

# SPECIAL FACTORS COUNSELLING ACTION: WHY COURTS SHOULD ALLOW PEOPLE DETAINED PRETRIAL TO BRING FIFTH AMENDMENT *BIVENS* CLAIMS

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*As the courts continue to restrict and further restrict the availability of Bivens remedies, one category of claims has been left behind—medical-care claims brought by people detained pretrial. Because of the way the Supreme Court structured the Bivens analysis in Ziglar v. Abbasi, people incarcerated postconviction can, and do, bring claims under the Eighth Amendment for damages resulting from constitutionally defective medical care. But many courts are refusing to allow people detained pretrial to bring these same claims under the Fifth Amendment. This situation creates a doctrinally incoherent and illogical reality in which people detained pretrial are more constrained in vindicating their constitutional rights than people incarcerated postconviction. In light of the factual and doctrinal similarities between Eighth and Fifth Amendment claims, the courts’ unique role in resolving doctrinal conflict, and the political vulnerability of people detained pretrial, this Note argues that courts should recognize Fifth Amendment medical-care claims, and that they can do so under the current Bivens framework.*

## INTRODUCTION

Joseph Jones, Jr. died on August 15, 1975.<sup>1</sup>

At the time of his death, Mr. Jones was incarcerated in a federal prison.<sup>2</sup> A month before he died, Mr. Jones spent eight days in a hospital with asthma complications and was discharged with treatment recommendations.<sup>3</sup> The prison staff did not follow these recommendations, and Mr. Jones suffered an asthma attack.<sup>4</sup> The prison staff admitted him to the infirmary but left him untreated for eight hours.<sup>5</sup> His condition deteriorated.<sup>6</sup> The prison staff then attempted to use a respirator—known to be broken—to assist

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1. *Green v. Carlson*, 581 F.2d 669, 670 (7th Cir. 1978), aff’d, 446 U.S. 14 (1980).

2. *Id.*

3. *Id.* at 671. The court also noted that prison staff were already aware of Mr. Jones’s condition, as he was diagnosed with chronic asthma when he arrived at the prison. *Id.*

4. *Id.*

5. *Id.* (“Although he was in serious condition for some eight hours, no doctor saw him because none was on duty and none was called in.”).

6. *Id.*

with his breathing.<sup>7</sup> Mr. Jones informed them that the respirator was making it more difficult for him to breathe.<sup>8</sup> The prison staff then injected him with the wrong medication, twice.<sup>9</sup> After receiving his second injection, Mr. Jones experienced respiratory arrest.<sup>10</sup> The prison staff retrieved a machine that could be used to restart his breathing—though not by them; the officers present did not know how to use it.<sup>11</sup> They transferred Mr. Jones to an outside hospital.<sup>12</sup> He died before he arrived.<sup>13</sup>

After Mr. Jones's death, his mother, Marie Green, sued the prison staff for the unconstitutional mistreatment of her son.<sup>14</sup> She claimed that their behavior violated the Eighth Amendment and that they should be liable for damages under the theory of constitutional torts articulated in *Bivens v. Six Unknown Named Agents*.<sup>15</sup> The district and circuit courts recognized her *Bivens* claim but disagreed over the applicability of state law.<sup>16</sup> For this reason, the case made its way up to the Supreme Court.<sup>17</sup>

The Supreme Court recognized Ms. Green's *Bivens* claim.<sup>18</sup> The true import of this decision became evident years later, when the Court mandated that *Bivens* claims previously recognized by the Supreme Court could move forward but labeled extending the claims into new contexts “a ‘disfavored’ judicial activity.”<sup>19</sup> By recognizing Ms. Green's claim, the Court in *Carlson v. Green* opened the door to Eighth Amendment medical-care claims brought by people confined in federal prisons, and, in *Ziglar v. Abbasi*,<sup>20</sup> the Court kept the door open—even as it suggested preventing most other claims brought by most other people.<sup>21</sup>

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7. Id. (stating that a staff member “had been notified two weeks earlier that the respirator was broken”).

8. Id.

9. Id. (“[The staff member] administered two injections of Thorazine, a drug contraindicated for one suffering an asthmatic attack.”).

10. Id.

11. Id. (describing how two officers “brought emergency equipment to administer an electric jolt to Jones, but neither man knew how to operate the machine”).

12. Id.

13. Id.

14. Id.

15. Id. at 671–72; see also *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 390–97 (1971) (concluding that the plaintiff had a cause of action for damages under the Fourth Amendment). Ms. Green also brought claims under the Due Process Clause of the Fifth Amendment, but only her Eighth Amendment claim was discussed by the court. See *Carlson*, 581 F.2d at 671, 675.

16. *Carlson*, 581 F.2d at 671–72, 674.

17. *Carlson v. Green*, 446 U.S. 14, 17–18 (1980).

18. Id. at 18.

19. *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1857 (2017) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 675 (2009)); see also *infra* section I.A.3.

20. 137 S. Ct. 1843.

21. See *infra* section I.A.3.

One group that may not be able to bring *Bivens* claims post-*Ziglar* is people who suffer harm while detained pretrial. Unlike people incarcerated postconviction, like Mr. Jones, people detained pretrial bring their medical-care claims under the Fifth Amendment.<sup>22</sup> Courts therefore may find that these claims arise in a new context even if they are otherwise identical to the claims brought by Ms. Green on behalf of her son.<sup>23</sup> People detained pretrial and people incarcerated postconviction can reside in the same facility and receive mistreatment from the same correctional officer.<sup>24</sup> Yet, as the law currently stands, a person detained pretrial in a federal detention facility may have fewer rights than a person incarcerated after having been adjudged guilty of committing a crime.<sup>25</sup> This situation not only is at odds with basic notions of logic and fairness but also conflicts with doctrine mandating that people detained pretrial have rights that are at least as great as the rights of people incarcerated postconviction.<sup>26</sup>

This Note argues that courts should allow people detained pretrial to bring *Bivens* suits when corrections officers violate the Fifth Amendment by providing constitutionally inadequate medical care. Part I discusses how the Court extended *Bivens* to cover a postconviction incarcerated person's Eighth Amendment medical-care claim in *Carlson v. Green*<sup>27</sup> before continually limiting its applicability for reasons articulated in *Ziglar v. Abbasi*.<sup>28</sup> Part I also tracks the development of Fourteenth Amendment medical-care claims brought by people detained pretrial in state facilities under 42 U.S.C. § 1983<sup>29</sup> and introduces the doctrinal conflict created by *Ziglar*. Then, Part II discusses how courts post-*Ziglar* typically perpetuate this conflict and explains why courts' deference to congressional action for these specific claims is unwarranted. Finally, Part III proposes that courts recognize the existence of *special factors counselling action* that should lead them to resolve this

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22. See *Bell v. Wolfish*, 441 U.S. 520, 535 & n.17 (1979) (discussing how the claims of people detained pretrial are brought under the Due Process Clause).

23. See *infra* section II.A.

24. Cf. Alan Ellis, Securing a Favorable Federal Prison Placement, Champion, July 2015, at 24, 25, <http://alanellis.com/wp-content/uploads/2015/08/Securing-Favorable-Federal-Prison-Placement-Champion-Magazine.pdf> [https://perma.cc/YJW6-3A3G] (describing how people with short sentences can be placed in pretrial detention facilities and are in contact with people detained pretrial as a result of their work assignments). But see 18 U.S.C. § 3142(i)(2) (2018) (stating that detention orders must "direct that the person be committed . . . for confinement in a corrections facility separate, to the extent practicable, from persons awaiting or serving sentences or being held in custody pending appeal").

25. See *infra* section II.A.

26. See *infra* section I.B.

27. 446 U.S. 14 (1980).

28. 137 S. Ct. 1843 (2017).

29. 42 U.S.C. § 1983 (2018) (creating a right of action for a violation of a constitutional right by a person acting under the color of state law); see also *infra* section I.B.

logical and doctrinal incongruity by allowing Fifth Amendment medical-care claims.<sup>30</sup>

## I. AN EXPANSION AND CONTRACTION OF RIGHTS

This Part describes the development of doctrines that address how people detained and incarcerated in federal and state facilities bring constitutional tort claims. Section I.A discusses how the Supreme Court created the *Bivens* remedy and expanded its application in *Carlson* before limiting the doctrine through reasoning that found its strongest expression in *Ziglar*. Section I.B describes how courts mandated that people detained pretrial must have rights that are at least as great as the rights held by people incarcerated postconviction and have begun to recognize that people detained pretrial may deserve more protection for violations of their rights. Then, section I.C shows how these two doctrines conflict.

### A. *The Bivens Doctrine*

In 1971, the Court created the *Bivens* doctrine to provide a damages remedy for people whose constitutional rights were violated by federal officers.<sup>31</sup> The Court “established that the victims of a constitutional violation by a federal agent have a right to recover damages against the official in federal court despite the absence of any statute conferring such a right.”<sup>32</sup> The decision emphasized the importance of a federal remedy for violations of constitutional rights (regardless of applicable state laws) and determined that the judiciary should fashion it.<sup>33</sup> But despite this strong

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30. See *infra* section III.B.2. This Note recommends a new form of analysis that directs courts not only to see if there are factors indicating that they should *hesitate* to allow a *Bivens* remedy but also to look for factors counselling them to *act* and extend the availability of *Bivens* claims.

31. See Benjamin C. Zipursky, *Ziglar v. Abbasi* and the Decline of the Right to Redress, 86 Fordham L. Rev. 2167, 2168 (2018) (“[*Bivens*] stands for the maxim *ubi jus, ibi remedium* (where there is a right there is a remedy) . . . .” (footnotes omitted)). At the time *Bivens* was decided, it was fairly well established that the courts could provide injunctive relief to prevent unconstitutional conduct by federal officers. See *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 400 (1971) (Harlan, J., concurring in the judgment) (discussing the “presumed availability of federal equitable relief”); *Ex parte Young*, 209 U.S. 123, 156 (1908) (holding that the federal courts have the power to enjoin unconstitutional conduct by government officials).

32. *Carlson*, 446 U.S. at 18. The Court thought that state tort law was inadequate and found that damages were an appropriate remedy that could be granted by the courts. See *Bivens*, 403 U.S. at 390–97 (holding that a person can sue a federal agent for damages for violating the Fourth Amendment).

33. *Bivens*, 403 U.S. at 391–92 (explaining that the Constitution was meant to “operate[] as a limitation upon the exercise of federal power regardless of whether the State . . . would prohibit or penalize the identical act if engaged in by a private citizen”); *id.* (“[W]here federally protected rights have been invaded, it has been the rule from the beginning that courts will . . . adjust their remedies so as to grant the necessary relief.” (internal quotation marks omitted) (quoting *Bell v. Hood*, 327 U.S. 678, 684 (1946))); *id.* at 407 (Harlan, J., concurring in the judgment) (focusing on the importance of a federal

language, the Court soon began to restrict the availability of *Bivens* claims and eventually labeled the extension of *Bivens* “a ‘disfavored’ judicial activity.”<sup>34</sup>

1. *The Expansion of Bivens.* — After deciding *Bivens*, the Court spoke two more times to confirm that plaintiffs could bring *Bivens* claims in specific factual and legal situations.<sup>35</sup> In one of those cases, *Carlson v. Green*, decided in 1980, the Supreme Court extended *Bivens* to allow people incarcerated postconviction to sue for damages when prison staff violated the Eighth Amendment by providing constitutionally inadequate medical care.<sup>36</sup>

When deciding whether to extend *Bivens*, the Court in *Carlson* began with the premise that a right of action should be implied from the Constitution unless there are “special factors counselling hesitation”<sup>37</sup> or “Congress has provided an alternative remedy which it explicitly declared to be a substitute for recovery directly under the Constitution.”<sup>38</sup> The Court found no special factors counselling hesitation because the prison staff did “not enjoy such independent status in our constitutional scheme as to suggest that judicially created remedies against them might [have been] inappropriate,” and any burden they experienced from such lawsuits would be countered by the protective doctrine of qualified immunity.<sup>39</sup>

The Court also stated that it did not consider the Federal Tort Claims Act (FTCA)<sup>40</sup> an alternative remedy intended by Congress to preempt a *Bivens* action.<sup>41</sup> This determination was based on “congressional comments

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remedy and the “particular responsibility” of the judiciary in fashioning such a remedy “to assure the vindication of constitutional interests”).

34. *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1857 (2017) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 675 (2009)).

35. See *Carlson*, 446 U.S. at 18; *Davis v. Passman*, 442 U.S. 228, 230 (1979) (holding that a person can sue a member of Congress for violating the Fifth Amendment by firing them based on their gender); see also Bernard W. Bell, Reexamining *Bivens* After *Ziglar v. Abbasi*, 9 ConLawNOW, no. 1, 2018, at 77, 86, <https://ideaexchange.uakron.edu/cgi/view/content.cgi?article=1056&context=conlawnow> [<https://perma.cc/PX8Q-KS3Z>] (“The three cases in which the Court has upheld a *Bivens* remedy all involve officials who were not subject to meaningful constraint in acting or failing to act in ways that infringed upon plaintiffs’ constitutional rights.”).

36. See *Carlson*, 446 U.S. at 18. Officers are held to provide constitutionally inadequate medical care when they exhibit “deliberate indifference to serious medical needs of prisoners.” *Estelle v. Gamble*, 429 U.S. 97, 104 (1976). For more information about how plaintiffs plead these claims, see *infra* note 126.

37. *Carlson*, 446 U.S. at 18 (internal quotation marks omitted) (quoting *Bivens*, 403 U.S. at 396).

38. *Id.* at 18–19 (emphasis omitted) (citing *Davis*, 442 U.S. at 245–47; *Bivens*, 403 U.S. at 397).

39. *Id.* at 19 (citing *Davis*, 442 U.S. at 246). The doctrine of qualified immunity protects government officers from suit by allowing them to plead that their actions did not violate a well-established constitutional right. See *Immunity*, Black’s Law Dictionary (10th ed. 2014).

40. 28 U.S.C. § 1346 (2018). The FTCA allows a plaintiff to sue the United States for the tortious acts of federal employees. See *id.* § 1346(b)(1).

