No. 10-1104

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.

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

BRIEF OF *AMICUS CURIAE* DRI IN SUPPORT OF PETITIONERS

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INTRODUCTION AND INTEREST OF *AMICUS CURIAE* DRI[1]

DRI is an international organization that includes more than 22,000 attorneys involved in the defense of civil litigation. DRI is committed to enhancing the skills, effectiveness, and professionalism of defense attorneys. Because of this commitment, DRI seeks to address issues germane to defense attorneys and their clients, and to the civil justice system. Consequently, DRI has long been a voice in the ongoing effort to make the civil justice system more fair, efficient, and – where national issues are involved – consistent.

To promote these objectives, DRI participates as *amicus curiae* in cases that raise issues of import to its members, their clients, and to the judicial system. Recently, DRI has filed *amicus* briefs in this Court addressing the inconsistent application of law or judicial intrusion into legislative or regulatory authority. *See, e.g.*, *Matrixx Initiatives Inc. v. Siracusano*, 131 S. Ct. 1309 (2011); *Stolt-Nielsen S.A.*

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[1] Pursuant to Supreme Court Rule 37.6, *amicus curiae* states that no counsel for any party authored this brief in whole or in part and that no entity or person, aside from *amicus curiae*, its members, and its counsel, made any monetary contribution towards the preparation and submission of this brief. Pursuant to Supreme Court Rule 37.3(a), *amicus curiae* certifies that counsel of record for both petitioner and respondents have consented to this filing in letters on file with the Clerk's office. The parties were notified of the intention to file ten days prior to the due date of this brief.

v. Animalfeeds Int'l Corp., 130 S. Ct. 1758 (2010); *see also Greenwood v. CompuCredit Corp.*, 615 F.3d 1204 (9th Cir. 2010), *petition for cert. filed*, 79 U.S.L.W. 3442 (U.S. Jan. 24, 2011) (No. 10-948).

In the proceedings below, a divided panel authorized a private *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388 (1971) action for damages against private prison employees for alleged constitutional violations. In so doing, the majority broke away from the decisions of two other Circuits, both of which declined to recognize *Bivens* actions under largely the same circumstances, as well as controlling Supreme Court authority. Although the majority's decision created a seismic rift in current *Bivens* jurisprudence, the Ninth Circuit nevertheless denied rehearing *en banc*, with several judges dissenting in a sharply worded opinion.

The petition for writ of certiorari does an exemplary job of explaining why the majority's decision requires this Court's review and DRI will not repeat those reasons here. Instead, DRI submits this *amicus* brief to amplify the legal and practical consequences of the panel majority's decision, which favor granting certiorari as well.

As an initial matter, because creation of private causes of action is better suited to the legislative process, this Court for the last 30 years has refused to extend *Bivens* actions beyond three limited circumstances – none of which are present in this case. But the lower court's decision takes *Bivens* into uncharted territory by exposing private employees to

an unprecedented form of personal liability. The ramifications of extending *Bivens* in this manner involve precisely the type of complex and competing policy and practical issues that are best suited for the legislative process. Yet, while Congress has adopted multiple statutes governing private prisons, none of those statutes state or imply any intent to create avenues for relief beyond what the statutes provide. By creating a cause of action in the absence of any indication from Congress that one should exist, the Court of Appeals majority has improperly substituted its own judgment for Congress's and thus overstepped its bounds.

Moreover, as two other Circuits have recognized, creating a *Bivens* action in these circumstances will not accomplish the majority's stated purpose of achieving uniformity in the law. On the contrary, not only does the ruling depart from this Court's established jurisprudence, but it also imposes a second liability regime on top of the fifty states' tort laws. As a result, rather than promoting uniformity, the Court of Appeals majority has opened the door to parallel liability under a whole new set of rules. Nothing in the *Bivens* jurisprudence warrants that extraordinary result.

Finally, DRI is concerned that the decision will reverberate beyond the private prison setting. Because the Court of Appeals majority provides no measurable limits on *Bivens*, other private employees who work for companies that contract with the government – and DRI's membership represents many of

these companies – face an inchoate risk of personal liability. Because of the breadth of the government's contracting operations, the number of private employees that face potential liability is immense and the potential for an increase in *Bivens* lawsuits is substantial. Before the decision takes root, and unleashes these consequences on private employees and the judicial system, this Court should grant review to determine whether there are solid legal grounds for doing so.

