No. 14-328

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

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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COUNTERSTATEMENT OF QUESTION PRESENTED

Is it proper to instruct a jury that it may consider the constraints facing a government employee sued in his personal capacity in determining whether the employee is deliberately indifferent under the Eighth Amendment?

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INTRODUCTION

Petitioner Cion Peralta frames the issue before this Court as whether the Ninth Circuit erred in holding that lack of resources is always a defense to violations of the Eighth Amendment. That is not, however, what the Ninth Circuit held.

The Ninth Circuit held that in evaluating an Eighth Amendment claim for damages, a jury may take into account the resources or lack of resources available to an individual employee in determining whether that employee was deliberately indifferent to a prisoner's serious medical needs.

The Ninth Circuit's *en banc* decision is supported by this Court's precedent and the Courts of Appeals that hold that whether a government employee is deliberately indifferent depends on the constraints under which the employee is working. The decision is consistent with established section 1983 law that government employees are only responsible for their own conduct, and not the budgetary decisions of the state. The decision is also consistent with this Court's statements that a finding of deliberate indifference requires a state employee to have a sufficiently culpable state of mind. All of these elements are absent where an employee is unable to provide adequate care because of conditions beyond his control. The jury instruction at issue properly reflects these basic principles.

Similarly, Peralta's contention that the Ninth Circuit created an unsupported distinction between

actions for damages and actions for injunctive relief is meritless. What the Ninth Circuit actually stated is that, unlike injunctive relief, which is prospective, what resources are available to an employee is highly relevant to a claim of damages because those resources define the options the employee had to choose from and thus whether the employee was deliberately indifferent. This statement is consistent with the law and common sense. A government employee cannot be deliberately indifferent if he is unable to act based on conditions beyond his control.

The background of this case is that the State of California, which makes budgetary decisions regarding the prisons, is immune from liability under the Eleventh Amendment. Peralta therefore seeks to attach liability to blameless state employees on the theory that someone needs to be held responsible if inmates are injured as a result of the State's lack of resources. Accepting Peralta's argument would result in the imposition of "vicarious liability in reverse," as state employees would be held liable for the decisions of the state. Peralta's argument is contrary to this Court's well settled law that vicarious liability does not attach to a section 1983 claim. Peralta's position is also inconsistent with well settled law that a suit seeking damages against a state as the real party in interest is prohibited under the Eleventh Amendment. Similarly, Peralta's position is grossly unfair to state employees whom Peralta seeks to hold personally responsible for decisions that they cannot control.

The matter before the Court does not involve a break in precedent, conflict of the circuits, or a matter of exceptional importance. Therefore, certiorari should be denied.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Eighth Amendment to the United States Constitution states:

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

The Eleventh Amendment to the United States Constitution states:

> 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.

Title 42, section 1983 of the United States Code provides, in relevant 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 . . .

STATEMENT OF THE CASE AND FACTS

I. Background Of Case And Parties

Cion Adonis Peralta is an inmate in the custody of the California Department of Corrections and Rehabilitation ("CDCR"). (RT 1:44, 46).[1] During the relevant time period, Respondent Dr. Sheldon Brooks was a staff dentist at the California State Prison at Los Angeles County ("Lancaster") and Respondent Dr. Thaddeus Dillard was the Chief Dental Officer ("CDO"). (RT 1:44-45).

II. The Shortage Of Dental Staff At Lancaster Was Beyond Respondents' Control

In 2004 and 2005, the Lancaster prison was severely understaffed with dental professionals. This understaffing led to a backlog of inmate patients needing to be seen. (RT 1:50-51, 3:89). At the time, the dental staff at Lancaster consisted of three to

[1] The Reporter's Transcript will be referred to throughout this brief as "RT." Because the transcript was prepared without the use of consecutive pagination, Respondents will refer to the transcripts by volume after the citation "RT": Volume 1 is May 5, 2009; Volume 2 is May 6, 2009; Volume 3 is May 7, 2009, and Volume 4 is May 8, 2009. "ER" refers to Petitioner's Excerpts of Record in the Ninth Circuit.

four dentists and three to four dental assistants. (RT 2:21-22, 45-46). There were between 4,200 and 4,500 inmates at Lancaster. (RT 2:44). The Lancaster dental staff was also responsible for treating at least 1,800 more inmates housed in nearby fire camps and two medium security facilities. (RT 2:4).

According to the State of California, the ratio between staff dentists and inmates was supposed to be 950 to 1. (RT 2:44). Instead, the actual ratio was closer to 1,500 to 1 when all the dental positions were filled, and 2,000 to 1 when only three positions were filled, as occurred during the 2004-2005 time period. (RT 2:44-47).[2] During this same time period, there were no office technicians or dental hygienists in the dental department. (RT 2:47). As a result, in addition to treating patients, the staff dentists and dental assistants were required to review sick call slips, schedule visits, and respond to inmate appeals. (RT 2:47, 208, 212-213, 3:88). These administrative tasks took time away from seeing patients. (RT 2:47). There were also many occasions where Dr. Brooks did not have a dental assistant and performed that role himself. (RT 3:90-91).

Making the understaffing problem even more challenging to the Lancaster dental staff was the fact that the inmate population typically has a far greater

[2] In this respect, Peralta's claim that the ratio was only as high as one dentist to every 1,400 prisoners (Petition, pg. 6-7) is incorrect.

need for dental services than the general civilian population. (RT 3:99-100).

