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# RIP *Bivens*

ABSTRACT

*For more than fifty years, the* Bivens *cause of action provided a legal avenue for plaintiffs to seek damages against federal officials for certain constitutional violations. Recent Supreme Court decisions, however, have severely restricted the application of this doctrine. This Essay examines the evolution of the* Bivens *doctrine from its inception to its current state of effective death and demonstrates empirically that since 2022 — when the Court issued its most recent* Bivens *decision,* Egbert v. Boule *— lower federal courts have overwhelmingly refrained from extending the implied cause of action beyond its precise original contexts.*

*The death of* Bivens *leaves the more than 150,000 people incarcerated in the custody of the federal government without a viable remedy for past violations of their constitutional rights. This absence of a means of redress significantly impacts their ability to hold federal officials accountable for uses of excessive force, inadequate medical care, and otherwise cruel and unusual conditions of confinement. This Essay proposes strategies for addressing the ramifications of the demise of* Bivens *and underscores the urgent need to implement accountability mechanisms governing federally managed places of incarceration.*

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## I. INTRODUCTION

The implied *Bivens* cause of action is effectively dead. For more than fifty years, *Bivens* permitted plaintiffs to sue federal officials for damages arising out of certain constitutional violations.[1] For nearly as long, however, the Court has committed to restricting the doctrine.[2] Over time, the majority justices' hostility toward expanding the reach of *Bivens* has led some scholars and advocates to consider whether *Bivens* was still good law.[3] At this point, its legacy appears to be set—rest in peace, *Bivens*.

This Essay demonstrates that since the Supreme Court's most recent decision on the issue in *Egbert v. Boule*,[4] lower federal courts have overwhelmingly heeded the Court's repeated admonitions to avoid extending the cause of action to virtually all contexts that do not precisely mirror the three cases in which the Court recognized the cause of action decades ago:[5] *Bivens* itself, *Davis v. Passman*,[6] and *Carlson v. Green*.[7] After all, the Supreme Court expressed in *Egbert* that the relevant legal standard governing the recognition of a *Bivens* cause of action is a question that nearly answers itself: Is there "*any reason* to think that Congress might be better equipped to create a damages remedy" than the federal judiciary?[8] The Court's resounding answer is yes, and lower federal courts have responded by declining to allow *Bivens* claims to proceed in nearly all instances since *Egbert*.

One consequence of *Bivens*' demise is that more than 150,000 people who are incarcerated in the custody of the federal government[9] are left

1. Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388 (1971).
2. *See, e.g.*, Butz v. Economou, 438 U.S. 478 (1978); Bush v. Lucas, 462 U.S. 367 (1983); Chappell v. Wallace, 462 U.S. 296 (1983); Fed. Deposit Ins. Corp. v. Meyer, 510 U.S. 471 (1994); Corr. Services Corp. v. Malesko, 534 U.S. 61 (2001); Minneci v. Pollard, 565 U.S. 118 (2012); Ziglar v. Abbasi, 582 U.S. 120 (2017); Hernandez v. Mesa, 140 S.Ct. 735 (2020); Egbert v. Boule, 596 U.S. 482 (2022).
3. *See, e.g.*, Henry Rose, *The Demise of the* Bivens *Remedy is Rendering Enforcement of Federal Constitutional Rights Inequitable But Congress Can Fix It*, 42 N. Ill. U. L. Rev. 229 (2022); Stephen I. Vladeck, *The Disingenuous Demise and Death of* Bivens, Cato Sup. Ct. L. Rev. (2020); Matthew G. Mazefsky, Correctional Services Corporation v. Malesko*: Unmasking the Implied Damage Remedy*, 37 U. Rich. L. Rev. 639 (2003); Anya Bidwell and Nick Sibilla, "*Limiting Bivens: The US Supreme Court's Reluctance to Allow Lawsuits Against Federal Agents*," Jurist (Nov. 22, 2021), https://www.jurist.org/commentary/2021/11/anya-bidwell-nick-sibilla-supreme-court-bivens-federal-agents/ [https://perma.cc/465L-8JHV].
4. Egbert v. Boule, 596 U.S. 482 (2022).
5. *Id.* at 486 ("Because our cases have made clear that, in all but the most unusual circumstances, prescribing a cause of action is a job for Congress, not the courts . . .").
6. Davis v. Passman, 442 U.S. 228 (1979).
7. Carlson v. Green, 446 U.S. 14 (1980).
8. *Egbert*, 596 U.S. at 492 (emphasis added).
9. *See generally Population Statistics*, Fed. Bureau of Prisons, https://www.bop.gov/mobile/about/population_statistics.jsp (last visited February 13, 2024) [https://perma.cc/KKG3-F7EW].

with no remedy for many violations of their constitutionally protected rights. A prisoner in the custody of the Federal Bureau of Prisons no longer has a viable cause of action to hold a federal officer accountable for using excessive force against them. They no longer have a viable cause of action to hold a federal officer accountable for knowingly or recklessly placing them in danger. And, in all likelihood, they no longer have a viable cause of action to hold a federal officer accountable for failing to provide adequate medical treatment for serious medical needs.

The *Nebraska Law Review's* 2023 Symposium was titled "Advancing Justice for the Federally Incarcerated." Symposium participants have brought an array of expertise, interests, and perspectives to the table, both in person and in this Issue, for considering how to improve access to justice for those in the custody of the federal government who face particularized circumstances and concerns when compared to their counterparts incarcerated in state facilities. The availability, or lack thereof, of a civil remedy for constitutional violations occurring in federally managed places of incarceration is chief among those concerns for the reasons explained herein.

