No. 23-1046

IN THE

Supreme Court of the United States

PETER GEORGE NOE,

Petitioner,

v.

BERKLEY, DR., ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF FOR DR. ANNE S. DOUDS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Other Authorities

INTEREST OF *AMICUS CURIAE*[1]

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SUMMARY OF ARGUMENT

Dental care is a vital component of medical care. Inadequately treated, dental issues can have a significant impact on individuals' short- and long-term physical health, mental health, social relations, and employability. Poor dental care is a particularly serious problem in the prison system. From scheduling appointments to managing pain and receiving proper follow-up care, incarcerated people often have difficulty obtaining prompt and complete treatment for dental issues. Moreover, when incarcerated individuals receive inadequate dental care, both the individual and society suffer. Research demonstrates that formerly incarcerated persons have more difficulty reintegrating into society and

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[1] *Amicus* states that this brief was not authored in whole or in part by counsel for any party, and that no person or entity other than *amicus*, their members, or its counsel made a monetary contribution intended to fund the preparation or submission of this brief. Counsel of record for the parties received timely notice of *amicus*'s intent to file this brief.

obtaining employment if they have poor dental health. The costs of these difficulties ultimately are borne by society in the form of increased reliance on public assistance programs, medical systems, and public health infrastructure.

Courts can and do ensure that incarcerated persons have legal recourse when the prison system fails to address their dental needs. The overwhelming majority of lower courts explicitly recognize that state prisoners' dental care *is* medical care, and that deliberate indifference to prisoners' dental issues violates the Eighth Amendment's ban on cruel and unusual punishment. But the Tenth Circuit's decision in this case prohibits individuals in federal prison from obtaining similar relief for similar violations of their constitutional rights. As a direct consequence of this ruling, incarcerated persons in federal prisons can seek redress only from the very institution that showed deliberate indifference to their dental needs in the first place. The Court should grant the petition for certiorari and reverse the lower court.

ARGUMENT

I. INADEQUATE DENTAL CARE IN PRISONS IS AN IMPORTANT AND WIDESPREAD ISSUE.

The importance of dental care for those incarcerated in our Nation's prison system cannot be understated. Although our health care system often administratively treats dental care as separate from medical care, dental issues are serious medical issues—leaving lasting and costly impacts on individuals' overall health. Incarcerated persons are especially likely to feel those impacts because of poor

access to, and low quality of, dental care in prisons. Moreover, when incarcerated individuals do not receive proper dental care, there are significant downstream impacts both for those individuals and society as a whole.

A. Dental Issues Are Significant Medical Issues.

Courts have long recognized that "dental needs—for fillings, crowns, and the like—are serious medical needs as the law defines that term." *Dean v. Coughlin*, 623 F. Supp. 392, 404 (S.D.N.Y. 1985), *vacated on other grounds*, 804 F.2d 207 (2d Cir. 1986); *see, e.g.*, *Chance v. Armstrong*, 143 F.3d 698, 702 (2d Cir. 1998) (likening "dental conditions" to "other medical conditions" as having varying degrees of severity); *McCarthy v. Place*, 313 F. App'x 810, 814 (6th Cir. 2008) (recognizing that dental needs fall into the category of "serious medical needs"); *Farrow v. West*, 320 F.3d 1235, 1243–44 (11th Cir. 2003) (finding that the need for dental care, combined with the effects of not receiving it, may give rise to a "serious medical need"). Indeed, for the incarcerated population in particular, "dental care is one of the most important medical needs." *Ramos v. Lamm*, 639 F.2d 559, 576 (10th Cir. 1981).

