No. 20-941

In the
Supreme Court of the United States

GREGORY ATKINS, CHRISTOPHER GOOCH, KEVIN PROFFITT, and THOMAS ROLLINS, JR., on behalf of themselves and all others similarly situated,

Petitioners,

v.

DR. KENNETH WILLIAMS, Medical Director, Tennessee Department of Correction, in his official capacity,

Respondent.

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

REPLY BRIEF FOR PETITIONERS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Authorities

REPLY BRIEF

Thirty years ago, the Court identified a wrinkle in the standard for deliberate indifference under the Eighth Amendment. If the standard requires a culpable state of mind, can a prison official avoid a judgment by blaming the failure to care for inmates on lack of funding? The Court did not decide because it had no indication that officials were raising that defense to avoid their constitutional duties. *Wilson v. Seiter*, 501 U.S. 294, 301-02 (1991). By now, though, almost all of the circuits have confronted the lack of funds defense, and they cannot agree on its validity. The Sixth Circuit took the defense to its outer limit in this case, refusing injunctive relief to inmates who needed direct-acting antiviral (DAA) medication for hepatitis C because the prison official in charge of their care, Dr. Williams, did not have enough funding. Instead of the Eighth Amendment fixing a minimum level of care, the level of funding chosen by the legislature fixed the requirements of the Eighth Amendment. Disagreement over the lack of funds defense is producing arbitrary and inhumane results. The Court must intervene and finally confront this life-and-death constitutional matter.

Dr. Williams's efforts to paint this case as a bad vehicle for review do not stand up to scrutiny. No issue of substance or justiciability stands between the Court and the questions presented. The Sixth Circuit did not treat funding as one of many relevant factors. It made funding central to its decision and consciously departed from other circuits. Furthermore, as the majority stated in its opinion, the parties are only disputing a single aspect of the Eighth Amendment claim. This clears the

arena for an argument over the lack of funds defense. And under a long line of decisions, a certified class action like this does not become moot simply because the class representatives' individual claims do. TDOC will have thousands of inmates in need of relief for the foreseeable future. The Court will not get a better set-up for considering the lack of funds defense.

I. The Sixth Circuit Staked its Position in an Important Circuit Split

In order to show that circuits have "the same uniform approach," Dr. Williams conflates two distinct concepts: cost and funding. *See* Resp't's Br. 2, 19-20. The petition before the Court concerns the legal significance of funding, not cost, under the Eighth Amendment.

Lower courts generally agree that the cost of medical treatment figures into the deliberate indifference standard. One influential decision describes a sliding scale based on the seriousness of the medical need and the cost of treatment. *Ralston v. McGovern*, 167 F.3d 1160, 1162 (7th Cir. 1999). The Sixth Circuit did not rule on that basis. The majority noted the cost of DAA treatment, App. 3, but it did not conclude that cost outweighed the seriousness of chronic hepatitis C and associated health problems. Therefore, Petitioners have not asked the Court to review that issue, nor do they contend that the Eighth Amendment "guarantee[s] prisoners the right to be entirely free from the cost considerations that figure in the medical-care decisions made by most non-prisoners in our society." *See Reynolds v. Wagner*, 128 F.3d 166, 175 (3d Cir. 1997) (Alito, J.).

The Sixth Circuit rested its decision on the lack of funding made available to

Dr. Williams for the purchase of DAAs. To call this one of many "case-specific factors" mischaracterizes the majority opinion. *See* Resp't's Br. 1. The majority looked at all the facts through the lens of funding. It summarized Dr. Williams's process for evaluating, monitoring, and prioritizing infected inmates. App. 9-10. The process did not show deliberate indifference, the majority said, because Dr. Williams "sought to employ the finite resources at his disposal to maximize their benefit for the inmates in his care." *Id*. 10. Petitioners lost because they "demand[ed] that he spend money he did not have." *Id*. If these statements were not clear enough, the majority ended with a reminder that it evaluated deliberate indifference "[i]n the real world of limited resources." *Id*. 10-11. A reader can only take this to mean that the Sixth Circuit accepted lack of funds as a defense.

The dissent took it that way. *See id*. 12 (Gilman, J., dissenting) (calling insufficient funding "[t]he essence of the majority's rationale"). The dissent further explained how the majority contradicted decisions from the Eighth, Ninth, and Eleventh circuits, which held that lack of funds does not provide a defense in cases for injunctive relief. *Id*. 16-18.