REASONS FOR GRANTING THE PETITION

Creating "a private right of action is . . . better left to legislative judgment in the great majority of cases." *Sosa v. Alvarez-Machain*, 542 U.S. 692, 727 (2004). The unifying thread among the only three decisions in which this Court has permitted the unlegislated *Bivens* theory was that the plaintiff had no sufficient remedy to redress his or her grievance. *See Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. at 389 (federal agents who, under the color of federal authority, commit Fourth Amendment violations could be liable for civil damages; plaintiff could not sue federal officer under Section 1983); *Davis v. Passman*, 442 U.S. 228, 245 (1979) (employee of Congressman could allege claims under the Fifth Amendment's equal protection clause for gender discrimination; plaintiff had no remedies under federal anti-discrimination statutes or state law); *Carlson v. Green*, 446 U.S. 14, 20, 25 (1980) (prisoner

could sue public prison official; although Federal Tort Claims Act provided plaintiff with an alternative remedy against the United States, it provided no remedy against the individual who committed the constitutional violation).

As petitioners note, this Court uniformly has refused to expand *Bivens* beyond the above trilogy in many decisions over the last 30 years. This jurisprudence is a byproduct of the limited role of the judicial branch – and, by contrast, the primacy of Congress – in determining whether substantive legal liability should be created in the public interest. *See Schweiker v. Chilicky*, 487 U.S. 412, 426-27 (1988) ("[W]e declined in *Bush* '"to create a new substantive legal liability . . . " because we are convinced that Congress is in a better position to decide whether or not the public interest would be served by creating it.'" (internal quotations and citation omitted). As the Fourth Circuit observed in rejecting *Bivens* actions against private prison employees:

> Congress possesses a variety of structural advantages that render it better suited for remedial determinations in cases such as this. Unconstrained by the factual circumstances in a particular case or controversy, Congress has a greater ability to evaluate the broader ramifications of a remedial scheme by holding hearings and soliciting the views of all interested parties. [citation] And by debating policies and passing statutes rather than deciding individual cases, Congress has increased latitude to implement potential

> safeguards – e.g., procedural protections or limits on liability – that may not be at issue in a particular dispute.

Holly v. Scott, 434 F.3d 287, 290 (4th Cir. 2006).

Here, as the Fourth Circuit also observed, "there are a variety of statutes authorizing the housing of federal inmates in privately operated facilities." *Holly*, 434 F.3d at 290 (citing 18 U.S.C. § 4013(b)). "Congress passed these statutes in the belief that private management would in some circumstances have comparative advantages in terms of cost, efficiency, and quality of service." *Id*. However, nothing in these statutes states or implies Congressional intent to create a right of action against private prison employees for constitutional violations. *Cf. Carlson*, 446 U.S. at 20 (*Bivens* action permissible where Federal Tort Claims Act explicitly stated that the statute ran parallel to *Bivens* actions). On the contrary, to create a *Bivens* action in addition to existing statutory "avenues of inmate relief might well frustrate a clearly expressed congressional policy." *Holly*, 434 F.3d at 290.

The Court of Appeals majority did not heed this statutory scheme or the absence of any express or implied intent by Congress to provide a remedy for constitutional violations by private prison employees. Instead, the majority simply substituted its own judgment. This kind of judicial legislating is forbidden. *See U.S. v. Nat'l Treasury Employees Union*, 513 U.S. 454, 479 (1995) ("Our obligation to avoid judicial

legislation also persuades us to reject the Government's second suggestion – that we modify the remedy by crafting a nexus requirement for the honoraria ban."); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran*, 456 U.S. 353, 394 n.100 (1982) ("It is just as much 'judicial legislation' for a court to withdraw a remedy which Congress expected to be continued as to improvise one that Congress never had in mind." (citation omitted)).

There is no practical reason to depart from these longstanding prohibitions against judicial legislation, either. Again, the Court has extended *Bivens* only twice – "to provide an otherwise nonexistent cause of action . . . [and] to provide a cause of action for a plaintiff who lacked any alternative remedy for harms caused by an individual officer's unconstitutional conduct." *See Corr. Svcs. Corp. v. Malesko*, 534 U.S. 61-62, 70 (2001) (emphasis omitted). But here, the individual tort regimes of the fifty states already provide prisoners with adequate means of redressing their grievances through damages. In light of these available alternative remedial schemes, creating a *Bivens* action through judicial legislation is an unnecessary and unwarranted exercise.

