No. 23-384

IN THE

Supreme Court of the United States

MICHAEL BORESKY, IN HIS INDIVIDUAL AND OFFICIAL CAPACITY AS A SPECIAL AGENT FOR THE U.S. SECRET SERVICES,

Petitioner,

v.

JEREMY GRABER,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF OF THE COUNSEL OF PRISON LOCALS C-33 AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*[1]

The Council of Prison Locals C-33 is a Council within the American Federal of Government Employees (AFGE) that represents more than 30,000 bargaining unit members. Its members include rank and file employees of the Federal Bureau of Prisons, including the Bureau's Correctional Officers.

The decision of the Court of Appeals in *Graber v. Boresky*, 59 F.4th 603 (3d Cir. 2023), should be reversed because prohibiting defendants from immediately appealing decisions extending the remedies available pursuant to *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388 (1971), will interfere with the duties of the Bureau of Prison employees, place extreme burdens on the individual officers, and undermine the safety and security of federal correctional facilities, as set forth below.

SUMMARY OF ARGUMENT

In *Bivens v. Six Unknown Fed. Narcotics Agents*, the Supreme Court authorized a cause of action against federal officials for violations of the Fourth Amendment. 403 U.S. 388 (1971). The Supreme Court has since extended *Bivens* only twice, finding a new cause of action for Fifth Amendment sex-discrimination claims, *Davis v. Passman*, 442 U.S. 228 (1979), and for

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[1] Pursuant to Rule 37.6 of the Rules of this Court, *amicus* states that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *amicus* or its counsel made a monetary contribution to its preparation or submission. Pursuant to Rule 37.2, all parties received timely notice of the intent of the Council of Prison Locals to file this brief.

a federal prisoner's inadequate-care claim under the Eighth Amendment, *Carlson v. Green*, 446 U.S. 14 (1980). Since then, the Court has made it clear that expanding the *Bivens* remedy is a disfavored judicial activity. *Ziglar v. Abbasi*, 582 U.S. 120, 135 (2017).

The Third Circuit's finding that a decision extending *Bivens* does not meet the collateral order doctrine for immediate appeal failed to consider the burdens and costs that make such a decision effectively unreviewable on final judgment.

Even though this Court has clearly found an implied remedy under the Constitution only in the instances enumerated in *Bivens, Davis,* and *Carlson*, *see Abbasi*, 582 U.S. at 131, courts have nonetheless extended *Bivens* to new areas, subverting this Court's clear precedent and case law. When a court takes such an erroneous action, the defendant must have the right to immediately appeal that decision under the collateral order doctrine.

Correctional Officers employed by the Federal Bureau of Prisons (BOP), including those represented by the Council of Prison Locals, are responsible for maintaining the security of federal correctional facilities, and keeping the inmates, staff, and surrounding communities safe. Correctional Officers are often sued by prisoners in *Bivens* actions, and thus must bear the costs and burdens that come along with such litigation. While defending any lawsuit comes with costs, the lack of interlocutory appeal right greatly expands and increases these burdens.

Correctional Officers faced with defending a *Bivens* lawsuit, without the right to immediate appeal, are looking at potentially years-long litigation, including discovery and trial. Officers are often on leave during

Bivens lawsuits, may have to pay out of pocket for representation, and face ostracization from coworkers. Additionally, the threat of these consequences may cause Correctional Officers to second guess choices and become more cautious in their decision-making abilities, thereby threatening the safety and security of the institutions.

Thus, the burdens, costs, and serious consequences that result from defending a *Bivens* action without an immediate appeal right make a district court decision extending *Bivens* effectively unreviewable.

ARGUMENT

Generally, a Court of Appeals only has jurisdiction over appeals "from all final decisions of the district courts of the United States." 28 U.S.C. § 1291. However, a "small class" of collateral rulings that do not end the litigation are deemed "final" and can be immediately appealed. *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 545–46 (1949). Under the collateral order doctrine, decisions that are conclusive, resolve important questions on the merits, and are effectively unreviewable on appeal from the final judgment can be immediately appealed. *Swint v. Chambers County Comm'n*, 514 U.S. 35, 42 (1995); *see also Cohen*, 337 U.S. at 546 (such claims are "too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated").

