No. 14-6368

IN THE

Supreme Court of the United States

MICHAEL B. KINGSLEY,

Petitioner,

v.

STAN HENDRICKSON AND FRITZ DEGNER,

Respondents.

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

REPLY BRIEF OF PETITIONER

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Respondents' opposition relies on an improper attempt to recast the question presented, yet respondents cannot explain away the clear split between the Seventh Circuit and decisions from the Eighth, Ninth, Tenth, and D.C. Circuits, and cannot simply rewrite the question presented to avoid it. This conflict—which springs from fundamental disagreements about the constitutional sources underlying excessive force claims by pretrial detainees—will not resolve itself. This Court should grant the petition, end decades of disagreement, and decide what constitutional standards govern pretrial detainees' excessive force claims.

I. RESPONDENTS MISAPPREHEND THE QUESTION PRESENTED.

Respondents rewrite the question presented in an attempt to neutralize the conflict among the circuits. The issue as petitioner presented it here and in the Seventh Circuit below is the one this Court should decide; namely, "[w]hether the requirements of a[n] . . . excessive force claim brought by . . . a pretrial detainee . . . are satisfied by a showing that the state actor deliberately used force against the pretrial detainee and the use of force was objectively unreasonable." Pet. i; see also Br. Appellant 2 ("Whether the jury was improperly instructed regarding the standard for excessive force that applies to Mr. Kingsley's claim . . . .").

Engaging in classic question begging, respondents assume the truth of their premise that Fourth Amendment principles cannot inform the excessive force test under the due process clause of the Fourteenth Amendment. Thus moving past the heart

of the argument, they conclude that "[t]he only constitutional provision at issue in this case is the Fourteenth Amendment." Br. Opp'n 5. Respondents do not grapple with the fact that at least one circuit—the Ninth—has already held that the Fourth Amendment's objective standard is useful in determining whether actions by government actors constitute excessive force violations of the due process clause of the Fourteenth Amendment. *Gibson* v. *Cnty. of Washoe*, 290 F.3d 1175, 1197 (9th Cir. 2002). That one of the circuits in the split has relied on the Fourth Amendment standard means that it cannot be assumed away.

Respondents additionally gloss over the fact that this case is not about just *any* § 1983 claim made by pretrial detainees, but instead focuses solely on excessive force claims, and the proper constitutional standard for evaluating them. As demonstrated by the Ninth Circuit's decision to apply the Fourth Amendment standards to excessive force claims, *id.*, the constitutional underpinnings of § 1983 excessive force claims plainly differ from other kinds of § 1983 claims. Respondents' attempt to recast the question in reliance on non-excessive force cases only serves to muddle the issues and not to "narrow" them as respondents contend. Br. Opp'n 1.

II. THE FEDERAL COURTS OF APPEALS ARE SPLIT ON THE PROPER STANDARD FOR EXCESSIVE FORCE CLAIMS.

Respondents try to explain away the split, but fail. The Seventh Circuit majority below held that a plaintiff must prove two separate elements in order to succeed on an excessive force claim, and one of those elements is a showing of a subjective intent. Pet. App. 17a-18a. The Seventh Circuit's requirement

of subjective intent conflicts with binding[1] Ninth Circuit precedent, which provides a wholly objective test, and with D.C., Eighth, and Tenth Circuit precedent, which view intent as a relevant factor, but do not *require* a subjective intent element.

Specifically, the Ninth Circuit has explained that the excessive force analysis is an objective one to be conducted from "the viewpoint of the reasonable officer," *Gibson*, 290 F.3d at 1197, which leaves no room for an intent requirement or for an inquiry into the offending officer's subjective state of mind:

> The Due Process clause protects pretrial detainees from the use of excessive force that amounts to punishment. Although the Supreme Court has not expressly decided whether the Fourth Amendment's prohibition on unreasonable searches and seizures continues to protect individuals during pretrial detention, we have determined that the Fourth Amendment sets the "applicable constitutional limitations" for considering claims of excessive force during pretrial detention. [The Fourth Amendment case law] therefore explicates the standards applicable to a pretrial detention excessive force

