No. _____

In The
Supreme Court of the United States

COUNTY OF SAN DIEGO, ET AL.,

Petitioners,

v.

ANA SANDOVAL,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Lawsuits alleging deliberate indifference to the medical needs of pretrial detainees are ubiquitous on the district courts' dockets, but the circuits are split on the basic elements of such claims. The Fifth, Eighth, Tenth and Eleventh Circuits hold that a pretrial detainee suing under the Fourteenth Amendment must show that the defendant was subjectively aware of the detainee's medical needs. The Second, Seventh, and Ninth Circuits, reading this Court's *Kingsley* decision broadly, hold that the deliberate indifference test is purely objective.

The first question presented is:

Under the Fourteenth Amendment, must a pretrial detainee alleging deliberate indifference to medical needs prove that the defendant was subjectively aware of his or her medical needs? Or is it sufficient that the defendant's actions were objectively unreasonable?

2. The events at issue in this action occurred in 2014. At the time, the Ninth Circuit applied a subjective deliberate indifference test. In 2018, the Ninth Circuit changed course, and adopted its objective deliberate indifference test.

The second question presented is:

In determining whether a right is "clearly established" for purposes of qualified immunity, must courts address the elements of the claim that existed at the time of the events at issue? Or may they ignore elements based on subsequent changes to the law, as the majority held below?

PARTIES TO THE PROCEEDING

Ana Sandoval, Ronnie Sandoval, Jr., and Josiah Sandoval were plaintiffs in the district court below, and are respondents here.

The County of San Diego and Nurses Romeo de Guzman, Maria Llamado, and Dana Harris were defendants in the district court and are petitioners here.

RELATED PROCEEDINGS

Sandoval et al. v. County of San Diego et al., United States Court of Appeals for the Ninth Circuit, Case No. 18-55289.

Sandoval et al. v. County of San Diego et al., United States District Court, Southern District of California, Case No. 3:16-cv-01004-BEN-AGS.

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PETITION FOR A WRIT OF CERTIORARI

The County of San Diego and Nurses Romeo de Guzman, Maria Llamado, and Dana Harris respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The Ninth Circuit's Opinion of January 13, 2021 is reported at 985 F.3d 657 (9th Cir. 2021) and is reproduced in the Appendix ("App.") at 1–81. Petitioners timely petitioned the Ninth Circuit for rehearing and rehearing en banc on March 2, 2021. The Ninth Circuit's order of March 25, 2021 denying the petition is reproduced at App. 124–125.

The order of the United States District Court for the Southern District of California granting in part and denying in part defendants' motion for summary judgment, dated February 6, 2021, is not officially reported. It is reproduced at App. 82–123.

STATEMENT OF JURISDICTION

The United States Court of Appeals for the Ninth Circuit entered judgment on January 13, 2021 (App. 1), and denied petitioners' petition for rehearing en banc on March 25, 2021 (App. 124). This Court has jurisdiction under 28 U.S.C. § 1254(1), and this Petition is

timely pursuant to this Court's Miscellaneous Order of March 19, 2020.

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fourteenth Amendment provides, in relevant part: "No State shall . . . deprive any person of life, liberty, or property without due process of law. . . ."

42 U.S.C. § 1983 provides, in relevant part: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proceeding for redress. . . ."

STATEMENT OF THE CASE

A. Factual Background

1. Ronnie Sandoval died in jail due to a massive methamphetamine overdose. He swallowed the lethal dose to conceal it from the Sheriff's deputies who arrested him, and he never told anyone he needed help.

During fingerprinting, deputies noticed that Sandoval was sweating, lethargic, and confused. Sandoval

told them he didn't feel well, that he may have diabetes, and that he had not eaten that day. When asked if he had been drinking or using drugs, Sandoval "lied and denied his use of drugs. . . ." App. 103.

A jail nurse, Romeo de Guzman, suspected Sandoval's symptoms were related to his reported diabetes, so he checked Sandoval's blood sugar and asked him a few questions. Sandoval's blood sugar was normal and Nurse de Guzman did not observe any signs of medical distress. When de Guzman's shift ended eight hours later, Sandoval was sitting up, awake, and not in distress.

2. Sandoval's condition later deteriorated, and witnesses reported seizure-like activity. Two nurses rushed to his cell, but, based on their distinct interactions with Sandoval, they had differing opinions on how to respond. Nurse Harris arrived first, personally assessed Sandoval, confirmed his vital signs were stable, and observed responsiveness inconsistent with a seizure. Still, she asked deputies to call for Emergency Medical Technicians ("EMTs") for immediate transport to the hospital. Nurse Llamado arrived next, and had intermittent interactions with Sandoval, as she was covering other responsibilities—calling the charge nurse, addressing paperwork, and retrieving equipment. Based on her more limited interactions with Sandoval, she thought paramedics were necessary.

Less than three minutes after first observing Sandoval, Nurse Harris asked deputies to call for EMTs. Twelve minutes after asking for EMTs, Nurse

Harris concluded that Sandoval's condition had worsened, and requested an upgrade to paramedics. EMTs arrived first, and the paramedics arrived roughly 20 minutes after the EMTs. Sandoval was pronounced dead shortly thereafter.

