No. 10-1104

IN THE

Supreme Court of the United States

MARGARET MINNECI, *et al.*,
Petitioners,

v.

RICHARD LEE POLLARD, *et al.*,
Respondents.

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

BRIEF FOR RESPONDENT RICHARD LEE POLLARD

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QUESTION PRESENTED

Whether a federal inmate is barred from bringing a damages action for a violation of his Eighth Amendment rights because the federal actors who committed the violation were employed by a private prison operating under contract with the federal government.

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INTRODUCTION

Richard Lee Pollard is a federal prisoner whose federal constitutional rights were violated by persons acting under color of federal law. To remedy these harms, Pollard asserts a federal cause of action under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). Petitioners would have Pollard rely instead on a state cause of action the existence of which is doubtful at best. Given federal prisoners' longstanding access to constitutional damages under *Carlson v. Green*, 446 U.S. 14 (1980), and the uncertain availability of state remedies, a federal cause of action is appropriate.

STATEMENT OF THE CASE

1. In July 1997, the Federal Bureau of Prisons (BOP) hired Wackenhut Corrections Corporation, now known as The Geo Group, to operate a federal prison in Taft, California. The BOP transferred Richard Lee Pollard into that prison in March 2001 from a BOP-operated facility and then, in November 2002, transferred him out to another BOP-operated facility. Pollard's claims arise from his 20-month stay in the privately run Taft facility.

On April 7, 2001, while working in the prison kitchen, Pollard fell and fractured both his elbows. After this accident, he sought medical assistance from the prison infirmary, which provided him with pain medication and bandages. JA31. Two days later, when the pain had not abated, Pollard visited the infirmary again, and an X-ray revealed a possible fracture in each elbow. Prison staff then made an appointment for Pollard to visit an orthopedist at a clinic outside the prison. JA31. During the next several months, Pollard suffered four different Eighth Amendment violations at the hands of five different

Geo Group employees, all of whom were Defendants below and are Petitioners here.

The first violation concerned Pollard's transport to the orthopedist. Bob D. Stiefer was the Chief of Security at Taft and was responsible for prisoner transport. JA29. When Pollard was summoned for his trip to the orthopedist, Stiefer ordered Pollard, who was in obvious pain and posed no security threat, to take off his bandages and sling and put on a jumpsuit. JA31. Given Pollard's inability to bend his arms at the elbow, putting on the jumpsuit caused him "the most excruciating pain." JA32. After ordering him to put on the jumpsuit, Stiefer also ordered Pollard to wear a "black box," a handcuff-like device attached to a chain around an inmate's waist. The weight and positioning of the device put downward pressure on Pollard's arms for six-and-a-half hours, causing him tremendous and unnecessary pain. JA32. Several weeks later, Stiefer ordered Pollard a second time to wear the black box for transport to another appointment. JA37. Pollard again suffered extraordinary pain. JA37.

Pollard suffered his second Eighth Amendment violation at the hands of Jonathan E. Akanno and Robert Spack, both physicians then working for The Geo Group. JA29. Akanno deliberately ignored Pollard's serious medical needs by refusing to provide medical care recommended by the outside orthopedist, including placing Pollard's arm in a splint and providing him with physical therapy. JA33, 40, 42. The refusal to provide such basic medical care caused Pollard significant and long-lasting pain. Spack violated Pollard's Eighth Amendment rights by ignoring obvious evidence of discoloration and significant swelling in Pollard's hands. This reckless behavior forced Pol-

lard to go without basic treatment and suffer extended pain. JA40-41.

Becky Maness, a Food Services supervisor at Taft, also violated Pollard's Eighth Amendment rights. JA29. After Pollard's injury, but long before his arms had healed, Maness forced Pollard to work on various kitchen tasks that caused great pain to his arms. JA35-36. Maness knew of Pollard's injury and painful condition but nonetheless forced Pollard to perform the tasks, even after Pollard's protestations. JA35, 36. After several days of this painful and unnecessary work, Pollard finally was able to visit a prison physician, who declared him unfit to work for the next two weeks. JA36.

Margaret Minneci violated Pollard's Eighth Amendment rights by ignoring Pollard's basic need for food and hygiene. Minneci was Pollard's Health Services Administrator and as such was responsible for overseeing his medical needs. JA28-29. During a portion of his treatment, both of Pollard's arms were placed in casts from his wrists to above his elbows. Because of the casts, Pollard was unable to participate in regular meals or clean himself in the shower or toilet. Minneci had a constitutional responsibility to address Pollard's basic needs and yet made no attempt to intervene. JA33.

2. Based on these events, Pollard filed suit *pro se* in the United States District Court for the Eastern District of California on August 21, 2001. JA13. He amended his complaint on April 18, 2002. JA15. On September 12, 2006, a Magistrate Judge recommended that the action be dismissed because Pollard had no cause of action under *Bivens* and its progeny. JA16. Without analyzing or citing any California

case law, the Magistrate Judge found the cause of action barred on the ground that Pollard had "alternative and superior remedies available to him in state court." Pet. App. 79a. On June 7, 2007, the District Court "adopted in full" the Magistrate Judge's recommendation of dismissal. Pet. App. 71a. Pollard, now represented by counsel, timely appealed the decision to the Court of Appeals for the Ninth Circuit. JA17-18.

The Ninth Circuit reversed. The court held that Petitioners acted under color of federal law (a holding uncontested before this Court) and were suable in a *Bivens* action. Petitioners sought rehearing en banc, which the Ninth Circuit refused, JA10-11, and then petitioned this Court for a writ of certiorari, which this Court granted. JA12.

SUMMARY OF ARGUMENT

To remedy the constitutional violations he suffered at the hands of persons acting under color of federal law, Pollard asserts an implied right of action of the type recognized by this Court in *Bivens*, and in a setting where this Court has repeatedly applied *Bivens*: claims of Eighth Amendment violations at a federal prison. Petitioners insist that Pollard has no claim for the violation of his constitutional rights and should instead be limited to whatever rights he may have under state common law. A federal cause of action is appropriate for either of two reasons.

First, in *Carlson v. Green,* this Court held that a federal prisoner may bring a *Bivens* action for Eighth Amendment violations against prison personnel acting under color of federal law. The cause of action alleged here is, in every meaningful sense, the same as that approved in *Carlson*. This Court has never

drawn a line in its *Bivens* cases between privately employed persons acting under color of federal law and publicly employed persons acting under color of federal law. Were it to do so, privately held federal prisoners would be the only prisoners in the country, whether federal or state, prohibited from enforcing their constitutional rights through a damages action. The Court rejected such asymmetry in *Correctional Services Corporation v. Malesko*, 534 U.S. 61, 72 (2001), where it explained that, in the private prison setting, "a *Bivens* claim against the offending individual officer" is an appropriate remedy. The force of *Carlson* and *Malesko* is unaffected by Petitioners' lack of qualified immunity. As this Court has stated before, "the question of official immunity from *Bivens* liability" is "analytically distinct" from the "the *Bivens* inquiry." *United States v. Stanley*, 483 U.S 669, 684 (1987).

Second, a federal cause of action is appropriate for prisoners in Pollard's shoes. When this Court approves or disapproves a *Bivens* action, it does so for an entire "context" or "category of defendants." *Malesko*, 534 U.S. at 68. The context and the category of defendants implicated here—Eighth Amendment damages actions brought against individuals acting under color of federal law—are appropriate for a *Bivens* action. Privately held federal prisoners have no alternative federal remedies, and the availability and adequacy of state remedies are conjectural. Moreover, there are no "special factors" here to preclude the action. *Bivens* actions are routinely used to enforce Eighth Amendment rights, a point not lost on Congress when it specifically approved such actions in 1988. *See* 28 U.S.C. § 2679(b). Finally, permitting *Bivens* actions here will have no appreciable effect on

the volume of federal court litigation or the costs imposed on the federal government.

ARGUMENT

I. A FEDERAL INMATE WHOSE EIGHTH AMENDMENT RIGHTS HAVE BEEN VIOLATED MAY BRING A CONSTITUTIONAL DAMAGES ACTION.

In *Bivens*, this Court held that a federal agent's violation of the Fourth Amendment "gives rise to a cause of action for damages consequent upon his unconstitutional conduct." 403 U.S. at 389. Nine years later in *Carlson v. Green,* 446 U.S. 14 (1980), this Court applied *Bivens*' core holding to claims brought by federal prisoners under the Eighth Amendment against individual prison employees. Pollard has a cause of action here because his suit is, in every meaningful sense, the same as the suit recognized in *Carlson*.

