No. 21-56282

IN THE

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

Denise Mejia,

Plaintiff-Appellee,

v.

Wesley Miller,

Defendant-Appellant.

On appeal from the United States District Court
for the Central District of California
Case No. 5:20-cv-1166-SB-SP (Blumenfeld, J.)
Opinion filed Nov. 14, 2022 (Tashima, Lee, *Freudenthal*, JJ.)

APPELLEE DENISE MEJIA'S PETITION FOR REHEARING OR REHEARING EN BANC

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INTRODUCTION AND RULE 35(b) STATEMENT

After the Supreme Court's decision in *Egbert v. Boule*, how much of *Bivens* remains is a question of exceptional importance. For some, like Denise Mejia, it is a question of redress for serious injuries. For others, like the 20,000 federal prisoners in the Ninth Circuit,[1] it can be a question of life and death. For anyone who might cross paths with the federal government—that is, for everyone—it is a question of grave moment.

Bivens claims are analyzed using a two-part test. First, courts ask whether the claim presents a "new context." If it does, courts next ask whether "special factors" counsel denying relief. If the answer to either question is "no," the *Bivens* claim can proceed. But according to the panel, the answer to both questions is always "yes." Every claim arises in a new context and every context presents special factors. In effect, nothing of *Bivens* remains.

The Supreme Court has refused—explicitly, pointedly, and repeatedly—to go that far. It has declined even to consider overruling *Bivens*. *See* Order, *Egbert v. Boule*, 142 S. Ct. 457 (2021) (denying certiorari on the third question presented); Petition for Writ of

[1] *See Population Statistics*, Bureau of Prisons, https://www.bop.gov/mobile/about/population_statistics.jsp (last visited Jan. 29, 2023).

Certiorari, *Egbert v. Boule*, No. 21-147, 2021 WL 3409109, at *i (U.S. 2021) ("3. Whether the Court should reconsider *Bivens*."). It has trimmed the sails of *Bivens* adventurism, but—unlike the panel—it has not "dispense[d] with *Bivens* altogether." *Egbert v. Boule*, 142 S. Ct. 1793, 1803 (2022).

The panel's decision also conflicts directly with *Carlson v. Green*, 446 U.S. 14, 19–20 (1980). In *Carlson*, the Supreme Court held that the Federal Tort Claims Act was not a special factor that displaced *Bivens* relief. The panel held that it was. The Court has never overruled *Carlson*, so the panel's decision broke with binding precedent.

It also created splits with the Second, Third, Fourth, Sixth, and Seventh Circuits. Indeed, it created splits within the law of this circuit. If allowed to stand, it will result in a chaos of discordant holdings in the district courts. To secure and maintain uniformity of its decisions, the Court should rehear this case en banc.

And, at bottom, the panel's decision is wrong. Its analysis would exclude even an "unconstitutional arrest and search carried out in New York City." *Cf. Hernández v. Mesa*, 140 S. Ct. 735, 744 (2020) (describing *Bivens*). The Supreme Court has declined to vest federal agents with such complete immunity from liability. The panel presumed to strike where the Court has stayed its hand. This Court should correct the panel's manifest error.

BACKGROUND

1. Wesley Miller shoots Denise Mejia.

When Denise and Peter Mejia planned an off-road adventure on public land, they didn't expect to end the day on the wrong end of a federal agent's firearm. *See* 2-ER-184. First they encountered some mild bad luck—a flat they couldn't fix. *Id.* But they limped on. 2-ER-184–85. Then a park ranger approached them. *Id.* They began to stop, but he sped up to intercept their friends, who were ahead of them and traveling faster. *Id.*; 2-ER-200.

As the Mejias were returning home, Wesley Miller and another officer positioned their vehicles in the Mejias' path. *See* 2-ER-208. It was "[p]itch dark." 2-ER-118–19. All of a sudden the officers activated their lights. 2-ER-208; 2-ER-185. Peter slammed the brakes—but not fast enough. 2-ER-185. "[A]lmost immediately," Miller shot Denise Mejia through the hand and in the head. *Id.*; 2-ER-203–04.

2. The panel holds that Mejia lacks a *Bivens* cause of action.

Mejia sued Miller for violating her right against excessive force. 1-ER-2–3. The district court denied Miller's request for qualified immunity. Dkt. 10 at 3–4. On Miller's interlocutory appeal, that was the only issue the parties briefed. *Id.*; Dkt. 15 at 1; Dkt. 18 at 1.

A few weeks after briefing was complete, the Supreme Court decided *Egbert*. The panel asked the parties for supplemental briefing,

no more than five pages each, on "*Egbert*'s significance for this case." Dkt. 25. The panel then held—in a published decision—that Mejia lacked a cause of action under *Bivens*. Slip op. at 1, 11.

ARGUMENT

1. The panel's definition of a "new context" conflicts with decisions of this Court, other circuits, and the Supreme Court.

The first question in the *Bivens* analysis is whether the plaintiff's claim arises in a "new *Bivens* context." *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1859 (2017). If not—if the claim is similar enough to the Supreme Court's existing *Bivens* cases—then the inquiry is over and the claim may proceed on the merits. *E.g.*, *Ioane v. Hodges*, 939 F.3d 945, 952 (9th Cir. 2018); *Jacobs v. Alam*, 915 F.3d 1028, 1038–39 (6th Cir. 2019).

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. The Court has offered some guidance on what makes a difference "meaningful," such as when the "constitutional right at issue" differs or when the defendant officers are of a different (generally higher) rank, but it has also cautioned that "[s]ome differences" will be "so trivial" that they will not create a new *Bivens* context. *Id.* at 1859–60, 1865.

