
No. 18-1202

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT**

MICHAEL LEIBELSON, Administrator of the Estate of Benjamin Leibelson,
deceased

Plaintiff-Appellee,

v.

CHRISTOPHER COOK and DOUGLAS MEYER

Defendants-Appellants,

On Appeal from the United States District Court
For the Southern District of West Virginia

**BRIEF AMICUS CURIAE OF THE RODERICK AND SOLANGE
MACARTHUR JUSTICE CENTER IN SUPPORT OF PLAINTIFF-
APPELLEE**

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Fourth Circuit Local Appellate Rule 26.1, *Amicus Curiae* Roderick and Solange MacArthur Justice Center states that it is not a publicly held corporation or other publicly held entity, that it does not issue shares to the public and has no parent companies, subsidiaries, or affiliates that have issued shares to the public in the United States or abroad, that no publicly held corporation or other publicly held entity has a direct financial interest in the outcome of the litigation, and that the case does not arise out of a bankruptcy proceeding.

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INTEREST OF AMICUS CURIAE¹

The Roderick and Solange MacArthur Justice Center (“RSMJC”) is a public interest law firm founded in 1985 by the family of J. Roderick MacArthur to advocate for human rights and social justice through litigation. RSMJC has offices at Northwestern Pritzker School of Law, at the University of Mississippi School of Law, in New Orleans, in St. Louis, and in Washington, D.C. RSMJC attorneys have led civil rights battles in areas that include police misconduct, the rights of the indigent in the criminal justice system, compensation for the wrongfully convicted, and the treatment of incarcerated men and women. RSMJC litigates appeals related to the civil rights of incarcerated men and women throughout the federal circuits.

¹ All parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no person or entity, other than amicus and its counsel, made a monetary contribution intended to fund the preparation and submission of this brief.

SUMMARY OF ARGUMENT

When correctional officials abuse the rights of inmates under their supervision, those inmates are entitled to an adequate method of redress for their injuries. The Supreme Court in *Bivens v. Six Unknown Named Agents* determined that victims of Fourth Amendment violations by federal officials have a right to recover damages against those officials. 403 U.S. 388 (1971). Recognizing the need to deter correctional staff abuse, the Supreme Court in *Carlson v. Green* determined that federal inmates may also bring *Bivens* claims against Bureau of Prisons officials under the Eighth Amendment. 446 U.S. 14, 21 (1980).

There are good reasons to continue to allow such actions. Available examples and statistics demonstrate that misconduct against prison inmates by guards remains a significant problem. Examples bring to life situations in which federal prison guards have been caught abusing their positions and the inmates under their care. Available data regarding sexual assault in particular shows that inmates are uniquely vulnerable and can be abused by the very individuals who are supposed to be guarding them. Deterrence of this misconduct is a necessary and important function that the law should provide through personal liability for those who do wrong.

The government cites *Ziglar v. Abbasi*, 137 S. Ct. 1843 (2017), to argue that *Carlson* is limited to failure to provide medical treatment, but federal courts have repeatedly applied *Carlson* to federal prison guard conduct outside that artificially

constricted context. And even if this court were to conclude that the current case requires an expansion of *Carlson* under the Supreme Court's "special factors" analysis, neither the Federal Tort Claims Act ("FTCA") nor the federal prison grievance process provides a reasonable alternative remedy that would foreclose a cause of action against federal prison guards. *Carlson* itself already concluded that the FTCA was not an alternative remedy, and the grievance process functions poorly at best and does not give inmates adequate relief to be a legitimate alternative to damages actions. This court should continue to allow *Bivens* actions against federal prison guards for Eighth Amendment violations in this case because abuse remains a real and tragic problem.

ARGUMENT

I. ***Bivens* Actions Are Necessary to Address Federal Prison Officials' Violations of Inmates' Eighth Amendment Rights**

Bivens actions are particularly important in the federal prison context to address and deter what can be severe violations of inmates' Eighth Amendment rights. It is "almost axiomatic" that damages serve as a deterrent to unconstitutional acts by government employees and policymakers. *Carlson*, 446 U.S. at 21. The threat of damages can affect the behavior of individual officers by "creat[ing] an incentive for officials who may harbor doubts about the lawfulness of their intended actions to err on the side of protecting citizens' constitutional rights." *Owen v. City of Independence*, 445 U.S. 622, 651-52 (1980). Therefore, "[a] damages remedy against the offending party is a vital component of any scheme for vindicating cherished constitutional guarantees." *Id.*

The level and severity of Eighth Amendment violations in federal prisons calls out for the deterrent power of a damages remedy. Too often, federal prisoners suffer unconscionable abuse that takes many forms, as the examples cited below illustrate. While statistical information is not available for most types of federal prison abuse, sexual abuse is a notable exception, thanks to statutory reporting requirements. The sexual abuse data therefore provides one of our best windows into the overall scale of federal prison abuse. And these statistics make one thing clear: the last thing federal prisons need is for deterrent mechanisms to be weakened.

