No. 21-264

In The Supreme Court of the United States

COUNTY OF SAN DIEGO et al.,

Petitioners,

v.

ANA SANDOVAL,

Respondent.

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

BRIEF OF THE CALIFORNIA STATE ASSOCIATION OF COUNTIES, THE NATIONAL SHERIFFS' ASSOCIATION, THE CALIFORNIA STATE SHERIFFS' ASSOCIATION, THE CALIFORNIA POLICE CHIEFS ASSOCIATION, AND THE CALIFORNIA PEACE OFFICERS' ASSOCIATION AS AMICI CURIAE IN SUPPORT OF PETITIONERS

JENNIFER B. HENNING
Counsel of Record
CALIFORNIA STATE ASSOCIATION OF COUNTIES
1100 K Street, Suite 101
Sacramento, CA 95814
Telephone: (916) 327-7535
jhenning@counties.org

LEE H. ROISTACHER
DEAN GAZZO ROISTACHER, LLP
440 Stevens Avenue, Suite 100
Solana Beach, CA 92075
Telephone: (858) 264-4938
lroistacher@deangazzo.com

Attorneys for Amici Curiae

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

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

Page

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

BRIEF OF AMICI CURIAE IN SUPPORT OF PETITIONERS

The California State Association of Counties ("CSAC"), the National Sheriffs' Association ("NSA"), the California State Sheriffs' Association ("CSSA"), the California Police Chiefs Association ("CPCA") and the California Peace Officers' Association ("CPOA") respectfully submit this brief as amici curiae in support of Petitioners.

INTEREST OF THE AMICI CURIAE[1]

CSAC's membership consists of the 58 California counties. CSAC sponsors a Litigation Coordination Program, which is administered by the County Counsels' Association of California and is overseen by the Association's Litigation Overview Committee, comprised of county counsels throughout the state. The Litigation Overview Committee monitors litigation of concern to counties statewide and has determined that this case is a matter affecting all counties.

The NSA is a non-profit association formed under 26 U.S.C. § 501(c)(4). Since 1940, the NSA has promoted the fair and efficient administration of criminal

[1] The parties have consented to the filing of this brief. The parties were notified more than ten days prior to the due date of this brief of the intention to file. This brief was not authored in whole or in part by counsel for any party. No person or entity other than amicus curiae made a monetary contribution to this brief's preparation or submission.

justice throughout the United States while advancing and protecting the Office of Sheriff. The NSA has over 13,000 members and is the advocate for 3,083 sheriffs throughout the United States. The NSA also works to promote the public interest goals and policies of law enforcement throughout the nation. It participates in the judicial process where the vital interests of law enforcement and its members are affected. The NSA represents the nation's sheriffs who operate more than 3,000 local correctional facilities throughout the country. Sheriffs and jail operators, as the custodians of the inmates housed within these facilities, are charged with providing a safe and secure environment for both the inmates and for their staff. These sheriffs and jail operators depend on their line officers to follow law and policy when carrying out their duties.

CSSA is a non-profit professional organization that represents each of the 58 California Sheriffs. It was formed to allow the sharing of information and resources between sheriffs and departmental personnel in order to allow for the general improvement of law enforcement throughout the State of California. CPCA represents virtually all of the more than 400 municipal chiefs of police in California. CPCA seeks to promote and advance the science and art of police administration and crime prevention, by developing and disseminating professional administrative practices for use in the police profession. It also furthers police cooperation and the exchange of information and experience throughout California. Finally, CPOA represents more than 2,000 peace officers, of all ranks, throughout the

State of California. CPOA provides professional development and training for peace officers, and reviews and comments on legislation and other matters impacting law enforcement.

Amici have a significant interest in the important and unresolved issue presented in the petition for certiorari, which provides this Court with an opportunity to consider whether the culpability standard applicable to 42 U.S.C. section 1983 claims brought by pretrial detainees asserting inadequate medical care in violation of the Due Process Clause of the Fourteenth Amendment continues to include a state-of-mind component analogous to the Eighth Amendment's deliberate indifference standard, or whether courts should apply the "objective unreasonableness" standard established for Fourteenth Amendment excessive force claims brought by pretrial detainees in *Kingsley v. Hendrickson*, 576 U.S. 389, 396-97 (2015).

