No. 10-1104

In The
Supreme Court of the United States

———— ♦ ————

MARGARET MINNECI, *et al.*,

Petitioners,

v.

RICHARD LEE POLLARD,

Respondent.

———— ♦ ————

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

———— ♦ ————

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

———— ♦ ————

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QUESTIONS PRESENTED

1. Whether individuals responsible for the medical care of federal inmates are federal actors for the purpose of the Eighth Amendment, given that *West v. Atkins*, 487 U.S. 40 (1988), holds that individuals responsible for the medical care of state inmates are state actors for the purpose of the Eighth Amendment.

2. Whether a federal inmate who has suffered a violation of his Eighth Amendment rights may, as approved in *Carlson v. Green*, 446 U.S. 14 (1980), seek damages from the responsible prison officials, or is barred from enforcing his constitutional rights simply because the prisoner happens to be housed in a private prison.

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STATEMENT

A. Facts

In 2001, Richard Lee Pollard was an inmate in a federal correctional facility located in Taft, California. The facility was operated by Wackenhut Corrections Corporation, a private corporation hired by the federal government to house federal prisoners.[1] On April 7 of that year, Mr. Pollard broke both his elbows in a single incident. In the ensuing weeks and months, the Defendants—all employees of the prison—violated Pollard's Eighth Amendment rights in at least four ways.

First, Pollard's access to medical care was conditioned on his compliance with irrational demands that caused him extreme pain. He was told that, in order to see a physician, he would have to change into a special jumpsuit and wear a "black box." Changing into the jumpsuit required Pollard to bend both his arms at the elbow, a movement that caused him severe and unnecessary pain. The black box was even worse. A black box is a handcuff-like device attached to a chain around an inmate's waist. The weight and positioning of the device force an inmate's hands down and arms together. For the average inmate, the device is tolerable. For a man with two broken elbows, however, the device is horribly cruel. For six and a half hours, the black box forced Pollard to hold his broken elbows in an awkward and tremendously painful position. Pollard vigorously protested this practice for the six and a half

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[1] After Mr. Pollard filed suit, Wackenhut changed its name to "The GEO Group." *See* Pet. App. 15a n.2.

hours he was forced to wear the device, only to be forced into the device again during a subsequent visit to the doctor. These measures were completely irrational and unjustified. Having broken both elbows, Pollard was in obvious pain and in no way a threat to anyone's safety.

Second, Pollard was denied basic medical care for his injury. The orthopedist who examined Pollard immediately after the accident ordered that one of his arms be placed in a posterior splint for several weeks. The splint would immobilize the arm, which was necessary for the arm to properly heal. Yet when Pollard returned to the prison, he was denied a splint because of staffing and facility limitations. As a result, Pollard's arm healed incorrectly, causing him pain and limitations in movement that remain with him to this day.

Third, long before Pollard regained even minimal movement of his arms, he was forced back on work duty. His work included tasks that were particularly painful to his arms. Thus, he was forced to sweep floors and shovel manure. Pollard's protestations of pain fell on deaf ears and his convalescence was further delayed.

Fourth, Pollard was denied basic access to food and hygiene for significant periods of time. With both arms virtually unusable, Pollard could not hold a food tray in the cafeteria and was forced to either go without food or sell his private property to obtain money to buy food from the commissary. Nor was Pollard able to clean his body in the shower or when using the toilet. These unacceptable condi-

tions were known to several of the defendants, but completely ignored.

B. Proceedings Below

After suffering these constitutional violations, Mr. Pollard filed an action for damages against the Wackenhut employees who had mistreated him.[2] Under 28 U.S.C. § 1915A, a magistrate judge prescreened the complaint to determine if it stated a claim upon which relief could be granted. Construing it as an action under *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971), the magistrate judge recommended the claims be dismissed. The district court adopted this recommendation and Pollard, now acting with the assistance of counsel, appealed.

The Ninth Circuit reversed. The court held that Mr. Pollard's *Bivens* claims against the individual defendants may proceed because (1) the defendants were federal actors and (2) federal prisoners may bring *Bivens* actions against prison officers. The individual defendants petitioned the Ninth Circuit to rehear the case *en banc*, which the court denied. The Defendants then timely petitioned this Court for a writ of certiorari.

