No. 14-6368

In the Supreme Court of the United States

MICHAEL B. KINGSLEY,

Petitioner,

v.

STAN HENDRICKSON AND FRITZ DEGNER,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Whether there is a split in the circuit courts regarding a 42 U.S.C. § 1983 excessive force claim brought by a pretrial detainee based solely on the Fourteenth Amendment, where every circuit to specifically address the intent requirement for such a claim is in agreement with the Seventh Circuit below that the subjective intent of the officer, whether shown through direct evidence or objective criteria, must be considered when deciding whether the action taken by the officer amounted to punishment in violation of the Due Process Clause.

PARTIES TO THE PROCEEDINGS

All the parties to the proceedings before the Seventh Circuit are listed in the caption. The proceedings before the district court included the parties in the caption, as well as defendants Lisa Josvai, Patricia Fish, Robert Conroy, and Karl Blanton. None of the Respondents are a corporation.

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CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

Pursuant to the Fourteenth Amendment to the United States Constitution: "[n]o State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1.

Section 1983, codified as 42 U.S.C. § 1983, provides, in pertinent part:

> 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, suit in equity, or other proper proceeding for redress . . . .

42 U.S.C. § 1983.

COUNTER-STATEMENT OF THE CASE

There is no split among the circuits regarding the very narrow constitutional question presented here: whether an officer's subjective intent is a requirement of an excessive force claim brought by a pretrial detainee under the Fourteenth Amendment. This case is not about, and thus is not the appropriate vehicle through which the Court should consider, whether specific constitutional provisions – such as the Fourth and Eighth Amendments – protect pretrial detainees. The only constitutional violation claimed by Petitioner in this case is a Fourteenth Amendment due process violation.

Factual Background and Proceedings Below

Respondents incorporate by reference the recitation of facts in the opinion below. (Petitioner's Appendix ("Pet. App.") 32a-41a.) Respondents further state as follows:

Petitioner was incarcerated as a pretrial detainee in the Monroe County Jail in Sparta, Wisconsin at the time of the events at issue. (Pet. App. 33a.) On May 21, 2010, deputies were forced to transfer Petitioner from his cell to a segregation cell (known in the Monroe County Jail as a "receiving cell") after he repeatedly refused to comply with the deputies' requests that he remove a sheet of yellow legal paper that was covering the light above his bed. (Pet. App. 34a.) In order to complete the transfer, several officers approached Petitioner's cell and ordered him to stand up and to back up to the cell door with his hands behind his back. (Pet. App. 35a.) Petitioner did not comply. (*Id.*) After the deputies ordered Petitioner to stand up yet again, he put his hands behind his back but continued to lie on his bunk. (*Id.*) The officers eventually entered the cell and attempted to handcuff Petitioner, but he resisted by tensing and moving his arms. (*Id.*) After the officers managed to handcuff him, Petitioner refused to stand, so they pulled him to his feet, and ultimately carried him from his cell to the receiving cell. (*Id.*) Once in the receiving cell, Petitioner resisted the deputies' attempts to remove his handcuffs. (*Id.* 35a-36a.)

The deputies initially were trying to remove the handcuffs for Petitioner's own safety, and it is Jail policy not to leave handcuffs on inmates in the receiving

cell. (Record ("R.") 154 at 23-24; R. 155 at 31; R. 158 at 72-73.) When Petitioner continued to struggle with the officers, the officers grew concerned about the potential for harm either to him or to them, and they were equally concerned that Petitioner might escalate the situation and begin actively fighting with them. (R. 154 at 25-26; R. 158 at 71; R. 155 at 37-38 & 74-75.)

The deputies were trained consistent with State of Wisconsin guidelines that the use of a taser is justified to overcome active resistance or the threat thereof. The deputies were also trained that active resistance is presented when a subject physically counteracts an officer's control efforts under circumstances in which the behavior, the environment, or other factors create a risk of bodily harm. (R. 156 at 20-23.)

Under the circumstances, Respondent Stan Hendrickson believed that all other reasonable alternatives had been exhausted, and he instructed Respondent Fritz Degner to apply a contact stun to Petitioner with his taser. Degner applied a five second contact stun to the back of Petitioner's right shoulder. Petitioner continued struggling even after the use of the taser. (R. 155 at 37, 40-42, & 77-78; R. 158 at 73.) John Peters, a national expert in the use of force by law enforcement officers, testified that the use of a taser in contact stun mode under these circumstances was reasonable. (R. 156 at 27-28.)

