No. 10-1104

In the Supreme Court of the United States

MARGARET MINNECI, ET AL.,

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 THE AMERICAN CIVIL LIBERTIES UNION, THE LEGAL AID SOCIETY OF NEW YORK, AND THE WASHINGTON LAWYERS' COMMITTEE FOR CIVIL RIGHTS AND URBAN AFFAIRS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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Interest Of *Amici Curiae*

The American Civil Liberties Union is a nationwide, non-profit, non-partisan organization with over 500,000 members dedicated to the principles of liberty and equality embodied in the Constitution and this nation's civil rights laws. Throughout its 90-year history, the ACLU has been deeply involved in protecting the rights of prisoners, and in 1972 created the National Prison Project to further this work.

The Legal Aid Society of New York is a private, non-profit organization that has provided free legal assistance to indigent persons in New York City for over 125 years. Through its Prisoners' Rights Project, the Society seeks to ensure the protection of prisoners' constitutional and statutory rights through litigation and advocacy.

The Washington Lawyers' Committee for Civil Rights and Urban Affairs is a non-profit public interest organization. Since 1989, its Prisoners' Project has engaged in broad-based litigation seeking to improve overall conditions at correctional facilities wherever Washington, D.C. inmates are held. At least fifty percent of the District's felony prisoner population must be housed in private contract facilities. *See* Pub. L. No. 105-33, § 11201, 111 Stat. 712, 734–37 (1997).

Consistent with their institutional goals, these organizations have appeared before this Court and other state and federal courts in numerous cases involving the rights of prisoners. They have a vital

interest in the resolution of the question presented, because the availability of a constitutional damages remedy against employees of private federal prison contractors is of fundamental importance to the preservation of prisoners' constitutional rights.[1]

Summary Of Argument

I. Federal prisoners are increasingly held in facilities operated by private contractors. Conditions at such facilities are often sub-standard due to the contractors' financial incentives and inadequate government oversight. Confronted with greater risks than other federal prisoners, private prison inmates should enjoy access to uniform federal judicial relief, and not be left to the uncertainty of state tort relief.

II. The right of individual federal prisoners to seek relief under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), for Eighth Amendment violations does not depend on the availability of state tort remedies. This Court has consistently recognized a *Bivens* remedy where the violation of constitutional rights arises from the individual exercise of federal

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[1] The parties have provided blanket consents to the filing of *amicus* briefs. Pursuant to Rule 37.6, counsel for *amici curiae* states that no party's counsel authored this brief in whole or in part and that no party or party's counsel made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission.

authority and Congress has not precluded judicial relief; conversely, the Court has never held that state law remedies alone preclude the core *Bivens* claim that Pollard alleges.

Moreover, the case-by-case evaluation of state remedies that Petitioners propose would mire lower federal courts in a morass of unclear and varying state tort law. This uncertainty will force—and has already forced—federal courts to predict (in some cases, invent) state law applicable to federal prisoners. The task is further complicated because the federal courts will face this uncertainty at the initial screening of prisoner complaints required by the Prison Litigation Reform Act (PLRA). Accordingly, the evaluation of state law remedies will have to be made solely on the basis of the allegations of *pro se* prisoner complaints.

Furthermore, state tort law may not protect Eighth Amendment rights. Strict state procedural requirements—such as the certificate of merit required to state a medical malpractice claim in many jurisdictions—create further state-by-state variation in protection of prisoner rights. Ultimately, the uncertain patchwork of state remedies does not amount to the convincing reason necessary to deny Pollard's *Bivens* remedy. To the contrary, only recognition of Pollard's *Bivens* claim vindicates the core deterrence and uniformity interests *Bivens* is designed to protect.

Argument

I. The Federal Government's Increasing Reliance On The Private Prison Industry Places Prisoners At Increased Risk Of Injury and Neglect.

The federal Bureau of Prisons (BOP) increasingly relies on private prisons to incarcerate federal prisoners. Unfortunately, private prison facilities have every incentive to cut costs and maximize profit, even at the expense of institutional and public safety, through lower pay for correctional officers, limited training, and minimal staffing. Due in part to such incentives, private prison inmates face greater threats to health and safety than other incarcerated persons, and inadequate federal oversight compounds these dangers.

1. The number of prisoners incarcerated in private prisons has increased dramatically over the past two decades. In 1990, the BOP did not house any prisoners in for-profit institutions. U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, CENSUS OF STATE AND FEDERAL CORRECTIONAL FACILITIES, 1995, at iv (1997). By 1995, for-profit prisons held 1,018 federal inmates, and by 2009, the figure had grown 33-fold to 34,087 (approximately 16% of the total federal prison population, which stood at 208,118 by December 31, 2009). *Id.*; U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, PRISONERS IN 2009, at 2, 33 (2010). On a given day, private facilities also hold nearly half of all federal immigration detainees. *See* DETENTION WATCH NETWORK, THE INFLUENCE OF THE PRIVATE PRISON INDUSTRY IN IMMIGRATION

DETENTION (2011), *available at* http://www.detentionwatchnetwork.org/privateprisons (approximately 49% of the total detained population).

2. "[T]he private sector is a more dangerous place to be incarcerated." Curtis R. Blakely & Vic W. Bumphus, *Private and Public Sector Prisons — A Comparison of Select Characteristics*, 68 FED. PROBATION 27, 30 (2004). A U.S. Department of Justice study, based on a national survey of private prisons, reported that "privately operated facilities have a much higher rate of inmate-on-inmate and inmate-on-staff assaults and other disturbances" than comparable publicly operated facilities. JAMES AUSTIN & GARY COVENTRY, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE ASSISTANCE, EMERGING ISSUES ON PRIVATIZED PRISONS 52 (2001). Another Department of Justice study comparing the private federal prison where Pollard was held, Taft Correctional Institution (TCI), with institutions operated by BOP, found: "TCI consistently demonstrated lower levels of performance on . . . inmate misconduct and illegal drug use." HARLEY G. LAPPIN, ET AL., U.S. DEP'T OF JUSTICE, EVALUATION OF THE TAFT DEMONSTRATION PROJECT: PERFORMANCE OF A PRIVATE-SECTOR PRISON AND THE BOP, at x (2005); *see also* Blakely & Bumphus, *supra*, at 29 (finding, based upon an analysis of national data, that "the private sector experienced more than twice the number of assaults against inmates than did the public sector").

Recent examples of unsafe conditions in private prisons include the following:

- In May 2011, the United States Attorney's Office for the Western District of Texas charged Donald Dunn, a private prison employee responsible for the transportation of immigration detainees, with sexually abusing female detainees on four separate occasions. Press Release, U.S. Dep't of Justice, Western District of Texas, *Former T. Don Hutto Correction Center Employee Faces Federal Charges* (May 12, 2011), http://www.justice.gov/usao/txw/press_releases/2011/Dunn_information.pdf. Dunn earlier pled guilty to state charges of official oppression and unlawful restraint in connection with the molestation of five detainees.

