

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 MARGARET MINNECI, ET AL., :

4 Petitioners :

5 v. : No. 10-1104

6 RICHARD LEE POLLARD, ET AL. :

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8 Washington, D.C.

9 Tuesday, November 1, 2011

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11 The above-entitled matter came on for oral
12 argument before the Supreme Court of the United States
13 at 11:03 a.m.

14 APPEARANCES:

15 JONATHAN S. FRANKLIN, ESQ., Washington, D.C.; for
16 Petitioners.

17 PRATIK A. SHAH, ESQ., Assistant to the Solicitor
18 General, Department of Justice, Washington, D.C.; for
19 the United States, as amicus curiae, supporting
20 Petitioners.

21 JOHN F. PREIS, ESQ., Richmond, Virginia; for
22 Respondents.

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1 P R O C E E D I N G S

2 (11:03 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear argument
4 next in Case 10-1104, Minneci v. Pollard.

5 Mr. Franklin.

6 ORAL ARGUMENT OF JONATHAN S. FRANKLIN

7 ON BEHALF OF THE PETITIONERS

8 MR. FRANKLIN: Mr. Chief Justice, and may it
9 please the Court:

10 Over the last three decades, the Court has
11 made clear that Bivens remedies are disfavored and will
12 only be authorized in narrow situations where there are
13 no adequate alternative means for redressing a
14 plaintiff's injuries and no other factor counsels
15 hesitation. Respondent has satisfied neither criterion.
16 He has not shown that he lacked a traditional tort
17 remedy for the injuries of which he complains, and
18 Petitioners' status as employees of a private
19 contractor, rather than the government, at a minimum
20 gives rise to factors counseling hesitation.

21 JUSTICE GINSBURG: We go back to what you
22 said initially; that is, if there's no alternative
23 remedy, Bivens fills the gap.

24 Suppose we had a case just like Carlson,
25 only the State law allows survivor actions. In Carlson,

1 I thought the rule emerging from Carlson is that prison
2 personnel in Federal prisons are subject to Bivens
3 liability, and we don't look in each case to see whether
4 there could have been a State tort.

5 MR. FRANKLIN: Well, the rule --

6 JUSTICE GINSBURG: Is that so?

7 MR. FRANKLIN: In -- the rule -- the Carlson
8 rule still applies, Your Honor, because that involved
9 actual Federal Government employees. And since Carlson,
10 Congress has pre-empted all tort claims against them.
11 So, whether Indiana law now -- which has been amended,
12 but whether Indiana law provides a remedy or doesn't is
13 immaterial, because Congress has pre-empted all tort
14 claims against actual employees of the government.

15 But these -- this case involves -- the
16 Petitioners are not employees of the government. They
17 are employees of a private contractor. And under the
18 Westfall Act, what Congress did was pre-empt all claims
19 against actual government officials while preserving
20 Bivens remedies.

21 But it did the opposite for employees of
22 private contractors. For them, there are adequate
23 alternative tort remedies. And it's virtually
24 undisputed in this case that there was such a remedy
25 here. And they are deliberately -- Congress expressly

1 excluded them from the category of employees against
2 whom it preserved Bivens remedies.

3 So, yes, in the Carlson situation, there is
4 still a Bivens claim because Congress has expressly
5 preserved that. But here we have a different
6 congressional policy that we are, in effect, asking the
7 Court to embrace here.

8 What Congress did in the Westfall Act is it
9 said what in effect we are asking this Court to
10 recognize and what we believe the Court has recognized
11 in cases like Malesko, and that is, where there are
12 adequate alternative tort -- excuse me -- where there
13 are no adequate --

14 JUSTICE KAGAN: Well, suppose, Mr. Franklin,
15 that there weren't. I mean, I think you have a good
16 case about California law here. But suppose we were in
17 a State where the law was very different from what
18 California's law appears to be, where there was no
19 special duty recognized for jailors and, indeed, where
20 the basic negligence tort was unavailable to inmates
21 because there was a finding of -- a holding of the State
22 supreme court that there was no duty on the part of
23 jailors to inmates. What would happen then?

24 MR. FRANKLIN: In that hypothetical instance
25 -- and we do think it's hypothetical -- we think that

1 would be a different case, and the Court could in that
2 circumstance say there are no adequate alternative
3 remedies. But the reason we think it's entirely
4 hypothetical is there has nothing been shown in the
5 briefing of this Court, and as the Ninth Circuit
6 dissenters made clear, that any State doesn't afford the
7 bedrock cause of negligence. And that cause, as the
8 Court held in *Malesko* quite expressly, is not only
9 adequate to redress any actions that would violate the
10 Eighth Amendment, but it's actually superior.

11 JUSTICE KAGAN: But is your answer --

12 JUSTICE GINSBURG: Mr. Franklin, there were
13 some references to Mississippi law that seem to be
14 inconsistent with the notion that all States would
15 provide an adequate remedy.

16 MR. FRANKLIN: I believe that reference, if
17 I'm correct, comes from an amicus brief, and that law
18 does not -- would not on its face prohibit an action
19 against a private managed prison holding Federal
20 prisoners. These laws -- and the Mississippi law is an
21 example; there's a New York law. Those apply to State
22 government officials. They're similar to the Westfall
23 Act, but on a State level. They immunize State
24 government officials from claims, but those claims would
25 be subject to 1983 actions. Here we have a privately

1 managed prison holding Federal prisoners.

2 JUSTICE GINSBURG: Is it -- and it might
3 hold State prisoners as well.

4 MR. FRANKLIN: I'm sorry.

5 JUSTICE GINSBURG: It might hold -- some
6 private facilities will take State prisoners as well as
7 Federal prisoners.

8 MR. FRANKLIN: There has been some
9 representation, that we don't disagree with, that there
10 might be some facilities that have State prisoners
11 and --

12 JUSTICE GINSBURG: And if they do have State
13 prisoners, the State prisoner would have recourse to,
14 not Bivens, but 1983.

15 MR. FRANKLIN: Most likely, Your Honor, yes,
16 if it's under --

17 JUSTICE GINSBURG: So, you have two
18 prisoners, identical mistreatment, and one gets a
19 Federal remedy and the other doesn't.

20 MR. FRANKLIN: The other actually gets what
21 the Court in Malesko described as a superior remedy.
22 The prisoner -- the Federal prisoner has, in that sense,
23 a remedy that's beyond the Eighth Amendment, that
24 goes --

25 JUSTICE KENNEDY: Can you tell me why it is

1 that you care in this suit? If you're telling us, oh,
2 don't worry, there's going to be liability and probably
3 perhaps even more extensive liability than in Bivens,
4 what difference does it make? Bivens doesn't give you
5 attorneys' fees. Now, it's true that the Federal
6 question may get you into Federal court.