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[2] Pollard also filed suit against Wackenhut itself and one non-employee physician. Pollard did not appeal the dismissal of those claims and they are not at issue here. Pet. App. 16a n.5, 17a-18a n.6.

REASONS FOR DENYING THE WRIT

This case is unworthy of review for three reasons: First, the Ninth Circuit's federal action holding is consistent with the precedent of this Court and virtually every other lower court. Second, the case lacks sufficient factual development for this Court to make an informed decision on the *Bivens* issue. Third, the Ninth Circuit's *Bivens* holding is consistent with this Court's precedent.

I. THE NINTH CIRCUIT'S FEDERAL ACTION HOLDING IS CONSISTENT WITH SETTLED LAW THROUGHOUT THE NATION.

The Ninth Circuit held that employees of a private corporation charged with caring for federal inmates are federal actors. This holding is consistent with the law pronounced by this Court and faithfully applied throughout the nation. There is thus no reason for this Court to address the federal action issue.

In *West v. Atkins*, 487 U.S. 42 (1974), this Court held that individuals hired by state private prisons to care for inmates are state actors. In *West*, a state prisoner sued a physician hired by the prison to provide him medical care. The physician argued that he was simply a private individual, and thus not obliged to obey the Constitution. This Court disagreed, holding that if a private individual was given power over an inmate and then "misused his power, . . . the resultant deprivation was caused, in the sense relevant for state action inquiry, by the State's

exercise of its right to punish [the inmate] and deny him a venue independent of the State to obtain needed medical care." *Id*. at 55. To hold otherwise would allow states to escape Eighth Amendment restraints through a contractual sleight of hand.

Relying on *West v. Atkins*, lower courts have consistently held that private individuals under contract to care for or supervise state prisoners are state actors.[3] Though a state action case, *West* applies with equal force in the federal action context because the state and federal action tests are identical in all material respects.[4] This is as it should be, for "[t]he 'constitutional design' would be stood on its head if federal officials did not at least face the same liability as state officials guilty of the same constitutional transgression." *Carlson v. Green*, 446 U.S. 14, 22 (1980). Thus, in considering *Bivens* actions against

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[3] *See, e.g.*, *Rosborough v. Mgmt. & Training Corp.*, 350 F.3d 459 (5th Cir. 2003); *Natale v. Camden Cnty. Corr. Facility*, 318 F.3d 575, 581 (3d Cir. 2003); *Street v. Corr. Corp. of Am.*, 102 F.3d 810, 814 (6th Cir. 1996); *Conner v. Donnelly*, 42 F.3d 220, 225 (4th Cir. 1994); *Carswell v. Bay Cnty.*, 854 F.2d 454, 456-7 (11th Cir. 1988); *C.K. v. Northwestern Human Servs.*, 255 F. Supp. 2d 447, 450 (E.D. Pa. 2003); *Gabriel v. Corr. Corp. of Am.*, 211 F. Supp. 2d 132, 137-138 (D.D.C. 2002); *Herrera v. Cnty. of Santa Fe*, 213 F. Supp. 2d 1288, 1290 (D.N.M. 2002); *Palm v. Marr*, 174 F. Supp. 2d 484, 487 (N.D. Tex. 2001); *Kesler v. King*, 29 F. Supp. 2d 356, 370-371 (S.D. Tex. 1998); *Blumel v. Mylander*, 919 F. Supp. 423, 426-27 (M.D.Fla. 1996).

[4] *Brown v. Philip Morris, Inc.,* 250 F.3d 789, 800-801 (3d Cir. 2001); *Chin v. Bowen*, 833 F.2d 21, 24 (2d Cir. 1987); *Kitchens v. Bowen*, 825 F.2d 1337, 1340 (9th Cir. 1987); *Morast v. Lance*, 807 F.2d 926, 931 (11th Cir. 1987); *Miller v. Hartwood Apartments, Ltd.*, 689 F.2d 1239, 1243 & n.7 (5th Cir. 1982); *Warren v. Government Nat'l Mortgage Assoc.*, 611 F.2d 1229, 1232 (8th Cir. 1980).

guards at private prisons, almost every lower court that has considered the issue has found federal action to be present.[5]

One exception—indeed, the *only* exception—to this is *Holly v. Scott*, 434 F.3d 287 (4th Cir. 2006). In *Holly*, the Fourth Circuit held (over a vigorous dissent by Judge Motz) that employees of a private federal prison were not federal actors. *Holly* is an outlier, however. In the five years since the opinion was issued, *not a single circuit judge* has ever followed or even voiced support for *Holly*'s federal action analysis.

