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GOING ROGUE: THE SUPREME COURT'S NEWFOUND HOSTILITY TO POLICY-BASED *BIVENS* CLAIMS

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In Ziglar v. Abbasi, *137 S. Ct. 1843 (2017), the Supreme Court held that a proposed* Bivens *remedy was subject to an exacting special factors analysis when the claim arises in a "new context." In* Ziglar *itself, the Court found the context of the plaintiffs' claims to be "new" because, in the Court's view, they challenged "large-scale policy decisions concerning the conditions of confinement imposed on hundreds of prisoners."* Bivens *claims for damages caused by unconstitutional policies, the Court suggested, were inappropriate.*

This Essay critically examines the Ziglar *Court's newfound hostility to policy-based* Bivens *claims. We show that an exemption for policy challenges can claim no support in the Court's own development of the* Bivens *doctrine, or in the principles that animate the Court's broader approach to government accountability law. Equally troubling, the policy exemption has already caused substantial confusion among lower courts. Judging that it lacks a legitimate predicate and defies coherent application, we conclude that the Court should pursue no further its hostility to policy-based* Bivens *claims.*

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INTRODUCTION

In *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*,[1] the Supreme Court recognized the right to sue federal officials for damages when they have violated constitutional protections.[2] By 1980, the Court had recognized a right to bring a *Bivens* claim in three distinct settings.[3] But in the decades since, the Court has progressively limited this power to sue.[4] Under today's two-step approach, courts first inquire whether the claim arises in a settled context—that is, whether it is sufficiently similar to the Court's three prior decisions recognizing a *Bivens* action for damages.[5] If so, then the action can proceed. If, however, the court perceives the context as "new," then it should ask if special factors counsel hesitation in the recognition of a right to sue.[6] The tendency in recent Supreme Court decisions has been to view narrowly the scope of established rights to sue, first finding almost all contexts "new," and then invoking the more searching special factors analysis. In addition, the Court has enunciated a growing list of special factors that inform judicial restraint. The upshot is that litigants are often barred from seeking *Bivens* relief, even when the factual differences between their claims and prior *Bivens* cases appear trivial.[7]

1 403 U.S. 388 (1971).

2 *Id.* at 397.

3 *See* Carlson v. Green, 446 U.S. 14, 17–18 (1980) (recognizing a *Bivens* claim for an Eighth Amendment violation); Davis v. Passman, 442 U.S. 228, 234–35, 243–49 (1979) (same for Fifth Amendment Due Process Clause violations stemming from employment discrimination); *Bivens*, 403 U.S. at 389–90, 397 (same for Fourth Amendment violations).

4 For an account of the Court's increasing skepticism of *Bivens* actions, see James E. Pfander, Alexander A. Reinert & Joanna C. Schwartz, *The Myth of Personal Liability: Who Pays When* Bivens *Claims Succeed*, 72 STAN. L. REV. 561, 574–78 (2020).

5 The Court's opinion in *Schweiker v. Chilicky* was the first to characterize this approach in terms of whether a claim arose in a "new context[ ]." 487 U.S. 412, 421 (1988). For one overall critique of the Court's new context approach, see Alexander A. Reinert & Lumen N. Mulligan, *Asking the First Question: Reframing* Bivens *After* Minneci, 90 WASH. U. L. REV. 1473, 1498–1504 (2013).

6 *See, e.g.*, Hernández v. Mesa, 140 S. Ct. 735, 743 (2020).

7 The Fifth Circuit's decision in *Oliva v. Nivar*, 973 F.3d 438 (5th Cir. 2020), is illustrative. The plaintiff in *Oliva* brought claims under the Fourth Amendment against federal officers who allegedly used excessive force. *Id.* at 441. Even though *Bivens* itself also involved Fourth Amendment claims of excessive force against federal officers, the Fifth Circuit found the context in *Oliva* to be "new" because it arose in a hospital, not a private home, because the dispute giving rise to the use of force was not the same as the narcotics

In *Ziglar v. Abbasi*,[8] the Court redefined more contexts as "new" and added considerably to the special factors analysis.[9] Facing a challenge to the constitutionality of the detention policy that the Department of Justice and the Federal Bureau of Investigation ("FBI") developed in response to the 9/11 attacks in New York City, the *Ziglar* Court narrowly defined settled law and treated the claims in question as arising in a "new context."[10] Turning to the second question, the *Ziglar* Court gave voice to a long list of special factors, including the burden and distraction of litigation, the presence of national security concerns, and the threat of personal liability.[11] For these and other reasons, the Court found that the responsibility for recognizing a right to challenge detention policies via damages suits fell to Congress and was not the proper subject of a *Bivens* action.[12]

Ziglar's laundry list of special factors, though somewhat familiar, included an entirely novel consideration—an expression of concern that the claims in question sought to challenge national detention policy as formulated by high-ranking executive branch officials.[13] According to the plaintiffs, the officials in question, Attorney General John Ashcroft, FBI Director Robert Mueller, and Immigration and Naturalization Service Commissioner James Ziglar, collaborated in the development and implementation of the government's hold-until-cleared policy.[14] Under the terms of the policy, as alleged by the plaintiffs, Arab and South Asian Muslim men detained after 9/11 were confined in extremely harsh conditions until they were cleared of any connection to the terrorist attacks and then deported.[15] Many of the men sought damages under *Bivens*, both from the jailers who implemented the policy and from the high-ranking executive branch architects of the policy.[16] But the Court viewed these challenges to the government's detention policy as an inappropriate use of the *Bivens* action.[17] Unlike settled uses of

investigation at issue in *Bivens*, and because the plaintiff in *Oliva* was placed in a chokehold, whereas the plaintiff in *Bivens* was manacled and strip-searched. *Id.* at 442–43. Having found that the plaintiff's claims arose in a meaningfully different context from *Bivens*, the Fifth Circuit went on to hold that special factors counseled against implying a new *Bivens* remedy for the plaintiff in *Oliva*. *Id.* at 443–44.

8 137 S. Ct. 1843 (2017).

9 *Id.* at 1859–60.

10 *Id.* at 1859–60, 1864. In the interest of full disclosure, we note that Alexander Reinert was one of the lawyers who represented the respondents in *Ziglar* before the Supreme Court, and he continues to represent them in district court.

11 *Id.* at 1860–61. We have previously found no empirical basis for the *Ziglar* Court's concern with the personal liability of government officials. *See* Pfander et al., *supra* note 4, at 566 (concluding on the basis of settlement data that the government holds individuals harmless in 95% of the successful *Bivens* suits brought against federal prison officers, virtually eliminating the threat of personal liability).

12 *Ziglar*, 137 S. Ct. at 1864–65.

13 *Id.* at 1859–61.

14 *Id.* at 1852–53.

15 *Id.*

16 *Id.*

17 *Id.* at 1865.

Bivens litigation to challenge individual instances of "discrimination or law enforcement overreach," the Court characterized the detention policy claims as seeking to contest "large-scale policy decisions concerning the conditions of confinement imposed on hundreds of prisoners."[18]

The *Ziglar* Court rested its hostility to policy-based *Bivens* claims on three different considerations. First, the Court suggested that *Bivens* claims had never served as a "a proper vehicle for altering an entity's policy,"[19] but instead had served "to deter the *officer*."[20] Second, the Court indicated that damages actions challenging government policy were an improper way to influence policies, worrying that the "burden and demand of litigation" might distract high level officials from meeting the needs of their position.[21] The worry was said to reflect both the practicalities of discovery as well as the potential for judicial interference "with sensitive functions of the Executive Branch."[22] In *Ziglar* itself, these concerns were amplified by the Court's tendentious claim that the risk of damages liability, more so than injunctive relief, might "cause an official to second-guess difficult but necessary decisions concerning national-security policy" because of the supposed risk of personal financial loss.[23] Finally, the Court suggested, alternative remedial methods—such as habeas petitions and claims for injunctive relief—were better suited than *Bivens* claims to challenge government policies.[24]

In this Essay, we offer three arguments against the *Ziglar* Court's suggestion that plaintiffs may not seek damages for injuries caused by an unconstitutional federal government policy. We begin in Part I by examining the purported doctrinal roots of the hostility to policy-based claims. Rather than finding it well grounded in prior decisions, we show that *Ziglar*'s policy concern represents a novel, indeed wholly unprecedented, departure from prior law. Part II shows that *Ziglar*'s concern with the costs of policy-based damages claims contravenes the assumptions on which the Court has built its rules of government accountability. Recognizing that damages actions can be brought to challenge state and local government policies, the Court has assumed that these suits can influence government practices through a vari-

18 *Id.* at 1862.

19 *Id.* at 1860 (quoting Corr. Servs. Corp. v. Malesko, 534 U.S. 61, 74 (2001)).

20 *Id.* (quoting FDIC v. Meyer, 510 U.S. 471, 485 (1994)).

21 *Id.* For its part, the government's briefing suggested that damages litigation for unconstitutional policies was unwarranted based on precedent like *Malesko*, separation of powers grounds, and fiscal concerns. *See Malesko*, 534 U.S. at 74. The government argued that, to the extent one should account for concerns that unconstitutional policies might pose a greater risk to individual liberty than discrete unconstitutional conduct, awaiting a legislative response, rather than an implied cause of action, was "more likely[ ] and more beneficial." Reply Brief for the Petitioners at 8–9, *Ziglar*, 137 S. Ct. 1843 (No. 15-1359), 2017 WL 117334, at *8–9. In the meantime, injunctive relief was available to prevent unconstitutional policies from continuing. *Id.* at 10; Brief for the Petitioners at 24–25, *Ziglar*, 137 S. Ct. 1843 (No. 15-1359), 2016 WL 6873020, at *24–25.

22 *Ziglar*, 137 S. Ct. at 1860–61.

23 *Id.* at 1861.

24 *Id.* at 1862–63.

ety of pressures. The Court's assertion in *Ziglar* that damages actions may be an inappropriate means of contesting unlawful government practices represents a dramatic break with these prior decisions. Part III offers a more practical objection: the *Ziglar* Court does not offer clear guidance about what constitutes a policy decision inappropriate for resolution as a *Bivens* claim. Lower courts have disagreed about how to apply *Ziglar*'s policy concern and, at least in some circuits, *Ziglar* appears to threaten the viability of even well-settled forms of *Bivens* liability.

Part IV offers our most charitable understanding of *Ziglar*—as an invocation of the Court's longstanding preference for alternative remedial measures, including habeas and injunctive relief, as a means of addressing unconstitutional policies. But we also explain why the Court's asserted preference for remedial alternatives, while perhaps attractive on the page, is less desirable on the ground. For one thing, lower courts demonstrate equal confusion about the availability of remedial alternatives as about the boundaries of the policy exception in *Ziglar*. In addition, the Court has made the remedial alternatives it touts in *Ziglar* virtually impossible to achieve because it has erected doctrinal barriers against obtaining those alternative remedies. In the end, we conclude that the limitation on policy-based claims cannot be coherently applied in ways that accomplish the *Ziglar* Court's stated goal of preserving a viable *Bivens* action to deter unconstitutional conduct. We therefore suggest that the Court abandon its attempt to limit the applicability of *Bivens* in cases challenging government policies. Whatever one might say for the Court's sundry explanations for limiting *Bivens*, the *Ziglar* Court's concern with policy-based claims lacks merit.

