STATE OF NORTH CAROLINA COUNTY OF WAKE	IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION No. 19 CVS 14089
ROCKY DEWALT, et al., Plaintiffs, v. ERIK HOOKS, et al., Defendants.	BRIEF OF PROFESSORS SHARON DOLOVICH, MARGO SCHLANGER, AND JOHN STINNEFORD AS *AMICUS CURIAE*

INTRODUCTION

In the federal courts, two standards have been used to review challenges to conditions of confinement brought under the Eighth Amendment. To prevail under the so called "subjective" standard, a plaintiff must show: (1) she was exposed to an unreasonable risk of harm, and (2) defendants knew of and disregarded such risk. *Farmer v. Brennan*, 511 U.S. 825, 837 n.6 (1994). By contrast, to prevail under the so-called "objective" standard, a plaintiff must show: (1) she was exposed to an unreasonable risk of harm, and (2) a reasonable official would have appreciated the risk. *See, e.g.*, *Hutto v. Finney*, 437 U.S. 678 (1978). That is, the Eighth Amendment is violated under an objective standard irrespective of prison officials' subjective motivation for imposing those conditions.

Until the early 1990s, the federal courts were inconsistent, sometimes reviewing claims of unconstitutional prison conditions under an objective framework, *see Rhodes v. Chapman*, 452 U.S. 337 (1981), and sometimes applying a subjective framework, *see Estelle v. Gamble*, 429 U.S. 97 (1976). In 1991, however, the United States Supreme Court resolved this contest decidedly in favor of a subjective standard. *See Wilson v. Seiter*, 501 U.S. 294 (1991). Federal courts today hold that the Eighth Amendment is violated *only* if prison officials turn a blind eye to dangers they

actually appreciate. Recently, the pendulum began to swing back toward the objective standard. In *Kingsley v. Hendrickson*, 576 U.S. 389 (2015) the Court applied an objective standard to a case brought by a pretrial detainee and, in so doing, raised questions about the propriety of the subjective standard in cases brought by post-conviction prisoners.

In interpreting Article I, Section 27 of the North Carolina Constitution, this Court is not required to adopt the United States Supreme Court's present view of the Eighth Amendment. And it should reject it in favor of the superior objective standard for several reasons. First, application of a subjective standard to system-wide challenges is simply unworkable: it is all but impossible to divine the subjective motivation of a large organization comprised of numerous individuals. Second, in both system-wide and individual cases, the subjective standard incentivizes failures of care, creates arbitrary distinctions between prisoners who suffer the same harm, and results in the proliferation of cruel and unusual conditions that this Court should steadfastly guard against. Third, as noted above, federal standards are themselves trending *back* to purely objective considerations. And finally, the original meaning of the Eighth Amendment supports application of an objective standard.

INTERESTS OF *AMICUS CURIAE*

Amici are prominent professors and recognized constitutional law experts. They have published extensively on the laws governing conditions of confinement claims brought in state and federal courts. Recently, in interpreting the original meaning of the Eighth Amendment to the United States Constitution, the United States Supreme Court relied upon the work of one *amicus curiae*. *See Bucklew v. Precythe*, 139 S. Ct. 1112, 1123 (2019) (citing Professor Stinneford's scholarship). Through their extensive research, *amici* have concluded that the United States Supreme Court erred in adopting a subjective deliberate indifference standard for conditions of

confinement claims brought in *federal* courts. That doctrinal error has rendered federal law governing conditions of confinement claims unworkable and counterproductive. *Amici curiae* offer their expertise in the hope that this Court will not import a significant federal doctrinal error into the North Carolina courts.

Amici are:

1. **Sharon Dolovich** is Professor of Law at UCLA School of Law. She is the founding director of the UCLA Prison Law and Policy Program and the UCLA Law Covid-19 Behind Bars Data Project, and has published widely on prison conditions and the law governing prisoners' rights. Her work has been published by the *Harvard Law Review*, the *New York University Law Review*, the *Duke Law Journal*, the *Harvard Law and Policy Review*, the *Northwestern University Journal of Criminal Law and Criminology*, and the *Berkeley Journal of Criminal Law*, among others.

