No. _____

IN THE

Supreme Court of the United States

CION ADONIS PERALTA,

Petitioner,

v.

THADDEUS C. DILLARD AND SHELDON BROOKS,

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether prison officials sued under 42 U.S.C. § 1983 for violating the Eighth Amendment may evade a finding of deliberate indifference by raising the defense that state-imposed budgetary constraints prevented the provision of constitutionally adequate medical care.

2. Whether the Eighth Amendment supports a distinction between the subjective element required for a finding of deliberate indifference in a claim for injunctive relief, and that required for an award of damages.

PARTIES TO THE PROCEEDINGS

The following were parties to the proceedings in the United States Court of Appeals for the Ninth Circuit:

1. Cion Adonis Peralta, the petitioner on review, was plaintiff-appellant below.

2. Dr. Thaddeus C. Dillard and Dr. Sheldon Brooks, the respondents on review, were defendants-appellees below.

3. Dr. Junaid Fitter, not a party here, was a defendant-appellee below.

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INTRODUCTION

Since this Court's decision in *Wilson v. Seiter*, 501 U.S. 294 (1991), the availability of a "cost defense" to prisoner Eighth Amendment claims has been an open question. Until now, the Courts of Appeals—including the Ninth Circuit—had declined to bless such a defense, and continued to hold that inadequate funding will not excuse unconstitutional prison conditions or care. But in a ruling with troubling implications for hundreds of thousands of inmates in overcrowded and underfunded prison systems nationwide, an en banc panel of the Ninth Circuit departed from this settled rule. The court below held 6-5 that a prison official, though aware of an inmate's serious medical need and of the likelihood of serious harm to the prisoner if that need goes unmet, may evade a finding of liability for the harm that results from his inaction by pointing the finger at the State of California and its well-chronicled failure to adequately fund its prisons. *See Brown v. Plata*, 131 S. Ct. 1910 (2011).

The Ninth Circuit's approval of a cost defense to damages claims establishes differing standards for proving Eighth Amendment violations depending on whether the plaintiff seeks money damages or injunctive relief. At minimum, the Ninth Circuit's approach immunizes defendants in underfunded prison systems from personal liability for deliberate indifference to serious medical needs, removing any incentive that the Eighth Amendment currently creates to provide minimally adequate medical care. But because the Ninth Circuit's holding rests on an unworkable and unsupported distinction between the elements of deliberate indifference necessary to establish an entitlement to damages and those

necessary to support injunctive relief, the inevitable result of the decision below will be to permit the defense in all cases, leaving inmates in underfunded systems without any realistic avenue for obtaining constitutionally adequate care. This Court should grant the petition and clarify that inadequate funding cannot excuse cruel and unusual punishment, regardless of a plaintiff's prayer for relief.

OPINIONS BELOW

The Ninth Circuit's en banc opinion is reprinted at App. A and reported at 744 F.3d 1076 (9th Cir. 2014). The Ninth Circuit's unpublished order denying full court rehearing is reprinted at App. B. The three-judge panel's published opinion is reprinted at App. C and reported at 704 F.3d 1124 (9th Cir. 2013). The three-judge panel's unpublished memorandum disposition is reprinted at App. D and electronically available at 520 F. App'x 494 (9th Cir. 2013). The Ninth Circuit's order granting rehearing en banc is reprinted at App. E and reported at 719 F.3d 1128 (9th Cir. 2013). The district court's judgment on special verdict in favor of Dr. Brooks is reprinted at App. F and is unpublished. The district court's civil minutes granting directed verdicts in favor of Dr. Fitter and Dr. Dillard are reprinted at App. G and are also unpublished.

JURISDICTION

The en banc Ninth Circuit entered judgment on March 6, 2014, and denied a timely petition for rehearing en banc before the full court on May 30, 2014. On August 14, 2014, Justice Kennedy extended the time to file this petition to September 25, 2014. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Eighth Amendment to the United States Constitution provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Title 42, Section 1983 of the United States Code provides, in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State * * * subjects, or causes to be subjected, any citizen of the United States * * * to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress * * * .

The Eleventh Amendment to the United States Constitution provides:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

STATEMENT

A. Eighth Amendment Framework

In a trio of cases decided between 1976 and 1994, this Court articulated the standards the lower courts must follow in deciding prisoners' claims that the conditions of their confinement constitute cruel and unusual punishment, and thus violate the Eighth Amendment. In *Estelle v. Gamble*, the Court adopted the standard to be followed when a prisoner complains that the medical care he has received was constitutionally inadequate: he must prove that he was harmed when prison officials were "deliberately indifferen[t]" to his serious medical needs. 429 U.S. 97, 103-04 (1976). In *Wilson v. Seiter*, the Court held that *Estelle's* deliberate indifference standard applied to all claims against prison officials alleging unconstitutional conditions of confinement. 501 U.S. at 303-04. Finally, in *Farmer v. Brennan*, the Court clarified that an official is deliberately indifferent when he "knows of and disregards an excessive risk to inmate health or safety[.]" 511 U.S. 825, 837 (1994).

In each case, the Court held that in order to violate the Eighth Amendment, a defendant must have exhibited at least deliberate indifference, which in turn requires a sufficiently "culpable state of mind." *Wilson*, 501 U.S. at 297. In *Wilson*, the United States as *amicus curiae* in support of the prisoner petitioner expressed the concern that adopting the deliberate indifference standard and its component state-of-mind inquiry in prison conditions cases "might allow officials to interpose the defense that, despite good-faith efforts to obtain funding, fiscal constraints beyond their control prevent the elimination of inhumane conditions." *Id.* at 301.

The *Wilson* majority declined to resolve the question of whether a "cost defense" may be available because the defense was not raised in that case, but noted that it was "hard to understand how [fiscal constraints] could control the meaning of 'cruel and unusual punishments' in the Eighth Amendment." *Id.* at 301. This Court has not since revisited the issue.

B. The California State Prison System

Serious constitutional violations have long plagued California's prison system. "The violations have persisted for years. They remain uncorrected." *Plata*, 131 S. Ct. at 1922. In 2006, California prisons housed a total inmate population of more than 170,000, and had become so overcrowded that then-Governor Schwarzenegger declared an official "State of Emergency" within the system. Prison Overcrowding State of Emergency Proclamation (Oct. 4, 2006).[1] In 2011, this Court agreed that the "exceptional" degree of overcrowding in California's prisons warranted the unprecedented order of a three-judge court that could have required the State to release as many as 46,000 inmates, and affirmed that order. *Plata*, 131 S. Ct. at 1923. In its opinion, this Court observed that "[f]or years the medical and mental health care provided by California's prisons has fallen short of minimum constitutional requirements and has failed to meet prisoners' basic health needs." *Id.* The Court also noted that despite conceding "that deficiencies in prison medical care violated prisoners' Eighth Amendment rights," and stipulating to a

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[1] *Available at* http://gov.ca.gov/news.php?id=4278

remedial injunction, the state "failed to comply with that injunction, and in 2005 the court appointed a Receiver to oversee remedial efforts." *Id.* at 1926. It is against this backdrop of persistent constitutional violations and failed injunctive relief that Cion Adonis Peralta's case arose.

C. Mr. Peralta's Condition And Treatment

On June 24, 2004, Mr. Peralta was transferred to the California State Prison, Los Angeles County in Lancaster, California ("Lancaster"). Shortly after arriving at Lancaster, he submitted both verbal and written requests for dental care, complaining of severe pain stemming from a combination of cavities and bleeding gums that had begun deteriorating the bone in his jaw.

After two rounds of appeals to prison officials in which Mr. Peralta complained of infected teeth, bleeding gums, and severe pain, and requested to be seen by a dentist, on October 15, 2004, Dr. Brooks—the staff dentist at the Lancaster facility—interviewed Peralta for the first time. Although Mr. Peralta complained of bleeding and pain throughout his mouth, Brooks asked only which *one* tooth hurt the most, and took an x-ray of just that tooth—tooth #2. At the time, it was Dr. Brooks's practice because of time constraints and understaffing at Lancaster to address only a patient's chief complaint. Although California policy called for a ratio of one dentist for every 950 prisoners, Lancaster's ratio at the time

may have been as high as one dentist to every 1,400 prisoners.[2] RT 2:21, 2:46.[3]

Brooks diagnosed Mr. Peralta with periodontal disease and bone loss, but did not examine Mr. Peralta for infections, or clean, scale, or examine any of his teeth other than tooth #2. Dr. Brooks believed that Peralta was in severe pain and that his dental problems were severe enough to warrant a spot on the urgent care list, which would entitle Mr. Peralta to receive priority for treatment. But Brooks placed Mr. Peralta back on the *routine* care wait list, and scheduled Mr. Peralta for an extraction—which was later determined to be unnecessary—of tooth #2. In 2004 and 2005, the routine wait list was approximately one year long.

On December 23, 2005, nearly 18 months after making his initial request for care, and after multiple rounds of inmate appeals, Mr. Peralta was seen by Brooks and received his first teeth cleaning. Brooks diagnosed Mr. Peralta with a variety of

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[2] Dr. Brooks testified that in 1999, he filed a complaint with the department of corrections requesting more dental staff, and a 2001 memorandum from Brooks to his supervisors predicted that the staffing shortages and wait times "could lead to a difficult-to-defend lawsuit." RT 2:26, 3:111. Brooks offered no evidence that he took any specific measures in the 2004-2005 time period to ensure provision of constitutionally adequate care to prisoners, or that he took any such measures to see that Peralta's needs in particular were met.

[3] Because the reporter's transcript was prepared without consecutive pagination, citations to the trial transcript ("RT") refer to the volume followed by page number. "ER" refers to Petitioner's record excerpts filed in the Ninth Circuit.

serious dental problems, including bleeding gums, severe bone loss, gingival recession, and advanced periodontitis (periodontal disease). Even then, Brooks did not examine Mr. Peralta for cavities, nor did he schedule another visit for Mr. Peralta to treat his periodontitis and other dental issues.

Mr. Peralta was transferred to another prison in February of 2006. At no time during his incarceration at Lancaster did Mr. Peralta have any cavities filled or receive an examination for cavities, despite his requests. RT 3:81-82, 109, 116. Nor was he treated for his periodontal disease. RT 3:78. The only treatment he received for pain during his time at Lancaster was when he was given 12 tablets of ibuprofen (approximately 3-5 days' worth) on October 15, 2004 and January 25, 2005 for his "severe pain."

D. Procedural History

On March 18, 2005, having exhausted his administrative remedies and thus complied with 42 U.S.C. § 1997e(a), Mr. Peralta filed a complaint for damages under 42 U.S.C. § 1983 in the U.S. District Court for the Central District of California, alleging Eighth Amendment violations by his treating dentist Dr. Brooks, as well as Dr. Thaddeus Dillard and Dr. Junaid Fitter, the Chief Dental and Medical Officers at Lancaster. Mr. Peralta's complaint asserted that defendants were deliberately indifferent to his serious medical needs in failing to provide necessary dental care while he was housed at Lancaster.

In her opening statements at trial, defendants' counsel informed the jury about the understaffing at Lancaster, and that defendants "didn't have control over the budget." RT 1:26-29. Each of the defendants offered testimony on direct examination about the budget constraints and understaffing faced by the

dental department at Lancaster. Dr. Brooks testified that the reasons for his failure to fully examine Mr. Peralta, address his periodontal disease, or investigate the cause of his "uncontrollable" pain despite his knowledge of Mr. Peralta's condition were "the circumstances of the staff shortage and [that he] just didn't have enough time[.]" RT 3:96-97.

After the close of evidence at trial, the district court denied Dr. Brooks's motion for judgment under Fed. R. Civ. P. 50, finding that there was enough evidence of Brooks's deliberate indifference to Peralta's serious dental needs to send the case to the jury.[4] App., *infra*, 56a. Mr. Peralta submitted a proposed jury instruction stating that "lack of funding from the State of California for resources at the Lancaster facility is not a defense to liability under Section 1983" and "lack of staffing or other resources in the dental department at the Lancaster facility is not a defense to liability under Section 1983." ER 8-2. Instead, over Mr. Peralta's objections, the district court gave the jury the following instruction:

> Evidence has been presented during the trial regarding dental staffing levels and the availability of resources at the Lancaster correctional facility where Plaintiff Peralta was incarcerated during the time of his alleged injuries in this case.

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[4] The district court granted Dr. Dillard's and Dr. Fitter's oral Rule 50 Motions. App., *infra*, 90a. Mr. Peralta does not seek this Court's review of the judgment in favor of Dr. Fitter.

> Whether a dentist or doctor met his duties to Plaintiff Peralta under the Eighth Amendment must be considered in the context of the personnel, financial, and other resources available to him or her which he or she could reasonably obtain. A doctor or dentist is not responsible for services which he or she could not render or cause to be rendered because the necessary personnel, financial, and other resources were not available to him or her or which he or she could not reasonably obtain.

In her closing argument, Brooks's counsel discussed the prison budget and staffing issues at length. In reference to the jury instruction at issue, she told the jury: "It's everything to this case." RT 4:86. The jury returned a verdict in favor of Dr. Brooks, the district court entered judgment, and Mr. Peralta timely appealed.

E. The Ninth Circuit

1. A divided three-judge panel affirmed the jury's verdict and approved the district court's jury instruction, drawing a distinction between claims for damages and those for injunctive relief, and reasoning that a prison doctor who denies a prisoner even necessary medical care because of a lack of resources cannot be held individually liable. App., *infra*, 59a-61a (citing with approval *Williams v. Bennett*, 689 F.2d 1370 (11th Cir. 1982)).[5] The

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[5] Although the majority opinion, delivered by Senior Circuit Judge Fernandez, cited *Williams* as support for its cost defense

majority saw "no reason to impose an injustice upon employees of prison systems in an attempt to avoid injustices to inmates." *Id* at 61a.[6]

Judge Berzon dissented, noting at the outset that whether Mr. Peralta's medical needs were objectively serious and that a reasonable jury could have found Dr. Brooks deliberately indifferent to those needs were not at issue on appeal. *Id.* at 65a. According to the dissent, "Brooks knew that Peralta needed care for a serious medical need but did not provide the care. Under *Farmer*, that combination of factors is all that is required to establish deliberate indifference." *Id.* at 66a. Judge Berzon criticized the majority for its new distinction between damages claims and those for injunctive relief. *Id.* at 68a ("Our cases have made crystal clear—including when plaintiffs have sought damages—that budgetary constraints do not justify cruel and unusual punishment.") (punctuation and citation omitted). Finally, Judge Berzon

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to individual liability, in that pre-*Wilson* case, the Eleventh Circuit was "careful to note, however, that insufficient funds does not give rise to a separate defense." *Williams,* 689 F.2d at 1388.

[6] In a separate unpublished disposition, the panel affirmed, 2-1, the Rule 50 ruling in favor of Dillard and Fitter. App., *infra*, 81a-83a. The majority wrote that the verdict in favor of Dr. Brooks "underscore[d] and reinforce[d]" its conclusion that Dr. Dillard "who, at worst, failed to intervene in Dr. Brooks' treatment regime," was not himself deliberately indifferent. *Id.* at 83a. Judge Berzon dissented, noting her disapproval of the jury instruction as to Dr. Brooks, and thus, the "jury's verdict in light of that instruction [wa]s therefore not a relevant consideration in determining * * * Dillard's liability." *Id.* at 84a (Berzon, J., dissenting in part).

observed that the panel's decision "erect[ed] yet another barrier for prisoner plaintiffs to obtain redress for deprivations of fundamental rights, but also eliminate[d] one incentive for California policy-makers to address systemic inadequacies in providing prisoners with the most basic level of medical attention." *Id.* at 80a.

2. Mr. Peralta timely filed a petition for rehearing en banc, which was granted. App., *infra*, 86a.

In a 6-5 decision, the en banc Ninth Circuit affirmed the validity of the district court's jury instruction. App., *infra*, 12a.[7] Like the panel majority, the en banc majority distinguished the circuit's long line of decisions holding that budgetary constraints were not a defense to Eighth Amendment violations, including *Snow v. McDaniel*, 681 F.3d 978 (9th Cir. 2012), and *Jones v. Johnson*, 781 F.2d 769 (9th Cir. 1986), on the basis that the plaintiffs in those cases each sought injunctions and not solely damages. App., *infra*, 9a. "To the extent," the Court clarified, "*Jones* and *Snow* can be read to apply to monetary damages against an official who lacks authority over budgeting decisions, they are overruled." *Id*. at 10a.

The majority explained that it had "no quarrel with the * * * view that Peralta may have suffered

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[7] Chief Judge Kozinski delivered the majority opinion. He was joined by five judges in affirming the jury instruction and verdict. Judge Christen and Judge Hurwitz wrote separate dissents, each joined by four judges concerning the jury instruction. Judge Bybee joined each dissent disapproving of the jury instruction, but voted to affirm the district court's Rule 50 ruling in favor of Dr. Dillard.

an Eighth Amendment violation." However, it reasoned that because a "prison medical official who fails to provide needed treatment because he lacks the necessary resources can hardly be said to have intended to punish the inmate," he could not be held individually liable. *Id.* at 12a. The majority found California's indemnification of its prison officials unimportant, and suggested that consideration of that policy as a reason to reject the cost defense may implicate the Eleventh Amendment's prohibition on suits against the states. *Id.* at 11a ("We may not circumvent this protection by imputing the state's wrongdoing to an employee who himself has committed no wrong.").[8]

Judge Christen, joined by four judges, dissented, concluding that the majority overturned "more than thirty years of circuit precedent * * * dat[ing] back to 1979 when, writing for the Ninth Circuit, now-Justice Kennedy explained that 'the cost or inconvenience of providing adequate facilities is not a defense to the imposition of a cruel punishment.'" *Id.* at 28a (Christen, J., dissenting in part) (quoting *Spain v. Procunier*, 600 F.2d 189, 200 (9th Cir. 1979)). Judge Christen found the majority's "newly-minted distinction between claims for injunctions

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[8] Like the panel majority, the en banc majority affirmed the Rule 50 judgment in favor of Dr. Dillard, based in part on the fact that the jury found Dr. Brooks was not deliberately indifferent, and like Dr. Brooks, Dr. Dillard had no control over the prison's budget. App., *infra*, at 19a ("[T]here's no way that the jury could have found that Dillard and Fitter were liable after finding that Brooks was *not*."). For this reason, Dr. Dillard is appropriately a party in this Court.

and claims for damages" to be unconvincing, and predicted that "[u]nder the lack of resources defense, even prisoners who suffer grievous injury will be left with no recourse at all." *Id.* at 31a.

Judge Hurwitz filed a separate dissent, also joined by four judges, and opined that the cost defense to damages claims "turns the law upside down." *Id.* at 41a (Hurwitz, J., dissenting in part). The majority opinion, he wrote, "not only forecloses relief to inmates who suffer cruel and unusual punishment, but also encourages future constitutional violations." He noted that "the Supreme Court has left open whether fiscal constraints are a defense to an Eighth Amendment claim," but also that "in doing so Justice Scalia aptly noted that 'it is hard to understand how' funding issues 'could control the meaning of "cruel and unusual punishments" in the Eighth Amendment.'" *Id.* (quoting *Wilson*, 501 U.S. at 301).

Judge Hurwitz further observed that by effectively making injunctions "the default remedy for Eighth Amendment violations," the Ninth Circuit had "run[] roughshod over the general presumption in favor of legal remedies over equitable relief." *Id.* at 45a.

Judge Hurwitz found it significant that "California not only indemnifies prison officials named as defendants in § 1983 actions, but also pays for their legal defense." *Id.* at 47a. The majority's rule, he wrote, permits a "charade" that "allows the state—while funding and directing the defense—simultaneously to argue that it would be unfair to impose liability [on the official] because of budgeting decisions made by the state itself." *Id.* at 48a. Finally, the second dissent dismissed the majority's

concerns about sovereign immunity, noting that states "have no obligation to indemnify their employees for damages imposed because of constitutional violations. But, when a state chooses to do so, the state agent should not be heard to argue that the imposition of liability on him individually is unfair." *Id.* at 48a.

On March 20, 2014 Peralta timely filed a petition for rehearing en banc before the full Ninth Circuit. The petition was denied on May 30, 2014. App., *infra*, 50a.

REASONS FOR GRANTING THE WRIT

The decision below gives rise to two important questions about the protection and vindication of the constitutional rights of inmates incarcerated in underfunded, overcrowded, and understaffed prisons. First, does the Eighth Amendment permit a "cost defense" to excuse the denial of needed medical care in underfunded prisons? Second, can a finding of an Eighth Amendment violation hinge on a plaintiff's prayer for relief under 42 U.S.C. § 1983, or does the same deliberate indifference standard apply to injunctive relief and damages claims?

