No. 24-2207

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

RENEE KAY MARTIN, Parent, individually and on behalf of TRL and on behalf of BRW,

Plaintiff-Appellant,

v.

KELAN GOURNEAU, in his individual and official capacity, et al.,

Defendants-Appellees.

On Appeal from the United States District Court
for the District of North Dakota

BRIEF FOR FEDERAL DEFENDANTS-APPELLEES KELAN GOURNEAU, MICHAEL SLATER, EVAN PARISIEN, EARL CHARBONNEAU, HEATHER BAKER, REED MESMAN, AND THE UNITED STATES OF AMERICA

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SUMMARY OF THE CASE AND STATEMENT REGARDING ORAL ARGUMENT

Brandon Richard Laducer was shot and killed by law enforcement officers investigating a nearby shooting. His mother, plaintiff Renee Kay Martin, brought this damages action under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), and 42 U.S.C. § 1983. She asserts that federal, city, and county officers erroneously pursued and killed her son and later failed to provide accurate information regarding her son's death. Liberally construed, her complaint also asserts claims under the Federal Tort Claims Act (FTCA).

The district court dismissed the claims against the federal defendants. The court held that plaintiff failed to exhaust her administrative remedies as required under the FTCA. The court also declined to infer a *Bivens* remedy, noting that the Supreme Court has instructed courts to approach novel *Bivens* claims with extreme caution and that Congress would be better positioned to authorize damages here.

We do not request oral argument in this appeal. The legal issues are straightforward and the district court resolved them correctly. We stand ready to present oral argument if the Court believes it would be of use.

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INTRODUCTION

Brandon Richard Laducer was shot and killed by law enforcement officers investigating a nearby shooting. Plaintiff Renee Kay Martin, the mother of Mr. Laducer, filed a damages action on behalf of herself and Mr. Laducer's children. She sought relief from the United States under the Federal Tort Claims Act (FTCA) and from federal, city, and county officers under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), and 42 U.S.C. § 1983.

The district court dismissed plaintiff's claims against the United States and its federal officers. As to the FTCA claim, the court correctly concluded that plaintiff had failed to exhaust her administrative remedies, a jurisdictional prerequisite to bringing an FTCA action in federal court. *King v. United States*, 3 F.4th 996, 999 (8th Cir. 2021). As to her *Bivens* claims, the district court correctly heeded the Supreme Court's admonition that Congress, not the courts, should nearly always be responsible for deciding whether damages are available against federal officers in novel contexts. The Supreme Court has never recognized a *Bivens* remedy arising from law enforcement activities on tribal land (where the officer-involved shooting in this case occurred), or from the conduct of law enforcement

after an officer-involved shooting, and multiple special factors counsel hesitation before recognizing a *Bivens* claim in this case. Numerous alternative remedies are available, and a judicial remedy is especially inappropriate here because this case implicates matters that are within the "plenary and exclusive" powers of Congress, *United States v. Lara*, 541 U.S. 193, 200 (2004) (quotations omitted), including federal-tribal relations and the conduct of federal law enforcement on tribal lands. This Court should affirm the district court's judgment as to the federal defendants.

STATEMENT OF JURISDICTION

Plaintiff invoked the district court's jurisdiction under 28 U.S.C. § 1331. R. Doc. 1. The district court issued an order dismissing the complaint for lack of subject-matter jurisdiction and failure to state a claim on April 16, 2024. R. Docs. 95, 96. Plaintiff filed a timely notice of appeal on June 11, 2024. *See* Fed. R. App. P. 4(a)(1)(B). This Court has jurisdiction pursuant to 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

1. Whether the district court correctly dismissed plaintiff's FTCA claim for failure to exhaust administrative remedies. 28 U.S.C. § 2675(a); *King v. United States*, 3 F.4th 996 (8th Cir. 2021).

2. Whether the district court correctly declined to infer a *Bivens* cause of action for damages in this case, thereby dismissing plaintiff's claims against federal officers in their individual capacities. *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971); *Egbert v. Boule*, 596 U.S. 482 (2022); *Ahmed v. Weyker*, 984 F.3d 564 (8th Cir. 2020), *cert. denied*, 142 S. Ct. 2833 (2022).

STATEMENT OF THE CASE

A. Legal Background

1. The FTCA provides a limited waiver of sovereign immunity and creates a federal cause of action for damages claims for certain torts caused by federal employees acting within the scope of their employment. 28 U.S.C. § 1346(b)(1). Before bringing an FTCA suit, however, the statute requires a plaintiff to "first present[] the claim to the appropriate Federal agency" and have the claim "finally denied by the agency in writing." *Id.* § 2675(a). An agency's failure to reach a "final disposition of a claim" within six months after the claim is filed is deemed a final denial for purposes of this provision. *Id.* This requirement is a "jurisdictional prerequisite to filing an FTCA action in federal court." *King v. United States*, 3 F.4th 996, 999 (8th Cir. 2021) (quotations omitted).

