No. 21-1210

In the
Supreme Court of the United States

SCOTT COUNTY, TENNESSEE,
Petitioner,

v.

TAMMY BRAWNER,
Respondent.

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

BRIEF OF THE KENTUCKY JAILERS ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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The Kentucky Jailers Association is a nonprofit association whose members include the constitutionally elected Jailers and appointed Jail Administrators in the Commonwealth of Kentucky.[1] The goal of the Association is to support, educate, and promote the best interests of Jailers in the Commonwealth of Kentucky. Because the Majority decision in *Brawner* purports to set a new constitutional standard for evaluating medical claims of pretrial detainees, a population in the custody and care of Jailers in the Commonwealth of Kentucky, the Kentucky Jailers Association offers this amicus curiae brief in support of the Petition for Certiorari.

SUMMARY OF THE ARGUMENT

The Petition correctly argues that a circuit split has emerged regarding the claims of pretrial detainees following this Court's decision in *Kingsley v. Hendrickson,* 576 U.S. 389 (2015). Though now four Circuits have held that *Kingsley* requires the adoption of an objective standard for evaluating denial of medical needs claims under the Fourteenth Amendment Due Process Clause, no clear and workable test has emerged. Four iterations of the new

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[1] The parties have consented to the filing of this brief. Counsel of Record for all parties received timely notice of the *amicus curiae*'s intention to file this brief. In accordance with Supreme Court Rule 37.6 Counsel for the Kentucky Jailers Association, D. Barry Stilz, Jeffrey C. Mando, and Claire E. Parsons, undersigned, affirm that they authored this brief in whole without financial support or contribution from any third-party.

post-*Kingsley* objective test have been offered, but it remains unclear what separates this new recklessness standard from simple negligence. Despite this lack of clarity, the new post-*Kingsley* recklessness standard has already spread to claims other than denial of medical care, including all conditions of inmate confinement. There are indications that the impact of the recklessness standard could apply more broadly to claims against municipal entities. The rapid expansion of the post-*Kingsley* recklessness standard is startling considering the lack of support its adoption finds in the precedents of this Court. Indeed, the adoption of a vague recklessness standard is directly at odds with the directives in *Farmer v. Brennan,* 511 U.S. 825 (1994) and *Daniels v. Williams,* 474 U.S. 327 (1986) that objective recklessness is insufficient to demonstrate culpability for a constitutional violation. This Court's review is necessary to prevent the spread of the post-*Kingsley* recklessness standard from decimating the long-held principle that mere negligence is insufficient to state a constitutional claim under 42 U.S.C. § 1983.

ARGUMENT

I. Not Only Is There a Circuit Split, There Is Also a Decided Lack of Clarity in the New Standard That Has Emerged.

The Petition correctly argues that a pronounced Circuit split has emerged with respect to the impact of this Court's decision in *Kingsley v. Hendrickson,* 576 U.S. 389 (2015) on denial of medical needs claims under the Fourteenth Amendment Due Process Clause. Unfortunately for the officials who work in jails and are

charged with care and custody of inmates and honoring their constitutional rights, the split means that nearly half the nation has adopted an unworkable and unclear constitutional standard.

As the Petition explains, the Fifth, Eighth, Tenth, and Eleventh Circuits have remained steadfast to the holding from *Farmer v. Brennan,* 511 U.S. 825 (1994) in continuing to apply the two-part deliberate indifference test to medical needs claims of pretrial detainees. *Cope v. Cogdill,* 3 F.4th 198, 207 & n.7 (5th Cir. 2021); *Whitney v. City of St. Louis,* 887 F.3d 857, 860 (8th Cir. 2018); *Strain v. Regalado,* 977 F.3d 984, 991 (10th Cir. 2020); *Dang by & Through Dang v. Sheriff, Seminole Cty.*, 871 F.3d 1272, 1279 n. 2 (11th Cir. 2017). These courts have correctly reasoned that *Kingsley* addressed the excessive force claims of pretrial detainees alone, and so chose not to broadly expand that holding to medical needs claims. *See id.* Some courts, including the Fifth and Tenth Circuits, offered more subtle analysis of the incongruence between the active malfeasance alleged in *Kingsley* and the inaction theories advanced in most medical needs claims. *Cope,* 3 F.4th at 207 n.7 (quoting *Dyer v. Houston,* 964 F.3d 374, 380 (5th Cir. 2020); *Strain*, 977 F.3d at 991.

