No. _____

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Eighth Amendment prohibits cruel and unusual punishments, including deliberate indifference to a convicted prisoner's serious medical needs and other basic requirements. This prohibition applies to States through the Fourteenth Amendment, and inmates have a right of action to enforce it under 42 U.S.C. § 1983. The deliberate indifference standard requires proof of an objectively serious need on the part of the inmate, as well as a culpable mental state on the part of the defendant.

The federal courts of appeals have split on whether a lack of funds or other resources can defeat a deliberate indifference claim by undercutting the mental state requirement. In the typical scenario, a State has underfunded its prison system, preventing officials from delivering medical treatment, security, or proper sanitation. A number of circuits only recognize the lack of funds defense when an inmate is trying to hold a prison official personally liable for damages, not in cases for injunctive relief to improve prison conditions going forward. A few circuits do not recognize the lack of funds defense at all, regardless of the relief sought. Going to the other extreme, the Sixth Circuit held in this case that inmates cannot even get an injunction if the defendant shows that poor prison conditions resulted from a lack of funds.

The questions presented are:

1. Does the unavailability of funds or other resources negate the subjective component of a deliberate indifference claim under the Eighth Amendment?

2. If lack of funds is a valid defense at all, can a defendant assert this defense when sued in his or her official capacity for injunctive relief?

PARTIES TO THE PROCEEDINGS

Petitioners are Gregory Atkins, Christopher Gooch, Kevin Proffitt, and Thomas Rollins, Jr. They were the plaintiffs in the district court at the time of judgment and the appellants in the court of appeals.

Respondent is Dr. Kenneth Williams. He was a defendant in the district court and the appellee in the court of appeals.

Charles Graham and Russell Davis were the original plaintiffs in the district court. They were not appellants in the court of appeals and are not parties here.

Tony Parker and Dr. Marina Cadreche were other defendants in the district court. They were not appellees in the court of appeals and are not parties here.

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PETITION FOR WRIT OF CERTIORARI

Hepatitis C, a communicable and sometimes fatal disease, has become widespread in prisons. In some cases, inmates contract it through risky behaviors like tattooing or sexual contact. In other cases, inmates contract it because of cramped and unsanitary living conditions. Those infected experience a range of harsh symptoms, including pain, bleeding, cognitive decline, and scarring of the liver. Eventually, the disease can lead to cirrhosis and liver failure or to liver cancer.

Tennessee's prison system has not escaped this problem. By a conservative estimate, at the time of trial in this case, approximately 4,740 of the 21,000 inmates (23%) had chronic hepatitis C. Approximately 1,375 of the infected inmates (29%) were in the final stages of the disease, having reached the point of advanced liver scarring or cirrhosis.

Prisons have mighty weapons to fight hepatitis C. Pharmaceutical drugs called direct-acting antivirals (DAAs) have been available since 2011. After some refinements, they now cure virtually every patient who takes them.

Dr. Kenneth Williams, the top medical official in the Tennessee Department of Correction (TDOC), abandoned the older hepatitis C medication after the introduction of DAAs. However, he did not make the transition and give out DAAs to the inmates who needed them. Only about 450 inmates ever got them. Year after year, inmates died of hepatitis C under Dr. Williams's supervision—81 since DAAs became available.

Petitioners sued Dr. Williams solely for injunctive relief to gain access to these life-saving drugs. A divided panel of the Sixth Circuit affirmed a judgment

for Dr. Williams following a bench trial. The majority held that Dr. Williams was not deliberately indifferent because he spent all the money set aside for DAAs in TDOC's budget. Since Dr. Williams supposedly did the best he could with limited funds, the inmates could not get an injunction requiring him to do better.

As the dissent pointed out, this decision puts the Sixth Circuit in direct conflict with other courts of appeals. The Eighth Amendment means very different things, depending on where inmates happen to be serving their sentences.

For the Eighth, Ninth, Tenth, and Eleventh Circuits, the type of relief sought makes all the difference. These circuits let an individual prison official avoid damages liability by showing that he or she did not have the funds to care for inmates. Underlying this rule is the idea that holding prison officials personally liable for budgetary decisions made by someone else would be unfair. However, the circuits that take this view still allow injunctive relief to correct substandard prison conditions. A State must increase funding as necessary to comply with an injunction.

The First, Fifth, and Seventh Circuits have not faced the lack of funds defense in a damages suit but agree that the defense does not apply when the plaintiff is seeking an injunction.

The Second, Third, Fourth, and District of Columbia Circuits categorically reject the lack of funds defense, even in a damages suit.

The Sixth Circuit, standing alone, recognizes the lack of funds defense in all cases. If defendants can show that they failed to act because the legislature did not appropriate enough money, then even egregious

cases of mistreatment will go unremedied. This rule invites States to cut prison funding and provides no consequence if inmates suffer or die as a result.

Properly interpreted, the Eighth Amendment requires the humane treatment of prisoners, even when officials fail to request or approve an adequate budget. The Court just reinstated a deliberate indifference case brought by an inmate who was held in "shockingly unsanitary cells" without clothes or access to a functioning toilet. *Taylor v. Riojas*, 141 S. Ct. 52, 53-54 (2020) (per curiam). The Court denied qualified immunity because "any reasonable officer should have realized that Taylor's conditions of confinement offended the Constitution." *Id.* at 54; *see also id.* at 56 (Alito, J., concurring in the judgment) (agreeing that qualified immunity did not protect officers who made no effort to alleviate these "horrific" conditions). Mr. Taylor's experience would have been no less intolerable if it happened because budget cuts left the prison short-staffed. And if the Eighth Amendment prohibited holding Mr. Taylor in filthy cells for six days, then it would surely entitle him to medical care if he contracted hepatitis C from the human waste in those cells.