After the taser had been applied, Lt. Conroy ordered the officers out of the cell. (Pet. App. 36a.) Shortly thereafter, one of the officers re-entered the cell and successfully removed the handcuffs. (*Id.*)

Petitioner eventually sued Respondents, and other officers, claiming he was subjected to the use of excessive force in violation of the Fourteenth Amendment. (Pet. App. 37a, 83a.) Although Petitioner filed the matter *pro se*, counsel was subsequently appointed to represent Petitioner through trial. (Pet. App. 38a.) Only Petitioner's excessive force claim against Respondents went to the jury. (*Id.*) After the jury returned a verdict in favor of Respondents, Petitioner appealed to the Seventh Circuit, claiming the jury instruction was erroneous. (Pet. App. 41a.) He argued, among other things, "that the instruction wrongfully conflated the standard for excessive force claims under the Eighth and Fourteenth Amendments and that, as a result, the instruction incorrectly required him to demonstrate that the defendants acted with reckless disregard for his safety." (*Id.*) Analyzing his claim under the Fourteenth Amendment's Due Process Clause, the Seventh Circuit adhered to its previous cases holding that "the existence of intent—at least recklessness—is a requirement in Fourteenth Amendment excessive force cases," and that the instruction given properly required such a showing, "measured largely by the objective factors . . . ." (Pet. App. 52a-53a.) Petitioner's request for rehearing or rehearing *en banc* was denied. (Pet. App. 81a-82a.)

SUMMARY OF THE ARGUMENT

This is a factually unremarkable case that raises a limited legal issue that is well on its way to being settled by the United States Circuit Courts of Appeals with no need for intervention by this Court. The only basis for review asserted in the petition for a writ of certiorari ("Petition") is a purported split among the circuits

regarding the applicable standard for an excessive force claim brought by a pretrial detainee under 42 U.S.C. § 1983. As this Court has repeatedly instructed, however, Section "1983 is not itself a source of substantive rights, but merely provides a method for vindicating federal rights elsewhere conferred. In addressing an excessive force claim brought under § 1983, analysis begins by identifying the specific constitutional right allegedly infringed by the challenged application of force." *Graham v. Connor*, 490 U.S. 386, 393-94 (1989) (citation and internal quotation marks omitted). The only constitutional provision at issue in this case is the Fourteenth Amendment. (Pet. App. 37a, 83a.) Although the Fourth and Eighth Amendments are raised in the Petition, Petitioner did not claim in the proceedings below that his Fourth or Eighth Amendment rights were violated by the Respondents. Rather, his claims were limited solely to the Fourteenth Amendment. (*Id.*) And Petitioner's claims were presented even more narrowly before the Seventh Circuit, raising the limited issues of whether (a) the Fourteenth Amendment requires a showing of the officer's subjective intent to punish a pretrial detainee – be it through direct evidence or objective factors – before liability for excessive force under the Fourteenth Amendment may attach, and (b) whether the district court erred on instructing the jury on the issue of harm, a claim Petitioner has now abandoned *sub silentio*. (Pet. App. 41a.) It is therefore irrelevant, and this is not the case through which the Court should settle, whether the Fourth and Eighth Amendments protect pretrial detainees – issues not presented or developed below. The very limited constitutional issue presented here—and which the

Seventh Circuit answered in the affirmative—is whether an officer's subjective intent is a requisite element of a Section 1983 excessive force claim brought by a pretrial detainee based solely on the Fourteenth Amendment. As that conclusion does not conflict with the opinion of any other circuit court to specifically address that issue, and as no other compelling basis is urged or presented for review by this Court, the petition for a writ of certiorari should be denied.

REASONS FOR DENYING THE PETITION

I. THE INTENT REQUIREMENT RECOGNIZED BY THE SEVENTH CIRCUIT IS NOT IN CONFLICT WITH ANY OTHER UNITED STATES COURT OF APPEALS THAT HAS ADDRESSED THIS ISSUE.

