THE *KINGSLEY* SPLIT AND INADEQUATE-MEDICAL-CARE CLAIMS: HOW ADOPTING THE OBJECTIVE DELIBERATE INDIFFERENCE STANDARD CAN HELP ALLEVIATE THE JAIL-SUICIDE EPIDEMIC

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ABSTRACT

Although suicide is the leading cause of death in jails, most facilities lack sufficient policies to prevent inmate suicide. The problem is particularly acute in smaller jails, where the suicide rate among inmates is six times higher when compared to larger facilities. Studies have found that liability from civil litigation has forced jails to adopt stronger preventative measures. However, due to the Supreme Court's decision in Farmer v. Brennan *to implement a subjective deliberate indifference test to an inmate's failure-to-protect claim under the Eighth Amendment (which was later extended by the Court to pretrial detainees' claims under the Fourteenth Amendment), inmates rarely are able to hold individual officers liable. Despite this precedent, in 2015, the Supreme Court held in* Kingsley v. Hendrickson *that an objective standard applies in excessive-use-of-force claims brought under the Fourteenth Amendment. While others have written about the potential impact of the objective standard on jail-suicide litigation in the immediate aftermath of* Kingsley, *the issue has yet to be revisited since the circuits have split on the question of whether to extend the objective standard to pretrial detainees' other claims arising under the Fourteenth Amendment.*

This Note examines the history of inadequate-medical-care claims resulting in suicide and arguments made by both sides of the circuit split and argues that the current circuit split should

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be resolved by extending the objective deliberate indifference standard to inadequate-medical-care claims brought under the Fourteenth Amendment. Should that standard be extended, this Note argues that litigation against smaller jails can be made more accessible, thus encouraging those facilities to adopt stronger suicide prevention policies.

TABLE OF CONTENTS

I. INTRODUCTION

On August 25, 2022, Michael Nieves died by suicide while being held as a pretrial detainee at the Riker's Island Jail Complex.[1] Although jail officials had placed Mr. Nieves on suicide watch for two previous suicide attempts, Mr. Nieves was still able to obtain a razor blade.[2] Subsequently, Mr. Nieves was found dead in his cell.[3] If the Estate of Mr. Nieves were to bring a claim for inadequate medical care resulting in suicide under 42 U.S.C. § 1983, the standard for adjudicating the claim would depend upon the circuit in which it is brought.[4] In the Second Circuit, for example, claims against individual officials are assessed under an objective standard.[5] However, other circuits apply a more demanding subjective standard.[6]

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1. Melissa Klein, *Rikers Island Inmate Killed Self with Razor After Captain Ignored Protocol: Source*, N.Y. POST (Sept. 17, 2022, 11:38 AM), https://nypost.com/2022/09/17/rikers-island-kills-self-after-captain-skips-protocol-source/. In total, six inmates committed suicide in 2022 while detained at the Rikers Island Jail Complex. *See* Courtney Gross, *NY1 Investigation: Looking for Mental Health Care Behind Bars at Rikers*, SPECTRUM NEWS NY1 (Jan. 12, 2023, 7:00 PM), https://ny1.com/nyc/all-boroughs/public-safety/2023/01/12/ny1-investigation--looking-for-mental-health-care-at-rikers.

2. Klein, *supra* note 1.

3. *Id.*

4. *See* Helphenstine v. Lewis County, 60 F.4th 305, 315–16 (6th Cir. 2023) (discussing the *Kingsley* split).

5. *See, e.g.*, Yousef v. County of Westchester, No. 19-CV-1737 (CS), 2020 WL 2037177, at *28 (S.D.N.Y. Apr. 28, 2020) (requiring the plaintiffs to show that the defendant acted intentionally or with "objective recklessness" towards the decedent's risk for suicide). In addition to the Second Circuit, the Ninth Circuit applies an objective standard as well. *See, e.g.*, Cavanaugh v. County of San Diego, No. 3:18-cv-02557-BEN-LL, 2020 WL 6703592, at *12 (S.D. Cal. Nov. 12, 2020) (describing how inadequate-medical-care claims brought by pretrial detainees are evaluated under an objective standard).

6. *See, e.g.*, Brabbit v. Capra, 59 F.4th 349, 353 (8th Cir. 2023) ("To establish deliberate indifference, a plaintiff must show the jailer had actual knowledge of an inmate's 'substantial' risk of suicide and did not take reasonable measures to abate the risk." (quoting Whitney v. City of St. Louis, 887 F.3d 857, 860 (8th Cir. 2018))); Heidel v. Mazzola, 851 F. App'x 837, 840 (10th Cir. 2021) ("[T]he Estate cannot establish an underlying

Unfortunately, suicide remains a leading cause of death in jails, with "well over 400 inmates tak[ing] their lives each year."[7] However, a potential boon to this epidemic emerged with the Supreme Court's ruling in *Kingsley v. Hendrickson*.[8] There, the Court held that the appropriate standard in excessive-use-of-force claims brought by a pretrial detainee under the Fourteenth Amendment is "an objective" one.[9] Such an objective standard, if applied to pretrial detainees' claims for inadequate medical care, could make suicide litigation more accessible and, potentially, lead to enhanced suicide prevention policies.

This Note will address whether, in light of the current circuit split, the objective deliberate indifference standard articulated in *Kingsley* should apply to pretrial detainees' claims for inadequate medical care.[10] Part II of this Note will provide the background material necessary to understand the claim for inadequate medical care resulting in suicide, and it will also describe the evolution of the deliberate indifference standard. Part III will then examine the Court's decision in *Kingsley v. Hendrickson*. Part IV will articulate how the circuits have split on the question of extending *Kingsley*'s objective standard to pretrial detainees' other deliberate indifference claims. Lastly, Part V will argue that extending the objective standard to pretrial detainees' claims for inadequate-medical-care is both appropriate and that by doing so, suicide litigation against local jails can be made more accessible.

II. INADEQUATE-MEDICAL-CARE CLAIMS AND THE DELIBERATE INDIFFERENCE STANDARD

The families of inmates who commit suicide while in government custody have the option of seeking relief in civil court under two options:

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constitutional violation by any of the jail's officers because they did not have subjective awareness of Ms. Rowell's risk of suicide.").

7. LINDSAY M. HAYES, NAT'L INST. OF CORR., NATIONAL STUDY OF JAIL SUICIDE: TWENTY YEARS LATER 1 (2010), https://nicic.gov/resources/nic-library/all-library-items/national-study-jail-suicide-20-years-later.

8. 576 U.S. 389, 390 (2015).

9. *Id.* at 396–97. As such, pretrial detainees bringing excessive-use-of-force claims need not prove that the individual officer involved was subjectively aware that the amount of force used was unreasonable. *See id.* The Supreme Court has repeatedly declined to address the deliberate indifference standard since *Kingsley*. *See, e.g.*, Castro v. County of Los Angeles, 833 F.3d 1060 (9th Cir. 2016), *cert. denied*, 580 U.S. 1099 (2017); Strain v. Regalado, 977 F.3d 984 (10th Cir. 2020), *cert. denied*, 142 S. Ct. 312 (2021); Cope v. Cogdill, 3 F.4th 198 (5th Cir. 2021), *cert. denied*, 142 S. Ct. 2573 (2022).

10. For a discussion on *Kingsley*'s potential impact on jail-suicide litigation before the circuit split developed, see generally Kyla Magun, Note, *A Changing Landscape for Pretrial Detainees? The Potential Impact of* Kingsley v. Hendrickson *on Jail-Suicide Litigation*, 116 COLUM. L. REV. 2059 (2016).

a state law tort claim or a civil-rights claim.[11] This Part will provide an overview of the development of the legal claim for inadequate medical care resulting in an inmate's suicide under 42 U.S.C. § 1983.

A. The Mechanics of the Claim for Inadequate Medical Care

When an inmate commits suicide while in the custody of jail or prison officials, their estate may sue several entities for damages: the individual officers involved, the medical staff, or the municipality responsible for managing the facilities.[12] Typically, plaintiffs will argue that custodial officials failed to prevent the inmate's suicide through the inadequate provision of medical care.[13]

Under federal law, the legal claim for an inmate's suicide derives from 42 U.S.C. § 1983.[14] Under that statute, a legal claim arises when a government actor violates an inmate's constitutional rights.[15] To establish personal liability for the deprivation of constitutional rights under § 1983, it is enough for the plaintiff to show "that the official, acting under color of state law, caused the deprivation of a federal right."[16] However, holding a municipality liable for the actions of its officers is more complicated.

Originally, the Supreme Court held that municipalities could not be held liable for the actions of its officers in a § 1983 suit.[17] However, upon revisiting the issue, the Court held that "[l]ocal governing bodies . . . can

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11. CHRISTINE TARTARO & DAVID LESTER, SUICIDE AND SELF-HARM IN PRISONS AND JAILS 157–58 (2010). This Note will address civil-rights claims brought under 42 U.S.C. § 1983.

12. Magun, *supra* note 10, at 2064; *see, e.g.*, Jordan v. Gautreaux, 593 F. Supp. 3d 330, 341–43 (M.D. La. 2022); *see also* Robert D. Hanser, *Inmate Suicide in Prisons: An Analysis of Legal Liability Under 42 USC Section 1983*, 82 PRISON J. 459, 459 (2002).

13. *See* Hanser, *supra* note 12, at 460 ("Because of the *Estelle* ruling, Eighth Amendment claims of inadequate medical care became the most frequent type of allegations filed in civil suits involving prison suicide." (citing Estelle v. Gamble, 429 U.S. 97 (1976))).

14. *See infra* Section II.C.

15. *See* 42 U.S.C. § 1983 ("Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law. . . ."); *see also* TARTARO & LESTER, *supra* note 11, at 158.