In *Taylor* and previous cases, the Court has tried to create an enforceable standard for conditions of confinement in prison. That was an exercise in futility if States can deactivate the Eighth Amendment simply by withholding funds. The circuit split on this extremely important issue should not continue. The Court should grant the petition for certiorari and reject the lack of funds defense.

OPINIONS BELOW

The Sixth Circuit's opinion is reported at 972 F.3d 734 and reproduced at App. 1-21. The district court's findings of fact and conclusions of law are reported at 412 F. Supp. 3d 761 and reproduced at App. 22-68.

JURISDICTION

The Sixth Circuit issued its opinion and judgment on August 24, 2020. In an Order dated March 19, 2020, this Court extended the time for filing all petitions for a writ of certiorari to 150 days from the date of the lower court judgment, order denying discretionary review, or order denying a timely petition for rehearing. Petitioners filed this petition within the 150-day time limit. The Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Eighth Amendment to the United States Constitution provides:

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

42 U.S.C. § 1983 provides, in relevant part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof 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

A. Deliberate Indifference Under the Eighth Amendment

Estelle v. Gamble, 429 U.S. 97, 103 (1976), established that convicted prisoners have a right to basic medical care under the Cruel and Unusual Punishments Clause of the Eighth Amendment. To succeed in this type of claim, the inmate must show "deliberate indifference to serious medical needs," as opposed to negligence or inadvertence. *Id*. at 104-06.

The Court later confirmed that the deliberate indifference standard applies to all Eighth Amendment claims challenging conditions of confinement. *Wilson v. Seiter*, 501 U.S. 294, 303 (1991). The standard has an objective component relating to the seriousness of the deprivation and a subjective component relating to the defendant's mental state. *Id*. at 298.

The United States, as amicus curiae in *Wilson*, warned that a mental state requirement encouraged defendants to argue that, "despite good-faith efforts to obtain funding, fiscal constraints beyond their control prevent the elimination of inhumane conditions." *Id*. at 301. The Court found it "hard to understand" how that would justify dropping the mental state requirement altogether. *Id*. at 301-02. However, the Court did not decide whether a lack of funds can defeat a deliberate indifference claim. The respondents in *Wilson* did not make that argument, and the Court had no "indication that other officials have sought to use such a defense to avoid the holding of *Estelle v. Gamble*, 429 U.S. 97, 97 S.Ct. 285, 50 L.Ed.2d 251 (1976)." *Id*. at 302.

The Court elaborated on the subjective component in *Farmer v. Brennan*, 511 U.S. 825, 847 (1994), holding that a prison official shows deliberate indifference "only if he knows that inmates face a substantial risk of serious harm and disregards that risk by failing to take reasonable measures to abate it."

The Court has not revisited the lack of funds defense since noting it in *Wilson*.

B. Evidence and Proceedings in the District Court

Hepatitis C is a contagious virus spread through contact with infected blood or other bodily fluids. App. 25. In approximately 15% to 25% of cases, the infection spontaneously clears during the first several months. *Id*. Patients whose infections do not clear move into the chronic phase. *Id*.

Chronic hepatitis C causes progressive scarring of the liver, called fibrosis. App. 26. Fibrosis is measured on a five-point scale: F0 (no fibrosis), F1 (mild fibrosis), F2 (moderate fibrosis), F3 (advanced fibrosis), and F4 (cirrhosis). *Id*. Approximately 20% to 40% of chronic hepatitis C patients will progress to cirrhosis, and approximately 4% will develop liver cancer. App. 27. The disease causes many other health problems. Patients may experience fatigue, jaundice, nausea, and pain at any stage. App. 26. Patients with advanced cases may experience vasculitis and skin lesions, mental impairment, kidney symptoms, and heart symptoms. *Id*. Symptoms vary and do not correlate with the level of fibrosis. App. 27.

Doctors used to treat hepatitis C with a drug called interferon. App. 28. Interferon had severe side effects and only a moderate success rate. *Id*.

In 2011, the U.S. Food and Drug Administration first approved DAAs to treat hepatitis C. *Id.* Patients take a DAA pill once a day, and it has minimal side effects. *Id.* DAAs cure hepatitis C in the vast majority of patients. App. 28-29, 59. With the introduction of DAAs, the medical community abandoned interferon. App. 28.

At all relevant times, Dr. Williams served as TDOC's Medical Director and Chief Medical Officer and had overall responsibility for the medical treatment of inmates. App. 34-35. In 2015, he formed a committee to decide which inmates get DAA treatment. App. 36. Dr. Williams chaired the committee. *Id.*

In the words of the district court, the committee "approved a very few inmates for DAA treatment." App. 44. TDOC prescribed DAAs for a total of "approximately 450 inmates" over the years. App. 24. As of 2019, TDOC had about 21,000 inmates, and approximately 4,740 of them (23%) were known to be infected with chronic hepatitis C. *Id.* The infection rate may have been higher because TDOC had not tested everyone. *Id.* Approximately 1,375 of the inmates known to be infected (29%) had reached the F3 or F4 stage—advanced fibrosis or cirrhosis. App. 38. At least 109 inmates in TDOC custody died from complications of hepatitis C from 2009 to 2019. App. 25.