As an initial matter, all circuits agree – as they must based on this Court's precedent – "that the Due Process Clause protects a pretrial detainee from the use of excessive force that amounts to punishment." *Graham*, 490 U.S. at 395 n.10; *Bell v. Wolfish*, 441 U.S. 520, 535-40 (1979). However, "[n]ot every disability imposed during pretrial detention amounts to 'punishment' in the constitutional sense." *Bell*, 441 U.S. at 537. So, true to these teachings, all Circuits when considering an excessive force claim brought by a pretrial detainee under the Fourteenth Amendment inquire whether the action taken by the officer amounted to punishment in violation of the Due Process Clause. *See, e.g., Sawyer v. Asbury*, 537 F. App'x 283, 290 (4th Cir. 2013) ("claims of post-arrest excessive force against an arrestee or pre-trial detainee . . . are governed by the Due Process Clause of the Fourteenth Amendment, which prohibits before conviction 'the use of excessive force that amounts to punishment.'"); *Jackson v. Buckman*, 756 F.3d 1060, 1067 (8th Cir.

2014) ("The Due Process Clause of the Fourteenth Amendment protects pretrial detainees from 'the use of excessive force that amounts to punishment.'"); *Sonntag v. Balaam*, 498 F. App'x 745 (9th Cir. 2012) (same); *Gibson v. Cnty. of Washoe*, 290 F.3d 1175, 1197 (9th Cir. 2002) (same); *Estate of Booker v. Gomez*, 745 F.3d 405, 420 (10th Cir. 2014) (same). This is a well settled standard that is not subject to any purported circuit split.

Not surprisingly, what conduct amounts to punishment in the constitutional sense cannot be and has not been strictly defined by this Court or the lower courts. Indeed, this Court has instructed in other contexts that the rules of due process not be mechanically applied:

> The phrase [due process of law] formulates a concept less rigid and more fluid than those envisaged in other specific and particular provisions of the Bill of Rights. Its application is less a matter of rule. Asserted denial is to be tested by an appraisal of the totality of facts in a given case. That which may, in one setting, constitute a denial of fundamental fairness, shocking to the universal sense of justice, may, in other circumstances, and in the light of other considerations, fall short of such denial.

Cnty. of Sacramento v. Lewis, 523 U.S. 833, 850 (1998) (internal quotation marks omitted). Consequently, what constitutes a violation of the Due Process Clause is an inquiry rarely subject to a uniform and precise checklist of factors. The Seventh Circuit therefore applies a case-by-case balancing test that considers the actor's subjective intent, among other factors, to determine whether the state has punished a pretrial detainee in violation of the Due Process Clause. (Pet. App. 43a-53a.) Intent to punish must be shown, be it through direct evidence or objective considerations. (Pet. App. 50a-53a.) Petitioner disagrees, asking this Court to

conclude that an officer's subjective intent is irrelevant and should not be considered. No circuit has adopted this "wholly objective" standard advocated by Petitioner in the context of a due process claim, nor is such a standard supported by the precedent of this Court.

A. A Subjective Intent Requirement for a Due Process Violation Conforms With This Court's Precedent.

This Court has made clear that "the due process guarantee does not entail a body of constitutional law imposing liability whenever someone cloaked with state authority causes harm." *Cnty. of Sacramento*, 523 U.S. at 848. Indeed, "liability for negligently inflicted harm is categorically beneath the threshold of constitutional due process." *Id.* at 849. And in the jail context, deliberate or criminally reckless conduct is a necessary predicate to any claim under the Fourteenth Amendment. *Daniels v. Williams*, 474 U.S. 327, 334 (1986). The Seventh Circuit has therefore correctly concluded that for liability to lie under the Due Process Clause, "the official conduct must be at least reckless. Recklessness, which necessarily incorporates some measure of subjective intent, stands in contrast to the rule under the Fourth Amendment that focuses only on whether the government conduct was '*objectively* reasonable' in light of all of the facts and circumstances." (Pet. App. 44a-45a.) As explained below, none of the cases cited by Petitioner reject this proposition.

B. All the Circuits That Have Addressed the Issue Presented Here Consider the Actor's Subjective Intent to Punish a Pretrial Detainee When Analyzing a Due Process Excessive Force Claim.

