No. 18-337

In the Supreme Court of the United States

COUNTY OF ORANGE, CALIFORNIA, ET AL.,
Petitioners,

v.

MARY GORDON, successor in interest for decedent, Matthew Shawn Gordon, individually,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF FOR PETITIONERS

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I. INTRODUCTION.

Orange County's Petition demonstrated that the circuit courts are presently split on an important, recurring constitutional issue – whether the due process test for inmate "medical care" claims should be objective or subjective. Needless to say, resolving circuit splits of this type represents one of this Court's most important functions. *See*, Margaret Cordray & Richard Cordray, *The Philosophy of Certiorari: Jurisprudential Considerations in Supreme Court Case Selection*, 82 Wash. U. L.Q. 389, 437 (2004)("it is widely regarded as unfair and unseemly for litigants to receive different treatment based merely on the geographic accident of where their cases were filed.")

Even when viewed charitably, Respondent Mary Gordon's Opposition fails to squarely contest any of the key points raised by Orange County's Petition. At the outset, Gordon does not dispute that the appellate courts are currently split on the issue of whether the due process test for "medical care" claims should be objective or subjective. *See*, *Richmond v. Huq*, 885 F.3d 928, 938, n.3 (6th Cir. 2018)(as to "whether *Kingsley* . . . abrogates the subjective intent requirement of a Fourteenth Amendment deliberate indifference claim[,] [s]everal of our sister courts have and are split.") Gordon does not deny that the three circuits finding an objective standard should govern are further split on the level of medical fault which the plaintiff must demonstrate. (Pet., 9-10) Among these three circuits, Gordon does not dispute that the Ninth stands alone in holding that conduct which is merely "akin to recklessness" is sufficient to impose due process liability on medical caregivers. (*Id.*, 10).

Gordon also does not deny that the Ninth Circuit's "akin to recklessness" standard is unprecedented in "due process" jurisprudence. Indeed, this Court has never authorized anything like it for use in the due process context – or in any other context for that matter. *See*, *Cty. of Sacramento v. Lewis,* 523 U.S. 833, 845–46 (1998)(Court has "emphasized time and again that the touchstone of due process is protection of the individual against *arbitrary action* of government" and "that *only* the *most egregious* official conduct can be said to be *arbitrary* in the constitutional sense.")(internal quotation marks omitted; emphasis added); *Daniels v. Williams,* 474 U.S. 327, 331 (1986) ("Historically, th[e] guarantee of due process has been applied to *deliberate decisions* of government officials to deprive a person of life, liberty, or property.") (emphasis added.)

When its novel and erroneous components all converge, the Ninth Circuit's formulation facially threatens to constitutionalize medical malpractice liability – a form of "liability for negligently inflicted harm [that] is categorically beneath the threshold of constitutional due process." *Lewis,* 523 U.S. at 849; *see*, *Estelle v. Gamble*, 429 U.S. 97, 106 (1976)("Medical malpractice does not become a constitutional violation merely because the victim is a prisoner.") The Court should grant review on this nationally important issue, it should reject the Ninth Circuit's tort – like due process formulation and it should adopt the subjective medical care standard now employed by a majority of the circuits.

II. THIS CASE PRESENTS AN EXCELLENT VEHICLE FOR CLARIFYING THE DUE PROCESS MEDICAL CARE STANDARD.

A. The Ninth Circuit's New Test Risks Constitutionalizing Medical Malpractice.

Given its novelty, Gordon does not deny that the Ninth Circuit's due process formulation would unavoidably permit an expansive new species of constitutional medical claims under the due process clause. Indeed, the Ninth Circuit has found that "objectively unreasonable" medical errors can be constitutionally actionable even when they are subjectively unintended. (Pet. App., 14). This formulation tracks state tort law and is consequently incompatible with this Court's due process precedent. *See*, *Lewis,* 523 U.S. at 849 ("liability for negligently inflicted harm is categorically beneath the threshold of constitutional due process."); *Parratt v. Taylor*, 451 U.S. 527, 544 (1981)(warning against efforts to make the Fourteenth Amendment "a font of tort law . . . .") The Ninth Circuit's opinion is otherwise suffused with tort-like phrases that risk serving as proxies for state medical malpractice law, such as "a reasonable official in the circumstances", "reasonable available measures" and "conduct akin to reckless disregard". (Pet. App., 14).

