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The Punishment of Cruel and Unusual Conditions: Extending the Purely Objective Standard Adopted in Kingsley v. Hendrickson to Claims of Deliberate Indifference

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THE PUNISHMENT OF CRUEL AND UNUSUAL CONDITIONS: EXTENDING THE PURELY OBJECTIVE STANDARD ADOPTED IN *KINGSLEY V. HENDRICKSON* TO CLAIMS OF DELIBERATE INDIFFERENCE

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ABSTRACT

In 2015, the Supreme Court in *Kingsley v. Hendrickson* held that a pretrial detainee claiming excessive force on the part of the state must only show that the force used was objectively unreasonable. Prior to the adoption of the purely objective standard, many courts around the country were analyzing such cases through a subjective standard to determine whether the officers subjectively knew that the force used against a pretrial detainee was unreasonable. The absence of this objective standard essentially allowed state officials to use excessive force against pretrial detainees without violating an individual's Constitutional rights. The Supreme Court reasoned that since it has been well established that pretrial detainees cannot be subjected to any form of punishment because they have not yet been convicted of a crime, the use of the purely objective standard was the proper standard.

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Currently, the Second, Sixth, Seventh, and Ninth Circuits apply *Kingsley*'s objective standard to inadequate care claims brought by pretrial detainees, however, the Fifth, Eighth, Tenth, and Eleventh Circuits have declined to extend this standard to such claims. This Note analyzes the *Kingsley* decision and places a heavy emphasis on the rationale behind the purely objective standard. This Note also analyzes the reasoning behind each circuit's decision to either extend or decline to extend the *Kingsley* standard to claims of inadequate care and deliberate indifference.

While this Note argues that the creation of certain conditions such as inadequate care or deliberate indifference is a form of punishment, it is sensitive to the possibility that the *Kingsley* decision could be put in jeopardy if the Supreme Court decides to resolve this circuit split. Given that the *Kingsley* decision was a 5-4 decision and that the current conservative majority is unafraid to disrupt precedent, the *Kingsley* standard could potentially be pulled out from underneath the incarceration system. However, the Court has repeatedly denied certiorari on cases that center around extending the *Kingsley* standard so it is possible that this split may never be resolved which may be for the best.

I. INTRODUCTION

An arrestee has been taken into custody by government officials. She will be held at a local jail or detention center as she awaits to be arraigned and waits to find out whether she is eligible to be released on bail. She learns that her arraignment will take place the next morning and that she must be held overnight. She is brought to a holding cell with other pretrial detainees where she will spend the night. The cell is crowded to the point where she cannot sit, and the floor is covered in garbage, vomit, urine, and feces. There is poor ventilation, and the smell becomes overwhelming and unbearable. After a few hours of standing, she succumbs to her exhaustion and sits on the floor of the cell. Her pants become drenched in sewage from the clogged toilet that overflowed when another detainee attempted to flush. Another detainee asks a guard for toilet paper, but the guard refuses and threatens the detainee for making a request.

At some point, she could no longer wait until the next morning to use a proper bathroom and asked a guard to escort her to a functioning toilet. The guard looks at her, does not respond, and turns away. The officer listens to her pleas but does not acknowledge or help her, and she ends up urinating in her pants. By the time the morning comes, she is sick from being exposed to many different elements and bodily excretions, and becomes extremely dehydrated and lightheaded from a lack of drinkable water. By the time she is released, she is covered in vomit, feces, and urine, and can barely walk. She consults with an attorney only to find out that she cannot do anything to prevent other detainees from being subjected to such degrading conditions. She realizes that the officers were legally permitted to engage in such mistreatment because the officers did not commit an affirmative act against her. Instead, they sat back and did nothing. Although this scenario is fictional, it is a reality many pre-trial detainees face in institutions across the country.

The Fourteenth Amendment states that state government officials cannot "deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."[1] It has been well established that pretrial detainees cannot be subjected to any form of punishment because they

[1] U.S. CONST. amend. XI.

have not yet been convicted of a crime,[2] but can the creation of certain conditions, such as inadequate care[3] or deliberate indifference,[4] be considered a form of punishment?

In 2015, the Supreme Court in *Kingsley v. Hendrickson*[5] held that a pretrial detainee claiming excessive force on the part of the state "[m]ust show only that the force purposely or knowingly used against him was objectively unreasonable to prevail on an excessive force claim."[6] Section 1983 provides that the government is liable in a civil action to the harmed party if it violated a protected right under the Constitution.[7] This Note argues that the purely objective standard adopted in *Kingsley* should apply to claims of inadequate care and deliberate indifference (including medical conditions) brought by pretrial detainees. Pretrial detainees are–at the bare minimum–afforded the same rights as convicted prisoners.[8] The absence of this objective standard essentially allows state officials to subject pretrial detainees to inhumane conditions–which arguably is a form of punishment–without violating an individual's Constitutional rights. Section II of this Note provides the background of *Kingsley v. Hendrickson*.[9] Section III of this Note briefly discusses the Supreme Court precedent used for the Court's analysis in *Kingsley*. Section IV of this Note introduces the circuit split regarding the extension of this purely objective standard to claims of deliberate indifference and inadequate care. Section V discusses the analysis of the circuits that decided to extend *Kingsley*. Section VI discusses the analysis of the circuits that declined to extend *Kingsley*. Section VII discusses the future of *Kingsley*, the expectations of treatment that our society has on detainees, and entertains the argument that the Supreme Court should put an end to the circuit split by extending this objective standard. However, section VIII argues that the Supreme Court should not resolve the circuit split because

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[2] Graham v. Connor, 490 U.S. 386, 395 (1989).

[3] "Inadequate Care" is defined as "[a]ny act or failure to act that may be physically or emotionally harmful to a recipient." *Inadequate Care*, LAWINSIDER.COM, https://www.lawinsider.com/dictionary/inadequate-care (last visited Apr. 12, 2023).

[4] Black's Law Dictionary defines "deliberate indifference" as an "awareness of and disregard for the risk of harm to another person's life, body, or property." *Deliberate Indifference*, BLACK'S LAW DICTIONARY (11th ed. 2019).

[5] 576 U.S. 389, 396-97 (2015).

[6] *Id.* at 389.

[7] 42 U.S.C. § 1983.

[8] *Kingsley*, 576 U.S. at 400.

[9] *Id.* at 389.

addressing this issue–given the recent history of the current Supreme Court–puts the entire *Kingsley* decision in jeopardy.

KINGSLEY V. HENDRICKSON

In 2015, the Supreme Court addressed whether pretrial detainees alleging deprivation of their Fourteenth Amendment Due Process right must demonstrate either that the officers subjectively knew that the force used was unreasonable or that the force used was objectively unreasonable.[10] In a landmark 5-4 ruling, the Court held that "a pretrial detainee must show only that the force purposely or knowingly used against him was objectively unreasonable."[11] Justice Breyer wrote the majority opinion and was joined by Justices Kennedy, Ginsburg, Sotomayor, and Kagan.[12] Justice Scalia filed a dissenting opinion and was joined by Chief Justice Roberts and Justice Thomas.[13] Justice Alito also filed his own dissenting opinion.[14]

Michael Kingsley was arrested on drug charges and placed in the county jail as a pretrial detainee.[15] When the officers asked him to remove a piece of paper in his cell that was covering a light, Kingsley refused.[16] The next morning Kingsley was asked to remove the paper again and when he refused, the jail administrator told Kingsley that he would be moved to a different cell so that the officers could remove the paper.[17] Four officers then entered Kingsley's cell, handcuffed him behind his back, and brought him to a different cell where he was placed face down on a concrete bed while still handcuffed.[18] The jail officers argued that Kingsley resisted the officers when they tried to take his handcuffs off.[19] Kingsley maintained that he did not resist the officers' efforts to remove the handcuffs.[20] The sergeant placed his knee on Kingsley's back while he was still lying on the bed.[21]

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[10] *Id.* at 391-92.
[11] *Id.* at 396-97.
[12] *Id.* at 390.
[13] *Id.*
[14] *Id.*
[15] *Id.* at 392.
[16] *Id.*
[17] *Id.*
[18] *Id.*
[19] *Id.*
[20] *Id.*
[21] *Id.*

Kingsley claimed that the sergeant then bashed his head into the concrete bed.[22] The officers denied this claim.[23] The sergeant then directed a subordinate to stun Kingsley with a taser, and the officer complied.[24] The officers left Kingsley alone in the cell while he was still handcuffed.[25] The officers returned approximately fifteen minutes later and removed Kingsley's cuffs.[26]

Kingsley filed suit claiming a deprivation of the Fourteenth Amendment Due Process Clause.[27] After a trial, the district court relied on both a subjective and objective analysis of the officers' minds and whether, if the officers did intend to cause the harm, they did not do so unreasonably under the circumstances.[28] The jury found in favor of the officers and Kingsley appealed.[29] The circuit judges were split in their decision, but the majority held that a subjective inquiry into the officers' state of mind was the proper test, and affirmed the district court's ruling which again found for the defendants.[30] A dissenting judge urged that the court should have adopted the jury instructions set out by the Committee on Pattern Civil Jury Instructions for the Seventh Circuit, which provided that pretrial detainees must show only that the force used against them was objectively unreasonable.[31] Kingsley then filed a writ of certiorari, which the Supreme Court granted in 2015.[32]

