No. 21-___

IN THE

Supreme Court of the United States

MAX RAY BUTLER,

Petitioner,

v.

S. PORTER, ET AL.,

Respondents.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

In *Carlson v. Green*, 446 U.S. 14 (1980), the Court recognized a remedy under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), for violations of a federal prisoner's Eighth Amendment right to adequate medical care.

The question presented is whether *Bivens* remedies are categorically unavailable to federal prisoners in any other context.

PARTIES TO THE PROCEEDINGS AND RULE 29.6 DISCLOSURE STATEMENT

Petitioner Max Ray Butler was the plaintiff in the district court and the appellant in the Fifth Circuit.

Respondents S. Porter, K. Morgan, Calvin Johnson, Captain Rex, Caleb Gotreaux, Kaci Maxey, A. White, Christopher Gore, John Does, SHU Staff, SIA Lieutenant S. Brown, SIS Technician R. Rodriguez, J. Ledoux, F. Coker, C. Robinson, C. Wilson, and Unknown Officer were the defendants in the district court and the appellees in the Fifth Circuit.

There are no publicly held corporations involved in this proceeding.

RELATED PROCEEDINGS

Butler v. Porter, No. 17-CV-230, U.S. District Court for the Western District of Louisiana. Judgment entered January 2, 2019.

Butler v. Porter, No. 19-30029, U.S. Court of Appeals for the Fifth Circuit. Judgment entered June 2, 2021.

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INTRODUCTION

In *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), this Court recognized a cause of action for damages against federal officers who violate the Fourth Amendment. In *Carlson v. Green*, 446 U.S. 14 (1980), the Court held that the same cause of action extends to claims against federal officials who violate the Eighth Amendment by failing to provide prisoners adequate medical treatment. In so holding, *Carlson* reaffirmed the core premise of *Bivens*: "that the victims of a constitutional violation by a federal agent have a right to recover damages against the official in federal court" in the absence of "'special factors counselling hesitation'" or an "alternative remedy." *Id.* at 18.

As this Court has repeatedly recognized, prison officials are not exempt from *Bivens* liability. "[P]rison officials do not enjoy an independent status in our constitutional scheme, nor are they likely to be unduly inhibited in the performance of their duties by the assertion of a *Bivens* claim." *McCarthy v. Madigan*, 503 U.S. 140, 151 (1992), *abrogated on other grounds by* 42 U.S.C. § 1997e(a) (citing *Carlson*, 446 U.S. at 19). Accordingly, "[i]f a federal prisoner in a [Bureau of Prisons] facility alleges a constitutional deprivation, he may bring a *Bivens* claim against the offending individual officer[.]" *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 72 (2001).

Dicta in *Ziglar v. Abbasi*, 137 S. Ct. 1843 (2017), however, has cast doubt on that longstanding rule. There, the Court stated that "legislative action suggesting that Congress does not want a damages remedy is itself a factor counseling hesitation" in

extending *Bivens* to new contexts. *Id.* at 1865. It further suggested that the Prison Litigation Reform Act of 1995 ("PLRA") might fit that bill, because "the Act itself does not provide for a standalone damages remedy against federal jailers." *Id.* As a result, "[i]t could be argued that … Congress chose not to extend the *Carlson* damages remedy to cases involving other types of prisoner mistreatment." *Id.*

After *Abbasi*, the courts of appeals have split over whether *Carlson* articulates the *only* fact pattern in which a *Bivens* remedy is available to federal prisoners. On one side, citing the absence of a damages remedy in the PLRA and concerns about prison administration, the Fifth and Sixth Circuits categorically have rejected the possibility of recognizing any "new causes of action in this area." *Callahan v. Fed. Bureau of Prisons*, 965 F.3d 520, 524 (6th Cir. 2020); *see also Watkins v. Three Admin. Remedy Coordinators of Bureau of Prisons*, 998 F.3d 682, 685 (5th Cir. 2021); Pet.App.10a–11a. On the other side, the Third and Fourth Circuits take a case-by-case approach, asking in each case whether specific prison-administration concerns foreclose a new *Bivens* remedy. *See, e.g.*, *Bistrian v. Levi*, 912 F.3d 79, 93 (3d Cir. 2018); *Earle v. Shreves*, 990 F.3d 774, 780–81 (4th Cir. 2021). Indeed, the Third Circuit repeatedly has held that the absence of a damages remedy in the PLRA "*cannot* rightly be seen as dictating that a *Bivens* cause of action should not exist at all." *Bistrian*, 912 F.3d at 93 (emphasis added). And it has recognized a *Bivens* remedy for a prisoner's Fifth Amendment failure-to-protect claim, even though this Court has never recognized such a remedy. *Id.* at 90–94.

This circuit split is consequential for prisoners and the judicial system alike. For the more than 39,000 federal prisoners in the Fifth and Sixth Circuits, *Bivens* effectively is a dead letter. They have no redress for "individual" constitutional violations, "which due to their very nature are difficult to address except by way of damages actions after the fact." *Abbasi*, 137 S. Ct. at 1862. Prison officials may thus violate prisoners' constitutional rights with impunity—even, for example, by punishing prisoners who exercise their First Amendment rights with starvation and food "contaminated with feces and urine[.]" *Watkins*, 998 F.3d at 684. Meanwhile, prisoners, counsel, and judges in other circuits are expending significant time and resources litigating on an *ad hoc* basis the availability of *Bivens* claims. *Cf. Edwards v. Vannoy*, 141 S. Ct. 1547, 1560 (2021).

This case is an ideal vehicle to resolve this division of authority. In two brief paragraphs—one for the PLRA and one for "prison administration"—the Fifth Circuit rejected a *Bivens* remedy on grounds applicable to *any* claim brought by a federal prisoner. Indeed, the Fifth Circuit expressly preserved for federal prisoners only "the one" remedy recognized in *Carlson* for inadequate medical care in violation of the Eighth Amendment. Pet.App.10a n.2.

