No. 21-_____

IN THE

SUPREME COURT OF THE UNITED STATES

VERNON EARLE,

Petitioner,

v.

MICHAEL SHREVES, CORRECTIONAL COUNSELOR, et al.,

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

This Court held in *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971), that federal officers may be subject to individual-capacity damages liability directly under the U.S. Constitution if they violate its provisions, *id.* at 389. But before a court can recognize the availability of a *Bivens* remedy in any given context, it must conclude that "no special factors counsel[] hesitation in the absence of affirmative action by Congress." *Id.* at 396. Factors that counsel hesitation include the risk of interfering in "high-level policies" likely to "attract the attention of Congress," *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1862 (2017), but not the risk of influencing individual, low-level officers' day-to-day "efforts to perform their official duties," *Carlson v. Green*, 446 U.S. 14, 19 (1980).

This question presented is: Whether a rogue correctional officer's unlawful retaliation against an inmate for utilizing an administrative grievance process implicates the sort of sensitive, policy-based judgments that present special *Bivens* factors under this Court's precedent.

PARTIES TO THE PROCEEDING

Petitioner Vernon Earle was the plaintiff in the U.S. District Court for the Northern District of West Virginia and the plaintiff-appellant in the U.S. Court of Appeals for the Fourth Circuit.

Respondents Michael Shreves, Correctional Counselor; Jose Rivera, Unit Manager in Training; Rhonda Domas, Training Unit Manager; Derrick Washington, Lieutenant; [Unknown] Squires, Lieutenant, Special Investigative Services; Brad Gorondy, Special Investigative Agent; Michael Breckon, Associate Warden; Rachel Thompson, Executive Assistant; Jennifer Saad, Warden; Kevin Kelly, Complex Warden; Angela Gyorko, Case Manager; Christopher Pulice, Case Management Coordinator; J.F. Caraway, U.S. Bureau of Prisons Regional Director; and Ian Connors, National Inmate Appeals Administrator were defendants in the U.S. District Court for the Northern District of West Virginia and defendants-appellees in the U.S. Court of Appeals for the Fourth Circuit.

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INTRODUCTION

This Court has long recognized that, "unless [constitutional] rights are to become merely precatory," one who experiences a constitutional violation and has no other means of redress must be able to turn to the courts for "protection." *Davis v. Passman*, 442 U.S. 228, 242 (1979). And where it is "damages or nothing" that can offer such protection, this Court's decision in *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971), empowers federal courts to grant monetary relief, even absent a legislatively enacted damages remedy. *Davis*, 442 U.S. at 245 (quoting *Bivens*, 403 U.S. at 410 (Harlan, J., concurring in the judgment)).

Despite suggesting that *Bivens* might not have followed the same reasoning had it been decided today, this Court has never retreated from *Bivens*' core guarantee that a judicially created damages remedy remains available unless there are "special factors counselling hesitation in the absence of affirmative action by Congress." *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1856–57 (2017) (quoting *Carlson v. Green*, 446 U.S. 14, 18 (1980)). Such factors may arise if a constitutional claim targets "large-scale policy decisions" in sensitive areas like foreign relations or national security, *id.* at 1862, or if Congress has chosen to fully occupy the remedial field by

constructing an "elaborate remedial system . . . step by step, with careful attention to conflicting policy considerations," *Bush v. Lucas*, 462 U.S. 367, 388 (1983). But as recently as 2017, this Court has reaffirmed that *Bivens* remains essential to deter "individual instances" of unlawful conduct that do not implicate broader policy judgments because, "due to [its] very nature," such discrete misconduct is "difficult to address except by way of damages actions after the fact." *Ziglar*, 137 S. Ct. at 1862.

Lower courts, though, have struggled to reconcile *Bivens*' enduring vitality with this Court's view that extending *Bivens* into new contexts is "disfavored." *Id.* at 1857 (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 675 (2009)). Accordingly, even while acknowledging that *Bivens* extensions are available absent "special factors," lower courts are now identifying "special factors" that look nothing like the ones this Court has historically recognized. Rather than asking whether a suit implicates high-level policies or undermines a comprehensive, congressionally enacted remedial scheme, lower courts today deny *Bivens* claims based on factors necessarily present in *any* damages suit against a federal officer, *see, e.g.*, *Ahmed v. Weyker*, 984 F.3d 564, 570 (8th Cir. 2020) (the need to inquire into "what [the officer] knew, what she did not know, and her state of

mind at the time" of the violation); *Cantú v. Moody*, 933 F.3d 414, 423 (5th Cir. 2019) (the "length of time Congress has gone without statutorily creating a *Bivens*-type remedy"), or even factors this Court has specifically *rejected* as "special," *compare Cantú*, 933 F.3d at 423 (treating "the existence of a statutory scheme for torts committed by federal officers" as a special factor), *with Carlson*, 446 U.S. at 19–23 (explaining why it is "crystal clear" that the selfsame scheme does not displace *Bivens* remedies).

