No. 07-16112

In the United States Court of Appeals for the Ninth Circuit

Richard Lee Pollard,

Plaintiff and Appellant,

vs.

The GEO Group,

Defendants and Appellees.

BRIEF OF DRI AS *AMICUS CURIAE* IN SUPPORT OF THE GEO GROUP'S PETITION FOR PANEL REHEARING OR REHEARING *EN BANC*

Appeal from the Unites States District Court
for the Eastern District of California
The Honorable Oliver W. Wanger
No. CV-01-06078 OWW (WMW)

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CORPORATE DISCLOSURE STATEMENT

DRI has no parent corporation and no publicly held corporation owns 10% or more of its stock.

DATED: July 22, 2010.

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I

INTRODUCTION AND INTEREST OF *AMICUS CURIAE*

DRI is an international organization that includes more than 22,000 attorneys involved in the defense of civil litigation. DRI is committed to enhancing the skills, effectiveness, and professionalism of defense attorneys. Because of this commitment, DRI has long been a voice in the ongoing effort to make the civil justice system more fair, efficient, and—where national issues are involved—consistent. To promote these objectives, DRI participates as *amicus curiae* in cases that raise issues of import to its members, their clients, and to the judicial system.

A divided panel here has authorized a private, so-called *Bivens* cause of action for damages against private employees for alleged constitutional violations. DRI is deeply concerned about this ruling for several reasons.[1]

First, because the creation of private causes of action is better suited to the legislative process, the Supreme Court for the last 30 years has refused to extend *Bivens* actions beyond three limited circumstances—none of

[1] The parties have agreed to allow DRI to appear as *amicus curiae* and file this brief in support of the petition for panel rehearing or rehearing *en banc*. DRI thus submits this brief without first seeking leave of the Court. *See* Ninth Cir. L.R. 29-2(a) ("[A]ny other amicus curiae may file a brief only by leave of court or if the brief states that all parties have consented to its filing.").

which are present here. Two sister Circuit decisions have followed the Supreme Court's lead and refused to create a *Bivens* action against private prison employees. Thus, the majority's decision creates an unprecedented split in the circuits.

Moreover, the majority's stated purpose of attempting to achieve uniformity in the law will not be achieved by adopting a *Bivens* claim. The ruling merely imposes a second liability regime on top of the fifty-state tort laws. As a result, the panel's ruling does not promote uniformity, but instead opens the door to liability under a whole new set of rules. Nothing in the Supreme Court's *Bivens* jurisprudence warrants that extraordinary result.

DRI is particularly troubled that the panel's decision implies a private right of action in the absence of any evidence of Congressional intent to permit one. Whereas *Bivens* previously had applied to the actions of federal officials, the majority's decision exposes private employees to a new form of personal liability. The ramifications of extending *Bivens* into this uncharted territory involve precisely the type of complex and competing policy and practical issues that are best suited for the legislative process. Yet, although Congress has adopted multiple statutes governing private prisons, none of those statutes state or imply any intent to create avenues for relief in addition to those the statutes provide. In the absence of any such expressed Congressional intent, courts must exercise judicial restraint before creating the kind of private cause of action the majority has created here.

In addition to creating a direct split with the law of other circuits that have addressed the identical question, the majority's decision likely will resonate beyond the private prison setting. Because the majority's reasoning does not provide measurable limits on *Bivens*, other private employees who work for companies that contract with the government face an inchoate risk of *personal* liability. In light of the breadth of the federal government's contracting operations, the number of employees that fall into this category is immense. Because the Supreme Court consistently has refused to extend *Bivens* for the last three decades, panel rehearing or rehearing *en banc* should be granted before this Court opens the Pandora's Box of extending *Bivens* to private employees.

II

THE MAJORITY'S OPINION IMPROVIDENTLY EXPANDS THE SUPREME COURT'S NARROW *BIVENS* JURISPRUDENCE

Creating "a private right of action is one better left to legislative judgment in the great majority of cases." *Sosa v. Alvarez-Machain*, 542 U.S. 692, 727 (2004). As a stark exception to that rule, the Supreme Court held in *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388, 389 (1971), that federal agents who, under the color of federal authority, commit Fourth Amendment violations could be liable for civil damages. Since then, however, the Court has extended *Bivens* only in two situations.

In *Davis v. Passman*, a Congressman had fired an employee

based on her gender and she alleged claims under the Fifth Amendment's equal protection clause. 442 U.S. 228, 245 (1979). The Supreme Court authorized a *Bivens* action in that case because the plaintiff had no available remedies under federal anti-discrimination statutes or state law. *Id.* As the Court put it, the plaintiff had "no other alternative forms of judicial relief. For Davis, as for Bivens, it is 'damages or nothing.'" *Id.* (citing *Bivens*).

The following year, the Supreme Court held in *Carlson v. Green* that a prisoner could bring a *Bivens* action against federal prison officials under the Eighth Amendment. 446 U.S. 14, 20, 25 (1980). The Court reasoned that although the Federal Tort Claims Act provided the plaintiff with an alternative remedy against the United States, it provided no remedy against the individual who committed the constitutional violation and thus was a lesser deterrent against constitutional violations than a *Bivens* action. *Id.* at 21. Additionally, the Court's ruling reflected Congress' express intent that the FTCA provide remedies parallel to *Bivens* and its progeny. *Id.* at 20 (citing S. Rep. No. 93-588, p. 3 (1973)).

