No. 21-1210

IN THE
Supreme Court of the United States

SCOTT COUNTY, TENNESSEE,

Petitioner,

v.

TAMMY BRAWNER,

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

Should this Court overturn the Sixth Circuit's adoption of an objective test for medical care claims brought by pretrial detainees and instead adopt a subjective test even though this Court has *only* applied subjective tests to claims by post-conviction prisoners and has *never* done so with respect to claims by pretrial detainees?

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INTRODUCTION

This case is a remarkably bad vehicle to review the question presented. Even if this Court rules in petitioner's favor, it would not impact the outcome of the case. Both the panel majority and dissent agree that respondent would succeed regardless of whether the objective or subjective standard applies. Pet. App. 12 (majority); *id.* at 35 (dissent). The dissent even characterizes the majority's discussion of the question presented as "non-binding dicta" since it has no impact on the outcome of the case. *Id.* at 38. Put simply, petitioner cannot show—and, in fact, does not even attempt to show—that resolution of the question presented would have any effect on the outcome.

Contrary to handwringing by petitioner and *amici*, resolution of the question presented also would have limited practical effect on outcomes generally. The dissenting judge—whose position petitioner urges this Court to adopt—reasons that "it is not entirely clear how [the majority's] objective reasonableness standard differs from [the Sixth Circuit's] traditional subjective indifference standard." *Id.* at 50. Where even the dissent cannot tease apart the difference in the two standards, it makes little sense to suggest that the change in standard is one of "profound importance," Pet. 20, or that it "significantly raises the bar," National Troopers Amicus 24.

In any case, even if this were the right vehicle, and even if the question presented had far-reaching implications, this Court's intervention would be premature. Three of the four circuits that petitioner relies on to support its side of the split have addressed the issue

not in reasoned opinions but with cursory analysis, often relegated to footnotes. Moreover, the Sixth Circuit's own position is not yet clear: Just months after the decision below, a subsequent Sixth Circuit decision purported to re-impose a subjective standard for medical care claims by pretrial detainees. *Trozzi v. Lake Cnty.*, 29 F.4th 745 (6th Cir. 2022). This petition fails to satisfy any of the traditional criteria for certiorari.

The petition is also wrong on the merits. In the decision below, 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. Furthermore, the Sixth Circuit's decision is consistent with the writings of such founding-era authorities as Eden and Blackstone, who recognized that pretrial detainees enjoy broader legal protection than post-conviction prisoners.

Finally, this Court has repeatedly denied petitions for certiorari raising the question presented, even without the glaring vehicle problems present here. *See Strain v. Regalado*, 142 S. Ct. 312 (2021); *Dart v. Mays*, 142 S. Ct. 69 (2021); *Cnty. of Orange v. Gordon*, 139 S. Ct. 794 (2019). This Court should once again deny review.

STATEMENT OF THE CASE

I. Legal Framework

Conditions of confinement claims brought by convicted prisoners arise under the Eighth Amendment

and are governed by subjective standards of fault.[1] In an excessive force claim, a convicted prisoner must prove that an officer defendant acted "maliciously and sadistically to cause harm." *Hudson v. McMillian*, 503 U.S. 1, 6–7 (1992). A different subjective standard—subjective deliberate indifference—governs other conditions claims brought by convicted prisoners, including claims regarding inadequate medical care, failure to protect, and living conditions.[2] That standard requires showing that a defendant subjectively knew of, but nonetheless disregarded, a substantial risk of serious harm.[3]

Unlike convicted prisoners' conditions claims, pretrial detainees' conditions claims arise under the Due Process Clauses of the Fifth and Fourteenth Amendments.[4] Prior to this Court's 2015 decision in *Kingsley v. Hendrickson*, 576 U.S. 389 (2015), the lower courts borrowed the subjective Eighth Amendment standards that apply to convicted prisoners' Eighth Amendment claims and applied those tests to Fourteenth

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[1] *Farmer v. Brennan*, 511 U.S. 825, 832 (1994); *Hudson v. McMillian*, 503 U.S. 1, 8 (1992); *Wilson v. Seiter*, 501 U.S. 294, 298 (1991); *Whitley v. Albers*, 475 U.S. 312, 318–19 (1986).

