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

REPLY BRIEF FOR PETITIONERS

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INTRODUCTION

This is a clear case for certiorari. Respondent ("Pollard") does not and cannot dispute that there is an unequivocal, direct circuit split that extends to two aspects of the question presented, and that the question is both important and recurring. Instead, he argues primarily that the Ninth Circuit was right and the other circuits were wrong. He is mistaken, but the merits are for this Court to decide after plenary briefing and argument. That there may be two sides to this important question is a reason to grant certiorari, not deny it.

Pollard also argues that this Court cannot decide this pure question of law without further, unspecified factual development and should instead wait for another case that may never come. The time to resolve the confusion in the law is now, and this case presents an ideal vehicle for doing that. The Ninth Circuit, like the Fourth and Eleventh circuits before it, was able to decide this quintessentially legal issue at the dismissal stage, just as this Court has done in almost every *Bivens* case it has decided. The Court should do the same here.

I. THERE IS A DIRECT CIRCUIT SPLIT.

Pollard does not dispute that there is a direct conflict among the circuits. *See* Opp. 6, 8. Nor does he deny the issue is important. And despite Pollard's attempt to confuse the issue, *cf. id.* at 4-7, the conflict involves two aspects of a single question—whether the Court should imply a new *Bivens* remedy against employees of private prison contractors—rather than two different questions.

Courts may not imply a *Bivens* remedy if there are "special factors counseling hesitation before authorizing a new kind of federal litigation." *Wilkie* v. *Robbins*, 551 U.S. 537, 550 (2007). In *Holly* v. *Scott*, 434 F.3d 287 (4th Cir. 2006), the Fourth Circuit found two such factors: the defendants' status as private employees rather than government officials, and the existence of adequate (and arguably superior) state law remedies. *Id.* at 290 ("This case presents two 'special factors counseling hesitation,' each of which independently precludes the extension of *Bivens*."). Judge Motz disagreed with the reliance on the first factor, but agreed that the second warranted dismissal of the *Bivens* claim. *Id.* at 297-303. In *Alba* v. *Montford*, 517 F.3d 1249 (11th Cir.

2008), the Eleventh Circuit agreed with that result without evaluating the first factor. In this case, an extremely divided Ninth Circuit held that neither factor precluded a *Bivens* remedy. In *Peoples* v. *CCA Det. Ctrs.*, 449 F.3d 1097 (10th Cir. 2006), the *en banc* Tenth Circuit deadlocked on the entire question. And in *Corr. Servs. Corp.* v. *Malesko*, 534 U.S. 61, 65 (2001), this Court expressly left the question unresolved.

There is thus widespread confusion in the law that warrants this Court's review. As set forth in the petition, both factors, viewed either together or independently, preclude a *Bivens* remedy. The availability of tort remedies itself means that no *Bivens* remedy should be implied. *See* Pet. 16-20. And the defendants' status as employees of a private prison contractor rather than the government is an additional factor supporting the same conclusion. *Id.* at 20-26. The Court should grant certiorari to decide that important question over which the lower courts are irreconcilably divided.

II. THERE IS NO NEED TO AWAIT FURTHER PROCEEDINGS OR CASES TO RESOLVE THE QUESTION PRESENTED.

1. The question for this Court is the same one decided by the Ninth Circuit: whether the properly-pleaded factual allegations in Pollard's complaint, even if taken as true, state a valid *Bivens* claim as a matter of law. Just as the Ninth Circuit did not need further proceedings or factual development to decide that question, this Court does not either.