This case is about Miller's use of excessive force against Mejia. *See* 2-ER-185. So the context in which it arises is the domestic "search-and-seizure context." *Abbasi*, 137 S. Ct. at 1856. *Bivens* itself arose in that context, *id.*, as did several other cases in which the Supreme Court recognized a Fourth Amendment claim against federal law-enforcement officers. *See Groh v. Ramirez*, 540 U.S. 551, 555–57 (2004); *Wilson v. Layne*, 526 U.S. 603, 609–14 (1999); *Hanlon v. Berger*, 526 U.S. 808, 809–10 (1999) (per curiam); *G.M. Leasing Corp. v. United States*, 429 U.S. 338, 344–45, 359 (1977). The context here is not new.

The panel latched on to two differences between this case and *Bivens*: Miller was employed by the Bureau of Land Management, not the Bureau of Narcotics, and he used excessive force against Mejia outdoors instead of indoors. Slip op. at 8–10. The Supreme Court has never held that such slight differences can make for a new context, and several courts of appeals—including this Court—have rejected such reasoning.[2]

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[2] The panel also made a logically prior error by asserting interlocutory jurisdiction over the *Bivens* issue at all. *See Will v. Hallock*, 546 U.S. 345, 353–54 (2006) (interlocutory review is not automatically available whenever a federal officer faces a *Bivens* action); *Wong v. United States*, 373 F.3d 952, 961 (9th Cir. 2004) (concluding that this Court "lack[ed] jurisdiction [on] interlocutory appeal to review the district court's decision to infer a *Bivens* remedy"); *but see Wilkie v. Robbins*, 551 U.S. 537, 549 n.4 (2007) (suggesting in dicta that appellate courts do have interlocutory jurisdiction over the *Bivens* question).

1. The panel reasoned that a case presents a new context "even if only the officer's employing agency is different." Slip op. at 9. It cited *Egbert* for that proposition, but *Egbert* didn't analyze the new-context prong. The lower courts there had held that the "border-security context" was new, and the Court agreed, so it confined its analysis to special factors. 142 S. Ct. at 1804, 1807. *Egbert* did not hold or even hint that every agency would beget a new context.

Nor have the Court's other cases. To the contrary, *Abbasi* confirmed that *Bivens* relief against "federal law enforcement officers" is a "fixed principle in the law." 137 S. Ct. at 1857. To be sure, *Hernández* annulled that principle for claims with a "cross-border" element. 140 S. Ct. at 744. But when it comes to *domestic* Fourth Amendment violations, *Abbasi* remains the last word. And *Abbasi* deprecated any notion that its reasoning "cast doubt on the continued force, or even the necessity, of *Bivens*" in the "search-and-seizure context." 137 S. Ct. at 1856.

Abbasi also held that any context encountered in "previous *Bivens* cases decided by [the Supreme] Court" is not new. *Id*. at 1859. Such cases include Fourth Amendment *Bivens* claims against ATF agents, U.S. marshals, an assistant U.S. Attorney, and even agents of the Fish & Wildlife Service. *Groh*, 540 U.S. at 554; *Wilson*, 526 U.S. at 606; *Hanlon*, 526 U.S. at 809. What's more, FWS and BLM both sit within the Department of the Interior, so even under the panel's "employing

agency" rule, the Court has recognized the context here. More broadly, though, these cases confirm that the relevant level of granularity is not the employing agency but the domestic "search-and-seizure context." *Abbasi*, 137 S. Ct. at 1856. In mincing the context more finely, the panel erred.

Indeed, the panel effectively limited *Bivens* to its facts. The Federal Bureau of Narcotics has been defunct for more than 50 years,[3] so a modern-day remake of *Bivens* would feature DEA or FBI agents in the defendants' role. Yet under the panel's analysis, that would present a new context because the officers' "employing agency" would be different. Slip op. at 9. Contrast that with *Abbasi*, which treated the *Bivens* defendants as though they *were* "FBI agents." 137 S. Ct. at 1860. The common factor is that whether they were employed by the FBI or the Bureau of Narcotics, they were federal agents conducting domestic law enforcement. That's the level of granularity at which the Supreme Court analyzes a case's context. *See id.* at 1856. So analyzed, Mejia's claim arises in the same context as *Bivens* itself.

The panel's decision also creates intra- and inter-circuit splits:

- In *Ioane*, this Court held that a claim against IRS agents arose in same context as *Bivens* because both cases involved similar

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[3] *See Drug Enforcement Administration: A Tradition of Excellence* 7 (2008), *available at* https://hdl.handle.net/2027/mdp.39015075666894.

agents of similar rank similarly enforcing federal law. 939 F.3d at 952.

- In *Hicks v. Ferreyra*, the Fourth Circuit held that a Fourth Amendment claim against Park Police officers—part of Interior, like BLM—was "not an extension of *Bivens* so much as a replay." 965 F.3d 302, 311 (4th Cir. 2020).
- In *Jacobs*, the Sixth Circuit held that excessive-force claims against federal marshals were "run-of-the-mill challenges to 'standard law enforcement operations' that [fell] well within *Bivens* itself." 915 F.3d at 1038 (quoting *Abbasi*, 137 S. Ct. at 1861).
- In *McLeod v. Mickle*, the Second Circuit allowed a Fourth Amendment claim against Forest Service officers, who are also employed by Interior. 765 F. App'x 582, 583 (2d Cir. 2019).
- Finally, in *Greenpoint Tactical Income Fund LLC v. Pettigrew*—a post-*Egbert* case—the Seventh Circuit recognized a *Bivens* claim against an FBI agent, reasoning that *Egbert* "does not change" *Bivens*'s "continued force in its domestic Fourth Amendment context." 38 F.4th 555, 564 & n.2 (7th Cir. 2022).