The decision below exemplifies this confusion. In that decision, the U.S. Court of Appeals for the Fourth Circuit held that no *Bivens* remedy is available to redress rogue correctional officers' unlawful retaliation against an inmate for filing an administrative grievance. App. 3a. But although the decision below purported to find support for this holding in this Court's general words of caution against *Bivens* extensions, App. 9a, the particulars of the lower court's special-factors analysis defied both this Court's precedent and common sense. The decision below held that the risk of "judicial intrusion" into correctional officers' everyday conduct was a special factor, App. 11a, even though this Court has held that qualified immunity sufficiently accounts for precisely this risk, *Carlson*,

446 U.S. at 19. And the decision below counterintuitively held that the existence of the very grievance process that led to retaliation in the first place was a special factor, App. 10a, even though Congress did not create this process *at all*, let alone with the aim of displacing judicial remedies.

The decision below thus highlights the need for this Court to offer guidance on the rapidly eroding distinction its precedent has drawn between "special" factors that counsel against a *Bivens* extension and ordinary factors that do not. And this case presents an urgent reason to do so. In refusing to hold correctional officers accountable for their abuse of the administrative grievance process that inmates must exhaust before bringing any federal claims to court, *see* 42 U.S.C. § 1997e(a), the decision below opens the door for rogue correctional officers to effectively insulate themselves from *all* forms of legal accountability—be they judicially or congressionally created—for *any* unlawful harm they inflict on the people under their care. This Court should head off that troubling prospect by granting certiorari and reversing the erroneous decision below.

OPINIONS BELOW

The decision of the U.S. Court of Appeals for the Fourth Circuit (App. 1–13a) is reported at 990 F.3d 774. The opinion and order of the

U.S. District Court for the Northern District of West Virginia are unreported and are available at App. 14–23a.

JURISDICTION

The Fourth Circuit, exercising jurisdiction under 8 U.S.C. § 1331, entered judgment on March 10, 2021. App. 1a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL PROVISION

The First Amendment to the U.S. Constitution provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. Const. amend. I.

STATEMENT OF THE CASE

1. In November 2015, while Petitioner Vernon Earle was housed at a Federal Correctional Institution in West Virginia, a group of correctional officers that included Respondent Michael Shreves beat up one of Mr. Earle's fellow inmates.[1] App. 36a. In the aftermath of this

[1] Because the lower courts resolved this case at the summary-judgment stage, this factual recitation is drawn from Mr. Earle's verified pleadings

incident, Mr. Earle's housing unit was placed on lockdown, with hot meals, visitation, and recreation suspended. *Id.*

Mr. Earle responded to the incident and resultant lockdown by filing two administrative grievances with his Unit Managers. *Id.* The Unit Managers then impermissibly forwarded the grievances to Mr. Shreves, notwithstanding his personal involvement in the underlying events. *Id.*; *see* U.S. Bureau of Prisons, *Administrative Remedy Program Statement*, OPI No. 1330.18 at 10 (2014), https://www.bop.gov/policy/progstat/1330_018.pdf ("Matters in which specific staff involvement is alleged may not be investigated by either staff alleged to be involved or by staff under their supervision.").

Upon receiving the grievances, Mr. Shreves had Mr. Earle and another inmate who had made similar complaints moved into solitary confinement in the Special Housing Unit (SHU). App. 36a. Mr. Earle repeatedly sought to learn why he had been placed in the SHU, and three different prison officials all eventually told him that he had been placed

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and presented in the light most favorable to his claim. *See Taylor v. Riojas*, 141 S. Ct. 52, 53 n.1 (2020) (per curiam).

in the SHU because of the grievances he had filed and not because he was under investigation for any kind of disciplinary infraction. App. 36–37a.

