners Seek a Liability Standard This Court Has Repeatedly Rejected.

This Court should also deny the petition because, in light of their allegations in the *Edmiston* case, Petitioners are, as a practical matter, asking this Court to recognize a constitutional violation under §1983 based on negligence or strict liability, notwithstanding the fact that this Court has repeatedly held that something more than negligence is required to establish liability for a constitutional violation.

As this Court acknowledged in *Kingsley*, liability for negligent harm "'is categorically beneath the threshold of constitutional due process.'"[50] Indeed, the core concept of due process is protection against arbitrary governmental action, and "only the most egregious official conduct can be said to be arbitrary in the constitutional sense."[51] This Court long ago held that the mere lack of due care by a government official does not deprive an individual of rights under the Fourteenth Amendment, explaining:

> Far from an abuse of power, lack of due care suggests no more than a failure to measure up to the conduct of a reasonable person. To hold that injury caused by such conduct is a deprivation within the meaning of the Fourteenth

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[50] *Kingsley*, 576 U.S. at 396 (quoting *Lewis*, 523 U.S. at 849).

[51] *Lewis*, 523 U.S. at 483, 486 (citation omitted).

> Amendment would trivialize the centuries-old principle of due process of law.[52]

Although Petitioners argue that jail officials' action or inaction should be measured by a standard which takes into account what the officer knew at the time, Petitioners also argue that reckless inaction would support a detainee's failure-to-protect claim. Petition at 25-26.[53] Petitioners provided no support for the contention that, given what the *Edmiston* Respondents knew at the time, any of them would have had any reason to believe they needed to take any action to protect Schubert from suicide. To the contrary, Schubert had never previously received treatment for mental health issues, had never previously attempted suicide, had never expressed suicidal ideation or any intent to harm himself, and had repeatedly expressed concern about his perception of a threat to his safety. *Supra* at 1-6, 11-15. Under these circumstances, courts could not find Respondents liable for violating

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[52] *Daniels*, 474 U.S. at 330-31, 332; *see also Davidson v. Cannon*, 474 U.S. 344, 347-48 (1986) (explaining that a guard's mistaken belief that a situation was not serious does not constitute abuse of governmental power or governmental oppression in violation of the Due Process Clause); *Hare*, 74 F.3d at 650 (rejecting the idea that an objective measure—that the jail official "should have been aware" of a risk of serious injury—is sufficient under the Fourteenth Amendment and characterizing such a standard as "redolent with negligence and its measures").

[53] Citing *Kingsley* 576 U.S. at 395-96 (explaining that, in a police pursuit case, a prior Supreme Court opinion noted, though without so holding, that "recklessness in some cases might suffice as a standard for imposing liability," but declining to decide whether that standard might suffice in the case of alleged mistreatment of a pretrial detainee) (citing *Lewis*, 523 U.S. at 849).

Schubert's substantive due process rights except on the basis of negligence or strict liability, a standard this Court has repeatedly rejected.

The Court should deny review because the Petition advocates a position in conflict with a well-settled rule of this Court.

CONCLUSION

For all of these reasons, the Court should deny the petition for a writ of certiorari.

Respectfully submitted,

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