No. 20-1562

IN THE
Supreme Court of the United States

FAYE STRAIN, as guardian of Thomas Benjamin Pratt,

Petitioner,

v.

VIC REGALADO, in his official capacity; ARMOR CORRECTIONAL HEALTH SERVICES, INC.; CURTIS MCELROY, D.O.; PATRICIA DEANE, LPN; KATHY LOEHR, LPC,

Respondents.

On Petition for a Writ of Certiorari to the Tenth Circuit Court of Appeals

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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REPLY BRIEF FOR THE PETITIONER

This case perfectly fits this Court's criteria for granting review. Respondents fail to undermine the 4-3 circuit split on the question presented. That split has been acknowledged many times, including in this case. The Tenth Circuit decided the issue "head-on," Pet. App. 11a, in a reasoned, published opinion. The question presented is outcome-determinative: An obvious risk of severe harm was staring Respondents in the face, but they decided against providing treatment that could have prevented Pratt's ultimate cardiac arrest and life-long disability. And Respondents themselves do not dispute the exceptional importance of the question presented, which impacts the health and safety of hundreds of thousands of pretrial detainees. Nor could they. States, Sheriff's Associations, academic experts, and former corrections leaders have all urged the Court to resolve the issue. The Court should grant certiorari.

I. The Circuits Are Intractably Split.

In the less than three months since the petition was filed in this case, yet another federal appellate decision has acknowledged the split. *Bowles v. Bourbon Cnty.*, No. 21-5012, 2021 WL 3028128, at *8 (6th Cir. July 19, 2021); *see also* Pet. at 10 n.5 (listing six decisions explicitly referencing the split). The split is deep and intractable. Only this Court can settle it.

1. The Tenth Circuit explicitly underscored the circuit split in this case, describing the same lineup as the petition: The Second, Seventh, and Ninth Circuits split with the Fifth, Eighth, Tenth, and Eleventh Circuits on the question presented. *See* Pet. App. 10a–

11a, 11a n.4; Pet. at 11–13. Respondent Armor and the Virginia Sheriff's Association (a respondent-side amicus) agree that a split exists between these exact circuits. Armor Opp. at 18–20; Amicus Br. Of Virginia Sheriff's Association at 8. In fact, they view the split as even deeper.

2. Respondent Regalado does not seriously dispute the split, but he views it as lopsided in *Petitioner's* favor. Of the circuits to consider the impact of *Kingsley* on medical care claims, Regalado believes that the Second, Seventh, and Ninth Circuits have adopted an objective standard of fault; the Tenth Circuit alone hews to the pre-*Kingsley* subjective standard; and the Fifth, Eighth, and Eleventh Circuits have not really resolved the question because they decided it in a "conclusory fashion." *See* Regalado Opp. at 14–15. The fact that the three circuits to side with the Tenth have considered the argument only briefly speaks to the merits of the debate.

Nevertheless, the Fifth, Eighth, Tenth, and Eleventh Circuits are not confused about where they stand. The question presented involves a 4-3 split.

a. The Eleventh Circuit rejected *Kingsley*'s application to medical care claims in *Nam Dang v. Sheriff*, 871 F.3d 1272 (11th Cir. 2017), *see* Pet. App. 11a n.4, and denied rehearing en banc on this precise issue, *see* Order Denying Pet. For Rehearing En Banc, *Nam Dang*, 871 F.3d 1272 (No. 15-14842). It has considered the question settled ever since, citing to *Nam Dang* in case after case. *See, e.g.*, *Swain v. Junior*, 961 F.3d 1276, 1285, 1285 n.4 (11th Cir. 2020); *Bryant v. Buck*, 793 F. App'x 979, 983 n.3 (11th Cir.

2019); *Johnson v. Bessemer*, 741 F. App'x 694, 699 n.5 (11th Cir. 2018).

b. The Fifth Circuit considers the issue settled. That court rejected an objective standard of fault in *Alderson v. Concordia Par. Corr. Facility*, 848 F.3d 415, 420 n.4 (5th Cir. 2017). It has followed that position ever since. *See, e.g.*, *Cope v. Cogdill*, No. 19-10798, 2021 WL 2767581, at *5 n.7 (5th Cir. July 2, 2021); *Baughman v. Hickman*, 935 F.3d 302, 307 (5th Cir. 2019); *Westfall v. Luna*, 903 F.3d 534, 551 (5th Cir. 2018); *Childers v. San Saba Cnty.*, 714 F. App'x 384, 386 (5th Cir. 2018).

c. The Eighth Circuit has reiterated the same position multiple times. *See Whitney v. City of St. Louis*, 887 F.3d 857, 860 n.4 (8th Cir. 2018); *Briesemeister v. Johnston*, 827 F. App'x 615, 616 n.1 (8th Cir. 2020); *Karsjens v. Lourey*, 988 F.3d 1047, 1052 (8th Cir. 2021). And the Eighth Circuit denied rehearing en banc on this very issue in *Whitney*. *See* Order Denying Pet. for Rehearing En Banc, *Whitney*, 887 F.3d 857 (No. 17-2019). These circuits display no signs of reconsidering.