A. *Carlson v. Green* Authorizes the Cause of Action Alleged Here.

In *Carlson*, the survivor of a deceased federal prisoner brought a damages action against the prison employees responsible for the death. As a federal prisoner, the decedent was unquestionably entitled to the protections of the Eighth Amendment. Similarly, as actors under color of federal law, the defendants were unquestionably obligated to obey the Eighth Amendment. Thus, the only question before the Court was whether a damages action was available to federal prisoners deprived of their Eighth Amendment rights. The Court answered in the affirmative, holding that "a remedy [is] available directly under the Constitution" for Eighth Amend-

ment claims. *Id*. at 16. In the years since, the Court has entertained numerous constitutional actions against individual officers based on the Eighth Amendment and never once questioned their availability. *See, e.g., Hui v. Castaneda*, 130 S. Ct. 1845 (2010); *Farmer v. Brennan*, 511 U.S. 825 (1994); *McCarthy v. Madigan*, 503 U.S. 140 (1992). The Court's holding in *Carlson* thus remains firmly established. Indeed, Congress is fully aware of the Court's *Bivens* jurisprudence in the Eighth Amendment context and has signaled no intention to limit its scope. *See* 28 U.S.C. § 2679(b) (preserving damages actions against federal officials "brought for a violation of the Constitution of the United States").

Pollard's case is on all fours with *Carlson*. Like the victim in *Carlson*, Pollard alleges unconstitutional treatment in violation of the Eighth Amendment. Like the victim in *Carlson*, Pollard is a federal prisoner. That is, Pollard was tried, convicted and sentenced by the United States government for a violation of federal law. He was then ordered imprisoned by the federal government at a location of its choosing. And finally, like the defendants in *Carlson*, the defendants here all acted under color of federal law in executing the laws, regulations, and policies of the United States under which Pollard was imprisoned. Their mistreatment of Pollard "was caused, in the sense relevant for [federal] action inquiry, by the [federal government's] exercise of its right to punish [Pollard] by incarceration." *West v. Atkins*, 487 U.S. 42, 55 (1988) (holding physician hired by the state to

treat prisoners was a state actor). Thus, Pollard's suit calls for an ordinary application of *Carlson*.[1]

Were this Court to bar a *Bivens* action here, privately held federal prisoners would be the *only* prisoners in the country unable to enforce their Eighth Amendment rights through a damages action. Prisoners in publicly operated federal facilities can bring damages actions, *Carlson*, 446 U.S. 14, as can prisoners in both publicly and privately operated state facilities. 42 U.S.C. § 1983; *West*, 487 U.S. 42. This asymmetry is even more startling given that federal prisoners are often held side-by-side with state prisoners in privately run facilities.[2] In these circumstances, two prisoners held in the same prison and suffering the same constitutional violation would be forced to resort to entirely different remedial regimes.

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[1] There is no dispute in this case regarding federal action. Petitioners do not contest that they acted under color of federal law, Pet. Br. 37 n.8, and the United States expressly concedes federal action in this case. U.S. Br. 13-14 n.6.

[2] To take advantage of excess bed capacity at the state and local level, the BOP's Office of the Federal Detention Trustee regularly enters into "Intergovernmental Agreements" whereby state and local level governments hold federal prisoners in exchange for a negotiated payment. Although state and local governments enter into these Agreements, it is often a private prison that actually manages the state or local facility holding the federal prisoner. *See, e.g, County of Bernalillo v. United States*, 93 Fed. Cl. 228, 230-31 (Fed. Cl. 2010) (addressing contract dispute involving Intergovernmental Agreement between BOP and county regarding facility run by private prison company); *Lacedra v. Donald W. Wyatt Det. Facility*, 334 F. Supp. 114, 121 (D.R.I. 2004) (explaining Intergovernmental Agreements in action by federal inmate held in city-owned detention facility managed by private prison company).

Singling out privately held federal prisoners for different treatment could perhaps be justified if it had any basis in this Court's precedent. But there is none. In its *Bivens* cases, this Court has never distinguished between privately employed persons acting under color of federal law and publicly employed persons acting under color of federal law. In *Correctional Services Corp. v. Malesko*, 534 U.S. 61 (2001)—the only *Bivens* case the Court has heard involving federal action taken by a private party—the Court's decision did not turn on the defendants' private status.

In *Malesko*, an inmate in a privately run federal halfway house brought a *Bivens* action against Correctional Services Corporation (CSC), the operator of the halfway house, as well as one of its employees. The Court rejected the claim brought against the prison company *not* because it was privately chartered, but because it was an *entity* rather than an individual person. *Id.* at 70-71. This result was predictable in light of *FDIC v. Meyer*, 510 U.S. 471 (1994), another *Bivens* action brought against a federal agency. The Court in *Meyer* rejected a *Bivens* action against the agency because if *Bivens* actions were permitted against federal agencies, "there would be no reason for aggrieved parties to bring damages actions against individual officers" and the "deterrent effects of the *Bivens* remedy would be lost." *Id.* at 485. Seizing on "the logic of *Meyer*," the Court in *Malesko* rejected a *Bivens* action because "if a corporate defendant is available for suit, claimants will focus their collection efforts on it, and not the individual directly responsible for the alleged injury." 534 U.S. at 71. In so holding, the Court attached *no* significance to the company's private status. Indeed,

it reasoned that the private company was, "in every meaningful sense, the same" as the government agency sued in *Meyer*. *Id.*

Apart from its rejection of the public-private distinction, *Malesko* supports Pollard's cause of action in another way. What is often ignored in *Malesko* is that the plaintiff there brought a *Bivens* claim not only against CSC, but also against one of CSC's employees. When the case came to this Court on the issue of whether CSC was subject to a *Bivens* action, the parties, the United States as amicus curiae, and the Court itself all assumed that a *Bivens* action against the employee would have been proper had it not been barred on statute of limitations grounds. *Id.* at 65.

A central premise of CSC's argument to the Court was that privately held federal prisoners "have no need for a *Bivens* remedy against entities." Brief of CSC at 13, *Malesko*, 534 U.S. 61 (No. 00-860). A *Bivens* action against a prison company is unnecessary, CSC argued, because the plaintiff "could have brought a *Bivens*-type action against CSC's individual employees who allegedly acted unconstitutionally under color of federal law." *Id.* This assertion was not *ipse dixit*; it was based on the "weight of authority" at the time. *Id.* at 13-14 (referring to cases collected in *Heinrich ex rel. Heinrich v. Sweet*, 62 F. Supp. 2d 282, 306-07 (D. Mass. 1999)). According to CSC, this authority made clear that "individual employees of private entities acting under color of federal law are subject to *Bivens* actions." *Id.* at 13.

The United States, participating as amicus curiae in support of CSC, was equally explicit about the availability of a *Bivens* action against private prison

employees. The United States explained in its brief that *Bivens* actions against prison companies were unnecessary because "inmates in private [federal] institutions *already* have remedies, remedies that parallel those available to (and adequate for) their publicly housed counterparts." Brief of United States as Amicus Curiae Supporting Petitioner at 22, *Malesko*, 534 U.S. 61 (No. 00-860) (emphasis added). This statement was not based on the "weight of authority," as was CSC's similar statement, but instead on the "rationales" underlying *Bivens* itself. *Id*. According to the Solicitor General,

> the same rationales that supported the creation of a *Bivens* remedy against federal employees—deterring individuals from engaging in unconstitutional conduct, and ensuring the availability of a remedy separate and apart from state tort law—support the recognition of such a remedy against private individuals who violate constitutional rights under color of federal law.[3]

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[3] In its amicus brief here, the United States tries to paint its position in *Malesko* as nothing more than an "assum[ption] *arguendo* that a *Bivens* remedy would be available against individual employees." U.S. Br. 21 n.9. But the United States hardly could have expected the Court to credit its argument that *Bivens* actions against corporations are unnecessary because "inmates in private [federal] institutions already have remedies" if the United States truly had been agnostic on that issue. Brief of U.S. as Amicus Curiae 22, *Malesko*, 534 U.S. 61 (No. 00-860). Nor would an agnostic feel compelled to argue that the "rationales" behind *Bivens* "support the recognition of [a *Bivens*] remedy against private individuals." *Id*. at 17 n.6. The reality here is that the United States has abandoned its prior stance on

(*Footnote continued*)

Id. at 17 n.6 (internal citation omitted).

In light of the arguments presented to the Court by CSC and the United States as amicus curiae, it is not surprising that the Court *also* believed that *Bivens* actions were available against private prison employees. Writing for the majority, Chief Justice Rehnquist rejected a corporate *Bivens* action in part because "no federal prisoners enjoy" such a remedy. *Malesko*, 534 U.S. at 71-72. Appealing to the value of symmetry, the Chief Justice explained that remedies available to a privately held federal prisoner for a "constitutional deprivation" ought to mimic the remedies available to a publicly held federal prisoner for the same deprivation—namely, "a *Bivens* claim against the offending individual officer." *Id*. at 72. Indeed, the Court faulted the prisoner for not "timely pursu[ing]" a *Bivens* claim against the individual defendants. *Id*.; *see also id*. at 65 (noting the *Bivens* claim against "individual defendants . . . was dismissed on statute of limitations grounds").

In sum, *Malesko* confirms what is plain in *Carlson* itself: A federal prisoner whose Eighth Amendment rights have been violated may bring a constitutional damages action against persons acting under color of federal law.

B. Petitioners' Lack of Qualified Immunity Does Not Preclude a *Bivens* Action.

Despite the holding of *Carlson*, and the assumptions underlying *Malesko*, Petitioners argue that their lack of qualified immunity militates against a

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Bivens cases of this sort and refused to acknowledge, much less explain, its change of course.

