No. 19-5623

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

TAMMY BRAWNER
Plaintiff-Appellant

v.

SCOTT COUNTY, TENNESSEE
Defendant/Appellee

On appeal from the United States District Court
For the Eastern District of Tennessee
at Knoxville
Case No. 3:17-CV-00108

AMICUS BRIEF OF THE KENTUCKY JAILERS ASSOCIATION IN SUPPORT OF APPELLEE'S PETITION FOR REHEARING EN BANC

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STATEMENT OF IDENTITY OF AMICUS CURIAE AND COUNSEL

The Kentucky Jailers Association is a nonprofit association whose members include the constitutionally elected Jailers and appointed Jail Administrators in the Commonwealth of Kentucky. The goal of the Association is to support, educate, and promote the best interests of Jailers in the Commonwealth of Kentucky. Because the Majority decision in *Brawner* purports to set a new constitutional standard for evaluating medical claims of pretrial detainees, a population in the custody and care of Jailers in the Commonwealth of Kentucky, the Kentucky Jailers Association offers this amicus curiae brief in support of the Petition for Rehearing En Banc. In accordance with FRAP 29(a)(4)(E)(i), Counsel for the Kentucky Jailers Association, D. Barry Stilz, Jeffrey C. Mando, and Claire E. Parsons, undersigned, affirm that they authored this brief in whole without financial support or contribution from any third-party.

ARGUMENT

I. THE MAJORITY DECISION CONFLICTS WITH AN OVERWHELMING AMOUNT OF AUTHORITY OF THIS COURT

In *Brawner v. Scott County*, 2021 U.S. App. LEXIS 28722 (6th Cir. Tenn. September 22, 2021), the Majority unnecessarily answered a question about the impact that the Supreme Court's decision in *Kingsley v. Hendrickson*, 576 U.S. 389 (2015) had on the deliberate indifference claims of pretrial detainees arising under the Fourteenth Amendment. It found the evidence sufficient to satisfy the deliberate indifference standard that, up until its own decision, the Sixth Circuit had steadfastly applied[1] to Fourteenth Amendment denial of medical needs claims from pretrial detainees. *Id.* at *25 – 26. Nonetheless, it advanced a totally new constitutional standard for evaluating such claims. *Id.* at *23 – 24.

When past courts of this Circuit had come to this same crossroads, they chose the path of restraint, even if they acknowledged that *Kingsley* presented questions that a later court (or perhaps a higher court) might need to address.

[1] In addition to the authority cited below relating to judicial restraint, this Court in a published decision issued two years after *Kingsley*, applied the traditional deliberate indifference standard to the alleged denial of medical care claim of a pretrial detainee in *Winkler v. Madison County*, 893 F.3d 877 (6th Cir. 2018). Though *Kingsley* was not addressed int hat decision, en banc review was requested on that basis and this Court declined further hearing. *Winkler v. Madison Cty.*, 2018 U.S. App. LEXIS 21323 (6th Cir. July 31, 2018). The *Brawner* Majority cited to *Winkler* in its description of municipal liability but did not address it as a precedent that contradicted its expansion of *Kingsley* to medical claims. *See Brawner* at *10 – 23.

Though pretrial detainees had frequently encouraged it to do so, the Sixth Circuit has consistently refrained from extending *Kingsley* to medical needs claims made by pretrial detainees. *See Troutman v. Louisville Metro Dept. of Corrections*, 979 F.3d 472, FN8 (6th Cir. 2020); *Griffith v. Franklin County*, 975 F.3d 554 (6th Cir. 2020); *Bard v. Brown County*, 970 F.3d 738 (6th Cir. 2020); *Beck v. Hamblen County*, 969 F.3d 592 (6th Cir. 2020); *Cameron v. Bouchard*, 815 Fed. Appx. 978 (6th Cir. 2020); *Martin v. Warren County*, 799 Fed. Appx. 329 (6th Cir. 2020); *J.H. v. Williamson County*, 951 F.3d 709 (6th Cir. 2020); *Powell v. Med. Dept. Cuyahoga County Corr. Ctr.*, 2019 U.S. App. LEXIS 10461 (6th Cir.); *Richmond v. Huq*, 885 F.3d 928 (6th Cir. 2018).