[2] *Farmer*, 511 U.S. at 828 (failure to protect claim); *Wilson*, 501 U.S. at 303 (living conditions claim); *Estelle v. Gamble*, 429 U.S. 97, 106 (1976) (medical care claim).

[3] *Farmer*, 511 U.S. at 839–40.

[4] *Kingsley v. Hendrickson*, 576 U.S. 389, 400 (2015); *Bell v. Wolfish*, 441 U.S. 520, 535-36 (1979); *Schall v. Martin*, 467 U.S. 253, 263–64 (1984); *Block v. Rutherford*, 468 U.S. 576, 591 (1984).

Amendment conditions claims brought by pretrial detainees.[5]

In *Kingsley*, however, this Court held that when an officer uses force against a pretrial detainee, "the relevant standard" to determine excessiveness "is objective not subjective." 576 U.S. at 395. In other words, "the defendant's state of mind is not a matter that a plaintiff is required to prove." *Id*. *Kingsley* explained that "the language of the two Clauses"—the Cruel and Unusual Punishments Clause and the Due Process Clause—"differs." *Id.* at 400. "[M]ost importantly, pretrial 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)). *Kingsley* therefore abrogated lower court precedent that applied a subjective standard to pretrial detainees' excessive force claims. *Id*. at 395–97.

Kingsley did not expressly consider whether an objective standard of fault also governs non-use-of-force conditions claims brought by pretrial detainees. To date, four of the five circuits to decide that question in

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[5] *See Burrell v. Hampshire Cnty.*, 307 F.3d 1, 7 (1st Cir. 2002); *Caiozzo v. Koreman*, 581 F.3d 63, 72 (2d Cir. 2009); *Reynolds v. Wagner*, 128 F.3d 166, 174 (3d Cir. 1997); *Young v. City of Mount Ranier*, 238 F.3d 567, 575 (4th Cir. 2001); *Gibbs v. Grimmette*, 254 F.3d 545, 548 (5th Cir. 2001); *Spears v. Ruth*, 589 F.3d 249, 254 (6th Cir. 2009); *Minix v. Canarecci*, 597 F.3d 824, 831 (7th Cir. 2010); *Coleman v. Parkman*, 349 F.3d 534, 538 (8th Cir. 2003); *Clouthier v. Cnty. of Contra Costa*, 591 F.3d 1232, 1242 (9th Cir. 2010); *Barrie v. Grand Cnty., Utah*, 119 F.3d 862, 868 (10th Cir. 1997); *Goebert v. Lee Cnty.*, 510 F.3d 1312, 1326 (11th Cir. 2007).

reasoned opinions—as opposed cursory analysis usually in *ipse dixit* footnotes—have required an objective standard.[6]

II. Factual Background

Eight days after her booking into the Scott County Jail in Tennessee, Brawner suffered multiple seizures and was taken to the hospital where she was diagnosed with epilepsy. Pet. App. at 5. 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 forbidden from taking 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 3–4. Three of the four medications Brawner had been prescribed were controlled substances. *Id*. at 4.