The price of DAAs started high but dropped dramatically. A course of DAA treatment cost TDOC between $80,000 and $189,000 in 2015. App. 49. By 2019, the price had dropped to between $13,000 and $32,000. *Id.* TDOC's most recent annual budgets only had $4.6 million in recurring funds for the purchase of DAAs. *Id.*

In 2016, a group of inmates sued Dr. Williams and other TDOC officials under 42 U.S.C. § 1983 and the Eighth Amendment for failing to provide DAA treatment. The district court had federal question jurisdiction under 28 U.S.C. § 1331. It certified a class of all TDOC inmates infected with hepatitis C with at least 12 weeks left to serve on their sentences. App. 23-24. The district court later substituted the four Petitioners as the named plaintiffs and class representatives. Petitioners only sought injunctive and declaratory relief, not damages. App. 23.

Shortly before trial, TDOC received a special one-time allocation of $26.4 million for DAAs in the upcoming fiscal year. App. 49.

The district court held a bench trial and ruled that TDOC's hepatitis C treatment policies did not violate the Eighth Amendment. App. 23. "Plaintiffs presented compelling proof through individual inmates that TDOC's treatment of HCV inmates has been erratic, uneven, and poor, resulting in denial of DAA treatment where it was clearly appropriate." App. 45. Nevertheless, the district court determined that TDOC could prioritize the sickest patients for treatment "when resources are limited." App. 60-61. Dr. Williams had recently changed TDOC's "guidance" document to make every infected inmate at least eligible for consideration for DAAs, and he had created a "workflow" document with protocols for doctors. App. 35, 61-62. The district court found these measures adequate, "particularly given the resources available to TDOC." App. 62-63. The district court awarded judgment to Dr. Williams and a co-defendant. App. 69.

C. The Sixth Circuit's Divided Decision

Petitioners only appealed the judgment with respect to Dr. Williams. The Sixth Circuit affirmed by a 2-to-1 vote. App. 2.

Due to concessions made by Dr. Williams, the dispute was narrow:

> Here, everyone agrees that hepatitis C is an objectively serious medical condition and that Williams understood the risk that hepatitis C posed. The only question, then, is whether Williams—and Williams alone—"so recklessly ignored the risk" of hepatitis C, in designing and implementing the 2019 guidance, that he was deliberately indifferent to that risk.

App. 9.

In the majority's view, Dr. Williams acted appropriately by monitoring patients, prioritizing the sickest for treatment, and creating "an extensive latticework of procedures in support." App. 9-10. "The plaintiffs in essence demand that he spend money he did not have." App. 10. The majority doubted that Dr. Williams had a constitutional duty to seek more funding, but he did ask for budget increases. *Id.* "In the real world of limited resources, Dr. Williams's actions pursuant to the 2019 guidance reflected anything but indifference." App. 10-11.

Judge Gilman dissented. As he observed, the medical evidence supported treatment for hepatitis C as soon as possible, "causing rationing schemes such as the one endorsed by Dr. Williams to be abandoned by the medical establishment." App. 14. Eighty-one inmates in Dr. Williams's care died from hepatitis C after DAAs became available. App. 15.

The majority essentially held that "Dr. Williams has done the best that he can with the limited financial resources available to him." App. 12. Judge Gilman disagreed that this was a valid defense. In Supreme Court precedent, he found a "general principle that cost cannot excuse an ongoing constitutional violation." *Id*. (citing *Watson v. City of Memphis*, 373 U.S. 526, 537 (1963)). The majority also failed to "grapple with relevant persuasive precedent from our sister circuits" holding that lack of funds is not a defense to a deliberate indifference claim seeking injunctive relief. App. 16-18 (citing *Peralta v. Dillard*, 744 F.3d 1076, 1083 (9th Cir. 2014) (en banc), *Williams v. Bennett*, 689 F.2d 1370, 1388 (11th Cir. 1982), and *Finney v. Ark. Bd. of Corr.*, 505 F.2d 194, 201 (8th Cir. 1974)).

Dr. Williams always received the funding he requested for DAAs, but "nothing in the record shows that Dr. Williams ever *asked* for enough funding to treat all of the inmates suffering from chronic hepatitis C." App. 19.

Judge Gilman pointed to another recent case, *Stafford v. Carter*, No. 1:17-cv-00289-JMS-MJD, 2018 WL 4361639 (S.D. Ind. Sept. 13, 2018), which held that all Indiana inmates with chronic hepatitis C had a right to DAA treatment, except where it was medically contraindicated. App. 18. "Dr. Williams is essentially arguing that what has been held to be cruel and unusual in Indiana is not cruel and unusual in Tennessee." App. 19. The majority's recognition of the lack of funds defense, Judge Gilman wrote, "will result in a patchwork application" of the Eighth Amendment in different States. App. 18.

REASONS FOR GRANTING THE PETITION

No one expects prisons to be comfortable, but without adequate resources, prisons can easily turn into a nightmarish environment. Even inmates with relatively minor offenses experience physical violence, rape, filthy living conditions, and disease. Untreated hepatitis C can cause years of misery and an awful death. To protect inmates from such suffering, the Eighth Amendment sets a floor of civilized treatment and requires prison officials to take affirmative action.

The United States foresaw the danger of a lack of funds defense in *Wilson*, but the Court left the issue for another day. 501 U.S. at 301-02. Since then, many defendants have asserted a lack of funds to avoid responsibility for prison conditions. The issue has percolated in the lower courts for thirty years, resulting in a well-defined circuit split that the dissent below identified.

