No. _____

_____

IN THE

SUPREME COURT OF THE UNITED STATES

_____

RAUL SANCHEZ ZAVALA — PETITIONER
(Your Name) Plaintiff

vs.

HECTOR RIOS, ET AL. — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

RAUL SANCHEZ ZAVALA 11174-085
(Your Name)

FCI Lompoc/3600 Guard Road
(Address)

Lompoc, California 93436
(City, State, Zip Code)

_____
(Phone Number)

QUESTION(S) PRESENTED

I. WHETHER ZIGLAR v. ABBASI, 137 S.Ct. 1843 (2017), PRECLUDES A MONEY DAMAGES CLAIM UNDER BIVENS v. SIX UNKNOWN NAMED AGENTS OF FEDERAL BUREAU OF NARCOTICS, 403 U.S. 388 (1971), FOR VIOLATIONS OF PROCEDURAL DUE PROCESS RELATED TO PRISON MAIL AND CLAIMS AGAINST PRISON OFFICIALS.....II

THE NINTH CIRCUIT FAILED TO RESOLVE PLAINTIFF'S QUESTION:

WHETHER PLAINTIFF IS ENTITLED TO NOTICE WHEN **"UNOPENED"** MAIL HAS BEEN REJECTED AND RETURNED TO THE SENDER BECAUSE IT FAILED TO COMPLY WITH PRISON REGULATIONS?

LIST OF PARTIES

[ ] All parties appear in the caption of the case on the cover page.

[X] All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

Defendant Alicia Gonzaga

Unknown Defendant A

Unknown Defendant B

~~Assistant United~~ States Attorney Benjamin E. Hall

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FEDERAL STATUTES, RULES AND REGULATIONS

OTHER SOURCES

IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

[X] For cases from **federal courts:**

The opinion of the United States court of appeals appears at Appendix A to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[X] is unpublished.

The opinion of the United States district court appears at Appendix B to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[X] is unpublished.

[ ] For cases from **state courts:**

The opinion of the highest state court to review the merits appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the _____ court appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

JURISDICTION

[X] For cases from **federal courts:**

The date on which the United States Court of Appeals decided my case was May 2, 2018.

[X] No petition for rehearing was timely filed in my case.

[ ] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ___A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

[ ] For cases from **state courts:**

The date on which the highest state court decided my case was _____. A copy of that decision appears at Appendix _____.

[ ] A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ___A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Fifth Amendment to the United States Constitution

42 U.S.C. § 1997(e)

18 U.S.C. § 3626

Fed.R.Civ.P. 15

28 C.F.R. § 540.13

Procedural and Substantive Due Process

STATEMENT OF THE CASE

Mr. Zavala's civil rights action concerns several policies and practices at the United States Penitentiary in Atwater, California, from 2006 to 2008 that kept him from receiving important legal information from his attorneys during his direct appeal and habeas corpus proceedings. The facts herein focus on Atwater's unlawful policy that prisoners would not be provided notice if mail addressed to them was rejected unopened by prison staff based on a determination that the mail did not comply with prison weight and/or labeling rules. Under this policy, prison staff rejected and did not provide notice to him that the packages had been rejected.

The unlawful failure to notify occurred while Mr. Zavala was housed at Atwater following his 2006 conviction in district court for a drug offense that resulted in a life sentence. Mr. Zavala is currently hosued at the Federal Correctional Institution Low at Lompoc, California.

During the relevant time, Alicia Gonzaga supervised the Atwater mail room, inmate receiving and discharge, and inmate records office.

The first instance of prison staff rejecting Mr. Zavala's mail without notice occurred during his direct appeal. Mr. Zavla's appointed counsel, Karen Lindholdt, filed Mr. Zavala's opening brief and excerpts of record in the Ninth Circuit Court of Appeals in September 2006 and sent Mr. Zavala a copy of the documents by mail.*

*The docket from Mr. Zavala's direct appeal reflects that Ms. Lindholdt served the opening brief and excerpts on September 22, 2006, and filed them with the Court on September 25, 2006. United States v. Zavala, No. 06-30265 (9th Cir.), Dkt. No. 14. The reply brief was served on November 20th and filed on November 27th. Id. at Dkt. No. 20.

But because prison staff failed to notify him that the mail had been rejected, Mr. Zavala not only did not receive the package, he did not know that it had been sent either.

In early December 2006, after briefing was complete in his appeal, Mr. Zavala received two priority legal mail envelopes from Ms. Lindholdt that contained the filed briefs and excerpts. In a cover letter, Ms. Lindholdt informed him that her original mailing with the opening brief and excerpts of record had been returned by prison staff because "the box was 'too heavy' for prison standards." After Mr. Zavala had a chance to review the opening brief, he discovered factual inaccuracies that, because of Atwater's rejection of the mail without notice, he did not have an opportunity to address with Ms. Lindholdt in time for the reply brief.

Mr. Zavala inquired about Atwater's mailroom policy by sending a "cop-out"--a form that prisoners use to file requests with Atwater officials--addressed to Ms. Gonzaga, in which he asked whether any mail addressed to him had been rejected, and if so, "when, why and by whom." Mr. Zavala received the following response:

> Inmate Zavala I see no rejection in the month of February or March. Any time we reject something you will get a copy in the mail bag. If you had any legal documents sent in you would have gotten them if they were under 16 oz. If they are over 16 oz.you need to have a package authorization on file or it would have been returned to sender at the post office. We do not have to provide you with any notice if we do this. It is your responsibility to get with your unit team and have a package authorization on file with us if the package is over 16 oz.

Mr. Zavala sent another cop-out requesting a copy of his mail rejection records and received a response that no mail rejections had been found. Mr. Zavala then filed an administrative grievance known as an "Informal Resolution Form" to a prison official, but the grievance was denied. Mr. Zavala filed additional Informal

Resolution Forms about the mail rejections, but all were denied.