The creation of a *Bivens* action also is troubling because it constitutes a profound leap of uncertain implications. Statutes that impose personal liability on persons who commit civil rights violations under the color of law were developed with the understanding that public employees assume certain official duties when accepting public employment, and thus

are entitled to various privileges, immunities, and indemnity rights by virtue of their public employment. In the few instances in which it has authorized *Bivens* actions, the Supreme Court undoubtedly assumed that similar duties, privileges, immunities, and indemnity rights would apply to the federal officials subject to suit because those officials likewise were public employees. But the extension of *Bivens* to private employees in this case takes a doctrine developed exclusively to apply to public officials and injects it into an arena – private employment – where the rules are different. It is impossible to foresee all of the implications of extending *Bivens* into this new arena, and that is ample reason for the courts to exercise restraint and leave the issue for the legislative process, where those ramifications can be more fully explored.

Apart from overstepping its bounds, the Court of Appeals majority has done grave harm to its own stated intent of providing uniform liability for these kinds of claims. The majority has dropped a *Bivens*-based liability scheme right on top of the fifty states' tort law regimes. In the process, the panel has created a circuit split regarding whether a *Bivens* action may be maintained in these circumstances at all. The result is that some private prison employees may face tort liability under a patchwork of different state laws, as well as *Bivens* claims. Others may face only *Bivens* claims. Still others may face a patchwork of state tort liability and no *Bivens* claims at all. In all cases, private prison employees will not have the

benefit of a qualified immunity defense that their public employee counterparts enjoy. That is hardly a uniform picture of liability.

Finally, the Court of Appeals' decision will likely reach beyond private prison employees, resulting in a flood of *Bivens* actions. The majority has blurred the *Bivens* line in a way that creates uncertainty not just for private prison employees, but for all employees at any of the numerous private companies that contract with the government. All of these employees now face an inchoate risk that the decision may spur actions against them.

The number of private employees performing what typically are considered "government functions" – and who are thus potentially subject to *Bivens* actions under the Court of Appeals' reasoning – has only increased over the past twenty years. *See* Laura A. Dickinson, *Public Law Values In A Privatized World*, 31 YALE J. INTL. L. 383, 383-84 (2006). The growth in privatization has touched not only the prison management sector, but also sectors such as health care, education, welfare and public benefit administration, foreign affairs, and security services. *See id.*; *see also* Richard Frankel, *Regulating Privatized Government Through § 1983*, 76 U. CHI. L. REV. 1449, 1451-52 (2009); Laura A. Dickinson, *Government For Hire: Privatizing Foreign Affairs And The Problem Of Accountability Under International Law*, 47 WM. & MARY L. REV. 135, 137-38 (2005). Plus, "[w]ith billions of dollars in federal aid from the recently enacted economic stimulus package going to

state and local governments, privatization opportunities should only increase." Frankel, *supra*, at 1452.

At the same time, as petitioners point out, our courts have been inundated with approximately 19,000 *Bivens* actions in the last decade alone. On its face, this number is astonishing considering that the Court has recognized *Bivens* actions in only three limited circumstances. However, because the majority's decision would potentially expose all employees of private government contractors to *Bivens* liability – at a time when privatization of government functions is trending rapidly upwards – the number of *Bivens* actions filed in the next decade could skyrocket well above 19,000.[2] Before burdening our courts any further, as the Court of Appeals majority would envision, this Court should grant review to ensure there are good legal grounds for doing so.

[2] In the brief period since the Ninth Circuit denied rehearing *en banc* in this case, the decision already has been cited in actions that do not involve private prison employee-defendants. *See, e.g.*, *Reiner v. Mental Health Kokua*, No. 10-00340, 2011 WL 322535, at *6-8 (D. Haw. Jan. 31, 2011) (dismissing Fifth and Fourteenth Amendment claims against non-profit mental health facility operator and its employees because they were not state actors under *Pollard*); *Martinez v. Mercy Hosp. of Bakersfield*, No. 1:09-cv-01994, 2011 WL 444861, at *1 n.1 and *2 (E.D. Cal. Feb. 8, 2011) (dismissing Eighth Amendment claim against private hospital and its medical staff, "assuming but not deciding" that defendants could be state actors under *Pollard*).

CONCLUSION

The Court of Appeals' decision creates a direct circuit split, is a leap from current precedent, constitutes impermissible judicial legislation, and will lead to countless *Bivens* actions in the future. By any measure, Supreme Court review of this decision is warranted and respectfully urged.

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Respectfully submitted,

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