Bivens action here. Pet. Br. 36. Petitioners point to the Court's observation in *Carlson* that a damages remedy would not "inhibit [prison guards'] efforts to perform their official duties" because "the qualified immunity accorded [the guards] under *Butz v. Economou*, 438 U.S. 478 (1978), provides them adequate protection." *Carlson*, 446 U.S. at 19. Having no qualified immunity, Petitioners believe a cause of action is unjustified here.[4] What Petitioners fail to acknowledge, however, is that this Court has made clear since *Carlson* that a defendant's immunity, or lack thereof, is "analytically distinct" from a *Bivens* inquiry. *Stanley*, 483 U.S at 684.

In *Stanley*, the Court was asked to determine whether a *Bivens* action should be available in the military context. The Court rejected the action in deference to the unique disciplinary structure of the military. *Id*. at 679. Dissenting, Justice Brennan criticized the Court for, in effect, immunizing federal actors for their constitutional wrongs. *Id*. at 693 (Brennan, J., dissenting). Writing for the Court, Justice Scalia disagreed with Justice Brennan and drew a sharp distinction between causes of action and the affirmative defense of immunity.

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[4] In making this argument, Petitioners cite the "asymmetrical liability risks" it would face if a *Bivens* action were permitted here. Pet. Br. 36. Claims of asymmetry are plainly incorrect in light of private prison companies' routine detention of federal and state prisoners in the same facility. *See supra* 8 n.2. Barring federal prisoners in those facilities from bringing a *Bivens* action will not somehow return prison companies' liability risks to a state of "symmetry." The only effect of such a decision would be to render asymmetrical the constitutional remedies available to federal prisoners.

> [T]he availability of a damages action under the Constitution for particular *injuries* . . . is a question logically distinct from immunity to such an action on the part of particular *defendants*. When liability is asserted under a statute, for example, no one would suggest that whether a cause of action exists should be determined by consulting the scope of common-law immunity enjoyed by actors in the area to which the statute pertains. Rather, one applies that immunity (unless the statute says otherwise) *to* whatever actions and remedies the terms of the statute are found to provide. Similarly, the *Bivens* inquiry . . . is analytically distinct from the question of official immunity from *Bivens* liability.

Id. at 684 (emphasis in original).

Last year, the Court unanimously confirmed *Stanley*'s sharp distinction between causes of action and immunity. In *Hui v. Castaneda*, 130 S. Ct. 1845 (2010), a person detained by U.S. Immigration and Customs Enforcement (ICE) brought a *Bivens* action against physicians who had mistreated him. The physicians were members of the U.S. Public Health Service (PHS), a federal agency charged with caring for ICE detainees. The defendants argued that they were immune from suit under 42 U.S.C. § 233(a), a statute making actions under the Federal Tort Claims Act (FTCA) the "exclusive" remedy for certain harms caused by PHS employees. *Id*. at 1849. The Ninth Circuit saw the issue as whether a *Bivens* action was available for the type of violation at issue and, thus, searched for congressional intent to override the *Bivens* cause of action. Finding no indication

of a congressional override, the court of appeals ruled that the suit could proceed. *Castaneda v. United States*, 546 F.3d 682, 689-99 (9th Cir. 2008).

This Court unanimously reversed. Of particular importance here is how the Court reframed the issue. In the Court's view, a damages action against a federal officer requires "two separate inquiries." *Hui*, 130 S. Ct. at 1851-52 (*citing Stanley*, 483 U.S. at 684). One inquiry—"whether a damages remedy is available for a particular constitutional violation"—is the classic *Bivens* inquiry involving alternative remedies and special factors. *Id.* at 1852. The other inquiry—"whether the agent is amenable to suit"—is a question of immunity. *Id.* Disagreeing with the Ninth Circuit's formulation, the Court held that the case did *not* involve a *Bivens* inquiry. Instead, it "present[ed] the separate question whether petitioners are immune from suit for the alleged violations." *Id.* The analytical framework applied in *Hui* thus confirms what the Court held in *Stanley*: A defendant's immunity is a "*separate question*" from the *Bivens* question.[5]

The unacknowledged reality here is that Petitioners are dissatisfied with the Court's decision in *Richardson v. McKnight*, 521 U.S. 399 (1997). In *Rich-*

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[5] The distinction between causes of action and immunity does not apply only to *Bivens*. Rather, as the Court's earlier quoted opinion in *Stanley* makes clear, the distinction arises from the fundamental difference in all federal litigation between an affirmative claim for relief and an affirmative defense. *Compare* Fed. R. Civ. P. 8(a) (a complaint need only present "a short and plain statement of the claim showing that the pleader is entitled to relief") *with* 12(b) (a "defense to a claim for relief in any pleading must be asserted in the responsive pleading").

ardson, the Court denied qualified immunity to private prison employees acting under color of state law—a holding that applies equally to those acting under color of federal law. *Id.* at 401; *Butz*, 438 U.S. at 504; *see also* Pet. Br. 38. The Court's holding in *Richardson* was grounded in two observations. First, the Court found no "'firmly rooted' tradition of immunity applicable to privately employed prison guards." 521 U.S. at 404. Second, the Court reasoned that private prisons, unlike public prisons, face "marketplace pressures" that will fulfill the goals of the qualified immunity doctrine, namely keeping guards from acting in an "overly timid" manner. *Id.* at 410. *Richardson* demonstrates that, as in *Hui* and *Stanley*, the immunity question is separate from the cause of action question. Indeed, to reason that private prison guards should be rescued from liability through the device of denying a *Bivens* action because the Court has previously found that there is *no* sufficient reason to immunize them would turn *McKnight*, as well as *Hui* and *Stanley*, on their heads.

II. A FEDERAL DAMAGES ACTION IS AN APPROPRIATE REMEDY FOR EIGHTH AMENDMENT VIOLATIONS SUFFERED BY FEDERAL INMATES CONFINED IN PRIVATE PRISONS.

As explained above, *Carlson* provides Pollard with a cause of action. Even if *Carlson* does not specifically sanction Pollard's action, however, this Court should still recognize Pollard's right to sue using a federal cause of action.

In evaluating a cause of action here, the first issue the Court must resolve is whether to decide the

availability of a *Bivens* remedy on a case-by-case basis or, instead, adopt a categorical approach. Petitioners argue that "this Court prefers [a] 'case-by-case determination[] of whether adequate alternative remedies exist to a blanket determination that *Bivens* is available to an entire class of plaintiffs.'" Pet. Br. 32 (*quoting* Pet. App. 64a). This claim is incorrect. This Court does not follow a case-by-case approach, and such an approach would impose significant burdens on district courts with no countervailing benefit.

After determining that a case-by-case approach should be rejected in favor of a categorical approach, the Court must determine which categorical rule to adopt. The two possibilities are to *bar* all *Bivens* actions brought by federal prisoners against private prison employees for Eighth Amendment violations, or to *permit* all such actions. The proper course is to permit such actions because the varied and uncertain tort remedies available under state law are inadequate to deter the variety of Eighth Amendment violations committed in federal prisons, and because there exist no special factors counseling hesitation in the recognition of a *Bivens* action.

A. A Case-by-Case Approach to Alternative State Remedies Should Be Rejected.

Petitioners urge this Court to adopt "a case-by-case" approach to the "determination[] of whether adequate alternative remedies exist." Pet Br. 32; *see also* U.S. Br. 27-28. That is, they would have district courts in every *Bivens* action brought by a privately held prisoner determine whether, on the specific facts of the prisoner's complaint, state remedies are available to him. This approach is contrary to this

Court's consistent practices in the *Bivens* area and would needlessly burden district courts.

1. When this Court approves or disapproves a *Bivens* action, it does so for an entire "context" or "category of defendants." *Malesko*, 534 U.S. at 68. Thus, when the Court approved a cause of action in *Bivens*, *Carlson* and *Davis v. Passman*, 442 U.S. 228 (1979), the Court did not hold that *only* Webster Bivens, Marie Green and Shirley Davis had a cause of action. It held that other plaintiffs similarly situated *also* had a cause of action. That much is obvious from the many Fourth and Eighth Amendment *Bivens* actions routinely heard before this Court and courts across the country. *See, e.g.*, *Wilson v. Layne*, 526 U.S. 603 (1999) (Fourth Amendment action); *Farmer v. Brennan*, 511 U.S. 825 (1994) (Eighth Amendment action). Similarly, when the Court rejected a cause of action in cases like *Stanley, Bush v. Lucas,* 462 U.S. 367 (1983), and *Schweiker v. Chilicky*, 487 U.S. 412 (1988), the Court did not leave open the door for other plaintiffs to bring suit. The Court barred *all* claims by enlisted personnel for harms incident to service, *all* First Amendment claims by federal employees, and *all* claims for the wrongful withholding of social security benefits. In *no Bivens* action has the Court adopted a case-by-case approach.

