

No.

In the Supreme Court of the United States

NOAH A. HERZON, ET AL., PETITIONERS

v.

ROBERT ARIAS

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), in which this Court created a private right of action to seek damages for a Fourth Amendment claim arising out of a warrantless arrest in a home, should be extended to a Fourth Amendment excessive-force claim arising out of the execution of an arrest warrant outside the home.

PARTIES TO THE PROCEEDING

Petitioners (defendants-appellees below) are Noah A. Herzon, Juan Infante, Ty Kurcharski, Christopher Day, Adalberto Garcia, and Michael Bernard. Respondent (plaintiff-appellant below) is Robert Arias. The United States of America and the Drug Enforcement Administration were defendants but were dismissed as parties in the district court.

RELATED PROCEEDINGS

United States District Court (D.N.H.):

Arias v. Herzon, No. 17-cv-516 (June 27, 2023)

United States Court of Appeals (1st Cir.):

Arias v. Herzon, No. 23-1618 (Aug. 15, 2025)

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OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-57a) is reported at 150 F.4th 27. The order of the district court (App., *infra*, 58a-73a) is reported at 680 F. Supp. 3d 61.

JURISDICTION

The judgment of the court of appeals was entered on August 15, 2025. A petition for rehearing was denied on February 24, 2026 (App., *infra*, 74a-75a). On May 8, 2026, Justice Jackson extended the time within which to file a petition for a writ of certiorari to and including July 24, 2026. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

INTRODUCTION

In *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), this Court

created a private right of action to seek damages for a Fourth Amendment claim that federal officers used excessive force to conduct a warrantless arrest in the home. In the decision below, the First Circuit extended the *Bivens* remedy to respondent’s Fourth Amendment claim that officers used excessive force to conduct an arrest with a warrant outside the home.

That decision is incorrect. Since *Bivens*, this Court has come to recognize that “the power to create causes of action belongs to Congress,” not the courts. *Cisco Systems, Inc. v. Doe*, 146 S. Ct. 1882, 1890 (2026). “For the past 45 years,” therefore, it “has consistently declined to extend *Bivens* to new contexts.” *Goldey v. Fields*, 606 U.S. 942, 945 (2025) (per curiam). The court of appeals concluded that this case does not arise in a new context for *Bivens*, but that disregards meaningful differences between warrantless arrests in the home and warrant-authorized arrests outside the home.

The First Circuit’s decision deepens a multi-sided circuit conflict. Three courts of appeals (the First, Seventh, and Tenth Circuits) have determined that *Bivens* covers excessive-force claims arising out of warrant-authorized arrests outside the home. Two courts of appeals (the Fifth and Ninth Circuits) have determined that *Bivens* does not encompass excessive-force claims arising outside the home, whether with or without warrants. And one court of appeals (the Fourth Circuit) has determined that *Bivens* does not encompass excessive-force claims arising out of arrests with warrants, whether in or outside the home.

This Court should resolve that disagreement. At a minimum, the Court should hold the petition for a writ of certiorari pending the resolution of *Nielsen v. Watanabe*, cert. granted, No. 25-417 (June 22, 2026). Although *Nielsen* involves an Eighth Amendment claim rather

than a Fourth Amendment claim, it could affect the court of appeals' mode of analyzing whether this case arises in a new context for *Bivens*.

STATEMENT

1. In 2016, the Drug Enforcement Administration (DEA) began investigating respondent Robert Arias for drug trafficking. 2021 WL 185031, at *1. After DEA agents made several controlled purchases of fentanyl-laced heroin from respondent, the DEA obtained a warrant for his arrest. *Ibid.*

A task force consisting of DEA agents and local police officers executed the warrant in the parking lot of a shopping mall in Salem, New Hampshire. App., *infra*, 59a-60a. Finding respondent in the front passenger seat of a car, task-force members cut his seatbelt, removed him from the car, and handcuffed him. *Id.* at 60a. According to the officers, the arrest was “quick and non violent.” *Ibid.* But respondent alleges that the officers dragged him from the car by his neck, hit his head against the ground, stepped on his legs, and caused him to lose consciousness. *Ibid.*

2. Respondent sued petitioners—six task-force members who were allegedly involved in his arrest—in the United States District Court for the District of New Hampshire. 2021 WL 185031, at *1. Invoking *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), he seeks damages from petitioners on the ground that they violated the Fourth Amendment by using excessive force to arrest him or by failing to intervene to prevent the use of excessive force. App., *infra*, 58a. The district court granted summary judgment in favor of two of the six petitioners because respondent could not show that they participated in or witnessed his arrest. 2021 WL 185031, at *4-*5.

The district court later granted summary judgment in favor of the remaining petitioners on the ground that respondent lacks a right of action under *Bivens*. App., *infra*, 58a-73a. The court determined that respondent's excessive-force and failure-to-intervene claims arose in new contexts to which *Bivens* should not be extended. *Id.* at 66a-73a. The court concluded that this case differs from *Bivens* because the Inspector General Act of 1978 (Inspector General Act), Pub. L. No. 95-452, 92 Stat. 1101—which was extended to the DEA by the Inspector General Act Amendments of 1988, Pub. L. No. 100-504, 102 Stat. 2515—provided new administrative remedies for alleged misconduct by DEA agents. App., *infra*, 68a-71a. But the court rejected petitioners' contention that this case meaningfully differs from *Bivens* because *Bivens* involved a warrantless arrest in the home while this case involves the execution of an arrest warrant outside the home. *Id.* at 67a-68a.

3. A divided panel of the First Circuit affirmed in part, reversed in part, and remanded. App., *infra*, 1a-57a. The court concluded that respondent's excessive-force claim arises in the same context as *Bivens*, *id.* at 7a-43a, but noted that respondent did not contest the district court's holding that his failure-to-intervene claim arises in a different context, *id.* at 43a.

The court of appeals rejected petitioners' contention that the excessive-force claim arises in a new context for *Bivens* because it involves the execution of an arrest warrant outside the home. App., *infra*, 17a-23a. It reasoned that "[t]he use of excessive force in effectuating an arrest is equally excessive regardless of whether an arrest is made pursuant to a warrant," *id.* at 18a, and that "the fact that the allegedly excessive force took place in a parking lot rather than at a private home does not risk 'altering the policy balance that initially justi-

fied the cause of action recognized in *Bivens*,” *id.* at 20a-21a (brackets and citation omitted). The court of appeals then rejected the district court’s determination that the Inspector General Act distinguishes this case from *Bivens*. *Id.* at 23a-43a. The court stated that such a rationale would eliminate *Bivens* remedies “for all claims against federal law enforcement officers.” *Id.* at 26a n.5.

Judge Lynch concurred in part and dissented in part. App., *infra*, 44a-57a. Judge Lynch agreed with the court’s rejection of respondent’s failure-to-intervene claim, but she would have rejected his excessive-force claim as well. *Id.* at 44a. In her view, this case differs from *Bivens* because it involves the execution of an arrest warrant outside the home, *id.* at 53a-55a, and because the Inspector General Act has provided a system of administrative remedies, *id.* at 50a-53a.

4. Petitioners filed a petition for rehearing, which the court of appeals denied. App., *infra*, 74a-75a. Judge Lynch dissented from the denial of panel rehearing. *Id.* at 75a.

REASONS FOR GRANTING THE PETITION

The court of appeals erred by extending the private damages remedy in *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), a case that involved a warrantless arrest in the home, to cases that involve warrant-authorized arrests outside the home. Because that decision deepens a multi-sided circuit conflict, this Court should grant plenary review. At a minimum, the Court should hold the petition for a writ of certiorari pending the resolution of *Nielsen v. Watanabe*, cert. granted, No. 25-417 (June 22, 2026).

A. The Court Of Appeals Erred By Extending *Bivens* To Warrant-Authorized Arrests Outside The Home

1. “Constitutional rights do not typically come with a built-in cause of action to allow for private enforcement in courts.” *DeVillier v. Texas*, 601 U.S. 285, 291 (2024). “Instead, constitutional rights are generally invoked defensively in cases arising under other sources of law, or asserted offensively pursuant to an independent cause of action designed for that purpose.” *Ibid.* Such rights of action are ordinarily created through statutes enacted by Congress. See, *e.g.*, 42 U.S.C. 1983.

In *Bivens*, this Court created a private right of action for damages against federal narcotics agents who allegedly violated the Fourth Amendment by arresting the plaintiff in his house without a warrant. See 403 U.S. at 397. The agents in that case allegedly “manacled [the plaintiff] in front of his wife and children,” “threatened to arrest the entire family,” “searched the apartment from stem to stern,” and later “subjected [the plaintiff] to a visual strip search.” *Id.* at 389. In two subsequent cases, this Court extended the *Bivens* remedy by creating rights of action for a former congressional staffer’s Fifth Amendment equal-protection claim alleging discrimination based on sex, see *Davis v. Passman*, 442 U.S. 228, 230-231 (1979), and for a prisoner’s Eighth Amendment claim alleging deliberate indifference by prison staff to a medical emergency, see *Carlson v. Green*, 446 U.S. 14, 18-23 (1980).

Since then, this Court has come to recognize that “judicially created causes of action offend the separation of powers in almost every circumstance.” *Cisco Systems, Inc. v. Doe*, 146 S. Ct. 1882, 1891 (2026); see *Egbert v. Boule*, 596 U.S. 482, 491 (2022); *Alexander v. Sandoval*, 532 U.S. 275, 286 (2001). “At bottom, creating a cause

of action is a legislative endeavor.” *Egbert*, 596 U.S. at 491. The Court has accordingly described the creation of a *Bivens* action as “a disfavored judicial activity” and an “extraordinary act that places great stress on the separation of powers.” *Id.* at 491, 497 n.3 (citations omitted). In the 46 years since *Carlson*, the Court has consistently rejected every proposed *Bivens* action that it has considered. See *Goldey v. Fields*, 606 U.S. 942, 944-945 (2025) (per curiam); *Egbert*, 596 U.S. at 493-494, 498-499; *Hernández v. Mesa*, 589 U.S. 93, 113-114 (2020); *Ziglar v. Abbasi*, 582 U.S. 120, 145-146 (2017); *Minneeci v. Pollard*, 565 U.S. 118, 131 (2012); *Wilkie v. Robbins*, 551 U.S. 537, 562 (2007); *Correctional Services Corp. v. Malesko*, 534 U.S. 61, 74 (2001); *FDIC v. Meyer*, 510 U.S. 471, 486 (1994); *Schweiker v. Chilicky*, 487 U.S. 412, 425 (1988); *United States v. Stanley*, 483 U.S. 669, 678 (1987); *Bush v. Lucas*, 462 U.S. 367, 390 (1983); *Chappell v. Wallace*, 462 U.S. 296, 304 (1983).

2. This Court has applied a two-step test to decide whether to allow a *Bivens* claim to proceed. See *Egbert*, 596 U.S. at 492. The Court first asks whether the case presents “a new *Bivens* context”—*i.e.*, whether the case “meaningfully differ[s] from the three cases” in which the Court has recognized a *Bivens* remedy. *Ibid.* (brackets and citation omitted). “A case might differ in a meaningful way” on account of any of various kinds of alterations in its circumstances, such as “the rank of the officers involved; the constitutional right at issue; the generality or specificity of the official action; the extent of judicial guidance as to how an officer should respond to the problem or emergency to be confronted; the statutory or legal mandate under which the officer was operating; the risk of disruptive intrusion by the Judiciary into the functioning of other branches”—or from the presence of other “special factors that previous *Bivens*

cases did not consider.” *Abbasi*, 582 U.S. at 139-140. In other words, “the new-context inquiry is easily satisfied.” *Id.* at 149. A case presents a new context even if it differs from earlier *Bivens* cases in “small” ways, because “even a modest extension is still an extension.” *Id.* at 147, 149.

If a case arises in a new *Bivens* context, the Court asks whether “‘special factors’” indicate that courts are “at least arguably less equipped than Congress” to weigh the costs and benefits of a damages remedy. *Egbert*, 596 U.S. at 492 (citation omitted). “If there is even a single ‘reason to pause before applying *Bivens* in a new context,’ a court may not recognize a *Bivens* remedy.” *Ibid.* (citation omitted).

3. Neither respondent nor the court of appeals denied that, if this case arises in a new context for *Bivens*, special factors would counsel hesitation in extending *Bivens* to that context. Respondent instead contended, and the decision below held, only that this case arises in the same context as *Bivens*. That holding is wrong. This case, which involves a warrant-authorized arrest outside the home, meaningfully differs from *Bivens*, which involved a warrantless arrest in the home.

To start, “the constitutional right[s] at issue” differ. *Abbasi*, 582 U.S. at 140. While all arrests implicate the “right of the people to be secure in their persons,” an arrest in the home also implicates the “right of the people to be secure in their * * * houses.” U.S. Const. Amend. IV. Under the Fourth Amendment, the home “is first among equals,” *Florida v. Jardines*, 569 U.S. 1, 6 (2013), and “is entitled to special protection as the center of the private lives of our people,” *Georgia v. Randolph*, 547 U.S. 103, 115 (2006) (citation omitted). “‘Freedom’ in one’s own ‘dwelling is the archetype of the privacy protection secured by the Fourth Amendment,’”

and “‘physical entry of the home is the chief evil against which it is directed.’” *Lange v. California*, 594 U.S. 295, 303 (2021) (brackets and citation omitted). An arrest in that “most private place” thus meaningfully differs from an arrest that is made elsewhere. *Case v. Montana*, 607 U.S. 107, 113 (2026). Indeed, that is precisely why an arrest in the home usually requires a warrant, see *Payton v. New York*, 445 U.S. 573, 586-590 (1980), even though an arrest generally requires only probable cause, see *United States v. Watson*, 423 U.S. 411, 414-424 (1976).

That warrant requirement, in turn, protects the right to have probable cause determined by a “neutral and detached magistrate” rather than by “the officer engaged in the often competitive enterprise of ferreting out crime.” *Johnson v. United States*, 333 U.S. 10, 14 (1948). “The arrest warrant procedure serves to insure that the deliberate, impartial judgment of a judicial officer will be interposed between the citizen and the police, to assess the weight and credibility of the information which the complaining officer adduces as probable cause.” *Wong Sun v. United States*, 371 U.S. 471, 481-482 (1963). An arrest with a warrant respects those guarantees, while an improper arrest without a warrant subverts them.

This case also differs from *Bivens* with respect to the “extent of judicial guidance as to how an officer should respond to the problem or emergency to be confronted.” *Abbasi*, 582 U.S. at 140. This Court’s cases have “drawn a firm line at the entrance to the house.” *Payton*, 445 U.S. at 590. They provide clear guidance for law enforcement: In the absence of an exigency, officers must “get a warrant before entering a home without permission.” *Lange*, 594 U.S. at 298. Judicial guidance for officers executing a warrant outside the home, by con-

trast, is less precise. They must refrain from using excessive force in carrying out an arrest, but “[t]here is no ‘easy-to-apply legal test’” for determining when force is excessive. *Barnes v. Felix*, 605 U.S. 73, 80 (2025) (citation omitted). That “judicial precedents provide a less meaningful guide for official conduct” here is one reason this case “present[s] a new context for *Bivens* purposes.” *Abbasi*, 582 U.S. at 148.

Next, this case differs from *Bivens* because an officer who executes an arrest warrant operates under a different “legal mandate” than an officer who makes a warrantless arrest. *Abbasi*, 582 U.S. at 140. In general, the decision whether to make a warrantless arrest on the basis of an officer’s finding of probable cause lies within the discretion of the arresting officer. See *Town of Castle Rock v. Gonzales*, 545 U.S. 748, 760-761 & n.8 (2005). By contrast, an arrest warrant reflects a judicial magistrate’s finding of probable cause and concomitant “command” that the suspect be arrested. Fed. R. Crim. P. 4(a) and (b)(1)(C). A lawmaker could reasonably conclude that damages liability is more appropriate when police officers are exercising their own discretion to make arrests than when they are carrying out judicial commands.

Further distinguishing this case from *Bivens*, this case poses a heightened “risk of disruptive intrusion by the Judiciary into the functioning of other branches.” *Abbasi*, 582 U.S. at 140. Recognizing a *Bivens* action in the circumstances of this case would expose officers to personal liability not just for crossing the bright line associated with warrantless intrusions into the home, but for engaging in more general law-enforcement activities. Such a broad application of *Bivens* would heighten the “risk that fear of personal monetary liability and harassing litigation will unduly inhibit officials in the

discharge of their duties.” *Egbert*, 596 U.S. at 499 (citation omitted).