That summary rejection, illustrative of the reality faced by thousands of federal prisoners in the Fifth and Sixth Circuits, was wrong. It ignores this Court's holding that "'special factors' do not free prison officials from *Bivens* liability, because prison officials do not enjoy an independent status in our constitutional scheme, nor are they likely to be unduly inhibited in the performance of their duties by the

assertion of a *Bivens* claim." *McCarthy*, 503 U.S. at 151. And it gets congressional intent in the PLRA exactly backwards: As this Court (and numerous federal courts of appeals) recognized long before *Abbasi*, the PLRA was designed to *regulate* prisoner *Bivens* claims, not categorically *foreclose* them. *See, e.g.*, *Booth v. Churner*, 532 U.S. 731, 740 (2001).

This Court's immediate review is warranted.

OPINIONS BELOW

The court of appeals' opinion is reported at 999 F.3d 287 and reproduced in Appendix A. Pet.App.1a–19a. The district court's judgment adopting the magistrate judge's third report and recommendation is not reported but is available at 2019 WL 81677 and reproduced in Appendix B. Pet.App.20a. The magistrate judge's third report and recommendation is not reported but is available at 2018 WL 6920355 and reproduced in Appendix D. Pet.App.23a–33a.

JURISDICTION

The court of appeals affirmed the district court's judgment on June 2, 2021. Pet.App.1a. This petition was timely filed, consistent with the Supreme Court's March 19, 2020 Order, within 150 days of that judgment. This Court has jurisdiction under 28 U.S.C. § 1254(1).

PROVISIONS INVOLVED

42 U.S.C. § 1997e(a) provides as follows:

> No action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until

such administrative remedies as are available are exhausted.

42 U.S.C. § 1997e(c) provides as follows:

(1) The court shall on its own motion or on the motion of a party dismiss any action brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility if the court is satisfied that the action is frivolous, malicious, fails to state a claim upon which relief can be granted, or seeks monetary relief from a defendant who is immune from such relief.

(2) In the event that a claim is, on its face, frivolous, malicious, fails to state a claim upon which relief can be granted, or seeks monetary relief from a defendant who is immune from such relief, the court may dismiss the underlying claim without first requiring the exhaustion of administrative remedies.

STATEMENT OF THE CASE

A. Factual Background[1]

Mr. Butler formerly was a federal prisoner housed at the Oakdale Federal Correctional Complex in Oakdale, Louisiana. Pet.App.23a. While at Oakdale, Mr. Butler was placed in the Special Housing Unit ("SHU") for an extended period of time beginning on April 25, 2016. *Id.* at 24a. This was not a disciplinary

[1] Because the district court granted Respondents' motion to dismiss, the facts below are drawn from Mr. Butler's pleadings as reflected in the magistrate judge's reports and recommendations and the Fifth Circuit's opinion.

placement. *Id.* at 44a. Instead, prison officials initially told Mr. Butler that he had been the subject of "anonymous copouts"—threats by other prisoners—over the previous weekend. *Id.* Mr. Butler remained in the SHU for more than 400 days. *Id.* at 46a.

Mr. Butler filed a number of administrative grievances challenging his SHU placement. *Id.* at 24a, 44a. Those grievances, and eventually his filing of this lawsuit, led to a campaign of retaliation by Respondents (various prison officials) that forms the basis of this case. Specifically, Respondents retaliated by, among other things, unjustifiably prolonging Mr. Butler's SHU placement; targeting him for cell searches; reclassifying him as a higher security risk and coordinating his transfer to a "more dangerous" facility; arranging for him to be confined in the SHU at the new facility; destroying his commissary requests; preventing him from obtaining paper and stamps; delaying his mail; and depriving him of medical care, medication, and eyeglasses. *Id.* at 2a–3a, 24a, 44a–46a. As a result of Respondents' unlawful retaliation and his prolonged SHU placement, Mr. Butler suffered chest pains and sleeping problems, and ultimately lost nearly 50 pounds. *Id.* at 46a. He also ceased filing grievances "out of fear of further retaliation." *Id.* at 24a.

B. Procedural Background

Mr. Butler filed this lawsuit in February 2017. His complaint raised a number of constitutional claims including, as relevant here, that Respondents unconstitutionally retaliated against him for exercising his First Amendment rights. *Id.* at 50a. Following the district court's referral of the matter to

a magistrate judge, the magistrate judge recommended dismissal of "all claims but the one for retaliation[.]" *Id.* at 53a. As for Mr. Butler's retaliation claim, the magistrate judge concluded that he had "set[] forth sufficient allegations under each element required for a retaliation claim[,]" but ordered him to amend his complaint to "identify the defendants responsible under this claim alone[.]" *Id.* at 51a. Mr. Butler did so, naming Respondents. *Id.* at 35a–36a. The magistrate judge then issued a "supplemental" report and recommendation, recommending dismissal of "all of Butler's claims, with the exception of the retaliation claims" against Respondents. *Id.* at 34a, 41a (capitalization altered). In January 2018, the district court adopted the magistrate judge's recommendation and dismissed "all of Butler's claims, with the exception of the retaliation claims[.]" *Id.* at 22a.

Respondents thereafter filed a motion to dismiss Mr. Butler's First Amendment retaliation claim. *Id.* at 23a. Respondents argued that Mr. Butler lacks a *Bivens* remedy and, in any event, that they are entitled to qualified immunity. *Id.* at 24a.

The magistrate judge recommended that the district court grant Respondents' motion. The magistrate judge reasoned that Mr. Butler's claim presents "a new *Bivens* context" "because it involves a different constitutional right—the First Amendment—than the ones approved for *Bivens* remedies under the Court's prior decisions." *Id.* at 29a–30a. The magistrate judge also believed that two "special factors" counseled hesitation in recognizing a *Bivens* remedy. *Id.* at 31a–32a. First, the magistrate judge cited "concerns of institutional security," suggesting a *Bivens* remedy

would "unduly limit officers in their use of disciplinary segregation as a security measure at the prisons." *Id.* Second, the magistrate judge reasoned, relying on *Abbasi*'s dicta, that "Congress's efforts to limit prisoner suits through the [PLRA], and failure therein to provide a standalone remedy against federal jailers, likewise weighs against the extension of *Bivens* in [t]his case." *Id.* The magistrate judge did not address qualified immunity and expressly declined to address any other potentially relevant "special factors," including the availability of alternative remedies. *Id.* at 32a–33a. The district court adopted the report and recommendation and entered judgment without further comment. *Id.* at 20a.

