Egbert v. Boule, *Fisher v. Hollingsworth*, and the Death of *Bivens*: Rethinking Civil Rights Remedies for Federal Prisoners

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ABSTRACT

In 2022, the Supreme Court severely limited the reach of *Bivens* case law in *Egbert v. Boule*. In *Bivens*, the Court first recognized that an implied cause of action existed under certain constitutional rights for when federal actors violated these rights while acting under the color of their authority. *Egbert* has made the test for determining whether a *Bivens* claim exists much more restrictive, so much so that it is extremely unlikely that a litigant will be able to bring a successful *Bivens* case.

This Comment addresses the fallout of *Egbert* as applied to claims brought against Bureau of Prisons officers for their deliberate indifference. Specifically, this Comment examines deliberate indifference claims when officers ignore the risks that a prisoner, who presents obvious risks of assault, will be assaulted by other prisoners, and who are then assaulted in violation of the Fifth and Eighth Amendments. *Egbert* has caused several U.S. Courts of Appeals to hold that no *Bivens* remedy for these claims exists. Most recently, the Third Circuit adopted this position in *Fisher v. Hollingsworth*, unifying the circuit courts. However, this Comment argues that the circuit courts' analyses are flawed in many regards.

This result has left the prisoners with only administrative grievances as a remedy, which are arguably ineffective at providing actual redress. To correct this problem, and many other civil rights problems involving federal actors across society, Congress needs to take the broad approach

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and extend 42 U.S.C. § 1983 to federal actors. The state prisons and state agencies can clearly operate under the burden of § 1983. This Comment argues that the Bureau of Prisons and other federal agencies/actors should as well.

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I. INTRODUCTION

As of February 2025, the Bureau of Prisons (BOP) currently has 2,198 transgender inmates within its custody.[1] Transgender inmates are among the inmates most at risk for both physical and sexual assault.[2]

1. *See* Jaclyn Diaz, *Federal Prisons Prep to Move Trans Inmates as Early as This Week*, NPR (Feb. 25, 2025, at 09:04 ET), https://perma.cc/9ZAM-Z8GF.

2. *See* Beth Schwartzapfel, *3 Things to Know About Prison Violence Against Transgender People*, THE MARSHALL PROJECT (Nov. 13, 2024, at 06:00 ET), https://perma.cc/78SA-HPV7.

Almost entirely, transgender prisoners are held in facilities that match their birth sex, and not their gender identity.[3] On January 20, 2025, President Trump issued an executive order that only recognized two sexes, male and female.[4] This executive order upended the previous BOP policy that required officials to conduct an individualized assessment for each inmate in determining their appropriate housing assignment.[5] With the new executive order, transgender prisoners will likely be moved into less protective housing assignments, and violence against them will rise while they are in BOP custody.[6]

This situation is particularly true if BOP officials fail to protect these inmates from assault due to their deliberate indifference.[7] When prison officers fail to protect inmates from violence and assault, they violate the Fifth Amendment if the prisoner is a pretrial detainee,[8] or the Eighth Amendment if the prisoner has been convicted.[9] Other than injunctive, administrative, and other equitable forms of relief, these inmates generally lack a meaningful remedy for this violation of their constitutional rights.[10] Once the harm has occurred, the only meaningful remedy is monetary damages.[11] Because these prisoners are housed in a federal prison, and not a state prison, the inmates lack the ability to file suits based on 42 U.S.C. § 1983.[12] Instead, these federal inmates must rely solely on theories of liability based on *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics* to recover monetary damages.[13] However, current *Bivens* case law, which was significantly impacted by *Egbert v. Boule*, leads to the conclusion that these prisoners lack the ability to file a *Bivens* suit when one of these violent attacks will inevitably occur.[14]

This Comment discusses the current state of *Bivens* case law generally and how courts apply the doctrine to failure-to-protect-from-assault claims ("failure-to-protect claims") arising under the Fifth and Eighth Amendments. Part II of this Comment starts with a brief history of 42 U.S.C. § 1983 and the origins of *Bivens* case law.[15] Then, Part II

3. *See* Diaz, *supra* note 1.
4. *See id.*
5. *See id.*
6. *See id.*
7. *See, e.g.*, Farmer v. Brennan, 511 U.S. 825, 833 (1994).
8. *See* Bistrian v. Levi, 912 F.3d 79, 84–85 (3d Cir. 2018).
9. *See Farmer*, 511 U.S. at 828.
10. *See* Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 409–10 (1971) (Harlan, J., concurring in judgment).
11. *See id.*
12. *See* GRANT T. COLLINS, PENELOPE J. PHILLIPS & DAVID E. SCHLESINGER, MINN. PRAC., EMP. L. AND PRAC. § 14:17 (4th ed), Westlaw (database updated Nov. 2023).
13. *See, e.g.*, Fisher v. Hollingsworth, 115 F.4th 197, 208 (3d Cir. 2024).
14. *See* Schwartzapfel, *supra* note 2.
15. *See infra* Sections II.A.–II.C.

discusses the line of cases in which the Supreme Court has severely curtailed the scope of *Bivens*.[16] Part II then ends with an examination of failure-to-protect claims due to deliberate indifference under modern *Bivens* case law.[17]

In Part III, this Comment argues that failure-to-protect claims are properly foreclosed under modern *Bivens* case law.[18] However, this Comment argues that the circuit courts should reconsider the rest of their analysis because (1) the majority of these cases challenge the individual officer's conduct as applied to the plaintiffs, rather than challenging high-level agency policy; and (2) the Prison Litigation Reform Act only imposed a heightened screening for prisoner-brought cases.[19] This Comment further argues that the only special factor favoring foreclosing a *Bivens* remedy is the existence of an alternative remedy.[20] However, this Comment argues against this factor as well because of the flagrant failures that occur within the administrative grievance system.[21] Ultimately, this Comment recommends that Congress should extend 42 U.S.C. § 1983 to federal actors due to the failures and weaknesses of the current redress mechanisms.[22]

II. BACKGROUND

For much of American history, citizens have lacked avenues of redress for violations of their constitutional rights outside of specific performance and injunctive relief.[23] However, this type of relief does little to redress past harms.[24] Rather, a monetary damages remedy is required to adequately redress past harms.[25] It is readily "apparent that some form of damages is the only possible remedy for someone in [this] position" and that it will be a "rare case" that securing injunctive relief from a court will actually obviate the harm.[26] The first step toward providing a meaningful monetary remedy came through the Enforcement Act of 1871.[27]

16. *See infra* Section II.D.
17. *See infra* Section II.E.
18. *See infra* Section III.B.
19. *See infra* Section III.B.
20. *See infra* Section III.B.
21. *See infra* Section III.B.
22. *See infra* Section III.C.
23. *See* 42 U.S.C. § 1983.
24. *See generally* Anne Gibson LaLonde & Jerome Gibson, *Adios! To the Irreparable Harm Presumption in Trademark* Law, 107 TRADEMARK REP. 913, 958 (2017) (noting that injunctive relief is to address potential future harms, and it is not concerned with past harms).
25. *See* Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388, 409 (1971) (Harlan, J., concurring in the judgment).
26. *See id.* at 409–10.
27. *See* 42 U.S.C. § 1983.

A. A Brief History of the Enforcement Act of 1871

Congress enacted the Enforcement Act to combat widespread acts of violence committed against African Americans and their white supporters in the southern United States during the Reconstruction Era.[28] From 1865 to 1875 alone, more than 2,000 African Americans were lynched and killed.[29] During this time, as African Americans began exercising their newly-gained constitutional rights, mob violence against African Americans rose.[30] State actors, such as the police force, sometimes perpetrated and organized this type of mob violence.[31] The Ku Klux Klan also committed frequent acts of terror during this period.[32] Further, state courts were generally either unwilling or unable to address the widespread acts of terror committed against African Americans.[33]

Congress held hearings in response to the unrectified violence against African Americans.[34] In these hearings, Congress sought to ensure the enforcement of laws protecting African Americans by moving these cases from state to federal court.[35] Ultimately, Congress achieved this goal by enacting the Enforcement Act of 1871.[36]

The act states,

> Every person who, under color of [state law], subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, ...[37]

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28. *See* Janet A. Barbiere, *Conspiracies to Obstruct Justice in the Federal Courts: Defining the Scope of Section 1985(2)*, 50 FORDHAM L. REV. 1210, 1224–29 (1982).

29. *See Reconstruction in America: Racial Violence after the Civil War, 1865-1876*, EQUAL JUST. INITIATIVE, at 44 (2020), https://perma.cc/TU5L-PGGJ.

30. *See id.* at 28–31.