Petitioner readily acknowledges that a majority of the circuits to address this issue "require a pretrial detainee plaintiff in an excessive force case to show the defendant's subjective intent to violate the detainee's constitutional rights." (Pet. App. 24a-25a.) While Petitioner argues that the Fourth, Eighth, Ninth, Tenth, and D.C. Circuits have adopted a wholly objective standard for a due process excessive force claim, thus creating a split among the circuits, on close review none of the cases cited by Petitioner support such a conclusion. Indeed, all the cases cited are easily reconcilable or simply misapplied by Petitioner.

The first opinion cited by Petitioner, *Justice v. Dennis,* 793 F.2d 573 (4th Cir. 1986), has been vacated: first, by the Fourth Circuit when it granted rehearing and issued a new opinion, which notably omitted the very language quoted by Petitioner. *Justice v. Dennis,* 834 F.2d 380 (4th Cir. 1987) (opinion on rehearing); *see also* Fourth Circuit Loc. R. 35(c) ("Granting of rehearing en banc vacates the previous panel judgment and opinion"); and second, by this Court when it granted certiorari, vacated the judgment, and remanded the case for further consideration in light of *Graham*. *Justice v. Dennis*, 490 U.S. 1087 (1989). No subsequent opinion was published. (*See generally Justice v. Dennis*, Court of Appeals Docket No. 85-1431.) In any event, recent cases from the Fourth Circuit—none of which are addressed by Petitioner—make clear that an officer's subjective intent is a consideration. *See, e.g, McMillian v. Wake Cnty. Sheriff's Dep't*, 399 F. App'x 824, 827-28 (4th Cir. 2010) ("Excessive force claims of arrestees and pretrial detainees

are governed by the Due Process Clause of the Fourteenth Amendment. In analyzing such a claim, '[t]he proper inquiry is whether the force applied was in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm.'" (citations omitted)); *Sawyer*, 537 F. App'x at 290 (same); *Young v. Prince George's Cnty.*, 355 F.3d 751, 758 (4th Cir. 2004) (distinguishing Fourth Amendment's "objective reasonableness" standard from "subjective standard used to adjudicate excessive force claims brought under the Due Process Clause of the Fourteenth Amendment"); *Grayson v. Peed*, 195 F.3d 692, 696 (4th Cir. 1999), *cert. denied*, *Grayson v. Royer*, 529 U.S. 1067 (2000) (appellant's excessive force claim failed because "[t]he force applied by [the] officers was "'in a good faith effort to maintain or restore discipline,'" and thus not violative of the Due Process Clause of the Fourteenth Amendment"); *United States v. Cobb*, 905 F.2d 784, 789 (4th Cir. 1990) (finding of punitive intent required).

A similar good faith standard has been recognized by the Eighth Circuit:

> The guidelines for evaluating whether excessive force has been used are clearly set forth in this circuit . . . In determining whether the constitutional line has been crossed, a court must look to such factors as . . . whether force was applied in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm.

Dale v. Janklow, 828 F.2d 481, 484 (8th Cir. 1987), *cert. denied*, 485 U.S. 1014 (1988). Similar to the Seventh Circuit, a jury in the Eighth Circuit is allowed to determine whether the defendant's conduct amounted to "punishment on the basis of direct evidence of intent to punish, or it [can, based on objective factors,] infer that the purpose was punishment from the fact that the condition either bore no

reasonable relation to a legitimate goal or exceeded what was necessary for attaining such a goal." *Putman v. Gerloff*, 639 F.2d 415, 420 (8th Cir. 1981).

Petitioner ignores this authority and relies on *Andrews v. Neer*, 253 F.3d 1052, 1061 (8th Cir. 2001) (citing *Johnson-El v. Schoemehl*, 878 F.2d 1043 (8th Cir. 1989)), both of which are readily distinguishable, to argue that the Eighth Circuit applies a wholly objective standard to due process claims. *Johnson-El*, upon which *Andrews* is based, is a conditions of confinement case: "Their ***confinement conditions*** are analyzed under the due process clause of the Fifth and Fourteenth Amendments . . . ." *Johnson-El*, 878 F.2d at 1048 (emphasis added). Additionally, *Andrews* involved a constitutional claim brought by an involuntarily committed state hospital patient, not a pretrial detainee. 253 F.3d at 1060. In deciding that claim, the Court enumerated some of the factors that may be considered when analyzing an excessive force claim (253 F.3d at 1060 n.7), but the court did not state that the factors enumerated therein were exhaustive. Nowhere in that opinion did the court disagree with *Putman* or *Dale*, *supra*, or state that the actor's good faith can never be considered. That was simply not an issue in *Johnson-El* or *Andrews*. On close review, neither of those opinions address whether, let alone stand for the blanket proposition that, a defendant's subjective intent can never be considered in analyzing an excessive force claim based solely on the Fourteenth Amendment. At best, that issue remains unsettled within the Eighth Circuit, and any discrepancies within that circuit are not for this Court to resolve (and certainly not through a case such as this one that does not even originate from that circuit). Furthermore,

