

No. 10-1104

IN THE
Supreme Court of the United States

MARGARET MINNECI; JONATHAN E.
AKANNO; ROBERT SPACK; BOB D.
STIEFER; AND BECKY MANESS,

Petitioners,

v.

RICHARD LEE POLLARD *et al.*,

Respondents.

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

REPLY BRIEF FOR PETITIONERS

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INTRODUCTION

Bivens remedies cannot be authorized except in extraordinary circumstances based on a showing of need. Yet respondent (“Pollard”) does not attempt to make such a showing on the facts of this case. To show inadequacy of traditional remedies, Pollard needs to show that his allegations would state a claim under the onerous standards of the Eighth Amendment yet fail under the far more generous standards of state law. But he identifies no principle of California law (or that of any other state) that has *ever* denied such a cause of action to a prisoner

harmed by a jailer's negligent conduct, much less the kind of willful or malicious conduct required to state an Eighth Amendment violation.

Nor does Pollard contest that, as a result of Congressional action, defendant private contractor employees face materially different legal circumstances than their Federal government counterparts. Whereas Congress has preempted all state law tort claims against individual government employees—leaving plaintiffs with no non-constitutional damages remedies—it has done the opposite for people like petitioners. And whereas Congress, by statute, has expressly preserved *Bivens* claims against actual government employees, it excluded contractors from the scope of that statute. Moreover, unlike individual government employees, petitioners have no recognized qualified immunity defense.

Pollard thus seeks to extend *Bivens* to a new context and category of defendants not considered in *Carlson v. Green*, 446 U.S. 14 (1980), or any other precedent. Yet he does not justify the need for that extraordinary remedy on the facts of *this* case, as the Court has always required. Instead, Pollard urges the Court to create a blanket “categorical” damages remedy for *every* Eighth Amendment claim against private contractor employees, based on unfounded speculation about the possible existence of some future hypothetical case in some unspecified jurisdiction where a plaintiff might conceivably lack a state law remedy under some unknown legal principle yet to be devised. This approach contradicts the Court's *Bivens* jurisprudence and would overstep the judiciary's proper role. The essence of adjudication is applying legal principles to the specific facts of the case before the court. By

contrast, it is the job of legislators to use policy principles to create blanket categorical rules without regard to the facts of specific cases.

Pollard has not shown that he is entitled to a *Bivens* remedy in this case. If a future plaintiff suing a private employee presents materially different circumstances—and there is no reason now to believe that would ever happen—that plaintiff could attempt to make a contrary showing. But it is the job of Congress, not this Court, to craft “categorical” federal causes of action without regard to whether they may be necessary in any particular case. The Court should therefore reverse the Ninth Circuit’s judgment and uphold the district court’s dismissal of Pollard’s amended complaint.

ARGUMENT

I. THE COURT HAS NOT ALREADY DECIDED THIS CASE.

Pollard first argues that the Court, in *Carlson and Correctional Servs. Corp. v. Malesko*, 534 U.S. 61 (2001), already decided the question in this case. *See, e.g.*, Resp. Br. 7 (“Pollard’s case is on all fours with *Carlson*.”); *id.* at 12 (Court in *Malesko* “believed that *Bivens* actions were available against private prison employees”). Not even the Ninth Circuit adopted this argument, and for good reason.

1. The Court requires an independent justification before it will extend *Bivens* to “any new context or new category of defendants.” *Malesko*, 534 U.S. at 68. This case involves both a new context and a new category of defendants: claims for which there are adequate alternative remedies asserted against private contractor employees who are not covered by the Federal Tort Claims Act (“FTCA”) and who lack a

recognized qualified immunity defense. *Carlson*'s context differed, because the plaintiff lacked alternative remedies, and the defendants were actual government employees with qualified immunity. And in *Malesko*—the Court's only previous *Bivens* case involving a private defendant—the Court expressly left open the question now presented, because no individual defendant was a party to that case. *Id.* at 65 (“[T]he parties agree that the question whether a *Bivens* action might lie against a private individual is not presented here.”).

