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., et al.,

Petitioners,

v.

DALENA HALL, et al.,

Respondents.

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

RESPONSE OF DALENA HALL AND CARI RENEA MCGOWEN IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

The Petition presents the single question of whether an objective reasonableness test applied to pretrial detainees in excessive force cases in *Kingsley v. Hendrickson*, 576 U.S. 389 (2015), should be expanded to a pretrial detainee's claim for failure to protect from a substantial risk of suicide.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES—Continued

Page

TABLE OF AUTHORITIES—Continued

INTRODUCTION

Brenda Worl was arrested and transported to the Callahan County Jail. Less than forty minutes after she arrived, she committed suicide. While tragic, this happened very quickly and with no apparent warning. Worl did not have a history of mental illness or prior suicide attempts, and during the brief time she was there she did not engage in conduct that would indicate to the jailers that she was a suicide risk. The district court and the court of appeals reviewed the summary judgment evidence and properly found no genuine issue of material fact that the jailers perceived Worl to be a suicide risk.

Petitioners ask this Court to disregard the deliberate indifference standard articulated by this Court decades ago in *Farmer v. Brennan* for an "objective reasonableness" standard adopted in *Kingsley* for excessive forces cases. *Kingsley*, however, is of limited application and should not extend to deliberate indifference claims involving jail suicide. *Kingsley* drew from Fourth Amendment excessive force claims to fashion what is essentially a mirror-image standard for analyzing excessive force claims brought by pretrial detainees under the Fourteenth Amendment. Deliberate indifference claims on the other hand are based on wholly distinct governmental functions and corresponding rights of citizens that cannot be pigeonholed into a single standard that fails to account for these differences.

Nor is review warranted in this case because the decision below would not change regardless of which standard applies. Petitioners frame this case as one where Worl's "precarious mental health" was "apparent to the jailers" and "no objectively reasonable steps [were] taken to avert the risk of suicide." Pet. at 18. The record, however, tells a different story. There was no evidence Brenda Worl had mental health issues or a history of suicide attempts, and she did not objectively manifest any suicidal thoughts or actions that any reasonable officer would have, or should have, perceived to suggest Worl would attempt to take her life that evening. Therefore, applying *Kingsley* to the jailers' conduct would not yield a different result. Under a subjective or objective standard of deliberate indifference, the jailers were not deliberately indifferent to a substantial risk Brenda Worl would commit suicide that evening. There is no reason for the Court to modify the standard applied by the Fifth Circuit to this case, or a reason to revisit its holding. Both were correct.

STATEMENT OF THE CASE

I. Factual Background

On April 2, 2019, Brenda Worl was arrested by officers with the City of Clyde Police Department on misdemeanor assault charges and transported to the Callahan County Jail. ROA. 399. She arrived at 11:09 p.m. ROA. 399, 403, 418. Callahan County is a rural Texas county with a population of approximately

13,000 people. Built in 1887, it is one of the oldest operating jails in Texas. It contains four rooms for housing inmates and detainees and can hold a maximum of ten people. ROA. 427. The jailers on duty that night, Respondents Delana Hall and Renea McGowen, initiated the book-in process that included conducting a check through the Texas Health and Human Services Commission CCQ system to determine if Worl had previously received state mental healthcare or had a known intellectual or developmental disability. ROA. 399. The CCQ information came back negative for any prior mental health issues. ROA. 399, 406. Respondents attempted to ask her questions to complete the book-in process, but Worl was belligerent, drunk, uncooperative and refused to answer any questions.[1] ROA. 399, 412, 413, 418. The jail was full that night. There was no holding cell or open cell available, so McGowen placed Worl in a visitation room—the only room available—to calm her down so the jailers could complete the book-in process and to allow the jailers to clear a cell for her to be placed in after booking was complete.

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[1] Petitioners relied heavily on Worl's intoxication and behavior as alleged evidence she was a suicide risk. The Fifth Circuit rightly rejected that argument. Pet. App. 13a-14a. A detainee's intoxication does not indicate to an official that the detainee is a suicide risk. *See Estate of Bonilla v. Orange County*, 982 F.3d 298, 304-05 (5th Cir. 2020). Nor does aggressive or combative behavior. *See Branton v. City of Moss Point*, 261 Fed. App'x 659 (5th Cir. 2008) (holding "neither potential drug use nor aggressive behavior, either alone or in combination, places an officer on notice of a substantial risk of suicide"). People who are arrested are often intoxicated and uncooperative. Neither condition inherently suggests they are a suicide risk.

