Nos. 23-210, 23-260

IN THE

Supreme Court of the United States

CHRISTINA JORDAN,

Petitioner,

v.

KARLA HOWELL, as administratrix of the estate of Cornelius Pierre Howell,

Respondent.

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

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether this Court should overturn the Sixth Circuit's adoption of an objective test for conditions-of-confinement claims brought by pretrial detainees and instead adopt a subjective test even though this Court has repeatedly applied objective tests to claims by pretrial detainees, *see Kingsley v. Hendrickson*, 576 U.S. 389 (2015); *Bell v. Wolfish*, 441 U.S. 520 (1979), and subjective tests to claims by post-conviction prisoners, *see Farmer v. Brennan*, 511 U.S. 825 (1994); *Hudson v. McMillian*, 503 U.S. 1 (1992); *Wilson v. Seiter*, 501 U.S. 294 (1991); *Estelle v. Gamble*, 429 U.S. 97 (1976).

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STATEMENT OF THE CASE

I. Factual Background

Cornelius Pierre Howell had sickle cell disease. Pet. App. 3a.[1] Accordingly, soon after he was booked into the Hamilton County Justice Center (the Jail), he was placed on the "chronic care list" by the nurses who conducted his medical screenings. *Id.* at 2a-3a.[2]

One week after Mr. Howell was booked into the Jail, he got into an altercation with his cellmate. *Id.* at 3a. After this fight, two corrections officers took Mr. Howell to the medical area. *Id.* They attempted to lead him down a hallway and into an elevator, but video footage shows that he could not remain upright or put weight on his legs. *Id.* He repeatedly fell to the ground. *Id.* Eventually, the officers placed Mr. Howell in a wheelchair and transported him that way. *Id.*

Once they arrived at the medical area, Mr. Howell was placed in a room adjacent to the medical sallyport. *Id.* He screamed that he was in pain, "yell[ed], moan[ed], and groan[ed]," and said that he could not feel his legs. *Id.* Mr. Howell was then taken inside the medical sallyport—where his cries had been audible—and Petitioner Nurse Christina Jordan, in the presence of Petitioner Officer Daniel Erwin, evaluated him. *Id.* There, he continued to yell that his legs would not work and that he was in pain; he rated his pain at ten-out-of-ten. *Id.* Video shows

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[1] Because the relevant portions of the appendices to the two petitions are identical, this brief cites them interchangeably.

[2] NaphCare, Inc. is a private company that contracts with the Jail to provide medical services. The nurses who conducted the medical screenings and Petitioner Jordan were all employed by NaphCare, Inc. Pet. App. 2a-3a.

that he was unable to stay seated in his wheelchair. *Id.* Eventually, he slid out of the wheelchair and was left rolling around on the floor. *Id.*

Mr. Howell told Petitioner Jordan that he had sickle cell. *Id.* at 4a. Not only that, but Petitioner Jordan also reviewed Mr. Howell's medical chart, which documented both his sickle cell diagnosis and a prior sickle cell incident that had led Jail medical staff to send him to the hospital. *Id.* Petitioner Jordan had "professional experience, 'academic,' and on-the-job training in treating patients with sickle cell." *Id.* at 11a. From that experience, she knew that "pain [is] the primary symptom of sickle cell" and that a sickle cell crisis can manifest as numbness in the legs. *Id.* at 4a. She knew Mr. Howell exhibited both those symptoms: she "concluded Howell was in pain" and saw that he was unable to put weight on his legs. *Id.* at 3a-4a. She also took his vitals and noted a respiratory rate of 22—a rate that NaphCare Inc.'s medical director later acknowledged was "abnormal." *Id.* at 3a.

Despite all this, Petitioner Jordan did not send Mr. Howell to the hospital or otherwise provide medical care. *Id.* at 4a. Instead, at approximately 5:40 p.m., she ordered that he be sent away from the medical sallyport. *Id.* Officers placed Mr. Howell in a restraint chair and wheeled him into a cell where they attached the restraint chair to the wall. *Id.* Petitioner Jordan insists that an officer ordered the restraint chair while the officers insist that it was Petitioner Jordan who ordered it. *Id.* Either way, everyone agrees that neither Petitioner Jordan nor Petitioner Erwin objected to placing Mr. Howell in a restraint chair. *Id.*

Jail policy required officers to check on detainees in restraint chairs every ten minutes, to consider removing the detainee from the chair every hour, and to provide access to the restroom and water. *Id.* at 4a-5a. The policy also recommended at least ten minutes of limb rotations every two hours to prevent blood clots. *Id.* at 4a. Medical staff were also required to check on the detainee, though the frequency of those checks depended on who ordered the chair. *Id.* at 5a. If medical personnel ordered the restraint chair, then medical staff were required to check on the detainee every fifteen minutes. *Id.* If jail personnel ordered the chair, medical staff were required to perform checks every two hours. *Id.*

