No. 24-809

IN THE

Supreme Court of the United States

HOWARD GOLDEY, ASSOCIATE WARDEN, *et al.*,

Petitioners,

v.

ANDREW FIELDS, III, *et al.*,

Respondents.

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

PETITIONERS' REPLY BRIEF

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The Fourth Circuit opened a new frontier by extending *Bivens* to Eighth Amendment excessive force claims. Its opinion sparked a forceful and well-reasoned dissent. Pet.App. 23a-37a. It immediately drew withering criticism from a sister circuit. *Johnson v. Terry*, 119 F.4th 840, 850-51 (11th Cir. 2024). And it prompted unsolicited amicus briefs from the United States at both the rehearing and certiorari stages. That's because the decision below defies the Court's warnings about expanding *Bivens*, conflicts with the rulings of the eight other circuits to consider the same issue since *Egbert v. Boule,* 596 U.S. 482 (2022), and will interfere with correctional officers' daily decisions on the job.

Even so, Fields insists that there is nothing to see here. He dismisses the decision below as "narrow" (seven times), "unusual" (five times), and "rare" (eleven times), characterizing Petitioners as "rogue" agents (five times) engaged in "egregious" misconduct (eleven times). But Fields never disputes the substance of what the Fourth Circuit has held: Any plaintiff can bring a *Bivens* claim, despite Congress's failure to create one, if he *alleges* that a prison official used excessive force on him and that his failure to seek an administrative remedy is a defendant's fault. Such allegations are neither narrow nor rare, and in no other circuit would they suffice to create a cause of action. See, e.g., *Johnson*, 119 F.4th at 861 & n.7 (rejecting the argument that a plaintiff who says he was "not allowed to access the grievance procedure" has overcome the "special factors" counseling hesitation before creating a new *Bivens* right of action).

Confirming the significance of the Fourth Circuit's decision, at least one district court has already relied on it to further extend *Bivens*. D. Ct. Doc. 61, *Calderon-Velasquez v. Mears*, No. 22-CV-692 (E.D. Va. Apr. 11, 2025). Another relied on it to uphold an Eighth Amendment excessive force claim against prescreening review. *Acuna v. Jastal*, No. 5:24-CT-03097, 2025 WL 1296215, at *3 (E.D.N.C. May 2, 2025). And every *Bivens* case involves allegations of misconduct, often by purportedly "rogue" officials. The question isn't whether the court endorses the conduct alleged in the complaint. The question is whether in response to those allegations, the court should grab the wheel from Congress and exercise the legislative power to invent a new cause of action.

I. The Fourth Circuit is "a far-afield outlier."

Since the *Egbert* trilogy, the eight circuits faced with the question whether to extend *Bivens* to this new context have declined to do so. The Second, Ninth, and Tenth Circuits issued published opinions,[1] while the Third, Fifth, Sixth, Seventh, and Eleventh Circuits found the question straightforward enough that an unpublished opinion would suffice.[2] Only the

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[1] See *Edwards v. Gizzi*, 107 F.4th 81, 82 (2d Cir. 2024) (per curiam); *Chambers v. Herrera*, 78 F.4th 1100, 1107-08 (9th Cir. 2023); *Silva v. United States*, 45 F.4th 1134, 1141 (10th Cir. 2022)

[2] See *Landis v. Moyer*, No. 22-2421, 2024 WL 937070, at *2-*3 (3d Cir. Mar. 5, 2024); *Alsop v. Fed'l Bureau of Prisons*, No. 22-1933, 2022 WL 16734497, at *3 (3d Cir. Nov. 7, 2022); *Watkins v. Carter*, No. 22-40477, 2023 WL 4312771, at *1 (5th Cir. July 3, 2023); *Anderson v. Fuson*, No. 23-5342, 2024 WL 1697766, at *2-*4 (6th Cir. Feb. 1, 2024); *Patton v. Blackburn*, No. 21-5995, 2023

Fourth Circuit assumed the legislative authority to create an admittedly new cause of action. Given this divergence, the Eleventh Circuit was right to describe the decision below as "a far-afield outlier." *Johnson*, 119 F.4th at 85.

Yet Fields doesn't see any circuit split at all. To start, Fields brushes past the slew of unpublished opinions contrary to his position as if the question remained open in those circuits. He misses the point that in those circuits, the question is so firmly closed, in light of precedent from this Court and those circuits, that it now requires only an unpublished opinion.