16. Kentucky v. Graham, 473 U.S. 159, 166 (1985).

17. *See* Monroe v. Pape, 365 U.S. 167, 187 (1961) ("Congress did not undertake to bring municipal corporations within the ambit of § 1979."), *overruled by* Monell v. Dep't of Soc. Servs., 436 U.S. 658, 690 (1978). § 1983 originally appeared as § 1979 of the Revised Statutes before the implementation of the United States Code. *See* Chapman v. Hous. Welfare Rts. Org., 441 U.S. 600, 624, 628 (1979) (Powell, J., concurring) (discussing the history of § 1983).

be sued directly under § 1983 for monetary, declaratory, or injunctive relief."[18] Because the doctrine of *respondeat superior* is inapplicable in the § 1983 context,[19] to hold a municipality liable a plaintiff must prove that there is a "direct causal link between a municipal policy or custom and the alleged constitutional deprivation."[20]

With the basic mechanics of a § 1983 claim having been laid out, it is necessary to examine the underlying constitutional protections afforded to inmates, as these provide the basis for any § 1983 claim.

B. The Constitutional Protections Afforded to Inmates

Current case law attributes the protections afforded to inmates to three different constitutional amendments; the Fifth, Eighth, and Fourteenth.[21] Up until the point of a criminal conviction, the Fifth and Fourteenth Amendments protect an inmate[22] from the use of excessive force and inhumane conditions of confinement.[23] After a person has been criminally convicted of a crime, they are subsequently protected by the Eighth Amendment from punishment that amounts to "cruel and unusual."[24] As a result of these differing constitutional protections,

18. *Monell*, 436 U.S. at 690.

19. *See id.* at 694–95.

20. City of Canton v. Harris, 489 U.S. 378, 385 (1989); *see, e.g.*, Sanchez v. Young County, 866 F.3d 274, 280 (5th Cir. 2017) ("A government entity may incur Section 1983 liability . . . if plaintiffs first prove that County officials, acting with subjective deliberate indifference, violated her constitutional rights; and plaintiffs then establish that the County employees' acts resulted from a municipal policy or custom . . . .").

21. Margo Schlanger, *The Constitutional Law of Incarceration, Reconfigured*, 103 CORNELL L. REV. 357, 362–63 (2018).

22. Inmate is a term that will be used to refer to people in custody in general throughout this Note. "Pretrial Detainee" and "Convicted Prisoner" are terms that will be defined and used to differentiate between those who have gone through the judicial process and been convicted from those who have not. *See* Bell v. Wolfish, 441 U.S. 520, 536 (1979) ("A person lawfully committed to pretrial detention has not been adjudged guilty of any crime. He has had only a 'judicial determination of probable cause as a prerequisite to [the] extended restraint of [his] liberty following arrest.'" (alteration in original) (quoting Gerstein v. Pugh, 420 U.S. 103, 114 (1975))).

23. Schlanger, *supra* note 21, at 362–63; *see also* Kingsley v. Hendrickson, 576 U.S. 389, 404 (2015) (Scalia, J., dissenting) (noting that the Fifth and Fourteenth Amendments prohibit the excessive use of force when it is used to deprive someone of "life, liberty, or property" without due process of law).

24. *See* Farmer v. Brennan, 511 U.S. 825, 832 (1994) ("In its prohibition of 'cruel and unusual punishments,' the Eighth Amendment places restraints on prison officials, who may not, for example, use excessive physical force against prisoners.").

inmates are generally divided into two classes: pretrial detainees and convicted prisoners.[25]

1. The Eighth Amendment and Convicted Prisoners

The Eighth Amendment provides that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor *cruel and unusual punishments inflicted.*"[26] The Eighth Amendment's prohibition against cruel and unusual punishment has been interpreted by the Supreme Court to protect those convicted of a crime.[27] Not only does the Eighth Amendment prevent prison officials from inflicting punishment that is "cruel and unusual," but it also imposes affirmative obligations.[28]

2. The Fourteenth Amendment and Pretrial Detainees

Whereas convicted prisoners derive their constitutional protections from the Eighth Amendment, pretrial detainees obtain theirs from the Fourteenth Amendment's Due Process Clause.[29] Pretrial detainees are those "who have been charged with a crime but who have not yet been tried on the charge."[30] As a result of their status as a pretrial detainee, where the State imposes a form of punishment without an adjudication on the charge, the "pertinent constitutional guarantee is the Due Process Clause of the Fourteenth Amendment."[31]

Unlike convicted prisoners who may be subjected to punishment not amounting to "cruel and unusual," pretrial detainees cannot be punished

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25. Abby Dockum, Kingsley, *Unconditioned: Protecting Pretrial Detainees with an Objective Deliberate Indifference Standard in Section 1983 Conditions-of-Confinement Claims*, 53 ARIZ. ST. L.J. 707, 710 (2021).

26. U.S. CONST. amend. VIII (emphasis added).

27. Ingraham v. Wright, 430 U.S. 651, 664 (1977) (holding that the Eighth Amendment's prohibition against cruel and unusual punishment does not extend to the "paddling of children as a means of maintaining discipline in public schools").

28. *Farmer*, 511 U.S. at 832 ("The Amendment also imposes duties on these officials, who must provide humane conditions of confinement . . . ."); *see also* DeShaney v. Winnebago Cnty. Dept. of Soc. Servs., 489 U.S. 189, 200 (1989) ("The affirmative duty to protect arises not from the State's knowledge of the individual's predicament . . . but from the limitation which it has imposed on his freedom to act on his own behalf.").

29. Schlanger, *supra* note 21, at 363 (". . ."explaining that the Fourteenth Amendment's Due Process clause "afford[s] detainees protection against excessive force and harmful conditions of confinement"); *see* U.S. CONST. amend. XIV, § 1; *see also* Castro v. County of Los Angeles, 833 F.3d 1060, 1067–68 (9th Cir. 2016) (explaining that inmates who have not yet been convicted of a crime may sue prison officials for injuries sustained while in custody under the Fourteenth Amendment's Due Process Clause).

30. Bell v. Wolfish, 441 U.S. 520, 523 (1979).

31. *Ingraham*, 430 U.S. at 671 n.40.

at all.[32] This is due to the liberty interests the Fourteenth Amendment's Due Process Clause was designed to protect.[33] Among those interests protected by the Fourteenth Amendment's Due Process Clause is the right to be free from "unjustified intrusions on personal security."[34] As such, the state may not punish an individual without due process under the law.[35]

In determining whether an act amounts to punishment, the Court in *Bell v. Wolfish* held that the inquiry must begin with whether there was an intent to impose the "disability" upon the detainee.[36] Absent an express intent to punish the inmate, the Court explained that the inquiry will turn on "whether an alternative purpose to which [the restriction] may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned [to it]."[37] Thus, where the act in question is reasonably related to a legitimate governmental objective, the act will not rise to the level of punishment.[38] On the other hand, a court may infer that the governmental purpose behind an act was punishment if the condition is not reasonably related to a legitimate goal.[39]

C. Section 1983 Inadequate-Medical-Care Claims and the Deliberate Indifference Standard

42 U.S.C. § 1983 is the primary vehicle through which inmates may sue governmental officials for a deprivation of their constitutional rights.[40] Because § 1983 itself is not a source of "substantive rights," a plaintiff's claim must allege the infringement of a "specific constitutional right."[41] Generally, an inmate may bring one of two types of claims under the Eighth or Fourteenth Amendment:[42] a use-of-force claim or a

32. Kingsley v. Hendrickson, 576 U.S. 389, 400 (2015).
33. *Ingraham*, 430 U.S. at 672–73.
34. *Id.* at 673.
35. *Id.* at 674. Pretrial detainees' right to be protected from suicide is "grounded in the substantive liberty interest to adequate medical care." Atayde v. Napa State Hosp., 255 F. Supp. 3d 978, 988 (E.D. Cal. 2017).
36. Bell v. Wolfish, 441 U.S. 520, 538 (1979).
37. *Id.* (quoting Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168–69 (1979)).
38. *Id.* at 539.
39. *Id.*
40. *See* 42 U.S.C. § 1983.
41. Graham v. Connor, 490 U.S. 386, 393–94; *see also* Zimmerman v. Pautz, No. 12-CV-00763A(F), 2020 WL 13358554, at *7 (W.D.N.Y. June 2, 2020) ("Section 1983, however, is not itself a source of substantive rights but, instead, provides the mechanism by which a plaintiff may seek vindication of federal rights elsewhere conferred.").
42. Although it is outside the scope of this Note, it is worth noting that an arrestee would bring a claim under the Fourth Amendment. *See* Catherine T. Struve, *The Conditions*

conditions-of-confinement claim.[43] Generally, a use-of-force claim alleges that an unreasonable amount of force was used arising to the level of punishment in violation of either the Eighth or Fourteenth Amendment.[44] Conditions-of-confinement claims are further divided by the case law into three categories: inadequate-medical-care claims, failure-to-protect claims, and claims challenging the actual conditions of the correctional facility.[45]

A claim for an inmate's suicide may be pursued under either a failure-to-protect theory or inadequate medical care theory (and the analyses are largely the same).[46] However, this Note will focus on claims alleging the inadequate provision of medical care as these are the claims most often alleged in instances of custodial suicide.[47]

1. Inadequate-Medical-Care Claims and the Deliberate Indifference Standard

The deliberate indifference standard as well as the § 1983 claim for inadequate medical care both originated in the Supreme Court's seminal case of *Estelle v. Gamble*.[48] There, the Court had to determine whether the failure by prison authorities to provide adequate medical care constituted a cognizable claim under § 1983.[49] In that case, the respondent, Gamble, suffered a back injury after a bale of cotton fell on him.[50] Over a period of three months, Gamble was seen by prison medical personnel on seventeen occasions to address his back injury as well as

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of Pretrial Detention, 161 U. PA. L. REV. 1009, 1019 ("The Fourth Amendment's ban on unreasonable seizures regulates the manner in which the police may make an arrest.").

43. Schlanger, *supra* note 21, at 363.

44. *See, e.g.*, Kingsley v. Hendrickson, 576 U.S. 389, 393 (2015) ("Kingsley filed a §1983 complaint in Federal District Court claiming . . . that Hendrickson and Degner used excessive force against him, in violation of the Fourteenth Amendment's Due Process Clause.").

45. *See* Schlanger, *supra* note 21, at 363.