There are over 115 county operation jails in California[2] with roughly 44,200 pretrial detainees in these jails accounting for 75% of California's jail population.[3] At the national level, "[t]wo thirds of the confined population in county jails is pretrial and the proportion reaches nearly three-quarters in almost half of county jails. This trend is more pronounced in jails located in small counties – with less than 50,000 residents – and

---

[2] Magnus Lofstrom & Brandon Morton, Just the Facts – California County Jails (Public Policy Inst. of Cal. Feb. 2021), http://www.ppic.org/wp-content-uploads/JTF_CountyJailsJTF.pdf.

[3] Robert Lewis, Waiting for Justice (CalMatters, Mar. 31, 2021), https://calmatters.org/justice/2021/03/waiting-for-justice/.

in medium-sized counties – with populations between 50,000 and 250,000 residents."[4] Thus, the important issue presented in the petition for certiorari has local and national implications.

STATEMENT OF THE CASE

CSAC joins in and refers to the Statement of the Facts found in Petitioners' Petition for Writ of Certiorari (Writ Pet. at pp. 2-4).

SUMMARY OF THE ARGUMENT

"The difficulties of operating a detention center must not be underestimated by the courts." *Florence v. Bd. of Chosen Freeholders*, 566 U.S. 318, 326 (2012). Local jails (i.e., excluding prison facilities) have 10.3 million admissions annually.[5] The duty to protect these inmates includes the duty to provide medical care. However, not every failure to do so rises to a

[4] Natalie R. Ortiz, Ph.D., County Jails at a Crossroads, An Examination of the Jail Population and Pretrial Release (National Association of Counties, Why Counties Matter Paper Series, Issue 2, 2015), p. 2, https://www.naco.org/sites/default/files/documents/Final%20paper_County%20Jails%20at%20a%20Crossroads_8.10.15.pdf.

[5] Dept. of Justice, Bureau of Justice Statistics, Zhen Zeng, Ph.D., and Todd D. Minton, Jail Inmates in 2019 (Mar. 2021) p. 2, https://bjs.ojp.gov/content/pub/pdf/ji19.pdf.

constitutional violation. *Farmer v. Brennan*, 511 U.S. 825, 834 (1994).

When allegations arise that a substantial risk of serious harm existed for the inmate, the well-established deliberate indifference standard applied for years. Indeed, this Court has never adopted an objective test for deliberate indifference, understanding that the common law imposes tort liability on a purely objective basis. *Farmer*, 511 U.S. at 838. Parting from this well-grounded standard would constitutionalize negligence, thus having a devastating and sweeping impact on all jails throughout the United States.

Although this Court has several times noted the issue, it has never answered the question of whether some culpability standard other than the Eighth Amendment's deliberate indifference standard should apply to a Fourteenth Amendment inadequate medical claim brought by a pretrial detainee. *County of Sacramento v. Lewis*, 523 U.S. 833, 850 (1998); *City of Canton v. Harris*, 489 U.S. 378, 388 n.8 (1989); *Daniels v. Williams*, 474 U.S. 327, 334 n.3 (1986); *City of Revere v. Mass. Gen. Hosp.*, 463 U.S. 239, 244 (1983); *see Miranda-Rivera v. Toledo-Davila*, 813 F.3d 64, 74 (1st Cir. 2016) ("Fourteenth Amendment substantive due process requires the government to provide medical care to persons who are injured while being apprehended by the police. 'The boundaries of this duty have not been plotted exactly; however, it is clear that they extend at least as far as the protection that the Eighth Amendment gives to a convicted prisoner.' [citations omitted].").

Without guidance from this Court, circuit courts for decades uniformly held that a Fourteenth Amendment inadequate medical care claim brought by a pretrial detainee includes a deliberate indifference component analogous to the Eighth Amendment's deliberate indifference standard and, as such, a detainee had to prove the government official actually knew of and disregarded a serious health risk. *See* Catherine T. Struve, *The Conditions of Pretrial Detention*, 161 U. Pa. L. Rev. 1009, 1027 (2013); *see also* Michael S. DiBatista, *A Force to be Reckoned With: Confronting the (Still) Unresolved Questions of Excessive Force Jurisprudence After* Kingsley, 48 Colum. Hum. Rts. L. Rev. 203, 225-26 (2017). This uniformity dramatically changed after *Kingsley v. Hendrickson*, 576 U.S. 389 (2015).