These questions are of undeniable importance to inmates in state prisons around the nation, including the more than 115,000 in California alone who will be left with effectively no remedy for violations of their constitutional rights. Because the Ninth Circuit has strayed from the longstanding principle among the courts of appeals that a lack of funds cannot justify cruel and unusual punishment, this Court should grant review to resolve the question it left open in *Wilson*.

I. THE COURT SHOULD RESOLVE THE IMPORTANT CONSTITUTIONAL QUESTION LEFT OPEN IN *WILSON*.

A. This Case Presents An Excellent Vehicle For The Court To Decide This Unresolved And Important Question.

This Court should grant review to resolve the first question presented, which it expressly reserved in *Wilson*: Does the subjective component of an Eighth Amendment claim allow a prison official to defeat a § 1983 action by showing that insufficient funding from the state legislature prevented the provision of adequate care?

1. In its *amicus curiae* brief in *Wilson*, the United States argued against the adoption of the deliberate indifference standard in prison condition cases for the very reason that it "might allow officials to interpose the defense that, despite good-faith efforts to obtain funding, fiscal constraints beyond their control prevent the elimination of inhumane conditions." *Wilson*, 501 U.S. at 301. Four concurring Justices also found the majority's adoption of a subjective component to Eighth Amendment conditions of confinement claims to be "unwise" for even "leav[ing] open the possibility, for example, that prison officials will be able to defeat a § 1983 action" by showing that the conditions were caused by insufficient state funding. *Id.* at 311 (White, J., concurring).

The *Wilson* majority expressly reserved the question of whether a "cost defense" may be available, but noted that it was "hard to understand how [fiscal constraints] could control the meaning of

'cruel and unusual punishments' in the Eighth Amendment." *Id.* at 301.

Since *Wilson*, the availability of such a defense is a question that has puzzled the lower courts. On at least two occasions, the Fifth Circuit has noted that "the Supreme Court has left open the question of whether a cost defense is available under Eighth Amendment analysis," while acknowledging that the Fifth Circuit itself has rejected the defense. *Harris v. Angelina Cnty.*, 31 F.3d 331, 336 (5th Cir. 1994); *Alberti v. Sherriff of Harris Cnty.*, 937 F.2d 984, 999 (5th Cir. 1991). The Seventh Circuit recently read the Court's opinion in *Wilson* to intimate "that an argument that rests solely on fiscal constraints *cannot* negate a finding that 'cruel and unusual punishment' is being imposed." *Miller v. Harbaugh,* 698 F.3d 956, 962 (7th Cir. 2012) (emphasis added). The Eleventh Circuit has also noted the uncertainty surrounding the question. *See LaMarca v. Turner*, 995 F.2d 1526, 1537-38 n.23 (11th Cir. 1993).

Commentators, too, have read the decision with confusion. *See* B. Kritchevsky, *Is There a Cost Defense?*, 35 Rutgers L.J. 483, 529 (Winter 2004) (suggesting that "*Wilson* opened the door" to a cost defense, but observing that "*Wilson* has not changed the courts' approach to medical care cases"); M. Rifkin, *Farmer v. Brennan: Spotlight on an Obvious Risk of Rape in a Hidden World*, 26 Colum. Hum. Rts. L. Rev. 273, 307 (Winter 1995) (concluding that the possible defense "raised in dicta by the *Wilson* Court" was clearly *unavailable* after this Court's decision in *Rufo v. Inmates of Suffolk Cnty. Jail*, 502 U.S. 367, 392 (1992) ("[f]inancial constraints may not be used to justify the creation or perpetuation of constitutional violations"). E. Alexander, *Prison*

Health Care, Political Choice, and the Accidental Death Penalty, 11 U. Pa. J. Const. L. 1, 1 & n.3 (Dec. 2008) (understanding *Wilson* to suggest that "considerations of cost can defeat an Eighth Amendment claim"). In sum, as one district court complained, "[t]he law is frustratingly murky on the question of whether government officials sued in their individual capacities may defend against an Eighth Amendment claim on the ground that, 'despite good-faith efforts to obtain funding, fiscal constraints beyond their control prevent the elimination of inhumane conditions.'" *Masonoff v. DuBois*, 336 F. Supp. 2d 54, 60 (D. Mass. 2004) (quoting *Wilson*, 501 U.S. at 301-02).

The decisions of the Ninth Circuit itself offer the clearest indication that this Court should resolve this important question. At the outset, the majority below acknowledged that the "Supreme Court has not said whether juries and judges may consider a lack of resources as a defense in section 1983 actions." App., *infra*, 7a. But the court of appeals had long held that "the cost or inconvenience of providing adequate facilities is not a defense to the imposition of a cruel punishment." *Spain*, 600 F.2d at 200; *accord Snow*, 681 F.3d at 984-87 (refusal to provide necessary health care due to lack of resources was an improper motive supporting a finding of deliberate indifference). In *Jones v. Johnson*, the court stated the unequivocal rule that remained in place until the decision below: "Budgetary constraints * * * do not justify cruel and unusual punishment." 781 F.2d at 771. Now, that previously unqualified rule will not apply to damages claims. And although the en banc majority's embrace of the cost defense will be the authoritative law of the Ninth Circuit, it will be so

without demonstrating the clear views of that court's active judges.[9] Indeed, twelve active, non-senior judges of the Ninth Circuit have considered the validity of the instruction at issue in this case, and they have split evenly 6-6.[10] Given this robust debate, "this case bears * * * indicia of what [this Court has] come to call 'certworthiness.'" *Elmbrook Sch. Dist. v. Doe*, 134 S. Ct. 2283, 2286 (2014) (Scalia, J., dissenting from denial of certiorari).

2. The importance of this constitutional question can hardly be denied. The case was reheard en banc by the Ninth Circuit "because it involves, in the words of Federal Rule of Appellate Procedure 35(a)(2), a 'question of exceptional importance.'" App., *infra*, 39a (Hurwitz, J., dissenting in part) (quoting Fed. R. App. P. 35(a)). This Court, too, has long recognized the fundamental importance of the Eighth Amendment. "The basic concept underlying the Eighth Amendment is nothing less than the dignity of man." *Plata*, 131 S. Ct. at 1928 (quoting *Atkins v. Virginia*, 536 U.S. 304, 311 (2002)).

Indeed, in the very case in which this Court initially adopted the deliberate indifference standard for prison medical care cases, it noted that the courts of appeals were already "in essential agreement with

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[9] *See* The Hon. Pamela Ann Rymer, *The "Limited" En Banc: Half Full, or Half Empty?*, 48 Ariz. L. Rev. 317, 321 (Summer 2006) (noting that a Ninth Circuit's "limited en banc panel" can result in an opinion "that is contrary to the known views of the same number, or a greater number, of judges.").

[10] Judge Berzon was the only active, non-senior circuit judge on the three-judge panel, and she was not a member of the en banc panel.

this standard." *Estelle*, 429 U.S. at 106 n.14. Thus, even absent a circuit split like the Ninth Circuit has now created, *see infra*, Part I.B., this Court has concluded that the standards by which prisoners' claims alleging constitutionally deficient care should be judged is a question worthy of certiorari.

3. This issue is one that is likely to recur in a prison system that this Court has recently described as marked by the "grossly inadequate provision of medical and mental health care." *Plata*, 131 S. Ct. at 1923. More than three years after this Court's decision in *Plata*, California state prisons are still operating at over 140% of their designed capacity. *Brown v. Plata*, No. 01-01351, Dkt. 2011 (N.D. Cal. Sept. 15, 2014), Defendants' September 2014 Status Report in Response to February 10, 2014 Order at 1, *available at* http://www.cdcr.ca.gov/News/docs/3JP-Sept-2014/3JP-9-15-Status-Report.pdf.[11] Regardless of its budgetary woes, this Court has held that California cannot shirk its Eighth Amendment responsibilities to provide adequate medical care, shelter, and safety on the basis of inadequate resources. *See Plata*, 131 S. Ct. at 1928 ("A prison that deprives prisoners of basic sustenance, including adequate medical care, is incompatible with the concept of human dignity and has no place in civilized society. If government fails to fulfill this obligation, the courts have a responsibility to remedy the resulting Eighth Amendment violation."). Yet, the decision below provides an avenue and an incentive for the State to do just that.

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[11] The State reports that as of September 2014, Lancaster was occupied at 155.7% of its design capacity. *Id.* at Ex. A.

Especially in light of the facts of this case, it is a near certainty that all future § 1983 defendants in underfunded prisons throughout the Ninth Circuit will assert a cost defense to damages claims.[12] To support the defense, the district court and the Ninth Circuit required no evidence that Dr. Brooks took affirmative steps to provide constitutionally adequate care to Mr. Peralta. It was enough that he presented evidence that the prisons were overcrowded and understaffed, and that years earlier he had requested help. Because nearly every state prison system is underfunded, these minimal requirements will be easy to meet. *See* App., *infra*, 42a (Hurwitz, J., dissenting in part) (citing Andrew P. Wilper et al., *The Health and Health Care of U.S. Prisoners: Results of a Nationwide Survey,* 99 Am. J. Pub. Health 666, 669-71 (2009)). With the bar set low, "[i]n every case in which state actors are sued for failing to provide minimal medical care—even those cases involving loss of life or serious permanent injury—the defense will be lack of resources, and that defense will almost surely succeed." App., *infra*, 42a.

And because state indemnification of prison officials sued in § 1983 actions is nearly universal, *see id.* at 47a, removing the threat of damages in truth inures to the benefit of the states. That those states will be eager to wield this new tool is more

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[12] The Ninth Circuit has already included the challenged instruction with approval in the comments to its Ninth Circuit Manual of Model Civil Jury Instructions for Eighth Amendment claims. *Available at* http://www3.ce9.uscourts.gov/jury-instructions/node/163.

than speculation; nine states—including Nevada and Hawaii in the Ninth Circuit—and the Virgin Islands have already urged this Court to expressly hold that a lack of resources may negate the subjective component required under *Wilson* and *Farmer*. *See* Brief of Alabama, et al. as *Amici Curiae* in Support of Petitioners, *Davis v. Judy*, 540 U.S. 1075 (2003) (No. 03-608) 2003 WL 22879668, at *10-11 ("In short, the Court should grant certiorari review in this case to consider the validity of the 'cost' defense, a question the Court left open in *Wilson v. Seiter*. Amici urge that this Court accept the 'cost' defense, because it comports with the subjectivity requirement of *Farmer* and vindicates bedrock principles of justiciability.").

4. This case presents a perfect vehicle for this Court to decide this exceptionally important question. Unlike most prisoner § 1983 claims, the record here is fully developed, and the case went to the jury after the district court found that Mr. Peralta had made a prima facie showing of an objectively serious medical need, from which harm resulted. RT 3:210. Defendants agreed with these findings, *id.*, and they were not at issue on appeal below. Thus, the only issue requiring this Court's consideration—preserved both at the trial and appellate level—is whether lack of resources can negate a finding of deliberate indifference to that serious need.

B. The Ninth Circuit Has Departed From The Settled Principle Among The Courts Of Appeals That Lack Of Resources Is Not A Defense To Cruel And Unusual Punishments.

Although the *Wilson* Court's adoption of the deliberate indifference standard and its subjective

component to control Eighth Amendment conditions of confinement cases increased discussion about the availability of a cost defense, that decision did not begin the debate. Because Eighth Amendment medical care claims had required a showing of deliberate indifference since *Estelle*, the availability of a cost defense would have been equally applicable in that context. The *Wilson* majority acknowledged this, but observed an absence of "any indication that other officials ha[d] sought to use such a defense" to avoid *Estelle*'s holding. *Wilson*, 501 U.S. at 302. Whether it was true at the time, after the decision below, the *Wilson* majority's observation is no longer accurate.

In retreating from its own long-standing precedent, the Ninth Circuit has parted ways with every court of appeals to consider the question. As the four-Justice *Wilson* concurrence recognized, "[a]mong the lower courts, '[it was] well established that inadequate funding will not excuse the perpetuation of unconstitutional conditions of confinement.'" *Id.* at 311 & n.2 (White, J., concurring) (quoting *Smith v. Sullivan*, 611 F.2d 1039, 1043-1044 (5th Cir. 1980) and citing cases).

Take the Seventh Circuit's decision in *Wellman v. Faulkner*, 715 F.2d 269 (7th Cir. 1983). In that case, the court of appeals considered inmates' claims for both damages and injunctive relief for Eighth Amendment violations, including unconstitutional provision of medical care. *Id.* at 275-77. Applying *Estelle*'s deliberate indifference standard, the court affirmed the district court's findings that the medical care provided was constitutionally inadequate, and that some officials may be liable for damages related to specific instances of deficient treatment. *Id.* at

274. The court remanded the case for clarification of the damages awards after acknowledging that "many of these appalling medical deficiencies [we]re closely related to the lack of funds to support these activities." *Id.* This was no shield to liability, the court explained: "We understand that prison officials do not set funding levels for the prison. But, as a matter of constitutional law, a certain minimum level of medical service must be maintained to avoid the imposition of cruel and unusual punishment." *Id.*

Notably, like *Faulkner*, many of the pre-*Wilson* cases rejecting a cost defense were decided under a deliberate indifference standard, and thus the soundness of their holdings was unaffected by *Wilson*. *See, e.g.*, *Alberti*, 937 F.2d at 999 (noting that "[o]ther circuits have found deliberate indifference over allegations of inadequate funding"); *Battle v. Anderson*, 564 F.2d 388, 395-96 (10th Cir. 1977) (affirming finding of Eighth Amendment violations under *Estelle*, and holding that "lack of financing [is not] a defense to a failure to provide minimum constitutional standards"); *Ancata v. Prison Health Servs., Inc.*, 769 F.2d 700, 705 (11th Cir. 1985) (holding plaintiffs had sufficiently alleged deliberate indifference and stating that "[l]ack of funds for facilities cannot justify an unconstitutional lack of competent medical care and treatment for inmates"); *Todaro v. Ward*, 565 F.2d 48, 54 n.8 (2d Cir. 1977) (calling deliberate indifference standard the "long-standing rule" in the Second Circuit, and declaring that "[i]nadequate resources no longer can excuse the denial of constitutional rights"); *Morgan v. Dist. of Columbia*, 824 F.2d 1049, 1068 (D.C. Cir. 1987) (affirming damages award under deliberate indifference standard and explaining that "the Constitution

* * * offers no allowances for fiscal and political difficulties").

Indeed, until the decision below, in rulings both before and after this Court's decision in *Wilson*, the courts of appeals uniformly rejected cost or funding defenses to Eighth Amendment claims. *See*, *e.g.*, *Harris v. Thigpen*, 941 F.2d 1495, 1509 (11th Cir. 1991) ("[D]eficiencies in medical care may be related to a lack of funds allocated to prisons by the state legislature. Such a lack, however, will not excuse the failure of correctional systems to maintain a certain minimum level of medical service necessary to avoid the imposition of cruel and unusual punishment."); *Finney v. Ark. Bd. of Corr.*, 505 F.2d 194, 202 (8th Cir. 1974) (rejecting district court's finding that officials were not liable because they had done all they could with the resources available); *Ramos v. Lamm*, 639 F.2d 559, 574 n.19 (10th Cir. 1980) ("The lack of funding is no excuse for depriving inmates of their constitutional rights."); *Smith v. Sullivan*, 553 F.2d 373, 378 (5th Cir. 1977) ("[I]nadequate resources can never be an adequate justification for depriving any person of his constitutional rights."); *Rozecki v. Gaughan*, 459 F.2d 6, 8 (1st Cir. 1972) ("constitutional requirements are not, in this day, to be measured or limited by dollar considerations"); *Demata v. N.Y State Corr. Dep't of Health Servs.*, 198 F.3d 233, at *4 (2d Cir. 1999) (table) (noting courts have held "generally that the state's responsibility to provide adequate prison medical care does not turn on cost consideration"). The Ninth Circuit's departure from this previously well-settled rule among the courts of appeals warrants this Court's review.

II. THE DECISION BELOW CANNOT BE SQUARED WITH THIS COURT'S PRECEDENTS.

A. The Eighth Amendment Does Not Distinguish Between Claims For Damages And Injunctive Relief.

The en banc majority framed the question before it as "whether prison officials sued *for money damages* under 42 U.S.C. § 1983 may raise a lack of available resources as a defense." App., *infra*, 4a (emphasis added). In this way, the majority sought to distinguish the Ninth Circuit's prior holdings rejecting a cost defense on the basis that at least some of the claims in those previous cases sought injunctive relief. *Id.* at 9a-10a. Thus, the court created a distinction between the elements required to establish an Eighth Amendment claim depending upon whether the prayer is for injunctive relief or for damages.[13] This distinction, which establishes injunctive relief as "the default remedy for Eighth Amendment violations," *id.* at 45a (Hurwitz, J., dissenting in part), finds no support in this Court's precedents interpreting the Eighth Amendment.

In *Wilson*, the claims at issue included money damages as well as injunctive relief, and the rule

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[13] The majority opinion suggests that the Eleventh Circuit shares its view that a "prison official wouldn't be personally liable if he did everything he could," though injunctive relief may be available. App., *infra*, 9a (citing *LaMarca v. Turner*, 995 F.2d at 1542). But *LaMarca* explains that "an official 'may not escape liability solely because of the legislature's failure to appropriate requested [and necessary] funds.'" *LaMarca*, 995 F.2d at 1537 (quoting *Williams*, 689 F.2d at 1387).

announced in that case—that the deliberate indifference standard applies to all Eighth Amendment prison conditions claims—applies regardless of the plaintiff's prayer for relief or whether the alleged violation was "one-time" or "systemic." *Wilson*, 501 U.S. at 300 ("We perceive neither a logical nor a practical basis for that distinction."). Indeed, this universal standard was expressly argued for by eighteen states—including California—and the Commonwealth of Puerto Rico as *amicus curiae* in *Wilson*. Brief of the State of Michigan et al. as *Amicus Curiae* in Support of Respondents, *Wilson v. Seiter*, 501 U.S. 294 (1990) (No. 89-7376) 1990 WL 10022405, *16-19 ("STATE OF MIND REQUIREMENTS SHOULD NOT DEPEND ON THE RELIEF SOUGHT").

Logically, it cannot be otherwise. The en banc majority's rule results in the absurdity that "refusing to treat an inmate because of budget constraints is cruel and unusual when an inmate requests equitable relief, but somehow not so when he requests monetary relief." App., *infra*, 45a (Hurwitz, J., dissenting in part). But what if, as in *Wilson*, the plaintiff asserts claims against the same officials, in their individual and official capacities, for both damages and injunctive relief? This Court has held that a finding of deliberate indifference is required to establish each claim; the Ninth Circuit has ruled that a defense of insufficient funding can defeat such a finding. Thus, the inevitable outcome of the Ninth Circuit's new defense will be to preclude inmates in underfunded prison from obtaining injunctive relief as well as damages.

B. The Ninth Circuit's Decision Frustrates Congress's Intent In Passing § 1983.

This Court has explained that Congress's purpose in enacting § 1983 was to ensure that victims of constitutional wrongs are fully compensated and to deter future wrongdoing. *See, e.g., Wyatt v. Cole*, 504 U.S. 158, 161 (1992); *Owen v. City of Independence*, 445 U.S. 622, 651 (1980) (Section "1983 was intended not only to provide compensation to the victims of past abuses, but to serve as a deterrent against future constitutional deprivations, as well."). The Ninth Circuit's newly-announced cost defense to § 1983 damages claims undermines these twin goals.

Even before the decision below, a state prisoner's ability to obtain compensation for a completed constitutional wrong was limited. The Eleventh Amendment has long prevented state inmates from suing the state for damages. *See Edelman v. Jordan*, 415 U.S. 651, 676 (1974). Nor could they sue the state legislature, the men and women that control the prison budget. *See Tenney v. Brandhove*, 341 U.S. 367, 376-79 (1951). And now, by allowing prison officials to point the finger at those immune entities, the Ninth Circuit has effectively eliminated the last available source of compensation for an inmate in a state prison.

Under a toothless damages scheme, Congress's second purpose, deterring future constitutional deprivations, is likewise thwarted. As this Court has explained, the potential for monetary liability under § 1983 "should create an incentive" for government officials "to err on the side of protecting citizens' constitutional rights." *Owen*, 445 U.S. at 651-52. The Ninth Circuit's ruling not only eliminates any such incentive for prison officials, but a cost defense

actually *encourages* states and legislators to allocate limited funds to more politically popular programs, at the expense of constitutionally adequate care for those whom they have incarcerated. "If states do not have to pay damages for depriving inmates of the level of care required to avoid violating the Eighth Amendment, there will be little reason to increase appropriations for prisoner care." App., *infra*, 42a (Hurwitz, J., dissenting in part).