3. Sandoval's cause of death was acute methamphetamine intoxication. The medical examiner found "an astronomically high level of methamphetamine" in Sandoval's blood, indicating that he had taken "several hundred times more than a typical recreational dose." App. 88.

B. Proceedings Below.

1. In the district court below, plaintiffs claimed the nurses were deliberately indifferent to Sandoval's medical needs, in violation of the Fourteenth Amendment. Plaintiffs also brought state law claims for negligence and intentional infliction of emotional distress.

In its February 2018 decision, the district court found no constitutional violation and granted summary judgment in defendants' favor on all federal claims. It applied a subjective deliberate indifference standard drawn from this Court's *Farmer* decision, which requires a showing that the defendant actually knew of and disregarded an excessive risk. App. 94, citing *Farmer v. Brennan*, 511 U.S. 825, 837 (1994) and *Toguchi v. Chung*, 391 F.3d 1051, 1057 (9th Cir. 2004). The district court found that plaintiffs had not met their burden. There was no evidence that the intake nurse (de Guzman) was subjectively aware of

Sandoval's medical need. And for the nurses who responded after Sandoval's condition deteriorated (Harris and Llamado), the evidence suggested, at most, negligence, not deliberate indifference.

The district court further found that the individual defendants were entitled to qualified immunity, because "Sandoval's right to receive adequate medical care for an *unknown* serious medical need was not clearly established at the time of the alleged misconduct." App. 115 (emphasis in original).

The district court further declined to exercise supplemental jurisdiction over the state law claims, and remanded them to state court.

2. Plaintiffs appealed. While briefing was underway, the Ninth Circuit published its opinion in *Gordon v. County of Orange*, 888 F.3d 1118 (9th Cir. 2018). There, the Ninth Circuit held for the first time that claims for violation of the right to adequate medical care brought by pretrial detainees are governed by an objective deliberate indifference standard, and that a plaintiff need not make any showing of subjective awareness. The Ninth Circuit held that this Court's decision in *Farmer* (on which the district court below relied) applies only to Eighth Amendment claims by prisoners, not to Fourteenth Amendment claims by pretrial detainees. *Gordon*, 888 F.3d at 1125 fn.4.

3. The Ninth Circuit below applied *Gordon* and reversed the district court. It held that under an objective standard, disputes of fact precluded summary

judgment on the merits of the Fourteenth Amendment claim. App. 20–24.

The majority further held that the district court erred in granting qualified immunity. Although the Ninth Circuit's test for deliberate indifference included a subjective component at the time of the events in question, the majority found that the nurses' conduct should be measured against the purely objective *Gordon* standard.

For support, the majority looked to the decisions of four other circuits (*i.e.*, the First, Fifth, Sixth, and Seventh). App. 33–35. It acknowledged, however, that its holding was in conflict with the law of three other circuits (*i.e.*, the Third, Eighth, and Tenth). App. 39–40 fn.15.

4. Judge Collins dissented in part, explaining that plaintiffs' burden was to show that the defendants violated clearly established law as it existed in 2014. And in 2014, absent a showing of subjective deliberate indifference, there was no constitutional violation. The majority's analysis thus created an incongruent result:

> The majority errs—and expressly creates a circuit split—in reaching the oxymoronic conclusion that a county employee who did not even violate the law at the time he or she acted can nonetheless be said to have violated *clearly established* law at that time.

App. 56. Judge Collins further explained that "the majority's ruling creates a clear split with the decisions of at least three other circuits" (*i.e.*, the Third, Eighth,

and Tenth). App. 65. He expressed doubt in the majority's claim that its approach was consistent with decisions of other circuits. But even if the majority's cases could be interpreted to support the majority's view, he concluded, those cases were likewise erroneous:

> [The majority's] cases . . . thus supply little support for the majority's sweeping rule that the qualified immunity inquiry is exclusively objective and requires courts to affirmatively and always disregard any subjective elements of the previously clearly established law. In all events, to the extent that these cases could be read to endorse the majority's flawed analysis, then they are wrong as well.

App. 69–70.

REASONS FOR GRANTING THE WRIT

I. CERTIORARI SHOULD BE GRANTED TO ADDRESS THE REACH OF *KINGSLEY*, AN ISSUE THAT HAS DIVIDED THE COURTS OF APPEALS

A. *Kingsley* Is A Narrow Decision Addressing Excessive Force, Not Claims of Deliberate Indifference to Medical Needs.

1. It has been settled law for over 40 years that negligent diagnosis or treatment is not enough to support a prisoner's constitutional claim for inadequate medical care. *Estelle v. Gamble*, 429 U.S. 97, 106 (1976). Rather, a plaintiff suing for inadequate medical care

under the Constitution must plead and prove deliberate indifference to serious medical needs.

