**9.35** ***Bivens* Claim Against Federal Defendant in Individual Capacity—
Elements and Burden of Proof**

 The plaintiff brings [his] [her] claim[s] under a Supreme Court decision known as “*Bivens*,” which permits a plaintiff to seek damages from any person who, acting under color of federal law, deprives the plaintiff of certain rights, privileges, or immunities secured by the Constitution of the United States.

 To prevail on [his] [her] *Bivens* claim against the defendant [*name of individual defendant*], the plaintiff must prove each of the following elements by a preponderance of the evidence:

1. the defendant acted under color of federal law; and
2. the [act[s]] [failure to act] of the defendant deprived the plaintiff of [his] [her] particular rights under the United States Constitution, as explained elsewhere in these instructions.

 A person acts “under color of federal law” when the person acts or purports to act in the performance of official duties under any federal law. [[The parties have stipulated] [I instruct you] that the defendant acted under color of federal law.]

 If you find the plaintiff has proved each of these two elements, and if you also find that the plaintiff has proved all the elements [he] [she] is required to prove under Instruction[s] [*specify the instruction[s] that deal*[*s*] *with the particular right*[*s*]], your verdict should be for the plaintiff. If, on the other hand, you find that the plaintiff has failed to prove any one or more of these elements, your verdict should be for the defendant.

**Comment**

 In 1971, the Supreme Court in *Bivens* adopted an “implied cause of action theory” that permits a plaintiff to seek damages from federal officers for the unreasonable search and seizure in plaintiff’s home. *See Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971). Since then, the Supreme Court has recognized a *Bivens* action in two other contexts: a claim asserting that a Congressman discriminated on the basis of gender in employment, in violation of the Fifth Amendment due process clause, *Davis v. Passman*, 442 U.S. 228 (1979), and an Eighth Amendment claim for cruel and unusual punishment against federal jailers for failing to treat a prisoner’s severe asthma. *Carlson v. Green*, 446 U.S. 14 (1980).

 The most recent Supreme Court decision discussing the scope of a *Bivens* action is *Egbert v. Boule*, 142 S. Ct. 1793 (2022). *Egbert* “emphasized that recognizing a cause of action under Bivens is a ‘disfavored judicial activity.’” *Id.* at 1803 (quoting *Ziglar v. Abassi*, 137 S. Ct. 1843, 1856-57 (2017)). With that consideration in mind, *Egbert* explained that to determine whether a *Bivens* remedy exists in a particular case, the court must undertake a two-step process.

At the first step, a court must “ask whether the case present a new *Bivens* context—*i.e*., is it meaningfully different from the three cases in which the [Supreme] Court has implied a damages action.” *Id.* at 1803 (internal quotations and alterations omitted). The three cases in which the Supreme Court has held that the Constitution provides an implied cause of action through which plaintiffs can seek damages from federal officers who violate their constitutional rights are *Bivens*, in which the Court held that a plaintiff could seek damages from the Federal Bureau of Narcotics agents who allegedly violated his Fourth Amendment right to be free from unreasonable searches and seizures; *Davis v. Passman*, 442 U.S. 228 (1979), in which the Court provided a remedy for the plaintiff who alleged that her employer, a Member of Congress, had discriminated against her because of her sex, which was a Fifth Amendment due process violation; and *Carlson v. Green*, 446 U.S. 14 (1980), in which the Court held that the estate of a deceased prisoner could seek damages from federal prison officials for violating the prisoner’s Eighth Amendment right to be free from cruel and unusual punishment. *Pettibone v. Russell*, 59 F.4th 449, 454 (9th Cir. 2023). In *Pettibone*, *id.* at 455, the Ninth Circuit held that the plaintiff’s asserted *Bivens* claim that the defendant violated the Fourth Amendment presented a new context because the federal officer defendant was of a different rank than the officers in *Bivens*, his actions took place at a higher level of generality than the *Bivens* officers, his legal mandate of directing a multi-agency operation to protect federal property under an executive order, and providing a *Bivens* remedy would create an increased risk of disruptive intrusion by the courts into the other branches’ functioning. The Ninth Circuit likewise held in *Mejia v. Miller*, 61 F.4th 663 (9th Cir. 2023), that the plaintiff’s *Bivens* excessive force claim against Bureau of Land Management (BLM) agents created a new context because the alleged conduct occurred on public lands, not in the plaintiff’s home, and a Fourth Amendment claim against BLM agents would have “systemwide consequences” for BLM’s mandate to maintain order on public lands. Further, in *Harper v. Nedd*, 71 F.4th 1181 (9th Cir. 2023), the court held that the plaintiff’s Fifth Amendment due process *Bivens* claim presented a new context from *Davis*, because the claim involved a new category of defendants and the legal mandate the BLM officers were operating under (the Civil Service Reform Act of 1978 (CSRA)) was different from the one in *Davis*.