A. Examples Illustrate the Severity of Inmate Abuse by Prison Officials

The examples below illustrate the magnitude of the abuses of power and the breaches of trust that can occur in the federal prison context. These examples further show that federal officials who choose to abuse the inmates under their supervision may then compound their misdeeds by using physical force, blackmail, and other forms of coercion to avoid responsibility.

In a recent 2018 case, a federal prison guard lieutenant was found guilty in Brooklyn, New York, of repeatedly raping a female inmate in at least four different sexual assaults. *See* Richard P. Donoghue, U.S. Dep't of Justice, *Press Release: Federal Correctional Officer Convicted of Repeatedly Raping Federal Inmate*, (Jan. 19, 2018), available at <https://oig.justice.gov/press/2018/2018-01-19.pdf>. The details were shocking. As described by prosecutors, during the first sexual assault the lieutenant “forcibly grabbed Jane Doe by the back of her head and forced her to perform oral sex on him. Then [the lieutenant] pulled down Jane Doe’s pants and underwear and raped her.” *Id.* at 2. The lieutenant subsequently purchased emergency contraceptive pills to ensure that the victim would not become pregnant. *Id.* He then repeatedly raped the inmate over the course of some four months, while threatening her with additional jail time and assignment to a stricter prison unit if she revealed his abuse. *Id.* The inmate testified at trial that the lieutenant monitored

security video footage while raping her to make sure no one would discover the assaults. *Id.*

Also this year, a Victorville, California, federal prison guard was accused of “sexually abusing two female inmates who he ordered to engage in sexual acts with him and attempting to abuse a third” over the course of two years. Erika Martin, *Victorville Correctional Officer Arrested on Suspicion of Sexually Abusing Female Inmates: DOJ*, KTLA 5 (Mar. 16, 2018), <https://ktla.com/2018/03/16/victorville-correctional-officer-arrested-on-suspicion-of-sexually-abusing-female-inmates-doj/>. The guard allegedly blackmailed one of the inmates into sexual activity after finding her trying to steal food, saying he would “send the inmate to the ‘hole’” if she did not comply. *Id.* According to an affidavit filed in support of the complaint, “[t]he victim did not resist because ‘she felt frozen and powerless with fear.’” *Id.*

Sexual abuse by federal prison guards of course is not limited to female inmates. For instance, in 2011, a federal official pled guilty to sexual abuse of a ward at an all-male federal prison in Miami. Karen Franklin, *Prison Employee Pleads Guilty to Sex with Inmate*, NBC Miami, (Dec. 21, 2011), <https://www.nbcmiami.com/news/local/Male-Prison-Employee-Pleads-Guilty-to-Sex-With-Inmate-136012983.html>. The prison official admitted that he had a sexual relationship with an inmate for more than a year. *Id.* The official also admitted that he had sexual relationships with numerous other inmates. *Id.* The U.S. Attorney for

the Southern District of Florida stated the obvious in noting that, “[t]his conduct is an intolerable breach of trust that not only endangers the safety of inmates but also compromises prison security.” *Id.*

Of course, federal prison guard misconduct is not limited to sexual abuse. Other examples involve intentional infliction of injury on inmates that can even turn deadly. For instance, in 2009 and 2010, two federal prison guards were convicted in Florida of conspiracy to violate an inmate’s civil rights, leading directly to the inmate’s death. Jeff Weiner, *Former Corrections Officer Sentenced to 9 Years in Federal Prison*, Orlando Sentinel, (Dec. 21, 2010), http://articles.orlandosentinel.com/2010-12-21/news/os-corrections-officer-sentenced-20101215_1_richard-delano-erin-sharma-notoriously-violent-inmate.