The case-by-case approach has been viewed as particularly inapt in cases where state remedies played a role in the Court's analysis, as in *Bivens*, *Malesko* and *Wilkie v. Robbins*, 551 U.S. 537 (2007). In *Bivens* itself, the Court considered whether Bivens could bring a constitutional action against federal agents who unlawfully entered his apartment or must instead bring "an action in tort, under state law." 403

U.S. at 390. The Court was skeptical that state remedies would be available because the common-law tort of trespass—Bivens' presumptive state cause of action—would be susceptible to the defense of consent in circumstances where consent would not obviate a Fourth Amendment violation. *Id.* at 394-95 (noting that a citizen "may bar the door against an unwelcome private intruder" but will find it "futile . . . to resist an unlawful entry" demanded by an officer of the law, especially because "resistance . . . may amount to a crime"). The Court thus held that "*regardless* of whether the State in whose jurisdiction that power is exercised would prohibit or penalize the identical act if engaged in by a private citizen," a constitutional damages action could be brought. *Id.* at 392 (emphasis added). The Court did not hold that *Bivens* actions would be available only where a state remedy was questionable. It held that, because state remedies would often be of dubious value in remedying government misconduct, a federal action may be brought to remedy *all* Fourth Amendment violations, regardless of the availability (or not) of a state-law remedy.

The Court followed this same categorical approach in *Malesko*. In *Malesko*, a federal prisoner held by a private prison company sued the company for an Eighth Amendment violation. 534 U.S. at 64-66. The Court rejected a *Bivens* action because "the threat of suit against an individual's employer was not the kind of deterrence contemplated by *Bivens*." *Id.* at 70. In doing so, the Court noted the plaintiff's explicit concession that state remedies were "at least as great, and in many respects, greater, than anything that could be had under *Bivens*." *Id.* at 72. The opinion is clear, however, that even if state remedies had

been unavailable, a *Bivens* action against a private company would still have been barred. State remedies or not, the Court believed that a *Bivens* action against an entity, rather than an individual, failed to provide the type of deterrence for which *Bivens* was designed. A *Bivens* action against a prison company was therefore unavailable to *all* privately held prisoners, not just those whose attorneys conceded the adequacy of state remedies. *Id.* at 71.

Finally, in *Wilkie v. Robbins*, 551 U.S. 537 (2007)—the only *Bivens* case that Petitioners cite in favor of their case-by-case argument, Pet. Br. 32—the Court again adopted a categorical rule barring *Bivens* actions. The plaintiff in *Wilkie* sued federal agents for a pattern of "harassment and intimidation aimed at extracting an easement across [the plaintiff's] property." 551 U.S. at 541. The Court did not simply dismiss the suit in front of it, but held that *Bivens* does not authorize *any* suit alleging "retaliation for exercising . . . property rights" or "unjustifiably burdening . . . right[s] as a property owner." *Id.* at 562. A "freestanding [constitutional] damages remedy," the Court held, was inappropriate for such behavior because of the "difficulty of devising a workable cause of action." *Id.* at 550, 562. Moreover, had the Court seen its ruling as *sui generis*, there would have been no reason for it to express concern over a potential "onslaught of *Bivens* actions." *Id.* at 562.

Thus, in every one of this Court's cases in which a constitutional damages action was sought, the Court has ruled that the cause of action was or was not available in an entire "context" or "category of defendants." *Malesko*, 534 U.S. at 68. It has never confined its holding to the specific plaintiff or defendant before it.

2. Not only is a case-by-case inquiry into alternative remedies inconsistent with this Court's *Bivens* cases, but the approach would also needlessly burden district courts. When a federal prisoner brings a *Bivens* action, the district court judge must, under the Prison Litigation Reform Act (PLRA), prescreen the complaint to determine if it states a claim for relief. *See* 28 U.S.C. § 1915A. If the availability of a *Bivens* action in a particular case turns on the availability and adequacy of state remedies for each particular case, judges will be required in each case to search all of state law to determine whether the prisoner's complaint might state a claim under state law. This approach would involve an arduous process that would advance none of the principles underlying the *Bivens* doctrine.

First, under 28 U.S.C. § 1915A, federal judges searching for alternative state remedies will have only the prisoner's complaint before them. The judge will not have access to an answer or motion to dismiss that might elucidate the availability of state remedies. Moreover, the complaint will ordinarily be drawn with an eye towards federal constitutional law, not state law, and thus fail to address elements of state law that would be dispositive as to the availability (or not) of a state remedy. Making this task even more difficult will be the fact that a large proportion of prisoner complaints are filed *pro se* and thus lack clear allegations from which to search for state remedies.

Second, the search for alternative state remedies will be expansive. If district judges are instructed to evaluate state remedies on a case-by-case basis, the judges will be required to evaluate state statutes, regulations and cases, as well as similar laws at the

municipal and local level. Aside from the lack of pleadings by a defendant, this task will be frustrated further by the fact that state tort law pertaining to prisoners' rights is not well developed. This should not be surprising given that federal constitutional rights have long been enforced through federal, rather than state, causes of action. *See, e.g*, *Monroe v. Pape*, 365 U.S. 167, 173-74 (1961) (finding state law insufficient to enforce federal constitutional rights because state remedies were "adequate in theory, [but] not available in practice"); *Bivens*, 403 U.S. at 394 (rejecting state law as inadequate to the task of federal constitutional enforcement because state law may be "inconsistent or even hostile" to federal constitutional rights); *Carlson*, 446 U.S. at 23 (holding that the enforcement of Eighth Amendment rights should not be "left to the vagaries of the laws of the several States"). District courts are likely to face state-law issues of first impression on a routine basis and presumably will attempt to resolve them, as federal courts do when sitting in diversity, by "predict[ing] what [the state supreme] court would decide if it were to address the issue." *Raines v. Safeco Ins. Co. of Am*., 637 F.3d 872, 875 (8th Cir. 2011). This is no easy task.

Pollard's case is illustrative. Petitioners rely principally on *Giraldo v. Calif. Department of Corrections & Rehabilitation*, 85 Cal. Rptr. 3d 371 (Cal. Ct. App. 2008), to argue that "there can be no serious question" that Pollard had state remedies. Pet. Br. 25. *Giraldo*, however, was decided by an intermediate appellate court outside of Pollard's jurisdiction and dealt with a third-party attack on a transgendered prisoner. The decision came over six years after Pollard, acting *pro se*, filed his amended complaint and

was the first "California court [to] apparently discuss[], much less answer[]" the question of a jailer's duties to a prisoner. *Id*. at 382. Thus, under Petitioners' case-by-case approach, a district court prescreening Pollard's complaint to determine whether it stated a cause of action would have had to predict *Giraldo*'s holding six years before it was decided and then make the further leap of predicting that that holding would allow a state cause of action for Pollard's very different claims.

These interpretive challenges will persist far into the future. State statutes, regulations and common law will regularly change in response to concerns specific to each state. Indeed, it can be expected that prison companies will seek immunity for state-law wrongs from state legislatures and courts.

Third, it will not be enough for the district court to search for state causes of action based on a bare complaint. Consistent with this Court's observation in *Bivens* that a state-law defense will often frustrate the success of a state-law cause of action, district courts will also be required to evaluate the possibility of a viable defense. *Bivens*, 403 U.S. at 394 (rejecting a state-law remedy because the defendants might raise the defense of consent); *Malesko*, 534 U.S. at 74 n.6 (considering the applicability of the government contractor defense to a state-law action). At this stage of the case, without an answer, it will be impossible to determine with any certainty whether a defendant possesses a viable defense.

Thus, a case-by-case inquiry into alternative state remedies will be an arduous task. Perhaps the task could be justified if it yielded substantial countervailing benefits. But it does not. Unlike the inquiry into

federal alternative remedies, which is based on "bedrock principles of separation of powers," *Malesko*, 534 U.S. at 69, an inquiry into state remedies cannot be justified by "bedrock principles" of federalism because the dignity accorded states in our constitutional system is not implicated where a *federal* actor violates the *federal* constitutional rights of a *federal* prisoner. A case-by-case inquiry into state remedies is not only at odds with this Court's prior practices, but also a burdensome task that yields no benefits and advances no core constitutional values.

B. The Uncertain Patchwork of Remedies Available Under State Law Should Not Preclude the *Bivens* Action Alleged Here.

1. The purpose of a *Bivens* action is the "deterrence of individual officers who commit unconstitutional acts." *Malesko*, 534 U.S. at 71. A damages remedy plays a particularly important role in deterrence where constitutional violations are unexpected and short-lived, as in the Fourth or Eighth Amendment context. In these situations, victims have no opportunity to remedy their problems through injunctive or declaratory relief. *Butz*, 438 U.S. at 504. By the time the victim gets to court, the injuries have been felt and the constitutional violation has ceased. In these situations, "it is damages or nothing." *Bivens*, 403 U.S. at 410 (Harlan, J., concurring).