31. *See* Tiffany R. Wright, Ciarra N. Carr & Jade W.P. Gasek, *Truth and Reconciliation: The Ku Klux Klan Hearings of 1871 and the Genesis of Section 1873*, 126 DICK. L. REV. 685, 699–701 (2022).

32. *See id.* at 701.

33. *See id.* at 701–02. As an example, in Alabama during the time period, a Black woman pursued legal action against a group of white people who had attacked her. The court required her to pay litigation costs before it would hear her complaint. Once she paid, the court released the accused attackers, and ordered the woman to either drop the complaint or be imprisoned.

34. *See* Monroe v. Pape, 365 U.S. 167, 173–78 (1961) (highlighting key discussions from the legislative history of the failures of state courts to enforce the laws on the books and the need for federal courts to intervene).

35. *See id.*

36. *See* 42 U.S.C. § 1983.

37. *See id.*

The statute grants all Americans judicial recourse when state actors violate their constitutionally-guaranteed rights.[38]

To bring a case under this statute, a litigant must plead: (1) the defendant acted under the color of state law; and (2) the action deprived the plaintiff of rights, privileges, or immunities granted by the United States Constitution or the laws of the United States.[39] However, this pleading does not end the inquiry. Rather, the plaintiff must prove the elements of their case by a preponderance of the evidence and disprove any affirmative defenses raised, such as qualified immunity.[40]

Notably, § 1983 only applies when someone acts under the color of "any statute, ordinance, regulation, custom, or usage, of any *State* or Territory or the District of Columbia."[41] Section 1983 leaves a glaring hole in the vindication of our citizens' constitutional rights.[42] Under § 1983, no cause of action exists for the violation of a citizen's constitutional rights if the defendant is acting under the color of federal authority.[43]

B. Bivens *and Filling the Gap*

The U.S. Supreme Court addressed this cause-of-action gap through *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics.*[44] In *Bivens*, the Court held that an implied cause of action exists under the Fourth Amendment that allows citizens to sue federal officers in federal courts for Fourth Amendment violations.[45] *Bivens* is the seminal case that established that federal officers acting under the color of federal authority who violate a plaintiff's constitutional rights can be held liable for monetary damages.[46]

On November 26, 1965, Federal Bureau of Narcotics agents searched Webster Bivens's apartment.[47] Bivens claimed that the agents entered his apartment under their federal authority, arrested him, handcuffed him in front of his wife and children, threatened to arrest his whole family, and

38. *See* Daniel J. McDonald, *A Primer on 42 U.S.C. § 1983*, 12-May UTBJ 29, 30 (1999).

39. *See id*.

40. *See, e.g.*, Der v. Connolly, 666 F.3d 1120, 1126–29 (8th Cir. 2012).

41. *See* 42 U.S.C. § 1983 (emphasis added).

42. *See id.*

43. *See* GRANT T. COLLINS, PENELOPE J. PHILLIPS & DAVID E. SCHLESINGER, MINN. PRAC., EMP. L. AND PRAC. § 14:17 (4th ed), Westlaw (database updated Nov. 2023).

44. *See* Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 397 (1971).

45. *See id.* at 389.

46. *See* Mack v. Yost, 968 F.3d 311, 318 (3d Cir. 2020) (noting that "Bivens opened the door for courts to exercise their judicial power to fashion a damages remedy against federal officers for other types of constitutional violations").

47. *See Bivens*, 403 U.S. at 389.

tore his apartment apart while searching for narcotics.[48] Then, the agents took Bivens to the federal courthouse in Brooklyn, where he was interrogated, booked, and subjected to a strip search.[49] Although the agents found no drugs, they still charged Bivens with drug crimes.[50] The magistrate judge later dismissed the charges.[51] Bivens filed suit against the officers involved in federal district court.[52] Bivens claimed that (1) the agents conducted the arrest and search without a warrant; (2) the agents used unreasonable force in the arrest; and (3) the agents arrested him without probable cause.[53] Bivens sought $15,000 in damages from each of the agents involved in the search of his apartment and his arrest for the humiliation, embarrassment, and mental anguish he suffered.[54] The U.S. District Court dismissed the claim because Bivens failed to state a claim upon which relief could be granted.[55] The case was appealed to the Supreme Court.[56]

The Court held that an implied cause of action exists under the Fourth Amendment, thereby allowing plaintiffs whose Fourth Amendment rights had been violated to recover monetary damages.[57] In deciding that monetary damages were appropriate, the Court noted that federal courts often granted monetary damages as a remedial measure.[58] The Court reiterated that "it is . . . well settled that where legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done."[59] The Court also reasoned that the *Bivens* case presented "no special factors counselling hesitation in the absence of affirmative action by Congress."[60] In exclaiming the importance of vindicating constitutional rights, the Court quoted *Marbury v. Madison*, stating, "[t]he very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury."[61] *Bivens* fundamentally shifted civil rights litigation in the United States by

48. *See id.*
49. *See id.*
50. *See* James E. Pfander, *The Story of Bivens v. Six Unknown-Named Agents of the Federal Bureau of Narcotics* 13 (Nw. Sch. L., Working Paper No. 189, 2009), https://perma.cc/BKC3-T988.
51. *See id.*
52. *See Bivens*, 403 U.S. at 389.
53. *See id.*
54. *See id.* at 390.
55. *See* Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics, 276 F.Supp. 12, 16 (E.D.N.Y. 1967).
56. *See Bivens*, 403 U.S. at 390.
57. *See id.* at 397.
58. *See id*.
59. *Id.* at 396 (quoting Bell v. Hood, 327 U.S. 678, 777 (1946)).
60. *Id.*
61. *Id.* at 397 (quoting Marbury v. Madison, 1 Cranch 137, 163, 2 L.Ed. 60 (1803)).

allowing for monetary damages for the violation of a citizen's constitutional rights by a federal agent acting under the color of federal authority.[62]

C. Bivens' *Progeny:* Carlson and Davis

Bivens marked a step forward toward fully vindicating the people's constitutional rights. Federal courts now possessed a method of redress that could actually remedy the harms caused by federal actors to U.S. citizens.[63] However, the Supreme Court's holding in *Bivens* was initially limited to unreasonable searches and seizures under the Fourth Amendment.[64]

1. The First Extension of *Bivens*: *Davis v. Passman*

In 1979, the Supreme Court first extended *Bivens* in *Davis v. Passman*.[65] In *Davis*, the Court held that an implied cause of action existed for violations of the Fifth Amendment's Due Process Clause in gender-based employment discrimination cases.[66]

In 1974, Shirley Davis worked for U.S. Congressman Passman as a deputy administrative assistant.[67] However, Congressman Passman fired her after several months of employment.[68] Although Congressman Passman saw Davis as "able[,] energetic[,] and a very hard worker, he concluded that it was essential that the understudy to [his] Administrative Assistant be a man."[69] Davis sued Passman in federal district court for violating her Fifth Amendment rights.[70] The District Court granted summary judgment to Congressman Passman and held that Davis failed to state a claim.[71] Davis appealed to the Supreme Court.[72]

The Supreme Court held that an implied cause of action existed in this context under the Due Process Clause of the Fifth Amendment.[73] First, the Court noted that monetary damages were the appropriate form of relief for Davis's claim.[74] The Court explained that Davis could not receive equitable relief because Passman lost his seat in Congress, thereby

62. *See* Mack v. Yost, 968 F.3d 311, 318 (3d Cir. 2020).
63. *See Bivens*, 403 U.S. at 398.
64. *See* Alexander A. Reinert, *Measuring the Success of Bivens Litigation and Its Consequences for the Individual Liberty Model*, 62 STAN. L. REV. 809, 821–22 (2010).
65. *See* Davis v. Passman, 442 U.S. 228, 248–49 (1979).
66. *See id*.
67. *See id.* at 230.
68. *See id.*
69. *Id.*
70. *See id.*
71. *See id.* at 232.
72. *See id.* at 230.
73. *See id.* at 248–49.
74. *See id.*

rendering reinstatement impossible.[75] Thus, the Court reasoned, "[f]or Davis, as for Bivens, 'it is damages or nothing.'"[76] Second, although special factors counseled hesitation in recognizing a remedy, the Court found it important to emphasize that no government official was above the law.[77] Third, the Court found that Congress did not explicitly foreclose a private cause of action for Due Process violations.[78] Further, the Court found that no evidence suggested that Congress meant to foreclose remedies not covered by § 717 of Title VII of the Civil Rights Act of 1964.[79] Importantly, the Court rejected concerns that allowing these claims would create a "deluge" of litigation because identical claims existed under state law through 42 U.S.C. § 1983.[80] Thus, the Court allowed for *Bivens* to extend to other constitutional rights.