As in those cases, so too here: The differences between Miller and the federal law-enforcement agents in *Bivens* are "trivial." *Cf. Abbasi*, 137 S. Ct. at 1865. They do not create a new context.

2. The panel's other rationale for a new context was that *Bivens* took place inside a home, while the events here "occurred on public lands." Slip op. at 10. Nothing in *Abbasi* or any other Supreme Court case suggests that the *location* of a constitutional violation can create a new context. *Cf. Abbasi*, 137 S. Ct. at 1860. As for the courts of appeals, the traffic stops in *McLeod* and *Hicks* were both outside on "public lands," and *McLeod* even took place in a national park. *McLeod v. Mickle*, 2017 WL 11475282, at *1 (D. Vt. June 6, 2017); *Hicks*, 965 F.3d at 305. Neither court entertained the possibility that the setting al fresco would make a "meaningful" difference.[4] *Cf. Abbasi*, 137 S. Ct. at 1859.

The facts of *Abbasi*, *Hernández*, and *Egbert* set the benchmark for what makes a difference "meaningful." In *Abbasi*, the plaintiffs challenged a "high-level executive policy created in the wake of a major terrorist attack on American soil." *Id*. at 1860. *Hernández* involved an "international incident" sparked when a federal agent killed a Mexican national on Mexican soil. 140 S. Ct. at 740, 744. *Egbert* implicated the security of the nation's border. 142 S. Ct. at 1800, 1804. The panel's

[4] District courts, too, have regularly applied *Bivens* to Fourth Amendment cases that arise outside the home, even after *Abbasi*. *See, e.g.*, *Castellanos v. United States*, 438 F. Supp. 3d 1120, 1129–30 (S.D. Cal. 2020); *Bueno Diaz v. Mercurio*, 442 F. Supp. 3d 701, 709 (S.D.N.Y. 2020); *Lehal v. Cent. Falls Det. Facility Corp.*, 2019 WL 1447261, at *12 (S.D.N.Y. 2019).

distinction between excessive force outdoors and excessive force indoors doesn't rate.

* * *

Mejia's claim for excessive use of force is "familiar to federal courts and close to the heart of *Bivens*." *Greenpoint*, 38 F.4th at 564. It involves the same constitutional right as in *Bivens*, *Groh*, *Layne*, and *G.M. Leasing*; an officer of the same rank or lower; the same extensive judicial guidance on the Fourth Amendment's requirements; and the same interplay among the branches of government. It does not present a new context.

2. The panel's analysis of special factors compounds the earlier errors.

When a claim does present a new context, the Supreme Court next asks whether "special factors"—chiefly whether the plaintiff has an alternative remedy—counsel hesitation. *Abbasi*, 137 S. Ct. at 1857. If not, then the plaintiff may proceed under *Bivens*.

As before, *Abbasi* shows the way. Most of the claims there named high-level defendants like the attorney general and the director of the FBI. *Id*. at 1853. The defendants' high rank counseled hesitation. *Id*. at 1860–61. But the plaintiffs also asserted a claim against a prison warden who'd turned a blind eye to their abuse. *Id*. at 1864. That claim was more anodyne. *Id*. So while the Court dismissed the other

claims outright, it remanded the latter claim for further analysis of special factors, leaving open the possibility that it could proceed to the merits. *Id.* at 1865.

It follows that even in a new context, courts may hear a routine *Bivens* claim that presents no special factors. *See, e.g.*, *Lanuza v. Love*, 899 F.3d 1019, 1033 (9th Cir. 2018); *Bistrian v. Levi*, 912 F.3d 79, 92 (3d Cir. 2018). Mejia's claim fits that bill. The factors the panel identified—the possibility of relief under the FTCA, BLM's online complaint form, and nebulous "systemwide consequences"—are not special.

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

The panel held that because Mejia could seek relief under the FTCA, she couldn't proceed under *Bivens.* Slip op. at 10–11. That reasoning defies binding precedent and clashes with persuasive authority.

The Supreme Court has held definitively that the FTCA does not displace *Bivens*. *Carlson*, 446 U.S. at 19–20. Plaintiffs may pursue both an FTCA action against the government and a *Bivens* claim against the individual officials who violated their constitutional rights. *Id.* The Court has adhered to that conclusion even as it has retrenched *Bivens* in other respects. *See Bush v. Lucas*, 462 U.S. 367, 378 (1983) (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); *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 67–68 (2001) (same); *Minneci v. Pollard*, 565 U.S. 118, 124 (2012) (same); *see also Simmons v. Himmelreich*, 578 U.S. 621, 624 (2016) (holding unanimously that FTCA's judgment bar does not foreclose "a constitutional tort suit"—in other words, a *Bivens* suit—"against individual [federal] employees").

This pattern holds even in the Court's most recent cases. In *Hernández*, the Court acknowledged that the Westfall Act, which overhauled the FTCA and preempted other torts against federal officers, did not "attempt[] to abrogate *Bivens*." 140 S. Ct. at 748 n.9 (citing 28 U.S.C. § 2679(b)(2)(A)). Later that Term, the Court reiterated that the FTCA "left open claims for constitutional violations." *Tanzin v. Tanvir*, 141 S. Ct. 486, 491 (2020). And in *Egbert*, the defendant urged the Court to declare the plaintiff's failed FTCA claim an alternative remedy, but the Court didn't take up his request. 142 S. Ct. at 1822 n.7 (Sotomayor, J., concurring in part and dissenting in part); *see id.* at 1806–07. Nor did it contradict Justice Sotomayor's assertion that even after the Court's recent decisions, the FTCA still does not displace *Bivens* relief. *Cf. id.* at 1822 n.7 (Sotomayor, J.).

