No. 23-210

In the Supreme Court of the United States

CHRISTINA JORDAN, RN,

Petitioner,

v.

KARLA HOWELL, as Administratrix of the Estate of CORNELIUS HOWELL,

Respondent.

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

REPLY BRIEF OF PETITIONER CHRISTINA JORDAN, RN

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INTRODUCTION

In her Brief in Opposition, Respondent argues the Petition should be denied because:

1. A circuit court split does not exist. Brief in Opposition ("Opp.") at 9.
2. The Sixth Circuit did not err in applying an objective standard because *Kingsley* conforms to this Court's longstanding precedent, which requires the use of an objective standard to all claims of a pretrial detainee under the Fourteenth Amendment. Opp.13.
3. This case is a poor vehicle for resolving the question presented. Opp.20.
4. The question presented in the Petition is unimportant. Opp.22.

Respondent's arguments lack merit.

First, Respondent disputes the contours of the prevailing circuit court split. Respondent's attempt to minimize the scale of the circuit court split, however, only reinforces the conflict and confusion. It also reinforces the importance of this Court's clarification over the confines of *Kingsley*'s holding.

Second, *Kingsley* does not hold that an objective standard must be applied to all claims of pretrial detainees under the Fourteenth Amendment. This false assertion is disproven by *Bell*, *Kingsley*, and decisions rendered post-*Kingsley*.

Third, this case is an ideal vehicle for this Court's resolution because the Sixth Circuit, like so many other

circuit courts, constitutionalized medical malpractice through the application of *Kingsley*'s unworkable, unlawful, and inconsistent objective test.

Fourth, Respondent's contention that the question presented in this Petition is "unimportant" is disingenuous and inaccurate. The inappropriate extension of *Kingsley* has constitutionalized medical malpractice and/or negligence claims, as originally forewarned by the minority court. *Kingsley,* 576 U.S. at 408, 135 S.Ct. at 2479 (Scalia, J. dissenting, with whom Roberts, C.J. and Thomas, J. join, dissenting). Nearly a decade post-*Kingsley*, federal jurists continue to stress the unintended effects in hopes of this Court's ultimate resolution: "And as we continue to lower the bar for liability, we increasingly put these officials in impossible situations, ones the Constitution surely was never contemplated to resolve." *Helphenstine v. Lewis Cnty., Kentucky*, 65 F.4th 794, 801 (6th Cir. 2023) (Readler, J. statement respecting denial of rehearing en banc).

For these foregoing reasons, as set forth more fully below, Petitioner maintains that this Court should issue a writ of certiorari to limit the holding of *Kingsley* and restore the historical deliberate indifference framework to claims of inadequate medical care of pretrial detainees.

I. Respondent's Attempt to Minimize the Current Circuit Court Split Only Further Illustrates the Conflict Over the Question Presented in This Petition.

Respondent attempts to minimize the scale of the prevailing circuit court split over the applicability of *Kingsley*. Opp.9-12. Respondent splits hairs over what should qualify as declining to extend *Kingsley* versus a

mere "percolation" within the circuit court. Opp.10. Those arguments, however, only reinforce the volume of contradictions and conflicting decisions currently dividing the circuit courts.

Respondent agrees the Tenth Circuit rejected extending *Kingsley* to deliberate indifference claims of a pretrial detainee based on allegations of inadequate medical care. Opp.12. Conversely, Respondent contends the Third, Fifth, Eighth, and Eleventh Circuits did not expressly decline to extend *Kingsley* but reserved the question for future cases. Opp.10. To further her point, Respondent mischaracterizes several sister circuit court decisions as "poor vehicles" for demonstrating the divide in authority, stating that *Kingsley* did not affect the outcome, or was not thoroughly considered, in each. Opp.9-12 ("That discussion, tucked away in a footnote, says that *Kingsley* did not abrogate circuit precedent applying a subjective test[.]").