- In 2010, the Associated Press obtained video footage showing private prison guards standing idly by as a prisoner was mercilessly beaten: "[The victim] . . . manag[es] to bang on a prison guard-station window, pleading for help. Behind the glass, correctional officers look on, but no one intervenes when [the victim] is knocked unconscious." Rebecca Boone, *Prison Violence: At "Gladiator School," Help Never Comes*, SALT LAKE TRIB., Dec. 10, 2010.

- In 2009, State of Hawaii investigators sent to Otter Creek Correctional Center, a private prison for women in Kentucky that held Hawaii prisoners, found that "at least five corrections officials at the prison, including a chaplain, had been charged with having sex

with inmates in the last three years, and four were convicted." Ian Urbina, *Hawaii To Remove Inmates Over Abuse Charges*, N.Y. TIMES, Aug. 25, 2009.

- According to a 2007 Texas Youth Commission audit of a private facility for children, cells were "filthy, smelled of feces and urine," "there are serious problems with insects throughout the facility and grounds," "[t]here is racial segregation on the dorms," and youth reported that they have "not received church services in over two months." TEXAS YOUTH COMMISSION, COKE COUNTY JUVENILE JUSTICE CENTER AUDIT, at 4–9 (2007), http://www.tyc.state.tx.us/news/tyc_cokecounty_auditreport.pdf.

3. As compared to public facilities, private prisons pay correctional officers less, face a higher rate of staff turnover, employ staff with less training, and provide fewer correctional officers per inmate. Blakely & Bumphus, *supra*, at 29. In turn, "pay, training, and turnover may all contribute to the higher levels of violence seen in the private sector." *Id.* at 30; *see also* AUSTIN & COVENTRY, *supra*, at 52 ("[T]he number of staff assigned to private facilities is approximately 15 percent lower than the number of staff assigned to public facilities."); LAPPIN ET AL., *supra*, at 91 ("Most correctional professionals maintain that additional staff resources deter misconduct because additional staff provides greater surveillance."); SCOTT D. CAMP & GERALD G. GAES, FEDERAL BUREAU OF PRISONS, GROWTH AND QUALITY OF U.S. PRIVATE PRISONS: EVIDENCE FROM A

NATIONAL SURVEY 16 (2001) ("Privately operated prisons appear to have systemic problems in maintaining secure facilities. . . . Advocates of prison privatization have argued that private prisons can pay workers less, offer fewer benefits, and still deliver a product that is as good or better than that provided by the public sector. The evidence to date contradicts such an encompassing assertion.").

4. Private facilities housing federal prisoners and detainees are not subjected to adequate governmental oversight. Indeed, BOP has failed to hold private contractors accountable for their actions. For example, in 2003, the Justice Department's Civil Rights Division found that the Santa Fe Adult Correctional Detention Center, through Physicians Network Associates (PNA), "provides inadequate medical services in the following areas: intake, screening, and referral; acute care; emergent care; chronic and prenatal care; and medication administration and management. As a result, inmates at the Detention Center with serious medical needs are at risk for harm." Letter from Ralph F. Boyd, Jr., Assistant Attorney General, to Jack Sullivan, County Commission Chairman 3 (Mar. 6, 2003), *available at* http://www.justice.gov/crt/about/spl/documents/santa_fe_findings.pdf (last visited Sept. 15, 2011). The letter further explained that inmates were not offered treatment for new, contagious tuberculosis infections. *See id.* at 6–7.

Despite these findings, BOP later *rewarded* PNA by entering into a contract to house federal prisoners at the Reeves County Detention Center (RCDC), a private prison in Texas where PNA provides medical

care. Predictably, PNA's history of medical neglect repeated itself at RCDC. Jesus Manuel Galindo, an RCDC prisoner who received insufficient medication despite suffering epileptic seizures while in solitary confinement, suffered a fatal seizure on December 12, 2008. Complaint at 1, *Galindo v. Reeves County, et al.*, No. 3:10-cv-00454 (W.D. Tex. Dec. 7, 2010). After the body was "removed from the prison in what looked to [other inmates] like a large black trash bag," prisoners rioted and set fire to the facility, complaining of inadequate medical care. Tom Barry, *A Death in Texas*, BOSTON REV, Nov-Dec. 2009, http://bostonreview.net/BR34.6/barry.php.

5. Further limiting oversight of private prisons is the fact that federal government contractors are not subject to the Freedom of Information Act (FOIA), a statute designed to enable "citizens to know 'what their Government is up to.'" *Nat'l Archives & Records Admin. v. Favish*, 541 U.S. 157, 171–72 (2004) (quoting *U.S. Dep't of Justice v. Reporters Comm. for Freedom of Press*, 489 U.S. 749, 773 (1989)). Federal entities that incarcerate people, such as BOP, undoubtedly qualify as "agenc[ies]" under FOIA; records in the custody of governmentally operated facilities are therefore subject to FOIA requests, enforceable through litigation in federal court.[2] By contrast, private

[2] 5 U.S.C. § 552(a)(3)(A) ("[E]ach agency, upon any request for records . . . shall make the records promptly available to any person."); *Berry v. U.S. Dep't of Justice*, 733 F.2d 1343, 1344 (9th Cir. 1984) (stating that documents in BOP's possession are "agency records").

entities, such as for-profit prison companies, do not qualify as "agenc[ies]" under FOIA, and therefore are exempt from its disclosure requirements.[3]

* * *

In short, the explosive growth in the role of private contractors in federal prison management, with their incentives to cut costs and the absence of adequate oversight of their performance, has resulted in sub-standard security and medical care that makes federal prisoner access to uniform, effective judicial relief more important than ever.

II. Respondent's Right To Seek Relief Under *Bivens* Does Not Depend On The Existence Of State Tort Remedies.

"It is . . . well settled that where legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done." *Bivens*, 403 U.S. at 396 (quoting *Bell v. Hood*, 327 U.S. 678, 684 (1946) (alteration in original)). Explaining that, "[h]istorically, damages have been regarded as the ordinary remedy for an invasion of personal interests in liberty," *Bivens*, 403

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[3] 5 U.S.C. § 552(f)(1); (defining "agency" as "any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government . . ., or any independent regulatory agency").

U.S. at 395, *Bivens* "established that a citizen suffering a compensable injury to a constitutionally protected interest could invoke the general federal-question jurisdiction of the district courts to obtain an award of monetary damages against the responsible federal official." *Butz v. Economou*, 438 U.S. 478, 504 (1978).

Pollard's claim does not represent an extension of *Bivens*. His allegations of mistreatment while in federal custody fall comfortably within a "constitutionally protected interest" for which *Bivens* supplies a damage remedy. Contrary to Petitioners' suggestion, *see* Pet. Br. 21–36, this Court has never held that the potential availability of state tort remedies alone precludes a *Bivens* claim. *See* U.S. Br. 25. To do so in this case would mire federal courts in a morass of unclear and varying state tort law, and undermine federal prisoners' access to relief from the elevated dangers of private prisons.

