No. 19-5623

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

TAMMY BRAWNER,
Plaintiff-Appellant,
v.
SCOTT COUNTY, TENNESSEE,
Defendant-Appellee.

Appeal from the United States District Court
for the Eastern District of Tennessee at Knoxville
E.D. Tenn. No. 3:17-cv-108

RESPONSE TO PETITION FOR REHEARING EN BANC

Megha Ram
RODERICK & SOLANGE
MACARTHUR JUSTICE CENTER
501 H Street NE, Suite 275
Washington, DC 20002
(202) 869-3438
megha.ram@macarthurjustice.org

David M. Shapiro
RODERICK & SOLANGE
MACARTHUR JUSTICE CENTER
NORTHWESTERN PRITZKER
SCHOOL OF LAW
375 East Chicago Avenue
Chicago, IL 60611
(312) 503-0711
david.shapiro@law.northwestern.edu

Richard E. Collins
STANLEY, KURTZ & COLLINS, PLLC
422 S Gay Street, Suite 300
Knoxville, TN 37902
(865) 522-9942
richard@knoxvilleattorney.com

Counsel for Plaintiff-Appellant Tammy Brawner

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INTRODUCTION

In *Kingsley v. Hendrickson*, the Supreme Court squarely rejected a subjective standard in evaluating a pretrial detainee's claim of excessive force, explaining that "the relevant standard" is "objective not subjective." 576 U.S. 389, 395 (2015). In so holding, the Court underscored the difference between pretrial detainees and post-conviction prisoners, and reiterated that courts must look to the Fourteenth Amendment—not the Eighth Amendment—when evaluating conditions claims by pretrial detainees. *Id*. at 400-01. The Eighth Amendment prohibits only cruel and unusual punishments, *Wilson v. Seiter*, 501 U.S. 294, 300 (1991), but as *Kingsley* explained, the Fourteenth Amendment dictates that "pretrial detainees (unlike convicted prisoners) cannot be punished at all." *Kingsley*, 576 U.S. at 401. And while *Kingsley* concerned an excessive force claim, its analysis of the differences between the standards applicable to pretrial detainees and post-conviction prisoners extended beyond that context to "the challenged governmental action" more generally. *Id*. at 398.

This Court first applied Eighth Amendment standards to Fourteenth Amendment claims "to avoid the anomaly of extending greater constitutional protection to a convict than to one awaiting trial." *Roberts v. City of Troy*, 773 F.2d 720, 723 (6th Cir. 1985). But after *Kingsley*, it is clear that extending the *same* constitutional protection to the two groups is itself anomalous. As such, the majority

panel correctly determined that this Court's precedent is inconsistent with *Kingsley*, which requires modification of circuit law. Op. 12. Three other federal courts of appeals have also overturned prior circuit precedent in the wake of *Kingsley* to adopt an objective standard for medical care claims by pretrial detainees. *Miranda v. Cnty. of Lake*, 900 F.3d 335 (7th Cir. 2018); *Darnell v. Pineiro*, 849 F.3d 17 (2d Cir. 2017); *Bruno v. City of Schenectady*, 727 F. App'x 717 (2d Cir. 2018); *Castro v. Cnty. of Los Angeles*, 833 F.3d 1060 (9th Cir. 2016) (*en banc*); *Gordon v. Cnty. of Orange*, 888 F.3d 1118 (9th Cir. 2018). The Second and Seventh Circuits did so in panel decisions—and the Seventh Circuit denied *en banc* rehearing. *Miranda*, 900 F.3d 335; *Darnell*, 849 F.3d 17. And while the Ninth Circuit took the issue *en banc*, it did so to correct a panel decision that held *Kingsley* did not require a change to circuit precedent. *Castro*, 833 F.3d 1060.

The well-reasoned panel decision in this case modified circuit law to conform to an inconsistent decision of the Supreme Court. There is no basis for *en banc* review.

BACKGROUND

When Tammy Brawner arrived at Scott County jail, she was medically screened by the booking officer and listed the four medications she had been taking. Op. 3. Under longstanding jail practice, the booking officer was to print two copies of the intake form and place one copy in Nurse Massengale's box. *Id*. Tennessee law

then required Nurse Massengale to conduct a more complete medical examination within fourteen days of admission. *Id*. At this examination, she was required to check for "medication taken" and "special health requirements." *Id*.

