STATE OF MICHIGAN
IN THE SUPREME COURT

On Appeal from the Circuit Court for the County of Wayne
Hon. Timothy M. Kenny

On Plaintiffs-Appellants' Emergency Bypass Application

WAYNE COUNTY JAIL INMATES, et al,

Plaintiffs-Appellants, MSC No. 161566

v COA No. 354075

WILLIAM LUCAS, et al, Trial Ct No. 71-173217-CZ

Defendants-Appellees.

AMICUS CURIAE BRIEF OF AMERICAN CIVIL LIBERTIES UNION OF MICHIGAN, CRIMINAL DEFENSE ATTORNEYS OF MICHIGAN, NEIGHBORHOOD DEFENDER SERVICE OF DETROIT, STATE APPELLATE DEFENDER OFFICE, AND AMERICAN FRIENDS SERVICE COMMITTEE'S MICHIGAN CRIMINAL JUSTICE PROGRAM

Margo Schlanger (P82345)
Cooperating Attorney, American Civil Liberties Union Fund of Michigan
625 S. State St.
Ann Arbor, MI 48109
(202) 277-2506
margo.schlanger@gmail.com

Daniel S. Korobkin (P72842)
American Civil Liberties Union Fund of Michigan
2966 Woodward Ave.
Detroit, MI 48201
(313) 578-6824
dkorobkin@aclumich.org

Attorneys for Amici Curiae

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QUESTION PRESENTED

Did the circuit court err in its application of the law governing plaintiffs' conditions-of-confinement claims, including under:

- the United States Constitution's Cruel and Unusual Punishments Clause, US Const, Am VIII;
- the United States Constitution's Due Process Clause, US Const, Am XIV;
- the Michigan Constitution's Cruel or Unusual Punishment Clause, Const 1963, art 1, § 16; and
- the Michigan Constitution's Due Process Clause, Const 1963, art 1, § 17?

Amici answer: Yes.

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INTRODUCTION AND INTEREST OF AMICI[1]

In this longstanding jail conditions case, the circuit court denied plaintiffs' emergency motion for a temporary restraining order and a preliminary injunction. That motion sought various measures to ameliorate the high risk of COVID-19 infection in the Wayne County Jail, Michigan's largest, which typically houses about half pretrial and half post-conviction detainees.[2] Immediate interlocutory review by this Court is appropriate because the circuit court's erroneous resolution of plaintiffs' request for emergency relief is causing substantial harm to the plaintiff class, Wayne County Jail detainees, who are facing a high and partially avoidable risk of COVID-19 infection.

Amici—the American Civil Liberties Union of Michigan, Criminal Defense Attorneys of Michigan, Neighborhood Defender Service of Detroit, State Appellate Defender Office, and American Friends Service Committee's Michigan Criminal Justice Program—are public interest and direct service organizations dedicated to protecting the rights of the accused and incarcerated; they work routinely with and on behalf of individuals who are or have been detained in jails in Wayne County and elsewhere throughout Michigan. (More information on each amicus and its interest is provided in the motion for leave to file this amicus brief.) In their work with that population, amici are observing, daily, the detrimental effects of the circuit court's misguided resolution of plaintiffs' request for emergency relief. Immediate review by this Court is appropriate because without it, plaintiffs will experience substantial harm. MCR 7.305(B)(4)(a). If this Court

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[1] Pursuant to MCR 7.312(H)(4), amici state that no counsel for a party authored this brief in whole or in part, nor did any such counsel or a party make a monetary contribution intended to fund the preparation or submission of this brief. No person other than amici, their members, or their counsel made such a monetary contribution.

[2] See Fishman et al, Wayne County Jail—Report and Recommendations (Vera Institute of Justice, May 2020), p 13, fig 1 <https://www.vera.org/downloads/publications/wayne-county-jail%E2%80%93report-and-recommendations.pdf>.

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undertakes that review, it will readily see that the circuit court erred in its analysis of each of the four operative claims in this case, rendering its denial of a preliminary injunction an abuse of discretion. Accordingly, amici urge the Court to grant the bypass application, immediately review the circuit's order, and reverse.

ARGUMENT

The circuit court committed numerous legal errors, which led to its abuse of discretion in denying the requested preliminary injunction. See *Ronnisch Constr Group, Inc v Lofts on the Nine, LLC*, 499 Mich 544, 552; 886 NW2d 113 (2016) ("A trial court necessarily abuses its discretion when it makes an error of law.").

