No. 23-259

IN THE
Supreme Court of the United States

LEWIS COUNTY, KENTUCKY, ET AL.,
Petitioners,

v.

JULIE HELPHENSTINE,
Respondent.

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

REPLY BRIEF FOR PETITIONERS

JEFFREY C. MANDO
Adams Law, PLLC
40 West Pike Street
Covington, KY 41011

CLAYTON L. ROBINSON
COURTNEY L. SOLTIS
Robinson & Weber, PSC
101 Prosperous Place
Suite 100
Lexington, KY 40509

JENNIFER L. MASCOTT
R. TRENT MCCOTTER
Counsel of Record
Separation of Powers Clinic
Gray Center for the Study
of the Administrative State
Antonin Scalia Law School
3301 Fairfax Dr.
Arlington, VA 22201
(202) 706-5488
rmccotte@gmu.edu

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

REPLY BRIEF 1

I. THE CIRCUITS ARE DIVIDED 1

II. THE QUESTION PRESENTED IS IMPORTANT, AND THIS CASE PRESENTS A SUPERIOR VEHICLE 6

A. The Proper Test Is an Important Issue, and Clarity Is Badly Needed 6

B. This Case Is a Superior Vehicle 8

III. THE SIXTH CIRCUIT'S RULE IS WRONG 10

CONCLUSION 15

TABLE OF AUTHORITIES

Page(s)

Cases

Bell v. Wolfish,
441 U.S. 520 (1979) 11

Castro v. Cnty. of Los Angeles,
833 F.3d 1060 (9th Cir. 2016) 5, 12

Crandel v. Hall,
75 F.4th 537 (5th Cir. 2023) 2, 9

Edmiston v. Borrego,
75 F.4th 551 (5th Cir. 2023) 3

Farmer v. Brennan,
511 U.S. 825 (1994) 1, 2, 3, 11

Pittman ex rel. Hamilton v. Cnty. of Madison,
970 F.3d 823 (7th Cir. 2020) 13

Howell v. NaphCare, Inc.,
67 F.4th 302 (6th Cir. 2023) 10

Ireland v. Prummell,
53 F.4th 1274 (11th Cir. 2022) 3, 4

Karsjens v. Lourey,
988 F.3d 1047 (8th Cir. 2021) 3

Kingsley v. Hendrickson,
576 U.S. 389 (2015) 13

Miranda v. Cnty. of Lake,
900 F.3d 335 (7th Cir. 2018)....................................5

Robinson v. Midland Cnty.,
80 F.4th 704 (5th Cir. 2023) 2

Short v. Hartman,
87 F.4th 593 (4th Cir. 2023) 1, 5, 11

Strain v. Regalado,
977 F.3d 984 (10th Cir. 2020)............................5, 12

Swain v. Junior,
961 F.3d 1276 (11th Cir. 2020)................................3

Wade v. Daniels,
36 F.4th 1318 (11th Cir. 2022) 3

Westmoreland v. Butler Cnty.,
29 F.4th 721 (6th Cir. 2022) 14

Other Authorities

S. Ct. R. 10..2

REPLY BRIEF

Respondent accepts that there is a circuit split on the pure question of constitutional law presented here. Respondent also accepts that this case is a clean vehicle for resolving that question. And while Respondent asserts the question has little practical import, she does not deny that it was outcome-dispositive *in this case* and in many others across the country. Indeed, as Judge Readler explained below, this issue has caused serious “confusion” in the lower courts and cries out for this Court’s intervention. Pet.App.93a (Readler, J.). Respondent fails to muster a single reason why that is wrong.

Accordingly, the Court should grant the government’s Petition and hold that a pretrial detainee alleging deliberate indifference must demonstrate that the defendant actually recognized a serious risk of injury and nonetheless disregarded that risk, just as this Court required for *convicted inmates’* claims of deliberate indifference in *Farmer v. Brennan*, 511 U.S. 825 (1994). That framework is straightforward, longstanding, and administrable.

I. THE CIRCUITS ARE DIVIDED.

The Petition demonstrated there is an entrenched circuit split on the question presented. Pet.17–23. After the Petition was filed, the Fourth Circuit issued an opinion recognizing the split and clarifying that it was adopting the objective standard. *Short v. Hartman*, 87 F.4th 593, 603–11 (4th Cir. 2023). That brings the split to five circuits adopting the objective

test, and five circuits adopting the actual-knowledge test.