Pollard implicitly assumes that the existence of a *Bivens* cause of action cannot be decided at the dismissal stage. But that is decidedly untrue. Just

like the Ninth Circuit, the Fourth and Eleventh circuits decided the identical question at the same stage. *See Holly*, 434 F.3d at 288; *Alba*, 517 F.3d at 1251; *see also Peoples* v. *CCA Det. Ctrs.*, 422 F.3d 1090, 1093 (10th Cir. 2005). This Court, as well, has decided almost all of its *Bivens* cases—including *Bivens* itself—on review of decisions granting or denying motions to dismiss.[1]

Just as in all those cases, there is no need for further proceedings here because the relevant facts are the copious allegations in Pollard's 25-page amended complaint, which are taken as true for purposes of this appeal.[2] If Pollard now believes—unlike the dissenters below, Pet. App. 5a, 56-57a—that he had no adequate state law remedy for his alleged grievances, he may argue that point in his brief on the merits. For example, if he thinks his claims, as pleaded, fail under state law but not in a *Bivens* action, *cf.* Opp. 9, he can try to explain why. But no further proceedings are needed to make that point. Indeed, contradicting his own assertion that the issue cannot be decided now, Pollard argues elsewhere in his opposition that he lacks adequate alternative remedies as a matter of law. *Id.* at 19-21.

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[1] *See Malesko*, 534 U.S. at 65; *Schweiker* v. *Chilicky*, 487 U.S. 412, 419 (1988); *United States* v. *Stanley*, 483 U.S. 669, 673 (1987); *Chappell* v. *Wallace*, 462 U.S. 296, 298 (1983); *Green* v. *Carlson*, 581 F.2d 669, 670 (7th Cir. 1978), *aff'd sub nom. Carlson* v. *Green*, 446 U.S. 14 (1980); *Davis* v. *Passman*, 442 U.S. 228, 232 (1979); *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 390 (1971).

[2] The facts, however, are *not* those set forth in the citation-free "Facts" section of Pollard's brief in opposition. *See* Opp. 1-3. Many of those purported facts, as Pollard now characterizes them, are not set forth in the amended complaint.

2. Given the obstacles to appellate review in other cases, *see* Pet. 29-32, if the Court passes up this ideal opportunity to resolve the conflict it may be a long time before another one arises. Pollard says the Court "should wait for a case where state law tort claims have been litigated on the facts." Opp. 10. But there is no reason for such delay, and it is doubtful such a case, if it ever arose, would present a suitable vehicle for resolving the *Bivens* issue.

Pollard points to another case still in its infancy, *Phillip* v. *GEO Group*, No. 5:09-CT-3115-FL, 2011 WL 1297606 (E.D.N.C. Mar. 31, 2011), but that case only shows the problems with further delay. There, the *Bivens* claims were dismissed under the Fourth Circuit's *Holly* decision, but state law claims were allowed to proceed. Because the Fourth Circuit has already held there is no *Bivens* claim, only the plaintiff could seek certiorari on that issue and likely only if he loses on appeal of the other claims. Thus, the only way the issue effectively could reach this Court in that case is if (1) the case is not settled; (2) a final judgment is appealed and the plaintiff loses on grounds not also applicable to the *Bivens* claims; and (3) the plaintiff elects to seek certiorari on the *Bivens* issue even though he lost on the state law claims.

That particular constellation of circumstances is unlikely ever to arise, and certainly not soon, and the presence of the additional issues would complicate review. Moreover, as shown in the petition, there are similar impediments to review in other cases—most notably, the prospect of *in terrorem* settlements. In the meantime, the confusion in the circuits will only persist. By contrast, the issue is squarely presented in this case and ripe for decision. The Court should decide it.

III. POLLARD'S MERITS ARGUMENTS ARE NO REASON TO DENY CERTIORARI.

Most of Pollard's opposition is devoted to arguing that the Ninth Circuit was right on the merits and the other circuits were wrong. That is no reason to deny certiorari where, as here, the circuits are hopelessly divided on a concededly important question. Both sides can present all their arguments at the merits stage and the Court will then decide the question after plenary briefing and argument. But Pollard's merits arguments are nevertheless mistaken; indeed, the Ninth Circuit's holding conflicts with this Court's precedents.

