

No. 10-1104

In the Supreme Court of the United States

MARGARET MINNECI, ET AL., PETITIONERS

v.

RICHARD LEE POLLARD, ET AL.

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

**BRIEF FOR THE UNITED STATES
AS AMICUS CURIAE SUPPORTING PETITIONERS**

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QUESTION PRESENTED

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

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VII

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INTEREST OF THE UNITED STATES

This case presents the question whether employees of a private corporation operating a correctional facility for federal prisoners under contract with the Bureau of Prisons (BOP) are subject to an implied damages action under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). Congress has authorized the Attorney General, acting through BOP, to contract with private entities to house federal prisoners. *E.g.*, National Capital Revitalization and Self-Government Improvement Act of 1997 (1997 Act), Pub. L. No. 105-33, Subtit. C, § 11201(c), 111 Stat. 734 (secure facilities); 42 U.S.C. 13901(b) (halfway houses). Like the BOP, the Department of Homeland Security, United

States Marshals Service, Office of Refugee Resettlement, Bureau of Indian Affairs, and Office of the Federal Detention Trustee also contract with private firms for detention services. *E.g.*, 18 U.S.C. 4013; see Pet. 29 n.10. The United States has an interest in the extent to which the employees of the entities with which it contracts are exposed to liability under *Bivens* for their allegedly unconstitutional conduct, as well as in ensuring proper deterrence of and appropriate remedies for such conduct.

STATEMENT

1. Private organizations have long played a role in the operation of correctional facilities. As this Court has observed, “[p]rivate individuals operated local jails in the 18th century,” and “private contractors were heavily involved in prison management during the 19th century.” *Richardson v. McKnight*, 521 U.S. 399, 405 (1997) (citations omitted). Congress has authorized BOP to contract with private entities to operate secure correctional facilities and halfway houses (now called “Residential Reentry Centers”) for federal prisoners. *E.g.*, 1997 Act, 111 Stat. 734; 42 U.S.C. 13901(b); see 18 U.S.C. 3621(b) (“[BOP] may designate any available penal or correctional facility that meets minimum standards of health and habitability established by [BOP], whether maintained by the Federal Government or otherwise.”); *Statutory Authority to Contract with the Private Sector for Secure Facilities*, 16 Op. Off. Legal Counsel 65 (1992) (recognizing BOP’s contracting authority). There are currently 13 privately run secure facilities housing more than 25,000 federal prisoners and numerous privately run halfway houses holding almost 9000 more. BOP, *Weekly Population Report*

(July 21, 2011), http://www.bop.gov/locations/weekly_report.jsp#contract.

2. The claims at issue in this case arose at the Taft Correctional Institution (TCI) in Kern County, California, a privately operated secure facility owned by the government. The GEO Group, Inc. (GEO), formerly known as Wackenhut Corrections Corporation (see Pet. App. 15a n.2), operated TCI under contract with BOP from 1997 to 2007.

TCI, like all BOP contract facilities, operates subject to an extensive set of performance requirements and ongoing BOP monitoring to ensure “a safe, humane and appropriately secure facility” that “assist[s] offenders in becoming law-abiding citizens.” BOP, *TCI Statement of Work* at 4 (1997) (Statement of Work).¹ BOP requires that “[a]ll services and programs shall comply with * * * the U.S. Constitution; all applicable Federal, state and local laws and regulations; applicable Presidential Executive Orders (E.O.); all applicable case law; and Court Orders.” *Id.* at 7. Through the State-

¹ A new Statement of Work, which contains substantially similar language in relevant respects, became effective when BOP changed contractors at TCI in 2007. See TCI Contract Solicitation 1, Section C: Statement of Work (2006), http://www.fbo.gov/index?s=opportunity&mode=form&id=8bb9f7c87f3a2b1bd148664889b6f6ab&tab=core&_cview=1.

BOP’s Residential Reentry Centers, all of which are now operated by private contractors, are governed by similar standards and inspection requirements. See BOP, *Statement of Work for Residential Reentry Center* (2007), http://www.bop.gov/business/res_reentry_ctr_sow_2010.pdf; BOP, *Community Corrections Manual* §§ 4.5.5 to 4.5.14 (1999) http://www.bop.gov/policy/progstat/7300_009.pdf; see also Gov’t Br. 4, *Correctional Servs. Corp. v. Malesko*, 534 U.S. 61 (2001) (describing performance and monitoring requirements for BOP’s privately operated halfway houses).

ment of Work, BOP specifies compliance standards for a variety of subjects including contractor personnel (*id.* at 10-18), safety and emergency procedures (*id.* at 31-32), inmate discipline and rights (*id.* at 32), social services (*id.* at 37), inmate labor (*id.* at 37-39), and inmate health care (*id.* at 33-37). With respect to health care in particular, BOP provides that “the contractor shall adhere to all applicable Federal, state and local laws and regulations governing the delivery of health services” and that “[t]he provision of medical services commensurate to the level of care available in the community is an essential component of successful performance under the contract.” *Id.* at 34. BOP places its own personnel onsite to monitor contractor compliance with the terms of the Statement of Work, and maintains the right to conduct inspections of any part of the institution at any time. *Id.* at 4, 7.

BOP also utilizes a Quality Assurance Plan for secure facilities to ensure contractor compliance with the Statement of Work, BOP policies, and applicable law and regulations. See BOP, *Contract Facility Quality Assurance Plan* at 1-2 (2010) (Plan); see also BOP, *Program Statement 7740.01: Oversight of Private Sector Secure Correctional Facilities* (2000), <http://www.bop.gov/DataSource/execute/dsPolicyLoc>. The Plan identifies “vital functions” for successful implementation of the core requirements of the contract. The Plan then sets forth detailed monitoring requirements for BOP to assess contractor performance of each function through a regular inspection process. Plan at 1-2. With respect to health services, for example, the Plan requires BOP to review medical records, observe delivery of patient care, interview health-care personnel, conduct inventories, review staffing patterns, and inspect facilities. *Id.* at 23-

39. The Plan also requires BOP review of inmate grievances for denial of medical services and review of the underlying medical records. *Id.* at 37-38.²

3. a. Respondent, a federal inmate, was incarcerated at TCI in 2001 and 2002. Pet. App. 15a. Respondent alleges that during that period, he slipped on a cart left in a doorway, injured himself, and was examined by the prison's medical staff. Medical staff diagnosed him with possible fractures of both elbows, placed him in a bilateral sling, and referred him to an orthopedic clinic outside the prison for further evaluation. *Ibid.*; J.A. 30-31.

