No. 18-760

IN THE

# Supreme Court of the United States

OBERIST LEE SAUNDERS,

*Petitioner,*

v.

WAYNE IVEY, SHERIFF OF BREVARD COUNTY, IN HIS OFFICIAL CAPACITY; SUSAN JETER, IN HER OFFICIAL CAPACITY; JOHN C. WRIGHT, IN HIS INDIVIDUAL CAPACITY; AND PATRICIA TILLEY, IN HER INDIVIDUAL CAPACITY,

*Respondents.*

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

## REPLY BRIEF FOR PETITIONER


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## REPLY BRIEF OF PETITIONER

This case presents an opportunity for the Court to resolve an entrenched circuit split regarding the appropriate standard of review for constitutional claims brought by pretrial detainees. Three courts of appeals have heeded this Court's clear instruction in *Kingsley v. Hendrickson*, 135 S. Ct. 2466 (2015), and have held that pretrial detainees need only satisfy an *objective* standard, not a *subjective* one. But four courts of appeals, including the Eleventh Circuit, have restricted *Kingsley* to its facts and are continuing to apply a subjective standard to any claims brought by pretrial detainees that do not involve excessive force. This Court need not, and should not, wait any longer to resolve this conflict.

Respondents do not deny that the courts of appeals are split, but urge the Court to defer because, they say, the critical question was not "pressed or passed on below." Brief in Opposition ("Opp.") 1 (quoting *Youakim v. Miller*, 425 U.S. 231, 234 (1976)). Respondents are mistaken. The Eleventh Circuit could not possibly have resolved Petitioner's claims *without* deciding what standard should control them. Moreover, *both* Petitioner and Respondents addressed the question of the proper standard in their appellate briefing. Insofar as Respondents mean to suggest that this Court must deny the petition because Petitioner did not expressly cite *Kingsley* in his response brief in the Eleventh Circuit, that is also incorrect. Petitioner raised *Kingsley* as soon as he could plausibly ask the Eleventh Circuit to overrule the adverse precedents that Petitioner contends conflict with that decision.

In any event, even if this Court believes that Petitioner should have expressly invoked *Kingsley* at an earlier juncture in his appellate proceedings, it should nevertheless grant review in this case. It is fundamentally unfair for pretrial detainees in one circuit to face a harsher standard for their civil-rights claims than pretrial detainees in another circuit. The time to remedy this disparity is now—particularly given that the Court already has the benefit of reasoned opinions from at least seven courts of appeals, all of whom have weighed in on *Kingsley*'s implications beyond the excessive-force context.

Finally, entirely separate and apart from the *Kingsley* question, the Eleventh Circuit's qualified immunity analysis was plainly wrong. For months, Petitioner was subjected to conditions of confinement that were flagrantly inconsistent with basic norms of human decency. The Eleventh Circuit granted Respondents qualified immunity despite these conditions because, the court said, Petitioner had not established that Respondents had violated any clearly established law. That assessment cries out for summary reversal—not because it "misapplie[s] the law to the facts," as Respondents claim, Opp. at 7, but because it flies in the face of numerous precedents from both this Court and the Eleventh Circuit that clearly establish the unlawfulness of Respondents' indifference. And, even setting aside those decisions, both the Eleventh Circuit and Respondents should have understood that it cannot possibly be constitutional to house prisoners—convicted or not—in cells covered in urine, feces, and semen, particularly while also denying them ready access to soap, toilet paper, and eating utensils. The Constitution does not countenance the treatment of incarcerated persons "in a way anti-

thetical to human dignity," and neither does this Court. See *Hope v. Pelzer*, 536 U.S. 730, 745 (2002). Summary reversal is warranted.

## I. This Court Can, and Should, Clarify the Standard for Evaluating Conditions-of-Confinement Claims Brought by Pretrial Detainees—An Issue That Has Divided the Courts of Appeals and Was Both Pressed and Passed on Below

Respondents do not dispute the existence of an entrenched circuit split as to the proper standard for reviewing conditions-of-confinement claims brought by pretrial detainees. Instead, they argue that the Court should not resolve the split in this case because the question of the appropriate standard "was not pressed by the Petitioner below, and was not considered by the Eleventh Circuit." Opp. 3. Respondents are wrong on both counts. Petitioner did raise the issue before the Eleventh Circuit, in both his response brief and a petition for rehearing en banc, and the Eleventh Circuit plainly passed on it, both in the decision below and in a prior published decision. See *Dang ex rel. Dang v. Sheriff, Seminole County Fla.*, 871 F.3d 1272, 1279 n.2 (11th Cir. 2017).