The second instance of Atwater staff rejecting Mr. Zavala's mail without notice occurred while he was preparing a petition for certiorari and a habeas petition on his own behalf. In October 2007, Mr. Zavala asked his trial attorney Frank Cikutovich, for documents from his case file. See United States v. Zavala, No. 06-30265 (9th Cir.), Dkt. Nos. 62, 64. Based on the earlier response to his cop-out indicating that he needed to file a package authorization form for any mail over 16 ounces, including legal mail, Mr. Zavala completed the authorization form and personally delivered it to Ms. Gonzaga.

This time, Ms. Gonzaga informed Mr. Zavala that the authorization form was not necessary for legal mail--contrary to the guidance he had received earlier. Ms. Gonzaga did not return the authorization form to Mr. Zavala. Mr. Zavala filed another cop-out form to clarify whether he needed to file an authorization form in order to receive legal packages over 16 ounces, to which Ms. Gonzaga and another prison official responded that a "legal mail package did not need to be pre-approved and no authorization form was needed."

Based on these responses, Mr. Zavala mailed a letter to Mr. Cikutovich on October 12, 2007, requesting his case file and informing Mr. Cikutovich that the package needed to marked "Special Mail -- Open in the presence of inmate only." Over a month later, another prison official informed Mr. Zavala that his legal mail instead needed to be marked "Authorized by Bureau Policy."

Having waited four months for a response from Mr. Cikutovich and received none, on February 18, 2008, Mr. Zavala filed a motion to compel the release of the documents with the district court in

which he was convicted, the Eastern District of Washington. On May 19, 2008, Mr. Zavala received a copy of an order from the district court instructing Mr. Cikutovich to respond to the motion to compel within 20 days. Mr. Zavala did not recieve any response from Mr. Cikutovich or any further notices from the court until late July 2008, when he received a copy of a court order containing Mr. Cikutovich's response to the motion to compel.**

From the court order, Mr. Zavala learned that Mr. Cikutovich had sent the requested legal documents way back on February 19, 2008, but they were returned to him a month later marked with "Receiver Did Not Want" and "Package Authorization Not on File" stamps. The court order also noted that Mr. Cikutovich had left several messages with Mr. Zavala's counselor at Atwater after receiving the returned legal materials, but Mr. Cikutovich never received a response from the counselor or any other prison official.

Meanwhile, Mr. Zavala was never given notice from the prison that Mr. Cikutovich's legal mail to him had been rejected and returned to sender, or that Mr. Cikutovich had contacted his couselor about the returned mail. Without the trial documents from his counsel, Mr. Zavala did not possess all of the necessary information to support his habeas petition when it was filed.

To reiterate, prison staff had:

- rejected the first legal package to Mr. Zavala without notice, based on its weight, pursuant to a determination that Mr. Zavala needed to submit an authorization form for any packages over 16 ounces;

** Mr. Zavala's instructions to his trial attorney correctly reflect the rule on marking legal mail. 28 C.F.R. § 540.19(b)(inmates should advise their "attorney that correspondence will be handled as special mail only if the envelope is marked with the attorney's name and an indication that the person is an attorney, and the front of the envelope is marked 'Special Mail--Open only in the presence of the inmate'"); USP Atwater Inmate Admission & Orientation Handbook, at p. 59, available at https://www.bop.gov/locations/institutions/atw/ATW_aohandbook.pdf(last accessed on 10/17/2017).

- informed Mr. Zavala that he needed to fill out an authorization form for any packages weighing over 16 onces;

- later refused to accept Mr. Zavala's authorization form, explaining that legal packages weighing over 16 ounces did not require an authorization form;

- yet rejected the second legal package without notice, based on its weight and the lack of an authorization form.

All fo this deprivded Mr. Zavala of important information with which to support the legal redress he was lawfully pursuing. Not only did prison staff fail to provide any notice to Mr. Zavala regarding the rejections, they also did not maintain a log or record of the rejections.

Between late 2008 and early 2009, Mr. Zavala filed numerous cop-outs and appeals concerning the return of his legal mail to his attorneys without notice to him. Some of these cop-outs were denied. In response to other cop-outs, he was informed that there were no rejections on file, but also that staff was not required to keep a record of mail that was rejected at the prison post office. Several responses to Mr. Zavala stated the prison mail policy that staff working at the prison post office could "refuse" unopened packages for weight or labeling reasons, in which case they were "not considered inspected or accepted for processing by institutional staff" and "staff [was] neither required to keep record of packages rejected at the post office nor provide a formal written notice to [the prisoner] or the sender." Neither Ms. Gonzaga nor other prison staff ever took corrective action to address Mr. Zavala's complaints.

PROCEDURAL HISTORY

Mr. Zavala filed this Bivens action pro se on April 16, 2009. Mr. Zavala's first five complaints were dismissed at screening under 28 U.S.C. § 1915A, for failure to state a cognizable claim, but with

leave to amend certain claims. The district court ordered the fifth amended complaint served on Ms. Gonzaga, who filed an answer.

Mr. Zavala subsequently filed the operative seventh amended complaint. In a screening order, the district court determined that Mr. Zavala stated a cognizable Fifth Amendment due process claim against Ms. Gonzaga and Doe Defendants A and B, who are unidentified prison mailroom employees at Atwater. The complaint alleged that Ms. Gonzaga and the Doe Defendants "violated his Fifht Amendment due process rights by failing to notify him of the prison's rejection of packages containing legal materials." Mr. Zavala sought both compensatory and punitive damages from the individual defendants.

Following discover, Ms. Gonzaga and the other Defendants filed a motion for summary judgment on February 9, 2015. The district court granted Mr. Zavala's motion for an extension fo time to respond, but denied his motion for leave to amend the pleadings. Mr. Zavala filed a response to Ms. Gonzaga's summary judgment motionon May 18, 2015.