The third factor — whether a decision is effectively unreviewable — "cannot be answered without a judgment about the value of the interests that would be lost through rigorous application of a final judgment requirement." *Digital Equipment Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 878–79 (1994). Courts have held

that decisions that "would imperil a substantial public interest" or "some particular value of a high order" are effectively unreviewable and merit immediate appeal. *Will v. Hallock*, 546 U.S. 345, 352–53 (2006). For example, when finding that a decision regarding absolute immunity met the collateral order doctrine, this Court stressed that "compelling public ends" that would be compromised helped meet the third *Cohen* prong. *Nixon v. Fitzgerald*, 457 U.S. 731, 758 (1983). In finding that a decision denying qualified immunity was immediately appealable, this Court stated that not allowing an appeal would threaten the disruption of governmental functions, and the "fear of inhibiting able people from exercising discretion in public service if a full trial were threatened." *Will*, 546 U.S. at 352 (citing *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985)). Thus, the "avoidance of a trial that would imperil a substantial public interest" renders a decision effectively unreviewable. *Will*, 546 U.S. at 353.

A decision extending *Bivens*, like a decision on absolute and qualified immunity, is effectively unreviewable because it significantly impacts a substantial public interest — namely, the safety, security, and operations of federal correctional facilities. *See id*. at 352 (stating that an important public value includes the inhibition of federal officers "from exercising discretion in public service" (quotation marks omitted)).

I. Bureau of Prison Employees are Regularly the Subject of *Bivens* Lawsuits.

The Federal Bureau of Prisons operates 122 correctional facilities, housing over 150,000 inmates,

across the country.[2] Throughout the BOP, there are over 12,000 Correctional Officers, and over 22,000 other employees.[3] The BOP is responsible for protecting the public safety and ensuring that the federal inmates serve their sentences in facilities that are safe and secure.[4]

Bureau of Prison employees, specifically Correctional Officers, are some of the most targeted law enforcement officers with *Bivens* actions. The nature of correctional work breeds complaints from inmates, and inmates often attempt to redress grudges by employing the judicial system to file *Bivens* cases against Correctional Officers, seeking redress for the many realities of federal prison. At least 100 *Bivens* lawsuits are filed each year against BOP employees. Most of these cases assert Eighth Amendment claims for excessive force and deliberate interference to health and safety, although prisoners also attempt to assert violations of other Constitutional provisions. *E.g.*, *Landis v. Shellhammer*, Case No. 20 CV 50447, 2023 WL 6276521 (N.D. Ill. Sept. 26, 2023) (a federal prisoner brought a *Bivens* action against Correctional Officers at the U.S. Penitentiary in Thomson, Illinois for Eighth Amendment violations stemming from excessive force and deliberate indifference to medical needs); *Cain v. Paviglianti*, Case No. 2:20-cv-01768-JDP (PC), 2023 WL 3855284 (E.D. Cal. June 6, 2023) (prisoner at

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[2] Federal Bureau of Prisons, *Population Statistics*, https://www.bop.gov/mobile/about/population_statistics.jsp (last accessed Oct. 24, 2023).

[3] Federal Bureau of Prisons, *Federal Bureau of Prisons Fact Sheet* (Sept. 11, 2023), https://www.bop.gov/about/statistics/docs/bop_fact_sheet.pdf?v=1.0.8

[4] Federal Bureau of Prisons, *About Our Agency*, https://www.bop.gov/about/agency/ (last accessed Oct. 24, 2023).

Federal Correctional Institution in Herlong, California brought *Bivens* case against a Correctional Officer for excessive force); *Caraballo v. Pliler*, Case No. 21-CV-10476 (PMH), 2023 WL 3467185 (S.D.N.Y. May 15, 2023) (prisoner at Federal Correctional Institute in Otisville, New York, brought *Bivens* action alleging a First Amendment violation for retaliation, a Fourteenth Amendment violation for medical negligence, and an Eighth Amendment claim regarding inadequate and unsanitary conditions of confinement).

