No.

IN THE

Supreme Court of the United States

JEREMY HENNING,

Petitioner,

v.

DONALD V. SNOWDEN,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

This Court has repeatedly cautioned against extending the implied damages remedy created in *Bivens* v. *Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971). Before allowing putative *Bivens* actions to proceed, courts must ask "whether the case presents a 'new *Bivens* context'"—*i.e.*, whether it is "'meaningful[ly]' different from the three cases in which the Court has [previously] implied a damages action." *Egbert* v. *Boule*, 596 U.S. 482, 492 (2022). If so, *Bivens* cannot be extended where "'special factors' indicat[e] that the Judiciary is at least arguably less equipped than Congress to 'weigh the costs and benefits of allowing a damages action to proceed.'" *Id.* at 492. "[A]ny rational reason (even one) to think that Congress is better suited to 'weigh the costs and benefits'" precludes *Bivens*' extension. *Id.* at 496.

Here, the Seventh Circuit allowed a *Bivens* action arising from the alleged use of excessive force in effecting an arrest, in a hotel lobby, pursuant to a warrant. The court agreed that, while the arrest in *Bivens* occurred in the plaintiff's home, the arrest here occurred in a location open to the public. And while *Bivens* involved warrantless conduct, the officer here was executing a judicially issued warrant. Contrary to the decisions of other courts of appeals, the decision below deemed each of those differences trivial; held they do not present a new *Bivens* context; and allowed the *Bivens* claim to proceed. "Hotel" lobby "or home, warrant or no warrant," the court declared, there was "no meaningful difference" from *Bivens*.

The question presented is:

Whether the court of appeals erred in allowing a *Bivens* remedy in this case, where the claim arises from an arrest made outside the home, in a place open to the public, pursuant to a warrant.

PARTIES TO THE PROCEEDINGS BELOW

Petitioner Jeremy Henning was the appellee in the court of appeals.

Respondent Donald V. Snowden was the appellant in the court of appeals.

The Carbondale, Illinois Quality Inn Hotel, "Cashier Cindy," and the Drug Enforcement Agency were defendants in the district court but did not participate in the appeal that is the subject of this petition.

RELATED PROCEEDINGS

The following proceedings are directly related to this case within the meaning of Rule 14.1(b)(iii):

United States Court of Appeals (7th Cir.):

- *Snowden* v. *Henning*, No. 21-1463 (judgment entered Nov. 3, 2023)

United States District Court (S.D. Ill.):

- *Snowden* v. *Henning*, No. 19-CV-01322 (final order entered Mar. 4, 2021)

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Jeremy Henning respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit.

OPINIONS BELOW

The court of appeals' opinion (App., *infra*, 1a-19a) is reported at 72 F.4th 237. The court of appeals' denial of Agent Henning's petition for rehearing and for rehearing en banc (App., *infra*, 33a) is unreported but available at 2023 WL 7284194. The district court's order (App., *infra*, 20a-32a) is unreported but available at 2021 WL 806724.

STATEMENT OF JURISDICTION

The court of appeals entered judgment on June 27, 2023, App., *infra*, 1a-19a, and denied rehearing and rehearing en banc on November 3, 2023, *id.* at 33a. On Janu-

ary 25, 2024, Justice Barrett extended the time to file the petition to March 4, 2024. No. 23A679. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment to the U.S. Constitution provides, in pertinent part, "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated * * * ." U.S. Const. amend. IV.

PRELIMINARY STATEMENT

This case presents important and recurring issues that have divided the circuits—and sown confusion among district courts—over the availability of implied damages actions under *Bivens* v. *Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971). In *Bivens*, the Court created a damages action against federal agents accused of conducting an unreasonable, warrantless search and seizure inside the plaintiff's home in violation of the Fourth Amendment.

Since *Bivens*, this Court has "come 'to appreciate more fully the tension between' judicially created causes of action and 'the Constitution's separation of legislative and judicial power.'" *Egbert* v. *Boule*, 596 U.S. 482, 491 (2022). In case after case, the Court has "emphasized that recognizing a cause of action under *Bivens* is 'a disfavored judicial activity.'" *Ibid.*

Consequently, federal courts faced with a "proposed *Bivens* claim" must first consider "whether the case presents 'a new *Bivens* context.'" *Egbert*, 596 U.S. at 492. A case presents a "new context" if it involves factual distinctions or legal issues that might alter the cost-benefit balance that previously led this Court to recognize *Bivens* remedies in one of the three decisions where this Court

has done so. See *ibid.* If the context is "new," courts must ask whether any "special factors" counsel against extending *Bivens* to that context. *Ibid.* "If there is even a single 'reason to pause,'" courts "may not recognize a *Bivens* remedy." *Ibid.*

The Seventh Circuit's decision in this case recognizes a *Bivens* claim arising from the plaintiff's arrest in a hotel lobby, pursuant to a warrant. The court acknowledged that, whereas the arrest in *Bivens* took place in the sanctity of the plaintiff's home, the arrest here occurred in an area open to the public. App., *infra*, 17a-18a. The court further acknowledged that, unlike the officers who carried out the warrantless search and seizure in *Bivens*, the officer here was executing a judicially issued warrant. *Ibid.* The court, however, found those distinctions irrelevant. "Hotel or home, warrant or no warrant," the court stated, what mattered was that "the claims here and in *Bivens* stem from run-of-the-mill allegations of excessive force during an arrest." *Ibid.*

That reasoning defies this Court's decision in *Egbert*. Under *Egbert*, "a plaintiff cannot justify a *Bivens* extension based on 'parallel circumstances' with *Bivens*" alone. 596 U.S. at 501. Focusing on such parallels here, the court of appeals overlooked the multiple ways the differences between this case and *Bivens* alter "the costs and benefits of allowing a damages action to proceed." *Ziglar* v. *Abbasi*, 582 U.S. 120, 136 (2017). It is not merely that public places do not enjoy the extraordinary solicitude accorded to the home. Arrests that occur in public also present different risks for law enforcement, including a greater risk of bystander injury. And an officer executing a warrant fulfills a judicially imposed duty—operating under a different legal mandate—not implicated in *Bivens*. Whether to permit damages actions in such cir-

cumstances is precisely the sort of question Congress is better equipped than the courts to answer. That precludes *Bivens*' extension here.

In reaching the opposite conclusion, the decision below exacerbates two square and acknowledged circuit conflicts. The First, Fifth, Eighth, and Ninth Circuits have recognized that claims arising from searches and seizures outside the home are meaningfully different from the in-home search and seizure challenged in *Bivens*. By contrast, the Fourth, Seventh, and Tenth Circuits have rejected such arguments. The First, Sixth, and Ninth Circuits have held that conduct pursuant to a warrant is meaningfully different from the warrantless conduct in *Bivens*. By contrast, the Seventh and Tenth Circuits have now held that a warrant makes no difference.

Each of those square and acknowledged conflicts independently warrants review. But they also reflect a more fundamental disagreement among the lower courts on the nature of the differences that can render a context "new." If the courts of appeals cannot agree on the significance of *the home* and *warrants* to Fourth Amendment *Bivens* claims, something is seriously wrong. Review is warranted.

STATEMENT

This case concerns the implied cause of action for damages this Court created in *Bivens* v. *Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971). Since that decision, the Court has made clear that, before allowing *Bivens* claims to proceed, courts must ask whether the context is "new." Courts thus must ask whether there is any factual or legal difference that might rationally be thought to alter the policy balance that previously led this Court to create a cause of action under *Bivens*. *Egbert* v. *Boule*, 596 U.S. 482, 492 (2022).

A context is also "new" if it involves a "potential special factor[ ] that previous *Bivens* cases did not consider." *Ibid.* The court of appeals held below that the difference in locations here—a home in *Bivens* versus a publicly accessible hotel lobby—did not present a new *Bivens* context. App., *infra*, 17a-18a. The court likewise dismissed the fact that, unlike in *Bivens*, the arrest here was made pursuant to a warrant. *Id.* at 18a.

I. LEGAL FRAMEWORK

A. This Court's Creation of Implied Damages Actions Against Federal Officers

In 1971, *Bivens* created an implied damages action against federal agents accused of conducting an unreasonable, warrantless search and seizure, inside the plaintiff's home, in violation of the Fourth Amendment. The Court has "extended [that] holding only twice." *Corr. Servs. Corp.* v. *Malesko*, 534 U.S. 61, 70 (2001). In *Davis* v. *Passman*, 442 U.S. 228, 248-249 (1979), the Court allowed a congressional staffer to sue for sex-based discrimination in violation of the Fifth Amendment. And in *Carlson* v. *Green*, 446 U.S. 14, 19-23 (1980), the Court allowed the family of a federal inmate to sue prison officials under the Eighth Amendment for failing to treat his medical condition, resulting in his death. In each case, the Court found "no special factors" to counsel "hesitation in the absence of affirmative action by Congress." *Bivens*, 403 U.S. at 396; *Davis*, 442 U.S. at 245, 247; *Carlson*, 446 U.S. at 19.

This Court has since "come 'to appreciate more fully the tension between' judicially created causes of action and 'the Constitution's separation of legislative and judicial power.'" *Egbert*, 596 U.S. at 491. "[C]reating a cause of action," the Court now recognizes, "is a legislative endeavor." *Ibid.* "Congress is 'far more competent than the Judiciary' to weigh [the relevant] policy considerations."

Ibid. Consequently, in the four decades since *Carlson*, the Court has "declined [12] times to imply a similar cause of action for other alleged constitutional violations." *Id.* at 486.

B. This Court's Two-Step Framework for Assessing Proposed *Bivens* Claims

Because judicial creation of damages actions is "a disfavored judicial activity," courts must evaluate any "proposed *Bivens* claim" using a two-step analysis. *Egbert*, 596 U.S. at 492.

First, a court must assess whether the claim "arises in a new *Bivens* context"—that is, whether it differs "in a meaningful way" from the three cases where this Court has recognized *Bivens* actions (*Bivens*, *Davis*, or *Carlson*). *Ziglar* v. *Abbasi*, 582 U.S. 120, 139, 147 (2017). Because the Court's "understanding of a 'new context' is broad," *Hernández* v. *Mesa*, 140 S. Ct. 735, 743 (2020), the "new-context inquiry is easily satisfied," *Ziglar*, 582 U.S. at 149. Any factual or legal difference that alters "the costs and benefits of implying a cause of action" gives rise to a "new *Bivens* context." *Egbert*, 596 U.S. at 496. So, too, can the presence of "potential special factors that previous *Bivens* cases did not consider." *Id.* at 492. Relevant differences include:

> 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.

Ziglar, 582 U.S. at 139-140.

Consequently, plaintiffs cannot "justify a *Bivens* extension based on 'parallel circumstances' with *Bivens*" alone. *Egbert*, 596 U.S. at 501. Nor is it enough to say that a claim is "conventional" or involves the same "common and recurrent sphere of law enforcement." *Id.* at 494-495 (internal quotation marks omitted). Focusing on such "superficial similarities," the Court has warned, obscures important differences that alter the policy balance—the "costs and benefits"—involved in deciding whether to create a cause of action. *Id.* at 495-496.

Second, if the context is new, "a *Bivens* remedy will not be available if there are special factors counselling hesitation in the absence of affirmative action by Congress." *Ziglar*, 582 U.S. at 136 (quotation marks omitted). "'[T]he most important question is who should decide whether to provide for a damages remedy, Congress or the courts?'" *Egbert*, 596 U.S. at 492. "If there is a rational reason to think that the answer is 'Congress'—as it will be in most every case—no *Bivens* action may lie." *Ibid.* (citation omitted). "If there is even a single 'reason to pause,' * * * a court may not recognize a *Bivens* remedy." *Ibid.*

Those two steps "often resolve to a single question: whether there is *any* reason to think that Congress might be better equipped to create a damages remedy." *Egbert*, 596 U.S. at 492 (emphasis added). Given that "Congress is 'far more competent than the Judiciary' to weigh" the "policy considerations" relevant to "creating a cause of action," *id.* at 491, the answer will be "yes" in any case that presents considerations different from those presented in *Bivens*, *Davis*, and *Carlson*.

II. PROCEEDINGS BELOW

This case arises from the mid-day arrest of an indicted drug trafficker in the lobby of a Carbondale, Illinois hotel. App., *infra*, 21a.

A. District Court Proceedings

On September 10, 2019, a federal grand jury indicted respondent Donald Snowden for methamphetamine distribution. App., *infra*, 4a; Dist. Ct. Dkt. 24-2. A warrant directing Snowden's arrest was issued that same day. Dist. Ct. Dkt. 24-1. The duty to execute that warrant fell to DEA Agent Jeremy Henning.

