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 FOR THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

Barbara E. Bergman
Co-Chair, Amicus
Committee
NATIONAL ASSOCIATION
OF CRIMINAL DEFENSE
LAWYERS
1117 Stanford, N.E.
Albuquerque, NM 87131
(505) 277-3304

Mitchell F. Dolin
Counsel of Record
Jeff Kosseff
David Metcalf
COVINGTON & BURLING LLP
One City Center
850 Tenth St., NW
Washington, DC 20001
(202) 662-6000

Counsel for Amicus Curiae

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Interest Of *Amicus Curiae*

The National Association of Criminal Defense Lawyers ("NACDL") is a nonprofit professional bar association that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of crimes or misconduct.[1] NACDL was founded in 1958. It has a nationwide membership of approximately 10,000 direct members in 28 countries, and 90 state, provincial and local affiliate organizations totaling up to 40,000 attorneys. NACDL's members include private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges. The American Bar Association recognizes NACDL as an affiliated organization and awards it full representation in its House of Delegates.

NACDL has participated as *amicus* in many of the Court's most significant criminal cases. In many such cases, as in this one, NACDL has sought to ensure that criminal defendants are not subject to excessive force during pretrial detention.

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[1] Each party has consented to the filing of *amicus curiae* briefs in support of either party or of neither party. Pursuant to Rule 37.6, counsel for *amicus curiae* states that no party's counsel authored this brief in whole or in part and that no party or party's counsel made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

Summary Of Argument

The Seventh Circuit erred in its conclusion that excessive force claims by pretrial detainees cannot succeed unless the plaintiff demonstrates that the officers *both* used objectively unreasonable force *and* subjectively acted with reckless disregard of the plaintiff's safety. The subjective intent requirement is unnecessary; the proper—and only—requirement should be an objective assessment of whether the officers' actions were reasonable.

Since our nation's earliest days, courts have relied on the objective reasonableness test as a fair method of determining whether law enforcement and other officials have violated an individual's civil liberties in a wide range of circumstances, including in many types of excessive force cases. This *amicus* brief summarizes the history of the objective reasonableness test, as well as the reasons that courts have adopted it for more than a century in a variety of contexts. Neither the Seventh Circuit nor the respondents have set forth a persuasive basis for deviating from this test in cases involving pretrial detainees. Accordingly, the Seventh Circuit's decision should be reversed.

Argument

I. The Court Has Assessed the Objective Reasonableness of Alleged Civil Liberties Deprivations by Law Enforcement Personnel for More than a Century.

In holding that the jury correctly required Mr. Kingsley to demonstrate *both* objective unreasonableness *and* the officers' subjective intent, the Seventh Circuit ignored more than a century of precedent in which this Court has applied the objective reasonableness test to a wide range of claims against law enforcement and other officials.

The objective reasonableness test has been a cornerstone of Fourth Amendment jurisprudence since our nation's earliest days. Even before the Court used the term "objective reasonableness," it recognized the need to evaluate the government's actions from the perspective of a neutral, third-party observer. In *Locke v. United States*, 11 U.S. (7 Cranch) 339 (1813), the claimant challenged the federal government's condemnation of goods for violations of import laws, arguing that the government lacked probable cause for the goods' seizure. In addressing the argument, Chief Justice Marshall observed that probable cause "means less than evidence which would justify condemnation." *Id.* at 348. Probable cause, he wrote, "imports a seizure made under circumstances which warrant suspicion." *Id.* In other words, probable cause requires an *objective* analysis

of the circumstances, rather than an inquiry into the government's state of mind.

Subsequent precedents developed and honed this objective test. In *Stacey v. Emery*, 97 U.S. 642 (1878), the Court considered the plaintiff's claim that internal revenue agents violated his Fourth Amendment rights by seizing his whiskey. The plaintiff alleged that the seizure was wrongful and malicious. The Court refused to consider such factors, reasoning that

> [t]he question of malice or of good faith is not an element in the case. It is not a question of motive. If the facts and circumstances before the officer are such as to warrant a man of prudence and caution in believing that the offence has been committed, it is sufficient. Whether the officer seized the occasion to do an act which would injure another, or whether he moved reluctantly, is quite immaterial.