Both convicted prisoners and pretrial detainees have constitutional rights to adequate medical care, but the source of those rights differs. Convicted prisoners are protected by the Eighth Amendment's bar against cruel and unusual punishment, and under this Court's *Farmer* decision, a "subjective deliberate indifference" standard applies. *Farmer v. Brennan*, 511 U.S. 825, 837 (1994). Prison officials are liable for disregarding serious medical needs only if they are both "aware of facts from which the inference could be drawn that a substantial risk of serious harm exists" and actually "dr[e]w the inference." *Id.*

This is for good reason. "Deliberate indifference" requires more than mere negligence. It requires more than mistakes, oversights, or poor decision-making. Rather, deliberate indifference requires a reckless and culpable state of mind. *Id.* at 838. For those who undertake the "unenviable task of keeping dangerous men in safe custody under humane conditions" (*id.* at 845), liability is warranted only where an official is *subjectively* deliberately indifferent.

The Eighth Amendment does not apply prior to conviction, and pretrial detainees are instead protected by the Fourteenth Amendment's guarantee of due process. *Bell v. Wolfish*, 441 U.S. 520, 537 fn.16 (1979). Historically, this was a distinction without much of a difference. Although this Court indicated, decades ago, that Fourteenth Amendment protections

for pretrial detainees are "at least as great as the Eighth Amendment protections available to a convicted prisoner" (*City of Revere v. Mass. Gen. Hosp.*, 463 U.S. 239, 244 (1983)), it did not identify any contexts in which they would be decoupled. Lower courts, in the main, treated Eighth Amendment and Fourteenth Amendment protections as interchangeable. *See* M. SCHLANGER, THE CONSTITUTIONAL LAW OF INCARCERATION, RECONFIGURED, 103 CORNELL L. REV. 357, 365 (2018) ("[T]he Supreme Court offered little guidance on the difference between pretrial and post-conviction standards . . . " and "[i]n response, the lower courts blurred the standards."); *see also* CATHERINE T. STRUVE, THE CONDITIONS OF PRETRIAL DETENTION, 161 U. PA. L. REV. 1009, 1009 (2013) ("The Supreme Court has set forth in detail the standards that govern convicted prisoners' . . . claims . . . but has left undefined the standards for comparable claims by pretrial detainees. . . .").

The Ninth Circuit's approach was typical:

> Although the Fourteenth Amendment's Due Process Clause, rather than the Eighth Amendment's protection against cruel and unusual punishment, applies to pretrial detainees, we apply the same standards in both cases. . . . [A] plaintiff must show that the official was "(a) subjectively aware of the serious medical need and (b) failed adequately to respond.

Simmons v. Navajo County, Arizona, 609 F.3d 1011, 1017–18 (9th Cir. 2010). *See also Clouthier v. County of Contra Costa*, 591 F.3d 1232, 1242–43 (9th Cir. 2010).

2. In *Kingsley v. Hendrickson*, 576 U.S. 389 (2015), this Court, 5–4, identified a single area where the Eighth and Fourteenth Amendments parted ways. In the context of excessive force claims brought by pretrial detainees, the majority (Justices Ginsburg, Kennedy, Breyer, Kagan and Sotomayor) held that under the Fourteenth Amendment, a purely objective standard applies. *Id.* at 395. Under *Kingsley*, the officer's subjective belief as to whether the force was "excessive" is not relevant to the Fourteenth Amendment inquiry.

Justice Scalia, in a dissent joined by Chief Justice Roberts and Justice Thomas, opined that objective unreasonableness is not enough. *Id.* at 404. Rather, the Fourteenth Amendment requires a plaintiff to show that the officer acted with a subjective intent to punish. *Id.*, citing *Bell*, 441 U.S. at 535; *Wilson v. Seiter*, 501 U.S. 294, 300 (1991).[1] Otherwise, the law of substantive due process would collapse into an ordinary negligence inquiry, effectively constitutionalizing medical malpractice law for detainees. *Kingsley*, 576 U.S. at 406.

3. The Ninth Circuit has since converted the narrow and fragile *Kingsley* rule—decided in the context of an excessive force claim—into a broad entitlement

[1] Justice Alito dissented separately, stating, "I would not decide the due process issue presented in this case until the availability of a Fourth Amendment claim is settled." *Id.* at 408.

to heightened protections in other contexts. It proceeded in two steps. First, in *Castro v. County of Los Angeles*, 833 F.3d 1060 (9th Cir. 2016), the Ninth Circuit, en banc, held that under *Kingsley*, there is not "a single 'deliberate indifference' standard applicable to *all* § 1983 claims, whether brought by pretrial detainees or by convicted prisoners." *Id.* at 1069 (emphasis in original). Although conceding that *Kingsley* "did not squarely address whether the objective standard applies to all kinds of claims by pretrial detainees" (*id.*), the Ninth Circuit concluded that claims of failure to protect, like claims of excessive force, were governed by an objective standard.[2]

Then, in *Gordon v. County of Orange*, 888 F.3d 1118 (9th Cir. 2018), a panel of the Ninth Circuit went further still. It held that claims for inadequate medical care by pretrial detainees are governed by the objective deliberate indifference standard, and suggested that *Kingsley* may require an objective standard in *all* section 1983 claims by pretrial detainees under the Fourteenth Amendment. *Id.* at 1124.

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[2] Judge Ikuta, joined by Judges Callahan and Bea, dissented, expressing "dismay that the majority has misinterpreted *Kingsley*" and "made a mess of the Supreme Court's framework. . . ." *Id.* at 1084. In particular, the dissent criticized the majority for equating two very different fact patterns—excessive force (which addresses affirmative actions) and failure to protect (which addresses omissions). "[T]he *Kingsley* standard is not applicable to cases where a government official fails to act. . . . [A] person who unknowingly fails to act—even when such a failure is objectively unreasonable—is negligent at most." *Id.* at 1086.