A. This Court Has Never Denied A *Bivens* Claim On The Basis Of State Tort Remedies, And Doing So Would Be Contrary To The Rationale of This Court's *Bivens* Decisions.

Pollard's claim is at the core of the interests that *Bivens* and its progeny are designed to protect. Contrary to the United States' present assertion, *see* U.S. Br. 25, *Bivens*'s substantive reasoning and

jurisdictional basis foreclose reliance on non-federal remedies as a barrier to Pollard's *Bivens* claim.[4]

1. "To incarcerate, society takes from prisoners the means to provide for their own needs. Prisoners are dependent on the State for food, clothing, and necessary medical care." *Brown v. Plata*, 131 S. Ct. 1910, 1928 (2011). Accordingly, the Eighth Amendment shields prisoners from "[a] prison official's 'deliberate indifference' to a substantial risk of serious harm to an inmate . . .," *Farmer v. Brennan*, 511 U.S. 825, 828 (1994), and imposes corresponding "duties on [prison] officials, who must provide humane conditions of confinement." *Id.* at 832.

Although this Court has expressed "caution toward extending *Bivens* remedies," *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 74 (2001), Pollard's *Bivens* claim does not "extend" *Bivens* to a functionally "new context or category of defendants." Pet. Br. 13 (quoting *Ashcroft v. Iqbal*, 129 S. Ct.

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[4] In *Correctional Services Corporation v. Malesko*, 534 U.S. 61 (2001), the United States argued "[t]he same rationales that supported the creation of a *Bivens* remedy against federal employees—deterring individuals from engaging in unconstitutional conduct, and ensuring the availability of a remedy separate and apart from state tort law—support the recognition of such a remedy against private individuals who violate constitutional rights under color of federal law." Brief for the United States as Amicus Curiae Supporting Petitioner at 17 n.6, *Corr. Servs. Corp. v. Malesko*, No. 00-860 (May 2001) (internal citation omitted).

1937, 1948 (2009)). *See* Resp. Br. 6–12 (explaining that Pollard's "case is on all fours with *Carlson*"); *id.* at 40–49 (demonstrating that no "special factors" counsel against Pollard's claim). Instead, the GEO Group, Inc's (GEO) employees perform the same federal function as the BOP employees sued in *Carlson v. Green*, 446 U.S. 14 (1980)—the incarceration of citizens pursuant to the federal government's authority to punish federal crimes. *See* U.S. Br. 13 n.6 (conceding federal prison contractors are federal actors). Where the function and authority exercised by a contractor are identical to those exercised by the government, "[c]ontracting out prison [operation] . . . does not relieve the State of its constitutional duty . . . and it does not deprive . . . prisoners of the means to vindicate their Eighth Amendment rights." *West v. Atkins*, 487 U.S. 42, 56 (1988) (holding State's private contract physician operates under color of state law for purposes of 42 U.S.C. § 1983).[5]

2. This Court has never held that state remedies alone may preclude a *Bivens* remedy. To the contrary, limitations on *Bivens* have principally rested on the structural separation of powers.[6] This

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[5] This is equally true in the *Bivens* context. *See* Brief for the U.S., *supra* n.4, at 17 n.6 ("*Bivens* did not rest on the fact that the defendants there were formally employed by the United States; it rested on the fact that they exercised *federal power*." (emphasis in original)).

[6] The Court's *Bivens* jurisprudence demonstrates this central preoccupation with the judiciary's remedial authority in (continued…)

is because the federal courts' power to create (and adjudicate) *Bivens* claims is grounded in the congressional grant of jurisdiction in 28 U.S.C. § 1331. *See*, *e.g.*, *Bush v. Lucas*, 462 U.S. 367, 378 (1983) ("The federal courts' statutory jurisdiction to decide federal questions confers adequate power to award damages to the victim of a constitutional violation.").

a. *Bivens* identified several fundamental problems with relying on state tort law to vindicate individual constitutional interests violated through exercise of federal authority. First, the Court reasoned that the potential for abuse of federal authority requires a federal remedy. As the Court explained, the exercise of federal authority distorts the assumptions underlying state tort law because "[a]n agent acting—albeit unconstitutionally—in the name of the United States possesses a far greater capacity for harm than an individual [tortfeasor] exercising no authority other than his own." *Bivens*,

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relation to Congress. *See*, *e.g.*, *Bivens*, 403 U.S. at 397; *id.* at 402, 403–04 (Harlan, J., concurring in the judgment), *id.* at 411–12 (Burger, C.J., dissenting); *Davis v. Passman*, 442 U.S. 228, 242–43, 248 (1979); *id.* at 249 (Burger, C.J., dissenting); *id.* at 253 (Powell, J., dissenting); *Carlson*, 446 U.S. at 18–23; *id.* at 27, 29 (Powell, J., concurring in the judgment); *id.* at 34 (Rehnquist, J., dissenting); *Bush*, 462 U.S. at 378, 379–88, 389; *id.* at 390 (Marshall, J., concurring); *Chappell v. Wallace*, 462 U.S. 296, 300–02, 304 (1983); *Schweiker v. Chilicky*, 487 U.S. 412, 423, 425–29 (1988); *Malesko*, 534 U.S. at 67 & n.3, 69 (discussing implied statutory causes of action); *Wilkie v. Robbins*, 551 U.S. 537, 554 (2007).

403 U.S. at 392. *See also id*. at 408–09 (Harlan, J., concurring in the judgment) (agreeing "that the types of harm which officials can inflict . . . are different from the types of harm private citizens inflict on one another"). Here, the exercise of intimidating federal power is even more overwhelming. *See*, *e.g.*, *Johnson v. California*, 543 U.S. 499, 511 (2005) (recognizing that "the government's power is at its apex" "[i]n the prison context"). *See also Brown*, 131 S. Ct. at 1928. As in *Bivens*, Petitioners' reliance on state law "seek[s] to treat the relationship between a citizen and a federal agent unconstitutionally exercising his authority as no different from the relationship between two private citizens. In so doing, they ignore the fact that power, once granted, does not disappear like a magic gift when wrongfully used." *Bivens*, 403 U.S. at 391–92.

Moreover, *Bivens* suggests that state tort remedies are fundamentally problematic because they often under-protect federal rights, or conflict with federal authority in unacceptable ways. *Bivens*, 403 U.S. at 395 ("For just as state law may not authorize federal agents to violate the Fourth Amendment, neither may state law undertake to limit the extent to which federal authority can be exercised.") (internal citation and quotation marks omitted). "The inevitable consequence of this dual limitation on state power is that the federal question becomes . . . an independent claim both necessary and sufficient to make out the plaintiff's cause of action." *Id*.