Id. at 645. Indeed, the statute in *Stacey* used the term "reasonable cause of seizure," and the Court reasoned that there is not a "substantial difference" in the meaning of the terms "reasonable cause" and "probable cause." "If there was a probable cause of seizure, there was a reasonable cause. If there was a reasonable cause of seizure, there was a probable cause. In many of these reported cases the two expressions are used as meaning the same thing[.]" *Id.* at 646.

Similarly, the Court has held that objective reasonableness is the standard for false imprisonment claims, applying an understanding of the term "probable cause," albeit not in connection with a constitutional civil rights lawsuit. In *Director General of Railroads v. Kastenbaum*, 263 U.S. 25 (1923), the plaintiff claimed that an officer illegally detained him in connection with an investigation into theft of a rail car. The Court rejected the government's argument that the court should consider the intent of the officer. "The question is not whether he thought the facts to constitute probable cause, but whether the court thinks they did," Chief Justice Taft wrote, citing *Holmes on the Common Law*. *Id.* at 28. The Court noted that the want of probable cause "is measured by the state of the defendant's knowledge, not by his intent." *Id.* at 27-28; *see also id.* at 28 ("But the standard applied to defendant's consciousness is external to it.").

Building on Chief Justice Taft's reasoning, the Court has long recognized the dangers of focusing on the subjective intent of officers. In *Beck v. Ohio*, 379 U.S. 89 (1964), the Court considered the defendant's motion to suppress evidence gathered during his arrest, which he claimed lacked probable cause. The Court reversed the Ohio Supreme Court's affirmance of his conviction, reasoning that even if the police arrested the defendant in good faith, that is "not enough." *Id.* at 97 (citation and internal quotation marks omitted). Justice Stewart wrote that "[i]f subjective good faith alone were the test, the protections of the Fourth Amendment would evaporate, and the people would be 'secure in their persons, houses, pa-

pers, and effects,' only in the discretion of the police." *Id.*

Similarly, in *Terry v. Ohio*, 392 U.S. 1 (1968), the Court explained why the objective reasonableness test is the *only* framework in which to evaluate a Fourth Amendment claim arising from a stop-and-frisk. The Court concluded that the Fourth Amendment "becomes meaningful only when it is assured that at some point the conduct of those charged with enforcing the laws can be subjected to the more detached, neutral scrutiny of a judge who must evaluate the reasonableness of a particular search or seizure in light of the particular circumstances." *Id.* at 21. Applying a different standard, the Court reasoned, "would invite intrusions upon constitutionally guaranteed rights based on nothing more substantial than inarticulate hunches, a result this Court has consistently refused to sanction." *Id.* at 22.

The objective reasonableness test, in fact, often protects the *government's* interests. Even if an officer's motive for a search or other intrusion is in bad faith, the officer will not face liability if the actions were objectively reasonable. *See United States v. Leon*, 468 U.S. 897, 918-19 (1984) ("[E]ven assuming that the rule effectively deters some police misconduct and provides incentives for the law enforcement profession as a whole to conduct itself in accord with the Fourth Amendment, it cannot be expected, and should not be applied, to deter objectively reasonable law enforcement activity"); *see also* Wayne R. LaFave, *Search And Seizure: A Treatise On The Fourth Amendment* § 1.04(d) (4th ed. 2004).

The Court has long considered the objective reasonableness test to be the most effective analytical framework for deterring improper actions by law enforcement at the search and arrest stages. As Justice White explained in *Illinois v. Gate*s, "[g]rounding the modification in objective reasonableness . . . retains the value of the exclusionary rule as an incentive for the law enforcement profession as a whole to conduct themselves in accord with the Fourth Amendment." 462 U.S. 213, 261, n.15 (1983) (White, J., concurring in judgment).

II. The Court Has Applied the Objective Reasonableness Test to Excessive Force Cases.

The Seventh Circuit's imposition of a subjective intent requirement also conflicts with this Court's excessive force jurisprudence, which has historically analyzed the conduct of law enforcement personnel in relation to arrestees in objective terms.