41. *Carlson*, 446 U.S. at 19. At the time *Carlson* was decided, plaintiffs could sue federal officials for common law torts when those officers engaged in tortious conduct. See Jerry L.

accompanying [the 1974] amendment [that] made it crystal clear that Congress view[ed] [the] FTCA and *Bivens* as parallel, complementary causes of action" as well as a congressional practice of "explicitly stating when it [meant] to make FTCA an exclusive remedy."<sup>42</sup> The Court also found the FTCA to be an inadequate alternative because the FTCA did not hold individuals liable for damages and therefore was not an "effective deterrent" for preventing mistreatment of people incarcerated postconviction.<sup>43</sup> Lastly, the Court emphasized that, since FTCA actions were allowed only when state tort law provided a cause of action, the use of the statute prevented the development of "uniform rules" for governing "citizens' constitutional rights."<sup>44</sup> The Court summarized its assessment, stating that "[p]lainly [the] FTCA [was] not a sufficient protector of the citizens' constitutional rights, and without a clear congressional mandate we [could not] hold that Congress relegated respondent exclusively to the FTCA remedy."<sup>45</sup>

2. *The Contraction of Bivens.* — Despite language from earlier cases that seemed to imply that "the Court would keep expanding *Bivens* until it became the substantial equivalent of 42 U.S.C. § 1983,"<sup>46</sup> the Court soon began to reject *Bivens* claims in situations that differed from the three causes of action the Court recognized in *Bivens*, *Carlson*, and *Davis*.<sup>47</sup> These limitations appeared in claims similar to the prison claim recognized in

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Mashaw, Richard A. Merrill, Peter M. Shane, M. Elizabeth Magill, Mariano-Florentino Cuéllar & Nicholas R. Parrillo, *Administrative Law: The American Public Law System* 1432–33 (7th ed. 2014). But, after Congress passed the Westfall Act in 1998, the FTCA became the exclusive remedy for common law torts, and individual officials could no longer be liable for damages. See Pub. L. No. 100-694, 102 Stat. 4563 (1988) (codified as amended at 28 U.S.C. §§ 2671, 2674, 2679 (2018)); Mashaw et al., *supra*, at 1433.

42. *Carlson*, 446 U.S. at 19–20.

43. Id. at 20–21. As the Court stated: "It is almost axiomatic that the threat of damages has a deterrent effect, surely particularly so when the individual official faces personal financial liability." Id. at 21 (footnote omitted) (citation omitted). For more information about whether officials actually face "personal financial liability," see *infra* notes 248–252 and accompanying text. The Court also found *Bivens* remedies superior because, unlike the FTCA, they allowed for the awarding of punitive damages and provided the option of a jury trial. *Carlson*, 446 U.S. at 22.

44. *Carlson*, 446 U.S. at 23. The Court stated that "only a uniform federal rule of survivorship will suffice to redress the constitutional deprivation here alleged and to protect against repetition of such conduct." Id.

45. Id. For a discussion of how exceptions to FTCA liability could be seen as further undermining its utility, see generally James R. Levine, Note, *The Federal Tort Claims Act: A Proposal for Institutional Reform*, 100 Colum. L. Rev. 1538, 1541 (2000).

46. *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1855 (2017) (quoting Andrew Kent, *Are Damages Different?: Bivens and National Security*, 87 S. Cal. L. Rev. 1123, 1139–40 (2014)). The statute referenced grants people the right to sue state officials for damages when these officials violate their constitutional rights. 42 U.S.C. § 1983 (2018) ("Every person who, under color of [state law], subjects . . . any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights . . . secured by the Constitution and laws, shall be liable to the party injured . . .").

47. *Ziglar*, 137 S. Ct. at 1857 (collecting cases).

*Carlson*, as well as in *Bivens* claims more generally, and coincided with the Court’s rejection of implied rights of action from statutes.

a. *Limiting Carlson*. — In the prison context implicated in *Carlson*, this inclination to limit the recognition of *Bivens* claims was best expressed in *Correctional Services Corp. v. Malesko*,<sup>48</sup> decided in 2001, and *Minneci v. Pollard*,<sup>49</sup> decided in 2012. In *Malesko*, the Court refused to allow a *Bivens* claim for inadequate medical care against the corporation responsible for running a private federal prison.<sup>50</sup> The Court rejected the plaintiff’s claims because he was not a “plaintiff in search of a remedy[,] . . . [n]or [did] he seek a cause of action against an individual officer, otherwise lacking.”<sup>51</sup> Then, in *Minneci*, the Court rejected a claim by a plaintiff suing an individual corrections officer at a privately run prison because those officers could be sued in a common law tort suit.<sup>52</sup> The Court’s decisions in these cases reaffirmed its post-*Carlson* reluctance “to extend *Bivens* liability to any new context or new category of defendants,” and “rejected the claim that a *Bivens* remedy should be implied simply for want of any other means for challenging a constitutional deprivation in federal court.”<sup>53</sup>

The Court also limited the rights of people detained or incarcerated by the federal government in *Hui v. Castaneda*.<sup>54</sup> There, the Court held that a statute precluded a *Bivens* suit against Public Health Service officials because Congress explicitly designated the FTCA the exclusive remedy for “damage for personal injury . . . resulting from the performance of medical . . . or related functions,”<sup>55</sup> despite recognizing that the FTCA was an

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48. 534 U.S. 61 (2001).

49. 565 U.S. 118 (2012).

50. *Malesko*, 534 U.S. at 63.

51. Id. at 72–74. The Court found that the plaintiff in *Malesko* could sue the corporation under state tort law and his claims would not advance *Bivens*’s underlying purpose of deterring the unconstitutional acts of federal officers, as the defendant was a private corporation. Id.; see also Richard H. Fallon, Jr., John F. Manning, Daniel J. Meltzer & David L. Shapiro, *Hart & Wechsler’s Federal Courts and the Federalist System* 774 (7th ed. 2015).

52. *Minneci*, 565 U.S. at 118. As discussed above, employees of government-operated federal prisons cannot be sued in a common law tort suit. See *supra* note 40.

53. *Malesko*, 534 U.S. at 69. This statement seems to go directly against the majority opinion in *Bivens*, in which the Court created the *Bivens* remedy in part to provide the plaintiff with a federal cause of action. See *supra* note 32.

54. 559 U.S. 799 (2010).

55. Id. at 805 (quoting 42 U.S.C. § 233(a) (2018)). After the passing of this statute, *Bivens* suits can be brought only against nonmedical staff, like corrections officers, as Public Health Service officials comprise the majority of the medical professionals providing care to people detained and incarcerated in federal facilities. See The Commissioned Corps and the Federal Bureau of Prisons: Partners in Public Health Since 1930, Commissioned Corps of the U.S. Pub. Health Serv., <https://usphs.gov/newsroom/features/action/bop-highlights.aspx> [<https://perma.cc/288F-C3J8>] (last visited Feb. 1, 2020).

inadequate remedy in *Carlson*.<sup>56</sup> Together, these cases show an unwillingness to extend *Bivens* in the prison or jail context and a willingness to revise previous determinations about the necessity of *Bivens* claims.

b. *The Emergence of Special Factors.* — Outside of the prison context, the Court has also rejected new *Bivens* claims. In the vast majority of these cases, the Court considered the need for deference to Congress's power to create legal rights a special factor counselling hesitation, and it continued to increase the level of deference required. While the Court first found special factors counselling hesitation when Congress expressly stated an intention to avoid creating *Bivens* remedies, it soon began to hesitate whenever there were any indications of congressional displeasure.<sup>57</sup> In *Bush v. Lucas*—decided just three years after *Carlson* in 1983—the Court did not allow a First Amendment *Bivens* claim because it found that the federal courts should not exercise their “power to grant relief not expressly authorized by Congress”<sup>58</sup> whenever Congress implicitly indicated that it has decided how the problem should be solved.<sup>59</sup> The Court decided *Chappell v. Wallace* on the same day it decided *Bush* and held that military personnel could not bring *Bivens* actions because “Congress'[s] activity in the field,” even if unrelated to the right at issue, was a special factor counselling hesitation as the activity indicated that Congress considered itself the proper party to determine remedies.<sup>60</sup> Five years later, in *Schweiker v. Chilicky*, the Court again expanded its deference for the role of Congress.<sup>61</sup> It considered the complex remedial scheme Congress created a special factor counselling hesitation because the *Bivens* analysis had “proved to include an appropriate judicial deference to indications that congressional inaction [had] not been inadvertent.”<sup>62</sup>

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56. See Fallon et al., *supra* note 51, at 772.

57. See Christian Patrick Woo, Comment, The “Final Blow” to *Bivens*? An Analysis of Prior Supreme Court Precedent and the *Ziglar v. Abbasi* Decision, 43 Ohio N.U. L. Rev. 511, 523 (2017) (“[T]he express remedy that was once required in the expansion era cases seemed to no longer be necessary—allowing courts to imply what Congress had intended.”).

58. 462 U.S. 367, 373–74 (1983).

59. Compare *Carlson v. Green*, 446 U.S. 14, 18–19 (1980) (finding a special factor counselling hesitation when “Congress has provided an alternative remedy which it *explicitly* declared to be a substitute for recovery directly under the Constitution” (emphasis added)), with *Bush*, 462 U.S. at 378 (“When Congress provides an alternative remedy, it may, of course, *indicate* its intent, by statutory language, by clear legislative history, or perhaps even by the statutory remedy itself, that the Court’s power should not be exercised.” (emphasis added)). In *Bush*, the Court thought that Congress indicated its decision by creating “comprehensive procedural and substantive provisions giving meaningful remedies against the United States.” *Id.* at 378.

60. 462 U.S. 296, 304–05 (1983).

61. 487 U.S. 412 (1988).

62. *Id.* at 423. As the Court explained, “When the design of a Government program suggests that Congress has provided what it considers adequate remedial mechanisms for constitutional violations that may occur in the course of its administration, we have not created additional *Bivens* remedies.” *Id.*

In two later cases, *Federal Deposit Insurance Corp. v. Meyer*,<sup>63</sup> decided in 1994, and *Wilkie v. Robbins*,<sup>64</sup> decided in 2007, the Court hesitated for reasons other than congressional intent.<sup>65</sup> First, in *Meyer*, the Court found special factors counselling hesitation when extending *Bivens* to cover suits against federal agencies in part because it “would be creating a potentially enormous financial burden for the Federal Government.”<sup>66</sup> The Court decided to “leave it to Congress to weigh the implications of such a significant expansion of Government liability.”<sup>67</sup> Then, in *Wilkie*, the Court declined to extend *Bivens* because the claim at issue could lead to an “enormous swath of potential litigation” and it would be difficult to devise a “standard that could guide an employee’s conduct and a judicial fact-finder’s conclusion.”<sup>68</sup>

c. *A Shift in the Approach to Implied Rights of Action.* — The cases described above were in keeping with a more general shift away from “recognizing implied causes of action for damages.”<sup>69</sup> The Court’s decisions in *Bivens*, *Davis*, and *Carlson* were made at a time when the Court was more willing to imply rights of action from statutes,<sup>70</sup> a connection emphasized in Justice Harlan’s *Bivens* concurrence.<sup>71</sup> This connection, while

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63. 510 U.S. 471 (1994).

64. 551 U.S. 537 (2007).

65. See Natalie Banta, Note, Death by a Thousand Cuts or Hard Bargaining?: How the Court’s Indecision in *Wilkie v. Robbins* Improperly Eviscerates the *Bivens* Action, 23 BYU J. Pub. L. 119, 121 (2008) (“[T]he Court adopts an unnecessarily broad interpretation of special factors counselling hesitation to include concern over opening the floodgates to litigation and the difficulty of deciding whether a right was violated that precludes a *Bivens* remedy.”).

66. *Meyer*, 510 U.S. at 486. Although not mentioned by the Court, Congress’s decision to exclude a damages remedy within the Administrative Procedure Act’s waiver of sovereign immunity could also indicate that Congress did not intend to allow for damages remedies against federal agencies or their employees. See 5 U.S.C. § 702 (2018) (“An action in a court of the United States seeking relief other than money damages . . . shall not be dismissed nor relief therein be denied on the ground that it is against the United States . . . ”).

67. *Meyer*, 510 U.S. at 486.

68. *Wilkie*, 551 U.S. at 561. The plaintiff in *Wilkie* “accused [Bureau of Land Management employees] of harassment and intimidation aimed at extracting an easement across private property.” Id. at 541. The Court thought it would be difficult to discern “a workable cause of action” because the plaintiff brought a multitude of claims that did not fit neatly into a cause of action the Court previously recognized. Id. at 555–57. For this reason, the Court would be forced to construe the claim at a “high level of generality” that “would invite claims in every sphere of legitimate governmental action affecting property interests.” Id. at 561.

69. *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1855 (2017) (collecting cases).

70. See Zipursky, *supra* note 31, at 2171 (describing how the Court’s reasoning “stemmed from a time when the Court thought differently about implied rights of action in the statutory context”).

71. Peter Margulies, Curbing Remedies for Official Wrongs: The Need for *Bivens* Suits in National Security Cases, 68 Case W. Res. L. Rev. 1153, 1162–63 (2018). Justice Harlan supported the Court’s decision with cases in which the Court held that statutes conferred an implied right of action. See *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 402 & n.4 (1971) (Harlan, J., concurring in the judgment). In fact,

innocuous at the time, may have lessened the Court's support for *Bivens* when it later retreated from its more positive position on statutory implied rights of action and voiced concerns about usurping Congress's legislative prerogative and aggrandizing the Court's jurisdiction.<sup>72</sup> Though this philosophy originally emerged in the Court's dissents,<sup>73</sup> it made its way into the Court's majority opinions.<sup>74</sup> The extent of the Court's turn is best articulated in *Alexander v. Sandoval*, in which the Court held that “[w]ithout [congressional intent to create one], a cause of action does not exist and courts may not create one, no matter how desirable [it] might be as a policy matter, or how compatible with the statute.”<sup>75</sup> But, even among those critical of the Court's liberal approach to implied damages remedies, there was some recognition that implied rights of action from the Constitution differed from implied rights of action from statutes. Justice Powell, author of the persuasive dissent in *Cannon v. University of Chicago* that criticized the Court for recognizing implied rights of action from statutes,<sup>76</sup> concurred in the *Carlson* decision. He recognized that “[a] plaintiff who seeks his remedy directly under the Constitution asks the federal courts to perform an essentially legislative task,” but he did not criticize the Court for performing that task.<sup>77</sup>

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both the majority and the concurrence cited *J.I. Case Co. v. Borak*, a case in which the court articulated its permissive approach to implying rights of action from statutes as “an especially clear example” of the role courts should play when determining which remedies would best “effectuate the congressional policy underpinning the substantive provisions of the statute.” *Id.* (citing *J.I. Case Co. v. Borak*, 377 U.S. 426, 432–34 (1964)); see also *id.* at 397 (majority opinion) (citing *J.I. Case Co.*, 377 U.S. at 433).

72. See Margulies, *supra* note 71, at 1163 (arguing that Justice Harlan's argument “weakened the case for *Bivens* remedies when the Court turned against implied rights of action”); see also *Cannon v. Univ. of Chi.*, 441 U.S. 677, 730–31 (1979) (Powell, J., dissenting) (“When Congress chooses not to provide a private civil remedy, federal courts should not assume the legislative role of creating such a remedy and thereby enlarge their jurisdiction.”).