2. The Second Extension of *Bivens*: *Carlson v. Green*

The U.S. Supreme Court further extended *Bivens* to cases involving violations of the Eighth Amendment, for when a corrections officer's deliberate indifference in providing medical attention to a prisoner in need leads to injury, in *Carlson v. Green*.[81] In *Carlson*, the estate of Joseph Jones Jr., a deceased federal prisoner, sued federal prison officials for failing to provide Jones with proper medical attention, which resulted in his injury and death.[82] The estate alleged that the prison officials violated Jones's Eighth Amendment rights against cruel and unusual punishment by failing to provide him with adequate medical attention.[83] The district court found that a valid *Bivens*-type claim existed under the Eighth Amendment.[84] However, the court dismissed the complaint because the estate could not reach the amount-in-controversy requirement.[85] Eventually, the case was appealed to the Supreme Court.[86]

The Supreme Court held that an implied remedy existed under the Eighth Amendment when prison officials were deliberately indifferent to

75. *See Passman*, 442 U.S. at 245.

76. *Id.* (quoting Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 410 (1971) (Harlan, J., concurring in the judgment)).

77. *See id*. at 246.

78. *Id.* at 246–47.

79. *See id.* at 247; 42 U.S.C. § 2000e–16.

80. *Id.* at 248. Whenever the Court bars claims due to lack of judicial resources, the Court is expressing a value judgment on the importance of different classes of legally protected rights. The Court stated that the existence of current budget inadequacies is not a valid reason to reject cases presenting otherwise sound constitutional principles.

81. *See* Carlson v. Green, 446 U.S. 14, 24–25 (1980).

82. *See id.* at 16.

83. *See id.* at 16–18.

84. *See id.* at 17.

85. *See id.*

86. *See id.* at 18.

and failed to provide medical care to prisoners in need.[87] The Court based its rationale in *Carlson* on *Bivens*.[88] The Court broadly stated that "the victims of a constitutional violation by a federal agent have a right to recover damages against the official in federal court despite the absence of any statute conferring such a right."[89] However, the Court explained that two situations limited this right: (1) if there were "special factors counselling hesitation . . . ;"[90] and (2) if "Congress ha[d] provided an alternative remedy which it explicitly declared to be a substitute for recovery directly under the Constitution and viewed as *equally effective*."[91]

The Court noted that no special factors existed in *Carlson* because (1) the prison officials did not enjoy any independent status that would make judicially created remedies imposed against them inappropriate; and (2) qualified immunity gave the officials adequate protection.[92] The Court further found that the Federal Torts Claim Act (FTCA) did not preempt a *Bivens* claim.[93] Rather, the Court drew attention to congressional comments indicating that *Bivens* and FTCA claims were parallel, complementary causes of action.[94] In comparing *Bivens* claims to FTCA claims, the Court reasoned that *Bivens* claims provide judicial value because (1) *Bivens* claims deter against wrongful conduct in addition to compensating victims;[95] (2) they allow for punitive damages, unlike in FTCA claims;[96] (3) plaintiffs can opt for a jury trial in *Bivens* claims and cannot under the FTCA;[97] and (4) *Bivens* claims may proceed under the U.S. Constitution, unlike the FTCA, which requires that the claim involve a recognized tort in the state where the misconduct occurred.[98]

After *Carlson*, there were three situations where federal actors could be held liable for violating these particular constitutional rights.[99] But this was the last time the Court would expand Bivens to new contexts.[100]

87. *See id.* at 23–25.
88. *See id.*
89. *Id*.
90. *Id.*
91. *See Carlson*, 446 U.S. at 18–19 (emphasis added).
92. *See id.* at 19.
93. *See id.* at 19–20.
94. *See id.* (noting "Furthermore, this provision should be viewed as a counterpart to the Bivens case[s][.]" (quoting S. Rep. No. 93-588, at 3 (1973))).
95. *See id.* at 24–25 (noting "[a] federal official contemplating unconstitutional conduct . . . must be prepared to face the prospect of a Bivens action." (quoting Robertson v. Wegmann, 436 U.S. 584, 592 (1978))).
96. *See id.* at 21–22.
97. *See id.* at 22–23.
98. *See id.* at 23.
99. *See id.*
100. *See* Ziglar v. Abbasi, 582 U.S. 120, 131 (2017).

D. The End of the Supreme Court's Willingness to Extend Bivens

Over time, the Supreme Court has moved away from recognizing implied causes of action, such as the *Bivens* line of cases. The Court has recently discussed that *Bivens* came from a time when the Court believed one of its "proper judicial function[s] was to 'provide [. . .] remedies' [to effectuate] a statute's purpose."[101] Since then, the Court has refused to extend *Bivens* to "any new context or category of defendant".[102] The Court has even called expanding *Bivens* a "'disfavored' judicial activity."[103]

1. Summarizing the Reasons for Refusing to Extend *Bivens*: *Correctional Services Corp. v. Malesko*

Correctional Services Corp. v. Malesko[104] was not the first time the Court expressed distaste for expanding *Bivens*.[105] However, the case illustrates the Court's reasons for the change. In *Correctional Services Corp.*, a federal prisoner with a heart condition lived on an upper-level floor of the prison.[106] Prison officials required the prisoner to take the stairs instead of the elevator.[107] Eventually, the prisoner fell down the stairs due to his heart condition and suffered injuries.[108] The prisoner filed a *Bivens* claim against the individual officers involved.[109] His suit also sought to expand *Bivens* to permit a claim against the BOP itself.[110] The district court dismissed the claim in its entirety on the ground that *Bivens* suits may only be brought against private individuals.[111] The plaintiff appealed to the Supreme Court.[112]

The Court first recognized that "[t]he absence of statutory relief for a constitutional violation . . . does not by any means necessarily imply that courts should award money damages against the officers responsible for the violation."[113] The Court stated "[w]e therefore reject[] the claim that a *Bivens* remedy should be implied simply for want of any other means for challenging a constitutional deprivation in federal court."[114]

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101. *Id.* at 121 (quoting J.I. Case Co. v. Borak, 377 U.S. 426, 433 (1964)).
102. Corr. Servs. Corp. v. Malesko, 534 U.S. 61, 68 (2001).
103. *Ziglar*, 582 U.S. at 121 (quoting Ashcroft v. Iqbal, 556 U.S. 662, 675 (2009)).
104. *See Corr. Servs. Corp.*, 534 U.S. at 74.
105. *See, e.g.*, FDIC v. Meyer, 510 U.S. 471, 484–86 (1994).
106. *See Corr. Servs. Corp.*, 534 U.S. at 64.
107. *See id.*
108. *See id.*
109. *See id.*
110. *See id.*
111. *See* Corr. Servs. Corp. v. Malesko, No. 97 Civ. 4080(JSM), 1999 WL 549003, at *2 (S.D.N.Y. July 28, 1999) (noting "[a] Bivens action may only be maintained against an individual").
112. *See Corr. Servs. Corp.*, 534 U.S. at 66.
113. *Id.* at 69 (2001) (quoting Schweiker v. Chilicky, 487 U.S. 412, 421–22 (1988)).
114. *Id.* at 69.

Next, the Court drew attention to the importance of the separation of powers in deciding to create a new implied judicial remedy.[115] The Court stated they were unwilling to create such a remedy if some "avenue for redress" existed.[116] Further, it was improper to consider *Bivens* suits against the offending agency.[117] The Court explained that creating agency liability would cause the deterrence value of *Bivens* to evaporate, and that special factors would easily counsel hesitation because allowing agency liability could place an enormous financial burden on the agency.[118] The Court noted that it would not impose this burden on the agencies and that Congress would be the only proper authority to do so.[119]

Although the Court was unwilling to impose agency liability on the BOP, the Court held that a *Bivens* suit did exist against the prison officials in their individual capacity, and that this action sufficiently redressed the prisoner's harms.[120] The Court reasoned that this case was not a "damages or nothing case" like *Bivens*, and alternative remedies were at least as effective as a *Bivens* suit.[121] Further, the Court noted that the respondents did not claim that they lacked effective remedies.[122] Instead, the alternative remedies provided sufficient deterrence value.[123] Finally, the Court recognized that because the *Bivens* suit concerned the Fourth Amendment, alternative remedies—other than an implied cause of action for monetary damages—were "inconsistent or even hostile" to the remedy implied by the Fourth Amendment.[124] As the Court's willingness to extend *Bivens* decreased, the question of how restrictively the Court would approach *Bivens* suits soon arose.

