

No. 14-1120

In the Supreme Court of the United States

MICHELLE KOSILEK, PETITIONER

v.

CAROL HIGGINS O'BRIEN, COMMISSIONER,
MASSACHUSETTS DEPARTMENT OF CORRECTION

*ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT*

**BRIEF OF AMICI CURIAE CIVIL PROCEDURE
SCHOLARS IN SUPPORT OF PETITIONER**

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QUESTIONS PRESENTED

1. Whether appellate courts must parse “questions that present elements both factual and legal” into their factual and legal components, so that all factual findings can be reviewed for clear error, or whether, as the First Circuit ruled, they may review such questions as a whole along a “continuum” of deference, where the degree of deference given to the district court is of “variable exactitude.”

2. Whether the Eighth Amendment prohibits prison officials from denying necessary medical treatment to a prisoner for non-medical reasons, such as security concerns.

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INTEREST OF AMICI¹

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Amici submit this brief to address the first question presented in the Petition for Certiorari regarding the “clearly erroneous” standard for appellate review of

¹ All parties were given timely notice to the filing of this brief and have consented to its filing pursuant to Rule 37.2(a). This brief was not authored in whole or in part by counsel for any party, and no person or entity other than *amici* made a monetary contribution to its preparation or submission.

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district court findings of fact under Federal Rule of Civil Procedure 52(a)(6).

SUMMARY OF THE ARGUMENT

After conducting a 28-day trial in a case that it had been shepherding for over ten years, the district court concluded that the Massachusetts Department of Corrections (DOC) had engaged in a systematic campaign to deny Michelle Kosilek access to medically necessary surgery for illegitimate reasons. Based on its evaluation of extensive live testimony and other relevant evidence, the district court concluded that DOC repeatedly departed from its ordinary procedures, offered false or pretextual explanations for its intransigence, and shopped for medical experts who would support its preferred outcome rather than relying on the advice of the providers ordinarily charged with making decisions about medical care. DOC took these actions, the court found, because Kosilek is a reviled individual and providing her with the surgery that was medically necessary to relieve her mental anguish and suicidal ideation would provoke political outrage. These were findings of fact, reached through assessment of live witness testimony and credibility determinations made during a trial that followed sustained engagement with counsel regarding the content and meaning of the record, as well as superintendence of this litigation through multiple phases of Kosilek's medical care and multiple requests for judicial intervention.

On the basis of these factual findings, the district court concluded that DOC had violated Kosilek's Eighth Amendment rights. Although it had found in an earlier proceeding that DOC's initial denial of medical care to Kosilek was not done with willful or reckless

disregard for her health, the Court found after a subsequent trial that DOC's continued refusal to permit her to have surgery over the course of ten more years was the product of hostility toward Kosilek, political pressure, and the use of unfounded security concerns as a pretext. These actions, the court found, satisfied the standard for reckless or willful disregard of a serious medical need under the Eighth Amendment. This was a mixed ruling of fact and law: the application of a legal standard to a set of factual findings.

The First Circuit arrived at a different conclusion about the sequence of events in this case. Without witnessing live testimony or spending a decade actively supervising the dispute, the appellate court concluded that the DOC witnesses were credible. It found that the plaintiff and her representatives, rather than DOC, were the ones seeking sympathetic and unreliable medical experts. And it concluded that DOC's departure from ordinary procedures in making determinations about medical care and security did not suggest that DOC's justifications for its actions were pretextual. On the strength of these appellate findings of fact, the court reversed and directed that the Eighth Amendment claim be dismissed.

At no point did the First Circuit find that any of the district court's subsidiary factual findings was clearly erroneous. The appellate court identified no basis for a "firm and definite conviction" that the district court had erred in concluding that DOC officials gave false and non-credible testimony, or that the opinions of plaintiff's medical experts offered a reliable application of accepted medical practice and DOC's experts did not, or that the long history of Kosilek's incarceration and

DOC's conduct in response to her requests for surgery indicated that DOC's purported concerns over Kosilek's security were a pretext. Instead, the First Circuit conducted an independent examination of the record and relied on its own independent judgment under a *de novo* standard of review.