The decision below applied and amplified the *Gordon* rule. As the majority would have it, the protections of the Eighth Amendment are merely a "starting point" for evaluating the rights of pretrial detainees, and *Kingsley* calls into question, across-the-board, the circuit's prior practice "of applying Eighth Amendment standards to other varieties of Fourteenth Amendment claims brought by pretrial detainees." App. 17.

The Ninth Circuit's decisions run afoul of this Court's admonition that the circuits are not to overextend its precedents. "It is of course contrary to all traditions of our jurisprudence to consider the law on this point conclusively resolved by broad language in cases where the issue was not presented or even envisioned." *R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377, 386 fn.5 (1992). The Ninth Circuit's rule directly conflicts with *R.A.V.* It expressly relied on the "broad language of *Kingsley*" to extend this Court's excessive force rule to deliberate indifference claims (*see Gordon*, 888 F.3d at 1124). That is far beyond the actual holding of *Kingsley*, and the Ninth Circuit extended the decision into a factual context that was not envisioned by this Court.

B. The Circuits Are Split Over the Reach of *Kingsley*.

1. There is a widely acknowledged circuit split over whether *Kingsley* should be extended to deliberate indifference claims under the Fourteenth Amendment:

> [T]he circuits are split on whether *Kingsley* eliminated the subjective component of the deliberate indifference standard by extending to Fourteenth Amendment claims outside the excessive force context.

Strain v. Regalado, 977 F.3d 984, 990 (10th Cir. 2020). Circuit courts and district courts have both recognized the split. *See Griffith v. Franklin County, Kentucky*, 975 F.3d 554, 570 (6th Cir. 2020) ("the circuits have divided on whether an objective test similarly governs conditions-of-confinement claims brought under the Fourteenth Amendment"); *Britt v. Hamilton County*, ___ F. Supp.3d ___, 2021 WL 1184057, at *8 (S.D. Ohio Mar. 30, 2021) ("[C]ircuits are now split on whether an objective test similarly governs inadequate medical treatment claims brought by pretrial detainees under the Fourteenth Amendment."); *Herriges v. Cnty. of Macomb*, No. 19-12193, 2020 WL 3498095, at *6 (E.D. Mich. June 29, 2020) ("circuits are split").

The split is well recognized in the scholarly community, too. As one commenter put it, "*Kingsley* splintered the circuit courts as to the proper standard to apply to pretrial detainees' claims of inadequate medical care, with some applying the objective standard and others applying the subjective standard." K. LAMBROZA, PRETRIAL DETAINEES AND THE OBJECTIVE STANDARD AFTER *KINGSLEY V. HENDRICKSON*, 58 AM. CRIM. LAW REV. 429 (2021). *See also* H. RUTKOWSKI, RETHINKING THE REASONABLE RESPONSE: SAFEGUARDING THE PROMISE OF *KINGSLEY* FOR CONDITIONS OF CONFINEMENT, 119 MICH. L. REV. 829, 846 (Feb. 2021) ("[C]ourts of appeal

have not been uniform in whether and how to extend *Kingsley* to conditions claims by pretrial detainees. . . .").

The split is mature and entrenched. Although there was some intracircuit disagreement as the circuits first grappled with *Kingsley*—resulting in occasional divided opinions and some reluctance among the district courts—seven circuits have now firmly staked their positions. Four circuits hold that *Kingsley's* objective test applies to claims of deliberate indifference to medical needs of pretrial detainees. Three circuits hold that a subjective test survives *Kingsley*.

As the issue has now been percolating in the lower courts for over six years, the arguments are fully developed, and multiple published circuit decisions have analyzed both sides of the rift.

2. The Tenth Circuit's opinion in *Strain* provides the leading explanation of the majority's position. There, the Court presented several reasons why *Kingsley* should not be extended to Fourteenth Amendment deliberate indifference claims.

First, *Kingsley* involved an excessive force claim, not a claim of deliberate indifference, and the opinion said nothing to suggest it intended to reach any further.

Second, a pretrial detainee's cause of action for excessive force serves a different purpose than a cause of action for deliberate indifference. The former is based on allegations of an affirmative act (use of excessive

force) that may raise an inference of punitive intent. The latter is based on allegations of *inaction*. Unknowing inaction raises no inference of punitive intent, and instead suggests, at most, negligence. And negligence, of course, does not violate the Fourteenth Amendment. *Estelle*, 429 U.S. at 106. Accordingly, to state a viable claim for deliberate indifference, unknowing inaction is not enough. A plaintiff must allege and prove subjective knowledge of the risk of harm.

Third, the concept of deliberate indifference implies a subjective component. "After all, deliberate means 'intentional,' 'premeditated,' or 'fully considered.'" *Strain*, 977 F.3d at 992, quoting BLACK'S LAW DICTIONARY 539 (11TH ED. 2019).