For example, *Moore* and *Dang* clearly illustrate how circuit courts are unwilling to adopt *Kingsley* in the context of pretrial detainees' claims for allegedly inadequate medical care, in full recognition of the prevailing circuit court split. *Dang v. Sheriff, Seminole Cnty. Fla.*, 871 F.3d 1272, 1279 n. 2 (11th Cir. 2017) ("We cannot and need not reach this question"); *Moore v. Luffey*, 767 F. App'x 335, 340 n. 2 (3d Cir. 2019) (Moore does not cite to any cases of this Court applying *Kingsley*). Nevertheless, Respondent ignores that, and instead claims *Moore* and *Dang* demonstrate certain circuit courts are unwilling to adopt *Kingsley* in cases where the pretrial detainees' claims failed under either framework: historical or *Kingsley*. Opp.11-13. Over that, Respondent further speculates that a different case may one day sway the Third and

Eleventh Circuits to take the issue up *en banc* and properly decide to adopt an objective standard. Opp.11-13.

However, Respondent fails to recognize the contradiction in her reasoning of *Moore* and *Dang*. The very Sixth Circuit precedent upon which she relies, *Brawner v. Scott Cnty., Tennessee*, 14 F.4th 585 (6th Cir. 2021), chose to extend *Kingsley* to deliberate indifference claims of a pretrial detainee based on allegations of inadequate medical care despite the majority panel fully conceding the pretrial detainee's claims failed under either standard. "[T]he facts here, viewed in the light most favorable to *Brawner*, support a finding of deliberate indifference under either *Farmer*'s subjective or *Kingsley*'s objective standard." *Brawner*, 14 F.4th at 592. Likewise, the Sixth Circuit subsequently denied en banc.[1] *Brawner v. Scott Cnty., Tennessee*, 18 F.4th 551 (6th Cir. 2021), (Readler, J., dissenting from the denial of rehearing *en banc*) ("We should not be enlisting a case about excessive force to disturb our deliberate indifference to medical needs jurisprudence."). In fact, the Sixth Circuit has yet to grant rehearing *en banc* on the issue, as exemplified by this Petition and recent similar lawsuits alleging deliberate indifference before the Sixth Circuit. *Helphenstine*, 65 F.4th 794, 795 (6th Cir. 2023).

Respondent's claim that *Moore* and *Dang* are "poor vehicles" for demonstrating the circuit court split because *Kingsley* did not affect their outcome, is belied

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[1] *See* Appellees' Brief, Doc. 49, Page 36-40; *see also Wright v. Spaulding*, 939 F.3d 695, 701 (6th Cir. 2019) ("[A] conclusion that does nothing to determine the outcome is dictum and has no binding force.") (emphasis omitted).

by the fact that the Court in *Brawner*, a decision upon which Respondent heavily relies, similarly found that the outcome would have been the same under either standard. Opp.17, 21-22.

Respondent's attempt to minimize the circuit court split over the interpretation of *Kingsley* instead serves to reinforce the conflict spanning the circuits.[2] The parties' inability here to even agree on the scope and bounds of these decisions only reinforces the confusion on this important issue and the need for this Court to intervene and provide final clarification.

II. Respondent Contends the Sixth Circuit Did Not Err Because This Court's Historical Precedent Requires a Stringent Objective Standard for All Claims of Pretrial Detainees Under the Fourteenth Amendment, but *Bell*, *Kingsley*, and Post-*Kingsley* Decisions Prove the Opposite.

Kingsley does not hold that an objective standard must be applied to all condition-of-confinement claims asserted by pretrial detainees under the Fourteenth Amendment. *Kingsley* also does not hold that it should apply to correctional medical care claims. To state otherwise is inaccurate.