Accordingly, where an officer violates a federal constitutional right through exercise of federal

authority, it is "entirely proper that these injuries be compensable according to uniform rules of federal law" rather than "the vagaries of common-law actions." *Id*. at 409 (Harlan, J., concurring in the judgment).[7] In *Carlson*, the Court applied this insight to federal prisoners' Eighth Amendment claims. *See* 446 U.S. at 23; *id*. at 28 n.1 (Powell, J., concurring in the judgment) ("Here, as in *Bivens* itself, a plaintiff denied his constitutional remedy would be remitted to the vagaries of state law.").

Petitioners' and the United States' reliance on Justice Harlan's observation that, "[f]or people in Bivens shoes, it is damages or nothing," *Bivens*, 403 U.S. at 410 (Harlan, J.); Pet. Br. 16; U.S. Br. 15, is misplaced. Far from intimating that a constitutional damages remedy depends upon an absence of state remedies, Justice Harlan's observation arose in a discussion of wholly federal remedies; specifically, whether federal courts can award damages as well as equitable relief under their general federal question jurisdiction. *See Bivens*, 403 U.S. at 409–10. Justice Harlan's statement simply made clear that Bivens could not, for practical reasons, rely on other federal remedies that might be available in other

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[7] Whether the remedy is created by Congress or the federal courts, it provides federal law uniformity. *See Bivens*, 403 U.S. at 392; *id*. at 409 (Harlan, J.); *Carlson*, 446 U.S. at 23, 24; *id*. at 28 n.1 (Powell, J., concurring in the judgment); *see also Chilicky*, 487 U.S. at 414, 428 (denying *Bivens* remedy where Congress provided a uniform, comprehensive remedial scheme); *Wallace*, 462 U.S. at 302 (same); *Bush*, 462 U.S. at 385 (same).

circumstances, such as the exclusionary rule (because he was not charged), or an injunction (because the invasion of his home had already occurred). *See id*. at 410. Justice Harlan's comment was not addressing state tort remedies, nor suggesting that such remedies, to the extent they exist, are an adequate substitute for constitutional damages under *Bivens*. In Justice Harlan's view, Bivens had no choice but damages vis-à-vis other federal remedies.[8]

b. State tort remedies have not played a significant role in the Court's recognition of *Bivens* claims. Although *Davis v. Passman*, 442 U.S. 228 (1979), noted the petitioner lacked a state remedy for her employment claim, the Court focused on the fact that federal "equitable relief . . . would be unavailing" against a former congressman under Title VII. 442 U.S. at 245 & n.23. Indeed, the Court suggested that, even if a state remedy had been

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[8] Although Bivens himself possessed potential causes of action in tort, which the Court recognized were likely to fail, *see Bivens*, 403 U.S. at 390, 394 (postulating trespass action and potential consent defense), the Court's recognition of Bivens's constitutional cause of action was not predicated on the likely defense to his potential state tort claim. Instead, the Court recognized the potential application of an equally powerful immunity defense to the constitutional tort on remand. *See id*. at 397–98 (district court found respondents enjoyed official immunity, but court of appeals did not consider immunity issue); *Camreta v. Greene*, 131 S. Ct. 2020, 2030–31 (2011) (federal employees may receive qualified immunity to *Bivens* claims).

available, it would have been insufficient to preclude a *Bivens* remedy, which was "particularly appropriate" for "the application of the [federal constitution] to a federal officer in the course of his federal duties." *Id*. at 245 n.23.

In *Carlson*, separation of powers dominated the Court's analysis, specifically whether Congress intended to preclude a constitutional damages remedy through the Federal Tort Claims Act (FTCA). *See* 446 U.S. at 18–23; *see also id*. at 27, 29 (Powell, J., concurring in the judgment) (cautioning against "denigrat[ing] the doctrine of separation of powers"). Notably, in assessing Congress' intent in the FTCA, which adopts state substantive law, the Court refused to consign "violations by federal officials of federal constitutional rights . . . to the vagaries of the laws of the several States. . . ." *Id*. at 23.

c. Even more notably, state remedies played no role in the Court's refusal to recognize a *Bivens* remedy in federal employee cases. In each instance, the Court relied on special congressional authority over the subject matter of the case or a comprehensive remedial scheme enacted by Congress. *See Schweiker v. Chilicky*, 487 U.S. 412, 414, 428 (1988) (relying on "comprehensive statutory schemes" covering Social Security claims); *United States v. Stanley*, 483 U.S. 669, 683–86 (1987) (unique structure of military discipline and justice, and plenary congressional authority over military); *Chappell v. Wallace*, 462 U.S. 296, 300–04 (1983) (same); *Bush*, 462 U.S. at 368, 385–88 (congressional action on federal employee claims, and resulting

"comprehensive procedural and substantive provisions").

d. *Malesko* similarly did not rely upon state remedies. The Court suggested that the existence of state tort remedies would not have been a barrier to a *Bivens* suit if it had been brought against named individuals rather than a private corporation operating a halfway house under contract with the BOP. *See* Resp. Br. 10–12. Likewise, the Court did not consider state tort remedies in concluding that corporate defendants could not generally be sued under *Bivens*. *See Malesko*, 534 U.S. at 63. Rather, such suits were inconsistent with *Bivens*'s "core premise," *id*. at 71, which the Court identified as "deter[ring] individual federal officers from committing constitutional violations," *id*. at 70. Indeed, the *Malesko* majority considered alternative remedies only in hypothesizing that, had the Court been "confronted with a situation in which claimants in respondent's shoes lack effective remedies," *id*. at 72, it might have found a "reason . . . to consider extending *Bivens* beyond [its] core premise." *Id*. at 71. The Court's search for exceptional circumstances in *Malesko* does not impact Pollard's claim, which vindicates *Bivens*'s "core premise" to deter *individuals* exercising federal authority. And, contrary to the United States' suggestion, U.S. Br.

19, *Wilkie v. Robbins*, 551 U.S. 537 (2007), also did not rest on the existence of state tort remedies.[9]

B. A Rule Requiring Federal Courts To Evaluate State Tort Remedies Prior To Adjudicating A *Bivens* Claim Would Impose Substantial And Unnecessary Burdens On Reviewing Courts.

In this case, the Petitioners argue that Pollard has no *Bivens* claim because his California tort remedies effectively address his constitutional injuries. If the Court decides the case on that ground, it will set the lower federal courts on an arduous case-by-case quest to evaluate the particular state remedies available against private prison employees for each federal prisoner's *Bivens* claim. *See* Pet. Br. 32 (demanding case-by-case review). Respondent correctly demonstrates that this Court prefers categorical evaluation of *Bivens* claims, rather than such a case-by-case inquiry. *See* Resp.

