

No. 16-676

In the Supreme Court of the United States

IMHOTEP CARTER AND SALEH OBAISI,
Petitioners,

v.

TYRONE PETTIES,
Respondent.

*On Petition for Writ of Certiorari to the
United States Court of Appeals for the Seventh Circuit*

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the Seventh Circuit's determination that genuine issues of material fact precluded summary judgment for Petitioners was consistent with this Court's decisions in *Estelle v. Gamble*, 429 U.S. 97 (1976), and *Farmer v. Brennan*, 511 U.S. 825 (1994).

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INTRODUCTION

In January 2012, Respondent Tyrone Petties suffered a complete rupture of his left Achilles tendon while incarcerated. He received some initial care, but was forced to wait several weeks for basic treatment (immobilization) that was necessary to enable healing and protect him from excruciating pain. Thereafter, he suffered further delays in care and was denied physical therapy ordered by a specialist. During discovery, Mr. Petties obtained evidence showing that this deficient care resulted from the deliberate indifference of Petitioners, his treating physicians. Relying on other evidence that, in their view, suggested their course of treatment was negligent at worst, Petitioners moved for summary judgment. On appeal, the Seventh Circuit (sitting *en banc*) correctly articulated the applicable legal standard, reviewed the factual record, and determined there was sufficient evidence for a reasonable jury to conclude Petitioners had acted with the mental state required to support an Eighth Amendment claim.

Dissatisfied with the Seventh Circuit's thorough and faithful application of longstanding U.S. Supreme Court precedent to the particular facts of this case, Petitioners seek certiorari. But they identify no errors of law, circuit splits, or other legal issues of national importance that render this case a proper vehicle for revisiting decades of jurisprudence governing Eighth Amendment claims for deliberate indifference to prisoners' serious medical needs. Indeed, the lower courts have regularly and correctly applied the Court's touchstone decisions in this area, *Estelle* and *Farmer*, to claims like Mr. Petties's that are premised on

evidence of deficient medical treatment resulting from a prison doctor's deliberate indifference.

The Petition reflects fundamental misunderstandings of *Estelle* and *Farmer*. Contrary to Petitioners' arguments, *Estelle* did not hold that prisoners who receive some medical care cannot state an Eighth Amendment claim. In fact, it relied upon case law holding just the opposite. And *Farmer* did not require prisoners to show that, in addition to defendants acting with deliberate indifference toward an existing, objectively serious medical condition, the defendants placed them at risk of further such conditions. Petitioners' waived argument to the contrary ignores that *Farmer* involved a claim for failure to prevent harm—not one for deliberate indifference to present, serious medical needs. Tellingly, Petitioners cite to no authority that has adopted their misreading of Eighth Amendment doctrine.

Petitioners also err in arguing that the Seventh Circuit applied an improper objective standard in considering whether Petitioners acted with deliberate indifference. The court of appeals clearly stated that deliberate indifference is a *subjective* standard. And *Farmer* explicitly approved using circumstantial evidence to infer a defendant's subjective mental state, which is all the Seventh Circuit suggested a reasonable jury might do here.

The Seventh Circuit correctly applied *Estelle* and *Farmer* to determine that the evidence in this case created a genuine issue of material fact as to whether Petitioners acted with deliberate indifference to Mr. Petties's serious medical needs. This Court should

reject Petitioners' veiled invitation to revisit the factual record and selectively credit their favored evidence—a practice the Court recently condemned in *Tolan v. Cotton*, 134 S. Ct. 1861 (2014). This case presents an unremarkable application of the usual summary judgment standard, and the Court's review is therefore unwarranted.

STATEMENT OF THE CASE

Because Petitioners' Statement of the Case omits important facts supporting the Seventh Circuit's decision, Mr. Petties provides the following summary of the factual background and proceedings below.

A. Factual Background

On January 19, 2012, Respondent Tyrone Petties suffered a rupture of his left Achilles tendon while serving a prison sentence at Stateville Correctional Center. (R. 73-3 at 1; R. 79-1 at ¶ 2; R. 79-8 at 2.)¹ This injury consists of a tear in the tendon connecting the calf muscles to the heel, which prevents the foot from pointing downward. (App'x A, 2a.) At the time of this injury, Mr. Petties was still suffering from the lingering effects of an April 2010 rupture of his right Achilles tendon that had not fully healed, rendering Mr. Petties vulnerable to decreased mobility from his new injury. (R. 79-1 at ¶ 2; R. 73-4 at 8.)