The decision below makes the difference between a cost defense and a lack of funds defense quite stark. Petitioners could not force Dr. Williams to provide them with medication because the State had not given him enough money. The uncontested facts that hepatitis C causes cirrhosis, cancer, and death, *see id*. 2, that DAAs cure almost every patient, *see id*. at 3, and that doctors only use DAAs to treat the disease, *see id*., did not make a difference. Even if the sliding scale of cost and

need showed DAAs to be "the civilized minimum" of care, *see Ralston*, 167 F.3d at 1162, the Sixth Circuit would not require Dr. Williams to "spend money he did not have," *see* App. 10. When the need for treatment justifies its cost, courts should not let a defendant "plead poverty as an excuse for refusing to provide it." *Hoffer v. Sec'y, Fla. Dep't of Corr.*, 973 F.3d 1263, 1277 (11th Cir. 2020).

A circuit split thus exists on the role of funding in deliberate indifference. Petitioners have outlined the three different camps. Pet'rs' Br. 12-20. Several circuits recognize the lack of funds defense to a claim for damages but not injunctive relief. *E.g.*, *Peralta v. Dillard*, 744 F.3d 1076, 1083 (9th Cir. 2014) (en banc); *Williams v. Bennett*, 689 F.2d 1370, 1388 (11th Cir. 1982). Other circuits reject the defense for damages claims, as well. *E.g.*, *Morgan v. District of Columbia*, 824 F.2d 1049, 1067-68 (D.C. Cir. 1987). The Sixth Circuit allows the defense across the board. App. 10-11 (claim for injunctive relief); *Birrell v. Brown*, 867 F.2d 956, 959 (6th Cir. 1989) (claim for damages).

Cases addressing the lack of funds defense have involved not only medical care but also inmate violence, overcrowding, heat, and other prison conditions. *See* Resp't's Br. 21-22. The fault lines in authority, however, have nothing to do with particular prison conditions. The lack of funds defense works the same way, whether a plaintiff is seeking medication or heat in the winter. The variety of situations in which the defense comes up only shows how pervasive and important it is.

Petitioners have presented two questions for review, one stated more broadly and the other more narrowly, so the Court may choose how to approach the matter.

The first question asks whether lack of funds provides a defense to a deliberate indifference claim. Pet. i. This encompasses any case, regardless of the relief sought. The second question narrows the focus to cases like the present one, which only seek injunctive relief from the defendant in his or her official capacity. *Id*. ii. The decision below implicates both questions, as a negative answer to either one would mean that the Sixth Circuit erred.

Dr. Williams calls the conflict of authority on the second, more specific question "much shallower," Resp't's Br. 17, but he does not show that it is less worthy of review. Nearly every circuit has considered the lack of funds defense in the injunction context and chosen not to allow it there. Only the Sixth Circuit withholds injunctive relief because of a prison official's inadequate resources. Even if no other circuit adopts this outlier position, it will deeply erode Eighth Amendment protections for over one hundred thousand prisoners in a four-state region. The lopsided nature of the circuit split on the second question testifies to the Sixth Circuit's profound error and the need to correct it.

II. This Case is an Ideal Vehicle

Dr. Williams tries to portray this case as laden with side issues and complications that will stop the Court from reaching the questions presented. In reality, Dr. Williams did not preserve arguments as to other parts of the deliberate indifference standard. His tepid efforts at fighting hepatitis C have not mooted the controversy because thousands of inmates are still desperately seeking DAAs.

At this stage, the litigation has distilled to just one part of the subjective

component of deliberate indifference. Since "everyone agrees that hepatitis C is an objectively serious medical condition and that Williams understood the risk that hepatitis C posed," the "only question" is whether Dr. Williams recklessly ignored the risk. App. 9. The Sixth Circuit majority resolved that question by focusing on the "limited resources" available for DAAs. *Id*. 10-11.

Dr. Williams denies making the concessions described by the Sixth Circuit, *see* Resp't's Br. 13 & n.1, but his stipulations in the district court clearly removed most issues from dispute. *See* Order ¶ 4, July 5, 2019, ECF No. 219 (documenting stipulation that class members had hepatitis C, "which is a serious medical need," and that Dr. Williams "ha[d] knowledge of their serious medical need"). Dr. Williams cannot revive issues that he deliberately abandoned. *See Wood v. Milyard*, 566 U.S. 463, 474 (2012). Even if some lingering issue could affect the ultimate outcome on remand, it will not affect this Court's decision on the lack of funds defense.

