22-654

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Clint Edwards,
Plaintiff-Appellant,

v.

Drew Gizzi, **Robert Johnsen**, **Frank Pena**, **Walter Cook**, **Anthony Mercurio**, and **Does 1–10**,
Defendants-Appellees,

and

Michael Lewis and **United States**,
Defendants.

On appeal from the United States District Court
for the Southern District of New York
Case No. 7:20-cv-7371-KMK
Hon. Kenneth M. Karas

APPELLANT CLINT EDWARDS'S OPENING BRIEF

Athul K. Acharya
PUBLIC ACCOUNTABILITY
P.O. Box 14672
Portland, Oregon 97293
(503) 383-9492

Counsel for Plaintiff-Appellant
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STATEMENT OF JURISDICTION

The district court had jurisdiction over this federal civil-rights action under 28 U.S.C. § 1331. It issued its final judgment dismissing Plaintiff Clint Edwards's claims on March 2, 2022. A38. Edwards timely appealed. A40; Fed. R. App. P. 4(a)(1)(A). This Court has jurisdiction under 28 U.S.C. § 1291.

INTRODUCTION

In *Bivens v. Six Unknown Named Agents*,[1] the Supreme Court recognized a cause of action for victims of unlawful searches and seizures at the hands of federal officers. Since then, three other Supreme Court cases—*Carlson v. Green*,[2] *McCarthy v. Madigan*,[3] and *Farmer v. Brennan*[4]—have permitted *Bivens* claims by federal prisoners who undergo cruel and unusual punishment. Under those cases, Clint Edwards—a federal prisoner who alleges he endured an excessive use of force—can seek *Bivens* relief.

In recent years, the Supreme Court has faced extraordinary *Bivens* claims—claims that challenge the separation of powers in areas like national security, foreign policy, and border operations. It has rebuffed those claims. But it has also explicitly left ordinary *Bivens* claims alone. It has explained that if a claim is similar enough to a previously recognized *Bivens* claim, it can proceed to the merits without further analysis. Only if a claim presents a "new context" must it be analyzed for "special factors counselling hesitation," such as separation-of-powers problems or the availability of alternative remedies. And even then, if no special factors are present, courts can hear the claim.

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[1] 403 U.S. 388 (1971).

[2] 446 U.S. 14 (1980).

[3] 503 U.S. 140 (1992).

[4] 511 U.S. 825 (1994).

Edwards's claim passes this test with flying colors. It varies only in trivial ways from the claims recognized in *Carlson*, *McCarthy*, and *Farmer*, so no special-factors analysis is necessary. And in any event, no special factors counsel hesitation. Issues like national security, foreign policy, and border operations aren't in play here. And the only thing close to an alternative remedy is a claim under the Federal Tort Claims Act—but *Carlson* expressly held that *Bivens* claims coexist with claims under the FTCA.

The district court, however, disregarded *Carlson*. It reasoned that the Court's more recent cases—even though they continue to cite *Carlson* favorably—had overruled *Carlson* by implication. And so it held that the FTCA *does* displace *Bivens* claims.

Supreme Court precedent forbids this type of tea-leaf reading. "Needless to say," the Court has said, "only this Court may overrule one of its precedents."[5] Until that happens, other courts "should follow the case which directly controls."[6] That case here is *Carlson*. The district court expressly refused to follow *Carlson*, so its decision should be reversed. *See* Part 2.3.1, *infra*. This is the most straightforward reason for reversal.

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[5] *Thurston Motor Lines, Inc. v. Jordan K. Rand, Ltd.*, 460 U.S. 533, 535 (1983).

[6] *Rodriguez de Quijas v. Shearson/Am. Exp., Inc.*, 490 U.S. 477, 484 (1989).

But the district court also erred earlier in its analysis. It held that Edwards's claim presented a new context, even though his claim is the archetype of a *Bivens* claim—a conventional damages claim against rank-and-file federal officers for an isolated violation of a constitutional right—and even though it arises in the long-recognized context of cruel and unusual punishment by federal officers. The Supreme Court endorsed nearly identical claims in *Carlson*, *McCarthy*, and *Farmer*. So the district court erred in holding that Edwards's claim presented a new context. This is another reason to reverse. *See* Part 2.1, *infra*. If the Court takes this route, it need not even reach the FTCA question.

Whichever path this Court chooses, it should reverse the district court and permit Edwards's claim to proceed.

ISSUES PRESENTED

1. In at least three cases—*Carlson*, *McCarthy*, and *Farmer*—the Supreme Court has recognized *Bivens* claims by federal prisoners against rank-and-file federal officers for isolated Eighth Amendment violations. Edwards, a federal prisoner, brings a *Bivens* claim against rank-and-file federal officers for needlessly breaking his arm. Does his claim present a "new" context?

2. In *Carlson*, the Supreme Court held that the FTCA does not displace *Bivens*—that they are "parallel, complementary causes of action." It has reaffirmed *Carlson* several times, including in its most recent cases. Even so, does the FTCA displace *Bivens*?

3. Congress enacted the Prison Litigation Reform Act to "reduce the quantity and improve the quality" of prisoners' claims. It expressly included federal prisoners' *Bivens* claims. Did it mean to eliminate such claims entirely?

4. This is a "domestic case." Do any other special factors—like national security, foreign policy, or border operations—counsel hesitation?

STATEMENT OF THE CASE

This is a civil-rights case. A11. Edwards, a federal prisoner, alleges that federal officers violated his constitutional rights. *Id.* Defendants Gizzi and Johnsen moved to dismiss, arguing that Edwards lacked a cause of action under *Bivens*. A22. The district court (Karas, J.) granted their motion and ordered Edwards to show cause why it shouldn't dismiss his claims against the remaining defendants as well. A36–37; *Edwards v. Gizzi*, 2022 WL 309393, at *10–11 (S.D.N.Y. 2022). Edwards asked the court to convert its partial dismissal into an appealable final judgment. A38. The court granted his request and entered a final judgment dismissing Edwards's claims against all parties. *Id.*

STATEMENT OF FACTS

Federal officers needlessly break Edwards's arm.

When Clint Edwards heard a federal judge hand him a 20-year sentence, he briefly broke down and "black[ed] out." A12 ¶ 3. He remembers yelling at the judge and the prosecutor. *Id.* According to one officer present, he "left the chair he was seated in" and Defendants (Officers) decided to "physically restrain him." A16. According to Defendant Drew Gizzi, Edwards also lunged towards the prosecutor's table. A14. Whatever happened, the Officers ultimately took him to the ground. A12 ¶ 4.

When he came to, Edwards stopped resisting. A12 ¶¶ 4, 6. He began complying with orders. A12 ¶ 6. Someone told him to put his hands behind his back and he did. A12 ¶ 4. Then, one officer straightened his arm out while another hit it hard enough to break the bone. A12 ¶¶ 4–5, 7. This caused Edwards "extreme pain." A12 ¶ 7. An x-ray confirmed that the Officers had broken his arm. A12 ¶ 5.