2. The Next Constriction of *Bivens*: *Ziglar v. Abbasi*

The next tightening of *Bivens* was *Ziglar v. Abbasi*.[125] In response to the September 11th terror attacks, the United States incarcerated hundreds of undocumented noncitizens to determine if they had a connection to terrorism.[126] Detainees from the Metropolitan Detention Center in

115. *See id*.
116. *Id.*
117. *See id.* at 69–70.
118. *See id.*
119. *See id.* at 72.
120. *See Corr. Servs. Corp.*, 534 U.S. at 72.
121. *See id.* at 72–73.
122. *See id.* at 72.
123. *See id.* at 73–74 (identifying the value of alternative remedies such as federal claims for injunctive relief or administrative grievances through the Bureau of Prisons Administrative Remedy Program).
124. *Id.* at 74 (quoting Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 393–94 (1971)).
125. *See* Ziglar v. Abbasi, 582 U.S. 120, 121 (2017).
126. *See id.* at 127.

Brooklyn, New York, filed a *Bivens* suit against executives in the Department of Justice and the supervising wardens based on the harsh conditions that the detainees faced.[127] The detainees alleged that these harsh conditions violated the Due Process Clause of the Fifth Amendment.[128]

The district court dismissed the claims against the executives but allowed the claims against the wardens to proceed.[129] The Second Circuit affirmed in part and reversed in part, holding that the claims against the executives and most of the wardens should be allowed to proceed.[130] The Supreme Court granted certiorari.[131]

First, the Court explained that its views concerning implied causes of action had shifted.[132] The Court characterized its earlier precedent as "*ancien régime*,"[133] during which one of the proper judicial functions was to recognize implied remedies to effectuate statutes' purposes.[134] The Court stated that it now approached recognizing implied causes of action cautiously, and that the crucial question is one of statutory intent.[135] The Court concluded that, "[i]f the statute itself does not 'displa[y] an intent' to create 'a private remedy,' then 'a cause of action does not exist and courts may not create one, no matter how desirable creating a remedy might be as a policy matter, or how compatible it would be with the statute.'"[136] The Court limited its judicial task solely to determining whether Congress intended to create a private cause of action when enacting the statute.[137]

The Supreme Court emphasized that this analysis applies to statutes and the Constitution differently.[138] The Court stated that when Congress enacts statutes, Congress must follow specific timing rules and

127. *See id.* at 128–29 (recognizing that the detainees were often strip-searched, kept under bright lights twenty-four hours a day in small cells, denied communication with the outside world, and deprived of basic hygiene products).

128. *See id.* (alleging they were subjected to harsh conditions for a punitive purpose, the strip searches served no legitimate penal interest in violation of substantive due process and the Fourth Amendment, and the wardens knowingly allowed guards to abuse the inmates).

129. *See id.* at 130.

130. *See id.*

131. *See id.*

132. *See id.* at 131–32 (acknowledging that "[i]n cases decided after Bivens, . . . the Court adopted a far more cautious course before finding implied causes of action").

133. *See Ancien Regime*, CAMBRIDGE DICTIONARY, https://perma.cc/T695-Q732 (last visited Feb. 28, 2025) (defining "ancien regime" as "an old system, especially a political or social one, that has been replaced by a more modern system").

134. *See Ziglar*, 582 U.S. at 133.

135. *See id.*

136. *Id.* at 133 (quoting Alexander v. Sandoval, 532 U.S. 275, 286–87 (2001)).

137. *See id.* at 133.

138. *See id.*

procedures.[139] Therefore, courts may logically assume that Congress will explicitly state whether it intends to create a remedy within a statute.[140] For Constitutional provisions, the analysis differs because "no single, specific congressional action to consider and interpret [exists]."[141] However, the analysis requires courts to consider the separation of powers and other economic and governmental factors.[142] The question of whether there should be an implied monetary remedy for violations of constitutional rights boils down to whether it is proper for the courts or for Congress to decide.[143]

The Court then provided clarity on the special factors analysis required by *Bivens*, stating, "the inquiry must concentrate on whether the Judiciary is well suited, . . . to consider and weigh the costs and benefits [of imposing an implied remedy.]"[144] Next, the Court discussed that if equitable remedies are insufficient, a damages action may be required to redress harm and deter government officials, but to do so requires an analysis of its impact on the government system as a whole.[145] Finally, the Court stated that the existence of an alternative remedial structure may be a reason not to recognize an implied remedy.[146]

The Court found that the situation presented in this case was not a recognized *Bivens* context, so a special factors analysis was required.[147] The Court stated that the proper test to determine if a case presents a new *Bivens* context is "[i]f the case is different in a meaningful way from previous *Bivens* cases . . . , then the context is new."[148] The Court failed to provide an exact definition of "meaningful differences," but instead gave some illustrative examples.[149] The Court reasoned that this case involved high-level executive policy concerning terrorist attacks and that this

139. *See id.*

140. *See id.*

141. *Id.*

142. *See id.* at 133 (noting that suits against government actors often involve substantial costs due to the defenses they concern and through indemnification, along with the time and administrative costs for the federal agency through the discovery and trial process).

143. *See Ziglar*, 582 U.S. at 135–36 (noting that when there are significant considerations that must be weighed, the decisions should belong to "'those who write the laws' rather than 'those who interpret them.'" (quoting Bush v. Lucas, 462 U.S. 367, 380 (1983))).

144. *Id.* at 136.

145. *See id.*

146. *See id.* at 137.

147. *See id.* at 139.

148. *Id.*

149. *See id.* at 139–40 (highlighting among others "the rank of the officer involved, the constitutional right at issue, . . . the risk of the judiciary being disruptive by intruding into the other branches, or special factors that Bivens did not consider" as meaningful differences).

situation was meaningfully different from the three previously recognized *Bivens* cases.[150]

Next, the Court focused on the special factors analysis for both the actions of the executives and the wardens. As for the executives, the Court found that the actions challenged would call into question general prison policy and cause a cascade of litigation and discovery surrounding the history of these policies.[151] In this finding, the Court noted that recognizing an implied remedy would violate the separation of powers,[152] and that other special factors that counselled hesitation existed as well.[153]

As for the wardens, the Court held that the special factors counseled against extending *Carlson* for several reasons.[154] The Court noticed that there was less developed judicial guidance available to the wardens.[155] There were also alternative forms of relief available.[156] The Court also gave value to the fact that Congress had passed the Prison Litigation Reform Act of 1995 (PLRA), which was silent on *Bivens* actions.[157] The Court interpreted this silence to mean that Congress did not want to see *Bivens* extended, so the Court was unwilling to do so without clear direction.[158] Overall, *Ziglar* demonstrated that the Supreme Court disfavored extending *Bivens*.

3. The Most Recent and Severe Restriction of *Bivens*: *Egbert v. Boule*

In 2022, the Supreme Court expressed further disdain toward expanding *Bivens* in *Egbert v. Boule*.[159] Boule owned a bed-and-breakfast on the U.S.-Canadian border.[160] U.S. Border Patrol Agent Egbert approached a guest at Boule's house, and Boule asked Egbert to leave his property.[161] Egbert refused and threw Boule against his vehicle and onto the ground.[162] Boule filed a grievance against Egbert and an administrative suit under the Federal Tort Claim Act for Egbert's use of excessive force

150. *See id.* at 140.
151. *See Ziglar*, 582 U.S. at 141.
152. *See id.* at 141–42.
153. *See id.* at 142–45 (discussing (1) this action addressed matters of national security with the response to the terror attacks; (2) the silence of Congress was relevant due to the importance of the policies; and (3) there were existing alternative remedial structures such as a suit for injunctive relief).
154. *See id.* at 147–49.
155. *See id.* at 148.
156. *See id.* (noting the availability of a writ of habeas corpus or injunctive relief).
157. *See id.* at 148–49.
158. *See id.* at 149.
159. *See* Egbert v. Boule, 596 U.S. 482, 490–93 (2022).
160. *See id.* at 486–87.
161. *See id.*
162. *See id*.

and his injuries.[163] Boule further alleged that, in response to these claims, Egbert retaliated against him by reporting his license plate, "SMUGLER," for referencing illegal conduct, and prompting the IRS to audit his tax returns.[164] Boule filed suit against Egbert under *Bivens* for excessive force in violation of the Fourth Amendment and unlawful retaliation in violation of the First Amendment.[165] The case was appealed to the Supreme Court.[166]

The Supreme Court again refused to extend *Bivens*.[167] The Court reiterated the rationale from *Ziglar* but added further guidance.[168] The Court stated that when a federal court engages in the *Bivens* analysis, the analysis can often be reduced to a single question: "whether there is any reason to think that Congress might be better equipped to create a damages remedy."[169] If so, *Bivens* should not be extended.[170] The Court also stated that it has only recognized *Bivens* in three contexts.[171]

The Supreme Court refused to extend a *Bivens* remedy to Boule because his context failed the special factors test.[172] The case concerned the border, national security, and foreign policy, which the Court stated are areas of law that the judiciary should not intrude.[173] Regarding the second special factor, the Court found that alternative remedial structures existed.[174] The Court reiterated that it would not analyze the effectiveness of the grievance process because analyzing the effectiveness of administrative remedies is a legislative determination left for Congress.[175] *Egbert* is the Court's most recent and restrictive application of *Bivens* and shows the Court's disfavor for expanding the doctrine's application.