The prison security concerns also slowed the provision of dental care. For example, there could be only one inmate in the examination room at any time. (RT 3:92). Further, because dental instruments could be turned into lethal weapons by the inmates, the dental tools had to be counted both before an inmate entered the exam room and before an inmate left the room. (RT 2:48, 3:92-93). Inmates also could not be left alone in a room with dental tools. (RT 3:93). Moreover, during periods of lock downs or modified programs, only inmate patients with extreme emergencies could be seen. (RT 3:92).

Because of the staffing shortages and security constraints, it took from nine to twelve months to fulfill prisoner requests for routine cleanings. (RT 3:89).

Dr. Brooks and Dr. Dillard complained about the lack of staffing and its impact on the provision of dental care. Dr. Dillard raised the staffing shortage issue with Regional Administrators and CDCR headquarters in Sacramento. (RT 1:51, 2:49-51). Dr. Brooks sent memos to his supervisors and filed a formal grievance about the staff shortages and his lack of adequate time to treat patients. (RT 3:110-111). The dentists were advised that there was no money in the budget to hire more staff. (RT 1:99).

Because the budget for Lancaster prison was controlled by CDCR headquarters in Sacramento, the

individual defendants had no control over how money was allocated. (RT 1:96-98, 2:48). Nor did they have any power to allocate money differently than as directed by CDCR. (*Id.*) When the dentists' complaints were unsuccessful, they tried other means to alleviate the backlog problem, including increasing their work hours to see more patients, reclassifying budgeted positions, and trying to see more patients each day. (RT 2:50-52, 3:89-90, 111).

Because of the resource shortages, Dr. Brooks did not have time to treat the patients the way he wanted to. (RT 3:110). The dentists did the best they could under difficult circumstances. (RT 1:51-52, 3:111).

III. Peralta's Incarceration And Treatment At Lancaster

Against this backdrop of staff shortages and prison conditions, Peralta arrived at Lancaster from Folsom State Prison on June 24, 2004. (RT 1:44, 46, 2:76-77). Peralta had his teeth cleaned in December 2003 while at Folsom Prison. (RT 2:131).

Within two or three days of arriving at Lancaster, Peralta put in a request to receive dental care, claiming that he had cavities, bleeding gums, and pain in his teeth. (RT 2:79).

On July 15, 2004, 21 days after he arrived at Lancaster, Peralta filed a CDCR Form 602 Inmate/Parolee Appeal ("602 appeal") claiming that he had "infected teeth, cavities, and severe pain." (RT 2:81,

3:130). Peralta admitted at trial that he did not know if he had any cavities nor did he know whether he had an infection. (RT 2:163, 165). Peralta was informally advised that he had been placed on the waiting list to receive dental care but Peralta was advised that due to staffing shortages, there was a long wait to see the dental staff. (RT 2:83). Dissatisfied with that response, Peralta pursued the formal 602 appeal process. (RT 2:83).

On October 15, 2004, Peralta was seen by Dr. Brooks to enable him to respond to Peralta's inmate appeal. (RT 3:95). At that time, Dr. Brooks looked at the tooth about which Peralta was complaining, reviewed the unit health record, had x-rays to be taken, and told Peralta that he would be scheduled for an extraction. (RT 2:62-65, 3:85, 99). Because of time constraints, Dr. Brooks' practice was to address an inmate's chief complaint. (RT 3:85, 113-114). Dr. Brooks saw no sign of infection in Peralta's teeth. (RT 3:122). Dr. Brooks also gave Peralta a three or four day supply of Ibuprofen for his pain. (RT 3:69).[3] After the examination, Dr. Brooks partially granted the appeal stating that Peralta would be scheduled for an extraction of his number two tooth. Peralta was placed on a waiting list for a tooth extraction. (RT 2:219).

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[3] While Peralta claims that Dr. Brooks placed Peralta back on a routine care list, Dr. Brooks testified that he was placed for urgent care as to Peralta's chief complaint. (RT 2:220-221).

After receiving the first level response, Peralta submitted a second level appeal. (RT 2:87). The second level grievance in a dental case was to be signed by the Chief Dental Officer and the Chief Medical Officer. (RT 2:17, 43). The Chief Dental Officer, however, did not sign Peralta's second level appeal. Rather, a staff doctor signed in his stead. (RT 2:40). The 602 appeal was partially granted, as Peralta was to be seen for treatment on the next available date. (RT 2:13, 3:71).

On January 25, 2005, Peralta was taken to the dental clinic for the extraction of his number two tooth. (RT 3:96).[4] At that point, Peralta told Dr. Brooks that the tooth only hurt "at times." (RT 3:97-98). Dr. Brooks had another x-ray taken and told Peralta that if the tooth was not hurting him and he did not want it extracted, it did not need to be extracted. (RT 3:76-77, 97-98, 100). Peralta decided he did not want to have the tooth extracted because he had already lost seven teeth before he arrived at Lancaster. (RT 2:94, 3:132). At the conclusion of the visit, Peralta was given Ibuprofen for the occasional pain and Tetracycline for an infection that had developed after the October 602 appeal interview. (RT 2:75-76, 95). Because of the time constraints imposed as a result of staffing and prison procedure, Dr. Brooks did not have time to conduct a cleaning of Peralta's teeth in October 2004 or January 2005,

[4] Peralta omits any discussion of this visit from his statement of facts.

which was not the reason for Peralta's visit in any event. (RT 3:102-103, 109-110).[5]

On December 23, 2005, Peralta was seen by Dr. Brooks again. (RT 3:104). Peralta filled out a dental health questionnaire in which he requested the dentist to "check teeth, bleeding gums, cavities, and give me a cleaning." (RT 2:96-98). Dr. Brooks took four x-rays, reviewed Peralta's health history, and cleaned Peralta's teeth. (RT 3:85, 100, 106-108).