resolution of any intra-circuit split by this Court, even if deemed appropriate, would be premature for two reasons. First, unlike the Seventh Circuit, the Eighth Circuit is yet to conclusively resolve the threshold question of whether the Fourth Amendment protects pretrial detainees. *See, e.g, Andrews*, 253 F.3d at 1060-61 ("we have not drawn a bright line dividing the end of the arrestee's status and the beginning of the pre-trial detainee's status"). Second, in due time, the Eighth Circuit may very likely side with the Seventh Circuit. In fact, the Eighth Circuit recently stated in June of this year, that "conduct that is merely negligent or grossly negligent does not implicate the protections of the Due Process Clause," implying the intent requirement, and while the Court went on to say that "[t]he objective indicia relevant to the excessive-force analysis under the Fourth Amendment guide this due-process inquiry," it cited the Seventh Circuit's opinion in this case, in addition to *Andrews*. *Jackson*, 756 F.3d at 1067. While it is simply too early to tell if the Eighth Circuit will ultimately draw the conclusion urged by Petitioner in this case, the citation to the opinion below indicates otherwise. Either way, Petitioner has not cited a single Eighth Circuit case in which the court squarely addressed the question of punitive intent and held that the official's subjective intent is irrelevant for purposes of a due process analysis.

The same holds true for the Ninth, Tenth, and D.C. Circuits. As stated in the Ninth Circuit case cited by Petitioner, *Gibson v. County of Washoe*, that court has determined that the *Fourth* Amendment protects pretrial detainees. 290 F.3d 1175. Contrary to Petitioner's suggestion, however, the Fourth Amendment and its

objective standard does not apply to *all* pretrial claims in the Ninth Circuit. *See, e.g, Wilson v. Pima Cnty. Jail*, 256 F. App'x 949, 950 (9th Cir. 2007) (whether the Fourth or Eighth Amendment standard applies to post-arraignment pretrial detainees is "an open question in this circuit"). To the contrary, the Ninth Circuit has recently held that "[a]fter arraignment, the Due Process Clause of the Fourteenth Amendment protects a detainee from excessive force amounting to punishment," and that "[a] pretrial post-arraignment detainee's rights under the Fourteenth Amendment are comparable to a prisoner's rights under the Eighth Amendment, so, post-arraignment, the . . . 'malicious and sadistic' standard applies." *Young v. Wolfe*, 478 F. App'x 354, 356 (9th Cir. 2012). Given these two standards, it simply cannot be said that the decision of the Seventh Circuit in this case defining only the *due process* rights of a pretrial detainee and in which no Fourth Amendment claim is raised is in conflict with the Ninth Circuit. It is not. Rather, the Fourth Amendment cases relied on by Petitioner are wholly inapposite.

As for the Tenth Circuit, even the single case Petitioner cites as allegedly conflicting with this one, *Estate of Booker v. Gomez*, makes clear that "although an excessive force claim brought under the Fourth Amendment depends on the objective reasonableness of the defendants' actions, the same claim brought under the Fourteenth Amendment turns on additional factors, including '***the motives of the state actor***.'" 745 F.3d at 419 (emphasis added). The court then went on to address whether the plaintiff had demonstrated the "requisite subjective intent." *Id.* at 426. Nowhere in that opinion did the Tenth Circuit hold that a defendant's

subjective intent need not be established. That is simply not the law in that circuit. *See, e.g., Smith v. Iron Cnty.*, 692 F.2d 685, 687 (10th Cir. 1982) (considering as part of due process analysis "whether force was applied in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm"); *Porro v. Barnes*, 624 F.3d 1322, 1327 (10th Cir. 2010) ("In our due process precedent we have said that we examine the force used, the injury inflicted, and relevant motives. But in each instance, the focus must always be on the *defendant*—on the force *he* used or caused to be used, on the injury *he* inflicted or caused to be inflicted, and on *his* motives. This is because § 1983 isn't a strict liability offense.").