Around 12 p.m. on September 12, 2019, Agent Henning arrived at the hotel where Snowden was staying. C.A. App. 26; App., *infra*, 4a. According to Snowden, Agent Henning had the front-desk clerk summon Snowden to the front desk to pay for his stay. App., *infra*, 4a. Snowden left his room and made his way to the lobby. *Ibid.* In the lobby, Agent Henning allegedly rushed Snowden, pushed him into a door and onto the ground, and punched him several times, injuring him. *Ibid.*

While in pretrial detention, Snowden filed a *pro se* complaint against Agent Henning. App., *infra*, 4a. Among other things, he asserted a Fourth Amendment claim for excessive use of force, which the district court construed as a *Bivens* claim. *Id.* at 4a-5a.[1]

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[1] Snowden also sued the hotel, the front-desk clerk, and the DEA. The district court dismissed those claims after screening Snowden's complaint under the Prison Litigation Reform Act, 28 U.S.C. § 1915A. App., *infra*, 5a. Snowden did not challenge those rulings, *id.* at 6a-7a, and they are no longer at issue. Snowden also asserted a state-law battery claim against Agent Henning. *Id.* at 5a. As explained below, that state-law claim is not directly at issue here. See p. 9-10 n.2, *infra*.

The district court granted Agent Henning's motion to dismiss, finding that Snowden's claim would require *Bivens*' unwarranted expansion. App., *infra*, 26a. Following this Court's two-step framework, the district court first concluded that the claim was meaningfully different from *Bivens* in at least two respects. *Id.* at 26a-27a. The district court observed that the arrest in *Bivens* occurred in the privacy of the plaintiff's home, while the arrest here occurred in a hotel lobby open to the public. *Ibid.* The public setting of Snowden's arrest, the court ruled, was a factual difference rendering this a "new context." *Id.* at 26a. Moreover, the issue in *Bivens* was principally "the constitutionality of [a] home entry, arrest, and search without a warrant," but Snowden's claim involved only "the right to be free from excessive force incident to an otherwise lawful arrest." *Ibid.* Finally, while the officers in *Bivens* "lacked a warrant and probable cause" to make the arrest, Agent Henning "acted pursuant to a warrant issued after a finding of probable cause." *Id.* at 27a.

Turning to the second step, the district court "ask[ed] whether any special factors counsel hesitation in" extending *Bivens* "absent affirmative action by Congress." App., *infra*, 25a. It ruled that "the existence of" the Federal Tort Claims Act (FTCA) "as a potential remedy" was one such factor. *Id.* at 29a. The FTCA provides a federal damages remedy against the United States for certain tortious conduct. 28 U.S.C. §§ 2671 *et seq.* In the court's view, the FTCA "signaled that [Congress] does not want a damages remedy against individual federal agents." App., *infra*, 29a.[2]

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[2] Snowden asserted no other federal claims. While Snowden had asserted an Illinois-law battery claim, he resisted Agent Henning's motion to substitute the United States as a defendant under the

B. The Court of Appeals' Decision

The Seventh Circuit reversed in relevant part. App., *infra*, 1a-19a.

1. The court of appeals "focus[ed]" its analysis "on the first step" of this Court's *Bivens* framework—"whether Snowden's *Bivens* claim arises in a 'new context.'" App., *infra*, 8a. The court recognized that a context is "'new' if 'the case is different in a meaningful way from previous *Bivens* cases." *Ibid.* This "Court's evolving *Bivens* guidance," the court observed, "suggest[s] that a difference is 'meaningful' if it might alter the policy balance that initially justified the causes of action recognized in *Bivens*" (or the two other cases in which the Court has recognized an implied damages action, *Davis* v. *Passman*, 442 U.S. 228 (1979), and *Carlson* v. *Green*, 446 U.S. 14 (1980)). App., *infra*, 12a. "If a case involves facts or legal issues that would require reweighing the costs and benefits of a damages remedy against federal officials," the court explained, "then the difference is 'meaningful' because we risk further encroachment on the legislative function rather than simply applying controlling Supreme Court precedent." *Ibid.*

The court of appeals, however, found "no meaningful difference between Snowden's case and *Bivens* to suggest that he should not be able to pursue [his] excessive-force claim." App., *infra*, 15a. Snowden's claim, the court obser-

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Westfall Act, 28 U.S.C. § 2679, which would have allowed the claim to proceed as a federal action under the FTCA. App., *infra*, 5a. The district court denied substitution in accordance with Snowden's wishes. *Id.* at 30a. Having dismissed Snowden's only federal cause of action—the *Bivens* claim—the district court declined supplemental jurisdiction over Snowden's state-law battery claim. *Id.* at 31a. Snowden never challenged the court's decision not to exercise supplemental jurisdiction. *Id.* at 6a-7a.

ved, had much in common with *Bivens*. "Agent Henning operated under the same legal mandate as the officers in *Bivens*—the enforcement of federal drug laws." *Id.* at 15a-16a. Agent Henning was "also the same kind of line-level federal narcotics officer as the defendant-officers in *Bivens*." *Ibid.* Moreover, "[l]ike Webster Bivens," Snowden "alleged that officers used unreasonable force in an arrest." *Ibid.* The court emphasized that "the legal landscape of excessive-force claims is well settled, with decades of circuit precedent" that give officers "clear guidance on the level of force that is reasonable when arresting a suspect who does not resist." *Id.* at 16a.

2. The court of appeals rejected the argument that Snowden's claim implicated distinct policy interests—and altered the cost-benefit balance of judicially creating a cause of action—because it occurred in a place open to the public, pursuant to a warrant, with no intrusion on the sanctity of the home. The court acknowledged Agent Henning's argument that *Bivens* rested on "'the right to be free of unreasonable warrantless search and detention in one's own home and arrest in the absence of probable cause,'" while Snowden's claim was "rooted in 'the right to be free of excessive force in the context of a lawful arrest in a public place pursuant to a warrant issued following a finding of probable cause.'" App., *infra*, 17a. In the court's view, however, that argument "overlooks" that *Bivens* also involved an excessive-force claim. *Ibid.*

The court acknowledged the "factual differences" between this case and *Bivens*, including "that the alleged Fourth Amendment violations took place in different locations (a hotel lobby here, a home in *Bivens*)" and that Agent Henning "had a warrant (the officers in *Bivens* did not)." App., *infra*, 18a. In the court's view, those distinctions were "not sufficient to affect the *Bivens* inquiry."

Ibid. The court acknowledged that, in other circuits, the arrest's location has rendered the context "new." Thus, in *Oliva* v. *Nivar*, 973 F.3d 438 (5th Cir. 2020), the Fifth Circuit declined to extend *Bivens* from conduct within the home to an arrest in a government building. App., *infra*, 18a. But the decision below held that the difference in locations here—a home in *Bivens* versus an open-to-the-public hotel lobby—was not "meaningful," characterizing both as a "private home or building." *Ibid.* The court did not address the different societal expectations about non-consensual interactions in those two different locations; the greater legal solicitude accorded the home; or the higher bystander risks that exist when an area is open to the public.

While emphasizing that Agent Henning and the defendants in *Bivens* both worked for agencies with "the same legal mandate * * * —the enforcement of federal drug laws," App., *infra*, 15a, the court dismissed the difference in their missions as "trivial," *id.* at 18a. The officers in *Bivens* were pursuing their agency's investigative mandate, conducting a search and seizure without a warrant. 403 U.S. at 389-390. Here, Agent Henning was executing a warrant, issued by the judicial branch, that commanded Snowden's arrest. App., *infra*, 4a.

Finally, the court of appeals was not persuaded that the availability of a monetary remedy against the United States under the FTCA presented a meaningful difference from *Bivens*. The court of appeals invoked this Court's conclusion, in *Carlson*, that FTCA claims were not meant to "displace a *Bivens* claim in the narrow cases where it is available." App., *infra*, 16a n.4.

"In short," the Seventh Circuit concluded, "the factual distinctions Henning emphasizes are of the 'trivial' kind that 'will not suffice to create a new *Bivens* context.'"

App., *infra*, 18a (quoting *Ziglar*, 582 U.S. at 149). "Hotel or home, warrant or no warrant—the claims here and in *Bivens* stem from run-of-the-mill allegations of excessive force during an arrest." *Ibid.*

REASONS FOR GRANTING THE PETITION

This Court has repeatedly made clear that the creation of implied damages actions is "a disfavored judicial activity." *Egbert* v. *Boule*, 596 U.S. 482, 491 (2022); *Hernández* v. *Mesa*, 140 S. Ct. 735, 742 (2020); *Ziglar* v. *Abbasi*, 582 U.S. 120, 135 (2017). To the contrary, creating a new cause of action for damages is a quintessentially *legislative* activity. *Egbert*, 596 U.S. at 491. Consequently, this Court has cautioned against extending *Bivens* and the two other cases where the Court implied a cause of action for damages. *Ibid.* Courts presented with potential damages actions under *Bivens* must ask whether the claim presents a "new *Bivens* context," *i.e.*, whether it involves any "meaningful"—even if seemingly "small"—difference from the three cases in which the Court has implied a damages action. *Ziglar*, 582 U.S. at 149.

This Court's "understanding of a 'new context' is broad," *Hernández*, 140 S. Ct. at 743, and the "new-context inquiry" is "easily satisfied," *Ziglar*, 582 U.S. at 149. If a claim involves new facts or legal issues that bear on "the costs and benefits of implying a cause of action," the case presents a "new" *Bivens* context and, "in all but the most unusual circumstances," must fail. *Egbert*, 596 U.S. at 486, 496. A context is likewise "new" if it raises "potential special factors that previous *Bivens* cases did not consider." *Ziglar*, 582 U.S. at 139-140. Plaintiffs cannot "justify a *Bivens* extension based on 'parallel circumstances' with *Bivens*, *Passman*, or *Carlson*" alone. *Egbert*, 596 U.S. at 501.

Despite this Court's guidance, the courts of appeals are divided on the circumstances that are different enough to make a context "new." This case differs from *Bivens* in at least two respects. First, the search and seizure challenged in *Bivens* took place in one of the most sacred and protected locations—the home. By contrast, the arrest here occurred in a place open to the public, a hotel lobby. That different setting not only lacks the special solicitude accorded the home; it also presents heightened risks to bystanders. Second, while the plaintiff in *Bivens* was subjected to a warrantless search and seizure, Snowden's arrest here was directed by a judicially issued arrest warrant based on a finding of probable cause—indeed, following Snowden's indictment.

Recognizing that a rational legislature could think those differences relevant to the costs and benefits of authorizing a damages action, many courts of appeals have held that arrests outside the home, and arrests made pursuant to a warrant, are "new *Bivens* contexts." Joining other courts of appeals, however, the Seventh Circuit held the opposite. "Hotel" lobby "or home, warrant or no warrant," that court held, there was no meaningful difference because "the claims here and in *Bivens* stem from run-of-the-mill allegations of excessive force during an arrest." App., *infra*, 17a-18a.

The resulting circuit conflicts require review. Given the demanding standard for extending *Bivens*, the new-context analysis is often dispositive. The circuits' divergent views thus make the threat of potential *Bivens* liability a question of geography. That is untenable. The limits on *Bivens* reflect separation-of-powers principles that do not vary with the circuit in which a case arises. The officers who risk their lives enforcing this Nation's laws deserve a predictable legal framework that does not

change when they cross circuit boundaries. Review is warranted.

I. THE COURTS OF APPEALS ARE DIVIDED ON THE "NEW CONTEXT" INQUIRY

The courts of appeals are firmly divided. At least four circuits have found a new *Bivens* context based on whether a claim arises in the seclusion of the home, as in *Bivens*, or in a place open to the public like the hotel lobby here. Many courts of appeals likewise have distinguished the warrantless actions challenged in *Bivens* from seizures commanded by a judicially issued warrant. The legal and practical differences between the *warrantless*, *in-home* search and seizure at issue in *Bivens*, and the *warranted*, *public* arrest in this case, raise precisely the sorts of "policy considerations" that "Congress is 'far more competent than the Judiciary' to weigh." *Egbert*, 596 U.S. at 491. But the Seventh Circuit, joined by other courts of appeals, reached the opposite conclusion on both of those differences.

A. The Circuits Are Divided Over Whether Arrests Outside the Home Present a New *Bivens* Context

There is an entrenched, open, and acknowledged conflict over whether claims arising from law-enforcement conduct outside the home present a new *Bivens* context. At least four courts of appeals have held that they do. But the decision below, and decisions of two other courts of appeals, hold the opposite.

1. The First, Fifth, Eighth, and Ninth Circuits have each recognized that claims arising from searches and seizures outside the home are meaningfully different from *Bivens*. The Fifth Circuit has held that "[v]irtually everything" that does not precisely mirror the facts in *Bivens*, *Davis*, or *Carlson* presents "a 'new context.'" *Oliva* v.

Nivar, 973 F.3d 438, 442 (5th Cir. 2020), cert. denied, 141 S. Ct. 2669 (2021); accord *Byrd* v. *Lamb*, 990 F.3d 879, 880 (5th Cir. 2021), cert. denied, 142 S. Ct. 2850 (2022). That includes claims arising outside the home. Thus, in *Byrd*, the Fifth Circuit found Fourth Amendment excessive-force claims presented a new context in part because they "arose in a parking lot, not a private home as was the case in *Bivens*." 990 F.3d at 882. In *Oliva*, that court found similar claims, arising from an altercation at a VA hospital, presented a new context because "a government hospital" was a "meaningful[ly]" different setting from the "private home" in *Bivens*. 973 F.3d at 442-443. And in *Cantù* v. *Moody*, 933 F.3d 414 (5th Cir. 2019), cert. denied, 141 S. Ct. 112 (2020), the Fourth Amendment falsified-evidence claim presented a new context in part because the plaintiff did "not allege the officers entered his home without a warrant or violated his rights of privacy." *Id.* at 423.