In assessing the Fifth Amendment due process claim, the district court found that Mr. Zavala "raised a genunine issue of material fact as to whether Defendant Gonzaga knew or directed her supervisees to deny notice to inmates when their mail was rejected at the prison post office"--"a practice which, according to the evidence, only occurred on her watch." However, the district court granted summary judgment on the basis of qualified immunity. The court defined the issue as whether Mr. Zavala had a due process right "to notice when unopened mail has been rejected and returned to the sender because it failed to comply with prison regulations for markings on the package," and concluded that the right had not been

clearly established. Mr. Zavala filed a motion for reconsideration, which the district court denied.

Mr. Zavala timely appealed to this Court and filed pro se briefing. (Informal Opening Brief). This Court determined that pro bono counsel would benefit its review and ordered counsel to address "whether a prisoner's constitutional right to due process is violated when his unopened legal mail is rejected without notice," along with any other issues addressed in the briefs. (Pro Bono Order). Hastings Appellate Project has been appointed as pro bono counsel and submits this supplemental opening brief on the due process issues identified in the Court's pro bono order, but does not intend to waive or abandon the additional issues raised by Mr. Zavala in parts II-XVII of his informal opening brief. (Informal Opening Brief, pp. 9-39), 32-1 (Pro Bono Counsel Appointment Order).

REASONS FOR GRANTING THE PETITION

I. ZIGLAR v. ABBASI, 137 S.Ct. 1843 (2017), DOES NOT PRECLUDE A MONEY DAMAGES CLAIM UNDER BIVENS v. SIX UNKNOWN NAMED AGENTS OF FEDERAL BUREAU OF NARCOTICS, 403 U.S. 388 (1971), FOR VIOLATIONS OF PROCEDURAL DUE PROCESS RELATED TO PRISON MAIL AND CLAIMS AGAINST PRISON OFFICIALS

a. A Bivens Cause of Action is Available to Mr. Zavala for his Fifth Amendment Due Process Claim Against Prison Officials

In the seminal Bivens case in 1971, the Supreme Court first "established 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." Carlson v. Green, 446 U.S. 14, 18 (1980) (citing Bivens, 403 U.S. at 396). Bivens involved a Fourth Amendment claim against federal officials who conducted an unreasonable search and seizure, but since then, the Supreme Court has recognized a Bivens cause of action for a Fifth Amendment due process claim, as asserted here, and a constitutional claim against federal prison officials, as also asserted here. See Bivens, 403 U.S. at 392-93; Davis v. Passman, 442 U.S. 228, 230 (1979); Carlson, 446 U.S. at 18-19.

The government, in the Ninth Circuit, contended for the first time on appeal that Mr. Zavala's case presented a new context for a Bivens action and Bivens should not be extended to Mr. Zavala's case because there are special factors counseling hesitation. Repondent's Answering Brief (AB) at 10-29. The government's argument relied on a recent Supreme Court case, Ziglar v. Abbasi, 137 S.Ct. 1843 (2017) which involved constitutional claims against high-level government officials for detention policies enacted in the wake of the September 11 terrorist attacks that allowed for the detention of illegal aliens with suspected ties to terrorism. Although the Supreme Court held that a Bivens claim could not lie

against those defendants, it remanded the claims against the wardens at the detention centers for the district court to evaluate in light of several factors. Id. at 1863-65.

As Abbasi set forth, courts consider several factors in deciding whether a Bivens cause of action is available for a constitutional claim. The first question is whether allowing a Bivens cause of action in the plaintiff's case would extend Bivens to a new context. Id. at 1857. If the answer is yes, courts consider whether special factors counsel heistation in extending Bivens to the new context, including whether Congress has provided the plaintiff with an alternative remedy. Id. at 1859-60.

Here, Mr. Zavala's case does not present a new context and, even if it did, there are not special factors counseling hesitation, nor an alternative remedy available to him. Thus, Mr. Zavala can proceed with a Bivens action.

b. The Facts of Mr. Zavala's Case Do Not Require Extending Bivens to a New Context.

A case presents a new context only "if the case is different in a meaningful way from previous Bivens cases decided by [the Supreme Court]." Id. at 1859. In Abbasi, the Supreme Court articulated a non-exhaustive list of differences meaningful enough to make a context a new one:

* 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; and
* the presence of potential special factors that previous Bivens cases did not consider.

Id. at 1860.

The Ninth Circuit has also considered how a Bivens cause of action should apply to new contexts, and has cautioned that "context" should not be construed too broadly or narrowly by court:

> Examining the availability of a Bivens remedy at a high level o of generality would invite claims in every sphere of legitimate governmental action touching, however tangentially, on a constitutionally protected interest. Examining the question at too low a level of generality would invite never ending litigation because every case has points of distinction. As such, we join our sister circuit and construe the word context as it is commonly used in law; to reflect a potentially recurring scenario that has similar legal and factaul components.

Mirmehdi v. United States, 689 F.3d 975, 981 (9th Cir. 2012) (internal citations and quotation marks omitted).

Under the Abbasi factors and this Court's framework for defining context, Mr. Zavala's case does not present any meaningful differences from the Supreme Court cases that have already recognized the availability of a Bivens cause of action for a civil due process claim and for claims against federal prison officials directly involved in constitutional violations. See Davis, 442 U.S. at 230-31 (allowing a Bivens cause of action against a Congressman who was alleged to have fired a woman on the basis of her sex in violation of her Fifth Amendment due process rights); Carlson, 446 at 18-19 (allowing a woman to bring a Bivens action on behalf of her prisoner-son to remedy Eighth Amendment violations allegedly committed by federal prison officials).