Fourth, the Supreme Court held in *Farmer* that deliberate indifference is not a "purely objective test," but instead focuses "on what a defendant's mental attitude actually was." *Strain*, 977 F.3d at 992, quoting *Farmer*, 511 U.S. at 839. Moreover, *Farmer* expressly opined that excessive force cases should *not* be governed by the same standard as deliberate indifference cases. *Strain*, 977 F.3d at 992.

The Tenth Circuit acknowledged that other circuits saw the issue differently, and identified the contrary holdings. *Id.* at 990 fn.4. But it elected not to join them, and held that deliberate indifference claims include a subjective component. *Id.* at 990.

The Eighth Circuit has reached the same conclusion. *See Whitney v. City of St. Louis*, 887 F.3d 857, 860 fn.4 (8th Cir. 2018) ("*Kingsley* does not control because

it was an excessive force case, not a deliberate indifference case.").

The Eleventh Circuit, too, applies a subjective test. *See Dang ex rel. Dang v. Sheriff, Seminole Cnty.*, 871 F.3d 1272, 1279 fn.2 (11th Cir. 2017) (declining to apply *Kingsley* because it "involved an excessive force claim, not a claim of inadequate medical treatment due to deliberate indifference"). A district court in the Eleventh Circuit expressed reservations about the rule—noting that the subjective test "may well eventually disappear under the rationale in *Kingsley*—but concluded that "for now, binding precedent holds the subjective component stays." *Race v. Bradford Cnty.*, *Florida*, Case No. 3:18-cv-153-J-39PDB, 2019 WL 7482235, at *7 fn.4 (M.D. Fla. Aug. 20, 2019).

The Fifth Circuit agrees. Its seminal decision interpreting *Kingsley* was divided, but the majority found that a subjective test applies. *See Alderson v. Concordia Par. Corr. Facility*, 848 F.3d 415, 419 fn.4 (5th Cir. 2017) ("[T]he Fifth Circuit has continued to . . . apply a subjective standard post-*Kingsley*."); *but see id.* at 425 (Graves, J., concurring) ("Because I read *Kingsley* as the Ninth Circuit did and would revisit the deliberate indifference standard, I write separately."). After *Alderson*, however, the Fifth Circuit issued five decisions, all unanimous, applying the subjective deliberate indifference standard. *Baughman v. Hickman*, 935 F.3d 302, 307 (5th Cir. 2019) (applying subjective deliberate indifference standard); *Galvan v. Calhoun County*, 719 F. App'x 372 (5th Cir. 2018) (same); *Lafleur v. St. Elizabeth Hosp. Staff Emergency Room*, 743 F.

App'x 545, 555 (5th Cir. 2018) (same); *Westfall v. Luna*, 903 F.3d 534, 551 (5th Cir. 2018) (same); *Childers v. San Saba County*, 714 F. App'x 384, 386 (5th Cir. 2018) (same).

3. The Sixth Circuit has "generally stayed out of the fray" and has not yet squarely decided the issue. *Griffith v. Franklin County, Kentucky*, 975 F.3d 554, 570 (6th Cir. 2020). While one panel applied the subjective prong without discussion of *Kingsley* (*see McCain v. St. Clair Cnty.*, 750 F. App'x 399, 403), another panel expressed "serious doubt" that a subjective standard still applies (*see Richmond v. Huq*, 885 F.3d 928, 938 fn.3 (6th Cir. 2018). District courts in the Sixth Circuit have nonetheless sided with the majority of circuits, opting to retain the subjective inquiry. *See Britt*, 2021 WL 1184057, at *8 ("the Court finds the Tenth Circuit's decision in *Strain* most compelling"); *Waddell v. Lloyd*, No. 16-14078, 2019 WL 1354253, at *4 (E.D. Mich. Mar. 26, 2019) (applying subjective test); *Martin v. Southern Health Partners, Inc.*, No. 1:17-CV-00020-GNS-HBB, 2019 WL 539064, at *3 (W.D. Ky. Feb. 11, 2019) (rejecting plaintiff's argument that *Kingsley* "abrogates the deliberate indifference standard when applied to pretrial detainees").

District courts in the Fourth Circuit, too, find that a subjective test applies. *See Davis v. PrimeCare Medical, Inc.*, No. ELH-20-2690, 2021 WL 1375565, at *10 (disagreeing with *Gordon*—"neither this Court nor the Fourth Circuit has applied *Kingsley* to a pretrial detainee's claim of failure to protect or deliberate indifference to a serious medical need, where there are no

allegations of force applied by the defendants"), quoting *Perry v. Barnes*, No. PWG-16-705, 2019 WL 1040545, at *3 fn.3 (D. Md. Mar. 5, 2019); *see also Mays v. Sprinkle*, No. 7:18CV00102, 2019 WL 3848948, at *1 (W.D. Va. Aug. 15, 2019) (same); *Wallace v. Moyer*, CCB-17-3718, 2020 WL 1506343, at *6 fn.9 ("The court will . . . treat *Kingsley* as limited to its terms and assume that *Farmer* still provides the appropriate framework. . . ."). One district court of the Fourth Circuit described an objective test as "sensible," but still applied a subjective test because the Fourth Circuit had not modified its pre-*Kingsley* precedent. *See Coreas v. Bound*, 451 F. Supp. 3d 407, 422 (D. Md. 2020), applying *Hill v. Nicodemus*, 979 F.2d 987, 991–92 (4th Cir. 1992).