73. See, e.g., *Cannon*, 441 U.S. at 730–31 (Powell, J., dissenting).

74. See *Alexander v. Sandoval*, 532 U.S. 275, 286–87 (2001).

75. *Id.*

76. See *Cannon*, 441 U.S. at 730–31 (Powell, J., dissenting).

77. *Carlson v. Green*, 446 U.S. 14, 28 (1980) (Powell, J., concurring in the judgment). This recognition could have stemmed from the idea that, as some scholars have argued, “[r]ights guaranteed by the Constitution require a fuller suite of protections than those afforded statutory duties. The latter Congress can confer or take away, as it chooses. However, the former are part of the fundamental charter of governance itself.” Margulies, *supra* note 71, at 1172. Justice Powell distanced himself from the majority’s opinion because he thought that courts should not be forced to allow a *Bivens* remedy whenever Congress has not expressly declared an alternative remedy. *Carlson*, 446 U.S. at 26–27. He thought such a restrictive holding unduly cabined the courts’ discretion to determine constitutional remedies and ignored non-explicit congressionally created remedies. *Id.*

For a contrary view about how courts should respond to the differences between implying rights of action from statutes and the Constitution, see *Corr. Servs. Corp. v. Malesko*, 534

Despite this recognition, one could see a similar turn in the Court's retreat from implying damages remedies from the Constitution. In both *Bivens* and *Carlson*, Justices in the dissent argued that "it is 'an exercise of power that the Constitution does not give . . .' for [the] Court to infer a private civil damages remedy from the Eighth Amendment or any other constitutional provision."<sup>78</sup> As discussed above, an emphasis on congressional intent soon permeated the Court's post-*Carlson* majority opinions.

In the pre-*Ziglar* world, lower courts were then left to navigate applying the *Bivens* principles in a legal landscape that rejected the basic premise of implying private rights of action.<sup>79</sup> Even though the Court shifted its position on *Bivens* claims, the lower courts continued to allow people detained pretrial to bring *Bivens* claims under the Fifth Amendment.<sup>80</sup> These decisions persisted even with the passing of the Prison Reform Litigation Act (PLRA),<sup>81</sup> a statute that indicated a congressional priority of limiting the filing of "voluminous and meritless prison litigation."<sup>82</sup> Pre-*Ziglar* courts that addressed whether the PLRA foreclosed the possibility of *Bivens*

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U.S. 61, 75 (2001) (Scalia, J., concurring) ("There is even greater reason to abandon [implying private rights of action] in the constitutional field, since an 'implication' imagined in the Constitution can presumably not even be repudiated by Congress.").

78. *Carlson*, 446 U.S. at 34 (Rehnquist, J., dissenting) (quoting *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 428 (1971) (Black, J., dissenting)). There appears to be more consistent agreement around courts' ability to provide equitable relief for constitutional violations absent congressional approval. See, e.g., *id.* at 42 (agreeing that "federal courts have historically had broad authority to fashion equitable remedies"); *Ex parte Young*, 209 U.S. 123, 156 (1908) (holding that federal courts have the power to enjoin unconstitutional conduct by state officials). But others have argued that courts should not view themselves as having a special responsibility to remedy constitutional violations. See, e.g., *Webster v. Doe*, 486 U.S. 592, 614 (1988) (Scalia, J., dissenting) (arguing that the federal courts' jurisdiction is dictated by Congress and they do not have a special responsibility to remedy constitutional violations).

79. See *Wilkie v. Robbins*, 551 U.S. 537, 554 (2007) ("It would be hard to infer that Congress expected the Judiciary to stay its *Bivens* hand, but equally hard to extract any clear lesson that *Bivens* ought to spawn a new claim."); *Robinson v. Sherrod*, 631 F.3d 839, 842 (7th Cir. 2011) ("*Bivens* is under a cloud, because it is based on a concept of federal common law no longer in favor . . . : the concept that for every right conferred by federal law the federal courts can create a remedy above and beyond the remedies created by the Constitution, statutes, or regulations.").

80. See Plaintiffs' Memorandum of Law in Support of *Bivens* Liability at 23, *Turkmen v. Ashcroft*, No. 02-CV-2307 (DLI) (SMG), 2018 WL 4026734 (E.D.N.Y. Aug. 13, 2018), <https://ccrjustice.org/sites/default/files/attach/2018/01/Plaintiffs%20Mem%20of%20Law%20in%20Support%20of%20Bivens%20Liability.pdf> [<https://perma.cc/3KPV-H2KY>] (collecting cases).

81. 42 U.S.C. § 1997e (2018).

82. James E. Robertson, Psychological Injury and the Prison Litigation Reform Act: A "Not Exactly," Equal Protection Analysis, 37 Harv. J. on Legis. 105, 113 (2000). The PLRA required "prisoners" to exhaust administrative remedies before bringing suits challenging prison conditions "under section 1983 . . . , or any other Federal law," 42 U.S.C. § 1997e(a), and limited the amount of fees victorious attorneys could receive. *Id.* § 1997e(d). Congress also instituted a three strikes rule that restricted a "prisoner's" ability to bring a lawsuit in forma pauperis when they had brought three prior failed lawsuits that were "frivolous, malicious, or [had failed] to state a claim." 28 U.S.C. § 1915 (2018).

suits found that the statute envisioned the existence of *Bivens* actions and often applied the Act's requirements to *Bivens* claims.<sup>83</sup>

3. *An Attempted Clarification.* — In *Ziglar v. Abbasi*, the Court attempted to clarify when courts should allow a *Bivens* claim to proceed. It first marked extending *Bivens* “a ‘disfavored’ judicial activity” but preserved the three claims brought in *Bivens*, *Davis*, and *Carlson*, even though “the analysis in [these] cases might have been different if they were decided today.”<sup>84</sup>

a. *The New Framework.* — After making that pronouncement, the Court went on to describe how courts must first assess *Bivens* claims to determine whether the claim presents a context that is “different in a meaningful way from previous *Bivens* cases decided by [the] Court.”<sup>85</sup> To assist lower courts interpreting this guidance, the Court provided a nonexhaustive “list of differences” that included:

[T]he 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.<sup>86</sup>

The Court stated that, if a *Bivens* claim does present a new context, then courts should not extend *Bivens* if there are “special factors counse�ing hesitation.”<sup>87</sup> Although the Court did not “define[] the phrase,” it did specify 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.”<sup>88</sup> The Court further clarified that Congress is primarily the party “who should decide” whether to provide for a damages remedy.<sup>89</sup>

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83. See *Porter v. Nussle*, 534 U.S. 516, 524 (2002) (stating, in dicta, that the PLRA’s exhaustion requirements applied to *Bivens* claims); *Nyhuis v. Reno*, 204 F.3d 65, 68–69 (3d Cir. 2000) (“Congress clearly intended to sweep *Bivens* actions into the auspices of the § 1997e(a) when it enacted the PLRA.”).

84. *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1856–57 (2017) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 675 (2009)).

85. *Id.* at 1859.

86. *Id.* at 1859–60.

87. *Id.* at 1857 (internal quotation marks omitted) (quoting *Carlson v. Green*, 446 U.S. 14, 18 (1980)).

88. *Id.* at 1857–58. A main reason to doubt or “limit the power of the Judiciary” is the existence of “an alternative remedial structure.” *Id.* at 1858. The Court cited *Wilkie v. Robbins*, 551 U.S. 537 (2007), *Bush v. Lucas*, 462 U.S. 367 (1983), *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61 (2001), and *Minneci v. Pollard*, 565 U.S. 118 (2012) to support the proposition that Congress indicates that it has selected the exclusive means of relief when it creates a remedial structure. *Ziglar*, 137 S. Ct. at 1858.

89. *Ziglar*, 137 S. Ct. at 1857 (quoting *Bush*, 462 U.S. at 380).

Justice Kennedy supported his reluctance to extend *Bivens* by referencing the Court's retreat from implying private rights of action from statutes, but he recognized that “[t]he decision to recognize an implied cause of action under a statute involves somewhat different considerations than [the decision] to recognize an implied cause of action to enforce a provision of the Constitution.”<sup>90</sup> He stated that while the creation of a statute provides an opportunity for Congress to “be explicit if it intends to create a private cause of action[,] . . . [w]ith respect to the Constitution, . . . there is no single, specific congressional action to consider and interpret.”<sup>91</sup>

The Court has since reaffirmed the *Ziglar* analysis in *Hernandez v. Mesa*, a 2020 case arising out of a border patrol officer’s cross-border shooting of a Mexican teenager.<sup>92</sup> It emphasized the connection between the seminal *Bivens* cases and inferring private rights of action from statutes and cautioned that concerns of judicial modesty and separation of powers should counsel against recognizing claims in new contexts.<sup>93</sup>

b. *Applying Ziglar.* — In applying this formulation to the claims brought by the plaintiffs in *Ziglar*, six men arrested and detained in the United States following the 9/11 attacks, the Court first determined that “respondents’ detention policy claims challeng[ing] the confinement conditions imposed on illegal aliens pursuant to a high-level executive policy created in the wake of a major terrorist attack on American soil . . . [bore] little resemblance to the three *Bivens* claims the Court ha[d] approved in the past.”<sup>94</sup> It then easily determined that they could not bring a *Bivens* claim to challenge their detention under the Fifth Amendment because “national-security policy is the prerogative of the Congress and President.”<sup>95</sup> Similarly, in *Hernandez*, the Court considered the context new because the factual scenario differed from *Bivens*, and it determined that “the potential effect on foreign relations” and an “element of national security” meant that Congress should determine whether to extend liability.<sup>96</sup>

However, in *Ziglar*, the Court’s analysis became more complicated when it assessed the general conditions-of-confinement claims the plaintiffs brought against the warden of the Metropolitan Detention Center

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90. Id. at 1855–56 (“In cases decided after *Bivens*, and after the statutory implied cause-of-action cases that *Bivens* itself relied upon, the Court adopted a far more cautious course before finding implied causes of action.”); see also Margulies, *supra* note 71, at 1168.

91. *Ziglar*, 137 S. Ct. at 1856.

92. 140 S. Ct. 735, 739 (2020).

93. Id. at 741–43.

94. *Ziglar*, 137 S. Ct. at 1860.

95. Id. at 1860–63. The Court also determined that the plaintiffs had an alternative remedy because they could seek relief from their detention with a writ of habeas corpus, and it declined to engage with whether damages would be a proper deterrent for unconstitutional government behavior in this situation. Id. at 1863–64.

96. *Hernandez*, 140 S. Ct. at 744–46, 749–50.

(MDC).<sup>97</sup> The Court acknowledged that the claims “ha[d] significant parallels” to *Carlson* and that the “allegations of injury . . . [were] just as compelling” as they were in that case.<sup>98</sup> But the Court held that “even a modest extension [of *Bivens*] is still an extension.”<sup>99</sup> It considered these claims to arise in a new context in part because they were brought by people detained pretrial under the Fifth Amendment and in part because the standard for assessing the warden’s supervisory conduct differed from the standard used in *Carlson* to assess the conduct of those who interacted directly with the plaintiff.<sup>100</sup> The Court then left the special factors analysis for remand, but, in dicta, expressed a belief that Congress not including “a standalone damages remedy against federal jailers” in the PLRA “could . . . suggest[] [a choice] not to extend the *Carlson* damages remedy to cases involving other types of prisoner mistreatment.”<sup>101</sup> This language evoked the broader conception of congressional preclusion expressed in previous *Bivens* cases and suggested that the Court would not be willing to create any new *Bivens* remedies in the prison or jail context.

c. *Justice Breyer’s Dissent.* — Dissenting from the majority opinion, Justice Breyer disagreed with almost every element of the majority’s analysis. He thought his colleagues misstated the import of the PLRA,<sup>102</sup> overstated the availability of alternate remedies,<sup>103</sup> and mischaracterized *Bivens* remedies as interfering in Congress’s domain.<sup>104</sup> But the crux of Justice Breyer’s argument focused on the fact that the conditions-of-confinement

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97. *Ziglar*, 137 S. Ct. at 1863 (“One of respondents’ claims under *Bivens* requires a different analysis: the prisoner abuse claim against the MDC’s warden . . . ”).

98. Id. at 1864. The Court typically classifies medical-care claims with other conditions-of-confinement claims. See *Wilson v. Seiter*, 501 U.S. 294, 303 (1991) (stating that there is “no significant distinction between claims alleging inadequate medical care and those alleging inadequate ‘conditions of confinement’”); see also *Farmer v. Brennan*, 511 U.S. 825, 832 (1994) (identifying “medical care” as a service prison officials must provide to ensure that conditions of confinement are humane in accordance with the Eighth Amendment).

99. *Ziglar*, 137 S. Ct. at 1864.

100. Id. at 1864–65. The Court thought the different standard for supervisory conduct could be problematic because “the standard for [such] a claim . . . is less clear under the Court’s precedents.” Id.

101. Id. at 1864. Despite this cautionary language, Justice Ginsburg later described the Court’s actions as “recognizing that one of the plaintiffs’ *Bivens* claims might be viable.” *Hernandez*, 140 S. Ct. at 755 (Ginsburg, J., dissenting).

102. See *Ziglar*, 137 S. Ct. at 1878 (Breyer, J., dissenting) (“There is strong evidence that Congress assumed that *Bivens* remedies would be available to prisoners when it enacted the PLRA—e.g., Congress continued to permit prisoners to recover for physical injuries, the typical kinds of *Bivens* injuries.”).

103. See id. at 1879 (“Neither a prospective injunction nor a writ of habeas corpus, however, will normally provide plaintiffs with redress for harms they have *already* suffered.”).

104. See id. at 1880. In his view, congressional silence on the *Bivens* issue “contain[ed] strong signs that it accepted *Bivens* actions as part of the law.” Id. Justice Breyer also did not think that the Court’s doctrine regarding implied rights of action from statutes should have any bearing on the case because the Court in *Bivens* supported its decision primarily by drawing on the “need for such a remedy when measured against a common-law and constitutional history of allowing traditional legal remedies where necessary.” Id.

claims did not present a new context.<sup>105</sup> His assessment of the claims would not go past “Step One,” the new context analysis, because the claims were within *Carlson*’s context.<sup>106</sup> He argued that “[w]here the harm is the same . . . and where the only difference in constitutional scope consists of a circumstance (the absence of a conviction) that makes the violation here worse, it cannot be maintained that the difference between the [Fifth and Eighth] Amendments is ‘fundamental.’”<sup>107</sup> He therefore felt that the “Court’s holding would significantly shrink the existing *Bivens* contexts, diminishing the compensatory remedy constitutional tort law [offered] to harmed individuals.”<sup>108</sup>

To bolster his argument that Fifth Amendment *Bivens* claims were not new, Justice Breyer cited numerous circuit court cases that extended *Bivens* to cover the condition-of-confinement claims of people detained pretrial, indicating his support for their holdings.<sup>109</sup> He also cited Supreme Court cases where people detained pretrial had been allowed to bring claims against state officials through the Fourteenth Amendment.<sup>110</sup> In one of those cases, Justice Breyer wrote the majority opinion—that case was *Kingsley v. Hendrickson*.<sup>111</sup>

#### B. *The Kingsley Doctrine*

The cases leading up to and following *Kingsley* solidified and increased the protections courts provide to people detained pretrial. They recognized that people detained pretrial should not have fewer rights than people incarcerated postconviction and have begun to recognize that the rights of people detained pretrial should be greater.