¹ R. __” refers to the Record on Appeal from the district court (United States District Court for the Northern District of Illinois, Eastern Division, No. 12 CV 9353). “App'x” refers to the Appendix attached to the Petition (“Pet.”).

Mr. Petties's tendon ruptured while he was walking up the stairs at his cell house. After falling to the ground in excruciating pain, he was taken to the health clinic at Stateville. (R. 79-1 at ¶ 3; R. 73-3 at 1.) Dr. Imhotep Carter was then employed as Stateville's medical director by Wexford Health Sources, Inc., a private provider of medical services at correctional facilities. (R. 56 at ¶ 2.) Dr. Saleh Obaisi succeeded Dr. Carter as medical director at Stateville in mid-2012. (*Id.* at ¶ 3.)

During their respective tenures as medical director, Dr. Carter and Dr. Obaisi were responsible for all health care provided at Stateville. (R. 80 at 5.) This meant they had a duty to ensure a timely response to all inmates' health care needs. (R. 81 at 8-9.) They were also in charge of implementing Wexford's medical policies and procedures, among which are treatment protocols designed to ensure a standard level of medical care for various ailments. (R. 80 at 6-7; R. 82 at 4.) Wexford's policies state that physicians should incorporate these protocols into their daily practice. (R. 82 at 4.) Dr. Carter and Dr. Obaisi both testified that they knew Wexford policy required them to respond to inmates' health needs in a timely manner. (R. 86-1 at 9:18-10:11, 14:6-14, 18:8-19:9; R. 86-2 at 13:18-14:18, 23:20-24:7.) Dr. Carter also testified that he knew he was responsible for implementing Wexford's protocols, policies, and procedures. (R. 86-1 at 11:14-22, 15:12-19.)

Wexford has a treatment protocol for Achilles tendon ruptures. Its "Orthopedic Surgery Guidelines" call for a patient with a ruptured Achilles tendon to be given (1) a splint, (2) crutches, and (3) antibiotics if the

wound includes a laceration. The patient should then be sent to a specialist for further treatment. (R. 82 at 16.) Dr. Carter and Dr. Obaisi are not orthopedic surgeons and do not specialize in treating Achilles tendon injuries. Dr. Carter has treated approximately ten Achilles tendon ruptures in 20 years of medical practice, whereas Dr. Obaisi does not recall ever diagnosing an Achilles injury in his private practice. (R. 86-1 at 26:1-9, 31:15-16; R. 86-2 at 6:10-18, 11:4-9, 29:16-18.)

Dr. Carter's referral notes from the day of Mr. Petties's injury reflect that he believed the injury was an "Achilles tendon rupture." (R. 79-7 at 4.) He later testified in detail that immobilization is the proper treatment for an Achilles tendon rupture. (R. 86-1 at 105:18-107:4.) But despite this, and contrary to Wexford's treatment protocol, Dr. Carter did not prescribe Mr. Petties a splint, brace, bandage, or other means of keeping his left ankle immobile. (R. 79-1 at ¶ 3; R. 86-1 at 72:24-73:14.) Dr. Carter does not recall considering whether to immobilize Mr. Petties's ankle. (*Id.* at 69:15-19.)

Instead of immobilization, Mr. Petties received pain medication and crutches and was allowed to stay in his cell for meals for one week, after which he was forced to walk to the cafeteria. (R. 73-3 at 1, 40.) Due to the lack of immobilization, Mr. Petties suffered terrible pain whenever his ankle moved. (R. 79-1 at ¶ 3.) Dr. Carter testified that although he does not remember the particular types of splints the prison had, he cannot recall a time when splints were unavailable at Stateville. (R. 86-1 at 69:20-70:10.)

Although Dr. Carter referred Mr. Petties to specialists, the appointments were set for March 2012—over six weeks after the injury occurred. (R. 79-7 at 4-5.) Dr. Carter testified he could have expedited the outside referrals if he wished. (R. 86-1 at 25:10-20, 62:13-16.) But from January until March, Mr. Petties was not sent to an outside specialist and his ankle was not immobilized. He continued to experience severe pain whenever his ankle moved. (R. 79-1 at ¶ 4.) On March 6, 2012, an MRI taken at Provena St. Joseph Medical Center confirmed Mr. Petties’s injury was a complete Achilles tendon rupture with a “gap” measuring about 4.7 centimeters. (R. 79-8 at 2-3.)

