No. 21-783

IN THE

Supreme Court of the United States

PATSY K. COPE, ET AL.,

Petitioners,

v.

LESLIE W. COGDILL, ET AL.,

Respondents.

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

BRIEF OF DISABILITY RIGHTS TEXAS, DISABILITY RIGHTS LOUISIANA, DISABILITY RIGHTS MISSISSIPPI, THE NATIONAL ALLIANCE ON MENTAL ILLNESS OF TEXAS, THE NATIONAL ASSOCIATION OF RIGHTS PROTECTION AND ADVOCACY, PROSUMERS INTERNATIONAL, AND MENTAL HEALTH AMERICA OF GREATER DALLAS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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INTERESTS OF *AMICI CURIAE*[1]

Disability Rights Texas, Disability Rights Louisiana, and **Disability Rights Mississippi** are the federally mandated protection and advocacy agencies for the states of Texas, Louisiana, and Mississippi, respectively, established pursuant to the Developmental Disabilities Assistance and Bill of Rights Act of 2000, 42 U.S.C. §§ 15041 *et seq.*; the Protection and Advocacy for Mentally Ill Individuals Act, 42 U.S.C. §§ 10801 *et seq.*; and the Protection and Advocacy for Individual Rights Act, 29 U.S.C. § 794e. Their collective mission is to protect the rights of and advocate for people with disabilities, to ensure their full and equal participation in society. This includes advocacy on behalf of individuals with disabilities held in county jails, including individuals with mental illness who are at higher risk of dying by suicide.

The National Alliance on Mental Illness of Texas (NAMI Texas) is a 501(c)(3) nonprofit organization founded by volunteers in 1984. NAMI Texas is affiliated with the National Alliance on Mental Illness (NAMI) and has 25 local affiliates throughout Texas. NAMI Texas has nearly 2,000 members made up of individuals living with mental illness, family members, friends, and professionals. Its purpose is to help improve the lives of people affected by mental

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[1] *Amici* timely notified the parties of their intent to file this brief and this brief is filed with the consent of both Petitioners and Respondents. Pursuant to Supreme Court Rule 37.6, *amici* state that no counsel for either party authored this brief in whole or in part, and that no person or entity, other than *amici* or their counsel, contributed monetarily to the preparation of this brief. Pursuant to Supreme Court Rule 29.6, none of the *amici* have parent corporations or stock.

illness through education, support, and advocacy. NAMI Texas is dedicated to improving the quality of life of all individuals living with mental illness and their families, including those who are involved with the criminal justice system. NAMI Texas is interested in this matter because of the implications that the Court's decision will have on the health and safety of justice-involved individuals living with mental illness.

The National Association of Rights Protection and Advocacy (NARPA) was formed in 1981 to provide support and education for advocates working in the mental health arena. It monitors developing trends in mental health law and identifies systemic issues and alternative strategies in mental health service delivery on a national scale. Members are attorneys, people with psychiatric histories, mental health professionals and administrators, academics, and non-legal advocates—with many people in roles that overlap. Central to NARPA's mission is the promotion of those policies and strategies that represent the preferred options of people who have been diagnosed with mental disabilities. Approximately 40% of NARPA's members are current or former patients of the mental health system. NARPA members were key advocates for the passage of Federal legislation such as the Americans with Disabilities Act (ADA) (42 U.S.C. §§ 12101 *et seq.*), the ADA Amendments Act of 2008 (ADAAA) (Pub. L. 110-325), and the Protection and Advocacy for Individuals with Mental Illness (PAIMI) Act of 1986 (42 U.S.C. §§ 10801-51).

Prosumers International (Prosumers) is a nonprofit organization whose mission is to empower all people

to transcend adverse life experiences and to inspire resiliency for all people to thrive while fulfilling their dreams. Prosumers is governed by, run by, and services provided by people with lived experience of mental health issues. As such, one of the ways Prosumers fulfills its mission is to ensure that the rights of people dealing with mental health concerns are protected and honored. Prosumers is interested in this matter because one of those rights is access to care and appropriate treatment in a time of crisis. People in the custody of law enforcement have a reasonable expectation of safety and adequate care; unfortunately too many people living with mental health concerns lose their lives when dealing with law enforcement and the carceral system. People with lived experience are forced to interact with law enforcement and the carceral system as these have become de facto mental health providers in Texas. Until such time as this is corrected, people expressing mental health distress must receive appropriate treatment and care while in the custody of the carceral system as soon as it is evident or suspected that they require this care.

