No. 10-____

IN THE

Supreme Court of the United States

MARGARET MINNECI; JONATHAN E. AKANNO; ROBERT SPACK; BOB D. STIEFER; AND BECKY MANESS,

Petitioners,

v.

RICHARD LEE POLLARD *et al.*,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Court should imply a cause of action under *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), against individual employees of private companies that contract with the Federal government to provide prison services, where the plaintiff has adequate alternative remedies for the harm alleged and the defendants have no employment or contractual relationship with the government.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioners, who were defendants and appellees in the proceedings below, are Margaret Minneci, Jonathan E. Akanno, Robert Spack, Bob D. Stiefer and Becky Maness.

Respondent Richard Lee Pollard was the plaintiff and appellant in the proceedings below.

GEO Group, Inc. ("GEO"), sued as Wackenhut Corrections Corporation, was a defendant and appellee in the proceedings below, and the judgment of dismissal as to GEO was affirmed. GEO is a respondent supporting the petition pursuant to Sup. Ct. R. 12.6. GEO has no parent companies and FMR Inc. owns 10% or more of its stock.

Raymond Andrews, Everett Uzzle and Marshall Lewis were named in the complaint as additional defendants. Mr. Andrews was never included in the appeal from the district court's judgment. *See* Appendix ("App.") at 17a n.6. Mr. Uzzle died in 2008, *id*., and his estate was never substituted as a party pursuant to Fed. R. App. P. 43(a). Dr. Lewis was never served with the complaint or notice of appeal and therefore was never a party in the District Court or the Court of Appeals. App. 17a n.6. Because these individuals were not parties to the proceedings in the Court of Appeals or named in that court's judgment, they are not parties to this proceeding. *See* Sup. Ct. R. 12.6.

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Petitioners Margaret Minneci, Jonathan E. Akanno, Robert Spack, Bob D. Stiefer, and Becky Maness respectfully petition this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The decision of the Ninth Circuit, as amended, is reported at 629 F.3d 843 and reproduced at page 1a of the Appendix to this petition ("App."). The unpublished order of the District Court is reproduced at App. 70a. The District Court's order adopted an

unpublished recommendation of a Magistrate Judge, which is reproduced at App. 73a.

JURISDICTION

The judgment of the Ninth Circuit was entered on June 7, 2010, and the panel amended its opinion on December 10, 2010. App. 1a. The Ninth Circuit denied a timely filed petition for rehearing en banc on December 10, 2010, with eight judges recording their dissent. App. 4a. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Eighth Amendment to the Constitution provides that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

INTRODUCTION

Expressly placing itself in conflict with other circuits, the Ninth Circuit has extended the narrow remedy of *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), in an unprecedented way, holding that it applies to suits against private, non-governmental employees even though the plaintiff had other adequate remedies available to redress the harm alleged. The opinion of Judge Bea dissenting from denial of rehearing *en banc*—which was joined by seven of his colleagues—amply explains why certiorari is warranted in this case:

> The panel majority—over a vigorous dissent * * *—extends and grants a *Bivens* claim to a prisoner against private company prison guards who are unprotected by notions of qualified immunity, available only to government employees.

> It does so for personal injury claims between California litigants, for acts and omissions which took place in California, and for which California tort law provides adequate remedies through compensatory and punitive damages. In doing so, the panel majority frankly admits its opinion creates an irreconcilable conflict with the decisions of two federal circuits, the Fourth and Eleventh. Further, it disregards the Supreme Court's narrowing instructions on *Bivens*, which have limited recognition of new *Bivens* actions to those situations where, for one reason or another, damages were unavailable under both state and federal law.

App. 4a (footnote omitted).

As these judges recognized, "such an unprecedented opinion demands further review." *Id.* "By recognizing an implied cause of action in this instance, the panel extends *Bivens* far beyond its carefully prescribed contours and places this circuit in direct conflict with each of the other circuits to address the issue." *Id.* at 5a.

The grounds for certiorari in this case are thus unusually compelling. As the Ninth Circuit expressly recognized, it created circuit conflicts on two different components of the question presented. *See* App. 21a. And as Judge Bea noted, this Court's prior *Bivens* decisions show how "marked a departure is the panel majority's opinion from established precedent." *Id.* at 8a. Moreover, this case presents an ideal vehicle to decide the question, which this Court expressly left unresolved in *Corr. Servs. Corp.* v. *Malesko*, 534 U.S. 61, 65 (2001). The Ninth Circuit's holding was clear, unequivocal, and dispositive of the case. Given the prevalence of both

private prison operators and prisoner *Bivens* claims, the issue is an oft-recurring one, but there can be procedural obstacles to appellate review of it in other cases. The Court should not pass up this opportunity to resolve the conflict and bring certainty to this important area of the law.

STATEMENT OF THE CASE

A. Facts.

Respondent Richard Lee Pollard is a federal prisoner who was sentenced in 1996 to 20 years imprisonment for drug trafficking and firearms offenses. *See United States* v. *Pollard*, No. 95-CR-145 (E.D. Wash.). Since then, Pollard has been a "frequent filer" in the federal courts, having filed at least ten other civil actions in addition to this one.[1]

Pollard, originally appearing *pro se*, filed this action in 2001 when he was an inmate at the Taft Correctional Institution ("TCI") in California. At that time, TCI was operated by the Wackenhut Corrections Corporation, a non-governmental corporation that is now known as The GEO Group, Inc. Pollard's initial complaint was dismissed with leave to amend, and Pollard filed an amended complaint in 2002.

According to the amended complaint (whose facts are taken as true for purposes of this appeal) on

[1] *See Pollard* v. *Thomas*, No. 09-CV-726 (D. Ore.); *Pollard* v. *United States*, No. 04-CV-346 (E.D. Wash.); *Pollard* v. *United States*, No. 05-CV-00121 (E.D. Wash.); *Pollard* v. *United States*, No. 03-CV-386 (E.D. Wash.); *Pollard* v. *United States*, No. 02-CV-58 (E.D. Wash.); *Pollard* v. *United States*, No. 00-CV-72 (E.D. Wash.); *Pollard* v. *Hawk-Sawyer*, No. 00-CV-131 (D.D.C.); *Pollard* v. *United States*, No. 99-CV-3228 (D.D.C.); *Pollard* v. *U.S. Dep't of Justice*, No. 98-CV-00399 (E.D. Wash.); *Pollard* v. *United States*, No. 97-CV-78 (E.D. Wash.).