When Mr. Petties finally saw a specialist, the doctor immediately identified serious harm resulting from Dr. Carter’s failure to immobilize his injury. Dr. Anuj Puppala, an orthopedic surgeon at Hinsdale Orthopedics in Joliet, Illinois, met with and examined Mr. Petties on March 15, 2012. (R. 73-5 at 5-12.) Dr. Puppala noted the lack of immobilization and opined that the delay in providing this treatment was contributing to Mr. Petties’s pain and also causing “gapping” at the rupture site—*i.e.*, a space between the ruptured tendon edges. (*Id.* at 11; R. 73-7 at 19:11-20:16.) He therefore placed Mr. Petties’s foot into an immobilizing boot. (R. 79-1 at ¶ 5.) Believing that Mr. Petties could benefit from surgical repair of his tendon, but might also need “graft augmentation” using tissue from a donor or Mr. Petties’s own body, Dr. Puppala ordered a follow-up appointment with an ankle specialist “for definitive treatment.” (R. 73-5 at 11; R. 73-7 at 20:23-21:23.)

Mr. Petties's ruptured tendon was not surgically repaired, and Dr. Carter told him he would not order surgery for cost reasons. (R. 79 1 at ¶ 6.) Instead, Mr. Petties was again forced to wait months for further treatment by outside specialists. Despite Dr. Puppala's March 2012 referral, Mr. Petties was not sent for another appointment with a specialist until July 2, 2012. (*Id.* at ¶¶ 7-8; R. 73-4 at 6-7.) That day, Dr. Samuel Chmell of the University of Illinois Medical Center at Chicago ("UIC") ordered physical therapy, gentle stretching exercises, and a follow-up with UIC's foot-and-ankle clinic. (*Id.* at 7.) But after Mr. Petties returned to Stateville, Dr. Obaisi told Mr. Petties he could not have physical therapy. (R. 79-1 at ¶ 9.) This was despite Dr. Obaisi's admissions that he deferred to the specialists' judgment and knew a physical therapist was available at Stateville. (R. 86-2 at 85:21-86:5, 62:14-21.) Dr. Obaisi later testified he had denied physical therapy to Mr. Petties because Mr. Petties already knew how to conduct physical therapy exercises on his own due to his prior Achilles tendon injury. But Dr. Obaisi admitted he did not know whether Mr. Petties had received physical therapy for this prior injury, nor did he recall speaking with Mr. Petties about self-exercise in lieu of physical therapy. (*Id.* at 65:21-66:1, 63:10-14.)

After July 2012, Mr. Petties received limited treatment. Aside from a follow-up MRI in September 2012, Mr. Petties never again saw an outside specialist. (*See* R. 73-4 (UIC records).) He never received physical therapy, nor was he sent to UIC's foot-and-ankle clinic for the follow-up Dr. Chmell ordered. (*Id.*; R. 79-1 at ¶ 9.) Over two years after his injury, Mr. Petties still

experienced pain, soreness, and stiffness in his left Achilles tendon when attempting to walk. (*Id.* at ¶ 12.)

B. Proceedings Below

Mr. Petties filed his original complaint on November 21, 2012, asserting claims against Dr. Carter, Dr. Obaisi, and Wexford. (R. 1.) He sought and obtained appointment of counsel and leave to proceed *in forma pauperis*. (R. 3, 4, 5.) Mr. Petties later filed amended complaints adding further factual allegations, dropping Wexford from the case, and withdrawing his official-capacity claims, leaving only his individual-capacity claims against Dr. Carter and Dr. Obaisi. (R. 35, 52.) On March 10, 2014, following the close of written discovery and depositions of Mr. Petties, Dr. Carter, Dr. Obaisi, Dr. Puppala, and Dr. Chmell, the defendants moved for summary judgment. (R. 71.)

On June 30, 2014, the district court granted summary judgment for the defendants. (R. 89, 90.) As to Dr. Carter, the court reasoned that the delay in immobilizing Mr. Petties's injury was "simply a matter of different medical opinions, which is, at best, malpractice." (R. 89. at 9.) As to Dr. Obaisi, the court reasoned that his failure to provide physical therapy ordered by Dr. Chmell did not constitute deliberate indifference. The court relied upon evidence suggesting, in its view, that (1) Mr. Petties could have performed physical therapy on his own and (2) other modes of treatment provided by the defendants were effective without physical therapy. (R. 89 at 11-12.) On July 30, 2015, a divided panel of the U.S. Court of Appeals for the Seventh Circuit affirmed the district court's judgment. Mr. Petties petitioned for rehearing *en banc*.