The First Circuit justified this departure from the mandate of Rule 52 by pointing to the part of this case that involves mixed questions of fact and law: the application of the Eighth Amendment standard to findings of subsidiary fact when determining whether the events in this case constituted willful or reckless disregard of Kosilek's serious medical need. The appellate court claimed the power under Rule 52 to apply a standard of "variable exactitude" to the entire record before it, authorizing it to apply a less demanding "continuum" of deference to all subsidiary factual findings—not merely to those mixed findings that involve the application of a legal standard—when questions of fact and mixed questions of fact and law are both present in a case. And insofar as the First Circuit believed that the district court made mistakes of law in assessing the significance of some witness testimony, it did not correct the district court's error of law and remand for further findings, but rather conducted an independent determination of the trial record and entered its own findings of fact.

The *gestalt* approach to Rule 52 that is now the law of the First Circuit—treating all subsidiary findings of fact in a district court ruling as mere adjuncts to the ultimate mixed question of fact and law—was thoroughly rejected by this Court in *Teva Pharmaceuticals USA, Inc. v. Sandoz, Inc.*, decided one month after the

First Circuit ruled. 135 S. Ct. 831, 837 (2015). The First Circuit's use of *de novo* review for the subsidiary factual findings in an Eighth Amendment dispute involving medical care and mental injury also flouts this Court's insistence in *Brown v. Plata* that the clearly erroneous standard be applied faithfully and deferentially in that setting. 131 S. Ct. 1910, 1929-1930 (2011). And the appellate court's decision to make its own findings of fact rather than correcting any legal errors and remanding to the district court ignores this Court's ruling in *Pullman-Standard v. Swint*, which reversed the Fifth Circuit for the same flawed approach to Rule 52. 456 U.S. 273, 293 (1982).

This Court should grant the Petition for a Writ of Certiorari and enter a summary reversal that reiterates the principles governing Rule 52 expressed in *Teva Pharmaceuticals, Plata*, and *Pullman-Standard*. In the alternative, this Court should grant the Petition and schedule this case for full argument. At the very least, this Court should issue an order granting the Petition, vacating the decision of the First Circuit, and remanding the case for further consideration in light of *Teva Pharmaceuticals*.

ARGUMENT**I. THE FIRST CIRCUIT HAS VIOLATED THREE DEFINING PRINCIPLES OF THE CLEARLY ERRONEOUS STANDARD.****A. *Teva Pharmaceuticals v. Sandoz* Demands A Deferential Rule 52 Standard For All Subsidiary Findings Of Fact.**

In *Teva Pharmaceuticals v. Sandoz*, this Court held that the command of Rule 52—which prohibits appellate courts from setting aside the findings of a district court “unless clearly erroneous,” Fed. R. Civ. P. 52(a)(6)—controls findings of “subsidiary fact” in cases that include mixed questions of fact and law. 135 S. Ct. 831, 836-837 (2015). When a complex dispute contains some questions that require the application of a set of facts to a legal standard—for which more invasive appellate review may be appropriate—the Court of Appeals does not thereby acquire a license to conduct its own independent inquiry into the disputed facts of the case. See *id.* at 841-842. Rather, “[Rule 52(a)(6)] and the standard it sets forth must apply when a court of appeals reviews a district court’s resolution of subsidiary factual matters made in the course of its” resolution of any ultimate legal issues. *Id.* at 836. The standard adopted by the First Circuit in *Kosilek* stands squarely at odds with this command.

Teva Pharmaceuticals involved a challenge to a patent that turned on a construction of the term “molecular weight”—specifically, whether that term was too indefinite to support a valid patent. 135 S. Ct. at 835-836. After conducting a hearing and taking evidence from experts on the question, the district court concluded that the context in which the term was used

made clear that it had a definite and knowable scientific meaning. *Id.* at 836. The Federal Circuit reversed. In doing so, it “reviewed *de novo* all aspects of the District Court’s claim construction, including the District Court’s determination of subsidiary facts.” *Id.* at 833. Because the ultimate question of claim construction in a patent validity challenge is a question of law, the Federal Circuit believed that it had the power to conduct *de novo* review of any subsidiary findings of fact that inform the claim construction. *Ibid.*

The Court categorically rejected this *gestalt* approach to Rule 52. The presence of a contested legal question requiring the resolution of disputed facts—a mixed question of fact and law—does not authorize an appellate court to make independent findings on the disputed facts on which that question depends. *Teva Pharm.*, 135 S. Ct. at 837. Thus, when construction of a patent depends not only on review of the patent documents themselves but also “extrinsic evidence in order to understand, for example, the background science or the meaning of a term in the relevant art during the relevant time period,” *id.* at 841, the resolution of the “underlying factual dispute” can be reversed on appeal, if at all, only if “the Court of Appeals [] find[s] that the judge, in respect to those factual findings, has made a clear error.” *Ibid.* It is a matter of no moment if it would be “simpler for that appellate court to review the entirety of the district court’s [ruling] *de novo* rather than to apply two separate standards.” *Id.* at 839. The Courts of Appeals are not “free to ignore the Federal Rule.” *Ibid.*