Respondent acknowledges there is a circuit split, BIO1, 13, which alone provides a sufficient basis for granting review, *see* S. Ct. R. 10(a). But Respondent claims the split is not yet worthy of review because several circuits that adopted the actual-knowledge test did so without (in her view) providing a sufficient explanation and that perhaps they are waiting to review the matter *en banc*. BIO2, 15–18. Those arguments are unpersuasive for several reasons.

Five Circuits Apply the Actual-Knowledge Test. Respondent mischaracterizes the state of the law in the five circuits that have adopted the actual-knowledge standard. She claims that—except for the Tenth Circuit—those circuits merely addressed the issue in passing and are reserving it for *en banc* review. BIO2, 15–19. That is both irrelevant and incorrect.

Despite Respondent's view that the Fifth, Eighth, and Eleventh Circuits did not adequately explain why they were rejecting the *Kingsley* test, the fact remains that the *Farmer* test is the controlling law in those circuits for pre-trial detainees' deliberate-indifference claims, as demonstrated by numerous subsequent cases where those circuits cited their actual-knowledge standard as binding. *See, e.g., Robinson v. Midland Cnty.*, 80 F.4th 704, 711 (5th Cir. 2023); *Crandel v. Hall*, 75 F.4th 537, 544 (5th Cir. 2023); *Edmiston v. Borrego*, 75 F.4th 551, 558–

59 (5th Cir. 2023); *Ireland v. Prummell*, 53 F.4th 1274, 1287 (11th Cir. 2022); *Wade v. Daniels*, 36 F.4th 1318, 1326 n.3 (11th Cir. 2022); *Karsjens v. Lourey*, 988 F.3d 1047, 1052 (8th Cir. 2021); *Swain v. Junior*, 961 F.3d 1276, 1285 n.4 (11th Cir. 2020).

Respondent is therefore wrong to insist that only one circuit has actually adopted the *Farmer* test for pretrial detainees' claims of deliberate indifference. BIO13, 19. In reality, five circuits undoubtedly apply that test.[1]

The brevity with which those circuits have disposed of Respondent's argument confirms its lack of merit, *see* Part III, *infra*, but it does nothing to undercut the precedential value of those decisions, which still bind subsequent panels and district courts.

Respondent is also incorrect to theorize that the Fifth, Eighth, and Eleventh Circuits may just be waiting to reconsider the issue *en banc*. Each of those circuits has *already* denied *en banc* review of this exact issue. For example, in *Cope*, the plaintiffs sought rehearing *en banc* from the Fifth Circuit on whether *Kingsley* "requires that pretrial detainees' failure-to-protect due process claims be judged by objective reasonableness rather than subjective

[1] Respondent similarly claims the First Circuit "has not reached the question at all," BIO2, but later acknowledges that the First Circuit does in fact "[a]pply[] the subjective *Farmer* test" to such claims, BIO31.

deliberate indifference." Pet. for Rehearing En Banc 21, *Cope v. Cogdill*, No. 19-10798 (5th Cir. July 30, 2021). Not a single judge called for a response or voted in favor of rehearing. Order, *Cope*, No. 19-10798 (5th Cir. Aug. 13, 2021). Fifth Circuit law is now so settled that pretrial detainees seek review directly from this Court, rather than *en banc* review. *See Crandel v. Hall*, No. 23-317 (cert. filed Sept. 22, 2023).

The Eighth Circuit has likewise denied *en banc* review—over the dissent of two judges—of "whether objective or subjective standards govern Fourteenth Amendment conditions-of-confinement claims brought by pretrial detainees." Pet. for Rehearing En Banc 1, *Whitney v. City of St. Louis*, No. 17-2019 (8th Cir. Apr. 26, 2018); Order, *Whitney*, No. 17-2019 (8th Cir. June 14, 2018).

The fact that two judges voted for rehearing in *Whitney* defeats Respondent's stretched claim that every case seeking *en banc* rehearing on this issue was simply a bad vehicle. BIO15–18. The problem hasn't been the vehicle; rather, it's that Respondent's position on the merits is incorrect, and these circuits see no reason to revisit the matter.

The Eleventh Circuit has similarly twice rejected *en banc* petitions on this issue. *See* Pet. for Rehearing En Banc at v, *Ireland*, No. 20-10539 (11th Cir. Nov. 28, 2022); Order, *Ireland*, No. 20-10539 (11th Cir. Jan. 24, 2023); Pet. for Rehearing En Banc 4, *Dang v. Seminole Cnty.*, No. 15-14842 (11th Cir.