2. In *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 389 (1971), the Supreme Court "recognized for the first time an implied private action for damages against federal officers alleged to have violated a citizen's constitutional rights." *Ashcroft v. Iqbal*, 556 U.S. 662, 675 (2009) (quoting *Correctional Servs. Corp. v. Malesko*, 534 U.S. 61, 66 (2001)). *Bivens* held that, despite the absence of a statutory cause of action, federal law-enforcement officials could be sued for money damages for conducting a warrantless search and arrest in a person's home, accompanied by the excessive use of force, in violation of the Fourth Amendment. *Bivens*, 403 U.S. at 389. The Court has approved of an implied damages remedy under the Constitution only two other times, in *Davis v. Passman*, 442 U.S. 228 (1979), for an equal-protection violation involving sex discrimination in congressional-staff employment, and in *Carlson v. Green*, 446 U.S. 14 (1980), for an Eighth Amendment violation involving the failure to provide competent treatment during an inmate's severe asthma attack.

Since then, "the Court has not implied additional causes of action under the Constitution" and has "emphasized that recognizing a cause of action under *Bivens* is a disfavored judicial activity." *Egbert v. Boule*, 596

U.S. 482, 491 (2022) (quotations omitted). When *Bivens*, *Davis*, and *Carlson* were decided, the Court was in its "heady days in which [it] assumed common-law powers to create causes of action." *Id.* (quoting *Malesko*, 534 U.S. at 75 (Scalia, J., concurring)). The Court has since rejected that approach, explaining that "a private cause of action will not be created through judicial mandate." *Ziglar v. Abbasi*, 582 U.S. 120, 133 (2017). Since that "notable change in the Court's approach to recognizing implied causes of action," the Court has "consistently refused to extend *Bivens* to any new context or new category of defendants." *Id.* at 135 (quoting *Malesko*, 534 U.S. at 68).

The Supreme Court's decision in *Egbert* confirmed that a court should undertake a two-part test to determine whether a plaintiff has a cause of action against federal officials in their personal capacities. First, a court must determine whether the claim arises in a "new *Bivens* context" by determining whether the case is "'meaningful[ly]' different from" the three previous *Bivens* cases in which the Supreme Court has recognized a damages action. *Egbert*, 596 U.S. at 492 (alteration in original) (quoting *Abbasi*, 582 U.S. at 139). Second, if the case arises in a new context, the court must consider whether any special factors "indicat[e] that the

Judiciary is at least arguably less equipped than Congress to 'weigh the costs and benefits of allowing a damages action to proceed.'" *Id.* (quoting *Abbasi*, 582 U.S. at 136). "If there is even a single 'reason to pause,'" the court cannot allow the *Bivens* claim to proceed. *Id.* (quoting *Hernández v. Mesa* (*Hernández II*), 589 U.S. 93, 102 (2020)). In asking whether special factors counsel hesitation, the court gives important weight to "'separation-of-powers principles'" and "consider[s] the risk of interfering with the authority of the other branches." *Hernández II*, 589 U.S. at 102 (quoting *Abbasi*, 582 U.S. at 135). This inquiry "often resolve[s] to a single question: whether there is any reason to think that Congress might be better equipped to create a damages remedy." *Egbert*, 596 U.S. at 492. In most cases, the answer to that question will be an emphatic "yes."

B. Factual Background[1]

Plaintiff alleges that federal and county law enforcement officers unlawfully shot and killed her son, Brandon Richard Laducer, an enrolled

[1] Courts assume the truth of the factual, non-conclusory allegations in a complaint. The Court may also consider factual statements in the North Dakota Bureau of Criminal Investigation (NDBCI) report, *see* R. Doc. 66-1, which is referenced extensively in the complaint and therefore incorporated into the pleadings. *Ashanti v. City of Golden Valley*, 666 F.3d 1148, 1151 (8th Cir. 2012) ("Documents necessarily embraced by the

Continued on next page.

member of the Turtle Mountain Tribe of Chippewa Indians, outside a residence on tribal land in North Dakota. R. Doc. 1, at 10. Plaintiff states that the shooting took place after "an incident that occurred off reservation in Bottineau County." *Id.*; *see* R. Doc. 66-1, at 12 (NDBCI report indicating that a "Brandon Laducer" had threatened patrons and fired a handgun while at a bar in Bottineau County). Law enforcement officers allegedly arrived at Mr. Laducer's home after Bureau of Indian Affairs (BIA) Lieutenant Kelan Gourneau "offered to pursue a Brandon Laducer" on tribal lands. R. Doc. 1, at 10. Plaintiff also alleges that Gourneau stated that there was an active tribal warrant for Mr. Laducer's arrest, but that this warrant was for a different individual with the same first and last name. *Id.*

When the officers arrived, Mr. Laducer exited his home "brandishing and firing a handgun." R. Doc. 66-1, at 1, 9; *see also id.* at 9–14. Law enforcement officers then fired upon Mr. Laducer, striking him multiple

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pleadings include 'documents whose contents are alleged in a complaint and whose authenticity no party questions, but which are not physically attached to the pleading.'" (citation omitted)); *Miller v. Redwood Toxicology Lab'y, Inc.*, 688 F.3d 928, 931 (8th Cir. 2012) (courts considering a motion to dismiss may consider materials "that are necessarily embraced by the pleadings" (quotations omitted)); *see* R. Doc. 1 (Complaint).

times and killing him. R. Doc. 1, at 10. BIA Officer Evan Parisien allegedly "delivered the deadly shot." *Id.* There is no allegation that any other federal officer was involved in the events leading up to Mr. Laducer's death.