46. *See* Magun, *supra* note 10, at 2068 ("Courts find that the exact right at issue is less relevant because the resulting duties serve the 'same underlying purpose' of 'prevent[ing] the detainee from suffering further physical pain or harm.'" (alteration in original) (quoting Hare v. City of Corinth, 74 F.3d 633, 644 (5th Cir. 1996))); *see also* Estate of Vela v. County of Monterey, No. 16-cv-02375-BLF, 2018 WL 4076317, at *3 (N.D. Cal. Aug. 27, 2018) ("[C]laims for failure to provide medical care and failure to protect are evaluated under the same legal standards." (citing Gordon v. County of Orange, 888 F.3d 1118, 1124 (9th Cir. 2018))).

47. *See* Hanser, *supra* note 12, at 460 ("Because of the *Estelle* ruling, Eighth Amendment claims of inadequate medical care became the most frequent type of allegations filed in civil suits involving prison suicide." (citing Estelle v. Gamble, 429 U.S. 97 (1976))).

48. *See* TARTARO & LESTER, *supra* note 11, at 159–60.

49. *Estelle*, 429 U.S. at 106–07.

50. *Id.* at 99.

other ailments he was suffering from (e.g., high blood pressure and heart problems).[51] Gamble's complaint alleged that his Eighth Amendment right against cruel and unusual punishment was violated when: (1) prison personnel punished him for failing to return to work after being cleared by medical staff; (2) medical staff failed to order an x-ray of his back; and (3) medical staff failed to fill two prescriptions (for high blood pressure and back pain) for four days.[52]

The Court held that "deliberate indifference to serious medical needs of prisoners constitutes the 'unnecessary and wanton infliction of pain,' proscribed by the Eighth Amendment."[53] In reaching this holding, the Court first noted that the Eighth Amendment's drafters were primarily concerned with limiting torture and other "barbar[ous]" forms of punishment.[54] Taking into account that the Amendment "proscribes more than physically barbarous punishments,"[55] the Court held that the government must provide medical care to those in its custody.[56]

Thus, the claim for failure to provide adequate medical care under § 1983 became cognizable. This was regarded as a significant development because injuries that had previously only been actionable under state tort law were now litigable at the federal level.[57]

In articulating the claim for inadequate medical care, the *Estelle* Court announced two elements that had to be satisfied. First, the plaintiff must prove that prison officials involved displayed deliberate indifference.[58] Second, the plaintiff must show that he was suffering from a serious medical condition.[59] Despite introducing the deliberate indifference standard, the opinion contained relatively little guidance on how courts should apply it.[60]

In the post-*Estelle* environment, two issues arose related to suicide litigation and inadequate-medical-care claims generally. First, the lower

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51. *Id.* at 107.

52. *Id.* at 100–01, 107; TARTARO & LESTER, *supra* note 11, at 159.

53. *Estelle*, 429 U.S. at 104 (citation omitted) (quoting Gregg v. Georgia, 428 U.S. 153, 173 (1976)).

54. *Id.* at 102 (alteration in original) (quoting Anthony F. Granucci, *"Nor Cruel and Unusual Punishment Inflicted:" The Original Meaning*, 57 CALIF. L. REV. 839, 842 (1969)).

55. *Id.* (citing *Gregg*, 428 U.S. at 171 ("[T]he Clause forbidding 'cruel and unusual' punishments 'is not fastened to the obsolete but may acquire meaning as public opinion becomes enlightened by a humane justice.'")).

56. *Id.* at 103.

57. Hanser, *supra* note 12, at 460.

58. *Estelle*, 429 U.S. at 104–05.

59. *Id.* at 106.

60. *See id.* at 104–05 (speaking on the deliberate indifference standard, the only guidance the Court provided was that "deliberate indifference . . . constitutes the 'unnecessary and wanton infliction of pain,' proscribed by the Eighth Amendment" (citation omitted)).

courts had to determine whether suicide would be considered a "serious medical need."[61] Second, the courts had to determine what would constitute deliberate indifference.[62]

Addressing the first question, several lower courts first determined that mental health issues constituted serious medical needs.[63] In turn, the courts agreed that the risk of suicide is necessarily a serious medical need due to its "terminal nature."[64] However, the second question regarding what constitutes deliberate indifference proved to be a more challenging issue for the lower courts. While there was some agreement upon a general framework to determine what constituted deliberate indifference to the serious medical needs of an inmate,[65] differences arose regarding whether the knowledge component of the deliberate indifference standard should be judged objectively or subjectively.[66]

Additionally, in post-*Estelle* suicide litigation, the courts invented what is known as the "individual-specific" requirement.[67] This rule requires proof that the individual at issue in the case was specifically at risk to commit suicide as opposed to presenting "at-risk indicators derived from generalized inmate typologies."[68] In other words, plaintiffs are required to provide evidence that the individual officers involved possessed actual knowledge that the decedent was suicidal.

For example, in *Frake v. City of Chicago*, the decedent's estate sued the city of Chicago following his suicide.[69] The estate predicated its claim upon the fact that over the previous seven years there had been twenty

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61. *See* Hanser, *supra* note 12, at 460–61.

62. *See id.*

63. *Id.* (first citing Bowring v. Godwin, 551 F.2d 44, 47 (4th Cir. 1977) (holding that an inmate is entitled to "psychological or psychiatric treatment"); then citing Campbell v. McGruder, 580 F.2d 521, 531 (D.C. Cir. 1978) ("[C]onditions of confinement that are likely to impair a detainee's mental . . . health should be subjected to the closest scrutiny and can be justified only by the most compelling necessity."); and then citing James E. Robertson, *Fatal Custody: A Reassessment of Section 1983 Liability for Custodial Suicide*, 24 U. TOL. L. REV. 807, 814–15 (1993) [hereinafter Robertson, *Fatal Custody*].

64. *Id.* at 461 (citation omitted); Robertson, *Fatal Custody*, *supra* note 63, at 815 ("Later in 1986, in *Gagne v. City of Galveston*, the Fifth Circuit spoke nearly of 'the *possible* existence and scope of such a duty [to identify and protect suicidal inmates].'" (alteration in original) (quoting Gagne v. City of Galveston, 805 F.2d 558, 560 (5th Cir. 1985))).

65. Hanser, *supra* note 12, at 461 ("[M]any cases required a showing that the defendant jailers had (1) reckless knowledge of; (2) suicidal danger personal to the victim; and (3) failed to undertake reasonable preventive measures." (quoting James E. Robertson, *Jailers' Liability for Custodial Suicide After* Farmer v. Brennan, 6 JAIL SUICIDE/MENTAL HEALTH UPDATE 1, 2 (1996) [hereinafter Robertson, *Jailers' Liability*])).

66. *Id.*

67. *See* TARTARO & LESTER, *supra* note 11, at 165.

68. Hanser, *supra* note 12, at 461–62 (citing Robertson, *Jailers' Liability*, *supra* note 65, at 3).

69. Frake v. City of Chicago, 210 F.3d 779, 781 (7th Cir. 2000).

suicides and 163 suicide attempts by hanging.[70] Despite evidence that the city was aware of the general risk of suicide by hanging in the jail, the court affirmed the district court's grant of summary judgment to the defendants because the plaintiffs failed to prove that the officers involved had actual knowledge of Frake's risk for suicide.[71]

For years the Court failed to address the knowledge component of the deliberate indifference standard.[72] However, that changed in 1994 when the Court took up the case of *Farmer v. Brennan*.[73] Even though the Court's decision in *Farmer* had nothing to do with suicide,[74] it did elaborate on the deliberate indifference standard and its requirements.

2. *Farmer* and Subjective Deliberate Indifference

In *Farmer*, the Court had to confront the issue of whether the deliberate indifference standard in a failure-to-protect claim arising under the Eighth Amendment should be judged by an objective or subjective standard.[75] There, the petitioner was a transgender inmate.[76] After being moved for disciplinary reasons, the petitioner was assaulted and raped by another inmate.[77]

Noting that post-*Estelle* Supreme Court precedent had found "that Eighth Amendment liability requires 'more than ordinary lack of due care for the prisoner's interests or safety,'"[78] the Court held that for a prison official to be found liable for denying humane conditions of confinement, "the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference."[79] The Court's reasoning was largely premised on its holding in *Wilson v. Seiter*.[80] There, the Court rejected an interpretation of the Eighth Amendment that would subject prison officials to liability because of objectively inhuman prison conditions.[81] The *Wilson* Court emphasized that a state of mind

70. *Id.* at 782.
71. *Id.*
72. *See* TARTARO & LESTER, *supra* note 11, at 160.
73. *See* Farmer v. Brennan, 511 U.S. 825, 842–43 (1994).
74. *Id.*
75. *Id.* at 837.
76. *Id.* at 829.
77. *Id.* at 830.
78. *Id.* at 835 (quoting Whitley v. Albers, 475 U.S. 312, 319 (1986)).
79. *Id.* at 837.
80. *Id.* at 838.
81. *See* Wilson v. Seiter, 501 U.S. 294, 299–302 (1991).

requirement is inherent in the Eighth Amendment's prohibition on cruel and unusual punishment.[82]

Not only did the *Farmer* decision clarify that the deliberate indifference standard requires a subjective analysis of the prison official's state of mind, but it also impacted the individual-specific rule.[83] With the holding in *Farmer*, the individual-specific rule was "modified to include protections for inmates profiled to belong to identifiable groups at heightened risk of suicide."[84] Before *Farmer*, general categories of suicide risk were not considered viable evidence to prove liability.[85] However, after *Farmer* it became possible for a court to conclude that the risk of suicide was so evident that the official must have been aware of the danger.[86]

*D. The Post-*Farmer *Effect on Suicide Litigation*

Despite its modification of the individual-specific rule, the *Farmer* ruling had a negative net result on an inmate's chances of succeeding in a custodial suicide claim under § 1983.[87] According to one study performed by Darrell Ross, in the pre-*Farmer* period, correctional personnel in jails prevailed in 56% of custodial suicide cases.[88] However, after the *Farmer* decision that number rose to 64%, and a plaintiff's chances of succeeding dropped from 18% to 12%.[89] Additionally, despite seemingly dispensing of the individual-specific rule, lower courts continued to apply it.[90]

Even though *Farmer* was concerned with the proper standard for analyzing a claim brought by a convicted prisoner under the Eighth

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82. *Id.* at 300 ("The source of the intent requirement is not the predilections of this Court, but the Eighth Amendment itself, which bans only cruel and unusual *punishment*. If the pain inflicted is not formally meted out *as punishment* by the statute or the sentencing judge, some mental element must be attributed to the inflicting officer before it can qualify.").

