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Turning a Blind Eye to "Prisoner-on-Prisoner" Brawls: Why Failure-to-Protect Claims Should Proceed Under *Bivens*

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TURNING A BLIND EYE TO "PRISONER-ON-PRISONER" BRAWLS: WHY FAILURE-TO-PROTECT CLAIMS SHOULD PROCEED UNDER *BIVENS*

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Correctional officers have an obligation, under the Eighth Amendment and 18 U.S.C. § 4042, to protect incarcerated persons from an attack at the hands of fellow incarcerated individuals. Despite this duty, when a federal officer fails to protect an incarcerated person from attack, the viability of the victim's claim against the offending officer is uncertain. Even though the doctrine, created in Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, *allows courts to infer a cause of action for damages directly from the Constitution, the U.S. Supreme Court adopted a test in* Ziglar v. Abbasi *that has restricted the applicability of* Bivens *remedies. The* Abbasi *test only allows a* Bivens *remedy to proceed in cases that are factually similar to prior* Bivens *holdings and where there are no special factors that counsel hesitation.*

Federal circuit courts apply the Abbasi *test inconsistently, especially in the context of incarcerated individuals' failure-to-protect claims. Focusing on the granular factual differences, the presence of alternative remedial structures, and separation-of-powers concerns, the U.S. Courts of Appeals for the Fourth and Ninth Circuits have determined that incarcerated individuals' failure-to-protect claims may not proceed under* Bivens. *The U.S. Court of Appeals for the Third Circuit, on the other hand, has concluded that these same claims fall neatly within prior* Bivens *holdings, affording incarcerated individuals with a* Bivens *remedy.*

This Note examines the emerging circuit split over whether there is an implied constitutional cause of action under Bivens *for incarcerated individuals' failure-to-protect claims against correctional officers. This Note then advocates for future courts to adopt a modified version of the Third Circuit's test, motivated by the central purpose of* Bivens *liability: deterring future misconduct and compensating victims.*

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INTRODUCTION

On August 9, 2021, Kyle Senear, an inmate at a New York state correctional facility, was exiting his cell for dinner when he was brutally

attacked by another inmate.[1] While he was being beaten, three corrections officers stood nearby, watching and laughing.[2] Because Senear was incarcerated at a state prison, his subsequent Eighth Amendment[3] claim against the state prison officers for their failure to protect him was comfortably grounded in 42 U.S.C. § 1983, which provides a cause of action to anyone whose constitutional rights are infringed by state officials.[4]

Just three months earlier, in another instance of federal officers shirking their duties, federal corrections officers allegedly removed inmate Davon Gillians from his cell, placed him in solitary confinement, strapped him to a restraining chair, and denied him any food or water for forty-eight hours.[5] Afterwards, those same officers allegedly removed him and deliberately placed him in a cell with an inmate notorious for his propensity for violence.[6] Immediately, the other inmate started brutally assaulting Gillians as the officers watched from outside the cell.[7] After the attack, Gillians was unable to exit the cell himself and had to be carried out.[8] Shortly thereafter, Gillians was rushed to a nearby hospital where he was pronounced dead.[9] Gillians's father brought suit against the federal corrections officers on behalf of his deceased son, alleging that the officers failed to protect his son in violation of the Eighth Amendment—the same type of claim Senear brought against New York prison officers.[10] But unlike Senear, whose claim arose under state law, Gillians's father's suit was dismissed because he brought a federal claim, and there is no federal statutory counterpart to § 1983.[11]

The only modern day means to recover damages against federal actors for alleged constitutional violations is through a judicially created doctrine that originates in the U.S. Supreme Court case *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*.[12] In *Bivens*, the Court created a damages remedy for plaintiffs who have their Fourth Amendment[13] rights violated by federal officers acting under color of federal authority.[14] In this seminal case, Webster Bivens alleged that federal narcotics agents entered his apartment without a warrant in violation of the Fourth Amendment.[15] Because the officer worked for a federal agency, a claim to recover for his

1. *See* Senear v. Mininni, No. 21-cv-11131, 2023 WL 4422805, at *1 (S.D.N.Y. July 10, 2023).
2. *See id.*
3. U.S. CONST. amend. VIII.
4. *Id.*; *see also* 42 U.S.C. § 1983. Senear's case was later dismissed on exhaustion grounds. *Senear*, 2023 WL 4422805, at *6.
5. *See* Conyers v. Avers, No. 22-cv-115, 2023 WL 5533504, at *1–2 (M.D. Fla. July 20, 2023).
6. *See id.* at *2.
7. *See id.*
8. *See id.*
9. *See id.*
10. *See id.*
11. *See id.* at *9.
12. 403 U.S. 388 (1971).
13. U.S. CONST. amend. IV.
14. *See Bivens*, 403 U.S. at 389; *see also* U.S. CONST. amend. IV.
15. *See Bivens*, 403 U.S. at 389.

alleged violation could not be brought under § 1983, so the U.S. District Court for the Eastern District of New York dismissed Bivens's claims.[16] After the U.S. Court of Appeals for the Second Circuit affirmed, the Supreme Court allowed Bivens's claim to proceed and held that Bivens had a cause of action directly under the Fourth Amendment.[17]

Functionally, the *Bivens* decision remedied an inconsistency where victims of constitutional torts committed by state actors could seek relief under § 1983, whereas victims of the same misconduct committed by federal officers did not have an avenue to pursue their claims.[18] Evident in the *Bivens* decision, and a central tenet of the American legal system, is the notion that when a legal wrong occurs, a judicial remedy should be available to address it.[19] It has long been established that when this remedy takes the form of a damages award, it serves to deter the unlawful conduct.[20] The judicially-invented damages remedy created in *Bivens* supports the notion that the "Constitution is meant to circumscribe the power of government where it threatens to encroach on individuals."[21]

For nearly three decades after it decided *Bivens*, the Court continued to expand *Bivens* liability to allow claimants to recover damages for violations of other constitutional rights by federal officers, most notably for due process violations under the Fifth Amendment[22] and for medical-indifference claims derived from the Eighth Amendment's Cruel and Unusual Punishment Clause.[23] In the past twenty years, however, the Court has reined in *Bivens*, even going so far as to declare that extending *Bivens* is a "disfavored judicial activity."[24] The Court has developed a new test to determine whether to apply *Bivens*, an inquiry that evaluates the factual circumstances of each potential claim on a case-by-case basis.[25] As a result, even the fate of *Bivens* claims brought for constitutional violations that the Supreme Court has approved in the past (i.e., for the Fourth, Fifth, and Eighth Amendments) is uncertain.

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16. *See id.* at 390.

17. *See id.* at 392 ("[W]here federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief." (quoting Bell v. Hood, 327 U.S. 678, 684 (1946))).

18. *Id.* at 406 (Harlan, J., concurring).

19. *See* Henry Rose, *The Demise of the* Bivens *Remedy is Rendering Enforcement of Federal Constitutional Rights Inequitable but Congress Can Fix It*, 42 N. ILL. U. L. REV. 229, 238 (2022); *see also* Benjamin C. Zipursky, Ziglar v. Abbasi *and the Decline of the Right to Redress*, 86 FORDHAM L. REV. 2167, 2168 (2018) (explaining that *Bivens* stands for the maxim *ubi jus, ibi remedium*, meaning where there is a right there is a remedy, a principle celebrated by Chief Justice John Marshall in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803)).

20. *See* Rose, *supra* note 19, at 239.

21. *See* Susan Bandes, *Reinventing* Bivens*: The Self-Executing Constitution*, 68 S. CAL. L. REV. 289, 292 (2005).

22. U.S. CONST. amend. V.; *see also* Davis v. Passman, 442 U.S. 228, 230 (1979); *see also infra* Part I.B.

23. *See infra* Part I.B; *see* Carlson v. Green, 446 U.S. 14, 24 (1980).

24. Egbert v. Boule, 142 S. Ct. 1793, 1803 (2022) (quoting Ziglar v. Abbasi, 137 S. Ct. 1843, 1857 (2017)).

25. *See infra* Part I.C.

For instance, the success of Gillians's father's Eighth Amendment claim hinged upon whether the U.S. District Court for the Middle District of Florida considered it to be a permissible *Bivens* claim, which was an unlikely outcome given the recent trend toward a strict interpretation of *Bivens* liability. Compounded by the lack of any federal equivalent to § 1983, a narrow conception of *Bivens* liability has created a grim future for incarcerated individuals' ability to seek redress for violations of their constitutional rights by federal officers.

Responding to this restriction, three federal courts of appeals have recently evaluated whether *Bivens* extends to Eighth Amendment failure-to-protect claims stemming from "prisoner-on-prisoner" violence.[26] The U.S. Courts of Appeals for the Fourth and Ninth Circuits have held that incarcerated individuals' failure-to-protect claims against corrections officers are outside the purview of *Bivens*.[27] As a result, 16,850 inmates, or 26 percent of all federal inmates, in the Fourth and Ninth Circuits[28] categorically lack *Bivens* remedies for violations of their Eighth Amendment rights unless the facts of their case match the narrow facts recognized as medical indifference by the Court in *Carlson v. Green*.[29] Conversely, federal inmates' claims in the U.S. Court of Appeals for the Third Circuit have a different fate; these incarcerated individuals can bring their failure-to-protect claims to court in hopes of being made whole by a damages remedy because, in the Third Circuit's view, these claims are *not* factually distinct from medical-indifference claims and failure-to-provide-medical-care claims.[30]

This Note evaluates whether there is an implied constitutional cause of action against federal prison officials for Eighth Amendment failure-to-protect claims. Part I provides background on *Bivens* claims[31] with a particular emphasis on the Supreme Court's narrowing of *Bivens* liability in recent years.[32] Part II analyzes the Third,[33] Fourth,[34] and Ninth[35] Circuits' varying views of *Bivens* in the context of failure-to-protect claims under the Eighth Amendment. Lastly, Part III argues that the Court should adopt the Third Circuit's perspective, which holds that claims against federal officials for their failure to protect incarcerated individuals should be allowed to proceed under *Bivens*.[36] In particular, Part III argues that the Third Circuit's approach to failure-to-protect claims is the most faithful application of *Bivens*

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26. *See infra* Part II.

27. *See* Bulger v. Hurwitz, 62 F.4th 127, 133 (4th Cir. 2023); Hoffman v. Preston, No. 20-15396, 2022 WL 6685254, at *1 (9th Cir. Oct. 11, 2022).

28. *See Interactive Data Analyzer*, U.S. SENT'G COMM'N, https://ida.ussc.gov/analytics [https://perma.cc/7ZAE-9WKF] (last visited Oct. 12, 2024) (filter for Fourth and Ninth Circuits to see results).

29. 446 U.S. 14 (1980).

30. *See* Bistrian v. Levi, 912 F.3d 79, 83 (3d Cir. 2018).

31. *See infra* Parts I.A–B.

32. *See infra* Part I.C.

33. *See infra* Part II.A.

34. *See infra* Part II.C.

35. *See infra* Part II.B.

36. *See infra* Part III.

given the circuit's emphasis on deterring unconstitutional conduct and compensating victims.[37]

I. THE ROAD TO *BIVENS*: BACKGROUND AND A CHANGING LANDSCAPE

Understanding the doctrinal history and statutory landscape surrounding *Bivens* liability is essential to analyzing its posture in American legal jurisprudence today. As the U.S. Court of Appeals for the Tenth Circuit recently noted, "[t]he story of *Bivens* is a saga played out in three acts: creation, expansion, and restriction."[38] This Part contextualizes the current *Bivens* landscape through these three "acts."[39] More specifically, Part I.A discusses implied constitutional causes of action, the creation of *Bivens* liability, as well as alternative statutory avenues for relief including claims under § 1983 and the Federal Tort Claims Act[40] (FTCA). Part I.B explains the years after *Bivens*, including *Carlson v. Green*, which expanded *Bivens* liability to claims against federal officers for Eighth Amendment violations.[41] Part I.C discusses the Supreme Court's recent inclination to restrict the context in which *Bivens* liability may be available.

A. Implied Constitutional Causes of Action and the Road to Bivens

In the earliest days of American legal history, courts permitted personal damages suits by private citizens against federal officers, even though Congress never authorized these suits by statute.[42] Although a particularly generative source for private rights of action, the U.S. Constitution itself does not explicitly authorize private remedies under its amendments.[43] As a result, from the beginning, courts have been actively involved in crafting remedies for constitutional violations, only under a different posture.[44] Well before *Bivens* and back in the nineteenth century, government officials were

37. *See infra* Part III.

38. Silva v. United States, 45 F.4th 1134, 1138 (10th Cir. 2022).

39. *Id.*

40. 28 U.S.C. §§ 2671–80.

41. *See* Carlson v. Green, 446 U.S. 14, 24–25 (1980).

42. *See* Alex Langsam, Note, *Breaking* Bivens*?: Falsification Claims After* Ziglar v. Abbasi *and Reframing the Modern* Bivens *Doctrine*, 88 FORDHAM L. REV. 1395, 1401–02 (2020) (explaining that even though no congressional statutory authorization existed, courts assumed a cause of action existed if a citizen was wronged).

43. *See generally* U.S. CONST.; *see also* Carlos M. Vázquez, *The Constitution as a Source of Remedial Law*, 131 YALE L.J. 1062, 1062 (2023) ("It is often remarked that the Constitution expressly addresses remedies in only two provisions: the Takings Clause and the Suspension Clause.").

