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Cases and Materials on Judicial Federalism and the Lawyering Process

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Justiciability and the Case or Controversy Requirement

A. Standing

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Gill v. Whitford

Supreme Court of the United States, 2018.
585 U.S. ____ (2018).

CHIEF JUSTICE ROBERTS delivered the opinion of the Court.

The State of Wisconsin, like most other States, entrusts to its legislature the periodic task of redrawing the boundaries of the State's legislative districts. A group of Wisconsin Democratic voters filed a complaint in the District Court, alleging that the legislature carried out this task with an eye to diminishing the ability of Wisconsin Democrats to convert Democratic votes into Democratic seats in the legislature. The plaintiffs asserted that, in so doing, the legislature had infringed their rights under the First and Fourteenth Amendments.

But a plaintiff seeking relief in federal court must first demonstrate that he has standing to do so, including that he has "a personal stake in the outcome," distinct from a "generally available grievance about government." That threshold requirement "ensures that we act *as judges*, and do not engage in policymaking properly left to elected representatives." Certain of the plaintiffs before us alleged that they had such a personal stake in this case, but never followed up with the requisite proof. The District Court and this Court therefore lack the power to resolve their claims. We vacate the judgment and remand the case for further proceedings, in the course of which those plaintiffs may attempt to demonstrate standing in accord with the analysis in this opinion.

I

Wisconsin's Legislature consists of a State Assembly and a State Senate. The 99 members of the Assembly are chosen from single districts that must "consist of contiguous territory and be in as compact form as practicable." State senators are likewise chosen from single-member districts, which are laid on top of the State Assembly districts so that three Assembly districts form one Senate district.

The Wisconsin Constitution gives the legislature the responsibility to "apportion and district anew the members of the senate and assembly" at the first session following each census. In recent decades, however, that responsibility has just as often been taken up by federal courts. Following the census in 1980, 1990, and 2000, federal courts drew the State's legislative districts when the Legislature and the Governor — split on party lines — were unable to agree on new districting plans. The Legislature has broken the logjam just twice in the last 40 years. In 1983, a Democratic Legislature passed, and a Democratic Governor signed, a new districting plan that remained in effect until the 1990 census. In 2011, a Republican Legislature passed, and a Republican Governor signed, the districting plan at issue here, known as Act 43. Following the passage of Act 43, Republicans won majorities in the State Assembly in the 2012 and 2014 elections. In 2012, Republicans won 60 Assembly seats with 48.6% of the two-party statewide vote for Assembly candidates. In 2014, Republicans won 63 Assembly seats with 52% of the statewide vote.

In July 2015, twelve Wisconsin voters filed a complaint in the Western District of Wisconsin challenging Act 43. The plaintiffs identified themselves as "supporters of the public policies espoused by the Democratic Party and of Democratic Party candidates." They alleged that Act 43 is a partisan gerrymander that "unfairly favor[s] Republican voters and candidates," and that it does so by "cracking" and "packing" Democratic voters around Wisconsin. As they explained:

> Cracking means dividing a party's supporters among multiple districts so that they fall short of a majority in each one. Packing means concentrating one party's backers in a few districts that they win by overwhelming margins.

Four of the plaintiffs — Mary Lynne Donohue, Wendy Sue Johnson, Janet Mitchell, and Jerome Wallace — alleged that they lived in State Assembly districts where Democrats have been cracked or packed. All of the plaintiffs also alleged that, regardless of "whether they themselves reside in a district that has been packed or cracked," they have been "harmed by the manipulation of district boundaries" because Democrats statewide "do not have the same opportunity provided to Republicans to elect representatives of their choice to the Assembly."

The plaintiffs argued that, on a statewide level, the degree to which packing and cracking has favored one party over another can be measured by a single calculation: an "efficiency gap" that compares each party's respective "wasted" votes across all legislative districts. "Wasted" votes are those cast for a losing candidate or for a winning candidate in excess of what that candidate needs to win. The plaintiffs alleged that Act 43 resulted in an unusually large efficiency gap that favored Republicans. They also submitted a "Demonstration Plan" that, they asserted, met all of the legal criteria for apportionment, but was at the same time "almost perfectly balanced in its partisan consequences." They argued that because Act 43 generated a large and unnecessary efficiency gap in favor of Republicans, it violated the First Amendment right of association of Wisconsin Democratic voters and their Fourteenth Amendment right to equal protection. The plaintiffs named several members of the state election commission as defendants in the action.

The election officials moved to dismiss the complaint. They argued, among other things, that the plaintiffs lacked standing to challenge the constitutionality of Act 43 as a whole because, as individual voters, their legally protected interests extend only to the makeup of the legislative districts in which they vote. A three-judge panel of the District Court denied the defendants' motion. In the District Court's view, the plaintiffs "identif[ied] their injury as not simply their inability to elect a representative in their own districts, but also their reduced opportunity to be represented by Democratic legislators across the state." It therefore followed, in the District Court's opinion, that "[b]ecause plaintiffs' alleged injury in this case relates to their statewide representation, . . . they should be permitted to bring a statewide claim."

The case proceeded to trial, where the plaintiffs presented testimony from four fact witnesses. The first was lead plaintiff William Whitford, a retired law professor at the University of Wisconsin in Madison. Whitford testified that he lives in Madison in the 76th Assembly District, and acknowledged on cross-examination that this is, under any plausible circumstances, a heavily Democratic district. Under Act 43, the Democratic share of the Assembly vote in Whitford's district is 81.9%; under the plaintiffs' ideal map — their Demonstration Plan — the

projected Democratic share of the Assembly vote in Whitford's district would be 82%. Whitford therefore conceded that Act 43 had not "affected [his] ability to vote for and elect a Democrat in [his] district." Whitford testified that he had nevertheless suffered a harm "relate[d] to [his] ability to engage in campaign activity to achieve a majority in the Assembly and the Senate." . . .

At the close of evidence, the court held that the plaintiffs had a "cognizable equal protection right against state-imposed barriers on [their] ability to vote effectively for the party of [their] choice." It concluded that Act 43 "prevent[ed] Wisconsin Democrats from being able to translate their votes into seats as effectively as Wisconsin Republicans," and that "Wisconsin Democrats, therefore, have suffered a personal injury to their Equal Protection rights." The court turned away the defendants' argument that the plaintiffs' injury was not sufficiently particularized by finding that "[t]he harm that the plaintiffs have experienced . . . is one shared by Democratic voters in the State of Wisconsin. The dilution of their votes is both personal and acute." . . .

The District Court enjoined the defendants from using the Act 43 map in future elections and ordered them to have a remedial districting plan in place no later than November 1, 2017. The defendants appealed directly to this Court, as provided under 28 U.S.C. § 1253. We stayed the District Court's judgment and postponed consideration of our jurisdiction.

II

A

Over the past five decades this Court has been repeatedly asked to decide what judicially enforceable limits, if any, the Constitution sets on the gerrymandering of voters along partisan lines. Our previous attempts at an answer have left few clear landmarks for addressing the question. What our precedents have to say on the topic is, however, instructive as to the myriad competing considerations that partisan gerrymandering claims involve. Our efforts to sort through those considerations have generated conflicting views both of how to conceive of the injury arising from partisan gerrymandering and of the appropriate role for the Federal Judiciary in remedying that injury.

* * *

B

At argument on appeal in this case, counsel for the plaintiffs argued that this Court *can* address the problem of partisan gerrymandering because it *must*: The Court should exercise its power here because it is the "only institution in the United States" capable of "solv[ing] this problem." Such invitations must be answered with care. "Failure of political will does not justify unconstitutional remedies." Our power as judges to "say what the law is" rests not on the default of politically accountable officers, but is instead grounded in and limited by the necessity of resolving, according to legal principles, a plaintiff's particular claim of legal right.

Our considerable efforts [on partisan gerrymandering] leave unresolved whether such claims may be brought. In particular, two threshold questions remain: what is necessary to show standing in a case of this sort, and whether those claims are justiciable. Here we do not decide the latter question because the plaintiffs in this case have not shown standing under the theory upon which they based their claims for relief.

To ensure that the Federal Judiciary respects "the proper — and properly limited — role of the courts in a democratic society," a plaintiff may not invoke federal-court jurisdiction unless he can show "a personal stake in the outcome of the controversy." A federal court is not "a forum for generalized grievances," and the requirement of such a personal stake "ensures that courts exercise power that is judicial in nature." We enforce that requirement by insisting that a plaintiff satisfy the familiar three-part test for Article III standing: that he "(1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." Foremost among these requirements is injury in fact — a plaintiff's pleading and proof that he has suffered the "invasion of a legally protected interest" that is "concrete and particularized," *i.e.*, which "affect[s] the plaintiff in a personal and individual way."

We have long recognized that a person's right to vote is "individual and personal in nature." Thus, "voters who allege facts showing disadvantage to themselves as individuals have standing to sue" to remedy that disadvantage. The plaintiffs in this case alleged that they suffered such injury from partisan gerrymandering, which works through "packing" and "cracking" voters of one party to disadvantage those voters. That is, the plaintiffs claim a constitutional right not to be placed in legislative districts deliberately designed to "waste" their votes in elections where their chosen candidates will win in landslides (packing) or are destined to lose by closer margins (cracking).