After the victim bruised one of the guard’s arms, the guard conspired with a colleague to get revenge. The two lied to their superiors to transfer the inmate from his private cell into a cell with an inmate described as “notoriously violent.” *Id.* One of the guards discussed with the violent inmate how he should injure the victim, including telling him to break the victim’s leg. *Id.* The victim’s new cellmate violently assaulted him three days after the transfer, and the victim died two weeks later. *Id.*

And sometimes federal prison guard misconduct triggers straight-from-the-movies tragedies. In one 2006 example, a gun battle broke out inside a Tallahassee,

Florida federal prison when FBI and Justice Department agents tried to arrest six prison guards for a two-year-long scheme to trade sex with female inmates for money and contraband. *See* Associated Press, *2 Federal Employees Die in Fla. Prison Shooting*, NBC News.com (June 21, 2006), http://www.nbcnews.com/id/13415618/ns/us_news-crime_and_courts/t/federal-employees-die-fla-prison-shooting/#.W3NN7vIKjcu. One of the prison guards implicated in the misconduct opened fire when officials arrived to arrest him with a gun he smuggled into the jail. The guard and a Justice Department agent died in the exchange of gunfire, and a third official was hospitalized. *Id.* The remaining prison guards were ultimately charged with a series of abusive and corrupt acts to facilitate their sexual abuse scheme, including switching prison assignments to arrange trysts and “threatening to plant contraband in inmates’ belongings or have them sent to other institutions farther from their families if they reported the illegal activity.” *Id.*

As this suggests, as bad as the initial misconduct can be, prison officials sometimes exacerbate it by engaging in additional misbehavior to cover their tracks. Just last spring, a former federal prison officer in Georgia was sentenced to one year and eight months in prison for “using excessive force against an inmate in 2016, and for writing two false reports about the incident in an effort to cover up his crime.” U.S. Dep’t of Justice, *Former Federal Prison Lieutenant Sentenced for Using Excessive Force and Obstructing Investigation*, (Mar. 26, 2018), available at

<https://www.justice.gov/opa/pr/former-federal-prison-lieutenant-sentenced-using-excessive-force-and-obstructing>. According to information presented at court, an inmate complained to the officer that a strip search was taking too long. The officer responded by repeatedly punched the inmate in the face. *Id.* He then wrote two separate reports, in which he claimed falsely that the inmate swung a fist at him. *Id.* The officer eventually pled guilty to using excessive force, intentionally violating the inmate's constitutional rights, and intentionally impeding and obstructing the investigation of the incident. *Id.*

In addition, prison officials sometimes file false reports to hide abuse perpetrated by their colleagues. In 2016, two federal prison officers pled guilty to beating a federal inmate and submitting false reports about the incident. U.S. Dep't of Justice, *Two U.S. Bureau of Prisons Corrections Officers Plead Guilty to Assaulting a Prison Inmate and Falsifying Reports*, (Jan. 13, 2016), available at <https://www.justice.gov/opa/pr/two-us-bureau-prisons-corrections-officers-plead-guilty-assaulting-prison-inmate-and>. The first official pled guilty to violating a federal inmate's civil rights by striking him repeatedly and to submitting two false reports connected to the incident. *Id.* The second official pled guilty only to one count of falsifying official reports "for his role in submitting a false report in an effort to cover up [the first official's] abuse." *Id.*

In still another case, three federal prison guards in Florence, Colorado were convicted in 2003 after a nine-week trial of beating inmates and of going to extraordinary lengths to cover up their abusive behavior. *See Three Guards Found Guilty of Beating Inmates: Four Other Guards Found Not Guilty in Same Case*, ABC Denver7 (June 24, 2003), <https://www.thedenverchannel.com/news/three-guards-found-guilty-of-beating-inmates>. These officials allegedly believed that misbehaving prisoners were not punished severely enough and took matters into their own hands, calling themselves and other guards the “Cowboys.” *Id.* They were “accused of kicking shackled prisoners, smashing their heads into walls and mixing human waste into their food.” *Id.* That conduct was bad enough, but the officials added to it with an extensive cover-up. They “fabricated records and other evidence in an organized cover-up, and pressured fellow officers to keep quiet.” *Id.*

In sum, prison abuse perpetrated by federal prison guards can be violent and horrifying. Both sexual and physical abuse occur, and prison officials can and do aggravate their serious misconduct by further abusing their positions through false reports and attempted coverups. While a full picture is perhaps unknowable, the available stories demonstrates that when it occurs the abuse can be significant, with tragic results for all involved.

B. Statistical Evidence Shows the Extent to Which Correctional Officials Sexually Abuse Inmates

In many instances, it is difficult to compile accurate statistical information about correctional staff misconduct. One important exception is sexual abuse of inmates, an area where the data is more comprehensive. There is no reason to believe that other types of Eighth Amendment violations are any less pervasive in federal prisons just because they have not been studied as extensively. This section surveys the data on sexual abuse in prison because that information is the most complete and provides a window into the overall scale of serious abuse in federal prison.

