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

BRIEF FOR PETITIONERS

JONATHAN S. FRANKLIN*
MARK EMERY
FULBRIGHT & JAWORSKI L.L.P.
801 Pennsylvania Ave., N.W.
Washington, D.C. 20004
(202) 662-0466
jfranklin@fulbright.com

* Counsel of Record *Counsel for Petitioners*

QUESTION PRESENTED

Whether the Court should infer 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 had adequate alternative remedies for the harm alleged and the defendants have no employment or contractual relationship with the government.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioners, who were defendants and appellees in the proceedings below, are Margaret Minneci, Jonathan E. Akanno, Robert Spack, Bob D. Stiefer and Becky Maness.

Respondent Richard Lee Pollard was the plaintiff and appellant in the proceedings below.

GEO Group, Inc. ("GEO"), sued as Wackenhut Corrections Corporation, was a defendant and appellee in the proceedings below, and the judgment of dismissal as to GEO was affirmed. GEO is a respondent supporting the petition pursuant to Sup. Ct. R. 12.6. GEO has no parent companies and FMR Inc. owns 10% or more of its stock.

Raymond Andrews, Everett Uzzle and Marshall Lewis were named in the complaint as additional defendants. Mr. Andrews was never included in the appeal from the district court's judgment. *See* Pet. App. 17a n.6. Mr. Uzzle died in 2008, *id.*, and his estate was never substituted as a party pursuant to Fed. R. App. P. 43(a). Dr. Lewis was never served with the complaint or notice of appeal and therefore was never a party in the District Court or the Court of Appeals. Pet. App. 17a n.6. Because these individuals were not parties to the proceedings in the Court of Appeals or named in that court's judgment, they are not parties to this proceeding. *See* Sup. Ct. R. 12.6.

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BRIEF FOR PETITIONERS

OPINIONS BELOW

The decision of the Ninth Circuit, as amended, is reported at 629 F.3d 843 and reproduced at page 1a of the Appendix to the petition ("Pet. App."). The unpublished order of the District Court is reproduced at Pet. App. 70a. The District Court's order adopted an unpublished recommendation of a Magistrate Judge, which is reproduced at Pet. App. 73a.

JURISDICTION

The judgment of the Ninth Circuit was entered on June 7, 2010, and the panel amended its opinion on

December 10, 2010. Pet. App. 1a. The Ninth Circuit denied a timely filed petition for rehearing *en banc* on December 10, 2010, with eight judges dissenting. Pet. App. 4a. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Eighth Amendment to the Constitution provides that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

INTRODUCTION

The question in this case is whether the Court should, for the first time in more than 30 years, extend the judicially-created right of action of *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), to a new context and a new category of defendants—employees of a private company that contracts with the Federal government to provide prison management services. The Court should not, and should instead leave that question to the policy judgment of Congress.

The Court has consistently held that the narrowly-circumscribed *Bivens* right of action will not be extended unless the plaintiff lacks any adequate alternative remedy—including under state law—for the harms alleged. And even if there is no such remedy, the Court still will not create a *Bivens* remedy if there are any special factors that "counsel hesitation." Both considerations preclude creation of a *Bivens* remedy in this case, whether considered separately or together. Respondent not only had adequate state law remedies for the harms he alleges, but those remedies are superior to his putative *Bivens* remedy under the Eighth

Amendment, which would require him to meet a far more onerous burden. Moreover, petitioners' status as private employees rather than government officials, at a minimum, gives rise to special factors counseling hesitation. Unlike their Federal government counterparts, petitioners lack the recognized governmental immunities that led to creation of the *Bivens* doctrine in the first place, raising the specter of asymmetrical liability as compared to actual government employees. And whereas Congress has shielded Federal government employees from ordinary tort liability while expressly preserving constitutional claims against them, Congress has done the opposite with respect to petitioners and other employees of contractors.

Far from simply filling a remedial gap, creation of a new *Bivens* right of action here would multiply respondent's remedies, subjecting petitioners to liability not faced by their Federal government counterparts. As this Court has consistently held over the last three decades, such a decision should be made by Congress after weighing all the relevant policy considerations, rather than by this Court through what would amount to an exercise in judicial lawmaking.

STATEMENT OF THE CASE

A. Facts.

Respondent Richard Lee Pollard is a federal prisoner sentenced in 1996 to 20 years imprisonment for drug trafficking and firearms offenses. *United States* v. *Pollard*, No. 95-CR-145 (E.D. Wash.). While in prison, Pollard has been a "frequent filer" in the federal courts, having filed at least ten other civil actions in addition to this one. *See* Pet. 4 n.1.

Pollard originally filed a *pro se* complaint in this action in 2001 when he was an inmate at the Taft Correctional Institution ("TCI") in California. TCI was then managed by Wackenhut Corrections Corporation, now known as The GEO Group, Inc., under contract with the Federal government as directed by Congress. *See* Pet. App. 5a n.4; S. Rep. No. 104-353, at 36-37 (1996) (directing Bureau of Prisons to use appropriated funds for privatization of TCI).

Pollard's initial 2001 complaint principally alleged that an unreasonably dangerous condition caused him to trip over a cart outside the TCI butcher shop where he was working. JA21-25. That complaint was dismissed with leave to amend. JA14, Dkt. 9.

In 2002, Pollard filed an amended complaint that no longer sought damages for the initial fall. JA26.[1] According to the amended complaint (whose facts are taken as true for purposes of this appeal) the accident occurred on April 7, 2001. JA30. Afterwards, TCI medical personnel bandaged Pollard's arms, put them in a sling, and scheduled him to see a doctor on the morning of April 9. JA31. The doctor, respondent Jonathan Akanno, diagnosed possible fractures of both elbows, prescribed an analgesic, and referred Pollard to an outside clinic in Bakersfield. *Id.*

On April 12, Pollard reported to the discharge unit to go to the outside appointment. A security guard removed the bandages and sling and told Pollard to put on a jump suit, which caused him pain. JA31-32. The guards also required Pollard to wear a "black box" security device. JA32. The complaint does not

[1] Although the amended complaint references various exhibits, there are no exhibits in the District Court's record.

further describe the "black box," but the term generally refers to a plastic box that covers the lock of a prisoner's handcuffs. A chain runs through the box and around the prisoner's waist and secures his hands to his stomach. *See May* v. *Baldwin*, 109 F.3d 557, 564 (9th Cir. 1997); *Knox* v. *McGinnis*, 998 F.2d 1405, 1407 (7th Cir. 1993); *Moody* v. *Proctor*, 986 F.2d 239, 240 n.3 (8th Cir. 1993) (use of black box does not contravene Eighth Amendment); *Fulford* v. *King*, 692 F.2d 11 (5th Cir. 1982) (same). Pollard alleges that he had to wear the black box to the outside visit despite claiming that it did not adequately support his injured arms and caused him pain. JA32. He alleges that the chain slipped below his waist, which put pressure on his arms for 6 1/2 hours. *Id*.

At the outside clinic, Pollard was diagnosed with injuries to his arms, including fractures, and was told he would need a splint and then surgery. JA32-33. Upon returning to TCI, however, he was told there were no facilities for putting on a splint. JA33; JA42.

The next day, April 13, Pollard was x-rayed and scheduled for surgery on April 18. JA33. Pollard alleges that from April 13-18, he could not "participate in the schedule[d] 3 meals a day food service program [due] to his inability to carry a food tra[y]" and that the medical staff "failed to provide an alternative means to feed [him]." *Id*. Pollard also alleges that he could not bathe himself for two weeks and that because his medication level was reduced he could not sleep and was in pain. *Id*.

On April 18, Pollard had the surgery at an outside clinic. This time, in response to his complaints, he was not required to wear the black box. JA33-34.

Pollard alleges that, after the surgery, "[i]n spite of his debilitating condition and his inability to carry his own food tray, he was eventually left to for[a]ge for himself." JA34-35. He alleges that "to avoid going to the food service to eat and being humiliated," he auctioned off personal items to purchase food from the commissary. JA35.

On May 2, Pollard was transported to an outside clinic for an examination, and the doctor recommended physical therapy. JA42. He alleges that he never received that therapy. *Id.*

On May 31, over six weeks after the surgery, Pollard was scheduled for work. JA35. He complained about difficulty extending his arms. The following Sunday, he appeared for work and was required to sweep the floor. His hands were swollen and discolored and he was in pain. JA35-36. He was required to work the next three days. JA36. Pollard then went to sick call and the doctor said he should not have been permitted to work and put him on a two-week restriction. *Id.* After that period, he was told to report for work again. *Id.* But when he explained his situation to the supervisor and showed his hands, he was told to return to his unit. *Id.*

On June 20, Pollard was required to wear the black box for a follow-up trip to clinic. He alleges that this caused his hands to swell. JA37.

