IN THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 21-6109

RAYMOND TATE,

Appellant,

v.

D.J. HARMON, ET AL.,

Appellees.

Appeal from the United States District Court
for the Western District of Virginia
at Roanoke
The Honorable Norman K. Moon, Senior District Judge

BRIEF OF THE APPELLEES

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STATEMENT OF JURISDICTION

This is a civil appeal of a dismissal of a *Bivens* action in the United States District Court for the Western District of Virginia in Roanoke for failure to state a claim under Rule 12(b)(6). The district court entered its order on December 7, 2020. JA243.[1] Tate filed a motion for reconsideration on December 23, 2020, JA244–254, which the district court denied on January 4, 2021. JA260. A timely notice of appeal was filed January 15, 2021. JA261. After informal briefing by the appellant and amicus, the Court appointed the appellant counsel and ordered formal briefing on February 10, 2022. ECF No. 23 & 25.

This Court has jurisdiction over the appeal pursuant to 28 U.S.C. § 1291.

INTRODUCTION

This is a purported *Bivens* action. Appellant-Plaintiff Raymond Tate filed suit against twelve Federal Bureau of Prisons (BOP) employees in their individual capacity (Defendants) pursuant to *Bivens v. Six Unknown Federal Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). Tate, a former U.S. Penitentiary (USP) Lee inmate serving a life sentence, alleged Defendants violated his First, Fifth, and Eighth Amendment rights. Defendants moved to dismiss Tate's complaint pursuant to Federal Rule of Civil Procedure 12(b)(6), as well as Rules 12(b)(1) and 12(b)(2).

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[1] References to the Joint Appendix are designated as "JA__." References to Appellant's Brief are designated as "Brief at __." Internal citations and quotations are generally omitted unless otherwise noted.

The court granted the motion. The only issue on appeal is whether the district court correctly held that Tate's novel Eighth Amendment claim premised on allegedly improper conditions of confinement did not state a cognizable *Bivens* claim. This Court should affirm the district court because *Bivens* has never been extended to claims akin to those Tate asserts here, and *Egbert v. Boule*, 142 S. Ct. 1793 (2022) forecloses such an extension.

ISSUES PRESENTED

Whether the district court correctly held there is no *Bivens* remedy for Eighth Amendment claims alleging unlawful conditions of confinement.

STATEMENT OF THE CASE

Tate sued twelve BOP staff members, including the Regional Counsel, USP Lee Warden, and various counselors and officers at USP Lee, in their individual capacities.[2] Tate alleged a laundry list of First, Fifth, and Eighth Amendment violations, but only his Eighth Amendment conditions of confinement claims are at issue in this appeal. Brief at 4 n.2.

[2] Tate also sued the United States but claimed to have done so only "for purposes of injunctive relief." JA10. The United States moved to dismiss for failure to state a claim and lack of subject matter jurisdiction. JA96. The district court dismissed all defendants in its dismissal order for failure to state a claim on which relief can be granted. JA243. Tate does not appeal the district court's dismissal of the United States.

Tate's complaint begins with an incident report issued on October 22, 2018, which led to him being placed in the Special Housing Unit (SHU). JA12–13. Tate alleges the reporting officer retaliated against him because Tate filed a *Bivens* case against the reporting officer's "colleague"—a captain at a different prison on the other side of the country.[3] *Id*.

The incident report charged Tate with (1) threatening another with bodily harm, (2) making sexual proposals or threats, and (3) interfering with the taking of count. *Id.* After a disciplinary hearing on November 21, 2018, a disciplinary hearing officer found Tate interfered with the taking of count and "drop[ped]" the other violations after considering Tate's partial denial along with his admission that he interfered with the taking of count. JA39.

Tate alleges that while in the SHU as a result of this incident report, he was subject to certain deprivations, which amounted to an Eighth Amendment violation. He asserts he did not receive enough recreation time outside due to eligibility

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[3] The *Bivens* action Tate refers to in his complaint is a Federal Tort Claims Act (FTCA) lawsuit in the U.S. District Court for the Central District of California arising from events at U.S. Penitentiary Victorville. Brief at 4; *Tate v. United States*, dkt. no. 1, Case No. 2:15-cv-09323 (C.D. Cal. filed Dec. 2, 2015). Tate amended that complaint to add a *Bivens* allegation against Captain Robert Hodak on April 4, 2018, *id.* dkt. no. 120, and Captain Hodak was served at USP Victorville on October 5, 2018. *Id.* dkt. no 170. In November 2021, the claims against Captain Hodak were dismissed, and the court held a bench trial on the FTCA claims. The trial verdict on the FTCA claims is currently pending.

