21-1210

In the Supreme Court of the United States

SCOTT COUNTY, TENNESSEE,

Petitioner,

v.

TAMMY BRAWNER,

Respondent.

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

BRIEF OF AMICI CURIAE MACOMB, OAKLAND, AND WAYNE COUNTIES, MICHIGAN IN SUPPORT OF PETITIONER

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INTEREST OF AMICI CURIAE[1]

Macomb County, Oakland County, and Wayne County, Michigan are the state's three most populous counties.[2] Each County, through their elected sheriffs, operate detention facilities that hold 1,000 or more pretrial detainees and sentenced offenders, and similar to the findings of the Pew Charitable Trusts, *Jails: Inadvertent Health Care Providers*, at 9 (Jan. 2018) and Zhen Zeng, *Jail Inmates in 2017*, Bureau of Justice Statistics, at 1 (Apr. 2019), have been sued by both pretrial and post-conviction inmates for alleged deliberate indifference to their medical care or conditions of confinement.

Macomb, Oakland and Wayne counties have been directly impacted by the Sixth Circuit's decision in *Brawner v. Scott County, Tennessee,* where two circuit judges adopted an objective only test for the analysis of a pretrial detainee's Fourteenth Amendment claim of a prison official's deliberate indifference to medi-

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[1] Concurrence for the filing of this *amici curiae* brief was sought from counsel for the parties on March 17, 2022, more than 10 days before its filing. Concurrence in its filing was given by all parties. No counsel for a party authored this brief in whole or in part, and no counsel for a party (nor a party itself) made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici* or their counsel made a monetary contribution to its preparation or submission.

[2] *Population and Household Estimates for Southeast Michigan*. Southeast Michigan Council of Governments (SEMCOG), July 2021.

cal care. The Sixth Circuit's change in the legal standard discounted this Court's instruction to view deliberate indifference cases through both an objective and subjective lens. *Farmer v. Brennan*, 511 U.S. 825, 834, 114 S.Ct. 1970, 128 L.Ed.2d 811 (1994).

Brawner became binding in the Sixth Circuit through subsequent decisions. *See*, *Greene v. Crawford Cty., Michigan*, 22 F.4th 593 (6th Cir. 2022). It also caused the U.S. District Court for the Eastern District of Michigan to order additional briefing on pending Rule 56 summary judgment motions that were grounded on this Court's precedent in *Farmer*,[3] or to look at a "more generous standard" than the traditional analysis of a pretrial detainee's claims of deliberate indifference.[4] The impact of *Brawner* on Macomb, Oakland and Wayne counties is not hypothetical but applies to all pending pretrial detainee claims of deliberate indifference asserted against these local units of state government.

SUMMARY OF ARGUMENT

In *Farmer v. Brennan*, 511 U.S. 825, 114 S.Ct. 1970, 128 L.Ed.2d 811 (1994) the Court held that a prison official's subjective knowledge of an inmate's excessive risk to health or safety is required to estab-

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[3] *Jessica Preston v. Macomb County*, 5:18-cv-12158, ECF No. 124, PageID.6957 Filed 02/01/22.

[4] *Rebekah Buetenmiller v. Macomb County*, 2:20-cv-11031, ECF No. 97, PageID.2415 Filed 01/20/22.

lish deliberate indifference under the Eighth Amendment. According to the Court "a prison official cannot be found liable under the Eighth Amendment for denying an inmate humane conditions of confinement unless the official knows of and disregards an excessive risk to inmate health or safety; the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference." *Id.* at 837.

After *Farmer*, the federal courts uniformly applied its objective and subjective test to inmate claims that a prison official was deliberately indifferent to a serious medical need, irrespective of the inmate's status as a sentenced prisoner under the Eighth Amendment or a pretrial detainee under the Fourteenth Amendment, until the Court's decision in *Kingsley v. Hendrickson*, 576 U.S. 389, 135 S.Ct. 2466, 192 L.Ed.2d 416 (2015). In *Kingsley*, the Court looked at whether "a pretrial detainee must show that the officers were subjectively aware that their use of force was unreasonable, or only that the officers' use of that force was objectively unreasonable." *Id.* at 391-92. The Court held that the appropriate legal standard for a pretrial detainee asserting an excessive force claim under the Fourteenth Amendment contains only an objective element. *Id. Kingsley* did not however, address whether an objective only standard applied in non-excessive force claims brought by pretrial detainees under the Fourteenth Amendment.