ROA. 399-400, 418-419. McGowen performed a pat search before placing her in the room and took her shoes, coat, and a loose eye glass lens that she had on her person so Worl could not use those items as devices to hurt herself or others. ROA. 418.

Worl was placed in the visitation room at 11:33 p.m., just twenty-four minutes after she arrived at the jail.[2] ROA. 399-400, 419, 439. Just twelve minutes later, at approximately 11:45 p.m., Hall checked on Worl and observed her sitting on the stool with no apparent issues. ROA. 400, 439.[3] Two minutes later, McGowen checked on Worl.[4] She appeared to be sitting on the floor and McGowen could only observe the top of her head, so McGowen retrieved the visitation room key from the dispatch office, entered the room, and discovered Worl had attempted suicide by using a telephone cord from one of the two telephones in that room.[5] ROA. 419. Worl had been at the jail only 38 minutes, had been in the visitation room only 14 minutes, and had been checked on only a few minutes

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[2] McGowen can be seen on the jail video at timestamp 14:58:21 when she was on her way back to the dispatch office after placing Worl in the visitation room. ROA. 419, 435.

[3] Jail video corroborates this as it recorded Hall walking to and from the visitation room area at that time. ROA. 400, 435.

[4] These checks were made in far less time than the 30-minute checks the County jailers would have been required to perform had they known she was a suicide risk. ROA. 432.

[5] The officers immediately initiate CPR and dispatched EMS to the scene. EMS was able to obtain a pulse and transported Worl to the nearest medical center where she was pronounced dead the following day. ROA. 400, 419.

before they discovered she had attempted suicide. ROA. 399-400, 418-419. During her brief time in custody, Worl did not appear to be suicidal or manifest any intent to commit suicide. ROA. 400, 419.

Petitioners make several factual assertions not supported by the record and ask this Court to draw inferences from the record that are not there.[6] Petitioners begin their account by reciting the circumstances of the initial domestic disturbance call Worl made to the Callahan County Sheriff's Office and subsequent events that occurred when officers arrived at her home. They state Worl's husband, Billy Worl, told the officers she had a history of mental health issues. Pet. at 9. This mischaracterizes the record. As reflected in the body camera footage from that night, Clyde Police Department Officer Daniel Piper asked Billy Worl if Brenda had a mental *disability*, "like bi-polar" to which Billy responded, "in the past," but when asked if she suffered from any mental *illness* during the four years they had been together he answered, "no." ROA. 445. Billy did not explain what, if any, past disability Worl may have had, nor was there any indication it involved suicidal ideations. Importantly, Billy denied Worl was presently suffering from any disability or mental health issues. This exchange also occurred at the scene of the arrest. The jailers were not present and had no

[6] Respondents are compelled to address these assertions to "address . . . misstatement[s] of fact . . . in the petition that bear[ ] on what issues properly would be before the Court if certiorari were granted." S. Ct. R. 15.2.

knowledge of any statements made by Billy Worl to the officers.[7] ROA. 399, 400, 418, 419.

Petitioners primarily rely on the fact that, when asked by McGowen whether she had ever attempted suicide, Worl presented her arms to McGowen and stated, "I don't know, have I?" Pet. at 2; ROA. 418-419, 449-450. Petitioners seek to turn that inference on its head—as some indication Worl had previously attempted suicide. But Worl did not have any injuries, scars or markings on her wrists or arms that would indicate a prior suicide attempt, a fact that was corroborated by one of the Clyde Police Officers. ROA. 419, 449-450, 1289. Extending and revealing a wrist lacking in visible scars, markings, or other signs of suicide attempts would lead a reasonable officer to conclude that Worl had not attempted suicide in the past, which is the inference that McGowen reasonably drew. ROA. 418-419. In fact, the record is devoid of any evidence that Worl had previously attempted suicide—a fact that Petitioners certainly could have introduced into evidence had that occurred. It did not.