This Essay proceeds in three parts. Part I discusses the Supreme Court's decision in *Bivens* and the evolution of the doctrine through its latest decision in *Egbert*—the "how we got here." Part II discusses lower courts' treatment of *Bivens* claims since *Egbert*, surveying every case appealed since the decision came down, to support the overall assertion that *Bivens* is effectively dead—the "where we are now." Part III tackles some specific recommendations for moving forward from the death of *Bivens* to ensure that federal officials act with some measure of accountability mechanisms in place for the people they may harm—the "where do we go next."

## II. HOW WE GOT HERE.

"The story of *Bivens* is a saga played out in three acts: creation, expansion, and restriction," as Judge Baldock of the Tenth Circuit recently described.[10] The saga began in 1971 when the Supreme Court first recognized an implied cause of action against federal officers for damages[11] arising from the federal constitution.[12] Webster Bivens, in a *pro se* complaint, alleged that on November 26, 1965, six agents of

10. Silva v. United States, 45 F.4th 1134, 1138 (10th Cir. 2022).
11. Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics, 403 U.S. 388, 389, 398 (1971).
12. Prior to *Bivens*, the Court had recognized an implied cause of action against federal officials for prospective relief arising from the Constitution, pursuant to both the federal judiciary's general equity powers and the importance of judicial review to the power to craft a remedy. *See* Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics, 409 F.2d 718, 723 (2d Cir. 1969) (citing Bell v. Hood, 327 U.S. 678, 684 n.4 (1946); Larson v. Domestic and Foreign Com. Corp., 337 U.S. 682,

the now-dissolved Federal Bureau of Narcotics entered his apartment without a search or arrest warrant.[13] They searched his home and then arrested him in front of his wife and children, accusing him of a narcotics violation.[14] The agents took him to the Federal Bureau of Narcotics in Brooklyn, where they interrogated, fingerprinted, photographed, strip-searched, and booked him.[15] Ultimately, the charges were dismissed.[16] In his civil complaint, Mr. Bivens alleged the experience caused him "great humiliation, embarrassment, and mental suffering" and sought $15,000 in damages from each of the six agents.[17] Although he did not explicitly articulate which right or rights he believed the defendants violated, the district court construed Mr. Bivens's complaint to allege Fourth Amendment violations.[18]

The district court dismissed Mr. Bivens's complaint for lack of subject matter jurisdiction, finding that none of the statutory provisions alleged were proper.[19] Specifically, the court reasoned that none of the provisions expressly authorized the district court to adjudicate a claim arising under the Constitution for the specific relief Mr. Bivens sought, *i.e.*, damages.[20]

As to 28 U.S.C. § 1331, for instance, the federal question statute, the court concluded Mr. Bivens's claim did not arise under federal law because he was "unable to point to any constitutional provision or federal statute giving one who has suffered an unreasonable search and seizure or false imprisonment by federal officers any federal right or cause of action to recover damages from those officers as individuals."[21] The Bill of Rights, the court stated, is simply a constitutional codification of existing common law rights vis-à-vis the federal government.[22] Federal officers, when acting pursuant to their official duty, enjoy sovereign immunity just as the federal government does; when exceeding the scope of their official duty, federal officers lose the protection of sovereign immunity but may claim ordinary common law defenses.[23] Accordingly, the court held that any right of recovery against individual federal officers alleged to have exceeded the scope of their official duty falls under a state common law tort theory, and § 1331 does not

696–97 (1949); *Ex Parte* Young, 209 U.S. 123 (1908); United States v. Lee, 106 U.S. 196 (1882), *rev'd*, 403 U.S. 388 (1971)).

13. *See Bivens*, 409 F.2d at 719.
14. *Id.*
15. *Id.*
16. *Id.*
17. *Id.*
18. Bivens v. 6 Unknown Named Agents of the Fed. Bureau of Narcotics, 276 F.Supp. 12, 14 (E.D.N.Y. 1967), *aff'd* 409 F.2d 718 (2d Cir. 1969), *rev'd* 403 U.S. 388 (1971).
19. *Id.* at 13–15.
20. *Id.* at 14.
21. *Id.* at 15.
22. *Id.*
23. *Id.*

confer federal court subject matter jurisdiction over claims arising under state law.[24]

As to 42 U.S.C. § 1983, the civil rights statute, the district court concluded the statute confers federal subject matter jurisdiction only for claims alleging constitutional violations against officials acting under color of state law, not federal law.[25] Thus, "[i]t [was] abundantly clear that no federal question [was] presented by the complaint."[26] The Second Circuit affirmed.[27]

The Supreme Court, in a majority opinion authored by Justice Brennan, reversed the lower court's judgment.[28] The Fourth Amendment, the Court held, uniquely limits federal power and "where federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief."[29] State law theories, in contrast to the lower court's holding, are inadequate because they are often narrower than,[30] or at times "inconsistent or even hostile" to, federal constitutional protections.[31] Moreover, there was historical precedent for awarding

24. *Id.*
25. *Id.* at 13–14.
26. *Id.* at 16.
27. Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics, 409 F.2d 718, 726 (2d Cir. 1969), *aff'g* 276 F.Supp. 12 (E.D.N.Y. 1967), *rev'd* 403 U.S. 388 (1971).
28. Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics, 403 U.S. 388, 398 (1971), *rev'g* 409 F.2d 718, 726 (2d Cir. 1969), *rev'g* 276 F.Supp. 12 (E.D.N.Y. 1967). Justice Brennan seems to have reframed or refocused the district court's decision as one finding Mr. Bivens had failed to state a claim upon which relief can be granted, rather than a jurisdictional one. *Id.* at 390 ("The District Court, on respondents' motion, dismissed the complaint on the ground, inter alia, that it failed to state a cause of action."). The Second Circuit concluded the district court dismissed the complaint on jurisdictional grounds but, in the alternative, "did validly rest its disposition on the merits for failure to state a claim for which relief can be granted. It is on this ground that we affirm." *Bivens*, 409 F.2d at 720. This discrepancy has created ambiguity in whether the *Bivens* question is a jurisdictional one or a pleading one that has tinged the doctrine ever since. *See, e.g.*, Butz v. Economou, 438 U.S. 478, 504 (1978) (holding just a few years later, "the decision in *Bivens* established that a citizen suffering a compensable injury to a constitutionally protected interest could invoke the general federal-question jurisdiction of the district courts to obtain an award of monetary damages against the responsible federal official").
29. *Bivens*, 403 U.S. at 392.
30. *Id.* ("Our cases have long since rejected the notion that the Fourth Amendment proscribes only such conduct as would, if engaged in by private persons, be condemned by state law.").
31. *Id.* at 394 ("[W]e may bar the door against an unwelcome private intruder, or call the police if he persists in seeking entrance. The availability of such alternate means for the protection of privacy may lead the State to restrict imposition of liability for any consequent trespass. A private citizen, asserting no authority other than his own, will not normally be liable in trespass if he demands, and is granted, admission to another's house. . . . But one who demands admission under a claim of federal authority stands in a far different position. . . . The mere invocation of