Rank of the officers. Regarding the first factor, rank, of the Supreme Court has already allowed a Bivens cause of action against federal prison officials directly involved in a constitutional violation. See Carlson, 446 U.S. at 19. Likewise, the Ninth Circuit and other circuit courts have recognized the availability of a Bivens cause of action against federal prison officials directly involved in constitutional violation. Gillespie v. Civiletti, 629 F.2d 637, 642

(9th Cir. 1980)(Bivens action could be maintained under First, Fifth, and Eighth Amendments); Bonner v. Outlaw, 552 F.3d 673, 675 (8th Cir. 2009)(challenging constitutionality of prison mail handling and lack of notice under First, Fifth, and Sixth Amendments); Bagola v. Kindt, 39 F.3d 779, 779-80 (7th Cir. 1994) (per curiam)(bringing Bivens action against prison officials for Eighth Amendment violations). Thus, Mr. Zavala's case is different from Abbasi, in which the Supreme Court declined to extend Bivens to top officials in the federal government who were a "new category of defendants." See Abbasi, 137 S.Ct. at 1857.

Constitutional Right at Issue. Mr. Zavala's claim involves a Fifth Amendment due process claim, which was the constitutional right at issue in Davis, 442 U.S. at 230-31. Although Davis involved a substantive due process claim and Mr. Zavala brings a procedural due process claim, district courts have long recognized procedural due process claims as a Bivens cause of action. As the Ninth Circuit articulated, "[t]he due process guarantees of the fifth amendment, both substantive and procedural may serve as the foundation for a Bivens action." F.E. Trotter, Inc. v. Watkins, 869 F.2d 1312, 1314 (9th Cir. 1989); see alsoBothke v. Fluor Engineers & Constructors, Inc., 834 F.2d 800, 814 (9th Cir. 1987)(same); Manning v. Miller, 355 F.3d 1028,1031 n.1 (7th Cir. 2004)("[W]e have recognized that Bivens may be used to bring claims for volations of procedural and substantive due process." (citations omitted)).

Generality or Secificity of the Official Action. Additionally, Mr. Zavala's claim is narrow in that it challenges a specific mail notice policy implemented by the prison under Ms. Gonzaga's supervision.

Supplemental Opening Brief ("OB"). Thus, Mr. Zavala's claim is unlike the claim rejected in Abbasi in which the Court declined to allow the plaintiffs to extend a Bivens action to challenge the government's "detention policy" for "illegal aliens" "in the wake of a major terrorist attack." Abbasi, 137 S.Ct. at 1860.

Mr. Zavala's claim is more akin to the claim against the prison warden in Abbasi for allegedly allowing the guards to abuse prisoners while detained, which the Court sent back for the lower court to consider whether the claim could proceed. Id at 1863. The Abbasi plaintiff's second claim against prison officials, like Mr. Zavala's, is in keeping with the traditional type of Bivens action against a prison official directly involved in a constitutional violation during confinement. These challenges to specific acts are like the challenges brought in Bivens, Davis, and Carlson, and readily distinguishable from the general national policy challenged by the Abbasi plaintiffs. Compare Bivens, 403 U.S. at 389 (challenging a search), and Davis, 442 U.S. at 230 (challenging a termination), and Carlson, 446 U.S. at 16 (challenging specific actions by prison officials), with Abbasi, 137 S.Ct. at 1860 (challenging a high-level national detention policy).

Extent of Judicial Guidance. Courts have always required notice for rejected mail and thus well-established case law made clear Mr. Zavala's due process right to notice. Since the Supreme Court's Procuner decision in 1974, courts have continually held that prison officials must notify a prisoner whenever mail is not delivered to the prisoner for any reason. Procunier, 416 U.S. at 405-06; Krug v. Lutz, 329 F.3d 692, 697 (9th Cir. 2003); Sorrels v. McKee, 290 F.3d 965, 972 (9th Cir. 2002); Prison Legal News v. Cook, 238 F.3d 1145,

1152-53 (9th Cir. 2001); Frost v. Symington, 197 F.3d 348, 351-52 (9th Cir. 1999); Therefore. this factor in Mr. Zavala's case is also distiguishable from Abbasi where the Court found that the legal landscape for detaining illegal aliens in the wake of an attack on U.S. soil was uncharted. 137 S.Ct. at 1861.

Statutory or Other Legal Mandate Under Which the Officer Was Operating.

Atwater, as a fed
Atwater, as a federal prison, is controlled by the mail handling rules laid out in Code of Federal Regulations 28 C.F.R. §540.13, which requires notice to the prisoner whenever mail is rejected for whatever reason. Further Excerpts of Record ("FER").

The Code of Federal Regulations plainly states that notice must be given to a prisoner whenever mail is rejected: "When correspondence is rejected...[t]he Warden shall also notify an inmate of the rejection of any letter addressed to that inmate, along with the reasons for the rejection and shall notify the inmate of the right to appeal the rejection." 28 C.F.R. § 540.13 (entitled " "Notification of rejections"). The term "correspondence" means any incoming or outgoing mail and packages of any size or weight. See 28 C.F.R. §540.2 (general correspondence definition). Enacted after the Supreme Court decided Procunier, the regulation mirrors Procunier's rule and rationale by requiring notification for any rejected "correspondence," so that the prisoner can know of the rejection and challenge it if it was arbitrary. See Procunier, 416 U.S. at 417-19. And, like the decision in Procunier, the regulation does not express any exception to the notice requirement based on why correspondence is rejected.

Risk of Disruptive Intrusion by the Judiciary. There is no risk of an undue intrusion here because Atwater already provided notice

for all other packages that were rejected and thus, would not have to implement an entirely new process for providing notice. See, e.g. FER 111 ("Anytime we reject something you will get a copy in the mail bag."). Nor would Atwater have to perform a function that other federal prisons were not already performing at the time in compliance with Procunier and 28 C.F.R. § 540.13.