44. *See* Richard H. Fallon, Jr., *Bidding Farewell to Constitutional Torts*, 107 CALIF. L. REV. 933, 941 (2019) (noting it would be impossible to establish the rule of law regime understood by the founding generation without judicially created remedies).

held accountable for unlawful conduct, including constitutional violations, by actions available at common law under ordinary tort law.[45]

This method of seeking remedies for constitutional violations continued well into the twentieth century, without much jurisdictional variation in remedies, because the pre-*Bivens* era largely overlapped with the pre-*Erie R.R. Co. v. Tompkins*[46] era.[47] Until *Erie*, federal courts applied "federal common law."[48] So, when evaluating tort claims against federal officials, federal courts applied the "federal common law" applicable to that tort claim, not the common law of the state in which the tort occurred or in which the court sat.[49] Since *Erie*, however, federal courts interpret and apply the common law of the state in which they sit.[50] Thus, after *Erie*, the common law tort remedies that previously addressed constitutional violations were assumed to be state law remedies, which could, and would, diverge. Thus, *Erie* rendered the tort law method of redressing constitutional violations unworkably inconsistent.[51]

Partly in response to the unworkability of using state tort law to address constitutional violations, the Supreme Court examined the viability of a federal cause of action directly under the Constitution in 1946 in *Bell v. Hood*.[52] In *Hood*, the plaintiff asserted Fourth and Fifth Amendment claims against federal officials in federal court; however, the lower court dismissed the claims for lack of subject matter jurisdiction because the case did not arise under federal law.[53] Although reserving the question of whether federal law

45. *See id.* at 942–43; *see, e.g.*, Little v. Barreme, 6 U.S. (2 Cranch) 170, 178–79 (1804). Plaintiff Barreme's ship was seized by Captain Little, who was acting under presidential orders, making him a federal actor. *Barreme*, 6 U.S. at 178–79. Barreme brought suit against Little by bringing a common-law trespass action against him, and the Court found Little liable for his trespass. *Id.* The fact that the cause of action pursued was a tort claim rather than a claim based on the Fourth Amendment's prohibition of unreasonable searches and seizures did not matter, because the action vindicated the same interests, and the federal actor was held personally responsible. *See* Carlos M. Vázquez & Stephen I. Vladeck, *State Law, the Westfall Act, and the Nature of the* Bivens *Question*, 161 U. PA. L. REV. 509, 531–42 (2013) (noting that from the beginning of the nation's history, federal officials were subject to liability under common-law tort suits and violations of the Constitution would result in the loss of any defense relating to the offender's official position, leaving the offender vulnerable to suit as if they were a private individual); Langsam, *supra* note 42, at 1401–02.

46. 304 U.S. 64 (1938).

47. *See* Vázquez & Vladeck, *supra* note 45, at 539.

48. *See, e.g.*, Boyle v. United Techs. Corp., 487 U.S. 500, 516–17 (1988) (noting that, before *Erie*, "federal courts sitting in diversity were generally free, in the absence of a controlling state statute, to fashion rules of 'general' federal common law").

49. *See Erie*, 304 U.S. at 71–73 (discussing how federal courts assessed the broad field of general law and had the power to declare rules of decision).

50. *See, e.g.*, Barth Packaging, Inc. v. Excelsior Packaging Grp., Inc., No. 11-cv-2563, 2011 WL 3628858, at *1 (S.D.N.Y. Aug. 16, 2011) (applying New York contract law to a dispute involving citizens of two different states).

51. *See* Vázquez & Vladeck, *supra* note 45, at 541–43 (noting that after *Erie*, courts addressing the question of damages for constitutional violations declined to view these claims as having the status of federal common law).

52. 327 U.S. 678 (1946). The plaintiff in *Hood* sought money damages, alleging that her Fourth and Fifth Amendment rights were violated by the Federal Bureau of Investigation. *Id.* at 679.

53. *Id.* at 680.

provided a cause of action for violations of the Constitution generally, the Supreme Court allowed the case to proceed based on a finding of federal question jurisdiction.[54] Writing for the Court, Justice Hugo Black reasoned that "where federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief."[55]

This same sentiment, a commitment to provide redress for victims of constitutional violations, runs through *Bivens*, which formally created an implied cause of action for damages based on Fourth Amendment violations by federal officials.[56] In particular, the *Bivens* Court, in 1971, held that there existed a cause of action under the Fourth Amendment to sue federal officials for money damages arising from an unreasonable search and seizure.[57] Bivens alleged that agents from the Federal Bureau of Narcotics[58] violated his Fourth Amendment rights when they entered his apartment without a warrant, handcuffed and arrested him, and then took him to a federal courthouse where he was subjected to a visual strip search.[59] Disagreeing with the federal district and appellate courts, Justice William J. Brennan, Jr., writing for the majority, held that Bivens had a viable cause of action, noting that it "should hardly seem a surprising proposition" that damages are available for victims who have had their Fourth Amendment rights violated by federal officials.[60]

In coming to this conclusion, the Court emphasized three major points. First, damages are the traditional remedy for the invasion of personal liberty interests, as they perform the key function of deterring unconstitutional conduct.[61] Second, there were no "special factors counseling hesitation" to allow money damages in the absence of an explicit authorization by Congress.[62] Third, federal officials wield a relatively high level of authority

54. *Id.* at 684–85.

55. *Id.* at 678.

56. Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 389 (1971).

57. *Id.*

58. The Federal Bureau of Narcotics was succeeded by the Drug Enforcement Administration in 1973. *See* U.S. Dep't of Just., *Organization, Mission and Functions Manual: Drug Enforcement Administration*, https://www.justice.gov/doj/organization-mission-and-function
s-manual-drug-enforcement-administration [https://perma.cc/737M-JW8Z] (last visited Oct. 12, 2024).

59. *See Bivens*, 403 U.S. at 389.

60. *Id.* at 395–96. The Court recognized that "[o]f course, the Fourth Amendment does not in so many words provide for its enforcement by an award of money damages for the consequences of its violation" but nevertheless indicated that "where legal rights have been invaded . . . federal courts may use any available remedy to make good the wrong done." *Id.* at 396 (quoting *Hood*, 327 U.S. at 684).

61. *Id.*

62. *Id.* This language would become one of the bases for the Court's restriction of *Bivens* application in later years, and the "special factors counseling hesitation" test would become a tool for just that. *See infra* Part I.C. The Court also emphasized that, for the purposes of providing a judicially created damages remedy, a relevant inquiry was whether there was an explicit congressional declaration that victims of Fourth Amendment violations may *not*

which necessitates the creation of a damage remedy to protect and make citizens whole again when federal officials use their power to violate individual rights.[63] Thus, the *Bivens* decision created a damages remedy against federal officers who violate citizens' Fourth Amendment rights.

Functionally, the *Bivens* decision worked to remedy an inconsistency that developed in the twentieth century where victims of constitutional torts at the hands of state actors could seek relief, whereas victims of the same misconduct by federal officers did not have an avenue to pursue their claims.[64] When a state government actor, such as a police officer or a public school teacher, violates an individual's constitutional rights, the victim has a cause of action for damages under § 1983.[65] Pursuant to § 1983, inmates in state custody may bring civil rights suits in federal courts against state and local correctional officers.[66] However, there is no statutory parallel under which individuals can sue *federal* officials in their individual capacity for constitutional violations.[67] Section 1983 does not provide this relief because it is limited to actions committed under color of state law, not federal law.[68]

Although citizens and incarcerated individuals alike cannot seek redress from § 1983 for violations of their constitutional rights by federal officers, they can pursue their claims in federal court under the FTCA.[69] Enacted in 1946, the FTCA allowed private parties to recover money damages for most torts committed by federal officers in the course of their official duties.[70] As originally enacted, the FTCA explicitly exempted intentional torts,[71] but as amended in 1974,[72] it created a cause of action against the United States for

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recover money damages. *See id.* at 397. Thus, it follows that the Court authorized an implied constitutional damages remedy so long as Congress had not explicitly legislated against it. *See id.*; *see also infra* Part I.C.

63. *Bivens*, 403 U.S. at 394–95.

64. *Id.* at 406 (Harlan, J., concurring).

65. 42 U.S.C. § 1983; *see, e.g.*, Nieves v. Bartlett, 139 S. Ct. 1715, 1721 (2019). Section 1983 is a federal law that provides a statutory remedy for damages and equitable relief against state and local officials acting "under color of state law" for alleged violations of civil rights. *Id.* at 1730; *see* 42 U.S.C. § 1983; *see also* Langsam, *supra* note 42, at 1402.

66. *See* Timothy J. Kilgallon, *The* Bivens *Remedy in Prisoners' Rights Litigation*, 40 WASH. & LEE L. REV. 215, 215 (1983).

67. *See* Ziglar v. Abbasi, 137 S. Ct. 1843, 1854 (2017) (noting that Congress has not provided a specific damages remedy for "plaintiffs whose constitutional rights were violated by agents of the Federal Government").

68. 42 U.S.C. § 1983; *see also* Fallon, *supra* note 44, at 946–47 (arguing that § 1983 was significant to constitutional tort and *Bivens* development because it put constitutional violations at the center of suits against federal officials, pulling focus away from whether the wrong could be redressed at common law).

69. *See infra* Part I.C.3.

70. *See* Federal Tort Claims Act, 28 U.S.C. § 2679 (authorizing civil actions for monetary relief due to "personal injury or death arising or resulting from the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment"); *see also* Fallon, *supra* note 44, at 980–81.

71. *See* MICHAEL D. CONTINO & ANDREAS KUERSTEN, CONG. RSCH. SERV., R45732, THE FEDERAL TORT CLAIMS ACT (FTCA): A LEGAL OVERVIEW 25 (2023).

72. *See* Act of Mar. 16, 1974, Pub. L. No. 93-253, 88 Stat. 50 (amending the FTCA to permit suits for "assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution" against "law enforcement officers").

intentional torts committed by its officers.[73] An FTCA claim differs from a *Bivens* claim significantly in that it is not brought against the individual tortfeasor, rather it is brought against the United States which serves as the defendant in place of the individual.[74] In addition, to use the FTCA to vindicate federal constitutional rights, the underlying misconduct must be *tortious*.[75] In other words, under the FTCA, "the United States . . . has not rendered itself liable . . . for constitutional tort claims," only for common-law tort claims.[76]

B. The Early Years: Rights Rhetoric and Extending Bivens *to the Eighth Amendment in* Carlson v. Green

After recognizing an implied cause of action against federal officers for Fourth Amendment violations, the Supreme Court expanded the *Bivens* remedy to two more implied causes of action for money damages against federal officials for violating the Fifth and Eighth Amendments. In *Davis v. Passman*,[77] the Court held that *Bivens* covered a former congressional administrative assistant's claim for money damages against her employer, pursuant to the equal protection component of the Due Process Clause of the Fifth Amendment, when her boss, a U.S. representative, terminated her employment because of her sex.[78] The majority opinion—again penned by Justice Brennan—reaffirmed a core tenet of the *Bivens* philosophy, finding that the "judiciary is clearly . . . the primary means through which [constitutional] rights may be enforced."[79] In addition to reaffirming the role of the courts in protecting constitutional values, the *Passman* Court determined that a *Bivens*-like, judicially-enforced remedy would be presumed *unless* the Constitution explicitly and textually commits the issue to another branch of government.[80]

In deciding to extend *Bivens* liability to a Fifth Amendment claim, the Court articulated a three-part analysis to determine when *Bivens* is applicable to constitutional claims other than the Fourth Amendment. First, the Court analyzed whether the plaintiff asserted a constitutionally protected right.[81]

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73. *See* 28 U.S.C. § 2674; *see also* CONTINO & KUERSTEN, *supra* note 71, at 26.
74. *See* CONTINO & KUERSTEN, *supra* note 71, at 1.
75. *See id.* at 5 n.44.
76. FDIC v. Meyer, 510 U.S. 471, 478 (1994).
77. 442 U.S. 228 (1979).
78. *See id.* at 232, 249.
79. *Id.* at 241 (recognizing that the Constitution is not all encompassing by any means, that it does not "partake of the prolixity of a legal code" (quoting McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 407 (1819))).
80. *See id.* at 242; *see also* Baker v. Carr, 369 U.S. 186, 217 (1962). In applying this standard to the facts of *Passman*, the Court found that there was no "'*explicit* congressional declaration that persons' in petitioner's position injured by unconstitutional federal employment discrimination 'may not recover money damages from' those responsible for the injury." *Passman*, 554 U.S. at 246–47 (quoting Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 397 (1971)). In other words, the Court would look to whether statutory language specifically contemplated the factual scenario of the specific constitutional violation that had allegedly occurred.
81. *See Passman*, 442 U.S. at 234.

Second, the Court examined whether the plaintiff had stated a cause of action that asserts the right.[82] And third, the Court determined whether relief in damages constitutes an appropriate form of remedy.[83] In assessing the third prong, the Court found that a damages remedy was surely appropriate, given that it was the traditional means of compensating individuals for such invasions of rights, and it was judicially manageable.[84]

In the following term, the Supreme Court decided *Carlson v. Green*[85] and extended *Bivens* further, to permit recovery against federal prison officials' violation of the Eighth Amendment for deliberate indifference to an inmate's serious medical needs.[86] In *Carlson*, an inmate died while incarcerated in federal prison, allegedly as a result of inadequate medical attention.[87] More specifically, the inmate's estate alleged that federal officers knew of the seriousness of the inmate's asthmatic condition but nevertheless kept him in an inadequate facility against the advice of doctors and failed to get him medical attention for eight hours after he had an asthma attack.[88] Thereafter, the administrator of the inmate's estate sued the several federal prison officials allegedly involved.[89]

The Supreme Court held that the administrator's claim could proceed under *Bivens* because, absent an express congressional declaration that a statutory remedy is intended to be an equally effective substitute for a *Bivens* remedy, a plaintiff may proceed under *Bivens*, even if alternative remedies are available.[90] Additionally, the Court broadly stated that the *Bivens* remedy is available to all victims of constitutional violations by federal agents, *unless* defendants demonstrate either that special factors counsel hesitation "in the absence of affirmative action by Congress" or "that Congress has provided an alternative remedy which it explicitly declared to be a *substitute* for recovery directly under the Constitution and viewed as equally effective."[91]

The *Carlson* Court gave judicially implied damages a fairly expansive application, almost suggesting that a *Bivens* remedy may be available for all constitutional violations.[92] Indeed, some commentators have suggested that "[t]he language of the [*Carlson*] opinion suggests that the *Bivens* decision

82. *See id.*
83. *See id.*
84. *See id.* at 245 ("For Davis, as for Bivens, 'it is damages or nothing.'" (quoting *Bivens*, 403 U.S. at 410 (Harlan, J., concurring)).
85. 446 U.S. 14 (1980).
86. *Id.* at 24–25.
87. *See id.* at 14.
88. *See id.* at 16 n.1 (noting that the federal officers also administered a drug which made the plaintiff inmate's attack more severe, attempted to use a respirator known to be inoperative, further impeding his breathing, and unreasonably delayed his transfer to an outside hospital which all resulted in his untimely death).
89. *See id.* at 16.
90. *See id.* at 26–27.
91. *See id.* at 18–19.
92. *See id.* at 18 (establishing that "the victims of a constitutional violation by a federal agent have a right to recover damages against the official in federal court despite the absence of any statute conferring such a right").

created a remedy for victims of constitutional violations in general."[93] This is because the language of *Carlson* is particularly expansive and rights focused, as the Court provided even more instruction about when the application of *Bivens* to constitutional claims is authorized.