2. **Margo Schlanger** is the Wade H. and Dores M. McCree Collegiate Professor of Law at the University of Michigan. She is the lead author of Incarceration and the Law, Cases and Materials (West Academic, 10th ed. 2020), and the founder and director of the Civil Rights Litigation Clearinghouse. Her scholarship frequently addresses the law governing conditions of confinement in civil and criminal detention. Her work has been published by the *Michigan Law Review*, the *Harvard Law Review*, the *Northwestern University Law Review*, the *New York University Law Review*, the *Cornell Law Review*, the *Vanderbilt Law Review*, the *Notre Dame Law Review*, the *Harvard Civil Rights and Civil Liberties Law Review*, and the *University of Pennsylvania Journal of Constitutional Law*, among others.

3. **John F. Stinneford** is Professor of Law at the University of Florida Levin College of Law. He has written extensively on the history of the Eighth Amendment and, in particular, the

original public meaning of the Cruel and Unusual Punishments Clause. His work has been published in numerous scholarly journals including the *Georgetown Law Journal*, the *Northwestern University Law Review*, the *Virginia Law Review*, the *Notre Dame Law Review*, the *William & Mary Law Review*, the *Harvard Journal of Law and Public Policy*, and the *Northwestern University Journal of Criminal Law and Criminology*, among others.

ARGUMENT

I. The Application Of A Subjective Deliberate Indifference Standard To System-Wide Challenges Is Impracticable And Will Cause Cruel And Unusual Conditions To Proliferate.

History has revealed the "subjective deliberate indifference" standard to be a failed experiment. First, application of such a standard to systemic problems in a prison system is unworkable because it is all but impossible to divine the subjective motivation of a large organization comprised of numerous individuals. Second, the subjective standard has been shown to create prison environments where the proliferation of cruel and unusual conditions is essentially guaranteed.

A. The Subjective Standard Is Impracticable To Administer.

The subjective deliberate indifference standard proposed by Defendants suffers from serious practical flaws—especially where, as here, it is applied to claims challenging system-wide policies and practices.

As Justice White made clear, "intent simply is not very meaningful when considering a challenge to an institution, such as a prison system." *Wilson v. Seiter*, 501 U.S. 294, 310 (1991) (White, J., concurring). It goes without saying that "[i]nstitutions, as complex organizations, lack the unified psychology of natural persons." Sharon Dolovich, *Cruelty, Prison Conditions, and the Eighth Amendment*, 84 N.Y.U. L. REV. 881, 925 (2009). Because Plaintiffs allege that the solitary

confinement regime, taken as a whole, constitutes "cruel or unusual punishment" in violation of Section 27, assessing their claims under a subjective standard requires asking the additional question of *whose* intent to examine.

Perhaps it is for these reasons that federal courts have long applied objective standards to damages claims raising systemic challenges against municipalities: The Supreme Court determined in *Monell v. Department of Social Services. of City of New York* that "when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury [then it is] the government as an entity [that] is responsible under § 1983." 436 U.S. 658, 694 (1978). And in claims against municipalities where plaintiffs must show deliberate indifference to succeed, deliberate indifference is defined objectively. *Farmer v. Brennan*, 511 U.S. 825, 841 (1994) (explaining that *Canton v. Harris*, 489 U.S. 378 (1989), requires a showing of deliberate indifference for certain claims against municipalities and noting that "[i]t would be hard to describe the *Canton* understanding of deliberate indifference, permitting liability to be premised on obviousness or constructive notice, as anything but objective").

Even individual cases suffer from serious administrability problems under a subjective intent framework.[1] First, "[w]hen liability has a subjective focus, the central factual issue—the officer's state of mind—is extremely difficult to adjudicate accurately." Margo Schlanger, *The Constitutional Law of Incarceration, Reconfigured*, 103 Cornell L. Rev. 357, 402 (2018). This is because "[p]laintiffs will rarely have direct evidence, and officers will nearly always be able to argue that even if the force they used was objectively excessive, they were honestly (if

[1] Though this case presents a system-wide challenge, *amici* note this concern as the standard applied by this Court in this case may be exported to other contexts.

unreasonably) mistaken, rather than malicious, sadistic, or reckless." *Id*. That is, no matter what actually happens, "the officials involved can nearly always claim that they did not intend for the harm to occur" and the "nearly impossible burden" to "prove otherwise is on the prisoner plaintiff." Alice Ristroph, *State Intentions and the Law of Punishment*, 98 J. CRIM. L. & CRIMINOLOGY 1353, 1404 (2008). The problem here is not just that prisoners lack evidence of prison officials' intentions, but rather "that judgments about intentions are inevitably contestable." *Id*.