In 2003, Congress unanimously passed the Prison Rape Elimination Act, 34 U.S.C. § 30301, *et seq.* In the statute, Congress found that “[i]nsufficient research has been conducted and insufficient data reported on the extent of prison rape” but concluded that a conservative expert estimate was “that at least 13 percent of the inmates in the United States have been sexually assaulted in prison.” *Id.* § 30301(2). That estimate meant that nearly 200,000 state and federal inmates incarcerated at the time had experienced or would experience prison rape, with the total number of inmates sexually assaulted in the preceding 20 years likely exceeding 1 million. *Id.* Among the many resulting problems, Congress recognized that “[t]he high incidence of sexual assault within prisons involves actual and potential violations of the United States Constitution,” specifically citing the Eighth Amendment. *Id.* § 30301(13).

In response to the lack of research and data, Congress made “increas[ing] the available data and information on the incidence of prison rape” one of its priorities to “improv[e] the management and administration of correctional facilities” and “establish[ed] a zero-tolerance standard for the incidence of prison rape.” *Id.* § 30302(1) & (4). It directed the Bureau of Justice Statistics (“BJS”) of the Department of Justice to “carry out, for each calendar year, a comprehensive statistical review and analysis of the incidence and effects of prison rape.” *Id.* § 30303(a)(1). The review is statutorily required to include “not less than 10 percent of all Federal, State, and county prisons, and a representative sample of municipal prisons” based on confidential surveys and other methods. *Id.* § 30303(a)(4), (a)(5). Those statistics illustrate the scope of staff-on-inmate sexual assault and shine a light on perhaps the most significant type of prison staff abuse.

After years of data collection, this data provides a distressing snapshot of sexual victimization in prison. As the National Prison Rape Elimination Commission concluded after a review of the first few years of data, “[t]oo often, in what should be secure environments, men, women and children are raped or abused by other incarcerated individuals and corrections staff.” *National Prison Rape Elimination Commission Report*, June 2009 Report, at 3 (2009).

A 2011-2012 anonymous BJS survey asked over 91,000 federal and state prison inmates about their experiences with sexual abuse. *See* Allen J. Beck et al.,

U.S. Bureau of Justice Statistics, *Sexual Victimization in Prisons and Jails Reported by Inmates, 2011–12: National Inmate Survey, 2011–12* (2013) (hereafter Sexual Victimization Reported by Inmates, 2011-12). The survey concluded that fully 4% those inmates reported experiencing sexual victimization in the preceding twelve months alone. *Id.* at 8. Of those numbers, 2.4% reported an incident involving facility staff, while an additional 0.4% reported sexual victimization by both staff and other inmates. *Id.* If those percentages hold true for the entire prison population, BJS noted that they correspond to some 80,600 prisoners experiencing sexual abuse in a single year. And as to staff-on-inmate victimization, the survey data suggests 34,100 inmates may have experienced sexual victimization by prison staff, plus 5,500 inmates abused by both staff and other inmates. *Id.* Additionally, because this data was collected before a significant 2011-2015 ramp-up in sexual victimization reporting by prison officials, it is possible that these numbers will grow as more current data becomes available.

BJS also compiles reports on rates of sexual abuse reported by prison administrators. The Bureau of Justice Statistics does not break out data for staff-on-inmate sexual victimization to distinguish between federal and state prisons. But it does separate sexual victimization overall (including both staff-on-inmate and inmate-on-inmate misconduct) by federal and state facilities. Between 2012 and 2015, inclusive, prison administrators reported 3,113 allegations of sexual abuse in

federal prison. Ramona R. Rantala, U.S. Bureau of Justice Statistics, *Sexual Victimization Reported by Adult Correctional Authorities, 2012-15*, tbl. 1 (2018).

Looking back farther in time, allegations of staff sexual abuse and misconduct appear to be spread throughout the federal prison system. In an exhaustive 2009 report that covered the 2001 to 2008 time period, the Department of Justice, Office of the Inspector General noted that there were allegations of prison staff sexual abuse and misconduct “in all but 1 of the 93 [Bureau of Prisons]-managed sites.” U.S. Dep’t of Justice, Office of the Inspector General, *The Department of Justice’s Efforts to Prevent Staff Sexual Abuse of Federal Inmates*, at 20 (2009).² Female staff may be more likely to be accused of misconduct against male inmates than the other way around. According to the same Office of the Inspector General report, “[t]he number of allegations of sexually abusive behavior involving female staff members and male inmates exceeded those involving male staff members and female inmates each year from FY 2004 through FY 2008,” even though the federal prison workforce was 73.5% male. *Id.* at 30; see also Luran Teichner, *Unusual Suspects: Recognizing and Responding to Female Staff Perpetrators of Sexual Misconduct in U.S. Prisons*, 14 MICH. J. GENDER & L. 259, 261-62 (2008) (“Of the 344 substantiated allegations of staff-on-inmate sexual violence made in federal, state and private prisons in 2005,

² The single exception was a minimum security prison camp for inmates with relatively short sentences who were specially screened for suitability for confinement there. *Id.* at 20 n.27.