3. Even if Respondent Regalado were correct that the Fifth, Eighth, and Eleventh Circuits do not contribute to the split, the split would nonetheless beg for resolution. Nobody disputes that the Second, Seventh, and Ninth Circuits have applied *Kingsley* in the medical care context, or that the Tenth Circuit has refused to follow suit. Armor Opp. at 19–20; Regalado Opp. at 19; Pet. App. at 11a n.4. A direct conflict among four circuits constitutes a circuit split worthy

of this Court's intervention. *See, e.g.*, *Babb v. Wilkie*, 140 S. Ct. 1168, 1172 (2020).[1]

II. The Standard Applied Is Outcome-Determinative.

The Tenth Circuit reached the wrong result because it applied the wrong rule. If instructed by this Court to apply the correct legal standard, the Tenth Circuit would almost certainly reverse the district court's grant of the motion to dismiss. The question presented is therefore outcome-determinative.

1. The Tenth Circuit would not have decided the legal standard in this case if it did not matter to the result. The court chose this case as its vehicle to decide which side of the split to join because that decision determined the outcome here. Judicial minimalism and constitutional avoidance disfavor resolving major constitutional questions when a lesser issue suffices to decide a case. *See Camreta v. Greene*, 563 U.S. 692, 705 (2011).

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[1] Respondent Regalado quibbles that the question presented refers to the elements a plaintiff must ultimately establish on the merits rather than the elements a plaintiff must allege in the complaint. *See* Regalado Opp. at 13. That argument fails because there is no difference between the two. Plaintiffs must plead at the beginning of a case the exact elements they must prove at the end of a case: "[T]he essential elements of a claim remain constant through the life of a lawsuit." *Comcast Corp. v. Nat'l Ass'n of African Am.-Owned Media*, 140 S. Ct. 1009, 1014 (2020).

True to those doctrines, the Tenth Circuit punted on the legal question in several prior opinions where the plaintiff would have lost on the facts, regardless of the constitutional standard applied: "We haven't yet addressed *Kingsley*'s impact on Fourteenth Amendment claims like this one. . . . [W]e decline to do so here, where resolution of the issue would have no impact on the result of this appeal." *Perry v. Durborow*, 892 F.3d 1116, 1122 n.1 (10th Cir. 2018). In another case: "[P]laintiffs' claim would fail under either standard"—"[t]hat is, they have shown neither subjective disregard of a known risk, nor objectively reckless disregard of a serious medical concern." *Est. of Vallina v. Cnty. of Teller Sheriff's Off.*, 757 F. App'x 643, 647 (10th Cir. 2018). And so on many times. *See Crocker v. Glanz*, 752 F. App'x 564, 569 (10th Cir. 2018); *Burke v. Regalado*, 935 F.3d 960, 991 n.9 (10th Cir. 2019); *Khan v. Barela*, 808 F. App'x. 602, 609 (10th Cir. 2020).

Then came this case, where the Tenth Circuit chose to confront the issue "head-on." Pet. App. 11a. In contrast to the previous cases where the legal standard did not matter to the outcome, in this case it apparently *did* matter. Otherwise, the Tenth Circuit would have done the same thing it did at least five times before when presented with this very issue: reserve judgment on the legal standard and decide the case on the facts.

2. The rule applied by the Second, Seventh, and Ninth Circuits would change the outcome of Respondents' motion to dismiss. Under that rule, a pretrial detainee must show: (1) the defendant made an intentional decision regarding medical care, and (2) that decision created an objectively obvious risk of

serious harm that ultimately caused such harm. *See Castro v. Cnty. of Los Angeles*, 833 F.3d 1060, 1071 (9th Cir. 2016); *Gordon v. Cnty. of Orange*, 888 F.3d 1118, 1124–25 (9th Cir. 2018); *Darnell v. Pineiro*, 849 F.3d 17, 36 (2d Cir. 2017); *Miranda v. Cnty. of Lake*, 900 F.3d 335, 353–54 (7th Cir. 2018). Petitioner alleges that, time and again, Pratt displayed obvious signs that he was in danger of serious harm. Pet. App. 53a–61a. Yet medical staff repeatedly decided against minimal measures to abate obvious risks to Pratt's health.