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[9] The principal shortcoming of the proposed Takings Clause claim in *Wilkie* rested on the "difficulty in defining a workable cause of action." *See* 551 U.S. at 555–56. While the Court reviewed potential alternative remedies, *see id*. at 551–54, it found "a patchwork, an assemblage of state and federal . . . regulations, statutes and common law rules" that neither required nor foreclosed a *Bivens* remedy, *id*. at 554. And, the Court tied this discussion to Congress' "expect[ations]," *id*., suggesting that state remedies are relevant only insofar as they reflect a congressional choice. *See also* Resp. Br. 30; *Carlson*, 446 U.S. at 20 (noting FTCA adopted state tort law, and otherwise retained *Bivens*).

Br. 17–20. Amici supplement that point by demonstrating below the practical folly of Petitioners' case-by-case approach, which would impose a heavy burden on the lower federal courts, resulting in an uncertain and piecemeal intrusion into state tort law that counsels in favor of retaining Pollard's *Bivens* remedy.

Although Petitioners assert that Pollard's allegations of mistreatment sound in tort, *see* Resp. Br. 1–3, they provide a relatively shallow analysis of state law beyond California. *See* Pet. Br. 26–27, 33–34 & n.6. The remedial regimes in several of the thirteen states in which either GEO operates a federal facility or the BOP contracts with a private company to operate a federal prison facility[10] illustrate that denying Pollard's *Bivens* claim would mire lower federal courts in an uncertain morass of

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[10] California, Colorado, Florida, Georgia, Louisiana, Mississippi, New Mexico, New York, North Carolina, Ohio, Pennsylvania, Texas, and Washington. *See*, *e.g.*, The GEO Group, Inc., North America Facility Locations, http://www.geogroup.com/locations_na.asp (last visited Sept. 16, 2011); Federal Bureau of Prisons, Maps of Facilities, Northeast Region, http://www.bop.gov/locations/maps/NER.jsp (last visited Sept. 16, 2011); *id*., Mid-Atlantic Region, http://www.bop.gov/locations/maps/MXR.jsp (last visited Sept. 16, 2011); *id*., Southeast Region, http://www.bop.gov/locations/maps/SER.jsp (last visited Sept. 16, 2011); *id*., North Central Region, http://www.bop.gov/locations/maps/NCR.jsp (last visited Sept. 16, 2011); *id*., South Central Region, http://www.bop.gov/locations/maps/SCR.jsp (last visited Sept. 16, 2011); *id*., Western Region, http://www.bop.gov/locations/maps/WXR.jsp (last visited Sept. 16, 2011).

state law characterized by varying and variable remedies that may fail to protect indigent prisoners like Pollard.

1. Because several states have enacted remedial schemes that result in a lack of relevant substantive state law, federal courts may have little or no guidance in determining whether federal prisoners have effective remedies under state law. In effect, they will have to invent state tort law where there is none, and do so even for states that have arguably made public policy decisions that prisoners (at least those housed in state institutions) should have no tort law rights.

For example, the Mississippi Tort Claims Act (MTCA) "provides the exclusive remedy against a governmental entity or its employee for tortious acts or omission," *Carter v. Miss. Dep't of Corrs.*, 860 So. 2d 1187, 1191 (Miss. 2003), and immunizes the state, governmental entities, and employees acting in the course and scope of employment from liability "for any claim . . . [o]f any claimant who at the time the claim arises is an inmate of any . . . jail . . . or other such institution." MISS. CODE ANN. § 11-46-9(1)(m) (West 2011); *see also id.* § 11-46-1(g) (defining "[g]overnmental entity" to include the state). The MTCA has been applied strictly, "effectively cut[ting] off an inmate's right to bring a negligence action against the State or its employees." *Wallace v. Town of Raleigh*, 815 So. 2d 1203, 1208 (Miss. 2002) (quotation omitted). Although Mississippi inmates in both government and private prisons, may appeal administrative resolution of their claims in state courts, *see* Miss. Dep't of Corr., Administrative

Remedy Program, http://www.mdoc.state.ms.us/administrative_remedy_program.htm (last visited Sept. 16, 2011), the court's review is limited to determining whether the administrative decision was, *inter alia*, "arbitrary or capricious." *Clay v. Epps*, 19 So. 3d 743, 745 (Miss. Ct. App. 2008). As a result, there is little decisional law in Mississippi to guide a federal court in determining what tort remedies might be available to a state prisoner housed in a private prison facility.

At the other end of the spectrum, New York permits prisoner tort claims against the state but prohibits nearly all privately owned and operated state or local prison facilities, *see* N.Y. CORR. LAW § 121 (McKinney 2011), and claims against individual state prison employees, *see id.* § 24. *See also Haywood v. Drown*, 129 S. Ct. 2108 (2009) (recognizing that N.Y. CORR. LAW § 24 limits prisoners to circumscribed claims against the State, and holding provision unconstitutional as applied to § 1983 actions). The result is the same as in Mississippi: there is no state law guidance as to the application of tort rules to individual private prison employees for a federal court's *Bivens* review.[11]

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[11] Texas presents another variation on this theme. Because the Texas Tort Claims Act (TTCA) contains a very limited waiver of sovereign immunity, *see* TEX. CIV. PRAC. & REM. CODE ANN. § 101.021 (West 2011), many state cases reviewing prison conditions claims focus on the applicability of the TTCA's waiver provisions rather than the substance of relevant tort law. *See*, *e.g.*, *Ramos v. Tex. Dep't of Crim. Just.-Corr. Inst. Div.*, No. 12-10-00397-CV, 2011 WL 3273468, at *3 (Tex. Ct. (continued…)

Thus, both the restrictive Mississippi and solicitous New York regimes would require a federal court to fill wide gaps in state law in order to evaluate (or adjudicate) a prisoner's claims.

Even where state remedial schemes do not hinder development of state decisional law, federal courts have already faced difficult state law issues involving private prisons. For example, federal courts in North Carolina have had to decide state law issues of first impression in cases brought by federal prisoners held in private prisons. *See Mathis v. GEO Group, Inc.*, No. 2:08-ct-21-D, at 29–33 (E.D.N.C. Nov. 9, 2009) (holding North Carolina's certificate of merit requirement applicable to claims for equitable relief, even though "[n]o North Carolina appellate court ha[d] addressed" that issue).

A case-by-case review would thus force a federal court to pass judgment on the effectiveness of state remedies, *see infra*, and make predictions about state law that may often prove incorrect. *See* Barry Friedman, *Under the Law of Federal Jurisdiction: Allocating Cases Between Federal and State Courts*, 104 COLUM. L. REV. 1211, 1238 (2004) (describing "the potential [of federal court predictions of state law] to create a variety of problems, from the minor to the chaotic"). Such "[n]eedless decisions of state law should be avoided both as a matter of comity and

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App. July 29, 2011); *Davis v. Barnett*, No. 2-09-207-CV, 2010 WL 3075670, at *5 (Tex. Ct. App. Sept. 2, 2010).

to promote justice between the parties, by procuring for them a surer-footed reading of applicable law." *United Mine Workers of Am. v. Gibbs*, 383 U.S. 715, 726 (1966).