The majority of these required checks never happened. *Id.* at 5a-6a. It is now undisputed that Petitioner Erwin falsified entries on the restraint chair log to make it look like he complied with the ten-minute check policy when, in fact, he did not. *Id.* at 6a. Petitioner Erwin also failed to consider Mr. Howell for removal every hour, rotate his limbs every two hours, or provide him with water or the opportunity to use the restroom. *Id.* And the few checks that he did complete consisted of briefly looking through the "small little window" on the locked door to the cell—a view that provided only a side view of Mr. Howell. *Id.* at 5a. From that vantage point, Petitioner Erwin could not see Mr. Howell's eyes and could not tell if he was even alive. *Id.* at 5a-6a. Petitioner Erwin never actually entered the cell to check on Mr. Howell. *Id.* at 5a.

For her part, Petitioner Jordan never checked on Mr. Howell while he was in the restraint chair. *Id.* at 5a. Her colleague, Nurse Arthur, went to Mr. Howell's cell at approximately 6:06 p.m. *Id.* That was the

first—and last—time that medical personnel even went near Mr. Howell's cell while he was in the restraint chair. *Id.*

At 9:45 p.m., Officer Hunt went inside the cell and found Mr. Howell dead. *Id.* at 6a. The Hamilton County Deputy Coroner performed an autopsy the next day and determined that Mr. Howell died from sickle cell crisis. *Id.* Dr. Martin Steinberg, a sickle cell expert, likewise determined that Mr. Howell died as a result of a complication of sickle cell disease. *Id.* He explained that transfer to a hospital "would more likely than not have prevented [] Howell's death." *Id.*

II. Proceedings Below

Mr. Howell's sister, as administratrix of his estate, brought suit under 42 U.S.C. § 1983. *Id.* at 6a-7a. The Estate alleged that Petitioners Jordan and Erwin violated Mr. Howell's Fourteenth Amendment rights. *Id.* at 7a. The district court granted both of them summary judgment. *Id.*[3]

The district court determined that Petitioner Jordan "had some prior experience with sickle cell crisis," heard Mr. Howell's "complaints of pain," and saw Mr. Howell "sliding out of the wheelchair and rolling around on the ground." *Id.* at 93a. It nevertheless credited her assertion that she believed Mr. Howell was experiencing a "psychiatric episode" and determined that her use of a restraint chair "was consistent" with that understanding. *Id.* at 94a, 102a. It therefore granted her summary judgment. *Id.*

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[3] The Estate brought additional federal and state claims against Petitioners and other Defendants that are not relevant here. Pet. App. 7a.

As for Petitioner Erwin, the district court found that he saw Mr. Howell's "wide eyes, bleeding lip, complaints of pain, yelling, slumping in his chair, and rolling around on the floor" and that he "at some point thought that Howell should go to the hospital." *Id.* at 71a, 73a. The district court also determined that Petitioner Erwin's failure to conduct ten-minute checks violated policy and that his decision to cover that up by falsifying documents "was blameworthy." *Id.* at 74a. It nevertheless concluded that no reasonable jury could find that Petitioner Erwin consciously disregarded a serious medical risk and granted him summary judgment. *Id.* at 78a.

The Estate moved for relief from judgment, explaining that the legal standard applicable to pretrial detainees' Fourteenth Amendment medical treatment claims had changed approximately six weeks before the district court issued its decision, and that the district court had improperly applied the old standard. *Id.* at 7a.

The Sixth Circuit had set out the new standard in *Brawner v. Scott Cnty.*, 14 F.4th 585 (6th Cir. 2021). It did so because of this Court's decision in *Kingsley v. Hendrickson*, 576 U.S. 389 (2015), which held that pretrial detainees' excessive force claims were governed by an objective standard, in contrast to the subjective standard that applies to convicted prisoners' excessive force claims. *Id.* at 395–97. In adopting an objective standard for claims by pretrial detainees, the *Kingsley* Court emphasized that "the language of the two Clauses"—the Eighth Amendment (governing claims by convicted prisoners) and the Fourteenth Amendment (governing claims by pretrial detainees)—"differs." *Id.* at 400. "[M]ost importantly," this Court explained, "pre-trial

detainees (unlike convicted prisoners) cannot be punished at all, much less 'maliciously and sadistically.'" *Id.* at 400–01 (quoting *Ingraham v. Wright*, 430 U.S. 651, 671–72, n.40 (1977)).