Eight days after her booking, Brawner suffered multiple seizures and was taken to the hospital where she was diagnosed with epilepsy. *Id*. at 4. The treating physician recommended that she see another physician within two days and prescribed an anti-epilepsy medication for her seizures. *Id*. Although the hospital was informed that Brawner had four prescribed medications, it was *not* told that she was not permitted to take those medications per jail policy. *Id*. Under this policy, prescribed medication was administered *only* if expressly ordered by the jail doctor, and *all* controlled substances were banned—even when a detainee had been taking the substance pursuant to a prescription. *Id*. at 3. Three of the four medications Brawner had been taking were controlled substances. *Id*.

Upon returning to the jail, Brawner was examined by Nurse Massengale. *Id*. at 4. At the jail doctor's instruction, Nurse Massengale discontinued the anti-epilepsy medication and instead administered daily doses of an anti-seizure medication. *Id*. Four days later, Brawner suffered another seizure. The next day, Nurse Massengale performed the state-required examination and noted that Brawner suffered from a "seizure disorder or cerebral trauma." *Id*. Two days later, Brawner was observed acting erratically, including by drinking out of the toilet. *Id*. A social

worker conducted an evaluation and concluded that the symptoms were likely the result of drug withdrawal. *Id*. Recall, at this time Brawner had gone nearly two weeks without taking her prescribed medications. *Id*. It does not appear that Nurse Massengale consulted with the jail doctor after receiving the evaluation. *Id*.

The next day, Brawner suffered seizure after seizure. *Id*. at 5. Eventually, after at least twelve seizures, Nurse Massengale called 911. *Id*. Brawner suffered three more seizures at the hospital before being transported by helicopter to another hospital's intensive-care unit. *Id*.

Brawner brought suit against Scott County and various jail staff, alleging that she suffered permanent and debilitating injuries as a result of prolonged seizure activity. *Id*. Among other claims, she brought suit under Section 1983 for violation of her Fourteenth Amendment right to adequate medical care. *Id*.

Before trial, the parties stipulated to the dismissal of the individual defendants, leaving Scott County as the sole defendant. *Id*. After Brawner presented her case at trial, the district court granted Scott County's Rule 50(a) motion for judgment as a matter of law. *Id*. It concluded that her claim against the County could not succeed because she could not establish an underlying constitutional violation by any individual. *Id*. at 6. There was no individual violation, it explained, because Brawner did not satisfy the subjective component of a deliberate indifference claim; that is, she did not show that jail staff failed to act while knowing that she faced a substantial

risk of serious harm. *Id*. at 5. The district court also addressed and rejected Brawner's theories of county liability. *Id*. at 6.

On appeal, the panel decision concluded that Brawner presented evidence from which a reasonable jury could find that Nurse Massengale violated her constitutional rights and that this violation was the result of the County's policies. *Id*. at 14. In reaching this conclusion, the panel resolved a question that this Court has previously acknowledged, but has not needed to decide until this case: whether the Supreme Court's decision in *Kingsley* requires evaluation of a pretrial detainee's medical care claim under an objective standard. *Id*. at 8. Although the facts supported finding a constitutional violation under the subjective deliberate indifference standard, the panel majority decided the applicability of the objective standard because the district court frankly stated that it would charge the jury under the subjective standard "until the Sixth Circuit changes the law." *Id*. at 8 n.2. It was thus necessary for the panel to decide the proper standard so the jury could be properly instructed on remand. *Id*.

ARGUMENT

I. Subjective Tests Govern Eighth Amendment Claims By Convicted Prisoners While Objective Tests Govern Fourteenth Amendment Claims By Pretrial Detainees.

The Supreme Court has clarified that pretrial detention operates in a separate constitutional realm than post-conviction imprisonment: while the Eighth

Amendment governs claims by post-conviction prisoners, the Fourteenth Amendment governs those by pretrial detainees. *Bell v. Wolfish*, 441 U.S. 520, 537 n.16 (1979).