requirements, such as being awake, dressed, and having a clean cell. JA17. Tate alleges his cell was dirty with mold, and he was not given sufficient cleaning products to address the mold because he lost his commissary privileges as punishment for the incident report. JA18. He claims his mattress was dirty and thin. *Id*. He also complains about the toilet paper, toothbrush, and pencil he was given in the SHU. JA17–19. Tate did not suffer any physical injury while in the SHU. He alleges his gums bled when he flossed once permitted dental floss in general population, and that he was "weak."[4] JA19, JA22.

Defendants moved to dismiss Tate's complaint pursuant to Federal Rule of Civil Procedure 12(b)(6) because Tate's allegations did not state a claim for *Bivens* relief as a matter of law. JA87, JA203.

SUMMARY OF THE ARGUMENT

Although Congress frequently legislates the management of prisons and the treatment of incarcerated persons, it has never provided a cause of action for federal prisoners to sue BOP employees in their individual capacities. In 1971, the Supreme Court found an implied cause of action in the Fourth Amendment. In the next nine years, it extended that implied remedy in two, limited circumstances. In the 42 years thereafter, the Supreme Court has never again done so. Instead, the Court has "come

[4] Tate also includes several allegations of injury other inmates suffered, but Tate's suit can only address the injuries he allegedly suffered. *Hummer v. Dalton*, 657 F.2d 621, 625–26 (4th Cir. 1981)

to appreciate more fully the tension between judicially created causes of action and the Constitution's separation of legislative and judicial power." *Egbert v. Boule*, 142 S. Ct. 1793, 1802 (2022). And as the Court held last month, "When asked to imply a *Bivens* action, our watchword is caution." *Id.* at 1803. "[I]n all but the most unusual circumstances, prescribing a cause of action is a job for Congress, not the courts . . . ." *Id.* at 1800. At bottom, this court faces only one question in deciding whether to extend a *Bivens* remedy: "whether there is *any* rational reason (even one) to think that *Congress* is better suited to weigh the costs and benefits of allowing a damages action to proceed." *Id.* at 1805. The answer is no.

STANDARD OF REVIEW

The Court reviews *de novo* a district court's granting of a Rule 12(b)(6) motion. *Annappareddy v. Pascale*, 996 F.3d 120, 132 (4th Cir. 2021). The facts from the complaint are accepted as true for purposes of the appeal. *Id.* at 127.

ARGUMENT

I. A *BIVENS* REMEDY IS UNAVAILABLE FOR TATE'S CLAIM.

Tate alleges he suffered a violation of his Eighth Amendment right against cruel and unusual punishment. He argues he can sue federal employees in their individual capacities who he claims placed him in allegedly unconstitutional conditions of incarceration. There is no such cognizable cause of action for Tate's

claims, and this Court should affirm the district court's decision granting Defendants' motion to dismiss.

In *Bivens*, the plaintiff sued Federal Bureau of Narcotics agents in their individual capacities. Bivens alleged the defendants manacled him in front of his family, threatened to arrest his entire family, searched his apartment without a search warrant, and arrested him for alleged narcotics violations without a warrant or probable cause. 403 U.S. 388, 389 (1971). The Supreme Court found, under general principles of federal jurisdiction, an implied cause of action for damages in the Fourth Amendment for the alleged constitutional violations alleged. *Id.* at 390–98.

Since 1971, the Supreme Court has found an implied cause of action against federal employees in only two other cases: "[a] claim against a Congressman for firing his female secretary; and a claim against prison officials for failure to treat an inmate's asthma." *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1860 (2017). Since deciding *Carlson v. Green*, 446 U.S. 14 (1980), 42 years ago, the Supreme Court has not found another extension of the *Bivens* remedy, as this Court has noted. *Tun-Cos v. Perrotte*, 922 F.3d 514, 521 (4th Cir. 2019). Indeed, the Supreme Court "ha[s] declined 11 times to imply a similar cause of action for other alleged constitutional violations." *Egbert*, 142 S. Ct. at 1799.

