

No. 25-417

IN THE
Supreme Court of the United States

FRANCIS NIELSEN,
Petitioner,
v.

KEKAI WATANABE,
Respondent.

**On Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit**

**BRIEF OF *AMICUS CURIAE*
ELAINE MITTLEMAN
IN SUPPORT OF PETITIONER**

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INTEREST OF AMICUS CURIAE ¹

Amicus curiae is an attorney who has had substantial experience in federal courts. In her first job after graduating from the University of Michigan Law School, she worked at the U.S. Department of Treasury on the Chrysler Loan Guarantee program. After expressing concern about the financial reporting, she was fired from that position. See Ann Crittenden, *Treasury's Ousted Chrysler Critic*, The New York Times, March 6, 1981.

The follow-up from that experience involved lengthy litigation. Opinions from that litigation include *Mittleman v. United States Treasury*, 773 F.Supp. 442 (D.D.C. 1991); *Mittleman v. Office of Personnel Management*, 76 F.3d 1240 (D.C. Cir. 1996), and *Mittleman v. United States*, 104 F.3d 410 (D.C. Cir. 1997).

In addition, the Whistleblower Protection Act of 1989 included a provision based on her experience with the Office of Special Counsel. S. Rep. No. 100-413, at 10-11 (1988). As a result of this experience and her lengthy experience in litigation, *amicus* has been interested in the status of the precedent in *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971).

¹ *Amicus* affirms that no counsel for a party authored this brief in whole or in part and that no person other than *amicus* made a monetary contribution to its preparation or submission.

SUMMARY OF ARGUMENT

Amicus had first-hand experience with seeking a remedy while relying upon *Bivens*. *Mittleman v. United States Treasury*, 773 F.Supp. 442, 453-454 (D.D.C. 1991). The district court found that plaintiff's *Bivens* claims were precluded by the Civil Service Reform Act and the Privacy Act. Plaintiff's damages claim based on her termination for exercising her First Amendment rights was barred. There should be a statute, similar to 42 U.S.C. § 1983, to permit plaintiffs to seek a remedy in federal court for constitutional violations.

A statute is needed to replace *Bivens*. To understand why a statute is necessary, it is instructive to understand the history and status of the *Bivens* doctrine. The Supreme Court authorized a damages action against federal officials in *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388 (1971). The cause of action created in *Bivens* was under the Fourth Amendment. 403 U.S. at 397.

After *Bivens*, the Court has established two other causes of action under the Constitution. *Davis v. Passman*, 442 U.S. 228 (1979), involved a cause of action under the Fifth Amendment for a sex-discrimination claim. *Carlson v. Green*, 446 U.S. 14 (1980), involved a cause of action under the Eighth Amendment for an inadequate-care claim.

Justice Thomas noted in *Egbert v. Boule*, 596 U.S. 482, 486 (2022), that, over the past 42 years, the Court had declined 11 times to imply a similar cause of action. One of those cases was *Bush v. Lucas*, 462 U.S. 367, 388 (1983), in which the question was

whether an elaborate remedial scheme involving federal employees should be augmented by a new judicial remedy.

The analysis to determine whether a *Bivens* claim is permitted involves a two-step process. First, it is asked whether the case presents “a new *Bivens* context” and whether it is meaningfully different from the three cases in which the Court has authorized a damages action. *Ziglar v. Abbasi*, 582 U.S. 120, 139 (2017).

Second, if a claim arises in a new context, a *Bivens* remedy is unavailable if there are “special factors” indicating that the Judiciary is arguably less equipped than Congress to allow the damages action to proceed. *Ziglar*, 582 U.S. at 136.

Although the cases describe two steps, the analysis essentially is a single question: whether there is any reason to think that Congress might be better equipped to create a damages remedy. *Egbert*, 596 U.S. at 492. For example, a court likely cannot predict the “systemwide” consequences of recognizing a cause of action under *Bivens*. *Ziglar*, 582 U.S. at 136.