The Majority in *Brawner* did not take this body of authority for what it was: solid precedent urging judicial restraint. Instead, it viewed them as *carte blanche* to answer a question that did not need to be answered. Without acknowledging the pattern of judicial restraint demonstrated in this Circuit, the Majority collectively discarded all of these past precedents by claiming that the courts had merely "not yet decided" or "declined to resolve" the issue into which it chose to delve. *Brawner*, *supra*, at *14, *20.

In short, the Majority in *Brawner* focused on whether they could answer a constitutional question instead of focusing on whether they should. As the Dissent pointed out, the past decisions of the Sixth Circuit do not signify a lacuna that had

to be filled. *Id.* at *39 – 40 (J. Readler dissenting). Rather, they are authorities that indicate this Court's long-standing adherence to answering constitutional questions only when it is "absolutely necessary." *Id.* at *41. The Majority's only explanation for failing to exercise the restraint that past panels of this Court have wisely adhered to is the notion that *Kingsley* compelled a different result. *Id.* at *19 – 20. The flaws in transposing *Kingsley*, a decision about an excessive force claim that draws heavily from the law of the Fourth – and not Fourteenth Amendment – will be discussed further below. But, assuming *arguendo* that *Kingsley* represented such a compulsion, the Majority in *Brawner* did not explain why past panels of this Court did not feel so compelled. *See Id.*

Indeed, a review of Sixth Circuit authority and the decisions from several other Circuits demonstrate that *Kingsley* did not compel the Majority to be so proactive. The Majority in *Brawner* determined that application of the existing standard, deliberate indifference, was sufficient to resolve the issues before it. Thus, the Majority should have applied the deliberate indifference standard and reserved the *Kingsley* question for another day.

II. THE MAJORITY MISREADS AND MISAPPLIES *KINGSLEY*

They Majority also misunderstood the impact of the *Kingsley* holding. In particular, it failed to appreciate two critical distinctions between the present case

and *Kingsley*: (1) the distinction between an action theory (such as excessive force) and an inaction theory (such as a deprivation of medical care); and (2) the distinction between theories arising under the Fourth, Eight and Fourteenth Amendments. The failure to appreciate these differences caused the Majority to misunderstand the true meaning of *Kingsley* and its relevance to the facts at issue here.

In its take on *Kingsley*, the Majority focused on the punishment aspect that the Supreme Court used as one prong of its reasoning for concluding that proof of a malevolent subjective intent is not required for a pretrial detainee to pursue an excessive force claim under the Fourteenth Amendment. *Brawner*, *supra*, at *20-21. The Majority overlooked, however, the Supreme Court's distinction between the differing kinds of intent. *See Id.* For action theories like excessive force, the Supreme Court in *Kingsley* keenly noted that the there are two separate categories of intent:

> The first concerns the defendant's state of mind with respect to his physical acts – ***i.e.***, his state of mind with respect to the bringing about of certain physical consequences in the world. The second question concerns the defendant's state of mind with respect to whether his use of force was 'excessive.'

Kingsley, 576 U.S. at 395. For excessive force claims, the Court explained, the first prong is often not disputed because a defendant would know (or rightfully be charged with knowledge) of the facts and circumstances surrounding him as he engaged in physical acts. *Id.*

It was the second aspect of intent, however, that the Supreme Court found was irrelevant to evaluating force claims under the Fourteenth Amendment. The Court described that aspect as the "defendant's state of mind with respect to the proper *interpretation* of the force (a series of events in the world)." *Id.* at 396. This real-time awareness that the defendant's conduct was unlawful as he or she used force, was what the Supreme Court held was not required for pretrial detainees to pursue excessive force claims. *Id.* This is why the Supreme Court took issue with the defendant's proposed instruction that authorized a liability verdict only if his actions were intended "maliciously and sadistically to cause harm." *Id.* at 400. Based on this reasoning, the Court's holding in *Kingsley* is restricted only to intent that would describe a defendant's internal purpose, judgment, or appraisal of his own actions.