Oct. 16, 2017); Order, *Dang*, No. 15-14842 (11th Cir. Dec. 28, 2017).

Clearly, these circuits believe their precedent on the matter is fully settled: they have repeatedly denied *en banc* review and continue to rely on their existing rule to resolve cases. Five circuits have therefore adopted the actual-knowledge test.

The Question Presented Has Fully Percolated. Regardless of the exact number of circuits on each side of the split, both sides have been well ventilated. The Sixth Circuit's opinion below, for example, presented the disagreement among the circuits and also within its own circuit caselaw, and made clear it was adopting the objective standard. Pet.App.13a. Judge Readler's separate opinion provided an additional detailed summary of the split, explained why the actual-knowledge standard is correct, and argued this Court should grant review. Pet.App.80a–95a (Readler, J.).

As Respondent herself acknowledges, BIO13–14, other circuits on both sides of the issue have recognized the split and explained why they were not adopting the other side's test. *See, e.g.*, *Strain v. Regalado*, 977 F.3d 984, 990–93 & n.4 (10th Cir. 2020); *Short*, 87 F.4th at 603–11 & n.9; *Miranda v. Cnty. of Lake*, 900 F.3d 335, 351–52 (7th Cir. 2018); *see also Castro v. Cnty. of Los Angeles*, 833 F.3d 1060, 1086–87 (9th Cir. 2016) (*en banc*) (Ikuta, J., dissenting).

There has accordingly been more than sufficient "percolation." BIO2. Only this Court can resolve the disagreement.

II. THE QUESTION PRESENTED IS IMPORTANT, AND THIS CASE PRESENTS A SUPERIOR VEHICLE.

A. The Proper Test Is an Important Issue, and Clarity Is Badly Needed.

Respondent does not dispute that the question presented arises frequently, *see* BIO4, 28; Pet.24–25, but she argues that it "rarely matters," BIO28.

It certainly matters here. Respondent does not attempt to dispute that the proper test was outcome-determinative for Petitioners. Pet.27–28. Indeed, the Sixth Circuit took the highly unusual step of overruling its own circuit precedent from just a year earlier—without going through *en banc* proceedings—because the outcome here turned on the precise *mens rea* test that applied. Pet.App.14a. If that test did not matter, the panel would have simply pretermitted the issue.

The question presented also matters in hundreds of other cases. As Judge Readler demonstrated below, judges across the country have expended significant effort trying to identify the appropriate test. Pet.App.81a–84a (Readler, J.). Those endeavors would make no sense if the outcome rarely mattered anyway. "Simply put, that so many have said so much in so little time is both an acknowledgement

that [the *Kingsley* test] has left ample room for debate over its holding as well as a recognition of the frequency with which these cases appear on our docket." Pet.App.83a (Readler, J.).

Similarly, there are hundreds of district judges across the country who must attempt to apply those circuit opinions to particular cases before them. "Until Supreme Court intervention comes to pass," those judges "are left to muddle on, following paths leading in any and all directions." Pet.App.94a–95a (Readler, J.).

The appropriate test surely "matters" to litigants, too. For thousands of detainees and local government officials, the determination of liability largely turns on the circuit in which they reside.[2]

Respondent argues that the question presented does not "matter" because qualified immunity will ultimately protect defendants "for all but the easiest calls." BIO32. That is wrong, and this case proves it. The Sixth Circuit rejected qualified immunity for Petitioners below, Pet.App.36a–38a, even though the

---

[2] Using a cherry-picked set of cases, Respondent suggests the outcome will flip in approximately 10% of cases when the actual-knowledge test is applied rather than the objective test. BIO29–30 & nn.4–5 (alleging that in the Second Circuit, which applies an objective test, two out of twenty cases would have come out differently under an actual-knowledge test). But even that figure would still mean potentially hundreds of cases coming out differently at the district-court level, given the frequency of such claims. *See* Pet.24.

circuit's own caselaw was so unsettled that the judges themselves had been unable to determine which of their cases were actually binding. And again, the fact that so many courts and judges have weighed in on the question presented confirms it cannot so easily be avoided simply by invoking qualified immunity.