By asking Worl about past suicide attempts, McGowen was trying to determine if Worl was a suicide risk so she would be able to protect Worl if she did

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[7] While not related to Petitioners' claims against these Respondents, they also criticize the Clyde Police Department Officers for arresting Worl after she had been the one to make the 911 call for help. It is undisputed she had been in a physical altercation with her husband prior to her arrest and she admitted to hitting him. ROA. 445; *see also* ROA. 449, 453. As a result, the officers arrested her for Class C misdemeanor assault. ROA. 399.

have a history of self-harm. Worl's response did not give her any reason to believe Worl had attempted suicide in the past or was a present suicide risk. In fact, Worl did not make any statements to indicate she intended to harm herself. ROA. 400, 419. Worl did not exhibit suicidal behavior or otherwise display any sign she had mental health issues, nor did Respondents believe she was suicidal or had mental health issues based on their observations, and Worl did not have any outward signs of injury or illness that would suggest she was a suicide risk. ROA. 400, 419.

II. Procedural History

Petitioners filed their Complaint against Respondents in the United States District Court for the Northern District of Texas, Abilene Division, asserting claims under 42 U.S.C. § 1983, for allegedly failing to protect Brenda Worl from committing suicide that evening. The trial court granted Respondents' Motion for Summary Judgment based on qualified immunity, holding "there [was] no evidence before the Court, beyond speculative evidence, to raise a genuine issue of material fact as to whether [defendants] appreciated that Worl was a suicide risk or that the phone cord would likely be an instrument of suicide." Pet. App. 7a. The Fifth Circuit declined to extend the objective-unreasonableness standard in *Kingsley v. Hendrickson*, citing the court's "rule of orderliness." Pet. App. 11a.

In a published opinion,[8] the Fifth Circuit affirmed. Pet. App. 3a. As to Respondent Hall, the Fifth Circuit held, "Plaintiffs fail to establish a genuine dispute of material fact that Worl did or said anything to show Hall that she was suicidal or intended to harm herself or that Hall otherwise drew that inference." Pet. App. 16a. As to McGowen, the Fifth Circuit held, [b]ecause plaintiffs failed to establish a genuine dispute of material fact regarding McGowen's subject knowledge of a substantial risk of suicide they fail to show a violation of Worl's statuary or constitutional right." Pet. App. 18a.

Because the Fifth Circuit found no genuine issue of material fact regarding Respondents' subjective knowledge, Worl was a substantial suicide risk, it did not reach the question of whether Respondents acted with deliberate indifference. Pet. App. 13a. It also did not reach the second prong of the qualified immunity analysis, whether the right at issue was clearly established. Pet. App. 12a.

REASONS FOR DENYING THE PETITION

I. The Court of Appeals Applied the Proper Standard

This Court recognized a claim for deliberate indifference to the serious medical needs of convicted prisoners under the Eighth Amendment in *Estelle v.*

[8] *Crandel v. Hall*, 75 F.4th 537 (5th Cir. 2023).

Gamble, 429 U.S. 97, 104 (1976). In *Farmer v. Brennan*, 511 U.S. 825, 836-37 (1994), the Court adopted a criminal recklessness standard for deliberate indifference, which requires as part of the analysis, "disregard[ing] a risk of harm of which [the officer] is aware." The Court reasoned that "punishment" under the Eighth Amendment required a culpable state of mind and that the subjective understanding and intent of the officer was critical in analyzing whether their actions would rise to the level of constitutionally prohibited punishment. The Court considered, but rejected, the civil definition of recklessness that applied an objective standard for evaluating the officer's conduct, reasoning that it was akin to imposing tort liability and not appropriate for constitutional consideration:

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

Id. at 837-38 (citation omitted).

The Fifth Circuit in *Hare v. City of Corinth* applied the subjective deliberate indifference standard announced in *Farmer* to claims brought by pretrial

detainees. 74 F.3d 633, 647-48 (5th Cir. 1996) ("[N]o constitutionally relevant difference exists between the rights of pretrial detainees and convicted prisoners to be secure in their basic human needs.") For almost thirty years, the Fifth Circuit and the other circuits have consistently used this standard to evaluate claims brought by pretrial detainees alleging claims for inadequate medical care and specifically failure to protect from suicide.

Petitioners nevertheless urge the Court to discard this well-developed area of the law in favor of the standard announced in *Kingsley*. They reason that a singular standard should apply to all claims under the Fourteenth Amendment, that the "status of the person in custody" should control, not the "nature of the claim." Pet. at 5. To the contrary, Fourteenth Amendment due process cannot be examined through the lens of a single standard. Due process encompasses varying government responsibilities and citizen rights that require different criteria for examining these corresponding rights and obligations based on the claim asserted. There is no justification for disregarding established precedent for a standard uniquely suited for excessive force claims and that would be unsuitable for analyzing claims for deliberate indifference in the jail suicide context.