On August 23, 2016, following reargument, the Seventh Circuit reversed the district court's grant of summary judgment. The court first thoroughly reviewed *Estelle*, *Farmer*, and their progeny in articulating the standard for an Eighth Amendment claim of deliberate indifference. (App'x A, 5a – 14a.) In particular, the Court acknowledged that such claims require an inquiry “into [the defendant's] subjective state of mind.” (*Id.* at 7a.) The court therefore acknowledged that “[e]ven objective recklessness—failing to act in the face of an unjustifiably high risk that is so obvious that it *should* be known—is insufficient to make out a claim.” (*Id.* (citing *Farmer*, 511 U.S. at 836-38).)

Turning to the factual record, the Seventh Circuit concluded the evidence supported a reasonable inference that both Dr. Carter and Dr. Obaisi acted with deliberate indifference to Mr. Petties's serious medical needs. (*Id.* at 14a – 19a.) As to Dr. Carter, the court cited his own detailed testimony that immobilization is the appropriate treatment for an Achilles tendon rupture; similar testimony from outside specialists; medical records confirming Dr. Carter's diagnosis; a treatment protocol Dr. Carter was admittedly responsible for implementing; and Dr. Carter's testimony that he was unaware of a shortage of splints at Stateville at the time. (*Id.* at 14a – 16a.) As to Dr. Obaisi, the court cited his own testimony that he deferred to the specialists' recommendations, yet did not order physical therapy for Mr. Petties. (*Id.* at 19a.) The court explained that Dr. Obaisi contradicted his own explanation that Mr. Petties could perform physical therapy on his own, since he testified he did not even know whether Mr. Petties had received

physical therapy for his prior injury. (*Id.*) The court also noted an absence of any medical evidence supporting Dr. Obaisi's suggestion that walking was the equivalent of physical therapy. (*Id.*) The court therefore reversed and remanded for further proceedings.

Petitioners filed their Petition for a Writ of Certiorari on November 21, 2016.

ARGUMENT

Petitioners assert that certiorari is warranted for three reasons.

First, they contend the Seventh Circuit's decision is inconsistent with *Estelle v. Gamble*, 429 U.S. 97 (1976), which Petitioners interpret to preclude Eighth Amendment claims in all cases where there is evidence the plaintiff received "substantial palliative medical treatment." (Pet. at 18.)

Second, they assert the Seventh Circuit misapplied the two-step analysis for Eighth Amendment claims by identifying Mr. Petties's objectively serious medical need and considering circumstantial evidence of Petitioners' subjective mental state. (Pet. at 26.)

Third, they argue the "substantial prison population in the United States and the corresponding number of prisoner litigation" renders this case one of national importance. (Pet. at 30.)

None of Petitioners' arguments justify this Court's intervention.

I. THE SEVENTH CIRCUIT'S DECISION IS CONSISTENT WITH *ESTELLE* AND CASES FROM THE OTHER COURTS OF APPEALS.

The Petition correctly identifies *Estelle* as the pathmarking case for Eighth Amendment claims against prison doctors. Petitioners analogize this case to *Estelle* at length, but rightly concede that any purported factual similarity would not be, “in and of itself, a matter for this Court’s concern.” (Pet. at 23.) Instead, they advance a misreading of *Estelle* that would preclude all Eighth Amendment claims brought by prisoners who “receive[] treatment,” but “claim[] the treatment provided was substantially inadequate.” (*Id.* at ii.)

This novel position finds no support in, and is affirmatively contradicted by, this Court’s decision in *Estelle*. The Court held that “deliberate indifference to serious medical needs of prisoners constitutes the ‘unnecessary and wanton infliction of pain’” the Eighth Amendment forbids. 429 U.S. at 104 (quoting *Gregg v. Georgia*, 428 U.S. 153, 173 (1976)). The Court elaborated:

This is true *whether the indifference is manifested by prison doctors in their response to the prisoner’s needs* or by prison guards in intentionally denying or delaying access to medical care or intentionally interfering with the treatment once prescribed. *Regardless of how evidenced*, deliberate indifference to a prisoner’s serious illness or injury states a cause of action under § 1983.

