No. 24-

IN THE

Supreme Court of the United States

HOWARD GOLDEY, ASSOCIATE WARDEN, *et al.*,

Petitioners,

v.

ANDREW FIELDS, III, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), the Court recognized an implied cause of action under the Constitution for damages against federal officers for allegedly violating the Fourth Amendment. More recently, however, the Court has cautioned that "if [a] claim arises in a new context, a *Bivens* remedy is unavailable if there are special factors"—"even a single reason to pause"—"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." *Egbert v. Boule*, 596 U.S. 482, 492 (2022) (internal quotation marks omitted). All parties have agreed that this case presents a new context—a claim of excessive force under the Eighth Amendment. A divided panel of the Fourth Circuit held that the plaintiff's allegations justified implying a new damages cause of action under that constitutional provision.

The questions presented are:

1. Whether an implied cause of action exists for Eighth Amendment excessive force claims.

2. Whether the Court should reconsider the premise that the Judiciary may imply causes of action for damages under the federal Constitution that Congress did not enact.

PARTIES TO THE PROCEEDING

Petitioners Howard Goldey, William Fields, Neullan Naff, Joshua Robbins, Jimmy Baker, Jackie Mitchell, Joshua Ewing, Brandon Gayheart, Michael Sloan, Stuart Scott, Jonathan Bolling, Michael Garrett, Denver Scholl, Dustin Farmer, Jerel Dickenson, Jonathan Nichols, Michael Hamilton, Phillip Mullins, Delores Hughes, and James Gilbert were defendants in the district court and appellees in the Fourth Circuit.

Respondent Andrew Fields, III was the plaintiff in the district court and the appellant in the Fourth Circuit.

Respondent Federal Bureau of Prisons was a defendant in the district court and an appellee in the Fourth Circuit.

Respondent Jason Streeval was a defendant in the district court and an appellee in the Fourth Circuit.

RELATED PROCEEDINGS

United States District Court (W.D. Va.):

Fields v. Federal Bureau of Prisons, No. 7:22-cv-00021 (Jan. 31, 2023)

United States Court of Appeals (4th Cir.):

Fields v. Federal Bureau of Prisons, No. 23-6246 (July 25, 2024)

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Petitioners Howard Goldey, William Fields, Neullan Naff, Joshua Robbins, Jimmy Baker, Jackie Mitchell, Joshua Ewing, Brandon Gayheart, Michael Sloan, Stuart Scott, Jonathan Bolling, Michael Garrett, Denver Scholl, Dustin Farmer, Jerel Dickenson, Jonathan Nichols, Michael Hamilton, Phillip Mullins, Delores Hughes, and James Gilbert respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-37a) is reported at 109 F.4th 264. The opinion of the United States District Court for the Western District of Virginia (Pet. App. 38a-55a) is unreported, but is available at 2023 WL 1219334.

JURISDICTION

The Fourth Circuit issued its opinion on July 25, 2024. A timely petition for rehearing was denied on October 22, 2024 (Pet. App. 56a-57a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

INTRODUCTION

This petition raises fundamental questions about the federal courts' power to fashion new causes of action against federal officials, for money damages, based on alleged violations of the Constitution. In *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), this Court created an implied cause of action against federal officials for violating the Fourth Amendment. Over

the next decade, the Court expanded *Bivens* twice, recognizing implied remedies for a Fifth Amendment due process claim and an Eighth Amendment deliberate indifference claim.

But then the tide turned. Over the last four and a half decades, the Court has refused to expand the narrow set of recognized *Bivens* claims 12 times. See *Egbert v. Boule*, 596 U.S. 482, 491 (2022). It has disavowed the original trilogy, warning that, if it were asked to decide *Bivens* today, it would not find *any* implied causes of action in the Constitution. *Id.* at 502. That was no exaggeration: In *Egbert*, the Court declined to extend *Bivens* to a fact pattern that four Justices found to be materially indistinguishable from *Bivens* itself. 596 U.S. at 503 (Gorsuch, J., concurring in the judgment); *id.* at 505, 513 (Sotomayor, J., dissenting).

The Court's unwillingness to infer new *Bivens* claims accords with its broader repudiation of the whole project of judicially inferring causes of action that Congress did not create. Reflecting this evolution, the Court has cautioned lower courts against expanding *Bivens* in the strongest possible terms, calling it "a disfavored judicial activity," to be avoided "in all but the most unusual circumstances." *E.g.*, *id.* at 486, 491. To put it bluntly, inferring *Bivens* claims offends the modern understanding of the Constitution's separation of powers.

But while the Court has spent decades barricading the law against new *Bivens* claims, a divided panel of the Fourth Circuit held below that federal corrections officers may be liable under *Bivens* for allegedly using excessive force against an inmate in violation of the Eighth Amendment.

The importance of this ruling is indisputable. The question of whether to extend *Bivens* to prisoner excessive force claims recurs with stunning frequency. Since this Court decided *Egbert* in June 2022, the question has reached the courts of appeals at least a dozen times, yielding five published opinions. Only the Fourth Circuit's opinion below recognized the novel claim. It did so on the basis of reasoning that its sister circuits had explicitly rejected and that—as the United States explained in supporting rehearing en banc—"drastically depart[ed]" from this Court's precedent. U.S. Amicus Br. 2-3. So when it created a new cause of action, the Fourth Circuit also created a sharp 3-1 circuit split. And the divide widened within a few months: The Eleventh Circuit published a blistering critique of the Fourth Circuit's opinion, calling it "a far-afield outlier" that may finally lead this Court to overrule *Bivens* once and for all. *Johnson v. Terry*, 119 F.4th 840, 850-51 (11th Cir. 2024).

The practical problems with the decision below are as obvious as they are far-reaching. Correctional officers have to place their hands on inmates in the ordinary course of their work, whether they are engaged in prisoner transport, discipline, or care. At the thirteen federal correctional institutions in the Fourth Circuit, including two high-security penitentiaries housing thousands of the most dangerous offenders, they now face a unique risk of lawsuits without a statutory foundation that could affect their on-the-job decision making. That is why the United States identified the threat of "significant harm to the government and its employees" resulting from this decision. U.S. Amicus Br. 1.

What is more, Congress has comprehensively legislated in the area of prison litigation, but decided not to create a private damages remedy—probably due to the availability of other remedial schemes, like the Federal Tort Claims Act (FTCA) and the Bureau of Prisons' Administrative Remedy Program. And in all events, running a prison is an inherently challenging task, far better suited to the Executive Branch than the Judicial.

STATEMENT

1. In 1871, Congress passed a statute letting plaintiffs sue state officials for money damages if the officials violated their constitutional rights, which was eventually codified at 42 U.S.C. § 1983. *Ziglar v. Abbasi*, 582 U.S. 120, 130 (2017). Congress never passed a coordinate statute allowing plaintiffs to sue federal officials for constitutional violations. *Id*.

A century later, in *Bivens*, this Court held that even though Congress had not provided any statutory authority for such actions, the plaintiff had an *implied* cause of action under the Fourth Amendment entitling him to sue federal officials for money damages. 403 U.S. at 397. Over the next decade, the Court created two more implied causes of action for money damages under the Fifth and Eighth Amendments in *Davis v. Passman*, 442 U.S. 228 (1979) (recognizing a Fifth Amendment gender discrimination claim), and *Carlson v. Green*, 446 U.S. 14 (1980) (recognizing an Eighth Amendment deliberate indifference claim).

But things dried up after *Carlson*. In the forty-five years since, this Court has rejected every request—12 of them now—to create a new implied cause of

action against a federal official for money damages under the Constitution. See *Egbert*, 596 U.S. at 491; *Hernandez v. Mesa*, 589 U.S. 93, 102 (2020). In the last eight years alone, the Court has handed down a trilogy of opinions warning against expanding *Bivens*, all but admitting that the case was a mistake. *Egbert*, 596 U.S. at 491 ("Now long past the heady days in which this Court assumed common-law powers to create causes of action [as in *Bivens*], we have come to appreciate more fully the tension between judicially created causes of action and the Constitution's separation of legislative and judicial power.") (internal quotation marks and citations omitted); *Hernandez*, 589 U.S. at 101 (noting that if "the Court's three *Bivens* cases [had] been ... decided today, it is doubtful that we would have reached the same result") (alterations in original) (internal quotation marks omitted); *Ziglar*, 582 U.S. 135 (warning that "expanding the *Bivens* remedy is now a disfavored judicial activity") (internal quotation marks omitted).

This course correction results from the Court's increased appreciation of "the tension between judicially created causes of action and the Constitution's separation of legislative and judicial power." *Egbert*, 596 U.S. at 491 (quotation marks and citation omitted). Unlike freewheeling midcentury courts, which were quick to spot implied causes of action, the Court now recognizes 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." *Ziglar*, 582 U.S. at 133. And because the power to create causes of

action is legislative, "[i]n most instances … the Legislature is in the better position to consider if the public interest would be served by imposing a new substantive legal liability." *Id.* at 136 (quotation marks omitted).

After all, creating new causes of action involves complex policy calculations, weighing "economic and governmental concerns, administrative costs, and the impact on governmental operations systemwide." *Egbert*, 596 U.S. at 491 (quotation marks omitted). A court's ability to weigh those considerations is "at best, uncertain." *Id.* Thus, under modern practice, "recognizing a cause of action under *Bivens*" outside of the three contexts already recognized has become "a disfavored judicial activity," to be avoided "in all but the most unusual circumstances." *Id.* at 486, 491 (quotation marks omitted).

The Court has gone so far as to indicate "that if we were called to decide *Bivens* today, we would decline to discover any implied causes of action in the Constitution." *Id.* at 502.

So when faced with a *Bivens* claim, courts today undertake a restrictive two-step inquiry. First, they check to see if the claim arises in a "new context," one meaningfully different from those to which the Court has already extended *Bivens*. *Egbert*, 596 U.S. at 492. If so, they ask whether any "special factors" counsel hesitation. *Hernandez*, 589 U.S. at 102 (quoting *Ziglar*, 582 U.S. at 136). The special-factors inquiry focuses on separation-of-powers principles, requiring the courts to consider whether judicial intrusion into a given field is appropriate. *Id.* at 102. Courts must show the utmost deference to Congress, which enjoys the principal—and probably the sole—authority to create new causes of action for constitutional

violations. See *Egbert*, 596 U.S. at 491-92. Otherwise, they risk "arrogating legislative power." *Id.* at 492 (cleaned up). The presence of a single special factor is enough to require a court to refrain from creating a remedy. *Id.* at 491.

These two steps often boil down to a single question: Is there any reason to think that Congress might be better equipped to create a new damages remedy? *Id.* at 492. And by "any reason," the Court means "*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 (quoting *Ziglar*, 582 U.S. at 136). "Put another way, 'the most important question is who should decide whether to provide for a damages remedy, Congress or the courts?'" *Id.* at 491-92 (quoting *Hernandez*, 589 U.S. at 114).

2. This case arises from the dismissal of inmate Andrew Fields's complaint seeking damages for alleged excessive force under the Eighth Amendment. Fields says that while he was an inmate at the high-security U.S. Penitentiary Lee in southwestern Virginia, he was sent to the special housing unit and placed on administrative segregation. Pet. App. 3a-4a. When a scuffle erupted on the way, corrections officers placed him in ambulatory restraints and put him in a wheelchair for the rest of the trip. Pet. App. 4a. Upon arrival at the special housing unit, Fields was placed in an observation cell. Pet. App. 4a. Because he was still restrained, he says, prison staff had to check on him at regular intervals. Pet. App. 4a. Fields alleges that they used each check as a chance to physically abuse him while he was restrained, "including by ramming his head into the concrete wall and hitting [him] with a fiberglass shield." Pet. App. 4a. Fields

claims that the whole series of events was retaliation for an unrelated incident at another prison. Pet. App. 4a.

Fields also alleges that he tried to use the Bureau of Prisons' administrative grievance procedure, but that staff denied him the necessary forms. Pet. App. 4a.

3. Fields filed a pro se complaint in the Western District of Virginia against the Bureau of Prisons and individual Bureau employees. Pet. App. 1a, 5a. He alleged various violations of the Constitution, including a claim for excessive force in violation of the Eighth Amendment. Under the Prison Litigation Reform Act of 1995 (PLRA), 28 U.S.C. § 1915A(b), the district court prescreened the complaint before it was served on the defendants. Pet. App. 5a.

The district court dismissed the complaint for failure to state a claim, finding that most of its allegations did not assert a constitutional violation. Pet. App. 5a. Even those that did failed because *Bivens* did not provide a damages remedy for them. Pet. App. 5a. Relevant here, the district court held that it had "no difficulty in concluding that" Fields's claims for excessive force "arise in a new context, as the Supreme Court has never ruled that a damages remedy exists for claims of excessive force by BOP officers against an inmate." Pet. App. 49a. The court found multiple "rational reason[s]" why "Congress would be better equipped than the courts to determine whether to allow such claims." Pet. App. 51a.

Because the case was dismissed at the prescreening stage, petitioners were never served.

4. Fields appealed and retained counsel, challenging only the dismissal of his Eighth Amendment excessive force claims. Pet. App. 5a.

a. A split panel of the Fourth Circuit affirmed in part, reversed in part, and remanded. Pet. App. 21a-22a. The court recognized that to determine whether a *Bivens* claim can proceed, it should conduct the two-step analysis described above, first checking to see if the claim arose in a new context, and then looking for special factors counselling hesitation. Pet. App. 7a-8a.

As to the first prong, Fields conceded that his claim arose in a new *Bivens* context, as the district court had concluded. The court of appeals accepted that concession. Pet. App. 8a & n.1.

As to the second, however, the court of appeals concluded that "where an inmate brings a claim against individual, front-line officers who personally subjected the plaintiff to excessive force in clear violation of prison policy, and where rogue officers subsequently thwarted the inmate's access to alternative remedies," *Bivens* provides a remedy. Pet. App. 12a. It reasoned that the risk of systemwide consequences was "negligible" because Fields challenged only the individual conduct of "rogue prison officers," not a systemwide policy. Pet. App. 13a-16a.

The court acknowledged the existence of alternative remedies, notably the Bureau's Administrative Remedy Program. It determined that those alternative remedies did not preclude a *Bivens* remedy because Fields alleged that he was denied access to them. Pet. App. 16a-19a.

Finally, the Fourth Circuit recognized that Congress had legislated in this area by enacting the

PLRA, but decided not to provide a remedy for plaintiffs like Fields. Pet. App. 19a. Even so, the court reasoned that this was not dispositive, because Congress had not prohibited all inmate *Bivens* claims, either. Pet. App. 19a-21a. The Fourth Circuit concluded that Congress wanted to preserve some Eighth Amendment *Bivens* claims. Pet. App. 19a-20a.

The court of appeals acknowledged that its reasoning did not apply to the claims against the Bureau, the warden, and "the other supervisory officials named in the complaint," and it affirmed the dismissal of the claims against those defendants.[1] Pet. App. 12a-13a, 22a.

b. Judge Richardson lodged a forceful dissent. He noted that this case presents not just one special factor counselling hesitation, but three. Pet. App. 25a. First, while Congress has actively legislated in this area—most notably through the PLRA—it has not enacted a statutory cause of action for damages. Pet. App. 26a-29a. The dissent pointed out that this Court has specifically rejected the majority's argument that Congress's failure to statutorily overrule *Bivens* licensed courts to create new *Bivens* remedies. Pet. App. 27a. In all events, the dissent argued, the relevant inquiry was not whether Congress meant to bar all *Bivens* remedies, but simply whether there was any special factor counselling hesitation. Pet. App. 28a. "That Congress looked intently and specifically at prisoner litigation and

[1] The Fourth Circuit did not specify which defendants received the benefit of this affirmance. Some petitioners in addition to Warden Streeval must fall within this supervisory category, but identifying them may require a hearing in the district court.

offered no private damages remedy should give us a reason to *think* that Congress *might* not want us to usurp its authority and create one ourselves." Pet. App. 28a.