The ruling of the *en banc* court in *Kosilek* adopts a standard for the review of complex cases that ignores

the Federal Rule and violates the principle announced in *Teva Pharmaceuticals*. The First Circuit frames the standard of review in the following terms:

The test for establishing an Eighth Amendment claim of inadequate medical care encompasses a multitude of questions that present elements both factual and legal. Review of such “mixed questions” is of a variable exactitude; the more law-based a question, the less deferentially we assess the district court’s conclusion.

Kosilek v. Spencer, 774 F.3d 63, 84 (2014). The Court of Appeals contrasts this permissive approach for subsidiary findings of fact in a case that contains a mixed question to cases involving determinations of “pure fact.” *Ibid.* The latter is the only circumstance in which the First Circuit acknowledges the authority of the clearly erroneous standard.

This is precisely the *gestalt* approach to complex cases that *Teva Pharmaceuticals* rejects. When a claim “encompasses a multitude of questions that present elements both factual and legal,” *Kosilek*, 774 F.3d at 84, that fact does not license the appellate court to treat the entire dispute as a “mixed question” subject to less deferential review. *Teva Pharm.*, 135 S. Ct. at 838. The ultimate question in such a case may be a mixed question that the appeals court may review with something less than strict deference, but when the resolution of that question makes reference to discrete findings of subsidiary fact, “Rule [52(a)(6)] requires appellate courts to review all such subsidiary factual findings under the ‘clearly erroneous’ standard.” *Ibid.*

The First Circuit’s misstatement of the clearly erroneous standard is more than an infelicitous choice of words. The court relied on its *gestalt* approach to reject the district court’s subsidiary findings of fact in favor of its own independent determinations, neither acknowledging nor applying the deference that Rule 52(a)(6) requires.

As the Petition details, the district court made extensive findings on the key factual disputes on which the resolution of the ultimate Eighth Amendment question depends: Kosilek’s medical need, the treatments she requires, the reliability and motivations of the competing experts, and the pretextual and dishonest testimony that DOC officials offered when called on to explain their continued denial of effective treatment to address Kosilek’s mental anguish. See Pet. 22-27. The First Circuit substituted its own judgment for that of the district court on these matters and made appellate findings of fact concerning what treatments would be “reasonably commensurate with the medical standards of prudent professionals” and “provide Kosilek with a significant measure of relief,” *Kosilek*, 774 F.3d at 90, and—astonishingly—concerning the credibility of witnesses that the appellate court did not see testify. Thus, on the issue of the DOC’s motivation for denying care, the Court of Appeals opined that “[c]ertain facts in this particular record—including the medical providers’ non-uniform opinions regarding the necessity of SRS, Kosilek’s criminal history, and the feasibility of post-operative housing—were important factors impacting [DOC’s] decision.” *Id.* at 91. This is *de novo* fact finding, not clear error analysis. See also *id.* at 94-95 (rejecting the district court’s finding that DOC witnesses offered dishonest or pretextual testimony in fa-

vor of its own conclusion that “the DOC testified consistently that it believed the postoperative security concerns surrounding Kosilek’s treatment were significant and problematic.”). Not once in its opinion did the First Circuit explain that any of the district court’s subsidiary findings of fact was clearly erroneous.

In *Pullman-Standard v. Swint*, 456 U.S. 273 (1982), this Court reversed the Fifth Circuit for a similar failure to apply Rule 52 faithfully.

[A]lthough the Court of Appeals acknowledged and correctly stated the controlling standard of Rule 52(a), the acknowledgment came late in the court’s opinion. The court had not expressly referred to or applied Rule 52(a) in the course of disagreeing with the District Court’s resolution of the factual issues deemed relevant under [the governing Title VII precedent]. Furthermore, the paragraph in which the court finally [resolved the ultimate question in the case] strongly suggests that the outcome was the product of the court’s independent consideration of the totality of the circumstances it found in the record.