This case isolates and tees up the controversy as well as it possibly could. Dr. Williams conceded every aspect of Petitioners' deliberate indifference claim, except his alleged failure to reasonably respond to the risk of hepatitis C. The majority ruled in his favor, even though he stood by for years and watched inmates die from a curable disease. The only thing that saved Dr. Williams from a judgment, according to the Sixth Circuit, was the legislature's failure to provide enough money for necessary medical care.

The courts of appeals sharply disagree on this defense. Defendants will continue to raise it wherever the governing circuit law allows, and the Eighth Amendment's prohibition against cruelty will continue to depend on a prisoner's location. The circuit split on this grave constitutional matter requires immediate review by the Court.

I. The Decision Below Deepens a Long-Running Circuit Split on the Lack of Funds Defense

A. Some Circuits Have a Double Standard for Damages and Injunctions

The Ninth and Eleventh Circuits explicitly distinguish between damages suits and injunction suits, only permitting the lack of funds defense in the former. The Eighth and Tenth Circuits have embraced the same distinction by taking opposite positions in the two different contexts.

In *Williams v. Bennett*, 689 F.2d 1370, 1374 (11th Cir. 1982), an inmate who had been stabbed sued prison officials for not providing adequate security. The Eleventh Circuit reviewed an instruction letting the jury "consider the lack of sufficient funds to comply" with a prior injunction intended to prevent such violence. *Id.* at 1387. The defendants argued the "unfairness" of holding them personally liable when they were "powerless to control legislative appropriations that would facilitate compliance." *Id.*

Because the inmate sought damages, the Eleventh Circuit upheld the jury instruction:

> Th[e] distinction lies in the difference between a suit for injunctive relief against a state and a suit for damages against an individual state employee. The assumption underlying rejection of the lack of funds defense is that a state is not required to operate a penitentiary system. If, however, a state chooses to operate a prison system, then each facility must be operated in a manner consistent with the constitution. Thus, when a court is considering injunctive relief against the operation of an

> unconstitutionally cruel and unusual prison system, it should issue the injunction without regard to legislative financing. . . .
>
> In contrast, however, we are called upon to consider the liability of individual state employees for injuries suffered as a result of the unconstitutional conditions. Unlike the state, an individual defendant generally has neither the power to operate nor close down a prison. . . .
>
> In essence, the availability of funds, or lack thereof, is relevant in determining whether the individual is capable of committing the constitutional wrong alleged.

Id. at 1388 (footnote omitted); *accord LaMarca v. Turner*, 995 F.2d 1526, 1537 & n.23 (11th Cir. 1993).

The Ninth Circuit followed in these footsteps. In *Peralta v. Dillard*, 744 F.3d 1076, 1080 (9th Cir. 2014) (en banc), it "consider[ed] whether prison officials sued for money damages under 42 U.S.C. § 1983 may raise a lack of available resources as a defense." Writing for the majority, Judge Kozinski recognized that proof of a culpable mental state is necessary. *Id.* at 1084. However, *Wilson* did not resolve how funding interacts with the mental state requirement. *Id.* at 1082.

For the Ninth Circuit, differentiating between damages and injunctions provided a way to maintain accountability without unfairly punishing individual defendants:

> Lack of resources is not a defense to a claim for prospective relief because prison officials may be compelled to expand the

> pool of existing resources in order to remedy continuing Eighth Amendment violations. A case seeking prospective relief thus can't be dismissed simply because there is a shortage of resources.
>
> Damages are, by contrast, entirely retrospective. They provide redress for something officials could have done but did not. What resources were available is highly relevant because they define the spectrum of choices that officials had at their disposal.

Id. at 1083 (internal citations omitted).

Mr. Peralta only sought damages for a delay in dental care; therefore, the Ninth Circuit held that the district court properly instructed the jury to consider the resources available to the prison dentist. *Id*. at 1083-84. A jury should not "ignore that there was no money or staff available" on the way to holding the dentist personally liable. *Id*. at 1082-83.

The decisions of the Eighth and Tenth Circuits line up the same way. Prison officials can assert the lack of funds defense when sued individually for damages. *See Cullor v. Baldwin*, 830 F.3d 830, 839 (8th Cir. 2016) (affirming summary judgment for defendants where "governmental and economic factors played the greatest role in the shortage" of dentists and defendants were not "responsible for *setting* the budget available to the ISP to hire dentists"); *Tafoya v. Salazar*, 516 F.3d 912, 920 (10th Cir. 2008) (where sheriff claimed "he did not install more surveillance cameras because of budget constraints," a jury had to decide whether the failure truly arose "out of deliberate indifference or lack of funding").

By contrast, a lack of funds will not stop a district court from issuing injunctive relief in the Eighth and Tenth Circuits. *See Ramos v. Lamm*, 639 F.2d 559, 573 n.19 (10th Cir. 1980) ("If the appellants are suggesting, by their reference to their proposed 1981 budget, that they lack sufficient funds to increase the security staff at Old Max, we must reject their argument. The lack of funding is no excuse for depriving inmates of their constitutional rights."); *Finney v. Ark. Bd. of Corr.*, 505 F.2d 194, 201 (8th Cir. 1974) ("Lack of funds is not an acceptable excuse for unconstitutional conditions of incarceration.").