In any event, the presumption that the Court should decline review of issues "not pressed or passed upon below" is "prudential." *Izumi Seimitsu Kabushiki Kaisha v. U.S. Philips Corp.*, 510 U.S. 27, 33 n.7 (1993). Where, as here, a petition raises a recurring question of law that has significant implications for individual constitutional rights and has been thoroughly vetted by numerous courts of appeals, this Court can, and should, grant the writ of certiorari.

Only this Court can provide the clarity the lower courts need to guarantee uniform treatment of pretrial detainees' civil-rights claims across the circuits.

### A. The Eleventh Circuit Has Indisputably Passed on the Question of Which Legal Standard Governs Conditions-of-Confinement Claims Brought By Pretrial Detainees

Respondents first contend that this Court should not grant the petition because the first question presented was not "passed on" below. Opp. 1–3. Respondents are incorrect. Petitioner asks this Court to clarify the proper standard for evaluating conditions-of-confinement claims brought by pretrial detainees. That is an issue the Eleventh Circuit *had to resolve* to adjudicate the appeal below, no matter what arguments were in the parties' briefing.

The opinions below confirm as much. The majority expressly stated that Petitioner's claims should be evaluated using a subjective standard. App. 8a. And Judge Martin, writing in dissent, explicitly acknowledged that Petitioner's pretrial claims should be "reviewed under the Due Process Clause of the Fourteenth Amendment," but then cited binding circuit precedent holding that pretrial conditions-of-confinement claims must be evaluated under "the same" subjective standard as claims brought by "convicted persons." App. 23a–24a n.1 (quoting *Jacoby v. Baldwin County*, 835 F.3d 1338, 1344 (11th Cir. 2016), and *Hamm v. DeKalb County*, 774 F.2d 1567, 1574 (11th Cir. 1985)).

As Judge Martin's dissenting opinion recognizes, the Eleventh Circuit has also passed on the question of which legal standard governs the claims of pretrial detainees in prior cases—both before and after this Court's decision in *Kingsley*. See *Dang*, 871 F.3d at 1279 n.2 (holding, post-*Kingsley*, that deliberate-indifference claims brought by pretrial detainees should be evaluated under a subjective standard); *Goebert v. Lee County*, 510 F.3d 1312, 1326 (11th Cir. 2007) (holding the same pre-*Kingsley*). This is therefore not a scenario in which the Court would be taking up the question presented in the first instance. The Eleventh Circuit—along with at least six of its sister circuits—has clearly already decided the issue.

### B. Petitioner Adequately Pressed the Question of the Appropriate Legal Standard Below

Respondents also urge the Court to deny certiorari because, they say, Petitioner did not press the issue of the appropriate standard below. Opp. 1–3. This, too, is incorrect. As Petitioner has already explained, his response brief pointed to the "potential conflict" between a subjective standard and the rule that pretrial detainees may not be "punished" prior to an adjudication of guilt, albeit without citing *Kingsley*. Initial Brief of Appellee Oberist Saunders at 37–40 & n.9, *Saunders v. Sheriff of Brevard County*, No. 16-17607 (11th Cir. Apr. 20, 2017).

Moreover, Petitioner expressly raised *Kingsley* in his petition for rehearing en banc, see Petition for Rehearing En Banc, *Saunders v. Sheriff of Brevard County*, No. 16-17607 (11th Cir. June 7, 2018)—his first viable opportunity to urge the Eleventh Circuit

to adopt an objective standard for evaluating claims brought by pretrial detainees. As explained in Judge Martin's dissenting opinion, the panel that decided Petitioner's appeal was bound by Eleventh Circuit precedents imposing a subjective standard. See *United States v. Kaley*, 579 F.3d 1246, 1255 (11th Cir. 2009) (explaining limited circumstances in which a panel "may disregard the holding of a prior opinion"). Indeed, a panel in a different case declined to "consider what, if any, implications *Kingsley* might have for the claims of pretrial detainees involving … deliberate indifference" for precisely that reason. See *Dang*, 871 F.3d at 1279 n.2. A petition for rehearing en banc was therefore Petitioner's first realistic opportunity to ask the Eleventh Circuit to reconsider its binding adverse precedents.