E. Deliberate Indifference in Violation of the Eighth Amendment and Bivens *Claims*

The Court has made clear that it has only recognized three *Bivens* contexts.[176] However, failure-to-protect claims involving deliberate indifference to a prisoner being assaulted by other inmates are quite similar

163. *See id*.
164. *See id.* at 489–90.
165. *See id*. at 490.
166. *See id.* 490.
167. *See id.* at 501–02.
168. *See id*. at 490–93.
169. *Egbert*, 596 U.S. at 492.
170. *See id.*
171. *See id.*
172. *See id* at 494.
173. *See id*.
174. *See id*. at 497.
175. *See id.*
176. *See Egbert*, 596 U.S. at 492.

to *Carlson* claims.[177] The Supreme Court has considered it deliberate indifference when a prison official "knows of and disregards an excessive risk to the prisoner's health or safety . . . ."[178] The prison official must be aware of the facts from which an inference could be drawn that a substantial risk of serious harm exists and has reached that inference.[179] Then, the official must act, or fail to act, in a manner that demonstrates a reckless disregard for the prisoner's safety.[180] Conduct considered deliberately indifferent may violate a prisoner's Eighth Amendment rights if the conduct demonstrates an "unnecessary and wanton infliction of pain."[181]

1. *Bistrian v. Levi*

In 2018, the Third Circuit decided *Bistrian v. Levi* and held that a *Bivens* claim existed for failure-to-protect claims.[182] Bistrian was a prisoner in the Special Housing Unit at the Federal Detention Center in Philadelphia.[183] Bistrian received special privileges due to his work as an orderly, which gave him the opportunity to pass notes between the prisoners.[184] Bistrian allowed prison officials to photocopy the notes before they could be delivered.[185] On one occasion, Bistrian accidentally delivered one of the photocopies, instead of the original, to the intended prisoner recipient.[186] Bistrian received multiple threats from other prisoners for his involvement in the surveillance operation, and he alerted prison officials to the threats.[187] Nonetheless, the guards placed Bistrian inside the recreation yard with these prisoners, who brutally assaulted him.[188] At the time, the few guards present waited until more guards could arrive before stopping the assault.[189]

Subsequently, Bistrian filed a *Bivens* suit against the prison guards and the warden, alleging unlawful retaliation in violation of the First Amendment, punitive detention in violation of the Fifth Amendment, and failure to protect in violation of the Eighth Amendment.[190] The defendants

177. *See* Bistrian v. Levi, 912 F.3d 79, 90–91 (3d Cir. 2018).
178. *See* Farmer v. Brennan, 511 U.S. 825, 837 (1994).
179. *See id.*
180. *See id.*
181. Whitley v. Albers, 475 U.S. 312, 319 (1986).
182. *See* Bistrian v. Levi, 912 F.3d 79, 90 (3d Cir. 2018).
183. *See id.* at 83.
184. *See id.* at 84.
185. *See id.*
186. *See id.*
187. *See id.*
188. *See id.*
189. *See id.*
190. *See id.* at 84–85. Due to the focus of this Comment being on Eighth Amendment failure-to-protect under Bivens, the other suits will be discussed only in a cursory fashion.

moved for summary judgment.[191] The district court ultimately denied summary judgment for most of the prison officers because qualified immunity did not apply, because the right to be protected from prisoner-on-prisoner violence was already established.[192] The remaining defendants filed an interlocutory appeal to the Third Circuit.[193]

The Third Circuit held that Bistrian's failure-to-protect claims under the Fifth and Eighth Amendments were not a new *Bivens* context due to the Circuit's prior precedent[194] and the Circuit's belief that the Supreme Court recognized this precedent through *Farmer v. Brennan*.[195] The Third Circuit recognized that although the Supreme Court did not explicitly say it was recognizing a new *Bivens* context in *Farmer*, the Court nevertheless did so.[196] The Circuit concluded that the Supreme Court implicitly indicated that it did not see *Farmer* as meaningfully different from *Carlson*.[197] Further, the Third Circuit noted that although *Ziglar* did not mention *Farmer* in its list of approved *Bivens* cases, the court refused to believe the Supreme Court overruled its earlier precedent through implication only.[198] In addition, the Third Circuit did not see Bistrian's claim arising under the Fifth Amendment as meaningfully different from Carlson's claim arising under the Eighth Amendment.[199]

The court held that because Bistrian's claims did not constitute new contexts, it did not need to conduct the special factors analysis.[200] The court then stated in dicta that if it was required to do so, the special factors at issue would be the existence of alternative remedial structures, the passage of PLRA, and the separation of powers.[201] But the court would hold that these three factors did not cause hesitation in recognizing an implied remedy.[202]

First, the Third Circuit found the existence of alternative remedial structures unpersuasive.[203] FTCA claims are meant to be complementary to *Bivens* claims.[204] Also, neither the grievance structure nor a habeas writ

191. *See id.*
192. *See Bistrian*, 912 F.3d at 84–85.
193. *See id.* at 85–87.
194. *See* Curtis v. Everette, 489 F.2d 516, 518–19 (3d Cir. 1973).
195. *See Bistrian*, 912 F.3d at 90–92.
196. *See id.*
197. *See id.* at 90.
198. *See id* at 91.
199. *See id*. at 91.
200. *See id.* at 91–92.
201. *See id.* at 92.
202. *See id.*
203. *See id.*
204. *See id.*

would actually redress Bistrian's harms.[205] The court stated that, like in *Bivens*, for Bistrian, the remedy was damages or nothing.[206]

Second, the Congressional silence in the PLRA regarding *Bivens* remedies would not cause the court hesitation.[207] The court stated that the PLRA's purpose was "'to eliminate unwarranted federal-court interference with the administration of prisons' and 'to reduce the quantity and improve the quality of prisoner suits.'"[208] The court then reasoned that the PLRA's main purpose was to make the process of bringing *Bivens* suits more rigorous for prisoners and to require plaintiffs to exhaust their administrative remedies first.[209] The purpose of the PLRA was not to foreclose *Bivens* suits altogether.[210]

Finally, the Third Circuit stated that separation of powers principles were not of concern.[211] The Court explained that Bistrian did not challenge the Detention Center's policy as a whole.[212] Rather, Bistrian challenged the particular individuals' actions to place him in the recreation yard with other inmates who threatened him and their inactions by not stopping the assault until they had more officers available.[213] The court then noted that some level of prison policy is always involved in a *Bivens* analysis involving prisons, but a minor challenge to prison policy was not a good reason to bar a *Bivens* suit.[214] The net result of *Bistrian* was a new line of *Bivens* cases.[215]

2. *Shorter v. United States*

In 2021, the Third Circuit affirmed its *Bistrian* holdings in *Shorter v. United States*.[216] In *Shorter*, Chrissy Shorter, a transgender woman, was serving a prison sentence at Fort Dix, a Federal Correctional Institute.[217] Shorter presents as openly female, and she was screened as having a significantly higher risk for sexual assault.[218] Despite these concerns, prison officials decided to house Shorter in a unit with men and in cells without locks.[219] Eventually, a male inmate entered Shorter's cell in the

205. *See Bistrian*, 912 F.3d at 92.
206. *See id.*
207. *See id.* at 93.
208. *Id.* (quoting Woodford v. Ngo, 548 U.S. 81, 93–94 (2006)).
209. *See id.* at 93.
210. *See id.*
211. *See id.* at 93.
212. *See id.*
213. *See Bistrian*, 912 F.3d at 93.
214. *See id.*
215. *See id.*
216. *See* Shorter v. United States, 12 F.4th 366, 372 (3d Cir. 2021).
217. *See id.* at 369.
218. *See id.*
219. *See id.* at 369–70.

middle of the night, raped her, and stabbed her seven times.[220] Shorter exhausted her administrative remedies and then filed a *Bivens* suit against the prison officials who chose her housing assignment, alleging that their deliberate indifference to her risk of harm violated her Eighth Amendment rights.[221] The district court dismissed her complaint because she only alleged general fears of being at risk of sexual assault, and no evidence suggested that inmates made specific threats against her that would have required the defendants to take measures to ensure that she would not be assaulted.[222]