Further, a court may not create a *Bivens* remedy if Congress has provided or authorized “an alternative remedial structure. *Ziglar*, 582 U.S. at 137. A court must ask only whether it is better equipped than the political branches to decide whether existing remedies should be augmented. *Egbert*, 596 U.S. at 492-493.

The question presented in this case is whether the Ninth Circuit erred in recognizing a *Bivens* cause of action. The Ninth Circuit held that the suit did not present a “new” context from *Carlson*. Respondent alleged that he suffered a fractured coccyx in a prison gang fight.

The Court should address the viability of the *Bivens* precedent. In light of the long-standing disapproval of *Bivens* in new contexts, the unworkable two-step process, and the litigation uncertainties and burdens, it is time for the Court to overrule *Bivens*. If *Bivens* is overruled, then Congress should have the strong incentive to pass appropriate statutes to provide causes of action.

ARGUMENT

I. Congress can write statutes to create remedies for federal employees.

Congress can write statutes to create remedies for federal employees. In *Egbert*, Justice Gorsuch concurred in the judgment, explaining that the Constitution’s separation of powers prohibits federal courts from legislating. He noted that the Court had acknowledged its error. The problem is how to recover from that error. *Egbert*, 496 U.S. at 502 (Gorsuch, J., concurring in judgment).

He noted the two-step inquiry, which really is just a single question. The larger remaining point is that courts should not act as legislatures, weighing the costs and benefits of new laws. He has difficulty with the Court’s case-specific analysis. The answer is always no if the question is whether a court is better

equipped than Congress to evaluate a new cause of action. Justice Gorsuch concluded with urging the Court to return the power to create new causes of action to Congress. *Egbert*, 496 U.S. at 502-504.

Amicus has experienced first-hand the unavailability of *Bivens* claims as a method to seek a remedy for constitutional violations. In *Mittleman v. United States Treasury*, 773 F.Supp. 442, 445 (D.D.C. 1991), she brought constitutional claims based on her experience working at the U.S. Department of Treasury on the Chrysler Loan Guarantee program.

In that case, the defendants argued that the court should not imply a *Bivens* action where Congress had established comprehensive statutory schemes which provided plaintiff with meaningful remedies. Defendants contended that the Civil Service Reform Act (“CSRA”) and the Privacy Act barred plaintiff’s constitutional claims.

The district court agreed that the CSRA precluded plaintiff’s *Bivens* claims, relying upon *Bush v. Lucas*, 462 U.S. at 367. The preclusive effect of *Bush* extended even to those claimants for whom the CSRA provided no remedy whatsoever.

The district court explained that “even though plaintiff was fired from a Schedule A position and then denied a Schedule C position, and Schedule A and C employees do not enjoy the same substantive and procedural protections provided members of the competitive service by the CSRA, plaintiff does not have a remedy for damages for constitutional violations outside the CSRA.” Plaintiff’s claim for

damages regarding her termination for exercising her First Amendment rights was barred. *Id.* at 453-454.

The district court used similar reasoning to find that plaintiff's constitutional claims relating to disclosures of false information in plaintiff's records were precluded by the Privacy Act. *Id.* at 454. 1983,

Thus, *amicus* could not rely upon *Bivens* to seek damages for claims of constitutional violations. The preclusive effect of the CSRA applied even if plaintiff had no remedy whatsoever under the CSRA.

Congress should write a statute, perhaps similar to 42 U.S.C. § 1983, to permit plaintiffs to get into court to pursue constitutional claims against federal officials. It is untenable that there is not a statutory cause of action for constitutional claims against federal officials.

II. The *Bivens* doctrine is unworkable.

Lower court judges have expressed frustration with *Bivens* and its questionable status. Judge Parker dissented in *Edwards v. Gizzi*, 107 F.4th 81, 89-91 (2d Cir. 2024) (Parker, J., dissenting), noting that the Supreme Court continues to express serious doubts about the future of *Bivens*. However, as long as *Bivens*, *Davis*, and *Carlson* remain good law, lower courts cannot rely upon the Supreme Court's doubts about *Bivens*' origins to functionally overturn those precedents.