The Fifth Circuit affirmed. Like the magistrate judge, the Fifth Circuit concluded that Mr. Butler's "First Amendment retaliation claim presents a new *Bivens* context." *Id.* at 9a. And "[a]t least two special factors," the Fifth Circuit continued, "counsel hesitation [in recognizing a *Bivens* remedy] here." *Id.* at 10a. First, pointing to *Abbasi*'s discussion of the PLRA, the Fifth Circuit said that "congressional legislation already exists in this area." *Id.* And the absence of a damages remedy in the PLRA "suggest[s] that Congress did not intend for a standalone damages remedy against federal jailers, apart from the one previously established [in *Carlson*] *before* the PLRA's enactment." *Id.* at 10a n.2. Second, "'[p]rison administration … has been committed to the responsibility of [the political] branches, and separation of powers concerns counsel a policy of judicial restraint.'" *Id.* at 11a (quoting *Turner v. Safley*, 482 U.S. 78, 85 (1987)). Thus, given "the very complex nature of managing federal prisons,"

recognizing a *Bivens* remedy "would be a paradigmatic violation of separation-of-powers principles." *Id.*

Like the magistrate judge, the Fifth Circuit did not address any other potentially relevant special factors. Unlike the magistrate judge, however, the Fifth Circuit cited a number of recent court of appeals decisions declining to recognize *Bivens* remedies in similar contexts and suggested in a single sentence that qualified immunity would apply in any event in light of those decisions. *Id.* at 11a–12a.

REASONS FOR GRANTING THE PETITION

I. THERE IS A CLEAR CIRCUIT SPLIT ON THE QUESTION PRESENTED.

The courts of appeals are divided about whether federal prisoners categorically lack any *Bivens* remedies other than the specific remedy recognized in *Carlson*.

A. The Fifth and Sixth Circuits hold that no new *Bivens* remedies are available to federal prisoners.

1. The Fifth Circuit first did so in *Watkins v. Three Administrative Remedy Coordinators of Bureau of Prisons*, 998 F.3d 682 (5th Cir. 2021). In that case, a federal prisoner alleged that prison officials violated his First Amendment rights when they retaliated against him for filing grievances. *Id.* at 685. Recognizing that the claim presented a new *Bivens* context, the Fifth Circuit affirmed dismissal based on a cursory citation of *Abbasi*. The PLRA, the Fifth Circuit said, "governs lawsuits brought by prisoners" but "'does not provide for a standalone damages remedy against federal jailers.'" *Id.* (quoting *Abbasi*, 137 S. Ct. at 1865). Thus, "out of respect for Congress and the longstanding principle of separation-of-

powers, we cannot imply such a remedy in this case." *Id.*

The Fifth Circuit took the same approach in the decision below. As in *Watkins*, the Fifth Circuit parroted *Abbasi*'s observation that "congressional legislation"—that is, the PLRA—"already exists in this area." Pet.App.10a. This suggests, according to the Fifth Circuit, "that Congress did not intend for a standalone damages remedy against federal jailers, apart from the one previously established [in *Carlson*] *before* the PLRA's enactment." *Id.* at 10a n.2. And "[s]uch" legislative intent "'is itself a factor counseling hesitation.'" *Id.* at 10a (quoting *Abbasi*, 137 S. Ct. at 1865).

The Fifth Circuit also identified a second "special factor[] counsel[ing] hesitation"—namely, "separation-of-powers concerns" around prison administration. *Id.* "'Prison administration,'" the Fifth Circuit reasoned, "'has been committed to the responsibility of [the political] branches.'" *Id.* at 11a (quoting *Turner*, 482 U.S. at 85). And so, the Fifth Circuit continued, recognizing a *Bivens* remedy "would run afoul of [a policy of judicial] restraint and risk improperly entangling courts in matters committed to other branches." *Id.*

As in *Watkins*, the Fifth Circuit did not base its decision on the facts of this case. Instead, the Fifth Circuit rested on two rationales that categorically foreclose new *Bivens* remedies in the prison context.

2. The Sixth Circuit holds the same view. In *Callahan v. Federal Bureau of Prisons*, 965 F.3d 520 (6th Cir. 2020), the Sixth Circuit confronted a federal prisoner's allegation that prison officials violated his

First Amendment free speech rights when they seized his sexually explicit paintings and mail-order photos. *Id.* at 522. The Sixth Circuit affirmed the district court's dismissal of the prisoner's complaint on the ground that he lacked a *Bivens* remedy. In so doing, the Sixth Circuit offered two principal justifications—the same two justifications on which the decision below rests.

First, like the Fifth Circuit, the Sixth Circuit reproduced the dicta in *Abbasi* stating that "'legislative action suggesting that Congress does not want a damages remedy' counsels against judicial do-it-yourself projects." *Id.* at 524 (quoting *Abbasi*, 137 S. Ct. at 1865). Congress, the Sixth Circuit continued, "paid close attention to inmate constitutional claims when it enacted the [PLRA]," yet "[t]he Act 'does not provide for a standalone damages remedy against federal jailers.'" *Id.* (quoting *Abbasi*, 137 S. Ct. at 1865). "That suggests," the Sixth Circuit concluded, "a considered decision not to extend a damages remedy to First Amendment violations." *Id.*

Second, the Sixth Circuit held that "[p]rison-based claims also present a risk of interference with prison administration." *Id.* Like the Fifth Circuit, the Sixth Circuit relied heavily on *Turner* to emphasize that the task of "'[r]unning a prison'" falls "'peculiarly within the province of the legislative and executive branches.'" *Id.* (quoting *Turner*, 482 U.S. at 84–85). The Sixth Circuit thus concluded that, "[g]iven the array of challenges facing prison administration and the complexity of those problems, 'separation of powers concerns' … counsel in favor … of the judiciary not creating new causes of action in this area." *Id.* (quoting *Turner*, 482 U.S. at 85).