83. *See* Hanser, *supra* note 12, at 463–64.

84. *Id.* at 464.

85. *Id.*

86. TARTARO & LESTER, *supra* note 11, at 165.

87. *See* Darrell L. Ross, *The Liability Trends of Custodial Suicides*, AM. JAILS, Mar–Apr. 2010, at 45.

88. *Id.* at 39.

89. *Id.* at 39 fig.1.

90. TARTARO & LESTER, *supra* note 11, at 167; *see, e.g.*, House v. County of Macomb, 303 F. Supp. 2d 850, 854 (E.D. Mich. 2004) (granting defendant's motion for summary judgment) ("Plaintiffs have only presented evidence that the certain individuals that came into contact with Mrs. House *should have known* that she was suicidal or otherwise facing an excessive risk to her health and safety. In other words, there is no evidence anyone actually *knew* that she was suicidal or facing some other excessive health or safety risk.").

Amendment, the courts began to apply the same subjective analysis to pretrial detainee's claims brought under the Fourteenth Amendment.[91] It would take nearly twenty years before the Supreme Court would address the state of mind requirement for the deliberate indifference standard in claims brought under the Fourteenth Amendment.

III. *KINGSLEY V. HENDRICKSON*

In 2015, the Supreme Court heard arguments in a case concerning the use of excessive force on a pretrial detainee.[92] The petitioner, Michael Kingsley, was arrested on a drug charge and held in a Wisconsin jail while awaiting trial.[93] After Kingsley repeatedly refused to remove a piece of paper that he had placed over the light in his cell, four officers entered and attempted to restrain him.[94] Kingsley was subsequently placed in handcuffs and taken to another cell.[95] According to the petitioner, after Sergeant Hendrickson placed his knee upon Kingsley's back another officer joined and both slammed the petitioner's head against the concrete bunk in the cell.[96] Thereafter, one of the officers tasered Kingsley for a period of five seconds.[97]

Kingsley subsequently brought a complaint under § 1983 alleging that the individual officers involved used excessive force against him, violating his rights under the Fourteenth Amendment's Due Process Clause.[98] After the jury found in favor of the defendants, Kingsley appealed to the Seventh Circuit, arguing that "the correct standard for judging a pretrial detainee's excessive force claim is objective unreasonableness."[99] A nearly unanimous court (a single justice dissented) held that a subjective inquiry into the officer's state of mind was necessary and that the officer must have "an actual intent to violate [the plaintiff's] rights or reckless disregard for his rights."[100]

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91. *See* Farmer v. Brennan, 511 U.S. 825, 838 (1994); *see, e.g.*, Castro v. County of Los Angeles, 833 F.3d 1060, 1068 (9th Cir. 2016) ("We read *Farmer* and *Bell* to create a single 'deliberate indifference' test for plaintiffs who bring a constitutional claim—whether under the Eighth Amendment or the Fourteenth Amendment.").

92. *See* Kingsley v. Hendrickson, 576 U.S. 389, 391 (2015).

93. *Id.* at 392.

94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.* at 393.

98. *Id.*

99. *Id.* at 394.

100. *Id.* (alteration in original) (quoting Kingsley v. Hendrickson, 744 F.3d 443, 451 (7th Cir. 2014)).

In granting Kingsley's request for certiorari, the Supreme Court agreed to address the question of "whether the requirements of a §1983 excessive force claim brought by a pretrial detainee must satisfy the subjective standard or only the objective standard."[101] The Court first recognized that in excessive-use-of-force claims, there are two pertinent state-of-mind questions.[102] The first concerns whether the defendant's physical acts were committed purposefully or knowingly.[103] Neither party disputed that this question required a subjective analysis.[104] However, the second question concerns the defendant's state of mind as to whether the amount of force used was excessive.[105] In addressing the proper state of mind requirement for the second question, the Court announced that "a pretrial detainee must show only that the force purposely or knowingly used against him was *objectively* unreasonable."[106] In assessing the objective reasonableness of the amount of force used, the Court offered several factors that a court may weigh.[107] However, the Court emphasized that the objective standard cannot be applied "mechanically," and that objective reasonableness turns on the "facts and circumstances of each particular case."[108]

A. The Kingsley *Court's Reasoning*

Several considerations led the Court to adopt the objective deliberate indifference standard. First, the Court believed that an objective reasonableness standard was consistent with its precedent.[109] Noting that its precedent had held that the Due Process Clause of the Fourteenth Amendment protects pretrial detainees from the "use of excessive force that amounts to punishment,"[110] the Court emphasized

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101. *Id.* at 395.
102. *Id.*
103. *Id.* at 395–96 ("The first [question] concerns the defendant's state of mind with respect to his physical acts—*i.e.*, his state of mind with respect to the bringing about of certain physical consequences in the world.").
104. *Id.* at 395.
105. *Id.*
106. *Id.* at 396–97 (emphasis added).
107. *Id.* at 397. These factors included:

> [T]he relationship between the need for the use of force and the amount of force used; the extent of the plaintiff's injury; any effort made by the officer to temper or to limit the amount of force; the severity of the security problem at issue; the threat reasonably perceived by the officer; and whether the plaintiff was actively resisting.

Id.
108. *Id.* (quoting Graham v. Connor, 490 U.S. 386, 396 (1989)).
109. *Id.* at 397.
110. *Id.* (citing *Graham*, 490 U.S. at 396).

that in *Bell* it held that, in the absence of an "expressed intent to punish," the plaintiff can nonetheless prevail by providing objective evidence that the challenged governmental action is not "rationally related to a legitimate nonpunitive governmental purpose."[111]

Second, the Court focused on the differing constitutional protections possessed by pretrial detainees and convicted prisoners.[112] Crucially, the Court announced that due to the differing language of the Eighth and Fourteenth Amendments, "pretrial detainees (unlike convicted prisoners) cannot be punished at all."[113] Therefore, unlike when a convicted prisoner brings a claim for excessive use of force, there is no need to determine when punishment is unconstitutional.[114] Lastly, the *Kingsley* court made it a point to note that the objective reasonableness standard is "workable."[115] Not only is the standard consistent with the pattern jury instructions utilized in several circuits but the objective standard also "adequately protects an officer who acts in good faith."[116]

B. The Kingsley *Dissent*

Writing in dissent, Justice Scalia argued that "the intentional infliction of punishment upon a pretrial detainee may violate the Fourteenth Amendment; but the infliction of 'objectively unreasonable' force, without more, is not the intentional infliction of punishment."[117] Also citing *Bell*, Justice Scalia argued that the majority misread the case.[118] Noting that *Bell* was addressing a conditions of confinement claim, rather than an excessive-use-of-force claim, Scalia argued that "[i]t is *illogical*, however, automatically to infer punitive intent from the fact that a prison guard used more force against a pretrial detainee than was necessary."[119] The "illogical" nature of this conclusion, according to Justice Scalia, lies in the difference between conditions-of-confinement claims and excessive-use-of-force claims.[120]

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111. *Id.* at 398 (citing Bell v. Wolfish, 441 U.S. 520, 561 (1979)).
112. *See id.* at 400–01.
113. *Id.* at 400.
114. *Id.* at 401.
115. *Id.* at 399.
116. *Id.* at 399–400 ("[A] court must judge the reasonableness of the force used from the perspective and with the knowledge of the defendant officer. We have also explained that a court must take account of the legitimate interests in managing a jail, acknowledging as part of the objective reasonableness analysis that deference to policies and practices needed to maintain order and institutional security is appropriate.").
117. *Id.* at 404 (Scalia, J., dissenting).
118. *Id.* at 405 (citing Bell v. Wolfish, 441 U.S. 520, 535 (1979)).
119. *Id.* at 405–06 (alteration in original).
120. *Id.*

According to Justice Scalia, because a pretrial detainee's conditions of confinement are a result of State policies subject to "considered deliberation," "[i]f those conditions and policies lack any reasonable relationship to a legitimate, nonpunitive goal, it is logical to infer a punitive intent."[121] On the other hand, the amount of force used can be influenced by a variety of factors surrounding the situation.[122] As such, it is improper to infer intent to punish from an act that may have been influenced by rapidly developing circumstances.[123]

While Justice Scalia rejected the use of the objective reasonableness test in excessive-use-of-force claims, his dissent seems to support its application to conditions-of-confinement claims brought by pretrial detainees.[124]

C. *Questions After* Kingsley

While the Court's holding announced the proper standard by which to analyze the state-of-mind question in an excessive-use-of-force claim brought by a pretrial detainee, the holding opened the door to a significant question: does the objective reasonableness standard extend to pretrial detainees' other claims arising under § 1983?[125]

IV. THE *KINGSLEY* SPLIT

After the Supreme Court announced the objective deliberate indifference standard in *Kingsley*, the circuit courts split on whether that standard should apply to pretrial detainees' other claims under § 1983. Circuits that have elected to extend the objective standard to pretrial detainee's claims for inadequate medical care include the Second, Sixth,

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121. *Id.* at 406.
122. *See id.*
123. *See id.*
124. *See id.* ("*Bell* makes intent to punish the focus of its due-process analysis. Objective reasonableness of the force used is nothing more than a heuristic for identifying this intent. That heuristic makes good sense for considered decisions by the detaining authority, but is much weaker in the context of excessive-force claims.").
125. The need for the Supreme Court to provide guidance in this area has not been lost on the courts. *See, e.g.*, Westmoreland v. Butler County, 35 F.4th 1051, 1053 (6th Cir. 2022) (Bush, J., dissenting) ("Our circuit's decision . . . highlights the need for the Supreme Court to provide guidance."); Helphenstine v. Lewis County, 65 F.4th 794, 801 (6th Cir. 2023) ("For the sake of litigants and courts alike, the Supreme Court should soon grant certiorari in a case involving allegedly unconstitutional deliberate indifference toward a pretrial detainee.").