With regard to any potential and explicit congressional declaration counseling against *Bivens* liability for Eighth Amendment violations, the Court specifically rejected petitioner's arguments that the FTCA was meant to preempt a *Bivens* remedy, and that an FTCA claim provides an equally effective remedy.[94] In fact, this was the first time the Court took the opportunity to address how a remedy under the FTCA compared to that under *Bivens*. Interestingly, even though the *Carlson* Court rejected the FTCA as a replacement remedy that would distinguish a *Bivens* claim, the existence of a possible claim under the FTCA has morphed into a rationale against *Bivens*'s extension in recent years.[95] Ultimately, the *Carlson* Court determined that *Bivens* remedies serve the dual purposes of compensation and deterrence and signaled that this type of redress should have expansive application to protect constitutional rights.[96]

C. Recent History: Reining in Bivens

In the years after *Carlson*, the Court has "gradually but steadily narrowed the availability of *Bivens*,"[97] ultimately announcing in 2017 that expanding *Bivens* liability is a "'disfavored' judicial activity."[98] Indeed, since *Carlson*, the Court has consistently declined to extend *Bivens* actions to other constitutional violations,[99] except for in one case, *Farmer v. Brennan*,[100] in which the Supreme Court addressed in part whether *Bivens* liability extends specifically to an incarcerated individual's failure-to-protect claim against a correctional officer.[101] The plaintiff was Dee Farmer, a transgender woman

93. Kilgallon, *supra* note 66, at 222 n.38 (arguing that the *Carlson* Court interpreted *Bivens* to reach broadly); *see* Langsam, *supra* note 42, at 1405.

94. *See Carlson*, 446 U.S. at 19.

95. *See infra* Part I.C.3; *see also* 28 U.S.C. § 2680(h).

96. *See Carlson*, 446 U.S. at 18.

97. Langsam, *supra* note 42, at 1406 nn.96–97 (noting that, at times, the Court cut off entire categories of constitutional violations, such as First Amendment claims in *Bush v. Lucas*, 462 U.S. 367 (1983), and other times adding to the list of special factors that counsel hesitation, like in *FDIC v. Meyer*, 510 U.S. 471 (1994), when the Court considered enormous financial burden to be a factor limiting *Bivens* liability).

98. Ziglar v. Abbasi, 137 S. Ct. 1843, 1857 (2017).

99. *Abbasi*, 137 S. Ct. at 1857–60 (holding that *Bivens* remedies would not be allowed either in a "new context" or where other factors "counseled hesitation"); *see also* Hernandez v. Mesa, 140 S. Ct. 735, 743 (2022) (refusing to extend *Bivens* liability and dismissing decedent's estate's claim for damages against border patrol agent who shot and killed decedent from across the U.S.-Mexico border because other factors, such as foreign relations and undermining border security, counseled hesitation).

100. 511 U.S. 825 (1994).

101. *See* William J. Rold, *Federal Courts in Colorado Restrict Eighth Amendment Claims of Federal Prisoners*, LGBT L. NOTES 17, Mar. 2021, at 17–18 (arguing that the Supreme Court's failure to acknowledge the *Farmer* decision is a sign that the Court considers deliberate indifference to safety to be an extension of deliberate indifference to health in *Carlson*).

incarcerated in federal prison, who was beaten and raped by other inmates after being placed in the general male prison population by correctional officers despite the institution's history of inmate sexual assaults and the officers' personal knowledge that her "project[ion] [of] feminine characteristics" made her particularly vulnerable to assault.[102] Farmer alleged that the correctional officers' deliberate indifference to her health and safety violated her Eighth Amendment rights, so she filed a *Bivens* complaint against multiple prison personnel, including the correctional officers responsible for her placement.[103]

The U.S. District Court for the Western District of Wisconsin granted summary judgment to the prison officials on the merits, concluding that they lacked the requisite knowledge to satisfy the deliberate indifference standard with regards to Farmer's safety.[104] The Seventh Circuit affirmed without issuing an opinion, and the Supreme Court granted a writ of certiorari expressly "because Courts of Appeals had adopted inconsistent tests for 'deliberate indifference.'"[105]

In *Farmer*, the Court clarified the standard for deliberate indifference claims and remanded the case for reconsideration according to its articulated standard.[106] The Court did not address the viability of Farmer's *Bivens* claim nor did it announce any extension of *Bivens* to a new circumstance.[107] Notably, the Court referenced *Bivens* only twice in the opinion—once in reference to the claim asserted in Farmer's complaint and once to clarify that Farmer's claim was civil in nature.[108] However, whether *Bivens* applies to a case is an issue of subject matter jurisdiction, so to conclude that *Farmer* is not a *Bivens* case would arguably mean that the Court decided a case it did not have jurisdiction over.[109] Thus, it is uncertain whether *Farmer* constitutes the Court's previous recognition or approval of this claim, considering the issue was not briefed by the parties or addressed in the opinion.[110] This controversy remains a core outstanding issue between the circuit courts that have addressed *Bivens* failure-to-protect claims.[111]

In every case besides *Farmer*, the Court has limited the situations in which *Bivens* liability is actionable altogether—even if the claim is alleging a constitutional violation previously recognized by the Court.[112] Despite its

102. *See Farmer*, 511 U.S. at 830–31.
103. *See id.*
104. *See id.* at 831–32.
105. *See id.*
106. *See id.* at 847 (holding that "a prison official may be held liable under the Eighth Amendment for denying humane conditions of confinement only if he knows that inmates face a substantial risk of serious harm and disregards that risk by failing to take reasonable measures to abate it").
107. *See id.*
108. *See id.* at 830, 839.
109. *See infra* Part II.A.
110. *See* Bulger v. Hurwitz, 62 F.4th 127, 139 (4th Cir. 2023).
111. *See infra* Part II.
112. *See, e.g.*, Egbert v. Boule, 142 S. Ct. 1793, 1799–800 (2022) (holding that the plaintiff's suit against a federal officer for allegedly violating his Fourth Amendment rights

extreme narrowing of the doctrine, the Court has not overruled *Bivens*, or what it considers to be its two cases extending *Bivens* liability.[113]

After years of refusing to expand *Bivens*,[114] the Court supplanted its former methodology for determining the viability of a *Bivens* claim in *Ziglar v. Abbasi*.[115] The *Abbasi* Court developed a revised two-step inquiry for analyzing potential *Bivens* claims.[116] First, the Court examines whether a claim falls within the causes of action already authorized under the Court's three prior *Bivens* cases[117] or whether it "arises in a 'new context' or involves a 'new category of defendants.'"[118] Second, if it is a new context, the Court asks if there are any special factors that "counsel hesitation" about granting the extension of *Bivens* liability, which is an inquiry largely centered around separation-of-powers concerns.[119]

The Supreme Court's most recent word on *Bivens* and the *Abbasi* framework was in the 2022 decision *Egbert v. Boule*.[120] *Boule* had the effect of further tightening step two of the *Abbasi* analysis because the Court declared definitively that "[a] court faces only one question: whether there is *any* rational reason (even one) to think that *Congress* is better suited to 'weigh the costs and benefits of allowing a damages action to proceed.'"[121] As a result of the *Abbasi* framework in tandem with the *Boule* decision, *Bivens* liability today is severely restricted, and the Court's rationale for doing so lays in a patchwork. The following subsection will briefly survey the most prominent reasons why the Supreme Court has denied a *Bivens* remedy since *Carlson*.

1. Claims That Contain Factual Differences

The first prong of the *Abbasi* test for *Bivens* application asks courts to analyze the factual similarity between the *Bivens* trilogy of cases and a

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could not proceed, even though the claim arose as a violation of the same amendment as in the original *Bivens* case).

113. *See supra* Part I.B.

114. *See, e.g.*, Corr. Servs. Corp. v. Malesko, 534 U.S. 61, 74 (2001) (holding that *Bivens* liability did not extend to an Eighth Amendment deliberate indifference to medical needs claim against a private corporation operating a halfway house under contract with the prisons bureau); FDIC v. Meyer, 510 U.S. 471, 486 (1994) (refusing to permit a *Bivens* claim alleging a Fifth Amendment Due Process violation against a federal agency); *see also* Wilkie v. Robbins, 551 U.S. 537 (2007) (declining to recognize a *Bivens* action alleging a federal official's retaliation against a private landowner for failure to find a cause of action and because special factors, such as opening the floodgates of litigation, counseled hesitation).

115. 137 S. Ct. 1843 (2017).

116. *Id.* at 1848–49.

117. This includes only *Bivens* itself, *Passman*, and *Carlson*. *See* Mesa v. Hernandez, 140 S. Ct. 735, 755 (2022) ("The Court has extended *Bivens* twice." (citing Davis v. Passman, 442 U.S. 228 (1979); Carlson v. Green, 446 U.S. 14 (1980))). *But see* Rold, *supra* note 101, at 17.

118. Tate v. Harmon, 54 F.4th 839, 844 (4th Cir. 2022) (quoting *Hernandez*, 140 S. Ct. at 743).

119. *See Hernandez*, 140 S. Ct. at 743 (noting that the special factors inquiry should focus on separation-of-powers principles and intrusion into a given field).

120. 142 S. Ct. 1793 (2022).

121. *Id.* at 1805–06.

potential new case.[122] To determine whether there were meaningful differences between the cases, the *Abbasi* court provided several factors to consider, such as:

> the rank of the officers involved; the constitutional right at issue; the generality or specificity of the official action; the extent of judicial guidance as to how an officer should respond to the problem or emergency to be confronted; the statutory or other legal mandate under which the officer was operating; the risk of disruptive intrusion by the Judiciary into the functioning of other branches; or the presence of potential special factors that previous *Bivens* cases did not consider.[123]

In *Abbasi*, the Court found that the case bore little resemblance to the three *Bivens* claims the Court has approved in the past.[124] *Abbasi* involved claims brought by noncitizen detainees following the attacks of September 11, in which they sought damages under the Fourth and Fifth Amendments related to their conditions of confinement.[125] Given that the political circumstances of *Abbasi* were novel as compared to previous *Bivens* cases, the Court easily found that the first element of its newly articulated test was satisfied and that this *Bivens* case arose in a factually new context.

Other times, the Court has interpreted the similar factual circumstance prong of the *Abbasi* test to involve more granular facts. Take, for example, the U.S. Court of Appeals for the Fifth Circuit's decision in *Oliva v. Nivar*.[126] In that case, the plaintiff brought a *Bivens* claim alleging that U.S. Department of Veterans Affairs (VA) police officers violated her Fourth Amendment rights by using excessive force in a physical altercation that occurred while the plaintiff stood in line for a metal detector at a hospital entrance.[127] Despite the factual similarities to *Bivens*,[128] the Fifth Circuit found that the plaintiff's Fourth Amendment claim presented a new factual context because (1) it arose in a hospital, not a private home like in *Bivens*; (2) the situation giving rise to the use of force was not a narcotics investigation, as it was in *Bivens*; and (3) the excessive force used against the plaintiff was a chokehold, whereas in *Bivens* the use of force was a strip search.[129] The Fifth Circuit's factual analysis in *Oliva* suggests that even the slightest factual differences will render a case distinct for *Bivens* purposes. Some critics write that the trend in recent Supreme Court decisions, as shown in *Oliva*, is to invoke the more searching special-factors analysis found in the second prong of the *Abbasi* test and thereby construe almost all contexts as new.[130]

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122. *See* Ziglar v. Abbasi, 137 S. Ct. 1843, 1848–49, 1860 (2017).
123. *Id.*
124. *See id.*
125. *See id.* at 1853–54.
126. 973 F.3d 438 (5th Cir. 2020).
127. *Id.* at 441.
128. *See supra* notes 58–59 and accompanying text.
129. *See Oliva*, 973 F.3d at 443.
130. *See, e.g.*, Joanna C. Schwartz, Alexander Reinert & James E. Pfander, *Going Rogue: The Supreme Court's Newfound Hostility to Policy-Based* Bivens *Claims*, 96 NOTRE DAME L. REV. 1835, 1837 (2021).

2. Restrictions on Factual Contexts That Influence National Policy

Many of the rationales that courts have used to restrict *Bivens* liability have roots in the separation-of-powers concerns that underlie much of the *Abbasi* special-factors analysis.[131] For instance, a primary, and relatively new, way in which courts have restricted *Bivens* liability post-*Abbasi* is through an expression of concern that some claims seek to challenge nationally promulgated policies by other branches of government.[132] Courts tend to characterize damages actions as challenges to government policy, rather than claims to receive compensation for *past* violations of constitutional rights.[133] They then go on to find that any contexts that implicate policy are inappropriate for a judicially implied constitutional cause of action—even if the claims fall under the Fourth Amendment like *Bivens* and are factually similar.

The Supreme Court decision in *Boule* is a primary example of this. The facts of *Boule* are strikingly similar to those of *Bivens*,[134] except that the underlying incident occurred at an international border and involved federal border agents.[135] In denying a *Bivens* remedy, the Court again articulated concern that the risk of damages liability would cause an official to second guess national policy decisions because of the supposed risk of financial loss,

131. *See* Ziglar v. Abbasi, 137 S. Ct. 1843, 1858 (2017) ("When a party seeks to assert an implied cause of action under the Constitution itself . . . separation-of-powers principles are or should be central to the analysis, the question is 'who should decide' whether to provide for a damages remedy, Congress or the courts?"); *see also supra* notes 116–19 and accompanying text.

132. *See* Est. of Diaz v. Cheatum, No. 17-CV-24108, 2019 WL 296766, at *3 (S.D. Fla. Jan. 23, 2019) (denying *Bivens* liability for an inmate's medical-indifference claim that related to the "de facto policy to punish any mid-level custody official who authorizes the transfer or transport of an inmate to an outside hospital"); *see also* Smith v. Shartle, No. CV-18-00323, 2019 WL 2717097, at *2 (D. Ariz. June 28, 2019) (rejecting an inmate's failure-to-protect *Bivens* claim because the complaints request for injunctive relief implicated the prison's policy of housing sex offenders with other inmates). *But see* Cuevas v. United States, No. 16-CV-00299, 2018 WL 1399910, at *4 (D. Colo. Mar. 19, 2018) (allowing an inmates's *Bivens* claims against an officer to proceed and explaining that the claim challenges day-to-day inmate operations, not complex matters of the Bureau of Prisons' policymaking).