Failing to acknowledge these inherent differences, however, the Second, Seventh, Ninth, and now Sixth, Circuits have relied on *Kingsley,* to chart a new course in the manner of evaluating medical needs claims of pretrial detainees. *Darnell v. Piniero,* 849 F.3d 17, 34-35 (2nd Cir. 2017); *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). In doing so, they have cast aside the well-established deliberate indifference standard from *Farmer v. Brennan* that has governed inaction theories of pretrial detainees for decades. In its place, they have attempted to transpose the *Kingsley* standard derived in part from the Fourth Amendment to cover inaction theories relating to medical needs and conditions of confinement under the Fourteenth Amendment Due Process Clause. *See id.*

Having decided without authority which of this Court's precedents to honor, it is no surprise that four federal circuits would be reluctant to follow suit. Indeed, there is even dissension and confusion within the federal Circuits that have adopted this new, post-*Kingsley* standard. Two of the four Circuits to have adopted the so-called objective deliberate indifference standard came with passionate dissents. Justice Readler dissented from the majority decision in *Brawner* and he was joined by 4 other Justices when the Sixth Circuit denied the request to rehear the matter *en banc. Brawner v. Scott Co.,* 14 F.4th 585, 588 (6th Cir. 2021) (J. Readler dissenting); *Brawner v. Scott Co.,* 18 F.4th 551 (6th Cir. 2021) (J. Readler dissenting joined by JJ. Thapar, Bush, Nalbandian, and Murphy).

Likewise, the Ninth Circuit first adopted the objective deliberate indifference standard in *Castro v. Cty. of Los Angeles,* 833 F.3d 1060 (9th Cir. 2016), but did so only after first rejecting the application of *Kingsley* to inaction theories under the Fourteenth Amendment. *Castro v. City of Los Angeles,* 785 F.3d 336 (9th Cir. 2015). When a panel rehearing resulted in

a reversal of fortunes on that point, 3 members of the panel dissented, arguing that the panel's decision to transpose *Kingsley* to the failure-to-protect context had "made a mess" of the constitutional framework under the Fourteenth Amendment. *Castro,* 833 F.3d at 1084 (J. Ikuta dissenting joined by JJ. Callahan and Bea).

In the years since the Ninth Circuit led the charge to revamp the deliberate indifference standard without invitation from this Court, this mess has yet to be cleaned up. In place of *Farmer's* simple two-part deliberate indifference test, the Ninth Circuit enunciated a four-part test which purports to adopt the objective standard from *Kingsley,* but includes language reminiscent of the elements of state law negligence:

i) the defendant made an intentional decision with respect to the conditions under which the plaintiff was confined;

ii) those conditions put the plaintiff at substantial risk of suffering serious harm;

iii) the defendant did not take reasonable available measures to abate that risk, even though a reasonable official in the circumstances would have appreciated the high degree of risk involved – making the consequences of the defendant's conduct obvious; and

iv) by not taking such measures, the defendant caused the plaintiff's injuries.

Gordon v. Cty. of Orange, 888 F.3d 1118, 1125 (9th Cir. 2018).

Though the Second Circuit followed the Ninth Circuit's lead, it declined to adopt this four-part test and instead held that deliberate indifference can be shown with proof that the defendant

> recklessly failed to act with reasonable care to mitigate the risk that the condition posed to the pretrial detainee even though the defendant-official knew, or should have known, that the condition posed an excessive risk to health or safety."