In the thirty years since *Carlson*, the Court uniformly has refused to expand *Bivens* beyond the above trilogy. *See, e.g., Wilkie v. Robins*, 551 U.S. 537, 537 (2007) (private landowner had no *Bivens* action under Fourth or Fifth Amendments against Bureau of Land Management); *Correctional Svcs. Corp. v. Malesko*, 534 U.S. 61, 74 (2001) (no *Bivens* action against private prison operator); *FDIC v. Meyer*, 510 U.S. 471, 473 (1994) (no *Bivens* action against federal agency); *Schweiker v. Chilicky*, 487 U.S. 412,

414 (1988) (no *Bivens* action against federal Social Security officials); *United States v. Stanley*, 483 U.S. 669, 683 (1987) (civilian had no *Bivens* action against military officers and civilians); *Chappell v. Wallace*, 462 U.S. 296, 305 (1983) (enlisted military personnel had no *Bivens* action against superior officer); *Bush v. Lucas*, 462 U.S. 367, 378 (1983) (employee had no *Bivens* action against federal officials for First Amendment violations).

The Court's most recent pronouncements reaffirm its narrow view of *Bivens* actions:

> In 30 years of *Bivens* jurisprudence, we have extended its holding only twice, to provide an otherwise nonexistent cause of action against *individual officers* alleged to have acted unconstitutionally, or to provide a cause of action for a plaintiff who lacked *any alternative remedy* for harms caused by an individual officer's conduct. Where such circumstances are not present, we have consistently rejected invitations to extend *Bivens*
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> . . . .

Malesko, 534 U.S. at 70 (emph. orig.); *see also Wilkie*, 551 U.S. at 550 ("[I]n most instances we have found a *Bivens* remedy unjustified[.]").

Less than a year ago, a different Ninth Circuit panel heeded the Supreme Court's caution against extending *Bivens* and refused to permit a *Bivens* action against the United States Forest Service and its officers. *W.*

Radio Svcs. Co. v. United States Forest Svc., 578 F.3d 1116, 1117 (9th Cir. 2009). This was because the Administrative Procedures Act provided an adequate (albeit imperfect) remedy for the plaintiff and there was no need to provide another avenue for relief. *Id.* at 1123. In reaching this conclusion, the panel recognized that in every case since *Carlson*, the Supreme Court "consistently refused to extend *Bivens* liability to any new context or new category of defendants" [*id.* at 1119] and that given the Supreme Court's narrow vision of *Bivens*, the panel was compelled to "stay its *Bivens* hand" [*id.* at 1123].

It is difficult to reconcile the majority's decision here with the foregoing line of authority. For the last three decades, the Supreme Court has reaffirmed its intent to limit *Bivens* actions to a discrete set of circumstances—chiefly, where a plaintiff "lack[s] any alternative remedy for harms caused by an individual officer's conduct." *Malesko*, 534 U.S. at 70. At least one other Ninth Circuit panel recently has embraced these limitations. *See W. Radio Svcs.*, 578 F.3d at 1117. And, these limitations are precisely why two sister Circuits have refused to extend *Bivens* actions against private prison employees. *See Alba v. Montford*, 517 F.3d 1249, 1254 (11th Cir. 2008) ("[T]he existence of a state remedy precludes recovery under *Bivens*."); *Holly v. Scott*, 434 F.3d 287, 296 (4th Cir. 2006) ("[A]n inmate in a privately run federal correctional facility does not require a *Bivens* cause of action where state law provides him with an effective remedy.").

It likewise is difficult to reconcile the majority's decision with its

own stated intent of providing uniform liability for these kinds of claims. (Slip Op. at 8167-68) The panel has dropped a *Bivens*-based liability scheme right on top of state tort law regimes. In the process, the panel also has created a circuit split regarding whether a *Bivens* action may be maintained in these circumstances at all. The end is result is that some private prison employees may face tort liability under a patchwork of different state laws, as well as *Bivens* claims. Others may face only *Bivens* claims. Still others may face patchwork tort liability and no *Bivens* claims at all. That is hardly a uniform picture of liability.

The majority's decision is a leap from current precedent and fractures what has been a consistent body of law. DRI respectfully urges panel rehearing or rehearing *en banc* for this reason alone.

III

THE DECISION EXPANDS STATUTORY RELIEF WITHOUT CONGRESSIONAL AUTHORIZATION

No plaintiff holds an automatic right to a private cause of action for alleged constitutional violations. *Wilkie*, 551 U.S. at 550 (recognizing no "automatic entitlement" to damages for constitutional violations). The limits exist for good reason. *Bivens* actions are "implied without any express congressional authority whatsoever." *Holly*, 434 F.3d at 290. The Supreme Court "has therefore on multiple occasions declined to extend *Bivens* because "Congress is in a better position to decide whether or not the public interest

would be served by the creation of 'new substantive legal liability.'" *Id.* at 291 (quoting *Schweiker*, 487 U.S. at 426-27).