Finally, the alleged conduct in *Bivens* involved a more significant violation of the Fourth Amendment than respondent’s allegations. The conduct in *Bivens*—the use of excessive force in making a warrantless arrest in the home—was among “the most flagrant abuses of official power” and “the most flagrant and patently unjustified sorts of police conduct.” 403 U.S. at 410-411 (Harlan, J., concurring in the judgment). A reasonable lawmaker could conclude that such conduct is more deserving of a damages remedy than the use of excessive force to execute an arrest warrant in a public place.

The court of appeals reasoned that this case, like *Bivens*, involves “excessive force claims” against “line law enforcement officers,” App., *infra*, 15a, and that “[t]he use of excessive force in effectuating an arrest is equally excessive regardless of whether an arrest is made pursuant to a warrant,” *id.* at 18a, or whether the arrest is made in the home, *id.* at 20a-21a. This Court, however, rejected a similar line of reasoning in *Egbert*, where it declined to recognize a *Bivens* action against a border-patrol agent who allegedly used excessive force in making an arrest near the border between the United States and Canada. See 596 U.S. at 494-496. Though *Bivens* and *Egbert* “involve[d] similar allegations of excessive force and thus arguably present[ed] ‘almost parallel circumstances,’” the Court determined that “these superficial similarities [we]re not enough to support the judicial creation of a cause of action.” *Id.* at 495 (citation omitted). That *Egbert* involved a “‘conventional’ excessive-force claim, as in *Bivens*, d[id] not bear on the relevant point.” *Ibid.* So too here, the differences between this case and *Bivens* are more important than the similarities.

The court of appeals also found the differences between this case and *Bivens* insufficiently “meaningful” to create a new context. App., *infra*, 21a. This Court has explained, however, that “the new-context inquiry is easily satisfied,” that even “small” differences can make a context new, and that “even a modest extension is still an extension.” *Abbasi*, 582 U.S. at 147, 149. Because the differences between warrant-authorized arrests outside the home and warrantless arrests in the home are not “trivial,” this case arises in a new context. *Id.* at 149.

B. The Question Presented Warrants This Court’s Review

The court of appeals’ decision warrants this Court’s review because it deepens a multi-sided circuit conflict about whether *Bivens* extends to claims that officers used excessive force outside the home or in executing an arrest warrant.

Three courts of appeals—the First Circuit in this case, the Seventh Circuit in *Snowden v. Henning*, 72 F.4th 237 (2023), cert. denied, 145 S. Ct. 137 (2024), and the Tenth Circuit in *Logsdon v. U.S. Marshal Service*, 91 F.4th 1352 (2024)—have concluded that *Bivens* encompasses excessive-force claims arising out of the execution of arrest warrants outside the home. *Snowden* involved the alleged use of excessive force to execute an arrest warrant in a hotel lobby. See 72 F.4th at 247. The Seventh Circuit concluded that *Bivens* encompassed “run-of-the-mill allegations of excessive force during an arrest,” whether in a “[h]otel or home” and with “[a] warrant” or with “no warrant.” *Ibid.* In *Logsdon*, the plaintiff alleged that officers used excessive force to execute an arrest warrant outdoors. See 91 F.4th at 1356. Although the Tenth Circuit ultimately rejected the extension of *Bivens* on the basis of other differences, *id.*

at 1358, the court “agree[d]” with the plaintiff that “the warrant and the location of the arrest have no legal significance in an excessive-force case.” *Id.* at 1357.

By contrast, two courts of appeals—the Fifth Circuit in *Byrd v. Lamb*, 990 F.3d 879 (2021), cert. denied, 142 S. Ct. 2850 (2022), and the Ninth Circuit in *Mejia v. Miller*, 61 F.4th 663 (2022)—have declined to extend *Bivens* to excessive-force claims arising outside the home. In *Byrd*, the Fifth Circuit rejected a *Bivens* claim based on the alleged use of excessive force in a parking lot. See 990 F.3d at 880-881. The court emphasized that the claim “arose in a parking lot, not a private home as was the case in *Bivens*.” *Id.* at 882. Similarly, in *Mejia*, the Ninth Circuit rejected a *Bivens* claim based on the use of excessive force on public lands. See 61 F.4th at 665-666. The court found it significant that “none of the events in question occurred in or near [the plaintiff’s] home.” *Id.* at 668.

The Fourth Circuit, meanwhile, has distinguished among excessive-force claims based on whether they arise out of the execution of a warrant. In *Orellana v. Godec*, 145 F.4th 516 (4th Cir. 2025), the court declined to recognize a *Bivens* action based on the use of excessive force to effectuate an arrest—even though the arrest occurred in the plaintiff’s apartment—because “the officers acted under a warrant.” *Id.* at 525. The court stated that “the Fourth Amendment sharply distinguishes between with-warrant and warrantless [arrests], treating the introduction of the warrant as a signal moment in the proceedings.” *Ibid.* (quoting *Annaparedy v. Pascale*, 996 F.3d 120, 135-136 (4th Cir. 2021)).

In short, this case squarely presents a 3-2-1 conflict among the courts of appeals. An excessive-force claim such as this one may proceed in the First, Seventh, and Tenth Circuits; may not proceed in the Fifth and Ninth

Circuits because it arises outside the home; and may not proceed in the Fourth Circuit because it arises out of the execution of an arrest warrant.

Judges have acknowledged that circuit conflict. For example, when the Tenth Circuit concluded that “[a] warrant and location of the arrest have no legal significance in an excessive-force case,” it acknowledged that “there is substantial authority to the contrary” and that “other circuits have said that a new *Bivens* context exists when federal officials execute a valid warrant” or “when the violation does not occur in the plaintiff’s home.” *Logsdon*, 91 F.4th at 1357. Similarly, the First Circuit suggested in the decision below that, no matter how it resolved this case, it could “hardly avoid a circuit split.” App., *infra*, 22a; see *id.* at 20a. And Judge Lynch’s dissent observed that the court’s decision “magnifies existing circuit splits” regarding whether “the existence of a warrant” or the occurrence of the relevant conduct “outside the home” are “meaningful difference[s] from *Bivens*.” *Id.* at 55a-56a. Judge Lynch added that “[t]he Supreme Court may wish to address these circuit splits” and to provide “additional guidance to lower court judges, who in good faith have reached different outcomes.” *Id.* at 45a n.11.

That conflict warrants this Court’s review. The question presented recurs frequently; as discussed above, in just the last five years, six courts of appeals (the First, Fourth, Fifth, Seventh, Ninth, and Tenth Circuits) have decided cases about whether *Bivens* extends to excessive-force claims arising out of arrests outside the home or arrests authorized by warrants. The question presented is also important; the court of appeals’ decision undermines the separation of powers by usurping a function, the creation of new rights of action, that the Constitution generally reserves to the Legislative Branch.

Finally, this case is an excellent vehicle for resolving the question presented. Petitioners contended in both the court of appeals and the district court that this case differs from *Bivens* because it involves an arrest with a warrant outside the home, and both courts addressed that argument on the merits. See App., *infra*, 16a, 66a-67a. No jurisdictional or procedural obstacle would prevent the Court from reaching the question presented. And because that question is a pure issue of law, no further factual development is necessary to resolve it.

C. Alternatively, This Court Should Hold The Petition Pending The Resolution Of *Nielsen*

This Court has already granted review in *Nielsen* to consider the continuing vitality and scope of *Carlson*, the case that extended *Bivens* to certain claims brought by prisoners alleging that prison staff violated the Eighth Amendment through deliberate indifference to their medical needs. See Pet. at 15-32, *Nielsen*, *supra* (No. 25-417). Although this case involves a Fourth Amendment claim under *Bivens* rather than an Eighth Amendment claim under *Carlson*, *Nielsen* could affect the proper resolution of this case.

In *Nielsen*, the court of appeals concluded that certain distinctions between that case and *Carlson* were too insignificant to give rise to a new context. See Pet. App. at 8a, *Nielsen*, *supra* (No. 25-417). The court in that case also reasoned that the existence of alternative remedies is relevant only “at the *second* step of the *Bivens* analysis.” *Id.* at 15a. The court of appeals in this case similarly concluded that the distinctions between this case and *Bivens* are insufficiently meaningful to give rise to a new context, see App., *infra*, 16a, and that “the mere existence of a previously unconsidered” alternative remedy does not necessarily “ma[ke]

the context new,” *id.* at 27a. *Nielsen* could therefore affect the court of appeals’ new-context analysis. As a result, if this Court does not grant plenary review in this case, it should hold the petition for a writ of certiorari pending the resolution of *Nielsen*.

CONCLUSION

The petition for a writ of certiorari should be granted. Alternatively, the petition should be held pending the resolution of *Nielsen v. Watanabe*, cert. granted, No. 25-417 (June 22, 2026).

Respectfully submitted.

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APPENDIX

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 23-1618

ROBERT ARIAS, PLAINTIFF, APPELLANT

v.

NOAH A. HERZON, JUAN INFANTE, TY KURCHARSKI,
CHRISTOPHER DAY, ADALBERTO GARCIA, MICHAEL
BERNARD, DEFENDANTS, APPELLEES,
US GOVERNMENT, US DRUG ENFORCEMENT
ADMINISTRATION, DEFENDANTS

Filed: Aug. 15, 2025

Appeal from the United States District Court for the
District of New Hampshire
[Hon. Landya B. McCafferty, U.S. District Judge]

Before BARRON, Circuit Judge, LYNCH, and THOMP-
SON, Circuit Judges.

BARRON, Chief Judge. More than a half a century ago, in Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971), the Supreme Court of the United States recognized an implied cause of action for damages against a federal law enforcement officer for violating an individual's Fourth Amendment rights. Is that remedy still available? The U.S. District Court for the District of New Hampshire held that it is

not. This appeal requires us to decide whether that is right.

The District Court based its ruling on a 1988 amendment to the Inspector General Act (IGA) that established an administrative mechanism for lodging misconduct complaints against federal law enforcement officers with the U.S. Department of Justice’s Office of the Inspector General.¹ The District Court concluded that, because of that legislative development, the Fourth Amendment claims in this case arise in a new context compared to Bivens. The District Court went on to conclude that the IGA’s “alternative remedial scheme” counseled against extending the Bivens remedy to that new context. And, on that basis, it held that the defendants—U.S. Drug Enforcement Agency (DEA) agents—were entitled to summary judgment on the Fourth Amendment claims that the plaintiff—Robert Arias—brought against them for excessive force and a failure to intervene to prevent the use of that force.

We do not agree that Congress’s more than three-decades-old amendment to the IGA in and of itself makes the context in which Arias’s claims arise new compared to Bivens. Thus, because we conclude that, the IGA aside, Arias’s excessive force claims arise in the same context as Bivens, the Bivens remedy is available here just as it was there. Indeed, were we to conclude otherwise, we would have to conclude, incongruously,

¹ The District Court stated that Congress created this remedy through enacting the Inspector General Act of 1978, but Congress did not extend that statute’s provisions to the Department of Justice until 1988. Compare Inspector General Act of 1978, Pub. L. No. 95-452, 92 Stat. 1101 (1978), with Inspector General Act Amendments of 1988, Pub. L. No. 100-504, 102 Stat. 2515 (1988).

that the Bivens remedy has been a dead letter since the IGA's amendment, even though the Supreme Court has reaffirmed the existence of that remedy in the years after that now decades-old legislative development.

Accordingly, we reverse the District Court's grant of summary judgment to the defendants on Arias's excessive force claims. However, we affirm the grant of summary judgment to the defendants on his failure-to-intervene claims. We do so because Arias fails to explain why, notwithstanding the distinct nature of the misconduct that those claims allege, they arise in the same context as Bivens. Nor does he explain why, insofar as those claims do arise in a new context, the Bivens remedy should be extended to it.

I.

In 2017, Arias brought a suit for damages in the District of New Hampshire against federal DEA agents. He sought the damages for the physical and emotional harms allegedly caused by his September 2016 arrest, which was undertaken pursuant to a warrant and in a shopping center parking lot. He based the claims on the implied cause of action for damages under the Fourth Amendment that the Supreme Court recognized in Bivens. His complaint alleges that some of the defendants violated his Fourth Amendment rights through their use of excessive force, and that the others violated his Fourth Amendment rights by failing to intervene to prevent that excessive use of force.

The defendants moved for summary judgment based on what was then the Supreme Court's most recent decision in the Bivens line, Egbert v. Boule, 596 U.S. 482 (2022). They argued that, under Egbert, Arias could not

assert the implied cause of action for damages that Bivens recognized as to any of his claims.

In Egbert, the Court described a two-step framework for assessing when a Bivens remedy is available. Id. at 492. At the first step, a court must determine whether the plaintiff’s claims arise in a “new context” compared to one of the cases in which the Court already has recognized a damages remedy under Bivens. Id. If the context is not new, then the inquiry ends and the Bivens remedy may be asserted. Id.; Quinones-Pimentel v. Cannon, 85 F.4th 63, 70 (1st Cir. 2023). If the context is new, then a court must move on to the second step. Egbert, 596 U.S. at 492. There, it must determine whether there are “special factors counselling hesitation” in extending the Bivens remedy to that new context. Ziglar v. Abbasi, 582 U.S. 120, 136 (2017); see Egbert, 596 U.S. at 492. If the court concludes that there is such a factor, then it must conclude that the Bivens remedy is not available. Egbert, 596 U.S. at 492.

As to the first step, the defendants argued that Arias’s claims arise in a new context because, unlike the alleged misconduct in Bivens itself, the misconduct that he alleged: (1) was undertaken pursuant to a warrant, (2) occurred in a publicly accessible parking lot, and (3) included a claim based on a failure to intervene to prevent the excessive use of force. As to the second step, the defendants argued that there are “special factors counseling hesitation” that preclude extending the Bivens remedy to that new context. They pointed to both the IGA’s administrative remedy and the availability of damages against the United States under the post-Bivens amendments to the Federal Tort Claims Act (FTCA).

The District Court granted the defendants' summary judgment motion. It considered Arias's excessive force claims separately from his failure-to-intervene claims.

The District Court observed that Arias's excessive force claims "share[d] many of the same background facts" with Bivens: "an arrest made by federal narcotics agents investigating a violation of federal drug laws that would have been routine but for the alleged constitutional violations." It also recognized that Arias's excessive force claims named the same category of defendants as the claims in Bivens, even though Bivens involved claims against agents from the Federal Bureau of Narcotics. The functions of that agency, the District Court noted, had been transferred to the DEA by the time that the excessive force allegedly occurred. The District Court observed, too, that Arias's excessive force claims alleged a violation of the same constitutional right as the claims in Bivens, as the claims in that case also alleged a violation of the Fourth Amendment right against the use of excessive force.

In addition, the District Court expressly rejected the defendants' assertions that Arias's excessive force claims arise in a new context because the allegedly excessive force occurred during an arrest that had been effectuated pursuant to a warrant and in a shopping center parking lot. The District Court reasoned that, although the search and arrest in Bivens were alleged to have been carried out without a warrant and at the plaintiff's home, those distinctions were not meaningful, and that "[a]t bottom" Arias's case "presents with facts virtually indistinguishable from Bivens."

Nonetheless, the District Court determined that the similarities between Arias's excessive force claims and

the claims in Bivens did not necessarily show that the context was the same in the two cases. Rather, the District Court determined, based on its understanding of Egbert and without the defendants having so argued, that it also had to address a distinct possible basis for Arias's excessive force claims arising in a new context compared to Bivens—namely, the availability under the IGA of an administrative remedy.

The District Court observed that, under the IGA and 28 C.F.R. § 0.29c(c), Arias could file a misconduct report about the defendants' conduct with the U.S. Department of Justice's Office of the Inspector General and have his allegations investigated and remedied administratively. By contrast, the District Court noted, the plaintiff in Bivens did not have available to him that same legislatively established means of administratively addressing the misconduct that he alleged.

The District Court went on to determine that, under Egbert, “the existence of the alternative remedial scheme is enough to both place the case into a new context at the first step and to prohibit expanding Bivens at the second step.” The District Court therefore determined that Arias could not assert an implied cause of action for damages under the Fourth Amendment as to his excessive force claims. And it did so despite its conclusion that—setting the IGA aside—those claims arise in the same context as in Bivens itself.

The District Court further concluded that the presence of the IGA's scheme is a special factor counseling hesitation in extending the Bivens remedy to a new context. And, finally, the District Court concluded that, because this remedial scheme is itself “sufficient to require dismissal,” there was no need to decide whether the

damages remedy against the United States that, post-Bivens, the FTCA makes available to recover for uses of excessive force by federal law enforcement officers “might also foreclose Arias’s Bivens claims.”