Further, the issue of notice is not related to any sensitive issues regarding prisoner safety or control with incoming and outgoing mail; this case strictly concerns a prisoner's right to notice when mail is rejected. Mr. Zavala is not challenging Atwater's categorical decision to reject his mail. Rather, he is challenging the constitutionality of Atwater's decision to deny him notice of the rejection. Therefore, this case does not require a judicial inquiry into the labeling requirements for legal mail sent to federal prisons which might potentially implicate a separation of powers concerns. Cf. Abbasi, 137 S.Ct. at 1861 (judicial intrusion upon sensitive "national-security policy [that] is the prerogative of the Congress and the President").

The final factor courts consider is whether there are any special factors not previously raised in Bivens cases. Id at 1860. Because the government raised purported special factors separately, this Plaintiff's reply brief did the same at the Court of Appeal level.

c. No Special Factors Counsel Hesitation Against Providing A Bivens Cause of Action in Mr. Zavala's Case.

Even if the Court finds that Mr. Zavala's case presents a new context, the Court should hold that no special factors counsel hesitation in applying Bivens. Id. at 1859.

The special-factors inquiry focuses on whether the "[j]udiciary

is well suited, absent congressional action or instruction, to consider and weigh the costs and benefits of allowing a damages action to proceed." Hernandez v. Mesa, 137 S.Ct. 2003, 2006 (2017) (citing Abbasi, 137 S.Ct. at 1858). Some of the special factors that the Supreme Court has considered in declining to extend Bivens are whether: (1) the plaintiff's claims require the court to wade into federal fiscal or national security policy, United States v. Standard Oil Co., 332 U.S. 301, 314 (1947), and Abbasi, 137 S.Ct. at 1861; (2) the extent of congressional authority delegated by Congress, Wheeldin v. Wheeler, 373 U.S. 647, 666 (1963); and (3) the special nature of military life, Chappell v. Wallace, 462 U.S. 296, 304 (1983). Most recently, in Hernandez, 137 S.Ct. at 2005-07, the Supreme Court noted special concerns with allowing a Bivens action by a noncitizen for an injury sustained on foreign soil, but did not foreclose the possibility that a Bivens action could lie and remanded for the lower court to address.

Mr. Zavala's case does not present any of these special factors that the Supreme Court cautioned go against extending Bivens. Instead, his case represents the type of Bivens prisoner civil rights actions that courts have routinely recognized. See, e.g., Koprowski v. Baker, 822 F.3d 248, 249-50 (6th Cir. 2016)(alleging violating of Eighth Amendment rights); Gillespie, 629 F.2d at 642; Bonner, 552 F.3d at 675; Bagola, 39 F.3d at 780.

Further, the Supreme Court has already acknowledged that routine cases against prison officials involved in specific instances of misconduct "involve[] no special factors counseling hesitation in the absence of affirmative action by Congress." Carlson, 446 U.S. at 19.

As the Court explained:

> [Prison officials] do not enjoy such independent status in our constitutional scheme as to suggest that judically created remedies against them might be inappropriate. Moreover, even if requiring them to defend [a] suit might inhibit their efforts to perform their official duties,...qualified immunity...provides adequate protection.

Id. Consistent with this, the Court in Abbasi remanded the plaintiff's prisoner abuse claims against the prison warden for further consideration. Abbasi, 137 S.Ct. at 1863-65.

In its answering brief, however, the government argues that three factors counsel hesitation: the availability of alternative remedies, congressional intent to limit prisoner actions, and separation of powers concerns. As explained below, these arguments are misguided because: (1) no equally effective alternative remedy exists; (2) Congress has protected against frivolous prisoner actions through the Prisoner Litigation Reform Act ("PLRA") but not intended to eliminate them; and (3) no separation of powers concerns arise because requiring prisons to provide notice does not meddle in their core functions.

1. For Mr. Zavala, "It is damages or nothing."

For this part of the special-factor inquiry, the Supreme Court has looked to whether an "equally effective" alternative remedy exists, Carlson, 446 U.S. at 18-19. and acknowledged that, for some plaintiffs, "it is damages or nothing," Abbasi, 137 S.Ct. at 1857. In other words, "if equitable remedies prove insufficient, a damages remedy might be necessary to redress past harm and deter future violations." Id. at 1858. The government contended for the first time on direct appeal that Mr. Zavala has alternative remedies, but none of these purported alternatives provide viable releif.

The government begins by suggesting that the prison's

administrative grievance system provided Mr. Zavala with an alternative form of relief, but this argument elevates the concept of administrative exhaustion to the primary role of judicial review. Mr. Zavala exhausted his administrative remedies and, not suprisingly, the prison officials pointed to their no-notice policy as justification for not providing Mr. Zavala with notice. As Mr. Zavala's experience shows, relying on the prison's administrative remedy process is an insufficient legal remedy because it depends entirely on the prison's ability to police itself. Spagnola v. Mathis, 809 F.2d 16, 24-25 (D.C. Cir. 1986)(finding that an alternative remedy was not adequate to prevent a Bivens cause of action because it lacked direct judicial review). Exhaustion of the prison grievance system gives prison officials an opportunity to correct mistakes and develops the record for review, but it is not meant to supplant judicial review entirely. See Porter v. Nussle, 534 U.S. 516, 524-25 (2002)(explaining the purpose of exhaustion under the PLRA and the continuing role of judicial review); Reed-Bey v. Pramstaller, 603 F.3d 322, 325-26 (6th Cir. 2010)(exhaustion of prison grievance procedures allows "prison officials...the first shot at correcting their own mistakes;" exhaustion is not intended as "insulation from federal judicial review").