In its ruling in *Kingsley*, the Court relied on its previous ruling in *Bell v. Wolfish*,[33] which held that a pretrial detainee can prevail on a violation of his or her Fourteenth Amendment due process right based solely on objective evidence to claim that the government did not act rationally related to a legitimate government objective, or that its actions were excessive in relation to that purpose.[34] *Bell* also determined

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[22] *Id.*
[23] *Id.*
[24] *Id.* at 393.
[25] *Id.*
[26] *Id.*
[27] *Id.*
[28] *Id.* at 393-94.
[29] *Id.* at 394.
[30] *Id.*
[31] *Id.*
[32] *Id.* at 395.
[33] 441 U.S. 520 (1979). The *Kingsley* decision heavily relied on *Bell* which held that punishment can be defined as "actions taken with an 'expressed intent to punish.'" *Kingsley*, 576 U.S. at 398.
[34] *Kingsley*, 576 U.S. at 389.

that punishment can be defined as "actions taken with an 'expressed intent to punish.'"[35] *Bell* evaluated on an objective basis whether the conditions that pretrial detainees were subjected to were rationally related to a legitimate government purpose.[36] The Court found that they were rationally related because they "did not appear excessive in relation to that purpose."[37] The Court also noted that courts must consider the officers' duty to maintain order within the prison and that the officers have "substantial discretion" to make quick on-the-spot judgment calls to secure the facility.[38]

A. Subjective Standard Argued by the Respondents in Kingsley

The defendant officers in *Kingsley* argued that the subjective inquiry into the officers' states of mind, which required a finding that the officers acted "maliciously and sadistically to cause harm," was the appropriate and precedent-based test to determine whether the force used was excessive.[39] They thus relied on case law to support this assertion, but those cases pertained to a violation of a convicted prisoner's Eighth Amendment right under the Cruel and Unusual Punishment clause.[40] The Court rejected this standard because pretrial detainees cannot be subjected to any form of punishment on the ground that they have not yet been convicted of any crime.[41] Thus, the issue was not whether the level of punishment reached a certain threshold to be considered unconstitutional under the Eighth Amendment, but rather that it should not be addressed at all because pretrial detainees cannot ever be subjected to punishment.[42]

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[35] *Id.* at 398.
[36] *Id.*
[37] *Id.* The issue presented in *Bell* was the practice of double-bunking and holding pretrial detainees in small rooms prior to trial. *Id.*
[38] *Id.* at 399.
[39] *Id.* at 400.
[40] *Id.*
[41] *Id.*
[42] *Id.* at 401.

B. Objective Standard Argued and Adopted by the Court in *Kingsley*

The *Kingsley* Court thus derived that a purely objective standard is a workable standard in a situation where a pretrial detainee was allegedly a victim of excessive force on the part of jail officials, especially because many facilities train officers to treat detainees "as if the officers' conduct is subject to objective reasonableness."[43] The Court also reasoned that a purely objective standard would protect officers who act in good faith because the determination of reasonableness will be determined through "…the perspective [of] and with the knowledge of the defendant officer …."[44] As such, the jury must thus determine whether the officers acted either deliberately (with purpose or knowledge), or recklessly.[45] This will protect officers acting with mere negligence, because negligence alone does not rise to a level considered to be a violation of a constitutional right.[46] The Court also noted that an officer is granted qualified immunity and cannot be held personally liable for excessive force unless the force "violated a 'clearly established' right, such that 'it would [have been] clear to a reasonable officer that his conduct was unlawful in the situation he confronted.'"[47]

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[43] *Id.* at 389-90.

[44] *Id.* at 390. While this inquiry appears to have a subjective prong, it is important to clarify that the Supreme Court has identified this standard as one that is "objectively unreasonable." *Id.* at 392. According to the majority, determination of reasonableness must be made from the perspective of a reasonable officer on the scene, including what the officer knew at the time and must account for the "legitimate interests [stemming from the government's] need to manage the facility in which the individual is detained," appropriately deferring to "policies and practices that in th[e] judgment" of jail officials "are needed to preserve internal order and discipline and to maintain institutional security." *Id; see also Kingsley v. Hendrickson: The Objectively Unreasonable Standard for Excessive Force Claims*, CONSTITUTIONAL LAW REPORTER, https://constitutionallawreporter.com/2016/01/19/kingsley-v-hendrickson-the-objectively-unreasonable-standard-for-excessive-force-claims/ (last visited Mar. 7, 2023).

[45] *Kingsley*, 576 U.S. at 396.

[46] *Id.*

[47] *Id.* at 400.

C. Dissenting Opinions in *Kingsley*

Justice Scalia filed a dissenting opinion and acknowledged that while a pretrial detainee's Fourteenth Amendment rights may be violated by use of objectively unreasonable force, the violation is not equivalent to "intentional infliction of punishment."[48] In *Bell v. Wolfish*, the Court held that a pretrial detainee may not be subjected to conditions "that amount to punishment."[49] Justice Scalia reasoned that a condition may be considered punishment when the pretrial detainee is purposefully subjected to such conditions for the singular purpose of punishment.[50] Punishment may be inferred based on circumstantial evidence so long as the conditions were not rationally related to a legitimate government purpose.[51] While Justice Scalia agreed that a pretrial detainee's Fourteenth Amendment rights are violated when the use of excessive force amounts to punishment, he did not subscribe to the notion that "intentional application of force that is objectively unreasonable in degree is a use of excessive force that 'amount[s] to punishment.'"[52] Kingsley's claims were not protected by substantive due process because they were not a "fundamental liberty interest."[53] A fundamental liberty interest is one that is evaluated objectively based on "this Nation's history and tradition, and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed."[54] Justice Scalia ultimately determined that Kingsley brought a state tort law claim for assault and battery, and that the Due Process Clause should not be used as a vehicle to adjudicate such cases.[55]

Justice Alito filed a separate dissenting opinion in which he observed that the Court should have first evaluated whether a pretrial detainee can assert a deprivation of his or her Fourth Amendment right based on the use of excessive force by an officer of a detention facility because that issue had not yet been decided by this Court.[56] The Fourth

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[48] *Id.* at 404 (Scalia, J., dissenting).
[49] *Id.* at 405.
[50] *Id.*
[51] *Id.*
[52] *Id.*
[53] *Id.* at 407.
[54] *Id.*; *see also* Washington v. Glucksberg, 521 U.S. 702 (1997).
[55] *Kingsley*, 576 U.S. 408 (Scalia, J., dissenting).
[56] *Id.* (Alito, J., dissenting).

Amendment test for an unreasonable search and seizure is objective and would have been "indistinguishable from the substantive due process claim that the Court discusses."[57] Justice Alito argued that if this claim could have been brought under the Fourth Amendment, then we "should not rely on substantive due process."[58] Justice Alito reasoned that "Kingsley forfeited any argument under the Fourth Amendment by failing to raise it below …."[59]

II. SUPREME COURT PRECEDENT

The Supreme Court in *Kingsley* was heavily influenced by *Bell v. Wolfish***,** when the justices made the decision to adopt an objective standard to evaluate claims of excessive force brought by pretrial detainees.[60] In *Bell*, the Supreme Court held that "[A] pretrial detainee could prevail on a claim that his due process rights were violated by providing only objective evidence that the challenged governmental action was not rationally related to a legitimate governmental objective or that it was excessive in relation to that purpose."[61] This objective standard created in *Bell* also applied to judging the constitutionality of prison conditions, such as double-bunking.[62]

III. FEDERAL CIRCUIT SPLITS

Kingsley thus held that a purely objective standard must be used to adjudicate claims of excessive force by a pretrial detainee.[63] However, there is a split among the circuits on whether this standard applies to claims of inadequate care and deliberate indifference brought by pretrial detainees. The Second, Sixth, Seventh, and Ninth Circuits have held that the *Kingsley* objective standard extends to inadequate care claims brought by pretrial detainees. These circuits adopted the purely objective standard established in *Kingsley* and

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[57] *Id.*
[58] *Id.*
[59] *Id.*
[60] *Id.* at 389.
[61] *Id.*
[62] *Id.* at 398.
[63] *Id.* at 396-97.

extended the standard because the decision in *Kingsley* "altered the standard for deliberate indifference claims under the Due Process Clause."[64] These circuits determined that deliberate indifference is a form of punishment, and that a pretrial detainee may not be subjected to any form of punishment at the hands of the government.[65] Additionally, these circuits have recognized that prisoners cannot be deprived of basic human needs, nor can they be subjected to conditions that threaten their health.[66]

The Fifth, Eighth, Tenth, and Eleventh Circuits have held that *Kingsley*'s objective standard does not extend to inadequate care claims. These circuits place a heavy emphasis on the definition of "punishment" and argue that deliberate indifference and excessive force are very different from each other in that the latter requires an affirmative act to inflict harm.[67] These circuits also suggest that the Supreme Court in *Kingsley* did not address or mention deliberate indifference and that extending the *Kingsley* analysis to deliberate indifference misconstrues the Supreme Court's ruling.[68]

IV. EXTENDING *KINGSLEY* TO DELIBERATE INDIFFERENCE CLAIMS

A. Second Circuit

In *Darnell v. Pineiro*,[69] twenty pretrial detainees who were held at the New York City Police Department's ("NYPD") Brooklyn Central Booking ("BCB") center while awaiting arraignment filed suit against the City of New York, Captain Kenneth Kobetisch, and NYPD Captain William Tobin, alleging a deliberate indifference to their Fourteenth Amendment due process rights as to the conditions to which they were subjected while they were being held at BCB.[70] Each plaintiff was detained at BCB between ten to twenty-four hours, and in that

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[64] Cano v. City of New York, 119 F. Supp. 3d 65 (E.D.N.Y. 2015), *rev'd sub nom.* Darnell v. Pineiro, 849 F.3d 17, 30 (2d Cir. 2017).

