

No. 17-1638

In the Supreme Court of the United States

NICOLE SANCHEZ, CASY SIMPSON, AND EDWARD LAROY
SIMPSON, II, INDIVIDUALLY AND AS THE REPRESENTATIVES OF
THE ESTATE OF DIANA LYNN SIMPSON,
Petitioners,

v.

YOUNG COUNTY, TEXAS AND YOUNG COUNTY
SHERIFF'S DEPARTMENT,
Respondents.

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

REPLY BRIEF BY PETITIONERS

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REPLY BRIEF FOR THE PETITIONERS

I. Petitioners preserved the question presented.

Petitioners specifically argued in the district court that an objective standard should apply. Those arguments are highlighted in the petition and included in the appendix. *See* Pet. at 14–15; Pet. App. at 94, 96, 97–99.

The district court, however, rejected Petitioners’ arguments, concluding that “although Plaintiffs *generally* accuse jail officials of wrongdoing,” and “while the staff . . . *collectively* may have acted negligently, or even grossly negligently, by ignoring jail procedures, no single individual deliberately ignored an excessive risk of harm.” Pet. App. at 55, 60–61 (emphasis added).

Petitioners again argued in the court of appeals for an objective standard. Those arguments are highlighted in the petition and included in the appendix. Pet. at 15–16; Pet. App. at 103–106.

Judge Barksdale, in dissent, admonished Petitioners for “urging constructive knowledge,” and noted that the majority correctly rejected Petitioners’ “attempt[] to broaden the . . . standard of *subjective* knowledge by the official for government-entity liability to mere *constructive* knowledge.” Pet. App. at 30, 32. Moreover, Judge Barksdale all but invited Petitioners to file a petition for rehearing en banc because the majority’s improper application of Fifth Circuit precedent “highlight[ed] the need for an updated articulation by our court.” Pet. App. at 24. No court has ever suggested these arguments were waived.

Thereafter, Petitioners filed an en banc petition and specifically argued that in light of this Court’s decision in *Kingsley v. Hendrickson*, 135 S. Ct. 2466 (2015), an objective standard should apply. Pet. App. at 107, 109–12.

Petitioners cited *Kingsley* in their en banc petition because the Fifth Circuit had previously declined to revisit its precedent in light of *Kingsley*. In a prior controlling decision, the court concluded that “[b]ecause the Fifth Circuit has continued to rely on *Hare* [*v. City of Corinth*, 74 F.3d 633 (5th Cir. 1996) (en banc)] and to apply a subjective standard post-*Kingsley*, this panel is bound by [the Fifth Circuit’s] rule of orderliness.” *Alderson v. Concordia Par. Corr. Facility*, 848 F.3d 415, 419 n.4 (5th Cir. 2017) (citations omitted); *see also* Pet. at 21 n.4.

Under the court’s rule of orderliness, “one panel . . . may not overturn another panel’s decision, absent an intervening change in the law, such as by a statutory amendment, or the Supreme Court, or [by the] en banc court.” *Mercado v. Lynch*, 823 F.3d 276, 279 (5th Cir. 2016) (per curiam). “For a Supreme Court decision to satisfy this . . . rule of orderliness, it must be unequivocal, not a mere ‘hint’ of how the Court might rule in the future.” *Id.* (citations and quotations omitted). The rule is simply an application of “stare decisis in determining whether an earlier panel opinion is controlling” and the recognition that “one panel may not overrule another.” *United States v. Castillo-Rivera*, 853 F.3d 218, 227 (5th Cir. 2017) (en banc) (Higginbotham, J., concurring).

Therefore, consistent with the Fifth Circuit’s rule of orderliness, the court’s prior precedent, and Rule 35 of

the Federal Rules of Appellate Procedure, Petitioners timely and appropriately argued in their en banc petition that *Kingsley* supported their argument that an objective standard should apply to Petitioners' claim. Pet. App. at 107, 109–12.