Mr. Earle was released from the SHU after thirty days. App. 3–4a. But the prison warden then stripped him of his prison job and transferred him and the other inmate who had complained about Mr. Shreves into another housing unit so that—in the warden's words—"there [wouldn't] be any further retaliatory actions." App. 37a. Meanwhile, Mr. Earle's case manager changed his custody classification in an effort to have him moved to a higher-security facility. *Id.*; *see* U.S. Bureau of Prisons, *Inmate Security Designation and Custody Classification*, OPI No. 5100.8, ch. 6 at 1 (2006), https://www.bop.gov/policy/progstat/5100_008.pdf (explaining custody classification). The case manager told Mr. Earle that she had done this because Mr. Earle "love[d] to file" grievances. App. 37a. When Mr. Earle notified his case manager's supervisor about the retaliatory change to his custody classification, the supervisor refused to intervene and instead told Mr. Earle to "take it to the courts." *Id.*

2. Mr. Earle filed a *pro se* lawsuit against Mr. Shreves and various other members of the prison staff (collectively, "the Officers") in

the U.S. District Court for the Northern District of West Virginia.[2] App. 24–39a. As relevant, he claimed that the Officers had violated the First Amendment by retaliating against him for filing administrative grievances. App. 34–35a. And as a remedy, Mr. Earle sought money damages from the Officers under *Bivens*. App. 41a.

The Officers moved to dismiss or, in the alternative, for summary judgment. App. 43a. As a threshold matter, they argued that Mr. Earle was not entitled to relief even if he established a First Amendment violation because, in their view, this Court's decision in *Ziglar v. Abbasi*, 137 S. Ct. 1843 (2017), barred the district court from recognizing a *Bivens* remedy for a federal correctional officer's unconstitutional retaliation against an inmate. App. 51–56a. In addition, the Officers submitted affidavits disclaiming any retaliatory intent and argued that Mr. Earle's sworn allegations were insufficient to establish that any constitutionally impermissible retaliation had occurred. App. 56–63a, 69–83a.

The district court granted summary judgment for the Officers. App. 14a. The court first held that Mr. Earle had failed to establish any

[2] Before filing suit, Mr. Earle exhausted his available administrative remedies by following the U.S. Bureau of Prisons' internal grievance process. *See* App. 15a.

Officer's "personal involvement" in the retaliation. App. 19a. Although the court noted Mr. Earle's sworn allegations that several Officers had made statements openly suggesting retaliatory intent, the court reasoned that Mr. Earle had "provide[d] nothing that could support that th[ese] statement[s] actually occurred." App. 20a. In the alternative, the district court held that the retaliation claim failed as a matter of law because "there is no First Amendment right to file grievances."[3] App. 21a.

3. Mr. Earle appealed. After appointing undersigned counsel and receiving briefing and argument, the U.S. Court of Appeals for the Fourth Circuit affirmed dismissal of Mr. Earle's retaliation claim, although its reasoning differed from the district court's. App. 13a & n.3.

According to the Fourth Circuit, *Ziglar* barred it from recognizing a *Bivens* remedy in Mr. Earle's case. App. 3a. Because all parties agreed that Mr. Earle sought to extend *Bivens* into a context that was "different in a meaningful way from [this Court's] previous *Bivens* cases," App. 7a (quoting *Ziglar*, 137 S. Ct. at 1859), the Fourth Circuit identified the key question as "whether there [were] 'special factors counselling hesitation'

[3] Because the district court believed that "there was no constitutional right violated," it also held that the Officers were entitled to qualified immunity. App. 22a.

in implying a cause of action" for an inmate to seek damages for federal correctional officers' unconstitutional retaliation, App. 9a (quoting *Ziglar*, 137 S. Ct. at 1857). The Fourth Circuit discerned two. First, it noted that such an inmate would not be "completely without remedy" absent a *Bivens* action because he could seek injunctive relief or file an administrative grievance. App. 10a. Second, it worried that extending *Bivens* into this context "could lead to an intolerable level of judicial intrusion" into the prison staff's disciplinary judgment calls. App. 11a. Thus concluding that *Bivens* afforded Mr. Earle no cause of action, the Fourth Circuit affirmed dismissal of his retaliation claim. App. 12–13a.

REASONS FOR GRANTING THE WRIT

The decision below reflects lower courts' deep confusion over the import of this Court's opinion in *Ziglar*. While *Ziglar* observed that "expanding the *Bivens* remedy is now a 'disfavored' judicial activity," it took pains to emphasize that expansion is nonetheless permissible where no special factors counsel hesitation. *Ziglar*, 137 S. Ct. at 1857 (quoting *Iqbal*, 556 U.S. at 675). But the Fourth Circuit's capacious view of what constitutes a "special factor" effectively shuts the narrow pathway to new *Bivens* claims that *Ziglar* carefully preserved. The rationales the

decision below gave for declining to extend *Bivens* here look nothing like the special factors this Court has identified in the past and directly conflict with this Court's precedential reasoning in *Carlson v. Green*, 446 U.S. 14 (1980). Unfortunately, though, the decision below is not alone in relying on an overreading of *Ziglar*'s dicta instead of on this Court's actual holdings. This Court should intervene and clarify that *Ziglar* meant neither more nor less than exactly what it said about the need to distinguish between those "special" factors that counsel against a *Bivens* extension and those ordinary factors that do not.