Respondent disputes there are practical problems with the objective test, arguing it is easier to apply than the actual-knowledge test. BIO32. But she neglects to cite even a single case where judges disagreed over the requirements or case-specific application of the actual-knowledge test. Compare that to the rampant judicial disagreement about what the *Kingsley* test itself actually requires (separate from whether to apply *Kingsley* in the first place). *See, e.g.*, Pet.App.81a–84a (Readler, J.).

Detainees, government officials, circuit judges, and district judges all need clarity on this frequently arising issue. Only this Court can provide that clarity.

B. This Case Is a Superior Vehicle.

As noted, Respondent never disputes that the appropriate test for *mens rea* was outcome-determinative in this case. Pet.27–29. This readily distinguishes it from prior *certiorari* denials, where—as the Petition explained, and Respondent does not dispute—the outcome would have been the same under any test. *See* Pet.27–29; BIO32–33. This

case therefore lacks the vehicle issues that thwarted prior review of this issue.

The importance of the question presented is further confirmed by several other pending petitions raising variations of the same issue, but this case is a superior vehicle for resolving the split.

The petition in *Crandel v. Hall*, No. 23-317 (*cert.* filed Sept. 22, 2023), is a poor vehicle for several reasons. *First*, the defendants would have prevailed even under *Kingsley*. They had left two pretrial detainees unattended for mere minutes after arresting them, during which time the detainees killed themselves using common objects. *See Crandel* Petition 2. *Crandel.* Indeed, the *Crandel* petition itself could muster only that the outcome "*plausibly* would come out the opposite way under a *Kingsley*-derived objective-reasonableness standard." *Id.* at 20 (emphasis added). By contrast, the outcome here *definitely* turns on the test applied, as discussed above.

Second, the petition in *Crandel* focuses "particularly [on] the context of failure to protect against the risk of suicide," *id.* at 1–2, rather than the appropriate test writ-large for deliberate indifference, which this case presents. An opinion in *Crandel* thus risks addressing only a narrow subset of claims.

Third, the petition in *Crandel* largely cribs from the Sixth Circuit's panel decision and Judge Readler's statement in *this* very case, citing them

nearly a dozen times. Rather than granting a follow-on case, the Court should grant review of the case that even Crandel apparently believes is the best vehicle.

The pending petitions in *Jordan v. Howell*, No. 23-210 (*cert.* filed Aug. 31, 2023), and *Erwin v. Howell*, No. 23-260 (*cert.* filed Aug. 31, 2023), likewise demonstrate the importance of the question presented but largely turn on the propriety of *affirmative* treatment provided due to an alleged medical misdiagnosis, rather than more typical allegations of *indifference*, as here. *See Howell v. NaphCare, Inc.*, 67 F.4th 302, 312–14 (6th Cir. 2023). That is an important distinction when the circuit split is about deliberate indifference, not affirmative mistreatment. Even if framed as a deliberate-indifference case, the facts in *Howell* are quite unusual: the detainee stabbed a fellow inmate and was isolated for safety, during which time the detainee apparently suffered a medical episode and later died. *See Jordan* Petition 7–10.

* * *

The Court should grant the Petition in this case, which presents the best vehicle.

III. THE SIXTH CIRCUIT'S RULE IS WRONG.

Respondent devotes an outsized portion of her brief to defending the Sixth Circuit's decision on the merits. BIO2–4, 19–28. Her overwhelming focus on

the merits confirms that *certiorari* is warranted here, at which point the parties can submit full briefing on the merits.

Respondent argues that this Court's precedent "forecloses" Petitioners' claim, BIO19, but to be clear, no decision of this Court has squarely addressed this issue. Rather, the Court has provided different tests for pretrial detainees' claims of excessive force (in *Kingsley*) and for convicted inmates' claims of deliberate indifference (in *Farmer*). The lower courts have split over which of those tests is better suited for pretrial detainees' claims of deliberate indifference.

Especially unpersuasive is Respondent's argument that an objective test for pre-trial detainees' claims of deliberate indifference is directly "compelled by" *Farmer* and *Bell v. Wolfish*, 441 U.S. 520 (1979). BIO19–22. Every regional circuit court in the country rejected that argument and held that *Farmer* (which construed *Bell*) actually required application of the *actual-knowledge test* to pretrial detainees' claims of deliberate indifference. *See, e.g., Short*, 87 F.4th at 607 (noting that "a consensus emerged among the courts of appeal that *Farmer*'s subjective Eighth Amendment standard applied to Fourteenth Amendment claims" for pretrial detainees) (citing cases from every regional circuit). After *Kingsley*, some circuits have concluded that *Farmer* no longer applies to such claims, but no circuit has suggested that the older opinions in *Farmer* or *Bell* themselves required that outcome.