April 7, 2001, Pollard accidentally tripped over a cart outside the TCI butcher shop where he was working. App. 74a; *see generally* Am. Compl. (Dkt. 11, filed April 18, 2002). His arms were placed in a sling. App. 15a. After an x-ray, he was diagnosed with possible elbow fractures. *Id.*

Pollard was referred to an off-site orthopedic clinic. In preparation for his transfer, he was directed to put on a jumpsuit, which required putting his arms through his sleeves. *Id.* Pollard protested that this would cause him pain but was nevertheless required to put it on. During the transfer to the clinic, he was also required to wear a "black box" mechanical restraint device on his wrists notwithstanding complaints about pain. *Id.* He was diagnosed with injuries to his elbows, including fractures, and the examining physician recommended a splint. *Id.*

Upon returning to TCI, Pollard was told that he would not receive a splint due to staffing and facilities limitations. *Id.* Pollard alleges that, in the ensuing weeks, he was unable to carry a food tray, was not provided an alternative means to feed himself, and was unable to bathe himself. *Id.*; App. 75a. Pollard also alleges that he was required to return to work before his injuries had healed and was again required to wear the black box when returning to the outside clinic for a follow-up visit. App. 15a-16a.

B. Proceedings Below.

Pollard's amended complaint asserted damages claims against GEO and eight individual defendants (seven of whom were employees of GEO) alleging violation of his Eighth Amendment rights. App. 16a. Five of these GEO employees, petitioners Margaret

Minneci, Jonathan E. Akanno, Robert Spack, Bob D. Stiefer, and Becky Maness, remain parties to the case.[2]

Pursuant to 28 U.S.C. § 1915A(b)(1), which requires pre-screening of *pro se* prisoner complaints, a Magistrate Judge recommended that the amended complaint be dismissed. The Judge found that Pollard "has alternative and superior remedies available to him in state court." App. 79a. And relying on decisions of the Fourth and Tenth circuits, the Judge concluded that "extending *Bivens* would not provide Plaintiff with an otherwise nonexistent cause of action. Nor would extending *Bivens* deter future unconstitutional conduct by federal officers as the Defendants are employees of a private corporation. As such, the court finds that this case does not present circumstances warranting the extension of *Bivens*." App. 80a. After conducting a *de novo* review, the District Court adopted the Magistrate Judge's recommendation in full, and dismissed the case. *Id*. at 71a.

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[2] Defendant Marshall Lewis was an outside doctor employed by another company. App. 16a. He was never served with the complaint or notice of appeal and was therefore never a formal party in the District Court or the Court of Appeals. App. 17a n.6. Defendant Everett Uzzle died while this case was on appeal, *id*., and his estate was never substituted as a party pursuant to Fed. R. App. P. 43(a). Defendant Raymond Andrews was not included in Pollard's appeal from the district court's judgment. *Id*. Because Dr. Lewis, Mr. Uzzle and Mr. Andrews were not parties to the proceedings in the Court of Appeals or named in that court's judgment reversing the dismissal of the complaint, the dismissal of the claims against them was not disturbed and they are not parties to this proceeding. *See* Sup. Ct. R. 12.6.

Pollard, by then represented by counsel, appealed, and a divided Ninth Circuit panel reversed as to the claims against the five GEO employees still in the case. Expressly rejecting the holdings of all other circuits to have considered the issue, the majority held that "Pollard's suit under *Bivens* against the GEO employees for alleged violations of his Eighth Amendment rights should be allowed to proceed" because (1) the GEO employees act "under color of federal law" for purposes of *Bivens* liability; and (2) "state tort remedies alone are insufficient to displace *Bivens* and there are no 'special factors counselling hesitation' in allowing Pollard's suit to proceed." *Id.* at 52a.

Judge Restani of the Court of International Trade, sitting by designation, dissented. She concluded that the majority erred in rejecting the holdings of the other circuits and that "[t]he evolution of the U.S. Supreme Court's *Bivens* jurisprudence confirms that this Court should follow their lead." *Id.* at 53a. In her view, "[t]he availability of a superior alternative remedy is a convincing reason for the Judicial Branch to refrain from providing a new, freestanding damages remedy." *Id.* at 55a. Therefore, she "would join with other circuits in concluding that a *Bivens* cause of action is not available against employees of privately-run prison corporations where, as here, state tort laws provide a remedy." *Id.* at 68a.

The panel denied rehearing (while amending its opinion in minor respects) and the full Ninth Circuit denied rehearing *en banc*. *Id.* at 2a-4a. Eight judges, however, dissented from denial of rehearing *en banc* in an opinion authored by Judge Bea. These judges concluded that the panel majority erred in rejecting the holdings of other circuits and in

"disregard[ing] the Supreme Court's narrowing instructions on *Bivens*," and that "such an unprecedented opinion demands further review." *Id.* at 5a. Subsequently, the Ninth Circuit stayed its mandate pending final resolution of this petition. *Id.* at 81a.

REASONS FOR GRANTING THE WRIT

I. THE CIRCUITS ARE SHARPLY DIVIDED ON THE QUESTION PRESENTED.

This is not a case where a conflict among the circuits must be inferred. The Ninth Circuit not only expressly recognized that its decision conflicted with the holdings of other circuits, but further noted that the conflict extended to two different aspects of the question presented. The Ninth Circuit held that (1) the GEO employees are considered federal actors for purposes of *Bivens* liability and (2) the availability of a state tort remedy does not foreclose redress under *Bivens*. App. 21a. It then stated that "[w]e recognize that the former holding directly conflicts with the Fourth Circuit's holding in *Holly* v. *Scott*, 434 F.3d 287, 294 (4th Cir. 2006), and the latter conflicts with both *Holly* and the Eleventh Circuit's holding in *Alba* v. *Montford*, 517 F.3d 1249, 1254 (11th Cir. 2008)." *Id.* *See also id.* at 22a (noting "our disagreement with our sister circuits"); *id.* at 31a (noting "the contrary holding of the Fourth Circuit").

Judge Restani also recognized the division, concluding that the panel erred by "creat[ing] a split in the law of the various circuits." *Id.* at 53a. Similarly, the rehearing dissenters identified the "irreconcilable conflict with the decisions of two federal circuits," stating that "[t]he facts of *Alba* and *Holly* are so similar to this case that the panel

majority does not even try to distinguish them," and that the panel's opinion "places this circuit in direct conflict with each of the other circuits to address the issue." *Id*. at 14a. As they stated, "[t]he panel majority's decision, by its own admission, creates a circuit split with the two courts of appeals which held, on indistinguishable facts, that alternative state remedies are sufficient, on their own, to preclude recognition of a *Bivens* claim." *Id*. at 11a.