In short, *Carlson* remains good law. The panel offered no reason for departing from it. *See* slip op. at 10–11. And the Supreme Court has expressly prohibited lower courts from concluding that its "more recent cases have, by implication, overruled an earlier precedent."

Agostini v. Felton, 521 U.S. 203, 237 (1997); *Thurston Motor Lines, Inc. v. Jordan K. Rand, Ltd.*, 460 U.S. 533, 535 (1983) ("Needless to say, only this Court may overrule one of its precedents."). Instead, lower courts "should follow the case which directly controls." *Rodriguez de Quijas v. Shearson/Am. Exp., Inc.*, 490 U.S. 477, 484 (1989). The panel's failure to do so is reason enough to rehear this case en banc. Fed. R. App. P. 35(b)(1)(A).

On top of that, the panel's decision flouts the law of this circuit and splits with decisions of other circuits. This Court, in *Quintero Perez v. United States*, recognized that "[t]he Supreme Court has been unequivocal" that the FTCA does not displace *Bivens.* 8 F.4th 1095, 1105 (9th Cir. 2021). That holding isn't "clearly irreconcilable" with *Egbert*, so the panel should have followed it. *Miller v. Gammie*, 335 F.3d 889, 900 (9th Cir. 2003) (en banc). And the Third Circuit agrees that "the existence of an FTCA remedy does not foreclose an analogous remedy under *Bivens*." *Bistrian*, 912 F.3d at 92. These intra- and inter-circuit splits supply yet more reasons for en banc review.

2.2. BLM's online complaint box also does not displace *Bivens.*

In *Egbert*, the Supreme Court ruled that Border Patrol's grievance procedures provided an alternative remedial scheme. 142 S. Ct. at 1806–07. Here, the panel extended that reasoning to encompass a complaint form on BLM's website. Slip op. at 10; Addendum 15–16.

But while Border Patrol's grievance procedures were promulgated by binding legislative rules authorized by Congress, BLM's online complaint box is an informal, voluntary undertaking. It lacks the hallmarks of a remedy and thus cannot displace *Bivens.*

Under Border Patrol's grievance procedures, anyone aggrieved by the conduct of its officers has the right to "lodge a complaint" with the Department of Homeland Security. 8 C.F.R. § 287.10(b). On receiving a complaint, the Department must investigate it "promptly" and "expeditiously," prepare an "investigative report," and refer it "promptly" for "appropriate action." § 287.10(a),(c). In fact, "Boule took advantage of this grievance procedure," and his complaint instigated "a year-long internal investigation into Agent Egbert's conduct." *Egbert*, 142 S. Ct. at 1806.

The key feature of Border Patrol's grievance procedure—the thing that makes it a *remedy* rather than a circular file for strongly worded letters—is that "by regulation, Border Patrol *must* investigate" every grievance it receives. *See id.* (emphasis added).[5] In other words, it grants those aggrieved a positive right to file a complaint and impose on Border Patrol a mandatory duty to conduct an investigation. *See id.*

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[5] *Egbert* cited *Malesko* for the proposition that a grievance process could be an alternative remedy. *Id.* at 1806. *Malesko*'s grievance process was also mandatory. *See* 534 U.S. at 74; 28 C.F.R. § 542.11(a)(3) (federal prison contractors and officials "shall" investigate grievances submitted by inmates).

What the panel relied on here—a website where BLM's Office of Professional Responsibility accepts allegations of misconduct—is far more threadbare. No regulation requires BLM to investigate complaints that come in, or to review them, or to operate such a site, or even to have an office of professional responsibility. *Cf., e.g.*, 28 C.F.R. §§ 0.39, 0.39a(a) (creating the Department of Justice's OPR and requiring that it "[r]eceive, review, investigate and refer for appropriate action allegations of misconduct involving Department attorneys"). Nor is there any evidence that BLM does investigate complaints. Under the panel's rule, the existence of the form is itself an alternative remedy.

That stretches the word "remedy" past any meaning. A "remedy" is a "means of enforcing a right" or a "right by which an aggrieved party may seek relief." *Remedy*, *Black's Law Dictionary* (10th ed. 2014). And a "right," in turn, entails some sort of "legal guarantee." *Right*, *Black's Law Dictionary* (10th ed. 2014). That is why only remedies that "*Congress* already has provided, or has *authorized* the Executive to provide," pass muster and displace *Bivens*. *See Egbert*, 142 S. Ct. at 1804 (emphasis added). Only such remedies have the "force of law." *Ass'n of Flight Attendants v. Huerta*, 785 F.3d 710, 716 (D.C. Cir. 2015) (quotation marks omitted). Anything else is just an act of administrative grace.

In *Egbert*, Border Patrol's grievance procedures emerged from notice-and-comment rulemaking and thus bound the agency. *See* 68

Fed. Reg. 35273, 35273, 35281–82 (June 13, 2003); *Ass'n of Flight Attendants*, 785 F.3d at 716. They conferred on Boule the right to a mandatory investigation and a means to enforce that right by lodging a grievance. They had the force of law and thus displaced *Bivens*. In contrast, BLM's web complaint form mandates nothing and grants rights to no one. It is not an "[in]adequate" remedy, *cf. Egbert*, 142 S. Ct. at 1807; it is no remedy at all. It cannot displace *Bivens*.

2.3. The Government has conceded that no "systemwide consequences" counsel denying relief in routine, domestic excessive-force claims.

The panel's final special factor was the prospect of "'systemwide consequences' for BLM's mandate to maintain order on federal lands." Slip op. at 10 (quoting *Egbert*, 142 S. Ct. at 1803–04). Such unspecified consequences could probably be hypothesized for any *Bivens* claim. But the Government has disclaimed such an all-encompassing interpretation of special factors. At argument in *Egbert*, it conceded that special factors would not preclude "routine" excessive-force claims against domestic law-enforcement officers—even those who police federal lands. Tr., *Egbert v. Boule*, 34:6–14 (Mar. 2, 2022) ("Tr.").[6] This Court should take it at its word.