Mental Health America of Greater Dallas' (MHA-Dallas) work is driven by its commitment to promote mental health as a critical part of overall wellness, including prevention services for all; early identification and intervention for those at risk; integrated care, services, and supports for those who need them; with recovery as the goal. MHA-Dallas supports effective, accessible mental health treatment for all people who need it who are confined in adult or juvenile correctional facilities or under correctional control. People with mental health and

substance use conditions also need an effective classification system to protect vulnerable prisoners and preserve their human rights. Notwithstanding their loss of their liberty, prisoners with mental health and substance use conditions retain all other rights, and these must be zealously defended. MHA-Dallas is interested in this matter because we believe everyone with a mental illness should receive adequate and humane mental health services while incarcerated.

SUMMARY OF THE ARGUMENT

It is beyond dispute that Respondents Brixey and Cogdill had subjective knowledge of Mr. Monroe's substantial risk of suicide. Pet. App. at 19a, 47a-48a. Upon intake, Mr. Monroe disclosed a suicide attempt shortly before his arrest which was relayed immediately to both Respondents. *Id.* at 24a. After Mr. Monroe attempted suicide twice in the jail, both Respondents were informed of the attempts, which prompted Cogdill to change Mr. Monroe's housing from a general population cell with cellmates to the single-cell with the thirty-inch telephone cord. *Id.* at 25a. Brixey ratified this decision. *Id.*

Counsel for Petitioners have ably set forth the legal arguments why this Court should determine Respondents Brixey and Cogdill responded with deliberate indifference towards Mr. Monroe. *Amici* write to expound upon the well-known and well-documented trend of county jails becoming de facto mental health institutions and the frequent occurrence of jail deaths by suicide using jail-provided ligatures. Where jail staff in Texas might once have

been able to claim ignorance regarding jail-provided ligatures left in cells housing inmates known to be suicidal, thus excusing their actions under the deliberate indifference standard, that time has long-passed. The only way for a Texas jailor to be ignorant of the risks posed by jail-provided ligatures is if that jailor willfully chooses to be blind. The Fifth Circuit's requirement of an identical ligature case to satisfy deliberate indifference under a subjective standard only encourages this willful blindness on the part of jailors, placing suicidal jail inmates at risk of serious future harm. This Court should reject this identical-case standard.

ARGUMENT

I. Given the Increased Prevalence of Mental Illness Among Inmates and the Well-Documented Risks of Suicide Using Jail-Provided Ligatures, Texas Jails Must Have Ligature-Free Spaces for Inmates Known to be Suicidal.

a. Jails are confining more people with mental illness than they did forty years ago.

In order to understand how absurd the Fifth Circuit's insistence on identical ligatures is before officers are determined to be deliberately indifferent to an inmate identified as suicidal, it is necessary to understand the prevalence of mental illness in the jail inmate population and the well-known risks of jail suicides. While suicide has been the leading cause of inmate

death for at least the last two decades,[2] it has become an epidemic in local jails, fed by a jailhouse population boom and a burgeoning population of inmates with mental illness. In the last four decades, the overall jail population has tripled, with the largest increase among pre-trial detainees.[3] In fact, when only pretrial detainees are considered, jail population has almost quadrupled.[4] Put more concretely, in 2013, over 434,000 people were awaiting trial in local jails, compared to just under 113,000 in 1983.[5] Throughout this time, death by suicide has consistently accounted for approximately thirty percent of all jail deaths.[6]

The exponential jail inmate growth alone would be cause for increased concern about jail suicides; however, the inmate population with mental illness has grown disproportionately. In 1983, 6.4 percent of inmates were estimated to have serious mental illness;[7] however, by 2010, that percentage had almost tripled to more than 16 percent.[8] Some studies

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[2] E. ANN CARSON, UNITED STATES DEPARTMENT OF JUSTICE, MORTALITY IN LOCAL JAILS, 2000-2018-STATISTICAL TABLES, 6 (2021), *available at* https://bjs.ojp.gov/content/pub/pdf/mlj0018st.pdf.

[3] JOSHUA AIKEN, PRISON POLICY INITIATIVE, ERA OF MASS EXPANSION: WHY STATE OFFICIALS SHOULD FIGHT JAIL GROWTH, Figure 1 (2017), *available at* https://www.prisonpolicy.org/reports/jailsovertime.html.

[4] *Id.*

[5] *Id.*

[6] E. ANN CARSON, *supra* note 2, at 6.

[7] For purposes of this brief, "serious mental illness" means diagnoses of schizophrenia, schizoaffective disorder, bipolar disorder, and major depressive disorder.

[8] E. FULLER TORREY, ET AL., TREATMENT ADVOCACY CENTER, MORE MENTALLY ILL PERSONS ARE IN JAILS AND PRISONS THAN HOSPITALS: A SURVEY OF THE STATES, 1 (2010), *available at*

place the percentage even higher, with more than forty percent of jail inmates reporting an overnight mental health hospital stay and over sixty percent reporting taking prescription medication for mental health concerns at some point during their lives.[9] Thus, not only are jails incarcerating more people generally, they are specifically incarcerating more people with mental illness.

