UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

Case No. 16-56005

MARY GORDON, successor in interest for
Decedent, Matthew Shawn Gordon, individually,

Plaintiff-Appellant

vs.

COUNTY OF ORANGE, et al.

Defendants-Appellees

On Appeal from the United States District Court
For the Central District of California,
(District Court No. SACV 14-01050 CJC (DFMx))
The Hon. Cormac J. Carney, Judge Presiding

AMICUS CURIAE BRIEF BY CALIFORNIA STATE ASSOCIATION OF COUNTIES IN SUPPORT OF APPELLEES' PETITION FOR REHEARING EN BANC

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I.

CORPORATE DISCLOSURE STATEMENT

Amicus Curiae California State Association of Counties (CSAC) is a non-profit corporation. CSAC has no parent corporation and no publically held corporation owns more than 10% more of its stock.

II.

AMICUS IDENTITY STATEMENT AND INTEREST IN THE CASE

CSAC is a non-profit corporation. The membership consists of the 58 California Counties. CSAC sponsors a Litigation Coordination Program, which is administered by the County Counsel's Association of California and overseen by the Association's Litigation Overview Committee, which is comprised of county counsels throughout California. The Litigation Overview Committee monitors litigation of concern to counties statewide and has determined that *Gordon v. County of Orange*, 888 F.3d 1118 (9th Cir. 2018) raises issues affecting all counties. CSAC is interested in this case because the issues presented have a profound

impact on all California counties, as well as other government agencies throughout California that house and provide medical care to pretrial detainees.

III.

STATEMENT OF AUTHORSHIP AND FINANCIAL SUPPORT

No counsel for any party in this case authored any part of this brief. No party or counsel for any party in this case contributed money intended to fund preparation or submission of this brief. No person or entity other than CSAC and its counsel contributed money intended to fund preparation or submission of this brief.

IV.

STATEMENT REGARDING CONSENT TO FILE

All parties consented to the filing of this brief.

V.

INTRODUCTION

In *Kingsley v. Hendrickson*, 135 S.Ct. 2466 (2015), the Supreme Court adopted an objective reasonableness standard for Fourteenth Amendment excessive force claims

by pretrial detainees. *Id.* at 2470-2472. In *Castro v. County of Los Angeles*, 833 F.3d 1060 (9th Cir. 2016) (en banc), this Court extended *Kingsley's* objective reasonableness standard to Fourteenth Amendment failure-to-protect claims brought by pretrial detainees. *Id.* at 1071. Thus, *Kingsley* and *Castro* establish Fourteenth Amendment claims brought by pretrial detainees for, respectively, excessive force and failure-to-protect are measured by an "objective deliberate indifference" standard.

Neither *Kingsley* nor *Castro* involved a Fourteenth Amendment claim by a pretrial detainee for inadequate medical care ("medical care claim"). And neither *Kingsley* nor *Castro* held that the "objective deliberate indifference" standard applied to any other type of Fourteenth Amendment claim brought by a pretrial detainee other than, respectively, excessive force and failure-to-protect claims.

Thus, binding Ninth Circuit precedent existing when the panel issued its decision still required a pretrial detainee bringing a medical care claim to prove "subjective deliberate

indifference" by government officials. In other words, the pretrial detainee had to show an official knew of and purposefully disregarded a serious medical need. *Simmons v. Navajo County*, 609 F.3d 1011 (9th Cir. 2010); *Clouthier v. County of Contra Costa*, 591 F.3d 1232, 1241 (9th Cir. 2010), *overruled on other grounds*, *Castro,* 833 F.3d at 1070; *Lolli v. County of Orange*, 351 F.3d 410, 419 (9th Cir. 2003). The panel opinion improperly disregarded this binding precedent.

CSAC believes en banc review of the panel decision is necessary and appropriate for the following reasons:

* The panel opinion's adoption of a new objective deliberate indifference standard for medical care claims raises an issue of great importance with far reaching ramifications.
* The panel opinion adopted a new objective deliberate indifference standard for medical care claims by improperly disregarding binding precedent without first determining whether the

precedent was clearly irreconcilable with *Kingsley* or *Castro*.