Dr. Brooks testified that he did not have adequate time to treat patients and that he did the best he could under the circumstances. (RT 3:110-111).

IV. Dr. Dillard's Role In This Case

Dr. Dillard played no role in the events that led to this lawsuit. Dr. Dillard never met Peralta and never examined him. (RT 2:53-54, 186). Dr. Dillard first looked at Peralta's records after this lawsuit was filed. (RT 2:31). Dr. Dillard did not participate in Peralta's appeal. (RT 2:43, 57). Rather, Dr. Dillard's only involvement in this case is that his name was routinely put on second level appeal responses during the relevant time period. However, he had no

[5] A typical cleaning would take 20 to 30 minutes per inmate. (RT 3:109). At a ratio of 2,000 inmates to every dentist, it would take a minimum of 40,000 hours to clean every inmate's teeth in a year. Dr. Brooks worked approximately 2,000 hours per year. (RT 3:111).

involvement in Peralta's appeal and he had no knowledge of it. (RT 2:43).

V. Procedural History

Peralta filed a Complaint in the United States District Court for the Central District of California alleging that Dr. Brooks, Dr. Junaid Fitter,[6] and Dr. Dillard violated his Eighth Amendment rights in connection with the provision of dental care at Lancaster. (ER, Tab-2). Peralta only sought monetary damages. (Appellees' Excerpts of Record 9). Peralta did not, and could not, sue the State of California for damages.

Contrary to Peralta's claims in his petition for certiorari, Dr. Brooks and Dr. Dillard asserted the defense of qualified immunity as reflected in the Pre-Trial Conference Order. (ER, Tab 9-8).

The case was tried to a jury in May 2009. At the conclusion of Peralta's case, the District Court granted a directed verdict in favor of Dr. Dillard. (ER, Tab 2-6, 7). The District Court found there was no evidence that Dr. Dillard was deliberately indifferent to Peralta's dental needs. (*Id.*) Indeed, Peralta's attorney admitted during oral argument on the Rule 50 motion that there was no evidence Dr. Dillard knew Peralta had a serious medical condition. (ER, Tab 2-6).

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[6] In his writ, Petitioner has advised the court and the Respondents that he is not pursuing the case against Dr. Fitter.

As for Dr. Brooks, the jury was instructed to consider "the context of the personnel, financial, and other resources available" to Dr. Brooks in determining whether he violated Peralta's Eighth Amendment rights, and was further instructed that Dr. Brooks "is not responsible for services which he or she could not render or cause to be rendered" due to the unavailability of these resources. (RT 4:52-53).

After brief deliberations, the jury returned a unanimous verdict in favor of Dr. Brooks, finding that he did not act with deliberate indifference to Peralta's serious dental needs. (ER, Tab 4-1, 2).

Peralta appealed the subsequent Judgment to the Ninth Circuit Court of Appeals. The Ninth Circuit held that the District Court properly instructed the jury that whether Dr. Brooks could be found responsible for failing to provide services should be considered in the context of the available resources. (App. 61a). The Court stated that "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." (App. 58a-59a (citing *Leer v. Murphy*, 844 F.2d 628, 633 (9th Cir. 1988))). Clearly, an employee's liability must take account of the "duties, discretion and means" available to that individual. (App. 61a).

Peralta sought and was granted a rehearing *en banc*. The *en banc* panel affirmed the Judgment. (App. 22a). In discussing the deliberate indifference

standard applicable to this case, the majority cited this Court's pronouncements that "prison officials aren't deliberately indifferent to a prisoner's medical needs unless they act wantonly, see *Estelle [v. Gamble]*, 429 U.S. 97, 104 [1994], and whether an official's conduct 'can be characterized as "wanton" depends upon the constraints facing [him],' *Wilson [v. Seiter]*, 501 U.S. 294, 303 [1991]." (App. 8a). Not only did Dr. Brooks face challenging conditions, such as the previously described inmate to dentist ratio and security restrictions, he had no control over these conditions. (App. 8a). "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." (App. 9a). The jury instruction properly allowed the jury to consider the resources Dr. Brooks had at his disposal in determining whether he was deliberately indifferent. (App. 14a).

The *en banc* court's dissent argued that the decision would overturn years of precedent and would deny any remedy to prisoners. (App. 23a). The dissent acknowledged that Dr. Brooks produced evidence that he was unable to treat Peralta because of lack of resources and that he had no control over the prison budget. (App. 26a, 33a, 43a). The dissent also agreed that budget decisions are the responsibility of the State of California. (*Id.*) Nevertheless, the dissent would still hold Dr. Brooks liable asserting that if Dr. Brooks is not held responsible, Peralta would have no

damage remedy because of the state's immunity under the Eleventh Amendment. (App. 30a-32a, 42a-44a).