[65] *Darnell*, 849 F.3d at 29.

[66] *Id.* at 30.

[67] Strain v. Regalado, 977 F.3d 984, 991 (10th Cir. 2020), *cert. denied*, 142 S. Ct. 312 (2021).

[68] *Id.* at 982.

[69] 849 F.3d 17 (2d Cir. 2017).

[70] *Id.* at 20.

time was subjected to horrendous conditions which–they argued–constituted a constitutional deprivation.[71] BCB only had eight cells and two were used to detain women and six were used to detain men.[72]

The plaintiffs' complaint stated that they were subjected to "(1) Overcrowding; (2) Unusable Toilets; (3) Garbage and Inadequate Sanitation; (4) Infestation; (5) Lack of Toiletries and Other Hygienic Items; (6) Inadequate Nutrition; (7) Extreme Temperatures and Poor Ventilation; (8) Deprivation of Sleep; and (9) Crime and Intimidation."[73] Overall, the plaintiffs testified that the conditions they were subjected to at the BCB were "degrading" and were not suitable to hold human beings.[74] The BCB offered evidence that contradicted the plaintiffs' claims, namely the BCB's book entries which noted that the cells were cleaned and that the BCB had practices in place to ensure the health and safety of the detainees.[75] The District Court reasoned that because none of the plaintiffs had suffered any substantial injuries, none were subjected to dangerous conditions that could lead to any health problems, and, moreover, that they were only held at the BCB for no more than twenty-four hours.[76] Thus, there was no "objectively substantial deprivation."[77] The District Court also held that the subjective prong of a deliberate indifference claim was not satisfied because there was no proof that the defendants were aware of the appalling conditions, acted reasonably in response to the alleged conditions, and that none of the officers "acted with punitive intent."[78] However, this decision was issued shortly after the Supreme Court's ruling in *Kingsley*, and the district court did not analyze this issue under *Kingsley* when reaching its decision.[79]

The plaintiff appealed, and the Second Circuit Court of Appeals turned to *Kingsley* and noted that the Supreme Court has held that a pretrial detainee could prevail on an excessive force claim under the Fourteenth Amendment by satisfying only the objective prong by demonstrating "only that the force purposely or knowingly used

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[71] *Id.* at 23.
[72] *Id.*
[73] *Id.*
[74] *Id.* at 26.
[75] *Id.* at 28.
[76] *Id.* at 20.
[77] *Id.*
[78] *Id.* at 20-21.
[79] *Id.* at 21.

against him was objectively unreasonable."[80] The *Kingsley* decision also held that it was unnecessary for a pretrial detainee to satisfy the objective prong by proving the state of mind of the defendants in that "the force against the pretrial detainee 'maliciously and sadistically to cause harm.'"[81] In the Second Circuit's ruling, the court held that "after *Kingsley*, it is plain that punishment has no place in defining the *mens rea* element of a pretrial detainee's claim under the Due Process Clause."[82]

Ultimately, the Second Circuit evaluated the case under the *Kingsley* standard and noted that this court previously held that prisoners could not be deprived of basic human needs, nor can they be subjected to conditions that threaten their health.[83] Conditions that threaten health could be when an individual is placed in unsanitary conditions, which, when combined with a lack of ventilation and sanitary items can be considered an objective deprivation.[84] Thus, in *Willey v. Kirkpatrick*,[85] the Second Circuit held that "[t]he severity of an exposure may be less quantifiable than its duration, but its qualitative offense to a prisoner's dignity should be given due consideration."[86] Additionally, the Supreme Court in *Farmers v. Brennan*,[87] held that the term "deliberate indifference" equates to recklessness, and the term recklessness is interpreted differently in criminal law than it is in civil suits.[88] In civil suits, deliberate indifference is defined through an objective standard where a plaintiff does not have to prove actual knowledge or awareness of the conditions that amount to deliberate indifference.[89] In criminal law, deliberate indifference is defined through the subjective standard which requires proof that a defendant

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[80] *Id.*
[81] *Id.*
[82] *Id.* at 35.
[83] *Id.* at 30; *Jabbar v. Fischer*, 683 F.3d 54, 57 (2d Cir. 2012) (reasoning that "[P]risoners may not be deprived of their 'basic human needs – e.g., food, clothing, shelter, medical care, and reasonable safety' – and they may not be exposed 'to conditions that 'pose an unreasonable risk of serious damage to [their] future health.'").
[84] *Darnell*, 849 F.3d at 30.
[85] 801 F.3d 51 (2d Cir. 2015)
[86] *Darnell*, 849 F.3d at 31.
[87] 511 U.S. 825 (1970).
[88] *Darnell*, 849 F.3d at 32.
[89] *Id.*

was subjectively aware (in this circumstance) of the degrading conditions.[90]

The *Darnell* decision overturned a case previously decided by the Second Circuit, *Caiozzo v. Koreman*,[91] in which the court applied a subjective standard for deliberate indifference claims because it most closely mirrored the Supreme Court's decision in *Farmer*.[92] Thus, it now adopted the purely objective standard as set out in *Kingsley*.[93]

If this court had affirmed the District Court's ruling, then the circuit court would be sending a message that subjecting pretrial detainees to atrocious conditions will not amount to a constitutional violation as long as they are not exposed to those conditions for more than twenty-four hours.[94] This would be dangerous to societal norms to the extent that constitutional interpretation requires this court to analyze each individual claim of deliberate indifference, especially for pretrial detainees since they have never been convicted of a crime.[95]

The new standard in this circuit, which adopted *Kingsley*, states that an individual claiming deliberate indifference must establish an objective deprivation of a Fourteenth Amendment right, and that "the inmate must show that the conditions, either alone or in combination, pose an unreasonable risk of serious damage to his health."[96] To prevail on a deliberate indifference claim under Section 1983, a plaintiff must prove an objective prong "showing that the challenged conditions were sufficiently serious to constitute objective deprivations of the right to due process" as well as a subjective prong showing that "the officer acted with at least deliberate indifference to the challenged conditions."[97] The Second Circuit also reasoned that in *Farmer*, the Supreme Court clarified that deliberate indifference means recklessness, which can be defined either subjectively or objectively.[98] If recklessness is defined subjectively, we must look to what the person knew and disregarded.[99] If defined objectively, then we look to what a

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[90] *Id.*
[91] 581 F.3d 63 (2d Cir. 2009).
[92] *Farmer*, 511 U. S. at 825 (1970).
[93] *Darnell*, 849 F.3d at 36.
[94] *Id.* at 37.
[95] *Id.*
[96] *Id.* at 30.
[97] *Id.* at 29.
[98] *Id.*
[99] *Id.*

reasonable person knew or should have known.[100] A pretrial detainee must prove that the official acted intentionally or recklessly rather than negligently.[101]

B. Sixth Circuit

In *Brawner v. Scott County, Tennessee*,[102] the Sixth Circuit Court of Appeals addressed the issue of whether the purely objective standard adopted by the Supreme Court in *Kingsley* extended to claims of inadequate medical care by pretrial detainees.[103] The jail policy surrounding the suit in *Brawner* was that officers were not permitted to administer controlled substances to detainees, even if they had been prescribed that medication.[104] The plaintiff was arrested and detained at the county jail and thereafter prescribed four different medications, three of which were controlled substances.[105] As a result of the jail policy, the plaintiff was unable to take her medications–meaning that she immediately stopped taking all four of her medications from the time of her arrest.[106] The plaintiff suffered dozens of seizures which was a known and common side effect when an individual stopped taking her prescription medication without having first been weaned off.[107] The plaintiff filed suit against Scott County and the county staff that worked at the jail, claiming that the jail's failure to provide her with adequate medical care was a violation of her Fourteenth Amendment right.[108] The trial court held that the plaintiff met the objective prong of the deliberate-indifference claim which was that her medical condition was "sufficiently serious," but failed to prove the subjective prong being that the staff was "subjectively deliberately indifferent to her serious medical need."[109] The plaintiff appealed and argued that

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[100] *Id.*

[101] *Id.* at 36.

[102] 14 F.4th 585, 590 (6th Cir. 2021), *cert. denied*, 143 S. Ct. 84 (2022).

[103] *Id.* at 596.

[104] *Id.* at 589. The jail policy provided that "prescribed medications were permitted to be administered to detainees only if *expressly ordered* by the jail doctor; all controlled substances were banned, even when a detainee had been taking the substance pursuant to a prescription." [emphasis added]. *Id.*

[105] *Id.*

[106] *Id.*

[107] *Id.* at 598.

[108] *Id.* at 590.