damages for invasions of personal liberty, such as those Mr. Bivens alleged.[32] And while the Fourth Amendment may not *expressly* provide for an award of monetary damages for its violation, "it is . . . well settled that where legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done."[33] Nothing about Mr. Bivens's case, including congressional silence on the matter, counseled the Court's hesitation in extending that proposition to Mr. Bivens's case.[34] Such "necessary relief" in this context, therefore, was monetary damages for his claim arising directly under the federal constitution.[35] "The very essence of civil liberty," the Court concluded, "certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury."[36]

Justices Burger, Black, and Blackmun dissented separately from the majority's opinion, citing the need to defer to Congress in the matter as well as a fear of another avalanche of new federal cases resulting from the decision.[37] But, nonetheless, the implied *Bivens* remedy had been created.

The chapter of expansion in this saga is brief—less than a decade for the Court. In 1979, the Court extended the remedy in the case of *Davis v. Passman*, a Fifth Amendment challenge to the conduct of Otto E. Passman, a Congressman from Louisiana.[38] Shirley Davis, the plaintiff, alleged Representative Passman hired her as a deputy administrative assistant but fired her seven months later because, he

federal power by a federal law enforcement official will normally render futile any attempt to resist an unlawful entry or arrest by resort to the local police; and a claim of authority to enter is likely to unlock the door as well.").

32. *Id.* at 395.
33. *Id.* at 396 (citing Bell v. Hood, 327 U.S. 678, 684 (1946)).
34. *Id.* at 396–97 ("The present case involves no special factors counselling hesitation in the absence of affirmative action by Congress . . . For we have no explicit congressional declaration that persons injured by a federal officer's violation of the Fourth Amendment may not recover money damages from the agents, but must instead be remitted to another remedy, equally effective in the view of Congress.").
35. *Id.* at 397.
36. *Id.* at 397 (quoting Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1803)).
37. *Id.* at 428 (Burger, C.J., dissenting) (Black, J., dissenting) (Blackmun, J., dissenting) ("Even if we had the legislative power to create a remedy, there are many reasons why we should decline to create a cause of action where none has existed since the formation of our Government. The courts of the United States as well as those of the States are choked with lawsuits. The number of cases on the docket of this Court have reached an unprecedented volume in recent years. A majority of these cases are brought by citizens with substantial complaints . . . Unfortunately, there have also been a growing number of frivolous lawsuits, particularly actions for damages against law enforcement officers . . . My fellow Justices on this Court and our brethren throughout the federal judiciary know only too well the time-consuming task of conscientiously poring over hundreds of thousands of pages of factual allegations of misconduct by police, judicial, and corrections officials.").
38. Davis v. Passman, 442 U.S. 228, 230 (1979).

allegedly said, "it was essential that the understudy to my Administrative Assistant be a man."[39]

Passman moved to dismiss the complaint for failure to state a claim upon which relief can be granted.[40] In another majority opinion by Justice Brennan, the Court concluded that the federal constitution "speaks . . . with a majestic simplicity" and "[o]ne of 'its important objects,' . . . is the designation of rights."[41] Further, "the judiciary is clearly discernible as the primary means through which these rights may be enforced."[42] Absent congressional action otherwise, the Court stated it would "presume that justiciable constitutional rights are to be enforced through the courts."[43] In Ms. Davis's case, like in Mr. Bivens's, a damages remedy was "necessary relief" for her alleged constitutional violation because of historical precedent,[44] judicial experience in fashioning damages remedies for employment discrimination claims,[45] and the absence of any available prospective relief.[46] Moreover, any special concerns that might have counseled the Court's hesitation were mitigated by constitutional defenses available to Congressman Passman,[47] there was no explicit congressional declaration that litigants like Ms. Davis may not recover damages for unconstitutional discrimination,[48] and the deluge of lawsuits the dissenters feared in *Bivens* was overstated.[49] Again, Justice Burger dissented, joined by Justices Powell and Rehnquist, citing "very grave questions of separation of powers."[50]

39. *Id.*
40. *Id.* at 232.
41. *Id.* at 241.
42. *Id.*
43. *Id.* at 242.
44. *Id.* at 245 ("[A] damages remedy is surely appropriate in this case. 'Historically, damages have been regarded as the ordinary remedy for an invasion of personal interests in liberty.'" (quoting Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 395)).
45. *Id.* ("Litigation under Title VII of the Civil Rights Act of 1964 has given federal courts great experience evaluating claims for backpay due to illegal sex discrimination.").
46. *Id.* ("[S]ince respondent is no longer a Congressman . . . equitable relief in the form of reinstatement would be unavailing.").
47. *Id.* at 246 ("[A]lthough a suit against a Congressman for putatively unconstitutional actions taken in the course of his official conduct does raise special concerns counselling hesitation, we hold that these concerns are coextensive with the protections afforded by the Speech and Debate Clause . . . If respondent's actions are not shielded by the Clause, we apply the principle that 'legislators ought . . . generally to be bound by [the law] as are ordinary persons.'").
48. *Id.* at 246–47.
49. *Id.* at 248.
50. *Id.* at 249.

