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 OF DRI AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS CURIAE*[1]

Amicus curiae DRI is an international organization that includes more than 23,000 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 seeks to address issues germane to defense attorneys, to promote the role of the defense lawyer, to improve the civil justice system, and to preserve the civil jury. 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. This is one such case.

[1] Pursuant to Supreme Court Rule 37.6, *amicus curiae* states that no counsel for any party authored this brief in whole or in part and that no entity or person, aside from *amicus curiae*, its members, and its counsel, made any monetary contribution towards the preparation and submission of this brief. Pursuant to Supreme Court Rule 37.3(a), *amicus curiae* certifies that counsel of record for both petitioners and respondent have consented to this filing in correspondence on file with the Clerk's office.

SUMMARY OF ARGUMENT

In the proceedings below, a divided Ninth Circuit panel authorized *Bivens* damages against private prison employees for alleged constitutional violations. In so doing, the majority broke away from the decisions of two other Circuits, both of which declined to recognize *Bivens* damages under largely the same circumstances, as well as controlling Supreme Court authority. Although the majority's decision created a seismic rift in current *Bivens* jurisprudence, the Ninth Circuit nevertheless denied rehearing *en banc*, with several judges dissenting in a sharply worded opinion.

Petitioners' merits brief does an exemplary job of explaining why the majority's decision warrants reversal and DRI will not repeat those reasons here. Instead, DRI submits this *amicus curiae* brief to amplify the legal and practical consequences of the majority's decision, which favor reversal as well.

Because creation of private causes of action is better suited to the legislative process, this Court for the last thirty years has refused to extend *Bivens* beyond three limited circumstances – none of which are present in this case. But the Ninth Circuit majority's decision takes *Bivens* into uncharted territory by exposing private employees to an unprecedented form of personal liability. The ramifications of extending *Bivens* in this manner involve precisely the type of complex and competing policy and factual debate that is best suited for the legislative process. Yet, Congress

never has stated or implied any intent to create avenues for relief in these circumstances. By creating a cause of action in the absence of any indication from Congress that one should exist, the majority has substituted its own judgment for Congress's and thus overstepped its bounds.

Moreover, the Ninth Circuit majority set no measurable limits on the availability of *Bivens* damages in this setting, which means all other employees who work for private government contractors – and DRI's membership represents many of these companies – face an inchoate risk of personal liability. At the same time, the size and scope of the government's contracting operations has grown and will continue to grow sharply.

The upshot is twofold. First, the Ninth Circuit majority's opinion will result in an onslaught of lawsuits seeking *Bivens* damages. That is a hard pill to swallow in this era of soaring budget deficits, reduced public and private resources, and congested court dockets. It also may have a chilling effect on the initiative taken by private contractor employees on behalf of the government. In contrast, Congress is perfectly suited to fashion a more tailored remedy, if it chooses, that balances these factors. Second, private government contractors will be forced to increase their costs to account for defending, indemnifying, or insuring their employees against potential *Bivens* damages. Privatization thus will become more expensive for the government and, ultimately, for the taxpayer. Some might be willing to accept those

increased costs in light of the policies supporting the availability of a *Bivens* remedy against private contractor employees. Others may not be so willing. Regardless of where one falls along this spectrum, the point is that Congress – *not* the court system – is responsible for making this call.

The Ninth Circuit majority's decision should be reversed for these reasons as well.

ARGUMENT

A. The Ninth Circuit Majority Overstepped Established Separation Of Powers Principles

Creating "a private right of action is . . . better left to legislative judgment in the great majority of cases." *Sosa v. Alvarez-Machain*, 542 U.S. 692, 727 (2004). This rule – rooted in fundamental separation of powers principles – has fueled the Court's *Bivens* jurisprudence for the past thirty years.