The First, Eighth, and Ninth Circuits have followed suit. The First Circuit has held that claims arising from an FBI raid of a private business presented a new context because "no one's home * * * was searched." *Quinones-Pimentel* v. *Cannon*, 85 F.4th 63, 71-72 (1st Cir. 2023). The Eighth Circuit has likewise found the context "new" where the defendant "did not enter a home," because "[t]he focus in *Bivens* was on an invasion into a home and the officers' behavior once they got there." *Ahmed* v. *Weyker*, 984 F.3d 564, 568 (8th Cir. 2020). And the Ninth Circuit has found excessive-force claims arising from an arrest on publicly managed lands presented a new context because, "importantly," "none of the events in question occurred in or near [the plaintiff's] home." *Mejia* v. *Miller*, 61 F.4th 663, 668 (9th Cir. 2023).

2. Those decisions reflect the very different cost-benefit balances—of individual, public, and law-enforce-

ment interests—that the distinct settings present. The home is a place of special solicitude, while places open to the public are not. And arrests in public settings can often create potential risks to bystanders, including risk of bystander intervention, that fundamentally alter the costs and benefits of exposing officers to damages actions.

When it comes to individual interests, historical expectations, and legal principles, there is a vast gulf between the home—"the center of the private lives of our people"—and places open to the public. *Georgia* v. *Randolph*, 547 U.S. 103, 115 (2006). The "'physical entry of the home is the chief evil against which the wording'" of the Fourth Amendment "'is directed.'" *New York* v. *Harris*, 495 U.S. 14, 17-18 (1990). The Amendment thus draws "a firm line at the entrance to the house." *Payton* v. *New York*, 445 U.S. 573, 590 (1980). Outside the home, we expect to and necessarily do interact with others: We may be approached by strangers on the street; rub shoulders on the subway; or bump into others at the grocery store. But the home has for centuries been the bulwark against all that. Whatever intrusions on our persons we tolerate outside the home, the "'house of every one is as to him as his castle and fortress, as well for his defen[s]e against injury and violence, as for his repose.'" *Lange* v. *California*, 141 S. Ct. 2011, 2022 (2021) (quoting *Semayne's Case*, 5 Co. Rep. 91a, 91b, 77 Eng. Rep. 194, 195 (K.B. 1604)).

The law reflects those expectations. Law-enforcement officers thus have "greater latitude exercising their duties in public places" than they do in the home. *Florida* v. *White*, 526 U.S. 559, 565 (1999); see *Payton*, 445 U.S. at 587 (noting the "distinction between a warrantless seizure in an open area and such a seizure on private premises"). Warrantless "entry into the public lobby of a motel and restaurant" to serve a subpoena, for example, "is scarcely

the sort of governmental act which is forbidden by the Fourth Amendment." *Donovan* v. *Lone Steer Inc.*, 464 U.S. 408, 413-414 (1984).

Arrests in public also present dramatically different risks—an entirely different balance of public and law-enforcement interests—than arrests in the home. Confrontations with suspects in public locations can pose immediate threats to bystanders. See, *e.g.*, *Arrest Made in an Attempted Unarmed Carjacking Offense*, Washington, D.C. Metropolitan Police (Sept. 27, 2021), https://mpdc.dc.gov/release/arrest-made-attempted-unarmed-carjacking-offense-unit-block-macdill-boulevard-southwest. Or bystanders may intervene, placing themselves, officers, or the suspects at risk. See, *e.g.*, Joel F. Shults, *Bystander Management is Increasingly Critical Especially when Unmanageable*, https://nationalpolice.org/main/bystander-management-is-increasingly-critical-especially-when-unmanageable.

The need to mitigate such threats quickly and decisively is among the most important factors in officer decision-making—and a key determinant in assessing the reasonableness of any use of force. See *Plumhoff* v. *Rickard*, 572 U.S. 765, 775-776 (2014). Indeed, imminent threats to bystanders are one of just two circumstances (along with threats to officer safety) in which the Department of Justice authorizes the use of deadly force. See U.S. Dep't of Justice, *Policy on Use of Force* (July 2022), https://www.justice.gov/jm/1-16000-department-justice-policy-use-force.

Those differences plainly affect "the costs and benefits of implying a cause of action." *Egbert*, 596 U.S. at 496. A rational legislature could certainly determine that, even if private damages actions are warranted where officers are accused of using excessive force on individuals within their

homes, a different result is warranted for arrests in public places where the risk of bystander injury is greater. The prospect of personal liability, legislators could conclude, should not make officers hesitant to act decisively when innocent lives may be at stake. In such cases, moreover, the traditional solicitude accorded the home—the individual's powerful interest in freedom from intrusion—is absent as well. Under *Egbert*, that makes those differences "meaningful" and the context "new." Indeed, this Court has held that the presence of "potential special factors that previous *Bivens* cases did not consider" is sufficient to make the context "new." *Ziglar*, 582 U.S. at 139-140. The risks to bystanders presented by arrests in areas open to the public—and the corresponding importance of not deterring decisive action in that context—are "potential special factors" *Bivens* "did not consider." *Ibid.*

3. The Fourth, Seventh, and Tenth Circuits have nonetheless reached the opposite conclusion, rejecting the argument that arrests outside the home—in places open to the public—present a new *Bivens* context. The decision below, for example, dismissed that difference as "'trivial.'" App., *infra*, 18a. "Hotel or home, warrant or no warrant," the Seventh Circuit declared, it is enough that Snowden's and Bivens' claims both involved "run-of-the-mill allegations of excessive force during an arrest." *Ibid.* The Tenth Circuit "agree[s]" that the "location of the arrest" has "no legal significance in an excessive-force case." *Logsdon* v. *U.S. Marshal Serv.*, 91 F.4th 1352, 1357 (10th Cir. 2024) (citing App., *infra*, 18a.). And the Fourth Circuit has held that claims unrelated to the "search of a home" do not present a new context, deeming an unreasonable-seizure claim arising from a traffic stop "a replay" of *Bivens*. *Hicks* v. *Ferreyra*, 64 F.4th 156, 167-168 & n.2 (4th Cir. 2023), cert. denied, 144 S. Ct. 555 (2024).

The conflict is open and acknowledged. Despite following the decision below and holding that the arrest's location has "no legal significance in an excessive-force case," the Tenth Circuit has acknowledged "substantial authority to the contrary." *Logsdon*, 91 F.4th at 1357. "[S]ome circuits," it observed, "have said that a new context arises when the violation does not occur in the plaintiff's home." *Ibid.* In support, the court identified decisions of the Fifth and Ninth Circuits. *Ibid.*

B. The Circuits Are Divided on Whether a Warrant Makes the Context New

The courts of appeals likewise disagree on whether the context is "new" where, unlike in *Bivens*, officers act pursuant to a warrant.

1. The Seventh Circuit below and Tenth Circuit have now both held that whether an officer is "execut[ing] an arrest warrant" is—along with the arrest's location—not relevant to the "new context" analysis in excessive force cases. *Logsdon*, 91 F.4th at 1357; see App., *infra*, 18a ("warrant or no warrant," "run-of-the-mill" excessive-force claims do not present a new *Bivens* context). That creates a square circuit conflict with, in the Tenth Circuit's terms, "substantial authority to the contrary." *Logsdon*, 91 F.4th at 1357. "Several other circuits," it observed, "have said that a new *Bivens* context exists when federal officials execute a valid warrant." *Ibid.*; see *id.* at 1358 (acknowledging "differences with other circuits").

2. The First, Sixth, and Ninth Circuits all agree that whether officers are executing a warrant is a "meaningful difference" from *Bivens* that gives rise to a "new context." In *Quinones-Pimentel*, the First Circuit found that Fourth Amendment claims arising from the search of a business presented a new context in part because, unlike in *Bivens*, the searches were conducted pursuant to a

warrant. 85 F.4th at 71-72. The Sixth and Ninth Circuits have held that even claims arising from searches or seizures inside private homes present new *Bivens* contexts where the defendants were executing an unchallenged warrant. See *Cain* v. *Rinehart*, No. 22-1893, 2023 WL 6439438, at *3 (6th Cir. July 25, 2023); *Massaquoi* v. *FBI*, No. 22-55448, 2023 WL 5426738, at *2 (9th Cir. Aug. 23, 2023).

The Fifth Circuit has addressed a warrant's relevance to the "new context" inquiry only where the warrant was challenged. *Cantú*, 933 F.3d at 423 (falsifying evidence to obtain warrant "involves different conduct" than warrantless search and seizure in *Bivens*).[3] Given the Fifth Circuit's holding that "[v]irtually everything" different from the facts of *Bivens* renders the context "new," *Oliva*, 973 F.3d at 442, the law of the Fifth Circuit is not doubtful. Trial courts in the Fifth Circuit routinely apply *Oliva* to find that excessive-force claims arising from execution of an unchallenged arrest warrant present a new context. See, *e.g.*, *Goodale* v. *Seguin*, No. SA-22-CV-00031, 2022 WL 17084400, at *4 (W.D. Tex. Nov. 17, 2022); *Belfrey-Farley* v. *Palmer*, No. 3:19-CV-1305, 2021 WL 2814885, at

[3] The Third, Fourth, and Eighth Circuits have likewise addressed the issue only in cases involving Fourth Amendment challenges based on how the warrant was obtained. The Fourth Circuit held that "searches and a seizure conducted *with* a warrant" implicate "a distinct Fourth Amendment guarantee" and present new contexts, as *Bivens* involved the "right to be free of unreasonable *warrantless* searches and seizures." *Annappareddy* v. *Pascale*, 996 F.3d 120, 135 (4th Cir. 2021). The Third and Eight Circuits similarly hold that a seizure challenged on the ground that officers obtained a warrant without probable cause "involves different conduct" than the warrantless search and seizure in *Bivens*. *Xi* v. *Haugen*, 68 F.4th 824, 834 (3d Cir. 2023); *Farah* v. *Weyker*, 926 F.3d 492, 499 (8th Cir. 2019); see *Cantú*, 933 F.3d at 423.

*5 (N.D. Tex. May 7, 2021); *Greenlaw* v. *Klimek*, No. 4:20-CV-311, 2021 WL 6112784, at *5 (E.D. Tex. Dec. 27, 2021).

Those holdings faithfully reflect this Court's precedents. In *Ziglar*, this Court identified differences in "the statutory or other legal mandate under which the officer was operating" as an example of differences "meaningful enough to make the context a new one." 582 U.S. at 139-140. Recognizing that consideration's relevance, the decision below emphasized that Agent Henning and the defendants in *Bivens* both worked for agencies with "the same legal mandate—the enforcement of federal drug laws." App., *infra*, 15a. But that assertion, like the similar ruling of the Tenth Circuit, ignores the fundamentally different "legal mandate" under which officers are "operating" when they execute judicially issued arrest warrants. *Ziglar*, 582 U.S. at 139-140.

A warrant is a judicial order. It "*command[s]*" the officer "to arrest and bring [the named person] before a United States magistrate judge without unnecessary delay." See Admin. Office of the U.S. Courts, Arrest Warrant (Form AO 442) (emphasis added), https://www.uscourts.gov/forms/law-enforcement-grand-jury-and-prosecution-forms/arrest-warrant. Consequently, an officer executing an arrest warrant is not performing a discretionary investigative function. He is carrying out the court's directive.

This Court emphasized precisely that in *Utah* v. *Strieff*, 579 U.S. 232, 240-241 (2016). There, the Court explained, the officer was required to arrest the suspect pursuant to an outstanding warrant: "[O]nce Officer Fackrell discovered the warrant" for Strieff's arrest, "he had an *obligation* to arrest" him. *Id.* at 240 (emphasis added).

> "A warrant is a judicial mandate to an officer to conduct a search or make an arrest, and the officer has a sworn duty to carry out its provisions." Officer Fackrell's arrest of Strieff thus was a *ministerial act* that was independently *compelled* by the pre-existing warrant.

Ibid. (quoting *United States* v. *Leon*, 468 U.S. 897, 920 & n.21 (1984)) (emphasis added).

Consequently, officers executing an arrest warrant operate under an entirely different "legal mandate": Far from exercising discretionary investigative authority, as in *Bivens*, officers executing arrest warrants are effectuating "a *judicial* mandate." *Strieff*, 579 U.S. at 240 (emphasis added). Under *Ziglar*, that difference is "meaningful enough to make [the] context a new one." 582 U.S. at 139. A reasonable legislature could certainly conclude that, even if officers should confront possible personal monetary liability for how they conduct discretionary arrests, the threat of such liability is inappropriate where a "judicial mandate" makes arrest obligatory. *Strieff*, 579 U.S. at 240.

C. The Decision Below Is Wrong

The decision below is on the wrong side of both circuit conflicts. Because this Court's "understanding of a 'new context' is broad," *Hernández*, 140 S. Ct. at 743, the "new-context inquiry" is "easily satisfied," *Ziglar*, 582 U.S. at 149. Any legal or factual difference that might affect "the costs and benefits of implying a cause of action" is sufficient to render the case a "new *Bivens* context." *Egbert*, 596 U.S. at 496.