The dissent argued that it was not unfair to hold state employees liable in the face of budgetary constraints because the State of California indemnifies employees for the cost of their defense and damages. (App. 31a, 47a). As a result, "the state is in every respect the real party in interest in a damages suit." (App. 46a). Indeed, Justice Hurwitz stated that the issue before the Ninth Circuit was "whether a state can shield itself from the consequences of denying constitutionally required medical treatment to those it incarcerates by deliberately choosing not to appropriate sufficient funds for that treatment." (App. 39a-40a) (Hurwitz, J., dissenting). By asserting that Peralta's injuries were caused by the decisions of the State of California and not Dr. Brooks or Dr. Dillard, the dissent asserts that the State of California is the real party in interest.

After the *en banc* decision, Peralta filed a request that the matter be heard by the entire Ninth Circuit. After briefing, the request was denied.

REASONS WHY THIS COURT SHOULD DENY CERTIORARI

I. This Case Does Not Present The Question Posed By Peralta.

Peralta abstractly frames the question before this Court as "does the Eighth Amendment permit a 'cost defense' to excuse the denial of needed medical care in underfunded prisons?" (Petition, pg. 15).

That is not the question decided by the Ninth Circuit. The question decided by the Ninth Circuit was whether a jury may consider the personnel, financial, and other resources available to an employee in determining whether the employee violated the Eighth Amendment.

This instruction is in accord with the law and common sense: a prison employee is only liable for his own misconduct and cannot be liable for failing to provide care which was beyond his means to provide.

A. The Ninth Circuit's Decision Is Consistent With The Well Settled Law That Government Employees Are Only Liable For Their Own Conduct

It is important to understand the context in which this case arises. Under the Eleventh Amendment, states and state officials sued in their official capacity for damages are generally immune from liability. *Kentucky v. Graham*, 473 U.S. 159, 169 (1985). However, the state and state officials can be

sued for prospective injunctive and declaratory relief. (*Id.* at n. 18) State employees may also be sued in their personal capacity for damages for their own wrongdoing. *Hafer v. Melo*, 502 U.S. 21, 31 (1991). While an aggrieved citizen can sue municipalities for money damages for unlawful policies or customs (see *Monell v. Dep't of Soc. Servs. of City of New York*, 436 U.S. 658, 661 (1978)), the same is not true of the states.

Section 1983 liability is limited by two foundational principles. First, there is no vicarious liability under section 1983. Rather, "each government official, his or her title notwithstanding, is only liable for his or her own misconduct." *Ashcroft v. Iqbal*, 556 U.S. 662, 677 (2009); *City of Canton, Ohio v. Harris*, 489 U.S. 378, 385 (1989). Therefore, state employees cannot be held liable for decisions that they neither made nor controlled.

Second, finding a violation of the Eighth Amendment in relation to the provision of medical care requires a finding that the accused individual was deliberately indifferent to a prisoner's serious medical needs. *Wilson v. Seiter*, 501 U.S. 294, 297 (1991). To be deliberately indifferent, an official must have a sufficiently culpable state of mind, i.e., that of wantonness. (*Id.* at 302) Whether an official's conduct "can be characterized as 'wanton' *depends upon the constraints facing the official*." (*Id.*) (emphasis added). Lack of resources, such as inadequate staffing for the prison population's needs, are constraints that a jury can consider.

Two inevitable conclusions follow from these principles. First, an individual cannot be held individually liable for failing to provide medical care where such failure was not due to his own misconduct, but rather due to factors beyond his control. Second, under the subjective prong of the deliberate indifference standard, an employee cannot be deemed to have a "wanton" state of mind where he failed to act not because of indifference but because of factors beyond his control.

The jury instruction properly reflected these two principles and followed the well settled law of this Court. The Ninth Circuit did not break new legal ground or depart from legal precedent in approving this instruction. The jury instruction set forth the applicable standard.

B. The Ninth Circuit's Decision Is Consistent With The Decisions Of This Court

The Ninth Circuit's decision is in line with the decisions of this Court regarding the personal liability of government officials pursuant to Section 1983.

In *Youngberg v. Romeo*, 457 U.S. 307, 323 (1982), this Court stated that in "an action for damages against a professional in his individual capacity . . . the professional will not be liable if he was unable to satisfy his normal professional standards because of budgetary constraints; in such a situation, good-faith immunity would bar liability."

Moreover, in the 1991 decision in *Wilson v. Seiter*, *supra*, this Court held that a finding of deliberate indifference requires a "wanton" state of mind. (*Id*. at 297) In coming to this conclusion, this Court in *Seiter* acknowledged that a state of mind inquiry left open the possibility that employees might interpose a fiscal constraints defense. (*Id*. at 301) This Court nevertheless confirmed the requirement that an Eighth Amendment violation required a finding of wantonness. This Court in *Seiter* specifically held that "whether [conduct] can be characterized as 'wanton' depends upon the constraints facing the *official*." (*Id*. at 303) An official simply cannot have a wanton state of mind where he fails to act, not because of recklessness, but because of a lack of resources. Therefore, this Court has recognized that a state employee is not personally liable for damages for failing to act due to constraints beyond his control.

C. The Ninth Circuit's Decision Is Consistent With The Decisions Of The Other Courts Of Appeals

Peralta claims that "[i]n retreating from its own long-standing precedent, the Ninth Circuit has parted ways with *every* court of appeals to consider the question." (Petition, pg. 23) (emphasis added). This assertion is patently false. The Courts of Appeals that have addressed the precise question decided by the Ninth Circuit in this case support the jury instruction given by the District Court.