I. The Illusory Doctrinal Basis for *Ziglar*'s Hostility to Policy Claims

We begin with a focus on the Court's suggestion that its jurisprudence has long featured hostility to policy-based *Bivens* claims. Contrary to its insinuation, the Court had never questioned the availability of *Bivens* claims seeking damages for unconstitutional policies prior to *Ziglar*. Indeed, prior cases had suggested the opposite, namely that policy-based claims could be cognizable under *Bivens*. This reading of the caselaw is supported by the Office of the Solicitor General's contemporaneous briefing, which had never argued that *Bivens* was flat out unavailable where claims were based on unconstitutional policies.[25] If anything, both the Court and the government had long assumed that, while policy-based claims might implicate the personal involvement requirement or the qualified immunity defense, *Bivens* claims brought

25 The Solicitor General represents the interests of the United States before the Court, and it has routinely represented high-level officials sued for damages under *Bivens*. Although briefs filed by the Solicitor General's Office are pieces of advocacy, not dispositive statements of the law, we assume the Office would have raised objections to policy-based *Bivens* claims if that were a fair reading of the Court's caselaw.

against individuals directly responsible for unconstitutional policies would otherwise be available.

A. The Role of Policy in Early Bivens *Cases*

The Supreme Court's decisions in the 1970s and 1980s routinely assumed that *Bivens* cases were available to challenge policies.[26] Some opinions during this time period did question whether *Bivens* defendants sued for their policy decisions were entitled to absolute or qualified immunity. But the Court's focus on immunity only underscores the presumed availability of policy-based damages claims.[27] In *Butz v. Economou*,[28] for example, the Court made clear that a federal official could not avoid liability for violations of the federal Constitution, even when he was making decisions at the policy level.[29] Even when an official could claim authorization under positive law, unconstitutional acts, including policy decisions, would vitiate any claim for immunity.[30] *Butz* articulated no concerns about holding officials accountable for unconstitutional policymaking.[31] To the contrary, *Butz* recognized the dissonance created by providing greater protection from liability to policymaking officials than to line officers, precisely because "the greater power of such officials affords a greater potential for a regime of lawless conduct."[32]

Later cases during this period adhered to the view that *Bivens* claims could challenge federal government policy—and concluded that the defend-

26 Some were brought against high-level executive officials with the Court's blessing and without any hint of the policy limitation it set out in *Ziglar*. *See* Carlson v. Green, 446 U.S. 14, 19 (1980) (holding that director of Bureau of Prisons did not "enjoy such independent status in our constitutional scheme as to suggest that judicially created remedies against [him] might be inappropriate").

27 Consistent with our account in Part II below, throughout these cases, the Court took pains to acknowledge the importance of damages actions against high-level policymakers precisely because they could cause widespread harm.

28 438 U.S. 478 (1978).

29 *Id.* at 506–08. *Butz* addressed only the scope of immunity available to the individual defendants, because no party raised any question as to whether a *Bivens* claim was available. Typical of its time, the lower court's decision in *Butz* treated *Bivens* liability as similar to § 1983 liability, despite the different provenance of the causes of action. Economou v. U.S. Dep't of Agric., 535 F.2d 688, 695 n.7 (2d Cir. 1976), *vacated sub nom.* Butz v. Economou, 438 U.S. 478 (1978).

30 *Butz*, 438 U.S. at 490–91 (first citing United States v. Lee, 106 U.S. 196, 218–23 (1882); and then citing Va. Coupon Cases, 114 U.S. 269, 285–92 (1885)); *id.* at 494–95 ("Whatever level of protection from state interference is appropriate for federal officials executing their duties under federal law, it cannot be doubted that these officials, even when acting pursuant to congressional authorization, are subject to the restraints imposed by the Federal Constitution.").

31 *Id.* at 498.

32 *Id.* at 505–06. This was in contrast to then-Justice Rehnquist, who dissented in part on the grounds that there was a "compelling reason" for distinguishing between § 1983 and *Bivens* actions in terms of whether high-level federal officials should maintain an immunity from damages. *Id.* at 524–25 (Rehnquist, J., concurring in part and dissenting in part).

ants were not entitled to any sort of immunity, either. In *Harlow v. Fitzgerald*,[33] the defendants argued that they should be absolutely immune from *Bivens* liability for policy-level decisionmaking.[34] But the Court rejected this argument, citing *Butz* for the proposition that "an executive official's claim to absolute immunity must be justified by reference to the public interest in the special functions of his office, not the mere fact of high station."[35] And in *Mitchell v. Forsyth*,[36] the Court rejected absolute immunity for the Attorney General's actions in the national security context precisely because, contra *Ziglar*, it did not expect the prospect of litigation to have any impact on the Attorney General's performance of his duties.[37] The Court considered liability in this context—mediated by qualified immunity—necessary because none of the "built-in restraints" that characterized the judicial and legislative branches applied to executive branch decisions regarding national security.[38]

And although the Court rejected some *Bivens* cases in which plaintiffs directly based their claims on application of federal policy, the Court never suggested that *Bivens* was an inapplicable remedy for a policy challenge. In *United States v. Stanley*,[39] the plaintiff sued because he was secretly administered LSD as part of an Army-approved plan to study chemical agents.[40] The government argued that he should not be permitted to sue, not because he sought to challenge a policy but because his lawsuit threatened to interfere with decisions related to the management of the military, implicating distinct separation of powers concerns.[41] The Court agreed, finding that "congressionally uninvited intrusion into military affairs by the judiciary is inappropriate."[42] The plaintiffs in *Schweiker v. Chilicky* specifically attacked policies adopted by the defendants to administer federal disability benefits, arguing that the policies violated the Fifth Amendment's Due Process Clause.[43] The Court found that *Bivens* was unavailable not because the plaintiffs had challenged a policy and sued policymakers, but because Congress had created an

33 457 U.S. 800 (1982).

34 Brief for Petitioners Harlow and Butterfield at 38–39, *Harlow*, 457 U.S. 800 (Nos. 79-1738 and 80-945), 1981 WL 390511, at *38–39.

35 *Harlow*, 457 U.S. at 812.

36 472 U.S. 511 (1985).

37 *Id.* at 521–22 ("Whereas the mere threat of litigation may significantly affect the fearless and independent performance of duty by actors in the judicial process, it is unlikely to have a similar effect on the Attorney General's performance of his national security tasks.").

38 *Id.* at 522–23. The Court also found injunctive and declaratory relief inadequate to address the kinds of national security abuses alleged in *Mitchell*. *Id.* at 523 n.7.

39 483 U.S. 669 (1987).

40 *Id.* at 671.

41 Brief for the Petitioners at 28, *Stanley*, 483 U.S. 669 (No. 86-393), 1987 WL 880383, at *28.

42 *Stanley*, 483 U.S. at 683. In this way, *Stanley* is a straightforward application of the Court's decision in *Chappell v. Wallace*, 462 U.S. 296 (1983), which held that a race discrimination claim could not be brought via *Bivens* because it arose in the context of military service. *Id.* at 300.

43 Schweiker v. Chilicky, 487 U.S. 412, 417–19 (1988).

alternative remedy that provided adequate relief to the plaintiffs.[44] Nor did the government's briefing raise any issue concerning the inapplicability of *Bivens* remedies for policy challenges, instead focusing on the remedy created by Congress.[45]

In short, *Bivens* jurisprudence from the 1970s and 1980s, along with cases generally addressed to the liability of government officials, betrayed none of the *Ziglar* Court's skepticism toward policy-based claims brought against high-level officials. Instead, the cases suggest that individual liability for high-level officials helps to ensure accountability for unconstitutional conduct that has wide-ranging impact.

B. Ziglar*'s Misrepresentation of* Meyer *and* Malesko

The *Ziglar* Court found support for its hostility to policy-based claims in two cases: *Meyer* and *Malesko*.[46] But neither case supports *Ziglar*'s reading. In *Meyer*, the Court found that *Bivens* was unavailable because the plaintiff sought to sue an agency rather than an individual acting under color of federal law.[47] Indeed, immediately after the Court rejected a cause of action against the agency as a "significant extension" of *Bivens*, it reaffirmed the plaintiff's cause of action against Pattullo, the Federal Savings and Loan Insurance Corporation employee who terminated him, as one "that the logic of *Bivens* supports—a *Bivens* claim for damages."[48] In other words, although the *Meyer* Court disapproved of using *Bivens* to sue an entity for its policy, it approved of suit against the individual officer who applied that policy to the detriment of the plaintiff.

In *Ziglar*, the Court implied that *Meyer* disapproved of policy-based claims because it viewed the deterrence of misconduct by individual officers, rather than the challenge to government policies, as central to *Bivens*'s logic.[49] But *Meyer*'s discussion of the importance of deterrence arose in connection with the Court's assessment of the operation of qualified immunity—presumptively applicable to suits against officers and inapplicable to claims brought against entities.[50] If the claim against the entity were available, the

44 *Id.* at 425. Of course, *Ziglar* also rested in part on its perception that there were alternative remedies available to challenge the policies at issue in that case. But the alternative remedies identified in *Schweiker*—which were congressionally created and offered the prospect of monetary relief—were quite broader than the remedies identified in *Ziglar*, which provided only prospective relief at best. *See* Ziglar v. Abbasi, 137 S. Ct. 1843, 1865 (2017); *Schweiker*, 487 U.S. at 424–25.

45 Brief for the Petitioners at 22–23, *Schweiker*, 487 U.S. 412 (No. 86-1781), 1987 WL 880510, at *22–23. For the role of alternative remedies in the *Ziglar* Court's analysis and our concerns, see *infra* Part IV.

46 FDIC v. Meyer, 510 U.S. 471 (1994); Corr. Servs. Corp. v. Malesko, 534 U.S. 61 (2001).

47 *Meyer*, 510 U.S. at 484–85.

48 *Id.* at 484–85.

49 *See Ziglar*, 137 S. Ct. at 1860 (stating that policy-based claims are disfavored because *Bivens* claims serve "to deter the *officer*" (quoting *Meyer*, 510 U.S. at 485)).

50 *See Meyer*, 510 U.S. at 485.

Court reasoned, no one would sue the individual officer, thereby reducing the deterrent value of *Bivens* claims.[51] The Court had nothing to say about any supposed mismatch between the individual deterrent purpose of *Bivens* claims and the use of *Bivens* to challenge unconstitutional policies.

The notion that *Bivens* claims cannot be used to seek damages from individuals responsible for creating and implementing unconstitutional policies was similarly absent from the government's briefs.[52] Rather, the briefs expressed concern that claims against entities would implicate fiscal policy, not the unconstitutional policy challenged in the plaintiff's claim.[53] Indeed, the government never argued that *Bivens* claims could not attack unconstitutional policies, where those claims were brought against individual defendants. The government's overriding argument was that *Bivens* claims should not be brought against agencies, a view ultimately adopted by the Court.[54]

The second decision on which the *Ziglar* Court relied in support of its assertion that *Bivens* claims cannot challenge policies, *Malesko*, was similarly focused on the distinction between claims against officers and claims against agencies.[55] Like *Meyer*, it held that *Bivens* claims should run against individuals, not entities, because if plaintiffs could sue both, they would focus on the latter, undermining individual deterrence.[56] At the same time, the *Malesko* Court recognized that *Meyer* permitted *Bivens* claims against individuals who

51 *Id.*

52 The government was focused on why a *Bivens* claim should not run against an agency, even if individual officers could be liable under *Bivens*. The heart of the argument was that three "special factors," not present for claims against individuals, were implicated by claims against agencies. *See* Brief for the FDIC at 25, *Meyer*, 510 U.S. 471 (No. 92-741), 1993 WL 348895, at *25–26. First, while acknowledging the reality of indemnification, the government argued that claims against agencies would implicate federal fiscal policy in a special way because Congress had not appropriated federal funds to satisfy judgments against agencies. *See id.* at 25–26 (comparing regulatory regime limiting indemnification of individual defendants with the unlimited liability of agencies contemplated by the lower court's decision in *Meyer*). Second, the government analogized to the FTCA's discretionary function exception to argue that *Bivens* claims should not be permitted to challenge an agency's policy choice. *See id.* at 26–28. But this argument was not framed as an argument that *Bivens* claims could not be used to pursue damages remedies against individual policymakers. Instead, it centered on the reasons to hesitate before creating a claim against the *agency* for unconstitutional claims where Congress had already spoken to the issue. *See id.* at 27–28 ("The court of appeals' decision to imply a *Bivens* remedy here impermissibly expands judicial review of administrative and legislative policy choices in the face of Congress's express prohibition of such review."). Third, the government argued that the plaintiff could have pursued claims against the agency through a variety of alternative remedial schemes. *See id.* at 28–29.