Seventh, and Ninth Circuits.[126] On the other hand, circuits that have chosen to retain the subjective standard for pretrial detainees' claims for inadequate medical care include the Fifth, Eighth, Tenth, and Eleventh Circuits.[127]

A. Arguments Made by Circuits Extending the Objective Standard

Among those circuits that have elected to extend the objective standard, a common argument is that the *Farmer* decision was bound to Eighth Amendment principles.[128] Therefore, because pretrial detainees derive their constitutional protections from the Fourteenth Amendment's Due Process Clause, *Farmer*'s subjective deliberate indifference test is inapplicable.[129]

For example, in *Darnell v. Pineiro*, the Second Circuit took up the issue of whether "*Kingsley* altered the standard for conditions of confinement claims under the Fourteenth Amendment's Due Process

126. *See generally* Bruno v. City of Schenectady, 727 F. App'x 717 (2d Cir. 2018); Brawner v. Scott County, 14 F.4th 585 (6th Cir. 2021); Miranda v. County of Lake, 900 F.3d 335 (7th Cir. 2018); Gordon v. County of Orange, 888 F.3d 1118 (9th Cir. 2018).

127. *See generally* Cope v. Cogdill, 3 F.4th 198, 207 n.7 (5th Cir. 2021); Whitney v. City of St. Louis, 887 F.3d 857 (8th Cir. 2018); Strain v. Regalado, 977 F.3d 984 (10th Cir. 2020); Nam Dang *ex rel.* Vina Dang v. Sheriff, Seminole Cnty., 871 F.3d 1272 (11th Cir. 2017). Circuits that have not yet addressed the issue include the First, Third, Fourth, and District of Columbia Circuits. *See, e.g.*, Cox v. Bos. Police Dep't, No. 22-11009-RGS, 2022 WL 17486595, at *2 n.1 (D. Mass. Dec. 7, 2022) ("[T]he First Circuit has not addressed the issue . . . ."); McLaughin v. Zavada, No. 19-422, 2022 WL 409492, at *3 (W.D. Pa. 2022) (noting that the Third Circuit has not yet addressed *Kingsley*'s impact in other Fourteenth Amendment contexts); Mays v. Sprinkle, 992 F.3d 295, 301 n.4 (4th Cir. 2021) ("[N]either party raised *Kingsley* and the discussion should not be read to resolve this issue."). While the District of Columbia Circuit has not yet addressed *Kingsley*'s impact on pretrial detainees' other claims, some district courts have chosen to apply the objective standard. *See, e.g.*, Banks v. Booth, 468 F. Supp. 3d 101, 111 (D.D.C. 2020) ("[U]nder the due process clause, pre-trial detainee Plaintiffs Phillips and Smith are likely to succeed on the merits by showing that the Defendants *knew or should have known* that the jail conditions posed an excessive risk to their health . . . ." (emphasis added)); United States v. Moore, No. 18-198 (JEB), 2019 WL 2569659, at *2 (D.D.C. 2019) (explaining that a pretrial detainee could prevail on a due-process claim by presenting evidence that a "a restriction is objectively unreasonable").

128. *See, e.g.*, *Brawner*, 14 F.4th at 595–97 ("[T]he *Farmer* Court adopted the subjective component of the test for deliberate indifference under the Eighth Amendment based on the language and purposes of that amendment, focusing particularly on 'punishments,' and not on any intrinsic meaning of the term.").

129. *See Miranda*, 900 F.3d at 352 ("We begin with the fact that the Supreme Court has been signaling that courts must pay careful attention to the different status of pretrial detainees. . . . We thus conclude . . . that medical-care claims brought by pretrial detainees under the Fourteenth Amendment are subject only to the objective unreasonableness inquiry identified in *Kingsley*.").

Clause."[130] There, twenty plaintiffs filed a single complaint alleging unconstitutional conditions of confinement at Brooklyn Central Booking ("BCB").[131] At the close of discovery, the defendants requested and were granted summary judgment.[132]

Overruling a prior decision in which the Second Circuit held that the same subjective deliberate indifference standard under the Eighth Amendment should apply to deliberate indifference claims under the Fourteenth Amendment,[133] the court held that for conditions-of-confinement claims brought by pretrial detainees "the 'subjective prong' . . . of a deliberate indifference claim is defined objectively."[134] Integral to the court's decision to overrule *Caiozzo v. Koreman* was the fact that *Farmer*'s holding was predicated upon a reading of the Eighth Amendment's Cruel and Unusual Punishments Clause which "connote[d] a subjective intent on the part of the official."[135] Noting that the *Farmer* decision did not address the standard for deliberate indifference under the Fourteenth Amendment's Due Process Clause,[136] the court (citing *Kingsley*) "stressed the different functions of the Eighth Amendment's Cruel and Unusual Punishments Clause and the Fourteenth Amendment's Due Process Clause."[137] Due to these differences, the court

130. Darnell v. Pineiro, 849 F.3d 17, 21 (2d Cir. 2017).

131. *Id.* at 22–27. Among the plaintiffs' complaints were overcrowding; unusable toilets; inadequate sanitation; infestation; lack of hygienic items; inadequate food and water provisions; extreme temperatures and poor ventilation; deprivation of sleep; and unchecked crime amongst the detainees. *Id.*

132. *Id.* at 27; *see* Cano v. City of New York, 119 F. Supp. 3d 65, 82 (E.D.N.Y. 2015) ("[T]he evidence put forth by Plaintiffs does not and cannot amount to a deprivation of their rights sufficient to satisfy the objective prong. For these reasons, Defendant's motion for summary judgment on this issue is granted.").

133. *Darnell*, 849 F.3d at 35; *see also* Caiozzo v. Koreman, 581 F.3d 63, 71 (2d Cir. 2009) ("[I]t is a logical extension of the principles recognized in *Farmer* that an injured state pretrial detainee, to establish a violation of his Fourteenth Amendment due process rights, must prove, *inter alia*, that the government-employed defendant disregarded a risk of harm to the plaintiff of which the defendant was aware.").

134. *Darnell*, 849 F.3d at 35. The Second Circuit later explicitly extended the objective deliberate indifference standard to pretrial detainees' claims for inadequate medical care. *See* Bruno v. City of Schenectady, 727 F. App'x 717, 720 (2d Cir. 2018) (holding that the proper standard asks "whether a 'reasonable person' would appreciate the risk to which the detainee was subjected" (citing *Darnell*, 849 F.3d at 29, 33–35)).

135. *Darnell*, 849 F.3d at 32–33; *see also* Farmer v. Brennan, 511 U.S. 825, 837 (1994) ("The Eighth Amendment does not outlaw cruel and unusual 'conditions'; it outlaws cruel and unusual 'punishments.'").

136. *Darnell*, 849 F.3d at 33.

137. *Id.* at 34 ("The language of the two Clauses differs, and the nature of the claims often differs. And, most importantly, pretrial detainees (unlike convicted prisoners) cannot be punished at all, much less 'maliciously and sadistically.' Thus, there is no need here, as there might be in an Eighth Amendment case, to determine when punishment is unconstitutional." (quoting Kingsley v. Hendrickson, 576 U.S. 389, 400–01 (2015))).

held that an "objective analysis should apply to an officer's appreciation of the risks associated with an unlawful condition of confinement in a claim for deliberate indifference under the Fourteenth Amendment."[138]

Another argument made by those courts who favor extending the objective deliberate indifference standard is the broad language in the *Kingsley* decision.[139] For example, in *Castro v. County of Los Angeles*, the Ninth Circuit took up the issue of whether, in light of *Kingsley*, the objective standard applies to pretrial detainee's failure-to-protect claims under § 1983.[140] There, the plaintiff Castro was arrested on a public drunkenness charge.[141] After being placed in a "sobering" cell, Castro was severely beaten by another detainee.[142] Thereafter, Castro brought a failure-to-protect claim against the defendants.[143]

The individual officers involved appealed the jury's verdict which found them deliberately indifferent to a substantial risk of serious harm to the plaintiff.[144] The defendants argued that there was insufficient evidence to establish their subjective awareness of the dangers faced by Castro.[145] Using the appeal as an opportunity to review the impact of *Kingsley*'s holding, the court held that "*Kingsley* applies . . . to failure-to-protect claims brought by pretrial detainees against individual defendants under the Fourteenth Amendment."[146]

In choosing to extend the objective deliberate indifference standard, the court emphasized the "broad wording of *Kingsley*."[147] In particular, the court focused on *Kingsley*'s language that "a pretrial detainee can prevail by providing only objective evidence that *the challenged governmental action* is not rationally related to a legitimate governmental objective or that it is excessive in relation to that purpose."[148] As such, *Kingsley*'s holding was not limited to the excessive

138. *Id.* at 35; *see also* Brawner v. Scott County, 14 F.4th 585, 596 (6th Cir. 2021) ("Given *Kingsley*'s clear delineation between claims brought by convicted prisoners under the Eighth Amendment and claims brought by pretrial detainees under the Fourteenth Amendment, applying the same analysis to these constitutionally distinct groups is no longer tenable.").

139. *See, e.g.*, Castro v. County of Los Angeles, 833 F.3d 1060, 1070 (9th Cir. 2016).

140. *Id.*

141. *Id.* at 1064–65.

142. *Id.* at 1065.

143. *See id.* (naming defendants as the City of Los Angeles, the Los Angeles Sheriff's Department, and the individual officers overseeing Mr. Castro's detainment).

144. *Id.* at 1066.

145. *Id.* at 1072.

146. *Id.* at 1070.