133. *See* Schwartz, Reinert & Pfander, *supra* note 130, at 1837–38 (noting that in *Abbasi*, the Court characterized the post-September 11 detainees' claims against federal detention officers as seeking to contest large scale policy decisions, concerning hundreds of incarcerated individuals, including the national detention policy decisions of high-ranking federal officials); *see also* Mesa v. Hernandez, 140 S. Ct. 735, 755 (2022) (declining to permit a Fourth Amendment *Bivens* claim because the events giving rise to the suit occurred on the border of Mexico, and allowing the claim against federal border officers to proceed would implicate their ability to effectively perform, thus affecting national security).

134. *See* Egbert v. Boule, 142 S. Ct. 1793, 1815–16 (2022) (Sotomayor, J., concurring) (arguing that Boule's Fourth Amendment claim did not arise in a new context and that the facts alleged in Boule's complaint were consistent with those alleged in *Bivens*).

135. *See id.* at 1800–02 (majority opinion). Boule operated an inn on the U.S.-Canadian border that often held people who unlawfully entered the country. *Id.* Agent Erik Egbert, suspicious of one of the guests, got into an altercation with Boule after he demanded to see the guest's immigration paperwork and allegedly used excessive force against Boule, in violation of his Fourth Amendment rights. *Id.*

thus implicating national policy.[136] The Court ultimately stated that in the context of international border security, Congress was in a better position to create remedies than the judiciary.[137]

Although there is minimal direct guidance from the Supreme Court about what policies can preclude *Bivens* claims, in determining what a policy claim is, "the Court appears to embrace a perception that policies differ from one-off actions taken within a zone of discretion."[138] In fact, lower courts have used the policy hook to deny cases factually similar to established *Bivens* claims.[139]

3. Alternative Remedies Are Special Factors Counseling Hesitation

Another way in which the Court has restricted *Bivens* liability in the name of separation-of-powers principles involves alternate remedial structures that the Court believes are available to the plaintiff as substitutes—including administrative remedies, as well as recovery under the FTCA.[140] As one of the longest standing factors the Court has used to counsel hesitation in extending *Bivens*, administrative remedies come in many forms. The pretext of administrative remedies is that, if there are alternative administrative remedies by which a plaintiff can recover, then Congress has already spoken to the issue.[141] As such, it is inappropriate, as a matter of separation of powers, for the courts to fashion a competing judicial remedy by following *Bivens*.[142]

For example, in *Bush v. Lucas*,[143] the Supreme Court refused to extend *Bivens* liability to a NASA aerospace engineer's claim that his supervisor violated his First Amendment[144] rights.[145] The Court denied the plaintiff's *Bivens* action primarily because the U.S. Civil Service Commission provided an alternative remedy for the alleged retaliatory demotion.[146] This was one of the first times the Court articulated the special-factors analysis; the Court ultimately determined that in the context of specialized federal employment, administrative remedies precluded *Bivens* claims.[147]

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136. *Id.*

137. *Id.* at 1805.

138. *See* Schwartz, Reinert & Pfander, *supra* note 130, at 1856–57 (identifying a potential dividing line between official policies and patterns of misconduct).

139. *See supra* note 132. For a compilation of cases that reject *Bivens* actions because they were deemed suits implicating a federal policy, see Schwartz, Reinert & Pfander, *supra* note 130, at 1856.

140. *See* Ziglar v. Abbasi, 137 S. Ct. 1843, 1863 (2017) (noting that "when alternative methods of relief are available, a *Bivens* remedy usually is not").

141. *See, e.g.*, Bush v. Lucas, 462 U.S. 367, 388–89 (1983).

142. *See Abbasi*, 137 S. Ct. at 1864–65 ("[L]egislative action suggesting that Congress does not want a damages remedy is itself a factor counseling hesitation.").

143. 462 U.S. 367 (1983).

144. U.S. CONST. amend. I.

145. *See Bush*, 462 U.S. at 368–69.

146. *See id.* at 388.

147. *See id.* at 388–89; *see also* Chappel v. Wallace, 462 U.S. 296, 298 (1983) (finding that enlisted military personnel cannot bring suits directly under the Constitution to recover

Similarly in *Boule*, the Court determined that the U.S. Customs and Border Protection's administrative grievance process "independently foreclose[d]" extending *Bivens*, because Congress had already created an "alternative remed[y]."[148] This type of analysis is significant, because, although commonplace, the administrative procedures used by most federal law enforcement agencies provide little protection or meaningful relief for complainants.[149] Thus, in *Boule*, the Court "set a new floor for 'alternative remedies' that foreclose a *Bivens* cause of action."[150]

In *Bivens* litigation related to incarcerated individuals, the Prison Litigation Reform Act[151] (PLRA), which applies to all inmate claims, is the primary statutory scheme that the courts take into consideration when determining whether an alternative remedial structure exists.[152] Enacted in 1996, the PLRA requires "a prisoner confined in any jail, prison, or other correctional facility" to exhaust "such administrative remedies as are available" before filing any "action . . . with respect to prison conditions under . . . any . . . Federal law."[153] In other words, the PLRA requires incarcerated individuals to utilize to the fullest extent possible their prison's administrative grievance process before filing a claim in state or federal court.[154] Importantly, the PLRA itself "does not provide for a standalone damages remedy against federal jailers."[155] Nevertheless, because Congress necessarily addressed the issue of inmates' constitutional claims in the PLRA and because the statute works as a mechanism to filter these claims, some courts interpret the act's existence as supporting the conclusion that Congress considered—and rejected—the possibility of federal damages for violations of the rights of incarcerated individuals.[156]

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damages from superior officers for alleged violations of their rights because of the unique structure of the military establishment and Congress's activity in that field).

148. Egbert v. Boule, 142 S. Ct. 1793, 1798 (2022).

149. *See Constitutional Remedies — Bivens Actions — Excessive Force — Retaliation —* Egbert v. Boule, 136 HARV. L. REV. 370, 370 (2022).

150. *See id.*

151. Pub. L. No. 104-134, tit. 8, 110 Stat. 1321-66, 1321-66 to 1321-77 (codified as amended in scattered sections of the U.S. Code).

152. 42 U.S.C. § 1997e(a).

153. *Id.*

154. *See* U.S. DEP'T. OF JUST., ADMINISTRATIVE REMEDY PROGRAM (2014), https://www.bop.gov/policy/progstat/1330_018.pdf [https://perma.cc/46ZG-BPN4] (explaining the purpose, scope, and procedures for filing a grievance within the federal prison system, as required of inmates by the PLRA).

155. Butler v. Porter, 999 F.3d 287, 294–95 (5th Cir. 2021) (quoting Ziglar v. Abbasi, 137 S. Ct. 1843, 1865 (2017) (holding that an inmate's First Amendment retaliation claim against federal corrections officers was a new *Bivens* context, and that special factors counseled hesitation, including the existence of the PLRA)).

156. *See, e.g.*, *id.* at 295 (explaining that the lack of a damages remedy in the PLRA suggests that Congress did not want a damages remedy for incarcerated individuals, thus counseling hesitation); Watkins v. Three Admin. Remedy Coordinators of Bureau of Prisons, 998 F.3d 682, 685 (5th Cir. 2021) (denying a federal inmate's First Amendment *Bivens* claim in part "out of respect for Congress" because the PLRA does not provide a standalone damages remedy against federal prison officials, indicating congressional disapproval and thus implicating separation-of-powers concerns); Callahan v. Fed. Bureau of Prisons, 965 F.3d 520, 524 (6th Cir. 2020) (reasoning that legislative inaction in the PLRA suggests that

Finally, courts also look to the FTCA when evaluating whether there are alternative remedial schemes that preclude *Bivens* claims. The FCTA creates a cause of action against the United States for torts committed by its officers.[157] For instance, federal inmates may pursue actions under the FTCA for a violation of prison officer's statutorily imposed duty of safekeeping.[158] Significantly, this statutory duty specifically forbids federal corrections officers from burying their head in the sand with regard to incarcerated individual safety and "prisoner-on-prisoner" violence, and affirmatively requires them to protect inmates and provide for their safekeeping.[159] Congress modified the FTCA with the Federal Employees Liability Reform and Tort Compensation Act of 1988[160] (the "Westfall Act").[161] Under the Westfall Act, incarcerated individuals cannot bring state-law tort actions against employees of the federal government for actions arising out of acts they undertake in the course of their official duties.[162] Thus, for a plaintiff to successfully bring a state-law tort suit against a corrections officer, the corrections officer must have been acting outside the scope of his employment.[163] Whether the officer was in fact acting within the scope of employment is a fact that the U.S. Attorney General certifies; this depends on the law of the specific jurisdiction and whether the legal standard finds that the officer could even be acting within the scope of their employment when committing intentional torts.[164] If the Westfall Act applies, the United States is substituted as the defendant in the place of the offending officer and the claim must proceed in federal court pursuant to the FTCA.[165]

When first fleshing out the parameters of *Bivens* liability, the Supreme Court in *Carlson* determined that it is "crystal clear" that Congress, in amending the FTCA in 1974, viewed the FTCA and *Bivens* as "parallel, complementary causes of action."[166] The Court also specified four factors that each suggests that the *Bivens* remedy is more effective than the FTCA's remedies. First, the Court found that the *Bivens* remedy serves a deterrent

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Congress did not want a damages remedy for an inmate's *Bivens* claim, and "counsels against judicial do-it-yourself projects").

157. *See* 28 U.S.C. § 2674; *see also id.* § 1346 (providing federal courts with jurisdiction to hear claims against the United States for money damages); *see supra* Part I.A.

158. *See* 18 U.S.C. § 4042 (requiring that the Bureau of Prisons "provide suitable quarters and provide for the safekeeping, care, and subsistence of all persons charged with or convicted of offenses against the United States, or held as witnesses or otherwise" and "provide for the protection, instruction, and discipline of all persons charged with or convicted of offenses against the United States").

159. *See id.*

160. Pub. L. No. 100-694, 102 Stat. 4563 (codified at 28 U.S.C. §§ 2671, 2674, 2679).

161. *See* 28 U.S.C. §§ 2671, 2679(b)(1).

162. *See id.*; *see also* Minneci v. Pollard, 565 U.S. 118, 126 (2012); Osborn v. Haley, 549 U.S. 225, 229 (2007).

163. *See* Hoffman v. Preston, 26 F.4th 1059, 1066 (9th Cir. 2022) (citing *Osborn*, 549 U.S. at 229).

164. *See id.*

165. *See* 28 U.S.C. § 2679(d)(4); *see also Osborn*, 549 U.S. at 230.

166. *See* Carlson v. Green, 446 U.S. 14, 20 (1980); Langsam, *supra* note 42, at 1405 n.88.

purpose because it is recoverable against individuals, as opposed to the FTCA remedy against the United States.[167] Second and third, the Court also considered that punitive damages and jury trials are not available in FTCA suits.[168] Fourth, the Court identified that an action under the FTCA exists only if the state in which the misconduct occurred permits a cause of action for that specific alleged wrong.[169] As the Court noted, *Bivens* suits contain none of these limitations.[170] However, it is worth noting that the *Carlson* Court's view of the personal liability afforded by *Bivens* is drastically different than that of the current Court.[171]

II. UNCERTAINTY FOR *BIVENS* FAILURE-TO-PROTECT CLAIMS IN THE FEDERAL COURTS OF APPEALS

Although the Supreme Court has counseled against further extension of *Bivens* liability, recent circuit court decisions leave uncertain whether "prisoner-on-prisoner" violence and failure-to-protect *Bivens* claims may proceed in the post-*Abbasi Bivens* regime. Part II.A examines two recent decisions by the Third Circuit which interpreted *Abbasi* to permit failure-to-protect *Bivens* claims to proceed. Part II.B examines recent decisions by the Ninth Circuit, first permitting a failure-to-protect claim[172] and then reversing course shortly after *Boule*.[173] Finally, Part II.C presents the recent decision by the U.S. Court of Appeals for the Fourth Circuit that interpreted *Abbasi* to prohibit *Bivens* claims against federal officers for violence perpetrated by incarcerated individuals.[174]

A. The Third Circuit's Approach to Bivens *and Failure-to-Protect Claims*

In *Bistrian v. Levi*,[175] the Third Circuit addressed pretrial detainee Peter Bistrian's claims against federal prison officials who failed to protect him from attacks by other inmates in a prison yard.[176] After being placed in solitary confinement for a year, Bistrian earned some privileges that allowed him to interact with other inmates.[177] Knowing Bistrian had access to others

167. *See Carlson*, 446 U.S. at 20–21; *see also* James E. Pfander, Alex A. Reinert & Joanna C. Schwartz, *The Myth of Personal Liability: Who Pays When* Bivens *Claims Succeed*, 72 STAN. L. REV. 561 (2020) (providing an empirical examination to determine who actually pays when *Bivens* claims succeed, based on information supplied by the Federal Bureau of Prisons over a ten-year period).

168. *See Carlson*, 446 U.S. at 21–22.

169. *See id.* at 23.

170. *See id.*

171. *See* Egbert v. Boule, 142 S. Ct. 1793, 1803 (2022).

172. *See* Hoffman v. Preston, 26 F.4th 1059 (9th Cir.), *withdrawn*, 50 F.4th 9127 (9th Cir. 2022), *overruled by* No. 20-15396, 2022 WL 6685254 (9th Cir. Oct. 11, 2022).

173. *See generally* Hoffman v. Preston (*Hoffman II*), No. 20-15396, 2022 WL 6685254 (9th Cir. Oct. 11, 2022).

174. *See* Bulger v. Hurwitz, 62 F.4th 127 (4th Cir. 2023).

175. 912 F.3d 79 (3d Cir. 2018).

176. *See id.* at 83–84.

