No. 21-264

In The
Supreme Court of the United States

COUNTY OF SAN DIEGO, ET AL.,

Petitioners,

v.

ANA SANDOVAL, ET AL.,

Respondents.

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

REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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REPLY

I. THE RELEVANT ISSUES ARE PURELY LEGAL, BUT THIS CASE RESTS ON A FIRM FOUNDATION OF UNDISPUTED FACTS

Faced with clean legal issues and two undeniable circuit splits, respondents attempt to re-style the record to suggest that the case rests on a muddy factual foundation. They make a blanket objection to petitioners' factual background, but identify only three facts they contend are in dispute. *See* Respondents' Brief 2–4 nn.2–4. In reality, petitioners' recitation of the facts is drawn almost entirely from the opinion. *See* App. 3, 7–8, 53. And the purported factual disputes identified by respondents are far from genuine.[1]

The relevant facts are simple and undisputed. Respondents do not dispute that Sandoval lied about swallowing drugs (App. 53); that he claimed he might be diabetic (App. 4); and that he "became agitated and refused to answer further questions" (Respondents' Brief 3, citing App. 4).

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[1] Particularly troubling is respondents' claim that the nurses dallied for 37 minutes before calling paramedics (Respondents' Brief 5), a claim based on an unauthenticated hearsay report (Dist. Ct. Dkt. No. 24, at 194) that neither the district court nor the Ninth Circuit credited. The only admissible evidence shows Harris came to Sandoval's aid at 12:58 a.m., within three minutes of notice of a possible seizure (Dist. Ct. Dkt. No. 20-3, at 105 (NOL Exh. 7)); she took vitals and monitored Sandoval closely (*id.*); and a 911 call was pending no later than 1:10 a.m. (*id.*). *See also id.* at 104 (verifying NOL Exh. 7).

Respondents further concede that Nurse de Guzman provided a blood sugar test (App. 5), an appropriate response given that Sandoval was possibly diabetic. And they acknowledge Nurse Harris and Nurse Llamado disagreed about *how* to address Sandoval's seizure-like activity—*i.e.*, by summoning EMTs or paramedics (Respondents' Brief 5, citing App. 7)—but they do not claim either nurse sat idly by. These are the facts that matter, and none of them are in dispute.

But even taking respondents at their word, certiorari is warranted to determine which legal test governs, and whether section 1983 plaintiffs can avoid qualified immunity based on subsequent changes to circuit law. These reasons for certiorari are purely legal, and they are no less compelling if respondents' version of the facts is accepted wholesale.

II. THE CIRCUITS' DISPARATE READINGS OF *KINGSLEY* DRIVE DISPARATE OUTCOMES

A. The Circuit Split Is Acknowledged by the Courts, Is Undisputed by Respondents, And Has Only Grown During the Pendency of this Petition.

1. The law of deliberate indifference is in disarray, and respondents make no real effort to argue otherwise. The entrenched intercircuit split is undeniable, and disagreement persists even within the circuits.

Indeed, the dissonance has grown even since the filing of this petition just months ago. The Sixth Circuit recently joined the Second, Seventh, and Ninth Circuits in holding that *Kingsley*'s objective-only test applies to claims of deliberate indifference to medical needs. *See Brawner v. Scott Cnty., Tn.*, 14 F.4th 585 (6th Cir. 2021). The Fifth, Eighth, Tenth and Eleventh Circuits, in contrast, hold that a subjective test applies. Pet. 14–16.

Notably, the majority in *Brawner* decided the issue haltingly, relying not on precedent from this Court, but instead drawing inferences from this Court's silence. *Id.* ("We also reject any argument that *Farmer* controls here until the Supreme Court tells us otherwise. . . .").

2. Moreover, the *Brawner* majority drew an expansive and scholarly dissent from Judge Readler, which runs directly counter to respondents' substantive defense of an objective-only test.

Echoing Judge Ikuta's dissent in *Castro v. Cnty. of L.A.*, 833 F.3d 1060 (9th Cir. 2016) (en banc) (*see also* Pet. 11 n.2), Judge Readler emphasized the distinction between claims of excessive force (which address affirmative conduct) and claims of failure to protect (which address omissions). While the former can be fairly decided without inquiry into subjective awareness, the latter cannot:

> With respect to affirmative acts that amount to excessive force, punitive intent customarily may be inferred without defaulting to subjective considerations. But the same inference

> does not arise from the deprivation of adequate medical care, which often rests on an unwitting failure to act, making one's subjective intent critical in understanding the chain of events. . . . Without any manner of inquiry into a party's intent, courts cannot fairly distinguish negligent deprivation of care—which does not give rise to a constitutional claim—from an intentional deprivation of care that amounts to punishment—which violates the Fourteenth Amendment.