The District Court next turned to Arias’s failure-to-intervene claims. With respect to the first step of the analytical framework that Egbert described, the District Court explained that “[r]egardless of whether a failure-to-intervene claim is an alternative theory of liability or separate constitutional violation, Bivens did not involve any theory that the defendant officers’ failure to intervene should subject them to bystander liability.” In the District Court’s view, therefore, Arias’s failure-to-intervene claims arise in a new context compared to Bivens. The District Court then explained that, as with Arias’s excessive force claims, “the existence of an alternative remedial scheme [in the form of the IGA] [wa]s sufficient to place the case in a new context and foreclose [Arias’s] Bivens claim.”

Accordingly, the District Court granted summary judgment to the defendants on Arias’s claims. Arias timely appealed.

II.

We start with Arias’s challenge to the grant of summary judgment to the defendants on his excessive force claims. Arias contends that, the IGA aside, the District Court was right to treat the claims as arising in the same context as Bivens. But he contends that the District Court erred in ruling that, because of the IGA, the claims necessarily arise in a new context compared to Bivens. He thus argues that the District Court erred in

granting the defendants summary judgment on the claims. We agree.

To explain why, we first describe the analytical framework for determining whether a Bivens remedy is available and how its two steps, though distinct, relate to one another. We then address how that framework applies to Arias’s excessive force claims.

A.

“In Bivens, the Court held that a Fourth Amendment violation by federal agents, acting under color of governmental authority, gave rise to a cause of action for money damages against those agents in their individual capacities.” González v. Vélez, 864 F.3d 45, 52 (1st Cir. 2017). The Court thereafter recognized implied causes of action for damages under the Constitution against federal officers in two other contexts.

First, in Davis v. Passman, the Court recognized a damages action under the Fifth Amendment that permitted a former congressional staffer to bring a sex discrimination claim against a Congressperson. 442 U.S. 228 (1979). Second, during the very next Term, in Carlson v. Green, the Court recognized a damages action under the Eighth Amendment against federal prison officials for the inadequate medical treatment of a prisoner. 446 U.S. 14 (1980).

Since Carlson, however, the Court has made clear that it is skeptical that there can be implied causes of action. “Now long past ‘the heady days in which th[e] Court assumed common-law powers to create causes of action,’” the Court has explained, it has “come ‘to appreciate more fully the tension between’ judicially created causes of action and ‘the Constitution’s separation of

legislative and judicial power.’” Egbert, 596 U.S. at 491 (first quoting Corr. Servs. Corp. v. Malesko, 534 U.S. 61, 75 (2001) (Scalia, J., concurring); and then quoting Hernandez v. Mesa, 589 U.S. 93, 100 (2020)).

“At bottom,” the Court has reasoned, “creating a cause of action is a legislative endeavor.” Id. It even has gone so far as to question whether, under this newer view of implied causes of action, it would have decided Bivens, Davis, or Carlson the same way. Id. at 502; Abbasi, 582 U.S. at 134.

Nonetheless, “[r]ather than dispense with Bivens altogether,” Egbert, 596 U.S. at 491, the Court merely has “made clear that expanding the Bivens remedy is now a ‘disfavored’ judicial activity.” Abbasi, 582 U.S. at 135 (emphasis added) (quoting Ashcroft v. Iqbal, 556 U.S. 662, 675 (2009)). Thus, the Court has counseled that the “watchword is caution” when a plaintiff’s claim would require an extension of one of the implied causes of action the Bivens line already recognizes. Egbert, 596 U.S. at 491 (quoting Hernandez, 589 U.S. at 101). And, based on that “reluctan[ce] to create new causes of action,” the Court has consistently denied requests to extend the remedy recognized in Bivens, Davis, or Carlson. Hernandez, 589 U.S. at 101-02 (emphasis added).

At the same time, the Court has been careful to state that Bivens itself is still good law. It therefore has made clear that the cause of action recognized there remains available. See Abbasi, 582 U.S. at 134 (“The settled law of Bivens in th[e] common and recurrent sphere of law enforcement, and the undoubted reliance upon it as a fixed principle in the law, are powerful reasons to retain it in that sphere.”); Egbert, 596 U.S. at 502 (declining to overrule Bivens). Indeed, in the wake of the Court’s in-

vocation of law enforcement’s reliance on the “fixed principle” Bivens established, Abbasi, 582 U.S. at 134, courts have continued to permit damages actions brought under Bivens. See, e.g., Snowden v. Henning, 72 F.4th 237, 243-44 (7th Cir. 2023), cert. denied, 145 S. Ct. 137 (2024); Hicks v. Ferreyra, 64 F.4th 156, 166 (4th Cir. 2023), cert. denied, 144 S. Ct. 555 (2024). Consistent with that view, we have repeatedly acknowledged that the Bivens remedy continues to exist. See DeMayo v. Nugent, 517 F.3d 11, 15 (1st Cir. 2008) (“An individual may vindicate a proven violation of his or her right to be free from unreasonable searches through a Bivens action.”); Quinones-Pimentel, 85 F.4th at 70 (explaining that “[if] the case presents . . . no new context[,] . . . relief under Bivens is available”).

Accordingly, it is doubtful that a plaintiff may seek damages under the Fourth Amendment against federal law enforcement officers under a cause of action that a court would have to create.

But a plaintiff may do so pursuant to the cause of action that the Court recognized in Bivens.²

² We do not understand Egbert to suggest otherwise in stating that “recognizing a cause of action under Bivens is ‘a disfavored judicial activity,’” Egbert v. Boule, 596 U.S. 482, 491 (2022) (emphasis added) (quoting Ziglar v. Abbasi, 582 U.S. 120, 135 (2017)), given that in Abbasi and Hernandez, the Court emphasized that “expanding the Bivens remedy” was judicially disfavored. Abbasi, 582 U.S. at 135 (emphasis added); Hernandez, 589 U.S. at 101 (“We have stated that expansion of Bivens is a ‘disfavored judicial activity.’” (cleaned up) (quoting Abbasi, 582 U.S. at 135)); see also Egbert, 596 U.S. at 491 (referring multiple times in the same paragraph to “creating” a damages remedy).

B.

The first step of the two-step framework that Egbert describes follows from the Court’s decision to affirm the cause of action that Bivens recognized, see Abbasi, 582 U.S. at 134 (“Bivens does vindicate the Constitution by allowing some redress for injuries”), but caution against the creation of any new ones. At that step, as we noted at the outset, a court must determine whether the plaintiff, in seeking damages under the Bivens line, is requesting the creation of a new cause of action or is merely asserting a cause of action that the Court already has recognized.

How, then, is a court supposed to make that determination? The answer turns on whether the plaintiff’s claim “presents ‘a new Bivens context.’” Egbert, 596 U.S. at 492 (quoting Abbasi, 582 U.S. at 139).

The Supreme Court has made clear that the plaintiff’s damages action arises in a new context if the case is “‘meaningful[ly]’ different from the three cases in which the Court has implied a damages action.” Id. (alteration in original) (emphasis added) (quoting Abbasi, 582 U.S. at 139). Consistent with this focus, the Court has emphasized that “[s]ome differences, of course, will be so trivial that they will not suffice to create a new Bivens context.” Abbasi, 582 U.S. at 149 (emphasis added). And we agree with the Seventh Circuit that the Supreme Court’s requirement “[t]hat a difference must be ‘meaningful’ suggests that some degree of variation will not preclude a Bivens remedy.” Snowden, 72 F.4th at 243-44.

In other words, it is most doubtful that Bivens, Davis, and Carlson are tickets that may be used to reach a stop

that is not already on the existing Bivens line of authority. But those tickets are not good only for those same three stops. They also may be used for additional stops on the same line that Bivens, Davis, and Carlson define.

What, then, makes a difference “meaningful,” such that—again at this first step of the analysis—the context is “new”? The answer to that question is “a bit unclear,” Quinones-Pimentel, 85 F.4th at 69, as the Supreme Court has not provided an exhaustive accounting.

The Court has explained, however, that:

A case might differ in a meaningful way because of the rank of the officers involved; the constitutional right at issue; the generality or specificity of the official action; the extent of judicial guidance as to how an officer should respond to the problem or emergency to be confronted; the statutory or other legal mandate under which the officer was operating; the risk of disruptive intrusion by the Judiciary into the functioning of other branches; or the presence of potential special factors that previous Bivens cases did not consider.

Abbasi, 582 U.S. at 139-40 (emphasis added). It also has made clear that when a case “involves a ‘new category of defendants,’” that is a meaningful difference which renders the context new. Egbert, 596 U.S. at 492 (quoting Malesko, 534 U.S. at 68).

We agree with the Seventh Circuit that, in the end, the inquiry is a functional one. As it has explained, “the Court’s evolving Bivens guidance . . . suggest[s] that a difference is ‘meaningful’ if it might alter the policy balance that initially justified the causes of action recognized in Bivens, Davis, and Carlson.” Snowden, 72 F.4th

at 244. Thus, it has explained that “[i]f a case involves facts or legal issues that would require reweighing the costs and benefits of a damages remedy against federal officials, then the difference is ‘meaningful’ because we risk further encroachment on the legislative function rather than simply applying controlling Supreme Court precedent.” Id. (emphasis added). It follows that if a case does not involve facts or legal issues that would require such a reweighing, then the difference does not in and of itself make the context new.

This functional approach accords with the fact that it is only when a case presents a new context that we must proceed to the second step of the analysis and ask whether “there are any ‘special factors’ counseling against extending Bivens” to that new context. Quinones-Pimentel, 85 F.4th at 70 (emphasis added) (quoting Egbert, 596 U.S. at 492). That question need not be asked if the context is one in which the Supreme Court already has performed the required “[w]eighing” in recognizing—and then reaffirming—the implied causes of action in Bivens, Davis, or Carlson. Snowden, 72 F.4th at 244. In a context of that sort, the Court already has asked and answered whether there is any “indicat[ion] that the Judiciary is at least arguably less equipped than Congress to ‘weigh the costs and benefits of allowing a damages action to proceed.’” Egbert, 596 U.S. at 492 (quoting Abbasi, 582 U.S. at 136). And, as a lower court, we may not second-guess that determination once the Court has made it, which is why we have explained that “[i]f the case presents no meaningful differences (and thus no new context), the analysis ends there and relief

under Bivens is available.”³ Quinones-Pimentel, 85 F.4th at 70 (emphasis added).

C.

All that said, Egbert does note that the two-step analysis may in some cases present only a single question. Egbert, 596 U.S. at 492 (“While our cases describe two steps, those steps often resolve to a single question: whether there is any reason to think that Congress might be better equipped to create a damages remedy.”). The very factor that may make a context new may be the “special factor counseling hesitation” in extending the cause of action. See id. (“[W]e have identified several examples of new contexts—e.g., a case that involves a ‘new category of defendants,’—largely because they represent situations in which a court is not undoubtedly better positioned than Congress to create a damages action.” (quoting Malesko, 534 U.S. at 68)); cf.

³ At oral argument, the defendants argued based on González v. Vélez, 864 F.3d 45 (1st Cir. 2017), that we could reach step two of the Bivens inquiry even if the case did not present a new context. They apparently rested that contention on our statement in that case that “even if we assume[d] for argument’s sake that the context [was] substantially the same, the plaintiffs [would] hit a roadblock at the next step of the analysis” regarding alternative remedies. Id. at 53. But the plaintiffs there were attempting to use the cause of action recognized in Davis v. Passman, 442 U.S. 228 (1979), to raise a claim that “b[ore]” only a “superficial similarity” to Davis itself. González, 864 F.3d at 53. In assuming that the claims arose in “substantially the same context,” we were merely assuming that they were “substantially” similar enough to warrant comparison to Davis in the first place—not that the contexts were, in fact, the same. Thus, we proceeded to the second step of the analysis only because it was clear that the context was new. See id. at 52 (explaining that the second step alternative remedies inquiry applies only “[o]nce it is determined that the context is new”).

Snowden, 72 F.4th at 243 n.3 (“[S]ometimes the Court’s cases do not explicitly address the ‘new context’ inquiry because they do not need to—where, for example, the case raises a claim under a different constitutional provision (like the First Amendment) or presents an obviously distinct factual setting (like the military).”). Relatedly, the special factor that counsels against extending the Bivens remedy to a new context also may be a factor that in and of itself makes the context new. In other words, in some cases the same factor may do double duty. Importantly, however, the Court was careful to observe that the two-step inquiry “often” will reduce to a single question, Egbert, 596 U.S. at 492 (emphasis added), rather than that it always does so.

III.

We are now well situated to address the excessive force claims under the first step of the analysis described in Egbert. With respect to that step, Arias emphasizes that, like the plaintiff in Bivens, his excessive force claims seek damages under the Fourth Amendment for “unreasonable force . . . employed in making [his] arrest.” Bivens, 403 U.S. at 389. He also emphasizes that, like the plaintiff in Bivens, he names line law enforcement officers as defendants in those claims.

Arias acknowledges that the defendants here were employed by the DEA at the time of the alleged misconduct, while the defendants in Bivens were employed by the Federal Bureau of Narcotics. He contends that this difference is not meaningful, though, because the DEA is the successor to that now-defunct agency. See United States v. Feola, 420 U.S. 671, 684 n.18 (1975).

Arias also points out that the “judicial guidance” as to what constitutes excessive force under the Fourth Amendment is at least as clear now as it was at the time of Bivens. See Abbasi, 582 U.S. at 140; see also Graham v. Connor, 490 U.S. 386, 395-97 (1989) (outlining the relevant inquiry); Cnty. of Los Angeles v. Mendez, 581 U.S. 420, 427 (2017) (noting that the “case law sets forth a settled and exclusive framework for analyzing whether the force used in making a seizure complies with the Fourth Amendment”); Lachance v. Town of Charlton, 990 F.3d 14, 20 (1st Cir. 2021); O’Brien v. Town of Bel-
lingham, 943 F.3d 514, 530-31 (1st Cir. 2019). So, again, he argues, his excessive force claims do not arise in a new context.

Of course, “even a modest extension is still an extension.” Abbasi, 582 U.S. at 147. Thus, despite the many parallels between Arias’s excessive force claims and the claims in Bivens, we must remain alert for any “meaningfully new factual circumstances.” Quinones-Pimentel, 85 F.4th at 70.

The defendants highlight three factual circumstances that they argue—either when taken together or considered on their own—render the context here new. See id. at 72 n.6 (concluding that multiple “differences, collectively, [can] distinguish [a] case meaningfully from Bivens”). The three circumstances are: the presence of a warrant, the public location of the arrest, and the presence of a post-Bivens alternative remedy via the IGA.⁴

⁴ The defendants also contend that Arias’s “inclusion of a failure-to-intervene claim” counts among the “factors” that place his case into a new context. But they identify no support for the notion that this separate claim could bear on whether Arias’s excessive force claims

We start with the first two circumstances even though the District Court relied solely on the third in finding the context here new. Reviewing de novo, Quinones-Pimentel, 85 F.4th at 68, we are not persuaded that either one of these two circumstances shows that Arias’s excessive force claims arise in a new context. We then consider the third circumstance—the presence of the IGA’s administrative remedy. Reviewing de novo, id., we conclude that this circumstance also fails to make the context new.

A.

As to their possession of a warrant, the defendants direct our attention to Abbasi. The Court explained there that a “case might differ in a meaningful way because of . . . the statutory or other legal mandate under which the officer was operating.” Abbasi, 582 U.S. at 139-40. The defendants point out that, when assessing the reasonableness of a use of force, courts must consider, among other factors, the severity of the crime. See Graham, 490 U.S. at 396. They go on to contend that, when a warrant is issued, the severity of the crime depends “not solely on the judgment of the officer on the scene, but on the probable cause determination of a neutral and detached magistrate.” They therefore contend that we must conclude that law enforcement officers who use force while acting pursuant to a warrant operate under a different legal mandate than do law enforcement officers who use such force while not acting pursuant to a warrant. And so, the defendants argue, because the officers in Bivens did not have a warrant, Bivens, 403

present a new context. So, we analyze whether that claim presents a new context in Part IV.

U.S. at 389, the officers here were operating under a different legal mandate.

We are not convinced. Arias alleges that the defendants violated his Fourth Amendment rights by using excessive force—not by conducting an unreasonable search or merely effecting an unlawful seizure. While “the right to make an arrest or investigatory stop necessarily carries with it the right to use some degree of physical coercion or threat thereof to effect it,” Graham, 490 U.S. at 396, it plainly does not provide a “legal mandate” to use excessive force, see Abbasi, 582 U.S. at 139–40.

That an arrest warrant requires a “neutral and detached magistrate” to determine probable cause also does not show that the officers here were operating under a different legal mandate. The judicial determination to grant an arrest warrant was not a determination that excessive force may be used to execute that warrant or, quite obviously, that the force in fact used was not excessive. Nor was that judicial determination an assessment of the severity of the crime to which the warrant pertains. It was an assessment of whether there was a sufficient basis for an arrest, not of the underlying crime’s severity.