To the extent the plaintiffs' alleged harm is the dilution of their votes, that injury is district specific. An individual voter in Wisconsin is placed in a single district. He votes for a single representative. The boundaries of the district, and the composition of its voters, determine whether and to what extent a particular voter is packed or cracked. This "disadvantage to [the voter] as [an] individual[]" therefore results from the boundaries of the particular district in which he resides. And a plaintiff's remedy must be "limited to the inadequacy that produced [his] injury in fact." In this case the remedy that is proper and sufficient lies in the revision of the boundaries of the individual's own district.

For similar reasons, we have held that a plaintiff who alleges that he is the object of a racial gerrymander — a drawing of district lines on the basis of race — has standing to assert only that his own district has been so gerrymandered. A plaintiff who complains of gerrymandering, but who does not live in a gerrymandered district, "assert[s] only a generalized grievance against governmental conduct of which he or she does not approve." Plaintiffs who complain of racial gerrymandering in their State cannot sue to invalidate the whole State's legislative districting map; such complaints must proceed "district-by-district."

The plaintiffs argue that their claim of statewide injury is analogous to the claims presented in *Baker* and *Reynolds*, which they assert were "statewide in nature" because they rested on allegations that "districts *throughout a state* [had] been malapportioned." But, as we have already noted, the holdings in *Baker* and *Reynolds* were expressly premised on the understanding that the injuries giving rise to those claims were "individual and personal in nature," because the claims were brought by voters who alleged "facts showing disadvantage to themselves as individuals."

The plaintiffs' mistaken insistence that the claims in *Baker* and *Reynolds* were "statewide in nature" rests on a failure to distinguish injury from remedy. In

those malapportionment cases, the only way to vindicate an individual plaintiff's right to an equally weighted vote was through a wholesale "restructuring of the geographical distribution of seats in a state legislature."

Here, the plaintiffs' partisan gerrymandering claims turn on allegations that their votes have been diluted. That harm arises from the particular composition of the voter's own district, which causes his vote — having been packed or cracked — to carry less weight than it would carry in another, hypothetical district. Remedying the individual voter's harm, therefore, does not necessarily require restructuring all of the State's legislative districts. It requires revising only such districts as are necessary to reshape the voter's district — so that the voter may be unpacked or uncracked, as the case may be. This fits the rule that a "remedy must of course be limited to the inadequacy that produced the injury in fact that the plaintiff has established."

The plaintiffs argue that their legal injury is not limited to the injury that they have suffered as individual voters, but extends also to the statewide harm to their interest "in their collective representation in the legislature," and in influencing the legislature's overall "composition and policymaking." But our cases to date have not found that this presents an individual and personal injury of the kind required for Article III standing. On the facts of this case, the plaintiffs may not rely on "the kind of undifferentiated, generalized grievance about the conduct of government that we have refused to countenance in the past." A citizen's interest in the overall composition of the legislature is embodied in his right to vote for his representative. And the citizen's abstract interest in policies adopted by the legislature on the facts here is a nonjusticiable "general interest common to all members of the public."

We leave for another day consideration of other possible theories of harm not presented here and whether those theories might present justiciable claims giving rise to statewide remedies. Justice Kagan's concurring opinion endeavors to address "other kinds of constitutional harm," perhaps involving different kinds of plaintiffs, and differently alleged burdens. But the opinion of the Court rests on the understanding that we lack jurisdiction to decide this case, much less to draw speculative and advisory conclusions regarding others. The reasoning of this Court with respect to the disposition of this case is set forth in this opinion and none other. And the sum of the standing principles articulated here, as applied to this case, is that the harm asserted by the plaintiffs is best understood as arising from a burden on those plaintiffs' own votes. In this gerrymandering context that burden arises through a voter's placement in a "cracked" or "packed" district.

C

Four of the plaintiffs in this case — Mary Lynne Donohue, Wendy Sue Johnson, Janet Mitchell, and Jerome Wallace — pleaded a particularized burden along such lines. They alleged that Act 43 had "dilut[ed] the influence" of their votes as a result of packing or cracking in their legislative districts. The facts necessary to establish standing, however, must not only be alleged at the pleading stage, but also proved at trial. As the proceedings in the District Court progressed to trial, the plaintiffs failed to meaningfully pursue their allegations of individual harm. The plaintiffs did not seek to show such requisite harm since, on this record, it appears that not a single plaintiff sought to prove that he or she lives in a cracked or packed district. They instead rested their case at trial — and their

arguments before this Court — on their theory of statewide injury to Wisconsin Democrats, in support of which they offered three kinds of evidence.

First, the plaintiffs presented the testimony of the lead plaintiff, Professor Whitford. But Whitford's testimony does not support any claim of packing or cracking of himself as a voter. Indeed, Whitford expressly acknowledged that Act 43 did not affect the weight of his vote. His testimony points merely to his hope of achieving a Democratic majority in the legislature — what the plaintiffs describe here as their shared interest in the composition of "the legislature as a whole." Under our cases to date, that is a collective political interest, not an individual legal interest, and the Court must be cautious that it does not become "a forum for generalized grievances."

Second, the plaintiffs provided evidence regarding the mapmakers' deliberations as they drew district lines. As the District Court recounted, the plaintiffs' evidence showed that the mapmakers "test[ed] the partisan makeup and performance of districts as they might be configured in different ways." Each of the mapmakers' alternative configurations came with a table that listed the number of "Safe" and "Lean" seats for each party, as well as "Swing" seats. The mapmakers also labeled certain districts as ones in which "GOP seats [would be] strengthened a lot," or which would result in "Statistical Pick Ups" for Republicans. And they identified still other districts in which "GOP seats [would be] strengthened a little," "weakened a little," or were "likely lost."

The District Court relied upon this evidence in concluding that, "from the outset of the redistricting process, the drafters sought to understand the partisan effect of the maps they were drawing." That evidence may well be pertinent with respect to any ultimate determination whether the plaintiffs may prevail in their claims against the defendants, assuming such claims present a justiciable controversy. But the question at this point is whether the plaintiffs have established injury in fact. That turns on effect, not intent, and requires a showing of a burden on the plaintiffs' votes that is "actual or imminent, not 'conjectural' or 'hypothetical.' "

Third, the plaintiffs offered evidence concerning the impact that Act 43 had in skewing Wisconsin's statewide political map in favor of Republicans. This evidence, which made up the heart of the plaintiffs' case, was derived from partisan-asymmetry studies. The plaintiffs contend that these studies measure deviations from "partisan symmetry," which they describe as the "social scientific tenet that [districting] maps should treat parties symmetrically." In the District Court, the plaintiffs' case rested largely on a particular measure of partisan asymmetry — the "efficiency gap" of wasted votes. That measure was first developed in two academic articles published shortly before the initiation of this lawsuit.

The plaintiffs asserted in their complaint that the "efficiency gap captures in a single number all of a district plan's cracking and packing." That number is calculated by subtracting the statewide sum of one party's wasted votes from the statewide sum of the other party's wasted votes and dividing the result by the statewide sum of all votes cast, where "wasted votes" are defined as all votes cast for a losing candidate and all votes cast for a winning candidate beyond the 50% plus one that ensures victory. The larger the number produced by that calculation, the greater the asymmetry between the parties in their efficiency in converting votes into legislative seats. Though they take no firm position on the matter, the

plaintiffs have suggested that an efficiency gap in the range of 7% to 10% should trigger constitutional scrutiny.

The plaintiffs and their *amici curiae* promise us that the efficiency gap and similar measures of partisan asymmetry will allow the federal courts — armed with just "a pencil and paper or a hand calculator" — to finally solve the problem of partisan gerrymandering that has confounded the Court for decades. We need not doubt the plaintiffs' math. The difficulty for standing purposes is that these calculations are an average measure. They do not address the effect that a gerrymander has on the votes of particular citizens. Partisan-asymmetry metrics such as the efficiency gap measure something else entirely: the effect that a gerrymander has on the fortunes of political parties.

Consider the situation of Professor Whitford, who lives in District 76, where, defendants contend, Democrats are "naturally" packed due to their geographic concentration, with that of plaintiff Mary Lynne Donohue, who lives in Assembly District 26 in Sheboygan, where Democrats like her have allegedly been deliberately cracked. By all accounts, Act 43 has not affected Whitford's individual vote for his Assembly representative — even plaintiffs' own demonstration map resulted in a virtually identical district for him. Donohue, on the other hand, alleges that Act 43 burdened her individual vote. Yet neither the efficiency gap nor the other measures of partisan asymmetry offered by the plaintiffs are capable of telling the difference between what Act 43 did to Whitford and what it did to Donohue. The single statewide measure of partisan advantage delivered by the efficiency gap treats Whitford and Donohue as indistinguishable, even though their individual situations are quite different.

That shortcoming confirms the fundamental problem with the plaintiffs' case as presented on this record. It is a case about group political interests, not individual legal rights. But this Court is not responsible for vindicating generalized partisan preferences. The Court's constitutionally prescribed role is to vindicate the individual rights of the people appearing before it.

III

In cases where a plaintiff fails to demonstrate Article III standing, we usually direct the dismissal of the plaintiff's claims. This is not the usual case. It concerns an unsettled kind of claim this Court has not agreed upon, the contours and justiciability of which are unresolved. Under the circumstances, and in light of the plaintiffs' allegations that Donohue, Johnson, Mitchell, and Wallace live in districts where Democrats like them have been packed or cracked, we decline to direct dismissal.