After *Kingsley*, circuit courts are now divided on the culpability standard for Fourteenth Amendment inadequate medical care claims brought by pretrial detainees. *Miranda v. County of Lake*, 900 F.3d 335, 351-52 (7th Cir. 2018) (discussing circuit court split); *Richmond v. Huq*, 885 F.3d 928, 938 n.3 (6th Cir. 2018) (same).

Because *Kingsley* dealt exclusively with a Fourteenth Amendment excessive force claim by a pretrial detainee, many circuits continue to utilize the well-established deliberate indifference standard for a pretrial detainee's Fourteenth Amendment inadequate medical care claim. *E.g.*, *Whitney v. City of St. Louis*, 887 F.3d 857, 860 & n.4 (8th Cir. 2018); *Nam Dang by & through Vina Dang v. Sheriff, Seminole County, Fla.*, 871 F.3d 1272, 1279 (11th Cir. 2017); *Alderson v.*

Concordia Parrish Corr. Facility, 848 F.3d 415, 419-20 & n.4 (5th Cir. 2017) ("The concurring opinion suggests that our en banc court should reconsider [prior precedent] in light of the Supreme Court's opinion in *Kingsley*. . . . Because the Fifth Circuit has continued . . . to apply a subjective standard post-*Kingsley*, this panel is bound by our rule of orderliness."); *Strain v. Regalado*, 977 F.3d 984, 989 (10th Cir. 2020) (applying deliberate indifference standard post-*Kingsley*).

However, other circuits believe *Kingsley*'s reasoning extends beyond excessive force claims and have inappropriately applied *Kingsley*'s objective unreasonableness standard to Fourteenth Amendment inadequate medical care claims, as well as other non-excessive force based Fourteenth Amendment claims brought by pretrial detainees. *E.g.*, *Miranda*, 900 F.3d at 351 (applying *Kingsley* to inadequate medical care claim); *Gordon v. County of Orange*, 888 F.3d 1118, 1124-25 (9th Cir. 2018) ("While *Kingsley* did 'not necessarily answer the broader question of whether the objective standard applies to all Section § [sic] 1983 claims brought under the Fourteenth Amendment against individual defendants[,]' [citation] logic dictates extending the objective deliberate indifference standard . . . to medical care claims."); *Darnell v. Pineiro*, 849 F.3d 17, 34-35 (2d Cir. 2017) (applying *Kingsley* to a condition of confinement claim).

Each of these decisions, as well as the one below, seemingly inappropriately applies the *Kingsley* test to replace the well-established deliberate indifference test. Use of force precedents like *Kingsley* were never

intended to be stretched and distorted to replace the subjective deliberate indifference standard for medical care in a correctional facility. To change the standard to an objective standard for Fourteenth Amendment claims, where state medical negligence redress avenues remain available to the inmate, lowers the constitutional threshold, which this Court has protected fiercely for decades.

In addition, this case presents an opportunity for the Court to consider whether there should be a different standard for convicted prisoners than for pretrial detainees at all. The facilities, staffing, treatment plans and so on do not change on the day a person is convicted and their status changes from pretrial detainee to convicted prisoner. The struggle that the Courts of Appeals have shown in attempting to apply these standards raises the question of whether the expansion of substantive due process to cover these types of conditions of confinement claims was in error and should be reconsidered.

A definitive answer from this Court on whether the culpability standard for Fourteenth Amendment inadequate medical care claims brought by pretrial detainees differs from the Eighth Amendment's deliberate indifference standard was unnecessary when the circuits were uniform in their treatment of such claims. But now, an answer from this Court is necessary. It is imperative that this Court affirm that the subjective deliberate indifference standard is the applicable standard for all claims brought by an inmate, regardless of their status.