As explained above, whether the arrest occurs in the home, or in a place open to the public like a hotel lobby, fundamentally alters "costs and benefits" of creating a da-

mages remedy. The individuals' interest in freedom from intrusion is at its apogee where, as in *Bivens*, they are in the seclusion of their homes. But that interest is greatly reduced in public settings. See pp. 17-18, *supra*. Arrests in public settings create potential risks to bystanders that weigh against exposing officers to damages actions. See pp. 18-19, *supra*. And officers executing judicially issued warrants operate under a different legal mandate than the officers in *Bivens*. See pp. 22-23, *supra*.

1. The Seventh Circuit's legalistic response contravenes precedent. Despite recognizing that the location of the arrest (*e.g.*, on government property) can make a difference, the court declared there was no meaningful difference between the arrests in this case and in *Bivens* because both occurred in locations that can be characterized as a "private home or building." App., *infra*, 18a. Emphasizing perceived similarities between this case and *Bivens*, the court declared that "the claims here and in *Bivens* stem from run-of-the-mill allegations of excessive force during an arrest." *Id.* at 17a-18a. And the court urged that "the legal landscape of excessive-force claims is well settled, with decades of circuit precedent." *Id.* at 16a.

That defies rather than implements the Court's directive in *Egbert*: A "plaintiff cannot justify a *Bivens* extension based on 'parallel circumstances' with *Bivens*" alone. *Egbert*, 596 U.S. at 501. Nor is it enough to say that a claim is "'conventional'" or that it involves the same "'common and recurrent sphere of law enforcement'" in which *Bivens* arose. *Id.* at 494-495. Equating a hotel lobby that is open to the public with the seclusion of the home, because both are "private property," overlooks the profoundly different expectations individuals have in each. Such "superficial similarities" obscure important differ-

ences that alter the cost-benefit balance involved in deciding whether to impose personal liability on law-enforcement officers. *Ibid.*

2. The Seventh Circuit's reasoning overlooks another meaningful difference from *Bivens*. Even when this Court was still creating *Bivens* remedies, it considered whether the complainant had alternative remedies. In *Bivens*, Justice Harlan observed that, "[f]or people in Bivens' shoes, it is damages or nothing." 403 U.S. at 410 (Harlan, J., concurring in judgment). In *Davis* v. *Passman*, 442 U.S. 228 (1979), the Court again emphasized the absence of alternative relief: "For Davis, as for Bivens, it is damages or nothing." *Id.* at 245 (quotation marks omitted). In *Correctional Services Corp.* v. *Malesko*, 534 U.S. 61 (2001), this Court declined to extend *Bivens* because the circumstances were not such that "claimants in respondent's shoes lack effective remedies." *Id.* at 72.

This case differs from *Bivens* in that respect, too. In *Bivens*, this Court found that the principal state-law remedy for wrongful entry to the home, an action for trespass, was unavailable to plaintiffs in Bivens' position. 403 U.S. at 394-395. Trespass actions cannot be asserted against those who enter with consent. *Id.* at 394. As a result, such actions offer no relief to those with federal agents at their doorstep: If they let the agents enter, they forfeit their state-law trespass remedy; the alternative, resisting entry, "'may amount to crime.'" *Id.* at 395. This potential "inconsisten[cy]" between the "interests protected by state laws regulating trespass and the invasion of privacy, and those protected by the Fourth Amendment's guarantee against unreasonable searches and seizures," helped persuade the Court to create its own implied damages remedy. *Id.* at 394.

The court of appeals identified no such inconsistency here. Plaintiffs like respondent Snowden, who claim they were subjected to excessive force, can avail themselves of state tort remedies like actions for battery. Snowden himself brought an Illinois-law battery claim seeking damages for the same injuries that he contends support a *Bivens* claim here. App., *infra*, 20a-21a; C.A. App. 26-27. The government certified that Agent Henning was acting within the scope of his duties, allowing Snowden to seek money damages against the United States under the Federal Tort Claims Act. See pp. 9-10 n.2, *supra*. Since *Bivens*, moreover, Congress has directed DOJ's Office of Inspector General to "review information and receive complaints alleging abuses of civil rights and civil liberties by employees and officials of the Department of Justice." Pub. L. No. 107-56, 115 Stat. 272, § 1001 (2001).[4]

The availability of those remedies weighs decisively against judicial creation of a *Bivens* remedy here. A "court may not fashion a *Bivens* remedy if Congress already has provided, or has authorized the Executive to provide, 'an alternative remedial structure.'" *Egbert*, 596 U.S. at 493. This Court has repeatedly invoked such remedies in declining to extend *Bivens*. See *Ziglar*, 582 U.S. at 144 (noting Congress's requirement that the DOJ "'review and report semi-annually to Congress on any identified abuses of civil rights and civil liberties in fighting terrorism'"). "So long as Congress or the Executive has created a remedial process that it finds sufficient to secure an adequate level of deterrence, the courts cannot second-guess

[4] The Office can investigate such allegations and refer individuals for prosecution or administrative discipline. See 5 U.S.C. § 413(b)(2); Off. of the Inspector Gen., Report to Congress on Implementation of Section 1001 of the USA PATRIOT Act, No. 23-115 (Sept. 2023), https://oig.justice.gov/sites/default/files/reports/23-115.pdf.

that calibration by superimposing a *Bivens* remedy." *Egbert*, 596 U.S. at 498. The availability of a tort remedy for battery in this context, moreover, is a "potential special factor[ ] that previous *Bivens* cases did not consider." *Ziglar*, 582 U.S. at 139-140.[5]

The Seventh Circuit responded that the FTCA "does not displace a *Bivens* claim in the narrow cases where [*Bivens*] is available." App., *infra*, 16a n.4. That is circular: That the FTCA does not displace *Bivens* claims in the "narrow cases" where *Bivens already* provides a remedy does not mean that the availability of alternative remedies is irrelevant to *whether* the context is new. Just the opposite: That the FTCA provides a remedy here—that it is not "*Bivens* or nothing"—precludes this from being among the "narrow cases" in which a *Bivens* claim is available. See *Harper* v. *Nedd*, 71 F.4th 1181, 1187 (9th Cir. 2023) (context "novel" where it presents an "alternative remedial structure" not available in *Bivens*).

Nor does *Carlson* v. *Green*, 446 U.S. 14 (1980), counsel otherwise. App., *infra*, 16a-17a n.4. *Carlson*'s ruling that the FTCA was not intended to displace *Bivens* may apply in the Eighth Amendment context that *Carlson* presented. But this Court has held that *Carlson*'s reasoning "carries little weight" given "the last four decades of intervening case law." *Egbert*, 596 U.S. at 500-501. That Congress did not wish to *displace Bivens* in contexts where it applies does not answer whether *Bivens* applies to a new context in the first instance. The "'analytic framework' prescribed by the last four decades of intervening case law" makes

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[5] Congress has considered whether to create a cause of action and declined to do so. In 2021, members of both houses introduced bills to extend 42 U.S.C. § 1983's cause of action to federal officers. See Bivens Act of 2021, H.R. 6185, 117th Cong. § 2 (2021); Bivens Act of 2021, S. 3343, 117th Cong. § 2 (2021). Both bills died in committee.

clear that *any* alternative remedy precludes implying a *Bivens* cause of action. *Id.* at 501.

3. The Seventh Circuit's reasoning underscores a more fundamental disagreement among the circuits. Courts like the Seventh Circuit treat the "new context" inquiry as judicial in nature—as employing a "familiar mode of judicial reasoning" focused on "determin[ing] whether the case before us fits within the [Supreme] Court's" *Bivens* "precedent." App., *infra*, 12a.

That misconceives the inquiry. Because "creating a cause of action is a legislative endeavor," courts must decide whether a *legislature* could think that some factual or legal differences might alter "the costs and benefits of implying a cause of action." *Egbert*, 596 U.S. at 491, 496. That is why courts "engaged in that unenviable task must evaluate a 'range of policy considerations at least as broad as the range a legislature would consider,'" including "'economic and governmental concerns,' 'administrative costs,' and the 'impact on governmental operations systemwide.'" *Id.* at 491 (ellipses omitted). And that is why the "new-context inquiry" is "easily satisfied," even by "small" differences. *Ziglar*, 582 U.S. at 149. If *Congress* could find differences meaningful, judicial creation of a cause of action would improperly displace "Congress' preeminent authority in this area." *Egbert*, 596 U.S. at 492.

Consequently, the only question is whether "*Congress* is better suited to 'weigh the costs and benefits of allowing a damages action to proceed.'" *Egbert*, 596 U.S. at 496. "If there is a rational reason to think that the answer is 'Congress'—as it will be in most every case—no *Bivens* action may lie." *Id.* at 492 (citation omitted). Federal courts may not "independently assess the costs and benefits of implying a cause of action." *Id.* at 496.

II. THE ISSUES ARE RECURRING AND IMPORTANT

This Court has repeatedly granted review to clarify *Bivens*' limited scope. See *Egbert*, 596 U.S. at 486 (collecting cases). Three times in the last six Terms, the Court has admonished lower courts to be wary of extending *Bivens*. See *id.* at 501; *Hernandez*, 140 S. Ct. at 742-743; *Ziglar*, 582 U.S. at 135. Yet lower courts continue to reach conflicting results when applying the new-context inquiry.

District courts confront these issues—and reach divergent results—with alarming frequency. Some find that an officer's execution of a warrant renders the context "new" because it alters the "legal mandate" under which the officers operate.[6] But others reject that argument.[7] And others find a warrant sufficient to create a new context without further analysis.[8]

The arrest's location has produced similar disarray. Indeed, district courts in the Second Circuit are on both sides of the issue. Some reject the "argument that the location of [a] [p]laintiff's arrest—in public, rather than in his home—constitutes a meaningful difference from

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[6] See, *e.g.*, *MT ex rel. Zubkova* v. *United States*, No. 3:22-CV-171, 2023 WL 2468948, at *11 (S.D. Cal. Mar. 10, 2023); *Lewis* v. *Westfield*, 640 F. Supp. 3d 249, 253 (E.D.N.Y. 2022); *Cienciva* v. *Brozowski*, No. 3:20-CV-2045, 2022 WL 2791752, at *9 (M.D. Pa. July 15, 2022) ("the presence of a warrant is a crucial difference in the *Bivens* new-context analysis"); *Style* v. *Mackey*, No. 17-CV-1691, 2020 WL 3055319, at *4 (E.D.N.Y. June 8, 2020).

[7] See, *e.g.*, *Bueno Diaz* v. *Mercurio*, 442 F. Supp. 3d 701, 708 (S.D.N.Y. 2020); *Lehal* v. *Cent. Falls Det. Facility Corp.*, No. 13-CV-3923, 2019 WL 1447261, at *11-12 (S.D.N.Y. Mar. 15, 2019).

[8] See, *e.g.*, *Young* v. *City of Council Bluffs*, 569 F. Supp. 3d 885, 894 (S.D. Iowa 2021); *Robinson* v. *Heinze*, 655 F. Supp. 3d 1276, 1281 (N.D. Ga. 2023); *Challenger* v. *Bassolino*, No. 18-CV-15240, 2023 WL 4287204, at *7 (D.N.J. June 30, 2023).

Bivens." *Bueno Diaz* v. *Mercurio*, 442 F. Supp. 3d 701, 709 (S.D.N.Y. 2020).[9] Others take the opposite view.[10]

Those conflicting results are untenable. The limits on *Bivens* reflect separation-of-powers principles and the legislature's primacy in creating causes of action. Those principles do not vary with the circuit in which the case arises—or the judge to whom the case is assigned. Nor should the critical mission of federal agents with national responsibilities be subject to a patchwork of legal regimes. It cannot be that Agent Henning, based out of the DEA's St. Louis Division, risks damages suits when he arrests drug dealers in a park in East St. Louis, Illinois (in the Seventh Circuit), but not when doing the very same thing across the river in St. Louis, Missouri (in the Eighth Circuit). Agents executing search warrants risk damages suits when acting in Grand Junction, Colorado (in the Tenth Circuit), but not Grand Rapids, Michigan (in the Sixth Circuit).

Those different outcomes reflect a deeper conflict. The courts of appeals disagree on *how* to conduct the new-context inquiry and whether it requires judicial or legislative reasoning. See pp. 15-23, *supra*. Indeed, that the circuits disagree over such fundamental questions as the relevance of *the home* and *warrants* in *Fourth Amend-*

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[9] Accord, *e.g.*, *Lehal* v. *Cent. Falls Det. Facility Corp.*, No. 13-CV-3923, 2019 WL 1447261, at *12 (S.D.N.Y. Mar. 15, 2019) (holding "location of the arrest" makes "no 'meaningful difference'").

[10] See, *e.g.*, *Rivera* v. *Samilo*, 370 F. Supp. 3d 362, 369 (E.D.N.Y. 2019) (claim "from the force allegedly applied in making a lawful street arrest" is meaningfully different from "warrantless invasion of [the plaintiff's] home" in *Bivens*); *Campbell* v. *City of Yonkers*, Nos. 19-CV-2117, 19-CV-9444, 2023 WL 4867459, at *8 (S.D.N.Y. July 31, 2023) ("*Bivens* involved a warrantless arrest and search of the plaintiff's home, whereas this case involves an arrest made on a public street with probable cause.").

ment Bivens actions may signal that the new-context inquiry is unworkable—and that *Bivens* should be overruled altogether. For that reason, too, review is warranted.