Following *Kingsley*, the Circuit Courts of Appeals split on its applicability to Fourteenth Amendment non-excessive force claims. The Second, Seventh and Ninth Circuits found that *Kingsley*'s objective only test applied to all pretrial detainee claims asserted under

the Fourteenth Amendment, while the Fifth, Eighth, Tenth and Eleventh Circuits limited *Kingsley*'s application to a pretrial detainee's claim of excessive force.

The Sixth Circuit Court of Appeals recently joined with the Second, Seventh and Ninth Circuits in its split decision of *Brawner v. Scott County*, 14 F.4th 585 (2021), making the Circuits evenly divided with four Circuits following *Farmer*'s traditional analysis and four Circuits extending *Kingsley* to non-excessive force claims of deliberate indifference brought by pretrial detainees against prison officials.

Amici contend that Scott County's Petition for Writ of Certiorari should be granted since the jurisprudence developed by the Second, Seventh and Ninth Circuit Courts of Appeals, now joined by the Sixth Circuit in *Brawner*, yields inconsistent legal outcomes for prison officials, based solely on an inmate's prisoner status. In granting Scott County's Petition for Writ of Certiorari, the Court can restore the uniform analysis of non-excessive force deliberate indifference claims established in *Farmer*.

ARGUMENT

I. THE COURT SHOULD GRANT SCOTT COUNTY'S PETITION FOR WRIT OF CERTIORARI AND RESOLVE THE EXISTING 4-4 DIVIDE AMONG THE CIRCUIT COURTS OF APPEALS.

In *Farmer v. Brennan*, 511 U.S. 825, 114 S.Ct. 1970, 128 L.Ed.2d 811 (1994), the Court granted certiorari "because Courts of Appeals had adopted inconsistent tests for deliberate indifference." *Id.*, 511 U.S. 832. In a similar vein, the Court should grant Scott County's Petition for Writ of Certiorari and restore the pre-*Kingsley v. Hendrickson*, 576 U.S. 389, 135 S.Ct. 2466, 192 L.Ed.2d 416 (2015) clarity that existed under *Farmer* for the uniform analysis of Eighth and Fourteenth Amendment claims premised on a failure to provide adequate inmate medical care. As Judge Readler wrote in his separate opinion dissenting from the denial of the petition for rehearing en banc, "[t]his is no small matter. Not in substance . . . Nor in scope. Detainee medical malpractice claims are at the heart of federal dockets." *Brawner v. Scott County*, 18 F.4th 551, 556 (6th Cir. 2021).

At this juncture, the Fifth, Eighth, Tenth and Eleventh Circuit Courts of Appeals have continued with *Farmer*'s traditional analysis of Eighth and Fourteenth Amendment claims by requiring that a prisoner show two components, one objective and the other subjective, before establishing that a prison official acted with deliberate indifference to an inmate's serious

medical needs.[5] Conversely, the Second, Seventh and Ninth Circuit Courts of Appeals, now joined by the Sixth Circuit in *Brawner v. Scott County*, 14 F.4th 585 (6th Cir. 2021), have turned to *Kingsley*'s excessive force opinion as a source for retooling their long established legal frameworks when evaluating a pretrial detainee's claim of deliberate indifference to medical care.[6] This reorganized jurisprudence eliminates *Farmer*'s subjective component. In these Circuits, prison officials may be found liable for their actions or inactions, absent a pretrial detainee establishing that the prison official acted with a culpable state of mind. This post-*Kingsley* landscape has given rise to a chasm among the Circuit Courts of Appeals, and the success or failure of a prison official's defense to a pretrial detainee's Fourteenth Amendment claim of deliberate indifference to a serious medical need, or a challenge to a detainee's conditions of confinement, now may turn on which Circuit Court of Appeals the detention facility is located.

By granting Scott County's Petition for Writ of Certiorari, the Court can make clear the appropriate legal standard all federal courts should employ when reviewing a pretrial detainee's Fourteenth Amendment

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[5] *Alderson v. Concordia Par. Corr. Facility*, 848 F.3d 415, 420 (5th Cir. 2017); *Whitney v. City of St. Louis*, 887 F.3d 857, 860 n.4 (8th Cir. 2018); *Strain v. Regalado*, 977 F.3d 984, 991 (10th Cir. 2020); *Dang ex rel. Dang v. Sheriff, Seminole Cnty.*, 871 F.3d 1272, 1279 n.2 (11th Cir. 2017).