Given the circuit split, the culpability standard for Fourteenth Amendment inadequate medical care claims brought by pretrial detainees differs from state to state, depending on what circuit the particular state lies in. This is an unacceptable result. *Cf. Rodriguez v. Swartz*, 899 F.3d 719, 758 (9th Cir. 2018) (Smith, C.J., dissenting). This Court should now resolve this uncertain and unacceptable state of constitutional jurisprudence.

Although Amici believe adopting an objective unreasonableness standard for Fourteenth Amendment medical care claims by pretrial detainees creates a "constitutional medical malpractice claim," state and local governments across the country need a definitive answer from this Court, whatever the answer may be, to properly allocate limited resources and to develop appropriate and consistent policies, practices, and procedures that conform to a final determination from this Court of what is constitutionally required.

ARGUMENT

I. This Court Has Left Unresolved The Issue Of Whether Fourteenth Amendment Inadequate Medical Care Claims Brought By Pretrial Detainees Are Governed By A Culpability Standard Different Than The Eighth Amendment's Deliberate Indifference Standard.

In 1976, this Court held that the Eighth Amendment provides convicted prisoners with a right to medical care and that a "deliberate indifference to serious medical needs" violates the Eighth Amendment because it "constitutes the 'unnecessary and wanton infliction of pain.'" *Estelle v. Gamble*, 429 U.S. 97, 104 (1976) (citation omitted). As this Court explained:

> [I]n the medical context, an inadvertent failure to provide adequate medical care cannot be said to constitute "an unnecessary and wanton infliction of pain" or to be "repugnant to the conscience of mankind." Thus, a complaint that a physician has been negligent in diagnosing or treating a medical condition does not state a valid claim of medical mistreatment under the Eighth Amendment. Medical malpractice does not become a constitutional violation merely because the victim is a prisoner. In order to state a cognizable claim, a prisoner must allege acts or omissions sufficiently harmful to evidence deliberate indifference to serious medical needs. It is only such indifference that can offend

> "evolving standards of decency" in violation of the Eighth Amendment.

Id. at 105-106.

In 1979, this Court concluded that holding pretrial detainees in conditions that "amount to punishment" violates the Fourteenth Amendment when conditions are "imposed for the purposes of punishment." *Bell v. Wolfish*, 441 U.S. 520, 535, 538 (1979).

In 1983, this Court held in *City of Revere* that the Fourteenth Amendment requires government officials to provide pretrial detainees with adequate medical care, finding the Fourteenth Amendment provides protections "at least as great as the Eighth Amendment protections available to a convicted prisoner." 463 U.S. at 244. But this Court declined to decide whether something less than the Eighth Amendment's deliberate indifference standard governed. *Id.* This Court again declined to answer the question in 1986. *Daniels v. Williams*, 474 U.S. 327, 334, n.3 (1986) ("Despite his claim about what he might have pleaded, petitioner concedes that respondent was at most negligent. Accordingly, this case affords us no occasion to consider whether something less than intentional conduct, such as recklessness or 'gross negligence,' is enough to trigger the protections of the Due Process Clause.").

In 1989, this Court in *City of Canton* again passed on deciding whether the standard for Fourteenth Amendment inadequate medical care claims brought by pretrial detainees was anything less than the Eighth Amendment's deliberate indifference standard.

489 U.S. at 388 n.8 ("[T]his Court has never determined what degree of culpability must be shown before the particular constitutional deprivation asserted in this case – a denial of the due process right to medical care while in detention – is established. Indeed, in *Revere* . . . , we reserved decision on the question whether something less than the Eighth Amendment's 'deliberate indifference' test may be applicable in claims by detainees asserting violations of their due process right to medical care while in custody. We need not resolve here the question left open in *Revere*. . . .").

Nine years later, in *County of Sacramento*, this Court once again declined to decide whether the level of culpability required for Fourteenth Amendment inadequate medical care claims brought by pretrial detainees was something different than the Eighth Amendment's deliberate indifference standard. 523 U.S. at 849-50 ("We held in *City of Revere* . . . that 'the due process rights of a [pretrial detainee] are at least as great as the Eighth Amendment protections available to a convicted prisoner.' [Citation]. Since it may suffice for Eighth Amendment liability that prison officials were deliberately indifferent to the medical needs of their prisoners, [citation], it follows that such deliberately indifferent conduct must also be enough to satisfy the fault requirement for due process claims based on the medical needs of someone jailed while awaiting trial, [citations].").

