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

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

The petition presents a question this Court left unanswered in *Wilson v. Seiter*, 501 U.S. 294 (1991): Whether prison officials may raise the defense that "fiscal constraints beyond their control" prevented the provision of adequate care and thus avoid a finding of an Eighth Amendment violation. *Id.* at 301-02. In a 6-5 decision, the en banc Ninth Circuit broke from the other circuits and answered the question affirmatively, holding that a jury must consider the financial resources available to a prison doctor when deciding whether the Eighth Amendment has been violated. Accordingly, in the Ninth Circuit, the level of care required to meet constitutional standards now rises and falls with the level at which a state funds its prisons.

In their opposition, respondents do not meaningfully dispute that the issues presented here are of exceptional national importance warranting this Court's review. Instead, they argue that the questions presented were not actually decided by the Ninth Circuit; that the decision below does not conflict with the decisions of the other Courts of Appeals; that this Court has implicitly blessed a budgetary constraints defense; and that the Eleventh Amendment bars respondents' liability. None of these arguments holds water.

ARGUMENT

I. THIS CASE SQUARELY PRESENTS AN UNRESOLVED AND RECURRING QUESTION OF EXCEPTIONAL IMPORTANCE.

The Ninth Circuit has wrongly decided an important question of constitutional law expressly left unresolved by this Court. That question was plainly identified in the first sentence of the en banc majority's opinion: "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." App. 4a. The majority held that such a defense may defeat a finding of deliberate indifference in a claim for damages, but purported to leave intact the circuit's precedent 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), when it comes to claims for injunctive relief. App. 9a-10a.

A. Respondents argue that the questions presented by the petition were not actually decided by the Ninth Circuit, and downplay the reach of the ruling below by asserting that the holding only states that a jury "may" take into account the resources available to a prison official in determining whether he was deliberately indifferent. BIO 1, 15. But the Ninth Circuit's holding was clear, and the jury instruction approved was not merely permissive. It stated that whether the Eighth Amendment was violated "must" be considered in light of the resources available. Pet. 10.

The significance of the jury instruction is highlighted by the fact that respondents concede that

Dr. Brooks failed to provide adequate care to Mr. Peralta. BIO 30-31 ("***Dr. Brooks was unable to provide adequate care*** to prisoners such as Peralta because of constraints under which he was forced to act and over which he had no control.") (emphasis added). Since Brooks does not dispute that he was aware of Mr. Peralta's "urgent" need for care, RT 2:221, 3:57, nor that he failed to adequately provide that care, the judgment in this case rests on whether Brooks's claims that he did the "best he could" in light of the budgetary constraints he faced, BIO 7, 10, can excuse his obligation under the Eighth Amendment to provide adequate care.

The reach of the Ninth Circuit's decision extends beyond jury instructions. Indeed, even since the petition was filed, two district courts in the Ninth Circuit have relied on the ruling's budget constraints defense to support grants of summary judgment in favor of prison officials. *See Wynn v. Turner*, No. 6:13–cv–02296–MO, 2014 WL 5489000, at *2 (D. Or., Oct. 28, 2014); *Allen v. Cheung*, No. 1:09–cv–00930–AWI–JLT (PC), 2014 WL 6685733, at *5 (E.D. Cal., Nov. 26, 2014). These rulings confirm that the petition presents an important and recurring question warranting this Court's review.

B. Respondents suggest the questions presented are settled, asserting that this Court has already held that "a state employee is not personally liable for damages for failing to act due to constraints beyond his control." BIO 17-18.

To support this argument, respondents quote dicta from this Court's decision in *Youngberg v. Romeo*, 457 U.S. 307, 323 (1982), stating that a "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."[1] But *Youngberg* is inapplicable to this case.