On appeal, the Third Circuit held that Shorter's case did not present a new *Bivens* context because, as in *Bistrian*, her claims fell under *Farmer*.[223] The Third Circuit again held that the Supreme Court saw *Farmer* as an extension of *Carlson* and implicitly recognized *Farmer* as a valid *Bivens* context.[224] The Third Circuit affirmed, "a prison official can [ ] be found liable under the Eighth Amendment for denying an inmate humane conditions of confinement [if he or she] knows of and disregards an excessive risk to inmate health or safety."[225] Ultimately, the Third Circuit reversed the district court and allowed Shorter's case to proceed.[226]

3. *Bulger v. Hurwitz*

In 2023, the Fourth Circuit created a circuit split by disagreeing with the Third Circuit's holdings in *Bistrian* and *Shorter* in *Bulger v. Hurwitz*.[227] In *Bulger*, the estate of James Bulger sued the United States and several BOP officials after other inmates beat Bulger to death.[228] Bulger was a gang leader and a Federal Bureau of Investigation (FBI) informant.[229] Prison officials transferred Bulger from a prison that housed inmates with more intensive medical needs to a prison that housed inmates with less intensive medical needs.[230] Within fourteen hours of his transfer, prison officials had found Bulger beaten to death in his cell.[231] The estate brought several claims, including *Bivens* claims that alleged the BOP officials violated Bulger's Eighth Amendment rights by failing to prevent

220. *See id.*
221. *See id.*
222. *See id.* at 370–71.
223. *See id.* at 374.
224. *See id.* at 371–72.
225. Shorter v. United States, 12 F.4th 366, 372 (3d Cir. 2022) (quoting Farmer v. Brennan, 511 U.S. 825, 837 (1994)).
226. *See id.* at 375.
227. *See* Bulger v. Hurwitz, 62 F.4th 127, 139 (4th Cir. 2023).
228. *See id*. at 133.
229. *See id.*
230. *See id.* at 134.
231. *See id.*

his attack and for failing to prevent his transfer to a more violent facility.[232] The district court dismissed the claims, holding that the *Bivens* claims presented a new *Bivens* context and that special factors counseled hesitation.[233]

On appeal, the Fourth Circuit began by summarizing the current state of *Bivens* case law.[234] The Fourth Circuit specifically noted, "[i]n the last five years alone, the [Supreme] Court has scaled back *Bivens* significantly, delivering a trilogy of opinions expressing opposition toward any expansion of *Bivens* actions."[235] Further, "[t]he Supreme Court has warned lower courts to act with utmost hesitation when faced with actions that do not fall precisely under *Bivens*, *Davis*, or *Carlson*."[236]

Applying this caution to the case, the Fourth Circuit found that Bulger's case presented a new *Bivens* context.[237] The estate argued that the circumstances of the case were analogous to *Farmer* and *Carlson*, but the court found this argument unpersuasive.[238] As for the *Carlson* argument, the court reasoned that "the Supreme Court has made clear that courts should not interpret *Carlson* to apply outside the precise context at issue in that case."[239] The court explained that because Bulger's case involved a failure to protect from violence claim, and not a failure to provide medical care claim, that factual difference alone settled that the case fell outside of *Carlson*.[240] As for *Farmer*, the Fourth Circuit held that although *Farmer* was brought under a *Bivens* theory of liability, the Supreme Court never affirmed its legitimacy.[241] The Supreme Court had never listed *Farmer* among its list of approved *Bivens* cases.[242] The Fourth Circuit then acknowledged the Third Circuit's holding in *Bistrian*.[243] The Fourth Circuit disagreed with *Bistrian*'s logic, noting that the Third Circuit lacked the guidance of *Hernandez v. Mesa* and *Egbert* when it decided *Bistrian*.[244]

Moving to the special factors test, the Fourth Circuit held that special factors counseled hesitation in recognizing a *Bivens* remedy in this context.[245] Specifically, the court reasoned that creating a new *Bivens*

232. *See id.* at 134–35.
233. *See id.* at 135.
234. *See id.* at 135–37.
235. *Id.* at 136 (referencing Ziglar v. Abbasi, 582 U.S. 120 (2017); Hernadez v. Mesa, 589 U.S. 93 (2020); and Egbert v. Boule, 596 U.S. 482 (2022)).
236. *Bulger*, 62 F.4th at 137.
237. *See id.* at 139.
238. *See id.* at 138.
239. *Id.*
240. *See id.*
241. *See id.* at 139.
242. *See id.*
243. *See id*.
244. *See id.*
245. *See id.* at 139–40.

remedy would (1) expose a new category of defendants to liability; (2) challenge the statutory scheme underlying BOP policy; (3) challenge Congress's silence in the PLRA on individual-capacity damages; and (4) place a substantial litigation burden on the BOP by imposing liability at a systemic level.[246] The court also noted that an alternative remedy structure—the Administrative Remedy Program—existed.[247] Because of these factors, the Fourth Circuit affirmed the dismissal of the *Bivens* claims in *Bulger*.[248] The Seventh Circuit and Ninth Circuit would later adopt this reasoning as they weighed in on the circuit split through similar cases.[249]

4. *Fisher v. Hollingsworth*

In 2024, the Third Circuit revisited *Bistrian* and *Shorter* in *Fisher v. Hollingsworth*.[250] Fisher was convicted on charges involving child pornography and incarcerated at Fort Dix, a federal prison in New Jersey.[251] According to the prison's staff psychologist, Fisher presented with five risk factors for sexual assault by another prisoner: "status as [a] victim of sexual assault, fear of the general prison population, sexual orientation, status as a first-time prisoner, and criminal history of sex offenses."[252] Despite these findings, the psychologist reasoned that Fisher faced no greater risk for sexual assault than other inmates and, therefore, did not need protective custody.[253] Within a few days of this meeting, another inmate raped Fisher three times in three days.[254] The staff psychologist reevaluated Fisher after learning of the rapes and concluded that he required segregated housing.[255]

In 2018, Fisher filed a *Bivens* suit against eight federal prison officials for violating his Eighth Amendment right against cruel and unusual punishment based on their deliberate indifference to his risk of sexual assault by another inmate.[256] The district court dismissed Fisher's claims because they were time-barred under the statute of limitations.[257]

246. *See Bulger*, 62 F.4th at 140–42.
247. *See id.*
248. *See id.* at 142.
249. *See also* Sargent v. Barfield, 87 F.4th 358, 365 (7th Cir. 2023) (where the Seventh Circuit joins the Fourth Circuit); Marquez v. Rodriguez, 81 F.4th 1027, 1031 n.2 (9th Cir. 2023) (where the Ninth Circuit also joins the Fourth Circuit).
250. *See* Fisher v. Hollingsworth, 115 F.4th 197, 204 (3d Cir. 2024).
251. *See id.* at 200–01.
252. *Id.* at 201.
253. *See id.*
254. *See id.*
255. *See id.*
256. *See id.*
257. *See id.* at 202.

On appeal, the Third Circuit acknowledged that in *Bistrian*, it extended *Bivens* by implying a cause of action under *Farmer*.[258] The court also recognized that it affirmed the *Bistrian* rationale in *Shorter*.[259] However, the court conceded that it needed to rethink its decision in light of the Supreme Court's decision in *Egbert*.[260] The Third Circuit recognized that *Egbert* further restricted the *Ziglar* test.[261] Specifically, when the Supreme Court decided *Ziglar*, it did not specify which cases were approved contexts, but in *Egbert*, the Supreme Court qualified that only *Bivens*, *Davis*, and *Carlson* were valid contexts.[262] The circuit held that *Egbert* abrogated its holdings in *Bistrian* and *Shorter* and that those cases were no longer good law.[263]

Further, the circuit court acknowledged that *Egbert* also narrowed the special factors test.[264] The court stated that, under *Ziglar*, the special factors test was whether the judiciary was well-suited to consider the costs and benefits of allowing the damages action.[265] But under *Egbert*, the test grew more restrictive and considered whether the judiciary was arguably worse equipped than Congress to weigh the costs and benefits of a damages action.[266] The court acknowledged that *Shorter* and *Bistrian* were considered under *Ziglar*'s lower standard, which further supported abrogating *Shorter* and *Bistrian*.[267]

Consequently, the court held that Fisher's case was meaningfully different from the three approved *Bivens* cases because none of them were factually similar enough to satisfy the *Egbert* test.[268] The court determined that the closest recognized context to Fisher's was *Carlson*.[269] But unlike in Fisher's case, the injury in *Carlson* was caused by the BOP staff themselves, not by another inmate.[270]

Because Fisher's case was meaningfully different, a special factors analysis was required.[271] The circuit stated that a list of special factors causing hesitation existed, including that (1) implying a *Bivens* remedy would cause a system-wide impact with high costs on the BOP;[272] and (2)

258. *See id.* at 203–04.
259. *See id.* at 204.
260. *See Fisher*, 115 F.4th at 204.
261. *See id.* at 204–05.
262. *See id.*
263. *See id.* at 204.
264. *See id.* at 205.
265. *See id.*
266. *See id.*
267. *See id.* at 205–06.
268. *See id.* at 206.
269. *See Fisher*, 115 F.4th at 206.
270. *See id.*
271. *See id.* at 207.
272. *See id*.

