No. 23-260

In the Supreme Court of the United States

DANIEL ERWIN,

Petitioner,

v.

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

Respondent.

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

REPLY BRIEF OF PETITIONER

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REPLY BRIEF OF PETITIONER

Respondent's brief in opposition primarily asserts that Petitioner is wrong on the merits, arguing that this Court consistently applies subjective standards to claims by post-conviction prisoners and objective standards to claims by pretrial detainees. Thus, she argues the application of the objective standard used in a pretrial detainee's excessive force case, *Kingsley v. Hendrickson*, 576 U.S. 389 (2015), to a pretrial detainee's claim of deliberate indifference to a serious medical need is proper and the Court should not accept review.

But Respondent confuses the issue. Petitioner does not seek to alter the standard used in excessive force cases, whether the plaintiff is a pretrial detainee or a prisoner. Petitioner seeks this Court's decision on whether the change in the standard for excessive force cases brought by pretrial detainees made in *Kingsley* requires a similar change for the standard in deliberate indifference cases — that is, whether it requires abrogation of the subjective part of that standard set forth in *Farmer v. Brennan*, 511 U.S. 825 (1994), where *Kingsley* did not once mention *Farmer* or claims for deliberate indifference to serious medical needs.

Kingsley states that the Due Process Clause of the Fourteenth Amendment protects pretrial detainees from the use of excessive force that amounts to punishment. *Kingsley*, at 397. This is because, as pretrial detainees rather than convicted prisoners, they are not to be subject to *any* punishment at all. *Id.*, at 400.

Previously, the standard in deliberate indifference cases had *both* an objective component *and* a subjective component: the plaintiff was required to show both a serious medical need *and* that the defendant has a sufficiently culpable state of mind. This second, subjective prong was satisfied if the defendant "knows of and disregards an excessive risk to inmate health or safety." *Farmer, supra*, 511 U.S. at 837. "Whether a convicted prisoner or a pretrial detainee, deliberate indifference to one's need for medical attention suffices for a claim under 42 U.S.C. § 1983." *Blackmore v. Kalamazoo Cty.*, 390 F.3d 890, 895 (6th Cir.2004), *citation omitted*. Accord *Smith v. Cty. of Lenawee*, 505 F.App'x 526, 531 (6th Cir.2012). This is because it does not (should not) matter if a person is a pretrial detainee or a convicted prisoner when it comes to providing treatment for their medical needs.

Kingsley does not address claims for a deliberate indifference to serious medical needs by pretrial detainees or post-conviction prisoners. But in *Brawner v. Scott Cty.*, 14 F.4th 585 (6th Cir. 2021), the Sixth Circuit applied *Kingsley* to claims of deliberate indifference to serious medical needs such that it no longer considers the defendant's state of mind in deliberate indifference cases. That was improper. Given the great difference between excessive force cases and deliberate indifference cases, there is no reason for the standards in these cases to be the same.

This Court has applied *Kingsley* only to excessive force claims: *Beale v. Madigan*, 577 U.S. 801, 136 S.Ct. 53 (2015); *White v. Pauly*, 580 U.S. 73, 137 S.Ct. 548 (2017); *Lombardo v. City of St. Louis*, ___ U.S. ___, 141 S.Ct. 2239 (2021). The only deliberate indifference case from this Court since the ruling in *Kingsley* that

even mentions *Kingsley* does so in a dissent, which cites it only for the proposition that pretrial detainees, unlike convicted prisoners, cannot be punished at all. *Ziglar v. Abbasi*, 582 U.S. 120, 170, 137 S.Ct. 1843 (2017).

A defendant's subjective state of mind should continue to be one consideration in a claim for deliberate indifference to a serious medical need; it is not the only consideration — there is still an objective prong that the plaintiff must demonstrate. *Kingsley* does not offer a valid reason — or any reason — for changing the standard in this entirely different area of law.

As for Respondent's other arguments:

(1) Petitioner Erwin does not overstate the circuit conflict. Respondent dismisses the split in the circuits simply because not all of the cases analyze in detail whether to apply *Kingsley* to deliberate indifference cases. They either apply it or they don't. But it was not Petitioner who initially recognized the split among the circuits as to whether *Kingsley* requires rejection of the subjective component for claims of deliberate indifference to serious medical needs — the Sixth Circuit did. *Brawner*, 14 F.4th at 593. The Second, Sixth, Seventh and Ninth Circuits say "Yes"; the Fifth, Eighth, Tenth and Eleventh say "No". *Id.* at 593-594. *Brawner* stated,

> In the Tenth Circuit's view, *Kingsley* does not require modification of the deliberate-indifference standard for pretrial detainees because *Kingsley* turned on considerations unique to the excessive-force context rather than on the status of the plaintiff. The nature of a deliberate-indifference claim requires a

> subjective component, and principles of *stare decisis* weigh against overruling its precedent applying a subjective component.

Id., citing *Strain v. Regalado*, 977 F.3d 984, 991 (10th Cir. 2020). Exactly. Petitioner agrees there is no reason for courts to use the same standard in deliberate indifference claims as they do in excessive force claims because of the very different nature of these different claims. The unique considerations of excessive force cases merit a solely objective standard when applied to pretrial detainees. Those considerations are not present in deliberate indifference cases. Application of the *Kingsley* standard to deliberate indifference claims is illogical and use of it by some courts and not others further confuses the issue and creates more inconsistency (between and within circuits) and unfairness to both sides.

Next, (2) this case provides an ideal vehicle for resolving the circuit split and settling the *Kingsley* question — whether it requires abrogation or modification of the subjective prong of the test for deliberate indifference to a serious medical need (of a pretrial detainee).[1] This is because here, Petitioner Erwin took Howell to see the jail's medical personnel after his fight with his cellmate, and while Erwin initially thought Howell may go to the hospital, once the nurses said that was not necessary, he had no reason to think that Howell had a serious medical need. Erwin's subsequent failure to check on Howell as often as re-

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[1] Such a claim by a post-conviction prisoner is not at issue herein, but, as above, pursuant to existing caselaw, these claims use the same standard regardless of the status of the plaintiff vis-à-vis conviction.

quired by jail policy may have been negligent, but he was not reckless or deliberate in ignoring a serious medical need because *he was not aware of a serious medical need*, as medical personnel ruled it out. Abrogating the subjective prong of a deliberate indifference claim would essentially constitutionalize negligence claims — exactly what this Court and the various circuit courts of appeal have repeatedly held should not be done. ("Failure to follow procedures does not, by itself, rise to the level of deliberate indifference because doing so is at most a form of negligence." *Winkler v. Madison Cty.*, 893 F.3d 877, 892 (6th Cir. 2018) (citations omitted).

Finally, (3) this issue is not "relatively unimportant." The standard to be used in a § 1983 claim for deliberate indifference to serious medical needs is an issue of exceptional importance not only because of the great importance of the rights at issue and the large number of such cases in the federal courts, but also because of the disagreement as to whether *Kingsley* applies at all. The standard is important to corrections officers and plaintiffs alike. Even though the Sixth Circuit's new standard was formulated in a 2-1 panel decision that has not been adopted by that court en banc, it is being widely used throughout the circuit. Leaving the issue to "percolate further" would lead only to more confusion, inconsistency and unfairness to all.

CONCLUSION

This Court should grant a writ of certiorari, accept this case for review and hold that *Kingsley* does not apply to cases alleging deliberate indifference to a serious medical need.

Respectfully submitted,

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