No. 23A-_____

IN THE
Supreme Court of the United States

_____

LEWIS COUNTY, KENTUCKY; JEFF LYKINS; ANTHONY RUARK; ANDY LUCAS; BEN CARVER; AMANDA MCGINNIS; THE ESTATE OF SANDY BLOOMFIELD[1]; MARK RILEY; MELINDA MONROE; JEFFREY THOROUGHMAN; TOMMY VON LUHRTE; JOHNNY BIVENS; AND JOHN BYARD,

Petitioners,

v.

JULIE HELPHENSTINE,

Respondent.

_____

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

_____

APPLICATION FOR AN EXTENSION OF TIME IN WHICH TO FILE A PETITION FOR A WRIT OF CERTIORARI

_____

To the Honorable Brett Kavanaugh, Associate Justice and Circuit Justice for the United States Court of Appeals for the Sixth Circuit:

Pursuant to 28 U.S.C. § 2101(c) and Rules 13.5, 21, 22, and 30 of this Court, Petitioners respectfully request a 60-day extension of time, to and including Friday, September 15, 2023, within which to file a Petition for a Writ of Certiorari to the U.S. Court of Appeals for the Sixth Circuit in this case. The Sixth Circuit issued its panel opinion on February 9, 2023, and denied rehearing *en banc* on April 18, 2023. A petition for a writ of certiorari is currently due on or before July 17, 2023. This application is being filed more than ten days before that date.

[1] After the Sixth Circuit's decision issued, Sandy Bloomfield passed away, and Respondent has moved the district court to substitute Bloomfield's estate as a defendant. *See* Motion to Substitute, *Helphenstine v. Lewis Cnty., Ky.*, No. 0:18-cv-93 (E.D. Ky.).

The district court's decision is unreported but available at 2022 WL 1433009 and attached as Exhibit 1. The Sixth Circuit panel opinion is reported at 60 F.4th 305 and attached as Exhibit 2. The Sixth Circuit's order denying rehearing *en banc*, along with Judge Readler's statement, is reported at 65 F.4th 794 and attached as Exhibit 3. The jurisdiction of this Court would be invoked under 28 U.S.C. § 1254.

BACKGROUND

In *Kingsley v. Hendrickson*, 576 U.S. 389 (2015), this Court held that a pretrial detainee bringing an excessive-force claim under the Fourteenth Amendment's Due Process Clause must show that "the force purposely or knowingly used against him was objectively unreasonable." *Id.* at 397. The dissent argued that such a claim instead must demonstrate the defendant's "intentional infliction of punishment upon a pretrial detainee." *Id.* at 404 (Scalia, J., dissenting). In the dissent's view, the fact "[t]hat an officer used more force than necessary might be *evidence* that he acted with intent to punish, but it is no more than that." *Id.* at 406 (emphasis in original).

In the years since, the lower courts have badly fractured over whether *Kingsley* also applies to deliberate indifference claims by pretrial detainees, with four circuits holding that it does not,[2] at least four holding that it does,[3] and three continuing to apply pre-*Kingsley* caselaw while leaving

[2] *See, e.g.*, *Cope v. Cogdill*, 3 F.4th 198, 207 & n.7 (5th Cir. 2021); *Whitney v. City of St. Louis*, 887 F.3d 857, 860 n.4 (8th Cir. 2018); *Strain v. Regalado*, 977 F.3d 984, 991 (10th Cir. 2020); *Dang ex rel. Dang v. Sheriff, Seminole Cnty.*, 871 F.3d 1272, 1279 n.2 (11th Cir. 2017).

[3] *See, e.g.*, Ex. 2 at 8; *Miranda v. Cnty. of Lake*, 900 F.3d 335, 354 (7th Cir. 2018); *Gordon v. Cnty. of Orange*, 888 F.3d 1118, 1124–25 (9th Cir. 2018); *Darnell v. Pinerio*, 849 F.3d 17, 34–35 (2d Cir. 2017). In these circuits, the view was not always unanimous. *See Brawner v. Scott Cnty.*, 14 F.4th 585, 601 (6th Cir. 2021) (Readler, J., dissenting); *Castro v. Cnty. of Los Angeles*, 833 F.3d 1060, 1086 (9th Cir. 2016) (*en banc*) (Ikuta, J., dissenting).