Id. at 104-105 (emphases added). Thus, under *Estelle*, Eighth Amendment claims are not foreclosed by any medical response. Rather, such claims may proceed if the response is so deficient as to evince deliberate indifference. Although the *Estelle* plaintiff's particular factual allegations against a prison physician were held inadequate to state an Eighth Amendment claim, the case does not support Petitioners' contention that no prisoner who receives any palliative medical treatment can *ever* state such a claim.²

To remove any doubt on this point, one need only read the first case the *Estelle* court cited in support of its holding, *Williams v. Vincent*, 508 F.2d 541 (2d Cir. 1974). *Williams* held that a prison physician's alleged choice of an "easier and less efficacious treatment" for a prisoner's serious injury met the test for deliberate indifference. *Estelle*, 429 U.S. at 104 n.10 (quoting *Williams*, 508 F.2d at 544). The plaintiff in *Williams* received palliative medical treatment: ten stitches to mend his partially-severed ear. 508 F.2d at 543. Yet, the court disagreed that the doctor's decision not to attempt reattachment of the severed portion of the plaintiff's ear could only be viewed as "a difference of

² Even the factual similarities between this case and *Estelle* are overblown. Although the plaintiffs in both cases suffered painful physical injuries, the evidence of deliberate indifference on the part of the doctors here is far stronger. The plaintiff in *Estelle* did not, as here, present evidence that his doctors deviated inexplicably from their employer's treatment protocol; cited cost rather than medical judgment as a rationale for denying medical care ordered by a specialist; or undercut their own credibility by providing "post-hoc rationalization[s]" for failure to provide treatment that were "totally at odds with the evidence in th[e] case." (App'x A, 19a.)

opinion over a matter of medical judgment.” *Id.* at 544. Instead, the court reasoned that the plaintiff’s allegations “support[ed] the claim that it was deliberate indifference towards Williams’ medical needs, rather than an exercise of professional judgment,” that motivated the decision. *Id.* *Estelle*’s reliance on *Williams* fatally undermines Petitioners’ suggestion that Eighth Amendment claims are categorically limited to prisoners to whom “care was denied.” (Pet. at 25.)

Petitioners’ misreading of *Estelle* also defies common sense. Under their view, Eighth Amendment claims would fail so long as the prison physician provided *any* palliative medical care, even if (as in *Williams*) evidence suggests the care was woefully inadequate or unsuited to the prisoner’s medical need. Such a rule would insulate prison physicians from liability not just when they exercise substandard medical judgment (as in a negligence case), but also when they intentionally cause a prisoner to suffer unnecessary pain—so long as they provide some minimal care. This result cannot be squared with the Constitution’s prohibition on “pain and suffering which no one suggests would serve any penological purpose.” *Estelle*, 429 U.S. at 103.

Notably, Petitioners do not cite a single case adopting their cramped view of *Estelle*, let alone identify a circuit split that might justify this Court’s intervention. To the contrary, they admit the Seventh Circuit’s decision “reflects trends present in other circuits.” (Pet. at 4.) Indeed, the courts of appeals have for many years allowed claims based on deficient palliative treatment that resulted from the deliberate

indifference of prison medical staff. *See, e.g., Dimanche v. Brown*, 783 F.3d 1204, 1215 (11th Cir. 2015) (“[D]eliberate indifference may be established by a showing of grossly inadequate care as well as by a decision to take an easier but less efficacious course of treatment.”) (quoting *McElligott v. Foley*, 182 F.3d 1248, 1255 (11th Cir. 1999)); *De’lonta v. Johnson*, 708 F.3d 520, 526 (4th Cir. 2013) (“[J]ust because Appellees have provided De’lonta with *some* treatment consistent with [the standard of care], it does not follow that they have necessarily provided her with *constitutionally adequate* treatment”); *Langford v. Norris*, 614 F.3d 445, 460 (8th Cir. 2010) (“[A] total deprivation of care is not a necessary condition for finding a constitutional violation: ‘Grossly incompetent or inadequate care can [also] constitute deliberate indifference, as can a doctor’s decision to take an easier and less efficacious course of treatment.’”) (quoting *Smith v. Jenkins*, 919 F.2d 90, 93 (8th Cir. 1990)); *Feeney v. Corr. Med. Servs., Inc.*, 464 F.3d 158, 163 (1st Cir. 2006) (deliberate indifference claims may be premised on “the choice of a certain course of treatment” if “the attention received is ‘so clearly inadequate as to amount to a refusal to provide essential care’”) (quoting *Torraco v. Maloney*, 923 F.2d 231, 234 (1st Cir. 1991)); *Self v. Crum*, 439 F.3d 1227, 1232 (10th Cir. 2006) (“If a prison doctor ... responds to an obvious risk with treatment that is patently unreasonable, a jury may infer conscious disregard”); *Jett v. Penner*, 439 F.3d 1091, 1096-98 (9th Cir. 2006) (reversing summary judgment for doctor who provided some treatment for prisoner’s broken thumb, including pain medication and x-rays, but did not ensure the thumb was immobilized to enable healing); *Lawson v. Dallas Cnty.*, 286 F.3d 257, 262-63 (5th Cir. 2002) (affirming