The court explained that it was addressing four conditions-of-confinement claims, two under the United States Constitution and two under the Michigan Constitution. Within each source of law, one claim covers pretrial detainees and the other covers post-conviction prisoners. As the court acknowledged, "The grounds of Plaintiffs' motion are alleged violations of the Eighth Amendment's prohibition against cruel and unusual punishment, violations of the due process clause of the Fourteenth Amendment, and violations of Article I, Sections 16 and 17 of the Michigan Constitution." Op & Order, p 9.

The court, however, collapsed those four claims into one. The court focused on federal precedents because, it found, "there is little Michigan case law on the subject." *Id.*, p 10. Then it held that "under the Fourteenth Amendment, pretrial detainees are 'entitled to the same Eighth Amendment rights as other inmates.'" *Id.*, citing *Thompson v Co of Medina, Ohio*, 29 F3d 238, 242 (CA 6, 1994). Therefore, it applied only "the analysis set forth in *Farmer* [*v Brennan*, 511 US 825, 832 (1994)]," because, it held, "although rooted in the Eighth Amendment,'" that analysis "'applies with equal force to a pretrial detainee's Fourteenth Amendment claims.'" Op & Order, pp 10-11, quoting *Richko v Wayne Co, Mich*, 819 F3d 907, 915 (CA 6, 2016). Applying *Farmer*'s

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"deliberate indifference" standard, it focused on defendants' recently promulgated COVID-19 policies and on inmate releases, finding that these together defeated plaintiffs' claims. With respect to policies, the circuit court relied on the facts that "Defendants have *issued* policies and directives" and "Defendants have also *ordered* mandatory testing, provided necessary supplies and equipment, and *mandated* staff adherence to the directives." Op & Order, p 14 (emphasis added).

This was incorrect in multiple ways. The circuit court misapplied the *Farmer* standard. (See I.A, below.) In addition, under the United States Constitution's Due Process Clause and the Cruel and Unusual Punishments Clause, respectively, the standards for pretrial detainees and post-conviction prisoners differ; the Due Process Clause standard is more favorable to plaintiffs' claims. (See I.B, below.) Moreover, state constitutional law does, in fact, offer significant precedential resources leading to plaintiff-favoring divergence from the federal Eighth Amendment standard (mis)applied by the circuit court. (See II.A, below, for the Michigan Constitution's Due Process Clause, and II.B, below, for the Michigan Constitution's Cruel or Unusual Punishment Clause.) Under the correct legal standards, plaintiffs have a high likelihood of success on each of the four claims; denial of the preliminary injunction was for that reason an abuse of discretion.

I. THE CIRCUIT COURT MISAPPLIED FEDERAL CONSTITUTIONAL LAW.

First, the circuit court erred in its application of federal law. Plaintiffs properly invoked two different provisions of the United States Constitution, the Eighth Amendment's Cruel and Unusual Punishments Clause and the Fourteenth Amendment's Due Process Clause. See Pls' Emerg Mot for Temp Restraining Order and Prelim Inj, p 31. The former protects post-conviction prisoners; the latter, pretrial detainees. See *Bell v Wolfish*, 441 US 520 (1979) (analyzing pretrial detention conditions of confinement claim under the Due Process Clause); *Kingsley v Hendrickson*, 576 US 389, 400 (2015) (distinguishing "claims brought by convicted prisoners under the Eighth Amendment's Cruel and Unusual Punishment Clause [from] claims brought by

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pretrial detainees under the Fourteenth Amendment's Due Process Clause"). With respect to the Eighth Amendment, the circuit court stated the correct test for liability in a conditions of confinement case, but committed legal error in applying the test. With respect to the Fourteenth Amendment, the circuit court misstated the test altogether. For both, correct application of law compels a finding that plaintiffs are highly likely to succeed on the merits.

A. The Eighth Amendment Requires Not Just Reasonable Policy But a Reasonable Response to Known Risks of Serious Harm.

Eighth Amendment cases involve two tests—objective and subjective; plaintiffs must satisfy both. First, the deprivation alleged must be, objectively, "sufficiently serious," *Wilson v Seiter*, 501 US 294, 298 (1991). This test encompasses prison officials' obligation to provide convicted prisoners "humane conditions of confinement," including "adequate food, clothing, shelter, and medical care." *Farmer*, 511 US at 832. And the obligation to address prisoners' serious medical needs includes not just manifest harm but *risk* of serious harm. See, e.g., *Helling v McKinney*, 509 US 25, 33-34 (1993) (nonsmoking prisoner stated Eighth Amendment claim for relief because of exposure to environmental tobacco smoke). There is no question in this case that the risk of COVID-19 infection in the Wayne County Jail is sufficiently serious to satisfy this objective prong of the Cruel and Unusual Punishments Clause. See Op & Order, p 14 ("[E]veryone, the public as well as Jail officials, knows of the risks of exposure to COVID-19, especially medically vulnerable persons. This widespread knowledge easily satisfies the objective prong of 'deliberate indifference.'").