The Eighth Amendment's Cruel and Unusual Punishments Clause forbids the "wanton infliction of pain" on post-conviction prisoners. *State of Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459, 463 (1947). A "wanton" state of mind is—by definition—akin to subjective deliberate indifference. Black's Law Dictionary (11th ed. 2019) (defining "wanton" as "[u]nreasonably or maliciously risking harm while being utterly indifferent to the consequences"). Thus, in *Estelle v. Gamble*, the Court derived a subjective deliberate indifference standard for medical care claims brought by convicted prisoners from the Eighth Amendment's prohibition of "wanton" punishment. 429 U.S. 97, 104 (1976); *see also Whitley v. Albers*, 475 U.S. 312, 319 (1986) ("[O]bduracy and wantonness ... characterize the conduct prohibited by the Cruel and Unusual Punishments Clause."); *Wilson*, 501 U.S. at 299 (holding only the "wanton" infliction of pain required "inquiry into a prison official's state of mind when it is claimed that the official has inflicted cruel and unusual punishment"). Indeed, as the panel majority explained, the Court opted for the "subjective definition" of deliberate indifference in *Farmer v. Brennan*, 511 U.S. 825 (1994), precisely because "it best comports with the text of the Eighth Amendment." Op. 11. The panel dissent in this case also acknowledges that the Supreme Court "derived

an Eighth Amendment-based deliberate indifference cause of action in the context of prisoners—those who have been convicted and sentenced." Dissent Op. 26.

Meanwhile, the Supreme Court has never applied a subjective test to a case about treatment in pretrial detention. Instead, the Court has differentiated sharply between its treatment of prisoners and pretrial detainees, noting that while the Eighth Amendment prohibits "wanton" punishment of convicted prisoners, the Fourteenth Amendment prohibits *all* punishment of pretrial detainees. *Bell*, 441 U.S. at 535. This is because "the State does not acquire the power to punish with which the Eighth Amendment is concerned until after it has secured a formal adjudication of guilt." *Id.* at 535 n.16 (citations omitted). As Blackstone wrote, when a pretrial detainee is "committed to the county [jail]," it must be "only for safe custody, and not for punishment." 4 William Blackstone, Commentaries on the Laws of England 300 (1769).

This Court has also recognized that claims by pretrial detainees and post-conviction prisoners are governed by different constitutional amendments, and initially imported Eighth Amendment standards into pretrial detention cases intending to *expand* rights, reasoning that it should analogize the rights of pretrial detainees to those of prisoners "to avoid the anomaly of extending greater constitutional protection to a convict than to one awaiting trial." *Roberts v. City of Troy*, 773 F.2d 720, 723 (6th Cir. 1985). And while later cases continued to

recognize that pretrial detainee claims "sound in the Due Process Clause of the Fourteenth Amendment rather than the Eighth Amendment," they simply repeated the proposition from *Roberts* that claims by pretrial detainees are "analyzed under the same rubric as Eighth Amendment claims brought by prisoners." *Villegas v. Metro. Gov't of Nashville*, 709 F.3d 563, 568 (6th Cir. 2013) (citing *Roberts*, 773 F.2d at 723).

Kingsley is an inconsistent decision of the Supreme Court warranting reconsideration of this standard. While this Court recognized long ago that it would be an "anomaly" to extend greater constitutional protection "to a convict than to one awaiting trial," *Roberts*, 773 F.2d at 723, *Kingsley* goes further by requiring greater constitutional protection for pretrial detainees, 576 U.S. at 400. The *Kingsley* Court concluded that Eighth Amendment culpable state of mind rules arising out of the prohibition of "wanton" punishment simply cannot be extended to pretrial detainees, who have a Fourteenth Amendment right to be free from all punishment. *Id*. "The language of the two Clauses differs," the Court reasoned, "and the nature of the claims often differs." *Id*. "And, most importantly, pretrial detainees (unlike convicted prisoners) cannot be punished at all . . . ." *Id*.[1] Thus, "the appropriate

[1] Amicus suggests that "*Kingsley* was derived from analysis of Fourth Amendment" claims. KY Jailers Amicus 6. While the *Kingsley* Court cited Fourth Amendment precedent, its focus was the distinction between the Fourteenth and Eighth Amendments as evidenced by its express, repeated comparisons of those two provisions. *Kingsley*, 576 U.S. at 400-01.

standard for a pretrial detainee's excessive force claim," *Kingsley* held, "is solely an objective one." *Id*. at 397.