Because of the limited *Bivens* remedy and the high number of *Bivens* complaints filed by pro se prisoners, many of the hundreds of complaints against Correctional Officers are frivolous — they are either dismissed on screening before action from the defendant is required, or on a motion to dismiss. However, some *Bivens* complaints are allowed to proceed past a motion to dismiss and into discovery. Most often, these complaints fall into an already established *Bivens* remedy category — like a deliberate indifference to medical care claim under *Carlson*. *E.g.*, *Bailey v. Rife*, Case No. 1:21-00424, 2021 WL 6496561 (S.D. W.Va. Nov. 19, 2021) (allowing a claim of deliberate indifference to medical care to proceed while dismissing all other claims); *Watanabe v. Derr*, Case No. 22-00168 JAO-RT, 2022 WL 1597396 (D. Haw. May 19, 2022) (denying a motion to dismiss a claim of denial of adequate medical care). However, despite this Court's clear instructions, some complaints are allowed to proceed under new *Bivens* causes of action.

II. Courts Have Extended *Bivens* Remedies in Cases Brought Against Correctional Officers.

Even though this Court has repeatedly cautioned against extending *Bivens, see Abbasi*, 582 U.S. at 135, district and appellate courts still regularly extend the

Bivens remedy in cases brought against Correctional Officers and other BOP employees.

In *Williams v. Baker*, Plaintiff Shannon Williams, a federal inmate, brought an Eighth Amendment excessive force claim against Correctional Officer Baker. 487 F. Supp. 3d 918, 921 (E.D. Cal. 2020). In analyzing whether there was a cognizable *Bivens* action, the magistrate judge stated that there was a "modest extension, but an extension nonetheless," finding that the claim was meaningfully different than the claim brought in *Carlson*. *Id.* at 922–23. Additionally, the judge found that no special factors "counseled hesitation" in extending *Bivens*. *Id.* at 930; *see also Abassi*, 582 U.S. at 136 (stating that a *Bivens* remedy is not available if there are special factors counselling hesitation). Therefore, Williams stated a cognizable *Bivens* action against officer Baker. *Id.*[5]

In *Gambino v. Cassano,* Plaintiff David Gambino, an inmate at Federal Correctional Institution Fort Dix in New Jersey, brought a *Bivens* claim against various BOP employees, alleging in part an Eighth Amendment violation due to the conditions in the Special Housing Unit. Civil No. 17-0830 (NLH) (AMD), 2021 WL 1186794, at *5 (D.N.J. Mar. 30, 2021). In dismissing the case, the district court noted that the Supreme Court had not explicitly held that a *Bivens* Eighth Amendment remedy extended to conditions of confinement claims, but that the "*Bivens* remedy extends to Eighth Amendment conditions of confinement claims," nonetheless. *Id.*

[5] This case was decided before the Supreme Court ruled in *Egbert v. Boule* that a *Bivens* remedy did not extend to Eighth Amendment excessive force claims. 596 U.S. 482 (2022).

In *Marquez v. Rodriquez*, discussed in more detail below, pre-trial detainee Steve Marquez filed a *Bivens* action alleging his right to be free from deliberate indifference to health and safety was violated while at the Metropolitan Correctional Center (MCC) in San Diego, California. Case No.: 3:18-cv-0434-CAB-NLS, 2021 WL 2826075 (S.D. Cal. July 6, 2021). He alleged that Correctional Officers Rodriguez and Kelly denied his requests for protective custody which resulted in him being assaulted. *Id.* at *3. In ruling on a motion to dismiss, the district court found the claim arose in a new *Bivens* context because it presented a Due Process claim for failure to protect under the Fifth Amendment rather than the Eighth Amendment. *Id.* at *7 ("[T]he Court finds that Plaintiff's Fifth Amendment failure to protect claim would extend *Bivens* to a new context[.]"). In analyzing the special factors, the district court found that while such factors may counsel hesitation against extending *Bivens*, the defendants did not make the appropriate showing at the time and denied the motion to dismiss on that claim. *Id.* at *14.