True to its vow not to create "new causes of action in this area," *id.*, the Sixth Circuit subsequently has declined to recognize any new *Bivens* remedies for federal prisoners. In *Pontefract v. United States*, No. 20-3064, 2020 WL 8513590, at *1 (6th Cir. Nov. 6, 2020) (order), a federal prisoner alleged violations of his Eighth Amendment rights. Rather than assess the facts of the case, the Sixth Circuit held that "prison expertise … counsels against recognizing [an] extension" of *Bivens*. *Id.* at *2. Similarly, in *Harris v. Federal Bureau of Prisons*, No. 19-3585, 2020 WL 7586968 (6th Cir. Sept. 22, 2020) (order), a federal prisoner alleged First, Fifth, and Fourteenth Amendment violations, involving his right to marry, his filing of grievances, and his religion. *Id.* at *1. Again, ignoring the facts of the case, the Sixth Circuit reasoned that the district court "did not err by declining to extend the *Bivens* remedy in this new context," because "the running of a prison is traditionally left to the legislative and executive branches of government." *Id.* at *2.

In short, the Fifth and Sixth Circuits categorically have foreclosed recognition of any new *Bivens* remedies for federal prisoners. In their view, the lack of a damages remedy in the PLRA (a justification inspired by *Abbasi*) and concerns about interference with prison administration justify that bar.

B. The Third and Fourth Circuits, however, have rejected a categorical bar on recognizing new *Bivens* remedies for federal prisoners. The Third Circuit has expressly dismissed the notion that the lack of a damages remedy in the PLRA suggests Congress intended to foreclose new *Bivens* remedies. And both the Third and Fourth Circuits have taken a case-by-

case approach to determining whether prison-administration concerns weigh against recognizing new *Bivens* remedies for federal prisoners.

1. In *Bistrian v. Levi*, 912 F.3d 79 (3d Cir. 2018), the Third Circuit considered a federal prisoner's First Amendment retaliation claim alongside his Fifth Amendment failure-to-protect and punitive-detention claims. In addressing the availability of *Bivens* remedies for these claims, the Third Circuit expressly rejected *Abbasi*'s suggestion that "congressional silence in the PLRA about the availability of *Bivens* remedies is evidence of an intent that there be none." *Id.* at 92. The Third Circuit noted that the PLRA "govern[s] the process by which federal prisoners bring *Bivens* claims." *Id.* at 93. Accordingly, "[t]he very statute that regulates how *Bivens* actions are brought cannot rightly be seen as dictating that a *Bivens* cause of action should not exist at all." *Id.* And addressing the *Abbasi* dicta head on, the Third Circuit reasoned that "[i]t is equally, if not more, likely … that Congress simply wanted to reduce the volume of prisoner suits by imposing exhaustion requirements, rather [than] eliminate whole categories of claims through silence and implication." *Id.* at 93 n.22.

Having rejected the lack of a damages remedy in the PLRA as a special factor counseling hesitation, the Third Circuit went on to recognize one *Bivens* remedy and reject two others based on an *ad hoc* consideration of prison-administration concerns. As to the Fifth Amendment failure-to-protect claim, the Third Circuit believed that the claim did not present a new context in light of *Farmer v. Brennan*, 511 U.S. 825 (1994)—even though *Farmer*, an Eighth Amendment case, "did not explicitly state that it was recognizing a *Bivens*

claim[.]" *Bistrian*, 912 F.3d at 90. But the Third Circuit went on to hold, in the alternative, that the claim survived a "special factors" analysis because it would not "unduly affect the independence of the executive branch in setting and administering prison policies." *Id.* at 93. Indeed, the Third Circuit rejected overbroad prison-administration arguments that would apply to (and bar) *Bivens* remedies for "practically all claims arising in a prison." *Id.*

By contrast, the Third Circuit declined to recognize a remedy for the same prisoner's Fifth Amendment punitive-detention and First Amendment retaliation claims, on the ground that "[r]uling on administrative detention policy matters would unduly encroach on the executive's domain." *Id.* at 95–96. According to the Third Circuit, "[u]nlike [the] failure-to-protect claim, which relates to a specific and isolated event, a punitive-detention claim [and a retaliation claim related to punitive detention] more fully call[] in[to] question broad policies pertaining to the reasoning, manner, and extent of prison discipline." *Id.* at 94.

The Third Circuit later reaffirmed its view of the PLRA and its *ad hoc* approach to prison-administration concerns in *Mack v. Yost*, 968 F.3d 311 (3d Cir. 2020). In *Mack*, the Third Circuit considered a federal prisoner's First Amendment retaliation claim involving his termination from a work assignment. Notwithstanding *Bistrian*, the government relied on *Abbasi* to argue that the PLRA "suggests that Congress had specific occasion to create a damages remedy for constitutional violations against federal officials and chose not to do so." *Id.* at 323. But the Third Circuit "again reject[ed] the argument that Congressional silence within the PLRA

suggests that Congress did not want a damages remedy against prison officials for constitutional violations." *Id.* at 324. Indeed, the Third Circuit called the argument "untenable" because "it would arguably foreclose all *Bivens* claims brought in the prison context, which would run counter to the Supreme Court's ruling in *Carlson* and our recent ruling in *Bistrian* … regarding the inmate's Fifth Amendment duty-to-protect claim." *Id.*