Expansion continued the next year, 1980, with the Court's decision in *Carlson v. Green*.[51] The plaintiff, Marie Green, sued officials of the Federal Bureau of Prisons after her son, Joseph Jones Jr., died in defendants' custody.[52] Mr. Jones, who had chronic asthma, was incarcerated at the U.S. Penitentiary in Terre Haute, Indiana.[53] After he was hospitalized for eight days for complications arising from his asthma, doctors recommended Mr. Jones be transferred to a more favorable climate.[54] Defendants refused to do so. Back at the prison in Terre Haute, the defendants did not give Mr. Jones his proper medication or prescribed treatments.[55] A few weeks later, Mr. Jones was admitted to the prison hospital for an asthma attack, but he was not seen by a doctor for eight hours despite being in serious condition.[56] At one point, a Medical Training Assistant gave Mr. Jones "two injections of Thorazine, a drug contraindicated for one suffering an asthmatic attack."[57] Moreover, the respirator available at the time was broken, and officials at the prison did not know how to operate the machine needed to give Mr. Jones an electric shock once he went into respiratory arrest.[58] Mr. Jones was finally taken to St. Francis Hospital in Terre Haute where he passed away.[59]

On behalf of her son's estate, Ms. Green claimed violations of the Fifth Amendment's due process and equal protection clauses and the Eighth Amendment's protection from cruel and unusual punishment.[60] She sought $1.5 million in actual damages and $500,000 in punitive damages.[61]

In the third majority opinion in this line of doctrine authored by Justice Brennan, the Court again expanded the coverage of *Bivens*,[62] articulating *Bivens* as establishing, broadly, "that the victims of a constitutional violation by a federal agent have a right to recover damages against the official in federal court despite the absence of any statute conferring such a right."[63] The Court recognized that such a cause of action "may be defeated . . . in two situations:" (1) where "special factors counsel[] hesitation in the absence of affirmative action by Congress" and (2) where "Congress has provided an alternative remedy which it explicitly declared to be a *substitute* for recovery directly under the

51. Carlson v. Green, 446 U.S. 14 (1980).
52. *Id.* at 16–17.
53. Green v. Carlson, 581 F.2d 669, 670–71 (7th Cir. 1978).
54. *Id.* at 671.
55. *Id.*
56. *Id.*
57. *Id.*
58. *Id.*
59. *Id.*
60. *Id.*
61. *Id.*
62. Carlson v. Green, 446 U.S. 14, 24–25 (1980).
63. *Id.* at 18.

Constitution and viewed as equally effective."[64] Neither situation was present in Ms. Green's case, and thus, the claims proceeded.[65] The decision, however, marked the end of the expansion of *Bivens*.

The restriction of *Bivens* came as the Court's composition shifted right with the additions of Justices O'Connor and Scalia and with Justice Rehnquist assuming the position of Chief Justice. In a series of cases to follow *Carlson* through the 1980s, 1990s, and early 2000s, the Court declined to extend *Bivens* any further.[66] The justifications ranged from the existence of a robust and equally effective remedial scheme in *Bush v. Lucas*[67] to the need to avoid intrusion into military discipline and the exclusive system of military justice in *Chappell v. Wallace*,[68] and to the absence of the sort of deterrent effect that motivated the *Bivens* majority when suing a federal agency instead of an individual federal officer in *F.D.I.C. v. Meyer*.[69] The Court also declined to extend *Bivens* to private corporations and employees of private corporations, even those operating private prisons and engaged in conduct similar to the defendants in *Carlson*, finding that the policy justifications underlying *Bivens* simply were not present with private actors.[70]

By the time the Court's 2012 decision in *Minneci* came around, the doctrine had evolved in two ways. First, it is asked whether the case presents a "new context," which means asking if the case involves the application of *Bivens* to a context not previously recognized.[71] Second, if a case does present a new context, the court will then consider if there is "any alternative, existing process for protecting the [constitutionally recognized] interest" and are there "any special factors counselling hesitation before authorizing a new kind of federal litigation?"[72] This turned out to be a demanding standard.

The true restriction era, however, came quite recently in a trilogy of decisions beginning in 2017. In *Ziglar v. Abbasi*, the Court, in an opinion authored by Justice Kennedy, declined to extend *Bivens* to plaintiffs'

64. *Id.* at 18–19.
65. *Id.* at 19–20.
66. *See generally* Minneci v. Pollard, 565 U.S. 118 (2012); Wilkie v. Robbins, 551 U.S. 537, 550 (2007); Corr. Serv. Corp. v. Malesko, 534 U.S. 61 (2001); Fed. Deposit Ins. Corp. v. Meyer, 510 U.S. 471 (1994); Schweiker v. Chilicky, 487 U.S. 412 (1988); Chappell v. Wallace, 462 U.S. 296 (1983); Bush v. Lucas, 462 U.S. 367 (1983).
67. *Bush*, 462 U.S. at 387–89.
68. *Chappell*, 462 U.S. at 300.
69. *Meyer*, 510 U.S. at 486.
70. *Minneci*, 565 U.S. at 118; *Malesko*, 534 U.S. at 61; *See generally* Danielle C. Jefferis, *Constitutionally Unaccountable: Privatized Immigration Detention*, 95 IND. L.J. 145 (2020) for a discussion on the application of those holdings to private actors operating immigration detention facilities.
71. *E.g.*, *Malesko*, 534 U.S. at 68–69.
72. *E.g.*, *Minneci*, 565 U.S. at 122–23 (citing Wilkie v. Robbins, 551 U.S. 537, 550 (2007)).