The Ninth Circuit has recently declined to extend a Bivens remedy where an inmate brought a First Amendment and Fifth Amendment Due Process claim against private prison officials because the inmate had alternative remedies. Vega v. United States, F.3d , No. 2-11-cv-00632-RSM, 2018 WL 740184, *6 (9th Cir. Feb. 7, 2018). Specifically, this Court found the inmate had alternative remedies because he had successfully used the

Administrative Remedy Process and could have brought a habeas petition. Id. Mr. Zavala, however, does not have such remedies available to him. Unlike the plaintiff in Vega, Mr. Zavala's use of the Administrative Remedy Process was not successful at remedying his constitutional violations. Additionally, in Vega the claims could have been brought as a habeas claim under 28 U.S.C. §2241 because they challenge prison discipline, whereas Mr. Zavala could not bring a habeas claim because he does not challenge the conditions of his confinement. See Vega, 2018 WL 740184 at *6, Tucker v. Carlson, 925 F.2d 330, 332 (9th Cir. 1991)(holding that a fedeal prisoner challegning the execution of his sentence must bring § 2241 habeas petition, whereas a prisoner complaining of civil rights violations must bring a Bivens action). Because Mr. Zavala does not have alternative remedies available, his case is readily distinguishable from Vega.

Second, the government argues that Mr. Zavala could bring an action for declaratory or injunctive releif under 18 U.S.C. § 3626, but neither form of equitable releif would vindicate the past violation fo due process. To start, declaratory relief primarily "offers parties the oppostunity to determine how the law will operate on the facts of a specific case before they act in a way that might violate the law." Samuel L. Bray, The Myth of the Mild Declaratory Judgment, 63 Duke L.J. 1091, 1095-96 (2014) (explainign that the differences between the declaratory judgment and the injunction are best seen in terms of ease of judicial management and early timing); see also fireman's Fund Ins. Co. v. Ignacio, 860 F.2d 353, 354 (9th Cir. 1988)(the purpose of declaratory relief "is to provide the opportunity to clarify rights and legal relationships without waiting for an adversary to file suit").

Thus, declaratory relief is not a viable remedy to plaintiffs whose rights have already been violated. Id.; see also AmSouth Bank v. Dale, 386 F.3d 763, 786 (6th Cir. 2004)("The 'useful purpose' served by the declaratory judgment action is the clarification of legal duties for the future, rather than the past harm....").

Injunctive releif is similarly unavailing to plaintiffs like Mr. Zavala who no longer face a constitutional violation when they file suit. By the time Mr. Zavala exhausted the prison's administrative process--as he was required to do before bringing suit in federal court--his legal mail had already been rejected without notice; his direct appeal and habeas proceedings had already closed; and defendant Gonzaga, under whose direction mail was returned without notice, was no longer the supervisor of the mail room. A federal court could not grant injunctive relief to Mr. Zavala, given that the harm to him occurred entirely inthe past and had no prospect of occurring in the future. Hodgers-Durgin v. De La Vina, 199 F.3d 1037, 1042 (9th Cir. 1999)(en banc)(an "equitable remedy is unavailable absent a showing of ... any real or immediate threat that plaintiffs will be wronged again"). As the Abbasi court recognized, "equitable remedies" might "prove insufficient" in cases involving "past harm" and, thus, "a damages remedy might be necessary." 137 S.Ct. at 1858. This is such a case.

Moreover, to the extent the government suggested that Mr. Zavala could bring suit under 18 U.S.C. § 3636 for equitable relief, it ignores that the statute does not create a cause of action--it only describes remedies. In its brief during direct review, the government does not suggest what statute or judicially implied

cause of action would allow Mr. Zavala to seek relief, if not a Bivens action. However, if the COurt were to determine that Mr. Zavala could have or should have asserted a different cause of action for the due process violation, he should be allowed to amend his complaint accordingly. See Fed.R.Civ. P. 15 (allowing for amendment of complaint at any time during proceedings with leave of court).

Finally, to the extent the government suggest the use of a writ of habeas corpus as an alternative remedy, it is unclear that the-no-notice policy would be considered a condition of confinement for habeas purposes and, in any event, a habeas petition could only provide "less-restrictive conditions" as a remedy. See Abbasi, 137 S.Ct. at 1863. The due process right to notice of nondelivered prison mail has instead been addressed through §1983 and Bivens claims. See, e.g., Procunier, 416 U.S. at 405-07 (§1983 action); Krug, 329 F.3d at 697 (§1983 claim); Bonner, 552 F.3d at 675 (Bivens action). Thus, a habeas remedy is not an alternative for plaintiffs who challegne a mail violation like Mr. Zavala.

2. No action by Congress suggests an intent to preclude Bivens actions for prisoner cases like Mr. Zavala's

The government argued in the Ninth Circuit Congress's passing of the PLRA, 42 U.S.C. § 1997(e), suggests that Congress "might doubt the efficacy or necessity" of a Bivens remedy for prisoner claims like Mr. Zavala's. This argument, however, misunderstands the PLRA. The PLRA is meant to limit--but not undo--the Bivens cause of action and remedy.

This Court first recognized a Bivens claim in the prisoner context in 1980. Carlson, 446 U.S. at 17-18. Over 25 years later,

in 1995, Congress passed the PLRA "to reduce the quantity and improve the quality of prisoner suits" and "to affor[d] corrections officials time and opportunity to address complaints internally before allowing the initiation of a federal case." Woodford v. Ngo, 548 U.S. 81, 93-94 (2006)(internal quotations and citations omitted). To achieve this goal, the PLRA requires inmates to exhaust adminstrative remedies prior to filing a lawsuit under §1983 (against state prison officials) or Bivens (against federal prison officials), but does not displace either vehicle for bringing suit. See Porter, 534 U.S. at 524 (PLRA provisions apply to Bivens suits); see also James E. Pfander, Iqbal, Bivens, and the Role of Judge-Made Law in Constitutional Litigation, 114 Penn. St.L. Rev. 1387, 1410-11 ("Congress enacted the PLRA on the assumption that Bivens suits were avaialble to enforce prisoner rights..."). Thus, Congress has not precluded Bivens prisoner suits for damages.