The danger of tort law concepts overwhelming the sage due process boundaries set by this Court only becomes more pronounced the closer one looks. For example, under the Ninth Circuit's formulation, once a jail caregiver makes an "intentional" medical decision, all that an inmate need show is that the decision was an objectively "unreasonable" error of a type "akin to

recklessness". (Pet. App., 14) But what does "akin to recklessness" mean? And what level of "kinship" is sufficient for liability? Tellingly, neither the Ninth Circuit (or Gordon) have ever attempted to answer these questions – and resolution of important due process questions of this type "cannot be left to the unguided discretion of a judge or jury." *Youngberg v. Romeo*, 457 U.S. 307, 321 (1982).[1]

In the face of all this confusion, even conscientious juries would be all too likely to find medical conduct "akin to recklessness" includes medical negligence – especially since negligence shares a "kinship" with recklessness, and the line between the two concepts is notoriously blurred and indistinct. *See*, *Snyder v. Phelps*, 562 U.S. 443, 458 (2011)(expressing concern that juries would prove unable to appreciate constitutional liability limits when asked to apply a "highly malleable" tort definition). Indeed, library shelves groan beneath the weight of authorities wrestling with the issue of where and how to draw a line between "negligence" and civil "recklessness". *See*, *e.g.*, David Welkowitz, *Willfulness*, 79 Alb. L. Rev. 509, 520 (2016)("the difficulty" in distinguishing among levels of culpability "is especially pronounced when distinguishing between . . . recklessness and negligence."); Gregory G. Jackson, *Punishments for Reckless Skiing -- Is the Law Too Extreme?*, 106 Dick. L. Rev. 619, 632 (2002)("There is often a fine line

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[1] Given its unacceptable vagueness, the Ninth Circuit's formulation should be recognized for what it is: authorization for caregivers to face trials charging what can only be called -- in Kafka's memorable phrase -- "nameless crimes". Franz Kafka, *Der Process (The Trial)*, (1925).

between an innocent mistake that results in an accident and recklessness."); Donald C. Langevoort, *The Reform of Joint and Several Liability Under the Private Securities Litigation Reform Act of 1995: Proportionate Liability, Contribution Rights, and Settlement Effects*, 51 Bus. Law. 1157, 1165 (1996) ("Many people have noted the fine line between recklessness and negligence.")

Notwithstanding the forgoing, Gordon boldly suggests that certiorari would be improper because nothing in the Ninth Circuit's due process standard embraces forbidden tort concepts. (Opp., 14). Gordon's chief point seems to be that the Ninth Circuit has disclaimed any intent to authorize state tort - style medical malpractice suits under the Fourteenth Amendment. (*Id.*). But, as just noted, the actual language of its common law - style objective test risks doing exactly that. Given this fact, sheep's clothing of the sort offered by the Ninth Circuit cannot disguise the wolf it proposes to unleash – particularly when the lupine character of its due process test is otherwise open and obvious. *See*, *Morrison v. Olson*, 487 U.S. 654, 699 (1988)(Scalia, J., dissenting)("Frequently an issue of this sort will come before the Court clad, so to speak, in sheep's clothing. . . . But this wolf comes as a wolf.")

B. The Important, Recurring Questions in this Case are Ripe for Review.

Gordon argues that certiorari should be denied because the Ninth Circuit's decision establishing a new Constitutional "medical care" standard is "interlocutory." (Opp., 17-18.) But Respondent is wrong for several reasons.

First, and most importantly, Respondent does not challenge this Court's *jurisdiction* over this case. The Ninth Circuit's decision fully resolved the legal question presented, and the Court has full discretion to review that judgment. *See, Mazurek v. Armstrong,* 520 U.S. 968, 975 (1997)(per curiam) ("[O]ur cases make clear that there is no absolute bar to review of nonfinal judgments[.]"); *see also,* Stephen M. Shapiro *et al., Supreme Court Practice,* § 4.18, at 283 (10th ed. 2013) ("[W]here . . . there is some important and clear-cut issue of law that is fundamental to the further conduct of the case and that would otherwise qualify as a basis for certiorari, the case may be reviewed despite its interlocutory status.").

Accordingly, this Court regularly grants review of interlocutory decisions that, like this one, raise important issues with widespread impact on other cases. *See*, *e.g.*, 17 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 4036 & n. 57 (3d ed. 2008)("certiorari has been granted to review many nonfinal dispositions without any further explanation"; citing 18 such cases); Shapiro, § 4.18, at 283 and 285 (collecting cases). And this is particularly so where, as here, the formation or application of constitutional standards is in issue. *See*, *e.g.*, *American Legion v. American Humanist Ass'n*, Case No. 17-1717, 2018 WL 3159307, at *1 (November 2, 2018)(granting certiorari to resolve First Amendment religion clause issues); *Estelle,* 429 U.S. at 98 (certiorari granted to establish constitutional test for convict "medical care" claims); *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 247, n.6 (1974) (certiorari granted so as to not "leave unanswered . . . an important question of freedom of the press under the First Amendment.").