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[1] Respondents resort to citing two unpublished, non-precedential Ninth Circuit cases in an attempt to distract the Court from the state of the law in the Ninth Circuit. These cases cannot eliminate the circuit split for two reasons. First, neither case involve excessive force claims, but instead relate to other types of § 1983 claims. Second, under the Ninth Circuit's rules, "[u]npublished dispositions and orders of this court are not precedent." 9th Cir. R. 36-3(a).

claim in this circuit.[2]

Id. (citations omitted) (quoting *Pierce* v. *Multnomah Cnty.*, 76 F.3d 1032, 1043 (9th Cir. 1996)). Therefore, respondents are flatly wrong when they claim that "All the [c]ircuits" consider subjective intent and that "No circuit" has adopted a wholly objective standard. Br. Opp'n 8-9.

Apart from the Ninth Circuit, the panel opinion below also conflicts with other circuits that look to subjective intent as a factor, but not a necessary element of a § 1983 excessive force claim, as it is in the Seventh Circuit. The D.C., Eighth, and Tenth Circuits allow intent to be considered as a factor, but do not require a subjective intent requirement. See *Norris* v. *District of Columbia*, 737 F.2d 1148, 1150 (D.C. Cir. 1984); *Andrews* v. *Neer*, 253 F.3d 1052, 1060 (8th Cir. 2001); *Estate of Booker* v. *Gomez*, 745 F.3d 405, 419 (10th Cir. 2014).

The D.C. Circuit, in *Norris*, endorsed a "shocks the conscience" judicial test to determine whether the force at issue is unconstitutionally excessive. 737 F.2d at 1150. Contrary to respondents' argument, however, the *Norris* court did not require a "subjective intent" element. The court's analysis focused on the relationship between the need for force, and the amount of force used, *i.e.*, an objective test, in order to determine whether the force was

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[2] There is no indication in *Gibson* that there is a distinction between different types of pretrial detainees. In fact, there does not seem to be any defensible reason why Fourth Amendment protections would stop applying to a pretrial detainee if they apply at all after arrest. If the touchstone is the fact that the prisoner has not been convicted of a crime and therefore cannot be punished, then that fact does not change even after arraignment.

applied in "good faith" or otherwise. *Id.* And in fact, the court analyzed the excessive force claim in that case based solely on the conduct of the officers without regard to their subjective intent. *Id.* at 1151-52.

The Eighth Circuit likewise allows intent to be considered, but it does not require proof of subjective intent. As with *Norris*, one factor courts consider in the Eighth Circuit is whether the officers were acting in good faith. *Dale* v. *Janklow*, 828 F.2d 481, 487 (8th Cir. 1987); *Putman* v. *Gerloff*, 639 F.2d 415 (8th Cir. 1981). But as a case discussed by respondents concludes: the analysis must focus on "whether the officers were *objectively* acting in good faith under the circumstances." *Dale*, 828 F.2d at 487 (emphasis added). Thus, nothing in these opinions conflicts with the Eighth Circuit's pronouncement in *Andrews* v. *Neer*: "The evaluation of excessive-force claims brought by pre-trial detainees, although grounded in the Fifth and Fourteenth Amendments rather than the Fourth Amendment, also relies on an *objective* reasonableness standard." 253 F.3d at 1060 (emphasis added).

Similarly, in the Tenth Circuit, intent can be a factor considered in excessive force analysis, as recognized by respondents. Br. Opp'n 14 ("*Smith v. Iron Cnty.*, 692 F.2d 685, 687 (10th Cir. 1982) (considering as part of due process analysis 'whether force was applied in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm'); *Porro v. Barnes*, 624 F.3d 1322, 1327 (10th Cir. 2010) ('In our due process precedent we have said that we examine the force used, the injury inflicted, and relevant motives . . .')."). How that fits within the broader excessive force framework, however, is established by

Estate of Booker v. *Gomez*, 745 F.3d at 419. There the Tenth Circuit stated: "an excessive force claim brought under the Fourth Amendment depends on the *objective* reasonableness of the defendants' actions, the same claim brought under the Fourteenth Amendment turns on additional factors, including 'the motives of the state actor.'" *Id.* (emphasis added) (quoting *Porro*, 624 F.3d at 1325-26). These cases do not hold that a plaintiff must adduce evidence of intent and prove that intent by a preponderance in order to establish an excessive force claim, only that motive can be considered as a factor within an objective framework.