The Supreme Court has articulated a two-step process for determining whether a *Bivens* cause of action exists for a proposed claim. First, the Court must

consider whether the instant case presents a "new context," i.e. did it "differ in a meaningful way" from *Bivens*, *Davis*, and *Carlson*. *Abassi*, 137 S. Ct. at 1859–60. If so, the court must consider whether "special factors counsel[ ] hesitation" in extending a *Bivens* remedy. *Id.* at 1857; *Egbert*, 142 S. Ct. at 1803. The Supreme Court recently held, however, "those [two] steps often resolve to a single question: whether there is any reason to think that Congress might be better equipped to create a damages remedy." *Id.* at 1803. If "there is *any* rational reason (even one) to think that *Congress* is better suited" to resolve the cost-benefit analysis attached to permitting a damages action to lie, an implied action is precluded. *Id.* at 1805. This is because separation-of-powers principles must be central to the analysis in implying a cause of action under the Constitution itself. *Abbasi*, 137 S. Ct. at 1857.

The Supreme Court has never ruled a *Bivens* remedy exists for a condition of confinement claim as Tate presents here. Further, there are numerous reasons Congress is better equipped to create such a damages remedy, although merely one reason suffices to preclude extending a *Bivens* remedy. *Egbert*, 142 S. Ct. at 1805. Therefore, the Court should affirm the district court's dismissal.

A. Tate's Allegations Present a New *Bivens* Context.

Tate claims his Eighth Amendment right was violated because "Defendants were deliberately indifferent to the substantial risk of harm posed by the depraved conditions of the SHU." Brief at 18. This claim, however, is not cognizable because

it differs in meaningful ways from the Supreme Court's three prior *Bivens* cases. *See Egbert*, 142 S. Ct. at 1809 ("[A] plaintiff cannot justify a *Bivens* extension based on 'parallel circumstances' with *Bivens*, *Passman*, or *Carlson* unless he also satisfied the 'analytic framework' prescribed by the last four decades of intervening case law.").

A court must have a "broad" understanding of what constitutes a "new context." *Hernandez v. Mesa*, 140 S. Ct. 735, 743 (2020). "A claim may arise in a new context even if it is based on the same constitutional provision as a claim in a case in which a damages remedy was previously recognized." *Id.*

Tate argues his case presents the same context as *Farmer v. Brennan*, 511 U.S. 825 (1994) and *Carlson v. Green*, 446 U.S. 14 (1980).[5] Brief at 19–22. It does not.

First, Tate misplaces reliance on *Farmer*, which the Supreme Court itself does not recognize as a case in which it has extended a *Bivens* remedy, and under *Egbert*, it cannot be.[6] *Egbert*, 142 S. Ct. at 1802. Second, while *Carlson* allowed for a *Bivens*

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[5] Tate's claims are not akin to the unlawful search and seizure of *Bivens* or the discrimination on the basis of sex in *Davis*, and he does not argue otherwise.

[6] Even if the Court did consider *Farmer* a previous *Bivens*-implied remedy case for the "new context" analysis, it is meaningfully different from Tate's allegations. The prisoner in *Farmer* alleged the defendants failed to protect him from other inmates after knowing he was a transsexual and placing him in the general prison population, leading to his rape and assault. *Farmer*, 511 U.S. at 829–31. Tate's allegations do not involve any failure to protect him from assault by other inmates.

claim—predicated on the Eighth Amendment—for failure to provide adequate medical care resulting in an inmate's death, Tate's Eighth Amendment conditions of confinement claim is meaningfully different in several respects. *See Abbasi*, 137 S. Ct. at 1864 ("Yet even a modest extension is still an extension.").

While both Tate and *Carlson* present the same constitutional right, "[a] claim may arise in a new context even if it is based on the same constitutional provision as a claim in a case in which a damages remedy was previously recognized." *Hernandez*, 140 S. Ct. at 743; *see also id.* (specifically noting that the Court refused to recognize an Eighth Amendment *Bivens* claim in *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61 (2001) notwithstanding the Eighth Amendment *Bivens* claim recognized in *Carlson*). The Supreme Court routinely finds cases present a new context, and this Court should do so here.