53 *See id.* at 25–26.

54 *See id.* (noting that even if fiscal impact from claims against individuals would be the same because of indemnification, Congress had never authorized "the expenditure of federal funds to satisfy judgments in a court-authorized [damages] action" against an agency).

55 Corr. Servs. Corp. v. Malesko, 534 U.S. 61 (2001).

56 *See id.* at 69 ("[In *Meyer*, w]e reasoned that if given the choice, plaintiffs would sue a federal agency instead of an individual who could assert qualified immunity as an affirmative defense."); *id.* at 71 ("This case is, in every meaningful sense, the same. For if a corpo-

are acting pursuant to policy.[57] Indeed, even though the claim in *Malesko* was based on the entity's policy,[58] it was the distinction between individual and entity liability, not the policy basis for the claim, that animated the entirety of the decision in *Malesko*.

Language from *Malesko* selectively quoted in *Ziglar* may appear to offer a kernel of support but does not, read in context, stand for the proposition that *Bivens* is unavailable to challenge policy. *Malesko* drew a distinction between "the *Bivens* remedy, which we have never considered a proper vehicle for altering an entity's policy," and "injunctive relief" which "has long been recognized as the proper means for preventing entities from acting unconstitutionally."[59] In context, however, this merely reflects the Court's intuition that suits for injunctive relief contest the constitutionality of current and continuing practices and direct a prospective change in policy in appropriate cases, itself an unexceptional proposition. It does not address the availability of damages claims against policymakers, or claims that challenge unlawful policies. After all, the government conceded that *Bivens* liability in a case like Malesko's would be appropriate if the individual employees of a private corporation were sued instead of the corporation itself.[60] Nor did the United States in *Malesko* argue that the policy basis for the claim precluded *Bivens*—instead, the government relied on *Meyer*'s distinction between entity and individual liability.[61] Petitioners in *Malesko* went beyond the entity-individual distinction, noting that the "quintessential *Bivens* defendant" is "either a line agent directly interacting with the public or an administrator directly setting an entity's policies."[62]

Contemporaneous interpretation of *Malesko* and *Meyer* make clear that they were not read as hostile to policy-based *Bivens* claims for damages. In

rate defendant is available for suit, claimants will focus their collection efforts on it, and not the individual directly responsible for the alleged injury.").

57 *Id.* at 70 (citing *Meyer*, 510 U.S. at 473–74).

58 *See id.* at 64–65 (describing factual background).

59 *Id.* at 74.

60 *Id.* at 79 n.6 (Stevens, J., dissenting) ("[T]he reasoning of the Court's opinion relies, at least in part, on the availability of a remedy against employees of private prisons. [The Court noted] that *Meyer* 'found sufficient' a remedy against the individual officer, '*which respondent did not timely pursue.*'" (emphasis added) (citation omitted) (quoting *id.* at 72 (majority opinion))); Brief for the United States as Amicus Curiae Supporting Petitioner at 11–12, *Malesko*, 534 U.S. 61 (No. 00-860), 2001 WL 558228, at *11–12 ("The parties do not dispute that federal prisoners in private facilities may bring equivalent actions: a *Bivens* claim against the individuals responsible for the constitutional violation and a tort suit against the correctional entity that employed those individuals.").

61 *See* Brief for the United States, *supra* note 60, at 15–16; *id.* at 19–20 ("Here, as in *Meyer*, providing a damages action against the corporate employer would undermine the incentive for aggrieved parties to sue the individual directly responsible for their constitutional injuries.").

62 Reply Brief of Petitioner at 4, *Malesko*, 534 U.S. 61 (No. 00-860), 2001 WL 1023502, at *4 (2001); *id.* at 5 ("First, because plaintiffs can bring *Bivens* actions against individuals who directly make policy for federal entities and entities acting under color of federal law, it plainly is not necessary to have a *Bivens* action against the entity.").

Wilson v. Layne,[63] the plaintiff brought claims against defendants who were alleged to have acted pursuant to the U.S. Marshals Service's media ride-along policy.[64] The plaintiff sued both federal and state officials (under *Bivens* and § 1983, respectively) for allegedly violating the Fourth Amendment by inviting a reporter and photographer to witness the execution of arrest warrants for the plaintiff.[65] The role of policy was not deemed relevant to whether the plaintiff had a *Bivens* claim (no one questioned the existence of the claim), and the Court squarely held that the media ride-along violated the Fourth Amendment.[66] But the existence of the policy was relevant to whether the defendants were entitled to qualified immunity based in part on reasonable reliance on the policy.[67] And just as in prior cases, the government based its argument not on the unavailability of *Bivens* liability to challenge policy, but on the availability of qualified immunity.[68] Lower courts similarly applied *Meyer* to distinguish between *Bivens* claims against entities and claims against individuals—instead of distinguishing between claims alleging unconstitutional policies and claims alleging individual misconduct.[69]

*C. The Role of Policy Post-*Malesko

The trajectory of *Bivens* jurisprudence between *Malesko* and *Ziglar* is consistent with what we have described to this point. Even as the Court expressed continuing hostility to *Bivens* actions in general, neither the government in its opposition to *Bivens* claims nor the Court in its rejection of *Bivens* claims recognized or pressed the hostility to policy-based claims announced in *Ziglar*. Despite numerous opportunities to argue against the

63 Wilson v. Layne, 526 U.S. 603 (1999).

64 *Id.* at 607–08.

65 *Id.*

66 *Id.* at 614.

67 *See id.* at 615–17.

68 *See* Brief for Fed. Respondents Harry Layne, James A. Olivo, & Joseph L. Perkins at 39–40, *Wilson*, 526 U.S. 603 (No. 98-83), 1999 WL 38593, at *39–40 ("On the contrary, the existence of the Marshals Service policy itself provides strong support for respondents' claim that they are entitled to qualified immunity in this case.").

69 *See, e.g.*, Alba v. Montford, 517 F.3d 1249, 1255 n.6 (11th Cir. 2008) (relying on *Malesko* and *Meyer* for proposition that *Bivens* is unavailable when "challenging the conduct or policy of a non-individual defendant"); Polanco v. U.S. Drug Enf't Admin., 158 F.3d 647, 650–51, 651 n.2 (2d Cir. 1998) (characterizing *Meyer* as concerned with distinction between agency liability and individual liability, in part because of availability of qualified immunity defense); Kauffman v. Anglo-Am. Sch. of Sofia, 28 F.3d 1223, 1227 (D.C. Cir. 1994) ("*Meyer* argued that if given a choice, plaintiffs would have every reason to sue a federal agency instead of its individual officials, because this tactic would circumvent the qualified-immunity defenses that the individuals might be expected to raise. . . . Accordingly, to recognize *Bivens* actions against federal agencies would undermine *Bivens* itself."); *id.* (declining to find *Bivens* remedy against private entity, relying on "*Meyer*'s logic [that] provision of a damages remedy against a private entity would actively diminish the deterrent value of the remedy against the individual"); *see also* Corr. Servs. Corp. v. Malesko, 534 U.S. 61, 66 n.2 (2001) (citing *Kauffman*, 28 F.3d at 1227).

imposition of *Bivens* liability for adoption of particular policies, the government refrained over this time from making such arguments, even as it argued against the imposition of liability on other grounds. In *Christopher v. Harbury*,[70] a case implicating foreign policy, the United States as amicus made no argument about barring *Bivens* claims based on policy, although it did argue against extension of *Bivens* to the claim brought in that case.[71] And in *Wilkie v. Robbins*,[72] although the United States in its briefing described the overlapping land management policies at stake in that decision, it did not seek to bar *Bivens* based on these policy implications,[73] nor did the Court base its decision on those concerns.[74]

Iqbal, of course, concerned a challenge to the same policies at issue in *Ziglar*. The Court's decision expressed no doubt regarding the availability of a *Bivens*-type claim for damages caused by an allegedly unconstitutional policy.[75] Indeed, when the Court analyzed the plaintiff's complaint, it addressed the claims challenging government policy and focused not on whether this type of challenge could be brought as a *Bivens* claim but instead on whether the plaintiffs had adequately alleged that the defendants in question had adopted the policy for discriminatory reasons.[76] The premise of the government's briefing in *Iqbal* was similar—it read *Malesko* and *Meyer* to establish that "high-level federal officials may be held liable only for their direct involvement in constitutional violations, or at least their deliberate indifference in the face of information that the rights of others are being violated."[77] To the extent the government argued that policymaking defendants should be protected from liability, their argument was located in the qualified immunity defense, not the inapplicability of *Bivens*.[78] By contrast, the government's discussion of the pleadings in *Iqbal* made clear their concession that high-level officials could be held liable under *Bivens* for personally creating an unconstitutional policy.[79]

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70 Christopher v. Harbury, 536 U.S. 403 (2002).

71 Brief for Petitioners at 38–39, *Christopher*, 536 U.S. 403 (No. 01-394), 2002 WL 200675, at *38–39.

72 Wilkie v. Robbins, 551 U.S. 537 (2007).

73 *See* Brief for the Petitioners at 2–4, *Wilkie*, 551 U.S. 537 (No. 06-219), 2007 WL 128587, at *2–4.

74 *See Wilkie*, 551 U.S. at 555–60 (conducting special factors analysis to conclude that no *Bivens* remedy should be available, principally because of the difficulty in crafting a judicially manageable standard). The Court's opinion in *Wilkie* makes no reference to any land management policies implicated by the plaintiff's proposed cause of action.

75 *See* Ashcroft v. Iqbal, 556 U.S. 662, 676–77 (2009) (referring to the need for *Bivens* to be based on an individual defendant's actions, not the actions of subordinates).

76 *See id.* at 680–81.

77 Brief for the Petitioners at 14, *Iqbal*, 556 U.S. 662 (No. 07-1015), 2008 WL 4063957, at *14.

78 *See id.* at 18–19.