### C. This Case Is a Good Vehicle for Considering This Important Legal Question, Which Has Divided the Circuit Courts and Significantly Impacts Prisoners' Civil Rights

Even if the Court were to conclude that Petitioner should have raised *Kingsley* and the issue of the appropriate standard more explicitly in his response brief, the rule that an issue must be pressed and passed on below "is not inflexible." *Youakim v. Miller*, 425 U.S. 231, 234 (1976). Where "an important, recurring issue" is "squarely presented," the Court is not precluded from taking it up. *Carlson v. Green*, 446 U.S. 14, 17 n.2 (1980). Indeed, just this month, the Court heard argument on an issue that was not pressed *at any point* by the petitioner in the courts below. See, e.g., *Return Mail, Inc. v. U.S. Postal Service*, 139 S. Ct. 397 (2018); see also, e.g.,

*United States v. Williams*, 504 U.S. 36, 41–45 (1992) (considering an issue, even though "petitioner did not contest [it] in the case immediately at hand"); *Stevens v. Dep't of Treasury*, 500 U.S. 1, 8 (1991) (same). The Court should similarly exercise its discretion and grant certiorari here for at least two reasons.

*First*, this case squarely presents an important constitutional issue that is the subject of an entrenched circuit split. Pet. 17–23 (citing the relevant opinions). Because the question presented has already been answered by at least *seven* courts of appeals, this Court will have the benefit of numerous reasoned opinions to guide its analysis.

*Second*, this case is a good vehicle because the standard applied is likely to be outcome-determinative for Petitioner's claims. Moreover, because this case was litigated in the district court under the more stringent subjective standard, the record is already developed such that it will not pose an obstacle to this Court's review. If the Court were to hold that the appropriate standard is an objective one, it could then evaluate whether Respondents' conduct ran afoul of that standard without the need for further factual development, thereby obviating any possible prejudice to Respondents.

Time and again, this Court has not hesitated to take up important legal questions that, although imperfectly presented on direct appeal, are otherwise ripe for review. The question presented in this case falls neatly into that category, and the Court should not delay its consideration of this important civil-rights issue any longer.

## II. The Fact That Petitioner Received Credit for Time Served Is Altogether Irrelevant

Respondents' next argument can be dealt with in short order. Respondents claim that the Eleventh Circuit must have applied an Eighth Amendment analysis to Petitioner's claims because he ultimately received sentencing "credit" for the time he served in unconstitutionally deplorable conditions before his trial. Opp. 3–6. The gist of this argument seems to be that Petitioner's credit for time served somehow transformed his Fourteenth Amendment pretrial claim into one challenging his punishment under the Eighth Amendment and, evidently, that this case would therefore be a poor vehicle for deciding the appropriate standard for pretrial claims.

Respondents are again off base. The court of appeals did not rely—and could not have relied—on Petitioner's credit for time served in choosing to evaluate Petitioner's claim using the Eighth Amendment standard. As an initial matter, the court below clearly did not "accept[]" the argument that an Eighth Amendment analysis applies when a prisoner ultimately receives credit for time served prior to trial. Opp. 5. The court never even mentioned that argument, much less validated it. Respondents insist otherwise based solely on the Eleventh Circuit's reference to the Eighth Amendment in setting forth the relevant legal standard, *id.*, but their interpretation of the opinion is plainly wrong. As Petitioner has already explained, see *supra* pp. 4–6, the panel below was bound by (erroneous) circuit precedent mandating that conditions-of-confinement claims brought by pretrial detainees be evaluated under the same Eighth Amendment standard that governs the claims

of convicted inmates. The Eleventh Circuit's focus on the Eighth Amendment reflected its respect for *stare decisis*, and nothing more. See App 23a–24a n.1 (confirming as much).