Pollard also alleges that respondent Margaret Minneci, who was the Medical Administrator at TCI, failed to schedule "a further work-up with EMG nerve conduction studies" which caused him to suffer a "medical anomaly with his hands." JA39-40. And he alleges that in January 2002, he was seen by another TCI doctor, respondent Robert Spack, who

failed to perform an adequate examination and failed to diagnose Pollard with a condition called cyanosis. JA40-41.

B. Proceedings In The District Court.

Pollard's amended complaint asserted damages claims against Wackenhut (now GEO) and eight individual defendants (seven of whom were GEO employees) alleging violation of his Eighth Amendment rights. Pet. App. 16a. Five of these GEO employees (all of whom are now former employees) remain parties to the case. *See supra* at ii. As noted, Ms. Minneci was the TCI Medical Administrator, and Drs. Akanno and Spack were doctors at the facility. JA28-29; JA40-41. Respondent Bobby Stiefer was Chief of Security, and respondent Becky Maness was the Food Service Supervisor. JA29-30; JA43; JA45.

Pursuant to 28 U.S.C. § 1915A(b)(1), which requires pre-screening of *pro se* prisoner complaints, a Magistrate Judge recommended that the amended complaint be dismissed because Pollard lacked an implied remedy under *Bivens*. The Judge found that Pollard "has alternative and superior remedies available to him in state court." Pet. App. 79a & n.1. And relying on decisions of the Fourth and Tenth circuits, the Judge concluded that

> extending *Bivens* would not provide Plaintiff with an otherwise nonexistent cause of action. Nor would extending *Bivens* deter future unconstitutional conduct by federal officers as the Defendants are employees of a private corporation. As such, the court finds that this case does not present circumstances warranting the extension of *Bivens*.

Pet. App. 80a. After a *de novo* review, the District Court adopted the Magistrate Judge's recommendation in full, and dismissed the case. *Id.* at 71a.

C. Proceedings In The Court Of Appeals.

1. Pollard, by then represented by counsel, appealed to the Ninth Circuit. Expressly rejecting the holdings of the other circuits to have considered the issue,[2] a divided panel held that "Pollard's suit under *Bivens* against the GEO employees for alleged violations of his Eighth Amendment rights should be allowed to proceed" because (1) the GEO employees act "under color of federal law" for purposes of *Bivens* liability; and (2) "state tort remedies alone are insufficient to displace *Bivens* and there are no 'special factors counselling hesitation' in allowing Pollard's suit to proceed." Pet. App. 52a.

The majority stated that "the mere availability of a state law remedy does not counsel against allowing a *Bivens* cause of action." *Id.* at 35a. In its view, "only remedies crafted *by Congress*" can suffice as adequate alternatives to a *Bivens* remedy. *Id.* at 35a-36a (emphasis in original). The majority was also concerned that "[i]f we were to allow state tort law to preclude a *Bivens* action for Pollard and similarly situated prisoners, the liability of federal officials for constitutional violations would no longer be governed by uniform rules." *Id.* at 40a. The majority then found no special factor that might counsel hesitation before extending *Bivens* to this context. *Id.*

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[2] *See Holly* v. *Scott*, 434 F.3d 287, 296 (4th Cir. 2006); *id.* at 303 (Motz, J., concurring); *Alba* v. *Montford*, 517 F.3d 1249 (11th Cir. 2008); *see also Peoples* v. *CCA Det. Ctrs.*, 422 F.3d 1090 (10th Cir. 2005), *vacated in relevant part by equally divided court*, 449 F.3d 1097 (10th Cir. 2006) (*en banc*).

2. Judge Restani of the Court of International Trade, sitting by designation, dissented. She concluded that the majority erred in rejecting the holdings of the other circuits. As she explained, this Court has extended *Bivens* "only where federal officials, by virtue of their position, enjoy impunity, if not immunity, from damages liability because of gaps or exemptions in statutes or in the common law." *Id.* at 53a. Here, ordinary tort remedies for negligence provided an "adequate, alternative, existing process, for protecting Pollard's interest." *Id.* at 56a. Moreover, such remedies are more "easily obtained" than a *Bivens* remedy. *Id.* at 56a-57a. Given the availability of a "superior alternative remedy," Judge Restani would not have extended *Bivens*, which she viewed as a decision "'better left to legislative judgment.'" *Id.* at 58a (citation omitted).

Unlike the majority, the dissent found that under this Court's precedents an "alternative remedy need not be a federal remedy." *Id.* at 59a. Judge Restani also disagreed that potential differences in state procedural rules or damages caps required a *Bivens* remedy. *Id.* at 63a. And she concluded that recognizing a *Bivens* action here "may impose asymmetrical liability costs, as a plaintiff currently may assert tort claims against private prison employees, while *Bivens* actions allow for recovery from federal employees where the FTCA otherwise bars tort claims against them," and given that "plaintiffs may be able to recover from private prison employees more often than from federal prison employees because private prison employees are not entitled to qualified immunity." *Id.* at 68a.

3. The panel denied rehearing (while amending its opinion in minor respects) and the full Ninth

Circuit denied rehearing *en banc* over the dissents of eight judges. *Id.* at 2a-4a. Writing for the dissenters, Judge Bea emphasized that the panel majority had "disregard[ed] 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," and that its "unprecedented" opinion "extends *Bivens* far beyond its carefully prescribed contours and places this circuit in direct conflict with each of the other circuits to address the issue." *Id.* at 4a-5a.

Rejecting the majority's "abstract claim of 'lack of uniformity'" resulting from failing to recognize a *Bivens* action, the *en banc* dissenters explained that these qualms were irrelevant because Pollard "has not shown—because he cannot—that there is any state which does not provide recovery for that most fundamental tort claim" of negligence. *Id.* at 11a. This made "the panel's lack of uniformity preoccupation * * * as imagined as is any legal support for its assertion that state law remedies cannot, on their own, preclude recognition of a *Bivens* action." *Id.*

SUMMARY OF THE ARGUMENT

This Court has repeatedly stressed that it will not exercise its quasi-legislative power to extend the *Bivens* doctrine to a new context or new class of defendants except in narrow circumstances where the plaintiff lacks any alternative remedy for the harms alleged and no special factor counsels hesitation. Where either of these criteria is not met, the Court has stayed its hand and instead has left the matter to Congress, which is better equipped to balance competing policy considerations. That is what the Court should do here.

Pollard not only had adequate alternative remedies for the harms he alleges, but those remedies are superior to what he would have under *Bivens*. In all three cases in which this Court has previously inferred a *Bivens* right of action, the plaintiff lacked such remedies, including under state law. Thus, as this Court squarely held in *Correctional Servs. Corp.* v. *Malesko*, 534 U.S. 61, 70 (2001), and contrary to the Ninth Circuit majority's view, the existence of adequate state law remedies is reason enough to decline to extend *Bivens*. As in *Malesko*, Pollard's state law remedies are not only adequate but superior to a putative *Bivens* claim under the Eighth Amendment. Whereas Pollard would have to prove, at most, negligence to prevail on state law claims, the *scienter*-based Eighth Amendment "deliberate indifference" standard would be far more difficult to meet. The Ninth Circuit's speculation about whether adequate remedies would exist in other hypothetical cases not before the Court is not only irrelevant to the disposition of this case, but unfounded.

The existence of adequate alternative remedies is itself reason to decline to recognize a *Bivens* right of action. But there are also special factors counseling hesitation, stemming from the fact that, at the time of the events at issue, petitioners were not employees of the government but rather employees of a private contractor. As such, they lack the recognized qualified immunity defenses of their government counterparts, which raises the specter of asymmetrical liability and eliminates a key concern that originally led to the creation of the *Bivens* doctrine for claims against government employees. Moreover, Congress's expressed intent as to employees of government contractors is the opposite of the legislative

intent that this Court found dispositive in authorizing *Bivens* claims against government employees. Congress has expressly preserved *Bivens* claims against government employees while pre-empting all tort claims against them in favor of a remedy against the United States that this Court deemed an inadequate substitute to *Bivens* claims. But for petitioners and other employees of government contractors, Congress did the opposite. It deliberately excluded them from the FTCA, thereby leaving state law claims in place while expressing no intent to preserve any *Bivens* claims.

For all these reasons, the Court should leave the creation of a new federal remedy in this context to Congress, just as the Court has done in every other *Bivens* case it has faced in the last 31 years. Congress is in a far better position to evaluate whether to create a new remedy that could have the effect of increasing government contracting costs and spawning a host of new federal court prisoner litigation.