Id. at 290-291. The First Circuit has committed the same error in *Kosilek* that required reversal in *Pullman-Standard*, but with an added problem: when the First Circuit recited the Rule 52 standard, it did not state it correctly but rather embraced the *gestalt* approach that this Court would go on to reject in *Teva Pharmaceuticals* one month later.

B. *Brown v. Plata* Requires Strict Adherence To The Clearly Erroneous Standard In Cases Involving Competing Medical Opinions.

The First Circuit’s misstatement of the Rule 52 standard is particularly troubling in light of this Court’s recent decision in *Brown v. Plata*, 131 S. Ct. 1910 (2011), which contains an exposition of the standard of appellate review in Eighth Amendment cases—one that the Court of Appeals ignored.

Plata arose out of this Court’s review of a three-judge district court’s order requiring a reduction in overcrowding as a remedy for inadequate mental health services and denial of medical care in the California prison system. 131 S. Ct. at 1922-1923. “After years of litigation” in two parallel cases—one in which a district judge presided over a “39-day trial” that found “systematic failure to deliver necessary care to mentally ill inmates” and another that undertook multiple rounds of remedial proceedings following the State’s confession of liability for failure to provide adequate care for “serious medical conditions”—the three-judge panel “heard 14 days of testimony and issued a 184-page opinion, making extensive findings of fact” in support of its conclusion that a reduction in prison overcrowding was necessary to remedy these ongoing Eighth Amendment violations. *Id.* at 1922, 1926-1928 (internal quotation marks omitted). The case came before this Court as the appellate tribunal of first instance, and the Court affirmed the findings of the trial court regarding the urgent need for extraordinary relief. *Id.* at 1923.

Faced with a remedial order that combined extensive subsidiary findings of fact with the mixed question of how the Eighth Amendment should apply to those

facts, this Court reiterated the care with which appellate courts must apply Rule 52 in terms that prefigured the holding in *Teva Pharmaceuticals*.

This Court's review of the three-judge court's legal determinations is *de novo*, but factual findings are reviewed for clear error. Deference to trial court factfinding reflects an understanding that the trial judge's major role is the determination of fact, and with experience in fulfilling that role comes expertise. The three-judge court oversaw two weeks of trial and heard at considerable length from California prison officials, as well as experts in the field of correctional administration. The judges had the opportunity to ask relevant questions of those witnesses. Two of the judges had overseen the ongoing remedial efforts of the Receiver and Special Master. The three-judge court was well situated to make the difficult factual judgments necessary to fashion a remedy for this complex and intractable constitutional violation. The three-judge court's findings of fact may be reversed only if this Court is left with a definite and firm conviction that a mistake has been committed.

131 S. Ct. at 1929-1930 (citations and quotation marks omitted). The Court went on to emphasize the need for appellate deference in the particular context of an Eighth Amendment case involving disputes over the adequacy of medical care.

The parties dispute the standard of review applicable to this determination. With respect to the three-judge court's factual findings, this Court's review is necessarily deferential. It is not this Court's place to duplicate the role of the trial court. The ultimate issue of primary cause presents a mixed question of law and fact; but there, too, the mix weighs heavily on the "fact" side. Because the district court is better positioned to decide the issue, our review of the three-judge court's primary cause determination is deferential.

Id. at 1932 (citations and quotation marks omitted). In so holding, the Court built on earlier rulings in which it had found that some mixed questions of law and fact depend on context and the unfolding of events, matters that the district court is uniquely situated to assess. See, e.g., *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 402 (1990) ("Familiar with the issues and litigants, the district court is better situated than the court of appeals to marshal the pertinent facts and apply the fact-dependent legal standard mandated by Rule 11.").

Under *Plata*, the *gestalt* approach adopted by the First Circuit is particularly inappropriate. As in *Teva Pharmaceuticals*, *Plata* carefully delineated between subsidiary factual findings and the ultimate mixed question of fact and law when defining the standard of appellate review. See *Plata*, 131 S. Ct. at 1929-1930. But unlike in *Teva Pharmaceuticals*, where the ultimate question of patent law involved construction of documents and could properly be approached *de novo*

by the appellate court, even the mixed question of law and fact “weighs heavily on the ‘fact’ side” in an Eighth Amendment dispute involving competing testimony over medical need, mental health, and appropriate remedies. See *id.* at 1932. Following *Plata*, the First Circuit was on notice that it bore a double responsibility of deference to the efforts of a district court in such a case. That court’s *gestalt* approach moved the Rule 52 standard in the opposite direction.