In light of this guidance, the Sixth Circuit in *Brawner* determined that *Kingsley* was "inconsistent" with then-extant circuit precedent imposing a subjective standard on pretrial detainees' conditions-of-confinement claims, and that its caselaw therefore "require[d] modification." *Brawner*, 14 F.4th at 596. The Sixth Circuit left unchanged the first component of the analysis; pretrial detainees bringing medical treatment claims must still show a sufficiently serious medical need. However, in light of *Kingsley*, the Sixth Circuit updated the second component of the analysis. Previously, a pretrial detainee was required to prove that the defendant had a culpable state of mind, but now a pretrial detainee need only prove that the defendant failed to act with reasonable care even though the defendant knew or should have known of a serious risk of harm. *Id.* at 597. The Sixth Circuit denied rehearing *en banc*, *Brawner v. Scott Cnty.*, 18 F.4th 551 (6th Cir. 2021), and this Court denied certiorari, *Scott Cnty. v. Brawner*, 143 S. Ct. 84 (2022).

In deciding the Estate's motion for relief from judgment, the district court acknowledged that *Brawner* controlled and that it had "applied the wrong [pre-*Brawner*] legal standard." Pet. App. 33a. It nevertheless denied the motion because it "would have reached the same result under the new standard." *Id.* at 33a-34a. The Estate appealed.

As relevant here, the Sixth Circuit reversed the district court's grant of summary judgment to

Petitioners Jordan and Erwin in a unanimous opinion. Pet. App. 7a-21a.

As to Petitioner Jordan, the Sixth Circuit explained that there is "no dispute" that she knew Mr. Howell had sickle cell disease; that she had professional, academic, and on-the-job experience with sickle cell; and that she knew sickle cell crises can manifest in extreme pain and numbness. *Id.* at 11a-12a. It further observed that she "did nothing to treat" Mr. Howell—either for a sickle cell crisis or for his "excruciating pain." *Id.* at 12a. Instead, she ordered that he "be put in a restraint chair" and "then failed to check on him." *Id.* The Sixth Circuit explained that the district court erred in treating this as a simple misdiagnosis that could not give rise to a constitutional violation. *Id.* at 14a-16a. First, it explained, a diagnosis of "psychiatric episode" is so "generic" as to "cover almost any physiological symptom" and so cannot "serve as blanket insulation from liability." *Id.* at 16a. Moreover, Petitioner 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." *Id.* Accordingly, the Sixth Circuit reversed the district court's grant of summary judgment to Petitioner Jordan.

As to Petitioner Erwin, the Sixth Circuit noted that he observed Mr. Howell "slumped over" and "sprawled out"; that he heard medical staff debate whether Mr. Howell needed to go to the hospital; that Petitioner Erwin himself thought that Mr. Howell needed to go to the hospital; and that other officers in the area heard Mr. Howell yelling that he could not feel his legs. *Id.* at 19a. The Sixth Circuit further

explained that medical staff decided not to send Mr. Howell to the hospital based on the understanding that officers would complete observational checks every ten minutes—something Petitioner Erwin indisputably failed to do. *Id.* It concluded that a jury could find that his actions "were the kind of bare minimum observation that ceases to be constitutionally adequate." *Id.* at 20a (internal quotation marks and citation omitted). It also concluded that his conduct violated decades-old clearly established law. *Id.* at 23a-24a. Accordingly, it reversed the district court's grant of summary judgment to Petitioner Erwin and held that he was not entitled to qualified immunity. *Id.* at 20a-21a, 23a-24a.

The Sixth Circuit affirmed the district court's grant of summary judgment to another nurse and two other officers, all of whom it determined did not violate the Constitution. *Id.* at 17a, 21a-23a.

Both Petitioners Jordan and Erwin sought rehearing *en banc*. *Id.* at 108a. No judge on the Sixth Circuit requested a vote and the petitions were denied. *Id.* at 109a.

REASONS FOR DENYING THE PETITION

I. The question presented is still percolating in the lower courts—so much so that even petitioners cannot agree on the contours of the current split. And where the two petitioners agree, they overstate the divide: three of the four circuits that both petitioners place on their side of the split have not issued reasoned opinions on the question presented, but have relegated their discussion to cursory footnotes stating only that *Kingsley* is not so directly on point that it would permit a panel to abandon pre-*Kingsley* circuit

precedent. There is no reason for this Court to intervene before those circuits have had a meaningful opportunity to reconsider the issue *en banc*.

II. The petitioners are also wrong on the merits. In adopting an objective standard for medical-care claims by pretrial detainees, the Sixth Circuit adhered to this Court's longstanding precedent, which has consistently applied subjective standards to claims by post-conviction prisoners and objective standards to claims by pretrial detainees. This precedent is also consistent with the writings of such founding-era authorities as Blackstone and Eden, who recognized that pretrial detainees enjoy broader legal protection than post-conviction prisoners.

III. Even if the Court wanted to review the question presented, this case would be a poor vehicle to do so. Both petitioners all but admit that their core disputes have nothing to do with the question presented.

IV. Finally, the issue is relatively unimportant, and neither petitioner makes much effort to suggest otherwise. This Court has apparently reached the same conclusion as it has repeatedly denied petitions for certiorari raising the question presented. Here, where the petitions fail to satisfy any of the traditional criteria for certiorari, this Court should once again deny review.