In *Smith v. Trujillo*, Plaintiff Joseph Smith brought an Eighth Amendment claim for excessive force and an Eighth Amendment claim for deliberate indifference against Correctional Officers at Federal Correctional Institution Florence. Civil Action No. 20-cv-00877-RBJ, NYW, 2021 WL 1799400, at *2 (D. Col. Mar. 26, 2021). The magistrate judge, in analyzing the excessive force claim, found that the already established deliberate indifference claim in *Carlson* covered an excessive force claim, and that the facts did not present a new *Bivens* context. *Id.* at *4; *see also id.* at *5 (finding "no meaningful difference between the deliberate indifference claim in *Carlson* and Mr. Smith's excessive force claim – both arising under the Eighth Amendment"). Further, the judge found that

even if the claim did arise in a new context, special factors did not counsel against hesitation in extending *Bivens*. *Id.* at *6.[6] Therefore, it was recommended that the motion to dismiss be denied as to the Eighth Amendment claim.

In *Hoffman v. Preston*, Plaintiff Marcellas Hoffman, an inmate at U.S. Penitentiary Atwater in Atwater, California, brought a *Bivens* action against Correctional Officer Preston, alleging that Preston had labeled him as a snitch, and offered a bounty to assault him, which led to his assault and injuries. Case No. 1:16-cv-01617-LJO-SAB (PC), 2019 WL 5188927, at *3 (E.D. Cal. Oct. 16, 2019). The district court found that the Eighth Amendment *Bivens* remedy in *Carlson* for failure to provide medical care did not cover Plaintiff's case and dismissed the claim. *Id.* at *5.

Plaintiff appealed, and on appeal in the Ninth Circuit, the Court of Appeals agreed that the claims arose in a new context that is "different in a modest way" from *Carlson*. *Hoffman v. Preston*, 26 F.4th 1059, 1065 (9th Cir. 2022). However, the Court of Appeals found that no special factors counseled against hesitation in allowing a *Bivens* remedy "for a federal prison inmate alleging that a prison guard intentionally targeted him for harm and failed to protect him from the predictable harm that resulted." *Id.*[7]

As shown, Correctional Officers are often the subject of erroneous attempts to extend *Bivens* remedies.

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[6] This case was decided before the Supreme Court ruled in *Egbert v. Boule* that a *Bivens* remedy did not extend to Eighth Amendment excessive force claims. 596 U.S. 482 (2022).

[7] After *Egbert* was decided, the Ninth Circuit affirmed the District Court's decision dismissing the case. *Hoffman v. Preston*, No. 20-15396, 2022 WL 6685254 (9th Cir. Oct. 11, 2022).

If the Third Circuit's ruling is allowed to stand, such erroneous decisions in these cases will not be immediately appealable, thus having a significant impact on Correctional Officers.

III. Bureau of Prison Employees Have Rightfully Immediately Appealed Erroneous *Bivens* Decisions.

Should the Third Circuit's erroneous ruling be allowed to stand, Bureau of Prison employees will face serious consequences from the inability to immediately appeal an erroneous *Bivens* ruling. In previous cases, when courts have wrongly extended *Bivens*, Correctional Officers have immediately appealed, and won.

A. Marquez v. Rodriquez

Plaintiff Steve Marquez brought a *Bivens* action alleging that his right to be free from deliberate indifference to health and safety was violated while a pre-trial detainee at MCC San Diego. *Marquez*, 2021 WL 2826075 (S.D. Cal. July 6, 2021). Specifically, Marquez was charged with sex crimes and requested he be placed in protective custody to protect him from other inmates. *Id.* at *1. According to Marquez, Correctional Officer Rodriguez denied this request and placed Marquez in the general population. *Id.* Marquez was threatened and tortured by other inmates, requiring hospitalization. *Id.* at *2. He then requested from Correctional Officer Kelly to be placed in protective custody, and this request was also denied. *Id.* Marquez claims that Correctional Officers Rodriquez and Kelly were "deliberately indifferent to the substantial risk of serious harm or injury" when they ignored and denied his request to be placed in protective custody. *Id.* at *3.