Respondent contends that *Kingsley* distinguished the difference between Eighth Amendment claims and Fourteenth Amendment claims in adherence to this Court's longstanding precedent requiring an objective

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[2] Respondent similarly contradicts herself when relying upon the Fourth District's recent decision in *Short v. Hartman*, 87 F.4th 593 (4th Cir. 2023), *see* Opp.10, given the Fourth Circuit has not yet ruled on whether to grant or deny a rehearing *en banc*.

standard for all claims of pretrial detainees under the Fourteenth Amendment. Opp.9, 14-17. *Bell, Kingsley*, and federal court decisions post-*Kingsley,* however, establish that position is not accurate.

First, the *Kingsley* Court did not conclude that *Bell* requires the application of an objective standard for all pretrial detainee claims under the Fourteenth Amendment. Instead, the *Kingsley* Court only identified that, under *Bell*, "a pretrial detainee *can* prevail by providing only objective evidence." *Kingsley*, 576 U.S. at 398, 135 S.Ct. at 2473 (emphasis added). The *Kingsley* Court did not obviate the first component of *Bell*, which is whether an "intent to punish"[3] exists in relation to the condition asserted by the pretrial detainee. *Bell v. Wolfish*, 441 U.S. 520, 538, 99 S.Ct. 1861, 1873 (1979). Hence, the threshold analysis of any conditions-of-confinement claim of a pretrial detainee under the Fourteenth Amendment includes a subjective component. Only absent a finding of an intent to punish does a federal court turn to objective considerations, such as to whether the alleged restriction is rational or excessive. *Id.*; *see also Kingsley,* 576 U.S. at 406 (Scalia, J. dissenting) ("In sum: *Bell* makes intent to punish the focus of its due-process analysis.").

Second, *Kingsley* itself does not hold that a stringent objective standard must be applied to all pretrial detainee claims under the Fourteenth Amendment. The adopted "objective unreasonableness" test includes subjective considerations. "[W]e have stressed that a court must judge the reasonableness of the force used from the perspective and with the knowledge of the

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3 *Intent:* "The state of mind accompanying an act, esp. a forbidden act.", BLACK'S LAW DICTIONARY (11th ed. 2019).

defendant officer." *Kingsley*, 576 U.S. 389 at 399, 135 S.Ct. 2466 at 2474. Notwithstanding the confines of *Kingsley*'s limited holding or its inapplicability to correctional medical claims, the supposed "*Kingsley* objective test" promoted by Respondent still requires a state of mind analysis, which is subjective. Even in the use of force context, the *Kingsley* Court was unwilling to eliminate necessary considerations inherent in any traditional Eighth Amendment framework.

Lastly, post-*Kingsley* federal courts have continued to rely upon the Eighth Amendment frameworks for other condition-of-confinement claims. *See Oliver v. Baca*, 913 F.3d 852, 859 (9th Cir. 2019) (determining "the same [Eighth Amendment] considerations are relevant in the pretrial detainee context" when analyzing conditions of confinement claims under the Fourteenth Amendment); *see also Christmas v. Nabors*, 76 F.4th 1320, 1330-31 (11th Cir. 2023) (Eighth Amendment's objective and subjective standards to prevail on his deprivation of a "basic necessity" claim under the Fourteenth Amendment's Due Process Clause). Similarly, federal courts still require an affirmative act or subjective state of mind evidence to hold a correctional supervisor liable for alleged Fourteenth Amendment violations of a pretrial detainee. *Hyde v. City of Willcox*, 23 F.4th 863, 874 (9th Cir. 2022) (citations omitted).

Respondent inaccurately claims *Kingsley* conclusively holds that an objective standard must be applied to any and all claims of a pretrial detainee under the Fourteenth Amendment. An abundance of federal precedent demonstrates otherwise. Respondent's analysis of the case law to date only further demonstrates the necessity of this Court's ultimate resolution of this issue.

III. Respondent Can Only Confuse the Issues to Distract from the Unworkability of *Kingsley*'s Objective Standard and the Sixth Circuit's Clear Error.