In pursuing the goal of deterrence, the Court has proceeded cautiously. Such caution is grounded in "bedrock principles of separation of powers." *Malesko*, 534 U.S. at 69. Just as the Court has the "power to award damages to the victim of a constitutional violation," Congress also enjoys a power over constitutional remedies. *Bush v. Lucas*, 462 U.S. 367,

378 (1983). Congress may create its own remedial scheme or may bar a *Bivens* remedy altogether. *Id.* Where Congress has spoken in the field of constitutional remedies, this Court has given wide berth to Congress' choices. *Id.*

For instance, in *Bush v. Lucas*, a federal employee brought a *Bivens* action against his supervisor for alleged First Amendment violations. As a federal employee, however, the plaintiff was already "protected by" the Civil Service Reform Act, "an elaborate, comprehensive scheme" that Congress "constructed step by step, with careful attention to conflicting policy considerations." *Id.* at 385, 388. Although Congress did not "expressly preclude[]" a *Bivens* action in its remedial scheme, the Court nonetheless found it unwise to "augment[]" Congress' remedial choices with "a new judicial remedy." *Id.* at 373, 388; *see also Schweiker v. Chilicky*, 487 U.S. 412, 425 (1988) (refusing a *Bivens* remedy where Congress had already "provide[d] meaningful safeguards or remedies for the rights of persons situated as [plaintiffs]").

2. Occasionally, the Court has looked at state rather than federal alternative remedies in determining whether a *Bivens* action is appropriate. The Court's concern with state remedies is not grounded in "bedrock principles of separation of powers," because, as noted *supra* at 24, states have no shared role in creating constitutional enforcement schemes against federal officers. *Malesko*, 534 U.S. at 69. Instead, the inquiry into state remedies is grounded in the Court's concern for adequate deterrence of unconstitutional conduct. Only where a state remedy would provide significant deterrence is the need for a *Bivens* action less pressing.

This Court has heard four *Bivens* cases implicating state remedies and never once found a state remedy sufficient by itself to bar an entire class of plaintiffs from asserting a *Bivens* action. In *Bivens* itself, for example, a plaintiff sought constitutional damages after federal officers demanded and received entry into his apartment. 403 U.S. at 389. The defendants opposed the suit by arguing that Bivens should instead pursue "an action in tort, under state law." *Id.* at 390. The Court squarely rejected this argument, holding that the Fourth Amendment "guarantees to citizens an *absolute* right to be free from unreasonable searches and seizures." *Id.* at 392 (emphasis added). Thus, a federal cause of action was available "regardless of whether [state law] . . . would prohibit or penalize the identical act." *Id.* Aside from impoverishing an absolute right, relying on state law would likely prove ineffectual because "the interests protected by state laws . . . and those protected by the Fourth Amendment, may be inconsistent or even hostile." *Id.* at 394 (noting that consent might be a defense to a state-law action in circumstances where it would not bar a Fourth Amendment claim). Accordingly, state tort law could not be relied on to deter constitutional violations committed by federal officers.

In *Carlson*, the Court again expressed skepticism toward state remedies. The plaintiff in *Carlson* brought a *Bivens* action for Eighth Amendment violations. The defendants, several employees of a federally operated prison, argued that the plaintiff should pursue damages under the FTCA rather than under the Eighth Amendment. The Court rejected this argument in part because liability under the FTCA turned on the tort law of the "State in which

the alleged misconduct occurred." 446 U.S. at 23. The Court found it "obvious" that the enforcement of "federal constitutional rights" should not be "left to the vagaries of the laws of the several States." *Id*.

The Court discussed state remedies in relation to *Bivens* for a third time in *Malesko*. There, as discussed above, a federal prisoner brought a *Bivens* action against a correctional corporation for a violation of his Eighth Amendment rights. The Court rejected the action because of deterrence concerns. "The purpose of *Bivens*," the Court explained, "is to deter *individual* federal officers." 534 U.S. at 70 (emphasis added). "[I]f a corporate defendant is available for suit," however, "claimants will focus their collection efforts on it, and not the individual directly responsible for the alleged injury." *Id*. In this situation, "the deterrent effects of the *Bivens* remedy would be lost." *Id*. at 70-71 (*quoting Meyer*, 510 U.S. at 485). Thus, the Court declined to authorize a *Bivens* action for fear it would discourage *Bivens* plaintiffs from seeking recovery from individual corporate employees and thus compromise the deterrent value of *Bivens* itself.

After holding that a "suit against an individual's employer was not the kind of deterrence contemplated by *Bivens*," *id*. at 70, *Malesko* noted the alternative remedies potentially available to the plaintiff. With regard to federal remedies, the Court suggested that the prisoner had the same remedy as a "federal prisoner in a BOP facility," namely, "a *Bivens* claim against the offending individual officer." *Id*. at 72. In addition, the plaintiff could obtain prospective relief through the "BOP's Administrative Remedy Program." *Id*. at 74. With regard to state remedies, the Court found the plaintiff likely had such remedies

because he "alleged . . . a quintessential claim of negligence."[6] *Id.* at 73.

Malesko's treatment of state remedies did not suggest that such remedies alone were sufficient to preclude a *Bivens* action; after all, as discussed *supra* at 19-20, the Court would hardly have held that *no* federal prisoner may sue a prison company simply because *this* prisoner likely had a negligence claim under New York law. The Court's categorical rejection of *Bivens* actions against corporate defendants was instead based only on a concern that would be common to *all* suits against prison companies—namely, that a "suit against an individual's employer was not the kind of deterrence contemplated by *Bivens*." *Id.* at 70.

The fourth and final case in which the Court considered state remedies, *Willkie v. Robbins*, 551 U.S. 537 (2007), confirms the roles of both deterrence and separation of powers in the Court's alternative remedy jurisprudence. In *Wilkie,* plaintiff Harvie Robbins brought a *Bivens* action against federal officials for a pattern of "harassment and intimidation aimed at extracting an easement" from him. *Id.* at 541. The

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[6] The plaintiff in *Malesko* did not allege any Eighth Amendment violations; he only alleged that the defendants were "*negligent* in failing to obtain requisite medication . . . and were further *negligent* by refusing . . . use of the elevator" and, in summary, that the plaintiff's injuries were a "result of the *negligence* of the Defendants." *Malesko*, 534 U.S. at 73 (emphasis in original). The only reason the suit even implicated the Eighth Amendment was that the "District Court . . . construed the complaint as raising a *Bivens* claim, presumably under the Cruel and Unusual Punishments Clause of the Eighth Amendment." *Id.*

pattern of harassment allegedly involved a variety of acts by federal officials, including unauthorized entry onto Robbins' property, several unjustified federal prosecutions, and the wrongful withdrawal of land use permits. *Id.* at 543-47. Consistent with its prior *Bivens* cases, the Court began its inquiry by asking 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." *Id.* at 550.

Turning first to the unauthorized entry onto Robbins' property, the Court found that Robbins had a "civil remedy in damages for trespass." *Id.* at 551.[7] As to the wrongful federal prosecutions, the Court found that Robbins had "some procedure to defend and make good on his position." *Id.* at 552. With regard to the withdrawal of land use permits, the Court found that federal "administrative review was available, subject to ultimate judicial review under the [Administrative Procedure Act]." *Id.* "In sum," the Court explained, "Robbins ha[d] an administrative, and ultimately a judicial, process for vindicating virtually all of his complaints." *Id.* at 553.

Despite the existence of multiple alternative remedies, *Wilkie* did *not* find those remedies alone sufficient to preclude a *Bivens* action. As in the Court's

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[7] Presumably, the Court was referring to an FTCA action against the United States based on a state common-law trespass claim. Under the FTCA, only the United States itself, and not individual officers, can be sued for common-law harms committed by federal officers in the course of their employment. 28 U.S.C. § 2679(b).

other alternative-remedy cases, the Court's conclusion that the remedies did not suffice was based on concerns related to both separation of powers and deterrence. Although Robbins had a variety of potential remedies under different laws and in different tribunals, the Court found it "hard to infer" from this "patchwork" of remedies "that Congress expected the Judiciary to stay its *Bivens* hand"; thus, separation of powers considerations did not mandate rejection of *Bivens*. *Id*. at 554.

Similarly, this "assemblage of state and federal, administrative and judicial[,] . . . statut[ory] and common law" remedies offered, at best, a weak deterrent to "public officials bent on making life difficult" "over a period of six years." *Id*. at 554-55. "The whole [harm was] greater than the sum of its parts." *Id*. at 555. As such, Robbins' "patchwork" of sub-constitutional remedies could not adequately deter the claimed constitutional violations. This lack of adequate deterrence in turn rendered the remedies themselves insufficient to preclude a *Bivens* action, though the Court went on to find that other considerations weighed against recognizing a *Bivens* action for such asserted violations.

In sum, this Court's cases show that the level of respect accorded to alternative remedies depends on considerations of both separation of powers and deterrence. The separation of powers rationale demands that, where Congress has created a remedial scheme to address the harms alleged by a *Bivens* plaintiff, the Court "stay its *Bivens* hand." *Id.* at 554. The deterrence rationale demands that *Bivens* bow to the existence of state remedies *only* where those remedies are plainly available and sufficient to satisfy the goal of deterrence as to entire classes of plain-

tiffs and defendants. In the previous four cases before this Court implicating state remedies, the Court has never once held that a state remedy was sufficient to bar an entire class of plaintiffs from bringing a *Bivens* action.

