No. 21-5780

IN THE SUPREME COURT OF THE UNITED STATES

OMARI H. PATTON, PETITIONER

v.

CRYSTAL KIMBLE

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the cause of action for damages for violations of the Constitution that was recognized in Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971), should be extended to a claim alleging that a Federal Bureau of Prisons officer retaliated against an inmate, in violation of the First Amendment, by searching the inmate's cell and confiscating legal documents.

ADDITIONAL RELATED PROCEEDINGS

United States District Court (N.D. W.Va.):

Patton v. Kimble, No. 16-cv-10 (June 17, 2019)

United States Court of Appeals (4th Cir.):

Patton v. Kimble, No. 17-7032 (Mar. 30, 2018)

Patton v. Kimble, No. 19-6902 (May 13, 2021)

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A3) is not published in the Federal Reporter but is reprinted at 847 Fed. Appx. 196. A prior opinion of the court of appeals is not published in the Federal Reporter but is reprinted at 717 Fed. Appx. 271. The order of the district court (Pet. App. B1-B16) is unreported. A prior order of the district court is not published in the Federal Supplement but is available at 2017 WL 3189004. The report and recommendation of the magistrate judge (Pet. App. C1-C12) is not published in the Federal Supplement but is available at 2017 WL 9565824.

JURISDICTION

The judgment of the court of appeals was entered on May 13, 2021. The petition for a writ of certiorari was filed on September 24, 2021. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner is a federal inmate serving a 30-year sentence for convictions for conspiring to distribute cocaine and heroin. See Pet. 9. In 2014, while petitioner was incarcerated at Federal Correctional Institution Hazelton, a Federal Bureau of Prisons (BOP) facility in West Virginia, petitioner alleges that respondent, a BOP correctional officer, searched his cell and confiscated a binder containing some legal documents. See Pet. App. C3. Petitioner alleges that he verbally complained about respondent's search and the confiscation of his materials to a lieutenant at the prison. Ibid. Petitioner further alleges that, a few days later, respondent again searched petitioner's cell and confiscated additional legal documents, after having stated that she would do so because of petitioner's complaint. See ibid.

Petitioner thereafter "filed a request for administrative remedy" with BOP, asserting that respondent had "retaliat[ed] against him for complaining to her superior about her conduct" and had "confiscat[ed] his legal papers without justification." Pet. 10. That administrative process was resolved "in favor of" respondent, ibid., when the BOP officials considering petitioner's

administrative claim determined that respondent "did not remove any of [petitioner's] legal documents from his cell during both searches," Pet. C.A. Br. 21 (Aug. 26, 2019) (No. 19-6902).

2. In 2016, petitioner filed a pro se complaint invoking Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971), and claiming, among other constitutional violations, that respondent had violated petitioner's First Amendment rights by conducting the second search of his cell in retaliation for his complaints about respondent's first search. Pet. App. B1-B2. Petitioner's complaint sought monetary damages and an order directing respondent to return the legal documents that had allegedly been confiscated. Id. at C3.

A magistrate judge recommended that petitioner's complaint be dismissed for failure to state a claim on which relief could be granted. Pet. App. C1-C12. The magistrate judge concluded that petitioner's First Amendment claim failed as a matter of law based on circuit precedent holding that "a federal inmate's verbal complaints are not constitutionally protected and cannot support a retaliation claim." Id. at C8 (citing Daye v. Rubenstein, 417 Fed. Appx. 317, 319 (4th Cir. 2011) (per curiam), cert. denied, 565 U.S. 845 (2011)). The district court overruled petitioner's objections, adopted the magistrate judge's report and recommendation, and granted respondent's motion to dismiss the complaint. See 2017 WL 3189004. The court of appeals vacated and remanded in part, holding that "prisoners have a clearly established First

Amendment right 'to file a prison grievance free from retaliation.'" 717 Fed. Appx. 271, 272 (quoting Booker v. South Carolina Dep't of Corrs., 855 F.3d 533, 545 (4th Cir. 2017), cert. denied, 138 S. Ct. 755 (2018)).*

On remand, the parties engaged in discovery. See Pet. 13-14. Respondent moved for summary judgment, arguing that this Court's decision in Ziglar v. Abbasi, 137 S. Ct. 1843 (2017), showed that the Bivens remedy should not be extended to the new context presented by petitioner's First Amendment prison-retaliation claim. See Pet. App. B3. In the alternative, respondent argued that qualified immunity barred petitioner's suit, see ibid., and that "[c]ontemporaneous BOP records reflect that [respondent] documented both searches and that she removed only nude photographs, no legal documents, from [petitioner's] cell," Pet. 14 (citation omitted; first set of brackets in original).