Respondent claims Petitioner is seeking certiorari "largely" based on misdiagnosis or disagreements over the best course of treatment, neither of which have anything to do with *Kingsley*. Opp.20-21. Respondent confuses the issues. The fact remains that the Sixth Circuit erred because it constitutionalized medical malpractice. The Sixth Circuit, like so many other circuit courts, constitutionalized medical malpractice through the application of *Kingsley*'s unworkable, unlawful, and inconsistent objective test.

First and foremost, expanding *Kingsley*'s objective standard to Fourteenth Amendment deliberate indifference claims has resulted in federal courts constitutionalizing state law medical malpractice claims, just as the Sixth Circuit did here. Longstanding circuit precedent holds that a misdiagnosis or a disagreement over the best course of treatment is insufficient to demonstrate deliberate indifference, both pre- and post-*Brawner*'s adoption of *Kingsley*. *See, e.g.*, *Helphenstine v. Lewis Cnty.*, *Kentucky*, 60 F.4th 305, 322 (6th Cir. 2023) (citing *Darrah v. Krisher*, 865 F.3d 361, 372 (6th Cir. 2017).

However, the application of *Kingsley*'s objective test invited the Sixth Circuit to err by allowing the Court to speculate about what Nurse Jordan could have known rather than considering what she actually knew: "Jordan was faced with multiple symptoms that were unrelated to the misdiagnosis and consistent with the proper diagnosis, yet she failed to undertake any

additional evaluation, care, or treatment during or after the misdiagnosis." App.16a.

As demonstrated by the panel's decision, *Kingsley*'s objective test is impractical if applied outside the context of a claim for excessive use of force. *Kingsley* was intended to apply to an intentional action rather than inaction. "For it is the unique case in which an officer harms a prisoner with objectively excessive force but nonpunitive intent." *Brawner*, 14 F.4th at 608 (Readler, J., concurring, in part, dissenting, in part).

This is not a case where no medical treatment whatsoever was provided to a pretrial detainee, as the Sixth Circuit here erroneously concluded. App.3a-4a, 12a, 16a. To the contrary, after stabbing his cellmate, Mr. Howell was transferred to the medical sally port to be assessed by Petitioner. App.3a-4a. Petitioner took Mr. Howell's vitals, examined him, reviewed his medical chart, and attempted to administer hydration, glucose tablets, and a urinalysis. Mr. Howell, however, yelled, rolled on the ground, and generally acted erratically. Most significantly, Mr. Howell refused the medical treatment that Petitioner attempted. He spit out his glucose tabs and refused hydration and a urinalysis. App.12a.

It is undisputed that Petitioner believed that Mr. Howell was suffering from an acute psychiatric episode. App.13a. Therefore, Petitioner's decision to transport Mr. Howell to the psych unit of the jail and instruction to the psych nurse, to check on Mr. Howell, were additional actions taken by Petitioner in response to Mr. Howell's perceived medical needs. *Westlake v. Lucas*, 537 F.2d 857, 860 n.4 (6th Cir. 1976) ("Whether a prisoner has suffered unduly by the failure to provide

medical treatment is to be determined in view of the totality of the circumstances.").

Nonetheless, upon the application of yet another misinterpreted version of *Kingsley*'s objective test, the Sixth Circuit panel here reasoned that a material fact exists over whether Petitioner "acted or recklessly failed to act where a reasonable [nurse] would have recognized that Howell's [sickle cell] posed an unjustifiably high risk of harm." (internal quotations omitted). App.11a. In support of its ruling, the panel equated the medical symptoms between two potential diagnoses, and then assigned its own "reasonable inference" to Petitioner, in the absence of record evidence: "[Petitioner] knew Howell had sickle cell, heard him make repeated complaints synonymous with sickle cell illness, and the record provides a reasonable inference that Jordan knew about Howell's recent hospitalizations related to sickle cell." App.12a-13a. Further, the panel reasoned Petitioner "never took further action to rule out a sickle cell crisis," App.13a, notwithstanding the fact a registered nurse does not have the ability or licensure to diagnose or rule out a medical condition, including sickle cell crisis. Appellee's Pet. For Reh'g, Doc. 73-1, Page 16.