[109] *Id.*

the purely objective standard adopted by the Supreme Court in *Kingsley* applied to her claim of inadequate care.[110]

The Sixth Circuit Court of Appeals decided to address the *Kingsley* decision head-on.[111] In determining whether the purely objective standard applied, the court first noted that claims by prisoners under the Eighth Amendment are evaluated under the same test as claims by pretrial detainees under the Fourteenth Amendment.[112] The court held that the same test should not apply when evaluating claims by prisoners under the Eighth Amendment, and claims by pretrial detainees under the Fourteenth Amendment.[113] The circuit court then reviewed the Supreme Court's reasoning that determined the outcome of the *Kingsley* case, and reiterated the principle that pretrial detainees have not been convicted of a crime and thus should not be subjected to any level of punishment.[114]

Perhaps the strongest argument that the Sixth Circuit made in support of extending *Kingsley* to claims of inadequate medical care was evaluating the distinction between the Eighth Amendment and the Fourteenth Amendment.[115] The Supreme Court established the subjective prong in inadequate medical care claims brought by prisoners under the Eighth Amendment in *Farmer v. Brennan*.[116] *Farmer* required prisoners to prove that their medical needs were objectively "sufficiently serious," and that the jail officials subjectively knew and disregarded a prisoner's known health risk.[117] Further, the *Farmer* court determined that a prisoner also had to prove that the official "was aware of facts from which an inference of substantial risk of serious harm to inmate health or safety could be drawn," and that the official did in fact draw this inference.[118] The *Kingsley* decision retired this subjective prong established in *Farmer* as it applies to cases brought under the Fourteenth Amendment.[119] The Sixth Circuit ultimately held that it agreed with "…the Second, Seventh, and Ninth Circuits that

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110 *Id.* at 591.
111 *Id.* at 592.
112 *Id.* at 591.
113 *Id.* at 596.
114 *Id.*
115 *Id.* at 595.
116 *Id.*
117 *Id.*
118 *Id.* at 591.
119 *Id.* at 594.

Kingsley requires modification of the subjective prong of the deliberate-indifference test for pretrial detainees."[120]

C. Seventh Circuit

The Seventh Circuit has directly held that "[m]edical-care claims brought by pretrial detainees under the Fourteenth Amendment are subject only to the objective unreasonableness inquiry identified in *Kingsley*. "[121] In *Miranda v. County of Lake*,[122] Lyvita Gomes, a citizen of India, was arrested for not showing up for jury duty,[123] and was also charged with resisting arrest when she "pulled away from the officers" during her arrest for that failure.[124] This erroneous arrest led to a tragic ending for Gomes.[125] One day after being arrested, Gomes was placed on suicide watch following certain statements made to county jail officers.[126] Two days later, Gomes was transferred into the custody of ICE, and was released soon thereafter.[127] Approximately two months later, Gomes failed to show up for her court date related to the resisting arrest charge, and a warrant was issued for her arrest.[128] Gomes was again arrested on December 14, 2011, and later died in custody on January 3, 2012.[129]

Between December 14 and January 3, there was a repeated failure on the part of jail officials to ensure that Gomes was eating and drinking.[130] A mental health evaluation revealed that Gomes was not eating or drinking, and officials placed her on a hunger strike protocol by December 18, 2011.[131] Between December 18th and December 29th, Gomes continually refused to eat or drink and refused medical

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120 *Id.* at 596.

121 Estate of Gomes v. County of Lake (N.D. Ill. 2016), *rev'd sub nom.* Miranda v. County of Lake, 990 F.3d 335, 352 (7th Cir. 2018).

122 900 F.3d 335, 341 (7thCir. 2018).

123 "In hindsight, this was the County's first misstep: as a non-citizen, Gomes was categorically ineligible to serve as a juror." *Id.*

124 *Id.*

125 *Id.*

126 *Id.*

127 *Id.*

128 *Id.*

129 *Id.* at 341-42.

130 *Id.* at 341.

131 *Id.* at 342.

treatments and tests.[132] On December 29th, Gomes was finally transferred to the hospital and was severely dehydrated and malnourished.[133] Tragically, Gomes passed away five days later on January 3, 2012.[134] The autopsy report stated that the cause of death was "complications of starvation and dehydration" and the manner of her death was ruled a suicide.[135]

Gomes's Estate filed suit against Lake County, the sheriff, the jail's acting chief, the liaison responsible for communication between the medical and correctional staff,[136] and the jail's medical provider, Correct Care Solutions.[137] The Estate alleged that the jail's chief and liaison were "deliberately indifferent to Gomes's inadequate medical care in violation of her due process rights."[138] The Seventh Circuit held that it was reasonable for the chief and liaison to rely on the information provided to them by the medical experts who were directly overseeing Gomes's care.[139] Since the chief and liaison demonstrated concern for Gomes by requesting regular updates regarding her care, the chain of events that followed did "not make them culpable."[140] The Estate also alleged that the jail's sheriff had *Monell* liability[141] because the sheriff had authority over creating the hunger-strike policy instituted by the jail.[142] However, the sheriff "was not deliberately indifferent in enacting this policy."[143]

The Estate also challenged the district court's jury instructions regarding the intent on behalf of the jail officials.[144] The Seventh

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[132] *Id.*
[133] *Id.*
[134] *Id.*
[135] *Id.*
[136] *Id.*
[137] *Id.* at 341.
[138] *Id.* at 343.
[139] *Id.*
[140] *Id.* at 343-44.
[141] *See* John C. Taylor, *What is the Monell Doctrine?*, TAYLOR RING (Nov. 23, 2020), https://www.taylorring.com/blog/what-is-the-monell-doctrine/ (The *Monell* doctrine provides that "a municipality may be held liable for an officer's actions when the plaintiff establishes the officer violated their constitutional right, and that violation resulted from an official municipal policy, an unofficial custom, or because the municipality was deliberately indifferent in a failure to train or supervise the officer.").
[142] *Miranda*, 900 F.3d at 344.
[143] *Id.*
[144] *Id.* at 350.

Circuit Court of Appeals evaluated the Supreme Court's ruling in *Kingsley*, which held that "the defendant's state of mind is not a matter that a plaintiff is required to prove" when a pretrial detainee asserts a claim for excessive force in violation of a constitutional right.[145] The Seventh Circuit noted that there is a difference between a Fourteenth Amendment Due Process case and claims of a violation of the Eighth Amendment.[146] The Eighth Amendment's cruel and unusual punishment clause protects against the "deliberate indifference to a prisoner's serious medical needs."[147]

Customarily, the courts assess a pretrial detainee's claims for inadequate medical care under the Eighth Amendment rather than the Fourteenth Amendment.[148] In *Kingsley*, which was a claim for excessive force in violation of a pretrial detainee's Fourteenth Amendment right, the Supreme Court held that a plaintiff "needed only to show that the defendant's conduct was *objectively* unreasonable."[149] The Seventh Circuit noted that the Ninth Circuit had extended the *Kingsley* standard to "failure-to-protect"[150] claims and "medical-need claims"[151] brought by pretrial detainees under the Fourteenth Amendment.[152] Additionally, the Second Circuit Court of Appeals had also extended the *Kingsley* standard as applied to "a claim of deliberate indifference to a serious medical condition."[153] Notably, the Fifth,[154] Eighth,[155] and Eleventh[156] Circuits have decided not to extend the *Kingsley* standard to claims other than Fourteenth Amendment violations.[157]

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145 *Id.* at 353.
146 *Id.* at 351.
147 *Id.* at 350.
148 *Id.*
149 *Id.* at 351.
150 Castro v. Cnty. of L.A., 833 F.3d 1060 (9th Cir. 2016), *cert. denied*, 137 S. Ct. 831 (2017).
151 Gordon v. Cnty. of Orange, 888 F.3d 1118 (9th Cir. 2018), *cert. denied*, 139 S. Ct. 794 (2019).
152 *Miranda*, 900 F.3d at 351.
153 *Id.*; *see* Bruno v. City of Schenectady, 727 Fed. App'x 717, 720 (2d Cir. 2018), *cert. denied*, 139 S. Ct. 259 (2018).
154 Alderson v. Concordia Parish Corr. Facility, 848 F.3d 415 (5th Cir. 2017).
155 Whitney v. City of St. Louis, Missouri, 887 F.3d 857 (8th Cir. 2018).
156 Dang v. Sheriff of Seminole County, Florida, 2015 WL 13655676 (M.D. Fla. 2015), *rev'd sub nom.* Dang by & through Dang v. Sheriff, Seminole Cnty., 871 F.3d 1272 (11th Cir. 2017).
157 *Miranda*, 900 F.3d at 352.