The district court granted summary judgment to respondent. Pet. App. B1-B16. Applying Abbasi, the court found that petitioner's First Amendment retaliation claim would "clearly" require extending Bivens to a new context, id. at B8, and that "multiple special factors" counseled hesitation against authorizing an implied damages remedy for petitioner's claim, id. at B13; see id. at B8-B13. In the alternative, the court found that petitioner's

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* The court of appeals determined that the district court had properly dismissed petitioner's other claims against respondent. See 717 Fed. Appx. at 272; see also Pet. 12 n.2 ("conced[ing] that these [other] claims were properly dismissed").

suit would be barred by qualified immunity, reasoning that, at the time of the events at issue, no precedent had clearly established that the First Amendment protected prisoners' verbal complaints. Id. at B13-B15.

3. The court of appeals affirmed in an unpublished, per curiam order, concluding that the implied-damages remedy recognized in Bivens should not be extended to petitioner's First Amendment retaliation claim against a prison official. Pet. App. A1-A3. The court invoked its recent holding in Earle v. Shreves, 990 F.3d 774 (2021), cert. denied, 142 S. Ct. 358 (2021), that "the Bivens remedy may not 'be extended to include a federal inmate's claim that prison officials violated his First Amendment rights by retaliating against him for filing grievances.'" Pet. App. A2 (quoting 990 F.3d at 776). The court in Earle had applied Abbasi and identified special factors that counseled against extending Bivens to that new context, including the existence of BOP's alternative remedial mechanism for prisoners' grievances, 990 F.3d at 780, and the fact that "allowing a Bivens action for such" easily manufactured retaliation claims "could lead to an intolerable level of judicial intrusion" into matters of prison discipline that are "best left to correctional experts," id. at 780-781.

ARGUMENT

Petitioner contends (Pet. 18-21) that the judicially created remedy for damages that was recognized in Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971),

should be extended to his First Amendment claim against a prison official for alleged retaliation in searching his cell and confiscating material. The court of appeals' decision declining to extend Bivens to that new context is correct and follows directly from this Court's decisions in Ziglar v. Abbasi, 137 S. Ct. 1843 (2017), and Hernández v. Mesa, 140 S. Ct. 735 (2020). The court of appeals' decisions does not conflict with any decision of this Court or another federal court of appeals. This Court recently denied a petition for a writ of certiorari presenting very similar issues in the case that was the foundation for the court of appeals' reasoning in this case. See Earle v. Shreves, 142 S. Ct. 358 (2021) (No. 21-5341). The same course is warranted here.

1. a. As this Court has recently recounted, its 1971 decision in Bivens "broke new ground by holding that a person claiming to be the victim of an unlawful arrest and search" at his home "could bring a Fourth Amendment claim for damages against the responsible [federal] agents even though no federal statute authorized such a claim." Hernández, 140 S. Ct. at 741. The Court reasoned that, although "the Fourth Amendment does not in so many words provide for its enforcement by an award of money damages for the consequences of its violation," federal courts could infer that "particular remedial mechanism," as they had done for claims alleging violations of various federal statutes. Bivens, 403 U.S. at 396-397. In creating that cause of action, however, the Court emphasized that the case presented "no special factors counselling

hesitation in the absence of affirmative action by Congress." Id. at 396.

Since deciding Bivens in 1971, this Court has extended its holding only twice. See Hernández, 140 S. Ct. at 741. In Davis v. Passman, 442 U.S. 228 (1979), the Court allowed a congressional employee to sue for sex discrimination in violation of the Fifth Amendment. Id. at 248-249. And in Carlson v. Green, 446 U.S. 14 (1980), the Court allowed a suit against federal prison officials for Eighth Amendment violations arising from a failure to provide medical treatment that led to an inmate's death. Id. at 16, 19-23 & n.1. In each case, the Court reiterated that it found "no special factors counselling hesitation." Id. at 19; see Davis, 442 U.S. at 245.

"After those decisions, however, the Court changed course." Hernández, 140 S. Ct. at 741. In the more than 40 years since Carlson, this Court has "consistently refused to extend Bivens to any new context or new category of defendants." Abbasi, 137 S. Ct. at 1857 (citation omitted). Ten decisions of this Court have squarely rejected efforts to extend Bivens. See Hernández, 140 S. Ct. at 743 (citing cases).