Edwards filed suit *pro se* in federal court. A11. He alleged that by breaking his arm even though he had stopped resisting and was complying with directions, the Officers used excessive force[7] in violation of his right against cruel and unusual punishment. A12 ¶ 7.

The district court held that Edwards lacked a cause of action under *Bivens*. A35–36. It reasoned that Edwards's claim arose in a new context and that the FTCA provided an alternative remedial scheme. *Id.* It recognized that the Supreme Court had expressly held in *Carlson* that the FTCA didn't displace *Bivens*, and that the Court has never repudiated that holding. A32–34. But, it speculated, perhaps the Court had since overruled *Carlson* by implication. A35–36. And on that basis it dismissed Edwards's complaint. *Id.*

This appeal followed.

[7] Edwards also alleged "deliberate indifference," A12 ¶ 7, but he doesn't press this argument on appeal.

STANDARD OF REVIEW

This Court reviews de novo whether a plaintiff has stated a claim. *McGarry v. Pallito*, 687 F.3d 505, 510 (2d Cir. 2012). It accepts the plaintiff's factual allegations as true and draws all reasonable inferences in his favor. *Id.* The Court also extends "special solicitude" to complaints filed pro se, interpreting them to raise the "strongest claims" that they suggest, *Hardaway v. Hartford Pub. Works Dep't*, 879 F.3d 486, 489 (2d Cir. 2018) (quotation marks omitted), especially when they allege violations of civil rights. *McGarry*, 687 F.3d at 510; *see also McLeod v. Jewish Guild for the Blind*, 864 F.3d 154, 156 (2d Cir. 2017).

SUMMARY OF ARGUMENT

Edwards alleges that federal officials violated his right under the Eighth Amendment to be free of cruel and unusual punishment. He may seek relief under *Bivens*.

1. Although the Supreme Court has rejected claims extending *Bivens* into novel territory, it has expressly declined to do away with conventional *Bivens* claims.

a. The Court's recent cases denying *Bivens* relief have all involved extraordinary facts: international incidents, border security, and the unique post-9/11 national-security context. Those cases have also clarified that they did not "dispense with *Bivens* altogether." *Egbert v. Boule*, 142 S. Ct. 1793, 1803 (2022).

b. Conventional *Bivens* claims—those that seek relief for "individual instances of [constitutional violations]" by rank-and-file federal officers—are still permitted. *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1862 (2017); *see also id.* at 1856–57.

2. Edwards has a conventional *Bivens* claim.

a. Edwards's claim does not arise in a "new context." The Supreme Court has recognized Eighth Amendment *Bivens* claims in several cases, including *Carlson*, *McCarthy*, and *Farmer*. This case is not "different in a meaningful way" from those. *Abbasi*, 137 S. Ct. at 1859.

b. Even if Edwards's claim does arise in a new context, the Supreme Court has held that courts may recognize new *Bivens* claims unless "special factors" bar relief.

c. No "special factors" bar granting Edwards relief: The Supreme Court has already held that the FTCA doesn't displace *Bivens*; the PLRA merely regulates how *Bivens* actions are brought rather than displace them entirely; and no other special factor is present in this garden-variety challenge to an individual instance of unconstitutionally excessive force.

ARGUMENT

1. The Supreme Court still permits conventional *Bivens* claims.

When a state official violates a person's constitutional rights, that person may sue the official for damages under 42 U.S.C. § 1983. For decades, if the transgressing officer was federal, *Bivens* provided the "federal analog." *Hartman v. Moore*, 547 U.S. 250, 254 n.2 (2006). It provided a cause of action for the victim of a constitutional violation by a federal official to sue the official for damages in federal court. *Id.* (citing *Carlson*, 446 U.S. at 18); *see also Davis v. Passman*, 442 U.S. 228, 237–40 & n.18 (1979) (explaining what a "cause of action" is and distinguishing it from other justiciability doctrines).

Beginning in the mid-1980s, the Supreme Court began trimming the scope of *Bivens*. It declined to extend the *Bivens* remedy to cases involving sensitive government activity (like military operations), special classes of defendants (like private contractors), and complex remedial schemes legislated by Congress (like disability benefits). *See Lanuza v. Love*, 899 F.3d 1019, 1026–27 n.3 (9th Cir. 2018) (collecting cases). Still, in the mine run of cases, plaintiffs who alleged that they had been "deprived of a constitutional right by a federal agent acting under color of federal authority" could proceed under *Bivens*. *See Thomas v. Ashcroft*, 470 F.3d 491, 496 (2d Cir. 2006).

More recently, the Court has further reined in *Bivens* in three cases involving national security, foreign relations, and border operations:

- In *Ziglar v. Abbasi*, the Court addressed whether noncitizens who were suspected of having ties to terrorism in the wake of September 11 could pursue *Bivens* claims against high-level federal officials—including the attorney general and the director of the FBI—who had allegedly orchestrated their unconstitutional treatment. 137 S. Ct. at 1853–54. As to most of the officials, the answer was "no." *Id.* at 1863.[8]
- In *Hernández v. Mesa*, the issue was whether a *Bivens* remedy was available when a Border Patrol agent shot and killed a Mexican teenager across the U.S.–Mexico border. 140 S. Ct. 735, 739–40 (2020). Because the case implicated sensitive areas of foreign policy and national security, the Court again answered in the negative. *Id.* at 749–50.
- And in *Egbert v. Boule*, the Court held that Border Patrol agents engaged in "border security" are not amenable to suit under *Bivens*. 142 S. Ct. at 1806 (quoting *Hernández*, 140 S. Ct. at 746–47).

[8] But not as to the prison warden, who was most directly responsible for the abuse. *Id.* at 1863. This distinction is discussed extensively below.

But even as the Supreme Court has trimmed *Bivens*'s "outer reaches," it has taken "great care" to confirm that the "core of *Bivens*" remains intact. *Jacobs v. Alam*, 915 F.3d 1028, 1037 (6th Cir. 2019) (citing *Abbasi*, 137 S. Ct. at 1856–57). In *Abbasi*, it stated expressly that its reasoning did not "cast doubt on the continued force, or even the necessity, of *Bivens* in the search-and-seizure context in which it arose." 137 S. Ct. at 1856. In *Hernández*, the Court cabined its limitation of *Bivens* to cases that threatened the "delicate web of international relations." 140 S. Ct. at 749. And in *Egbert*, the Court was asked squarely to "reconsider *Bivens*" wholesale. Petition for Writ of Certiorari, *Egbert*, No. 21-147, 2021 WL 3409109 (U.S. 2021).[9] It didn't even grant certiorari on that question. Order, *Egbert*, 142 S. Ct. 457 (2021). And in its opinion, it once again declined to "dispense with *Bivens* altogether." 142 S. Ct. at 1803.