We therefore remand the case to the District Court so that the plaintiffs may have an opportunity to prove concrete and particularized injuries using evidence — unlike the bulk of the evidence presented thus far — that would tend to demonstrate a burden on their individual votes. We express no view on the merits of the plaintiffs' case. We caution, however, that "standing is not dispensed in gross": A plaintiff's remedy must be tailored to redress the plaintiff's particular injury.

The judgment of the District Court is vacated, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE KAGAN, with whom JUSTICE GINSBURG, JUSTICE BREYER, and JUSTICE SOTOMAYOR join, concurring.

The Court holds today that a plaintiff asserting a partisan gerrymandering claim based on a theory of vote dilution must prove that she lives in a packed or cracked district in order to establish standing. The Court also holds that none of the plaintiffs here have yet made that required showing.

I agree with both conclusions, and with the Court's decision to remand this case to allow the plaintiffs to prove that they live in packed or cracked districts. I write to address in more detail what kind of evidence the present plaintiffs (or any additional ones) must offer to support that allegation. And I write to make some observations about what would happen if they succeed in proving standing — that is, about how their vote dilution case could then proceed on the merits. The key point is that the case could go forward in much the same way it did below: Given the charges of statewide packing and cracking, affecting a slew of districts and residents, the challengers could make use of statewide evidence and seek a statewide remedy.

I also write separately because I think the plaintiffs may have wanted to do more than present a vote dilution theory. Partisan gerrymandering no doubt burdens individual votes, but it also causes other harms. And at some points in this litigation, the plaintiffs complained of a different injury — an infringement of their First Amendment right of association. The Court rightly does not address that alternative argument: The plaintiffs did not advance it with sufficient clarity or concreteness to make it a real part of the case. But because on remand they may well develop the associational theory, I address the standing requirement that would then apply. As I'll explain, a plaintiff presenting such a theory would not need to show that her particular voting district was packed or cracked for standing purposes because that fact would bear no connection to her substantive claim. Indeed, everything about the litigation of that claim — from standing on down to remedy — would be statewide in nature.

Partisan gerrymandering, as this Court has recognized, is "incompatible with democratic principles." More effectively every day, that practice enables politicians to entrench themselves in power against the people's will. And only the courts can do anything to remedy the problem, because gerrymanders benefit those who control the political branches. None of those facts gives judges any excuse to disregard Article III's demands. The Court is right to say they were not met here. But partisan gerrymandering injures enough individuals and organizations in enough concrete ways to ensure that standing requirements, properly applied, will not often or long prevent courts from reaching the merits of cases like this one. Or from insisting, when they do, that partisan officials stop degrading the nation's democracy.

I

As the Court explains, the plaintiffs' theory in this case focuses on vote dilution. That is, the plaintiffs assert that Wisconsin's State Assembly Map has caused their votes "to carry less weight than [they] would carry in another, hypothetical district." And the mechanism used to wreak that harm is "packing" and "cracking." In a relatively few districts, the mapmakers packed supermajorities of Democratic voters — well beyond the number needed for a Democratic candidate to prevail. And in many more districts, dispersed throughout the State, the mapmakers cracked Democratic voters — spreading them

sufficiently thin to prevent them from electing their preferred candidates. The result of both practices is to "waste" Democrats' votes.

The harm of vote dilution, as this Court has long stated, is "individual and personal in nature." It arises when an election practice — most commonly, the drawing of district lines — devalues one citizen's vote as compared to others. Of course, such practices invariably affect more than one citizen at a time. For example, our original one-person, one-vote cases considered how malapportioned maps "contract[ed] the value" of urban citizens' votes while "expand[ing]" the value of rural citizens' votes. But we understood the injury as giving diminished weight to each particular vote, even if millions were so touched. In such cases, a voter living in an overpopulated district suffered "disadvantage to [herself] as [an] individual[]": Her vote counted for less than the votes of other citizens in her State. And that kind of disadvantage is what a plaintiff asserting a vote dilution claim — in the one-person, one-vote context or any other — always alleges.

To have standing to bring a partisan gerrymandering claim based on vote dilution, then, a plaintiff must prove that the value of her own vote has been "contract[ed]." And that entails showing, as the Court holds, that she lives in a district that has been either packed or cracked. For packing and cracking are the ways in which a partisan gerrymander dilutes votes. Consider the perfect form of each variety. When a voter resides in a packed district, her preferred candidate will win no matter what; when a voter lives in a cracked district, her chosen candidate stands no chance of prevailing. But either way, such a citizen's vote carries less weight — has less consequence — than it would under a neutrally drawn map. So when she shows that her district has been packed or cracked, she proves, as she must to establish standing, that she is "among the injured."

In many partisan gerrymandering cases, that threshold showing will not be hard to make. Among other ways of proving packing or cracking, a plaintiff could produce an alternative map (or set of alternative maps) — comparably consistent with traditional districting principles — under which her vote would carry more weight. For example, a Democratic plaintiff living in a 75%-Democratic district could prove she was packed by presenting a different map, drawn without a focus on partisan advantage, that would place her in a 60%-Democratic district. Or conversely, a Democratic plaintiff residing in a 35%-Democratic district could prove she was cracked by offering an alternative, neutrally drawn map putting her in a 50-50 district. The precise numbers are of no import. The point is that the plaintiff can show, through drawing alternative district lines, that partisan-based packing or cracking diluted her vote.

Here, the Court is right that the plaintiffs have so far failed to make such a showing. William Whitford was the only plaintiff to testify at trial about the alleged gerrymander's effects. He expressly acknowledged that his district would be materially identical under any conceivable map, whether or not drawn to achieve partisan advantage. That means Wisconsin's plan could not have diluted Whitford's own vote. So whatever other claims he might have, Whitford is not "among the injured" in a vote dilution challenge. Four other plaintiffs differed from Whitford by alleging in the complaint that they lived in packed or cracked districts. But for whatever reason, they failed to back up those allegations with evidence as the suit proceeded. So they too did not show the injury — a less valuable vote — central to their vote dilution theory.

That problem, however, may be readily fixable. The Court properly remands this case to the District Court "so that the plaintiffs may have an opportunity" to "demonstrate a burden on their individual votes." That means the plaintiffs — both the four who initially made those assertions and any others (current or newly joined) — now can introduce evidence that their individual districts were packed or cracked. And if the plaintiffs' more general charges have a basis in fact, that evidence may well be at hand. Recall that the plaintiffs here alleged — and the District Court found — that a unified Republican government set out to ensure that Republicans would control as many State Assembly seats as possible over a decade (five consecutive election cycles). To that end, the government allegedly packed and cracked Democrats throughout the State, not just in a particular district or region. Assuming that is true, the plaintiffs should have a mass of packing and cracking proof, which they can now also present in district-by-district form to support their standing. In other words, a plaintiff residing in each affected district can show, through an alternative map or other evidence, that packing or cracking indeed occurred there. And if (or to the extent) that test is met, the court can proceed to decide all distinctive merits issues and award appropriate remedies.

When the court addresses those merits questions, it can consider statewide (as well as local) evidence. Of course, the court below and others like it are currently debating, without guidance from this Court, what elements make up a vote dilution claim in the partisan gerrymandering context. But assume that the plaintiffs must prove illicit partisan intent — a purpose to dilute Democrats' votes in drawing district lines. The plaintiffs could then offer evidence about the mapmakers' goals in formulating the entire statewide map (which would predictably carry down to individual districting decisions). So, for example, the plaintiffs here introduced proof that the mapmakers looked to partisan voting data when drawing districts throughout the State — and that they graded draft maps according to the amount of advantage those maps conferred on Republicans. This Court has explicitly recognized the relevance of such statewide evidence in addressing racial gerrymandering claims of a district-specific nature. "Voters," we held, "of course[] can present statewide *evidence* in order to prove racial gerrymandering in a particular district." And in particular, "[s]uch evidence is perfectly relevant" to showing that mapmakers had an invidious "motive" in drawing the lines of "multiple districts in the State." The same should be true for partisan gerrymandering.

Similarly, cases like this one might warrant a statewide remedy. Suppose that mapmakers pack or crack a critical mass of State Assembly districts all across the State to elect as many Republican politicians as possible. And suppose plaintiffs residing in those districts prevail in a suit challenging that gerrymander on a vote dilution theory. The plaintiffs might then receive exactly the relief sought in this case. To be sure, remedying each plaintiff's vote dilution injury "requires revising only such districts as are necessary to reshape [that plaintiff's] district — so that the [plaintiff] may be unpacked or uncracked, as the case may be." But with enough plaintiffs joined together — attacking all the packed and cracked districts in a statewide gerrymander — those obligatory revisions could amount to a wholesale restructuring of the State's districting plan. The Court recognizes as much. It states that a proper remedy in a vote dilution case "does not *necessarily* require restructuring all of the State's legislative districts." Not necessarily — but possibly. It all depends on how much redistricting is needed to cure all the packing and cracking that the mapmakers have done.

II

Everything said so far relates only to suits alleging that a partisan gerrymander dilutes individual votes. That is the way the Court sees this litigation. And as I'll discuss, that is the most reasonable view. But partisan gerrymanders inflict other kinds of constitutional harm as well. Among those injuries, partisan gerrymanders may infringe the First Amendment rights of association held by parties, other political organizations, and their members. The plaintiffs here have sometimes pointed to that kind of harm. To the extent they meant to do so, and choose to do so on remand, their associational claim would occasion a different standing inquiry than the one in the Court's opinion.