This case offers an ideal chance to do so. The special-factors issue was fully briefed below and is dispositive of Mr. Earle's appeal. What is more, intervention here is uniquely important because the decision below enables the subversion of both the judicial function and the will of Congress. Both this Court and Congress have recognized legal claims that inmates have an indisputable right to present in court. *See, e.g.*, *Carlson*, 446 U.S. at 17–18 (recognizing an Eighth Amendment *Bivens* claim); 42 U.S.C. § 2000cc-2(a) (creating a cause of action for certain religious liberty claims). Congress, meanwhile, has directed that an inmate must exhaust the administrative grievance process before

presenting such indisputably cognizable claims in a lawsuit. *See* 42 U.S.C. § 1997e(a). In holding that no *Bivens* remedy is available to deter rogue officers from weaponizing that grievance process through retaliation, the Fourth Circuit's opinion opens the door for officers to inflict grave, unlawful harm on an inmate who attempts to pursue available judicially and legislatively created remedies through the mechanisms Congress has deemed essential for doing so. This Court should ensure that the threat of retaliation does not interfere with the judiciary's role in hearing and adjudicating viable claims, or with Congress's chosen means of facilitating judicial efficacy.

I. The Decision Below Reflects Lower Courts' Confusion Over the Circumstances Under Which *Bivens* May Be Extended into New Contexts Following *Ziglar*.

The decision below reflects widespread misunderstanding of *Ziglar* that only this Court can address. In holding that Mr. Earle's *Bivens* claim was not viable "after *Ziglar*," App. 3a, the decision below quoted *Ziglar* at length for the general and uncontroversial propositions that *Bivens* extensions are disfavored and that the associated special-factors analysis is exacting, App. 5–7a. But when it came time to actually conduct that analysis, *Ziglar* was nowhere to be found—because its discussion of

factors that "call into question the formulation and implementation of a general [executive] policy," *Ziglar*, 137 S. Ct. at 1860, has nothing to do with Mr. Earle's claim of rogue officer misconduct. Meanwhile, perhaps owing to its mistaken belief that *Ziglar* controlled, the decision below did not once cite the special-factors analysis in *Carlson*, this Court's most on-point precedent. Such misguided reliance on *Ziglar*'s broadly worded statements of general principle rather than this Court's holdings is hardly unique to the decision below. This Court should intervene to clarify that nothing in *Ziglar*'s dicta relieves lower courts from adhering to precedents like *Carlson* (and *Ziglar* itself) that recognize *Bivens*' critical role in deterring discrete instances of patently unlawful conduct.

1. *Ziglar* formalized a two-step process for deciding whether a *Bivens* action is available to pursue a given constitutional claim. First, a court must ask whether the claim "presents a new *Bivens* context" outside this Court's existing precedent. *Ziglar*, 137 S. Ct. at 1859. If it does, the court must then ask whether "special factors counsel[] hesitation" against authorizing a *Bivens* action "in the absence of affirmative action by Congress." *Id.* at 1857 (quoting *Carlson*, 446 U.S. at 18). While Congress will "most often" be the appropriate body to decide

"whether to provide for a damages remedy," *id.*, courts remain empowered to do so in cases where "the Judiciary is well suited, absent congressional action or instruction, to consider and weigh the costs and benefits of allowing a damages action to proceed," *id.* at 1858.

Ziglar then made clear what sort of special factors counsel against a *Bivens* extension. In rejecting claims challenging executive detention policies adopted in response to the September 11, 2001 attacks, *Ziglar* focused on the risk that a *Bivens* suit could "call into question the formulation and implementation" of those "general polic[ies]" and "border upon or directly implicate the discussion and deliberations that led to the[ir] formation." *Id.* at 1860–61. The suit concerned not "standard 'law enforcement operations,'" but "major elements of the Government's whole response to the September 11 attacks," including "sensitive issues of national security" that are typically the prerogative of the executive. *Id.* at 1861 (quoting *United States v. Verdugo-Urquidez*, 494 U.S. 259, 273 (1990)). While the "high-level policies" at issue had captured Congress's "frequent and intense" attention, Congress had shown no inclination to create an avenue for redress. *Id.* at 1862 (second quoting *Schweiker v. Chilicky*, 487 U.S. 412, 425 (1988)). And because the *Ziglar* plaintiffs

challenged "large-scale policy decisions concerning the conditions of confinement imposed on hundreds of prisoners," injunctive relief and habeas corpus could adequately redress any constitutional harm. *Id.* *Ziglar*, in short, did not involve "individual instances" of unlawful conduct, which "due to their very nature are difficult to address except by way of damages actions after the fact." *Id.*