In jettisoning the subjective component of deliberate indifference, the Majority in *Brawner* went too far afield. In the Sixth Circuit, the deliberate indifference standard under the Fourteenth Amendment has never required proof that a defendant knew his or her actions were unlawful or done maliciously. *Richmond*, 885 F.3d at 939 (citing *Whitley v. Albers*, 475 U.S. 312, 319 (1976)). They have, however, correctly required proof that a defendant was personally aware of facts suggesting an inmate's need for care and failed to take action. *Id.*

That element speaks to the defendant's personal awareness of a situation and not his or her subjective intent in failing to take action. *See id.* That is because, unlike an excessive force situation which involves affirmative and usually physical actions in a span of minutes, an actor's intent can be inferred from their actions. *See Kingsley*, *supra*, at 396. Where inaction is at issue and must be judged from a series of events that often occur, as in this case, over the course of hours, days, weeks or even months, a more refined analysis is needed to determine if the conduct goes beyond mere negligence. *Daniels v. Williams*, 474 U.S. 327, 332 (1986) (mere negligence insufficient to pursue due process claim against jail officials under Fourteenth Amendment).

Along these same lines, the Majority failed to appreciate that the result in *Kingsley* was heavily influenced by precedents analyzing force claims under the Fourth Amendment. Under that standard, an officer's subjective intent is not in issue and force instead must be analyzed only objectively. *Graham v. Connor*, 490 U.S. 386, 397 (1989). *Kingsley* cited to *Graham*, which set the standard for force clams under the Fourth Amendment, at least 5 times to make the point that force claims traditionally have been analyzed only objectively. *See Id.* at 397 - 402.

Despite these clear indications that *Kingsley* was derived from analysis of Fourth Amendment excessive force claims, the Majority never explained why it made sense to borrow elements of the objective reasonableness standard to inform

the test for medical needs claims of pretrial detainees arising under the Fourteenth Amendment. *See Id.* It chose to discard well-reasoned holdings in *Farmer v. Brennan*, 511 U.S. 825 (1994) and *Estelle v. Gamble*, 429 U.S. 97 (1974) as having originated from the Eighth Amendment's cruel and unusual punishment prohibition alone. *Brawner*, *supra*, at *15 – 19. But in doing so, the Majority merely substituted the strand of excessive force cases arising under the Fourth Amendment in its place. *See Id.*

As Justice Scalia observed in his dissent to *Kingsley*, the Supreme Court has repeatedly counseled that the Fourth Amendment and Due Process Clauses of the Fifth and Fourteenth are textually different and thus must not be mixed and combined in the way that the Majority has done. *Kingsley*, 576 U.S. at 405 – 408 (J. Scalia dissenting). The failure of the Majority to honor this requirement is what led it to offer a nebulous test of liability for medical claims arising under the Fourteenth Amendment that permits a jury to conclude a defendant is "reckless" even if there is no proof that he or she was personally aware of a risk to the plaintiff. *Brawner*, *supra*, at *23 – 24. This flies in the face of a well-established body of law on the standard of deliberate indifference as well as a jurisprudence holding that Fourteenth Amendment liability requires more than mere negligence. For these reasons, the Majority erroneously re-wrote the standard for deliberate indifference claims under the Fourteenth Amendment and the *en banc* panel should correct it.