judgment against prison medical staff who provided some care to paraplegic inmate, but did not follow outside treaters' instructions for additional care); *LeMarbe v. Wisneski*, 266 F.3d 429, 438-39 (6th Cir. 2001) ("A government doctor has a duty to do more than simply provide some treatment to a prisoner who has serious medical needs; instead, the doctor must provide medical treatment to the patient without consciously exposing the patient to an excessive risk of serious harm."); *Sherrod v. Lingle*, 223 F.3d 605, 611 (7th Cir. 2000) ("a prisoner is not required to show that he was literally ignored by the staff"); *Chance v. Armstrong*, 143 F.3d 698, 703 (2d Cir. 1998) ("In certain instances, a physician may be deliberately indifferent if he or she consciously chooses 'an easier and less efficacious' treatment plan.") (quoting *Williams*, 508 F.2d at 544)); *Durmer v. O'Carroll*, 991 F.2d 64, 67 (3d Cir. 1993) (rejecting argument that "sending [plaintiff] to several different specialists and providing of some treatment precludes a finding of deliberate indifference").³

³ In a dissenting opinion, Judge Easterbrook (joined by Judges Flaum and Kanne) argued that four cases decided by the Third, Tenth, and D.C. Circuits are "incompatible" with the Seventh Circuit's decision. (App'x A, 24a – 25a.) Petitioners do not cite or discuss these cases, and a close inspection reveals they do not support the position that prisoners who "received some treatment" cannot state an Eighth Amendment claim. (*Id.* at 24a); *Crum*, 439 F.3d at 1232 (noting that "[i]f a prison doctor ... responds to an obvious risk with treatment that is patently unreasonable, a jury may infer conscious disregard"); *Farmer v. Moritsugu*, 163 F.3d 610, 614-16 (D.C. Cir. 1998) (reversing denial of qualified immunity to medical director of Bureau of Prisons where plaintiff received no treatment for transsexualism, but could not establish a need for treatment "of which [the director] was aware and to

In short, the Seventh Circuit properly considered and rejected Petitioners' argument, reasoning it was contrary to the plain terms of *Estelle*. (App'x A, 6a n.1.) This Court should decline Petitioners' invitation to revisit and upend four decades of Eighth Amendment jurisprudence.

II. THE SEVENTH CIRCUIT APPLIED THE PROPER TWO-STEP ANALYSIS TO MR. PETTIES'S CLAIM.

The Seventh Circuit correctly articulated and applied both elements of the test for a claim under an Eighth Amendment. Here again, Petitioners misconstrue the court of appeals' reasoning and this Court's precedents. (Pet. at 26-30.)

Petitioners initially suggest the Seventh Circuit misapplied the first element of the test by failing to consider "whether a significant *risk* is present," and instead asking "whether a plaintiff suffered from an objectively serious medical condition." (Pet. at 26.) But Petitioners waived this argument below because they framed the first element exactly as the Seventh Circuit did, and then declined to contest it. In their brief in support of summary judgment, Petitioners argued that "[d]eliberate indifference has both an objective and a

which he was indifferent"); *Durmer*, 991 F.2d at 67 (reversing summary judgment in favor of prison physician-in-charge where plaintiff received some treatment and *rejecting* district court's conclusion that "sending Durmer to several different specialists and providing of some treatment precludes a finding of deliberate indifference"); *Inmates of Allegheny Cnty. Jail v. Pierce*, 612 F.2d 754, 763 (3d Cir. 1979) (remanding to determine whether level of psychiatric care provided at prison was constitutionally adequate).

subjective element: *the inmate must have an objectively serious medical condition*, and the health care provider must be subjectively aware of and consciously disregard a risk to the inmate's health or safety." (R. 72 at 1-2 (emphasis added).) They then conceded, for purposes of summary judgment, that Mr. Petties had satisfied the first element of the test. (*Id.* at 2; *see also* Pet. at 3.) The Seventh Circuit likewise recognized that the first element of the test was undisputed. (App'x A, 6a – 7a.) Petitioners cannot raise the issue for the first time in this Court.