As to the published opinions, he tries to paint them as factually distinguishable. But the circuit conflict here isn't based on mirror-image fact patterns. This case presents a split because the Fourth Circuit dismissed factors that proved outcome-dispositive in other circuits, such as Congress's decision not to create a private remedy for damages in the PLRA and the availability of other remedies like the FTCA or the Administrative Remedy Program.[3]

WL 7183139, at *2-*3 (6th Cir. May 2, 2023); *Greene v. United States*, No. 21-5398, 2022 WL 13638916, at *3 (6th Cir. Sept. 13, 2022); *Ajaj v. Fozzard*, No. 23-2219, 2024 WL 4002912, at *2 (7th Cir. Aug. 30, 2024); *Farrington v. Diah*, No. 22-13281, 2023 WL 7220003, at *1-*2 (11th Cir. Nov. 2, 2023). In fairness to Fields, the Petition did not cite *Watkins*, see Pet. 27-28, but the Government flagged the opinion in its amicus brief, U.S. Cert. Amicus Br. 15.

[3] See *Edwards*, 107 F.4th at 84-86 (Park, J., concurring); *Chambers*, 78 F.4th at 1107-08.

Fields counters that he alleged that Petitioners denied him access to the Administrative Remedy Program, so it wasn't really available here. That argument fails on the merits for the reasons explained below. But it also fails as an effort to ward off a circuit split, because the Eleventh Circuit rejected the same argument in *Johnson*. 119 F.4th at 859-61 & n.7. The court explained that "whether the plaintiff himself was denied access to an administrative remedy is not the question. The question is 'whether the Government has put in place safeguards to prevent constitutional violations from recurring.'" *Id.* at 860 (quoting *Egbert*, 596 U.S. at 498). So not only did the Fourth Circuit ignore factors that would have ended the analysis in other circuits, it adopted a rationale that another court promptly rejected. That's a classic split.

Beyond that, if the dispositive factor in an opinion was the availability of an alternative remedy in the FTCA[4] or Congress's failure to create a private

[4] Fields complains that under *Carlson*, the FTCA cannot qualify as an alternative remedy. BIO 22-23. But as Judge Park explained, when *Carlson* was decided, the Court looked to whether "'Congress has provided an alternative remedy which it *explicitly* declared to be a substitute for recovery directly under the Constitution and viewed as equally effective' in assessing whether an alternative remedial scheme forecloses a *Bivens* claim." *Edwards,* 107 F.4th at 85 n.3 (Park, J., concurring) (quoting *Carlson v. Green*, 446 U.S. 14, 18-19 (1980) (emphasis altered)). Modern case law reverses the presumptions, so today the Court will defer to congressional inaction so long as "the design of a Government program suggests that Congress has provided what it considers adequate remedial mechanisms." *Ibid.* (quoting *Egbert*, 596 U.S. at 501). Thus, this Court's modern approach gives "little weight" to *Carlson*'s conclusion "because it

damages remedy in the PLRA, then why would it matter if the plaintiff alleges that he was denied access to the Program? If the Program's availability didn't drive the court's analysis, then its purported unavailability should not change the result.

Fields also accuses Petitioners of mischaracterizing the decision below by saying that it approved a *Bivens* action for all excessive force claims. BIO 1, 7-9. This is a straw man. Petitioners explicitly recognized that the Fourth Circuit created a *Bivens* remedy "where an inmate brings a claim against individual, front-line officers who personally subjected the plaintiff to excessive force in clear violation of prison policy, and where rogue officers subsequently thwarted the inmate's access to alternative remedies … ." Pet. 9 (quoting Pet.App. 12a). The question presented is whether such a claim must fail because the courts have no authority to create a cause of action for excessive force under the Eighth Amendment without action by Congress. Obviously, the Fourth Circuit ruled on the claims before it based on the record, as opposed to issuing a sweeping prospective rule. That's the difference between a judicial opinion and a statute. But just as obviously, the Fourth Circuit extended *Bivens* to a new context, recognizing an implied cause of action for Eighth Amendment excessive force claims. See Pet.App. 1a-22a. That is not a "mischaracterization." Other courts have

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predates [the Court's] current approach to implied causes of action and diverges from the prevailing framework." *Ibid.* (quoting *Egbert*, 596 U.S. at 500-01) (alterations in original).

described the opinion in the same terms, including multiple courts in the Fourth Circuit.[5]

II. The decision below is wrong.

Fields strains to recast the opinion below as a faithful application of governing precedent. BIO 9-21. By his lights, there is not a single reason—not even one—to suspect that the Legislature might be better suited than the Judiciary to decide if *Bivens* should be extended to Eighth Amendment excessive force claims.