Justice Kennedy explained the First Amendment associational injury deriving from a partisan gerrymander in his concurring opinion in *Vieth*. "Representative democracy," Justice Kennedy pointed out, is today "unimaginable without the ability of citizens to band together" to advance their political beliefs. That means significant "First Amendment concerns arise" when a State purposely "subject[s] a group of voters or their party to disfavored treatment." Such action "burden[s] a group of voters' representational rights." And it does so because of their "political association," "participation in the electoral process," "voting history," or "expression of political views."

As so formulated, the associational harm of a partisan gerrymander is distinct from vote dilution. Consider an active member of the Democratic Party in Wisconsin who resides in a district that a partisan gerrymander has left untouched (neither packed nor cracked). His individual vote carries no less weight than it did before. But if the gerrymander ravaged the party he works to support, then he indeed suffers harm, as do all other involved members of that party. This is the kind of "burden" to "a group of voters' representational rights" Justice Kennedy spoke of. Members of the "disfavored party" in the State, deprived of their natural political strength by a partisan gerrymander, may face difficulties fundraising, registering voters, attracting volunteers, generating support from independents, and recruiting candidates to run for office (not to mention eventually accomplishing their policy objectives). And what is true for party members may be doubly true for party officials and triply true for the party itself (or for related organizations). By placing a state party at an enduring electoral disadvantage, the gerrymander weakens its capacity to perform all its functions.

And if that is the essence of the harm alleged, then the standing analysis should differ from the one the Court applies. Standing, we have long held, "turns on the nature and source of the claim asserted." Indeed, that idea lies at the root of today's opinion. It is because the Court views the harm alleged as vote dilution that it (rightly) insists that each plaintiff show packing or cracking in her own district to establish her standing. But when the harm alleged is not district specific, the proof needed for standing should not be district specific either. And the associational injury flowing from a statewide partisan gerrymander, whether alleged by a party member or the party itself, has nothing to do with the packing or cracking of any single district's lines. The complaint in such a case is instead that the gerrymander has burdened the ability of like-minded people across the State to affiliate in a political party and carry out that organization's activities and objects. Because a plaintiff can have that complaint without living in a packed or cracked district, she need not show what the Court demands today for a vote dilution claim. Or said

otherwise: Because on this alternative theory, the valued association and the injury to it are statewide, so too is the relevant standing requirement.

On occasion, the plaintiffs here have indicated that they have an associational claim in mind. In addition to repeatedly alleging vote dilution, their complaint asserted in general terms that Wisconsin's districting plan infringes their "First Amendment right to freely associate with each other without discrimination by the State based on that association." Similarly, the plaintiffs noted before this Court that "[b]eyond diluting votes, partisan gerrymandering offends First Amendment values by penalizing citizens because of . . . their association with a political party." And finally, the plaintiffs' evidence of partisan asymmetry well fits a suit alleging associational injury (although, as noted below, that was not how it was used). As the Court points out, what those statistical metrics best measure is a gerrymander's effect "on the fortunes of political parties" and those associated with them.

In the end, though, I think the plaintiffs did not sufficiently advance a First Amendment associational theory to avoid the Court's holding on standing. Despite referring to that theory in their complaint, the plaintiffs tried this case as though it were about vote dilution alone. Their testimony and other evidence went toward establishing the effects of rampant packing and cracking on the value of individual citizens' votes. Even their proof of partisan asymmetry was used for that purpose — although as noted above, it could easily have supported the alternative theory of associational harm. The plaintiffs joining in this suit do not include the State Democratic Party (or any related statewide organization). They did not emphasize their membership in that party, or their activities supporting it. And they did not speak to any tangible associational burdens — ways the gerrymander had debilitated their party or weakened its ability to carry out its core functions and purposes. Even in this Court, when disputing the State's argument that they lacked standing, the plaintiffs reiterated their suit's core theory: that the gerrymander "intentionally, severely, durably, and unjustifiably dilutes Democratic votes." Given that theory, the plaintiffs needed to show that their own votes were indeed diluted in order to establish standing.

But nothing in the Court's opinion prevents the plaintiffs on remand from pursuing an associational claim, or from satisfying the different standing requirement that theory would entail. The Court's opinion is about a suit challenging a partisan gerrymander on a particular ground — that it dilutes the votes of individual citizens. That opinion "leave[s] for another day consideration of other possible theories of harm not presented here and whether those theories might present justiciable claims giving rise to statewide remedies." And in particular, it leaves for another day the theory of harm advanced by Justice Kennedy in *Vieth*: that a partisan gerrymander interferes with the vital "ability of citizens to band together" to further their political beliefs. Nothing about that injury is "generalized" or "abstract," as the Court says is true of the plaintiffs' dissatisfaction with the "overall composition of the legislature." A suit raising an associational theory complains of concrete "burdens on a disfavored party" and its members as they pursue their political interests and goals. And when the suit alleges that a gerrymander has imposed those burdens on a statewide basis, then its litigation should be statewide too — as to standing, liability, and remedy alike.

III

* * *

Because of the way this suit was litigated, I agree that the plaintiffs have so far failed to establish their standing to sue, and I fully concur in the Court's opinion. But of one thing we may unfortunately be sure. Courts — and in particular this Court — will again be called on to redress extreme partisan gerrymanders. I am hopeful we will then step up to our responsibility to vindicate the Constitution against a contrary law.

JUSTICE THOMAS, with whom JUSTICE GORSUCH joins, concurring in part and concurring in the judgment.

I join Parts I and II of the Court's opinion because I agree that the plaintiffs have failed to prove Article III standing. I do not join Part III, which gives the plaintiffs another chance to prove their standing on remand. When a plaintiff lacks standing, our ordinary practice is to remand the case with instructions to dismiss for lack of jurisdiction. The Court departs from our usual practice because this is supposedly "not the usual case." But there is nothing unusual about it. As the Court explains, the plaintiffs' lack of standing follows from long-established principles of law. After a year and a half of litigation in the District Court, including a 4-day trial, the plaintiffs had a more-than-ample opportunity to prove their standing under these principles. They failed to do so. Accordingly, I would have remanded this case with instructions to dismiss.

Notes

1. Is Justice Kagan correct that partisan gerrymandering inflicts harm on voters, regardless of whether the district in question has been packed or cracked? Which of the two possibilities, packing or cracking, presents a more compelling injury-in-fact under Article III?

2. Does partisan gerrymandering inflict an associational harm sufficient to confer standing under Article III?

3. What do you think about the majority's decision to allow the plaintiffs another chance to prove an injury on remand? Is the majority correct that the plaintiffs deserve another chance because this is an "unusual case"?

4. Does the Court's standing analysis give you any insight into how it might decide the merits of a future partisan-gerrymandering case?

5. In the next principal case, *Lujan v. Defenders of Wildlife*, the Court states that the elements of Article III standing "must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, *i.e.*, with the manner and degree of evidence required at the successive stages of the litigation." What, if anything, can we learn from *Gill* about what plaintiffs must do to satisfy their burden?

Chapter 8
Federal Common Law

D. Implied Remedies for Violation of Constitutional Rights

Page 468: ***insert after the Note:***

Ziglar v. Abbasi

Supreme Court of the United States, 2017.
137 S. Ct. 1843.

JUSTICE KENNEDY delivered the opinion of the Court, except as to Part IV-B.

After the September 11 terrorist attacks in this country, and in response to the deaths, destruction, and dangers they caused, the United States Government ordered hundreds of illegal aliens to be taken into custody and held. Pending a determination whether a particular detainee had connections to terrorism, the custody, under harsh conditions to be described, continued. In many instances custody lasted for days and weeks, then stretching into months. Later, some of the aliens who had been detained filed suit, leading to the cases now before the Court.

The complaint named as defendants three high executive officers in the Department of Justice and two of the wardens at the facility where the detainees had been held. Most of the claims, alleging various constitutional violations, sought damages under the implied cause of action theory adopted by this Court in *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388 (1971). . . .

[The United States District Court for the Eastern District of New York granted motions to dismiss as to some defendants, but denied them as to others. The Second Circuit held that the complaints were sufficient.]

The Court granted certiorari to consider these rulings. . . .

I

A

[Following the September 11, 2001 terrorist attacks, the FBI questioned thousands of individuals, including many aliens unlawfully in the United States.]

If the FBI designated an alien as "of interest" to the investigation, or if it had doubts about the proper designation in a particular case, the alien was detained subject to a "hold-until-cleared policy." The aliens were held without bail.

* * *

B

Respondents are six men of Arab or South Asian descent. Five are Muslims. Each was illegally in this country, arrested during the course of the September 11 investigation, and detained in the [the Administrative Maximum Special Housing Unit (or Unit) of the Metropolitan Detention Center in Brooklyn, New York] for periods ranging from three to eight months. After being released respondents were removed from the United States.

Respondents then sued on their own behalf, and on behalf of a putative class, seeking compensatory and punitive damages, attorney's fees, and costs. . . . The gravamen of their claims was that the Government had no reason to suspect them of any connection to terrorism, and thus had no legitimate reason to hold them for so long in [the] harsh conditions [of the Unit].