And, frankly, jails are well-aware of this. Thomas J. Dart, Sheriff of Cook County, wrote in an open letter to sheriffs and jail directors in 2016, "[a]s we know all too well, jails and prisons now serve as the largest mental health providers in 44 out of the 50 states."[10] The Sheriff was quick to note that while articles about the growing population of persons with mental illness in jails focus on large jails like his, "studies have

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https://www.treatmentadvocacycenter.org/storage/documents/final_jails_v_hospitals_study.pdf; *see also* Henry J. Steadman, et al., *Prevalence of Serious Mental Illness Among Jail Inmates,* 60 PSYCHIATRIC SERV. 761, 764 (2009) *available at* https://tinyurl.com/ymn6d7ad (Finding 14.5% of males and 31% of females booked had serious mental illness.).

[9] JENNIFER BRONSON AND MARCUS BERZOFSKY, U.S. DEPARTMENT OF JUSTICE, SPECIAL REPORT: INDICATORS OF MENTAL HEALTH PROBLEMS REPORTED BY PRISONERS AND JAIL INMATES, 2011-2012, 8 (2017), *available at* https://bjs.ojp.gov/content/pub/pdf/imhprpji1112.pdf.

[10] THOMAS J. DART, A MENTAL HEALTH TEMPLATE FOR AMERICAN JAILS: SAVING LIVES AND MONEY THROUGH COMMONSENSE REFORM, 1 (July 2016), *available at* https://www.cookcountysheriff.org/wp-content/uploads/2017/10/Mental HealthTemplate_072116.pdf; *see also* ALISA ROTH, INSANE: AMERICA'S CRIMINAL TREATMENT OF MENTAL ILLNESS 1-2 (Basic Books 2018) ("Across the country, correctional facilities are struggling with the reality that they have become the nation's de facto mental health care providers… this situation is readily apparent in almost every correctional facility in the country.").

shown that individuals with mental illness are responsible for the explosive incarceration rates occurring in smaller counties and jails. Every one of us is on the front lines of this crisis."[11] In September 2018, the Police Executive Research Forum conducted a survey and published a report that identified "managing mental illness" in the jails as the "most complex challenge" reported by sheriffs themselves.[12] The report went on to affirm, "county jails have become the *de facto* mental health care system for large numbers of individuals in many communities" and cited Los Angeles and Cook County jails as holding more individuals with mental illness than any individual psychiatric hospital in the United States.[13] The same report noted that this increased population of inmates with mental illness meant increased risks of self-harm and deaths by suicide.[14] While not all inmate deaths by suicide occur among inmates with serious mental illness, these inmates are over-represented in the data.[15]

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[11] DART, *supra* note 10, at 1.

[12] POLICE EXECUTIVE RESEARCH FORUM, MANAGING MENTAL ILLNESS IN JAILS: SHERIFFS ARE FINDING PROMISING NEW APPROACHES, 1 (2018), *available at* https://www.policeforum.org/assets/mentalillnessinjails.pdf.

[13] *Id.* at 5-6.

[14] *Id.* at 6.

[15] CHRISTINE TARTARO AND DAVID LESTER, SUICIDE AND SELF-HARM IN PRISONS AND JAILS 23 (Lexington Books 2009); *see also* J. Richard Goss, et al., *Characteristics of Suicide Attempts in a Large Urban Jail System with an Established Suicide Prevention Program*, 53 PSYCHIATRIC. SERV. 574 (May 2002), *available at* https://tinyurl.com/4wc5pfne ("The prevalence of mental illness among inmates who attempted suicide was 77 percent, compared with 15 percent in the general jail population.").

A survey of state prison systems and members of the National Institute of Corrections Large Jail Network found that suicide is the seventh-most common reason jails and prisons are sued, with 36 of 50 responding facilities having been sued in the three years before the survey.[16] Nor are small jails excused—consistent with earlier years, inmates were more likely to die in a "small" jail, defined as a jail with an average daily population less than fifty detainees/inmates, than in a larger jail.[17] Small jail size is specifically correlated with higher rates of deaths by suicide.[18]

Unfortunately, Texas is no exception to these trends. In 2000, the number of jail inmates held on an average day was 57,999 inmates.[19] In 2018, that number had grown to 68,445, almost a twenty percent increase.[20] Moreover, Texas, like other states, is confining more pretrial detainees with mental illness.[21] In 2016, a doctor at a state-run mental

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[16] TARTARO AND LESTER, *supra* note 15, at 157, citing Margo Schlanger, *Inmate Litigation: Results of a National Survey*, LJN EXCHANGE 1-12, (2003), *available at* https://www.law.umich.edu/facultyhome/margoschlanger/documents/publications/inmate_litigation_results_national_survey.pdf.