III. This Case Is An Ideal Vehicle

This case is an ideal vehicle. Both acknowledged circuit conflicts are squarely and cleanly presented. At each stage, Agent Henning urged that this case raised a new *Bivens* context because Snowden was arrested outside the home—in a location open to the public—and pursuant to a warrant commanding his arrest. App., *infra*, 17a-18a, 26a-27a. He consistently raised the availability of alternative relief. *Id.* at 6a, 16a n.4, 27a-29a. The case was resolved on the pleadings, leaving no factual disputes to impede this Court's review. *Id* at 4a, 21a. Snowden limited his appeal to the dismissal of his *Bivens* claim against Agent Henning. No other claims clutter the case. *Id.* at 6a. Nor is this case burdened by additional factors that might unduly narrow the issues presented for decision. Unlike *Hicks* v. *Ferreyra*, No. 23-324, or *Oliva* v. *Nivar*, No. 20-1060, Snowden's arrest did not take place on federal lands or in a government facility—special areas that may raise their own special considerations.

This Court's resolution of the new-context issue would likely be dispositive. Arrests in public locations, outside the home, would present a "new *Bivens* context" in the First, Fifth, Eighth, or Ninth Circuits. The warrant for Snowden's arrest would have done the same in the First, Fifth, Sixth, or Ninth Circuits. And once a court determines the context is "new," *Bivens* claims almost always must fail. Courts may not imply *Bivens* remedies in any "new contexts" if any "special factors" counsel "'hesitation.'" *Egbert*, 596 U.S. at 491-493. The inquiry ultimately reduces to "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.'" *Id.* at 496. "If there is a rational reason to think that the answer is 'Congress'—as it will be in most every case—no *Bivens* action may lie." *Id.* at 492 (citation omitted).

Congress is surely better suited to weigh the costs and benefits of subjecting federal agents to damages suits for their conduct in executing warrants in places that are open to the public. When officers are called upon to make urgent, life-or-death decisions, the threat of personal liability for making the wrong call risks "second-guessing, hesitation, and potential confusion in situations of danger where not only the officer's life is in jeopardy but also those of bystanders." Int'l Ass'n of Chiefs of Police, *Use of Force Position Paper*, https://www.theiacp.org/sites/default/files/2019-05/Use%20of%20Force%20Task%20Force%20Recommendations_Final%20Draft.pdf. The wisdom of subjecting federal officers to personal liability in such circumstances is precisely the sort of policy choice that Congress is best suited to make.

CONCLUSION

The petition should be granted.

Respectfully submitted.

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MARCH 2024

APPENDIX

APPENDIX – TABLE OF CONTENTS

APPENDIX A
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 21-1463

DONALD V. SNOWDEN,

Plaintiff-Appellant,

v.

JEREMY HENNING,

Defendant-Appellee.

Appeal from the United States District Court
for the Southern District of Illinois.
No. 3:19-cv-01322-JPG – J. Phil Gilbert, *Judge.*

Argued: November 2, 2021
Decided: June 27, 2023

Before SYKES, *Chief Judge*, and FLAUM and JACKSON-AKIWUMI, *Circuit Judges*.

SYKES, *Chief Judge*. In *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), the Supreme Court recognized an implied damages remedy against federal officers for certain constitutional violations. *Bivens* involved a claim for damages against federal narcotics agents for alleged Fourth Amendment violations stemming from a warrantless search, arrest, and unreasonable use of force against the plaintiff in his home. The Court later extended the *Bivens* remedy to two additional contexts: a claim against a

member of Congress under the Fifth Amendment for workplace sex discrimination, *Davis* v. *Passman*, 442 U.S. 228 (1979), and a claim against federal prison officials under the Eighth Amendment for failure to provide adequate medical care, *Carlson* v. *Green*, 446 U.S. 14 (1980). Since then, however, the Court has consistently refused to authorize new *Bivens* claims. Today, extending the *Bivens* cause of action is a "'disfavored' judicial activity." *Ziglar* v. *Abbasi*, 582 U.S. 120, 135 (2017) (quoting *Ashcroft* v. *Iqbal*, 556 U.S. 662, 675 (2009)).

In recent years, the Court has emphasized that creating new causes of action is the prerogative of Congress, not the federal courts. To guard against encroachments on legislative authority, the Court has fashioned a two-step framework for evaluating *Bivens* claims. The first step considers whether the claim arises in a new context. The context is new if the claim is different in a "meaningful way" from an earlier *Bivens* claim authorized by the Court. *Id.* at 139. If the context is not new, then the claim may proceed. But if the context is new, then the analysis proceeds to the second step, which asks whether "special factors" counsel against authorizing a *Bivens* remedy. *Id.* at 136.

This case requires us to survey the evolving *Bivens* landscape. While staying at a hotel, Donald Snowden received a call from the front-desk clerk asking him to visit the lobby to pay for the room. Special Agent Jeremy Henning with the Drug Enforcement Administration ("DEA") awaited Snowden's arrival; a warrant had been issued for his arrest. According to Snowden, Agent Henning pushed him to the ground and—unprovoked—punched him several times in the face. Snowden suffered two black eyes and a left orbital fracture.

Snowden sued Agent Henning, bringing a Fourth Amendment *Bivens* claim for use of excessive force during the arrest and a state-law claim for battery. The district judge dismissed the *Bivens* claim, concluding that it presents a new context and that special factors counseled against extending *Bivens* here. The judge dismissed the state-law battery claim without prejudice, and Snowden appealed.

We resolve this case at step one of the *Bivens* inquiry. Snowden's claim does not arise in a new context. While the Supreme Court has strictly limited the reach of *Bivens*, it has left the door open for at least some claims to proceed—provided, however, that the claim is not meaningfully different from *Bivens* itself (or one of the other two cases in which the Court recognized an implied remedy). A difference is "meaningful" when it involves a factual distinction or new legal issue that might alter the policy balance that initially justified the implied damages remedies in the *Bivens* trilogy.

If the case involves new or different considerations from an already-recognized *Bivens* action, then the inquiry moves to step two and separation-of-powers considerations are decisive. As the doctrine now stands, under the "special factors" inquiry, a court cannot extend *Bivens* to a new context if "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." *Egbert* v. *Boule*, 142 S. Ct. 1793, 1805 (2022) (internal quotation marks omitted). Few (if any) new claims will survive this test. After all, creating new causes of action is primarily a legislative task.

Still, some claims may proceed under a straightforward application of *Bivens* itself. Snowden's case presents such a claim. We therefore reverse.

I. BACKGROUND

We recount the facts as alleged in Snowden's complaint, accepting the well-pleaded allegations as true at this stage of the litigation. *Engel* v. *Buchan*, 710 F.3d 698, 699-700 (7th Cir. 2013).

On September 12, 2019, Snowden was staying at the Quality Inn in Carbondale, Illinois. He received a call from the front-desk clerk, who asked him to visit the lobby to pay for the room. The clerk knew that Agent Henning was present to arrest Snowden. An arrest warrant had been issued after a federal grand jury indicted Snowden for methamphetamine distribution.[1]

When Snowden arrived in the lobby, Agent Henning rushed at him, pushing him into a door and onto the ground. Snowden did not resist, yet Henning punched him several times in the face. Snowden suffered two black eyes and a fractured left eye socket during the arrest.[2]

Several months later while in pretrial detention on the methamphetamine charge, Snowden filed a pro se complaint against Agent Henning alleging a Fourth Amendment claim for "grossly excessive force" and a battery claim under Illinois law. Snowden also named the DEA, Quality Inn, and the front-desk clerk as defendants. The claims against the DEA targeted the agency's training and supervision practices, and the claims against Quality Inn

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[1] Agent Henning attached the arrest warrant to his motion to dismiss. We may take judicial notice of matters of public record when reviewing a complaint. *Fosnight* v. *Jones*, 41 F.4th 916, 922 (7th Cir. 2022).

[2] Snowden claims that the U.S. Attorney's Office has video evidence confirming his account. He sought production of the video, but the judge denied the request as premature because the case had not yet proceeded to discovery on the merits.

and the front-desk clerk alleged that the hotel and its staff obstructed justice.

Because Snowden filed a civil action against the government while in federal pretrial detention, the judge screened the pleading under the Prison Litigation Reform Act ("PLRA"). *See* 28 U.S.C. §1915A. He construed the complaint to allege a Fourth Amendment *Bivens* claim against Henning for use of excessive force during Snowden's arrest. The judge allowed that claim to move forward, and he also exercised supplemental jurisdiction over the state-law battery claim against Henning. He dismissed the claims against the DEA, Quality Inn, and the front-desk clerk.

Agent Henning moved to dismiss the *Bivens* claim for failure to state a claim. He argued that this case presents a new context and that special factors counseled against extending *Bivens*. Henning also moved to convert the battery claim to one under the Federal Tort Claims Act ("FTCA" or "the Act") and substitute the United States as the defendant. He explained that the FTCA provides the exclusive remedy for injuries stemming from a federal employee's violation of state law while acting within the scope of his employment and that the United States is the only proper defendant under the Act. The government certified that Agent Henning acted within the scope of his employment during the events in question.

Snowden opposed both motions. In a pro se filing, he argued that the constitutional claim, which was based on allegations of unreasonable force during an arrest, was not meaningfully different from *Bivens*. He did not explain his opposition to the motion to convert the battery claim to one under the FTCA and substitute the United States as the defendant.

The judge dismissed the *Bivens* claim against Agent Henning. He identified certain factual distinctions between Snowden's case and *Bivens*, including the location of the arrest, the presence of an arrest warrant, and the number of officers involved in the incident. He also identified what he characterized as a legal difference between the Fourth Amendment rights at issue in Snowden's case and in *Bivens*. He described *Bivens* as "primarily" involving allegations concerning the "rights of privacy" implicated in an unlawful warrantless home entry, arrest, and search, while Snowden alleged a violation of his "right to be free from excessive force incident to an otherwise lawful arrest." These differences led the judge to conclude that Snowden's case presents a new *Bivens* context. The judge then held that special factors weighed against recognizing a *Bivens* claim here—namely, the availability of an alternative remedy under the FTCA and the absence of a damages remedy against federal officers in the FTCA or PLRA.

Finally, the judge declined to substitute the United States on the battery claim and convert the claim to one under the FTCA. He explained that Snowden had pursued a *Bivens* claim against Agent Henning and should be able to decide for himself if he would also like to bring an FTCA claim against the United States as a substitute for the state-law tort claim.

With the *Bivens* claim dismissed, no federal claim remained. The judge relinquished jurisdiction over the battery claim, dismissing it without prejudice.

II. Discussion

Snowden limits his appeal to the dismissal of his *Bivens* claim against Agent Henning. The judge's other rulings—dismissing the other defendants at screening and

declining to convert the battery claim to one under the FTCA—are not at issue here.

The practice of recognizing implied damages remedies against federal officials for alleged constitutional violations had a short run at the Supreme Court. In its 1971 decision in *Bivens*, the Court authorized a damages remedy for a plain-tiff who alleged that federal narcotics officers violated his Fourth Amendment rights by entering and searching his home without a warrant and arresting him using unreason-able force. 403 U.S. at 389-90. Nearly a decade later, the Court recognized an implied damages action against a member of Congress for workplace sex discrimination in violation of the Fifth Amendment. *Davis*, 442 U.S. at 230, 248-49. The following year, the Court extended *Bivens* again, approving a cause of action for damages against federal prison officials for failure to provide adequate medical care in violation of the Eighth Amendment. *Carlson*, 446 U.S. at 16, 19.

Carlson marked the end of the line. Since 1980 the Court has consistently rejected requests to recognize additional *Bivens* claims. *See Hernández* v. *Mesa*, 140 S. Ct. 735, 743 (2020) (citing Supreme Court cases after *Carlson* that rejected *Bivens* claims). And in recent years the Court has made explicit what had been implicit—"that expanding the *Bivens* remedy is now a 'disfavored' judicial activity." *Abbasi*, 582 U.S. at 135 (quoting *Iqbal*, 556 U.S. at 675).

Bivens emerged at a time when courts freely implied causes of action under federal statutes in the name of legislative purpose. The Court later rejected statutory remedies created through "judicial mandate," reinforcing that a cause of action must be supported by congressional intent ex-pressed clearly in statutory text. *Id.* at 133. The Court likewise stressed that "it is a significant step under

separation-of-powers principles for a court to determine that it has the authority, under the judicial power, to create and enforce a cause of action for damages against federal officials in order to remedy a constitutional violation." *Id.* The Court's most recent *Bivens* case makes the point more emphatically: "[C]reating a cause of action is a legislative endeavor." *Egbert*, 142 S. Ct. at 1802.