1. *The Rights of Pretrial Detainees*. — In *Bell v. Wolfish*, the Court for the first time decided a case brought by a person detained pretrial challenging his conditions of confinement.<sup>112</sup> It held that the rights of a person

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105. Id. at 1873 (explaining that the “most important point of [his] disagreement” was based on the majority determining “that permitting a constitutional tort action here would ‘extend’ *Bivens*”).

106. Id. at 1876–79.

107. Id. at 1877–78.

108. Id. at 1873.

109. Id. at 1878 (collecting cases).

110. Id. (collecting cases).

111. 135 S. Ct. 2466 (2015).

112. 441 U.S. 520, 523 (1979) (“This case requires us to examine the constitutional rights of pretrial detainees—those persons who have been charged with a crime but who have not yet been tried on the charge.”). Because the plaintiffs were seeking injunctive relief, as opposed to damages, the Court did not have to consider extending the *Bivens* remedy. See *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 400 (1971) (Harlan, J., concurring in the judgment) (discussing the “presumed availability of federal equitable relief” for constitutional claims); see also Mashaw et al., *supra* note 41, at 1433–34 (“The federal courts . . . have long been prepared to issue injunctions to protect constitutional rights with no statutory authority for such a remedy . . . ”).

detained pretrial were violated when “conditions amount to punishment of the detainee” because “a detainee may not be punished prior to an adjudication of guilt.”<sup>113</sup> But, while the Court expressed that “pretrial detainees . . . retain at least those constitutional rights . . . enjoyed by convicted prisoners,”<sup>114</sup> the standard it articulated for demonstrating a violation of those rights created confusion over whether these plaintiffs, like convicted plaintiffs, were tasked with the difficult job of showing subjective intent.<sup>115</sup>

The Court addressed these same concerns again in *City of Revere v. Massachusetts General Hospital*,<sup>116</sup> a case brought under 42 U.S.C. § 1983. Again, the Court agreed that “the due process rights of [people detained pretrial] are at least as great as the Eighth Amendment protections available to a convicted prisoner,”<sup>117</sup> but it refused to state if a different standard should be used to assess the medical-care claims of people detained pretrial.<sup>118</sup> Although this statement did not clarify whether an objective or subjective standard should apply, it further entrenched a doctrinal position that people detained pretrial cannot have fewer rights than people incarcerated postconviction.

2. *A Potential Expansion.* — Then, in *Kingsley v. Hendrickson*,<sup>119</sup> the Supreme Court held that people detained pretrial can use an objective standard when asserting excessive force claims under 42 U.S.C. § 1983 through the Fourteenth Amendment.<sup>120</sup> Previously, most circuits held that people detained pretrial must show “that the officers were subjectively aware that their use of force was unreasonable.”<sup>121</sup> The Court, however,

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113. *Bell*, 441 U.S. at 535. The Court, therefore, supported its position through the Fifth Amendment Due Process Clause because the Eighth Amendment’s prohibition on cruel and unusual punishment could not apply, as any punishment was impermissible. *Id.* at 535 n.16.

114. *Id.* at 545.

115. See *id.* at 538 (“A court must decide whether the disability is imposed for the purpose of punishment or whether it is but an incident of some other legitimate governmental purpose.”); Rosalie Berger Levinson, *Kingsley* Breathes New Life into Substantive Due Process as a Check on Abuse of Government Power, 93 Notre Dame L. Rev. 357, 369–70 (2017) (describing the *Kingsley* majority citing *Bell* for articulating an objective test and the dissent for a subjective test).

116. 463 U.S. 239, 244 (1983).

117. *Id.*

118. *Id.* (“We need not define, in this case, Revere’s due process obligation to pretrial detainees or to other persons in its care who require medical attention.”).

119. 135 S. Ct. 2466 (2015).

120. See *id.* at 2472–73 (holding that an objective standard governs); see also Levinson, *supra* note 115, at 366 (“[T]he relevant culpability standard is objective, not subjective, deliberate indifference.”).

121. *Kingsley*, 135 S. Ct. at 2470 (emphasis omitted); see also Brief for Respondents at 38 & n.9, *Kingsley*, 135 S. Ct. 2466 (No. 14-6368), 2015 WL 1519055 (“The vast majority of courts already have applied the [subjective] standard to pretrial detainee excessive force claims.”). Those circuits, like the Seventh Circuit that was reversed by the Supreme Court in *Kingsley*, held that both people detained pretrial and people incarcerated postconviction must present “a subjective inquiry into the defendant’s state of mind.” *Kingsley v. Hendrickson*, 744 F.3d 443, 452 (7th Cir. 2014), vacated and remanded, 135 S. Ct. 2466

determined that “the appropriate standard for a pretrial detainee’s excessive force claim is solely an objective one.”<sup>122</sup> It refused to hold people detained pretrial to the Eighth Amendment excessive force test because “pretrial detainees (unlike convicted prisoners) cannot be punished at all.”<sup>123</sup> Eliminating this requirement made it easier for people detained pretrial to bring excessive force claims.<sup>124</sup>

The Court’s decision in *Kingsley* raised questions about how the logic behind the ruling should be applied in the context of other claims by people detained pretrial—including claims of unconstitutional medical care. In fact, all but one of the Justices indicated that an objective test should govern conditions-of-confinement claims, sending a clear message to lower courts.<sup>125</sup> Circuit courts have already responded to *Kingsley* by requiring that people detained pretrial satisfy an objective deliberate indifference standard when pleading their conditions-of-confinement claims.<sup>126</sup> In

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(2015); see also, e.g., *Bozeman v. Orum*, 422 F.3d 1265, 1271 (11th Cir. 2005) (“[I]t makes no difference whether Haggard was a pretrial detainee or a convicted prisoner because ‘the applicable standard is the same . . .’” (quoting *Cottrell v. Caldwell*, 85 F.3d 1480, 1490 (11th Cir. 1996))).

122. *Kingsley*, 135 S. Ct. at 2473.

123. *Id.* at 2475.

124. Maureen N. Armour, Federal Courts as Constitutional Laboratories: The Rat’s Point of View, 57 Drake L. Rev. 135, 166 (2008) (“It is easier for a plaintiff to plead and prove an objective or constructive knowledge standard of deliberate indifference than a subjective standard.”). The Court also found that “an objective standard is workable,” as numerous circuit courts already used an objective standard in their jury instructions. *Kingsley*, 135 S. Ct. at 2474. It noted that there has not been “a rash of unfounded filings in Circuits that use an objective standard” because the PLRA prevents the filing of frivolous claims. *Id.* at 2476. The decision that an objective standard is workable was also supported by the amicus brief submitted by former corrections administrators and experts, who informed the Court that an objective standard for assessing officer conduct is currently used by many correctional facilities around the country. Jordan A. Shannon, Note, Reasonableness as Corrections Reform in *Kingsley v. Hendrickson*, 62 Loy. L. Rev. 577, 609 (2016). According to them: “The introduction of subjective standards governing the use of force invites uncertainty and individualized discretion, which is fertile ground for unchecked abuses. Objective standards, by contrast, are a bulwark against the repeated use of excessive force.” Brief of Former Correction Administrators and Experts as Amici Curiae in Support of Petitioner at 19, *Kingsley*, 135 S. Ct. 2466 (No. 14-6368), 2015 WL 1045423.

125. Levinson, *supra* note 115, at 375 (“Indeed, combining the *Kingsley* majority opinion and dissent, eight Justices endorsed the view expressed in *Bell* that an objective ‘reasonable relation’ test should govern ‘conditions’ claims brought by pretrial detainees.” (footnote omitted)); see also *id.* at 391–92 (“[C]ourts that have imposed the Eighth Amendment’s criminal recklessness standard on those never convicted of a crime[] have now been alerted by the Supreme Court’s analysis in *Kingsley* that an objective civil culpability standard should govern claims of constitutional wrongdoing.”).

126. *Id.* at 383 (describing courts “reject[ing] the use of the Eighth Amendment’s heightened malice standard in favor of a ‘traditional’ deliberate indifference test”); see also *Miranda v. Cty. of Lake*, 900 F.3d 335, 351–52 (7th Cir. 2018) (rejecting the Eighth Amendment standard for a person detained pretrial); *Gordon v. Cty. of Orange*, 888 F.3d 1118, 1120, 1122–25 (9th Cir. 2018) (same); *Darnell v. Pineiro*, 849 F.3d 17, 34–35 (2d Cir. 2017) (same); cf. *Richmond v. Huq*, 885 F.3d 928, 938 n.3 (6th Cir. 2018) (expressing that a “shift in

reaching their holdings, these courts have spoken more generally about a shift in the way courts should differentiate their treatment of people detained pretrial from their treatment of people incarcerated postconviction. In *Miranda v. County of Lake*, the court discussed “the fact that the Supreme Court [had] been signaling that courts must pay careful attention to the different status of pretrial detainees.”<sup>127</sup> Similarly, the court in *Darnell v. Pineiro* quoted the district court’s language for the proposition that the “Constitution and societal standards require more, . . . especially for pretrial detainees.”<sup>128</sup> As these statements indicate, some have interpreted *Kingsley*’s language to suggest that people detained pretrial should have an easier time accessing the courts than people incarcerated postconviction.<sup>129</sup>

### C. When *Bivens* Meets *Kingsley*

While the Supreme Court clearly expressed that *Bivens* is not the “substantial equivalent of 42 U.S.C. § 1983,”<sup>130</sup> the Court has also recognized that, once a *Bivens* action is found, the analysis of the two claims is

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Fourteenth Amendment deliberate indifference jurisprudence calls into serious doubt whether Richmond need even show that the individual defendant-officials were subjectively aware of her serious medical conditions and nonetheless wantonly disregarded them”). But see Burke v. Regalado, 935 F.3d 960, 991 n.9 (10th Cir. 2019) (declining to decide whether an objective standard should apply to medical-care and conditions-of-confinement claims); Williams v. City of Georgetown, 774 F. App’x 951, 955 n.2 (6th Cir. 2019) (acknowledging that *Kingsley* may have changed the analysis but declining to address the issue); Moore v. Luffey, 767 F. App’x 335, 340 n.2 (3d Cir. 2019) (deciding not to apply the Court’s holding in *Kingsley* to a medical-care claim). Under an objective standard, a plaintiff has to show that (1) the officer “acted purposefully, knowingly, or perhaps even recklessly,” and (2) the action was objectively unreasonable. *Miranda*, 900 F.3d at 353. Under a subjective standard, the plaintiff would have to show that (1) the officer acted purposefully or knowingly, and (2) they knew or intended that their actions would unreasonably harm the plaintiff. See *id.* at 351, 353.

127. 900 F.3d at 352; see also Hardeman v. Curran, 933 F.3d 816, 821–22 (7th Cir. 2019) (finding that the objective standard should apply because “[p]retrial detainees are in a different position”).

128. 849 F.3d at 37 (internal quotation marks omitted) (quoting Cano v. City of New York, 44 F. Supp. 3d 324, 333 (E.D.N.Y. 2014)).

129. Some have argued that *Kingsley* should be read as changing the pleading standard for people incarcerated postconviction as well as those detained pretrial. See, e.g., Margo Schlinger, The Constitutional Law of Incarceration, Reconfigured, 103 Cornell L. Rev. 357, 428–33 (2018) (explaining why the Court’s decision in *Kingsley* mandates that an objective standard applies to Eighth and Fourteenth Amendment claims). If these scholars are correct, then *Kingsley* would not directly stand for the proposition that people detained pretrial should have more rights than people incarcerated postconviction, but rather for a general softening of the pleading standards for both populations.

130. *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1855 (2017) (quoting Kent, *supra* note 46, at 1139–40); see also *supra* section I.A.

generally the same.<sup>131</sup> For example, in *Farmer v. Brennan*, a person incarcerated postconviction brought an Eighth Amendment *Bivens* claim challenging the conditions of her confinement.<sup>132</sup> When deciding that a “deliberate indifference” standard should apply, the Court cited two cases brought under 42 U.S.C. § 1983.<sup>133</sup> Later § 1983 cases frequently cite *Farmer* for the proposition that the deliberate indifference standard applies to conditions-of-confinement claims brought under the Eighth Amendment.<sup>134</sup> As this citation circle indicates, courts traditionally view the substantive law for claims brought under *Bivens* and § 1983 as interchangeable.

And, as section I.A.3 discusses, Justice Breyer criticized the majority’s decision to differentiate *Bivens* claims brought under the Fifth Amendment and those brought under the Eighth Amendment. Justice Breyer pointed out that, in the § 1983 context, the Court has found that “the due process rights of [people detained pretrial] are at least as great as the Eighth Amendment protections available to a convicted prisoner.”<sup>135</sup> He cited numerous cases in which the Court reaffirmed this finding as well as the majority opinion he authored in *Kingsley*, quoting language from the case that appears to indicate that people detained pretrial may be entitled to more rights than people incarcerated postconviction.<sup>136</sup>

Building on Justice Breyer’s new-context analysis, one could argue that the § 1983 doctrine’s preservation and expansion of the rights of people detained pretrial made the Court’s decision in *Ziglar* problematic because it failed to recognize that the plaintiffs’ claims are not new *and* because it

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131. See *Ashcroft v. Iqbal*, 556 U.S. 662, 675 (2009) (“In the limited settings where *Bivens* does apply, the implied cause of action is the ‘federal analog to suits brought against state officials under [§ 1983].’” (quoting *Hartman v. Moore*, 547 U.S. 250, 255 n.2 (2006))).

132. See 511 U.S. 825, 828–30, 832 (1994).

133. Id. at 828 (citing *Helling v. McKinney*, 509 U.S. 25 (1993); *Wilson v. Seiter*, 501 U.S. 294 (1991)). In *Wilson*, the Court applied the deliberate indifference standard for § 1983 medical-care-related claims developed in *Estelle v. Gamble*, 429 U.S. 97, 106 (1976), to § 1983 conditions-of-confinement claims. See *Wilson*, 501 U.S. at 297. Then, in *Helling*, the Court used a deliberate indifference standard to assess whether exposing the plaintiff to excessive amounts of cigarette smoke violated the Eighth Amendment and characterized the plaintiff’s claim as a § 1983 conditions-of-confinement claim. See *Helling*, 509 U.S. at 31–32.

134. See, e.g., *Ortiz v. Jordan*, 562 U.S. 180, 190–91 (2011) (stating that the existing law governing § 1983 claims has been clear and citing *Farmer*); *Hope v. Pelzer*, 536 U.S. 730, 737–38 (2002) (citing *Farmer* when discussing the substantive standards for a § 1983 conditions-of-confinement claim); *Delaughter v. Woodall*, 909 F.3d 130, 136 (5th Cir. 2018) (citing *Farmer* when applying the deliberate indifference standard to a § 1983 medical-care claim); *Wilson v. Adams*, 901 F.3d 816, 820 (7th Cir. 2018) (same).