After Mr. Laducer's death, plaintiff asserts that the federal government failed to provide accurate information regarding the officer-involved shooting. She alleges that Federal Bureau of Investigation (FBI) Agent Reed Mesman misstated the basis for law enforcement's presence on Mr. Laducer's homestead, incorrectly attributing it to a family member's mental health crisis; that Officer Parisien erroneously failed to contact Mr. Laducer's family; and that the federal government failed to respond to plaintiff's requests for information under the Freedom of Information Act (FOIA). R. Doc. 1, at 10, 12.

C. Prior Proceedings

1. On August 19, 2022, plaintiff submitted an administrative tort claim to the Department of Justice, which was then forwarded to the Department of the Interior. R. Doc. 60-1. Three days later, and before the federal government had responded, plaintiff sued various state and federal defendants for damages under *Bivens*, 403 U.S. 388, and 42 U.S.C. § 1983.

R. Doc. 1, at 3. Plaintiff brought this action on behalf of herself, as Mr. Laducer's mother, as well as Mr. Laducer's two minor children. With respect to the federal defendants, plaintiff sued five BIA officers (Kelan Gourneau, Michael Slater,[2] Evan Parisien, Heather Baker, and Earl Charbonneau), as well as FBI Agent Reed Mesman and the United States of America. R. Doc. 1, at 1–4, 7. She asserts that the officers were unlawfully at Mr. Laducer's homestead, that Mr. Laducer was unlawfully killed, and that officers failed to provide accurate information about her son's death or respond to her requests under FOIA.

On January 6, 2023, the Department of the Interior informed plaintiff that it had rejected her administrative tort claim because she had not demonstrated her authority to file a wrongful death action on behalf of Mr. Laducer's estate. R. Doc. 60-2, at 1. Plaintiff did not respond. *Id.* The Department of the Interior did not receive any administrative claims submitted by or on behalf of Mr. Laducer's two minor children. R. Doc. 60, at 2–3.

[2] Michael Slater's brother, Rolette County Sheriff's Deputy Mitchell Slater, is also a defendant in this action. R. Doc. 66-1, at 12.

2. The federal, city, and county defendants moved to dismiss. The magistrate judge recommended granting both motions, R. Doc. 89, and the district court adopted the magistrate judge's report and recommendation in full, R. Docs. 95, 96.

As to the federal defendants, the district court first construed plaintiff's pleadings liberally to raise an FTCA claim, but then dismissed the claim for lack of subject-matter jurisdiction because plaintiff had not exhausted her administrative remedies. R. Doc. 89, at 6–7. As the court explained, plaintiff filed her lawsuit before receiving either a final agency denial of her administrative tort claim or before the six-month waiting period had passed. *Id.* at 7; *see* 28 U.S.C. § 2675(a). The court also dismissed plaintiff's claims against the United States and its officers in their official capacities under the doctrine of sovereign immunity. R. Doc. 89, at 7–8 (citing *Laswell v. Brown*, 683 F.2d 261, 268 (8th Cir. 1982)).

Next, the court dismissed plaintiff's *Bivens* claims against the FBI and BIA officers in their individual capacities. Applying the Supreme Court's two-part test from *Abbasi,* 582 U.S. 120, the court concluded that plaintiff's claims arose in a "new context" because they took place on tribal land, raising "'unique issues of federal jurisdiction and sovereignty'" that were

meaningfully different from the Fourth Amendment excessive-force claims in *Bivens*. R. Doc. 89, at 17. The court declined to consider whether this case presented a new context based on the categories of defendants—here, BIA and FBI agents, compared to the drug enforcement agents in *Bivens*. *Id.* The court also rejected any argument that this case was meaningfully different from *Bivens* because it alleged excessive force outside of the home. *Id.* at 16 n.8, 16–17.

At the second step of the test, the district court recognized that several "special factors" foreclosed relief in this case. The court pointed to existing BIA and Department of Justice procedures for reporting and investigating misconduct by law enforcement officers, explaining that the availability of these alternative procedures counseled against an extension of *Bivens*. R. Doc. 89, at 19–21. The court also concluded that extending *Bivens* could upset federal-tribal relations, undermine the federal government's ability to maintain order on tribal lands, and implicate matters of tribal sovereignty—an "uncertainty" with potentially system-wide consequences that alone constituted a "special factor that forecloses relief." *Id.* at 21 (quotations omitted). Because the court held that plaintiff lacked a cause of action under *Bivens*, it declined to address whether the

federal defendants would be entitled to qualified immunity in their individual capacities. *Id.* at 22 n.12.[3]

Plaintiff timely appealed. R. Doc. 98.