Darnell, 849 F.3d at 35. Again, the language of negligence could not be avoided. *See id.*

Jumping into this fray, the Seventh Circuit also did not adopt the Ninth Circuit's test or even appear to establish any test of its own at all. Rather, it stated only that deliberate indifference exists if a defendant made an intentional action or decision not to act "with purposeful, knowing, or reckless disregard of the consequences[.]" *Miranda*, 900 F.3d at 354. While the Court noted that mere negligence was not sufficient, it did not offer guidance as to the hallmarks that separate negligence from a "reckless disregard of the consequences." *See id.*

Despite the benefit of its sister Circuit's trial and error in attempting to set a wholly new constitutional standard without express instruction from this Court, the Sixth Circuit in the case below failed to clarify the test for this new objective deliberate indifference standard. Instead of setting forth a standard of

liability, the Court identified the permissible, if not ineffable, range of situations that might constitute deliberate indifference: "more than negligence but less than subjective intent – something akin to reckless disregard." *Brawner,* 14 F.4th at 596-597 (*citing Castro* and *Darnell, supra*). Again, while negligence is disclaimed in this test, it is not clear what additional factors must be present to be viewed as "akin to reckless disregard" and trigger constitutional protections. *See id.*

Though now at least four iterations of the new post-*Kingsley* deliberate indifference standard have been offered, it remains decidedly unclear what differentiates recklessness from mere negligence. *Brawner*, 18 F.4th at 556 (J. Readler dissenting). Each of the above tests pays lip service to the well-established rule that negligence is insufficient to state a claim for a constitutional violation under 42 U.S.C. § 1983. *Gordon, supra*; *Darnell, supra*, *Miranda, supra*; *Brawner, supra.* Yet, none of the cases explain with any clarity what "recklessness" means and what separates it from mere negligence. *See id.* Indeed, this question is made more difficult by the fact that the tests from the Seventh and Ninth Circuits expressly draw on the language of negligence by referring to "reasonableness" and avoiding "excessive risks" in their post-*Kingsley* deliberate indifference tests. *Darnell*, *supra*; *Gordon, supra.*

This is why subsequent courts which have applied this new standard have remarked that it is "far from clear[.]" *Hyman v. Lewis*, 2022 U.S. App. LEXIS 5991, *5, 2022 Fed. App. 0045P (6th Cir. 2022) (citing

Brawner). Ultimately, though, the problem is not whether tidily delineated factors have been supplied, but rather whether constitutional principals have been distilled into a meaningful and workable test. As noted above, however, there are few guideposts like this to be found in *Brawner,* or the decisions it followed from the Second, Seventh, and Ninth, Circuits because the "reasonable official standard" is nowhere to be found in the Fourteenth Amendment. *Brawner*, 18 F.4th at 552 (J. Readler dissenting).

Lacking a constitutional foundation for this new standard, judges in the Second, Sixth, Seventh, and Ninth Circuits have little to prevent this new objective test from becoming a new federal cause of action for medical malpractice. As this Court has noted, "courts are particularly ill equipped to deal with the[] problems of prison administration." *Shaw v. Murphy*, 532 U.S. 223, 229 (2001) (quoting *Procunier v. Martinez*, 416 U.S. 396, 405 (1974)). When it comes to the evaluation of risk in the jail setting where the risk "is already elevated", the judicial consideration of whether a risk if "excessive" inevitably will collapse into mere negligence. *Westmoreland v. Butler Co.*, 2022 U.S. App. LEXIS 7772 at *30 (6th Cir. 2022)(J. Bush dissenting)(citing Dep't of Justice, Office of the Inspector General, M. Horowitz, Top Management and Performance Challenges Facing the Department of Justice – 2021 (2021)).

In this way, this Court's review is needed not merely to resolve a difference of opinion among the federal circuits. It is necessary to prevent an ill-crafted standard from serving as a Trojan horse to sneak

medical malpractice theories past the stalwart restriction prohibiting recovery for negligence under 42 U.S.C. § 1983.