The case most on point and the only case that addresses a jury instruction on lack of resources is *Williams v. Bennett*, 689 F.2d 1370, 1387 (11th Cir. 1982). There, the plaintiff challenged a district judge's instruction that the jury could consider lack of sufficient funds in determining whether prison officers were deliberately indifferent to an assault on plaintiff. The prison officers argued that, although lack of funds generally does not defeat a constitutional injunctive relief claim, it is a different story when "officials are sued in their individual capacities and are powerless to control legislative appropriations that would facilitate compliance." (*Id.*) The Eleventh Circuit agreed with the defendants.

> Because the element of callous indifference focuses on a defendant's intent . . . if full compliance is beyond the control of a particular individual, and that individual can demonstrate that he accomplished what could be accomplished within the limits of his authority, then he cannot be said to have acted with callous indifference.

(*Id.* at 1387-1388)[7]

The Eleventh Circuit distinguished the case before it from cases stating that lack of funds is not a defense to a constitutional deprivation. (*Id*. at 1388) "This distinction lies in the difference between a suit

[7] Peralta's brief does not forthrightly address *Williams v. Bennett*, a clear demonstration of the weakness of his position.

for injunctive relief against a state and a suit for damages against an individual state employee." (*Id.*) "Unlike the state, an individual defendant generally has neither the power to operate nor close down a prison." (*Id.*) Therefore, "[a]lthough 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." (*Id*. at 1388) Consequently, "a defendant who was without the authority or means to provide the necessary security could rebut a charge of callous indifference." (*Id.* at 1389)

The logic of *Williams v. Bennett* is inescapable. A prison official cannot be deliberately indifferent to a prisoner's medical needs where compliance is beyond his control, whether because of natural disaster, an emergency, or budgetary constraints.

The other circuits that have addressed this precise issue are in agreement that government officials sued in their personal capacity for damages cannot be held liable under section 1983 where their failure to act was due to circumstances, such as budgetary constraints, beyond their control. See *Pinto v. Nettleship*, 737 F.2d 130, 133 (1st Cir. 1984) ("The district court correctly concluded that personal liability in damages under section 1983 cannot be based on prison conditions beyond the control of a defendant."); *P.C. v. McLaughlin*, 913 F.2d 1033, 1043 (2d Cir. 1990) (holding defendants were not liable for failing to place plaintiff in a more suitable housing arrangement because of a lack of alternatives due to budget

constraints); *Scott By & Through Weintraub v. Plante*, 691 F.2d 634, 637 (3d Cir. 1982) (whether New Jersey prison official is liable in his personal capacity for money damages is dependent on whether "severe budgetary constraints" are the cause of the purported constitutional violation); *Thomas S. v. Morrow*, 781 F.2d 367, 375 (4th Cir. 1986) ("*Youngberg* points out that lack of funds is an absolute defense to an action for damages brought against a professional in his individual capacity" but this principle does not apply to prospective injunctive relief); *McCord v. Maggio*, 927 F.2d 844, 848 (5th Cir. 1991) (same); *Birrell v. Brown*, 867 F.2d 956, 959-960 (6th Cir. 1989) (prison official "was confronted with a situation over which he could not exercise as much control as might be desired due to a lack of funds. It therefore appears that Brown is entitled to qualified immunity under the *Youngberg* standard and that his motion for summary judgment should have been granted.") (emphasis in original); *K.H. Through Murphy v. Morgan*, 914 F.2d 846, 853-854 (7th Cir. 1990) (if defendant officials cannot find a safe placement for child because of resource constraints, they cannot be held personally liable for damages); *Kish v. Milwaukee Cnty.*, 441 F.2d 901, 904 (7th Cir. 1971) (Sheriff not personally liable because prisoner assaults resulted from the physical construction and overcrowding of the jail, not from any acts or omissions of Sheriff); *Tafoya v. Salazar*, 516 F.3d 912, 920 (10th Cir. 2008) (in Eighth Amendment prisoner assault case, "[w]hether or not [the Sheriff] failed to install more [surveillance] cameras out of deliberate indifference or lack of

funding is a genuine issue of material fact to be considered by a jury."); *LaMarca v. Turner*, 995 F.2d 1526, 1537 (11th Cir. 1993) (prison official in Eighth Amendment case can present evidence of monetary constraints to defeat allegation of subjective intent element of Eighth Amendment claim); *Campbell v. McGruder*, 580 F.2d 521, 540 (D.C. Cir. 1978) (financial constraints are relevant to whether official violated constitution, if not determinative).

Peralta does not discuss any of these cases.

The Ninth Circuit's decision is in line with the authority of sister circuits. Peralta's claim that, until this case, "the courts of appeals uniformly rejected cost or funding defenses to Eighth Amendment claims" (Petition, pg. 25) is inaccurate. Peralta's claim of an irreconcilable split in the circuit courts is likewise inaccurate.

D. The Cases Cited By Peralta Are Distinguishable

Peralta cites a number of cases he claims demonstrate a break by the Ninth Circuit from precedent. Even a cursory reading of these cases makes it clear that they do not involve the same issue considered by the Ninth Circuit.