7 MR. FRANKLIN: Well, I have several answers
8 to that. First, Your Honor, my clients care very deeply
9 in this case because, as the district court held, if
10 there's no Bivens remedy, this case is dismissed. This
11 case was dismissed on the lack of a Bivens remedy --

12 JUSTICE KENNEDY: Just because of the
13 statute of limitations?

14 MR. FRANKLIN: It's way too late now, 10
15 years after the incident, for them to now assert State
16 law claims. So, we do care. And, in fact, that was the
17 same situation that was in Malesko. In Malesko, you had
18 a virtually identical situation, where the --

19 JUSTICE KENNEDY: If we're looking -- if
20 we're looking forward beyond this case --

21 MR. FRANKLIN: Right.

22 JUSTICE KENNEDY: -- and there's no statute
23 of limitation problem, does it really make any
24 difference that he have this second cause of action
25 that's just --

1 MR. FRANKLIN: It makes a --

2 JUSTICE KENNEDY: -- (a) duplicative or (b)
3 arguably narrow, more narrow?

4 MR. FRANKLIN: Well, two points. I'd like
5 to first say that the Court in Malesko adopted the
6 principle that if there is an alternative remedy, that's
7 not a reason for piling on a Federal remedy; that's a
8 reason not to. But in a practical sense --

9 JUSTICE KENNEDY: But why? What --

10 MR. FRANKLIN: I understand --

11 JUSTICE KENNEDY: What difference does it
12 make?

13 MR. FRANKLIN: Let me give you --

14 JUSTICE KENNEDY: Who cares?

15 MR. FRANKLIN: -- a practical difference that
16 does matter for individuals in my clients' situation.
17 If a State tort claim is brought, there is respondeat
18 superior liability under a State court claim. And in
19 many if not most cases, the plaintiff will choose,
20 voluntarily choose, to sue the corporation and leave the
21 individual out of the case.

22 Now, the deterrent effect that Bivens is
23 concerned with still exists because the case can be
24 brought against the individual. However, if there's a
25 Bivens claim, that has to be brought against the

1 individual; it cannot be brought under respondeat
2 superior. So, if there is a Bivens claim, as a
3 practical matter you're going to see more and more
4 individuals being dragged through these cases without,
5 by the way, the recognized qualified immunity defense --

6 JUSTICE KAGAN: Mr. Franklin --

7 MR. FRANKLIN: Yes.

8 JUSTICE KAGAN: -- do you have a theory
9 about why these are brought as Bivens claims? It seems
10 mysterious to me. If you bring it as a negligence
11 claim, you get a lower standard of liability, negligence
12 versus deliberate indifference.

13 MR. FRANKLIN: Right.

14 JUSTICE KAGAN: You get vicarious liability.
15 So, I've been trying to puzzle out, why aren't these
16 brought as negligence claims rather than as Bivens
17 claims?

18 MR. FRANKLIN: I can't answer that question.
19 What I can say -- well, I can try to answer it, but I
20 can say that if the Court rules as we ask it to in this
21 case, we think that there will not be Bivens claims,
22 that people will bring them under the tort law.

23 It could be that there are forms in some of
24 these prisons that are given out that have section 1983
25 written on them, that Bivens is there. It could be that

1 prisoners are not quite aware that the Westfall Act
2 doesn't cover private contractors.

3 But we would think that if the Court rules
4 as we -- as we suggest it should, that there -- that the
5 prisoners who are relatively savvy, even on a pro se
6 basis, about their rights would then understand that
7 they have these rights and will exercise them and that
8 the Bivens remedy would not have to be employed
9 willy-nilly as it was in this case. But I --

10 JUSTICE KAGAN: To go back to what I asked
11 before when I hypothesized a State that didn't have
12 adequate remedies, and you said -- well, just to pin
13 down what you said, if there were no adequate remedies,
14 there would be a Bivens action available?

15 MR. FRANKLIN: There might be, Your Honor.
16 There still is the factors counseling hesitation, which
17 is the second step of the Bivens analysis. And I
18 wouldn't want to give up that there might be factors in
19 those cases counseling hesitation. But certainly our
20 position is not that in a circumstance, if that arose --
21 and, again, we think it's hypothetical because there's
22 no indication either that it has arisen or that it will
23 arise -- but if it were to, our position wouldn't rule
24 out the possibility of a Bivens claim in those
25 circumstances.

1 JUSTICE ALITO: To get back to the question
2 that Justice Ginsburg asked, is it -- is that consistent
3 with Carlson? Because the Court in Carlson didn't say
4 that there's a Bivens action because in this particular
5 State there isn't a viable State action, but it might be
6 different in another State where there is a viable State
7 claim. It did it on basically a categorical ground.

8 MR. FRANKLIN: Well, it -- as the case came
9 to the Court in Carlson, it was undisputed that there
10 was no adequate State law remedy, the lower courts had
11 held. So, that was sort of the basic premise that the
12 Court then went ahead and decided the case on.

13 Since Carlson, we've had cases, notably
14 Malesko, also Wilkie, which have made clear that the
15 adequacy of remedies, including State law remedies, is a
16 factor in the Bivens analysis and is in fact the
17 dispositive factor in Malesko, and as in this case as
18 well.

19 We don't think that there is really any
20 serious dispute in this case that there were adequate
21 alternative remedies. Again, the deliberate
22 indifference standard is much, much more hard -- much
23 harder to meet than a traditional negligence standard.
24 California law is, further, more protective of
25 prisoners.

1 As we understand the Respondents' position,
2 the Court -- they would urge the Court, notwithstanding
3 the availability of alternative remedies in this case
4 and as far as we can tell in every foreseeable case, to
5 create what they refer to as a categorical cause of
6 action, one that would apply regardless of whether the
7 remedies are adequate or not.

8 And in our view, that would turn the Bivens
9 jurisprudence effectively on its head. The Court has
10 said Bivens is a narrow -- I think Justice Ginsburg at
11 least paraphrased our argument as saying it's a
12 gap-filling mechanism, which is what our argument is,
13 that would apply only in those circumstances when it's
14 necessary. Other than that, the Court has consistently
15 deferred the matter to Congress. And that's where we
16 think it ought to lie in this case.

17 JUSTICE ALITO: Does a prisoner in a State
18 that requires the filing of a certificate of merit in a
19 medical malpractice case have a -- have an
20 alternative -- a viable alternative State claim --

21 MR. FRANKLIN: Yes, again, that's --

22 JUSTICE ALITO: -- for malpractice?

23 MR. FRANKLIN: We say yes. That issue is
24 not in this case. The Eleventh Circuit in Alba
25 expressly addressed that issue under that State's law,

1 and said, yes, that is adequate. It's simply a
2 procedural requirement that applies to all plaintiffs.

3 And I would add, by the way, that --

4 JUSTICE KAGAN: Well, how is a prisoner
5 supposed to satisfy that requirement?

6 MR. FRANKLIN: The same way any other
7 plaintiff is supposed to -- but what I was going to add
8 is that when you're alleging an Eighth Amendment
9 violation, you're talking about a claim that's by its
10 nature very severe. You're talking about deliberate
11 indifference to serious medical needs that constitutes
12 the unnecessary and wanton infliction of pain.

13 In those circumstances, we would suggest
14 that it might even be easier to procure that kind of a
15 declaration, but that issue was decided in Alba. So,
16 that -- that was decided. If it comes up in another
17 case, it can be decided there. We don't think that that
18 would render the -- if it's -- if it's an adequate
19 remedy for everyone else in that State and most States
20 that have these things, then it's an adequate remedy for
21 Bivens.

22 JUSTICE GINSBURG: Did any of those courts
23 address the problem of how the pro se prisoner is going
24 to get an affidavit?

25 MR. FRANKLIN: Well, Alba -- the Alba court

1 is the only court that I'm aware of on the circuit level
2 that considered it, and I believe they did address that
3 issue and simply said that it is -- puts them on an
4 equal footing with other plaintiffs and that that would
5 be an adequate remedy.

6 CHIEF JUSTICE ROBERTS: I don't -- I don't
7 understand your answer to Justice Kagan. If I heard you
8 right, you were saying, well, they're going to be able
9 to get a certificate because it's an Eighth Amendment
10 violation, and everything is very severe. But the point
11 is they're going to bring a negligence action, not an
12 Eighth Amendment action.

13 MR. FRANKLIN: Right.

14 CHIEF JUSTICE ROBERTS: So --

15 MR. FRANKLIN: I'm talking about if the
16 conduct -- we're comparing here between conduct that
17 would violate the Eighth Amendment and conduct that's
18 negligent. And I'm saying if the conduct rises to the
19 level of an Eighth Amendment violation, which is what
20 we're talking about in terms of the adequacy, then it
21 would be easier, one would presume.