* The panel opinion's adoption of a new objective deliberate indifference standard for medical care claims creates an intra-Circuit conflict.

* The panel opinion's adoption of a new objective deliberate indifference standard for medical care claims creates a conflict with other Circuit Courts continuing to employ the subjective deliberate indifference standard for medical care claims after *Kingsley*.

* The panel opinion's adoption of a new objective deliberate indifference standard cannot work for all medical care claims and otherwise brings a substantive due process claim far too close to claims for medical malpractice

For all these reasons, en banc review is necessary and appropriate.[1] Fed. R. App. Proc. 35(a); Ninth Circuit Rule 35-1.

VI.

EN BANC REVIEW IS NECESSARY AND APPROPRIATE

A. The Panel Opinion's Adoption Of A New Objective Deliberate Indifference Standard For Medical Care Claims Raises An Issue Of Great Importance With Far Reaching Ramifications

Changing the standard in the Ninth Circuit for medical care claims from a subjective deliberate indifference standard to an objective deliberate indifference standard is a significant decision of exceptional importance with broad impacts, and accordingly warrants en banc review.

There are 117 county run jails in California[2] with the roughly 46,000 pretrial detainees in these jails accounting

[1] *Gordon* is already impacting at least one currently pending case before this Court. *See Crowell v. Cowlitz County*, Case No. 15-35992, Doc. No. 81 (April 30, 2018 order asking the parties to brief by May 22 the following issue: "Should the panel vacate the summary judgment and remand for the district court to consider, in the first instance, the effect of this court's recent decision in *Gordon v. County of Orange*, No. 16-56005, slip op. at 1 (9th Cir. Apr. 30, 2018)?")

[2] Magnus Lofstrom & Brandon Morton, *Just the Facts* –

for 64% of California's jail population.[3] California is not alone in this respect. While CSAC has not yet ascertained the number of pretrial detainees in jails in the many states, counties and cities within the broad reach of the Ninth Circuit, on a national level "[t]wo thirds of the confined population in county jails is pretrial and the proportion reaches three-quarters in almost half of county jails. This trend is more pronounced in jails located in small counties — with less than 50,000 residents — and medium-sized counties — with populations between 50,000 and 250,000 residents."[4] It is accordingly safe to believe that pretrial detainees make up at least 50% of the jail population

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California County Jails (Public Policy Inst. of Cal. Nov. 2017), http://www.ppic.org/wp-content/uploads/JTF_CountyJailsJTF.pdf

[3] Sonya Tafoya et al., *Pretrial Release in California* (Public Policy Inst. of Cal., May 2017), p. 5, www.ppic.org/content/pubs/report/R_0517STR.pdf.

[4] Natalie R. Ortiz, Ph.D., County Jails At A Crossroads, An Examination Of the Jail Population And Pretrial Release (National Association of Counties Why Counties Matter Paper Series, Issue 2, 2015), p. 2, www.naco.org/sites/default/files/documents/Final%20paper_County%20Jails%20at%20a%20Crossroads_8.10.15.pdf.

throughout the Ninth Circuit. These are significant and ever increasing numbers, which is reflected in the debate over bail reform occurring in many states.

The panel opinion's creation of a new objective deliberate indifference standard for medical care claims impacts all entities housing pretrial detainees. Now that a lesser liability standard exists, these entities are exposed not only to increased costs associated with increased litigation and potential adverse verdicts, but also with the unascertainable but significant costs associated with retraining to ensure compliance with the less than certain liability standard articulated in the panel opinion.