The Third Circuit nonetheless cited prison-administration concerns to reject a *Bivens* remedy for that particular First Amendment retaliation claim. The Third Circuit acknowledged that the decisions surrounding prisoner work assignments "are not as weighty as" the punitive-detention decisions addressed in *Bistrian*. *Id.* at 322. But the Third Circuit observed that, by regulation, "the BOP, not the judiciary, is responsible for delegating prison work assignments and overseeing the operational needs of the prison." *Id.* at 323. And because cases like *Turner* "have recognized that such day-to-day administrative decisions have been committed solely to the province of the BOP," the Third Circuit declined to recognize a *Bivens* remedy that "would improperly encroach upon the executive's domain." *Id.*

As *Bistrian* and *Mack* reflect, the Third Circuit unequivocally rejects the PLRA dicta in *Abbasi* that the Fifth and Sixth Circuits have adopted. They also illustrate that, unlike the Fifth and Sixth Circuits, the Third Circuit is willing to recognize—and has recognized—new *Bivens* remedies in the prison context on a case-by-case basis so long as those remedies do not "*unduly* affect" prison administration. *Bistrian*, 912 F.3d at 93 (emphasis added).

2. The Fourth Circuit has followed the Third Circuit's case-by-case approach to assessing the viability of new *Bivens* remedies for federal prisoners. In *Earle v. Shreves*, 990 F.3d 774 (4th Cir. 2021), the Fourth Circuit considered a federal prisoner's claims that a prison official placed him in the SHU in retaliation for grievances that the prisoner had filed. In declining to recognize a *Bivens* remedy, the Fourth Circuit relied on *Bistrian* and asked whether recognizing a remedy in this context "would work a significant intrusion into an area of prison management that demands quick response and flexibility[.]" *Id.* at 781. Concluding that the retaliation claim at issue would "raise[] serious questions relating 'to the reasoning, manner, and extent of prison discipline[,]'" the Fourth Circuit declined to allow the prisoner's claim regarding "retaliatory detention" to proceed. *Id.* at 780 (quoting *Bistrian*, 912 F.3d at 94).

In the process, however, the Fourth Circuit left open the possibility that other new *Bivens* remedies for federal prisoners may be available. Even though it cited *Callahan*, *Bistrian*, and *Mack*, *see id.* at 780–81, *Earle* nowhere mentioned the PLRA, let alone suggested that the PLRA operates as a categorical bar on new *Bivens* remedies for federal prisoners. Instead, by focusing precisely on "retaliatory detention" claims that, in the Fourth Circuit's view, "raise[] serious questions relating 'to the reasoning, manner, and extent of prison discipline[,]'" *id.* at 780 (quoting *Bistrian*, 912 F.3d at 94), *Earle* necessarily cabined its reasoning to the unique context presented by those claims. And as a result, *Earle* left ample room for

prisoners to distinguish different claims that do not raise the same prison-administration concerns.

Notably, although *Earle* was only recently decided, at least one magistrate judge within the Fourth Circuit has already taken the case-by-case approach endorsed in *Earle*. In *Simpson v. McCabe*, No. 19-CV-217, 2021 WL 4469645, at *1 (N.D. W. Va. June 2, 2021), *report and recommendation adopted* 2021 WL 3598540 (N.D. W. Va. Aug. 13, 2021), a prisoner asserted various *Bivens* claims, including a First Amendment retaliation claim based on the filing of grievances. The magistrate judge summarily dismissed that claim because "the Fourth Circuit has held that actions under *Bivens* do not extend 'to include a federal inmate's claim that prison officials violated his First Amendment rights by retaliating against him for filing grievances.'" *Id.* at *13 (quoting *Earle*, 990 F.3d at 776). The magistrate judge also summarily rejected—again quoting *Earle*—a due process claim regarding the prisoner's SHU placement. *Id.* at *17.

But the magistrate judge took a different tack as to the prisoner's Eighth Amendment claim that a prison official had "sexually assaulted [the prisoner] by groping him and digital penetration." *Id.* at *16. Instead of rejecting the claim out of hand—as it would have done under the Fifth and Sixth Circuit's categorical rule—the magistrate judge permitted the claim to proceed. *Id.* And the district court agreed that the claim "should go forward." 2021 WL 3598540, at *2.

Simpson thus underscores that the Fourth Circuit has not categorically foreclosed new *Bivens* remedies

for federal prisoners and that courts in that Circuit will address new claims on an *ad hoc* basis as they arise.

* * *

The upshot of all this is that federal prisoners in the Fifth and Sixth Circuits categorically lack *Bivens* remedies for violations of their constitutional rights other than the remedy recognized in *Carlson* for violations of the Eighth Amendment right to adequate medical care. By contrast, federal prisoners in the Third and Fourth Circuits may bring other constitutional claims, subject to a case-specific analysis regarding the extent to which recognizing a new remedy would interfere with prison administration.

II. THE QUESTION PRESENTED IS EXCEPTIONALLY IMPORTANT AND THIS IS AN IDEAL VEHICLE FOR RESOLVING IT.

The Court should resolve this circuit split now, both because the question presented is profoundly important and because this case is an excellent vehicle for answering it.

A. Consider first the reality that federal prisoners within the Fifth and Sixth Circuits currently face. The Bureau of Prisons' population statistics indicate that approximately 39,000 federal prisoners are located in Kentucky, Louisiana, Michigan, Mississippi, Ohio, Tennessee, and Texas. Fed. Bureau of Prisons, Population Statistics, https://tinyurl.com/ywxdpyaf (last visited Oct. 29, 2021). Under the Fifth and Sixth Circuits' categorical rule, none of these federal prisoners have a *Bivens* remedy for violations of their

constitutional rights—unless their claim falls squarely within *Carlson*.

The result is open season on federal prisoners' constitutional rights. Indeed, the Court recently recognized that, "due to their very nature," "individual" constitutional violations are "difficult to address except by way of damages actions after the fact." *Abbasi*, 137 S. Ct. at 1862. Without viable damages actions, therefore, these 39,000 federal prisoners have virtually no redress for individual violations of their constitutional rights—no matter how unspeakable those violations may be.