3. The Court should not withhold a *Bivens* action from privately held federal prisoners on the basis of alternative remedies. First, all parties and amici agree that Congress has neither "expressly precluded" a *Bivens* action here nor created an "elaborate, comprehensive scheme" to remedy the harm alleged. *Bush*, 462 U.S. at 373, 385. Thus, the only alternative-remedy question facing this Court is whether, in the face of congressional silence, it should turn over to states and state tort law the task of enforcing the Eighth Amendment in private federal prisons.[8]

The Court should not do so because the harms suffered by Pollard, and federal prisoners generally, as a result of Eighth Amendment violations do not clearly give rise to relief under state law. Although it is possible that a state remedy might be available for a particular harm in a particular case, state tort law rarely speaks to the distinct constitutional injuries suffered by federal prisoners. Where a complaint *certainly* states a claim under the Eighth Amendment,

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[8] As a privately held prisoner, Pollard has no remedy for an Eighth Amendment violation resulting from mistreatment by private prison employees under the Bureau of Prison's Administrative Remedy Program. 28 C.F.R. § 542.10; *see* U.S. Br. 5 n.2. In addition, even if an FTCA remedy could preclude a *Bivens* action, which it cannot under *Carlson*, 446 U.S. at 23, Pollard has no claim under the FTCA because the defendants are not "employees" of the United States. 28 U.S.C § 2679(b); *see also* Pet. Br. 42.

and Congress has not expressed its opinion on the matter, it is improper to dismiss the complaint purely because the prisoner *might* obtain relief under a state law.

Federal prisoners suffer a wide variety of constitutional harms. Like Pollard, many suffer the deprivation of nutrition, hygiene and medical care, or suffer intentional harms arising from physical contact with prison personnel. Other prisoners suffer attacks by other inmates, preventable suicides, or the denial of heat, ventilation or movement. State-law remedies for these harms are in many cases uncertain or nonexistent.

Take, for example, Pollard's claim that he was denied nutrition and hygiene. Petitioners confidently assure the Court that "there can be no serious question that Pollard's [state-law] remedies were 'at least as great, and in many respects much greater, than anything that could be had under *Bivens*.'" Pet. Br. 25 (*quoting Malesko*, 534 U.S. at 72). Petitioners' support for this claim, however, is long on general legal propositions and short on specific cases. "General propositions," however, "do not decide concrete cases." *Lochner v. New York*, 198 U.S. 45, 76 (1905) (Holmes, J., dissenting).

Petitioners' first general proposition is that, under California law, "'persons have a duty to use due care to avoid injury to others, and may be held liable if their careless conduct injures another person.'" Pet. Br. 26 (*quoting Knight v. Jewett*, 834 P.2d 696, 708 (Cal. 1992)). This overstates California law considerably. Although California law recognizes a *general* duty to be reasonable, this duty is far from universal. California courts routinely shield defendants from

liability where the "sum total . . . considerations of policy" militate against liability. *Dillon v. Legg,* 69 Cal. Rptr. 72, 76 (Cal. 1968) (*quoting* William Prosser, Law of Torts 332-33 (3d ed. 1964)). These policy considerations include:

> the foreseeability of harm to the plaintiff, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant's conduct and the injury suffered, the moral blame attached to the defendant's conduct, the policy of preventing future harm, the extent of the burden to the defendant and consequences to the community of imposing a duty to exercise care with resulting liability for breach, and the availability, cost, and prevalence of insurance for the risk involved.

Cabral v. Ralph's Grocery Co., 122 Cal. Rptr. 3d 313, 318 (Cal. 2011) (*quoting Rowland v. Christian*, 70 Cal Rptr. 97, 110 (Cal. 1968)).

Moreover, just because a California court declares a duty in a particular circumstance does not mean that a duty will necessarily exist in an analogous circumstance. "California courts are increasingly treating duty as a live issue in every negligence case." Dilan A. Esper & Gregory C. Keating, *Abusing "Duty"*, 79 S. Cal. L. Rev. 265, 271 (2006).

This is not to say that California tort law is awash in a sea of uncertainty. For injuries that repeatedly occur, certainty exists. Those injured in a car accident can normally be certain that the defendant possesses a duty of care and that an action will be available for a breach of that duty. But for uncommon injuries—like the deprivation of food and hygiene by a

person performing services for the federal government—there is no certainty as to the availability of relief. California courts may award relief, or they may not. Without substantial prior precedent, any claim about the certainty of relief under California law is not credible.

The closest Petitioners come to providing any law relevant to Pollard's specific circumstances is their citation to *Giraldo v. California Department of Corrections & Rehabilitation,* 85 Cal. Rptr. 3d 371 (Cal. Ct. App. 2008), a case addressing the "special relationship between jailer and prisoner [and] imposing on the former a duty of care to the latter." Pet. Br. 26. This case undermines, not supports, Petitioners' argument.

As noted above, *supra* at 22-23, *Giraldo* involved a transgendered prisoner's claim that prison employees had a duty to protect him from attacks by other prisoners. Not only are the facts of *Giraldo* markedly different from those alleged by Pollard, but the opinion was issued by the Court of Appeals for the First District, an intermediate appellate court having no authority over the law applicable in Taft, California, which is located in California's Fifth District. It is possible that the Court of Appeals for the Fifth District would follow *Giraldo*, but, as this Court knows, courts are apt to disagree with one another on a regular basis. To argue that Pollard had state remedies here is thus to argue that Pollard was required to predict that the Fifth District would follow the First, and that the Fifth District would view a case involving an attack on a transgendered inmate in a publicly run state facility applicable to a claim for the deprivation of food and hygiene in a privately run federal facility.

Even if *pro se* prisoners, or even federal courts, should be required to make these judgments, such a judgment would not have been possible here because, as noted above, *Giraldo* was not decided until 2008, *six years after* Pollard filed his amended complaint. Nor was prior law available on this topic. As *Giraldo* explained, as of the date of its opinion, "no California court ha[d] apparently discussed, much less answered" the question whether a jailer has a duty to protect a prisoner from harm. *Id*. at 382.

In sum, Petitioners' argument comes down to this: An intermediate appellate court having no authority over the law in Taft, California, held that jailers have a duty to protect inmates from attacks by other prisoners; therefore, Pollard can certainly obtain relief for the deprivation of food and hygiene or any other possible Eighth Amendment violation. Petitioners' reasoning is far too tenuous to assure this Court that the deterrent value of *Bivens* will systematically be fulfilled by California law.

Looking beyond California law, Petitioners' argument fairs no better. Acknowledging that a case-by-case analysis of state remedies is not pre-ordained here, the Petitioners argue that the tort law in "others states" will provide federal prisoners with sufficient remedies. Pet. Br. 33. Tellingly, the Petitioners do not argue that *all* states provide prisoners with remedies for the full spectrum of Eighth Amendment injuries. They simply offer the Court a footnote containing a string of sources allegedly demonstrating that prisoners "have that most fundamental of tort claim, [one] in which one person's negligent conduct causes physical and/or emotional harm to another." Pet. Br. 33 (*quoting* Pet. App. 11a (Bea, J., dissenting)).

As with Petitioners' claims about California law, this argument speaks only in the most general terms and thus underscores the ambiguous nature of state remedies for prisoners held in private federal facilities. Simply because "negligent conduct causes physical and/or emotional harm to another" does *not* mean that the injured party will have a remedy. As in California, the Restatement (Third) of Torts that holds sway over so many state courts states that the general duty to be reasonable can be suspended where a "countervailing principle or policy warrants denying or limiting liability in a particular class of cases." Restatement (Third) of Torts § 7 (2010). Thus, because policy goals differ among jurisdictions, whether a prisoner can obtain a remedy under state law will depend on the divergent and ever-changing laws of the 50 states, the District of Columbia and multiple federal territories.

The concern here is not that states will be unable or unwilling to enforce federal constitutional rights. States have long proven themselves invaluable allies of the federal courts in enforcing civil rights. *See, e.g., Stone v. Powell*, 428 U.S. 465, 493 n.35 (1976). The concern is that states will evaluate common-law tort claims of federal prisons in an inappropriately parochial manner, especially given that the principles they announce in such cases will apply to potential claims against their own state officers by state prisoners. A state faced with significant prison overcrowding and billions of dollars in budget shortfalls, for example, likely will view the duties of jailers in a light different from a state with no such challenges. *See, e.g., Brown v. Plata*, 131 S. Ct. 1910 (2011). States can hardly be blamed for such parochialism when privately held federal prisoners account for on-

ly tiny minority of state prison populations[9] and state law explicitly requires courts to consider matters of public policy that will likely affect far more cases brought by state prisoners than actions by federal prisoners.