In its response to the petition for rehearing en banc, Respondent did not argue Petitioners waived this issue by failing to raise it below. Instead, it argued that *Kingsley* was limited to its facts: “*Kingsley* simply did not change this Court’s standards for deliberate indifference to inadequate medical care claims.” Reply App. at 2. Respondent also relied on *Alderson* to contend that “because other Fifth Circuit panels continued to rely on *Hare* after the *Kingsley* decision[,] . . . there is no basis to conclude that the majority’s decision conflicts with *Kingsley*.” *Id.*

Petitioners thus squarely raised to the en banc Fifth Circuit the question of whether its subjective standard still applied post-*Kingsley*. But the court—by a vote of 11 to 4—denied rehearing en banc. Pet. App. at 71–72. Consequently, a majority of the judges of the Fifth Circuit rejected Petitioners’ argument that an objective standard should apply post-*Kingsley*; four judges voted to consider the issue and did not consider it waived.

This Court’s “traditional rule is that ‘[o]nce a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below.’” *Lebron v. Nat’l R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995) (quoting *Yee v. Escondido*, 503 U.S. 519, 534 (1992) (alterations in original)). Petitioners’ argument that an objective standard applies in light of *Kingsley*, “is . . . not a new claim.” *Lebron*, 513 U.S. at 379.

Rather, it is “a new argument to support what has been [Petitioners’] consistent claim: that [Respondent] did not accord [Mrs. Simpson] the rights it was obliged to provide by the [Fourteenth] Amendment.” *Id.* (citing *Yee*, 503 U.S. at 534–35).

Therefore, Petitioners timely, consistently, and appropriately argued for an objective standard. Petitioners were not required to specifically cite *Kingsley* to a three-judge panel bound by controlling circuit precedent to reject *Kingsley*’s application in order to preserve the issue that an objective standard should apply.

Accordingly, there are no procedural impediments that counsel against this Court resolving the circuit split.

II. Respondent concedes the circuits are split on the question presented.

Respondent admits that post-*Kingsley*, the circuits are split on the question presented. Resp. at 11.

Respondent essentially argues the petition should be denied because this split is of recent vintage. *Id.* at 11–17. Central to Respondent’s argument is its contention that “it was not until last month that the Eleventh Circuit explicitly held [in *Johnson v. Bessemer*] the opposite” of the Second, Third, Seventh, and Ninth Circuits on the question presented. Resp. at 13 (citing *Johnson v. Bessemer*, No. 17–13122, 2018 WL 3359672, at *3 n.5 (11th Cir. July 10, 2018)).

The *Johnson* court, however, relied on *Dang ex rel. Dang v. Sheriff, Seminole Cty.*, 871 F.3d 1272 (11th Cir. 2017), an earlier decision involving a medical needs

case. *Johnson*, 2018 WL 3359672 at *3 n.5. In *Dang*, the court held that a plaintiff “must prove subjective knowledge of a risk of serious harm” and concluded *Kingsley* had not “actually abrogate[d]” that standard. *Dang*, 871 F.3d at 1279 n.2, 1280. Thus, the *Johnson* court merely reaffirmed its earlier 2017 decision in *Dang* and quoted the exact “dicta” Respondent confusingly suggests prevented the split from fully maturing until “last month.” Resp. at 13.

Respondent also attempts to muddle the issue by claiming the Seventh Circuit’s reasoning in *Smego v. Jumper*, 707 F. App’x 411, 412 (7th Cir. 2017) (unpublished), amounts to dicta that does not establish a circuit split. Resp. at 13. But *Smego* is no longer relevant because the Seventh Circuit, in a published decision joining the Second, Third, and Ninth Circuits, has now concluded an objective standard applies in medical-needs cases post-*Kingsley*. *Miranda v. Cty. of Lake*, ___ F.3d ___, 2018 WL 3796482, *9–*12 (7th Cir. Aug. 10, 2018); Pet. Supp. at 1–4.

Respondent’s effort to explain away the deepening circuit split on this substantial issue of constitutional law by first acknowledging the split exists but then distorting its true nature strains credulity. See Pet. at 22–26; Pet. Supp. at 5–7.