ARGUMENT

I. THE COURT WILL NOT RECOGNIZE A *BIVENS* RIGHT OF ACTION EXCEPT IN NARROW CIRCUMSTANCES.

In *Bivens*, the Court recognized an implied damages remedy against federal officers alleged to have violated a plaintiff's Fourth Amendment rights. In more than 40 years, the Court has extended that holding only twice, to provide "an otherwise nonexistent cause of action" against a federal officer alleged to have acted unconstitutionally, and 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 (emphasis in original) (discussing *Davis* v. *Passman*, 442 U.S. 228 (1979), and *Carlson* v. *Green*, 446 U.S. 14 (1980)).

Since the last extension of the doctrine more than 30 years ago, the Court has "responded cautiously to suggestions that *Bivens* remedies be extended into new contexts." *Schweiker* v. *Chilicky*, 487 U.S. 412, 421 (1988); *see also FDIC* v. *Meyer*, 510 U.S. 471, 484 (1994) (same). Because implied causes of action are "disfavored," the Court has been "reluctant to" and has "consistently refused to" extend *Bivens* liability "to any new context or category of defendants." *Ashcroft* v. *Iqbal*, 129 S. Ct. 1937, 1948 (2009); *Malesko*, 534 U.S. at 68. *See also Malesko*, 534 U.S. at 75 (Scalia, J., joined by Thomas, J., concurring) ("*Bivens* is a relic of the heady days in which this Court assumed common-law powers to create causes of action" and prior cases should be limited "to the precise circumstances that they involved"); *Wilkie* v. *Robbins*, 551 U.S. 537, 568 (2007) (Thomas, J., joined by Scalia, J., concurring) (same); Laurence H. Tribe, *Death by a Thousand Cuts: Constitutional Wrongs Without Remedies After* Wilkie v. Robbins, 2007 Cato Sup. Ct. Rev. 23, 26 (2007) ("[T]he best that can be said of the *Bivens* doctrine is that it is on life support with little prospect of recovery."). Indeed, since 1980, the Court has declined to extend *Bivens* in all seven cases in which it has faced the issue.[3]

In *Wilkie*, 551 U.S. at 550, the Court set forth a two-step framework for deciding whether to

[3] *See Wilkie*, 551 U.S. 537; *Malesko*, 534 U.S. 61; *Meyer*, 510 U.S. 471; *Schweiker*, 487 U.S. 412; *United States* v. *Stanley*, 483 U.S. 669 (1987); *Chappell* v. *Wallace*, 462 U.S. 296 (1983); *Bush* v. *Lucas*, 462 U.S. 367 (1983); *see also Hui* v. *Castaneda*, 130 S. Ct. 1845 (2010) (finding statute preclusive).

recognize a *Bivens* right of action. First, the Court asks "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.* But "even in the *absence* of an alternative, 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.'" *Id.* (quoting *Bush*, 462 U.S. at 378) (emphasis added).

As the Second Circuit has noted, the threshold for staying the Court's *Bivens* hand even where no adequate alternative remedy exists—"that a factor 'counsels hesitation'—is remarkably low. It is at the opposite end of the continuum from the unflagging duty to exercise jurisdiction. Hesitation is a pause, not a full stop, or an abstention; and to counsel is not to require. 'Hesitation' is 'counseled' whenever thoughtful discretion would pause even to consider." *Arar* v. *Ashcroft*, 585 F.3d 559, 574 (2d Cir. 2009) (*en banc*). In these circumstances, "'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." *Wilkie*, 551 U.S. at 562 (quoting *Bush*, 462 U.S. at 389).

Here, Pollard's putative *Bivens* remedy fails at both steps of the analysis. He not only had adequate alternative remedies for the harm he alleges, but those remedies were in fact superior to a *Bivens* remedy. And in any event, the fact that petitioners are employees of a private government contractor, rather than actual government officials gives rise to

factors counseling hesitation, given that private employees lack the recognized immunities from both tort and constitutional claims that their governmental counterparts enjoy.

II. POLLARD HAD ADEQUATE ALTERNATIVE REMEDIES FOR THE HARMS HE ALLEGES.

In all three of the cases where this Court has recognized a *Bivens* right of action—*Bivens* itself, *Davis*, and *Carlson*—the plaintiffs lacked any alternative remedy for redress of their injuries, including under state law. In this case, by contrast, Pollard had adequate—indeed, superior—alternative remedies.

A. The Court Has Recognized A *Bivens* Right Of Action Only When No Alternative Remedies Existed.

In *Bivens*, federal officers entered and searched Bivens' apartment without a warrant, allegedly in violation of the Fourth Amendment. The lower court had found, and the government argued to this Court, that there was no need to infer a damages remedy directly under the Constitution because Bivens could obtain relief under state tort law. 403 U.S. at 390-91. This Court disagreed, because the interests protected by state law of trespass and invasion of privacy may be "inconsistent [with] or even hostile" to the interests protected by the Fourth Amendment. *Id*. at 394. Whereas the tort of trespass is normally defeated if the putative intruder "demands, and is granted, admission to another's house," when a federal officer seeks entry "a claim of authority to enter is likely to unlock the door as well." *Id*. at 394-95. The only way to preserve a trespass claim was therefore "'the alternative of resistance, which may

amount to crime.'" *Id*. at 395 (citation omitted). *See Malesko*, 534 U.S. at 73 (in *Bivens*, "lack of resistance alone might foreclose a cause of action in trespass or privacy"). Since the case involved "no special factors counseling hesitation in the absence of affirmative action by Congress," *Bivens*, 403 U.S. at 396, the Court recognized an implied damages remedy directly under the Fourth Amendment.

In *Davis*, a Congressional aide alleged that she was terminated on the basis of her sex, in violation of the Fifth Amendment. It was undisputed that Davis had no remedy under state law, 442 U.S. at 245 n.23, and since the defendant was no longer a Congressman at the time of suit, administrative and injunctive remedies such as reinstatement were no longer effective. Therefore, there were "no other alternative forms of judicial relief." *Id*. at 231 n.4, 243 n.21, 245. "For Davis, like Bivens, 'it [was] damages or nothing.'" *Id*. at 245 (quoting *Bivens*, 403 U.S. at 410 (Harlan, J., concurring)); *see also Malesko*, 534 U.S. at 67 ("In *Davis*, we inferred a new right of action chiefly because the plaintiff lacked any other remedy for the alleged constitutional deprivation.").

In *Carlson*, an administratrix of an estate sued on behalf of her son, who died in federal prison allegedly because of the deliberate indifference of the prison staff to his serious medical needs in violation of the Eighth Amendment. It was undisputed that the plaintiff lacked an adequate state law remedy for those harms because of an Indiana statute barring most survivorship claims. 446 U.S. at 17 n.4. The administratrix would have been limited, at most, to out-of-pocket expenses incurred in connection with

the death.[4] Accordingly, the Court found that a *Bivens* remedy presumptively existed, *id.* at 18, and then analyzed whether that cause of action was "defeated" either because there were "special factors counselling hesitation" or because Congress had expressly provided a substitute remedy it viewed as equally effective. *Id.* at 18-19.

On the first issue, the Court held that "even if requiring [petitioners] to defend respondent's suit might inhibit their efforts to perform their official duties, the qualified immunity accorded them under *Butz* v. *Economou*, 438 U.S. 478 (1978), provides adequate protection." *Carlson*, 446 U.S. at 19. On the second, the Court held that the FTCA did not evidence Congress's intent to "pre-empt" the *Bivens* remedy the Court found otherwise available. *Id.* Rather, it held that Congress intended to allow, for Federal government employees, both FTCA claims against the United States and *Bivens* claims against the employees, who could not be sued under the FTCA, where the United States is the only defendant. The Court found it "crystal clear that

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[4] The lower courts had given two reasons. The court of appeals had held that all recovery was barred by a state law providing that personal injury claims did not survive death where the acts complained of caused the victim's death. *See id.* (citing Ind. Code § 34-1-1 (1976)). The district court had dismissed the case for failure to meet the federal jurisdictional threshold based on another state statute allowing personal representatives, other than spouses, dependent children or dependent next of kin (which the victim did not have) to recover only out-of-pocket hospital, medical, funeral, and estate administration expenses. *See id.* (citing Ind. Code § 34-1-2 (1976)); *Green* v. *Carlson*, 581 F.2d 669, 672 & n.4 (7th Cir. 1978). This Court found it unnecessary to resolve that state law conflict. *Carlson*, 446 U.S. at 17 n.4.

Congress views FTCA and *Bivens* as parallel, complementary causes of action." *Id.* at 19-20.