Second, the dissent noted that the existence of an alternative remedial scheme—the Bureau's Administrative Remedy Program—also counselled hesitation. Pet. App. 30a-32a. It was no answer to say that Fields alleged that prison officials thwarted his access to this remedy. The question was simply whether the alternative remedy existed, not whether the court deemed it adequate. Pet. App. 30a-32a.

Third, the consequences of implying a new damages remedy cut against extending *Bivens*. Pet. App. 32a-37a. Authorizing a *Bivens* action for excessive force under the Eighth Amendment would open the door to a multitude of such cases. Pet. App. 33a. Allowing suits alleging that individual officers "went rogue" could have systemic consequences because every prisoner would be able to sue alleging that officers used excessive force, and every officer would have to constantly calibrate their behavior to account for this litigation risk. Pet. App. 33a-35a.

The dissent closed by observing that the Court has chosen to leave its three existing *Bivens* actions in place "while effectively directing that lower courts should not create new ones." Pet. App. 37a. Even so, given just this slight crack in the door, "inferior courts continue to ignore the directive to stop expanding *Bivens*." Pet. App. 37a. The dissent found that the governing decisional law forbade expanding *Bivens*. Pet. App. 37a. "But perhaps the majority's holding to the contrary shows it's time to shut the *Bivens* door completely." Pet. App. 37a.

5. Because the court of appeals had dismissed the Bureau of Prisons and left the case to proceed only against individual defendants (who had never been served with process), the Department of Justice authorized petitioners to retain private counsel for purposes of seeking further review. Petitioners sought rehearing or rehearing en banc, and the United States filed an amicus brief supporting that petition. As the rehearing petition and the United States' brief explained, the court of appeals' decision created a lopsided circuit split; "drastically depart[ed]" from this Court's precedent; and "threaten[ed] significant harm to the government and its employees." U.S. Amicus Br. 1-3.

The Fourth Circuit denied rehearing. Pet. App. 57a.

REASONS FOR GRANTING THE PETITION

The Court should grant certiorari to resolve the circuit conflict about whether an implied remedy is available under *Bivens* for an Eighth Amendment excessive force violation. That issue is vitally important. It recurs frequently, as the five published appellate opinions issued in the past three years show. The Fourth Circuit's pathbreaking decision parted ways with every other circuit to consider the issue since *Egbert*. In doing so, it also departed from this Court's highly restrictive criteria for recognizing new *Bivens* actions. Only this Court can restore uniformity and ensure that correctional officers in this circuit can do their job without risking burdensome lawsuits that no other circuit would allow.

The Fourth Circuit's decision also shows why the Court should reject not just *this* type of *Bivens* action, but the entire concept of a judicially inferred cause of action to enforce the Constitution. This Court's precedents have increasingly dialed *Bivens* back while undermining its foundations. But so long as the Court leaves the *Bivens* door even slightly ajar, litigants will keep bringing suits—and at least some federal courts will keep accepting them. *Bivens* and the other decisions following its now-closed path should be overruled.

This case is an ideal vehicle to resolve the circuit split and reconsider *Bivens*. The case below turned on the availability of *Bivens* in an admittedly novel Eighth Amendment context. It was dismissed on prescreening review, so Fields's allegations are taken as true and no further fact findings are necessary. The Fourth Circuit panel produced a lengthy opinion and a thorough dissent. The Court should grant this petition to bring this important area into line with the Court's modern separation-of-powers jurisprudence.

I. The Fourth Circuit's decision creates a circuit split.

Until this case, every circuit to consider the issue since *Egbert* has concluded that *Bivens* cannot be expanded to imply a damages remedy for Eighth Amendment excessive force claims. They have based their decisions on factors equally present here, like the existence of an alternative remedial structure and Congress's decision not to create a damages remedy in the PLRA.

1. Start with the Second Circuit, which affirmed a district court's dismissal of a plaintiff's claim that U.S. Marshals and court security officers violated his Eighth Amendment rights by using excessive force to restrain him. *Edwards v. Gizzi*, 107 F.4th 81 (2d Cir. 2024) (per curiam). In a separate opinion concurring in the judgment, Judge Park explained that Edwards's claim arose in a new context, because an Eighth Amendment excessive force claim is distinct from the Eighth Amendment deliberate indifference claim recognized in *Carlson*. *Id*. at 84-85. And at least one special factor counselled hesitation before expanding *Bivens*: An alternative remedial structure was already in place under the FTCA. *Id*. at 84-86. The concurrence noted that "[t]o be fair, the Supreme Court's reluctance to confront the constitutional infirmity of *Bivens* and its mixed messages about *Bivens*'s remaining vitality continue to confuse lower courts," *id*. at 86 n.6, implicitly inviting this Court to clarify matters and put an end to that confusion.

Judge Robinson also concurred in the judgment, agreeing that the claim arose in a new context under *Bivens*. *Id*. at 87. She wrote separately to stress that this Court has never overruled *Bivens*, which by her lights "remains alive and well," at least "in the heartland cases … ." *Id*. at 87.

Judge Parker dissented. He did not believe that Edwards's Eighth Amendment excessive force claim "differ[ed] in a meaningful way from previous *Bivens* cases decided by the Supreme Court." *Id*. at 89. Even if it did, he saw no special factors counselling hesitation. *Id*. at 91. The FTCA was not an alternative remedial structure, he reasoned, because it imposed liability against the United States, while a *Bivens* remedy would be "centered entirely [on] individual

officer deterrence." *Id.* The dissent closed by all but daring this Court to overrule *Bivens*:

> In sum, the fact that the Supreme Court continues to express serious doubts about *Bivens*' future does not, in my view, grant a license to *sub silentio* do for the Supreme Court what it has thus far been unwilling to do itself. If the Supreme Court plans to take away important protections against constitutional violations and allow federal officials to act unconstitutionally without consequence unless and until Congress acts, then it should face the nation and say as much. It should not delegate that work to us.

Id.

2. The Ninth Circuit likewise held that a plaintiff "has no Eighth Amendment excessive force claim under *Bivens*." *Chambers v. C. Herrera*, 78 F.4th 1100, 1107 (9th Cir. 2023). It agreed with the district court that the plaintiff's allegations were "too threadbare" to survive a motion to dismiss. *Id.* Before this Court's decision in *Egbert*, the district court had assumed without deciding that a *Bivens* remedy was available, and had dismissed the claim without prejudice for failure to allege a plausible claim. *Id.* The Ninth Circuit affirmed on the alternative basis that under *Egbert*, not even plausible allegations could state a *Bivens* claim, so amendment would be futile. *Id.* It thus affirmed the dismissal, but ordered it converted to dismissal with prejudice. *Id.*

The Ninth Circuit explained that Chambers's claim arose in a new context because while this Court recognized an Eighth Amendment deliberate

indifference claim in *Carlson*, an Eighth Amendment excessive force claim was "entirely different." *Id.* at 1107-08. Because Chambers was aware of the Bureau's grievance procedures but chose not to use them, expanding *Bivens* would risk precisely the "disruptive intrusion by the Judiciary" that *Ziglar* forbids. *Id.* at 1108. Beyond that, when Congress enacted the PLRA, it authorized the Bureau to establish grievance procedures for prisoner complaints but stopped short of creating a damages remedy for Eighth Amendment excessive force claims. *Id.*

3. The Tenth Circuit came to the same conclusion in *Silva v. United States*, 45 F.4th 1134 (10th Cir. 2022), focusing on the alternative remedial schemes available to the plaintiff. It held that Silva's Eighth Amendment excessive force claim was "foreclosed by the availability of the BOP Administrative Remedy Program to address his complaint." *Id.* at 1142.

4. Finally, in *Johnson v. Terry*, 119 F.4th 840, 852 (11th Cir. 2024), the Eleventh Circuit held that the plaintiff had abandoned his Eighth Amendment excessive force claim. Even so, it took the opportunity to launch a broadside at the Fourth Circuit's opinion in this case, blasting it as a "far-afield outlier." *Id.* at 850-51. The Eleventh Circuit predicted that if the majority's opinion "manage[d] to duck en banc correction," then it might require this Court to finally overrule *Bivens*. *Id.* at 851.

Also relevant here, the Eleventh Circuit specifically rejected the notion that a prisoner plaintiff can plead around this Court's restraints on new *Bivens* causes of action. The plaintiff "contend[ed] that the BOP's administrative remedy program

should not be considered a sufficient alternative remedy *for him*, and hence not a special factor, because the district court found that *he* was denied access to the program." *Id.* at 860 (emphases added). The Eleventh Circuit made clear that "[t]he alternative remedy question is a general one, not a specific one; a macro focus, not a micro focus." *Id.* Whether the plaintiff himself was denied access to the remedy was not the issue. Rather, the question was "whether the Government has put in place safeguards to prevent constitutional violations from recurring." *Id*. (quoting *Egbert*, 596 U.S. at 498).

Thus, the Fourth Circuit's decision creates a methodological split about the analysis of alternative remedies *in addition to* the specific split on whether courts should fashion a new Eighth Amendment cause of action. And because the Fourth Circuit's no-alternative-remedy reasoning appears to apply to any case in which a federal prisoner contends that the defendants didn't give him the right forms to access the Administrative Remedy Program, it may well affect *Bivens* litigation by federal prisoners in the Fourth Circuit on theories beyond the Eighth Amendment. The Fourth Circuit's willingness to disregard this alternative remedy, and give a *Bivens* cause of action to any plaintiff who *alleges* that he personally was frustrated in his attempt to bring a grievance, heightens the significance of this case and the need for this Court's resolution.

II. The decision below is contrary to this Court's precedent.

The Fourth Circuit's decision to part company with its sister circuits was mistaken for two reasons. First, as the dissent pointed out, the majority's reasoning is inconsistent with this Court's instructions in the *Egbert* trilogy, as it expanded *Bivens* to a new context despite the presence of at least three special factors counselling hesitation. Second, and more fundamentally, in the 50 years since *Bivens* was handed down, the law has moved in a direction that has fatally undermined the case.

1. This Court's precedents teach that the presence of even one special factor is reason enough not to expand *Bivens*. *E.g., Egbert*, 596 U.S. at 492. Here, three special factors present themselves.

a. First, an alternative remedial structure already exists for prisoners like Fields. U.S. Amicus Br. 2-3, 7-8. This Court has explained that 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 (quoting *Ziglar*, 582 U.S. at 137). Here, several remedial mechanisms are already in place, "including suits in federal court for injunctive relief and grievances filed through the BOP's Administrative Remedy Program." *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 74 (2001) (citing 28 C.F.R. § 542.10). The Administrative Remedy Program offers a "means through which allegedly unconstitutional actions and policies can be brought to the attention of the BOP and prevented from recurring." *Id.*

That should be the end of the analysis. "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 that calibration by superimposing a *Bivens* remedy." *Egbert*, 596 U.S. at 498. This is true even if the lower court concludes that the political branches' preferred alternative remedy is less effective than an individual damages remedy. *Id.*

The Fourth Circuit dismissed this factor because Fields alleged that prison officials blocked his access to these remedies. Pet. App. 16a-18a. That misunderstood the relevant inquiry. The court was undertaking a separation-of-powers analysis. It should not have asked whether *Bivens* relief was appropriate under the facts of a particular case; instead, it should have asked broadly whether there was any reason to think that judicial intrusion into a given field might be inappropriate. *Egbert*, 596 U.S. at 496.

The majority countered that "no court (in this Circuit or otherwise) has ever before been presented with a case in which one of the allegations was that the grievance process was intentionally withheld from the inmate." Pet. App. 18a. But that was exactly the scenario in *Johnson*: The prisoner alleged—and the district court found after discovery—that he was denied access to the Administrative Remedy Program. 119 F.4th at 846, 860. Even so, the Eleventh Circuit declined to extend *Bivens* because the Government had already provided an alternative remedy. *Id.* at 859-62. That the plaintiff himself was denied access to the remedy did not matter. *Id.* at 860. "The only consideration is whether there is a remedial process in place that is intended to redress the kind of harm faced by those

like the plaintiff." *Id.*; see also U.S. Amicus Br. 2-3, 8.

b. Second, Congress has actively legislated in this area but has chosen not to create a cause of action for money damages. See *Ziglar*, 582 U.S. at 148-49. The Legislature has been anything but silent about prisoner litigation. The prime example is the PLRA, "which made comprehensive changes to the way prisoner abuse claims must be brought in federal court." *Id.* at 148. Yet despite having "specific occasion to consider the matter of prisoner abuse and ... remed[ies for] those wrongs," Congress has not—in the PLRA or elsewhere—"provide[d] for a standalone damages remedy against federal jailers." *Id.* at 148-49.

And just last year, Congress passed the Federal Prison Oversight Act, bipartisan legislation specifically aimed at remedying "corruption, abuse, and misconduct within the Federal prison system … ." E.g., Sen. Jon Ossoff, Press Releases, *SIGNED INTO LAW: Sens. Ossoff, Braun, & Durbin, Reps. McBath & Armstrong's Bipartisan Federal Prison Oversight Act*, available at https://www.ossoff.senate.gov/press-releases/signed-into-law-sens-ossoff-braun-durbin-reps-mcbath-armstrongs-bipartisan-federal-prison-oversight-act/ (last visited Jan. 14, 2025). The Act focuses on establishing oversight mechanisms and improving transparency in the system. Federal Prison Oversight Act, Public Law No. 118-71, 138 Stat. 1492 (July 25, 2024). While it creates a new Ombudsman to receive prisoner complaints, the Act provides no private damages remedy for allegations of constitutional violations. *Id.* President Biden signed the Act into law on the same

day that the Fourth Circuit issued the opinion below. *Id.*

It is reasonable to infer from Congress's silence in this area where it has otherwise been active that it did not want to create a damages remedy.

c. Finally, the consequences of granting Fields's requested relief cut against extending *Bivens*. By creating a *Bivens* action for prisoner excessive force claims, the Fourth Circuit invited a flood of those cases. Line correctional officers must employ force and restrain prisoners in the ordinary course of their work. Even if they are not actually sued, the prospect of individual liability will change the way they do their jobs on a daily basis. It may cause them to hesitate when the situation calls for action—to protect themselves, their colleagues, or other prisoners. See U.S. Amicus Br. 10. And those federal employees, like petitioners, unlucky enough to find themselves sued will face years of disruptive litigation.

The Fourth Circuit minimized this concern, insisting that the officers Fields alleges to have violated his constitutional rights did so by going "rogue" in violation of Bureau policies. Pet. App. 13a-16a. Because no prison policy was directly implicated, it reasoned, expanding *Bivens* would have no systemic repercussions. Pet. App. 13a-16a.