In 1994, this Court clarified *Estelle*'s Eighth Amendment deliberate indifference standard in *Farmer*, holding that deliberate indifference is a

subjective standard and exists only when a prison official knows of and disregards a substantial risk of serious harm to an inmate. 511 U.S. at 829, 847; *see also id.* at 837-38 ("*We reject petitioner's invitation to adopt an objective test for deliberate indifference. . . . The common law . . . imposes tort liability on a purely objective basis.*") (emphasis added).

In *Kingsley*, this Court addressed the specific issue of "whether the requirements of a § 1983 excessive force claim brought by a pretrial detainee [under the Fourteenth Amendment] must satisfy the subjective standard or only the objective standard"; that is, did the pretrial detainee only have to show that a "deliberate – i.e., purposeful and knowing" "use of force was objectively reasonable." 576 U.S. at 393-94. This Court found the objective unreasonableness standard appropriate for excessive force claims, *id.* at 396-97, but did not touch any other type of Fourteenth Amendment claim brought by a pretrial detainee.

II. The Circuit Conflict That Emerged And Solidified After *Kingsley* Necessitates This Court's Resolution Of The Important Issue Of What Culpability Standard Applies To Fourteenth Amendment Inadequate Medical Care Claims Brought By Pretrial Detainees.

A. Before *Kingsley*, Circuit Courts Uniformly Applied The Eighth Amendment's Deliberate Indifference Standards To Fourteenth Amendment Inadequate Medical Care Claims Brought By Pretrial Detainees.

For decades, absent guidance from this Court otherwise, circuit courts applied the Eighth Amendment's deliberate indifference standard to pretrial detainees' Fourteenth Amendment inadequate medical care claims, requiring satisfaction of both an objective prong (i.e., a serious need for medical care) and a subjective prong (i.e., knowing of and disregarding an excessive health risk). *E.g.*, *Estate of Booker v. Gomez*, 745 F.3d 405, 429-30 (10th Cir. 2014); *Minix v. Canareci*, 597 F.3d 824, 830-31 (7th Cir. 2010); *Natale v. Camden County Corr. Facility*, 318 F.3d 575, 582 (3d Cir. 2003); *Coleman v. Parkman*, 349 F.3d 534, 538 (8th Cir. 2003); *Hare v. City of Cornith*, 74 F.3d 633, 643 (5th Cir. 1996); *Hill v. Nicodemus*, 979 F.2d 978, 990-93 (4th Cir. 1992); *see* Struve, *supra*, 161 U. Pa. L. Rev. at 1027; DiBattista, *supra*, 48 Colum. Hum. Rts. L. Rev. at 225-26.

B. After *Kingsley*, Circuit Courts Are In Conflict Over The Culpability Standard For Fourteenth Amendment Inadequate Medical Care Claims Brought By Pretrial Detainees.

The uniform application of the Eighth Amendment's deliberate indifference standard to Fourteenth Amendment inadequate medical care claims brought by pretrial detainees existing before *Kingsley* is gone. Circuit courts are now irreconcilably divided on the issue of whether such claims are governed by the Eighth Amendment's deliberate indifference standard or *Kingsley*'s objective unreasonableness standard. *Miranda*, 900 F.3d at 938 n.3 (discussing circuit split); *compare Clark v. Colbert*, 895 F.3d 1258, 1269 (10th Cir. 2018) (deliberate indifference), *Whitney*, 887 F.3d at 860 n.4 (same), *Nam Dang*, 871 F.3d at 1279 (same), and *Alderson*, 848 F.3d at 419-20 n.4 (same), *with Miranda*, 900 F.3d at 351 (objective unreasonableness), *Hardeman v. Curran*, 933 F.3d 816, 822-23 (7th Cir. 2019) (same), *Gordon*, 888 F.3d at 1124-25 (same), and *Darnell*, 849 F.3d at 34-35 (same).