Moreover, Respondent suggests “[t]his Court should decline to pass judgment on the Fifth Circuit’s stance before it takes one.” Resp. at 13. But the Fifth Circuit’s subjective deliberate indifference standard for “[episodic-acts-or-admissions] liability is well-established within [the] circuit,” Pet. App. at 32 (Barksdale, J., dissenting), having been adopted over

twenty-two years ago. *Hare v. City of Corinth*, 74 F.3d 633, 643 (5th Cir. 1996) (en banc).

In fact, the standard is so well-established that since *Kingsley*, the court has uniformly applied *Hare*'s subjective deliberate indifference test in at least fifteen other cases. See generally *Perniciaro v. Lea*, No. 17–30161, 2018 WL 3941607 (5th Cir. Aug. 16, 2018); *Leal v. Wiles*, No. 16–51410, 2018 WL 2123264 (5th Cir. May 8, 2018) (per curiam) (unpublished); *Hartzog v. Hackett*, 711 F. App'x 235 (5th Cir. 2018) (per curiam) (unpublished); *Childers v. San Saba Cty.*, 714 F. App'x 384 (5th Cir. 2018) (per curiam) (unpublished); *Alexander v. Hamilton*, 700 F. App'x 381 (5th Cir. 2017) (per curiam) (unpublished); *Balle v. Nueces Cty.*, 690 F. App'x 847 (5th Cir. 2017) (unpublished); *Johnson v. Johnson*, 694 F. App'x 945 (5th Cir. 2017) (per curiam) (unpublished); *Alderson*, 848 F.3d at 415; *Montano v. Orange Cty.*, 842 F.3d 865 (5th Cir. 2016); *Hyatt v. Thomas*, 843 F.3d 172 (5th Cir. 2016); *Bailey v. E. Baton Rouge Par. Prison*, 663 F. App'x 328 (5th Cir. 2016) (per curiam) (unpublished); *Zimmerman v. Cutler*, 657 F. App'x 340 (5th Cir. 2016) (per curiam) (unpublished); *Graham v. Hodge*, 619 F. App'x 394 (5th Cir. 2015) (per curiam) (unpublished); *Thomas v. Mills*, 614 F. App'x 777 (5th Cir. 2015) (per curiam) (unpublished); *Estate of Henson v. Wichita Cty.*, 795 F.3d 456 (5th Cir. 2015).

Respondent next argues the Fifth Circuit's controlling decision in "*Alderson* stands for little more than the proposition that [it] is aware of the disagreement and intends to resolve it when the proper case presents itself." Resp. at 12. Respondent's

argument to this Court, however, stands in stark contrast to the argument it made to the Fifth Circuit:

Plaintiffs also cite Judge Graves' dissenting opinion in *Alderson* . . . for the proposition that *Kingsley* calls into question this Court's en banc holding in *Hare*. However, the majority in *Alderson* rejected this notion because other Fifth Circuit panels continued to rely on *Hare* after the *Kingsley* decision. This case is no different. ***Kingsley* simply did not change this Court's standards for deliberate indifference to inadequate medical care claims.** Therefore, en banc review is not warranted.

Reply App. at 2 (emphasis added) (internal citations omitted).

Respondent requests that this Court deny the petition because it claims the Fifth Circuit has yet to weigh-in on this issue. Resp. at 13. Not true. The Fifth Circuit has made it abundantly clear—in *Alderson*, in over fifteen post-*Kingsley* decisions, and by an en banc vote denying rehearing in this case—that it has and will “continue[] to rely on *Hare* and . . . apply a subjective standard post-*Kingsley*” in “medical needs” cases brought by pretrial detainees. *Alderson*, 848 F.3d at 419 n.4, 422; *supra* at 6; Pet. App. at 71–72.

III. The alternative grounds below are closely tied to the question presented.

Respondent incorrectly argues for plain error review in an appeal from a summary judgment. *Tolan v. Cotton*, 134 S. Ct. 1861, 1866 (2014) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249, 255 (1986)).

Respondent, however, correctly notes that “[w]hether a subjective or objective standard applies, it must be applied to evidence in the record.” Resp. at 19. But Respondent fails to explain why Petitioners—on this record—would not be successful in raising genuine issues of material fact should the Court grant review, reverse, and remand for application of *Kingsley*’s objective standard.