SUMMARY OF ARGUMENT

1. The district court correctly dismissed plaintiff's claims under the FTCA for failing to meet the statute's exhaustion requirement. Under this jurisdictional requirement, plaintiffs must first present their administrative tort claims to the appropriate federal agency and receive either a final denial, or wait six months, before filing a federal lawsuit, 28 U.S.C. § 2675(a); *King v. United States*, 3 F.4th 996, 999 (8th Cir. 2021). Plaintiff brought this action just three days after attempting to submit her administrative tort claim—well before receiving any final decision from the relevant agency or before the six-month waiting period had expired. The court thus correctly dismissed her claim for lack of subject-matter jurisdiction.

[3] The court also dismissed plaintiff's claims against the city and county defendants as well as private citizen Annette Laducer. R. Doc. 89, at 22–26, 29.

2. The district court also correctly declined to infer a *Bivens* damages remedy, recognizing that Congress would be best positioned to weigh the costs and benefits of creating a damages remedy for the types of conduct alleged here. The Supreme Court has emphasized that implying new *Bivens* remedies is disfavored. *See Egbert v. Boule*, 596 U.S. 482, 491 (2022). And it has never recognized a *Bivens* remedy for the context presented by this case: a fatal officer-involved shooting on tribal land involving BIA officers and law enforcement's subsequent communications regarding the shooting. Multiple special factors counsel hesitation in implying a damages remedy, rather than deferring to Congress's prerogatives: alternative remedies are available to deter officer misconduct, and plaintiff's claims implicate significant issues of federal-tribal relations—matters that are within the "plenary and exclusive" powers of Congress. *United States v. Lara*, 541 U.S. 193, 200 (2004) (quotations omitted).

ARGUMENT

This Court reviews de novo a district court's grant of a motion to dismiss for lack of subject-matter jurisdiction, *King v. United States*, 3 F.4th 996, 999 (8th Cir. 2021), and for failure to state a claim, *Yang v. Robert Half Int'l, Inc.*, 79 F.4th 949 (8th Cir. 2023). In evaluating a dismissal for lack of

jurisdiction, the court "may look at materials outside the pleadings." *King*, 3. F.4th at 999 (quotations omitted).

I. The district court correctly dismissed plaintiff's claims against the United States and its federal officers in their official capacities.

A. The district court correctly held that it lacked jurisdiction over plaintiff's FTCA claim because plaintiff did not exhaust her administrative remedies before filing suit. "The text of the FTCA unambiguously commands that a plaintiff must administratively exhaust her remedies before filing suit in federal court." *King v. United States*, 3 F.4th 996, 999 (8th Cir. 2021). This requirement encourages the "prompt consideration and settlement" of meritorious claims, and it is a "jurisdictional prerequisite to filing an FTCA action in federal court.'" *Id.* (quotations omitted). Under this rule, a plaintiff must first submit an administrative tort claim to the appropriate federal agency and wait for a response. 28 U.S.C. § 2675(a). A plaintiff may only file an FTCA suit after receiving a final agency denial of her claim or after the agency fails to issue a final decision within six months after the claim is submitted. *Id.* An FTCA suit remains premature and must be dismissed if the plaintiff's administrative

claim is denied while the suit is pending. *See McNeil v. United States*, 508 U.S. 106, 111–12 (1993).

The district court correctly dismissed plaintiff's FTCA claims for failing to meet the statute's presentment requirement. As the court explained, plaintiff did not wait to receive a final agency denial of her claim before she filed her lawsuit. Plaintiff submitted her administrative claim to the Department of Justice on August 19, 2022; the Department of Justice forwarded her claim to the appropriate agency on December 5, 2022; and the agency informed her that her claim was invalid and treated as "never received" on January 6, 2023. R. Doc. 60-1, at 2, 4. Plaintiff initiated her federal lawsuit, however, on August 22, 2022, R. Doc. 1, at 3, well before receiving any decision from the relevant agency or before the six-month waiting period had expired. Plaintiff does not dispute any of these underlying facts, all of which are supported by the record in this case.