135. *City of Revere v. Mass. Gen. Hosp.*, 463 U.S. 239, 244 (1983); see also *Ziglar*, 137 S. Ct. at 1877–78 (Breyer, J., dissenting).

136. See *Ziglar*, 137 S. Ct. at 1877–78 (Breyer, J., dissenting) (collecting cases); see also *Kingsley v. Hendrickson*, 135 S. Ct. 2466, 2475 (2015); *City of Revere*, 463 U.S. at 244.

created a doctrinal conflict.<sup>137</sup> These cases may actually indicate that people detained pretrial should receive greater protection for their rights.<sup>138</sup>

## II. THE COSTS OF LETTING CONGRESS DECIDE

In *Ziglar v. Abbasi*, the Supreme Court announced its position that Congress should almost always decide when new *Bivens* remedies should be recognized.<sup>139</sup> Section II.A discusses how lower courts struggle to apply this mandate in the context of prison litigation, and generally hesitate in a way that unfairly restricts the rights of people detained pretrial. Section II.B describes how this hesitation is misplaced in light of the futility of waiting for Congress to act.

### A. *Doctrinal Conflict and Confusion*

Because the Supreme Court declared that the creation of new *Bivens* remedies is a “disfavored judicial activity,”<sup>140</sup> many lower courts refuse to recognize claims that differ, even slightly, from the three claims previously recognized by the Court.<sup>141</sup> But courts continue to recognize claims that arise within those three contexts, including the Eighth Amendment medical-care claim recognized in *Carlson*.<sup>142</sup> This creates a situation in which people incarcerated postconviction can typically bring *Bivens* medical-care claims and those detained pretrial typically cannot, which conflicts with court doctrine guaranteeing people detained pretrial rights that are at least equal to those held by people incarcerated postconviction.<sup>143</sup> And a minority of courts have recognized claims that differed from *Carlson*, indicating that courts can pursue another approach.<sup>144</sup>

1. *The Restriction of Bivens Availability.* — Although it could be said that the Court in *Ziglar* clearly signaled that the passing of the PLRA expressed Congress’s intention to not create new *Bivens* remedies in the jail or prison context,<sup>145</sup> the district court on remand did not embrace this rationale when rejecting the plaintiffs’ Fifth Amendment claims against the MDC warden.<sup>146</sup>

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137. See infra section II.A.2.

138. See supra section I.B. The special-factors analysis may provide a more doctrinally and logically appealing place for considering these issues. See infra section III.B.

139. 137 S. Ct. at 1857.

140. Id. at 1857 (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 675 (2009)).

141. These claims include an Eighth Amendment inadequate medical care claim, *Carlson v. Green*, 446 U.S. 14, 18 (1980), a Fifth Amendment employment discrimination claim, *Davis v. Passman*, 442 U.S. 228, 248–49 (1979), and a Fourth Amendment improper search claim, *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 389 (1971).

142. *Carlson*, 446 U.S. at 18; see also infra note 165 and accompanying text.

143. See supra sections I.B–C.

144. See infra section II.A.2.

145. See *Ziglar*, 137 S. Ct. at 1865; supra note 101 and accompanying text.

146. *Turkmen v. Ashcroft*, No. 02-CV-2307 (DLI) (SMG), 2018 WL 4026734, at \*6–8 (E.D.N.Y. Aug. 13, 2018).

In *Turkmen v. Ashcroft*, the court first noted that the PLRA did not apply to “immigration detainees” like the plaintiffs and highlighted that “the Court merely stated that ‘[i]t could be argued’ that the PLRA implied an intention to preclude further claims.<sup>147</sup> Then, the court discussed how it found the plaintiffs’ contention “that, when Congress passed the PLRA, it presumed the existence of a *Bivens* cause of action for prisoner abuse” even more persuasive.<sup>148</sup>

Instead of resting its denial on the passing of the PLRA, the court found a factor counselling hesitation in the fact that personal liability could interfere with administrative procedures.<sup>149</sup> But the court still felt compelled to explain its determination by pointing out that, in the Second Circuit, “The threshold for concluding that a factor counsels hesitation ‘is remarkably low.’”<sup>150</sup> Additionally, the district court found that the FTCA was an adequate alternative remedy notwithstanding the Court’s finding in *Carlson* that the remedies the FTCA provided were inadequate.<sup>151</sup> The *Turkmen* court thought that a new “far broader view” of alternative remedies was one of the reasons behind the Court’s declaration that it may have decided the three seminal *Bivens* cases differently today.<sup>152</sup>

This case is but one of many in which district courts have taken up *Ziglar*’s mandate and viewed extending *Bivens* actions with disfavor.<sup>153</sup> Many district courts disagreed with *Turkmen*’s assessment of the PLRA and held that Congress’s failure to provide a damages remedy when regulating claims that arise from jails and prisons indicated that courts should hesitate to give any new *Bivens* rights to “prisoners.”<sup>154</sup> Additionally,

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147. Id. at \*7 (quoting *Ziglar*, 137 S. Ct. at 1865).

148. Id.

149. Id. at \*8–9 (describing procedures that prescribed how wardens should respond to staff misconduct and directed special treatment of post-9/11 detainees).

150. Id. at \*9 (quoting *Arar v. Ashcroft*, 585 F.3d 559, 574 (2d Cir. 2009)). Under this low bar, the type of hesitation that would prevent the extension of *Bivens* “is a pause, not a full stop.” Id.

151. Id. at \*10 (“[W]hile the absence of an explicit declaration by Congress that the FTCA is intended to be a substitute for *Bivens* may have been dispositive to the Court that decided *Carlson*, that absence is of little significance after *Ziglar*.”).

152. Id. (quoting *Ziglar*, 137 S. Ct. at 1856).

153. Alexander A. Reinert, The Influence of Government Defenders on Affirmative Civil Rights Enforcement, 86 Fordham L. Rev. 2181, 2187 (2018) (“[T]he Court issued a decision on *Bivens* remedies that already is resonating in every *Bivens* case being heard in the lower courts.”).

154. See, e.g., *Vanaman v. Molinar*, No. CV-17-00222-TUC-JGZ, 2018 WL 4698655, at \*3 (D. Ariz. Sept. 28, 2018) (“Congress passed the [PLRA], which ‘suggests that Congress does not want a damages remedy, which is itself a factor counseling hesitation.’” (quoting *Rager v. Augustine*, No. 5:15cv35/MW/EMT, 2017 WL 6627416, at \*18 (N.D. Fla. Nov. 8, 2017), adopted by 2017 WL 6627784 (N.D. Fla. Dec. 28, 2017)); *Muhammad v. Gehrke*, No. 2:15-cv-00334-WTL-MJD, 2018 WL 1334936, at \*4 (S.D. Ind. Mar. 15, 2018) (“Congress has been active in the area of prisoners’ rights, and its actions—not creating new rights—do not support the creation of a new *Bivens* claim.”); *Morgan v. Shivers*, No. 1:14-cv-7921-GHW,

numerous district courts have agreed with the court in *Turkmen* and refused to extend *Bivens* because the FTCA provides an “adequate alternate remedy.”<sup>155</sup> While some of those claims arose in a context that differed significantly from *Carlson*,<sup>156</sup> some were more directly on point.<sup>157</sup> For example, in *Mercer v. Matevousian*, the court refused to recognize an Eighth Amendment *Bivens* conditions-of-confinement claim because “such a claim differ[ed] from a medical care claim”<sup>158</sup>—a statement that is suspect in light of the Supreme Court’s assessment of those claims.<sup>159</sup> After declaring the two claims distinct, the court went on to find that the FTCA and internal procedures afforded an alternative remedy and that the PLRA indicated that “Congress has been active in the area of prisoners’ rights, and its actions do not support the creation of a new *Bivens* claim.”<sup>160</sup>

These trends have led some to question whether the Supreme Court has implicitly limited *Bivens*, *Carlson*, and *Davis* to their facts.<sup>161</sup> Justices Scalia and Thomas urged the Court to follow this approach in *Malesko* and *Minneci*,<sup>162</sup> and Justices Thomas and Gorsuch went a step further in *Hernandez*,

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2018 WL 618451, at \*7 (S.D.N.Y. Jan. 29, 2018) (“This statutory scheme [in the PLRA] further causes the Court to hesitate in extending an implied damages remedy here.”).

155. *Turkmen*, 2018 WL 4026734, at \*10 (“Since *Ziglar*, other courts have questioned the continued vitality of *Carlson*’s holding that FTCA and *Bivens* claims may proceed as parallel, complementary causes of action, and have declined to permit *Bivens* claims to proceed because the FTCA provides an adequate alternative remedy.”).

156. See, e.g., *Huckaby v. Bradley*, No. 1:16-cv-4327 (NLH/KMW), 2018 WL 2002790, at \*1, \*6 (D.N.J. Apr. 30, 2018) (finding that the FTCA provides an alternative remedy for Fifth Amendment violations that occur in military detention); *Free v. Peikar*, No. 1:17-cv-00159 MJS (PC), 2018 WL 905388, at \*5–6 (E.D. Cal. Feb. 15, 2018) (finding that the FTCA provides an alternative remedy for First Amendment claims).

157. Many courts refused to extend *Bivens* to cover claims that were nearly identical to the claims brought in *Carlson*. See, e.g., *Williams v. Verna*, No. 1:16-cv-00764-AWI-SAB (PC), 2018 WL 5777365, at \*6–8 (E.D. Cal. Oct. 31, 2018) (refusing to extend *Bivens* to cover an Eighth Amendment conditions-of-confinement claim because of the availability of administrative remedies and the congressional intent signaled by the PLRA); *Mercer v. Matevousian*, No. 1:18-cv-00265-DAD-BAM (PC), 2018 WL 3917969, at \*3–4 (E.D. Cal. Aug. 14, 2018) (refusing to extend *Bivens* to cover an Eighth Amendment conditions-of-confinement claim because of the availability of administrative remedies, the FTCA, and the PLRA).

158. *Mercer*, 2018 WL 3917969, at \*4.

159. See supra note 98.

160. *Mercer*, 2018 WL 3917969, at \*3.

161. Constitutional Remedies—*Bivens* Actions—*Ziglar v. Abbasi*, 131 Harv. L. Rev. 313, 313 (2017) [hereinafter Constitutional Remedies] (“[F]or the sake of judicial candor and litigative efficiency [the Court] should hold that the *Bivens* cause of action is limited to the facts of *Bivens*, *Davis*, and *Carlson*.”); see also Daniel B. Rice & Jack Boeglin, *Confining Cases to Their Facts*, 105 Va. L. Rev. 865, 882–84 (2019) (arguing that the Court has confined its three *Bivens* cases to their facts by implication).

162. See Rice & Boeglin, supra note 161, at 882–84; see also *Minneci v. Pollard*, 565 U.S. 118, 131–32 (2012) (Scalia, J., concurring) (“As I have previously stated, I would limit *Bivens* and its two follow-on cases to the precise circumstances that they involved.” (citations omitted) (citing *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 75 (2001) (Scalia, J., concurring); *Carlson v. Green*, 446 U.S. 14 (1980); *Davis v. Passman*, 442 U.S. 228 (1979))).

urging the Court to “consider discarding the *Bivens* doctrine altogether.”<sup>163</sup> Proponents of cabining *Bivens* point to *Ziglar*’s “unorthodox manner of distinguishing cases” and the near-fatal special factors analysis to argue that it is almost impossible for new *Bivens* claims to survive.<sup>164</sup>

2. *Creation of Doctrinal Conflict.* — But the Supreme Court has not expressly limited the *Bivens* cases to their facts, and courts that have decided cases arising within the *Carlson* context have continued to find that *Bivens* provides a cause of action.<sup>165</sup> These cases indicate that, at the very least, *Carlson* has not been restricted to its facts. The persistence of these cases also points to the existence of a doctrinal conflict—as people incarcerated postconviction have the opportunity to bring claims that are unavailable to people detained pretrial. This conflicts with the Court’s explicit mandate that “pretrial detainees . . . retain at least those constitutional rights . . . enjoyed by convicted prisoners.”<sup>166</sup>

However, some courts have not been deterred by *Ziglar*’s pronouncement that extending *Bivens* is disfavored.<sup>167</sup> They either have allowed some flexibility into determining whether claims arose in a new context,<sup>168</sup> or they

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163. *Hernandez v. Mesa*, 140 S. Ct. 735, 750 (2020) (Thomas, J., concurring).

164. See Constitutional Remedies, supra note 161, at 318 (stating that “it will be very difficult for any case not presenting those facts to survive”); Woo, supra note 57, at 516 (“As a result of *Abbasi*, however, the Court may have just issued the ‘final blow’ to *Bivens* availability in any situation—with the exception of claims mirroring the *very specific* facts of its early decisions.”).

165. See, e.g., *Taylor v. Gilbert*, No. 2:15-cv-00348-JMS-MJD, 2019 WL 1396978, at \*1, \*6 (S.D. Ind. Mar. 28, 2019) (awarding damages for an Eighth Amendment claim based on excessive force); see also, e.g., *Hunt v. Warden*, No. 16-16639, 2018 WL 4191016, at \*2 n.1 (11th Cir. Aug. 31, 2018) (remarking that the plaintiff’s medical-related claims under the Eighth Amendment could be brought under *Bivens* had they been sufficient); *Carlucci v. Chapa*, 884 F.3d 534, 538–40 (5th Cir. 2018) (remanding for review of factual basis for *Bivens* Eighth Amendment medical-care claim); *Bruno v. United States*, No. 3:18CV1390-MCR-HTC, 2019 WL 2719803, at \*6 (N.D. Fla. May 30, 2019) (dismissing an Eighth Amendment claim for failure to state a claim after dismissing other *Bivens* claims because they arose in a new context and there were special factors counselling hesitation), adopted by No. 3:18CV1390-MCR-HTC, 2019 WL 2717973 (N.D. Fla. June 28, 2019); *Leinheiser v. T. Hoey*, No. 17-11642 (RBK) (AMD), 2018 WL 6427866, at \*13 (D.N.J. Dec. 7, 2018) (allowing a *Bivens* Eighth Amendment medical-care claim to proceed); *Scott v. McGann*, No. CV 17-5865 (JBS-JS), 2018 WL 3546190, at \*3 (D.N.J. July 24, 2018) (same).

166. *Bell v. Wolfish*, 441 U.S. 520, 545 (1979); see also supra section I.B.