The issue for decision here satisfies all of these criteria. As the *amici* briefs ably demonstrate, the proper standard for resolving inmate "medical care" claims has recurring national importance. Millions of incarcerated persons and their caregivers will be impacted by how the Court resolves this case. (Associations' Br., 2-3; States' Br., 13-14.) Even before the Ninth Circuit's decision, litigation by pre-trial detainees on medical care issues was "ubiquitous". (States' Br, 15). In fiscal year 2012 alone, prisoners initiated 22,662 civil rights filings in federal district court. *See,* Margo Schlanger, *Trends in Prisoner Litigation As The PLRA Enters Adulthood*, 5 UC Irvine L. Rev. 153, 157 (2015). Prior review of certain federal dockets found that between 10-25% of inmate litigation is directed to inmate medical care. *See,* Margo Schlanger, *Inmate Litigation,* 116 Harv. L. Rev. 1555, 1570-71 nn. 47 & 48 (2003) (discussing and tabulating results of studies "which between them cover inmate cases filed at various times in a large number of federal courts from 1971 to 1994") Billions of dollars in taxpayer medical budgeting, including potentially explosive future litigation expenditures, are therefore implicated by the outcome of this case. (States' Br., 13-15).

Likely for similar then - extant reasons, in *Estelle v. Gamble*, 429 U.S. 97 (1976) this Court granted certiorari to enunciate the applicable standard in convict "inadequate medical care" cases. The *Estelle* Court granted certiorari when that case (like this one) had been remanded by the court of appeals for further proceedings. *Id.* at 98. Given the constitutional issue presented, the Court found certiorari appropriate even though that case (unlike this one) presented no

identifiable circuit split. *Id.* at 115 (Stevens, J., dissenting)(Court grants certiorari even when "all the Courts of Appeals to consider the question have reached substantially the same conclusion that the Court adopts.") Needless to say, the circuit split presented here provides powerful independent grounds for granting certiorari. *See, e.g., Thompson v. Keohane*, 516 U.S. 99, 106 (1995)(certiorari granted to resolve circuit conflict regarding federal habeas corpus statute "[b]ecause uniformity among federal courts is important on questions of this order. . . .")

Second, although Respondent relies on Justice Alito's statement respecting denial of certiorari in *Mount Soledad Memorial Association v. Trunk,* 567 U.S. 944 (2012), the factual basis for his finding is wholly absent here. In *Mount Soledad,* Justice Alito reasoned that it was "unclear precisely what action" would be required of the district court after remand. *Id.* at 945-46 (Alito, J.)(citation omitted). Here, by contrast, the Ninth Circuit definitively announced an objective test for resolution of inmate due process claims, thereby foreclosing the District Court from reaching a contrary conclusion. (Pet. App., 14).

Because the question of whether the Ninth Circuit's objective "medical care" test satisfies substantive due process requirements is a "clear-cut issue of law that is fundamental to the further conduct of th[is] case," this Court may -- and should -- grant certiorari now to correct the Ninth Circuit's clearly erroneous decision. Shapiro, § 4.18, at 283*; see, Mazurek,* 520 U.S. at 975 (granting certiorari prior to final judgment where "the Court of Appeals' decision [wa]s clearly erroneous under [Supreme Court] precedents.")

C. Gordon's Jail Guard Claims Raise Due Process "Medical Care" Issues.

Gordon makes the surprising assertion that the Court's ability to resolve the standard for adjudging "medical care" claims may be complicated, or blocked outright, by the presence of jail guard defendants in this case. (Opp., 18-20). Specifically, Gordon suggests that the jail guard aspect of the case might implicate "failure to protect" issues rather than "medical care" claims. (Opp. 12) From this, Gordon hints that this case may not be a true "medical care" case at all. (Opp. 18-20).

But the record shows otherwise. As regards the jail officers -- and the other nursing defendants Gordon sues – Respondent's own brief admits that she pled *one* constitutional theory in the trial court: "that Petitioners caused Gordon's death by failing to provide constitutionally adequate medical care." (Opp., 7). The case was decided in the trial court based solely on Gordon's "medical care" allegations. (Pet. App., 38). The case was also decided by the Ninth Circuit based solely on Gordon's "medical care" claims against all defendants, including the jail officers. (Pet. App., 4).