In any event, Petitioners' new argument misapprehends the objective prong of the test for a deliberate-indifference claim. Again, *Estelle* held in the context of claims against prison doctors that "deliberate indifference to serious medical needs of prisoners" violates the Eighth Amendment. *Estelle*, 429 U.S. at 104. By its clear terms, this standard contains two elements: an objectively serious medical need, and the prison doctor's deliberate indifference to that need. Petitioners would limit Eighth Amendment claims to cases in which the plaintiff alleges indifference to a risk of *future* injury, as in *Farmer v. Brennan*, 511 U.S. 825 (1994) (Pet. at 27), but nothing in *Estelle* suggests that deliberate indifference to an *existing* injury requiring medical attention cannot also state a claim. In fact, the case holds just the opposite.

Petitioners' argument stems from a misunderstanding of *Farmer*, in which the plaintiff sued several prison administrative officials alleging they failed to protect her from inmate assaults. *Id.* at 830-31. In this specific factual context, the Court reasoned that the first element of an Eighth

Amendment claim requires a risk of serious harm. *Id.* at 834 (“For a claim (like the one here) based on a failure to prevent harm, the inmate must show that he is incarcerated under conditions posing a substantial risk of serious harm.”). *Farmer* did not involve a claim against prison doctors for deliberate indifference to an existing injury, nor did it hold or suggest that *all* Eighth Amendment claims require a showing of substantial risk of further harm in the future.

Here, as in *Estelle* and the mine run of cases brought against prison doctors, the objectively serious condition to which deliberate indifference is alleged is a present “serious medical need.” *Estelle*, 429 U.S. at 104. Petitioners conceded this element below. (Pet. at 3.) And of course, Mr. Petties presented evidence that Petitioners’ deliberate indifference caused him lasting harm in the form of needless pain and a delayed healing process. (*See supra.*)

Likewise, Petitioners’ argument concerning the second element—whether the defendant was deliberately indifferent—misreads *Farmer* and its application by the Seventh Circuit. Petitioners contend the court of appeals “substitute[d] an objective standard for deliberate indifference medical claims rather than the subjective one mandated by this Court’s decision in *Farmer*.” (Pet. at 29.) This assertion is belied by the Seventh Circuit’s opinion:

To determine if a prison official acted with deliberate indifference, we look into his or her subjective state of mind. ... Even objective recklessness—failing to act in the face of an unjustifiably high risk that is so obvious that it should be known—is insufficient to make out a

claim. Instead, the Supreme Court has instructed us that a plaintiff must provide evidence that an official actually knew of and disregarded a substantial risk of harm.

(App’x A, 7a (citing *Farmer*, 511 U.S. at 836-38).) The court of appeals faithfully and correctly articulated *Farmer*’s and *Estelle*’s requirement of a subjective showing of deliberate indifference.

Petitioners suggest the Seventh Circuit departed from this standard in practice by citing circumstantial evidence supporting a reasonable inference that they acted with deliberate indifference. (Pet. at 28-30.) Here again, Petitioners misread this Court’s precedent. *Farmer* recognized that “[w]hether a prison official had the requisite knowledge of a substantial risk is a question of fact subject to demonstration in the usual ways, including inference from circumstantial evidence.” *Farmer*, 511 U.S. at 842. This Court further stressed that “a factfinder may conclude that a prison official knew of a substantial risk *from the very fact that the risk was obvious*.” *Id.* (emphasis added). In suggesting otherwise, Petitioners make the classic mistake the Court cautioned against in *Farmer*: “confusing a mental state with the proof of its existence.” *Id.* (quoting J. Hall, *General Principles of Criminal Law* 118 (2d ed. 1960)).

Consistent with *Farmer*, the court of appeals explained how circumstantial evidence may allow a prisoner to establish an Eighth Amendment claim, even when the defendant physician denies actually knowing of a substantial risk of harm to the plaintiff:

The difficulty is that except in the most egregious cases, plaintiffs generally lack direct evidence of actual knowledge. Rarely if ever will an official declare, “I knew this would probably harm you, and I did it anyway!” Most cases turn on circumstantial evidence, often originating in a doctor’s failure to conform to basic standards of care. While evidence of medical malpractice often forms the basis of a deliberate indifference claim, the Supreme Court has determined that plaintiffs must show more than mere evidence of malpractice to prove deliberate indifference. *Estelle*, 429 U.S. at 106. But blatant disregard for medical standards could support a finding of mere medical malpractice, or it could rise to the level of deliberate indifference, depending on the circumstances.