In *Hernandez*, the Supreme Court found that although *Hernandez*, *Bivens*, and *Davis* all involved Fourth and Fifth Amendment claims, "it [wa]s glaringly obvious that [Hernandez's] claims involve[d] a new context." *Id.* In so finding, the Court looked at the facts underlying the three cases' claims: "an allegedly unconstitutional arrest and search carried out in New York City; [and] . . . alleged sex discrimination on Capitol Hill" as compared to "cross-border shooting claims." *Id.* at 744. Finding a "world of difference" between those claims, the Supreme Court found the cross-border shooting claim was a new context. *Id.*

In *Abbasi*, one of the plaintiffs' allegations was of prisoner physical abuse by staff. 137 S. Ct. 1843, 1863 (2017). Specifically, the plaintiffs alleged the warden "violated the Fifth Amendment by allowing prison guards to abuse [the plaintiffs]." *Id.* at 1863. Acknowledging the similarities to *Carlson*, the sufficiently alleged constitutional violation, and the alleged "serious violations of Bureau of Prisons policy," the Supreme Court nonetheless found the case "does seek to extend *Carlson* to a new context." *Id.* at 1864. The Supreme Court concluded, "The differences between this claim and the one in *Carlson* are perhaps small, at least in practical terms[but g]iven this Court's expressed caution about extending the *Bivens* remedy [ ] the new-context inquiry is easily satisfied." *Id.* at 1865.

As the Supreme Court found in *Hernandez* and *Abbasi*, the new-context inquiry is easily satisfied here as well. The consideration requires comparing the factual allegations. *Carlson* involved allegations the defendants were aware of "gross inadequacy[ies]" in the prison's medical facility, which led to a significant delay in medical care, administering of contra-indicated drugs, and use of damaged medical equipment, culminating in the prisoner's death. *Carlson*, 446 U.S. at 16 n.1. Tate's allegations do not involve medical care or any physical injury. Instead, Tate's claims relate to the cleanliness of his cell, the provision of supplies while in the SHU, and the use of recreation time. Tate does not claim he was denied medical care as the plaintiff did in *Carlson*. And Tate does not allege he suffered extreme physical

harm, unlike in *Carlson* where the plaintiff died. Thus, the facts demonstrate Tate's claims present a new context. *See Springer v. United States*, No. 21-11248, 2022 WL 2208516, at *1 (5th Cir. June 21, 2022) (per curiam) (distinguishing the prisoner's condition of confinement claim from *Carlson*'s deliberate indifference to medical needs claim); *Dongarra v. Smith*, 27 F.4th 174, 181 (3d Cir. 2022) (finding the prisoner's allegation the defendants were deliberately indifferent to his risk of assault from other prisoners was a different context than *Carlson*).

B. There Are Many Reasons to Think Congress Is Better Suited to Fashion a Damages Remedy in This New Context.

As the Supreme Court noted, "[b]ecause recognizing a *Bivens* cause of action is an extraordinary act that places great stress on the separation of powers," courts "have a concomitant responsibility to evaluate any grounds that counsel against *Bivens* relief." *Egbert v. Boule*, 142 S. Ct. 1793, 1806 n.3 (2022). A plaintiff may not seek a *Bivens* extension solely "based on 'parallel circumstances' with *Bivens*, *Passman*, or *Carlson*" but must "also satisf[y] the 'analytic framework' prescribed by the last four decades of intervening case law." *Id.* at 1809 (quoting *Abbasi*, 137 S. Ct. at 1859); *see also id.* at 1805 (observing "'almost parallel circumstances' or a similar 'mechanism of injury'" as no longer enough "to support the judicial creation of a cause of action" (quoting *Abbasi*, 137 S. Ct. at 1859)).

This analytical framework or special factors analysis involves two primary inquiries, both anchored by separation of powers concerns. First, whether there are

reasons to think Congress is better positioned to authorize a damages action in the broad context or class of cases implicated by a plaintiff's claim. *See id.* at 1803. Second, whether there is evidence, including alternative remedial structures or processes, indicating Congress doubts the necessity or efficacy of a damages action at all. *See id.* at 1808.

Both inquiries here are answered in the affirmative.

1. Congress is better positioned to authorize a damages remedy against any BOP official.

The Supreme Court advised courts against inquiring "whether *Bivens* relief is appropriate in light of the balance of circumstances in the particular case" due to the inevitable impairment of governmental interests and frustration of Congress's policymaking role that would result from applying the special factors analysis at a "narrow level of generality." *Id.* at 1805. "Rather, under the proper approach, a court must ask 'more broadly' if there is any reason to think that 'judicial intrusion' into a given field might be 'harmful' or 'inappropriate.'" *Id.* (quoting *United States v. Stanley*, 483 U.S. 669, 681 (1987)). "[I]f there is even the *potential* for such consequences," as *Egbert* instructs, "a court cannot afford a plaintiff a *Bivens* remedy." *Id.* Because Congress is better positioned to create a damages remedy here, the Court should decline to extend a *Bivens* remedy.