In the similar case of *Alba v. Montford*, 517 F.3d 1249, 1254 (11th Cir. 2008), for example, the Eleventh Circuit "assum[ed], without deciding" that federal action was present and ruled only on the availability of a *Bivens* action. This is perhaps not surprising, for Eleventh Circuit precedent is clear that "the concept of action under color of federal law for purposes of a *Bivens* action is almost identical to the doctrine of action under color of state law," *Morast v. Lance*, 807 F.2d 926, 931 (11th Cir. 1987), and

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[5] *Purkey v. Corrections Corp. Det. Ctr.*, 339 F. Supp. 2d 1145, 1151 (D. Kan. 2004) (allowing federal inmates' *Bivens* action against private prison employees); *Jama v. U.S. I.N.S.*, 343 F. Supp. 2d 338, 363 (D.N.J. 2004) (plaintiffs in privately run detention facility may assert a *Bivens* claim against guards); *Sarro v. Cornell Corr., Inc.*, 248 F. Supp. 2d 52, 61 (D.R.I. 2003) (private prison guards employed by corporation operating prison were federal actors for *Bivens* purposes). *See also Bender v. General Servs. Admin.*, 539 F. Supp. 2d 702, 707-08 (S.D.N.Y. 2008) (holding that employee of security company hired by the federal government to monitor government office was subject to *Bivens* action).

that a private person who "provide[s] medical care to inmates acts under color of state law." *Carswell v. Bay Cnty.*, 854 F.2d 454, 456-57 (11th Cir. 1988). Thus, the current law in the Eleventh Circuit holds that the defendants in this case would be federal actors.

The judges in the Ninth Circuit feel no differently. Judge Restani (sitting by designation) disagreed with the panel majority on the *Bivens* issue, but did *not* dispute the majority's federal action holding. In the very first sentence of her dissent, Judge Restani expressly agreed with the majority that "employees of a private corporation operating a federal prison are federal government actors." Pet. App. 52a-53a. Even the Ninth Circuit judges who dissented from the denial of rehearing *en banc* made no effort to defend (let alone adopt) *Holly*'s federal action holding. Pet. App. 12a n.8. (noting only that *Holly* was "also grounded" in the absence of federal action).

In sum, there is wide agreement in the federal courts that employees of private prison corporations are federal actors. The Ninth Circuit's opinion in *Pollard* applies this view and thus is in no need of review by this Court.

II. THIS CASE IS INSUFFICIENTLY DEVELOPED FOR THE COURT TO MAKE AN INFORMED DECISION ON THE *BIVENS* ISSUE.

Writs of certiorari do not issue every time two lower courts disagree. Nor should they, for not every

case is properly developed or situated for this Court to evaluate the legal issues in the case. While it is true that lower courts have disagreed about some of the issues presented in this case, the case is nonetheless a poor candidate for review because the record will prevent this Court from properly considering the availability of alternative remedies. Moreover, future opportunities for review are likely to be plentiful. The Court should therefore decline review.

A. The Record Does Not Contain Sufficient Information on Pollard's Alleged Alternative State Remedies.

The availability of a *Bivens* action is a question of judgment, *i.e.*, a "judgment about the best way to implement a constitutional guarantee." *Wilkie v. Robbins*, 551 U.S. 537, 550 (2007). In looking for this "best way," this Court typically inquires into whether "any alternative, existing process for protecting the [constitutional guarantee] amounts to a convincing reason for the Judicial Branch to refrain from providing a new and freestanding remedy in damages." *Id.* To determine whether a *Bivens* action or an "alternative, existing process" is the "best way" to implement a constitutional right, this Court will naturally desire to have before it a record sufficient to the task. The record in Pollard's case falls far short of this.