Moreover, these dissenters noted that the majority also created an arguable conflict with the Tenth Circuit, a panel of which reached a contrary conclusion in *Peoples* v. *CCA Det. Ctrs.* ("*Peoples I*"), 422 F.3d 1090 (10th Cir. 2005). Although that opinion was later vacated when the *en banc* court divided evenly on the question, the panel decision in *Peoples* "is still another example of a federal court refusing to recognize a *Bivens* action in this area." App. 5a n.3. *See also Holz* v. *Terre Haute Reg. Hosp.*, 123 Fed. App'x 712, 713 (7th Cir. 2005) (affirming dismissal of inmate's *Bivens* claim against nurse employed by privately owned hospital, because a "*Bivens* claim cannot be brought against a private entity (or individual), even if it is a federal contractor").

1. In *Holly*, the Fourth Circuit faced the same question that is at issue in this case: "whether individual employees of a privately operated prison face Eighth Amendment liability under *Bivens* * * * and its progeny for allegedly providing inadequate medical care to a federal inmate." *Holly*, 434 F.3d at 288. Just as in this case, the individual defendants were employees of GEO. Yet unlike the Ninth Circuit, the Fourth Circuit (in an opinion authored by Judge Wilkinson) answered the question in the negative, holding that "[w]e decline to extend the

Bivens cause of action to these circumstances, both because the actions of the private prison employees are not fairly attributable to the federal government and because the inmate has adequate remedies under state law for his alleged injuries." *Id.*

The court found that these two "special factors" each "independently precludes the extension of *Bivens*." *Id.* at 290. As it noted, both governmental action and the lack of another legal remedy against individual defendants "represent critical justifications for the very existence of the *Bivens* doctrine," and "[t]o judicially infer a cause of action where these elements are absent would be to release that doctrine from its moorings and cast it adrift." *Id.*

a. The *Holly* court first held that the actions of employees of private prison contractors are "not of a sufficiently federal character" to foster liability under *Bivens*. *Id.* at 292. Such individuals are not federal officials, federal employees, or even independent contractors with the government. *Id.* Although "GEO, like a great many private corporations, does business under contract with the government," that "is not by itself enough to subject it to constitutional liability, let alone to create such liability for its individual private employees." *Id.* at 293 (citation omitted).

Noting the holding in *Richardson* v. *McKnight*, 521 U.S. 399, 405 (1997), that "correctional functions have never been exclusively public," the Fourth Circuit held that prison administration is not one of the narrow circumstances where the actions of private actors might give rise to *Bivens* liability. The court also distinguished this Court's decision in *West* v. *Atkins*, 487 U.S. 42 (1988), which held that a doctor employed by a state to provide medical services to inmates acted "under color of state law" for purposes

of liability under 42 U.S.C. § 1983 ("Section 1983"). As the court explained, a privately-run prison involves materially different circumstances from *West*, where "the state itself was directly responsible for managing the prison." *Holly*, 434 F.3d at 294.

The court also noted that *Richardson* further counseled against finding *Bivens* liability in this context. *Richardson* held that employees of private contractors operating state prisons, unlike their governmental counterparts, are not entitled to qualified immunity in actions brought under Section 1983. Accordingly, because the Fourth Circuit understood the scope of qualified immunity to be identical in Section 1983 and *Bivens* actions, *see Butz* v. *Economou*, 438 U.S. 478, 504 (1978), implying a *Bivens* cause of action against employees of private prison contractors would leave those individuals without the qualified immunity defense enjoyed by federal prison employees. As the court held, "[i]n the absence of statutory authority, we are reluctant to create an anomaly whereby private defendants face greater constitutional liability than public officials." *Holly*, 434 F.3d at 294.

b. The court also held that "a second independent factor" precluded recognition of a *Bivens* remedy against GEO employees: the fact that the plaintiff "possesses alternative—and arguably superior—causes of action against defendants under the state law of negligence." *Id.* at 295. Because "[t]he dangers of overreaching in the creation of judicial remedies are particularly acute where such remedies are unnecessary," the court "decline[d] to invite such dangers by recognizing *Bivens* liability here." *Id.*

The Fourth Circuit noted that this Court has extended *Bivens* beyond its specific facts in only two

circumstances: where a plaintiff "lacked any alternative remedy for harms caused by an individual officer's unconstitutional conduct," and to "provide an otherwise non-existent cause of action against individual officers alleged to have acted unconstitutionally." *Malesko*, 534 U.S. at 70. The *Holly* court concluded that neither circumstance was present, because the plaintiff had an adequate alternative state law remedy. Noting that the plaintiff "already enjoys claims that an inmate in a government-run facility would not have," the court explained that "[i]n requesting that we also grant him a *Bivens* claim—indeed, that we grant him a superior one in which qualified immunity is unavailable—Holly seeks much more than is necessary to remedy his alleged injuries." *Holly*, 434 F.3d at 296-97.

c. Judge Motz concurred in the judgment. She disagreed with the panel majority's conclusion that the GEO employees were not federal actors for purposes of the *Bivens* analysis. But she agreed with the majority's holding that because the plaintiff "possesses an alternative remedy for his alleged injuries, no action under *Bivens* * * * lies in this case." *Id*. at 297 (Motz, J., concurring).

2. In *Alba*, the Eleventh Circuit likewise considered whether "a federal prisoner incarcerated in a privately operated prison may pursue a *Bivens* action against employees of the private prison for allegedly violating his Eighth Amendment right to medical treatment." 517 F.3d at 1251. Like the Fourth Circuit in *Holly* and unlike the Ninth Circuit here, the court answered the question in the negative.

The court assumed without deciding that employees of privately-operated federal prisons are government actors for purposes of *Bivens* liability.

Id. at 1254. But the court found no cause of action under *Bivens* because "alternative remedies exist by which [the plaintiff] can recover from the Defendants." *Id.* Like the Fourth Circuit, the Eleventh Circuit read this Court's decision in *Malesko* as holding that a *Bivens* remedy will be implied only where a cause of action is otherwise unavailable and the plaintiff lacks any alternative remedy for the harm alleged. *Id.*

The court rejected the plaintiff's contention that the alternative remedy must be a federal remedy, following the Fourth Circuit's reasoning in *Holly*. *See id.* ("At least one circuit court has acknowledged that the existence of a state remedy precludes recovery under *Bivens*.") (citing and quoting *Holly*, 434 F.3d at 296). And the court held that the available state law remedies were adequate, regardless of whether they might involve additional procedural requirements. *Alba*, 517 F.3d at 1255-56.