In her opening brief, plaintiff addressed the district court's FTCA ruling in one sentence, stating only that she "filed a FTCA claim after [she] exhausted all other administrative remedies" as she "did not receive any of the information from our FOIA requests." Br. 3. Plaintiff appears to have conflated the FTCA's presentment requirement—which requires

exhausting administrative tort claims before bringing a suit in federal court—with her separate efforts to obtain information under FOIA and her subsequent decision to seek FTCA relief when her FOIA efforts allegedly failed. But her FOIA efforts are unrelated to the FTCA's presentment requirement, and there is no dispute that plaintiff brought this action just three days after she first attempted to submit her administrative tort claim. Plaintiff also argues that she "requested the case be Continued" pending the release of an alleged Department of Justice report, Br. 5, but for the reasons discussed above, any such report would not cure plaintiff's failure to meet the FTCA's presentment requirement. The district court thus correctly dismissed her FTCA claims for lack of subject-matter jurisdiction. *See Mader v. United States*, 654 F.3d 794, 807 (8th Cir. 2011) (en banc) ("[A] claim that fails to satisfy [28 U.S.C.] § 2675(a)'s requirements remains inchoate, unperfected, and not judicially actionable.").

B. The district court also correctly dismissed plaintiff's official-capacity claims against the individual federal defendants and against the United States under the doctrine of sovereign immunity. "[A] suit against" a federal employee "in his official capacity is treated as a suit against" his employing agency, and "[i]t is well settled that a *Bivens* action cannot be

prosecuted against the United States and its agencies because of sovereign immunity." *Buford v. Runyon*, 160 F.3d 1199, 1203 (8th Cir. 1998).

II. The district court correctly dismissed plaintiff's claims against the federal officers in their individual capacities.

The district court also correctly concluded that plaintiff's individual-capacity damages claims presented a new *Bivens* context and that multiple special factors suggested that Congress, rather than the courts, should determine whether to extend a damages remedy. As a preliminary matter, in her opening brief, plaintiff makes no argument that the district court erred in its *Bivens* analysis, and "points not meaningfully argued in an opening brief are waived." *Ahlberg v. Chrysler Corp.*, 481 F.3d 630, 634 (8th Cir. 2007). In any event, the district court correctly declined to extend *Bivens* to this case.

A. The Supreme Court has sharply limited extending *Bivens* to new contexts.

In *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), the Supreme Court "recognized for the first time an implied private action for damages against federal officers alleged to have violated a citizen's constitutional rights"—there, based on a warrantless search and seizure and use of excessive force in violation of the Fourth

Amendment. *Ashcroft v. Iqbal*, 556 U.S. 662, 675 (2009) (quoting *Correctional Servs. Corp. v. Malesko*, 534 U.S. 61, 66 (2001)). The Court subsequently approved *Bivens* claims for sex discrimination by a member of Congress in violation of the Due Process Clause of the Fifth Amendment in *Davis v. Passman*, 442 U.S. 228 (1979), and for a failure to provide appropriate medical treatment to an inmate during a severe asthma attack in violation of the Eighth Amendment in *Carlson v. Green*, 446 U.S. 14 (1980).

But the Supreme Court has since "consistently rebuffed requests to add to the claims allowed under *Bivens*." *Hernández II*, 589 U.S. 93, 102 (2020). The Court shifted its approach as it began "'to appreciate more fully the tension between' judicially created causes of action and 'the Constitution's separation of legislative and judicial power.'" *Egbert v. Boule*, 596 U.S. 482, 491–92 (2022) (quoting *Hernández II*, 589 U.S. at 100). This Court has likewise adopted a "presumption against creating new *Bivens* actions." *Ahmed v. Weyker*, 984 F.3d 564, 567 (8th Cir. 2020), *cert. denied*, 142 S. Ct. 2833 (2022). Expanding *Bivens* is now "a disfavored judicial activity." *Egbert*, 596 U.S. at 491 (quotations omitted). "Congress is best positioned to evaluate whether[] . . . monetary and other liabilities

should be imposed upon" federal officers. *Hernández II*, 589 U.S. at 101 (quotations omitted).

The Supreme Court has thus set forth stringent criteria for analyzing whether a court may recognize a new *Bivens* remedy. At the threshold, courts must determine if the asserted claim arises in a new context—that is, if it differs "in a meaningful way from previous *Bivens* cases decided by [the Supreme] Court." *Ziglar v. Abbasi*, 582 U.S. 120, 139 (2017). If the case arises in a new context, then courts ask whether "special factors" counsel against inferring such an action absent "affirmative action by Congress." *Id.* at 136 (quotations omitted). The Supreme Court has noted that those steps generally "resolve to a single question: whether there is any reason to think that Congress might be better equipped to create a damages remedy." *Egbert*, 596 U.S. at 492. In light of separation-of-powers concerns, the Court has cautioned that "'[e]ven a single sound reason to defer to Congress' is enough to require a court to refrain from creating such a remedy." *Id.* at 491 (quotations omitted); *see also id.* at 496 (asking "whether there is *any* rational reason (even one) to think that *Congress* is better suited to 'weigh the costs and benefits of allowing a damages action to proceed'" (quoting *Abbasi*, 582 U.S. at 136)).