B. Several More Circuits Agree That a Lack of Funds Does Not Prevent Injunctive Relief

The First, Fifth, and Seventh Circuits have only addressed the lack of funds defense in injunction suits, and all of them rejected it. *See Wellman v. Faulkner*, 715 F.2d 269, 274 (7th Cir. 1983) ("We, of course, recognize that many of these appalling medical deficiencies are closely related to the lack of funds to support these activities. We understand that prison officials do not set funding levels for the prison. But, as a matter of constitutional law, a certain minimum level of medical service must be maintained to avoid the imposition of cruel and unusual punishment."); *Smith v. Sullivan*, 611 F.2d 1039, 1043-44 (5th Cir. 1980) ("It is well established that inadequate funding will not excuse the perpetuation of unconstitutional conditions of confinement . . . ."); *Rozecki v. Gaughan*, 459 F.2d 6, 8 (1st Cir. 1972) (where district court dismissed complaint because "the authorities are doing all they can with what they have," court of appeals reversed because "[h]umane considerations and constitutional requirements are not, in this day, to be measured or limited by dollar

considerations" (quotation marks omitted)).

Confined to the context in which they arose, these decisions add to the body of law holding that injunction suits are not subject to the lack of funds defense.

C. Some Circuits Reject the Lack of Funds Defense in Damages Suits, As Well

The Second, Third, Fourth, and District of Columbia Circuits have gone a step further and refused to allow the defense in the damages context.

In *Williams v. Greifinger*, 97 F.3d 699, 700 (2d Cir. 1996), an inmate sued the prison's chief medical officer after being denied out-of-cell exercise for over a year. The inmate eventually returned to the general population, so his complaint only sought damages for what he previously endured. *Id.* at 701-02. Reversing a summary judgment for the chief medical officer based on qualified immunity, the court of appeals held that the inmate had a clearly established right to exercise under the Eighth Amendment. *Id.* at 703-05. Furthermore, "prisons may not invoke cost considerations in denying prisoners the opportunity to exercise." *Id.*; *see also id.* at 707 ("Nor, as we have already observed, may [the prison] argue that it would be too costly to provide Williams with separate exercise arrangements."). By ruling out "cost considerations," the Second Circuit closed the door on the lack of funds defense.

Elsewhere, prison officials allegedly denied an inmate physical therapy in the time frame for it to be effective, causing him to lose function in his left leg and foot. *Durmer v. O'Carroll*, 991 F.2d 64, 66-67 (3d Cir. 1993). By all appearances, the inmate only sued for his past injury—that is, for damages. The evidence suggested that physical therapy was not

available in the prison and the prison doctor "might have had a motive for deliberately avoiding physical therapy, namely, that physical therapy would have placed a considerable burden and expense on the prison and was therefore frowned upon throughout the prison health system." *Id*. at 68 & n.10. The court of appeals reversed a grant of summary judgment to the prison doctor because a trier of fact could determine that he failed to provide physical therapy because of a "non-medical factor." *Id*. at 69. Once again, an alleged scarcity of resources did not shield the prison official from liability.

In *Mitchell v. Rice*, 954 F.2d 187, 189 & n.2 (4th Cir. 1992), an inmate sued after being confined in a cell for long periods without out-of-cell exercise or fresh air. A previous appeal had narrowed the case to a damages claim relating to lack of exercise. *See id*. at 190; *Mitchell v. Martin*, 867 F.2d 609 (4th Cir. 1989) (table) (describing case as an "action for damages"). On remand, the district court denied the prison officials qualified immunity at summary judgment. 954 F.2d at 190. Reviewing that decision, the court of appeals "look[ed] to substantive Eighth Amendment law as established at the time of the alleged violations." *Id*. at 191. It found that case law generally required out-of-cell exercise but made exceptions for disciplinary problems. *Id*. at 192. Cost, on the other hand, did not factor into the analysis. *Id*. (citing *Spain v. Procunier*, 600 F.2d 189, 200 (9th Cir. 1979) (opinion by Kennedy, J.)). The Fourth Circuit concluded that a prison official could not use "financial justifications" to deny an inmate exercise. *Id*. It remanded for the district court to apply this standard after more fact-finding. *Id*. at 193.

The District of Columbia Circuit affirmed a jury award of $75,000 to a former inmate who was injured

in a fight during his incarceration. *Morgan v. District of Columbia*, 824 F.2d 1049, 1052 (D.C. Cir. 1987). The claim arose under the Eighth Amendment, *id.* at 1055, and the deliberate indifference standard applied, *id.* at 1057. From the evidence, the jury could reasonably conclude that the "correctional system was strained to the breaking point by overcrowding," which contributed to the assault. *Id.* at 1063. The court of appeals appreciated the District of Columbia's "dilemma" of meeting its obligations "at a time of strained finances." *Id.* at 1067. "But the District's administrative conundrum cannot damp the constitutional rights of inmates of the District jails; the Constitution extends its protections even to those incarcerated in our penal institutions and offers no allowances for fiscal and political difficulties." *Id.* at 1067-68. Although *Morgan* involved a damages claim against a municipality, not an individual prison official, the court of appeals rejected the lack of funds defense in broad terms that would apply to any defendant.

Of the four circuits discussed above, two have also rejected the lack of funds defense in injunction suits. *See Monmouth Cnty. Corr. Institutional Inmates v. Lanzaro*, 834 F.2d 326, 350-52 (3d Cir. 1987) (holding that Eighth Amendment required prison officials to provide access to abortion services and also to fund them, if necessary); *Todaro v. Ward*, 565 F.2d 48, 54 n.8 (2d Cir. 1977) ("Inadequate resources no longer can excuse the denial of constitutional rights."). The other two circuits would presumably do the same, as the defense has failed to gain traction in the injunction context almost everywhere.