67% of the overall victims were male inmates and 62% of the overall perpetrators were female staff.”) (internal citations omitted).

While the foregoing gives an overall view of the risks of sexual misconduct in prisons, some inmate populations face enhanced risks as compared to the general population. LGBT individuals, victims of prior sexual abuse, and inmates with mental illnesses appear particularly vulnerable to abuse, including by prison staff.

Most notably, BJS found “[l]arge differences in sexual victimization” between heterosexual inmates and inmates who identified as gay, lesbian, bisexual, or other sexual orientations. Sexual Victimization Reported by Inmates, 2011-12, at 18 & tbl. 8. While 2.1% of heterosexual federal and state inmates reported sexual victimization by prison staff, 5.4% of LGBT inmates reported the same. *Id.* In addition, inmates who reported prior sexual victimization before coming to the prison where they currently were housed were also more likely to report sexual victimization. Of inmates who had not been previously victimized, 1.8% reported sexual abuse by prison staff, compared to 6.7% of inmates who had experienced abuse. *Id.*

There is a similar relationship for individuals with mental health problems. While inmates with no currently-diagnosed mental illness reported a 1.1% sexual victimization rate by prison staff, those with anxiety-mood disorders reported sexual victimization by staff at a 3.0% rate, while those with serious psychological distress

reported at a 5.6% rate. *Id.* at 24-26 & tbl. 14. Increased rates of abuse were also reported for individuals who had a history of mental health problems, experienced an overnight stay in a hospital in the prior year, used prescription medications, or received mental health therapy. *Id.* In other words, the data suggests that if prison officials engage in sexual misconduct against inmates, they are significantly more likely to target some of the most vulnerable individuals in their care.

II. The *Bivens* Remedy Extends to Eighth Amendment Claims Brought by Federal Prisoners

Appellants ask this court to overlook the critical need for deterrence of unconstitutional conduct by federal prison staff, supposedly because the Supreme Court in *Ziglar* limited Eighth Amendment *Bivens* claims. There are two problems with that argument. First, unlike *Ziglar*, which denied a request to create brand new Fourth and Fifth Amendment claims, the present case does not seek to expand *Bivens* to a new context at all. *Carlson* long ago authorized *Bivens* actions against federal prison officials to address just such Eighth Amendment violations as those discussed above, and case law does not support limiting that decision to just some Eighth Amendment violations by federal prison personnel. Second, even if this case were addressing in the first instance whether *Bivens* allows Eighth Amendment abuse claims by inmates against federal guards, there is no alternative remedial structure that should give courts pause. Neither the FTCA nor the federal grievance system provides an adequate alternative remedial structure. Accordingly, federal prison

officials should be liable when they violate inmates' Eighth Amendment right to be free of cruel and unusual punishment.

A. *Carlson* Long Ago Authorized *Bivens* Claims Against Federal Prison Officials for Eighth Amendment Violations Beyond Just Medical Claims

A review of Eighth Amendment inmate cases brought against federal prison officials shows that *Carlson* is not artificially limited to incidents involving medical treatment. Rather, the cases allow a variety of claims against federal prison officials alleging improper conditions of confinement under the Eighth Amendment.

At the outset, Supreme Court precedent itself demonstrates that *Carlson* sweeps beyond failure to provide medical treatment. *Ziglar* stated that three cases—*Bivens*, *Davis v. Passman*, 442 U.S. 228 (1979), and *Carlson*—“represent the only instances in which the Court has approved of an implied damages remedy under the Constitution itself.” *Ziglar*, 137 S. Ct. at 1855. That statement has important implications for understanding the scope of *Carlson* in light of a fourth Supreme Court decision, *Farmer v. Brennan*, 511 U.S. 825 (1994), which also allowed an Eighth Amendment *Bivens* action against prison guards to proceed.

Farmer involved an Eighth Amendment *Bivens* claim brought by a transsexual inmate who alleged deliberate indifference to safety by federal prison officials after a rape and beating by another inmate. *Id.* at 830-31. In the case, the Court recognized that “the treatment a prisoner receives in prison and the conditions

under which he is confined are subject to scrutiny under the Eighth Amendment,” *id.* at 832 (quoting *Helling v. McKinney*, 509 U.S. 25, 31 (1993)), and proceeded to resolve a circuit split about the standard for deliberate indifference to prisoners’ safety for purposes of liability. *Id.* at 835-39. The Court ultimately concluded that “a prison official may be held liable under the Eighth Amendment for denying humane conditions of confinement” so long as he or she knows “that inmates face a substantial risk of serious harm and disregards that risk by failing to take reasonable measures to abate it.” *Id.* at 847.