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[6] Available at https://www.supremecourt.gov/oral_arguments/argument_transcripts/2021/21-147_2c8f.pdf.

When the Supreme Court heard oral argument in *Egbert*, several Justices—including those ultimately in the majority—expressed concern that ruling for Agent Egbert would amount to doing away with *Bivens* entirely. Tr. 6:12–14 (Justice Thomas); *id*. at 7:11–19 (Chief Justice Roberts); *id*. at 18:12–19 (Justice Barrett); *id*. at 36:23–37:5 (Justice Kavanaugh). This the Court was unwilling to do. *See* Order, *Egbert*, 142 S. Ct. at 457 (denying certiorari on that question). So the Justices sought a limiting principle to the argument that Boule's *Bivens* claim raised special factors.

The attorney for the Government dutifully supplied one. In a "routine[,] domestic" excessive-force claim, he assured the Court, the Government "would not argue that there are special factors counseling hesitation." Tr. 37:6–16. He said so not once but twice. First, Chief Justice Roberts asked him if he could offer "a hypothetical case where . . . *Bivens* permits a cause of action." Tr. 34:3–5. He responded that for "routine . . . excessive force claim[s]" involving "an FBI agent or an agent of the Park Police or the Marshals Service," "the government has not argued either before or after *Abbasi* that those cases give rise to special factors." Tr. 34:6–14.

A few minutes later, Justice Kavanaugh followed up, asking specifically for a case in which "the special factors would not apply." Tr. 36:23–37:1. The attorney for the Government first referred Justice Kavanaugh to his previous answer to Chief Justice Roberts. Tr. 37:6–7.

He then reiterated: "In a *routine domestic* search-and-seizure context or an *excessive force claim* involving a U.S. citizen . . . we would not argue that there are special factors counseling hesitation unless the case has facts like it implicates national security or something like that." Tr. 37:7–16 (emphasis added).

Formally, Miller is an individual and he isn't represented by government attorneys, so principles of estoppel don't apply. *Cf. New Hampshire v. Maine*, 532 U.S. 742, 749–50 (2001). But the Government's position in *Egbert* should give the Court pause. The Government freely allowed that *Bivens* would be available in broad classes of cases indistinguishable from this one. It didn't even *consider* the possibility of adverse systemwide consequences in a routine, domestic excessive-force claim. So even without formal estoppel, the Court should consider the Government's own words when deciding on the merits whether special factors displace *Bivens* here.

CONCLUSION

The Supreme Court has had many opportunities to overrule *Bivens* and *Carlson*. It was invited to do so within the past year. It has refused each time. The panel should not have overruled them in the Supreme Court's stead. *See Rodriguez de Quijas*, 490 U.S. at 484. For that reason and the other reasons above, the Court should grant Mejia's petition for panel rehearing or rehearing en banc.

Dated: January 30, 2023

Respectfully submitted,

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

PUBLIC ACCOUNTABILITY
Counsel for Plaintiff-Appellee

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Form 11. Certificate of Compliance for Petitions for Rehearing/Responses

Instructions for this form: http://www.ca9.uscourts.gov/forms/form11instructions.pdf

9th Cir. Case Number(s) 21-56282

I am the attorney or self-represented party.

I certify that pursuant to Circuit Rule 35-4 or 40-1, the attached petition for panel rehearing/petition for rehearing en banc/response to petition is (*select one*):

(●) Prepared in a format, typeface, and type style that complies with Fed. R. App. P. 32(a)(4)-(6) and **contains the following number of words**: 4,182.

(Petitions and responses must not exceed 4,200 words)

OR

( ) In compliance with Fed. R. App. P. 32(a)(4)-(6) and does not exceed 15 pages.

Signature /s/Athul K. Acharya **Date** Jan 30, 2023

(use "s/[typed name]" to sign electronically-filed documents)

Addendum
Panel Opinion

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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

DENISE MEJIA, an individual, Plaintiff-Appellee, v. WESLEY MILLER, Bureau of Land Management Officer, in his individual and official capacity, Defendant-Appellant, and UNITED STATES OF AMERICA, Defendant.	No. 21-56282 D.C. No. 5:20-cv-01166-SB-SP OPINION

Appeal from the United States District Court
for the Central District of California
Stanley Blumenfeld, Jr., District Judge, Presiding

Argued and Submitted October 3, 2022
Pasadena, California

Before: A. Wallace Tashima and Kenneth K. Lee, Circuit Judges, and Nancy D. Freudenthal,* District Judge

Opinion By Judge Freudenthal

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* The Honorable Nancy D. Freudenthal, United States District Judge for the District of Wyoming, sitting by designation.

SUMMARY[**]

Civil Rights

The panel vacated the district court's denial, on summary judgment, of qualified immunity to a now-retired officer of the Bureau of Land Management and remanded with instructions to enter summary judgment dismissing with prejudice plaintiff's excessive force claim brought pursuant to *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics,* 403 U.S. 388 (1971).

In 1971, the Supreme Court in *Bivens* adopted an "implied cause of action theory" permitting the petitioner to seek damages from federal officers for unreasonable search and seizure in his home. Since then, the Supreme Court has recognized a *Bivens* action in two other contexts: a claim asserting a Congressman discriminated on the basis of gender in employment, in violation of Fifth Amendment due process (*Davis v. Passman,* 442 U.S. 228 (1979)), and an Eighth Amendment claim for cruel and unusual punishment against federal jailers for failing to treat a prisoner's severe asthma. *Carlson v. Green,* 446 U.S. 14 (1980). These three cases—*Bivens, Davis,* and *Carlson*—represent the only instances in which the Court has approved of an implied damages remedy under the Constitution itself. Since *Carlson*, expanding the *Bivens* remedy is a disfavored judicial activity.