First, this case implicates the field of prison administration and, therefore, relates to a matter that is "rarely [the] proper subject[] for judicial intervention." *Id.*

The Supreme Court has long recognized that "federal courts have adopted a broad hands-off attitude toward problems of prison administration," *Procunier v. Martinez*, 416 U.S. 396, 404 (1974), because "[r]unning a prison is an inordinately difficult undertaking that requires expertise, planning, and the commitment of resources, all of which are peculiarly within the province of the legislative and executive branches of government." *Turner v. Safley*, 482 U.S. 78, 84–85 (1987); *see also Hewitt v. Helms*, 459 U.S. 460, 467 (1983) ("[P]rison officials have broad administrative and discretionary authority over the institutions they manage . . . . [and] administration of a prison is at best an extraordinarily difficult undertaking . . . ."); *Bell v. Wolfish*, 441 U.S. 520, 548 (1979) ("[P]rison administrators may be 'experts' only by Act of Congress . . . . But judicial deference is accorded not merely because the administrator ordinarily will, as a matter of fact in a particular case, have a better grasp of his domain than the reviewing judge, but also because the operation of our correctional facilities is peculiarly the province of the Legislative and Executive Branches of our Government, not the Judicial."). This "hands-off attitude" is especially appropriate in the federal prison context presented here.

More particularly, Tate's allegations concern BOP's decisions regarding SHU housing policies and conditions, which implicates two pillars of prison administration—housing and security of a federal facility. Both are areas in which

Congress has given affirmative indication of judicial intervention being inappropriate. With respect to prison-housing decisions, Congress has expressly deferred to the BOP on how best to "provide suitable quarters and . . . safekeeping" for federal inmates. 18 U.S.C. § 4042(a)(2). This deference runs congruent with Congress broadly granting BOP the authority to determine which prison facilities are to house each federal inmate. *See id.* § 3621(b). "The federal statute governing the BOP's authority expressly strips [ ] court[s] of jurisdiction to review certain decisions made by BOP officials," *Brown v. Holder*, 770 F. Supp. 2d 363, 365 (D.D.C. 2011) (citing 18 U.S.C. § 3625), and "[i]t is well settled that this exclusion applies to cases in which federal inmates are challenging their security classifications and facility designations." *Id.* (collecting cases). *See also Meachum v. Fano*, 427 U.S. 215, 228–29 (1976) (declining to apply the Due Process Clause to the process of transferring state prisoners to avoid "involv[ing] the judiciary in issues and discretionary decisions that are not the business of federal judges"). As one court noted, "[w]hile Congress has been conspicuously vocal about preventing courts from interfering with BOP housing decisions, it has been conspicuously silent about creating a remedy for prisoners to obtain damages from individual officers." *Bulger v. Hurwitz*, No. 20-CV-206, 2022 WL 340594, at *7 (N.D.W. Va. Jan. 12, 2022), *appeal docketed*, No. 22-1106 (4th Cir. Feb. 3, 2022).

Additionally, general "functions of prison management [ ] must be left to the broad discretion of prison administrators to enable them to manage the prisons safely and efficiently." *Gaston v. Taylor*, 946 F.2d 340, 343 (4th Cir. 1991). "[T]he recognition of a *Bivens* remedy in this case would work a significant intrusion into an area of prison management that demands quick response and flexibility, and it could expose prison officials to an influx of manufactured claims." *Earle v. Shreves*, 990 F.3d 774, 781 (4th Cir. 2021).[7] Moreover, such manufactured claims would create heightened system-wide costs for federal prison employees sued personally and in-turn the federal government itself. *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1858 (2017).