For instance, the Court in *Chappell v. Wallace* confronted whether enlisted military personnel could recover *Bivens* damages against individual officers for racial discrimination. 462 U.S. 296, 297-98 (1983). The Court unanimously refused to expand *Bivens* in this manner, explaining in part that "Congress, the constitutionally authorized source of authority over the military system of justice, has not provided a damage remedy for claims by military personnel that constitutional rights have been violated by superior

officers." *Id.* at 304. Thus, to the Court, "[a]ny action to provide judicial response by way of such a remedy would be plainly inconsistent with Congress' authority in this field." *Id.*

The Court reached a similar conclusion for similar reasons in *Bush v. Lucas*, 462 U.S. 367 (1983). There, an aerospace engineer sued the director of a federal space flight center for damages under *Bivens*, alleging he was demoted in retaliation for exercising First Amendment rights. *Id.* at 368-69. The Court recognized that the comprehensive statutory and regulatory scheme governing civil employee grievances was not as effective as a damages remedy in compensating the plaintiff for the harm suffered. *Id.* at 372. The Court also recognized that Congress had not expressly authorized or precluded the damages remedy the plaintiff had sought. *Id.* at 372-73. But to the Court, the adequacy or availability of legislative remedies was beside the point. Rather, the availability of *Bivens* damages turned on "a thorough understanding of the existing regulatory structure and the respective costs and benefits that would result from the addition of another remedy for violations of employees' First Amendment rights." *Id.* at 388. As a practical matter, that analysis was for Congress and *not* the courts:

> In all events, Congress is in a far better position than a court to evaluate the impact of a new species of litigation between federal employees on the efficiency of the civil service.

> Not only has Congress developed considerable familiarity with balancing governmental efficiency and the rights of employees, but it also may inform itself through fact-finding procedures such as hearings that are not available to courts. [*Id.* at 389.]

The Court repeated this refrain in *Schweicker v. Chilicky*, 487 U.S. 412 (1988). In that case, claimants who had their social security benefits terminated sued several agency officials for damages under *Bivens*. *Id.* at 417-18. Although the Court sympathized that the wrongful termination of disability benefits "must surely have gone beyond what anyone of normal sensibilities would wish to see imposed on innocent disabled citizens[,]" it nevertheless declined to authorize *Bivens* damages as a result. *Id.* at 428-29. The Court explained that Congress "has addressed the problems created by state agencies' wrongful termination of disability benefits" and deference to Congressional authority was warranted regardless of "[w]hether or not [the Court] believe[d] that its response was the best response." *Id.* at 429. As the Court put it, "Congress has discharged that responsibility to the extent that it affects the case before us, and we see no legal basis that would allow us to revise its decision." *Id.*

The same reasoning held sway in *FDIC v. Meyer*, where a discharged employee sued a federal agency for damages and alleged wrongful discharge in violation of due process. 510 U.S. 471, 473-74 (1994). The Court declined to permit *Bivens* damages against

federal agencies, in large part because of the "potentially enormous financial burden for the Federal Government" that such remedies would inflict. *Id.* at 486. The Court rejected the employee's argument that funds otherwise spent on indemnifying federal employees for *Bivens* damages could be shifted to cover agency liability, because "decisions involving federal fiscal policy are not ours to make." *Id*. (citations and internal quotations omitted). Rather, the Court would "leave it to Congress to weigh the implications of such a significant expansion of Government liability." *Id*.

And more recently, the separation of powers doctrine surfaced in *Wilkie v. Robbins*, where the Court declined to permit *Bivens* damages to a landowner who sued Bureau of Land Management employees. 551 U.S. 537, 560-62 (2007). The Court reiterated that "any damages remedy for actions by Government employees who push too hard for the Government's benefit may come better, if at all, through legislation." *Id.* at 562. Because Congress had more appropriate fact-finding procedures, it was "in a far better position" to evaluate the impact of new remedies "against those who act on the public's behalf." *Id.* Further, the Court observed, "Congress can tailor any remedy to the problem perceived, thus lessening the risk of raising a tide of suits threatening legitimate initiative on the part of the Government's employees." *Id.*

These separation of powers principles are the engine of the *Bivens* analysis, and they drove the Fourth Circuit to reject *Bivens* damages against

private prison employees. *Holly v. Scott*, 434 F.3d 287, 290 (4th Cir. 2006). In this regard, the Fourth Circuit explained:

> 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.*]

The Fourth Circuit further explained that "neither the absence nor incompleteness of such a scheme represents an invitation for a court to step in to correct what it may perceive as an injustice toward an individual litigant." *Holly*, 434 F.3d at 290. To do so, according to the Fourth Circuit, "might well frustrate a clearly expressed congressional policy." *Id.*