Respondent alleges that, before leaving the prison for his clinic visit, one of the officers (a GEO employee) forced him to wear a prison jumpsuit despite respondent's protest that putting his arms through the sleeves of the jumpsuit was extremely painful. Respondent also alleges that he was forced to wear a "black box" mechanical restraint device on his wrists during his transport and clinic visit, despite his complaints that wearing the device caused him severe pain. J.A. 31-32; Pet. App. 15a.

According to respondent, the orthopedist at the clinic diagnosed serious injuries to his elbows and recommended that his left elbow be put into a posterior splint

² Federal prisoners housed in privately operated secure facilities also have restricted access to BOP's administrative remedy program (see 28 C.F.R. 542.10-542.18). Complaints from such prisoners may be appealed to BOP if they involve certain issues such as classification, designation, sentence computation, reduction in sentence, removal or disallowance of good-conduct time, confiscation of inmate property, or issues directly involving BOP staff. See Statement of Work at 32; Michael B. Cooksey & Christopher Erlewine, *BOP Memorandum for Regional Directors re: Implementation of Administrative Remedy Program—Contract Facilities 2* (May 14, 2004).

for approximately two weeks. After returning to TCI, respondent was told that his elbow would not be put into a posterior splint because of limitations in staffing and facilities. J.A. 32-33. Respondent alleges that prison medical personnel also failed to provide other necessary care, such as nerve conduction studies and physical therapy, resulting in continuing impairment. J.A. 39-43. Respondent further alleges that he was unable to eat, bathe, or sleep properly due to the pain from his injuries; that he was required to return to work before his injuries had healed; and that he was forced to wear the “black box” restraint again when returning for a follow-up clinic appointment. J.A. 33-37; Pet. App. 15a-16a.

b. Respondent filed a *pro se* complaint alleging Eighth Amendment violations and seeking money damages (which the courts below construed as claims under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971)). J.A. 38-46; Pet. App. 16a.³ The first amended complaint names Wackenhut Corrections Corporation (now GEO) and eight individuals as defendants. The five individual defendants who remain in the case—all employees of GEO at the time of respondent’s incarceration—are petitioners before this Court. See *id.* at 17a n.6. Three petitioners were prison medical personnel, one was a security officer, and one was a food-services supervisor. J.A. 28-29.

The district court dismissed GEO from the suit based on the Court’s holding in *Correctional Services Corp. v. Malesko*, 534 U.S. 61 (2001), that private prison corporations are not subject to *Bivens* liability. Pet. App. 16a.

³ Respondent also brought a claim for intentional infliction of emotional distress based on the conduct alleged above. J.A. 47-48. Respondent did not appear to press that claim below, and neither the district court nor the court of appeals considered it separately.

The district court dismissed the individual GEO employees (including petitioners) as well, reasoning that they were not subject to *Bivens* liability because (1) they did not act under color of federal law; and (2) state law provided alternative damages remedies. *Id.* at 70a-72a, 73a-80a.

3. a. A divided panel of the court of appeals reversed in relevant part, holding that respondent's *Bivens* claims against petitioners could proceed. Pet. App. 14a-68a.⁴

As a threshold matter, the court of appeals held that petitioners had acted “under color of federal law” for *Bivens* purposes because their job duties served a “fundamentally governmental function.” Pet. App. 29a, 31a; see *id.* at 22a-31a. Although the court noted that neither this Court nor the Ninth Circuit had decided whether employees of a private corporation operating a federal prison act under color of federal law, the court looked to principles developed in suits under 42 U.S.C. 1983 to determine whether a private entity has engaged in state action. The court relied in particular on *West v. Atkins*, 487 U.S. 42 (1988), in which this Court permitted a Section 1983 claim against a private doctor providing medical care to inmates in state prison. Pet. App. 23a-26a. Finding “no principled basis to distinguish the activities of the GEO employees in this case,” the Court concluded that petitioners had acted under color of federal law. *Id.* at 26a, 31a.

⁴ The court of appeals noted that it was unclear whether respondent had appealed the dismissal of GEO itself. Pet. App. 16a n.5. In any event, as the court of appeals held, this Court's decision in *Malesko*, *supra*, forecloses a *Bivens* suit against GEO. *Ibid.* The court of appeals thus affirmed the district court's dismissal with respect to GEO, and that issue is not before this Court. *Ibid.*; see Br. in Opp. 3 n.2.

Applying the two-part test articulated in *Wilkie v. Robbins*, 551 U.S. 537 (2007), the court of appeals held that *Bivens* should be extended to create an implied private damages remedy against petitioners. Pet. App. 31a-52a. First, the court concluded that the fact that respondent could obtain redress under state tort law did not “amount[] to a convincing reason[] for the Judicial Branch to refrain from providing a new and freestanding remedy in damages.” *Id.* at 37a (quoting *Wilkie*, 551 U.S. at 550). The court reasoned that the availability of alternative state-law remedies, unlike congressionally crafted remedies, does not raise separations-of-powers concerns that counsel against a judicially created *Bivens* remedy. *Id.* at 37a-39a. The court further reasoned that the need for uniform rules to govern liability for constitutional violations demands a federal remedy. *Id.* at 39a-41a.

Second, the court of appeals found no “special factors counselling hesitation” in the present context. Pet. App. 52a (quoting *Wilkie*, 551 U.S. at 575). The court took the view that it was feasible to create a uniform *Bivens* cause of action against employees of privately run prisons, whereas requiring courts to determine the availability of adequate state-law remedies in each case before deciding the viability of a *Bivens* claim was not. *Id.* at 42a-47a. The court also reasoned that, unlike in *Malesko*, see 534 U.S. at 69, extending *Bivens* to employees of private prison contractors would not undermine the core purpose of deterring individual officers from committing constitutional violations. Pet. App. 47a-51a. In reaching this result, the court recognized that an extension of *Bivens* would impose asymmetric liability costs on employees of privately run facilities as compared to government-run facilities (because federal employees

could claim qualified immunity). But the court noted that a contrary conclusion would also result in asymmetry. The court concluded that the prospect of asymmetric liability costs therefore “does not counsel hesitation in recognizing a *Bivens* remedy here,” as it did in *Malesko*. *Id.* at 51a-52a.⁵

b. Judge Restani dissented in pertinent part. Pet. App. 52a-68a. Although she agreed with the majority that petitioners acted under color of federal law, Judge Restani disagreed with the majority’s conclusion that they are subject to liability under *Bivens* where adequate state-law remedies exist. *Id.* at 52a-53a. Explaining that this Court has limited *Bivens* to cases in which no alternative remedy exists against the federal actor, Judge Restani concluded that the availability of alternative state tort remedies—including universally available remedies for negligence and medical malpractice—provided sufficient reason to refrain from implying a new damages remedy in this case. *Id.* at 53a-63a. Judge Restani also concluded that special factors counsel hesitation in the present context. She explained that state tort remedies generally are available for prison conduct that violates the Eighth Amendment; that state tort liability already deters unconstitutional conduct; and that extending *Bivens* in this context would permit a plaintiff