The parallels between *Kosilek* and *Plata* go deeper still. In affirming the findings of the three-judge panel in *Plata*, this Court explained that it could not “ignore the political and fiscal reality behind this case.” 131 S. Ct. at 1939. Despite the State’s own admission that the conditions in its prisons stood in continuing violation of the Eighth Amendment, “California’s Legislature ha[d] not been willing or able to allocate the resources necessary to meet this crisis absent a reduction in overcrowding” and there was “no reason to believe it [would] begin to do so.” *Ibid.* Spending money on the medical needs of inmates is often politically unpopular, requiring the finder of fact in an Eighth Amendment case to be particularly attentive to the “political and fiscal reality” that might be driving the denial of care. In this case, District Judge Wolf made extensive findings of fact regarding the charged political atmosphere in which DOC officials persisted in their refusal to provide Kosilek with needed medical care and prevaricated when called on to justify that refusal.

[T]he court finds that defendant’s decision to deny Kosilek sex reassignment surgery was not based on good faith and reasonable security concerns, and is not entitled

to deference. Rather, the court finds that the decision to deny Kosilek sex reassignment surgery was made to avoid political and public criticism. Dennehy and her successor, Clarke, had an unusual motive to deny Kosilek the treatment that DOC doctors prescribed and to testify falsely about their reason for doing so. Issues concerning medical care for prisoners rarely attract political or public attention. In this case, however, the Lieutenant Governor in whose administration Dennehy served publicly expressed her opposition to Kosilek receiving sex reassignment surgery. A State Senator, who was close to Dennehy, called her to discuss the television piece Dennehy was facilitating and then introduced legislation to prohibit the DOC from paying for sex reassignment surgery.

Kosilek v. Spencer, 889 F. Supp. 2d 190, 246 (D. Mass. 2012). Under *Plata*, probing the impact of these dynamics on the denial of medical care was a necessary part of the district court's inquiry, and the court's findings are entitled to respect and deference.

Nowhere in its opinion does the First Circuit discuss or even cite *Plata's* exposition of the standard of appellate review in an Eighth Amendment case.³ The

³ *Plata* makes just one appearance, and then only for a general statement of the substantive Eighth Amendment standard. See *Kosilek*, 774 F.3d at 82 (citing *Plata* for the proposition that “[w]here society takes from prisoners the means to provide for

Court of Appeals does not acknowledge the district court's role in assessing the "political and fiscal reality behind th[e] case." *Plata*, 131 S. Ct. at 1939. Instead, the court substitutes its own judgment about the motivations of witnesses, crediting the portions of the transcript in which DOC officials offered benign explanations for their actions over the judgment of the district court that these officials were being disingenuous. Compare *Kosilek*, 774 F.3d at 94-95 ("As an initial matter, the fact that Dennehy was motivated in part by concerns unrelated to prison security does not mean that the security concerns articulated by the DOC were irrelevant, wholly pretextual, or—most importantly—invalid on the merits. * * * [T]he DOC testified consistently that it believed the post-operative security concerns surrounding Kosilek's treatment were significant and problematic."), with *Kosilek*, 889 F. Supp. 2d at 247 ("In this case, the defendant has denied Kosilek sex reassignment surgery because of the belief that the idea of providing such treatment for a transsexual who murdered his [sic] wife is offensive to many members of the community, many of their elected representatives, and to the actively interested media as well. Dennehy, who formulated the position of the DOC, and her successors have denied Kosilek the prescribed sex reassignment surgery to avoid controversy, criticism, and, indeed, ridicule, and scorn.").

When a Court of Appeals minimizes or ignores the authority that controls the deference it owes to the findings of the trial court, that fact is relevant to the impact of its opinion on the standard of review in that

their own needs, the failure to provide such care may actually produce physical torture or a lingering death.").

Circuit and, hence, to this Court's decision whether *certiorari* is called for. See *Pullman-Standard*, 456 U.S. at 290-291 (noting the failure of the Fifth Circuit to acknowledge the controlling standard of appellate review until "late in the court's opinion"). The decision in *Kosilek* leaves doubt whether *Plata* will be applied faithfully in the First Circuit.