B. The Panel Opinion Adopted A New Objective Deliberate Indifference Standard For Medical Care Claims By Improperly Disregarding Binding Precedent Without First Determining Whether The Precedent Was Clearly Irreconcilable With *Kingsley* or *Castro*

"[T]he doctrine of stare decisis is of fundamental importance to the rule of law." *Welch v. Texas Dep't Of Highways and Public Transp.*, 483 U.S. 468, 494 (1987). The Ninth Circuit honors this principal with the inflexible rule

that a three-judge panel is bound to follow existing precedent unless the reasoning underlying that precedent is "clearly irreconcilable" with subsequent higher authority. *Miller v. Gammie*, 335 F.3d 889, 892-893 (9th Cir. 2003) (en banc). As it should be, "clearly irreconcilable" is "a high standard." *Rodriguez v. AT & T Mobility Servs. LLC*, 728 F.3d 975, 979 (9th Cir. 2013). "It is not enough for there to be 'some tension' between the intervening higher authority and prior circuit precedent, or for the intervening higher authority to 'cast doubt' on the prior circuit precedent. The intervening higher precedent must be 'clearly inconsistent' with the prior circuit precedent." *Lair v. Bullock*, 697 F.3d 1200, 1207 (9th Cir. 2012) (citations omitted).

The panel opinion never analyzed whether the subjective deliberate indifference standard for medical care claims established in *Simmons, Clouthier and Lolli* was clearly irreconcilable with *Kingsley* or *Castro*. Instead, the panel opinion departed from binding precedent because "*logic dictates* extending the objective deliberative

indifference standard [for failure-to protect claims] articulated in *Castro* to medical care claims." *Gordon*, 888 F.3d at 1123 (italics added).

Given the inevitable disagreement that different panels of three judges will have about what logic dictates, logic is accordingly not the test for disregarding prior precedent. Indeed, several different panels of this Court applied the subjective deliberate indifference standard to medical care claims after *Castro*. *Assenberg v. Whitman County*, 2018 WL 1752049, at *2 (9th Cir. Apr. 12, 2018) (unpub.); *Okpoti v. Las Vegas Metro. Police Dep't.;* 712 F. App'x. 671, 672 (9th Cir. 2018); *Ortega v. Ritchie*, 708 F. App'x. 446 (9th Cir. 2018); *Law v. Blandon*, 698 F. App'x. 440, 441 (9th Cir. 2017).

Determining whether prior precedent establishing a subjective deliberate indifference standard for medical care claims is clearly irreconcilable with either *Kingsley* or *Castro* is a mandate the panel opinion ignored. *See, e.g., Vanorden v. Bannock County*, 719 F. App'x. 633, 634 (9th Cir. 2018)

("We asked the parties to brief the question whether the subjective standard for medical deliberate-indifference cases articulated in *Simmons* [ ] is clearly irreconcilable with our later decision in *Castro* [ ]. We conclude that we need not answer that question in this case, because the result is the same under either test."); *Crowell v. Cowlitz County*, Ninth Circuit Case No. 15-35992, Doc. No. 62 (asking the parties to brief the following question: "Is prior Ninth Circuit precedent holding that a pretrial detainee bringing a claim of deliberate indifference to a serious medical need must show that the defendants were subjectively aware of the medical need and failed to respond adequately, e.g., *Simmons* [ ], 'clearly irreconcilable' with *Castro* [ ]?").

Because the County of Orange aptly demonstrates in its petition for rehearing how and why the existing subjective deliberate indifference standard for medical care claims established in *Simmons, Clouthier* and *Lolli* is not "clearly irreconcilable" with *Kingsely* or *Castro*, CSAC does not repeat those arguments.