But the Court has stopped short of overruling the *Bivens* trilogy. Instead, it has fashioned a two-step framework to ensure that the judiciary does not further encroach on legislative authority under the banner of *Bivens*. The first step asks whether the plaintiff's case presents "a new *Bivens* context." *Id.* at 1803 (quoting *Abbasi*, 582 U.S. at 139). If it does not, then the plaintiff's claim may proceed. But if the claim arises in a new context, then the court must consider whether "there are 'special factors' indicating that the Judiciary is at least arguably less equipped than Congress to 'weigh the costs and benefits of allowing a damages action to proceed.'" *Id.* (quoting *Abbasi*, 582 U.S. at 136). "If there is even a single 'reason to pause before applying *Bivens* in a new context,' a court may not recognize a *Bivens* remedy." *Id.* (quoting *Hernández*, 140 S. Ct. at 743).

We focus here on the first step—whether Snowden's *Bivens* claim arises in a "new context." A context is "new" if "the case is different in a meaningful way from previous *Bivens* cases" decided by the Supreme Court. *Abbasi*, 582 U.S. at 139. The Court has identified some differences that qualify as "meaningful":

> 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.

Id. at 140. A context may also be "new" when a "new category of defendants" is involved. *Hernández*, 140 S. Ct. at 743 (quotation marks omitted).

Several cases show these principles in practice. In *Abbasi* illegal immigrants who were detained in a special detention unit in the aftermath of the September 11 terrorist attacks brought a damages claim against senior Department of Justice officials and prison wardens for harsh conditions in the unit. Seeking a remedy under *Bivens*, they pointed to "significant parallels" with *Carlson*, which had recognized a cause of action under the Eighth Amendment for inadequate prison medical care. *Abbasi*, 582 U.S. at 147. The Court held that the case represented an extension of *Bivens* to a new context, noting that the claim implicated a different constitutional right (the Fifth Amendment vs. the Eighth Amendment), that alternative remedies might have been available, and that the PLRA suggested that Congress "chose not to extend the *Carlson* damages remedy to cases involving other types of prisoner mistreatment." *Id.* at 148-49. These differences "easily satisfied" the new-context test. *Id.* at 149.

The Court followed a similar path in *Hernández*, which involved a cross-border shooting in which a Border Patrol agent shot and killed a Mexican teenager who had been running back and forth across the U.S.–Mexico border. 140 S. Ct. at 739-40. The victim's parents sued the agent, relying on *Bivens* and *Davis* to support claims under the Fourth and Fifth Amendments. The Court explained that a Bivens claim may present a new context "even if it is

based on the same constitutional provision as a claim in a case in which a damages remedy was previously recognized." *Id.* at 743. And "[a] cross-border shooting is by definition an international incident"—a "world of difference" from the claims recognized in *Bivens* and *Davis*. *Id.* at 744. That difference was significant: it raised foreign-relations and border-security concerns, which risked "disruptive intrusion by the Judiciary into the functioning of other branches." *Id.* (quoting *Abbasi*, 582 U.S. at 140). The Court held that "multiple factors" counseled against extending *Bivens*, all of which could be "condensed to one concern—respect for the separation of powers." *Id.* at 749.

Minneci v. *Pollard*, 565 U.S. 118 (2012), is another example. Prisoners sued employees of a privately operated federal prison seeking damages for inadequate medical care in violation of the Eighth Amendment. The plaintiffs argued that *Carlson* governed and authorized their *Bivens* claim. The Court responded that the defendants' status as "personnel employed by a *private* firm" was a "critical difference." *Id.* at 126. A prisoner could not ordinarily sue a federal employee for damages in a state-law tort action, but a state-law tort claim is an available remedy against an employee of a privately operated prison. The Court added that an earlier case had foreclosed the argument that a private prison-management firm should be treated as a "federal agent." *Id.* at 126-27 (citing *Corr. Servs. Corp.* v. *Malesko*, 534 U.S. 61, 70 & n.4 (2001)). Because the context was new and the plaintiffs had an adequate remedy at state law, the Court declined to imply a *Bivens* remedy.[3] *Id.* at 131.

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[3] It's worth noting that the Court's *Bivens* cases do not uniformly adhere to the two-step framework. Sometimes the Court declines to

The distinctions that proved meaningful in *Abbasi*, *Hernández*, and *Minneci* are not exclusive. Here Snowden raises a Fourth Amendment claim, and the threshold question for us is whether his case is meaningfully different from *Bivens* itself—in the sense meant by the Court's "new context" caselaw. That a difference must be "meaningful" suggests that *some* degree of variation will not preclude a Bivens remedy. The Court has explicitly recognized this point: "Some differences, of course, will be so trivial that they will not suffice to create a new *Bivens* context." *Abbasi*, 582 U.S. at 149.

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imply a *Bivens* remedy because Congress had already created a remedial scheme. *See, e.g.*, *Bush* v. *Lucas*, 462 U.S. 367, 380-90 (1983). Sometimes it declines to extend *Bivens* because of the sensitive domain involved, like the military. *See, e.g.*, *Chappell* v. *Wallace*, 462 U.S. 296, 298-305 (1983). Still other cases decline to extend *Bivens* because a new category of defendant was present. *See, e.g.*, *Corr. Servs. Corp.* v. *Malesko*, 534 U.S. 61, 69-74 (2001). Though these cases do not formally follow the two-step framework, they resolve the *Bivens* question in a functionally similar way.

Minneci is much the same. The Court began by considering whether *Carlson* controlled because the plaintiffs brought a *Bivens* claim based on prison conditions. *Minneci* v. *Pollard*, 565 U.S. 118, 126-27 (2012). Looking to its precedent, the Court considered whether the case involved a new context. The Court then evaluated the adequacy of a state-law tort remedy, which is a special factor that might counsel hesitation in extending the *Bivens* remedy. Minneci basically maps onto the two-step framework.

On the other hand, sometimes the Court's cases do not explicitly address the "new context" inquiry because they do not need to—where, for example, the case raises a claim under a different constitutional provision (like the First Amendment) or presents an obviously distinct factual setting (like the military). These cases move straight to the analysis of special factors to determine whether to authorize a *Bivens* claim. *See, e.g.*, *Bush*, 462 U.S. at 378-90; *Chappell*, 462 U.S. at 298-305.

We understand the Court's evolving *Bivens* guidance to suggest that a difference is "meaningful" if it might alter the policy balance that initially justified the causes of action recognized in *Bivens*, *Davis*, and *Carlson*. If a case involves facts or legal issues that would require reweighing the costs and benefits of a damages remedy against federal officials, then the difference is "meaningful" because we risk further encroachment on the legislative function rather than simply applying controlling Supreme Court precedent. Viewed another way, we're called on to apply a familiar mode of judicial reasoning to determine if the case before us fits within the Court's still-valid—but now quite limited—precedent, with special solicitude to the separation-of-powers concerns identified by the Court.

This understanding accords with the cases we've just described. In *Abbasi* a damages remedy like the one recognized in *Carlson* might not be appropriate because the plaintiffs invoked a different constitutional right, had alternate remedies, and the PLRA suggested that Congress might not have wanted to extend *Carlson* to other prisoner-mistreatment claims. These differences, though "perhaps small," suggested that the factual and legal background had shifted enough from *Carlson* to warrant restraint. *Id.* The same was true in *Hernández*. A cross-border shooting implicates foreign-relations concerns that were not present in the everyday law-enforcement context of *Bivens*. That difference readily indicated that a court might weigh the propriety of an implied damages remedy differently than in *Bivens*. Finally, the presence in *Minneci* of a new class of defendant, subject to a state-law tort suit, signaled that the balance struck in *Carlson* did not apply. The availability of an adequate state-law remedy against a class of defendant not covered by the Court's *Bivens* trilogy could suggest that the differences are

sufficiently meaningful to require careful consideration of separation-of-powers factors that counsel against a *Bivens* action.

Note that we speak not in absolute terms but in "mights" and "coulds" instead. That is because "our watchword is caution." *Hernández*, 140 S. Ct. at 742. If a court finds differences in a case that could upset a straightforward application of *Bivens* or *Davis* or *Carlson*, then the case presents a new *Bivens* context and the analysis moves to the "special factors" inquiry. This understanding of the new-context requirement harmonizes the two steps in the Court's *Bivens* framework. In the first step we identify claims that entail "meaningful" differences from the claims at issue in the *Bivens* trilogy—i.e., factual distinctions and legal issues that might alter the cost–benefit balance that justified an implied damages remedy in those cases. In the second step we pay special attention to separation-of-powers concerns, considering whether "special factors" indicate that Congress is better equipped in the specific context to assess the costs and benefits of a damages remedy. An approach that sorts cases in the heartland of *Bivens* from those that might introduce separation-of-powers concerns makes sense because of the deference owed to Congress, which "is best positioned to evaluate 'whether, and the extent to which, monetary and other liabilities should be imposed upon individual officers and employees of the Federal Government' based on constitutional torts." *Id.* (quoting *Abbasi*, 582 U.S. at 134).

The Fourth Circuit has distilled the new-context inquiry in much the same way. The court explained: "[A] new context may arise if *even one* distinguishing fact has *the potential to implicate separation-of-powers considerations*." *Tate* v. *Harmon*, 54 F.4th 839, 846 (4th Cir. 2022)

(second emphasis added). And recent *Bivens* cases from other circuits also reflect this approach, finding a new context when there are separation-of-powers considerations different than those already present in the *Bivens* trilogy. *See Bulger* v. *Hurwitz*, 62 F.4th 127, 137-38 (4th Cir. 2023) (concluding that the *Bivens* claim arose in a new context because the plaintiff's claim implicated the Bureau of Prisons' "organizational policies, administrative decisions, and economic concerns inextricably tied to inmate transfer and placement determinations"); *Dyer* v. *Smith*, 56 F.4th 271, 277-78 (4th Cir. 2022) (new context because TSA officers operate under a different legal mandate); *Tun-Cos* v. *Perrotte*, 922 F.3d 514, 523-25 (4th Cir. 2019) (new context because immigration enforcement concerns noncitizens, because of "broad policy concerns," and because ICE agents are a "new category of defendants"); *Mejia* v. *Miller*, 61 F.4th 663, 668-69 (9th Cir. 2023) (new context because "[t]he entire incident occurred on public lands managed by BLM and the National Park Service, a place where [the plaintiff] had no expectation of privacy"); *K.O. ex rel. E.O.* v. *Sessions*, No. 20-5255, 2022 WL 3023645, at *3-4 (D.C. Cir. July 29, 2022) (per curiam) (new context because the "case arises in the context of immigration detention" and because the claims "implicate new defendants," including "various high-level officials").

At the other end of the spectrum, a recent Fourth Circuit decision recognized that a *Bivens* claim remains viable if it doesn't present concerns that might caution against the application of a preexisting damages remedy. *Hicks* v. *Ferreyra*, 64 F.4th 156, 166-69 (4th Cir. 2023) (concluding that the *Bivens* claim did not present a new context because it involved "not an extension of *Bivens* so much as a replay of the same principles of constitutional criminal law

prohibiting the unjustified, warrantless seizure of a person" (internal quotation marks omitted)).

Of course, just last term the Supreme Court emphasized just how narrow the path is for a *Bivens* claim to proceed. In *Egbert* the Court suggested that the two-step framework boils down to one question: "whether there is any reason to think that Congress might be better equipped to create a damages remedy." 142 S. Ct. at 1803. Writing on a blank slate, we might say that it is never appropriate for a federal court to create an implied cause of action for damages under the Constitution. *See Abbasi*, 582 U.S. at 134 ("[I]t is possible that the analysis in the Court's three *Bivens* cases might have been different if they were decided today."). But we operate within the current state of the doctrine, and the Court has said that its recent decisions are "not intended to cast doubt on the continued force, or even the necessity, of *Bivens* in the search-and-seizure context in which it arose." *Id.* Indeed, the Court has explained that "[t]he settled law of *Bivens* in th[e] 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." *Id.* Because *Bivens* remains good law, at least for now, we continue to apply it.

On these understandings, we can identify no meaningful difference between Snowden's case and *Bivens* to suggest that he should not be able to pursue this excessive-force claim. Agent Henning operated under the same legal mandate as the officers in *Bivens*—the enforcement of federal drug laws. He is also the same kind of line-level federal narcotics officer as the defendant-officers in *Bivens*. Like Webster Bivens, Snowden seeks damages for violation of his rights under the Fourth Amendment; more specifically, both plaintiffs alleged that officers used

unreasonable force in an arrest. And the legal landscape of excessive-force claims is well settled, with decades of circuit precedent applying the Supreme Court's test announced in *Graham* v. *Connor*, 490 U.S. 386 (1989). *See, e.g.*, *Doxtator* v. *O'Brien*, 39 F.4th 852, 860-62 (7th Cir. 2022); *Brownell* v. *Figel*, 950 F.2d 1285, 1292-93 (7th Cir. 1991). Officers have clear guidance on the level of force that is reasonable when arresting a suspect who does not resist. *See Gonzalez* v. *City of Elgin*, 578 F.3d 526, 539 (7th Cir. 2009) ("An officer's use of force is unreasonable from a constitutional point of view only if, judging from the totality of circumstances at the time of the arrest, the officer used greater force than was reasonably necessary to make the arrest." (internal quotation marks omitted)); *Abbott* v. *Sangamon County*, 705 F.3d 706, 732 (7th Cir. 2013) (concluding that it had been "well-established in this circuit that police officers could not use significant force on nonresisting or passively resisting suspects").