Shortly after the briefing in this case, the Supreme Court issued *Egbert v. Boule,* 596 U.S. —, 142 S. Ct. 1793 (2022), which held that in all but the most unusual circumstances, prescribing a cause of action is a job for Congress, not the courts. The existence of alternative remedial structures is reason enough to not infer a new *Bivens* cause of action. Similarly, uncertainty about the potential systemwide consequences of implying a new *Bivens* cause of action is by itself a special factor that forecloses relief.

The panel held that there was no *Bivens* cause of action for plaintiff's claim, which presented a new context. And given this new context, special factors counseled against implying a cause of action here. For example, Fourth Amendment excessive force claims against Bureau of Land Management ("BLM") officers

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[**] This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

would have "'systemwide' consequences" for BLM's mandate to maintain order on federal lands, and uncertainty about these consequences provided a reason not to imply such a cause of action. The panel further determined that plaintiff had alternative remedies, including administrative remedies. And while plaintiff's claims pursuant to the Federal Tort Claims Act were based on a different legal theory, in plaintiff's instance they were an alternative avenue to seek damages for the injuries alleged in her *Bivens* claim.

COUNSEL

Dennis E. Wagner (argued), Wagner Zemming Christensen LLP, Riverside, California, for Defendant-Appellant.

Barry M. Walker (argued), Walker Trial Lawyers LLP, Canyon Lake, California, for Plaintiff-Appellee.

FREUDENTHAL, District Judge.

Defendant-Appellant Wesley Miller, a now-retired officer of the Bureau of Land Management ("BLM"), brings an interlocutory appeal from the denial of qualified immunity on summary judgment.

I. JURISDICTION

In light of *Egbert v. Boule,* 596 U.S. —, 142 S. Ct. 1793, 213 L. Ed. 2d 54 (2022), we first address whether a cause of action exists under *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics,* 403 U.S. 388 (1971). We have jurisdiction to do so on this interlocutory appeal because the existence of the cause of action is an antecedent legal question defining the claim (*Hernández v. Mesa,* 589 U.S. —, 137 S. Ct. 2003, 2006, 198 L. Ed. 2d 625 (2017), (*"Hernández I"*)), and it is directly implicated by the defense of qualified immunity. *Rodriguez v. Swartz,* 899 F.3d 719, 735 (9th Cir. 2018), *vacated on other grounds,* 140 S. Ct. 1258 (2020); *Hartman v. Moore,* 547 U.S. 250, 257 n.5 (2006) (appellate jurisdiction on interlocutory appeal to consider the definition of an element of the claim). As the Court concludes below, there is no *Bivens* cause of action for Plaintiff-Appellee Denise Mejia's claim. Therefore, we do not reach the question of qualified immunity.

II. BACKGROUND

Mejia alleges that Miller used excessive force while attempting an arrest on June 10, 2018 in Berdoo Canyon, part of public lands managed by BLM near Joshua Tree National Park. At the time, Miller was a senior law enforcement officer for BLM. Mr. and Mrs. Mejia had spent the day driving their utility terrain vehicle ("UTV"). Shortly before sunset, the Mejias failed to yield to a park ranger. The ranger was attempting to stop them for a traffic violation and to alert the Mejias that one of their rear tires was very low. The UTV temporarily stopped but then went off-road.

The National Park Service requested that Miller assist them. The dispatcher indicated the suspected violation was at a felony level due to reported speeds endangering the park ranger and the public, and an apparent attempt to ram the ranger. Miller and the park ranger searched until late at night when they saw a flashlight above them on high ground and heard an engine start. Miller and the park ranger positioned their vehicles to block the UTV as it came down. They turned on their vehicle lights when they saw the UTV approach. Miller yelled, "police, put your hands up."

Most of what happened next is disputed. But the parties do not dispute that the UTV passed Miller within arm's reach, and as it did so, he fired multiple shots. Mejia was shot in the right hand and a bullet grazed her head.

In the case below, Mejia asserts several claims against the United States under the Federal Tort Claims Act ("FTCA"). The district court denied the United States' summary judgment motion, and those claims await trial. Mejia also brought *Bivens* claims against Miller, asserting unreasonable seizure and excessive force in violation of the Fourth Amendment.[1] Miller did not raise the issue of whether a *Bivens* cause of action existed and sought summary judgment on qualified immunity. The district court granted his motion on the unreasonable seizure claim, but denied it as to excessive force. Miller timely sought relief under Rules 59(e) and 60(b)(6), which was denied. He timely appeals from these decisions.

III. THE *BIVENS* QUESTION

In 1971, the Supreme Court in *Bivens* adopted an "implied cause of action theory" permitting the petitioner to seek damages from federal officers for unreasonable search and seizure in his home. The petitioner also asserted "unreasonable force" during his arrest, but the Court noted he "primarily" asserted the officers violated his rights of privacy. *Bivens,* 403 U.S. at 389–90. The opinion focuses entirely on the unreasonable search-and-seizure context. The Court held:

> the Fourth Amendment does not in so many words provide for its enforcement by an award of money damages for the consequences of its violation. But 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.

[1] Mejia also sued the park ranger but voluntarily dismissed those claims.

Id. at 396 (marks omitted).