Under the Eighth Amendment's second, subjective, prong, the United States Supreme Court has held that an official violates the Cruel and Unusual Punishments Clause only if he or she acts with a "sufficiently culpable state of mind." *Wilson*, 501 US at 302-303. In several cases, the Court has explained that this requirement is founded in the Eighth Amendment's coverage of

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“punishments”:

> 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. [*Id.* at 300.]

It elaborated:

> Since . . . only the unnecessary *and wanton* infliction of pain implicates the Eighth Amendment, a prisoner advancing such a claim must, at a minimum, allege deliberate indifference to his serious medical needs. [*Id.* at 297 (internal quotation marks and citations omitted).]

Specifically, the intent requirement under the Eighth Amendment—used to identify “those who inflict punishment,” *Farmer*, 511 US at 839—is a subjective form of “deliberate indifference.” *Id.* at 840-842. As the Court explained in *Farmer*, deliberate indifference is “something less than acts or omissions for the very purpose of causing harm or with knowledge that harm will result.” *Id.* at 835. The test is simply put:

> [A] prison official may be held liable under the Eighth Amendment for denying humane conditions of confinement . . . if he knows that inmates face a substantial risk of serious harm and disregards that risk by failing to take reasonable measures to abate it. [*Id.* at 847.]

The circuit court correctly stated this test. But it committed reversible legal error with respect to this Eighth Amendment claim when it gave dispositive weight to Wayne County’s policies, utterly failing to take account of the unrebutted evidence that those policies are not being followed in the jail. See Bypass Application, pp 27-33. Legally, the requirement of a reasonable response is far from satisfied by mere policy, even if that policy seems reasonable. See, e.g., *Martinez-Brooks v Easter*, No. 3:20-cv-00569, 2020 WL 2405350, at *23 (D Conn, May 12, 2020) (“[B]y failing to make meaningful use of her home confinement authority, the Warden has failed to implement what appears to be the sole measure capable of adequately protecting vulnerable inmates[.]”); *Mays v Dart*, No. 20-cv-2134, 2020 WL 1812381, at *11 (ND Ill, April 9, 2020)

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(issuing TRO where Sheriff "point[ed] to policies that call[ed] for sanitation and cleaning supplies to be made available to detainees, but . . . offer[ed] no evidence that this [was] actually happening on the ground, and . . . the plaintiffs . . . offered significant evidence reflecting that it [was] *not* happening."). Assuming for the sake of argument that defendants' policies *were* reasonable (but see Bypass Application, pp 22-27), the existence of a reasonable policy actually bolsters a claim of deliberate indifference, if that policy is not followed, because the policy evidences defendants' actual knowledge of the problem to be solved and their own assessment of what a reasonable response looks like.

In this case, for the reasons amply canvassed by plaintiffs, defendants' COVID-19 policies are far from reasonable. See Bypass Application, pp 22-27. And in any event, overwhelming evidence establishes widespread failure to implement policy. *Id.*, pp 27-33. Defendants' indubitable failure to implement their COVID-19 policies demonstrates their deliberate indifference to the uncontested serious risk of harm from COVID-19. The circuit court erred when it found postconviction plaintiffs unlikely to succeed in establishing this claim.

B. The Fourteenth Amendment's Due Process Clause Imposes an Objective Test for Conditions of Confinement.

With respect to plaintiffs' Fourteenth Amendment claim, the circuit court cited several Sixth Circuit cases stating that such claims should be analyzed under the Eighth Amendment test. See Op & Order, pp 10-11, citing *Thompson v Co of Medina, Ohio*, 29 F3d 238, 242 (CA 6, 1994), and *Richko v Wayne Co, Mich*, 819 F3d 907, 915 (CA 6, 2016).[3] More important, in a 1991 pretrial

[3] The circuit court also cited a COVID-19 conditions case brought by immigrant detainees, *Albino-Martinez v Adducci*, No. 2:20-cv-10893, ––– F Supp 3d –––, 2020 WL 1872362, at *2 (ED Mich, April 14, 2020), as "analyz[ing] the claims, which were related to health concerns, under the Eighth Amendment, rather than the Fifth Amendment." Op & Order, p 11 n 4. Actually, the authority on which *Albino-Martinez* relied, *Awshana v Adducci*, No. 20-cv-10699, ––– F Supp 3d –––, 2020 WL 1808906, at *3 (ED Mich, April 9, 2020), used the Eighth Amendment *test* as analogously