These limits on inferring private causes of action in the absence of any statutory framework mirror the rule that courts must tread cautiously when finding an implied cause of action in a statute that does not expressly provide for one. "Where a federal statute does not explicitly create a private right of action, a plaintiff can maintain a suit only if 'Congress intended to provide the plaintiff with a[n implied] private right of action.'" *In re Digimarc Corp. Derivative Litig.*, 549 F.3d 1223, 1230 (9th Cir. 2008). "In the absence of clear evidence of congressional intent, [courts] may not usurp the legislative power by unilaterally creating a cause of action." *Id.* at 1231. In this vein, the Supreme Court has crafted a four-part test to determine whether a particular statute contains an implied cause of action.[2] *See Cort v.*

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[2] The four factors are:

> First, is the plaintiff one of the class for whose especial benefit the statute was enacted-that is, does the statute create a federal right in favor of the plaintiff? Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one? Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff? And finally, is the cause of action one traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a

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Ash, 422 U.S. 66, 78 (1975). The most important factor addresses "whether there is congressional intent to create a private right of action." *Williams v. United Airlines*, 500 F.3d 1019, 1023 (9th Cir. 2007).

The majority's decision here disregards these principles. As the Fourth Circuit recognized in *Holly*, "there are a variety of statutes authorizing the housing of federal inmates in privately operated facilities." *Holly*, 434 F.3d at 290 (citing 18 U.S.C. § 4013(b)). "Congress passed these statutes in the belief that private management would in some circumstances have comparative advantages in terms of cost, efficiency, and quality of service." *Id.* However, nothing in these statutes states or implies Congressional intent to create a right of action against private prison employees for constitutional violations. *Cf. Carlson*, 446 U.S. at 20 (*Bivens* action permissible where FTCA explicitly stated that the statute ran parallel to *Bivens* actions). On the contrary, to create a *Bivens* action in addition to existing statutory "avenues of inmate relief might well frustrate a clearly expressed congressional policy." *Holly*, 434. F.3d at 290.

The reasons for exercising judicial restraint in this setting need little amplification:

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> cause of action based solely on federal law? [*Cort*, 422 U.S. at 78.]

> Congress possesses a variety of structural advantages that render it better suited for remedial determinations in cases such as this. Unconstrained by the factual circumstances in a particular case or controversy, Congress has a greater ability to evaluate the broader ramifications of a remedial scheme by holding hearings and soliciting the views of all interested parties. [citation] And by debating policies and passing statutes rather than deciding individual cases, Congress has increased latitude to implement potential safeguards — e.g., procedural protections or limits on liability — that may not be at issue in a particular dispute.

Id.

These concerns are of particular note here because the majority's authorization of a *Bivens* action against private employees constitutes a profound leap of uncertain implications. Statutes that impose personal liability on persons who commit civil rights violations under the color of federal authority were developed with the understanding that public employees assume certain official duties when accepting public employment, and thus are entitled to various privileges, immunities, and indemnity rights by virtue of their public employment. In the few instances in which it has authorized *Bivens* actions, the Supreme Court undoubtedly assumed that similar duties, privileges, immunities, and indemnity rights would apply to the federal officials subject to suit because those officials likewise were public employees. But the majority's extension of *Bivens* to private employees in

this case takes a doctrine developed exclusively to apply to public officials and injects it into an arena—private employment—where the rules are different. It is impossible to foresee all of the implications of extending *Bivens* into this new arena, and that is ample reason for the courts to exercise restraint and leave the issue for the legislative process, where those ramifications can be more fully explored.

Moreover, in extending *Bivens* to private employees who work for companies that contract with the government, the majority has blurred the *Bivens* line in a way that creates uncertainty for other private employees as well. Private employees at any of the numerous companies that contract with the government now face an inchoate risk that the majority's decision may be used as the template for actions against such other private employees. Before this Circuit unleashes that potentially potent source of litigation, panel rehearing or rehearing *en banc* is warranted.

In short, not only does the majority's decision contradict thirty years of unbroken Supreme Court authority, it also runs afoul of the carefully crafted limitations on creating implied causes of action from federal statutes. The relevant federal statutory scheme simply does not leave room for the kind of *Bivens* action the majority created. DRI respectfully urges panel rehearing or rehearing *en banc* for this reason, too.

IV
CONCLUSION

The majority erroneously has expanded Supreme Court *Bivens* jurisprudence and the federal statutory scheme. Before this decision becomes the law of this Circuit, DRI respectfully urges panel rehearing or rehearing *en banc*.

DATED: July 22, 2010.

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CERTIFICATION OF COMPLIANCE
PURSUANT TO NINTH CIRCUIT RULE 32-4
FOR CASE NO. 07-16112

I certify that:

The foregoing Amici Curiae Brief of Defense Research Institute in Support of The GEO Corp., Inc. complies with the length limits set fort at Ninth Circuit Rule 32-4. The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6).

DATED: July 22, 2010.

/s/ David J. de Jesus
David J. de Jesus