The controversy has not and will not become moot, regardless of Petitioners' personal status. After a long wait, each of the Petitioners has now received DAA treatment or left TDOC's custody. However, Petitioners represent a certified class of inmates with hepatitis C. App. 1, 23-24. Petitioners can continue litigating for the benefit of class members who need DAAs. *See Bell v. Wolfish*, 441 U.S. 520, 526 n.5 (1979); *Sosna v. Iowa*, 419 U.S. 393, 399-401 (1975).

Dr. Williams contends that the foregoing rule only applies to class actions involving transitory issues that are capable of repetition, yet evading review. Resp't's Br. 28-30. The Court has determined otherwise. "[N]othing" in *Sosna* or its progeny

"holds or even intimates that the fact that the named plaintiff no longer has a personal stake in the outcome of a certified class action renders the class action moot unless there remains an issue 'capable of repetition, yet evading review.'" *Franks v. Bowman Transp. Co.*, 424 U.S. 747, 754 (1976).

Sosna's requirement of a certified class has a "limited exception" for inherently transitory claims. *United States v. Sanchez-Gomez*, 138 S. Ct. 1532, 1539 (2018). If a named plaintiff's claim becomes moot prior to class certification, the case may remain justiciable if "the pace of litigation and the inherently transitory nature of the claims at issue conspire to make [the class certification] requirement difficult to fulfill." *Id.* Petitioners do not need this extra leeway because the district court certified a class.

Here, mootness turns on whether the unnamed class members still have an adversary relationship with Dr. Williams that will facilitate the presentation of issues to the Court. *See Franks*, 424 U.S. at 755-56. They certainly do. TDOC inmates with chronic hepatitis C have ample incentive to continue seeking DAAs from Dr. Williams; if they succeed, they will avoid further suffering or even death.

Dr. Williams has not offered a serious reason to doubt that this is a live controversy, and the Court need not fear that TDOC will run out of infected inmates before a decision. Dr. Williams suggests that all inmates who consent to DAA treatment "may well" receive it soon. Resp't's Br. 32. Unfortunately, that is not remotely realistic. TDOC has made very little progress in reducing the population of infected inmates.

TDOC had approximately 4,740 inmates with chronic hepatitis C at the time of trial in July 2019. App. 3, 24. Slightly more than a year later, TDOC said that it treated 1,449 inmates and was currently treating another 176. Travis Loller, *6th Circuit: OK to Ration Hepatitis C Treatment to Prisoners*, Associated Press (Aug. 25, 2020), https://apnews.com/article/43209fa5f1abdc17696aee9151f8073a. These treatment figures imply that TDOC had about 3,115 infected inmates as of last August.

But other data made public by TDOC reveals an even bleaker situation. On June 30, 2019, TDOC had 4,969 inmates with hepatitis C in the chronic care clinic. TDOC Fiscal Year 2019 Statistical Abstract at 61, *available at* https://www.tn.gov/content/dam/tn/correction/documents/StatisticalAbstract2019.pdf. On June 30, 2020, it had 4,585 such inmates. TDOC Fiscal Year 2020 Statistical Abstract at 82, *available at* https://www.tn.gov/content/dam/tn/correction/documents/StatisticalAbstract2020.pdf. For all of Dr. Williams's "promises and projections about anticipated success," *see* App. 67, TDOC only reduced the number of infected inmates by 384, or 7.7%, in the span of a year.

The pace of treatment has apparently slowed down. TDOC treated 1,978 inmates with DAAs between July 2019 and February 2021. Resp't's Br. 32. A total of 1,625 inmates had at least begun treatment as of last August. Loller, *6th Circuit: OK to Ration Hepatitis C Treatment to Prisoners*. This means that TDOC only treated about 353 inmates from August through February, which averages to 59 inmates per month.

Hepatitis C is a contagious virus, App. 2, 25, so the number of infected inmates will grow, unless TDOC widely distributes DAAs like Petitioners are asking. Even if Dr. Williams followed through on his "current goal" of treating hundreds of inmates per month, *see* Resp't's Br. 32—something he has not been doing for the last six months, at least—TDOC will have thousands of inmates with hepatitis C for the duration of this case. The vast majority want DAA treatment. *See id.* 33 n.5 (estimating that only 250 inmates have refused treatment).

If the Court has any concern about mootness, it can substitute untreated inmates for Petitioners. *See id.* 30 (citing *Baxter v. Palmigiano*, 425 U.S. 308, 310 n.1 (1976)). Any number of inmates would volunteer to be substituted, if necessary to correct the injustice of the Sixth Circuit's decision.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for certiorari.

Respectfully submitted,

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