167. The impact *Hernandez* will have on this trend remains to be seen.

168. See *Ramirez v. Tatum*, No. 17 CIV. 7801 (LGS), 2018 WL 6655600, at \*6–8 (S.D.N.Y. Dec. 19, 2018) (allowing a plaintiff’s claims for inadequate medical care under the Fifth Amendment to proceed but not performing the new-context inquiry); *Laurent v. Borecky*, No. 17-CV-3300 (PKC) (LB), 2018 WL 2973386, at \*4–5 (E.D.N.Y. June 12, 2018) (finding that a Fifth Amendment inadequate-medical-care claim does not arise in a new context); see also, e.g., *Lineberry v. Johnson*, No. CV 5:17-04124, 2018 WL 4232907, at \*9–10 (S.D. W. Va. Aug. 10, 2018) (holding that excessive force claims under the Eighth Amendment do not present a new context), adopted sub nom. *Lineberry v. United States*, No. 5:17-CV-04124, 2018 WL 4224458 (S.D. W. Va. Sept. 5, 2018); *Doty v. Hollingsworth*, No. CV 15-3016 (NLH), 2018 WL 1509082, at \*3 (D.N.J. Mar. 27, 2018) (allowing a plaintiff’s Eighth Amendment

have recognized that claims presented a new context but found that special factors did not counsel hesitation.<sup>169</sup> Some courts, like the court in *Turkmen*, have not embraced the Supreme Court's dicta assessment of the PLRA and have held that the PLRA does not indicate that courts should abstain from recognizing *Bivens* claims.<sup>170</sup> And courts have cited *Carlson* for the proposition that the FTCA does not provide an adequate alternative remedy.<sup>171</sup> For example, the Third Circuit in *Bistrian v. Levi* allowed a plaintiff to bring a Fifth Amendment failure-to-protect claim based on incidents that occurred while he was detained pretrial.<sup>172</sup> The court determined that this claim did not present a new context because the Supreme Court previously recognized an Eighth Amendment failure-to-protect claim in *Farmer v. Brennan*.<sup>173</sup> The court also adopted Justice Breyer's reasoning in his *Ziglar* dissent and stated that the distinction between Fifth Amendment and Eighth

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failure-to-protect claim to proceed because the context was similar to the Court's decisions in *Carlson v. Green*, 446 U.S. 14 (1980), and *Farmer v. Brennan*, 511 U.S. 825 (1994)).

169. *Moneyham v. United States*, No. EDCV 17-329-VBF (KK), 2018 WL 3814586, at \*3–4 (C.D. Cal. May 31, 2018) (allowing an Eighth Amendment claim because “[t]he mere availability of a claim under the FTCA . . . is not sufficient to foreclose a *Bivens* claim,” the PLRA “does not sufficiently counsel against extending” *Bivens*, the claim is similar enough to *Carlson* to not affect officers’ work, and the claim promotes deterrence), adopted by No. ED CV 17-00329-VBF-KK, 2018 WL 3807839 (C.D. Cal. Aug. 6, 2018); *Jerra v. United States*, No. 2:12-cv-01907-ODW (AGRx), 2018 WL 1605563, at \*5 (C.D. Cal. Mar. 29, 2018) (allowing an Eighth Amendment excessive force claim because damages were the only way of remedying the wrong and *Ziglar*'s special factors concerns were not implicated); *Cuevas v. United States*, No. 16-CV-00299-MSK-KMT, 2018 WL 1399910, at \*4 (D. Colo. Mar. 19, 2018) (allowing a nonmedical Eighth Amendment claim to proceed because administrative remedies were insufficient and it did not implicate *Ziglar*'s concerns); *Leibelson v. Collins*, No. CV 5:15-CV-12863, 2017 WL 6614102, at \*12 (S.D. W. Va. Dec. 27, 2017) (allowing nonmedical deliberate indifference claims to proceed because the “case does not implicate national security, prison policy, or other executive or legislative functions”).

170. See *Turkmen v. Ashcroft*, No. 02-CV-2307 (DLI) (SMG), 2018 WL 4026734, at \*7 (E.D.N.Y. Aug. 13, 2018) (accepting the plaintiffs' argument “that, when Congress passed the PLRA, it presumed the existence of a *Bivens* cause of action for prisoner abuse”); see also, e.g., *Bistrian v. Levi*, 912 F.3d 79, 92–93 (3d Cir. 2018) (stating that the PLRA would not cause the court to hesitate because the PLRA does not indicate an intent to preclude *Bivens* claims); *Lineberry*, 2018 WL 4232907, at \*10–11 (deciding that the PLRA does cause the court to hesitate because excessive force claims are frequently handled by courts and they do not implicate broader Bureau of Prison policies); *McLean v. Gutierrez*, No. EDCV15275RGKSP, 2017 WL 6887309, at \*19 (C.D. Cal. Sept. 28, 2017) (same), adopted by No. EDCV15275 RGKSP, 2018 WL 354604 (C.D. Cal. Jan. 10, 2018).

171. *Bistrian*, 912 F.3d at 92 (stating that it does not consider the FTCA an adequate alternative remedy); *Lineberry*, 2018 WL 4232907, at \*10 (“The Supreme Court, however, has held that the FTCA does not provide an alternative remedial process bearing on the availability of a *Bivens* remedy.”); *McLean*, 2017 WL 6887309, at \*19 (relying on the Court’s determination that the FTCA is not an adequate alternative to a *Bivens* claim).

172. 912 F.3d at 88.

173. Id. at 90 (citing *Farmer v. Brennan*, 511 U.S. 825, 832–49 (1994)). The court relied on the Supreme Court's decision in *Farmer* even though it “did not explicitly state that it was recognizing a *Bivens* claim” and it was not one of three cases mentioned in *Ziglar*. Id. at 89–90. The court “decline[d] to ‘conclude [that the Supreme Court's] more recent cases

Amendment claims was immaterial because “it is a given that the Fifth Amendment provides the same, if not more, protection for pretrial detainees than the Eighth Amendment does for imprisoned convicts.”<sup>174</sup> Although the court did not need to reach the special-factors analysis, it concluded that special factors did not counsel hesitation. The court relied on *Carlson*’s reasoning when determining that “the existence of an FTCA remedy does not foreclose an analogous remedy under *Bivens*” and thought that “the FTCA itself appears to recognize the complementary existence of *Bivens* actions.”<sup>175</sup> When discussing other special factors, the court determined that congressional silence when enacting the PLRA did not indicate an intention to foreclose *Bivens* suits.<sup>176</sup> The court then concluded its analysis by finding that “since failure-to-protect claims have been allowed for many years, there is no good reason to fear that allowing [the plaintiff’s] claim [would] unduly affect the independence of the executive branch in setting and administering prison policies.”<sup>177</sup>

Furthermore, two judges in New York issued rulings that extended *Bivens* to cover the medical-care claims of people detained pretrial. In *Laurent v. Borecky*, a judge in the Eastern District of New York distinguished the case from *Ziglar* because the circumstances of that case were more similar to the circumstances presented in *Carlson*.<sup>178</sup> Both cases raised claims that corrections staff injured the plaintiffs directly, and these claims were easily governed by the deliberate indifference standard.<sup>179</sup> The court also held that

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have, by implication, overruled an earlier precedent.” Id. at 91 (quoting *Agostini v. Felton*, 521 U.S. 203, 237 (1997)).

174. Id. at 91; see also *supra* notes 107–110 and accompanying text.

175. *Bistrian*, 912 F.3d at 92. The court thought that Congress implicitly recognized *Bivens* actions “by creating an exception for suits against individual federal officers for constitutional violations.” Id. (citing *Vanderklok v. United States*, 868 F.3d 189, 201 (3d Cir. 2017)). It also decided that “[t]he administrative grievance process is not an alternative because it does not redress [the plaintiff’s] harm, which could only be remedied by money damages.” Id. (citing *Nyhuis v. Reno*, 204 F.3d 65, 70 (3d Cir. 2000)).

176. The court stated that congressional silence was not persuasive because the Act was intended to remedy a separate issue, see *id.* at 92–93 (“[T]he PLRA reflects Congress’s intent to make more rigorous the process prisoners must follow to bring suit in federal court.”), and it has been interpreted to apply to *Bivens* claims. See *id.* at 93 (“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.”).

177. *Id.* at 93.

178. See No. 17-CV-3300 (PKC)(LB), 2018 WL 2973386, at \*5 (E.D.N.Y. June 12, 2018) (“While this case admittedly also presents a different constitutional right at issue . . . unlike *Ziglar*, it bears an extremely strong ‘resemblance to [one of] the three *Bivens* claims the [Supreme] Court has approved in the past: . . . a claim against prison officials for failure to treat an inmate’s asthma.’” (quoting *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1861 (2017))). *Ziglar* differed from *Laurent* and *Carlson* because the claim depended on a warden’s complicity in the mistreatment of people detained pretrial, not his individual acts of mistreatment. See *Ziglar*, 137 S. Ct. at 1864–65 (“[T]he judicial guidance available to this warden, with respect to his supervisory duties, was less developed.”).

179. See *Laurent*, 2018 WL 2973386, at \*5.

the claim did not arise in a new context because it considered the two deliberate indifference standards to be identical.<sup>180</sup> Then, in *Ramirez v. Tatum*, a judge in the Southern District of New York allowed a *Bivens* claim to proceed after recognizing that the plaintiffs had brought a medical-care claim under the Fifth Amendment.<sup>181</sup> Although this court conducted a new-context and special-factors analysis for the plaintiff's retaliation and excessive force claims, it did not do so for the medical-care claims, indicating that it did not consider those claims as arising in a new context.<sup>182</sup>

### B. Congressional Inaction

As section II.A demonstrated, the current trend in the lower courts—in keeping with the Supreme Court's recommendations—is to refuse to extend *Bivens* claims to cover anything other than Eighth Amendment conditions-of-confinement claims or, even more specifically, Eighth Amendment medical-care claims. Yet, as this section will discuss, Congress too is unlikely and unwilling to act, thus allowing the doctrinal incongruity between the *Bivens* and *Kingsley* doctrines to persist.

1. *Congress Is Unlikely to Act.* — Despite some indications that lower courts may be willing to recognize new *Bivens* claims, most courts are currently unwilling to do so.<sup>183</sup> Many of the courts refusing to extend *Bivens* ground their decisions in congressional activity—either providing an alternate remedy or passing the PLRA—that could suggest that Congress should be the body to decide if any new *Bivens* claims ought to exist in this area of the law.<sup>184</sup> But this approach raises questions about Congress's actual capacity to respond to the specific issue identified in this Note: the ability of people detained pretrial to bring the *Bivens* claims that people incarcerated postconviction can already bring.<sup>185</sup>

The text of the PLRA and other statutes could imply that Congress is unlikely to address the nuances of this issue because Congress rarely conceptualizes people detained pretrial and people incarcerated postconviction as distinct populations when regulating how those people can access

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180. See *id.* This holding appears to conflict with Second Circuit precedent separating claims brought by people detained pretrial and people incarcerated postconviction. Compare *id.* at \*3 (quoting an Eighth Amendment case that proposes a subjective deliberate indifference standard), with *Darnell v. Pineiro*, 849 F.3d 17, 34–35 (2d Cir. 2017) (using an objective deliberate indifference standard).

181. No. 17 CIV. 7801 (LGS), 2018 WL 6655600, at \*6–8 (S.D.N.Y. Dec. 19, 2018) (citing *Darnell*, 849 F.3d at 35).

182. See *id.* at \*5–6.

183. See supra section II.A.1.

184. See supra notes 154–155 and accompanying text.

185. Congress's qualifications for determining whether *Bivens* actions should be brought in general appears to have been decided by the Court in *Ziglar*. See supra section I.A.3. Scholars, however, have noted that Congress is unlikely to take any action to extend *Bivens*. See, e.g., *Zipursky*, supra note 31, at 2174 (criticizing *Ziglar*'s separation of powers argument as “clearly disingenuous since we appear to be very far from a Congress that would confer such remedies”).

the judicial system. The PLRA defines a “prisoner” as “any person incarcerated or detained in any facility who is accused of, convicted of, sentenced for, or adjudicated delinquent for, violations of criminal law or the terms and conditions of parole, probation, pretrial release, or diversionary program.”<sup>186</sup> This broad definition is used again in a provision restricting the type of relief courts may provide to “prisoners” along with a definition of “prison” that conflates “any Federal, State, or local facility that incarcerates or detains juveniles or adults accused of, convicted of, sentenced for, or adjudicated delinquent for, violations of criminal law.”<sup>187</sup> Similarly, the Prison Rape Elimination Act (PREA) and the Religious Land Use and Institutionalized Persons Act (RLUIPA) contain definitions that do not differentiate between pretrial detention and postconviction incarceration.<sup>188</sup> These statutes indicate that, when Congress legislates in this area of the law, it often collapses the distinction between people detained pretrial and people incarcerated postconviction, making it unlikely that Congress will pass a law specifically designed to address the importance of this distinction.<sup>189</sup>

2. *Congress Is Unwilling to Act.* — Furthermore, even if Congress recognized the need to make these distinctions, it would be unlikely to act in a way that prioritizes resolving this conflict, let alone resolving it in a way that enhances the rights of detained people.<sup>190</sup> Legislators making decisions about criminal justice tend to cater “to the needs and wants of prosecutors and the police, and to make popular symbolic statements” that do little to promote coherence or reform.<sup>191</sup> Additionally, legislators may feel

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186. 42 U.S.C. § 1997e(h) (2012).

187. 18 U.S.C. § 3626(g)(3), (5) (2012).

188. The PREA defines “inmate” using the PLRA’s definition and defines “prison” as “any confinement facility of a Federal, State, or local government, whether administered by such government or by a private organization on behalf of such government, and includes . . . any local jail or police lockup.” 42 U.S.C. § 15609(2), (7). The PREA does include separate definitions for “jail” and “police lockup,” but these terms are used only to describe the sources of data underlying the act’s policies, and not to develop the policies themselves. See id. § 15609(3), (6). RLUIPA uses a definition for “institution” that includes “a jail, prison, or other correctional facility” as well as “a pretrial detention facility.” Id. § 1997(1)(B).

189. For an example of a statute unrelated to access to the judicial process that does recognize the distinction between these populations, see 18 U.S.C. § 3142 (mandating that a detention order must “direct that the person be committed . . . for confinement in a corrections facility separate, to the extent practicable, from persons awaiting or serving sentences or being held in custody pending appeal”).

190. The importance of a resolution that enhances the rights of people detained pretrial, instead of contracting the rights of people detained pretrial and people incarcerated postconviction is discussed *infra* in section III.B.3.