Gordon's strategic decisions in this regard came with good reason. Jail guards, like the nursing defendants she names, can face liability under a 42 U.S.C. § 1983 "medical care" theory. *See, e.g., Estelle,* 429 U.S. at 104-05 (constitutional medical care claims can arise against "prison doctors" or "prison guards" for "intentionally denying or delaying access to medical care or intentionally interfering with the treatment once prescribed.")

As the record plainly reveals, Gordon sought, and obtained, an objective Ninth Circuit "medical care" liability test for use against jail guards and nurses. Respondent cannot avoid this Court's review of that test by expressing eleventh hour second thoughts about her own prior forensic decisions. *See*, *Rent-A-Center, West, Inc. v. Jackson*, 561 U.S. 63, 75–76 (2010) (finding that "contention, not mentioned below" came "too late, and we will not consider it.")

In short, this case is an excellent vehicle for resolving whether an objective or subjective test governs due process "medical care" claims. The question is squarely presented, and it presents a pure issue of constitutional law. Moreover, reversal of the decision below may be outcome determinative: If a subjective test applies, the case should be dismissed.

III. THE CIRCUITS ARE SHARPLY SPLIT ON THE ISSUE PRESENTED.

Gordon does not deny that the circuits have come to opposite conclusions on the issue before the Court. (Pet., 11-19). Gordon's simply calls for more "percolation" of the issue (Opp., 25-26), but without offering any explanation of how the circuit split will resolve on its own without the Court's guidance.

Gordon's "percolation" argument seems to be based on the observation that the circuit opinions which have applied *Kingsley's* objective "excessive force" standard to "medical care" claims include more text than those which have not. (Opp., 20). But this is facially a function of the issue to be decided.

This issue presently dividing the circuits is whether *Kingsley v. Hendrickson,* 135 S. Ct. 2466 (2015)

requires adoption of an objective standard for judging due process medical care claims — instead of the subjective standard previously employed by all circuits. (Pet. 19-23). Plainly, nothing said by this Court in *Kingsley* so much as hinted that its objective rationale — intended for application in adjudging *intentional* officer uses of force — has any applicability in judging *unintended* medical errors. And the circuits which have declined to find *Kingsley* applicable to medical care issues have chiefly rested on this succinct, powerful point. *See*, *e.g.*, *Whitney v. City of St. Louis*, 887 F.3d 857, 860 n.4 (8th Cir. 2018)("*Kingsley* does not control because it was an excessive force case, not a deliberate indifference case."); *Nam Dang by & through Vina Dang v. Sheriff, Seminole Cty.*, 871 F.3d 1272, 1279 n.2 (11th Cir. 2017) ("*Kingsley* involved an excessive-force claim, not a claim of inadequate medical treatment due to deliberate indifference.").

The cases which have ostensibly applied *Kingsley* to medical care claims have needed to contend with this reality — as well as offer attempted justifications for reversing their own prior precedent. These opinions are not longer because they are better "reasoned" as Gordon repeatedly suggests. (Opp., 2, 6, 12). Fairly read, they have simply had more adverse points to try and explain away. And by necessity, a lengthy and complicated exposition is required to craft a new test for judging *unintended* medical errors through reference to a case (*Kingsley*) that dealt with jail guards' *intentional* uses of force. The Ninth Circuit's opinion in this case is illustrative. With nothing in *Kingsley* referencing medical care to quote, the circuit chiefly elaborates at length on its own sense of "logic". (*See e.g.*, Pet. App., 12)(Ninth Circuit concludes that

"logic dictates extending [*Kingsley's*] objective deliberative indifference standard . . . to medical care claims.")(citations omitted.)

Tellingly, Gordon's criticism of footnote use by courts on the subjective side of the split is not supported by any citations. And, in any event, "footnotes are part of an opinion too. . . ." *United States v. Denedo*, 556 U.S. 904, 921 (2009)(Roberts J., concurring in part and dissenting in part); *see*, *Melancon v. Walt Disney Productions,* 127 Cal.App.2d 213, 214 (1954) ("There is no merit in plaintiff's contention . . . that the ruling of the Supreme Court was not binding since it appeared in the footnote in the opinion. A footnote is as important a part of an opinion as the matter contained in the body of the opinion and has like binding force and effect.") It should otherwise be obvious that "there is no direct correlation between the length of an opinion and its soundness. . . ." *Alberts v. HCA, Inc.*, 496 B.R. 1, 9 (D.D.C. 2013).

IV. CONCLUSION.

For all the foregoing reasons, the Court should grant the Petition.

Respectfully submitted,

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