177. *See id.*

held in solitary confinement, other inmates asked him to deliver notes on their behalf.[178] Bistrian told officers about this request, which led to his cooperation and involvement in a Federal Bureau of Prisons (BOP) surveillance operation.[179] Sometime after, his cooperation with prison officials became known to other inmates, and he began receiving threats.[180] The impetus for Bistrian's claim came from prison officials' placing him in a recreation yard with the inmates who had threatened him—despite their knowledge of the threats—and failing to intervene when he was attacked.[181]

Applying the *Abbasi* framework, the Third Circuit held that Bistrian's failure-to-protect claim could proceed under *Bivens*.[182] As to the first prong of the *Abbasi* test, the Third Circuit relied primarily on *Farmer* to decide that the "Supreme Court ratified [failure-to-protect] claim[s]" and thus, Bistrian's claim against the officers did "not present a new *Bivens* context."[183] The Third Circuit discussed the Supreme Court's failure to directly address or condone *Bivens* liability for failure-to-protect claims in *Farmer*, and concluded that, nevertheless, the case represented Supreme Court approval of *Bivens* liability for these types of claims.[184] That the focus of the *Farmer* opinion was delineating the "deliberate indifference" legal standard to assess a *Bivens* claim, rather than *Bivens* liability itself, was inconsequential to the Third Circuit.[185] In fact, the Third Circuit emphasized that the deliberate indifference standard discussed in *Farmer*'s failure-to-protect context was the same standard that the Supreme Court had primarily used in *Carlson* to evaluate prison officials' medical indifference, and that the existence of deliberate indifference was relevant, rather than similarities between the hyper-specific facts of the two cases.[186] Additionally, even though the Supreme Court in *Abbasi* specifically identified three *Bivens* cases (*Bivens*, *Passman*, and *Carlson*) and did not address or cite *Farmer*,[187] the Third Circuit noted that this language likely meant that "the [Supreme] Court simply viewed the failure-to-protect claim as not distinct from the Eighth Amendment deliberate indifference claim in the medical context" in

178. *See id.* at 84.
179. *See id.*
180. *See id.*
181. *See id.*
182. *See id.* at 90–91, 91 n.19. Importantly, Bistrian brought his failure-to-protect claim under the Fifth Amendment's Due Process Clause rather than the Eighth Amendment because his status as a pretrial detainee was immaterial to the court. *See id.* Even though Bistrian's claim derived from another amendment, it was not "different in a meaningful way" from other failure-to-protect claims brought under the Eighth Amendment. *Id.* at 91.
183. *See id.* at 90.
184. *See id.* at 90–91.
185. *See id.* (citing Doty v. Hollingsworth, No. 15-3016, 2018 WL 1509082, at *3 n.2 (D.N.J. Mar. 27, 2018) (upholding an inmate's failure-to-protect claim brought under the Eighth Amendment and noting that it would be irrational for the court to assume that the Supreme Court in *Farmer* "would outline a merits analysis for a cause of action that does not exist and over which it lacked subject-matter jurisdiction")).
186. *See id.*
187. *See id.* at 91; *see also* Ziglar v. Abbasi, 137 S. Ct. 1843, 1854–56 (2017) ("These three cases—*Bivens*, [*Passman*], and *Carlson*—represent the only instances in which the Court has approved of an implied damages remedy under the Constitution itself.").

Carlson.[188] Notably, the Third Circuit did not engage in a searching factual analysis comparing individual specific facts of Bistrian's claim to other established *Bivens* cases.[189] Instead, it relied more generally on the similarity between Bistrian's claim of an officer's deliberate indifference to his safety and the deliberate indifference claims in *Farmer* and *Carlson*, and concluded that Bistrian's claim did not present a novel extension of *Bivens*.[190] According to the *Abbasi* test, a finding that Bistrian's claim did not present a new *Bivens* context ends the analysis and allows the claim to proceed.[191] Thus, on this alone, the Third Circuit held that Bistrian's claim could proceed.[192]

Nonetheless, the court engaged in a special-factors analysis pursuant to the second step of *Abbasi*.[193] At this step, the circuit primarily focused on the existence of an alternative remedial structure and separation-of-powers principles and concluded that—even if the claim presented a new *Bivens* context—no special factors counseled hesitation in extending the *Bivens* remedy and allowing the claim to proceed.[194]

Beginning with potential alternate remedial structures, the *Bistrian* court concluded that the FTCA, prison grievance programs, and a writ for habeas corpus all failed as alternatives to a *Bivens* remedy.[195] Determining that the "FTCA is not a sufficient protector of the citizens' constitutional rights," the Third Circuit rejected an FTCA claim as an alternative remedy because it does not provide for recovery against *individuals*.[196] Thus, the Third Circuit concluded that the FTCA was inadequate to deter federal officials' misconduct because it does not hold officers personally accountable for their actions.[197]

Turning to other administrative routes for bringing a failure-to-protect claim, the Third Circuit dismissed prison grievance programs and a petition for a writ of habeas corpus as avenues for relief because neither allows for damages as a potential remedy, and in failure-to-protect claims it is "damages or nothing."[198] Relying on the language in *Abbasi*, the Third Circuit emphasized that "individual instances of [official misconduct], [] due to their very nature are very difficult to address except by way of damages actions after the fact."[199] According to the Third Circuit, neither the prison administrative grievance structure nor habeas corpus would be able to redress Bistrian's harm already suffered because neither remedy allows for money

188. *See Bistrian*, 912 F.3d at 91.
189. *See supra* Part I.C; *infra* Part II.C.
190. *See Bistrian*, 912 F.3d at 91.
191. *See supra* Part I.C.
192. *See Bistrian*, 912 F.3d at 91–92.
193. *See id.* at 92; *see also supra* Part I.C.
194. *See Bistrian*, 912 F.3d at 92–94.
195. *See id.* at 92.
196. *See id.*
197. *See id.*
198. *See id.* (citing Ziglar v. Abbasi, 137 S. Ct. 1843, 1862 (2017)).
199. *See id.* (citing *Abbasi*, 137 S. Ct. at 1862).

damages.[200] The shortcomings of the prison administrative grievance program and habeas relief are particularly apparent in *Bistrian*, the Third Circuit held, because at the time of litigation, Bistrian had been transferred to another facility.[201] Any relief without the possibility for awarding damages, therefore, would be a futile attempt to redress the constitutional violation he suffered at the hands of federal officials.[202] Thus, the Third Circuit found no alternative remedial structures that would counsel hesitation in extending *Bivens* liability to Bistrian's failure-to-protect claim.[203]

Turning to the question of whether separation-of-powers principles counsel hesitation in allowing Bistrian to bring a *Bivens* claim, the court built on its alternative remedial structure analysis and focused on the individualized nature of failure-to-protect claims. The potential that an officer's misconduct would at times be related to a prison administrative policy was immaterial to the Third Circuit, given that "Bistrian's claim fits squarely within *Bivens*' purpose of deterring misconduct by prison officials."[204] Contrary to claims that implicate or challenge a largescale administrative policy relating to national security like in *Abbasi*, the Third Circuit noted failure-to-protect claims challenge "particular individuals' action or inaction in a particular incident."[205] Although challenges to individual conduct are much less likely by their nature to infringe on another branch of government, the court conceded that at times these claims would implicate policies regarding inmate safety and security, such as the prison officials defendants' decision to place Bistrian in the yard after receiving death threats.[206] Nevertheless, the Third Circuit refused to acknowledge that a prison policy would raise a separation-of-powers concern because "that would be true of practically all claims arising in a prison."[207] Thus, the Third Circuit in *Bistrian* refused to reject *Bivens* claims in situations where the imposition of liability might implicate policy discretion, and found that no separation-of-powers concerns counseled hesitation.[208]

Lastly, the Third Circuit rejected the argument that congressional silence as to damage remedies in the PLRA was evidence of legislative disapproval of the *Bivens* remedy.[209] Because the PLRA regulates how *Bivens* actions are brought, the Third Circuit determined that it "cannot rightly be seen as dictating that a *Bivens* cause of action should not exist at all."[210] Thus, the Third Circuit concluded that the lack of a damages remedy in the PLRA did

200. *See id.*
201. *See id.*
202. *See id.*
203. *See id.* at 92–93.
204. *See id.* at 93.
205. *Id.*
206. *See id.*
207. *Id.*
208. *See id.*; *cf. id.* at 94 (explaining that Bistrian's Fifth Amendment punitive detention claim was not a valid *Bivens* claim because it implicated separation-of-powers concerns given prison officials have "and indeed must have[] the authority to determine detention policies").
209. *See id.* at 92–93.
210. *Id.* at 93.

not show that Congress intended to foreclose a *Bivens* remedy for federal inmates, and thus Congress did not speak to the issue, so no separation-of-powers concerns were present.[211]

Nearly three years later, the Third Circuit decided another failure-to-protect *Bivens* claim, *Shorter v. United States*.[212] Christopher "Chrissy" Shorter, a transgender woman who was incarcerated in a federal prison, was continually placed in housing arrangements that put her at risk of sexual assault despite her many requests for transfer and expressed concerns, and a screening that indicated that she was at a "significantly" higher risk than other inmates[213]—all of which ultimately culminated in her being attacked and sexually assaulted while asleep one night in her cell.[214] She was released shortly thereafter, and brought a *Bivens* claim, against the correctional officers responsible for her placement, for their failure to protect her from the risk of harm, in violation of her Eighth Amendment rights.[215]

Relying heavily on its decision in *Bistrian* as well as the factual similarities between Shorter's case and *Farmer*, the Third Circuit concluded that Shorter had a valid *Bivens* claim.[216] The Third Circuit kept true to its factual analysis approach from *Bistrian*: in Eighth Amendment *Bivens* claims, the relevant facts are those that concern an officer's deliberate indifference to their statutorily imposed duties to the incarcerated individuals[217] as outlined in *Farmer*.[218] Although the court did note the striking factual similarities between *Shorter* and *Farmer*—both involved transgender women's failure-to-protect claims against correctional officers who failed to protect them from sexual assault at the hands of other inmates—the touchstone of the Third Circuit's *Bivens* analysis was the deliberate indifference similarity, not the granular background facts that made the cases similar.[219] Because *Shorter* did not present a new factual paradigm, the court allowed the claim to proceed without addressing the second prong of *Abbasi*.[220]

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211. *See id.* (echoing the Supreme Court's stated purpose of the PLRA, as articulated in *Woodford v. Ngo*, 548 U.S. 81 (2006), which renders it a statute to control the influx of *Bivens* claims).

212. 12 F.4th 366 (3d Cir. 2021).

213. *See id.* at 369 (noting that Shorter's screening report stated that she "should not be housed with anyone perceived to be 'at risk' for sexual abuse perpetration").

214. *See id.* at 370–71. First, Shorter was placed in a cell with eleven men. *Id.* at 369. Eventually, after articulating her concerns, Shorter was moved to a two-person cell, but she was assigned a sex offender as a cellmate, her cell did not have a lock, and the cell was located the furthest from the officer's station as possible. *Id.* at 369–70. Then, she was transferred to a facility that had a disproportionately large number of sex offenders. *Id.* at 370.

215. *See id.* at 370–71.

216. *See id.* at 373.

217. *See supra* notes 157–58 (explaining the statutory obligations of the BOP to incarcerated individuals).

218. *See* Farmer v. Brennan, 511 U.S. 825, 832 (1994) (explaining that the Eighth Amendment "imposes duties on [prison] officials, who must provide humane conditions of confinement; prison officials must ensure that inmates receive adequate food, clothing, shelter, and medical care, and must take reasonable measures to guarantee the safety of the inmates"); *see also supra* Part I.C.

219. *See Shorter*, 12 F.4th at 373.

220. *See id.*

B. The Ninth Circuit's Shifting Approach to Bivens *and Failure-to-Protect Claims*

In *Hoffman v. Preston*[221] ("*Hoffman I*"), the Ninth Circuit originally allowed a failure-to-protect claim to proceed under *Bivens* after a correctional officer repeatedly and publicly labeled Marcellas Hoffman, a federal inmate, a "snitch" in front of other inmates and offered a bounty to specific individuals to harm him, which resulted in his assault at the hands of other inmates.[222] In a lengthy opinion, the Ninth Circuit allowed Hoffman's *Bivens* claim to proceed, but its analysis under the *Abbasi* test was considerably different from that of the Third Circuit in *Bistrian*.[223] Unlike the Third Circuit's determination under the first step of *Abbasi*, the Ninth Circuit concluded that Hoffman's failure-to-protect claim *was* a new *Bivens* context, albeit a "very modest expansion of the *Bivens* remedy," but that no special factors counseled hesitation, thus allowing the claim to proceed.[224]

Considering step one of the *Abbasi* analysis, the court found that the claim presented a new *Bivens* context because the facts that Hoffman alleged were different from the factual basis in *Carlson*. The Ninth Circuit specifically noted that although Hoffman argued that the corrections officer was deliberately indifferent to his health and safety, the argument was inconsistent with his complaint, in which he alleged that the officer publicly labeled him a snitch and offered a bounty for his life.[225] Although still misconduct, these affirmative actions to harm Hoffman, the court said, did not amount to indifference to Hoffman's health and safety, making Hoffman's claim slightly different from the claim in *Carlson*.[226] The court focused on the fact that the corrections officer in Hoffman's case created the risk to his safety, rather than purposely failing to come to his aid in violation of the officer's duty to the inmate.[227] Here, the Ninth Circuit acknowledged a key factual distinction in Hoffman's failure-to-protect claim that placed the offending corrections officer's conduct outside of the deliberate indifference realm. On this difference, the Ninth Circuit found that Hoffman's claim arose in a new *Bivens* context, making his claim "a modest extension" of *Bivens*.[228]

Moving to the second step of *Abbasi*, the Ninth Circuit determined that no special factors counseled hesitation "against what is a very modest expansion

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221. 26 F.4th 1059 (9th Cir.), *withdrawn*, 50 F.4th 9127 (9th Cir. 2022), *overruled by* No. 20-15396, 2022 WL 6685254 (9th Cir. Oct. 11, 2022).

222. *See id.* at 1065–66.

223. *See supra* Part II.B.

224. *Hoffman I*, 26 F.4th at 1061.

225. *See id.* at 1063.

226. *See id.* at 1062.

227. *See id.*; *see also supra* notes 158–59 and accompanying text.