The record in this case lacks any information pertaining to the actual—as opposed to hypotheti-

cal—availability of alternative remedies.[6] Because the district court dismissed this suit pursuant to its obligation to prescreen prisoner complaints, *see* 28 U.S.C. § 1915A, the Defendants have never filed an answer and neither party has taken any discovery. The existence of state remedies has been assumed but never litigated, a fact that will frustrate this Court's review.

For instance, one issue that routinely affects the availability of alternative remedies is the existence of a valid defense. The existence of a defense has long been important to this Court in determining whether alternative remedies are sufficient to displace a *Bivens* action. For example, in *Bivens* itself, the federal officers argued that the plaintiff "may obtain money damages to redress [the] invasion" of Fourth Amendment rights "by an action in tort." *Bivens*, 403 U.S. at 390. The Court rejected that remedy as a viable alternative, however, because the officers likely possessed the defense of consent. *Id*. at 394 (explaining that trespass is not actionable against a defendant who "demands, and is granted, admission to another's house"). Thirty years later in *Correctional Services Corp. v. Malesko*, 534 U.S. 61, 74 n.6 (2001), the Court turned away a *Bivens* plaintiff based on alternative remedies only after assuring itself that there was "no basis" for a defense that is sometimes available to government contractors.

The existence of a defense is a realistic possibility here. For example, Pollard's access to emer-

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[6] To be clear (and as explained in Part III), Pollard does not concede that alternative state remedies are relevant to his case, or if they are, that he has any such remedies.

gency medical care was made contingent on his submission to the "black box." If Pollard brought some type of tort claim for his injuries, it is entirely possible that the claim would be foiled the defense of consent. From the current record, however, there is simply no way to determine this. As such, any inquiry into Pollard's alternative remedies will be merely hypothetical, which is hardly the proper way for this Court to make a "judgment about the best way to implement a constitutional guarantee." *Wilkie*, 551 U.S. at 550.

Instead of issuing a writ of certiorari in this case, the Court should wait for a case where state law tort claims have been litigated on the facts. For instance, just days ago, the Eastern District of North Carolina ruled in *Phillip v. Geo Group*, 2011 WL 1297606 (E.D.N.C. Mar. 31, 2011) that, even though a prisoner's *Bivens* claims against private prison officers were barred, his tort claims could proceed. The prison officers had filed a motion for summary judgment attacking the factual predicate of the prisoner's tort claims, but the court denied the motion. The case is now set for further proceedings, and the record produced in such an action will undoubtedly be superior to the record in the instant case. The record in *Phillip* or a similar case will allow this Court to know *for certain* whether alternative remedies exist, and if they do exist, their exact nature and scope.

There is little point in taking this case if a key issue—the availability of alternative remedies—is simply a matter of conjecture. This Court should not make law for the entire nation without a record that,

at a minimum, contains information on the actual availability of a prisoner's alternative remedies. The Court should thus decline review.

B. Future Opportunities for Review Will Be Plentiful.

As this Court well knows, there is no shortage of prisoners seeking review of their claims. Whether owing to pervasive mistreatment or not, federal prisoners routinely sue prison officials and subsequently seek review in this Court. The Defendants nonetheless claim that this Court will be starved for opportunities to review this issue. Pet. 29-32. This is simply not true.

If a defendant loses in the district court, the Defendants first argue that appeals to this Court will be unlikely because losing defendants will not be able to appeal until after a final judgment has been issued. Pet. 30. This is true, but it is hardly a reason for this court to jump at this case. If the issue presented here is of the importance the Defendants claim, it cannot be said that losing defendants will fail to seize further opportunities to litigate the issue at an appellate level. The Defendants argue in the alternative that, even if losing defendants will appeal, the appeal might not yield a *Bivens* holding because the court might resolve the appeal "on other grounds." Pet. 30. This is only possible in certain narrow circumstances, however. If the appeals court wishes to affirm he judgment below, it *must* resolve the *Bivens* issue. Even if the court wishes to reverse the judgment below on a non-*Bivens* ground (such as trial error), the court will *still* have to resolve the *Bi-*

vens issue for application on remand. It is only reversals without remands, therefore, that *might* preclude appellate review. This situation will occur on occasion, but that is hardly a reason to expect appeals to this Court to dry up–especially when appeals by losing plaintiffs are taken into account.