Relying on states for the maintenance of federal rights in federal prisons would be less problematic if this Court possessed the authority to review state court decisions denying relief. Under Petitioners' proposed rule, however, no such review will be possible. If a privately held federal prisoner suffering an Eighth Amendment injury brings a claim for relief under state law in state court, and the state court rejects the claim, this Court will be unable to review the state court holding because the case would lack a federal question. *See* 28 U.S.C. § 1257. If the federal prisoner brings the same claim in federal court under diversity jurisdiction, this Court's longstanding practice is to decline review. *See* Sup. Ct. Rule 10; Richard H. Fallon *et al.*, The Federal Courts and The Federal System 1476 n.1 (2009) (noting the Court's reluctance to review federal court decisions presenting only state-law issues). Moreover, even if this Court chose to review the district court's ruling, it would be bound by state law. *Johnson v. Fankell*, 520 U.S. 911, 916 (1997) ("Neither this Court nor any other federal tribunal has any authority to place a construction on a state statute different from the one rendered by the highest court of the State."). Thus, if

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[9] Privately held federal prisoners account for approximately two percent of the prisoners held in each state. *See* Bureau of Justice Statistics, Prisoners in 2009, at 1, 34 (2010), *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/p09.pdf.

this Court turns over the deterrence of constitutional violations to actions based on state tort law, it must do so without any expectation that it will be able to exercise review.[10]

Given this lost capacity for review, the scope of state law becomes of paramount importance. Unlike Petitioners, the United States actually admits that some constitutional claims may not be "redressable under state law." U.S. Br. 24-25 (*citing Schweiker*, 487 U.S. at 421-22; *Bush*, 462 U.S. at 388). This should not trouble the Court, the United States argues, because complete redressability is not required under this Court's alternative remedy jurisprudence. Although it is true that the Court has withheld a *Bivens* action where alternative remedies provided less than "complete relief," *Bush*, 462 U.S. at 385-86, the Court has done so only where the prescribed remedies derived from deliberate choices by Congress, thus implicating separation of powers concerns. *Schweiker*, 487 U.S. at 425 (rejecting *Bivens* action because Congress "provide[d] meaningful safeguards or remedies for the rights of persons situated as respondents were"); *Bush*, 462 U.S. at 386 (refusing a *Bivens* action because the plaintiff's

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[10] Of course, in any given case, a federal court could hold that a state remedy did not exist for a particular Eighth Amendment violation and could provide a federal remedy, thus maintaining the supremacy of federal law. But this could only occur if the Court here adopted a case-by-case approach—an approach that, as explained *supra* at 17-24, is both unprecedented and inadvisable. If this Court holds that, as a categorical matter, privately held federal prisoners may not bring a *Bivens* action, then no federal court will possess any authority to ensure that such Eighth Amendment violations are deterred through state-law damages actions.

claims were "fully cognizable" within an "elaborate, comprehensive scheme" created by Congress). Where separation of powers concerns are not present, the sufficiency of an alternative remedy system turns on the system's capacity to deter constitutional violations. Adequate deterrence does not require that each violation be met with "complete relief," but it does require that each violation be redressable with *some* relief. Without at least some relief, *Bivens*' objective of deterrence cannot be satisfied.

In this case, Congress has made no deliberate choice with respect to remedies for privately held federal prisoners. The question therefore is whether the separate remedial systems of the 50 states, the District of Columbia and multiple territories will each provide *some* relief to prisoners who suffer Eighth Amendment violations. Neither the United States nor Petitioners have shown that such relief will be available.[11]

There is another reason to doubt that tort suits will have the deterrent force claimed by Petitioners. Petitioners assert that tort suits are superior to a *Bivens* remedy because "a prisoner in a privately managed facility will generally be able to seek vicarious liabil-

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[11] Petitioners attempt to shift the burden to *Pollard* to prove that "there is any state which does not provide recovery" for his injuries. Pet. Br. 33 (*quoting* Pet. App. 11a (Bea, J., dissenting)). But this imposes on Pollard the impossible task of proving a negative. For at least a half century, civil rights have been enforced through federal law and primarily in federal courts. *See Monroe*, 356 U.S. at 183 (rejecting state law as insufficient for the enforcement of federal rights); *Bivens*, 403 U.S. at 392 (same). It is thus not surprising that state tort law pertaining to prisoners' rights is sparse.

ity against the contractor under *respondeat superior*. . . . Indeed, a claimant would ordinarily *prefer* a state tort suit against the company given the certainty of recovery." Pet. Br. 31 (emphasis added). If Petitioners' claim is true—that state tort suits will generally result in liability on the part of private prison companies rather than the individual employees who are responsible for the wrongful conduct—then a *Bivens* action is even more justified here. This Court has thrice held that suits against entities are *inferior* to suits against individuals in deterring unconstitutional conduct. *Carlson*, 446 U.S. at 21; *Meyer*, 510 U.S. at 485; *Malesko*, 534 U.S. 70-71. Thus, by Petitioners' own admission, the remedial system they propose does not provide "the kind of deterrence contemplated in *Bivens*." *Malesko,* 534 U.S. at 70.

C. This Cause of Action Does Not Give Rise to Special Factors Counseling Hesitation.

In addition to considering a plaintiff's remedial alternatives, this Court's *Bivens* jurisprudence takes account of "any special factors counselling hesitation before authorizing a new kind of federal litigation." *Wilkie*, 551 U.S. at 550 (quoting *Bush*, 462 U.S. at 378). None of the factors previously recognized by the Court applies in this case. Nor is any hesitation needed here because of "policy determinations made by the Congress." *Bush*, 462 U.S. at 373.

1. This Court has held that "special factors" stand in the way of a *Bivens* action in three circumstances. First, in *Chappell v. Wallace* and *United States v. Stanley,* the Court rejected *Bivens* actions between military personnel. In the Court's view, the military context demands such "inescapable . . . obedience to

orders" that the "rights of men" must bow to "certain overriding demands of discipline and duty." *Chappell v. Wallace*, 462 U.S. 296, 300 (1983); *see also Stanley*, 483 U.S. at 679-80. There is no argument here that the cause of action touches on the military. Although it might be contended that the administration of prisons requires military-like obedience and discipline, this Court's cases are clear that constitutional damages actions *are* appropriate in the prison context. *See, e.g., Carlson*, 446 U.S. 14; *Farmer*, 511 U.S. 825.

Second, in *Wilkie*, the Court held that the "difficulty of devising a workable cause of action" amounted to a special factor that precluded a *Bivens* action. *Wilkie*, as noted earlier, involved a rancher's claim of "retaliation" by federal officials for his refusal to grant the government an easement over his land. 551 U.S. at 562. Although the Court suggested it viewed the officials' conduct as inappropriate in some respects, it ultimately denied a cause of action because it could not craft a "workable" distinction between "hard bargaining," which is constitutionally permissible, and "illegitimate pressure," which arguably is not. *Id*.

The special factor applicable in *Wilkie* does not apply here. A cause of action to enforce a prisoner's Eighth Amendment rights is eminently "workable." Federal courts have adjudicated Eighth Amendment *Bivens* actions for thirty years, *see Carlson*, 446 U.S. 14, and have been resolving the same actions against state officials for even longer. *See, e.g., Estelle v. Gamble*, 429 U.S. 97 (1976). There is a large and ever-growing body of precedent distinguishing permissible from impermissible behavior, rendering the action asserted here workable.

Third, in *FDIC v. Meyer*, the Court labeled as a special factor the "potentially enormous financial burden" that a *Bivens* action might impose on the federal government. 510 U.S. at 486. *Meyer* involved a *Bivens* action against a federal agency. The Court rejected the action in part because parties would aim their damages actions at federal agencies rather than federal officials, which would in turn impose a significant financial burden on the federal government.

Recognizing a *Bivens* action here would not impose a "potentially enormous financial burden" on the United States. To begin with, any liability imposed on Petitioners in a *Bivens* case would fall first on Petitioners themselves, *not* on the United States or even on the private prison company. Even if a portion of this liability were passed on to the United States, however, it can hardly be contended that the federal government will suffer financial hardship. To the extent that the costs of *Bivens* liability are passed on to the employers of the responsible employees, the United States already absorbs the costs of *Bivens* liability for prisoners in BOP facilities and this Court has never characterized such costs as excessively burdensome. Moreover, if the prison industry's claims about cost savings are correct, *see* http://www.thegeogroupinc.com/facts.asp, relying on private prisons—even with whatever incremental costs may be attributed to *Bivens* liability—will continue to cost the federal government significantly less than using BOP-operated facilities.

In any event, it is doubtful that imposing *Bivens* liability on private prison employees will increase prison companies' costs, let alone the expenses of the federal government. To the extent that prison com-

panies indemnify their employees for liability arising from conduct in the course of employment (and presumably also insure themselves against such costs), the imposition of *Bivens* liability would not substantially increase the indemnification costs already faced by private prisons. If a *Bivens* action is, as Petitioners claim, wholly duplicative of state-law actions, private prisons have nothing to fear from *Bivens* liability. Private prisons *already* face such liability costs, and because double recovery for the same harm is barred, a *Bivens* action will not increase these liability costs. *Medina v. District of Columbia*, 643 F.3d 323, 328 (D.C. Cir. 2011) (holding that an injury caused by behavior in violation of constitutional and sub-constitutional law only merits a single damages award). And even if, as is more likely the case, *Bivens* claims will lie in circumstances where state law would not provide a recovery, the marginal cost of such claims as compared to costs already incurred to insure against other liabilities, are unlikely to be significant.