But allegations of individual misconduct do not foreclose the possibility of systemic consequences. A court looking to extend *Bivens* is charged with considering not just the consequences of creating a remedy in the present case, but also the consequences that its new remedy will have across the broad run of future cases. So the relevant inquiry is not whether a court is competent to authorize a damages remedy

against particular defendants, but against all similarly situated officials. See U.S. Amicus Br. 9-10.

In the context of line officers in a prison, the answer must be no. As the Court has recognized, "[r]unning a prison is an inordinately difficult undertaking that requires expertise, planning, and the commitment of resources, all of which are peculiarly within the province of the legislative and executive branches of government." *Turner v. Safley*, 482 U.S. 78, 84-85 (1987). Creating a new *Bivens* remedy for prisoner excessive force claims would invite litigation over myriad decisions made every day about safety and discipline throughout the prison system. Uncertainty about those consequences alone is enough to foreclose expanding *Bivens*, because it provides a rational reason to think that Congress is better suited to weigh the costs and benefits of allowing a damages action to proceed. See *Egbert*, 596 U.S. at 493.

2. The decision below was also wrong because the entire concept of a judicially inferred cause of action under the Constitution is relic from an earlier era, incompatible with modern precedent. This case presents an ideal vehicle for reconsidering *Bivens* and avoiding future litigation over incessant attempts to expand it.

The Court decided *Bivens* in 1971, when it was common for courts to create new causes of action to protect the policies that they perceived to underlie the Constitution or statutes. *Id.* at 131-32. The Court extended *Bivens* just twice, in 1979 and 1980. *Carlson v. Green*, 446 U.S. 14 (1980); *Davis v. Passman*, 442 U.S. 228 (1979). "After those decisions, however, the Court changed course," *Hernandez*, 589 U.S. at 99,

rejecting every effort to extend *Bivens* in the past 45 years, *Egbert*, 596 U.S. at 491. Its foundations eroded, *Bivens*'s holding lingers on today as a curious artifact from an "ancien regime." *Ziglar*, 582 U.S. at 131.

That erosion results from a paradigm shift in the Court's overall approach to implied rights of action—whether based on a constitutional provision or a statute for which Congress has not granted an express right of action. The Court has come "to appreciate more fully the tension between this practice and the Constitution's separation of legislative and judicial power." *Hernandez,* 589 U.S. at 100. Congress, not the courts, has the authority to create new causes of action. *Bivens* violates this separation of powers because it allows courts to usurp legislative authority by crafting their own new causes of action.

Today, the Court has repeatedly "expressed doubt about [its] authority to recognize any causes of action not expressly created by Congress." *Hernandez*, 589 U.S. at 101. In "constitutional cases," that principle warrants even further caution, because "Congress is best positioned to evaluate 'whether, and the extent to which, monetary and other liabilities should be imposed on [federal officers]' based on constitutional torts." *Id*. (quoting *Ziglar*, 582 U.S. at 134). This is why the *Egbert* Court explained "that if we were called to decide *Bivens* today, we would decline to discover any implied causes of action in the Constitution." 596 U.S. at 502.

Less remarked but no less problematic is the challenge that *Bivens* poses to the Executive's authority. The President is sworn to "preserve, protect and defend the Constitution of the United

States." U.S. Const., art. II, § 1, cl. 8. He is entrusted with a duty "to take Care that the Laws be faithfully executed … ." U.S. Const., art. II, § 3. This includes implementing constitutional guarantees like the Eighth Amendment—for example, by supervising the conduct of Executive Branch employees and addressing mistakes and misconduct.

When a federal court creates a new cause of action against an Executive employee, which Congress never presented to the President for signature, it impinges upon the executive power. *Cross v. Buschman*, No. 22-3194, 2024 WL 3292756, at *5 (3d Cir. July 3, 2024) (Matey, J., concurring). The President's Faithful Execution duty is why courts consider administrative remedies when determining whether to extend *Bivens*. *Id*. "Remedial programs reflect the Executive's judgment about how wrongful acts should be addressed, alleviated, and compensated." *Id.*

Congress sensibly charged the Executive—that is, the President and the Attorney General—with implementing federal prison programs. *Id*. (citing 18 U.S.C. §§ 4001(b)(1), 4042). In carrying out that duty, the President has an independent duty to protect the Constitution's guarantees in federal prisons. *Id*. "The President has answered that call in the BOP's administrative remedy program." *Id*. (citing 28 C.F.R. §§ 542.10-19). When it comes to the specific means of implementing the Eighth Amendment, "the Constitution leaves it to the states, Congress, and the Executive." *Id.*

Moving from the conceptual level to the practical, *Bivens* has proven unworkable, requiring repeated overhauls. At first, courts essentially presumed that new *Bivens* actions were valid, unless special factors

or an explicit Congressional declaration indicated otherwise. *Silva v. United States*, 45 F.4th 1134, 1139 (10th Cir. 2022). Later, the Court "flipped" the presumption, explaining that courts should decline to recognize new *Bivens* claims in the face of any special factors counselling hesitation or alternative remedies. *Id.*; *Wilkie v. Robbins*, 551 U.S. 537, 550 (2007). *Ziglar* raised the bar, making "separation-of-powers principles … central to the analysis," and indicating that "[i]n most instances … the Legislature is in the better position" to decide the advisability of new causes of action. 582 U.S. at 136. *Hernandez* heightened the standard again, stressing that the Court's "watchword is caution," and listing numerous non-exhaustive factors weighing against extending *Bivens* to new contexts. 589 U.S. at 101-02. And just three years ago, *Egbert* tightened things up even further, explaining that "[w]hile our cases describe two steps, those 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." 596 U.S. at 492.

Yet the Court's current, exacting criteria still demand judgment calls that judges are poorly positioned to make. For example, lower courts are told to weigh the impact of recognizing a *Bivens* action "on governmental operations systemwide." *Ziglar*, 582 U.S. at 136. But courts are not set up to study such far-reaching policy issues, and parties are even less equipped to brief them. And as Justice Gorsuch pointed out, "if the only question is whether a court is 'better equipped' than Congress to weigh the value of a new cause of action, surely the right answer will always be no." *Egbert*, 596 U.S. at 504 (Gorsuch, J., concurring in the judgment).

Meanwhile, the calls to reconsider *Bivens* mount. They start at the top, as multiple Justices have urged overruling *Bivens*. E.g., *Egbert*, 596 U.S. at 504 (Gorsuch, J., concurring in the judgment); *Hernandez*, 589 U.S. at 119 (Thomas, J., concurring); *Carlson*, 446 U.S. at 31-32 (Rehnquist, J., dissenting). Circuit Judges have joined the chorus. There is, of course, Judge Richardson's dissent below, Pet. App. 23a-37a, which the Eleventh Circuit endorsed in *Johnson*, 119 F.4th at 851. And then there are the separate opinions out of the Second Circuit in *Edwards*. 107 F.4th at 86 n.6 (Park, J., concurring in the judgment); *id.* at 91 (Parker, J., dissenting). Judge Silberman repeatedly urged this Court to overrule *Bivens*, which he saw as "another egregious example" of the Court "acting like a common law court rather than an Article III court." *K.O. by and through E.O. v. Sessions*, 41 F.4th 664, 665 (D.C. Cir. 2022) (Silberman, J., concurring) (collecting cases). And Judge Sutton, writing for a Sixth Circuit majority, noted: "There's something to be said for … pointing out that the best idea for [plaintiffs] is to urge Congress to create a cause of action." *Callahan v. Fed. Bureau of Prisons*, 965 F.3d 520, 523 (6th Cir. 2020).

"[T]he time has come to consider discarding the *Bivens* doctrine altogether." *Hernandez*, 589 U.S. at 114 (Thomas, J., concurring). And this is an optimal case to do so. The Fourth Circuit extended *Bivens* to a new context despite this Court's strong reservations against the whole project of implying remedies. If *Bivens* has not survived into the twenty-first century, the Court should say so, in fairness to litigants and lower courts alike. That would provide

clarity, cut litigation costs, and end decades of incremental interventions.

III. The questions presented are exceptionally important and squarely presented.

1. Recognizing an implied right of action implicates separation-of-powers questions that go to the core of our constitutional framework. These questions are inherently important. Here, they arise in a setting raising sensitive concerns about whether recognizing new inmate *Bivens* actions will undercut the ability of correctional officers to maintain safety and discipline in the prison system.

The stakes are daunting. The Bureau of Prisons employs more than 36,000 people overseeing more than 155,000 inmates in 122 prisons across the nation. Fed. Bureau of Prisons, *About Our Agency,* https://www.bop.gov/about/agency/ (last visited Jan. 13, 2025); Fed. Bureau of Prisons, *About Our Facilities*, https://www.bop.gov/about/facilities/federal_prisons.jsp (last visited Jan. 13, 2025). If the prospect of *Bivens* suits limits federal officers' ability to safely manage those institutions, the consequences could be catastrophic. And because the prisons are located in different circuits, only this Court can ensure uniformity.

The question of *Bivens* remedies for Eighth Amendment excessive force claims recurs frequently. Since *Egbert* came down in June 2022, it has reached the circuit courts at least a dozen times, yielding five published decisions and seven unpublished ones. In the former category are the decision below and the four cases discussed in Part I, above. In the latter

category are *Greene v. United States*, No. 21-5398, 2022 WL 13638916, at *3 (6th Cir. Sept. 13, 2022) (order) (plaintiff's Eighth Amendment excessive force claim "was not cognizable under *Bivens*."); *Alsop v. Fed. Bureau of Prisons*, No. 22-1933, 2022 WL 16734497, at *3 (3d Cir. Nov. 7, 2022) (per curiam order) (plaintiff's allegations that correctional officer used excessive force were "not a basis for relief under *Bivens*."); *Patton v. Blackburn*, No. 21-5995, 2023 WL 7183139 (6th Cir. May 2, 2023) (plaintiff's Eighth Amendment excessive force claim arose in a new context and failed in light of special factors); *Farrington v. Diah*, No. 22-13281, 2023 WL 7220003 (11th Cir. Nov. 2, 2023) (per curiam) (plaintiff's Eighth Amendment excessive force claim was properly dismissed, as it arose in a new context and alternative remedies were available); *Anderson v. Fuson*, No. 23-5342, 2024 WL 1697766 (6th Cir. Feb. 1, 2024) (order) (plaintiff's Eighth Amendment excessive force claim arose in a new context and failed in light of special factors); *Landis v. Moyer*, No. 22-2421, 2024 WL 937070, at *3 (3d Cir. Mar. 5, 2024) ("Because the BOP provides an alternative remedy, a *Bivens* action for use of excessive force in violation of the Eighth Amendment is unavailable."); *Ajaj v. Fozzard*, No. 23-2219, 2024 WL 4002912, at *2 (7th Cir. Aug. 30, 2024) (order) (because Congress has provided for an alternative remedial structure in the Bureau's Administrative Remedy Program, "a *Bivens* remedy cannot apply.").

2. This case is an ideal vehicle for resolving the questions presented, which were outcome-determinative below. The district court dismissed Fields's *Bivens* claim on prescreening review. No additional factual development is needed. The Fourth Circuit reversed because it considered extensions of

Bivens warranted in the Eighth Amendment context, applying a methodology at odds with both this Court's teaching and its sister circuits' reasoning. The majority triggered a cogent and forceful dissent, which joined battle not only on the advisability of extending *Bivens* to a novel Eighth Amendment context, but also on the continuing vitality of *Bivens* itself.

Further percolation is unnecessary. These cases keep working their way up through the court system, and the courts of appeals keep batting them down—with the occasional outlier like the decision below, or Judge Parker's dissent in *Edwards*. Circuit Judges are openly pleading for this Court's help in either clarifying *Bivens* or finally putting it to rest. This Court should intervene now both to restore uniformity and stem a tide of further unnecessary litigation.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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APPENDIX

TABLE OF APPENDICES

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT, FILED JULY 25, 2024

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 23-6246

ANDREW FIELDS, III,

Plaintiff-Appellant,

v.

FEDERAL BUREAU OF PRISONS; WARDEN STREEVAL; A. W. GOLDEY; CAPTAIN BAKER; MITCHELL; MULLINS; NEFF; EWING; GAYHEART; SESSONS; FIELDS; SLOAN; NURSE SCOTT; J. ROBBINS; BOLLING; GARRETT; SCHOLL; GILBERT; BAKER; BARKER; FARMER; DICKENSON; LIEUTENANT LAFFIN; LIEUTENANT NICHOLOUS; LIEUTENANT HAMILTON; LIEUTENANT MULLINS; HUGHES; LASTER,

Defendants-Appellees.

Argued: January 26, 2024 Decided: July 25, 2024

Appeal from the United States District Court for the Western District of Virginia, at Roanoke. Elizabeth Kay Dillon, District Judge. (7:22-cv-00021-EKD-JCH)

Appendix A

Before GREGORY, THACKER, and RICHARDSON, Circuit Judges.

Affirmed in part, reversed in part, and remanded by published opinion. Judge Gregory wrote the opinion, in which Judge Thacker joined. Judge Richardson wrote a dissenting opinion.

GREGORY, Circuit Judge:

While incarcerated at U.S. Penitentiary (USP) Lee, Andrew Fields was the target of egregious physical abuse. There is little doubt that Fields would have a viable § 1983 claim against prison officials if he had been incarcerated at a state prison. But Fields was at a federal facility, and claims against federal officials for constitutional violations are severely limited under established precedent. Thus, the district court concluded that Fields cannot obtain relief and that his claim must be dismissed pursuant to the Prison Litigation Reform Act's prescreening procedure. Though we acknowledge the limited availability of claims under *Bivens v. Six Unknown Named Agents of Federal Narcotics Bureau* against federal officials, including officers in federal prisons, we conclude that Fields can overcome those limitations and successfully state a claim against the officers. Accordingly, we reverse.

I.

We review de novo a district court's dismissal through PLRA prescreening for failure to state a claim. *Moore v. Bennette*, 517 F.3d 717, 728 (4th Cir. 2008). In so doing, we

apply the same standard as under Rule 12(b)(6). *Veney v. Wyche*, 293 F.3d 726, 730 (4th Cir. 2002). We accept all facts pled in the Complaint as true and "draw all reasonable inferences in favor of the plaintiff." *Nemet Chevrolet, Ltd. v. Consumeraffairs.com, Inc.*, 591 F.3d 250, 253 (4th Cir. 2009). Because the complaint in this case was filed pro se, we construe the allegations "liberally" in the plaintiff's favor. *Shaw v. Foreman*, 59 F.4th 121, 126 (4th Cir. 2023).

II.

Fields alleges that he was the victim of excessive force, inflicted by several prison officials at USP Lee in violation of the Eighth Amendment. Specifically, he alleges that on November 10, 2021, he went to lunch without his inmate movement pass, which he was required to carry with him whenever he left his housing unit. J.A. 9. Upon his return, he was escorted to USP Lee's lieutenants' office, where he was berated for failing to carry his inmate movement pass with him at all times. J.A. 10-11. He was then ordered to be taken to the special housing unit (SHU), colloquially known as "the hole," and placed in administrative segregation. J.A. 11. Before he was taken to the SHU, an officer conducted a pat down search and seized several legal documents Fields had on his person and Fields's prescription eyeglasses. J.A. 12. To date, neither the documents nor the eyeglasses have been returned. *Id.*

On the way to the SHU, a scuffle erupted. J.A. 13. According to an incident report appended to the complaint, Fields allegedly tried to assault the officers escorting him.