4. Three circuits are in direct conflict with the approach of the Fifth, Eighth, Tenth, and Eleventh Circuits, and hold that *Kingsley's* objective test applies to claims of deliberate indifference to medical needs. The Ninth Circuit did so below, as it did in *Gordon*, several other published cases, and over a dozen unpublished cases. *See*, *e.g.*, *Horton by Horton v. City of Santa Maria*, 915 F.3d 592, 600 (9th Cir. 2019) ("partially subjective standard has since been revised to an entirely objective standard for pretrial detainees"); *Shorter v. Baca*, 895 F.3d 1176, 1190–91 (9th Cir. 2018). The decision below is now the leading case in the Ninth Circuit for the proposition that the defendant's mental state "has no bearing on the analysis." *Gordon v. County of Orange* (*Gordon II*), ___ F.4th ___, 2021 WL 3137954, at *4 (9th Cir. 2021), citing *Sandoval*, 985 F.3d at 678.

The Second Circuit, after extensively analyzing *Kingsley*, followed the Ninth Circuit. *See Darnell v. Pineiro*, 849 F.3d 17, 34–35 (2d Cir. 2017) ("[D]eliberate indifference should be defined objectively for a claim of a due process violation"). The Seventh Circuit likewise joined the minority, holding that the test is purely objective. *Miranda v. Cty. of Lake*, 900 F.3d 335, 352 (7th Cir. 2018) ("medical-care claims brought by pretrial detainees under the Fourteenth Amendment are subject only to the objective unreasonableness inquiry identified in *Kingsley*").

All told, it is now the settled law of four circuits that claims of deliberate indifference to the medical needs of pretrial detainees require a showing of subjective deliberate indifference. And it is the settled law of three circuits that such claims do not require any subjective showing at all. The split is stark, it is intractable, and it has persisted and widened over the years. This Court's attention is warranted to harmonize the discord. *See* A. DOCKUM, *KINGSLEY*, UNCONDITIONED: PROTECTING PRETRIAL DETAINEES WITH AN OBJECTIVE DELIBERATE INDIFFERENCE STANDARD IN SECTION 1983 CONDITIONS-OF-CONFINEMENT CLAIMS, 53 ARIZ. ST. L.J. 707, 738–39 (2021) (for the sake of "constitutional consistency, the Supreme Court should settle the state-of-mind requirement. . . .").

C. The Minority Position Constitutionalizes Medical Malpractice Claims that Should Be Resolved Through State Tort Law.

The majority of circuits have it right, and the decision below was in error. Excising the subjective components of the deliberate indifference analysis expands the Fourteenth Amendment into the realm of simple negligence, converting the Constitution into a replica of state malpractice law. That is not what constitutional claims are for, and that is precisely what Justice Scalia cautioned against. *DeShaney v. Winnebago Cty. Dep't of Soc. Servs.*, 489 U.S. 189, 196 & 202 (1989) ("[T]he Due Process Clause of the Fourteenth Amendment was intended to prevent the government 'from abusing [its] power'" but not to "transform every tort committed by a state actor into a constitutional violation."); *Estelle*, 429 U.S. at 106 ("Medical malpractice does not become a constitutional violation merely because the victim is a prisoner."); *Kingsley*, 576 U.S. at 408 (Scalia, J., dissenting) ("The Due Process clause is not a 'font of tort law to be superimposed upon' [a] state system. Today's majority overlooks this in its tenderhearted desire to tortify the Fourteenth Amendment.")

A subjective standard is consistent with this Court's precedents, and it prevents district court dockets from being overwhelmed with claims sounding in negligence. Moreover, aggrieved plaintiffs will not be deprived of a remedy, as they are free to pursue their state law claims in state court. Indeed, that is precisely what happened below. The district court declined to find a constitutional violation, but remanded plaintiffs'

state law claims—for negligence and intentional infliction of emotional distress—to the California Superior Court. App. 90 fn.4.

D. The Issue Is Exceptionally Important.

There are over 10 million admissions to America's jails each year, and two-thirds of those admitted are pretrial detainees. ZHEN ZENG, BUREAU OF JUST. STAT., U.S. DEP'T OF JUST., NCJ 253044, Jail Inmates in 2018, at 2 tbl. 1 (2020).[3] Not all detainees have medical or psychiatric conditions, but many of them do—detainees are far more likely to require ongoing treatment and care than members of the general population. *See* STEVE COLE, THE JAIL HEALTH-CARE CRISIS, NEW YORKER (Feb. 25, 2019).[4] Accordingly, claims of deliberate indifference to medical and psychiatric needs are ubiquitous in the federal courts. A recent survey found that over 90% of large jails had been sued for denial of medical care. *See* PEW CHARITABLE TRUSTS, INADVERTENT HEALTH CARE PROVIDERS (Jan. 2018) p. 9. Such claims make up a significant portion of the federal docket, with 10–25% of all inmate litigation addressing inmate medical care. *See* M. SCHLANGER, INMATE LITIGATION, 116 HARV. L. REV. 1555, 1570–71 fn.47 & 48 (2003).

