No. 14-6368

In The Supreme Court of the United States

MICHAEL B. KINGSLEY,

Petitioner,

v.

STAN HENDRICKSON
AND
FRITZ DEGNER,

Respondents.

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

BRIEF OF THE RUTHERFORD INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Whether the requirements of a 42 U.S.C. § 1983 excessive force claim brought by a plaintiff who was a pretrial detainee at the time of the incident are satisfied by a showing that the state actor deliberately used force against the pretrial detainee and the use of force was objectively unreasonable.

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IDENTITY AND INTEREST OF *AMICUS CURIAE*[1]

The Rutherford Institute is an international non-profit organization headquartered in Charlottesville, Virginia. Founded in 1982 by its President, John W. Whitehead, the Institute specializes in providing legal representation without charge to individuals whose civil liberties are threatened or infringed and in educating the public about constitutional and human rights issues. The Rutherford Institute is interested in the instant case because it is greatly concerned about and seeks to defend the safety and security of the most vulnerable among us from abuses of power at the hands of the government. Pretrial detainees are particularly vulnerable to abuse because they are held beyond the view of the public; those charged with their detention and custody are not subject to the moderating influence of public scrutiny and inspection. The legal remedies available to pretrial detainees must not be unduly restrictive if their right not to suffer needless abuse is to be assured. The Rutherford Institute submits this brief in the hopes that the law will provide true protection for the security of pretrial detainees.

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[1] This amicus brief is filed with the parties' consent. Petitioner filed a letter granting consent to *amicus curiae* briefs in support of either or neither party on February 10, 2015, and Respondents filed a similar letter of consent on February 19, 2015. No counsel for any party authored this brief in whole or in part, and no monetary contribution intended to fund the preparation or submission of this brief was made by such counsel or any party.

SUMMARY OF ARGUMENT

"At common law pretrial detainees were differentiated from sentenced prisoners." *Feeley v. Sampson*, 570 F.2d 364, 368 (1st Cir. 1978). As the Circuits often have noted,[2] the issue before this Court was addressed more than 245 years ago by Blackstone in his *Commentaries* where he agreed that pretrial detainees are entitled as a matter of simple justice to better treatment than that given convicted criminals.

> [I]f the offense be not bailable, or the party cannot find bail, he is to be committed to the county [jail] ... But this imprisonment, as has been said, is only for safe custody, and not for punishment: therefore, in this dubious interval between the commitment and the trial, a prisoner ought to be used with the utmost humanity, and neither be loaded with needless fetters, or subjected to other hardships than such as are absolutely requisite for the purpose of confinement only....

4 W. Blackstone, *Commentaries* *300. This "elegant statement"[3] holds as true today as it did then, and should guide the outcome of this case.

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[2] *See, e.g.*, *Campbell v. McGruder*, 580 F.2d 521, 527-28 (D.C.Cir. 1978); *Halvorsen v. Baird*, 146 F.3d 680, 689 (9th Cir. 1998).

[3] *Rhem v. Malcolm*, 507 F.2d 333, 342 (2d Cir. 1974).

Consistent with this Court's precedent, several Circuits continue to apply this common law principle in our constitutional age, holding that the use of objectively unreasonable force against pretrial detainees runs afoul of the Fourteenth Amendment and is the modern day constitutional equivalent of the common law's needless fetters, unnecessary hardships, and lack of humanity. Under this standard, the lack of intent is irrelevant if the officer acts in an objectively unreasonable way. A pure heart cannot shield an empty head. Objective reasonableness is elastically measured, not in hindsight, but by the facts and circumstances confronting the officer at that time. And officials who fail to meet this standard towards pretrial detainees have imposed a form of "punishment" as forbidden at common law since the days of Blackstone and constitutionally since this Court's decision in *Bell v. Wolfish*, 441 U.S. 520 (1979). The Seventh Circuit below followed a contrary standard which fails to accord proper protection to the liberty interests of pretrial detainees and should be reversed.