That Congress could think that an arrest with a warrant differs from an arrest without one is therefore of little relevance here. The use of excessive force in effectuating an arrest is equally excessive regardless of whether an arrest is made pursuant to a warrant. We thus do not see how the presence of a warrant here constitutes a meaningful difference from Bivens, given the nature of the claims at issue. That is especially so because nothing in Bivens appears to have turned on the

officers not having a warrant when using the allegedly excessive force. See generally Bivens, 403 U.S. 388. Nor are we alone in so holding. See Snowden, 72 F.4th at 247; Logsdon v. U.S. Marshal Serv., 91 F.4th 1352, 1357 (10th Cir. 2024).

The cases relied on by the defendants—and the dissent—do not persuade us otherwise. Those cases involved claims targeting unreasonable searches and other factors that clearly gave rise to a new context compared to Bivens. See Cain v. Rinehart, No. 22-1893, 2023 WL 6439438, at *3-4 (6th Cir. July 25, 2023) (unreasonable search and new category of defendant); Quinones-Pimentel, 85 F.4th at 72 (same); Annappareddy v. Pascale, 996 F.3d 120, 135-36 (4th Cir. 2021) (same, along with a different injury).

Cienciva v. Brozowski, No. 3:20-CV-2045, 2022 WL 2791752 (M.D. Pa. July 15, 2022), which the defendants also cite, did conclude that the presence of a warrant is a meaningful difference that places an excessive force claim into a new context. Id. at *9-11. The claim there, however, also involved a new category of defendant, which would squarely place the case into a new context. Id.; see Egbert, 596 U.S. at 492. But, although the district court in that case did not deem the context new on that basis, we do not find the reasoning in Cienciva convincing—for all the reasons we already have given—insofar as the district court concluded that the warrant on its own made the context for an excessive force claim new.

The dissent, for its part, invokes Cantú v. Moody, 933 F.3d 414, 423 (5th Cir. 2019), to show that the Fifth Circuit has “held that the existence of a warrant amounts to a meaningful difference from Bivens.” But that case did not involve an argument that the presence of a war-

rant independently rendered the context new. Nor did the Fifth Circuit hold there what the dissent asserts that it held. It merely observed that the “claim [in that case] involve[d] different conduct” than in Bivens because the claim was premised on the allegation that the defendant “falsified affidavits” rather than that “the officers entered his home without a warrant or violated his rights of privacy.” Id. The Fifth Circuit thus concluded that the context was new because the extent of judicial guidance “differs across the various kinds of Fourth Amendment violations” and the plaintiff’s claims involved “different officers from a different agency.” Id.

So, while our dissenting colleague accuses us of creating a circuit split, the dissent would hardly avoid one. Under the approach that the dissent favors, our circuit would be directly at odds with the Seventh and Tenth Circuits.

B.

As to the excessive force having allegedly occurred here in a publicly accessible parking lot, it is true that the alleged misconduct in Bivens occurred at a private home. It is also true that the place where an alleged Fourth Amendment violation occurs can be a meaningful difference. See Hernandez, 589 U.S. at 103. But the location where the misconduct occurred here—the parking lot of a privately owned shopping center—does not trigger the kind of acute separation of powers concerns that made the “cross-border” context at issue in Hernandez meaningfully different from the context of Bivens itself. Id.

Moreover, the fact that the allegedly excessive force took place in a parking lot rather than at a private home

does not risk “alter[ing] the policy balance that initially justified the cause[] of action recognized in Bivens” as “a separation-of-powers matter.” Snowden, 72 F.4th at 244, 247. As the Seventh Circuit well put it in considering a claim of excessive force that allegedly occurred in the lobby of a hotel, “[h]otel or home, warrant or no warrant—the claims here and in Bivens stem from run-of-the-mill allegations of excessive force during an arrest.” Id. at 247; see also id. (distinguishing the excessive force claim from one that allegedly occurred “in a government facility”).

We also do not see how the location, when combined with the fact that the arrest is alleged to have been made pursuant to a warrant, makes the context here meaningfully different from the context in Bivens. Nor do the defendants explain why, when these two features are considered together, their interaction would require a different conclusion than when either is considered alone.

The dissent does correctly note that in Byrd v. Lamb, 990 F.3d 879, 882 (5th Cir. 2021), the Fifth Circuit concluded that the fact that the “case arose in a parking lot, not a private home as was the case in Bivens,” was a meaningful difference. But because the Fifth Circuit provided no explanation for why that difference would be meaningful, we do not find its decision persuasive.

The dissent cites Mejia v. Miller, 61 F.4th 663, 668 (9th Cir. 2023), for the proposition that “challenged conduct outside the home amounts to a meaningful difference from Bivens.” The challenged conduct there, however, was alleged to have “occurred on public lands managed by” a new category of defendants—officers from the Bureau of Land Management—who were also oper-

ating under a different legal mandate. Id. So, the public location of that violation—unlike the location at issue in the case before us—does appear to have raised separation of powers concerns of the kind that the Supreme Court has suggested are meaningful.

Once again, moreover, our dissenting colleague fails to acknowledge that we would hardly avoid a circuit split if we were to affirm the ruling below. Given the holdings by the Seventh Circuit in Snowden, 72 F.4th at 247, and the Tenth Circuit in Logsdon, 91 F.4th at 1357, the dissent’s favored approach would deepen one.

The dissent does invoke Florida v. Jardines, 569 U.S. 1 (2013). But that case does not show that the location of the alleged misconduct here makes the context new.

Unlike Bivens and this case, Jardines involved an alleged search, not a claim of excessive force. See id. at 6-7. The distinction is significant. An excessive force claim takes aim at the extent of the force used against the person rather than the extent to which an expectation of privacy has been infringed or a trespass has occurred. So, Payton v. New York, 445 U.S. 573 (1980), and United States v. Karo, 468 U.S. 705 (1984), are no different from Jardines in that they also implicate concerns about privacy rather than excessive force. And because Quinones-Pimentel, 85 F.4th at 71-72, like Jardines, involved an unlawful search, the dissent’s reliance on it is similarly misplaced.

That there may be a greater likelihood of other people being present in a parking lot may bear on the privacy interests involved. But we do not see how, in its nature, the physical location being a parking lot on its own bears on the reasonableness of the level of force

used, such that the involvement of this location risks “alter[ing] the policy balance that initially justified the cause[] of action recognized in Bivens” as “a separation-of-powers matter.” Snowden, 72 F.4th at 244, 247.

Insofar as our focus is on the nature of the allegedly unconstitutional conduct alleged, we also do not see how allowing a damages action here would risk any more “disruptive intrusion” into the “functioning of other branches” than Bivens itself already permits. Abbasi, 582 U.S. at 140. The right asserted here is the same as that asserted in Bivens—a right under the Fourth Amendment against the excessive use of force by officers at the successor agency in Bivens.

C.

We come, then, to the final feature of this case that the defendants contend makes the context in which Arias’s excessive force claims arise “meaningfully different”—and so new. That feature, on which the District Court also relied, is the post-Bivens enactment in 1988, through an amendment to the IGA, of an administrative mechanism for lodging a complaint about misconduct by a federal law enforcement officer. For the reasons explained below, we are not persuaded that this legislative development renders this context new, even accounting for the other supposedly distinguishing factual circumstances addressed above.

1.

To start, we recognize that the District Court understood Egbert to require the conclusion at step one that the IGA’s administrative remedy rendered the context for Arias’s excessive claims new. We also recognize that Egbert held that a plaintiff could not assert a Fourth

Amendment claim for damages against a federal Border Patrol agent for the use of excessive force in part because the existence of an administrative process for lodging misconduct complaints against the agent was a “special factor” that counseled against authorizing the Bivens cause of action there. See Egbert, 596 U.S. 493-94, 497-98.

The Supreme Court expressly noted in Egbert, however, that, in so holding, it was addressing only the second step of the Bivens analysis, not the first. Id. As the Supreme Court explained, the Ninth Circuit had held below that the Fourth Amendment claims in that case arose in a new context. Id. at 494.

Moreover, the Ninth Circuit had not deemed the context new because there was an administrative remedial scheme for lodging complaints against federal Border Patrol agents. Boule v. Egbert, 998 F.3d 370, 387 (9th Cir. 2021), rev’d on other grounds, 596 U.S. 482 (2022). It had done so only for other reasons. Id. In fact, the defendants had not invoked that administrative scheme as a reason to conclude that no Bivens remedy was available. See Egbert, 596 U.S. at 497 n.3. The Ninth Circuit then went on to hold, at the second step of the Bivens analysis, that, notwithstanding the existence of other alternative remedies, Egbert, 998 F.3d at 387, 391-92, there were no special factors that counseled against extending the Bivens remedy to the new context. So, in seeking review in the Supreme Court, the defendants were challenging only that latter aspect of the Ninth Circuit’s holding, which they did by for the first time invoking the presence of the administrative remedy. See Egbert, 596 U.S. at 497 n.3.

As a result, in Egbert, the Supreme Court held only that, at the second step of the analysis, the administrative remedy there counseled against extending the Bivens remedy to a new context. It did not hold that the administrative remedy in and of itself made the context new. Nor did it have occasion to decide whether such a remedy in and of itself ever could render a context new.

2.

Even though the precise holding of Egbert does not require us to conclude that the IGA’s administrative remedy makes the context here new, we still must decide whether such a conclusion is warranted on some other basis. But we note up front that there is good reason for us to be wary of arguments that there is.

The Supreme Court has been clear that “it is this Court’s prerogative alone to overrule one of its precedents.” State Oil Co. v. Khan, 522 U.S. 3, 20 (1997). It is thus of some significance that, although Congress amended the IGA to create the administrative remedy that supposedly spelled Bivens’s demise nearly forty years ago, see Inspector General Act Amendments of 1988, Pub. L. No. 100-504, 102 Stat. 2515 (1988), the Supreme Court has repeatedly and recently declined to overrule Bivens, see, e.g., Abbasi, 582 U.S. at 134 (reaffirming the “continued force” of Bivens within its existing context and observing that “no congressional enactment has disapproved of” the three original Bivens decisions). And, in doing so, the Court has recognized that the “undoubted reliance” on “the settled law of Bivens in th[e] common and recurrent sphere of law enforcement” is itself a “powerful reason[] to retain it in that sphere.” Id.; see also id. (noting that Bivens not only “vindicate[s] the Constitution by allowing some redress

for injuries,” but also “provides instruction and guidance to federal law enforcement officers going forward”); cf. Dickerson v. United States, 530 U.S. 428, 443 (2000) (declining to overrule Miranda v. Arizona, 384 U.S. 436 (1966), in part because “Miranda has become embedded in routine police practice to the point where the warnings have become part of our national culture”).

If we were to conclude that the IGA makes the context here new, however, then we would have to endorse the view that the remedy Bivens recognized is no longer available, notwithstanding the Court’s determination that there are “powerful reasons to retain it.” Abbasi, 582 U.S. at 134. And we would also have to believe that this state of affairs has prevailed for nearly four decades, but that no one, including the Supreme Court, has noticed. For, if the original Bivens cause of action were no longer available due to the IGA’s amendment in 1988, then there would have been no need for the Court to have considered the need for Bivens’s extension in cases in which similar administrative complaint mechanisms were available. Yet, the Court has done so nonetheless. See Hernandez, 589 U.S. 93; Egbert, 596 U.S. at 497 (considering whether to “superimpos[e]” a Bivens remedy onto an administrative remedy that allows “[a]ny person[.]” to “lodge a complaint” with the Department of Homeland Security’s Office of Inspector General (quoting 8 C.F.R. § 287.10(b))).⁵ And it would be hard to un-

⁵ The dissent asserts that the length of time that has passed since the IGA’s adoption provides no reason to be skeptical that it spelled the end of Bivens seemingly for all claims against federal law enforcement officers. The dissent asserts that this passage of time reveals only that Congress has not seen fit to review the silently buried Bivens cause of action during that time. But this misapprehends our reason for emphasizing the vintage of the IGA. During that time,

derstand why in 2017 the Court thought it important to account for “the undoubted reliance” on the “settled law of Bivens” by “federal law enforcement officers going forward” if it were evident by then that the Bivens remedy had been unavailable for nearly three decades. Abbasi, 582 U.S. at 134.

We do not lightly ascribe to the Supreme Court a misapprehension about the continuing vitality of its own precedents. And, as a lower court, we are required to follow the Court’s precedents, not treat them as but shells of their former selves. See Agostini v. Felton, 521 U.S. 203, 237 (1997) (“[W]e do not hold[] that other courts should conclude our more recent cases have, by implication, overruled an earlier precedent.”).

All that said, the Court has not been presented with the precise question before us today: Does the IGA’s administrative mechanism for lodging complaints place a claim that otherwise arises in the same context as Bivens in a new one? So, we must look closely at the relevant precedents, including Egbert itself, to determine whether they require the District Court’s conclusion that Bivens, in essence, has been long dead. For the reasons we next explain, we are not persuaded that they do.

3.

The Court has directly considered, in applying the first step of the analysis, how an alternative remedy bears on whether a context is new in exactly one case: Abbasi. There, the plaintiffs, like the plaintiff in Carlson, alleged

the Court has itself repeatedly reaffirmed Bivens, which was a curious thing for it to be doing if that remedy was already a thing of the past.

“prisoner mistreatment” resulting in “compelling” injury. 582 U.S. at 147.

Abbasi reaffirmed the viability of the damages remedy that Carlson recognized. Id. at 134, 140. But the Court then concluded, at the first step of the analysis, that the context was new. Id. at 149.

Abbasi did so with reference, in part, to remedies “that were not considered in the Court’s previous Bivens cases.” Id. at 148. Thus, it does make clear that previously unconsidered alternative remedies may be relevant at the first step, and it thereby accords with its own instruction that a “case might differ in a meaningful way because of . . . the presence of potential special factors that previous Bivens cases did not consider.” Id. at 139–40 (emphasis added).

Nonetheless, Abbasi did not suggest that the mere existence of a previously unconsidered administrative mechanism for lodging misconduct complaints made the context new. And that was so even though, by the time of Abbasi, such a previously unconsidered administrative mechanism—the Administrative Remedy Program (ARP), 28 C.F.R. § 542—was in place.

The Abbasi Court was well aware, moreover, of the ARP, which it knew had not been considered in Carlson and which provided that inmates could “file[]” “grievances” regarding “an issue which relates to any aspect of their confinement[.]” Malesko, 534 U.S. at 74 (quoting 28 C.F.R. § 542.10 (2001)). Indeed, in Malesko, the Court had explicitly relied on the ARP’s remedy in declining to extend the Carlson remedy to a new class of defendants at the second step of the analysis. Id. at 74. And Abbasi even cited to that portion of Malesko’s anal-

ysis repeatedly, see 582 U.S. at 136, 137, 140, 145, including in its discussion at the first step of whether the context was new, id. at 139.

At the first step, however, Abbasi identified meaningful differences other than the presence of the ARP. Specifically, the Court first pointed to the fact that the plaintiffs in Abbasi, unlike the plaintiff in Carlson (who alleged under the Eighth Amendment that prison officials’ provision of inadequate medical care resulted in acute harm, see Carlson, 446 U.S. at 16 n.1), alleged that a warden’s supervisory failures resulted in continuing violations under the Fifth Amendment, see 582 U.S. at 148. The Court then also observed that, seemingly in consequence of this difference, the plaintiffs in Abbasi had remedies other than damages that the plaintiff in Carlson did not. And the Court identified those remedies as being only a writ of habeas corpus, “an injunction requiring the warden to bring his prison into compliance with [prison] regulations[,] . . . or some other form of equitable relief.” Id.

Finally, Abbasi pointed to “legislative action” that Carlson had not considered as a meaningful difference. Id. Here, the Court focused on the enactment of the Prison Litigation Reform Act of 1995, Pub. L. No. 104-134, 110 Stat. 1321 (1996) (PLRA), which had mandated among other things that prisoners avail themselves of the ARP before filing suits against prison officials.⁶ Indeed, in

⁶ Although the ARP existed at the time that Carlson was decided, Koprowski v. Baker, 822 F.3d 248, 256 (6th Cir. 2016) (citing 44 Fed. Reg. 62248-51 (Oct. 29, 1979)), it was a remedy that Congress had not “affirmatively . . . requested or required.” McCarthy v. Madigan, 503 U.S. 140, 149 (1992) (noting that the ARP was “neither enacted nor mandated by Congress”). After Carlson, however, Congress

referencing the PLRA, the Court in Abbasi explicitly observed that in an earlier case it “ha[d] said in dicta that the [PLRA’s] exhaustion provisions would apply to Bivens suits.” Abbasi, 582 U.S. at 148-49; see Porter v. Nussle, 534 U.S. 516, 524 (2002) (“Thus federal prisoners suing under Bivens v. Six Unknown Fed. Narcotics Agents, must first exhaust inmate grievance procedures just as state prisoners must exhaust administrative processes prior to instituting a § 1983 suit.” (citation omitted)). But Abbasi did not suggest that the ARP in and of itself made the context there new. It explained that because the PLRA addressed when and how suits may be brought against prison officials without providing a damages remedy, that statute arguably “suggest[ed] that] Congress chose not to extend the Carlson damages remedy to cases involving other types of prisoner mistreatment.” Abbasi, 582 U.S. at 149, 148 (emphasis added).