D. The Sixth Circuit Recognizes the Lack of Funds Defense in All Cases

An inmate cannot get either damages or injunctive relief in the Sixth Circuit if the defendant shows that poor prison conditions resulted from a lack of funds.

Long ago, the Sixth Circuit held that "budgetary constraints" support qualified immunity for prison officials in a damages suit. *Birrell v. Brown*, 867 F.2d 956, 959 (6th Cir. 1989). It also remarked that such constraints would "not, of course, excuse the constitutional violations themselves, or prevent court orders that require the government to correct deficiencies." *Id.* (citing *Williams v. Edwards*, 547 F.2d 1206 (5th Cir. 1977)). However, this remark was dictum because the inmate no longer had a live claim for injunctive relief. *See id.* at 957-58. The "sole issue" on appeal was qualified immunity from damages. *Id.* at 956.

In the present case, the Sixth Circuit validated the lack of funds defense for injunction suits, as well. The majority evaluated Dr. Williams's response to hepatitis C in "the real world of limited resources" and affirmed the judgment in his favor because of "the finite resources at his disposal." App. 10-11. Dr. Williams's dismal track record of treating hepatitis C and his prolonged failure to request adequate funding carried no weight.

Under the majority's logic, a federal court can never enjoin Dr. Williams to provide greater treatment, as long as he spends the funds given to him by the legislature. If the legislature gave him no funds, that would keep him from treating anybody, but it would also make him invulnerable to judicial review.

No other circuit has gone this far. Even the ones that recognize the lack of funds defense say that it does not prevent injunctive relief. The dissent saw this conflict and correctly described the different interpretations of the Eighth Amendment as a "patchwork." App. 16-18.

II. The Questions Presented Are Extremely Important

The Court has said that "conditions in jails and prisons are clearly matters 'of great public importance.'" *Houchins v. KQED, Inc.*, 438 U.S. 1, 8 (1978) (plurality opinion) (quoting *Pell v. Procunier*, 417 U.S. 817, 830 n.7 (1974)). These facilities play a "crucial" role in the criminal justice system. *Id.* Subjecting inmates to cruel and unusual punishment offends human decency and may undermine the goals of incarceration. At the same time, jails and prisons "require large amounts of public funds," *id.*, and the government wants to manage costs. All of these concerns intersect in the lack of funds defense, making it "a matter of great significance in civil rights litigation." Barbara Kritchevsky, *Is There a Cost Defense? Budgetary Constraints as a Defense in Civil Rights Litigation*, 35 Rutgers L.J. 483, 485 (2004).

The viability of this defense affects every State and every inmate in an underfunded prison. The Sixth Circuit's decision directly governs Tennessee, Kentucky, Ohio, and Michigan, which together have over one hundred thousand prisoners. *See* U.S. Dep't of Justice, Bureau of Justice Statistics, NCJ 255115, *Prisoners in 2019* at 4 (2020), *available at* https://www.bjs.gov/content/pub/pdf/p19.pdf.

A. Inmates Have a Dire Need for Eighth Amendment Protection

Caring for inmates ranks as a low political priority. *See Brown v. Plata*, 563 U.S. 493, 525 (2011) (partly attributing deficient health care in California prisons to "chronic and worsening budget shortfalls" and "a lack of political will in favor of reform"); *Rhodes v. Chapman*, 452 U.S. 337, 358 (1981) (Brennan, J., concurring in the judgment) ("Public apathy and the political powerlessness of inmates have contributed to the pervasive neglect of the prisons."); *Inmates of Suffolk Cnty. Jail v. Rufo*, 12 F.3d 286, 294 (1st Cir. 1993) ("It is a notorious fact that prisons are now desperately crowded and that the willingness of legislatures to fund new prison construction is limited by competing social needs and public resistance to increased taxes."); *Albro v. Onondaga Cnty.*, 681 F. Supp. 991, 992 (N.D.N.Y. 1988) ("The court is well aware that the expenditure of tax dollars on prisons is unpopular with the public and an anathema to politicians.").

Hepatitis C has once again revealed this political reality. Pharmaceuticals, particularly for hepatitis C, have been a primary driver of rising health care costs in prisons. U.S. Gov't Accountability Office, GAO-17-379, *Bureau of Prisons: Better Planning and Evaluation Needed to Understand and Control Rising Inmate Health Care Costs* at 20-24 (2017), *available at* https://www.gao.gov/assets/690/685544.pdf; Pew Charitable Trusts, *Pharmaceuticals in State Prisons: How Departments of Corrections Purchase, Use, and Monitor Prescription Drugs* at 2, 16-17 (2017), *available at* https://www.pewtrusts.org/-/media/assets/2017/12/pharmaceuticals-in-state-prisons.pdf.

For years, states chose not to provide DAAs to the vast majority of infected inmates and "cited high drug prices as the reason for denying treatment." Siraphob Thanthong-Knight, *State Prisons Fail To Offer Cure To 144,000 Inmates With Deadly Hepatitis C*, Washington Post (July 9, 2018), https://www.washingtonpost.com/national/health-science/state-prisons-fail-to-offer-cure-to-144000-inmates-with-deadly-hepatitis-c/2018/07/09/99790838-8358-11e8-9e06-4db52ac42e05_story.html.