The en banc majority asserts that prisoners will still have an adequate remedy for violations of their fundamental, constitutional rights: injunctions. App., *infra*, 10a. As discussed *supra*, Part II.A., the Ninth Circuit's untenable new rule will likely result in making injunctions impossible for inmates in underfunded prisons to obtain, as well. But even if available, the threat of an injunction neither compensates nor deters. Certainly, a court order requiring constitutionally adequate medical care to be provided in the future is little solace to a dead man's family. As Judge Christen's dissent asked, "what good is prospective injunctive relief to a prisoner whose appendix has burst?" App., *infra*, 31a (Christen, J., dissenting in part). Nor have injunctions proven effective. *See Plata*, 131 S. Ct. at 1925-28 (describing California's repeated failures to comply with remedial injunctions). For many prison litigants, "it is damages or nothing." *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 409-10 (1971) (noting that for some constitutional violations, "[i]t will be a rare case * * * in which an individual in [the plaintiff's] position will be able to obviate the harm by securing injunctive relief from any court.").

Moreover, the Ninth Circuit's new preference for injunctive relief is at odds with the warnings of both Congress and this Court that judicial intervention into the workings of prisons is to be avoided whenever possible. *See* 18 U.S.C. § 3626(a)(1)(A) (a court "shall not grant or approve any prospective relief unless the court finds that such relief is narrowly drawn, extends no further than necessary to correct the violation of the Federal right, and is the least intrusive means necessary"); *Turner v. Safley*, 482 U.S. 78, 85 (1987) ("separation of powers concerns counsel a policy of judicial restraint" when it comes to prison administration).

C. The Decision Below Misapplied This Court's Deliberate Indifference Standard.

The en banc majority also incorrectly applied this Court's well-settled deliberate indifference standard. Where, as here, a prisoner has established a serious medical need, to demonstrate deliberate indifference and make out an Eighth Amendment violation, he need only further show: (i) the medical officer's subjective awareness of and (ii) disregard of that need. *See Farmer*, 511 U.S. at 837-38. Despite this decades-long standard, the Ninth Circuit now adds a third prong to this constitutional standard—specific intent to punish. *See* App., *infra*, 12a ("A prison medical official who fails to provide needed treatment because he lacks the necessary resources can hardly be said to have intended to punish the inmate.").

To be sure, this Court has established that a "state of mind" inquiry is required to prove an Eighth Amendment claim. *Wilson*, 501 U.S. at 302-03. But the Court has clearly held that the requisite culpability is established when a prison official

"knows of and disregards an excessive risk" to an inmate's health. *Farmer*, 511 U.S. at 837. Judge Posner has explained that the misconception that "unless the intentions of the prison officials are in some sense punitive, there can be no liability under the cruel and unusual punishments clause" confuses the intent required for an Eighth Amendment claim with *motive*. *Johnson v. Phelan*, 69 F.3d 144, 155-56 (7th Cir. 1995) (Posner, J., dissenting in part). "If prison officials, knowing that an inmate is seriously ill, refuse to provide him with any treatment, the fact that their motive is not to punish him but merely to save time and money is not a defense to his Eighth Amendment claim." *Id.* (citing *Estelle*, 429 U.S. at 97).[14]

Further, the en banc majority incorrectly interpreted language in this Court's direction in *Farmer* that "even if an official knows of a substantial risk, he's not liable 'if [he] responded reasonably [to the risk].'" App., *infra*, 8a (quoting *Farmer*, 511 U.S. at 844). While that case can be understood to mean that choosing ultimately ineffective, though medically justifiable treatments may insulate an official from liability, it cannot reasonably be read to justify the denial of access to any treatment at all for months on end, as was the case

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[14] The Seventh Circuit has subsequently explained that "[t]o the extent that any language in our prior cases may have suggested that a plaintiff inmate making a deliberate indifference claim must establish that prison officials intended the harm that ultimately transpired, those statements do not accurately state the law in this circuit post *Farmer v. Brennan*." *Haley v. Gross,* 86 F.3d 630, 641 (7th Cir. 1996).

here. This Court has never suggested that a decision to delay or completely deny necessary medical care could be deemed a "reasonable" response to the risk of harm to an inmate's health if based on financial reasons. On the contrary, it has indicated that deliberate indifference may be exhibited by a response based on something other than "an exercise of professional judgment." *Estelle*, 429 U.S. at 104 n.10 (quoting *Williams v. Vincent*, 508 F.2d 541, 544 (2d Cir. 1974).

In contrast to the decision below, other courts of appeals have held that delay or denial of needed treatment for financial reasons is inherently unreasonable. The Third, Fourth, and Eleventh Circuits have held that "if necessary medical treatment has been delayed for non-medical reasons," such as cost, deliberate indifference has been shown. *Ancata*, 769 F.2d at 704; *see also Harper v. Lawrence Cnty.*, 592 F.3d 1227, 1235 (11th Cir. 2010); *Durmer v. O'Carroll*, 991 F.2d 64, 68 (3d Cir. 1993); *Hunt v. Sandhir*, M.D., 295 F. App'x 584, 585-86 (4th Cir. 2008). Other courts have agreed in substance, if not precise language. *See Chance v. Armstrong*, 143 F.3d 698, 704 (2d Cir. 1998) (tooth extraction on the basis of cost, not medical views, would show that the defendants had a culpable state of mind); *Soneeya v. Spencer*, 851 F. Supp. 2d 228, 243 (D. Mass. 2012) ("Cost of treatment, however, may not be used as a reason to deny an inmate medically necessary care."); *Baldridge v. Clinton*, 674 F. Supp. 665, 670 (E.D. Ark. 1987) (appropriate care must be based on medical criteria, "not upon what resources are available"). The Ninth Circuit now stands alone in holding that a reasonable response to a risk of serious harm is dependent on finances.

D. The Decision Below Unnecessarily Burdens Constitutional Rights.

The Eighth Amendment "imposes duties" on prison officials, who "must ensure that inmates receive adequate food, clothing, shelter, and medical care." *Farmer*, 511 U.S. at 832. The decision below sweeps those duties aside and places the perceived unfairness of subjecting prison officials to liability above the constitutional rights of the inmates in those prisons.

But this Court has already balanced these concerns in the form of qualified immunity. That doctrine—which shields officials from liability even when found to have violated a constitutional right if the right was not "clearly established" at the time of the conduct—"protects the balance between vindication of constitutional rights and government officials' effective performance of their duties by ensuring that officials can reasonably anticipate when their conduct may give rise to liability for damages." *Reichle v. Howards*, 132 S. Ct. 2088, 2093 (2012) (quoting *Anderson v. Creighton,* 483 U.S. 635, 639 (1987)) (internal punctuation omitted). In this case, there can be no doubt that Mr. Peralta possessed a clearly-established right to adequate medical care, and that Dr. Brooks was on notice of his duty to provide that care to patients in his charge.[15] Unsurprisingly then, he did not even seek qualified immunity. App., *infra*, 73a n.8 (Berzon, J., dissenting).

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[15] A 2001 letter from Dr. Brooks to Dr. Dillard warned that the length of the Lancaster wait list and failure to treat urgent needs "could lead to a difficult-to-defend lawsuit." RT 2:25-26.

In truth, prison officials do not need the extra protection the en banc majority would give them. In addition to the availability of qualified immunity, every state in the Ninth Circuit *voluntarily* indemnifies its prison officials, as is the prevailing practice nationwide. *See supra*, Part I.A.2; App., *infra*, 47a & n.3 (Hurwitz, J., dissenting in part). Thus, the real beneficiary of a cost defense is the very state that chooses to underfund its prisons in the first place.

Acknowledging this fact hardly—as the en banc majority suggested—constitutes an end run around the Eleventh Amendment's guarantee of state sovereign immunity. App., *infra*, 11a. Rather, the widespread and voluntary indemnification of prison officials indicates the way states have chosen to address the concern that qualified doctors would decline to work for a prison if they face potential personal liability because of underfunding. This Court has acknowledged such indemnification, and never expressed any disapproval of the practice or its purposes. *See*, *e.g.*, *West v. Atkins*, 487 U.S. 42, 45 n.4 (1988) (noting North Carolina's provision of legal representation and indemnification from § 1983 liability for prison medical providers). As now-Justice Breyer wrote for the First Circuit, "indemnification by the state has the effect of transferring some of the human cost of the system, borne in the form of death and misery, to the public treasury, and thereby, perhaps, making the public more aware of those costs, and encouraging change." *Cortes-Quinones v. Jimenez-Nettleship*, 842 F.2d 556, 562 (1st Cir. 1988).

CONCLUSION

For the foregoing reasons, the Court should grant this petition for a writ of certiorari.

Respectfully submitted,

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APPENDIX

APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CION ADONIS PERALTA, *Plaintiff-Appellant,* v. T.C. DILLARD, Chief Dental Officer; S. BROOKS, D.D.S. Staff Dentist; J.FITTER, Chief Medical Officer, *Defendants-Appellees*	No. 09-55907 D.C. No. 2:05-cv-01937-JVS-PLA OPINION

Appeal from the United States District Court for the Central District of California James V. Selna, District Judge, Presiding

Argued and Submitted En Banc September 18, 2013—San Francisco, California

Filed March 6, 2014

Before: Alex Kozinski, Chief Judge, Barry G. Silverman, Susan P. Graber, Richard C. Tallman, Johnnie B. Rawlinson, Richard R. Clifton, Jay S. Bybee, Milan D. Smith, Jr., Morgan Christen, Jacqueline H. Nguyen and Andrew D. Hurwitz, Circuit Judges.

Opinion by Chief Judge Kozinski;
Partial Concurrence and Partial Dissent by Judge Christen;
Partial Concurrence and Partial Dissent by Judge Hurwitz

SUMMARY*

Prisoner Civil Rights

The en banc court affirmed the district court's judgment following a jury verdict in favor of a prison dentist and affirmed the district court's judgment as a matter of law in favor of prison administrators in a 42 U.S.C. § 1983 action alleging deliberate indifference to medical needs in connection with a prisoner's dental care.

The court held that a prison official sued for money damages under § 1983 may raise a lack of available resources as a defense. The court held that the district court's challenged jury instruction in this case properly advised the jury to consider the resources that the prison dentist had available when determining if he was deliberately indifferent. The court held that to the extent the court's prior decisions in *Jones v. Johnson,* 781 F.2d 769 (9th Cir. 1986), and *Snow v. McDaniel,* 681 F.3d 978 (9th Cir. 2012), could be read to apply to monetary damages against an official who lacks authority over budgeting decisions, they were overruled.

The court held that the jury had sufficient evidence on which to base a finding that a lack of resources caused any delay in providing care. The court further held that the district court did not err by granting judgment as a matter of law in favor of Dr. Fitter, the prison's Chief Medical Officer and Dr. Dillard, the Chief Dental Officer.

The court held that the district court's prior decision refusing to grant Fitter and Dillard summary judgment did not, under law of the case,

preclude the district court from re- considering its pretrial ruling.

Dissenting in part and concurring in part, Judge Christen, joined by Judges Rawlinson, M. Smith, and Hurwitz and Judge Bybee as to parts I, II, and III, stated that the decision overturned more than thirty years of circuit precedent by holding that lack of resources is a defense to providing constitutionally inadequate care for prisoners. She joined the majority in affirming the dismissal of plaintiff's claims against Dr. Fitter, but she disagreed with the majority's conclusion that a directed verdict was appropriate on plaintiff's claims against Dr. Dillard.

Dissenting in part and concurring in part, Judge Hurwitz, joined by Judges Rawlinson, M. Smith and Christen, and Judge Bybee as to parts I and II, stated that the majority effectively held that a state can first choose to underfund the medical treatment of its wards, and then excuse the Eighth Amendment violations caused by the underfunding. Judge Hurwitz stated that as to Dr. Fitter, the majority correctly held that he was entitled to qualified immunity as he had relied on his staff's medical judgment.

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OPINION

Chief Judge KOZINSKI delivered the opinion of the court, which is joined in full by Judges SILVERMAN, GRABER, TALLMAN, CLIFTON and NGUYEN. Judge BYBEE joins Part II.B.

KOZINSKI, Chief Judge:

We consider whether prison officials sued for money damages under 42 U.S.C. § 1983 may raise a lack of available resources as a defense.

I. Background

At the time Cion Adonis Peralta arrived at California State Prison, Los Angeles County (Lancaster), the prison had only three or four dentists and three or four dental assistants. It had no office technicians or dental hygienists. State policy calls for one dentist for every 950 prisoners, but the ratio at Lancaster was closer to one to 1,500. In addition, the dentists there were responsible for roughly 1,800 inmates at other facilities, bringing the ratio to around one to 2,000.

Peralta requested dental care almost immediately. He complained that his teeth hurt, he had cavities and his gums were bleeding. When he hadn't received care a few weeks after his initial request, Peralta filed a written appeal, in which he again claimed that he had cavities and severe pain. In the informal response to that appeal, Peralta was put on a waiting list, which was generally nine to twelve months long.

Peralta then pursued a formal appeal. He was subsequently interviewed by Dr. Brooks, a staff dentist. Brooks asked Peralta which tooth hurt most, took X-rays and scheduled Peralta for an extraction of that tooth. Brooks also gave Peralta a few days' supply of Ibuprofen. Dissatisfied, Peralta filed a second-level appeal a few days later, and was told that "further treatment [would] be provided based on the waiting list."

About three months after his initial interview, Peralta had his second visit with Brooks. During that visit, Peralta was supposed to have the

scheduled extraction, but he declined to go through with it after Brooks told him removal was unnecessary. Brooks gave Peralta more Ibuprofen and medication for an infection. Eleven months after that, Brooks saw Peralta again and took X-rays, reviewed Peralta's history and cleaned his teeth.

After Peralta declined to have his tooth extracted, but before his cleaning, he filed this section 1983 lawsuit for money damages against Brooks; the prison's Chief Dental Officer, Dr. Dillard; and the Chief Medical Officer, Dr. Fitter. He claimed that their deliberate indifference to his serious medical needs violated his Eighth Amendment rights. *See* 42 U.S.C. § 1983. In the end, his claims amounted to a several-month delay in getting his teeth cleaned and an alleged failure to treat his pain. These claims went to trial, but after Peralta presented his case, the district court granted directed verdicts to Dillard and Fitter. The jury found for Brooks. Peralta challenges the jury instruction, as well as the judgment in favor of Dillard and Fitter.

II. Discussion

Prison officials violate the Eighth Amendment if they are "deliberate[ly] indifferen[t] to [a prisoner's] serious medical needs." *Estelle v. Gamble*, 429 U.S. 97, 104 (1976). A medical need is serious if failure to treat it will result in "'significant injury or the unnecessary and wanton infliction of pain.'" *Jett v. Penner*, 439 F.3d 1091, 1096 (9th Cir. 2006) (quoting *McGuckin* v. *Smith,* 974 F.2d 1050, 1059 (9th Cir. 1992), *overruled on other grounds by WMX Techs., Inc.* v. *Miller,* 104 F.3d 1133 (9th Cir. 1997) (en banc)). A prison official is deliberately indifferent to

that need if he "knows of and disregards an excessive risk to inmate health." *Farmer* v. *Brennan,* 511 U.S. 825, 837 (1994).

A. "Cost Defense" Jury Instruction

The court instructed the jury that "[w]hether a dentist or doctor met his duties to Plaintiff Peralta under the Eighth Amendment must be considered in the context of the personnel, financial, and other resources available to him or her or which he or she could reasonably obtain." The court also told the jury that "[a] doctor or dentist is not responsible for services which he or she could not render or cause to be rendered because the necessary personnel, financial, and other resources were not available . . . or which he or she could not reasonably obtain."

We review a district court's formulation of civil jury instructions for abuse of discretion, *Dang* v. *Cross,* 422 F.3d 800, 804 (9th Cir. 2005), but we review de novo whether an instruction states the law correctly, *Clem* v. *Lomeli,* 566 F.3d 1177, 1180-81 (9th Cir. 2009). Jury instructions must be supported by the evidence, fairly and adequately cover the issues presented, correctly state the law, and not be misleading. *Id.* at 1181.

1. The Instruction's Statement of the Law

The Supreme Court has not said whether juries and judges may consider a lack of resources as a defense in section 1983 actions. *See Wilson v. Seiter*, 501 U.S. 294, 302 (1991) ("[T]he validity of a 'cost' defense as negating the requisite intent is not at issue in this case . . . ."); *see also Harris v. Angelina*

Cnty., 31 F.3d 331, 336 (5th Cir. 1994). But the Court has told us that prison officials aren't deliberately indifferent to a prisoner's medical needs unless they act wantonly, *see Estelle*, 429 U.S. at 104, and whether an official's conduct "can be characterized as 'wanton' depends upon the constraints facing [him]," *Wilson*, 501 U.S. at 303. The Court has also told us that, even if an official knows of a substantial risk, he's not liable "if [he] responded reasonably." *Farmer*, 511 U.S. at 844.

What is reasonable depends on the circumstances, which normally constrain what actions a state official can take. This case is a fine example. Peralta rests his claim on having to wait for dental care, but prisons are a particularly difficult place to provide such care. Security concerns dictate that only one prisoner be in the examination room at a time, even if there's more than one chair, and that no prisoner be left alone, lest he try to use dental tools as weapons. Further exacerbating the problem, only emergency cases can be seen when the prison is in lockdown, and dentists can't accept prisoners' complaints at face value, as inmates often try to jump the line by exaggerating their symptoms.

These challenges aside, there simply weren't enough dentists at Lancaster to provide every prisoner with dental care on demand. The ratio of dentists to prisoners was less than half what the state said it should be, there were no office technicians or dental hygienists and, on many occasions, Brooks had no dental assistant. Peralta doesn't argue that Brooks was responsible for these constraints. Nor could he, since Brooks had no control over the budget.

Peralta would have had the jury ignore that there was no money or staff available to treat him immediately, and hold Brooks personally liable for failing to give Peralta care that Brooks would have found impossible to provide. Peralta claims that this approach is compelled by our decisions in *Jones* v. *Johnson,* 781 F.2d 769 (9th Cir. 1986), and *Snow* v. *McDaniel,* 681 F.3d 978 (9th Cir. 2012). In *Jones,* we reversed a district court's dismissal of a pretrial detainee's deliberate indifference claims because we found "no other explanation in the record than the budget concerns" for denying treatment, and "[b]udgetary constraints . . . do not justify cruel and unusual punishment." 781 F.2d at 771. In *Snow,* we reversed a district court's grant of summary judgment in favor of prison officials who delayed an inmate's surgery, partially due to a lack of resources, because the desire to avoid paying for a surgery is an "improper motive[]"for delaying it. 681 F.3d at 987.

As an en banc court, we're not bound by either decision. Even if we were, it wouldn't help Peralta. In *Jones* and *Snow,* plaintiffs sought both money damages and injunctions. Neither case dealt with jury instructions; the question in both was whether the case could proceed at all.

Lack of resources is not a defense to a claim for prospective relief because prison officials may be compelled to expand the pool of existing resources in order to remedy continuing Eighth Amendment violations. *See LaMarca v. Turner*, 995 F.2d 1526, 1536-39, 1542 (11th Cir. 1993) (prison official wouldn't be personally liable if he did everything he could, but prisoner could get an injunction against official in his official capacity); *see also Watson v.*

City of Memphis, 373 U.S. 526, 537 (1963) (rejecting argument that city couldn't desegregate parks because of budgetary concerns); *Wright v. Rushen*, 642 F.2d 1129, 1134 (9th Cir. 1981) ("[C]osts cannot be permitted to stand in the way of eliminating conditions below Eighth Amendment standards."). A case seeking prospective relief thus can't be dismissed simply because there is a shortage of resources.

Damages are, by contrast, entirely retrospective. They provide redress for something officials could have done but did not. What resources were available is highly relevant because they define the spectrum of choices that officials had at their disposal. To the extent *Jones* and *Snow* can be read to apply to monetary damages against an official who lacks authority over budgeting decisions, they are overruled. Judge Christen claims we are also overruling *Spain v. Procunier*, 600 F.2d 189 (9th Cir. 1979), but this is plainly not so. *Spain* involved *only* injunctive relief; it has nothing to say about damages, much less jury instructions. *See id*. at 192.

Peralta seeks only damages. Allowing the jury to consider the constraints under which an individual doctor operates in determining whether he is liable for money damages because he was deliberately indifferent doesn't mean that prisoners have no remedy for violations of their Eighth Amendment rights. For example, although prisoners can't sue states for monetary relief, they *can* sue for injunctions to correct unconstitutional prison conditions. *See Will v. Mich. Dep't of State Police*, 491 U.S. 58, 71 & n.10 (1989); *see also Brown v. Plata*, 131 S. Ct. 1910 (2011).