ARGUMENT

I. THE LIBERTY INTEREST TRADITIONALLY AFFORDED TO PRETRIAL DETAINEES REQUIRES APPLICATION OF AN OBJECTIVE STANDARD TO EXCESSIVE FORCE CLAIMS THEY ASSERT

A. This Court's Guideposts.

1. Arrestees - the Objective Fourth Amendment Standard. An excessive force claim brought by an otherwise free citizen arising during

the course of his arrest is analyzed under the familiar "objective reasonableness" standard of *Graham v. Connor*, 490 U.S. 386, 388 (1989). The question is whether the officer's actions are "'objectively reasonable' in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation." *Id.* at 397. Subjective motivations have no bearing. "An officer's evil intentions will not make a Fourth Amendment violation out of an objectively reasonable use of force; nor will an officer's good intentions make an objectively unreasonable use of force constitutional." *Id.*

2. Convicted Prisoners - the Subjective Eighth Amendment Standard. At the other end of the spectrum, excessive force claims brought by convicted prisoners are governed by the cruel and unusual punishment test of the Eighth Amendment, where the core inquiry is "whether force was applied in a good faith effort to maintain or restore discipline, or maliciously and sadistically to cause harm." *Hudson v. McMillian*, 503 U.S. 1, 6 (1992); *see Whitley v. Albers*, 475 U.S. 312, 320-21 (1986). Subjective intent is key. "[T]he subjective motivations of the individual officers are of central importance in deciding whether force used against a convicted prisoner violates the Eighth Amendment." *Graham*, 490 U.S. at 398.

3. Pretrial Detainees - the Fourteenth Amendment Standard. The decision in this case will establish standards to govern claims of excessive force for those citizens - pretrial detainees - who find themselves in this "dubious

interval"[4] between these two poles of the justice system. In *Graham*, this Court explained that "our cases have not resolved the question whether the Fourth Amendment continues to provide individuals with protection against excessive physical force beyond the point at which arrest ends and pretrial detention begins, and we do not attempt to answer that question today." *Graham*, 490 U.S. at 395 n.10.[5] However, this Court did find it "clear that the Due Process Clause protects a pretrial detainee from the use of excessive force that amounts to punishment." *Id.*

4. The Punishment Test. The limited extent of this Court's precedent addressing the due process rights of pretrial detainees is found in the earlier case of *Bell v. Wolfish*, 441 U.S. 520 (1979). There the Court explained that "[a] person lawfully committed to pretrial detention has not been adjudged guilty of any crime. He has had only a judicial determination of probable cause as a prerequisite to the extended restraint of his liberty following arrest." *Id.* at 536 (internal punctuation omitted). Thus, because "a detainee may not be punished prior to an adjudication of guilt in accordance with due process of law," *id.* at 535; *see id.* at 535 n. 16 ("[d]ue process requires that a pretrial detainee not be punished."), "the proper inquiry is whether those conditions amounted to

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[4] 4 W. Blackstone, *Commentaries* *300.

[5] As the Brief of the Petitioner persuasively argues, the Fourth Amendment also should apply to applications of force against pretrial detainees because use of force is a wholly distinct seizure of the prisoner. Br. of Pet. at 27-34.

punishment of the detainee." *Id.* at 535. In other words, a "court must decide whether the disability is imposed for the purpose of punishment or whether it is but an incident of some other legitimate government purpose." *Id.* at 538. The *Bell* Court continued and set forth a two-part analysis for determining whether punishment has occurred, explaining that -

> Absent a showing of an expressed intent to punish on the part of the detention facility officials, that determination will generally turn on whether an alternative purpose to which the restriction may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned to it.

Id. at 538 (internal punctuation omitted) (emphasis added). Thus, punishment under *Bell* can be proven in any one of two ways:

1. Through evidence of an "expressed intent" to punish, *Bell*, 441 U.S. at 538, or

2. By analyzing whether the challenged action at issue is reasonably related to a legitimate government purpose and whether the action is excessive to achieving that purpose. *See id.* (this "determination will generally turn on whether an alternative purpose to which the restriction may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned to it.") (emphasis added); *id.* at 539

> ("Thus, if a particular condition or restriction of pretrial detention is reasonably related to a legitimate government objective, it does not, without more, amount to 'punishment.'") (emphasis added); *id.* ("if a restriction or condition is not reasonably related to a legitimate goal - if it is arbitrary or purposeless - a court permissibly may infer that the purpose of the government action is punishment that may not constitutionally be inflicted upon detainees qua detainees."). *Id.* (emphasis added).