[17] E. ANN CARSON, *supra* note 2, at 2.

[18] TARTARO AND LESTER, *supra* note 15, at 37.

[19] E. ANN CARSON, *supra* note 2, at 19.

[20] *Id.* Only seven states had lower average censuses in 2018 than in 2000; the other states in the Fifth Circuit saw an even greater increase with Louisiana averages increasing from 22,744 inmates in 2000 to 29,781 in 2018 (31% increase) and Mississippi increasing from 9,885 inmates to 12,975 (also 31%) over the same time period. *Id.*

[21] A significant portion of inmates with mental illness in Texas jails are in severe enough condition that they have been found incompetent to stand trial, resulting in their remaining confined

health facility to which detainees found incompetent to stand trial are sent wrote an article in the Texas Medical Association journal concerning increased incidence of mental illness in jails. That article summarized a survey that had been sent to jails across the state including the fact that "most thought that mental illness was increasing" in their jails.[22] The article also stated that "[j]ails and prisons in the United States have become the places where people with mental illness go."[23] The Texas Association of Counties[24] is equally blunt, asserting, "[t]he county jail system is the largest mental health system in the

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in local jails awaiting a bed at a state mental health facility for competency restoration. These individuals are placed on waiting lists which have grown from approximately two hundred people fifteen years ago to over eighteen hundred (and counting) today, a nine-fold increase. JOSH HINKLE AND DAVID BARER, KXAN INVESTIGATES AND THE USC ANNENBERG CENTER FOR HEALTH JOURNALISM, MENTAL COMPETENCY CONSEQUENCES: THE HIDDEN AND UNRELIABLE DATA TEXAS TRACKS…OR DOESN'T (Nov. 2021), *available at* https://media.psg.nexstardigital.net/kxan/story/mental_competency_consequences/index.html.

In 2021, the average wait time for a non-maximum security bed for individuals with misdemeanors and non-violent felonies at a mental health facility was 204 days; the wait for a bed at a maximum-security facility was 510 days. *Id.* That's 204 and 510 days that a person with mental illness severe enough that they are found incompetent to stand trial sits in a local county jail, often times deteriorating further.

[22] Emilie Attwell Becker, *Mental Health Services in Texas Jails*, TEXAS MEDICINE (November 2016), *available at* https://www.texmed.org/Nov16Journal/.

[23] *Id.*

[24] In 1969, Texas counties established the Texas Association of Counties to represent the concerns of all Texas counties to state officials and the general public. About the Texas Association of Counties (TAC), https://www.county.org/About-TAC (last visited December 20, 2021).

State of Texas."[25] Harris County Jail, serving the metropolitan Houston area, is a perfect example—it is known to be the largest mental health facility in Texas, treating more persons with mental illness than the state mental health facilities combined.[26]

b. Suicide by use of jail-provided ligatures is a well-known occurrence, constitutes the majority of deaths by suicide in jails, and is preventable.

Texas sheriffs are particularly aware of this change in the inmate population and the suicide risks that accompany them. In 2015, Sandra Bland died by suicide in the Waller County Jail using a ligature made from a trash bag placed in her cell. Ms. Bland's widely-publicized death resulted in calls for reform in how Texas jails responded to persons with mental illness and threats of suicide. In response, the Texas Legislature passed Senate Bill 1849, the Sandra Bland Act, in 2017. The Act called for reforms to mental health care in Texas jails, including requiring all county jails have access to tele-mental health, mandating mental health training for jailors, and requiring electronic sensors for cell checks.[27] Just a

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[25] Texas Association of Counties, Legislative Issues: Behavioral Health, https://www.county.org/Legislative/County-Legislative-Issues/Behavioral-Health (last visited December 20, 2021).

[26] Renuka Rayasam, *Houston's Biggest Jail Wants to Shed Its Reputation as a Mental Health Treatment Center*, POLITICO (July 9, 2018), *available at* https://www.politico.com/story/2018/07/09/houstons-biggest-jail-wants-to-shed-its-reputation-as-a-mental-health-treatment-center-650264.

[27] TEXAS COMMISSION ON JAIL STANDARDS, 2017 ANNUAL REPORT 17-18 (February 1, 2018), *available at* https://www.tcjs.

few months before Mr. Monroe's death, the Texas Commission on Jail Standards issued a memo about the Sandra Bland Act to all Texas Sheriffs regarding these changes.[28]

While not all of these reforms were in place by the time Mr. Monroe died, Ms. Bland's death in 2015 by hanging using a jail-provided, non-bedding ligature left in her cell; her family's $1.9 million dollar settlement in 2016 with Waller County; and the resulting law changes were well-publicized and well-known before Mr. Monroe died.[29] Indeed, in the weeks before Mr. Monroe died, Coleman County Jail staff responded to a survey conducted by The Meadows

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state.tx.us/wp-content/uploads/2019/08/2017Annual JailReport.pdf.