Section 1983 also authorizes prisoners to sue municipal entities for damages if the enforcement of a municipal policy or practice, or the decision of a final municipal policymaker, caused the Eighth Amendment violation. *See City of St. Louis v. Praprotnik*, 485 U.S. 112, 138 (1988); Pembaur v. *City of Cincinnati,* 475 U.S. 469, 481 (1986); *Monell* v. *Dep't of Soc. Servs.,* 436 U.S. 658, 663 & n.7, 685-86 (1978). A chronic shortage of resources may well amount to a policy or practice for which monetary relief may be available under *Monell,* but *Monell* claims can't be brought against states, which are protected by the Eleventh Amendment. *See, e.g.*, *Quern* v. *Jordan,* 440 U.S. 332, 345 (1979). The prison where Peralta was held was, of course, run by the state.

Our dissenting colleagues would have the jury hold Brooks liable for delay in treatment caused by shortages beyond his control, on the theory that the state will wind up paying any damages award. According to the dissenters, this will give the state an incentive to improve prison conditions. Christen Dissent 28-30; Hurwitz Dissent 43-45. But the state is protected from monetary damages by the Eleventh Amendment. We may not circumvent this protection by imputing the state's wrongdoing to an employee who himself has committed no wrong. The dissenters attempt an end run around the Eleventh Amendment by subjecting the state to precisely the kind of economic pressure against which the amendment protects it.

We have no quarrel with the dissenters' view that Peralta may have suffered an Eighth Amendment violation. If the state provided insufficient resources

to accord inmates adequate medical care, it could be compelled to correct those conditions. *See Plata,* 131 S. Ct. 1910; *Spain,* 600 F.2d 189. But such a lawsuit could provide no redress for past constitutional violations because the state is protected by sovereign immunity, "a fundamental aspect of the sovereignty which the States enjoyed before the ratification of the Constitution, and which they retain today." *Alden* v. *Maine,* 527 U.S. 706, 713 (1999). Congress could abrogate this immunity, but it has not done so for cases brought under 42 U.S.C. § 1983. *See Quern,* 440 U.S. at 345. We decline to bring about by indirection what Congress has chosen not to do expressly.

An "intent requirement is either implicit in the word 'punishment' or is not; it cannot be alternately required and ignored as policy considerations might dictate." *Wilson,* 501 U.S. at 301-02. The Supreme Court has told us that it is. A prison medical official who fails to provide needed treatment because he lacks the necessary resources can hardly be said to have intended to punish the inmate. The challenged instruction properly advised the jury to consider the resources Brooks had available in determining whether he was deliberately indifferent.

2. The Evidence Supporting the Jury Instruction

Peralta also argues that the jury instruction shouldn't have been given, even if it was correct, because there was no evidence that budgetary constraints actually affected his treatment. Even if Peralta's argument had merit, we would reject it because he invited the error. *See United States* v.

Perez, 116 F.3d 840, 845 (9th Cir. 1997) (en banc). Peralta himself first suggested that the evidence introduced at trial supported an instruction about budgetary constraints. He proposed an instruction that stated, as did the final instruction, that "[e]vidence has been presented during the trial regarding dental staffing levels and the availability of resources at the Lancaster correctional facility where Plaintiff Peralta was incarcerated during the time of his alleged injuries," but his instruction would have required the jury *not* to consider it. Peralta's proposed instruction presupposed that there *was* sufficient evidence about the lack of resources at Brooks's disposal. He can't now turn around and challenge the instruction containing some of the very text he proposed, on the new theory that it's unsupported by the evidence.

In any event, there's plenty of evidence to support a finding that a lack of resources prevented Brooks from cleaning Peralta's teeth sooner. For example, in the Inmate Appeal Response, Brooks listed "staffing shortages beyond our control" as an explanation for the "waiting list for dental procedures." There was also evidence that the prison had less than half the number of dentists required by law, there were no dental hygienists and dentists frequently had to work without dental assistants.

Peralta argues that there's no proof connecting the staff shortages to his lack of care. But Brooks testified that he focused on a prisoner's most pressing complaint because he didn't have enough time, and Fitter testified that staff shortages limited the amount of time Brooks could have spent

with Peralta during any visit. Peralta argues that Brooks could at least have put him on the emergency list, but the decision whether to put an inmate on the emergency list calls for a balancing of the inmate's needs against the available resources and the needs of other patients. Because resources were limited, putting Peralta on the emergency list would have delayed another prisoner's treatment. It was up to the jury to decide whether Brooks was deliberately indifferent by failing to put Peralta on the emergency list, given "the personnel, financial, and other resources available to him . . . or which he . . . could reasonably obtain."

Peralta also argues that Brooks *had* the resources to prescribe him additional (or different) pain medication. But Brooks did prescribe Ibuprofen, and Peralta testified that it helped alleviate his pain. There's no evidence that Peralta requested further medication, although other inmates did so routinely, until months later when he next met with Brooks. During this second visit, Brooks gave Peralta more Ibuprofen and medicine to treat an infection. Brooks testified that he didn't see any signs of an infection during Peralta's first visit. The jury had sufficient evidence on which to base a finding that a lack of resources caused any delay in providing dental care. It would have been surprising if the jury had concluded otherwise.

B. Judgment as a Matter of Law

Peralta also challenges the district court's decision to grant Fitter, the Chief Medical Officer, and Dillard, the Chief Dental Officer, judgment as a matter of law. *See* Fed. R. Civ. P. 50(a). Judgment as

a matter of law is warranted "'when the evidence presented at trial permits only one reasonable conclusion.'" *Torres* v. *City of Los Angeles,* 548 F.3d 1197, 1205 (9th Cir. 2008) (quoting *Santos* v. *Gates,* 287 F.3d 846, 851 (9th Cir. 2002)). We review de novo the district court's decision to grant judgment as a matter of law, drawing all reasonable inferences in favor of Peralta. *Id.* at 1205-06.

Supervisors aren't vicariously liable for constitutional violations under section 1983. *Hunt* v. *Dental Dep't,* 865 F.2d 198, 200 (9th Cir. 1989). But they can be liable for their own conduct. *Redman* v. *Cnty. of San Diego,* 942 F.2d 1435, 1445-46 (9th Cir. 1991) (en banc), *abrogated on other grounds by Farmer,* 511 U.S. 825. Consequently, a prison administrator can be liable for deliberate indifference to a prisoner's medical needs if he "knowingly fail[s] to respond to an inmate's requests for help." *Jett,* 439 F.3d at 1098.

1. Serious medical need

A medical need is serious if "failure to treat a prisoner's condition could result in further significant injury or the unnecessary and wanton infliction of pain." *Id.* at 1096 (internal quotation marks omitted). Peralta's claim arises primarily out of the delay in cleaning his teeth. The mere failure to provide a routine tooth cleaning doesn't create a serious medical need. *Hallett* v. *Morgan,* 296 F.3d 732, 745-46 (9th Cir. 2002). The Eighth Amendment "'requires neither that prisons be comfortable nor that they provide every amenity that one might find desirable.'" *Id.* at 745 (quoting *Hoptowit* v. Ray, 682 F.2d 1237, 1246 (9th Cir. 1982)).

But Peralta alleges that he was denied more than a routine cleaning. He alleges that he had severe pain, infected teeth, cavities and bleeding gums, and that a cleaning was necessary to treat those medical conditions. We've held that the "existence of chronic and substantial pain" indicates that a prisoner's medical needs are serious, *McGuckin,* 974 F.2d at 1060, and recognized that a delay as short as three months in receiving necessary dental care can create a genuine issue of material fact, *Hunt,* 865 F.2d at 200-01. Defendants haven't challenged these precedents, nor disputed before us that Peralta has adequately alleged a serious medical need. We thus assume, without deciding, that this is so.

2. Fitter's Subjective Intent

As the Chief Medical Officer, Fitter was required to—and did—sign Peralta's second-level appeal. The case against Fitter rests entirely on this signature. But the fact that Fitter signed the form doesn't mean that he knew about Peralta's complaints. To be liable, "the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference." *Farmer,* 511 U.S. at 837. Even if a prison official *should* have been aware of the risk, if he "was not, then [he] has not violated the Eighth Amendment, no matter how severe the risk." *Gibson* v. *Cnty. of Washoe,* 290 F.3d 1175, 1188 (9th Cir. 2002).

Peralta hasn't shown that Fitter should have been aware of any risk to Peralta's health, let alone that Fitter actually was aware. Although he supervised the dental department, Fitter isn't a

dentist, and he didn't independently review Peralta's claims or read his chart before signing off on the second-level appeal. Instead, he relied on the medical opinions of the staff dentists who had investigated Peralta's complaints and already signed off on the treatment plan.

Fitter understood his role to be largely administrative, ensuring that the proper personnel had signed off on a reasonable course of treatment, not second guessing staff dentists' medical judgments. And how could he have? Even if he had looked at Peralta's chart, he wouldn't have been able to tell whether Peralta had a serious medical need and what the best course of treatment was. *See Johnson* v. *Doughty,* 433 F.3d 1001, 1011 (7th Cir. 2006); *Meloy* v. *Bachmeier,* 302 F.3d 845, 849 (8th Cir. 2002).

Peralta argues that a reasonable jury could nevertheless "conclude that by signing off on dental second-level appeals and placing inmates back on the extensive waiting list without reviewing their records . . . Fitter was . . . deliberately indifferent to the serious risk posed by his actions to inmates *in Mr. Peralta's position."* (emphasis added); *see Redman,* 942 F.2d at 1446. But Fitter's decision to sign appeals that he knew had already been reviewed by at least two qualified dentists, when he had no expertise to contribute to that review, isn't a wanton infliction of unnecessary pain. *See Estelle,* 429 U.S. at 104.

3. Dillard's Subjective Intent

Unlike Fitter, Dillard is a dentist. Although he was required to sign Peralta's second-level appeal, he didn't. Instead, the appeal was signed by Dr. Cassim, a staff medical doctor. Dillard didn't review Peralta's medical records or meet with him prior to the filing of the lawsuit. Dillard testified that he would authorize someone else to sign the second-level responses on his behalf when he knew he would be absent from the prison because appeals had to be processed quickly. As there's no evidence that Dillard participated in Peralta's treatment, Peralta hasn't proven that Dillard was aware of Peralta's complaints.

Peralta argues that the lawsuit itself put Dillard on notice, but he cites no cases holding that the mere filing of a lawsuit can create independent liability under section 1983. Section 1983 complaints often allege numerous violations, many of which turn out not to be supported by the evidence. It would be unfair to make section 1983 defendants liable merely for failing to sift through what are often rambling and incoherent pro se complaints to determine the truth of each allegation, even before discovery has begun.

Peralta also argues that Dillard was deliberately indifferent to the suffering of prisoners in Peralta's position by having a non-dentist sign inmate appeals and failing to read them himself. To find for Peralta, a jury would have had to conclude that Dillard's behavior wasn't merely negligent, but wanton. *See Estelle,* 429 U.S. at 104. At most, Peralta has shown that Dillard failed to follow required procedures. But

Dillard's failure to follow such procedures isn't, of itself, enough to establish a violation of Peralta's constitutional rights. *See Ramirez* v. *Galaza,* 334 F.3d 850, 860 (9th Cir. 2003); *Mann* v. *Adams,* 855 F.2d 639, 640 (9th Cir. 1988) (order). Peralta must prove both (1) that the failure to follow procedure put inmates at risk and (2) that Dillard *actually knew* that his actions put inmates at risk. *See Gibson,* 290 F.3d at 1188. There wasn't enough evidence for any reasonable juror to draw that conclusion.

Like Fitter, Dillard understood his role to be administrative. He didn't think that the Chief Dental Officer was required to interview prisoners or review medical records, or that he should second-guess staff dentists' diagnoses. Dillard knew that first-level appeals were signed by two staff dentists, in this case Drs. Kumar and Brooks, and that another doctor would have reviewed the appeal in his place to make sure all of the proper procedures were followed. Perhaps Dillard should have known that his actions put prisoners at risk. But, "[i]f a person should have been aware of the risk, but was not, then the person has not violated the Eighth Amendment, no matter how severe the risk." *Id.* Because Peralta hasn't shown that Dillard had actual knowledge, judgment as a matter of law was appropriate.

In any event, any error was harmless. *See Goulet* v. *New Penn Motor Express, Inc.,* 512 F.3d 34, 42-43 (1st Cir. 2008). Despite Peralta's assertions to the contrary, there's no way that the jury could have found that Dillard and Fitter were liable after finding that Brooks was not. *See supra* pp. 10-13; *cf Corales* v. *Bennett,* 567 F.3d 554, 570 (9th Cir. 2009); *Jackson* v. *City of Bremerton,* 268 F.3d 646, 653-54

(9th Cir. 2001). Peralta hasn't pointed to anything that Fitter or Dillard could have done that Brooks couldn't. Like Brooks, Fitter and Dillard had no control over the budget. Not only did they have no say over how much money was allocated to the prison, but they couldn't take money allocated for one purpose and use it for another. They had no input into the prison's funding levels or even how many dental positions the prison would have. Because the case against Dillard and Fitter was identical to that against Brooks, by finding Brooks not liable, the jury essentially resolved the question of Dillard's and Fitter's liability as well.

4. Law of the Case

Finally, Peralta argues that the law of the case doctrine precluded the district court from granting Fitter and Dillard judgment as a matter of law because it had previously refused to grant them summary judgment. But the denial of a summary judgment motion is never law of the case because factual development of the case is still ongoing. Denial of summary judgment may result from a factual dispute at the time. That dispute may disappear as the record develops. *See Shouse* v. *Ljunggren,* 792 F.2d 902, 904 (9th Cir. 1986) (citing *Preaseau* v. *Prudential Ins. Co. of Am.,* 591 F.2d 74, 79-80 (9th Cir. 1979)).

Peralta points to a passage in *Federal Insurance Co.* v. *Scarsella Bros.,* 931 F.2d 599 (9th Cir. 1991), indicating that we overstated the rule when we said in *Shouse* that "the law of the case doctrine does not apply to pretrial rulings." *Id.* at 601 n.4 (internal quotation marks omitted). According to *Scarsella*

Bros., pretrial rulings can create binding law of the case if the court "clearly intended to decide the issues at hand." *Id.*

To the extent that *Scarsella Bros.* purported to hold that the law of the case doctrine bars district courts from reconsidering pretrial rulings, we overrule it. Pretrial rulings, often based on incomplete information, don't bind district judges for the remainder of the case. Given the nature of such motions, it could not be otherwise. At the summary judgment stage, for example, trial courts ask only whether there could be a material issue of fact. They must draw all inferences in the non-movant's favor, *see Anderson* v. *Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986), and rest their rulings on the evidence that they think *could* be introduced at trial. But when considering whether to grant judgment as a matter of law, they look only at the evidence actually introduced at trial.

It makes no sense to say that a ruling that the plaintiff could hypothetically prove some set of facts that would support his claim prevents a district court from later finding that the plaintiff had not, in fact, proven those facts. Nor to say that if a district court realizes an earlier ruling was mistaken, it can't correct it, but must instead wait to be reversed on appeal. All that would do is waste both the courts' and litigants' time and resources. Thus, Wright and Miller have observed that, although "[i]t is proper [for a district judge] to refuse to reconsider a summary judgment ruling[,] . . . [d]enial of summary judgment often is reconsidered." 18B Charles Alan Wright, Arthur R. Miller & Edward H. Cooper,

Federal Practice and Procedure: Jurisdiction 2d § 4478.1 (2002). "Denial can easily be followed," as it was here, "by judgment as a matter of law or dismissal after trial." *Id.*

Peralta's case illustrates the point. The evidence introduced at trial went beyond that presented in the motion for summary judgment. *See Old Person* v. *Brown,* 312 F.3d 1036, 1039 (9th Cir. 2002). Dillard and Fitter moved for summary judgment on the grounds that (1) Peralta hadn't presented expert evidence and (2) Dillard and Fitter weren't personally involved in Peralta's care. The district court found that the lack of an expert alone wasn't enough to entitle Fitter and Dillard to summary judgment, and that there were material questions of fact as to whether Peralta had a serious medical need, what kind of care Peralta received at the prison and when Fitter and Dillard became aware of Peralta's complaints. The court noted, for example, that "[w]hether or not Dillard personally signed the Second Level Appeal, authorized someone else to sign on his behalf, or was wholly unaware of the document is a question of fact." But after Peralta had presented his case, the court found that there was no evidence that either doctor knew about Peralta's alleged condition. Therefore, the district court didn't abuse its discretion in granting Dillard and Fitter judgment as a matter of law. *SeeMilgard Tempering, Inc.* v. *Selas Corp. of Am.,* 902 F.2d 703, 714-15 (9th Cir. 1990).

AFFIRMED.

CHRISTEN, Circuit Judge, with whom RAWLINSON, M. SMITH, and HURWITZ, Circuit Judges, join, and with whom BYBEE, Circuit Judge, joins as to Parts I, II, and III, dissenting in part and concurring in part:

Twenty years ago, the United States Supreme Court observed: "The Constitution does not mandate comfortable prisons, but neither does it permit inhumane ones, and it is now settled that the treatment a prisoner receives in prison and the conditions under which he is confined are subject to scrutiny under the Eighth Amendment." *Farmer v. Brennan,* 511 U.S. 825, 832 (1994) (internal citations and quotation marks omitted). The majority characterizes Peralta's Eighth Amendment claim as arising from a "several-month delay in getting his teeth cleaned and an alleged failure to treat his pain." But Peralta's claim is based on the defendants' failure to put him on the prison's emergency dental care list for conditions the prison's dentist admitted qualified for emergency care: severe pain, bleeding gums, and a bacterial infection. Peralta remained on the prison's routine care list for 18 months. During that time, he developed periodontitis and severe bone loss, and the prison's treating dentist acknowledged he suffered severe pain.

The decision announced today overturns more than thirty years of circuit precedent by holding that lack of resources is a defense to providing constitutionally inadequate care for prisoners. Because it will deny any remedy for prisoners who have suffered injuries due to prison officials' deliberate indifference and eliminates an important

incentive for improving prison conditions, I respectfully dissent.

I.

Peralta complained of cavities, bleeding gums, and severe pain within days of arriving at California State Prison, Los Angeles County (Lancaster). After about a month without treatment, Peralta filed his first appeal, asking for treatment for his infected teeth, cavities, and severe pain.

Dr. Brooks, a treating dentist at the prison, interviewed Peralta about four months later. He diagnosed Peralta with periodontal disease, a bacterial infection that can cause the gums to swell and bleed and can lead to the loss of the bone that supports the teeth. Dr. Brooks testified that cleaning and scaling is part of the treatment for periodontal disease.

Dr. Brooks did not doubt that Peralta was in severe pain, and his testimony confirmed that Peralta's dental problems entitled him to a spot on the emergency list. Working with too few colleagues and too many patients to see, Dr. Brooks did not treat Peralta's periodontal disease or prescribe antibiotics to treat Peralta's infection. Instead, he asked Peralta which tooth hurt the most and scheduled that tooth for extraction three months later. Dr. Brooks did not examine Peralta's other teeth for cavities or infection.

Peralta appealed again, stating that he had been left with bleeding gums and infected teeth and was in severe pain. He received a written response informing him that there were long delays at the

prison and that he was on a waiting list for dental care.

The dentists at Lancaster prison kept one waiting list for patients needing routine care and another list for patients needing emergency care. If a prisoner's request was classified as an emergency, he was entitled to receive treatment ahead of others on the routine care list. Peralta remained on the waiting list for routine dental care, and he waited three more months for his second appointment.

At this visit, Dr. Brooks told him that the tooth could be saved after all, and Peralta decided against the scheduled extraction. Again Dr. Brooks did not prescribe a course of treatment for Peralta's periodontal disease or clean his teeth. He did not address Peralta's concern that he had cavities. Peralta received twelve Ibuprofen pills and some medication for his infection, and eleven more months passed before Dr. Brooks saw Peralta again.

By the time of the third visit, Peralta was suffering from advanced periodontitis. We do not need to take Peralta's word about the nature or severity of his condition; Dr. Brooks testified to these observations and diagnosis at trial. He also testified that Peralta's gums were bleeding and that he had sustained severe bone loss by the time of the third visit, which occurred about 18 months after Peralta first asked for treatment at Lancaster. This time, Dr. Brooks cleaned Peralta's teeth but still did not examine them for cavities.

Peralta was transferred to Mule Creek State Prison less than two months later. There, he received

treatment for periodontal disease and had seven cavities filled over the course of several visits. Peralta testified that he was happy with the dental care he received at Mule Creek.

The defendants argued at trial that Dr. Brooks was overworked and the prison understaffed. To anyone familiar with the conditions of California's prisons, it will come as no surprise that prison officials there have inadequate resources. *See Brown v. Plata,* 131 S. Ct. 1910, 1923 (2011) ("Overcrowding has overtaken the limited resources of prison staff; imposed demands well beyond the capacity of medical and mental health facilities; and created unsanitary and unsafe conditions that make progress in the provision of care difficult or impossible to achieve."). Nor is it surprising that providers working in chronically understaffed and underfunded prison medical and dental facilities are sometimes unable to provide adequate care. *Id.* (describing how overcrowding leads to "grossly inadequate provision of medical and mental health care").