J.A. 29. As a result of this incident, Fields was placed in ambulatory restraints and taken the rest of the way to the SHU in a wheelchair. J.A. 13. This is the first alleged incident of excessive force, though Appellees argue that the officers' actions were justified because Fields initiated the scuffle.

Once at the SHU, Fields was placed in an observation cell. J.A. 14. At regular intervals, prison staff were required to check on Fields. Despite the fact that Fields was still in restraints with both his hands and feet cuffed, the officers used each check as another opportunity to physically abuse Fields, including by ramming his head into the concrete cell wall and hitting Fields with a fiberglass security shield. J.A. 14. There is no allegation that Fields posed a physical threat to the officers during any of these checks. J.A. 14-23. Fields alleges that this entire sequence of events was retaliation for his involvement in an unrelated proceeding concerning events that occurred at a different federal prison. J.A. 9.

Following his time in the SHU, Fields attempted to utilize the Bureau of Prisons' (BOP's) administrative grievance procedure, but prison staff denied him access to the necessary forms. J.A. 24, 26. He was thus unable to pursue any alternative remedies. J.A. 26. After unsuccessfully attempting to access the available administrative remedies, Fields filed a pro se civil rights complaint in the United States District Court for the Western District of Virginia. The suit named the BOP, the prison warden, and several other officers, both supervisory and those who directly interacted with Fields during the events giving rise to this case.

The district court prescreened the complaint pursuant to 28 U.S.C. § 1915A(b). That provision of the Prison Litigation Reform Act (PLRA) requires courts "as soon as practicable after docketing" to review civil cases "in which a prisoner seeks redress from a governmental entity or officer" and "dismiss the complaint, or any portion of the complaint" that "is frivolous, malicious, or fails to state a claim upon which relief may be granted." § 1915A(b). The district court dismissed the complaint in full because, it said, many of its allegations failed to state a constitutional violation and even those that did were not cognizable because "there is no damages remedy under *Bivens*" for those claims. J.A. 96.

Fields appealed the dismissal and has since retained counsel. On appeal, he challenges only the dismissal of his Eighth Amendment excessive force claim. He concedes that this case arises in a new context under our *Bivens* analysis but argues that *Bivens* should nonetheless be extended to permit him to pursue this claim. He does not challenge the dismissal of any of the other claims originally brought in his complaint.

III.

"Although § 1983 gives plaintiffs the statutory authority to sue *state* officials for money damages for constitutional violations, there is no statutory counterpart to sue federal officials." *Mays v. Smith*, 70 F.4th 198, 201 (4th Cir. 2023). If they are to proceed at all, plaintiffs suing federal-officer defendants must proceed under an implied cause of action first established by the Supreme Court in *Bivens v. Six Unknown Named Agents of Federal Bureau*

of Narcotics. 403 U.S. 388, 91 S. Ct. 1999, 29 L. Ed. 2d 619 (1971). To date, the Supreme Court has recognized a *Bivens* cause of action in only three circumstances. In *Bivens* itself, the Supreme Court recognized an implied cause of action against six Federal Bureau of Narcotics agents in their individual capacities. *See generally id.* The agents had shackled the defendant in front of his family, threatened to arrest his entire family, searched his apartment without a search warrant, and arrested him for alleged narcotics violations without a warrant or probable cause. *Id.* at 389. The Supreme Court found an implied cause of action for damages for the alleged Fourth Amendment violation. *Id.* at 390–98. In *Davis v. Passman*, the Supreme Court extended *Bivens* to create an implied cause of action under the Fifth Amendment's Due Process Clause, which prohibits the federal government from denying anyone the equal protection of the law. 442 U.S. 228, 236, 99 S. Ct. 2264, 60 L. Ed. 2d 846 (1979). Specifically, it found a cause of action against a congressman for firing his female secretary. *Id.* at 234. Finally, in *Carlson v. Green*, the Supreme Court allowed a prisoner's estate to sue BOP officials for violating the inmate's Eighth Amendment rights by failing to treat the prisoner's asthma. 446 U.S. 14, 100 S. Ct. 1468, 64 L. Ed. 2d 15 (1980). The latter is akin to a § 1983 claim for Eighth Amendment deliberate indifference to medical needs.

Since these decisions were handed down, the tide has turned against *Bivens*. "The [Supreme] Court has made clear that expanding the *Bivens* remedy to a new context is an extraordinary act that will be unavailable in most every case." *Mays*, 70 F.4th at 202. And in the Supreme

Court's most recent *Bivens* decision, *Egbert v. Boule*, 596 U.S. 482, 142 S. Ct. 1793, 213 L. Ed. 2d 54 (2022), "the Supreme Court all but closed the door on *Bivens* remedies." *Dyer v. Smith*, 56 F.4th 271, 277 (4th Cir. 2022). It emphasized that "we have 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 (quoting *Hernandez v. Mesa*, 589 U.S. 93, 140 S. Ct. 735, 741, 206 L. Ed. 2d 29 (2020)). Thus, the *Egbert* court asserted that "recognizing a cause of action under *Bivens* is 'a disfavored judicial activity,'" but chose not to dispense with *Bivens* altogether. *Id.* (quoting *Ziglar v. Abbasi*, 582 U.S. 120, 121, 137 S. Ct. 1843, 198 L. Ed. 2d 290 (2017)).

A.

To determine whether a plaintiff's claim may proceed under *Bivens*, we conduct a two-step analysis:

> First, we ask whether the case presents a new *Bivens* context—*i.e.*, is it meaningfully different from the three cases in which the Court has implied a damages action. Second, if the claim arises in a new context, a *Bivens* remedy is unavailable if 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. If there is even a single reason to pause before applying *Bivens*

> in a new context, a court may not recognize a *Bivens* remedy.

Egbert, 596 U.S. at 492 (internal quotations omitted).

With respect to the first step, the Supreme Court has counseled that "[a] claim may arise in 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." *Hernandez v. Mesa*, 589 U.S. 93, 140 S. Ct. 735, 743, 206 L. Ed. 2d 29 (2020). "A case might differ in a meaningful way because of 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 v. Abbasi*, 582 U.S. 120, 139–40, 137 S. Ct. 1843, 198 L. Ed. 2d 290 (2017).

Fields concedes that this case arises in a new context.[1] We are thus faced solely with step two and must determine

1. It is perhaps arguable that this case arises in the same context as *Carlson*. Like this case, *Carlson* was a suit against prison officials whose individual conduct threatened the health of an inmate. But because Fields concedes that his case arises in a new context, he has waived that argument. *See Grayson O Co. v. Agadir Int'l LLC*, 856 F.3d 307, 316 (4th Cir. 2017) ("A party waives an argument by failing to present it in its opening brief or by failing to develop its argument—even if its brief takes a passing shot at the issue." (cleaned up)).

"whether there is any reason to think that Congress might be better equipped to create a damages remedy" for Fields's excessive force claim. "Put another way, the most important question is who should decide whether to provide for a damages remedy, Congress or the courts?" *Egbert*, 596 U.S. at 491–92 (internal quotation omitted).

B.

Since *Egbert*, this Court has declined to extend *Bivens* in a number of cases brought by federal prison inmates against BOP officials. In these cases, we concluded that many of the same special factors counseled against extending *Bivens*: (1) Congress's decision to omit an individual capacity damages remedy from the Prison Litigation Reform Act (PLRA); (2) the existence of alternative remedies; and (3) the potential for systemwide consequences.

We have given great weight to Congress's decision to omit an individual-capacity damages remedy from the PLRA because separation of powers is a central concern in deciding whether to extend *Bivens*. That decision, we said, "speaks volumes and counsels strongly against judicial usurpation of the legislative function." *Bulger v. Hurwitz*, 62 F.4th 127, 141 (4th Cir. 2023) (declining to extend *Bivens* to an inmate's Eighth Amendment claims that BOP officials failed to protect him against attack by fellow inmates and transferred him to a "violent" facility); *Mays*, 70 F.4th at 206 (declining to extend *Bivens* to an inmate's Fifth Amendment equal protection and due process claims stemming from alleged racial discrimination by the

inmate's supervisor in the BOP's employment program).

Relatedly, because courts "may not fashion a *Bivens* remedy if Congress has already provided, or has authorized the Executive to provide, 'an alternative remedial structure,'" *Egbert*, 596 U.S. at 493 (quoting *Ziglar*, 582 U.S. at 137), our prior cases pointed to the BOP's Administrative Remedy Program (ARP) as another factor counseling against extending *Bivens*. We have said that the existence of an alternative remedial scheme prevents us from extending *Bivens*, even when that scheme does "not provide complete relief." *Tate v. Harmon*, 54 F.4th 839, 847 (4th Cir. 2022) (quoting *Egbert*, 596 U.S. at 493). That is true even when the alternate remedies cannot provide a form of relief that would be available in court. *See Earle v. Shreves*, 990 F.3d 774, 777 (4th Cir. 2021) ("While these alternate remedies do not permit an award of money damages, they nonetheless offer the possibility of meaningful relief and therefore remain relevant to our analysis."); *Schweiker v. Chilicky*, 487 U.S. 412, 425, 108 S. Ct. 2460, 101 L. Ed. 2d 370 (1988) (declining to imply a Bivens remedy for due process claims arising from the denial of Social Security benefits despite the unavailability of compensatory damages under an alternate remedial scheme). Finally, we have noted that "[t]he potential unavailability of a remedy in a particular circumstance does not warrant supplementing that scheme." *Bulger*, 62 F.4th at 141 (declining to extend *Bivens* in part because of the ARP despite the fact that the inmate "did not have enough time to avail himself of the remedies offered by the ARP before his transfer to [a different facility] or before he was killed").

Our precedents also point to the potential for systemwide consequences that may result from extending *Bivens*. Allowing "broad-based, systemic claim[s] against an array of federal officials," we said, would risk "expand[ing] prison officials' liability from previous *Bivens* actions to systemic levels, potentially affecting not only the scope of their responsibilities and duties but also their administrative and economic decisions." *Tate*, 54 F.4th at 846. In contrast to the claims in *Carlson* (that the prison officials were deliberately indifferent when they failed to treat the inmate's asthma), which were "narrow and discrete," and thus "implicat[ed] well-established criteria for liability and damages," *id.*, claims based on conditions of confinement, *see Tate*, 54 F.4th at 841, failure to protect by moving an inmate to a "violent facility," *see Bulger*, 62 F.4th at 133, or discrimination in BOP employment programs, *see Mays*, 70 F.4th at 200, implicate "'not only the scope of [each official's] responsibilities and duties' but also the organizational policies, administrative decisions, and economic concerns inextricably tied to inmate transfer and placement determinations." *Bulger*, 62 F.4th at 138 (quoting *Tate*, 54 F.4th at 846).

What's more, recognizing these claims "could open the door for increased litigation over the myriad decisions made every day regarding inmate discipline, transfer, and employment across the entire BOP system." *Mays*, 70 F.4th at 206. The uncertainty about the extent of these systemwide consequences foreclosed relief. *Id.* Thus, in *Tate, Bulger*, and *Mays*, our conclusion that the claims risked a cascade of systemwide consequences hinged on the fact that those claims implicated systemic decision-

making and a broad swath of legitimate every-day BOP decisions.

But these factors do not apply with equal force to Fields's case, and thus they do not bar his claim.

IV.

Fields alleges that while he was being held in the Special Housing Unit, he was subject to egregious physical abuse with no imaginable penological benefit. The officers' alleged conduct amounts to a clear-cut constitutional violation that would easily withstand a motion to dismiss in a § 1983 case. Then, adding insult to injury, rogue officers intentionally withheld the administrative remedies that the executive branch has implemented to redress such violations. This must be a rare case. *See* Oral Arg. at 26:17–27:00 (the government conceding that the egregious abuse alleged here is rare and cannot be condoned). If the officers' conduct alleged here is a frequent occurrence in prisons across the country, it would be a telling indictment of the American carceral system. In such a case, where an inmate brings a claim against individual, front-line officers who personally subjected the plaintiff to excessive force in clear violation of prison policy, and where rogue officers subsequently thwarted the inmate's access to alternative remedies, no special factors counsel against providing a judicial remedy.

Preliminarily, because Fields's allegations are exclusively against the individual front-line officers who subjected him to excessive force, the BOP, the warden,

and the other supervisory officials named in the complaint must be dismissed. Fields himself concedes the BOP is not subject to suit under *Bivens* and he frames the allegations and claim as being only "against individual officers who commit[ed] isolated acts of abuse." Reply Br. at 1. While Fields contends that he can join supervisory officers as defendants pursuant to Federal Rule of Civil Procedure 20 even if his claim is against the front-line officers, that is true only if he has a cause of action against the supervisory officers. *See* Fed. R. Civ. P. 20 (permitting joinder of defendants against whom "a right to relief is asserted"). Because the allegations and Fields's arguments on appeal clearly present his claim as being against the front-line officers only, he cannot join supervisory officers under Rule 20. Accordingly, we affirm the district court's opinion in so far as it dismissed the claims against the BOP and supervisory officers, and we proceed with our *Bivens* analysis only with respect to the individual front-line officers who personally subjected Fields to excessive force.

Under the circumstances presented here, the risk of systemwide consequences identified in our prior cases is negligible. In *Tate, Bulger*, *Mays*, and *Earle*, our concern about systemwide consequences stemmed from the fact that the claims in those cases implicated prison policies and broader systemic concerns. *See Tate*, 54 F.4th at 846; *Bulger*, 62 F.4th at 141–42; *Mays*, 70 F.4th at 206; *Earle*, 990 F.3d at 780. That concern was heightened because those claims implicated issues of prison administration over which the BOP has broad discretion, requiring deference from the judiciary. *See Bulger*, 62 F.4th at 140–41 (noting Congress's choice to give the BOP discretion

over inmate placement, inmate transfer, and housing decisions); *Mays*, 70 F.4th at 205 (stating that the BOP must be given deference concerning prison discipline and inmate employment); *Earle*, 990 F.3d at 781 (stating that extending *Bivens* for retaliation claims "could lead to an intolerable level of judicial intrusion into an issue best left to correctional experts").

By contrast, Fields challenges only the individual conduct of rogue prison officers. His claim implicates no prison policy.[2] In fact, part of his argument rests on the

2. The dissent asserts that the "individual instances of discrimination" challenged in *Mays* likewise concern only improper conduct by individual prison officials. The dissent's characterization of *Mays* ignores the fact that *Mays* also involved a procedural due process claim for the inmate's administrative detention and transfer to another institution without "notice or an opportunity to rebut the allegations." *Mays*, 70 F.4th at 201. That allegation certainly concerns systemic decision-making, not just individual discriminatory action. In accusing us of "cleverly reframe[ing] *Mays*," Dissent Op. at 31 n.10, it is the dissent itself that misconstrues our precedent. But even if the dissent were correct that *Mays* concerned only an allegation of discrimination, determining whether such an allegation is viable requires probing the entire system within which the discrimination occurred, not just the individual officer's conduct toward the plaintiff. By way of illustration, in Title VII cases, it is not enough for plaintiffs to allege how they were treated; to prove their claims, plaintiffs must additionally point to comparators who were treated differently. *See, e.g., Spencer v. Va. State Univ.*, 919 F.3d 199, 207 (4th Cir. 2019). But determining whether force was excessive is a much narrower inquiry, which can be resolved with reference only to the facts of the incident of alleged excessive force. Consequently, this claim, unlike a discrimination claim like the one presented in

fact that the officers acted *in violation of* the relevant prison policy. *See* Opening Br. at 16; *see also Younger v. Crowder*, 79 F.4th 373, 384 (4th Cir. 2023) (concluding that prison official's violation of prison policy was evidence of Eighth Amendment violation in § 1983 case). Thus, his claim does not masquerade as a "vehicle for altering an entity's policy," *Ziglar v. Abbasi*, 582 U.S. 120, 140, 137 S. Ct. 1843, 198 L. Ed. 2d 290 (2017) (internal quotations omitted), but rather constitutes an appropriate attempt to ensure *compliance* with the entity's policy.