This Court's refusal to extend Bivens in those cases reflects its changed understanding of the scope of judicial authority to create private rights of action. See Hernández, 140 S. Ct. at 741-742; Abbasi, 137 S. Ct. at 1855-1856. The reasoning of Bivens "rel[ied] largely on earlier decisions implying private damages

actions into federal statutes." Correctional Servs. Corp. v. Malesko, 534 U.S. 61, 67 (2001); see Bivens, 403 U.S. at 397 (citing J. I. Case Co. v. Borak, 377 U.S. 426 (1964)); Bivens, 403 U.S. at 402-403 & n.4 (Harlan, J., concurring in the judgment) (same). "Bivens, Davis, and Carlson were [thus] the products of" another "era" -- an "'ancien regime'" under which "'the Court assumed it to be a proper judicial function to "provide such remedies as are necessary to make effective" a statute's purpose'" and was therefore willing to infer "'causes of action not explicit in the statutory text itself.'" Hernández, 140 S. Ct. at 741 (quoting Abbasi, 137 S. Ct. at 1855).

The Court has since come "to appreciate more fully the tension between this practice and the Constitution's separation of legislative and judicial power." Hernández, 140 S. Ct. at 741. "[W]hen a court recognizes an implied claim for damages on the ground that doing so furthers the 'purpose' of the law, the court risks arrogating legislative power," because "a lawmaking body that enacts a provision that creates a right or prohibits specified conduct may not wish to pursue the provision's purpose to the extent of authorizing private suits for damages." Id. at 741-742. A novel damages action implicates "a number of economic and governmental concerns," including by "often creat[ing] substantial costs" for "defense and indemnification," as well as "the time and administrative costs attendant upon intrusions resulting from the discovery and trial process." Abbasi, 137 S. Ct. at 1856. An issue

that requires such "a host of considerations that must be weighed and appraised * * * should be committed to those who write the laws rather than those who interpret them." Id. at 1857 (citation and internal quotation marks omitted). This Court accordingly has "retreated from [its] previous willingness to imply a cause of action where Congress has not provided one," Malesko, 534 U.S. at 67 n.3, and has stated that "expanding the Bivens remedy is now a 'disfavored' judicial activity," Abbasi, 137 S. Ct. at 1857 (citation omitted).

b. Against that backdrop, this Court has explained that when a plaintiff asserts a Bivens claim, a court must apply a "two-step inquiry" to determine whether the claim can proceed. Hernández, 140 S. Ct. at 743. The court first asks whether the claim "arises in a 'new context' or involves a 'new category of defendants'" different from those in Bivens, Davis, and Carlson. Ibid. (quoting Malesko, 534 U.S. at 68). The court then considers "whether there are any 'special factors that counsel hesitation' about granting the extension." Ibid. (quoting Abbasi, 137 S. Ct. at 1857) (brackets omitted). If there are -- if there is "reason to pause" -- then the claim is not allowed. Ibid.; cf. Nestlé USA, Inc. v. Doe, 141 S. Ct. 1931, 1938-1939 (2021) (plurality opinion) ("A court 'must' not create a private right of action if it can identify even one 'sound reaso[n] to think Congress might doubt the efficacy or necessity of [the new] remedy.'") (citation omitted; brackets in original). In asking whether special factors counsel

hesitation, the Court gives important weight to "'separation-of-powers principles'" and "consider[s] the risk of interfering with the authority of the other branches." Hernández, 140 S. Ct. at 743 (quoting Abbasi, 137 S. Ct. at 1857). The Court has also held that the "existence of alternative remedies" is "a further reason not to create Bivens liability," id. at 750 n.12, even if "the laws currently on the books" would not afford the particular plaintiff "an 'adequate' federal remedy," United States v. Stanley, 483 U.S. 669, 683 (1987).

2. The court of appeals correctly applied that framework in declining to extend Bivens to petitioner's claim that respondent, a BOP correctional officer, violated his First Amendment rights by searching his cell and confiscating certain legal materials, allegedly in retaliation for petitioner's verbal complaints regarding a previous search of his cell.

a. Petitioner's claim would clearly require extending Bivens to a new context. The claims in Bivens, Davis, and Carlson did not involve the First Amendment. See Reichle v. Howards, 566 U.S. 658, 663 n.4 (2012) (observing that this Court has "never held that Bivens extends to First Amendment claims"). "A claim may arise in a new context" for purposes of the Bivens analysis "even if it is based on the same constitutional provision as a claim in a case in which a damages remedy was previously recognized." Hernández, 140 S. Ct. at 743; see Abbasi, 137 S. Ct. at 1859. But a claim that puts a new "constitutional right at issue" -- like

respondent's First Amendment retaliation claim -- is necessarily materially different from those that have previously been accepted. Abbasi, 137 S. Ct. at 1859-1860.