Since then, the Supreme Court has recognized a *Bivens* action in two other contexts: a claim asserting a Congressman discriminated on the basis of gender in employment, in violation of Fifth Amendment due process (*Davis v. Passman,* 442 U.S. 228 (1979)), and an Eighth Amendment claim for cruel and unusual punishment against federal jailers for failing to treat a prisoner's severe asthma. *Carlson v. Green,* 446 U.S. 14 (1980). "These three cases—*Bivens, Davis,* and *Carlson*—represent the only instances in which the Court has approved of an implied damages remedy under the Constitution itself." *Ziglar v. Abbasi*, 582 U.S. —, 137 S. Ct. 1843, 1855, 198 L. Ed. 2d 290 (2017).

Since *Carlson*, there has been a "notable change in the Court's approach to recognizing implied causes of action." *Id.* at 1857. The Court has grown increasingly reluctant to recognize any new *Bivens* claims. Indeed, "in light of the changes to the Court's general approach to recognizing implied damages remedies, it is possible that the analysis in the Court's three *Bivens* cases might have been different if they were decided today." *Id.* at 1856. However, the Court also held

> it must be understood that this opinion is not intended to cast doubt on the continued force, or even the necessity, of *Bivens* in the search-and-seizure context in which it arose.

Abbasi, 137 S. Ct. at 1857. In sum, *Bivens* is "settled law" in the search-and-seizure context and relied upon "as a fixed principle in the law," but "expanding the *Bivens* remedy is now a 'disfavored' judicial activity." *Id.*

Under a longstanding framework, courts were first to determine whether the *Bivens* claim arose in a "new context," such as a "new category of defendants." A "new context" is one that is "different in a meaningful way from previous *Bivens* cases decided by this Court." The Court gave non-exclusive examples:

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

Abbasi, 137 S. Ct. at 1859–60.

If the context was new, *Abbasi* required courts to analyze whether there were other "special factors counselling hesitation." *Id.* at 1857–58. Without defining an exhaustive list, *Abbasi* held "[t]he necessary inference … is that the inquiry must concentrate on *whether the Judiciary is well suited,* absent congressional action or instruction, to consider and weigh the costs and benefits of allowing a damages action to proceed." *Id.* (emphasis added). "[S]eparation-of-powers principles are or should be central to the analysis. The question is "who should decide" whether to provide for a damages remedy, Congress or the courts? * * * The answer most often

will be Congress." *Id.* at 1857. In that case, alien detainees' claims regarding a post-9/11 policy presented a new context due to the national security concerns and executive level of the policy. For largely the same reasons, the creation of such a cause of action was for Congress, not the Judiciary.

Three years later, the Court issued *Hernández v. Mesa*, 589 U.S. —, 140 S. Ct. 735, 206 L. Ed. 2d 29 (2020) ("*Hernández II*"). *Hernández II* articulated the same analytical framework as *Abbasi*, including whether the Judiciary is well suited to creating the new cause of action. *Hernández II* also observed that the Court's "understanding of a 'new context' is broad." *Id.* at 743. The cross-border shooting in that case was a new context, and several factors counselled hesitation — including the case's potential effect on international relations. Again, the cause of action was for Congress to create, not the courts.

Neither the district court nor the parties' briefing to this Court addressed whether a *Bivens* cause of action existed. Then shortly after the briefing in this case, the Court issued *Egbert*. *Egbert* reiterates the longstanding first step of the *Bivens* question, but clarified that the second step is now whether:

> special factors indicate that the Judiciary is *at least arguably less equipped than Congress* to weigh the costs and benefits of allowing a damages action to proceed.

Egbert, 142 S. Ct. at 1797–98 (emphasis added, marks omitted).

The question is no longer whether the Judiciary is well suited, but whether

Congress is better suited. After *Egbert*, the two-step analysis "often resolve[s] to a single question: whether there is any reason to think that Congress might be better equipped to create a damages remedy." *Id*. at 1803. "*[A]ny* rational reason … to think that *Congress* is better suited to weigh the costs and benefits" is enough to preclude extending *Bivens*. *Id.* at 1805 (marks omitted). "If there are alternative remedial structures… that alone … is reason enough to … [not] infer a new *Bivens* cause of action." *Id.* at 1804 (marks omitted). Similarly, uncertainty about the potential "'systemwide' consequences" of implying a new *Bivens* cause of action is by itself "a special factor that forecloses relief." *Id.* at 1803-04 (quoting *Abbasi*, 137 S. Ct. at 1858).

In *Egbert,* a border patrol agent allegedly used excessive force against a Washington resident (Boule) in the driveway of his home. His property backed to the Canadian border and was notorious for illegal crossings and smuggling. This Court held in relevant part that the Fourth Amendment claim was a "'modest extension' in a new context" because the officer was a border patrol agent, not an F.B.I. agent. *Boule v. Egbert,* 998 F.3d 370, 387 (9th Cir. 2021). But because it was a "conventional Fourth Amendment excessive force claim arising out of actions by a[n] … agent on Boule's own property," this Court held that no special factors weighed against the extension. *Id.*

The Supreme Court reversed and held that "similar allegations of excessive

force," "almost parallel circumstances," or a "similar 'mechanism of injury'" as *Bivens* "are not enough to support the judicial creation of a cause of action." *Egbert,* 142 S. Ct. at 1805. The Court held that Boule had no *Bivens* action for two independent reasons: courts are not better suited than Congress to weigh creating a cause of action that involves national security concerns, and alternative remedies were available. *Id.* at 1806–07.

Given the Supreme Court's decision in *Egbert*, this Court requested supplemental briefs on its significance. Miller argues Mejia's claim presents a new context because he is a new category of defendant. He further argues that unlike *Bivens'* narcotics arrest in a home, this incident occurred on public lands. Miller was also exercising a different mandate than the narcotics officers; his mandate was "to find [Mejia] after a reported high-speed chase in Joshua Tree National Park, which was a violation of federal law on federal lands." Miller further notes that Mejia has existing alternative remedies, a special factor weighing against this Court creating a cause of action.