So *Bivens* adventurism is clearly "disfavored." *Abbasi*, 137 S. Ct. at 1857 (quotation marks omitted). But just as clearly, traditional *Bivens* claims can proceed. *See, e.g.*, *Jacobs*, 915 F.3d at 1038 (permitting a "garden-variety" claim for excessive force to proceed under *Bivens*). The archetype of such claims is a suit against "individual federal officers" for "individual instances of official misconduct."

[9] Available at https://www.supremecourt.gov/DocketPDF/21/21-147/185392/20210730091936515_Cert%20Petition%20-%20Egbert%20v.%20Boule.pdf.

Bistrian v. Levy, 912 F.3d 79, 92 (3d Cir. 2018) (quoting *Abbasi*, 137 S. Ct. at 1862) (cleaned up).

The Court has also explained *why* it continues to permit traditional *Bivens* claims. Such claims serve critical constitutional purposes. They "deter individual federal officers from committing constitutional violations." *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 70 (2001). They "provide[] instruction and guidance to federal law enforcement." *Abbasi*, 137 S. Ct. at 1856–57. And for plaintiffs like Edwards, who have sustained purely retrospective injuries—for whom "it is damages or nothing"—*Bivens* offers direct redress. 403 U.S. at 410 (Harlan, J., concurring in the judgment); *Abbasi*, 137 S. Ct. at 1856. These "powerful reasons" are why the Court continues to permit conventional *Bivens* claims. *Abbasi*, 137 S. Ct. at 1857.

2. Edwards has a conventional *Bivens* claim.

To evaluate whether a plaintiff has a cause of action under *Bivens*, the Court has set forth a two-part test. *Egbert*, 142 S. Ct. at 1803. The first question is whether the case presents a "new *Bivens* context." *Abbasi*, 137 S. Ct. at 1859. If not—if the claim is similar enough to the Court's existing *Bivens* cases—then the inquiry is over and the claim may proceed on the merits. *E.g.*, *Shorter v. United States*, 12 F.4th 366, 372–73 (3d Cir. 2021); *Jacobs*, 915 F.3d at 1038–39; *Ioane v. Hodges*, 939 F.3d 945, 952 (9th Cir. 2018).

If the claim does present a new context, then the next question is whether "special factors"—mainly whether the plaintiff has some other adequate remedy—counsel hesitation before allowing a claim to proceed. *Abbasi*, 137 S. Ct. at 1857; *Hoffman v. Preston*, 26 F.4th 1059, 1065–66 (9th Cir. 2022). If not, then here too the plaintiff's *Bivens* claim may proceed. *See, e.g.*, *Hoffman*, 26 F.4th at 1074; *Greenpoint Tactical Income Fund LLC v. Pettigrew*, 38 F.4th 555, 564 & n.2 (7th Cir. 2022); *Bueno Diaz v. Mercurio*, 442 F. Supp. 3d 701, 712 (S.D.N.Y. 2020); *Williams v. Baker*, 487 F. Supp. 3d 918, 930 (E.D. Cal. 2020).

2.1. Edwards's claim arises in the long-recognized Eighth Amendment context.

A claim arises in a "new" context if it differs "in a meaningful way" from previous *Bivens* cases decided by the Supreme Court. *Abbasi*, 137 S. Ct. at 1859. In *Abbasi*, the Court offered some guidance for what makes a difference "meaningful": A different right might be involved, for instance, or the defendant officers might be of a different rank, or there may be a heightened risk of disrupting the functioning of the other branches. *Id.* at 1859–60 (supplying a non-exhaustive list). But not all differences count: "Some differences, of course, will be so trivial that they will not suffice to create a new *Bivens* context." *Id.* at 1865.

Edwards alleges that the Officers broke his arm for no reason. A12 ¶ 4. He brings a claim for excessive force in violation of his right against cruel and unusual punishment. A12 ¶ 6.[10] In other words, his claim arises in the context of prisoner mistreatment in violation of the Eighth Amendment.

Eighth Amendment claims are far from a new context. As *Abbasi* pointed out, the Court recognized an Eighth Amendment "*Bivens* claim for prisoner mistreatment" in *Carlson v. Green*. *Abbasi*, 137 S. Ct. at 1864. In fact, *Carlson* is only one of several cases in which the Court has recognized an Eighth Amendment *Bivens* claim. At least two others remain binding precedent: *McCarthy* and *Farmer*. These three cases—plus two more, also discussed below—show that the Court has long recognized all sorts of *Bivens* claims for unconstitutional mistreatment of prisoners.

- In *Carlson*, the decedent's mother alleged that the defendant prison officials had killed her son through deliberate indifference to his severe asthma. 446 U.S. at 16 n.1. The Supreme Court permitted her to bring her claim "directly

[10] The district court was unclear whether Edwards's right against excessive force was properly analyzed under the Fifth Amendment or the Eighth. A28–29 n.5. It presumed that an Eighth Amendment analysis was more likely correct. *Id.* Just so. The Fifth Amendment protects "pretrial detainees," while "convicted prisoners" like Edwards are protected by the Eighth Amendment. *See Kingsley v. Hendrickson*, 576 U.S. 389, 400 (2015).

under the Constitution." *Id.* at 16–18. It held that despite the parallel cause of action under the FTCA, plaintiffs like her could seek relief under *Bivens* for a "violation of the Eighth Amendment's proscription against infliction of cruel and unusual punishment." *Id.* at 16–18, 23.

- In *McCarthy*, the Court held that prisoners need not exhaust internal grievances before suing under *Bivens*. 503 U.S. at 141, 156. Not one of the nine Justices—not even Justice Thomas, who authored *Egbert*—questioned that prisoners could seek relief under *Bivens* for violations of their Eighth Amendment rights. 503 U.S. at 152; *id.* at 156 (Rehnquist, C.J., concurring in the judgment).[11]
- In *Farmer*, the plaintiff was a transgender woman who was beaten and raped after prison officials transferred her to the general population of a notoriously violent facility. 511 U.S. at 829–31. She brought suit under *Bivens* and the Eighth Amendment. *Id.* at 830. The lower courts granted summary judgment against her, but the Supreme Court vacated those decisions and allowed her to press her claims. *Id.* at 851. As in

[11] Congress later enacted an exhaustion requirement in the Prison Litigation Reform Act, 42 U.S.C. § 1997e(a), legislatively overruling that part of *McCarthy*. But it left the rest of *McCarthy* alone. In particular, as Part 2.3.2 explains, Congress did not overrule *McCarthy*'s recognition of a *Bivens* claim under the Eighth Amendment.

> *McCarthy*, it again treated as uncontroversial the proposition that "*Bivens* actions [would lie] against federal prison officials." *Id.* at 839.

Abbasi explained that if a context can be found in a "previous *Bivens* case[] decided by [the Supreme] Court," it isn't "new." 137 S. Ct. at 1859. *Carlson* is a previous *Bivens* case decided by the Supreme Court. So is *McCarthy*. So is *Farmer*. Of these three, *Abbasi* discusses only *Carlson*, but as the Third Circuit inferred, this is likely because the Court views the Eighth Amendment failure-to-protect claim in *Farmer* as "not distinct from" the Eighth Amendment failure-to-treat claim in *Carlson*. *Bistrian*, 912 F.3d at 91. Together, the three cases show that federal prisoners alleging a violation of the Eighth Amendment's prohibition on cruel and unusual punishment can seek relief under *Bivens*.