Fisher already had access to the Administrative Remedy Program.[273] Consequently, the court concluded that Fisher had no cause of action under *Bivens*.[274]

III. ANALYSIS

With *Fisher*, the Third Circuit joined its sister circuits in holding that failure-to-protect claims arising under the Fifth and Eighth Amendments are new *Bivens* contexts and are foreclosed based on the special factor analysis.[275] This Comment argues that the Third Circuit correctly decided *Fisher* when considering *Egbert* and correctly joined its sister circuits.[276] Although the circuit courts are now correctly aligned, this result demonstrates a need for Congress to extend 42 U.S.C. § 1983 to federal actors.

A. Do Failure to Protect from Assault Claims Present a New Bivens *Context?*

Failure-to-protect claims present a new *Bivens* context and require special factor analysis.[277] These claims are meaningfully different from the accepted three *Bivens* contexts.[278] Failure-to-protect claims are most closely related to *Carlson* claims, but they are not closely related enough to avoid being considered meaningfully different.[279] For example, *Carlson* was concerned about the prison officials' failure to provide medical aid, but failure-to-protect claims often challenge BOP prisoner housing policies and assessment of danger for inmates.[280] Claims that concern an individual officer's actions are meaningfully different from claims arising from an agency's policy decisions.[281] Thus, failure-to-protect claims differ enough in subject matter for courts to find that these cases are meaningfully different from *Carlson*.[282]

To find that failure-to-protect claims are not a new *Bivens* context, courts must depend almost entirely on a liberal interpretation of *Farmer*.[283] Under *Bistrian* and *Shorter*, the Third Circuit saw these deliberate indifference claims as presenting a recognized *Bivens* context under

273. *See id.* at 207–08.
274. *See id.* at 208.
275. *See id.*
276. *See id.*
277. *See* Bulger v. Hurwitz, 62 F.4th 127, 139 (4th Cir. 2023).
278. *See id.* at 138.
279. *See id.*
280. *See id.* at 138–39.
281. *See id.*
282. *See id.*
283. *See id.*

Farmer.[284] The court based its reasoning on a belief that the Supreme Court had implicitly held that *Farmer* itself was not a new context and fell under the *Carlson* line of cases.[285] However, in *Fisher*, the court changed course and recognized that *Farmer* did not actually recognize a *Bivens* claim.[286] Instead, the court reasoned that *Farmer* simply assumed that one existed so that the Supreme Court could address the confusion among the circuits as to the proper legal standard for deliberate indifference.[287] Therefore, these failure-to-protect claims present a new *Bivens* context.[288]

This interpretation also aligns favorably with the Supreme Court's rhetoric concerning *Bivens* in *Egbert* and *Ziglar*.[289] The correct interpretation is that failure-to-protect claims are a new *Bivens* context and require a special factor analysis.[290] In *Ziglar*, the Court emphasized that it saw the *Bivens* line of cases as coming from a distant past.[291] Now, the Court proceeds under extreme caution in recognizing implied causes of action because doing so is "a disfavored judicial activity."[292] In *Egbert*, the Court clearly stated that only "three" recognized *Bivens* contexts exist.[293] Therefore, every case that is not exactly analogous to *Bivens*, *Carlson*, and *Davis* creates a new context.[294] Due to failure-to-protect claims presenting a new *Bivens* context, courts must apply a special factor analysis when analyzing such claims.[295]

B. Bivens *Special Factor Analysis for Failure-to-Protect Claims*

As recognized by the Third Circuit in *Fisher*, under *Egbert*, the standard for the special factor analysis has shifted and narrowed.[296] Previously, the standard for the analysis was whether the judiciary was well-suited to consider the costs and benefits of the remedy.[297] However, the analysis now examines whether Congress is better equipped than the judiciary to create the remedy.[298] This is a heightened standard and makes it much more difficult for a claim to survive.[299]

284. *See* Fisher v. Hollingsworth, 115 F.4th 197, 203–04 (3d Cir. 2024).
285. *See id.*
286. *See id.*
287. *See id.*
288. *See id.*
289. *See* Egbert v. Boule, 596 U.S. 482, 483–84 (2022).
290. *See* Sargeant v. Barfield, 87 F.4th 358, 365 (7th Cir. 2023).
291. *See* Ziglar v. Abbassi, 582 U.S. 120, 131 (2017).
292. *See id.* at 135.
293. *See Egbert*, 596 U.S. at 484–85.
294. *See id.*
295. *See* Fisher v. Hollingsworth, 115 F.4th 197, 206 (3d Cir. 2024).
296. *See id.* at 205.
297. *See* Ziglar v. Abbassi, 582 U.S. 120, 136 (2017).
298. *See Egbert*, 596 U.S. at 483.
299. *See Fisher*, 115 F.4th at 203–04.

The Third Circuit in *Fisher* announced two special factors that counseled hesitation in recognizing a remedy for these failure-to-protect claims: (1) these claims had the potential to challenge government policy on a system-wide level and would possibly create a deluge of litigation; and (2) there was an existence of an alternative remedial structure: the BOP's Administrative Remedy Program.[300] Other circuits presented with similar claims have identified another special factor that needs to be addressed as well: Congress's silence regarding *Bivens* suits in the PLRA.[301] For the most part, *Shorter* and *Bistrian* in dicta addressed all these factors and instead came out the other way.

First, the factor considering systemic impacts of recognizing a *Bivens* claim for failure-to-protect cases does not counsel hesitation.[302] As recognized by *Bistrian*, these types of *Bivens* claims do implicate some system-level policy considerations.[303] However, these suits tend not to challenge the policies at a system-wide level, but rather challenge the wrongful conduct of particularized individuals at the level of implementation.[304] *Bistrian* did not challenge the BOP's policy of which prisoners can be placed in the yard together.[305] He challenged the decisions of the individual guards who ignored the known threats made against him and chose to put him in a situation where he was harmed.[306] The same is true for the majority of the other plaintiffs discussed, such as the plaintiff in *Fisher*.[307] Fisher did not challenge the BOP's systemic-level policies for determining a prisoner's risk for sexual assault.[308] Rather, he challenged the individual prison official's determination as applied to him.[309] He argued that with his obvious risk factors for sexual assault, the individual prison official should have acted differently.[310] The only valid argument for why this factor could potentially counsel hesitation is that, because these designations include some level of systemic policy, Congress is in the best place to create a remedy under *Egbert*.[311] However, *Davis* saw these potential systemic policy implications as not particularly worrisome.[312] The Court did not believe that recognizing a *Bivens* remedy

300. *See id.* at 207–08.
301. *See* Bulger v. Hurwitz, 62 F.4th 127, 141 (4th Cir. 2023).
302. *See* Bistrian v. Levi, 912 F.3d 79, 93 (3d. Cir. 2018).
303. *See id.*
304. *See id.*
305. *See id.*
306. *See id.*
307. *See* Fisher v. Hollingsworth, 115 F.4th 197, 202 (3d. Cir. 2024).
308. *See id.* at 202.
309. *See id.*
310. *See id.*
311. *See* Egbert v. Boule, 596 U.S. 482, 483 (2022).
312. *See* Davis v. Passman, 442 U.S. 228, 248 (1979).

would create a large litigation burden.[313] Suits involving the exact same conduct but involving state actors instead exist under § 1983, and there is no "deluge" of litigation.[314]

Next, the silence in the PLRA does not counsel hesitation under either *Ziglar* or *Egbert*.[315] In the PLRA, Congress was silent on whether *Bivens* suits could continue to exist after the PLRA was enacted.[316] However, this silence does not require the death of *Bivens* in the prison context.[317] The PLRA's actual impact on *Bivens* suits is that it requires prisoners to exhaust their administrative remedies before bringing a *Bivens* suit.[318] These requirements do not necessitate the end of *Bivens* claims.[319] Instead, the PLRA imposes additional requirements before a *Bivens* suit can be brought to increase the quality of prisoner-brought suits and to decrease the frequency of prisoner litigation.[320] Therefore, this factor used by the circuit courts does not weigh against extending a *Bivens* remedy.[321]