Judge Tymkovich dissented in *Mohamed v. Jones*, 100 F.4th 1214, 1235-1244 (10th Cir. 2024) (Tymkovich, J., dissenting). He explained that "[m]yriad rational reasons suggest that Congress is

better suited to weigh the costs and benefits of permitting Mr. Mohamed’s *Bivens* claims. *Id.* at 1243. Although the Court has recognized that *Bivens* claims are contrary to the constitutional separation of powers, the Court created a self-defeating test in *Egbert*. *Id.* at 1244. Moreover, Judge Tymkovich emphasized that the public is harmed by the zombie existence of *Bivens*. Congress has no incentive to legislate absent the formal abrogation of *Bivens*. *Id.* at 1240.

In *Garraway v. Ciufu*, 113 F.4th 1210, 1224-1225 (9th Cir. 2024) (Bumatay, J., dissenting), Judge Bumatay cited Judge Tymkovich, including his reference to the zombie existence of *Bivens*. Judge Bumatay cautioned that the “judiciary is particularly ill-equipped to assess these questions and reach policy determinations.”

Judge Willett specially concurred in *Byrd v. Lamb*, 990 F.3d 879, 883-885 (5th Cir. 2021) (Willett, J., specially concurring). He explained that the “*Bivens* doctrine, if not overruled, has certainly been overtaken.” He pointed out that “Congress certainly knows how to provide a damages action for unconstitutional conduct.” Moreover, “individuals whose constitutional rights are violated at the hand of federal officers are essentially remedy-less.”

The burdensome two-step process to determine if *Bivens* applies becomes even more convoluted when there are interlocutory appeals. In *Mohamed v. Jones*, 100 F.4th 1214, 1215 (10th Cir. 2024), Bureau of Prisons (“BOP”) officials beat prisoner Mohamed while other officials watched. Mohamed brought Eighth Amendment excessive force and failure to

intervene claims against several BOP officials. Defendants argued *Bivens* did not extend to Mohamed's claims. The district court denied defendants' motion. The defendants sought interlocutory review. The Tenth Circuit dismissed the appeal for lack of jurisdiction.

In *Garraway v. Ciufu*, 113 F.4th 1210, 1214 (9th Cir. 2024), defendants filed an interlocutory appeal after the district court denied their motion for reconsideration of an earlier motion for judgment on the pleadings in which they argued no *Bivens* remedy existed for failure to protect an inmate from prisoner violence. The Ninth Circuit dismissed the interlocutory appeal for lack of jurisdiction.

Similarly, in *Fleming v. United States*, 127 F.4th 837, 839-840 (11th Cir. 2025), the Eleventh Circuit joined four other circuits in finding that an interlocutory appeal is not permitted for orders recognizing *Bivens* claims. The interlocutory appeal was dismissed for lack of jurisdiction.

In *Pearson v. Callahan*, 555 U.S. 223, 236 (2009), this Court addressed the two-step sequence in evaluating qualified immunity claims. The Court permitted discretion by the judges of the district court and the courts of appeals in deciding when of the two prongs of the qualified immunity analysis should be addressed first. The lower court judges had not been reticent in criticizing the rigid order of battle. Members of this Court had also criticized the rule. *Id.* at 234-325.

It is important that this Court consider opinions by lower court judges concerning whether a precedent

or rule is workable. Where a decision has been questioned by members of the Supreme Court and has defied consistent application by the lower courts, those factors weigh in favor of reconsideration. *Payne v. Tennessee*, 501 U.S. 808, 829-830 (1991).