As relevant here, respondents sued two groups of federal officials in their official capacities. The first group consisted of former Attorney General John Ashcroft, former FBI Director Robert Mueller, and former Immigration and Naturalization Service Commissioner James Ziglar. This opinion refers to these three petitioners as the "Executive Officials." The other petitioners named in the complaint were the MDC's warden, Dennis Hasty, and associate warden, James Sherman. This opinion refers to these two petitioners as the "Wardens."

Seeking to invoke the Court's decision in *Bivens*, respondents brought four claims under the Constitution itself. First, respondents alleged that petitioners detained them in harsh pretrial conditions for a punitive purpose, in violation of the substantive due process component of the Fifth Amendment. Second, respondents alleged that petitioners detained them in harsh conditions because of their actual or apparent race, religion, or national origin, in violation of the equal protection component of the Fifth Amendment. Third, respondents alleged that the Wardens subjected them to punitive strip searches unrelated to any legitimate penological interest, in violation of the Fourth Amendment and the substantive due process component of the Fifth Amendment. Fourth, respondents alleged that the Wardens knowingly allowed the guards to abuse respondents, in violation of the substantive due process component of the Fifth Amendment.

* * *

C

The District Court dismissed the claims against the Executive Officials but allowed the claims against the Wardens to go forward. The Court of Appeals affirmed in most respects as to the Wardens. As to the Executive Officials, however, the Court of Appeals reversed, reinstating respondents' claims. . . .

II

The first question to be discussed is whether petitioners can be sued for damages under *Bivens* and the ensuing cases in this Court defining the reach and the limits of that precedent.

A

In 1871, Congress passed a statute that was later codified at 42 U.S.C. § 1983. It entitles an injured person to money damages if a state official violates his or her constitutional rights. Congress did not create an analogous statute for federal officials. Indeed, in the 100 years leading up to *Bivens*, Congress did not provide a specific damages remedy for plaintiffs whose constitutional rights were violated by agents of the Federal Government.

In 1971, and against this background, this Court decided *Bivens*. The Court held that, even absent statutory authorization, it would enforce a damages remedy to compensate persons injured by federal officers who violated the prohibition against unreasonable search and seizures. The Court acknowledged that the Fourth Amendment does not provide for money damages "in so many words." The Court noted, however, that Congress had not foreclosed a damages remedy in "explicit" terms and that no "special factors" suggested that the Judiciary should "hesitat[e]" in the face of congressional silence. The Court, accordingly, held that it could authorize a remedy under general principles of federal jurisdiction.

In the decade that followed, the Court recognized what has come to be called an implied cause of action in two cases involving other constitutional violations. In *Davis v. Passman*, 442 U.S. 228 (1979), an administrative assistant sued a

Congressman for firing her because she was a woman. The Court held that the Fifth Amendment Due Process Clause gave her a damages remedy for gender discrimination. And in *Carlson v. Green*, 446 U.S. 14 (1980), a prisoner's estate sued federal jailers for failing to treat the prisoner's asthma. The Court held that the Eighth Amendment Cruel and Unusual Punishments Clause gave him a damages remedy for failure to provide adequate medical treatment. These three cases — *Bivens*, *Davis*, and *Carlson* — represent the only instances in which the Court has approved of an implied damages remedy under the Constitution itself.

B

To understand *Bivens* and the two other cases implying a damages remedy under the Constitution, it is necessary to understand the prevailing law when they were decided. In the mid-20th century, the Court followed a different approach to recognizing implied causes of action than it follows now. During this "*ancien regime*," *Alexander v. Sandoval*, 532 U.S. 275 (2001), the Court assumed it to be a proper judicial function to "provide such remedies as are necessary to make effective" a statute's purpose, *J. I. Case Co. v. Borak*, 377 U.S. 426 (1964). Thus, as a routine matter with respect to statutes, the Court would imply causes of action not explicit in the statutory text itself.

These statutory decisions were in place when *Bivens* recognized an implied cause of action to remedy a constitutional violation. Against that background, the *Bivens* decision held that courts must "adjust their remedies so as to grant the necessary relief" when "federally protected rights have been invaded." In light of this interpretive framework, there was a possibility that "the Court would keep expanding *Bivens* until it became the substantial equivalent of 42 U.S.C. § 1983."

C

Later, the arguments for recognizing implied causes of action for damages began to lose their force. In cases decided after *Bivens*, and after the statutory implied cause-of-action cases that *Bivens* itself relied upon, the Court adopted a far more cautious course before finding implied causes of action. In two principal cases under other statutes, it declined to find an implied cause of action. See *Piper v. Chris-Craft Industries, Inc.*, 430 U.S. 1, 42 (1977); *Cort v. Ash*, 422 U.S. 66 (1975). Later, in *Cannon v. University of Chicago*, 441 U.S. 677 (1979), the Court did allow an implied cause of action; but it cautioned that, where Congress "intends private litigants to have a cause of action," the "far better course" is for Congress to confer that remedy in explicit terms.

Following this expressed caution, the Court clarified in a series of cases that, when deciding whether to recognize an implied cause of action, the "determinative" question is one of statutory intent. If the statute itself does not "displa[y] an intent" to create "a private remedy," then "a cause of action does not exist and courts may not create one, no matter how desirable that might be as a policy matter, or how compatible with the statute." The Court held that the judicial task was instead "limited solely to determining whether Congress intended to create the private right of action asserted." If the statute does not itself so provide, a private cause of action will not be created through judicial mandate.

The decision to recognize an implied cause of action under a statute involves somewhat different considerations than when the question is whether to recognize an implied cause of action to enforce a provision of the Constitution itself. When Congress enacts a statute, there are specific procedures and times for considering its terms and the proper means for its enforcement. It is logical, then, to assume

that Congress will be explicit if it intends to create a private cause of action. With respect to the Constitution, however, there is no single, specific congressional action to consider and interpret.

Even so, it is a significant step under separation-of-powers principles for a court to determine that it has the authority, under the judicial power, to create and enforce a cause of action for damages against federal officials in order to remedy a constitutional violation. When determining whether traditional equitable powers suffice to give necessary constitutional protection — or whether, in addition, a damages remedy is necessary — there are a number of economic and governmental concerns to consider. Claims against federal officials often create substantial costs, in the form of defense and indemnification. Congress, then, has a substantial responsibility to determine whether, and the extent to which, monetary and other liabilities should be imposed upon individual officers and employees of the Federal Government. In addition, the time and administrative costs attendant upon intrusions resulting from the discovery and trial process are significant factors to be considered. In an analogous context, Congress, it is fair to assume, weighed those concerns in deciding not to substitute the Government as defendant in suits seeking damages for constitutional violations. See 28 U.S.C. § 2679(b)(2)(A) (providing that certain provisions of the Federal Tort Claims Act do not apply to any claim against a federal employee "which is brought for a violation of the Constitution").

For these and other reasons, the Court's expressed caution as to implied causes of actions under congressional statutes led to similar caution with respect to actions in the *Bivens* context, where the action is implied to enforce the Constitution itself. Indeed, in light of the changes to the Court's general approach to recognizing implied damages remedies, it is possible that the analysis in the Court's three *Bivens* cases might have been different if they were decided today. . . .

Given the notable change in the Court's approach to recognizing implied causes of action, however, the Court has made clear that expanding the *Bivens* remedy is now a "disfavored" judicial activity. This is in accord with the Court's observation that it has "consistently refused to extend *Bivens* to any new context or new category of defendants." *Correctional Services Corp. v. Malesko*, 534 U.S. 61 (2001). Indeed, the Court has refused to do so for the past 30 years.

For example, the Court declined to create an implied damages remedy in the following cases: a First Amendment suit against a federal employer, a race-discrimination suit against military officers, a substantive due process suit against military officers, a procedural due process suit against Social Security officials, a procedural due process suit against a federal agency for wrongful termination, an Eighth Amendment suit against a private prison operator, a due process suit against officials from the Bureau of Land Management, and an Eighth Amendment suit against prison guards at a private prison.

When a party seeks to assert an implied cause of action under the Constitution itself, just as when a party seeks to assert an implied cause of action under a federal statute, separation-of-powers principles are or should be central to the analysis. The question is "who should decide" whether to provide for a damages remedy, Congress or the courts?

The answer most often will be Congress. When an issue " 'involves a host of considerations that must be weighed and appraised,' " it should be committed to

" 'those who write the laws' " rather than " 'those who interpret them.' " In most instances, the Court's precedents now instruct, the Legislature is in the better position to consider if " 'the public interest would be served' " by imposing a " 'new substantive legal liability.' " As a result, the Court has urged "caution" before "extending *Bivens* remedies into any new context." The Court's precedents now make clear that a *Bivens* remedy will not be available if there are " 'special factors counselling hesitation in the absence of affirmative action by Congress.' "

This Court has not defined the phrase "special factors counselling hesitation." The necessary inference, though, is that the inquiry must concentrate on whether the Judiciary is well suited, absent congressional action or instruction, to consider and weigh the costs and benefits of allowing a damages action to proceed. . . .

It is not necessarily a judicial function to establish whole categories of cases in which federal officers must defend against personal liability claims in the complex sphere of litigation, with all of its burdens on some and benefits to others. It is true that, if equitable remedies prove insufficient, a damages remedy might be necessary to redress past harm and deter future violations. Yet the decision to recognize a damages remedy requires an assessment of its impact on governmental operations systemwide. Those matters include the burdens on Government employees who are sued personally, as well as the projected costs and consequences to the Government itself when the tort and monetary liability mechanisms of the legal system are used to bring about the proper formulation and implementation of public policies. These and other considerations may make it less probable that Congress would want the Judiciary to entertain a damages suit in a given case.

