No. 18-337

In The Supreme Court of the United States

COUNTY OF ORANGE, CALIFORNIA, et al.,

Petitioners,

v.

MARY GORDON, Successor in Interest for Decedent, Matthew Shawn Gordon, Individually,

Respondent.

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

BRIEF OF THE CALIFORNIA STATE ASSOCIATION OF COUNTIES, NATIONAL SHERIFF'S ASSOCIATION, AND CALIFORNIA STATE SHERIFF'S ASSOCIATION AS AMICI CURIAE IN SUPPORT OF PETITIONERS

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INTERESTS OF AMICI CURIAE[1]

California State Association of Counties (CSAC) is a non-profit corporation. The 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 in California, as well as counties throughout the United States.

National Sheriffs' Association (NSA) is a non-profit association. NSA seeks to promote fair and efficient administration of criminal justice throughout the United States and in particular to advance and protect the Office of Sheriff. NSA has over 20,000 members and is the advocate for 3,080 sheriffs throughout the United States. 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. NSA represent the nation's sheriffs who operate more than 3,000 local correctional

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[1] Amici notified all counsel of record of its intent to file this brief more than 10 days before the due date, and consent to file was given by all. This brief was not authored in whole or in part by counsel for any party. No person or entity other than amici made a monetary contribution to this brief's preparation or submission.

facilities throughout the United States. The vast majority of these facilities house both pretrial detainees and convicted inmates. Sheriffs, 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.

The California State Sheriff's Association (CSSA) is a non-profit professional organization that represents each of the 58 elected California Sheriffs. CSSA was formed to allow the sharing of information and resources between sheriffs and departmental personnel, and for the general improvement of law enforcement throughout California. CSSA's membership is made up of all sheriffs in California, who have authority over many law enforcement officers and the majority of California's inmates. These sheriffs are constitutional officers within California counties, who have policy making authority and oversight over their departments and jail and court facilities within California.

Amici have a significant interest in the important and unresolved issue presented in the petition for certiorari, which is, as slightly restated: Should the Eighth Amendment's deliberate indifference standard continue to be 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, or should courts apply the "objective unreasonableness" standard established in *Kingsley v. Hendrickson*, 135 S. Ct. 2466, 2473-74 (2015), for Fourteenth

Amendment excessive force claims brought by pretrial detainees?

There are 117 county run jails in California[2] with roughly 46,000 pretrial detainees in these jails accounting for 64% 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 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 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.

SUMMARY OF ARGUMENT

"The difficulties of operating a detention center must not be underestimated by the courts. *Turner v. Safley*, 482 U.S. 78, 84-85 [] (1987). Jails (in the stricter

[2] Magnus Lofstrom & Brandon Morton, Just The Facts – California County Jails (Public Policy Inst. of Cal. Nov. 2017), http://www.ppic.org/wp-content/uploads/JTF_CountyJailsJTF.pdf.

[3] Sonya Tafoya et al., Pretrial Release In California (Public Policy Inst. of Cal., May 2017), p. 5, www.ppic.org/content/pubs/report/R_0517STR.pdf.

[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, www.naco.org/sites/default/files/documents/Final%20paper_County%20Jails%20at%20a%20Crossroads_8.10.15.pdf.

sense of the term, excluding prison facilities) admit more than 13 million inmates a year. *See e.g*. Dept. of Justice, Bureau of Justice Statistics, T. Minton, Jail Inmates at Midyear 2010 – Statistical Tables 2 (2011)." *Florence v. Board of Chosen Freeholders*, 566 U.S. 318, 326 (2012). The duty to protect these inmates includes the duty to provide medical care. However, not every claim rises to a 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. *Id*. at 838. To part 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 care claim brought by a pretrial detainee. *County of Sacramento v. Lewis*, 523 U.S. 833, 850 (1998); *City of Canton, Ohio 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. *City of Revere v. Mass. Gen. Hosp.*, 463 U.S. 239, 244, 103 S. Ct. 2979, 77 L.Ed.2d 605 (1983). '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.' [Citation].").

Without guidance from this Court, circuit courts for decades uniformly held that a Fourteenth Amendment inadequate medical care claim brought by a pretrial detainee was governed by 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. DiBattista, *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*.