II. Instruction from the Court Is Needed Now Because the Post-*Kingsley* Deliberate Indifference Standard Is Changing a Broad Array of Claims.

Medical deliberate indifference claims of pretrial detainees make up a sizable percentage of all the claims pending in the federal courts. *Brawner*, 18 F.4th at 556 (J. Readler dissenting). Thus, the lack of clarity in the new objective deliberate indifference standard would be concerning if only those claims were likely to be affected. It is already clear, however, that the expansion of *Kingsley* will apply beyond the claims of pretrial detainees relating to their medical needs.

Though the radical shift in the constitutional standards without express instruction from this Court is startling, the speed of this change should not be surprising. The sheer volume of prison and jail litigation in the federal courts creates the inherent risk that novel legal theories, whether they stand on solid constitutional grounds or not, may sweep rapidly from circuit to circuit and from theory to theory. *Brawner*, 18 F.4th at 556 (J. Readler dissenting).

Some of the first cases to adopt the new standard for deliberate indifference under the Fourteenth Amendment were not medical needs claims, but related instead to other conditions of confinement. *Castro*, *supra.* Following the lead of the Ninth Circuit in that regard, the Sixth and Seventh Circuits have also

applied the post-*Kingsley* deliberate indifference standard to conditions of confinement claims. *Westmoreland v. Butler Co.*, 2022 U.S. App. LEXIS 7772 (6th Cir. 2022); *Hardman v. Curran*, 933 F.3d 816 (7th Cir. 2019). Likewise, in *Cope v. Cogdill*, a petition for cert is pending with this Court. Though that case was resolved on the basis of qualified immunity, the petitioner expressly argues that the standard from *Kingsley* must be applied to also address an alleged failure to prevent suicide. *See Cope v. Cogdill,* U.S. Supreme Court, Case No. 21-783, Petition for Writ of Certiorari filed November 22, 2021.

There is even authority to suggest that the revisions to the deliberate indifference standard could apply more broadly. At least one court has applied the rule from *Brawner* to the claims of convicted prisoners. *Cameron v. Bouchard*, 815 Fed. Appx. 978 (6th Cir. 2020) (applying objective standard to class action comprised of pretrial detainees and convicted prisoners). Historically, most circuits pre-*Kingsley* applied the same deliberate indifference standard for pretrial detainees and convicted prisoners. Given the fact that pretrial detainees and convicted prisoners are separated only by a legal status and share many functional aspects of their incarcerations in common, it is not difficult to imagine that maintaining two legal standards for similar constitutional theories in the same context may be unwieldy to say the least.

Indeed, there is even reason to believe that the new post-*Kingsley* deliberate indifference standard could affect claims totally outside of the pretrial detainee context. Though *Kingsley* did not address municipal

liability at all, one panel member from the Ninth Circuit has even argued that the new deliberate indifference standard developed post-*Kingsley* should govern inaction claims against municipalities under *Monell v. Dep't of Soc. Services,* 436 U.S. 658 (1978). *Hyun Ju Park v. City of Honolulu,* 952 F.3d 1136, 1147-1148 (9th Cir. 2022) (J. Smith Jr. dissenting) This is true even though the holding from *Kingsley* was expressly restricted to individual, rather than municipal liability and although the prohibition on *respondeat superior* liability for municipalities was intended to prevent the imposition of § 1983 for mere torts. *Monell,* 952 U.S. at 691-693. Even so, *Park* suggests that if the result in *Brawner* is allowed to remain, the deliberate indifference standard in contexts well beyond those relating to the medical needs of pretrial detainee may be called into question.

In this way, there is not only a Circuit split relating to the particular matters at issue in the present case but an emerging and growing division about the deliberate indifference standard in contexts far broader than what this Court ever considered or even envisioned in *Kingsley*. Review from this Court is needed to ensure that incorrect constitutional standards do not spread broadly to all manner of claims under 42 U.S.C. § 1983.