These administrability problems exist not only in the context of court proceedings, but also in the context of prison administration. As a group of former corrections officials put it: "Unlike the question whether conduct was reasonable given the circumstances, jail administrators have an exceedingly difficult time examining a staff member's subjective intentions." Brief of Former Corrections Administrators and Experts as Amici Curiae in Support of Petitioner, *Kingsley*, 576 U.S. 389 (No. 14-6368), 2015 WL 1045423, at *21.

B. The Subjective Standard Incentivizes Undesirable Conduct And Achieves Intolerable Outcomes.

Beyond administrability concerns, applying a subjective standard incentivizes undesirable conduct. All too often, intolerable outcomes are the result.

Start with the pernicious incentives. First, subjective deliberate indifference encourages failures of care at the macro level of prison management. Prisons are bureaucracies "and as with all bureaucracies, inertia and negligence can create the potential for enormous harm." Dolovich, *supra*, at 946. Yet, an intent standard not only forgives bureaucratic negligence and inertia, but it actually "create[s] incentives for those responsible for adequate service delivery and other macro-level conditions not to know about or investigate the possibility of even system-wide inadequacies that could cause serious harm." *Id*. at 947. Likewise, "job functions are highly compartmentalized" in "[m]odern prison systems" such that no individual "in the system may have actual awareness of

an unjustifiable risk of harm." John F. Stinneford, *The Original Meaning of "Cruel"*, 105 Geo. L.J. 441, 499 (2017 (hereinafter "Cruel"). And an intent requirement only exacerbates this trend by "giv[ing] officials a powerful incentive to bureaucratize and compartmentalize" job duties even further "in order to defeat" claims. *Id*. at 501.

Second, an intent requirement incentivizes failures of care at the level of individual corrections officers. Because an intent requirement "holds officers liable only for those risks they happen to notice," it "creates incentives for officers not to notice—despite the fact that when prison officials do not pay attention, prisoners may be exposed to the worst forms of suffering and abuse." Dolovich, *supra*, at 892; *see also* Stinneford, *Cruel*, *supra*, at 501 (explaining that an intent requirement "encourages public officials to avoid learning about the risks of harm facing criminal offenders, thus increasing the likelihood that such harms will actually occur"). If the relevant legal standard immunizes a corrections officer when he is unaware of the risk of harm, then it is no surprise that such a standard would "discourage[e] situational awareness." Schlanger, *supra*, at 420. In fact, a group of former corrections officials themselves explained that "a subjective standard would erode staff accountability" because under such a standard, a staff member could evade liability simply "by saying that he did not behave recklessly or with malice." Brief of Former Corrections Administrators and Experts as Amici Curiae in Support of Petitioner at 21, *Kingsley*, 576 U.S. 389(No. 14-6368), 2015 WL 1045423, at *21. So, while it is true that "correctional officers cannot easily know about every risk faced by the inmates in their custody," rather than "directing officials' attention to possible risks," a subjective standard "create[s] incentives for officials not to notice such risks." Dolovich, *supra*, at 947.

Third, the intent standard "creates arbitrary distinctions between offenders who suffer the same harm." Stinneford, *Cruel*, *supra*, at 500. For instance, consider the following two individuals:

two preoperative transgender prisoners "are placed into the same type of prison setting, and suffer the same beatings and rape, but one was 'lucky' enough to have a demonstrably malevolent or reckless jailer while the other was simply caught in the maw of a mindless bureaucracy"—only the former could succeed under a subjective intent standard. *Id.* at 501; *see also* Schlanger, *supra*, at 399 (positing a similar hypothetical).

History has shown that these perverse incentives all too often result in intolerable outcomes. The case of *Grieveson v. Anderson* is particularly illustrative. 538 F.3d 763 (7th Cir. 2008). Over a four-month period, the plaintiff was violently attacked on seven different occasions—once, by a correctional officer—resulting in a broken nose, intense pain and blood "down his throat," "bruising and bleeding injuries," a broken tooth that had to be surgically removed, a "shoulder injury," "a broken left eye socket, damage to his optic nerve, and injuries to his ribs, face, jaw, and nose." *Id.* at 767-70. In addition to privately warning correctional officers, and family members contacting the jail from the outside, the plaintiff filed the following complaint before the final and "by far the worst" attack:

> As you know I have been beaten and assaulted over 6 times and [through] no fault of mine. I am real scared of my life in here and the guards are even afraid to come into the block[.] How do you think we fell[?] I feel like I am [losing] my mind in here and going to have a breakdown. I ask you to move me to another jail or at the least move me to a safer block.