Similarly, because the defendant officers are alleged to have violated prison policy, they lacked the discretion to act as they did. Because Fields's claim is "narrow and discrete" in that it concerns only the conduct of individual prison officers who acted in violation of prison policy, it more closely resembles *Carlson* than this Court's recent precedents. *See Tate*, 54 F.4th at 847 (distinguishing Tate's claims from those in *Carlson* on the basis that Tate's claims were not "narrow and discrete"). In light of the body of excessive force precedent that has been developed in the § 1983 context, Fields's claim, like that in *Carlson*, also implicates "well-established criteria for liability and damages," further limiting the potential for systemic consequences presented when the judiciary involves itself in an area where murky standards indicate broad BOP discretion. *See id.* As such, claims like the one presented in this case do not present the risk of systemwide consequences that our prior cases highlighted

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Mays, is unique among our precedents in that it is "narrow and discrete." *See Tate*, 54 F.4th at 847.

because they do not implicate systemic policies or unduly impose judicial oversight in areas over which the BOP has discretion.

To the extent that extending scrutiny to new categories of conduct or defendants implicates the potential for systemwide consequences, *see Bulger*, 62 F.4th at 140, this case's similarity to *Carlson* alleviates those concerns. *Carlson* already provides a cause of action against individual officers who fail to act to respond to an inmate's medical needs. Requiring individual officers to refrain from acting affirmatively to endanger an inmate's health implicates the same principles and affects the same defendants.

Relatedly, the impact on prison officials' discharge of their duties will be minimal. Because Fields's claim is brought only against front-line officers and does not implicate any systemic policies, by its very nature it cannot impact the discharge of supervisory officers' duties. And though the government raises the specter of frivolous litigation that could have a chilling effect on front-line officers' discharge of their duties, that concern is overstated. This case itself demonstrates why. The PLRA directs courts to prescreen cases brought by inmates "before docketing, if feasible." 28 U.S.C. § 1915A(a). As happened here, that means many cases will be dismissed before officers are even served. If officers never learn of cases filed against them, that litigation cannot have an impact on the discharge of their duties.

Next, though this Court has declined to extend *Bivens*

to cases brought by federal inmates in the past, it has done so on the theory that inmates have access to alternative remedies. But that reasoning does not apply here—Fields lacked access to alternative remedies because prison officials *deliberately* thwarted his access to them. The government argues that *Bulger* squarely forecloses any reliance on the unavailability of an administrative remedy in determining whether to extend *Bivens*. But *Bulger* does not properly apply. In *Bulger*, the inmate could not avail himself of the ARP because he died before he had a chance to file a formal grievance. *Bulger*, 62 F.4th at 141. We said that this special factor still counseled against a *Bivens* extension, despite the fact that the inmate's estate could not itself file a grievance through the ARP process and the inmate had not had time to do so. *Id.* But that holding concerned the inadequacy of the ARP itself, which was not broad enough in that case to provide the desired relief. *Bulger*, 62 F.4th at 141.

By contrast, here, the ARP is not the problem. The system put in place by the executive has the capacity to provide relief to Fields. Instead, the problem was the intentional improper conduct of the individual officers, which deprived Fields of access to the ARP. Unlike in *Bulger*, what is at issue here is not the ARP's adequacy or whether Fields can obtain the remedy he seeks through the ARP. Rather, the question is whether the ARP is operational, such that it can provide any remedy to any prisoner at all. And because Fields has alleged that officers intentionally subverted the operation of the ARP, its technical existence does not bar Fields's *Bivens* claim.

Permitting a *Bivens* claim to proceed where rogue

officers intentionally subverted alternative remedies does not improperly arrogate power to the judiciary. "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 that calibration by superimposing a *Bivens* remedy." *Egbert*, 596 U.S. at 498. But when rogue officers thwart the inmate's access to alternative remedies, it is the officers' conduct that interferes with the balance struck by the existing remedial scheme. As the government conceded at oral argument, no court (in this Circuit or otherwise) has ever before been presented with a case in which one of the allegations was that the grievance process was intentionally withheld from the inmate. Oral Arg. at 30:52–32:04. But in the unfortunate circumstance, such as this, where that scenario does arise, providing a judicial remedy is not a matter of "second-guess[ing the] calibration" effected by the coordinate branches because that calibration has already been disrupted. *See id.* Far from trampling on Congress's or the Executive's authority, the judiciary secures the objectives of the wrongfully displaced remedial scheme by stepping in.

The government also contends that the complaint indicates that Fields may have had access to and in fact did access some administrative remedies. Therefore, it argues, whatever may be true of purported excessive force claims without access to administrative remedies more broadly, Fields himself had access. But because Fields's complaint was filed pro se, we are required to construe it liberally and make all possible inferences in Fields's favor. *See Shaw*, 59 F.4th at 126. Viewing the complaint through

that lens, it adequately alleges that all administrative remedies were withheld.[3]

Finally, though the PLRA may counsel against extending *Bivens* in cases brought by inmates in federal prisons as a general matter, it cannot be true that it bars such claims in every case. It certainly does not counsel against extending *Bivens* in this case. When the PLRA was enacted in 1996, *Carlson* was already on the books. This Court has rightly noted that the PLRA's silence concerning an individual damages remedy for federal inmates "speaks volumes and counsels strongly against usurpation of the legislative function." *Bulger*, 62 F.4th at 141. But had Congress intended to bar all *Bivens* claims brought by federal inmates, it could easily have done so by statutorily overruling *Carlson*. Congress's decision to leave *Carlson* intact *also* "speaks volumes."

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3. The government also argues that, even putting aside administrative remedies, the Federal Tort Claims Act provides an alternative remedy that bars a *Bivens* claim. But that argument is foreclosed by the Supreme Court's decision in *Carlson*, where it stated that the FTCA "contemplates that victims of the kind of intentional wrongdoing alleged in this complaint shall have an action under FTCA against the United States *as well as* a *Bivens* action against the individual officers." *Carlson*, 446 U.S. at 20 (emphasis added). Though this pronouncement is in tension with more recent Supreme Court precedent, it has never been directly overruled. Supreme Court's decisions "remain binding precedent until [the Supreme Court] see[s] fit to reconsider them, regardless of whether subsequent cases have raised doubts about their vitality," *Bosse v. Oklahoma*, 580 U.S. 1, 3, 137 S. Ct. 1, 196 L. Ed. 2d 1 (2016) (internal quotation omitted), so we are bound by this ruling.

See id. Carlson's continued existence thus belies the claim that the PLRA bars *Bivens* actions by federal inmates wholesale.[4]

The question then is whether the PLRA prohibits an implied cause of action in *this* case. As we explain below, because Fields alleged that no alternative remedy was in fact available, the theoretical existence of administrative remedies cannot bar his recourse to the judiciary to obtain a remedy. This balance between the preference for administrative remedies and the recognition that rogue actors can make administrative remedies functionally inoperable is entirely in line with the PLRA. As a general matter, the PLRA requires inmates to exhaust administrative remedies that "are available" before filing

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4. Contrary to the dissent's assertion, *see* Dissent Op. at 24–25, we do not take Congress's decision not to overrule *Carlson* as a green light for implying new *Bivens* causes of action in the prison context. We recognize, as the dissent also points out, that the Supreme Court has rejected that approach. *See* Dissent Op. at 25 (citing *Hernandez*, 589 U.S. at 111 n.9). The dissent takes the Supreme Court's admonition that Congress's decision to leave *Carlson* intact is "not a license to create a new *Bivens* remedy in a context we have never before addressed," *Hernandez*, 589 U.S. at 111 n.9, as an affirmative instruction *not* to extend *Bivens*. But that takes it too far. Rather, Congress's decision to leave *Carlson* intact is a neutral fact, telling us only what we already knew: that *Bivens* extensions are "disfavored," *Ziglar*, 582 U.S. at 121, but that the proverbial door to a *Bivens* extension remains slightly ajar. *Cf. Egbert*, 596 U.S. at 504 (Gorsuch, J., concurring). Because Congressional silence on this question does not resolve the issue one way or the other, we must look elsewhere to determine whether Fields's claim is one that can proceed through that proverbial door.

a lawsuit. *See* 42 U.S.C. § 1997e(a). But while an inmate "must exhaust available remedies," they "need not exhaust unavailable ones." *Ross v. Blake*, 578 U.S. 632, 642, 136 S. Ct. 1850, 195 L. Ed. 2d 117 (2016). Crucially, the Supreme Court has stated that an administrative remedy is "unavailable" for purposes of the PLRA where, as here, "prison administrators thwart inmates from taking advantage of a grievance process through machination, misrepresentation, or intimidation." *Id.* at 644.

The PLRA permits prisoners to bring lawsuits for physical injuries, *see* 42 U.S.C. § 1997e(e) (limiting recovery only for "mental or emotional injury"), and because the PLRA was enacted in an era where *Bivens* extensions were more readily available than they are today, the omission of an individual-capacity damages remedy is not necessarily indicative of intent to prohibit such a remedy. The purpose of the PLRA is to *reduce* prisoner litigation, not do away with it entirely, and most of its provisions are procedural, rather than substantive, bars. Because the PLRA grants inmates access to the courts where prison officials thwarted their ability to utilize administrative procedures, permitting cases such as this to proceed under *Bivens* does not "conflict with Congress's choice," as expressed in the PLRA, concerning the remedies and procedures available to aggrieved inmates. *See Bulger*, 62 F.4th at 141.

V.

For the foregoing reasons, we affirm in part and reverse in part the district court's dismissal of Fields's

claims. We affirm the dismissal of Fields's excessive force claim as to the BOP, USP Lee's warden, and other supervisory prison officials who were not personally involved in the conduct alleged in the complaint. We reverse and remand Fields's excessive force claim as to the individual officers who personally subjected Fields to excessive force.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED

RICHARDSON, Circuit Judge, dissenting:

My colleagues readily admit that "the tide has turned against *Bivens*." Majority Op. at 7. And before today's holding, one could well have believed that the Supreme Court had effectively ended lower courts' efforts to recognize novel implied money-damages actions for deprivations of constitutional rights. But my good friends in the majority claim to see a bit of wiggle room in the Supreme Court's repeated admonitions. The wiggle room they purport to detect, however, has been foreclosed by both that Court and this one. Yet the majority charges ahead. I must respectfully dissent.

In the forty-four years since the Supreme Court decided *Carlson v. Green*, 446 U.S. 14, 100 S. Ct. 1468, 64 L. Ed. 2d 15 (1980), it "has 'consistently rebuffed' every request—12 of them now—to find implied causes of action against federal officials for money damages under the Constitution."[1] *Tate v. Harmon*, 54 F.4th 839, 843 (4th

1. *See Chappell v. Wallace*, 462 U.S. 296, 103 S. Ct. 2362, 76 L. Ed. 2d 586 (1983); *Bush v. Lucas*, 462 U.S. 367, 103 S. Ct. 2404, 76 L. Ed. 2d 648 (1983); *United States v. Stanley*, 483 U.S. 669, 107 S. Ct. 3054, 97 L. Ed. 2d 550 (1987); *Schweiker v. Chilicky*, 487 U.S. 412, 108 S. Ct. 2460, 101 L. Ed. 2d 370 (1988); *FDIC v. Meyer*, 510 U.S. 471, 114 S. Ct. 996, 127 L. Ed. 2d 308 (1994); *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 122 S. Ct. 515, 151 L. Ed. 2d 456 (2001); *Wilkie v. Robbins*, 551 U.S. 537, 127 S. Ct. 2588, 168 L. Ed. 2d 389 (2007); *Hui v. Castaneda*, 559 U.S. 799, 130 S. Ct. 1845, 176 L. Ed. 2d 703 (2010); *Minneci v. Pollard*, 565 U.S. 118, 132 S. Ct. 617, 181 L. Ed. 2d 606 (2012); *Ziglar v. Abbasi*, 582 U.S. 120, 137 S. Ct. 1843, 198 L. Ed. 2d 290 (2017); *Hernandez v. Mesa*, 589 U.S. 93, 140 S. Ct. 735, 206 L. Ed. 2d 29 (2020); *Egbert v. Boule*, 596 U.S. 482, 142 S. Ct. 1793, 213 L. Ed. 2d 54 (2022).

Cir. 2022) (quoting *Hernández*, 589 U.S. at 102). And this Court has repeatedly observed that, while stopping short of overturning *Bivens* itself, "[t]he [Supreme] Court has made clear that expanding the *Bivens* remedy to a new context is an 'extraordinary act' . . . that will be unavailable 'in most every case.'" *Mays v. Smith*, 70 F.4th 198, 202 (4th Cir. 2023) (quoting *Egbert*, 596 U.S. at 492, 497 n.3); *see Bulger v. Hurwitz*, 62 F.4th 127, 136–37 (4th Cir. 2023); *Earle v. Shreves*, 990 F.3d 774, 778 (4th Cir. 2021); *Tate*, 54 F.4th at 843–45.

When faced with a *Bivens* claim, therefore, we conduct a "highly restrictive" twostep inquiry. *Bulger*, 62 F.4th at 137. We first ask whether the claim arises in a "new context," that is, one different from those to which the Supreme Court has already extended *Bivens*. *Egbert*, 596 U.S. at 492. This step need not detain us long because Fields rightly concedes that his case arises in a new context; the Supreme Court has never approved an implied damages action for prisoners' Eighth Amendment claims for excessive force. *See Ziglar*, 582 U.S. at 149 ("[T]he new-context inquiry is easily satisfied."); *Hernández*, 589 U.S. at 102 ("[O]ur understanding of a 'new context' is broad."); *id.* at 103 ("A claim may arise in 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.").

So "we proceed to the second step and ask whether there are any 'special factors that counsel hesitation' about granting the extension." *Hernández*, 589 U.S. at 102 (quoting *Ziglar*, 582 U.S. at 136 (cleaned up)). There is no "exhaustive list" of factors that counsel hesitation. *Id.* (quoting *Ziglar*, 582 U.S. at 139). Yet we are not without guidance. The Court has

told us that "separation-of-powers principles" should anchor our analysis. *Id.* (quoting *Ziglar*, 582 U.S. at 135). Courts must cautiously defer to the nation's lawmakers, who enjoy the principal—perhaps sole—authority to invent new legal causes of action for constitutional violations. *See Egbert*, 596 U.S. at 491–92 ("[A]bsent the utmost deference to Congress' preeminent authority in this area, the courts 'arrogat[e] legislative power.'" (quoting *Hernández*, 589 U.S. at 100 (second alteration in original))); *id.* at 502–03 (Gorsuch, J., concurring in the judgment); *Hernández*, 589 U.S. at 100–01; *id.* at 117–18 (Thomas, J., concurring); *Ziglar*, 582 U.S. at 135–36; *Carlson*, 446 U.S. at 27–28 (Powell, J., concurring); *id.* at 36–44, 51–53 (Rehnquist, J., dissenting); *Bivens*, 403 U.S. at 427–30 (Black, J., dissenting). Accordingly, if "there is any reason to think that Congress might be better equipped to create a damages remedy" than the judiciary is, then sanctioning a new *Bivens* action is inappropriate. *Egbert*, 596 U.S. at 492. And by "any reason," the Court means "*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 (quoting *Ziglar*, 582 U.S. at 136).[2] Here, we have not just one reason, but three.