Two other cases confirm that *Bivens* is available to federal prisoners seeking redress for unconstitutional mistreatment. In *Cleavinger v. Saxner*, the Court confronted whether federal prison disciplinarians were entitled to absolute immunity from *Bivens* suits. 474 U.S. 193, 194 (1985). The Court declined to undo the cause of action it had just granted federal prisoners by granting federal prison staff absolute immunity. *Id.* at 207–08. Instead, it held that prison staff were sufficiently protected by qualified immunity. *Id.* at 206–07. Although *Cleavinger* was brought under the Fifth Amendment rather

than the Eighth, its reasoning endorses robust liability for federal officials who violate prisoners' constitutional rights. *Id.* at 198, 207–08.

And finally, in *Simmons v. Himmelreich*, the Court unanimously held that the FTCA's judgment bar did not foreclose "a constitutional tort suit"—in other words, a *Bivens* suit—"against individual Bureau of Prison employees." 578 U.S. 621, 624 (2016). *Simmons* was decided just one year before *Abbasi*. And—as in *McCarthy* and *Farmer*—no Justice questioned that a *Bivens* action for prisoner mistreatment was available. In fact, all nine permitted one to proceed. *Id.* at 631.[12]

Despite this wealth of Supreme Court cases recognizing *Bivens* claims for federal prisoners under both the Fifth and the Eighth Amendments, the district court held that Edwards's claim presented a new context. A28–30.[13] It reasoned, first, that a claim that federal officials violated the Eighth Amendment through excessive force was different from a claim that federal officials violated the Eighth Amendment through medical indifference; and second, that previous

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[12] One last data point: In *Malesko*, all nine Justices agreed that "[i]f a federal prisoner in a BOP facility alleges a constitutional deprivation, he may bring a *Bivens* claim against the offending individual officer, subject to the defense of qualified immunity." 534 U.S. at 72.

[13] Because Edwards was unrepresented, the district court was not made aware of *Farmer*, *McCarthy*, *Cleavinger*, or *Simmons*. It thus compared his claim only to *Bivens* and *Carlson*.

Bivens cases had involved employees of the Federal Bureau of Narcotics and the Bureau of Prisons, but not the U.S. Marshals. *Id.*

Neither of these features is the "meaningful" kind of distinction that the Supreme Court has held makes a difference. *Cf. Abbasi*, 137 S. Ct. at 1859. The claims *Abbasi* rejected presented a new context because they challenged a "high-level executive policy created in the wake of a major terrorist attack on American soil." *Id.* at 1860. Similarly, *Hernández* involved an "international incident"—a gunshot fired by a federal agent across the U.S.–Mexico border. 140 S. Ct. at 740, 744. And in like manner, *Egbert* involved Border Patrol operations within feet of the U.S.–Canada border. 142 S. Ct. at 1800, 1804. If these examples show how significant a difference must be to be "meaningful," the distinctions drawn by the district court don't rate.

Another benchmark can be found in the Court's analysis of the claim against Warden Hasty, which like the rest of the *Abbasi* claims presented a new context, but for different reasons. 137 S. Ct. at 1863–65. The Court explained that this claim arose in a new context because it involved a different constitutional right than did *Carlson*: the Fifth Amendment right to due process rather than the Eighth Amendment right against cruel and unusual punishment. *Id.* at 1864. And, the Court continued, the "judicial guidance" for prisoner mistreatment under the Fifth Amendment was "less developed" than under the Eighth. *Id.* at 1864–65. But importantly, the Court also explained that

these differences were "modest"—that is, *just* meaningful enough to tip the claim into a new context. *Id.* at 1864.

Unlike that claim, Edwards's claim implicates the same constitutional right as in *Carlson* and *Farmer* (and *McCarthy* and *Simmons*): the Eighth Amendment right against infliction of "cruel and unusual punishments." U.S. Const amend. VIII. As *Farmer* explains, the various requirements of the Eighth Amendment—that prison officials protect prisoners, that they provide prisoners with adequate medical care, that they not "use excessive physical force against prisoners"—are simply related aspects of a single constitutional right. 511 U.S. at 832; *cf. Egbert*, 142 S. Ct. at 1807 ("[A] new context arises when there is a new 'constitutional right at issue[.]'" (quoting *Abbasi*, 137 S. Ct. at 1860)). And as this Court has pointed out, the "guard who beat a prisoner" is the "easy" *Bivens* case. *Arar v. Ashcroft*, 585 F.3d 559, 580 (2d Cir. 2009).[14] So unlike the claim against Warden Hasty, the "judicial guidance" on excessive force under the Eighth Amendment is quite "clear." *Cf. Abbasi*, 137 S. Ct. at 1864–65.

To be sure, *Hernández* warned that a claim may arise in a new context "even if it is based on the same constitutional provision" as a

[14] Also, a holding that excessive force is a new context would have the perverse effect of punishing more harshly the guard who allows an inmate to be beaten than the guard who beats an inmate himself. *Cf. Farmer*, 511 U.S. at 833–34 (allowing *Bivens* claim for failure to protect inmate); *Simmons*, 578 U.S. at 623 (same).

previous *Bivens* case. 140 S. Ct. at 743. But what that means is that extraordinary facts can tear an otherwise familiar claim out of a recognized context—not that every different *method* of violating a right will give rise to a new context. To illustrate: In *McLeod v. Mickle*, this Court assumed without controversy that *Bivens* provided a cause of action for an unlawful traffic stop, even though *Bivens* itself had involved a different type of Fourth Amendment violation—the warrantless search of a home. 765 F. App'x 582, 583, 585 (2d Cir. 2019) (vacating grant of qualified immunity); *cf. Bivens*, 403 U.S. at 389–90. And in *Hernández*, it wasn't the use of deadly force that gave rise to a new context—it was the extraordinary fact that the shot had crossed an international border. *See* 140 S. Ct. at 743–44.

No extraordinary facts propel Edwards's claim out of the Eighth Amendment context long recognized in cases like *Carlson*, *Farmer*, *McCarthy*, and *Simmons*. Just like those plaintiffs, Edwards brings a claim against rank-and-file officers for an isolated violation of his right against cruel and unusual punishment. The distinctions drawn by the district court—that the Officers violated this right using excessive force instead of medical indifference, or that the Officers were employed by a different federal agency than in previous cases—are the kind of "trivial" differences that do not "suffice to create a new *Bivens* context." *See Abbasi*, 137 S. Ct. at 1865; *cf. Reid v. United States*, 825 F. App'x 442, 444–45 (9th Cir. 2020) (holding that an inmate's excessive-force claim

did not present a new context); *Prado v. Perez*, 451 F. Supp. 3d 306, 315 (S.D.N.Y. 2020) ("It cannot be that the character of the law enforcement officer, without more, automatically converts a plaintiff's claim into a 'new context,' even post-*Abbasi*.").