claims against high-level executive officials for allegedly unconstitutional treatment while the plaintiffs were detained in a federal jail in Brooklyn.[73] The Court explicitly identified that it was "follow[ing] a *different approach* to recognizing implied causes of action" than in the mid-twentieth century.[74] Ultimately, the Court noted that "[t]he arguments for recognizing implied causes of action for damages began to lose their force."[75] The Court has "adopted a far more cautious course" since, opting instead to rely on Congress to confer remedies "in explicit terms."[76] After all, a federal court recognizing an implied cause of action for damages is "a significant step under separation-of-powers principles[.]"[77] Accordingly, "expanding the *Bivens* remedy is now a 'disfavored' judicial activity."[78] With that in mind, the guiding question after *Ziglar* is "'who should decide' whether to provide for a damages remedy, Congress or the courts?"[79] Unambiguously, the Court held in *Ziglar* that "[t]he answer most often will be Congress."[80]

Three years later, while writing for the majority in *Hernandez v. Mesa*, Justice Alito expanded on this admitted shift in judicial philosophy since *Bivens*: "In later years [after *Bivens*], we came to appreciate more fully the tension between [recognizing implied causes of action] and the Constitution's separation of legislative and judicial power."[81] The Court again declined to extend *Bivens* to the constitutional claims of the parents of Sergio Adrián Hernández Güereca, a fifteen-year-old boy who was fatally shot by a U.S. Customs and Border Protection agent while with a group of friends on the Mexican side of the U.S.-Mexico border in Texas.[82] "We have recognized that Congress," the majority wrote, "is best positioned to evaluate 'whether, and the extent to which, monetary and other liabilities should be imposed upon individual officers and employees of the Federal Government' based on constitutional torts."[83] Reiterating this philosophy, the Court admitted that if *Bivens*, *Davis*, and *Carlson* were decided today, "it is doubtful that [they] would have reached the same result."[84]

The restriction of *Bivens* culminated in the Court's 2022 decision in *Egbert v. Boule*, wherein Justice Thomas, writing for the majority, collapsed the governing legal standard concerning the new context, special factors, and alternative remedies into one question: "whether

73. Ziglar v. Abbasi, 582 U.S. 120, 127–28 (2017).
74. *Id.* at 131 (emphasis added).
75. *Id.* at 132.
76. *Id.* at 132–33.
77. *Id.* at 133.
78. *Id.* at 135 (citation omitted).
79. *Id.* (citation omitted).
80. *Id.*
81. Hernandez v. Mesa, 589 U.S. 93, 100 (2020).
82. *Id.* at 96–97.
83. *Id.* at 101 (quoting Ziglar v. Abbasi, 582 U.S. 120, 134 (2017)).
84. *Id.* at 101.

there is any reason to think that Congress might be better equipped to create a damages remedy."[85] Given the resounding messages that extending *Bivens* is a disfavored activity that poses grave concerns for separation-of-powers principles, the question itself nearly begs its own answer. In the Court's view, Congress is virtually exclusively better equipped to create a damages remedy. This articulation of the governing legal standard has effectively put *Bivens* to rest in the lower courts, as the next Part discusses.

## III. WHERE WE ARE

Between the Supreme Court's decision in *Egbert* in 2022 and this writing in February 2024, federal circuit courts have cited *Bivens* in 255 opinions.[86] Federal district courts have cited *Bivens* in more than 2,430 decisions.[87] In the overwhelming majority of those cases, the reviewing court has declined to allow the *Bivens* claims to proceed beyond a motion to dismiss, demonstrating that *Bivens* is effectively dead.

There are rare exceptions, arising generally where the claims were tried before *Egbert* was decided or where the defendants did not explicitly raise a defense on *Bivens* grounds. For example, in *Irele v. Griffin*, a case falling in the latter exception and involving a surviving son's Eighth Amendment claims against prison officials for damages arising from his mother's death in custody, the district court recently denied the defendants' motion to dismiss, allowing the claims to proceed to discovery.[88] The defendants did not challenge the availability of a *Bivens* cause of action for the claims asserted against the defendants who were alleged to have personally participated in the constitutional violations, perhaps concluding that *Carlson* governed.[89] Their brief did not cite *Ziglar*, *Hernandez*, or *Egbert*, nor did the defendants discuss the Court's recent, restrictive view of *Bivens*.[90]

85. Egbert v. Boule, 596 U.S. 482, 483 (2022).
86. WESTLAW, *Citing References*, BIVENS V. SIX UNKNOWN NAMED AGENTS OF FED. BUREAU OF NARCOTICS, www.westlaw.com (last visited 03/02/2024) (to navigate to the correct page, enter "403 U.S. 388," into the search bar; then navigate to the "citing references" bar, and use the side panel to narrow the jurisdiction to "Federal" and then "Courts of Appeals," and narrow further with the date range of June 9, 2022, through Feb. 9, 2024).
87. WESTLAW, *Citing References*, BIVENS V. SIX UNKNOWN NAMED AGENTS OF FED. BUREAU OF NARCOTICS, www.westlaw.com (last visited 03/02/2024) (to navigate to the correct page, enter "403 U.S. 388," into the search bar; then navigate to the "citing references" bar, and use the side panel to narrow the jurisdiction to "Federal" and then "District Courts," and narrow further with the date range of June 9, 2022, through Feb. 9, 2024).
88. Iriele v. Griffin, No. 7:20-CV-383 (N.D. Ala. order filed Dec. 5, 2023).
89. *See generally* Individual Federal Defendants' Motion to Dismiss, *Iriele*, No. 7:20-CV-383 (N.D. Ala., Aug. 21, 2023), ECF No. 46.
90. *See id.*

Where defendants do raise the Court's new view of *Bivens*, however, lower courts seldom allow the claims to proceed. For federal prisoners' claims, the arguments against allowing the claims tend to focus on the assertion that nearly every claim for damages arising in a federal prison presents a "new context" from *Carlson* and, thus, the court should decline to extend the cause of action to the new context because an alternative remedy, such as the BOP's administrative grievance procedure, exists.[91] In light of the Court's *Egbert* question—and its pronouncement that the existence of an alternative remedy "is reason enough to 'limit the power of the Judiciary to infer a new *Bivens* cause of action'"[92]—these grounds alone are more than sufficient to decline to allow the claim.