[28] TEXAS COMMISSION ON JAIL STANDARDS, TECHNICAL ASSISTANCE MEMO SB 1849 SANDRA BLAND ACT (July 24, 2017), *available at* https://www.tcjs.state.tx.us/wp-content/uploads/2019/08/TA-Memo-SB1849-SandraBlandAct-1.pdf.

[29] Searches of national newspapers reveal that over thirty articles were published regarding Sandra Bland's death by suicide in The New York Times as well as The Washington Post. Fox News likewise had at least forty. The local NBC affiliate for Coleman County, Texas had at least seven. *See e.g.* Wes Rapaport, *State Prepares for Sandra Bland Act to Take Effect*, KTAB/KBAC (August 22, 2017), *available at* https://www.bigcountryhomepage.com/news/state-regional/state-prepares-for-sandra-bland-act-to-take-effect/; Johnathan Silver, *Sandra Bland's Family Settles Wrongful Death Lawsuit*, KTAB/KBAC (September 15, 2016), *available at* https://www.bigcountryhomepage.com/news/sandra-blands-family-settles-wrongful-death-lawsuit/; Abby Ohlheiser and Sarah Larimer*, Rangers Investigating Death of Woman in Police Custody*, KTAB/KBAC (July 17, 2015), *available at* https://www.bigcountryhomepage.com/news/rangers-investigating-death-of-woman-in-police-custody/.

Foundation at the behest of the Texas Commission on Jail Standards specifically conducted to determine county jail readiness to implement the changes in the Sandra Bland Act.[30] It thus strains credulity to suggest that any county jail in Texas, including Coleman County Jail, would be unaware of the death of Ms. Bland, how she died, or the risks inherent in jail-provided ligatures left in cells with inmates known to be suicidal.

Nationally, as in Ms. Bland's death, hanging is the most common method used by jail inmates who die by suicide.[31] The implications for this are numerous, beginning with the fact that hanging is one of the most lethal methods of suicide, with unconsciousness and death coming quickly.[32] Further, studies have determined that the means used in a suicide matter, such that most individuals who choose a particular means (handgun, poisoning, etc.) will not make an attempt using an alternate means due to a variety of factors including fear of additional pain and suffering caused by non-preferred means.[33]

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[30] THE MEADOWS MENTAL HEALTH POLICY INSTITUTE FOR TEXAS, TEXAS COMMISSION ON JAIL STANDARDS SENATE BILL 1849 SURVEY: SUMMARY OF MAJOR FINDINGS 1, 14 (January 2018), *available at* https://mmhpi.org/wp-content/uploads/2018/07/TCJS-Survey-Results-Appendix-A-and-B.pdf.

[31] TARTARO AND LESTER, *supra* note 15, at 40.

[32] *Id.* at 39, citing G. STONE, SUICIDE AND ATTEMPTED SUICIDE (New York: Carroll and Graf Publishers, 1999).

[33] HARVARD T.H. CHAN SCHOOL OF PUBLIC HEALTH, MEANS MATTER: MEANS REDUCTION SAVES LIVES, *available at* https://www.hsph.harvard.edu/means-matter/means-matter/saves-lives/ (last visited December 20, 2021); TARTARO AND LESTER, *supra* note 15, at 116,121 citing R.V. CLARKE AND

Second, even where an inmate is determined to make another attempt by different means, the jail environment is highly controlled. Indeed, the incidence of deaths by hanging is evidence of this. In the free population, hanging is not the most common means used by those who die by suicide; firearms and drowning/submersion are both more common means than ligatures, with poisoning by gas and jumping from heights close behind.[34] In jails, by contrast, firearms, bodies of water, poisons, and heights are unavailable or tightly controlled, making ligatures the only commonly available method for death by suicide. Controlling for jail property that can be used as ligatures—like bedding, cords, clothing, and trash bags—is thus an easy and effective means to immediately decrease incidents of inmate death by suicide in jails since the remaining commonly available methods in a correctional environment (head banging and choking on toilet paper) are extremely painful and thus disfavored.[35]

The risks posed by ligatures to inmates with suicidal ideation as well as the need to remove these items are well-documented and well-known. Even before the Texas Commission on Jail Standards sent their 2015 and 2017 memos, nationally-recognized corrections expert Lindsay M. Hayes included within his

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D. LESTER, SUICIDE: CLOSING THE EXITS (New York: Springer-Verlag, 1989).