The circuit split could be the result of some issues left unanswered in *Kingsley*, or issues otherwise not clearly stated. As noted by one commentator:

> The inquiry into *Kingsley*'s impact raises two key questions. The first is whether the Court actually intended to set a precedent that Fourteenth Amendment and Eighth Amendment claims require different standards. In the opinion, the court acknowledged that the

> decision "may raise questions about the use of a subjective standard in the context of excessive force claims brought by convicted prisoners" but deliberately chose not to address the issue. Instead, it limited the decision to the Fourteenth Amendment claim at hand. [fn] The second question is whether, if the court did mean to apply two different standards, this lesser standard for pretrial detainees was meant to extend to other types of Fourteenth Amendment claims. In the post-*Kingsley* period, lower courts have begun to grapple with whether the *Kingsley* holding that intent is not required for an act to be considered punishment serves a precedent for applying an objective deliberate indifference standard to pretrial detainees' failure-to-protect or serious-medical-needs claims. [fn]

Kyla Magun, *A Changing Landscape for Pretrial Detainees? The Potential Impact of* Kingsley v. Hendrickson *on Jail-Suicide Litigation*, 116 Colum. L. Rev. 2059, 2083-84 (2016); *accord* Kate Lambroza, Note, *Pretrial Detainees and the Objective Standard After* Kingsley v. Hendrickson, 58 Am. Crim. L. Rev. 429, 441 (2021).

C. This Court Must Settle The Important Issue Of What Culpability Standard Applies To Fourteenth Amendment Inadequate Medical Care Claims Brought By Pretrial Detainees.

In the years since *Kingsley* was decided, the issue presented in the petition for certiorari has sufficiently

percolated in circuit courts, and the circuit split is solidified. The undeniable result of the circuit split is the untenable reality that the applicable culpability standard – deliberate indifference or objective unreasonableness – is geographically dependent. And the circuit split will remain absent this Court resolving the issue, an issue this Court has previously left unanswered. *See Kingsley*, 135 S. Ct. at 2472 (granting certiorari "[i]n light of the disagreement among the Circuits" on the issue of whether a "[section] 1983 excessive force claim brought by a pretrial detainee must satisfy the subjective standard or only the objective standard"); *Farmer*, 511 U.S. at 832 (granting certiorari "because Courts of Appeals had adopted inconsistent tests for 'deliberate indifference.'"); *DeShaney v. Winnebago County Dep't of Soc. Servs.*, 489 U.S. 189, 194 (1989) (granting certiorari "[b]ecause of the inconsistent approaches taken by the lower courts in determining when, if ever, the failure of a state or local governmental entity or its agents to provide an individual with adequate protective services constitutes a violation of the individual's due process rights, [citations], and the importance of the issue to the administration of state and local governments").

III. Applying An Objective Unreasonableness Standard To Fourteenth Amendment Inadequate Medical Care Claims Brought By Pretrial Detainees Creates A Constitutional Medical Malpractice Claim.

"The Due Process Clause of the Fourteenth Amendment was intended to prevent government 'from abusing [its] power, or employing it as an instrument of oppression,' [citations.]" *DeShaney*, 489 U.S. at 196. This Court has "emphasized time and again that '[t]he touchstone of due process is protection of the individual against arbitrary action of government.'" *County of Sacramento*, 523 U.S. at 845 (quoting *Wolff v. McDonnell*, 418 U.S. 539, 558 (1974)). "[O]nly the most egregious official conduct can be said to be 'arbitrary in the constitutional sense,' [citation]." *Id.* at 846.

"To this end, for half a century now [this Court has] spoken of the cognizable level of executive abuse of power as that which shocks the conscience." *Id.* "[T]he 'shock the conscience' standard is satisfied where the conduct was 'intended to injure in some way unjustifiable by any government interest,' or in some circumstances if it resulted from deliberate indifference." *Rosales-Mireles v. United States*, 138 S. Ct. 1897, 1906 (2018) (quoting *County of Sacramento*, 523 U.S. at 849-50). As such, "'liability for *negligently* inflicted harm is categorically beneath the threshold of constitutional due process.'" *Kingsley*, 576 U.S. at 396 (quoting *County of Sacramento*, 523 U.S. at 849). So "[i]t should not be surprising that the constitutional concept of conscience shocking duplicates no traditional