So under *Bell*'s second prong, the analysis turns on how to determine the reasonableness of a challenged government action and whether that action is excessive.

B. The Circuit Court Approaches. Although a number of Circuits have recognized that *Bell* requires this two part analysis,[6] only some apply it.

1. Subjective Intent Required - The Eighth Amendment Standard. The Fifth and Third Circuits have taken the position that "[w]hile [the *Bell*] inquiry works well for claims of improper conditions or restrictions, it does not lend itself to analysis of claims of excessive use of force in

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[6] *See*, *e.g. Blackmon v. Sutton*, 734 F.3d 1237, 1241 (10th Cir. 2013); *Bistrian v. Levi*, 696 F.3d 352, 373 (3d Cir. 2012); *Baribeau v. City of Minneapolis*, 596 F.3d 465, 483 (8th Cir. 2010); *Slade v. Hampton Roads Regional Jail*, 407 F.3d 243, 251 (4th Cir. 2005); *Valencia v. Wiggins*, 981 F.2d 1440, 1446 (5th Cir. 1993).

controlling prison disturbances." *Valencia*, 981 F.2d at 1446; *Fuentes v. Wagner*, 206 F.3d 335, 347 (3d Cir. 2000).

Both of these Circuits have explicitly declined to apply the *Bell* test and instead apply the subjective Eighth Amendment *Hudson* excessive force standard for convicted prisoners.[7] They are joined by the Second,[8] Fourth[9] and Eleventh[10]

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[7] *See Valencia*, 981 F.2d at 1446 ("For these reasons, we conclude that excessive use of force claims by pretrial detainees should not be analyzed under Bell's conditions of confinement standard. Instead, we are guided by the standard announced in *Whitley* and *Hudson*"); *Fuentes*, 206 F.3d at 347-48 ("Accordingly, we hold that the Eighth Amendment cruel and unusual punishments standards found in [*Whitley* and *Hudson*] apply to a pretrial detainee's excessive force claim arising in the context of a prison disturbance") (emphasis removed).

[8] *See U.S. v. Walsh*, 194 F.3d 37, 48 (2d Cir. 1999) ("we conclude that the Hudson analysis is applicable to excessive force claims brought under the Fourteenth Amendment as well").

[9] *See Taylor v. McDuffie*, 155 F.3d 479, 483 (4th Cir. 1998) ("To succeed on a claim of excessive force under the Due Process Clause of the Fourteenth Amendment, Taylor must show that Defendants inflicted unnecessary and wanton pain and suffering.... The proper inquiry is whether the force applied was in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm.") (internal punctuation omitted) (overruled on other grounds by *Wilkins v. Gaddy*, 559 U.S. 34 (2010) (per curiam)).

Circuits in explicitly applying the Eighth Amendment standard.

Applying standards similar to that of the Eighth Amendment are the Sixth[11] and D.C.[12] Circuits, as well as the Seventh in the decision under review.[13]

But in many of these same Circuits, the case law itself is mixed on these issues. Significant parts of the majority and dissenting opinion below centered around the decision in *Titran v. Ackman*,

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[10] *See Fennell v. Gilstrap*, 559 F.3d 1212, 1216 n.5 (11th Cir. 2009) ("A claim of excessive force under the Fourteenth Amendment is analyzed as if it were an excessive force claim under the Eighth Amendment.").

[11] *See Shreve v. Franklin County, Ohio*, 743 F.3d 126, 134 (6th Cir. 2014) (applying a shocks the conscience standard); *Burgess v. Fischer*, 735 F.3d 462, 472-73 (6th Cir. 2013) ("shocks the conscience standard" and observing this is a "a substantially higher hurdle to overcome" than the Fourth Amendment objective reasonableness standard).

[12] *See Norris v. District of Columbia*, 737 F.2d 1148, 1152 n.8 (D.C. 1984) (the "Constitution may be offended if the force used grossly exceeds that warranted by the circumstances"); *id*. at 1150 (citing with favor a test which includes Eighth Amendment subjective intent analysis).