22 JUSTICE KAGAN: But I think the question,
23 Mr. Franklin, is really just a practical one --

24 MR. FRANKLIN: Sure.

25 JUSTICE KAGAN: -- which is how a pro se

1 person sitting in prison is supposed to have access to a
2 doctor who will provide this certificate. And, I mean,
3 maybe there would be means, but I guess I'm asking
4 whether there would be.

5 MR. FRANKLIN: I would think there would,
6 but I don't want to say -- I don't want to argue someone
7 else's case on that. I mean, I do think that that was
8 an issue that was resolved, at least in the Eleventh
9 Circuit in Alba. It's not an issue that applies in this
10 case because there's no such certificate here in
11 California.

12 I do think it would be adequate. I mean,
13 Bush v. Lucas, which is a Federal remedies case, said
14 there were what they called "meaningful remedies." As
15 long as there's a meaningful remedy, it's sufficient.
16 And if Congress wants to think that there's a problem,
17 for example, if Congress thinks there's a problem with
18 these certificates of merit in the case of privately run
19 facilities, then it certainly can establish a cause of
20 action as it did in section 1983.

21 But the Bivens doctrine is really a narrow,
22 as we say, gap-filling doctrine. And the Court has
23 always used it very sparingly. And the reason the Court
24 has done that is because there is no authority for it in
25 the language of any constitutional or statutory

1 provision.

2 So, the Court has always treaded very
3 cautiously in this area. And I wouldn't rule out in
4 that circumstance that somebody could make that
5 argument. I -- I just don't think in this case there
6 has been any real dispute that there's an adequate
7 remedy. There wasn't in Malesko, and that was
8 sufficient in that case. And we think it is sufficient
9 in this case as well for the Court to in effect stay its
10 Bivens hand and turn the matter if necessary over to
11 Congress.

12 JUSTICE ALITO: Under the PLRA -- under the
13 PLRA, a district judge has to perform a screening
14 function for -- for these complaints, and is that -- is
15 it going to be an impossible burden for district judges
16 to ascertain the contours of State prison law, in that
17 there apparently is not a lot of prisoner litigation
18 under State law? Most prisoners seem to choose 1983.

19 MR. FRANKLIN: Well, in this case, the
20 magistrate judge did it. It wasn't an impossible burden
21 for him. This was done on a prescreening. The court
22 ruled as exactly as we are asking the Court to rule now.
23 The court did it. The Court in Malesko did it. It
24 wasn't difficult. If it is deemed that there's an issue
25 there, there are various procedural mechanisms that

1 could be employed. There could be a dismissal without
2 prejudice, a dismissal with repleading, certification to
3 a State court. You could stay the Bivens action.

4 There's various things that district courts
5 can do. But in this case, it wasn't an issue. It
6 wasn't an issue in Malesko. We don't think it's going
7 to be an issue in other cases either.

8 If I may reserve the remainder of my time.

9 CHIEF JUSTICE ROBERTS: Thank you, counsel.
10 Mr. Shah.

11 ORAL ARGUMENT OF PRATIK A. SHAH

12 ON BEHALF OF THE UNITED STATES, AS AMICUS CURIAE,

13 SUPPORTING THE PETITIONERS

14 MR. SHAH: Mr. Chief Justice, and may it
15 please the Court:

16 The last three decades of this Court's
17 precedents make clear that judicial extension of a
18 Bivens remedy is not the default presumption. It is
19 permissible only where there is no adequate alternative
20 remedy and there are no other factors counseling
21 hesitation. Neither criterion is satisfied here.

22 Respondent is suing employees of a private
23 prison corporation who, unlike their federally employed
24 counterparts, are subject to well-established theories
25 of tort liability but lack a recognized qualified

1 immunity defense. Under the circumstances present here,
2 which I submit reflect the heartland of cases alleging
3 Eighth Amendment violations for deliberate indifference
4 to serious medical needs, recognition of the Bivens
5 remedy is neither necessary nor appropriate.

6 JUSTICE GINSBURG: Mr. Shah, go back to what
7 you said about lacking -- these private -- these
8 employees of the private corporation you said lack
9 qualified immunity. But they do have -- courts have
10 allowed them to have a good faith defense. So, in
11 practice, how different is that, whether they have
12 qualified immunity or whether they have a good faith
13 defense?

14 MR. SHAH: A couple of responses, Your
15 Honor.

16 First, this Court has never recognized a
17 good faith defense. So, I wouldn't call it a recognized
18 defense. It is true that some lower courts have applied
19 a good faith defense. Reading those cases, it's not
20 entirely clear exactly what the content of that good
21 faith defense is. What is clear is that it's something
22 less than qualified immunity. It appears in most of the
23 cases that they're grafting on some sort of subjective
24 element, subjective intent element, on top of what you
25 must establish to get qualified immunity.

1 So, whatever it is, it's something lesser
2 than qualified immunity, and I think that in and of
3 itself creates an asymmetry. But I think the larger
4 point is, is that these prisoners have alternative
5 adequate remedies under State law because they're suing
6 a private employee rather than a government employee.

7 The government employee is subject to the
8 Westfall Act, and, therefore, all civil actions other
9 than Bivens are pre-empted. And so, I think that's the
10 fundamental difference. I think it further counsels
11 hesitation because of the lack of a recognized immunity
12 defense, whether that's qualified immunity or good
13 faith.

14 JUSTICE SOTOMAYOR: Could you address the
15 question posed earlier of what were to happen if there
16 was a State law that gave absolute immunity to these
17 private correctional officers, and that was the case
18 before us. This particular State, it's undisputed,
19 would not permit any kind of intentional or negligence
20 suit against these officers.

21 MR. SHAH: Sure. Your Honor, in that
22 hypothetical -- and of course, there is no suggestion in
23 this case that any State has such a rule -- but if a
24 State were to adopt that such rule, I think that would
25 be a case where there is no adequate alternative remedy,

1 because in your -- in your hypothetical, there is
2 absolute immunity. There wouldn't be a way for the
3 prisoner to redress -- seek redress for the gravamen of
4 his injuries. And I think in that case, we have a very
5 different situation, and a Bivens remedy may well be
6 justified. But --

7 JUSTICE SOTOMAYOR: Interesting, because
8 what you're proposing is a sort of State-by-State,
9 circuit-by-circuit, presumably, existence of a Bivens
10 claim or not. That's really the outcome of your
11 position.

12 MR. SHAH: Well, yes, Your Honor, except the
13 fact that there has been no suggestion that any State
14 has such a draconian rule or has ever passed one. We're
15 simply arguing for a rule that would limit Bivens to
16 when there is no adequate State law remedy. That's
17 clearly the case here. It's clearly going to be the
18 case in the vast majority of Eighth Amendment prisoners.
19 What this Court should not do is craft a default rule
20 allowing Bivens remedies against employees of private
21 prison corporations just to account for the hypothetical
22 possibility that there may be a case which may or may
23 not ever arise in which an adequate alternative is not.
24 That turns Bivens jurisprudence on its head.

25 JUSTICE SOTOMAYOR: Then I guess the

1 question is -- yes, when you talk about an overlap of
2 remedies, we have said that it doesn't need to be a
3 matching one-to-one remedy, but you do need some degree
4 of meaningful overlap, don't you?