Accordingly, while Abbasi addressed the import of alternative remedies at the first step, it did not do so in a way that suggests that an administrative remedy like the IGA’s in and of itself makes a context new, such that the presence of that remedy would render the context new even in a case in which the plaintiff alleged the exact same type of prisoner mistreatment as the plaintiff in Carlson alleged. In fact, despite the presence in Abbasi of the previously unconsidered congressionally blessed ARP, the Court focused its new-context analysis in that case only elsewhere.

required the exhaustion of that administrative remedy through the PLRA. See Woodford v. Ngo, 548 U.S. 81, 8485 (2006).

4.

Of course, there is only so much insight that can be gleaned from what the Court did not do in Abbasi. But the fact that Abbasi did not rely on the ARP at the first step would be less worthy of note if the Court had elsewhere—even once—relied on the introduction of such an administrative remedy to find a context new. As it turns out, though, we have not come across any case in which the Court has done so. Nor do the defendants identify one.

The dissent seems to suggest that it has found a few such cases. The only one that the dissent identifies that in fact considers alternative remedies in applying the first step, though, is Abbasi itself. Otherwise, to support its contention that, under Supreme Court precedent, the presence of an alternative remedial structure is sufficiently meaningful to create a new context, the dissent relies exclusively on the Court’s statements regarding step two. See Egbert, 596 U.S. at 493 (“If there are alternative remedial structures in place, ‘that alone,’ . . . is reason enough to ‘limit the power of the Judiciary to infer a new Bivens cause of action.’” (emphasis added) (quoting Abbasi, 582 U.S. at 137)); Goldey v. Fields, 606 U.S. 942, 944-45 (2025) (explaining that the fact that “‘an alternative remedial structure’ already exists” is a “‘special factor[.]’ counsel[ing] against . . . extending Bivens” (emphasis added)); Malesko, 534 U.S. at 70, 74 (listing the presence of alternative remedies as one “reason[.] that foreclose[s] [Bivens’s] extension here” (emphasis added)); Bush v. Lucas, 462 U.S. 367, 388 (1983) (referring to “whether an elaborate remedial system . . . should be augmented by the creation of a new judicial remedy” (emphasis added)).

We do not see how the language about step two that the dissent relies on demonstrates that the presence of an alternative remedial structure is sufficiently meaningful to create a new context at step one. The Court reiterated just this past Term that we only reach step two “if” we first conclude that “the case is ‘different in a meaningful way’ from the cases in which th[e] Court has recognized a Bivens remedy” and thus “presents ‘a new Bivens context.’” Goldey, 606 U.S. at 944 (quoting Ab-basi, 582 U.S. at 139); see id. (explaining that “[i]f [the case presents a new context], we then ask whether there are ‘special factors’” that counsel against extending Bivens to that new context (emphasis added)).

The dissent does appear to take issue with the need for us to adhere to the two-step framework, seemingly suggesting that what once were two steps now are better understood as one. It does so, apparently, based on the idea that any factor that would counsel hesitation in extending Bivens to a new context is necessarily also a factor that makes a context new. But, insofar as the dissent finds support for that position in Egbert, we fail to see how it is there.

Egbert was itself decided at the second step of the analysis. And, our own precedents do not comport with such a reading of Egbert. See Quinones-Pimentel, 85 F.4th at 70 (explaining, after Egbert, that “[i]f the case presents no meaningful differences (and thus no new context), the analysis ends there and relief under Bivens is available”).

True, Egbert did state, as we have noted, that the “two steps . . . often resolve to a single question: whether there is any reason to think that Congress might be better equipped to create a damages remedy.” 596 U.S. at

492 (emphasis added). Egbert also characterized its prior “expla[nation] that a new context arises when there are ‘potential special factors that previous Bivens cases did not consider’” as an “example” of how the “two steps . . . often” merge. Id. (quoting Abbasi, 582 U.S. at 140).

Egbert supported that proposition, though, by citing Abbasi. And that case simply instructs that the presence of “potential special factors that previous Bivens cases did not consider” is one way in which “[a] case might differ in a meaningful way.” Abbasi, 582 U.S. at 139-40 (emphasis added).

Moreover, in the paragraph preceding that statement, the Court in Egbert reiterated that “whether [a] case presents ‘a new Bivens context’” depends on whether it is “‘meaningful[ly]’ different from the three cases in which the Court has implied a damages action.” Egbert, 596 U.S. at 492 (alteration in original) (quoting Abbasi, 582 U.S. at 139). Thus, while Egbert observed that “a new context arises when there are ‘potential special factors that previous Bivens cases did not consider,’” id. (quoting Abbasi, 582 U.S. at 140), we do not understand the Court to have impliedly rejected Abbasi’s core premise that a “potential special factor that previous Bivens cases did not consider” makes a context new only if that factor makes the context different in a way that is meaningful. See Nat’l Pork Producers Council v. Ross, 598 U.S. 356, 373-74 (2023) (emphasizing that the Court’s opinions cannot “always . . . be parsed as though . . . dealing with the language of a statute” and “must [instead] be read with a careful eye to context” (quoting Reiter v. Sonotone Corp., 442 U.S. 330, 341 (1979))). In that respect, Egbert’s “example” accords with the general requirement that, to reach step two, the context

must be “‘meaningful[ly]’ different” from the one in which the Bivens remedy has been recognized by the Court. Id. (alteration in original) (quoting Abbasi, 582 U.S. at 139); see also Goldey, 606 U.S. at 944; Quinones-Pimentel, 85 F.4th at 70.

Consistent with this understanding of Egbert, we emphasize that when a “potential special factor[] that previous Bivens cases did not consider” shows that the case is meaningfully different, that same “special factor[]” will almost always counsel against allowing the damages remedy. 596 U.S. at 492 (quoting Abbasi, 582 U.S. at 140). But, conversely, if a “potential special factor[] that previous Bivens cases did not consider” fails to show the case is meaningfully different, then the case does not present a new context and the plaintiff may use the existing Bivens cause of action. Id. (quoting Abbasi, 582 U.S. at 140).

After all, in that latter type of case, a court need not “create a damages remedy.” Id. It need only apply the one that the Court already has recognized. Accordingly, Egbert’s “single question” could not be presented. Id.

Thus, we do not understand Egbert, in observing that the “two steps . . . often resolve to a single question,” to have relieved courts of their duty to engage in the general new-context inquiry. Indeed, in the sentences surrounding that observation in Egbert, the Court makes clear that its focus is on whether a court may “fashion” or “creat[e] . . . a new judicial remedy.” Id. at 493 (quoting Bush, 462 U.S. at 388). And, in a context that does not meaningfully differ from the existing Bivens cases, a court would not be “infer[ring],” “fashion[ing],” or “creat[ing]” a “new” “Bivens cause of action,” id., because a Bivens cause of action plainly already exists, id.

at 493 n.2 (noting that there are contexts “in which a Bivens remedy is generally available” (quoting Hui v. Castaneda, 559 U.S. 799, 807 (2010))). So, the inquiry into whether there is reason to hesitate before entering that uncharted ground need not be undertaken.

For these reasons, we cannot agree with the dissent’s seeming suggestion that Egbert’s “single question” discussion itself requires that we bypass the inquiry in this case as to whether the IGA’s mechanism for lodging complaints administratively constitutes a meaningful difference from Bivens. Even if that scheme provides a reason not to extend the Bivens remedy, it does not follow that the scheme constitutes the kind of meaningful difference that gives rise to a new context. And we are especially reluctant to conclude otherwise, when doing so necessarily would spell Bivens’s demise in every context involving a Fourth Amendment claim.

The dissent also finds support for its position in the Court’s latest word on Bivens—Goldey v. Fields, 606 U.S. 942 (2025). But we do not find that support there any more than we find it in Egbert.

In Goldey, the Court reiterated that “[t]o determine whether a Bivens claim may proceed, the Court has applied a two-step test.” Id. at 944. Then, in accord with the undisputed positions of the parties and the Court of Appeals in that case, see Fields v. Fed. Bureau of Prisons, 109 F.4th 264, 270 (4th Cir. 2024) (“Fields concedes that this case arises in a new context. We are thus faced solely with step two . . .”), the Court explained that the “case arises in a new context.” Goldey, 606 U.S. at 944; see also id. at 943 (explaining that an “Eighth Amendment excessive-force claim” was not among the three contexts in which the Court had “recognized” that “implied

Bivens causes of action were permitted”). It was then—and only then—that the Court went on to address, as one would expect at the second step of the analysis, whether there were “special factors’ counsel[ing] against recognizing an implied Bivens cause of action” in that new context. Id. at 944. Analyzing those factors, it “declined to extend Bivens to [this] new context[.]” Id. at 945. If anything, then, the two-step framework is, after Goldey, even more solidly supported in the precedent than it already was.

In sum, we cannot agree that any precedent of the Court holds that a previously unconsidered alternative remedy akin to the IGA’s administrative mechanism for lodging complaints in and of itself suffices to render a context new. There is none that does.

5.

The dissent also suggests that our own circuit’s precedents compel the conclusion that the IGA’s administrative remedy independently renders this context new. It first suggests that we decided the question of whether an alternative remedy is a special factor that independently creates a new context in González, 864 F.3d 45. But the “special factors” language that the dissent relies on in that case plainly draws from our analysis at step two. See id. at 53 & n.5. We thus cannot agree that we decided there the antecedent question of whether the presence of a remedy that was not previously considered is necessarily a difference that is meaningful.

The dissent also invokes our recent precedent in Waltermeyer v. Hazlewood, 136 F.4th 361 (1st Cir. 2025). But that case did not involve any of the differences that we are presented with here. The claims in Waltermeyer

were premised on Carlson, rather than Bivens itself. Id. at 362. So, we cannot see how the differences that we found meaningful there—none of which concerned the presence of an administrative means of lodging complaints about misconduct—are relevant to the question presented here. Nor does the dissent explain why such a comparison would be appropriate.

6.

The dissent relies as well on cases from our sister circuits finding a context to be new. However, none of those cases, save for one, held that there was an alternative remedy that in and of itself made the context there new. See Kalu v. Spaulding, 113 F.4th 311, 327-29 (3d Cir. 2024) (noting that “several factors render[ed] [the] claim meaningfully different” including “a different kind of officer misconduct” and the “heightened risk” of “judicial intrusion into a different aspect of federal prison administration”); Logsdon, 91 F.4th at 1358-60 (first explaining that the case presented a new context because it involved a “new category of defendant” and then describing “the availability of alternative remedies” as an “independent ground for not . . . creat[ing] a remedy” (emphasis added)); Johnson v. Terry, 119 F.4th 840, 859 (11th Cir. 2024) (listing the constitutional right and injury as among the “differences” that “ma[d]e th[e] [case] a new context”); Lewis v. Bartosh, No. 22-3060-PR, 2023 WL 8613873, at *2 (2d Cir. Dec. 13, 2023) (finding a new context, in part, based on the new category of defendant).⁷

⁷ The dissent also cites Bell v. Leavenworth U.S. Penitentiary, No. 24-3156, 2025 WL 1650187 (10th Cir. June 11, 2025), but that case did not discuss the role of alternative remedies at any step of the Bivens analysis, let alone the first, id. at *2.

The one exception is Noe v. United States Government, No. 23-1025, 2023 WL 8868491, at *3 (10th Cir. Dec. 22, 2023). But that case is an unpublished, nonbinding order. And it rested on that panel’s understanding that its prior decision, Silva v. United States, 45 F.4th 1134 (10th Cir. 2022), required it to foreclose Bivens relief when faced with an alternative remedy “even if the factual context is not meaningfully different from” an existing Bivens case, Noe, 2023 WL 8868491, at *3.

But while Silva is itself precedential, Noe’s interpretation of Silva’s holding is dubious. Silva explicitly recognized that a meaningful difference did place the plaintiff’s claim into a new context—it noted that the “distinction between” the plaintiff’s “excessive force” claim and the “deliberate indifference to medical needs claim” in Carlson was “sufficient to conclude that [his] claim would require an extension of Bivens” and thus arose within a new context. 45 F.4th at 1137; see also id. (“[H]is claim clearly constitutes an expansion of Bivens.”).

7.

That no case has turned up that adopts the dissent’s view of the state of Bivens law should not be surprising. In Bivens, Carlson, and Davis, the Court each time considered the context in which the claimed constitutional violation arose. In light of that context, it then weighed the need for a damages remedy against the individual officer and concluded that it was proper to imply one. Thereafter, the Court has reaffirmed each of those rulings despite knowing of administrative remedies it had

not earlier considered (to say nothing of the damages remedy that the FTCA was amended to provide).⁸

Thus, while it is true that when the context is new, we, as a lower court, must account for an administrative remedy in weighing whether to extend an existing Bivens remedy, we see little to suggest that we may treat the existence of that remedy as an invitation to set aside the Court’s prior calculus. And we are particularly disinclined to infer that such a suggestion was intended when doing so would entail the conclusion that the Bivens remedy has long been a relic, despite the Court having affirmed its continuing vitality and noted the “powerful reasons to retain it.” Abbasi, 582 U.S. at 134.

8.

We make one last observation: Congress itself has given no indication that—contrary to its intent as expressed through the Westfall Act—it meant to “abrogate Bivens” in creating the administrative remedy at issue here. Hernandez, 589 U.S. at 111 n.9. Certainly, nothing in the text of the IGA suggests such an intent. And, unlike the PLRA, to which Abbasi gave weight in finding the context there new, the IGA does not purport to address when or how Bivens suits may be brought.

Nor have we been able to identify any aspect of the IGA’s statutory history that suggests a legislative aim

⁸ The Court has also demonstrated its awareness of the IGA in the context of internal administrative remedies within other federal agencies. See Dep’t of Transp. v. Ass’n of Am. R.Rs., 575 U.S. 43, 52 (2015) (explaining that the IGA requires Amtrak to maintain an inspector general “much like [other] governmental agencies”); NASA v. FLRA, 527 U.S. 229, 237-39 (1999) (discussing the IGA in the context of NASA).

of limiting Bivens suits that otherwise would be available. In fact, Congress initially authorized the relevant IGA remedy here just one month before it “explicit[ly] except[ed]” “Bivens claims” from the Westfall Act’s exclusivity requirement. Hui, 559 U.S. at 807; compare Inspector General Act Amendments of 1988, Pub. L. No. 100-504, 102 Stat. 2515 (1988) (enacted October 18, 1988), with Federal Employees Liability Reform and Compensation Act of 1988, Pub L. N. 100-694, 102 Stat. 4563 (1988) (enacted November 18, 1988).

To be sure, we are not addressing the distinct question—independent of the two-step framework—of whether Congress has “preclude[d] a claim under Bivens” by “affirmatively foreclos[ing] one.” Egbert, 596 U.S. at 493 n.2; see, e.g., Hui, 559 U.S. at 808 (concluding that “the text of [the statute involved there] plainly indicates that it precludes a Bivens action against petitioners for the harm alleged in this case”). But the IGA’s statutory history does have relevance to the step-one issue that is at hand.

To the extent that, through the Westfall Act, Congress expressed its “clear” intent to “le[ave] Bivens where it found it,” we cannot see why the IGA—which was enacted one month before the Westfall Act—should not be understood to reflect that same intent. Hernandez, 589 U.S. at 111 n.9; cf. Merck & Co. v. Reynolds, 559 U.S. 633, 648 (2010) (“We normally assume that, when Congress enacts statutes, it is aware of relevant judicial precedent.”). It would be surprising, to say the least, for Congress to have made a point of leaving Bivens where it found it if just a month before it had taken action that it understood to have left Bivens for dead.

As a result, the absence of any mention of Bivens in the IGA, even in its legislative history, offers no sign that Congress intended to leave Bivens in worse shape than the Westfall Act did. Cf. Abbasi, 582 U.S. at 148-49 (considering “legislative action suggesting that Congress does not want a damages remedy”). If anything, the silence offers further reason for us not to do what the Court has so far declined to do—declare that, because of a decades-old legislative change codifying a means of lodging internal complaints, the remedy recognized in Bivens may no longer be asserted in any context, no matter how similar the context otherwise is to the one involved in Bivens itself. See Chisom v. Roemer, 501 U.S. 380, 396 n.23 (1991) (“Congress’ silence in this regard can be likened to the dog that did not bark.” (citing A. Doyle, Silver Blaze, in The Complete Sherlock Holmes 335 (1927))).