Sometimes there will be doubt because the case arises in a context in which Congress has designed its regulatory authority in a guarded way, making it less likely that Congress would want the Judiciary to interfere. And sometimes there will be doubt because some other feature of a case . . . causes a court to pause before acting without express congressional authorization. In sum, if there are sound reasons to think Congress might doubt the efficacy or necessity of a damages remedy as part of the system for enforcing the law and correcting a wrong, the courts must refrain from creating the remedy in order to respect the role of Congress in determining the nature and extent of federal-court jurisdiction under Article III.

In a related way, if there is an alternative remedial structure present in a certain case, that alone may limit the power of the Judiciary to infer a new *Bivens* cause of action. For if Congress has created "any alternative, existing process for protecting the [injured party's] interest" that itself may "amoun[t] to a convincing reason for the Judicial Branch to refrain from providing a new and freestanding remedy in damages."

III

It is appropriate now to turn first to the *Bivens* claims challenging the conditions of confinement imposed on respondents pursuant to the formal policy adopted by the Executive Officials in the wake of the September 11 attacks. The Court will refer to these claims as the "detention policy claims." The detention policy claims allege that petitioners violated respondents' due process and equal protection rights by holding them in restrictive conditions of confinement; the claims further allege that the Wardens violated the Fourth and Fifth Amendments

by subjecting respondents to frequent strip searches. . . . At this point, the question is whether, having considered the relevant special factors in the whole context of the detention policy claims, the Court should extend a *Bivens*-type remedy to those claims.

A

Before allowing respondents' detention policy claims to proceed under *Bivens*, the Court of Appeals did not perform any special factors analysis at all. The reason, it said, was that the special factors analysis is necessary only if a plaintiff asks for a *Bivens* remedy in a new context. And in the Court of Appeals' view, the context here was not new.

To determine whether the *Bivens* context was novel, the Court of Appeals employed a two-part test. First, it asked whether the asserted constitutional right was at issue in a previous *Bivens* case. Second, it asked whether the mechanism of injury was the same mechanism of injury in a previous *Bivens* case. Under the Court of Appeals' approach, if the answer to both questions is "yes," then the context is not new and no special factors analysis is required.

That approach is inconsistent with the analysis in *Malesko*. Before the Court decided that case, it had approved [in *Carlson*] a *Bivens* action under the Eighth Amendment against federal prison officials for failure to provide medical treatment. In *Malesko*, the plaintiff sought relief against a private prison operator in almost parallel circumstances. In both cases, the right at issue was the same: the Eighth Amendment right to be free from cruel and unusual punishment. And in both cases, the mechanism of injury was the same: failure to provide adequate medical treatment. Thus, if the approach followed by the Court of Appeals is the correct one, this Court should have held that the cases arose in the same context, obviating any need for a special factors inquiry.

That, however, was not the controlling analytic frame-work in *Malesko*. Even though the right and the mechanism of injury were the same as they were in *Carlson*, the Court held that the contexts were different. The Court explained that special factors counseled hesitation and that the *Bivens* remedy was therefore unavailable.

* * *

The proper test for determining whether a case presents a new *Bivens* context is as follows. If the case is different in a meaningful way from previous *Bivens* cases decided by this Court, then the context is new. Without endeavoring to create an exhaustive list of differences that are meaningful enough to make a given context a new one, some examples might prove instructive. A case might differ in a meaningful way because of the rank of the officers involved; the constitutional right at issue; the generality or specificity of the official action; the extent of judicial guidance as to how an officer should respond to the problem or emergency to be confronted; the statutory or other legal mandate under which the officer was operating; the risk of disruptive intrusion by the Judiciary into the functioning of other branches; or the presence of potential special factors that previous *Bivens* cases did not consider.

In the present suit, respondents' detention policy claims challenge the confinement conditions imposed on illegal aliens pursuant to a high-level executive policy created in the wake of a major terrorist attack on American soil. Those claims bear little resemblance to the three *Bivens* claims the Court has approved in

the past: a claim against FBI agents for handcuffing a man in his own home without a warrant; a claim against a Congressman for firing his female secretary; and a claim against prison officials for failure to treat an inmate's asthma. The Court of Appeals therefore should have held that this was a new *Bivens* context.

B

After considering the special factors necessarily implicated by the detention policy claims, the Court now holds that those factors show that whether a damages action should be allowed is a decision for the Congress to make, not the courts.

With respect to the claims against the Executive Officials, it must be noted that a *Bivens* action is not "a proper vehicle for altering an entity's policy." Furthermore, a *Bivens* claim is brought against the individual official for his or her own acts, not the acts of others. "The purpose of *Bivens* is to deter the *officer*." *Bivens* is not designed to hold officers responsible for acts of their subordinates.

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. This, in turn, would necessarily require inquiry and discovery into the whole course of the discussions and deliberations that led to the policies and governmental acts being challenged. These consequences counsel against allowing a *Bivens* action against the Executive Officials, for the burden and demand of litigation might well prevent them — or, to be more precise, future officials like them — from devoting the time and effort required for the proper discharge of their duties.

A closely related problem, as just noted, is that the discovery and litigation process would either border upon or directly implicate the discussion and deliberations that led to the formation of the policy in question. Allowing a damages suit in this context, or in a like context in other circumstances, would require courts to interfere in an intrusive way with sensitive functions of the Executive Branch.

In addition to this special factor, which applies to the claims against the Executive Officials, there are three other special factors that apply as well to the detention policy claims against all of the petitioners. First, respondents' detention policy claims challenge more than standard "law enforcement operations." They challenge as well major elements of the Government's whole response to the September 11 attacks, thus of necessity requiring an inquiry into sensitive issues of national security. Were this inquiry to be allowed in a private suit for damages, the *Bivens* action would assume dimensions far greater than those present in *Bivens* itself, or in either of its two follow-on cases, or indeed in any putative *Bivens* case yet to come before the Court.

National-security policy is the prerogative of the Congress and President. Judicial inquiry into the national-security realm raises "concerns for the separation of powers in trenching on matters committed to the other branches." These concerns are even more pronounced when the judicial inquiry comes in the context of a claim seeking money damages rather than a claim seeking injunctive or other equitable relief. The risk of personal damages liability is more likely to cause an official to second-guess difficult but necessary decisions concerning national-security policy.

* * *

There are limitations, of course, on the power of the Executive under Article II of the Constitution and in the powers authorized by congressional enactments, even with respect to matters of national security. And national-security concerns must not become a talisman used to ward off inconvenient claims — a "label" used to "cover a multitude of sins." This " 'danger of abuse' " is even more heightened given " 'the difficulty of defining' " the " 'security interest' " in domestic cases.

Even so, the question is only whether "congressionally uninvited intrusion" is "inappropriate" action for the Judiciary to take. The factors discussed above all suggest that Congress' failure to provide a damages remedy might be more than mere oversight, and that congressional silence might be more than "inadvertent." This possibility counsels hesitation "in the absence of affirmative action by Congress."

Furthermore, in any inquiry respecting the likely or probable intent of Congress, the silence of Congress is relevant; and here that silence is telling. In the almost 16 years since September 11, the Federal Government's responses to that terrorist attack have been well documented. Congressional interest has been "frequent and intense," and some of that interest has been directed to the conditions of confinement at issue here. Indeed, at Congress' behest, the Department of Justice's Office of the Inspector General compiled a 300-page report documenting the conditions in the MDC in great detail. Nevertheless, "[a]t no point did Congress choose to extend to any person the kind of remedies that respondents seek in this lawsuit."

This silence is notable because it is likely that high-level policies will attract the attention of Congress. Thus, when Congress fails to provide a damages remedy in circumstances like these, it is much more difficult to believe that "congressional inaction" was "inadvertent."

It is of central importance, too, that this is not a case like *Bivens* or *Davis* in which "it is damages or nothing." Unlike the plaintiffs in those cases, respondents do not challenge individual instances of discrimination or law enforcement overreach, which 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. Indeed, the habeas remedy, if necessity required its use, would have provided a faster and more direct route to relief than a suit for money damages. . . .

There is a persisting concern, of course, that absent a *Bivens* remedy there will be insufficient deterrence to prevent officers from violating the Constitution. In circumstances like those presented here, however, the stakes on both sides of the argument are far higher than in past cases the Court has considered. If *Bivens* liability were to be imposed, high officers who face personal liability for damages might refrain from taking urgent and lawful action in a time of crisis. And, as already noted, the costs and difficulties of later litigation might intrude upon and interfere with the proper exercise of their office.

On the other side of the balance, the very fact that some executive actions have the sweeping potential to affect the liberty of so many is a reason to consider proper means to impose restraint and to provide some redress from injury. There is therefore a balance to be struck, in situations like this one, between deterring

constitutional violations and freeing high officials to make the lawful decisions necessary to protect the Nation in times of great peril. The proper balance is one for the Congress, not the Judiciary, to undertake. For all of these reasons, the Court of Appeals erred by allowing respondents' detention policy claims to proceed under *Bivens*.