As the opening brief explained, this case is materially different from *Carlson*. See Pet. Br. 15-19, 39, 41-42; see also U.S. Br. 20. First, in *Carlson*, the plaintiff had no state law remedy, 446 U.S. at 17 n.4, and the Court therefore inferred a federal survivorship remedy under *Bivens* to ensure the possibility of relief, *id.* at 24. Moreover, in the Westfall Act Congress subsequently preempted all state damages claims against actual government employees, 28 U.S.C. § 2679(b)(1), eliminating any alternative relief against such defendants. But here, state remedies exist unpreempted because Congress has expressly excluded private contractor employees from the FTCA. 28 U.S.C. § 2671. Moreover, whereas *Carlson* found no reason to hesitate in creating a *Bivens* action because the defendants were protected by qualified immunity, 446 U.S. at 19, petitioners here have no such recognized defense. Pet. Br. 37-41.

Second, *Carlson* relied on Congress's “crystal clear” intent to make the FTCA remedy against the United States parallel and complementary to the *Bivens* remedy against individual government officers. 446 U.S. at 18. The Westfall Act subsequently codified

that intent by expressly preserving *Bivens* claims against individual “government employees,” 28 U.S.C. § 2679(b)(2)(A), who otherwise face no claims at all. But no such intent exists in this case. There is no parallel FTCA remedy, and the category of “government employees” against whom Congress preserved *Bivens* claims expressly excludes petitioners and other contractor employees. Pet. Br. 42.

For these reasons, this case is not “on all fours with *Carlson*.” Resp. Br. 7. Pollard’s brief neither disputes these points nor explains why they do not materially distinguish this case from *Carlson*.

Pollard’s assertion that *Malesko* resolved the issue in this case, *see id.* at 5, 12, is specious. As noted, *Malesko* expressly left the issue open. According to Pollard, the Court in *Malesko* “explained that, *in the private prison setting*, ‘a *Bivens* claim against the offending individual officer’ is an appropriate remedy.” *Id.* at 5 (quoting *Malesko*, 534 U.S. at 72) (emphasis added). That is a distortion of the Court’s opinion. The Court actually stated that “[i]f a federal prisoner *in a BOP facility* alleges a constitutional deprivation, he may bring a *Bivens* claim against the offending individual officer, subject to the defense of qualified immunity.” *Malesko*, 534 U.S. at 72 (emphasis added). By omitting the words “in a BOP facility,” Pollard’s brief implies that the Court held something it did not. In fact, while *Malesko* did not decide the issue presented here, the Court’s reasoning compels dismissal of Pollard’s claims. *See* Pet. Br. 21.¹

¹ Pollard’s discussion of the litigants’ positions in *Malesko*, Resp. Br. 10-12, is irrelevant. It is the Court’s opinion, not the litigants’ arguments, that governs here. But Pollard is wrong

2. Pollard’s contention that *Carlson* decided this case also relies on the mistaken view—which permeates his entire brief—that a *Bivens* right of action can only be recognized on a “categorical” basis, rather than by considering whether the claim is justifiable on the facts of the case before the Court (which Pollard dismissively calls the “case-by-case” approach). See, e.g., Resp. Br. 17 (“[A] case-by-case approach should be rejected in favor of a categorical approach.”); *id.* at 18 (“In *no Bivens* action has the Court adopted a case-by-case approach.”). This view both overstates the judiciary’s proper role and contradicts the Court’s precedents.

in asserting that the United States took a position in *Malesko* on individual *Bivens* liability. As the United States now explains, it merely assumed the possibility of such liability for purposes of argument. See U.S. Br. 21 n.9. In *Malesko*, counsel for the United States was asked during oral argument whether the Government was “making that [assertion] as *arguendo* or are you conceding that?” and counsel replied that “it should be assumed *arguendo* because if there’s a reason not to subject * * * the private individuals, to liability under *Bivens*, it would be that private individuals have so few immunities and so few defenses, compared to their governmental counterparts, that there’s no reason to infer a Federal cause of action.” *Malesko* Oral Arg. Tr. 19-20. The United States made the same point in its *Malesko* brief, in language that Pollard omits from his own discussion. See U.S. *Malesko* Br. 17 n.6 (“private-sector employees generally have greater exposure to state law claims and fewer immunities than their public-sector counterparts, which may lessen the imperative of inferring a constitutional cause of action”). The United States now expressly takes that position in this case, arguing that individual liability is improper. And although counsel for the *Malesko* petitioner, unlike the United States, did purport to concede the existence of individual liability, he admitted at argument that the concession was effectively meaningless since no individuals were defendants. *Malesko* Oral Arg. Tr. 10-11.