Finally, Petitioner cites a 1984 case by the D.C. Circuit in which the actor's intent was not at issue to argue for a wholly objective standard. In that case, *Norris v. D.C.*, 737 F.2d 1148 (D.C. Cir. 1984), the lower court granted summary judgment based on its conclusion that because the plaintiff did not suffer permanent injuries his claims did not give rise to a constitutional violation. *Id.* at 1148. In deciding to reverse that decision, the D.C. Circuit accepted the plaintiff's allegations "that four correctional officers, without cause and for malicious purposes, maced, beat, and kicked him . . . ." *Id.* at 1152. Intent was simply not an issue. The court nonetheless indicated that the officer's intent is a consideration. Quoting *Johnson v. Glick,* 481 F.2d 1028, 1033 (2nd Cir. 1973), *cert. denied,* 414 U.S. 1033 (1973), the D.C. Circuit stated that one of the factors to be considered when determining whether an officer has violated due process is "'whether force was applied in a good faith effort to maintain or restore discipline or maliciously and sadistically for the

very purpose of causing harm.'" *Norris*, 737 F.2d at 1150. Nowhere in that opinion did the D.C. Circuit state that the officer's subjective intent is irrelevant.

At bottom, Petitioner has not cited a single case in the Fourth, Eighth, Ninth, Tenth, or D.C. Circuits in which one of those courts squarely addressed the issue of the intent required for an excessive force claim under the Due Process Clause and concluded, contrary to the Seventh Circuit, that the officer's subjective intent need not be established, be it through direct evidence or objective considerations.

Indeed, all the circuits that have specifically addressed this issue or even come close to addressing it, appear to agree with the Seventh Circuit that the officer's subjective intent must be considered when determining punitive conduct for purposes of a due process claim, albeit they do not all use the exact same terminology. *See, e.g., United States v. Walsh*, 194 F.3d 37, 48-49 (2nd Cir. 1999) ("'whenever prison officials stand accused of using excessive physical force in violation of the [Constitution], the core judicial inquiry is . . . whether force was applied in a good-faith effort to maintain or restore discipline, or maliciously and sadistically to cause harm'"); *Murray v. Johnson No. 260*, 367 F. App'x 196, 198 (2nd Cir. 2010) ("The subjective condition [for a due process claim] is satisfied by showing that the defendant had a 'sufficiently culpable state of mind'-the core inquiry being 'whether force was applied in a good-faith effort to maintain or restore discipline, or maliciously and sadistically to cause harm.'"); *Fuentes v. Wagner,* 206 F.3d 335, 344 (3rd Cir. 2000), *cert. denied*, 531 U.S. 821 (2000) (applying malicious and sadistic standard); *Valencia v. Wiggins,* 981 F.2d 1440, 1446-47 (5th Cir. 1993)

(same); *Shreve v. Franklin Cnty.,* 743 F.3d 126, 134, 137 (6th Cir. 2014) ("Generally, to constitute a Fourteenth Amendment violation, an official's conduct must 'shock [ ] the conscience,'" which is a "more difficult" standard for a plaintiff to meet than the objectively unreasonable test); *Darrah v. City of Oak Park*, 255 F.3d 301, 306 (6th Cir. 2001) (Fourteenth Amendment standard is "[a] substantially higher hurdle . . . than . . . 'objective reasonableness' test"); *Ewolski v. City of Brunswick*, 287 F.3d 492, 510 (6th Cir. 2002) ("In order to establish a constitutional violation . . . Appellant must demonstrate that the state acted with the requisite culpability to establish a substantive due process violation under the Fourteenth Amendment. . . . At a minimum, the [shocks the conscience] standard requires a showing beyond mere negligence.") (citations omitted); *Bozeman v. Orum*, 422 F.3d 1265, 1271 (11th Cir. 2005) (applying malicious and sadistic standard). As Petitioner has not shown and cannot show that the Seventh Circuit's opinion below on the limited issue of intent conflicts with the opinion of any other circuit to squarely address that issue, review by this Court is unwarranted.