79 Reply Brief for Petitioners at 10–11, *Iqbal*, 556 U.S. 662 (No. 07-1015), 2008 WL 5009266, at *10–11 ("Thus, it is not sufficient simply to allege that a high-level officer was 'instrumental' or a 'principal architect' of a policy like the one respondent alleges. Instead, there must be an actual factual basis in the complaint for concluding that such a

Cases decided after *Iqbal* paint a similar picture. *Ashcroft v. al-Kidd*[80] involved a challenge to a high-level policy decision made by the Attorney General, but the Court based its decision on qualified immunity, not on whether a *Bivens* action was available to challenge the Attorney General's conduct.[81] And in *Wood v. Moss*,[82] plaintiffs also based their claims on an "actual but unwritten" Secret Service policy regarding how to police demonstrations against the President, but the Court did not question its viability on that ground.[83] Instead, the Court found insufficient allegations to support the alleged policy or to connect the policy to the actions of the defendants.[84] The government's briefing in *al-Kidd* and *Wood* made no argument that the viability of the claims in those cases was influenced by the fact that they were policy-based.[85] The government did not even cite to *Malesko* or *Meyer* in their briefs.

And so we come to *Ziglar*. Reading the Court's opinion in isolation, one could be forgiven for assuming that the hostility to policy-based claims was firmly ensconced in *Bivens* jurisprudence. As illustrated above, however, if anything the opposite was true. Neither the Court nor the government attorneys arguing before it ever laid claim to the policy hostility articulated in *Ziglar*. Rather, the running assumption guiding government briefs and Supreme Court decisions was that *Bivens* claims could be deployed to seek damages arising from unconstitutional policies and that policymakers could be held liable where they directly implemented, via policy, unconstitutional conduct. The *Ziglar* Court constructed its contrary suggestion, like much of its *Bivens* jurisprudence, with smoke and mirrors.

II. The *Ziglar* Court's Novel Disdain for Policy Reform Through Constitutional Torts

The *Ziglar* Court's hostility to policy-based claims contradicts not only prior *Bivens* doctrine but also, as we show in this Part, the Court's own long-standing views about the role that constitutional tort claims can—and should—play in a system of government accountability. In addition to the misleading use of precedent we document in Part I, the *Ziglar* Court offered two further reasons for its hostility to *Bivens* claims based on unconstitutional policies. The first is related to the precedent-based argument canvassed above—the Court's statement that a *Bivens* suit does not provide "a proper

policy exists and was handed down by such a high-level officer—here the Attorney General or Director of the FBI himself.").

80 Ashcroft v. al-Kidd, 563 U.S. 731 (2011).

81 *Id.* at 734, 743–44.

82 572 U.S. 744 (2014).

83 *Id.* at 755.

84 *See id.* at 763–64.

85 *See* Brief for Petitioner at 11–14, *al-Kidd*, 563 U.S. 731 (No. 10-98), 2010 WL 5087872, at *11–14 (focusing on absolute and qualified immunity); Brief for Petitioners at 19, 49, *Wood*, 572 U.S. 744 (No. 13-115), 2014 WL 173484, at *19, *49; Reply Brief for Petitioners at 17–20, *Wood*, 572 U.S. 744 (No. 13-115), 2014 WL 984991, at *17–20.

vehicle for altering an entity's policy"[86] —which we take to be a pragmatic claim that *Bivens* actions are well suited to deter individual bad actors but should not be used to effectuate a change in harmful policies. Second, the *Ziglar* Court explained that policies should not be challenged through *Bivens* actions because discovery and litigation in these actions will "require courts to interfere in an intrusive way with sensitive functions of the Executive Branch."[87]

In this Part, we explain why the *Ziglar* Court's concerns—about the ability to challenge government policies through damages actions and the sensibility of these types of claims—run counter to the structure of constitutional litigation as it has developed in connection with suits against state and local actors under § 1983 and against federal actors under assorted statutory vehicles. The Court has long assumed that individuals harmed by an unlawful policy can bring suit to challenge that policy as it was applied to them. The nature of the policy may inform the manner in which the claim proceeds, but the policy itself does not enjoy immunity from constitutional scrutiny. Moreover, contrary to the language in *Ziglar*, and the post-*Ziglar* suggestion of some lower courts, the deterrent effect of the threat of monetary liability does not improperly impinge on the policymaking discretion of government actors but properly confronts those actors with incentives to comply with law.

A. The Role of Policy Under § 1983

Policy plays an important role in defining the contours of liability under § 1983, but it tends to increase the range of available remedies, rather than to constrain remedial options. Consider the important decision of *Monell v. Department of Social Services*, the Court's leading case on the liability of cities and counties for constitutional violations under § 1983.[88] There, departments of the City of New York had a policy requiring pregnant employees to take unpaid leave before it became medically necessary.[89] The district court recognized that the plaintiffs' claim for injunctive relief had been mooted by the City's abandonment of the policy in question.[90] That left the plaintiffs' claims for damages. The Supreme Court ruled that the damages claims should proceed against the City, overruling so much of its decision in *Monroe v. Pape* as had refused to allow such suits against municipalities.[91]

86 Ziglar v. Abbasi, 137 S. Ct. 1843, 1860 (2017) (quoting Corr. Servs. Corp. v. Malesko, 534 U.S. 61, 74 (2001)). For further discussion of the Court's invocation of *Malesko*, see *supra* Part I.

87 *Ziglar*, 137 S. Ct. at 1860–61.

88 436 U.S. 658 (1978).

89 *See id.* at 660–61 (describing challenge to the Department's "official policy compell[ing] pregnant employees to take unpaid leaves of absence before such leaves were required for medical reasons").

90 *Id.* at 661.

91 *See id.* at 700–01 (overruling *Monroe v. Pape*, 365 U.S. 167 (1961), with respect to local government liability under § 1983).

The Court nowhere suggested that the presence of a policy foreclosed recovery. To the contrary, the policy in *Monell* was broadly applicable to a variety of city employees and was nonetheless subject to attack in a suit for damages and injunctive relief. The Court summarized its conclusions as follows:

> Local governing bodies, therefore, can be sued directly under § 1983 for monetary, declaratory, or injunctive relief where, as here, the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers. Moreover, although the touchstone of the § 1983 action against a government body is an allegation that official policy is responsible for a deprivation of rights protected by the Constitution, local governments, like every other § 1983 "person," by the very terms of the statute, may be sued for constitutional deprivations visited pursuant to governmental "custom" even though such a custom has not received formal approval through the body's official decisionmaking channels.[92]

The Court thus approved litigation to challenge both formal policies and informal practices rising to the level of governmental custom. At the same time, the Court refused to impose respondeat superior liability on local governmental bodies, concluding that such bodies were responsible for their own policies or practices but not for the unauthorized constitutional torts committed by their employees.[93]

Just as *Monell* subjects the governmental body to suit for its policies, so too does the Court hold individual officials accountable when they act pursuant to a clearly unconstitutional policy. Consider, for example, the Court's decision in *Monroe*, holding a Chicago police officer legally accountable under § 1983 for an unconstitutional intrusion into plaintiff's home and for later detaining the plaintiff on open charges.[94] Although Justice Frankfurter objected to imposing federal liability for random and unlawful actions that were prohibited by state law, he agreed that the defendant was accountable for unlawful detention on open charges pursuant to official custom.[95] Since *Monroe*, the Court has consistently reaffirmed that individual officials may be held to account for constitutional torts committed pursuant to official policies and to practices and usages that rise to the level of custom for § 1983 purposes. Qualified immunity may shield officers from personal liability, but not when the actions were taken pursuant to a clearly unconstitutional policy.[96]

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92 *Id.* at 690–91.

93 *See id.* at 691, 694.

94 *See Monroe*, 365 U.S. at 169, 187.

95 *See id.* at 258–59 (Frankfurter, J., concurring in part and dissenting in part).

96 *See* Hope v. Pelzer, 536 U.S. 730, 745–46 (2002) (finding prison guards were subject to personal liability and not entitled to qualified immunity when using a hitching post to subdue and punish prisoners pursuant to Alabama state prison policy that authorized such measures); *cf.* Pembaur v. City of Cincinnati, 475 U.S. 469, 484–85 (1986) (holding county liable for unconstitutional policy and concluding that officers violated the Constitution in

Notably, the availability of suits for money damages to challenge an unconstitutional policy under § 1983 does not depend on the existence, or not, of injunctive- and declaratory-style remediation.[97] The suit for injunctive relief in *Monell* and in other cases may succeed in disbanding an unconstitutional policy as a prospective matter, but such success will not foreclose those injured by the policy from seeking monetary relief in an otherwise appropriate proceeding. *Monell* itself proceeded to recognize the viability of monetary claims for New York's wrongful pregnancy policies and many other decisions point in the same direction.[98] Thus, in *Hope v. Pelzer*, the Court approved personal liability for the prison guards involved in the punitive use of a hitching post pursuant to a detention policy that a federal district court had already enjoined in separate class action litigation.[99]

To be sure, remedial principles create some interdependence between damages and injunctive relief; the traditional view was to see damages as the primary remedy and the suit for injunctive relief as an alternative. But even that rule, as the Supreme Court explained in *Sterling v. Constantin*,[100] did not foreclose injunctive relief in a proper case.[101] There, the Court upheld the issuance of injunctive relief against action taken to enforce an unconstitutional state policy, notwithstanding the State's contention that only damages relief was available.[102]

> The suggestion confuses the question of judicial power with that of judicial remedy. If the matter is one of judicial cognizance, it is because of an alleged invasion of a right, and the judicial power necessarily extends to the granting of the relief found to be appropriate according to the circumstances of the case. Whether or not the injured party is entitled to an injunction will depend upon equitable principles; upon the nature of the right invaded and the adequacy of the remedy at law.[103]

Here, the State's unconstitutional policy was subject to judicial attack, whether carried out by low-level officials or by way of the declaration of martial law by the Governor.[104] Both damages and, in appropriate cases, injunctive relief were available to contest the policy and obtain proper relief.[105]

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conducting a warrantless search in violation of the Fourth Amendment pursuant to the policy but were shielded by qualified immunity).

97 In the *Bivens* context, in contrast, the Court has invoked the availability of remedial alternatives to limit the right to damages. *See infra* Part IV.

98 *See Monell*, 436 U.S. at 694; *cf.* Uzuegbunam v. Preczewski, 141 S. Ct. 792 (2021) (upholding viability of suit for nominal damages to challenge university policy restricting religious freedom after circumstances mooted claims for declaratory and injunctive relief).

99 *See Hope*, 536 U.S. at 744 (citing Austin v. Hopper, 15 F. Supp. 2d 1210, 1244–46 (M.D. Ala. 1998) (granting class-wide injunctive relief against unconstitutional hitching post policy)).

100 287 U.S. 378 (1932).

101 *See id.* at 403.

102 *See id.* at 404.

103 *Id.* at 403.

104 *See id.* at 393.

105 *See id.* at 403.

B. Policy Claims Against Federal Officials

The remedial framework for suits against federal officials has also subjected to judicial scrutiny both the policies of the government and those who carry them into effect. That was true in the nineteenth century and remains true today, to some extent, at least outside the context of *Bivens* litigation. Only when the policies in question violate a narrow set of constitutional guarantees, such as the Takings Clause, or when they operate in effect as a breach of contract does the law foreclose officer suits. But that protection reflects the fact that the government (rather than the individual officer) bears liability directly, typically in a suit brought against the sovereign in the court of claims.