To be sure, respondents have been able to find Fourth Circuit case law, which petitioner had not found, indicating that the test in that Circuit may not be a wholly objective one for excessive force claims. See *Young* v. *Prince George's Cnty.*, 355 F.3d 751, 758 (4th Cir. 2004). But that one oversight by petitioner does not eliminate the split of authority here. Nor does it explain the fact that the existing split of authority has been expressly noted by several courts including the Sixth Circuit in *Aldini* v. *Johnson*, 609 F.3d 858, 865 (6th Cir. 2010), and the dissent below, Pet. App. 29a. Respondents cannot escape the reality that the majority opinion below conflicts with decisions from the Eighth, Ninth, Tenth, and D.C. Circuits.

Finally, respondents' assertion that the split among the federal courts of appeals will simply resolve itself is unsupported and nothing more than mere speculation. If anything, without guidance from this Court, the chasm between the circuits is more likely to widen and deepen. For example, even among the circuits that require a showing of subjective intent, there is disagreement as to the level of intent that

must be established. Pet. 10. Some circuits require mere recklessness. Pet. App. 21a-22a. Others require a showing of sadistic or malicious purpose. *Griffin* v. *Hardrick*, 604 F.3d 949, 954 (6th Cir. 2010). This fractured case law reveals a deep disagreement about which constitutional protections adhere to the pretrial detainee, and the varying approaches are not reconcilable. The decisions of the courts of appeals will continue to be fractured until this Court decides the issue.

III. THE CONSTITUTIONAL ANALYSIS IN PRETRIAL DETAINEE CASES IS NOT LIMITED TO THE FOURTEENTH AMENDMENT.

The question of which constitutional protections apply to a pretrial detainee are both explicit and implicit in the questions presented to the Seventh Circuit and to this Court. Supreme Court Rule 14(1)(a) allows the court to reach all issues "fairly included" in the question presented. Mr. Kingsley has repeatedly argued that the objective unreasonableness test for his claim of excessive force tracks the Fourth Amendment test, and does not require a showing of subjective intent as in Eighth Amendment jurisprudence. Implicit in petitioner's claim is the proposition that a pretrial detainee is afforded greater constitutional protections than are granted to convicted prisoners. Whether that greater protection is afforded by the Fourth Amendment, the Fourteenth Amendment, or some combination of the two is for this Court to decide now that the federal courts of appeals have come to different decisions on the issue. See Sup. Ct. R. 10(a).

Even if deciding whether the Fourth Amendment applies to pretrial detainees independently of the Fourteenth Amendment is not implicit within the

question presented, the lower court passed on the issue. As this Court stated in *Lebron* v. *National Railroad Passenger Corp.*, "even if this *were* a claim not raised by petitioner below, we would ordinarily feel free to address it, since it was addressed by the court below. Our practice 'permit[s] review of an issue not pressed so long as it has been passed upon . . . .'" 513 U.S. 374, 379 (1995) (quoting *United States* v. *Williams*, 504 U.S. 36, 41 (1992)).

Both the majority and dissent below discussed the Fourth, Eighth, and Fourteenth Amendments. The majority recognized that the Fourth Amendment standard requires a determination of whether the conduct of the government official was "objectively reasonable." Pet. App. 13a-14a (emphasis omitted). The majority specifically rejected the wholly objective test based on the Fourth Amendment, Pet. App. 15a-16a, and instead held that at least recklessness must be shown to establish a violation of the Fourteenth Amendment in excessive force cases, Pet. App. 21a. In rejecting the need to establish recklessness, the dissent also discussed the Fourth, Eighth, and Fourteenth Amendments, Pet. App. 28a-31a, in arguing that proving recklessness should not be required, Pet. App. 40a-41a.

As evidenced by these discussions, the Seventh Circuit certainly passed on the question left open by this Court in *Graham* v. *Connor*, 490 U.S. 386 (1989), of whether the Fourth Amendment applies to pretrial detainees. The Seventh Circuit majority answered that question with a definitive "no" by creating a Fourteenth Amendment standard that requires a subjective inquiry that is not required by the Fourth Amendment. This Court is empowered to determine whether that determination is correct. *Williams*, 504 U.S. at 41.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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