Youngberg concerned a mentally incompetent person's liberty interests under the Fourteenth Amendment, and was decided under the professional judgment standard, ***not*** the deliberate indifference standard applicable to Eighth Amendment claims for inadequate prison medical care. *Id.* at 321-22. Moreover, though the quoted dicta speaks to "good-faith immunity" from liability based on budgetary constraints, the case against Brooks was not decided on immunity grounds in either the district court or the Ninth Circuit.[2] Rather, the instruction required the jury to consider prison resources in deciding whether Brooks was deliberately indifferent, and thus whether a constitutional violation occurred at all. Finally, *Youngberg* was decided prior to this Court's decision in *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), in which the Court replaced the subjective "good-faith" element of qualified immunity with a solely objective consideration of whether the complained of conduct "violate[d] clearly established

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[1] At oral argument, respondents' counsel referred to the quoted language in *Youngberg* as "dicta," and agreed that this case did "not [present] a qualified immunity issue." Video of En Banc Oral Argument (Sept. 18, 2003), 30:28-31:05, available at http://www.ca9.uscourts.gov/media/view_video.php?pk_vid=0000006219

[2] Brooks insists he sought qualified immunity. BIO at 11, 32 n. 10. But it was not raised in his Oct. 1, 2007 Motion for Summary Judgment (Dkt. 100), nor during his oral Rule 50 motion on May 7, 2009 (RT 3:206-07), nor in his Feb. 16, 2012 Answering Brief in the Ninth Circuit (Dkt. 60).

statutory or constitutional rights of which a reasonable person would have known."[3] *Id.* at 817-18. The Court did not mention *Youngberg* in its *Harlow* opinion, suggesting that if a subjective "good-faith" immunity remains valid at all, it does so only in the due process context or for mental health professionals.

II. THE NINTH CIRCUIT'S DECISION CONFLICTS WITH THE DECISIONS OF THE OTHER COURTS OF APPEALS AND OF THIS COURT.

In deciding this case, the Ninth Circuit departed from its own precedent and that of the other Courts of Appeals which had held that budgetary constraints cannot excuse cruel and unusual punishments. What's more, the Ninth Circuit's distinction between Eighth Amendment standards depending on the relief sought, and its application of the deliberate indifference standard conflict with the decisions of this Court. Respondents' efforts to distinguish this authority fail.

A. Respondents argue that "even a cursory reading" of *Jones v. Johnson*, *Snow v. McDaniel*, and *Spain v. Procunier*, 600 F.2d 189 (9th Cir. 1979), "makes it clear that they do not involve the same issue" considered in this case. BIO 22-23. Six respected Ninth Circuit judges, in three vigorous dissents, have disagreed. *See* App. 68a-69a ("This

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[3] Brooks has conceded he did not provide Mr. Peralta with adequate care, BIO 30-31, and cannot deny that Mr. Peralta's right to such care was clearly established. *See Farmer v. Brennan*, 511 U.S. 825, 832 (1994) ("prison officials must ensure that inmates receive adequate * * * medical care"). Thus, an assertion of qualified immunity would have been meritless.

instruction does not accurately state our case law.") (citing *Snow* and *Jones*) (Berzon, J., dissenting); App. 28a ("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.") (Christen, J., dissenting); App. 42a ("The majority overrules *Jones* and *Snow* * * * .") (Hurwitz, J., dissenting).

Respondents' efforts to evade this Court's review trivialize the complex and important legal issues presented here. In truth, even the en banc majority's strained distinction between Eighth Amendment standards depending on the relief sought cannot alter the fact that it has overruled its prior precedent. "*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." App. 70a (Berzon, J., dissenting). Likewise, "*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." *Id.*

B. Respondents' attempts to distinguish the precedents of the other circuits fare no better. Each of the other circuit cases cited in the petition addressed Eighth Amendment claims under the deliberate indifference standard, and each stands for the proposition that budgetary constraints cannot excuse cruel and unusual punishment. Pet. 11. But, respondents argue, there is no circuit split because these cases either included claims for injunctive relief, were claims against municipalities under

Monell v. Dep't of Soc. Servs. of City of New York, 436 U.S. 658 (1978), or consist of dicta. BIO 23.