⁵ The court of appeals acknowledged that its decision created a conflict with at least two other circuits. Pet. App. 21a-22a (citing *Holly v. Scott*, 434 F.3d 287 (4th Cir.), cert. denied, 547 U.S. 1168 (2006); *Alba v. Montford*, 517 F.3d 1249 (11th Cir.), cert. denied, 129 S. Ct. 632 (2008)). The Tenth Circuit, in an opinion vacated by an equally divided en banc court, also declined to extend *Bivens* liability to the employees of a private corporation. See *Peoples v. CCA Det. Ctrs.*, 422 F.3d 1090 (2005), vacated in part on reh’g en banc., 449 F.3d 1097, cert. denied, 549 U.S. 1056, and 549 U.S. 1063 (2006).

to pursue both a *Bivens* action and a tort action against a private prison employee (who may not be entitled to qualified immunity), but only the former against a federal employee (who is entitled to qualified immunity). *Id.* at 63a-68a.

c. The Ninth Circuit denied a petition for rehearing en banc. Pet. App. 1a-14a. Eight judges dissented. In their view, the court had erred in “disregard[ing] the Supreme Court’s narrowing instructions on *Bivens*, which have limited recognition of new *Bivens* actions to those situations where, for one reason or another, damages were unavailable under both state and federal law.” *Id.* at 5a (Bea, J., dissenting from denial of rehearing en banc). In the dissenting judges’ view, the court had “extend[ed] *Bivens* far beyond its carefully prescribed contours” by recognizing a “freestanding” federal cause of action against private company employees where adequate, and arguably superior, state remedies are available.” *Id.* at 13a-14a.

SUMMARY OF ARGUMENT

The Ninth Circuit erred in recognizing a remedy under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), against employees of a private corporation operating a correctional facility for federal prisoners where a state-law remedy is available.

A. The Court has extended the implied damages action crafted in *Bivens* only twice, and not at all since 1980. In *Bivens*, as well as in the two other cases in which the Court implied a cause of action, the plaintiff lacked any other apparent remedy against the individual federal officer for the alleged constitutional violation. See *Bivens*, 403 U.S. at 394; *Davis v. Passman*, 442 U.S.

228, 245 (1979); *Carlson v. Green*, 446 U.S. 14, 18-23 (1980). Since *Carlson*, the Court has consistently declined to recognize a *Bivens* action where an alternative remedy exists, even if that remedy is not “equally effective” or does not provide “complete” relief.

B. The Ninth Circuit’s decision in this case extends *Bivens* beyond existing precedent. Neither this Court nor any other court of appeals has permitted a *Bivens* action against individual employees of a federal contractor in a privately run prison, who, unlike their federally employed counterparts, are subject to liability under state law. The Ninth Circuit’s extension of *Bivens* to this context is both unnecessary and unwarranted.

1. There is no reason to extend *Bivens* in this new context because the injuries respondent alleges are redressable under state law. The gravamen of respondent’s complaint is medical malpractice and failure to provide related accommodations. The universal availability of a malpractice action is not in dispute, and California, like other States, also recognizes the availability of a negligence action based on breach of a jailer’s duty of care to prisoners. See *Giraldo v. California Dep’t of Corr. & Rehab.*, 85 Cal. Rptr. 3d 371, 387-390 (Cal. Ct. App. 2008); see also *Correctional Servs. Corp. v. Malesko*, 534 U.S. 61, 72-74 (2001) (relying on availability of state-law negligence claims for private prison employees’ refusal to provide medication and use of elevator despite prisoner’s heart condition). Indeed, in important respects, the state remedies available to respondent are superior to a *Bivens* remedy. State tort law imposes a lower standard of liability than the Eighth Amendment, and employees of private prison corporations generally do not enjoy the special immunities con-

ferred on government employees acting in the same capacity. *Id.* at 72-73.

It is likely that all of respondent's claims (to the extent they amount to constitutional violations) are redressable under state law, but even if they are not, this Court's precedents do not support implying a *Bivens* remedy merely because alternatives do not afford "complete" relief. *Bush v. Lucas*, 462 U.S. 367, 388 (1983). Nor do this Court's cases require that alternative remedies be supplied by Congress. On the contrary, the availability of state remedies is directly relevant to assessing whether a *Bivens* remedy is necessary: state remedies ensure that some remedy is available to the plaintiff, and they deter unconstitutional conduct by state actors. Finally, the possibility that no state remedies might be available in other cases provides no reason to imply an additional *Bivens* remedy in this case, where adequate—and indeed, superior—state remedies were available.

2. Another factor counsels hesitation in the present context: extending *Bivens* would create a greater risk of liability for private prison employees compared to their governmental counterparts. Unlike federal government employees, who are covered by the Federal Tort Claims Act (FTCA) bar on non-constitutional claims, see 28 U.S.C. 2671, 2679(b)(1), employees of private contractors are subject to suit under state tort law. To imply an additional federal remedy, as respondent urges, would therefore subject employees of private prison contractors to a double dose of liability under state and federal law. To further complicate matters, under this Court's precedent, employees of federal contractors may well be found to lack the qualified immunity defense available to government employees in

Bivens suits. Federal prisoners in privately run facilities therefore would have a much greater likelihood of prevailing on a *Bivens* claim than their counterparts in government-run facilities. While asymmetries in the remedies available to prisoners in privately run facilities may be inevitable, whether those asymmetries warrant creation of an additional federal damages remedy is a matter that Congress should decide.

ARGUMENT

RESPONDENT IS NOT ENTITLED TO AN IMPLIED DAMAGES ACTION UNDER *BIVENS* AGAINST EMPLOYEES OF A PRIVATE ENTITY OPERATING A CORRECTIONAL FACILITY UNDER FEDERAL CONTRACT BASED ON INJURIES THAT ARE REDRESSABLE UNDER STATE LAW

The Ninth Circuit in this case extended the implied damages remedy recognized in *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), to employees of a private corporation operating a correctional facility for federal prisoners. This Court should reject that novel and unwarranted expansion of *Bivens*, at least where, as here, alternative state tort remedies are available to the prisoner. Under these circumstances, there is no need to imply a federal-common-law damages remedy to redress respondent’s alleged injuries or to deter unconstitutional conduct. Moreover, the Ninth Circuit’s approach would expose private prison employees to a greater risk of liability compared to their governmental counterparts—a factor that counsels hesitation in the absence of congressional action.⁶

⁶ Petitioners do not ask this Court to review the court of appeals’ determination that they acted under federal law, see Pet. Br. 37 n.8, and

A. This Court Exercises Great Caution In Considering Whether To Extend *Bivens* To Any New Context Or Class Of Defendants

1. In *Bivens*, the Court for the first time recognized an implied private action for damages against federal officers alleged to have violated constitutional rights.⁷

the Court need not reach the issue to decide this case. See *Alba v. Montford*, 517 F.3d 1249, 1254 (11th Cir.) (“assuming, without deciding,” federal action in holding that prisoner lacked *Bivens* remedy), cert. denied, 129 S. Ct. 632 (2008).