Recognizing dental health as medical health makes sense. The mouth has been described "as a mirror of health or disease, as a sentinel or early warning system[,] . . . and as a potential source of pathology affecting other systems and organs." Henrie M. Treadwell et al., *The Case for Oral Health Care for Prisoners*, in Public Health Behind Bars 333, 335 (Robert B. Greifinger ed., 2007). Periodontal

(gum) diseases have been linked to nearly 60 other adverse health conditions, including cancer, diabetes, cardiovascular disease, and Alzheimer's disease. *See* Anne S. Douds et al., *Why Prison Dental Care Matters: Legal, Policy, and Practical Concerns*, 29 Annals Health L. & Life Sci. 101, 103 (2020) (first citing Yasusei Kudo et al., *Oral Environment and Cancer*, 38 Genes & Env't 1, 4 (2016); and then citing Muhammed Ashraf Nazir*, Prevalence of Periodontal Disease, Its Association with Systemic Diseases and Prevention*, 1 Int'l J. Health Sci. 72, 76 (2017)); U.S. Dep't of Health and Human Servs., *Oral Health in America* 3A-1 (2021). Among many other examples, poor oral hygiene is correlated with pregnancy complications, such as preeclampsia, and periodontal infections during pregnancy are often tied to preterm low birth weight, making it more likely that the baby will have medical issues of its own. *See* Douds et al., *Why Prison Dental Care Matters* at 103; Treadwell et al., *The Case for Oral Health Care for Prisoners* at 336.

Even seemingly minor dental needs can lead to profound adverse health effects if not properly and promptly addressed. An ordinary cavity may "present[] a serious medical need" because it could deteriorate and ultimately "require more invasive and painful treatments, such as root canal therapy or extraction." *Formica v. Aylor*, 739 F. App'x 745, 756 (4th Cir. 2018) (internal quotation marks omitted)); *see also Harrison v. Barkley*, 219 F.3d 132, 137 (2d Cir. 2000) (concluding that cavities present a "serious medical need" (internal quotations omitted)). Likewise, an abscessed tooth is not a "simple toothache," but rather a "bacterial infection of the root of the tooth" that "can spread to the adjacent gum and

beyond," which "may cause swelling that closes off the airway, or . . . may travel to the brain and cause death." *Formica*, 739 F. App'x at 745 (internal quotation marks omitted).

In addition to these long-term health effects, dental health has a significant impact on day-to-day health. Persons with persistent dental issues tend to avoid hard-to-chew foods and struggle to consume sufficient fiber. Anne S. Douds et al., *Decayed Prospects: A Qualitative Study of Prison Dental Care and its Impact on Former Prisoners*, 41 Crim. Justice Rev. 21, 30 (2015). Instead, they often opt for processed foods with high levels of cholesterol, saturated fatty acids, carbohydrates, and low levels of vitamins and protein. *Id.* Individuals with these nutritional deficiencies face a higher risk of malnutrition, constipation, colon cancer, and diabetes. *Id.* In short, the common societal perception that dental health and medical health are separate and distinct concerns is contradicted by both scientific research and well-reasoned caselaw. Dental health is essential to an individual's overall medical health.

B. Many Incarcerated Individuals Receive Poor Dental Care.

Despite the critical importance of oral health, incarcerated individuals generally receive abysmally inadequate dental care. Although incarcerated individuals may in theory book a dentist appointment, they cannot do so on their own. Relying on prison staff, incarcerated individuals' complaints of dental pain are often either wholly ignored, subject to significant delays, or met with inadequate treatment.

Neglect of incarcerated individuals' dental care

has been recognized by many courts. In one case, an incarcerated individual reported feeling a "sharp pain" every time "air hit[] an area of [his] mouth" because of a missing filling. *Formica* , 739 F. App'x at 750. Despite the hole in his tooth being so large that other individuals could see it, the dentist reported "no significant findings." *Id*. In another case, an individual suffering severe pain from the loss of dentures alleged that prison officials failed to act to relieve his pain or prescribe a soft food diet—despite knowing that his gums were bleeding, his teeth were breaking, and his ailing dental health affected his chewing. *Hunt v. Dental Dep't*, 865 F.2d 198, 200 (9th Cir. 1989).