Id. at 769 (alterations in original). Nevertheless, for this final attack, and for five of the six others, the court held that he failed to show that prison officials possessed the requisite subjective knowledge. *Id.* at 775-79. This reasoning makes plain the perverse incentives of the deliberate indifference standard: an unresponsive and compartmentalized prison system left the plaintiff at risk of violence and then denied him redress. Likewise, in *Marbury v. Warden*, the plaintiff "repeatedly attempted to be transferred to another dormitory" after witnessing over 15 stabbings and receiving threats to his safety. 936 F.3d 1227, 1231 (11th Cir. 2019). One officer responded:

"[y]ou don't have a shank, . . . you need to get one." *Id.* at 1231-32. Shortly thereafter, the plaintiff was attacked, resulting in a "puncture wound to the base of his skull, multiple stab wounds to his shoulder area, a broken nose, and a gash two centimeters deep in his back." *Id.* at 1239 (Rosenbaum, J., dissenting). The court nonetheless held that a "reasonable jury could not extrapolate" that the officer "was subjectively aware of a substantial risk of serious harm." *Id.* at 1238. Judge Rosenbaum wrote in dissent, "*Lord of the Flies* is supposed to be a work of fiction; it should not describe the environment in our prisons." *Id.* at 1239. And yet, in case after case, the deliberate indifference standard ensures that it does. Unfortunately, neither *Grieveson* nor *Marbury* is anomalous.

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Ultimately, "[t]he state, having chosen to put [a prisoner] in a dangerous environment, is obliged to keep him safe." Dolovich, *supra*, at 960. An objective standard does just that: it "incentivizes reasonable behavior, allocates loss to the party more responsible for the loss, and implements the moral insight that everyone's welfare matters." Schlanger, *supra*, at 421. Meanwhile, the subjective standard suffers from major administrability problems, incentivizes both system-wide and individual failures of care, creates arbitrary distinctions between prisoners who suffer the same harm, and results in intolerable outcomes that this Court should steadfastly guard against.

II. The Subjective Standard Is Inconsistent With Recent Federal Jurisprudential Developments And The Original Meaning Of The Eighth Amendment.

The subjective standard may represent a misguided aberration. During the 1970s and 1980s, the United States Supreme Court variously applied objective and subjective standards in conditions cases. In 1991, the court resolved this uncertainty in favor of the subjective standard. Yet it now applies an objective standard in excessive force cases brought by pre-trial detainees, raising serious

questions about the logic and propriety of the application of a subjective standard to conditions challenges brought by post-conviction prisoners. A subjective standard is also inconsistent with original meaning.

A. A Shift In Recent Federal Jurisprudence May Reflect A Recognition That The Subjective Standard Was Adopted In Error.

The United States Supreme Court's early conditions cases embraced both objective and subjective standards. In *Estelle v. Gamble*, for example, the Court read the Eighth Amendment to contain a scienter standard—only those conditions imposed with a "wanton" mindset or "deliberate indifference" were actionable. 429 U.S. 97, 102 (1976). In *Hutto v. Finney*, however, the Court described conditions of confinement in Arkansas as "constitut[ing] cruel and unusual punishment" by emphasizing the objectively awful conditions prisoners were forced to endure. 437 U.S. 678, 685-88 (1978). There was simply no discussion of scienter or subjective motivation. Then in *Rhodes v. Chapman*, 452 U.S. 337, 348 (1981), the Court upheld double-celling in an Ohio prison and, in so doing, evaluated the conditions entirely objectively.

In 1991, the Court seemed to resolve this philosophical contest, holding that subjective intent was an element of an Eighth Amendment conditions case. *See Wilson v. Seiter*, 501 U.S. 294 (1991); *Hudson v. McMillian*, 503 U.S. 1 (1992); *Farmer v. Brennan*, 511 U.S. 825 (1994). That misguided approach was not without its detractors even then. In *Wilson*, for instance, Justice White, joined by Justices Marshall, Blackmun, and Stevens, noted that "the majority's intent requirement [was] a departure from precedent." 501 U.S. at 310 (White, J., concurring in the judgment). They argued that the standard must remain objective:

> Eighth Amendment challenges to conditions of confinement are to be treated like Eighth Amendment challenges to punishment that is "formally meted out as punishment by the statute or the sentencing judge,"—we examine only the objective severity, not the subjective intent of government officials.