To see the early view of policy, consider the Court's well-known decision in *Little v. Barreme*,[106] which arose during what historians refer to as the Quasi-War between the United States and France.[107] There, Captain Little intercepted a foreign ship pursuant to the instructions he received from the Secretary of the Navy.[108] The Court found no legal basis for the ship's capture; the policy announced by the Secretary was unlawful under the terms of applicable law.[109] In the end, the Court approved an award of damages against Captain Little, holding him personally accountable for the government's unlawful policy, and Congress adopted legislation to compensate Little and make the plaintiff whole for the loss suffered.[110]

Claims for an unlawful taking of property presented a slightly different remedial problem. If the taking was authorized, then the law regarded the obligation to pay just compensation as one that was owed by the government itself as a matter of contract.[111] At one time, those claims would proceed by petition to Congress, but since 1855 have been handled by the U.S. Court of Claims (now known as the Court of Federal Claims).[112] If by contrast the taking was unauthorized, the invasion of property rights represented a tort and the liability was assigned to the officer who committed the taking.[113] The creation of a policy, in this context, thus served to identify the responsible party for claims sounding in contract. The policy itself did not immunize the government's action from scrutiny but identified the proper defendant when property was wrongly taken.

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106 6 U.S. (2 Cranch) 170 (1804).

107 *See id.* at 173. For an account of the litigation and Little's subsequent indemnification, see James E. Pfander & Jonathan L. Hunt, *Public Wrongs and Private Bills: Indemnification and Government Accountability in the Early Republic*, 85 N.Y.U. L. Rev. 1862, 1877–87 (2010).

108 *Little*, 6 U.S. (2 Cranch) at 176–78.

109 *See id.* at 173–75.

110 *See* Pfander & Hunt, *supra* note 107, at 1902 & n.181.

111 *See* James E. Pfander, *Dicey's Nightmare: An Essay on the Rule of Law*, 107 Calif. L. Rev. 737, 742 (2019).

112 *See id.*

113 *See id.* at 768.

Perhaps needless to say, the relationship between those detained in *Ziglar* and the federal officials named as defendants was not founded on contract. The assignment of contract and takings claims to a separate tribunal thus has no application to claims for unlawful custody and abuse—claims that classically sound in tort and give rise to personal official liability. The Court of Federal Claims has long been governed by a statute that deprives it of jurisdiction over tort claims and the government has never accepted liability for the constitutional torts of its officers.[114] *Bivens* liability has always rested on the need to deter officers and by extension the agencies that employ them from violating the constitutional rights of individuals. By design, that deterrent effect encourages the adjustment of policies that resulted in those constitutional violations. To be sure, we believe that the Supreme Court's descriptions of lawsuits' deterrent signal does not reflect the ways in which some local governments process that signal. Each of us has described these gaps between the Court's vision and the reality on the ground.[115] But, as the next Section shows, that research only strengthens the case against the *Ziglar* Court's novel concern with the way constitutional tort actions influence government policy.

C. The Court's Longstanding Vision of Deterrence

As we established in Part I, the *Ziglar* Court's citation to prior precedent to support its hostility to policy-based claims obscures the fact that no prior case had questioned the use of *Bivens* to seek redress for injuries caused by unconstitutional policies. Similarly, the Court's suggestion that damages awards are ineffective at influencing policy, or even worse, pose a threat to effective governmental operations, is new. Indeed, the Supreme Court has long expected that damages awards against individual officers and policymakers can influence government officials to change unconstitutional policies. Many times, the Court has applauded this type of deterrent effect, whether directed at federal, state, or local governmental policies.[116]

For example, in *Carlson v. Green*,[117] the Court wrote that a damages award against an individual federal officer in a *Bivens* action can and should

114 *See* 28 U.S.C. § 1491(a)(1) (2018) (extending jurisdiction of the Court of Federal Claims to constitutional and contract claims "not sounding in tort").

115 *See generally* Pfander et al., *supra* note 4; Alexander A. Reinert, *Measuring the Success of* Bivens *Litigation and Its Consequences for the Individual Liability Model*, 62 STAN. L. REV. 809 (2010); Joanna C. Schwartz, *Myths and Mechanics of Deterrence: The Role of Lawsuits in Law Enforcement Decisionmaking*, 57 UCLA L. REV. 1023 (2010); Joanna C. Schwartz, *Police Indemnification*, 89 N.Y.U. L. REV. 885 (2014) [hereinafter Schwartz, *Police Indemnification*].

116 *See, e.g.*, Pembaur v. City of Cincinnati, 475 U.S. 469, 495 (1986) (Powell, J., dissenting) ("The primary reason for imposing § 1983 liability on local government units is deterrence, so that if there is any doubt about the constitutionality of their actions, officials will 'err on the side of protecting citizens' rights.'" (quoting Owen v. City of Independence, 445 U.S. 622, 652 (1980))); City of Newport v. Fact Concerts, Inc., 453 U.S. 247, 269 (1981) (explaining that judgments against municipalities will cause policymakers to "discharge . . . offending officials" and change policies); *see also infra* notes 117–21.

117 446 U.S. 14 (1980).

influence the behavior of both the individual defendant and their government employer.[118] As the Court explained, the government argued that "FTCA liability is a more effective deterrent because . . . the Government would be forced to promulgate corrective policies."[119] But the Court rejected this argument on the ground that it assumed "that the superiors would not take the same actions when an employee is found personally liable for violation of a citizen's constitutional rights."[120] Instead, the Court concluded, "[t]he more reasonable assumption is that responsible superiors are motivated not only by concern for the public fisc[,] but also by concern for the Government's integrity."[121]

The patchwork of liability rules that the Court has settled on for § 1983 liability also rests on an understanding that damages awards against individual officers and municipalities can influence governmental policies. When the Court held that municipalities were not entitled to qualified immunity, its logic turned on its conclusion that damages awards entered against local governments and their policymakers can and should influence policies.[122] As the Court reasoned in *Owen v. City of Independence*:

> The knowledge that a municipality will be liable for all of its injurious conduct . . . should create an incentive for officials who may harbor doubts about the lawfulness of their intended actions to err on the side of protecting citizens' constitutional rights. Furthermore, the threat that damages might be levied against the city may encourage those in a policymaking position to institute internal rules and programs designed to minimize the likelihood of unintentional infringements on constitutional rights. Such procedures are particularly beneficial in preventing those "systemic" injuries that result not so much from the conduct of any single individual, but from the interactive behavior of several government officials, each of whom may be acting in good faith.[123]

In contrast to the *Ziglar* Court's assertion that damages actions cannot influence government policies, the Court recognized decades ago that damages awards against individual officers or policymakers can, in fact, induce officials to change policies. And the Court in *Carlson* and *Owen* not only accepted but celebrated the deterrent power of these damages awards. Indeed, in the Court's view, the deterrent impact of damages actions is one of § 1983's "*raisons d'être*."[124]

The Court's model of individual liability in § 1983 litigation also turns on an understanding of the deterrent impact of damages actions. Qualified

118 *See id.* at 21.
119 *Id.*
120 *Id.*
121 *Id.*
122 *See* Owen v. City of Independence, 445 U.S. 622, 638, 651–53 (1980).
123 *Id.* at 651–53 (citations omitted).
124 *Id.* at 656 (quoting Note, *Section 1983 and Federalism*, 90 HARV. L. REV. 1133, 1224 (1977)); *see also* Pembaur v. City of Cincinnati, 475 U.S. 469, 480–81 (1986) (holding that municipal liability can flow from the actions of a single policymaker and that denying liability "would . . . be contrary to the fundamental purpose of § 1983").

immunity doctrine is based precisely on the fear that damages actions will *overdeter* government officials, of particular concern where policy is made.[125] Nonetheless, the Court identified the need for deterrence of "recurrent constitutional violations" as a justification for permitting individual § 1983 defendants to be subjected to punitive damages, even as it barred the award of such damages against municipalities.[126] The Court has even viewed damages actions against individuals as a "more effective" deterrent than damages actions against the entity, in both the § 1983 and *Bivens* contexts.[127]

Bivens liability, of course, does not precisely mirror that under § 1983. But the differences only reinforce our misgivings about *Ziglar*'s hostility to policy-based claims. The protections against individual liability in the *Bivens* context are even greater than in § 1983, because not only can *Bivens* defendants invoke qualified immunity, but the defense comes into play only if the plaintiff can show that a *Bivens* claim exists. Moreover, there is no *Monell* parallel to *Bivens*, which means that there is less opportunity to bring claims against government entities that do not enjoy the protections afforded by qualified immunity. So to the extent that *Bivens* liability will deter ongoing unconstitutional conduct, the window of opportunity is narrower than in § 1983.

At the same time, there are critical similarities such that, when viable *Bivens* claims exist, they are just as likely as § 1983 claims to incentivize compliance with the law without creating a risk of overdeterrence. For example, both § 1983 claims and *Bivens* actions can influence government behavior by clarifying the scope of constitutional protections. Even when the Court held in *Pearson v. Callahan*[128] that lower courts need no longer follow the "rigid order of battle" in sequencing qualified immunity considerations, it acknowledged that "the two-step procedure promotes the development of constitutional precedent."[129] That development has concrete ramifications for policy, even when damages claims are unsuccessful. In *Camreta v. Greene*,[130] for instance, the defendant prevailed in the lower court on his qualified immunity defense because, even though his actions violated the Fourth Amendment, the relevant law was not "clearly established."[131] On certiorari, the Court found that he had standing to seek review because, although he had prevailed below, the Ninth Circuit's decision on the Fourth Amendment meant that the defendant "must either change the way he performs his duties

125 Thus, qualified immunity protected the official sued in *Meyer* who had carried out the disputed policy in that case. *See* FDIC v. Meyer, 510 U.S. 471, 473–74 (1994).

126 City of Newport v. Fact Concerts, Inc., 453 U.S. 247, 267–70 (1981).

127 *Id.* at 270 ("The Court previously has found, with respect to such violations, that a damages remedy recoverable against individuals is more effective as a deterrent than the threat of damages against a government employer." (citing Carlson v. Green, 446 U.S. 14, 21 (1980))).

128 555 U.S. 223 (2009).

129 *Id.* at 234, 236.

130 563 U.S. 692 (2011).

131 *Id.* at 699.

or risk a meritorious damages action."[132] Confronted with a determination as to the scope of constitutional protection, governments must decide how to adjust their policy, if at all, to ward off a repetition of future litigation.

In both liability regimes, the Court expressed concern that overdeterrence of individual defendants through the imposition of damages awards could undermine the valuable public-regarding purposes of individual liability. The Court's concern with overdeterrence in the context of constitutional torts, both in *Bivens* and § 1983 litigation, reflects the Court's belief that individual damages actions *can* influence decisionmaking.[133] But the Court has seemed particularly concerned with the ill effects of the personal liability regime contemplated by *Bivens*.[134] In *Ziglar*, the Court found this concern particularly salient in the perceived unfairness of holding individual officers personally accountable for their actions in formulating and carrying out government policy.[135] And in *Ziglar*, concerns about the threat of personal liability appeared to factor into the Court's case against the use of *Bivens* litigation for policy challenges.[136]

These concerns had been aired before. But they were invoked by the *Ziglar* Court for the first time to curtail the right to sue. In the past, the Court has described the potential burdens on high-level officials associated with discovery and trial when creating heightened standards for pleading and qualified immunity.[137] But the *Ziglar* Court was the first to advance the notion that these types of concerns should foreclose the right to sue altogether. Critically, the Court never clarified why a damages action would present this risk but not equitable claims for injunctive relief. If anything, equitable claims would seem to present a risk of greater intrusion, with their potential to interfere with ongoing governmental functions.[138]

Indeed, we have found that the threat of individual officials' financial liability is illusory at best. In *Bivens* claims brought against federal officers employed by the Federal Bureau of Prisons, we found that individual officers

132 *Id.* at 703.