In sum: Edwards's claim involves the same constitutional right as in *Carlson*, *McCarthy*, and *Farmer*; officers of the same rank or lower; the same extensive judicial guidance on the Eighth Amendment's cruel-and-unusual-punishments clause; and the same interplay among the branches of government as in *Carlson*, *McCarthy*, *Farmer*, and *Simmons*. It's not meaningfully different from those cases. It does not present a new context. This Court should reverse the district court's decision to the contrary and remand for further proceedings.

2.2. Even if Edwards's *Bivens* claim presents a new context, this Court may hear it if no special factors counsel hesitation.

Even if Edwards's claim did present a new context, that wouldn't be fatal. The *Abbasi* plaintiffs' claim against Warden Hasty presented a new context, but the Supreme Court still remanded it for further proceedings. 137 S. Ct. at 1864–65. It instructed this Court to consider whether alternative remedies or other special factors counseled against hearing the claim, leaving open the possibility that the claim could proceed to the merits. *Id.* at 1865. It follows that even in a new

context, unless special factors counsel hesitation, courts may hear a *Bivens* claim. The Court has not limited its *Bivens* cases to their facts.

The district court held otherwise, relying heavily on a case from the Fifth Circuit: *Oliva v. Nivar*, 973 F.3d 438 (5th Cir. 2020). A35 (finding *Oliva* to be "especially relevant"). Judge Willett of that court summarized *Oliva* thus: "[N]ew context = no *Bivens* claim." *Byrd v. Lamb*, 990 F.3d 879, 883 (5th Cir. 2021) (Willett, J., concurring). But if that were true, the Supreme Court wouldn't have remanded *any* of the claims in *Abbasi*. *Cf.* 137 S. Ct. at 1864–65. It wouldn't have spent several pages explaining the special-factors analysis. *Cf. id.* at 1857–58, 1860–63. If "new context = no *Bivens* claim," the Court would have announced that the claims presented a new context and stopped there. It didn't do that—not in *Abbasi*, not in *Hernández*, and not in *Egbert*. Each time, the Court analyzed whether special factors counseled hesitation—because when no special factors counsel hesitation, *Bivens* claims can proceed.

The Court may someday announce that new *Bivens* claims are forbidden entirely. Or it may not.[15] But for now, the holding of *Abbasi*,

[15] When the Court wants to retire a doctrinal path that "never actually applies in practice," it knows how to do so. *See, e.g.*, *Edwards v. Vannoy*, 141 S. Ct. 1547, 1560 (2021). It has chosen, explicitly and repeatedly, not to do so with *Bivens*. In *Egbert*, Justice Gorsuch implored the Court to close off the special-factors inquiry. 142 S. Ct. at 1810 (Gorsuch, J., concurring). The Court acknowledged his request and expressly declined. *Id.* at 1809.

Hernández, and *Egbert* is that even in a new context, if there are no special factors, courts can hear a *Bivens* claim. *Hoffman*, 26 F.4th at 1061. So if the Court determines that Edwards's claim arises in a new *Bivens* context, the next question is whether special factors counsel hesitation.

2.3. No special factors counsel hesitation here.

The special-factors inquiry focuses on the separation of powers—on "who should decide" whether to provide for a damages remedy, Congress or the courts. *Abbasi*, 137 S. Ct. at 1857 (quotation marks omitted); *see also Egbert*, 142 S. Ct. at 1802–03. As a result, the "paradigmatic" special factor that bars relief is the existence of a "comprehensive" remedial scheme enacted by Congress. *M.E.S., Inc. v. Snell*, 712 F.3d 666, 675–76 (2d Cir. 2013); *see, e.g.*, *Bush v. Lucas*, 462 U.S. 367 (1983); *Schweiker v. Chilicky*, 487 U.S. 412 (1988). Other potential special factors include national-security or foreign-policy concerns, intrusion into sensitive government operations, challenges to "large-scale policy decisions," and any affirmative indication from Congress that the plaintiff should have no remedy. *Abbasi*, 137 S. Ct. at 1857–63.

In the view of the district court, just one special factor barred relief: The existence of an "alternative remedy" under the FTCA. A35–36. But the Supreme Court has repeatedly—and consistently—

explained that the FTCA doesn't displace *Bivens*. Nor is any other special factor present here. So even if Edwards's claim presents a new context, no special factors bar granting him relief.

2.3.1. As the Supreme Court has consistently held, the FTCA does not displace *Bivens*.

The Supreme Court has identified several ways Congress can obviate *Bivens* relief. It can enact an "alternative remedial structure." *Abbasi*, 137 S. Ct. at 1858. It can design a comprehensive regulatory scheme that doesn't include a damages remedy. *Id.* at 1858. It can simply rule out a *Bivens* action by granting federal officers immunity. *Egbert*, 142 S. Ct. at 1804 n.2. In all these scenarios, the operative inquiry is into "the likely or probable intent of Congress." *Abbasi*, 137 S. Ct. at 1862. The question is whether there are "sound reasons to think Congress might doubt the efficacy or necessity of a damages remedy." *Id.* at 1858.

When it comes to the FTCA, though, there's no need to ask about Congress's "likely or probable" intent. *Cf. id.* at 1862. There's no "congressional silence" to decipher. *Cf. id.* Congress has been "crystal clear" that it "views FTCA and *Bivens* as parallel, complementary causes of action." *Carlson*, 446 U.S. at 20.

Begin with Congress's own words.[16] In 1974, after federal agents conducted a series of "abusive, illegal and unconstitutional 'no-knock' raids," Congress amended 28 U.S.C. § 2680(h) to permit victims of intentional torts committed by federal law enforcement to sue under the FTCA. S. Rep. No. 93-588 at 3 (1973), *reprinted in* 1974 U.S.C.C.A.N. 2789, 2790; Pub. L. No. 93-253, § 2, 88 Stat. 50, 50 (1974). In its comments accompanying that bill, the Senate committee stated its view that upon enactment, victims of such torts would have a cause of action "against the individual Federal agents *and* the Federal Government." S. Rep. No 93-588 at 3 (emphasis added), 1974 U.S.C.C.A.N. at 2791. The report went on:

> [T]his provision should be viewed as a *counterpart* to the *Bivens* case and its [progeny], in that it waives the defense of sovereign immunity so as to make the Government *independently* liable in damages for the same type of conduct that is alleged to have occurred in *Bivens* (and for which that case imposes liability upon the individual Government officials involved).

Id. (emphasis added).

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[16] For reference, here's a quick sketch of the FTCA. Section § 1346(b)(1) of Title 28 U.S.C. waives the federal government's sovereign immunity and provides a damages action for conduct by federal employees that would be tortious under state law. Section 2680 carves out several exceptions from that waiver of immunity, including many intentional-tort claims. § 2680(h). And § 2679(b) preempts all other remedies—except for civil actions "brought for a violation of the Constitution of the United States."