II. ANY PERCEIVED CONFLICT WILL LIKELY BE CORRECTED WITHOUT THIS COURT'S INTERVENTION.

The parameters of a pretrial detainee's constitutional rights are still being shaped in the different circuits, as is the standard applicable to claims – such as the one here – analyzed solely under the Due Process Clause. With the majority of the circuits already concluding that the officer's subjective intent is a required element of a due process claim, whether shown through direct evidence or objective considerations, in due time the circuits yet to resolve this issue may very well side

with the majority obviating the need for any intervention by this Court. While Petitioner claims that nearly every circuit has weighed in on the question presented here, the truth of the matter is that even Petitioner's own cited authorities do not support that conclusion. (*See supra,* pp. 9-16.) To be clear, the question in this appeal is not whether the Fourth, Eighth, or some other specific constitutional provision protects pretrial detainees as portrayed by Petitioner. The limited question argued and preserved by Petitioner here is simply whether the officer's subjective intent is a requisite element of a due process excessive force claim where no other specific constitutional provision is asserted. As *that* question is still being resolved by the circuits, intervention by this Court is unnecessary.[1]

III. THE ABSENCE OF A CLAIM UNDER A SPECIFIC CONSTITUTIONAL PROVISION MAKES THIS AN INAPPROPRIATE CASE FOR REVIEW.

The Court's jurisprudence instructs that "if a constitutional claim is covered by a specific constitutional provision, such as the Fourth or Eighth Amendment, the claim must be analyzed under the standard appropriate to that specific provision, not under the rubric of substantive due process." *United States v. Lanier*, 520 U.S. 259, 272 n.7 (1997). This Court is yet to decide—and has rejected previous opportunities to decide—whether a specific constitutional provision, such as the Fourth Amendment, protects a pretrial detainee from the use of excessive force. *See, e.g., Valencia*, 981 F.2d 1440 (5th Cir.), *cert. denied*, 509 U.S. 905 (1993)

[1] Incidentally, even if the Court were inclined to adopt an intent requirement different from that of the majority of the circuits, Petitioner in this case would not obtain a new trial because Respondents would be entitled to qualified immunity. *Harlow v. Fitzgerald*, 457 U.S. 800, 818-19 (1982).

(rejecting defendant's claim that Fourth Amendment applies); *Fuentes*, 206 F.3d at 347 (3rd Cir.) (holding that pretrial detainee not entitled to Fourth Amendment "objective reasonableness" instruction), *cert. denied,* 531 U.S. 821 (2000); *Robles v. Prince George's Cnty.,* 302 F.3d 262, 269 (4th Cir.) (holding that Fourth Amendment did not protect pretrial detainee), *cert. denied*, 538 U.S. 945 (2003); *Lewis v. Downey*, 581 F.3d 467 (7th Cir.) (rejecting plaintiff's claim that Eighth Amendment applied), *cert. denied*, 59 U.S. 1008 (2010); *Gibson*, 290 F.3d at 1197 (9th Cir.) ("Fourth Amendment sets the 'applicable constitutional limitations' for considering claims of excessive force during pretrial detention"), *cert. denied*, 537 U.S. 1106 (2003). As that issue was not presented or developed below, this is not the case through which the Court should decide this important question. Nor does the Court's precedent allow the Court to start defining the rights of pretrial detainees under the rubric of substantive due process having refused to settle whether any specific constitutional provisions protect pretrial detainees. Indeed, such drastic action is not warranted here, for, as detailed above, there is no disagreement among the circuits – nor can there be based on this Court's precedent – regarding the requisite intent requirement for excessive force claims based solely on the Fourteenth Amendment – the only claim presented here.

CONCLUSION

True to this Court's precedent on due process claims, the Seventh Circuit correctly concluded that the Fourteenth Amendment requires a showing of the officer's subjective intent to punish a pretrial detainee – be it through direct

evidence or objective factors – before liability for an excessive force under the Fourteenth Amendment may lie. As this conclusion does not conflict with the decision of any other circuit on this specific issue, and no other basis is asserted for review, Respondents respectfully request that the Petition for a Writ of Certiorari be denied.

Dated: December 4, 2014

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CERTIFICATE OF SERVICE

I hereby certify that on this 4th day of December, 2014, I served a copy of the enclosed RESPONDENTS' BRIEF IN OPPOSITION on all counsel of record by electronic mail and by depositing an envelope containing a copy of the brief in the United States mail properly addressed to each of them and with postage prepaid. The names and addresses of those served are as follows:

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