3. As noted above, the Ninth Circuit deliberately created a conflict with both the Fourth Circuit's decision in *Holly* and the Eleventh Circuit's decision in *Alba*.

Based on its reading of this Court's decision in *West*, *supra*, the panel majority rejected the Fourth Circuit's rationale that GEO employees are not federal actors for purposes of *Bivens* liability. Embracing Judge Motz's contrary view on that issue, the majority stated that "[t]he Fourth Circuit does not share our understanding of *West*," and held that "[w]e cannot subscribe to such an illogical reading of *West*." App. 27a. The court also expressly rejected the Fourth Circuit's reliance on *Richardson*. *Id.*

The court then proceeded to disagree with both the Fourth and Eleventh circuits as to whether the existence of other adequate remedies precludes implying a *Bivens* remedy. Without any finding that Pollard's alternative remedies would, in fact, have been inadequate to redress the harm he alleges, the court held that "the mere availability of a state law remedy does not counsel against allowing a *Bivens* cause of action." App. 35a. It held that "only remedies crafted by *Congress*," can preclude recognition of a *Bivens* remedy, and disagreed with the other circuits' holdings that "state tort law can preclude a *Bivens* remedy." *Id*. at 36a (citing *Alba*, 517 F.3d at 1253-55 and *Holly*, 434 F.3d at 295-97) (emphasis in original).

4. As the dissenters below concluded, the Ninth Circuit's decision is also in tension, if not direct conflict, with the Tenth Circuit's resolution of the issue. In *Peoples I*, *supra*, the court considered two companion cases brought by a federal inmate of a privately-operated prison. A panel of the Tenth Circuit reached the same conclusion later reached by the Fourth and Eleventh circuits—"that there is no implied private right of action for damages under *Bivens* against employees of a private prison for alleged constitutional deprivations when alternative state or federal causes of action for damages are available to the plaintiff." 422 F.3d at 1101.

The Tenth Circuit subsequently granted *en banc* rehearing. The *en banc* court concluded that subject matter jurisdiction existed and therefore reversed the judgment in one of the two cases because the judgment had been predicated on that ground. *Peoples* v. *CCA Det. Ctrs.* ("*Peoples II*"), 449 F.3d 1097, 1099 (10th Cir. 2006). But the court divided

evenly on the *Bivens* issue. *Id.* As a result, the judgment in the second case, which had been predicated on the lack of a *Bivens* remedy, was affirmed by an equally divided court. In light of that disposition, the district court on remand once again dismissed the first case on the same ground. *See* Dkt. 42 at 3, *Peoples* v. *CCA Det. Ctrs.*, No. 03-3129-KHV (D. Kan. 2006) ("Because plaintiff has a state court remedy, the Court can not imply a *Bivens* action.").

Although the panel opinion on the *Bivens* issue was vacated by the *en banc* court and lacks precedential value, *Peoples II*, 449 F.3d at 1099, the disposition of the Tenth Circuit on that issue—affirming the district court's dismissal for lack of a *Bivens* remedy—continues to govern in the Tenth Circuit, just as it did in *Peoples* itself on remand. Thus, in *Cohen* v. *Zaki*, No. 10-1309, 2011 WL 767160 (10th Cir. Jan. 4, 2011), the Tenth Circuit was urged, despite an apparent waiver, to consider "whether employees of a private corporation operating under a federal contract can be held liable in a *Bivens* action" but the court "held that "[w]e have already answered this question" in *Peoples*. *Id.* at *3 n.1. Thus, although there is no precedential opinion on the issue in the Tenth Circuit, that court's disposition in *Peoples* continues to govern future cases and conflicts with the Ninth Circuit's holding in this case. And in any event, the stalemate in the Tenth Circuit is another factor warranting this Court's intervention.

* * *

The Court has explained that a "principal purpose for which we use our certiorari jurisdiction * * * is to resolve conflicts among the United States courts of appeals." *Braxton* v. *United States*, 500 U.S. 344,

347 (1991). The Court should do so here. The conflict is direct and intractable, and the present confusion in the law will persist unless this Court intervenes to resolve it.

II. THE NINTH CIRCUIT'S HOLDING CONFLICTS WITH THIS COURT'S PRECEDENTS.

Certiorari is also warranted because the Ninth Circuit's decision conflicts with this Court's precedents. As Judge Bea and his fellow dissenters noted, the panel's decision is a "marked * * * departure * * * from established precedent" that "disregards the Supreme Court's narrowing instructions on *Bivens*." App. 8a. Although this Court has not yet directly faced the question presented in this case, *see Malesko*, 534 U.S. at 65, the Ninth Circuit's decision conflicts with the central precepts of this Court's *Bivens* jurisprudence. By implying a federal cause of action against non-governmental officers notwithstanding the availability of adequate alternative remedies, the Ninth Circuit overstepped the narrow bounds set by this Court.

A. The Court Has Held That Adequate Alternative Remedies Preclude Recognition Of A *Bivens* Cause Of Action.

The Court has recognized *Bivens* remedies in only two cases other than *Bivens* itself, and since 1980 has "consistently refused to extend *Bivens* liability to any new context or new category of defendants." *Malesko*, 534 U.S. at 68.[3] *Cf. id.* at 75 (Scalia, J.,

[3] Since *Carlson* v. *Green*, 446 U.S. 14 (1980), the Court has declined to imply a *Bivens* remedy in every case it has considered. *See Wilkie* v. *Robbins*, 551 U.S. 537 (2007); *Malesko*, 534 U.S. 61 (2001); *FDIC* v. *Meyer*, 510 U.S. 471 (1994); *Schweiker* v. *Chilicky*, 487 U.S. 412 (1988); *United States* v.

concurring) ("*Bivens* is a relic of the heady days in which this Court assumed common-law powers to create causes of action" and prior cases should be limited "to the precise circumstances that they involved"); Laurence H. Tribe, *Death by a Thousand Cuts: Constitutional Wrongs Without Remedies After* Wilkie v. Robbins, 2007 Cato Sup. Ct. Rev. 23, 26 ("[T]he best that can be said of the *Bivens* doctrine is that it is on life support with little prospect of recovery."). And "[i]n its forty-year *Bivens* history, [this] Court has never provided a *Bivens* claim for relief to a person who—like the plaintiff in this case * * *—had adequate state tort remedies." App. 5a (Bea, J., dissenting). By manufacturing such a cause of action "for the first time in this country's history," the Ninth Circuit "extend[ed] *Bivens* far beyond its carefully prescribed contours." *Id.* at 13a-14a.