Take, for example, the prison officials in *Watkins*, who starved a prisoner and gave him food "contaminated with feces and urine" simply because he exercised his First Amendment rights. 998 F.3d at 684. Or consider the prison officials in *Pontefract*, who stole prisoners' food to sell it to other prisoners. 2020 WL 8513590, at *1. And then there was the prison official in *Reid v. Ryan* who—without provocation—"came from behind [a prisoner] and slammed his head and face into the wall, knocking him unconscious[,]" No. 17cv184, 2021 WL 4549728, at *1 (E.D. Tex. Oct. 5, 2021). All of these prison officials got a *Bivens* pass under the Fifth and Sixth Circuit's rule.

And that is only the beginning. Numerous district courts and magistrate judges have cited the categorical PLRA and prison-administration rationales in similar recent decisions to reject all manner of *Bivens* claims brought against prison

officials.[2] This Court's review is thus urgently needed to correct course.

But, even if the Fifth and Sixth Circuits' categorical bar on prisoner *Bivens* remedies were correct, the Court's immediate review would remain warranted. Since *Abbasi*, some 10,000 federal court opinions mention *Bivens*; some 7,000 of those opinions also mention "inmate" or "prisoner."[3] These raw numbers suggest that prisoner *Bivens* actions comprise the lion's share of *Bivens* litigation. If *Bivens* is really a dead letter for all non-*Carlson Bivens* claims, that work was—and continues to be—pointless. It gives "false hope" to prisoners and "wastes the resources" of

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[2] *See, e.g.*, *Stone v. Wilson*, No. 20-cv-406-O, 2021 WL 2936055, at *6–7 (N.D. Tex. July 13, 2021) (First and Eighth Amendment claims); *Morrison v. Wilson*, No. 20-cv-00222-O, 2021 WL 2716596, at *6–7 (N.D. Tex. June 30, 2021) (First and Eighth Amendment claims); *Springer v. United States*, No. 20-CV-3088-B, 2021 WL 4552239, at *15 (N.D. Tex. Aug. 24, 2021), *adopted* 2021 WL 4859636 (N.D. Tex. Oct. 19, 2021) (Eighth Amendment claim); *Watkins v. Weston*, No. 11cv651, 2021 WL 3645876, at *3–4 (E.D. Tex. June 22, 2021), *adopted* 2021 WL 3634526 (N.D. Tex. Aug. 16, 2021) (Fifth Amendment claim); *Awan v. Harmon*, No. 17-CV-130-C, 2021 WL 2690088, at *10 (N.D. Tex. June 1, 2021), *adopted* 2021 WL 2688598 (N.D. Tex. June 30, 2021) (First and Eighth Amendment claims); *Dissler v. Zook*, No. 20-cv-00942-D, 2021 WL 2598689, at *5 (N.D. Tex. May 7, 2021), *adopted* 2021 WL 2589706 (N.D. Tex. June 23, 2021) (Eighth Amendment claim); *Butts v. Martinez*, No. 12cv114, 2021 WL 1061184, at *1 (E.D. Tex. Mar. 18, 2021) (First Amendment claim); *Nabaya v. Zook*, No. 21-cv-438-X-BN, 2021 WL 1918781, at *3 (N.D. Tex. Mar. 4, 2021), *adopted* 2021 WL 3566344 (N.D. Tex. Aug. 12, 2021) (wrongful incarceration claim).

[3] These numbers are the product of Westlaw searches within each federal court of appeals for "Bivens & DA(aft 06-18-2017 & bef 10-29-2021)" and "Bivens & DA(aft 06-18-2017 & bef 10-29-2021) & (inmate OR prisoner)."

prisoners, counsel, and courts. *Edwards*, 141 S. Ct. at 1560.

However the Court views the ultimate answer to question presented, therefore, it is critical that the Court provide an answer soon.

B. This case is an ideal vehicle for doing so.

First, it tees up a clean legal question—whether *Carlson* establishes the only *Bivens* remedy for federal prisoners—with no factual analysis necessary. The Fifth Circuit did not engage with the merits of Mr. Butler's First Amendment retaliation claim, choosing instead to reject it on two grounds universally applicable to all federal prisoners' *Bivens* claims. Pet.App.10a–11a. The Court, therefore, need only address the Fifth Circuit's categorical reasoning and remand for further proceedings.

Second, and as a corollary, the decision below isolates two potentially relevant "special factors," thereby avoiding thorny case-specific questions about whether other special factors may counsel hesitation in recognizing a *Bivens* remedy in this context. Most notably, the magistrate judge expressly declined, *id.* at 32a–33a—and the Fifth Circuit implicitly declined—to address whether Mr. Butler had available alternative remedies. This Court may thus address and reverse as to the two categorical special factors on which the Fifth Circuit based its decision, and then remand for the lower courts' consideration in

the first instance of any other potentially relevant special factors.[4]

Third, Mr. Butler likely would have prevailed in the Third and Fourth Circuits. In deciding whether to recognize a *Bivens* remedy in any particular case, those courts focus on the extent to which the claim at issue implicates "day-to-day administrative decisions" committed to prison officials. *Mack*, 968 F.3d at 323. Mr. Butler endured retaliatory acts that cannot plausibly be recast as the products of "day-to-day administrative decisions." *Id.* The intentional destruction of his commissary requests, the intentional delay of his mail, and the intentional deprivation of basic medication and eyeglasses, for example, are all malicious acts of retaliation that serve no conceivable prison-administration purpose. Pet.App.2a–3a. Unlike claims limited to "retaliatory detention," *Earle*, 990 F.3d at 780; *Bistrian*, 912 F.3d at 96, or retaliatory employment actions, *Mack*, 968 F.3d at 314—and similar to intentionally feeding prisoners food contaminated with urine and feces—