In a *pro se* case pending in the District of Colorado, for example, the plaintiff, Pedro Casilla-Diaz, sought leave to amend his complaint to add claims for damages against individual BOP officials[93] whom he alleged failed to provide adequate medical care for a serious injury he suffered in prison, thus violating the Eighth Amendment.[94] The context would seem to be quite similar to Marie Green's claim of inadequate medical care for her son's serious medical need in *Carlson*. The government, however, argued that Mr. Casilla-Diaz's proposed claims are not cognizable under *Bivens* because he sought to extend *Bivens* to a new context.[95] Namely, Mr. Casilla-Diaz's proposed claims are asserted against non-medical defendants, whereas Ms. Green's claims were asserted against medical defendants.[96] Further, the government argued that the sort of denial of medical care in *Carlson* is distinguishable from Mr. Casilla-Diaz's alleged denial of medical care: "[I]n *Carlson*, the deprivation in medical care was so severe that the prisoner ultimately died[;] here, Plaintiff's alleged consequences—a knee injury worsened by delay in treatment or inadequate care—are not nearly so dire."[97] Another distinguishing factor, the government argued, is that "the denial of care in *Carlson* was in the context of a true medical emergency that caused death within hours. But Plaintiff's claims are based on non-life-threatening conditions (failure to

91. *See, e.g.*, Bulger v. Hurwitz, 62 F.4th 127, 140-41 (4th Cir. 2023); Silva v. United States, 45 F.4th 1134, 1141 (10th Cir. 2022) ("We therefore have little difficult concluding that the BOP Administrative Remedy Program is an adequate 'means through which allegedly unconstitutional actions . . . can be brought to the attention of the BOP and prevented from recurring." (quoting Corr. Serv. Corp. v. Malesko, 534 U.S. at 74 (2001)).
92. Egbert v. Boule, 596 U.S. 482, 493 (2022).
93. Plaintiff's Request for Leave of Court to Amend Complaint, Casilla-Diaz v. United States, No. 23-CV-1333 (D. Colo., Oct. 26, 2023), ECF No. 49.
94. *Id*. at ECF No. 49-1 (attached Plaintiff's First Amended Complaint).
95. United States' Response to Motion to Amend at 10, *Casilla-Diaz*, No. 23-CV-1333, ECF No. 57.
96. *Id.* at 10–11.
97. *Id.* at 11 (citation omitted).

more immediately schedule him for orthopedic surgery and later provide physical therapy.)"[98] Last, "in *Carlson*, the defendants did not provide any competent medical attention or care. Here, Plaintiff himself alleges that he received some medical attention and care[.]"[99] Thus, the new context from which Mr. Casilla-Diaz's claim arose pushed the analysis into the special factors and alternative remedy inquiries, both of which the government argued demonstrated the claims should not proceed.[100] The district court agreed, denying Mr. Casilla-Diaz's motion for leave to amend to add those claims on the grounds that no *Bivens* remedy was available.[101]

*Hicks v. Ferreyra* presents the rare instance of a case falling in the former exception, involving *Bivens* claims that were tried before *Egbert* and, therefore, upheld on appeal.[102] Now-retired U.S. Secret Service Special Agent Nathanial Hicks alleged in a 2016 complaint that U.S. Park Police Officers Gerald Ferreyra and Brian Phillips detained him during two traffic stops in violation of the Fourth Amendment.[103] Defendants sought early dismissal of the case, arguing *Bivens* should not be extended to the facts Mr. Hicks alleged.[104] The district court denied the motion,[105] and the case went to trial. The jury returned a verdict in July 2021 for Mr. Hicks, awarding him $80,000 in compensatory damages and $225,000 in punitive damages against Officer Ferreyra and $125,000 in compensatory damages and $300,000 in punitive damages against Officer Phillips.[106]

Officers Ferreyra and Phillips moved for a new trial, asserting (among other things) that *Ziglar* precludes the sort of *Bivens* claims brought against them.[107] The district court denied the motion, and the Fourth Circuit affirmed the denial.[108] On appeal, the court found that Mr. Hicks's claims did *not* present a new *Bivens* context despite factual differences from Mr. Bivens's claims, reasoning that the Court's restriction of the doctrine "does not undermine the vitality of *Bivens*

98. *Id.* (citation omitted).
99. *Id.* (citation omitted).
100. *See id.* at 11–14.
101. Order on Plaintiff's Request for Leave to Amend Complaint at 11, *Casilla-Diaz*, No. 23-CV-1333, ECF No. 59.
102. *See generally* Hicks v. Ferreyra, 64 F.4th 156 (4th Cir. 2023).
103. *Id.* at 161–62.
104. Motion to Dismiss for Failure to State a Claim, or, in the Alternative, for Summary Judgment at 4, Hicks v. Ferreyra, No. 16-CV-2521 (D. Md., Oct. 28, 2016), ECF No. 37.
105. Hicks v. Ferreyra, No. 16-CV-2521 (D. Md. Apr. 11, 2017).
106. Special Verdict Form, Hicks v. Ferreyra, No. 16-CV-2521 (D. Md., July 12, 2021), ECF No. 150.
107. Defendants' Omnibus Post-Trial Motion, Hicks v. Ferreyra No. 16-CV-2521 (D. Md., Sept. 3, 2021), ECF No. 165.
108. *Hicks*, 64 F.4th at 177.