133 For a discussion of these concerns, see Pfander et al., *supra* note 4; *see also* Sheldon Nahmod, *Constitutional Torts, Over-Deterrence and Supervisory Liability After* Iqbal, 14 Lewis & Clark L. Rev. 279 (2010); Joanna C. Schwartz, *The Case Against Qualified Immunity*, 93 Notre Dame L. Rev. 1797, 1811–14 (2018).

134 *See* Pfander et al., *supra* note 4, at 574–78 (describing these concerns).

135 *See* Ziglar v. Abassi, 137 S. Ct. 1843, 1860 (2017) ("*Bivens* is not designed to hold officers responsible for acts of their subordinates." (citing Ashcroft v. Iqbal, 556 U.S. 662, 676 (2009))).

136 *See Ziglar*, 137 S. Ct. at 1860.

137 *See Iqbal*, 556 U.S. at 685 (describing plausibility pleading rules as necessary to protect government officials from "the substantial diversion that is attendant to participating in litigation"); Mitchell v. Forsyth, 472 U.S. 511, 526 (1985) (explaining that qualified immunity is necessary to protect against the burdens of discovery and trial because "[i]nquiries of this kind can be peculiarly disruptive of effective government" (quoting Harlow v. Fitzgerald, 457 U.S. 800, 817 (1982))).

138 *See, e.g.*, Larson v. Domestic & Foreign Com. Corp., 337 U.S. 682, 704 (1949) (expressing concern lest the government be "stopped in its tracks by any plaintiff who presents a disputed question of property or contract right").

rarely contributed to settlements and judgments entered over a ten-year period.[139] Payouts did not come from the Bureau of Prison's budget, either. Instead, these awards were taken from the Judgment Fund, located in the U.S. Treasury.[140] In our study, we found no instance in which a supervisory officer or high-ranking policy official was required to contribute to an award.[141] One of us has found a similar pattern in indemnification patterns in § 1983 litigation.[142] In other words, although both § 1983 and *Bivens* are premised on a personal liability regime, as a practical matter they function as an entity liability regime, with the same potential for deterrent effect that the Court has identified in its *Monell* jurisprudence.

To sum up, the *Ziglar* Court's description of *Bivens* suits' deterrent effects runs contrary to the Court's longstanding vision of the ways in which damages awards deter both individuals and entities. But recognizing this shift is not to endorse the ways in which the Court has conceived of lawsuits' deterrent power. As we have shown in our empirical work, individually and collectively, the Court worries far too much about overdeterrence in the context of constitutional torts. But these observations about the mechanics of deterrence further undermine the *Ziglar* Court's reasons for suggesting that *Bivens* doctrine should not embrace policy-based claims.

III. CONFUSED APPLICATION OF *ZIGLAR*'S POLICY HOSTILITY

Apart from its failure to identify support in *Bivens* doctrine or in the law of government accountability, *Ziglar* failed to clarify how lower courts should apply its limits on suits challenging government policy. One might argue that the exception applies only in connection with the Court's evaluation of special factors; it was in that section of the opinion in which the Court questioned the use of *Bivens* as a vehicle for policy challenges.[143] But in an earlier section of the opinion, the Court explained that new context analysis should consider "the presence of potential special factors that previous *Bivens* cases did not consider."[144] Given the novelty of its approach in *Ziglar*, prior cases will have predictably failed to take account of the Court's stated concern with policy-based *Bivens* litigation. Perhaps, on that view, lower courts will consider the presence of a disputed government policy to warrant both a new context finding and a special factors concern.

Ziglar also does little to define what counts as a policy for purposes of either the new context or special factors inquiry. For starters, the Court appears to embrace a perception that policies differ from one-off actions taken within a zone of discretion. Thus, the Court distinguished between the detention policy at issue in *Ziglar* and the "harsh conditions" inflicted on the

139 *See* Pfander et al., *supra* note 4, at 565, 594.
140 *Id.* at 594–95.
141 *See id.* at 600.
142 *See* Schwartz, *Police Indemnification*, *supra* note 115, at 912–17.
143 *See* Ziglar v. Abbasi, 137 S. Ct. 1843, 1860 (2017).
144 *Id.*

plaintiffs at the Metropolitan Detention Center that "were not imposed pursuant to official policy" but instead amounted to "a pattern of 'physical and verbal abuse.'"[145] But the Court did not clarify the dividing line between official policies and patterns of misconduct, or identify any requirements of form that government decisions must display to qualify as policies for purposes of rendering *Bivens* inapplicable. Perhaps predictably, lower courts have found it difficult to distinguish policy-based activities from "individual" actions.

Courts applying *Ziglar*'s holding must also give some thought to which parties should be permitted to raise the specter that a *Bivens* claim implicates policy. In *Ziglar* itself, the Court made clear that its hostility to policy-based claims went beyond those brought against the officials involved in the formulation of the detention policy.[146] *Ziglar* suggested that its skepticism of policy-based claims also applied to claims against the officers who carried the policy into effect.[147] Thus, the decision apparently foreclosed detention-policy claims against both the executive officials and the wardens, leaving open only the prisoner-abuse claims against Hasty.[148] As the Court explained, detention policy claims against any one of the defendants might lead to discovery into the formulation of government policy and to the litany of problems that were said to flow from litigation of national security matters.[149]

In short, the *Ziglar* opinion offers little guidance to lower courts as to the handling of policy-based *Bivens* claims. Justice Kennedy offered a lengthy list of special factors but did not suggest that any one factor was to be regarded as dispositive. Instead, he emphasized the need for a balance of competing interests, one that took account of a "persisting concern" that, in the absence of a *Bivens* remedy, "there will be insufficient deterrence to prevent officers from violating the Constitution."[150] Justice Kennedy addressed that persisting concern in *Ziglar* by suggesting that other modes (injunctive and habeas relief) were available to test the legality of many government policies, including those governing conditions of detention.[151] Notably, though, the Court stopped well short of suggesting that its new hostility to policy-based claims came into play only where Congress had made adequate remedial alternatives available.

This Part describes the lower courts' unsurprising division on two questions posed by *Ziglar*'s reasoning: First, what constitutes "policy"? Second, which defendants may invoke *Ziglar*'s hostility to policy-based claims? In the next Part, we explore the way in which lower courts have understood the

145 *Id.* at 1853 (quoting Turkmen v. Hasty, 789 F.3d 218, 228 (2d Cir. 2015)).

146 *See id.* at 1860.

147 *See id.*

148 *See id.*

149 *Id.* at 1860–61 ("Even if the action is confined to the conduct of a particular Executive Officer in a discrete instance, these claims would call into question the formulation and implementation of a general policy.").

150 *Id.* at 1863.

151 *Id.* at 1862–63.

Ziglar Court's limitations on *Bivens* remedies based on the availability of remedial alternatives.

A. *Navigating the Policy Spectrum in Light of* Ziglar

To put it mildly, lower courts' decisions are not a model of clarity about what constitutes a policy for purposes of triggering the concerns identified in *Ziglar*. Many of the post-*Ziglar* cases arise in the prison and immigration contexts, far removed from the formulation of national security policy that seemingly animated the Court's anxieties in *Ziglar*. Many of the cases, moreover, assert claims against relatively low-level figures within the prison and immigration bureaucracies and thus fail to implicate the Court's concern with the protection of high-level policymakers. Despite these distinguishing factors, however, lower courts have often, but not invariably, adopted relatively broad definitions of policy as a bar to *Bivens* litigation.

At one end of the spectrum are cases that involve disputes over relatively formal policy. In *King v. Goode*,[152] a shakedown of plaintiff's cell uncovered a collection of sexually explicit materials that he described as the working manuscript of a book he was writing.[153] Defendants invoked Bureau of Prisons (BOP) Code 334, which prohibits "inmates from conducting a business without [staff] authorization."[154] On internal review, the warden expunged the infraction and returned the manuscript, concluding that there had been no sales of the book and the manuscript came within the scope of Program Statement 53350.27, which states that an incarcerated person "may prepare a manuscript for private use or for publication while in custody without staff approval."[155] Dismissing on other grounds, the court left little doubt that it regarded the *Bivens* claim as improperly contesting the formulation and implementation of BOP policy.[156] The court paid little attention to the fact that the policy against business transactions did not appear to apply to preparation of a book manuscript, and thus failed to warrant confiscation of the plaintiff's materials.

Similarly, formal health care policy was at the center of litigation in New York over the provision of dental treatment. In *Ojo v. United States*,[157] the plaintiff sought damages for the denial of dental care, challenging as discriminatory a Bureau of Prisons policy that inmates wait for twelve months before receiving such care.[158] According to the complaint, BOP maintained a written policy as set forth in Program Statement 6400.02, dated January 15, 2005,

152 No. 2:18-CV-00015, 2019 WL 1339605 (E.D. Ark. Mar. 7, 2019).

153 *See id.* at *1.

154 *Id.* at *1, *4.

155 *Id.* at *2.

156 *See id.* at *3–4 (dismissing on the basis that administrative review had provided an adequate remedy, but nonetheless describing the BOP policy as the "most important 'special factor'" against allowing a *Bivens* action).

157 364 F. Supp. 3d 163 (E.D.N.Y. 2019).

158 *Id.* at 165–68.

specifying a twelve-month wait for routine dental treatment.[159] In addition, the complaint alleged that the prison had an unwritten policy that discriminated against pretrial detainees by blocking them from receiving emergency dental treatment during their detention.[160] In rejecting the claim, the district court emphasized that the litigation challenged a "large-scale policy, rather than the rogue conduct of individual employees" and implicated complex questions of "prison resource allocation."[161] Adjudication of challenges to so broad a policy would thus necessitate an inquiry into "the discussions and deliberations" that led to the policy and thus triggered the *Ziglar* Court's concern with policy-based *Bivens* litigation.[162]

In cases involving less formal policies, lower courts have also relied on *Ziglar* to deny a *Bivens* remedy. In *Estate of Diaz*,[163] suit was brought on behalf of the estate of a person held in a federal prison who died after receiving inadequate medical treatment.[164] The nub of the claim was that the warden, assistant warden, and clinical director of a prison in Florida had adopted a policy of refusing to transfer incarcerated people for treatment by an outside medical facility.[165] While the court acknowledged that a *Bivens* claim was available for deliberate indifference to the plaintiff's medical conditions, it focused on allegations that defendants, "in an effort to save money, 'made and enforced a *de facto* policy to punish any mid-level custody official who authorizes the transfer or transport of an inmate . . . to an outside hospital.'"[166] Citing *Ziglar*, and its hostility to policy litigation, the *Diaz* court concluded that the claim might proceed as a challenge to intentional denial of treatment, "but not for adoption of a policy to cut back on healthcare spending in general."[167]

Even less formal was the policy at issue in *Smith v. Shartle*,[168] a suit on behalf of the estate of a convicted sex offender who was killed in prison by the person who was assigned to share his cell.[169] Naming the wardens of the facility in Arizona as defendants, the complaint alleged that the prison had failed to adopt a "system . . . to ensure [that] sex offenders were housed separately from [those] who wished to harm them."[170] For the court, these allegations suggested that the plaintiff sought to challenge prison policy, despite the plaintiff's disclaimers. That the complaint also sought declaratory and injunctive relief confirmed that the goal of the litigation was to