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suicide case brought under the Due Process Clause of the Fourteenth Amendment, this Court adopted the "prevalent rule in the federal circuit courts defin[ing] the [due process] right analogously to that guaranteed convicted prisoners under the Eighth Amendment." *York v City of Detroit*, 438 Mich 744, 758; 475 NW2d 346 (1991). See also, e.g., *Jackson v City of Detroit*, 449 Mich 420; 537 NW2d 151 (1995); *In re Morden*, 275 Mich App 325; 738 NW2d 278 (2007). But that approach can no longer stand; it has become inconsistent with United States Supreme Court case law, which (despite being cited by the plaintiffs, see Pls' Emerg Mot, p 34), went unacknowledged and unimplemented by the circuit court.

In 2015, the U.S. Supreme Court decided *Kingsley v Hendrickson*, 576 US 389, a use-of-force case brought by a pretrial detainee. *Kingsley*'s majority opinion emphasized the difference between Eighth Amendment and Fourteenth Amendment claims by incarcerated plaintiffs, explaining: "The language of the two Clauses differs, and the nature of the claims often differs." *Id*. at 400. "[M]ost importantly," the Court stated, where the Eighth Amendment forbids only "cruel and unusual punishments," "pretrial detainees (unlike convicted prisoners) cannot be punished at all." *Id.*

Kingsley's context was a claim for excessive force. The opinion acknowledged that an Eighth Amendment excessive force plaintiff "must prove that the use of force was not 'applied in a good-faith effort to maintain or restore discipline' but, rather, was applied 'maliciously and sadistically to cause harm.'" *Id.*, citing *Whitley v Albers*, 475 US 312, 320-321 (1986). Nonetheless, *Kingsley* held, for an analogous case brought by a pretrial detainee, "a pretrial detainee must show only that the force purposely or knowingly used against him was objectively unreasonable." *Kingsley*, 576 US at 396-397. The *Kingsley* Court's reasoning did not hinge, in any

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operative under the Fifth Amendment; it did not say the Eighth Amendment applied directly.

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way, on the excessive force context. Indeed, its reasoning applies even more directly to non-force conditions-of-confinement claims.

The Court explained that pretrial detainees, not convicted of any crime, are for that reason constitutionally entitled not to be punished. It follows that the key question in a conditions-of-confinement case is whether those conditions "amount[] to punishment." *Kingsley*, 576 US at 397, quoting *Graham v Connor*, 490 US 386, 395 n 10 (1989). *Kingsley* elaborated, leaning heavily on *Bell v Wolfish*, 441 US 520 (1979), a non-force pretrial conditions of confinement case:

> [I]n *Bell*, we explained that such "punishment" can consist of actions taken with an "expressed intent to punish." But the *Bell* Court went on to explain that, in the absence of an expressed intent to punish, a pretrial detainee can nevertheless prevail by showing that the actions are not "rationally related to a legitimate nonpunitive governmental purpose" or that the actions "appear excessive in relation to that purpose." [*Kingsley*, 576 US at 398 (citations omitted).]

Accordingly, "a pretrial detainee can prevail by providing only objective evidence that the challenged governmental action is not rationally related to a legitimate [that is, non-punitive] governmental objective or that it is excessive in relation to that purpose." *Id.* Unreasonable force, the Court held, is—because unreasonable—"excessive in relation to" its (purportedly non-punitive) purpose.

The same analysis leads inexorably to the same liability standard in pretrial detention cases: where an official undertakes an intentional course of conduct (whether by act or omission) that creates unreasonably unsafe pretrial conditions of confinement, those conditions are "excessive in relation to" any non-punitive purpose, and therefore "amount[] to punishment" in violation of the Fourteenth Amendment's Due Process Clause.

Although the Supreme Court did not expressly state that its objective standard applies in non-force conditions cases, that conclusion is implicit not only as a matter of logic but because the *Kingsley* Court relied on *Bell v Wolfish*—a non-force conditions-of-confinement case brought by

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pretrial detainees. The *Kingsley* Court stated, with approval, "The *Bell* Court applied [an] objective standard to evaluate a variety of . . . conditions, including . . . double bunking. In doing so, it did not consider the . . . officials' subjective beliefs about the policy." *Kingsley*, 576 US at 398, citing *Bell*, 441 US at 541-543.