In addition, the likelihood that federal courts will incorrectly predict state law in assessing federal prisoners' *Bivens* claims threatens further consumption of federal judicial resources and dire practical consequences for federal prisoners' constitutional rights. Should a federal court conclude that state remedies preclude a *Bivens* claim, the court would have to determine whether it still had diversity jurisdiction—or another ground for federal question jurisdiction, *see* 28 U.S.C. § 1367—to consider the state tort claims. Diversity jurisdiction would not be uncommon for federal inmates regularly transferred around the country, *see* Resp. Br. 48 & n.15, because "the courts presume that the prisoner remains a citizen of the state where he was domiciled before his incarceration." *Hall v. Curran*, 599 F.3d 70, 72 (1st Cir. 2010). In that case, the federal court will face the gaps in state tort law, *see supra* pp. 22–24, a second time—in determining the merits of the prisoner's state tort claims. Absent diversity jurisdiction, however, the federal court may dismiss the federal prisoner's complaint, and the prisoner will have to re-file in state court. *See*, *e.g.*, 28 U.S.C. § 1915A(b). Should the state court determine, contrary to the federal court's conclusion, that the prisoner lacks an effective state cause of action, the federal prisoner will be left without any judicial relief for his constitutional injuries.

2. The federal court screening process prescribed by the PLRA compounds these problems. A federal court must screen prisoner complaints "before docketing, if feasible or, in any event, as soon as practicable after docketing." 28 U.S.C. § 1915A(a). Given this early review, a case-by-case inquiry would require a federal court to ascertain applicable state law, *see supra*, and assess its effectiveness, *see infra*, based solely upon a complaint likely aimed at a federal cause of action. The resulting absence of allegations regarding, *inter alia*, necessary elements of state claims—such as the certificate of merit required for state medical malpractice claims in many jurisdictions, *see infra* pp. 31–33—and information on state law defenses to the federal prisoner's potential tort claims, *see Bivens*, 403 U.S. at 394, heaps further uncertainty on a reviewing federal court and diminishes the practical feasibility of a case-by-case *Bivens* inquiry. *Cf. Whitfield v. Lawrence Corr. Ctr.*, No. 06-cv-968, 2008 WL 3874718, at *3 (S.D. Ill. Aug. 18, 2008) ("Often it is unclear exactly what a prisoner's claim is," but "[*p*]*ro se* complaints filed by prisoners are entitled to be liberally construed."). In this way, the prescreening procedure enacted by Congress in the PLRA—which applies to all prisoner litigation regarding conditions of confinement—provides a "special factor[] counseling hesitation." *Bivens*, 403 U.S. at 396–97. But, here, the "hesitation" supports Pollard's *Bivens* remedy rather than "counseling" against it.[12]

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[12] To be sure, a prisoner's allegations—and the applicability of (continued…)

3. Finally, state courts and legislatures can alter the substance of state remedies or the procedures governing them. *See*, *e.g.*, *DeShaney v. Winnebago Cnty. Dep't of Soc. Servs.*, 489 U.S. 189, 202–03 (1989) (recognizing state control over tort law "through its courts and legislatures" and ability to "chang[e] the tort law of the State in accordance with the regular lawmaking process"); Resp. Br. 22–23, 34–35 (describing changes in California law via *Giraldo v. Cal. Dep't of Corr. & Rehab.*, 85 Cal. Rptr. 3d 371 (Cal. Ct. App. 2008)). Consequently, a federal court's decision about one federal prisoner's access to state remedies may not apply to similar claims by subsequent prisoners.[13]

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state law—may become more clear if the case proceeds beyond the screening stage before the court determines the availability of a *Bivens* remedy. That solution, however, undermines "Congress's intent [in the PLRA] to conserve judicial resources by authorizing district courts to dismiss nonmeritorious prisoner complaints at an early stage." *O'Neal v. Price*, 531 F.3d 1146, 1153 (9th Cir. 2008). *See also Jones v. Bock*, 549 U.S. 199, 202 (2007) ("Among other reforms, the PLRA mandates early judicial screening of prisoner complaints. . . ."); *Id.* at 203 (noting Congress' goal in enacting the PLRA was "fewer and better prisoner suits").

[13] Indeed, states possess authority to alter the availability of state remedies in response to a federal court's review. *Cf. Bell v. Maryland*, 378 U.S. 226, 237–41 (1964) (remanding case to state court to consider supervening change in law affecting resolution of federal constitutional inquiry); *Vandenbark v. Owens-Illinois Glass Co.*, 311 U.S. 538, 543 (1941) (holding federal courts sitting in diversity must apply state law even (continued…)

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In sum, the United States' blithe contention that "there is no reason to doubt courts' ability to resolve" state remedial issues, U.S. Br. 28 n.13, fails to appreciate the substantive and practical complexities of the task it seeks to impose on the federal courts. Moreover, the judicial effort required to sort through these complexities undermines the PLRA's intended efficiencies. *See* 141 Cong. Rec. 26,553 (1995) (statement of Sen. Hatch) ("[The PLRA] will help bring relief to a civil justice system overburdened by frivolous prisoner lawsuits."). State tort law thus fails to provide a "convincing reason for the Judicial Branch to refrain," *Wilkie*, 551 U.S. at 550, from recognizing an easily applied *Bivens* remedy for violation of federal prisoners' Eighth Amendment rights by individual employees of private federal prison contractors.

C. State Tort Law Does Not Provide Effective Relief For The Constitutional Violations Respondent Alleges Either In Theory Or In Fact.

Petitioners and the United States claim "Pollard's available state law remedies are superior to what he would have under *Bivens*." Pet. Br. 25. *See also* U.S. Br. 11. They largely base this contention on the simple difference between proving

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though state courts may change law "for the purpose of affecting former federal rulings").

negligence and "deliberate indifference." *See*, *e.g.*, Pet. Br. 2–3, 11, 28; U.S. Br. 11–12, 23. But that simple assumption rests on two faulty premises. First, that tort law and constitutional law protect the same interests. They do not. And second, that the procedural and substantive rules surrounding prisoner tort actions do not effectively foreclose relief in many states. They do. These limitations compound the uncertainty federal courts will face in case-by-case evaluations of the effectiveness of state remedies.[14]

1. As *Bivens* correctly recognized, state tort law is neither coextensive with an individual's constitutional rights nor is it designed to protect the same dignitary interests. *See supra* pp. 14–16; *Bivens*, 403 U.S. at 393–94; *Trop v. Dulles*, 356 U.S. 86, 100 (1958) ("The basic concept underlying the Eighth Amendment is nothing less than the dignity of man."). Although "the wanton and unnecessary infliction of pain," *Rhodes v. Chapman*, 452 U.S. 337, 347 (1981), may violate state tort law as well as the Eighth Amendment, the Eighth Amendment also