IV

A

One of respondents' claims under *Bivens* requires a different analysis: the prisoner abuse claim against the MDC's warden, Dennis Hasty. The allegation is that Warden Hasty violated the Fifth Amendment by allowing prison guards to abuse respondents.

* * *

The complaint alleges that guards routinely abused respondents; that the warden encouraged the abuse by referring to respondents as "terrorists"; that he prevented respondents from using normal grievance procedures; that he stayed away from the Unit to avoid seeing the abuse; that he was made aware of the abuse via "inmate complaints, staff complaints, hunger strikes, and suicide attempts"; that he ignored other "direct evidence of [the] abuse, including logs and other official [records]"; that he took no action "to rectify or address the situation"; and that the abuse resulted in the injuries described above, see. These allegations — assumed here to be true, subject to proof at a later stage — plausibly show the warden's deliberate indifference to the abuse. Consistent with the opinion of every judge in this case to have considered the question, including the dissenters in the Court of Appeals, the Court concludes that the prisoner abuse allegations against Warden Hasty state a plausible ground to find a constitutional violation if a *Bivens* remedy is to be implied.

Warden Hasty argues, however, that *Bivens* ought not to be extended to this instance of alleged prisoner abuse. As noted above, the first question a court must ask in a case like this one is whether the claim arises in a new *Bivens* context, *i.e.*, whether "the case is different in a meaningful way from previous *Bivens* cases decided by this Court."

It is true that this case has significant parallels to [*Carlson*]. There, the Court did allow a *Bivens* claim for prisoner mistreatment — specifically, for failure to provide medical care. And the allegations of injury here are just as compelling as those at issue in *Carlson*.

Yet even a modest extension is still an extension. And this case does seek to extend *Carlson* to a new context. . . .

The constitutional right is different here, since *Carlson* was predicated on the Eighth Amendment and this claim is predicated on the Fifth. And the judicial guidance available to this warden, with respect to his supervisory duties, was less developed. The Court has long made clear the standard for claims alleging failure to provide medical treatment to a prisoner — "deliberate indifference to serious medical needs." The standard for a claim alleging that a warden allowed guards to abuse pre-trial detainees is less clear under the Court's precedents.

This case also has certain features that were not considered in the Court's previous *Bivens* cases and that might discourage a court from authorizing a *Bivens* remedy. As noted above, the existence of alternative remedies usually precludes a court from authorizing a *Bivens* action. And there might have been alternative

remedies available here, for example, a writ of habeas corpus, an injunction requiring the warden to bring his prison into compliance with the regulations discussed above; or some other form of equitable relief.

Furthermore, legislative action suggesting that Congress does not want a damages remedy is itself a factor counseling hesitation. Some 15 years after *Carlson* was decided, Congress passed the Prison Litigation Reform Act of 1995, which made comprehensive changes to the way prisoner abuse claims must be brought in federal court. See 42 U.S.C. § 1997e. . . . [T]he Act itself does not provide for a standalone damages remedy against federal jailers. It could be argued that this suggests Congress chose not to extend the *Carlson* damages remedy to cases involving other types of prisoner mistreatment.

The differences between this claim and the one in *Carlson* are perhaps small, at least in practical terms. Given this Court's expressed caution about extending the *Bivens* remedy, however, the new-context inquiry is easily satisfied. Some differences, of course, will be so trivial that they will not suffice to create a new *Bivens* context. But here the differences identified above are at the very least meaningful ones. Thus, before allowing this claim to proceed under *Bivens*, the Court of Appeals should have performed a special factors analysis.

B

Although the Court could perform that analysis in the first instance, . . . the Court declines to perform the special factors analysis itself. The better course is to vacate the judgment below, allowing the Court of Appeals or the District Court to do so on remand.

V

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B

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The judgment of the Court of Appeals is reversed as to all of the claims except the prisoner abuse claim against Warden Hasty. The judgment of the Court of Appeals with respect to that claim is vacated, and that case is remanded for further proceedings.

It is so ordered.

JUSTICE SOTOMAYOR, JUSTICE KAGAN, and JUSTICE GORSUCH took no part in the consideration or decision of these cases.

JUSTICE THOMAS, concurring in part and concurring in the judgment.

I join the Court's opinion except for Part IV-B.

I

With respect to respondents' *Bivens* claims, I join the opinion of the Court to the extent it reverses the Second Circuit's ruling. The Court correctly applies our precedents to hold that *Bivens* does not supply a cause of action against petitioners for most of the alleged Fourth and Fifth Amendment violations. It also correctly recognizes that respondents' claims against petitioner Dennis Hasty seek to extend *Bivens* to a new context.

I concur in the judgment of the Court vacating the Court of Appeals' judgment with regard to claims against Hasty. I have previously noted that " '*Bivens* is a relic of the heady days in which this Court assumed common-law powers to create causes of action.' " I have thus declined to "extend *Bivens* even

[where] its reasoning logically applied," thereby limiting "*Bivens* and its progeny . . . to the precise circumstances that they involved." This would, in most cases, mean a reversal of the judgment of the Court of Appeals is in order. However, in order for there to be a controlling judgment in this suit, I concur in the judgment vacating and remanding the claims against petitioner Hasty as that disposition is closest to my preferred approach.

II

* * *

JUSTICE BREYER, with whom JUSTICE GINSBURG joins, dissenting.

* * *

The plaintiffs before us today seek damages for unconstitutional conditions of confinement. They alleged that federal officials slammed them against walls, shackled them, exposed them to nonstop lighting, lack of hygiene, and the like, all based upon invidious discrimination and without penological justification. In my view, these claims are well-pleaded, state violations of clearly established law, and fall within the scope of longstanding *Bivens* law. For those reasons, I would affirm the judgment of the Court of Appeals. . . .

* * *

I

* * *

A

[Justice Breyer described the development of *Bivens* remedies.]

* * *

As the majority opinion points out, this Court in more recent years has indicated that "*expanding* the *Bivens* remedy is *now* a 'disfavored' judicial activity." Thus, it has held that the remedy is not available in the context of suits against *military* officers, in the context of suits against *privately* operated prisons and their employees, in the context of suits seeking to vindicate procedural, rather than substantive, constitutional protections, and in the context of suits seeking to vindicate two quite different forms of important substantive protection, one involving free speech, and the other involving protection of land rights. Each of these cases involved a context that differed from that of *Bivens*, *Davis*, and *Carlson* with respect to the kind of defendant, the basic nature of the right, or the kind of harm suffered. That is to say, as we have explicitly stated, these cases were "*fundamentally different* from anything recognized in *Bivens* or subsequent cases." In each of them, the plaintiffs were asking the Court to " 'authoriz[e] a *new* kind of federal litigation.' "

Thus the Court, as the majority opinion says, repeatedly wrote that it was not "expanding" the scope of the *Bivens* remedy. But the Court nowhere suggested that it would narrow *Bivens*' existing scope. In fact, to diminish any ambiguity about its holdings, the Court set out a framework for determining whether a claim of constitutional violation calls for a *Bivens* remedy. At Step One, the court must determine whether the case before it arises in a "new context," that is, whether it involves a "new category of defendants," or (presumably) a significantly different kind of constitutional harm, such as a purely procedural harm, a harm to speech, or a harm caused to physical property. *If the context is new, then* the court proceeds to Step Two and asks "whether any alternative, existing process for protecting the interest amounts to a convincing reason for the Judicial Branch to refrain from

providing a new and freestanding remedy in damages." *If there is none, then* the court proceeds to Step Three and asks whether there are " 'any special factors counselling hesitation before authorizing a new kind of federal litigation.' "

Precedent makes this framework applicable here. I would apply it. And, doing so, I cannot get past Step One. This suit, it seems to me, arises in a context similar to those in which this Court has previously permitted *Bivens* actions.

B

1

The context here is not "new," or "fundamentally different" than our previous *Bivens* cases. First, the plaintiffs are civilians, not members of the military. They are not citizens, but the Constitution protects noncitizens against serious mistreatment, as it protects citizens. Some or all of the plaintiffs here may have been illegally present in the United States. But that fact cannot justify physical mistreatment. Nor does anyone claim that that fact deprives them of a *Bivens* right available to other persons, citizens and noncitizens alike.

Second, the defendants are Government officials. They are not members of the military or private persons. . . .

Third, from a *Bivens* perspective, the injuries that the plaintiffs claim they suffered are familiar ones. They focus upon the conditions of confinement. The plaintiffs say that they were unnecessarily shackled, confined in small unhygienic cells, subjected to continuous lighting (presumably preventing sleep), unnecessarily and frequently strip searched, slammed against walls, injured physically, and subject to verbal abuse. They allege that they suffered these harms because of their race or religion, the defendants having either turned a blind eye to what was happening or themselves introduced policies that they knew would lead to these harms even though the defendants knew the plaintiffs had no connections to terrorism.

These claimed harms are similar to, or even worse than, the harms the plaintiffs suffered in *Bivens* (unreasonable search and seizure in violation of the Fourth Amendment), *Davis* (unlawful discrimination in violation of the Fifth Amendment), and *Carlson* (deliberate indifference to medical need in violation of the Eighth Amendment). Indeed, we have said that, "[i]f a federal prisoner in a [Bureau of Prisons] facility alleges a constitutional deprivation, he may bring a *Bivens* claim against the offending individual officer, subject to the defense of qualified immunity." *Malesko*. The claims in this suit would seem to fill the *Bivens*' bill.