C. The Panel Opinion's Adoption Of A New Objective Deliberate Indifference Standard For Medical Care Claims Creates An Intra-Circuit Conflict

Simmons, Clouthier, and *Lolli* all hold that medical care claims are governed by the subjective deliberate indifference standard.[5] The panel opinion holds the exact opposite. The irreconcilable nature of the conflict requires en banc review. *United States v. Gasca-Ruiz*, 852 F.3d 1167, 1168 (9th Cir. 2017) (en banc) ("We took this case en banc to resolve an intra-circuit conflict over the standard of review that applies when we review a district court's application of the United States Sentencing Guidelines to the facts of a given case."); *see Atonio v. Wards Cove Packing Co.*, 810 F.2d 1477, 1479 (9th Cir. 1987) (en banc) ("We now hold that the appropriate mechanism for resolving an irreconcilable conflict is an en banc decision. A panel faced with such a

[5] While *Castro,* 833 F.3d at 1070, did "overrule *Clouthier* to the extent that it identified a single deliberate indifference standard for all § 1983 claims and to the extent that it required a plaintiff to prove an individual defendant's subjective intent to punish in the context of a pretrial detainee's failure-to-protect claim," *Castro's* limited rejection of *Clouthier* did not otherwise overrule *Clouthier's* holding on medical care claims and certainly did nothing to the holdings of *Simmons* and *Lolli*.

conflict must call for en banc review, which the court will normally grant unless the prior decisions can be distinguished.").

D. The Panel Opinion's Adoption Of A New Objective Deliberate Indifference Standard For Medical Care Claims Creates A Conflict With Other Circuit Courts Continuing To Employ The Subjective Deliberate Indifference Standard After *Kingsley*

Subsequent to *Kingsley*, a number of Circuits continue to apply the subjective deliberate indifference standard to medical care claims. *Whitney v. City of St. Louis, Missouri,* 887 F.3d 857, 859-860 & n. 4 (8th Cir. 2018); *Dang ex rel Dang v. Sheriff, Seminole County, Fla.*, 871 F.3d 1272, 1279 & n.2 (11th Cir. 2017); *Rife v. Oklahoma Dep't of Pub. Safety*, 854 F.3d 637, 647 (10th Cir. 2017); *Ryan v. Armstrong*, 850 F.3d 419, 425 (8th Cir. 2017); *Alderson v. Concordia Parish Corr. Facility*, 848 F.3d 415, 419 & n.4 (5th Cir. 2017); *Guy v. Metro. Gov't of Nashville & Davidson County, Tennessee*, 687 F. App'x. 471, 477–478 (6th Cir. 2017); *Barton v. Taber,* 820 F.3d 958, 964-965 (8th Cir. 2016); *Miranda-Rivera v. Toledo-Davila*, 813 F.3d 64, 74 (1st

Cir. 2016); *Bailey v. Feltmann*, 810 F.3d 589, 593–594 (8th Cir.), *cert. denied*, 137 S. Ct. 60 (2016).[6]

The panel opinion creates a conflict with these decisions, which accordingly warrants en banc review. *United States v. Jose*, 131 F.3d 1325, 1327 (9th Cir. 1997) (en banc) ("In light of this inter circuit conflict, we decided sua sponte to consider the merits of this case en banc.").

E. The Panel Opinion's New Objective Deliberate Indifference Standard Cannot Be Applied To All Medical Care Claims And Otherwise Brings A Constitutional Substantive Due Process Claim Far Too Close To A Tort Claim For Medical Malpractice

Pursuant to the panel opinion, "the elements of a pretrial detainee's medical care claim against an individual defendant under the due process clause of the Fourteenth Amendment are: (i) the defendant made an intentional decision with respect to the conditions under which the plaintiff was confined; (ii) those conditions put the plaintiff at substantial risk of suffering serious harm; (iii) the

[6] Notably, the petition for review to the Supreme Court by the plaintiff in *Bailey* argued *Kingsley* applied to medical care claims. *Bailey v. Feltmann*, 2016 WL 2765365 (U.S.), at *12-14.

defendant did not take reasonable available measures to abate that risk, even though a reasonable official in the circumstances would have appreciated the high degree of risk involved—making the consequences of the defendant's conduct obvious; and (iv) by not taking such measures, the defendant caused the plaintiff's injuries." *Gordon*, 888 F.3d at 1025. "'With respect to the third element, the defendant's conduct must be objectively unreasonable, a test that will necessarily 'turn[ ] on the facts and circumstances of each particular case.' " *Id.* at 1071 (quoting *Castro*, 833 F.3d at 1071). "The 'mere lack of due care by a state official' does not deprive an individual of life, liberty, or property under the Fourteenth Amendment.'" *Id.* "Thus, the plaintiff must 'prove more than negligence but less than subjective intent—something akin to reckless disregard.'" *Id.*