Indeed, it would be bizarre if the liability standard for pretrial detention was *lower* for excessive force allegations than for unconstitutional conditions allegations. The Court explained in *Whitley v Albers*, 475 US 312 (1986), that a *higher* liability standard was appropriate in force cases than in other conditions cases, because of courts' "appropriate hesitancy to critique in hindsight decisions necessarily made in haste, under pressure, and frequently without the luxury of a second chance," *id.* at 320, and because of prison officials' "competing obligations" to "take into account the very real threats . . . unrest presents to inmates and prison officials alike, in addition to the possible harms to inmates against whom force might be used." *Id.* If excessive force is judged using an objective standard, at least as plaintiff-favorable an approach to conditions cases follows a fortiori.

Application of the *Kingsley* standard in pretrial jail conditions cases is consonant with longstanding law about other forms of detention, as well. For example, in *Youngberg v Romeo*, 457 US 307, 312 (1982), the Supreme Court rejected a deliberate indifference standard for plaintiffs involuntarily confined because of their intellectual disabilities, *id.* n 11; it held that such detainees "are entitled to more considerate treatment and conditions of confinement than criminals whose conditions of confinement are designed to punish." *Id.* at 321-322.

The Second Circuit, the Seventh Circuit, and the Ninth Circuit have overruled prior circuit precedent to adopt, in the wake of *Kingsley*, an objective liability test in cases challenging pretrial detention conditions, with analyses similar to the discussion above. See *Darnell v Pineiro*, 849

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F3d 17, 34-35 (CA 2, 2017); *Bruno v City of Schenectady*, 727 F Appx 717, 720 (CA 2, 2018); *Miranda v Co of Lake*, 900 F3d 335, 350-352 (CA 7, 2018); *Castro v Co of Los Angeles*, 833 F3d 1060, 1069-1070 (CA 9, 2016) (en banc), cert denied 137 S Ct 831 (2017); *Winger v City of Garden Grove*, 690 F Appx 561, 563 (CA 9, 2017); *Gordon v Co of Orange*, 888 F3d 1118, 1120, 1122-1125 (CA 9, 2018), cert denied 139 S Ct 794 (2019).

There is a circuit split: several other federal Courts of Appeals have limited *Kingsley* to its excessive-force setting. But these contrary precedents, unlike the fully briefed and reasoned opinions just cited, addressed the issue only in cursory footnotes. In *Whitney v City of St. Louis*, 887 F3d 857, 860 n 4 (CA 8, 2018), the Eighth Circuit wrote, in total: "*Kingsley* does not control because it was an excessive force case, not a deliberate indifference case." In *Alderson v Concordia Parish Corr Facility*, 848 F3d 415, 419 n 4 (CA 5, 2017), the Fifth Circuit said it was constrained by pre-*Kingsley* circuit law applying the subjective standard. (Moreover, the court noted, the case would be a poor vehicle for en banc consideration of the issue because the pro-se plaintiff would lose under either a subjective or objective standard.) And in *Bryant v Buck*, 793 F Appx 979, 983 n 3 (CA 11, 2019), the Eleventh Circuit held that post-*Kingsley* circuit law had already endorsed a subjective standard—citing *Dang v Seminole Co*, 871 F3d 1272, 1279 n 2 (CA 11, 2017), which had, in fact, declined to reach the issue.

The issue is unresolved in Michigan's federal courts. The Sixth Circuit has noted that *Kingsley* "calls into serious doubt" the application of a subjective test to pretrial detainees. *Richmond v Huq*, 885 F3d 928, 938 n 3 (CA 6, 2018); see also *Martin v Warren Co*, 799 F Appx 329, 338 n 4 (CA 6, 2020) ("Whether an objective standard applies to pretrial detainee claims of deliberate indifference and what the standard entails are open questions."); *Cameron v Bouchard*, No. 20-1469, ___ F Appx ___, 2020 WL 3867393, at *5 (CA 6, July 9, 2020) ("We need not

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resolve the issue today . . . .").[4] Michigan's federal district courts are also split. See, e.g., *Malam v Adducci*, No. 20-cv-10829, 2020 WL 3512850, at *13-*17 (ED Mich, June 28, 2020) (justifying objective test for due process COVID-19 conditions claim by federal immigration detainees); *Waddell v Lloyd*, No. 16-cv-14078, 2019 WL 1354253, at *4 (ED Mich, March 26, 2019) (applying subjective test, because the Sixth Circuit has not yet revisited the issue), aff'd sub nom *Waddell v Zak*, 790 F Appx 789, 790 (CA 6, 2020) ("Waddell does assert that the district court should have applied a different substantive standard than the one it did apply. But Waddell neither made that argument below nor developed it on appeal. And in any event the difference between the two standards is immaterial on the record here.").