I. Petitioners Overstate The Circuit Conflict.

Both petitioners point to a divide on the question presented. Jordan Pet. 14-16; Erwin Pet. 22-23. But they cannot agree on the contours of that divide. *Compare* Jordan Pet. 14-16 (asserting that the "Third,

Fourth, Fifth, Eighth, Tenth, and Eleventh Circuits have declined to extend *Kingsley*"); *with* Erwin Pet. 23 & n.3 (categorizing the Third and Fourth Circuits as undecided). In any case, it is not as deep or entrenched as either of them asserts. Six circuits have now considered the question presented in reasoned decisions, and five have resolved it against petitioners. In an attempt to bolster this lopsided divide in their favor, petitioners place several other circuits on their side of the split. In truth, those circuits have either reserved the question for a future case where the answer will impact the outcome or until *en banc* review permits them to revisit pre-*Kingsley* circuit precedent. Further percolation is required before this Court determines whether to weigh in.

Petitioner Jordan's exaggerated head-count on the *Kingsley*-doesn't-apply side has become glaringly obvious with the Fourth Circuit's recent decision in *Short v. Hartman*, No. 21-1396, -- F.4th--, 2023 WL 8488148 at *9 (4th Cir. Dec. 8, 2023) . While Petitioner Jordan characterized the Fourth Circuit as one that had "declined to extend *Kingsley* beyond its limited holding" because it was waiting for "this Court [to] resolve[] the question," Jordan Pet. 15, the case on which she relied explained that it did not resolve the question because the choice of standard "would make no difference" to the case. *Mays v. Sprinkle*, 992 F.3d 295, 300-01 & n.4 (4th Cir. 2021). And now, in a decision post-dating her petition, the Fourth Circuit made clear that it had not been waiting for this Court's intervention by joining the majority circuits in adopting an objective standard: "The only way to respect the distinction *Kingsley* drew between the Eighth and Fourteenth Amendments is to recognize

that *Kingsley*'s objective test extends" to pretrial detainee conditions-of-confinement claims. *Short v. Hartman*, No. 21-1396, -- F.4th--, 2023 WL 8488148 at *9 (4th Cir. Dec. 8, 2023).

Petitioner Jordan's characterization of the Third Circuit is equally unavailing. She places it on her side of the split, arguing that in *Moore v. Luffey*, 767 F. App'x 335 (3d Cir. 2019), the court "declined to extend *Kingsley* beyond its limited holding" because it is waiting "until this Court resolves the question." Jordan Pet. 15. That blatant misreading is refuted by the Third Circuit's own explanation that it "decline[d] to address" the question presented because the plaintiff's claims "fail[ed] under both standards." *Moore*, 767 F. App'x at 340 n.2.

Both petitioners then mischaracterize the Fifth Circuit, but rely on different cases to do so. Petitioner Jordan points to *Alderson v. Concordia Parish Correctional Facility*, 848 F.3d 415 (5th Cir. 2017). Jordan Pet. 15. There, a Fifth Circuit panel observed—in a footnote, no less—that it was bound by its "rule of orderliness" such that only the *en banc* court could consider whether *Kingsley* altered the standard applied to conditions claims. 848 F.3d at 419 n.4. *En banc* review made little sense because, as the panel explained, the choice of standard "would not change the outcome of the case." *Id*. Petitioner Erwin points to a different decision: *Cope v. Cogdill*, 3 F.4th 198 (5th Cir. 2021), *cert. denied Cope v. Cogdill*, 142 S. Ct. 2573 (2022). Erwin Pet. 23 n.3. But that decision is no more definitive. In *Cope*, the court merely followed the rule of orderliness it had set out in *Alderson* and explained that *Kingsley* did not "abrogate [its] deliberate-indifference precedent" because it "discussed a different type of constitutional

claim." *Cope*, 3 F.4th 198 at 207 n.7. That case, too, was a poor vehicle for *en banc* review of the question presented because the case turned on qualified immunity. *Id.* at 207-12. Accordingly, the *en banc* Fifth Circuit has not yet weighed in on this issue.

The Eleventh Circuit is similarly situated. In *Dang v. Seminole Cnty.*, 871 F.3d 1272 (11th Cir. 2017)—the only Eleventh Circuit case that both petitioners cite—the court said in a footnote that it "cannot and need not reach this question." *Id.* at 1279 n.2. It then went on to say that, "regardless of whether *Kingsley* could be construed to have affected the standard for pretrial detainees' claims involving inadequate medical treatment . . . it could not affect [the plaintiff's] case." *Id.* That is, the Eleventh Circuit in *Dang* took no position on this issue because the choice of standard made no difference in that case. And because the standard "could not affect" the outcome of the case, it was a poor vehicle for *en banc* review. *Id.*

Like the Fifth and Eleventh Circuits, the Eighth Circuit case that petitioners hang their hat on includes no more than the barest discussion of the question presented. *Whitney v. City of St. Louis*, 887 F.3d 857 (8th Cir. 2018), *rehearing and rehearing en banc denied* (June 14, 2018). That discussion, tucked away in a footnote, says that *Kingsley* did not abrogate circuit precedent applying a subjective test to conditions-of-confinement claims brought by pretrial detainees because "it was an excessive force case, not a deliberate indifference case." *Id.* at 860 n.4.