159 *See id.* at 166–67.
160 *Id.* at 167–68.
161 *Id.* at 175.
162 *Id.*
163 Estate of Diaz v. Cheatum, No. 1:17-CV-24108, 2019 WL 296766 (S.D. Fla. Jan. 23, 2019).
164 *See id.* at *1.
165 *Id.* at *1.
166 *Id.* at *3 (alteration in original).
167 *See id.* at *3–4.
168 No. CV-18-00323, 2019 WL 2717097 (D. Ariz. June 28, 2019).
169 *See id.* at *2.
170 Complaint and Jury Demand at 27, *Smith*, 2019 WL 2717097 (No. 4:18-cv-00323).

secure policy changes and greater protection for sex offenders. Yet, even on the logic of *Ziglar*, such coercive forms of litigation can be advanced without implicating the Court's hostility to the use of *Bivens* claims to challenge policies.[171]

Courts have also been faced with the question of whether conduct consistent with standard operating procedure has the status of "policy" for purposes of applying *Ziglar*. In *Creedle v. Miami-Dade County*,[172] the plaintiff—a U.S. citizen—was subjected to detention when an immigration official mistakenly and without probable cause issued a detainer against him.[173] As the court saw things, the immigration officer was acting "within the parameters of ICE's current practices and procedures for issuing detainers."[174] The plaintiff's complaint was therefore viewed by the court as targeting the broader, general policy of issuing detainers, rather than as "seeking damages for an unauthorized, ultra vires act done by a malicious or reckless official."[175] As a result, despite a lack of probable cause for the detainer, the Court disallowed the *Bivens* claim.[176]

At perhaps its most extreme, some courts have applied *Ziglar*'s policy skepticism even where no policy had been adopted or infringed, but because the prospect of individual damages awards might prompt a *change* in policy. In *Maria S. v. Garza*,[177] next friends brought suit on behalf of Laura S., a Mexican national who was taken into custody by Customs and Border Protection ("CBP") and allegedly coerced into signing a "voluntary" removal form.[178] Laura reportedly feared for her life in Mexico; her ex-boyfriend had threatened to kill her.[179] She explained her concerns to the CBP officer, but he directed her to sign the relevant form.[180] A few days after her return to Mexico, the ex-boyfriend made good on his threat.[181] In the course of rejecting the *Bivens* claim, the Fifth Circuit did not identify any formal policy. But it nonetheless found that due process challenges to allegedly coerced agreements to accept voluntary removal could trigger a "tidal wave of litigation"[182] and would "likely force CBP to change policies and procedures, even to adopt excessive precautions to prevent potential liability."[183] Such policy and procedure changes were "for the Congress, not the Judiciary" to address.[184] As a result, the *Bivens* claim could not proceed.

171 *See Smith*, 2019 WL 2717097, at *2–4.
172 349 F. Supp. 3d 1276 (S.D. Fla. 2018).
173 *Id.* at 1282.
174 *Id.* at 1315.
175 *Id.*
176 *Id.*
177 912 F.3d 778 (5th Cir. 2019).
178 *Id.* at 781–82.
179 *Id.* at 781.
180 *Id.*
181 *Id.* at 782.
182 *Id.* at 785 (quoting De La Paz v. Coy, 786 F.3d 367, 379 (5th Cir. 2015)).
183 *Id.*
184 *Id.* (quoting Hernández v. Mesa, 885 F.3d 811, 821 (5th Cir. 2018)).

Several courts, however, have refused to follow the Fifth Circuit in rejecting *Bivens* claims in situations where the imposition of liability might impede policy discretion. Thus, in *Bistrian v. Levi*,[185] the Third Circuit allowed a claim to proceed against prison officials who placed the plaintiff in the yard and then failed to intervene when he was savagely beaten.[186] The court acknowledged that allowing the claim to proceed will "unavoidably implicate 'policies regarding inmate safety and security.'"[187] But that would be true, the court explained, "of practically all claims arising in a prison."[188] Observing that failure-to-protect claims had long been allowed, the court saw little reason to believe that allowing such claims would undercut executive branch authority to set and administer prison policy.[189]

Other courts have reached conclusions similar to *Bistrian*, rejecting defendants' arguments that excessive force or failure to protect claims implicate policy. For example, a district court judge in the Central District of California refused to dismiss a *Bivens* claim against corrections officers who had used force against the plaintiff and then retaliated against him for complaining about his treatment, concluding that the claims at issue "involve two individual officers, and their individual actions—not large-scale government policies . . . [that] implicate national security, executive policy, or the other largely political concerns addressed in *Ziglar*."[190] A district court judge in the District of Colorado similarly refused to dismiss claims against BOP officers who told other incarcerated people sensitive information about the plaintiff and his crimes, with the intention that those inmates would "retaliate violently" against the plaintiff.[191] The court explained that this suit challenged "day-to-day prison operations," not "complex matters of BOP policymaking," and that only money damages provided an adequate remedy for the past dissemination of information about him.[192] And in a *Bivens* action against an officer who failed to protect the plaintiff from assault in prison, a judge in the Northern District of Ohio rejected a summary judgment motion invoking the policy exemption, reasoning that the case involved an "individual instance of law enforcement overreach."[193]

Courts have also rejected the applicability of the policy exception in cases involving low-level officers in contexts that, at least conceptually, are more closely tied to national security concerns than cases arising in the BOP.

185 912 F.3d 79 (3d Cir. 2018).

186 *Id.* at 83.

187 *Id.* at 93 (quoting Brief on Behalf of Appellant Lt. James Gibbs at 19, *Bistrian*, 912 F.3d 79 (No. 18-2011), 2018 WL 3571053, at *19).

188 *Id.*

189 *Id.*

190 Jerra v. United States, No. 2:12-cv-01907, 2018 WL 1605563, at *6 (C.D. Cal. Mar. 29, 2018).

191 Cuevas v. United States, No. 16-cv-00299, 2018 WL 1399910, at *1 (D. Colo. Mar. 19, 2018).

192 *Id.* at *4.

193 Himmelreich v. Fed. Bureau of Prisons, No. 4:10-CV-02404, 2019 WL 4694217, at *14 (N.D. Ohio Sept. 25, 2019).

For example, a judge in the Eastern District of Pennsylvania allowed an excessive force claim to proceed against a Secret Service agent, despite the argument that the officer was working a national security detail that implicated *Ziglar*'s policy concerns.[194] Similarly, the Ninth Circuit in *Lanuza v. Love*[195] allowed a *Bivens* claim to proceed against an immigration official who falsified documents at an immigration hearing.[196] The court first rejected the argument that immigration proceedings invariably implicate national security concerns; the plaintiff had no ties to terrorism and his was a "run-of-the-mill immigration proceeding."[197] Next, the court specifically rejected the claim that all actions taken by immigration officers necessarily implicate immigration policy; the "illogical nature of such a reading," the court found, was "demonstrated by the absurdity of its results."[198]

B. Defendants Entitled to Claim the Policy Exemption

Circuit and district courts also have read *Ziglar* to reflect greater skepticism for claims brought against comparatively high-ranking government officials than their lower-level counterparts. In one suit, naming the U.S. Postal Service and the Postmaster General, a Missouri district court had little difficulty in concluding that the litigation would implicate the formulation and enforcement of government policies, leading to the sort of burdensome discovery that the *Ziglar* Court found troublesome.[199] Similarly, a federal court in northern Virginia rejected Fourth Amendment claims against the former Attorney General and another high-ranking official in the Department of Justice who were said to have authorized an electronic eavesdropping program to prevent leaks to the media.[200]

Even officials who occupy positions less exalted than those of Postmaster General and Attorney General have successfully claimed that *Bivens* litigation might implicate policy and thereby run afoul of *Ziglar*'s instructions. In one case, for example, a district court in the Southern District of California dismissed a *Bivens* claim brought by a plaintiff who sought to hold a border patrol officer and the chief of the agency accountable for a death that resulted from a cross-border shooting because the shooting was caused by an "alleged policy . . . that authorized agents to use deadly force in response to individuals throwing rocks."[201] Similarly, in *Ojo*, mentioned previously, an incarcerated person brought suit against the assistant warden and medical

194 *See* Graber v. Dales, No. 18-3168, 2019 WL 4805241, at *2–6 (E.D. Pa. Sept. 30, 2019).

195 899 F.3d 1019 (9th Cir. 2018).

196 *Id.* at 1029–30.

197 *Id.* at 1030.

198 *Id.* at 1029.

199 *See* Jackson v. U.S. Postal Serv., No. 4:18CV500, 2019 WL 1331636, at *4 (E.D. Mo. Mar. 25, 2019).

200 *See* Attkisson v. Holder, No. 1:17-cv-364, 2017 WL 5013230, at *5–8 (E.D. Va. Nov. 1, 2017).

201 *See* Del Socorro Quintero Perez v. Diaz, 331 F. Supp. 3d 1101, 1108 (S.D. Cal. 2017).

director of the Brooklyn facility in which he was housed.[202] The court in *Ojo* exempted these "high-level MDC officials" from liability, in part because they were being sued for carrying out Bureau of Prison policy that had been formulated at an even higher level.[203]

Such applications of *Ziglar*'s policy exemption pose real challenges for litigants seeking redress for unconstitutional forms of medical care. If, as in *Ojo*, the policy exemption protects both the policy itself and all those who carried it into effect but had no hand in its drafting, then it could foreclose suit against all potentially responsible parties. Similarly, in *Estate of Diaz*, if the policy itself triggers the exemption, and exempts both the wardens who fashioned the policy and the low-level officials who carried it into effect, then the policy exemption potentially threatens the viability of established claims for unconstitutional medical care.[204] Policy as deployed in *Estate of Diaz* might conceivably foreclose suit against deliberately indifferent superior officers and the low-level officials who were actively involved in delivering inadequate medical care in question.[205] The foreclosure of all conceivable forms of relief raises serious concerns, as the next Part briefly explains.

IV. Defining *Ziglar*'s Policy Exemption in Light of Remedial Alternatives

The *Ziglar* Court's hostility toward policy claims can most charitably be understood, we believe, as an extension of its longstanding preference for the use of alternative remedies, including claims for injunctive or declaratory relief or release from custody on habeas corpus.[206] The Court thus appeared to perceive a difference between litigation aimed at contesting the legality of broad-based government policies and litigation that focuses on the actions of particular officers. Consider the Court's account in *Ziglar*:

> Unlike the plaintiffs in [earlier *Bivens*] cases, respondents do not challenge individual instances of discrimination or law enforcement overreach, which

202 *See supra* notes 157–60 and accompanying text (describing the facts of *Ojo v. United States*, 364 F. Supp. 3d 163, 176 (E.D.N.Y. 2019)).

203 *See Ojo*, 364 F. Supp. 3d at 176.

204 *See supra* notes 163–67 and accompanying text (describing the facts of *Estate of Diaz v. Cheatum*, No. 1:17-CV-24108, 2019 WL 296766 (S.D. Fla. Jan. 23, 2019)).

205 Some courts no doubt fear that accepting such claims would contravene the Court's admonition that respondeat superior liability is unavailable in *Bivens* (or, relatedly, in § 1983) litigation. After all, this was one of the justifications offered by *Ziglar* when it announced its hostility to policy-based claims. Ziglar v. Abbasi, 137 S. Ct. 1843, 1860 (2017) (citing Ashcroft v. Iqbal, 556 U.S. 662, 676 (2009)). The flaw in the *Ziglar* Court's analogy to supervisory liability is that, even as *Iqbal* restated the established rule that supervisory liability could not be based on respondeat superior liability, it also comprehended *Bivens* claims based on a defendant's violation of their "superintendent responsibilities." *Iqbal*, 556 U.S. at 677. Insisting that claims against supervisors be based on their own unconstitutional conduct is perfectly consistent with holding officials accountable for the harms caused by their own unconstitutional policies.