Even where dental care is not denied outright, delay providing that care is commonplace. Some prisons require co-pays ranging from $6.00 to $50.00 and refuse to schedule dental appointments if individuals have not fully paid for prior services. Douds et al., *Why Prison Dental Care Matters* at 113. For incarcerated persons who make only a few cents per hour, these costs are often prohibitive. *Id.* at 102; Kritika Singh, *A Tooth for a Tooth: The Effects of Poor Dental Care in California State Prisons*, The Davis Vanguard (Nov. 2, 2021), https://tinyurl.com/49mtuk7c. In one instance, an incarcerated individual had two teeth extracted and later began experiencing severe pain because of an unrelated infected tooth. *Fields v. Gander*, 734 F.2d 1313, 1314 (8th Cir. 1984). Despite the fact that prison officials knew the individual was in pain and observed swelling in his face, he was denied further dental care until he paid for his two earlier extractions. *Id.*

Other facilities require individuals to be incarcerated for a certain amount of time before they can receive dental care. For example, the Michigan Department of Corrections required individuals to be incarcerated for two years before they were eligible to receive any "routine" dental procedure. *Dearduff v. Washington*, 330 F.R.D 452, 457 (E.D. Mich. 2019). The Bureau of Prisons has similar waiting periods for certain categories of incarcerated individuals. *See* Federal Bureau of Prisons, Program Statement: Dental Services 11 (2016). In two years, a patient's periodontal condition could worsen significantly, resulting in "gratuitous pain, loss of bone, and tooth loss." *Dearduff,* 330 F.R.D. at 457.

Of course, these are not the only obstacles prisoners face in obtaining prompt dental care. Across the country, incarcerated people face "[d]elay in securing an initial appointment. Delay in diagnosis. Delay in interim/temporary treatment. Delay in remediation of chronic conditions. Delay in referrals. [And] [d]elay in routine care." Douds et al., *Why Prison Dental Care Matters* at 119. These delays are costly. Immediate dental care is essential in identifying and triaging problems to minimize the chances of protracted pain, suffering, and complications. *Id.* at 112–13.

Once an incarcerated individual finally sees a dentist, they face another set of hurdles in obtaining *adequate* treatment. As with most medical ailments, simply slapping a band aid over a debilitating dental issue, rather than fixing its root cause, may result in irreversible physical damage. For example, one incarcerated individual submitted multiple requests over the course of months seeking dental services but

was entirely ignored. *Moore v. Jackson*, 123 F.3d 1082, 1085 (8th Cir. 1997). The last of these requests reported an "infected tooth, swelling to face/neck, fever, discharge eye & nose, intense pain." *Id.* After finally receiving an examination, he was provided Tylenol for pain relief, but the "intense pain," "swelling," and "discharge" continued. *Id*. Despite these ongoing symptoms, he was not seen by dental staff for another four months, when an extraction was required and he was diagnosed with irreversible pulpitis (inflammation of the pulp of the tooth). *Id.* In another instance, an incarcerated individual endured over seven months of severe pain due to a cavity before a dentist declined to perform a temporary filling and instead simply prescribed Ibuprofen. *McCarthy v. Place*, 313 F. App'x 810, 816 (6th Cir. 2008).

Inadequate follow-up care is similarly consequential. In one case, an incarcerated individual with a root infection was informed that the tooth would be pulled after the prescribed antibiotic had "run its course," but he never received a follow-up appointment. *Gevas v. Mitchell*, 492 F. App'x 654, 655–56 (7th Cir. 2012). Upon exhausting his supply of pain medication, the individual's condition "quickly worsened, an abscess developed, and he experienced difficulty eating and sleeping because of the extreme pain." *Id.* Beyond the pain, he was "disciplined when the pain kept him from reporting for a job assignment." *Id.* For months, he repeatedly asked for dental care, but did not see a dentist until nearly six months after the initial diagnosis. *Id.*