II. The Panel Dissent, Defendant-Appellee Scott County, and *Amicus* Make Several Errors In Arguing For Retention Of The Subjective Standard For Pretrial Detainees' Medical Care Claims.

The panel dissent opined that *Kingsley*'s holding as to excessive force cannot abrogate the subjective component of the deliberate indifference standard based in part on the mistaken belief that "*Kingsley* cited only excessive force cases." Dissent Op. 27-28. Defendant echoed the point that *Kingsley* should be limited to the excessive force context. *See* Pet. Rehr'g En Banc ("PFREB") 10-11. But *Kingsley* explicitly interprets *Bell* to mandate the use of an objective standard for a broad range of claims brought by pretrial detainees: "The *Bell* Court applied [an] objective standard to evaluate a *variety of prison conditions*." *Kingsley*, 576 U.S. at 398 (emphasis added) (citing *Bell*, 441 U.S. at 541-43). Accordingly, it explained, "as *Bell* itself shows (and as our later precedent affirms), a pretrial detainee can prevail [on a due process claim] by providing only objective evidence." *Id*. Far from citing "only excessive force cases," Dissent Op. 27, then, *Kingsley* relies extensively on *Bell*—a case concerning a range of jail conditions outside the excessive force context—to reach its holding. Moreover, in explaining that precedent dictated an objective standard for claims by pretrial detainees, *Kingsley* did not speak

specifically of excessive force claims, but rather of "the challenged governmental action" more generally. 576 U.S. at 398.

Indeed, *Kingsley*'s reliance on non-force precedent and its application beyond the force context is well-recognized by this Court's sister circuits. *Darnell*, 849 F.3d at 36 ("*Kingsley*'s broad reasoning extends beyond the excessive force context[.]"); *Miranda*, 900 F.3d at 352 (explaining that "nothing in the logic the Supreme Court used in *Kingsley*" is limited to excessive force claims); *Castro*, 833 F.3d at 1070 ("[*Kingsley*] did not limit its holding to 'force' but spoke to 'the challenged governmental action' generally"). Each of these circuits recognized that *Kingsley*'s rejection of a subjective standard turns not on a distinction between force and non-force cases, but on a distinction between the legal status of pretrial detainees and convicted prisoners. *Miranda*, 900 F.3d at 350-52; *Darnell*, 849 F.3d at 34-35; *Castro*, 833 F.3d at 1069-70.

The panel dissent and the defendant nonetheless take a contrary view, arguing that the *Kingsley* Court limited the scope of its ruling to excessive force claims because it expressly declined to decide whether its "view that an objective standard is appropriate in the context of excessive force claims brought by pretrial detainees" also undermined "the use of a subjective standard in the context of excessive force claims brought by convicted prisoners." Dissent Op. 28 (quoting *Kingsley*, 576 U.S. at 402); *see also* PFREB 10-11. But this shows just the opposite. In declining to

decide what its holding meant for convicted prisoners bringing the same claim, the *Kingsley* Court only underscored further that its focus was on the status of the individual, not the type of claim. The Court made this even clearer by discounting the relevance of two cases because they concerned "excessive force claims brought by convicted prisoners under the Eighth Amendment[] . . . , not claims brought by pretrial detainees under the Fourteenth Amendment[]." *Kingsley*, 576 U.S. at 400. The type of claim (excessive force or otherwise) was therefore less important than the status of the individual (pretrial or post-conviction) in determining the appropriate standard.

This makes sense. Limiting *Kingsley* to excessive force cases would create an illogical result: If detainees can win excessive force cases with objective evidence alone, but must provide state-of-mind evidence in all other types of conditions cases, jail staff will enjoy the least deference in excessive force litigation. That cannot be right. The Supreme Court has stated that corrections personnel must have the most deference in the excessive force context, where guards must act "quickly and decisively," *Hudson v. McMillian*, 503 U.S. 1, 6 (1992), making split-second decisions "in haste, under pressure, and frequently without the luxury of a second chance," *Whitley*, 475 U.S. at 320.