In reaching this conclusion, the Court treated *Carlson* as authorizing the claim. Importantly, there is no question that *Farmer* did not involve failure to provide medical treatment. If the Court’s decision in *Farmer* is to be squared with *Ziglar*, it can only be because *Farmer* was not an expansion of *Carlson* to a new context. It was instead a routine application of what *Carlson* already authorized. In turn, that means that *Carlson* is not limited to medical treatment claims at all—it authorizes suits against federal prison officials for Eighth Amendment conditions of confinement violations.³

³ The government claims that *Farmer* assumed a *Bivens* remedy on the way to resolving an Eighth Amendment deliberate indifference claim. App. Br. 28-29. But the Court could only decide *Farmer* if the plaintiff had a potential federal claim and a way to redress it, and it recognized that *Bivens* and *Carlson* were the path the plaintiff asserted to do so. *See Farmer*, 511 U.S. at 830.

Court of appeals decisions confirm this conclusion. For instance, this court in *Danser v. Stansberry* already applied *Farmer* and *Carlson* to a *Bivens* claim under the Eighth Amendment against a federal prison guard who allegedly failed to supervise an inmate who was beaten by another prisoner. 772 F.3d 340 (4th Cir. 2014). While that particular inmate's claim failed on qualified immunity grounds, *id.* at 349, 350, this court clearly recognized that an Eighth Amendment claim under the facts alleged was possible. *See, e.g., id.* at 344 n.6 (citing *Carlson* as “extending *Bivens* to claims for Eighth Amendment violations”). There was no suggestion that *Carlson* was artificially limited to medical claims.

Several other federal courts have similarly referenced *Carlson* for the general proposition that the Supreme Court extended *Bivens* claims to “federal prisoners seeking compensation for cruel and unusual punishments inflicted by prison officials in violation of the Eighth Amendment.” *Bagola v. Kindt*, 131 F.3d 632, 637-38 (7th Cir. 1997); *see also Smith v. United States*, 561 F.3d 1090, 1099-1100 (10th Cir. 2009) (“[T]he Supreme Court has held that a *Bivens* remedy *may* be available against federal prison officials for violations of the Eighth Amendment.”); *Doty v. Hollingsworth*, No. 15-cv-3016, 2018 WL 1509082, at *3 (D.N.J., Mar. 27, 2018) (“Nothing in the text of the *Carlson* opinion suggests that the Supreme Court meant to limit its decision only to medical treatment claims arising under the Eighth Amendment.”).

These cases have recognized that the *Bivens* remedy extends to a broad range of Eighth Amendment claims brought by federal prisoners. *Bagola* involved an Eighth Amendment claim for deliberate indifference to safety against federal prison officials by an inmate who lost a hand in a machine while participating in a work program. 131 F.3d at 634-35. *Smith* allowed an Eighth Amendment claim for deliberate indifference against federal prison guards who exposed an inmate to asbestos dust while doing work on a prison building work detail. 561 F.3d at 1099-1105; *see also Del Raine v. Williford*, 32 F.3d 1024, 1031-38 (7th Cir. 1994) (federal prisoner could bring Eighth Amendment conditions of confinement claim for alleged placement in a very cold prison cell). These cases demonstrate that courts can and do interpret *Carlson* to authorize Eighth Amendment claims against federal prison guards who act in deliberate indifference to the safety of inmates under their care.

Courts reviewing Eighth Amendment medical treatment claims have also cited *Carlson*'s holding more broadly, recognizing that "federal prison officials are generally subject to Eighth Amendment money damages claims under *Carlson*." *Koprowski v. Baker*, 822 F.3d 248, 255 n.2 (6th Cir. 2016); *see also id.* at 257-58 ("For more than 30 years, the Supreme Court has repeatedly affirmed the holding of *Carlson*: prisoners may bring money-damages actions under the Eighth Amendment against federal prison officials."); *Browning v. Pennerton*, 633 F. Supp. 2d 415, 428 (E.D. Ky. 2009) ("*Bivens* involved Fourth Amendment rights, but its principle was

extended to the Eighth Amendment in *Carlson v. Green*.”). The key holding in *Carlson* is its expansion of *Bivens* to Eighth Amendment claims against prison officials in general, not to medical treatment claims in particular.

Even *Ziglar* itself cannot bear the weight the government puts on it. While the Court there cautioned against expanding *Bivens* claims to new contexts, it distinguished the plaintiffs’ claims from *Carlson* primarily because they arose under different constitutional provisions. *Ziglar*, 137 S. Ct. at 1864-65. In determining that *Ziglar* involved a new *Bivens* context, the court stressed that “[t]he constitutional right is different here, since *Carlson* was predicated on the Eighth Amendment, and this claim is predicated on the Fifth.” *Id.* at 1864.