Upon returning to the jail, Nurse Massengale conducted an examination of Brawner. *Id*. at 5. At the jail doctor's instruction, Nurse Massengale discontinued

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[6] *Castro v. Cnty. of Los Angeles*, 833 F.3d 1060, 1070–71 (9th Cir. 2016) (en banc) (adopting objective standard); *Darnell v. Pineiro*, 849 F.3d 17, 34–35 (2d Cir. 2017) (same); *Miranda v. Cnty. of Lake*, 900 F.3d 335, 350 (7th Cir. 2018) (same); Pet. App. 1–52 (same); *Strain v. Regalado*, 977 F.3d 984 (10th Cir. 2020), *cert. denied*, 142 S. Ct. 312, 211 L. Ed. 2d 147 (2021) (adopting subjective standard despite *Kingsley*).

the anti-epilepsy medication prescribed by the hospital and instead administered daily doses of an anti-seizure medication. *Id*. Four days later, Brawner suffered another seizure. *Id.*

The next day, Nurse Massengale performed the state-required examination. *Id*. Under Tennessee law, this examination must occur within fourteen days of admission, and the examining nurse is required to check for "medication taken" and "special health requirements." *Id*. at 4. At this examination, Nurse Massengale noted that Brawner suffered from a "seizure disorder or cerebral trauma." *Id*. at 5.

Two days later, Brawner was observed acting erratically, including by drinking out of the toilet. *Id*. at 6. A social worker conducted an evaluation and concluded that the symptoms were likely the result of drug withdrawal. *Id*. By that time, Brawner had gone nearly two weeks without taking her prescribed medications. *Id*. at 5–6. It does not appear that Nurse Massengale consulted with the jail doctor after receiving the evaluation. *Id*. at 6.

The next day, Brawner suffered seizure after seizure. *Id*. at 6. 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*. She suffered permanent and debilitating injuries as a result of prolonged seizure activity. *Id*. at 7.

III. Procedural Background

Brawner brought suit against Scott County and various jail staff. *Id*. Among other claims not relevant at this stage of the proceedings, she asserted a claim

under 42 U.S.C. §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.* The court concluded that Brawner's claim against the county first required her to prove that an individual officer had violated her right to adequate medical care. *Id.* at 61, 70. And it found that there was no such individual violation because Brawner did not satisfy the subjective component of her deliberate indifference claim; that is, according to the district court, Brawner did not show that any individuals had actual, subjective knowledge that Brawner faced a substantial risk of serious harm. *Id.* at 72. The district court also addressed and rejected Brawner's other theories of county liability. *Id.* at 8–9.

On appeal, the Sixth Circuit concluded that Brawner presented evidence from which a reasonable jury could find that Nurse Massengale violated her constitutional rights and that this violation resulted from the County's policies. *Id.* at 22. In reaching this conclusion, the majority explained that in light of this Court's "clear delineation" in *Kingsley* between claims brought by convicted prisoners and pretrial detainees, "applying the same analysis to these constitutionally distinct groups is no longer tenable." *Id.* at 20. Accordingly, it held that an objective standard of fault governs medical care claims by pretrial detainees. *Id.* at 21.

Although the Sixth Circuit reached this conclusion, it frankly acknowledged that Brawner was entitled to reversal under both the old subjective standard and the new objective standard. *Id.* at 12. Under either standard, it explained, Brawner could show an individual violation by Nurse Massengale, and that individual violation could serve as the basis for her claim against the county. *Id.*

One judge on the panel—who concurred in part and dissented in part—emphasized that the majority should not have adopted a new standard once it determined that Brawner would succeed even under the old standard. *Id.* at 35. That is, because "the case could be decided on alternative grounds," adopting a new standard was "neither absolutely necessary" nor "unavoidable" to the appeal's disposition. *Id.* at 35, 37. Accordingly, he explained, the majority's discussion of the legal standard was merely "non-binding dicta." *Id.* at 37–38. He further reasoned that "it is not entirely clear how [the majority's] objective reasonableness standard differs from [the Sixth Circuit's] traditional subjective indifference standard." *Id.* at 50.

Petitioner filed a petition for rehearing *en banc*, which was denied. *Id.* at 90.

REASONS FOR DENYING THE PETITION

This case has insurmountable vehicle problems; the split needs time to percolate; and there is little practical difference between the two standards. Even if none of this precludes certiorari, the decision below should not be disturbed as it is consistent with this Court's longstanding precedent and the writings of founding-era authorities. Thus, the Court should deny the petition.