The Court then examined four "additional" factors supporting its conclusion "that Congress did not intend to limit respondents to an FTCA action." *Id.* at 21. First, "[b]ecause the *Bivens* remedy is recoverable against individuals, it is a more effective deterrent than the FTCA remedy against the United States." *Id.* *See Malesko*, 534 U.S. at 67-68 ("In *Carlson*, we inferred a right of action against individual prison officials where the plaintiff's only alternative was [an FTCA] claim against the United States," which "was insufficient to deter the unconstitutional acts of individuals"). Second, the Court noted that although precedents "indicate" that punitive damages "may" be available in *Bivens* suits, the FTCA prohibits them. *Id.* at 21-22. Third, the FTCA prohibits jury trials. *Id.* at 22. Fourth, whereas the FTCA tracks state law—which, as noted, provided no recovery in *Carlson*—the *Bivens* action the Court had already found presumptively available would be governed by uniform federal rules rather than incorporating state survivorship law. *Id.* at 23.

Thus, in *Carlson* the plaintiff had no adequate state law remedy and it was "crystal clear" that Congress viewed the FTCA and *Bivens* as parallel, complementary causes of action. *Id.* at 19-20. Since *Carlson*, those issues have further crystallized. When *Carlson* was decided, it was unclear whether federal employees enjoyed absolute immunity from state tort claims. But after this Court decided otherwise in *Westfall* v. *Erwin*, 484 U.S. 292 (1988), Congress immediately overruled that decision in the Westfall Act by making the FTCA remedy against the United States exclusive for government

employees. *See* 28 U.S.C. § 2679(b)(1). At the same time, Congress expressly preserved all constitutional claims "against an employee of the Government." *Id.* § 2679(b)(2)(A). Accordingly, there now are no tort remedies—state or federal—against federal employees covered by the FTCA, except the *Bivens* claims expressly preserved against those employees.

As this Court has summarized, remedies were inferred in these three cases because "Davis had no other remedy, Bivens himself was not thought to have an effective one, and in *Carlson* the plaintiff had none against Government officials." *Wilkie*, 551 U.S. at 555. Since then, the Court has routinely declined to infer *Bivens* causes of action even where the plaintiff did *not* have adequate alternative remedies. *See*, *e.g.*, *Schweiker*, 487 U.S. at 425 (rejecting claim even though "a *Bivens* remedy would obviously offer the prospect of relief for injuries that must now go unredressed"); *Bush*, 462 U.S. at 388 (no *Bivens* remedy even though "existing remedies do not provide complete relief for the plaintiff"); *cf. Wilkie*, 551 U.S. at 554 (finding no *Bivens* remedy despite the "inadequacy of discrete, incident-by-incident remedies").

In *Malesko*, the Court declined to recognize a *Bivens* right of action in a case very similar to this one, where the plaintiff had alternative state law remedies. There, a prisoner brought suit against a private prison management company that contracted with the Federal government to operate the halfway house where he was detained, alleging a violation of the Eighth Amendment when he suffered a heart attack after negligently being forced to climb several flights of stairs. The Court understood the issue to

be whether to "extend" *Bivens* to actions against private entities. 534 U.S. at 63.

Malesko, like Pollard here, "contend[ed] that the Court must recognize a federal remedy at law wherever there has been an alleged constitutional deprivation, no matter that the victim of the alleged deprivation might have alternative remedies elsewhere * * *." *Id*. at 66. Malesko's alternative remedies, however, were "at least as great, and in many respects greater, than anything that could be had under *Bivens*." *Id*. at 72. As the Court explained, "federal prisoners in private facilities enjoy a parallel tort remedy that is unavailable to prisoners housed in Government facilities." *Id*. at 72-73. Specifically, Malesko's allegations stated a "quintessential claim of negligence," whereas "the heightened 'deliberate indifference' standard of Eighth Amendment liability would make it considerably more difficult for [him] to prevail than on a theory of ordinary negligence." *Id*. at 73 (quoting *Estelle* v. *Gamble*, 429 U.S. 97, 104 (1976)). This made the case "altogether different from *Bivens*, in which [the Court] found alternative state tort remedies to be 'inconsistent or even hostile' to a remedy inferred from the Fourth Amendment." *Id*. (citation omitted).

Malesko was therefore "not a plaintiff in search of a remedy" like Bivens or Davis, "nor does he seek a cause of action against an individual officer, otherwise lacking, as in *Carlson*." *Id.* at 74. Instead, Malesko sought "a marked extension of *Bivens*" and "[t]he caution toward extending *Bivens* remedies into any new context, a caution consistently and repeatedly recognized for three decades, foreclose[d] such extension." *Id*.

Malesko did not decide whether individual employees of private prison contractors could be sued under *Bivens*. *See* 534 U.S. at 65 ("the parties agree that the question whether a *Bivens* action might lie against a private individual is not presented here"). But the Court's reasoning compels the same result here. As in *Malesko*, Pollard is not a plaintiff in search of a remedy, and he did not lack alternative causes of action against the individuals he says harmed him. Rather, as explained more fully below, Pollard, like Malesko, had adequate alternative state tort remedies that the plaintiffs in *Bivens*, *Davis*, and *Carlson* lacked.

B. Alternative Remedies Need Not Be Federal.

Malesko, and *Bivens* itself, conclusively rebut the Ninth Circuit majority's view that "only remedies crafted by *Congress*" can ever be adequate alternatives to a *Bivens* remedy. Pet. App. 35a. As explained in *Malesko*, *Bivens* has been extended only to provide "an otherwise nonexistent cause of action" against individual officers or to provide one for a plaintiff "who lacked *any alternative remedy*." 534 U.S. at 70 (emphasis in original). "Where such circumstances are not present, [the Court has] consistently rejected invitations to extend *Bivens*." *Id*.

Thus, in *Malesko*, the Court placed dispositive reliance on the existence of a state tort remedies against private prison management companies and their employees. *See Wilkie*, 551 U.S. at 551 (characterizing *Malesko* as a case "considering [the] availability of state tort remedies in refusing to recognize a *Bivens* remedy"). Although the Court also noted the availability of internal Bureau of Prison ("BOP") grievance procedures, *id*. at 74 (citing

28 C.F.R. § 542.10 (2001)), the Court made clear that the availability of state tort claims was what made Malesko's situation "altogether different from *Bivens*." *Id.* at 73. The cited BOP procedures do not provide for damages, and the Court nowhere indicated that they sufficed as adequate alternative remedies to a *Bivens* claim. Rather, as the Court made clear, it was the lack of any adequate state tort law claim that served as the predicate for inferring a claim in *Bivens* itself. *See also 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").

More recently, in *Wilkie*, the Court likewise considered the availability of state tort remedies in evaluating the first step of the *Bivens* analysis. *See* 551 U.S. at 551 ("in each instance, Robbins had a civil remedy in damages for trespass"); *id.* at 554 (noting "patchwork" of remedies, including "state" courts applying "common law rules"). If those remedies are always irrelevant to the inquiry, as the Ninth Circuit believed, there would have been no reason for the Court to have even discussed them.

Malesko, which arose in virtually the same context as this case, refutes the Ninth Circuit's argument that the existence of state tort remedies cannot preclude resort to *Bivens*. *See* Pet. App. 59a (Restani, J., dissenting) (holding is "wrong because the Supreme Court actually has considered remedies not crafted by Congress, and *Malesko* itself is one instance in which the Court declined to recognize a *Bivens* remedy because of state remedies"). But the panel majority's rationales for rejecting reliance on state law remedies are in any event flawed.

The majority focused first on scattered statements in the Court's *Bivens* jurisprudence regarding whether Congress had crafted remedies expressly displacing a *Bivens* remedy. Pet. App. 35a-36a. These cases, however, involved questions of "express *Bivens* preemption by a statute." Pet. App. 60a (Restani, J., dissenting) (quotation and citation removed). In *Carlson*, for example, there was no state law remedy, and the Court therefore considered whether the federal FTCA displaced the *Bivens* remedy it viewed as otherwise available. In *Malesko*, by contrast, there were adequate state law remedies and no analysis of any federal statute was either urged or necessary. *Id*. The same is true here.

The panel majority also focused on the lack of "uniformity" in relying on adequate state law remedies. Once again, *Malesko*'s reliance on just such remedies in this very context disposes of this argument. But regardless, if a state law tort claim is adequate to redress a claimed injury—as is the case here, *see infra* at 25-35—it is immaterial that a plaintiff elsewhere might face different procedural requirements or be subject to different damages caps. Such requirements merely place all plaintiffs on the same footing when they bring suit for the same sorts of injuries in a particular jurisdiction. *Alba*, 517 F.3d at 1255. Alternative federal remedies can suffice to displace *Bivens* even when they "do not provide complete relief for the plaintiff." *Bush*, 462 U.S. at 388. It follows, then, that alternative state remedies suffice when they do provide adequate relief, albeit subject to the same kinds of procedural requirements faced by other claimants. Indeed, the uniformity argument cannot help Pollard here, given that, as in *Malesko*, his "uniform" federal remedy is

far inferior to his state law claim. *Malesko*, 534 U.S. at 72; *infra* at 28-29.