[6] *Darnell v. Pineiro*, 849 F.3d 17, 34-35 (2nd Cir. 2017); *Greene v. Crawford Cty., Michigan*, No. 20-1715, 2022 WL 34785 (6th Cir. 2022); *Miranda v. County of Lake*, 900 F.3d 335, 352 (7th Cir. 2018); *Gordon v. County of Orange*, 888 F.3d 1118, 1124-25 (9th Cir. 2018).

deliberate indifference claim, and restore consistency among the Circuit Courts of Appeals.

II. THE COURT SHOULD GRANT SCOTT COUNTY'S PETITION FOR WRIT OF CERTIORARI AND HOLD THAT *KINGSLEY* DID NOT ABROGATE *FARMER*'S SUBJECTIVE PRONG IN A FEDERAL COURT'S REVIEW OF A PRETRIAL DETAINEE'S CLAIM OF DELIBERATE INDIFFERENCE TO ADEQUATE MEDICAL CARE.

In *Brawner v. Scott County*, 14 F.4th 585 (2021), the Sixth Circuit joined with the Second, Seventh and Ninth Circuit Courts of Appeals in holding that "*Kingsley* requires modification of the subjective prong of the deliberate indifference test for pretrial detainees." *Id.* at 586. The foundation for the Sixth Circuit's split decision rests squarely on its determination that "*Kingsley* is an inconsistent [with *Farmer*] Supreme Court decision that requires modification of our case law." *Id. Brawner* was quickly followed in the Sixth Circuit by several published and unpublished opinions, including *Greene v. Crawford County*, 22 F.4th 593, 607 (6th Cir. 2022); *Britt v. Hamilton County*, No. 21-3424, 2022 WL 405847, at *3 (6th Cir. Feb. 10, 2022); *Hyman v. Lewis*, No. 21-2607, ___ F.4th ___, 2022 WL 682543, at *2-3 (6th Cir. Mar. 8, 2022) and *Westmoreland v. Butler Cnty.*, ___ F.4th ___, 2022 U.S. App. LEXIS 7772, 2022 FED App. 0053P (6th Cir. 2022). Amici contend that *Kingsley* did not alter *Farmer*'s holding that a prison official's subjective knowledge of an inmate's substantial risk of serious harm is an essential element of the deliberate indifference standard. As Judge Readler's dissent aptly observed, "*Kingsley* reversed the precedent of those circuits that imposed a subjective standard for

excessive force claims brought by pretrial detainees against prison officials." *Brawner* at 606 (emphasis added). But, as Judge Readler noted, "it is difficult to see how *Kingsley*'s holding as to excessive force abrogates the subjective component of our Fourteenth Amendment deliberate indifference standard. For starters, nothing in *Kingsley* purports to address, let alone modify, deliberate indifference standards." *Id.* In support of his position, Judge Readler offered, "Case in point, *Kingsley* cited only excessive force cases. It made no mention of *Farmer*, the genesis of the subjective deliberate indifference standard." *Id.*

Amici submit that *Farmer*'s two-part test for analyzing claims of deliberate indifference to adequate medical care should be the same for both convicted prisoners under the Eighth Amendment and pretrial detainees under the Fourteenth Amendment, regardless of their prisoner status. Although different constitutional protections are afforded each grouping of prisoners, using the same subjective element set out in *Farmer*, "serves an identical purpose in both contexts: it helps delineate whether a failure to provide adequate medical care (to either a prisoner or pretrial detainee) occurred merely due to an official's negligence or, instead, due to an intentional act, thereby constituting unconstitutional 'punishment.'" *Brawner* at 606. Separating claims of deliberate indifference to adequate medical care by prisoner status will yield inconsistent outcomes with the only variable being an inmate's trial status as the determinative factor.

Prison officials at detention facilities like those operated by Macomb, Oakland and Wayne counties are impacted by *Brawner*'s extension of *Kingsley* beyond claims of excessive force. Each of these facilities house

both pretrial detainees and sentenced prisoners on the same units based upon medical and mental health screenings, security classifications and inmate behavior. Detention staff assigned to these housing units, whether a nurse, a social worker or a correctional deputy, are unaware of an inmate's pre or post-conviction status in their daily interactions with inmates. Now, post *Kingsley* and *Brawner*, detention staff—even with identical inmate interactions—are subject to inconsistent court rulings in prisoner lawsuits alleging claims of deliberate indifference. Here are a few scenarios that are likely to occur on a regular basis:

- A booking officer is sued under 42 U.S.C. § 1983 after placing a new inmate with minor cold symptoms in the same holding cell with a pretrial detainee awaiting intake and a convicted prisoner awaiting transport to a state prison, after each inmate later develops COVID-19. Under *Kingsley* and *Farmer*, the same action by the same booking officer that resulted in the same injury is now likely to lead to different legal outcomes based solely on the inmate's status as a pre or post-conviction inmate.
- A post-conviction diabetic inmate serving a sentence at a state prison is temporarily returned to a local detention facility awaiting trial on another charge. Following the inmate's return to the state prison, he brings a lawsuit under 42 U.S.C. § 1983 claiming that a local prison official was deliberately indifferent to his serious diabetic medical need. Does the local prison official's defense lie under *Kingsley* or *Farmer*?
- A pregnant female inmate reports to a young, unmarried and childless male correctional deputy

> that she has had a "bloody show." Is his liability for a claim of delayed medical care different under *Kingsley*'s objective unreasonableness standard compared to *Farmer*'s subjective knowledge test given his youth and life experience of not understanding what the term "bloody show" means? Does liability change if the corrections deputy was a middle-aged female with four children? A nurse?

Determining a prison official's responsibility, and ultimately liability, on the narrow basis of whether an inmate's status is that of a pre or post-convicted prisoner, a fact largely unknown by most prison staff, loses sight of the Court's recognition that "[r]unning a [jail] is an inordinately difficult undertaking." *Turner v. Safley*, 482 U.S. 78, 84-85, 107 S.Ct. 2254, 96 L.Ed.2d 64 (1987).

Amici request that the Court grant Scott County's Petition for Writ of Certiorari and restore consistency, as it did in *Farmer*, to all claims in which an inmate asserts a prison official's deliberate indifference to medical care.

III. THE COURT SHOULD GRANT SCOTT COUNTY'S PETITION FOR WRIT OF CERTIORARI SINCE THE SIXTH CIRCUIT CIRCUMVENTED THE COURT'S RIGOROUS STANDARDS FOR ESTABLISHING MUNICIPAL LIABILITY UNDER 42 U.S.C. § 1983.

In *Brawner*, the sole defendant on trial was Scott County, Tennessee. At issue was the County's inmate intake and medical screening policies which did not allow a pretrial detainee to access prescription medications before the detainee's physical examination—which in some circumstances may occur up to 14 days post-intake—coupled with the policy banning controlled substances in the jail. *Brawner*, at 18 F.4th 558-559. No proofs were submitted establishing that Scott County's policies were facially unconstitutional as drafted, or evidence proffered of a widespread pattern of constitutional harms connected to the policies that would have put Scott County on notice of a problem with the implementation of its policies.

In *Monell v. New York Dep't of Social Services*, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978), the Court held that the sick-leave policy at issue was "unquestionably" "the moving force of the constitutional violation found by the District Court." *Id.*, at 694-695. In *Brawner*, the Sixth Circuit did not make any finding that Scott County's policies, on their written terms, were "unquestionably" "the moving force" of Brawner's constitutional violation, "rather than from some other intervening cause." *See*, *Bd. of Comm'rs of Bryan Cty v. Brown*, 520 U.S. 397, 408, 117 S.Ct. 1382, 137 L.Ed. 2d 626 (1997). Likewise, the Sixth Circuit did not weigh through multiple and repeated incidents of constitutional harm directly attributable to Scott County's intake polices. As the Court concluded in *Oklahoma*

City v. Tuttle, 471 U.S. 808, 105 S.Ct. 2427, 85 L.Ed.2d 791 (1985), "where the policy relied upon is not itself unconstitutional, considerably more proof than the single incident will be necessary in every case to establish both the requisite fault on the part of the municipality, and the causal connection between the 'policy' and the constitutional deprivation." *Id.* at 816.

The Sixth Circuit, having looked beyond the need to establish a facially unconstitutional municipal policy or find a pervasive pattern of unconstitutional harm stemming directly from Scott County's policies, simply bootstrapped municipal liability on an employee's improper following of a sound policy. In other words, it attached municipal liability to Scott County on an employee's vicarious actions or inactions, contrary to *Monell*'s directive that "a municipality can be found liable under 42 U.S.C. § 1983 only where the municipality itself causes the constitutional violation" and that "[r]espondeat superior or vicarious liability will not attach under § 1983." *Id.* at 694-695.

CONCLUSION

For the foregoing reasons, amici curiae respectfully submit that the Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit be granted.

Respectfully submitted,

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