191. William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 Mich. L. Rev. 505, 546 (2001) [hereinafter Stuntz, *Pathological Politics*].

disincentivized to advocate for reform because they do not consider people who commit crimes “a constituency worth protecting.”<sup>192</sup> This dynamic has worsened over time as geographic migrations and the centralization of criminal justice enforcement allow criminal justice policies to operate “mostly [as] political symbols or legal abstractions.”<sup>193</sup> The distance created can produce decisionmakers that are typically unaffected by their decisions, and “[d]ecisionmakers who neither reap the benefit of good decisions nor bear the cost of bad ones tend to make bad ones.”<sup>194</sup>

Scholars identify three main reasons why legislators routinely fail to sufficiently protect the rights of people who are involved with the criminal justice system. First, in most states, people with felony convictions are unable to vote while they are incarcerated,<sup>195</sup> and, in some states, they cannot vote after they serve their sentence.<sup>196</sup> This population is “literally disenfranchised” and cannot advocate for their concerns with their elected representatives.<sup>197</sup> But, even though people detained pretrial can vote in every state,<sup>198</sup> they are generally unable to do so.<sup>199</sup> Because they have “only limited contact with the outside world, detained people must rely on jail administrators to provide them with the information and resources they

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192. J. Richard Broughton, Congressional Inquiry and the Federal Criminal Law, 46 U. Rich. L. Rev. 457, 471 (2012) (“[L]egislators may feel that the only real beneficiaries of reform are the ‘bad guys’ or those with a propensity to commit crimes—hardly a constituency worth protecting, in the mind of the typical legislator.”).

193. William J. Stuntz, *Unequal Justice*, 121 Harv. L. Rev. 1969, 1974 (2008).

194. *Id.*

195. See Laleh Ispahani, ACLU & Tricia Forbes, Right to Vote, Voting While Incarcerated iii (2005), [https://www.aclu.org/sites/default/files/pdfs/votingrights/votingwhileincarc\\_20051123.pdf](https://www.aclu.org/sites/default/files/pdfs/votingrights/votingwhileincarc_20051123.pdf) [<https://perma.cc/Z4CQ-EPTN>] (“People in prison generally are not able to vote, unless they are incarcerated in Maine or Vermont.”); Felon Voting Rights, Nat'l Conference State Legislatures (Oct. 14, 2019), <https://www.ncsl.org/research/elections-and-campaigns/felon-voting-rights.aspx> [<https://perma.cc/K6H6-H48Y>] (“It has been common practice in the United States to make felons ineligible to vote, in some cases permanently.”).

196. For a state-by-state breakdown, see *Felon Voting Rights*, *supra* note 195.

197. Eric Berger, Lethal Injection and the Problem of Constitutional Remedies, 27 Yale L. & Pol'y Rev. 259, 312 (2009) (describing how a lack of political protection “is more likely where the victims are prisoners or inmates of mental institutions, literally disenfranchised persons with no access to normal legislative processes”).

198. Ispahani & Forbes, *supra* note 195, at iii.

199. Danielle Root & Lee Doyle, Protecting the Voting Rights of Americans Detained While Awaiting Trial, Ctr. for Am. Progress (Aug. 23, 2018), <https://www.americanprogress.org/issues/democracy/reports/2018/08/23/455011/protecting-voting-rights-americans-detained-awaiting-trial> [<https://perma.cc/79RZ-GQ8B>] (“Jails make it so that detained people often lack two critical elements necessary for voting: information and access.”). Additionally, people detained pretrial who have a prior felony conviction may be barred from voting in some states. See *Felon Voting Rights*, *supra* note 195.

need,” and these “administrators do not always prioritize election information and accessibility.”<sup>200</sup> As a result, this population is often practically disenfranchised.<sup>201</sup>

Second, this representational problem is exacerbated because people who are not directly affected by the criminal justice system are generally unable to relate to the people who are affected.<sup>202</sup> This may be partly due to the perception that “those in prison all deserve to be there,” which can lead to lack of support for prison reform.<sup>203</sup> And it may be partly due to the features of our criminal justice system that allow the majority of citizens to feel as if they will never be affected by it.<sup>204</sup> As most voters do not fear ending up in jails or prisons, they are less likely to advocate for those who do spend time within those facilities.<sup>205</sup>

The characterization of this population as “the other” points to the third reason that Congress is unlikely to intervene—the socio-economic makeup of the affected group. Prisons and jails are filled primarily with people living in poverty who have a limited education.<sup>206</sup> This population often has “no money to give” and “come[s] from families with[out] the

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200. Root & Doyle, *supra* note 199.

201. See *id.* (“[V]oting-eligible Americans detained in jails participate in elections at very low rates. An examination of one Ohio county jail, for example, estimated that only 8 out of 1,600 detained people would vote in the 2016 election.”). While it could be argued that people with felony convictions forfeit their right to vote by committing serious crimes, an occurrence anticipated by the Constitution, see U.S. Const. amend. XIV, § 2 (allowing states to prevent a person with a felony conviction from voting), it could not be argued that people who have not yet been convicted forfeit those same rights.

202. See Daniel Epps, *The Consequences of Error in Criminal Justice*, 128 Harv. L. Rev. 1065, 1115 (2015) (“[V]oters and legislators, for one reason or another, have insufficient regard for the interests of criminal suspects and defendants.”). This lack of interest could be exacerbated by the fact that the general public is unaware of the harsh realities of prison life. See Nicole B. Godfrey, *Holding Federal Prison Officials Accountable: The Case for Recognizing a Damages Remedy for Federal Prisoners’ Free Exercise Claims*, 96 Neb. L. Rev. 924, 965–66 (2018) (“[T]he reality of modern-day prison life is largely unknown to the American public.”).

203. Epps, *supra* note 202, at 1106.

204. *Id.* at 1115 (explaining that the general public is unconcerned with the rights of detained and incarcerated people “[b]ecause the criminal justice ‘system is constructed so that ‘people like us’ run no realistic risk” of becoming a part of it (quoting John Hart Ely, *Democracy and Distrust* 173 (1980))); see also Bailey W. Heaps, *Note, The Most Adequate Branch: Courts as Competent Prison Reformers*, 9 Stan. J.C.R. & C.L. 281, 306 (2013) (“The result has been to place power over the criminal justice system in the hands of those least affected by it.”).

205. Epps, *supra* note 202, at 1102. (“[M]ost voters in our society have little expectation of ever facing criminal sanctions.”).

206. See Robertson, *supra* note 82, at 133 (“[F]ifty percent had incomes under \$10,000 . . . . [U]nemployment rates mirror those of the Great Depression. Fifty percent left school before . . . eleventh grade. Three of every four inmates cannot read above an eighth grade level and as many as half may be functionally illiterate.” (citations omitted)); see also Richard H. Frankel & Alistair E. Newbern, *Prisoners and Pleading*, 94 Wash. U. L. Rev. 899, 902 (2017) (discussing the high rates of intellectual and mental disabilities among incarcerated people).

resources to have significant influence in the political process.”<sup>207</sup> Thus, they are often unable to fully advocate for their interests in a wealth- and connection-driven political system.<sup>208</sup>

These three factors have led some scholars to characterize this population as a “discrete and insular minority” that is unlikely to receive sufficient protection from Congress and should therefore receive more protection from the courts.<sup>209</sup> Even though the “Court’s doctrinal consistency with [this] theory . . . has been uneven,”<sup>210</sup> this concept can be helpful when determining if courts should rely on Congress to resolve issues that affect certain groups. As Justice Stevens expressed: “The courts, of course, have a special obligation to protect the rights of prisoners. Prisoners are truly the outcasts of society. Disenfranchised, scorned and feared, . . . shut away from public view, prisoners are surely a ‘discrete and insular minority.’”<sup>211</sup> When dealing with such a politically vulnerable population, courts should be more willing to recognize the futility of waiting for Congress to react, even if they are unwilling to provide other judicial protections.

### III. SPECIAL FACTORS COUNSELLING ACTION

As discussed in Part II, currently neither courts nor Congress are likely to resolve the doctrinal conflict that prevents people detained pretrial

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207. Erwin Chemerinsky, The Essential but Inherently Limited Role of the Courts in Prison Reform, 13 Berkeley J. Crim. L. 307, 310 (2008) [hereinafter Chemerinsky, Role of the Courts].

208. See Abram Chayes, The Role of the Judge in Public Law Litigation, 89 Harv. L. Rev. 1281, 1315 (1976) (arguing for judicial intervention because people who are incarcerated “have no alternative access to the levers of power in the system”).

209. See, e.g., Erwin Chemerinsky, The Constitution in Authoritarian Institutions, 32 Suffolk U. L. Rev. 441, 459 (1999) (citing *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938)); see also Chayes, *supra* note 208, at 1315 (“Moreover, one may ask whether democratic theory really requires deference to majoritarian outcomes whose victims are prisoners . . .”); Epps, *supra* note 202, at 1102–03, 1115 (“According to the conventional wisdom, the political process consistently creates outcomes that are suboptimal or unjust when it comes to criminal law. This is because voters and legislators . . . have insufficient regard for the interests of criminal suspects and defendants.”); Godfrey, *supra* note 202, at 965–66 (recognizing that “the political process provides little oversight or protection to prisoners”). Some have also connected policies targeting people affected by the criminal justice system to policies targeting specific races, as black people are incarcerated at much higher rates than white people. For example, in 2016, black people were “incarcerated in jail at a rate 3.5 times that of white[] [people].” Zhen Zeng, DOJ, Bureau of Justice Statistics, Jail Inmates in 2016, at 3 (2018), <https://www.bjs.gov/content/pub/pdf/ji16.pdf> [<https://perma.cc/S5JN-DFQS>]; see also Robertson, *supra* note 82, at 125–29 (“Differential treatment of the races thus colors the prison population and, at the very least, portrays an unconscious racism.” (footnotes omitted)).

210. Jesse H. Choper & Stephen F. Ross, The Political Process, Equal Protection, and Substantive Due Process, 20 U. Pa. J. Const. L. 983, 986 (2018).

211. *Hudson v. Palmer*, 468 U.S. 517, 557 (1984) (Stevens, J., concurring in part and dissenting in part) (citing *Carolene Products*, 304 U.S. at 152 n.4).

from having rights that are at least equal to the rights of people incarcerated postconviction. This Part provides a solution. Section III.A discusses why courts should be willing to recognize the *Bivens* medical-care claims of people detained pretrial because such an extension is not precluded by *Ziglar*. Recognizing that only a few courts have followed this approach, section III.B argues that courts should actively recognize these claims because a resolution of the doctrinal conflict that enhances the rights of people detained pretrial is normatively superior to one that limits the rights of both populations.

#### A. Courts Should Not Find Special Factors Counselling Hesitation

Some courts, like those discussed in section II.A.2, have been willing to recognize *Bivens* claims that are not identical to the three causes of action in *Bivens*, *Carlson*, and *Davis*. Building on the logic Justice Breyer used in his dissent, courts should accept that they are able to recognize Fifth Amendment medical-care claims (1) because these claims do not arise in a new context or (2) because there are no special factors counselling hesitation.

1. *Claims Do Not Arise in a New Context.* — Courts faced with a Fifth Amendment medical-care claim could recognize that the claim does not present a new context for *Bivens* expansion because of its numerous similarities to the claim brought in *Carlson*.<sup>212</sup> These claims share not only doctrinal similarities but also practical similarities, as a Fifth Amendment claim and an Eighth Amendment claim could be brought against the same officer in the same facility for the same unconstitutional conduct.<sup>213</sup> While *Ziglar* could be seen as standing for the proposition that a context is new whenever it implicates a new constitutional amendment,<sup>214</sup> some judges appear to pursue an alternative reading that entails a more contextual approach.<sup>215</sup> Regardless of the doctrinal fidelity of this approach, the fact remains that some courts are willing to work around the Court's mandate in *Ziglar*. This could indicate that *Ziglar* need not stand for the proposition

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212. See, e.g., *Ramirez v. Tatum*, No. 17 Civ. 7801 (LGS), 2018 WL 6655600, at \*6 (S.D.N.Y. Dec. 19, 2018) (allowing a Fifth Amendment medical-care claim to proceed without conducting a special-factors analysis); *Laurent v. Borecky*, No. 17-CV-3300 (PKC) (LB), 2018 WL 2973386, at \*5 (E.D.N.Y. June 12, 2018) (considering a Fifth Amendment medical-care claim the same as an Eighth Amendment medical-care claim); cf. *Bistrian v. Levi*, 912 F.3d 79, 91 (3d Cir. 2018) (ignoring the distinction between Fifth Amendment and Eighth Amendment claims because "it is a given that the Fifth Amendment provides the same, if not more, protection for pretrial detainees than the Eighth Amendment does for imprisoned convicts").

213. See supra note 24 and accompanying text.

214. See supra note 86 and accompanying text. Further, the Court in *Hernandez* reiterated that its "understanding of a 'new context' is broad." *Hernandez v. Mesa*, 140 S. Ct. 735, 743 (2020).

215. See supra note 212.

that a variance in “the constitutional right at issue” automatically triggers the special factors analysis.<sup>216</sup>

2. *No Special Factors Counselling Hesitation.* — Additionally, even if courts do proceed to the special-factors analysis,<sup>217</sup> as will likely be required under most readings of *Ziglar*, they do not need to conclude that special factors counsel hesitation. First, Congress has not indicated that the courts should not extend *Bivens* in this manner. Neither the FTCA nor the PLRA expressly foreclose the existence of *Bivens* remedies, and some commentators and courts have even suggested that the legislative history of these statutes indicates congressional acceptance of *Bivens* claims in this area of the law.<sup>218</sup> While persuasive arguments could be made against extension,<sup>219</sup> alternative arguments are available.<sup>220</sup> Courts could seize these arguments to address the doctrinal incongruity. And, as will be discussed below, the separation of power concerns that animate the Court’s discussion of congressional intent do not counsel hesitation in light of the courts’ role in resolving doctrinal conflicts.<sup>221</sup>

Second, Fifth Amendment medical-care claims against correctional officers do not implicate the special factors concerns unrelated to congressional intent discussed in prior *Bivens* cases.<sup>222</sup> They raise neither national security concerns<sup>223</sup> nor broad questions of administrative policy<sup>224</sup>—issues

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216. *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1860 (2017).

217. See *supra* notes 87–89 and accompanying text.

218. See, e.g., *Bistrian v. Levi*, 912 F.3d 79, 92 (3d Cir. 2018) (“[T]he FTCA itself appears to recognize the complementary existence of *Bivens* actions by creating an exception for suits against individual federal officers for constitutional violations.”); Godfrey, *supra* note 202, at 954–55, 960; see also *Hernandez*, 140 S. Ct. at 748 n.9 (“By enacting [the FTCA provision permitting claims for constitutional violations], Congress made clear that it was not attempting to abrogate *Bivens* . . . .”); *Ziglar*, 137 S. Ct. at 1878 (Breyer, J., dissenting) (“[T]here is strong evidence that Congress assumed that *Bivens* remedies would be available to prisoners when it enacted the PLRA—e.g., Congress continued to permit prisoners to recover for physical injuries, the typical kinds of *Bivens* injuries.”).

219. A court could find that the FTCA is an alternative remedy in light of the expansive approach taken in cases post-*Carlson*, see *Ziglar*, 137 S. Ct. at 1863 (collecting cases), or that Congress marked its territory in the realm of prison litigation through the PLRA following the Court’s characterization of that statute in *Ziglar*. See *supra* notes 103–104 and accompanying text.