Finally, the existence of alternative remedies is the only factor that supports foreclosing a *Bivens* remedy for prisoner failure-to-protect claims.[322] Over time, the views of the Supreme Court have shifted with regard to the value of alternative remedies.[323] Under *Carlson*, the Court originally required an alternative remedy to be equally effective and explicitly declared a substitute remedy by Congress.[324] Stepping back from requiring an equally effective remedy, in *Correctional Services Corp*., the Court stated that some avenue for redress is enough, and that grievance systems provide adequate deterrence against wrongful conduct by federal agents.[325] The Court distinguished the need for recognizing an implied monetary damages remedy in *Bivens*, where the Court reasoned that alternative remedies were inconsistent and even hostile to remedying violations of the Fourth Amendment.[326] Finally, in *Egbert*, the Court stated that it would not consider the effectiveness of the grievance system or whether the system actually does redress the harms suffered by the

313. *See id.*
314. *See id.*
315. *See* Bistrian v. Levi, 912 F.3d 79, 92–93 (3d Cir. 2018).
316. *See id.*
317. *See id.*
318. *See id.*
319. *See id.*
320. *See id.*
321. *See id.*
322. *See* Fisher v. Hollingsworth, 115 F.4th 197, 208 (3d Cir. 2024).
323. *See* Ziglar v. Abbasi, 582 U.S. 120, 132–33 (2017).
324. *See* Carlson v. Green, 446 U.S. 14, 18–19 (1980).
325. *See* Corr. Servs. Corp. v. Malesko, 534 U.S. 61, 69 (2001).
326. *See id.* at 73.

prisoners.[327] Ultimately, the Court declined to second-guess Congress on these matters.[328]

With this final piece of guidance from *Egbert*, the existence of the grievance system suffices to find that a special factor counsels hesitation in recognizing an implied cause of action.[329] As announced by *Fisher*, the special factors test is not a balancing test, and a single special factor counseling hesitation is enough to foreclose a *Bivens* remedy.[330] As such, failure-to-protect claims are properly foreclosed under current *Bivens* case law.

C. Recommendation: Congress Should Extend 42 U.S.C. § 1983 to Federal Actors

For prisoners who have been violently attacked or killed by their fellow prisoners because of BOP officers' failure to protect them, no *meaningful* remedy currently exists.[331] The only remedy these prisoners are left with is their administrative remedy, which is the filing of grievances.[332] However, these administrative grievances are completely ineffective and offer nothing more than a "threadbare review."[333] Our justice system should do so much more.[334] As discussed in one of the most important cases in United States history, *Marbury v. Madison*, "[t]he very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury."[335] The Court specifically stated that "[t]he government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no [meaningful] remedy for the violation of a vested legal right."[336] *Marbury* speaks to the ideals to which we hold our government in recognizing and vindicating our constitutional rights.[337] Currently, our system is failing to meet these principles laid out by *Marbury* by leaving prisoners with only

327. *See* Egbert v. Boule, 596 U.S. 482, 497 (2022).
328. *See id.*
329. *See* Fisher v. Hollingsworth, 115 F.4th 197, 207 (3d Cir. 2024).
330. *See id.*
331. *See* Egbert v. Boule, 596 U.S. 482, 524 (2022) (Sotomayor, J., concurring in part) (arguing that it was incorrect for the Court not to consider the effectiveness of the alternative remedy because not considering its effectiveness drained the word "remedy" of all its meaning).
332. *See id.* Occasionally, prisoners may be able to bring claims under the Federal Tort Claims Act (FTCA). However, to bring an FTCA claim, the conduct at issue must be recognized as a tort in the state where the conduct occurred. This is a particular issue for constitutional claims, where there will not often be a corresponding state tort.
333. *See id.* at 524.
334. *See* Marbury v. Madison, 1 Cranch 137, 163 (1803).
335. *Id.*
336. *Id.*
337. *See id.*

this inadequate alternative remedy.[338] The filing of grievances should not be considered an alternative remedy because this alleged alternative remedy is neither an alternative nor a remedy.[339] An alleged alternate remedy can only be considered an alternate remedy if it "afford[s] participatory rights, an opportunity for judicial review, and the potential to secure at least some meaningful relief."[340] Administrative grievances fail to fulfill all three parts of this notion, and instead, Congress must act and should extend a § 1983 remedy to federal prisoners.

Extending a § 1983 remedy to federal prisoners and other citizens would not particularly burden the federal government.[341] At least extending the remedy would not be more burdensome than it is for the state governments.[342] Compared to state prisons, federal prisons would likely face much fewer § 1983 claims than state prisons do, so the litigation burden would be less.[343] Several factors would reduce the number of § 1983 claims brought against federal prisons compared to state prisons.[344] First, federal prisons are generally less overcrowded than state prisons, so the risk of violence and harm from overcrowding would be lessened.[345] Second, BOP officers are often better trained than state prison officers, so they are less likely to engage in tortious acts against prisoners.[346] Third, the conditions of confinement are often better in federal prisons.[347] Finally, due to the numerous constraints imposed by the PLRA, most of these complaints are resolved at summary judgment anyway.[348] The PLRA further provides that in the event that a prisoner brings three complaints the court deems frivolous, the prisoner will encounter additional burdens if they continue to bring suits.[349] If state prisons and other state agencies can operate under this burden, there is no good reason that the BOP and other federal agencies could not do so as well.

338. *See id.*

339. *See Egbert*, 596 U.S. at 524 (Sotomayor, J., concurring in part).

340. *See id.*

341. *See* Joseph T. Lukens, *The Prison Litigation Reform Act: Three Strikes and You're Out of Court – It May Be Effective But is It Constitutional?*, 70 TEMP. L. REV. 471, 490 (1997).

342. *See id.*

343. *See id.* at 490 n.116.

344. *See id.*

345. *See* Emily Widra, *Since You Asked: Just How Overcrowded Were Prisons Before the Pandemic, and at This Time of Social Distancing, How Overcrowded Are They Now?*, PRISON POL'Y INITIATIVE (Dec. 21, 2020), https://perma.cc/36DA-H6HF (providing data that the federal prison system is more overcrowded than the state system, although some states are less overcrowded).

346. *See* Lukens, *supra* note 338, at 490 n.116.

347. *See id.*

348. *See id.* at 490–97.

349. *See id.*

Currently, our system is not living up to these ideals and is undeserving of the high honor discussed by the Great Chief Justice in *Marbury*.[350] When federal actors violate our citizens' constitutional rights, citizens do not possess a meaningful remedy.[351] To sufficiently vindicate violations of constitutional rights by federal actors, Congress must amend § 1983 and extend it to federal actors. Like in *Bivens*, for these prisoners, it is damages or nothing.[352] No administrative grievance can heal the wounds caused by a rape or a violent beating that a prison official could have prevented but for their deliberate indifference.[353] Once the damage has occurred, only monetary damages can even attempt to remedy the violation.[354] By amending § 1983, Congress could finally provide a meaningful avenue of redress for these victim prisoners and other citizens outside the prison context.

IV. CONCLUSION

In *Egbert*, the Supreme Court has now made it nearly impossible for a new *Bivens* context to be recognized or even for cases to proceed under the three accepted cases if the presented cases have even minuscule differences.[355] *Egbert* has led the circuit courts to abandon recognizing a *Bivens* remedy for these failure-to-protect claims.[356] However, the circuit courts' analysis is not entirely without flaw.[357] The circuit courts have misguided their analysis on several of the special factors, mainly the silence in the PLRA and the potential for systemic-level agency policy challenges.[358] The only special factor that causes hesitation is the existence of the grievance program, but this factor is not without controversy either.[359]

Now, prisoners who suffer an assault by another inmate while presenting obvious risk factors have no meaningful remedy for the injustices they have suffered.[360] Congress must recognize the current injustices happening in our prison system.[361] But Congress should not stop there. Congress should act broadly to ensure that when our constitutional rights are violated by any federal actor acting under their federal authority,

350. *See* Egbert v. Boule, 596 U.S. 482, 524 (2022) (Sotomayor, J., concurring in part).
351. *See id.*
352. *See* Davis v. Passman, 442 U.S. 228, 245 (1979).
353. *See* Bistrian v. Levi, 912 F.3d 79, 92 (3d. Cir. 2018).
354. *See id.*
355. *See supra* Section II.D.3.
356. *See supra* Section II.E.4.
357. *See supra* Section III.B.
358. *See supra* Section III.B.
359. *See supra* Section III.B.
360. *See supra* Section III.C.
361. *See supra* Section III.C.

our rights are vindicated. Congress should act by extending 42 U.S.C. § 1983 to federal actors.[362] The state-level government system can clearly operate under the burden of § 1983; there is no good reason the federal government could not as well.[363]

362. *See supra* Section III.C.
363. *See supra* Section III.C.