This court therefore should reject the government’s artificially limited interpretations of *Ziglar* and *Carlson*. Federal courts have long understood that *Carlson* authorizes claims by federal prisoners against guards arising from Eighth Amendment violations in general rather than limited to medical treatment.

B. Even if a “Special Factor” Analysis Were Required, Inmates Have No Reasonable Alternative Remedy

Even if *Carlson* did not already authorize the present suit, there would be no reason to conclude that either the FTCA or the federal prison grievance system could substitute for a *Bivens* action. As *Ziglar* noted, “the existence of alternative remedies usually precludes a court from authorizing a *Bivens* action.” *Ziglar*, 137 S. Ct. at 1865. But neither the FTCA nor the grievance system is a true alternative,

and a *Bivens* action is therefore proper to provide inmates a meaningful avenue for redress for abuse by prison staff.

1. The FTCA is not a reasonable alternative remedy

The Supreme Court itself in *Carlson* has held that the FTCA is not an adequate alternative remedial structure. 446 U.S. at 19-20. Unless the Supreme Court revisits that holding, it is binding law. *See also Bagola*, 131 F.3d at 638-39 (recognizing same). In addition, an FTCA suit lacks one of the fundamental purposes of litigation because the United States is the only proper defendant, rather than the actual wrongdoers. As the Supreme Court has explained, “[t]he purpose of *Bivens* is to deter the officer.” *Ziglar*, 137 S. Ct. at 1860 (quoting *FDIC v. Meyer*, 510 U.S. 471, 485 (1994)). Causing the government to pay money for the misconduct of its employees through an FTCA suit provides none of the deterrence that “a *Bivens* claim . . . brought against the individual officer for his or her own acts” provides. *Id.* And particularly with regard to sexual misconduct against inmates, deterrence is appropriate given that Congress has stated that its goal is a “zero-tolerance standard for the incidence of prison rape.” 34 U.S.C. § 30302(1). Deterrence through *Bivens* actions under the Eighth Amendment against prison guards engaged in abuse of inmates is a significant step toward that goal.

2. The federal prison grievance system is also inadequate

Nor does the federal prison grievance system provide an adequate remedy. That system functions poorly at best. It is confusing, error-prone, and slow. And while the remedies available are ill-defined, they do not include money damages.

The federal prison grievance system process consists of four phases, each with its own set of procedures for inmates to decipher. Because of the Prison Litigation Reform Act of 1995, inmates likely must exhaust their administrative remedies before bringing a claim “with respect to prison conditions” under federal law. 42 U.S.C. § 1997e(a); *see also Ziglar*, 137 S. Ct. at 1865 (Court “has said in dicta” that §1997e’s exhaustion provisions apply to *Bivens* actions); *Jones v. Bock*, 549 U.S. 199, 216 (2007) (exhaustion is an affirmative defense that inmate need not plead); *Custis v. Davis*, 851 F.3d 358 (4th Cir. 2017) (same). But exhaustion does not provide the kind of alternative remedy necessary to foreclose a separate *Bivens* action because the grievance system is plagued by dysfunction.

First, grievance system complaints drag on for months before resolution. In theory, if prison officials respond within the given deadlines “[c]omplete exhaustion of [Bureau of Prisons] administrative remedies may take over five months after the date of initial filing with the warden.” *Forde v. Miami Fed. Dep’t of Corr.*, 730 F. App’x 794, 798 (11th Cir. 2018) (per curiam). However, federal prison officials often miss deadlines for responding to inmate complaints, causing the process to

take even longer. *See, e.g., Barnes v. Broyles*, No. 13-737, 2016 WL 155037, at *5 (D.N.J. Jan 12, 2016) (prison officials took three months to respond to inmate's initial informal report).