Federal courts provide a necessary check on the tendency to devalue prisons.

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

Brown, 563 U.S. at 511; *accord Rhodes*, 452 U.S. at 352. Reasonable people may debate the exact requirements of the Eighth Amendment, but the judiciary must draw the line somewhere and enforce it.

This case highlights the dangerous consequences of the lack of funds defense. Dr. Williams did not have to answer for letting thousands of inmates suffer and dozens die. The Eighth Amendment requires a prison to meet all of an inmate's "basic human needs—*e.g.*, food, clothing, shelter, medical care, and reasonable safety." *DeShaney v. Winnebago Cnty. Dep't of Soc. Servs.*, 489 U.S. 189, 200 (1989). The government has to pay for all of these things, so the lack of funds

defense puts them all in jeopardy. Courts have faced the defense in a variety of settings. *See Peralta*, 744 F.3d at 1082-84 (dental care); *Tafoya*, 516 F.3d at 920 (protection from sexual assault); *Williams*, 689 F.2d at 1387-88 (protection from physical assault); *Finney*, 505 F.2d at 201 (overcrowding and sanitation).

In *Wilson*, four justices called the majority's approach "unwise" for leaving open the possibility "that prison officials will be able to defeat a § 1983 action challenging inhumane prison conditions simply by showing that the conditions are caused by insufficient funding from the state legislature." 501 U.S. at 311 (White, J., concurring in the judgment); *see also Peralta*, 744 F.3d at 1096-97 (Hurwitz, J., dissenting in part and concurring in part) (objecting that "a state can first choose to underfund the medical treatment of its wards, and then excuse the Eighth Amendment violations caused by the underfunding").

Commentators have voiced the same concern. *See* Kritchevsky, *Is There a Cost Defense?*, 35 Rutgers L.J. at 485 ("The Eighth Amendment means nothing if a state can excuse a failure to feed prisoners by claiming that it lacks the money to purchase food."); Russell W. Gray, Note, Wilson v. Seiter: *Defining the Components of and Proposing A Direction for Eighth Amendment Prison Condition Law*, 41 Am. U. L. Rev. 1339, 1382 (1992) (stating that, if the lack of funds defense is valid, "it is likely that the defense will be raised frequently and successfully," and "the rights of prisoners not to live in squalor may be lost as a result of the fiscal problems facing our nation's prisons").

The questions presented in this appeal go to the heart of the Cruel and Unusual Punishments Clause and the status of prisoners in society.

B. Focusing on State and Local Funding Creates Federalism Problems

The lack of funds defense immunizes defendants who fail to care for inmates by negating the subjective component of deliberate indifference. This drives the law in other directions when egregious facts cry out for a remedy.

If lack of funds excuses the failure to provide care, then the blame for poor prison conditions lies with officials in charge of budgeting. The dissent below saw this:

> Even accepting the majority's tenuous premise that Dr. Williams should not be held responsible for his limited budget, the argument would carry more weight had Dr. Williams actually requested full funding and not received it. But nothing in the record shows that Dr. Williams ever *asked* for enough funding to treat all of the inmates suffering from chronic hepatitis C. And because requesting funding and setting medical budgets are Dr. Williams's responsibilities, the seeking of such funding was the one "reasonable measure[ ]" that Dr. Williams simply did not take.

App. 19 (citation omitted).

Focusing judicial review on state and local budgets is not desirable. In *Horne v. Flores*, 557 U.S. 433, 438-39 (2009), a district court granted statewide relief requiring Arizona to assist English language learning (ELL). Both the district court and the Ninth Circuit "focused excessively on the narrow question of the adequacy of the State's incremental funding for ELL instruction," as opposed to whether Arizona was meeting its obligations under federal law. *Id*. at 439.

The Court noted that "institutional reform injunctions often raise sensitive federalism concerns," especially when "a federal court decree has the effect of dictating state or local budget priorities." *Id.* at 448. The Ninth Circuit should have considered Arizona's request for relief from the judgment with these concerns in mind, *id.* at 450-51, but it "improperly substituted its own educational and budgetary policy judgments for those of the state and local officials to whom such decisions are properly entrusted," *id.* at 455. In short, "funding is simply a means, not the end." *Id.* at 454-55.

This holds true for Eighth Amendment cases. Federal courts should decide whether an inmate is getting life's basic necessities without regard to prison funding. State and local governments can decide for themselves how to fund the constitutionally mandated care.

III. This Case Offers an Excellent Vehicle to Consider the Lack of Funds Defense

The facts and posture of this case present an ideal opportunity to settle the issue left open in *Wilson*.

The parties tried the case and created a full factual record, complete with expert testimony, treatment and death statistics, and firsthand accounts from inmates. The Court does not have to decide the questions presented in the abstract.

Side issues will not prevent the Court from reaching the questions presented. "Here, everyone agrees that hepatitis C is an objectively serious medical condition and that Williams understood the risk that hepatitis C posed." App. 9. The parties only dispute whether Dr. Williams recklessly ignored the risk. *Id.* This is where the lack of funds defense comes into play.

The parties still have a live and justiciable controversy. The four Petitioners have now started DAA treatment, completed it, or been paroled. However, Petitioners represent a certified class of inmates with hepatitis C. *See* App. 1, 23-24. Once a class is certified, it acquires a status separate from the named plaintiffs. *Sosna v. Iowa*, 419 U.S. 393, 399 (1975). If a class representative's claim becomes moot, he or she can still maintain the litigation on behalf of absent class members with active claims. *Id.* at 399-401; *see also Bell v. Wolfish*, 441 U.S. 520, 526 n.5 (1979) (applying this rule where plaintiffs brought class action over conditions at federal correctional facility but were later transferred or released).