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[4] The Fifth Circuit's single-sentence reference to qualified immunity is no bar to this Court's review of the question presented. Citing recent court of appeals decisions rejecting *Bivens* remedies in similar contexts, the Fifth Circuit hinted that—even absent binding Fifth Circuit precedent—"this case would be subject to qualified immunity given the lack of 'clearly established' law supporting Butler's claim." Pet.App.11a–12a. But Respondents have never argued that the unsettled nature of case law regarding the existence of a *Bivens remedy* for First Amendment retaliation claims entitles them to qualified immunity. That is unsurprising, given that such an argument is foreclosed by this Court's precedents. *See Hui v. Castaneda*, 559 U.S. 799, 807 (2010) (whether "the defendant is immune from suit" and whether "a *Bivens* remedy is … available" are "two separate inquiries").

these retaliatory acts do not implicate prison officials' "discretion" or demand a "quick response and flexibility[.]" *Earle*, 990 F.3d at 780–81. At the very least, a *Bivens* remedy for retaliation based on this conduct would not "*unduly* affect the independence of the executive branch in setting and administering prison policies." *Bistrian*, 912 F.3d at 93 (emphasis added).

Finally, this case presents an appropriately targeted question regarding the scope of the *Bivens* remedy. In contrast with petitions like *Egbert v. Boule*, No. 21-147 (U.S.), which asks the Court to either foreclose all *Bivens* First Amendment retaliation claims or overrule *Bivens* itself, this case implicates only those *Bivens* claims asserted by federal prisoners. This case thus permits the Court to address the claims that comprise the vast majority of post-*Abbasi Bivens* litigation. But it presents no basis for recognizing or foreclosing the availability of *Bivens* remedies in other contexts.

III. THE DECISION BELOW IS WRONG.

The decision below—which exemplifies the Fifth and Sixth Circuit's categorical bar against non-*Carlson Bivens* remedies for federal prisoners—also gets the relevant law and history wrong.

A. Start with *Carlson* itself. In *Carlson*, the Court held that federal prison officials "do not enjoy such independent status in our constitutional scheme as to suggest that judicially created remedies against them might be inappropriate." 446 U.S. at 19. Indeed, the Court went further and dismissed the suggestion that *Bivens* claims "might inhibit their efforts to perform their official duties," reasoning that "qualified

immunity … provides adequate protection." *Id.* And the Court later expressly reaffirmed this holding in *McCarthy v. Madigan*, 503 U.S. 140 (1992). Citing *Carlson*, the Court there emphasized that "'special factors' do not free prison officials from *Bivens* liability, because prison officials do not enjoy an independent status in our constitutional scheme, nor are they likely to be unduly inhibited in the performance of their duties by the assertion of a *Bivens* claim." *Id.* at 151.

The decision below, however, does exactly what *Carlson* and *McCarthy* say courts cannot do: It gives "prison officials … an independent status in our constitutional scheme." *Id.* It shields them from *Bivens* liability solely because the claims against them arise in the prison context—notwithstanding this Court's recognition that prison officials are unlikely "to be unduly inhibited in the performance of their duties by the assertion of a *Bivens* claim." *Id.*

To be sure, this Court has in recent years said that the analysis in *Carlson* "might have been different" if *Carlson* "were decided today." *Abbasi*, 137 S. Ct. at 1856. But the Court has never overruled *Carlson*. To the contrary, the Court has recognized that, "[i]f a federal prisoner in a [Bureau of Prisons] facility alleges a constitutional deprivation, he may bring a *Bivens* claim against the offending individual officer[.]" *Malesko*, 534 U.S. at 72. *Carlson*'s holding that prison officials lack "independent status in our constitutional scheme," 446 U.S. at 19, thus remains the law of the land.

B. The Fifth Circuit's invocation of the PLRA to foreclose new *Bivens* remedies for federal prisoners also profoundly misunderstands the PLRA.

Relying on passing dicta in *Abbasi*, the Fifth Circuit held that the absence of a damages remedy in the PLRA "supports a conclusion" that "Congress did not intend for a standalone damages remedy against federal jailers, apart from the one previously established *before* the PLRA's enactment." Pet.App.10a & n.2. But as this Court recognized in *Booth v. Churner*, 532 U.S. 731 (2001), the PLRA was intended to *regulate* prisoner *Bivens* claims, not *foreclose* them.

That is clear first and foremost from the PLRA's text. As amended, the statute requires "a prisoner confined in *any* jail, prison, or other correctional facility" to exhaust "such administrative remedies as are available" before filing *any* "action … with respect to prison conditions under … *any* … Federal law." 42 U.S.C. § 1997e(a) (emphases added). A prisoner *Bivens* action, of course, fits squarely within that statutory text. *See Porter v. Nussle*, 534 U.S. 516, 524 (2002) ("[F]ederal prisoners suing under *Bivens* … must first exhaust inmate grievance procedures just as state prisoners must exhaust administrative processes prior to instituting a § 1983 suit."). And the statute says nothing whatsoever about foreclosing *Bivens* claims. To the contrary, it assumes that federal prisoners will bring actions that "seek[] monetary relief from a defendant." 42 U.S.C. § 1997e(c)(1), (2).

The only reasonable inference, therefore, is that Congress effectively incorporated—or, at least, did not intend to displace—the preexisting *Bivens* regime. *See*

Parker Drilling Mgmt. Servs., Ltd. v. Newton, 139 S. Ct. 1881, 1890 (2019) ("It is a commonplace of statutory interpretation that 'Congress legislates against the backdrop of existing law.'" (quoting *McQuiggin v. Perkins*, 569 U.S. 383, 398 n.3 (2013))). And that regime involved the ongoing recognition of numerous *Bivens* remedies for federal prisoners. *See, e.g.*, *Bagola v. Kindt*, 39 F.3d 779 (7th Cir. 1994) (Eighth Amendment); *Williams v. Meese*, 926 F.2d 994 (10th Cir. 1991) (First Amendment); *Cale v. Johnson*, 861 F.2d 943 (6th Cir. 1988) (Fifth Amendment). It is thus unsurprising that "there is strong evidence that Congress assumed that *Bivens* remedies would be available to prisoners when it enacted the PLRA[.]" *Abbasi*, 137 S. Ct. at 1878 (Breyer, J., dissenting).