5 MR. SHAH: I would agree with that, Your
6 Honor. I think -- I think --

7 JUSTICE SOTOMAYOR: So, how -- define how
8 much or how do we describe the adequacy of that overlap?

9 MR. SHAH: I think it would be difficult to
10 come up with a precise formulation. I think the
11 formulation that we use in our brief is that as long as
12 it redressed the gravamen of the prisoner's injuries.
13 So, I think as long as it provides some meaningful
14 relief for the injuries and in turn that would provide
15 some deterrence to the individual employees' actions --
16 I think as long as those two elements are present, I
17 think we would think that there is an adequate
18 alternative remedy.

19 Or, alternatively, if you wanted to use the
20 words -- the word that this Court used in Bivens, you
21 could approach it from the flip side and say there would
22 not be an adequate alternative remedy where the State
23 law is either inconsistent with or hostile to the
24 corresponding constitutional interest. We submit in
25 this case there's no question that there are remedies

1 available under California State law and, as far as we
2 know, the State law of every other State in this country
3 that would allow --

4 CHIEF JUSTICE ROBERTS: It is -- a Bivens
5 action is unusual in the first place, but it's also
6 unusual to say that you don't have a Federal cause of
7 action because of something a State gives you.

8 Do you have any other example of something
9 like that, where the availability of Federal relief
10 turns on the availability of alternative relief under
11 State law?

12 MR. SHAH: Your Honor, it may not be an
13 exact analogue, but I think Federal due process cases
14 often will look at if someone's claims of deprivation of
15 property, an unlawful deprivation of property, in
16 violation of process -- the Federal court may often look
17 at what are the available State law procedures to
18 provide redress for that claim before it would impose or
19 find a violation of Federal due process.

20 So, I think there are analogues where
21 Federal courts do look at the availability of State law
22 remedies and look at their adequacy before determining
23 whether a Federal law remedy is necessary. And this
24 Court has done that. And the Court did it in Malesko, I
25 think is the best example in the Bivens context of where

1 the Court looked at alternative State remedies and said
2 that, hey, look, the availability of these other
3 remedies counsel against the imposition of a Bivens
4 remedy.

5 JUSTICE KAGAN: What is the theory behind
6 that, Mr. Shah? I mean it's an obvious theory when
7 Congress has provided an alternative remedial system,
8 which is a separation of powers theory. But what's the
9 theory about looking to State law for these kinds of
10 alternative remedies?

11 MR. SHAH: Two responses, Your Honor. While
12 I agree the separation of powers problem is much more
13 heightened when Congress acts, I think there is still a
14 separation of powers issue even when Congress has not
15 acted. That is, the Court should be hesitant before --
16 before implying a judicial -- a cause of action for
17 damages under the Constitution, given that it's
18 typically been Congress's province to do so.

19 But, beyond that, the rationales -- there
20 have been two rationales that have been given by this
21 Court in its -- in its Bivens jurisprudence for implying
22 such a remedy. One is the need to provide some
23 meaningful relief. We submit when there is an
24 alternative State remedy, that rationale has been
25 satisfied.

1 The other rationale this Court has offered
2 is provide some deterrence to the actions of an
3 individual employee or officer. We also submit that
4 when there is a State tort damages remedy available,
5 that rationale too will be accomplished.

6 The three cases in which this Court has
7 recognized a Bivens remedy, Bivens itself, Davis, and
8 Carlson, those two factors were not present. There was
9 either no alternative remedy at all or, at least as in
10 Carlson, no alternative remedy against the individual
11 officer.

12 JUSTICE ALITO: What would you propose that
13 the Court say about the degree of adequate State remedy
14 that is necessary? Just -- what we have here in
15 California is enough and not go any further or --

16 MR. SHAH: I think the Court should start
17 with that. Certainly, here there hasn't been any
18 dispute that there would be -- any real serious dispute
19 that there would be an adequate alternative remedy. I
20 think the Court could also say that, as long as the
21 adequate alternative remedy addresses the gravamen of
22 the prisoner's injuries, that should be sufficient. And
23 I think it could give content to that by looking at the
24 two rationales this Court has offered for Bivens.

25 JUSTICE ALITO: Suppose that a State did for

1 claims against private prisons and private prison guards
2 what I understand New York has done with respect to
3 State-run prisons; in other words, that you eliminate
4 any claim against individual prison employees or guards
5 and give the prisoner just a tort claim against the
6 State. Would that be adequate?

7 MR. SHAH: I think that would be a tougher
8 case. And, of course, I assume in your hypothetical
9 that that's -- that that would also apply to Federal
10 prisoners and federally contracted prisons, and it's
11 difficult to figure out what the State's interests --

12 JUSTICE ALITO: Not a claim against the
13 State. I misspoke. A claim -- only a claim against the
14 company that runs the prison.

15 MR. SHAH: Your Honor, again I think that
16 would be a more difficult hypothetical because the
17 rationale about individual deterrence of the individual
18 officer may not be as strong in that hypothetical. But,
19 once again, no State has such a rule, and it's difficult
20 to imagine a State's incentive to adopt such a rule
21 because it's not coming out of the State's pockets.
22 These are federally contracted prisons, contracted by
23 BOP and run by private prison corporations.

24 JUSTICE GINSBURG: What about the character
25 of the claim? If it's a Bivens claim, it's a

1 constitutional claim. It's an Eighth Amendment claim.
2 And if you're looking to State remedies, that's an
3 ordinary tort remedy with no constitutional involvement.

4 MR. SHAH: Your Honor, it is true, the
5 labels are different and there's going to be different
6 meaning to those remedies. But from the prisoner's
7 standpoint, the rationale behind Bivens was to provide
8 some damages relief. From the prisoner's standpoint,
9 it's not going to matter, I would submit, whether that
10 -- those damages are procured under State law or under a
11 constitutionally implied action.

12 Thank you.

13 CHIEF JUSTICE ROBERTS: Thank you, counsel.

14 Mr. Preis.

15 ORAL ARGUMENT OF JOHN F. PREIS

16 ON BEHALF OF THE RESPONDENTS

17 MR. PREIS: Mr. Chief Justice, and may it
18 please the Court:

19 The question before the Court today is
20 whether a Federal prisoner's access to constitutional
21 remedies should turn on the mere happenstance of where
22 the prisoner is detained. The Petitioners' chief
23 argument is that privately held Federal prisoners should
24 not have an Eighth Amendment damages remedy because they
25 have remedies under State law. This argument suffers

1 from two flaws. First, it misconceives this Court's
2 Bivens jurisprudence; second, it misconceives the nature
3 of State remedies available to prisoners.

4 JUSTICE SOTOMAYOR: Why are State
5 remedies -- what of your clients' claims could not be
6 vindicated under State law? And why is a Bivens action
7 superior to a negligence action in California?

8 MR. PREIS: Your Honor, with regard to the
9 claims that can't be vindicated under State law, we
10 think it's likely that his medical malpractice claims,
11 the claims against the doctors, could be vindicated. We
12 don't think the law is clear in -- excuse me -- in
13 California that his other claims, the deprivation of
14 nutrition and hygiene, forced labor at some point before
15 he was -- his injuries were healed, that those would
16 necessarily be covered.

17 We admit there's a chance, as we did in our
18 brief, that it's possible the California Supreme Court
19 could say, well, there has been an intermediate
20 appellate court who has decided this. We take on
21 guidance that and believe these remedies would be
22 covered. But there's nothing here that could -- that
23 could assure this Court that that's the way it will work
24 out.

25 With regards to why Bivens are superior,

1 Bivens are superior when there's no State cause of
2 action. So, there will be some cases, as we concede,
3 where a State cause of action is available. The reason
4 Mr. Pollard brings a Federal cause of action in this
5 case is because it's not clear that State remedies are
6 certainly available.