[13] *See Kingsley v. Hendrickson*, 744 F.3d 443, 453 (7th Cir. 2014) ("the existence of intent - at least recklessness - is a requirement in Fourteenth Amendment excessive force cases").

893 F.2d 145, 147 (7th Cir.1990), where the Seventh Circuit explained that "[m]ost of the time the propriety of using force on a person in custody pending trial will track the Fourth Amendment: the court must ask whether the officials behaved in a reasonable way in light of the facts and circumstances confronting them," *id.* at 147, but then continued and conversely observed that "the search for 'punishment' cannot be wholly objective." *Id.* Similarly, in *U.S. v. Budd*, 496 F.3d 517, 530 (6th Cir. 2007), the Sixth Circuit analyzed a finding of excessive force by a prison guard against a pretrial detainee under the two part *Bell* standard, not the more restrictive subjective Eighth Amendment test.

The Seventh Circuit also has previously observed that the Fourteenth Amendment rights of pretrial detainees should be broader than those of convicted criminals under the Eighth Amendment. *See Forrest v. Prine*, 620 F.3d 739, 744 (7th Cir. 2010) ("The Fourteenth Amendment right to due process provides at least as much, and probably more, protection against punishment as does the Eighth Amendment's ban on cruel and unusual punishment"). The Sixth Circuit has made similar observations. *See Leary v. Livingston County*, 528 F.3d 438, 443 (6th Cir. 2008) ("there is room for debate over whether the Due Process Clause grants pretrial detainees more protections than the Eighth Amendment does.").

2. Subjective Intent Not Required. Three Circuits do not require a pretrial detainee to prove an officer's subjective intent to harm him.

a. Subjective Intent Irrelevant - the Fourth Amendment Standard. Both the Eighth[14] and Ninth Circuits[15] apply an objective reasonableness standard akin to that under the Fourth Amendment when evaluating excessive force claims of pretrial detainees.

b. Subjective Intent Can Be a Factor, but Is Not Required. The Tenth Circuit follows a unique approach in that although it does not require a finding of intent, it recognizes that intent can be a factor in a totality of the

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[14] *See Andrews v. Neer*, 253 F.3d 1052, 1060 (8th Cir. 2001) ("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."); *Jackson v. Buckman*, 756 F.3d 1060, 1067 (8th Cir. 2014) ("The objective indicia relevant to the excessive force analysis under the Fourth Amendment guide this due process inquiry.") Notably, in *Jackson*, the 8th Circuit applied the second prong of the *Bell* analysis, finding that "[a]n official's use of force does not amount to punishment in the constitutional sense if it is but an incident of some other legitimate government purpose." *Jackson*, 756 F.3d at 1067.

[15] *See Gibson v. County of Washoe, Nev.*, 290 F.3d 1175 (9th Cir. 2002) ("the Fourth Amendment sets the applicable constitutional limitations for considering claims of excessive force during pretrial detention.") (internal punctuation omitted); *Hunter v. County of Sacramento*, 652 F.3d 1225, 1231 n.6 (9th Cir. 2011) ("*Graham*...explicates the standards applicable to a pre-trial detention excessive force claim in this circuit.").

circumstances analysis to determine excessive force.[16]

C. Elimination of a Subjective Intent Element is Consistent with *Bell*. Consistent with their treatment at common law and as a matter of constitutional law, the protections afforded pretrial detainees should be stronger than those afforded to convicted prisoners. As this Court observed in *Graham*, "the less protective Eighth Amendment standard applies only after the State has complied with the constitutional guarantees traditionally associated with criminal prosecutions." *Graham*, 490 U.S. at 398 (internal punctuation omitted). Yet pretrial detainees have not received the protections of these constitutional guarantees. They have not been convicted of any crime, they have not been judged by a jury of their peers, they have not faced their accuser, they have not yet been able to see the government's evidence against them, they have not yet had their day in court, and have not yet experienced the rest of the full panoply of constitutional and statutory protections afforded to those accused of a crime. So as this Court held in *Bell*, absent an actual adjudication of guilt, they cannot be punished. *Bell*, 441 U.S. at 535. Yet no