Under *Kingsley*, the circuit court erred in holding that federal due process claims of pretrial detainees are governed by the Eighth Amendment's subjective deliberate indifference standard. Rather, the constitutional due-process-clause command to avoid punishment of pretrial detainees requires liability to attach when state or local officials undertake intentional actions (or inactions) that create unreasonably unsafe conditions of confinement. Under the correct legal standard, pretrial plaintiffs are highly likely to succeed on the merits of their claim.

II. THE CIRCUIT COURT MISAPPLIED STATE CONSTITUTIONAL LAW.

The circuit court also erred significantly in its resolution of plaintiffs' analogous state law claims. The court held that because "there is little Michigan case law on the subject," it would look

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[4] The Sixth Circuit has applied a subjective test in several post-*Kingsley* cases, mostly unreported, but in each case has done so without even referencing *Kingsley* and seemingly unaware of its significance. See, e.g., *Richko v Wayne Co, Mich*, 819 F3d 907, 915 (CA 6, 2016) ("The analysis set forth in *Farmer*, although rooted in the Eighth Amendment, applies with equal force to a pretrial detainee's Fourteenth Amendment claims."); *Korthals v Co of Huron*, 797 F Appx 967 (CA 6, 2020) (noting that the plaintiff "properly recited the [deliberate indifference] test as requiring the plaintiff to show both an objective substantial risk of serious harm ... [and] that the prison official subjectively knew of and deliberately disregarded that risk") (citations omitted).

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to federal case law for "guidance." Op & Order, p 10. This Court should indeed adopt the federal due process test set out above—an objective test—as the correct interpretation of the Michigan Constitution's Due Process Clause, both because Const 1963, art 1, § 17 is generally coextensive with federal law, and because the standard is consonant with Michigan's own due process precedents. With respect to the "cruel or unusual punishment" claim by post-conviction plaintiffs under Const 1963, art 1, § 16, the Michigan Constitution provides broader protections than (under current doctrine) the United States Constitution's Eighth Amendment.

A. The Correct Test for Unconstitutional Conditions of Pretrial Confinement Under Const 1963, Art 1, § 17 Is an Objective Test.

This Court has suggested that Const 1963, art 1, § 17 is generally to be interpreted coextensively with its federal analogue, see, e.g., *People v Sierb*, 456 Mich 519, 523; 581 NW2d 219 (1998), although it has also noted that § 17 may "afford protections greater than or distinct from those offered by US Const, Am XIV, § 1." *AFT Michigan v State of Michigan*, 497 Mich 197, 245; 866 NW2d 782 (2015), citing *Delta Charter Twp v Dinolfo*, 419 Mich 253, 276 n 7; 351 NW2d 831 (1984). Whether arrived at by reference to the federal analogue and caselaw, or independently, the correct interpretation of the Michigan Constitution's Due Process Clause is that it forbids intentional conduct (whether by act or omission) by state or local officials that creates unreasonably unsafe conditions of confinement.

The federal precedents are addressed above. See *supra* Part I.B. Under Michigan's due process caselaw, the outcome is the same. Due process forbids imposition of punishment on pretrial detainees, who have not been convicted of any crime. Thus, Const 1963, art 1, § 17 is the source of law for a pretrial conditions-of-confinement case. See, e.g., *In re Boynton*, 302 Mich App 632; 840 NW2d 762 (2013) (Const 1963, art 1, § 16 has no application to a pretrial detainee). And this Court has explained that punishment can occur either as a matter of official intent or

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effect. *People v Earl*, 495 Mich 33, 43-44; 845 NW2d 721 (2014) (application of Michigan's Ex Post Facto Clause, Const 1963, art 1, § 10). Where state conduct "functions as a criminal punishment in application," it counts as punishment, constitutionally. *Id.* at 38.

The Court in *Earl* quoted the U.S. Supreme Court case, *Kennedy v Mendoza-Martinez*, 372 US 144, 168-169 (1963), for factors that suggest a nominally civil sanction might be, effectively, punishment:

> [1] Whether the sanction involves an affirmative disability or restraint, [2] whether it has historically been regarded as a punishment, [3] whether it comes into play only on a finding of scienter, [4] whether its operation will promote the traditional aims of punishment—retribution and deterrence, [5] whether the behavior to which it applies is already a crime, [6] whether an alternative purpose to which it may rationally be connected is assignable for it, and [7] whether it appears excessive in relation to the alternative purpose assigned. [*Earl*, 495 Mich at 44 (alterations in original).]