It is impossible to reconcile this reasoning and these cases with the Ninth Circuit majority's decision here. In authorizing *Bivens* damages, the Ninth Circuit majority disregarded the absence of any express or implied intent by Congress to provide a remedy for constitutional violations by private prison employees. It failed to recognize not only the myriad

real-world consequences of authorizing *Bivens* damages in these circumstances, but also that Congress is best suited to evaluate whether these consequences are acceptable. Instead, the majority simply substituted its own judgment. This kind of judicial legislating is forbidden, particularly in the *Bivens* context. *See* discussion *supra* at 4-8 and cases cited; *see also U.S. v. Nat'l Treasury Employees Union*, 513 U.S. 454, 479 (1995) ("Our obligation to avoid judicial legislation also persuades us to reject the Government's second suggestion – that we modify the remedy by crafting a nexus requirement for the honoraria ban."); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran*, 456 U.S. 353, 394 n.100 (1982) ("It is just as much 'judicial legislation' for a court to withdraw a remedy which Congress expected to be continued as to improvise one that Congress never had in mind." (citation omitted)).

There is no practical reason to depart from these longstanding prohibitions against judicial legislation, either. The unifying thread among the only three decisions in which the Court has permitted the unlegislated *Bivens* remedy was that the plaintiff had *no* remedy at all to redress his or her grievance. *See Carlson v. Green*, 446 U.S. 14, 20, 25 (1980) (prisoner could sue public prison official; although Federal Tort Claims Act provided plaintiff with an alternative remedy against the United States, it provided no remedy against the individual who committed the constitutional violation); *Davis v. Passman*, 442 U.S. 228, 245 (1979) (employee of Congressman could

allege claims under the Fifth Amendment's equal protection clause for gender discrimination; plaintiff had no remedies under federal anti-discrimination statutes or state law); *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388, 389 (1971) (federal agents who, under the color of federal authority, commit Fourth Amendment violations could be liable for civil damages; plaintiff could not sue federal officer under Section 1983).

But here, as petitioners explain, the individual tort regimes of the fifty states already provide prisoners with means of redressing their grievances through damages. In light of these available alternative remedial schemes, fashioning a *Bivens* remedy through judicial legislation is an unnecessary and unwarranted exercise.

The Ninth Circuit majority's attempt at judicial legislation is particularly troubling because it results in a leap of uncertain implications. Statutes that impose personal liability on persons who commit constitutional violations under the color of law 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 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 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 and underlying policies are different. *See* Pet.'s Brf. at 37-41.

Despite these differences, however, the Ninth Circuit majority simply pounded the square peg of *Bivens* into the round hole of private employee liability. But as the Court has said time and again, this kind of pounding should be left to the legislative process, where the consequences can be more fully explored. The Ninth Circuit majority's decision should be reversed for this reason as well.

B. The Ninth Circuit Majority's Decision Potentially Exposes Any Employee Of A Federal Contractor To Actions Seeking To Impose Personal *Bivens* Liability

The number of private employees performing what might be considered typical "government functions" – and who are thus potentially subject to *Bivens* damages under the Ninth Circuit majority's reasoning – has only increased over the past twenty years. *See* Laura A. Dickinson, *Public Law Values In A Privatized World*, 31 Yale J. Intl. L. 383, 383-84 (2006). The growth in privatization has touched not only the prison management sector, but also sectors such as health care, education, welfare and public benefit administration, foreign affairs, and security services. *See id*.; see also Richard Frankel, *Regulating*

Privatized Government Through § 1983, 76 U. Chi. L. Rev. 1449, 1451-52 (2009); Laura A. Dickinson, *Government For Hire: Privatizing Foreign Affairs And The Problem Of Accountability Under International Law*, 47 Wm. & Mary L. Rev. 135, 137-38 (2005). In the welfare sector alone, "[a]s many as forty states have privatized aspects of their welfare and public benefits administration and delivery programs and have spent billions on contracts with private welfare providers." Richard Frankel, *The Failure Of Analogy In Conceptualizing Private Entity Liability Under Section 1983*, 78 U.M.K.C. L. Rev. 967, 968 n.9 (2010) (citations omitted). Plus, "[w]ith billions of dollars in federal aid from the recently enacted economic stimulus package going to state and local governments, privatization opportunities should only increase." Frankel, *Regulating Privatized Government* at 1452.