Jones v. Johnson, 781 F.2d 769, 771 (9th Cir. 1986), distinguished by the Ninth Circuit's *en banc* decision in this case, addressed whether the case could proceed past the pleading stage. It did not

concern a claim by an official that was unable to comply with a prisoner's rights because of lack of resources. (*Id.*) Rather, the complaint merely alleged that the treating physician referenced "a tight budget" as a reason he did not want to provide care. (*Id.*) *Spain v. Procunier*, 600 F.2d 189, 200 (9th Cir. 1979), involved an action for injunctive relief as to certain general conditions at a prison such as exercise routines and the use of restraints. It did not involve a claim for damages against individual officers with no control over budgets. Similarly, *Snow v. McDaniel*, 681 F.3d 978, 987 (9th Cir. 2012) did not involve a claim by officials of inability to provide care due to budgetary constraints. Rather, evidence was presented in summary judgment proceedings that defendants refused to schedule a surgery because they simply did not want to pay for the surgery. (*Id.*) That is an entirely different matter from Dr. Brooks, who was simply unable to provide better treatment because of lack of time due to understaffing vis-à-vis the needs of the inmate population. Therefore, the Ninth Circuit correctly recognized that *Jones* and *Snow* are distinguishable.

The other cases cited by Peralta involve claims against states or municipalities for injunctive relief, claims against municipalities for damages under *Monell*, *supra*, or amount to *dicta*. See *Todaro v. Ward*, 565 F.2d 48, 54, n. 8 (2d Cir. 1977) (claim for injunctive relief and no discussion of individual liability due to budgetary constraints); *Durmer v. O'Carroll*, 991 F.2d 64, 68 (3d Cir. 1993) (no cost

defense at issue); *Smith v. Sullivan*, 553 F.2d 373, 378 (5th Cir. 1977) (lack of funds no defense to compliance with court injunction to correct prison conditions); *Finney v. Arkansas Bd. of Correction*, 505 F.2d 194, 202 (8th Cir. 1974) (injunctive relief against Arkansas agency); *Ramos v. Lamm*, 639 F.2d 559, 574, n. 19 (10th Cir. 1980) (*dicta* that lack of sufficient funds to increase security staff will not defeat a claim for injunctive relief against Colorado and high level prison officials); *Battle v. Anderson*, 564 F.2d 388, 391 (10th Cir. 1977) (State of Oklahoma appealed injunction directing it to achieve specific inmate population reductions at two state penal facilities); *Ancata v. Prison Health Servs., Inc.*, 769 F.2d 700, 705 (11th Cir. 1985) (county is responsible for ensuring there are adequate funds for inmate medical treatment at Broward County jail); *Harris v. Thigpen*, 941 F.2d 1495, 1509 (11th Cir. 1991) (lack of funding "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.") (emphasis added); *Morgan v. D.C.*, 824 F.2d 1049, 1067-1068 (D.C. Cir. 1987) (the only defendant in the case was the District of Columbia).

All of these cases involved situations where the plaintiff pointed the finger at responsible state or municipal agencies, not innocent state employees.

While some of these cases abstractly declare that lack of funds is not a defense to constitutional violations, cases are only authority as to the issues that are actually decided. See, e.g., *United States v.*

Brandon P., 387 F.3d 969, 975 (9th Cir. 2004). No cases cited by Peralta hold that individual employees without control over resources should be held personally liable when insufficient resources are deemed to be the cause of the inmate's complaints. See *Wellman v. Faulkner*, 715 F.2d 269, 276 (7th Cir. 1983) (holding that plaintiffs failed to show individual defendants were personally responsible for violations). In short, the cases cited by Peralta suggest that a state cannot avoid liability for constitutional violations by claiming poverty. They do not stand for the proposition that state employees who have no control over budget decisions and allocation of resources can be held liable under the Eighth Amendment.

Further, while Peralta cites the Seventh Circuit case, *Miller v. Harbaugh*, 698 F.3d 956, 962 (7th Cir. 2012), that case supports Respondent's position. In deciding whether defendant prison officials were deliberately indifferent to an inmate who hanged himself, the court stated "we have held that defendants cannot be thought to be reckless if the remedial step was not within their power." (*Id.*) (citing *Dixon v. Godinez*, 114 F.3d 640, 645 (7th Cir. 1997) (" . . . officials do not act with 'deliberate indifference' if they are helpless to correct the protested conditions. . . ."); *Del Raine v. Williford*, 32 F.3d 1024, 1038 (7th Cir. 1994) ("If the harm [to an inmate] is remote rather than immediate, or the officials don't know about it or can't do anything about it, the subjective component [of deliberate indifference] is

not established and the suit fails.") (citing *Wilson v. Seiter*, *supra*)).

While Peralta claims there is considerable confusion regarding the cost defense, the law journal article he cites for support of this claim makes it clear that individual employees cannot be liable when resource constraints beyond their control prevent them from acting. See B. Kritchevsky, *Is There a Cost Defense?*, 35 Rutgers L.J. 483, 564 (Winter 2004) ("An official who does everything possible within budgetary constraints should not be held individually liable because he is not responsible for the lack of funding.").

In short, Peralta refuses to acknowledge the obvious differences described in *Williams v. Bennett* between cases holding that "lack of funds" is not a defense to the government's decision to refuse to provide adequate resources but is a defense to suits against individual employees for damages. In the latter instance, a state employee simply cannot be liable for failing to act because of budgetary constraints beyond his control.

This case does not present a break in precedent but rather stands directly in accordance with a long line of precedent upholding the basic principle than individual employees cannot be held personally liable for circumstances which they neither direct nor control.

II. The Ninth Circuit Properly Described And Applied The Deliberate Indifference Standard.

Peralta claims that once a prisoner has established a serious medical need, he need only further show: (1) the medical officer's subjective awareness of and (2) disregard of that need. (Petition, pg. 30). Peralta then claims that the Ninth Circuit incorrectly added an "intent to punish" prong to the standard.