That the Eleventh Circuit rejected Respondents' half-baked theory is hardly surprising. Respondents are suggesting that the conversion of pretrial detention into time served can cure what would otherwise be unconstitutional treatment of a person who has not yet been adjudicated guilty. This extraordinary proposition finds no support in any case from any court in any context.[1] The receipt of credit for time served no more cures a constitutional violation that occurred during pretrial detention than a guilty verdict cures a Fourth or Fifth Amendment violation that occurred before or during trial. Respondents' entirely unfounded argument to the contrary provides no basis for denying certiorari.

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[1] The only opinion Respondents cite (Opp. at 4)—*Ford v. Nassau County Executive*, 41 F. Supp. 2d 392 (E.D.N.Y. 1999)—supports Petitioner's position, not Respondents'. In that case, the plaintiff alleged a constitutional violation because he had been required to serve as a "food cart worker" while in pretrial detention. *Id.* at 394. Consistent with Petitioner's argument here, the court evaluated the plaintiff's claim under the Fourteenth Amendment standard set forth in *Bell v. Wolfish*, 441 U.S. 520, 545 (1979)—*not* under any Eighth Amendment standard. *Ford*, 41 F. Supp. 2d at 397. The court did go on to hold that "[a]part from the holding that [the plaintiff] ha[d] suffered no cognizable invasion of his due process rights," he also lacked any *damages* theory because he had received credit for time served and could lawfully have been required to serve as a food cart worker as a convicted prisoner. *Id.* at 399–400. But that portion of the court's opinion is wholly irrelevant in this case.

## III. The Eleventh Circuit's Egregious Grant of Qualified Immunity Warrants Summary Reversal

Finally, Respondents insist that Petitioner is not challenging the Eleventh Circuit's assessment of the "state of the law" applicable to conditions-of-confinement claims, but rather is simply arguing "that the Eleventh Circuit misapplied the law to the facts." Opp. 7. Respondents misunderstand Petitioner's argument.

As detailed in the petition, the Eleventh Circuit did *not* properly assess the "state of the law" governing Respondents' actions. Pet. 25–32. To the contrary, the court entirely ignored *numerous* binding precedents from this Court in granting Respondents qualified immunity. *Id.* First, the court of appeals eschewed decades of precedent clearly establishing that the precise conditions Petitioner was forced to endure in pretrial detention violate the Constitution. Pet. 26–32 (citing *Hutto v. Finney*, 437 U.S. 678 (1978), *Rhodes v. Chapman*, 452 U.S. 337 (1981), and other cases). Second, the court of appeals overlooked this Court's clear instruction that subjective deliberate indifference can be *inferred* where "the risk of harm" from conditions of confinement "is obvious." Pet. 4–5 & 13 n.3 (citing *Hope*, 536 U.S. at 738). Third, the court of appeals neglected to seriously evaluate whether Petitioner's conditions of confinement had the "mutually enforcing effect" of depriving Petitioner of a basic human need. Pet. 31–32 (citing *Wilson v. Seiter*, 501 U.S. 294, 304 (1991)). Finally, the court of appeals failed even to consider whether the conditions of Petitioner's confinement were so "degrading and dangerous" to his health that

they amounted to an "obvious" constitutional violation. Pet. 26–32 (citing *Hope*, 536 U.S. 730).

Every single one of these errors reflected a fundamental misunderstanding of—or simply an unwillingness to abide by—this Court's qualified immunity precedents. Where, as here, a lower court either misapprehends this Court's qualified immunity holdings, or flatly refuses to apply them, this Court has consistently intervened to ensure the continued vitality of its precedents. See, e.g., *Sause v. Bauer*, 138 S. Ct. 2561 (2018); *Tolan v. Cotton*, 572 U.S. 650, 659 (2014); *Brosseau v. Haugen*, 543 U.S. 194, 198 & n.3 (2004). The Court should do so again here.

## CONCLUSION

This Court should grant the petition for a writ of certiorari. Alternatively, the Court should summarily reverse the Eleventh Circuit's decision to grant Respondents qualified immunity.

Respectfully submitted,

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