Respondent seems to argue that the objective test is mandated because pretrial detainees' claims arise under the due process clause, which prohibits punishment of detainees. BIO20–21. But Respondent fails to explain why inaction that was merely unreasonable—but not *deliberate and affirmative*—is "punishment" at all. This Court "has never suggested that we should remove the subjective component for claims addressing inaction," and "[t]hus, the force of *Kingsley* [which addressed claims of affirmative force] does not apply to the deliberate indifference context, where the claim generally involves inaction divorced from punishment." *Strain*, 977 F.3d at 992.

As Judge Ikuta aptly put it, "*Kingsley* applies to a different category of claims: those involving intentional, objectively unreasonable actions." *Castro*, 833 F.3d at 1087 (Ikuta, J., dissenting). The proper test for deliberate indifference claims, by contrast, "is whether the situation at issue amounts to a punishment of the detainee. While punitive intent may be inferred from affirmative acts that are excessive in relationship to a legitimate government objective, the mere failure to act does not raise the same inference. Rather, a person who unknowingly fails to act—even when such a failure is objectively unreasonable—is negligent at most." *Id.* at 1086.

Respondent contends that it would be "incoheren[t]" and "upside-down" to impose a higher standard for pretrial detainees' deliberate-indifference claims than for their excessive-force claims (governed by *Kingsley*). BIO4, 27–28. But if anything, that just confirms that *Kingsley*'s objective

test itself is questionable, not that it should be copied-and-pasted over to a new context. As the Petition explains, Pet.33–34, there are serious federalism and separation-of-powers concerns with further converting the Due Process Clause into a "'font of tort law to be superimposed upon' th[e] state system.'" *Kingsley v. Hendrickson*, 576 U.S. 389, 408 (2015) (Scalia, J., dissenting).

In any event, this Court can retain *Kingsley* while ruling in Petitioners' favor. As explained in the Petition, the underlying logic of *Kingsley* actually indicates that *Farmer*'s test should apply to pretrial detainees' deliberate-indifference claims because *Kingsley*'s adoption of an objective test was based on that case's underlying Fourth Amendment context (i.e., excessive force, which is an objective inquiry), not the underlying Eighth Amendment context at issue with deliberate indifference (i.e., punishment, which is a subjective inquiry). Pet.30–32.

Finally, caselaw and common sense refute Respondent's assertion that the objective standard is meaningfully tougher than a negligence standard. BIO25–26. For example, the Seventh Circuit has said the test is simply whether the defendant's actions were "objectively reasonable." *Pittman ex rel. Hamilton v. Cnty. of Madison*, 970 F.3d 823, 827 (7th Cir. 2020).[3] That is indistinguishable from a

---

[3] Respondent notes that then-Judge Barrett authored *Pittman,* BIO3, but as the Petition explained, *Pittman* did not address

negligence test. Even courts that purport to apply a "recklessness" standard have framed it as whether a defendant "recklessly failed to act *unreasonably*," Pet.App.20a (emphasis added), and that final adverb means "there is nothing left for a court to do save for applying a generic 'reasonableness' standard," Pet.App.91a (Readler, J.), which again is hard to distinguish from negligence, *see, e.g., Westmoreland v. Butler Cnty.*, 29 F.4th 721, 734–35 (6th Cir. 2022) (Bush, J., dissenting) (comparing the Sixth Circuit's test to the definition of "negligence" in the *Restatement (Third) of Torts: Phys. & Emot. Harm* (2010)).

---

the *Kingsley* issue anew and instead simply followed circuit precedent that had adopted the objective standard, *see* Pet.22.

CONCLUSION

The petition for a writ of certiorari should be granted.

JEFFREY C. MANDO
Adams Law, PLLC
40 West Pike Street
Covington, KY 41011

CLAYTON L. ROBINSON
COURTNEY L. SOLTIS
Robinson & Weber, PSC
101 Prosperous Place
Suite 100
Lexington, KY 40509

JENNIFER L. MASCOTT
R. TRENT MCCOTTER
Counsel of Record
Separation of Powers Clinic
Gray Center for the Study of the Administrative State
Antonin Scalia Law School
3301 Fairfax Dr.
Arlington, VA 22201
(202) 706-5488
rmccotte@gmu.edu

January 2, 2024