These shortcomings in prison dental care can have serious repercussions for an individual's health. In a particularly gruesome case, an incarcerated

individual who began complaining of molar pain in early November 2006—and filled out almost-weekly sick-call requests describing increasing levels of pain—was not seen by a dentist until January 2007. *McGowan v. Hulick*, 612 F.3d 636, 638 (7th Cir. 2010). At that appointment, the procedure "went badly," with the patient experiencing "excruciating pain" after the tooth fragmented and the dentist used "nondental instruments, including an ice pick, to dig the splinters from his gums." *Id.* To treat this pain, and the pain associated with a mass of tissue the size of a golf ball that subsequently broke through his stitches, the individual was given aspirin and Tylenol. *Id.* Faced with significant delays in treatment, his ordeal continued until November 2007—a year after he first began experiencing pain—when an ENT (ear, nose, and throat) specialist performed surgery to remove the tissue mass and close the hole. *Id.* at 639.

Like these incarcerated individuals, Mr. Noe experienced lengthy delays and inadequate dental care while in prison. Despite suffering from substantial pain in three teeth, Mr. Noe was forced to wait *eighteen months* between his initial visit and the last repair—and was denied pain medication. *Noe v. United States*, 2023 WL 8868491, at *1 (10th Cir. Dec. 22, 2023). The care he received was also grossly deficient. While Mr. Noe's dentist acknowledged that he needed three crowns, the dentist instead filled one of the three teeth because the facility's policies limited treatment to one tooth per visit and did not cover the expense of crowns. *Id.* When Mr. Noe's filled tooth worsened, the dentist tried another filling, but the issues with that tooth persisted. *Id*. Eventually, the dentist tried a pin and a filling, a procedure which

shattered the tooth and ultimately required an extraction. *Id.*

Given the significant delay and lack of adequate treatment that pervade prison dental care, it is no wonder that, compared to the general population, incarcerated individuals across the country have higher rates of untreated decay, worse periodontal health, and a higher prevalence of urgent dental needs. U.S. Dep't of Health and Human Servs., *Oral Health in America* at 1–17.

C. Inadequate Dental Care Has Detrimental Effects on the Reintegration of Incarcerated Persons and the Welfare of Society as a Whole.

For formerly incarcerated individuals, dental issues make it all the more difficult to overcome their criminal records and reenter society. Their teeth may become another badge of incarceration that makes it "harder to enter" the labor market. Janet L. Dolgin, *Who's Smiling Now?: Disparities in American Dental Health*, 40 Fordham Urb. L.J. 1395, 1402 (2013). For example, missing teeth directly correlate with worse employment outcomes and social mobility. *Id.* As a woman who lost all her teeth reported: "Since I didn't have a smile . . . I couldn't even work at a checkout counter." Erik Eckholm, *America's 'Near Poor' Are Increasingly at Economic Risk, Experts Say*, N.Y. Times (Apr. 15, 2024), https://tinyurl.com/3e63ka3h. And without a job, the formerly incarcerated cannot afford to receive dental treatment to fix the problems that may have developed in prison, particularly since "the price of cosmetic dental care [is] high." Dolgin, 40 Fordham Urb. L.J. at 1426 ("Remolding teeth can

cost between $5,000 and $80,000 and is generally not covered by insurance.").

Relatedly, "a person's dental condition is a powerful sign of socioeconomic status." Dolgin, 40 Fordham Urb. L.J. at 11397 ("[T]eeth have become consumer goods—more effective markers of class status, even, than clothing, jewelry, and hairstyle."). The same dental imperfections that are commonly considered markers of poverty "further decrease [a person's] opportunity to obtain employment that might in turn offer health coverage." *Id.* at 1402.