While emphasizing the importance of a rigorous special-factors inquiry, then, *Ziglar* did nothing to change this Court's understanding of what constitutes a special factor. Since *Bivens*' early days, this Court's special-factors inquiry in cases challenging the conduct of an individual governmental actor has focused on whether a *Bivens* suit threatens to undermine "federal . . . policy" in an area where "Congress [is] normally quite solicitous," *Bivens*, 403 U.S. at 396 (first quoting *United States v. Standard Oil Co. of Cal.*, 332 U.S. 301, 311 (1947)), and whether Congress has displaced judicial remedies by creating a comprehensive remedial scheme it views as "equally effective," *Carlson*, 446 U.S. at 19.[4]

[4] This Court has so far rejected plaintiffs' efforts to bring *Bivens* claims against defendants other than governmental actors because state-law remedies are generally available in those cases. *See, e.g.*, *Minneci v. Pollard*, 565 U.S. 118, 126 (2012) (pointing to state tort law as a means

Both before and after *Ziglar*, that is where this Court's focus has remained. *See, e.g.*, *Hernandez v. Mesa*, 140 S. Ct. 735, 749 (2020) (risk of undermining foreign-policy and national-security judgments); *Schweiker*, 487 U.S. at 429 (risk of upsetting the "inevitable compromises required in [Congress's] design of a massive and complex welfare benefits program"); *United States v. Stanley*, 483 U.S. 669, 678–86 (1987) (risk of interfering in military affairs); *Bush*, 462 U.S. at 388 (risk of interfering with "comprehensive" scheme of "civil service remedies" Congress developed through considered "policy judgment").

2. Despite the obvious dissimilarities between Mr. Earle's claim of a discrete instance of unconstitutional retaliation by a set of rogue officers and the *Ziglar* plaintiffs' challenge to "large-scale [executive] policy decisions" enacted in response to a major act of international terrorism, *Ziglar*, 137 S. Ct. at 1862, the decision below nonetheless held that, "after *Ziglar*," Mr. Earle's claim was not viable,[5] App. 3a. But the

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of redressing constitutional injury inflicted by "employees of a private firm"). The situation "differs dramatically," however, when a plaintiff seeks damages "from personnel employed by the *government*," because they typically enjoy immunity from state-law actions. *Id.*

[5] Along with *Ziglar*, the decision below cited the Fourth Circuit's opinion in *Tun-Cos v. Perrotte*, 922 F.3d 514 (4th Cir. 2019), as foreclosing Mr.

decision below identified no aspect of *Ziglar*'s special-factors analysis that reinforced this conclusion. Instead, it pointed only to *Ziglar*'s general statements that extending *Bivens* is "a disfavored judicial activity," App. 5a (quoting *Ziglar*, 137 S. Ct. at 1857), "a significant step under separation-of-powers principles," App. 6a (quoting *Ziglar*, 137 S. Ct. at 1856), and inappropriate where "there are sound reasons to think Congress might doubt the efficacy or necessity of a damages remedy," App. 9a (quoting *Ziglar*, 137 S. Ct. at 1858). These statements are all true enough. But given *Ziglar*'s express recognition that *Bivens* extensions *are* available where "the Judiciary is well suited . . . to consider and weigh the costs and benefits" of allowing them, *Ziglar*, 137 S. Ct. at 1858, the broad background principles that the decision below drew from *Ziglar* say nothing about whether a *Bivens* extension is

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Earle's claim. App. 3a. As in *Ziglar*, the *Tun-Cos* plaintiffs challenged a broad executive policy in an area with "the natural tendency to affect" matters squarely within the executive's traditional realm of authority, such as "diplomacy, foreign policy, and the security of the nation." *Tun-Cos*, 922 F.3d at 526 (quoting *Mirmehdi v. United States*, 689 F.3d 975, 982 (9th Cir. 2012)); *see also id.* at 527 (noting that the *Tun-Cos* plaintiffs' initial complaint "specifically targeted the Trump Administration's immigration enforcement policy with the purpose of altering it" and that they had "undoubtedly not abandoned" this purpose during litigation).

warranted in the specific context of Mr. Earle's retaliation claim—let alone establish that it is not.