There is no “categorical” approach to adjudication that announces legal rules without regard to whether they are properly applied to the facts of a case before the Court. If the circumstances of a later case are materially indistinguishable from a decided case, the earlier rule governs under *stare decisis* (unless overruled). But if the circumstances are materially different, a different rule will apply. Pollard recognizes as much when he admits that the holdings of prior *Bivens* cases apply only to “other plaintiffs similarly situated.” *Id.* at 18. The relevant question is thus whether Pollard and the petitioners here are in fact “similarly situated” to the parties in *Carlson*, *Bivens*, or *Davis v. Passman*, 442 U.S. 228 (1979). They are not—because, *inter alia*, Pollard has adequate state law remedies while those plaintiffs did not, and petitioners face materially different legal circumstances than their Federal government counterparts.

Nor has the Court applied Pollard’s “categorical” approach in past *Bivens* cases. Pollard argues that because the Court held that the *Carlson* plaintiff had a *Bivens* claim for violation of the Eighth Amendment, that right of action must be available to anyone asserting such a violation. Resp. Br. 7. But the Court expressly held to the contrary in *Malesko*, denying a *Bivens* remedy to a plaintiff alleging Eighth Amendment violations because those claims arose in different circumstances than *Carlson*.

Similarly, no fair-minded reader of *Wilkie v. Robbins*, 551 U.S. 537 (2007), could conclude that the Court adopted any “categorical rule” divorced from the facts of that case. Resp. Br. 20. The Court stressed that a *Bivens* remedy “is not an automatic entitlement no matter what other means there may

be to vindicate a protected interest.” *Wilkie*, 551 U.S. at 550. It then proceeded, in that “factually plentiful case,” to analyze on an almost microscopic level whether the specific plaintiff had adequate remedies for each of his idiosyncratic claims. *Id.* at 551. The Court held that “when the incidents are examined one by one, Robbins’ situation does not call for creating a constitutional cause of action for want of other means of vindication,” and it declined to infer an action based on “the course of dealing as a whole.” *Id.* at 555. The Court specifically *rejected* the invitation to create a cause of action at a “high level of generality,” *id.* at 561, because such a right “may come better, if at all, through legislation,” *id.* at 562.

As in *Wilkie* and every other *Bivens* case the Court has considered in the last 30 years, Pollard has not justified the need for a new remedy in the circumstances of his case (or, indeed, any case). *Wilkie*’s holding underscores the fundamental flaw in Pollard’s “categorical” approach. Courts engage in adjudication, not legislation. The essence of adjudication is the “case-by-case” approach, which is the application of legal principles to the facts of the specific case before the court. Pollard disparages this approach because he cannot justify the result he favors on the facts of his case. But it is the role of legislators, not judges, to weigh broad policy concerns and enact “categorical” causes of action without regard to any specific case or controversy.

Congress has done just that in this area. *See, e.g.*, 42 U.S.C. § 1983 (legislating civil liability for those who violate the Constitution “under color of” state and local, but not federal, law); 18 U.S.C. § 242 (legislating criminal, but not civil, liability for those who violate the Constitution “under color of any

law”). Pollard’s comparison between his situation and the statutory rights of prisoners in state and local custody, Resp. Br. 8, is therefore inapt. Pollard argues that, if he has no *Bivens* remedy, state and local prisoners in private facilities can assert constitutional claims under Section 1983 while federal prisoners will have different avenues of relief. The reason, however, is that *Congress* has enacted a statute covering actions taken under color of state and local law but never enacted a comparable statute in the federal context.

Given that the text of no statute or constitutional provision supports that result, creation of Pollard’s proposed categorical cause of action is a job for Congress, not this Court. *See, e.g., Wilkie*, 551 U.S. at 562; *Bush v. Lucas*, 462 U.S. 367, 389 (1983).

II. POLLARD HAS NOT SHOWN THAT HE LACKED ADEQUATE ALTERNATIVE REMEDIES.

As shown in the opening brief, there is no warrant to manufacture a *Bivens* remedy for Pollard’s claim, because he had adequate alternative remedies for the harms he alleges. *See* Pet. Br. 15-36; *see also* U.S. Br. 11. Nowhere in Pollard’s brief does he argue that he lacked such remedies. Instead, he urges the Court to create a categorical *Bivens* remedy *regardless* of whether alternative remedies existed, because it would allegedly be too hard for courts to evaluate that issue case by case. That approach turns the Court’s *Bivens* jurisprudence on its head. Inferring a *Bivens* remedy is an extraordinary exercise, and Pollard is therefore not entitled to one when he has not justified the need for it.