If the answer at the first step is yes, meaning that the “claim arises in a new context,” the second step dictates that “a *Bivens* remedy is unavailable if there are ‘special factors’ indicating that the Judiciary is at least arguably less equipped than Congress to ‘weigh the costs and benefits of allowing a damages action to proceed.’” *Id*. at 1803 (quoting *Ziglar,* 137 S.Ct. at 1858). “If there is even a single ‘reason to pause before applying Bivens in a new context,’ a court may not recognize a Bivens remedy.” *Id.* (quoting *Hernández v. Mesa*, 140 S.Ct. 735, 743 (2020)). For example, “a court may not fashion a *Bivens* remedy if Congress already has provided, or has authorized the Executive to provide, ‘an alternative remedial structure.’” *Id.* (quoting *Ziglar,* 137 S. Ct. at 1858). The existence of an alternative remedial structure precludes a *Bivens* action even where the available remedial scheme does not provide monetary relief. *Pettibone v. Russell*, 59 F.4th 449, 457 (9th Cir. 2023) (quoting *Egbert*, 142 S.Ct. at 1806). Nor may a *Bivens* cause of action lie “where . . . national security is at issue.” *Egbert*, 142 S.Ct. at 1804. *See also Pettibone*, 59 F.4th at 455 (quoting *Ziglar*, 137 S. Ct. at 1860) (holding that *Bivens* remedy cannot be extended where, *“*because [defendant] was carrying out an executive order, providing a *Bivens* remedy. . . would carry a greater risk of ‘disruptive intrusion by the Judiciary into the functioning of other branches’ than was present in *Bivens*”). *See also Mejia*, 61 F.4th at 669 (explaining plaintiff has alternative remedies to address his grievance); *Marquez v. Rodriguez*, 81 F.4th 1027 (9th Cir. 2023) (rejecting the *Bivens* claim of a pretrial detainee alleging that federal correctional officers failed to protect him from other detainees because the claim presents a new *Bivens* context, there were no special factors, and Congress has already legislated on prison administration without providing a damages remedy against jail officials).

 A *Bivens* defendant is at risk of personal liability, including punitive damages, and a plaintiff is entitled to a jury trial in a *Bivens* action. *See Carlson*, 446 U.S. at 22. Because a *Bivens* action is brought against a federal official in the official’s personal capacity, it is not considered to be an action against the United States and thus is not barred by sovereign immunity.

Use this instruction only in conjunction with an applicable “particular rights” instruction, such as Instructions 9.9–9.33, modified as necessary to reflect that the defendant is a federal actor, not a state actor. Such an instruction should set forth the additional elements a plaintiff must establish to prove the violation of a particular constitutional right.

 To be individually liable in a *Bivens* action, an individual must personally participate in an alleged deprivation of rights. *See Avalos v. Baca*, 596 F.3d 583, 587 (9th Cir. 2010). In a *Bivens* action, as with a § 1983 action, “the plaintiff must also demonstrate that the defendant’s conduct was the actionable cause of the claimed injury.” *Harper v. City of Los Angeles*, 533 F.3d 1010, 1026 (9th Cir. 2008). “To meet this causation requirement, the plaintiff must establish both causation-in-fact and proximate causation.” *Id*.

 In a *Bivens* action, a supervisor can be held liable in his or her individual capacity only if (1) he or she personally participated in the constitutional violation, or (2) there is a “sufficient causal connection between the supervisor’s wrongful conduct and the constitutional violation.” *Hansen v. Black*, 885 F.2d 642, 645-46 (9th Cir. 1989); *see also Chavez v. United States*, 683 F.3d 1102, 1110 (9th Cir. 2012) (“[T]aking qualified immunity into account, a supervisor faces liability under the Fourth Amendment only where it would be clear to a reasonable [supervisor] that his conduct was unlawful in the situation he confronted.”) (quotation marks omitted; first brackets added; second brackets in original). Moreover, for liability to attach, supervisors must have actual supervisory authority over the government actor who committed the alleged violations. *See Felarca v. Birgeneau*, 891 F.3d 809, 820 (9th Cir. 2018). In other words, “[t]hey cannot be supervisors of persons beyond their control.” *Id*.

 If the plaintiff alleges that a supervisor personally participated in a constitutional violation, use the instruction shown above. If, however, the plaintiff alleges that a subordinate committed a constitutional violation and there is a causal connection between the violation and the supervisor’s wrongful conduct, use Instruction 9.4 and replace “state law” with “federal law.”

 One of the defenses that may be available to a federal official in a *Bivens* lawsuit is official immunity from actions for damages. There are two types of official immunity available as affirmative defenses: absolute and qualified. Absolute immunity is often granted to judges, prosecutors, legislators, and the President, so long as they are acting within the scope of their duties. Qualified immunity applies to all other federal officials. *See Harlow v. Fitzgerald*, 457 U.S. 800, 807-808 (1982).

 “For purposes of immunity, we have not distinguished actions brought under 42 U.S.C. § 1983 against state officials from *Bivens* actions brought against federal officials.” *Antoine v. Byers & Anderson, Inc*., 508 U.S. 429, 433 n.5 (1993). For a discussion of qualified immunity under § 1983, *see* Comment at Instruction 9.34.

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