Indeed, prison administration is an area Congress has extensively legislated in and has not created a *Bivens* remedy against BOP officials. The Supreme Court observed of the PLRA—passed 15 years after *Carlson*—that Congress "clear[ly] . . . had specific occasion to consider the matter of prisoner abuse and to consider the proper way to remedy those wrongs," but "the Act itself does not provide for a standalone damages remedy against federal jailers," which could "suggest[] Congress chose not to extend the *Carlson* damages remedy to cases

[7] This Court also cautioned in *Earle* regarding the ease with which an inmate could allege a retaliation claim. Tate's claims stem from an allegation of retaliation, and thus, similar concerns exist here. Tate argues "[i]t is easy to weed out frivolous lawsuits," Brief at 34, yet this Court has recognized the ease with which certain meritless lawsuits could nonetheless proceed to litigation. *Earle*, 990 F.3d at 781.

involving other types of prisoner mistreatment." *Id.* at 1865. As *Egbert* teaches, courts are "[n]ow . . . [to] defer to 'congressional inaction' if 'the design of a Government program suggests that Congress has provided what it considers adequate remedial mechanisms.'" *Egbert*, 142 S. Ct. at 1808 (quoting *Schweiker v. Chilicky*, 487 U.S. 412, 423 (1988)); *see also Bulger*, 2022 WL 340594, at *8 ("Viewed comprehensively, this legislative backdrop is more than enough to raise doubts about whether Congress would welcome a judicially created damages remedy for harms arising from prison-housing decisions.").

Despite the Supreme Court's clear guidance on this point, Tate argues the PLRA was merely procedural and thus cannot be read to have such an implication here. Brief at 32–33. But Tate fails to address the Supreme Court's conclusion to the contrary in *Abbasi*. "Congress chose not to extend the *Carlson* damages remedy to cases involving other types of prisoner mistreatment," and the Court should not do what Congress chose not to do. *Abbasi*, 137 S. Ct. at 1865. Procedural or otherwise, the purpose of the PLRA was to "eliminate unwarranted federal-court interference with the administration of prisons" and "to reduce the quantity and improve the quality of prisoner suits." *Woodford v. Ngo*, 548 U.S. 81, 93–94 (2006). And as applicable here, the PLRA provides that "[n]o Federal civil action may be brought by a prisoner confined in a jail, prison, or other correctional facility, for mental or emotional injury suffered while in custody without a prior showing of physical

injury." 42 U.S.C. § 1997e(e). That Congress chose to require some physical injury prior to a prisoner being able to file a civil action is a strong indication the Judiciary should not graft an additional implied constitutional damages remedy for what Tate describes as "deliberately exposing him to *the risk* of physical harm." Brief at 2.

Second, to authorize a *Bivens* remedy over the question of physical prison conditions and related policies, runs the very real risk of "judicial intrusion" into the field of prison administration that could produce harmful and inappropriate consequences. *See Egbert v. Boule*, 142 S. Ct. 1793, 1805 (2022). The BOP is presently responsible for the custody and care of 157,800 federal inmates and has 35,214 employees. *See* BOP, *About Our Agency*, https://www.bop.gov/about/agency/ (last visited July 15, 2022).[8] *Any* inmate who is in the SHU could survive a motion to dismiss an individual-capacity damages claim by merely alleging that his conditions in segregated housing are inadequate. Permitting a *Bivens* action premised on such an allegation would have unpredictable "systemwide consequences." *Egbert*, 142 S. Ct. at 1803. "That uncertainty alone is a special factor that forecloses relief" in this case. *Id.* at 1804. Moreover, it could

[8] Information on government websites and not subject to reasonable disputes is appropriate for judicial notice. *See* Fed. R. Evid. 201(b)(2); s*ee, e.g.*, *United States v. Akinrosotu*, 637 F.3d 165, 168 (2d Cir. 2011) (taking judicial notice of the official BOP website).

result in "a significant expansion of Government liability, [which] counsels against permitting *Bivens* relief." *Id.* at 1808.

Like in *Egbert*, recognizing a *Bivens* remedy for Tate's claims "pose[s] an acute risk" of increasing "substantial social costs, including the risk that fear of personal monetary liability and harassing litigation will unduly inhibit officials in the discharge of their duties.'" *Id.* at 1807. An Eighth Amendment claim for failure to protect—like the plaintiff's First Amendment claim at issue in *Egbert*, which the Court rejected 9-0—implicates an "official's state of mind," which "is easy to allege and hard to disprove;" consequently, insubstantial claims of this type are "less amenable to summary disposition." *Id.*

Tate points to § 1983 law suits and argues "[s]tate prisons continue to function," so similar claims should be allowed against federal prison employees. Brief at 33. The difference, however, is Congress made the affirmative decision to allow such lawsuits in enacting § 1983, after weighing the benefits and costs, but Congress has not done so for BOP employees. Before minting a new *Bivens* remedy, judges must "consider the risk of interfering with the authority of the other branches" by "ask[ing] whether there are sound reasons to think Congress might doubt the efficacy or necessity of a damages remedy, and 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." *Hernandez v. Mesa*, 140 S. Ct. 735, 743 (2020).