The defendants argued that they should be relieved of liability for any violations of the Eighth Amendment because of the lack of resources at Lancaster. Consistent with Ninth Circuit precedent, Peralta proffered a jury instruction that "the lack of staffing or other resources in the dental department at the Lancaster facility is not a defense to liability under Section 1983." Though this had been a correct statement of the law in the Ninth Circuit for approximately thirty years, *see Jones v. Johnson,* 781 F.2d 769, 771 (9th Cir. 1986); *Spain v. Procunier,* 600 F.2d 189, 200 (9th Cir. 1979), the district court

instructed the jury that defendants were entitled to rely on lack of resources as a defense to the allegation that Peralta's Eighth Amendment rights had been violated.

II.

The Eighth Amendment imposes upon prison officials the duty to provide humane conditions of confinement; prison officials must ensure that prisoners receive adequate food, clothing, shelter, and medical care. *Farmer,* 511 U.S. at 832. A prison official violates the Eighth Amendment when two conditions are met: "First, the deprivation alleged must be, objectively, sufficiently serious; a prison official's act or omission must result in the denial of the minimal civilized measure of life's necessities." *Id.* at 834 (internal citations and quotation marks omitted). Though the majority characterizes Peralta's case as being about "the delay in cleaning his teeth," in the end the majority recognizes that even the defendants did not contest that Peralta's medical condition was "objectively, sufficiently serious." *Cf. Hunt v. Dental Dep't,* 865 F.2d 198, 199-200 (9th Cir. 1989) (allegation that prisoner suffered bleeding gums and broken teeth for three months while waiting for dental care was sufficient to state a claim for deliberate indifference under § 1983). The first prong of *Farmer* is not at issue on appeal.

Farmer's second requirement is that "a prison official must have a sufficiently culpable state of mind." *Farmer,* 511 U.S. at 834 (internal citations and quotation marks omitted). "In prison-conditions cases that state of mind is one of 'deliberate indifference' to inmate health or safety." *Id.*

Farmer examined the deliberate indifference standard and made clear that a plaintiff need not demonstrate the prison official intended harm, or even that the official knew harm would result from the challenged conditions of confinement. *Id.* at 835. *Farmer* held that a prison official may be liable under the Eighth Amendment for deliberate indifference if "the official knows of and disregards an excessive risk to inmate health or safety; the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference." *Id.* at 837. In other words, the official must "consciously disregard a substantial risk of serious harm." *Id.* at 839 (internal quotation marks and alteration omitted).

Today, our court overturns more than thirty years of circuit precedent by holding that lack of resources is a defense to a damages claim that a prisoner was denied the constitutionally-required minimum threshold for adequate care. The jettisoned circuit precedent dates back to 1979 when, writing for the Ninth Circuit, now-Justice Kennedy explained that "the cost or inconvenience of providing adequate facilities is not a defense to the imposition of a cruel punishment." *Spain,* 600 F.2d at 200. Our circuit reiterated and reaffirmed this rule in *Jones,* 781 F.2d at 771, and, much more recently, in *Snow v. McDaniel,* 681 F.3d 978, 984-87 (9th Cir. 2012).

The plaintiff in *Jones* filed a § 1983 suit seeking damages and injunctive relief against a county jail, jail doctors, supervisory jail personnel, and county officials for deliberate indifference to his medical needs. 781 F.2d at 770. He alleged that he was

refused a necessary hernia surgery because of the county's "tight budget." *Id.* at 771. Our circuit reversed the district court's dismissal of the claims against the individual defendants, holding that by alleging he was denied necessary surgery due to budgetary constraints, Jones pleaded sufficient facts to constitute deliberate indifference. *See id.* at 771-72 ("We find no other explanation in the record than the budget concerns for denying Jones's surgery. *Budgetary constraints, however, do not justify cruel and unusual punishment.* . . . Because Jones has properly alleged both that he had a serious medical need and that the defendants were deliberately indifferent to that need, he has adequately stated a cause of action under the fourteenth amendment." (emphasis added)). As in *Jones,* Peralta's case permits "no other explanation in the record than the budget concerns" for denying treatment for his "objectively, sufficiently serious" medical condition.

In *Snow,* we reaffirmed the rule that lack of resources cannot be a defense for the failure to provide constitutionally- required medical care for prisoners. The prisoner in *Snow* sued doctors and wardens of the Nevada Department of Corrections for declaratory and injunctive relief and damages under § 1983. 681 F.3d at 984. He alleged these officials were deliberately indifferent to his medical needs by denying him necessary hip surgery. *Id.* at 984-85. Citing *Jones,* we concluded that the record supported the inference that the defendants denied surgery to Snow due to "improper motives"—namely, "to avoid eventually paying for it"—and that this inference could show the defendants acted with deliberate indifference. *See id.* at 987.

The majority assures us that prisoners will still be able to bring § 1983 claims if they seek injunctive relief and attempts to distinguish *Jones* and *Snow* on the basis that Peralta sought only money damages. But the principle in *Jones* and *Snow* was first articulated in *Spain,* which drew no distinction between the type of relief sought by the plaintiff: "The cost or inconvenience of providing adequate facilities is not a defense to the imposition of a cruel punishment." 600 F.2d at 200. The majority's attempt to retroactively apply a newly-minted distinction between claims for injunctions and claims for damages to our decision in *Spain* is not convincing. There is nothing tentative or limited about *Spain's* directive that "cost . . . is not a defense to the imposition of a cruel punishment," *id.*, and, until today, we have never suggested that cost may be a defense to Eighth Amendment claims for damages. In fact, *Snow* suggests the opposite. *Snow* specifically examined a plaintiff's claim for damages for defendants' deliberate indifference to his serious medical needs and rejected the cost defense in that context. *See Snow,* 681 F.3d at 985-87. Snow's claim for injunctive relief to remedy a "custom or policy" of inappropriate treatment—which the district court had dismissed as moot—was analyzed separately. *See id.* at 991.

The rule articulated in *Spain, Jones,* and *Snow* recognizes that the constitutionally-required threshold for the humane treatment of prisoners is impossible to safeguard if prison officials are permitted to claim lack of resources as a defense. In the case of California prisons, there can be no doubt that chronic underfunding and overcrowding have plagued prison administrators and the prison

population for decades. *See Brown,* 131 S. Ct. at 1923-26 (describing "exceptional" overcrowding in California's prisons and the resulting inability to provide minimal, adequate medical care to prisoners). The majority's decision will effectively prevent prisoners from bringing suits for damages against prison officials who have violated their Eighth Amendment rights by demonstrating deliberate indifference to serious medical needs: those who actually control prison budgets are immune from damage suits, *Tenney v. Brandhove,* 341 U.S. 367, 376-79 (1951) (providing absolute immunity for state legislators); and prison officials responsible for substandard care or conditions will be shielded by the newly-announced "lack of resources" defense.[1] Under the lack of resources defense, even prisoners who suffer grievous injury will be left with no recourse at all—what good is prospective injunctive relief to a prisoner whose appendix has burst? The concern that holding prison officials personally liable would be unfair overlooks the reality that California indemnifies employees for torts committed within the scope of their employment,[2] and pays the cost of their defense.[3]

The majority suggests that I seek an end run around the Eleventh Amendment by subjecting the

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[1] The majority suggests that a prisoner could pursue a *Monell* claim for damages against a municipal entity. But municipal entities do not operate state prisons.

[2] Cal. Gov't Code § 825.

[3] Cal. Gov't Code §§ 825, 995.

state to financial pressure to avoid cruelly and unusually punishing its prisoners. But the state's decision to indemnify Dr. Brooks was voluntary. Without the ability to seek damages, prisoners who sustain injuries from overcrowding and underfunding will be denied any meaningful form of relief, even for grievous violations of the Eighth Amendment. As Judge Hurwitz persuasively explains, California's freely- assumed obligation to its employees does not change this simple fact. If anything, the new distinction between claims for damages and claims for injunctive relief is an end run around the congressional directive embodied in 42 U.S.C. § 1983 that there should be redress when constitutional rights are violated. *Simpson v. Thomas,* 528 F.3d 685, 692 (9th Cir. 2008) ("Congress's purpose in enacting § 1983 was to create a novel civil remedy for violation of established constitutional rights." (citation and internal quotation marks omitted)).

Another overlooked reality is that the majority of cases in which a prisoner successfully proves a violation of his constitutional rights result in low damage awards for the prisoner. *See Woods v. Carey,* 722 F.3d 1177, 1182 n.6 (9th Cir. 2013) (quoting Margo Schlanger, *Inmate Litigation,* 116 Harv. L. Rev. 1555, 1603 (2003) ("[T]he mean damages for cases won at trial by inmate civil rights plaintiffs was $18,800, and the median was a mere $1000.")). Even small damage awards can affect substantial change in prison conditions; yet the rule announced today eliminates this modest, but important, incentive. *Owen v. City of Independence, Mo.,* 445 U.S. 622, 651 (1980) ("Moreover, § 1983 was intended

not only to provide compensation to the victims of past abuses, but to serve as a deterrent against future constitutional deprivations, as well.").

III.

The district court's jury instruction should not have been given, even under the newly-announced lack of resources defense, because it was not supported by the evidence and it was misleading; the evidence did not show that a lack of resources had anything to do with Brooks' failure to place Peralta on the emergency care list. *See Clem v. Lomeli,* 566 F.3d 1177, 1181 (9th Cir. 2009) ("[J]ury instructions must fairly and adequately cover the issues presented, must correctly state the law, and must not be misleading." (internal quotation marks omitted)).

There is no real question about whether the prison was understaffed; in fact, it was so understaffed that Dr. Brooks testified that the bulk of his workday was spent treating patients on the emergency care list.[4] He was only able to see patients on the routine care list if there was any time remaining at the end of the day. The net effect was that prisoners on the routine care list waited about twelve months before receiving any care.

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[4] That the staff was over-committed cannot be disputed. As the majority notes, Dr. Dillard testified that state policy called for a ratio of one dentist for every 950 prisoners, but the inadequate resources allocated to Lancaster left the prison with a ratio as high as one dentist to every 1,500 prisoners.

Because those on the routine care list only saw a care provider if there was any time remaining at the end of the day, the existence of the emergency care list is critical to the outcome of this case. Dr. Brooks testified that the particulars of Peralta's conditions—including bleeding gums and severe pain—would qualify as a dental emergency that entitled prisoners to be placed on the emergency care list. The Chief Dental Officer at the prison, Dr. Dillard, also testified that complaints of tooth pain and bleeding gums were given higher priority than routine cleanings. Yet Peralta was never moved to the emergency care list, and the defendants did nothing to rebut the evidence that the prison's overextended staff would have more promptly provided dental care to Peralta if he had been given a spot on that list. The district court's instruction was unsupported and misleading because defendants offered no evidence to show that lack of funding had anything to do with the failure to move Peralta from the routine care list to the emergency care list.

The majority suggests Peralta invited error by proffering a jury instruction that directed the jury to disregard evidence of understaffing and a lack of resources at the prison. This argument is premised on the assertion that "Peralta's proposed instruction presupposed that there *was* sufficient evidence about the lack of resources at Brook's disposal." This mischaracterizes Peralta's argument. Peralta's proffered instruction merely stated that the jury had heard evidence that the prison was understaffed, which they had, and instructed the jury that this lack of resources was not a defense to a claim of deliberate indifference. The instruction actually given to the jury turned the proffered instruction

upside down. Peralta's proffered instruction was a correct statement of the law; he did not invite any error.[5]

Without support from the record, the majority also asserts that placing Peralta on the emergency care list would have inevitably delayed another prisoner's treatment. This is speculation. The record reveals nothing about whether or how patients on the emergency care list were triaged, or the order in which prisoners on the emergency care list were treated. What we do know is that Peralta would have received care more promptly if he had been moved from the routine care list to the emergency care list because Dr. Brooks was only able to serve prisoners on the routine care list if there was any time left over at the end of each day. The majority concedes that this was the way the emergency care list worked by noting that prisoners sometimes try to "jump the line" by exaggerating symptoms. Peralta wasn't asking for special consideration. He was asking only that he be placed on the emergency list like other inmates with qualifying dental conditions, rather than waiting months on the routine care list until it was discovered he had periodontitis and severe bone loss.

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[5] Error is only invited when the objecting party (1) proposed the allegedly flawed jury instruction; and (2) intentionally waived a known right by doing so. *United States v. Perez,* 116 F.3d 840, 845 (9th Cir. 1997) (en banc).

IV.

Before the case went to the jury, the district court entered a directed verdict in favor of Drs. Fitter, the chief medical officer, and Dillard, the chief dental officer. As to Dr. Dillard, the district court found that "[t]here is no evidence here that [Dr. Dillard] had actual knowledge of a serious medical condition. . . .At most, he was negligent in the discharge of his duties." The district court similarly found that there was "no evidence in the record that Dr. Fitter was in fact aware of a serious medical condition which he then treated with deliberate indifference. . . . At most, his conduct was negligent." The district court ruled that Dr. Fitter was entitled to qualified immunity but did not make a comparable ruling regarding Dr. Dillard.

I join the majority in affirming the dismissal of Peralta's claims against Dr. Fitter, but I disagree with the majority's conclusion that a directed verdict was appropriate on Peralta's claims against Dr. Dillard. As the supervising dentist, Dr. Dillard testified that he was required by California law to conduct second level appeals. *See* 15 Cal. Code Reg. § 3084.7(d)(2). Dr. Dillard also testified that he was the only supervisor with the expertise to determine whether the first level response to an inmate's complaint was proper. But Dr. Dillard testified that it was his practice to authorize someone else to sign second level responses on his behalf when he was to be absent in order to process appeals quickly. Dr. Dillard conceded that prison staff were able to get extensions to review appeals, but he testified that "no one likes to be late on appeals because it doesn't

look good and the warden doesn't favor that." Apparently to avoid an untimely response that wouldn't look good, Dr. Dillard did not conduct or sign Peralta's second level appeal, nor was it even signed by a dentist. Instead, Dr. Dillard arranged for a prison physician to review the dental appeals in his place. Dr. Dillard never met or examined Peralta, or looked at Peralta's dental records, until after Peralta filed his lawsuit.

The majority holds that Dr. Dillard's failure to review Peralta's appeal—an obligation conferred upon him by California law—shields him from liability. Unchecked, this rule will allow care providers to defeat claims of deliberate indifference by arguing that they had no actual knowledge of the prisoner's condition, even if that lack of knowledge is the result of failing to perform duties expressly assigned to them. The majority not only charts a path that permits prison officials to escape liability by arguing that they have inadequate funds to provide emergency care to inmates, it condones an escape hatch from liability available to officials willing to look the other way or who fail to perform assigned duties that might cause them to gain actual knowledge of an inmate's condition. Neither circuit nor Supreme Court authority permits such a result.

In *Farmer,* the Supreme Court rejected concerns that prison officials could escape liability by "ignor[ing] obvious dangers to inmates," reasoning that a plaintiff need only show the "official acted or failed to act despite his knowledge of a substantial risk of serious harm." *Farmer,* 511 U.S. at 842. A prisoner is not required to show that an official intended for harm to occur, or that the official had

actual knowledge that harm would occur, to show that the Eighth Amendment has been violated. *Id.*

Judgment as a matter of law is only appropriate if no reasonable juror could find in Peralta's favor. *See El-Hakem v. BJYInc.,* 415 F.3d 1068, 1072 (9th Cir. 2005). Here, a reasonable jury could conclude that some Lancaster prisoners' emergency dental problems would go unaddressed if the only staff dentist qualified to review first level appeals did not actually review them. Dr. Dillard knew he was obligated to review the first level appeals, and he knew he was the only staff dentist qualified to do so. On this record, a jury could conclude that Dr. Dillard did not fulfill his obligations and consciously disregarded a substantial risk of serious harm to the dental needs of prisoners at Lancaster. The law does not require that Dr. Dillard intended harm to result. Judgment as a matter of law was inappropriate.

V.

"A prison that deprives prisoners of basic sustenance, including adequate medical care, is incompatible with the concept of human dignity and has no place in civilized society." *Brown,* 131 S. Ct. at 1928. "If government fails to fulfill this obligation, the courts have a responsibility to remedy the resulting Eighth Amendment violation." *Id.*

The decision announced today overturns more than thirty years of circuit precedent by holding that a lack of resources is a defense to providing constitutionally inadequate care for prisoners. It effectively eliminates § 1983 suits for damages against prison officials, denies relief to those

prisoners who have already suffered injuries, even when they are grievous, and permits prison officials to escape liability by failing to perform job duties imposed by law. For these reasons, I respectfully dissent.

HURWITZ, Circuit Judge, with whom RAWLINSON, M. SMITH, and CHRISTEN, Circuit Judges, join, and with whom BYBEE, Circuit Judge, joins as to Parts I and II, dissenting in part and concurring in part:

The majority opinion has something of a seductive quality. It pits Peralta, a jailhouse lawyer, against Dr. Brooks, an overworked dentist. The case involves dental care, an amenity not available to large portions of the law- abiding population. Given the majority's characterization of the *dramatis personae* and the issue, it is not difficult to predict the result.

But, of course, this case is really not about just Peralta and Dr. Brooks. Nor is it about an alleged constitutional right to dental care.[1] Rather, this case is before the en banc court because it involves, in the words of Federal Rule of Appellate Procedure 35(a)(2), a "question of exceptional importance." That question is whether a state can shield itself from the

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[1] The majority suggests that Peralta sued because his teeth were not cleaned. Maj. Op. at 5-6, 14. Judge Christen's dissent rightly dismisses this suggestion. Christen Diss. at 21-22. Given that there is no clearly established right to teeth cleaning, the opinion could have dismissed such a claim on qualified immunity grounds.

consequences of denying constitutionally required medical treatment to those it incarcerates by deliberately choosing not to appropriate sufficient funds for that treatment.

The majority effectively holds that a state can first choose to underfund the medical treatment of its wards, and then excuse the Eighth Amendment violations caused by the underfunding. Today's decision thus not only forecloses relief to inmates who suffer cruel and unusual punishment, but also encourages future constitutional violations. I respectfully dissent.

I

Peralta asserted Eighth Amendment claims against three defendants—Dr. Brooks (the treating dentist), Dr. Dillard (the Chief Dental Officer), and Dr. Fitter (the Chief Medical Officer). Because only the claim against Dr. Brooks went to the jury, the instruction to consider the financial resources made available to the prison system by the State of California applies to that claim alone. But, the history of the claims against the other two defendants is nonetheless instructive.

The district court determined that Dr. Fitter had qualified immunity, and directed a judgment in his favor; the court did not reach the issue of qualified immunity as to Dr. Dillard, finding that Peralta had not established a prima facie case of deliberate indifference and also issuing a judgment as a matter of law on his behalf. Dr. Brooks, however, did not assert qualified immunity. Thus, the "resources" jury instruction only comes into play in cases in which qualified immunity has not been granted and in

which the district court finds sufficient evidence of an Eighth Amendment violation to submit the claim to a jury. *See* Maj. Op. at 11 ("We have no quarrel with the dissenters' view that Peralta may have suffered an Eighth Amendment violation."). The majority thus holds that even if a plaintiff makes out a prima facie Eighth Amendment violation, an agent of the state may nonetheless justify cruel and unusual punishment by claiming that the state itself caused the problem by withholding the resources necessary to provide appropriate medical care.

This turns the law upside down. A state official inflicts cruel and unusual punishment by exhibiting deliberate indifference to a prisoner's serious medical needs. *Estelle v. Gamble,* 429 U.S. 97, 103-04 (1976). Deliberate indifference in turn requires subjective culpability—the official must know of and disregard an excessive risk to inmate health. *Farmer v. Brennan,* 511 U.S. 825, 837-38 (1994). Although the Supreme Court has left open whether fiscal constraints are a defense to an Eighth Amendment claim, in doing so Justice Scalia aptly noted that "it is hard to understand how" funding issues "could control the meaning of 'cruel and unusual punishments' in the Eighth Amendment." *Wilson v. Setter,* 501 U.S. 294, 301 (1991). Four justices went even further, criticizing the *Wilson* majority for even "leav[ing] open the possibility, for example, that prison officials will be able to defeat a § 1983 action challenging inhumane prison conditions simply by showing that the conditions are caused by insufficient funding from the state legislature rather than by any deliberate indifference on the part of the prison officials." *Id.* at 311 (White, J., concurring in the judgment).