D.

In the end, our task is to determine whether this case arises in a new context relative to Bivens and then, if it does, to determine whether there are special factors counseling hesitation in extending the damages remedy that Bivens recognized. That first step of that analysis calls on us “to apply a familiar mode of judicial reasoning”: “determin[ing] if the case before [us] fits within the Court’s still-valid—but now quite limited—precedent.” Snowden, 72 F.4th at 244.

We thus must decide whether the differences between this case and Bivens are meaningful, given the Court’s reaffirmation of the result of the weighing that it did in Bivens in recognizing the implied cause of action for damages there. For the reasons we have explained, we conclude that the differences here are not meaningful,

in part because the relevant precedents fail to show that the IGA is a legal development that “would require reweighing the costs and benefits of a damages remedy against federal officials” as to the excessive force claims in this case in a way that the Court has not already weighed them in recognizing the cause of action in Bivens itself. Id. at 244. Were we to conclude otherwise, we would have to conclude that the Court has been reaffirming the existence of a remedy that had long since ceased to exist.

Perhaps the Court will be convinced to conclude that the IGA’s administrative mechanism for filing internal complaints suffices to make this context new and so to trigger a new weighing that supersedes the earlier one. But, from where we sit, we cannot conclude that the Court already has come to that conclusion and thereby invited lower courts to render unavailable in any context the remedy that it has deemed necessary in the context that Bivens itself presented.

Accordingly, we conclude that the District Court erred in relying on the IGA to decide that Arias’s excessive force claims arise in a new context. Moreover, the defendants have failed to identify any other factual circumstances that, taken alone or together, suggest that the differences between the plaintiff’s excessive force claims and those in Bivens are in any sense meaningful.⁹

⁹ In reaching this conclusion, we emphasize that we do not intend to cast doubt on the possibility that other excessive force claims may, in fact, present a new context. The outcome could be different if, for example, the plaintiff alleged claims against a new category of defendants. Compare Carlson v. Green, 446 U.S. 14, 25 (1980) (recognizing a Bivens claim for Eighth Amendment claims of inadequate medical treatment against federal prison officials), with Corr. Servs.

We therefore conclude that the context here is not new and that, as a result, we need not reach step two of the Bivens analysis. See Quinones-Pimentel, 85 F.4th at 70 (explaining that if there is no new context “the analysis ends there and relief under Bivens is available”). Accordingly, we reverse the grant of summary judgment to the defendants on Arias’s excessive force claims.

IV.

Arias’s failure-to-intervene claims are a different matter. The District Court also relied on the existence of the IGA’s alternative remedy to dismiss those claims. But, in addition, it identified another difference that it concluded was meaningful: the absence of any bystander liability claims in Bivens itself. Because Arias does not raise on appeal any arguments that challenge this independent basis for the District Court’s ruling, we have no reason to conclude that ruling was erroneous. See United States v. Zannino, 895 F.2d 1, 17 (1st Cir. 1990).

V.

The judgment granting summary judgment to the defendants is **affirmed** as to Arias’s failure-to-intervene claims and **reversed** and **remanded** for further proceedings consistent with this decision as to Arias’s excessive force claims.

—Concurring and Dissenting Opinion Follows—

Corp. v. Malesko, 534 U.S. 61, 70 (2001) (holding that an Eighth Amendment inadequate medical treatment claim against a private prison operator presented a new context).

LYNCH, Circuit Judge (Concurring In Part and Dissenting In Part). I concur in the majority’s affirmance of entry of summary judgment in Arias’ failure-to-intervene claim. I respectfully dissent from the majority’s holding reversing entry of summary judgment against Arias’ Fourth Amendment excessive force claims. The majority misreads Supreme Court commands when it concludes that congressional amendment of the IGA, post-Bivens is not a “meaningful difference.” The majority further errs in concluding that even if the IGA were a meaningful difference, the IGA would not present a “new context.” The majority incorrectly reasons that “conclud[ing] otherwise would” require “conclud[ing], incongruously, that the Bivens remedy has been a dead-letter since the IGA’s amendment, even though the Supreme Court has reaffirmed the existence of that remedy in the years after that now decades-old legislative development.”

The majority’s framing and answer are incorrect for a number of reasons. It is precisely when Congress has acted that the judiciary should not, to use the Supreme Court’s terminology, “infer,” “authorize,” “enforce,” “approve,” “find,” “prescribe,” “recognize,” “create,” or “expand” a judicially created remedy for Fourth Amendment excessive force claims. Congress is assuredly aware of Bivens and it has decided that the IGA remains in effect and is good law. Statutes, like court opinions, do not become inoperative because they were enacted decades ago.

The premises of the majority’s reasoning are themselves inaccurate. The Supreme Court has neither resolved a Fourth Amendment arrest excessive force case in the years since the IGA’s passage, nor has it approved

a single Bivens-type lawsuit since Carlson v. Green, 446 U.S. 14 (1980). Rather, the Court has repeatedly made it clear that it is up to Congress, not the courts, to determine whether to create mechanisms and remedies for alleged constitutional violations by federal officers. The judicially created Bivens Fourth Amendment excessive force cause of action and damages remedy is not a dead letter as to cases which have no meaningful differences with Bivens, but only as to those cases. The majority pays short shrift to the Article III concerns articulated by the Supreme Court that it is properly the function of Congress, not the federal courts, to authorize such causes of action.¹⁰ Goldey v. Fields, 606 U.S. 942, 945 (2025) (per curiam), stated “[f]or the past 45 years, this Court has consistently declined to extend Bivens to new contexts,” thus discrediting the majority’s reasoning that the Court has somehow given new life to Bivens in the face of the IGA.

In my view, the majority’s holding is not only directly contrary to many Supreme Court holdings, but it also exacerbates the existing splits among the circuits and introduces a new split.¹¹ Under the Court’s latest guidance, the issue before us is whether this case arises even slightly in a new context. See id. at 944-45. The differences here are more than slight, including both that

¹⁰ “[T]he question whether a given remedy is adequate is a legislative determination that must be left to Congress, not the federal courts. . . . That is true even if a court independently concludes that the Government’s procedures are ‘not as effective as an individual damages remedy.’” Egbert v. Boule, 596 U.S. 482, 498 (2022) (quoting Bush v. Lucas, 462 U.S. 367, 372 (1983)).

¹¹ The Supreme Court may wish to address these circuit splits, reflecting the need for additional guidance to lower court judges, who in good faith have reached different outcomes.

Congress has chosen to create the IGA administrative remedy and that there are other meaningful differences with Bivens. Arias’ arrest for drug dealing was made pursuant to a warrant and thus on probable cause, and the assertion of excessive force arose from the officers’ attempt to enforce the warrant in a highly public place, a mall parking lot where there was a significant risk to the public. Arias’ claim is factually different and in a different context than the excessive force claim made years ago in Bivens.

There are several steps in the test which binds us for whether this claim for damages survives. See Egbert, 596 U.S. at 492-93. These steps start with whether the claim presents “‘a new Bivens context’—i.e., is it ‘meaningful[ly]’ different” from Bivens. Id. at 492 (alteration in original) (quoting Ziglar v. Abbasi, 582 U.S. 120, 139 (2017)); see also Hernandez v. Mesa, 589 U.S. 93, 102 (2020). The Supreme Court has identified a non-exhaustive list of what are “meaningful” differences and has included “special factors” on that list:

Without endeavoring to create an exhaustive list of differences that are meaningful enough to make a given context a new one, some examples might prove instructive. A case might differ in a meaningful way because of the rank of the officers involved; the constitutional right at issue; the generality or specificity of the official action; the extent of judicial guidance as to how an officer should respond to the problem or emergency to be confronted; the statutory or other legal mandate under which the officer was operating; the risk of disruptive intrusion by the Judiciary into the functioning of other branches; or the

presence of potential special factors that previous Bivens cases did not consider.

Abbasi, 582 U.S. at 139-140 (emphasis added). “Second, if a claim arises in a new context, a Bivens remedy is unavailable if there are ‘special factors’ indicating that the Judiciary is at least arguably less equipped than Congress to ‘weigh the costs and benefits of allowing a damages action to proceed.’” Egbert, 596 U.S. at 492 (quoting Abbasi, 582 U.S. at 136). The Court has stressed that “[i]f there is even a single ‘reason to pause before applying Bivens in a new context,’ a court may not recognize a Bivens remedy.” Id. (quoting Hernandez, 589 U.S. at 102).

The Egbert Court further held that “[w]hile our cases describe two steps, those steps often resolve to a single question: whether there is any reason to think that Congress might be better equipped to create a damages remedy.” Id. Applying Egbert’s ruling that the two questions often resolve to a single question, Goldey decided the two steps simultaneously, demonstrating it was proper to do so. See 606 U.S. at 944-45. By contrast the majority holds it is error for a court not to take the first step first, and if the first step is not satisfied, then the case must be remanded to the district court, which cannot consider the second step before then. That itself is error. In this case, if not necessarily in all cases, the two steps resolve into one.

The Court has specifically held that even “small” differences suffice to create a “new context,” and that “the new-context inquiry is easily satisfied.” Abbasi, 582 U.S. at 149. Hernandez explained that “[a] claim may arise in a new context even if it is based on the same constitutional provision as a claim in a case in which a damages

[claim] was previously recognized.” 589 U.S. at 103. And in Egbert, the Court held that while the facts at issue there “involve[d] similar allegations of excessive force and thus arguably present[ed] ‘almost parallel circumstances’ [to Bivens] . . . these superficial similarities [we]re not enough to support the judicial creation of a cause of action.” 596 U.S. at 495 (quoting Abbasi, 582 U.S. at 139).

In the decades since Bivens was decided, the Court “ha[s] come ‘to appreciate more fully the tension between’ judicially created causes of action and ‘the Constitution’s separation of legislative and judicial power,’” and that unless a court exhibits the “utmost deference to Congress’s preeminent authority in [creating a cause of action], it ‘arrogat[e]s legislative power.’” Egbert, 596 U.S. at 491-92 (second alteration in original) (quoting Hernandez, 589 U.S. at 100). The Court has further emphasized that “it is a significant step under separation-of-powers principles for a court to determine that it has the authority, under the judicial power, to create and enforce a cause of action for damages against federal officials in order to remedy a constitutional violation,” and “[i]n most instances, . . . the Legislature is in the better position to consider if ‘the public interest would be served’ by imposing a ‘new substantive legal liability.’” Abbasi, 582 U.S. at 133, 136 (quoting Schweiker v. Chilicky, 487 U.S. 412, 426-27 (1988)). Even seemingly small variations from Bivens are “meaningful” precisely because they inappropriately encroach on legislative power.

Egbert makes it even more clear that the IGA creates exactly such a new context:

[A] court may not fashion a Bivens remedy if Congress already has provided, or has authorized the Executive to provide, “an alternative remedial structure.” If there are alternative remedial structures in place, “that alone,” like any special factor, is reason enough to “limit the power of the Judiciary to infer a new Bivens cause of action.”

596 U.S. at 493 (citations omitted) (quoting Abbasi, 582 U.S. at 137). Egbert expressly held that an alternative remedial structure “alone” bars a Bivens remedy. Id. (quoting Abbasi, 582 U.S. at 137). The Supreme Court has repeatedly held that alternative remedies can create a “situation altogether different from Bivens.” Corr. Servs. Corp. v. Malesko, 534 U.S. 61, 73 (2001); see also Bush, 462 U.S. at 377-78.

The majority attempts, wrongly, to dismiss Goldey, but Goldey also held that no Bivens action was present because “‘an alternative remedial structure’ already exists,” and that no Bivens cause of action exists when “Congress has actively legislated in the area . . . but has not enacted a statutory cause of action for money damages.” 606 U.S. at 944. Goldey held it was error to recognize a Bivens claim because it “could have negative systemic consequences for [federal] officials.” Id. That is true here.

The majority is incorrect in reading Abbasi as supporting its position that the existence of a congressionally created alternative remedy does not necessarily create a new context. Indeed, to the extent that Abbasi addressed the role of administrative remedies, it noted that the “case also ha[d] certain features that were not considered in the Court’s previous Bivens cases and that might discourage a court from authorizing a Bivens

remedy. As noted above, the existence of alternative remedies usually precludes a court from authorizing a Bivens action.” Abbasi, 582 U.S. at 148; see also Administrative Remedy Program, 44 Fed. Reg. 62250 (Oct. 29, 1979) (to be codified at 28 C.F.R. § 542).

The Bivens Court had no occasion to consider the IGA,¹² as Bivens was decided in 1971, prior to the enactment of the IGA. Congress created the Inspector General Act of 1978, 5 U.S.C. ch. 4 (amended in 1988 to apply to the Department of Justice, Inspector General Act Amendments of 1988, Pub. L. No. 100-504, 102 Stat. 2515 (1988)), and the Executive established the Office of Professional Responsibility, 28 C.F.R. § 0.29c(c). These structures create an administrative complaint process which provides for formal investigation into allegations of DEA agent misconduct, with potential consequences including disciplinary action and criminal prosecution. That congressionally created alternative structure alone should result in entry of judgment for the defendants on these claims.¹³ Congress created an alternative struc-

¹² The majority’s reasoning that Congress demonstrated no intent to abrogate Bivens with the creation of the administrative remedies at issue asks the wrong question, as the Supreme Court makes clear. It is also inconsistent with this circuit’s prior holding that Congress need not have explicitly identified the remedial structure at issue as intended to supplant Bivens. In González v. Vélez, we held that the issue is “whether there exists an alternative process that Congress reasonably may have viewed as an equally effective surrogate for an action brought directly under the Constitution.” 864 F.3d 45, 53 (1st Cir. 2017) (emphasis added).

¹³ It is true that Hernandez found that the Federal Tort Claims Act (FTCA) is not an alternative remedy that abrogates Bivens. 589 U.S. at 111 n.9. But Hernandez, which was decided before Egbert, says nothing at all about the IGA and thus does not support the majority’s argument.

ture that “vindicate[s] the Constitution by allowing some redress for injuries.” Abbasi, 582 U.S. at 148. Courts may not substitute for the congressionally created procedure and remedy a judicially created Bivens cause of action. While Congress chose in the IGA not to provide the identical procedures and remedies as in Bivens, Egbert and its progeny make clear that is a choice for Congress to make.¹⁴

The majority seeks to minimize the significance of the IGA’s remedial scheme by repeatedly asserting a straw man: that the Supreme Court has not overruled Bivens itself in the years since the IGA’s passage. But neither has the Supreme Court found a single case in which it has continued a Bivens remedy since Carlson, a case from the “heady days in which th[e] Court assumed common-law powers to create causes of action.” Egbert, 596 U.S. at 491 (quoting Malesko, 534 U.S. at 75 (Scalia, J., concurring)). The majority thus attempts to read out of Egbert and its progeny the Court’s main message: that lower courts should not in any way use Bivens to justify judicially created causes of action in cases like this. The “functional test” adopted by the majority is itself doubtful and neither congruent nor consistent with the Supreme Court’s tests. And even if a functional test

¹⁴ The fact that an alternative remedial structure does not provide for money damages does not matter. In Egbert, the Supreme Court rejected arguments that the alternative remedial structure at issue was inadequate because the defendant was not entitled to participate and had no right to judicial review, noting that “we have never held that a Bivens alternative must afford rights to participation or appeal.” Egbert, 596 U.S. at 497-98. Abbasi likewise held that alternative remedies barred a Bivens remedy without any discussion of whether they provided for damages. Abbasi, 582 U.S. at 148.

were the correct test, this case would fail it, as it would “alter the policy balance.”