B. This case presents a new *Bivens* context.

The Supreme Court has identified "*Bivens*, *Davis*, and *Carlson*" as "the only instances in which the Court has approved of an implied damages remedy" for constitutional violations. *Abbasi*, 582 U.S. at 131. Measured against those three cases, a claim may present a new *Bivens* context based on, among other reasons, "the rank of the officers involved," "the . . . legal mandate under which the officer was operating," "the risk of disruptive intrusion by the Judiciary into the functioning of other branches," *id.* at 139–40, and "the sorts of actions being challenged," *Ahmed*, 984 F.3d at 568 (quoting *Farah v. Weyker*, 926 F.3d 492, 500 (8th Cir. 2019)). The "new-context inquiry is easily satisfied." *Abbasi*, 582 U.S. at 149. Even small differences constitute a new context, as "a modest extension is still an extension." *Id.* at 147; *see Hernández II*, 589 U.S. at 102 ("[O]ur understanding of a 'new context' is broad."); *Ahmed*, 984 F.3d at 570 (emphasizing this Court's presumption against creating new *Bivens* causes of action—"[i]f the test sounds strict, it is").

Plaintiff's claims bear no resemblance to those in *Carlson* (involving alleged Eighth Amendment violations related to prison medical care) or *Davis* (involving alleged sexual harassment by a Congressman). And

although this case, like *Bivens*, involves an alleged Fourth Amendment violation, both this Court and the Supreme Court have recognized that claims can arise in a new context "even if the 'constitutional right at issue' is the same." *Farah*, 926 F.3d at 498; *see Hernández II*, 589 U.S. at 103 ("A claim may arise in a new context even if it is based on the same constitutional provision as a claim in a case in which a damages remedy was previously recognized.").

As a preliminary matter, plaintiff does not allege any misconduct by defendants BIA officers Charbonneau, Baker, or Slater, and there is no indication that Charbonneau or Baker were even present at the site of the shooting or otherwise involved in the events underlying this case. *See* R. Doc. 1. FBI Special Agent Reed Mesman likewise was not on the scene at the time of the shooting. *Accord* R. Doc. 1, at 10 (stating that Mesman met with plaintiff several months after the incident).

As to plaintiff's claims against the BIA officers present at the scene of the shooting (Lieutenant Gourneau and Officer Parisien), the district court correctly concluded that these claims arise in a context different from any of those the Supreme Court has previously recognized for multiple reasons. First, her claims arose on tribal land and assert allegations of

excessive force against an enrolled member of a Native American tribe—claims that implicate delicate issues of federal-tribal relations and Congress's "plenary and exclusive" power to "legislate in respect to Indian tribes." *United States v. Lara*, 541 U.S. 193, 200 (2004) (quotations omitted). *Bivens*, 403 U.S. at 389, by contrast, involved an allegedly unconstitutional arrest and search in New York City—a "meaningfully different" setting that did not run the risk of "'disruptive intrusion by the Judiciary'" into Congress's relations with Native American tribes. *Hernández II*, 589 U.S. at 103 (quoting *Abbasi*, 582 U.S. at 140)); *see id.* (stating that it is "glaringly obvious" that claims involving cross-border shootings are meaningfully different from *Bivens* because of the risk of judicial intrusion into the other branches' foreign affairs powers). In this case, like others, the setting where the alleged violation occurred is significant. *See Ahmed*, 984 F.3d at 568 (discussing Supreme Court case law distinguishing between a claim arising in a privately-contracted prison and an identical claim arising in a federally-run prison (first citing *Malesko*, 534 U.S. at 63–64; and then citing *Carlson*, 446 U.S. at 16–18)); *see also Mejia v. Miller*, 61 F.4th 663, 668 (9th Cir. 2023) (similar, for conduct in a national park).

This case also involves a "'new category of defendants'" operating under a different "legal mandate" than the drug enforcement officers in *Bivens*. *Abbasi,* 582 U.S. at 135, 140 (quoting *Malesko*, 534 U.S. at 68). The Supreme Court and the federal courts of appeals have regularly concluded that a claim presented a new *Bivens* context where defendant law enforcement officers were acting pursuant to a different mandate. *See, e.g.*, *Egbert*, 596 U.S. at 494 (new *Bivens* context where federal agent was "carrying out Border Patrol's mandate" to stop cross-border smuggling); *Quinones-Pimentel v. Cannon*, 85 F.4th 63, 72–73 (1st Cir. 2023) (finding a new *Bivens* context because, among other things, the case involved claims against prosecutors); *Tun-Cos v. Perrotte*, 922 F.3d 514, 525 (4th Cir. 2019) (same where case involved claims against "[U.S. Immigration and Customs Enforcement] agents, who are charged with the enforcement of the immigration laws").

Again, plaintiff raises her excessive-force claims only against BIA officers. (Her sole claim against FBI Agent Mesman relates to conduct occurring months after her son's death. *See supra* p. 21.) BIA officers operate under a unique statutory authority, under which they may investigate crimes committed on tribal land and, in certain circumstances,

undertake certain law-enforcement activities only if "authorized by an Indian tribe." 25 U.S.C. § 2803(2). A BIA officer's authority can therefore implicate unique issues that were not present in *Bivens*, which involved claims against drug enforcement officers.