a. Respondent Deane: In the early morning hours of December 14, Nurse Deane conducted a drug and alcohol withdrawal assessment that showed Pratt's symptoms were worsening. Pet. App. 53a. Deane herself charted that Pratt was experiencing:

- severe tremors
- continuous hallucinations
- a state of acute panic, which suggested that Pratt was either severely delirious or in the throes of an acute schizophrenic episode

Pet. App. 53a. The assessment tool mandated that Respondent Deane contact a physician. Pet. App. 53a. Pratt's symptoms indicated delirium tremens, Pet. App. 53a, a condition that "generally requires immediate hospitalization," *see Speers v. Cnty. of Berrien*, 196 F. App'x 390, 395 (6th Cir. 2006).

But Respondent Deane decided to do nothing. *See* Pet. App. 56a. She chose not to contact a doctor, leaving Pratt's acute condition entirely unsupervised

by a physician, in violation of Armor's own protocols. Pet. App. 53a. She decided not to send Pratt to the hospital. *Id.* She decided against administering or scheduling any blood tests. She even opted not to take Pratt's vital signs. *Id.* In sum, Deane ignored "the obvious severity and emergent nature of Pratt's deteriorating condition." Pet. App. 53a.

b. Respondent McElroy: Eight hours later, Pratt finally saw Dr. McElroy. Pet. App. 6a. According to Dr. McElroy's own notes and Pratt's medical chart:

- Pratt was found on the floor, trying to pull floor tiles off of the ground
- a pool of blood was found in Pratt's cell
- Pratt's forehead was lacerated
- Pratt was so confused that he was talking about "what movie are we watching tonight"
- Pratt was continuously vomiting
- Pratt was hallucinating
- Pratt was suffering from severe tremors
- Pratt was in an acute panic state

Pet. App. 55a–56a.

Dr. McElroy chose not to send Pratt to a hospital. *Id.* He chose not to order diagnostic tests. *Id.* He opted against making a referral for a visit with a psychiatrist—or any specialist. *Id.* He decided not to

order bloodwork. *Id.* He did not even take Pratt's vitals or order them taken. *Id.*

c. Respondent Loehr: Ms. Loehr, a licensed professional counselor, saw Pratt the next day for an initial mental health evaluation. Pet. App. 57a–58a. Loehr herself documented:

- Pratt was so disoriented that he thought it was Sunday, when in fact it was Tuesday
- Pratt thought he was in a detox center
- Pratt was making slow, shaky movements
- Pratt appeared lethargic and his eye contact was poor
- Pratt had a wound on his forehead
- Pratt had difficulty following directions

Pet. App. 58a. Loehr could not even complete the evaluation because Pratt had deteriorated to the point that he had difficulty answering questions. *Id.* Loehr wrote that Pratt had been disoriented on the previous day as well. *Id.*

But Loehr chose to do nothing. Pet. App. 58a. She opted against sending Pratt to a hospital. *Id.* She decided not to contact a physician. *Id.* Instead, she chose to educate Pratt on "getting clothes." *Id.*

In sum, the complaint alleges that despite Pratt's December 13 placement on seizure precautions mandating vital signs every eight hours, Pet. App. 52a, medical staff chose to do next to nothing for three

days, even opting against "the minimal step of assessing vital signs even once on December 14, 15, or 16." Pet. App. 54a.

Thanks to Respondents' decisions, Pratt's heart stopped working. Pet. App. 59a. Staff found him unresponsive and without a pulse. *Id.* First responders managed to resuscitate him and rush him to the hospital. Pet. App. 59a–60a. He had suffered a brain injury and cardiac arrest. Pet. App. 60a. He now has a permanent disability, with severe seizure disorder, memory loss, verbal deficits, and other mental health issues, and he is incapable of living on his own. Pet. App. 60a–61a.

3. These allegations plainly satisfy the test adopted by the Second, Seventh, and Ninth Circuits. With respect to intentional action, there is no suggestion that *any* of the Respondents' conduct was unintentional—for example, that they forgot to check Pratt's vitals, or a test did not happen because they misrouted an order for it. Respondents might ultimately claim such inadvertence in defending the case, but it is certainly a plausible inference at the complaint stage that Respondents' repeated failure to provide treatment reflected a series of decisions. For the same reason, Respondent Regalado's contention that this case is a poor vehicle because Petitioner did not allege intentional action, *see* Regalado Opp. 13–14; Armor Opp. 14, is meritless.

With respect to the standard of fault, given the detailed allegations about the troubling symptoms documented by each individual Respondent, it could hardly be said—at the complaint stage, no less—that their decisions did not create obvious risks of severe

harm to Pratt. The risk of serious injury to Pratt if they did not escalate his treatment was staring them in the face.