The majority’s attempt to say that the existence of an alternative remedial structure qualifies as a “special factor” for purposes of the new-context analysis but does not amount to a “meaningful” difference is an outlier amongst our sister circuits, is also wrong, and creates a circuit split. The Second, Third, Tenth, and Eleventh Circuits have all held that alternative remedial structures create a “new context” or, more generally, categorically bar Bivens-type relief. See, e.g., Johnson v. Terry, 119 F.4th 840, 858 (11th Cir. 2024) (“[T]he context of these claims is different from the context of the claim in Carlson because there the Court did not consider whether there were alternative remedie”); Logsdon v. U.S. Marshal Serv., 91 F.4th 1352, 1359 (10th Cir. 2024) (identifying the existence of an alternative remedial structure as an “independent ground for not recognizing a Bivens action” (emphasis added)); Kalu v. Spaulding, 113 F.4th 311, 327-28 (3d Cir. 2024) (identifying the existence of an alternative remedial structure as a factor creating a new context); Lewis v. Bartosh, No. 22-3060, 2023 WL 8613873, at *1 (2d Cir. Dec. 13, 2023) (holding that “[i]f a claim arises in a new context”—such as if it involves ‘a new category of defendants’—or if there is an ‘alternative remedial structure,’ a Bivens remedy is generally ‘unavailable’” (quoting Egbert, 596 U.S. at 492-93)); see also Silva v. United States, 45 F.4th 1134, 1141 (10th Cir. 2022) (holding that under Egbert, Bivens-type claims do not survive when an alternative remedial structure exists); Noe v. U.S. Gov’t, No. 23-1025, 2023 WL 8868491, at *3 (10th Cir. Dec. 22, 2023) (holding that Bivens-type claim did not survive because of existence of alternative remedial structure even if

facts were otherwise identical).¹⁵ The majority breaks with all of these circuits and adopts a holding that is sui generis.¹⁶

Arias' case is also “meaningfully different” from Bivens in addition to the IGA because there are numerous factual and legal claim differences. First, unlike Bivens, Arias was arrested pursuant to a warrant. See Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388, 389 (1971). There was a judicial determination of probable cause¹⁷ that Arias had committed crimes. There was no such determination that Bivens had committed a crime, nonetheless officers entered his home and tried to arrest him.

Further, unlike Bivens who was arrested in his home, id., Arias was arrested in his car in a shopping mall parking lot. These facts present meaningful differences in an excessive force claim, which considers “whether the

¹⁵ The majority tries to discount the Tenth Circuit’s decision in Noe. While the Tenth Circuit’s opinion in Noe was unpublished, that court reached substantially the same conclusion in the published Logsdon opinion, which held that “the availability of alternative remedies” there was an “independent ground for not recognizing a Bivens action.” Logsdon, 91 F.4th at 1359.

¹⁶ The Ninth Circuit’s decision in Watanabe v. Derr, 115 F.4th 1034 (9th Cir. 2024), reh’g denied en banc, 139 F.4th 1056 (2025), does not support the majority as it was not a Fourth Amendment excessive force case, provides almost no reasoning, and the government did not, apparently, present the special factors argument it has presented here.

¹⁷ In the months before Arias’ arrest, “an undercover Drug Enforcement Administrative operative[] made several controlled purchases of fentanyl-laced heroin from” Arias. Order on Defendants’ Renewed Motion for Summary Judgment, Arias v. U.S., No. 17-cv-516-SM, ECF No. 56 at 3 (Jan. 19, 2021).

suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight.” Graham v. Connor, 490 U.S. 386, 396 (1989). Both in effecting the arrest and in preventing any attempts by Arias to speed away to avoid arrest, the law enforcement officers had to account for the real dangers which were posed to the women, children, and men in the lot of the shopping mall. Indeed, in circumstances where the suspect may pose a threat to the arresting officers or others, or may flee, the Supreme Court has held that officers may reasonably use additional force to effectuate a seizure. See Scott v. Harris, 550 U.S. 372, 384-86 (2007); see also Bannon v. Godin, 99 F.4th 63, 79-83 (1st Cir. 2024) (reasonableness of force must be assessed in light of threat to officer and members of the public and so lethal force was reasonable), cert. denied, 145 S. Ct. 1048 (2025), reh’g denied, 145 S. Ct. 1347 (2025).

More than that, public parking lots and people’s homes are different for Fourth Amendment purposes. Fourth Amendment interests are strongest in the home. See, e.g., Florida v. Jardines, 569 U.S. 1, 6 (2013) (noting that “when it comes to the Fourth Amendment, the home is first among equals” and that “the distinction between the home and the open fields is ‘as old as the common law’” for purposes of determining whether an unlawful search has taken place (quoting Hester v. United States, 265 U.S. 57, 59 (1924))); United States v. Karo, 468 U.S. 705, 714 (1984) (“[o]ur cases have not deviated from th[e] basic Fourth Amendment principle” that “private residences are places in which the individual normally expects privacy free of governmental intrusion not authorized by a warrant, and that expectation is plainly one that society is prepared to recognize as justifiable”);

Payton v. New York, 445 U.S. 573, 601 (1980)(“To be arrested in the home involves not only the invasion attendant to all arrests but also an invasion of the sanctity of the home. This is simply too substantial an invasion to allow without a warrant” (citation omitted)).

The majority reasons that excess force is the same no matter these differences and so the differences cannot be meaningful. I disagree, but more importantly, Congress could easily find these differences meaningful. Congress could readily conclude arrests without warrant in the sanctity of the home are greater invasions of Fourth Amendment protections than attempts by law enforcement to effectuate arrest warrants in busy public mall parking lots. Each of these clear differences, whether taken alone or collectively, creates a “new context.”¹⁸

The majority also magnifies existing circuit splits regarding other differences from Bivens. The Fourth, Fifth, and Sixth circuits have held that the existence of a warrant amounts to a meaningful difference from Bivens in Fourth Amendment claims. See Annappareddy v. Pascale, 996 F.3d 120, 135 (4th Cir. 2021)(“What Bivens

¹⁸ Arias and the majority rely on Hicks v. Ferreyra, 64 F.4th 156 (4th Cir. 2023) and Snowden v. Henning, 72 F.4th 237 (7th Cir. 2023), as demonstrating the viability of Bivens-type claims. Yet these out-of-circuit cases are distinguishable on the very characteristics that place this case in a “new context”: Hicks did not involve a warrant or an alternative remedial structure, see Hicks, 64 F.4th at 167, and the Snowden court did not involve a remedial structure other than the FTCA (and the Snowden court reasoned that the FTCA is not an alternative to Bivens-type actions), Snowden, 72 F.4th at 246 n.4. The majority also cites DeMayo v. Nugent, 517 F.3d 11 (1st Cir. 2008), but it too has little relevance, as it was decided well before Egbert and the line of Supreme Court cases that are controlling here.

involved was the Fourth Amendment right to be free of unreasonable warrantless searches and seizures; this case, by contrast, involves searches and a seizure conducted with a warrant.”); Cantú v. Moody, 933 F.3d 414, 423 (5th Cir. 2019); Cain v. Rinehart, No. 22-1893, 2023 WL 6439438, at *3 (6th Cir. July 25, 2023). The majority disagrees. But the Cantú decision’s own language shows the Fifth Circuit stated exactly that: One of the “[m]any measures” on which “Cantú’s claims [we]re meaningfully different from the Fourth Amendment claim at issue in Bivens” was that the officers had not “entered his home without a warrant.” Cantú, 933 F.3d at 423 (emphasis added). Since a new context arises whenever a claim is “‘meaningful[ly]’ different” from Bivens, the existence of a warrant produces a new context. Egbert, 596 U.S. at 492 (alteration in original) (emphasis added)(quoting Abassi, 582 U.S. at 139). The Seventh and Tenth circuits have held the opposite, with the latter court acknowledging this exact circuit split. See Snowden, 72 F.4th at 247; Logsdon, 91 F.4th at 1357 (“agree[ing]” with Snowden while recognizing “there is substantial authority to the contrary” as “[s]everal other circuits have said that a new Bivens context exists when federal officials execute a valid warrant”). By joining the Seventh and Tenth circuits rather than the majority position, this court exacerbates this existing and recognized split. And the majority is in conflict with the holding of the Tenth Circuit in Rowland v. Matevousian that even “small” differences can create a new context for Bivens-type claims. 121 F.4th 1237, 1243-44 (10th Cir. 2024).

Additionally, the Fifth and Ninth circuits have held that challenged conduct occurring outside the home amounts to a meaningful difference from Bivens, see

Byrd v. Lamb, 990 F.3d 879, 882 (5th Cir. 2021); Mejia v. Miller, 61 F.4th 663, 668 (9th Cir. 2023)¹⁹, while the Seventh and Tenth circuits have held the opposite, see Snowden, 72 F.4th at 247; Logsdon, 91 F.4th at 1357.

The majority also departs from this circuit’s decision in González, which held that a different remedial structure is a meaningful special factor in denying Bivens relief. See 864 F.3d at 53 (“The existence of such alternative processes is a special factor . . .”).²⁰ In Quinones-Pimental, this Court likewise identified the existence of a warrant and the public arrest as aspects of meaningful difference from Bivens. See 85 F.4th at 71-72 (“[T]ake first the law enforcement actions at issue here, which differ entirely from those at issue in Bivens. . . [N]o one’s home nor their person (naked or otherwise) was searched without a warrant.”). And in Waltermeyer v. Hazlewood, 136 F.4th 361 (1st Cir. 2025), this court held that “factual and legal differences” between the plaintiff’s claims and Carlson created a new context. Id. at 365.

I respectfully dissent.

¹⁹ The majority contends that Mejia is outside this split, as the challenged conduct in the case took place not merely outside the home, but on federal land. That decision’s emphasis on the out-of-home location of the conduct belies this reading. See, e.g., Mejia, 61 F.4th at 668 (“More importantly, unlike Bivens, none of the events in question occurred in or near [the plaintiff’s] home.”).

²⁰ Quinones-Pimental, 85 F.4th 63, does not address the question of whether an alternative remedial scheme would have been a special factor sufficient to create a “new context” under step one; it had no need to do so, since other factual differences from Bivens were sufficient to establish a new context. Id. at 70; see also Hornof v. United States, 107 F.4th 46, 65-66 (1st Cir. 2024) (same).

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE

Civil No. 17-cv-516-LM
Opinion No. 2023 DNH 076 P

ROBERT ARIAS

v.

NOAH A. HERZON, ET AL.

Filed: June 27, 2023

ORDER

Plaintiff Robert Arias alleges that several Drug Enforcement Administration (“DEA”) agents used excessive force on him (or failed to intervene against other agents’ use of excessive force) when they arrested him in September 2016. Arias’s claims arise under the Fourth Amendment. He seeks damages from the defendants under Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971).

Defendants move for summary judgment (doc. no. 66). They rely on recent Supreme Court precedent, Egbert v. Boule, — U.S. —, 142 S. Ct. 1793 (2022), that strictly limits the applicability of Bivens outside of its original “context.” Defendants contend that Arias’s excessive force and failure-to-intervene claims seek to apply Bivens to a new context. Arias disagrees and contends that both

claims survive summary judgment because they “fall within the ambit of Bivens.”

For the reasons that follow, the court agrees with defendants and grants their motion for summary judgment.

STANDARD OF REVIEW

Summary judgment is proper only if the moving party can demonstrate that there is no evidence in the record to support a judgment for the nonmoving party. Borges v. Serrano-Isern, 605 F.3d 1, 5, 8 (1st Cir. 2010); see also Fed. R. Civ. P. 56(a). In evaluating a motion for summary judgment, the courts must view the evidence in the light most favorable to the nonmoving party, must draw all reasonable inferences in that party’s favor, and may neither make credibility determinations nor weigh the evidence. Harris v. Scarcelli, 835 F.3d 24, 29 (1st Cir. 2016); Hicks v. Johnson, 755 F.3d 738, 743 (1st Cir. 2014).

BACKGROUND

The following facts are drawn from the court’s (McAuliffe, J.) first summary judgment order (doc. no. 56). They are uncontested for purposes of the issue before the court.

Law enforcement officers investigating drug trafficking made several controlled purchases of fentanyl-laced heroin from Arias. On September 8, 2016, the 6 named defendants¹ and 12 other federal law enforcement officers arrested Arias. Arias’s arrest was authorized by an arrest warrant. All of the defendants are either

¹ The court previously granted summary judgment in favor of two of the six defendants, so only four officers remain in this case. See doc. no. 56

DEA agents or local police officers assigned to a DEA task force.

The arrest occurred at the parking lot of the Rockingham Park Mall in Salem, New Hampshire. Arias arrived at the mall in a car driven by his pregnant wife, Carmen Jose. Arias sat in the front passenger seat. Carmen Jose pulled the car into a parking spot. Several police cars pulled in, blocking Arias's car into the spot. Seeing that she had nowhere to move the car, Carmen Jose put the car into park. The officers, many in plain clothes, approached the car with their weapons drawn.

The officers tried to remove Arias from the car, but he was wearing a seatbelt. An officer cut Arias's seatbelt and dragged him from the car, took him to the ground, and handcuffed him. Both Arias and Carmen Jose complied with all of the officers' commands. The officers stated in affidavits that the arrest was quick and nonviolent. They say that Arias suffered no injuries of significance.

By contrast, Arias stated in an affidavit that the officers dragged him from the car by his neck. Once the officers had Arias on the ground, they handcuffed him, stepped on his legs, and hit his head against the ground. Arias involuntarily urinated in his pants because of the fear the officers caused him. At some point, Arias lost consciousness. Carmen Jose recounted a similar version of events in her affidavit.

Arias brought this suit in 2017. He alleges that the arresting officers used excessive force against him in violation of the Fourth Amendment. He alleges that the officers who watched his violent arrest but failed to protect him also violated the Fourth Amendment.

Arias seeks money damages for the alleged physical and emotional injuries that he suffered. In January 2021, this court (McAuliffe, J.) denied defendants’ motion for summary judgment on the ground of qualified immunity. Defendants filed this second motion for summary judgment after the Supreme Court’s decision in Egbert v. Boule.

DISCUSSION

Relying on Egbert, defendants argue that the court must dismiss Arias’s claims for excessive force and failure to intervene in the use of excessive force because this case applies Bivens in a “new context.” Arias responds that the circumstances of his claims are, in all material respects, like those of Bivens. After reviewing the applicable law, the court addresses Arias’s excessive-force claims first and his failure-to-intervene claims second.

The Fourth Amendment prohibits federal officers from using excessive force on arrestees. E.g., Miranda-Rivera v. Toledo-Davila, 813 F.3d 64, 70-71 (1st Cir. 2016). While 42 U.S.C. § 1983 permits plaintiffs to bring damages suits against state officials for constitutional violations, there is no analogous statutory cause of action for such suits against federal officials. See Ziglar v. Abbasi, 582 U.S. 120, 130-31 (2017). Notwithstanding that absence of statutory authorization, the Supreme Court held in Bivens that an arrestee could bring a suit under the Fourth Amendment for damages from the federal officers who searched his home and arrested him, allegedly using excessive force in the process. 403 U.S. at 397. Subsequently, the Supreme Court recognized a similar “implied cause of action” under the constitution in two other suits seeking damages for alleged constitutional violations. First, in Davis v. Passman, 442

U.S. 228 (1979), the Court held that a former congressional staffer could bring a suit for damages against a United States Congressman for sex discrimination in violation of the Fifth Amendment. Then, in Carlson v. Green, 446 U.S. 14 (1980), the Court held that a deceased federal inmate’s estate could bring a suit for damages against prison officials for their failure to provide the inmate adequate medical treatment in violation of the Eighth Amendment.

But since deciding Carlson, the Supreme Court has “consistently refused” to extend Bivens despite numerous opportunities to do so. See Abbasi, 582 U.S. at 135; see also Drewniak v. U.S. CBP, 554 F. Supp. 3d 348, 355 (D.N.H. 2021) (collecting Supreme Court cases). More recently, the Supreme Court “has scaled back Bivens significantly, delivering a trilogy of opinions expressing opposition toward any expansion of Bivens actions.” See Bulger v. Hurwitz, 62 F.4th 127, 136 (4th Cir. 2023) (citing Egbert, 142 S. Ct. at 1803, Hernandez v. Mesa, 589 U.S. —, 140 S. Ct. 735, 741 (2020), and Abbasi, 582 U.S. at 135). This approach derives from the Court’s separation-of-powers concerns, as the Supreme Court has expressed its view that Congress—not the courts—should determine whether a private right of action for damages should exist for constitutional violations. See Abbasi, 582 U.S. at 133-34 (“[I]t is a significant step under separation-of-powers principles for a court to determine that it has the authority, under the judicial power, to create and enforce a cause of action for damages against federal officials in order to remedy a constitutional violation.”).

At the same time, the Supreme Court has not overruled Bivens. Egbert, 142 S. Ct. at 1803 (“[R]ather than

dispense with Bivens altogether, we have emphasized that recognizing a cause of action under Bivens is ‘a disfavored judicial activity.’”). Instead, the Supreme Court has imposed “a highly restrictive two-step analysis,” which limits when claims for damages against federal officers may proceed. Bulger, 62 F.4th at 136-37.

Under the first step, the court must determine whether the claim seeks to apply Bivens in a “new context” or involves a “new category of defendant.” Id. at 137 (quoting Hernandez, 140 S. Ct. at 743). A case presents “a new Bivens context” if it is “meaningfully” different from all three cases in which the Supreme Court has authorized damages claims against federal officers for constitutional violations. Egbert, 142 S. Ct. at 1803; Bulger, 62 F.4th at 137. Meaningful differences may include:

the rank of the officers involved; the constitutional right at issue; the generality or specificity of the official action; the extent of judicial guidance as to how an officer should respond to the problem or emergency to be confronted; the statutory or other legal mandate under which the officer was operating; the risk of disruptive intrusion by the Judiciary into the function of other branches; or the presence of potential special factors that previous Bivens cases did not consider.