open the door to switching their approach in the future.[4] The courts in the second camp have also split over the showing required.[5]

The decision below illustrates the level of confusion among the lower courts. The Sixth Circuit held in *Brawner v. Scott County*, 14 F.4th 585 (6th Cir. 2021), that *Kingsley* "modifi[ed]" the Sixth Circuit's former subjective standard for deliberate indifference claims, and that henceforth the defendant's inaction need only be "reckless[] in the face of an unjustifiably high risk of harm that is either known or so obvious that it should be known." *Id.* at 596 (citation omitted). The Sixth Circuit then held in *Trozzi v. Lake County*, 29 F.4th 745 (6th Cir. 2022), that this standard required a plaintiff to prove an objectively serious harm and two states of mind—one with respect to the harm suffered by the plaintiff and one with respect to the defendant's response to that harm. *Id.* at 757–58. But in the decision below, the Sixth Circuit concluded that *Trozzi* irreconcilably conflicted with *Brawner*, and that *Brawner* therefore controlled. Ex. 2 at 9–10. In a span of just two years, the Sixth Circuit's caselaw has swung wildly, with several judges "confess[ing] understandable confusion over the issue." Ex. 3 at 5 (Readler, J.) (citing cases). The confusion is made of greater consequence by the substantial frequency with which deliberate indifference claims arise. *Id.*

Kingsley did not change the framework for deliberate indifference claims. *See id.* at 3 (Readler, J., dissenting). The opinion never purported to address such claims, and, unlike excessive force, which implies a level of force beyond an objectively reasonable amount, the term "deliberate

[4] *See, e.g.*, *Mays v. Sprinkle*, 992 F.3d 295, 300–01 (4th Cir. 2021); *Moore v. Luffey*, 767 F. App'x 335, 340 n.2 (3d Cir. 2019); *Miranda-Rivera v. Toledo-Davila*, 813 F.3d 64, 74 (1st Cir. 2016).

[5] *See, e.g.*, Ex. 2 at 9 (noting conflicting Sixth Circuit opinions on this matter); *Gordon*, 888 F.3d at 1125 (framing the inquiry as "objective reasonableness"); *Charles v. Orange Cnty.*, 925 F.3d 73, 87 (2d Cir. 2019) (similar); *Pittman ex rel. Hamilton v. Cnty. of Madison*, 970 F.3d 823, 827–28 (7th Cir. 2020) (Barrett, J.) (framing the post-*Kingsley* inquiry into the objective reasonableness of a prison official's action as separate from whether the defendant acted "purposefully, knowingly, or . . . recklessly," the latter of which is shown when a prison official "'strongly suspect[s]' that [her] actions would lead to harmful results").

indifference" indicates the presence of a subjective intent (i.e., deliberation) to cause some type of harm, which historically meant specifically the intent to punish. *See id.* As Justice Scalia argued in his *Kingsley* dissent, at most the Due Process Clause applies to "[a]cting with the intent to punish," which "means taking a 'deliberate act intended to chastise or deter.'" *Kingsley*, 576 U.S. at 405 (Scalia, J., dissenting). For that reason alone, *Kingsley* did not dilute the subjective mens rea requirement for deliberate indifference claims.

There are also serious federalism and separation of powers concerns with *Kingsley* that militate against expanding it beyond excessive force claims. *Kingsley* continued a recent trend of constitutionalizing as a federal claim what had historically been a state law-based tort claim. But as Justice Scalia argued in his *Kingsley* dissent, "[t]he Due Process Clause is not 'a font of tort law to be superimposed upon' th[e] state system." *Kingsley*, 576 U.S. at 408 (Scalia, J., dissenting); *see also* Ex. 3 at 5 (Readler, J., dissenting) ("[T]hese garden variety tort claims have also been deemed matters of constitutional significance."). Nor has Congress expressly created a statutory cause of action for claims that allege only an objectively unreasonable or reckless use of force or deliberate indifference. *Cf. Egbert v. Boule*, 142 S. Ct. 1793, 1802 (2022) ("At bottom, creating a cause of action is a legislative endeavor."). "The Supreme Court could return all of these actions"—including those addressed in *Kingsley*—"to state court," and "there are grounds to do so." Ex. 3 at 5 (Readler, J., dissenting); *see Kingsley*, 576 U.S. at 408 (Scalia, J., dissenting). At the very least, however, federalism and separation of powers counsel against extending *Kingsley*'s lessened mens rea standard to deliberate indifference claims and thereby constitutionalizing an additional set of tort claims that otherwise would properly belong in state courts.