The history of the PLRA makes that perfectly clear because the statute was amended in response to this Court's decision in *McCarthy*. *See Booth*, 532 U.S. at 740 & n.5. In *McCarthy*, the Court was asked to decide whether a federal prisoner must exhaust administrative remedies "before he may initiate a suit, pursuant to the authority of [*Bivens*], solely for money damages." *McCarthy*, 503 U.S. at 141. Analyzing various potentially relevant statutory provisions, the Court concluded that "Congress ha[d] enacted nothing" like an exhaustion requirement for prisoner *Bivens* claims. *Id.* at 152. But it went on to say that "Congress, of course, is free to design or require an appropriate administrative procedure for a prisoner to exhaust his claim for money damages." *Id.* at 156.

Congress accepted the Court's invitation in passing the PLRA. Because the PLRA "removed the very [statutory] term" key to *McCarthy*'s holding, "the fair inference to be drawn is that Congress meant to

preclude the *McCarthy* result." *Booth*, 532 U.S. at 740 & n.5; *see also, e.g.*, *Lavista v. Beeler*, 195 F.3d 254, 256 (6th Cir. 1999) ("[T]he plain language of the new statute and the legislative history of the [PLRA] indicate that Congress intended that all prisoners, including federal prisoners, be required to exhaust their available administrative remedies before bringing a *Bivens* claim in federal court."); *Garrett v. Hawk*, 127 F.3d 1263, 1265 (10th Cir. 1997), *abrogated on other grounds by Booth*, 532 U.S. 731 ("The legislative history behind the revised version § 1977(e) reveals that Congress specifically amended the statute to overrule *McCarthy* by requiring federal prisoners to exhaust all administrative remedies before bringing a *Bivens* claim or a claim under 42 U.S.C. § 1983."). In other words, the PLRA required the exact exhaustion of administrative remedies for *Bivens* claims that *McCarthy* had held was not required.

As the PLRA's text and history demonstrate, the very premise of the PLRA was that the federal judiciary had recognized, and would continue to recognize, *Bivens* remedies for violations of prisoners' constitutional rights. On that premise, Congress constructed an exhaustion requirement in the PLRA that "regulates how *Bivens* actions are brought." *Bistrian*, 912 F.3d at 93.

Rather than "respect" congressional intent in the PLRA, *Watkins*, 998 F.3d at 685, therefore, the decision below does considerable violence to congressional intent. Indeed, by the Fifth Circuit's lights, the PLRA's exhaustion requirement for *Bivens* claims is good for one ride and one ride only: a claim seeking the specific remedy recognized in *Carlson*. *See* Pet.App.10a n.2 (Congress intended only "the one

[remedy] previously established *before* the PLRA's enactment."). But *Bivens* had been on the books for a quarter century leading up to the PLRA's passage. And, as noted above, courts around the country had recognized various *Bivens* remedies for federal prisoners prior to the PLRA's passage—and so, it was *Bivens* and that litigation expounding on *Bivens* that Congress sought to regulate by enacting an exhaustion requirement. There is simply no rational basis to conclude that the PLRA reflects Congress's intent to bar virtually all prisoner *Bivens* remedies.

In short, the absence of a damages remedy in the PLRA does not "suggest[] that Congress does not want a damages remedy" for federal prisoners. *Abbasi*, 137 S. Ct. at 1865. Quite the opposite. The PLRA unambiguously reflects Congress's intent to *regulate* prisoner *Bivens* actions.

C. Finally, doing away with all prisoner *Bivens* remedies except the one recognized in *Carlson* is bad policy. As explained above, *Bivens* provides the only viable remedy for individual violations of federal prisoners' constitutional rights. Eliminating *Bivens* remedies for federal prisoners, therefore, would effectively transform "[p]rison walls [into] a barrier separating prison inmates from the protections of the Constitution." *Turner*, 482 U.S. at 84. Indeed, it would gut the essential "purpose of *Bivens* [which] is to *deter* individual federal officers from committing constitutional violations." *Malesko*, 534 U.S. at 521 (emphasis added); *see also Abbasi*, 137 S. Ct. at 1863 (acknowledging "a persisting concern … that absent a *Bivens* remedy there will be insufficient deterrence to prevent officers from violating the Constitution").

And for no good reason. The Fifth and Sixth Circuits have expressed concerns about judicial interference with prison administration. But this Court already has said that this is not a serious concern. *See McCarthy*, 503 U.S. at 151 (prison officials are not "likely to be unduly inhibited in the performance of their duties by the assertion of a *Bivens* claim"). That is unquestionably correct because "*Bivens* comes accompanied with a qualified-immunity defense." *Abbasi*, 137 S. Ct. at 1883 (Breyer, J., dissenting). Qualified immunity, as this Court reaffirmed in *Abbasi*, "protects 'all but the plainly incompetent [prison officials] or those who knowingly violate the law.'" *Id.* at 1867 (plurality op.) (quoting *Malley v. Briggs*, 475 U.S. 335, 341 (1986)); *see also Carlson*, 446 U.S. at 19 ("[Q]ualified immunity … provides adequate protection."); *Malesko*, 534 U.S. at 72 (emphasizing that any *Bivens* claim against a prison official is "subject to the defense of qualified immunity"). Given "[t]he real-world functioning of modern immunity practice—essentially 'heads government wins, tails plaintiff loses,'" *Cole v. Carson*, 935 F.3d 444, 471 (5th Cir. 2019) (en banc) (Willett, J., dissenting), there can be no doubt that qualified immunity would provide more than sufficient protection for prison officials if this Court reaffirms the availability of *Bivens* remedies for federal prisoners. "Prison administration," therefore, cannot be a talisman that categorically wipes away federal prisoners' constitutional rights.

CONCLUSION

The petition for a writ of certiorari should be granted.

November 1, 2021

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