If a plaintiff loses in the district court, the Defendants first argue that the plaintiff may not elect to appeal. Pet. 31. This is of course a possibility, but federal appellate judges will surely confirm that prisoners are not shy about appealing. The Defendants further argue, however, that even if a losing plaintiff does appeal, consideration of the *Bivens* issue on appeal will be precluded "[i]f the defendant prevails on additional grounds applicable to all claims," such as "state law claims." Pet. 31.

What this argument misses, however, is that if a plaintiff loses in the district court on both *Bivens* and state law claims, the court of appeals will *still* be called on to determine whether a *Bivens* action is available. An appellate court cannot affirm the lower court's ruling without specifically addressing the *Bivens* issue because the plaintiff's argument will be that *Bivens* is a freestanding remedy available without regard to state law. Simply addressing state law rulings will not dispose of this claim. Even if the appellate court desires to reverse the lower court only on its state law ruling, the appellate court would still have to addressing the *Bivens* issue because the lower court would require instructions on how to handle the *Bivens* claim on remand.

III. THE NINTH CIRCUIT'S *BIVENS* HOLDING IS CONSISTENT WITH THIS COURT'S PRECEDENT.

The Ninth Circuit held that a federal prisoner may sue prison officials who violate his constitutional rights, despite the alleged availability of alternative state remedies. This conclusion is correct because (1) it falls squarely within *Carlson v. Green*, 446 U.S. 14 (1980), (2) state remedies are irrelevant in Eighth Amendment *Bivens* actions against federal actors and (3) even if state remedies were relevant, Pollard does not possess such remedies. The Ninth Circuit's decision is therefore in no need of review.

A. *Carlson v. Green* Permits This Action.

Mr. Pollard's *Bivens* action is, in all material respects, identical to that approved in *Carlson v. Green*. In *Carlson*, this Court held that a federal prisoner may seek damages from prison officers for their violations of the Eighth Amendment. In this action, *Pollard*, a federal prisoner, is seeking damages from prison officers for their violations of the Eighth Amendment. The Ninth Circuit's approval of Mr. Pollard's suit thus falls squarely within the holding of *Carlson*.

Carlson undeniably remains good law. A few terms ago in *Wilkie v. Robbins*, 551 U.S. 537 (2007), the Court summarized its *Bivens* holdings. Citing *Carlson*, the Court stated without reservation that a *Bivens* action is available "for an Eighth Amendment violation by prison officials." *Id.* at 550. Two sen-

tences later, the Court, citing *Correctional Services Corporation v. Malesko*, 534 U.S. 61 (2001), explained that it has "held against applying the *Bivens* model to claims . . . against private prisons." *Wilkie*, 551 U.S. at 550. The juxtaposition of these statements within the same paragraph is telling: On one hand, "an Eighth Amendment violation by prison officials" is grounds for a *Bivens* action, while on the other hand, *Bivens* actions "against private prisons" are barred. The conclusion is thus inescapable: *Bivens* actions against prison officers, as approved in *Carlson*, remain available.

Despite *Carlson*, the Defendants claim that "the Ninth Circuit extended *Bivens* to a brand-new area not authorized by this Court's precedents: claims against private citizens who are not federal officers but are employees of a private entity that contracts with the federal government." Pet. 20. This argument fails because the so-called "private citizens" sued here are quite plainly federal actors. Every citizen of the United States—whether an employee of a government or a private corporation—retains the status of "private citizen" when tending to their personal business. Where a private citizen acts on behalf of the state, however, the citizen steps into the role of state actor. It is the person's "*function* within the state system, not the precise terms of his employment, that determines whether his actions can fairly be attributed to the State." *West*, 487 U.S. at 55-56 (emphasis added). Were the law otherwise, the state and federal action inquiries would simply require an inspection of a defendant's W2 tax form. This is hardly the content of the law in this area.