Id. at 309 (White, J., concurring in the judgment) (citation and emphasis omitted). Not only was the new subjective standard at odds with precedent, but as these Justices rightly noted, it would likely prove "impossible to apply in many cases." *Id*. at 310. This is because:

> Inhumane prison conditions often are the result of cumulative actions and inactions by numerous officials inside and outside a prison, sometimes over a long period of time. In those circumstances, it is far from clear whose intent should be examined, and the majority offers no real guidance on this issue.

Id. Justices Blackmun and Stevens continued to object to the subjective standard in subsequent cases. *Farmer*, 511 U.S. at 851 (Blackmun, J., concurring) ("[I]nhumane prison conditions violate the Eighth Amendment even if no prison official has an improper, subjective state of mind."); *id*. at 858 (Stevens, J., concurring) ("I continue to believe that a state official may inflict cruel and unusual punishment without any improper subjective motivation.").

The Supreme Court's most recent pronouncement on the issue in *Kingsley v. Hendrickson*, 576 U.S. 389 (2015), suggests a possible revitalization of the objective standard.[2] In *Kingsley*, the Court definitively rejected a subjective standard and held that a pretrial detainee "must show only that the force purposely or knowingly used against him was objectively unreasonable" to succeed on an excessive force claim. *Id*. at 396-97. In the wake of *Kingsley*, several federal courts of appeals have adopted objective standards for a range of conditions-of-confinement claims brought by pretrial detainees. *See Miranda v. Cty. of Lake*, 900 F.3d 335, 352 (7th Cir. 2018) (adopting objective standard); *Darnell v. Pineiro*, 849 F.3d 17, 35 (2d Cir. 2017) (same); *Castro v. Cty. of Los Angeles*, 833 F.3d 1060, 1070 (9th Cir. 2016) (en banc) (same); *see also Richmond*

[2] *Amici* note that even under the objective standard set out in *Kingsley*, a defendant is not liable for unintentional action. *See Kingsley v. Hendrickson*, 576 U.S. 389, 395-96 (2015) (noting that liability will not stem from negligently inflicted harm and accidents).

v. Huq, 885 F.3d 928, 938 n.3 (6th Cir. 2018) (declining to decide the issue but noting that *Kingsley* "calls into serious doubt" whether pretrial detainees "need even show" subjective intent).

And though *Kingsley* concerned a pretrial detainee, the Court specifically "acknowledge[d] that [its] view that an objective standard is appropriate in the context of excessive force claims brought by pretrial detainees pursuant to the Fourteenth Amendment may raise questions about the use of a subjective standard in the context of excessive force claims brought by convicted prisoners." *Kingsley*, 576 U.S. at 402. That is to say, the *Kingsley* decision has consequences "not just [for] the standard for pretrial detainees but for convicted prisoners as well." Schlanger, *supra*, at 426-27; *see also* Judith Resnik, *The Puzzles of Prisoners and Rights: An Essay in Honor of Frank Johnson*, 71 Ala. L. Rev. 665, 698 n.189 (2020) (noting that *Kingsley* "has been read to signal a retreat from the subjective inquiry into state of mind"). Even Justice Scalia, who adopted the subjective standard in *Wilson*, believed that *Kingsley* marked a consequential departure from that standard. *Kingsley*, 576 U.S. at 404-08 (Scalia, J., dissenting). He is correct, and as such the "approach [in *Wilson*] must be jettisoned" in light of *Kingsley*. Schlanger, *supra*, at 427.

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It may be decades before the dust settles and this evident course correction is consummated. In the meantime, this Court should reject the ill-conceived, unworkable, and injurious subjective intent requirement Defendants propose in this matter.

The Founders rejected any notion of "uniform" state constitutions. Hans Linde, *First Things First—Rediscovering the States' Bills of Rights*, 9 U. BALT. L. REV. 379, 381 (1980). In the months leading up to independence, political leaders elected instead to leave individual states to "write a constitution satisfactory to itself." *Id.* (*citing* FLETCHER M. GREEN, CONSTITUTIONAL DEVELOPMENT IN THE SOUTH ATLANTIC STATES 1776-1860 52-56 (1930)). In our system of dual

sovereigns, the states have always been free to provide more robust constitutional rights than their federal counterpart. *See* William Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L REV. 489 (1977).