Once the Ninth Circuit majority's decision is viewed against the backdrop of increasing privatization, two conclusions emerge. First, the decision would unleash countless *Bivens*-related actions on our courts. The majority has blurred the *Bivens* line in a way that creates uncertainty not just for private prison employees, but for all employees at any of the numerous private companies that contract with the government. All of these employees now face an inchoate risk that the decision may spur actions against them *personally*. At the same time, the federal judiciary has been inundated with approximately

19,000 *Bivens*-related actions in the last decade alone.[2] On its face, this number is astonishing considering that the Court has recognized *Bivens* actions in only three limited circumstances. However, because the Ninth Circuit majority's decision would potentially expose employees of all private government contractors to *Bivens* damages – when privatization of government functions is trending rapidly upwards – the number of actions seeking *Bivens* damages in the next decade could skyrocket. This consequence seems ill-advised for any time, but particularly so during this era of swollen budget deficits, dwindling public and private resources, and crowded court dockets.

In contrast, Congress can legislate appropriately tailored remedies for constitutional violations by employees of federal contractors, after giving careful consideration to the relevant data and policies through its fact-finding process. By taking this surgical approach, if it so chooses, Congress could more effectively balance (1) "the risk of raising a tide of

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[2] A recent study of five federal judicial districts found that *Bivens* claims comprised 1.2% of total federal question filings in 2009. *See* Alexander A. Reinert, *Measuring the Success Of Bivens Litigation And Its Consequences For The Individual Liability Model*, 62 Stan. L. Rev. 809, 835 (2010). For the year ending September 2009, there were 136,041 federal question filings nationwide. *See* Admin. Office of the U.S. Courts, *Judicial Business Of The United States Courts* 152 (2009) (Table C-2). From 1999 to 2009, there were 1,578,305 federal question filings. *Id*. (series 1999-2009, Table C-2). Thus, extrapolating the study's findings nationwide, our courts faced 1,632 *Bivens* filings in 2009 and 18,940 for the decade.

suits" that otherwise would engulf our courts, (2) the chilling effect such lawsuits would have on legitimate work-related initiative taken by federal contractor employees on behalf of the government and taxpayers, and (3) the relevant social and economic costs. *See Wilkie*, 551 U.S. at 562. Conversely, the Ninth Circuit majority's blunt-force approval of *Bivens* damages does little to strike this balance or further these salutary goals.

Second, increased privatization reinforces the importance of separation of powers principles here. If allowed to stand, the Ninth Circuit majority's decision will mean that private government contractors – across the board – will face increased costs associated with defending, indemnifying, and/or insuring their employees against potential *Bivens* damages. That, in turn, means increased privatization costs for the federal government and, ultimately, the taxpayer.

Of course, reasonable minds may differ regarding the extent to which rising privatization costs are acceptable in light of the policies supporting the availability of *Bivens* damages against government contractor employees. Reasonable minds also may differ as to whether and how the federal government could or should increase, continue, reduce, or eliminate privatization as a result of these rising costs or for any other reason. But, as this Court consistently has held, this debate is for the legislature and not the courts. *Meyer,* 510 U.S. at 486 ("decisions involving federal fiscal policy are not ours to make"); *Lucas*, 462 U.S. at 388 (Congress was better suited to determine whether *Bivens* remedy should be permitted based on

"the existing regulatory structure and the respective costs and benefits that would result from the addition of another remedy for violations of employees' First Amendment rights").

CONCLUSION

The Ninth Circuit majority's decision disregards fundamental separation of powers principles that have been the bedrock of this Court's *Bivens* jurisprudence for the last three decades. It holds dramatic consequences not only for the court system, but also for the cost of privatized services for which the government wishes to contract and fund. Whether those consequences are an acceptable price for remedying constitutional violations by private contractor employees is a decision best left for Congress and not the courts. The decision should be reversed for these reasons, too.

Dated: July 29, 2011.

Respectfully submitted,

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