3. A Bivens cause of action would not create a separation of powers issue with the BOP or require oversight of prison management.

Moreover, contrary to the government's suggestion, allowing a Bivens damages remedy against prison personnel directly involved in a constitutional violation does not result in a separation of powers issue because it would not involve the federal judiciary in day-to-day prison management.

To start, the challenged policy of denying notice when unopened mail is rejected does not implicate sensitive prison control issues that courts might be wary to second guess. A prisoner's right to notice or rejected mail has enjoyed long-standing constitutional protection and has never been dispensed with.

See, e.g., Procunier, 416 U.S. at 401; Krug, 329 F.3d at 697; Sorrels, 290 F.3d at 972; Prison Legal News, 238 F.3d at 1152-53; Frost, 197 F.3d at 351-52.

Courts have deferred to BOP judgment in determinging and implementing prison mail screening and handling procedures to maintain institutional security and can continue to do so. See, Procunier, 416, U.S. at 414-14 (holding that censorship of prsion correspondence is justified if it furthers interests of security, order, or inmate rehabilitation); Woods v Daggett, 541 F.2d 237, 240 (10th Cir. 1976)(upholding prison policy that required books to be sent to prisoner directly from the publisher). However, even when courts have upheld a prison's decision to reject or withhold certain mail, they have still required notice of nondelivery as a fundamental due process right. See Procunier, 416 U.S. at 417; Woods, 541 F.2d at 241 (noting that even if the mail policy were upheld "notification would serve important purposes").

Thus, while courts avoid infringing on the BOP's control over prison management, see Turner v. Safley, 482 U.S. 78, 84-85 (1987), the right to notice of rejected mail is a fundamental constitutional issue, and courts have long been willing to hold prison officials responsible for a violation of this right. Continuing this role of the courts in protecting essential procedural due process rights would not present a separation of powers concern, particularly here where so little effort would be required by a prison with respect to such notification.

Moreover, allowing a Bivens damages remedy in a prisoner due process case like this would not impose a significant financial burdern onthe federal government. Under the PLRA, a prisoner can receive compensatory damages only if a jury find a concrete injury,

such as a physical injury, Oliver v. Keller, 289 F.3d 623, 628 (9th Cir. 2002), and punitive damages only if the jury finds that defendants acted with an evil motive or demonstrated reckless indifference to the plaintiff's constitutional rights, Smith v. Wade, 461 U.S. 30, 56 (1983). Thus, Bivens plaintiffs can only recover nominal damages unless they prove a physical injury or wrongful intent. See id. This, in addition to qualified immunity, is a safeguard protecting federal officials from damages for negligent conduct. See Carlson, 446 U.S. at 19. At the same time, the Supreme Court (this Court) has recognized that nominal damages play an important role in deterring constitutional violations, particularly with regard to procedral due process violations. Carey v. Piphus, 435 U.S. 247, 263-64, 266-67 (1978). And that is especially true, here.

Mr. Zavala should be allowed to bring his Bivens action for violation of his due process right. Though Abbasi precluded courts from extending Bivens to new calsses of defendants or to claims against general, high-level policies, Mr. Zavala's Bivens claim presents the core Bivens concern--claims agaisnt officials directly involved in the violation of constitutional rights. Because Mr. Zavala's case does not present a new context and, even if it did, there are no special factors counseling hesitation, Mr. Zavala's Bivens claims should be allowed to proceed.

d. The Right to Notice When Mail Is Rejected is Clear And Uncontested.

As the opening brief and answering brief both acknowledge, the Court can choose to address the two prongs fo the qualified immunity analysis in either order. Pearson v. Callahan, 555 U.S. 223, 232 (2009). In its answering brief, the government has not

contested that Mr. Zavala's claim satisfies the first prong of the analysis: considering the facts in the light most favorable to Mr. Zavala, the facts demonstrate that Defendants violated a constitutional right. See id. (explaining first prong of analysis). Instead, the government skips to the second prong of the analysis and contest whether the constitutional right to notice under the circumstances of this case was clearly established. See id. (explaining second prong). As explained in Section e. below, the government is wrong aobut that. To the first prong, though, the facts show that Mr. Zavala's constitutional right to notice of rejected mail was violated.

This honorable Supreme Court should reach the first prong here because it "promotes the development of constitutional precedetn and is especially valuable with respect to questions that do not frequently arise in cases in which a qualified immunity defense is unavailable." see Pearson, 555 U.S. at 236 (the first prong analysis "provides officials with prospective guidance to the constitutionality of their court"). This is true for this case because suits over prison mail policies typically give rise to a qualified immunity defense.

Mr. Zavala has established facts sufficient to demonstrate that defendants violated his right to due process. As the district court found, Mr. Zavala established a triable dispute as to Ms. Gonzaga's personal participation in denying Mr. Zavala notice that his legal mail was returned to sender. The government's brief during direct appeal mischaracterized this finding by stating that "the district court found that a factual dispute precluded summary judgment on the ground that Zavala had failed to prove Ms. Gonzaga's personal participation." To the

contrary, Gonzaga had the burden, as the moving party at summary judgment, to show that there was no set of facts under which she personally participated. The Court found instead that Mr. Zavala presented evidence "that Defendant Gonzaga did in fact direct rejection of his mail without notice to him--a practice which, according to the evidence, only occurred on her watch."

Further, taking the facts in Mr. Zavala's favor as the party opposing a summary judgment motion, a jury could find a deprivation of a protected liberty interest. Prisoners have a First Amnedment right to send and receive mail as established in Procunier, 416 U.S. at 418. Based on this First Amendment right, Procunier also established that when such mail is rejected for any reason, it must be "accompanied by a minimum procedural safeguards." Id. at 417. Specifically, prisoners have a due process right to notice of rejection of mail, and denying a prisoner notice results in a violation of the prisoner's constitutional rights. Id. at 418.