The officers brought a motion to dismiss, arguing in part that the claim extends *Bivens* to a new context which is precluded. *Id.* at *1. In denying this part of the motion, the district court first found that the claim does indeed arise in a new *Bivens* context. *Id.* at *4. Because Marquez was a pre-trial detainee, his claim fell under the Fifth Amendment Due Process Clause, rather than the Eighth Amendment's cruel and unusual punishment protections. *Id*. Therefore, the court concluded that the "recognition of a damages remedy here would be at least a modest extension of *Bivens* to a new context because a federal pre-trial detainee's failure to protect claim is different in a meaningful way from the . . Eighth Amendment claim in *Carlson*." *Id.* at *8.

Then, the district court considered whether special factors prevent an extension of *Bivens*. While the court noted that the factors "may" counsel hesitation in permitting Plaintiff to proceed with his claim, the court found that at the time, Defendants had not made the appropriate showing. *Id.* at *14. Thus, the court denied the motion to dismiss.

Following the denial, the Correctional Officers filed an interlocutory appeal. The Ninth Circuit Court of Appeals reversed, holding that Marquez did not have a cognizable *Bivens* claim. *Marquez v. Rodriquez*, 81 F.4th 1027 (9th Cir. 2023). The Ninth Circuit agreed that the claim arose in a new *Bivens* context, because it arose under a different amendment and alleged a different category of harm, in a different factual setting than the previously approved claims. *Id.* at 1032. The Court of Appeals found that special factors counseled against extending *Bivens*. Specifically, the Court found that other remedies were available, such as challenging his placement through an administrative

review process. *Id.* at 1033. Further, Congress has already legislated on prison administration without providing a remedy against jail officials. *Id.* Thus, the district court erred in finding that Marquez had a viable *Bivens* claim and dismissed his claims against the Correctional Officers.

B. Mohamed v. Jones

Plaintiff Khalfan Khamis Mohamed is an inmate at the U.S. Penitentiary Florence ADMAX in Florence, Colorado. *Mohamed v. Jones*, Civil Action No. 20-cv-02516-RBJ-NYW, 2022 WL 523440, at *1 (D. Col. Feb. 22, 2022). Mohamed declared a hunger strike and, following policy, Correctional Officers removed food items from his cell after he refused his ninth consecutive meal. While Plaintiff was being escorted back to his cell, Officer Brush allegedly assaulted Plaintiff, while Officer Armijo and Lieutenant Murton watched. *Id.* at *3. Then, a prison nurse allegedly refused to provide an x-ray, pain medication, or ice for Plaintiff's injuries. *Id.* at *4.

Plaintiff asserted various *Bivens* claims, including Eighth Amendment excessive force claims, failure to intervene claims, and deliberate indifference claims, as well as a First Amendment claim. *Id.* at *5. The magistrate judge found that the First Amendment claim arose in a new *Bivens* context, and that special factors counseled against extending *Bivens*, thereby recommending that the claim be dismissed. *Id.* at *12.

Regarding the Eighth Amendment excessive force claims, the magistrate judge found that Plaintiff's claims did not present a new *Bivens* context. *Id.* at *14. While the case presented a different factual scenario, the judge found "no meaningful difference between the deliberate indifference claim raised in *Carlson* and

Mr. Mohamed's excessive force claims, which all arise under the Eighth Amendment." *Id.* The judge also noted that even if the claims arose in a new context, no special factors would counsel against extending a *Bivens* remedy. *Id.* at *15. Similarly, in analyzing the Eighth Amendment failure to intervene claims, the judge again found that Plaintiff's case did not present a new *Bivens* context, because it was factually similar to *Carlson*. *Id.* at 18. Again, the judge noted that even if the claims arose in a new context, no special factors would counsel against extending a *Bivens* remedy. *Id.*

Over Defendants' objections to the magistrate judge's report and recommendation, the district court accepted and adopted the findings. *See Mohamed v. Jones*, Civil Action No. 20-cv-02516-RBJ, NYW, Dkt. 120. Defendants then filed a motion for reconsideration, which was denied. *See id.* at Dkts. 129, 150. Defendants then filed an interlocutory appeal of the denial of the motion for reconsideration that Plaintiff had asserted cognizable *Bivens* claims under the Eighth Amendment. *See id.* at Dkt. 156. The appeal is still pending.