A. Pollard Is Not Entitled To A *Bivens* Remedy If He Had Adequate Alternative Remedies.

Pollard abandons a key justification for the Ninth Circuit’s holding: that state law remedies can never be adequate alternatives to a *Bivens* action. *See* Pet. App. 35a. Pollard concedes, as he must, that “the Court has looked at state rather than federal alternative remedies in determining whether a *Bivens* action is appropriate.” Resp. Br. 25. *See also id.* at 43 (“*Bivens* claims will lie in circumstances where state law would not provide a recovery”).

Rather than argue that the existence of adequate state law remedies is irrelevant, Pollard asserts that the Court has not relied exclusively on that factor in prior *Bivens* cases. *See id.* at 11. But that is not surprising. In prior cases involving federal officials, the Court focused on alternative federal remedies because the plaintiffs had no state law remedies.² By contrast, in *Malesko*, which involved a private defendant, adequate alternative state remedies existed, and the Court squarely relied on that factor in declining to infer a *Bivens* remedy. *See Malesko*,

² The *Carlson*, *Davis*, and *Bivens* plaintiffs had no state remedies. *See* Pet. Br. 15-19. The defendants in *Bush v. Lucas* were absolutely immune from the plaintiff’s state law claim. 462 U.S. at 371. In the two military cases, the “*Feres*” doctrine apparently barred ordinary tort claims. *See United States v. Stanley*, 483 U.S. 669, 672 (1987); *Chappell v. Wallace*, 462 U.S. 296, 298 (1983). In *Schweiker v. Chilicky*, 487 U.S. 412, 425 (1988), the plaintiff’s injuries would “go unredressed” absent a *Bivens* claim, which the Court nonetheless denied. *See also id.* at 429 n.3 (statute precluded non-constitutional claims). And since enactment of the Westfall Act in 1988, all non-constitutional tort claims against government employees have been expressly preempted. *See* Pet. Br. 41-42.

534 U.S. at 72-73; *id.* at 79 (Stevens, J., dissenting) (noting that the Court “relies so heavily * * * on [the] assumption that alternative effective remedies—primarily negligence actions in state court—are available to respondent”); Pet. Br. 20.

Pollard attempts to sweep *Malesko* under the rug by noting that the Court also relied on the “asymmetrical liability” inherent in subjecting private entities to suit where public entities cannot be liable. 534 U.S. at 72. Asymmetrical liability concerns are also present here, justifying the same result. *See infra* at 21-23. But regardless, *Malesko* stressed that the Court has inferred *Bivens* actions *only* when a cause of action against individual federal officers was “otherwise nonexistent” or the plaintiff “lacked *any alternative remedy*,” and stated that “[w]here such circumstances are not present, we have consistently rejected invitations to extend *Bivens*.” 534 U.S. at 70 (emphasis in original).

In *Malesko*, the existence of adequate alternative state law remedies “ma[de] respondent’s situation altogether different from *Bivens*.” *Id.* at 73. Pollard’s own arguments show why that issue is similarly dispositive in this case. In his view, “[o]nly where a state remedy would provide significant deterrence is the need for a *Bivens* action less pressing.” Resp. Br. 25. But if state law provides adequate recovery for a plaintiff’s injuries, the existence of that remedy provides the requisite deterrence. Pollard has not shown, because he cannot, that his available state law remedies are inadequate to redress, and thus deter, the allegedly wrongful conduct of which he complains. Even under his own formulation of the law, there is no warrant to extend *Bivens* in this case.