Thus, under this first prong of the qualified immunity analysis, Mr. Zavala has established that a prison staff, under Ms. Gonzaga's direction, violated his due process rights when, pursuant to prison policy, they rejected unopened mail correctly addressed to him, but failed to provide him with any notice of the rejection.

e. The Requirement To Provide Notice To Prisoners For Any Rejected Mail Was Clearly Established At The Time Defendants Rejected Mr. Zavala's Mail.

The government contended to the Ninth Circuit that the due process right to notice was not clearly established because no cases have the same precise circumstances as presented here, where

the "packages were refused because they were not properly labeled for acceptance." The district Court based its decision on a similar rationale that no prior cases specifically addressed "unopened mail...rejected and returned to the sender because it failed to comply with prison regulations for markings on the package." But, as the supplemental opening brief filed by Plaintiff in the Ninth Ciruit explains, the procedural due process right to notice when mail is rejected is not so narrowly defined as to accommodate this distinction between mail rejected for labeling reasons and mail rejected for all other reasons.

A right is clearly established if "it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." Saucier v. Katz, 533 U.S. 194, 202 (2001). Reasonableness depends on whether "the state of the law" gave the government officials "fair warning that their alleged [conduct] was unconstitutional." Hope v. Pelzer, 536 U.S. 730, 742 (2002). Although courts look to the "specific context of the case" to determine whether a right was clearly established, Saucier, 533 U.S. at 194, a plaintiff need not present, "a case directly on point" as long as "exisiting precendent [has] placed the statutory or constitutional question beyond debate," Ashcroft v. al-Kidd, 563 U.S. 731, 741 (2011)). Indeed, Mr. Zavala has identified precedent form this honorable Supreme Court and lower courts, and case law from other circuits, that uniformly requires prison officials to give notice be given when mail is rejected, whatever the reason for rejection, all of which gave Ms. Gonzaga "fair warning" that failure to do so was a constitutional violation. Hope, 536 U.S. at 74.

As an initial matter, the government made repeated references

in its appellate brief to Mr. Zavala's rejected legal mail as an "unmarked package[s]." These statements blur the fact that Mr. Zavala's packages were sent from his lawyers, with their office addresses as the return address (to which they were returned); the packages were undisputedly addressed to Mr. Zavala with his proper address; and at least one of the packages, if not both, was marked "special mail," which further identified the packages as containing legal mail in accordance with prison policies. The prison admits that it rejected the packages only because the attorneys had not also hand written on the front of the packages the prison's own rule that no authorization was required for the prison to accept legal packages over 16 ounces. (The Court should be aware that Mr. Zavala was incorrectly advised numerous times about the precise labeling requirements, but there is no dispute that the packages were only rejected because they did not bear the "no authorization required" language.)

While the policy itself is assailable for putting the burden on an inmate's lawyers to remeind prison staff of their own policy that no authorization is needed to receive legal packages over 16 ounces, Mr. Zavala is neither challenging the policy nor the prison's decision to return his mail under the policy. Instead, he is challenging the prisons's failure. under Ms. Gonzaga's direction, to return Mr. Zavala's legal mail without giving him notice--a requirement that is clearly established under existing precedent.

An appropriate level of analysis makes it clear that the right to notice when mail is returned was clearly established at the time Mr. Zavala's mail was rejected. The government is wrong to contend that the multitude of cases from this Court, and other circuit courts did not put the constitutional question of

whether Mr. Zavala had a right to notice "beyond debate" because they did not specifically address unopened, mislabeled packages. As the supplemental opening brienf, filed in the Ninth Circuit, details, the requirement to provide notice was clearly established almost forty years ago with this honorable Court's precedent in Procunier and was solidified with several post-Procunier cases that repeatedly notice no matter what the reasonor circumstances for the rejection or withholding of mail by the prison.

In a case very similar to the facts here, Bonner, 552 F.3d at 678, the Eighth Circuit addressed the rejection of legal packages and stated that case law has long made "clear that an inmate has a right to procedural due process--including notice--whenever any form of correspondence addressed to that inmate is rejected." The Eighth Circuit held that a prisoner's due process rights were violated when his packages containing legal documents were rejected, without notice, based on prison staff's assessment that "they were not in compliance with prison regulations pertaining to the receipt of 'packages.'" Id. at 675. The Eighth Circuit explained that a prisoner's procedural due proces right to notice when mail is rejected is not based on minor distinctions as to why the mail is rejected. Id. at 677.

The government ignores Bonner in its briefing in the Ninth Circuit and tries to make the same type of minor distinctions as to why Mr. Zavala's packages were rejected, but this Court should follow the persuasive reasoning in Bonner. As the Ninth Circuit had already explained, "[i]t is not necessary that the alleged acts have been previously held unconstitutional, as long as the unlawfulness [of defendants' actions] was apparent in light of preexisting law." Sorrels, 290 F.3d at 970 (noting that "there

may be no published cases holding similar policies constitutional ...due more to the obviousness of the illegality than the novelty of the legal issue").

Further, the government's distinction between unopened and opened mail undercuts the very purpose of notice articulated by this honorable Court in the seminal Procunier case: notice to the prisoner of rejected mail is necessary to give him or her an opportunity to contest arbitrary or unlawful application of mail policies. Procunier, 416 U.S. at 418. The fact that the unopened mail is returned to the sender does not alleviate the need to notify the prisoner because, as this case demonstrates, prisoners are likely to remain unaware that their mail was returned due to the difficulty of communicating with lawyers, friends, or family outside the prison.

Regardless of whether the package was opened or unopened when rejected, or why the mail was rejected, the result is the same: the mail does not reach the prisoner. Because binding precedent, other circuit decisions, and the prison mail regulation have uniformly required notice for reject mail, whatever the circumstances, Mr. Zavala's right to notice was clearly established here.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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