Having highlighted dicta from *Ziglar* that gave no specific guidance on the special-factors analysis here, the decision below then fully ignored the precedent of this Court that offered just such guidance. In *Carlson v. Green*, 446 U.S. 14 (1980), which the briefing below discussed at length, this Court held that no special factors counseled hesitation in allowing a *Bivens* claim to proceed against correctional officers who allegedly deprived an inmate of necessary medical care, *id.* at 19. The officers, this Court held, "d[id] not enjoy such independent status in our constitutional scheme as to suggest that judicially created remedies against them might be inappropriate." *Id.* And "even if requiring them to defend" a *Bivens* suit "might inhibit their efforts to perform their official duties," qualified immunity would "provide[] adequate protection." *Id.*; *see McCarthy v. Madigan*, 503 U.S. 140, 151 (1992), *superseded in part on other grounds by statute* (reaffirming *Carlson*'s holding that "'special factors' do not free prison officials from *Bivens* liability").

By ignoring *Carlson*, the decision below avoided confronting the fact that its own special-factors analysis was irreconcilable with *Carlson*'s.

The decision below emphasized that the threat of a retaliation claim could interfere with a correctional officer's disciplinary judgments, App. 10–12a, but *Carlson* expressly dismissed comparable concerns on the grounds that qualified immunity will keep the risk of litigation from inhibiting officers in their everyday duties, *Carlson*, 446 U.S. at 19. Neither *Ziglar* nor any other precedent of this Court has departed from *Carlson* to deny a *Bivens* remedy based on a bare risk that individual liability for one-off misconduct might impact "standard 'law enforcement operations'" that do not implicate "major elements" of federal policy. *Ziglar*, 137 S. Ct. at 1861 (quoting *Verdugo-Urquidez*, 494 U.S. at 273); *see also Correctional Servs. Corp. v. Malesko*, 534 U.S. 61, 72 (2001) ("If a federal prisoner . . . alleges a constitutional deprivation, he may bring a *Bivens* claim against the offending individual officer, subject to the defense of qualified immunity."). And while the decision below believed that injunctive relief and the administrative grievance process—the very process that triggered the unlawful retaliation at issue in the first place—did not leave Mr. Earle "completely without remedy," App. 10a, the relevant question under *Carlson* is whether Congress "meant to *pre-empt* a *Bivens* remedy" by creating a remedial scheme it viewed as

"equally effective," *Carlson*, 446 U.S. at 19 (emphasis added); *see Ziglar*, 137 S. Ct. at 1862 (recognizing that "damages actions after the fact" can be critical for deterring "individual instances" of officer misconduct).[6]

The decision below thus ultimately depends on a reading of *Ziglar* that is inconsistent not only with *Carlson* but also with *Ziglar*'s own express recognition that *Bivens* extensions remain permissible. After all, it is impossible to imagine *any* constitutional claim that does not present the possibility that injunctive relief, for example, could theoretically be available in certain cases or raise the risk that damages liability could affect an individual actor's day-to-day decisions. But rather than looking carefully to the particulars of this Court's holdings to discern just what sort of factors are so "special" as to counsel against a *Bivens* extension,

[6] Mr. Earle's case makes clear why the supposed alternative remedies the lower court cited are more illusory than real. Where an officer's retaliatory conduct consists of a discrete, time-limited action—such as putting an inmate in the SHU for one month—claims for injunctive relief will almost certainly be moot by the time the case gets to court. And while an inmate can use the grievance process to bring unlawful retaliation to the attention of the Bureau of Prisons (assuming he can tolerate the risk of further retaliation), *see Malesko*, 534 U.S. at 74, it does not ensure any specific form of relief or any consequences that will deter future misconduct, *see* 28 C.F.R. §§ 542.10–542.19; *Koprowski v. Baker*, 822 F.3d 248, 256 (6th Cir. 2016) (noting that the administrative grievance process "has been in effect for nearly four decades" and yet "did not affect the Supreme Court's conclusion in *Carlson*").

the decision below treated *Ziglar*'s broad dicta as an invitation to conflate "*special* factors with *any* factors counseling hesitation." *McCarthy*, 503 U.S. at 151 (emphasis in original).

3. Such overreading of *Ziglar* is not unique to the decision below. Since *Ziglar* issued, Courts of Appeals have treated it as "renounc[ing]" some aspect of *Carlson* and somehow changing the nature of the special-factors analysis. *Callahan v. Fed. Bur. of Prisons*, 965 F.3d 520, 523 (6th Cir. 2020). But, as below, courts can identify nothing beyond *Ziglar*'s general discouragement of *Bivens* actions to justify this reading.