This case will serve as an excellent vehicle for the Court to resolve the splits arising out of *Kingsley*. Christopher Helphenstine was arrested and charged with drug crimes in Kentucky. While

being detained, he suffered withdrawal symptoms over a period of several days and was prescribed medication by the prison doctor. On April 18, 2017, at 11:00 p.m., he said, "I'm feeling all right now," but at 3:30 a.m. the next morning, he was found unresponsive, and resuscitation efforts failed. Ex. 2 at 2–5. Helphenstine's estate sued the county, the prison doctor, and more than ten different prison employees, alleging deliberate indifference in violation of the Fourteenth Amendment, pursuant to 42 U.S.C. § 1983. The district court granted summary judgment to all defendants. Ex. 1.

Helphenstine's estate appealed, and the Sixth Circuit reversed as to most defendants, including the County's elected jailer Jeff Lykins, finding that the requisite mens rea was satisfied by a range of alleged actions and inactions, and also reversed on the estate's *Monell* claim against the County itself. Ex. 2 at 11–24. The remaining defendants sought rehearing *en banc*, which was denied and accompanied by a lengthy statement arguing that both the Sixth Circuit's and other circuits' caselaw post-*Kingsley* is badly fractured and explaining why this Court should, at the very least, decline to extend *Kingsley* and alternatively should consider overruling it altogether. Ex. 3.

Because the district court resolved the case on summary judgment, there is a full record for consideration. And, as the Sixth Circuit panel acknowledged, the viability of the deliberate-indifference claims turned on the pure legal questions of whether *Kingsley* applies at all to such claims and, if so, which level of subjective intent is required. Ex. 2 at 10 ("[O]ur focus rests exclusively on the subjective prong"). Because *Kingsley* should not be extended to deliberate indifference claims at all, the particular steps that each defendant took or did not take are not material, but even if the Court chooses to extend *Kingsley*, the variety of numerous defendants' actions and inactions at issue here, including by the County's elected jailer, ensures this is not a case where the same outcome would obtain regardless of the precise mens rea required.

REASONS JUSTIFYING AN EXTENSION OF TIME

Good cause exists for extending the time in which Petitioners can file their petition for a writ of certiorari.

First, this case raises numerous cert-worthy legal issues requiring additional time to fully brief. In particular: (1) whether this Court's decision in *Kingsley* extends to deliberate-indifference claims and (2) if so, what the proper mens rea requirement is. The Sixth Circuit panel agreed that "our sister circuits are all over the map" on these issues. Ex. 2 at 9. The Sixth Circuit's recent volte-face of its own precedent demonstrates the confusion and inconsistency among the lower courts, which only this Court can resolve.

Second, this case has an extensive record. The litigation has been ongoing for five years, and the briefing on summary judgment alone featured over 50 exhibits.

Third, counsel for Petitioners is the Separation of Powers Clinic at Scalia Law School, in which law students are significant participants. Extension of the deadline for submission of this petition until the Fall will facilitate a greater opportunity for the participation of a wider range of law school students during the standard academic year, which begins in late August. Moreover, the Clinic was not involved in the case during the proceedings below.

Fourth, because of the number of Petitioners, additional coordination time is required when preparing filings.

PRAYER

For these reasons, Petitioners respectfully request that the Court extend the time to file their petition for a writ of certiorari by 60 days, to and including September 15, 2023.

Dated: July 5, 2023

/S/ R. TRENT MCCOTTER

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

Jeffrey C. Mando, Esq.
ADAMS LAW, PLLC
40 West Pike Street
Covington, KY 41011
859.394.6200
859.392.7263 – Fax
jmando@adamsattorneys.com

Clayton L. Robinson
Courtney L. Soltis
Robinson & Weber, PSC
101 Prosperous Place, Suite 100
Lexington, Kentucky 40509
crobinson@robinsonweber.com

Counsel for Petitioners