7 And I think the certainty is an important
8 thing for this Court to remember. The issue before
9 Bivens itself was whether or not this Court should adopt
10 a system of State remedies. And the --

11 JUSTICE BREYER: The specific case where the
12 State remedy is not available is?

13 MR. PREIS: Your Honor, I'm not aware of any
14 particular case where a State --

15 JUSTICE BREYER: No, no, no, no. Your --

16 MR. PREIS: Oh, excuse me.

17 JUSTICE BREYER: Your allegation which you
18 believe states a valid claim under Bivens action but not
19 under State law is?

20 MR. PREIS: The claims that we say do not
21 have a State law --

22 JUSTICE BREYER: I don't understand
23 specifically what they are. I mean, it sounds to me
24 that if a person (a) deliberately starves somebody to
25 death, for example, or deliberately gives him something

1 which will make him sick when he eats it, that that
2 would at least be negligence and would arise under
3 ordinary State tort law. So, I'm curious to know what
4 your claim is that does not arise under ordinary State
5 tort law?

6 MR. PREIS: Your Honor, I think at the
7 starkest example, if it was the case that somebody
8 actually starved someone --

9 JUSTICE BREYER: No, give me -- don't answer
10 my -- forget my hypothetical. Tell me your specific
11 claim that does not arise under State tort law. That's
12 all I want to know. Which is the same question I
13 heard -- I just didn't hear the answer to.

14 MR. PREIS: Oh, excuse me, Your Honor.

15 JUSTICE BREYER: I heard the answer in
16 general.

17 MR. PREIS: Okay.

18 JUSTICE BREYER: I want to know specifically
19 what you say they did to your client that doesn't make
20 out a State tort claim.

21 MR. PREIS: He brings four claims that he
22 think alleges an Eighth Amendment violation. One is the
23 medical malpractice, which we concede is likely
24 available; the other three, we do not find sufficient
25 evidence in California law that there will certainly be

1 a remedy.

2 JUSTICE BREYER: I heard you say --

3 MR. PREIS: And those three are --

4 JUSTICE BREYER: -- that. I just want to
5 know what it is physically you say the defendant did to
6 your client, so that I can evaluate your statement that
7 California gives no tort remedy for that.

8 MR. PREIS: Your Honor --

9 JUSTICE BREYER: Sorry, I don't mean to
10 sound irritated, but I just have trouble getting my
11 question across.

12 MR. PREIS: Understood, Your Honor. Mr.
13 Pollard was deprived of adequate food and hygiene. A
14 second claim, he was --

15 JUSTICE BREYER: All right. They failed to
16 give him adequate food for what? So he could live, or
17 for what?

18 MR. PREIS: Well, yes, adequate nutrition.
19 I'm not saying to the point of death, but --

20 JUSTICE BREYER: They gave him -- and if a
21 person in California who has charge of -- of a ward or
22 someone fails adequately to nourish that ward, you're
23 saying California tort law gives no remedy?

24 MR. PREIS: I'm saying there's no evidence
25 that it does, Your Honor. I think it --

1 JUSTICE BREYER: I would call it like
2 negligence, you give a remedy. If it's not negligent,
3 it's deliberate? Or what?

4 MR. PREIS: Your Honor, I think I would
5 put -- I think the best way to approach that question is
6 to look at the shoes of an attorney. When if someone
7 comes in and says I was deprived of these benefits that
8 I was entitled to and I was suffered a harm, the
9 question would be for the lawyer as well, I'll go read
10 the case --

11 JUSTICE SOTOMAYOR: You can't --

12 JUSTICE SCALIA: The lawyer would say, I
13 can't find a starving case in California; so, you must
14 not have a cause of action.

15 Is that what the lawyer would say?

16 MR. PREIS: No, I think the lawyer would
17 say, I can't be certain. I haven't found a case --

18 JUSTICE BREYER: It seems odd to me because
19 the Eighth Amendment says cruel and unusual punishment.
20 So, you have to have a cruel treatment. And where a
21 person deliberately or negligently subjects someone else
22 to cruel treatment, my -- my law school recollection of
23 many years ago is that there ordinarily is a tort
24 action.

25 So, that's what I'd like you -- I'm

1 suspicious of your statement that there isn't.

2 MR. PREIS: Yes, Your Honor.

3 JUSTICE BREYER: Therefore, I ask for some
4 elaboration of that.

5 JUSTICE SCALIA: What do you have besides
6 starving? What -- what else?

7 (Laughter.)

8 MR. PREIS: The other claims were, after he
9 suffered his injuries, he was put back on his work
10 detail before his injuries were healed. He was also,
11 immediately after being injured, forced to sort of
12 endure excessive security measures, forced to wear
13 particular handcuffs that pushed his arms in a -- in a
14 way that was -- caused extraordinary pain and was
15 unnecessary.

16 JUSTICE KAGAN: Can I ask you the same
17 question that I asked Mr. Franklin? Because it just
18 doesn't make any sense to me. The gravamen of this
19 claim is a medical malpractice claim. Why aren't your
20 State law remedies better? You have vicarious
21 liability, and all you have to prove is negligence. Why
22 wasn't this brought as a State law claim?

23 MR. PREIS: Your Honor, I think there's two
24 parts to that, two answers I would give. First, Mr.
25 Pollard was put in a Federal prison by the Federal

1 Government. He often has access -- actually only has
2 access to Federal law books. When he sees himself
3 injured, he thinks this is presumably a Federal case.
4 So, I think there is a certain ethic or, at least,
5 practice, is how that works.

6 Now, why wouldn't medical malpractice work
7 here?

8 JUSTICE KAGAN: Well, that would be false
9 consciousness that we can correct, right?

10 MR. PREIS: Excuse me, Your Honor, I missed
11 the beginning.

12 JUSTICE KAGAN: I mean, if the -- if the
13 true appropriate remedy, and the better remedy from your
14 client's point of view, is a State law action, we should
15 just say bring a State law action.

16 MR. PREIS: Well, we think that prisoners
17 should have access to the State law action, and when
18 there's cause of action available, it might indeed be a
19 better remedy. But I think in terms of whether or not
20 medical malpractice works here, it will work in terms of
21 deterring the medical professionals, but we have
22 multiple defendants in this case, not all of them -- of
23 which would be culpable under -- or liable under a
24 medical malpractice regime. How do we handle the other
25 prisoners -- excuse me -- the other defendants?

1 So, I think you're focused in terms of the
2 remedies available, and I would concede, of course,
3 that's important to the -- to the prisoner. But, of
4 course, the Court is concerned with deterrence in these
5 cases.

6 So, I want to return to Justice Breyer's
7 question, if I might. The gravamen of this case is that
8 in ordinary cases, most of the time -- and the Court is
9 required in this case to figure how big is that "most of
10 the time"? Is it 99 percent of time? Is it 80 percent
11 of the time? And that's what we simply don't have
12 evidence on in this case. And I want to point --

13 JUSTICE BREYER: When I went to law school,
14 which was many years ago, instead of talking about,
15 like, starvation cases or medical malpractice, they
16 talked about a general thing called negligence.

17 MR. PREIS: Yes.

18 JUSTICE BREYER: And it seemed to apply to
19 doctors, and then it was medical malpractice, and it
20 applied to others, and -- and is there something here
21 that wouldn't fall in that general kind of rubric or the
22 general terms of California tort law?

23 MR. PREIS: Your Honor, I guess your --

24 JUSTICE BREYER: And I know, I don't want
25 you just to repeat yourself.

1 MR. PREIS: No --

2 JUSTICE BREYER: So, I guess I have the best
3 answer I have.

4 MR. PREIS: Your Honor, I'll say two things
5 to that. First, I think what you're asking me to do,
6 and which in a sense the Court will be required to do in
7 this case, is predict what State supreme courts will do
8 on a regular basis. And I would suggest -- suggest
9 that's sort of an extraordinary measure to take in a
10 case where you have Federal prisoners, Federal
11 constitutional rights, and Federal actors.