The Seventh Circuit emphasized that different constitutional provisions require different levels of scrutiny.[158] However, since the Supreme Court has been stressing that the courts must pay close attention to "the different status of pretrial detainees," it is appropriate to apply the *Kingsley* standard to claims by pretrial detainees of inadequate medical-care, and such claims are evaluated using the purely objective unreasonableness standard.[159] An argument that was made against the adoption of such a purely objective standard, and which the defendants in this case expressed concern towards, is that it would "impermissibly constitutionalize medical malpractice claims, because it would allow mere negligence to suffice for liability"; however the "state-of-mind requirement for constitutional cases remains higher" than that of mere negligence.[160]

Ultimately, the Seventh Circuit adopted an expansion of *Kingsley*'s purely objective standard.[161] The court remanded the case for a jury to determine whether the doctors who were responsible for the oversight of Gomes "made the decision to continue observing Gomes in the jail, rather than transporting her to the hospital, with purposeful, knowing, or reckless disregard of the consequences."[162] The claims in this case were not mere negligence, but required a constitutional inquiry into whether the doctors "deliberate failure to act was objectively unreasonable."[163]

B. Ninth Circuit

In 2009, Jonathan Castro was arrested for public drunkenness in Los Angeles, California.[164] Some hours later, another individual was arrested, charged with committing a violent felony, and was placed in the same holding cell as Castro.[165] This subsequent individual was described as "bizarre" and "combative."[166] Pursuant to the station's manual, these sobering cells are only to be used for inmates

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158 *Id.*
159 *Id.*
160 *Id.* at 353.
161 *Id.* at 352.
162 *Id.* at 354.
163 *Id.*
164 *Castro*, 833 F.3d at 1064-65.
165 *Id.* at 1065.
166 *Id.*

who pose a threat to themselves or others, and placement of such cells must provide for "maximum visual supervision of prisoners by staff."[167] A few minutes after the combative felon was placed in the same holding cell as Castro, Castro sought the attention of some officers.[168] The police station's supervising officer, Solomon, delegated his duty to supervise the cells to an unpaid volunteer who walked past Castro's cell approximately twenty minutes after his initial attempt to get the attention of the officers.[169] However, the volunteer believed that Castro was "asleep" but observed the other detainee inappropriately touching Castro.[170] The volunteer did not enter the cell or attempt to stop the conduct, but notified Solomon of the activity.[171] When Solomon went to the cell approximately six minutes later, he saw the detainee "stomping on Castro's head, and found Castro lying unconscious in a pool of blood."[172] Castro was transported to a hospital where he remained for approximately one month, and was then transferred to a long-term care facility where he spent the next *four years*.[173] As a result of this violent and brutal attack, Castro suffered "severe memory loss and other cognitive disabilities."[174]

Prior to *Kingsley*, the Ninth Circuit Court of Appeals held that deliberate indifference claims require one single test, regardless of whether the claim was brought by an inmate under the Eighth Amendment's Cruel and Unusual Punishment Clause, or by a pre-trial detainee under the Fourteenth Amendment's Due Process Clause.[175] In this case following *Kingsley*, the court determined that the purely objective standard for claims of excessive force brought by a pre-trial detainee naturally extends to claims of deliberate indifference because "[t]he Court did not limit its holding to 'force' but spoke to 'the challenged governmental action' generally."[176] The Ninth Circuit

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[167] *Id.*
[168] *Id.*
[169] *Id.*
[170] *Id.*
[171] *Id.*
[172] *Id.*
[173] *Id.*
[174] *Id.*
[175] *Id.* at 1068; *see* Clouthier v. Cnty. of Contra Costa, 591 F.3d 1232, 1242 (9th Cir. 2010) (holding that "[a]n 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 …").
[176] *Castro*, 833 F.3d at 1070.

distinguished between claims of excessive force and claims for failure to protect, but acknowledged that the decision to do an act or not do an act is a conscious one that requires an exercise of intent.[177] As a result, the Ninth Circuit merged these principles to create the following rule of elements that conforms with *Kingsley* as applied to a pre-trial detainee's failure to protect claim against an individual officer:

> (1) The defendant made an intentional decision with respect to the conditions under which the plaintiff was confined;
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> (2) Those conditions put the plaintiff at substantial risk of suffering serious harm;
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> (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.[178]

If these elements are met, as determined by the finder of fact, then an individual officer will be liable for his or her failure to protect the plaintiff.[179] These elements also captured the requisite culpability of an officer because the plaintiff must "prove more than negligence but less than subjective intent–something akin to reckless disregard."[180] This test conformed to Supreme Court precedent which provides that claims of negligence against government individuals are not actionable under Section 1983.[181]

In *Castro*, the Ninth Circuit Court of Appeals affirmed the trial court's decision, following a jury trial, holding all defendants–Los Angeles Sherriff's Department, the County of Los Angeles, Christopher Solomon, the station's supervising officer, and Solomon's supervisor, David Valentine–liable for violating Castro's due process rights under the Fourteenth Amendment.[182] The Ninth Circuit reasoned that pretrial

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[177] *Id.*
[178] *Id.* at 1071.
[179] *Id.*
[180] *Id.*
[181] *Id.*; *see* Daniels v. Williams, 474 U.S. 327, 300 (1986).
[182] *Castro*, 833 F.3d at 1064.

detainees have "a right to be free from violence at the hands of other inmates."[183] An officer's duty to protect this right arises at the moment when detainees are detained because they are then "stripped [the inmates] of virtually every means of self-protection and foreclosed their access to outside aid."[184] Although the court distinguished between the Eighth Amendment's Cruel and Unusual Punishment Clause for inmates and the Fourteenth Amendment's Due Process Clause for pretrial detainees, the Ninth Circuit found that an affirmative act by the hands of the government is *not* a requirement that needs to be met in order to find liability of the government actor(s).[185] This reasoning flowed from the language of Section 1983, which does not include a state-of-mind requirement for a government actor.[186] Moreover, the damage that a detainee suffers, whether at the hands of an officer or at the hands of another detainee/inmate, has serious potential to cause "the same injuries, both physical and constitutional."[187] Therefore, requiring an affirmative act to be present in order to hold officers liable for deliberate indifference or failure-to-protect claims in violation of the Fourteenth Amendment would be counterintuitive to the purpose and design of Section 1983.[188]

The *Castro* decision came with two dissenting opinions. The first dissent–written by Judge Callahan and joined by Judge Beau and Judge Ikuta–agreed with the majority that the individual defendant officers be held liable; however, they disagreed that the County of Los Angeles and the Los Angeles Sheriff's Department be held liable under the doctrine of *Monell* liability due to insufficient evidence.[189] The second dissenting opinion–written by Judge Ikuta and joined by Judge Beau and Judge Callahan–expressed a strong disappointment with the Ninth Circuit's interpretation of *Kingsley*.[190] Judge Ikuta referenced the Supreme Court's decision in *Bell*,[191] which reasoned that if a pretrial detainee does not allege a violation of an "express guarantee of

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183 *Id.* at 1067 (quoting *Farmer*, 511 U.S. at 833).
184 *Castro*, 833 F.3d at 1067.
185 *Id.*
186 *Id.* at 1069.
187 *Id.* at 1070.
188 *Id.*
189 *Id.* at 1078.
190 *Id.* at 1084.
191 441 U.S. at 539.

the Constitution," then the court must inquire as to whether the pre-trial detainee's experience may be considered punitive.[192]

Castro claimed that the individual defendants "knew of a substantial risk of serious harm" when they made the decision to place the combative detainee in the same sobering cell.[193] However, a finding of liability of the individual defendants did not require the court to craft a new standard to conform to *Kingsley*.[194] Judge Ikuta urged that this new rule adopted in *Castro,* as a result of the court's interpretation of *Kingsley,* is "underinclusive," as the test "may relieve some officials of liability despite their deliberate indifference."[195] In other words, the use of the *Kingsley* standard–a case of excessive force–as a mold for addressing failure-to-act claims will now preclude certain plaintiffs from recovering because the test requires an intent (or imputation of intent) to punish rather than a failure to act.[196] This standard fails to include situations of an officer's failure to act based on a "mistaken assumption."[197] The majority, in response to the dissent's assertion that the test is underinclusive, urged that the four-factor test will "prevent 'overinclusiveness' by ensuring that liability will attach only in cases where the defendant's conduct is more egregious than mere negligence."[198]

The majority's ruling seems to fall more in accordance with *Kingsley* than the dissent's argument because the *Kingsley* Court made clear that liability should not attach where a constitutional right has been violated by way of negligence alone.[199]

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[192] *Castro*, 833 F.3d at 1084.
[193] *Id.* at 1985.
[194] *Id.*
[195] *Id.* at 1086.
[196] *Id.*
[197] *Id.* at 1087; *see Lolli v. County of Orange*, 351 F.3d 410, 420-21 (9th Cir. 2003) (holding an officer liable for failing to provide a pre-trial detainee with food after witnessing the detainee disclose his diabetic condition to another officer and requesting food in connection with the same. This finding of liability was based on the reasoning that the officer could have reasonably perceived the pre-trial detainee's condition as serious, yet failed to provide him with food.).
[198] *Castro*, 833 F.3d at 1071 n.4.
[199] *Kingsley*, 576 U.S. at 396.