Kingsley addressed the limited question of the standard to be applied to an excessive force claim brought by a pretrial detainee under the Fourteenth Amendment. 576 U.S. at 391. In fact, the Court took care to limit its opinion to excessive force claims only.

576 U.S at 395-96. *Kingsley* specifically addressed how to evaluate objectively the actual force applied, *i.e*., the offending conduct, not the officer's underlying motive or intent for the use of force in the first place. 576 U.S. at 395-96.[9] In answering this question the Court looked to excessive force cases involving arrests, investigatory stops, and seizures under the Fourth Amendment for guidance. 576 U.S. at 397-98 (citing *Graham v. Connor*, 490 U.S. 386 (1989)).

Excessive force claims involve different governmental action, interests, and corresponding rights of the detainee than that of deliberate indifference claims arising from the state's provision of medical care. Excessive force claims "protect[] a pretrial detainee from the use of excess of force that amounts to punishment," 576 U.S. at 397. That force is the product of deliberate, affirmative acts committed by officers while in the exercise of quintessential police functions, including maintaining order and institutional security. *Id*. at 399-400. Whether the force applied is considered excessive can be judged by the observable acts of the officer and whether that force is objectively reasonable for the circumstances necessitating its use.

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[9] The Court did not address the motive or intent of the officers, which would implicate inquiry into their state of mind, because it was undisputed the officers intended to use force against the detainee. *Id*. at 396. *Kingsley* nevertheless confirmed there is a state of mind requirement for the question of the officer's intent on the use of force in the first place. It is that intent that still must be discerned, which necessarily requires inquiry into the officer's state of mind at the time he or she acted or failed to act.

Deliberate indifference claims on the other hand are based on an alleged failure to act, which cannot be objectively evaluated without inquiring into the state of mind of the officer whose alleged failure to act is being challenged. "While 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. Rather, a person who unknowingly fails to act—even when such a failure is objectively unreasonable—is negligent at most." *Castro v. County of Los Angeles*, 833 F.3d 1060, 1086 (9th Cir. 2016) (en banc) (Ikuta, J., dissenting); *see also Strain v. Regalado*, 977 F.3d 984, 991 (10th Cir. 2020). Petitioners acknowledge and *Kingsley* confirms, negligence does not equate to deliberate indifference and is not subject to constitutional protection. "[T]he defendant must possess a purposeful, a knowing, or possibly a reckless state of mind. 576 U.S. at 396; *De Jesus Benavides v. Santos*, 883 F.2d 385, 388 (5th Cir. 1989) ("Section 1983 does not federalize tort law. . . . [T]here is a significant distinction between tort and a constitutional wrong.") (emphasis in original). Deliberate indifference by definition "presupposes a subjective component." *Strain*, 977 F.3d at 992 ("After all, deliberate means 'intentional,' 'premeditated,' or 'fully considered.' ") (quoting Black's Law Dictionary 539 (11th ed. 2019)).

Deliberate indifference claims also derive from, and protect, different rights than excessive force claims. "The deliberate indifference cause of action does not relate to punishment, but rather safeguards

a pretrial detainee's access to adequate medical care." *Strain*, 977 F.3d at 991. Thus, the deliberate indifference standard was developed to evaluate claims arising from the government's role in providing access to the provision of services, *i.e.*, medical care, that is not otherwise constitutionally guaranteed but for the government's exercise of custody over the detainee.

There is a critical distinction between analyzing the constitutionality of the state affirmatively causing injury through its exercise of authority versus the constitutionality of the state's provision of medical care. There is generally no affirmative constitutional right to medical care. *See DeShaney v. Winnebago Cty. Dep't of Soc. Servs.*, 489 U.S. 189, 196 (1989) ("The Due Process Clauses generally confer no affirmative right to governmental aid, even where such aid may be necessary to secure life, liberty, or property interests of which the government itself may not deprive the individual."). The exception to that general proposition, implicated here, is "[w]hen 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." *Id.* at 199-200. This "custody exception" triggers a constitutional duty to provide adequate medical care to incarcerated prisoners, pretrial detainees, and those under "other similar restraint of personal liberty." *Id.* at 200. And while the state may have an obligation to provide some level of medical care, this Court has never recognized a constitutional right to "the proper implementation of adequate suicide prevention [or screening] protocols."