B. Pollard Identifies No State Law Denying Recovery For Conduct That Violates The Eighth Amendment.

In *Malesko*, the Court held that the plaintiff had adequate alternative state law remedies, because he alleged “no more than a quintessential claim of negligence” and “the heightened ‘deliberate indifference’ standard of Eighth Amendment liability would make it considerably more difficult for respondent to prevail than on a theory of ordinary negligence.” 534 U.S. at 73 (citations omitted). *Malesko*, moreover, involved circumstances strikingly similar to this case. Whereas Pollard alleges, *inter alia*, that petitioners failed to accommodate his injuries by providing alternative access to food and bathing facilities, *Malesko* involved similar allegations by a prisoner in private custody that his jailers failed to accommodate his injuries by allowing access to an elevator.³

Pollard has not shown why *Malesko*’s holding does not apply here. To show inadequacy of alternative remedies, it is not sufficient for him to assert that he might have lost on the merits of state law claims. Rather, he would have to show that state law denies him a cause of action as a matter of law even though his factual allegations (assuming their truth) satisfy the onerous Eighth Amendment liability standards. Far from doing so, Pollard has identified no principle of California law—or any other state’s law—that has

³ Pollard does not dispute that these and his other allegations would state claims for basic medical negligence. *See also* U.S. Br. 21-22. Indeed, Pollard asserts that the person responsible for failing to provide alternative access to the cafeteria and bathing facilities was the prison’s “Health Services Administrator,” who “was responsible for overseeing his medical needs.” Resp. Br. 3.

ever denied a cause of action to a prisoner who could prove harm from a jailer's negligent conduct, much less the willful or malicious conduct required to state an Eighth Amendment violation.

As the Court recognized in *Malesko*, the basic cause of action for negligence embodied in the law of California (and every other state) makes actionable all the conduct of which Pollard complains. Pet. Br. 26. Indeed, California law is especially protective of prisoners in both governmental and private facilities, imposing a duty to protect them from all foreseeable harm. *Id.* at 26-27 (discussing *Giraldo v. Cal. Dep't of Corr. & Rehab.*, 85 Cal. Rptr. 3d 371 (Cal. Ct. App. 2008) and *Lawson v. Superior Ct.*, 103 Cal. Rptr. 3d 834 (Cal. Ct. App. 2010)). Moreover, as Pollard does not dispute, federal law prohibits prisoner *Bivens* claims that do not involve physical harm (such as damages claims for the denial of necessities), whereas California law has no such restriction. See Pet. Br. 30.

Rather than deny that alternative remedies exist, Pollard speculates—without foundation—that such remedies are “doubtful,” “conjectural,” or “uncertain.” See, e.g., Resp. Br. 1, 5, 24. That is so, he says, because some future court in some hypothetical case might deny a prisoner a basic negligence cause of action under some unspecified theory of legal duty not yet developed or applied, *id.* at 33, or because the law might change, *id.* at 23. Moreover, he dismisses the even broader duty recognized in California because *Giraldo* was issued relatively recently by an appellate court supposedly “having no authority over the law applicable in Taft, California,” and involved different factual allegations from his case. *Id.* at 34.

Baseless speculation cannot satisfy Pollard's burden to show that inadequacy of traditional remedies necessitates a judicially-created federal remedy. The question is not whether a specific reported decision has irrevocably found liability on precisely the same facts as this case. If that were so, this Court could never have held in *Malesko* and other *Bivens* cases that plaintiffs had adequate alternative state or federal remedies, because no two cases ever have identical facts and the law might always change.

Rather, the question is whether no other cause of action allows recovery where federal constitutional rights are violated. Saying that state courts can decline to recognize new duties based on broad factors, *id.* at 33, is no answer. Pollard cites no principle of California law that ever has denied, or ever would deny, the traditional negligence remedy to someone injured by "deliberate indifference to serious medical needs" that "constitutes the 'unnecessary and wanton infliction of pain' proscribed by the Eighth Amendment." *Estelle v. Gamble*, 429 U.S. 97, 104 (1976) (citation omitted).

Pollard's assertion that the *Giraldo* court has "no authority over the law applicable in Taft, California," Resp. Br. 34, misstates California law. Decisions of every Division of the California Court of Appeal are binding on all trial courts throughout the entire state. *See Auto Equity Sales, Inc. v. Superior Ct.*, 20 Cal. Rptr. 321, 324 (Cal. 1962). And regardless of when or by what court it was issued, *Giraldo* did not purport to change California law but instead followed long-settled legal principles. Nor is the decision irrelevant because its facts differ from this one. Resp. Br. 34. The *Giraldo* court applied a legal

standard even *more* protective of prisoners than ordinary negligence, in a case where *other prisoners* had inflicted the harm. That only underscores the availability of a remedy in the more typical circumstances of this case.