1. Pollard argues that his claim is "in all material respects identical to that approved in *Carlson*." Opp. 13. It is not. In *Carlson*, as in the other two cases where the Court has implied a *Bivens* remedy (including *Bivens* itself) the plaintiff had no adequate alternative remedy. *See* Pet. 16-19. The claims in *Carlson* were subject to the Federal Tort Claims Act ("FTCA"), which pre-empted all tort claims against the individual federal officers, and the Court viewed the sole FTCA remedy against the United States as inadequate. *Carlson*, 446 U.S. at 21. Here, by contrast, Congress specifically *exempted* employees of private contractors from the FTCA, so the alternative individual tort remedy remains applicable. *See* Pet. 24-25.

Pollard argues that the existence of alternative remedies is irrelevant because he is not seeking an "extension" of *Bivens*, Opp. 16-17, but that argument just begs the question. Because the Court, including in *Carlson*, has never implied a *Bivens* remedy where adequate alternative remedies are available, this case *would* be an extension of the doctrine. The

Court has explained that "[s]ince *Carlson* we have consistently refused to extend *Bivens* liability to any new context or new category of defendants." *Malesko*, 534 U.S. at 68. That is exactly what Pollard seeks to do here: "extend *Bivens* liability" to both a "new context" and a "new category of defendants." He cannot do that without independently justifying the extension.[3]

Pollard next argues that "only *federal* alternative remedies [are] relevant" in assessing whether a *Bivens* remedy should be implied. Opp. 15 (emphasis in original). But as Judge Restani explained below, "an alternative remedy need not be a federal remedy." Pet. App. 59a. Indeed, this Court "in *Bivens* itself expressed concern that Bivens could not recover damages against the federal narcotics agents under state tort law." *Alba*, 517 F.3d at 1254. *See Bivens*, 403 U.S. at 394. Similarly, in *Wilkie*, the Court noted that the plaintiff "had a civil remedy in damages for trespass" and characterized *Malesko* as a case "considering [the] availability of state tort remedies in refusing to recognize a *Bivens* remedy." 551 U.S. at 551 (citing *Malesko*, 534 U.S. at 72-73).

Where the plaintiff has "any alternative remedy," *Malesko*, 534 U.S. at 70, there is no need for courts to exercise their extraordinary power to imply a judge-made remedy that Congress has not seen fit to provide. Petitioners agree with Pollard that "[r]egulation of federal officers is the prerogative of the federal government." Opp. 19. But where

[3] Pollard's contention that *Malesko* decided the issue in his favor, Opp. 13-14, is easily refuted by the fact that *Malesko* expressly left the question unresolved. *Malesko*, 534 U.S. at 65 ("[T]he parties agree that the question whether a *Bivens* action might lie against a private individual is not presented here.").

Pollard would have that regulation come from the courts making up their own causes of action and re-defining who is a federal officer, petitioners believe it should come from Congress. *See Holly*, 434 F.3d at 290; DRI Amicus Br. 5-8.

Pollard also argues that state tort remedies were not adequate to redress his grievances, Opp. 19-21, but he does not support that assertion with any authority. The question is not whether Pollard would lose on state law claims. In petitioners' view, he would lose on state law claims just as surely as he would lose on his constitutional claims. The question is whether Pollard's factual allegations, as pleaded, would fail to state a claim as a matter of law under state law but nevertheless succeed under the Eighth Amendment. Pollard has made no such showing.

As the dissenters noted below, "Pollard's remedy under state law against both jailers and doctors is actually superior to any presumed action he would have under *Bivens*." Pet. App. 10a (Bea, J., dissenting), 67a (Restani, J., dissenting). *See also* Pet. App. 79a & n.1. That is because "the heightened 'deliberate indifference' standard of Eighth Amendment liability would make it considerably more difficult for [Pollard] to prevail than on a theory of ordinary negligence." *Malesko*, 534 U.S. at 74 (citing and quoting *Farmer* v. *Brennan*, 511 U.S. 825, 835 (1994) ("[D]eliberate indifference describes a state of mind more blameworthy than negligence.")).