Instead, Respondent focuses on a perceived lack of evidence in the record. Resp. at 18. The evidence Respondent claims is absent from the record, however, is material only if a *subjective* standard applies. Under an *objective* standard, the record evidence is more than sufficient to create genuine issues of material fact.

Respondent claims Petitioners “brought no evidence that the tragedy of Mrs. Simpson’s death was not an isolated incident, but part of a pattern.” Resp. at 19. Quoting the court below, Respondent states: “Plaintiffs offered no evidence of the alleged maltreatment of any other detainees at Young County’s jail.” *Id.* Respondent’s “single case” argument reveals the fundamental flaw in the subjective deliberate indifference standard first adopted by the Fifth Circuit’s en banc decision in *Hare*.

Although the Fifth Circuit in *Hare* sought to answer “a question [this] Court has repeatedly left open,” it

failed to acknowledge a question this Court considered closed. 74 F.3d at 640 (citations omitted). In *City of Canton v. Harris*, 489 U.S. 378 (1989), the Court noted that it had “never determined what degree of culpability must be shown before [a denial of the due process right to medical care while in detention] is established.” *Id.* at 388 n.8. But in the very next sentence, the Court made clear that “the proper standard for determining when a *municipality* will be liable under § 1983 for constitutional wrongs does not turn on any underlying culpability test that determines when such wrongs have occurred.” *Id.* (emphasis added).

Yet the Fifth Circuit in *Hare* created a two-step inquiry requiring exactly what the Court proscribed:

Our opinion in this case makes clear that to prove an underlying constitutional violation in an individual or episodic acts case, a pre-trial detainee must establish that an official acted with subjective deliberate indifference. Once the detainee has met this burden, she has proved a violation of her rights under the Due Process Clause. To succeed in holding a municipality accountable for that due process violation, however, the detainee must show that the municipal employee’s act resulted from a municipal policy or custom adopted or maintained with objective deliberate indifference to the detainee’s constitutional rights.

Hare, 74 F.3d at 649 n.4 (citing *Farmer v. Brennan*, 511 U.S. 825, 841 (1994)).

Thus, in order to establish a policy or custom under the Fifth Circuit's subjective-objective inquiry, plaintiffs must prove a pattern of "maltreatment" of other pretrial detainees and, under each case, prove the official's "subjective intention that harm occur." Pet. App. at 10. Consequently, Respondent's alternative "single case" argument for affirming summary judgment is inextricably intertwined with the question presented.

Moreover, this Court has long held that evidence of a single violation of federal rights can, in some circumstances, trigger municipal liability when the challenged conduct involves recurring situations presenting an obvious potential for such a violation to occur again in the future. *Bd. of Cty. Comm'rs of Bryan Cty. v. Brown*, 520 U.S. 397, 409 (1997) (citation omitted).

For these reasons, Respondent's claim that the record is undeveloped rings hollow. Properly applying this Court's municipal-liability jurisprudence would require Petitioners to prove only that Respondent's "execution of a . . . policy or custom" was the "moving force" behind the violation of Mrs. Simpson's constitutional rights. *Monell v. Dep't of Soc. Servs. of City of New York*, 436 U.S. 658, 694–95 (1978).

It is undisputed Sheriff Bryan Walls was Young County Jail's official policymaker, and the record contains his entire deposition testimony. Pet. App. at 11, 62; ROA.307–515.

Sheriff Walls testified that he was aware suicide is the number one threat faced by inmates in Young

County Jail. ROA.423, 446. But after Mrs. Simpson's death, the sheriff:

- did not review Mrs. Simpson's file or the arresting officer's report;
- conducted no investigation about the circumstances surrounding her death;
- issued no reprimands;
- identified no changes to Respondent's mental health policies;
- instituted no new procedures, or changes to Respondent's "observation-only" policy;
- implemented no new training programs;
- failed to verify whether jailers were properly trained for mental health screenings; and
- failed to educate himself on what a CCQ even was until he was told about it at his deposition.