Not only has Pollard failed to show that he lacked alternative remedies on the facts of his own case, but neither he nor his amici identify any law from *any* state denying a cause of action to a prisoner injured by jailer conduct that would violate the Eighth Amendment. The opening brief cited 25 cases from other jurisdictions, and authorities that collect nearly 100 more, Pet. Br. 33 n.6, all of which recognize state law duties of care owed by jailers to prisoners. Pollard neither distinguishes any of those authorities nor cites a contrary case. Resp. Br. 35-36. Instead, he asserts that state laws are “divergent and ever-changing,” *id.* at 36, without explaining how such unspecified divergence ever has abrogated, or ever would abrogate, a bedrock negligence cause of action in the kind of egregious circumstances implicated by the Eighth Amendment.

The closest Pollard’s amici get to such an argument is the assertion that some states (but not California) have a procedural rule requiring a plaintiff alleging medical negligence to procure a supporting declaration. *See* ACLU Br. 30-32. If a plaintiff in another case is subject to such a statute, he could attempt to show that it renders state remedies inadequate. But the argument has failed when it has been raised. *See Alba v. Montford*, 517 F.3d 1249, 1255 (11th Cir. 2008). These procedural requirements merely place all plaintiffs on equal footing, and for plaintiffs subjected to willful or malicious conduct that violates the Eighth

Amendment compliance with such rules is not onerous. In any event, as the United States explains—and Pollard concedes—even if an alternative remedy does not provide complete relief, its deterrent effect still renders a *Bivens* remedy unnecessary. See Pet. Br. 19, 23; U.S. Br. 24-25; Resp. Br. 39 (“Adequate deterrence does not require that each violation be met with ‘complete relief’”).

Rather than identify any state denying a cause of action for conduct violative of the Eighth Amendment, Pollard and his amici complain that some states have limited reported case law on prisoner claims. See, e.g., Resp. Br. 22; ACLU Br. 22-24.⁴ That is immaterial, particularly given the egregious conduct required to state an Eighth Amendment violation. For example, in *Hui v. Castaneda*, 130 S. Ct. 1845, 1850 n.3 (2010), the Federal government *conceded* liability under California state law (as incorporated in the FTCA) and after this Court denied a *Bivens* remedy, the plaintiffs prevailed on state law claims in California state court, securing a verdict for more than \$1,700,000. See Bob Egelko, *\$1.7 Million Verdict for Inmate’s Untreated Cancer*, S.F. Chronicle, Nov. 12, 2010, at C-4.⁵ Reported decisions are not needed to show that the traditional negligence cause of action exists in such circumstances. The point was obvious

⁴ The ACLU brief cites several state statutes that provide FTCA-type immunity to state government prison employees. *Id.* at 22-23. On their face, however, these statutes do not cover claims by federal prisoners in privately-managed facilities.

⁵ This belies the Government of Mexico’s assertion that immigration detainees—like the decedent in *Hui*—have no adequate state law remedies. See Mexico Amicus Br. 3.

to the Court in *Malesko*, and there is no reason for a different holding here.

C. Courts Are Competent To Determine The Adequacy of Alternative Remedies.

One of Pollard’s chief contentions is that the Court must create a “categorical” cause of action because it is too difficult for courts to determine that issue. Resp. Br. 21-24. That argument directly contradicts precedent.

Wilkie held that before authorizing a *Bivens* remedy courts must determine whether there is “any alternative, existing process for protecting the [plaintiff’s] interest.” *Wilkie*, 551 U.S. at 550. The Court had no difficulty conducting that analysis in *Malesko*—which involved a prisoner in a privately-managed facility—or in cases involving alternative federal remedies. And other courts commonly determine adequacy of alternative remedies in various contexts, including this one. See Pet. Br. 36 & n.7. The issue lies comfortably within the judiciary’s competence.

Belying his own argument, Pollard *concedes* that “[o]f course, in any given case, a federal court could hold that a state remedy did not exist for a particular Eighth Amendment violation.” Resp. Br. 38 n.10. That concession is not saved by his assertion that this result “could only occur if the Court here adopted a case-by-case approach,” which he claims would be “both unprecedented and inadvisable.” *Id.* The opposite is true. As Pollard admits, courts can, and regularly do, determine adequacy of alternative remedies in particular factual contexts.