As *Malesko* demonstrates, *Carlson* announced no rule that alternatives to *Bivens* must always be governed by uniform, federal rules. *Carlson* did note that "the liability of federal officials for violations of citizens' constitutional rights should be governed by uniform rules." 446 U.S. at 23 (citing Part III of Court's opinion). But this was just one of four "additional factors" supporting the Court's previous conclusion "that Congress did not intend to limit respondent to an FTCA action." *Id*. at 20-21. Rather than justifying the creation of a *Bivens* remedy, the statement regarding uniform rules presupposed its existence. Moreover, the accompanying citation to Part III of the Court's opinion, *see id*. at 23-24, shows that the Court merely concluded that the *Bivens* action already deemed appropriate should not be governed by state survivorship rules, which would have entirely abrogated the claim of the administratrix, Ms. Green. Since she had no state law remedy, thus justifying a federal *Bivens* remedy, incorporating state law survivorship rules into that *Bivens* claim would have been counterproductive.

That analysis has no relevance to this case. As next shown, Pollard, unlike Ms. Green, Mr. Bivens, and Ms. Davis, had adequate alternative remedies for the harm he alleged. Accordingly, just as in *Malesko*, there is no need for this Court to exercise its extraordinary quasi-legislative power to infer a private right of action found neither in the Constitution nor in any statute.

C. Pollard Had Superior Alternative Remedies.

Even the Ninth Circuit majority did not deny that Pollard had alternative state law remedies available to him. Instead, it concluded that "the mere availability of a state law remedy does not counsel against allowing a *Bivens* cause of action." Pet. App. 35a. As in *Malesko*, there can be no serious question that Pollard's remedies were "at least as great, and in many respects greater, than anything that could be had under *Bivens*." 534 U.S. at 72.

Importantly, the question is not whether Pollard would have won or lost had he raised state law claims. In petitioners' view, he would have lost on state law claims just as surely as he would lose on his constitutional claims. The question is whether Pollard's factual allegations, as pleaded, would have failed to state a claim as a matter of state law, but nevertheless succeed in stating a claim under the Eighth Amendment. The answer is no, because Pollard's available state law remedies are superior to what he would have under *Bivens*. *See* Pet. App. 10a (Bea, J., dissenting); Pet. App. 56a-57a (Restani, J., dissenting).

1. All of Pollard's claims arise from allegations that he received negligent medical diagnosis and follow-up care for his injured elbows. Some of these claims involve allegations that TCI staff exacerbated the injuries by unreasonably requiring him to wear the "black box," continuing his assigned work duties, or failing to accommodate his injuries in the cafeteria or with regard to his hygiene. But ultimately, the essence of the claims is that petitioners negligently failed to diagnose and care for his injuries.

California law, which indisputably applies to this case, provides ample remedies for these kinds of allegations. It provides that "[e]veryone is responsible, not only for the result of his or her willful acts, but also for an injury occasioned by his or her want of ordinary care or skill in the management of his or her property or person." Cal. Civ. Code § 1714. This means, "as a general rule, persons have a duty to use due care to avoid injury to others, and may be held liable if their careless conduct injures another person." *Knight* v. *Jewett*, 834 P.2d 696, 708 (Cal. 1992). As to medical negligence specifically, the Civil Code provides that health care providers are liable "for the failure to inform of the risks of treatment or failure to accept treatment, or for negligent diagnosis or treatment or the negligent failure to diagnose or treat." Cal. Civ. Code § 1714.8.

The duties owed by custodians of others, including prison personnel, are even more stringent. California law recognizes Section 314A of the Restatement (Second) of Torts, which states that "[o]ne who is required by law to take or who voluntarily takes the custody of another under circumstances such as to deprive the other of his normal opportunities for protection is under a similar duty to the other." *See* Pet. App. 43a; *Delgado* v. *Trax Bar & Grill*, 113 P.3d 1159, 1165 n.14 (Cal. 2005) (citing Section 314A with approval); *Melton* v. *Boustred*, 107 Cal. Rptr. 3d 481, 490 (Cal. Ct. App. 2010) (same).

This general duty applies specifically to jailers. In California, "there is a special relationship between jailer and prisoner, imposing on the former a duty of care to the latter." *Giraldo* v. *Cal. Dep't of Corr. & Rehab.*, 85 Cal. Rptr. 3d 371, 385 (Cal. Ct. App. 2008). The duty arises because prisoners are

"vulnerable" and "dependent," and because the relationship between jailer and prisoner "is protective by nature, such that the jailer has control over the prisoner, who is deprived of the normal opportunity to protect himself from harm inflicted by others." *Id.* at 386. The duty is broad: "jailers owe prisoners a duty of care to protect them from foreseeable harm." *Id.* at 387.

This duty, moreover, applies to private companies operating detention facilities in California, which have a specific obligation "to protect [detainees] from harm by obtaining needed medical care." *Lawson* v. *Superior Ct.*, 103 Cal. Rptr. 3d 834, 849-50 (Cal. Ct. App. 2010) (claim against, *inter alia*, employees of private company operating community correctional facility). Even when they contract with the State, neither the private companies nor their employees are cloaked with governmental immunities. *Id.* at 856-58.

To the extent they could ever have been proven, Pollard's factual allegations would have found remedies under these provisions, because he could have proved injury resulting either from negligence or a breach of the even broader duty to protect him from foreseeable harm. But again, whether he would have recovered under California law is not the question here. The question is whether his allegations would state a claim under the Eighth Amendment but *not* under California law, thereby rendering state law an inadequate alternative to a *Bivens* claim. As in *Malesko*, the answer to that question is plainly "no."

2. In *Malesko*, the Court noted that the allegations in that case—that the plaintiff, who had a known heart condition, was forced to climb stairs leading to a heart attack—appeared to be "a

quintessential claim of negligence." 534 U.S. at 73. Such a claim, the Court held, was more than an adequate alternative to a *Bivens* claim under the Eighth Amendment, "because 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." *Id.* (citations omitted).

The same is true here. Pollard's ordinary tort remedies are "actually superior to any presumed action he would have under *Bivens*." Pet. App. 10a (Bea, J., dissenting); *id.* at 56a-58a (Restani, J., dissenting) Under the federal standard, Pollard would have the burden to prove that the defendants showed "deliberate indifference to serious medical needs" that "constitutes the 'unnecessary and wanton infliction of pain' proscribed by the Eighth Amendment." *Estelle*, 429 U.S. at 104 (citation omitted). *See Ingraham* v. *Wright*, 430 U.S. 651, 670 (1977) ("[T]he unnecessary and wanton infliction of pain * * * constitutes cruel and unusual punishment forbidden by the Eighth Amendment."); *Hudson* v. *McMillian*, 503 U.S. 1, 6-7 (1992) ("Because society does not expect that prisoners will have unqualified access to health care, deliberate indifference to medical needs amounts to an Eighth Amendment violation only if those needs are 'serious.'").

As this Court has noted, "deliberate indifference describes a state of mind more blameworthy than negligence." *Farmer* v. *Brennan*, 511 U.S. 825, 835 (1994). *See also Whitley* v. *Albers*, 475 U.S. 312, 322 (1986) (emphasizing "the distinction between mere negligence and wanton conduct that we find implicit in the Eighth Amendment"). Accordingly, there is no credible argument that Pollard's claims of negligent

diagnosis and follow-up care of his injuries would state a claim under the *scienter*-based Eighth Amendment standard but would have failed to state a claim under state law. Indeed, the affirmative duty that California jailers owe their prisoners—to protect them from foreseeable harm—is even *more* protective than a simple negligence standard.

To the extent Pollard might recharacterize his "black box" allegations as claims of excessive force, they would fare even worse under the Eighth Amendment. He would have to show much more than negligence or the elements of common law assault and battery. He would have to show that force was not "applied in a good faith effort to maintain or restore discipline," but was applied "maliciously and sadistically to cause harm." *Hudson*, 503 U.S. at 7. As is obvious, "[m]ere negligence" is insufficient to satisfy that onerous burden. *Wilson* v. *Seiter*, 501 U.S. 294, 305 (1991).