Brawner, 14 F.4th at 607 (Readler, J., dissenting).

The dissent further reiterated the foundational principle that "liability for *negligently* inflected harm is categorically beneath the threshold of constitutional due process." *Id.* at 608, quoting *Kingsley v. Hendrickson*, 576 U.S. 389, 396 (2015) (emphasis supplied by Judge Readler). It then endorsed Judge Ikuta's rejection of an objective-only standard, because an objective-only standard would effectively convert the Fourteenth Amendment into a replica of state malpractice law. *Id.* at 608 ("[A] person who unknowingly fails to act—even when such a failure is objectively unreasonable—is negligent at most. And the Supreme Court has made clear that liability for negligently inflicted harm is categorically beneath the threshold of constitutional due process."), quoting *Castro*, 833 F.3d at 1086) (Ikuta, J., dissenting). *See also Estelle v. Gamble*, 429 U.S. 97, 106 (1976) (negligent diagnosis or treatment does not violate the Constitution).

The dissent further noted that expansion of the Fourteenth Amendment—and the accompanying infringement into areas traditionally reserved to state law—is precisely what Justice Scalia and Chief Justice Roberts cautioned against. *See Brawner*, F.4th at 611 (Readler, J., dissenting) ("I would not further expand the Fourteenth Amendment to swallow up matters left to those able bodies."); interpreting *Kingsley*, 576 U.S. at 408 (Scalia, J., dissenting from efforts to "tortify the Fourteenth Amendment").

3. All told, four circuits now apply an objective-only standard. Four circuits apply a subjective test. And even within the circuits, division persists. There is no realistic path to resolution absent clarification by this Court.

B. The Differing Approaches Drive Differing Outcomes, Both Here And Across the Entire Jail Litigation Industry.

Respondents do not dispute the existence of a broad circuit split. Nor do they dispute that the question applies to an entire litigation industry, with claims against jails serving as a fixture of district court dockets. *See* Pet. 21; Amicus Brief in Support of Petitioners 3–4.

Instead, respondents argue that applying a different standard wouldn't matter much below, and that it wouldn't matter in many other cases. They are incorrect on both fronts.

1.a. Respondents argue that it is not clear that there is any "material legal distinction" between an objective test and a subjective test. Pet. 15. As respondents would have it, the fact that the tests may overlap in some respects in some cases renders them functionally indistinguishable. In reality, the difference between a subjective standard and an objective-only standard drives outcomes. It determines winners and losers.

To be sure, in easy but less common cases, the ultimate outcome may be the same whether the test is objective or subjective. Where evidence of an official's unreasonable neglect is thin or non-existent, a finding of subjective awareness is unlikely. And where evidence of unreasonableness is compelling, a court may view the facts in plaintiffs' favor, and give greater credence to shaky evidence of subjective intent.

But it is not the obvious cases that overwhelm the district court dockets. In the usual cases, awareness and intent are hotly contested, and the requirement of proving subjective awareness will often be the singular factor determining who wins and who loses.

This is because subjective awareness is a meaningful, distinctive burden for plaintiffs—in their pleadings, on summary judgment, and especially at trial. Plaintiffs claiming deliberate indifference must do more than allege (and eventually prove) inattention, negligence, or even medical malpractice. Rather, they must plausibly allege and present evidence regarding the state of mind of the defendant.

It is on this subjective prong that a plaintiff's case often collapses, as it did in several of the circuit court decisions on the subjective side of the circuit split. *See Strain v. Regalado*, 977 F.3d 984 (10th 2020) ("Although Plaintiff's claims may smack of negligence, we conclude that they fail to rise to the high level of deliberate indifference against any Defendant."); *Whitney v. City of St. Louis, Missouri*, 887 F.3d 857, 860 (8th Cir. 2018) ("The complaint contains a legal conclusion that Sharp was deliberately indifferent but fails to make any allegation about Sharp's knowledge. This conclusory statement does not save the complaint absent any allegation of knowledge."); *Dang ex rel. Dang v. Sheriff, Seminole Cnty.*, 871 F.3d 1272 (11th Cir. 2017) ("[E]ven assuming [the doctor] knew [the inmate] had a one-time fever, his actions were not deliberately indifferent," because there is no liability for "an official's failure to alleviate a significant risk that he should have perceived but did not."), quoting *Farmer*, 511 U.S. at 838.