12 JUSTICE SOTOMAYOR: -- asking us to do is
13 limit our inquiry to California?

14 MR. PREIS: Excuse me.

15 JUSTICE SOTOMAYOR: Limit it to California.
16 What -- what --

17 MR. PREIS: I don't --

18 JUSTICE SOTOMAYOR: They're saying don't
19 look at what other courts will do; just look at the
20 State you're in, the place you're going to make your
21 claim, and figure out whether your claims are covered or
22 not covered essentially in those -- in that State.

23 MR. PREIS: They're suggesting this Court
24 look only at California.

25 JUSTICE SOTOMAYOR: Right.

1 MR. PREIS: We don't think that is
2 appropriate. This Court's view has always been that a
3 Bivens action exists or does not exist with regards to a
4 entire category of defendants, or the context.

5 JUSTICE SCALIA: Well, so, if there is one
6 State that would not have an adequate remedy for any --
7 any single bad thing that could happen in prison,
8 there's a Bivens action for everybody for everything?
9 Is that what you're saying?

10 MR. PREIS: Yes, Your Honor, we are.

11 JUSTICE SCALIA: Wow.

12 MR. PREIS: I think if the Court were to
13 write an opinion in that case --

14 JUSTICE SCALIA: I certainly wouldn't want
15 to hold that.

16 (Laughter.)

17 MR. PREIS: I'm not surprised that you
18 wouldn't want to hold that, Your Honor.

19 (Laughter.)

20 JUSTICE BREYER: I would find that rather
21 surprising, too, actually.

22 (Laughter.)

23 MR. PREIS: Well --

24 JUSTICE BREYER: Because I -- I think what
25 they're asking to do is fine. On their theory, you have

1 no problem because you go back and show to the court
2 that there is no remedy in California for shackling a
3 person, I guess, deliberately, with knowledge that that
4 would cause severe pain, and if you can show that, then
5 you're going to have your Bivens action in respect to
6 that.

7 MR. PREIS: Well --

8 JUSTICE BREYER: That -- what they're saying
9 is that you're not going to be able to show that; so, it
10 doesn't worry them.

11 MR. PREIS: Your Honor, I think that the --
12 the view that there's an ordinary duty of care, a duty
13 to be reasonable, is quite a bit more complex than the
14 Petitioners would make it out to be. Let me offer an
15 example. In this case, in 2007 the district court
16 dismissed Mr. Pollard's complaint. The district court
17 said you have State remedies.

18 Well, what was the proof for that? What was
19 the State law remedies that existed? The only thing the
20 district court cited in a footnote was section 1714 of
21 California's civil code.

22 JUSTICE SCALIA: Who says that the burden is
23 on the other side? Why isn't the burden on you, if you
24 want to bring a Bivens action, on you, to show that
25 there is not an adequate State remedy?

1 MR. PREIS: Your Honor --

2 JUSTICE SCALIA: You're the plaintiff here.
3 You're trying to bring the Federal cause of action. Our
4 law is clear; if there's an adequate remedy we don't
5 invent one. Why isn't it your burden to show that there
6 is not an adequate State remedy?

7 MR. PREIS: Your Honor, two answers to that.
8 First of all, this Court's most recent case where it
9 dealt with whether or not a burden should exist was
10 Wilkie, and there, the majority of the Court said, when
11 we look at alternative remedies, we try to figure out,
12 quote, "whether they amount to a" -- "amount to a
13 convincing reason for the judicial branch to refrain
14 from providing a new and free-standing remedy."
15 Inasmuch as there has been burden discussion in this
16 Court's case law, it would seem to fall -- fall on the
17 other side.

18 Now, I think there's an important point here
19 when we think of burdens. This case is so close to
20 Carlson that really the burden should be on them to take
21 it out of Carlson. I want to address Carlson for a
22 second, if I may.

23 CHIEF JUSTICE ROBERTS: Well, before you do,
24 on page 5 of your brief you say, in the private prison
25 setting, quote, "'a Bivens claim against the offending

1 individual offending officer,'" end quote, is an
2 appropriate remedy. And the quote is from Malesko.

3 MR. PREIS: Yes.

4 CHIEF JUSTICE ROBERTS: What we said in
5 Malesko, where you quote, is that if a Federal prisoner
6 in a BOP facility alleges a constitutional deprivation,
7 he may bring a Bivens claim against the offending
8 individual officer. Now, your friend describes that as
9 a distortion of what we said in Malesko, and I just
10 wanted to give you a chance to reply to what I think is
11 a fairly serious assertion.

12 MR. PREIS: Yes, Your Honor, and I would
13 seriously disagree with the suggestion it's a
14 distortion.

15 CHIEF JUSTICE ROBERTS: Well, just to be
16 clear, you quote that language -- you say "in the
17 private prison setting"; and the language specifically
18 says in a BOP facility.

19 MR. PREIS: Your Honor, what the Court was
20 speaking of in that section of its opinion was that the
21 remedies between a BOP facility and individuals in a
22 private facility should be similar, that it made no
23 sense to give extra remedies to people in a private
24 facility. And so, the Court, Justice -- Chief Justice
25 Rehnquist at the time, was making a comparison saying

1 there should be a general symmetry. And all we are
2 pointing out in that quote is that inasmuch as symmetry
3 matters, well, the Court there in Malesko had said,
4 well, we would likely expect there to be an individual
5 remedy.

6 CHIEF JUSTICE ROBERTS: You would expect the
7 same rule. That's your argument --

8 MR. PREIS: Yes.

9 CHIEF JUSTICE ROBERTS: -- to apply in the
10 private prison setting. What you say is that there we
11 explained that, in the private prison setting, a Bivens
12 claim against the offending individual officer was the
13 appropriate remedy.

14 MR. PREIS: Your Honor, I guess I certainly
15 took part of the quote and didn't use all of the quote,
16 but I did not in any means say -- mean to --

17 JUSTICE SCALIA: That's known as misquoting.

18 MR. PREIS: Well, Your Honor, I guess I
19 would respectfully differ.

20 JUSTICE GINSBURG: Would you be taking the
21 position that even if there is an alternative State
22 remedy, tort remedy, even so there ought to be a
23 parallel Bivens action? Or would you say no Bivens
24 action if all of the States have adequate tort remedies?

25 MR. PREIS: I think, Your Honor, if this

1 Court would -- could tell with confidence that States,
2 in all States, provided sufficient remedies for the
3 entire variety of Eighth Amendment violations, this
4 Court would be certainly wise in allowing State remedies
5 to work. But I think we're far from that situation.

6 I want to turn, if I may --

7 JUSTICE KAGAN: Could you give me your best
8 example of a State tort rule that would prevent a
9 prisoner from bringing an Eighth Amendment claim?

10 MR. PREIS: Excuse me, Your Honor. Could
11 you repeat that question?

12 JUSTICE KAGAN: Your best example of a tort
13 rule from any State that would preclude a -- a valid
14 Eighth Amendment claim.

15 MR. PREIS: In other words, the prisoner
16 would have an Eighth Amendment claim but not a tort --

17 JUSTICE KAGAN: You have 50 States' worth of
18 tort law to -- as your playground, and I want to know
19 what tort rule would keep a prisoner with a valid Eighth
20 Amendment claim -- would prevent him from recovering?