Both of these cases represent examples of Correctional Officers immediately appealing a ruling that a new, not previously recognized, *Bivens* action can proceed to discovery. Without the right to an interlocutory appeal, these officers would have been forced to litigate the case, going through arduous discovery and trial, only for—in the case of Rodriquez—an appellate court to find that a *Bivens* action never actually existed.

IV. Bureau of Prison Employees Face Serious Consequences When Subject to *Bivens* Litigation.

Not allowing Correctional Officers to immediately appeal a decision finding a new *Bivens* cause of action threatens the safety and security of federal prisons, has detrimental effects on the officers, and places a burden on Bureau of Prison operations.

A. A Lack of Interlocutory Appeal Affects Correctional Officers Ability to Perform Their Jobs.

Correctional Officers and other BOP staff have one overarching duty — to maintain the safety and security of the institution, including the inmates, staff, and surrounding community. *See Pell v. Procunier*, 417 U.S. 817, 823 (1974) ("Central to all other correctional goals is the institutional consideration of internal security within the corrections facilities themselves."); *see also Sabbath v. Hicks*, Civil Action No. 20-cv-00893-PAC-KMT, 2021 WL 1300602, at *5 (D. Col. Feb. 19, 2021) (stating that prisons have "unique security and administrative challenges"). For Correctional Officers to do their jobs safely and effectively, they need a wide range of deference "in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security." *Bell v. Wolfish*, 441 U.S. 520, 547 (1979); *see also Scaff-Martinez v. Reese*, Case No. 1:10-cv-00549-CLS-HGD, 2012 WL 6754889, at *13 (N.D. Ala. Aug. 31, 2012) ("Maintaining safety and security is an essential goal of prison authorities who must be free to take appropriate action to ensure the safety [of] inmates and staff.").

If a Correctional Officer faces the threat of lengthy litigation without the recourse of appeal until after discovery, dispositive motions proceedings, and (potentially) trial, that can result in them second-guessing decisions related to safety and security, and impact how they do their jobs. Correctional Officers might hesitate in making a decision or intervening in a situation that is necessary to keep the institution safe, if they know that they have no right to appeal an erroneous *Bivens* decision. *See Mack v. Yost*, 968 F.3d 311, 320 (3d Cir. 2020) (stating that the "threat of liability" may impact an "officer's ability to serve the public"); *Turkmen v. Ashcroft*, Case No. 02-cv-02307 (DLI) (SMG), 2021 WL 4099495, at *5 (E.D.N.Y. Sept. 9, 2021) (defending a *Bivens* suit can impact "wardens and supervisory officials from performing their duties, and the possibility of wardens adopting supervisory practices they otherwise might not because they may be accountable for failing to monitor and control the actions of officers under their command"); *Harlow v. Fitzgerald*, 457 U.S. 800, 816 (1982) (consequences include "the general costs of subjecting officials to the risks of trial – distraction of officials from their governmental duties, inhibition of discretionary action, and deterrence of able people from public service"). Therefore, extending the *Bivens* remedy without an immediate appeal right can having a chilling effect on life and death decisions that Correctional Officers must make to keep institutions safe.

Additionally, Correctional Officers subject to *Bivens* actions face potential ostracization from their colleagues — they lose credibility when they are sued. The nature of prisons makes it crucial for Correctional Officers to work together to keep inmates and staff safe; they must rely on each other in dangerous situations and trust each other completely. When an

officer loses that credibility and trust due to being the subject of a *Bivens* action, the safety and security of federal prisons is threatened.