The panel opinion adopted verbatim the elements this Court established for a failure-to-protect claim in *Castro*. *See Castro*, 833 F.3d at 1071. CSAC does not believe it is that simple. Medical care claims must be treated differently

than failure-to-protect claims because medical care decisions are fundamentally different than decisions regarding conditions of confinement. *See id.* at 1070 ("Because of the differences between failure-to-protect claims and claims of excessive force, though, applying *Kingsley's* holding to failure-to-protect claims requires further analysis.").

Contrary to what is implicit in the panel opinion's articulation of the elements for medical care claims, those providing medical care to pretrial detainees generally play no role in decisions regarding conditions of confinement. While the official failing to provide medical care in some circumstances may also be the official making decisions regarding conditions of confinement, the reality is that those generally providing medical care to pretrial detainees – doctors, nurses, and other similar medical care professionals – have no role in the intentionally made administrative decisions regarding actual conditions of confinement.

Neither *Kingsley* nor *Castro* altered the fundamental principal that "the Fourteenth Amendment is not a font of

tort law ...." *County of Sacramento v. Lewis*, 523 U.S. 833, 848 (1998). If the panel opinion's adoption of an objective deliberate indifference standard for medical care claims does not transform a substantive due process claim into a tort claim, it comes exceedingly close and in practice will very likely result in liability being imposed under the Fourteenth Amendment for medical malpractice.

According to the panel opinion, an official can be liable under the Fourteenth Amendment if: (1) the official made an intentional decision not to provide medical care to a pretrial detainee; (2) that decision put the pretrial detainee at substantial risk of suffering serious harm; (3) and the failure to provide medical care was objectively unreasonable. *Gordon*, 888 F.3d at 1125. By eliminating the requirement that an official subjectively know that his or her decision is exposing the pretrial detainee to a significant risk of harm, the panel opinion creates a framework where an official can violate the Fourteenth Amendment by making medical decisions that others believe, in hindsight, were

unreasonable. This is no different than a medical malpractice case where medical experts square off about what medical decisions were or were not below the standard of care. This problem is not eliminated by referencing an undefinable spectrum of conduct somewhere between negligence and subjective intent. *Id.*

VII.

CONCLUSION

CSAC respectfully contends that altering the existing subjective deliberate indifference standard for medical care claims to a less culpable objective deliberate indifference standard is a decision of such magnitude and impact that it should not be made by a three judge panel, but only by this Court sitting en banc upon full briefing and consideration of

the positions of those outside of this litigation impacted by the decision.

Dated: May 24, 2018

Daley & Heft, LLP

By:

/s/ Lee H. Roistacher

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Attorneys for Amicus Curiae,
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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(B) and Circuit Rule 29-2(c)(2), I certify that the Amicus Brief by the California State Association of Counties in support of the petition for rehearing en banc is proportionately spaced, has a typeface of 14 points or more and contains 2,884 words.

Dated: May 24, 2018

Daley & Heft, LLP

By:

/s/ Lee H. Roistacher

Lee H. Roistacher
Attorneys for Amicus Curiae,
California State Association of Counties

CERTIFICATE OF SERVICE

Re: *Mary Gordon v. County of Orange, et al.*
United States District Court of Appeals for the Ninth Circuit No. 16-56005
USDC Case No. SACV 14-01050 CJC (DFMx)

I hereby certify that I electronically filed the foregoing:

AMICUS CURIAE BRIEF BY CALIFORNIA STATE ASSOCIATION OF COUNTIES IN SUPPORT OF APPELLEES' PETITION FOR REHEARING EN BANC

with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the CM/ECF system on May 24, 2018.

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