[34] HARVARD T.H. CHAN SCHOOL OF PUBLIC HEALTH, MEANS MATTER: LETHALITY OF SUICIDE METHODS, *available at* https://www.hsph.harvard.edu/means-matter/means-matter/case-fatality/ (last visited December 20, 2021).

[35] TARTARO AND LESTER, *supra* note 15, at 122-23.

"Checklist for the 'Suicide-Resistant' Design of Correctional Facilities," "[w]all-mounted corded telephones should *not* be placed inside cells. Telephone cords of varying lengths have been utilized in hanging attempts."[36] Likewise, the Seventh Circuit in *Cavalieri v. Shepard* listed "a sturdy telephone cord" as an obvious ligature equal to that of bedding as an example of an item jails have removed from spaces housing inmates known to be suicidal. 321 F.3d 616, 621 (7th 2003). Closer to home, a Texas Court of Appeals quoted the testimony of a phone manufacturer that it was *"common knowledge"* in the jail telephone industry that *"a telephone or other object placed in a cell would be a danger to inmates"* in upholding the sufficiency of the evidence in a suit regarding the liability of the phone company that installed a phone in a jail cell. *JCW Electronics v. Garza*, 176 S.W.3d 618, 631 (Tex. App. 2005) (emphasis added), *overruled on other grounds by* 257 S.W.3d 701(Tex. 2008).

Looking again to Texas specifically, death by suicide is one of the leading causes of death of inmates in county jails, responsible for nearly a third of jail deaths annually.[37] In a review of the 140 deaths by suicide reported in Texas county jails between

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[36] LINDSAY M. HAYES, NATIONAL CENTER FOR INSTITUTIONS AND ALTERNATIVES, CHECKLIST FOR THE "SUICIDE-RESISTANT" DESIGN OF CORRECTIONAL FACILITIES, 1 (2011) (emphasis in original), *available at* http://www.ncianet.org/wp-content/uploads/2015/05/Checklist-for-the-"Suicide-Resistant"-Design-of-Correctional-Facilities.pdf.

[37] Terri Langford, et al., *In Texas Jails, Hanging Most Common Method of Inmate Suicide,* THE TEXAS TRIBUNE (July 24, 2015), *available at* https://www.texastribune.org/2015/07/24/hanging-most-common-suicide-method-texas-jails/.

September 1, 2009 and July 1, 2015, 118 (84%) were the result of hanging.[38] Of these 118 deaths, unsurprisingly, bedding/linens were the most common ligature (60% or 71 cases); however, electrical/telephone cords came in a close third (11.9% or 14 cases) behind clothing (13.6% or 16 cases).[39] The Texas Commission on Jail Standards noted over fifteen years ago that the most common materials used in inmate deaths by hanging were available items that were provided by the jail or legitimate inmate property, like clothing.[40] It is thus well-established that inmates commonly use non-bedding items like electrical and telephone cords, clothing, and bags as ligatures in Texas jails. For a Texas jailor to claim that they are unaware of these long-standing facts requires that jailor to have willfully chosen blindness to the risks posed by these items to inmates known to be suicidal.

II. The Failure of a Jail to Have a Space Free of Jail-Provided Ligatures for Known Suicidal Inmates Constitutes Deliberate Indifference.

The Fifth Circuit in the instant case determined that Respondents were entitled to qualified immunity since Mr. Monroe's right to be adequately protected from his suicidal impulses was established *only* if he used a bedsheet, but not if he used any other ligature

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[38] *Id.*

[39] *Id.* Bags like laundry bags and trash bags were the fourth-most commonly used item and accounted for 8 or 6.7% of the 118 deaths by hanging in jails. *Id.*

[40] TEXAS COMMISSION ON JAIL STANDARDS, HOUSE BILL 1660 REPORT TO THE TEXAS LEGISLATURE 6-7 (December 2004), *available at* https://tinyurl.com/58d327fy.

left in his cell. Pet. App. 19a-21a. In so holding, the Fifth Circuit relied almost exclusively on the fact that prior cases finding officers had acted with deliberate indifference to known suicidal inmates concerned deaths using bedding ligatures only. *Id.* Because no identical case could be found, the court determined (wrongly) that these officers could not and should not have subjective knowledge of the risk posed by the jail-provided, thirty-inch ligature imputed to them. *Id.* This holding not only authorizes but *encourages* officials to be willfully blind to obvious risks in order to avoid requiring subjective knowledge, in contravention of this Court's jurisprudence.