C. ***Pullman-Standard v. Swint* Instructs The Courts Of Appeals Not To Use Errors Of Law By A District Court As An Excuse For Engaging In Appellate Fact Finding.**

The First Circuit committed another error in applying Rule 52, one this Court specifically warned against in *Pullman-Standard*: after correcting what it believed to be a legal error in the standard that the district court applied when evaluating the DOC's testimony, the appellate court entered its own findings of fact rather than remanding the case to the district court for a reconsideration of its factual conclusions in light of that corrected standard. As the Court said in *Pullman-Standard*, this approach to the review of factual findings entails a "fundamental[]" error. 456 U.S. at 291.

The office of DOC Commissioner changed hands several times during the years that the district court presided over Ms. Kosilek's quest for medical treatment. In earlier phases of the case, the court heard testimony from Commissioner Kathleen Dennehy, who asserted that security concerns made the surgery that Kosilek sought unworkable. *Kosilek*, 889 F. Supp. 2d at 202-203. The court concluded that this testimony was pretextual and dishonest. *Ibid.* Dennehy left her posi-

tion in April 2007 and was replaced in November of that year by Harold Clarke. *Id.* at 228. The district court then directed Commissioner Clarke to explain his position on medical treatment for Kosilek. *Ibid.* Clarke submitted a report and subsequently testified in May 2008, ratifying the position of his predecessor on the issue of security concerns. *Ibid.* The district court found that Clarke's testimony suffered from the same flaws that had marred that of his predecessor and concluded that it, too, was pretextual and not credible. *Id.* at 246.

The First Circuit rejected the district court's assessment of Clarke's testimony due to what it believed was a legal error: "The district court improperly imputed its belief that Commissioner Dennehy had acted out of concern for public and political pressure to its assessment of the motivations of future DOC Commissioners [like Clarke]. This error ignores the requirement, in cases of injunctive relief, that a court consider the attitudes and beliefs of prison administrators at the time of its decision." *Kosilek*, 774 F.3d at 96. Assuming for purposes of analysis that the First Circuit was correct in its description of the legal standard and its assessment of the district court's reasoning, the proper course was to remand the case and permit the district court to reconsider the evidence in light of this corrected standard. *Pullman-Standard*, 456 U.S. at 291-292.

But the Court of Appeals did not remand the case. Instead, it entered its own finding of fact, concluding that the record before the district court did not indicate that the DOC's professed concerns about security were a pretext. *Kosilek*, 774 F.3d at 95-96. The appellate court did not acknowledge Rule 52 or apply the clearly

erroneous standard in making this finding of appellate fact. Rather, it performed a *de novo* credibility assessment of live testimony that it did not witness.

This Court reversed the Fifth Circuit in *Pullman-Standard* for committing the same error. A key question in that case was the relevance of racial bias by one actor (a union) to the motivations of another (an employer) in creating a workplace seniority system that disadvantaged African-American workers. *Pullman-Standard*, 456 U.S. at 278-279. The district court believed that the bad motives of the union had no relevance to its examination of the employer, but the Fifth Circuit disagreed, concluding that the district court should have assessed the motivations of the employer in light of the union's role in crafting the seniority system. *Id.* at 283-284. As this Court explained, that legal error would have justified the Fifth Circuit in setting aside the district court's findings and entering a remand for further proceedings, but it did not license the appellate court to make independent factual conclusions.

When an appellate court discerns that a district court has failed to make a finding because of an erroneous view of the law, the usual rule is that there should be a remand for further proceedings to permit the trial court to make the missing findings * * *. Likewise, where findings are infirm because of an erroneous view of the law, a remand is the proper course unless the record permits only one resolution of the factual issue. All of this is elementary.

Id. at 291-292 (citation omitted).

The disagreement between the district and appellate courts in these two cases is remarkably similar: in *Pullman-Standard*, the Fifth Circuit found that the district court failed to view the motivations of one actor in light of the actions of another; in *Kosilek*, the First Circuit found that the district court improperly viewed the motivations of one actor in light of the actions of another. In both instances, “the Court of Appeals, after holding that the District Court had failed to consider relevant evidence and indicating that the District Court might have come to a different conclusion had it considered that evidence, failed to remand for further proceedings * * *. Instead, the Court of Appeals made its own determination.” *Pullman-Standard*, 456 U.S. at 292.