In *Rochin v. California*, 342 U.S. 165 (1952), overruled on other grounds by *Mapp v. Ohio*, 367 U.S. 643 (1961), recognized by many commentators as this Court's first excessive force case,[2] police offic-

[2] *See, e.g.,* Irene M. Baker, *Wilson v. Spain*: *Will Pre-trial Detainees Escape the Constitutional 'Twilight Zone'?*, 75 St. John's L. Rev. 449 (2001); Kathryn R. Urbonya, *Establishing a Deprivation of a Constitutional Right to Personal Security Under Section 1983: The Use of Unjustified Force by State Officials in Violation of the Fourth, Eighth, and Fourteenth Amendments*, 51 Alb. L. Rev. 173 (1987); Irene Prior Loftus, *Note, The "Reasonable" Approach to Excessive Force Cases Under Section 1983*, 64 Notre Dame L. Rev. 136, 140-47 (1989).

ers transported an arrestee to a medical facility and forcibly administered an emetic solution to compel the arrestee to vomit drugs that he had allegedly swallowed. *Id.* at 166. This Court held that such behavior violated the guarantees of Due Process under the Fourteenth Amendment, which embodied "those canons of decency and fairness" and "standards of conduct" that comprise American criminal justice. *Id.* at 169, 173.

The first explicit application of the objective reasonableness test to excessive force claims occurred in *Tennessee v. Garner*, 471 U.S. 1 (1985), which involved a 42 U.S.C. § 1983 claim asserted on behalf of a fleeing suspect shot to death by police officers. Applying an objective reasonableness test to the use of lethal force by an arresting officer, this Court reasoned that "there can be no question that apprehension by the use of deadly force is a seizure subject to the reasonableness requirement of the Fourth Amendment." *Id.* at 7. This requirement, as articulated, discounts the subjective mindset of law enforcement entirely. *See id.* at 11 ("The use of deadly force to prevent the escape of all felony suspects, whatever the circumstances, is constitutionally unreasonable.").

This Court subsequently affirmed the application of the objective reasonableness test to excessive force claims in *Graham v. Connor*, 490 U.S. 386 (1989), noting that "*all* claims that law enforcement officers have used excessive force—deadly or not—in the course of an arrest, investigatory stop, *or other 'seizure'* of a free citizen should be analyzed under

the Fourth Amendment and its 'reasonableness' standard." *Id*. at 395 (emphasis added). In doing so, this Court notably rejected the subjective four-part test for excessive force claims advanced by lower courts prior to its decision, *see, e.g.*, *Johnson v. Glick*, 481 F.2d 1028 (2d Cir. 1973), which assessed, *inter alia*, "whether force was applied in a good faith effort." *Id.* at 1033. "As in other Fourth Amendment contexts," the Court emphasized, "the 'reasonableness' inquiry in an excessive force case is an objective one." *Graham*, 490 U.S. at 397.

On multiple occasions since, this Court has reaffirmed that *Graham* "clearly establishes the general proposition that use of force is contrary to the Fourth Amendment if it is excessive under objective standards of reasonableness." *Saucier v. Katz*, 533 U.S. 194, 201-02 (2001), *abrogated on other grounds by Pearson v. Callahan*, 555 U.S. 223 (2009); *see also Plumhoff v. Rickard*, 134 S. Ct. 2012, 2020 (2014) ("A claim that law-enforcement officers used excessive force to effect a seizure is governed by the Fourth Amendment's 'reasonableness' standard."); *Scott v. Harris*, 550 U.S. 372, 381 (2007) ("[A] claim of excessive force in the course of making a seizure of the person is properly analyzed under the Fourth Amendment's 'objective reasonableness' standard.") (internal quotations omitted); *Muehler v. Mena*, 544 U.S. 93, 98–99 (2005) ("Inherent in Summers' authorization to detain an occupant of the place to be searched is the authority to use reasonable force to effectuate the detention."); *Brosseau v. Haugen*, 543 U.S. 194, 197 (2004) ("These cases establish that claims of excessive force are to be judged under the

Fourth Amendment's 'objective reasonableness' standard.").

III. The Court's Reasoning in Support of the Objective Reasonableness Test is Equally Applicable to Cases Involving Pretrial Detainees.

The Seventh Circuit's decision to require Mr. Kingsley to make a showing of subjective intent as an element of his excessive force claim is particularly inappropriate for pre-trial detainees.