Nor does allowing a *Bivens* claim here risk a "disruptive intrusion" into the "functioning of other branches." At the very least, the intrusion is no more disruptive than what *Bivens* itself already approved. Finally, Snowden's claim implicates no other contextual factor—whether a national security issue (*Hernández*), a different constitutional right coupled with alternative remedies (*Abbasi*), or a different class of defendant (*Minneci*)—that might lead us to move to the second step of the *Bivens* inquiry.[4] In

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[4] Agent Henning discusses other factors only when he addresses the second step of the *Bivens* analysis, but the factors he identifies also do not suggest that Snowden's claim arises in a new context. He points to the availability of a remedy under the FTCA. However, the statute does not displace a *Bivens* claim in the narrow cases where it is available. In *Carlson* the Court concluded that "victims of the kind of intentional wrongdoing alleged in this complaint shall have an action

short, consideration of the *Abbasi* factors points to the same conclusion: We do not risk arrogating a legislative function by allowing Snowden's *Bivens* claim to proceed.

Resisting this conclusion, Agent Henning argues that *Bivens* rests on "the right to be free of unreasonable warrant-less search and detention in one's own home and arrest in the absence of probable cause." He describes Snowden's claim as rooted in "the right to be free of excessive force in the context of a lawful arrest in a public place pursuant to a warrant issued following a finding of probable cause." This argument overlooks that the claim in *Bivens* specifically included an allegation that "unreasonable force was employed in making the arrest." *Bivens*, 403 U.S. at 389.

Agent Henning also points to narrow factual differences to argue that Snowden's claim presents a new context dis-tinct from *Bivens*. Drawing on the district judge's reasoning, he highlights that the alleged Fourth Amendment violations took place in different locations (a hotel lobby here, a home in *Bivens*); that he had a warrant (the officers in *Bivens* did not); and that he was the only officer involved (six officers participated in the arrest at issue in

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under FTCA against the United States as well as a *Bivens* action against the individual officials alleged to have infringed their constitutional rights." *Carlson* v. *Green*, 446 U.S. 14, 20 (1980) (emphasis added).

More recently the Court recognized that "Congress made clear that it was not attempting to abrogate *Bivens*," *Hernández* v. *Mesa*, 140 S. Ct. 735, 748 n.9 (2020), because it excepted "a civil action . . . brought for a violation of the Constitution of the United States" from the FTCA's exclusivity provision, 28 U.S.C. §2679(b)(2)(A). The provision was "not a license to create a new *Bivens* remedy in a context [the Court] ha[s] never before addressed" but "simply left *Bivens* where it found it." *Hernández*, 140 S. Ct. at 748 n.9. This case does not present a new *Bivens* context, so the Act does not come into play.

Bivens). These distinctions are not sufficient to affect the *Bivens* inquiry. Hotel or home, warrant or no warrant—the claims here and in *Bivens* stem from run-of-the-mill allegations of excessive force during an arrest. The number of officers present might prove relevant to whether the force applied was reasonable, but as a separation-of-powers matter, the presence of one officer rather than six is not meaningful. This case does not involve a different class of defendant—a new context that indeed might require more careful consideration. *See, e.g.*, *Minneci*, 565 U.S. at 126-31; *FDIC* v. *Meyer*, 510 U.S. 471, 484-86 (1994). In short, the factual distinctions Henning emphasizes are of the "trivial" kind that "will not suffice to create a new *Bivens* context." *Abbasi*, 582 U.S. at 149.

Finally, Agent Henning seeks support in *Oliva* v. *Nivar*, 973 F.3d 438 (5th Cir. 2020). But Oliva involved a *Bivens* claim based on an allegation of excessive force that occurred at a security checkpoint in a Veterans Affairs hospital, and the distinctions there were meaningful. *Id.* at 440-41. The case involved a different type of officer with a different law-enforcement mandate: a VA police officer enforcing hospital safety (in contrast to narcotics officers carrying out a drug investigation). The seizure itself occurred in a government facility, a space that is meaningfully different than a private home or building for the purpose of a judicially implied damages remedy. The Fifth Circuit concluded that these distinctions mattered. The context therefore was new, and the court held that special factors warranted restraint. *Id.* at 443-44. The threat of a damages award against VA security officers could cause more lax enforcement of safety protocols in a government building. In other words, the circumstances in Oliva implicated the kind of policy balancing better left to Congress. Snowden's *Bivens* claim raises no such distinctions.

In the end, although the Supreme Court has narrowly cabined the *Bivens* remedy and consistently refused to recognize new claims, we cannot decline to apply "the settled law of *Bivens*" unless Snowden's case is meaningfully different—i.e., different in a way that implicates the separation-of-powers calculus. *Abbasi*, 582 U.S. at 134, 139-40. There is no such difference here. *Bivens* may one day be reexamined; indeed, two Justices have proposed that it be abandoned. *Egbert*, 142 S. Ct. at 1809-10 (Gorsuch, J., concurring); *Hernández*, 140 S. Ct. at 750-53 (Thomas, J., concurring). But our role is to apply the Court's caselaw as it stands now. Because Snowden's claim is not meaningfully different than *Bivens* itself, it may proceed.

REVERSED

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

NO. 19-CV-01322-JPG

DONALD V. SNOWDEN,

Plaintiff,

v.

JEREMY HENNING,

Defendant.

MEMORANDUM AND ORDER

March 3, 2021

GILBERT, District Judge:

This matter is now before the Court for a decision on Defendant Jeremy Henning's Motion to Dismiss for Failure to State a Claim (Doc. 24) and Motion to Substitute Party (Doc. 25). Plaintiff Donald Snowden filed this *pro se* action pursuant to 28 U.S.C. §1331 and *Bivens* v. *Six Unknown Named Agents*, 403 U.S. 388 (1971), claiming that he was subjected to the unauthorized use of force incident to his arrest without a warrant by Special Agent Jeremy Henning ("Agent Henning") of the Drug Enforcement Administration on September 12, 2019. (Doc. 1). He seeks money damages. (*Id.* at 7). The Court screened this matter pursuant to 28 U.S.C. §1915A and allowed Plaintiff to proceed with an excessive force claim (Count 1) pursuant

to *Bivens* and an Illinois battery claim (Count 4) pursuant to 28 U.S.C. §1367(a). (Doc. 15).

In lieu of an answer, Agent Henning filed a Motion to Dismiss *Bivens* Claim in Count 1 (Doc. 24) and a Motion to Substitute the United States as Defendant in Count 4 and convert the action to one brought pursuant to the Federal Tort Claims Act ("FTCA") (Doc. 25). Plaintiff opposes both motions on the ground that he specifically intended to file a *Bivens* action, not an FTCA claim, and he wishes to proceed with his damages claim against Agent Henning under *Bivens*. The Motion to Dismiss is **GRANTED**, and the Motion to Substitute is **DENIED**.

BACKGROUND

Plaintiff filed this action during his federal pretrial detention on a methamphetamine distribution charge. *See United States* v. *Snowden*, No. 19-cv-40081-JPG (S.D. Ill. 2019). In the Complaint, Plaintiff alleges that he was subjected to the unauthorized use of force incident to his arrest without a warrant on September 12, 2019. (Doc. 1, pp. 6, 9). As Plaintiff stood at the front desk of the Quality Inn located in Carbondale, Illinois, Agent Henning approached him and repeatedly punched him in the face, injuring his left eye socket. (*Id.* at 6, 9-10). Plaintiff claims that the force was unauthorized and unprovoked. (*Id.*).

The Court screened the Complaint pursuant to Section 1915A on March 9, 2020. (Doc. 15). Plaintiff was allowed to proceed with a claim against Agent Henning for the unauthorized use of force during his arrest without a warrant on September 12, 2019, in violation of his rights under the Fourth and/or Fourteenth Amendments[1] and pursuant to

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[1] The Court's reference to the Fourteenth Amendment Due Process Clause in the Screening Order was in error. The Fourteenth Amendment Due Process Clause does not apply to federal actors, but the

Bivens. (Count 1). He was also allowed to proceed with a supplemental state law battery claim. (Count 4).

On July 8, 2020, Agent Henning filed a Motion to Dismiss Count 1. (Doc. 24). Along with the Motion, Agent Henning filed a copy of the arrest warrant issued after a finding of probable cause on September 10, 2019—two days prior to Plaintiff's arrest. (Docs. 24-1 and 24-2). Citing the United States Supreme Court's decision in *Ziglar* v. *Abbasi*, __ U.S. ___, 137 S. Ct. 1843 (2017), Agent Henning argues that Count 1 presents a new context and an unauthorized expansion of the remedy contemplated in *Bivens*. (*Id.*). He asks the Court to dismiss Count 1 pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. (*Id.*). He also filed a Motion to Substitute the United States as a defendant in Count 4 pursuant to the Westfall Act and allow the claim to proceed under the Federal Tort Claims Act. (Doc. 25).

On August 11, 2020, Plaintiff filed a Response in Opposition to Defendant's Motion to Dismiss for Failure to State a Claim on Count 1. (Doc. 29). Plaintiff asserts that he intended to pursue relief against Agent Henning under *Bivens* and not against the United States under the Federal Tort Claims Act. (*Id.*). Plaintiff argues that his claim presents no new *Bivens* context and no special factors weigh against an implied damages remedy here. (*Id.*).

Fifth Amendment Due Process Clause does. This is a distinction that makes no difference here. *See Bowles* v. *Willingham*, 321 U.S. 504 (1994) (noting that the "restraints imposed on the national government . . . by the Fifth Amendment are no greater than those imposed on the States by the Fourteenth."). The Court simply notes that Count 1 involves a claim against Agent Henning under the Fourth or *Fifth* Amendment, rather than the Fourth or Fourteenth Amendment.

Moreover, the FTCA provides an inadequate remedy. (*Id.*).

DISCUSSION

I. COUNT 1

The purpose of a motion to dismiss filed pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure ("Rule 12(b)(6)") is to decide the adequacy of the complaint. *Gibson* v. *City of Chicago*, 910 F.2d 1510, 1520 (7th Cir. 1990). In order to survive a Rule 12(b)(6) motion, the complaint must allege enough factual information to "state a claim to relief that is plausible on its face" and "raise a right to relief above the speculative level." *Bell Atlantic Corp.* v. *Twombly*, 550 U.S. 544, 555 (2007). A claim is plausible when the plaintiff "pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft* v. *Iqbal*, 556 U.S. 662, 678 (2009). A Plaintiff need not plead detailed factual allegations, but he or she must provide "more than labels and conclusions, and a formulaic recitation of the elements." *Twombly*, 550 U.S. at 570.

When considering a motion to dismiss filed pursuant to Rule 12(b)(6), the Court must accept well-pleaded facts as true and draw all possible inferences in favor of the plaintiff. *McReynolds* v. *Merrill Lynch & Co., Inc.*, 694 F.3d 873, 879 (7th Cir. 2012). The Court must "consider the complaint in its entirety, as well as other sources courts ordinarily examine when ruling on Rule 12(b)(6) motions to dismiss, in particular, documents incorporated into the complaint by reference, and matters of which a court may take judicial notice." *Tellabs, Inc.* v. *Markor Issues & Rights, Ltd.*, 551 U.S. 308, 322 (2007). Ordinarily, to the extent a motion filed under Rule 12(b)(6) presents matters outside of the pleadings which the Court opts to consider, the Court must treat the motion as one for summary

judgment pursuant to Rule 12(d) and 56 of the Federal Rules of Civil Procedure. However, the Court may take judicial notice of matters that are in the public record when deciding a motion to dismiss. *Palay* v. *United States*, 349 F.3d 418, 425 n.5 (7th Cir. 2003).

In *Bivens*, the United States Supreme Court recognized an implied damages action against federal officers who violated the Fourth Amendment prohibition against unreasonable searches and seizures. *Bivens* v. *Six Unknown Named Agents*, 403 U.S. 388 (1971). Bivens alleged that federal drug agents entered his home and arrested him for federal drug violations apparently without probable cause or a warrant. *Id.* at 389-90, n.1. They cuffed him within view of his wife and children, threatened to arrest his family, and searched his apartment before interrogating, booking, and visually searching him. *Id.* at 389. When Bivens sued, the trial court dismissed the case for failure to state a claim, and the court of appeals affirmed. *Id.* at 390.

The Supreme Court rejected the argument that his remedy for this misconduct should be limited to a state court damages claim. *Id.* The Court instead concluded that "the Fourth Amendment operates as a limitation upon the exercise of federal power regardless of whether the State in whose jurisdiction that power is exercised would prohibit or penalize the identical act if engaged in by a private citizen." *Id.* at 392. The Court went on to find that Bivens stated a cause of action under the Fourth Amendment and that he was "entitled to recover money damages for injuries he . . . suffered as a result of the Agent's violation of the Amendment." *Id.* at 397.

In the decade that followed, the Supreme Court recognized an implied damages remedy under the Constitution only twice—in a Fifth Amendment gender discrimination

case, *Davis* v. *Passman*, 442 U.S. 228 (1979), and an Eighth Amendment Cruel and Unusual Punishments Clause case, *Carlson* v. *Green*, 446 U.S. 14 (1980). At the time the Court decided *Bivens*, *Davis*, and *Carlson*, the Court implied causes of action to provide remedies that were not explicitly available in statutory texts "as a routine matter." *Ziglar* v. *Abbasi*, __ U.S. ___, 137 S. Ct. 1843, 1855 (2017).