Lack of adequate alternative remedies has been the touchstone in all three cases in which this Court implied a *Bivens* remedy. In *Bivens* itself, the Court implied a cause of action to challenge an unlawful but consensual home search because state law would not have provided a remedy in light of the homeowner's consent. *Bivens*, 403 U.S. at 394. *See Malesko*, 434 U.S. at 73. "[A]bsent a right of action implied by the Court from the Constitution, Bivens would have had no means by which to vindicate his Fourth Amendment rights." App. 7a (Bea, J., dissenting). As Justice Harlan put it in his *Bivens* concurrence, "[f]or people in Bivens' shoes, it is damages or nothing." 403 U.S. at 410 (Harlan, J., concurring).

Stanley, 483 U.S. 669 (1987); *Chappell* v. *Wallace*, 462 U.S. 296 (1983); *Bush* v. *Lucas*, 462 U.S. 367 (1983); *see also Hui v. Castaneda*, 130 S. Ct. 1845 (2010).

Likewise, in *Davis* v. *Passman*, 442 U.S. 228 (1979), the Court implied a *Bivens* remedy for an employee suing a former congressman for sex discrimination because neither state nor federal law would have afforded her any relief. As the Court explained, "there are available no other alternative forms of judicial relief. For Davis, as for Bivens, 'it is damages or nothing.'" *Id*. at 245 (citation omitted). *See Malesko*, 534 U.S. at 67 ("In *Davis*, we inferred a new right of action chiefly because the plaintiff lacked any other remedy for the alleged constitutional deprivation."). Like Bivens, Davis was "a plaintiff in search of a remedy." *Id*. at 74. In both cases, "the plaintiffs' injuries would have gone entirely unredressed without an implied constitutional remedy." *Holly*, 434 F.3d at 295.

Finally, in *Carlson*, the Court implied a *Bivens* remedy for the administratrix of a deceased prisoner against federal prison officials, where state law allowed no recovery for pain and suffering and the Federal Tort Claims Act precluded a claim against the individual defendants. 446 U.S. at 23. Thus, in *Carlson*, the plaintiff sought "a cause of action against an individual officer [that was] otherwise lacking." *Malesko*, 534 U.S. at 74.

As this Court has summarized, *Bivens* claims were authorized in these cases because "Davis had no other remedy, Bivens himself was not thought to have an effective one, and in *Carlson* the plaintiff had none against Government officials." *Wilkie*, 551 U.S. at 555. Here, by contrast, Pollard had an adequate state law tort remedy against the individual defendants. *See* App. at 11a (Restani, J., dissenting) ("The plaintiff has not shown—because he cannot—that there is any state which does not provide

recovery for that most fundamental tort claim, in which one person's negligent conduct causes physical and/or emotional harm to another."). Indeed, the state law remedy is "actually superior to any presumed action he would have under *Bivens*," because of the onerous legal standard under the Eighth Amendment. *Id.* at 10a (Bea, J., dissenting). *Bivens* claims "were created for the situation in which the plaintiff had no other means of vindicating his constitutional rights in either state or federal court; that policy concern simply does not apply to a case, such as here, where adequate state tort remedies exist." *Id.*

In 2007, the Court distilled its *Bivens* jurisprudence into a two-part test. The first question is "whether any alternative, existing process for protecting the interest amounts to a convincing reason for the Judicial Branch to refrain from providing a new and freestanding remedy in damages." *Wilkie*, 551 U.S. at 550. But "even in the absence of an alternative," the Court will still refuse to imply a remedy if there are "special factors counseling hesitation before authorizing a new kind of federal litigation." *Id.* Here, the inquiry founders at the first stage. By creating a new and freestanding federal cause of action even though there is concededly an "alternative, existing process for protecting the interest," *id.*, the Ninth Circuit placed itself in conflict with this Court's precedents. As with the plaintiff in *Wilkie*, Pollard's "situation does not call for creating a constitutional cause of action for want of other means of vindication." *Id.* at 555.

Contrary to the Ninth Circuit's view, that an alternative remedy exists under state rather than federal law or might have different procedural

requirements than a *Bivens* claim has never been license for a court to imply a federal cause of action. *See Alba*, 517 F.3d at 1255; *Peoples I*, 422 F.3d at 1104-05; App. 55a-56a (Restani, J., dissenting); *id.* at 12a-13a (Bea, J., dissenting). Because Congress, unlike unelected judges, is well-suited to the task of determining appropriate remedies for violation of federal rights, "neither the absence nor the incompleteness of such a scheme represents an invitation for a court to step in to correct what it may perceive as an injustice toward an individual litigant." *Holly*, 434 F.3d at 290.

"So long as the plaintiff ha[s] an avenue for some redress, bedrock principles of separation of powers foreclose[] judicial imposition of a new substantive liability." *Malesko*, 534 U.S. at 69. Thus, the Court has authorized new *Bivens* remedies in only two circumstances: "to provide an otherwise non-existent cause of action" and to "provide a cause of action for a plaintiff who lacked any alternative remedy." *Id.* at 70. Neither circumstance is present in this case. The Ninth Circuit's disregard of the stringent limitations this Court has placed on the creation of new *Bivens* remedies warrants this Court's review.

B. The Court's Precedents Do Not Permit Extending *Bivens* To Employees Of A Private Contractor.

Review is also warranted because the Ninth Circuit extended *Bivens* to a brand-new area not authorized by this Court's precedents: claims against private citizens who are not federal officers but are employees of a private entity that contracts with the federal government. It imposed, by judicial fiat, new liability on such employees who—unlike actual federal officers—lack a recognized qualified immunity

defense, and whom Congress has expressly excluded as federal actors for purposes of tort liability. This drastic and unauthorized departure from this Court's precedents should not stand unreviewed.