Nevertheless, the panel dissent and amicus persist in arguing that excessive force cases are necessarily different because "punitive intent customarily may be

inferred" with respect to "affirmative acts that amount to excessive force," but "the same inference does not arise from the deprivation of adequate medical care," which rests on a "failure to act." Dissent Op. 30; *see also* KY Jailers Amicus 9. This misses the mark as *Kingsley* expressly notes that proof of punitive intent is no longer required in cases brought by pretrial detainees: "*Bell*'s focus on 'punishment' does not mean that proof of intent (or motive) to punish is required for a pretrial detainee to prevail on a claim that his due process rights were violated." *Kingsley*, 576 U.S. 398. The dissent's insistence that "inquiry into a party's intent" is a required component of a Fourteenth Amendment claim, *see* Dissent Op. 30, is therefore simply incorrect under controlling law.

At bottom, the dissent, defendant, and amicus cling to this Court's "*Farmer*-inspired deliberate indifference jurisprudence" without properly considering the ways in which *Kingsley* undermined it. Dissent Op. 29; *see also* PFREB 11-12; KY Jailers Amicus 7. But that makes little sense. *Farmer* held that the subjective deliberate indifference standard applies to convicted prisoners litigating under the Eighth Amendment. *Farmer*, 511 U.S. at 837-40. In fact, as the panel decision in this case recognized, the Court opted for the "subjective definition" of deliberate indifference in *Farmer* precisely because "it best comports with the text of the Eighth Amendment." Op. 11. Now that *Kingsley* reiterated that Eighth Amendment and

Fourteenth Amendment cases are fundamentally different, the subjective standard articulated in *Farmer* no longer controls.

III. The Panel Majority Adopted The Proper Objective Test.

The panel dissent objects to the "novel" standard adopted by the majority for pretrial detainees' medical care claims. Dissent Op. 31. But the "novel" standard is equivalent to the familiar civil law recklessness standard used in other contexts. Indeed, the Supreme Court called the very standard adopted by the panel majority "objective" deliberate indifference, said it was equivalent to civil law recklessness, and explained that it would be satisfied where a defendant "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 836-37; *compare* Op. 13 (describing exact same standard). This not-so-novel standard has also been utilized to evaluate pretrial detainees' medical care claims for years in other circuits. *See, e.g.*, *Darnell*, 849 F.3d at 35 (explaining that objective standard satisfied where defendant "knew, or should have known, that the condition posed an excessive risk to health or safety" and nonetheless failed to act); *Castro*, 833 F.3d at 1071 (explaining that objective test requires showing that defendant did not take reasonable measure to abate risk "even though a reasonable officer in the circumstances would have appreciated the high degree of risk involved—making the consequences of the defendant's conduct obvious").

The panel dissent's concern that this standard "is tantamount to determining whether th[e] official was negligent" is similarly without basis. Dissent Op. 31. This standard differs from negligence in two ways. First, the defendant must make an intentional decision about the plaintiff's medical treatment. As *Kingsley* explained in the use-of-force context, the act or decision must not be accidental or inadvertent: "[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." 576 U.S. at 396. Similarly, circuits applying an objective standard to medical care claims require the act or failure-to-act to be intentional, explaining that jail staff would not be liable under the objective standard if they "had 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." *Miranda*, 900 F.3d at 354; *see also Castro*, 833 F.3d at 1070; *Darnell*, 849 F.3d at 36. Requiring the act or omission to be intentional prevents the standard from penalizing merely negligent conduct. Second, the objective standard requires a plaintiff to show that the defendant disregarded a risk that was either known or "so obvious" that it should have been known. *Farmer*, 511 U.S. 836. This goes past mere negligence, which requires the plaintiff only to show that the defendant acted unreasonably, and rises to the level of civil law recklessness, which requires action in disregard of obvious risk. *See Gordon*, 888 F.3d at 1124-25

(explaining objective standard is greater than negligence standard); *Darnell*, 849 F.3d at 36 (same); *Miranda*, 900 F.3d at 353-54 (same).