III. The Objective Deliberate Indifference Standard Is Inconsistent with this Court's Precedents.

If the objective deliberate indifference standard adopted by the *Brawner* Court, was rooted in either the text of the Constitution or this Court's precedents, its

spread across the circuits and to a variety of legal theories might be unremarkable. The problem is, however, that the objective deliberate indifference standard that claims to hail from *Kingsley* finds little support in that decision. In addition, it is flatly inconsistent with *Farmer v. Brennan,* 511 U.S. 825 (1994) and *Daniels v. Williams,* 474 U.S. 327 (1986). In this way, the new rule sweeping across the circuits and now even expanding beyond claims under the Fourteenth Amendment Due Process Clause is an incorrect one.

Though the *Brawner* Court relies on *Kingsley* to support the adoption of its new objective deliberate indifference standard, it misunderstood the impact of the *Kingsley* holding. In particular, it failed to appreciate two critical distinctions between the present case and *Kingsley*: (1) the distinction between an action theory (such as excessive force) and an inaction theory (such as a deprivation of medical care); and (2) the distinction between theories arising under the Fourth, Eight and Fourteenth Amendments. The failure to appreciate these differences caused the Majority to misunderstand the true meaning of *Kingsley* and its relevance to the facts at issue here.

In its take on *Kingsley,* the Majority focused on the punishment aspect that the Supreme Court used as one prong of its reasoning for concluding that proof of a malevolent subjective intent is not required for a pretrial detainee to pursue an excessive force claim under the Fourteenth Amendment. *Brawner, supra,* at *20-21. The Majority overlooked, however, the Supreme Court's distinction between the differing

kinds of intent. *See Id.* For action theories like excessive force, the Supreme Court in *Kingsley* keenly noted that the there are two separate categories of intent:

> The first concerns the defendant's state of mind with respect to his physical acts – *i.e.*, his state of mind with respect to the bringing about of certain physical consequences in the world. The second question concerns the defendant's state of mind with respect to whether his use of force was 'excessive.'

Kingsley, 576 U.S. at 395. For excessive force claims, the Court explained, the first prong is often not disputed because a defendant would know (or rightfully be charged with knowledge) of the facts and circumstances surrounding him as he engaged in physical acts. *Id.*

It was the second aspect of intent, however, that the Supreme Court found was irrelevant to evaluating force claims under the Fourteenth Amendment. The Court described that aspect as the "defendant's state of mind with respect to the proper *interpretation* of the force (a series of events in the world)." *Id.* at 396. This real-time awareness that the defendant's conduct was unlawful as he or she used force, was what the Supreme Court held was not required for pretrial detainees to pursue excessive force claims. *Id.* This is why the Supreme Court took issue with the defendant's proposed instruction that authorized a liability verdict only if his actions were intended "maliciously and sadistically to cause harm." *Id.* at 400. Based on this reasoning, the Court's holding in *Kingsley* is restricted

only to intent that would describe a defendant's internal purpose, judgment, or appraisal of his own actions.

In jettisoning the subjective component of deliberate indifference, the Majority in *Brawner* went too far afield. In the Sixth Circuit, the deliberate indifference standard under the Fourteenth Amendment has never required proof that a defendant knew his or her actions were unlawful or done maliciously. *Richmond v. Huq,* 885 F.3d 928, 939 (6th Cir. 2018) (citing *Whitley v. Albers,* 475 U.S. 312, 319 (1976). They have, however, correctly required proof that a defendant was personally aware of facts suggesting an inmate's need for care and failed to take action. *Id.*

That element speaks to the defendant's personal awareness of a situation and not his or her subjective intent in failing to take action. *See id.* That is because, unlike an excessive force situation which involves affirmative and usually physical actions in a span of minutes, an actor's intent can be inferred from their actions. *See Kingsley, supra,* at 396. Where inaction is at issue and must be judged from a series of events that often occur, as in this case, over the course of hours, days, weeks or even months, a more refined analysis is needed to determine if the conduct goes beyond mere negligence. *Daniels*, 474 U.S. at 332 (mere negligence insufficient to pursue due process claim against jail officials under Fourteenth Amendment).