Petitioner asserts that his First Amendment retaliation claim is "not unlike the claim" at issue in Farmer v. Brennan, 511 U.S. 825 (1994). Pet. 18. But insofar as petitioner suggests that this Court "may have recognized a fourth Bivens context in Farmer," Pet. 18 (quoting Attkisson v. Holder, 925 F.3d 606, 621 n.6 (4th Cir. 2019)), that suggestion is contrary to Abbasi, which identified Davis and Carlson as the "only instances in which the Court has" extended the Bivens remedy. 137 S. Ct. at 1858; see Hernández, 140 S. Ct. at 741. In any event, this Court's decision in Farmer did not involve retaliation or the First Amendment; the Court instead considered a federal prisoner's claim that BOP officials had violated the Eighth Amendment by failing to protect the inmate from harm, and it explained how to apply the "deliberate indifference" standard that governs such claims. See 511 U.S. at 829-832.

b. The court of appeals' prior decision in Earle v. Shreves, 990 F.3d 774 (2021), cert. denied, 142 S. Ct. 358 (2021) -- on which the court relied in resolving this case, Pet. App. A2 -- correctly described multiple special factors that counsel hesitation against extending the Bivens remedy to the new context presented by petitioner's First Amendment claim.

First, the availability of alternative avenues to redress the sort of harm alleged by petitioner weighs strongly against extending Bivens to his claim. See Earle, 990 F.3d at 780. Petitioner, like the plaintiff in Earle, had "full access to remedial mechanisms established by the BOP, including suits in federal court for injunctive relief and grievances filed through the BOP's Administrative Remedy Program." Ibid. (quoting Malesko, 534 U.S. at 74). This Court has recognized that BOP's Administrative Remedy Program provides a "means through which allegedly unconstitutional actions and policies can be brought to the attention of the BOP and prevented from recurring," and a suit for injunctive relief, if necessary, "has long been recognized as the proper means for preventing entities from acting unconstitutionally." Malesko, 534 U.S. at 74. Petitioner does not dispute that BOP's administrative remedy process was available to him and provided a potential avenue for meaningful relief in connection with the allegedly improper deprivation of his legal documents. On the contrary, he acknowledges that he used BOP's administrative process to challenge respondent's alleged retaliation and the allegedly improper confiscation of his legal materials. See pp. 2-3, supra.

Second, extending the Bivens remedy to a prisoner's First Amendment retaliation claim like petitioner's "would work a significant intrusion into an area of prison management that demands quick response and flexibility." Earle, 990 F.3d at 781; see Bistrian v. Levi, 912 F.3d 79, 96 (3d Cir. 2018) (declining to

recognize a First Amendment retaliation claim against BOP officials because such a claim would implicate "real-time and often difficult judgment calls about disciplining inmates, maintaining order, and promoting prison officials' safety and security"). Earle involved a challenge to BOP officials' prison-housing decisions, see 990 F.3d at 781, but as the district court in this case recognized, similar concerns would arise from the prospect of judicial intrusion into BOP officials' decisions regarding when or how to search inmates' cells. See Pet. App. B11-B12.

This Court in Bush v. Lucas, 462 U.S. 367 (1983), declined to recognize a First Amendment Bivens claim against federal employers for retaliation against employees' protected speech, observing that the decision whether to recognize such a remedy would require balancing sensitive considerations. See id. at 368-370, 388-390. The prospect of individual suits for damages would make it "quite probable" that some federal personnel "would be deterred" from energetically performing their duties. Id. at 389. But "Congress is in a far better position than a court to evaluate the impact of a new species of litigation" against federal officials. Ibid. The same principle applies here: the possibility that some federal prison officials might hesitate in their decisions regarding searching inmates' cells, based on the potential of being forced to defend an individual Bivens claim for retaliation, gives reason to doubt that Congress would want such a damages remedy to be available in this context. See Abbasi, 137 S. Ct. at 1856. Indeed,

it would be "especially puzzling to recognize a Bivens First Amendment claim for federal inmates but not for federal employees," given that First Amendment claims generally "have less purchase in prisons." Callahan v. Federal Bureau of Prisons, 965 F.3d 520, 524 (6th Cir. 2020).