220. See *supra* notes 102–111 and accompanying text; see also *supra* section II.A.2. Courts can still find the FTCA inadequate by using the same reasoning used in *Carlson*, and they can hold that the PLRA does not foreclose *Bivens* remedies or stand for the proposition that Congress has recognized *Bivens* remedies. See *Bistrian*, 912 F.3d at 92.

221. See *infra* section III.B.

222. See Godfrey, *supra* note 202, at 927–28 (“None of these special factors are present where a federal prisoner challenges the unconstitutional conduct of a federal prison official.”).

223. See *supra* note 95 and accompanying text. Following the Court’s analysis in *Ziglar*, claims for unconstitutionally harsh conditions of confinement, even for detainees with suspected terrorist ties, do not implicate national security concerns. See *Ziglar*, 137 S. Ct. at 1863.

224. See *supra* note 149 and accompanying text. In these cases, the conduct challenged is typically a violation of a policy, not the creation of a policy. See, e.g., *Ziglar*, 137 S. Ct. at 1864 (“[T]he complaint alleges serious violations of Bureau of Prisons policy.”).

that courts consider delegated to other branches of government.<sup>225</sup> They also do not introduce a cause of action likely to overwhelm the courts or the federal government with their volume or complexity, as these suits would be relatively few in number and courts have been handling nearly identical suits in the Eighth Amendment and § 1983 contexts.<sup>226</sup> For these reasons, courts could feel comfortable finding that special factors do not counsel hesitation.

#### B. Courts Should Find Special Factors Counselling Action

In addition to not finding factors counselling them to hesitate, courts should affirmatively find factors counselling them to resolve the doctrinal incongruity by increasing the protections available to people detained pretrial. Although one could interpret Justice Breyer's dissent to raise similar concerns about doctrinal incongruity in his new-context analysis,<sup>227</sup> these more normative considerations appear better suited to the special-factors analysis, in which courts are tasked with considering their institutional role.<sup>228</sup>

##### 1. First Special Factor Counselling Action: Resolving Doctrinal Incongruity.

— As the Supreme Court has expressed, the federal courts are responsible for overseeing the constitutional claims of people within the prison system,<sup>229</sup> and that responsibility is all the more apparent when the issue preventing the proper adjudication of these claims is the result of a doctrinal incongruity to which courts are uniquely able to respond. Some have even thought that “the Court’s long retreat from *Bivens* . . . proves that the Court continues to subscribe to a key aspect of the *Bivens* view of judicial

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225. See *Ziglar*, 137 S. Ct. at 1861 (“National-security policy is the prerogative of the Congress and President.”); see id. at 1863 (explaining that, for policy decisions, “[t]he proper balance is one for the Congress, not the Judiciary, to undertake”); see also *Hernandez v. Mesa*, 140 S. Ct. 735, 744–46 (2020) (explaining that foreign relations decisions and national security matters were meant for the legislative and executive branches).

226. See supra notes 63–68 and accompanying text. Only 9,600 people are detained in federal detention facilities. Peter Wagner & Wendy Sawyer, Mass Incarceration: The Whole Pie 2019, Prison Policy Initiative (Mar. 19, 2019), <https://www.prisonpolicy.org/reports/pie2019.html> [<https://perma.cc/JZ7T-AGVV>]. The PLRA already places numerous restrictions on the suits this population can bring. See supra note 82. Even if the courts determine that Fifth Amendment medical-care claims require a different pleading standard, this standard is still clearly workable. See supra note 124.

227. See supra notes 102–111 and accompanying text.

228. See, e.g., *Rodriguez v. Swartz*, 899 F.3d 719, 744 (9th Cir. 2018) (allowing a *Bivens* claim to proceed after concluding during the special-factors analysis that the courts are “well suited . . . to consider and weigh the costs and benefits of allowing a damages action to proceed” (internal quotation marks omitted) (quoting *Ziglar*, 137 S. Ct. at 1858)).

229. See *Turner v. Safley*, 482 U.S. 78, 84 (1987) (“[F]ederal courts must take cognizance of the valid constitutional claims of prison inmates.”); *Procunier v. Martinez*, 416 U.S. 396, 405–06, (1974) (“When a prison regulation or practice offends a fundamental constitutional guarantee, federal courts will discharge their duty to protect constitutional rights.”), overruled by *Thornburgh v. Abbott*, 490 U.S. 401 (1989).

power: that the Court can and should take a leading role in shaping constitutional enforcement doctrines.”<sup>230</sup> Even those most concerned about respecting the “Constitution’s separation of legislative and judicial power” should recognize that the courts are the ones who should decide how to resolve what could be considered a purely legal, doctrinal conflict.<sup>231</sup>

The Ninth Circuit has recognized that a court’s unique ability to respond to issues affecting the legitimacy of the judicial process counsels in favor of recognizing new *Bivens* claims.<sup>232</sup> During the special-factors analysis, the court in *Lanuza v. Love* decided to extend *Bivens* because it felt that “[j]udges [were] particularly well-equipped” to address the specific claim at issue.<sup>233</sup> The court thought that this unique ability created “compelling interests that favor extending the *Bivens* remedy” and determined that “on balance, those interests outweigh the costs of allowing this narrow claim to proceed against federal officials.”<sup>234</sup>

Here too, courts should recognize that they are “particularly well-equipped”<sup>235</sup> to resolve the doctrinal conflict created by the cabining of *Bivens* in *Ziglar*.<sup>236</sup> They should follow the example set by the Ninth Circuit and find that this unique ability provides an affirmative reason for extending *Bivens* to another “narrow claim”—medical-care claims brought by people detained pretrial.<sup>237</sup> While the correct answer to the “who should decide” question “most often will be Congress,”<sup>238</sup> it can sometimes be the courts. The courts’ responsibility for resolving this doctrinal conflict is a special factor counselling action.

2. *Second Special Factor Counselling Action: Congressional Inaction.* — Additionally, courts should find a special factor counselling action in the futility of waiting for Congress to resolve this doctrinal conflict. Historically, congressional legislation related to the judicial process has not recognized the differences between people detained pretrial and people incarcerated postconviction, indicating that Congress will not recognize and respond to this conflict.<sup>239</sup> Further, Congress is unlikely to prioritize resolving this conflict, as it lacks incentives to pass legislation that addresses the

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230. Scott Michelman, The Branch Best Qualified to Abolish Immunity, 93 Notre Dame L. Rev. 1999, 2012 (2018). In fact, *Ziglar* could be seen as the Court’s effort to resolve the same type of doctrinal incongruity at issue here—the existence of two parallel doctrines that conflict. One could argue that Justice Kennedy was attempting to reconcile the Court’s doctrine of statutory interpretation with its doctrine of constitutional interpretation. See supra notes 87–89 and accompanying text.

231. *Hernandez v. Mesa*, 140 S. Ct. 735, 741 (2020).

232. *Lanuza v. Love*, 899 F.3d 1019, 1032–33 (9th Cir. 2018).

233. *Id.*

234. *Id.* at 1033.

235. *Id.* at 1032.

236. See supra section II.A.2.

237. See *Lanuza*, 899 F.3d at 1032.

238. *Hernandez v. Mesa*, 140 S. Ct. 735, 750 (2020) (quoting *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1857 (2017)).

239. See supra section II.B.1.

rights of people detained pretrial.<sup>240</sup> As this doctrinal incongruity will likely persist unless courts take action, courts should determine that they are the ones who should decide whether to extend *Bivens* to cover the medical-care claims of people detained pretrial.<sup>241</sup>

*3. Third Special Factor Counselling Action: Increasing Protections for Pretrial Detainees.* — Lastly, courts could resolve the doctrinal incongruity by determining that *Carlson v. Green*<sup>242</sup> is restricted to its facts, but this solution is less satisfactory than one that allows claims brought by people detained pretrial. Restricting *Carlson* would cause people incarcerated postconviction to have the same rights as people detained pretrial, as neither population would be able to bring *Bivens* claims for constitutionally inadequate medical care.<sup>243</sup> This solution would ensure that the *Bivens* doctrine would adhere to *Bell's* mandate that “pretrial detainees . . . retain at least those constitutional rights . . . enjoyed by convicted prisoners,”<sup>244</sup> but it would not respond to recent decisions by the Supreme Court and circuit courts that seem to suggest that people detained pretrial deserve easier access to the judicial system.<sup>245</sup> As Justice Breyer stated, “The violation here [is] worse,” so courts should therefore be more inclined to allow people detained pretrial to bring claims for violations of their constitutional rights.<sup>246</sup>

Restricting *Carlson* is also an unsatisfying response because it would address the doctrinal incongruity while leaving both populations without remedies for wrongs that cannot be rectified by injunctions and without whatever deterrent effect damages could provide. While injunctive relief can rectify many of the harms associated with conditions of confinement,<sup>247</sup> this relief is ineffective at providing a remedy to those whose rights

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240. See Chemerinsky, Role of the Courts, supra note 207, 311–12 (“[I]n some instances the courts are the only entity with the will to enforce the Constitution.”); Stuntz, Pathological Politics, supra note 191, at 600 (“[T]he key to better lawmaking lies in some lawmaker other than legislatures or prosecutors. The most plausible lawmakers are the courts.”).

241. See Chemerinsky, Role of the Courts, supra note 207, at 311 (arguing that because “[t]he political branches have inadequate incentives to comply with the Constitution[,] . . . [u]nless judges act, constitutional violations in prisons will go unremedied”).

242. 446 U.S. 14 (1980).

243. Some have even argued that such action is “a logical next step,” following the restrictions imposed in *Ziglar*. Constitutional Remedies, supra note 161, at 322.

244. *Bell v. Wolfish*, 441 U.S. 520, 545 (1979).

245. See supra section I.B.

246. *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1877–78 (2017) (Breyer, J., dissenting).

247. See supra note 78.

are no longer being violated.<sup>248</sup> For these plaintiffs, “[I]t is damages or nothing.”<sup>249</sup> Additionally, despite the practical reality that individual defendants rarely, if ever, pay their own judgements because they are indemnified by the federal government,<sup>250</sup> some courts and commentators continue to promote the deterrent potential of damages in civil rights litigation.<sup>251</sup> To the extent damages can deter harmful conduct, people detained and incarcerated in federal facilities should be able to use that deterrent to their advantage given the often dangerous conditions in U.S. prisons and jails.<sup>252</sup>

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248. See Mashaw et al., *supra* note 41, at 1433–34 (“Injunctive relief . . . is not a satisfactory remedy for the one-time abridgement of rights that occurred in the past . . . ”). This may be because they are no longer detained, they are no longer subject to the unconstitutional behavior, or, like Joseph Jones, they are no longer alive. See *supra* notes 1–13. Additionally, in the jail and prison context, the court’s ability to provide injunctive relief is restricted by the PLRA. See Chemerinsky, *Role of the Courts*, *supra* note 207, at 315 (describing the limitations the PLRA places on court’s ability to provide injunctive relief). For a discussion on how the Court’s willingness to provide injunctive relief instead of damages for constitutional violations “misconceives the rationale for [damages] suits and their venerable place in the hierarchy of relief for official wrongs,” see Margulies, *supra* note 71, at 1174–75.

249. *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 410 (1971) (Harlan, J., concurring).

250. Cornelia T.L. Pillard, *Taking Fiction Seriously: The Strange Results of Public Officials’ Individual Liability Under Bivens*, 88 Geo. L.J. 65, 65 (1999) (“Individual liability under *Bivens* is fictional, however, because the federal government in practice functions as the real party in interest, paying for representation and reimbursing the sued individuals when they settle or pay judgments.”).

251. *Id.* at 79 (“From Justice Brennan’s opinion for the Court in *Carlson v. Green*[, 446 U.S. 14 (1980),] to Justice Thomas’s opinion for a unanimous Court in *FDIC v. Meyer*, [510 U.S. 471 (1994),] the Court has defended individual liability as the best deterrent rule.”); see also *Hernandez v. Mesa*, 140 S. Ct. 735, 756 (2020) (Ginsburg, J., dissenting) (explaining how the *Ziglar* Court accepted that suits against individual officers “deter behavior incompatible with constitutional norms”); Mashaw et al., *supra* note 41, at 1433–34 (describing the potential inadequacy of injunctive relief); Godfrey, *supra* note 202, at 966 (“[T]he very purpose of punitive damages in constitutional cases is to deter the powerful from exerting unfair control over the powerless.”).

252. See David M. Shapiro & Charles Hogle, *The Horror Chamber: Unqualified Impunity in Prison*, 93 Notre Dame L. Rev. 2021, 2060 (2018) (“We do not know the marginal effect of liability as a deterrent—that is, we do not know how much *worse* it might be if correctional officers were, say, entitled to absolute immunity as a matter of formal doctrine.”). The ability to utilize even a minor deterrent effect from the prospect of damages could be crucial in a detention context, as experts across disciplines “have endorsed the view that structural characteristics of the prison environment increase the likelihood of staff either abusing prisoners or permitting abuse to go on under their watch.” *See id.* at 2024–25; see also Godfrey, *supra* note 202, at 965–66 (“[S]ocial psychologists have long recognized that authoritarian institutions like prisons are ripe for allowing and even encouraging abuses by those in power.”). This concept is most chillingly illustrated in the Stanford Prison Experiment, in which college students were divided randomly into two groups, prison guards and prisoners, to see how they would respond to the power dynamics inherent in that relationship. Godfrey, *supra* note 202, at 966–67. The people designated as the prison guards became so abusive that the study had to conclude early—after only six days. *Id.* at 967. For more information about the potential for abusive and degrading conditions in prisons

## CONCLUSION

Courts should look for ways to recognize the Fifth Amendment medical-care claims brought by people detained pretrial to resolve an unjust doctrinal incongruity. These claims are nearly identical to the claims that continue to be brought by people incarcerated postconviction and raise the same special factors concerns. Therefore, even those who think the Supreme Court intended to prevent the creation of any new *Bivens* actions should agree that it is illogical to accept one and reject the other, especially considering the line of cases insisting that people detained pretrial have rights that are at least as robust as those given to people incarcerated postconviction. Because of courts' unique ability to recognize this conflict and the improbability of Congress resolving this issue, courts should recognize that they are the ones who should resolve the conflict. And, given the restrictions created by Congress and the vulnerability of this marginalized group, courts should resolve the doctrinal conflict in a way that enhances the rights of people detained pretrial.

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and jails, see Shapiro & Hogle, *supra*, at 2024–36 (describing the disturbing and horrific treatment of individuals within U.S. prisons and jails); Aviva Stahl, Prisoners Endure A Nightmare ‘Gulag’ In Lower Manhattan, *Hidden In Plain Sight*, Gothamist, (June 19, 2018), [http://gothamist.com/2018/06/19/mcc\\_jail\\_human\\_rights\\_torture.php](http://gothamist.com/2018/06/19/mcc_jail_human_rights_torture.php) [<https://perma.cc/E5LC-FWCW>] (describing “filthy conditions, vermin infestations, substandard medical care, and violence and abuse at the hands of guards” in the Metropolitan Correctional Center, a federal detention facility in downtown Manhattan).

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