Peralta's argument is wrong and fails to explain why this Court's intervention is needed.

A. Peralta Fails To Explain How The Ninth Circuit's Application Of The Deliberate Indifference Standard Warrants This Court's Review

Peralta fails to explain how the Ninth Circuit's application of the deliberate indifference standard requires this Court's intervention. The deliberate indifference standard is well established. Peralta describes no divisive split in the circuit courts or other important issue beyond the particular facts of this case. Therefore, this case does not warrant review by this Court.

B. Peralta Misstates The Deliberate Indifference Standard By Omitting The Requirement That An Employee Must Act In A "Wanton" Or "Reckless" Manner

"To violate the Cruel and Unusual Punishments Clause, a prison official must have a 'sufficiently culpable state of mind.'" *Farmer v. Brennan*, 511 U.S. 825, 834 (1994). "Subjective recklessness as used in the criminal law is a familiar and workable standard that is consistent with the Cruel and Unusual Punishments Clause . . . and we adopt it as the test for 'deliberate indifference' under the Eighth Amendment." (*Id.* at 839-840)

As the Ninth Circuit correctly explained in citing *Farmer*, *Wilson* and *Estelle*, the Supreme Court " . . . has told us that prison officials aren't deliberately indifferent to a prisoner's medical needs unless they act wantonly . . . and whether an official's conduct 'can be characterized as "wanton" depends upon the constraints facing [him].'" (App. 8a) (citing *Wilson*, *supra*, 501 U.S. at 303 and *Estelle*, *supra*, 429 U.S. at 104). Those constraints include the budgetary and staffing resources an official has to work within. The Ninth Circuit correctly described the deliberate indifference standard.[8]

[8] Peralta takes the Ninth Circuit's reference to whether Dr. Brooks intended to punish Peralta out of context. This statement was made following the Ninth Circuit's correct description

(Continued on following page)

Contrary to Peralta's claims in his Petition for certiorari, the Ninth Circuit also correctly explained the distinction between a suit for damages and one for injunctive relief. Damages are retrospective and thus the constraints that were facing an official are relevant to assessing whether the official is deliberately indifferent. (App. 10a). By contrast, injunctive relief is prospective and an official may be required to take additional action to alleviate the constraints. (*Id.*) This distinction is consistent with the law. See *Crowder v. Lash*, 687 F.2d 996, 1008, 1011 (7th Cir. 1982) (application of collateral estoppel to prior decision finding unconstitutional conditions in jail and imposing injunction does not establish defendants' individual liability for damages because defendants' personal responsibility was not established); *Leer v. Murphy*, *supra*, 844 F.2d at 633 (9th Cir. 1988) (finding that a more individualized inquiry of duties and responsibilities is required in a case for damages than in a case for injunctive relief); *LaMarca v. Turner*, *supra*, 995 F.2d at 1541 (separately analyzing the "retrospective analysis of the plaintiffs' damages claims" from the prospective relief requested); *Williams v. Bennett*, *supra*, 689 F.2d at 1383 (where individuals are being sued in individual capacities for damages, the causation inquiry must be more refined

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of the deliberate indifference standard and was made in reference to the requirement in the Eighth Amendment, as set forth by this Court, that a violation of the Eighth Amendment requires a finding of deliberate indifference.

and focused). The Ninth Circuit's discussion of an alternative vehicle for Peralta to obtain relief was also unnecessary to its ruling because Peralta did not seek injunctive relief. Therefore, it provides no basis for this Court's review.

In sum, recklessness involves more than simply failing to act when there is a need to act, as Peralta suggests. It involves a conscious decision to ignore the suffering of a prisoner *in the context* of the employees' ability to act. If a prison official knew of a substantial risk of harm to an inmate but was unable to act because of a natural disaster, such as a hurricane, no one would claim the official was deliberately indifferent. The same principle applies to an official whose abilities to act are limited due to budgetary constraints beyond his control.

To accept Peralta's claim that a mere failure to act constitutes deliberate indifference is to improperly collapse the deliberate indifference standard into a negligence theory, or even a strict liability one, with no regard for mental state. Negligence, however, has never been a sufficient basis on which to impose liability under the Eighth Amendment. See *Daniels v. Williams*, 474 U.S. 327, 333 (1986).

C. The Ninth Circuit Properly Applied The Deliberate Indifference Standard

The Ninth Circuit properly applied this Court's deliberate indifference standard. Dr. Brooks was unable to provide adequate care to prisoners such as

Peralta because of the constraints under which he was forced to act and over which he had no control. The staffing ratio made treating even emergency patients difficult. Dr. Brooks complained about the understaffing of the prison numerous times to his superiors, to no avail. (RT 3:110-111). Dr. Brooks had no control over how money was allocated in the prison. (RT 1:96-98, 2:48). Dr. Brooks tried other means to alleviate the backlog problem, including increasing work hours and trying to see more patients each day. (RT 2:50-52; 3:89-90, 111).[9] The jury heard this evidence, evaluated Dr. Brooks' conduct, and determined that he was not deliberately indifferent to Peralta's serious medical needs.

III. PERALTA'S ARGUMENT IS AT ODDS WITH THIS COURT'S WELL SETTLED LAW HOLDING THAT AN INDIVIDUAL CANNOT BE VICARIOUSLY LIABLE UNDER SECTION 1983.