IV. The Panel Majority Was Correct To Reach The Issue.

This Court has declined to decide the *Kingsley* question in previous cases where the plaintiff lost under both standards, where the district court did not decide the issue, or where neither party briefed the question. Op. 8 n.2. None of those barriers to resolution were present in this case. The district court explained that it would apply the subjective test "until the Sixth Circuit changes the law," *id*., and the parties both briefed the issue on appeal, Brawner Opening Br. 26-29; Scott County Response Br. 15-18. And although the panel majority found a constitutional violation no matter which standard was applied, it was necessary to decide the applicability of the objective standard as the district court frankly stated that it "will charge the jury" under the subjective standard "until" the Sixth Circuit changed the law. Op. 8 n.2. This Court's sister circuit similarly reached the *Kingsley* question for the sake of properly charging the jury on remand. *Miranda*, 900 F.3d at 352 (explaining it was "appropriate to address the proper standard" because "the answer may make a difference in the retrial"). Arguments by the panel dissent, the

defendant, and amicus that the panel majority should not have reached the question are thus without merit. Dissent Op. 23; PFREB 13-15; KY Jailers Amicus 1-3.[2]

Clarifying the standard at this stage is particularly important because there is a clear difference in how a jury would be instructed under the two standards. Under the subjective standard, the jury must find that the defendants had knowledge of the risk of harm. The jury could find a defendant liable by relying on the fact that the risk was obvious; alternatively, it could conclude that a defendant is not liable if he did not subjectively perceive the risk *even if* the risk was obvious. Meanwhile, under the objective standard, the jury must find for the plaintiff if it concludes that the risk of harm was obvious. While this is an important distinction, and one that required the panel majority to resolve the *Kingsley* question in this case, the panel dissent is correct that the objective standard "may well yield results largely the same as the . . . subjective test," Dissent Op. 32, particularly at earlier stages of litigation. Indeed, as the panel majority points out, this Court has decided many cases where the choice of standard made no difference to the outcome of the case. *See* Op. 8 n.2. This suggests the new standard will have limited impact and there is little reason for the *en banc* court's involvement.[3]

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[2] The panel dissent went so far as to say that the panel majority's discussion of *Kingsley* is merely dicta. Dissent Op. 24. If that's true, then this case is not sufficiently important for the *en banc* court's involvement.

[3] The observation by the panel dissent that the two standards will yield the same results in many cases cuts against the suggestion by amicus that this is a "question[]

CONCLUSION

For the foregoing reasons, this Court should deny the petition for rehearing *en banc*.

Date: November 2, 2021

Respectfully submitted,

s/ Richard E. Collins

Richard E. Collins
STANLEY, KURTZ & COLLINS, PLLC
422 S Gay Street, Suite 300
Knoxville, TN 37902
(865) 522-9942
richard@knoxvilleattorney.com

Megha Ram
RODERICK & SOLANGE
MACARTHUR JUSTICE CENTER
501 H Street NE, Suite 275
Washington, DC 20002
(202) 869-3438
megha.ram@macarthurjustice.org

David M. Shapiro
RODERICK & SOLANGE
MACARTHUR JUSTICE CENTER
NORTHWESTERN PRITZKER
SCHOOL OF LAW
375 East Chicago Avenue
Chicago, IL 60611
(312) 503-0711
david.shapiro@law.northwestern.edu

Counsel for Plaintiff-Appellant
Tammy Brawner

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of exceptional importance" that "affects the jails of the Commonwealth of Kentucky and all other officials charged with the care and custody of pretrial detainees." KY Jailers Amicus 10.

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), I certify that:

1. This brief complies with the type-volume limitation of Fed. R. App. P. 35(b)(2)(A) because this brief contains 3,898 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Office 365 in 14-point Times New Roman typeface.

Date: November 2, 2021

s/ Richard E. Collins
Richard E. Collins

CERTIFICATE OF SERVICE

I hereby certify that on November 2, 2021, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Sixth Circuit by using the appellate CM/ECF system.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

Date: November 2, 2021

s/ Richard E. Collins
Richard E. Collins