Indeed, the Fifth Circuit's overly-narrow articulation of the deliberate indifference inquiry in this case is precisely what this Court instructed lower courts *not* to do in *Farmer v. Brennan*, a case concerning the liability of prison officials who housed a transwoman in a men's prison where she was attacked. 511 U.S. 825 (1994). In articulating the risk to the inmate's rights, this Court specifically noted

> a prison official [may not] escape liability for deliberate indifference by showing that, while he was aware of an obvious, substantial risk to inmate safety, he did not know that the complainant was especially likely to be assaulted by the specific prisoner who eventually committed the assault. The question…is whether prison officials, acting with deliberate indifference, exposed a prisoner to sufficiently substantial risk of serious damage to

> [her] future health and *it does not matter whether the risk comes from a single source or multiple sources…*

Id. at 843 (emphasis added) (internal citation omitted). In the instant case, Respondents "exposed [Mr. Monroe] to a sufficiently substantial risk of serious damage to [his] future health", *id.*, and it does not matter that the source of that risk was ultimately a telephone cord rather than a bedsheet. In light of the well-documented and well-known risks posed by non-bedding ligatures in Texas jails discussed *supra* Section I, Respondents should not be rewarded with qualified immunity for burying their heads in the sand to avoid acknowledging the risk posed to Mr. Monroe's life by the telephone cord in his jail cell. As the Seventh Circuit has noted, "[b]eing an ostrich involves a level of knowledge…sufficient for liability under the…subjective standard." *McGill v. Duckworth*, 944 F.2d 344, 351 (7th Cir. 1991) (internal citations omitted) *overruled on other grounds by Farmer v. Brennan*, 511 U.S. 825 (1994).

Turning to the Fifth Circuit's insistence on factually-similar cases, while such cases can serve to provide "fair notice" that an official's actions are unconstitutional, this Court has never required factually-similar cases to find that an officer acted with deliberate indifference. *See Hope v. Pelzer*, 536 U.S. 730, 739 (2002) ("…the Court of Appeals required that the facts of previous cases be 'materially similar' to Hope's situation. This rigid gloss on the qualified immunity standard…is not consistent with our cases.") (internal citations omitted). Indeed, in *Hope*, this Court decried "rigid, overreliance on factual

similarity" when it overturned the Eleventh Circuit's grant of qualified immunity to prison officials who chained an inmate to a hitching post for hours despite case law holding that chaining someone to a fence and cell bars was unconstitutional. *Id.* at 742. The Court explained that "a general constitutional rule already identified in the decisional law may apply with obvious clarity to the specific conduct in question." *Id.* at 741 (*quoting United States v. Lanier*, 520 U.S. 259, 271 (1997)). More recently, this Court overruled a Fifth Circuit case awarding qualified immunity to jail officials who kept an inmate in feces-encrusted and freezing cells for days because no prior case held that such inhumane treatment violated an inmate's constitutional rights. *Taylor v. Riojas*, 141 S.Ct. 52 (2020) (per curiam). Rejecting the rigid insistence on identical case precedent, this Court, again concluded that a factually-identical case was not required to determine officials were not entitled to qualified immunity where the "general constitutional rule already identified" concerning wantonly degrading and dangerous jail conditions "appl[ied] with obvious clarity" to the officers' conduct. *Id.* at 53-54; *Hope*, 536 U.S. at 741.

This Court has never held that a risk can be "obvious" only if another case has declared it to be so—indeed, that is precisely the opposite of what this Court stated in *Farmer* when it noted obvious risks could be used to impute subjective knowledge. 511 U.S. at 842. And it is impossible for Texas jailors, even in small county jails, to be unaware of the heightened risk of inmate deaths using both bedding and non-bedding jail-provided ligatures. Indeed, Judge Dennis in his dissent at the court below documented that

Respondents "attended a training where they learned that the suicide rate for all county jails is nine times greater than in the general population" and that both had worked at the Coleman City Jail where an inmate had died by suicide using a non-bedding ligature (shoelaces). Pet. App. at 24a. Thus they both had the requisite knowledge of the serious risk to Mr. Monroe's right to adequate protection from his own suicidal tendencies and knowledge that inmates use non-bedding ligatures when attempting to die by suicide.

Courts should not allow defendants to "'escape liability if the evidence shows that [they] merely refused to verify underlying facts that [they] strongly suspected to be true, or declined to confirm inferences of risk that [they] strongly suspected to exist.' In other words, the Constitution does not reward those who play ostrich." *Mombourquette ex rel Mombourquette v. Amundson*, 469 F.Supp.2d 624, 645 (W.D. Wis. 2007) *quoting* *Farmer*, 511 U.S. at 843 n8. As discussed *supra* Section I.b., ligatures made from electrical and/or telephone cords are the third-most common ligature used by inmates who die by suicide in Texas jails, responsible for almost 12% of inmate deaths by ligature.[41] Recognizing the risk posed by phone cords, the Texas Commission on Jail Standards issued a statewide memorandum that went to all sheriffs and jail administrators advising that telephone cords could be used as ligatures by suicidal inmates and, therefore, they advised that phone cords should be no longer than twelve inches. Pet. App. at 19a fn. 11. The memo specifically stated it was in

[41] Langford, et al., *supra* note 37.

response to four deaths by suicide using telephone cord ligatures in eleven months in Texas jails. *Id*. at 26a.