I. This Case Is An Exceedingly Poor Vehicle Because The Choice Of Standard Is Irrelevant To The Outcome.

This case is a remarkably bad vehicle because the question presented is obviously not outcome-determinative. Both the panel majority and dissent explicitly state that Brawner would succeed no matter which standard applied. Pet. App. 12 (panel majority); *id.* at 35 (panel dissent). The dissent went even further, characterizing the majority's discussion of the question presented here as "non-binding dicta." *Id.* at 38. It explained that the majority should not have reached the question presented because "the case could be decided on alternative grounds," *id.* at 35, and noted that "resolving the *Kingsley* issue" was neither "necessary" nor "unavoidable," *id.* at 37. In fact, even petitioner does not argue that resolution of this issue in its favor would make any practical difference to the outcome of this case. So, if this Court decided the question presented here, it would be issuing a quintessential advisory opinion. The irrelevance of the question presented to the outcome makes this case a terrible vehicle for review.[7]

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[7] On top of that, and at the risk of gilding the lily, the question presented concerns the proper standard for deliberate indifference claims against *individual* defendants, but the only claim remaining in this case is against petitioner—a County. Pet. App. 7. And the Sixth Circuit has yet to decide whether municipal liability is contingent on a finding of individual liability. *Winkler v. Madison Cnty.*, 893 F.3d 877, 900 (6th Cir. 2018) (explaining that while some Sixth Circuit caselaw "broadly states that the imposition of municipal liability is contingent on a finding of individual liability under § 1983, other cases from this circuit have indicated

II. The Circuit Split Is Neither As Deep Nor As Intractable As Petitioner Claims.

Petitioner claims a "deep" and "intractable" split among the circuits "as to whether the Court's holding in *Kingsley* can be expanded to claims by pretrial detainees for insufficient medical care." Pet. 10, 13. The split is not nearly as deep as petitioner imagines, and the issue requires further percolation in the lower courts.

Three of the four circuits that petitioner would put on its side of the split—the Fifth, Eighth, and Eleventh Circuits—have given this issue almost no consideration, instead relegating any discussion of it to footnotes. *See* Pet. 10 (citing *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 v. Sheriff, Seminole Cnty.*, 871 F.3d 1272, 1279 n.2 (11th Cir. 2017)); *see also id.* at 12–13 (similar).

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that the principle might have a narrower application"). Indeed, this very question is the subject of a circuit split. *Compare Fagan v. City of Vineland*, 22 F.3d 1283, 1294 (3d Cir. 1994) (holding "that a municipality can be liable . . . even if no individual officer participating in the chase violated the Constitution"), *with McCoy v. City of Monticello*, 411 F.3d 920, 922 (8th Cir. 2005) (explaining that "individual liability first must be found" before municipal liability can attach). So, even if the question presented is answered in petitioner's favor, and even if petitioner convinces the Sixth Circuit to reverse itself and find that no individual violation is possible under a subjective standard, the outcome of this case against the County *still* may not change.

In any event, some of the footnotes leave the issue undecided. The Eleventh Circuit, for instance, explains in a footnote that it "cannot and need not reach this question." *Dang*, 871 F.3d 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 due to deliberate indifference . . . 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.

The Sixth Circuit itself does not cleanly fall on either side of the split. Just months after deciding this case, the Sixth Circuit took the opposite view, holding that a defendant could not be liable unless he "*knew*" that his conduct "would pose a serious risk to the pretrial detainee." *Trozzi*, 29 F.4th at 757–58 (emphasis added). That is the same standard urged by petitioner in this case. Pet. 20.

III. The Question Presented Is Not One Of "Profound Importance."

Petitioner (and amici) argue that the question presented is one of "profound importance" because the decision below and concurring circuits have "essentially constitutionalized medical negligence" by adopting objective legal standards for medical care claims. Pet. 20. This is flatly wrong. Petitioner's assertion has been refuted by every single court of appeals that has adopted an objective standard for medical care claims post-*Kingsley*. And it is contrary to *Kingsley* itself.