The Third Circuit offers a potent example. Since 1981, that court had recognized that a federal inmate may pursue a First Amendment retaliation claim against correctional officers under *Bivens*. *See Mack v. Warden Loretto FCI*, 839 F.3d 286, 297 (3d Cir. 2016) (citing *Milhouse v. Carlson*, 652 F.2d 371 (3d Cir. 1981)). But in 2018, the Third Circuit held that *Ziglar*'s reminder that "expanding *Bivens* beyond those contexts already recognized by the Supreme Court is disfavored" required it to reassess circuit precedent. *Bistrian v. Levi*, 912 F.3d 79, 95 (3d Cir. 2018). Without identifying any new guidance *Ziglar* offered as to what constitutes a special factor, the Third Circuit then wiped away thirty

years' worth of its own holdings and announced that inmates' retaliation claims are not cognizable under *Bivens* after all. *See id.* at 95–96.

Even where courts do not go so far as overruling precedent, they cite *Ziglar* to justify a breathtakingly broad conception of special factors that has no basis in this Court's *Bivens* precedents. For example, in *Byrd v. Lamb*, 990 F.3d 879 (5th Cir. 2021) (per curiam), the Fifth Circuit considered excessive-force and unlawful-detention claims filed against a federal law enforcement officer who brandished a gun at a young man investigating an car accident involving the officer's son, told the young man he would "blow his head off" and "put a bullet through his f—king skull," attempted to smash the young man's car window, and ultimately had the young man unlawfully handcuffed and detained for four hours, *id.* at 880. The Fifth Circuit held that no *Bivens* remedy was available after conducting a four-sentence special-factors analysis that pointed vaguely to "separation of powers" and the fact that "Congress did not make individual officers statutorily liable" for the claims at issue—factors present in *all* cases considering *Bivens* extensions. *Id.* at 882; *see Watkins v. Three Administrative Remedy Coordinators of Bur. of Prisons*, 998 F.3d 682, 685 (5th Cir. 2021) (citing the lack of a statutory damages

remedy and "respect for Congress and the longstanding principle of separation-of-powers" as the only special factors justifying refusal to extend *Bivens* to cover a federal inmate's First Amendment retaliation claim).

Indeed, some decisions—like the decision below—have identified special factors even where this Court has specifically held that there are none. The Fifth Circuit's decision in *Cantú v. Moody*, 933 F.3d 414 (5th Cir. 2019), for example, treated "the existence of a statutory scheme for torts committed by federal officers" as a special factor counseling against recognizing a *Bivens* remedy against law enforcement officers accused of fabricating evidence, *id.* at 423, even though this Court has squarely held that the exact statutory provision referenced in *Cantú* does *not* displace *Bivens*, *see Carlson*, 446 U.S. at 19–20. And, in a sharp break with *Carlson*, the Sixth Circuit has suggested that, after *Ziglar*, all "[p]rison-based claims" might involve special factors because they "present a risk of interference with prison administration." *Callahan*, 965 F.3d at 524; *see also* Jessica Marder-Spiro, *Special Factors Counselling Action: Why Courts Should Allow People Detained Pretrial to Bring Fifth Amendment* Bivens *Claims*, 120 Colum. L. Rev. 1295, 1316 n.157 (2020) (citing cases

that have "refused to extend *Bivens* to cover claims that were nearly identical to the claims brought in *Carlson*").

These cases, like the decision below and countless others, reflect suspicion that this Court "did not mean what it said" in *Ziglar* "when it refused to cast doubt on the continued availability of redress for injuries caused by garden-variety abuses of power by federal officials." Stephen I. Vladeck, *The Disingenuous Demise and Death of* Bivens, 2020 Cato Sup. Ct. Rev. 263, 277. But lower courts are meant to follow this Court's holdings, not draw jurisprudential hunches from subtextual emanations. This Court should intervene and clarify that the notes of caution *Ziglar* sounded against extending *Bivens* did nothing to alter this Court's precedents explaining when extensions are and are not available—and that those precedents continue to bind lower courts.

II. This Case Is an Ideal Vehicle for Clarifying When *Bivens* May Be Extended Because It Presents a Context in Which *Bivens*' Deterrent Purpose Is Uniquely Essential.

This case, which involves correctional officers' unlawful retaliation against an inmate for filing an administrative grievance, presents a particularly strong opportunity for this Court to offer guidance on applying *Ziglar*'s special-factors analysis. Because Congress has made

an inmate's access to the federal court system contingent on his following the administrative grievance process, *see* 42 U.S.C. § 1997e(a), ensuring the integrity of that process (and, with it, the availability of a judicial forum) is an area of critical importance to both judiciary and legislature alike. And a ruling from this Court on whether a *Bivens* remedy is available to deter rogue officers from intentionally corrupting that process will be dispositive here.