Courts on the opposite side of the circuit split—those that hold that the test is purely objective—likewise recognize that the different tests can be determine outcomes. *See Miranda v. Cnty. of Lake*, 900 F.3d 335 (2018) ("Because the answer may make a difference in the retrial of [plaintiff's] claims, we think it appropriate to address the proper standard at this time.").

1.b. Respondents' effort to blur the lines between a subjective test and an objective test is based on an incomplete picture of how deliberate indifference cases

unfold in practice. Specifically, respondents' discussion of the cases only addresses 12(b)(6) motions and motions for summary judgment—motions on which courts construe the facts in the light most favorable to plaintiffs and draw all inferences in plaintiffs' favor. *See* Respondents' Brief 16–17.

Given the deferential lens afforded to plaintiffs prior to trial, it is not surprising that courts occasionally draw inferences of subjective awareness from the objective circumstances. In *Mays v. Sprinkle*, 992 F.3d 295, 305 (4th Cir. 2021) (*see* Respondents' Brief 16), for example, the plaintiff alleged that a detainee was extremely intoxicated, and that the defendant-officer had noticed prescription pills in his truck. The district court found that insufficient, because there was no allegation that the officers were aware that the detainee had taken the pills (and mixed them with alcohol). The Fourth Circuit reversed, but did so only because the district court's "analysis fails to accept May's allegations as true and draw all reasonable inferences in his favor." *Id.* Under the lenient plausibility standard, the objective circumstances permitted an inference of subjective awareness.

But litigation, of course, does not end when a motion to dismiss or summary judgment is denied. The case will then march to trial, and the jury, properly instructed, must reach a decision—not by viewing the facts in the light most favorable to the plaintiffs; not based on inferences in plaintiffs' favor; but instead by weighing whether the plaintiffs carried their burden on each and every element of their claims. *Consider*

Mays, 992 F.3d at 305 (disputes over officers' actual knowledge were questions "for summary judgment or trial").

The question presented here, then, is not merely whether *courts* sometimes blur the lines between subjective and objective inquiries during pretrial motion practice. The relevant question is broader—what legal standard governs the ultimate outcome?

If a plaintiff must demonstrate subjective awareness, special verdict forms should include the question, and juries should be instructed accordingly. If not, they shouldn't. This not an academic question. Presenting the question to the jury versus withholding it will have an impact on how cases are tried, and how cases are decided. It will often decide who wins and who loses.

2.a. Here, direction by this Court to use the subjective standard would have immediate, outcome-determinative consequences for Nurse de Guzman. As Judge Collins explained, "[t]he district court correctly held that Plaintiff had not presented sufficient evidence to permit a reasonable jury to find that de Guzman 'was actually aware Sandoval had a serious medical need.'" App. 71. The majority reached the opposite result only by ignoring de Guzman's actual awareness, and instead addressing only what "a reasonable nurse in de Guzman's position" would have inferred. App. 42.

2.b. Clarification by this Court could also change the course of the litigation for Nurse Llamado and Nurse Harris. The majority below never inquired into

their subjective awareness. Rather, it asked only what a "reasonable nurse" would have understood. App. 41 ("The nurses' actual subjective appreciation of the risk is not an element of the established-law inquiry."). Application of the proper standard could change the outcome on summary judgment, and even if it didn't, a reasonable jury, properly instructed to address actual knowledge, could well side with the nurses.

2.c. This Court's direction to apply a subjective test would have immediate consequences for the entity defendant, too. Entity liability could not be predicated on the actions of Nurse de Guzman, because "[i]f a person has suffered no constitutional injury at the hands of the individual . . . [t]he fact that [a policy] might have authorized the [challenged action] is quite beside the point." *City of L.A. v. Heller*, 475 U.S. 796, 799 (1986). And if the claims against Nurse Harris and Nurse Llamado fell, then the *Monell* claims against the County would fall with them.

III. THE DOCTRINE OF QUALIFIED IMMUNITY IS HERE TO STAY, AND THIS COURT SHOULD ENSURE IT IS APPLIED COHERENTLY

A. Respondents Ignore *Stare Decisis* and the Litany of Decisions Reaffirming Qualified Immunity.

Respondents ask this Court to upend decades of settled law and to abolish the doctrine of qualified immunity wholesale. That, of course, is not realistic.