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[3] Available at https://bjs.ojp.gov/content/pub/pdf/ji18.pdf [https://perma.cc/C84L-F4Q3].

[4] Available at https://www.newyorker.com/magazine/2019/03/04/the-jail-health-care-crisis [https://perma.cc/52FD-8XJ2].

It is not surprising, then, that plaintiffs, defendants, and a cross-ideological chorus of amici have all asked this Court to resolve the issue. *Compare Strain v. Regalado*, No. 20-1562 (Petition for Certiorari filed by plaintiffs on May 7, 2021) *with Gordon v. County of Orange*, No. 18-337 (Petition for Certiorari, filed by defendants, denied Jan. 7, 2019). Although the various stakeholders propose different ways of resolving the circuit conflict, all agree that the question needs to be answered, and that the time to answer it is now.

E. This Case Is An Ideal Vehicle for Clarifying the Law.

The relevant facts in this case are simple and undisputed, and they present the opportunity to consider the full range of possible interpretations of *Kingsley*. Specifically, this case does not involve a subjective intent to punish. It thus provides an opportunity to revisit the *Kingsley* dissent, in which Justice Scalia opined that the Fourteenth Amendment requires a showing of subjective intent to punish. *See Kingsley*, 576 U.S. at 404 (Scalia, J., dissenting).

Alternatively, this case would support a broad clarification that *Kingsley* addresses only affirmative acts of malfeasance, and that the Ninth Circuit thus went astray not just below and not just in *Gordon* (both addressing deliberate indifference to medical needs), but also in *Castro* (addressing failure to protect). The facts here could also support a narrow clarification addressing only claims of deliberate indifference to

medical needs (rather than addressing omissions and nonfeasance more generally), thus leaving the question of failure to protect for another day.

Finally, this case involves a fact pattern that recurs regularly in jail and prison litigation—deception and dishonesty by the detainee or prisoner. Here, Sandoval never asked for help, never indicated a need, and "lied and denied his use of drugs. . . ." App. 103. Even if an objective-only test were to apply, dishonesty and concealment by the plaintiff or decedent is a factor that should be analyzed and given considerable weight. The majority below, however, ignored this fact entirely.

This case is an ideal vehicle for clarifying the law. The simple, undisputed facts provide an occasion to interpret *Kingsley* narrowly or broadly, or to revisit it entirely.

II. THE DECISION BELOW DEEPENS A CIRCUIT SPLIT OVER THE EFFECT OF AUTHORITY THAT POSTDATES THE CHALLENGED CONDUCT

1. The concept of fair notice is the central principle animating the doctrine of qualified immunity. The doctrine "is intended to provide government officials with the ability reasonably to anticipate when their conduct may give rise to liability." *Anderson v. Creighton*, 483 U.S. 635, 646 (1987) (citation omitted). Accordingly, qualified immunity attaches unless the official violates a constitutional right that is so clearly

established that it is "beyond debate." *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011).

A decision that does not yet exist cannot give a government official "fair notice," and is "of no use in the clearly established inquiry." *Kisela v. Hughes*, 138 S. Ct. 1148, 1154 (2018). Accordingly, for more than three decades this Court has consistently held that the "clearly established" law analysis must be based on authority that was in effect at the time of the challenged action. *See Anderson*, 483 U.S. at 646 (qualified immunity measured "in light of current American law"); *D.C. v. Wesby*, 138 S. Ct. 577, 589 (2018) (jail employees entitled to qualified immunity unless the unlawfulness of their conduct was "clearly established at the time") (quoting *Reichle v. Howards*, 566 U.S. 658, 664 (2012); *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1866 (2017) (action "must be assessed in light of the legal rules that were clearly established at the time [the action] was taken.") (quoting *Anderson*, 483 U.S. at 638); *Kisela*, 138 S. Ct. at 1154 ("[A] reasonable officer is not required to foresee judicial decisions that do not yet exist.").

2. Here, the events in question all happened in 2014. The majority, however, relied on the 2018 *Gordon* decision to support its finding that the rights at issue were "clearly established" in 2014. Under this Court's authority, the majority's decision was wrong. *See Brosseau v. Haugen*, 543 U.S. 194, 200 fn.4 (2004) (cases that "postdate the conduct in question . . . could not have given fair notice . . . and are of no use in the clearly established inquiry.").

The majority's approach is not isolated. Panel majorities in the Ninth Circuit continue to rely on cases that postdate the events at issue, and have drawn repeated rebukes from dissenters. In *Garcia v. McCann*, 833 F. App'x 69, 73 (9th Cir. 2020), *petition for cert. filed* May 17, 2021 (No. 20-1592), the majority held that a 2018 case, *Demaree v. Pederson*, 887 F.3d 870, 883 (9th Cir. 2018), clearly established the right at issue, even though the events in the case occurred in 2013. Judge Collins explained in dissent: "the majority's reliance on *Demaree* . . . is plainly improper, because that decision postdates the events in this case." *Garcia*, 833 F. App'x at 75.[5]

In *Sampson v. County of Los Angeles*, 974 F.3d 1012, 1021–22 (9th Cir. 2020), the majority relied on a 2019 decision (*Capp v. County of San Diego*, 940 F.3d 1046 (9th Cir. 2019)) in its determination that the law was "clearly established" as of 2015. Judge Hurwitz dissented: "Decided years after the relevant conduct here, *Capp* is of no use." *Sampson*, 974 F.3d at 1028.