21 MR. PREIS: Your Honor, I would note
22 Maryland, for example. In Maryland, attacks by a
23 prisoner on another prisoner are evaluated in terms of
24 the liability of the warden; a lot evaluate it on a
25 maliciousness standard. Now, the standard this Court

1 uses in attacks by one prisoner against another is a
2 deliberate indifference standard. The deliberate
3 indifference standard is different.

4 We're not arguing in this case --

5 JUSTICE SCALIA: I don't understand what
6 you're talking about. Is this a suit against a prisoner
7 who was attacked?

8 MR. PREIS: Excuse me, Your Honor.

9 JUSTICE SCALIA: He's not liable unless he's
10 malicious, or what?

11 MR. PREIS: No, it's a suit against the
12 warden --

13 JUSTICE SCALIA: The warden.

14 MR. PREIS: -- for a failure to protect
15 someone against attack by another prisoner.

16 JUSTICE SCALIA: I see. And -- and the
17 warden is liable in Maryland, you say, only if he is
18 malicious?

19 MR. PREIS: The test in Maryland is
20 maliciousness, yes.

21 CHIEF JUSTICE ROBERTS: What about medical
22 malpractice caps? Is that an issue? In other words,
23 State law -- and I don't know how many there are; I know
24 it's been proposed -- I think it's true in some
25 cases will cap your recovery for medical malpractice at

1 a particular level.

2 MR. PREIS: Your Honor, I don't think it's a
3 significant difference in this case. For instance,
4 California --

5 CHIEF JUSTICE ROBERTS: I was -- that was a
6 helpful question, in the sense that --

7 (Laughter.)

8 MR. PREIS: Oh, I understand. I --

9 CHIEF JUSTICE ROBERTS: The Bivens action --
10 presumably the cap would not apply. But it applies
11 under State law.

12 MR. PREIS: I think there will be some cases
13 in which the remedies will be curtailed under State law.
14 And one could expect that the deterrent value of a State
15 law remedy would not be available.

16 I have a couple of minutes remaining, and I
17 want to turn to Carlson. I think the suggestion is in
18 this that we've -- the discussion that we have had so
19 far is that we're asking the Court to reach out and
20 create an extraordinary cause of action. I simply don't
21 think that's true. This case is very similar if not the
22 same as Carlson.

23 In Carlson, the Court said that a Federal
24 prisoner has a cause of action against Federal actors
25 for a Federal constitutional right. That's what this

1 case is. And the only distinction the Petitioners can
2 point to is the fact that they are privately employed
3 Federal actors as opposed to publicly employed Federal
4 actors.

5 So, the question becomes, is "privately
6 employed" Federal actor a meaningful distinction from
7 "publicly employed"? We would -- if that distinction is
8 meaningful, we would have expected to find some
9 discussion of it in Malesko, but the Court there paid
10 absolutely no attention to the private status. The
11 Court in Malesko said that Malesko, that case, was in
12 every meaningful sense the same as FDIC v. Meyer.
13 FDIC v. Meyer was a suit against a public agency.

14 If the case is in every meaningful sense the
15 same as Meyer, then it must have been what mattered to
16 the Court in Malesko was that it was a suit against an
17 entity, not public versus private. So, we think there's
18 no evidence in this case that -- or, excuse me -- no --
19 nothing in the law that suggests this Court cares and
20 ever has cared the distinction between public and
21 private remedies.

22 JUSTICE GINSBURG: But in Carlson, it was
23 Bivens or no damage remedy. Here, that's not the case.

24 MR. PREIS: Excuse me, Your Honor, I missed
25 the first part of the question.

1 JUSTICE GINSBURG: In Carlson, the Court was
2 operating on the theory that with respect to the Federal
3 employee, it was a Bivens remedy for damages or no
4 remedy at all.

5 MR. PREIS: No individual remedy.

6 JUSTICE GINSBURG: Right.

7 MR. PREIS: Yes. Yes, Your Honor.

8 JUSTICE GINSBURG: And here, it is different
9 from Carlson because there is an -- a remedy against an
10 individual. So, we have the parallel remedies here
11 which didn't exist in Carlson, and that makes the two
12 cases different.

13 MR. PREIS: Your Honor, I think it's fair to
14 say that, in Carlson, the Court expressed a preference
15 for an individual remedy over an entity remedy. But I
16 don't think it's fair to say that the Court addressed in
17 Carlson how it would compare to individual remedies.

18 That issue actually came up in Bivens.
19 There was an individual remedy proposed that would be
20 available under State law, and the alternative was a
21 remedy under the Constitution itself. So, when the
22 Court was faced with two alternative individual actions,
23 the Court said that we prefer the constitutional cause
24 of action. And the reason in Bivens was we can't be
25 certain really how State law works.

1 CHIEF JUSTICE ROBERTS: Do you disagree
2 that the -- I know you have your argument on
3 compensation --

4 MR. PREIS: Yes.

5 CHIEF JUSTICE ROBERTS: -- but with respect
6 to deterrence, is there any significant difference
7 between the two causes of action? In other words, if
8 you think the most significant aspect of Bivens is
9 to deter constitutional violations, doesn't that work
10 equally as well or perhaps more effectively under the
11 State law than under Bivens?

12 MR. PREIS: Your Honor, I think in the end
13 the question asks me to make a 50-State assessment of
14 how State law works, and in that sense, one can only
15 speak in generalizations.

16 CHIEF JUSTICE ROBERTS: So, your answer --
17 your answer is the same as under compensation, that the
18 State law might be different or not?

19 MR. PREIS: We think, inasmuch as a cause of
20 action is available, with the exception, as the Court
21 noted, of damages caps, there -- we would expect to have
22 a similar level of deterrence, provided that damages are
23 available.

24 CHIEF JUSTICE ROBERTS: Who -- who actually
25 ends up paying in these Bivens actions? Is it the -- I

1 mean --

2 MR. PREIS: What we don't know for --

3 CHIEF JUSTICE ROBERTS: -- the Federal
4 Government or an individual or --

5 MR. PREIS: We would expect -- first of all,
6 obviously, the liability is imposed on the individual.
7 We would expect, as a general matter, that there would
8 be indemnification by the corporation. The question
9 then is, of course, whether that gets passed on to the
10 Federal Government. And I don't think it's fair -- if
11 the Court allows a Bivens action here, I think there's
12 the suggestion that all of a sudden, there'll be a whole
13 new realm of liability and costs. And that's simply not
14 the case.

15 CHIEF JUSTICE ROBERTS: I'm just looking in
16 terms of the practical deterrence. The problem I've had
17 with it in general, I don't know how much practical
18 deterrence there is as if you sue the individual and
19 the -- the individual doesn't actually pay; the
20 government does. It seems to me perhaps more likely in
21 the private context that the individual may get stuck
22 with some amount of the liability if the employer just
23 says, look, you were off doing something you weren't
24 supposed to do; we're not going to pay for it.

25 MR. PREIS: Your Honor, I'm not versed in

1 the indemnification rules of private prisons, but I
2 would expect that there will be some instances where
3 there's indemnification. I think the general rule in
4 terms of --

5 JUSTICE SCALIA: Do you think that the
6 warden of a Maryland prison is aware that if -- if he
7 allows one prisoner to beat up another prisoner, he is
8 only liable for maliciousness and not for deliberate
9 indifference, if indeed there is a difference between
10 the two? Do you think that -- that he's threading the
11 needle that finely, as far as -- as far as deterrence is
12 concerned?

