No. 23-___

IN THE

Supreme Court of the United States

JOSEPH RANDOLPH MAYS,

Petitioner,

v.

T.B. SMITH, WARDEN, S. MA'AT, JAMIE HOSKINS, V. WILLIS, J. HALFAST, R. MARTIN, LT. CHRISTOPHER, LT. K. HENDRY, OFFICER V. WILKINS, OFFICER GLASS, OFFICER SLAYDON, OFFICER LASSITER, J. CARAWAY, AND JOHN/JANE DOES,

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In *Davis v. Passman,* 442 U.S. 228 (1979) and *Carlson v. Green*, 446 U.S. 14 (1980), this Court made clear that claims for gender discrimination and claims by federal inmate prisoners against prison officials are cognizable under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). However, recent Supreme Court decisions in *Ziglar v. Abbasi*, 582 U.S. 120 (2017) and *Egbert v. Boule*, 596 U.S. 482 (2022) have created confusion in the lower courts as to whether the original cases finding valid *Bivens* claims retain vitality in light of these recent decisions. This case involves a run-of-the mill race discrimination employment claim by a federal inmate prisoner against prison officials, yet the courts below found that this case presented a new, impermissible context under *Bivens*.

Petitioner was a federal inmate prisoner who worked a factory job at the federal institution where he was imprisoned. He was discriminated against on the basis of his race during the commission of his job, and was also fired from that job on the basis of his race.

The question presented is: May a prisoner bring a suit for damages under *Bivens* based on claims of racial discrimination, or have *Abbasi* and *Egbert* eliminated *Bivens* claims for all actions except those that are factually identical to *Bivens*, *Davis*, or *Carlson*?

PARTIES TO THE PROCEEDING

The parties to the proceedings below were Petitioner Joseph Randolph Mays as plaintiff-appellant and Respondents T.B. Smith, Warden, S. Ma'at, Jamie Hoskins, V. Willis, J. Halfast, R. Martin, Lt. Christopher, Lt. K. Hendry, Officer V. Wilkins, Officer Glass, Officer Slaydon, Officer Lassiter, J. Caraway, and John/Jane Does as defendants-appellees. There are no corporate parties requiring a disclosure statement under Supreme Court Rule 29.6.

STATEMENT OF RELATED PROCEEDINGS

Fourth Circuit: *Joseph Randolph Mays v. T.B. Smith, et al.*, No. 20-7450 (Judgment Entered June 6, 2023).

United States District Court for the Eastern District of North Carolina: *Joseph Randolph Mays v. T.B. Smith, et al.*, No. 5:18-CT-3186-FL (Judgment Entered September 30, 2020).

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INTRODUCTION

Petitioner was discriminated against by prison officials on the basis of his race and sought damages under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971); however, the district court and Fourth Circuit determined that Petitioner's claims present a new context under *Bivens* and that special factors counsel against extending *Bivens* to Petitioner's claims.

The rulings below conflict with this Court's precedent and deepen a circuit split. This Court made clear in *Davis v. Passman*, 442 U.S. 228 (1979) and *Carlson v. Green*, 446 U.S. 14 (1980), that claims for gender discrimination and claims by federal inmate prisoners against prison officials are cognizable under *Bivens*. However, in *Ziglar v. Abbasi*, 582 U.S. 120 (2017) and *Egbert v. Boule*, 596 U.S. 482 (2022), this Court narrowed the scope of claims that are cognizable under *Bivens*. In *Abbasi*, the Court noted that "a case can present a new context for *Bivens* purposes if it implicates a different constitutional right; if judicial precedents provide a less meaningful guide for official conduct; or if there are potential special factors that were not considered in previous *Bivens* cases." 582 U.S. at 148. However, a case must be different from previous *Bivens* cases decided by the Supreme Court "in a *meaningful* way." *Id.* at 139 (emphasis added). In *Egbert*, the Court added an additional requirement for courts to consider when determining whether a claim is cognizable under *Bivens*—whether "'Congress is in a better position to decide whether or not the public interest would be served' by imposing a damages action." 596 U.S. at 499 (quoting *Bush v. Lucas*, 462 U.S. 367, 390 (1983)). Since these rulings, there has been

substantial confusion in the lower courts as to what constitutes a "meaningful difference"—and whether the prior cases retain any vitality.

Taking the position that the prior *Bivens* cases do not retain vitality except in circumstances where the facts are *identical* to the prior precedent, the district court improperly concluded that Petitioner's case presented a new, impermissible context under *Bivens*. The Fourth Circuit affirmed. However, these decisions conflict with prior Supreme Court precedent. Federal law requires that treatment based on racial classifications receive a stricter level of scrutiny by courts than treatment based on gender classifications. *Compare Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 201 (1995) (racial classifications receive strict scrutiny) *with Craig v. Boren*, 429 U.S. 190 (1976) (gender classifications receive intermediate scrutiny). And this Court in *Davis* found that claims based on gender discrimination are cognizable under *Bivens*. *Davis*, in turn, relied on race discrimination precedent. *See Bolling v. Sharpe*, 347 U.S. 497 (1954). Therefore, it follows that claims based on racial discrimination, as are present here, must also be cognizable under *Bivens*. That Petitioner was employed while incarcerated should not change this analysis because Petitioner's employment discrimination claims are not unique to the prison context—and are therefore not "meaningfully" different from the claims in *Davis*. But even if Petitioner's status as an inmate were relevant, this Court allowed *Bivens* claims by inmates in *Carlson*. Petitioner's claims also do not implicate national security issues in any way—making the limitations imposed by *Abbasi* and *Egbert* inapposite. In

short, there is simply no legitimate reason to distinguish the claims here from those in *Davis* and *Carlson*. Therefore, the lower courts' conclusions that *Abbasi* and *Egbert* change the *Bivens* analysis under all circumstances and in such a way that any case that is not factually identical to either *Bivens*, *Davis*, or *Carlson* presents a new, impermissible context are wrong and inconsistent with this Court's precedent.

Moreover, the Fourth Circuit's decision deepens a circuit split. The Third Circuit holds that the prior Supreme Court decisions retain vitality following *Abbasi* and *Egbert*, such that prisoners asserting claims for violations of their Fifth Amendment rights do present cognizable claims under *Bivens*. *See, e.g.*, *Bistrian v. Levi*, 912 F.3d 79, 90 (3d Cir. 2018) (holding that "an inmate's claim that prison officials violated his Fifth Amendment rights by failing to protect him against a known risk of substantial harm does not present a new *Bivens* context"). And the Tenth Circuit has not revisited its similar holding. *See*, *e.g.*, *Williams v. Meese*, 926 F.2d 994, 998 (10th Cir. 1991) (holding that a plaintiff's race discrimination claim based on the Fifth Amendment properly stated a claim for relief under *Bivens*). The Fifth Circuit used to permit *Bivens* claims based on racial discrimination prior to *Abbasi,* but district courts within the circuit have more recently relied on *Abbasi* to prohibit such claims. *Compare Moore v. U.S. Dep't of Agric. on Behalf of Farmers Home Admin.*, 993 F.2d 1222, 1222-23 (5th Cir. 1993) (finding an inmate alleging racial discrimination presented a valid *Bivens* claim) *with Webb v. McQuade*, 2022 WL 136464, at *7 (W.D. Tex. Jan. 14, 2022) (finding that racial discrimination claims

present a new context under *Bivens* and special factors counsel against extending *Bivens* to such claims). Through the decision below, the Fourth Circuit has now changed its position regarding *Bivens* claims based on racial discrimination in light of *Abbasi* and *Egbert*—having previously held that an inmate's equal protection claims based on racial discrimination allegedly committed by federal correctional officers are cognizable under *Bivens* and 42 U.S.C. § 1983. *See Roudabush v. Milano*, 714 F. App'x 208, 210-11 (4th Cir. 2017) (remanding an inmate's race discrimination suit for further proceedings because he stated a valid claim).

The question presented is important and recurring. It is important to ensure that courts understand the circumstances under which *Bivens* remedies remain available to plaintiffs. And this case is an ideal vehicle to address the question here, as it is cleanly and squarely presented and there are no alternative grounds on which the courts below based their rulings.

Because the ruling below conflicts with this Court's decisions as well as decisions from other courts over an important and recurring issue, this Court should grant certiorari and answer the question presented.

OPINIONS BELOW

The opinion of the Fourth Circuit is unpublished and is reproduced at Pet.App.1a-19a.

JURISDICTION

The Fourth Circuit issued its decision and judgment on June 6, 2023 (Pet.App.1a-19a) and denied rehearing and rehearing en banc on August 4, 2023 (Pet.App.20a-21a). On October 25, 2023, Chief Justice Roberts extended the time to file this petition until

December 29, 2023. No. 23A367 (U.S.). This Court has jurisdiction under 28 U.S.C. § 1254.

CONSTITUTIONAL PROVISIONS INVOLVED

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

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

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

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

A. Factual Background

Petitioner, Joseph R. Mays, was an African-American inmate housed at the Federal Correctional Institution in Butner, North Carolina ("FCI-Butner"),

when he experienced "racial discrimination, disparate treatment, harassment, abuse of authority, and defamation of character." Pet.App.108a (citing Pet.App.22a-77a at ¶¶ 3, 6, 22). Petitioner suffered from racial discrimination because Respondents gave "preferential treatment" to white inmates. *Id.* (citing Am. Compl. Ex. 1 (DE 45-2) at 5). Specifically, certain Respondents withheld information and tools from Petitioner that were necessary to complete his work—instead giving such information and tools to white inmates. Pet.App.121a (citing Pet.App.73a ¶ 201); Pet.App.47a-48a at ¶¶ 50-60. Then, multiple FCI-Butner employees retaliated against Petitioner for filing grievances related to this discrimination by accusing him of "malingering" and using abusive and demeaning language. Pet.App.108a (citing Am. Compl. Ex. 1 (DE 45-2) at 4). Such treatment ultimately resulted in Petitioner's placement in administrative detention without cause, wrongful termination from his employment at the UNICOR factory, and improper transfer to another correctional institution without receiving notice of the alleged misconduct or an opportunity to rebut the allegations. Pet.App.110a-113a (citing Pet.App.22a-77a at ¶¶ 76, 80-82, 85, 89-96, 108, 126; Pet.App.86a-87a). After exhausting the available administrative remedies, Petitioner filed a lawsuit in the Eastern District of North Carolina seeking damages for the Constitutional violations he experienced at FCI-Butner. *See* Pet.App.88a-104a.

In June 2016, Respondent Hoskins, Petitioner's manager at the UNICOR optics factory, gave preferential treatment to white inmates over Petitioner. *See* Pet.App.108a (citing Pet.App.22a-77a at ¶¶ 6, 22; Am.

Compl. Ex. 1 (DE 45-2) at 4-5). Petitioner filed administrative remedy requests with the Federal Bureau of Prisons ("FBOP") regional director's office in protest. *Id.* As a result, Respondent Hoskins and Respondent Dickerson, a UNICOR optics factory supervisor, met with Petitioner to discuss his concerns and "reassured" him that he would not be transferred to another correctional facility. Pet.App.45a at ¶ 34. Further, in August 2016, Hoskins and Respondent Ma'at, the associate warden at FCI-Butner, met with Petitioner in the dining hall to address Petitioner's concerns regarding his UNICOR position. Pet.App.46a-47a at ¶¶ 43-50. When Petitioner informally addressed his concern that Hoskins withheld information from him that was necessary to complete his work as a lead mechanic based on Petitioner's race, Hoskins dismissed his concerns by responding that he provided the information to another inmate who had "IT experience." Pet.App.47a-48a at ¶¶ 53-60. Petitioner alleged Hoskins allowed Petitioner's white inmate coworkers to withhold information and "refuse[d] to share information … with the Plaintiff." Pet.App.73a-74a at ¶¶ 202-04. Hoskins never acknowledged that Petitioner was the "lead mechanic, had been trained on the relevant machines by an outside contractor, and had prior experience working in an information technology position." Pet.App.110a (citing Pet.App.47a-48a at ¶¶ 54-60). Instead, Hoskins falsely accused Petitioner of "starting to disrupt the orderly running of the facility." Pet.App.49a at ¶ 64.

Although Petitioner responded to these allegations by suggesting possible ways to resolve the dispute, Respondent Ma'at threatened termination, saying "or we can fire you! If you [are not] trained, we can fire you

and get someone else." *Id.* at ¶¶ 66-67. Further, Ma'at threatened Petitioner's job security by stating that Petitioner "[does not have a] union[.]" Pet.App.50a at ¶ 69. When Petitioner asked if his co-worker that withheld information from him would be held accountable, Respondent Hoskins refused to answer directly. *Id.* at ¶¶ 70-71. However, Ma'at stated that he could fire both employees, and he could "get someone to replace both of [them]." *Id.* at ¶ 73. Later that day, Petitioner was fired from his UNICOR position. Pet.App.110a (citing Pet.App.22a-77a at ¶¶ 74, 197-204). The white co-worker that had withheld information from him was not fired. *Id.* The stated "reasons" for Petitioner's termination were false allegations that Petitioner had made threatening comments to Respondents Ma'at and Hoskins and threatened to cause a UNICOR work stoppage. *See* Pet.App.111a-112a (citing Pet.App.86a-87a).

Petitioner alleges that the Respondents fired him solely because he was an African American who filed grievances alleging discrimination and not due to any poor work performance. Pet.App.72a at ¶ 197. Petitioner further alleges that Respondents fabricated false charges against him for these grievances, and he was subsequently subjected to disparate treatment, which included being fired, detained, and transferred. Pet.App.72a-73a at ¶¶ 198-99. Petitioner also alleges that Respondents gave his white co-worker preferential treatment by not firing him when Petitioner was fired for similar conduct. Pet.App.73a at ¶ 200.

Moreover, in addition to firing Petitioner based on the false allegations of "making threatening comments" and "threatening to cause a work stoppage," Respondents Christopher and Hendry, FCI-Butner

corrections officers, drafted an administrative detention order that transferred Petitioner to the special housing unit. Pet.App.110a-111a (citing Pet.App.22a-77a at ¶¶ 76, 89). Although the "administrative detention order . . . did not specify the reason for plaintiff's placement in administrative detention," Respondent Glass, a special investigations supervisor assigned to FCI-Butner, later told Petitioner that "someone 'got in their feelings' because you filed a grievance." Pet.App.111a; Pet.App.52a at ¶ 85. However, Respondents Glass, Christopher, and Wilkins never explained to Mays the precise or official reason he was placed in administrative detention. Pet.App.53a at ¶¶ 90-91. In late August 2016, Respondent Glass informed Petitioner "off the record" that Respondents Ma'at and Hoskins wanted Petitioner to be transferred to a different institution, while also informing Petitioner that the investigation about his meeting with Ma'at and Hoskins was private and could not be disclosed. Pet.App.112a (citing Pet.App.54a at ¶¶ 95-96). On September 2, 2016, when Petitioner asked Respondent Slaydon, a special investigations supervisor, why he was in administrative detention, Slaydon simply responded, "it's complicated." Pet.App.112a (citing Pet.App.22a-77a at ¶¶ 15, 107-108). Thus, despite asking at least five FCI-Butner staff members why he was in administrative detention, Petitioner was never offered a formal or adequate explanation.

While in administrative detention, Petitioner developed severe health problems. On September 16, 2016, Petitioner became dizzy and lightheaded, ultimately fainting in his cell. Pet.App.58a at ¶ 128. As a result

of his administrative detention, Petitioner also developed gastrointestinal problems that significantly affected his quality of life and ability to function. *See* Pet.App.61a at ¶ 157. Petitioner did not suffer gastrointestinal problems or lightheadedness prior to his administrative detention, which indicates the mental and physical stress the Prison Employees put him through by subjecting him to administrative detention. *Id.* at ¶ 159.

Further, administrative detention had both a financial and an emotional toll on Petitioner. Losing his UNICOR job cost Petitioner $200 per month, for a total loss of $4,400. *See* Pet.App.63a-66a at ¶¶ 172, 180. Even worse, while Petitioner was unnecessarily placed in administrative detention for unknown reasons, Petitioner was denied access to speak to his father for approximately two months prior to his father's death. Pet.App.61a at ¶¶ 153-156. Petitioner was transferred to FCI-Gilmer on October 21, 2016, and arrived on November 1, 2016. *Id.* at ¶¶ 152, 161. While in transit, Petitioner's father died. *Id.* at ¶ 153.

B. Procedural History

On July 23, 2018, Petitioner filed a complaint in the United States District Court for the Eastern District of North Carolina alleging violations of his First and Fifth Amendment rights. After several amended complaints, the Respondents timely filed their answer in the form of a motion to dismiss Petitioner's claims, which Petitioner opposed. On September 30, 2020, the district court granted Respondents' motion to dismiss, finding that Petitioner's equal protection and due process claims present a new context and are therefore not cognizable under *Bivens*.

On appeal, the Fourth Circuit affirmed the dismissal. Focusing on a broad interpretation of what a "meaningful difference" is under *Abbasi* and dismissing Petitioner's arguments regarding the Third Circuit's decision in *Bistrian v. Levi*, 912 F.3d 79 (3d Cir. 2018), the Fourth Circuit agreed with the district court that Petitioner's claims presented a new context under *Bivens* and that special factors counseled hesitation against extending *Bivens* to Petitioner's claims. The Fourth Circuit made a sweeping interpretation of this Court's precedent, noting that "'the Supreme Court [has] all but closed the door on *Bivens* remedies' that do not fit within the precise confines of its prior *Bivens* cases. *Dyer v. Smith*, 56 F.4th 271, 277 (4th Cir. 2022). Such is the case here." Pet.App.3a.

First, the Fourth Circuit found that Petitioner's Fifth Amendment claims presented a new *Bivens* context. Pet.App.8a-9a. In reaching this decision, the court noted a new context under *Bivens* "is a low bar because even 'quite minor' differences between a proposed claim and the claims in the three existing *Bivens* cases can amount to a new context." Pet.App.9a (citing *Tun-Cos v. Perrotte*, 922 F.3d 514, 523 (4th Cir. 2019)). The Fourth Circuit reasoned that Petitioner's claims presented a new context under *Bivens* because (1) "[t]he Supreme Court has never authorized a *Bivens* claim for procedural due process or race-based discrimination[;]" (2) prison officials are a new category of defendants (even though the defendants in *Carlson* were prison officials); and (3) the Third Circuit's ruling in *Bistrian*, which allowed a *Bivens* claim for Fifth Amendment violations brought by an inmate, could not be reconciled with this Court's recent precedent in *Egbert*. Pet.App.9a-10a (citations

omitted). The Fourth Circuit supported its conclusion that Petitioner's claims present a new *Bivens* context by noting that *Egbert* "rejected a virtually identical claim" to the claim in *Bivens* (despite *Egbert*'s very different national security implications), suggesting that all claims that are not actually identical to those in *Bivens*, *Davis*, or *Carlson* should be considered new contexts. Pet.App.11a. Ultimately, the Fourth Circuit concluded that Petitioner's claims had "the potential to implicate separation-of-powers considerations," and therefore presented a new *Bivens* context. Pet.App.12a (citation omitted).

After finding that Petitioner's claims presented a new context, the Fourth Circuit determined that "special factors" counseled hesitation against extending *Bivens* to Petitioner's claims. Ignoring that *Carlson* involved prison officials, it found that the category of defendants was new. Pet.App.13a. It also found that the category of conduct—racial discrimination—was new. *Id.* It reasoned that Petitioner's claims "'intersect with the statutory scheme delegating authority over prison designation, transfer, and housing decisions to the BOP,' as well as those governing prison discipline and inmate employment." Pet.App.13a-14a (citations omitted). And it found that the BOP's Administrative Remedy Program constituted an available alternative remedial structure. Pet.App.14a-15a. It noted that Congress has legislated in the area of prisoner litigation via the Prison Litigation Reform Act, which does not create an individual-capacity damages remedy for federal inmates. Pet.App.15a. Ignoring that this case has nothing to do with national security or unique prison-security concerns, the Fourth Circuit also noted that if it were to "authorize

this new category of prison litigation, claims like Mays's would almost certainly 'impose liability on prison officials on a systemic level' and amount to a 'substantial burden' on government officials." *Id.* (citation omitted).

In sum, the decision below is based on the apparent belief that Supreme Court precedent has limited *Bivens* actions to the exact confines of the facts of *Bivens*, *Davis*, and *Carlson*.

On June 20, 2023, Petitioner filed a petition for panel rehearing and *en banc* rehearing. On August 4, 2023, the Fourth Circuit denied that petition Pet.App.20a-21a. On October 25, 2023, Chief Justice Roberts extended the time to file this petition until December 29, 2023. No. 23A367 (U.S.).

REASONS FOR GRANTING THE PETITION

I. The Lower Court Decisions Conflict With This Court's Precedent Allowing *Bivens* Claims For Gender Discrimination in the Employment Context and by Prison-Inmate Plaintiffs.

A. The Original *Bivens* Precedent Provided Claims for Gender Discrimination and for Prison-Inmate Plaintiffs.

To begin with, the decisions below conflict with this Court's precedent allowing *Bivens* claims based on gender discrimination in the employment context. The first key precedent with which the decisions below conflict is *Davis v. Passman*, 442 U.S. 228 (1979). In *Davis*, a plaintiff who was fired on the basis of her gender presented a cognizable claim for Fifth Amend-

ment violations under *Bivens*. *Id*. at 228. Significantly, this Court relied on a *racial discrimination* case in holding that the plaintiff's Fifth Amendment *gender discrimination* claims were cognizable under *Bivens*. *See id*. at 242-43 (citing *Bolling v. Sharpe*, 347 U.S. 497 (1954) ("The plaintiffs . . . claimed that they had been refused admission into certain public schools . . . solely on account of their race. They rested their suit directly on the Fifth Amendment. . . . Plaintiffs were clearly the appropriate parties to bring such a suit, and this Court held that equitable relief should be made available.")). In fact, the Supreme Court has repeatedly held that "the Due Process Clause of the Fifth Amendment forbids the Federal Government to deny equal protection of the laws." *Davis*, 442 U.S. at 234 (internal quotation marks omitted). The Equal Protection Clause of the Fifth Amendment requires that "all persons similarly situated should be treated alike." *City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985). A plaintiff stating an equal protection claim must show that their unequal treatment was on the basis of discrimination, after which "the court proceeds to determine whether the disparity in treatment can be justified under the requisite level of scrutiny." *Veney v. Wyche*, 293 F.3d 726, 730-31 (4th Cir. 2002) (citation omitted); *Morrison v. Garraghty*, 239 F.3d 648, 654 (4th Cir. 2001). Racial classifications are entitled to review under strict scrutiny, which is a higher level of scrutiny than gender classifications receive. *Compare Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 201 (1995) (racial classifications receive strict scrutiny) *with Craig v. Boren*, 429 U.S. 190 (1976) (gender classifications receive intermediate scrutiny).

Moreover, inmates "have the constitutional right to be free from racial discrimination." *Bentley v. Beck*, 625 F.2d 70, 70-71 (5th Cir. 1980) (holding that a prisoner alleging that he was denied a prison job based on his race properly stated an equal protection claim). And this Court has held that "invidious racial discrimination is as intolerable within a prison as outside [a prison], except as may be *essential* to 'prison security and discipline.'" *Hudson v. Palmer*, 468 U.S. 517, 523 (1984) (citing *Lee v. Washington*, 390 U.S. 333, 334 (1968)) (emphasis added).

The second key precedent with which the decisions below conflict is *Carlson v. Green*, 446 U.S. 14 (1980). In *Carlson*, the Supreme Court allowed *Bivens* claims against prison officials by a federal inmate prisoner alleging violations of his Eighth Amendment rights to proceed. *Id.* at 20. Relying on *Davis*, *Carlson* noted: "Petitioners [i.e. prison officials] do not enjoy such independent status in our constitutional scheme as to suggest that judicially created remedies against them might be inappropriate." *Id.* at 19.

B. The Recent Decisions in *Abbasi* and *Egbert* Limit Bivens in the National Security Context.

Recently, however, the Court has limited the circumstances in which *Bivens* remedies are available where there are substantial national security concerns, such as in *Egbert v. Boule*, 596 U.S. 482 (2022) and in *Ziglar v. Abbasi*, 582 U.S. 120 (2017).

In *Abbasi*, the Court declined to extend a *Bivens* remedy to Fourth Amendment claims by prisoners challenging their confinement conditions following the September 11 terrorist attacks. 582 U.S. at 120.

The Court reasoned that "a case can present a new context for *Bivens* purposes if it implicates a different constitutional right; if judicial precedents provide a less meaningful guide for official conduct; or if there are potential special factors that were not considered in previous *Bivens* cases." *Id.* at 148. However, it noted that a case must be different from previous *Bivens* cases decided by the Supreme Court "in a *meaningful* way" for the context to be new. *Id*. at 139 (emphasis added).

In *Egbert*, the Court declined to extend a *Bivens* remedy to Fourth Amendment claims by a plaintiff who regularly provided transportation and lodging to illegal border crossers because "a *Bivens* cause of action may not lie where, as here, national security is at issue." 596 U.S. at 494. The Court in *Egbert* added an additional requirement for courts to consider when determining whether a claim is cognizable under *Bivens*—whether "'Congress is in a better position to decide whether or not the public interest would be served' by imposing a damages action." *Id.* at 499 (quoting *Bush v. Lucas*, 462 U.S. 367, 390 (1983)).

C. The Fourth Circuit's Decision Conflicts with Both this Court's Original Precedent and Recent Decisions.

Here, Petitioner's case presents a run-of-the-mill race discrimination claim in the employment context, where the employee happens to be an inmate, but no national security or border security concerns are even questionably at issue. Therefore, it falls squarely within *Davis* and *Carlson*. Of the recognized *Bivens* contexts, *Davis* is the most similar to the current case.

The Fourth Circuit even acknowledged that Petitioner's equal protection claims "mirror" the claim in *Davis*. Pet.App.12a. Petitioner's context is not meaningfully different from the context in *Davis*—at their core, both involve discrimination against someone in a protected class. In fact, the primary difference is that Petitioner was discriminated against on the basis of his race, rather than his gender, and it is a fundamental tenet of federal law that discrimination on the basis of race receives a *stricter* level of scrutiny than discrimination on the basis of gender. *See supra* at 13. The Fourth Circuit did not address this point in its decision, but it is illogical to find that an employment discrimination claim based on race presents a new, impermissible *Bivens* context when employment discrimination claims based on gender are permissible.

Moreover, because this Court in *Davis* relied on *Bolling v. Sharpe*, a race discrimination case, in holding that the plaintiff alleging gender discrimination can bring a Fifth Amendment equal protection claim under *Bivens*, it cannot be that this Court intended to foreclose a remedy under *Bivens* for plaintiffs alleging race discrimination and bringing Fifth Amendment equal protection claims, as Petitioner does.

That Petitioner was discriminated against while he was employed as an inmate in prison does not change this analysis. Like in *Carlson*, in which the Court established that prisoners may bring *Bivens* actions against prison officials, here, Petitioner should similarly be allowed to bring a *Bivens* action against Respondents. And although *Davis* did not involve employment in the prison context, nothing about the facts of this case suggests that the discrimination that Petitioner faced was essential or even tangentially

relevant to prison security or discipline, as would be required by *Hudson* for the discrimination to be tolerated. Petitioner worked a job while in prison that was equivalent to jobs outside of prison; he was mistreated and eventually fired because of racial animus, which caused him harm. There is nothing unique about these allegations to the prison context.

Thus, because both Petitioner's claims and the claim in *Davis* arise under the Fifth Amendment equal protection doctrine, and federal law imposes a stricter level of scrutiny on race than gender, and because *Carlson* has established that prisoners may bring *Bivens* actions against prison officials, there are no "meaningful" differences between the contexts of Petitioner's claims and those the Court has approved of in *Davis* and *Carlson*. As such, Petitioner's claims do not present a new *Bivens* context.

Finally, Petitioner's claims are critically different from the claims at issue in *Egbert* and *Abbasi*, where this Court has cautioned against extending *Bivens* remedies to new contexts, because Petitioner's claims are run-of-the-mill racial discrimination claims that mirror those in *Davis* and that do not implicate national security. Unlike in *Egbert* and *Abbasi*, where the Court found a new *Bivens* context for Fourth Amendment claims raising substantial national security concerns, here, Petitioner's Fifth Amendment claims have been established as an appropriate context under *Bivens* in *Davis*, and Petitioner's status as an inmate has absolutely no national security implications.

Because Petitioner's claims are garden variety employment claims alleging discrimination on the basis

of race, which receive a higher level of scrutiny than claims based on gender, and which in no way implicate national security concerns, the lower courts' decisions conflict with this Court's precedent.

II. The Fourth Circuit's Decision Deepens A Circuit Split.

In the wake of *Abbasi* and *Egbert*, it is uncertain to what extent the Court's prior precedent in *Bivens, Davis,* and *Carlson* retain vitality. Neither *Abbasi* nor *Egbert* explicitly overturns the Court's prior precedent; instead, both cases offer guidance regarding *Bivens* claims that involve national security issues. *See supra* at 14. The Fourth Circuit's decision deepens a split with the Third and Tenth circuits as to whether the original *Bivens* decisions retain vitality such that an inmate's claims alleging Fifth Amendment violations due to racial discrimination are cognizable under *Bivens*. The Fifth Circuit has previously found that racial discrimination claims are valid under *Bivens*, but district courts in the Fifth Circuit have interpreted *Abbasi* and *Egbert* to mean that the law has changed, and such claims are no longer cognizable under *Bivens*. The Fourth Circuit seems to have taken the position through its decision below that *Abbasi* and *Egbert* do fundamentally change the law regarding *Bivens* claims, such that the only claims that are cognizable under *Bivens* are those whose facts are identical to either *Bivens*, *Davis*, or *Carlson*.

1. In *Bistrian v. Levi*, 912 F.3d 79, 84 (3d Cir. 2018), an inmate, Bistrian, brought a *Bivens* claim alleging violations of his Fifth Amendment rights after certain prison officials failed to protect Bistrian from a violent attack by other inmates in the prison yard,

despite knowing of threats made against him by those same inmates. The Third Circuit revealed its belief that *Abbasi* does not change the fundamental *Bivens* law, holding that "an inmate's claim that prison officials violated his Fifth Amendment rights by failing to protect him against a known risk of substantial harm does not present a new *Bivens* context." *Bistrian*, 912 F.3d at 90; *see also Farmer v. Brennan*, 511 U.S. 825, 832-49 (1994). Bistrian's claims involved the Fifth Amendment, but the court used *Farmer*, a case involving Eighth Amendment claims, to confirm that the plaintiff's claim did not present a new *Bivens* context. 912 F.3d at 90-91 ("[A]lthough Bistrian's claim derives from a different Amendment, it is not 'different in a meaningful way' from the claim at issue in *Farmer*. The failure-to-protect claim here thus does not call for any extension of *Bivens*.") (quoting *Abbasi*, 582 U.S. at 139) (internal citations omitted). The Fourth Circuit directly disagreed with the Third Circuit in *Bistrian* (Pet.App.10a-11a); however, *Bistrian* is still good law in the Third Circuit. *See Shorter v. United States*, 12 F.4th 366, 373 (3d Cir. 2021) ("Because Bistrian's claim was not meaningfully different from the claim at issue in *Farmer*, we concluded the latter case 'practically dictate[d] our ruling' in the former. [citation] So too here.") Thus, the Fourth Circuit's decision to disregard *Bistrian* deepens a circuit split regarding how to treat *Bivens* claims following this Court's recent decisions.[1]

[1] Nor is the Third Circuit's recent decision in *Xi v. Haugen*, 68 F.4th 824 (3d Cir. 2023), to the contrary. There, a plaintiff alleged Fifth Amendment violations because he was "investi-

2. Moreover, the Tenth Circuit has not altered its interpretation of *Bivens* claims in light of *Abbasi* and *Egbert*, either. In *Williams v. Meese*, 926 F.2d 994, 996 (10th Cir. 1991), an inmate alleged violations of his Fifth Amendment rights after "defendants denied him certain prison job assignments, for which he was qualified, solely on the basis of his age, race, or handicap." The Tenth Circuit found that the inmate's allegations of such discrimination by prison officials are "sufficient [] to state a *Bivens* claim for deprivation of the right to equal protection secured by the fifth amendment." *Id.* at 998. The court continued that "[a]lthough plaintiff has no right to a job in the prison

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gated by a 'Special Agent employed by the FBI working on Chinese counterintelligence' based 'on the fact that ... Xi is racially and ethnically Chinese.'" *Id.* at 835. The Third Circuit determined that these claims presented a new *Bivens* context because the plaintiff "does not allege that Haugen harbored personal animus against the Chinese. Rather, . . . he attributes [the discrimination] solely to the FBI's counterintelligence policy and the mission of its Chinese counterintelligence unit." *Id.* Thus, a new context existed because the plaintiff did not challenge an individual act of racial discrimination, but a broad policy of the FBI regarding Chinese civilians. *See id.* ("The conduct that Xi challenges is also of a far broader scope than the discrete action in *Davis*. The plaintiff there challenged a specific employment decision . . . Xi, in contrast, contests 'Haugen's investigation and initiation of prosecution ... based on impermissible racial and ethnic factors' that Xi believes informed the FBI's investigative priorities and charging recommendation."). Indeed, the very unique policy challenge in *Xi* is akin to the impermissible policy challenge in *Abbasi*. Critically, *Xi* does not cut back on *Bistrian*; it simply shows that the Third Circuit can apply this Court's recent precedent in multiple ways. And *Xi* does not undercut Petitioner's claims, as Petitioner alleges very specific acts of discrimination by individual defendants and does not challenge any federal agency's policies or broad practices.

or to any particular job assignment, *see Ingram v. Papalia*, 804 F.2d 595, 596 (10th Cir.1986), prison officials cannot discriminate against him on the basis of his age, race, or handicap, in choosing whether to assign him a job or in choosing what job to assign him, *see Bentley v. Beck*, 625 F.2d 70, 70-71 (5th Cir.1980)." *Id.* While this case was decided by the Tenth Circuit before *Egbert* and *Abbasi* cautioned against extending *Bivens*, it is still good law in the Tenth Circuit, as the Tenth Circuit has not revisited its precedent regarding Fifth Amendment *Bivens* claims based on racial discrimination since *Abbasi* and *Egbert* were decided.[2]

3. The Fifth Circuit previously found that *Bivens* claims based on racial discrimination are valid, but district courts in the Fifth Circuit have interpreted *Abbasi* and *Egbert* to mean that the law has changed, and such claims are no longer cognizable. In *Moore v. U.S. Dep't of Agric. On Behalf of Farmers Home Admin.,* 993 F.2d 1222, 1222 (5th Cir. 1993), plaintiff-appellant farmers were denied an opportunity to participate in sale of inventory farmland solely because they were white. The Fifth Circuit ruled that the allegations of "overt racial discrimination" by plaintiffs-appellants "pose[d] more than a possibility of recovery

[2] That said, the Tenth Circuit has found in the context of Eighth Amendment claims that *Egbert* has fundamentally changed *Bivens* law, stating that expanding *Bivens* to new contexts "is an action that is impermissible in virtually all circumstances." *Silva v. United States*, 45 F.4th 1134, 1140 (10th Cir. 2022). *Silva* involved an Eighth Amendment excessive force claim—it does not implicate racial discrimination in any way. *Id.* at 1136. Given the very different claims in *Silva*, it does not indicate whether the Tenth Circuit would now consider Fifth Amendment racial discrimination claims to be a new context, but it does suggest a reluctance to allow *Bivens* claims to proceed.

under a *Bivens*-type action founded in the equal protection component of the Fifth Amendment." *Id.* at 1222-23. But several district courts within the Fifth Circuit have interpreted this Court's recent decision in *Abbasi* to mean that racial discrimination claims present a new context under *Bivens* and special factors counsel against extending *Bivens* to such claims. *See Webb v. McQuade*, 2022 WL 136464, at *7 (W.D. Tex. Jan. 14, 2022); *Belfrey-Farley v. Palmer*, No. 3:19-cv-1305-S-BT, 2021 WL 2814885, at *6-7 (N.D. Tex. May 7, 2021), *report and recommendation adopted*, No. 3:19-CV-1305-S-BT, 2021 WL 2808826 (N.D. Tex. July 6, 2021) (finding that plaintiff's claims that a defendant invaded her home at least in part due to her "race, ethnicity and/or perceived national origin" presented a new *Bivens* context). In *Webb*, a prisoner-plaintiff alleged Fifth Amendment violations of his right to equal protection under *Bivens* after a prison official referred to him using a racial slur. 2022 WL 136464, at *7. The court stated that although "Fifth Circuit case law regarding racial discrimination claims under Bivens is not entirely clear[,]" "[a]dopting the Supreme Court's reasoning in *Abbasi*, the Court finds that Webb's racial discrimination claims are meaningfully different from established *Bivens* claims, and therefore, present a new *Bivens* context." *Id.* The court also cited *Abbasi* to state that the special factors "show that whether a damages action should be allowed is a decision for the Congress to make, not the courts[,]" and dismissed the claims as invalid under *Bivens*. *Id.* at *7-8.

4. The Fourth Circuit's decision below reflects an interpretation that *Abbasi* and *Egbert* have fundamentally changed *Bivens* law, as the Fourth Circuit

previously had held that an inmate's equal protection claims based on racial discrimination allegedly committed by federal correctional officers were cognizable under *Bivens* and 42 U.S.C. § 1983. *See Roudabush v. Milano*, 714 F. App'x 208, 210-11 (4th Cir. 2017). In *Roudabush*, the Fourth Circuit remanded an inmate's equal protection claims against federal correctional officers for further proceedings under *Bivens* and 42 U.S.C. § 1983. *Id.* Roudabush's complaint alleged "widespread racial discrimination at the ADC [correctional center] against white and Hispanic inmates and in favor of black inmates." *Id*. at 209. While *Roudabush* presents a different procedural posture than the one here and the Fourth Circuit did not conduct a detailed *Bivens* analysis of the plaintiff's claims, it remains that the Fourth Circuit previously allowed a claim nearly identical to Petitioner's to proceed under *Bivens*—an equal protection claim against a federal correctional officer for discriminatory treatment on the basis of race.

The Fourth Circuit's contrary decision below demonstrates a belief that *Abbasi* and *Egbert* changed the law as to *Bivens* remedies. Indeed, quoting *Egbert*, the Fourth Circuit stated that the "Court has made clear that expanding the *Bivens* remedy to a new context is an 'extraordinary act,' that will be unavailable 'in most every case.'" Pet.App.7a (quoting *Egbert*, 596 U.S. at 492, 497 n.3) (citations omitted). The Fourth Circuit also reasoned that this "Court's understanding of a 'new context' is 'broad,' which means that the scope of the existing *Bivens* actions must be narrowly construed." Pet.App.8a (quoting *Tate v. Harmon*, 54 F.4th 839, 844 (4th Cir. 2022)). The Fourth Circuit in *Tate* relied on *Hernandez v. Mesa*, 589 U.S. ----, 140 S.

Ct. 735, 743 (2020) for the understanding of a "new context" as "broad": *Hernandez,* in turn, relied on *Abbasi* in coming to that conclusion. Thus, it is apparent that the Fourth Circuit has interpreted this Court's recent precedent as broadly limiting its original precedent of *Bivens*, *Davis*, and *Carlson* essentially to only their precise facts.

Accordingly, the decision below deepens the conflict among the Third, Tenth, and Fifth Circuits, and departs from its own prior precedent. There is plainly a significant question among the circuits as to how to treat *Bivens* claims following of *Abbasi* and *Egbert.*

5. Moreover, beyond *Bivens'* application to racial-discrimination claims, there is confusion among the lower courts regarding when a claim presents a "new context." *Compare Jacobs v. Alam*, 915 F.3d 1028, 1038 (6th Cir. 2019) ("*Ziglar* and *Hernandez* are not the silver bullets defendants claim them to be—plaintiff's claims are run-of-the-mill challenges to 'standard law enforcement operations' that fall well within *Bivens* itself.") *and Snowden v. Henning*, 72 F.4th 237, 244 (7th Cir. 2023) (finding no new context when the agent acted under the same legal mandate as in *Bivens* [federal drug law enforcement], the agent was the same line-level federal narcotics officer, and plaintiffs sought damages for the same violation of Fourth amendment rights [unreasonable force in arrest].) *and Lanuza v. Love*, 899 F.3d 1019, 1030 (9th Cir. 2018) (finding a new *Bivens* context but that special factors do not counsel against expanding *Bivens* to a "run-of-the-mill immigration proceeding" because "expanding *Bivens* to this context does not threaten the political branches' supervision of national security and foreign policy.") *with Vega v. United States*, 881

F.3d 1146, 1153 (9th Cir. 2018) ("But because neither the Supreme Court nor we have expanded *Bivens* in the context of a prisoner's First Amendment access to court or Fifth Amendment procedural due process claims arising out of a prison disciplinary process, the circumstances of Vega's case against private defendants plainly present a 'new context' under *Abbasi*.") *and Cain v. Rinehart*, No. 22-1893, 2023 WL 6439438, at *3 (6th Cir. July 25, 2023) (finding a new context under *Bivens* where law enforcement entered into a private residence and assaulted the plaintiff because it was "meaningfully" different from *Bivens*—the defendants here were attempting to execute an arrest warrant of a third party who they believed was there, while the officers in *Bivens* had no such warrant).

Granting certiorari is necessary to resolve this split among the circuits regarding whether the prior case law of *Bivens*, *Davis*, and *Carlson* retain vitality, or whether *Abbasi* and *Egbert* have obliterated that prior law such that the only cognizable *Bivens* claims are those that are essentially factually identical to the prior cases. And granting certiorari is necessary to answer how courts should treat racial discrimination claims under *Bivens*.

III. The Question Presented Is Exceptionally Important And Recurring.

This case is exceptionally important with respect to how the law on *Bivens* has changed following *Abbasi* and *Egbert*, and specifically whether racial discrimination claims are cognizable under *Bivens*.

First, the question presented is important because a core principle of the American legal system is that people should be free from discrimination on the basis

of their race. The Fourteenth Amendment enshrines this very principle: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." *See also* the Civil Rights Act of 1964 (outlawing discrimination on the basis of race, color, religion, sex or national origin.).

Indeed, this Court emphasized in *Davis*, "[t]he equal protection component of the Due Process Clause thus confers on petitioner a federal constitutional right to be free from gender discrimination[.]" *Davis*, 442 U.S. at 235. The court relied on *Bolling v. Sharpe*, 347 U.S. 497 (1954), which did not address gender discrimination, but rather was a Fifth Amendment racial discrimination case: "[l]ike the plaintiffs in *Bolling v. Sharpe, supra,* petitioner rests her claim directly on the Due Process Clause of the Fifth Amendment. She claims that her rights under the Amendment have been violated, and that she has no effective means other than the judiciary to vindicate these rights. We conclude, therefore, that she is an appropriate party to invoke the general federal-question jurisdiction of the District Court to seek relief. She has a cause of action under the Fifth Amendment." 442 U.S. at 243-44. The Fourth Circuit's decision below turns this crucial principle on its head, but this Petition presents this Court with the opportunity to right that wrong. *See also Davis,* 442 U.S. at 242 ("'The very essence of civil liberty,' wrote Mr. Chief Justice Marshall in *Marbury v. Madison*, 5 U.S. 137, 163 [] (1803), 'certainly consists in the right of every individual to claim the

protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection.'").

Second, this issue is also recurring, as demonstrated by the frequency with which petitions on this issue have been granted and decided by this Court within the last twenty-five years alone. *See, e.g.*, *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61 (2001); *Wilkie v. Robbins*, 551 U.S. 537 (2007)*; Minneci v. Pollard*, 565 U.S. 118 (2012); *Ziglar v. Abbasi,* 582 U.S. 120 (2017); *Hernandez v. Mesa*, 589 U.S. ----, 140 S. Ct. 735 (2020); *Egbert v. Boule*, 596 U.S. 482 (2022). And the question of how to treat *Bivens* claims has continuously presented itself before the various circuit courts: as of filing this petition, sixty-one circuit court decisions have discussed *Abbasi* at length since it was decided in 2017 (332 circuit court decisions have cited it), and twenty-four circuit court decisions have discussed *Egbert* at length since it was decided in 2022 (80 circuit court decisions have cited it). Over 700 district court decisions have discussed *Abbasi* at length, and nearly 200 district court decisions have discussed *Egbert* at length.

The question whether *Bivens* actions may still be maintained following *Abbasi* and *Egbert* is therefore important and recurring. *See also* Joanna C. Schwartz, Alexander Reinert & James E. Pfander, *Federal Courts, Practice & Procedure: Going Rogue: The Supreme Court's Newfound Hostility to Policy-Based Bivens Claims*, 96 NOTRE DAME L. REV. 1835, 1854 (2021) ("when viable *Bivens* claims exist, they are just as likely as § 1983 claims to incentivize compliance with the law without creating a risk of over-deterrence. For example, both § 1983 claims and

Bivens actions can influence government behavior by clarifying the scope of constitutional protections.").

IV. The Decision Below Is Wrong.

The Fourth Circuit's extremely restrictive view that *Bivens* actions after *Abbasi* and *Egbert* are now limited only to those cases that are essentially factually identical to *Bivens*, *Davis*, or *Carlson* is wrong, and does not logically follow this Court's precedent.

1. As discussed, in both *Abbasi* and *Egbert*, the Court declined to extend a *Bivens* remedy where plaintiffs alleged violations of their Fourth Amendment rights in contexts that triggered substantial national security concerns.

In *Abbasi*, the prisoners were not entitled to relief under *Bivens* because the case presented a new context and "[a]fter considering the special factors necessarily implicated by the detention policy claims, the Court now holds that those factors show that whether a damages action should be allowed is a decision for the Congress to make, not the courts." 582 U.S. at 140. The Court acknowledged the uniqueness of Abbasi's claims, noting that, "[i]n the present suit, respondents' detention policy claims challenge the confinement conditions imposed on illegal aliens pursuant to a high-level executive policy created in the wake of a major terrorist attack on American soil. Those claims bear little resemblance to the three *Bivens* claims the Court has approved in the past[.]" *Id.* at 140.

This Court went on to analyze the policy reasons for not extending *Bivens* to claims against Executive branch officials, noting that, "[i]ndeed, 'courts traditionally have been reluctant to intrude upon the au-

thority of the Executive in military and national security affairs' unless 'Congress specifically has provided otherwise.' *Department of Navy v. Egan*, 484 U.S. 518, 530 (1988). Congress has not provided otherwise here." 582 U.S. at 143. And this Court noted that the "silence [of Congress] is telling . . . Congressional interest has been 'frequent and intense,' [*Schweiker v. Chilicky*, 487 U.S. 412, 425 (1988)] and some of that interest has been directed to the conditions of confinement at issue here." *Id.* at 144. "Thus, when Congress fails to provide a damages remedy in circumstances like these, it is much more difficult to believe that 'congressional inaction' was 'inadvertent.'" *Id.* (quoting *Schweiker*, 487 U.S. at 423). Thus, the substantial national security concerns implicated and the fact that Congress so frequently addressed conditions of confinement in the context of terrorist attacks itself, yet did not provide for a damages remedy, were critical to the determination that the claims presented a new, impermissible context under *Bivens*.

In *Egbert*, the Court declined to extend a *Bivens* remedy to a plaintiff who regularly provided transportation and lodging to illegal border crossers because "national security is at issue." 596 U.S. at 494. Although *Egbert* added an additional requirement that courts consider whether "'Congress is in a better position to decide whether or not the public interest would be served' by imposing a damages action," *id.* at 499, the Court actually cautioned against applying the special factor analysis at too granular a level. *Id.* at 496 ("The Court of Appeals' analysis betrays the pitfalls of applying the special-factors analysis at too granular a level. The court rested on three irrelevant distinctions

from *Hernández*."). Thus, like in *Abbasi*, the substantial national security concerns implicated by the plaintiff's claims and the additional border security concerns were critical to this Court's determination that the claims presented a new, impermissible context under *Bivens*.

Here, unlike in *Abbasi*, Petitioner did not assert claims against Executive Officials, which appears to account for a large portion of the Court's reasoning in *Abbasi*. *See Abbasi*, 582 U.S. at 140 ("With respect to the claims against the Executive Officials, it must be noted that a *Bivens* action is not 'a proper vehicle for altering an entity's policy.'"). And while in *Abbasi*, "Respondents' detention policy claims bear little resemblance to the three *Bivens* claims the Court has approved in previous cases," *id*. at 122, by comparison, Petitioner's race discrimination claims bear a significant resemblance to the claims in *Davis*. Moreover, *Abbasi* noted that:

> It is of central importance, too, that this is not a case like *Bivens* or *Davis* in which "it is damages or nothing." [citations]. Unlike the plaintiffs in those cases, **respondents do not challenge individual instances of discrimination or law enforcement overreach, which due to their very nature are difficult to address except by way of damages actions after the fact**. Respondents instead challenge large-scale policy decisions concerning the conditions of confinement imposed on hundreds of prisoners.

Abbasi, 582 U.S. at 144 (emphasis added). Here, Petitioner undoubtedly challenges the actions of select

prison personnel that do not implicate "large-scale policy decisions" of the federal prison system, but rather are discrete instances of discrimination like in *Davis* and *Carlson*. For Petitioner, it is damages or nothing.

Next, unlike in *Egbert*, Petitioner's claims have nothing to do with foreign policy or national security, which appears to account for a large portion of the Court's reasoning in *Egbert*. *See Egbert*, 596 U.S. at 494 ("Because '[m]atters intimately related to foreign policy and national security are rarely proper subjects for judicial intervention,' *Haig v. Agee*, 453 U.S. 280, 292 (1981), we reaffirm that a *Bivens* cause of action may not lie where, as here, national security is at issue."). Here, no national security concerns are implicated by Petitioner's run-of-the-mill employment discrimination claims. *See* Pet.App.108a (citing Am. Compl. Ex. 1 (DE 45-2) at 5).

Instead, Petitioner's claims most closely follow this Court's precedent in *Davis* and *Carlson*. Because the Supreme Court in *Davis* relied on *Bolling v. Sharpe*, a race discrimination case, in holding that Fifth Amendment gender discrimination claims are valid under *Bivens*, it does not logically follow that this Court intended to prohibit racial discrimination claims under *Bivens*. That Petitioner was an inmate-employee should not change this analysis. Like in *Carlson*, in which the Court established that prisoners may bring *Bivens* actions against prison officials, here, Petitioner should similarly be allowed to bring a *Bivens* action against Respondents. And although *Davis* did not involve employment in the prison context, nothing suggests that Petitioner's discrimination was essential or even tangentially relevant to prison security or

discipline, as would be required for the discrimination to be tolerated. *See Hudson*, 468 U.S. at 523. Petitioner was an inmate working a job in prison that was equivalent to jobs outside of prison; he was mistreated and eventually fired because of his race, which caused him harm. Nothing is unique about these allegations to the prison context.

2. However, even if Petitioner's claims do present a new context under *Bivens*, the lower courts were also wrong in finding that special factors counsel against extending *Bivens* to Petitioner's claims. Most significantly, Petitioner's claims do not implicate national or border security issues, as were crucial to the special factors analyses in *Abbasi* and *Egbert*. Moreover, the other special factors identified—whether an alternative remedial structure is available, whether separation-of-powers principles are implicated, the potential burdens on the Government, whether Congress has previously enacted legislation in the area, whether a damages remedy is necessary to deter future similar violations, and whether the claim addresses broader policy questions delegated to an administrative agency—also do not counsel hesitation against extending *Bivens* to Petitioner's claims.

An alternative remedial structure is not available to Petitioner because the BOP's Administrative Remedy Program was rendered unavailable to Petitioner when Respondents confronted Petitioner after he filed grievances regarding the discriminatory treatment he received. Pet.App.22a-77a; *see also Ross v. Blake*, 578 U.S. 632, 644 (2016) (An administrative scheme, such as the grievance process, is rendered unavailable "when prison administrators thwart inmates from

taking advantage of [it] through machination, misrepresentation, or intimidation."). Separation-of-powers principles are not implicated because here, monetary damages are Petitioner's only available avenue of relief. *Compare Abbasi*, 582 U.S. at 143-46 *with Davis,* 422 U.S. at 245. The potential burden on the Government of extending *Bivens* here is small: instructing employers not to discriminate on the basis of race does not burden government operations. And although Congress has enacted the Prison Litigation Reform Act ("PLRA"), the PLRA is complementary to *Bivens*, not exclusionary. *See, e.g., Abbasi*, 582 U.S. at 171 (Breyer, J., dissenting) ("[T]here is strong evidence that Congress assumed that *Bivens* remedies would be available to prisoners when it enacted the PLRA."). A damages remedy is necessary to deter future similar violations, and there are no broader policy burdens that would be better delegated to an administrative agency present. Thus, special factors do not counsel hesitation against extending *Bivens* to Petitioner's claims.

V. This Case Is An Ideal Vehicle To Resolve The Question Presented.

This case is an ideal vehicle to decide the question presented. Although Petitioner is an inmate, the facts of this case are simple. Petitioner was discriminated against on the basis of his race, causing him to be fired from his employment. That he was employed in prison has no bearing on whether his claims are cognizable. Thus, this case presents a clean question of whether racial discrimination claims in the employment context are cognizable.

This case is also an ideal vehicle because there are no outstanding collateral issues or procedural defects preventing this petition from being decided on the merits. The Fourth Circuit dismissed Petitioner's claims for failing to state a claim under *Bivens*. *See* Pet.App.1a-21a. This petition squarely presents this Court with the opportunity to reverse that error and allow Petitioner to litigate his claims.

Finally, this case is an ideal vehicle because the issues raised in this petition have been extensively developed below. Petitioner has raised and fully briefed the justifications for allowing racial discrimination claims under *Bivens* before the Fourth Circuit, and the government has also briefed the issue. Petitioner again briefed the issue in his motion for rehearing en banc.

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

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