Until today, the law of this Circuit was that "budgetary constraints . . . do not justify cruel and unusual punishment." *Jones v. Johnson,* 781 F.2d 769, 771 (9th Cir. 1986); *accord Snow v. McDaniel,* 681 F.3d 978, 987 (9th Cir. 2012). The majority overrules *Jones* and *Snow* and holds that an official does not act with deliberate indifference if he (a) lacks the "resources" to treat an inmate and (b) is sued for money damages. Maj. Op. at 8-10. But, the Eighth Amendment prohibits all cruel and unusual punishments, not simply those inflicted by officials of states with well-funded prison medical systems. More importantly, there are likely no such states. *See* Andrew P. Wilper et al., *The Health and Health Care of US Prisoners: Results of a Nationwide Survey,* 99 Am. J. Pub. Health 666, 669-71 (2009). Today's opinion therefore renders damages suits by inmates who suffer grievous injuries as a result of constitutionally forbidden indifference all but impossible in practice. In every case in which state actors are sued for failing to provide minimal medical care—even those cases involving loss of life or serious permanent injury—the defense will be lack of resources, and that defense will almost surely succeed.

This will encourage further constitutional violations: If states do not have to pay damages for depriving inmates of the level of care required to avoid violating the Eighth Amendment, there will be little reason to increase appropriations for prisoner care.

A

Not to worry, the majority says. Although Dr. Brooks can assert a lack of resources defense, that defense will not be available to those who fail to request sufficient resources. Maj. Op. at 10-11. But again, in reality, no such defendants will exist. Every putative defendant will be able to honestly plead poverty.

Wardens, medical supervisors, and staff doctors have no control over California's prison budget, which contains "line items" for prison medical, mental health, and dental care. Budget Act of 2013, Assemb. B. 110, 2013 Reg. Sess., § 2.00, No. 5225-002-0001 (Cal. 2013) (allocating prison medical funding); *see also id.* § 32.00 (limiting departmental expenditures to the appropriated amount); Cal. Gov't Code § 13324 (prohibiting expenditures in excess of a department's budget). Prison officials may only spend in excess of the Department of Corrections and Rehabilitation's budget if so ordered by a court-appointed receiver. Cal. Assemb. B. 110, § 2.00, No. 5225-002-0001; *see Plata v. Schwarzenegger,* No. C01-1351 TEH, 2005 WL 2932253 (N.D. Cal. Oct. 3, 2005). The entities that control California's prison budget—the receiver and the state legislature—are immune from damages suits. *Bogan v. Scott-Harris,* 523 U.S. 44, 49 (1998) (providing absolute immunity for state legislators); *Mosher v. Saalfeld,* 589 F.2d 438, 442 (9th Cir. 1978) (granting absolute quasi-judicial immunity for receivers). And a suit for damages against the state itself is barred by sovereign immunity. *Edelman v. Jordan,* 415 U.S.

651, 676 (1974). Thus, even accepting the majority's limitation of its rule, there is really no one left to sue.

B

The majority's alternative answer is that lack of resources is not a defense to a suit for injunctive relief. Maj. Op. at 9. But injunctive relief provides no comfort to an inmate who loses a limb because of untreated diabetes. For such constitutional violations, "it is damages or nothing." *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics,* 403 U.S. 388, 410 (1971) (Harlan, J., concurring in the judgment). Indeed, even for prisoners not yet injured by constitutionally deficient conditions, history counsels skepticism about the utility of injunctive relief. *See Brown v. Plata,* 131 S. Ct. 1910, 1923-28 (2011) (documenting California's failure, in the face of multiple remedial injunctions, to improve prison medical care).[2]

More importantly, the majority's distinction between damages and injunctive relief finds no support in the Eighth Amendment. Cruel and unusual punishment violates the Eighth Amendment

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[2] Obtaining equitable relief before one suffers permanent injury can require herculean efforts. A prisoner first has to exhaust administrative remedies. 42 U.S.C. 1997e(a). Then, a typically pro se litigant must either prevail in court or receive a favorable settlement. "Of 55,376 inmate civil rights cases that ended in 2000, 49,492 were coded as pro se. Of these, 1411 (2.85%) were coded as having settled; 491 (0.99%) were coded as having gone to trial; 52 (10.59% of trials) were coded as ending in a trial victory for the plaintiff." Margo Schlanger, *Inmate Litigation,* 116 Harv. L. Rev. 1555, 1610 n.158 (2003).

regardless of the inmate's prayer for relief. But, in the eyes of the majority, refusing to treat an inmate because of budget constraints is cruel and unusual when an inmate requests equitable relief, but somehow not so when he requests monetary relief.

The majority has thus made injunctive relief the default remedy for Eighth Amendment violations. The law is precisely to the contrary. Rather, "[a] damages remedy against the offending party is a vital component of any scheme for vindicating cherished constitutional guarantees. . . ." *Owen v. City of Independence,* 445 U.S. 622, 651 (1980). Moreover, Congress has warned that federal courts should rarely issue equitable relief in prison condition cases, Prison Litigation Reform Act, 18 U.S.C. § 3626(a)(1)(A), and the Supreme Court has often emphasized the same, *see e.g.*, *Farmer,* 511 U.S. at 846-47; *Turner v. Safley,* 482 U.S. 78, 84-85 (1987); *Bell v. Wolfish,* 441 U.S. 520, 562 (1979); *Procunier v. Martinez,* 416 U.S. 396, 404 (1974).

The majority thus today runs roughshod over the general presumption in favor of legal remedies over equitable relief. "[I]t is axiomatic that a court should determine the adequacy of a remedy in law before resorting to equitable relief. Under the ordinary convention, the proper inquiry would be whether monetary damages provided an adequate remedy, and if not, whether equitable relief would be appropriate." *Franklin v. Gwinnett Cnty. Pub. Sch.,* 503 U.S. 60, 75-76 (1992); *see also Carey v. Piphus,* 435 U.S. 247, 256-57 (1978) ("To the extent that Congress intended that awards under § 1983 should deter the deprivation of constitutional rights, there is no evidence that it meant to establish a deterrent

more formidable than that inherent in the award of compensatory damages."); *Bivens,* 403 U.S. at 395 ("Historically, damages have been regarded as the ordinary remedy for an invasion of personal interests in liberty."). By denying inmates an adequate remedy at law, the majority inverts the basic law/equity presumption.

II

In the end, the only rational justification for today's decision is concern for the prison medical provider. That solicitude is valid: With shoestring budgets, prison doctors must triage medical care. "California prison wardens and health care managers make the difficult decision as to which of [various class actions] they will fail to comply with because of staff shortages and patient loads." *Plata,* 131 S. Ct. at 1927 (quoting Receiver's Report re Overcrowding, *Plata v. Schwarzenegger,* No. C01-1351-TEH). It would, of course, be unfair to subject a doctor to personal liability because he could not immediately treat every inmate.

But this case does not deal with the imposition of liability on a doctor who was unable to see a patient. Peralta managed to become Dr. Brooks' patient, and the suit attacks decisions made by Dr. Brooks from that point forward. *Peralta v. Dillard,* 704 F.3d 1124, 1133-34 (9th Cir. 2013) (Berzon, J., dissenting). More importantly, the majority's focus on the personal liability of prison physicians ignores an important reality—the state is in every respect the real party in interest in a damages suit.

California indemnifies employees for torts committed in the scope of their employment.[3] Cal. Gov't Code § 825. "Indemnification is 'near[ly] universal' among state and local entities, either as a matter of official policy or practice." *Peralta,* 704 F.3d at 1136 (Berzon, J., dissenting) (quoting Schlanger, *supra,* at 1676 n.391).

California not only indemnifies prison officials named as defendants in § 1983 actions, but also pays for their legal defense. Cal. Gov't Code §§ 825, 995. Yet, the majority allows the state—while funding and directing the defense—simultaneously to argue that it would be unfair to impose liability because of budgeting decisions made by the state itself. If that defense succeeds, the only financial winner is the very entity that created the problem in the first place.[4]

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[3] Every other state in our Circuit does the same. *See* Ariz. Rev. Stat. § 41-621; Idaho Code § 6-903; Mont. Code Ann. § 2-9-305; Nev. Rev. Stat. § 41.0349; Or. Rev. Stat. § 30.285; Wash. Rev. Code § 4.92.075. Although Alaska does not indemnify by statute, Alaska Stat. § 09.50.253(f), its collective bargaining agreement holds prison doctors harmless for torts committed in the scope of their employment. Collective Bargaining Agreement between the State of Alaska and the Alaska Correctional Officers Association, Art. 29, *available at* http://doa.alaska.gov/dop/fileadmin/LaborRelations/pdf/contracts/ACO ACO2012-2013.pdf. Hawaii authorizes, but does not mandate, indemnification. Hawaii Rev. Stat. § 662-16. But it also apparently protects prison doctors by agreement. Institutional, Health and Correctional Workers Bargaining Unit 10 Agreement, § 63.18, *available at* http://dhrd.hawaii.gov/wp-content/uploads/_2012/12/BU-10-UPW-2007-09-CBA.pdf.

[4] California will not indemnify an employee who acts outside of the scope of employment. Cal. Gov't Code § 825. But, no such

We should not countenance such a charade. When a state funds its employee's defense and indemnifies him against any judgment, it ought not then assert that he is faultless because the state is really to blame. The policy concern that no doctor will work for a prison if he faces the possibility of personal liability has already been addressed (and apparently effectively so) by California's promise to hold the physician harmless. Having made the policy decision to incarcerate a large number of wrongdoers, California should not be allowed to avoid the Eighth Amendment consequences of that decision by systematically underfunding medical care. At a minimum, when a state attempts to do so, we should create an exception to the judge-made collateral source rule and allow the plaintiff to inform jurors that the state, not the individual defendants, will pay any compensatory damages awarded. *See Bell v. Clackamas Cnty.,* 341 F.3d 858, 868 (9th Cir. 2003).

Such an approach would not, as the majority suggests, Maj. Op. at 11, violate state sovereign immunity. States have no obligation to indemnify their employees for damages imposed because of constitutional violations. But, when a state chooses to do so, the state agent should not be heard to argue that the imposition of liability on him individually is unfair. Section 1983 and the Constitution do not codify a collateral source rule.

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situation is presented here; all defendants clearly acted within the scope of their employment and were defended and indemnified by the State.

III

Today's decision, as Judge Christen's dissent convincingly demonstrates, is wrong on the record of this case. But even if that were not so, the decision sweeps far too broadly, effectively foreclosing any liability for permanent injuries and deaths caused by the deliberate indifference of state funding authorities. I therefore dissent from the affirmance of the judgment in favor of Dr. Brooks.

For the reasons set forth in Judge Christen's dissent, I also cannot join the majority opinion insofar as it affirms the judgment as a matter of law in favor of Dr. Dillard (pretermitting, as did the district court, any claim of qualified immunity). As to Dr. Fitter, the majority correctly holds that he was entitled to qualified immunity, as he relied on his staff's medical judgment, and I join its opinion on that score alone.

APPENDIX B

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

Filed May 30, 2014

CION ADONIS PERALTA,	No. 09-55907
Plaintiff - Appellant,	D.C. No. 2:05-cv-01937-JVS-PLA
v.	ORDER
T. C. DILLARD, Chief Dental Officer; S. BROOKS, D.D.S., Staff Dentist; J. FITTER, Chief Medical Officer,	
Defendants - Appellees.	

Before: **KOZINSKI**, Chief Judge, **SILVERMAN**, **GRABER**, **TALLMAN**, **RAWLINSON**, **CLIFTON**, **BYBEE**, **M. SMITH**, **CHRISTEN**, **NGUYEN** and **HURWITZ**, Circuit Judges.

The petition for rehearing en banc before the full court is denied. See Fed. R. App. P. 35; 9th Cir. R. 35-3.

APPENDIX C

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CION ADONIS PERALTA *Plaintiff-Appellant,* v. T.C. DILLARD, Chief Dental Officer; S. BROOKS, D.D.S. Staff Dentist; J. FITTER, Chief Medical Officer, *Defendants-Appellees*.	NO. 09-55907 D.C. NO. 2:05-CV-01937- JVS-PLA OPINION

Appeal from the United States District Court
for the Central District of California
James V. Selna, District Judge, Presiding

Argued and Submitted
October 10, 2012—Pasadena, California

Filed January 7, 2013

Before: Ferdinand F. Fernandez and Marsha S. Berzon, Circuit Judges, and Marco A. Hernandez, *District Judge.

Opinion by Judge Fernandez;
Dissent by Judge Berzon

* The Honorable Marco A. Hernandez, United States District Judge for the District of Oregon, sitting by designation.

SUMMARY**

Prisoner Civil Rights

The panel affirmed the district court's judgment following a jury verdict in favor of a prison dentist in a prisoner's 42 U.S.C. § 983 action alleging deliberate difference to medical needs related to his dental care.

The panel held that the district court did not err when it instructed the jury on the question of whether defendant could be held responsible for failing to provide services when he lacked resources. The panel held that the instruction was proper because it took account of the duties, discretion and means available and properly advised the jury that if the prison dentist could not render or cause to be rendered the needed services because of a lack of resources that he could not cure, he also could not be individually liable.

Dissenting, Judge Berzon stated that the majority upheld a jury instruction absolving a prison dentist of liability for providing constitutionally deficient care, even though he was not entitled to be so exonerated under 42 U.S.C. § 1983 or the Eighth Amendment.

** This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

COUNSEL

Derek Milosavljevic, Kirkland & Ellis LLP, Los Angeles, California, for Plaintiff-Appellant.

Janine K. Jeffery, Reily & Jeffery, Northridge, California, for Defendants-Appellees.

OPINION

FERNANDEZ, Circuit Judge:

Cion Adonis Peralta appeals the district court's judgment as a matter of law in favor of Dr. Thaddeus Dillard and Dr. Junaid Fitter and its judgment following a jury verdict in favor of Dr. Sheldon Brooks, in Peralta's 42 U.S.C. § 1983 action claiming that they were deliberately indifferent to his medical needs related to dental care. In this opinion, we decide whether the district court erred when it instructed the jury on the question of whether Dr. Brooks could be held responsible for failing to provide services when he lacked resources.[1] We affirm.

BACKGROUND

Peralta was incarcerated at various California state prisons, prior to January 24, 2004, when he arrived at California State Prison, Los Angeles County ("Lancaster"). He remained in Lancaster until February 7, 2006. While he was there, Dr. Brooks was a staff dentist.

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[1] We address Peralta's claims against Dr. Dillard and Dr. Fitter in an unpublished memorandum disposition filed this date.

Within three days of his arrival at Lancaster, Peralta submitted oral and written requests for dental care. He asserted that he had cavities and bleeding gums and that he needed to receive treatment for pain. Having received no immediate response, Peralta filed a Form 602 Inmate Appeal on July 15, 2004. He stated that he had infected teeth, cavities, and severe pain, but he had not been seen by a dentist despite having submitted requests. The initial informal response by the medical appeals analyst, dated August 13, 2004, indicated that the appeal was partially granted; he was placed on a waiting list to see a dentist.

The wait for routine care could take up to twelve months, but emergency dental cases were given a higher priority. The length of the waiting list, as well as the limited amount of time that staff dentists could ultimately spend with patients, was due to staff shortages at Lancaster during 2004-05 and to other constraints on the dentists' time. Moreover, while Dr. Brooks and the other doctors tried to address the shortage through various means, including requests for more resources and changing staff schedules to allow staff to see more patients, they had no control over the staffing budget, which was set at the state level.

On August 23, 2004, Peralta formally appealed the decision by the medical appeals analyst and stated that waiting for a number of months was inadequate. In response and pursuant to the procedure for Form 602 appeals, Dr. Brooks interviewed Peralta on October 15, 2004. The dental progress notes indicate that Dr. Brooks had one x-ray taken, reviewed Peralta's Form 602 and his health history form, and performed a clinical examination of tooth #2. He found severe bone loss and mobility and assessed the tooth as a candidate for extraction; he also prescribed twelve ibuprofen

tablets and planned to extract tooth #2 on the next visit. He did not, however, examine Peralta further for other cavities or infections.

After that interview, Dr. Brooks prepared and signed a first-level appeal response. It stated that the appeal was partially granted. It also stated that Dr. Brooks had prescribed pain medication and that Peralta would be scheduled for an extraction. It noted that there was a waiting list for dental procedures. A second staff dentist, Dr. Kumar, also signed the Form 602 and the first level appeal response.

On October 21, 2004, Peralta sought a second level review of his Form 602 Appeal. He stated that he was not examined, but only asked which tooth hurt most and was given four days' worth of Motrin although he had existing dental needs or pain. On January 25, 2005, while the review was still pending, Peralta saw Dr. Brooks a second time in order to have tooth #2 extracted. During the appointment, Dr. Brooks explained that the tooth had no cavity and did not need to be extracted, but that he could have it extracted if it was causing him pain. Peralta decided not to have the tooth pulled at that time. Dr. Brooks did obtain x-rays, reviewed Peralta's health history form, and performed an examination, assessment and consultation. He also prescribed twelve ibuprofen tablets and, prophylactically, tetracycline for infection.

Peralta saw Dr. Brooks the third and last time on December 23, 2005. At that time, Dr. Brooks cleaned Peralta's teeth; Dr. Brooks testified that the time for cleaning teeth of a patient with the amount of plaque and calculus build up that Peralta had would take twenty to thirty minutes.

In February 2006, Peralta was transferred to Mule Creek State Prison.

This case proceeded to trial on May 5, 2009. After judgment as a matter of law was granted in favor of Dr. Dillard and Dr. Fitter, the case continued as to Dr. Brooks alone and was presented to the jury, which returned a special verdict in his favor. The jury determined that Dr. Brooks did not act with deliberate indifference to Peralta's severe dental needs and thereby cause him harm. The district court issued judgment in accordance with that special verdict on May 26, 2009. This appeal followed.

JURISDICTION AND STANDARD OF REVIEW

The district court had jurisdiction pursuant to 28 U.S.C. §§ 1331, 1343. We have jurisdiction pursuant to 28 U.S.C. § 1291.

We review the issue of whether a jury instruction misstates the law de novo. *See Clem v. Lomeli*, 566 F.3d 1177, 1180-81 (9th Cir. 2009).

DISCUSSION

Peralta's sole attack on the judgment in favor of Dr. Brooks is based upon Peralta's assertion that the district court erred when it gave the following instruction to the jury:

> Evidence has been presented during the trial regarding dental staffing levels and the availability of resources at the Lancaster correctional facility where Plaintiff Peralta was incarcerated during the time of his alleged injuries in this case.

> Whether a dentist or a doctor met his duties to Plaintiff Peralta under the Eighth Amendment must be considered in the context of the personnel, financial, and other resources available to him or her or which he or she could reasonably obtain. A doctor or dentist is not responsible for services which he or she could not render or cause to be rendered because the necessary personnel, financial, and other resources were not available to him or her or which he or she could not reasonably obtain.

Peralta does not complain about the precise wording of the instruction; rather, he asserts that our cases preclude consideration of available resources when an individual is sued for violating a prisoner's Eighth Amendment[2] rights due to deliberate indifference to that person's serious medical needs.[3] To sustain his deliberate indifference claim, Peralta had to meet the following test:

> First, the plaintiff must show a serious medical need by demonstrating that failure to treat a prisoner's condition could result in further significant injury or the unnecessary

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[2] U.S. Const. amend. VIII.

[3] Therefore, it is the principle we address here; we do not intend to induce the reader to see the instruction as an all purpose form or, for that matter, the very best possible wording for an instruction of this type.

> and wanton infliction of pain. Second, the plaintiff must show the defendant's response to the need was deliberately indifferent. This second prong — defendant's response to the need was deliberately indifferent — is satisfied by showing (a) a purposeful act or failure to respond to a prisoner's pain or possible medical need and (b) harm caused by the indifference.

Jett v. Penner, 439 F.3d 1091, 1096 (9th Cir. 2006) (citations and internal quotation marks omitted); *see also Toguchi v. Chung*, 391 F.3d 1051, 1057 (9th Cir. 2004). Even when officials "actually knew of a substantial risk to inmate health or safety [they] may be found free from liability if they responded reasonably to the risk . . . ." *Farmer v. Brennan*, 511 U.S. 825, 844, 114 S. Ct. 1970, 1982-83, 128 L. Ed. 2d 811 (1994). But what is (and should be) the law when those in charge of funding refuse to give the providers of prisoner care sufficient funds to allow them to afford the level of care that prisoners need? For example, suppose, as here, the established standard is 1 dentist for every 950 inmates, but the dentist must work at a 1 dentist for every 4200-4500 inmates ratio. Is the individual dentist to be held responsible because he cannot give proper care to the inmates, that is, he cannot reasonably respond to the risk of harm that those underserved inmates face when dental problems occur or are about to occur? We think not. As we noted over two decades ago in the context of a prisoner's stabbing, it is one thing to seek injunctive relief against state officials for the general conditions at a facility, and an entirely different thing when a prisoner seeks to mulct an individual prison employee with damages. *See Leer v. Murphy*, 844 F.2d 628, 633

(9th Cir. 1988). In the latter instance, we cannot simply react to deplorable conditions at the prison, but must "take a very individualized approach which accounts for the duties, discretion, and means of each defendant." *Id*. at 633-34; see also *Clement v. Gomez*, 298 F.3d 898, 905 n.4 (9th Cir. 2002). That is as it should be. The point was put most eloquently by the Eleventh Circuit Court of Appeals thirty years ago. *See Williams v. Bennett*, 689 F.2d 1370 (11th Cir. 1982).