IV. CIRCUIT COURTS DECLINING TO EXTEND KINGSLEY TO DELIBERATE INDIFFERENCE CLAIMS

A. Fifth Circuit

The Fifth Circuit Court of Appeals has held that the *Kingsley* standard does not extend to deliberate indifference claims, especially those arising out of a pre-trial detainee's claim of deliberate indifference to medical treatment.[200] "Since *Kingsley* discussed a different type of constitutional claim, it did not abrogate our deliberate-indifference precedent."[201] In *Cope v. Cogdill*,[202] a pre-trial detainee committed suicide in the county jail and his Estate brought suit against the jail and the officers and administrators of the jail, and claimed that there was a deliberate indifference to the detainee's risk of suicide.[203] Derreck Monroe, the decedent, was arrested on September 29, 2017, and booked at the county jail.[204] The jail conducted screening which revealed that Monroe was suicidal and stated that he "'wished [he] had a way to kill himself that day'" and that he attempted suicide two weeks before his arrest.[205] Additionally, the screening revealed that Monroe was previously diagnosed with a form of schizophrenia and that he "displayed other signs of mental illness and emotional disturbance."[206] Monroe was placed on suicide watch by the jail administrator, Brixey, yet he attempted suicide the next day by trying to hang himself.[207] The sheriff, Leslie Cogdill, and jailer Jessie Laws, were aware of Monroe's intake form and mental health history, yet continued to hold Monroe in the same cell and did not seek to admit him to a mental health facility for treatment.[208]

The following morning, October 1, 2017, Laws began his shift and was the only jailer on duty since there were budget cuts that left only one jailer alone during nights and weekends.[209] Monroe began to

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200 Cope v. Coleman Cnty., WL 11715574 (N.D. Tex. 2019), *rev'd sub nom.*; Cope v. Cogdill, 3 F.4th 198, 207 n.7 (5th Cir. 2021), *cert. denied,* 142 S. Ct. 2573 (2022).
201 *Cope*, 3 F.4th at 207 n.7.
202 3 F.4th 198 (5th Cir. 2021).
203 *Id.* at 202.
204 *Id.*
205 *Id.*
206 *Id.*
207 *Id.* at 203.
208 *Id.*
209 *Id.*

overflow his toilet in his cell, so Laws cut off the water supply to Monroe's cell.[210] Monroe became angry and started beating the toilet with the plunger as Laws was mopping the water outside of the cell.[211] Monroe started slamming the phone in the cell against the wall and wrapped the phone cord around his neck while Laws continued to mop.[212] Laws called Brixey, the jail administrator, while Monroe was strangling himself with the phone cord; however, Laws did not make any calls to Emergency Medical Services.[213] Monroe became unconscious and stopped moving about a minute or two after the strangulation, but Laws did not enter the cell,[214] and waited approximately five minutes until Brixey arrived.[215] Laws then entered the cell and unwrapped the phone cord that was around Monroe's body, but neither Brixey or Laws attempted to resuscitate Monroe, and instead called paramedics.[216] The paramedics arrived and performed chest compressions for approximately twenty minutes from the start of Monroe's strangulation.[217] Monroe was taken to the hospital where he died the next day on October 2, 2017, just three days after his booking into the Coleman County Jail.[218]

Monroe's estate filed suit against Cogdill, Brixey, and Laws, and alleged that they violated the Due Process Clause of the Fourteenth Amendment in that they were objectively unreasonable[219] in the treatment of Monroe by denying him appropriate medical care.[220] The district court held that a jury must determine whether Laws, who watched Monroe strangle himself with a phone cord and did not intervene, was reasonable under the circumstances.[221] The district court also held that Cogdill and Brixey were not entitled to qualified immunity because there was "a high and obvious risk of suicide" by housing a suicidal

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210 *Id.*
211 *Id.*
212 *Id.*
213 *Id.*
214 The jail policy was that jailers could not enter a cell until backup arrived. *Id.* at 208.
215 *Id.* at 203.
216 *Id.*
217 *Id.*
218 Note that the *Kingsley* standard is the objectively unreasonable standard.
219 *Id.*
220 *Cope*, 3 F.4th at 203.
221 *Id.*

inmate in a cell that had a phone cord.[222] Cogdill and Brixey filed an interlocutory appeal as to the issue of qualified immunity.[223]

The Fifth Circuit analyzed the deliberate indifference claim against Laws and applied the two prong test in that it would have to be determined "whether Laws (1) 'had subjective knowledge of a substantial risk of serious harm' and (2) 'responded to that risk with deliberate indifference.'"[224] The court noted the plaintiff's argument that the standard of reasonableness of Laws's conduct should be objective and not subjective due to the Supreme Court decision in *Kingsley*, but rejected this argument because *Kingsley* only addressed an excessive force claim.[225] The court clarified that the plaintiff must prove "subjective knowledge," but that a "subjective intent of harm does not have to be proven."[226]

The circuit analyzed Laws's failure to enter Monroe's cell until backup arrived, and concluded that because Laws followed the jail policy he cannot be deemed to have acted with deliberate indifference.[227] "It would not be 'sufficiently clear that every reasonable official would have understood that' waiting for a backup officer to arrive in accordance with prison policy 'violates [a pretrial detainee's] right.'"[228] The court then analyzed Laws's failure to call Emergency Medical Services until after Brixey arrived.[229] A jailer that knows a detainee is suicidal cannot ignore that fact and "cannot 'disregard … precautions he kn[ows] should be taken.'"[230] Laws's failure to call emergency services as he watched Monroe attempt suicide was "not a reasonable response," especially since the jail policy did not allow for Laws to intervene himself without backup.[231] The court determined that Laws's failure to call emergency services "was both unreasonable and an effective disregard for the risk to Monroe's life."[232] However, at the time

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[222] *Id.* at 204.
[223] *Id.*
[224] *Id.* at 207.
[225] *Id.* at n.7.
[226] *Id.*; *see* Hare v. City of Corinth, Miss., 74 F.3d 633, 646 (5th Cir. 1996) (discussing the requirement of subjective knowledge); *see* Dyer v. Houston, 964 F.3d 374, 380 (2020) (clarifying that there is no requirement of a subjective intent to harm).
[227] *Cope*, 3 F.4th at 208.
[228] *Id.* Note that this analysis by the court is an objective one.
[229] *Id.* at 209.
[230] *Id.*
[231] *Id.*
[232] *Id.*

of the incident, there was no clear precedent as to whether the failure to call for emergency help amounted to a constitutional violation or deliberate indifference and therefore, because this was not clearly established, Laws was entitled to qualified immunity.[233] "We now make clear that promptly failing to call for emergency assistance when a detainee faces a known, serious medical emergency—e.g., suffering from a suicide attempt—constitutes unconstitutional conduct."[234]

The circuit addressed the deliberate indifference claims against Cogdill and Brixey for placing Monroe in a cell with a phone cord.[235] However, the court reasoned that "the danger posed by the phone cord" was not an obvious risk of which Cogdill and Brixey could have been aware.[236] Since Cogdill and Brixey did not appreciate this risk, they did not "violate a clearly established constitutional right."[237] Next, the court addressed the deliberate indifference claims against Cogdill and Brixey for staffing only one jailer on the weekends.[238] The court held that they cannot not be held liable for following Coleman County's budget policy.[239] The court ultimately concluded that all three defendants were entitled to qualified immunity.[240]

The dissenting opinion, written by Circuit Judge James L. Dennis, cited an overwhelming amount of statistics that pointed to the risk of suicide in correction facilities.[241] Judge Dennis briefly referenced *Kingsley*, but agreed with the majority that excessive force claims are a "sharp contrast" to deliberate indifference claims.[242] This opinion relies heavily on the argument that the majority interpreted too narrowly the determination of a clearly established right.[243] Judge Dennis relied on the court's decision in *Jacobs v. W. Feliciana Sheriff's Dep't*.[244] The *Jacobs* case addressed the response of prison officers when faced with suicide.[245] In *Jacobs*, the court evaluated the officers

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233 *Id.* at 209-10.
234 *Id.* at 209.
235 *Id.* at 210.
236 *Id.*
237 *Id.* at 211.
238 *Id.*
239 *Id.* at 211-12.
240 *Id.* at 212.
241 *Id.*
242 *Id.* at 219 n.6.
243 *Id.*
244 228 F.3d 388, 397 (5th Cir. 2000); *see Cope*, 3 F.4th at 219.
245 228 F.3d at 397.

and whether they "conducted [themselves] in an objectively reasonable manner with respect to [their] duty to not act with subjective deliberate indifference to the known risk that Jacobs might have attempted suicide."[246] Judge Dennis pointed out that the officers in *Jacobs* were not entitled to qualified immunity even though there were no cases addressing inmate suicide that were "factually analogous" to the case at hand.[247] This argument attacked the majority's reasoning that there be existing case law that clearly establishes an officer's conduct that amounts to a constitutional violation in order to find that an officer is not entitled to qualified immunity.[248] "Thus, the requirement that clearly established rights be defined with a high degree of specificity does not apply to deliberate indifference claims."[249]

A. Eighth Circuit

Similarly, the Eighth Circuit Court of Appeals declined to extend *Kingsley* to claims of deliberate indifference because *Kingsley* dealt exclusively with excessive force.[250] In *Whitney v. City of St. Louis, Missouri*,[251] the plaintiff filed a deliberate indifference action against a corrections officer and the City of St. Louis when his son, Whitney, a pretrial detainee, died as a result of hanging himself in a monitored detention cell.[252] Whitney had expressed suicidal thoughts; however, the officer assigned to monitor Whitney denied any knowledge of suicidal thoughts or behaviors.[253] After Whitney's death, a medical practitioner came forward and stated that Whitney made suicidal remarks to him.[254] The plaintiff's complaint stated that the officer caused Whitney's death "[T]hrough her deliberate indifference by failing to: (1) 'adequately monitor Whitney;' (2) 'timely provide adequate medical care to his serious suicidal medical condition and need;' and/or (3) 'timely intervene to rescue Whitney while he was

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[246] *Id.* Note that this standard is a hybrid that considers objective reasonableness when carrying out their duty to not act with subjective deliberate indifference to a known risk. *Id.* The first prong is comparable to the *Kingsley* standard.

[247] *Id.*

[248] *Id.*

[249] *Id.* at n.6.

[250] *Whitney*, 887 F.3d at 860 n.4.

[251] 887 F.3d 857, 858 (8th Cir. 2018).

[252] *Id.* at 858.

[253] *Id.* at 859.