3. Although the Ninth Circuit is squarely in the minority, there is a circuit split regarding the effect of

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[5] Another Ninth Circuit panel held, unanimously, that *Demaree* "cannot be considered" because it "was decided after the removal." *See Reyna v. County of Los Angeles*, 840, F. App'x 955, 959 (9th Cir. 2021). This intracircuit disarray further supports certiorari or, alternatively, a summary reversal to bring the Ninth Circuit back into alignment. *See CNH Industrial N.V. v. Reese*, 138 S. Ct. 761 (2018) (certiorari granted to resolve intracircuit split; decision below summarily reversed). *See also* S. SHAPIRO, K. GELLER, T. BISHOP, E. HARTNETT & D. HIMMELFARB, SUPREME COURT PRACTICE § 4.6, pp. 4-24–4-25 (11TH ED. 2019).

subsequent authority on the clearly established analysis. The majority acknowledged the split below (App. 39–40 fn.15), as did Judge Collins in dissent (App. 56, 65).

At least three other circuits disagree with the Ninth Circuit and hold that even if controlling law changes after the incident in question, qualified immunity turns on the law in effect at the time of the incident, and all elements of the then-governing standard must be considered.

A Tenth Circuit decision, *Quintana v. Santa Fe Cnty. Bd. of Comm'rs*, 973 F.3d 1022, 1027–28 (10th Cir. 2020), is most instructive. The case involved a jail nurse's failure to provide medical care to a pretrial detainee who was experiencing opioid withdrawals. Just like the plaintiffs here, the *Quintana* plaintiffs argued that *Kingsley* excised the subjective prong of the deliberate indifference test, and that the qualified immunity analysis should excise it too. The Court rejected that approach, and instead held that the qualified immunity analysis "requires both an objective and a subjective inquiry." *Quintana*, 973 F.3d at 1028.

In a concurring opinion, Judge Bacharach noted that, per *Kingsley*, "[t]he subjective prong has been altered for at least some claims involving detainees." Still, "we apply the subjective prong as it was clearly established at the time of [plaintiff's] detention." *Id.* at 1038 fn.2. The majority agreed, and "endorse[d] Judge Bacharach's rejection of the argument that *Kingsley*

requires us to conduct only an objective inquiry." *Id.* at 1028 fn.1 (citation omitted).

The Third Circuit and Eighth Circuit likewise agree that a subjective analysis is required for purposes of qualified immunity, even if the subjective analysis is later excised from the substantive law. *See Kedra v. Schroeter*, 876 F.3d 424, 440 (3d Cir. 2017) (applying subjective test—"[W]e assess qualified immunity based on the law that was 'clearly established at the time an action occurred, and at the time of the [incident] . . . it was not yet clearly established whether deliberate indifference in the substantive due process was governed by an objective or subjective standard."); *Hall v. Ramsey County*, 801 F.3d 912, 917 fn.3 (8th Cir. 2015) (applying subjective test—because qualified immunity depends on whether the law was "clearly established at the time of the alleged violation . . . *Kingsley* does not [a]ffect the standard against which we evaluate the [defendants'] conduct in the qualified immunity analysis.").

The same is true if the law is uncertain at the time of the incident, and is later clarified or made more specific. The later authority does not convert a law that was uncertain at the time into one that was clearly established. *See Bishop v. Szuba*, 739 F. App'x 941, 945 (10th Cir. 2018); *McKee v. Hart*, 436 F.3d 165, 173 (3d Cir. 2006).

4. The First Circuit, however, is arguably aligned with the majority's decision below. In *Miranda-Rivera v. Toledo-Davila*, 813 F.3d 64 (1st Cir. 2016), the First

Circuit found that the law of excessive force was clearly established for purposes of qualified immunity in 2007, even though *Kingsley* was not decided until 2015. Specifically, it held that inquiry into the officer's subjective mindset was unnecessary, and instead focused on what a "reasonable officer" should have done. *Id.* at 73.

The majority contends that two other circuits agree that the mental state required to establish liability has no bearing on the qualified immunity analysis. App. 33–34. Specifically, on remand from this Court in *Kingsley*, the Seventh Circuit applied an objective standard in its qualified immunity analysis. *Kingsley v. Hendrickson*, 801 F.3d 828 (7th Cir. 2015) (per curiam) ("*Kingsley II*"). The Sixth Circuit has done the same. *See Hopper v. Plummer*, 887 F.3d 744, 755–56 (6th Cir. 2018).

Certiorari is warranted to address this dissonance in the case law. The question recurs regularly, and the circuits have taken conflicting approaches. This Court should clarify and harmonize the law.

CONCLUSION

The majority's decision deepens an intractable circuit conflict over the reach of *Kingsley*. So too does it deepen a conflict over how to analyze whether a constitutional right is "clearly established." These are exceptionally important questions that recur regularly,

and both the lower courts and the scholarly community recognize the need for clear answers.

Certiorari should be granted.

Respectfully submitted,

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