In *Williams*, a prison had been run in a manner that placed prisoners at a severe risk of violence. *Id*. at 1375. A prisoner brought an action against a number of prison officials, who had not given him reasonable protection; he accused them of deliberate indifference. *Id*. at 1374-75. However, the problems at the prison were said to be largely caused by a lack of funding. *Id*. at 1387. The trial court had instructed the jury in a manner similar to the instruction here. *Id.* The court of appeals recognized that lack of funds will not generally defeat claims for constitutional violations. *Id*. However, its response to the attack on the instruction was:

> In contrast [to considering injunctive relief], however, we are called upon to consider the liability of individual state employees for injuries suffered as a result of the unconstitutional conditions. Unlike the state, an individual defendant generally has neither the power to operate nor close down a prison. Moreover, we refuse to adopt the position that an employee who attempts to accommodate the constitutional rights of prisoners in his charge, within the financial limitations

> imposed, should, instead, resign from his position because of the realization that full compliance is impossible in the absence of adequate funding. Indeed, the corrections official who walks away could be said to act with greater indifference than those who remain and attempt to work within the system.
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> In essence, the availability of funds, or lack thereof, is relevant in determining whether the individual is capable of committing the constitutional wrong alleged. Although each prison employee owes a duty to the inmates affected by his function, that duty must be measured by the scope of his discretion and the extent of his authority. For example, an individual defendant should be able to demonstrate that he had insufficient authority to correct the constitutional deficiencies in the prison. He also should be permitted to demonstrate that he did not have the resources necessary to correct that deficiency.

Id. at 1388 (citations omitted); *see also Lopez v. LeMaster*, 172 F.3d 756, 762 & n.4 (10th Cir. 1999); *Anderson v. City of Atlanta*, 778 F.2d 678, 680, 686-87 (11th Cir. 1985). Just so.

The above does not, of course, suggest that a governmental entity cannot be held liable in damages for its own wrongdoing when it incarcerates individuals, but refuses to provide the proper funds. That is not the issue before us. Nor do we suggest that injunctive or declaratory relief can be turned aside simply because

necessary resources have not been made available. *See, e.g., Jones v. Johnson*, 781 F.2d 769, 770, 772 (9th Cir. 1986) (dismissal of a complaint for damages and injunctive relief was overturned on the basis that a cause of action had been stated; however, the question of individual responsibility and of damages as such was not taken up); *Spain v. Procunier*, 600 F.2d 189, 200 (9th Cir. 1979) (holding injunctive relief proper despite assertions about the cost of proper facilities). *Leer*, 844 F.2d at 633 (distinguishing between injunctive relief and damages); *Williams*, 689 F.2d at 1388 (same).

Thus, a proper standard must take account of the "duties, discretion and means" available. *Leer*, 844 F.2d at 633. The instruction in question here did just that. It did not give a free pass to those who could, but did not bother to, give a constitutional level of care to an inmate. Rather, it, in effect, stated that if the employee involved — here Dr. Brooks — could not "render or cause to be rendered" the needed services because of a lack of resources that he could not cure, he also could not be individually liable.

CONCLUSION

We see no reason to impose an injustice upon employees of prison systems in an attempt to avoid injustices to inmates. Nor do we see any reason to drive prison employees out of positions where they can at least try to ameliorate afflictions, even though they have no apotropaion that will effect cures in the absence of sufficient resources. To do so would be to provide an iatrogenic remedy. Thus, we hold that the principle contained in the instruction given in this case was a proper one.

AFFIRMED.

BERZON, Circuit Judge, dissenting:

The majority upholds a jury instruction absolving a prison dentist of liability for providing constitutionally deficient care, even though under our case law, he was not entitled to be so exonerated.[1] Because the instruction in question does not properly state any applicable rule under 42 U.S.C. § 1983 or the Eighth Amendment — whether with respect to the requisite mens rea, causation requirement, any immunity doctrine, or otherwise — I respectfully dissent.

I

A reasonable juror could conclude that the record in this case establishes the following facts regarding Dr. Sheldon Brooks's deliberate indifference to Cion Peralta's serious medical needs:[2]

Shortly after arriving at Lancaster prison in June 2004, Peralta made a formal request for dental care to address his bleeding gums and pain in his teeth. After receiving no response for about a month, he filed a written appeal seeking dental attention to his "severe

[1] I discuss Peralta's claims against Dr. Dillard and Dr. Fitter in a dissent from the memorandum disposition filed concurrently with this opinion.

[2] "Although this is an appeal from a jury verdict, because [I would] conclude the jury instruction[] w[as] erroneous, the prevailing party is not entitled to have disputed factual questions resolved in his favor because the jury's verdict may have resulted from a misapprehension of law rather than from factual determinations in favor of the prevailing party." *Clem v. Lomeli*, 566 F.3d 1177, 1179 (9th Cir. 2009) (internal quotation marks omitted).

pain." The prison responded by placing him on the "routine" dental care waiting list.

Patients on that list could expect to wait about twelve months to receive care.

Dr. Brooks initially saw Peralta on October 15, 2004. At the appointment, Peralta complained of bleeding gums and pain throughout his mouth. Brooks responded to Peralta's complaints by explaining: "We're not going to worry about that today." Brooks did not examine Peralta for cavities, periodontal disease, or infection. Nor did Brooks prescribe a treatment plan for periodontal disease. Instead, Brooks asked Peralta which one tooth hurt the most. Brooks x-rayed the tooth that Peralta identified, scheduled Peralta to have that tooth extracted, and gave Peralta a few-day supply of ibuprofen. Although he did not examine Peralta for cavities or infection, or address the cause of Peralta's pain, Brooks signed a form noting that Peralta's appeal was "partially granted in that [Peralta] was examined by the dentist."

Peralta immediately sought review of his appeal, contending that the examination was incomplete and inadequate. Drs. Fitter and Cassim "partially granted" the appeal by leaving Peralta on the routine waiting list for further care. In December 2004, Peralta sought the next level of administrative review of his appeal, noting that it had been six months since he first complained of "severe pain" and bleeding gums.

In January 2005, at his next appointment, Brooks took another x-ray. Peralta decided against having the earlier- identified tooth extracted, after Brooks informed him that the tooth did not need extraction, and because the pain throughout the rest of his mouth remained

unaddressed. Brooks gave Peralta antibiotics and twelve ibuprofen but did not otherwise address his bleeding gums or pain. Brooks did not prescribe a course of treatment for periodontal disease or check Peralta for cavities. The appointment lasted about five minutes.[3]

Peralta waited almost a year to see Brooks again. At a December 2005 appointment, Brooks finally cleaned Peralta's teeth. Brooks again did not check Peralta for cavities or prescribe an ongoing course of treatment for periodontal disease other than recommendations for improved oral hygiene.[4]

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[3] The majority states that Dr. Brooks "reviewed Peralta's health history form, and performed an examination, assessment and consultation." Maj. Op. at 5. A reasonable juror could have credited Peralta's testimony that the January 2005 visit lasted only about five minutes and that once Peralta decided against the extraction, Brooks "didn't address the cavities or the pain, the bleeding, or anything." Brooks agreed that the "focus" of the January 2005 visit was on the single tooth that Peralta had identified and testified that he did not check Peralta for cavities during that visit or "prescribe a course of treatment for periodontal disease." Although Peralta's medical records for that visit contain the notation "clinical exam - #2 [tooth] - indicated, bone loss," the records do not refer to an "assessment" or "consultation" with regard to Peralta's other complaints.

[4] There was disputed testimony as to whether Peralta was diligent in caring for his teeth and gums. Peralta's medical records noted his poor oral hygiene. Peralta testified that he was at times unable to floss regularly because the Lancaster prison did not provide dental floss but that he brushed regularly and flossed when he could. Peralta was allowed to order "care packages" including items such as floss, but during his time at Lancaster, the five care packages he ordered contained only food items such as candy and cookies, as well as non-sugary foods. Peralta testified that except for one occasion, he did not eat the sugary foods but rather traded

II

Before directly addressing the jury instruction at issue, I first note what is *not* at issue in this appeal: There is no question that a reasonable jury could have found that Brooks was deliberately indifferent to Peralta's serious medical need in the sense described in *Farmer v. Brennan*, 511 U.S. 825 (1994). Indeed, the district court denied Brooks's Rule 50 motion, stating: "I can't say that a reasonable dentist would perform the duties in the same way that Dr. Brooks performed the duties." Nor does the majority assume otherwise.

To establish Brooks's liability for an Eighth Amendment claim based on inadequate prison medical treatment, Peralta needed to demonstrate three elements: (1) a "serious medical need," such that "failure to treat [the] condition could result in further significant injury or the unnecessary and wanton infliction of pain," *Jett v. Penner*, 439 F.3d 1091, 1096 (9th Cir. 2006) (internal quotation marks omitted); (2) that Brooks was "aware of" that serious medical need, *see Farmer*, 511 U.S. at 837; and (3) that Brooks disregarded the risk that need posed, *see id.* at 846, such as by denying or delaying care, *see Snow v. McDaniel*, 681 F.3d 978, 986 (9th Cir. 2012); *Gibson v. Cnty. of Washoe,* 290 F.3d 1175, 1188 (9th Cir. 2002).

A reasonable juror could have concluded that Peralta satisfied each of these elements. First, Peralta's chronic dental pain and bleeding gums were a serious medical need. *See Hunt v. Dental Dep't*, 865 F.2d 198, 200 (9th Cir. 1989). Second, Brooks was plainly aware of

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them for other items, such as playing cards, and on occasion, dental floss.

Peralta's complaints; Peralta explained his symptoms at each of his appointments and in the appeal form that Brooks reviewed. Third, Brooks provided only scant attention to Peralta's complaint of serious pain, prescribing no ongoing course of treatment for periodontal disease and offering only to extract one tooth, which neither Brooks nor Peralta considered the cause of Peralta's primary symptoms and which Brooks determined was not diseased.

In short, Brooks knew that Peralta needed care for a serious medical need but did not provide the care. Under *Farmer*, that combination of factors is all that is required to establish deliberate indifference.

The case cited by the majority, *Leer v. Murphy*, 844 F.2d 628 (9th Cir. 1988), decided before *Farmer*, does not hold otherwise. Leer determined that when a prisoner seeks to impose Eighth Amendment liability on a prison official in his individual capacity, "[t]he prisoner must set forth specific facts as to each individual defendant's deliberate indifference." *Id.* at 634. That is just what Peralta has done. In *Leer*, the plaintiffs did not establish a "causal connection" between the officials' failure to implement security procedures, and the third-party, prisoner-on-prisoner violence that caused the plaintiffs' injuries. *Id.* at 631, 633-34.[5] In contrast, Peralta has demonstrated that the assigned dentist failed to provide care responsive to a serious medical

[5] The case that Brooks and the majority cite in support of the disputed jury instruction, *Williams v. Bennett*, 689 F.2d 1370 (11th Cir. 1982), was also decided before *Farmer*, and also involved a claim against officials for failure to dispatch guards to prevent prisoner-on-prisoner violence, rather than a claim against a medical provider assigned to treat a patient.

need despite actual knowledge of that need. The deliberate indifference standard does not require more.

III

At the outset, I observe that the rule enunciated by the majority would deny relief in cases of a medical practitioner's deliberate indifference to a prisoner's medical needs even as egregious as in Snow, 681 F.3d at 987.[6] With particular concern for the precedent that the majority's opinion sets for even the most serious deprivations of prisoner medical care, I proceed to discuss why the instruction contravenes both our case law and first principles.

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[6] In *Snow*, a Nevada prisoner sentenced to death could "barely walk" because of severe degenerative hip disease and "need[ed] assistance just to get up off of his bunk." 681 F.3d at 982. Prison physicians initially treated his condition only with pain medication. A year after Snow initially sought treatment, an "independent medical consultant" — an orthopedic surgeon — examined Snow, was "surprised Snow was able to walk at all," and recommended "a bilateral total hip arthroplasty . . . to replace both hip joints." *Id*. at 983. A panel of prison physicians comprised of non-specialists nonetheless denied the surgeon's "emergency" recommendation for surgery. *Id*. In the meantime, Snow's creatinine levels became "very high" because of the pain medication, and one prison doctor admitted that Snow's condition was "urgent" and "potentially life threatening." *Id*. at 983-84. The prison panel denied surgery a second time, and although prison doctors recommended a change in Snow's pain relief drug regimen, the prison was unable to supply the recommended medicine. *Id*. at 984. Prison staff then prescribed regular doses of oxycodone, a powerful narcotic. *Id*. The prison panel denied surgery a third time, before finally approving the surgery three years after the orthopedic surgeon first deemed Snow's condition an "emergency." *Id*. at 983-84.

A

Brooks was entitled to a jury instruction that "correctly state[d] the law" and was "not . . . misleading." *See Clem v. Lomeli*, 566 F.3d 1177, 1181 (9th Cir. 2009). In addition to instructing the jury on the deliberate indifference standard, the district court gave the following instruction:

> Evidence has been presented during the trial regarding dental staffing levels and the availability of resources at the Lancaster correctional facility where Plaintiff Peralta was incarcerated during the time of his alleged injuries in this case.
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> Whether a dentist or a doctor met his duties to Plaintiff Peralta under the Eighth Amendment must be considered in the context of the personnel, financial, and other resources available to him or her or which he or she could reasonably obtain. A doctor or dentist is not responsible for services which he or she could not render or cause to be rendered because the necessary personnel, financial, and other resources were not available to him or her or which he or she could not reasonably obtain.

This instruction does not accurately state our case law. Our cases have made crystal clear — including when plaintiffs have sought damages — that "[b]udgetary constraints . . . do not justify cruel and unusual punishment." *Jones v. Johnson*, 781 F.2d 769, 771 (9th Cir. 1986). We recently reiterated that holding,

see Snow, 681 F.3d at 987, and until now, have not deviated from that clear principle.

The majority says of *Jones* only that "the question of individual responsibility and of damages as such was not taken up," Maj. Op. at 11, and does not mention *Snow* at all.

Binding precedent cannot be treated so cavalierly. *Jones* was a case against individual defendants for damages in circumstances parallel to those here, and that claim for relief, as well as the claim for injunctive relief, was allowed to proceed. *Jones*, 781 F.2d at 770, 772. And *Snow* dealt at length with the liability of individuals for damages for unconstitutional denial of medical care, relying on *Jones*'s "holding that budgetary constraints do not justify cruel and unusual punishment" in the course of doing so. *Snow*, 681 F.3d at 987 (citing *Jones*, 781 F.2d at 771).

Nor has the Supreme Court stated otherwise. More than twenty years ago, the Court declined to decide whether prison officials could interpose a "'cost' defense" and rely on the argument that "fiscal constraints beyond the officials'] control prevent[ed] the elimination of inhumane conditions." *Wilson v. Seiter*, 501 U.S. 294, 301-02 (1991). The Court "note[d that] there [was not] any indication that other officials have sought to use such a defense." *Id.* I am aware of no case in which the Court has revisited the issue, and Brooks has cited none.

Under binding Ninth Circuit case law, then, in no way inconsistent with the Supreme Court's rulings, Brooks was not entitled to have the jury instructed on a cost defense. Brooks therefore relies on out-of-circuit

cases, principally the inapposite Williams case, see supra n. 5. For the reasons explained below, those cases not only contradict our holdings but, even if considered *ab initio*, do not correctly state the applicable rule.

B

The majority seems to understand the instruction as stating a causation principle. *See* Maj. Op. at 7-11. But the jury was already instructed as to § 1983's causation requirement, and a defendant is not entitled to duplicative instructions. *See United States v. Lopez-Alvarez*, 970 F.2d 583, 597 (9th Cir. 1992).

What's more, the instruction at issue misstates the causation requirement. We look to the "common law of torts" for the "necessary causation factor" under § 1983. *Stevenson v. Koskey*, 877 F.2d 1435, 1438-1439 (9th Cir. 1989) (citing Restatement (Second) of Torts ("Restatement")); *see also Staub v. Proctor Hosp.*, 131 S. Ct. 1186, 1192 n.2, 1194 n.3 (2011) (consulting the Restatement to determine principles underlying federal tort law). Applying tort law principles, an actor's reckless conduct is a "legal cause of harm" if the conduct "is a substantial factor in bringing about the harm," and the actor is not otherwise relieved of liability. Restatement §§ 431, 501. If two independent "forces are actively operating," and each "is sufficient to bring about harm," then the first actor's recklessness "may be found to be a substantial factor in bringing about" the harm. *Id.* §§ 432, 501.

In stating that if Brooks "could not reasonably obtain" resources necessary to provide care, then he "[was] not responsible," the instruction departed from the generally applicable causation rule. It relieved Brooks of liability for deliberately indifferent care

because the ratio of dentists to prisoners encouraged rationing the care available. But Brooks could have provided constitutionally acceptable care to those patients to whom he rendered care, at the cost of not assisting others who remained on the waiting list. And "[a] person deprives another of a constitutional right, within the meaning of section 1983, if he does an affirmative act, participates in another's affirmative acts, or omits to perform an act *which he is legally required to do* that causes the deprivation of which [the plaintiff complains]." *Redman v. Cnty. of San Diego*, 942 F.2d 1435, 1439-40 (9th Cir. 1991) (en banc) (emphasis added) (internal quotation marks omitted), *abrogated on other grounds by Farmer*, 511 U.S. at 837.

A medical professional "is under no legal obligation to render professional services to everyone who applies to him or her," absent a "statute providing otherwise." *See* 61 Am. Jur. 2d Physicians, Surgeons, and Other Healers § 121 (2012). Similarly, under the common law rule, "a physician could with legal impunity refuse to aid a stranger in need of immediate medical care." *Colby v. Schwartz*, 78 Cal. App. 3d 885, 890 (1978). Nor do medical ethics ordinarily require a provider to care for a person absent a pre-existing doctor-patient relationship. *See Agnew v. Parks*, 172 Cal. App. 2d 756, 763-64 (1959) (discussing the Hippocratic Oath). Although professional ethics may require medical professionals to provide some pro bono services to the indigent, there is no ethical obligation to provide care to any particular individual. *See* Am. Med. Ass'n, Current Opinions of the Council on Ethical & Judicial Affairs, Code of Medical Ethics ("Code of Medical Ethics") § 9.065 (1994); *id.* § 10.05 (2008); Am. Coll. of Dentists, Ethics Handbook for Dentists 14 (2012).

But "[a] patient-physician relationship exists when a physician serves a patient's medical needs." Code of Medical Ethics § 10.015 (2001); *see* Am. Dental Ass'n, Principles of Ethics and Code of Professional Conduct § 2.F (2012). So once a patient-provider relationship is established, the provider "is bound by law to exercise a high standard of skill and care, to continue the treatment until the relation . . . is legally terminated, and not to abandon the case." 61 Am. Jur. 2d Physicians, Surgeons, and Other Healers § 121 (2012). Analogously, under the common law rule, a "physician who stopped and gave aid" to a "stranger in need of immediate medical care" through his actions "created a doctor-patient relationship and thereby assumed a duty of reasonable care towards the patient." *Colby*, 78 Cal. App. 3d at 890.

Here, Brooks was assigned to treat Peralta and first examined him on October 15, 2004, thereby creating a provider-patient relationship. Peralta claims — and a reasonable juror could find, *see supra* Part II — that Brooks failed to provide constitutionally adequate care in the subsequent fourteen months, during which time Brooks saw Peralta for two additional appointments and signed off on a form effectively denying Peralta's request for more thorough or timely care.

In sum, under basic principles of tort law, even if prison budget constraints were an independent and sufficient cause of the extraordinary delays in providing Peralta with basic dental care, that fact alone would not exonerate Brooks, if his own acts or omissions

were also sufficient to cause Peralta — Brooks's assigned patient — harm.[7]

By stating the opposite rule, the instruction allowed Brooks to point to inadequacies in California's prison system to preclude the jury's consideration of his own actions. But deficiencies and delays in California's provision of health care to prisoners are long-standing and endemic, *see Plata v. Schwarzenegger*, No. C01-1351-THE, 2009 WL 799392 (N.D. Cal. Mar. 24, 2009), *affd in part*, 603 F.3d 1088 (9th Cir. 2010), and "[n]eedless suffering and death have been the well-documented result." *Brown v. Plata*, 131 S. Ct. 1910, 1923 (2011). The instruction that the majority upholds will now allow prison officials sued for damages to flaunt our longstanding holding in *Jones* that "[b]udgetary constraints . . . do not justify cruel and unusual punishment." *Jones*, 781 F.2d at 771.