Congress was even clearer in 1988, when it enacted the comprehensive FTCA reform that became known as the Westfall Act. Section 5 of that legislation, codified at 28 U.S.C. § 2679(b), made the FTCA "the exclusive remedy for most claims against Government employees arising out of their official conduct." *Hernández*, 140 S. Ct. at 748 (quotation marks omitted); Pub. L. No. 100-694, § 5, 102 Stat. 4563, 4564 (1988). In other words, it preempted state tort claims against federal officials performing federal duties. But it also carved out of that preemption any "civil action . . . for a violation of the Constitution of the United States." § 2679(b)(2). In other words, the Act expressly does "not affect" victims' ability to "seek personal redress" under *Bivens* from federal employees who violate their constitutional rights. H.R. Rep. No. 100-700 at 6 (1988), *reprinted in* 1988 U.S.C.C.A.N. 5945, 5949–50.

The Supreme Court has also weighed in on whether the FTCA displaces *Bivens*—with a definitive "no." *Carlson*, 446 U.S. at 19–23. Quoting the 1973 report extensively, the Court found that Congress "did not intend to limit" victims of constitutional violations "to an FTCA action." *Id.* at 20–21. Such plaintiffs, the Court explained, have both an FTCA action against the government and "a *Bivens* action against the individual officials alleged to have infringed their constitutional rights." *Id.* at 20. And despite the Court's later retrenchment of the *Bivens* remedy in other respects, it has continued to

adhere to that conclusion. *See Bush*, 462 U.S. at 378 (FTCA remedy is not a "substitute for a *Bivens* action"); *FDIC v. Meyer*, 510 U.S. 471, 485 (1994) (citing *Carlson*'s reasoning with approval); *Malesko*, 534 U.S. at 67–68 (same); *Minneci v. Pollard*, 565 U.S. 118, 124 (2012) (same); *see also Simmons*, 578 U.S. at 624 (FTCA's judgment bar did not preclude a *Bivens* suit against prison officials).

Even the Court's most recent cases have declined to repudiate (or even limit) *Carlson*. Consider *Abbasi*, in which the Supreme Court instructed this Court to consider special factors on remand. 137 S. Ct. at 1865. It was specific about which alternative remedies to consider: habeas relief, injunctive relief, and other equitable remedies. *Id.* The FTCA didn't make the list. The Court also instructed this Court to consider whether "legislative action" suggested that Congress deprecated a damages remedy. *Id.* But the legislation it mentioned was the PLRA, not the FTCA. *Id.*

The Court was even clearer in *Hernández*, in which acknowledged forthrightly that "Congress made clear that [the Westfall Act] was not attempting to abrogate *Bivens*." 140 S. Ct. at 748 n.9 (citing 28 U.S.C. § 2679(b)(2)(A)). True, the Court also rejected the argument that Congress intended to codify *Bivens*. *Id.* But its bottom-line conclusion was that Congress "simply left *Bivens* where it found it."

Id.[17] In other words, the Westfall Act and the FTCA neither codify *Bivens* nor displace it.

Last, in *Egbert*, the Court again pointedly omitted the FTCA from its analysis. 142 S. Ct. at 1806–07. It considered alternative remedies as dubious as a Border Patrol complaint hotline, but it *still* didn't mention the FTCA. *Id.* at 1806 (citing 8 C.F.R. § 287.10(a)–(b)). The Court's omission was all the more glaring because Boule had brought and lost an FTCA claim. *Id.* at 1802. That's why the partial concurrence could say without rebuttal that the Court "repeatedly has observed that the FTCA does not cover claims against Government employees for 'violation[s] of the Constitution of the United States'" and thus does not "offer[] an alternative remedy for [*Bivens*] claims." *Id.* at 1822 n.7 (Sotomayor, J., concurring in part and dissenting in part) (quoting 28 U. S. C. § 2679(b)(2)(A)) (first alteration in original).

To be sure, the Court has also said that the analysis in its *Bivens* cases "might have been different if they were decided today." *Abbasi*, 137 S. Ct. at 1856. But it hasn't overruled them. *Cf. Engel v. Buchan*, 710 F.3d 698, 708 (7th Cir. 2013) ("[S]haky or no, [*Carlson*] remains the law, and we are not free to ignore it."). As one well-reasoned district-court decision in this circuit put it: "The Supreme Court has

[17] And in another case decided the same Term as *Hernández*, the Court reaffirmed that the Westfall Act "left open claims for constitutional violations." *Tanzin v. Tanvir*, 141 S. Ct. 486, 491 (2020).

not been bashful in signaling its skepticism of the *Bivens* remedy—if the Court intended to overrule *Carlson*, . . . it would simply do so." *Powell v. United States*, 2020 WL 5126392, at *10 (S.D.N.Y. 2020); *see also Bueno Diaz*, 442 F. Supp. 3d at 711.

Nor may this Court speculate about the Supreme Court's potential jurisprudential direction and overrule *Carlson* itself. The Supreme Court has expressly prohibited courts from concluding that its "more recent cases have, by implication, overruled an earlier precedent." *Agostini v. Felton*, 521 U.S. 203, 237 (1997); *see also Thurston Motor Lines*, 460 U.S. at 535. Instead, "the Court of Appeals should follow the case which directly controls." *Rodriguez de Quijas*, 490 U.S. at 484. That case here is *Carlson*. And *Carlson* holds, conclusively, that the FTCA is not an alternative remedial scheme that displaces *Bivens*. 446 U.S. at 19–20; *see Bistrian*, 912 F.3d at 92 ("[T]he existence of an FTCA remedy does not foreclose an analogous remedy under *Bivens*."); *Hoffman*, 26 F.4th at 1068 ("The availability of a remedy under [the FTCA] does not foreclose a parallel *Bivens* suit[.]").[18]

To sum up: Whether an alternative remedy displaces *Bivens* depends on whether Congress intended it to displace *Bivens*. *Abbasi*, 137 S. Ct. at 1858, 1862. Here, Congress made its intent clear: The

[18] *See also Todashev ex rel. Shibly v. United States*, 815 F. App'x 446 (11th Cir. 2020) (permitting a *Bivens* claim to go forward even though the plaintiff had also brought a claim under the FTCA).

FTCA and *Bivens* work alongside each other to deter unconstitutional misconduct and compensate victims. S. Rep. No 93-588 at 3; H.R. Rep. No. 100-700 at 6. Abiding by that Congressional intent, the Supreme Court has consistently refused to hold that the FTCA displaces *Bivens*. *Egbert*, 142 S. Ct. at 1822 n.7 (Sotomayor, J., concurring in part and dissenting in part). This Court should do the same.

2.3.2. The PLRA also does not displace *Bivens*.

In *Abbasi*, the Supreme Court considered briefly what effect the PLRA might have on *Bivens* remedies for federal prisoners. 137 S. Ct. at 1865. It "could be argued," the Court hypothesized, that the lack of a "standalone damages remedy" in the PLRA "suggests Congress chose not to extend the *Carlson* damages remedy to cases involving other types of prisoner mistreatment." *Id*. But the Court did not decide the question.