The function of the Defendants in this case—whether one calls them "private citizens" or not—was to care for a federal prisoner. The federal government "has a constitutional obligation, under the Eighth Amendment, to provide adequate medical care to those whom it has incarcerated." *Id.* at 54. When a private citizen steps into this role, he becomes a federal actor. Not only is this the law pronounced by the Supreme Court, but as noted in Part I, *supra*, it is the law overwhelmingly applied in the lower courts.

Once the petitioners are seen for what they are—federal actors—it becomes clear that the Ninth Circuit did not "extend[]" *Bivens* in any way. The Ninth Circuit held that a federal prisoner may sue federal actors for a violation of his Eighth Amendment rights. That is the exact holding of *Carlson* and the Ninth Circuit's decision is thus an application of settled *Bivens* doctrine, not an extension of it.

B. The Existence of State Remedies Is Irrelevant.

The Defendants argue that this action is barred because Mr. Pollard possesses an "adequate state law tort remedy." Pet. 18. Even if it were true that he had such remedies (a point disproved in Part III.C, *infra*), the existence of these remedies is irrelevant to the case at bar. This is so for two reasons: (1) alternative remedies are only relevant where an extension of *Bivens* is sought and (2) the logic of this Court's *Bivens* jurisprudence makes only *federal* alternative remedies relevant.

1. The supposed importance of alternative remedies to this case stems largely from statements by this Court in *Correctional Services Corp. v. Malesko*, 534 U.S. 61 (2001). The relevant portion of *Malesko* is as follows:

> In 30 years of *Bivens* jurisprudence we have extended its holding only twice, to provide an otherwise nonexistent cause of action against individual officers alleged to have acted unconstitutionally, or to provide a cause of action for a plaintiff who lacked any alternative remedy for harms caused by an individual officer's unconstitutional conduct.

The Defendants argue that Mr. Pollard does not lack "any alternative remedy," and thus that his *Bivens* action is barred. Pet. at 16-20. As the above quote shows, however, this argument misreads *Malesko*.

Malesko spoke of alternative remedies *only* in the context of "extend[ing]" *Bivens*. The Court *did not* reverse or modify any of its prior cases holding *Bivens* actions available. Thus, the Court's holding in *Bivens*—that a damages action for a Fourth Amendment violation existed "regardless of whether [state law] . . . would prohibit or penalize the identical act"—was not in any way altered by *Malesko*. 403 U.S. at 391. Nor was the holding in *Carlson*—that federal prisons make bring Eight Amendment claims against prison officers—altered by *Malesko*. Both cases continue to be applied in the Supreme

Court and lower courts without a case-by-case inquiry into the existence of alternative remedies.

Only where the Court is deciding whether to "extend" *Bivens* does the existence of alternative remedies become relevant. But as made clear above, Pollard's case is not an extension of *Bivens*; it is simply an ordinary application of *Carlson*. The alleged existence of alternative remedies is thus irrelevant.

2. Even if Pollard's suit represented an extension of *Bivens*, however, his suit would still not be barred by alternative remedies. This is because remedial alternatives, to displace a *Bivens* action, must derive from the choice of Congress, not the states.

In implying a damages action directly from the Constitution, this Court has been especially mindful of Congress' shared role in choosing how the Constitution shall be enforced. Congress quite clearly has the authority to create a damages action against federal officers, and has done just that against state officers with 42 U.S.C. § 1983. Thus, in *Bivens* itself, the Court was careful to imply the cause of action only in the "absence of affirmative action by Congress." *Bivens*, 403 U.S. at 396.

Such "affirmative action" can come in two forms. First, if Congress "explicit[ly] . . . declar[es] that persons injured by federal officers' [constitutional] violations" may not resort to a *Bivens* action, the action will obviously be unavailable. *Carlson*, 446 U.S. at 19; *see also Bush v. Lucas*, 462 U.S. 367,

378 (1983) (inquiring into whether Congress "expressly den[ied]" a *Bivens* action in the federal employment setting).