ROA.318–20, 328–30, 334, 335–36, 340–43, 347–48, 349, 352, 357–58, 360, 387, 409, 421, 435, 436.

As Judge Barksdale noted in his dissent, Sheriff Walls's testimony showed an "unapologetic and flagrant disregard" for state-mandated intake procedures and observation policies along with a "clear admission to the lack of training" for jailers, which "demonstrate[d] the requisite genuine dispute[s] of material fact regarding a county custom of disregarding policies to properly take in, as well as monitor, detainees." Pet. App. at 31, 32. According to Judge Barksdale, these genuine issues of material fact

revealed that Respondent's customs that led to Mrs. Simpson's death were "not only unconstitutional but unconscionable." Pet. App. at 24.

Before the Fifth Circuit altered the standard for municipal liability in *Hare* in 1996, these actions would have "entitled [a jury] to conclude" the sheriff's flagrant disregard for state law "was accepted as the way things are done and have been done in [Young County]." *Grandstaff v. City of Borger*, 767 F.2d 161, 171 (5th Cir. 1985). Stated differently, "[i]f what the [Young County jailers] did and failed to do . . . was not acceptable to [Sheriff Walls], changes would have been made." *Id.* Respondent has made no changes to its constitutionally-deficient intake procedures or "observation only" policy following Mrs. Simpson's death. ROA.340-43, 349, 357-58, 360, 387. "Employing meager measures that [jailers or municipalities] know or should know to be ineffectual amounts to deliberate indifference." *Rhyne v. Henderson Cty.*, 973 F.2d 386, 396 (5th Cir. 1992) (Goldberg, J., concurring) (alterations in original, citations and quotations omitted).

Viewed from an objective standard and drawing all inferences in favor of Petitioners, there are genuine issues of material fact about whether Respondent's policies were adopted with objective deliberate indifference and closely related to Mrs. Simpson's death. There are also genuine issues of material fact about whether Respondent's policies were the moving force behind jail staff failing to monitor her serious medical needs. Finally, a reasonable jury could conclude that Mrs. Simpson's death was the highly predictable result of Respondent's *objective* deliberate

indifference to an obvious risk of harm to at-risk pretrial detainees. Accordingly, the question presented is ripe for this Court's review and should be settled by this Court.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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APPENDIX

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App. 1

APPENDIX 1

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

NO. 16-10227

[Filed September 11, 2017]

NICOLE SANCHEZ; CASY SIMPSON;	)
EDWARD LAROY SIMPSON, II,	)
Individually and as the Representative	)
of the Estate of Diana Lynn Simpson,	)
<i>Plaintiffs / Appellants</i>	)
	)
v.	)
	)
YOUNG COUNTY, TEXAS; YOUNG	)
COUNTY SHERIFF'S DEPARTMENT,	)
<i>Defendants / Appellees</i>	)

Appeal From Cause No. 7:15-cv-00012-O
United States District Court
For The Northern District of Texas

**APPELLEES' RESPONSE TO APPELLANTS'
PETITION FOR REHEARING EN BANC**

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* * *

[pp.15-16]

As noted above, Plaintiffs also cite Judge Graves' dissenting opinion in *Alderson v. Concordia Parish Correctional Facility*, 848 F.3d 415, 424 (5th Cir. 2017), for the proposition that *Kingsley* calls into question this Court's *en banc* holding in *Hare*. However, the majority in *Alderson* rejected this notion because other Fifth Circuit panels continued to rely on *Hare* after the *Kingsley* decision. *Id.* at 420 n.4. This case is no different. *Kingsley* simply did not change this Court's standards for deliberate indifference to inadequate medical care claims. Therefore, *en banc* review is not warranted.

C. The Majority Correctly Applied the Proper Standards Governing Episodic Acts or Omissions Claims

Finally, Plaintiffs (and the dissent) disagree with the majority's reliance on *Thompson v. Upshur County*, 245 F.3d 447 (5th Cir. 2001), ostensibly because *Thompson* did not involve government-entity liability. But this ignores the fact that there is no governmental liability for an episodic act or omission unless a plaintiff first demonstrates subjective deliberate indifference on the part of a government official.

* * *