Further, certain of Tate's claims are rooted in USP Lee and/or BOP policy. For example, the type of toothbrush and pencil inmates are permitted to have in the SHU and the prohibition on ripping up linens are policies designed to ensure inmate and staff safety. "*Bivens* actions have never been considered a proper vehicle for altering an entity's policy." *Tun-Cos v. Perrotte*, 922 F.3d 514, 527 (4th Cir. 2019). And when a complaint attempts to attack policies of the executive, it "represents yet another special factor counselling hesitation." *Id.* at 528.

"[C]reating a cause of action is a legislative endeavor," and one this Court should not undertake given the field and context that give rise to Tate's claims. *Egbert*, 142 S. Ct. at 1802. The district court's dismissal of Tate's claims is a dual recognition of the "separation of powers concerns [that] counsel a policy of judicial restraint" in the field of federal prison administration, *Turner v. Safley*, 482 U.S. 78, 85 (1987), particularly in the areas of housing and prison security, and the separation of powers concerns central to the analytical framework prescribed by the Supreme Court for the last four decades in the *Bivens* context. "Even a single sound reason to defer to Congress is enough to require a court to refrain from creating such a remedy." *Egbert*, 142 S. Ct. at 1803. This Court has several sound reasons to defer to Congress and should therefore decline to extend a *Bivens* remedy here.

2. Alternative remedial structures exist, thus precluding *Bivens* relief.

Tate's *Bivens* claims additionally fail for the separate dispositive reason that "a court may not fashion a *Bivens* remedy if Congress already has provided, or has authorized the Executive to provide an alternative remedial structure," which exists here. *Id*. at 1804. An alternative remedial structure alone indicates a court should not extend a *Bivens* remedy. *Id.* For prisoner conditions of confinement claims such as Tate's, there are several alternative remedial structures available, most notably BOP's administrative remedy process.

As this Court recently noted, "[l]ike all federal inmates, [Tate] has 'full access to remedial mechanisms established by the BOP, including suits in federal court for injunctive relief and grievances filed through the BOP's Administrative Remedy Program.'" *Earle v. Shreves*, 990 F.3d 774, 780 (4th Cir. 2021). Thus, the availability of alternative remedial structures precludes extending a *Bivens* remedy here. *Egbert*, 142 S. Ct. at 1804.

Tate argues the BOP administrative remedy process "is not an adequate alternative remedy." Brief at 29. This argument fails, however, because the requisite analysis does not consider the adequacy of the alternative remedial scheme. It "does [ ] not matter that existing remedies do not provide complete relief." *Egbert*, 142 S. Ct. at 1804. The analysis merely considers the existence of an alternative remedial process. "So long as Congress or the Executive has created a remedial process that

it finds sufficient to secure an adequate level of deterrence, the courts cannot second-guess that calibration by superimposing a *Bivens* remedy." *Id.* at 1807; *see also Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 74 (2001) ("This [administrative remedy] program provides yet another means through which allegedly unconstitutional actions and policies can be brought to the attention of the BOP and prevented from reoccurring."); *Earle*, 990 F.3d at 780 (noting the plaintiff "[wa]s not completely without remedy" because of the administrative remedy process); *Tun-Cos v. Perrotte*, 922 F.3d 514, 527 (4th Cir. 2019) ("[T]he relevant question . . . [is] whether an elaborate remedial system should be augmented by the creation of a new judicial remedy.").

The executive branch's creation of the BOP administrative remedy process—as opposed to Congress—also does not affect the analysis as Tate suggests because Congress authorized BOP to create the administrative remedy process. The fact Tate could not receive money damages through the administrative remedy process is likewise irrelevant to the analysis and "misses the point." *Id.* Moreover, Tate's argument the administrative remedy program here did not provide him with his requested relief is irrelevant. *Egbert*, 142 S. Ct. at 1807. He had the opportunity to engage in the process, which is well documented by his extensive administrative remedy history. JA132–134. But Tate declined to file an administrative remedy over his conditions of confinement allegations despite a well-documented history of filing

administrative remedies, including over seven times after his release from the SHU.[9] JA134.