To the extent plaintiff also alleges that officers erred in their execution of an arrest warrant, that claim involves a different "sort[] of action[] being challenged" than the conduct at issue in *Bivens*. *Farah*, 926 F.3d at 500. *Bivens* involved a warrantless search and arrest and use of excessive force inside the plaintiff's house. 403 U.S. at 389. Any claim concerning the execution of a warrant in this case, by contrast, would involve steps officers allegedly should have taken to verify the target's identity. Those law-enforcement activities "are a different part of police work than the apprehension, detention, and physical searches at issue in *Bivens*." *Farah*, 926 F.3d at 499; *accord Henry v. Essex County*, 113 F.4th 355 (3d Cir. 2024) (declining to extend *Bivens* to claim alleging mistaken-identity arrest).

Plaintiff's claims related to her information-gathering efforts also present a new *Bivens* context. She asserts that FBI Agent Mesman provided

inaccurate and misleading information about the circumstances surrounding her son's death; that BIA Officer Parisien improperly failed to contact her after her son's death; and that federal officials have not responded to her FOIA requests. R. Doc. 1, at 10, 12; Br. 3–4. Even assuming these allegations implicate a constitutional right, the district court correctly noted that "the Supreme Court has never recognized that type of claim." R. Doc. 89, at 15 n.7. The allegations bear little resemblance to the alleged misconduct in *Bivens*, 403 U.S. 388 (warrantless search and seizure in violation of the Fourth Amendment), *Davis*, 442 U.S. 228 (sex discrimination in violation of the Fifth Amendment), or *Carlson*, 446 U.S. 14 (inadequate medical treatment in prison in violation of the Eighth Amendment). As the district court recognized, there is "no question" that plaintiff's information-gathering "claims arise in a new context" under *Bivens*. R. Doc. 89, at 15 n.7.

C. Congress, not the courts, should determine whether to authorize damages in this new context.

Because plaintiff's claims arise in a new context, a *Bivens* remedy is unavailable "if there are 'special factors' indicating that the Judiciary is at least arguably less equipped than Congress to 'weigh the costs and benefits

of allowing a damages action to proceed.'" *Egbert*, 596 U.S. at 492 (quoting *Abbasi*, 582 U.S. at 136). This "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." *Abbasi*, 582 U.S. at 136. A *Bivens* remedy should not be judicially inferred if "there are sound reasons to think Congress might doubt the efficacy or necessity of a damages remedy as part of the system for enforcing the law and correcting a wrong." *Id.* at 137. At this step, the existence of "even a single 'reason to pause before applying *Bivens*'" forecloses relief in the narrow context of a judicially created damages remedy, *Egbert*, 596 U.S. at 492 (quoting *Hernández II*, 589 U.S. at 102), although a plaintiff remains free to pursue alternative avenues of relief.

The district court correctly concluded that Congress would be better positioned to weigh the costs and benefits of extending a damages remedy here. For one thing, the Supreme Court has held "that a court may not fashion a *Bivens* remedy if Congress has already provided, or has authorized the Executive to provide, 'an alternative remedial structure.'" *Egbert*, 596 U.S. at 493 (quoting *Abbasi*, 582 U.S. at 137). As the court in this case observed, both the BIA and FBI have processes to deter misconduct

and safeguard constitutional rights. R. Doc. 89, at 18–20. For example, the BIA is required by regulation to maintain a reporting system that "allows any resident of or visitor to Indian country to report officer misconduct." 25 C.F.R. § 12.52. "All allegations of misconduct must be thoroughly investigated and appropriate action taken when warranted." *Id.* § 12.53. Alleged civil rights violations must also be reported "immediately" to the internal affairs unit, which are then forwarded to the Department of Justice. *Id.* § 12.54. Similarly, both the Department of Justice and Department of the Interior have units charged specifically with reporting and, if appropriate, investigating complaints of misconduct against federal employees, including FBI officers. *See* 5 U.S.C. § 413(b); 43 C.F.R. § 20.103. As to plaintiff's efforts to gather information, she may avail herself of the statutory remedy that Congress has provided for allegedly inadequate FOIA responses. *See* 5 U.S.C. § 552(a)(4)(B).

The FTCA also provides an additional alternative remedy, as plaintiff's efforts in this case demonstrate. *See, e.g.*, *Oliva v. Nivar*, 973 F.3d 438, 444 (5th Cir. 2020) (the FTCA is an "alternative remedial scheme" for plaintiff's *Bivens* claims, even if the statute "might not give [plaintiff] everything he seeks"); *Wimberly v. Selent*, No. 23-13550, 2024 WL 2845476,

at *4 (11th Cir. June 5, 2024) (per curiam) (unpublished) (explaining that the FTCA, "which [the plaintiff] presently pursues in this case," constitutes an "alternative avenue[] for relief"); *accord Unus v. Kane*, 565 F.3d 103, 121 (4th Cir. 2009) (recognizing that *Bivens* and FTCA claims provide "alternative avenues of relief").