4. Respondents' argument that Petitioner would automatically lose under either standard because some "medical care was provided" to Pratt is wrong. *See* Armor Opp. at 5; *see also id.* at 7. The Tenth Circuit stated just the opposite, even under the subjective deliberate indifference test: "To be sure, whether Pratt received some care does not foreclose the possibility of a deliberate indifference claim." Pet. App. at 19a. Certainly, the provision of some care would not defeat Petitioner's claims under an objective standard of fault.

III. Respondents And The Tenth Circuit Are Wrong On The Question Presented.

1. In criticizing the standard used by the Second, Seventh, and Ninth Circuits, Respondents make much of the slippery distinction between acts and omissions. *See* Armor Opp. 7, 13. Whatever significance that distinction may have in other areas of law, it is decidedly irrelevant in the context of prison and jail medical care. Even the Eighth Amendment test for convicted prisoners' medical care claims—the one applied by the Tenth Circuit and championed by Respondents—explicitly eschews the false distinction. "[A] prisoner must allege *acts or omissions* sufficiently harmful to evidence deliberate indifference to serious medical needs." *Estelle v. Gamble*, 429 U.S. 97, 106 (1976) (emphasis added). *See also Farmer v. Brennan*, 511 U.S. 825, 834 (1994) ("a prison official's act or omission"); *id.* at 835 ("acts or omissions"). Likewise, the circuits that have

adopted an objective standard of fault for medical care claims brought by pretrial detainees uniformly treat acts and omissions identically. *See Charles v. Orange Cnty.*, 925 F.3d 73, 88–89 (2d Cir. 2019) (failure to provide discharge planning); *Miranda*, 900 F.3d at 353–54 (delay in providing medical care); *Sandoval v. Cnty. of San Diego*, 985 F.3d 657, 680–81 (9th Cir. 2021) (failure to provide treatment).

The law could not be otherwise. If denying or delaying care were not actionable, jail staff would escape liability even if they decided against calling an ambulance when Pratt's heart stopped and instead left him on the floor to die.

In any event, because both standards possible here (subjective or objective) reject a distinction between acts and omissions, the notion that objective standards will suddenly unleash a raft of unnecessary medical care, *see* Armor Opp. 6–7,14–15, is absurd. For both jail and prison medical care claims, the law already operates without this distinction.

2. Respondents' repeated references to a negligence standard just knock down a straw man. *See* Regalado Opp. 4, 20–21. As already explained, in contrast to negligence, the standard Petitioner advocates requires both (1) an intentional act or omission, rather than one that is inadvertent and (2) an *obvious* risk. The three circuits that apply this standard have uniformly rejected the idea that it amounts to negligence. *See Miranda*, 900 F.3d at 353; *Darnell*, 849 F.3d at 36; *Castro*, 833 F.3d at 1071.

3. The label "deliberate indifference," *see* Regalado Opp. 17; Armor Opp. 13–14, does not help

Respondents because it reflects a naming accident rather than a substantive argument. Because this Court established deliberate indifference as the standard for medical care claims brought by convicted prisoners, courts and practitioners have long used "deliberate indifference claim" as a shorthand for this type of Eighth Amendment claim. *See Estelle*, 429 U.S. at 104; *Farmer*, 511 U.S. at 828. Before *Kingsley*, the federal courts of appeal uniformly extended the deliberate indifference standard to Fourteenth Amendment medical care claims brought by pretrial detainees, *see* Pet. at 11–13, a "borrowing exercise" that failed to pay "any attention to the difference that exists between the Eighth and the Fourteenth Amendment standards." *Miranda*, 900 F.3d at 351. Naturally, "deliberate indifference claim" also became a shorthand for medical care claims brought by pretrial detainees—but that says nothing about the merits of the standard. This Court has never decided the proper standard for medical care claims brought by pretrial detainees, and it should grant certiorari in this case to do so.

IV. Everyone Agrees On The Exceptional Importance Of The Question Presented.

No one questions the exceptional importance of the question presented, which impacts the health and safety of hundreds of thousands of pretrial detainees. A group of States and sheriffs' associations asked this Court to review the same question in a previous case, decrying inconsistent rules across the circuits. *See* Pet. at 10. As the split has become deeper and more intractable, former corrections officials and legal scholars have called for review in this case. As if to underscore the importance of the issue even more, the

Virginia Sheriff's Association has filed a respondent-side amicus brief at the petition stage. The Court should take the opportunity to resolve this critical issue.

CONCLUSION

The Court should grant certiorari.

Respectfully submitted,

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