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); Petition, 7-10 (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, Mo.*, 887 F.3d 857, 860 & n.4 (8th Cir. 2018) (utilizing subjective deliberate indifference standard for inadequate medical care claim, holding "the Supreme Court's conclusion in *Kingsley* . . . that 'the relevant standard is objective not subjective' . . . does not control because it was an excessive force case, not a deliberate indifference case"); *Nam Dang by & through Vina Dang v. Sheriff, Seminole Cty., Fla.*, 871 F.3d 1272, 1279 (11th Cir. 2017) (utilizing subjective deliberate indifference standard for inadequate medical care claim, rejecting argument that *Kingsley* controls: "Dang argues that following *Kingsley* . . . a pretrial detainee alleging constitutionally deficient medical care need not show deliberate indifference. We cannot and need not reach this question. First, *Kingsley* involved an excessive-force claim, not a claim of inadequate medical treatment due to deliberate indifference. Therefore, it is not 'squarely on point' with and does not 'actually abrogate or directly conflict with,' [citation], our prior precedent identifying the standard we apply in this opinion to Dang's claim."); *Alderson v. Concordia Par. 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."); *Clark v. Colbert*, 895 F.3d 1258, 1269 (10th Cir. 2018) (applying deliberate indifference standard post-*Kingsley*); *see Crocker v. Glanz*, No. 18-5038, 2018 WL 4566260, at *4 (10th Cir. Sept. 24, 2018) (unpublished) (declining to address *Kingsley*'s application to inadequate medical care claims due to waiver but noting "the claim in [*Kingsley*] was an excessive-force claim where there was no question about the intentional use of force against the prisoner. The analysis in *Kingsley* may not apply to a failure to provide adequate medical care or screening, where there is no such intentional action. Indeed, the Court reiterated the proposition that 'liability for negligently inflicted harm is categorically beneath the threshold of constitutional due process.' 135 S. Ct. at 2472 (internal quotation marks omitted).").

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, stating "[t]he Supreme Court recently disapproved the uncritical extension of Eighth Amendment jurisprudence to the pretrial setting in *Kingsley*. . . ."); *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 deliberative indifference standard . . . to medical care claims."); *Bruno v. City of Schenectady*, 727 F. App'x 717, 720 (2d Cir. 2018) (holding *Kingsley*'s objective unreasonableness standard applies to inadequate medical care claim); *see Castro v. County of Los Angeles*, 833 F.3d 1060, 1070-72 (9th Cir. 2016) (en banc), *cert. denied sub nom. Los Angeles County v. Castro*, 137 S. Ct. 831 (2017) (extending *Kingsley* to a pretrial detainee's failure-to-protect claim based on the "broad wording of *Kingsley*" and that *Kingsley* "did not limit its holding to 'force' but spoke to 'the challenged governmental action' generally"); *Darnell v. Pineiro*, 849 F.3d 17, 34-35 (2d Cir. 2017) (applying *Kingsley* to a condition of confinement claim, holding "[c]onsistency with the Supreme Court's decision in *Kingsley* now dictates that deliberate indifference be measured objectively in due process cases").

Each of these decisions seemingly inappropriately applies the *Kingsley* test to replace the well-established deliberate indifference test. This Court in *Whitley v. Albers*, 475 U.S. 312 (1986), in its landmark decision overturning the Ninth Circuit, stated that the deliberate indifference test was no longer the standard for use of force cases involving a convicted inmate. Rather, a distinct and separate standard would now be applied in all use of force scenarios. A deliberate indifference standard does not adequately capture the importance of competing obligations of prison officials, or

convey the appropriate hesitancy to critique in hindsight decisions necessarily made in haste, under pressure, and frequently without the luxury of a second chance and was, therefore, not intended to mirror the other elements under the Eighth Amendment. *Id*. at 320. This Court again upheld this same analysis in *Hudson v. McMillian*, 503 U.S. 1 (1992), which is still prevailing law, that the standard for all other use of force scenarios is *not* the deliberate indifference test but whether the force was applied in a good faith effort to maintain and restore order, or was it applied maliciously and sadistically for the very purpose of causing harm. This is exactly the reason why this Court held in 1986 and again in 1992 that use of force and deliberate indifference are distinct issues with completely different dynamics, different considerations, and unique standards. Use of force decisions such as in *Kingsley* were never intended to be stretched and distorted to replace the deliberate indifference standard for medical care in a correctional facility. Use of force decisions involve chaotic, spur of the moment control of inmates in emergency situations whereas medical care involves planned and methodical medical judgment by medical experts. The two issues cannot be constitutionally evaluated together and made to precisely fit into the same category. This Court has made it clear that the deliberate indifference test applies to the Eighth Amendment's prohibition against Cruel and Unusual Punishment which has both subjective and objective components, recognizing there are different standards for use of force. 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.