All told, of the many circuits petitioners claim for their side of the split, only one circuit has actually issued a reasoned decision declining to extend *Kingsley*'s reasoning to conditions-of-confinement

claims brought by pretrial detainees. *Strain v. Regalado*, 977 F.3d 984 (10th Cir. 2020). Petitioners mischaracterize the rest: the Fourth Circuit has now definitively joined the majority circuits, the Third Circuit is undecided, and the Fifth, Eighth, and Eleventh Circuits have done little more than suggest the need for *en banc* review of the question presented. This is hardly an intractable divide and the Court's intervention would be premature.

II. The Sixth Circuit Is Correct.

The Sixth Circuit correctly determined that, after *Kingsley*, a pretrial detainee bringing a medical-care claim must satisfy an objective rather than subjective test. Petitioners' arguments to the contrary have no merit.

1. *Kingsley* applied an objective standard to pretrial detainees because of their distinct constitutional rights as persons in custody who have not been convicted of a crime; its reasoning was not, as petitioners suggest, "confine[d]" to the excessive force context. Jordan Pet. 20; *see also* Erwin Pet. 18.

Importantly, this Court has long distinguished between the treatment of pretrial detainees and convicted prisoners by applying subjective standards to claims by convicted prisoners, *see Farmer v. Brennan*, 511 U.S. 825 (1994); *Hudson v. McMillian*, 503 U.S. 1 (1992); *Wilson v. Seiter*, 501 U.S. 294 (1991); *Estelle v. Gamble*, 429 U.S. 97 (1976), and objective standards to claims by pretrial detainees, *see Bell v. Wolfish*, 441 U.S. 520 (1979). In adopting an objective standard over a subjective one for an excessive force claim brought by a pretrial detainee, the *Kingsley* Court faithfully followed this precedent.

It expressly rejected any reliance on two prior excessive force cases because those cases had been "brought by convicted prisoners under the Eighth Amendment's Cruel and Unusual Punishment Clause" rather than "by pretrial detainees under the Fourteenth Amendment's Due Process Clause." *Kingsley*, 576 U.S. at 400. Instead, it opted to rely on *Bell v. Wolfish*, which was not an excessive force case, but one in which pretrial detainees challenged "a variety of prison conditions." *Id*. at 398 (citing *Bell*, 441 U.S. at 541–43). This makes clear that *Kingsley* adopted an objective standard because that was required by the status of the plaintiff, a pretrial detainee, and *not* the type of claim, excessive force. *See id.* at 400 (explaining that "most importantly, pretrial detainees (unlike convicted prisoners) cannot be punished at all").

Even Petitioner Jordan admits that *Kingsley* adopted an objective standard "in large reliance upon its reading of *Bell v. Wolfish*"—which, again, had nothing to do with excessive force. Jordan Pet. 24; *see also id*. at 25-26. She tries to explain that away, first by arguing that "the *Kingsley* Court arguably misconstrued the *Bell v. Wolfish* test." Jordan Pet. 27. Then she backtracks, arguing that *Kingsley* actually got it right and the "excessive use of force [test] can turn upon the [] analysis found in *Bell*," but that it somehow "cannot be practically applied to medical claims." Jordan Pet. 28. This convoluted back-and-forth tries, and fails, to get around the simple truth: *Kingsley* relied on *Bell* because both cases concerned claims brought by pretrial detainees under the Fourteenth Amendment and that is the relevant factor in deciding whether an objective or subjective test applies. *See Kingsley*, 576 U.S. at 398-400.

All five circuits applying *Kingsley*'s reasoning to conditions-of-confinement claims agree "that *Kingsley* requires [courts] to properly distinguish Eighth Amendment claims from Fourteenth Amendment claims" and that the "only way to respect the distinction *Kingsley* drew between the Eighth and Fourteenth Amendments is to recognize that *Kingsley*'s objective test extends to all pretrial detainee claims under the Fourteenth Amendment." *Short v. Hartman*, No. 21-1396, -- F.4th--, 2023 WL 8488148 at *9 (4th Cir. Dec. 8, 2023); *see also Brawner,* 14 F.4th at 597; *Miranda v. Cnty. of Lake*, 900 F.3d 335, 352 (7th Cir. 2020); *Darnell v. Pineiro*, 849 F.3d 17, 35 (2d Cir. 2017); *Castro v. Cnty. of Los Angeles*, 833 F.3d 1060, 1070 (9th Cir. 2016) (en banc).