Following the Sixth Circuit's decision, a TDOC spokesperson stated that, of the approximately 4,700 inmates with chronic hepatitis C, "1,449 have completed treatment and 176 are currently undergoing treatment." Travis Loller, *6th Circuit: OK to Ration Hepatitis C Treatment to Prisoners*, Associated Press (Aug. 25, 2020), https://apnews.com/article/43209fa5f1abdc17696aee9151f8073a. That means that thousands of infected inmates remain untreated and would benefit from a favorable decision by the Court.

IV. The Sixth Circuit Took the Wrong Side in the Circuit Split and Carried it to the Extreme

When the government chooses to incarcerate offenders, it assumes the obligation to sustain them until their release. If inmates do not receive medical care, their punishment can turn into "torture or a lingering death, the evils of most immediate concern to the drafters of the [Eighth] Amendment." *Estelle*, 429 U.S. at 103 (quotation marks and citation

omitted). The deliberate indifference standard must guard against this. A State cannot let inmates starve, freeze, live in filth, waste away from disease, or be brutalized because it does not want to pay for them.

The Court has addressed deliberate indifference in detail, explaining how the standard works, the inferences a factfinder may draw from certain evidence, and the type of evidence that supports injunctive relief. *Farmer*, 511 U.S. at 842-47. If the Court meant to give States an easy escape hatch with the lack of funds defense, it would have mentioned that along the way.

Some courts worry about the unfairness of holding individuals liable for budgetary decisions they did not make. *See*, *e.g.*, *Peralta*, 744 F.3d at 1082-83. While understandable, this concern does not justify the lack of funds defense. In a suit for damages, the defendant already enjoys a favorable deliberate indifference standard and qualified immunity. On top of that, States normally indemnify their prison staff to remove the threat of personal liability. "Agency-provided defense and near-universal indemnification are the rule in practice." Margo Schlanger, *Inmate Litigation*, 116 Harv. L. Rev. 1555, 1676 n.391 (2003).

In the injunction context, the rationale for the lack of funds defense is even weaker. Because of sovereign immunity, civil rights plaintiffs do not sue a State itself but some agent of the State in his or her official capacity. "As long as the government entity receives notice and an opportunity to respond, an official-capacity suit is, in all respects other than name, to be treated as a suit against the entity." *Kentucky v. Graham*, 473 U.S. 159, 166 (1985). The resources available to the defendant, as an individual, should not matter. The State has vast resources and

the power to raise funds through taxation and other means. It can always meet the bare-minimum needs of people it has imprisoned.

Rejecting the lack of funds defense does not mean that inmates have an unlimited right to medical care. The Eighth Amendment only requires "reasonable measures" and only if "inmates face a substantial risk of serious harm." *Farmer*, 511 U.S. at 847. The cost of a particular treatment may influence whether the Eighth Amendment requires it. *See*, *e.g.*, *Ralston v. McGovern*, 167 F.3d 1160, 1162 (7th Cir. 1999) ("[T]he civilized minimum is a function both of objective need and of cost. The lower the cost, the less need has to be shown, but the need must still be shown to be substantial.").

The lack of funds defense has a different effect. It removes accountability when States refuse to pay for medical treatment that *is* reasonably necessary. The majority below did not hold that DAAs are too expensive, balancing the cost and need. Hepatitis C is a terrible disease, and the medical community only uses DAAs to treat it. Dr. Williams won because the legislature did not give him enough money to buy the drugs.

This gives the State too much protection from prison costs. As the dissent stated, "[a]n official may choose a less expensive treatment among several reasonable options. But officials may not resort to a treatment that they know to be ineffective—or refuse to treat a patient who has a serious medical need at all—merely to avoid paying the bill." App. 20 (citation omitted). "Put differently, if a particular course of treatment is indeed essential to 'minimally adequate care,' prison authorities can't 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).

Constitutional rights do not depend on the government's willingness to provide funds. *See Forsyth Cnty. v. Nationalist Movement*, 505 U.S. 123, 135-36 (1992) (holding that permit fee for demonstrations violated First Amendment, despite justification of "raising revenue for police services"); *Bullock v. Carter*, 405 U.S. 134, 147 (1972) (holding that filing fee to appear on primary ballot violated Equal Protection Clause, despite justification that "the filing fees serve to relieve the State treasury of the cost of conducting the primary elections"); *Watson v. City of Memphis*, 373 U.S. 526, 537 (1963) (holding that city could not delay desegregation of parks because of allegedly inadequate budget).

In a setting very similar to this, a case challenging jail conditions under the Due Process Clause, the Court stated that "[f]inancial constraints may not be used to justify the creation or perpetuation of constitutional violations." *Rufo v. Inmates of Suffolk Cnty. Jail*, 502 U.S. 367, 392-93 (1992); *see also id.* at 396 (O'Connor, J., concurring in the judgment) (agreeing that "the lack of resources can never excuse a failure to obey constitutional requirements").

The lack of funds defense hollows out the Eighth Amendment and licenses cruelty in prison. It also makes the right to be free from cruel and unusual punishments a uniquely disfavored constitutional right, without justification. The deliberate indifference standard needs to be clarified to correct this misunderstanding.

CONCLUSION

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

Respectfully submitted,

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