Whatever the scope of *Bivens* in its prescribed sphere, it provides only "a private cause of action for damages against *a federal official*." *Bush*, 462 U.S. at 374 (emphasis added). *See Malesko*, 534 U.S. at 70 (purpose of *Bivens* is "to deter individual *federal officers* from committing constitutional violations") (emphasis added). Petitioners are not federal officials or federal officers. During the events at issue, they were employees of GEO, a private company that contracted with the federal government to provide certain services. They were not employed by, and did not contract with, the government. They are accordingly outside the scope of the *Bivens* doctrine as this Court has defined it. And at a bare minimum, petitioners' status as private employees is a "special factor[] counseling hesitation before authorizing a new kind of federal litigation." *Wilkie*, 551 U.S. at 550.

"The presence or absence of congressional authorization for suits against federal officials is, of course, relevant to the question whether to infer a right of action for damages for a particular violation of the Constitution." *Butz*, 438 U.S. at 504. [4] And congressional intent becomes determinative where, as here, courts are asked to imply a remedy against private contractors that is more expansive than that

[4] *See* Thomas W. Merrill, *The Common Law Powers of Federal Courts*, 52 U. Chi. L. Rev. 1, 52 (1985) (before recognizing *Bivens*-type remedy, courts should "first determine whether Congress or the framers specifically intended to create a federal right enforceable by judicial action").

authorized for their governmental counterparts. In *Malesko*, the Court declined to imply a *Bivens* action against corporate contractors that was unavailable against their government agency counterparts, holding that "[w]hether it makes sense to impose asymmetrical liability costs on private prison facilities alone *is a question for Congress, not us, to decide*." *Malesko*, 534 U.S. at 72 (emphasis added).

Just as in *Malesko*, implying a *Bivens* remedy here would impose asymmetrical liability costs that raise a policy question for Congress, not courts, to resolve. That is so for at least two basic reasons.

1. *First*, unlike actual federal officials, individual employees of private prisoner contractors have no recognized qualified immunity defense. In *Richardson*, *supra*, this Court held that employees of private prison management firms that contract with state and local governments have no qualified immunity from constitutional claims brought under Section 1983. The Court so held because "[h]istory does not reveal a 'firmly rooted' tradition of immunity applicable to privately employed prison guards," given that "correctional functions have never been exclusively public." 521 U.S. at 404-05. Thus, qualified immunity did not apply to employees of "a private firm, systematically organized to assume a major lengthy administrative task (managing an institution) with limited direct supervision by the government, [which] undertakes that task for profit and potentially in competition with other firms." *Id.* at 413. And in *Butz*, 438 U.S. at 504, the Court held that "without congressional directions to the contrary, we deem it untenable to draw a distinction for purposes of immunity law between suits brought against state officials under

§ 1983 and suits brought directly under the Constitution against federal officials."

The Ninth Circuit's judicially-manufactured *Bivens* remedy therefore subjects employees of private prison contractors, unlike federal officers, to liability for constitutional torts without a recognized qualified immunity defense for actions taken in good faith. Qualified immunity "permits courts expeditiously to weed out suits which fail the test without requiring a defendant who rightly claims qualified immunity to engage in expensive and time-consuming preparation to defend the suit on its merits." *Siegert* v. *Gilley*, 500 U.S. 226, 232 (1991). Its purpose "is to spare a defendant not only unwarranted liability, but unwarranted demands customarily imposed upon those defending a long drawn out lawsuit." *Id*.

Accordingly, if the Ninth Circuit's ruling is allowed to stand, petitioners and other employees of private government contractors—unlike actual government employees—will face potentially crippling personal liability and legal costs without a recognized qualified immunity defense, even when they act in good faith. As the Court held in *Malesko*, imposing these "asymmetrical liability costs" on private employees "is a question for Congress, not us, to decide." 534 U.S. at 72. *See Holly*, 434 F.3d at 294 ("In the absence of statutory authority, we are reluctant to create an anomaly whereby private defendants face greater constitutional liability than public officials.") (citing *Malesko*, 534 U.S. at 71-72). The Ninth Circuit's disregard of this Court's directions warrants certiorari.

2. *Second*, the Ninth Circuit ignored clear Congressional intent that employees of federal contractors should *not* be treated the same as actual

federal officers for purposes of liability for torts committed in the scope of their employment, which undercuts any perceived rationale for extending *Bivens* to actions like this one.

The Federal Tort Claims Act, 28 U.S.C. §§ 1346(b), 2671-2680, creates an exclusive remedy against the United States for torts committed by federal employees in the scope of their employment, pre-empting state law causes of action against the individuals. Given that the individuals themselves could not be sued for such claims, the Court held in *Carlson* that a *Bivens* remedy was appropriate. *See Carlson*, 446 U.S. at 21 ("Because the *Bivens* remedy is recoverable against individuals, it is a more effective deterrent than the FTCA remedy against the United States."). The Court also noted that Congress had expressly approved of constitutional claims against federal employees. *Id*. at 19-20. *See also* 28 U.S.C. 2679(b)(2) (preserving constitutional claims "against an employee of the Government").

With regard to employees of government contractors, however, Congress has expressed the opposite intent. Whereas the FTCA defines government employees to include officers and employees of any federal agency, it expressly *excludes* employees of "any contractor with the United States." 28 U.S.C. § 2671. This exclusion encompasses prison contractors. *Logue* v. *United States*, 412 U.S. 521, 526-27 (1973). Excluding employees of contractors from the definition of government employees was an express decision by Congress. Congress "could have left the determination as to whose negligence the Government should be liable for under the [FTCA] to the law of the State involved, as it did with other aspects of liability under the Act" but "chose not to

do this, and instead incorporated into the definitions of the Act the exemption from liability for injury caused by employees of a contractor." *Id*. at 528.

Accordingly, *Carlson*'s rationale for implying a *Bivens* remedy against federal employees is absent for employees of contractors. Without a *Bivens* remedy, those with claims against federal employees would be relegated to an exclusive FTCA remedy that the Court in *Carlson* viewed as inadequate. But as Congress determined, that is not the case for those with claims against employees of federal contractors, who retain state law remedies. As the Fourth Circuit held in *Holly*, "[a]pplication of *Bivens* to private individuals simply does not find legislative sanction." 434 F.3d at 292.