A significant amount of time is spent in Peralta's Petition discussing the alleged systemic budget deficiencies within California's prison system. In doing so, Peralta merely proves Respondents' point: the systemic limitations are beyond the control of Dr. Brooks and Dr. Dillard.

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[9] Peralta fails to explain how Dr. Dillard has any role in this matter. He was not the subject of the jury instruction about which Peralta complains and he had no interaction with Peralta.

Peralta agrees that Dr. Brooks introduced evidence that he was unable to provide certain medical care to Peralta due to budgetary constraints caused by the State of California. (Petition, pg. 9) (citing RT 3:96-97). Peralta nevertheless insists that Dr. Brooks be held liable.[10] The Ninth Circuit correctly detected the hollowness of Peralta's argument.

The apparent basis for Peralta's unsupported argument is that it is unfair for Peralta to be left without a damages remedy in this case. However, "[a]n 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 v. Seiter*, *supra*, 501 U.S. at 301-302. As the Ninth Circuit succinctly responded, "[w]e see no reason to impose an injustice upon employees of prison systems in an attempt to avoid injustices to inmates." (App. 61a).

Peralta seeks to impose "vicarious liability in reverse" by holding state employees liable for the decisions of the State of California. This argument has no basis in civil rights law or any other law. Petitioner's argument is contrary to the well settled law of this Court stating that section 1983 liability

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[10] Peralta also misstates the facts when he claims that Dr. Brooks never sought qualified immunity. (Petition, pg. 33). Dr. Brooks clearly sought qualified immunity as reflected in the Pre-Trial Conference Order. (Appellant's Excerpts of Record, Tab 9-8).

cannot be imposed on the basis of a vicarious liability theory. *City of Canton v. Harris*, *supra*.

Therefore, this matter does not involve a divided question as to the application of civil rights law. Rather, it involves well settled principles that Peralta attempts to overturn without any legal basis.

IV. PERALTA'S ARGUMENT IS AT ODDS WITH THIS COURT'S WELL SETTLED LAW HOLDING THAT A STATE IS IMMUNE FROM SUIT UNDER THE ELEVENTH AMENDMENT.

The law is clear that the State of California is immune from damage suits under the Eleventh Amendment. The Eleventh Amendment of the United States Constitution prohibits federal courts from hearing suits brought by private citizens against state governments, without the state's consent. *Hans v. Louisiana*, 134 U.S. 1, 15 (1890). The Amendment was enacted to protect the state from federal court judgments and "accord States the dignity that is consistent with their status as sovereign entities." *Fed. Mar. Comm'n v. S. Carolina State Ports Auth.*, 535 U.S. 743, 760 (2002).

Peralta nevertheless seeks to hold the State of California liable for damages via Dr. Brooks and Dr. Dillard. Peralta's theory is that " . . . every state in the Ninth Circuit voluntarily indemnifies its prison officials" thereby admitting that the State of California

is the real party in interest in this case. (Petition, at pg. 34).[11]

Peralta cites no law to support this theory of liability.

The problem with Peralta's argument is that this Court has already stated in no uncertain terms that a state's decision to indemnify its employees cannot be interpreted as a waiver of Eleventh Amendment immunity. See *Edelman v. Jordan*, 415 U.S. 651, 673 (1974) ("we will find waiver [of Eleventh Amendment immunity] only where stated 'by the most express language or by such overwhelming implications from the text as (will) leave no room for any other reasonable construction.'") (citation omitted).

This Court has also stated that "[t]he Eleventh Amendment bars a suit against state officials when 'the state is the real, substantial party in interest.'" *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 101 (1984) (quoting *Ford Motor Co. v. Department of Treasury*, 323 U.S. 459, 464 (1945)); *Edelman v. Jordan*, *supra*, 415 U.S. at 663 ("a suit by private parties seeking to impose a liability which must be paid from public funds in the state treasury is barred by the Eleventh Amendment.").

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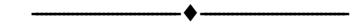
[11] The dissent from the *en banc* decision makes the same argument. (App. 46a) ("the state is in every respect the real party in interest in a damages suit.").

Further, Peralta ignores the fact that indemnification statutes can be repealed and that in Hawaii, indemnification is permissive but not required. Hawaii Rev. Stat. § 662-16. If a state amends its policy to prohibit indemnification, an innocent state employee will be forced to bear the burden of damages for the actions of the State.

Therefore, Peralta is arguing a position in direct contravention of this Court's decisions. As the *en banc* majority correctly stated, Peralta's argument is an attempted end-run around the Eleventh Amendment.

Peralta also suggests that the Ninth Circuit's decision is at odds with Congressional intent in passing section 1983. However, there is no evidence that Congress intended to subject states to monetary damages for section 1983 claims. Indeed, Congress has not abrogated sovereign immunity in such cases and the plain language of section 1983 permits suits against a "person," not against states. See *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 64, 66 (1989).

Peralta does not raise an issue of exceptional importance that is the subject of a deep split of opinion. Rather, Peralta raises an unsupported theory that has already been rejected by this Court. Therefore, this Court should deny certiorari.



CONCLUSION

The Ninth Circuit did not depart from well settled principles or create a conflict among the Courts of Appeals. To the contrary, it is Peralta who seeks to overturn settled law by punishing blameless employees for the acts of the state while eviscerating the Eleventh Amendment. This Court should deny certiorari.

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Respectfully submitted,

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