Finally, "the tort of negligence" covers Pollard's claims that he could not feed or bathe himself while his arms were in casts. Pet. App. 66a-67a (Restani, J., dissenting) (citing cases). Pollard does not allege he was deliberately deprived of food or hygiene as a punishment, but rather that prison employees unreasonably failed to care for his injuries by, for example, providing an alternative to a cafeteria tray.[5] To the

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[5] These allegations are dubious on their face. Pollard does not allege that he ever asked anyone to hold his tray or bring food to his cell, but rather that he elected to "avoid going to the food service to eat" and instead to purchase his own food, because he did not want to be "humiliated." JA35. And he does not allege that his inability to bathe after the surgery was any different than would be faced by anyone wearing casts after such a procedure.

extent these allegations involve either negligent conduct or foreseeable harm, California law would have provided a putative remedy. By contrast, under the federal Constitution, "[b]ecause routine discomfort is part of the penalty that criminal offenders pay for their offenses against society, only those deprivations denying the minimal civilized measure of life's necessities are sufficiently grave to form the basis of an Eighth Amendment violation." *Hudson*, 503 U.S. at 6-7 (citations and quotations omitted).

Moreover, Pollard would lack a *Bivens* remedy for any allegation of wrongdoing that did not cause physical injury to him. In the Prisoner Litigation Reform Act ("PLRA"), Congress provided that "[n]o Federal civil action may be brought by a prisoner confined in a 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 PLRA covers *Bivens* actions. *See*, *e.g.*, *Alexander* v. *Hawk*, 159 F.3d 1321 (11th Cir. 1998); *Whitley* v. *Hunt*, 158 F.3d 882 (5th Cir. 1998); *Garrett* v. *Hawk*, 127 F.3d 1263 (10th Cir. 1997); *see also Geiger* v. *Jowers*, 404 F.3d 371, 375 (5th Cir. 2005) ("Section 1997e(e) applies to all federal civil actions in which a prisoner alleges a constitutional violation * * * absent physical injury"); Robin Miller, Annotation, *Rights of Prisoners in Private Prisons*, 119 A.L.R.5th 1, § 12 (2004 & Supp.) (citing other cases). Thus, to the extent Pollard alleges discomfort without any actual physical injury, he would lack any *Bivens* claim at all. By contrast, state law actions in California state court are not so limited. *See Molien* v. *Kaiser Found. Hospitals*, 616 P.2d 813, 819-21 (Cal. 1980).

Finally, Pollard's state law remedies were superior to a *Bivens* remedy in another important respect. *Bivens* claims are not subject to *respondeat superior* liability. *See Iqbal*, 129 S. Ct. at 1948. But under California law, a prisoner in a privately-managed facility will generally be able to seek vicarious liability against the contractor under *respondeat superior*. *See*, *e.g.*, *Lawson*, 103 Cal. Rptr. 3d at 854-58 (claim brought against both company and employees). Thus, just as in *Malesko* and unlike under *Bivens*, prisoners like Pollard would have the ability to sue both the individual employees and the company in tort. Indeed, a claimant would ordinarily prefer a state tort suit against the company given the greater certainty of recovery. *Cf. Malesko*, 534 U.S. at 71 ("if a corporate defendant is available for suit, claimants will focus their collection efforts on it"); *id.* at 80-81 (Stevens, J., dissenting) ("It cannot be seriously maintained * * * that tort remedies against corporate employers have less deterrent value than actions against their employees.").

Thus, Pollard's available state law remedies for the physical harms he alleges were not only adequate alternatives, but were in fact superior, to any putative *Bivens* remedy. There is no instance in which Pollard could prevail only on a *Bivens* claim but not a state law claim for the same injury.

3. The Ninth Circuit majority did not deny that Pollard had adequate state law remedies. Instead, the court thought a blanket *Bivens* remedy justified based in part on speculation that other plaintiffs in other hypothetical cases might lack such remedies, and that courts might have difficulty determining adequacy of remedies in other cases. *See* Pet. App. 42a (determining adequacy of remedies "would likely

be difficult to administer"); *id.* at 43a-44a (speculating on lack of state law remedy for denial of "access to a toilet," "outdoor exercise," "socks, toilet paper, and soap" or "low cell temperature at night combined with a failure to issue blankets") (citations omitted).

These concerns, even if valid, could not justify creation of a *Bivens* remedy in *this* case. As the dissent noted, this Court prefers "case-by-case determinations of whether adequate alternative remedies exist to a blanket determination that *Bivens* is available to an entire class of plaintiffs." *Id.* at 64a (Restani, J., dissenting). The Court decides cases on the facts before it, not on the facts of hypothetical cases. *See Alabama State Fed. of Labor* v. *McAdory*, 325 U.S. 450, 461 (1945) (it is the Court's "considered practice" not to "formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied, * * * or to decide any constitutional question except with reference to the particular facts to which it is to be applied"). That was evident in *Wilkie*, where the Court declined to infer a *Bivens* remedy in circumstances unlikely ever to be repeated, based on the specific and unusual facts of that dispute.

Thus, in the unlikely event a future claimant in a future case believes that state law is an inadequate alternative to a *Bivens* claim under the Eighth Amendment, either for procedural or substantive reasons, he can try to make that showing. Invocation of *Bivens* involves "the kind of remedial determination that is appropriate for a common-law tribunal," *Wilkie*, 551 U.S. at 550 (citation omitted), and courts can thus calibrate the remedy to any unusual facts that may arise. And to the extent any

further problems arise, Congress can always provide whatever remedy it deems fit.

But in any event, the panel majority's concerns are unfounded. Although California law is the only state law implicated by this case, other states similarly provide remedies that are at least equivalent, if not superior, to a *Bivens* remedy under the Eighth Amendment. As the *en banc* dissenters noted, Pollard "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). These remedies include harms negligently inflicted on prisoners, including the failure to provide necessities.[6]

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[6] *See* Pet. App. 65a-67a (Restani, J., dissenting) (citing cases from five States); *Giraldo*, 85 Cal. Rptr. 3d at 384 (following cases from 14 other States); *Salazar* v. *Collins*, 255 S.W.3d 191, 200-01 nn. 7-8 (Tex. Ct. App. 2008) (following cases from 33 States and Territories); M.L. Schellinger, Annotation, *Civil Liability of Sheriff or Other Officer Charged With Keeping Jail or Prison for Death or Injury to Prisoner*, 14 A.L.R.2d 353, §§ 2(a), 4(a), 7, 8(b), 9(a), 10 (1950 & Supp.) (describing applicable cases from 27 States); Michael S. Vaughn, *Penal Harm Medicine: State Tort Remedies for Delaying and Denying Health Care to Prisoners*, 31 Crime, Law & Social Change 273, 276-296 (1999) (describing applicable medical negligence cases from 18 States); *see also Joseph* v. *State*, 26 P.3d 459, 466-67 (Alaska 2001); *Toombs* v. *Bell*, 915 F.2d 345, 349 (8th Cir. 1990) (Arkansas law); *Wormley* v. *United States*, 601 F. Supp. 2d 27, 44-45 (D.D.C. 2009) (D.C. law); *District of Columbia* v. *Mitchell*, 533 A.2d 629, 639, 645, 648 (D.C. 1987); *Gaither* v. *District of Columbia*, 333 A.2d 57, 60 (D.C. 1975); *Hall* v. *Knipp*, 982 So. 2d 1196, 1198 (Fla. Dist. Ct. App. 2008); *Alba*, 517 F.3d at 1254-56 (Georgia law); *Upchurch* v. *State*, 454 P.2d 112, 114-15 (Haw. 1969); *Trout* v. *Buie*, 653 N.E.2d 1002, 1008 (Ind. Ct. App. 1995); *Heumphreus* v. *State*, 334 N.W.2d 757, 759 (Iowa

There is no reason to believe—and the Ninth Circuit majority cited no authority for the proposition—that state laws would provide no remedy in other cases alleging denial of items like socks, toilet facilities, soap or blankets. *See* Pet. App. 65a-67a (Restani, J., dissenting) (citing cases). But the PLRA almost certainly precludes a *Bivens* remedy in such cases, unless these claims could somehow be considered to allege "physical harm." 42 U.S.C. § 1997e(e). The majority's principal concern was that state tort law might not apply where a claim does *not* "amount to 'physical harm.'" Pet. App. 43a (quoting Restatement (Second) of Torts § 314A(1)(a), (4)). *But see*, *e.g.*, *Molien*, 616 P.2d at 819-21. But the PLRA expressly *bars* prisoners from asserting such *Bivens* claims.