While this Court has embraced a subjective inquiry in adjudicating excessive force claims under the Eighth Amendment, *see Whitley v. Albers*, 475 U.S. 312, 318-26 (1986), the Court has applied this test only to convicted prisoners—not to pretrial detainees who have yet to be found guilty. In the post-conviction context of the Eighth Amendment, the question of whether a state actor has committed an "unnecessary and wanton infliction of pain" necessarily and appropriately contemplates scienter. *See id.* at 319. But the Seventh Circuit erred by imposing a subjective intent requirement to claims arising from excessive force that occurs *before* conviction.

The objective reasonableness test applies not only at the time of arrest or criminal investigation, *see Graham*, 490 U.S. at 394-96, but also to Mr. Kingsley inasmuch as pre-trial detainment triggers the protection of the Fourth Amendment and its correlative "objective reasonableness" test. As Justice Ginsburg has observed, any criminal detention or restraint on freedom prior to an adjudication of guilt constitutes a

"seizure" under the Fourth Amendment. *See Albright v. Oliver*, 510 U.S. 266, 276–78 (1994) (Ginsburg, J., concurring) (citing 2 M. Hale, Pleas of the Crown at 124; 4 W. Blackstone, Commentaries for proposition that bailees are still in custody and thus "seized").

While the Fourth Amendment arguably applies, this Court has stated that the Due Process Clause of the Fourteenth Amendment, at a minimum, protects pre-trial detainees from excessive force as an unconstitutional "punishment." *See Bell v. Wolfish*, 441 U.S. 520 (1979); *Graham*, 490 U.S. at 395 n.10. Accordingly, even if this Court determines that pre-trial detention marks the "point at which Fourth Amendment protections end and Fourteenth Amendment protections begin," *Orem v. Rephann*, 523 F.3d 442, 446 (4th Cir. 2008), the objective reasonableness standard should nonetheless govern all excessive force claims of pre-trial detainees, *see Gibson v. Cnty. of Washoe, Nev.*, 290 F.3d 1175 (9th Cir. 2002) (applying Fourth Amendment test); *accord Andrews v. Neer*, 253 F.3d 1052 (8th Cir. 2001).

Bell v. Wolfish, 441 U.S. 520 (1979), established that the Due Process Clause prohibits excessive force as an unconstitutional "punishment" under the Fourteenth Amendment. While the test outlined by *Bell* examines, *inter alia*, an "*expressed* intent to punish," this question and the test *in toto* constitute an objective inquiry: "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 governmental purpose." *Id.* at 538. Although the lower courts are in conflict, cases properly applying

Bell to pretrial detainees have treated its inquiry as an objective test. *See United States v. Budd*, 496 F.3d 517 (6th Cir. 2007); *Fuentes v. Wagner*, 206 F.3d 335 (3d Cir. 2000).

In fact, outside of the excessive force context, the inquiry into whether state action constitutes "punishment" under the Fourteenth Amendment has been an objective one. *See Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 165-167 (1963) (automatic forfeiture-of-citizenship after arrest for draft evasion constituted impermissible punishment); *Flemming v. Nestor*, 363 U.S. 603 (1960) (termination of social security benefits for deportee accused of communist membership); *De Veau v. Braisted*, 363 U.S. 144 (1960) (Bill of Attainder and Ex Post Facto laws).

Neither the Seventh Circuit nor respondents have set forth any persuasive arguments as to why pretrial detainees should face a higher standard of proof in excessive force claims. Accordingly, even if the Due Process Clause of the Fourteenth Amendment governs pretrial detainee excessive force claims, the test is and ought to be an objective one.

Conclusion

The Seventh Circuit's judgment should be reversed.

Respectfully submitted,

Barbara E. Bergman
Co-Chair, Amicus Committee
NATIONAL ASSOCIATION
OF CRIMINAL DEFENSE LAWYERS
1117 Stanford, N.E.
Albuquerque, NM 87131
(505) 277-3304

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Mitchell F. Dolin
Counsel of Record
Jeff Kosseff
David Metcalf
COVINGTON & BURLING LLP
One City Center
850 Tenth St., NW
Washington, DC 20001
(202) 662-6000

Counsel for Amicus Curiae