To start, Petitioner suggests that "[i]t is the inquiry into the subjective component that distinguishes a tort from a constitutional violation." Pet. 21. But applying this logic would require finding that *Kingsley* established a negligence standard when it held that pretrial detainees could make out excessive force claims under an "objective not subjective" standard. 576 U.S. at 395. Of course, *Kingsley* did no such thing; rather, it made clear that "liability for *negligently* inflicted harm is categorically beneath the threshold of constitutional due process." *Id*. (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.

Every court of appeals that has adopted an objective standard for medical care claims post-*Kingsley* has relied on this reasoning to ensure that objective standards do not devolve into negligence standards in the medical care 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 v. Cnty. of Lake*, 900 F.3d 335, 354 (7th Cir. 2018). The Second and Ninth Cir-

cuits have similarly held that negligence is insufficient. *Darnell v. Pineiro*, 849 F.3d 17, 36 & n.16 (2d Cir. 2017) (expressly rejecting defendants' argument that an objective standard would impose liability for "mere negligence"); *Castro v. Cnty. of Los Angeles*, 833 F.3d 1060, 1071 (9th Cir. 2016) (en banc) (holding that a pretrial detainee "must prove more than negligence").

The decision below also explains that "negligence is insufficient" under the objective standard it sets forth. Pet. App. 21. That makes sense because this case has nothing to do with accidental or inadvertent conduct: Nurse Massengale made a series of *intentional* decisions about when and how to seek additional medical care for petitioner. As the decision below explains, a jury could find that in making those decisions, Nurse Massengale "recklessly failed to act reasonably" to mitigate obvious risks to petitioner. *Id.* ("[The] defendant must . . . [act] recklessly in the face of an unjustifiably high risk of harm that is either known or so obvious that it should be known.") (quoting *Farmer*, 511 U.S. at 836). 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.

Amici pick up where Petitioner left off by arguing that the decision below "significantly raises the bar for officers." National Trooper Amicus 24. But even the dissenting opinion below—the very position petitioner and *amici* urge this Court to adopt—reasons that "it

is not entirely clear how [the majority's] objective reasonableness standard differs from [the Sixth Circuit's] traditional subjective indifference standard." Pet. at 50. Where even the dissent cannot tease apart the difference in the two standards, it makes little sense to suggest that the change in standard is one of "profound importance." Pet. 20.[8]

IV. The Decision Below Is Correct.

The Sixth Circuit got it right.

1. This Court has been clear 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).

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[8] While some *amici* make various doomsday predictions, they do not suggest that any of them have actually come to pass in the circuits that adopted objective tests years ago. *See* National Troopers Amicus 25; Counties Amicus 9–10. *Amicus* Kentucky Jailers Association makes a slippery slope argument that is particularly baseless. It argues that some courts have "even argued that the new deliberate indifference standard developed post-*Kingsley* should govern inaction claims against municipalities." Kentucky Jailers Association Amicus 11. But *Monell* claims are already governed by an objective standard—as *this* Court said. *Farmer*, 511 U.S. at 841 ("It would be hard to describe the *Canton* understanding of deliberate indifference [regarding *Monell* liability]. . . as anything but objective."). *Amicus* Kentucky Jailers Association's slippery slope argument is thus nonsensical.

This Court has been equally clear that subjective standards apply only "when it is claimed that the official has inflicted cruel and unusual punishment" under the Eighth Amendment. *Wilson v. Seiter*, 501 U.S. 294, 299 (1991). In such cases, the "source of the [subjective] intent requirement is not the predilections of [the Supreme] Court, but the Eighth Amendment itself." *Id.* Thus, in *Farmer v. Brennan*, this Court reiterated that the Eighth Amendment prohibits "wanton" punishment, and therefore requires proof of a "sufficiently culpable state of mind." 511 U.S. at 834 (quoting *Wilson*, 501 U.S. at 297). It went on to explain that a subjective deliberate indifference standard therefore "comports best" with the text of the Eighth Amendment. *Id.* at 837.