Respondents' effort to distinguish these cases on the basis that some included claims for injunctive relief merely begs the question respondents have excluded from their counterstatement: "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." Pet. i.[4] Moreover, it highlights the conflict with this Court's direction that under the Eighth Amendment, the same deliberate indifference standard applies whether the claims at issue are solely for damages, like in *Estelle v. Gamble*, 429 U.S. 97 (1976), or for both damages and injunctive relief, as in *Wilson* and *Farmer*.[5]

Respondents do not confront the unavoidable dilemma spawned by the Ninth Circuit's newly-created distinction: What standard applies when, as in *Farmer* and *Wilson*, a plaintiff asserts claims for both injunctive relief and damages? If Mr. Peralta had sought to compel Brooks to provide him with adequate care prospectively, and also sought damages for the harm he had already suffered, the same determination of whether Brooks was

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[4] Without explanation, respondents omit altogether the petition's second question. BIO i. This question was decided by the Ninth Circuit, App. 9a-10a, and is properly before this Court.

[5] Likewise, there is no basis for respondents' suggestion that *Monell* claims are subject to a different standard of deliberate indifference.

deliberately indifferent would be dispositive to each claim. Accordingly, budget constraints must either be a defense to both, or to neither.

C. Like their reliance on *Youngberg*, respondents' assertion that the Ninth Circuit's decision is actually in accord with the other Courts of Appeals rests on stale and inapposite case law. BIO 18-22. In fact, most of the cases respondents claim "addressed this precise issue," concerned, as *Youngberg* did, substantive due process claims under the professional judgment standard, ***not*** Eighth Amendment claims under the deliberate indifference standard. *See P.C. v. McLaughlin*, 913 F.2d 1033, 1037 (2d Cir. 1990); *Scott By and Through Weintraub v. Plante*, 691 F.2d 634, 638 (3d Cir. 1982); *Thomas S. v. Morrow*, 781 F.2d 367, 373 (4th Cir. 1986); *K.H. Through Murphy v. Morgan*, 914 F.2d 846, 853-54 (7th Cir. 1990). Still others, non-medical prison condition cases decided prior to this Court's holdings in *Wilson* and *Farmer*, were considered under even more defendant-friendly standards such as "clear abuse or caprice." *Kish v. Milwaukee County*, 441 F.2d 901, 905 (7th Cir. 1971); *McCord v. Maggio*, 927 F.2d 844, 848-49 (5th Cir. 1991) ("The principle of deliberate and callous indifference, which is applicable to claims of neglect of medical needs and of being placed in imminent danger of violence from other inmates or prison officials, does not control § 1983 prison conditions cases such as the instant case.").

Nor does the case respondents assert is "most on point" help them here. BIO 19-20 (discussing *Williams v. Bennett*, 689 F.2d 1370 (11th Cir. 1982). First off, in *Williams*, the Eleventh Circuit was "careful to note, * * * that insufficient funds does not

give rise to a separate defense" like the one approved by the Ninth Circuit. *Id.* at 1388. Indeed, in a post-*Williams* decision concerning an action for damages only, the Eleventh Circuit expressed its "disapproval of parts of [a jury] instruction given, most especially the references to the fact that lack of finances may be a permissible reason for understaffing. Lack of funds for facilities," it explained, "cannot justify an unconstitutional lack of competent medical care or treatment of inmates." *Anderson v. City of Atlanta*, 778 F.2d 678, 688 (11th Cir. 1985). Most recently, in *Fields v. Corizon Health, Inc.*, No. 11-14594, 2012 WL 3854592, *10 (11th Cir., Sept. 6, 2012), the Eleventh Circuit affirmed that cost is not a "medical justification," for delay or denial of care, and "if necessary medical treatment has been delayed for non-medical reasons, a case of deliberate indifference has been made out." *Id.* (quoting *Ancata v. Prison Health Servs., Inc.*, 769 F.2d 700, 704 (11th Cir. 1985)). Thus, despite respondents' reliance on *Williams*, the weight of Eleventh Circuit authority is not in agreement with the decision below. *See also Harris v. Thigpen*, 941 F.2d 1495, 1509 (11th Cir. 1991) ("We are aware that systemic deficiencies 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.").