Second, even where Congress has not explicitly barred a *Bivens* action, it can impliedly bar an action by enacting a comprehensive remedial scheme addressing the wrong in question. For example, in *Bush v. Lucas*, this Court rejected a *Bivens* claim by a federal employee because the employee's First Amendment claim was covered by an "elaborate, comprehensive scheme" designed by Congress to address "the First Amendment claims raised by [the employee]." 462 U.S. at 385-86. Similarly, in *Schweiker v. Chilicky*, 487 U.S. 412, 425 (1988), the Court barred a plaintiff from pursuing social security benefits in a *Bivens* action because "Congress . . . has addressed the problems [alleged by the plaintiff] through the creation of wide-ranging administrative remedies." Even in *Malesko*, where the Court mentioned a state remedy, the Court was careful to point out the availability of a federal "Administrative Remedy Program." 534 U.S. at 73-74. This program, when measured against "bedrock principles of separation of powers foreclosed judicial" creation of a new cause of action. *Id*. at 69.

This Court has *never* held that a state remedy alone can bar a *Bivens* action. This should not be surprising because it is Congress—not the states—whose shared interest in constitutional enforcement is at stake when the federal courts imply a *Bivens* action. *Bivens* actions, by definition, seek the enforcement of *federal* constitutional law against *federal* officers. No state has designed—or could de-

sign—an "elaborate, comprehensive scheme" to address constitutional violations by federal officers. Regulation of federal officers is the prerogative of the federal government, and it is thus only appropriate that federal remedies, not state remedies, displace a *Bivens* action.

C. Mr. Pollard Does Not Possess Adequate Alternative Remedies.

Even if Mr. Pollard's suit falls outside *Carlson v. Green*, and even if state remedies can displace a *Bivens* action, the Ninth Circuit's decision is still correct because Pollard does not possess adequate alternative remedies.

The Defendants claim that "Pollard has an adequate state law tort remedy." Pet. at 18; 19. Tellingly, however, they *never* discuss that remedy in any detail. About the closest the Defendants come to explaining Pollard's remedy is to quote Judge Restani's unsubstantiated claim that Pollard has the "most fundamental of tort claim, [one] in which one person's negligent conduct causes physical and/or emotional harm to another." Pet. 19. Missing from this claim is any citation of authority holding that Pollard *actually* has a state law claim for relief.

When one digs into the specific facts of Pollard's case, one sees that this his claim for relief under state law is either murky or altogether nonexistent. It is true that tort law extends into the prison context, *see Giraldo v. Dept. of Corr. & Rehab.*, 85 Cal. Rptr. 3d 371 (Cal. Ct. App. 2008), but it can hardly be said that the content of tort law is un-

affected by the prison context. For example, an ordinary citizen must normally respect a person's "apparent wishes to avoid intentional bodily contact." DAN B. DOBBS, THE LAW OF TORTS § 29 (2000). Within a prison, however, a prisoner's "apparent wishes" to be left alone are obviously far less powerful. In short, what might look like a tort in an ordinary setting may not be a tort inside the prison walls.

Consider Pollard's claim that he was forced to work before his arms healed. Forcing an injured prisoner to work is an Eighth Amendment violation, but one would search the reporters in vain for an applicable tort. The same goes for Pollard's claims related to food and hygiene. The Eighth Amendment entitles prisoners to minimum levels of nutrition and hygiene, but one would be hard pressed to locate a tort cause of action for such harms. When it comes to forced labor or access to life's necessities, ordinary tort law simply comes up short.

Consider as well Pollard's claim that he was forced to submit to the painful and useless "black box" device simply to receive emergency care. This allegation undoubtedly states an Eighth Amendment claim, but whether it states a claim in tort is far from clear. As noted above (*see* Part II.A), one significant risk for Pollard is the defense of consent. Pollard grudgingly consented to wearing the black box because he was desperate for emergency medical care. Any tort suit by Pollard would thus have to overcome this formidable defense.

In the ten-year history of this case, no party or judge has ever cited any precedent holding that Pol-

lard's federal constitutional harms can be remedied through tort law. This should not be surprising, for tort and constitutional law have evolved from different sources and are aimed at different ends. Pollard's constitutional claims cannot be shoehorned into tort law and the Ninth Circuit was thus correct to hold that his suit may proceed as alleged.

CONCLUSION

For the foregoing reasons, this Court should deny the Petition for Writ of Certiorari.

Respectfully submitted,

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