This Court has been willing to overrule precedent, particularly if it is unworkable. In *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369, 144 S.Ct. 2244, 2273, 219 L.Ed.2d 832 (2024), this Court held that *Chevron* [*Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984)] is overruled. Chief Justice Roberts explained that *Chevron* has proved to be fundamentally misguided. Attempts by the Court to clarify the doctrine have only added to *Chevron*'s unworkability. For decades, the Court often declined to invoke *Chevron* even where it might appear to be applicable. *Id.* at 2270-2273.

This Court should not hesitate to overrule *Bivens* based on concern that Congress may not pass a pertinent statute. Congress reacted quickly to this Court's opinion in *Westfall v. Erwin*, 484 U.S. 292 (1988), and passed the Federal Employees Liability Reform and Tort Compensation Act of 1988, Pub.L. 100-694, 102 Stat. 4563 (commonly known as the Westfall Act). *Gutierrez de Martinez v. Lamagno*, 515 U.S. 417, 425-426 (1995). Congress fashioned special rules to provide for the transition. *Mittleman v. United States*, 104 F.3d 410, 412 (D.C. Cir. 1997).

As Justice Gorsuch emphasized, "once more, we tote up for ourselves the costs and benefits of a private right of action in this or that setting." *Egbert*, 596 U.S. at 504 (Gorsuch, J., concurring in

judgment). The burdensome test to determine whether a *Bivens* cause of action exists contrasts sharply with the simple reliance upon a statute that permits claims against state and local officials.

In light of this Court's recognition of the serious separation of powers and workability problems with *Bivens*, it is time for this Court to overrule *Bivens*.

III. *Bivens* does not afford a remedy for federal employees.

Bivens has often been the basis for litigation involving federal employees. However, *Bivens* typically has not afforded a cause of action or a remedy for federal employees. In light of the questions now about the workability of the *Bivens* doctrine, it is important to focus on Congress creating a statutory cause of action on which federal employees can rely to bring their constitutional claims directly to federal court.

In *Harlow v. Fitzgerald*, 457 U.S. 800, 802 (1982), this Court addressed the scope of immunity available to senior aides of the President of the United States in a suit for damages based upon their official acts. This Court had recognized that, in situations of abuse of office, an action for damages may offer the only realistic avenue for vindication of constitutional guarantees. *Harlow*, 457 U.S. at 814, citing *Bivens*, 403 U.S. at 410 (For people in *Bivens*' shoes, it is damages or nothing.”).

In 1983, the year after *Harlow* was decided, this Court decided *Bush v. Lucas*, 462 U.S. 367, 388 (1983). The case concerned “whether an elaborate

remedial system ... should be augmented by the creation of a new judicial remedy.” The Court concluded that it would be inappropriate to supplement the regulatory scheme with a new judicial remedy. *Id.* at 368. Justice Marshall in concurrence emphasized that today’s decision did not foreclose a federal employee from pursuing a *Bivens* remedy where his injury is not attributable to personnel actions which may be remedied under the federal statutory scheme. *Id.* at 391 (Marshall, J., concurring).

The opinion asserted that “[f]ederal civil servants are now protected by an elaborate, comprehensive scheme that encompasses substantive provisions forbidding arbitrary action by supervisors and procedures—administrative and judicial—by which improper action may be redressed.” But, in a footnote, the opinion admitted that “[n]ot all personnel actions are covered by this system.” There are no provisions for appeal of either suspensions for 14 days or less or adverse actions against probationary employees. *Bush*, 462 U.S. at 385 and n. 28.

The Civil Service Reform Act of 1978, 5 U.S.C. § 1101 *et seq.*, established a comprehensive system for administrative and judicial review of personnel actions involving federal employees. *United States v. Fausto*, 484 U.S. 439, 455 (1988). In *Elgin v. Dep’t of Treasury*, 567 U.S. 1, 10 (2012), the Court stated that “the CSRA does not foreclose all judicial review of petitioners’ constitutional claims, but merely directs that judicial review shall occur in the Federal Circuit.” The question is whether it is fairly discernible that Congress intended in the CSRA that

covered employees appealing covered agency actions should proceed exclusively through the statutory review scheme.