The unemployment of formerly incarcerated individuals has ramifications for both the person and society at large. Taxpayers bear the burden when formerly incarcerated people cannot support themselves and are forced to enroll in "social programs like welfare and government-sponsored health plans such as Medicaid." Michele Westhoff, *An Examination of Prisoners' Constitutional Right to Healthcare: Theory and Practice*, ABA Health Law 1, 11 (Aug. 2008). Moreover, if a formerly incarcerated individual "is unable to provide for his or her own needs," they "may resort to committing crimes" in order to survive, which increases recidivism. *Id.* Such an outcome defeats the purpose of rehabilitation and creates a criminal cycle for the incarcerated. *Id.*

Poor dental health also raises the "already burdensome medical care costs and weigh[s] down the health care system." Kristen Chang, *Shining the Light on Pearly Whites: Improving Oral Care for Elders in A Post-Affordable Care Act World*, 23 Elder L.J. 489, 491 (2016). Data shows that people with dental diseases often first turn to emergency rooms for

their care. Dolgin, 40 Fordham Urb. L.J. at 1407 (identifying a Pew Center study which found that dental conditions comprised the primary reason for over 800,0000 visits to emergency rooms in 2009). Not only is the cost high, but those seeking care do not receive adequate treatment, as "emergency rooms often do not provide dental care beyond antibiotics and painkillers for infections." *Id.* Yet this tremendous burden and cost "could have been prevented by routine dental care." *Id.* Denying incarcerated persons adequate dental care thus has ripple effects far beyond the prisons and inmates themselves.

II. DELIBERATE INDIFFERENCE TO DENTAL CARE IS SIGNIFICANT UNDER THE EIGHTH AMENDMENT.

In *Estelle v. Gamble*, this Court took a major step toward protecting the rights of the incarcerated by holding that "deliberate indifference to serious medical needs" of an incarcerated person is a "violation of the Eighth Amendment['s]" ban on cruel and unusual punishment. 429 U.S. 97, 106 (1976). *Estelle* was not about dental care, but as discussed above, the overwhelming majority of lower courts have since held that dental care *is* medical care for Eighth Amendment purposes.

The scope of what constitutes deliberate indifference to dental care is truly diverse. Courts have recognized that deprivation of toothpaste is grounds for an Eighth Amendment claim. *See, e.g.*, *Flanory v. Bonn*, 604 F.3d 249, 256 (6th Cir. 2010) (noting that the plaintiff was deprived of "toothpaste for 337 days" and that "[p]rison officials were also aware that the only way for [the plaintiff] to obtain

toothpaste" would be to "purchase the item from the prison"). Prison officials can also be subject to Eighth Amendment claims if they do not provide medically necessary dentures or fail to treat an incarcerated person before they are fitted for dentures. *See Hunt v. Dental Dep't*, 865 F.2d 198, 200 (9th Cir. 1989) (concluding that allegations that "prison officials were aware that the loss of [plaintiff's] dentures was causing him severe pain and resulting in permanent damage to his teeth" were sufficient to state an Eighth Amendment claim); *see also Vasquez v. Dretke*, 226 F. App'x 338, 339 (5th Cir. 2007) (permitting an Eighth Amendment claim when the defendants denied the plaintiff dentures). Delaying treatment for oral issues like toothaches is also actionable. *See Hartsfield v. Colburn*, 491 F.3d 394, 397 (8th Cir. 2007) (recognizing that "a number of our decisions have reversed the grant of summary judgment in favor of prison officials and prison dentists who delayed three weeks or more in providing dental care for an inmate whose mouth showed obvious signs of serious infection").

Despite this extensive backdrop of precedent, the Tenth Circuit prevented Mr. Noe from vindicating his Eighth Amendment right in court. The panel below refused to recognize the availability of a remedy under *Bivens v. Six Unknown Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), due to an extremely narrow application of this Court's decision in *Egbert v. Boule*, 596 U.S. 482 (2022). *See Noe*, 2023 WL 8868491, at *3. The panel declined to consider if Mr. Noe's context was "meaningfully different" from other *Bivens* contexts—ending its analysis after determining that "an adequate alternative remedy

exists." *Id.* As the petition explains, this is a highly questionable reading of this Court's *Bivens* precedent.

Given the importance of the issues in this case, this Court's review is proper to ensure that incarcerated persons can receive the care they deserve under the law.

CONCLUSION

For the reasons stated above, the Court should grant the petition for certiorari and reverse the Tenth Circuit's judgment.

Respectfully submitted,

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