Several Texas district courts have found that telephone cords can constitute obvious ligature risks to inmates identified as being at-risk of suicide such that officers may not be entitled to qualified immunity where they failed to address these ligatures. In *Posey v. Southwestern Bell Telephone*, the Northern District of Texas determined that a jail was not liable for an inmate who used a phone cord in his death by suicide because jailors were unaware of the detainee's suicidal tendencies; however, the court noted the "combination of the corded telephone with sufficient evidence that Posey was a known risk for suicide could" satisfy the showing of subjective knowledge sufficient to constitute deliberate indifference. 430 F.Supp.2d 616, 623 (N.D. Tex 2006). Similarly, in *Duran v. City of Eagle Pass, Texas*, the Western District of Texas denied the City's motion to dismiss when a man with known suicidal tendencies died by suicide using a six-inch phone cord. No. SA-10-CV-504-XR, 2012 WL 1593185 (W.D. Tex. 2012). The court specifically found "material fact issues exist as to whether the City was deliberately indifferent in placing a corded phone within the cell occupied by Mr. Gomez (i.e. placing Mr. Gomez in an unsuitable environment.)" *Id.* at *6.

This was also the finding of the district court below which correctly documented the "*well-known suicide risks involving such items as cords*" and noted the "high and obvious risk of suicide by maintaining a policy of housing suicidal inmates in a cell with a

phone (and attached cord)…." Pet. App. at 64a fn4, 69a (emphasis added). The district court easily found that Respondents' housing Mr. Monroe in a cell with a telephone cord constituted an "obvious risk" under *Farmer* such that a directly on-the-nose case was not required to determine that officers were not entitled to qualified immunity. *Id.* at 71a-72a. In rejecting this "well-known suicide risk" posed by telephone cords and recognized by several Texas district courts, the Fifth Circuit departed from this Court's precedent when it awarded qualified immunity to Respondents based on the lack of prior factually-similar cases. The Fifth Circuit's opinion below, therefore, must be reversed.

The Fifth Circuit's opinion in this case and continued insistence on identical facts creates absurd results and has, in fact, created an absurd result in this case. Under the Fifth Circuit's opinion, if Respondents housed Mr. Monroe in a cell containing the most common ligatures used in deaths by suicide in Texas jails—a bedsheet, a telephone cord, a pair of pants, and a trash bag—Respondents' entitlement to qualified immunity changes based on which item he picks, despite their equal lethality. Where an inmate known to be suicidal has a right to adequate protection from harm, this right is meaningless if any of these common ligatures are "fair game" and officers are shielded from liability when inmates die by these items.

CONCLUSION

As this Court recently found in *Taylor,* 141 S.Ct. at 54, some risks to the Constitutional rights of pretrial detainees are so apparent that they do not require a court declaring them to be so in a published opinion before a jail is obligated to redress them—jail-provided ligatures made readily available to suicidal inmates is one of these risks. To hold otherwise is to require that someone identified as actively suicidal has to die before a jail must take the obvious precaution of insuring suicidal inmates are placed in cells free of jail-provided ligatures. Jail officials are well-aware that jails have become the de facto mental health facilities nationally and in Texas, that suicide is the leading cause of inmate death, and that jail-provided ligatures like electrical and telephone cords are commonly used suicide means. The Fifth Circuit's decision ignores this reality, encourages willful blindness on the part of jail officials to otherwise obvious ligature risks, and sanctions officials' playing ostrich rather than taking simple steps necessary to ensure inmates with known suicide risk are adequately protected from the harm posed by jail-provided ligatures.

This Court's deliberate indifference jurisprudence does not require a case with factually-identical circumstances to determine officials acted with deliberate indifference to the Constitutional rights of inmates and the Fifth Circuit below erred when it required one. The well-known risks to inmates known to be suicidal in Texas jails and the evidence in this case dictate that the phone cord in Mr. Monroe's cell created an obvious risk such that "a factfinder may

conclude that [Respondents] knew of a substantial risk from the very fact that it was obvious." *Farmer*, 511 U.S. at 826. A known suicidal inmate's right to reasonable protection from harm means nothing if jail staff are entitled to qualified immunity when they consciously avoid removing ligatures like thirty-inch phone cords from cells with inmates who are intent on harming themselves.

For the reasons set forth in Petitioners' Brief and this *Amicus*, this Court should grant the petition and reverse the ruling of the Fifth Circuit.

Respectfully submitted,

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