Further, Tate has additional alternative remedial processes to a *Bivens* remedy, such as the Federal Tort Claims Act (FTCA) and Administrative Procedures Act (APA). In *Carlson*, the Supreme Court recognized "FTCA and *Bivens* [to be] parallel, complementary causes of action." 446 U.S. 14, 20 (1980). In *Egbert*, however, the Court clarified that such reasoning "carries little weight because it predates [the Court's] current approach to implied causes of action." 142 S. Ct. at 1808. And at least two circuit courts have found that the FTCA serves as an alternative remedy that counsels against recognizing a *Bivens* claim.[10] *See Williams v. Keller*, No. 21-4022, 2021 WL 4486392, at *4 (10th Cir. Oct. 1, 2021); *Oliva v. Nivar*, 973 F.3d 438, 444 (5th Cir. 2020); *see also Brown v. United States*, No. 1:21-1688, 2022 WL 331240, at *5 (D.S.C. Jan. 7, 2022). Additionally, the APA would be the proper mechanism through which Tate could challenge BOP policies or

[9] Defendants raised Tate's failure to exhaust in their motion to dismiss, JA99–101, but the district court did not rule on the issue. JA241 n.9. Thus, if the district court's opinion were reversed and the case remanded, Defendants would again raise Tate's failure to exhaust his administrative remedies.

[10] State tort law also provides an alternative means of relief. The Supreme Court recognized this in a suit brought by a federal inmate seeking redress for alleged inadequate medical care. *See Minneci v. Pollard*, 565 U.S. 118, 127–130 (2012) (recognizing availability of remedy of state tort law and that "[s]tate-law remedies and a potential *Bivens* remedy need not be perfectly congruent").

regulations, providing yet another alterative remedy for at least some of his claims. *See Wilkie v. Robbins*, 551 U.S. 537, 551–52 (2007) (discussing the APA as an available alternative remedy); *W. Radio Servs. Co. v. U.S. Forest Serv.*, 578 F.3d 1116, 1122–23 (9th Cir. 2009) ("We therefore conclude that the APA leaves no room for *Bivens* claims based on agency action or inaction."); *Livingston v. United States*, No. 2:15-cv-00564, 2016 WL 1274013, at *9–10 (D.S.C. Mar. 31, 2016) (finding the APA an alternative remedy counseling against *Bivens* extension).

Tate also argues the Court should extend a *Bivens* remedy here because the purpose of such a remedy is to deter officers and "allowing a *Bivens* action to proceed here would align perfectly with this purpose." Brief at 34–35. This argument, however, ignores the additional alternative remedies that create a significant deterrent effect, such as internal BOP discipline and DOJ Office of Inspector General oversight and potential criminal prosecution. *See Egbert*, 142 S. Ct. at 1806 (discussing executive branch investigation and intra-agency oversight of employees as special factors); *Hernandez*, 140 S. Ct. at 744 (discussing DOJ's prosecution determination). The fear of internal BOP discipline and possible criminal prosecution for unconstitutional conduct serves a significant deterrent effect for BOP employees, and a *Bivens* remedy is not needed to create an additional deterrent effect as Tate argues.

Tate has several alternative remedial processes for the allegations in his complaint, namely, and as recently recognized by this Court, through the BOP administrative remedy program. This is a special factor that counsels against extending a *Bivens* remedy here. One special factor alone suffices to preclude a *Bivens* remedy, and the Court should therefore not extend a *Bivens* remedy here.

CONCLUSION

For the foregoing reasons, Appellees respectfully request the Court affirm the district court.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief was written using 14-point Times New Roman typeface and Microsoft Word 2016.

I further certify that this brief does not exceed 13,000 words (and is specifically 6,388 words) as counted by Microsoft Word, excluding the table of contents, table of authorities, statement regarding oral argument, this certificate, the certificate of service, and any addendum.

I understand that a material misrepresentation can result in the Court's striking the brief and imposing sanctions.

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CERTIFICATE OF SERVICE

I certify that on July 19, 2022, I electronically filed the foregoing Response Brief of Appellees with the Clerk of the Court using the CM/ECF System, which will send notice, and constitute service, of such filing to the following registered CM/ECF user(s): Daniel S. Harawa, Esquire, Counsel for Appellant.

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