in the warrantless-search-and-seizure context of routine criminal law enforcement."[109]

The Fourth Circuit's reasoning in *Hicks* is exceedingly unusual in comparison to the other federal circuits, where the "new context" inquiry is done at increasingly granular levels of factual detail such that virtually any claim arises in a "new context."[110] Judge Silberman of the D.C. Circuit recognized as much when he observed, "[T]he truth of the matter is [the Court] has simply red-circled—to use a labor relations term—three *Bivens* cases. Those cases are limited to virtually the same factual situations."[111]

Again, *Hicks* is a rare exception to an otherwise effectively dead *Bivens* doctrine. The Sixth Circuit recently clarified its view that "*Egbert* applies 'to all pending cases, whether or not those cases involve predecision events.'"[112] Similarly, the Second Circuit affirmed the eve-of-trial dismissal on *Egbert* grounds of Fourth Amendment claims for damages against U.S. Marshals defendants in *Lewis v. Bartosh*.[113] "[T]he district court was permitted to *sua sponte* raise the effect of the *Egbert* decision . . . We otherwise agree with the district court that *Egbert* precludes Lewis's *Bivens* claims."[114] A panel of the Tenth Circuit was "left in no doubt that expanding *Bivens* is not just a disfavored activity, it is an action that is impermissible in virtually all circumstances."[115] Even the Ninth Circuit has acknowledged that "[t]he Supreme Court means what it says: *Bivens* claims are limited to the three contexts the Court has previously recognized and are not to be extended unless the Judiciary is better suited than Congress to provide a remedy."[116]

The death of *Bivens* has a particularly acute effect on the more than 150,000 people who are in the custody of the federal government, as stated above, and for which federal civil actions provide a critical means of legal protection from serious harm experienced while incarcerated.[117] Indeed, of the 254 federal appellate decisions citing *Bivens* since the Court's decision in *Egbert*, almost half (104) involve claims against BOP officials. Another ten or so involve claims against immigration officials with carceral authority. That alone should demonstrate the significance of the *Bivens* remedy to the federally incarcerated who

109. *Id.* at 166, 169.
110. *See, e.g.*, *supra* pp. 11–14; *See, e.g.*, *infra* p. 15.
111. K.O. by and through E.O. v. Sessions, 41 F.4th 664, 665 (D.C. Cir. 2022) (Silberman, J. concurring).
112. Himmelreich v. Fed. Bureau of Prisons, No. 22-4030, 2023 WL 8712261, at *1 (6th Cir., Nov. 2, 2023) (quoting Watkins v. Healy, 986 F.3d 648, 665 (6th Cir. 2021)).
113. Lewis v. Bartosh, No. 22-3060, 2023 WL 8613873 (4th Cir., Dec. 13, 2023)); *see also* Lewis v. Westfield, 640 F.Supp.3d 249, 251 (E.D.N.Y. 2022) (issuing the holding that was affirmed in *Bartosh*).
114. *Bartosh* at *1.
115. Silva v. United States, 45 F.4th 1134, 1140 (10th Cir. 2022).
116. Harper v. Nedd, 71 F.4th 1181, 1183 (9th Cir. 2023).
117. *See* Jefferis, *supra* note 70.

otherwise have few options to seek accountability for harms they incur in prison at the hands of individual federal officials, especially discrete injuries for which no prospective relief would be available. The death of *Bivens* demands action from federal courts, from plaintiffs' lawyers, and from Congress, as the next Part discusses.

## IV. WHERE WE GO NEXT.

Lower federal courts have heard the message from the Court loud and clear: *Bivens* is (and should be) effectively dead. If the trend that has emerged among lower courts since *Egbert* continues, there will be no cause of action for damages recognized against federal officials of any type or under any sort of factual circumstances in the foreseeable future. The state of the law, thus, demands action. This Part discusses three specific calls to action, focusing first on the lower federal courts, then on Plaintiffs' lawyers, and finally on Congress. This Part does not address a glaring call to action to the Supreme Court, which is to expressly overturn *Bivens*, *Davis*, and *Carlson*, though such a step would help to settle the doctrine once and for all.

As for lower federal courts, this Part urges federal judges to stop stating that a Plaintiff's claims brought under other legal mechanisms are better suited under *Bivens*. Doing so erringly invites plaintiffs who are all too often unrepresented to spend time and resources refashioning a dispute as a *Bivens* claim only to then face the inevitable *Bivens* dismissal. This occurs often when a *pro se* plaintiff seeks relief from harmful conditions of federal confinement through a *habeas* petition. The reviewing court often dismisses the petition, stating expressly that the claims raised therein are better suited as challenges to conditions of confinement brought pursuant to *Bivens*. [118] It may be

118. *See, e.g.*, United States v. Akers, No. 22-3083, 2023 WL 4636751, at *1 (10th Cir., July 20, 2023); Cole v. Keyes, No. 22-3018, 2023 WL 4234403, at *1 (7th Cir., June 28, 2023); In re Peters, No. 22-3330, 2023 WL 3674661, at *1 (3d Cir., May 26, 2023) ("[T]o the extent that Peters mentions issues with his conditions of confinement in state or federal corrections facilities, he has alternative means of obtaining relief – exhausting his administrative remedies, and, if appropriate, filing a civil rights action [under *Bivens*]."); Hussain v. Warden Allenwood FCI, No. 22-1604, 2023 WL 2643619, at *1 n.1 (3d Cir., Mar. 27, 2023); Doe v. Secretary, U.S. Dep't of Homeland Sec., No. 22-11818, 2023 WL 2564856, at *3 n.1 (11th Cir., Mar. 20, 2023) ("The Supreme Court in *Bivens* established the availability of a cause of action against federal officials in their individual capacities for violations of constitutional rights."); Martinez Lara v. Garland, Nos. 17-72452, 18-71713, 19-71067, 2023 WL 2301437, at *1 (9th Cir., Mar. 1, 2023) (finding petitioner "also raises a *Bivens*-type claim for asserted violation of his civil rights. This, however, is neither the proper proceeding nor the proper forum in which to make such claims in the first instance."); United States v. Diaz-Rosado, No. 21-10834, 2023 WL 2129555, at *5 (11th Cir., Feb. 21, 2023) (denying compassionate release motion and stating "the 'appropriate … relief from prison conditions that violate the Eighth Amendment during legal incarceration' would be a lawsuit—under the circumstances here, presumably filed under [*Bivens*]"); United States v. Martinez, No. 22-10127,