For that reason, United States Supreme Court decisions "are not and should not be, dispositive of questions regarding rights guaranteed by counterpart provisions of state law." *Brennan*, *supra*, at 502. Rather, this Court has "the authority to construe our own constitution differently from the construction by the United States Supreme Court of the Federal Constitution, as long as our citizens are thereby accorded no lesser rights than they are guaranteed by the parallel federal provision." *State v. Carter*, 322 N. C. 709, 713, 370 S.E.2d 553, 555 (1988); *see also Minnesota v. National Tea Co.*, 309 U.S. 551 (1940) ("It is fundamental that state courts be left free and unfettered by us in interpreting their state constitutions."); *State v. Hicks*, 333 N. C. 467, 483, 428 S.E. 167, 176 (1993) ("The proper tests to be used in resolving questions arising under the Constitution of North Carolina can be determined with finality only by this Court"); *State v. Arrington*, 311 N. C. 633, 642, 319 S.E.2d 254, 260 (1984) ("In construing provisions of the Constitution of North Carolina, this Court is not bound by opinions of the Supreme Court of the United States construing even identical provisions in the Constitution of the United States"). "[O]nly" where federal case law is "logically persuasive and well-reasoned . . . may they properly claim persuasive weight as guideposts when interpreting counterpart state guarantees." Brennan, *supra*, at 502. For the reasons set forth above, federal Eighth Amendment jurisprudence does not satisfy that test.

B. Examining The United States And North Carolina Constitutions Through An Originalist Lens Shows That The Subjective Deliberate Indifference Standard Is Contrary To Original Meaning.

The United States Supreme Court's selection of an objective standard in *Kingsley* reflects the long-standing position of scholars who "share the position that the constitutional text cannot

justify an intent-based constitutional approach" for any prison conditions cases. *Schlanger*, *supra*, at 428-31 (collecting originalist scholarship).

To start, "cruel" in the Eighth Amendment "likely refers to the effect of the punishment, *not the intent* of the punisher." Stinneford, *Cruel*, *supra*, at 471 (emphasis added). The two most prominent founding era dictionaries each contain two definitions of "cruel": one definition "applied to persons or their dispositions," and another relating to the effect or experience of cruelty, such as: "inhuman; barbarous; savage; causing pain, grief or distress; exerted in tormenting, vexing or afflicting." *Id*. at 467 (*quoting* 1 Noah Webster, An American Dictionary of the English Language (New York, S. Converse 1828)). Nearly every originalist scholar to examine the question has concluded that "cruel" was understood by courts at the Founding to connote "excessive," "disproportionate," or "unjustly harsh" rather than a reference to the state actor's mindset.[3] In the context of adjudicating conditions claims, no other definition makes sense—whether or not an individual corrections officer has a "cruel disposition" is beside the point—kind people may run unconstitutional prisons just as surely as barbarous people.

This objective definition is also consistent with early explications of the North Carolina Constitution. The authoritative treatise on the history and meaning of the North Carolina Constitution observes that "the most usable touchstone [of the meaning of Section 27] was indicated as long ago as 1911 in Henry G. Connor and Joseph B. Cheshire's annotations to the state constitution: whatever is greater than has ever been prescribed, or known, or inflicted, must be excessive, cruel and unusual." John Orth And Paul Newby, The North Carolina State

[3] *See e.g.* Stinneford, *supra*; Alexander A. Reinert, *Reconceptualizing the Eighth Amendment: Slaves, Prisoners, and "Cruel and Unusual" Punishment*, 94 N.C. L. REV. 817, 855 (2016); Anthony F. Granucci, *"Nor Cruel and Unusual Punishments Inflicted:" The Original Meaning*, 57 CALIF. L. REV. 839, 844-60 (1969).

Constitution 69 (Oxford Second Edition, 2013). Likewise, the North Carolina Supreme Court in *State v. Driver* held that "what is greater than has ever been prescribed or known or inflicted, must be 'excessive, cruel and unusual.'" 78 N.C. 423, 426 (1878). Subjective intent is wholly absent from these analyses.[4]

CONCLUSION

The subjective standard is impracticable, pernicious, and contrary to original meaning. This Court should reject Defendants' invitation to invoke a subjective standard to evaluate the claims in this case.

[4] Notably, the condition at issue in this case—prolonged solitary confinement—is itself incompatible with the original meaning of the Eighth Amendment, an independent reason for this Court to reject a maligned and flawed subjective standard. *See John F. Stinneford, The Original Meaning of "Unusual": The Eighth Amendment as a Bar to Cruel Innovation*, 102 NW. U. L. REV. 1739, 1770-71 (2008).

Respectfully submitted this 26th day of November, 2020.

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