In fact, reasons abound.

1. Start with alternative remedies: The Legislative and Executive Branches have already established the Administrative Remedy Program.

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[5] See, e.g., *Williams v. Myers*, No. CV JKB-23-3017, 2025 WL 906270, at *3 (D. Md. Mar. 24, 2025) ("Nevertheless, the Fourth Circuit recently extended *Bivens* to a new context, allowing a federal prisoner's claims of excessive force in violation of the Eighth Amendment to proceed against individual prison officers."); *Kornegay v. Linter*, No. 5:24-CV-137, 2024 WL 5298779, at *5 (N.D.W. Va. Nov. 20, 2024), *report and recommendation adopted sub nom. Kornegay v. Lintner*, No. 5:24-CV-137, 2024 WL 5116847 (N.D.W. Va. Dec. 16, 2024) ("[T]he undersigned is mindful of the Fourth Circuit's recent decision in *Fields v. Federal Bureau of Prisons, et. al.*,109 F.4th 264 (4th Cir. 2024), where a divided panel of the [c]ourt extended *Bivens* to a new context, permitting a federal prisoner's Eighth Amendment excessive force claim to proceed against BOP officials."); *Dixon v. Royal Live Oaks Acad. of the Arts & Scis. Charter Sch.*, No. 9:22-CV-04198, 2024 WL 4284667, at *11 n.1 (D.S.C. Sept. 25, 2024) ("The Fourth Circuit recently extended *Bivens* to a federal prisoner's claims of excessive force in violation of the Eighth Amendment against individual prison officers.").

Fields contends that the Program is irrelevant, because he alleges that Petitioners denied him access to it. BIO 10-13.

This is less an argument than a category error. *Bivens* calls for a separation-of-powers analysis. The question is not whether we like how the Executive or Legislature's preferred remedy functions in a given case. The question is whether the Legislature or Executive has acted at all, to help us determine which branch is best positioned to craft a remedy. Here, both political branches acted. Fields says that Petitioners managed to end-run that remedy, denying him relief. But the political branches addressed that possibility, too: The Program lets inmates who believe that their safety would be endangered if their grievance became known at their institution bypass the warden, submitting a "sensitive" request directly to the Regional Director. 28 C.F.R. § 542.14(d)(1). Simply put, the Executive and Legislature established an alternate remedy for claims like this. That Fields finds it inadequate to his needs does not change the separation-of-powers analysis.

2. Next, Fields argues that Congress's decision not to include a private damages remedy in the PLRA should not counsel against judicially creating a remedy here because when Congress passed the PLRA, *Bivens* actions were common. BIO 13-14. But as this Court has explained, Congress's decision not to overrule *Carlson* "certainly does not suggest" a desire for "robust enforcement of *Bivens* remedies," much less give "license to create a new *Bivens* remedy." *Hernandez*, 589 U.S. at 111 n.9 (2020). And as the dissent noted below, "[t]hat Congress looked intently

and specifically at prisoner litigation and offered no private damages remedy should give us a reason to *think* that Congress *might* not want us to usurp its authority and create one ourselves." Pet.App. 28a.

Beyond that, Congress recently passed the Federal Prison Oversight Act, Pub. L. No. 118-71, 138 Stat. 1492 (July 25, 2024), revisiting the area of prisoner litigation and again declining to create a private damages remedy. Fields counters that the Act was not signed into law until the day the Fourth Circuit handed down its opinion, so it is irrelevant because he could not have taken advantage of it. BIO 16-17. This argument misses the mark. It doesn't matter whether Fields personally could proceed under the Act; of course he couldn't, because Congress decided not to create a private damages remedy. That's the point: The Legislature once again looked at this area of the law and decided not to authorize the claim that Fields wants to bring. That decision should have informed the analysis below. After all, the dissent brought it to the majority's attention. Pet.App. 26a n.3.

3. Fields argues that because the Fourth Circuit targeted allegedly "rogue" officers who violated prison policy, its decision will not have systemic effects. BIO 18-20. A little humility is in order here. "Running a prison is an inordinately difficult undertaking that requires expertise, planning, and … resources." *Turner v. Safley*, 482 U.S. 78, 84-85 (1987). Federal courts and appellate lawyers do not necessarily have the institutional competence to tackle those problems. At a minimum, they cannot reliably "predict the 'systemwide' consequences" of making prison staff personally liable under the Eighth Amendment. See

Egbert, 596 U.S. at 493. That uncertainty alone is a special factor foreclosing judicially created relief. *Ibid*.