D. The Ninth Circuit also misapplied this Court's Eighth Amendment standard in requiring an intent to harm. Pet. 30-32. Respondents argue that the Ninth Circuit's holding was correct because this Court has held that "a finding of deliberate

indifference requires a 'wanton' state of mind." BIO 18, 28. However, this Court has not held that wantonness is necessary to show deliberate indifference, but rather that deliberate indifference is sufficient to demonstrate the requisite wantonness. *Estelle v. Gamble*, 429, U.S. 97, 104 (1976) ("We therefore conclude that deliberate indifference to serious medical needs of prisoners constitutes the 'unnecessary and wanton infliction of pain' proscribed by the Eighth Amendment."). And the Court subsequently explained that deliberate indifference is in turn established when a prison official "knows of and disregards an excessive risk to inmate health[.]" *Farmer*, 511 U.S. at 837. "***[I]t is enough*** that the official acted or failed to act despite his knowledge of a substantial risk of serious harm." *Id*. at 842 (emphasis added). Nothing more is required; not an independent finding of wantonness as respondents suggest, nor an intent to punish or harm, as the en banc majority would require. *See* Pet. 30-31.

E. Betraying the fact that their defense is being funded by the State of California, respondents seize upon the en banc majority's discussion in dicta and argue that because the state indemnifies its prison officials, holding Brooks and Dillard responsible for their failure to provide constitutionally-adequate care in the face of budget constraints constitutes an "end-run around the Eleventh Amendment."[6] BIO at 34-35. But since neither the State of California nor any official capacity defendants were named in this

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[6] Respondents assert that Mr. Peralta has "admitt[ed] that the State of California is the real party in interest in this case." BIO at 33-34. He has done no such thing.

suit, respondents lack standing to make such an argument. And standing issues aside, respondents' argument is meritless, as even the Ninth Circuit itself has recognized as much in an express holding. *Ashker v. California Dep't of Corr.*, 112 F. 3d 392, 395 (9th Cir. 2007) ("[W]e hold California's indemnification of [defendant prison officials] does not render California the real party in interest."). It could not logically be otherwise. If indemnity agreements rendered damages claims invalid under the Eleventh Amendment, then every state would be free to "indemnify" its employees without fear of ever having to pay out.

F. Finally, respondents argue that Mr. Peralta "seeks to impose 'vicarious liability in reverse' by holding state employees liable for the decisions of the State of California." BIO 32. Not so. Mr. Peralta seeks to hold Brooks and Dillard responsible for their own failures to comply with the Eighth Amendment's unqualified mandate that "prison officials must ensure that inmates receive adequate * * * medical care[.]" *Farmer*, 511 U.S. at 832.

According to respondents, holding Brooks responsible for his admitted failure to provide Mr. Peralta with constitutionally-adequate care in the face of California's overcrowded prisons is akin to holding him responsible for failing to provide treatment in the midst of a hurricane.[7] BIO 30. But

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[7] Despite respondents' repeated assertion that Brooks was "unable" to provide adequate care, BIO 1, 2, 13, 23, 30, 32, the record demonstrates that Brooks could have treated Mr. Peralta's urgent needs at any one of the three times he met with him. RT 2:28-29 (Dillard testifying that Lancaster dentists could perform "[a]ll dental procedures notwithstanding these staffing issues" when they had an inmate in the chair).

this case does not concern an impossibility defense or the sudden emergency doctrine. Rather, the Ninth Circuit's announcement that whether constitutional standards were met must be considered in the context of the prison's resources creates a sliding scale for the level of care that will be deemed "adequate" under the Eighth Amendment. Under this rule, if California provides its prison doctors with only rusty pliers and a dull pocket knife, a physician performing surgery on inmates with those tools would not commit an Eighth Amendment violation, because he did "the best he could under the circumstances." *See* BIO 10. The Eighth Amendment is not so malleable, and this Court should grant review to say so.

CONCLUSION

The Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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