A definitive answer from this Court on whether the culpability standard for Fourteenth Amendment inadequate medical care claims brought by pretrial detainees was something other than 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 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) ("Three circuit courts touch the border between the United States and Mexico – our court, the Fifth Circuit, and the Tenth Circuit. Today, two of the three are split. The implications are troubling. Whereas an alien injured on Mexican soil by a Border Patrol agent shooting from Texas lacks recourse under *Bivens*, an alien injured on Mexican soil by an agent shooting from California or Arizona may sue for damages. This is an untenable result, and will lead to an uneven administration of the rule of law.").

This Court should now resolve this uncertain and unacceptable state of constitutional jurisprudence. "Running a prison is an inordinately difficult undertaking that requires expertise, planning, and the commitment of resources." *Turner*, 482 U.S. at 84-85. Although CSAC believes 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[5]

A. 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 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

[5] As framed in the petition for certiorari, the question presented is "[w]hether a pretrial detainee's 'inadequate medical care' claim pursuant to 42 U.S.C. § 1983 requires a showing of jail professional's subjective intent in delivering care or whether an objective 'unreasonableness' standard is sufficient." Petition, i. Amici also understand that a petition for certiorari raising the same issue will be filed in *Crowell v. Cowlitz County*, 726 F. App'x 593, 594 (9th Cir. 2018).

> 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 105-06.

In 1979, this Court concluded that holding pretrial detainees in conditions that "amount to punishment" violates the Fourteenth Amendment when the conditions are "imposed for the purpose 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*. . . .").

It was no different in 1998. 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 (1994); *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 unreasonable." 135 S. Ct. at 2471-72. This Court found the objective unreasonableness standard appropriate for excessive force claims, *id.* at 2473, but did not touch on any other type of Fourteenth Amendment claim brought by a pretrial detainee.

B. 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

1. Before *Kingsley*, Circuit Courts Uniformly Applied The Eighth Amendment's Deliberate Indifference Standard 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); *Lolli v. County of Orange*, 351 F.3d 410, 418-19 (9th Cir. 2003); *Hare v. City of Corinth, Miss.*, 74 F.3d 633, 643 (5th Cir. 1996); *Hill v. Nicodemus*, 979 F.2d 987, 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.

2. 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 351-52 (discussing circuit split); *Richmond*, 885 F.3d at 938 n.3 (same); Petition, 8-11 (same); *compare Clark*, 895 F.3d at 1269 (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), *Gordon*, 888 F.3d at 1124-25 (same), *and Darnell*, 849 F.3d at 34-35 (same).

Amici observe 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 as 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).

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

In the three years since *Kingsley*, 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 Cty. 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").

C. 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*, 135 S. Ct. at 2472 (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 of 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. 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] *Gordon*,

[6] Amici have refined 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 caused 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. Amici observe that the "*Gordon* test" does not really fit with inadequate medical care claims

888 F.3d at 1125. A medical professional always acts intentionally when making decisions about medical care.[7] Accordingly, an objective unreasonableness test like the one created 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 conclude that a pretrial detainee may need a surgical procedure to remedy a problem, but ultimately concludes in his or her judgment that surgery is unnecessary. That is an intentional decision regarding medical care. At trial, the pretrial detainee 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 problem. "[M]edical malpractice does not become a

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because medical professionals working with pretrial detainees are making medical decisions and not "confinement" decisions, which were previously made by others.

[7] Theoretically, a medical professional could accidently forget to provide medical care he or she intended to provide or accidently provide medical care he or she did not intend to provide.

constitutional violation merely because the victim is a prisoner," *Estelle v. Gamble*, 429 U.S. 97 (1976). 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 created by the Ninth Circuit 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 that the "Due Process Clause is not 'a font of tort law to be superimposed upon' that state system." *Kingsley*, 135 S. Ct. at 2479 (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.").

CONCLUSION

Amici respectfully request that this Court grant the petition for certiorari. Some circuit courts are extending *Kingsley* to claims other than excessive force claims, which is something this Court never intended because excessive force claims are significantly distinct from other Fourteenth Amendment claims.

Respectfully submitted,

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