To the extent the Court considers the issue, however, the government submits that private prison contractors do act “under color of law” for certain purposes, including for purposes of federal criminal law. See 18 U.S.C. 242 (providing criminal penalties against any person who, “under color of any law,” wilfully deprives any person of their rights under the Constitution or federal law). This Court has held that the phrase “under color of any law” in Section 242 “means the same thing” as the similar language of 42 U.S.C. 1983. *United States v. Price*, 383 U.S. 787, 794 n.7 (1966); see also *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 928 n.9 (1982). The Court has also held that a private physician working in a state prison under contract acts “under color of law” for purposes of Section 1983. See *West v. Atkins*, 487 U.S. 42, 54 (1988); cf. *Richardson v. McKnight*, 521 U.S. 399, 413 (1997) (remanding for determination of whether defendants, employees of a private prison contractor, were subject to suit under Section 1983). Taken together, those two lines of precedent establish the government’s authority to enforce Section 242 against state and local prison contractors. See, e.g., *United States v. Wallace*, 250 F.3d 738 (5th Cir. 2001) (Table) (per curiam) (rejecting claim that defendant, a guard employed by a private prison company, was not acting “under color of any law” within the meaning of Section 242). Because Section 242 does not differentiate between state and federal action, the same result obtains with respect to federal prison contractors.

⁷ *Bivens* relied on earlier decisions recognizing implied causes of action for damages under federal statutes. See 403 U.S. at 397 (citing *J.I. Case Co. v. Borak*, 377 U.S. 426, 433 (1964)). Those decisions reflected an expansive view of the Court’s authority to create causes of action

The *Bivens* Court held that federal officials could be sued for money damages for violating the plaintiff's Fourth Amendment rights by conducting a warrantless search of the plaintiff's home. In creating that common-law cause of action for damages, the Court noted that there were no apparent federal or state remedies available to redress the resulting injuries, as well as "no special factors counselling hesitation" in establishing a judicially fashioned remedy. *Bivens*, 403 U.S. at 389-390, 392-396; cf. *id.* at 409-410 (Harlan, J., concurring in the judgment) ("For people in *Bivens*' shoes, it is damages or nothing."). To the contrary, state laws regulating trespass and invasion of privacy could be "inconsistent or even hostile" to Fourth Amendment protections. *Id.* at 394.

Since *Bivens*, the Court has implied a *Bivens* remedy only twice. In *Davis v. Passman*, 442 U.S. 228 (1979), the Court recognized an implied damages action against a Congressman for alleged sex discrimination in violation of the Due Process Clause of the Fifth Amendment.

to effectuate statutory goals, even absent any textual or structural basis for inferring that a right of action was intended. See, e.g., *Borak*, 377 U.S. at 433 ("[I]t is the duty of the courts to be alert to provide such remedies as are necessary to make effective the congressional purpose."). Since that time, however, the Court has "retreated from [its] previous willingness to imply a cause of action where Congress has not provided one." *Correctional Servs. Corp. v. Malesko*, 534 U.S. 61, 67 n.3 (2001) (citing, e.g., *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 188 (1994); *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11, 15-16 (1979); *Cannon v. University of Chicago*, 441 U.S. 677, 688 (1979); *id.* at 717-718 (Rehnquist, J., concurring)). This Court has noted that it "'abandoned' the view of *Borak* decades ago, and ha[s] repeatedly declined to 'revert' to 'the understanding of private causes of action that held sway 40 years ago.'" *Ibid.* (quoting *Alexander v. Sandoval*, 532 U.S. 275, 287 (2001)).

The Court did so “chiefly because the plaintiff lacked any other remedy for the alleged constitutional deprivation.” *Correctional Servs. Corp. v. Malesko*, 534 U.S. 61, 67 (2001) (citing *Davis*, 442 U.S. at 245).

In *Carlson v. Green*, 446 U.S. 14 (1980), the Court permitted a *Bivens* action against individual federal prison officials for an alleged Eighth Amendment violation. The Court reasoned that plaintiff’s sole alternative remedy—an FTCA claim against the United States—was insufficient to deter the unconstitutional acts of individual government employees. See *Malesko*, 534 U.S. at 68 (citing *Carlson*, 446 U.S. at 18-23). The Court also found it “crystal clear” that Congress intended the FTCA and *Bivens* to serve as “parallel” and “complementary” sources of liability. *Ibid.* (quoting *Carlson*, 446 U.S. at 19-20).

2. Since *Carlson*, the Court has “refused to extend *Bivens* liability to any new context or new category of defendants.” *Malesko*, 534 U.S. at 68; see also, *e.g.*, *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1948 (2009) (“Because implied causes of action are disfavored, the Court has been reluctant to extend *Bivens* liability.”). Notably, the Court has refused to extend *Bivens* even in the absence of express statutory preclusion of implied remedies and irrespective of whether any available alternative remedy would be “equally effective,” *Carlson*, 446 U.S. at 19.

For example, in *Bush v. Lucas*, 462 U.S. 367 (1983), a federal agency employee claimed a First Amendment violation arising from a retaliatory demotion for his public statements critical of the agency. The Court refused to imply a *Bivens* remedy in light of the remedies available under the Civil Service Reform Act, even though the Act did not afford the employee damages for the constitutional violation beyond backpay and related re-

lief for the wrongful demotion. *Id.* at 388. The Court explained that the question whether a *Bivens* cause of action is available “obviously cannot be answered simply by noting that existing remedies do not provide complete relief for the plaintiff.” *Id.* at 378, 388.

In *Schweiker v. Chilicky*, 487 U.S. 412 (1988), the Court declined to recognize a damages action against federal employees alleged to have violated due process in their handling of Social Security applications, even though the Social Security review scheme afforded only retroactive disability benefits and not damages for any constitutional harms. The Court found no support for “the notion that statutory violations caused by unconstitutional conduct necessarily require remedies in addition to the remedies provided generally for such statutory violations.” *Id.* at 427; see *id.* at 421-422 (“The absence of statutory relief for a constitutional violation * * * does not by any means necessarily imply that courts should award money damages against the officers responsible for the violation.”). Notably, unlike in *Carlson*, the Court in *Chilicky* did not ask whether Congress has “explicitly declared” another remedy to be “equally effective.” *Carlson*, 446 U.S. at 18-19. Rather, the Court concluded that the availability of a federal statutory remedy could preclude implying an additional *Bivens* remedy, even if the statutory remedy offered limited relief, unless Congress’s failure to provide complete relief was “inadvertent.” *Chilicky*, 487 U.S. at 423.