These alternative remedies indicate that Congress is best positioned to weigh the prospect of liability for the circumstances presented here. As the Supreme Court has stated, "[s]o long as Congress or the Executive has created a remedial process that it finds sufficient to secure an adequate level of deterrence, the courts cannot second-guess that calibration by superimposing a *Bivens* remedy." *Egbert*, 596 U.S. at 498. The mandatory, multi-layered process for reporting and investigating BIA or FBI misconduct, combined with the availability of relief under the FTCA and FOIA, adequately safeguard against any constitutional violations. Indeed, the existence of each remedial structure "alone" is "reason enough to 'limit

the power of the Judiciary to infer a new *Bivens* cause of action.'" *Id.* at 493 (quotations omitted).[4]

A judicially implied remedy would also risk "disruptive intrusion by the Judiciary into the functioning of other branches." *Abbasi*, 582 U.S. at 140. As noted, Congress has the "plenary and exclusive" power to regulate federal-tribal affairs. *Lara*, 541 U.S. at 200 (quotations omitted); *see McGirt v. Oklahoma*, 591 U.S. 894, 903 (2020) ("[T]he Legislature wields significant constitutional authority when it comes to tribal relations . . . ."); *Lone Wolf v. Hitchcock*, 187 U.S. 553, 565 (1903) (tribal relations issues are "not subject to be controlled by the judicial department of the government"). Pursuant to that authority, Congress has regularly legislated in the area of Indian affairs and specifically in the area of BIA law enforcement—for example, passing the Indian Law Enforcement Reform Act in 1990 to "clarify and strengthen the authority of the law enforcement personnel and functions

[4] Because the district court held that there was no *Bivens* remedy available, the court declined to reach the individual defendants' alternative argument that the defendants were entitled to qualified immunity. R. Doc. 89, at 22 n.12; R. Docs. 95, 96. The court explained that plaintiff "may pursue her claims of each federal defendant's wrongdoing through the BIA's administrative complaint process, through the Inspector General of the Department of Justice's online complaint process, or through any available tribal court remedies." R. Doc. 89, at 22 n.12.

within the BIA." *United States v. Schrader*, 10 F.3d 1345, 1350 (8th Cir. 1993) (alteration omitted) (quoting S. Rep. No. 101-167, at 4 (1989)). Under that Act, the Secretary of the Interior may charge BIA officers with a broad range of law enforcement powers "in Indian country," 25 U.S.C. § 2802; *see Schrader*, 10 F.3d at 1350, and may also contract with tribal authorities to aid BIA in the provision of law enforcement services, 25 U.S.C. § 2804(a); *see Schrader*, 10 F.3d at 1350.

Congress is thus best positioned to create a damages remedy for alleged misconduct by BIA officers on tribal lands. As courts have recognized in other contexts, the fact that it has never done so despite delineating a careful statutory scheme implicates precisely the type of separation-of-powers concerns that counsel against a judicially created damages remedy here. *See, e.g.*, *Abbasi*, 582 U.S. at 148-49 (similar, with respect to prison officials); *Kalu v. Spaulding*, 113 F.4th 311, 336 (3d Cir. 2024) (similar, with respect to prison officials); *Tun-Cos*, 922 F.3d at 527 (similar, with respect to immigration officers). In the same way that "regulating the conduct of agents at the border unquestionably has national security implications," *Hernández II*, 589 U.S. at 108, regulating the conduct of agents on tribal lands unquestionably implicates areas of unique

federal interests that Congress is better situated to address. *See also Egbert*, 596 U.S. at 494.

The district court acknowledged potential "unfairness" in "permitting excessive force claims that do not arise on tribal land to proceed while not permitting those that arise on tribal land to proceed." R. Doc. 89, at 18 n.9; R. Doc. 95. Plaintiff's claims in this case, however, could not proceed even if they had not arisen on tribal land. As explained above, in this case like many others, there are multiple reasons that Congress would be better situated to weigh the costs and benefits of extending a damages remedy, including the availability of alternative remedies for the types of conduct alleged. The district court correctly heeded this Court's and the Supreme Court's repeated admonitions that "[t]he separation of powers generally vests the power to create new causes of action in Congress, not" the courts. *Ahmed*, 984 F.3d at 567.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limit of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 6,360 words. This brief also complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5)-(6) because it was prepared using Word for Microsoft 365 in Book Antiqua 14-point font, a proportionally spaced typeface.

Pursuant to Circuit Rule 28A(h)(2), I further certify that the brief has been scanned for viruses, and the brief is virus free.

s/ Caroline W. Tan
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CERTIFICATE OF SERVICE

I hereby certify that on October 3, 2024, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the appellate CM/ECF system. Service will be accomplished by the appellate CM/ECF system.

s/ Caroline W. Tan
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