The *Kingsley* Court's differentiation between the treatment of pretrial detainees and convicted prisoners is also consistent with legal history. Eden found it "contrary [] to public justice" to treat pretrial detainees the same as convicted prisoners. 2 WILLIAM EDEN, PRINCIPLES OF PENAL LAW 51–52 (1771). "[P]revious to the conviction of guilt," he explained, "the utmost tenderness and lenity are due" to the pretrial detainee. *Id.* at 51. Similarly, Blackstone wrote that where confinement is imposed in the "dubious interval between [] commitment and trial," it should be with "the utmost humanity." WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 300 (1769). Blackstone explained that because pretrial detention is "only for safe custody, and not for punishment," those detained awaiting trial should not be "subjected to other hardships than such as are absolutely requisite for the purpose of confinement only." *Id*.

2. Adopting an objective standard would not "boil down to a negligence standard" as petitioners argue. Erwin Pet. 19; *see also* Jordan Pet. 34 (arguing that an objective standard "is constitutionalizing a claim for medical malpractice").

To start, *Kingsley* made clear that "liability for *negligently* inflicted harm is categorically beneath the threshold of constitutional due process." 576 U.S. at 396 (internal quotation marks and citations omitted). In contrast to a negligence standard, *Kingsley* recognizes that if conduct is unintentional—that is, if it is accidental or inadvertent—it does not violate the Fourteenth Amendment: "[I]f an officer's Taser goes off by accident or if an officer unintentionally trips and falls on a detainee, causing him harm, the pretrial detainee cannot prevail on an excessive force claim." *Kingsley*, 576 U.S. at 396.

The courts of appeals that have adopted an objective standard for conditions-of-confinement claims post-*Kingsley* have relied on this reasoning to ensure that objective standards do not devolve into negligence standards in that context. The Seventh Circuit, for instance, has reasoned that medical providers would not be liable if they had inadvertently "forgotten that [a given detainee] was in the jail, or mixed up her chart with that of another detainee, or if [one doctor] forgot to take over coverage for [another doctor] when he went on vacation" because such conduct would constitute negligence. *Miranda*, 900 F.3d at 354. The Fourth Circuit called the very idea that an objective test "would collapse into negligence" a "spurious" one. *Short v. Hartman*, No. 21-1396, --F.4th--, 2023 WL 8488148 at *10 (4th Cir. Dec. 8, 2023). And the Second and Ninth Circuits agree. *Darnell*, 849 F.3d at 36 & n.16 (expressly rejecting

defendants' argument that an objective standard would impose liability for "mere negligence"); *Castro*, 833 F.3d at 1071 (holding that a pretrial detainee must "prove more than negligence").

The Sixth Circuit is no different: *Brawner* explains that "negligence is insufficient" under the objective standard it set forth. 14 F.4th at 596. The decision below likewise explains that negligence is insufficient. Pet. App. 11a ("the Estate must prove more than negligence") (internal quotation marks omitted). And both petitioners acted more than negligently here.

Start with Petitioner Jordan. The Sixth Circuit explained that there is "no dispute" that she knew Mr. Howell had sickle cell disease; that she had professional, academic, and on-the-job experience with sickle cell; and that she knew sickle cell crises can manifest in extreme pain and numbness. Pet. App. at 11a-12a. It further explained that she "did nothing to treat" Mr. Howell—either for a sickle cell crisis or for his "excruciating pain." *Id*. at 12a. Instead, she ordered that he "be put in a restraint chair" and "then failed to check on him." *Id*. As to Petitioner Erwin, the Sixth Circuit noted that he observed Mr. Howell "slumped over" and "sprawled out"; that he thought that Mr. Howell needed to go to the hospital; and that he indisputably failed to complete the required observational checks *Id*. at 19a. As this Court has explained, such disregard of obvious risks goes past mere negligence and rises to the level of civil law recklessness: "The civil law generally calls a person reckless who acts or (if the person has a duty to act) fails to act in the face of an unjustifiably high risk of harm that is either known or so obvious that it should be known." *Farmer*, 511 U.S. at 836. Neither petitioner was merely negligent.