Indeed, the error in *Kosilek* is more acute and the standard adopted by the First Circuit more improper than was the case in *Pullman-Standard*. *Pullman-Standard* was a “paper case” in which the evidence of discriminatory intent was contained entirely in documents. 456 U.S. at 302 (Marshall, J., dissenting). Notwithstanding that fact, the Court ruled that Rule 52 requires deference to the role of the district court and calls for a remand, not appellate fact-finding, where the Court of Appeals concludes that the findings of the district court were affected by a legal error. *Id.* at 291. In *Kosilek*, however, the Eighth Amendment question depended on subsidiary findings of fact that were based to a significant extent on the credibility of live witnesses and the possibility of dishonest or pretextual testimony. See, *e.g.*, 889 F. Supp. 2d at 202-203, 239-247. Rule 52(a)(6) instructs appellate courts to review factual

findings with “due regard to the trial court’s opportunity to judge the witnesses’ credibility,” an opportunity that this Court has identified as a defining rationale behind the Rule 52 standard. See *United States v. General Motors Corp.*, 384 U.S. 127, 141 n.16 (1966) (emphasizing “the trial court’s customary opportunity to evaluate the demeanor and thus the credibility of the witnesses” (citation omitted)). The *gestalt* approach to Rule 52 that the First Circuit has adopted disregards that command.

II. THIS COURT SHOULD FOLLOW THE PRACTICE IT ESTABLISHED IN *ERICKSON* v. *PARDUS* AND *TOLAN* v. *COTTON* TO MAINTAIN THE INTEGRITY OF ITS PROCEDURAL STANDARDS.

In a pair of recent rulings, this Court has exercised *certiorari* review to maintain the integrity of its decisions on controlling procedural standards in the face of error or recalcitrance by lower federal courts. After retiring the *Conley* standard in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 563 (2007) (retiring *Conley* v. *Gibson*, 335 U.S. 41 (1956)), thereby making it easier for defendants to challenge the sufficiency of a complaint, the Court issued a summary reversal of the Tenth Circuit in *Erickson v. Pardus*, 551 U.S. 89, 94 (2007) (per curiam) to emphasize the role of notice pleading and the plaintiff’s continuing entitlement to have all non-conclusory factual assertions treated as true at the pleading stage. Similarly, after strengthening the standard by which defensive motions for summary judgment would be measured in excessive force cases, see *Scott v. Harris*, 550 U.S. 372 (2007); *Plumhoff v. Rickard*, 134 S. Ct. 2012 (2014), thereby making it easi-

er for government officials to secure dismissals following discovery, the Court issued a summary reversal in *Tolan v. Cotton*, 134 S. Ct. 1861, 1863 (2014) (per curiam), correcting the Fifth Circuit's failure to give the plaintiff in that case the benefit of every reasonable inference when reasonable minds could differ about the legality of a police officer's use of deadly force.

What this Court did for pleadings under Rule 8 in *Erickson* and for summary judgment under Rule 56 in *Tolan* it should now do for the clearly erroneous standard under Rule 52. As in those cases, the Court of Appeals has embraced an approach to a core procedural question that stands squarely opposed to clear statements of this Court: its subsequent ruling in *Teva Pharmaceuticals*, which supersedes *Kosilek*; its recent ruling in *Plata*, which *Kosilek* ignored; and its longstanding guidance in *Pullman-Standard*, which *Kosilek* failed to follow. A summary reversal in the mode of *Erickson* and *Tolan* is an appropriate corrective.

In the alternative, this Court should enter an order granting the Petition, vacating the opinion of the Court of Appeals, and remanding for reconsideration in light of *Teva Pharmaceuticals*. The First Circuit should not have needed *Teva Pharmaceuticals* to understand that its *gestalt* approach to appellate review of complex cases is not a faithful application of Rule 52. *Plata* and *Pullman-Standard* provided ample guidance. In light of the fact that the opinion in *Teva Pharmaceuticals* issued a month after *Kosilek*, however, this Court might conclude that a GVR order providing the First Circuit with an opportunity to correct its error would show greater comity to that court.

Finally, this Court could grant the Petition and schedule the case for full argument. For the reasons outlined above, the First Circuit's departure from the text of Rule 52(a)(6) and the rulings of this Court is serious enough to warrant a fully briefed appeal.

The fact that *Kosilek* is the decision of an *en banc* court makes the need for one of these remedies particularly acute. If this Court does not intervene then a future correction by the First Circuit is unlikely, and that court's *gestalt* approach to Rule 52 will threaten the prerogatives of district courts in every complex case in which mixed questions of law depend on subsidiary findings of fact.

CONCLUSION

Amici urge this Court to grant the Petition and issue a summary reversal, enter a GVR order, or schedule this case for full argument.

Respectfully submitted,

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