Pollard argues that having courts decide this issue before creating new *Bivens* rights would “needlessly

burden district courts” Resp. Br. 21. Again, the opposite is true. The real needless burden would be to create a new categorical federal right of action for all prisoners in private facilities without regard to whether they have adequate alternative remedies.

Pollard’s “burden-on-the-courts” argument is also premised on the incorrect assumption that if the Court declines to create a new *Bivens* remedy here, all prisoners in private facilities will nonetheless continue to file *Bivens* actions, necessitating determinations about adequacy of alternative remedies in every future case. If this Court holds that prisoners must press damages claims through available traditional remedies, that is what they will do. Prisoners, even where *pro se*, can understand their basic legal rights. *Cf. Bounds v. Smith*, 430 U.S. 817, 826-27 (1977). Meanwhile, federal courts will remain open to actions for injunctive relief to remedy any systemic, ongoing constitutional violations. *See* Pet. Br. 34-35. Only in the most extraordinary circumstances—and Pollard has not shown that any exist—will a plaintiff conceivably have any reason to argue that a *Bivens* remedy is needed because traditional damages remedies are inadequate or non-existent.

As Pollard admits, Resp. Br. 38 n.10, if such an unusual case ever arises courts are readily capable of resolving the issue. Pollard notes that *pro se* prisoner complaints are subject to pre-screening (as this one was), *id.* at 21, but that process requires dismissal only when a complaint fails to state a claim on its face. Moreover, a prisoner may appeal dismissal of a *Bivens* claim, as Pollard did here, all

the way to this Court if necessary.⁶ Tellingly, while Pollard complains that other prisoners will improperly be subjected to summary dismissals, he is still unable to carry his own burden by identifying any flaws in the dismissal order in this case, even after plenary briefing to this Court.

At bottom, Pollard would have this Court reverse its presumption in *Bivens* cases. The Court has held that *Bivens* remedies are “disfavored,” *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1948 (2009), and cannot be authorized if there is any cause even for “hesitation,” *Wilkie*, 551 U.S. at 550. Pollard, however, would have the Court presume the availability of a new categorical federal cause of action based on the hypothetical possibility that state remedies might be inadequate in some unknown case for reasons yet to be explained. *Cf.* Resp. Br. 39 n.11 (arguing that Court should not “shift the burden to *Pollard*” to show inadequacy of alternative remedies). Pollard also complains that “state tort law pertaining to prisoners’ rights is not well-developed” because such issues “have long been enforced through federal, rather than state, causes of action.” *Id.* at 22. The existence of the traditional tort of negligence has been settled for centuries. But if basic tort law has become needlessly federalized with regard to other kinds of prisoners, that is no reason to displace state remedies in this context as well.

⁶ Thus, while this Court cannot review a state court dismissal of state law claims on the merits, Resp. Br. 37, federal court review would always be available for any determination that a putative *Bivens* plaintiff lacks adequate state law remedies.

III. PETITIONERS' STATUS AS PRIVATE EMPLOYEES GIVES RISE TO FACTORS COUNSELING HESITATION.

A. Congress Has Treated Government Employees Differently From Employees Of Government Contractors.

Pollard argues that there are no factors counseling hesitation in part because Congress has “affirmed *Bivens*” in the Westfall Act by “expressly preserv[ing] constitutional torts against individual officers.” Resp. Br. 46. *See also id.* at 5 (noting that Congress “specifically approved” *Bivens* actions). According to Pollard, this action shows that “Congress is fully aware of the Court’s *Bivens* jurisprudence in the Eighth Amendment context and has signaled no intention to limit its scope.” *Id.* at 7.

In fact, this action by Congress affirmatively dooms Pollard’s argument. In the Westfall Act, Congress did affirm *Bivens* actions. *See Hui*, 130 S. Ct. at 1851. But it did so *only* for claims against employees “of the Government,” 28 U.S.C. § 2679(b)(2), which “*does not include any contractor with the United States.*” 28 U.S.C. § 2671 (emphasis added). *See Pet. Br.* 41-42. Thus, the “scope” of *Bivens* actions preserved by Congress, Resp. Br. 7, includes only claims against actual government employees and expressly *excludes* the claims at issue in this case.