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2. Congress will almost always be better equipped to create a damages remedy than courts are. *Egbert*, 596 U.S. at 491 ("Congress is 'far more competent than the Judiciary' to weigh [relevant] policy considerations." (quoting *Schweiker*, 487 U.S. at 423)); *id.* at 504 (Gorsuch, J., concurring) ("[I]f the only question is whether a court is 'better equipped' than Congress to weigh the value of a new cause of action, surely the right answer will always be no."); *Hernández*, 589 U.S. at 101; *Bivens*, 403 U.S. at 429 (Black, J., dissenting); *see also Bush*, 462 U.S. at 389 ("Not only has Congress developed considerable familiarity with balancing governmental efficiency and the rights of employees, but it also may inform itself through factfinding procedures such as hearings that are not available to the courts."). But a court need

Congressional inaction notwithstanding congressional attention. The first factor counseling hesitation is that Congress has actively legislated in this area but has not enacted a statutory cause of action for money damages. *See Ziglar*, 582 U.S. at 148–49. Congress has been anything but absent from, and anything but silent on, the subject of prisoner litigation. *See Mays*, 70 F.4th at 206. The most obvious example is the Prison Litigation Reform Act of 1995 ("PLRA"), "which made comprehensive changes to the way prisoner abuse claims must be brought in federal court." *Ziglar*, 582 U.S. at 148. Despite having "specific occasion to consider the matter of prisoner abuse and . . . remed[ies for] those wrongs," Congress has not—in the PLRA or otherwise[3]—"provide[d] for a standalone

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not actually determine that Congress is better equipped in order to refuse to recognize a new *Bivens* action. Given the deference to the legislature's primacy in this domain, a court need only find a single reason to "*think* that Congress *might* be better equipped to create a damages remedy." *Egbert*, 596 U.S. at 492 (emphasis added); *see also id.* at 496 ("[E]ven if there is the '*potential*' [that judicial intrusion is inappropriate], a court cannot afford a *Bivens* remedy." (quoting *Ziglar*, 582 U.S. at 140, 148)).

3. Congress evidently still has its eye on this issue. In early July 2024, it passed and sent to the President's desk for approval the Federal Prison Oversight Act, H.R. 3019, 118th Cong. § 2(a) (2024). The bill, which will presumably be signed any day now, focuses on establishing independent oversight mechanisms and improving transparency in the federal prison system. While it creates a new Ombudsman position to receive prisoner complaints, it conspicuously lacks a private money-damages action for prisoners' allegations of any constitutional violations.

damages remedy against federal jailers." *Id.* at 148–49. The logical takeaway from Congress's silence in an area where it has otherwise been active is "that Congress did not want a money damages remedy against" corrections officers. *Tun-Cos v. Perrotte*, 922 F.3d 514, 527 (4th Cir. 2019); *Schweiker*, 487 U.S. at 423 (explaining the need for "appropriate judicial deference to indications that congressional inaction has not been inadvertent"). Thus courts must not supply a damages remedy in its stead. *See Ziglar*, 582 U.S. at 148–49; *Mays*, 70 F.4th at 206; *Bulger*, 62 F.4th at 141.

My colleagues acknowledge the PLRA's silence with respect to damages remedies. *See* Majority Op. at 9. But they suggest that another form of congressional silence negates that "special factor counseling hesitation"—the fact that Congress did not statutorily overrule *Carlson*. *See* Majority Op. at 18. The Supreme Court, however, has expressly rejected that argument, holding that such congressional inaction "certainly does not suggest" a desire for "robust enforcement of *Bivens* remedies," let alone give "license to create a new *Bivens* remedy in a context we have never before addressed." *Hernández*, 589 U.S. at 111 n.9 (citation omitted).[4]

4. We do not know, of course, why Congress has failed to overrule *Carlson* (or *Bivens*, or *Davis v. Passman*, 442 U.S. 228, 99 S. Ct. 2264, 60 L. Ed. 2d 846 (1979)). But *Hernández* tells us that courts cannot use that failure as a reason to expand *Bivens*. 589 U.S. at 111 n.9. Chief Justice Rehnquist provided one possible reason for Congress's passivity: It might "reflect Congress' understanding (albeit erroneous) that *Bivens* was a constitutionally required decision." *Carlson*, 446 U.S. at 33 n.2 (Rehnquist, J., dissenting).

Moreover, in emphasizing congressional silence following *Carlson*, the majority distorts the applicable test and the precedent applying it. The question is not whether "Congress intended to bar all *Bivens* claims" in a particular area. Majority Op. at 18. Rather, the question is whether "there are special factors counselling hesitation" about creating a new money-damages action "in the absence of *affirmative action* by Congress." *Ziglar*, 582 U.S. at 136 (quoting *Carlson*, 446 U.S. at 18 (emphasis added) (internal quotation marks omitted)).[5] In other words, we do not presume the power to create a damages remedy and then ask whether Congress explicitly forbade us from doing so; we instead presume that courts should not fashion legal remedies for constitutional violations and do not find that presumption overcome so long as "there is *even a single reason* to pause." *Mays*, 70 F.4th at 205 (quoting *Egbert*, 596 U.S. at 492). That Congress looked intently and specifically at prisoner litigation and offered no private damages remedy should give us a reason to *think* that Congress *might* not want us to usurp its authority and create one ourselves. Thus we should not imply Fields's requested cause of action. *See* John C.

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5. Indeed, my colleagues' asserted standard bears a remarkable resemblance to the one the Court in *Egbert* expressly repudiated. *See* 596 U.S. at 501 ("*Passman* indicated that a damages remedy is appropriate unless Congress 'explicit[ly]' declares that a claimant 'may not recover damages.' . . . Now, though, we defer to 'congressional inaction' if 'the design of a Government program suggests that Congress has provided what it considers adequate remedial mechanisms.'" (first quoting *Passman*, 442 U.S. at 246–47; and then quoting *Schweiker*, 487 U.S. at 423)).

Jeffries, Jr., et al., *Civil Rights Actions: Enforcing the Constitution* 34 (5th ed. 2022) ("The fact that Congress ha[s] legislated in the area without providing a damages remedy [i]s enough." (citing *Tun-Cos*, 922 F.3d 514)).

This is not just my view. It's what the Supreme Court has told us, *see Ziglar*, 582 U.S. at 148–49, and what prior panels of this Court have held, *see Bulger*, 62 F.4th at 141; *Mays*, 70 F.4th at 206. Whether we consider the Supreme Court's precedent or our own, therefore, the law is clear: The PLRA's lack of a damages remedy is a special factor counseling hesitation, even though Congress has not overruled *Carlson*.[6]

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6. In resisting the conclusion that the PLRA counsels against recognizing a *Bivens* action, my colleagues also assert:

> The PLRA permits prisoners to bring lawsuits for physical injuries, *see* 42 U.S.C. § 1997e(e) (limiting recovery only for "mental or emotional injury"), and because the PLRA was enacted in an era where *Bivens* extensions were more readily available than they are today, the omission of an individual-capacity damages remedy is not necessarily indicative of intent to prohibit such a remedy.

Majority Op. at 19. But rather than grant prisoners a cause of action or say what suits prisoners can bring, § 1997e(e) merely specifies one class of suits that prisoners *cannot* bring: Prisoners can't bring a claim based only on mental or emotional injuries, even if they have an express cause of action for damages under some other law. And since the PLRA was designed to limit, not promote, prisoner lawsuits, *see Jones v. Bock*, 549 U.S. 199, 203–04, 127 S. Ct. 910, 166 L. Ed. 2d 798 (2007), the majority's use of a negative inference here is particularly ill-conceived, *see N.L.R.B. v. SW Gen., Inc.*, 580 U.S. 288, 302, 137 S. Ct. 929, 197

Existence of an alternative remedial scheme. The second factor counseling hesitation is that an alternative remedial scheme exists for aggrieved federal prisoners like Fields. A "court may not fashion a *Bivens* remedy if Congress has already provided, or has authorized the Executive to provide, 'an alternative remedial structure.'" *Egbert*, 596 U.S. at 493 (quoting *Ziglar*, 582 U.S. at 137). Several remedial mechanisms are already in place for inmates, "including suits in federal court for injunctive relief and grievances filed through the BOP's Administrative Remedy Program." *Malesko*, 534 U.S. at 74. "This program provides . . . a[] means through which allegedly unconstitutional actions and policies can be brought to the attention of the BOP and prevented from recurring." *Id.* True, such forward-looking relief differs from backward-facing money damages. But "it is for *Congress*," not us, "to decide whether to 'augment[]' any existing remedial scheme with a damages remedy." *Mays*, 70 F.4th at 206 (quoting *Tun-Cos*, 922 F.3d at 527 (alteration in original)); *see Egbert*, 596 U.S. at 498.

My colleagues dismiss this as a special factor counseling hesitation on the grounds that "Fields lacked access to alternative remedies because prison officials

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L. Ed. 2d 263 (2017) ("The force of any negative implication . . . depends on context." (citation omitted)). Furthermore, the notion that "*Bivens* extensions were more readily available than they are today" is questionable. *See* Cornelia T.L. Pillard, *Taking Fiction Seriously: The Strange Results of Public Officials' Individual Liability Under* Bivens, 88 Geo. L.J. 65, 66–68 (1999).

deliberately thwarted his access to them." Majority Op. at 15. Yet that is "the wrong level of specificity" when deciding whether to imply a *Bivens* action. *Mays*, 70 F.4th at 206; *see Harper v. Nedd*, 71 F.4th 1181, 1188 (9th Cir. 2023); *cf. Stanley*, 483 U.S. at 681. We cannot myopically ask "whether *Bivens* relief is appropriate in light of the balance of circumstances in a 'particular case'"; instead, we must "ask '[m]ore broadly' whether there is any reason to think that 'judicial intrusion' into a given field might be 'harmful' or 'inappropriate.'" *Egbert*, 596 U.S. at 496 (quoting *Stanley*, 483 U.S. at 681, 683 (alteration in original)); *see Bush*, 462 U.S. at 388. For instance, the appellant in *Bulger* argued that the BOP's administrative remedies did not militate against finding a *Bivens* remedy because he did not have time to avail himself of them. 62 F.4th at 141.[7] We declined to recognize a *Bivens* remedy even though the specific circumstances precluded Bulger's access to the administrative remedial

7. I cannot agree with my colleagues' depiction of *Bulger* as simply raising the issues of whether the administrative remedy program was "broad enough . . . to provide the desired relief" or "whether [Bulger] c[ould] obtain the remedy he s[ought] through the" program. Majority Op. at 16. Bulger did not argue, for example, that the administrative remedy program was "inadequate" because he wanted money damages, as opposed to the other forms of relief the program provided. Instead, he argued that he "had no real opportunity to initiate *any sort* of formal grievance process." *Bulger*, 62 F.4th at 141 (emphasis added). In other words, Bulger asserted that the administrative remedy program was insufficient because it was not "operational, such that it c[ould] provide any remedy" for him. Majority Op. at 16. Fields's contention is not meaningfully different from Bulger's.

scheme. As we explained, the BOP's "elaborate remedial system" counseled against "the creation of a new judicial remedy," and "[t]he potential unavailability of a remedy in a particular circumstance does not warrant supplementing that scheme" ourselves. *Id.* (quoting *Tun-Cos*, 922 F.3d at 527); *see also Harper*, 71 F.4th at 1188; *Sargeant v. Barfield*, 87 F.4th 358, 368 (7th Cir. 2023)[8]; *Pinson v. U.S. Dep't of Just.*, 514 F. Supp. 3d 232, 243–44 (D.D.C. 2021).[9]

Consequences of implying the Bivens *remedy.* Finally, the consequences of allowing Fields's requested relief cut against extending *Bivens*. We avoid permitting a *Bivens* remedy when doing so would "'impose liability on prison officials on a systemic level' and amount to a 'substantial burden' on government officials." *Mays*, 70 F.4th at 206

8. *Compare* Majority Op. at 17 ("[N]o court (in this Circuit or otherwise) has ever before been presented with a case in which one of the allegations was that the grievance process was intentionally withheld from the inmate."), *with Sargeant*, 87 F.4th at 368 ("[Sargeant] also maintains that the grievance process was functionally unavailable to him: Barfield retaliated against him because he filed a grievance."), *and Pinson*, 514 F. Supp. 3d at 243 ("Pinson argues that the [administrative remedy program] was effectively unavailable to her because BOP officials refused to investigate her complaints.").

9. As a last argument, my colleagues note that an inmate need not exhaust unavailable remedies under the PLRA. Majority Op. at 19. I fail to see how an excuse for failure to exhaust, which allows a prisoner to sue under a statutory scheme that does *not* provide a cause of action for money damages, somehow greenlights the creation of such a remedy here.

(quoting *Bulger*, 62 F.4th at 141); *see Ziglar*, 582 U.S. at 136. By authorizing a *Bivens* action for excessive force under the Eighth Amendment, our Court opens the door for a multitude of cases each year wherein prisoners claim excessive force in hopes of securing monetary damages. And even if we were not confident in that forecast, uncertainty about the broader ramifications of devising a *Bivens* remedy alone is a special factor counseling hesitation. *Egbert*, 596 U.S. at 493; *Mays*, 70 F.4th at 206. That's because federal courts "are ill-suited to 'predict the systemwide consequences of recognizing a cause of action under *Bivens*.'" *Bulger*, 62 F.4th at 142 (quoting *Egbert*, 596 U.S. at 493). Such a cost-benefit analysis is for Congress to make. *Id.*; *supra* n.2.

My colleagues—who seem to think they, unlike other federal judges, are well-equipped for this inquiry—give several reasons why their holding will not lead to systemic consequences. To start, they say we can rest assured because the officers who Fields alleges violated his constitutional rights did so by going "rogue." *See* Majority Op. at 13–15. They explain that the officers who beat Fields on November 10 did so in clear violation of BOP policies about the treatment of prisoners. *Id.* at 13–14. And because no prison policy is directly implicated, they conclude, expanding *Bivens* here won't have systemic repercussions. *Id.*

But this conclusion rests on a misreading of precedent and another misconception of the appropriate level of

generality for our inquiry. Contrary to the majority's representations, we have not found systemic consequences that caution against expanding *Bivens* only in those cases involving challenges to prison policies or the actions of officials acting in compliance with those policies. In fact, the prisoner in *Mays* argued that a *Bivens* remedy for his Fifth Amendment claims wouldn't substantially burden prison officials on a systemic scale because he sought only to redress "individual instances of discrimination and law enforcement overreach." 70 F.4th at 206. It's hard to imagine that the corrections officers who Mays alleged placed him in administrative detention, fired him from a prison job, and transferred him to a different prison because of his race acted pursuant to prison policy. *See id.* at 201. Still, we rejected Mays's argument and declined to expand *Bivens*, in part because doing so "would almost certainly 'impose liability on prison officials on a systemic level' and amount to a 'substantial burden' on government officials." *Id.* at 206 (quoting *Bulger*, 62 F.4th at 141).[10]

10. The majority cleverly reframes *Mays* as being about prison policies rather than rogue officers by noting that *Mays* said the BOP is granted discretion over "inmate discipline and employment." Majority Op. at 13 (citing *Mays*, 70 F.4th at 205). What my colleagues seem to miss (aside from the actual allegations in *Mays*, of course) is that Fields's allegations also involve matters of inmate discipline over which prison officials have discretion—his treatment followed his failure to carry his movement pass as required and his alleged battery of a corrections officer. *See id.* at 4 ("Appellees argue that the officers' actions were justified because Fields initiated the scuffle."). [J.A. 10-11.] So if *Mays* indeed "implicated prison policies and broader systemic concerns," *id.* at 13, so too does this case.