Other courts, however, have. Both the Third and the Ninth Circuits have held that the PLRA doesn't displace *Bivens*. *Bistrian*, 912 F.3d at 92–93; *Hoffman*, 26 F.4th at 1070–71.[19] Their reasoning is compelling: "The very statute that regulates how *Bivens* actions are brought cannot rightly be seen as dictating that a *Bivens* cause of action should not exist at all." *Bistrian*, 912 F.3d at 93.

[19] The Fifth and Sixth Circuits have reached the opposite conclusion. *Butler v. Porter*, 999 F.3d 287, 294–95 (5th Cir. 2021); *Callahan v. Bureau of Prisons*, 965 F.3d 520, 524 (6th Cir. 2020).

Congress enacted the PLRA to "reduce the quantity and improve the quality of prisoner suits." *Porter v. Nussle*, 534 U.S. 516, 524 (2002). With full knowledge of the body of *Bivens* cases brought by federal prisoners,[20] Congress chose not to bar such suits outright. As Senator Orrin Hatch, the PLRA's chief sponsor, said: "I do not want to prevent inmates from raising legitimate claims. This legislation will not prevent those claims from being raised." 141 Cong. Rec. S14,267 (daily ed. Sept. 29, 1995) (statement of Sen. Hatch). Instead, Congress sought to "free up judicial resources for claims with merit by both prisoners and nonprisoners." 141 Cong. Rec. S19,114 (daily ed. Dec. 21, 1995) (statement of Sen. Kyl).

To that end, the PLRA imposed a series of procedural hurdles for prisoners to clear. *See, e.g.*, 42 U.S.C. § 1997e(a) (enhanced exhaustion requirement); 28 U.S.C. § 1915(g) (three-strikes rule); 28 U.S.C. § 1915A (judicial pre-screening). But what those hurdles show is that

[20] By the time Congress enacted the PLRA, most circuits had applied *Carlson* to a variety of Eighth Amendment claims. *E.g.*, *Young v. Quinlan*, 960 F.2d 351, 361–65 (3d Cir. 1992); *LaFaut v. Smith*, 834 F.2d 389, 392–94 (4th Cir. 1987); *Goar v. Civiletti*, 688 F.2d 27, 28 (6th Cir. 1982); *Bagola v. Kindt*, 39 F.3d 779, 779–80 (7th Cir. 1994); *Munz v. Michael*, 28 F.3d 795, 796 (8th Cir. 1994); *Gillespie v. Civiletti*, 629 F.2d 637, 641–42 (9th Cir. 1980); *Leggett v. Clark*, 39 F.3d 1192 (10th Cir. 1994) (table decision); *Powell v. Lennon*, 914 F.2d 1459, 1463–64 (11th Cir. 1990).

the PLRA is "a statute about process"—not the substantive remedies available to prisoners. *Hoffman*, 24 F.4th at 1071.

Nor can anything be read into the lack of a cause of action in the PLRA. When it was enacted in 1995, no one doubted that *Bivens* provided a cause of action for federal prisoners who suffered "constitutional deprivation[s]." *Malesko*, 534 U.S. at 72; *see also Porter*, 534 U.S. at 524 (noting without controversy that the PLRA applied to *Bivens* as well as § 1983 actions); n.20, *supra*. Far from displacing *Bivens* actions, the PLRA *presumes* their availability. *See, e.g.*, 42 U.S.C. § 1997e(a) (applying to prisoners' claims under § 1983 "or any other Federal law," i.e., *Bivens*). So it cannot "plausibly [be] read" as eliminating *Bivens* actions by federal prisoners entirely. *Hoffman*, 24 F.4th at 1071. In fact, both the PLRA and the Westfall Act show that abrogating *Bivens* would *itself* raise separation-of-powers concerns, because Congress has consistently legislated on the premise that *Bivens* claims are available.

2.3.3. No other special factors are involved: Edwards brings a conventional claim against individual officers for an isolated violation of his constitutional rights.

Apart from alternative remedial schemes, the Court has recognized that other factors may counsel hesitation before recognizing a *Bivens* remedy. The Ninth Circuit has summarized those factors as follows:

- the rank of the officer involved;
- whether *Bivens* is being used as a vehicle to alter an entity's policy;
- the burden on the government if such claims are recognized;
- whether litigation would reveal sensitive information;
- whether Congress has indicated that it does not wish to provide a remedy; and
- whether there is adequate deterrence absent a damages remedy.

Lanuza, 899 F.3d at 1028 (citing *Abbasi*, 137 S. Ct. at 1857–63). If there is "even a single" such reason to pause, a *Bivens* remedy will not lie. *Egbert*, 142 S. Ct. at 1803. But if no special factor counsels hesitation, then courts may recognize new *Bivens* claims. *Hoffman*, 26 F.4th at 1061; *Lanuza*, 899 F.3d at 1028.

Most of the analysis that follows is an artifact of the *kinds* of *Bivens* cases that make it to the Supreme Court. The Court doesn't grant certiorari in ordinary cases alleging isolated mistreatment by individual federal officers. It takes cases involving broad executive policies, cabinet-level officials, national security, foreign relations, military discipline, and the like. This "domestic case[]" bears little resemblance to those cases and raises none of their policy concerns. *Cf. Abbasi*, 137 S. Ct. at 1862. So no special factor counsels hesitation here.

No high-ranking officers. Edwards does not seek relief against high-level officers of the Executive Branch. *Cf. id.* at 1853, 1860–61 (in which the plaintiffs sought damages from the attorney general, the director of the FBI, and the commissioner of the INS). All defendants here are line-level federal officers—deputy marshals and court security officers. A14–15. They "do not enjoy such independent status in our constitutional scheme as to suggest that judicially created remedies against them might be inappropriate." *See Carlson*, 446 U.S. at 19.

No policy change. Edwards does not "challenge large-scale policy decisions." *Cf. Abbasi*, 137 S. Ct. at 1861–62 (in which the plaintiffs challenged "major elements of the Government's whole response to the September 11 attacks"). He "does not bring a claim against an entity, and he does not seek to enjoin or require a particular prison policy." *Hoffman*, 26 F.4th at 1069. If anything, his claim *aligns* with executive-branch policy, which almost certainly prohibits gratuitous and excessive use of force. *Cf., e.g.*, *id.* at 1072–73.

No great burden on the government. Because Edwards does not seek relief against high-level officials and does not seek to change official policy, this is a "straightforward case" that will not "burden the Executive Branch to an unacceptable degree." *Lanuza*, 899 F.3d at 1029. Allowing his suit to proceed would impact the government no more than any "garden-variety *Bivens* claim." *See Jacobs*, 915 F.3d at 1038. And since Eighth Amendment claims have been allowed under

Bivens for decades, "there is no good reason to fear that allowing [Edwards's] claim will unduly affect the independence of the executive branch in setting and administering prison policies." *Bistrian*, 912 F.3d at 93.