Instead, an affected prisoner would have the usual and appropriate remedy if such deprivations amount to a violation of the Eighth Amendment—injunctive

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1983); *Peoples*, 422 F.3d at 1103-05 (Kansas law); *Estate of Sisk* v. *Manzanares*, 262 F. Supp. 2d 1162, 1185-86 (D. Kan. 2002) (same); *Washington* v. *State*, 839 P.2d 555 (Kan. Ct. App. 1992); *C.J.W.* v. *State*, 853 P.2d 4, 8-9 (Kan. 1993); *Williams* v. *O'Brien*, 936 N.E.2d 1, 6 (Mass. 2010); *Thornton* v. *City of Flint*, 197 N.W.2d 485, 493 (Mich. 1972); *Thomsen* v. *Ross*, 368 F. Supp. 2d 961, 978 (D. Minn. 2005); *Scott-Neal ex rel. Scott* v. *New Jersey State Dep't of Corr.*, 841 A.2d 957, 961 (N.J. Super. Ct. App. 2004); *Marchione* v. *State*, 598 N.Y.S.2d 592, 594-595 (N.Y. App. Div. 1993); *Holly,* 434 F.3d at 296 (North Carolina law); *Multiple Claimants* v. *North Carolina Dep't of Health & Human Servs.*, 626 S.E.2d 666, 673 (N.C. Ct. App. 2006); *Bell* v. *Ohio Dep't of Rehab. & Corr.*, 810 N.E.2d 467, 470 (Ohio Ct. Cl. 2004); *Sloan* v. *Ohio Dep't of Rehab. & Corr.*, 695 N.E.2d 298, 300 (Ohio Ct. App. 1997); *Gregoire* v. *City of Oak Harbor*, 244 P.3d 924, 927 (Wash. 2010) (*en banc*); *Shea* v. *City of Spokane*, 562 P.2d 264, 267 (Wash. Ct. App. 1977), *aff'd* 578 P.2d 42 (Wash. 1978).

relief to compel provision of necessities. As noted in *Malesko*, "unlike the *Bivens* remedy, which we have never considered a proper vehicle for altering an entity's policy, injunctive relief has long been recognized as the proper means for preventing entities from acting unconstitutionally." 534 U.S. at 74. *Bivens* is concerned only with *damages*; a court's power to award injunctive relief has express statutory authorization, 28 U.S.C. § 1651, and is unaffected by the absence of a *Bivens* remedy. Thus, denial of a *Bivens* remedy in this case will not affect the ability of federal courts to rectify any ongoing Eighth Amendment violations. *Compare Brown* v. *Plata*, 131 S. Ct. 1910 (2011) (injunctive relief under PLRA to remedy severe overcrowding in state prison system).

Nor is there any warrant to infer a blanket *Bivens* remedy for an entire class of plaintiffs based on speculation that the adequacy of alternative remedies could be hard to determine in some other hypothetical case. The Ninth Circuit majority worried that courts would have to consider multiple sources of state law, including possible defenses. Pet. App. 44a-45a. But where, as in this case, creation of a *Bivens* right of action is unwarranted because adequate alternatives plainly exist, there is no license to nonetheless exercise that extraordinary power based on speculation about the ease with which the issue might be determined in some future case.

Regardless, the Ninth Circuit majority underestimated the ability of courts to manage and resolve legal issues. In *Wilkie*, for example, this Court examined multiple sources of state and federal law and, although it found the adequacy-of-remedies issue somewhat difficult, 551 U.S. at 553-54, was still able

to resolve the case. Courts are commonly called upon to determine the adequacy of alternative state and federal remedies, including in the prison context.[7] And other circuits have had no difficulty doing so in this specific context as well. *See Alba*, 517 F.3d at 1254-65; *Holly,* 434 F.3d at 296; *Peoples*, 422 F.3d at 1103-05. There is no reason why courts cannot continue to do so, in the unlikely event a plaintiff has reason to think that a state law remedy is an inadequate alternative to a *Bivens* claim.

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

Just as in *Malesko*, Pollard's adequate alternative remedies are themselves sufficient reason to decline to recognize a *Bivens* remedy. But this case also involves factors counseling hesitation, stemming from the fact that, at the time of the events at issue, petitioners were not federal officials but were instead employees of a private government contractor. As such, they lack the recognized immunities of their governmental counterparts, resulting in asymmetrical liability risks and eliminating a principal rationale for recognition of the *Bivens* doctrine in the first place. And whereas Congress has indicated its clear intent to preserve *Bivens* claims for actual

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[7] *See*, *e.g.*, *Nat'l Private Truck Council* v. *Okla. Tax Comm'n*, 515 U.S. 582, 588 (1995) (federal court "may not award damages or declaratory or injunctive relief in state tax cases when an adequate state remedy exists"); *Parratt* v. *Taylor*, 451 U.S. 527 (1981) (prisoner not denied due process where state provided adequate post-deprivation remedy); *Younger* v. *Harris*, 401 U.S. 37, 43-44 (1971) (noting the "basic doctrine of equity jurisprudence that courts of equity should not act * * * when the moving party has an adequate remedy at law").

governmental employees while pre-empting all other tort claims against them, Congress has expressed the opposite intent for employees of private contractors like petitioners. Whether considered separately or together with Pollard's adequate alternative remedies, these factors, at a minimum, counsel hesitation. *See Arar*, 585 F.3d at 574 ("'Hesitation' is 'counseled' whenever thoughtful discretion would pause even to consider."). The proper resolution, then, is to leave the matter to the policy judgment of Congress.[8]

A. Petitioners Lack The Recognized Immunities Of Their Governmental Counterparts.

In *Malesko*, the Court held that because a *Bivens* remedy would "impose asymmetrical liability costs," whether to fashion such a right of action "is a question for Congress, not us, to decide." 534 U.S. at 72. The same is true here. Because employees of private contractors such as petitioners lack the recognized immunities of their governmental counterparts, recognition of a *Bivens* action would

[8] This is not a case arising under 42 U.S.C. § 1983, which requires a determination of whether a defendant acts "under color of state law." *See*, *e.g.*, *West* v. *Atkins*, 487 U.S. 42, 43 (1988) (applying statutory language to claims against doctor employed by state prison as independent contractor). Nor does it require a determination of whether employees of private prison operators exercise governmental powers as a general matter. There is a plausible basis to hold that such employees do not exercise purely public functions, *see Holly*, 434 F.3d at 293-94, but the issue here is that petitioners are not government employees subject to suit under the criteria specifically designed by the Court for *Bivens* claims. As in *Malesko* and every other case where the Court has declined to extend *Bivens*, a *Bivens* remedy is inappropriate here regardless of whether private prison employees might be viewed as acting under color of law for other purposes.

create asymmetrical liabilities. As in *Malesko*, therefore, whether to create such an unbalanced remedial scheme is a policy question for Congress, not this Court, to resolve.

In *Richardson* v. *McKnight*, 521 U.S. 399 (1997), this Court held that employees of private prison management firms that contract with state and local governments have no qualified immunity from constitutional claims brought under 42 U.S.C. § 1983. The Court so held because "[h]istory does not reveal a 'firmly rooted' tradition of immunity applicable to privately employed prison guards," given that "correctional functions have never been exclusively public." 521 U.S. at 404-05. Thus, qualified immunity did not apply to employees of "a private firm, systematically organized to assume a major lengthy administrative task (managing an institution) with limited direct supervision by the government, [which] undertakes that task for profit and potentially in competition with other firms." *Id.* at 413. And in *Butz*, 438 U.S. at 504, the Court held that "without congressional directions to the contrary, we deem it untenable to draw a distinction for purposes of immunity law between suits brought against state officials under § 1983 and suits brought directly under the Constitution against federal officials."

Under these holdings, if petitioners were subjected to *Bivens* claims, that would not arm them with the recognized qualified immunity defense enjoyed by their federal employee counterparts. Qualified immunity "permits courts expeditiously to weed out suits which fail the test without requiring a defendant who rightly claims qualified immunity to engage in expensive and time-consuming preparation to defend the suit on its merits." *Siegert* v. *Gilley*,

500 U.S. 226, 232 (1991). Its purpose "is to spare a defendant not only unwarranted liability, but unwarranted demands customarily imposed upon those defending a long drawn out lawsuit." *Id*. Thus, in *Carlson*, 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." *Carlson*, 446 U.S. at 19.

The opposite result should obtain here, given that the "adequate protection" of a recognized immunity defense is absent. As the Ninth Circuit noted, the result of its rule is that prisoners asserting *Bivens* claims against employees of private prison contractors "may be able to recover more often than their counterparts in governmentally run prisons." Pet. App. 51a. The majority found that acceptable on the ground that other "asymmetries will persist" if no *Bivens* remedy is inferred. *Id*. at 52a. In fact, the only asymmetry in the absence of a *Bivens* remedy will be that prisoners like Pollard will have *superior* tort remedies against individual tortfeasors as compared to prisoners in governmentally-managed facilities. If a *Bivens* remedy is also added, those remedies will be multiplied to include a superior constitutional remedy that *Carlson* implicitly found would be problematic. Authorizing such liability "is a question for Congress, not [this Court], to decide." *Malesko*, 534 U.S. at 72. *See Holly*, 434 F.3d at 294 ("In the absence of statutory authority, we are reluctant to create an anomaly whereby private defendants face greater constitutional liability than public officials.").