C

Nor does the instruction accurately state any immunity principle.[8] In fact, under several lines of cases, a defendant is not entitled to invoke some independent unconstitutional conduct or policy to free himself of his own constitutional obligations.

First, courts have widely held that a party's purported defense that he was "'just following orders'" does "'not occup[y] a respected position in our jurisprudence.'" *Kennedy v. City of Cincinnati*, 595 F.3d

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[7] Because of the particular considerations applicable here, I leave aside the question whether an instruction of the sort the majority approves might be appropriate in other circumstances.

[8] Notably, Brooks has not sought qualified immunity in this case.

327, 337 (6th Cir. 2010) (quoting *O'Rourke v. Hayes*, 378 F.3d 1202, 1210 n.5 (11th Cir. 2004)); *Thaddeus-Xv. Blatter*, 175 F.3d 378, 393 (6th Cir. 1999) (en banc) (collecting cases). Instead, "officials have an obligation to follow the Constitution even in the midst of a contrary directive from a superior or in a policy." *Kennedy*, 595 F.3d at 337 (internal quotation marks omitted). The principle is so longstanding that in an 1804 opinion by Chief Justice Marshall, the Supreme Court upheld a damages award against the commander of an American warship for unlawfully seizing a Danish vessel, even though the seizure was made pursuant to a superior's instructions. *See Little v. Barreme*, 6 U.S. (2 Cranch) 170, 178-79 (1804) (Marshall, C.J.); *Busche v. Burkee*, 649 F.2d 509, 517 (7th Cir. 1981) (discussing Little). Analogously, we have held that police officers are not protected by qualified immunity when they act in reliance on training materials that contradict clearly established constitutional safeguards. *See Cal. Att'ys for Criminal Justice v. Butts*, 195 F.3d 1039, 1049-50 (9th Cir. 1999).

Second, officials are not immunized from liability for constitutional violations if they act pursuant to an unconstitutional statute. Even before the Supreme Court breathed new life into § 1983 through its interpretation of that statute in *Monroe v. Pape*, 365 U.S. 167 (1961), federal courts interpreted § 1983 to provide a damages remedy for "state-approved constitutional deprivations." *See id.* at 198 (Harlan, J., concurring).

Finally, police are not shielded from liability for unconstitutional searches or seizures simply because a neutral magistrate has issued the warrant on which the police rely. *See Messerschmidt v. Millender*, 132 S. Ct. 1235, 1245 (2012). Rather, if "'it is obvious that no

reasonably competent officer would have concluded that a warrant should issue," liability will attach. *Id.* (quoting *Malley v. Briggs*, 475 U.S. 335, 341 (1986)).

In sum, under a host of doctrines, we do not permit state actors to escape liability under § 1983 simply by pointing to some freestanding or intervening constitutional violation, or to unconstitutional directives from superiors. The rule should be no different where a doctor invokes a material constraint on his ability to discharge his duties under the Constitution to an assigned patient.

As I can find no support in § 1983 case law, the law of torts, or immunity doctrines for the instruction that the majority sanctions, I would hold that the instruction was a misstatement of the applicable law.

IV

"An error in instructing the jury in a civil case requires reversal unless the error is more probably than not harmless." *Clem*, 566 F.3d at 1182 (internal quotation marks omitted). "Because we presume prejudice where civil trial error is concerned, the burden shifts to the defendant to demonstrate that it is more probable than not that the jury would have reached the same verdict had it been properly instructed." *Id.* (internal quotation marks omitted). "When the trial court erroneously adds an extra element to the plaintiff's burden of proof, it is unlikely that the error would be harmless." *Id.* (internal quotation marks and alterations omitted).

It was more probable than not that the district court's instructional error prejudiced Peralta. The instruction allowed the jury to decide the case on the

impermissible ground that the prison's medical budget was inadequate — as to which evidence and argument was presented — and without regard to whether Brooks discharged his Eighth Amendment duties to Peralta. *See Jones*, 781 F.2d at 771; *Snow*, 681 F.3d at 986. As Peralta presented sufficient evidence for a reasonable juror to find that Brooks was a moving force behind the denial of care for Peralta's serious medical needs, the error could not have been harmless.

V

Finally, I must respond to the majority's suggestion that the novel instruction it approves is necessary on policy grounds — in particular, to avoid discouraging prison employees from continuing in their positions because budget constraints impact their ability to avoid committing constitutional violations. *See* Maj. Op. at 11.

As an initial matter, such a policy consideration is an improper basis "for departing from [the] strict application of" established principles of causation and immunity that do not otherwise entitle Brooks to the instruction at issue. *See Cortes-Quinones v. Jimenez-Nettleship,* 842 F.2d 556, 562 (1st Cir. 1998) (Breyer, J.).

Moreover, as I have noted, under longstanding principles, absent a basis for qualified or absolute immunity, a governmental employee's unconstitutional actions are not excused because committed under the directive of a superior or compelled by an unconstitutional statute. An employee directed by a supervisor to commit an unconstitutional act might well lose her job if she refuses to comply, but we have not regarded that as a reason to absolve her of liability if she

obeys the directive. The dilemma for state employees is no different under the present circumstances. The policy choice underlying the established principles I have discussed is that individuals of free will are obligated not to treat their fellow citizens unconstitutionally, even if it costs them their jobs and fewer government services are provided, at least in the short term. If the services are then not provided, the fault will be laid, politically if not legally, where it belongs — with the appointed superiors, or even more appropriately, with the elected officials who have created a system in which more people are imprisoned than can be accorded constitutionally adequate medical care with available funds. *See Plata*, 131 S. Ct. at 1947 (upholding a prisoner release order to remedy the California legislature's delay in ameliorating a prison system unable to provide constitutional care). The alternative — that the only recourse for constitutional violations created by inadequate resources is institutional reform litigation, leaving those already injured to absorb their own losses — is not the model we have adopted, as I have explained, nor the one best designed to impel elected officials to operate constitutionally adequate prisons.

In any event, the majority's fear of an exodus of medical providers from prisons is unfounded. It is a practical certainty that a prison employee sued in his individual capacity will not himself be on the hook for any damages. California indemnifies any public employee for a judgment arising from acts or omissions "within the scope of his or her employment as an employee of the public entity," Cal. Gov't Code §§ 825(a), 825.2(b), and may even indemnify employees for punitive damages under certain circumstances, *id.* § 825(b). Indemnification is "near[ly] universal" among

state and local entities, either as a matter of official policy or practice. Margo Schlanger, *Inmate Litigation*, 116 Harv. L. Rev. 1555, 1676 n.391 (2003); *see Arar v. Ashcroft*, 585 F.3d 559, 636 (2d Cir. 2009) (en banc) (Calabresi, J., dissenting); Lawrence Rosenthal, *A Theory of Governmental Damages Liability: Torts, Constitutional Torts, and Takings*, 9 U. Pa. J. Const. L. 797, 812 & n.51, 819 (2007) (noting the "ubiquity of public employee indemnification" and collecting statutes); John C. Jeffries, Jr., *In Praise of the Eleventh Amendment and Section 1983*, 84 Va. L. Rev. 47, 50 (1998) (describing "constitutional tort actions against government officers" as "functional substitutes for direct access to government treasuries"). And in many states — including California — a damages award is paid not from the state's general appropriations fund, but from the prison agency budget. Joshua J. Fougere, *Paying for Prisoner Suits: How the Source of Damages Impacts State Correctional Agencies' Behavior*, 43 Colum. J.L. & Soc. Probs. 283, 301 & n.101 (2010). A damages judgment against a prison dentist can therefore be expected to provide incentives to the California Department of Corrections and Rehabilitation (CDCR) to reallocate its sources of funding to provide constitutionally sufficient medical care.

The consequence of the majority's absolution of Brooks from any liability, then, is that the CDCR — the institution best positioned to remedy any institutional failure that may have contributed to Brooks's liability — is relieved from paying a damages award. As then-Judge Breyer put the point:

> [O]ne might argue that, in the context of a seriously deficient prison system . . ., courts should be unusually reluctant to [protect from liability] officials who are

> actually working for constructive change, lest damage[s] suits and the decisions of judges and juries, less knowledgeable about actual conditions, inadvertently interfere with conscientious efforts to achieve reform. In our view, however, if anything, the opposite is the case. . . . [I]ndemnification by the state has the effect of transferring some of the human cost of the system, borne in the form of death and misery, to the public treasury, and thereby, perhaps, making the public more aware of those costs, and encouraging change.

Cortes-Quinones, 842 F.2d at 562.

Permitting prisoners to obtain redress in suits against individual defendants also comports with traditional principles underlying equitable relief, as well as the Prison Litigation Reform Act, under which a prospective injunction is only appropriate when it is narrowly drawn and is "the least intrusive means necessary" to vindicate a constitutional violation. *See* 18 U.S.C. § 3626; *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979). When a jury awards damages against a state employee or official, and the award is paid from the state's fisc or the agency's budget, the legislative or executive branches can use cost-benefit analyses to choose whether to reallocate resources to limit future liability or continue to bear the costs of their unconstitutional practices. Damages actions are thus less intrusive into the operation of prisons by elected and appointed officials than structural injunctions, which require ongoing judicial oversight of prison management.

VI

Unlike the majority, I see no basis in our caselaw for allowing Brooks to rely on the CDCR's budget constraints to immunize himself from liability for his own failure to give basic attention to Peralta's serious dental needs. The rule that the majority sanctions not only erects yet another barrier for prisoner plaintiffs to obtain redress for deprivations of fundamental rights, but also eliminates one incentive for California policymakers to address systemic inadequacies in providing prisoners with the most basic level of medical attention. Because I would hold that the jury instruction at issue was not harmless error, I would remand for a new trial.

APPENDIX D

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CION ADONIS PERALTA Plaintiff-Appellant, v. T.C. DILLARD, Chief Dental Officer; S. BROOKS, D.D.S. Staff Dentist; J. FITTER, Chief Medical Officer, Defendants–Appellees.	NO. 09-55907 D.C. NO. 2:05-CV-01937- JVS-PLA **MEMORANDUM***

Appeal from the United States District Court
for the Central District of California
James V. Selna, District Judge, Presiding

Argued and Submitted October 10, 2012
Pasadena, California

Filed January 7, 2013

Before: FERNANDEZ and BERZON, Circuit Judges,
and HERNANDEZ,** District Judge.

Cion Adonis Peralta appeals the district court's judgment as a matter of law in favor of Dr. Thaddeus

* This disposition is not appropriate for publication and is not precedent except as provide by 9th Cir. R. 36-3.

**The Honorable Marco A. Hernandez, United States District Judge for the District of Oregon, sitting by designation.

Dillard, the Chief Dental Officer at the California State Prison at Lancaster, and Dr. Junaid Fitter, the Chief Medical Officer at that facility. See Fed. R. Civ. P. 50(a). He also appeals the judgment following a jury verdict in favor of Dr. Sheldon Brooks, a staff dentist at that same facility.[1] We affirm.

(1) We have reviewed the record and agree with the district court that a reasonable juror would not have a legally sufficient evidentiary basis to find for Peralta[2] on his claims against Dr. Dillard and Dr. Fitter for deliberate indifference.[3] Both of those officials were supervisors, but that alone does not preclude their personal liability. See Snow v. McDaniel, 681 F.3d 978, 989 (9th Cir. 2012); Redman v. Cnty. of San Diego, 942 F.2d 1435, 1446 (9th Cir. 1991) (en banc) abrogated in part on other grounds by Farmer v. Brennan, 511 U.S. 825, 114 S. Ct. 1970, 128 L. Ed. 2d 811 (1994). Again, we have reviewed the record and we are unable to state the evidence would support a decision that either of the doctors,

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[1] We address Peralta's claim against Dr. Brooks in an opinion filed this date.

[2] See Torres v. City of L.A., 548 F.3d 1197, 1205-06 (9th Cir. 2008).

[3] To prove a violation of the Eighth Amendment to the United States Constitution based on deliberate indifference to his medical needs, Peralta was required to show that he had a serious medical need and that "the defendant's response to the need was deliberately indifferent." Jett v. Penner, 439 F.3d 1091, 1096 (9th Cir. 2006); see also Farmer v. Brennan, 511 U.S. 825, 837, 114 S. Ct. 1970, 1979, 128 L. Ed. 2d 811 (1994) (holding that an official cannot be held liable unless he "knows of and disregards an excessive risk to inmate health or safety").

who saw, at one point or another, the second level review claim regarding their subordinate Dr. Brooks, both knew and were deliberately indifferent to Peralta's needs, which were being ministered to by Dr. Brooks. We note, by the way, that in its verdict, the jury decided that Dr. Brooks himself was not deliberately indifferent;[4] that underscores and reinforces our conclusion that those doctors, who, at worst, failed to intervene in Dr. Brooks' treatment regime, were not themselves deliberately indifferent. See Corales v. Bennett, 567 F.3d 554, 570 (9th Cir. 2009); Jackson v. City of Bremerton, 268 F.3d 646, 653-54 (9th Cir. 2001).

(2) Peralta also asserts that because the district court had earlier denied summary judgment to Dr. Dillard and Dr. Fitter, it was bound by the law of the case doctrine to deny the motion for judgment as a matter of law. We disagree. A district judge whose interlocutory determination has not been appealed has discretion to decline to follow that earlier decision at a later point in the case. See, e.g., Delta Sav. Bank v. United States, 265 F.3d 1017, 1027-28 (9th Cir. 2001); City of L.A., Harbor Div. v. Santa Monica Baykeeper, 254 F.3d 882, 888-89 (9th Cir. 2001). Especially is that true where, as here, the evidence presented at trial went beyond that set forth in the rather asthenic presentation at summary judgment.

AFFIRMED.

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[4] We note that, like Dr. Brooks, both tried to obtain more resources, but were denied relief by the higher authorities in Sacramento.

Filed January 7, 2013

BERZON, Circuit Judge, dissenting in part:

I join in Part 2 of the majority's disposition. Because I disagree that no reasonable juror could find in favor of Peralta's claims against defendants Fitter and Dillard, I respectfully dissent as to Part 1.

1. For the reasons stated in my dissent from the published opinion, I would hold that the jury instruction as to defendant Brooks was improper. The jury's verdict in light of that instruction is therefore not a relevant consideration in determining defendants Fitter's and Dillard's liability.

2. Even given the instruction as to Brooks, a reasonable juror could have found that both Fitter and Dillard knew of and disregarded the serious dental needs of Lancaster prisoners. *See Farmer v. Brennan*, 511 U.S. 825, 837 (1994); *Snow v. McDaniel*, 681 F.3d 978, 986 (9th Cir. 2012). The district court granted Fitter's and Dillard's Rule 50 motions on the ground that those defendants had no knowledge of Peralta's serious medical condition. But Fitter and Dillard could be liable regardless of whether they knew of Peralta's own serious medical needs. They need only be aware that "someone in [Peralta's] situation" — namely other Lancaster prisoners — had a "substantial risk of serious harm" in the absence of timely care. *See Gibson v. Cnty. of Washoe*, 290 F.3d 1175, 1191 (9th Cir. 2002); *see also Farmer*, 511 U.S. at 843-44; *Redman v. Cnty. of San Diego*, 942 F.2d 1435, 1448 (9th Cir. 1991) (en banc), *abrogated on other grounds by Farmer*, 511 U.S. at 837.

A reasonable juror could have found that through the Inmate Appeal system and complaints made by treating dentists, Fitter and Dillard were aware that patients with pressing health needs were placed on lengthy waiting lists. These defendants had the authority to make decisions regarding which prisoners were to receive medical treatment when — within the staffing and funding constraints of the prison — but nonetheless rubber stamped the decision to keep Peralta on the routine waiting list.

I therefore dissent from Part 1 of the majority's disposition and would reverse the district court's order granting these officials' Rule 50 motions.

APPENDIX E

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CION ADONIS PERALTA, *Plaintiff-Appellant*,	No. 09-55907
v.	D.C. No. 2:05-cv-01937-JVS-PLA
T.C. DILLARD, Chief Dental Officer; S. BROOKS, D.D.S. Staff Dentist; J. FITTER, Chief Medical Officer, *Defendants-Appellees*.	ORDER

Filed June 26, 2013

ORDER

KOZINSKI, Chief Judge:

Upon the vote of a majority of nonrecused active judges, it is ordered that this case be reheard en banc pursuant to Federal Rule of Appellate Procedure 35(a) and Circuit Rule 35-3. The three-judge panel opinion shall not be cited as precedent by or to any court of the Ninth Circuit.

Judge O'Scannlain did not participate in the deliberations or vote in this case.

APPENDIX F

JS - 6

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CION ADONIS PERALTA, Plaintiff,	CASE NO. CV 05-1937 JVS (PLAx)

v.

T.C. DILLARD, S. BROOKS, J. FITTER,

Defendants.

This action came on regularly for trial on May 5, 2009 in Courtroom 10C of the above-entitled court, the Honorable Judge Selna presiding. Plaintiff, Cion Adonis Peralta, was represented by Jeffrey Reeves, Erich Schiefelbine, Lauren Deeb, and John Carter, all of Gibson, Dunn & Crutcher. Defendant Dr. Brooks was represented by Janine K. Jeffery of Reily & Jeffery.

A jury of 8 persons was regularly impaneled and sworn. Witnesses were sworn and testified. After hearing the evidence and arguments of counsel, the jury was duly instructed by the Court and the cause was submitted to the jury. The jury deliberated and thereafter returned into court with its verdict as follows:

"Do you find by a preponderance of the evidence that Sheldon Brooks actcd with deliberate indifference to plaintiff Cion Adonis Peralta's severe dental needs and as a result caused harm to plaintiff Cion Adonis Peralta?

No."

NOW THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED that Plaintiff Cion Adonis Peralta take nothing from Defendant Sheldon Brooks and that Sheldon Brooks recover his costs against plaintiff Cion Adonis Peralta in the sum of $_____.

Dated: May 26, 2009 */s/ James V. Selna*
Judge James V. Selna

Submitted by:

REILY & JEFFERY

/s/ Janine K. Jeffery
Janine K. Jeffery, Esq.
Attorneys for Defendant

Approved as to Form:

GIBSON, DUNN & CRUTCHER

/s/ Erich Schiefelbine
Erich Schiefelbine, Esq.
Attorneys for Plaintiff

APPENDIX G

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - TRIAL

Case No. CV 05-1937-JVS(PLAx)

Date May 7, 2009

Title: Cion Adonis Peralta v. T.C. Dillard, et al.

Present: The Honorable JAMES V. SELNA

Karla J. Tunis
Deputy Clerk

Sharon Seffens
Court Reporter/Recorder, Tape No.

Attorneys Present for Plaintiff(s):
Jeffrey Reeves
Lauren Deeb
Erich Schiefelbine

Attorneys Present for Defendants:
Janine K. Jeffery

___ Day Court Trial **3rd** Day Jury Trial

___ One Day trial: ____ Begun (1st day); **X Held & Continued;** __ Completed by jury verdict/submitted to court.

___ The Jury is impaneled and sworn.

___ Opening statements made by _____

X Witnesses called, sworn and X Exhibits identified. X Exhibits admitted.

X Plaintiff(s) rests. ___ Defendant(s) rest.

___ Closing arguments made by ____ plaintiff(s) ___ defendant(s). ___ Court instructs jury.

___ Bailiff(s) sworn. ___ Jury retires to deliberate. ___ Jury resumes deliberations.

___ Jury Verdict in favor of _____ plaintiff(s) ___ defendant(s) is read and filed.

___ Jury polled. ___ Polling waived.

___ Filed Witness & Exhibit Lists ___ Filed jury notes. ___ Filed jury instructions.

___ Judgment by Court for _____ ___ plaintiff(s) ___ defendant(s).

___ Findings, Conclusions of Law & Judgment to be prepared by ___ plaintiff(s) ___ defendant(s).

___ Case submitted. ___ Briefs to be filed by _____

___ Motion to dismiss by _____ is ___ granted. ___ denied. ___ submitted.

___ Motion for mistrial by _____ is ___ granted. ___ denied. ___ submitted.

_X_ Motion for Judgment/Directed Verdict by defendant Dillard is **_X_ granted.** ___ denied. ___ submitted.

_X_ Motion for Judgment/Directed Verdict by defendant Fitter is GRANTED

_X_ Motion for Judgment/Directed Verdict by defendant Brooks is GRANTED IN PART

___ Settlement reached and placed on the record.

___ Clerk reviewed admitted exhibits with counsel to be submitted to the Jury/Court for deliberation/findings.

___ Counsel stipulate to the return of exhibits upon the conclusion of trial. Exhibit Release Form prepared and filed.

X Case continued Friday, May 8, 2009 at 7:30 a.m. for further trial/further jury deliberations.

X Other The Court and counsel confer regarding evidentiary issues and jury instructions.

7:05

Initials of Deputy Clerk kjt

cc: