No.

In the Supreme Court of the United States

ROY SARGEANT, PETITIONER,

v.

ARACELIE BARFIELD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether federal inmates may bring a cause of action in federal court against rank-and-file federal prison officials that violate their Eighth Amendment rights by deliberately subjecting them to serious risk of grievous harm from inmate-on-inmate violence.

RELATED PROCEEDINGS

U.S. District Court for the Northern District of Illinois (N.D. Ill.):

Sargeant v. Barfield, Case No. 19-cv-50187 (June 17, 2021) (granting motion to dismiss against petitioner)

U.S. Court of Appeals for the Seventh Circuit (7th Cir.):

Sargeant v. Barfield, Case No. 21-2287 (Nov. 28, 2023) (affirming N.D. Ill. decision)

Sargeant v. Barfield, Case No. 21-2287 (Mar. 19, 2024) (denying petition for rehearing en banc)

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OPINIONS BELOW

The opinion of the Seventh Circuit (App. 1a-33a) is published at 87 F.4th 358. The order of the court of appeals denying rehearing (App. 40a) is unreported. The decision of the District Court for the Northern District of Illinois (App. 34a-39a) is unpublished but available at 2021 WL 2473805.

JURISDICTION

The judgment of the court of appeals was entered on November 28, 2023. The court of appeals denied a timely petition for rehearing en banc on March 19, 2024. Justice Barrett extended the time to file the petition for certiorari to August 16, 2024. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant constitutional and statutory provisions are reproduced in the petition appendix, at App. 41a-42a.

STATEMENT OF THE CASE

This case is an ideal vehicle to resolve a recognized and intractable circuit conflict over an important recurring federal question: Whether federal inmates may bring a cause of action in federal court against rank-and-file federal prison officials that violate their Eighth Amendment rights by deliberately subjecting them to serious risk of grievous harm from inmate-on-inmate violence.

This Court's precedents already answer this question "yes." This Court's decisions in *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), *Carlson v. Green*, 446 U.S. 14 (1980), and *Farmer v. Brennan*, 511 U.S. 825 (1994) recognize that

under federal law, rank-and-file federal prison officials that violate the Eighth Amendment by using violence to inflict harm on inmates are liable in damages for their unconstitutional conduct. Despite that precedent, the circuits have now intractably divided over the answer to this question and the broader question it raises—which is how broadly or narrowly lower courts should construe the scope of this Court's *Bivens* contexts.

In the proceedings below, a divided Seventh Circuit panel, over a dissent by Judge Hamilton, held that federal law no longer provides a cause of action to inmates victimized by deliberate indifference of prison officials to inmate-on-inmate violence, and thereby deepened a acknowledged and entrenched circuit conflict that has only grown more significant and more entrenched since. Notwithstanding that suits just like petitioner's have been brought and decided by federal courts *for decades*, the Seventh Circuit held that this Court's recent *Bivens* cases stand for the proposition that such actions are no longer cognizable.

Specifically, the majority held that the "*Bivens* context" recognized by *Carlson*—and assumed by every member of this Court to extend to inmate-on-inmate violence in *Farmer*—is now limited to its facts and thus extends only to inmate claims of Eighth Amendment violations stemming from inadequate medical care. App. 1a, 13a-14a. The Seventh Circuit further held that there was no warrant to even infinitesimally "extend" *Carlson* to reach claims like petitioner's. App. 16a-18a.

In taking it upon itself to narrow the *Carlson* context, the Seventh Circuit expressly joined the Fourth Circuit and split from the Third Circuit, the latter of which has held that the *Carlson* context is broad enough to include claims for deliberate indifference to the risk of inmate-on-

inmate violence.[1] *Compare Bistrian v. Levi*, 912 F.3d 79, 90-91 (3d Cir. 2018), *with Bulger v. Hurwitz*, 62 F.4th 127, 139 (4th Cir. 2023) *and Marquez v. Rodriguez*, 81 F.4th 1027, 1030 (9th Cir. 2023). In doing so, the Seventh Circuit recognized that it was taking a side in this recognized "circuit split." App. 9a. Since that decision, the Eleventh Circuit has deepened the split further—bringing it to 4-1—by expressly "agree[ing] with the Seventh Circuit's reasoning in *Sargeant v. Barfield*" that "failure to protect" claims do not arise within any existing *Bivens* context. *Johnson v. Terry*, No. 23-11394, 2024 WL 3755110, at *9 (11th Cir. Aug. 12, 2024).

In reaching its holding, the Seventh Circuit *also* took sides in a 2-2 split with the Third, Fourth, and Eleventh circuits over whether—even if an inmate's Eighth Amendment claims do not fall within the four-corners of the *Carlson* context—a minute extension of the *Carlson* context is warranted to reach such claims.

This case readily satisfies the criteria for granting review. The conflict is clear, acknowledged, and entrenched.[2] The analysis on each side of the question has

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[1] Hours before this petition was due to be filed a three-judge Third Circuit panel purported to overrule *Bistrian* in *Fisher v. Hollingsworth*, No. 22-2846, 2024 WL 3820969 (3d Cir. Aug. 15, 2024), in seeming violation of the Third Circuit's rule that "no subsequent panel overrules the holding in a precedential opinion of a previous panel." *In re Aleckna*, 13 F.4th 337, 344 n.38 (3d Cir. 2021); *Pa. Pharmacists Ass'n v. Houstoun*, 283 F.3d 531, 534 (3d Cir.2002) (explaining that "[u]nder a longstanding practice of our Court, a panel may not overrule another panel decision"). Unless and until the *en banc* Third Circuit has passed upon the propriety of the panel's decision in *Fisher*, it is unclear whether *Bistrian* or *Fisher* is controlling in the Third Circuit.

[2] *See* App. 9a; *Johnson v. Terry*, No. 23-11394, 2024 WL 3755110, at *11 (11th Cir. Aug. 12, 2024) (discussing split); *Bulger v. Hurwitz*, 62 F.4th 127, 139 (4th Cir. 2023) (discussing split); *Marquez v. C. Rodriguez*, 81 F.4th 1027, 1031 n.2 (9th Cir. 2023) (discussing split);

been exhaustively set forth, and as the Eleventh Circuit's recent decision makes clear, the remaining Circuits are merely left to pick sides. The question presented is frequently recurring and important. Because this case presents an ideal vehicle to resolve this conflict, the petition should be granted.

1. Petitioner Roy Sargeant was a federal inmate at Federal Correctional Institution (FCI) Thomson in Thomson, Illinois. App. 35a. This case arises from retaliatory acts taken against petitioner by Aracelie Barfield, petitioner's case manager, responsible for evaluating his progress in prison. App. 2a, 35a-36a.

This case began with a dispute over books. App. 2a. Another prison official, Nicole Cruze, refused to give petitioner some books that he had ordered, and in response to his complaints, made objectionable and personally insulting remarks on his sexual preferences. *Id.* Seeking to hold Ms. Cruze accountable for these highly inappropriate remarks, petitioner filed a grievance against Ms. Cruze under the Prison Rape Elimination Act. App. 35a.

After petitioner inquired with respondent about the status of his grievances, respondent showed petitioner the prison's response to one of those grievances. App. 2a. Petitioner noticed that it was signed by Cruze and voiced his displeasure that Cruze had seen the grievance, which under prison rules she was not supposed to see. *Id.* Apparently unhappy with petitioner's remarks,

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see also Arthur S. Leonard, *Whither Bivens and LGBT Incarcerated Plaintiffs? 7th Circuit Trashes* Farmer v. Brennan *as a Precedent*, 2023 LGBT L. NOTES 1, 2 (explaining the decision below "contributes to an existing circuit split on a question of some significance for plaintiffs seeking to vindicate their constitutional rights by holding government officials accountable in damages"); Susan Yorke, *The Curious Case of the Missing Canons*, 77 Stan. L. Rev. (forthcoming 2025) (manuscript at 36-37) (discussing split).

respondent "angrily" told others about the grievance. *Id.* This led petitioner to file a new, separate grievance against respondent. *Id.*

In retaliation, respondent "repeatedly" put petitioner in cells with inmates that she knew were violent and would attack him. *Id.* As respondent intended, this led to attacks on petitioner by his cellmates. *See id.* Petitioner was later transferred to another prison. *Id.*[3]

2. In 2019, petitioner filed a *pro se* complaint against respondent seeking damages. App. 3a. The district court construed petitioner's complaint to raise only a First Amendment retaliation claim under *Bivens*. *Id.* The district court held that no First Amendment *Bivens* claims were cognizable and dismissed petitioner's complaint with prejudice. *Id.*

3. Petitioner appealed, arguing that the district court had erroneously failed to construe his case as raising a cognizable Eighth Amendment claim for deliberate indifference to the risk of inmate-on-inmate violence. *Id.*

a. A divided Seventh Circuit panel affirmed the judgment of the district court. App. 1a. Applying this Court's two-step framework for determining whether a particular claim is cognizable under *Bivens*, the majority held that petitioner's Eighth Amendment claim was not cognizable because it did not fall within an existing *Bivens* context and because there was no warrant for extending *Bivens* to these new circumstances. App. 11a-17a.

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[3] Petitioner suffered serious harms as a result of respondent's retaliation. Petitioner has never had the chance to amend his handwritten *pro se* complaint in this case. An amended complaint would lay out in detail the violence petitioner suffered and the physical and psychological injuries that resulted. The Bureau of Prisons recently released petitioner after more than two decades in federal prison. He grapples with mental and emotional trauma from this episode to this day.

The Seventh Circuit majority began by recognizing that the appropriate framework for analyzing *Bivens* claims is set forth in this Court's decision in *Ziglar v. Abbasi*, 582 U.S. 120 (2017). App. 7a. As the majority stated "[t]hat case explained that a two-step framework applies when determining whether a plaintiff may bring a claim under *Bivens*." *Id.* "First, a court must ask whether the claim presents a 'new *Bivens* context.'" *Id.* (quoting *Abbasi*, 582 U.S. at 139). "A context is new if the claim is 'different in a meaningful way from previous *Bivens* cases decided by [the Supreme] Court.'" *Id.* (quoting *Abbasi*, 582 U.S. at 139). The majority further recognized that *Abbasi* furnishes a non-exhaustive list of factors courts should use to determine whether a context is new, and block-quoted those factors from *Abbasi*. App. 7a-8a. The factors include for example, "[t]he rank of the officers involved; the constitutional right at issue; [and] the generality or specificity of the official action." *Id.* (quoting *Abbasi*, 582 U.S. at 139-40).

Second, the majority explained that if a court determines that the context is new, it "moves to the second question and ask[s] whether 'special factors counsel[] hesitation' against implying a remedy." App. 8a (quoting *Abbasi*, 582 U.S. at 136, 140). In conducting that analysis, the majority looked to this Court's recent decision in *Egbert v. Boule*, 596 U.S. 482 (2022), which it called "significant." *Id.* Quoting *Egbert*'s gloss on the second step the majority explained that in determining whether to extend *Bivens*, "a court must ask '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.'" App. 9a (quoting *Egbert*, 596 U.S. at 496).

Applying that two-step framework, the majority held that petitioner lacked a cause of action to vindicate his Eighth Amendment claim in federal court. App. 8a-15a.

Turning to the first factor, the majority held that petitioner's claim arose in a new *Bivens* context. App. 9a-13a. The majority emphasized that petitioner's claim was factually dissimilar from the inadequate medical care claim in *Carlson*. App. 13a-14a. Running through the list of factors that *Abbasi* directed lower courts to consider in determining whether a claim arises in an existing *Bivens* context, the majority conceded that many of the factors favored a finding that the contexts were the same. App. 14a.

The majority recognized that respondent's "rank is similar to or lower than the rank of the defendants in *Carlson*" that "both cases involve the same constitutional right, and there is substantial judicial guidance on both inadequate-medical-care and failure-to-protect claims." *Id.* The majority stated that "[t]wo other considerations—the generality or specificity of the action and the legal mandate under which the official was operating—present closer calls." *Id.* But the majority ultimately concluded that it did not need to "discuss them because the last two *Abbasi* considerations cut against [petitioner] in a way that dissolves his claim after *Egbert*." *Id.*

First, the majority held that the risk of disruptive intrusion by the Judiciary into the functioning of the executive branch warranted treating this as a new context different from *Carlson*. App. 14a-15a The majority conceded that "the risk of intrusion is low here." App. 15a But, according to the majority, that was irrelevant because petitioner's claim would potentially "interfere with a vastly different part of prison operations—housing assignments instead of medical care—meaning that his claim threatens to intrude in ways *Carlson* did not contemplate." *Id.*

Second, the majority held that petitioner's case presented potential special factors that *Carlson* did not consider because the Prison Litigation Reform Act

(PLRA) provides additional information about Congressional intent with respect to inmate suits that was unavailable when this Court decided *Carlson*. App. 16a-17a. According to the majority, because the PLRA does not provide inmates a cause of action in federal court for Eighth Amendment violations by prison officials, that means petitioner's claim does not fall within the *Carlson* context. *Id.*

Petitioner argued to the Seventh Circuit that this Court's decision in *Farmer* shows that it considers inmate-on-inmate violence claims to fall within the *Carlson* context. The underlying dispute in *Farmer* involved a *Carlson* claim alleging that prison officials were deliberately indifferent to the risk of inmate-on-inmate violence against the plaintiff. 511 U.S. at 829. Not one member of this Court—not even the concurrence in the judgment—remarked that the underlying case involved a *Bivens* extension to a new context. Petitioner argued that silence (at a time when this Court had already stated that it disfavored *Bivens* extensions) showed that this Court considered the scope of the *Carlson* context to encompass inmate-on-inmate violence claims. Petitioner emphasized that the Third Circuit agreed with this argument in *Bistrian v. Levi*, 912 F.3d 79 (3d Cir. 2018) and held that the *Carlson* context extends to inmate violence claims.

The majority rejected petitioner's argument. The majority stated "[a] circuit split exists on this point, with the Third and Fourth Circuits disagreeing over whether *Farmer* created a new context." App. 9a. Judge Pryor writing for the majority held: "[i]n interpreting *Farmer*, Sargeant invokes the Third Circuit's reasoning. He believes that *Farmer* impliedly established a new context—or at least stretched the bounds of *Carlson*'s context." App. 10a (citing *Bistrian*, 912 F.3d at 90-91). But, the majority held, "[t]he Fourth Circuit, with the benefit of *Egbert*'s guidance, disagreed with that

reasoning and questioned whether the Supreme Court would establish a new *Bivens* context in such a secretive way." *Id.* (citing *Bulger*, 62 F.4th at 139). "We now join the Fourth Circuit. A silent assumption in an opinion cannot generate binding precedent." App. 11a. (citing *United States v. Rodriguez-Rodriguez*, 453 F.3d 458, 460 (7th Cir. 2006)). "Any other approach would invite chaos because litigants could uncover and rely on unspoken assumptions in every opinion." *Id.* The majority concluded "the Supreme Court … does not make holdings silently." App. 12a. "Against this backdrop, we decline to rule that another *Bivens* context lurks in the shadows." *Id.*

Finally, the majority summarily rejected petitioner's argument that, even if this case does not fall squarely within the existing *Carlson* context, it should be extended infinitesimally to reach these facts. App. 13a-17a. Posing the question whether even "a single reason suggests that Congress is better positioned to assess the need for a remedy or that Congress might not desire a new remedy" the majority answered that "[t]he PLRA and the Bureau of Prisons' grievance program satisfy that low bar." App. 17a.

b. Judge Hamilton dissented. App. 19a-33a. Judge Hamilton agreed with the majority that *Abbasi* provides the relevant two-step framework for considering these claims. App. 19a-20a, 22a. Judge Hamilton also agreed that by reaching the conclusion that it did, the majority deepened a circuit split on the question whether claims of deliberate indifference to inmate-on-inmate violence fall within the existing *Carlson* context. *Id.*

Judge Hamilton vigorously disagreed with the majority's conclusion that petitioner's claim arises within a new *Bivens* context. App. 24a-25a. Applying the factors *Abbasi* instructed lower courts to consider, Judge Hamilton concluded that *all* of the relevant factors favor

a holding that petitioner's claim "fits comfortably" within the existing *Carlson* context. App. 24a.

As Judge Hamilton explained, the rank of the officer's involved, lower than in *Carlson* or *Farmer*, "weighs in [petitioner's] favor." *Id.* The constitutional right involved is "the same constitutional right allegedly violated in both *Carlson* and *Farmer*." *Id.* The generality or specificity prong is satisfied because just like this case "*Carlson* similarly challenged the specific acts of individual officials" and "[t]he specific acts in *Farmer* were even closer to this case [than in *Carlson*], dealing with an individual prisoner's cell assignment." App. 25a. The extent of judicial guidance prong was satisfied because "[j]udicial guidance" on claims like these "is extensive." *Id.* The statutory mandate prong favored petitioner because the policies and legal mandate involved "are not meaningfully different from the policies or legal mandate in *Farmer*" and *Carlson*. *Id.* Judge Hamilton wrote that the risk of intrusion is *de minimis* because "such cases are routine" and "pose[] little if any risk of disruption of executive or legislative power." *Id.* Additionally, "no special factors counsel against providing *Bivens* relief." *Id.* For these reasons, Judge Hamilton concluded, "this case does not present a new context." *Id.*

Addressing the majority's claims that this case involves a risk of intrusion into a new area, Judge Hamilton countered that the nature of the misconduct removed any possibility of the kind of intrusion the majority speculated could occur. App. 25a-26a. As Judge Hamilton wrote "this case involves not a high-level federal policy [regarding prison housing] but specific actions of a front-line official aimed at one prisoner." App. 26a. Petitioner "does not seek to reform over-arching prison management or prison policies." *Id.* Petitioner merely "alleges that a corrections officer deliberately created the risk of harm and then failed to protect him from that

harm." *Id.* As a consequence "[d]eciding this case would not cause courts to intrude into broad or sensitive prison policies." *Id.*

Judge Hamilton also disputed the majority's holding that the existence of the PLRA or prison grievance procedures somehow removes inmate-violence cases from the *Carlson* context. *Id.* As Judge Hamilton wrote, the failure to make new remedies available in the PLRA says nothing about whether Congress intended to make the existing *Bivens* remedies "unavailable." *Id.* As for the internal grievance process, "the internal grievance process is clearly inadequate in this instance." *Id.* "In fact, according to [petitioner's] complaint, his earlier use of that process triggered [respondent's] retaliation that put him at risk." *Id.*

Finally, Judge Hamilton took issue with the majority's interpretation of the Third Circuit's decision in *Bistrian*. The majority opinion, wrote Judge Hamilton, is "built on the premise that *Farmer* is not a true *Bivens* case because the Supreme Court did not list *Farmer* recently as one of its approved 'contexts' for *Bivens*." App. 23a. "It is evident, however, that at least eight Justices in *Farmer* had no doubt that, with sufficient proof of deliberate indifference, *Bivens* applies to a failure to protect a prisoner." *Id.* "[W]hile *Carlson* and *Farmer* "remain on the books," petitioner's claims "do not present a 'new context.'" *Id.*

"If *Bivens* and *Carlson v. Green* did not extend to deliberate failures to protect prisoners, *Farmer* would have been an odd vehicle for the Supreme Court to address the Eighth Amendment standard" for deliberate indifference claims. *Id.* "The majority's theory turns *Farmer*, with hindsight, into a misguided waste of everyone's time." *Id.* "The better view is that the universal assumption in *Farmer* that a *Bivens* remedy was available shows that the Court was treating failure-

to-protect claims as fitting comfortably within the reasoning of *Carlson*." App. 23a. "That conclusion was so obvious in *Farmer* that it did not need to be questioned or explained." *Id.* "*Farmer* has not been overruled by the Supreme Court, and we have no authority to do so." *Id.* "[Petitioner's] claims thus do not present a 'new context,' at least while *Carlson* and *Farmer* remain on the books." App. 24a.

4. The Seventh Circuit denied a timely petition for rehearing en banc. App. 40a.

REASONS FOR GRANTING THE PETITION

This case involves an acknowledged 4-1 circuit conflict over an important recurrent question of federal constitutional law. The case also implicates a 2-2 circuit conflict over whether *Carlson* extensions are ever appropriate, even when new facts or circumstances make the difference from *Carlson* inconsequential or *de minimis*. The question presented is immensely important given the sheer number of inmates in federal prison who are vulnerable to brutal Eighth Amendment violations as a result of misconduct by rank-and-file prison officials. The issue presented by this case is frequently recurring, the conflict is entrenched and fully-ventilated, and this case is an ideal vehicle to resolve it.

I. THERE IS A CLEAR AND INTRACTABLE CONFLICT OVER AN IMPORTANT QUESTION

The decision below deepens an irreconcilable and widely-acknowledged circuit split over whether federal inmates subjected to inmate-on-inmate violence as a result of rank-and-file prison officials' deliberate indifference have a cause of action under *Bivens*, *Carlson*, and *Farmer*. App. 9a. That conflict is square and indisputable: the courts of appeals have recognized the conflict, rejected each other's positions, and fractured into two firmly opposing factions. *See, e.g.*, *Johnson v. Terry*,

No. 23-11394, 2024 WL 3755110, at *11 (11th Cir. Aug. 12, 2024) (discussing split and taking sides).

The stark division over this fundamental question of constitutional remedies is untenable. The conflict has been openly acknowledged by courts and commentators alike. *See, e.g.*, *supra* note 2. Inmates face enormously disparate protections from violence and unconstitutional conduct based only on the facility in which federal prison officials choose to place them. Faced with repeated opportunities to change its position, the Third Circuit has doubled down rather than reverse course, meaning any hope that the split will resolve itself has vanished. The conflict is mature and ready for this Court's review. Definitive guidance over the availability of *Bivens* relief to federal inmates facing inmate-on-inmate violence as a result of rank-and-file prison officials' deliberate indifference is sorely needed to protect prisoners and provide clarity to federal officials. The circuit conflict is undeniable and entrenched, and it should be resolved by this Court in this case.

1.a. The decision below directly conflicts with settled law in the Third Circuit. In *Bistrian v. Levi*, the Third Circuit confronted the identical question presented here, and a unanimous panel adopted the polar opposite holding, stating "the Supreme Court has, pursuant to *Bivens*, recognized a failure-to-protect claim under the Eighth Amendment." 912 F.3d 79, 90 (3d Cir. 2018).[4]

[4] In *Bistrian*, the plaintiff was a pretrial detainee, so his claims arose under the Fifth, rather than Eighth, Amendment. The Third Circuit explained that the difference is purely technical, however, because "pretrial detainees are, at least, on equal footing with sentenced inmates when they claim that prison officials failed to protect them from other inmates." *Bistrian v. Levi*, 696 F.3d 352, 372-74 & n.8 (3d Cir. 2012). The Third Circuit thus determined that a Fifth Amendment pretrial detainee claim "is not 'different in a

In *Bistrian*, the plaintiff, Bistrian, alleged that prison officials were deliberately indifferent to a serious risk of harm when they placed Bistrian in the recreation yard with other inmates they knew were likely to violently attack him. *Id.* at 84. Bistrian was "brutally beat[en]" and "suffered severe physical and psychological injuries." *Id.*

The prison official defendants took an interlocutory appeal to the Third Circuit of the district court's denial of summary judgment on Bistrian's failure-to-protect claim. *Id.* at 86. At the threshold, the Third Circuit addressed the availability of *Bivens* relief, explaining that it was a question "antecedent to the other questions presented." *Id.* at 88 (quoting *Hernandez v. Mesa*, 582 U.S. 548, 553 (2017)).

To determine whether Bistrian could maintain his claim under *Bivens*, the Third Circuit, like the Seventh Circuit below, applied the two-step test set forth in *Ziglar v. Abbasi*, 582 U.S. 120 (2017) for determining whether *Bivens* relief is available in a particular case. As the Third Circuit explained, *Abbasi* requires courts to determine "[f]irst … whether or not the case is different in a meaningful way from previous *Bivens* cases" and second, if it is different, "whether any special factors counsel hesitation in permitting the extension" of *Bivens* relief to a new context. *Id.* at 89-90 (quotations marks and alterations omitted).

Applying that two-step framework, the Third Circuit determined that Bistrian's claims fell within the existing context established by *Carlson v. Green*, 446 U.S. 14 (1980) and that even if a modest extension of *Carlson* were necessary, "a special factors analysis [did] not counsel hesitation" to extend *Carlson* to its facts. *See id.* at 90-93.

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meaningful way' from" an Eighth Amendment claim. 912 F.3d at 91 (quoting *Abbasi*, 582 U.S. at 139).

Addressing step one of the *Abbasi* analysis, the Third Circuit determined that this fact pattern fell within the existing *Carlson* context. The Third Circuit considered the list of "potentially meaningful differences" laid out in *Abbasi*, determining that Bistrian's failure-to-protect claim was "not different in a meaningful way from the claim at issue" in *Farmer* and *Carlson*. *Id.* at 90-91 (quotation marks omitted) (examining *Abbasi*, 582 U.S. at 139-40). The Third Circuit rejected arguments that the pretrial nature of the plaintiff's detention meaningfully distinguished Bistrian's claim from post-conviction failure-to-protect claims. *Id.* at 91.

In making that determination, the Third Circuit relied principally on *Farmer v. Brennan*, 511 U.S. 825 (1994), a unanimous decision involving "a 'failure-to-protect' claim brought under the Eighth Amendment and *Bivens* as a result of prisoner-on-prisoner violence." 912 F.3d at 90. The Third Circuit rejected the relevance of this Court's omission of *Farmer* from a list of prior *Bivens* extensions in *Abbasi*, concluding that this Court "viewed the failure-to-protect claim as not [meaningfully] distinct from the Eighth Amendment deliberate indifference claim in the medical context" of *Carlson*. *Id.* at 91. Having concluded that "a failure-to-protect claim does not present a new context," the Third Circuit found that "there [wa]s no need to address the second step" of the *Abbasi* test for *Bivens* relief. *Id.* at 91-92.

Notwithstanding its step-one determination that Bistrian's claim arose in the existing *Carlson* context, the Third Circuit nonetheless also conducted a step-two analysis. The court examined whether, if Bistrian's claim arises in a new context, any special factors, "counsel against such an extension." *Id.* at 91. Concluding that no such factors exist, the court explicitly rejected arguments that the Bureau of Prisons administrative grievance process supplied a real alternative remedy, that

congressional silence about *Bivens* in the PLRA indicated opposition to *Bivens* relief, and that "separation-of-powers principles" more broadly counsel hesitation. *Id.* at 92-93. As such, the Third Circuit held in the alternative that if the *Carlson* context does not encompass "prisoner-on-prisoner" violence claims, an extension of *Carlson* to such cases would be warranted. *Id.* at 92-94.

b. The Third Circuit reaffirmed its position that the *Carlson* context extends to failure to protect claims three years later in *Shorter v. United States*, 12 F.4th 366, 373 (3d Cir. 2021). In response to the argument that, as it had in *Abbasi,* this Court omitted *Farmer* from its list of existing *Bivens* contexts in its then-recent decision in *Hernandez v. Mesa*, 589 U.S. 93 (2020), the Third Circuit explained that "the reasoning in *Bistrian II*—that the Supreme Court in *Abbasi* neglected to name *Farmer* because it saw that case as falling under the umbrella of *Carlson*—applies equally to *Hernandez*." *Shorter*, 12 F.4th at 373 n.5.

c. In 2023, at summary judgment in the *Bistrian* case, the district court ruled that the Third Circuit's holdings in *Bistrian* and *Shorter* remain intact after this Court's decision in *Egbert*. *Bistrian v. Levi*, No. 08-3010, 2023 WL 6927327, at *9 (E.D. Pa. Oct. 19, 2023). "[A]lthough the Third Circuit has interpreted *Egbert* to suggest a *de facto* prohibition on *any* extensions to a new *Bivens* context, [*Egbert*] did not call into question the decisions in *Shorter* and *Bistrian* [], which determined that Bistrian's Fifth Amendment failure-to-protect claims do not arise in a new context." *Id.*[5]

[5] As noted above, hours before this petition was due to be filed a three-judge Third Circuit panel purported to overrule *Bistrian* and *Shorter* in *Fisher v. Hollingsworth*, No. 22-2846, 2024 WL 3820969 (3d Cir. Aug. 15, 2024), in seeming violation of the Third Circuit's rule that three-judge panel cannot overrule an earlier panel. Until

2. The Fourth, Seventh, Ninth, and Eleventh Circuits have rejected the Third Circuit's position on failure-to-protect claims in published opinions. These courts interpret *Egbert* as having instructed lower courts to narrow the scope of *existing Bivens* contexts, including *Carlson*, to their precise facts. As a consequence, these Courts have held that *Carlson* is limited to inadequate medical care claims.

a. The Fourth Circuit was the first to openly split with the Third Circuit's position, in *Bulger v. Hurwitz*, 62 F.4th 127 (4th Cir. 2023). In *Bulger*, the estate of infamous mob boss Whitey Bulger sued the United States and an array of prison officials for alleged deliberate indifference in transferring Bulger to the United States Penitentiary in Hazelton, West Virginia. and placing him in the general population, where he was murdered by other inmates less than 14 hours after arrival. *Id.* at 133-34.

A unanimous Fourth Circuit panel held that the plaintiffs' suit was "materially distinct from a failure to provide adequate medical care claim like the one presented in *Carlson*" because the alleged wrongful conduct—transferring Bulger to Hazelton and then placing Bulger in the general prison population knowing he was at serious risk of being murdered by other inmates if not placed in protected custody—implicated "not only the scope of each official's responsibilities and duties but also the organizational policies, administrative decisions, and economic concerns inextricably tied to inmate transfer and placement determinations." *Id.* at 138 (citing *Tate v. Harmon*, 54 F. 4th 839, 846 (4th Cir. 2022)).

The Fourth Circuit rejected "[plaintiffs'] reliance on *Farmer*" and "considerable reliance on the Third Circuit's

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the *en banc* Third Circuit has reviewed the panel's decision in *Fisher*, it is unclear whether *Bistrian* or *Fisher* is controlling in the Third Circuit.

decision in *Bistrian*" as having established that the *Carlson* context encompasses more than just inadequate medical care claims. *Id.* at 138-39.

Addressing *Farmer*, the Fourth Circuit stated that "[plaintiffs'] theory that *Farmer* recognized a fourth context of *Bivens* claims beyond the issues presented in *Bivens, Davis*, and *Carlson* is contrary to the Supreme Court's recognition that it 'has refused' to 'extend *Bivens* to any new context' for 'the past 30 years,' which includes the time period it decided *Farmer*." *Id.* at 139 (quoting *Abbasi*, 582 U.S. at 135).

Addressing *Bistrian*, the Fourth Circuit panel rejected the Third Circuit's determination that the *Carlson* context encompasses failures to protect inmates from violence by other inmates, as well as its assessment of *Farmer*'s relevance to that inquiry. *Id.* at 139. The Fourth Circuit acknowledged that this conclusion put it at odds with the Third Circuit's holding in *Bistrian*, but reasoned that the Third Circuit "did not have the benefit of [this] Court's more recent *Bivens* guidance, as *Bistrian* was decided before [this] Court's decisions in *Hernandez* and *Egbert*[.]" *Id.* The Fourth Circuit held that this Court's omission of *Farmer* means it is irrelevant to the *Bivens* context analysis: "[d]espite ample opportunity to include *Farmer*, the Court has made clear that the universe of recognized *Bivens* claims consists of only three cases: *Bivens, Davis*, and *Carlson*." *Id.* "And lower courts should not interpret these cases to apply outside the precise contexts at issue." *Id.*[6]

At step two, the Fourth Circuit also broke with the Third Circuit, holding that "multiple special factors

[6] As discussed above in *Shorter*, the Third Circuit expressly reaffirmed its position that *Farmer* is relevant to determining the scope of the *Carlson* context notwithstanding this Court's decision in *Hernandez*. *See Shorter*, 12 F.4th at 373 n.5.

counsel against creating a new *Bivens* remedy." *Id.* at 140. In so holding, the court reasoned that inmate violence claims, especially those involving challenges to decisions about inmate placement, "would require scrutiny of new categories of conduct and a new category of defendants" and "conflict with Congress's choice to give the BOP discretion over inmate placement." *Id.* at 140-41. The Fourth Circuit also explicitly broke with the Third Circuit's interpretation of the Bureau of Prisons administrative grievance process and relevance of the PLRA. The existence of the administrative grievance process counsels hesitation notwithstanding "[t]he potential unavailability of a remedy in a particular circumstance." *Id.* at 141. And, the PLRA's existence alone "counsel[s] hesitation in extending *Bivens*" to inmate violence claims. *Id.*

b. The Ninth Circuit has also taken a position at odds with the Third Circuit's position on the scope of *Carlson*. In the withdrawn opinion in *Hoffman v. Preston*, the Ninth Circuit determined that failure-to-protect claims involving inmate violence "arise[] in a new context because [they are] different in a modest way from that of the plaintiff in *Carlson*." 26 F.4th 1059, 1065 (9th Cir. 2022) (withdrawn). The Ninth Circuit nonetheless initially held that "no special factors … counsel[ed] against allowing" a "modest extension" of *Carlson* in the case. *Id.* at 1063-64. After *Egbert*, the Ninth Circuit withdrew its opinion and held that "[t]he Supreme Court's decision in *Egbert v. Boule* precludes recognizing a *Bivens* remedy for these allegations." *Hoffman v. Preston*, No. 20-15396, 2022 WL 6685254, at *1 (9th Cir. Oct. 11, 2022).

Shortly thereafter, in *Marquez v. Rodriguez* the Ninth Circuit issued a precedential opinion rejecting the Third Circuit's approach in *Bistrian* and holding that inmate failure-to-protect claims arise in a new *Bivens* context. 81 F.4th 1027, 1030 (9th Cir. 2023). The Ninth

Circuit's post-*Egbert* position is that the Supreme Court "has cabined the [*Bivens*] doctrine to the facts of" *Bivens*, *Davis*, and *Carlson*. *Id.* In reaching that holding, the Ninth Circuit recognized that it was "depart[ing] from the Third Circuit … and instead join[ing] the Fourth Circuit." *Id.* at 1031 n.2.

c. The Eleventh Circuit is the latest Court to join the split, and its exhaustive opinion shows that this split is mature and that the remaining Circuits are left merely to pick sides. In *Johnson v. Terry*, the Eleventh Circuit "agree[d] with the Fourth, Seventh, and Ninth Circuits' holdings" that inmate-on-inmate violence claims do not arise within any existing *Bivens* context and "disagree[d] with the Third Circuit's [contrary] holding." No. 23-11394, 2024 WL 3755110, at *11 (11th Cir. Aug. 12, 2024). The Eleventh Circuit further held that the availability of the BOP prison grievance process means that *Carlson* cannot be extended to provide a cause of action in cases involving deliberate indifference to inmate-on-inmate violence. *Id.* at 14-16.

In *Johnson* the plaintiff alleged that prison officials were deliberately indifferent to repeated episodes of violence perpetrated against him by other inmates; and that they also were deliberately indifferent to his serious medical needs arising out of his injuries. *See id.* at *1-3. He further alleged that prison officials deliberately stymied his efforts to hold officials accountable through the prison grievance system. *See id.* at *3. The district court ultimately granted summary judgment to the defendant prison officials on the grounds that his claims presented a new context and special factors counseled against extending to that new context. *Id.* at *4. The Eleventh Circuit affirmed. *Id.* at *1, *16.

The Eleventh Circuit held, first, that the plaintiff's claims of deliberate indifference to a risk of inmate-on-inmate violence arose in a new *Bivens* context. *Id.* at *9-

14. Rather than argue that his case was materially similar to *Carlson* under the factors set forth in *Abbasi*, plaintiff argued only that his failure to protect claim did not present a new *Bivens* context because it was similar to the *Bivens* claim in *Farmer*. *Id.* at *9. The Eleventh Circuit rejected the plaintiff's argument that *Farmer* represents a *Bivens* context. *Id.* at *9-10. Wrote the Eleventh Circuit: "We agree with the Seventh Circuit's reasoning in *Sargeant v. Barfield* that '[n]ot once has the Supreme Court mentioned *Farmer* alongside [its three listed *Bivens*] cases, and we think it would have if *Farmer* created a new context or clarified the scope of an existing one.'" *Id.* at *9 (quoting *Sargeant*, 87 F.4th at 365). The Eleventh Circuit recognized the Circuits are split on this issue. *Id.* at *11. "Most of our sister circuits that have addressed whether *Farmer* created or recognized an implied *Bivens* remedy in that context have determined that it did not." *Id.* (collecting cases). "We agree with the Fourth, Seventh, and Ninth Circuits' holdings that *Farmer* did not create a *Bivens* remedy and thus cannot serve as a comparator case in the new context inquiry; we disagree with the Third Circuit's holding that it did and can." *Id.*

The Eleventh Circuit then turned to the plaintiff's claims of deliberate indifference to his serious medical needs and held that they also arose in a new *Bivens* context. *Id.* at *12-14. The Eleventh Circuit held that because some of the plaintiff's claims arose under the Fourteenth Amendment, rather than the Eighth, because the prison offered access to the BOP administrative remedy program, because his injuries were non-lethal, and because the "severity, type, and treatment" of his injuries differed from the injury in *Carlson*, the plaintiff's inadequate medical care claims were meaningfully distinct from the claims at issue in *Carlson* and thus arose in a new *Bivens* context. *Id.*

Finally, the Eleventh Circuit declined to extend *Carlson* to reach plaintiff's claims. *Id.* at *14-16. The Court held that the possibility of access to the BOP administrative remedy program forecloses any extensions of *Carlson* for federal prisoner's under this Court's decision in *Egbert*. *Id.*. That is so, the Eleventh Circuit held, even where prison officials thwart a federal inmate's access to the grievance program, as they had in *Johnson*. *Id.* at *15. "Although Johnson believes he was, in essence, not allowed to access the grievance procedure, that is not enough to disqualify it as a special factor and authorize the creation of a new *Bivens* remedy." *Id.*

3. The Seventh Circuit majority's refusal to even modestly extend *Carlson* to reach claims of inmate-on-inmate violence also deepens a post-*Egbert* circuit split over when, if ever, it is appropriate for federal courts to extend the existing *Bivens* contexts to cover cases where any difference between an existing *Bivens* context and the circumstances of the new case are inconsequential or *de minimis*. This Court in *Egbert* did not foreclose any future *Bivens* extensions. *See Egbert*, 596 U.S. at 495-96. Instead, it fashioned a standard that calls on courts to determine whether there is any "rational" reason to distinguish between and existing context and a similar-but-not-exact-match. *See id.*

a. The Seventh Circuit barely paused to consider petitioner's argument that this case would call for a modest *Bivens* extension. *See* App. 16a-17a. The majority held that the existence of the PLRA and prison grievance procedures meant that there was no warrant to extend *Carlson* to cover petitioner's claims because those "remedies" (such as they are) are now available to federal inmates. *See id.* The implication of the Seventh Circuit's decision is that *Carlson* claims can *never* be extended to *any* new claims by federal inmates because of the existence of those "remedies."

The Eleventh Circuit's analysis in declining to extend *Carlson* to reach the inmate-on-inmate violence claims in *Johnson v. Terry,* was virtually identical to the Seventh Circuit's analysis in this case. No. 23-11394, 2024 WL 3755110, at *7, *14-16 (11th Cir. Aug. 12, 2024). The Eleventh Circuit held that the mere existence of the BOP administrative remedy program forecloses all future extensions of *Carlson* regardless of any similarities between an inmate's claim and the *Carlson* context. *Id.* at *14-15.

b. Those holdings are flatly at odds with the holdings of the Third and Fourth Circuits, which have both reached the opposite conclusion.[7] In *Bistrian*, the Third Circuit held in the alternative that even if Bistrian's claims did not fall squarely within the existing *Carlson* context, the distinction between claims sounding in inadequate medical care versus inmate-on-inmate violence are inconsequential, meaning a modest extension of the *Carlson* context to encompass such claims was warranted. *See Bistrian*, 912 F.3d at 92-94.

The Seventh's and Eleventh Circuit's holdings are also squarely at odds with the Fourth Circuit's decision in *Fields v. Federal Bureau of Prisons*, 109 F.4th 264 (4th Cir. 2024). In *Fields*, the plaintiff "allege[d] that he was the victim of excessive force, inflicted by several prison officials at USP Lee in violation of the Eighth Amendment." *Id.* at 268. The plaintiff "concede[d] that

[7] The Eleventh Circuit acknowledged that its refusal to modestly extend the *Carlson* context to reach the plaintiff's claims in *Johnson v. Terry*, was in direct conflict with the Fourth Circuit's recent decision in *Fields v. Fed. Bureau of Prisons*, 109 F.4th 264 (4th Cir. 2024). *See Johnson v. Terry*, No. 23-11394, 2024 WL 3755110, at *7 (11th Cir. Aug. 12, 2024). The Eleventh Circuit went so far as to predict that the division between itself and the Fourth Circuit "may lead to *en banc* reconsideration or to the Supreme Court finally rendering *Bivens* cases extinct." *Id.*

this case [arose] in a new context." *Id.* In a footnote, the *Fields* majority stated that it was "perhaps arguable that this case arises in the same context as *Carlson*" but "because Fields concedes that his case arises in a new context, he has waived that argument." *Id.* at 270 n.1. Nonetheless, the panel held that a modest extension of the *Carlson* context was warranted because the plaintiff's claims challenged "only the individual conduct of rogue prison officers" and the "risk of systemwide consequences" was "negligible." *Id.* at 272-73. The Court held, squarely at odds with the holdings of the Eleventh Circuit and the majority below, that even if alternative remedies like prison grievances or the PLRA are theoretically available, "where rogue officers intentionally subverted alternative remedies" an extension of *Carlson* is permitted. *Id.* at 274.

Without the Court's intervention, these disparate results on virtually indistinguishable facts will persist, deepening confusion and wasting litigation resources.

4. Commentators, including the Congressional Research Service, have recognized the sharp circuit conflict over this question. *See, e.g.*, Michael John Garcia, Alexander H. Pepper, Craig W. Canetti, and Jimmy Balser, Cong. Rsch. Serv., RL47899, *The United States Courts of Appeals: Background and Circuit Splits from 2023* (2024) (acknowledging *Sargeant* and *Bulger* as creating a circuit split on this issue); Michael J. Sgarlat, *7th Circuit Declines to Extend Bivens to a Failure-to-Protect Claim Against BOP Officials* (Dec. 7, 2023), https://bit.ly/3yn69kg ("a circuit split exists on this issue").

* * * * *

The conflict over the availability of *Carlson* relief to federal inmates subject to inmate violence at the hands of rank-and-file prison officials is square and intractable. It has generated a 4-1 circuit split over the scope of the

Carlson context and 2-2 circuit split over whether courts may modestly extend *Carlson* to cover inmate violence claims even when they do not fall squarely within the *Carlson* context. The chances of this Circuit conflict resolving itself are nil. Until this Court intervenes, inmates will face disparate outcomes depending only on the federal circuit in which the Bureau of Prisons chooses to house them. Review is urgently warranted.

II. THE QUESTION PRESENTED IS IMPORTANT AND WARRANTS REVIEW IN THIS CASE

The question presented has exceptional legal and practical importance for the thousands of inmates in federal prison. This Court's decision will determine whether *Carlson* provides a remedy for a federal inmate where a rank-and-file federal prison official deliberately exposes the inmate to serious risk of inmate-on-inmate violence. Each side of the split has staked out its position, and the competing arguments have been thoroughly examined. The question is ripe for review.

1. For federal inmates across the country, the practical stakes are extremely high. When a low-level federal official violates a federal inmate's Eighth Amendment rights, a *Carlson* claim is often the only effective legal remedy.[8] There are approximately 158,703

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[8] The Federal Tort Claims Act ("FTCA"), which is often put forward as a potential substitute for *Bivens*, is not a federal remedial scheme at all, but a waiver of sovereign immunity that permits an injured claimant to recover damages against the United States where a private person "would be liable to the claimant in accordance with the law of the place where the act or omission occurred." 28 U.S.C. § 1346(b); *see also* 28 U.S.C. § 2674. Thus, as in *Bivens* itself, a plaintiff denied access to a *Carlson* claim would be remitted to the vagaries of state law. *See Bivens*, 403 U.S. at 394-95. The FTCA gives the plaintiff even less than he would receive under state law in many cases, because the statute is hedged with protections for the United States. And the FTCA allows neither

federal inmates in the United States, all of whom are subject to the authority of low-level federal officials every day of their incarceration. *See* Federal Bureau of Prisons, *Population Statistics*, https://bit.ly/465WNFO (last updated July 4, 2024). In the federal prison system, inmate-on-inmate violence is severe and pervasive, with hundreds of assaults recorded each month. *See* Federal Bureau of Prisons, *Serious Assaults on Inmates*, (June 2024), https://bit.ly/4bM54jx. In reality, the numbers are likely far higher, with reports showing that actual victimization is approximately ten times the amount of official estimates. Brief for MacArthur Justice Center as *Amici Curiae* in Support of Appellant at 7-8, *Sargeant v. Barfield*, No. 21-2287 (ECF No. 72) (citing James M. Byrne & Don Hummer, *Myths and Realities of Prison Violence: A Review of the Evidence*, 2 Victims & Offenders 77, 79-80 (2007)).[9] In some federal prisons "[c]haos reigns, along with uncontrolled violence." *United States v. Colucci*, No. 23-CR-417, 2024 WL 3643857, at *2-6 (E.D.N.Y. Aug. 5, 2024) (describing the "gruesome stabbings" at Metropolitan Detention Center in Brooklyn, the only federal detention facility in EDNY). Moreover, the availability of a *Carlson* claim is a meaningful deterrent against abuses. App. 27a (Hamilton, J., dissenting). But under the Seventh Circuit's holding,

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jury trial nor punitive damages. *See Carlson*, 446 U.S. at 22. And recovery may be barred altogether if the claim arises from a "discretionary function" or "the execution of a statute or regulation, whether or not such statute or regulation be valid." 28 U.S.C. § 2680(a). Prison grievances are no substitute for *Carlson* claims either, especially where, as in this case, prison officials subvert the grievance system. And the PLRA provides no remedies.

[9] Low-level federal prison officials also perpetrate violence against federal inmates and fail to protect federal inmates from violence from other low-level federal prison officials. *See* Brief for MacArthur Justice Center as *Amici Curiae* in Support of Appellant at 1-8.

petitioner is without a judicial remedy because he was incarcerated in federal prison, not state prison.

2. The Seventh Circuit's conclusion that *Carlson*'s Eighth Amendment scope is limited to medical claims contravenes this Court's precedent. *See* App. 19a (Hamilton, J., dissenting) ("Eighth Amendment claims like that asserted by [petitioner]—for deliberately putting a prisoner in danger of violence from other prisoners—have long been recognized by the Supreme Court, this circuit, and other courts as entirely suitable for a *Bivens* claim.").[10] This Court's analysis in *Farmer v. Brennan*, which recognized that "prison officials have a duty … to protect prisoners from violence at the hands of other prisoners" shows the breadth of a *Carlson* claim and should be conclusive here. 511 U.S. at 833 (citation omitted). Further, other Courts of Appeals have understood that federal inmates' Eighth Amendment claims are not limited to the narrow facts of *Carlson*. *See supra* at 13-16 (discussing *Bistrian* and *Shorter*).

3. This case presents an ideal vehicle for review. The dispute turns on a pure question of law: Whether federal law provides a cause of action to a federal inmate subjected to inmate-on-inmate violence by a low-level prison official. Petitioner's claim was squarely raised and resolved below and the Seventh Circuit thoroughly addressed the question and treated it as dispositive.

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[10] No one disputes that *Carlson* remains good law. *See Cross v. Buschman*, No. 22-3194, 2024 WL 3292756, at *2 n.4 (3d Cir. July 3, 2024) (acknowledging that several federal Courts of Appeals have recognized that this Court has chosen not to overrule the *Bivens* trilogy, which includes *Carlson*).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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