The Ninth Circuit was nevertheless determined to invent a new cause of action based on its view that GEO employees are "acting under color of federal law." App. 22a. Such an expansion of liability, however, is for Congress, not the courts, to prescribe. Congress has, by statute and for particular policy reasons, extended damages liability to those acting under color of *state* law. *See* 42 U.S.C. §§ 1981, 1983. But Congress has not done so with regard to those acting under color of *federal* law. Indeed, Congress knows full well how to extend laws to non-governmental individuals acting under color of federal law, including in the prison context. In the Religious Land Use and Institutionalized Persons Act, Congress defined the term "government" to include "any other person acting under color of Federal law," but only for narrow purposes not including the cause of action itself. *See* 42 U.S.C. § 2000cc-5(4)(B). *See also*, *e.g.*, 18 U.S.C. § 242 (criminalizing certain acts taken "under color of any law"). Yet Congress took

the opposite approach in the FTCA, excluding contractor employees from coverage.

As the Fourth Circuit explained in *Holly*, this Court's "repeated reluctance to extend *Bivens* is not without good reason" because "[a] *Bivens* cause of action is implied without any express congressional authority whatsoever." 434 F.3d at 289. Unlike courts, "Congress possesses a variety of structural advantages that render it better suited for remedial determinations in cases such as this." *Id.* at 290. The Ninth Circuit stood these admonitions on their head, implying a *Bivens* remedy against private individuals even though every indicia of congressional intent is to the contrary. Such an unprecedented exercise of judicial lawmaking warrants this Court's intervention.

III. THE QUESTION PRESENTED IS RECURRING AND IMPORTANT, AND THIS CASE IS AN IDEAL VEHICLE FOR DECIDING IT.

A. The Question Is Recurring.

In addition to the conflicts the Ninth Circuit has created with other circuits and this Court's precedents on an important issue, certiorari is warranted because this case raises a "recurring question on which courts of appeals have divided," *Clay* v. *United States*, 537 U.S. 522, 524 (2003), and "a considerable number of suits are pending in the lower courts which will turn on the resolution of these issues." *Massachusetts Trs. of E. Gas & Fuel Assocs.* v. *United States*, 377 U.S. 235, 237 (1964).

In addition to the appellate cases discussed above, numerous district courts in other circuits have considered whether to extend *Bivens* to employees of

private prison management companies, and they, like their appellate counterparts, are divided. Many have dismissed such claims.[5] But others have not.[6] Moreover, the issue is not limited to the detention context, but extends more broadly to claims against other federal government contractors.[7]

This recurrence is not surprising, given that *Bivens* claims are a significant component of the federal courts' dockets. A recent study of claims filed in five

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[5] *See*, *e.g.*, *Baez* v. *Cornell Cos., Inc.*, -- F. Supp. 2d --, No. 3:10-24, 2010 WL 5648572, *3 (W.D. Pa. 2010); *Fabian* v. *Dunn*, -- F. Supp. 2d --, No. SA-08-cv-269-XR, 2009 WL 2461207, *5 (W.D. Tex. 2009); *Lindsey* v. *Corr. Corp. of Am.* ("CCA"), -- F. Supp. 2d --, No. 07-3067-EFM, 2009 WL 2703691, *7 (D. Kan. 2009); *Hernandez-Chavez* v. *CCA*, No. 07-3198-SAC, 2009 WL 1689304, *3 (D. Kan. 2009); *Guillen* v. *Zenk*, No. 07-245J, 2008 WL 5416427, *2 (W.D. Pa. 2008); *Solesbee* v. *Nation*, No. 3:06-CV-0333-D, 2008 WL 244343, *10-11 (N.D. Tex. 2008); *Menteer* v. *Applebee*, No. 04-3054-MLB, 2008 WL 2649504, *10 (D. Kan. 2008); *Hall* v. *CCA*, No. 06-3090-SAC, 2008 WL 53666, *5 (D. Kan. 2008); *Longmire* v. *Carroll*, No. 3-06-CV-1503-P, 2006 WL 3542707, *2 (N.D. Tex. 2006); *Lawson* v. *Liburdi*, 114 F. Supp. 2d 31, 37 (D.R.I. 2000).

[6] *See*, *e.g.*, *Bromfield* v. *McBurney*, No. C07-5226RBL-KLS, 2008 WL 2746289, *13-18 (W.D. Wash. 2008); *Purkey* v. *CCA Detention Ctr.*, 339 F. Supp. 2d 1145, 1148-51 (D. Kan. 2004); *Jama* v. *INS*, 343 F. Supp. 2d 338, 363 (D.N.J. 2004); *Sarro* v. *Cornell Corr., Inc.*, 248 F. Supp. 2d 52, 59-62 (D.R.I. 2003).

[7] *See*, *e.g.*, *Lownsberry* v. *Lees*, -- F. Supp. 2d --, No. 06-13602, 2008 WL 4852791, *17 (E.D. Mich. 2008) (dismissing *Bivens* claims against employee of corporation managing Head Start program); *Bender* v. *GSA*, 539 F. Supp. 2d 702, 711-12 (S.D.N.Y. 2008) (denying motion to dismiss *Bivens* claim against contractor security guard for Social Security Administration officials); *Allen* v. *Travis*, No. 3:06-CV-1361-M (BH), 2008 WL 4602734, *3 (N.D. Tex. 2008) (denying motion to dismiss *Bivens* claim against employee of private security firm deputized as U.S. Marshal).

federal judicial districts found that *Bivens* claims constituted 1.2% of the total federal question filings in 2009. *See* Alexander A. Reinert, *Measuring the Success of* Bivens *Litigation and Its Consequences for the Individual Liability Model*, 62 Stan. L. Rev. 809, 835 (2010). When extrapolated nationwide, this amounts to more than 1,600 *Bivens* cases per year and nearly 19,000 filed in the past decade.[8] Many, like this case, crowd the dockets for years.

And if the Ninth Circuit's decision is allowed to stand, these numbers will only increase. About half of *Bivens* claims are brought against prison personnel.[9] If *Bivens* suits are authorized against employees of private prisoner operators, that number will rise significantly. Presently, the Federal Bureau of Prisons ("BOP") houses prisoners in 14 privately-run secure facilities in eight states. *See* BOP, *Weekly Population Report* (Feb. 17, 2011) (www.bop.gov/locations/weekly_report.jsp#contract). Between 2000 and 2009, the number of BOP prisoners in private facilities (secure and non-secure) rose from 15,524 to 34,087, with the latter number constituting 16.4% of all federal prisoners. *See* Bureau of Justice Statistics, *Prisoners in 2009* (Dec. 2010) (App'x

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[8] For the year ending September 2009, there were 136,041 federal question filings nationwide. *See* Admin. Office of the U.S. Courts, *Judicial Business of the United States Courts* 152 (2009) (Table C-2). From 1999-2009, there were 1,578,305 federal question filings. *Id*. (series 1999-2009, Tables C-2). Extrapolating the study's findings yields 1,632 *Bivens* filings nationwide in 2009 and 18,940 for the decade.