true that confinement conditions are not suited for a *habeas* petition, but there is little sense in suggesting to a litigant that they re-frame their claims as ones that are also not suited for a federal civil action. While this Essay does not suggest that federal courts should advise or counsel litigants as to how to frame their complaints, it may be wise for courts to look to what the Sixth Circuit did recently when dismissing a case that likely should have been brought via a different procedural mechanism: "To the extent the claimants seek damages directly under the First Amendment against a federal official, they must rely on [*Bivens*]. But extending *Bivens* is 'disfavored' . . . and the Supreme Court has rejected *Bivens* claims 'against private corporations acting under color of federal law.'"[119]

As for Plaintiffs' lawyers, the call to action is to take the Court's admonitions in *Egbert* seriously and consider, carefully, how and when to counsel a client about the effectiveness of pursuing a claim under *Bivens*. Survey the state of the law in the lower federal courts. With few exceptions, circuit courts are again and again communicating that *Bivens* is effectively limited to the precise factual circumstances of *Bivens*, *Davis*, and *Carlson*.[120] Advising a client that their constitutional remedies are severely limited is difficult, generally. It is even more difficult when your advice has to include the admission that if they had been in the custody of state officials instead of federal officials, their remedies would look quite different. The law has evolved in such a way, however, that the risk of bringing claims under *Bivens* is not so much one of creating "bad law" anymore but rather of wasting time and resources in pursuing remedies that do not exist.

Finally, the loudest call to action goes to Congress. The Court has, in no uncertain terms, kicked this question to the legislative branch. And while this Essay would not assert that the Court itself is demanding congressional action in any way, failing to act in this instance is borderline inexcusable. Federal constitutional protections that the nation holds so dear ring hollow when citizens cannot effectively exercise those rights by claiming appropriate remedies for violations. What does the Fourth Amendment really mean, for instance, if a federal official can forcefully or even violently search a person with no justification but then face no meaningful consequences for doing so? What sense is there in holding state officials accountable to constitutional standards but not their federal counterparts?

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2022 WL 16549238, at *1 (5th Cir., Oct. 31, 2022) ("To the extent that Martinez argues that prison officials have violated the Eighth Amendment, claims regarding prison conditions are properly addressable in a lawsuit brought pursuant to [*Bivens*].").

119. Ciraci v. J.M. Smucker Co., 62 F.4th 278 (6th Cir. 2023) (citations omitted).

120. *See* discussion *supra* Sections I, II.

The legislative fix is an easy one: amend 42 U.S.C. § 1983 to include officials acting "under color of federal law." This amendment would bring federal actors in line with state and local actors, thus ensuring a uniform application of the Constitution and private enforcement thereof. Indeed, this very amendment has been proposed in two recent Congresses. Congressman Hank Johnson of Georgia introduced the Bivens Act of 2020 in the 116th Congress with one co-sponsor, Congressman Raskin of Maryland.[121] The bill was referred to the House Committee on the Judiciary but did not proceed further.[122] Congressman Johnson introduced the same bill the next year where it then had fourteen co-sponsors, all Democrats.[123] The Bivens Act of 2021 was referred to the Subcommittee on the Constitution, Civil Rights, and Civil Liberties, but again, did not progress further.[124] In the same Congress, Senator Whitehouse of Rhode Island introduced the same legislation in the Senate with three co-sponsors, all Democrats.[125] The bill was read twice and referred to the Senate Judiciary Committee but, again, did not progress further.[126]

The failures to pass the Bivens Act are no reason to stop advocating for legislative action. The need for the bill is there; the evidence to support it is clear. The Court's refusal to uphold constitutional values in the absence of congressional action is loud and clear. *Bivens* was never a comprehensive doctrine, but it sustained certain causes for several decades. That era is over. The time is ripe for Congress to answer the call for action in this space.

## V. CONCLUSION

The Third Circuit was correct when it acknowledged recently in the aftermath of *Egbert*, "Not all rights have remedies, even when they are enshrined in the U.S. Constitution."[127] The effective death of the *Bivens* doctrine has led us here. This Symposium's focus on advancing justice for the federally incarcerated is exceptionally timely in its demand that we take a close look at the state (and demise) of the law in place to do just that—advance justice for those in federal custody.

As the law currently stands, there is significant work to do. But this is not where we have to remain. This Essay has identified three specific calls to action in the wake of the death of *Bivens*, targeting lower federal courts, plaintiffs' lawyers, and Congress. Certainly, allowing for more civil actions by incarcerated people will not solve all justice issues

121. Bivens Act of 2020, H.R. 7213, 116th Cong. (2020).
122. *Id*.
123. Bivens Act of 2021, H.R. 6185, 117th Cong. (2021).
124. *Id*.
125. Bivens Act of 2021, S. 3343, 117th Cong. (2021).
126. *Id*.
127. Xi v. Haugen, 68 F.4th 824, 828 (3d Cir. 2023).

impacting those who are incarcerated. But, specific attention should be paid to the call to action to Congress because that is where the path forward in this narrow space lies. Taking legislative action to codify the right to a damages remedy for constitutional violations committed by federal actors in the wake of the death of *Bivens* is essential.