206 *See, e.g.*, Wilkie v. Robbins, 551 U.S. 537, 561–62 (2007); Corr. Servs. Corp. v. Malesko, 534 U.S. 61, 63, 74 (2001).

> due to their very nature are difficult to address except by way of damages actions after the fact. Respondents instead challenge large-scale policy decisions concerning the conditions of confinement imposed on hundreds of prisoners. To address those kinds of decisions, detainees may seek injunctive relief. And in addition to that, we have left open the question whether they might be able to challenge their confinement conditions via a petition for a writ of habeas corpus.[207]

In this telling, litigants should use suits for injunctive relief, or perhaps habeas petitions, to contest the "large-scale" policies of the government. *Bivens* suits for damages remain available only to address individual instances of official misconduct for which injunctive and habeas relief may not be available.[208] The Court's preference for injunctive and declaratory forms of relief would explain its otherwise curious invocation of those remedies in the *Ziglar* case; indeed, the Court recognized that "if equitable remedies prove insufficient, a damages remedy might be necessary to redress past harm and deter future violations."[209] The preference also makes sense of what the Court described in *Ziglar* as its "persisting" concern with deterring "violat[ions]" of the Constitution.[210]

On this view of *Ziglar*, the existence of a government policy does not immunize government action from constitutional scrutiny. Instead, *Ziglar* expresses a preference for the adjudication of challenges to policy other than through suits for money. That means that *Ziglar* might tend to foreclose challenges to government policies in circumstances where the law provides other forms of remediation (suits for injunctive, declaratory, or administrative review). In circumstances where no such alternative exists, either as a practical or formal matter, *Ziglar* could be understood to instruct lower courts to refrain from adopting a policy characterization that would effectively immunize the government's action from all constitutional scrutiny.

We describe this as a charitable view because the Court has not only made *Bivens* claims harder to bring but has made these alternative remedies more difficult to achieve, as well. The Court has taken pains to make it harder to bring injunctive claims against government officials, even as it has cast doubt on the viability of damages claims, raising the question of whether

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207 *Ziglar*, 137 S. Ct. at 1862–63.

208 The Court relied on this distinction when assessing the propriety of claims against the high-ranking architects of the detention policy at issue in *Ziglar* (referred to in the opinion as the "Executive Officials") and claims against those who carried out the policy. *Id.* at 1860. The Court drew a distinction between the two kinds of claims, foreclosing challenges to the wardens' implementation of the broader policy but leaving open the possibility that the plaintiffs might recover for deliberate indifference to abusive conditions. The Court thus remanded the abusive detention claims for further proceedings, even as it foreclosed further litigation of detention policy claims.

209 *Ziglar*, 137 S. Ct. at 1858. The Court reprised this concern in its recent decision in *Tanzin v. Tanvir*, in which it observed that damages are not just "appropriate" relief in suits against government employees but "also the *only* form of relief that can remedy some RFRA violations." 141 S. Ct. 486, 492 (2020).

210 *Ziglar*, 137 S. Ct. at 1863.

this Court thinks any constitutional remediation is appropriate.[211] And the Court's habeas doctrine makes relief through this vehicle exceedingly difficult as well.[212] We also view with skepticism the Court's claim in *Ziglar* that damages claims are more burdensome, from a practical perspective, than claims seeking injunctive relief. We thus continue to call upon the Court to revisit its hostility to the use of *Bivens* and its newly restrictive approach to matters of policy in *Ziglar*.

But for lower courts obliged to make sense of *Ziglar* in the meantime, we suggest that the existence of remedial alternatives may offer a useful analytical structure for the fraught process of divining the contours of the new policy restriction. Consider the California district court's decision in *Hodges v. Matevousian*[213] and its handling of remedial alternatives in the course of rejecting a *Bivens* claim to challenge prison lighting policy.[214] The court indicated that suit for injunctive relief was the proper mode of contesting large-scale policy decisions such as a lighting policy that would affect hundreds of prisoners.[215] The court relied on an earlier Ninth Circuit decision rejecting a challenge to the handling of prison mail.[216] There, the Ninth Circuit found that injunctive and declaratory relief were available to test the prison mail policy and declined to allow an action under *Bivens* to proceed.[217]

Other courts, however, have failed to take proper account of remedial alternatives in the course of litigation over the scope of a *Bivens* policy-based claim. Consider, for example, the decision in *Smith v. Shartle*, denying a *Bivens* action brought to challenge the prison's failure to protect a sex offender from inmate violence.[218] The Arizona court found that the plaintiffs, suing on behalf of a prisoner who was killed while in custody, were seeking to recover damages for the wardens' "failure to create a policy that protected sex offenders."[219] Whatever one might say about the plaintiff's standing to pursue such a policy-based failure-to-protect claim while still alive and subject to continued incarceration, one has difficulty understanding how the representatives of a deceased prisoner have standing to pursue anything but a claim for damages for the housing decision that led to the prisoner's death.

211 David Rudovsky has referred to this as a classic "shell game." David Rudovsky, *Running in Place: The Paradox of Expanding Rights and Restricted Remedies*, 2005 U. Ill. L. Rev. 1199, 1212–13.

212 *See, e.g.*, Stephen R. Reinhardt, *The Demise of Habeas Corpus and the Rise of Qualified Immunity: The Court's Ever Increasing Limitations on the Development and Enforcement of Constitutional Rights and Some Particularly Unfortunate Consequences*, 113 Mich. L. Rev. 1219, 1223–44 (2015).

213 No. 1:18-cv-00790, 2019 WL 5566055 (E.D. Cal. Oct. 29, 2019).

214 *Id.* at *3–6.

215 *Id.* at *6.

216 *Id.*

217 *See* Zavala v. Rios, 721 F. App'x 720, 721 (9th Cir. 2018).

218 No. CV-18-00323, 2019 WL 2717097 (D. Ariz. June 28, 2019).

219 *Id.* at *2.

It makes little sense to deny the damages claim on the ground that it implicates a policy where prospective relief cannot be obtained.

A similarly disabling interpretation foreclosed a *Bivens* action seeking class-wide nominal damages for injuries allegedly inflicted by actions of the Office of Refugee Resettlement.[220] Concluding that suits for nominal damages operate as the functional equivalent of declaratory relief, the California district court dismissed the action after invoking the Supreme Court's admonition that "a *Bivens* action is not 'a proper vehicle for altering an entity's policy.'"[221] But the court failed to explain why a suit recharacterized as essentially aimed at securing declaratory relief would implicate *Ziglar*'s conception of *Bivens* litigation as a remedy of last resort. After all, suits for declaratory relief often appropriately seek to contest or alter government policy by asking the court to declare the rights of the parties and do so, like suits for nominal damages, without posing a threat of personal liability for the responsible officials. Such a suit might fairly be said to fall on the preferred rather than disfavored side of the remedial line.

The Fifth Circuit's definition of policy in the *Maria S.* case was similarly flawed.[222] In that case, as described above, a Mexican national was coerced into signing a removal form and was then returned to Mexico and killed.[223] The court was doubtless correct to recognize that the threat of litigation and the prospect of damages liability can lead agencies to alter their policies; indeed, one would worry about the structure of our system of constitutional remedies if such were not the case. But if the hostility against *Bivens* policy claims was limited to cases in which alternative remedial measures were available, then the dismissal of the *Bivens* claim in *Maria S.* was in error. One in the position of the claimant could not, by filing a suit for injunctive relief or petition under the Administrative Procedure Act, effectively seek review of the inchoate policies that might emerge from the combined impact of successful constitutional tort litigation.[224] All such claims would be subject to

220 *See* Lucas R. v. Azar, No. CV 18-5741, 2019 WL 6655262, at *2 (C.D. Cal. Aug. 21, 2019).

221 *Id.* at *3 (quoting Ziglar v. Abbasi, 137 S. Ct. 1843, 1860 (2017)).

222 *See* Maria S. v. Garza, 912 F.3d 778, 784–85 (5th Cir. 2019).

223 *See id.* at 781–82.

224 The Fifth Circuit in *Maria S.* viewed the threat of a "tidal wave" of litigation as a factor that might encourage the adoption of a new policy aimed at reducing the likelihood of future violations. *Id.* at 785. But the creation of such incentive effects, an obvious consequence of tort-based liability, would not necessarily lead to the articulation of a policy that the public could effectively challenge though declaratory forms of litigation. Whatever the range of policy options available to an agency, their mere existence would not warrant the exercise of judicial review. The Administrative Procedure Act provides for review of "final" agency action. 5 U.S.C. § 704 (2018). Inchoate policies do not qualify as final within the meaning of the statute. *See* Bennett v. Spear, 520 U.S. 154, 178 (1997) (defining final agency action as "consummation" of an agency's decision-making process, by which "rights or obligations have been determined," or from which "legal consequences will flow" (first quoting Chi. & S. Air Lines, Inc. v. Waterman S.S. Corp., 333 U.S. 103, 113 (1948); and then quoting Port of Bos. Marine Terminal v. Rederiaktiebolaget Transatl., 400 U.S. 62, 71 (1970))). From our perspective, then, the inability of a litigant to chal-

dismissal as hypothetical, speculative, and unripe. Such a vantage point allows us to see that policy *implications* should never rise to the level of a policy for *Ziglar* purposes. Indeed, if the Fifth Circuit's analysis takes hold, it could effectively foreclose constitutional oversight altogether, thus undercutting the Court's persisting—if tepid—concern with constitutional remediation through *Bivens*.

Conclusion

The unprecedented nature of the Court's hostility to policy-based claims offers a clue to the problem at the heart of *Ziglar*: a policy exemption makes no sense in light of the framework within which courts ensure government accountability. To be sure, as *Marbury v. Madison*[225] confirms, the Constitution confers discretion on executive officials, creating a space where they can conduct the nation's affairs subject to the control of the ballot box rather than the courts.[226] Similarly, the Constitution empowers Congress to create an executive branch that exercises policymaking discretion within boundaries specified by law. But the deference owed to government policy extends only to the policymaking space that the Constitution and laws lawfully confer. When government officials exceed those boundaries and inflict injuries on people, whether by wrongful seizure or detention, the fact that they do so pursuant to a "policy" should make absolutely no difference.

The Court might nonetheless fairly claim some control over the manner in which individuals subjected to unconstitutional government action pursue remedies for the violations in question. In some instances, as when the Court sets out to change the rules, suits for coercive relief (injunctions and habeas) may make more sense than suits for damages. In other instances, ordinary review of agency action under the Administrative Procedure Act will suffice to ensure government accountability. But in many instances where the government adopts a policy that evades judicial review in the ordinary course (torture, clandestine detention), a suit for damages under *Bivens* will provide the only vehicle by which individuals can seek redress and courts can police the constitutional boundaries of executive action. The test of legality in such cases cannot turn on the presence or absence of a policy, an inevitably slippery construct as we have seen, but must focus on the constitutionality of action taken. When the Court rejects a *Bivens* action in circumstances where it provides the only effective remedy for an unconstitutional policy, it has inverted our tradition and placed the executive above the Constitution. It has, in short, gone rogue.

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lenge policy implications through an alternative proceeding confirms that such implications should not displace federal authority to offer *Bivens* relief.

225 5 U.S. (1 Cranch) 137 (1803).

226 *Id.* at 166.