III. THE MAJORITY MISREADS THE AUTHORITY IN OTHER CIRCUITS WHICH HAVE HELD THAT *KINGSLEY* DOES NOT EXTEND TO INACTION THEORIES UNDER THE FOURTEENTH AMENDMENT

Finally, the Majority in *Brawner* misread the authority from other Circuits which have declined to extend *Kingsley* to Fourteenth Amendment deliberate indifference claims. While the Majority correctly noted that several of these decisions did not include ample analysis, it fails to appreciate the reason why extensive analysis was not required. *Brawner*, *supra*, at *13 – 14. Each of the Fifth Eighth, and Eleventh Circuits correctly noted that *Kingsley* was an excessive force claim and so they, appropriately, chose not to expand it to the deliberate indifference claims before them. *Cope v. Cogdill*, 3 F.4th 198, 207 n.7 (5th Cir. 2021); *Whitney v. City of St. Louis*, 887 F.3d 857 (8th Cir. 2018); *Nam Dang v. Sheriff, Seminole Cty., Fla.*, 871 F.3d 1272 (11th Cir. 2017).

While the Fifth Circuit's analysis rejecting *Kingsley* was brief, it picked up on one of the critical distinctions that the Majority's analysis overlooked: the distinction between subjective knowledge and intent. *Cope*, *supra*. In doing so, the Fifth Circuit cited *Dyer v. Houston*, 964 F.3d 374, 380 (5th Cir. 2020), which post-*Kingsley*, applied the deliberate indifference standard but explained that subjective knowledge of the medical needs, not subjective intent to cause harm, was required. Far from demonstrating that the Fifth Circuit's reasoning of *Kingsley* was less than

thorough, this suggests that the Majority failed to give full consideration to the Fifth Circuit's analysis of the issue.

Though the Tenth Circuit in *Strain v. Regalado*, 977 F.3d 984 (10th Cir. 2020) undertook a lengthy and scholarly discussion of *Kingsley*'s application to deliberate indifference claims, the Majority did not appreciate its wisdom. *Brawner*, *supra*, at *14. In a single sentence, it cast *Strain* aside without ever explaining why a decision on an excessive force case influenced by the law of the Fourth Amendment should govern a medical deliberate indifference claim under the Fourteenth Amendment. *See Id.* As discussed above, the case should have been considered this case more closely. Not only did the Court in *Strain* hold that *Kingsley* should not govern because it was a force case, it also explained the inherent differences between evaluating a medical needs claim and one for excessive force which necessitated different treatment with respect to the requisite intent:

> Excessive force requires an affirmative act, while deliberate indifference often stems from inaction. *Castro v. Cty. of Los Angeles*, 833 F.3d 1060, 1069 (9th Cir. 2016) (en banc). Although "punitive intent may be inferred from affirmative acts that are excessive in relationship to a legitimate government objective, the mere failure to act does not raise the same inference." Id. at 1086 (Ikuta, J., dissenting) (reasoning that "the Kingsley standard is not applicable to cases where a government official fails to act" because "a person who unknowingly fails to act – even when such a failure is objectively unreasonable – is negligent at most" and "the Supreme Court has made clear that liability for negligently inflicted harm is categorically beneath the threshold of constitutional due process"). Because the two categories of claims

> protect different rights for different purposes, the claims require different state-of-mind inquiries.

Strain v. Regalado, 977 F.3d 984, 991 (10th Cir. Okla. October 9, 2020).

In its decision, the Majority did not address this issue in any meaningful way. The failure to consider the authority from other Circuits fully and in context squarely places the Sixth Circuit on the wrong side of a circuit split. The *en banc* panel should correct this manifest error.

IV. EN BANC REVIEW IS NEEDED TO CORRECT THE MAJORITY'S ERRORS AND ADDRESS AN ISSUE OF EXCEPTIONAL IMPORTANCE

For all of these reasons, the Kentucky Jailers Association supports Appellee's Petition for Rehearing En Banc because it poses questions of exceptional importance and affects the jails of the Commonwealth of Kentucky and all other officials charged with the care and custody of pretrial detainees in Tennessee, Michigan and Ohio.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing brief complies with the type-volume limitation provided in Fed.R.App.P.32(a)(7)(B). The foregoing brief contains 2,546 words of Californian FB (14 point) proportional type. The word processing software used to prepare this brief was Microsoft Word for Microsoft Office.

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CERTIFICATE OF SERVICE

This is to certify that on the 8th day of October, 2020, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system, which will send a notice of electronic filing to all counsel of record.

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