3. To the extent petitioners suggest that excessive force requires an "affirmative act" whereas medical care claims "often stem[] from inaction," Erwin Pet. 20; *see also* Jordan Pet. 22, and that that somehow means an objective standard is not workable for medical care claims, they are wrong.[4]

Indeed, this Court has rejected that very distinction. *Farmer* repeatedly treated action and inaction together in discussing various standards of liability. 511 U.S. at 834 (discussing liability under the Eighth Amendment for a prison official's "act or omission"); *id.* at 836 (explaining that "acting or failing to act" can be done with deliberate indifference); *id.* (explaining that civil law recklessness attaches when a person "acts or . . . fails to act in the face of an unjustifiably high risk of harm"); *id.* at 840 (explaining that the term "deliberate" requires "nothing more than an act (or omission) of indifference to a serious risk that is voluntary"); *id.* at 842 (explaining that the Eighth Amendment test asks whether an official "acted or failed to act" despite knowledge of risk). This Court could not have been clearer that the distinction between action and inaction is irrelevant. And that makes sense, for in the conditions context, "action" versus "inaction" boils down to semantics: When petitioners relegated Mr. Howell to a restraint chair instead of sending him to the emergency room, did they fail to act or did they choose one course of action over another?

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[4] In making this argument, Petitioner Jordan uses two block indentations that are not—as her formatting suggests—entirely quotations from *Kingsley*, but include her own commentary on the decision. *See* Jordan Pet. 23.

4. Petitioners' standard would lead to absurd results. If detainees can win excessive force cases with objective evidence alone (as *Kingsley* now mandates), but must provide state-of-mind evidence in all other types of conditions cases (as petitioners urge), jail staff will enjoy the *least* deference in excessive force litigation.

That cannot be right. This Court has been clear that corrections personnel are entitled to the *most* deference in the excessive force context, because that is when guards must act "quickly and decisively," *Hudson*, 503 U.S. at 6, making split-second decisions "in haste, under pressure, and frequently without the luxury of a second chance," *Whitley v. Albers*, 475 U.S. 312, 320 (1986). Indeed, in *Wilson*, this Court explained that a more stringent standard must apply to excessive force claims as compared to other conditions-of-confinement claims precisely because a prison official's use of force typically happens "under pressure" and must be "balanced against competing institutional concerns for the safety of prison staff" while the "responsibility to attend to the medical needs of prisoners does not ordinarily clash with other equally important governmental responsibilities." 501 U.S. at 302. Even Petitioner Jordan recognizes that "society's expectations are different" in the excessive force and conditions-of-confinement contexts—she just misapprehends the import of that distinction. *See* Jordan Pet. 22.[5]

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[5] Petitioner Erwin suggests that because *Farmer* said deliberate indifference is not the proper standard for excessive force claims, "it would be inappropriate to apply the excessive force standard to deliberate indifference cases." Erwin Pet. 19. But he misses

III. This Case Is A Poor Vehicle for Deciding the Question Presented.

This case is an exceptionally poor vehicle. Both petitioners make clear that the decision below—and their challenges to it—have little to do with the question presented.

Petitioner Jordan explains that even "post-*Kingsley*," the Sixth Circuit has continued to hold that "disagreements over a 'best' course of medical treatment" do not make out a violation. Jordan Pet. 33. She then goes on to argue that "the Sixth Circuit's decision reversing summary judgment" against her "is based largely upon a difference of opinion over the best course of treatment." *Id*. at 34. That is, she concedes that the decision below is "largely" based on an issue that has nothing to do with *Kingsley* or its application to medical care claims, and on which she didn't seek certiorari. *Id.* Petitioner Jordan may be unhappy with the decision below, but her unhappiness has little to do with the question she presents to this Court.

For his part, Petitioner Erwin highlights that several "aspects of deliberate indifference claims remain the same" whether it is an objective or subjective inquiry. Erwin Pet. 21. Specifically, he argues that officers can still defer to medical professionals and that failure to follow an internal

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the important point that *Farmer* only said that to explain why the standard for conditions-of-confinement claims must be *lower* than for excessive force claims—not the other way around. *Farmer*, 511 U.S. at 835-36. So, because *Kingsley* mandates an objective standard for pretrial detainees' excessive force claims, a higher subjective standard cannot govern pretrial detainees' conditions-of-confinement claims.

policy is still insufficient to make out a constitutional violation on its own. *Id.* at 21-22. And while he argues that the Sixth Circuit erred on those two points, neither has anything to do with the question presented to this Court. In other words, Petitioner Erwin's gripe seems to be with how the Sixth Circuit applied two strands of caselaw unrelated to the legal question he is now raising in his petition.[6]

The choice of standard would make no difference in Petitioner Erwin's case for another reason, too: he repeatedly lied. Not only did he lie on the restraint chair log by entering checks that he never completed, but when answering Respondent's first set of discovery responses he said he could "neither admit nor deny" that he conducted all the required checks and pointed to the log for support, knowing full well that he fabricated the log. Dct. Dkt. 88-1, Erwin Discovery Responses, at 5 (filed April 4, 2021). This evidence that Petitioner Erwin *knew* he acted culpably suffices to make out a constitutional violation even under a subjective standard.