Most pertinent here are the sixth and seventh factors, which examine whether official action is excessive in relation to its non-punitive purpose. (It is instructive if not dispositive that other states' courts often give "greatest weight" to this "excessiveness" question. See, e.g., *Wallace v State*, 905 NE2d 371, 383 (Ind, 2009), and sources cited.) As the United States Supreme Court has held in construing what punishment is for purposes of the federal Ex Post Facto Clause, although the government need not have made "the best choice to address the problem," "the regulatory means chosen [must be] reasonable in light of the nonpunitive objective." *Smith v Doe*, 538 US 83, 105 (2003).

The appropriate test in this context is no different. The Michigan Due Process Clause test for inhumane conditions of confinement attaches liability when the regulatory means chosen is, as outlined above, unreasonable. That is, the Const 1963, art 1, § 17 test here is whether intentional conduct by jail officials is creating unreasonably unsafe conditions of confinement.

Michigan's more general due process law is entirely consonant with that approach. This

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Court has stated that the term "due process" encompasses not only procedural protections, but also contains a "substantive" component that protects individuals against "the arbitrary exercise of governmental power." *Bonner v City of Brighton*, 495 Mich 209, 223-224; 848 NW2d 380 (2014). To prevail on a claim of a violation of "substantive" due process, the plaintiff must prove that the challenged government action is not "reasonably related to a legitimate governmental interest." *Id*. at 227; see also *Shavers v Kelley*, 402 Mich 554, 612; 267 NW2d 72 (1978). Unreasonably unsafe conditions of confinement are precisely that—not reasonably related to a legitimate governmental interest. As with the due process analysis under federal constitutional law, plaintiffs are likely to succeed on the merits of their claims under Const 1963, art 1, § 17.

B. The Correct Test for Cruel or Unusual Punishment Under Const 1963, Art 1, § 16 Is Also an Objective Test.

With respect to plaintiffs' "cruel or unusual punishment" claim under the Michigan Constitution governing post-conviction conditions of confinement,[5] this Court should read Const 1963, art 1, § 16 more broadly than (under current doctrine) the United States Constitution's Eighth Amendment, and should hold that it, too, is governed by the test just offered: liability should attach where state or local officials engage in intentional conduct (whether act or omission) that creates unreasonably unsafe conditions of confinement. See *People v Bullock*, 440 Mich 15; 485 NW2d 866 (1992) (concluding in a case about proportionality of punishment that the Michigan Constitution's ban on "cruel or unusual punishment" provides greater protection than its federal counterpart's ban on "cruel and unusual punishments"); *Carlton v Dep't of Corrs*, 215 Mich App 490, 505; 546 NW2d 671 (1996) ("In an appropriate case, the Michigan Constitution's prohibition

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[5] Michigan courts have entertained conditions-of-confinement claims under Const 1963, art 1, § 16. See, e.g., *Carlton v Dep't of Corrs*, 215 Mich App 490; 546 NW2d 671 (1996); *Rusha v Dep't of Corrections*, 307 Mich App 300; 859 NW2d 735 (2014).

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against 'cruel or unusual' punishment may be interpreted more broadly than the Eighth Amendment's prohibition against 'cruel and unusual' punishment.").

Recall, the U.S. Supreme Court has held that the test for Eighth Amendment liability whether the government defendants acted with subjective "deliberate indifference." *Farmer v Brennan*, 511 US 825 (1994). Since *Wilson v Seiter*, 501 US 294 (1991), United States Supreme Court cases have emphasized that the doctrinal justification for this test is the Eighth Amendment reference to "punishment," because only when a state actor acts with subjectively culpable intent is that actor inflicting "punishment." See *supra* Part I.A. But this understanding of "punishment" as requiring a subjective assessment of the punishment's perpetrator is inconsistent with *Kingsley*. And it has been aptly criticized from its first appearance in federal jurisprudence. As Justice Stevens wrote, dissenting in the Eighth Amendment case *Estelle v Gamble*, 429 US 97, 116-117 (1976):

> [W]hether the constitutional standard has been violated should turn on the character of the punishment, rather than the motivation of the individual who inflicted it. Whether the conditions in Andersonville were the product of design, negligence, or mere poverty, they were cruel and inhuman.[6]

Only the U.S. Supreme Court can alter its own clear holding. *Rodriguez de Quijas v Shearson/Am Exp, Inc*, 490 US 477, 484 (1989).[7] By contrast, this Court faces no such constraint

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[6] The Confederate prisoner of war camp known as Andersonville housed 45,000 Union soldiers; about a third of them died, mostly of malnutrition. See Cloyd, *Haunted by Atrocity: Civil War Prisons in American Memory* (2010).