The upshot is that we have recognized that even prisoners' suits alleging individual officers "went rogue"—*i.e.*, acted arguably or even clearly in violation of applicable BOP policy—can have systemic ramifications that warn against implying a legal remedy. The reason we have recognized as much is that we aren't concerned with the consequences of the case before us, but rather the consequences of creating a new damages remedy. *See id.* Sure, allowing Fields's claim to go forward may only directly affect several "rogue" corrections officers. But expanding *Bivens* to afford a remedy for Eighth Amendment excessive-force claims will impact virtually every prisoner and every prison official in our Circuit. The former will now be able to bring cognizable damages actions alleging the latter used excessive force; and the latter will constantly have to assess the risk of a lawsuit, possibly keeping them from "taking urgent and lawful action" when necessary to ensure prison security and prisoner safety. *Ziglar*, 582 U.S. at 145; *see Carlson*, 446 U.S. at 47 (Rehnquist, J., dissenting).

This brings us to the majority's second attempt to dismiss the systemic effects its holding will have. According to it, "[t]he PLRA directs courts to prescreen cases brought by inmates 'before docketing, if feasible,'" so "many cases will be dismissed before officers are even served"; thus, there will be no burden on those officers. Majority Op. at 15 (quoting 28 U.S.C. § 1915A(a)). This ignores the facts that: (1) as just explained, the risk of suit alone places a substantial burden on prison officials

that weighs against implying a *Bivens* remedy; and (2) the PLRA's screening procedure would by no means prevent the docketing of a deluge of suits against prison officials. When evaluating whether a prisoner's complaint fails to state a claim under the PLRA's screening provision, the court accepts his factual allegations as true. *See, e.g.*, *De'Lonta v. Fulmore*, 745 F. Supp. 2d 687, 690 (E.D. Va. 2010). All a prisoner must do to state a claim under today's holding, therefore, is *allege* that corrections officers used excessive force against him and later denied him access to administrative remedies (even if the latter allegations are contradictory and vague).[11] *Cf. Egbert*, 596 U.S. at 500 ("It is easy to allege that federal employees acted beyond the scope of their authority when claiming a constitutional violation."). Suits will be docketed—and prison officials subjected to the costs of actual litigation—as long as those two allegations are present.

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11. I do not mean to suggest that prisoners will simply fabricate allegations, though of course some of that misbehavior is inevitable. But they could (like Fields) augment their excessive-force claims with vague allegations about obstruction and omit crucial context. For example, "my unit supervisors prevented me from accessing the administrative remedy program"—*temporarily, because I was in solitary confinement for harming another inmate or a corrections officer.* Or, "my unit supervisors prevented me from accessing the administrative remedy program"—*because I previously filed fifty frivolous grievances and triggered a restriction.* Or, "my unit supervisors prevented me from accessing the administrative remedy program"—*because they had already addressed my grievances in response to my verbal complaints.*

Finally, my colleagues say, "[t]o the extent that extending scrutiny to new categories of conduct or defendants implicates the potential for systemwide consequences, . . . *Carlson* already provides a cause of action against individual officers who fail to act to respond to an inmate's medical needs." Majority Op. at 15. This is baffling. The entire point of our analysis is to closely evaluate the propriety of extending *Bivens* to a *new* context, *i.e.*, one that "is different in a meaningful way from previous *Bivens* cases decided by th[e] Court." *Ziglar*, 582 U.S. at 139. The majority turns the inquiry on its head, finding that Fields's "new context" is a benefit, not a hinderance, to his claim.

* * *

As of now, the Supreme Court has chosen to leave its three approved *Bivens* causes of actions in place while effectively directing that lower courts should not create new ones. But given even the slightest crack in the door that the Court's beleaguered precedents leave, inferior courts continue to ignore the directive to stop extending *Bivens*. A faithful application of our precedent and the Supreme Court's leads squarely to the conclusion that we cannot create a new *Bivens* action here. But perhaps the majority's holding to the contrary shows it's time to simply shut the *Bivens* door completely. In any event, I respectfully dissent.

APPENDIX B — MEMORANDUM OPINION OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF VIRGINIA, ROANOKE DIVISION, FILED JANUARY 31, 2023

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ROANOKE DIVISION

Civil Action No. 7:22-cv-00021

ANDREW FIELDS, III,

Plaintiff,

v.

FEDERAL BUREAU OF PRISONS, *et al.*,

Defendants.

Filed January 31, 2023

MEMORANDUM OPINION

By: Elizabeth K. Dillon
United States District Judge

Plaintiff Andrew Fields, III, an inmate in the custody of the Bureau of Prisons (BOP) and proceeding *pro se*, filed this civil rights complaint, presumably relying on *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). He has paid the full filing fee and thus is responsible for effecting service. But

Fields has filed a motion requesting that the United States Marshal Service execute service of process for him, which is pending. (Dkt. No. 33.)

Additionally, and despite Fields's payment of the full filing fee, his complaint is subject to screening under 28 U.S.C. § 1915A(a). Under that statute, the court must conduct an initial review of a "complaint in a civil action in which a prisoner seeks redress from a governmental entity or officer or employee of a governmental entity." 28 U.S.C. § 1915A(a). The court must "dismiss the complaint, or any portion of the complaint," if it is frivolous, fails to state a claim on which relief may be granted, or "seeks monetary relief from a defendant who is immune from such relief." 28 U.S.C. § 1915A(b)(1)-(2).

In conducting its review, the court must give the pleadings a liberal construction and hold them to a less stringent standard than formal pleadings drafted by lawyers. *Erickson v. Pardus*, 551 U.S. 89, 94 (2007) (per curiam). Liberal construction does not mean, however, that the court can ignore a clear failure in pleadings to allege facts setting forth a claim cognizable in a federal district court. *See Weller v. Dep't of Social Servs.*, 901 F.2d 387, 391 (4th Cir. 1990).

Applying these standards to Fields's complaint, the court determines that it fails to state a claim for which relief can be granted. Many of his allegations fail to state a constitutional violation, but the court also concludes that there is no damages remedy under *Bivens* for his claims. Accordingly, this case will be dismissed, and Fields's

motion requesting service (Dkt. No. 33) will be denied as moot.

I. FACTUAL BACKGROUND

Fields names as defendants the Bureau of Prisons (BOP), the Warden of USP Lee, and more than two dozen other officers or personnel at USP Lee. In an introductory paragraph to his complaint, he explains that he is alleging a conspiracy by defendants to deprive him of his rights by

> committing unlawful cruel and unusual punishment acts such as: denying plaintiff access to his legal materials, mail tampering, retaliatory excessive force for engaging in protected conduct of accessing the courts and other outside prison agencies, torture while in ambulatory restraints, [and] malicious prosecution. [A]nd he was placed in punitive segregation where he received falsified incident reports and [was] subjected to staged gladiator fights in the Special Housing Unit.

(Compl. 2, Dkt. No. 1.)[1]

Fields lists two legal claims, the first of which appears to have sub-parts. He describes his first claim as "Cruel and Unusual Punishment-Retaliatory Acts of Excessive Force for Engaging in Protected Conduct." (*Id.* at 21.) He

1. The court has corrected spelling and grammatical errors when quoting from the complaint.

describes his second claim as "Denying One the Right to Seek Redress via the U.S.P.-Lee Grievance Procedure, Denying Plaintiff Access to His Legal Materials and Legal Forms." (*Id.*) As to both claims, he alleges that defendants violated his rights under the "First, Second, Fourth, Fifth, and Fourteenth Amendments." (*Id.*)

In terms of specific facts, Fields alleges first that he was falsely accused of misconduct, apparently in retaliation for sending a letter complaining about another institution. Then, based on the false charge, he was taken to the Special Housing Unit (SHU), also known as "the hole." As officers handcuffed him, they confiscated property, including legal documents, prescription glasses, and shoes, which he never received back. He claims that, while he was being escorted, a group of officers began punching him in the face with closed fists repeatedly until he fell to the floor. They then stomped on him with steel-toe boots and kicked and punched him in the face repeatedly, until he was semi-conscious. (*Id.* at 3-7.)

According to Fields, officers also used excessive force when placing him in the SHU cell and later when placing him in restraints, after a female officer falsely told other officers Fields was in his observation cell masturbating. Then, each time officers came into his cell to check on his ambulatory restraints, they used excessive force again, including one incident where his face was slammed into the wall and his tooth was knocked loose. After the incident was over, he claims in conclusory fashion that he was denied medical treatment for the results of the "torture," which included severe headaches with swelling around his head and overall body pain. (*Id.* at 18.)

In his second claim, Fields asserts that he was denied the right to seek redress via USP Lee's grievance procedure, was denied access to his legal materials and legal forms, and that certain defendants engaged in mail mishandling and "delayed transferring." (*Id.*) He also has not received back some of the other property that was taken from him, such as his prescription eye glasses. (*Id.* at 19.)

II. DISCUSSION

A. Many of Fields's Allegations Fail to State Any Cognizable Constitutional Claim.

Many of Fields's allegations are insufficient to state a violation of any constitutional rights.[2] For example, he claims that defendants interfered with his ability to file grievances. While allegations of such inference may be relevant to whether he appropriately exhausted his administrative remedies, they fail to state a violation of his constitutional rights. *Booker v. S.C. Dep't of Corr.*, 855 F.3d 533, 542 (4th Cir. 2017) (explaining that inmates do not have a "constitutional entitlement to and/or due process interest in accessing a grievance procedure").

Fields also alleges that his legal property was taken or legal mail was tampered with, and he asserts that his access to court was hampered, presumably in violation of his First Amendment rights. But because he does not

2. Regardless, and as discussed in the text with regard to his excessive force and retaliation claims, the court concludes that there is no *Bivens*-type remedy for these other claims, either. Thus, they are subject to dismissal on this ground, as well.

allege that any particular lawsuit or case was affected by the interference with his mail or by the loss of his legal papers, he fails to state a First Amendment violation based on a denial of access to courts. *See Lewis v. Casey*, 518 U.S. 343, 351 (1996) (noting that to state a claim, a plaintiff must allege facts to show that defendants actually "hindered his efforts to pursue" a nonfrivolous legal claim); *Christopher v. Harbury*, 536 U.S. 403, 415 (2002) (holding that the plaintiff must identify the lost legal claim in his complaint, along with the potential remedy that claim sought to recover).

Lastly, Fields's brief allegations that he was denied medical treatment fail to state a claim because he has not set forth sufficient details to show that any particular defendant acted with deliberate indifference to a serious medical need, as required to state an Eighth Amendment claim of deliberate indifference. *See Gordon v. Schilling*, 937 F.3d 348, 356 (4th Cir. 2019) (describing elements of claim). Fields names a nurse (Nurse Scott) in his complaint, but he alleges only that Scott conducted a temperature check of him while he was restrained and bent Fields's fingers backward "as if he was trying to break them." (*Id.* at 12.) Scott also told Fields that because Fields lied when he told Scott the bruise on his right arm was a new bruise from the recent incident, Fields would not be getting his pills. (*Id.*) Fields does not state what "pills" or medications Scott was talking about, what conditions those pills were treating, or whether he was, in fact, denied any of his medications.

Fields also states, in two different places in the complaint, that he sought medical help and was denied it,

but he does not identify any person from whom he sought that help, what he said, or what was done in response. In the first instance, he simply says that as unidentified staff left his cell, his "attempt to report severe trauma[,] headaches[,] and swelling around his head [was] to no avail." (*Id.*) In the second, he similarly states that he had injuries from the incidents, including severe headaches with swelling around his head and overall body pain from head to toe and that "he was denied medical treatment." (*Id.* at 18.) These summary statements do not implicate any individual in the denial of treatment, and they do not state an Eighth Amendment claim.[3]

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3. As to any deliberate indifference claim, the court recognizes that the Supreme Court has found an implied damages remedy for such an Eighth Amendment claim in *Carlson v. Green*, 446 U.S. 14 (1980). Thus, it is possible that such medical claims do not arise in a new context and could be cognizable. There are, however, differences between *Carlson* and this case, including that the prisoner in *Carlson* died as a result of the failure to treat his asthma, was given the wrong treatment, and alleged that he was kept in an inadequate medical facility. These differences may be enough to show a new context. *See*, *e.g.*, *Washington v. Fed. Bureau of Prisons*, No. CV 5:16-3913-BHH, 2022 WL 3701577, at *8 (D.S.C. Aug. 26, 2022) (holding that federal prisoner's Eighth Amendment claims of deliberate indifference to ongoing, non-life-threatening medical issues did not state a cause of action after *Egbert*); *McNeal v. Hutchinson*, No. 2:21-cv-3431-JFA-MGB, 2022 WL 16631042, at *9 (D.S.C. Nov. 2, 2022) (agreeing with the reasoning of *Washington* and applying it to a case where the plaintiff did not allege a medical emergency, but instead involved "chronic, non-fatal condition"), *appeal docketed* (4th Cir. Nov. 15, 2022). At this juncture, the court need not resolve whether Fields's medical claims arise in a new context because—as discussed in the text—Fields's allegations fail to identify any particular defendant who violated his Eighth Amendment rights by denying him medical care.

Aside from the claims just addressed in this section, Fields's claims are either excessive force claims under the Eighth Amendment or First Amendment retaliation claims. As the court discusses next, neither type of claim entitles him to a damages remedy.

B. There Is No Implied Damages Remedy for Fields's Excessive Force and Retaliation Claims.

1. The framework for determining whether the court should find an implied cause of action

This court recently addressed, in an opinion entered after full briefing by the parties—that there is no *Bivens*-like remedy for excessive force claims brought against BOP Officers. *Jean v. Smallwood*, No. 7:20-CV-00415, 2022 WL 17969091 (W.D. Va. Dec. 27, 2022). As discussed in *Jean*, the Supreme Court first recognized an implied cause of action for a constitutional violation by federal officers in *Bivens*, where it held that there was an implied claim for money damages available under the Fourth Amendment where the plaintiff alleged that federal officers had searched his apartment and arrested him without a warrant or probable cause and used unreasonable force in doing so. *Tun-Cos v. Perrotte*, 922 F.3d 514, 520 (4th Cir. 2019) (describing *Bivens*). Since then, the Court extended *Bivens* to other factual situations only in two cases:

> In the first, *Davis v. Passman*, 442 U.S. 228 (1979), the Court held that the equal protection

> component of the Fifth Amendment's Due Process Clause provided a damages remedy for an administrative assistant who alleged that a Congressman fired her because she was a woman. *See id.* at 248-49. And in the second, *Carlson v. Green*, 446 U.S. 14 (1980), the Court held that the Eighth Amendment's Cruel and Unusual Punishments Clause provided a damages remedy for the estate of a prisoner who died due to the alleged failure of federal jailers to treat his asthma. *See id.* at 19.