Mejia argues *Egbert* gives no guidance regarding what constitutes a new context, and there is no new context here. She argues there is no meaningful distinction between narcotics officers and BLM officers, relying on this point from the dissent in *Egbert. Egbert*, 142 S. Ct. at 1815 (Sotomayor, J., Breyer, J., and Kagan J., concurring in part and dissenting in part). But the majority opinion in

Egbert, to the contrary, identifies the "legal mandate under which the officer was operating" as an example of a new context. *Id.* at 1814. Mejia does not point to any reason to believe that most federal agencies have the same or similar legal mandates, or more to the point, that BLM has the same mandate as agencies enforcing federal anti-narcotics law. The majority also emphasizes that the question is whether to create a cause of action against all of an agency's officers. *Id.* at 1806. This likewise focuses on the agency.

Moreover, reading the *Egbert* majority opinion as a whole, it conveys a heightened restriction on *Bivens*. "Sometimes, it seems, this Court leaves a door ajar … even as it devises a rule that ensures no one … ever will" walk through it. *Id.* at 1810 (Gorsuch, J., concurring in the judgment, marks omitted). The dissent in *Egbert* does not appear to be wrong in inferring the Court now sees a new *Bivens* context even if only the officer's employing agency is different. *Id.* at 1815.

Mejia does not identify any Supreme Court cases recognizing a *Bivens* excessive force claim against a BLM officer, and this Court is aware of none. The only case in which the Court has considered any kind of *Bivens* claim against BLM officers is *Wilkie v. Robbins,* 551 U.S. 537 (2007). The Court declined to find a *Bivens* due process claim for a landowner alleging retaliation for exercising property rights. *Id.* at 561–62.

More importantly, unlike *Bivens,* none of the events in question occurred in

or near Mejia's home. The entire incident occurred on public lands managed by BLM and the National Park Service, a place where Mejia had no expectation of privacy. In *Bivens*, the unreasonable government intrusion occurred in his home. In short, Mejia's claim presents a new context. And given this new context, special factors counsel against implying a cause of action here. For example, a Fourth Amendment excessive force claims against BLM officers would have "'systemwide' consequences" for BLM's mandate to maintain order on federal lands, and uncertainty about these consequences provides a reason not to imply such a cause of action. *Egbert*, 142 S. Ct. at 1803-04.

Under *Egbert,* rarely if ever is the Judiciary equally suited as Congress to extend *Bivens* even modestly. The creation of a new cause of action is inherently legislative, not adjudicative. *Egbert*, 142 S. Ct. at 1802 ("At bottom, creating a cause of action is a legislative endeavor"). Although Mejia points to *Egbert's* discussion of national security as a special factor—a concern which is not present here—that was only one of the factors counselling hesitation in that case. The other factor was that Boule had alternative remedies. *Egbert,* 142 S. Ct. at 1806–07. The same is true here: Mejia has alternative remedies, including administrative remedies. *See Report Misconduct*, U.S. Dep't of the Interior Bureau of Land Mgmt, https://www.blm.gov/programs/public-safety-and-fire/law-enforcement/report-misconduct, last accessed October 6, 2022. And while her FTCA claims are based

on a different legal theory, in Mejia's instance they are an alternative avenue to seek damages for the injuries alleged in her *Bivens* claim.

In short, under *Egbert* "in all but the most unusual circumstances, prescribing a cause of action is a job for Congress, not the courts." 142 S. Ct. at 1800. This case is not the rare exception. Accordingly, we vacate the district court's denial of summary judgment and remand with instructions to enter summary judgment dismissing the *Bivens* excessive force claim with prejudice.

VACATED AND REMANDED.

U.S. DEPARTMENT OF THE INTERIOR
BUREAU OF LAND MANAGEMENT

REPORT MISCONDUCT

Indicates required field

The Office of Professional Responsibility is responsible for investigating allegations of misconduct involving BLM employees. This OPR feedback form is an important avenue for reporting fraud, waste, and misconduct.

Who*

Who committed the alleged misconduct/wrongdoing? (What is the title/position held by the alleged wrongdoer? Please include names, addresses and telephone numbers of victims and witnesses. If providing information concerning contractor or grantee fraud, please provide the name of the primary contractor or sub, type of contract, contract or grant numbers, the date of the award and name of agency official.)

What*

What exactly did the individual(s) do that was wrong? (Please provide specific and relevant details concerning the alleged misconduct/wrongdoing.)

cited in Mejia v. Miller
No. 21-56282 archived November 8, 2022

When*

When did the misconduct/wrongdoing occur? (Please provide dates and times, if possible.)

Where*

Where did the misconduct/wrongdoing occur? (Please provide the bureau or office, city and state.)

How*

How was the misconduct/wrongdoing committed? (e.g. falsifying documents, etc.)

First Hand Knowledge*

Addendum 15

Do you have first hand knowledge of the misconduct/wrongdoing?

Additional Information

Where can we obtain additional information concerning this misconduct/wrongdoing? (i.e. documents, etc.)

Who Else Is Aware

Who else might be aware of this misconduct/wrongdoing? (Please provide names, addresses and telephone numbers) How would this individual know about this?

Interview

Are you willing to be interviewed concerning this matter? If so please provide your name, address and telephone number, and the best time to contact you. You can provide contact information for us to follow-up with additional questions and still remain confidential.

Email (Optional)

Your E-Mail address (optional):(xx@xx.xxx)

Confidential*

- ○ Yes
- ○ No

If you wish to remain confidential, please select: (For a description of Confidentiality, please refer to the "Your Rights" page.)

SUBMIT

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No. 21-56282 archived November 8, 2022

Addendum 16