Abbasi, 582 U.S. at 140 (emphasis added). Thus, a meaningful difference from Bivens exists where a claim presents “special factors” which the Supreme Court did not consider in Bivens. Id. In Egbert, the Supreme Court made clear that an alternative remedial structure, created by either the Executive or by Congress, is one such “special factor” that courts must consider in making this

determination. See 142 S. Ct. at 1806-07. This followed from the Supreme Court’s earlier holdings that legislatively created comprehensive alternative remedies can make the “situation altogether different from Bivens.” See Correctional Servs. Corp. v. Malesko, 534 U.S. 61, 73 (2001); Bush v. Lucas, 462 U.S. 367, 378, 385-86 (1983); see also Gonzalez v. Velez, 864 F.3d 45, 52-54 (1st Cir. 2017) (holding, in the alternative, that the existence of an “alternative process that Congress may have viewed as an equally effective surrogate for an action brought directly under the Constitution” forecloses relief under Bivens).

The court proceeds to the second step in the analysis if it determines that a meaningful difference exists. At the second step, the court must dismiss the claim if there is “any rational reason (even one)” to think that either Congress or the Executive branch “is better suited” to determine whether a cause of action exists than the courts. Egbert, 142 S. Ct. at 1803. In Egbert, the Supreme Court acknowledged that the two-step analysis “often resolve[s] to a single question: whether there is any reason to think that Congress might be better equipped to create a damages remedy.” Id. And Egbert further clarified that the presence of an alternative remedial structure is a “special factor” counseling in favor of dismissal. See id. at 1806-07.

Thus, after Egbert, once a court determines that there is an alternative remedial structure that Bivens did not consider, the two-step framework collapses into one question: Is there any reason to think that the Judiciary is better equipped than Congress or the Executive branches to augment that remedy? Egbert, 142 S. Ct. at 1805. The answer requires deference to the

other branches and will likely always be answered in the negative. As explained in Egbert: “[T]he question of whether a given remedy is adequate is a legislative determination that must be left to Congress, not the federal courts. So long as Congress or the Executive has created a remedial process that it finds sufficient to secure an adequate level of deterrence, the courts cannot second-guess that calibration by superimposing a Bivens remedy.” Id. at 1807.

The parties agree that, of the three cases in which the Supreme Court has authorized damages causes of action against federal officers (Bivens, Carlson, and Davis), only Bivens itself is relevant here. In Bivens, officers from the Federal Bureau of Narcotics² entered Bivens’s apartment and arrested him for alleged narcotics crimes. 403 U.S. at 389. Bivens alleged that the agents handcuffed him “in front of his wife and children, and threatened to arrest the entire family.” Id. The officers searched the apartment, and they took Bivens to a federal courthouse, where he was interrogated, booked, and “subjected to a visual strip search.” Id. Bivens later brought suit against the arresting officers. Id. He al-

² The Supreme Court in Abbasi, 582 U.S. at 140, described Bivens as involving “a claim against FBI agents,” although Bivens involved agents from the Federal Bureau of Narcotics. Bivens, 403 U.S. at 389 (“Petitioner’s complaint alleged that . . . agents of the Federal Bureau of Narcotics acting under claim of federal authority . . .”); Bivens, 276 F. Supp. 12, 13 (E.D.N.Y. 1967) (quoting Bivens’s complaint as bringing claims against “six (6) Agents of the U.S. Narcotic Bureau”); Bivens, 456 F.2d 1339, 1341 (2d Cir. 1972) (stating, on remand from Supreme Court, that “we must now decide the important and highly controversial question whether the acts of these Federal Bureau of Narcotics Agents are clothed with immunity . . .”). It is unclear why the Supreme Court in Abbasi described the defendants in Bivens as FBI agents.

leged that the officers arrested him and searched his apartment without a warrant and without probable cause. Id. Additionally and separately, he alleged that the officers used unreasonable force when arresting him. Id. The Supreme Court held that Bivens could seek money damages against the officers for all those alleged violations of the Fourth Amendment, even though Congress had not expressly created a damages remedy by statute. Id. at 397 (“[W]e hold that petitioner is entitled to recovery money damages for any injuries he has suffered as a result of the agents’ violation of the Amendment.”).

Despite its refusal to extend Bivens, the Court recognizes that Bivens is still good law. Abbasi, 582 U.S. at 134. In Abbasi, the Court explained that the “settled law of Bivens in this common and recurrent sphere of law enforcement, and the undoubted reliance upon it as a fixed principle in the law, are powerful reasons to retain it in that sphere.” Id.

Relying on Bivens, Arias brings two Fourth Amendment excessive force claims against the DEA agents who arrested him. The first claim is brought against the officers who inflicted the excessive force, and the second is brought against the officers who failed to intervene to stop the excessive force. Until Egbert, Arias’s first Bivens claim may have survived. After Egbert, neither of his claims is viable.

I. Excessive Force

Defendants argue that Arias’s excessive-force claims are materially different from Bivens because (1) Arias was arrested pursuant to warrant in a parking lot while Bivens’s arrest occurred without a warrant in his home, and (2) the DEA has, like Border Patrol, an alternative

remedial structure, a factor which was not considered in Bivens and was dispositive in Egbert. Defendants' second argument is persuasive.

Bivens and Arias's claims share many of the same background facts: an arrest made by federal narcotics agents investigating a violation of federal drug laws that would have been routine but for the alleged constitutional violations. Whether the officers had a warrant for Arias's arrest is not a meaningful difference from Bivens. See Bueno Diaz v. Mercurio, 442 F. Supp. 3d 701, 708 (S.D.N.Y. 2020) (finding that plaintiff's arrest pursuant to a warrant did not create a meaningful difference from Bivens when plaintiff alleged excessive force claims). As discussed, Bivens involved two allegedly unlawful actions: a warrantless search and seizure and an arrest executed with excessive force, and it recognized the availability of damages for both violations. See 403 U.S. at 389 ("[H]is complaint asserted that the arrest and search were effected without a warrant, and that unreasonable force was employed in making the arrest . . ."). The arresting officers' possession of a warrant in this case is a difference from Bivens, but not one with meaning. Likewise, the court does not find persuasive defendants' argument that this case is meaningfully different from Bivens because Bivens involved an arrest in the plaintiff's home while this case involves an arrest in a parking lot. These differences are illusory rather than meaningful. See Abbasi, 582 U.S. at 149 (acknowledging that some differences "will be so trivial that they will not suffice to create a new Bivens context"). Furthermore, the category of defendants is effectively the same here as in Bivens. In 1973, the functions of the Federal Bureau of Narcotics (the agency at issue in Bivens) were trans-

ferred to the DEA—the agency defendants work for in this case.³

Here, however, the defendants also point to the DEA’s alternative remedial structures under the Inspector General Act of 1978, 5 U.S.C. chapter 4,⁴ and the Office of Professional Responsibility, 28 C.F.R. § 0.29c(c). These processes allow individuals like Arias to file misconduct reports against DEA agents, which may then be investigated and remedied by the appropriate office. Defendants contend that the Border Patrol’s similar administrative process was critical to the Supreme Court’s holding in Egbert that Bivens did not extend to a claim against a border patrol agent. The court agrees that the existence of these alternative remedial structures is sufficient both to place Arias’s case in a new context and to preclude expansion of Bivens to that new context.

In Abbasi, the Supreme Court stated that one reason to find a new context is the “presence of potential special factors that previous Bivens cases did not consider.” 582 U.S. at 140. Then, in Egbert, the Supreme Court made clear that an alternative remedial structure is a “special

³ Specifically, in 1968, the Bureau of Narcotics (which had been part of the Department of the Treasury) was abolished and its functions transferred to the newly established Bureau of Narcotics and Dangerous Drugs, part of the Department of Justice. See Reorganization Plan No. 1 of 1968, 38 F.R. 15932, 1968-2 C.B. 907; United States v. Feola, 420 U.S. 671, 684 n.18 (1975). Then, in 1973, the Bureau of Narcotics and Dangerous Drugs was abolished and its functions were transferred to the DEA. See Reorganization Plan No. 2 of 1973, 38 F.R. 15932, 87 Stat. 1091.

⁴ The Inspector General Act was initially codified in an appendix to the U.S. code, 5 U.S.C.App. §§ 1 et seq. Effective December 2022, Congress moved those provisions to 5 U.S.C. chapter 4. Pub. L. 117-286, 136 Stat. 4196.

factor” which courts must give heightened consideration. See 142 S. Ct. at 1806-07. In other words, the court—at either the first or second step of the Abbasi framework—cannot ignore the presence of special factors which were not considered in Bivens. McGee v. Bureau of Prisons, No. CV 23-00190 LEK-KJM, 2023 WL 3467116, at *5 (D. Haw. May 15, 2023) (holding that BOP’s administrative remedial structure was not considered in Carlson and therefore presents a new context for this Bivens claim).

The alternative remedial structure identified by the government applies to alleged misconduct by DEA agents and was created in 1978—several years after the Supreme Court decided Bivens. Therefore, it is a “special factor” which the Supreme Court did not consider in Bivens. And the existence of a special factor like an alternative remedial structure is sufficient to place a case in a new context.⁵ See Abbasi, 582 U.S. at 140; Egbert, 142 S. Ct. at 1803.

In light of Egbert, the court is not persuaded to apply the approach to the two-step framework used in Aaron v. City of Lowell, — F. Supp. 3d —, No. 20-cv-11604-

⁵ The court need not analyze all of the features of the DEA’s alternative remedial structure. In Egbert, the Supreme Court held that so long as Congress or the Executive created an alternative remedial process that it finds sufficient to secure an adequate level of deterrence, the courts cannot apply Bivens to federal agents covered by that process. See 142 S. Ct. at 1806. Arias has supplied no reason to distinguish the alternative remedial structures at issue here from the process at issue in Egbert, which the Supreme Court found to be sufficient to preclude application of Bivens. Additionally, because these alternative remedial structures are sufficient to require dismissal, the court does not reach whether the Federal Tort Claims Act, 28 U.S.C. § 2675, might also foreclose Arias’s Bivens claims.

ADB, 2023 WL 2743337, at *16 (D. Mass. Mar. 31, 2023), and Kennedy v. Massachusetts, No. 22-cv-11152, — F. Supp. 3d —, —, 2022 WL 17343849, at *4 (D. Mass. Nov. 30, 2022). Both cases hold that a court need not consider an alternative remedial structure unless it reaches the second step of the Abbasi framework. However, Abbasi states that courts must consider special factors which the Supreme Court did not consider in Bivens. 582 U.S. at 140. And even though the Court’s analysis in Egbert was made in the second step of the framework, the Supreme Court observed that the two-step Abbasi analysis “often resolve[s] to a single question: whether there is any reason to think that Congress might be better equipped to create a damages remedy.” 142 S. Ct. at 1803. Egbert stresses that the existence of a remedial scheme is sufficient by itself to carry the day: “If there are alternative remedial structures in place, ‘that alone’, like any special factor, is reason enough to ‘limit the power of the Judiciary to infer a new Bivens cause of action.’” Id. at 1804; see also id. at 1806 (holding that existence of “alternative remedies . . . independently foreclose a Bivens action”). That is the case here: the existence of the alternative remedial scheme is enough to both place the case into a new context at the first step and to prohibit expanding Bivens at the second step.

At bottom, this case is like Egbert: it presents with facts virtually indistinguishable from Bivens. But the two-step framework boils down to one question: whether the presence of a special factor which was not considered in Bivens precludes its application. The court answers that question in the affirmative. The alternative remedial scheme authorized by the Inspector General Act and implemented by the Executive branch is a reason to believe that Congress is better positioned

to create a damages remedy than the court. See Egbert, 142 S. Ct. at 1803, 1806-07. For that reason, Arias’s first set of excessive force claims are dismissed.

II. Failure to Intervene

Defendants also move for summary judgment as to Arias’s failure-to-intervene claims, arguing that Bivens did not involve claims for failure to intervene in the use of excessive force. Few courts have directly confronted the question,⁶ and there is minimal authority expressly recognizing a remedy under Bivens for failure to intervene in the use of excessive force. Accord Robinson v. Sauls, 2019 WL 13270432, at *10-*11 (N.D. Ga. Mar. 13, 2019) (“Ms. Robinson has not provided any authority indicating that a Bivens remedy exists for failure to intervene. The Court has conducted its own search and similarly finds no such authority.”). Arias identifies one case, Campbell v. City of Yonkers, which held that a failure-to-intervene claim does not state a separate constitutional violation but is instead an alternate theory of liability for the alleged use of excessive force. 2020 WL 5548784, at *10 (S.D.N.Y. Sept. 16, 2020). On that basis,

⁶ Most opinions involving Fourth Amendment claims brought under Bivens address arguments that the allegations are insufficient or are blocked by the difficult hurdle of qualified immunity. There are many decisions that address failure-to-intervene claims brought under Bivens, but none that the court can find which persuasively explain (considering Abbasi, Hernandez, or Egbert) why such a claim arises in the same context as that in Bivens. And, prior to Abbasi, the First Circuit “construed Bivens claims with some generality.” Ortega v. U.S. Customs & Border Protection, — F. Supp. 3d —, 2023 WL 2187896, at *5 n.2 (D. Mass. 2023) (noting that—considering Abbasi and Egbert—it is “highly doubtful” that the First Circuit’s pre-Abbasi decisions which apply Bivens in this way “remain[] good law in all respects”).

the court rejected an argument that the plaintiff’s failure-to-intervene claims presented Bivens in a new context. Id.⁷

Regardless of whether a failure-to-intervene claim is an alternative theory of liability or separate constitutional violation, Bivens did not involve any theory that the defendant officers’ failure to intervene should subject them to bystander liability under Bivens. And, in light of the Supreme Court’s recent Bivens jurisprudence, this seems like a meaningful difference. “[E]ven a modest extension is still an extension.” Abbasi, 582 U.S. at 147; see also Hernandez, 140 S. Ct. at 743 (“A claim may arise in a new context even if it is based on the same constitutional provision” as Bivens). Most importantly, however, (and for the reasons discussed above), the existence of an alternative remedial scheme is sufficient to place the case in a new context and foreclose this Bivens claim.

For these reasons, Arias’s failure-to-intervene claims apply Bivens to a new context and the existence of an alternative remedial structure requires the same analysis that the court used to dismiss Arias’s first set of excessive-force claims. The court therefore grants defendants’ motion for summary judgment on Arias’s “failure to intervene” excessive-force claims.

⁷ The other case cited by Arias on this topic, Damiani v. Duffy, does not provide any analysis of this issue and is therefore unhelpful. See 277 F. Supp. 3d 692, 706 (D. Del. 2017) (granting summary judgment in defendants’ favor on failure to intervene claims because the plaintiff had not shown excessive force as opposed to analyzing whether the case presented Bivens in a new context).

CONCLUSION

Arias's claims would extend Bivens to a new context and special factors counsel against expanding Bivens to that new context. Arias's claims are therefore dismissed. Defendants' motion for summary judgment (doc. no. 66) is granted. The clerk of court is directed to close the case.

SO ORDERED.

LANDYA MCCAFFERTY

Landya McCafferty
United States District Judge
June 27, 2023

cc: Counsel of Record

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 23-1618

ROBERT ARIAS, PLAINTIFF-APPELLANT

v.

NOAH A. HERZON; JUAN INFANTE; TY KURCHARSKI;
CHRISTOPHER DAY; ADALBERTO GARCIA; MICHAEL
BERNARD, DEFENDANTS-APPELLEES

US GOVERNMENT; US DRUG ENFORCEMENT
ADMINISTRATION, DEFENDANTS

Entered: Feb. 24, 2026

ORDER OF COURT

Before BARRON, Chief Judge, LYNCH, THOMPSON,
GELPÍ, MONTECALVO, RIKELMAN, AFRAME,* and DUN-
LAP, Circuit Judges.

The petition for rehearing having been denied by the panel of judges who decided the case, and the petition for rehearing en banc having been submitted to the active judges of this court and a majority of the judges not having voted that the case be heard en banc, it is ordered

* Judge Aframe is recused and did not participate in the consideration of this matter.

that the petition for rehearing and the petition for rehearing en banc be denied.

LYNCH, Circuit Judge, dissents from the denial of panel rehearing.

By the Court:

Anastasia Dubrovsky, Clerk

cc:

William L. Chapman, Jeremy D. Eggleton, Melissa N. Patterson, Jaynie Randall Lilley, Kasey Weiland