Tun-Cos, 922 F.3d at 521. The Supreme Court has not recognized a *Bivens*-type remedy outside of those contexts, however, and has repeatedly declined to do so "in *any* additional context." *Id.* (collecting authority). Accordingly, the Supreme Court "has made clear that expanding the *Bivens* remedy is now a 'disfavored' judicial activity." *Id.* at 522 (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 675 (2009)).

Most recently, the Supreme Court refused to recognize a *Bivens*-type remedy in a case that was factually very similar to *Bivens*. *Egbert v. Boule*, 142 S. Ct. 1793, 1803-04, 1807-09 (2022); *id.* at 1815 (Sotomayor, J., concurring in the judgment in part and dissenting in part) ("At bottom, Boule's claim is materially indistinguishable from the claim brought in *Bivens*."); *id.* at 1810 (Gorsuch, J., concurring) ("Candidly, I struggle to see how this set of facts differs meaningfully from those in *Bivens* itself."). In doing so, the Supreme Court made clear that the types of claims for which there are a *Bivens*-type remedy is extremely

limited. *See Silva v. United States*, 45 F.4th 1134, 1136 (10th Cir. 2022) ("The Supreme Court's message could not be clearer—lower courts expand *Bivens* claims at their own peril."). Indeed, in his concurrence, Justice Gorsuch suggested there could be no further cases recognizing a cause of action under the Court's reasoning and test. *Egbert*, 142 S. Ct. at 1810 (Gorsuch, J., concurring) (stating that "it's hard to see how" any case "ever could" satisfy the standard set forth by the Court and that "sometimes, it seems, 'this Court leaves a door ajar and holds out the possibility that someone, someday might walk through it' even as it devises a rule that ensures 'no one . . . ever will.'") (citation omitted).

The Fourth Circuit recently relied on *Egbert* and other authority in ruling that a BOP inmate's Eighth Amendment claims based on the conditions of his confinement were different from any of the prior Supreme Court decisions "finding a *Bivens* cause of action and that the relief he seeks in this new context should be provided by Congress, if at all." *Tate v. Harmon*, 54 F.4th 839, 841 (4th Cir. 2022). The *Tate* court discussed at length the Supreme Court's emphasis on separation-of-powers principles in this context. *Id.* at 843-44. As the Supreme Court has stated, in the years since *Bivens*, the 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." *Id.* at 844 (citing *Egbert*, 142 S. Ct. at 1802). Indeed, the *Egbert* Court observed that "creating a cause of action is a legislative endeavor" and "the Judiciary's authority to do so *at all* is, at best, uncertain." *Id.* (citing *Egbert*, 142 S. Ct. at 1802-03 (emphasis added by *Tate*)).

The *Tate* court followed the two-step analysis discussed by the Supreme Court and in the Fourth Circuit's prior cases, including *Tun-Cos.* At the first step, the court should decide whether the claims arise in a "new *Bivens* context." *Tun-Cos*, 922 F.3d at 522 (citing *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1857-60 (2017)). A context is new when "different in a meaningful way" from the three previous *Bivens* cases. *Tate*, 54 F.4th at 844 (quoting *Ziglar*, 137 S. Ct. at 1859)). The *Tate* court emphasized that "'new context' must be understood broadly [and] that a new context may arise if *even one* distinguishing fact has the potential to implicate separation-of-powers considerations." *Id.* at 846 (citing *Egbert*, 142 S. Ct. at 1805).

"If the context is *not* new . . . then a *Bivens* remedy" is available. *Tun-Cos*, 922 F.3d at 522-23 (emphasis in original). If the context is new, then the court turns to the second step, which requires it to determine whether "special factors counsel[ ] hesitation" in recognizing an implied cause of action. *Ziglar*, 137 S. Ct. at 1857 (citations omitted).

In *Egbert*, the court observed that "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." 142 S. Ct. at 1803. Indeed, if "there is *any* rational reason (even one) to think that *Congress* is better suited" to resolve the cost-benefit analysis of letting a damages action lie, an implied action is precluded. *Id.* at 1805. The *Tate* court recognized this conflation of the two steps, as well, explaining that "in

Egbert, . . . the Court recognized a substantial overlap between the factors relevant to" the two steps, "often leading to an analysis that addresses just [that] single question." *Tate*, 54 F.4th at 847-48.

2. Fields's excessive force claims arise in a new context.

Applying this analysis to Fields's excessive force claims, the court has no difficulty in concluding that these claims arise in a new context, as the Supreme Court has never ruled that a damages remedy exists for claims of excessive force by BOP officers against an inmate. As noted above, the context could be "new" for a reason as simple as "the rank of the officers involved; the constitutional right at issue; the generality or specificity of the official action; the extent of judicial guidance as to how an officer should respond to the problem or emergency to be confronted; the statutory or other legal mandate under which the officer was operating; [and] the risk of disruptive intrusion by the Judiciary into the functioning of other branches. . . ." *Tun-Cos*, 922 F.3d at 523 (quoting *Ziglar*, 137 S. Ct. at 1859-60)). Put differently, "the new-context inquiry is easily satisfied." *Ziglar*, 137 S. Ct. at 1865. As the *Tate* court cautioned, "courts are clearly warned to act with utmost hesitation when faced with actions that do not fall precisely under *Bivens, Davis*, or *Carlson*." 54 F.4th at 845.

None of the three cases—*Bivens, Davis*, or *Carlson*—involved Eighth Amendment claims alleging an improper use of force by BOP officers (or related bystander liability

claims). Moreover, the last distinction referenced above—"the risk of disruptive intrusion by the Judiciary into the functioning of other branches"—is particularly important here. Although he alleges that the disciplinary charges against him were false, Fields's complaint makes clear that at least the reason given for his being restrained was his own behavior and that the restraints were used as a disciplinary measure. If the court were to create a judicial remedy here, it would be interjecting the judiciary into decisions about when and under what circumstances restraints may be used. It also would be creating potential liability for assaults by BOP officers, especially as related to the use of restraints. These are issues that could have far-reaching consequences to the daily operation of BOP facilities. *Cf. Egbert*, 142 S. Ct. at 1803 (noting that "a court likely cannot predict the systemwide consequences of recognizing a cause of action under *Bivens*"); *see also Jean v. Smallwood*, No. 7:20-CV-00415, 2022 WL 17969091, at *5 (W.D. Va. Dec. 27, 2022) (noting same).

3. Fields's retaliation claims arise in a new context.

Similarly, Fields's claims that the excessive force was the result of retaliation and that he was given false disciplinary charges in retaliation for "accessing the courts and other outside prison agencies" also arise in a "new context." Indeed, in *Egbert*, the court also addressed a retaliation claim, although it arose in a different factual scenario. The *Egbert* court squarely held that "there is no *Bivens* action for First Amendment retaliation." 142 S. Ct. at 1807. Similarly, the Fourth Circuit has recently

declined to extend *Bivens* to a First Amendment claim. *See Dyer v. Smith*, — F.4th —, 2022 WL 17982796, at *3 (4th Cir. Dec. 29, 2022) (agreeing with district court that a First Amendment claim arose in a new context, in part because "[t]he Supreme Court has 'never held that *Bivens* extends to First Amendment claims'") (citations omitted).

4. Special factors counsel against recognizing an implied cause of action because Congress is better suited to make the determination of whether one is appropriate and desirable.

As previously explained, once a claim is determined to arise in a new context, then the court should not imply a cause of action if "there is *any* rational reason (even one) to think that *Congress* is better suited to weight the costs and benefits of allowing a damages action to proceed." *Egbert*, 142 S. Ct. at 1805 (cleaned up). And as in *Egbert* and *Tate*, the court concludes that there is certainly at least one "rational reason" why Congress would be better equipped than the courts to determine whether to allow such claims.

First of all, as in *Tate*, "[t]he political branches are indeed 'better equipped to decide whether existing remedies should be augmented by the creation of a new judicial remedy.'" 54 F.4th at 848 (quoting *Egbert*, 142 S. Ct. at 1804). Indeed, Congress's inaction and failure to provide a damages remedy, particularly where it has enacted sweeping reforms of prisoner litigation, suggest that an extension of a damages remedy for other types of mistreatment should not be judicially created. *See Ziglar*,

137 S. Ct. at 1865 ("[I]t seems clear that Congress had specific occasion to consider the matter of prisoner abuse and consider the proper way to remedy those wrongs" and Congress's declining to provide a "damages remedy against federal jailers . . . suggests [that] Congress chose not to extend the *Carlson* damages remedy to cases involving other types of prisoner mistreatment.").

Additionally, courts have long been committed to avoiding judicial intervention in the running of prisons or in matters of security within prisons. As noted, allowing liability for these types of claims opens up BOP officers to significant potential liability for the BOP's decisions about how to discipline inmates and when and under what circumstances it is appropriate to restrain them. This fact, too, counsels against recognizing an implied cause of action for Fields's claims, which—at least according to them—stem from the officials' response to his alleged misconduct. *See Landis v. Moyer*, No. 1:19-CV-470, 2022 WL 2677472, at *7 & n.5 (M.D. Pa. July 11, 2022), *appeal docketed*, No. 22-2421 (3d Cir. Aug. 5, 2022) As explained by the *Landis* court, "excessive-force claims against federal prison officials [ ] squarely implicate BOP policy and are inextricably tied to the preservation of institutional rules and order. Adjudicating prisoner excessive-force claims would also entangle the federal judiciary in byzantine issues of prison administration and institutional security and would impact BOP operations systemwide." *Id.*

There are other factors, as well, that caution against finding an implied cause of action here. For example, the

existence of alternative remedies available to federal prisoners like Fields strongly cautions against an expansion of *Bivens* into a new context. *Ziglar*, 137 S. Ct. at 1858 ("[I]f there is an alternative remedial structure present in a certain case, that alone may limit the power of the Judiciary to infer a new *Bivens* cause of action."). As explained in *Correctional Services Corp. v. Malesko*, a federal prisoner claiming negligence or deliberate indifference has access to "remedial mechanisms established by" the BOP. 534 U.S. 61, 74 (2001). Indeed, "many courts have explicitly recognized that the BOP's administrative remedy program is an alternative process that precludes a *Bivens* remedy." *Scates v. Craddock*, No. 1:17CV22, 2019 WL 6462846, at *8 (N.D.W. Va. July 26, 2019) (collecting authority), *report and recommendation adopted*, No. 1:17-CV-22, 2019 WL 4200862 (N.D.W. Va. Sept. 5, 2019); *see also Silva*, 45 F.4th at 1141 ("[W]e find the availability of the BOP's Administrative Remedy Program offers an independently sufficient ground to foreclose Plaintiff's *Bivens* claim.") The possibility of relief under the Federal Tort Claims Act (FTCA) also serves as an alternative remedy that counsels against recognizing an implied damages remedy, even if the FTCA does not "provide the exact same kind of relief *Bivens* would." *Oliva v. Nivar*, 973 F.3d 438, 443-44 (5th Cir. 2020).

As for any retaliation claims, the Supreme Court stated that "[t]here are many reasons to think that Congress, not the courts, is better suited to authorize" a damages remedy for First Amendment retaliation. *Egbert*, 142 S. Ct. at 1807. The Court went on to list the reasons and rationales, which included the acute risk of increasing

substantial societal costs by causing federal employees to be deterred from carrying out their duties in the face of personal liability. *Id.* at 1807-08. The costs are particularly likely to increase with allowing retaliation claims, since such claims rely on retaliatory intent and "may be less amenable to summary disposition." *Id.* (citation omitted). Thus, if damages are to be allowed for such claims, it should be Congress that makes that decision.

For the foregoing reasons, the court concludes that Fields's excessive force and retaliation claims are not cognizable. Other courts, employing similar reasons, are in agreement. As noted, retaliation claims were squarely rejected by *Egbert.* Moreover, following *Egbert*, circuit courts that have addressed the viability of excessive force claims have thus far uniformly concluded that there is no viable *Bivens* claim for excessive force in this context, as have many district courts. *See*, *e.g.*, *Silva v. United States*, 45 F.4th 1134, 1141-42 (10th Cir. 2022) (holding that the plaintiff did not have an Eighth Amendment *Bivens* claim against a BOP officer for use of excessive force); *Greene v. United States*, No. 21-5398, 2022 WL 13638916, at *3-4 (6th Cir. 2022) (unpublished) (same); *Alsop v. Fed. Bureau of Prisons*, No. 22-1933, 2022 WL 16734497, at *3 (3d Cir. 2022) (unpublished) (citing to *Egbert* and concluding that a claim of excessive force against a BOP correctional officer was "not a basis for relief under *Bivens*"); *Jean*, 2022 WL 17969091, at *6 (same); *Baldwin v. Hutson*, No. 6:19-CV-151-REW-HAI, 2022 WL 4715551, at *4-5 (E.D. Ky. Sept. 30, 2022) (holding that *Egbert* forecloses a cause of action based on an excessive use of force by BOP officers against a prisoner); *Morel v. Dep't of Just.*, No. CV 7:22-015-DCR,

2022 WL 4125070, at *3 (E.D. Ky. Sept. 9, 2022) (same); *Landis*, 2022 WL 2677472, at *7 & n.5 (same and collecting authority); *Bivens v. Blaike*, No. 21-CV-00783-PAB-NYW, 2022 WL 2158984, at *6 (D. Colo. June 15, 2022), *report and recommendation adopted*, No. 21-CV-00783-PAB-NYW, 2022 WL 2716533 (D. Colo. July 13, 2022) (same).

III. CONCLUSION

For the foregoing reasons, the court concludes that Fields's complaint fails to state a claim for which relief can be granted and must be dismissed pursuant to 28 U.S.C. § 1915A(b)(1). Thus, his complaint will be dismissed, and the court will deny his pending motion as moot. An appropriate order shall be entered.

Entered: January 31, 2023.

/s/
Elizabeth K. Dillon
United States District Judge

APPENDIX C — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT, FILED OCTOBER 22, 2024

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 23-6246
(7:22-cv-00021-EKD-JCH)

ANDREW FIELDS, III,

Plaintiff-Appellant,

v.

FEDERAL BUREAU OF PRISONS; WARDEN STREEVAL; A. W. GOLDEY; CAPTAIN BAKER; MITCHELL; MULLINS; NEFF; EWING; GAYHEART; SESSONS; FIELDS; SLOAN; NURSE SCOTT; J. ROBBINS; BOLLING; GARRETT; SCHOLL; GILBERT; BAKER; BARKER; FARMER; DICKENSON; LIEUTENANT LAFFIN; LIEUTENANT NICHOLOUS; LIEUTENANT HAMILTON; LIEUTENANT MULLINS; HUGHES; LASTER,

Defendants-Appellees.

UNITED STATES OF AMERICA,

Amicus Supporting Rehearing Petition.

Filed October 22, 2024

Appendix C

ORDER

The court denies the petition for rehearing and rehearing en banc. No judge requested a poll under Fed. R. App. P. 35 on the petition for rehearing en banc.

Entered at the direction of the panel: Judge Gregory, Judge Thacker, and Judge Richardson.

For the Court

/s/_____
Nwamaka Anowi, Clerk