In *Malesko, supra*, the Court held that federal prisoners confined in facilities operated pursuant to a contract between a private company and BOP had no *Bivens* remedy against the company itself for alleged constitutional violations. The Court relied in part on the fact that such prisoners did not “lack effective reme-

dies.” 534 U.S. at 72; see *ibid.* (noting “conce[ssion] at oral argument that alternative [state] remedies are at least as great, and in many respects greater, than anything that could be had under *Bivens*”). Specifically, the Court explained that the federal prisoners in privately run facilities could pursue state tort remedies (such as negligence), as well as federal administrative remedies and suits for injunctive relief. *Id.* at 73-74; see *id.* at 73 (contrasting plaintiff’s situation from *Bivens*, “in which we found alternative state tort remedies to be ‘inconsistent or even hostile’ to a remedy inferred from the Fourth Amendment”). The *Malesko* Court also explained that *Chilicky* had “rejected the claim that a *Bivens* remedy should be implied simply for want of any other means for challenging a constitutional deprivation in federal court.” *Id.* at 69 (“So long as the plaintiff had an avenue for some redress, bedrock principles of separation of powers foreclosed judicial imposition of a new substantive liability.”).

Finally, in *Wilkie v. Robbins*, 551 U.S. 537 (2007), the Court declined to create a *Bivens* remedy for Fourth and Fifth Amendment violations arising out of alleged retaliation by federal officials for a landowner’s refusal to grant the government an easement. *Id.* at 551-562. The Court clarified the *Bivens* analysis by treating the inquiry from *Bush* and *Chilicky* as the first step in deciding whether a *Bivens* remedy is available: “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. The Court then identified a second step, noting that even “in the absence of an alternative [process or remedy], a *Bivens* remedy is a subject of judgment: ‘the federal courts must make

the kind of remedial determination that is appropriate for a common-law tribunal, paying particular heed, however, to any special factors counselling hesitation before authorizing a new kind of federal litigation.’” *Ibid.* (quoting *Bush*, 462 U.S. at 378). For the portion of the landowner’s suit that alleged conduct actionable under state tort law, see *id.* at 551, the Court noted that “the tort or torts by Government employees would be so clearly actionable under the general law that it would furnish only the weakest argument for recognizing a generally available constitutional tort,” *id.* at 560. See also *id.* at 551 (characterizing *Malesko* as a case “considering availability of state tort remedies in refusing to recognize a *Bivens* remedy”).

In sum, the Court has declined to recognize a *Bivens* remedy both where alternate state remedies existed, see *Malesko*, 534 U.S. at 73-74; *Wilkie*, 551 U.S. at 551, and where alternate federal remedies existed, see *Chilicky*, 487 U.S. at 421-427; *Bush*, 462 U.S. at 388, even where those remedies did not provide the same kind or amount of damages the plaintiffs had sought for the alleged constitutional violations. Some four decades after *Bivens* was decided, it remains the case that this Court “ha[s] 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,” *Malesko*, 534 U.S. at 70. Otherwise, the Court has “consistently rejected invitations to extend *Bivens*.” *Ibid.*

**B. Respondent's Suit Does Not Warrant An Extension Of
*Bivens***

In concluding that a *Bivens* remedy is available in this case, the court below extended *Bivens* beyond existing precedent. Contrary to respondent's contention (Br. in Opp. 13), his action is not, "in all material respects, identical to that approved in *Carlson*." Most obviously, the defendants in *Carlson* were federal officials employed by the United States in a government-run prison, see 446 U.S. at 16 & n.1, whereas petitioners are individuals employed by a contractor in a privately run prison. That distinction is critical. As explained below (pp. 29-31, *infra*), whereas the FTCA precludes non-constitutional suits against federal officers, it affords no such protection to employees of private contractors. Moreover, whereas federal employees are generally entitled to the protections of qualified immunity, employees of private contractors (even those who might be considered federal actors for *Bivens* purposes, see note 6, *supra*) likely are not. To recognize a *Bivens* remedy in this case would thus require extending *Bivens* both to a new context and to a new class of defendants.⁸ Tellingly, the

⁸ Even apart from those material distinctions, respondent's heavy reliance on *Carlson* (Br. in Opp. 13-15) is misplaced. In *Carlson*, the Court appeared to presume that a *Bivens* remedy would be unavailable only if the defendants could (a) "show that Congress has provided an alternative remedy which it explicitly declared to be a *substitute* for recovery directly under the Constitution and viewed as equally effective," or (b) "demonstrate 'special factors counselling hesitation in the absence of affirmative action by Congress.'" 446 U.S. at 18-19 (citation omitted). As explained above (pp. 16-19, *supra*), however, later cases have manifested a deep reluctance to extend *Bivens* unless no alternative remedy (even one not "equally effective") is available and no special factors counsel otherwise. See, e.g., *Wilson v. Libby*, 535 F.3d 697, 708 (D.C. Cir. 2008) (noting that, "subsequent to *Carlson*, the Court clari-

court below stands alone in permitting a *Bivens* suit to proceed against private contractors in these circumstances. See *Malesko*, 534 U.S. at 65 (noting question not before the Court); *Holly v. Scott*, 434 F.3d 287 (4th Cir.) (rejecting *Bivens* remedy), cert. denied, 547 U.S. 1168 (2006); *Alba v. Montford*, 517 F.3d 1249 (11th Cir.) (same), cert. denied, 129 S. Ct. 632 (2008).⁹

Respondent’s request to extend *Bivens* in this context fails at both steps of the analysis set forth in *Wilkie*. First, the gravamen of respondent’s complaint is medical malpractice and breach of duties of care, and adequate state-law remedies are available for prisoner claims arising from those allegations. Second, the decision whether to create a federal damages remedy in this context, which threatens to expose private prison employees to greater liability than their government counterparts, is a decision Congress should make.

1. State law provides adequate alternative remedies

a. As respondent stated in the introduction to his amended complaint, this suit is designed “to obtain redress for deprivation of proper medical care.” J.A. 27.

fied that there does not need to be an equally effective alternate remedy” to preclude a *Bivens* action), cert. denied, 129 S. Ct. 2825 (2009).