147. *Id.*

148. *Id.* (quoting Kingsley v. Hendrickson, 576 U.S. 389, 398 (2015) (emphasis added)).

use of force context, but applicable to pretrial detainees' § 1983 claims generally.[149]

Lastly, a third argument made by circuits choosing to adopt the objective standard is the same constitutional argument made by the *Kingsley* Court: that the different protections offered by the Eighth and Fourteenth Amendments support different standards for pretrial detainees and convicted prisoners.[150] For example, in *Miranda v. County of Lake*, the decedent, Ms. Gomes, was arrested and detained after failing to appear in court on a resisting-arrest charge.[151] After refusing food and water for about three weeks, Ms. Gomes died from "[c]omplications of [s]tarvation and [d]ehydration" (the death was deemed a suicide).[152] Her estate subsequently filed a complaint against the parties involved alleging (among other claims) inadequate medical care.[153] Despite obtaining a favorable verdict against one of the social workers involved, the estate appealed the trial court's jury instructions regarding the issue of intent.[154]

In holding that the appropriate standard in inadequate-medical-care claims brought by pretrial detainees is objective unreasonableness,[155] the court emphasized the different "status" of pretrial detainees and convicted prisoners.[156] While the Eighth Amendment's subjective deliberate indifference test has traditionally been applied to pretrial detainees' deliberate indifference claims, the court emphasized that "[m]issing from this picture has been any attention to the difference that exists between the Eighth and the Fourteenth Amendment standards."[157] Said differences arise mainly from the fact that the subjective deliberate indifference standard is inexorably linked to the Eighth Amendment's prohibition on the infliction of "cruel and unusual punishment."[158] However, while state actors are prohibited from inflicting "cruel and unusual punishment" upon convicted prisoners,[159] pretrial detainees have not yet been convicted of a crime and, as such, the "punishment model" is inappropriate as applied to them.[160]

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149. *See id.* at 1070.
150. *See supra* notes 112–13 and accompanying text.
151. Miranda v. County of Lake, 900 F.3d 335, 341 (7th Cir. 2018).
152. *Id.* at 341–42.
153. *Id.* at 343.
154. *Id.* at 343, 350.
155. *Id.* at 352.
156. *Id.*
157. *Id.* at 350–51.
158. *Id.* at 350.
159. *See* Farmer v. Brennan, 511 U.S. 825, 837 (1994) ("The Eighth Amendment does not outlaw cruel and unusual 'conditions'; it outlaws cruel and unusual 'punishments.'").
160. *Miranda*, 900 F.3d at 350.

While several circuits have chosen to adopt the objective deliberate indifference standard, several other circuits have rejected such an extension.

B. Arguments Made by Circuits Retaining the Subjective Standard

Circuits that have chosen to retain the subjective standard to pretrial detainees' other § 1983 claims include the Fifth, Eighth, Tenth, and Eleventh Circuits.[161] Although some courts have given little reason for declining to extend the standard beyond simply stating that *Kingsley* did not address deliberate indifference claims,[162] those that have gone into more depth principally argue that the objective standard enunciated in *Kingsley* is inappropriate as applied to deliberate indifference claims.[163]

Primarily, these courts argue that the Supreme Court's decision in *Kingsley* should be confined to the type of claim that was at issue in that case (i.e., excessive-use-of-force claims).[164] For example, in *Strain v. Regalado*, the Tenth Circuit Court of Appeals considered whether the plaintiff's claim for inadequate medical care should be analyzed using a purely objective standard.[165] There, after having been booked into jail, the plaintiff almost immediately began to suffer from severe alcohol withdrawal.[166] The plaintiff's condition worsened to the point that he suffered a cardiac arrest; leaving him with permanent disabilities.[167]

In declining to extend the objective standard to pretrial detainees' claims for inadequate medical care under the Fourteenth Amendment, the *Strain* court's principal argument rested upon the different purposes served by excessive-use-of-force claims and inadequate-medical-care claims.[168] Whereas excessive-use-of-force claims protect a pretrial detainee from the use of force that amounts to punishment, "[t]he deliberate indifference cause of action does not relate to punishment, but rather safeguards a pretrial detainee's access to adequate medical

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161. *See, e.g.*, Cope v. Cogdill, 3 F.4th 198, 207 n.7 (5th Cir. 2021); Whitney v. City of St. Louis, 887 F.3d 857, 860 n.4 (8th Cir. 2018); Strain v. Regalado, 977 F.3d 984, 991 (10th Cir. 2020); Nam Dang *ex rel.* Vina Dang v. Sheriff, Seminole Cnty., 871 F.3d 1272, 1279 n.2 (11th Cir. 2017).

162. *See, e.g.*, *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.").

163. *See, e.g.*, *Strain*, 977 F.3d at 991.

164. *See, e.g.*, *id.* ("[T]he Court said nothing to suggest it intended to extend that standard to pretrial detainee claims generally or deliberate indifference claims specifically." (citing Kingsley v. Hendrickson, 576 U.S. 389, 395 (2015))).

165. *Id.* at 989.

166. *See id.* at 987–88.

167. *Id.* at 988.

168. *See id.* at 991.

care."[169] Therefore, because excessive use of force stems from an "affirmative act[]," the intent to inflict punishment can be inferred.[170] Because claims alleging inadequate medical care concern "inaction" on the part of state officials, the *Strain* court held that *Kingsley*'s holding does not apply to these claims.[171]

V. OBJECTIVE DELIBERATE INDIFFERENCE AND THE CLAIM FOR INADEQUATE MEDICAL CARE

The Supreme Court should extend the objective deliberate indifference standard to pretrial detainees' claims for inadequate medical care. Not only is such an extension appropriate, but the objective deliberate indifference standard could make litigation more accessible (e.g., clearly abolishing the individual-specific requirement),[172] potentially leading to policy changes that would help reduce the problem of suicide in local jails.[173]

A. Why the Objective Deliberate Indifference Standard Should Apply to Inadequate-Medical-Care Claims Brought Under the Fourteenth Amendment

The Supreme Court should extend the objective deliberate indifference standard to pretrial detainees' claims for inadequate medical care for two reasons. First, the objective standard aligns with Supreme

169. *Id.*

170. *Id.* (quoting Castro v. County of Los Angeles, 833 F.3d 1060, 1086 (9th Cir. 2016) (Ikuta, J., dissenting)).

171. *Id.* at 992. Other circuits have made similar arguments. *See, e.g.*, Whitney v. City of St. Louis, 887 F.3d 857, 860 n.4 (8th Cir. 2018) ("Whitney Sr. asserts that the Supreme Court's conclusion in *Kingsley v. Hendrickson* that 'the relevant standard is objective not subjective' should apply here. *Kingsley* does not control because it was an excessive force case, not a deliberate indifference case." (citation omitted)); Nam Dang *ex rel.* Vina Dang v. Sheriff, Seminole Cnty., 871 F.3d 1272, 1279 n.2 (11th Cir. 2017) ("*Kingsley* involved an excessive-force claim, not a claim of inadequate medical treatment due to deliberate indifference.").

172. Christine Tartaro, *What Is Obvious: Federal Courts' Interpretation of the Knowledge Requirement in Post-*Farmer v. Brennan *Custodial Suicide Cases*, 95 PRISON J. 23, 40 (2015) ("Regardless of the optimism that *Farmer* would lead to lower courts discarding the individual-specific requirement . . . the courts continue[] to grant summary judgment to defendants in cases where dangerous conditions exist[] but that the plaintiff[] [can] not prove that the defendants knew about a specific threat to the inmate in question.").

173. HAYES, *supra* note 7, at 46 ("[L]itigation involving jail suicide has persuaded (or forced) counties and facility administrators to take corrective actions in reducing the opportunity for future deaths.").

Court precedent.[174] Second, the objective standard has proven workable in those circuits that have chosen to adopt it.[175]

1. Supreme Court Precedent Supports Extending the Objective Standard

Despite having defined the appropriate mental-state requirements for a deliberate indifference claim under the Eighth Amendment as a subjective one,[176] the Supreme Court has yet to define the same requirements for conditions-of-confinement claims (the overarching category of claims that inadequate-medical-care claims fall under) under the Fourteenth Amendment.[177] However, this does not necessarily mean that precedent precludes extending the objective standard to inadequate-medical-care claims brought under the Fourteenth Amendment.[178] In fact, Supreme Court jurisprudence provides a basis for such an extension.

First of all, the *Kingsley* Court expressly rejected the argument that the constitutional protections afforded under the Eighth and Fourteenth Amendments are the same: "[t]he language of the two Clauses differs, and the nature of the claims often differs. And, most importantly, pretrial detainees (unlike convicted prisoners) cannot be punished at all."[179] Crucially, in differentiating between the rights of convicted prisoners and pretrial detainees, the *Kingsley* Court did not confine its reasoning to the use of force context; rather, the *Kingsley* Court spoke of the "challenged governmental action" generally.[180] As such, the extension of the objective standard to pretrial detainee's claims for inadequate medical care is supported by the reasoning contained in *Kingsley*.

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174. *See* Kingsley v. Hendrickson, 576 U.S. 389, 397 (2015).

175. *See, e.g.*, Yousef v. County of Westchester, No. 19-CV-1737 (CS), 2020 WL 2037177, at *9 (S.D.N.Y. Apr. 28, 2020) ("[P]rison officials . . . may be found free from liability if they responded reasonably to the risk, even if the harm ultimately was not averted." (quoting Farmer v. Brennan, 511 U.S. 825, 844 (1994))); Love v. Franklin County, 376 F. Supp. 3d 740, 745 (E.D. Ky. 2019) ("Experience belies any concerns that an objective standard will permit illegitimate claims to succeed." (citing Darnell v. Pineiro, 849 F.3d 17, 36 (2d Cir. 2017))).

176. *See Farmer*, 511 U.S. at 847.

177. *See* Griffith v. Franklin County, 975 F.3d 554, 588 (6th Cir. 2020) (Clay, J., concurring in part and dissenting in part) ("The Supreme Court did not explicitly indicate in *Kingsley* whether this objective test applies in other Fourteenth Amendment contexts, such as deliberate indifference to a pretrial detainee's serious medical needs.").

178. *See id.* at 588–89.

179. *Kingsley*, 576 U.S. at 400.

180. *Id.* at 398. *See also* Castro v. County of Los Angeles, 833 F.3d 1060, 1070 (9th Cir. 2016) ("The Court did not limit its holding to 'force' but spoke to 'the challenged governmental action' generally.").