Rather, this Court has reaffirmed and strengthened the doctrine for decades. *See* W. BAUDE, IS QUALIFIED IMMUNITY UNLAWFUL?, 106 Cal. L. Rev. 45, 82–83 (2018) (identifying over 20 Supreme Court decisions reaffirming the doctrine). Indeed, the first two decisions of this term yet again reaffirmed the doctrine, without a single dissent. *See City of Tahlequah, Oklahoma v. Bond*, ___ S. Ct. ___, 2021 WL 4822664 (Oct. 18, 2021); *Rivas-Villegas v. Cortesluna*, ___ S. Ct. ___, 2021 WL 4822662 (Oct. 18, 2021).

As one commenter put it, this Court's "embrace of qualified immunity has . . . been emphatic, frequent, longstanding, and nonideological." AARON L. NIELSEN & CHRISTOPHER J. WALKER, A QUALIFIED DEFENSE OF QUALIFIED IMMUNITY, 93 Notre Dame L. Rev. 1853, 1856–63 (2018). This Court's project, then, is to refine and improve the doctrine, not to abandon it.

B. The Majority's Approach Below Reflects a Growing Trend of Improper Reliance On Post-Incident Authority.

Below, the majority relied on *Gordon* (a 2018 case) to assess whether the unlawfulness of the conduct at issue (from 2014) was clearly established at the time. That was improper. Cases that "postdate the conduct in question . . . could not have given fair notice . . . and are of no use in the clearly established inquiry." *Kisela v. Hughes*, 138 S. Ct. 1148 (2018), quoting *Brosseau v. Haugen*, 543 U.S. 194, 200 n.4 (2004).

Respondents attempt to salvage the denial of qualified immunity by arguing that this Court cares only about whether an official's *conduct* violates clearly established law, and not whether the official acted with the requisite state of mind. But that assertion betrays the principle animating the doctrine of qualified immunity—fair notice. Officials should not be held personally liable for conduct unless the law provides clear notice that their actions—based on the circumstances known to them at the time—violated the plaintiff's constitutional rights. If the law requires a plaintiff to prove actual knowledge, a defendant's unknowing inaction cannot violate clearly established law. If the law requires subjective intent, simple negligence likewise does not suffice. App. 58 (Collins, J., dissenting) ("[A] nurse who, at the time, did not *subjectively* apprehend Sandoval's serious medical needs is entitled to qualified immunity.") (emphasis in original).

Unsurprisingly, then, respondents have no answer to the fundamental problem noted by Judge Collins: that the majority "reach[ed] 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 (emphasis in original).

Respondents instead attempt to minimize the problem. They contend that it will sunset soon, as most pending litigation now challenges post-*Gordon* conduct. But *Gordon* is hardly the first time a lower court has changed the elements of a claim, and it certainly will not be the last. And the Ninth Circuit's inattention

to *Kisela* extends beyond the change in law context. In both *Garcia* and *Sampson*, the majorities relied on subsequent authority that purported to summarize prior law, drawing dissents reiterating the *Kisela* rule, and creating an intra-circuit split with *Reyna*. (Pet. 25.)

Respondents address *Garcia* and *Sampson* only by characterizing them as a different species of violation of *Kisela*. *See* Respondents' Brief 29–30. But the fact that the Ninth Circuit is resisting *Kisela* in multiple contexts counsels in favor of certiorari, not against it.

Moreover, other circuits have committed similar errors. While most circuits adhere to *Kisela*, the Ninth Circuit, and arguably the First, Sixth, and Seventh, have resisted its teachings. Pet. 27–28. The majority and dissent both recognized this split below, and respondents make no effort to harmonize the cases. Respondents' Brief 29–30.

To correct these errors and to resolve the intercircuit and intracircuit splits, this Court should intervene and reaffirm that subsequent authority can play no role in the "clearly established" analysis.

CONCLUSION

The lower courts have been divided on both questions presented here, and differing approaches produce inconsistent outcomes across a broad litigation industry. This Court should intervene to clarify whether the

Constitution bars simple medical malpractice by jail officials, or whether such claims should be reserved for the state courts; and to reaffirm the notice principles underlying qualified immunity. Certiorari should be granted.

Respectfully submitted,

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