Pollard does not, and cannot, show that his state law remedies are weaker than what the Eighth Amendment would provide. California law recognizes that the relationship between prison personnel and inmates is "protective by nature," and "the epitome of a special relationship, imposing a

duty of care on a jailer owed to a prisoner." *Giraldo* v. *Cal. Dep't of Corr. & Rehab.*, 85 Cal. Rptr. 3d 371, 386 (Cal. Ct. App. 2008). In California, as elsewhere, "[j]ailers owe prisoners a duty of care to protect them from foreseeable harm." *Id.* at 387. *See* Pet. App. 65a (Restani, J., dissenting).

Pollard thus would be far more likely to succeed in obtaining a remedy under state law than under the Eighth Amendment. Whereas California law broadly imposes on jailers an affirmative duty to protect prisoners from foreseeable harm, the Eighth Amendment would require Pollard to prove that the defendant "knows of and disregards an excessive risk to inmate health or safety." *Farmer*, 511 U.S. at 837. Under California law, health care providers are liable for "negligent diagnosis or treatment or the negligent failure to diagnose or treat." Cal. Civ. Code § 1714.8. *See* App. 67a (Restani, J., dissenting), 79a n.1. But under the Eighth Amendment, Pollard would have to show "deliberate indifference to serious medical needs of prisoners" that constitutes "unnecessary and wanton infliction of pain." *Estelle* v. *Gamble*, 429 U.S. 97, 105 (1976).

Pollard has not shown that any of his claims would be actionable under the narrow *scienter*-based Eighth Amendment standard but nevertheless barred by the broad, protective standard of California law. Indeed, he does not even cite to the factual allegations in his own complaint, much less any authority holding those allegations actionable under the Eighth Amendment but not California law. But in any event, Pollard will have ample opportunity to try to make that showing at the merits stage.

2. As shown in the petition, Pet. 20-26, petitioners' status as private employees rather than

federal officials is yet another "special factor[]" counseling against implying a *Bivens* remedy. *Wilkie*, 551 U.S. at 550.

In response, Pollard relies on *West* v. *Atkins*, 487 U.S. 42 (1988), but that case did not address the propriety of a *Bivens* remedy because it involved a state, not federal, facility. *West* was decided under the specific language of 42 U.S.C. § 1983, in which Congress, for specific policy reasons, established a damages remedy for constitutional claims and extended it to anyone acting "under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia."[4]

Far from doing the same for anyone acting "under color of federal law," Congress has employed that language sparingly and, in the prison context, has declined to extend causes of action to such people. *See* Pet. 25. The *Bivens* remedy is a narrow one crafted for claims against "federal officers." *Malesko*, 534 U.S. at 70. Because of that status, federal officers have recognized immunities—notably, the qualified immunity defense—that private contractor employees lack. Pet. 22. Thus, as Pollard does not dispute, implying a *Bivens* remedy here would subject these private employees to greater risk of liability than is faced by their governmental counterparts. *Id.* at 23. Whether an asymmetrical

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[4] Moreover, the defendant in *West* was "a physician employed by North Carolina," which effectively made him a state employee. 487 U.S. at 54. Here, by contrast, the defendants were employed by a private company and had no contractual or employment relationship with the federal government. That further distinguishes this case from *West*, "where the state itself was directly responsible for managing the prison." *Holly*, 434 F.3d at 294.

private damages remedy should be authorized against such individuals for discharging their duties in good faith is a policy-laden "question for Congress, not [the courts], to decide." *Malesko*, 534 U.S. at 72.

This case does not require the Court to grapple with broad concepts of "state action" applicable in other legal contexts. *Cf.* Opp. 14. For example, the case does not involve the propriety of injunctive relief. *See Malesko*, 534 U.S. at 74 ("[U]nlike the *Bivens* remedy, which we have never considered a proper vehicle for altering an entity's policy, injunctive relief has long been recognized as the proper means for preventing entities from acting unconstitutionally"). The question is whether the Ninth Circuit erred in implying, by judicial fiat, a *Bivens* damages remedy against a "new category of defendants" never before subjected to one. *Id.* at 68. The Court should grant certiorari, reverse that judgment, and leave that policy question to Congress.

CONCLUSION

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

Respectfully submitted,

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