Indeed, this is something both the panel majority and the panel dissent agree upon. The majority recognizes that 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." Pet. App. 17. And the dissent similarly 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." Pet. App. 41.

Meanwhile, this 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, *Es-*

telle, 429 U.S. at 104, the Fourteenth Amendment prohibits *all* punishment of pretrial detainees, *Bell*, 441 U.S. at 535.

Kingsley is the Court's most recent pronouncement on this subject. In *Kingsley*, this Court explained that subjective tests arising out of the prohibition of cruel and unusual punishment under the Eighth Amendment cannot be extended to pretrial detainees, who have a Fourteenth Amendment right to be free from *all* punishment. *Kingsley*, 576 U.S. 400. "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*. Thus, "the appropriate standard for a pretrial detainee's excessive force claim," *Kingsley* held, "is solely an objective one." *Id*. at 397.

While *Kingsley* concerned an excessive force claim, its discussion of objective standards extends to "challenged governmental action" more generally. *Id*. at 398. *Kingsley* explicitly interprets this Court's prior decision in *Bell v. Wolfish* to mandate 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, "as *Bell* itself shows (and as our later precedent affirms), a pretrial detainee can prevail [on a Fourteenth Amendment claim] by providing only objective evidence." *Id*.

The Supreme Court's differentiation between the treatment of pretrial detainees and post-conviction prisoners also has deep roots in legal history. Eden found it "contrary [] to public justice" to "throw the accused and convicted . . . into the same dungeon." 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. *See 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." 4 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. Petitioner argues that the decision below "fail[ed] to consider and appreciate the difference between excessive force and inadequate medical care claims" and that the distinction matters because the "former is based on an action theory[] while the latter is oftentimes based on inaction." Pet. 17. This argument is a red herring.

As an initial matter, in the deliberate indifference to medical care context, action versus inaction is often just a matter of terminology. If a nurse gave Tylenol to a detainee who needed an immediate trip to the emergency room, did she fail to act or did she choose one course of action (providing Tylenol) over another (calling an ambulance)? Petitioner's distinction between action and inaction thus boils down to semantics.

Indeed, contrary to petitioner's suggestion, Pet. 17–18, this Court has rejected that very distinction. *Farmer* repeatedly treated action and inaction together in discussing various standards of liability. *See Farmer*, 511 U.S. at 834 (discussing liability under the

Eighth Amendment for a prison official's "act or omission"); *id.* at 835 (same); *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.

The language petitioner cites for the contrary position actually has nothing to do with that distinction. Petitioner observes that in *Farmer*, this Court said the malicious-or-sadistic test applies to Eighth Amendment excessive force claims, while the subjective deliberate indifference test applies to Eighth Amendment medical care claims. Pet. 17–18. But that was not because of any distinction between action and inaction; rather, it was because excessive force cases often involve decisions made "in haste, under pressure, and frequently without the luxury of a second chance." *Farmer*, 511 U.S. at 835 (quoting *Hudson v. McMillian*, 503 U.S. 1, 6 (1992)). Meanwhile, decisions in the medical care context—both decisions to act *and* decisions not to act—are usually made with more time for deliberation.

Indeed, limiting objective standards to excessive force cases—as petitioner urges—would create an illogical result precisely because excessive force cases

involve split-second decisions. 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 petitioner urges), jail staff will enjoy the least deference in excessive force litigation. That cannot be right. Corrections personnel are entitled to the *most* deference in the excessive force context, precisely 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*, 475 U.S. at 320. Because an objective standard applies in that context, it must also apply in the medical care context.

CONCLUSION

The Court should deny certiorari.

JUNE 2022

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