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[14] Petitioners' assertion that "[c]ourts are commonly called upon to determine the adequacy of alternative state and federal remedies," Pet. Br. 36, is unpersuasive. Petitioners rely upon cases limited to (1) the unique deference federal courts owe to state tax laws, *see Nat'l Private Truck Council, Inc. v. Okla. Tax Comm'n*, 515 U.S. 582, 586–87 (1995); (2) pending state criminal proceedings, *see Younger v. Harris*, 401 U.S. 37, 41 (1971); and (3) standards governing procedural due process claims, *see*, *e.g.*, *O'Neill v. Baker*, 210 F.3d 41, 50 (1st Cir. 2000).

imposes affirmative obligations that may not have a counterpart in state tort law. This Court has made clear, for example, that prisons must "ensure that inmates receive adequate food, clothing, shelter, and medical care." *Farmer*, 511 U.S. at 832.[15]

Additionally, some "conditions of confinement may establish an Eighth Amendment violation 'in combination' when each would not do so alone . . . [as] when they have a mutually enforcing effect that produces the deprivation of a single, identifiable human need such as food, warmth, or exercise." *Wilson v. Seiter*, 501 U.S. 294, 304 (1991). And, at least with respect to excessive force claims, this Court has refused to dismiss complaints "based on the supposedly *de minimis* nature of [the prisoner's] injuries." *Wilkins v. Gaddy*, 130 S. Ct. 1175, 1180 (2010).

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[15] To be sure, some states housing private federal prisons impose general duties of reasonable care and inmate medical care on prisons. *See*, *e.g.*, *Giraldo*, 85 Cal. Rptr. 3d at 385–87; FLA. STAT. ANN. § 944.105 (West 2011); *State ex rel. Jackson v. Phelps*, 672 So. 2d 665, 667 (La. 1996); *Multiple Claimants v. N.C. Dep't of Health & Human Servs.*, 626 S.E.2d 666, 668 (N.C. Ct. App. 2006); *Williams v. Syed*, 782 A.2d 1090, 1093–94 (Pa. Commw. Ct. 2001); *Shea v. City of Spokane*, 562 P.2d 264, 267–68 (Wash. Ct. App. 1977), *aff'd*, 578 P.2d 42 (Wash. 1978). The abstract availability of a duty, however, does not ensure an effective or readily identifiable tort remedy. *See* Restatement (Second) of Torts § 314A(4); *supra* pp. 22–24 (describing dearth of relevant decisional law in some states).

These Eighth Amendment principles may well be relevant to Pollard's allegations of continued mistreatment. Yet, neither Petitioners nor the United States explain the applicability of basic negligence and medical malpractice standards to these kinds of Eighth Amendment violations, while they simultaneously insist that Pollard's Eighth Amendment claim must be dismissed because of the alleged applicability of state tort remedies. *See* Resp. Br. 31–32, 39 & n.11 (detailing lack of Eighth Amendment overlap with state tort law, and explaining Petitioners' attempt to force Pollard to "prov[e] a negative").

2. The United States broadly contends that "[t]he gravamen of [Pollard's] complaint is medical malpractice." U.S. Br. 11. Yet a federal court would need to disentangle various state procedural requirements that could render state relief unavailable in practice. Most significantly, medical malpractice claims face state pre-filing requirements of varying levels of strictness and degree. In light of the specialized standard of care involved, many states require claimants "to file with the complaint an affidavit of an expert, competent to testify, which . . . shall set forth specifically at least one negligent act or omission claimed to exist and the factual basis for each such claim," GA. CODE ANN. § 9-11-9.1(a) (West 2011), or some variation thereof.[16] While

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[16] *See* FLA. STAT. ANN. §§ 766.104, 766.203 (West 2011); MISS. CODE ANN. § 11-1-58 (West 2011); N.C. GEN. STAT. § 1A-1, Rule 9(j) (2011); N.Y. C.P.L.R. § 3012-a (McKinney 2011); Ohio Civ. (continued…)

many states apply the certificate of merit requirement to claims of *pro se* (including inmate) litigants,[17] several states do not.[18] A federal court

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R. 10(D)(2) (LexisNexis 2011). *See also* COLO. REV. STAT. ANN. § 13-20-602(1)(a) (West 2011) (requiring certificate of review "within sixty days after the service of the complaint"); Pa. R. Civ. P. 1042.3 (West 2011) (requiring certificate of merit "within sixty days after the filing of the complaint"); TEX. CIV. PRAC. & REM. CODE ANN. § 74.351(a), (b) (West 2011) (requiring expert report(s) "not later than the 120th day after the date the original petition was filed"). Florida requires the claimant's counsel to certify that prior to filing he or she has made "a reasonable investigation . . . to determine that there are grounds for a good faith belief that there has been negligence." FLA. STAT. ANN. § 766.104. Florida claimants must also "notify each prospective defendant by certified mail . . . of intent to initiate litigation for medical negligence." *Id.* § 766.106 (effective Oct. 1, 2011). Compliance with the Florida provisions is "a condition precedent to maintaining an action for malpractice" and therefore must be satisfied within the statute of limitations period. *Kukral v. Mekras*, 679 So. 2d 278, 283 (Fla. 1996) (citation and quotation omitted).

[17] *See*, *e.g.*, *Cestnik v. Fed. Bureau of Prisons*, 84 F. App'x 51 (10th Cir. 2003) (applying Colorado law to dismiss *pro se* inmate's claim); *Whipple v. Warren Corr. Inst.*, No. 09AP-253, 2009 WL 2940240, at *3 (Ohio Ct. App. Sept. 10, 2009) (applying to *pro se* inmate); *McCool v. Dep't of Corrs.*, 984 A.2d 565, 571 & n.9 (Pa. Commw. Ct. 2009) (applying to *pro se* inmate); *Jefferson v. Univ. of Tex. Med. Branch Hosp. at Galveston*, No. 01-09-00062-CV, 2010 WL 987727, at *4 (Tex. App. Mar. 18, 2010) ("Indigent inmates are held to the same statutory requirements in health care liability claims as other citizens."). *See also James v. Goryl*, 462 So. 3d 1225, 1226 (Fla. Dist. Ct. App. 2011) (dismissing claim for failure to fulfill Florida pre-suit investigation requirement).

reviewing a federal inmate's *Bivens* claim will have to consider the proper application of these requirements in a variety of circumstances.[19] At the same time, the court must assess their practical effect on indigent prisoners who may be unable to engage a qualifying expert—either for a certificate of merit or at trial—while in custody,[20] and who may therefore be unable to vindicate their constitutional rights even through the indirect means provided by state tort law.

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[18] *See*, *e.g.*, MISS. CODE ANN. § 11-1-58(6) (West 2011); N.Y. C.P.L.R. § 3012-a(f) (McKinney 2011).

[19] For example, a federal court in North Carolina has held that private prisons are "health care providers" subject to the certificate of merit requirement, without citation to state decisional law on point. *See Hines v. GEO Group, Inc.*, No. 5:08-ct-3056-D, at 8–9 (E.D.N.C. Sept. 30, 2009); *see also Mathis*, No. 2:08-ct-21-D, at 33.