Taylor v. Barkes, 575 U.S. 822, 826 (2015); *see also Estate of Bonilla v. Orange County*, 982 F.3d 298, 307 (5th Cir. 2020) (holding no Fifth Circuit decision establishes the right to adequate suicide screening or suicide prevention protocols).

"The affirmative duty to protect arises not from the State's knowledge of the individual's predicament or from its expressions of intent to help him, but from the limitation which it has imposed on his freedom to act on his own behalf. In the substantive due process analysis, it is the State's affirmative act of restraining the individual's freedom to act on his own behalf—through incarceration, institutionalization, or other similar restraint of personal liberty—which is the 'deprivation of liberty' triggering the protections of the Due Process Clause, not its failure to act to protect his liberty interests against harms inflicted by other means." *Id*. at 200 (citation omitted).

In other words, the obligation to provide care derives from the incarceration itself and not the arbitrary distinction between whether the incarcerated individual has been convicted or not. There is therefore no substantive difference between the standard to be applied when analyzing the constitutional threshold of liability for the failure to provide such care and, therefore, no reason to depart from the deliberate indifference standard articulated in *Farmer* for claims brought by pretrial detainees.

II. This is not the Proper Case to Address any Circuit Split Over the Application of *Kingsley* to Claims for Deliberate Indifference

Petitioners cite opinions from the Second, Sixth, Seventh and Ninth Circuits adopting *Kingsley*'s objective standard to deliberate indifference primarily in claims for failure to protect the detainee from violence, conditions of confinement, and denial of medical care, not to the specific issue here—deliberate indifference to the substantial risk of suicide. *See Darnell v. Pineiro*, 849 F.3d 17, 34-35 (2d Cir. 2017) (adopting an objective standard in a conditions of confinement case); *Brawner v. Scott County*, 14 F.4th 585, 596 (6th Cir. 2021) (adopting an objective standard in a denial of medical care case); *Miranda v. County of Lake*, 900 F.3d 335, 352 (7th Cir. 2018) (adopting an objective standard in a denial of medical care case); *Castro v. County of Los Angeles*, 833 F.3d 1060, 1070 (9th Cir. 2016) (en banc) (adopting an objective standard in a case alleging the failure to protect an inmate from harm by another inmate).

Conversely, the Fifth, Eighth, Tenth and Eleventh Circuits have limited *Kingsley* to excessive force claims and continue to apply a subjective deliberate indifference standard. *See Alderson v. Concordia Par. Corr. Facility*, 848 F.3d 415, 419 & n.4 (5th Cir. 2017) (continuing to require a subjective element in a failure-to-protect case); *Whitney v. City of St. Louis*, 887 F.3d 857, 860 n.4 (8th Cir. 2018) (continuing to require a subjective element in a jail suicide case); *Strain v. Regalado*, 977 F.3d 984, 993 (10th Cir. 2020) (continuing

to require a subjective element in an inadequate medical care case); *Dang ex rel. Dang v. Sheriff, Seminole Cnty.*, 871 F.3d 1272, 1279 n.2 (11th Cir. 2017) (continuing to require a subjective element in an inadequate medical care case).

There is a lack of developed authority on the specific issue of whether *Kingsley* extends to jail suicide cases and, if so, how it would be applied in evaluating the actions of the officers or, more precisely, the failure of the officers to respond to a substantial suicide risk. As conceded by Petitioners, this question should not be taken up by this Court if it has not "adequately percolated" through the courts for there to be a "fully crystalized" circuit split. Pet. at 20. On that, there can be no doubt this issue has not been fully considered. There is a dearth of cases that have applied *Kingsley* specifically to jail suicides. *See Pittman v. County of Madison*, 970 F.3d 823 (7th Cir. 2020) (attempted suicide after detainee who had previously been on suicide watch had made repeated request for crisis counseling that went ignored); *Horton v. City of Santa Maria*, 915 F.3d 592 (9th Cir. 2019) (Pre-*Castro* attempted suicide acknowledging change in the deliberate indifference standard in light of *Kingsley* but holding officer entitled to qualified immunity under the law existing at the time).