It is true that the plaintiffs bring their "deliberate indifference" claim against Warden Hasty under the Fifth Amendment's Due Process Clause, not the Eighth Amendment's Cruel and Unusual Punishment Clause, as in *Carlson*. But that is because the latter applies to convicted criminals while the former applies to pretrial and immigration detainees. Where the harm is the same, where this Court has held that both the Fifth and Eighth Amendments give rise to *Bivens*' remedies, and where the only difference in constitutional scope consists of a circumstance (the absence of a conviction) that makes the violation here worse, it cannot be maintained that the difference between the use of the two Amendments is "fundamental." . . . .

Nor has Congress suggested that it wants to withdraw a damages remedy in circumstances like these. By its express terms, the Prison Litigation Reform Act of

1995 (PLRA) does not apply to immigration detainees. See 42 U.S.C. § 1997e(h) ("[T]he term 'prisoner' means any person incarcerated or detained in any facility who is accused of, convicted of, sentenced for, or adjudicated delinquent for, violations of criminal law . . ."). . . .

If there were any lingering doubt that the claim against Warden Hasty arises in a familiar *Bivens* context, the Court has made clear that conditions-of-confinement claims and medical-care claims are subject to the same substantive standard. See *Hudson v. McMillian*, 503 U.S. 1, 8 (1992) ("[*Wilson v. Seiter*, 501 U.S. 294, 303 (1991)] extended the deliberate indifference standard applied to Eighth Amendment claims involving medical care to claims about conditions of confinement"). Indeed, the Court made this very point in a *Bivens* case alleging that prison wardens were deliberately indifferent to an inmate's safety.

* * *

Because the context here is not new, I would allow the plaintiffs' constitutional claims to proceed. . . .

2

Even were I wrong and were the context here "fundamentally different," the plaintiffs' claims would nonetheless survive Step Two and Step Three of the Court's framework for determining whether *Bivens* applies. Step Two consists of asking whether "any alternative, existing process for protecting the interest amounts to a convincing reason for the Judicial Branch to refrain from providing a new and freestanding remedy in damages." I can find no such "alternative, existing process" here.

The Court does not claim that the PLRA provides plaintiffs with a remedy. Rather, it says that the plaintiffs *may* have "had available to them" relief in the form of a prospective injunction or an application for a writ of habeas corpus. Neither a prospective injunction nor a writ of habeas corpus, however, will normally provide plaintiffs with redress for harms they have *already* suffered. . . .

There being no "alternative, existing process" that provides a "convincing reason" for not applying *Bivens*, we must proceed to Step Three. Doing so, I can find no "special factors [that] counse[l] hesitation before authorizing" this *Bivens* action. I turn to this matter next.

II

A

The Court describes two general considerations that it believes argue against an "extension" of *Bivens*. First, the majority opinion points out that the Court is now far less likely than at the time it decided *Bivens* to imply a cause of action for damages from a statute that does not explicitly provide for a damages claim. Second, it finds the "silence" of Congress "notable" in that Congress, though likely aware of the "high-level policies" involved in this suit, did not "choose to extend to any person the kind of remedies" that the plaintiffs here "seek." I doubt the strength of these two general considerations.

The first consideration, in my view, is not relevant [because the cases implying damages remedies for statutes was not the main basis for the decision in *Bivens*]. . . .

Nor is the second circumstance — congressional silence — relevant in the manner that the majority opinion describes. The Court initially saw that silence as indicating an absence of congressional hostility to the Court's exercise of its

traditional remedy-inferring powers. Congress' subsequent silence contains strong signs that it accepted *Bivens* actions as part of the law. . . .

B

The majority opinion also sets forth a more specific list of factors that it says bear on "whether a case presents a new *Bivens* context." In the Court's view, a "case might differ" from *Bivens* "in a meaningful way because of [1] the rank of the officers involved; [2] the constitutional right at issue; [3] the generality or specificity of the individual action; [4] the extent of judicial guidance as to how an officer should respond to the problem or emergency to be confronted; [5] the statutory or other legal mandate under which the officer was operating; [6] the risk of disruptive intrusion by the Judiciary into the functioning of other branches; [7] or the presence of potential special factors that previous *Bivens* cases did not consider." *Ante*, at 16. In my view, these factors do not make a "meaningful difference" at Step One of the *Bivens* framework. Some of them are better cast as "special factors" relevant to Step Three. But, as I see it, none should normally foreclose a *Bivens* action and none is determinative here.

* * *

C

In my view, the Court's strongest argument is that *Bivens* should not apply to policy-related actions taken in times of national-security need, for example, during war or national-security emergency. As the Court correctly points out, the Constitution grants primary power to protect the Nation's security to the Executive and Legislative Branches, not to the Judiciary. But the Constitution also delegates to the Judiciary the duty to protect an individual's fundamental constitutional rights. Hence when protection of those rights and a determination of security needs conflict, the Court has a role to play. . . .

[A] *Bivens* action comes accompanied by many legal safeguards designed to prevent the courts from interfering with Executive and Legislative Branch activity reasonably believed to be necessary to protect national security. . . . The Constitution itself takes account of public necessity. Thus, for example, the Fourth Amendment does not forbid *all* Government searches and seizures; it forbids only those that are "unreasonable." Ordinarily, it requires that a police officer obtain a search warrant before entering an apartment, but should the officer observe a woman being dragged against her will into that apartment, he should, and will, act at once. The Fourth Amendment makes allowances for such "exigent circumstances." What is unreasonable and illegitimate in time of peace may be reasonable and legitimate in time of war.

Moreover, *Bivens* comes accompanied with a qualified-immunity defense. Federal officials will face suit only if they have violated a constitutional right that was "clearly established" at the time they acted.

Further, in order to prevent the very presence of a *Bivens* lawsuit from interfering with the work of a Government official, this Court has held that a complaint must state a claim for relief that is "plausible."

Finally, where such a claim is filed, courts can, and should, tailor discovery orders so that they do not unnecessarily or improperly interfere with the official's work. . . .

Given these safeguards against undue interference by the Judiciary in times of war or national-security emergency, the Court's abolition, or limitation of,

Bivens actions goes too far. If you are cold, put on a sweater, perhaps an overcoat, perhaps also turn up the heat, but do not set fire to the house.

At the same time, there may well be a particular need for *Bivens* remedies when security-related Government actions are at issue. History tells us of far too many instances where the Executive or Legislative Branch took actions during time of war that, on later examination, turned out unnecessarily and unreasonably to have deprived American citizens of basic constitutional rights. . . .

Can we, in respect to actions taken during those periods, rely exclusively, as the Court seems to suggest, upon injunctive remedies or writs of habeas corpus, their retail equivalent? Complaints seeking that kind of relief typically come during the emergency itself, when emotions are strong, when courts may have too little or inaccurate information, and when courts may well prove particularly reluctant to interfere with even the least well-founded Executive Branch activity.

A damages action, however, is typically brought after the emergency is over, after emotions have cooled, and at a time when more factual information is available. In such circumstances, courts have more time to exercise such judicial virtues as calm reflection and dispassionate application of the law to the facts. . . .

With respect, I dissent.

Notes

1. *Ziglar* significantly changes the analysis for determining whether to recognize a *Bivens* remedy. In *Bivens*, the Court adopted a presumption that individuals could bring an implied damages action for violations of the Constitution, invoking the traditional maxim that where there is a violation of a legal right, there is a remedy. The Court suggested that such an action would not lie only if Congress had created an alternative remedy or if anomalous, special factors counseled hesitation. Although the Court had exhibited antipathy towards recognizing new *Bivens* remedies for many years, it continued to adhere to the analysis set forth in *Bivens*.

In *Ziglar*, the Court effectively reverses that presumption. Although continuing to maintain the rule that a *Biven* remedy will not lie only if there are special factors counseling hesitation, the Court suggests that most cases present such special factors and accordingly bar the creation of an implied remedy for damages for constitutional violations.

2. In *Ziglar*, although the Court declines to overrule its prior decisions recognizing *Bivens* remedies, it says that expanding *Bivens* is now a "disfavored" judicial activity. It explains that although *Bivens* remedies may deter officials from violating the Constitution, they may overdeter and otherwise interfere with executive officials. According to the Court, the "balance" between these competing interests "is one for the Congress, and not the Judiciary, to undertake." Does this analysis suggest that expanding *Bivens* is not merely disfavored, but prohibited? In what situations might the Court recognize a new *Bivens* remedy?

Problem

Sergio Caldor is a citizen of Mexico. He is walking down a dry riverbed that separates El Paso, Texas, from Juarez, Mexico. The border between the United States and Mexico runs down the middle of the riverbed. While he is walking down the Mexican side of the riverbed, Caldor sees United States Border Patrol agent John Smith on the United States side. Caldor begins taunting Agent Smith by

calling him names. In response to the taunts, Agent Smith, while standing in U.S. territory, shoots his gun across the Mexican border and severely wounds Caldor.

Caldor subsequently files suit against Agent Smith in federal district court. He seeks damages under a *Bivens* theory, alleging that Agent Smith violated Caldor's rights under the Fourth and Fifth Amendments. Agent Smith moves to dismiss, arguing that Caldor's *Bivens* claim arises in a new context and that the court should not recognize the action because there are special factors counselling hesitation. Should the district court dismiss Caldor's action?