B. Correctional Officers Face Devasting Personal Effects From Lengthy *Bivens* Litigation.

A *Bivens* action brought against a Correctional Officer with no right to immediately appeal an erroneous decision also has devasting personal effects. When an officer is sued, they can request representation through the Bureau of Prisons, but such representation is not guaranteed. If they are not afforded representation, they are forced to pay out of pocket to defend against the *Bivens* action.

There is undoubtedly a huge difference in the cost of defending a *Bivens* action depending on whether there is a right to immediately appeal a finding of a new *Bivens* remedy. If this Court grants the petition and reverses the Third Circuit, then costs of defending a *Bivens* action include the filing and defending of a motion to dismiss, and then the corresponding immediate appeal, should the motion be denied. If the Third Circuit's ruling is allowed to stand, then the costs of defending a *Bivens* action also include lengthy, potentially years long discovery process, dispositive motions briefing, and a potential trial. Particularly if a Correctional Officer is forced to front the costs of representation out of pocket, this difference in cost can be ruinous. Forcing a Correctional Officer to pay for years long litigation, only for a court to eventually find that no cause of action existed, would cause devasting financial impacts, putting an immense strain on Officers and their families.

C. Bureau of Prison Operations are Impacted by *Bivens* Litigation.

In addition to the impact on safety and security, and the personal lives of Correctional Officers, a lack of a right to immediately appeal also burdens Bureau of Prison operations. *See Sandin v. Conner*, 515 U.S. 472, 483 (1996) (courts must "afford appropriate deference and flexibility to [prison] officials trying to manage a volatile environment"); *Bell*, 441 U.S. at 562 (courts have "become increasingly enmeshed in the minutiae of prison operations" and the "inquiry of federal courts into prison management must be limited"). The burden of extended *Bivens* litigation against Correctional Officers undoubtedly could impact prison operations, policies, and protocols. Because of the "complexities of prison administration," there are "wide-ranging impact[s] on government operations that can develop from court-created remedies." *Hoffman v. Preston*, Case No. 1:16-cv-01617-LJO-SAB (PC), 2019 WL 1865459, at *7 (E.D. Cal. Apr. 25, 2019).

Further, Correctional Officers who are the subject of *Bivens* litigation are often placed on administrative leave as a result of the underlying conduct. This administrative leave can last for years while litigation in both the civil and criminal systems is ongoing — in one facility, two Correctional Officers have been on administrative leave for approximately three years. When they are on leave, the BOP cannot replace them or fill their position. This results in staffing issues when many BOP facilities are already short staffed.[8]

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[8] Capstone Review of the Federal Bureau of Prisons' Response to the Coronavirus Disease 2019 Pandemic, Dep't of Justice, Office of the Inspector General (March 2023), at 45, *available at*

Moreover, an expansion of *Bivens* liability without the right to appeal, and the fear of corresponding costly litigation, will adversely impact BOP's ability to recruit and retain employees, exacerbating the staffing shortage. These impacts on staffing can lead to an increase in prison violence.[9] If Correctional Officers are forced to endure years long *Bivens* litigation, BOP operations will continue to suffer under the strain of staffing issues.

Maintaining the safety and security of federal correctional facilities is a substantial public interest that is imperiled by the lack of right to immediately appeal, thus, making a decision extending *Bivens* effectively unreviewable. *See Will*, 546 U.S. at 352–53.

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https://oig.justice.gov/sites/default/files/reports/23-054.pdf (As of September 2022, 21% of authorized Correctional Officer positions were vacant, and the number of onboarded Correctional Officers declined from 17,114 in September of 2012 to 16,153 at the end of September of 2022).

[9] Glenn Thrush, *Short on Staff, Prisons Enlist Teachers and Case Managers as Guards* (N.Y. Times, May 1, 2023), https://www.nytimes.com/2023/05/01/us/politics/prison-guards-teachers-staff.html

CONCLUSION

For the foregoing reasons, the petition should be granted and this Court should reverse the judgment of the court of appeals.

Respectfully submitted,

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