⁹ Consistent with the approach of the parties in *Malesko*, the United States (as an amicus) assumed *arguendo* that a *Bivens* remedy would be available against individual employees. See Gov’t Br. 17, *Malesko*, *supra* (“[A]lthough this Court has never held that private individuals acting under color of federal authority may be held liable under *Bivens*, both respondent and petitioner appear to assume that such an extension would be proper. For present purposes, we assume such an extension of *Bivens* is proper as well.”); see also Oral Arg. Tr. 19-20, *Malesko*, *supra*. The United States did not, as Justice Stevens stated in his dissent, “maintain[] that such liability would be appropriate.” *Malesko*, 534 U.S. at 79 n.6.

Although respondent attempts to divide his Eighth Amendment claim into four sub-categories—“deni[al] [of] basic medical care” (Br. in Opp. 2); conditioning “access to medical care” on compliance with inmate-transport procedures causing pain (*id.* at 1); “deni[al] [of] basic access to food and hygiene” due to incapacitation from his injuries (*id.* at 2); and being “forced” to return to work duty prematurely (*ibid.*)—all of these alleged violations arise from respondent’s central allegation that he was not provided adequate medical care or appropriate accommodations for his elbow injuries.

Most, if not all, of the wrongful conduct alleged in this case is redressable under state tort law. There is no dispute that a state tort remedy in medical malpractice would be available to a prisoner, like respondent, alleging deficient medical treatment of his injuries. Beyond that, California, like other states, recognizes that “jailers owe prisoners a duty of care to protect them from foreseeable harm.” *Giraldo v. California Dep’t of Corr. & Rehab.*, 85 Cal. Rptr. 3d 371, 387 (Cal. Ct. App. 2008); see Br. in Op. 19 (acknowledging that California “tort law extends into the prison context”) (citing *Giraldo*); see also Pet. App. 65a-67a (Restani, J., dissenting); Pet. Br. 33 n.6 (collecting state cases). Accordingly, even respondent’s allegations of mistreatment by non-medical personnel may give rise to a negligence action. *Giraldo*, 85 Cal. Rptr. 3d at 390; see also Pet. App. 65a (Restani, J., dissenting). Moreover, respondent could also bring parallel tort claims against GEO, petitioners’ employer, under a *respondeat superior* theory of liability. *Id.* at 57a n.1 (citing, *e.g.*, *Lisa M. v. Henry Mayo Newhall Mem’l Hosp.*, 907 P.2d 358, 360 (Cal. 1995)).

In *Malesko*, the Court emphasized that the prisoner, who alleged that private prison employees refused him

medication and use of an elevator despite knowledge of his heart condition (thereby resulting in a heart attack), had actionable tort claims for negligence or deliberate indifference. See 534 U.S. at 72-74 (noting that prisoner lacked an alternative tort remedy “due solely to strategic choice”). The Eighth Amendment-based allegations in *Malesko* are not meaningfully different from respondent’s non-malpractice allegations here (*e.g.*, being forced to work or to wear a “black box” restraint despite his injuries). As in *Malesko*, alternative state tort remedies exist to redress the gravamen of respondent’s complaint.¹⁰

b. Although this Court does not require alternate remedies to be “equally effective” as a *Bivens* remedy (see note 8, *supra*), from a plaintiff’s perspective, the state tort remedies available here may well be superior to a *Bivens* remedy in important respects.

As this Court explained in *Malesko*, “the heightened ‘deliberate indifference’ standard of Eighth Amendment liability * * * make[s] it considerably more difficult * * * to prevail than on a theory of ordinary negligence.” 534 U.S. at 73 (citing *Farmer v. Brennan*, 511 U.S. 825, 835 (1994) (“[D]eliberate indifference describes a state of mind more blameworthy than negligence.”)); see also *Holly*, 434 F.3d at 295-296 (finding state medical malpractice remedy superior to *Bivens* remedy); *Alba*, 517 F.3d at 1253-1254 (same). Even the Ninth Circuit appeared to acknowledge that point in the decision below. Pet. App. 48a-49a (“It is true that * * *

¹⁰ Respondent argues that possible defenses (such as consent) to some of his allegations might render some state remedies effectively unavailable. Br. in Opp. 9-10, 20. Even putting aside the implausibility of such a defense under the circumstances alleged, this Court’s precedents have never required “complete” relief for a plaintiff’s injuries.

it may be easier to prevail on [a state tort] claim than on an Eighth Amendment *Bivens* claim. Indeed, in an action to recover damages for personal injuries under state tort theories such as negligence or medical malpractice, the plaintiff would not be required to prove deliberate indifference, as required to establish an Eighth Amendment violation.”); see *id.* at 10a (Bea, J., dissenting from denial of rehearing en banc) (similar); *id.* at 56a-57a (Restani, J., dissenting) (similar).

Moreover, employees of private prison corporations likely do not enjoy the special immunities conferred on government employees acting in the same capacity, thereby further increasing the odds of an adverse damages judgment. See pp. 29-31, *infra*. Thus, respondent’s “alternative remedies are at least as great, and in many respects greater, than anything that could be had under *Bivens*.” *Malesko*, 534 U.S. at 72 (citation omitted).

For these reasons, the alternative tort remedies available in this context serve as an adequate deterrent—or at least as effective a deterrent as a *Bivens* action would be—to unconstitutional conduct. See *Malesko*, 534 U.S. at 70-71 (explaining that “[t]he purpose of *Bivens* is to deter individual federal officers from committing constitutional violations”). While it is conceivable that recognizing a *Bivens* action here might have some marginal deterrent effect in limited circumstances (see Pet. App. 49a-51a), the deterrence provided by existing tort remedies suffices to eliminate any need for a *Bivens* remedy in this case.

c. To the extent that respondent raises constitutional claims not in themselves redressable under state tort law, this Court’s cases have rejected the proposition that there must be a perfect one-to-one correlation be-

tween each alleged constitutional harm and available remedies. The Court in *Chilicky*, for example, refused to recognize a *Bivens* remedy even though the alternative remedial scheme allowed for recovery only of past disability benefits erroneously denied, not separate damages for any due process violation accompanying that denial. See 487 U.S. at 421-422 (“The absence of statutory relief for a constitutional violation * * * does not by any means necessarily imply that courts should award money damages against the officers responsible for the violation.”); see also *Bush*, 462 U.S. at 388 (refusing to create a *Bivens* remedy even though the statutory remedies “do not provide complete relief for the plaintiff”).

