No.

IN THE

Supreme Court of the United States

PETER GEORGE NOE, PETITIONER

v.

BERKLEY, DR.; H. SCHOUWEILER; DUNN, R.N.,
RESPONDENTS

ON PETITION FOR A WRIT OF CERTIORARI TO THE U.S. COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a cause of action can be maintained under *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), in circumstances not meaningfully different from that of the claim for deliberate indifference to serious medical needs recognized in *Carlson* v. *Green*, 446 U.S. 14 (1980).

PARTIES TO THE PROCEEDING

Pursuant to this Court's Rule 14(1)(b)(i), petitioner identifies all parties to the proceeding in the court whose judgment is sought to be reviewed[1]:

Plaintiff:

- Peter George Noe

Defendants:

- United States
- Berkley, Dr.
- H. Schouweiler
- Federal Bureau of Prisons
- Dunn, R.N.
- Fellows, R.N.

[1] The individual defendants' full legal names are unknown, and petitioner's claims were dismissed before discovery commenced. Respondents waived service.

RELATED PROCEEDINGS

Pursuant this Court's Rule 14(1)(b)(iii), petitioner identifies the following related proceedings and the date of final judgment or disposition in each:

United States District Court (D. Colo.):
Noe v. *United States*, No. 21-CV-1589 (Jan. 13, 2023)

United States Court of Appeals (10th Cir.):
Noe v. *United States*, No. 23-1025 (Dec. 22, 2023)

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Constitutional Provisions, Statutes & Regulations

Other Authorities

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 51a–67a) is unpublished but available at 2023 WL 8868491 (10th Cir.). The district court's order of dismissal (Pet. App. 36a–48a) is unpublished but available at 2023 WL 179929 (D. Colo.). The magistrate judge's report and recommendation (Pet. App. 1a–35a) is unpublished but available at 2022 WL 18587706 (D. Colo.).

JURISDICTION

The Tenth Circuit's judgment was entered on December 22, 2023. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Eighth Amendment provides, "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

INTRODUCTION

This petition presents the question whether *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), remains good law in circumstances not meaningfully different from the cases in which this Court has recognized a cause of action under *Bivens* (*Davis* v. *Passman*, 442 U.S. 228 (1979), and, relevant here, *Carlson* v. *Green*, 446 U.S. 14 (1980)), or whether, as the Tenth Circuit has held, *Bivens* and its progeny have been silently overruled in all circumstances.

In the decision below, the Tenth Circuit held that "where the government has provided an alternative remedy, a court generally should not recognize a *Bivens* claim ***even if the factual context is not meaningfully different*** from that in *Bivens*, *Davis*, or *Carlson*." Pet. App. 57a (emphasis added). Put otherwise, the Tenth Circuit held that *Bivens* is no longer good law, even in cases arising under the same facts in which this Court has previously recognized *Bivens* claims. That ruling was based on the Tenth Circuit's prior decision in *Silva* v. *United States*, 45 F.4th 1134 (10th Cir. 2022), in which the court held that if Congress has created, or is better positioned to create, an alternative remedy for a constitutional violation, a *Bivens* claim cannot go forward, *regardless* of the similarity between the claim on review and those at issue in the cases where this Court has recognized a *Bivens* claim.

The Tenth Circuit's approach (as announced in *Silva* and applied in the decision below) conflicts with this Court's decisions repeatedly declining to overrule *Bivens* and its progeny. It also breaks from the uniform practice of the other courts of appeals, which continue to apply the two-step framework for *Bivens* claims and to

recognize *Bivens* claims where the context of a claim is not "meaningfully different" from that of *Bivens*, *Davis*, or *Carlson*. As the decision below conclusively establishes, there remains disagreement as to whether and to what extent *Bivens* remains good law, and this case presents an ideal vehicle for the Court to resolve that important question.

STATEMENT

1. In *Bivens*, this Court recognized a private right of action for damages against a federal agent who conducted an unlawful search of a home in violation of the Fourth Amendment. 403 U.S. at 391–92. Eight years later, the Court extended *Bivens* to a Fifth Amendment employment-discrimination claim against a Congressman. *See Davis*, 442 U.S. at 234. And, most relevant here, the Court thereafter recognized an Eighth Amendment claim against federal agents for deliberate indifference to an incarcerated individual's serious medical needs. *See Carlson*, 446 U.S. at 23. Since those three cases, the Court has declined to extend *Bivens* to any new contexts.

In *Ziglar* v. *Abbasi*, 582 U.S. 120 (2017), this Court clarified the framework for determining, in a particular context, whether *Bivens* provides a private right of action against a federal agent for a constitutional violation. First, a court must assess whether the "case is different in a meaningful way from previous *Bivens* cases decided by this Court." *Id.* at 139. If the answer is "no," then binding precedent controls and the claim may proceed. *See ibid.* Only if the answer is "yes" does a court then ask whether "there are special factors counselling hesitation in the absence of affirmative action by Congress." *Id.* at 136 (quotation marks omitted); *see also Hernandez* v. *Mesa*, 140 S. Ct. 735, 743 (2020).

The Court reaffirmed and clarified that two-step framework in *Egbert* v. *Boule*, confirming that courts must first "ask whether the case presents a new *Bivens* context," and if so, then ask whether "there are special factors indicating that the Judiciary is at least arguably less equipped than Congress to weigh the costs and benefits of allowing a damages action to proceed." 596 U.S. 482, 492 (2022) (quotation marks omitted). The Court observed that "[w]hile [the] cases describe two steps, those steps often resolve to a single question: whether there is any reason to think that Congress might be better equipped to create a damages remedy." *Ibid.* The Court continued:

> For example, we have explained that a new context arises when there are potential special factors that previous *Bivens* cases did not consider. And we have identified several examples of new contexts—*e.g.*, a case that involves a new category of defendants—largely because they represent situations in which a court is not undoubtedly better positioned than Congress to create a damages action.

Ibid. (citations and quotation marks omitted).

2. Since *Egbert*, the courts of appeals have continued to apply the two-step framework to determine whether a plaintiff has stated a *Bivens* claim. *See infra* pp. 16–20. Only the Tenth Circuit has departed from that otherwise uniform view, creating the circuit split at issue here.

In *Silva* v. *United States*, 45 F.4th 1134 (10th Cir. 2022), the Tenth Circuit asserted that this Court in *Egbert* "appeared to alter the existing two-step *Bivens* framework." *Id.* at 1139. Rather than the two-step framework prescribed by this Court, the Tenth Circuit held that "courts may dispose of *Bivens* claims for two

independent reasons: Congress is better positioned to create remedies in the context considered by the court, and the Government already has provided alternative remedies that protect plaintiffs." *Id.* at 1141 (alteration and quotation marks omitted). On the facts before it, the court skipped the first step of the *Bivens* analysis—whether the claim presented a new context—and instead considered only "the alternative remedial schemes available to Plaintiff." *Ibid.* On that basis, the Tenth Circuit upheld dismissal of the plaintiff's *Bivens* claim alleging use of excessive force in a federal prison, holding that the Federal Bureau of Prisons' Administrative Remedy Program ("ARP") is an alternative remedial structure and an "independently sufficient ground to foreclose Plaintiff's *Bivens* claim." *Ibid.*[2]

3. Petitioner's claim does not arise in a new *Bivens* context. Like the plaintiff in *Carlson*, petitioner is asserting a violation of his Eighth Amendment rights arising out of federal prison officials' deliberate indifference to a serious medical need. *Compare* Pet. App 53a, *with Carlson*, 446 U.S. at 16–17 & n.1. In particular, petitioner alleges that he suffered chronic and substantial pain in three teeth for eighteen months. Pet. App. 52a. The prison dentist confirmed that petitioner needed crowns for all three teeth, but did not provide that treatment and instead used an inferior treatment for one tooth and ignored the others. Pet. App. 52a. Eventually, one of petitioner's teeth broke and had to be extracted, while the other two were not treated for several months. Pet. App. 52a.

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[2] Although *Silva* suggested in dicta that the plaintiff's claim there might implicate a new context under the two-step framework, 45 F.4th at 1137, there is no such dicta in this case.

Nonetheless, the magistrate judge, relying on *Silva*, recommended dismissal of petitioner's claim on the ground that "factual similarity to previous cases no longer appears sufficient to permit a *Bivens* claim to proceed." Pet. App. 18a–19a (citing *Silva*, 45 F.4th at 1140). The district court adopted the magistrate judge's recommendation. Pet. App. 36a.

The Tenth Circuit affirmed without considering whether petitioner's claim arises in a new context. Pet. App. 56a; *see also* note 2, *supra*. Instead, over petitioner's objection that this Court has not overturned its prior *Bivens* cases and that the two-step framework still applies, the Tenth Circuit held that "*Egbert* and *Silva* direct that where the government has provided an alternative remedy, a court generally should not recognize a *Bivens* claim *even if the factual context is not meaningfully different* from that in *Bivens*, *Davis*, or *Carlson*." Pet. App. 57a (emphasis added). The panel therefore reasoned that because the ARP is an alternative remedy, that alone was sufficient to foreclose petitioner's claim, even if it arose in a context identical to that of *Carlson*. Pet. App. 57a.

The panel acknowledged that other courts continue to apply the two-step framework and recognize *Bivens* claims where the claims do not arise in a new context. Pet. App. 57a. The panel held, however, that it was "bound by *Silva*'s interpretation of *Egbert*." Pet. App. 57a–58a.

REASONS FOR GRANTING THE PETITION

The Tenth Circuit held below that "where the government has provided an alternative remedy, a court generally should not recognize a *Bivens* claim *even if the factual context is not meaningfully different* from that in *Bivens*, *Davis*, or *Carlson*." Pet. App. 57a (emphasis

added). This Court should grant certiorari to review that ruling for three reasons.

First, the Tenth Circuit's approach to *Bivens* claims, as announced in *Silva* and applied in the decision below, conflicts with this Court's precedent. Despite repeated entreaties by other litigants, this Court has consistently declined to overrule *Bivens* or its progeny. Yet the Tenth Circuit has effectively done just that, jettisoning the two-part framework this Court has endorsed for years. Whether those cases have in fact been impliedly overruled is an important issue this Court should decide.

Second, the decision below reinforces and exacerbates a split regarding the framework for and continuing viability of *Bivens*. The overwhelming majority of courts continue to apply the two-step framework outlined in *Ziglar* and *Hernandez*, and three courts of appeals have allowed *Bivens* claims to go forward under that framework since *Egbert*. The Tenth Circuit stands alone, skipping the first step and declaring *Bivens* a dead letter.

Third, this case is a model vehicle for resolution of this important question. The appropriate analysis under *Bivens* is an issue this Court has frequently taken up, but about which the lower courts remain divided. The panel rejected petitioner's run-of-the-mill deliberate indifference claim based solely on the existence of an alternative remedial scheme, and expressly did not reach the question whether his claim arises in the same context as *Carlson*. This accordingly is an ideal vehicle to determine whether that inquiry is required.

I. The Decision Below Conflicts with This Court's *Bivens* Precedent

A "direct conflict" between the decision on review and a decision of this Court "is one of the strongest possible grounds for securing the issuance of a writ of certiorari." Stephen Shapiro et al., *Supreme Court Practice* § 4.5 (11th ed. 2019). That is the case here, where the decision below, applying *Silva*, conflicts directly with this Court's precedent establishing a two-step framework for determining whether a *Bivens* claim may proceed.

A. The Decision Below Rejects the Two-Step *Bivens* Framework

1. The two-step framework for *Bivens* claims is well settled by this Court's precedents. The Court clearly articulated this test in *Ziglar*, where it explained that a court must first assess whether a "case is different in a meaningful way from previous *Bivens* cases decided by this Court," 582 U.S. at 139, and then, if so, consider whether "there are special factors counselling hesitation in the absence of affirmative action by Congress," *id.* at 136 (quotation marks omitted). In doing so, the Court offered a number of factors that courts may consider when determining whether a case arises in a new context. *See id.* at 139–40. The Court reaffirmed that test in *Hernandez*, 140 S. Ct. at 743, and again in *Egbert*, 596 U.S. at 492.

In *Egbert*, this Court considered whether *Bivens* provided a private right of action for a plaintiff asserting a Fourth Amendment excessive force claim and a First Amendment retaliation claim against a U.S. Border Patrol agent arising out of an encounter on property abutting the Canadian border. 596 U.S. at 486–90. The court of appeals conceded that both claims arose in a new context, but concluded that there were no special

factors counselling hesitation before extending *Bivens*. *See id.* at 494–95. This Court reversed.

Egbert held that where a claim arises in a new context other than that at issue in *Bivens* or its progeny, a court at step two "faces only one question: whether there is *any* rational reason (even one) to think that *Congress* is better suited to 'weigh the costs and benefits of allowing a damages action to proceed.'" 596 U.S. at 496 (quoting *Ziglar*, 582 U.S. at 136). And in the case before it, the Court observed there were two special factors counselling hesitation: The claims implicated border patrol and national security, and alternative remedies were available to the plaintiff. *Id.* at 494. All of this analysis, however, was predicated on the court of appeals' concession that the claims arose in a new context. *Id.* at 494–95. *Egbert* thus reaffirmed that a proposed *Bivens* claim should be analyzed under the two-step inquiry, holding that once the court of appeals acknowledged the claims at issue arose in a new context, it should not have extended *Bivens* based on the step two considerations. *Id.* at 492–94.

2. In *Silva*, the Tenth Circuit abandoned the two-step inquiry long mandated by this Court, concluding that *Egbert* "appeared to alter the existing two-step *Bivens* framework." 45 F.4th at 1139. Under the Tenth Circuit's new construction, "courts may dispose of *Bivens* claims for 'two *independent* reasons'"—namely, the two special factors analyzed in *Egbert* at step two. *Id.* at 1141. Applying its new one-step framework to the facts, the court in *Silva* analyzed only whether there were "alternative remedial schemes available" to the plaintiff, and not whether the plaintiff's claim arose in a new context. *Ibid.* In the court's view, it did not "need [to] inquire any further." *Ibid.* The panel here applied

Silva to reach the same conclusion, holding that "where the government has provided an alternative remedy, a court generally should not recognize a *Bivens* claim even if the factual context is not meaningfully different from that in *Bivens*, *Davis*, or *Carlson*." Pet. App. 57a. That approach is flatly inconsistent with this Court's repeated endorsement of the two-step framework.

The Tenth Circuit's reading of *Egbert* overlooks that this Court offered up "two *independent* reasons" for dismissing *Bivens* claims only after noting that "[t]he Court of Appeals conceded that [the plaintiff's] Fourth Amendment claim presented a new context for *Bivens* purposes." 596 U.S. at 494. The Court thus did not suggest that similarity to prior *Bivens* cases was no longer a step in the analysis—it simply had no need to undertake that step in the facts before it.

The Tenth Circuit nonetheless attempted to justify its departure from precedent by pointing to this Court's observation in *Egbert* that the two steps "often resolve to a single question: whether there is any reason to think that Congress might be better equipped to create a damages remedy." *Egbert*, 596 U.S. at 492; *see Silva*, 45 F.4th at 1139. But this Court clarified that "a new context arises when there are potential special factors that previous *Bivens* cases did not consider" and pointed to prior cases arising in new contexts, "largely because they represent[ed] situations in which a court is not undoubtedly better positioned than Congress to create a damages action," and thus "counse[l] hesitation." *Egbert*, 596 U.S. at 492–93 (quotation marks omitted). In other words, a fact that gives rise to a new context often times is also the kind of fact that counsels hesitation before extending *Bivens*. Again, the Court did not hold that the first step no longer exists.

Consistent with this understanding, the Court in *Egbert* went on to explain that under the second step, "a court may not *fashion* a *Bivens* remedy" if there is already "an alternative remedial structure," and that such an alternative remedy "is reason enough to limit the power of the Judiciary to infer a *new Bivens* cause of action." *Egbert*, 596 U.S. at 493 (emphases added) (quotation marks omitted). The key words are "fashion" and "new," both of which refer to the creation of a *Bivens* remedy and not merely the recognition of a *Bivens* right of action already created in *Bivens*, *Davis*, or *Carlson*. *Egbert* did not overrule *Bivens* or the two-step framework—it simply explained how that framework functionally applies. The Tenth Circuit's misunderstanding of *Egbert* provides ample ground for review.

B. The Decision Below Improperly Treats this Court's Precedent as Impliedly Overruled

The Tenth Circuit's reimagining of this Court's precedent is not just untenable, but also inappropriate: It is not the prerogative of a court of appeals to hold this Court's precedent overruled absent an express statement by this Court. The decision below (like *Silva* before it) is in direct conflict with both *Bivens* and *Carlson*.

1. This Court has repeatedly reminded lower courts that even if a precedent of the Court "appears to rest on reasons rejected in some other line of decisions," a court of appeals "should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions." *Agostini* v. *Felton*, 521 U.S. 203, 237 (1997) (quoting *Rodriguez de Quijas* v. *Shearson/Am. Express, Inc.*, 490 U.S. 477, 484 (1989)); *see also Bosse* v. *Oklahoma*, 580 U.S. 1, 3 (2016) ("[I]t is this Court's prerogative alone to overrule one of its precedents." (quot-

ing *State Oil Co.* v. *Khan*, 522 U.S. 3, 20 (1997)). Accordingly, decisions of this Court "remain binding precedent until [it] see[s] fit to reconsider them, regardless of whether subsequent cases have raised doubts about their continuing vitality." *Hohn* v. *United States*, 524 U.S. 236, 252–53 (1998).

Despite multiple opportunities, this Court has declined to overrule *Bivens* or its progeny. *See, e.g.*, *Minneci* v. *Pollard*, 565 U.S. 118, 126 (2012); *Corr. Servs. Corp.* v. *Malesko*, 534 U.S. 61, 67–68 (2001). Just the opposite: In *Ziglar*, the Court cautioned that its opinion was "not intended to cast doubt on the continued force, or even the necessity, of *Bivens*." 582 U.S. at 134. And in *Egbert*, the Court again expressly refused to overrule *Bivens* itself, stating that the Court "need not reconsider *Bivens* itself" to resolve the case before it. 596 U.S. at 502; *see also id.* at 491 (noting that the Court had declined to "dispense with *Bivens* altogether").

The Tenth Circuit, however, has taken it upon itself to declare *Bivens*, *Davis*, and *Carlson* overruled, holding that even where those cases "directly control[]," *Agostini*, 521 U.S. at 237, there is no *Bivens* claim if a court can conceive of any reason why Congress might be better equipped to fashion a remedy, *see Silva*, 45 F.4th at 1141. And as this Court has observed, "in most every case," the answer to that question will be "yes." *Egbert*, 596 U.S. at 492. The rule in the Tenth Circuit is thus that directly applicable precedent from this Court in *Bivens* and its progeny no longer controls.

The Tenth Circuit's new approach is not an exercise in "distinguishing" prior precedent. The basis for the court's decision here was that inmates at federal prisons have access to an alternative remedy through the ARP. Pet. App. 57a. But the ARP has been in effect for several

decades, since before *Carlson*. *See* Bureau of Prisons, *Control, Custody, Care, Treatment, and Instruction of Inmates*, 44 Fed. Reg. 62,248 (Oct. 29, 1979). Thus, the precise ground on which the Tenth Circuit dismissed petitioner's claim here could also have been invoked in *Carlson*. The Tenth Circuit's decision here and in *Silva* therefore represent a clear and unambiguous refusal to adhere to this Court's precedent, necessitating review and correction.

2. To the extent the Tenth Circuit's approach may lead this Court to revisit *Bivens* or its progeny, *stare decisis* should control. This Court has recently described *Bivens* as "settled law." *Ziglar*, 582 U.S. at 134. And it has recognized the "undoubted reliance" upon *Bivens* in its traditional spheres, emphasizing that its past decisions were "not intended to cast doubt on the continued force, or even the necessity, of *Bivens*." *Ibid.* *Bivens* vindicates "the Constitution by allowing some redress for injuries, and it provides instruction and guidance to federal law enforcement officers." *Ibid.*

In fact, the Court has continued to emphasize the importance of *Bivens*. It has noted *Bivens*' role in "deterring individual officers from engaging in unconstitutional wrongdoing," *Malesko*, 534 U.S. at 74, and in providing an "alternative remedy against individual officers," *Minneci*, 565 U.S. at 127. For those contexts where *Bivens* applies, it "provides instruction and guidance to federal law enforcement officers" regarding how to execute their duties consistently with the Constitution. *Ziglar*, 582 U.S. at 134.

Nor is the current state of *Bivens* unworkable, *see* *Kimble* v. *Marvel Ent., LLC*, 576 U.S. 446, 459 (2015) (declining to overrule precedent because nothing about it "has proved unworkable")—at least for those courts

that follow this Court's instructions. This Court has given specific direction about the factors that might "present[] a new *Bivens* context" at step one. *Ziglar*, 582 U.S. at 139–40 (instructing courts to look at factors like "the constitutional right at issue" and "the generality or specificity of the official action"). And, at step two, courts have followed this Court's lead to hesitate before expanding *Bivens* into a new context. *Egbert*, 596 U.S. at 491. The message is clear: *Bivens* and its progeny are still good law, but should rarely be expanded. In most circuits, that is a workable standard and it should not be discarded.

Beyond *stare decisis*, there is good reason to retain *Bivens* in those circumstances where it has already been recognized. When Congress amended the Federal Tort Claims Act ("FTCA") in 1974, it made the FTCA the exclusive remedy against the United States and its employees for civil torts. *See* 28 U.S.C. § 2679(b)(1). Yet expressly carved out from the statute are civil actions "against an employee of the Government . . . which is brought for a violation of the Constitution of the United States." *Id.* § 2679(b)(2)(A). In *Carlson*, this Court read this carveout as making it "crystal clear" that Congress intended the amended FTCA to be a "a *counterpart* to the *Bivens* case." 446 U.S. at 19–20 (quoting the Senate report); *see also* James E. Pfander & David Baltmanis, *Rethinking* Bivens: *Legitimacy and Constitutional Adjudication*, 98 Geo. L.J. 117, 131 (2009) (by not making FTCA an exclusive remedy, "Congress deliberately retained the right of individuals to sue government officers for constitutional torts").

Congress's passage of the Prison Litigation Reform Act ("PLRA") in 1996 suggests a similar intent. *See* Omnibus Consolidated Rescissions and Appropriations Act

of 1996, Pub. L. No. 104-134, §§ 801–810, 110 Stat. 1321, 1321-66–1321-77. The PLRA's ostensible purpose was to "reduce the quantity of prisoner suits." *Woodford* v. *Ngo*, 548 U.S. 81, 84 (2006) (alteration and quotation marks omitted). But while eliminating existing *Bivens* claims surely would have accomplished that goal, Congress imposed no substantive limitations on suits by federal inmates, instead imposing only procedural exhaustion requirements. *See id.* at 84–85. To date, "no congressional enactment has disapproved of" *Bivens*. *Ziglar*, 582 U.S. at 134.

Whatever congressional silence may suggest about further extensions of *Bivens*, Congress has treated existing *Bivens* claims as a given, leaving them undisturbed for decades. Particularly in light of the common law tradition of allowing constitutional tort claims against federal officers, *see* Carlos M. Vázquez & Stephen I. Vladeck, *State Law, The Westfall Fact, and the Nature of the* Bivens *Question*, 161 U. Pa. L. Rev. 509, 531–42 (2013), there is no sound reason to erase *Bivens* and its progeny from precedent.

II. The Decision Below Conflicts With the Uniform Decisions of the Other Courts of Appeals

In effectively foreclosing all *Bivens* claims under its new one-step framework, the Tenth Circuit has broken from the nine other courts of appeals that have assessed and applied the *Bivens* framework since *Egbert*. Contrary to the Tenth Circuit's claim that *Egbert* "appeared to alter the existing two-step *Bivens* framework," *Silva*, 45 F.4th at 1139, those nine other courts of appeals have repeatedly confirmed that the two-step framework still applies, and that the first—and sometimes dispositive—step in a *Bivens* analysis is to assess whether the claim at issue arises in a context "meaningfully different" from

that at issue in *Bivens*, *Carlson*, or *Davis*. The Tenth Circuit has thus created a "square and irreconcilable" 9-1 circuit split, which is strong grounds for review in this Court. Shapiro, *supra*, § 4.4.

A. The Fourth, Seventh, and Ninth Circuits Continue to Allow *Bivens* Claims at Step One

Since *Egbert*, three courts of appeals have allowed a *Bivens* claim to proceed under step one of the *Bivens* framework. The Tenth Circuit's approach directly conflicts with decisions rendered by each of those other circuits. The claim in this case would have been allowed to proceed elsewhere.

1. The Ninth Circuit has "continu[ed] to 'apply a two-step framework'" in every *Bivens* case post-*Egbert*. *Stanard* v. *Dy*, 88 F.4th 811, 816 (9th Cir. 2023); *see also Pettibone* v. *Russell*, 59 F.4th 449, 454–55 (9th Cir. 2023); *Mejia* v. *Miller*, 61 F.4th 663, 667 (9th Cir. 2023); *Harper* v. *Nedd*, 71 F.4th 1181, 1185 (9th Cir. 2023); *Chambers* v. *Herrera*, 78 F.4th 1100, 1104 (9th Cir. 2023); *Marquez* v. *Rodriguez*, 81 F.4th 1027, 1030 (9th Cir. 2023). Although the Ninth Circuit has recognized that "future extensions of *Bivens* are dead on arrival," *Harper*, 71 F.4th at 1187, it also has made clear that the first step in any *Bivens* case is to determine whether a claim arises in a new context. "If the answer to th[at] question is no, then no further analysis is required." *Stanard*, 88 F.4th at 816 (quotation marks omitted).

In *Stanard*, the Ninth Circuit upheld a *Bivens* claim at the first step, and therefore did "not proceed to the special factors inquiry" at step two. 88 F.4th at 818. Like petitioner, the plaintiff's claim in *Stanard* arose from the chronic failure of officials at a federal prison facility to provide constitutionally adequate treatment

of a serious medical condition. *Id.* at 813–14. The district court had dismissed the plaintiff's Eighth Amendment claim, asserting that it "arose in a new *Bivens* context and that special factors counseled against extension of a *Bivens* remedy." *Id.* at 815.

The Ninth Circuit reversed. The court first observed that "post-*Egbert*," the Ninth Circuit "continue[s] to 'apply a two-step framework, asking first whether the claim arises in a new context." *Stanard*, 88 F.4th at 816. The Ninth Circuit held that the plaintiff's claim did not arise in a new context from *Carlson*, and therefore could proceed under *Bivens*. *Id.* at 817–18. The court rejected the defendants' argument that a "difference in degree" is sufficient to create a new *Bivens* context, and concluded that "[a]long every dimension the Supreme Court has identified as relevant to the inquiry, Stanard's case is a replay of *Carlson*." *Id.* at 817 (quotation marks omitted). The Ninth Circuit did not proceed to consider whether any "special factors" counselled against extension of *Bivens*, because there was no extension suggested.

2. The Seventh Circuit has held the same. In *Snowden* v. *Henning*, the court traced the history of *Bivens* and concluded that although the "path" for a "*Bivens* claim to proceed" is a "narrow" one, the Supreme Court "has stopped short of overruling the *Bivens* trilogy." 72 F.4th 237, 241–42, 245 (7th Cir. 2023), *petition for cert. pending*, No. 23-976 (filed Mar. 4, 2024). "Instead," the court explained, the Supreme Court "has fashioned a two-step framework" for determining whether a *Bivens* remedy is available, *id.* at 242, and where a case is not "meaningfully different" from *Bivens, Davis*, or *Carlson*, a court "cannot decline to apply 'the settled law'" of the Supreme Court, *id.* at 247 (quoting *Ziglar*, 582 U.S. at

134, 139–40). The Seventh Circuit interpreted the Supreme Court's "evolving *Bivens* guidance to suggest that a difference is 'meaningful' if it might alter the policy balance that initially justified the causes of action recognized in *Bivens*, *Davis*, and *Carlson*." *Id.* at 244.

Using that framework, the Seventh Circuit concluded that a *Bivens* remedy was available to the plaintiff at the "threshold" first step. *Snowden*, 72 F.4th at 243. The plaintiff's claim for excessive use of force in violation of the Fourth Amendment, the Seventh Circuit explained, fell squarely within the factual circumstances of *Bivens*, where the plaintiff likewise sued for the use of unreasonable force in an arrest. *See id.* at 245–46.

3. The Fourth Circuit likewise continues to apply the two-step framework for *Bivens* claims. *See Hicks* v. *Ferreyra*, 64 F.4th 156, 165–66 (4th Cir. 2023), *cert. denied*, 144 S. Ct. 555 (2024); *see also Mays* v. *Smith*, 70 F.4th 198, 202 (4th Cir. 2023), *cert. denied*, 2024 WL 759815 (U.S. Feb. 26, 2024); *Bulger* v. *Hurwitz*, 62 F.4th 127, 136–37 (4th Cir. 2023); *Tate* v. *Harmon*, 54 F.4th 839, 844 (4th Cir. 2022). In *Hicks*, the Fourth Circuit applied that framework to "resolve[] [a *Bivens* claim] at the first step." 64 F.4th at 166. There, a now-retired secret service agent brought a *Bivens* action against two U.S. Park Police officers, alleging they violated his rights under the Fourth Amendment by unlawfully seizing him during two traffic stops. Relying on this Court's "clear explanation in [*Ziglar*] that [the] severe narrowing of the *Bivens* remedy in other contexts does not undermine the vitality of *Bivens* in the warrantless-search-and-seizure context of routine criminal law enforcement," the Fourth Circuit held there was no meaningful difference between the claims at issue in that case and *Bivens*, and

a remedy was thus available at step one. *Ibid.*

B. Six Other Circuits Continue to Apply the Two-Step Framework

Even those circuits that have not yet allowed a *Bivens* claim to go forward post-*Egbert* recognize that the two-step framework still applies. These cases are squarely at odds with the Tenth Circuit's approach.

In *Quinones-Pimentel* v. *Cannon*, the First Circuit stressed that this Court "has never overruled *Bivens*" and has instead "clarified how courts should assess such claims[,]" starting by "ask[ing] whether the case presents a new *Bivens* context." 85 F.4th 63, 69 (1st Cir. 2023). "If the case presents no meaningful differences (and thus no new context), the analysis ends there and relief under *Bivens* is available." *Id.* at 70 (citing *Hicks*, 64 F.4th at 166). The Second, Third, Fifth, and D.C. Circuits are all in accord with that approach. *See Trump* v. *Cohen*, 2024 WL 20558, at *2 (2d Cir. Jan. 2, 2024) ("Before a court may extend *Bivens*, it must engage in a two-step inquiry." (quotation marks omitted)); *Xi* v. *Haugen*, 68 F.4th 824, 834 (3d Cir. 2023) ("Guided by *Egbert*, we [] consider whether [a] claim[] present[s] a 'new context,' and if so, whether special factors counsel against allowing a *Bivens* remedy."); *Dougherty* v. *U.S. Dep't of Homeland Sec.*, 2023 WL 6123106, at *5 (5th Cir. Sept. 19, 2023) ("The Supreme Court has set forth a two-step inquiry to determine whether a cognizable *Bivens* remedy exists."); *Buchanan* v. *Barr*, 71 F.4th 1003, 1007 (D.C. Cir. 2023) ("[C]ourts must ask if the claim arises in a 'new context' from the three previous *Bivens* claims recognized by the Supreme Court," and "[i]f the context is not new, the claim can go forward.").

The Sixth Circuit has gone further, invoking the two-step inquiry in remanding a plaintiff's *Bivens*

claims to the district court for consideration in the first instance, because *Egbert* did "not appear to explicitly foreclose" the plaintiff's claims. *Enriquez-Perdomo* v. *Newman*, 54 F.4th 855, 869 (6th Cir. 2022). Such remand would have been impossible if, as the Tenth Circuit has held, factual similarity to a prior *Bivens* case is irrelevant.

* * *

Every other circuit to address the issue since *Egbert* has confirmed that the two-step framework still applies. Three of those circuits have used that framework to allow *Bivens* claims to go forward. The Tenth Circuit's rejection of the two-step framework is in direct conflict with those cases. Certiorari is warranted to resolve this 9-1 circuit split on an important question of law.

III. This Case Is an Ideal Vehicle to Address an Important Issue Regarding the Vitality of *Bivens*

This case presents a prime opportunity for this Court to clarify the continuing force of *Bivens* and its progeny in cases arising under comparable factual circumstances.

A. The Tenth Circuit's Rule Has Serious and Far-Reaching Consequences

The Tenth Circuit no longer applies *Carlson* (or *Bivens* or *Davis*) in cases that arise under indistinguishable factual scenarios. That is reason on its own to grant certiorari: A court of appeals' effort to treat this Court's precedent as implicitly overruled is virtually always grounds for certiorari. *See* Shapiro, *supra*, § 4.5 (citing *Rodriguez de Quijas*, 490 U.S. 477).

Even were that not sufficient (it is), the vitality and scope of *Bivens* is an important and recurring issue. This Court has had occasion to revisit the topic three times in just the past few years. *See Ziglar*, 582 U.S. at

130; *Hernandez*, 140 S. Ct. at 739; *Egbert*, 596 U.S. at 486. Even as this Court has provided guidance on the circumstances in which a *Bivens* claim does *not* lie, the lower courts remain in disagreement about the circumstances in which a claim *does* lie under existing precedent—as evidenced by the deep split here. The Court has asserted "it is obvious that the liability of federal officials for violations of citizens' constitutional rights should be governed by uniform rules." *Carlson*, 446 U.S. at 23. However the issue ultimately is resolved, this case provides the Court an opportunity to provide that uniformity in the context of a case arising squarely under *Carlson*.

Moreover, depriving federal inmates of Eighth Amendment *Bivens* claims carries serious consequences. The Eighth Amendment enshrines the rule that all persons should be free from "cruel and unusual punishments." U.S. Const. amend. VIII. This principle is especially important in the context of federal penitentiaries, where prisoners are at the mercy of federal officials for all of their basic needs. Accordingly, this Court has long held that "deliberate indifference to serious medical needs of prisoners" is exactly the kind of "unnecessary and wanton infliction of pain" that constitutes cruel and unusual punishment. *Estelle* v. *Gamble*, 429 U.S. 97, 104 (1976).

This case exemplifies that reality. There is no question here that petitioner's claims implicate a serious medical condition—multiple broken teeth left untreated for months—sufficient to raise Eighth Amendment concerns. *See* Anne S. Douds et al., *Why Prison Dental Care Matters: Legal, Policy, and Practical Concerns*, 29 Annals of Health L. & Life Scis. 101, 101 (2020). Nor is there any serious question that petitioner was deprived

of needed care—one of respondents *admitted* to petitioner that he needed additional treatment. *See* Pet. App. 52a. This is the precise circumstance for which *Carlson* was intended, yet the Tenth Circuit has foreclosed all relief against the individuals responsible for these constitutional violations.

Just over a month ago, the Tenth Circuit doubled down on the decision below, holding that the court's *Bivens* analysis "should focus on [a] single question," namely, "whether there is any reason to think that Congress might be better equipped to create a damages remedy." *Logsdon* v. *U.S. Marshal Serv.*, 91 F.4th 1352, 1357 (10th Cir. 2024) (quotation marks omitted). The court affirmed dismissal of the plaintiff's *Bivens* claim on the "independent ground" that there were alternative remedies available. *Id.* at 1359.

Lower courts in the Tenth Circuit have followed suit, invoking *Silva* to bar *Bivens* relief for plaintiffs whose claims are not materially different from those recognized in *Bivens* and its progeny. *See, e.g.*, *Branscomb* v. *Troll*, 2024 WL 68371, at *2–3 (D. Kan. Jan. 5, 2024); *Locke* v. *Root*, 2023 WL 2914184, at *3–4 (D. Kan. Apr. 12, 2023); *Brewer* v. *Doe*, 2023 WL 2770096, at *4 (W.D. Okla. Feb. 8, 2023), *adopted by* 2023 WL 2761136 (W.D. Okla. Apr. 3, 2023). The Tenth Circuit encompasses 11 federal penitentiaries housing approximately 7,738 inmates, *Statistics*, Bureau of Prisons, https://www.bop.gov/mobile/about/population_statistics.jsp (as of March 17, 2024), all of whom have lost access to the relief afforded by this Court under *Carlson*. And as *Silva* is applied to claims under *Bivens* and *Davis*, that decision will affect *all* people in the Tenth Circuit, not just those in federal penitentiaries.

This case involves a direct conflict with this Court's precedent on an issue that affects millions of individuals nationwide. Certiorari is warranted.

B. This Case Provides an Ideal Vehicle to Resolve Disagreement Over the *Bivens* Framework

Finally, this case is an ideal vehicle to resolve the important issues presented here.

The sole basis for the Tenth Circuit's decision was its conclusion that there is no *Bivens* remedy for federal inmates regardless of the context in which their claims arise. Pet. App. 57a. This issue—including the continuing viability of the two-step framework—was preserved and litigated at all stages. Pet. App. 42a, 55a–56a. In its decision, the Tenth Circuit did not analyze, even in dicta, whether petitioner's claim does in fact arise in a new context (it does not), even as it recognized that other courts continue to engage in the two-step inquiry. Pet. App. 57a–58a. There are no collateral issues or procedural defects that would prevent this court from reaching the merits.

Additionally, this case presents a prototypical *Carlson* claim. Unlike other *Bivens* cases this Court has taken up, there are no meaningfully distinguishing facts to distract from the legal questions regarding the framework for *Bivens*. Under the factors for evaluating whether a case involves a "new context," *Ziglar*, 582 U.S. at 139–40, this case involves the same kinds of officials as *Carlson*, the same constitutional right, the same specificity of official action, the same (or greater) level of judicial guidance on the substantive issue, the same statutory mandate for the challenged conduct, and the same (low) risk of disruptive intrusion by the judiciary. This case does not have any national security implications, *see Egbert*, 596 U.S. at 494, and it does not

involve extension of *Bivens* to a new class of defendant, *see Malesko*, 534 U.S. at 63. The case is therefore free of collateral questions and instead resolves (at this stage) to one issue: Whether a cause of action exists under *Bivens* when the claim arises in a context not meaningfully different from *Carlson*.

* * *

The Tenth Circuit holds that a *Bivens* claim may not proceed even if it arises in circumstances not "meaningfully different" from those in *Bivens* and its progeny. It has therefore rejected the two-step framework this Court has long mandated for *Bivens* claims. In doing so, the Tenth Circuit has broken from every other court of appeals to address this important issue. This Court's review is clearly warranted.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

MARCH 2024

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APPENDIX

APPENDIX TABLE OF CONTENTS

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 21-cv-01589-CNS-STV

PETER GEORGE NOE

Plaintiff,

v.

UNITED STATES, DR. BURKLEY, H. SCHOUWEILER, MS. DUNN, MS. FELLOWS, and FEDERAL BUREAU OF PRISONS

Defendants.

RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

Magistrate Judge Scott T. Varholak

This Matter comes before the Court on three Motions: a Partial Motion to Dismiss filed by all Defendants [#114], a Partial Motion to Dismiss filed by Defendant United States [#144], (together, the "Motions to Dismiss"), and a "motion for emergency order" filed by Plaintiff (the "Emergency Motion") [#160]. These Motions have been referred to this Court. [##115; 146; 161] This Court has carefully considered the Motions and related briefing, the entire case file and the applicable case law, and has determined that oral argument would not materially assist in the disposition of the Motions. For the following reasons, the Court respectfully RECOMMENDS that the Motions to Dismiss

be GRANTED, and that Plaintiff's Complaint be DISMISSED. The Court further RECOMMENDS that the Emergency Motion be DENIED.

I. BACKGROUND[1]

Plaintiff, who proceeds pro se, is a convicted and sentenced federal prisoner, housed at USP Florence ADMAX ("ADX"). [#94 at 3] In November 2019, Plaintiff broke a tooth and had an appointment with ADX dentist Dr. Burkley. [*Id.* at 6] At that appointment, Plaintiff told Dr. Burkley that he had problems with five total teeth (the "Affected Teeth"). [*Id.*] Dr. Burkley examined all of the Affected Teeth. [*Id.* at 6-7] Dr. Burkley explained that two of the Affected Teeth ("Teeth #1 and #2") were "all filling from previous dental work," but were not medically appropriate for extraction and that Plaintiff "need[ed] crowns on those two teeth." [*Id.*] Dr. Burkley further explained that another one of Plaintiff's teeth ("Tooth #3") was "broken in half," but was not considered medically appropriate for extraction and "needed a crown." [*Id.* at 7] Dr. Burkley informed Plaintiff that he would "lose all three of the teeth that need[ed] crowns" because ADX told facility dentists that they were "not allowed to request crowns due to them costing to[o] much money." [*Id.* at 8] Finally, Dr. Burkley said that the remaining two Affected Teeth ("Teeth #4 and #5")

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[1] The facts are drawn from the allegations in Plaintiff's Second Amended Complaint (the "Complaint"), and Plaintiff's attached Affidavit, which the Complaint incorporates by reference. [#94]; *see Gee v. Pacheco*, 627 F.3d 1178, 1186 (10th Cir. 2010) (explaining that a court may consider documents attached to a complaint and incorporated by reference). The Court accepts these allegations as true at this stage of the proceedings. *See Wilson v. Montano*, 715 F.3d 847, 850 n.1 (10th Cir. 2013) (citing *Brown v. Montoya*, 662 F.3d 1152, 1162 (10th Cir. 2011)).

could be fixed with fillings. [*Id.* at 7] During that appointment, Dr. Burkley attempted to "fix" Tooth #3 by putting a filling in and explained that—because of an ADX policy permitting only "one procedure, per inmate, per visit"—Plaintiff would have to return on other occasions to fix the remaining teeth. [*Id.* at 7-9]

The filling in Tooth #3 did not improve Plaintiff's pain, so Plaintiff sought additional care and was called back to Dental. [*Id.* at 9] Dr. Burkley again explained that Tooth #3 "needed a crown" but since he could not provide a crown he "would have to 'figure something out.'" [*Id.*] Dr. Burkley filled Tooth #3 again and placed Plaintiff back on the waiting list, refusing to address the other Affected Teeth. [*Id.*] Plaintiff sent numerous requests for further dental care, but "[f]or the next six months [Plaintiff] was left suffering." [*Id.* at 9-10]

On June 3, 2020, Dr. Burkley visited Plaintiff's cell. [*Id.* at 10] Dr. Burkley told Plaintiff that he knew of Plaintiff's "broken teeth but couldn't fix them due to [COVID-19]." [*Id.*] On June 17th, however, Plaintiff returned to Dental. [*Id.* at 10] Plaintiff asked Dr. Burkley to treat his three broken teeth (i.e., Teeth #3, #4, and #5) because they were all causing substantial pain. [*Id.* at 11] Dr. Burkley refused, instead only treating Tooth #3. [*Id.*] Dr. Burkley proceeded to "drill out and put a pin [and filling]" in Tooth #3. [*Id.* at 11, 26] This procedure "caused unbearable pain, [and] broke [Tooth #3]," which had "rotted over the seven month delay." [*Id.* at 11, 26] Plaintiff returned to Dental on July 31st, and Tooth #3 was removed. [*Id.* at 26] During that visit, Plaintiff again asked for Teeth #4 and #5 to be treated due to the pain, but treatment on those teeth was refused. [*Id.*] On August 27th, Plaintiff was called to Dental for an x-ray on Teeth #4 and #5. [*Id.* at 26] Plaintiff was told that one tooth had

a "crack" and one was "broken," but was refused treatment on the teeth.[2] [*Id.*]

Plaintiff filed several more requests to be seen by Dental. [*Id.* at 12] These requests either went unanswered, or Plaintiff was informed by Defendant Schouweiler—a dental assistant at ADX "responsible for scheduling appointments"—that Plaintiff was "on the list." [*Id.*] Several times between June 2020 and November 2020, Plaintiff also stopped Defendants Dunn and Fellows, both nurses at ADX, and requested dental care. [*Id.* at 12-13] Defendants Dunn and Fellows promised to "make sure [Plaintiff's requests] were logged," but failed to put Plaintiff's requests in his file "with the exception of one from [Ms.] Fellows." [*Id.* at 13]

On November 12, 2020, Plaintiff returned to Dental, and Dr. Burkley placed a filling in Tooth #4. [*Id.*] Dr. Burkley again refused treatment on Plaintiff's other broken tooth and refused to place crowns on Teeth #1 and #2. [*Id.*] Dr. Burkley also denied Plaintiff pain medication. [*Id.*]

Plaintiff continued to send dental requests. [*Id.* at 14] In one request, Plaintiff "explain[ed] he was tired of suffering and that if they didn't treat him he would file again." [*Id.*] Defendant Schouweiler responded that Plaintiff "could 'file' all he wants and that he was not to 'threaten her.'" [*Id.*] Plaintiff filed a grievance, and "in retaliation" Dr. Burkley and Ms. Schouweiler reported to the warden that Plaintiff's teeth had been fixed in November 2020. [*Id.*]

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[2] Plaintiff was not provided with pain medication during this time period. [*Id.* at 11]

On April 1, 2021, Plaintiff received treatment on Tooth #5. [*Id.* at 15] Plaintiff "is still . . . in substantial pain with [Teeth #1 and #2] that need crowns." [*Id.*] Plaintiff filed this lawsuit on May 26, 2021 [#1] and filed his operative Complaint on April 27, 2022 [#94].

In his Complaint, Plaintiff brings three claims for relief against the United States, BOP, and various medical providers at ADX regarding Plaintiff's dental care. [*Id.*] In Claim One, Plaintiff alleges that Dr. Burkley, Ms. Schouweiler, Ms. Dunn, and Ms. Fellows (the "Individual Defendants") violated Plaintiff's Eighth Amendment rights by intentionally denying and delaying his dental care and interfering with his treatment, bringing the claim pursuant to *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971).[3] [#94 at 6-15] In Claim Two, Plaintiff brings a claim of medical negligence against Defendant United States Government under the Federal Tort Claim Act ("FTCA"), arising out of Dr. Burkley's refusal to provide Plaintiff with crowns. [*Id.* at 16-18] Finally, in Claim Three, Plaintiff brings an Eighth Amendment claim against Defendant Federal Bureau of Prisons ("BOP") for "enforcing a policy that is deliberately indifferent to serious medical needs." [*Id.* at 19] Claim Three seeks only injunctive relief. [*Id.* at 22]

Defendants filed a partial motion to dismiss, seeking to dismiss the Amended Complaint under Federal Rules of Civil Procedure 12(b)(1) and (b)(6), except to the extent that Plaintiff's FTCA claim related to a single tooth for which Plaintiff had exhausted his

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[3] A *Bivens* action provides a "private action for damages against federal officers" in certain limited circumstances. *Pahls v. Thomas*, 718 F.3d 1210, 1225 (10th Cir. 2013) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 675 (2009)).

administrative remedies. [#114] Defendant United States Government then filed a motion to dismiss Plaintiff's FTCA claim in its entirety pursuant to Federal Rule of Civil Procedure 41(b) based on Plaintiff's failure to file a certificate of review. [#144] The Motions to Dismiss have been fully briefed, and supplemental briefing has been filed and accepted in regards to #114. [##121, 122, 140-1, 147, 149, 153, 155] Plaintiff then filed his Emergency Motion, which has not received briefing. [#160]

II. STANDARD OF REVIEW

A. Federal Rule of Civil Procedure 12(b)(1)

Federal Rule of Civil Procedure 12(b)(1) empowers a court to dismiss a complaint for "lack of subject-matter jurisdiction." Fed. R. Civ. P. 12(b)(1). Dismissal under Rule 12(b)(1) is not a judgment on the merits of a plaintiff's case, but only a determination that the court lacks authority to adjudicate the matter. *See Castaneda v. INS*, 23 F.3d 1576, 1580 (10th Cir. 1994) (recognizing federal courts are courts of limited jurisdiction and may only exercise jurisdiction when specifically authorized to do so). A court lacking jurisdiction "must dismiss the cause at any stage of the proceedings in which it becomes apparent that jurisdiction is lacking." *Basso v. Utah Power & Light Co.*, 495 F.2d 906, 909 (10th Cir. 1974).

Rule 12(b)(1) challenges are generally presented in one of two forms: "[t]he moving party may (1) facially attack the complaint's allegations as to the existence of subject matter jurisdiction, or (2) go beyond allegations contained in the complaint by presenting evidence to challenge the factual basis upon which subject matter jurisdiction rests." *Merrill Lynch Bus. Fin. Servs., Inc. v. Nudell*, 363 F.3d 1072, 1074 (10th

Cir. 2004) (quoting *Maestas v. Lujan*, 351 F.3d 1001, 1013 (10th Cir. 2003)). When reviewing a facial attack on subject matter jurisdiction, the Court "presume[s] all of the allegations contained in the amended complaint to be true." *Ruiz v. McDonnell*, 299 F.3d 1173, 1180 (10th Cir. 2002).

B. Federal Rule of Civil Procedure 12(b)(6)

Under Federal Rule of Civil Procedure 12(b)(6), a court may dismiss a complaint for "failure to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). In deciding a motion under Rule 12(b)(6), a court must "accept as true all well-pleaded factual allegations . . . and view these allegations in the light most favorable to the plaintiff." *Casanova v. Ulibarri*, 595 F.3d 1120, 1124 (10th Cir. 2010) (quoting *Smith v. United States*, 561 F.3d 1090, 1098 (10th Cir. 2009)). Nonetheless, a plaintiff may not rely on mere labels or conclusions, "and a formulaic recitation of the elements of a cause of action will not do." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007).

"To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Twombly*, 550 U.S. at 570). Plausibility refers "to the scope of the allegations in a complaint: if they are so general that they encompass a wide swath of conduct, much of it innocent, then the plaintiffs 'have not nudged their claims across the line from conceivable to plausible.'" *Robbins v. Oklahoma*, 519 F.3d 1242, 1247 (10th Cir. 2008) (quoting *Twombly*, 550 U.S. at 570). "The burden is on the plaintiff to frame a 'complaint with enough factual matter (taken as true) to suggest' that he or she is entitled to relief." *Id.* (quoting *Twombly*, 550 U.S. at 556). The ultimate duty of the

court is to "determine whether the complaint sufficiently alleges facts supporting all the elements necessary to establish an entitlement to relief under the legal theory proposed." *Forest Guardians v. Forsgren*, 478 F.3d 1149, 1160 (10th Cir. 2007).

C. Pro Se Litigants

"A pro se litigant's pleadings are to be construed liberally and held to a less stringent standard than formal pleadings drafted by lawyers." *Hall v. Bellmon*, 935 F.2d 1106, 1110 (10th Cir. 1991) (citing *Haines v. Kerner*, 404 U.S. 519, 520-21 (1972)). The Court, however, cannot be a pro se litigant's advocate. *See Yang v. Archuleta*, 525 F.3d 925, 927 n.1 (10th Cir. 2008).

III. ANALYSIS

Defendants argue in their partial motion to dismiss that: the Court lacks subject matter jurisdiction over Ms. Fellows based on her absolute immunity [#114 at 5]; Plaintiff's claims against the Individual Defendants should be dismissed because the Individual Defendants are entitled to qualified immunity [*id.* at 6-12]; Plaintiff failed to plead facts showing an Eighth Amendment violation by the BOP [*id.* at 12-14]; and Plaintiff's FTCA claim should be dismissed for failure to exhaust administrative remedies, except to the extent that it relates to Tooth #3 [*Id.* at 14-15]. In its subsequently filed Motion to Dismiss, Defendant United States Government argues that Plaintiff's FTCA claim should be dismissed in its entirety for failure to file a certificate of review as required by Colo. Rev. Stat. § 13-20-602. [#144] The Court proceeds by analyzing its jurisdiction over Plaintiff's claim against Ms. Fellows, then Plaintiff's claim against the remaining Individual Defendants, then Plaintiff's claim against the BOP, and finally Plaintiff's FTCA claim.

A. Absolute Immunity

Defendants argue that the Court lacks subject matter jurisdiction over Plaintiff's claim against Ms. Fellows due to the absolute immunity provided to Public Health Service ("PHS") officers. [##114 at 5; 122 at 1-3] 42 U.S.C. § 233(a) "grants absolute immunity to PHS officers and employees for actions arising out of the performance of medical or related functions within the scope of employment by barring all actions against them for such conduct." *Hui v. Castaneda*, 559 U.S. 799, 806 (2010). *Bivens* claims against PHS officers acting within the scope of their employment should be dismissed for lack of subject matter jurisdiction. *See Weeks v. Barkman*, No. 20-cv-00544-PAB-NYW, 2021 WL 4555999, at *5 (D. Colo. Mar. 22, 2021) (dismissing *Bivens* claims against PHS officers for lack of jurisdiction), *report and recommendation adopted*, No. 20-cv-00544-PAB-NYW, 2021 WL 4146001 (D. Colo. Sept. 13, 2021); *Pitts v. Fed. Bureau of Prisons*, No. 20-cv-01422, 2021 WL 849812, at *4 (D. Colo. Feb. 16, 2021) (finding that the court lacked subject matter jurisdiction over a commissioned PHS officer who was entitled to absolute immunity under § 233(a)), *report and recommendation adopted*, 2021 WL 848345 (D. Colo. Mar. 5, 2021); *Freeman v. Vineyard*, No. 10-cv-02690-MSK-CBS, 2012 WL 1813119, at *6 (D. Colo. May 18, 2012) (dismissing for lack of subject matter jurisdiction the plaintiff's claims against PHS officers under § 233(a) because the Attorney General certified that these officers were acting within the scope of their employment).

Ms. Fellows has provided a sworn declaration stating that, during all times at issue, she was a commissioned PHS officer at ADX and that "any action taken by [her] with regard to [Plaintiff] was done . . .

within the course and scope of [her] employment as commissioned officer with the PHS, stationed at the ADX."[4] [#114-2 at ¶ 3] Plaintiff contends that Ms. Fellows's failure to file Plaintiff's medical requests fell outside of the scope of her duty because she did not follow the standard of care or facility policy. [#121 at 1-6] However, Section 233(a) exists to provide immunity from such alleged violations, and would serve little purpose if it could be pleaded around by alleging a violation of the standard of care or policy. *See Weeks v. Barkman*, No. 20-CV-00544-PAB-NYW, 2021 WL 4146001, at *2 (D. Colo. Sept. 13, 2021) (rejecting the argument that PHS officers do not act within the scope of their employment when they fail to follow the standard of care as "contrary [to] § 233(a)"). Here, Plaintiff alleges that Ms. Fellows took Plaintiff's requests for dental care but failed to adequately file them. [#94 at ¶¶ 22-23] Ms. Fellows's alleged action or inaction was therefore "related to [P]laintiff's medical care" such that she was acting in the scope of her employment. *See Weeks,* 2021 WL 4146001 at *2 ("Because [PHS officers'] alleged action and inaction were related to plaintiff's medical care, the Court finds that they were acting within the scope of their employment."); *Pitts*, 2021 WL 849812 at *4 (finding that allegations arising from performance of medical function were within the scope of employment of PHS employee); *Camerano v. United States*, 196 F. Supp. 3d 172, 180 (D. Mass. 2016) (finding that court did not

[4] This declaration by Ms. Fellows is properly considered under Rule 12(b)(1). *Weeks*, 2021 WL 4555999, at *4 (explaining that "[t]he court has wide discretion on Rule 12(b)(1) motions to dismiss to consider evidence outside the pleadings where the factual basis for subject matter jurisdiction is challenged" and considering declarations stating that certain defendants were immune to suit based on their roles as commissioned PHS officers).

have jurisdiction over *Bivens* claim brought against PHS employees when plaintiff alleged that defendants violated the standard of care).

Accordingly, the Court RECOMMENDS that Plaintiff's claim against Ms. Fellows be DISMISSED WITHOUT PREJUDICE for lack of subject matter jurisdiction.[5]

B. Plaintiff's *Bivens* Claims

Plaintiff alleges that the Individual Defendants were deliberately indifferent to his serious medical needs in violation of the Eighth Amendment. [#94 at 15] The Eighth Amendment to the United States Constitution protects a prisoner's right to "humane conditions of confinement guided by 'contemporary standards of decency.'" *Penrod v. Zavaras*, 94 F.3d 1399, 1405 (10th Cir. 1996) (quoting *Estelle v. Gamble*, 429 U.S. 97, 103 (1976)). Prison officials are required to "ensur[e] inmates receive the basic necessities of adequate food, clothing, shelter, and medical care and . . . tak[e] reasonable measures to guarantee the inmates' safety." *Barney v. Pulsipher*, 143 F.3d 1299, 1310 (10th Cir. 1998). Prison officials violate this standard when they are deliberately indifferent to an inmate's serious medical needs. *See Sealock v. Colorado*, 218 F.3d 1205, 1209 (10th Cir. 2000). "[D]ental care is one of the most important medical needs of inmates." *Ramos v. Lamm*, 639 F.2d 559, 576 (10th Cir. 1980).

"'Deliberate indifference' involves both an objective and a subjective component. The objective component is met if the deprivation is 'sufficiently serious.'" *Sealock*, 218 F.3d at 1209 (quoting *Farmer v. Brennan*,

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[5] A dismissal for lack of subject matter jurisdiction should be without prejudice. *See Webb v. Utah*, 706 F. App'x 470, 474 (10th Cir. 2017) (citing *Brereton v. Bountiful City Corp.*, 434 F.3d 1213, 1218 (10th Cir. 2006)).

511 U.S. 825, 834 (1994)). A sufficiently serious medical need "is one that has been diagnosed by a physician as mandating treatment or one that is so obvious that even a lay person would easily recognize the necessity for a doctor's attention." *Id.* (quoting *Hunt v. Uphoff*, 199 F.3d 1220, 1224 (10th Cir. 1999)). "The subjective component is met if a prison official knows of and disregards an excessive risk to inmate health or safety." *Crowson v. Washington Cnty.*, 983 F.3d 1166, 1178 (10th Cir. 2020).

The Supreme Court has made clear that a prisoner asserting a deliberate indifference claim has some fairly high hurdles to clear. Mere negligence on the part of his medical providers is not sufficient. *Farmer*, 511 U.S. at 835. Rather, "[t]he subjective component [of a deliberate indifference claim] is akin to 'recklessness in the criminal law,' where, to act recklessly, a 'person must "consciously disregard" a substantial risk of serious harm.'" *Self v. Crum*, 439 F.3d 1227, 1231 (10th Cir. 2006) (quoting *Farmer*, 511 U.S. at 837, 839).

Nonetheless, a prisoner who can clear these high hurdles, who can establish that his medical providers acted with a mindset "akin to recklessness in the criminal law," has historically had a civil remedy against his medical providers. For a state prisoner, that remedy was provided through 42 U.S.C. § 1983. "Section 1983 provides a cause of action for 'the deprivation of any rights, privileges, or immunities secured by the Constitution and laws' by any person acting under color of state law." *Pierce v. Gilchrist*, 359 F.3d 1279, 1285 (10th Cir. 2004) (quoting 42 U.S.C. § 1983). Thus, a state prison official—or any individual acting under color of state law—may be sued for violating another individual's constitutional rights. By its terms, however, Section 1983 only applies to individuals acting "under

color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia." 42 U.S.C. § 1983. Thus, federal officials are not covered by Section 1983.

So, without an explicit statutory remedy applicable to federal officials, are individuals acting pursuant to federal law free to violate others' constitutional rights without recourse? Historically, no. As the United States Supreme Court has explained, "*Bivens* established that the victims of a constitutional violation by a federal agent have a right to recover damages against the official in federal court despite the absence of any statute conferring such a right." *Carlson v. Green*, 446 U.S. 14, 18 (1980). Indeed, "[i]n the early years of *Bivens*, the [Supreme] Court essentially presumed new *Bivens* actions were valid 'unless the action [wa]s "defeated" in one of two specified ways'—an express declaration from Congress creating a substitute remedy or the existence of 'special factors' that counselled 'hesitation.'" *Silva v. United States*, 45 F.4th 1134, 1139 (10th Cir. 2022) (quoting *Carlson*, 446 U.S. at 26-27, (Powell, J., concurring in the judgment)). Following this formulation, the Supreme Court expanded the remedy recognized in *Bivens* to a gender discrimination claim under the Fifth Amendment, *Davis v. Passman*, 442 U.S. 228 (1979), and, most relevant here, to a claim of deliberate indifference under the Eighth Amendment arising out of inadequate medical treatment to a prisoner, *Carlson*, 446 U.S. 14.

Despite this precedent—despite the fact that the Supreme Court held more than forty years ago in *Carlson* that a prisoner who can establish that his medical providers acted with a mindset *akin to recklessness in the criminal law* could seek a civil remedy against those medical providers—the United

States argues that such a remedy no longer exists. [*See generally* #140-1] Reluctantly, this Court, bound by the decisions of the Supreme Court, agrees.

The Supreme Court's early amicability towards *Bivens* actions was short-lived. The Supreme Court has since "adopted a far more cautious course" with respect to *Bivens* actions. *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1855 (2017). Thus, *Bivens*, *Davis*, and *Carlson* "represent the only instances in which the [Supreme] Court has approved of an implied damages remedy under the Constitution itself." *Id.*

As solidified in *Ziglar*, the Supreme Court adopted a two-step approach to determine whether a plaintiff could vindicate his constitutional rights in a suit for damages through a *Bivens* action. First, the Court asked whether the case presented "a new *Bivens* context" such that it was "different in a meaningful way from" *Bivens*, *Davis*, or *Carlson*. *Id.* at 1859. If so, then the Court examined whether there was any alternative remedial structure present or other "special factor counselling hesitation" in creating an implied damages remedy. *Id.* at 1857-58. Applying this two-step regime, courts have arrived at inconsistent outcomes in considering whether a *Bivens* remedy is available for an Eighth Amendment claim of deliberate indifference towards a prisoner's dental care. *Compare Carlucci v. Chapa*, 884 F.3d 534, 538 (5th Cir. 2018) (holding that "an implied right of action [existed] against a federal actor who shows deliberate indifference to a prisoner's serious medical needs in violation of the Eighth Amendment" in a case involving inadequate dental care); *with Sharp v. United States Marshals Serv.*, No. 5:20-CT-03282, 2022 WL 3573860, at *7 (E.D.N.C. July 15, 2022) (finding that a *Bivens* remedy was not available when the plaintiff's "alleged

injuries—dental pain, infected and bleeding gums, and a tooth breaking into pieces—are vastly different from those in *Carlson*"); *Dissler v. Zook*, No. 3:20-CV-00942, 2021 WL 2598689, at *4-5 (N.D. Tex. May 7, 2021) (finding that the plaintiff's "deliberate indifference claim for inadequate dental treatment ar[ose] in a new context" in part because the plaintiff alleged "far less serious injuries" than those alleged in *Carlson*, and that "the administration of the federal prison system qualifie[d] as a special factor" that prevented the court from allowing a *Bivens* action), *report and recommendation adopted*, No. 3:20-CV-0942-D, 2021 WL 2589706 (N.D. Tex. June 23, 2021). Thus, were *Ziglar* the last Supreme Court opinion to address *Bivens* expansion, this Court would be presented with a close case as to whether a *Bivens* remedy is available to Plaintiff for his allegedly deficient dental care.

Just this year, however, the Supreme Court once again tightened the vice around *Bivens*. In *Egbert v. Boule*, 142 S. Ct. 1793 (2022), the Court made its strongest pronouncement yet against *Bivens*. The Court emphasized that "recognizing a cause of action under *Bivens* is 'a disfavored judicial activity,'" and that "'[e]ven a single sound reason to defer to Congress' is enough to require a court to refrain from creating such a remedy." *Egbert*, 142 S. Ct. at 1803 (first quoting *Ziglar*, 137 S. Ct. at 1856-57 then quoting *Nestlé USA, Inc. v. Doe*, 141 S. Ct. 1931, 1937 (2021) (plurality opinion)). The Court explained its two-step approach that "inform[s] a court's analysis of a proposed *Bivens* claim"—i.e., whether the case arises in a new context and whether special factors counsel against recognizing a *Bivens* remedy—but clarified that "those steps often resolve to a single question: whether there is any reason to think that Congress might be better equipped to create a damages remedy." *Id.* at 1803. Put

differently, "[a] court faces only one question [in conducting a *Bivens* inquiry]: whether there is *any* rational reason (even one) to think that *Congress* is better suited to 'weigh the costs and benefits of allowing a damages action to proceed.'"[6] *Id.* at 1805 (quoting *Ziglar*, 137 S. Ct. at 1858).

The *Egbert* Court further explained that a court must determine whether there is "an alternative remedial structure" available.[7] *Id.* at 1804 (quoting *Ziglar*, 137 S. Ct. at 1858). A court must conduct such an inquiry because "a court may not fashion a *Bivens*

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[6] And, as the Court explained, there is essentially *always* at least one rational reason to defer to Congress to create a remedy, namely that: "At bottom, creating a cause of action is a legislative endeavor . . . [and] Congress is far more competent than the Judiciary to weigh [the] policy considerations [involved with creating a cause of action]. And the Judiciary's authority to do so at all is, at best, uncertain." *Egbert*, 142 S. Ct. at 1802 (quotations and citations omitted).

[7] As explained below, the Tenth Circuit has described these two questions—whether Congress is better positioned to create remedies and whether the Government has already provided remedies—as "two independent reasons" to deny a *Bivens* remedy. *Silva v. United States*, 45 F.4th 1134, 1141 (10th Cir. 2022). This Court is not entirely convinced that the two questions are completely independent. One possible reading of *Egbert* is that the fact that the Government created alternative remedies necessarily means that Congress is better positioned to create remedies. *Egbert*, 142 S. Ct. at 1803 ("While our cases describe two steps, those steps often resolve to a *single* question: whether there is any reason to think that Congress might be better equipped to create a damages remedy." (emphasis added)); *id.* at 1804 ("If there are any alternative remedial structures in place, that alone, like any special factor, is reason enough to limit the power of the Judiciary to infer a new *Bivens* cause of action." (quotation omitted)). Ultimately, however, this is a distinction without a difference—post-*Egbert*, a "yes" answer to either question necessarily disposes of the *Bivens* claim.

remedy if Congress already has provided, or has authorized the Executive to provide, 'an alternative remedial structure'"—regardless of the extent of relief provided to the plaintiff by that remedial scheme. *Id.* (quoting *Ziglar*, 137 S. Ct. at 1858). Simply put, "[s]o long as Congress or the Executive has created a remedial process that it finds sufficient to secure an adequate level of deterrence, the courts cannot second-guess that calibration by superimposing a *Bivens* remedy." *Id.* at 1807.

Applying these general principles, the *Egbert* Court unsurprisingly held that a *Bivens* remedy was not available to Plaintiff Boule against federal officials for an alleged violation of the Fourth Amendment. The Court accepted the Court of Appeals' concession that Plaintiff Boule's Fourth Amendment Claim presented a new context, and held that no *Bivens* remedy could exist under this context because: (1) national security was at issue, distinguishing the case from the facts of *Bivens* and making the case particularly ill-suited for judicial intervention, *id.* at 1804-06, and, independently; (2) "Congress ha[d] provided alternative remedies for aggrieved parties in [Plaintiff] Boule's position that independently foreclose a *Bivens* action here," *id.* at 1806-07. This was true even though the "set of facts [presented did not] differ[] meaningfully from those in *Bivens* itself." *Id.* at 1810 (Gorsuch, J., concurring); *see also id.* at 1805 (recognizing that "*Bivens* and this case . . . arguably present 'almost parallel circumstances'" (quoting *Ziglar*, 137 S. Ct. at 1859)); *id.* at 1815 (Sotomayor, J., concurring in part and dissenting in part) ("At bottom, [Plaintiff] Boule's claim is materially indistinguishable from the claim brought in *Bivens*.").

In providing guidance on how courts in this Circuit are to apply *Egbert*, the Tenth Circuit has explained

that expanding *Bivens* "is an action that is impermissible in virtually all circumstances." *Silva*, 45 F.4th at 1140; *see also id.* at 1140-41 (noting the similarity between the facts in *Egbert* and those in *Bivens*, and questioning whether any circumstances could exist where there would be no reason to think that Congress was better equipped than the courts to create a cause of action). The Tenth Circuit stated that "the Supreme Court appeared to alter the existing two-step *Bivens* framework" and "emphasize[d] what [it] view[ed] as the key takeaway from *Egbert*, namely, that courts may dispose of *Bivens* claims for 'two *independent* reasons: Congress is better positioned to create remedies in the [context considered by the court], and the Government already has provided alternative remedies that protect plaintiffs.'" *Id.* at 1139, 1141 (quoting *Egbert*, 142 S. Ct. at 1804) (emphasis in original). The Tenth Circuit then held that the existence of the BOP Administrative Remedy Program constituted an adequate alternative remedy that foreclosed the plaintiff's *Bivens* claim against a BOP corrections officer. *Id.* at 1141. The Tenth Circuit declined to address whether there was any reason to think that Congress might be better equipped to create a damages remedy with respect to the plaintiff's claim. *Id.* at 1141 n.5.

Under this precedent, this Court finds that a *Bivens* remedy is not available to Plaintiff. Pursuant to *Egbert* and *Silva*, the existence of an alternative remedial scheme available to Plaintiff bars Plaintiff's *Bivens* claim. The Court acknowledges that Plaintiff's claim presents somewhat "parallel circumstances" and a "similar mechanism of injury" as that presented in *Carlson*—an Eighth Amendment claim for deliberate indifference to a prisoner's medical needs. But, under *Egbert*, factual similarity to previous cases no longer

appears sufficient to permit a *Bivens* claim to proceed.[8] According to the Court in *Egbert*, "a plaintiff cannot justify a *Bivens* extension based on 'parallel circumstances' with *Bivens*, *Passman*, or *Carlson* unless he also satisfies the 'analytic framework' prescribed by the last four decades of intervening case law." 142 S. Ct. at 1809; *see also Silva*, 45 F.4th at 1140 ("The Supreme Court's rejection of the plaintiff's Fourth Amendment claim, despite its close resemblance to the facts of *Bivens* itself, underscores the extent of the Court's disfavor towards *Bivens* claims."); *Washington v. Fed. Bureau of Prisons*, No. CV 5:16-3913-BHH, 2022 WL 3701577, at *5 (D.S.C. Aug. 26, 2022) ("[Under *Egbert*], a court should conduct a special factors analysis even when the plaintiff's allegations closely resemble *Carlson* because that case 'predates [the Court's] current approach to implied causes of action.'" (quoting *Egbert*, 142 S. Ct. at 1808)). This required

[8] Some courts across the country have disagreed, and have interpreted *Egbert* as merely restating the two-step test—concluding that if a claim does not arise in a "new [factual] context" but is sufficiently similar to claims that the Supreme Court or governing Circuit caselaw had allowed in the past, then the analysis ends there and the *Bivens* claim may proceed even after *Egbert*. *See, e.g.*, *Kennedy v. Massachusetts*, No. CV 22-11152-NMG, 2022 WL 17343849, at *4 (D. Mass. Nov. 30, 2022); ("[B]ecause this Court is not fashioning a new *Bivens* context, the Court need not consider alternative remedial structures."); *Ibuado v. Fed. Prison Atwater*, No. 1:22-cv-00651-BAM(PC), 2022 WL 16811880, at *4 (E.D. Cal. Nov. 8, 2022) ("Plaintiff's medical claim does not present a new *Bivens* context. In *Carlson v. Green*, the Supreme Court found that there was an available *Bivens* remedy for a federal prisoner's Eighth Amendment claim for failure to provide adequate medical treatment. The Court will therefore consider whether Plaintiff states a cognizable claim[] [u]nder the Eighth Amendment." (citations omitted)). Bound as it is to Supreme Court and Tenth Circuit precedent, this Court is unpersuaded that *Egbert* and *Silva* permit this method of analysis.

"analytical framework" includes asking whether an "alternative remedial structure" exists. *Egbert*, 142 S. Ct. at 1804. As explained by the Tenth Circuit, the apparent collapsing of the two steps in the *Bivens* inquiry means that under *Egbert's* framework, courts should "dispose of *Bivens* claims for 'two *independent* reasons: [(1)] Congress is better positioned to create remedies in the [context considered by the court], and [(2)] the Government already has provided alternative remedies that protect plaintiffs.'" 45 F.4th at 1141 (quoting *Egbert*, 142 S. Ct. at 1804) (emphasis in original). This second reason asks only if an alternative remedial structure exists. If so, then that alone provides an "independent means of disposing of *Bivens* claims," regardless of their context. *Id.*

As the Tenth Circuit made clear in *Silva*, the availability of the BOP's Administrative Remedy Program provided "sufficient ground to foreclose [the plaintiff's] *Bivens* claim." *Id.* Because this same administrative remedy program was available to Plaintiff regarding his allegedly inadequate dental care,[9] this Court finds that the existence of this program forecloses the availability of a *Bivens* remedy against BOP officials in Plaintiff's case, despite any "parallel circumstances" that may exist between it and *Carlson*.

Accordingly, the Court RECOMMENDS that Plaintiff's claims against Dr. Burkley, Ms. Schouweiler, and Ms. Dunn be DISMISSED WITH PREJUDICE due to the lack of a *Bivens* remedy.[10] The Court issues this

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[9] The BOP Administrative Remedy Program "allow[s] an inmate to seek formal review of an issue relating to any aspect of his/her confinement." 28 C.F.R. § 542.10(a). It "applies to all inmates in institutions operated by [the BOP] . . . ." *Id.* at § 542.10(b).

[10] Dismissal with prejudice is proper under these circumstances, as further amendment to the Complaint would be futile.

Recommendation fully aware of the implications of the Recommendation's rationale. Under the rationale of this Recommendation, a federal prison official may sadistically beat an inmate to within an inch of his life and that inmate will not have a civil remedy against that prison official—after all, the inmate may file a grievance pursuant to the BOP Administrative Remedy Program.[11] But the Court is bound by *Egbert* and, in this Court's view, *Egbert* compels this conclusion.

C. PLAINTIFF'S CLAIMS AGAINST THE BOP

Plaintiff next appears to assert claims against the BOP for injunctive relief under the Eighth Amendment.[12]

See Silva, 45 F.4th at 1142 ("In sum, Plaintiff's *Bivens* claim is foreclosed by the availability of the BOP Administrative Remedy Program to address his complaint. For the foregoing reasons, we AFFIRM the district court's dismissal of Plaintiff's complaint WITH PREJUDICE.").

[11] To state the obvious, were a state prison official to do the same thing, that state prison official would be subject to civil liability pursuant to Section 1983. *See Smith v. Trujillo*, 2021 WL 1608829, at *2 (D. Colo. April 26, 2021) (declaring in a pre-*Egbert* decision that extended a *Bivens* remedy to an excessive force claim brought by a federal inmate that "[i]t would be anomalous that a state prisoner could pursue an excessive force claim against a correctional officer, but a federal prisoner could not").

[12] In one sentence under a claim titled "Eighth Amendment (deli[berate] indiff[erence])," Plaintiff states that the BOP "violate[d] the administrative procedures act because by writ[t]en policy crowns are allowed." [#94 at 19] This single sentence, nested within an Eighth Amendment claim, fails to state a claim under the APA. For example, Plaintiff makes no allegations "that the [written policy] at issue," which Plaintiff fails to even identify, "was adopted under APA procedures," making dismissal appropriate. *See Hill v. Pugh*, 75 F. App'x 715, 720 (10th Cir. 2003). Moreover, to the extent that Plaintiff is referencing a BOP program statement, such statements are "internal agency

[#94 at 19, 22] Liberally construed, Plaintiff seeks to enjoin the BOP's alleged "no crowns" policy. Defendants concede that a federal prisoner may sue the BOP for injunctive relief under the Eighth Amendment. [#114 at 12]; *see also Simmat v. U.S. Bureau of Prisons*, 413 F.3d 1225, 1239 & n.11 (10th Cir. 2005). But Defendants argue that Plaintiff has inadequately pled the existence of a "no crowns" policy, and that such a policy does not violate the Eighth Amendment.

To begin, the Court finds that Plaintiff has adequately alleged that a "no crowns" policy has been applied to his case. The existence or nonexistence of a policy is a question of fact for the jury, but it must be pled with specific factual allegations as opposed to bald conclusory assertions. *Griego v. City of Albuquerque*, 100 F. Supp. 3d 1192, 1212-13 (D.N.M. 2015); *Atwell v. Gabow*, No. CIVA 06CV-02262-JLK, 2008 WL 906105, at *6 (D. Colo. Mar. 31, 2008), *aff'd*, 311 F. App'x 122 (10th Cir. 2009). Plaintiff concedes to the existence of a written BOP policy that allows for crowns under certain circumstances, but he alleges the existence of an informal policy against the use of crowns. [#121 at 9] As a district court in this Circuit has explained:

> With informal, unwritten policies, customs, or practices, the plaintiff can plead either a pattern of multiple similar instances of misconduct—no set number is required, and the more unique the misconduct is, and the more similar the incidents are to one another, the smaller the required number will be to render the alleged policy plausible—or use

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guidelines that are not subject to the rigors of the [APA]." *Id.* (quotation omitted).

> other evidence, such as a police officers' statements attesting to the policy's existence.

Griego, 100 F. Supp.3d at 1213. Here, Plaintiff alleges both a pattern of misconduct (albeit, one limited to himself through the refusal to provide crowns on his three teeth) and Dr. Burkley's statements directly attesting to the existence of a "no crowns" policy that would apply in Plaintiff's case. [*See generally* #94] Together, the Court finds that Plaintiff has adequately alleged that an informal "no crowns" policy has been applied to Plaintiff's Affected Teeth.

The Court finds, however, that the alleged "no crowns" policy, as applied in Plaintiff's case as currently alleged, did not violate Plaintiff's Eighth Amendments rights. Courts have recognized that offering extraction as the "only dental care" available at a facility generally violates the Eighth Amendment. *See Heitman v. Gabriel*, 524 F. Supp. 622, 627 (W.D.Mo.1981) ("While it is by no means unprecedented for an old-fashioned prison regime to offer tooth extraction as the only dental care, no case has been found where such a limitation has been deemed judicially tolerable."); *c.f. Baughman v. Garcia*, 254 F. Supp. 3d 848, 876 (S.D. Tex. 2017) (holding that a policy *denying standard fillings* if the inmate could not afford them, and instead only offering extractions, could give rise to an Eighth Amendment violation), *aff'd sub nom.*, *Baughman v. Seale*, 761 F. App'x 371 (5th Cir. 2019). But beyond that "extreme case," "[t]he majority of courts examining this issue have found that a prison's refusal to restore a tooth rather than extract it is not an Eighth Amendment violation if extraction is a medically appropriate treatment for the prisoner." *Bargo v. Kelley*, No. 17-cv-00281-KGB-PSH, 2020 WL 1172206, at *8 (E.D. Ark. Jan. 23, 2020) (emphasis omitted),

report and recommendation adopted, 2020 WL 1165761 (E.D. Ark. Mar. 10, 2020); *see also Greywind v. Podrebarac*, No. 1:10-CV-006, 2011 WL 4750962, at *7 (D.N.D. Sept. 12, 2011) ("[A] number of courts have held that prison policies that offer extraction in lieu of such things as crowns, implants, and even root canals in certain situations do not violate the Eighth Amendment." (collecting cases)), *report and recommendation adopted*, 2011 WL 4743751 (D.N.D. Oct. 5, 2011), *aff'd*, 471 F. App'x 544 (8th Cir. 2012)). In *James v. Penn. Dept. of Corr.*, for example, the Third Circuit held that there was no Eighth Amendment violation when a tooth was extracted despite the fact that a root canal, which was not permitted by the facility's policy, would have saved it. 230 F. App'x 195, 196-98 (3d Cir. 2007). Similarly, in *Koon v. Udah*, a district court found no Eighth Amendment violation when a facility declined to provide a root canal and crown at state expense on a tooth with "a minor infection or abscess," and instead only offered extraction of the tooth. No. 8:06–2000, 2008 WL 724041, at *7 (D.S.C. Mar. 17, 2008). Most like this case, in *Del Muro v. Federal Bureau of Prisons*, the plaintiff alleged that the facility only provided fillings and extractions. No. 5:03-CV-214-B, 2004 WL 1542216, at *3 (N.D. Tex. July 8, 2004). The plaintiff had three teeth filled, but the fillings fell out because of the extent of tooth decay. *Id.* The plaintiff was offered an extraction, but refused, contending that the denial of crowns or a bridge constituted an Eighth Amendment violation. *Id.* The district court held that the plaintiff's preference for crowns or a bridge as opposed to fillings and eventual extraction merely constituted an unactionable disagreement with the course of treatment. *Id.* at *3-4.

The Court acknowledges some caselaw to the contrary. Most significantly, in *Carlucci v. Chapa*, the Fifth

Circuit held that an Eighth Amendment violation could exist when a facility dentist recommended providing a bridge as "the only way to stop" further damage to the plaintiff's teeth, but declined to provide the treatment because the BOP "would never authorize" it. 884 F.3d at 537, 539. The Fifth Circuit explained that the plaintiff's "allegation is that the dentist recommended restoring his bridge and repairing the fractured teeth. [The plaintiff] did not claim that the dentist recommended pulling the teeth and [the plaintiff] disagreed." *Id.* at 539. According to the Fifth Circuit, this allegation sufficed to state a claim because the plaintiff "suffered permanent physical injury" due to the denial of the "recommended treatment by medical professionals." *Id.* (citing *Thompson v. Williams*, 56 F.3d 1385, 1385 (5th Cir. 1995) (unpublished) and *Huffman v. Linthicum*, 265 Fed. Appx. 162, 163 (5th Cir. 2008)). In *Carlucci*, however, there was no evidence that the plaintiff was offered any type of dental care for over a year after his teeth began to crack. The plaintiff was simply "assured [that he] would receive care," but after a year had only received a bite-guard. *Id.* at 536-37.

Here, Plaintiff alleges that he has been denied crowns on Teeth #1, #2, and #3.[13] He does not allege the "extreme case" where the only dental care offered was extraction. Indeed, with respect to Tooth #3, Dr. Burkley treated that tooth with three fillings and a pin. [#94 at 8-11] Though Plaintiff alleges that Dr. Burkley told Plaintiff that Plaintiff needed a crown on Tooth #3, Plaintiff does not allege that Dr. Burkley thought the alternative treatment of fillings and a pin would be ineffective at relieving Plaintiff's pain. [*Id.*]

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[13] Plaintiff does not allege that Crowns were ever recommended, requested, or denied for Teeth #4 and #5.

Ultimately, Tooth #3 was extracted. [*Id.* at 26] At the time of the extraction, Tooth #3 was rotten and broken in half [*id.* at 26] and Plaintiff does not allege that, by that point, it was not medically appropriate to extract Tooth #3. The Court thus does not find the "no crown" policy as applied to Tooth #3 constituted a constitutional violation.[14]

With respect to Teeth #1 and #2, Plaintiff alleges that they were "all filling from previous dental work," but that they caused him pain when drinking hot or cold beverages and when eating hard foods. [*Id.* at 6-7] He alleges that Dr. Burkley informed Plaintiff that these teeth "need[ed] crowns," but refused to provide those crowns on three occasions. [*Id.* at 7-9, 13] But it is unclear whether Plaintiff and Dr. Burkley had any further discussions about Teeth #1 and #2 or whether Dr. Burkley believed that other treatment would eliminate Plaintiff's pain. Indeed, in some instances, Plaintiff alleges that he only requested care for Teeth #3, #4, and #5, or refers simply to "requests" without specifying which teeth Plaintiff requested treatment for.[15] [*Id.* at 10-12] Given the limited allegations with respect to Teeth #1 and #2—including a lack of any allegations that Dr. Burkley denied any dental care on these teeth besides the requested crowns—the Court cannot conclude that the "no crown" policy as applied to Teeth #1 and #2 constituted a constitutional violation.

Ultimately, Plaintiff has thus failed to allege that the application of BOP's alleged "no crowns" policy has

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[14] In any event, Plaintiff's claim for injunctive relief as to Tooth #3 is likely moot because that tooth has been extracted. *See Greywind*, 2011 WL 4750962 at *9.

[15] Similarly, Teeth #1 and #2 are barely mentioned in Plaintiff's Affidavit. [*See id.* at 24-28]

resulted in a violation of Plaintiff's Eighth Amendment rights, nor has Plaintiff adequately alleged that it will do so in the future.[16] Such a policy, globally and indiscriminately applied, may be constitutionally impermissible under a certain set of circumstances.[17]

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[16] The Court's conclusion in this Section is limited. Plaintiff's claim for injunctive relief against the BOP appears to be limited to the "no crowns" policy. [#94 at 19] Plaintiff has also alleged that the BOP has a policy of "one procedure, per inmate, per visit," that it can take up to three months between visits, and that this delay caused Plaintiff substantial pain. [*Id.* at 8] Indeed, as a result of this "one procedure, per inmate, per visit" policy, it took Plaintiff roughly one year to get a standard filling in one broken tooth, and roughly a year and five months to get a standard filling in another. [*See id.* at 13, 15] Plaintiff does not appear to challenge this "one procedure" policy in his injunctive relief claim against the BOP, however, and thus the Court need not opine on whether such a policy could support a deliberate indifference claim for injunctive relief. Similarly, through the Court's conclusion in this Section, the Court does not imply that Plaintiff has failed to plausibly plead a deliberate indifference claim against any of the Individual Defendants based upon their alleged delay in providing Plaintiff with treatment. Rather, as explained in Section III.B above, in light of *Egbert*, there is simply no remedy against the Individual Defendants for such a claim.

[17] For example, the Court could envision a scenario where an inmate's teeth problems were causing substantial pain, a doctor refused to extract the teeth because extraction was not medically appropriate, standard fillings or other routine dental procedures were not medically appropriate for the teeth, and the doctor refused to (or was prohibited from) placing a recommended crown on the teeth. Under such a scenario, the Court could envision a valid deliberate indifference claim premised upon the no crown policy. As outlined above, however, Plaintiff has failed to allege such a scenario here. Nonetheless, recognizing Plaintiff's pro se status, and the Court's uncertainty as to the treatment for Teeth #1 and #2, the Court is recommending dismissal without prejudice with leave to amend this claim. *See Oxendine v. Kaplan*, 241 F.3d 1272, 1275 (10th Cir. 2001) (holding that when the plaintiff is proceeding pro se, dismissal with prejudice is only

But those circumstances are not before the Court in this case. Accordingly, the Court RECOMMENDS Plaintiff's claims against BOP by DISMISSED WITHOUT PREJUDICE.

D. FTCA CLAIM

Finally, Plaintiff brings an FTCA claim against the United States for medical negligence/medical malpractice based on Dr. Burkley's failure to provide Plaintiff with the requested crowns. [#94 at 16-18] Defendant United States filed a partial Motion to Dismiss, arguing that Plaintiff's FTCA claim should be dismissed in its entirety pursuant to Federal Rule of Civil Procedure 41(b) for failure to file a certificate of review. [#144]

Colorado law applies to suits brought against the United States under the FTCA and, thus, Colorado's certificate of review requirement applies. *Coleman v. United States*, 803 F. App'x 209, 212 (10th Cir. 2020); *Hill v. SmithKline Beecham Corp*, 393 F.3d 1111, 1117 (10th Cir. 2004). Colo. Rev. Stat. § 13-20-602(1)(a) states as follows:

> In every action for damages or indemnity based upon the alleged professional negligence of . . . a licensed professional, the plaintiff's or complainant's attorney shall file with the court a certificate of review for each . . . licensed professional named as a party, as specified in subsection (3) of this section, within

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appropriate "where it is obvious that the plaintiff cannot prevail on the facts he has alleged and it would be futile to give him an opportunity to amend" (quotation omitted)); *Reynoldson v. Shillinger*, 907 F.2d 124, 127 (10th Cir. 1990) (holding prejudice should not attach to dismissal when plaintiff has made allegations "which, upon further investigation and development, could raise substantial issues").

> sixty days after the service of the complaint, counterclaim, or cross claim against such person unless the court determines that a longer period is necessary for good cause shown.

"The certificate of review requirement is not jurisdictional; rather, it acts as an affirmative defense that may be waived." *Morales v. Rattan*, No. 17-cv-03009-PAB-KLM, 2019 WL 588192, at *3 (D. Colo. Feb. 13, 2019) (quotation omitted) (citing *Miller v. Rowtech*, LLC, 3 P.3d 492, 494-95 (Colo. App. 2000)). Before dismissing a claim for failure to provide a certificate of review, a court must first "determine[] whether expert testimony and therefore a certificate of review are required." *Coleman*, 803 F. App'x at 213; *see also Coleman v. United States*, No. 18-CV-01965-KMT, 2020 WL 6151005, at *3 (D. Colo. Oct. 20, 2020) (dismissing on remand the plaintiff's claim for failure to provide a certificate of review after analyzing whether a certificate of review was necessary), *aff'd*, No. 20-1403, 2021 WL 2835473 (10th Cir. July 8, 2021). Courts have discretion to determine whether a certificate of review is necessary. *Keller v. U.S. Dep' t of Veteran Affairs*, No. 08-cv-00761-WYD-KLM, 2008 WL 5330644, at *4 (D. Colo. Dec. 19, 2008) (citing *Giron v. Koktavy*, 124 P.3d 821, 825 (Colo. App. 2005)). "[A] certificate of review is necessary only for those claims of professional negligence which require expert testimony to establish a prima facie case." *Giron*, 124 P.3d at 825. A certificate of review is typically required for medical malpractice claims based on negligence because most of those claims require expert testimony. *Shelton v. Penrose/St. Francis Healthcare Sys.*, 984 P.2d 623, 627 (Colo. 2000). If a certificate of review is necessary, courts will not excuse pro se plaintiffs from the requirement of filing a certificate of review. *Yadon v. Southward*, 64 P.3d 909, 912 (Colo. App. 2002).

The Court agrees that a certificate of review is necessary in this case. Plaintiff's FTCA claim revolves around Dr. Burkley's refusal to provide crowns for Teeth #1, #2, and #3. [#94 at 16-18] According to Plaintiff, Dr. Burkley's multiple attempts to "fix" Tooth #3 and his decision to leave the fillings in Teeth #1 and #2 in place constituted medical negligence or medical malpractice. [*Id.*] Plaintiff alleges that Dr. Burkley's decision was made solely "to save the prison money," constituted a "breach[] [of] his legal duty of care," and "f[ell] below the degree of care[,] knowledge[,] and skill used by other physicians practicing the same skill or specialty, as anyone else would have done the required crown." [*Id.*] Whether the decision to rely on fillings instead of crowns to treat Teeth #1, #2, and #3 fell below the degree of care used by other dentists does not "lie[] within the ambit of common knowledge or experience of ordinary persons." *Teiken v. Reynolds*, 904 P.2d 1387, 1389 (Colo. App. 1995). This is especially true of Plaintiff's claim as it relates to Tooth #3—the only tooth for which Plaintiff exhausted his administrative remedies[18]—as that tooth received

[18] Before filing an FTCA claim, a plaintiff must have "first presented the claim to the appropriate Federal agency and his claim [must] have been finally denied by the agency." 28 U.S.C. § 2675(a). This provision "require[s] notice of facts and circumstances underlying [the plaintiff's] claim." *Est. of Trentadue ex rel. Aguilar v. United States*, 397 F.3d 840, 853 (10th Cir. 2005). "Because the FTCA constitutes a waiver of the government's sovereign immunity, the notice requirements established by the FTCA must be strictly construed." *Cizek v. United States*, 953 F.2d 1232, 1233 (10th Cir. 1992) (citing *Three–M Enters., Inc. v. United States*, 548 F.2d 293, 295 (10th Cir.1977)). "The requirements are jurisdictional and cannot be waived." *Id.* (citing *Three–M Enters., Inc.*, 548 F.2d at 294). In the Complaint, Plaintiff acknowledges the exhaustion requirement and alleges that it was fulfilled "by [Plaintiff's] filing [of] a form 95 tort claim

extensive treatment from Dr. Burkley. Indeed, Plaintiff has long conceded the necessity of a certificate of review in this case. [#28 at 2-3] ("There is part of ["Plaintiff's] medical negligence claim that will require an expert[']s testimony. . . . It will take an expert to prove that [Dr. Burkley's] procedure on [Tooth #3] falls below the degree of knowledge, skill, and care used by other physicians."). And the Court has previously noted that '[s]hould Plaintiff not obtain the *required*

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on Sept[ember] 14th case number TRT-NCR-2020-07199." [#94 at 16] Plaintiff further alleges that "[t]he defendant denied [Plaintiff's] claim in writing," and the Complaint includes as an exhibit the denial of his claim. [*Id.* at 16, 30] The Court may consider the tort claim itself because it is a document that Plaintiff "referred to in the complaint" that is "central to [Plaintiff's] claim." *Latham v. Five Bros. Mortg. Co. Servs. & Securing, Inc.*, 669 F. App'x 513, 514 (10th Cir. 2016). This tort claim only complains of Tooth #3. The "Basis of Claim" section reads, in full:

> I had *a broken tooth* for months that dental refused to fix. They said the *tooth* needed crowns put on but they couldn't provide crowns because under BOP policy crowns are not allowed and the dentist cannot do them in the BOP. I *lost my tooth* over this policy.

[#114-3 at 2 (emphases added)] Similarly, when instructed to "state the nature and extent of each injury . . . which forms the basis of the claim," the claim reads, in full:

> I suffered in pain for months over *this broken tooth* and ended up *losing it* when all I needed was a crown to fix it.

[*Id.* (emphases added)] The tort claim repeatedly and exclusively references only a single tooth. Tooth #3 is the only one that Plaintiff alleges he "lost." [#94 at 15] Plaintiff has therefore failed to exhaust his administrative remedies as to his remaining Affected Teeth, and the Court lacks jurisdiction over Plaintiff's FTCA claim, except as it relates to Tooth #3.

certificate of review, his claims *are subject to dismissal*." [#59 at 2-3 (emphases added)]

Plaintiff's deadline to file his required certificate of review in this case has been extended three times, extending his initial deadline of December 29, 2021 by nearly nine months to September 26, 2022. [## 59, 86, 117] In granting the last extension, the Court warned that "NO FURTHER EXTENSIONS WILL BE GRANTED." [#117; *see also* #141 (denying another request for extension pursuant to this warning)]. Thus, the operative and final deadline for Plaintiff to file his required certificate of review was September 26, 2022. Because no such certificate of review was filed, the Court RECOMMENDS that Plaintiff's FTCA claim be DISMISSED WITHOUT PREJUDICE.[19]

IV. PLAINTIFF'S EMERGENCY MOTION

Finally, the Court considers Plaintiff's Emergency Motion. [#160] The Emergency Motion represents that one of Plaintiff's Affected Teeth "exploded in his mouth." [*Id.* at 2 (emphasis omitted)] Plaintiff requests an order that "the crowns . . . be put on [Plaintiff's] teeth." [*Id*.] The Court CONTRUES this Emergency Motion as a request for a preliminary injunction.

Plaintiff has previously requested this same relief from the Court though an earlier-filed Motion for Preliminary Injunction and/or Protective Order. [#30] The Court recommended that this motion be denied, explaining that it requested a disfavored preliminary injunction and that Plaintiff had failed to meet his burden on any of the Preliminary Injunction factors.

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[19] When a plaintiff fails to file a required certificate of review, dismissal without prejudice under Federal Rule of Civil Procedure 41(b) is appropriate. *Coleman v. United States*, No. 20-1403, 2021 WL 2835473, at *3 (10th Cir. July 8, 2021).

[*See generally* #99] This Recommendation was affirmed and adopted by the District Court. [#112] The Emergency Motion before the Court presents no new circumstances or arguments that would alter this Court's previous analysis. Plaintiff asserts that one of his teeth has "exploded," but fails to support this allegation with any evidence or analysis as to how this alters any of the factors. [#160 at 2]; *see Lane v. Buckley*, 643 F. App'x 686, 689 (10th Cir. 2016) ("[A] district court should be wary of issuing an injunction based solely upon allegations and conclusory affidavits submitted by plaintiff." (citation omitted)). Moreover, the Court's further analysis of the Complaint's merits cuts strongly against granting the Emergency Motion—even more than when the Court considered Plaintiff's original request for a preliminary injunction. [*See* #99 at 11 n.6] As discussed above, the Court recommends dismissing the Complaint in its entirety. The Emergency Motion, with a single unsupported and vague allegation of further tooth damage, does nothing to alter that recommendation. Accordingly, the Court RECOMMENDS that the Emergency Motion be DENIED.

V. CONCLUSION

For the reasons set forth above, the Court RECOMMENDS that the Motions to Dismiss be GRANTED, that the Complaint be DISMISSED, and that the Emergency Motion be DENIED. More specifically, the Court RECOMMENDS that:

1. Plaintiff's claim against Ms. Fellows be DISMISSED WITHOUT PREJUDICE;
2. Plaintiff's claim against Dr. Burkley, Ms. Schouweiler, and Ms. Dunn be DISMISSED WITH PREJUDICE;

3. Plaintiff's claim against the BOP be DISMISSED WITHOUT PREJUDICE;
4. Plaintiff's claim against the United States be DISMISSED WITHOUT PREJUDICE;
5. Plaintiff's Emergency Motion be DENIED; and
6. If the Recommendation is Adopted, Plaintiff be given 14 days to file an Amended Complaint limited to claims for injunctive relief against the BOP.[20]

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[20] Within fourteen days after service of a copy of this Recommendation, any party may serve and file written objections to the magistrate judge's proposed findings of fact, legal conclusions, and recommendations with the Clerk of the United States District Court for the District of Colorado. 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72(b); *Griego v. Padilla (In re Griego)*, 64 F.3d 580, 583 (10th Cir. 1995). A general objection that does not put the district court on notice of the basis for the objection will not preserve the objection for *de novo* review. "[A] party's objections to the magistrate judge's report and recommendation must be both timely and specific to preserve an issue for *de novo* review by the district court or for appellate review." *United States v. 2121 East 30th Street*, 73 F.3d 1057, 1060 (10th Cir. 1996). Failure to make timely objections may bar *de novo* review by the district judge of the magistrate judge's proposed findings of fact, legal conclusions, and recommendations and will result in a waiver of the right to appeal from a judgment of the district court based on the proposed findings of fact, legal conclusions, and recommendations of the magistrate judge. *See Vega v. Suthers*, 195 F.3d 573, 579-80 (10th Cir. 1999) (holding that the district court's decision to review magistrate judge's recommendation *de novo* despite lack of an objection does not preclude application of "firm waiver rule"); *Int'l Surplus Lines Ins. Co. v. Wyo. Coal Refining Sys., Inc*., 52 F.3d 901, 904 (10th Cir. 1995) (finding that cross-claimant waived right to appeal certain portions of magistrate judge's order by failing to object to those portions); *Ayala v. United States*, 980 F.2d 1342, 1352 (10th Cir. 1992) (finding that plaintiffs waived their right to appeal the magistrate judge's ruling by

DATED: December 14, 2022

BY THE COURT:

s/Scott T. Varholak
United States Magistrate Judge

failing to file objections). *But see, Morales-Fernandez v. INS*, 418 F.3d 1116, 1122 (10th Cir. 2005) (holding that firm waiver rule does not apply when the interests of justice require review).

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Judge Charlotte N. Sweeney

Civil Action No. 1:21-cv-01589-CNS-STV

PETER GEORGE NOE,

Plaintiff,

v.

UNITED STATES GOVERNMENT, BERKLEY, DR.,
H. SCHOUWEILER, FEDERAL BUREAU OF PRISONS,
DUNN, R.N., and FELLOWS, R.N.,

Defendants.

ORDER

This matter comes before the Court on Plaintiff's Objection to Magistrate Judge Varholak's Report and Recommendation to (1) grant Defendants' Partial Motion to Dismiss and Defendant United States' Partial Motion to Dismiss Pursuant to Federal Rule of Civil Procedure 41(b), and (2) deny Plaintiff's Motion for an Emergency Order. (ECF Nos. 114, 144, 160, 162). As set forth below, the Court OVERRULES Plaintiff's objections and AFFIRMS and ADOPTS the Recommendation.

I. BACKGROUND

This case arises from a medical malpractice claim by Plaintiff, pro se, alleging inadequate dental care while incarcerated at USP Florence ADMAX (ADX), which is

a Bureau of Prisons (BOP) facility.[1] (ECF No. 94, pp. 6-19). In his Amended Complaint, Plaintiff raises three claims for relief: (1) violation of his Eighth Amendment rights pursuant to *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971) by (a) Dr. Burkley, dentist; (b) Schouweiler, a dental assistant; (c) Dunn, a registered nurse; and (d) Fellows, a registered nurse; (2) medical negligence against the United States under the Federal Tort Claims Act (FTCA) for Defendant Burkley's refusal to provide dental crowns, and (3) violation of the Eighth Amendment against the BOP and seeking injunctive relief for enforcing the policy to deny inmates dental crowns. (*Id.*, pp. 3-5).

Plaintiff specifically alleges that starting in November 2019, he received inadequate dental care for five teeth: Teeth 1 and 2 were "all filling from previous dental work" but, per Defendant Burkley, were "not medically appropriate for extraction" and needed crowns; Tooth 3 was "broken in half" and caused substantial pain but was not considered medically appropriate for extraction and needed a crown; Teeth 4 and 5 caused discomfort but could be repaired with fillings. (ECF No. 94, pp. 6-7). Allegedly, Defendant Burkley informed Plaintiff that he would lose the three teeth that needed crowns because ADX had an informal policy that dentists were not allowed to provide crowns due to the related cost. (*Id*., p. 9). Defendant Burkley also allegedly

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[1] Considering Plaintiff's *pro se* status, the Court reviews his filings liberally. *See Haines v. Kerner*, 404 U.S. 519, 520 (1972); *Hall v. Bellmon*, 935 F.2d 1106, 1110 n.3 (10th Cir. 1991). However, while the Court must construe a *pro se* litigant's pleadings liberally, Plaintiff's *pro se* status does not excuse his obligation to comply with fundamental procedural requirements. *See Garrett v. Selby Connor Maddux & Janer*, 425 F.3d 836, 840 (10th Cir. 2005).

informed Plaintiff at the initial appointment that there was a "one procedure, per inmate, per visit policy" and that Plaintiff would have to have the other four teeth repaired at separate appointments after Defendant Burkley repaired Tooth 3 in the first appointment. (*Id*, p. 8).

Unfortunately, despite filling Tooth 3, it had to be extracted; Plaintiff alleges that it could have been saved with a simple crown if not for the BOP's practice of not permitting crowns for incarcerated persons. (*Id*, p. 11). Due to numerous factors, not including the COVID-19 pandemic, Plaintiff was placed on a waitlist for approximately a year and had to make numerous requests to be seen by Dental. On August 27, 2020, Plaintiff had x-rays taken of Teeth 4 and 5. (*Id.*, p. 26). On November 12, 2020, Defendant Burkely placed a filling in Tooth 4; Plaintiff's request for same-appointment treatment for his other teeth was refused. (*Id.*, p. 13). On April 1, 2021, Plaintiff received treatment for Tooth 5. (*Id*., pp. 15, 28).

On December 14, 2022, Magistrate Judge Varholak recommended granting Defendants' motions to dismiss, finding that Plaintiff's claim (1) against Defendant Fellows should be dismissed without prejudice because Defendant Fellows has absolute immunity as a Public Health Service officer and, therefore, the Court lacks subject matter jurisdiction over the claim; (2) against Defendants Burkley, Schouweiler, and Dunn be dismissed with prejudice because, under *Egbert v. Boule*, 142 S. Ct. 1793 (2022), a *Bivens* remedy is not available as there is an alternative remedial scheme in place within the BOP; (3) of an Eighth Amendment violation and request for injunctive relief against the BOP be dismissed without prejudice due to failure to allege a constitutional violation or risk of future harm; and (4) claim against

the United States under the FTCA be dismissed without prejudice for failure to file a certificate of review. (ECF No. 162, pp. 8-29). The Magistrate Judge also recommended denying Plaintiff's emergency motion for dental care, construing it as a motion for a preliminary injunction, and finding that it failed to meet any of the preliminary injunction factors. (*Id*., pp. 29-30).

Plaintiff timely filed his Objection, arguing that (1) the Magistrate Judge erred in applying *Egbert* and has a valid *Bivens* claim, (2) he has stated a claim for injunctive relief for an Eighth Amendment violation; and (3) the Magistrate Judge erred in dismissing his FTCA claim for failure to file a certificate of review. (ECF No. 163, pp. 1-13).

II. STANDARD OF REVIEW

When a magistrate judge issues a recommendation on a dispositive matter, Federal Rule of Civil Procedure 72(b)(3) requires that the district judge "determine *de novo* any part of the magistrate judge's [recommendation] that has been properly objected to." An objection to a recommendation is properly made if it is both timely and specific. *United States v. 2121 East 30th St.*, 73 F.3d 1057, 1059–60 (10th Cir. 1996). An objection is sufficiently specific if it "enables the district judge to focus attention on those issues—factual and legal—that are at the heart of the parties' dispute." *Id*. at 1059. In conducting its review, "[t]he district judge may accept, reject, or modify the [recommendation]; receive further evidence; or return the matter to the magistrate judge with instructions." Fed. R. Civ. P. 72(b)(3).

Rule 12(b)(1) governs dismissal challenges for lack of subject matter jurisdiction and assumes two forms: factual or facial. In the first, the moving party may

"facially attack the complaint's allegations as to the existence of subject matter jurisdiction." *Merrill Lynch Bus. Fin. Servs., Inc. v. Nudell*, 363 F.3d 1072, 1074 (10th Cir. 2004). When reviewing a facial attack, courts must accept a complaint's allegations in the complaint as true. *Ratheal v. United States*, No. 20-4099, 2021 WL 3619902, at *3 (10th Cir. Aug. 16, 2021) (citation omitted). In the second, a party may "go beyond" the complaint's allegations by presenting evidence challenging the factual basis "upon which subject matter jurisdiction rests." *Nudell*, 363 F.3d at 1074 (citation omitted). When reviewing a factual attack, courts cannot "presume the truthfulness of the complaint's factual allegations," and may consider documents outside the complaint without converting the motion to dismiss into a motion for summary judgment. *Ratheal*, 2021 WL 3619902, at *3. In this instance, the plaintiff bears the burden of establishing subject matter jurisdiction as the party asserting it exists. *Basso v. Utah Power & Light Co.*, 495 F.2d 906, 909 (10th Cir. 1974).

Under Rule 12(b)(6), a court may dismiss a complaint for "failure to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true and interpreted in the light most favorable to the non-moving party, to state a claim to relief that is plausible on its face. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). Additionally, the complaint must sufficiently allege facts supporting all the elements necessary to establish an entitlement to relief under the legal theory proposed; however, a complaint may be dismissed because it asserts a legal theory not cognizable as a matter of law. *Forest Guardians v. Forsgren*, 478 F.3d 1149, 1160 (10th Cir. 2007); *Golan v. Ashcroft*, 310 F. Supp. 2d 1215, 1217 (D.

Colo. 2004). A claim is not plausible on its face "if [the allegations] are so general that they encompass a wide swath of conduct, much of it innocent," and the plaintiff has failed to "nudge[the] claims across the line from conceivable to plausible." *Robbins v. Oklahoma*, 519 F.3d 1242, 1247 (10th Cir. 2008) (quoting *Twombly*, 550 U.S. at 570). The standard, however, remains a liberal pleading standard, and "a well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of those facts is improbable, and that a recovery is very remote and unlikely." *Dias v. City & Cty. of Denver*, 567 F.3d 1169, 1178 (10th Cir. 2009) (internal quotations and citation omitted).

III. ANALYSIS

A. Objections Not Raised and Conceded Claims

Plaintiff does not contest that Defendant Fellows has absolute immunity as a PHS officer under 42 U.S.C. § 233(a), and that the *Bivens* claim against her should be dismissed for lack of subject matter jurisdiction. (ECF No. 162, pp. 8-10); *see Hui v. Castaneda*, 559 U.S. 799, 808 (2010) ("[T]he text of § 233(a) plainly indicates that it precludes a Bivens action against petitioners for the harm alleged in this case."). Plaintiff also does not contest the denial of his motion for an emergency order. (ECF No. 160). A party's failure to file such written objections may bar the party from a *de novo* determination by the District Judge of the proposed findings and recommendations. *Thomas v. Arn*, 474 U.S. 140, 150 (1985). When this occurs, the Court is "accorded considerable discretion" and "may review a magistrate's report under any standard it deems appropriate." *Summers v. State of Utah*, 927 F.2d 1165, 1167 (10th Cir. 1991) (citing *Thomas*, 474 U.S. at 150). After reviewing all the relevant pleadings, the Court concludes that Magistrate Judge Varholak's analysis

was thorough and comprehensive, the Recommendation is well-reasoned, and the Court finds no clear error.

B. *Bivens* Claims

Plaintiff objects to the dismissal of his *Bivens* claims against the individual Defendants, arguing that the Magistrate Judge erred in applying *Egbert* to find that he cannot bring a *Bivens* claim against BOP officials. (ECF No. 163, pp. 1-3). Plaintiff argues that *Egbert* does not overrule *Bivens* and *Egbert* only applies if the case or claim creates a new *Bivens* context. (*Id*.). Prior to *Egbert*, the court's analysis of an alleged *Bivens* claim proceeded in two steps. First, the court examined whether the case presented a new Bivens context or involves a new category of defendants (i.e., is it meaningfully different from the three cases where the Court has implied a damages action: a Fourth Amendment claim against law enforcement, a Fifth Amendment due-process employment-discrimination claim, and an Eighth Amendment claim involving medical care in prison.). *See Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971); *Davis v. Passman*, 442 U.S. 228 (1979); *Carlson v. Green*, 446 U.S. 14 (1980). Second, if the claim presented a new context, the court examined whether there were any alternative remedial structures present or other special factors that counseled hesitation about granting the extension of the claim. *Hernandez v. Mesa*, 140 S. Ct. 735, 743 (2020) (internal quotations and citations omitted).

In 2022, however, the Supreme Court determined that the analysis could be boiled down to one issue: "whether there is any reason to think that Congress might be better equipped to create a damages remedy." *Egbert*, 142 S. Ct. at 1803. The Court must only examine "whether it, rather than the political branches, is better equipped to decide whether existing remedies

should be augmented by the creation of a new judicial remedy." *Id.* at 1804 (internal quotations and citation omitted). The Tenth Circuit subsequently clarified that "courts may dispose of *Bivens* claims for two independent reasons: Congress is better positioned to create remedies in the [context considered by the court], and the Government already has provided alternative remedies that protect plaintiffs." *Silva v. United States*, 45 F.4th 1134, 1141 (10th Cir. 2022) (internal quotations omitted).

Plaintiff argues that his claims should not be dismissed because they are similar to *Carlson*. Unfortunately, that is not the case. Plaintiff's claims present a new *Bivens* context and are factually distinct from *Carlson*—a case pertaining to an incarcerated person's wrongful death due to prison officials failing to give proper medical attention. *Carlson*, 446 U.S. at 17. Applying *Egbert* to the instant case, Plaintiff's claims of Eighth Amendment violations arise in the federal prison context and he is asserting claims against BOP officials. The BOP Administrative Remedy Program is a regulatory creation of the BOP. *See* 28 C.F.R. § 542.10(a) ("The purpose of the Administrative Remedy Program is to allow an inmate to seek formal review of an issue relating to any aspect of his/her own confinement."). As the Magistrate Judge noted, the BOP Administrative Remedy Program qualifies as an adequate alternative remedy and his *Bivens* claims must be dismissed. *See Silva*, 45 F.4th at 1141 (affirming the district court's dismissal of the plaintiff's claims of excessive force against BOP officials). Since *Egbert*, a *Bivens* action is not just a "disfavored judicial activity" but "is impermissible in virtually all circumstances." *Id.* at 1140. Therefore, the Court must dismiss with prejudice Plaintiff's *Bivens* claims against Defendants Burkley, Schouweiler, and Dunn.

C. Eighth Amendment Injunctive Relief

Plaintiff argues that his Amended Complaint states a claim for injunctive relief. In Plaintiff's Amended Complaint, he alleged that the BOP was "enforcing a policy that is deliberately indifferent to serious medical needs" by instructing "all of the dentists that they are never to do crowns even when extraction is not 'medically appropriate' to solve the issue." (ECF No. 94, p. 19).

In order to establish an Eighth Amendment violation, Plaintiff must show: (1) a prison official's act or omission resulted in a deprivation that is objectively sufficiently serious; and (2) the prison official must have a sufficiently culpable state of mind, which amounts to one of deliberate indifference to inmate health or safety. *Farmer v. Brennan*, 511 U.S. 825, 834 (1994) (internal quotations and citations omitted). A medical need is considered sufficiently serious "if it is one that has been diagnosed by a physician as mandating treatment or one that is so obvious that even a lay person would easily recognize the necessity for a doctor's attention." *Hunt v. Uphoff*, 199 F.3d 1220, 1224 (10th Cir. 1999).

To prevail on a motion for a preliminary injunction, the movant must prove: (1) a substantial likelihood of prevailing on the merits; (2) irreparable injury unless the injunction is issued; (3) that the threatened injury (without the injunction) outweighs the harm that the preliminary injunction may cause the opposing party; and (4) that the injunction will not adversely affect the public interest. *Free the Nipple-Fort Collins v. City of Fort Collins, Colorado*, 916 F.3d 792, 797 (10th Cir. 2019) (internal quotations and citation omitted). "An injunction can issue only if each factor is established." *Denver Homeless Out Loud v. Denver, Colorado*, 32 F.4th 1259, 1277 (10th Cir. 2022) (citation omitted).

The final two requirements (harm to the opposing party and the public interest) merge when the Government is the opposing party. *Id*. at 1278 (citing *Nken v. Holder*, 556 U.S. 418, 435 (2009)). The Tenth Circuit's definition of "probability of success" is liberal, especially where "the moving party has established that the three 'harm' factors tip decidedly in its favor." *Heideman v. S. Salt Lake City*, 348 F.3d 1182, 1189 (10th Cir. 2003).

The Magistrate Judge noted that Plaintiff failed to allege that the application of the BOP's "no crowns" policy resulted in the violation of his Eighth Amendment rights, or that the BOP would do so in the future; therefore, injunctive relief was not appropriate. (ECF No. 162, p. 25). In particular, the Magistrate Judge determined that Plaintiff had not alleged an extreme case where the only dental care offered was extraction and did not allege that he was in a situation where there could be a potential deliberate indifference claim (i.e., that Plaintiff was (1) an incarcerated person who had dental problems that caused substantial pain, (2) the doctor determined that medical extraction was not appropriate and refused to extract the tooth/teeth, (3) routine dental procedures or fillings were not medically appropriate, (4) the recommended course of action was to place a crown on the tooth, and (5) a prison policy prohibited such a procedure or the doctor refused to place a crown on the tooth). (*See* ECF No. 162, p. 25 n.17). It was clear from the Amended Complaint that Tooth 3 was filled but then later extracted. The Amended Complaint is essentially silent as to the treatment of Teeth 1 and 2 (teeth that Plaintiff alleges need crowns), and teeth 4 and 5 only had tooth sensitivity to hot and cold food and beverage that could be repaired with fillings. The Magistrate Judge, therefore, recommended dismissal without

prejudice with leave to amend the claims (with a focus on Teeth 1 and 2 and whether Plaintiff was denied a crown for a tooth where it was medically inappropriate to extract and where a crown was the appropriate course of treatment). (*Id*.). Accordingly, the Court finds that Plaintiff fails to state a claim for injunctive relief based on a "no crowns" policy, and Plaintiff's claims for injunctive relief against the BOP are dismissed without prejudice.

Plaintiff now clarifies that his argument is that he was denied crowns for his teeth, that they have been diagnosed as warranting a crown, that his teeth are not medically appropriate for extraction, and that due to this alleged BOP policy he is being denied dental care that rises to the level of deliberate indifference. (ECF No. 163, pp. 3-4). Should Plaintiff wish the Court to consider this argument, he is hereby given fourteen (14) days to file an Amended Complaint to attempt to assert such a claim.

D. FTCA Claim

Plaintiff argues that the Magistrate Judge erred in dismissing his FTCA claim against the United States due to his failure to procure a certificate of review. As this Court has previously noted, Plaintiff was given multiple extensions of time to contact an expert and have the certificate of review furnished. (*See* ECF Nos. 136, 154).

The substantive law of the state in which the alleged tort occurred applies to Plaintiff's FTCA claim. *Hill v. SmithKline Beecham Corp.*, 393 F.3d 1111, 1116 (10th Cir. 2004). Colorado's certificate statute, Colorado Revised Statute § 13-20-602(1)(a), requires a *pro se* plaintiff to file a certificate of review when raising a claim of professional negligence. *Coleman v. United States*, 803

F. App'x 209, 211 (10th Cir. 2020). A certificate of review is necessary "for any claim based on allegations of professional negligence that requires expert testimony to establish a prima facie case." *Martinez v. Badis*, 842 P.2d 245, 250 (Colo. 1992). The Magistrate Judge determined that a certificate of review was necessary as the FTCA claim revolved around Defendant Burkley's refusal to provide crowns for Teeth 1, 2, and 3. (ECF No. 162, p. 27). This Court finds that expert testimony would be necessary to establish a prima facie case of an FTCA violation and therefore Plaintiff needed to obtain a certificate of review.

Specifically, Plaintiff needed to obtain a certificate of review that shows (1) he consulted an expert; (2) the expert reviewed the relevant information and concluded that the plaintiff's negligence claim does not lack substantial justification; and (3) the expert is competent and qualified to offer an opinion. *RMB Servs., Inc. v. Truhlar*, 151 P.3d 673, 675 (Colo. App. 2006). The purpose of the certificate of review requirement is "to prevent the filing of frivolous professional malpractice actions, to avoid unnecessary time and costs in defending professional negligence claims, and to reduce the resulting costs to society." *Williams v. Boyle*, 72 P.3d 392, 396 (Colo. App. 2003). The certificate of review needed to be filed within sixty days after the service of the complaint, counterclaim, or crossclaim unless the court found good cause to extend the time to file. Colo. Rev. Stat. Ann. § 13-20-602(1)(a). Plaintiff filed his initial Complaint on May 26, 2021, and two Amended Complaints on September 15, 2021, and April 27, 2022. (ECF Nos. 1, 14, 94). Despite being given three extensions, Plaintiff did not file a certificate of review by the last deadline of September 26, 2022. (*See* ECF No. 117).

Plaintiff objects, arguing that the BOP's mail policy prevented him from obtaining a certificate of review because he could not contact third parties and that the BOP failed to give him the documents he needed to conduct the certificate of review. This Court previously addressed this argument in its prior Order. (ECF No. 154). This Court found that Plaintiff has previously furnished exhibits showing that he contacted various law firms in 2022 and corresponded with them and Lt. A. Gonzales, a Special Investigative Services Lieutenant with the BOP, has also confirmed that Plaintiff can communicate directly with members of the public, medical professionals, or any other potential experts. (*See* ECF Nos. 123, pp. 10-13; 130-1). Plaintiff has had sufficient time to obtain a certificate of review and dismissal without prejudice of his claim against the United States for failure to file a certificate of review is proper. *Coleman*, 803 F. App'x at 213.

IV. CONCLUSION

Accordingly, Plaintiff's Objection is OVERRULED, and Magistrate Judge Varholak's Report and Recommendation is AFFIRMED and ADOPTED as an Order of this Court. Defendants' motions to dismiss are GRANTED. (ECF No. 114, 144). Plaintiff's motion for an emergency order is DENIED. (ECF No. 160).

IT IS FURTHER ORDERED that Plaintiff may, if he chooses to do so, file a Second Amended Complaint limited to claims for injunctive relief against the BOP within fourteen (14) days.

DATED this day 13th of January 2023.

BY THE COURT:

Charlotte N. Sweeney
United States District Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 21-cv-01589-CNS-STV

PETER GEORGE NOE,

Plaintiff,

v.

UNITED STATES GOVERNMENT, BERKLEY, H. SCHOUWEILER, FEDERAL BUREAU OF PRISONS, DUNN, and FELLOWS,

Defendants.

FINAL JUDGMENT

In accordance with the orders filed during the pendency of this case, and pursuant to Fed. R. Civ. P. 58(a), the following Final Judgment is hereby entered.

Pursuant to the Text Only ORDER of U.S. District Judge Charlotte N. Sweeney issued on May 9, 2023, [ECF No. 187] it is

ORDERED that the plaintiff's claims are DISMISSED without prejudice. It is

FURTHER ORDERED that judgment is entered in favor of the defendants, Fellows, Burkley, H. Schouweiler, Dunn, Federal Bureau of Prisons, and United States Government, and against the plaintiff, Peter George Noe. It is

FURTHER ORDERED that this case is closed.

Dated at Denver, Colorado this 9th day of May, 2023.

FOR THE COURT:
JEFFREY P. COLWELL, CLERK

By: s/ J. Dynes
J. Dynes, Deputy Clerk

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 23-1025
(D.C. No. 1:21-CV-01589-CNS-STV)
(D. Colo.)

PETER GEORGE NOE,

Plaintiff - Appellant,

v.

UNITED STATES GOVERNMENT; BERKLEY, DR.; H. SCHOUWEILER; FEDERAL BUREAU OF PRISONS; DUNN, R.N.; FELLOWS, R.N.,

Defendants - Appellees.

ORDER AND JUDGMENT*

Before EID, CARSON, and ROSSMAN, Circuit Judges.

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* After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist in the determination of this appeal. *See* Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument. This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

Peter George Noe, pro se, appeals the district court's judgment dismissing claims he raised concerning dental care he received from prison staff. Exercising jurisdiction under 28 U.S.C. § 1291, we affirm.

I. BACKGROUND

Noe is a federal prisoner housed at the United States Penitentiary Administrative Maximum Facility in Florence, Colorado. He filed a pro se action against the United States, the Bureau of Prisons (BOP), and four individual BOP employees in their individual capacities: a dentist (defendant Burkley), a dental assistant (defendant Schouweiler), and two nurses (defendants Dunn and Fellows). In the operative amended complaint, Noe alleged that at a November 2019 visit with Dr. Burkley, he complained of substantial pain in three teeth.[1] Dr. Burkley told Noe that the three teeth needed crowns, but because prison policy did not allow crowns due to the expense, Dr. Burkley planned to use fillings. Dr. Burkley then put a filling in one of those teeth ("tooth #3") and declined to treat the other two teeth because of a one-tooth-per-visit policy. When Noe complained that tooth #3 was worse, Dr. Burkley tried another filling. And when that did not work, Dr. Burkley tried a pin and a filling. The third procedure, which occurred in June 2020, broke tooth #3, which then had to be extracted. Noe received fillings in the other two teeth in November 2020 and April 2021. During the eighteen months between Noe's initial visit and the last repair, he was in substantial pain and was denied pain medication. The teeth continue to cause him substantial pain.

[1] Noe also complained about two other teeth, but treatment with respect to them is not at issue in this appeal.

Noe asserted three claims: (1) Eighth Amendment deliberate indifference against the individual defendants under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971); (2) a claim under the Federal Tort Claims Act (FTCA) against the United States; and (3) a claim for injunctive relief against the BOP based on the no-crowns policy. He sought declarations that defendants were liable on each claim, damages on claims one and two, and injunctive relief on claim three.

Noe sought and received multiple extensions of time to file a certificate of review for his FTCA claim, but he never filed one.[2] Defendants eventually filed motions to dismiss. In December 2022, the magistrate judge recommended: (1) dismissing the *Bivens* claim as not cognizable under applicable precedent, because the BOP's Administrative Remedy Program provided an alternative remedy Noe could have used to obtain relief; (2) dismissing the FTCA claim because Noe failed to obtain a certificate of review; and (3) dismissing the claim for injunctive relief because any "no crowns" policy did not violate the Eighth Amendment, but with leave to amend the claim to add allegations that might show such a policy amounted to an Eighth Amendment violation.

Noe filed objections, which included factual allegations supporting the claim for injunctive relief against the BOP that the magistrate judge had outlined. The district court overruled the objections, adopted the recommendation, and granted the motions to dismiss.

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[2] As we later explain more fully, a certificate of review is required under Colorado law to show that a plaintiff has consulted an expert who has concluded that the plaintiff's claims do not lack substantial justification. *See* Colo. Rev. Stat. § 13-20-602(1)(b)(3)(a)(I)–(II).

However, the court allowed Noe fourteen days to file an amended complaint limited to the claim for injunctive relief against the BOP.

Noe never filed an amended complaint. Instead, he filed a notice of appeal on January 30, 2023.

II. APPELLATE JURISDICTION

Defendants filed a motion to dismiss this appeal for lack of jurisdiction, arguing that the district court's order granting their motions to dismiss was not a final, appealable order. However, Noe has since filed a motion in the district court stating he did not intend to file an amended complaint and asking for a final judgment. On May 9, 2023, the district court entered a final judgment. Noe's notice of appeal, therefore, "is treated as filed on the date of and after the entry" of the final judgment, Fed. R. App. P. 4(a)(2). The notice of appeal is therefore timely and confers appellate jurisdiction on this court. Consequently, we deny as moot defendants' motion to dismiss and two related motions Noe filed ("Motion to Voluntarily Dismiss Motions" and "Motion for Clarification").

III. DISCUSSION

Noe raises five issues on appeal, which we address in the following order: (1) his *Bivens* claim is cognizable; (2) the district court should have allowed him to amend his complaint to cite certain statutes; (3) the district court abused its discretion in finding an expert was needed for his FTCA claim; (4) the district court should have granted him a fourth extension of time to file a certificate of review for his FTCA claim; and (5) the district court erred in denying his motion to appoint an expert. Liberally construing Noe's pro se filings, but without acting as his advocate, *see Yang v.*

Archuleta, 525 F.3d 925, 927 n.1 (10th Cir. 2008), we reject these arguments.

A. *Bivens* claim

In *Bivens*, the Supreme Court "authorized a damages action against federal officials for alleged violations of the Fourth Amendment." *Egbert v. Boule*, 596 U.S. 482, 486 (2022). Since then, the Supreme Court has only twice "fashioned new causes of action under the Constitution." *Id.* at 490. In *Davis v. Passman*, 442 U.S. 228 (1979), the Court recognized a damages action for a former congressional staffer's Fifth Amendment sex-discrimination claim. And in *Carlson v. Green*, 446 U.S. 14 (1980), the Court implied a damages action for a federal prisoner's inadequate-care claim under the Eighth Amendment.

However, the Supreme Court has since "emphasized that recognizing a cause of action under *Bivens* is a disfavored judicial activity." *Egbert*, 596 U.S. at 491 (internal quotation marks omitted). Accordingly, the Court eventually settled on a two-step analysis of proposed *Bivens* claims. At step one, a court has to consider "whether the case presents 'a new *Bivens* context'—*i.e.*, is it 'meaningfully' different from the three cases in which the [Supreme] Court has implied a damages action." *Id.* at 492 (brackets omitted) (quoting *Ziglar v. Abbasi*, 582 U.S. 120, 139 (2017)). And at step two, "if a claim arises in a new context, a *Bivens* remedy is unavailable if there are 'special factors' indicating that the Judiciary is at least arguably less equipped than Congress to 'weigh the costs and benefits of allowing a damages action to proceed.'" *Id.* (quoting *Abbasi*, 582 U.S. at 136).

Noe argues that his *Bivens* claim is cognizable because the factual context of his case is like the

factual context in *Carlson*, and factual similarity is sufficient to permit a *Bivens* claims to proceed regardless of whether a plaintiff has a meaningful alternative remedy. Noe also argues that the BOP's Administrative Remedy Program (ARP) is not a meaningful alternative to a civil action. Because the district court dismissed the *Bivens* claim with prejudice for failure to state a claim for relief, our review is de novo. *See Albers v. Bd. of Cnty. Comm'rs*, 771 F.3d 697, 700 (10th Cir. 2014).

We need not decide whether Noe's case is meaningfully different from *Carlson*, because in the wake of *Egbert* and *Silva v. United States*, 45 F.4th 1134 (10th Cir. 2022), the availability of the ARP is sufficient to foreclose a *Bivens* claim despite any factual similarity between the two. In *Silva*, we observed that *Egbert* "appeared to alter the existing two-step *Bivens* framework by stating that 'those steps often resolve to a single question: whether there is any reason to think that Congress might be better equipped to create a damages remedy.'" 45 F.4th at 1139 (quoting *Egbert*, 596 U.S. at 492). And we viewed "the key takeaway from *Egbert*" as being "that courts may dispose of *Bivens* claims for 'two *independent* reasons: Congress is better positioned to create remedies in the [context considered by the court], and the Government already has provided alternative remedies that protect plaintiffs.'" 45 F.4th at 1141 (quoting *Egbert*, 596 U.S. at 494) (emphasis and brackets in *Silva*). We concluded that, in light of Supreme Court precedent, "the [ARP] is an adequate 'means through which allegedly unconstitutional actions can be brought to the attention of the BOP and prevented from recurring.'" *Id.* (ellipsis omitted) (quoting *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 74 (2001)). And "'[b]ecause *Bivens* is concerned solely with deterring the unconstitutional acts of individual officers,'" we determined that "the availability

of the [ARP] offers an independently sufficient ground to foreclose [a] *Bivens* claim" brought by a federal prisoner. *Id.* (quoting *Egbert*, 596 U.S. at 498).[3]

Read together, *Egbert* and *Silva* direct that where the government has provided an alternative remedy, a court generally should not recognize a *Bivens* claim even if the factual context is not meaningfully different from that in *Bivens*, *Davis*, or *Carlson*. And here, the ARP, which *Silva* says is an adequate alternative remedy, is available to Noe. Thus, Noe's *Bivens* claim is, as the district court concluded, not cognizable.

As Noe points out, at least one district court (outside the Tenth Circuit) has said that if the context is not meaningfully different from *Bivens*, *Davis*, or *Passman*, the analysis ends there, and the *Bivens* claims can proceed without the step-two inquiry into whether an adequate alternative remedy exists. *See Kennedy v. Massachusetts*, 643 F. Supp. 3d 253, 259 (D. Mass. 2022) ("[B]ecause this court is not fashioning a new *Bivens* context, the Court need not consider alternative remedial structures.").[4] But precedential decisions of this court bind later panels unless there has been

---

[3] In *Silva*, we noted that *Egbert* did not overrule *Abbasi* and that there was some tension between *Abbasi*'s two-step approach and *Egbert*'s apparent collapsing of those two steps into one. *See* 45 F.4th at 1139 & n.4. But we "decline[d] to address or resolve any [such] tension . . . because it [was] not necessary to dispose of the appeal before us." *Id.* Likewise, here, we may decide this appeal without resolving any tension between *Abbasi* and *Egbert* given our reliance on *Silva*'s interpretation of *Egbert*.

[4] Noe relies on another case taking the same approach, *Ibuado v. Federal Prison Atwater*, No. 1:22-cv-00651, 2022 WL 16811880, at *4 (E.D. Cal. Nov. 8, 2022) (unpublished), but that decision—a magistrate judge's recommendation—was vacated by the magistrate judge before the district court ever ruled on it, *see* 2023 WL 159568, at *1 (E.D. Cal. Jan. 11th, 2023) (unpublished).

"en banc reconsideration or a superseding contrary decision of the U.S. Supreme Court." *United States v. Ensminger*, 174 F.3d 1143, 1147 (10th Cir. 1999) (internal quotation marks omitted). Because neither of those conditions is satisfied, we are bound by *Silva*'s interpretation of *Egbert*.

B. Amendment of complaint

A day before the district court entered its order adopting the magistrate judge's recommendation and granting the motions to dismiss, Noe filed a motion to amend his complaint to add citations to 5 U.S.C. § 702, which is a provision in the Administrative Procedures Act (APA), and to 28 U.S.C. §§ 2201 and 2202, which concern declaratory judgments.[5] The district court struck Noe's motion. Noe claims that citing these statutes, in conjunction with his reliance on the federal-question jurisdictional grant found in 28 U.S.C. § 1331, would have saved his request for declaratory relief as to claims one (*Bivens*) and three (injunctive relief against the BOP).

Noe's appellate argument fails because §§ 1331, 2201, and 2202 do not create any substantive rights, *see Hanson v. Wyatt*, 552 F.3d 1148, 1157 (10th Cir. 2008), and citing them would not have remedied the deficiencies that led to dismissal of claims one or three. Noe also has not shown that relief under § 702 is

[5] In relevant part, § 702 provides: "A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof." With some exceptions not relevant here, § 2201 permits a federal court, "[i]n a case of actual controversy within its jurisdiction," to "declare the rights and other legal relations of any interested party seeking such declaration." And § 2202 allows a court to grant "[f]urther necessary or proper relief based on a declaratory judgment or decree."

available, either by virtue of another statute or because there is no other adequate judicial remedy. *See* 5 U.S.C. § 704 (limiting judicial review under the APA to challenges to "[a]gency action made reviewable by statute" and to "final agency action for which there is no other adequate remedy in court").

C. Expert required for FTCA claim

Colorado's statutes pertaining to a certificate of review are "applicable to professional negligence claims brought against the United States under the FTCA." *Hill v. SmithKline Beecham Corp.*, 393 F.3d 1111, 1117 (10th Cir. 2004). Colorado Revised Statute § 13-20-602(1)(a) provides that a plaintiff has 60 days after service of a complaint seeking damages based on professional negligence of a licensed professional to file a certificate of review "unless the court determines that a longer period is necessary for good cause shown." The certificate of review certifies that the plaintiff's "attorney has consulted a person who has expertise in the area of the alleged negligent conduct" and that the person consulted has concluded that "the claim . . . does not lack substantial justification." § 13-20-602(1)(b)(3)(a)(I)–(II). "[T]he requirements of the certificate of review statute are applicable to civil actions alleging negligence of licensed professionals filed by nonattorney pro se plaintiffs," *Yadon v. Southward*, 64 P.3d 909, 912 (Colo. App. 2002), where "expert testimony would be necessary to establish a prima facie case," Colo. Rev. Stat. § 13-20-601.

In the district court, Noe repeatedly asserted that an expert was required for his FTCA claim, and he sought and received three extensions of time to file a certificate of review. Not until his response to the United States' motion to dismiss—and after the district court denied his fourth request for an extension of time to

file a certificate of review—did he argue that an expert was not necessary because the inadequacy of the treatment he received was self-evident: Dr. Burkley prescribed a crown for tooth #3, he did not provide a crown due to a "no crowns" policy, Noe was left in extreme pain for six months, and Noe lost the tooth. The district court rejected this argument and concluded that an expert was required. It then premised dismissal of the FTCA claim on Noe's failure to provide a certificate of review.

On appeal, Noe repeats his argument that expert testimony was unnecessary. We review a district court's determination regarding the need for expert testimony for an abuse of discretion. *See Shelton v. Penrose/St. Francis Healthcare Sys.*, 984 P.2d 623, 627, 629 (Colo. 1999).

The district court did not abuse its discretion in determining that expert testimony was necessary. Under Colorado law, "the standard of care for medical malpractice is an objective one." *Day v. Johnson*, 255 P.3d 1064, 1069 (Colo. 2011). Thus, Dr. Burkley's subjective opinion that tooth #3 required a crown, coupled with the ultimate failure of alternative treatment, does not, by itself, relieve Noe of the requirement to provide a certificate of review. Instead, an expert was required to evaluate, as an objective matter, whether Dr. Burkley's alternative treatment fell outside the relevant standard of care. The answer to that question does not "lie[] within the ambit of common knowledge or experience of ordinary persons," and therefore Noe had to "establish the controlling standard of care, as well as [Dr. Burkley's] failure to adhere to that standard, by expert opinion testimony." *Melville v. Southward*, 791 P.2d 383, 387 (Colo. 1990).

In contrast, to submit a case of professional negligence "to a jury on a theory of res ipsa loquitur," which is the theory implicit in Noe's argument that an expert is unnecessary, "circumstantial evidence must be such that it is more likely than not that the event was caused by negligence." *Shelton*, 984 P.2d at 627. "The doctrine applies where the cause of injury is so apparent that a lay person is as able as an expert to conclude that such things do not happen in the absence of negligence." *Williams v. Boyle*, 72 P.3d 392, 398 (Colo. App. 2003). "It is only in unusual circumstances that a medical malpractice claim can be proven without the presentation of expert medical opinion to establish the proper standard of care against which the professional's conduct is to be measured." *Shelton*, 984 P.2d at 627.

Noe's case does not present unusual circumstances, nor would a lay person be as able as an expert to conclude that Noe would have lost the tooth but for Dr. Burkley's alleged negligence. The circumstantial evidence only shows Dr. Burkley's subjective opinion that a crown was necessary and that the extensive, alternative treatment he provided ultimately did not work. It is insufficient to show, on its own, that the alternative treatment amounted to negligence, and it is difficult to see how it could show negligence absent expert testimony regarding the standard of care. We therefore conclude that the district court did not abuse its discretion in determining that Noe required expert testimony to establish a prima facie case for his FTCA claim.

D. Extension of time to file certificate of review

Noe sought counsel to help him obtain a certificate of review. The magistrate judge granted that request, but warned Noe that there was no guarantee that any attorney on the court's pro-bono panel would represent

him. Noe never found counsel willing to represent him. And as noted, Noe sought and obtained three extensions of time to file the certificate of review, variously relying on the prison's mail/communications policy and defendants' failure to provide him with copies of his dental x-rays or other medical records. As set out in a memorandum from the warden that Noe repeatedly submitted to the court, the communications policy permitted Noe to communicate only with people on his approved contact list, warned that approved contacts could not circumvent that limitation by forwarding communications or funds, and prohibited contacting anyone through a third party. However, defendants presented an affidavit from a staff lieutenant stating that Noe could communicate with members of the public, including medical professionals, provided the communications did not otherwise violate BOP policies.

The three extensions moved the deadline from approximately December 2021 to September 26, 2022. In granting the third extension, the magistrate judge warned that no further extensions would be granted. As the September deadline approached, Noe sought another extension, asserting that defendants still would not provide him with film of his x-rays (they provided only a paper copy that, according to Noe, did not show the pin that had been put into tooth #3) and that prison policy precluded him from contacting an expert on his own. The district court summarily denied the motion, directing Noe to its previous order upholding the magistrate judge's denial of Noe's motion for an indefinite stay but granting the final extension. In the previous order, the court determined that an indefinite stay would not advance the purpose of the certificate-of-review requirement (to weed out frivolous claims by pro se litigants); Noe had not explained why a paper copy of his x-rays was

unsatisfactory; and because Noe's prior requests for extensions of time "were based on the same communication restrictions," the magistrate judge did not err in denying "any further extension due to the same alleged issue." Suppl. R. at 105. The court also concluded more generally that despite any restrictions on third-party communications, Noe had had enough time to obtain a certificate of review.

On appeal, Noe's argument, although verbose, is that it was unfair to dismiss the FTCA claim on the ground that he failed to obtain a certificate of review when the causes of that failure were the prison's communications policies and defendants' refusal to provide the required medical records. He says that instead, the district court should have granted his fourth motion for an extension of time. Reviewing for an abuse of discretion, *see Rachel v. Troutt*, 820 F.3d 390, 394 (10th Cir. 2016), we see none.

Our resolution of this issue turns on evidence in the record that, despite the alleged limitation in the Warden's memo that Noe can only communicate with those on his approved contact list, he was able to ask for representation from the University of Denver Sturm College of Law's Civil Rights Clinic, *see* Suppl. R. at 20–21 (rejection letter dated October 27, 2021), and at least four law firms, *see id.* at 22 (undated rejection letter from Covington & Burling); *id.* at 83 (rejection letter from Law Offices of Dianne Sawaya dated June 30, 2022); *id.* at 84 (rejection letter from Killmer, Lane & Newman dated June 17, 2022); *id.* at 85 (rejection letter from Wahlberg, Woodruff, Nimmo & Sloane dated May 2, 2022). Noe has not claimed that the DU law clinic or any of the firms were on his approved contact list, or that he was disciplined for

contacting them. Thus, the evidence supports that Noe could communicate directly with members of the public.

But even if, for example, Noe had to get a medical professional on his approved contact list and doing so took as long as he now says it does (four to six months), he had almost eleven months to do so—from October 29, 2021, when he first served defendants, to September 26, 2022, the final deadline the court set to submit the certificate. Moreover, in another case he filed, which the district court discussed (the same magistrate judge was assigned to that case), he was able to get a certificate of review from his aunt, who is a nurse and, apparently, on his approved contact list. He fails to explain why she could not have helped him identify a dentist who could have reviewed his treatment and whom Noe could have tried to put on his approved contact list.[6] And without any showing that he had an expert who could review his medical records, it is irrelevant whether prison officials refused to give him film of his x-rays or any other medical records. In sum, the district court gave Noe a generous amount of time to find an expert and submit the certificate of review. Under the circumstances, it was not an abuse of discretion for the court to refuse to give him more time.

E. Denial of motion to appoint expert

In August 2022, Noe filed a motion asking the district court to appoint an expert under Federal Rule of Evidence 706(a) to complete the certificate of

[6] As mentioned in the next subpart of our decision, the magistrate judge determined at a hearing on Noe's motion to appoint an expert that he could have asked family and friends on his approved contact list to solicit experts to complete the certificate.

review.[7] The magistrate judge held a hearing on the motion and denied it in a minute order for reasons given at the hearing (there is no transcript of the hearing). Noe filed objections, which the district court overruled. The court gave two alternative reasons for upholding the magistrate judge's ruling. First, the court found that Noe's argument that prison policy prevents him from communicating with anyone not on his approved contact list was inconsistent with evidence that he was able to correspond with various law firms in 2022 and with the lieutenant's declaration. The court also observed that at the hearing on the motion, the magistrate judge noted that Noe could contact family and friends on his approved contact list and ask them to solicit experts for the certificate of review. Second, the court determined that Rule 706(a)'s purpose is to appoint an expert to assist the court, not the parties.

We review the denial of a motion to appoint an expert under Rule 706(a) for an abuse of discretion. *Rachel*, 820 F.3d at 397.

Noe argues that the district court abused its discretion by refusing to appoint an expert on the ground that BOP policy does not prevent him from contacting third parties. He argues he presented evidence that prison officials reject mail sent to him by third parties "all the time." Aplt. Br. at 19.

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[7] Rule 706(a) provides:

> On a party's motion or on its own, the court may order the parties to show cause why expert witnesses should not be appointed and may ask the parties to submit nominations. The court may appoint any expert that the parties agree on and any of its own choosing. But the court may only appoint someone who consents to act.

Noe's argument completely overlooks the district court's alternative reason for denying his motion—that Rule 706(a) allows the court to appoint an expert to assist the court, not the parties.[8] Noe's failure to challenge this alternative reason for denying his motion is fatal to his success on this issue: "[W]here a district court's disposition rests on alternative and adequate grounds, a party who, in challenging that disposition, only argues that one alternative is erroneous necessarily loses because the second alternative stands as an independent and adequate basis, regardless of the correctness of the first alternative." *Shook v. Bd. of Cnty. Comm'rs*, 543 F.3d 597, 613 n.7 (10th Cir. 2008).

IV. CONCLUSION

We affirm the district court's judgment. We grant Noe's motion to proceed on appeal without prepayment of costs and fees. We deny Noe's motion to appoint counsel. We deny as moot Appellees' Motion to Dismiss For Lack of Appellate Jurisdiction, Noe's Motion to

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[8] In support of that rationale, the district court relied on *McCleland v. Raemisch*, No. 20-1390, 2021 WL 4469947 (10th Cir. Sept. 30, 2021) (unpublished). In *McCleland*, a panel of this court determined that "[t]he details of Rule 706 make clear that an appointed expert's role is to assist the court, not the parties." *Id.* at *4. The panel pointed out that "'[t]he court [*i.e.*, not a party] must inform the expert of the expert's duties.'" *Id.* (quoting Fed. R. Evid. 706(b)) (second set of brackets in *McCleland*). The panel also observed that under Rule 706, "'[t]he expert must advise the parties of any findings the expert makes'" and "'may be deposed by any party.'" *Id.* (quoting Fed. R. Evid. 706(b)(1)–(2)) (ellipsis omitted). And the panel recognized that Rule 706 "'does not limit a party in calling its own experts.'" *Id.* (quoting Fed. R. Evid. 706(e)). Thus, the panel concluded that "Rule 706 was not designed to fill in the gaps for a party who cannot find or afford an expert." *Id.* at *5.

Voluntarily Dismiss Motions, and Noe's Motion for Clarification.

Entered for the Court

Allison H. Eid
Circuit Judge

UNITED STATES COURT OF APPEALS
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December 22, 2023

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RE: 23-1025, Noe v. United States Government, et al
Dist/Ag docket: 1:21-CV-01589-CNS-STV

Dear Counsel and Appellant:

Enclosed is a copy of the order and judgment issued today in this matter. The court has entered judgment on the docket pursuant to Fed. R. App. P. Rule 36.

Please contact this office if you have questions.

Sincerely,

/s/ Christopher M. Wolpert
Christopher M. Wolpert
Clerk of Court

CMW/klp