[254] *Id.*

committing suicide in the CCTV cell.'"[255] The district court dismissed the plaintiff's claims, and held that the plaintiff failed to state a claim for deliberate indifference by failing to allege facts sufficient to satisfy the subjective prong of the deliberate indifference inquiry.[256] This circuit's precedent for claims of deliberate indifference required a two prong test: (1) that the officer "[h]ad actual knowledge that Whitney had a substantial risk of suicide …;" and (2) that the officer "failed to take reasonable measures to abate that risk."[257]

The plaintiff appealed and argued that the district court erred in its decision to dismiss his action.[258] The plaintiff argued that the court should have applied the purely objective standard set out by the Supreme Court in *Kingsley*.[259] However, this circuit declined to entertain or engage in any analysis under the *Kingsley* standard, and simply held that "Kingsley does not control because it was an excessive force case, not a deliberate indifference case."[260] However, had this circuit adopted the *Kingsley* standard, it is possible that the plaintiff would have prevailed on his claim against the supervising officer for the deliberate indifference to his son's life since he had alleged facts sufficient to satisfy the objective prong of the required two-prong test adopted in this circuit.[261]

B. Tenth Circuit

The Tenth Circuit Court of Appeals has held that *Kingsley*'s objective standard for evaluating excessive force should not extend to actions for deliberate indifference because the two are drastically different in nature.[262] "The force of *Kingsley* does not apply to the deliberate indifference context, where the claim generally involves inaction divorced from punishment."[263] In *Strain v. Regalado*,[264] the plaintiff, Pratt, was booked into the Tulsa County Jail and was being held there

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255 *Id.*
256 *Id.* at 860.
257 *Id.*
258 *Id.* at 859.
259 *Id.* at 860 n.4.
260 *Id.*
261 *Id.* at 860.
262 *Strain*, 977 F.3d at 991.
263 *Id.* at 992.
264 977 F.3d 984, 991 (10th Cir. 2020).

as a pretrial detainee.[265] The next morning, he started suffering from alcohol withdrawals and requested detox medication.[266] The Tulsa County Sheriff's office contracted with the Armor Correctional Health Services so they could provide the necessary medical and mental health to the inmates.[267] Armor Correctional Health Services (Armor) is a government agency that is subject to the Fourteenth Amendment.[268] An Armor nurse conducted an alcohol withdrawal test on Pratt and admitted him to the jail's medical unit which documented his withdrawal symptoms.[269] Pratt was placed on seizure precaution which meant that his vitals were to be taken every eight hours, and he was given medication for his alcohol withdrawals.[270] The day after being placed on these medications, a nurse found that his condition was worsening as Pratt was disoriented, vomiting and suffering from "severe tremors."[271] The Armor nurse did not contact a doctor about his worsening condition and another nurse switched his alcohol withdrawal medication with a different alcohol withdrawal medication.[272] On Pratt's third day there, and the morning following the medication switch, a doctor walked past Pratt's cell and "noticed a two-centimeter cut on Pratt's forehead and a pool of blood in his cell."[273] Despite awareness of Pratt's medical conditions, this doctor did not transfer him to the hospital.[274] Various Armor staff had observed Pratt's condition later that afternoon and the next morning and again did not seek additional care for him.[275] The doctor saw Pratt the next morning and "noted that he was underneath the sink in his cell with a cut on his forehead."[276] On the fifth day of detention, an Armor nurse went to Pratt's cell to check his vitals but did not take his vitals because "he would not get up."[277] One hour later an officer noticed that Pratt was

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265 *Id.* at 987.
266 *Id.*
267 *Id.* at 987 n.1.
268 *Id.*
269 *Id.* at 987.
270 *Id.* at 987-88.
271 *Id.* at 988.
272 *Id.*
273 *Id.*
274 *Id.*
275 *Id.*
276 *Id.*
277 *Id.*

motionless in his bed and immediately called first responders.[278] Pratt was brought to the hospital where it was determined that he had suffered a cardiac arrest.[279] Pratt was diagnosed with a seizure disorder and was deemed "permanently disabled."[280]

Pratt's guardian filed suit against Armor, the Armor nurses and doctors that treated Pratt, and the Tulsa County Sheriff.[281] The guardian claimed that the defendants exhibited "deliberate indifference to Pratt's serious medical needs under 42 U.S.C. § 1983."[282] The plaintiff argued that to determine whether there was deliberate indifference on the part of the state actors, the court must use the objective standard determined by the Supreme Court in *Kingsley*.[283] The district court dismissed the action for failure to state a claim, and the plaintiff appealed.[284] The plaintiff argued that the Armor staff ignored serious health risks even though they were aware that he was suffering from alcohol withdrawals.[285] The defendants argued that, at most, their ignorance of Pratt's health condition was considered negligent and did not rise to deliberate indifference.[286]

The circuit court noted that deliberate indifference claims for failure to address a convicted prisoner's medical needs was first addressed by the Supreme Court under the Eighth Amendment in 1976 in *Estelle v. Gamble* 429 U.S. 97 (1976).[287] In *Estelle*, the Supreme Court held that failing to address a prisoner's serious medical needs was considered cruel and unusual punishment.[288] Following this ruling, this court in 1985 allowed pretrial detainees in *Garcia v. Salt Lake Cty*.,[289] to bring deliberate indifference claims under the Fourteenth Amendment because pretrial detainees are afforded the same legal protections as convicted inmates if their medical conditions are ignored.[290] Deliberate indifference claims may be brought under any amendment

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278 *Id.*
279 *Id.*
280 *Id.*
281 *Id.*
282 *Id.*
283 *Id.* at 989.
284 *Id.* at 988-89.
285 *Id.* at 993-94.
286 *Id.* at 994.
287 *Id.* at 989; *see* Estelle v. Gamble, 429 U.S. 97 (1976).
288 *Id.*
289 768 F.2d 303 (10th Cir. 1985).
290 *Strain*, 977 F.3d at 989.

and will be analyzed using the same standard.[291] The court determined that switching Pratt's medication was an issue of treatment and was not considered a deliberate indifference.[292] "A misdiagnosis, even if rising to the level of medical malpractice, is simply insufficient under our case law to satisfy the subjective component of a deliberate indifference claim."[293]

The court then analyzed the Supreme Court's decision in *Kingsley*, which held that a pretrial detainee may prevail on an excessive force claim under the Fourteenth Amendment solely on the objective standard, but noted that *Kingsley* did not discuss deliberate indifference to a pretrial detainee's medical needs.[294] The court noted the circuit split on whether the standard established by *Kingsley* extends to actions for deliberate indifference.[295] The court held that *Kingsley*'s purely objective standard does not apply to deliberate indifference claims and decided not to extend *Kingsley* for three different reasons.[296]

The first reason was that the Supreme Court did not address the possibility of extending this test, and noted that deliberate indifference claims are very different from excessive force claims because excessive force is "unique" and hones in on the issue of whether the force used by officials meets the threshold of punishment against a pretrial detainee.[297] Although the Supreme Court never established a bright-line rule, it never discussed the possibility of extending the *Kingsley* decision to actions other than excessive force.[298] The *Kingsley* decision turned on "the defendant's state of mind with respect to whether his use of force was 'excessive'" and that would be evaluated under an objective standard and not a subjective standard.[299] The court reasoned that it would be best to err on the side of caution and not impute meaning to the Supreme Court when it did not speak on the issue of deliberate indifference.[300] Moreover, excessive force differs from

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[291] *Id.*
[292] *Id.* at 995.
[293] *Id.*
[294] *Id.* at 990.
[295] *Id.*
[296] *Id.* at 991.
[297] *Id.*
[298] *Id.*
[299] *Id.*
[300] *Id.*

deliberate indifference because courts have always considered whether an officer's use of force on a pretrial detainee would cross a boundary into the punishment realm, which pretrial detainees cannot be subjected to.[301]

The second reason that this court declined to extend *Kingsley* was because deliberate indifference is not considered punishment and results from mere "inaction" while excessive force involves an affirmative act.[302] The courts have generally imputed an intent to punish to an official who uses excessive force that is not in accordance with "a legitimate government objective" whereas in deliberate indifference cases the courts have not imputed any kind of intent to an official and, at most, is considered negligent.[303] "The Supreme Court has made clear that liability for negligently inflicted harm is categorically beneath the threshold of constitutional due process."[304]

The Supreme Court's focus on punishment of a pretrial detainee is ultimately the reason that the subjective prong was set aside, and the actions were evaluated purely through the objective standard to show that the government's actions were done intentionally, even if the intent behind the actions was not to punish.[305] Additionally, the Supreme Court never mentioned or alluded to doing away with the subjective prong, so that should not be done in this case.[306] The court then reasoned that the definition of deliberate indifference implies the existence of a subjective prong.[307] Black's Law Dictionary defines "deliberate" as "intentional," "premeditated," or "fully considered."[308] "A plaintiff must allege that an actor possessed the requisite intent, together with objectively indifferent conduct, to state a claim for *deliberate* indifference."[309]

The court relied on the Supreme Court's decision in *Farmer*,[310] which declined to make the deliberate indifference test an objective one and held that an official must "subjectively disregard a known or

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301 *Id.*
302 *Id.*
303 *Id.*
304 *Id.*
305 *Id.* at 992.
306 *Id.*
307 *Id.* at 991.
308 *Id.* at 992.
309 *Id.*
310 511 U.S. at 839.

obvious, serious medical need" to be considered deliberate indifference.[311] Generally, deliberate indifference is more than negligence, but does not rise to the standard of purpose or knowledge.[312] Deliberate indifference evaluates the government official's intent and reasoning as to what they did or did not do and why, and excessive force does not consider an official's state of mind regarding the appropriate amount of force to be applied.[313] Eliminating the subjective prong is the opposite of the meaning of deliberate indifference.[314]