What's more, courts do not find systemic consequences only when a prisoner challenges prison policy or action in accordance with that policy. *Hernandez*, for example, involved a classic "rogue" officer; Justice Ginsburg described him as such four times. 589 U.S. at 118-27 (Ginsburg, J., dissenting). And as Judge Richardson observed below, not even the Fourth Circuit follows Fields's proposed rule. Pet.App. 34a. It's unlikely, for example, that the correctional officers who allegedly placed Joseph Mays in administrative detention, fired him from a prison job, and transferred him to a different prison because of his race acted under policy. Even so, the Fourth Circuit concluded that expanding *Bivens* "would almost certainly 'impose liability on prison officials on a systemic level' and amount to a substantial burden on government officials." *Mays v. Smith*, 70 F.4th 198, 206 (2023).

4. As for *Bivens*'s continuing vitality, Fields does not even try to square the genus of rights of action, inferred directly from the Constitution by judges, with modern doctrine.

III. This case is important.

Finally, Fields complains that the decision below is unimportant. BIO 26-27. Yet it prompted a thorough dissent—which Fields ignores altogether—and two unsolicited amicus briefs from the Government. It also drew immediate criticism from the Eleventh Circuit, which wrote:

> Meanwhile, rarity doesn't foreclose false sightings. In the recent *Fields* case, a divided Fourth Circuit panel extended *Bivens* to a new context, allowing a federal prisoner's claims of excessive force in violation of the Eighth Amendment to proceed against individual prison officers. A vigorous and cogent dissent rejected the "wiggle room" the *Fields* majority "purport[ed] to detect" in the Supreme Court's repeated warnings that courts should not extend Bivens.
>
> The decision in *Fields*, a far-afield outlier, may lead to en banc reconsideration or to the Supreme Court finally rendering *Bivens* cases extinct. After all, the Supreme Court has stated as clearly as the English language permits: "[I]f we were called on to decide *Bivens* today, we would decline to discover any implied causes of action in the Constitution." That "called on to decide *Bivens*" call may be coming if the panel decision in *Fields* manages to duck en banc correction.

Johnson, 119 F.4th at 850-51 (citations omitted).

If this case were unimportant, then the Court would not have heard from four Circuit Judges and the Solicitor General. In truth, this is a watershed case. The question of whether to recognize a *Bivens* remedy for an Eighth Amendment excessive force claim recurs frequently. Since *Egbert* was handed down in 2022, nine circuits have weighed in on the issue. As the Government points out, prisoner lawsuits are unduly burdensome. U.S. Cert. Amicus

Br. 10. Opening the spigot will affect the way correctional officers do their jobs on a daily basis.

Fields responds that so long as they avoid "egregious" misconduct, correctional officers don't need to fear litigation. But all that's required to file a lawsuit is an allegation of excessive force. In a prison system where officers have to place their hands on prisoners on a daily basis, U.S. Cert. Amicus Br. 9, disputes over the force used are common. And as the dissent noted below, it will take very little for a prisoner to allege that he has been denied access to an administrative remedy simply by making vague allegations or omitting necessary context—"[f]or example, 'my unit supervisors prevented me from accessing the administrative remedy program'—*temporarily, because I was in solitary confinement for harming another inmate or a corrections officer*.'" Pet.App. 36a n.11.

Fields argues that this case does not warrant review because the decision below "has not been used to adjudicate any other claim since it was issued." BIO 26; see also *id*. at 1 ("[N]o court has applied the Fourth Circuit's decision to authorize a cause of action in any circumstance beyond the rare facts presented here.").

He is wrong. A district court has already relied on the decision below to further extend *Bivens* to a Fourth Amendment bodily privacy claim. D. Ct. Doc. 61, *Calderon-Velasquez v. Mears*, No. 22-CV-692, at 6-8 (E.D. Va. Apr. 11, 2025) (finding prisoner's allegations that his grievances were "ignored" sufficient to find no alternate remedy). Another district court applied the decision to hold that an Eighth Amendment excessive force claim survived

prescreening review under the PLRA. *Acuna v. Jastal*, No. 5:24-CT-03097, 2025 WL 1296215, at *3 (E.D.N.C. May 2, 2025). That could not happen in any other circuit. And before this case, it could not have happened in the Fourth Circuit, either. See Pet.App.38a-55a (District Court opinion dismissing complaint on prescreening review).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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