The Fourth Circuit in *Short v. Hartman*, No. 21-1396, 2023 U.S. App. LEXIS 32521, *15-16 (4th Cir. Dec. 8, 2023), recently applied *Kingsley* in a suicide context. However, *Short* bears no factual similarity to this case. In *Short*, the detainee had a prior suicide

attempt for which the Sheriff's department had been dispatched to her home, and they were again notified she was suicidal when they responded to a domestic disturbance call at her home on the evening that resulted in her arrest. *Id*. at *2-3. Following her arrest, and despite the fact the detainee was a known suicide risk, deputies placed her in an isolation cell with a sheet and did not observe her as often as jail policy required. *Id*. at *3-6. Forty minutes elapsed between one check and the next check when an officer discovered she had hung herself with the sheet. *Id*. at *6.

The district court granted the defendants' motion for judgment on the pleadings, ruling in part that the plaintiff had failed to allege the defendants deprived the detainee of her constitutional rights. *Id*. at *9-10. On appeal, the Fourth Circuit requested that the parties brief whether the Fourteenth Amendment claims should be evaluated under the *Kingsley* standard. *Id*. at *10-11. In reaching its decision, the court of appeals acknowledged the question it raised about application of *Kingsley* was "antecedent to our consideration of the district court's disposition of [the plaintiff's] claims." *Id*. at *14. The Court framed the issue for consideration generally as whether it should apply an objective standard for "claims for deliberate indifference to a serious risk of harm," (*id*. at *27), and specifically to deliberate indifference to a "medical need." *Id*. at *28. The court held *Kingsley* required it to adopt an objective test for Fourteenth Amendment claims for deliberate indifference to medical care. It reversed on the basis that the district court had improperly applied a

subjective standard, while at the same time concluding the plaintiff's allegations were sufficient to state a claim under either an objective or subjective test.[10] *Id*. at *29.

Importantly, *Short* applied *Kingsley* to deliberate indifference claims generally, and specifically in the medical care context, but it did not fully examine how or why it should be incorporated to the specific circumstances of suicide. That distinction matters. As previously addressed, this Court has never recognized that the obligation to provide some level of medical care extends to a constitutional right to "the proper implementation of adequate suicide prevention [or screening] protocols." *Taylor v. Barkes*, 575 U.S. 822, 826 (2015); *Estate of Bonilla v. Orange County*, 982 F.3d 298, 307 (5th Cir. 2020) (holding no Fifth Circuit decision establishes the right to adequate suicide screening or suicide prevention protocols). This raises the threshold question of the constitutional protection that extends to these claims and whether a departure from *Farmer* is warranted.

Deliberate indifference in the context of failure to protect, conditions of confinement, and inadequate medical care claims do not necessarily involve the same considerations present in jail suicide cases, namely their inherent unpredictability and the difficulty in

[10] The court held the plaintiff's complaint was sufficient to state a claim that the defendant jail sergeant was deliberately indifferent to the detainee's serious medical needs because she failed to follow jail policy to mitigate the detainee's suicide risk. *Id*. at *38.

recognizing and responding to a detainee's risk or potential for committing suicide. *Domino v. Tex. Dep't of Criminal Justice*, 239 F.3d 752, 756 (5th Cir. 2001). When a detainee resolves in his or her mind to commit suicide, they carry it out through their own action. The officer's "conduct" being scrutinized centers on understanding, observing, and reacting to the subjective psyche of the detainee that is only revealed, if at all, from some outward expression of intent to commit the act, and the proper precautions to be taken for considering the circumstances known by the officer at the time based on those expressions of intent. Thus, what a defendant officer subjectively knows matters when dealing with an inmate's state of mind and then deciding what, if any, precautions may be taken to prevent the detainee from engaging in that course of action.

Subjective appreciation by the officer of the danger is important when analyzing the reasonableness of their conduct, as there must be an appreciation of the risk to mitigate against it. In making that determination, you cannot separate the consciousness from the conduct—the officer's knowledge from scrutiny of their alleged failure to act. Absent inquiry into the subjective perception of the officers, there is no way to evaluate whether their failure to act was intended as punishment and thus prohibited under the Constitution, or merely negligent or grossly negligent, which does not give rise to a constitutional deprivation. Eliminating the subjective component of the inquiry "constitutionalizes" tort law though Section 1983. This same consideration is not present in an excessive force

case and further illustrates why *Kingsley* should not be applied to this case.

III. The Court of Appeals' Decision was Correct Under Either Standard

The circuits applying *Kingsley* to failure to protect, conditions of confinement, and medical care claims have essentially adopted an "objective" deliberate indifference standard based on the definition of civil recklessness articulated in *Farmer*. Although the specific elements adopted by the circuits differ in some respects, they essentially incorporate a "should have known" element to the officer's perception of "an unjustifiably high risk of harm." 511 U.S. at 836.