Furthermore, even the *Kingsley* dissent provides a basis for extending the objective standard to inadequate-medical-care claims arising under the Fourteenth Amendment.[181] Despite dissenting and arguing that the objective standard is inapplicable to excessive-use-of-force claims,[182] Justice Scalia's dissent provides a basis for applying the objective standard to inadequate-medical-care claims. Citing *Bell*'s focus on the intent to inflict punishment, Justice Scalia conceded that the objective standard could rationally apply to conditions of confinement claims because conditions of confinement are the result of "considered deliberation."[183] Therefore, where "those conditions and policies lack any reasonable relationship to a legitimate, nonpunitive goal, it is logical to infer a punitive intent."[184]

Additionally, the Court's reasoning in *Farmer* provides support for extending the objective standard to pretrial detainees' claims for inadequate medical care. In *Farmer*, the Court explained that excessive-use-of-force claims require more than simple deliberate indifference.[185] This is because decisions to use force are often made "in haste" and without the opportunity for second guessing.[186] On the other hand, conditions-of-confinement claims (such as inadequate-medical-care claims) have a lower mental state requirement.[187] Therefore, it would be inconsistent to have a lower mental state requirement for excessive-use-of-force claims brought under the Fourteenth Amendment.[188] As such, the Supreme Court's precedent clearly supports extending the objective deliberate indifference to pretrial detainees' inadequate-medical-care claims.

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181. *See Kingsley*, 576 U.S. at 406 (Scalia, J., dissenting).
182. *See id.* at 405–06.
183. *Id.* at 406.
184. *Id.*
185. *See* Farmer v. Brennan, 511 U.S. 825, 835 (1994).
186. *Id.* (quoting Hudson v. McMillian, 503 U.S. 1, 6 (1992)).
187. *Id.* at 836 ("This standard of purposeful or knowing conduct is not, however, necessary to satisfy the *mens rea* requirement of deliberate indifference for claims challenging conditions of confinement; 'the very high state of mind prescribed by *Whitley* does not apply to prison conditions cases.'" (quoting Wilson v. Seiter, 501 U.S. 294, 302–03 (1991))).
188. Dockum, *supra* note 25, at 740 ("Though *Farmer* did not speak to the Fourteenth Amendment context, it would be anomalous to set a lower standard in conditions claims than in force claims for prisoners while doing the reverse for detainees.").

2. The Objective Standard Would Not "Tortify" the Fourteenth Amendment

A common assertion by those who argue against an extension of the objective deliberate indifference standard to inadequate-medical-care claims is the belief that the objective standard would "impermissibly constitutionalize medical malpractice claims, because it would allow mere negligence to suffice for liability."[189] This argument is premised upon *Daniels v. Williams* where the Supreme Court held that "mere lack of due care by a state official" cannot deprive an individual of "life, liberty, or property under the Fourteenth Amendment."[190] Rather than "tortify[ing] the Fourteenth Amendment"[191] by adopting an objective standard, these critics argue plaintiffs should seek relief under state negligence law.[192]

While the objective deliberate indifference standard may be less demanding than the subjective standard, the objective state-of-mind requirement still requires more than mere negligence. For example, when the Ninth Circuit adopted the objective deliberate indifference standard for pretrial detainee's inadequate-medical-care claims,[193] the court made clear that mere negligence would not suffice.[194] Rather, a plaintiff must "prove more than negligence but less than subjective

189. Miranda v. County of Lake, 900 F.3d 335, 353 (7th Cir. 2018); *see also* Brawner v. Scott County, 14 F.4th 585, 610 (6th Cir. 2021) (Readler, J., concurring in part and dissenting in part) ("I remain unconvinced that the Fourteenth Amendment confers any freestanding right to be free from jailhouse medical malpractice."); Strain v. Regalado, 977 F.3d 984, 994 (10th Cir. 2020) ("[N]egligent failure to provide adequate medical care, even one constituting medical malpractice, does not give rise to a constitutional violation." (quoting Perkins v. Kan. Dep't of Corr., 165 F.3d 803, 811 (10th Cir. 1999))).

190. Daniels v. Williams, 474 U.S. 327, 330–31 (1986) (holding that "in any given § 1983 suit . . . merely negligent conduct may not be enough to state a claim").

191. Kingsley v. Hendrickson, 576 U.S. 389, 408 (2015) (Scalia, J., dissenting).

192. *Brawner*, 14 F.4th at 610–11 (Readler, J., concurring in part and dissenting in part).

193. The Court articulated four elements of an inadequate-medical-care claim brought under the Fourteenth Amendment:

> [T]he elements of a pretrial detainee's medical care claim against an individual defendant under the due process clause of the Fourteenth Amendment are: (i) the defendant made an intentional decision with respect to the conditions under which the plaintiff was confined; (ii) those conditions put the plaintiff at substantial risk of suffering serious harm; (iii) the defendant did not take reasonable available measures to abate that risk, even though a reasonable official in the circumstances would have appreciated the high degree of risk involved—making the consequences of the defendant's conduct obvious; and (iv) by not taking such measures, the defendant caused the plaintiff's injuries.

Gordon v. County of Orange, 888 F.3d 1118, 1124–25 (9th Cir. 2018).

194. *Id.* at 1125.

intent—something akin to reckless disregard."[195] This requirement that a plaintiff proves either an intentional failure to provide adequate medical care or reckless disregard of the risk clearly satisfies the Supreme Court's concerns about constitutionalizing medical malpractice claims.[196] As such, the objective standard has proven workable in that it requires more than mere negligence, thus allaying any fears about *tortifying* the Fourteenth Amendment.

B. How the Objective Deliberate Indifference Standard Can Impact the Issue of Jail Suicides

As indicated by the title of this Note, suicide among pretrial detainees has become an epidemic. Since the U.S. Department of Justice began tracking jail deaths in 2000, suicide has become and remained the leading cause of death in these facilities.[197] For example, from 2001 to 2019, suicides accounted for 24% to 35% of all jail deaths.[198] The problem is particularly acute in smaller jails where the suicide rate is more than six times larger when compared to the suicide rate in larger jails.[199] While much has to be done to address this issue, adopting the objective deliberate indifference standard for pretrial detainee's inadequate-

195. *Id.* (footnote omitted) (quoting Castro v. County of Los Angeles, 833 F.3d 1060, 1071 (9th Cir. 2018)).

196. Farmer v. Brennan, 511 U.S. 825, 836 (1994) ("With deliberate indifference lying somewhere between the poles of negligence at one end and purpose or knowledge at the other, the Courts of Appeals have routinely equated deliberate indifference with recklessness. It is, indeed, fair to say that acting or failing to act with deliberate indifference to a substantial risk of serious harm to a prisoner is the equivalent of recklessly disregarding that risk." (footnote omitted) (citations omitted)).

197. 1A Remaking America, *What's Being Done About the Rise in Jail Deaths?*, NPR (Sept. 8, 2022, 4:16 PM), https://www.npr.org/2022/09/08/1121881816/1a-remaking-america-whats-being-done-about-the-rise-in-jail-deaths.

198. E. ANN CARSON, U.S. DEP'T OF JUST., SUICIDE IN LOCAL JAILS AND STATE AND FEDERAL PRISONS, 2000–2019 – STATISTICAL TABLES 1 (2021), https://bjs.ojp.gov/sites/g/files/xyckuh236/files/media/document/sljsfp0019st.pdf ("In 2019, a total of 355 local jail inmates died by suicide."). Additionally, unconvicted inmates (i.e., pretrial detainees) accounted for approximately 77% of those who died by suicide from 2000 to 2019. *Id.* at 3; *see also* E. ANN CARSON & MARY P. COWHIG, U.S. DEP'T OF JUST., MORTALITY IN LOCAL JAILS, 2000–2016 – STATISTICAL TABLES 1 (2020), https://bjs.ojp.gov/content/pub/pdf/mlj0016st.pdf ("Suicide remained the leading cause of death in local jails in 2016, accounting for nearly a third of jail deaths (31%).").

199. Tom Meagher & Maurice Chammah, *Why Jails Have More Suicides Than Prisons*, MARSHALL PROJECT (Aug. 4, 2015, 10:00 AM), https://www.themarshallproject.org/2015/08/04/why-jails-have-more-suicides-than-prisons.

medical-care claims could serve as a significant first step towards alleviating this scourge.[200]

1. The Objective Deliberate Indifference Standard and Inadequate-Medical-Care Claims Resulting in Suicide

As has been addressed, one of the significant obstacles plaintiffs face in bringing suicide claims under the subjective deliberate indifference standard is the individual-specific requirement.[201] To overcome this requirement, a plaintiff must show that the individual officer or officers involved had actual knowledge that the specific inmate was suicidal.[202] However, this requirement of proving actual knowledge often poses a significant barrier to litigation.[203]

One way in which the individual-specific requirement presents a hurdle for plaintiffs in bringing a claim for inadequate medical care resulting in suicide is the sheer amount of evidence that must be evaluated in such a case. Unlike a claim alleging excessive use of force or failure to protect, a claim for the denial of medical care (resulting in suicide) is often predicated on events that occur over a longer period.[204] As a result, plaintiffs' evidence of officers' deliberate indifference may exist in a wide array of places.[205]

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200. *But see* R. George Wright, *Objective and Subjective Tests in the Law*, 16 U.N.H. L. REV. 121, 144 (2017) ("The cumulative evidence from across several important areas of the law thus suggests that attempts to distinguish between objective and subjective legal tests must inevitably result in some form of incoherence.").

201. *See supra* Part II.C.1.

202. *See, e.g.*, Minix v. Canarecci, 597 F.3d 824, 831 (7th Cir. 2010) (affirming the lower court's grant of summary judgment to the defendants in an inadequate-medical-care claim for suicide because even though "Lonz's assessment was inadequate, the fact that she '*should have been aware*' of Zick's risk of suicide is not enough to show the required, actual knowledge of serious harm" (quoting Collins v. Seeman, 462 F.3d 757, 761 (7th Cir. 2006))).