228. *See Hoffman I*, 26 F.4th at 1063. Interestingly, the Ninth Circuit did not mention *Farmer* in its decision. In addition, even though the first prong of the *Abbasi* test only requires courts to indicate whether the claim arises in a new *Bivens* context, *see supra* notes 115–19 and accompanying text, the Ninth Circuit signaled its approval of Hoffman's claim by indicating that it was a logical extension of the *Bivens* remedy, one that was not leaps away from *Carlson*. *Hoffman I*, 26 F.4th at 1063.

of a *Bivens* remedy to this context" and allowed Hoffman's claim to proceed.[229] Like the Third Circuit in *Bistrian*, the *Hoffman I* court focused its analysis on the unavailability of alternate remedies that could adequately redress Hoffman's alleged harm.[230] The Ninth Circuit concluded that the FTCA alternative insufficiently deterred officer misconduct because, under the Westfall Act, any claim is entirely dependent on the jurisdiction in which plaintiff brings their case.[231] The court noted that California state law would govern Hoffman's FTCA claim, and under California law, it was "well established" that even a federal employee's criminal torts fall within the scope of their employment.[232] Thus, Hoffman's claim would likely be brought against the federal government, as opposed to against the specific officer who harmed him, and "the threat of suit against the United States [would be] insufficient to deter the unconstitutional acts of individuals."[233]

Additionally, the Ninth Circuit determined that the mandatory BOP grievance process in the PLRA was not a sufficient alternative to a *Bivens* damage remedy and did not serve as evidence of congressional intent to preclude *Bivens* claims.[234] First, the Ninth Circuit found that a remedy obtained through the prison grievance structure would be inadequate to cure the harm that Hoffman already suffered, especially here, where Hoffman had already been transferred to another facility.[235] Dismissing the dissent's argument,[236] the majority, like that in *Bistrian*, held that the existence of an administrative grievance process was not intended to preclude *Bivens* suits, especially given that it only provides injunctive relief.[237] Turning to the second special factor that can counsel hesitation—i.e., the separation-of-powers concerns—the Ninth Circuit found that the existence of the PLRA and mandatory prison grievance structure did not indicate congressional disapproval of the *Bivens* remedy.[238] According to the Court, when drafting the PLRA, Congress was well aware that incarcerated individuals were bringing failure-to-protect claims under *Bivens*.[239] Therefore, if there was congressional intent to prohibit *Bivens* actions, the Ninth Circuit reasoned that it would be stated *explicitly* in the statute.[240] Thus, the Ninth Circuit held that the PLRA and prison grievance remedies

229. *See Hoffman I*, 26 F.4th at 1061.
230. *See id.* at 1065.
231. *See id.* (citing Corr. Servs. Corp. v. Malesko, 534 U.S. 61, 67–68 (2001)); *see also supra* notes 161–65 and accompanying text.
232. *See Hoffman I*, 26 F.4th at 1066–67.
233. *Id.*
234. *See id.* at 1070.
235. *See id.*
236. Judge Carlos T. Bea dissented in *Hoffman I*, largely for the reasons adopted in *Hoffman II*. *See id.* at 1074 (Bea, J., dissenting).
237. *See id.* at 1069–70 (majority opinion) (noting that the PLRA does not create stand-alone money damages remedy or disallow one).
238. *See id.*
239. *See id.* at 1070.
240. *See id.* (collecting cases).

did not provide alternative remedies to *Bivens* actions and did not implicate separation-of-powers concerns.[241]

Lastly, the Ninth Circuit rejected the argument that Hoffman's failure-to-protect claim implicated prison administrative policies in a way that posed separation-of-powers concerns. The majority outlined the three categories of *Bivens* claims that inmates can bring: (1) challenges to their conditions of confinement, (2) challenges to the use of force by prison guards, and (3) claims that officers were deliberately indifferent to their health and safety.[242] Each of these claims, the Ninth Circuit reasoned, could present separations-of-powers concerns when the harm caused is the result of administrative prison polices which are the "responsibility of [the legislative and executive] branches."[243] Hoffman's failure-to-protect claim, the Ninth Circuit determined, relates both to the excessive use of force (because of the officer's affirmative actions of labeling Hoffman a snitch and putting a bounty on his head) and also deliberate indifference, but it did not implicate administrative policy, and thus separation-of-powers concerns, because it was not at all related to a *specific* prison policy.[244] In other words, the corrections officer's alleged misconduct was not the result of an explicit prison policy; in fact, it was prohibited by prison policy.[245] Because Hoffman's claim did not implicate prison policy, and also did not impact national security or raise cross-border concerns that would clearly counsel against a *Bivens* remedy, the Ninth Circuit ultimately determined that Hoffman's claim did not encroach on another branch and allowed Hoffman's claim to proceed.[246]

Less than a year after deciding *Hoffman I*, the Ninth Circuit reversed its decision in *Hoffman v. Preston*[247] ("*Hoffman II*"), and held that Hoffman's claim could not proceed under *Bivens*.[248] The reversal came shortly after the Supreme Court's decision in *Boule*, which was decided in 2022 after *Hoffman I*.[249] Interestingly, the opinion largely consisted of quotations from *Boule*.[250] Additionally, the reversal was influenced by the *Boule* Court's recasting of the *Abbasi* framework, stating that "[a] court faces only one question: whether there is *any* rational reason (even one) to think that *Congress* is better suited to 'weigh the costs and benefits of allowing a damages action to proceed.'"[251] The Ninth Circuit reported that the question

241. *See id.*
242. *See id.* at 1072.
243. *See id.* (citing Turner v. Safely, 482 U.S. 78, 84–85 (1978)).
244. *See id.* at 1072–73.
245. *See id.*
246. *See id.*
247. No. 20-15396, 2022 WL 6685254 (9th Cir. Oct. 11, 2022).
248. *See id.* at *1.
249. *See generally id.*; Egbert v. Boule, 142 S. Ct. 1793 (2022).
250. *See Hoffman II*, 2022 WL 6685254, at *1; *see also Boule*, 142 S. Ct. at 1805–06 ("The *Bivens* inquiry does not invite federal courts to independently assess the costs and benefits of implying a cause of action.").
251. *Hoffman II*, 2022 WL 6685254, at *1 (emphasis in original) (citing *Boule*, 142 S. Ct. at 1804).

is answered affirmatively if Congress or the executive branch has provided alternative remedies for aggrieved parties, or a remedial process that it finds is sufficient to deter misconduct.[252]

Reconsidering Hoffman's claim in light of the Court's newly articulated standard in *Boule*, the Ninth Circuit concluded that although Congress had not authorized a damages remedy in the failure-to-protect context, there could be "rational reasons" why Congress has been silent, such as the existence of the BOP formal review process for complaints.[253] Thus, the Ninth Circuit accepted the very argument it rejected in *Hoffman I*—that congressional silence can be construed as disapproval of the *Bivens* remedy.[254] That Congress had not explicitly authorized a remedy supplanting *Bivens* or rejected *Bivens* outright was immaterial, because the Ninth Circuit determined that the prison grievance process itself indicated congressional disapproval of *Bivens*.[255] Thus, the Ninth Circuit, with minimal explanation, vacated its decision in *Hoffman I* and held that Hoffman's claim could not be sustained under *Bivens*.[256]

C. The Fourth Circuit's Approach to Bivens *and Failure-to-Protect Claims*

In contrast to the Third Circuit, the Fourth Circuit recently held in *Bulger v. Hurwitz*[257] that an inmate's failure-to-protect claim against a federal officer could not proceed under *Bivens*.[258] The case concerned the events preceding the death of the notorious organized crime leader James "Whitey" Bulger, who led the Winter Hill Gang in Boston's "Southie" neighborhood for decades.[259] By the time Bulger was imprisoned, he was in his late seventies and had severe medical issues.[260] His poor health resulted in him being labeled a level-four inmate upon his imprisonment, the most severe level of medical need, meaning that he could only be placed in certain prisons that held other similarly situated inmates.[261] Before his death, Bulger was transferred to a level-two facility in West Virginia that served inmates without medical issues, but in order to successfully transfer him, prison officials downgraded his medical status code by two levels.[262] When he

252. *See id.*
253. *See id.*
254. *See id.*
255. *See id.*
256. *See id.*
257. 62 F.4th 127 (4th Cir. 2023).
258. *Id.* at 133.
259. *See Whitey Bulger*, MOB MUSEUM: NAT'L MUSEUM OF ORGANIZED CRIME AND L. ENF'T, https://themobmuseum.org/notable_names/whitey-bulger/ [https://perma.cc/8SKF-WNPJ] (last visited Oct. 12, 2024) (noting that although Bulger worked for decades as an informant for the Federal Bureau of Investigation beginning in the 1970s, he was responsible for some of the most viscous murders in Boston history which led to his eventual conviction after spending sixteen years as a fugitive).
260. *See Bulger*, 62 F.4th at 136.
261. *See id.* at 135.
262. *See id.*

arrived at the new facility, it is unknown if Bulger received any medical screening, which is protocol for new inmates to determine if they should be housed away from the general population of inmates.[263] Despite being in a wheelchair, the eighty-nine-year-old Bulger was placed within the general prison population at the new facility, and less than twelve hours after his arrival he was found dead in his cell, beaten to death by other inmates using a "lock in a sock" bludgeoning weapon.[264]

On behalf of his estate, Bulger's family sued the United States and federal prison officials for allegedly violating Bulger's Eighth Amendment rights by failing to protect him from the fatal attack by other inmates and by failing to intervene relating to their alleged roles in permitting his transfer to and placement in the general population of a violent facility.[265] The U.S. District Court for the Northern District of West Virginia granted the defendants' motions to dismiss, concluding that the *Bivens* claims "regarding failure to protect and failure to intervene are clearly a new [*Bivens*] context . . . [and that] multiple special factors counsel against creating a new *Bivens* remedy."[266]

On appeal, the Fourth Circuit rejected Bulger's[267] failure-to-protect *Bivens* claim, and concluded that, under the *Abbasi* framework, the claim both arose in a new context and that special factors counseled hesitation to extend *Bivens* liability to this new context.[268] The Fourth Circuit observed that Bulger's claims did not involve a federal official's deliberate medical indifference to an inmate's health—placing the claims outside the purview of *Carlson*.[269] Similar to *Hoffman II*,[270] the Fourth Circuit decided *Bulger* after the Supreme Court's decision in *Boule*, which had the effect of making the factual differences and special factors prongs of the *Abbasi* analysis more stringent.[271] The Fourth Circuit characterized Bulger's alleged constitutional violation as the prison officials' failure to stop Bulger's transfer to the new

263. *See id.* (noting that there is no record of any medical screening having taken place upon Bulger's arrival).

264. *See id.* at 136; *see also* Luke Barr, *Whitey Bulger Killing Was 'Planned' and Took Just 7 Minutes, Justice Department Says*, ABC NEWS (Aug. 23, 2022, 10:07 PM), https://abcnews.go.com/Politics/whitey-bulger-killing-planned-minutes-justice-department/story?id=88761649 [https://perma.cc/6FRZ-6CK9] (reporting that Bulger's murder was planned even before he arrived at the West Virginia facility, evidenced by a phone call of one of his assailants to his mother the night before Bulger's arrival, informing her of the plot); *Whitey Bulger*, *supra* note 259.

265. *See Bulger*, 62 F.4th at 127.

266. *Id.* at 136 (dismissing Bulger's FTCA claims against the United States as well, concluding that the FTCA's discretionary function exception barred the estate's claims because "[d]ecisions about how to safeguard prisoners are generally discretionary").

267. Any reference to Bulger's claim in this part refers to the claim brought on behalf of the deceased inmate Whitey Bulger, by the administrator of his estate, a family member who was also named Bulger.

268. *See id.* at 133 (affirming also the district court's dismissal of Bulger's FTCA claim because the discretionary function under the FTCA applies to prison officials' decisions to transfer inmates and whether to place them in the general population).

269. *See id.* at 138.

270. *See supra* Part II.B.

271. *See Bulger*, 62 F.4th at 138; *see also supra* notes 120–21.

facility and failure to protect him from "prisoner-on-prisoner" violence.[272] As such, because a lack of competent medical care did not cause Bulger's death, as it did in *Carlson*,[273] the Fourth Circuit found that Bulger's claim presented a new *Bivens* context.[274] Based on the *Abbasi* framework, the court then conducted *Abbasi*'s special-factors analysis.

Before addressing special factors, the Fourth Circuit explicitly rejected Bulger's argument, which relied on *Farmer* and the Third Circuit's decision in *Bistrian v. Levi*,[275] that his *Bivens* claims did not arise in a new context.[276] The Fourth Circuit explained that any reliance on *Farmer* to suggest that the Supreme Court has already approved a failure-to-protect *Bivens* claim would be inappropriate because "while the [Supreme] Court allowed the action [in *Farmer*] to proceed, it never addressed whether the claim was properly a *Bivens* claim."[277] Rather, the purpose of deciding *Farmer*, according to the Fourth Circuit, was to determine the proper legal test for deliberate indifference, not to approve of a *Bivens* remedy in that context, given that the parties did not brief the issue.[278] Additionally, the Fourth Circuit noted that the Supreme Court did not subsequently include *Farmer* on the list of *Bivens* cases they had decided, listing only *Bivens*, *Passman*, and *Carlson*.[279] Rejecting the Third Circuit decision in *Bistrian*, the Fourth Circuit noted that "the Third Circuit did not have the benefit of the Court's more recent *Bivens* guidance, as *Bistrian* was decided before the Court's decisions in . . . [*Boule*]."[280] Thus, the Fourth Circuit found any reliance on *Farmer* unavailing because the Supreme Court did not specifically condone a failure-to-protect *Bivens* case, and on *Bistrian*, because it was decided before the Court's most recent word on *Bivens* jurisprudence.[281]

The Fourth Circuit's special-factors analysis largely centered around separation-of-powers concerns and revolved around the "single [issue]: whether there is any reason to think that Congress might be better equipped to create a damages remedy."[282] The Fourth Circuit, however, highlighted a new reason that counseled against extending the remedy, namely that a *Bivens* remedy in this factual context would extend scrutiny to a new

272. *See Bulger*, 62 F.4th at 138.
273. *See supra* Part I.C.
274. *See Bulger*, 62 F.4th at 138 (noting that the facts of the case implicated the scope of prison officials' responsibilities and duties as well as prison policies, administrative, and economic decisions). Interestingly, the Fourth Circuit denied any potential connection between prison officials' mislabeling Bulger as a level-two inmate and placing him in a medically incompetent facility with inadequate medical attention, or medical indifference as it appears in *Carlson*, writing that "a lack of competent medical care did not cause Bulger's death." *Id.* at 138.
275. *See supra* Part II.B.
276. *See Bulger*, 62 F.4th at 138–39.
277. *Id.* at 139.
278. *See id.*
279. *See id.*
280. *Id.*
281. *See id.*
282. *Id.* at 140 (citing Egbert v. Boule, 142 S. Ct. 1793, 1802–03 (2022)).

category of defendants.[283] Because Bulger's failure-to-protect claim also involved his transfer from one facility to another, allowing his claim to proceed would extend liability to prison employees involved in transferring inmates and managing the agency's housing system—a group of federal officials not previously liable under *Bivens*.[284] Although not directly related to separation-of-powers principles, the Fourth Circuit cited this new potential category of defendants as cause to counsel against extending *Bivens* in Bulger's case.