No sensitive discovery. For the same reasons, discovery here would not "border upon"—much less "directly implicate"—high-level policymaking deliberations. *Cf. Abbasi*, 137 S. Ct. at 1860–61. Any discovery would likely "not involve the disclosure of any sensitive government information at all." *See Lanuza*, 899 F.3d at 1030.

No indication that Congress is reluctant to provide a remedy. This factor is generally about interpreting congressional silence—whether Congress's failure to provide a damages remedy is intentional or inadvertent. *Abbasi*, 137 S. Ct. at 1862. But Congress hasn't been silent here—it has affirmatively left open claims for constitutional violations. *See* Part 2.3.1, *supra*. Even in the PLRA, it sought only to channel, not eliminate, *Bivens* actions by federal prisoners. *See* Part 2.3.2, *supra*. So congressional reluctance is not a factor here.

No deterrence without a damages remedy. Edwards challenges an "individual instance[] . . . of law enforcement overreach." *Cf. Abbasi*, 137 S. Ct. at 1862. Such claims, "due to their very nature," are difficult to address "except by way of damages actions after the fact." *See id.* Edwards's claim thus "fits squarely within *Bivens*' purpose of deterring misconduct by prison officials." *Bistrian*, 912 F.3d at 93.

No other special factors. Along with the factors above, the Supreme Court has contemplated a few other reasons that could justify denying relief, none of which apply here. Edwards's claim involves no "sensitive issues of national security" or "cross-border security." *Cf. Abbasi*, 137 S. Ct. at 1861; *Egbert*, 142 S. Ct. at 1806. Nor would recognizing it thrust the judiciary into the middle of an international incident. *Cf. Hernández*, 140 S. Ct. at 744. Nor does Edwards seek redress for an injury sustained incident to military service. *Cf. United States v. Stanley*, 483 U.S. 669, 683–84 (1987); *Doe v. Hagenbeck*, 870 F.3d 36, 43 (2d Cir. 2017). Nor does he seek relief against a special class of defendants. *Cf. Malesko*, 534 U.S. at 63 (no *Bivens* action against private entity); *Meyer*, 510 U.S. at 483–86 (nor a federal agency).

Nor are the elements of an Eighth Amendment excessive-force claim "less [than] clear." *Cf. Abbasi*, 137 S. Ct. at 1864–65. To the contrary, this Court has explained that in these cases, it is "easy to identify both the line between constitutional and unconstitutional conduct, and the alternative course which officers should have pursued." *Arar*, 585 F.3d at 580.

In short, none of the special factors that have stayed the judiciary's hand in other cases is present here.

3. This Court should permit Edwards's *Bivens* claim to proceed.

The Supreme Court has instructed that the availability of *Bivens* should be analyzed at a broad level of generality. *Egbert*, 142 S. Ct. at 1805–06. The question is not whether special factors militate against hearing an individual case, but whether they militate against allowing *Bivens* actions in "a given field." *Id.* Here, that field is mistreatment of prisoners in violation of the Eighth Amendment. And as this Court has explained, that is core, heartland *Bivens* territory. *Arar*, 585 F.3d at 580.

It is also the rare field in which the judiciary really is better situated than Congress to recognize a remedy. Most people in federal prison cannot vote,[21] so Congress has little reason to consider "allowing a damages action [by federal prisoners] to proceed." *Egbert*, 142 S. Ct. at 1805 (quotation marks omitted). Simply put, there's no constituency for improving the lot of people in federal prison. For people like Edwards, it's the judiciary "or nothing." *See Bivens*, 403 U.S. at 410 (Harlan, J., concurring in the judgment).

And the Supreme Court has instructed that the right answer is not "nothing." In the "common and recurrent sphere of law

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[21] Only in Maine, Vermont, and the District of Columbia can people in prison vote. *State Voting Laws & Policies for People with Felony Convictions*, Britannica ProCon (May 24, 2022), https://felonvoting.procon.org/state-felon-voting-laws/.

enforcement," the *Abbasi* Court recognized that *Bivens* remains "necess[ary]," both to "vindicate the Constitution" and to "provide[] instruction and guidance to federal law enforcement officers going forward." 137 S. Ct. at 1856–57. The Court was talking about Fourth Amendment violations there, but excessive force in violation of the Eighth Amendment is just as "common and recurrent," and federal jailers and marshals are just as much in need of guidance. *Cf. id.*

And, indeed, federal prisoners' constitutional rights are just as worthy of vindication. That is why the Supreme Court long ago rejected absolute immunity for federal prison guards. *Cleavinger*, 474 U.S. at 207–08. When other remedies fall short, damages are "necessary to redress past harm and deter future violations." *Abbasi*, 137 S. Ct. at 1858. And the Court continues to recognize that "[i]n the context of suits against Government officials, damages have long been awarded as appropriate relief." *Tanzin*, 141 S. Ct. at 491. Without damages, "in vain would rights be declared." *See* 1 William Blackstone, *Commentaries on the Laws of England* 55–56 (1765).

Edwards seeks redress for the "isolated actions of individual federal employees." *Arar*, 585 F.3d at 578. Such claims are "exactly what *Bivens* was meant to address." *Reid*, 825 F. App'x at 444. Other circuits since *Abbasi* have recognized Eighth Amendment *Bivens* claims

under similar circumstances. *See, e.g.*, *Hoffman*, 26 F.4th at 1065; *Bistrian*, 912 F.3d at 93–94; *Shorter*, 12 F.4th at 373.[22]

This Court should do the same.

CONCLUSION

For all these reasons, the judgment of the district court should be reversed.

Dated: August 17, 2022

Respectfully submitted,

By: */s/Athul K. Acharya*
Athul K. Acharya

PUBLIC ACCOUNTABILITY
Counsel for Plaintiff-Appellant

[22] *See also, e.g.*, *Moorman v. Wadlow*, 2022 WL 861826, at *1 (4th Cir. 2022) (allowing an Eighth Amendment *Bivens* claim to proceed without in-depth *Abbasi* analysis); *Carlucci v. Chapa*, 884 F.3d 534, 538, 540 (5th Cir. 2018) (same); *Thompson v. Crnkovich*, 788 F. App'x 258, 259 (5th Cir. 2019) (same); *Gilmore v. Ormond*, 2019 WL 8222518, at *1–2 (6th Cir. 2019) (same); *Gooch v. Young*, 24 F.4th 624, 628 (7th Cir. 2022) (same); *Perotti v. Serby*, 786 F. App'x 809, 811 (10th Cir. 2019); *Riddick v. United States*, 832 F. App'x 607, 610, 616 (11th Cir. 2020).

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitations of Federal Rule of Appellate Procedure 32(g) Local Rule 32.1(a)(4)(A) because it contains 8,764 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f), according to the word count feature of Microsoft Word for Mac 16.65.

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Dated: August 17, 2022

By: */s/Athul K. Acharya*
Athul K. Acharya

PUBLIC ACCOUNTABILITY
Counsel for Plaintiff-Appellant