Under the standard adopted by the Second Circuit, "[A] detainee asserting a Fourteenth Amendment claim for deliberate indifference to his medical needs can allege either that the defendants *knew* that failing to provide the complained of medical treatment would pose a substantial risk to his health or that the defendants *should have known* that failing to provide the omitted medical treatment would pose a substantial risk to the detainee's health." *Charles v. Orange Cty.*, 925 F.3d 73, 87 (2d Cir. 2019) (emphasis in original). Despite adopting objective deliberate indifference as the standard, however, the court did not explain how to distinguish between "negligence" and "conscious disregard" absent inquiry into the subjective state of mind of the officer—an inquiry that takes on a greater importance when the challenged conduct in one of a

"failure to act" where no affirmative conduct is or can be evaluated.

The Sixth Circuit requires a plaintiff show: "(1) that [he or she] had a sufficiently serious medical need and (2) that each defendant acted deliberately (not accidentally), but also recklessly in the face of an unjustifiably high risk of harm that is either known *or so obvious that it should be known*." *Helphenstine v. Lewis Cty.*, 60 F.4th 305, 317 (6th Cir. 2023) (cleaned up) (emphasis added). However, *Helphenstine* acknowledged the inconsistency with which the courts have applied this standard. *Id.* at 316-17 (citing *Trozzi v. Lake County*, 29 F.4th 745 (6th Cir. 2022) and *Brawner v. Scott County*, 14 F.4th 585 (6th Cir. 2021)).

The Seventh Circuit extended *Kingsley* to deliberate indifference claims but did not articulate a specific standard for analyzing "objective reasonableness," recognizing only that negligence or gross negligence is not sufficient, but that "something akin to reckless disregard" would suffice. *Miranda v. County of Lake*, 900 F.3d 335, 353 (7th Cir. 2018) (quoting *Castro*, 833 F.3d at 1071).

Lastly, the Ninth Circuit requires the following: "(i) the defendant made an intentional decision with respect to the conditions under which the plaintiff was confined; (ii) those conditions put the plaintiff at substantial risk of suffering serious harm; (iii) the defendant did not take reasonable available measures to abate that risk, even though a reasonable official in the circumstances would have appreciated the high degree

of risk involved—making the consequences of the defendant's conduct obvious; and (iv) by not taking such measures, the defendant caused the plaintiff's injuries." *Gordon v. Cty. of Orange*, 888 F.3d 1118, 1124-25 (9th Cir. 2018) (citing *Castro v. County of Los Angeles*, 833 F.3d 1060, 1071 (9th Cir. 2016)). The third element again requires "more than negligence but less than subjective intent—something akin to reckless disregard." *Id*. (quoting *Castro*, 833 F.3d at 1071).

The courts that have adopted or considered *Kingsley* nevertheless recognize that "objective unreasonableness" is not met if the detainee does not provide information or engage in conduct that would support a finding the officer "should have known [the detainee's] condition posed an excessive risk to [his] health or safety or that [the officer's] failure to intervene was a violation of [the detainee's] constitutional rights." *See Callwood v. Meyer*, Nos. 20-2091-cv(L), 20-2096-cv (CON), 2022 U.S. App. LEXIS 13933, at *7 n.2 (2d Cir. May 24, 2022) (cleaned up); *see also Chilcutt v. Santiago*, No. 22-2916, 2023 U.S. App. LEXIS 18615, at *9 (7th Cir. July 21, 2023) (citing *Jump v. Village of Shorewood*, 42 F.4th 782, 793 (7th Cir. 2022)) (no objective unreasonableness when "officer has no reason to think a detainee is suicidal"); *Brawner v. Scott County*, 14 F.4th 585, 603-04 (6th Cir. 2021) (Readler, J., dissenting) (discussing that the majority opinion addressing *Kingsley* was not necessary to the ruling as well as past Sixth Circuit cases refusing to address *Kingsley* when it would not have impacted the outcome); *Dang ex rel. Dang v. Sheriff, Seminole Cnty.*, 871 F.3d 1272, 1279 n.2

(11th Cir. 2017) (finding that even if the court applied an objective standard, the outcome would be the same because the allegations only amount to negligence).