[7] For an argument that the logic of Eighth Amendment conditions-of-confinement jurisprudence is fatally undermined by *Kingsley* and that the U.S. Supreme Court should revisit the unduly high bar to liability it has imposed, see Schlanger, *The Constitutional Law of Incarceration, Reconfigured*, 103 Cornell L Rev 357 (2018); Schlanger, *Restoring Objectivity to the Constitutional Law of Incarceration* (September 2018) <https://www.acslaw.org/wp-content/uploads/2018/09/Schlanger-Sept-2018-IB-Restoring-Objectivity.pdf>. But only the U.S. Supreme Court can make the justified federal doctrinal adjustments, and it has not yet been confronted with an appropriate case to consider them.

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with respect to state law. See *People v Bullock*, 440 Mich 15, 27-28; 485 NW2d 866 (1992) ("In the case of a divided United States Supreme Court decision, we may in some cases find more persuasive, and choose to rely upon, the reasoning of the dissenting justices of that Court, and not the majority, for purposes of interpreting our own Michigan Constitution."). And under this Court's clear state law doctrine, the *Wilson* Court's understanding of "punishment" is incorrect. Under Michigan's constitutional law, punishment can occur when an individual is sentenced for criminal misconduct or when the government imposes restrictions that have the *effect* of punishment, even without intent. See *Earl*, 495 Mich at 43-44. Such state conduct "functions as a criminal punishment in application," *id.* at 38, and is therefore subject to constitutional constraints on imposition of punishment.

In other words, unlike the U.S. Supreme Court in *Wilson v Seiter* and *Farmer v Brennan* (though consistent with the U.S. Supreme Court in *Kingsley*), this Court has held that official conduct may constitute punishment, subject to all the constitutional constraints that apply to punishment, even without punitive (or deliberately indifferent) intent. The import of this inconsistency between *Wilson*/*Farmer* and Michigan state constitutional law is that the U.S. Supreme Court's Cruel and Unusual Punishments jurisprudence, including its deliberate indifference test, is incompatible with existing Michigan constitutional doctrine. Postconviction prisoners are certainly being punished when they are confined to a jail or prison pursuant to a criminal sentence. When they experience "cruel or unusual" conditions there, that violates Const 1963, art 1, § 16, and provides the basis for relief.

This Court need not for this case decide comprehensively what "cruel or unusual" means in this context. But at the very least, the correct answer includes a holding that intentional conduct that creates unreasonably unsafe jail or prison conditions is "cruel or unusual," in violation of

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Const 1963, art 1, § 16. Again, quoting Justice Stevens in his *Estelle* dissent:[8]

> Of course, not every instance of improper health care violates the Eighth Amendment. Like the rest of us, prisoners must take the risk that a competent, diligent physician will make an error. Such an error may give rise to a tort claim but not necessarily to a constitutional claim." [*Estelle*, 429 US at 116 n 13 (Stevens, J., dissenting).]

But an intentionally created system that is unreasonably unsafe is a different—and unconstitutional—story:

> If a State elects to impose imprisonment as a punishment for crime, . . . it has an obligation to provide the persons in its custody with a health care system which meets minimal standards of adequacy. As a part of that basic obligation, the State and its agents have an affirmative duty to provide reasonable access to medical care, to provide competent, diligent medical personnel, and to ensure that prescribed care is in fact delivered. For denial of medical care is surely not part of the punishment which civilized nations may impose for crime. [*Id.*]

In sum, if government officials' intentional conduct creates systemic serious harm or systemic risk of serious harm to prisoners incarcerated as punishment for crimes, such conditions of confinement are "cruel or unusual" and violate Michigan's Constitution. Under this test, again, plaintiffs have a high likelihood of success on the merits of their claim under Const 1963, art 1, § 16.

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[8] See *Bullock*, 440 Mich at 27-28 (relying on the reasoning of a United States Supreme Court dissent in an Eighth Amendment case for purposes of interpreting the Cruel or Unusual Punishment Clause of the Michigan Constitution).

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CONCLUSION

Plaintiffs' bypass application should be granted and the order of the circuit court should be reversed.

Respectfully submitted,

/s/ Margo Schlanger

Margo Schlanger (P82345)
Cooperating Attorney, American Civil Liberties Union Fund of Michigan
625 S. State St.
Ann Arbor, MI 48109
(202) 277-2506
margo.schlanger@gmail.com

/s/ Daniel S. Korobkin

Daniel S. Korobkin (P72842)
American Civil Liberties Union Fund of Michigan
2966 Woodward Ave.
Detroit, MI 48201
(313) 578-6824
dkorobkin@aclumich.org

Attorneys for Amici Curiae

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