There is a clear reason why Congress excluded contractor employees from the scope of the *Bivens* actions it preserved. In the Westfall Act, Congress also expressly preempted all state law tort claims against actual government employees by making the FTCA remedy exclusive as to such claims. 28 U.S.C. § 2679(b)(1). This preemption, however, did *not*

cover claims against contractor employees, as Congress continued the longstanding deliberate exclusion of contractors from the scope of the FTCA. 28 U.S.C. § 2671. *See* Pet. Br. 42-43.

Thus, through the Westfall Act, Congress adopted the same understanding of *Bivens* that petitioners urge in this case. It expressly preserved *Bivens* claims against actual government employees because it had precluded all other damages remedies against them. But it did not include contractor employees in that provision because there was no similar need—the traditional remedies against them were not preempted and still exist. At a bare minimum, this disparate intent by Congress “counsels hesitation” and thus mandates reversal of the Ninth Circuit.

B. The Specter Of Asymmetrical Liability Counsels Hesitation.

Another factor counseling hesitation is the specter of “asymmetrical liability” as between petitioners and their governmental counterparts, *Malesko*, 534 U.S. at 72, due to petitioners’ lack of a recognized immunity defense. Recognition of a new *Bivens* right would be inappropriate even without regard to this factor, given Congress’s intent in the Westfall Act and the lack of any federal analog to 42 U.S.C. § 1983. But Pollard incorrectly contends that this factor has no bearing on this case. Resp. Br. 12-16.

In *Carlson*, the Court held that there were no factors counseling hesitation in that case in part because “qualified immunity * * * provides adequate protection” against the unnecessary burdens a new species of constitutional liability would impose on government workers. 446 U.S. at 19. It therefore follows that where, as here, defendants have no

recognized qualified immunity defense, that factor does counsel hesitation. If the defendants' immunity had been immaterial to the extension of *Bivens* in *Carlson*, the Court would not have employed that factor in its analysis.

Neither *Stanley*, 483 U.S. 669, nor *Hui*, 130 S. Ct. 1845, overruled *Carlson*'s reliance on this factor. In *Stanley*, the Court rejected the argument that a *Bivens* action can be precluded "only when our immunity decisions would absolutely foreclose a money judgment," such that the scope of the *Bivens* right would be "coextensive" with the scope of immunity. 483 U.S. at 684-85. The Court held that the "special factors" limitation on *Bivens* actions would be "quite hollow if it does nothing but duplicate pre-existing immunity from suit." *Id.* at 686. In *Hui*, the Court considered the "separate question" of statutory immunity from *Bivens* claims, rather than whether a *Bivens* right existed in the first place. 130 S. Ct. at 1852.

Petitioners do not argue that the scope of a *Bivens* right is coextensive with qualified immunity in this or any other case, and this case presents no question of express statutory immunity as in *Hui*. Rather, petitioners rely on the asymmetry in subjecting them to greater potential liability than is faced by their governmental counterparts. *Stanley* rejected a new *Bivens* right because the limitations on *Bivens* actions are *broader* than the scope of qualified immunity. Although the two concepts are not coextensive, nothing in *Stanley* or *Hui* holds that immunity concerns can never inform the separate "special factors" component of the *Bivens* analysis. Indeed, *Carlson* employed just such an analysis.

Moreover, the relevant asymmetry is between different categories of *Bivens* defendants rather than between federal and state defendants. Pollard argues that if a *Bivens* remedy is denied here, federal prisoners in private facilities would lack a constitutional damages claim afforded prisoners in state custody. See Resp. Br. 8, 13 n.4. But that distinction is the result of Congress's action in providing a statutory remedy in the latter case but not the former. The *Bivens* doctrine is not coextensive with Section 1983; indeed, if it were, the Court would never withhold a *Bivens* remedy for any constitutional claim.

Here, creating a new federal remedy would expose employees of private contractors to greater liability than is faced by actual government employees, who have qualified immunity from constitutional claims and who are not subject at all to state law claims. The Court should not impose, by judicial fiat, greater liability on a new category of private defendants than Congress has elected to impose on their governmental counterparts. The imposition of such asymmetrical liability "is a question for Congress, not [the Court], to decide." *Malesko*, 534 U.S. at 72.

CONCLUSION

For the foregoing reasons, the judgment below should be reversed.

Respectfully submitted,

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