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[6] Petitioner Erwin also appears uncertain about whether the Sixth Circuit has even answered the question presented. He repeatedly argues that *Brawner* "was dicta" and "is not binding." Erwin Pet. 17; *see also id.* at 22 (arguing the decision "was simply dicta from a panel decision" that "is not properly the law of the Sixth Circuit"). Yet he also relies on *Brawner* to argue that the Sixth Circuit has definitively decided the question presented to bolster his articulation of the split. *Id.* at 23. It makes little sense for this Court to take a case where one of the petitioners cannot even decide whether the lower court has actually adopted the position that he claims is incorrect and on which he seeks certiorari.

IV. The Issue Is Relatively Unimportant.

Neither petitioner makes much effort to explain why the question presented is an issue of national importance. The closest they get is Petitioner Jordan's assertion that, post-*Kingsley*, "a relative flood of claims sounding in tort law have been filed across all courts." Jordan Pet. 33. But she provides no support for that bold assertion. She does not say that the circuits that have adopted an objective standard have seen more claims. She does not say that those circuits have ruled in favor of pretrial detainees more often. She does not say that the nature of medical care has changed in jails in those circuits. In short, she offers zero support and zero reasoning for her assertion.[7]

Moreover, the relative unimportance of the question presented is clear from the very fact that multiple circuits have left the question undecided *because* they cannot find a case where the standard makes a difference. *Moore*, 767 F. App'x at 340 n.2 (Third Circuit declining to resolve issue because plaintiff's "claims fail[ed] under both standards"); *Dang*, 871 F.3d at 1279 n.2 (Eleventh Circuit declining to resolve issue in part because the record showed "at most, negligence," which is insufficient under any standard).

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[7] Petitioner Jordan also argues there is a "need for this Court's resolution" because "the Sixth Circuit's interpretation of *Kingsley* has [] led to exceedingly inconsistent results." Jordan Pet. 33. But the two district court cases she cites to demonstrate that confusion both concern the Eighth Amendment, meaning neither *Kingsley* nor *Brawner* applies to them. *See id.* For that predictable reason, the two district court cases do not even cite *Kingsley* or *Brawner*. *Id.* The "inconsistent results" in the Sixth Circuit that Petitioner Jordan points to are unrelated to the question presented.

In fact, the Sixth Circuit repeatedly declined to resolve the question presented for that very reason before ultimately joining the majority circuits. *See, e.g.*, *Cameron v. Bouchard*, 815 F. App'x 978, 984-85 (6th Cir. 2020) ("We need not resolve the issue today, because no matter the approach we adopt, the outcome is the same."); *Griffith v. Franklin Cnty.*, 975 F.3d 554, 570 (6th Cir. 2020) (declining to consider question presented because the "same result would obtain under either" test); *Martin v. Warren Cnty.*, 799 F. App'x 329, 337 n.4 (6th Cir. 2020) (declining to consider question because plaintiff "at best shows negligent conduct"); *Bowles v. Bourbon Cnty., Kentucky*, No. 21-5012, 2021 WL 3028128, at *8 (6th Cir. July 19, 2021) (explaining that "Plaintiffs' claims fail" "[r]egardless" of the test applied).

The Fourth Circuit did the same. *See Michelson v. Coon*, No. 20-6480, 2021 WL 2981501, at *3 (4th Cir. July 15, 2021) ("We need not resolve this issue here because, even if a purely objective standard applies to a pretrial detainee's failure to protect claim, [plaintiff] failed to state such a claim."); *Mays*, 992 F.3d at 300-01 (declining to resolve issue because choice of standard "would make no difference" to the case).

Finally, most defendants facing liability in jail and prison cases are public employees and will therefore be entitled to raise the defense of qualified immunity—no matter the underlying standard. And "qualified immunity provides ample protection to all but the plainly incompetent or those who knowingly violate the law." *Malley v. Briggs*, 475 U.S. 335, 341 (1986). Petitioners forget this in fearmongering about an objective standard for conditions claims.

This question does not merit this Court's involvement. Accordingly, this Court should do what it's done many times before and deny the petitions. *See Scott Cnty., Tennessee v. Brawner*, 143 S. Ct. 84 (2022); *Cope v. Cogdill*, 142 S. Ct. 2573 (2022); *San Diego Cnty. v. Sandoval*, 142 S. Ct. 711 (2021); *Strain v. Regalado*, 142 S. Ct. 312 (2021); *Heidel v. Mazzola*, 142 S. Ct. 483 (2021); *Dart v. Mays*, 142 S. Ct. 69 (2021); *Cnty. of Orange v. Gordon*, 139 S. Ct. 794 (2019); *Saunders v. Ivey*, 139 S. Ct. 1325 (2019); *Cowlitz Cnty. v. Crowell*, 139 S. Ct. 802 (2019); *Los Angeles Cnty. v. Castro*, 580 U.S. 1099 (2017).

CONCLUSION

The petitions for writs of certiorari should be denied.

Respectfully submitted,

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