[9] *See* Reinert, *supra*, at 837 (Table 2). From 1992-94, 1,513 *Bivens* claims were filed against Bureau of Prison officials. *See* Br. for United States, *Kimberlin* v. *Quinlan*, 515 U.S. 321 (No. 93-2068) (www.usdoj.gov/osg/briefs/1993/w932068w.txt).

Tables 19 & 20) (bjs.ojp.usdoj.gov/content/pub/pdf/p09.pdf). These statistics, moreover, do not include the many people held by other federal agencies that also contract with private facilities to house detainees.[10]

Prisoner *Bivens* litigation is already inundating the federal courts, and the Ninth Circuit's dramatic expansion of liability, combined with the increasing prevalence of private prison contractors, will only ensure that such litigation increases. Indeed, like many prisoners, Pollard is not shy about instituting litigation to vindicate his perceived rights, as he has filed at least ten other federal actions in addition to this one. *See supra* note 1. Moreover, unlike normal *Bivens* claims, many of the cases now authorized by the Ninth Circuit would not ordinarily be brought in federal court. When a *Bivens* claim is brought against a federal employee, it will often be combined with an FTCA claim for which federal jurisdiction also exists. *See*, *e.g.*, *Hui*, 135 S. Ct. at 1848. But absent diversity of citizenship, the normal forum for claims like Pollard's would be state court. And if no qualified immunity defense exists, many cases against private employees will linger on the dockets far longer than normal *Bivens* claims.

B. The Question Is Squarely Presented Here And There Are Often Impediments To Appellate Review In Other Cases.

In this case, the question presented was squarely faced and resolved by the District Court and the

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[10] These include Immigration and Customs Enforcement, the Office of Refugee Resettlement, the Bureau of Indian Affairs, the U.S. Marshals Service, the Department of Defense, and the Office of the Federal Detention Trustee.

Ninth Circuit, and is dispositive of the entire case. But while the issue is oft-recurring in the lower courts, there are often impediments to appellate review of it in other cases. Accordingly, given the intractable conflict in the circuits, this Court should not pass up this ideal opportunity to decide the question and restore certainty to the law.

It would be very difficult for the issue to make its way to this Court from the Ninth Circuit in a future case. District courts in that circuit are now bound to let *Bivens* claims go to trial if they are otherwise cognizable. Thus, the issue would likely not recur in the Ninth Circuit unless (1) the plaintiff secures a favorable final judgment after a trial; (2) the defendant preserves the *Bivens* issue for appellate review; and (3) the judgment is not reversed on other grounds. In other cases, including those settled before trial, the defendant would have no realistic opportunity to raise the issue on appeal.[11]

There are impediments to review in other circuits as well. If a district court denies a motion to dismiss, the defendant would face the same impediments just noted. The defendant could try to seek interlocutory certification, *see*, *e.g.*, *Holly*, 434 F.3d at 288, but that would be wholly discretionary with both the trial court and the court of appeals. *See* 28 U.S.C. § 1292(b). Even if the district court dismisses the *Bivens* claims, impediments to appellate review

[11] It is unlikely the issue would arise if a defendant prevails in the trial court on other grounds. If the plaintiff appeals, the defendant could conceivably attempt to preserve the issue in the Ninth Circuit as an alternative basis for affirmance, but the plaintiff would have to prevail on appeal for the issue to be cognizable in this Court. And in that event, there would likely be other issues that would complicate this Court's review.

would still exist. If only *Bivens* claims were asserted, the plaintiff would still have to elect an appeal. But as occurs in cases against federal employees, where plaintiffs typically assert both *Bivens* and FTCA claims, *see Hui*, 135 S. Ct. at 1848, many plaintiffs suing private employees can be expected to assert *Bivens* claims along with state law claims. If so, dismissal of the *Bivens* claims could not be appealed until after final judgment on the other claims (absent interlocutory certification). *See* 28 U.S.C. § 1291. If the defendant prevails on additional grounds applicable to all claims, however, the *Bivens* issue would not be independently appealable.

And whether or not *Bivens* claims are dismissed, other complicating factors may often prevent the issue from cleanly arriving at this Court after final judgment. Most notably, many claims will settle before final judgment regardless of their merits, and the *in terrorem* effect of *Bivens* claims brought against private individuals without recognized qualified immunity defenses could well influence such settlements. *See* Reinert, *supra*, at 812-13 n.13, 837 (noting that *Bivens* claims are more successful than previously thought, with success including a settlement or voluntary dismissal). Indeed, cases where *Bivens* claims against private employees have survived dismissal motions have not proceeded to final judgments that could be appealed.[12]

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[12] After the decision in *Sarro*, 248 F. Supp. 2d at 60-62, the plaintiff dismissed his claims, likely pursuant to settlement. *See Sarro* v. *Cornell Corr., Inc.*, Dkt. 57, No. 00-011-T (D.R.I. 2003). After the decision in *Jama*, 343 F. Supp. 2d at 363, the case was tried but the *Bivens* claim was not submitted to the jury. *See Jama* v. *INS*, Dkt. 531, No. 97-3093(DRD) (D.N.J. 2007). After the decision in *Bender*, 539 F. Supp. 2d 702, the

Finally, if a future case does beat these odds and winds its way to this Court, it is unlikely to present the same clean vehicle for deciding the issue on which the circuits are squarely divided. The issue presented for review here was the sole and dispositive basis for decision in both the District Court and the court below, and there were no alternative grounds. It was posed unambiguously, and decided by the Ninth Circuit in a manner self-consciously in conflict with other circuits. The mandate has been stayed pending this Court's review, thereby precluding further substantive trial court proceedings. And there is no reason why the question would benefit from further consideration in the lower courts, a point resoundingly reinforced by the pointed dissents below. The Court should therefore grant review in order to bring certainty to the law.

CONCLUSION

For the foregoing reasons, the petition should be granted and the judgment below reversed.

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plaintiff withdrew her claims, likely pursuant to settlement. *See Bender* v. *GSA*, Dkt. 159, No. 05 Civ. 6459 (S.D.N.Y. 2009).