In dissent in *Elgin*, Justice Alito discussed *Bush v. Lucas*, 462 U.S. at 381. He explained that the Court had declined to allow a *Bivens* claim for retaliation against a federal employee who had exercised his First Amendment rights. The employee could have used the administrative process to pursue a statutory claim for wrongful removal. The Court had found that Congress did not intend to allow a duplicative nonstatutory claim for damages based on the same set of facts. *Elgin*, 567 U.S. at 31 (Alito, J., dissenting).

The holding in *Bush* seemingly relies upon the existence of a comprehensive scheme without determining whether the case at issue is actually covered by that comprehensive scheme. Justice Marshall wrote separately to emphasize that a different case would be presented if there was not a comprehensive scheme to provide full compensation to civil service employees who are discharged or disciplined in violation of their First Amendment rights. *Bush*, 462 U.S. at 390 (Marshall, J., concurring).

There have been ongoing concerns about whistleblower protections for federal employees. The cursory assumption in *Bush* that the scheme is comprehensive and reliably provides at least some remedy to federal employees is not correct. See Leslie Phillips, “Whistle-blower measure urges better protection,” USA TODAY, March 15, 1989; S. Rep. No. 100-413 (1988) – Whistleblower Protection Act of

1988: Report of the Committee on Governmental Affairs, United States Senate, to accompany S. 508. Senator Charles Grassley stated that our bureaucracy has not at all been receptive to whistleblowers. S. Rep. No. 100-413, at 5.

Elaine Mittleman, *amicus* in this case, had an unfortunate experience with the Office of Special Counsel (“OSC”). The Senate Report explained that “Ms. Mittleman not only did not receive any assistance from Office of Special Counsel on her complaint of reprisal, she was actually hurt by her contacting the OSC.” S. Rep. No. 100-413, at 10-11.

The myriad questions involving availability of judicial review of matters involving federal employees are continuing. This Court recently held in *Margolin v. Nat’l Ass’n of Immigr. Judges*, 146 S.Ct. 1285, 1287 (2026), that Congress intended federal employees to bring most work-related grievances to the Merit Systems Protection Board (“MSPB”) and the Special Counsel—not to federal district court.

In *Trump v. Slaughter*, Justice Sotomayor in dissent noted that the Government had argued that Congress had displaced any remedy in this case by enacting the CSRA. She noted that the CSRA explicitly does not apply to principal officers like Slaughter. However, that theory was not before the Court, as the Government had failed to raise it. *Trump v. Slaughter*, 609 U.S. at ____ (Sotomayor, J., dissenting) (slip op. at 92).

There is considerable uncertainty now about the status and authority of the Merit Systems Protection Board. Ian Kullgren, *Trump Defangs Independent*

Watchdog of Civil Service Disputes, Bloomberg Law, August 17, 2026. That article explained that recent steps by the Trump administration have moved some of MSPB's core responsibilities to other agencies or hollowed them out altogether. Rules set to take effect next month will take away appeals from MSPB and transfer them to the Office of Personnel Management. Thus, it is not clear at this time to what extent the comprehensive scheme discussed in *Bush* will continue to exist.

This Court held in *Egbert*, 596 U.S. at 498-499, that there is no *Bivens* cause of action for a First Amendment retaliation claim. With the present uncertainty about the complex and continuing issues involving review of actions concerning federal employees, the exemption from judicial review based on *Bush v. Lucas* and *Bivens* is very troubling. There are many differing situations involving federal employees, so asserting that there is a simple rule about the existence of a comprehensive statutory scheme is not instructive. Congress must act and provide a statutory basis so federal courts can address constitutional issues involving federal employees.

CONCLUSION

For the foregoing reasons, *amicus* urges this Court to reverse the judgment of the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted,

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