In the past three decades, however, the Court has taken a more cautious approach. *Ashcroft* v. *Iqbal*, 556 U.S. at 675. In *Abbasi*, the Supreme Court warned that "it is a significant step under separation-of-powers principles for a court to determine that it has authority, under the judicial power, to create and enforce a cause of action for damages against federal officials in order to remedy a constitutional violation." *Abbasi*, 137 S. Ct. at 1856. While recognizing that *Bivens* remains good law, the *Abbasi* Court made clear that the Supreme Court has consistently declined to extend *Bivens* "to any new context or new category of defendants," and further expansion of the *Bivens* remedy is "disfavored" judicial activity. *Id.* at 1857 (citing Iqbal, 556 U.S. at 675). When asked to extend *Bivens*, courts should first consider whether the request involves a claim that arises in a new context or involves a new category of defendants and then proceed to ask whether any special factors counsel hesitation in granting the extension absent affirmative action by Congress. *Id.* at 1857. Defendant's motion to dismiss thus presents the question of whether extension of the *Bivens* remedy to a claim of excessive force against a federal agent who used force while executing an arrest warrant issued after a finding of probable cause presents a new *Bivens* context or involves a new category of defendants and, if so, whether special factors counsel hesitation about granting the extension. For the

reasons discussed herein, the Court finds that Count 1 does present a new context, and special factors counsel against expansion of the *Bivens* remedy here.

A. New Context

A claim arises in a new *Bivens* context where a case differs in a meaningful way from a previous *Bivens* case decided by the Court. *Abbasi*, 137 S. Ct. at 1859-60. Differences may include the constitutional right at issue, the rank of the officer involved, the extent of judicial guidance for the official conduct, the risk of disruptive intrusion by the Judiciary into the functioning of other government branches, or the other special factors not considered in previous *Bivens* cases. *Id.* This list is not exhaustive. *Id.*

Of the three Supreme Court cases recognizing an implied damages remedy under the Constitution (*i.e.*, *Bivens*, *Davis*, and *Carlson*), *Bivens* has the most overlap with the instant case. Although similar, the underlying facts of the two cases are different. *Bivens* involved six federal drug agents entering a home without a warrant, arresting the plaintiff in the presence of his family, and visually searching him. The instant case involves a single federal drug agent's arrest of the plaintiff in public pursuant to a warrant issued two days earlier upon a finding of probable cause. (*See* Doc. 24-1 and 24-2).

The constitutional right at issue in the cases is also different. *Abbasi*, 137 S. Ct. at 1859- 60. While *Bivens* tested the constitutionality of the home entry, arrest, and search without a warrant, the instant matter tests the amount of force that can reasonably be used during an arrest. *Bivens*, 403 U.S. at 389-90. In *Bivens*, the rights at issue were "primarily rights of privacy." *Id.* Here, the right at issue is primarily the right to be free from excessive force incident to an otherwise lawful arrest. (*See* Docs. 24-1 and Doc. 24-2).

In addition, the officers were acting pursuant to different mandates. In *Bivens*, the officers lacked a warrant and probable cause to make the arrest. *Bivens*, 403 U.S. at 389-90, n.1. In the instant case, the officer acted pursuant to a warrant issued after a finding of probable cause. (Doc. 24-1 and 24-2). The officers' legal mandate in *Bivens* thus differed from the officer's legal mandate here. When determining whether a claim presents a new context, the *Abbasi* Court instructs lower courts to read *Bivens* narrowly. *Id.* at 1856-57. Consistent with this instruction, the Court finds that the differences noted here are meaningful, and Count 1 presents a new *Bivens* context.

B. Special Factors

When determining whether special factors counsel hesitation in expansion of an implied damages remedy here, the analysis boils down to whether Congress or the courts should decide to authorize a damages suit. *Abbasi*, 137 S. Ct. at 1857 (citing *Bush* v. *Lucas*, 462 U.S. 367 (1983)). Courts must refrain from creating a remedy where there are reasons to think that Congress might question the necessity of a damages remedy as part of the system for correcting a wrong and enforcing the law. *Abbasi*, 137 S. Ct. at 1858. Therefore, when presented with the question of whether Congress or the Court should decide to authorize a damages suit, the answer is usually Congress. *Id.*

Defendant argues that the availability of the Federal Tort Claims Act as a potential alternative remedy militates against expansion of a *Bivens* remedy here. The FTCA waives the Government's sovereign immunity from tort suits, but it excepts from the waiver certain intentional torts. 28 U.S.C. §2680(h). However, Section 2680(h) contains a proviso that extends the waiver of sovereign immunity to claims for six intentional torts, including assault and battery, that are based on the "acts or omissions" of

an "investigative or law enforcement officer," i.e., a federal officer "who is empowered by law to execute searches, to seize evidence, or to make arrests." *Id.* This proviso applies to law enforcement officers' acts or omissions that arise within the scope of their employment, regardless of whether the officers are engaged in investigative or law enforcement activity or are executing a search, seizing evidence, or making an arrest." *Millbrook* v. *United States*, 569 U.S. 50 (2013). Although the FTCA does not authorize suit against the United States for the constitutional torts of its employees, the availability of this statutory remedy for the underlying conduct at issue provides an alternative avenue to relief. *See* 28 U.S.C. §2679(b)(2)(A); *Schweiker* v. *Chilicky*, 487 U.S. 412, 425, 427 (1988).

Plaintiff argues that the Supreme Court squarely rejected this position in Carlson when it found that the FTCA provides an insufficient remedy for constitutional violations by individual officers. *Correctional Servs. Corp.* v. *Malesko*, 534 U.S. 61, 68 (2001) (citing *Carlson*, 446 U.S. at 21) ("Because the *Bivens* remedy is recoverable against individuals, it is a more effective deterrent than the FTCA remedy."). Plaintiff disregards the thirty years of precedent that has since limited expansion of the *Bivens* remedy where no other remedy was available. In *Malesko*, for example, the Supreme Court observed that it has since "rejected the claim that a *Bivens* remedy should be implied simply for want of any other means for challenging a constitutional deprivation in federal court. . . . So long as the plaintiff had an avenue for some redress, bedrock principles of separation of powers foreclosed judicial imposition of a new substantive liability." *Malesko*, 534 U.S. at 69. More recently, the Supreme Court observed that alternative remedies "need not be perfectly congruent" to preclude a *Bivens* remedy. *Minneci* v. *Pollard*, 556 U.S.

118, 129 (2012). Since then, the *Abbasi* Court has pointed out that "when alternative methods of relief are available, a *Bivens* remedy usually is not." *Abbasi*, 137 S. Ct. at 1863. And just last week, the Supreme Court observed that the FTCA "opened a new path to relief (suits against the United States) while narrowing the earlier one (suits against employees)." *Brownback* v. *King*, __ S. Ct. ___, 2021 WL 726222 (Feb. 25, 2021).

The existence of the FTCA as a potential remedy counsels hesitation in recognizing an implied damages remedy for the constitutional violation alleged in this case. Legislative action suggests that Congress did not want a damages remedy is a factor counseling hesitation. *Abbasi*, 137 S. Ct. at 1865. By enacting the law enforcement proviso, Congress signaled that it does not want a damages remedy against individual federal agents. Congress also did not provide a "standalone" damages remedy against federal officers when it enacted the Prison Litigation Reform Act. *Id.* In light of the Supreme Court's expressed caution about extending the *Bivens* remedy, this context must be regarded as new, and special factors counsel hesitation in extending the *Bivens* remedy to include Plaintiff's claim. Accordingly, Defendant's Motion to Dismiss Pursuant to Rule 12(b)(6) or, alternatively Rule 12(d) and 56 (Doc. 24), shall be granted, and Count 1 shall be dismissed.

II. COUNT 4

The only other claim remaining in this action is an Illinois battery claim against Agent Henning. (Doc. 15). Generally speaking "when a court has dismissed all the federal claims in a lawsuit before trial, it should relinquish jurisdiction over supplemental state law claims rather than resolve them on the merits." 28 U.S.C. §1367(c)(3); *Cortezano* v. *Salin Bank & Trust Co.*, 680 F.3d 936, 941 (7th Cir. 2012); *Wright* v. *Associated Ins. Cos. Inc.*, 29 F.3d

1244, 1252 (7th Cir. 1994) ("[W]hen all federal-law claims are dismissed before trial, the pendant claims should be left to the state courts."). There are exceptions to this general rule. For example, the Court may retain jurisdiction when: "(1) the statute of limitations has run on the pendant claim, precluding the filing of a separate suit in state court; (2) substantial judicial resources have already been committed, so that sending the case to another court will cause a substantial duplication of effort; or (3) it is absolutely clear how the pendant claims can be decided." *Sharp Elecs. Corp.* v. *Metro Life Ins. Co.*, 578 F.3d 505, 514-15 (7th Cir. 2009) (quoting *Wright*, 29 F.3d at 1251) (internal quotations omitted). None of these exceptions warrants retention of jurisdiction over the supplemental claim, as the battery claim is not time-barred under the applicable two-year statute of limitations, the case remains in its infancy, and it is not clear how the claim should be decided. Accordingly, the Court shall relinquish jurisdiction over the battery claim in Count 4, and this claim shall be dismissed without prejudice. Plaintiff may pursue his battery claim in state court, if he wishes to do so.

The Court declines to substitute the United States in place of Agent Henning and convert this matter to an action brought pursuant to the FTCA. (Doc. 25). Plaintiff chose to bring this action pursuant to 28 U.S.C. §1331 and *Bivens*—not the FTCA. (*See* Doc. 1, p. 1). In his Response, Plaintiff states that he intended to pursue a claim against Agent Henning and not the United States. (Doc. 27). Litigants are free to bring separate suits against joint tortfeasors. *Sterling* v. *United States*, 85 F.3d 1225, 1228 (7th Cir. 1996). Plaintiff has made clear that he does not wish to name the United States in this lawsuit or bring an FTCA claim against the United States here. There may be many good reasons for this. For one thing, the FTCA

forbids a victim to file suit against the United States until first presenting an administrative claim to the appropriate federal agency in an attempt to resolve it without litigation. 28 U.S.C. §2672. Failure to do so can cost the plaintiff the opportunity to recover damages. *McNeil* v. *United States*, 508 U.S. 106 (1993). Plaintiff is in the best position to decide whether and when to bring an FTCA claim against the United States. Accordingly, the Motion for Substitution (Doc. 25) shall be **DENIED**.

DISPOSITION

IT IS ORDERED that Defendant Henning's Motion to Dismiss Count 1 Pursuant to Rule 12(b)(6) or, Alternatively Rule 12(d) and 56 (Doc. 24), is **GRANTED**, and Defendant Henning's Motion to Substitute Party in Count 4 and Dismiss Defendant Henning (Doc. 25) is **DENIED**.

IT IS ORDERED that **COUNT 1** is **DISMISSED** with prejudice against Defendant **HENNING** because the claim presents a new context and an unauthorized expansion of the implied damages remedy under *Bivens*; **COUNT 4** is **DISMISSED** without prejudice against Defendant **HENNING** because the Court relinquishes jurisdiction over the supplemental state law battery claim pursuant to 28 U.S.C. §1367(c)(3).

This action is **DISMISSED** with prejudice for failure to state a claim upon which relief may be granted under 28 U.S.C. §1331 and *Bivens*.

If Plaintiff wishes to appeal this Order, he may file a notice of appeal with this Court within thirty days of the entry of judgment. FED. R. APP. 4(a)(1)(A). If Plaintiff does choose to appeal, he will be liable for the $505.00 appellate filing fee irrespective of the outcome of the appeal. *See* FED. R. APP. 3(e); 28 U.S.C. §1915(e)(2); *Ammons* v. *Gerlinger*, 547 F.3d 724, 725-26 (7th Cir. 2008). He must

list each of the issues he intends to appeal in the notice of appeal. A proper and timely motion filed pursuant to Federal Rule of Civil Procedure 59(e) may toll the 30-day appeal deadline. FED. R. APP. P. 4(a)(4). A Rule 59(e) motion must be filed no more than twenty-eight (28) days after the entry of judgment, and this 28-day deadline cannot be extended.

The Clerk's Office is **DIRECTED** to close this case and enter judgment accordingly.

IT IS SO ORDERED.

DATED: March 3, 2021

s/ J. Phil Gilbert

J. PHIL GILBERT
United States
District Judge

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

NO. 21-1463

DONALD V. SNOWDEN,

Plaintiff,

v.

JEREMY HENNING,

Defendants.

On Appeal from the United States District Court
for the Southern District of Illinois.
No. 3:19-cv-01322-JPG – J. Phil Gilbert, *Judge*.

ORDER

November 3, 2023

Before DIANE S. SYKES, *Chief Judge*, JOEL M. FLAUM, *Circuit Judge,* CANDACE JACKSON-AKIWUMI, *Circuit Judge*

On consideration of the petition for rehearing and for rehearing en banc, no judge in active service requested a vote on the petition for rehearing en banc, and all judges on the original panel voted to deny rehearing. It is therefore ordered that the petition for rehearing en banc is DENIED.