1. The precedent created below will have grave consequences for people incarcerated in federal facilities and for the proper functioning of the processes to which Congress has entrusted their rights. As this Court has noted, "the purpose of *Bivens* is to deter the officer" from misconduct. *Fed. Deposit Ins. Co. v. Meyer*, 510 U.S. 471, 485 (1994) (emphasis omitted). And it is precisely cases like this one, which address "individual instances of . . . law enforcement overreach," where the deterrent effect of a "damages action[] after the fact" is most potent and most necessary. *Ziglar*, 137 S. Ct. at 1862. By insulating correctional officers from personal liability for even the most malicious acts of illegal retaliation—including where the officers flout established law so egregiously that they would not be entitled to qualified immunity—the decision below strips

away this vital deterrent and leaves rogue officers free to punish inmates who report misconduct through the administrative grievance process.

But the effects of the decision below will reach far beyond the individuals directly subjected to retaliation. This Court has observed that "subjecting an individual to retaliatory actions . . . for speaking out" violates the Constitution precisely because "it threatens to inhibit exercise" of First Amendment rights. *Hartman v. Moore*, 547 U.S. 250, 256 (2006) (second quoting *Crawford-El v. Britton*, 523 U.S. 574, 588 n.10 (1998)). The retaliation that will go undeterred due to the decision below, then, could chill others from filing grievances or otherwise reporting officer misconduct in the first place. As a result, even where an inmate has an unambiguously viable claim—a religious liberty claim pursuant to the Religious Land Use and Institutionalized Persons Act, for example, or an Eighth Amendment *Carlson* claim—officer retaliation could thwart him from pursuing the relief that Congress or this Court deems essential.

Worse yet, beyond threatening the practical availability of legal remedies Congress has guaranteed, the failure to deter retaliation against inmates who file administrative grievances disserves congressional will in yet another way. In 1996, Congress passed the

Prison Litigation Reform Act (PLRA). The PLRA did nothing to eliminate the causes of action available to inmates—including the damages action that had been available under *Carlson* for fifteen years by that point—but it did create a requirement that any inmate bringing a federal claim to court must first exhaust the grievance process. 42 U.S.C. § 1997e(a). In doing so, Congress sought to ensure prisons "a fair opportunity to correct their own errors," to "reduce[] the quantity of prisoner suits" by weeding out claims that can be adequately resolved at the administrative level, and to prompt "the creation of an administrative record that is helpful to the court" in those cases that do proceed to litigation. *Woodford v. Ngo*, 548 U.S. 81, 94–95 (2006). But where unlawful retaliation chills inmates from initiating the grievance process in the first place, Congress's considered judgment as to the manner in which their claims should best be funneled into the courts is entirely undermined. Instead, the meritorious claims that Congress envisaged passing through the administrative process and arriving in court with the benefit of a developed record will simply die on the vine.

Put simply, the First Amendment right to press constitutional claims without fear of retaliation is a necessary precondition to the

vindication of every other right. Because the decision below poses grave risks to that foundational First Amendment protection, it is particularly important that this Court grant review to ensure that the special-factors analysis is conducted under a proper understanding of the governing law.

2. While the special-factors analysis here is critical for courts, Congress, and incarcerated individuals throughout the nation, it is also dispositive of Mr. Earle's appeal. There is no dispute that Mr. Earle seeks to extend *Bivens* into a new context, *see* App. 8a, so the presence or absence of special factors is determinative of whether he may pursue a First Amendment retaliation claim under *Bivens*. If he may, this case must return to the district court for further proceedings.

Even though the district court granted summary judgment to the Officers on grounds unrelated to *Bivens*, the Fourth Circuit had good reason for conspicuously declining to endorse its reasoning. App. 13a n.3. The district court's belief that "there is no First Amendment right to file grievances," App. 21a, is simply wrong under not only Fourth Circuit precedent, but also precedent from virtually every other circuit, *see Booker v. S.C. Dep't of Corrs.*, 855 F.3d 533, 545 (4th Cir. 2017) (relying on "decisions from nearly every court of appeals" to hold that the "right

to file a prison grievance free from retaliation was clearly established under the First Amendment" as early as 2010). And the district court's decision to credit the Officers' affidavits disclaiming retaliatory intent over Mr. Earle's sworn allegations that several of the Officers openly informed him that he was being punished for filing grievances, *see* App. 19–21a, was impermissible at the summary-judgment stage, *see Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986) ("Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge . . . ."). Should this Court reverse the decision below, then, nothing threatens to obviate the practical significance of this Court's judgment.

CONCLUSION

This Court should grant certiorari.

Respectfully submitted,

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