category of common-law fault, but rather points clearly away from liability, or clearly toward it, only at the ends of the tort law's spectrum of culpability. Thus, we have made it clear that the due process guarantee does not entail a body of constitutional law imposing liability whenever someone cloaked with state authority causes harm." *County of Sacramento*, 523 U.S. at 848. Put simply, "the Fourteenth Amendment is not a 'font or tort law to be superimposed upon whatever systems may already be administered by the States.'" *Id.* (quoting *Paul v. Davis*, 424 U.S. 693, 701 (1976)).

Using an objective unreasonableness standard to evaluate liability for Fourteenth Amendment inadequate medical care claims brought by pretrial detainees is fundamentally inconsistent with this Court's precedents establishing the subjective culpability level required to violate the Due Process Clause. Consider the Ninth Circuit's test, established in *Gordon v. County of Orange*, 888 F.3d 1118 (9th Cir. 2018), and applied by the Ninth Circuit in the present case. In the Ninth Circuit, an official can be liable under the Fourteenth Amendment if: (1) the official made an intentional decision not to provide medical care to a pretrial detainee; (2) that decision put the pretrial detainee at substantial risk of suffering serious harm; and (3) the

failure to provide medical care was objectively unreasonable.[6] *Id.* at 1125.[7]

In nearly all circumstances, a medical professional necessarily acts intentionally when making decisions about medical care. Theoretically, a medical professional could accidently forget to provide medical care

---

[6] This is a refined statement of the actual elements set forth in *Gordon*, which were articulated as: "(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 cause the plaintiff's injuries. 'With respect to the third element, the defendant's conduct must be objectively unreasonable, a test that will necessarily "turn[ ] on the facts and circumstances of each particular case." [Citations]. The ' "mere lack of due care by a state official" does not deprive an individual of life, liberty, or property under the Fourteenth Amendment.' [Citations]. Thus, the plaintiff must 'prove more than negligence but less than subjective intent – something akin to reckless disregard.' [Citation]." 888 F.3d at 1125. It is worth noting that the *Gordon* test does not really fit with inadequate medical care claims because medical professionals working with pretrial detainees are making medical decisions, not "confinement" decisions, which were previously made by others.

[7] In a more recent decision, the Ninth Circuit held that "pretrial detainees do have a right to direct-view safety checks sufficient to determine whether their presentation indicates the need for medical treatment." *Gordon v. County of Orange*, 6 F.4th 961, 973 (9th Cir. 2021). This expands the Due Process Clause in this context even further by essentially converting the Due Process Clause from a limitation on governmental power into a remedy against governmental employees whose professional performance fails to meet judicially-created professional standards.

he or she intended to provide, or accidentally provide medical care he or she did not intend to provide, but that would be a rare occurrence indeed. Accordingly, an objective unreasonableness test like the one applied by the Ninth Circuit establishes a framework where an official can violate the Fourteenth Amendment by making medical decisions that others believe, in hindsight, were objectively unreasonable.

Consider this example. A doctor might initially believe that a pretrial detainee may need a surgical procedure to remedy a problem, but ultimately conclude in his or her judgment that surgery is unnecessary. That is an intentional decision regarding medical care. At trial, the pretrial detainee then has an expert opine that no reasonable medical professional would have, or even could have, concluded surgery was unnecessary, and the decision falls far below the standard of care. A jury could rely on the expert's opinion to find the decision not to perform surgery was deliberately made and was objectively unreasonable, and thus find for the pretrial detainee on a Fourteenth Amendment inadequate medical care claim simply because an expert harshly criticizes the medical professional's judgment.

This is no different than a medical malpractice case where medical experts square off about what medical decisions were or were not below the standard of care. This is a constitutional problem because "medical malpractice does not become a constitutional violation merely because the victim is a prisoner." *Estelle*, 429 U.S. at 106. Likewise, medical malpractice does not

become a constitutional violation merely because the victim is a pretrial detainee. *See Comstock v. McCrary*, 273 F.3d 693, 703 (6th Cir. 2001) ("The requirement that the official have subjectively perceived a risk of harm and then disregarded it is meant to prevent the constitutionalization of medical malpractice claims.").