The Fourth Circuit found additional special factors that counseled against extending *Bivens* liability: (1) Bulger's claim implicated separation-of-powers concerns because it involved prison policy; (2) allowing for liability would interfere with the statutory scheme in the PLRA; and (3) there was an alternative remedial structure for Bulger to bring his claim, namely via the BOP administrative grievance system.[285] Although the court referred to this first consideration as the "burden and demand of litigation,"[286] it more aptly explained a line of reasoning akin to that in *Abbasi* and expressed worry that claims in this area could interfere with national or executive policy.[287] In particular, the court's express concern is that imposing liability on prison officials on a systemic level for an inadequate facility placement to meet the medical needs of an inmate implicated broad prison policies and systemwide procedures, thus impeding policy set by other branches of government.[288]

On the second factor, the Fourth Circuit concluded that allowing Bulger's *Bivens* claim to proceed would violate separation-of-powers principles because it would conflict with "Congress's choice . . . [to] omit an individual-capacity damages remedy" from the PLRA.[289] Declaring that "[i]nstitutional silence speaks volumes," the *Bulger* court interpreted the absence of an individual damages remedy in the PLRA as "counsel[ing] strongly against judicial usurpation of the legislative function."[290] Even though the court acknowledged that the ultimate purpose of the PLRA is to limit litigation brought by incarcerated individuals, still it concluded that the PLRA represents a congressional desire to prevent courts from interfering with BOP decisions, and thus counsels against permitting a judicial remedy for Bulger in the form of *Bivens* liability.

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283. *See id.*
284. *See id.*; *supra* Part I.C.
285. *See Bulger*, 62 F.4th at 140–41.
286. *Id.* (citing Ziglar v. Abbasi, 137 S. Ct. 1843, 1859–60 (2017)).
287. *See id.* at 143–44.
288. *See id.* at 140–41; *see also supra* notes 151–56.
289. *See Bulger*, 62 F.4th at 142 (emphasizing that the PLRA's purpose is to "'remove the federal district courts from the business of supervising the day-to-day operations' of prisons") (quoting Cagle v. Hutto, 177 F.3d 252, 257 (4th Cir. 1999)).
290. *Id.* (alteration in original) (quoting Tun-Cos v. Perrotte, 922 F.3d 514, 526–27 (4th Cir. 2019)) ("[T]he relevant question 'is not what remedy the court shall provide for a wrong that would otherwise go unredressed' but instead 'whether an elaborate remedial system . . . should be augmented by the creation of a new judicial remedy.'").

Finally, on the third special factor, the Fourth Circuit refused to extend *Bivens* liability to Bulger's failure-to-protect and failure-to-intervene claims because there was already an alternative remedial structure—the prison administrative grievance program.[291] More specifically, the *Bulger* court explained that the federal prison grievance program protects inmates' interests in their conditions of confinement and unwanted housing placements.[292]

The Fourth Circuit also rejected Bulger's challenge to the sufficiency of the administrative remedy. Bulger's estate argued that he did not have time to avail himself of the prison administrative remedial structure, given that he was killed just twelve hours after he arrived at the new facility.[293] To that, the Fourth Circuit contended that "the relevant question 'is not what remedy the court should provide for a wrong that would otherwise go unredressed' but instead 'whether an elaborate remedial system . . . should be augmented by the creation of a new judicial remedy.'"[294] The court relied on prior Fourth Circuit guidance suggesting that an alternative remedy weighs against finding a new *Bivens* claim "even if it is less effective than the damages that would be available under *Bivens* and is not expressly identified by Congress as an alternative remedy."[295]

The court acknowledged that the BOP's administrative remedial scheme did not include money damages.[296] Still, because it did allow for injunctive relief, the court found it to be a sufficient alternative to *Bivens* liability, and concluded that under the *Abbasi* framework, Bulger's failure-to-protect claim could not proceed under *Bivens*.[297]

III. A REFINED FACTUAL ANALYSIS IN THE *ABBASI* TEST SUPPORTS FAILURE-TO-PROTECT *BIVENS* CLAIMS

The Third Circuit's approach to analyzing failure-to-protect *Bivens* claims through the *Abbasi* framework properly allows the claims to proceed. In correctly finding that the aggrieved inmates' claims are not new factual scenarios, the Third Circuit's result affords inmates an opportunity to have their claims heard in federal court.

This part argues that *Abbasi*'s strict factual inquiry—as exemplified by the Fourth and Ninth Circuits—is dysfunctional at present because it is unaligned with the goals of *Bivens* liability: deterrence and compensation.[298] Part III.A explains why the *Abbasi* framework must be revised and suggests an approach that focuses on identifying deliberate indifference in

291. *See id.* at 140.
292. *See id.*
293. *See id.* at 141 (highlighting that for Bulger "it is damages or nothing").
294. *See id.* (alteration in original) (quoting *Tun-Cos*, 922 F.3d at 527).
295. *Id.* at 140 (quoting Dyer v. Smith, 56 F.4th 271, 278–79 (4th Cir. 2022)).
296. *See id.* (noting that "[t]he potential unavailability of a remedy in a particular circumstance does not warrant supplementing that scheme," and reemphasizing that the alternative remedy does not need to be equally as effective).
297. *See id.*
298. *See supra* Part I.B.

failure-to-protect *Bivens* claims. This section seeks to recenter the factual analysis around the purposes of *Bivens*, and ultimately concludes that failure-to-protect cases are not new *Bivens* claims. Part III.B addresses *Abbasi*'s special factors inquiry, focusing on the question of whether there are alternative remedial structures for failure-to-protect claims brought by incarcerated individuals. This part rejects the countervailing argument—adopted by the Fourth and Ninth Circuits—that the FTCA and PLRA are alternative remedial structures and suggests an inquiry that focuses on deterrence and damages.[299]

A. Abbasi*'s Factual Differences Analysis Should Focus on the Material Facts That Are Relevant to the Purpose of* Bivens

The Supreme Court, even in recent years, has affirmed the sentiment that there is a purpose and a need for *Bivens* liability in American jurisprudence.[300] Even in *Abbasi*, in which the Court adopted the framework that had the effect of significantly limiting the doctrine,[301] the Court, presented with the opportunity to overrule *Bivens*, instead noted "the continued force, or even necessity" of the doctrine.[302] Thus, although the Court considers *Bivens* a "disfavored judicial activity," the framing of the *Abbasi* test, with its "*Bivens*, unless" language, implies an ongoing commitment to the continuing viability of *Bivens*, as it is functionally structured with a presumption in favor of granting *Bivens* liability.[303]

The Court, however, is at odds with itself. On the one hand, the Court reaffirmed that "where federally protected rights have been invaded . . . courts will be alert to adjust their remedies so as to grant the necessary relief."[304] But at the same time it adopted a framework in the name of separation of powers that scholars overwhelmingly interpret as a narrowing of rights protections and increasing hostility to providing remedies for constitutional violations.[305]

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299. *See supra* Parts II.B–C.

300. *See* Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 397 (1971) ("The very essence of civil liberty certainly consists in the right of every individual to claim protection of the laws, whenever he receives an injury." (quoting Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1803))); *see also* Egbert v. Boule, 142 S. Ct. 1793, 1813–14 (2022) (emphasizing that *Bivens* remedies "vindicate[] the Constitution by allowing some redress for injuries" and "provide[] instruction and guidance to federal law enforcement officers going forward" and that there are "powerful reasons to retain [*Bivens*]").

301. *See supra* Part I.C.

302. Ziglar v. Abbasi, 137 S. Ct. 1843, 1856 (2017) ("The settled law of *Bivens* in this common and recurrent sphere of law enforcement, and the undoubted reliance upon it as a fixed principle in the law, are powerful reasons to retain it in that sphere."); *see also Boule*, 142 S. Ct. at 1809–10 (Gorsuch, J., concurring) (lamenting that the Court did not overrule *Bivens*).

303. *See supra* Part I.C.

304. *Abbasi*, 582 U.S. at 165 (quoting Bell v. Hood, 327 U.S. 678, 684 (1946)).

305. *See, e.g.*, Carlos M. Vázquez, Bivens *and the Ancien Régime*, 96 NOTRE DAME L. REV. 1923, 1930 (2021); Elisa Strangie-Brown, *Constitutional Law—Shoot First, Ask Questions Later: The Supreme Court Chooses Not to Extend* Bivens *to Victims of Cross-Border Shootings*—Hernandez v. Mesa, 53 SUFFOLK U. L. REV. 453, 458 (2020); *see also* ERWIN

The first prong of the *Abbasi* test is a clear example of this. *Abbasi* instructs courts to analyze whether the *Bivens* claim in front of them is factually similar to one that the Supreme Court has decided in the past.[306] But as Justice Sotomayor wrote concurring in *Boule*, "some differences are too 'trivial . . . to create a new *Bivens* context.'"[307] This fact-specific, case-by-case review has operationalized into a system with a strong presumption *against Bivens* claims, which arbitrarily limits *Bivens* actions in a way that is not simply unjust and unpredictable—but also undermines the "*Bivens*, unless" presumption articulated in *Abbasi*.[308]

In order for the factual differences prong of the *Abbasi* test to meaningfully promote the continuing of *Bivens* as the Court has suggested that it is committed to, it must be more than a stare decisis point, in which courts allow *Bivens* claims to proceed just because their facts in some way resemble those that have come before it.[309] Part III.A.1 further explains why the current *Abbasi* factual analysis prong is flawed and unworkable. Continuing, Part III.A.2 suggests a method for evaluating the factual differences in *Bivens* cases under the *Abbasi* framework that is similar to the Third Circuit's analysis and uses the Third Circuit's holdings in *Bistrian* and *Shorter* as examples of proper factual analyses when courts are faced with *Bivens* failure-to-protect claims.

1. The Current Factual Analysis Paradigm Yields Arbitrary Outcomes

The factual analysis prong of the *Abbasi* test, as it currently operates, does not provide lower courts with a principled method by which to analyze facts. The functioning of the first step of *Abbasi* is particularly critical in the failure-to-protect *Bivens* context because these claims are inherently similar at a baseline level to *Carlson*,[310] one of the three accepted *Bivens* holdings, for two reasons: firstly, failure-to-protect claims similarly arise under the Eighth Amendment's prohibition on cruel and unusual punishment, and secondly, they also involve an inmate's claim against a correctional officer.

CHEMERINSKY, THE CASE AGAINST THE SUPREME COURT 228 (2014) ("Our rights are meaningless if they cannot be vindicated . . . . [T]he Supreme Court has . . . far too often, kept those who have been injured by unconstitutional government conduct from having any remedy.").

306. *See supra* Part I.C.

307. Egbert v. Boule, 142 S. Ct. 1793, 1815 (2022) (Sotomayor, J., concurring) (quoting *Abbasi*, 137 S. Ct. at 1865).

308. *See* James E. Pfander & David Baltmanis, *Rethinking* Bivens*: Legitimacy and Constitutional Adjudication*, 98 GEO. L.J. 117, 119 (2009) (noting that the *Abbasi* factual differences test is extremely malleable, allowing for much flexibility and judicial discretion, as shown by the routine dismissal of *Bivens* claims during the Bush administration's terrorism-related detentions at Guantanamo Bay); *see, e.g.*, *Hoffman II*, No. 20-15396, 2022 WL 6685254, at *1 (9th Cir. Oct. 11, 2022) (rejecting a *Bivens* claim without any meaningful factual comparisons between plaintiff's claim and established *Bivens* claims).

309. *See supra* notes 118, 122.

310. *See supra* notes 86–89 and accompanying text.

As a preliminary matter, the *Abbasi* court provided a list of factual considerations that *may* be relevant to the factual analysis,[311] but the assortment of considerations provides little guidance to courts about what level of specificity they should require to conduct their comparison, or how searching the comparison should be. A few examples from *Abbasi*'s list highlight the source of confusion: "the rank of the officers involved; the constitutional right at issue . . . [; and] the presence of potential special factors not considered in previous *Bivens* cases."[312] The first item, the rank of the officers involved, is a specific and concrete factual finding. The constitutional right at issue is to some extent concrete, but it suggests that the nuances of the legal claims (i.e., the facts giving rise to the claim) may also be facts ripe for comparison. And lastly, the "presence of potential special factors" seems to be a general catchall for any facts that the court may consider materially different.[313] To put it mildly, the test affords judges overwhelming discretion with little guidance as to what facts the courts may deem relevant,[314] resulting in inconsistent and arbitrary outcomes.[315] At worst, the test introduces a "practice of judicial selectivity [that] raises legitimacy issues of its own."[316]

The factual scenario of *Bulger*, contemplated by the Fourth Circuit, highlights the unworkability of the *Abbasi* factual analysis prong when applied to an inmate's failure-to-protect claim.[317] To evaluate Bulger's *Bivens* claim under the *Abbasi* factual analysis prong, the Fourth Circuit asked whether the facts of Bulger's claim were sufficiently similar to an accepted *Bivens* claim.[318] The court summarily found that Bulger's case did not involve a federal officer's deliberate indifference to an inmate's health, which made it materially different from *Carlson*, where the Court permitted an inmate's Eighth Amendment *Bivens* claim to proceed against the officer who failed to provide him medical attention for eight hours after he had an asthma attack.[319] But the *Bulger* court failed to address records that showed that the offending officers were aware that Bulger was an elderly inmate—

311. *See supra* note 123 and accompanying text.

312. *Abbasi*, 137 S. Ct. at 1849.

313. *See id.*

314. *See Constitutional Remedies* — Bivens *Actions* — *Excessive Force* — *Retaliation* — Egbert v. Boule, *supra* note 149, at 374. The Justices are also not on the same page about the parameters of *Abbasi*'s factual analysis framework, evidenced by Justice Gorsuch's concurrence in *Boule*, in which he "[c]andidly . . . struggle[d] to see how [Boule's] set of facts differ[ed] meaningfully from those in *Bivens* itself." *Id.* (quoting Egbert v. Boule, 142 S. Ct. 1793, 1809–10 (2022) (Gorsuch, J., concurring) (arguing that the Court should have overruled *Bivens* entirely)).

315. *See supra* notes 127–29 and accompanying text (discussing *Oliva*, a Fifth Circuit decision in which the Court relied on superficial factual differences to deny a *Bivens* claim that was strikingly similar to the facts of the original *Bivens* case).

316. Pfander & Baltmanis, *supra* note 308, at 120 (emphasizing that the factual differences framework introduces the "real possibility that judicial evaluation of the merits of the specific claim may influence the *Bivens* calculus").

317. *See supra* notes 259–64 and accompanying text.

318. *See* Bulger v. Hurwitz, 62 F.4th 127, 137–138 (4th Cir. 2023).