Finally, Petitioners' argument about the financial ramifications of this suit is more than a little ironic. Petitioners argue that a ruling in favor of Pollard would "potentially increase the government's cost of contracting." Pet. Br. 44. Because government contractors naturally "pass along litigation costs" to the federal government, the argument goes, the government's "cost of contracting" in turn may rise. *Id*. Yet, at the same time, Petitioners claim that damages for conduct that violates the Eighth Amendment should be pursued only under state law, which, in their opinion, provides remedies "'at least as great and in many respects greater, than anything that could be had under *Bivens*.'" *Id*. at 25 (*quoting Malesko*, 534

U.S. at 72). If Petitioners are correct that Pollard has state-law remedies, and correct that these remedies are superior to his *Bivens* remedies, then Petitioners must be *incorrect* in arguing that a *Bivens* action here will increase the government's "cost of contracting." Conversely, Petitioners' evident fear of increased liability casts grave doubt on their confident assertions that *Bivens* claims add no deterrent value to claims already possible under state law.

2. Not only are there no special factors that apply in this case, but there are no "policy determinations made by the Congress" that suggest a *Bivens* action should not be recognized. *Bush*, 462 U.S. at 373. Indeed, Congress has been aware of *Bivens* actions since their inception in 1971 and never once attempted to limit them in any way.

Understanding Congress' view of *Bivens* first requires an understanding of the FTCA. Twenty-five years before *Bivens* was decided, Congress enacted the FTCA. Pub. L. No. 79-601, 60 Stat. 842 (1946). The statute waived the federal government's sovereign immunity for torts committed by federal employees in circumstances where a private actor would be liable. 28 U.S.C. § 1346(b). Where a federal employee committed a common-law tort, the government agreed to assume responsibility on a *respondeat superior* basis. The original FTCA, of course, expressed no congressional opinions about *Bivens*, which was not decided until 1971.

In 1974, three years after *Bivens* was decided, Congress amended the FTCA to include suits against the federal government for the intentional common-law torts committed by its employees. Given that the Supreme Court had recently handed down *Bivens*, Con-

gress could have abrogated *Bivens* and forced claimants to rely on common-law intentional tort actions to provide remedies even for conduct that also violated their constitutional rights. Congress considered this option, but in the end preserved *Bivens*. *See* S. Rep. No. 93-588, at 3 (1973). In the statute, Congress made it "crystal clear . . . that victims . . . of intentional wrongdoing . . . shall have an action under the FTCA against the United States *as well as* a *Bivens* action against the individual officials." *Carlson*, 446 U.S. at 20 (emphasis added).

Then, in 1988, eight years after *Carlson*, Congress amended the FTCA again, this time in response to the Court's decision in *Westfall v. Erwin*, 484 U.S. 292 (1988). Commonly known as the Westfall Act, the legislation abrogated *Westfall*'s holding that federal employees could be personally liable under state tort law, along with the federal government itself, for actions taken within the scope of their employment. Although the FTCA had long permitted plaintiffs to sue the federal government, it had not affirmatively barred suits against individual government employees for wrongs committed in the course of their employment. The Westfall Act did just this by making an FTCA suit against the government the "exclusive" remedy for common-law torts committed by federal employees. 28 U.S.C. § 2679(b).

Aware of the Court's decision in *Carlson* that *Bivens* actions were not displaced by the FTCA, Congress could have taken this opportunity to reject some or all of the Court's *Bivens* jurisprudence by, for example, making the FTCA the exclusive remedy for all intentional misconduct committed by govern-

ment employees, including constitutional torts.[12] Congress did the exact opposite, however. It affirmed *Bivens* by providing that, for damages actions "brought for a violation of the Constitution of the United States," an FTCA action is *not* the exclusive remedy and the federal government is *not* itself liable. 28 U.S.C. § 2679(b); *see also* H.R. Rep. 100-700, at 6 (1988) (noting that the Westfall Act "would not affect the ability of victims of constitutional torts to seek personal redress from Federal employees who allegedly violate their Constitutional rights"). In other words, Congress expressly preserved constitutional torts against individual officers.

The next pertinent piece of legislation came in 1996 with the enactment of the PLRA. In the PLRA, Congress addressed the perceived problem of excessive and frivolous litigation by prisoners. Given that *Carlson* explicitly approved of damages actions against federal prison guards, one would think that Congress, if it wanted to eliminate *Bivens* actions by prisoners, would have barred them at that point. But Congress did not take that path. Instead of barring a

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[12] Notably, as this Court held in *United States v Smith*, 499 U.S. 160 (1991), the FTCA in many instances bars common-law tort actions against federal employees for actions taken in the scope of their employment even where the FTCA would not actually provide any relief. *See* 28 U.S.C. § 2679(b) (making FTCA actions the "exclusive" remedy for common-law harms caused by federal employees); 28 U.S.C. § 2680(a) (barring government liability under the FTCA where the common-law was caused by the "perform[ance] [of] a discretionary function"). Thus, Congress could readily have made the FTCA exclusive of *Bivens* claims against federal employees, as it did with respect to other tort claims, even while preserving the United States' own immunity against constitutional tort claims.

particular cause of action *in toto*, Congress chose to limit *all* federal claims brought by prisoners in certain ways. Thus, in the PLRA, *all Bivens* and § 1983 claims brought by prisoners were made subject to exhaustion requirements, 42 U.S.C. § 1997e, mandatory prescreening, 28 U.S.C. § 1915A, limitations on recovery of emotional damages, 42 U.S.C. § 1997e(e), and mandatory payment of filing fees. 28 U.S.C. § 1915(b). The PLRA, like the legislation before it, reveals that Congress accepts *Bivens* actions as part of the traditional landscape of constitutional enforcement.

Against this history, Petitioners nonetheless maintain that Congress has "expressed the . . . intent" that *Bivens* actions against private prison guards be barred. Pet. Br. 41. According to Petitioners, this "intent" is revealed in Congress' "deliberate decision *not* to include any employees of government contractors within [the FTCA]." *Id.* at 42. This "deliberate decision" was made in 1946, however, 25 years *before Bivens* was decided. It is inconceivable that Congress' intent in 1946, to the extent it is known, can reveal Congress' disapproval of *Bivens* and its progeny. If anything, the only deliberate decision that can be attributed to Congress is the decision to *remove* constitutional tort actions from the reach of the FTCA. In this sense, private prisons employees occupy the same position as BOP employees: The availability of a *Bivens* action is a matter separate and unrelated to the content of the FTCA.

There is another problem with Petitioners' argument. If it is true that Congress disapproved of *Bivens* actions against those not covered by the FTCA, then one would have expected the Court to seize on this point in *Malesko*. After all, the corporate

defendant in *Malesko*, like the employees here, fell outside the purview of the FTCA. 28 U.S.C. § 2671. Yet the Court never brought up that concern and, indeed, never adverted once to the preferences of Congress on the issue presented here.

3. Petitioners warn this Court of an "increase in federal court litigation nationwide" should it approve a cause of action here. Pet. Br. at 43-44. This assertion is incorrect. According to Petitioners' own data, federal prisoners account for approximately 1,600 *Bivens* cases per year. Pet. App. 28. Because private prisoners account for 16.4% of the federal prison population, it is reasonable to assume that private prisoners contribute, at most, about 260 cases to this total. *Id*. Of these 260 cases, even absent a *Bivens* action, a large percentage of them will likely end up in federal court under diversity jurisdiction or removal jurisdiction.[13] *See* 28 U.S.C. § 1332. But even assuming, generously, that 50% of these cases will end up in state court, a ruling in favor of Petitioners here would only save the federal courts about 130 cases per year. This amounts to approximately 1.4 cases saved in each judicial district, or about .2 cases saved for each district court judge. A ruling in favor of Pollard will thus have little or no effect on the amount of litigation handled by the federal courts.

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[13] Federal inmates are routinely held in prisons outside of their home states and thus, when injured by a prison employee, often find themselves completely diverse from the putative defendant. *See Hall v. Curran*, 599 F.3d 70, 72 (1st Cir. 2010) ("[C]ourts presume that the prisoner remains a citizen of the state where he was domiciled before his incarceration").

Moreover, if the Court were to accept Petitioners' invitation to consider alternative remedies on a case-by-case basis, Pet. App. 32, there will probably be no decrease at all in federal prison litigation. Under such a regime, the rational plaintiff would allege *both* state and federal claims in the same suit, thus justifying federal jurisdiction under 28 U.S.C. § 1331 or § 1441 in *every* suit. Given the uncertainty of state remedies and the preclusive effects of an adverse judgment, plaintiffs would have nothing to lose and everything to gain by alleging federal constitutional violations along with their state-law claims.

CONCLUSION

The judgment below should be affirmed.

Respectfully submitted,

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