[20] For example, in Louisiana, the plaintiff has the burden of proving "the degree of care ordinarily exercised by physicians . . . in the state of Louisiana and actively practicing in a similar community or locale and under similar circumstances." LA. REV. STAT. ANN. § 9:2794(A)(1) (2011). Because a prisoner will generally need an expert to establish this special standard of care, the need for knowledge of "similar circumstances" suggests a prisoner would need to find an expert from among local prison physicians, a potentially significant impediment to finding an expert outside the prison in which the claimant is incarcerated (even with a Louisiana prisoner's right to subpoena an expert, *see id.* § 9:2794(B) (contemplating payment of a "fee" to the subpoenaed expert)).

Beyond these procedural barriers, substantive defenses may preclude federal prisoner claims in Pollard's situation. In Mississippi, for example, courts may consider the quality of the facilities available to a particular physician in assessing the extent of the duty of care in a medical malpractice claim. *See Hall v. Hilbun*, 466 So. 2d 856, 872 (Miss. 1985) (superseded by statute on other grounds). Because GEO employees refused to provide Pollard with a prescribed splint due to insufficient facilities and staff, *see* Joint Appendix 32–33, a medical malpractice claim by a federal prisoner in Mississippi may well be precluded under these circumstances. *Compare Harris v. Thigpen*, 941 F.2d 1495, 1509 (11th Cir. 1991) (holding that lack of resources "will not excuse the failure of correctional systems to maintain a certain minimum level of medical service necessary to avoid the imposition of cruel and unusual punishment").

Similarly, to the extent Pollard's claims regarding forced submission to a "black box" restraint and jumpsuit, *see* Resp. Br. 2, raise causes of action for battery or assault, *see*, *e.g.*, 18 PA. CONS. STAT. ANN. § 2701 (West 2011) (defining assault); *Caudle v. Betts*, 512 So. 2d 389, 391 (La. 1987) (defining battery), a federal court addressing those claims would need to consider, *inter alia*, whether consent offers a defense, *see Bivens*, 403 U.S. at 394 (noting consent defense), and whether a prisoner can voluntarily give consent. *See*, *e.g.*, *Munoz v. City of Union*, 16 Cal. Rptr. 3d 521, 545 (Cal. Ct. App. 2004) (recognizing police officers "need not be treated the same" as private citizens with respect to use of force);

Scott v. Gallagher, 209 S.W.3d 262, 267 (Tex. Ct. App. 2006) (recognizing correctional officers' "privilege to use force").

3. Finally, Petitioners' suggestion that consideration of state remedies beyond California is inappropriate, *see* Pet. Br. 23, 31–32, misses the mark. Reviewing state legal issues affecting Pollard's allegations in other relevant states illustrates the *methodological* shortcomings of the case-by-case regime Petitioners seek. In resolving the question whether damages are available to remedy Pollard's constitutional injury, such practical concerns are within the "policy considerations [this Court] may take into account," a class "at least as broad as the range . . . a legislature would consider with respect to an express statutory authorization. . . ." *Bivens*, 403 U.S. at 407 (Harlan, J., concurring in the judgment). *Cf. Bush*, 462 U.S. at 378 ("In the absence of . . . a congressional directive, the federal courts must make the kind of remedial determination that is appropriate for a common-law tribunal. . . ."); *Wilkie*, 551 U.S. at 550.

These methodological problems also illustrate why reliance on state tort law undermines the fundamental federal interests in deterrence and uniformity underlying *Bivens*. Those interests provide a convincing reason to retain a federal prisoner's right to seek damages under the Eighth Amendment against individual employees of private federal prison contractors.

a. "[D]eterrence of individual officers who commit unconstitutional acts" is the "core premise" of

Bivens liability. *Malesko*, 534 U.S. at 71. Yet the reality of private prison management increases the need for individual deterrence due to inadequate government oversight and public transparency. *See supra* pp. 8–10. Moreover, the availability of *respondeat superior* under state tort law,[21] as a practical matter, undermines individual deterrence "[f]or if a corporate defendant is available for suit, claimants will focus their collection efforts on it, and not the individual directly responsible for the alleged injury." *Malesko*, 534 U.S. at 71.[22]

b. Furthermore, relegating federal prisoners' constitutional claims to a welter of possible but often speculative state tort analogues creates in effect different constitutional regimes in each state housing a private federal prison. Prisoners will enjoy different remedies and prison employees will shoulder different obligations, simply based on the state of incarceration. *See supra*. In addition to this

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[21] *See*, *e.g.*, *Lisa M. v. Henry Mayo Newhall Mem'l Hosp.*, 907 P.2d 358, 360 (Cal. 1995); *Colo. Dep't of Corr. v. Nieto*, 993 P.2d 493, 500–05 (Colo. 2000); *Weinstock v. Groth*, 629 So. 2d 835, 838 (Fla. 1993); *Dozier v. Clayton Cnty. Hosp. Auth.*, 424 S.E.2d 632, 634–36 (Ga. Ct. App. 1992); *Bleiler v. Bodnar*, 479 N.E.2d 230, 232–33 (N.Y. 1985).

[22] Notably, Mississippi's exclusive administrative system for prisoner claims, *see supra* pp. 22–23, may foreclose any state-law damage remedy to prisoners and thus further undermine individual deterrence. *See Clay*, 19 So. 3d at 744–46 (upholding administrative decision denying damages because MTCA precludes state tort claims).

interstate variation, because BOP employs both privately-operated and government-operated institutions in some states,[23] a prisoner's rights under a case-by-case inquiry also depend on whether BOP sends the federal prisoner to a privately or publicly operated facility in that particular state.

Where the agent, the underlying authority and the injured rights are federal, however, this Court has long concluded that a uniform remedy is appropriate. *See Carlson*, 446 U.S. at 24; *id*. at 28 n.1 (Powell, J., concurring in the judgment). "Certainly, there is very little to be gained from the standpoint of federalism by preserving different rules of liability for federal officers dependent on the State where the injury occurs." *Bivens*, 403 U.S. at 409 (Harlan, J., concurring in the judgment).[24] Instead, remitting federal prisoners to the varying remedies of state law allows the federal government to evade its Eighth Amendment obligations and federal prisoners' corresponding rights simply by "[c]ontracting out prison medical care." *West*, 487 U.S. at 56.

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[23] *See*, *e.g.*, Federal Bureau of Prisons, Maps of Facilities, Northeast Region, http://www.bop.gov/locations/maps/NER.jsp (showing intrastate variation in Pennsylvania and Ohio) (last visited Sept. 16, 2011).

[24] The United States' dismissal of the importance of uniformity, *see* U.S. Br. 26, rests on the question-begging (and erroneous) assumption that *Bivens* is available only where no state remedies exist. *See supra* 13–20.

Conclusion

The judgment of the court of appeals should be affirmed.

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