319. *See supra* notes 272–74 and accompanying text (discussing the denial of Bulger's claims); *supra* notes 87–89 and accompanying text (discussing the facts of *Carlson*).

with a myriad of health issues—who was wrongfully placed in the general prison population, instead of with similarly situated inmates, which exposed him to an obviously dangerous environment.[320] Moreover, suppose that Bulger had survived, and after being beaten, he begged the allegedly offending officer for medical attention. The officer's conduct would have been strikingly similar to the conduct in *Carlson*, and Bulger, like the plaintiff in *Carlson*, would have been left in an extremely vulnerable position, without aid by someone whose responsibility was to care for them.[321] It is hard to see why, under *Abassi*, the fact of Bulger's death should dictate the viability of his claim.

Without a theory as to why certain facts are material and how much factual similarity is required, it is difficult to rationalize why the Court would be persuaded by the medical-indifference scenario in *Carlson* and let factually similar claims proceed but would deny incarcerated individuals bringing failure-to-protect claims the same right to redress.[322]

2. In Failure-to-Protect Claims, Courts Should Adopt the Third Circuit's Factual Analysis and Look for Deliberate Indifference[323]

Lower courts need a theory about which facts are relevant when analyzing failure-to-protect *Bivens* claims pursuant to the first prong of the *Abbasi* framework. Though the Court has not provided this guidance,[324] lower courts should evaluate facts as they relate to and by their relationship to the goals of *Bivens* as the court has expressed them.[325] Specifically, the best way to understand the *Abbasi* factual analysis prong is that the material or relevant facts should align with the purpose of *Bivens*, which is to compensate the victims of constitutional violations and deter unconstitutional conduct by federal officers.[326] Functionally, when reviewing failure-to-protect claims,

320. *See supra* notes 261–64 and accompanying text.

321. *See supra* notes 158–59 (explaining the statutory obligations of BOP officers to inmates).

322. *See supra* Part I.

323. This part assumes that *Farmer* represents a valid *Bivens* holding. *See supra* Part I.C. It is unsurprising that lower courts are divided on this point, considering that the Court did not address it directly in its opinion. *See supra* notes 107–08 and accompanying text. But even if the parties did not address or brief the *Bivens* issue, the Court must retain subject matter jurisdiction at all times. *See* Gonzales v. Thaler, 565 U.S. 134, 141 (2012) (explaining that when the issue is "subject-matter jurisdiction, courts are obligated to consider *sua sponte* issues that the parties . . . have not presented."). The *Farmer* decision, then, depended on the Court having subject matter jurisdiction. *See id.* Although the Supreme Court does not view *Farmer* as a core *Bivens* holding, the best understanding of the case is that it fell within the scope of the other three explicit holdings—*Bivens*, *Passman*, and *Carlson*—and thus is itself a Court-approved extension of *Bivens*. *See, e.g.*, Doty v. Hollingsworth, No. 15-3016, 2018 WL 1509082, at *3 n.2 (D.N.J. Mar. 27, 2018); Rold, *supra* note 101, at 17; *see also supra* Part I.A.

324. *See supra* Part I.C.

325. *See supra* notes 61–63 and accompanying text.

326. *See supra* notes 61–63 and accompanying text; *see also* Pfander, Reinert & Schwartz, *supra* note 167, at 578 ("[W]here liability ultimately falls matters a great deal to the systemic effectiveness of constitutional remedies.").

courts should assess the extent to which an officer exhibited deliberate indifference toward the plaintiff inmate, similar to the Third Circuit's approach in *Bistrian* and *Shorter*.[327]

In *Carlson*, the material operative facts that relate to the dual purposes of deterrence and compensation are that (1) a federal officer; (2) acted with impunity, exhibiting deliberate indifference to; (3) a vulnerable person, an inmate; (4) in violation of a federal statute; and (5) caused the inmate real harm.[328] Although the *Bivens* issue was not addressed by the Court,[329] these operative facts were also present in *Farmer*, wherein Farmer alleged that the officers had acted with deliberate indifference to her safety in violation of their statutory obligation to her, and accordingly, her Eighth Amendment rights.[330]

The same is true of *Bistrian*, *Hoffman*, and *Bulger*. In each instance, the material facts that related to the purpose of *Bivens* were present, even though the claims at the center of each case were articulated as an officer's failure to protect the inmate rather than the officer's deliberate indifference to the inmate's safety.[331]

As shown by its comparison of *Bistrian* and *Shorter* to *Farmer*, the Third Circuit's approach to failure-to-protect *Bivens* claims is principled, predictable, and most consistent with the purpose of *Bivens* because it focuses on deliberate indifference.[332] One factual difference between *Bistrian* and *Shorter* was that the inmate in *Shorter* was transgender, whereas the inmate in *Bistrian* was not.[333] In this way, at an incredibly granular level, *Shorter* better matched the facts of *Farmer*, where the plaintiff inmate was also transgender.[334] The Third Circuit correctly rejected any idea that this type of granular, factual difference matters when evaluating a *Bivens* claim, and instead correctly focused on the more relevant set of facts, namely that, in both *Bistrian* and *Shorter*, a prison official deliberately put an inmate in harm's way knowing they were vulnerable.[335] This fits with the rationale and purpose of *Bivens* because those offending individuals need to be held accountable for money damages to deter future misconduct—irrespective of a plaintiff's gender, which has no bearing on the principles of deterrence and compensation.[336]

Conversely, the Fourth and Ninth Circuits' approach to *Abbasi*'s first step is erroneous because they interpreted the factual prong too narrowly and engaged in the kind of searching fact comparison without an underlying basis

327. *See supra* Part II.A.
328. *See supra* Part I.B.
329. *See supra* note 107 and accompanying text.
330. *See supra* notes 102–03 and accompanying text (discussing *Farmer* in more detail).
331. *See supra* Part II.
332. *See supra* note 219 and accompanying text.
333. *See supra* Part II.A.
334. *See supra* Part I.C.
335. *See supra* Part II.A.
336. *See supra* Part I.B.

as to which facts are important for deterrence and compensation.[337] For example, the Fourth Circuit explained that Bulger's failure-to-protect claim presented a new set of facts because Bulger's death was not caused by an officer's failure to provide him competent medical attention.[338] Additionally, the *Bulger* court found it factually significant that Bulger's claim implicated prison officials involved in transferring inmates, as opposed to those keeping guard.[339] A correct factual analysis in this case would ask whether, by placing Bulger in the regular inmate population despite his debilitating medical condition, the officers acted with deliberate indifference toward him, in violation of their statutory duties toward him, and whether this placed him in real harm.

B. Abbasi*'s Alternative Remedial Structure Inquiry Should Be Guided by Damages and Deterrence*

The second prong of the *Abbasi* framework—whether there are any special factors that counsel hesitation—should similarly be guided by the goals of *Bivens*: deterrence and compensation.[340] If more aligned with the purpose of *Bivens*, the second inquiry would ask: do existing alternative remedies obviate the need for *Bivens*? On this point, alternative remedial structures should only matter for one of two reasons: either they are independently adequate and provide the kind of deterrence the Court is concerned about[341] or they clearly indicate that Congress has spoken to the issue, implicating a *serious* separation-of-powers concern.[342]

As the Court has restricted *Bivens* in recent years, there has been a significant shift in the rhetoric around what suffices as an alternative remedial structure. Courts that are challenged with applying the *Abbasi* framework have engaged in a "functionalist-formalist" debate.[343] For some courts, the mere existence of an alternative remedy is sufficient, whereas other courts assess the practicality and availability of the remedy to the plaintiff to determine whether the alternative remedial scheme was adequate.[344] In recent years, however, the Supreme Court has endorsed the formalist alternative remedies as sufficient to counsel hesitation in extending the *Bivens* remedy.[345]

More specifically, the acceptable standard for remedies has shifted from those that were "equally effective" as a *Bivens* remedy to those that were "meaningful" and then, subsequently, to a mere existence standard.[346]

337. *See supra* Parts II.B–C.
338. *See supra* notes 273–74 and accompanying text.
339. *See supra* notes 283–84 and accompanying text.
340. *See supra* Part I.B.
341. *See supra* notes 61–63 and accompanying text.
342. *See supra* note 119 and accompanying text.
343. Langsam, *supra* note 42, at 1427.
344. *See id.*
345. *See, e.g.*, Egbert v. Boule, 142 S. Ct. 1793, 1806–07 (2022).
346. *See Constitutional Remedies — Bivens Actions — Excessive Force — Retaliation —* Egbert v. Boule, *supra* note 149, at 376–78 (arguing that this sliding standard confuses lower

Because nearly every governmental department has some sort of internal complaint or grievance process similar to that of the BOP, the consequence of this existence standard for alternative remedies is that more *Bivens* claims are categorically barred under the second step of *Abbasi*.[347] Similar to the factual analysis in step one, the standard for sufficient alternative remedial structures has veered far from the purpose of *Bivens* that the court continually proclaims to support.[348]

An effective analysis of whether an alternative remedy is sufficient must be consistent with the purpose of *Bivens* by similarly deterring the unwanted conduct by the federal actors, and compensating the individual.[349] "[D]eterrence [is] promoted by [the] personal liability of federal officials" that a *Bivens* remedy affords.[350] As for compensation, "due to their very nature . . . [individual constitutional violations] are difficult to address except by way for damages actions after the fact."[351] Thus, at a minimum, for an alternative remedial structure to preclude a *Bivens* remedy, it must provide for some sort of repercussions for the offending officer (i.e., punishment resembling personal liability) and provide *significant* remedial relief (including compensatory relief) to the plaintiff.[352]

In failure-to-protect *Bivens* cases brought by incarcerated individuals, the alternative remedies of the BOP's administrative grievance process and the FTCA are insufficient, because they fail to satisfy the touchstones of an adequate remedy: deterrence and damages. Firstly, the prison grievance program that the Fourth Circuit viewed as an alternative remedial structure only provided injunctive relief and did not afford the victim an opportunity to receive damages.[353] The Third Circuit and the Ninth Circuit (prereversal) correctly noted that in many failure-to-protect cases, in which the affected inmate is either transferred after the incident or, in some cases, has died, injunctive remedies cannot provide victims of constitutional torts meaningful relief.[354] Moreover, injunctive relief against an offending officer that only reaches a dead or transferred inmate will have no deterrent effect on the officer's future conduct with other inmates.

Second, as explained by the Third Circuit,[355] the FTCA fails to provide a sufficient alternative remedy to *Bivens* in failure-to-protect claims because it does not adequately deter unconstitutional conduct through personal liability given that the United States is substituted for the offending officer in the

courts that are ill-informed as to what constitutes a sufficient alternative remedy); *see also Boule*, 142 S. Ct. at 1806–07.

347. *See Constitutional Remedies* — Bivens *Actions — Excessive Force — Retaliation* — Egbert v. Boule, *supra* note 149, at 376–78.

348. *See supra* notes 300–03.

349. *See supra* notes 61–63 and accompanying text.

350. Carlson v. Green, 446 U.S. 14, 47 (1980).

351. Ziglar v. Abbasi, 137 S. Ct. 1843, 1862 (2017).

352. *See supra* Part I.B.

353. *See supra* notes 291–97 and accompanying text.

354. *See supra* notes 201–02 (Third Circuit explanation); *supra* note 235 and accompanying text (Ninth Circuit explanation).

355. *See supra* notes 195–97.

case,[356] and is ultimately the entity that bears the cost of damages.[357] The Ninth Circuit panel also flagged the FTCA as an insufficient alternate remedy because the victim's potential for damages is uncertain and dependent on the state tort law in the jurisdiction in which the victims bring the case—a key detail that was overlooked by the Ninth Circuit upon review.[358] In sum, the alternative remedies available to inmates in failure-to-protect claims against correctional officers, BOP grievance and FTCA claims, do not obviate the need for *Bivens* liability because they fail to adequately deter correctional officers' misconduct and compensate the inmate.

In addition, one of the alternative remedies contemplated by the Fourth and Ninth Circuit,[359] the PLRA, does not implicate separation-of-powers concerns and thus counsels hesitation in extending a *Bivens* remedy.[360] First, the purpose of the PLRA—by the plain text of the statute—is to reduce the enormous amount of frivolous inmate lawsuits, *including Bivens* claims, not to replace them altogether.[361] The statute requires incarcerated individuals to exhaust internal grievance procedures *prior* to filing a lawsuit; it does not say that internal grievance procedures preclude *Bivens* claims.[362] In fact, the Court itself has recognized this purpose.[363] Thus, in passing the PLRA, Congress added to the statutory landscape that regulates claims by incarcerated individuals, but did not intend to supplant *Bivens* remedies. To use the PLRA as a mechanism to invoke a separation-of-powers concern as the Fourth and Ninth Circuits have done,[364] and assume that the absence of a damages remedy in the PLRA suggests "that Congress does not want a damages remedy"[365] for federal inmates is to misconstrue the text and history of the PLRA.

CONCLUSION

Since *Abbasi*, the viability of an incarcerated individual's failure-to-protect suit largely depends on how factually similar the claim at issue is to a prior *Bivens* holding as interpreted by the reviewing court, without much guidance from the Supreme Court about which facts are material. As a result, after their constitutional rights are violated, an inmate's opportunity to seek redress largely depends on the discretion of the federal

356. *See supra* note 165 and accompanying text.

357. *See* Pfander, Reinert & Schwartz, *supra* note 167, at 578 (arguing that where liability ultimately falls matters a great deal to the effectiveness of constitutional remedies).

358. *See supra* notes 231–33.

359. *See supra* Parts II.B–C.

360. *See supra* Part II.A.

361. *See* 42 U.S.C. § 1997e(a) ("No action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted."); *see supra* Part I.C.

362. 42 U.S.C. § 1997e(c).

363. *See* Porter v. Nussle, 534 U.S. 516, 524 (2002).

364. *See supra* notes 289–90 (discussing the Fourth Circuit), *supra* notes 253–56 and accompanying text (discussing the Ninth Circuit).

365. Ziglar v. Abbasi, 137 S. Ct. 1843, 1864–65 (2017).

circuit in which they bring the claim—a method of adjudication that yields arbitrary results. A factual analysis approach to failure-to-protect *Bivens* claims that is similar to the Third Circuit's holdings, and considers material facts, most notably an officer's shown deliberate indifference to the inmate, would better serve the purpose of *Bivens* liability as it has been articulated by the Supreme Court. Additionally, evaluating alternative remedial structures through the lens of whether they promote deterrence and provide damages reveals that there is currently no sufficient alternative to a *Bivens* liability in failure-to-protect claims, and as such, suggests their continuing necessity in providing a remedy where there has been a violation of an incarcerated individual's Eighth Amendment rights.