Along these same lines, the Majority failed to appreciate that the result in *Kingsley* was heavily influenced by precedents analyzing force claims under the Fourth Amendment. Under that standard, an

officer's subjective intent is not in issue and force instead must be analyzed only objectively. *Graham v. Connor,* 490 U.S. 386, 397 (1989). *Kingsley* cited to *Graham*, which set the standard for force clams under the Fourth Amendment, at least 5 times to make the point that force claims traditionally have been analyzed only objectively. *See Id.* at 397 – 402.

Despite these clear indications that *Kingsley* was derived from analysis of Fourth Amendment excessive force claims, the Majority never explained why it made sense to borrow elements of the objective reasonableness standard to inform the test for medical needs claims of pretrial detainees arising under the Fourteenth Amendment. *See Id.* It chose to discard well-reasoned holdings in *Farmer v. Brennan,* 511 U.S. 825 (1994) and *Estelle v. Gamble,* 429 U.S. 97 (1974) as having originated from the Eighth Amendment's cruel and unusual punishment prohibition alone. *Brawner*, *supra,* at *15 – 19. But in doing so, the Majority merely substituted the strand of excessive force cases arising under the Fourth Amendment in its place. *See Id.*

As Justice Scalia observed in his dissent to *Kingsley*, the Supreme Court has repeatedly counseled that the Fourth Amendment and Due Process Clauses of the Fifth and Fourteenth are textually different and thus must not be mixed and combined in the way that the Majority has done. *Kingsley,* 576 U.S. at 405 – 408 (J. Scalia dissenting). The failure of the Majority to honor this requirement is what led it to offer a nebulous test of liability for medical claims arising under the Fourteenth Amendment that permits a jury to conclude a defendant is "reckless" even if there is no

proof that he or she was personally aware of a risk to the plaintiff. *Brawner, supra*, at *23 – 24. This flies in the face of the holding from *Farmer*, which expressly rejected the adoption of an objective standard for deliberate indifference. 511 U.S. at 837.

Likewise, this Court has already rejected the idea that imposing a simple "recklessness" standard in and of itself is insufficient to distinguish constitutionally prohibited inaction from mere negligence. *Id.* at 837-838. In *Farmer*, this Court noted that lower courts had regularly used the term "reckless" to describe the level of culpability required to impose constitutional liability for denial of medical care. It expressly stated, however, that subjective recklessness, as defined in criminal law, was required and that mere objective recklessness was insufficient. *Id.* Similarly, in *Daniels* the Court expressed practical concerns that imposing a simple "recklessness" standard would inevitably lead to constitutionalizing the tort of negligence. 474 U.S. at 334 ("requiring complainants to allege something more than negligence would raise serious questions about what "more" than negligence – intent, recklessness, or "gross negligence" – is required, and indeed about what these elusive terms mean.").

Despite these clear dictates, this is precisely what the *Brawner* majority did when it adopted the standard of "more than negligence but less than subjective intent – something akin to reckless disregard." *Brawner,* 14 F.4th at 596-597 (*citing Castro* and *Darnell, supra*). This test is nearly verbatim what this Court told lower courts not to do in *Farmer* and *Daniels*. For these reasons, the Majority not merely err when it re-wrote

the deliberate indifference standard for Fourteenth Amendment Due Process Claims; it defied the express guidance from this Court.

Because the erroneous new deliberate indifference standard is not merely restricted to the Sixth Circuit or cases involving denial of medical needs under the Fourteenth Amendment, review from this Court is needed to prevent a fundamental misunderstanding from decimating the distinction between constitutional civil rights and state tort law.

CONCLUSION

For all of these reasons, the Kentucky Jailers Association requests that this Court grant the Petition for Certiorari and accept review of the erroneous en banc decision in *Brawner v. Scott County*.

Respectfully submitted,

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