The third reason the court declined to extend *Kingsley* is because the extension of a purely objective standard to deliberate indifference claims would undermine *stare decisis* in this circuit when the Supreme Court never discussed deliberate indifference.[315] It would be an interpretation of the Supreme Court ruling rather than following the binding precedent of the Supreme Court.[316] Adopting a purely objective standard for deliberate indifference claims undermines the Supreme Court's precedent in *Farmer* because *Farmer* addressed deliberate indifference but *Kingsley* did not.[317]

D. Eleventh Circuit

The Eleventh Circuit Court of Appeals declined to extend the *Kingsley* standard to claims of deliberate indifference to medical care in *Dang v. Sheriff, Seminole Cnty.*[318] In *Dang*, the pretrial detainee was suffering from meningitis symptoms for approximately three weeks before he was diagnosed.[319] During this period of three weeks, Dang was seen by doctors who did not perform any tests for meningitis.[320] Ultimately, Dang suffered from many strokes which left him with permanent injuries.[321] Dang filed suit against the health care providers and the county sheriff for inadequate medical care, and the

311 *Strain*, 977 F.3d at 992.
312 *Id.*
313 *Id.*
314 *Id.* at 993.
315 *Id.* at 991.
316 *Id.*
317 *Id.* at 993.
318 871 F.3d 1272 (11th Cir. 2017).
319 *Id.* at 1277-78.
320 *Id.* at 1278.
321 *Id.* at 1276.

district court granted summary judgment to the defendants and held that none of them were deliberately indifferent to Dang's medical needs.[322]

Dang appealed and argued that under the *Kingsley* standard, "[a] pretrial detainee alleging constitutionally deficient medical care need not show deliberate indifference."[323] The court gave two reasons as to why the *Kingsley* standard does not apply to claims of deliberate indifference to medical care.[324] The first reason is that *Kingsley* addressed claims of excessive force and not deliberate indifference.[325] Second, *Kingsley*'s objective standard does not comport with the Eleventh Circuit's precedent on the test for deliberate indifference which requires a plaintiff to "[s]how (1) a serious medical need; (2) the health care providers' deliberate indifference to that need; and (3) causation between the health care providers' indifference and Dang's injury."[326] The court noted that even if it did extend *Kingsley*'s objective standard to claims of deliberate indifference, Dang would not be able to prevail because the defendants, at most, acted negligently, and "[l]iability for *negligently* inflicted harm is categorically beneath the threshold of constitutional due process."[327]

V. THE SUPREME COURT SHOULD EXTEND THE OBJECTIVE STANDARD TO CLAIMS OF DELIBERATE INDIFFERENCE

The crux of the Fifth, Eighth, Tenth, and Eleventh circuits' arguments are that *Kingsley* only addressed a claim of excessive force, and that excessive force is very different from deliberate indifference.[328] But this reasoning is not strong enough to warrant a refusal to

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[322] *Id.* at 1278.

[323] *Id.* at 179 n.2.

[324] *Id.*

[325] *Id.*

[326] *Id.* at 179.

[327] *Id.* at 179 n.2.

[328] *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."); *Whitney*, 887 F.3d at 860 n.4 ("Kingsley does not control because it was an excessive force case, not a deliberate indifference case."); *Strain*, 977 F.3d at 992 ("Thus, the force of Kingsley does not apply to the deliberate indifference context, where the claim generally involves inaction divorced from punishment."); *Dang*, 871 F.3d at 1279 n.2 ("Kingsley involved an excessive-force claim, not a claim of inadequate medical treatment due to deliberate indifference.").

apply the objective standard to claims of deliberate indifference brought by pretrial detainees. This standard is functional, in accord with the intent behind the Fourteenth Amendment, will protect law enforcement officials from liability for negligence,[329] and follows the seminal case of *Bell v. Wolfish*.

The circuits that refuse to adopt this standard draw an arbitrary line which requires there to be a physical act of harm to satisfy the element of excessive force before applying this objective standard. However, the difference between the act of asserting excessive force on a pretrial detainee can be–and should be–equated to the act of making a conscious decision to ignore a life-threatening or degrading situation that a pretrial detainee is forced into pending a conviction.[330] Detainees are at the facility's mercy and physically cannot obtain the help or medical care they may require without law enforcement officials that work in these facilities.

The Fourteenth Amendment ensures that pretrial detainees are entitled to the presumption of innocence, and thus cannot be subjected to any form punishment–not limited to cruel and unusual punishment. The cases previously discussed in this Note involved law enforcement officials making a conscious decision not to seek help for a pretrial detainee, and those consequences often left these pretrial detainees with permanent disabilities, and some resulted in death. The reality is that many of these cases surpass negligence and fall squarely in line with a form of punishment when a law enforcement official knowingly makes a decision to ignore the needs of pretrial detainees. *Kingsley* dictates that pretrial detainees cannot be subjected to an act that amounts to punishment, and it is of course possible for an individual to be punished absent excessive force.

The circuit split that resulted after *Kingsley* leaves pretrial detainees with justice that is conditional upon the location they happen to be situated in rather than justice for the mistreatment they faced

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[329] A purely objective standard will protect officers who act in good faith because this analysis will have two prongs: (1) the reasonableness of the force used (2) coupled with the officers' knowledge. *Kingsley*, 576 U.S. at 390; s*ee also Darnell*, 849 F.3d at 36 (stating that a violation under the Due Process Clause "requires proof of a *mens rea* greater than mere negligence.").

[330] *Bell*, 441 U.S. at 539 ("[I]f a restriction or condition is not reasonably related to a legitimate goal-if it is arbitrary or purposeless-a court permissibly may infer that the purpose of the governmental action is punishment that may not constitutionally be inflicted upon detainees *qua* detainees.").

while being detained. The *Kingsley* objective standard is a workable standard that benefits all parties involved in an action because it prevents officers from being held liable for negligence, and it allows a plaintiff to show only that he or she faced an objectively unreasonable risk of harm. So far, the Supreme Court has denied certiorari to all petitioners who have presented cases that call for a determination as to whether the *Kingsley* standard should be extended to cases of deliberate indifference and inadequate care.[331] While the undertones of this Note suggest that the Supreme Court should put an end to the circuit split and extend the objective standard to claims of inadequate care and deliberate indifference, it does not seem like this will happen anytime soon.

VI. THE RISK THAT KINGSLEY COULD BE OVERRULED IF THE SUPREME COURT DECIDES TO RESOLVE THE CIRCUIT SPLIT

There is a strong argument to be made that the Supreme Court should not resolve this circuit split. The *Kingsley* decision was a 5-4 decision, and the fact that there is an even circuit split indicates a possibility that the current Court could overrule *Kingsley* completely. This possibility should not be ignored. While the arguments to extend the standard are strong–and this Note argues in support of that position–the arguments in support of declining to extend the standard are sound. The Justices who ruled in Kingsley's favor in 2015, which established this objective standard, were Breyer, Kennedy, Ginsburg, Sotomayor, and Kagan. The Justices who ruled against the *Kingsley* standard were Justices Scalia, Roberts, Thomas, and Alito. Given that the current conservative majority is unafraid to disrupt precedent and overrule decades old law,[332] the stability of the *Kingsley* standard could easily be pulled out from underneath the incarceration system.

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[331] Castro v. Cnty. of L.A., 833 F.3d 1060 (9th Cir. 2016), *cert. denied,* 137 S. Ct. 831 (2017); Strain v. Regalado, 977 F.3d 984 (10th Cir. 2020), *cert. denied*, 142 S. Ct. 312 (2021); Brawner v. Scott County, Tennessee*,* 14 F.4th 585 (6th Cir. 2021), *cert. denied,* 143 S. Ct. 84 (2022); Cope v. Cogdill, 3 F.4th 198 (5th Cir. 2021), *cert. denied,* 142 S. Ct. 2573 (2022).

[332] *See* South Dakota v. Wayfair, Inc., 138 S. Ct. 2080, 2099 (2018) (5-4 decision overruling National Bellas Hess v. Dep't of Revenue, 386 U.S. 753 (1967)); Janus v. AFSCME, Council 31, 138 S. Ct. 2448, 2460 (2018) (5-4 decision overruling Abood

If the issue is not reevaluated by the Supreme Court, then pre-trial detainees in the Second, Sixth, Seventh, and Ninth Circuits will have what this Note believes to be the proper level of protection against deliberate indifference and inadequate care. It is unfortunate that the Fifth, Eighth, Tenth, and Eleventh Circuits have declined to extend this standard, but it is better than risking the protection potentially be stripped from those in the Second, Sixth, Seventh, and Ninth Circuits.

v. Detroit Bd. of Educ., 431 U.S. 209 (1977); Franchise Tax Bd. v. Hyatt, 139 S. Ct. 1485, 1490 (2019) (5-4 decision overruling Nevada v. Hall, 440 U.S. 410 (1979)); Knick v. Twp. Of Scott, 139 S. Ct. 2162, 2179 (2019) (5-4 decision overruling in part Williamson County Reg'l Planning Comm'n v. Hamilton Bank, 473 U.S. 172 (1985)); Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 231 (2022) (6-3 decision overruling Roe v. Wade, 410 U.S. 113 (1973) and Planned Parenthood v. Casey, 505 U.S. 833 (1992)).