Regardless of the standard applied, there would be no different outcome here. There is no evidence in the record that would suggest the jailers acted with "reckless disregard" or otherwise should have known that Brenda Worl was a suicide risk. Petitioners focus on the fact that the jailers placed Worl in a room (temporarily) with a telephone cord. Placing a detainee in a room with a telephone cord as a temporary measure while a cell is being prepared is not itself objectively unreasonable and it is certainly not reckless. It only potentially becomes a problem if the detainee is likely to use that cord as a ligature. There must be an objective manifestation by the detainee, observed and appreciated by the jailer, that he or she is a suicide risk before the act of placing them in a cell with a phone cord is subject to scrutiny. Absent such a manifestation by the detainee, the jailer's actions are not unreasonable.

There would be no different outcome applying an objective component to the question, *i.e.*, not whether there was an actual appreciation of that risk, but whether a reasonable jailer should have appreciated it, as there was no objective reason for the jailers to believe Worl would use the telephone cord as a ligature to commit suicide. Worl did not say or do anything that would suggest she was at a substantial risk for committing suicide. Worl did not objectively express

any suicidal thoughts or exhibit any suicidal actions; she did not have a history of mental illness; she had never attempted suicide in the past; and she did not threaten to or otherwise indicate that she was going to attempt to kill herself that evening. Thus, even if one were to apply an "objective reasonableness" standard to the jailers, they would be entitled to summary judgment, as there is no evidence the jailers should have perceived Worl to be a substantial suicide risk.

IV. This Court has Continually Denied Review of this Issue and Should Again

Petitioners acknowledge the Court has denied certiorari numerous times on this very issue, recently in a case from the Fifth Circuit, *Cope v. Cogdill*, 142 S. Ct. 2573 (2022) (Sotomayor, J., dissenting).[11] Pet. at 20-22. They nevertheless argue that these cases were either not fully developed, or that the underlying facts would not result in a change in the court's ruling regardless of the standard applied. This case suffers the same infirmities. As previously addressed, the question of whether *Kingsley* applies to deliberate

[11] The dissent in *Cope* did not advocate modifying of the deliberate indifference standard. Rather, Justice Sotomayor believed reversal was appropriate because the record in the case reflected the jailers actually knew the detainee was a substantial suicide risk and, therefore, the officers were not entitled to qualified immunity under any standard of deliberate indifference. *Id*. at 2576. *Cope* bears no factual similarity to this case, as Worl never indicated she was a suicide risk.

indifference claims involving jail suicide has not been fully developed or resulted in a circuit split that requires this Court to resolve.

And applying *Kingsley* to the conduct of the jailers would not change the outcome. "It is not the habit of the Court to decide questions of a constitutional nature unless absolutely necessary to a decision of the case." *Ashwander v. TVA*, 297 U.S. 288, 346-47 (1936) (Brandeis, J., concurring) (quoting *Burton v. United States*, 196 U.S. 283, 295 (1905)). The jailers' conduct was not objectively unreasonable considering the facts known to them, or that should have been known to them. The jailers were not aware, nor should they have been aware, that Brenda Worl was a substantial suicide risk and, therefore, their actions did not rise to the level of either subjective or objective deliberate indifference.

Further, if the Court were to take up this case and expand *Kingsley* to the circumstances of this case, not only would Petitioners' claims fail on their merits, but Respondents would be entitled to qualified immunity, as that would signal a departure from existing precedent that would not have been clearly established as of April 2, 2019. *Keller v. Fleming*, 952 F.3d 216, 225 (5th Cir. 2020) (quoting *Anderson v. Creighton*, 483 U.S. 635, 641, (1987)) ("For purposes of determining whether the right was clearly established, '[t]he relevant question . . . is . . . whether a reasonable officer could have believed [his or her conduct] to be lawful, in light of clearly established law

and the information the . . . officers possessed.'"). Again, there would be no change in the outcome of the case on that basis as well.

This case is not one through which the Court should review this question. Even if this issue is one that is properly considered by this Court, it should address it in a case or cases that erroneously apply *Kingsley* to a pretrial detainee suicide and where application of *Kingsley* would result in a different outcome.

CONCLUSION

Respondents were not deliberately indifferent to the substantial risk that Brenda Worl would commit suicide. There was no evidence that the jailers perceived, or should have perceived, that Worl was a suicide risk that evening. Therefore, under either standard the court of appeals did not err in affirming the summary judgment in favor of Respondents. There is no basis for this Court to review the standard applied

by the court of appeals or its ultimate holding. Respondents respectfully request the Court deny the Petition.

Respectfully submitted,

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