Third, recognizing a Bivens claim in this context "could expose prison officials to an influx of manufactured claims." Earle, 990 F.3d at 781; see id. at 780 & n.2 (explaining "the ease with which an inmate could manufacture a claim of retaliatory detention"). Any number of prison-administration or -disciplinary decisions can be challenged as allegedly retaliatory, especially given the sometimes-confrontational nature of the prison setting. And this Court has previously observed that retaliation claims, which depend on an officer's motive for acting, are "easy to allege and hard to disprove." Crawford-El v. Britton, 523 U.S. 574, 584-585 (1998) (citation omitted). The vast range of BOP actions that could give rise to a retaliation claim, and the recognized difficulties of calibrating such claims to avoid impinging on governmental functions, make it more than reasonable to think that "Congress might doubt the efficacy or necessity of a damages remedy" in this setting. Hernández, 140 S. Ct. at 743 (quoting Abbasi, 137 S. Ct. at 1858).

Petitioner asserts (Pet. 20 n.19) that a claim like his would lack "any potential for fabrication because the issue complained about is readily verifiable." But it is the officer's purportedly

retaliatory state of mind that is "easy to allege and hard to disprove," Crawford-El, 523 U.S. at 584-585 (citation omitted), and petitioner provides no explanation for how that would be readily verified.

Fourth, "legislative action suggesting that Congress does not want a damages remedy" in this area is yet another "factor counseling hesitation." Abbasi, 137 S. Ct. at 1865; see Pet. App. B12-B13. For nearly forty years, Congress has evinced "frequent and intense" interest in the regulation of federal prisons and the remedies available to federal prisoners. Abbasi, 137 S. Ct. at 1862 (citation omitted). But while Congress long ago created a cause of action for damages against state officials for constitutional violations, see 42 U.S.C. 1983, Congress has never created a parallel action against federal officials generally or BOP officials specifically. There are many reasons to believe that the omission "might be more than mere oversight." Abbasi, 137 S. Ct. at 1862.

In particular, in the Prison Litigation Reform Act of 1995 (PLRA), 42 U.S.C. 1997e et seq., Congress "made comprehensive changes to the way prisoner abuse claims must be brought in federal court," Abbasi, 137 S. Ct. at 1865, including claims brought by federal prisoners. See Porter v. Nussle, 534 U.S. 516, 524 (2002). When Congress enacted the PLRA, it "had specific occasion to consider the matter of prisoner abuse and to consider the proper way to remedy those wrongs," yet "the Act itself does not provide for

a standalone damages remedy against federal jailers" for such wrongs. Abbasi, 137 S. Ct. at 1865. As this Court has noted, Congress's failure to provide a damages remedy under the PLRA arguably "suggests Congress chose not to extend the Carlson damages remedy to cases involving other types of prisoner mistreatment." Ibid. Because that "congressional silence might be more than inadvertent," courts should not infer petitioner's requested cause of action absent "affirmative action by Congress." Id. at 1862 (citations and internal quotation marks omitted).

3. Like the court of appeals below, every other federal court of appeals to consider the issue since Abassi has declined to extend Bivens to a prisoner's First Amendment retaliation claim, and petitioner does not argue otherwise. See, e.g., Mack v. Yost, 968 F.3d 311, 325 (3d Cir. 2020) (refusing prisoner's claim concerning allegedly retaliatory work assignment); Buenrostro v. Fajardo, 770 Fed. Appx. 807, 808 (9th Cir. 2019) (refusing prisoner's retaliation claim); Petzold v. Rostollan, 946 F.3d 242, 252 & n.46 (5th Cir. 2019) (finding it "unlikely" that Bivens extends to a prisoner's claim of retaliatory placement in special housing unit); Bistrian, 912 F.3d at 95 (3d Cir.) (same); see also Callahan, 965 F.3d at 525 (6th Cir.) (refusing prisoner's First Amendment claim based on seizure of assertedly sexually explicit images). There is accordingly no disagreement among the courts of appeals that might warrant this Court's review. See Sup. Ct. R. 10(a). And the agreement of so many courts before the decision

below is further evidence that ample grounds counsel hesitation before extending Bivens to prisoners' retaliation claims.

4. After the petition for a writ of certiorari was filed in this case, the Court granted a petition for a writ of certiorari in Egbert v. Boule, No. 21-147 (oral argument scheduled for Mar. 2, 2022), to determine (inter alia) whether Bivens should be extended to a First Amendment claim alleging that a law-enforcement officer retaliated against a citizen's speech by reporting the citizen to other state and federal agencies. But Egbert does not involve a retaliation claim by a prison inmate arising from a search of his cell, which implicates both discipline and safety within the prison. The reasons described above (at pp. 12-16, supra) for doubting that Congress would have wanted a damages remedy to be available for prisoners alleging retaliation -- especially the existence of an alternative remedial process designed specifically for prisoners' claims -- show that the court of appeals' decision here was correct irrespective of the outcome of Egbert. It is therefore unnecessary to hold this petition pending the Court's resolution of Egbert.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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