App’x A, 7a-8a. Petitioners are correct, so far as it goes, that “a doctor can be incompetent without being deliberately indifferent.” (Pet. at 29.) As the language quoted above demonstrates, the Seventh Circuit agreed. Its analysis, however, did not stop there: “[A] medical decision that has no support in the medical community, along with a suspect rationale provided for making it, can support a jury finding that a doctor knew his decision created a serious risk to an inmate’s health.” (App’x A, 10a n.2.) As the court correctly acknowledged, a contrary holding would immunize from scrutiny “any treatment decision a doctor made, regardless of whether it had any scientific basis.” (*Id.*)

In summary, negligence is not the only mental state that may be inferred from woefully incompetent medical care, and this Court’s precedents do not hold

otherwise. Under *Farmer*, a plaintiff may present evidence of surrounding circumstances to show an issue of fact on whether a prison doctor's actions reflected deliberate indifference. Petitioners' argument to the contrary would essentially require summary judgment in all cases where the defendant physician disclaims deliberate indifference in direct testimony. This extreme position—taken for the first time here—finds no support in *Farmer* or *Estelle*, and the Petition points to no authority that has adopted it.

III. THE PETITION DOES NOT PRESENT AN IMPORTANT QUESTION WARRANTING THE COURT'S REVIEW.

Petitioners identify no circumstances making this case a proper vehicle for review of the Court's Eighth Amendment jurisprudence. The unremarkable fact that the case arises following "summary judgment and rounds of fact finding" (Pet. at 31) does not distinguish it from the multitude of other Section 1983 lawsuits that regularly reach the Court. Likewise, the fact of a substantial prison population in the United States (*id.* at 30) in no way suggests that lower courts require further guidance from this Court in adjudicating deliberate indifference claims. To the contrary, lower courts have dutifully handled a high volume of such litigation under current law for 40 years.

As discussed above, Petitioners do not suggest the lower courts are divided in their application of *Estelle* or *Farmer*. Nor do Petitioners contend that the court of appeals' decision led to a major change in Eighth Amendment jurisprudence. This is for good reason: lower courts within the Seventh Circuit have relied on the decision below in granting summary judgment to

defendants when—unlike here—there was no genuine issue of material fact over whether the defendants were deliberately indifferent. *See, e.g., Hoyt v. Gilden*, No. 15-cv-437-jdp, 2017 WL 90389, at *5 (W.D. Wis. Jan. 10, 2017) (“At most, the undisputed evidence could (arguably) support a finding that her examination and diagnosis were negligent. But that is not enough to amount to deliberate indifference.”) (citing *Petties v. Carter*, 836 F.3d 722, 728 (7th Cir. 2016)); *Howe v. Hoover*, No. 1:15-cv-00771-WTL-DKL, 2016 WL 7210941, at *4 (S.D. Ind. Dec. 13, 2016) (“Even if Mr. Howe had shown negligence on the part of Nurse Hoover, which he has not, that would not be sufficient to demonstrate a violation of the Eighth Amendment.”) (citing *Petties*, 836 F.3d at 728); *Thomas v. Haymes*, No. 15-CV-34-NJR-DGW, 2016 WL 5369466, at *6 (S.D. Ill. Sept. 26, 2016) (“Dr. Haymes’s actions, while delayed, would not lead a reasonable jury to conclude that he was deliberately indifferent. As the Seventh Circuit recently reaffirmed, ‘[e]ven objective recklessness—fa[il]ling to act in the face of an unjustifiably high risk that is so obvious that it should be known—is insufficient to make out a claim.’” (quoting *Petties*, 836 F.3d at 728)).

At bottom, Petitioners simply dispute the Seventh Circuit’s application of the law to the specific facts of this case. But as outlined above, that disagreement is based on a selective view of the record that overlooks evidence favoring Mr. Petties. As this Court recently reiterated, courts must “adhere to the axiom that in ruling on a motion for summary judgment, ‘[t]he evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor.’” *Tolan*, 134 S. Ct. at 1863 (quoting *Anderson v. Liberty*

Lobby, Inc., 477 U.S. 242, 255 (1986)). Moreover, even if the Seventh Circuit had erred in applying the law to the facts (which it did not), “error correction ... is outside the mainstream of the Court’s functions” and “not among the ‘compelling reasons’ ... that govern the grant of certiorari.” S. Shapiro, K. Geller, T. Bishop, E. Hartnett, & D. Himmelfarb, *Supreme Court Practice* § 5.12(c)(3), p. 352 (10th ed. 2013) (cited in *Tolan*, 134 S. Ct. at 1868 (Alito, J., concurring)). Petitioners may disagree with the Seventh Circuit’s ultimate conclusion, but such disagreement does not justify this Court’s intervention.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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