d. Contrary to respondent’s contention (Br. in Opp. 15-16), neither *Bivens* nor any other decision of this Court holds that only federal remedies are relevant to the analysis. Although the Court has never expressly held that the availability of state-law remedies alone precludes implying a new *Bivens* remedy, the reasoning underlying the *Bivens* line of cases lends powerful support to that conclusion. In *Bivens* itself, the Court relied in significant part on the unavailability of a state-law remedy. See 403 U.S. at 394 (noting that trespass is not actionable against a defendant who “demands, and is granted, admission to another’s house”); see also, e.g., *Malesko*, 534 U.S. at 73 (in “*Bivens* * * * we found alternative state tort remedies to be ‘inconsistent or even hostile’ to a remedy inferred from the Fourth Amendment”) (quoting *Bivens*, 403 U.S. at 393-394); *Alba*, 517 F.3d at 1254 (“[The Court] in *Bivens* itself expressed concern that *Bivens* could not recover damages against the federal narcotics agents under state tort law.”). Moreover, in *Malesko*, this Court empha-

sized its unwillingness to extend *Bivens* except where a plaintiff lacks “*any* alternative remedy”—not just an alternative remedy under federal law—against the individual defendant. 534 U.S. at 70 (emphasis omitted); see *id.* at 72-74 (discussing alternative state-law remedies).¹¹

Nor does a rule that limits the inquiry to federal remedies comport with the primary purposes underlying the *Bivens* remedy: (1) ensuring some remedy for the violation of a plaintiff’s constitutional rights; and (2) deterring unconstitutional conduct by individual government actors. See, e.g., *Bivens*, 403 U.S. at 397; *Malesko*, 534 U.S. at 70-71. An adequate alternative remedy serves both of those purposes, whether the remedy is under federal law or state law.

The court of appeals’ emphasis on the need for a “uniform” remedy is similarly misplaced. Pet. App. 39a (quoting *Carlson*, 446 U.S. at 23). The Court has discussed the benefit of uniformity provided by a *Bivens* remedy only where (unlike here) a plaintiff has shown that no state remedy is otherwise available. In *Carlson*, for example, the plaintiff lacked an alternate remedy because the claims (at least in substantial part) did not survive the death of her son under the relevant state’s survivorship law. 446 U.S. at 17-18 n.4, 24. Similarly, in

¹¹ Respondent describes *Bivens* as holding that “a damages action for a Fourth Amendment violation existed ‘regardless of whether [state law] . . . would prohibit or penalize the identical act.’” Br. in Opp. 16 (brackets in original). That is incorrect. The Court in *Bivens* stated that “*the Fourth Amendment operates as a limitation upon the exercise of federal power regardless of whether [state law] would prohibit or penalize the identical act if engaged in by a private citizen.*” *Bivens*, 403 U.S. at 392 (emphasis added). The point concerns only the substantive scope of the Fourth Amendment; it says nothing about whether the existence of adequate state-law remedies would obviate the need for a judicially crafted damages action.

Bivens—where the uniformity concern surfaced only in Justice Harlan’s concurrence, 403 U.S. at 409—the Court had noted the unavailability of a state tort remedy, *id.* at 394. And the Court’s post-*Carlson* precedents do not emphasize uniformity, even where the primary alternative remedies would lie under state law. See, e.g., *Malesko*, 534 U.S. at 72-74.

In any event, respondent “has not shown—because he cannot—that there is any state which does not provide recovery for that most fundamental tort claim, in which one person’s negligent conduct causes physical and/or emotional harm to another.” Pet. App. 11a (Bea, J., dissenting from denial of rehearing en banc); see *id.* at 62a (“[O]rdinary negligence and medical negligence causes of action are already universally available against employees of a private corporation operating a federal prison, and the elements of such common law derived causes of action are fundamentally the same in every state.”) (Restani, J., dissenting). That states might have different procedural rules or limits on non-economic damages in such suits is hardly the kind of non-uniformity that would support recognition of a *Bivens* remedy, particularly given that an alternative remedy need not provide “complete” relief. *Bush*, 462 U.S. at 388; see pp. 16-17, *supra*.

e. Because state remedies are available to redress the sort of injuries respondent alleges, this case does not present the question whether a *Bivens* remedy should be made available against an employee of a federal prison contractor where there are no available state remedies¹² or where it is too difficult for a court to make

¹² Because the Prison Litigation Reform Act of 1995 provides that “[n]o Federal civil action may be brought by a prisoner confined in a

that determination.¹³ See Pet. App. 42a-46a. Were such a case to arise, the Court could consider whether the possibility of a federal-court suit for injunctive relief provides an adequate alternative to *Bivens*. See *Malesko*, 534 U.S. at 74. However the Court were to resolve that issue in other cases, the availability of adequate state remedies in this case provides sufficient reason to reject any extension of *Bivens* here.

2. Extending *Bivens* would create greater liability exposure for private prison employees compared to their governmental counterparts

a. Although the availability of adequate alternative remedies to redress respondent’s injuries provides sufficient reason not to extend *Bivens* in this case, another factor counsels hesitation in this context: extending a *Bivens* remedy would result in greater remedies for federal prisoners in privately run facilities compared to those in government-run facilities, and hence greater exposure to individual liability for private employees compared to federal employees serving the same functions.

jail, prison, or other correctional facility, for mental or emotional injury suffered while in custody without a prior showing of physical injury,” 42 U.S.C. 1997e(e), the hypothetical Eighth Amendment violations that concerned the Ninth Circuit because they might not result in “physical harm” redressable under state law (Pet. App. 43a-44a) might not be redressable in a *Bivens* action for much the same reason.

¹³ In most cases, as in this one, determining the potential availability of alternative state remedies will be relatively straightforward. And even where it is not, there is no reason to doubt courts’ ability to resolve the issue. See, e.g., *Wilkie*, 551 U.S. at 553-554 (examining “patchwork” of multiple sources of state and federal law).

In *Malesko*, the Court cited the potential for asymmetrical liability costs on private prison contractors as a reason not to extend *Bivens* to a federal prisoner in a privately run facility, given that a federal prisoner in a BOP facility could not bring the same claim. 534 U.S. at 71-72. Much as in *Malesko*, allowing a *Bivens* claims against employees of private prison contractors could lead to asymmetrical liability costs.

The asymmetry arises in part because of the FTCA, which provides a means for bringing a damages suit against the United States for torts committed by federal employees in the scope of their employment, see 28 U.S.C. 1346(b)(1), while expressly preempting all non-constitutional civil claims against individual federal employees for such torts, see 28 U.S.C. 2679(b)(1).¹⁴ The FTCA excludes from its scope claims arising out of the conduct of employees of “any contractor with the United States.” 28 U.S.C. 2671; see *Logue v. United States*, 412 U.S. 521, 526-527 (1973) (holding that FTCA excludes prison contractors). That statutory exclusion means that federal prisoners in contractor-operated facilities are able to bring state-law tort claims against individual employees, whereas their counterparts in government-run prisons are not. Under respondent’s contemplated remedy, therefore, employees of a federal prison con-

¹⁴ Section 2679(b)(1) makes the FTCA damages remedy against the United States (28 U.S.C. 1346(b)(1)) the exclusive remedy for any injury “resulting from the negligent or wrongful act or omission” of any federal employee acting within the scope of his employment. 28 U.S.C. 2679(b)(1). The following paragraph of the statute, however, carves out *Bivens* claims from the FTCA’s bar on individual suits. See 28 U.S.C. 2679(b)(2)(A) (“Paragraph (1) does not extend or apply to a civil action against an employee of the Government * * * which is brought for a violation of the Constitution.”).

tractor would be subject to a double dose of liability under state and federal law.