Standards like the one applied by the Ninth Circuit in this case do nothing more than "tortify the Fourteenth Amendment," substituting the Fourteenth Amendment for the "immense body of state statutory and common law under which individuals abused [or injured] by [government] officials can seek relief" despite the fact that the Due Process Clause is not to be superimposed upon state law. *Kingsley*, 576 U.S. at 408 (Scalia, J., dissenting); *see Daniels*, 474 U.S. at 333 ("That injuries inflicted by governmental negligence are not addressed by the United States Constitution is not to say that they may not raise significant legal concerns and lead to the creation of protectable legal interests. The enactment of tort claim statutes, for example, reflects the view that injuries caused by such negligence should generally be redressed. [Fn]. It is no reflection on either the breadth of the United States Constitution or the importance of traditional tort law to say that they do not address the same concerns.").

Finally, as some scholars have noted, it is worth considering whether the expansion of substantive due process to apply to pretrial detainee claims was in error given that both convicted prisoners and pretrial detainees alike are held in the same facilities, treated by

the same medical staff, provided the same treatment plans, and so on:

> Justice Breyer in *Kingsley* departed from the *Whitley* [*v. Albers*, 475 U.S. 312 (1986)] malice standard for pretrial detainees' excessive force claims, in favor of an objective reasonableness standard like that used in Fourth Amendment cases. *Kingsley v. Hendrickson*, 135 S. Ct. 2466, 2475-76 (2015). Pretrial detainee claims, however, are similar to convicted prisoner claims with respect to officials' need to maintain order and discipline. *Cf. id.* at 2474 (highlighting the need to maintain institutional order as relevant). Indeed, the facts of *Kingsley* suggest as much – *Kingsley*, a pretrial detainee, resisted an order to remove some paper from a light bulb in his cell, leading to a physical altercation when officers removed him from his cell. *Id.* at 2470.
>
> Justice Breyer's ground for distinguishing *Whitley*'s standard from the Fourteenth Amendment substantive due process standard was: "The language of the two Clauses differs, and the nature of the claims often differs. And, most importantly, pretrial detainees (unlike convicted prisoners) cannot be punished at all, much less 'maliciously and sadistically.' " *Id.* at 2475. But as Professor Schlanger correctly points out, convicted prisoners and pretrial detainees generally are not distinguishable with respect to a no-punishment rationale; putting aside the death penalty for convicted prisoners, corporal punishment such as disciplinary flogging is generally

> forbidden as to all inmates. Schlanger, *The Constitutional Law of Incarceration, Reconfigured*, 103 Cornell L. Rev. 357, 431-32 (2018) ("Neither pretrial detainees nor post-conviction prisoners can lawfully be subjected to any corporal punishment. . . ."). While Professor Schlanger treats this similarity as a reason to extend the *Kingsley* holding to convicted prisoners, *id.* at 425 ("American jail and prison officials do not distinguish between pretrial detainees and convicted prisoners, in either conditions-of-confinement or use-of-force policy. The Constitution is best read to do the same."), it might just as easily suggest that *Kingsley* was wrongly decided. In short, both with respect to the need to maintain order, as well as with respect to a no-punishment rationale, pretrial detainees and convicted prisoners are similarly situated.

Woolhandler & Collins, Commentary: *Inmate Constitutional Claims and the Scienter Requirement*, 98 Wash. U. L. Rev. 645, 659-60 (2020).

CONCLUSION

Amici Curiae respectfully request that this Court grant the petition for certiorari. There is a clear and uncontroverted division among the circuit courts, and some circuit courts, including the Ninth Circuit in this case, are extending *Kingsley* to claims other than excessive force claims. Doing so creates a constitutional violation from what amounts to a medical malpractice

tort claim, which this Court has repeatedly advised must be avoided.

Dated: September 23, 2021

Respectfully submitted,

JENNIFER B. HENNING
Counsel of Record
CALIFORNIA STATE
ASSOCIATION OF COUNTIES
jhenning@counties.org

Attorney for Amici Curiae