Neither "reasonable inference" nor a lack of further action constitutes proof of "objective unreasonableness," even under *Kingsley*. The Court stated, "We have stressed that a court must judge the reasonableness of the [care provided] from the perspective and with the knowledge of the defendant [nurse]." *Kingsley*, 576 U.S. 389 at 399, 135 S.Ct. at 2474 (emphasis added); *see also Edmo v. Corizon, Inc.*, 935 F.3d 757, 786 (9th Cir. 2019); *Fraihat v. U.S. Immigr. & Customs Enf't*,

16 F.4th 613, 636-37 (9th Cir. 2021). The panel's application of *Kingsley*'s objective test vastly differs from *Brawner*, 14 F.4th at 596, similar to how the *Trozzi* Court also applied their own version of *Kingsley*'s objective test. 29 F.4th 745, 757-58 (6th Cir. 2022) (the prison official knew that his failure to respond would pose a serious risk to the pretrial detainee and ignored that risk). Notably, *Trozzi* was published within a matter of days of the district court's decision granting summary judgment in favor of Petitioner.

Respondent's argument against this Court's acceptance of this Petition is unavailing. This Court has the appropriate set of facts before it to provide necessary resolution over the question presented.

IV. Circuit Courts Will Continue to Stress the Importance of the Question Presented Until This Court's Resolution.

Respondent states that *Kingsley*'s objective standard is a "relatively unimportant" issue, ignoring the calls to action of federal jurists throughout the circuit courts. Opp.22.

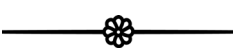
As forewarned by the minority's dissenting opinions, *Kingsley* was destined for misinterpretation and unintended fallout. *Kingsley*, 576 U.S. at 404-08 (Scalia, J. dissenting, with whom Roberts, C.J. and Thomas, J. join, dissenting). The confusion surrounding the interpretation and application of *Kingsley* to correctional medical claims of a pretrial detainee abounds. "This test simply doesn't fit a failure-to-act claim." *Castro v. Cnty. of Los Angeles*, 833 F.3d 1060, 1086 (9th Cir. 2016) (Ikuta, J. dissenting).

Until resolution is provided by this Court, lower federal courts will continue to resort to their own

interpretations of facts, standards, and expansions of *Kingsley*. *Compare McCann v. Ogle County*, 909 F.3d 881, 886-87 (7th Cir. 2018) (considering whether a defendant "foresaw or ignored the potential consequences of her actions" when deciding whether a defendant acted purposefully, knowingly, or recklessly) *and Charles v. Orange County*, 925 F.3d 73, 87 (2d Cir. 2019) (recklessness standard is satisfied upon showing prison official "should have known that failing to provide the omitted medical treatment would pose a substantial risk to the detainee's health") *with Fraihat*, 16 F.4th at 636-37 (9th Cir. 2021) (reckless disregard standard is not satisfied by an "inadvertent failure to provide adequate medical care").

If the widespread dissemination of conflicting authority does not alone stress the importance of this issue at hand, the Court need not look any further than the Sixth Circuit for direct confirmation: "In the circuits that upended the law for deliberate indifference post-*Kingsley*, those courts have split internally across the board over how to apply these new standards." *See*, *e.g.*, *Helphenstine*, 60 F.4th 305 (6th Cir. 2023), denying en banc, 65 F.4th 794, 795-796 (6th Cir. 2023), (Readler, J. delivering a separate statement respecting denial of rehearing en banc). As Judge Readler declares, and as Petitioner echoes herein, "[U]ntil Supreme Court intervention comes to pass, we are left to muddle on, following paths leading in any and all directions." *Id.* at 802.

This Court's resolution of this important question presented is a necessity.



CONCLUSION

For all the above reasons, Petitioner maintains that her Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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