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[16] *See Estate of Booker v. Gomez*, 745 F.3d 405, 423 (10th Cir. 2014) ("To determine whether a use of force is excessive under the Fourteenth Amendment we consider three factors: (1) the relationship between the amount of force used and the need presented; (2) the extent of the injury inflicted; and (3) the motives of the state actor."); *id.* at 426 (concluding there is no case law to support dismissal of a due process excessive force case solely based upon lack of evidence of illicit intent).

such adjudication occurred here in our present case.[17]

"In our society liberty is the norm, and detention prior to trial or without trial is the carefully limited exception." *U.S. v. Salerno*, 481 U.S. 739, 755 (1987). Pretrial detainees do not surrender their liberty interest to be free of beatings and other abuses. "[T]he right to personal security constitutes a 'historic liberty interest' protected substantively by the Due Process Clause ... [a]nd that right is not extinguished by lawful confinement, even for penal purposes." *Youngberg v. Romeo*, 457 U.S. 307, 315 (1982). "The interest of persons in the integrity of their bodies is a liberty interest of high order ... The order of this liberty interest is precisely as high among persons accused of crime as among

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[17] This concern is magnified by the numbers of pretrial detainees and length of time of their pretrial incarcerations. *See*, *e.g.*, Jeffrey Manns, *Liberty Takings: A Framework for Compensating Pretrial Detainees*, 26 Cardozo L.Rev. 1947, 1955 (2005) (noting "the tens of thousands of American citizens subject to pretrial detentions each year"); *id*. at 1950 n.11 (compiling state and federal statistics and, specific to federal detainees, finding that incarceration "averaged approximately one month for individuals who were eventually able to meet bail, to eighty-one days for those never able to meet bail, and one-hundred-and-ten days for those denied bail."); Catherine T. Struve, *The Conditions of Pretrial Detention*, 161 U.Pa.L.Rev. 1009, 1054-55 (2013) (citing federal statistics and concluding that for at midyear 2011, local jail facilities in the U.S. held approximately 736,000 inmates, of which more than 60% were pretrial detainees).

persons unaccused of crime." *Norris*, 737 F.2d at 1152-53 (Doyle, J., concurring).

In *Salerno*, 481 U.S. at 750-51, this Court recognized the "importance and fundamental nature" of an individual's liberty interest, but also acknowledged that it may be infringed by a "sufficiently weighty" government interest in the balancing. But no cognizable government interest is served by the unreasonable and excessive application of force to a pretrial detainee when none is objectively justified by the totality of the then existing circumstances. That is simply prong two of the *Bell* due process analysis of how to determine punishment and also a restatement of the needless fetters, unnecessary hardships and lack of humanity forbidden at common law. The problem with application of the subjective Eighth Amendment convicted prisoner standard to pretrial detainees is that it condones the unreasonable application of force when none is objectively justified. As Judge Hamilton succinctly stated in dissent below, "[i]f a pretrial detainee can prove that a correctional officer used objectively unreasonable force against him, it should be self-evident that the detainee was 'punished' without due process of law." *Kingsley*, 744 F.3d at 455 (Hamilton, J., dissenting).

Accordingly, and consistent with the second prong of the *Bell* analysis, the Court should apply the due process equivalent of a Fourth Amendment standard herein and recognize the distinction between the objectively reasonable application of force necessary to maintain order and enforce rules for pretrial detainees and the use of unnecessary and excessive force which goes above and beyond that

necessary to achieve these same ends. As the common law has long recognized, the differing liberty interests at stake between pretrial detainees and convicted prisoners demands no less.

CONCLUSION

Pretrial detainees, like all citizens, are entitled to the protection of the law from abuse at the hands of the government. When subjected to excessive force by their jailers, pretrial detainees must have justice and a fair opportunity to obtain that justice. The requirement imposed below and by other circuit courts that a detainee prove a defendant acted with some invidious intent not only unduly limits the opportunity for justice but is not compelled by this Court's precedent. Therefore, amicus submits that this Court should adopt the objective test of reasonable force propounded by the Petitioner and reverse the judgment of the Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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