203. *See* Nechelle Nicholas, *Cruel and Unusual Punishment: The Eighth Amendment and ICE Detainees in the COVID-19 Crisis*, 42 PACE L. REV. 223, 236 (2021) ("The common reason for courts striking down inadequate medical care claims is because of the heightened standard put on plaintiffs to prove the subjective prong . . . .").

204. *See* Christine M. Siscaretti, *Prosecuting the Denial of Medical Care Based on a Claim of Deliberate Indifference*, 70 DEP'T OF JUST. J. FED. L. & PRAC. 69, 86 (2022); *see, e.g.*, Deloney v. County of Fresno, No. 1:17-cv-01336-LJO-EPG, 2019 WL 1875588, at *1–2 (E.D. Cal. Apr. 26, 2019) (evaluating the decedent Mayberry's estate's allegations that the inadequate provision of medical care between March 11, 2016, and August 2, 2016, resulted in suicide).

205. For example, evidence tending to prove an officer's actual knowledge of an inmate's suicidal risk may exist as records from the booking process, officer's notes of when they were informed of the inmate's serious medical needs, notes from the medical officer, or video footage depicting the inmate's deteriorating condition. *See* Siscaretti, *supra* note 204, at 86.

While combing through evidence to prove a case is an exercise familiar to most attorneys, this evidentiary burden presents a special obstacle for inadequate-medical-care claims resulting in suicide. Unlike other litigation brought in federal courts, prisoner civil rights claims are disproportionately brought *pro se*.[206] In 2012, for example, 94.9% of all prisoner federal civil rights claims were brought *pro se*.[207] Thus, these plaintiffs must attempt to overcome a significant evidentiary hurdle oftentimes without the assistance of counsel.

There exist several reasons why counsel is difficult to obtain for these claims. First, many inmates (or their families) cannot afford to pay counsel except through contingent fees.[208] However, even when inmates do manage to overcome legal doctrines such as the individual-specific requirement, most cases result in very little damages.[209] For example, Margo Schlanger found that, of the prisoner civil-rights claims that made it to and succeeded at trial in 2012, the mean award was just under $22,000.[210] Second, public interest lawyers who may be willing to take on such a burdensome case with little opportunity for significant damages oftentimes lack the resources to bring suit against the small and local jails where suicide is a particularly acute problem. Amy Fettig, an attorney with the American Civil Liberties Union's National Prison Project, succinctly stated that "[c]ases tend to focus on big facilities because that's where we can help the most people, . . . [b]ut to do all these little jails, which would take the same amount of resources, it's just impossible, and so nothing gets done."[211]

However, adopting the objective deliberate indifference standard for inadequate-medical-care claims could help alleviate these issues. Under the objective deliberate indifference standard, this actual knowledge requirement would be abrogated. Rather, a plaintiff can successfully prove an officer's deliberate indifference by showing actual knowledge of the inmate's risk for suicide *or* by proving, by circumstantial evidence, that the officer should have known of the inmate's need for medical

206. David M. Shapiro & Charles Hogle, *The Horror Chamber: Unqualified Impunity in Prison*, 93 NOTRE DAME L. REV. 2021, 2048 (2018) (citing Margo Schlanger, *Trends in Prisoner Litigation, as the PLRA Enters Adulthood*, 5 U.C. IRVINE L. REV. 153, 166–67, 167 tbl.6 (2015)).

207. *Id.* (citing Schlanger, *supra* note 206, at 167 tbl.6). As a point of comparison, in 2012, only 12.6% of tort (nonproduct) actions were brought *pro se*. Schlanger, *supra* note 206, at 167 tbl.6. The next highest class of claims brought *pro se* are habeas (or other quasi-criminal) claims at 88.8%. *Id.*

208. Shapiro & Hogle, *supra* note 206, at 2049.

209. Schlanger, *supra* note 206, at 167–68.

210. *Id.* at 168.

211. Meagher & Chammah, *supra* note 199.

care.[212] This lowered burden could decrease the costs of litigation, making these cases more attractive to attorneys.[213] And with adequate representation, plaintiffs would be more likely to prevail in their claims. For example, when plaintiffs proceed with their claims *pro se* in federal court, they win in only 4% of cases.[214] However, when both plaintiff and defendant are represented and there is a final recorded judgment, each party wins about 50% of the time.[215]

As such, the adoption of the objective deliberate indifference test for inadequate-medical-care claims brought by pretrial detainees could help increase plaintiffs' chances of successfully bringing this type of litigation.

2. Objective Deliberate Indifference and Jail Suicide Policies

The adoption of the objective deliberate indifference standard for pretrial detainees' inadequate-medical-care claims and the potential result of increased accessibility to counsel could increase plaintiffs' chances of recovering damages for suicide or attempted suicide.[216] Over time, the threat of successful litigation and resulting liability could incentivize local jails to adopt and implement stronger suicide prevention policies and training.[217] This shift is key to attacking the epidemic of jail suicides.[218]

While numerous factors have coalesced to exacerbate the issue of jail suicides, chief among them is the lack of adequate policies and staff training aimed at identifying and preventing inmates from committing

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212. *See, e.g.*, Yousef v. County of Westchester, No. 19-CV-1737 (CS), 2020 WL 2037177, at *6 (S.D.N.Y. Apr. 28, 2020).

213. *See* Jack McAllister, *Mental Illness in Prison & the Objective Unreasonableness of the* Estelle *Test*, 8 IND. J.L. & SOC. EQUAL. 355, 375 (2020).

214. Mitchell Levy, Comment, *Empirical Patterns of Pro Se Litigation in Federal District Courts*, 85 U. CHI. L. REV. 1819, 1838 (2018).

215. *Id.*

216. *See* McAllister, *supra* note 213, at 376.

217. *See* HAYES, *supra* note 7, at 46 ("[L]itigation involving jail suicide has persuaded (or forced) counties and facility administrators to take corrective actions in reducing the opportunity for future deaths."); Bruce L. Danto, *Suicide Litigation as an Agent of Change in Jail and Prison: An Initial Report*, 15 BEHAV. SCI. & L. 415, 424 (1997) ("Suicide litigation as well as improved standards for jail administration have definitely served as agents of change. These developments have reduced the loss of life in the jail setting and have brought about substantial improvement in professional standards for both custodial and mental health staff.").

218. *See* Josephine Wonsun Hahn, *How to Lower the High Level of Jail Suicides: Until We Sustainably Invest in Public Health and Health Care Both In and Out of Jail, Preventable Deaths Will Continue*, BRENNAN CTR. (Aug. 17, 2022), https://www.brennancenter.org/our-work/analysis-opinion/how-lower-high-level-jail-suicides ("Correctional experts reiterate that suicides in jails are preventable through straightforward practices.").

suicide.[219] In fact, despite the prevalence of jail suicide, most facilities either fail to provide—or provide only minimal—suicide prevention training.[220] For example, a study conducted by the National Institute of Corrections found that 63% of jail facilities either did not provide suicide prevention training or did not provide it yearly.[221] Even of those facilities that did provide suicide prevention training to its staff, 69% of training provided was for two hours or less.[222]

However, with the specter of successful litigation and the resulting liability against individual officers, municipalities may be incentivized to adopt and implement more effective suicide prevention policies and training.[223] According to the National Institute of Corrections, suicide litigation has proven an effective means of persuading (or forcing) local municipalities to adopt stronger policies aimed at reducing future deaths.[224] As such, by adopting the objective standard and increasing access to counsel, local jails and municipalities may be forced to finally adopt adequate policies aimed at addressing the jail-suicide epidemic.[225]

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219. *Id.*

220. Leah Pope & Ayesha Delany-Brumsey, *Creating a Culture of Safety: Sentinel Event Reviews for Suicide and Self-Harm in Correctional Facilities*, VERA INST. JUST. (Dec. 2016), https://www.vera.org/publications/culture-of-safety-sentinel-event-suicide-self-harm-correctional-facilities; *see, e.g.*, Jonah E. Bromwich & Hurubie Meko, *Jails Officer Faked Suicide Prevention Training for Seventy-Four Guards, D.A. Says*, N.Y. TIMES (June 23, 2023), https://www.nytimes.com/2023/06/23/nyregion/correction-officer-suicide-prevention.html ("Amid a suicide crisis in New York City's jails, a correction officer falsified records to show that scores of her peers had taken a suicide prevention course that they had not actually completed . . . .").

221. HAYES, *supra* note 7, at xii.

222. *Id.*

223. *But see* Daryl J. Levinson, *Making Government Pay: Markets, Politics, and the Allocation of Constitutional Costs*, 67 U. CHI. L. REV. 345, 417 (2000) (arguing that damages do not "reliably deter government"); Sharon Cohen & Nora Eckert, *AP Investigation: Many US Jails Fail to Stop Inmate Suicides*, ASSOC. PRESS (June 18, 2019, 11:52 AM), https://apnews.com/article/ap-top-news-ut-state-wire-ia-state-wire-ca-state-wire-us-news-5a61d556a0a14251bafbeff1c26d5f15 ("'When . . . we're answering to the taxpayers, do we want to say we're putting that money toward improving your roads, your schools . . . or we're putting it toward making inmates more comfortable?' . . . The problem [also] extends beyond budgets." (quoting Christine Tartaro, a criminal justice professor at Stockton University)).

224. HAYES, *supra* note 7, at 46; *see also* Danto, *supra* note 211, at 424.

225. *See* Margo Schlanger, *Inmate Litigation*, 116 HARV. L. REV. 1555, 1683–84 (2003) ("I have found jail administrators far less reluctant to admit that they frequently have changed policies and practices nearly entirely because of individual lawsuits.").

VI. CONCLUSION

The *Kingsley* decision has created the opportunity to replace the subjective deliberate indifference standard articulated in *Farmer*, with an objective reasonableness standard for pretrial detainees' inadequate-medical-care claims. Not only is the objective standard supported by Supreme Court precedent and workable in practice, but it could help alleviate the epidemic of jail suicides. By making suicide litigation more accessible, civil rights organizations will be able to bring more lawsuits against local jails. The resulting pressure from these lawsuits could, in turn, lead to local jails making substantive changes.

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