The asymmetry also arises because of the uncertain application of the qualified immunity doctrine, which shields a government official from liability for certain conduct, even if unlawful, as long as that conduct does not violate clearly established law. *E.g.*, *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). In *Richardson v. McKnight*, 521 U.S. 399 (1997), which involved an action under 42 U.S.C. 1983, the Court held that employees of a state prison contractor are not entitled to qualified immunity.¹⁵ 521 U.S. at 412; but cf. *id.* at 413-414 (reserving question whether private defendants might be

¹⁵ That Section 1983 may provide a remedy to state prisoners against employees of private firms operating state prisons—a question left open in *Richardson*, 521 U.S. at 413—does not mean that a *Bivens* remedy must also be available in the federal context. The Court has instructed that, in order to effectuate congressional intent, the text of the statute should be read broadly. See *Lugar*, 457 U.S. at 934 (discussing the legislative history of the Civil Rights Act of 1871 and the authors’ goal of ensuring broad protection); *Lake Country Estates, Inc. v. Tahoe Reg’l Planning Agency*, 440 U.S. 391, 399-400 & n.17 (1979) (noting that it is “well settled that § 1983 must be given a liberal construction” and citing legislative history). By contrast, *Bivens* is a judge-made remedy, and for decades this Court has made clear that courts must exercise caution in extending that remedy into any new context or to any new class of defendants. For that reason, Section 1983 and *Bivens* are not coextensive in their reach. For example, even though entity liability is well accepted under Section 1983, the Court has declined to recognize such liability in the *Bivens* context. Compare *Monell v. Department of Soc. Servs.*, 436 U.S. 658, 690 (1978) (municipalities and local governments); *Lugar*, 457 U.S. at 936-937 (corporations), with *FDIC v. Meyer*, 510 U.S. 471 (1994) (federal agencies); *Malesko, supra* (BOP prison contractors). The material differences in source and scope between Section 1983 and *Bivens* undercuts the argument for a corresponding *Bivens* remedy here.

able to assert special “good-faith” defense). The logic of *Richardson* suggests that employees of federal prison contractors may also be found to lack a qualified immunity defense to any cognizable *Bivens* claim. To that extent, federal prisoners in a privately operated facility would have a much greater likelihood of prevailing on an otherwise identical *Bivens* claim than their counterparts in a government-run facility.¹⁶

b. Although the court of appeals expressed “concern[] about issuing a decision that will yield disparate rights and remedies among inmates in private and public prisons,” Pet. App. 51a, it concluded that the concern “does not counsel hesitation in recognizing a *Bivens* remedy here” because a rule that would leave prisoners in private prisons with no means of vindicating their constitutional rights is “equally undesirable.” *Id.* at 51a-52a. The latter concern is, however, unfounded. As demonstrated, respondent (and other similarly situated federal prisoners) are free to seek state tort remedies for injuries arising from allegedly unconstitutional conduct—even if those remedies do not separately compensate for the constitutional violation itself. See pp. 23-25, *supra*.

To be sure, an asymmetry in remedies will persist even if the Court declines to extend *Bivens* to the present context: federal prisoners in BOP-run facilities would have a *Bivens* remedy while those in contractor-run facilities would not. But the point of *Malesko* is that

¹⁶ The lack of a qualified immunity defense also removes a premise of the Court’s recognition of a *Bivens* action in *Carlson*, where the Court found no factor counseling hesitation because “even if requiring [petitioners] to defend respondent’s suit might inhibit their efforts to perform their official duties, * * * qualified immunity * * * provides adequate protection.” 446 U.S. at 19.

it should be up to Congress, and not the courts, to decide whether to resolve the asymmetry in favor of creating an additional federal damages remedy. That is especially true where, as here, creating such a remedy could increase contracting costs for the federal government. See *Malesko*, 534 U.S. at 72 (“Whether it makes sense to impose asymmetrical liability costs on private prison facilities alone is a question for Congress, not us, to decide.”); see also *Wilkie*, 551 U.S. at 562 (“‘Congress is in a far better position than a court to evaluate the impact of a new species of litigation’ against those who act on the public’s behalf.”) (quoting *Bush*, 462 U.S. at 389).

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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APPENDIX

1. 28 U.S.C. 1346 provides in pertinent part:

United States as defendant

* * * * *

(b)(1) Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

* * * * *

2. 28 U.S.C. 2671 provides:

Definitions

As used in this chapter and sections 1346(b) and 2401(b) of this title, the term “Federal agency” includes the executive departments, the judicial and legislative branches, the military departments, independent establishments of the United States, and corporations primarily acting as instrumentalities or agencies of the United

(1a)

States, but does not include any contractor with the United States.

“Employee of the government” includes (1) officers or employees of any federal agency, members of the military or naval forces of the United States, members of the National Guard while engaged in training or duty under section 115, 316, 502, 503, 504, or 505 of title 32, and persons acting on behalf of a federal agency in an official capacity, temporarily or permanently in the service of the United States, whether with or without compensation, and (2) any officer or employee of a Federal public defender organization, except when such officer or employee performs professional services in the course of providing representation under section 3006A of title 18.

“Acting within the scope of his office or employment”, in the case of a member of the military or naval forces of the United States or a member of the National Guard as defined in section 101(3) of title 32, means acting in line of duty.

3. 28 U.S.C. 2679 provides in pertinent part:

Exclusiveness of remedy

* * * * *

(b)(1) The remedy against the United States provided by sections 1346(b) and 2672 of this title for injury or loss of property, or personal injury or death arising or resulting from the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment is exclusive

of any other civil action or proceeding for money damages by reason of the same subject matter against the employee whose act or omission gave rise to the claim or against the estate of such employee. Any other civil action or proceeding for money damages arising out of or relating to the same subject matter against the employee or the employee's estate is precluded without regard to when the act or omission occurred.

(2) Paragraph (1) does not extend or apply to a civil action against an employee of the Government—

(A) which is brought for a violation of the Constitution of the United States, or

(B) which is brought for a violation of a statute of the United States under which such action against an individual is otherwise authorized.

* * * * *