13 MR. PREIS: Your Honor, I think it's always
14 been this Court's presumption that actors, legal actors,
15 respond to the standards of law that are imposed. I
16 can't say --

17 JUSTICE SCALIA: Not at that level of -- of
18 refinement. I mean, it seems to me that any warden
19 knows he's subject to State tort law and that State tort
20 law renders him liable for negligence and, indeed, for
21 physical assaults. Some of your causes of action are
22 intentional torts, not even negligence. I find it hard
23 to believe that, as far as deterrence is concerned,
24 there's a dime's worth of difference between State law
25 and -- and the Bivens action you're asking for.

1 MR. PREIS: Your Honor, if it's the case
2 that there's not a dime's worth of difference, that
3 would only be at this point. And one can expect State
4 law to change over time. I think one of the questions
5 propounded to Mr. Franklin or Mr. Shah was, what if a
6 State imposed a -- or created absolute immunity? I
7 think -- I take Your Honor's point to be that there
8 could be a similarity at one point. And we agree that
9 that could exist for any -- for a particular
10 circumstance. But we don't think this Court should take
11 the enforcement of Federal rights in Federal prisons
12 with regard to Federal actors and set up a scheme where
13 that's handled through State law. There's simply not a
14 justification there.

15 Your Honor, I'd like to address the Westfall
16 Act. They argue strenuously that Congress has already
17 spoken in this case. And that's simply not the case.
18 In the -- put it this way: The FTCA and the Westfall
19 Act deal only with Federal employees, the liability of
20 the Federal Government for actions of Federal employees.
21 Their argument is essentially that Congress attempted to
22 deal with whether or not private contractors should be
23 liable in these situations by -- by amending a statute
24 that has nothing to do with private contractors. And
25 that simply doesn't work. It's not -- there's no

1 suggestion here that Congress attempted to address this
2 situation.

3 JUSTICE GINSBURG: Well, what was the
4 purpose of making the reference to private contractors
5 in the Westfall Act?

6 MR. PREIS: Your Honor, the Court -- excuse
7 me -- Congress did not make a reference to private
8 contractors in the Westfall Act. They simply -- the
9 Congress simply referred to employees of the United
10 States. And the reason the Court -- excuse me --
11 Congress referred to employees of the United States was
12 because the FTCA only applies, and has always only
13 applied, to contractors -- excuse me -- employees of the
14 United States. There would have been no reason to reach
15 out because it would be totally beyond the specter of
16 the FTCA itself.

17 I think, Your Honor, there's something else
18 to note here with regard to Congress. At most, what
19 we're dealing with here is congressional silence. They
20 suggest that Congress is fit to take care of this.
21 Nobody doubts that Congress is fit to step in and take
22 care of this at some point in time. But -- this Court's
23 practice with regards to Bivens has been, when Congress
24 steps in, to stand back. But here we have congressional
25 silence. As this -- as the Court said in 2007, its most

1 recent Bivens case was, when you're dealing -- well,
2 excuse me -- the Wilkie case did not involve any
3 specific congressional action. The Court viewed it
4 essentially as congressional silence. The majority of
5 this Court at that time said our evaluation in that
6 instance is to figure out -- excuse me -- whether the
7 Federal courts must make the kind of remedial
8 determination that is appropriate for a common law
9 tribunal. The Court at that point saw itself as a
10 common law tribunal within the specific circumstance of
11 whether or not a Bivens remedy should be available.
12 That's not to say the Court should adopt some sort of
13 roving common law power. It's simply to say where
14 there's congressional silence and the case looks almost
15 identical to Carlson, if not identical, that there's
16 sufficient reason for this Court to find a Bivens cause
17 of action here.

18 If there's no further questions, I urge this
19 Court to affirm the holding of the Ninth Circuit.

20 CHIEF JUSTICE ROBERTS: Thank you, counsel.

21 Mr. Franklin, you have 4 minutes remaining.

22 REBUTTAL ARGUMENT OF JONATHAN S. FRANKLIN

23 ON BEHALF OF THE PETITIONERS

24 MR. FRANKLIN: Thank you, Mr. Chief Justice.

25 I just wanted to correct one possible

1 misimpression. There's no allegation here that anyone
2 was deliberately starved. With the allegation regarding
3 the food, his allegation in his complaint is that he --
4 because presumably his arms were in casts, he couldn't
5 hold his tray in the cafeteria, and, therefore, he says,
6 I had to buy my own food from the commissary because I
7 didn't want to be humiliated by going to the cafeteria.

8 We think that if that claim somehow stated a
9 claim under the Eighth Amendment for deliberate
10 indifference, that it would state a claim under
11 negligence as well. And all of these claims essentially
12 are that the prison failed to accommodate his injuries.
13 Malesko was the same. In Malesko, the argument was: I
14 didn't get to use an elevator because I had a
15 pre-existing condition, and that's what caused my harm.

16 If there is something that negligently
17 causes harm, unreasonably causes harm, there is a remedy
18 in California. I would also note that if it does not
19 cause harm, there's no Bivens remedy, because Congress
20 in the PLRA has said you cannot bring any claim, if
21 you're a prisoner, in Federal court unless it involves
22 physical harm.

23 JUSTICE SCALIA: Do you want us to hold that
24 there's no Bivens action in California? Is that -- is
25 that what our opinion is going to say?

1 MR. FRANKLIN: I think the opinion could be
2 as it was in Malesko: There is no Bivens action because
3 there are alternative remedies. We think that holding
4 as in Malesko would apply everywhere. Everybody has --
5 every State has a negligence cause of action. And I
6 think one thing that crystallized the argument for me is
7 the colloquy between Justice Scalia and -- and my
8 friend, where I think there was an admission that what
9 they are actually seeking is a blanket cause of action
10 to account for any possible instance in which there is
11 an inadequate remedy.

12 I think it goes even further. I think
13 they're asking for a blanket cause of action if somebody
14 can hypothesize an interest, an issue, and even further
15 than that, even if we can't hypothesize it, maybe
16 somewhere along the line, something might happen. We
17 think that's a -- flipping, turning Bivens on its head.
18 Bivens is a narrow remedy that is only allowed when it
19 is necessary. If those circumstances arise, they can be
20 dealt with at that time.

21 JUSTICE GINSBURG: Do you know if any of
22 these Bivens claims have been pled in the alternative;
23 that is, a Bivens remedy, but alternatively State law?

24 MR. FRANKLIN: Yes, that does happen, Your
25 Honor. Yes. And it happens I think relatively

1 frequently. But in these circumstances, we would
2 expect, if the Court rules our way, that there would be
3 in fact resort to what are not only adequate, but
4 superior, State law remedies and that Bivens would then
5 be reserved for another day if something happened that
6 might implicate it.

7 If there are no further questions --

8 JUSTICE GINSBURG: Is there diversity in
9 this case?

10 MR. FRANKLIN: There may be. I think -- I
11 think he alleged that there was. We would agree with
12 the other side that the domicile of a -- of a prisoner
13 is, at least in the circuits, determined by where the
14 prisoner had been before they were in prison, and I
15 think this particular prisoner had been somewhere other
16 than California. So, probably. I can't -- I can't say
17 about the -- the amount in controversy, but probably.

18 JUSTICE GINSBURG: So, you said there was a
19 statute of limitations problem with starting new.

20 MR. FRANKLIN: Yes.

21 JUSTICE GINSBURG: What about, if there is
22 diversity --

23 MR. FRANKLIN: Well, the case was dismissed.

24 JUSTICE GINSBURG: -- allowing an amendment?

25 MR. FRANKLIN: There's no -- the case was

1 dismissed, Your Honor, and it was appealed only on the
2 ground of a Bivens claim. So, if that is rejected,
3 there is no more case. There's nothing to amend.

4 CHIEF JUSTICE ROBERTS: Thank you, counsel.
5 The case is submitted.

6 (Whereupon, at 11:59 a.m., the case in the
7 above-entitled matter was submitted.)

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