These concerns also show that a key predicate for application of the *Bivens* doctrine is absent from this case. Contrary to the Ninth Circuit's view, there is nothing unusual about state law governing tort claims against even actual Federal government employees who exceed their constitutional authority. Before *Bivens*, state law was the normal way to obtain redress for such torts. *See Butz*, 438 U.S. at 489-91; *Bivens* v. *Six Unknown Named Agents of the Federal Bureau of Narcotics*, 409 F.2d 718, 721-22 (2nd Cir. 1969), *rev'd*, 403 U.S. 388 (1971). In such cases, claims that an officer exceeded constitutional authority arose to rebut the officer's immunity defense that the actions were "authorized by the national government." *Id*. at 721. When the federal officer sought to cloak himself in the government's immunity to avoid tort liability, the plaintiff would respond that such immunity was improper because the officer had exceeded his authority under the Constitution. *Butz*, 438 U.S. at 490-91.

In *Bivens*, this Court found this traditional model inadequate because of gaps in the state law of trespass. It therefore created, in the circumstances of that case, a special "cause of action for damages against a *federal official*." *Bush*, 462 U.S. at 374 (emphasis added). *See Malesko*, 534 U.S. at 70 (purpose of *Bivens* is "to deter individual *federal officers* from committing constitutional violations") (emphasis added). Similarly, in the Westfall Act of 1988, Congress foreclosed reliance on all state law claims against "any employee of the Government," 28 U.S.C. § 2679(b)(1), making a federal constitutional remedy more necessary for such claims. But the traditional state law model retains full validity in cases like this one, where the individual defendants have

no recognized immunity defenses to invoke and are not government employees covered by the FTCA. *Cf. Meyer*, 510 U.S. at 485 ("*Bivens* clearly contemplated that official immunity would be raised"). That this case does not raise the concerns that prompted development of the *Bivens* doctrine in the first place is yet another factor counseling hesitation.

B. Congress Has Expressly Exempted Private Contractors From The FTCA.

This Court has recognized that the "'special factors counseling hesitation in the absence of affirmative action by Congress'" includes "an appropriate judicial deference to indications that congressional inaction has not been inadvertent." *Schweiker*, 487 U.S. at 423. That deference is warranted here. Whereas Congress has expressed its intent to preserve *Bivens* claims against actual government employees while pre-empting ordinary tort claims against them, it has expressed the opposite intent with respect to employees of government contractors like petitioners.

As noted, in *Carlson* the Court held that Congress had expressed a "crystal clear" intent that the FTCA and *Bivens* remain as parallel, complementary remedies against government employees. 446 U.S. at 19-20. In the Westfall Act, that intent only became clearer. Presently, the FTCA remedy "against the United States" resulting from the "negligent or wrongful act or omission of any *employee of the Government*" acting within the scope of employment is "exclusive of any other civil action or proceeding for money damages by reason of the same subject matter against *the employee*" and "[a]ny other civil action or proceeding for money damages arising out of or relating to the same subject matter *against the employee* * * * is precluded." 28 U.S.C. §

2679(b)(1) (emphasis added). However, that exclusivity "does not extend or apply to a civil action against an *employee of the Government* * * * which is brought for a violation of the Constitution of the United States." *Id.* § 2679(b)(2) (emphasis added). As this Court has noted, § 2679(b)(2) is an "explicit exception for *Bivens* claims." *Hui*, 130 S. Ct. at 1851.

Congress, however, made a deliberate decision *not* to include any employees of government contractors within this remedial scheme. Congress has expressly provided that the term "Federal agency" as used in the FTCA "*does not include any contractor with the United States*" and that the term "Employee of the government" includes only "employees of any federal agency," members of the military or National Guard and persons acting "on behalf of a federal agency in an official capacity." 28 U.S.C. § 2671 (emphasis added). Thus, when Pollard attempted to assert an FTCA claim against the United States for the allegations at issue here, that claim was rejected on the ground that the FTCA does not cover claims against employees of contractors like GEO. *See* Mot. for Summ. Judg. at 7 (filed Oct. 18, 2006) (FTCA claim denied because "[t]he term "federal agency" does not include any contractor with the United States. Therefore, acts or omissions allegedly committed by contract staff at the Taft Correctional Institution cannot be considered under the provisions of the Federal Tort Claims Act.") (Dkt. 18).

This exclusion was broad and intentional. In *Logue* v. *United States*, 412 U.S. 512 (1973), which also involved a prisoner's claims of tortious conduct by employees of a federal prison contractor, the Court noted that Congress could have left the determination whether the United States should be

liable for the negligence of contractors to state agency law. But Congress "chose not to do this, and instead incorporated into the definitions of the Act the exemption from liability for injury caused by employees of a contractor." *Id*. at 528.

When it wants to, Congress knows how to prescribe liability for private parties acting "under color" of federal law, similar to what it has done in 42 U.S.C. § 1983 for those acting under color of state and local law. *See*, *e.g.*, 18 U.S.C. § 242 (imposing criminal liability for deprivations of constitutional rights committed "under color of any law"). In the FTCA, however, Congress made the deliberate decision *not* to include employees of government contractors in the same remedial scheme it constructed for employees of the government. For government employees, Congress (1) pre-empted all state tort claims against them and replaced those claims with an FTCA remedy against the United States that *Carlson* found an inadequate substitute to *Bivens*, while (2) expressly preserving *Bivens* claims against those individuals. But for people like petitioners, it did the opposite. State tort claims against them (and their employers) are not pre-empted and the "crystal clear" intent to preserve *Bivens* that was determinative in *Carlson*—and that became even clearer after the Westfall Act—is lacking as to them.

At a bare minimum, this disparate Congressional intent as between employees of government contractors and employees of the government is a factor counseling hesitation. There is no need to employ the Court's extraordinary powers to create a new private right of action, because traditional remedies exist that are more than adequate to compensate and

deter. And there is no express intent by Congress to preserve any additional *Bivens* remedies.

C. The Court Should Leave The Creation Of A New Federal Remedy To The Policy Judgment Of Congress.

Given these multiple causes for hesitation, the Court should leave these issues for Congress, which "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." *Wilkie*, 551 U.S. at 562 (quoting *Bush*, 462 U.S. at 389). For "Congress can tailor any remedy to the problem perceived," *id*., has "developed considerable familiarity with balancing governmental efficiency and the rights of employees," and "may inform itself through factfinding procedures such as hearings that are not available to the courts." *Bush*, 462 U.S. at 389.

What the Court should not do is to take it upon itself to provide the kind of asymmetrical federal right of action against employees of contractors that Congress has elected not to provide. Such a ruling would potentially increase the government's costs of contracting as contractors (not just in the prison context) pass along litigation costs incurred in defending and indemnifying their employees. *Cf*. *Boyle* v. *United Technologies Corp.*, 487 U.S. 500, 511-12 (1988). In *Meyer*, the Court declined to recognize a new category of *Bivens* claims that "would be creating a potentially enormous financial burden for the Federal Government," because "decisions involving 'federal fiscal policy' are not ours to make." 510 U.S. at 486 (citation omitted). The same is true here.

Moreover, the new blanket remedy that Pollard seeks would also result in an increase in federal

court litigation nationwide. *See Wilkie*, 551 U.S. at 562 (noting potential for an "onslaught of *Bivens* actions"); *Bivens*, 403 U.S. at 430 (Blackmun, J., dissenting) (Court's "judicial legislation * * * opens the door for another avalanche of new federal cases"). As noted in the petition, both prisoner *Bivens* claims and the percentage of federal prisoners housed in privately managed facilities are on the rise. *See* Pet. 28-29. Absent a new *Bivens* remedy, the normal forum for claims like Pollard's would be state court, unless diversity of citizenship could be shown.[9] But if the Court accepts the invitation to create a new blanket federal damages remedy, that would only increase the trend toward federalization of prisoner litigation involving allegations of ordinary negligence. That, as well, is a matter for Congress to consider. If anything, Congress's action in enacting the PLRA indicates that it is seeking to curtail, rather than expand, prisoner litigation in federal courts.

[9] This is unlike the normal *Bivens* claim, which is often combined with an FTCA claim for which federal jurisdiction already exists. *See*, *e.g.*, *Hui*, 135 S. Ct. at 1848.

CONCLUSION

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

Respectfully submitted,

JONATHAN S. FRANKLIN*
MARK EMERY
FULBRIGHT & JAWORSKI L.L.P.
801 Pennsylvania Ave., N.W.
Washington, D.C. 20004
(202) 662-0466

* Counsel of Record *Counsel for Petitioners*