Furthermore, the grievance system is unavailable to many inmates in practice. *See, e.g., Albino v. Baca*, 747 F.3d 1162, 1171 (9th Cir. 2014) (en banc) (remedy must be available to an inmate, meaning it “must be available as a practical matter; it must be capable of use; at hand.”) (citation omitted); *Kaemmerling v. Lappin*, 553 F.3d 669, 675 (D.C. Cir. 2008) (grievance system must “provide the possibility of some relief for the action complained of” to be considered available) (citation omitted). Prison officials regularly fail to provide inmates with the forms required under the regulations for the grievance system. *See, e.g., Dale v. Lappin*, 376 F.3d 652, 656 (7th Cir. 2004); *Johnson v. United States*, No. 14 C 10461, at *3 (N.D. Ill. June 20, 2016); *Bamdad v. Gavin*, No. 13-cv-0296, 2016 WL 1658657, at *4-5 (C.D. Cal. Feb. 5, 2016); *Coates v. Fed. Bureau of Prisons*, No. 15-cv-01109, 2015 WL 9899139, at *6 (D. Colo. Dec. 15, 2015); *Lineberry v. Fed. Bureau of Prisons*, 923 F. Supp. 2d 284, 288-89 (D.D.C. 2013). Worse, prison officials also destroy or delay complaints by inmates. *See Pumphrey v. Coakley*, 684 F. App'x 347, 349 (4th Cir. 2017) (per curiam); *Griffin v. Malatinsky*, No. 17-cv-12204, 2018 WL 3198547, at *2 (E.D. Mich. June 29, 2018). Without the proper forms or the ability to submit timely complaints, inmates cannot grieve abuse by prison officials.

When inmates do successfully submit properly filed complaints through the grievance system, federal prison officials have been known to threaten inmates or retaliate against them for doing so, particularly if a complaint alleges staff misconduct. *See Himmelreich v. Fed. Bureau of Prisons*, 766 F.3d 576, 577-78 (6th Cir. 2014) (per curiam) (federal prison officials threatened to transfer and assault inmate if he continued to utilize grievance system and placed him in segregation for persisting); *Toolasprashad v. Bureau of Prisons*, 286 F.3d 576, 581 (D.D.C. Cir. 2002) (in retaliation for complaint, federal officials verbally abused inmate and falsified memorandum that resulted in his transfer to different facility); *Lineberry*, 923 F. Supp. 2d at 288-89 (inmate unable to submit complaint because of prison officials' hostility); *West v. Fed. Bureau of Prisons*, No. 1:09-cv-01277, 2013 WL 1326532, at *2 (E.D. Ca. Apr. 2, 2013) (inmate isolated from other inmates for years in retaliation for filing complaints). The threat of retaliation against an inmate for submitting a complaint is exacerbated in federal prisons because the first phase in the grievance system is an informal complaint within the inmate's facility. "If staff members become aware of allegations against them"—which is likely considering the informal nature of the first phase and that the complaint is made within the facility—"they may apply implicit or explicit coercive or retaliatory pressure on the prisoner filing the grievance." *See Prison and Jail Grievance Policies: Lessons from a Fifty-State Survey*, MICH. LAW PRISON INFORMATION PROJECT, Oct. 18, 2015, at

11 (hereafter “MICH. LAW PRISON INFORMATION PROJECT”). In theory an inmate can mark his request “Sensitive” and direct it “to the appropriate Regional Director,” 28 C.F.R. § 542.14(d), but in practice that may just serve to highlight that the prisoner is complaining about incidents that he believes would place his safety or well-being in danger.

Moreover, prison officials’ responses to inmate complaints are often full of errors that make it very difficult for inmates to obtain a remedy through the grievance system. *See Nunez v. Duncan*, 591 F.3d 1217, 1226 (9th Cir. 2010) (prison ignored inmate’s claim of constitutional violation and cited to incorrect prison policy in response to complaint, causing inmate to miss deadline for appealing decision and sending him on an “almost ten-month wild goose chase”). Prison officials frequently lose an inmate’s complaint, thereby depriving the inmate of the right to a response and to appeal that response. *See Ryncarz v. Thomas*, No. 12-cv-01692, 2013 WL 4431322, at *11 (D. Or. Aug. 15, 2013) (finding inmate submitted appeal even though federal prison had no record of it). Or prison officials will not respond at all to an inmate’s properly filed complaint. *See West*, 2013 WL 1326532, at *2-3 (federal prison officials failed to respond to informal complaints, BP-9, or BP-10, and then rejected subsequent submissions as untimely).

The grievance system’s complexity is also a fundamental roadblock for inmates using it. Yet the Bureau of Prisons often does not educate inmates on how

to navigate the “multi-tiered procedural requirements” of the grievance system, which renders any remedy afforded inmates difficult to obtain. *Johnson v. Fernandez*, No. EDCV 15-71, 2016 WL 10805684, at *8 (C.D. Cal. Dec. 7, 2016) (finding Bureau of Prisons had not educated inmate on needing to use grievance system); *see also Forde*, 730 F. App’x at 800 (inmate never received handbook describing grievance system).

The federal prison system also provides no definition of events that are grievable or non-grievable under the grievance system, adding to inmate confusion and meaning that similarly situated grievants may not be treated the same by different prison officials. *See* MICH. LAW PRISON INFORMATION PROJECT, *supra*, at 5 (recommending that prison grievance policies define what is and is not grievable). Even when the prison system does educate inmates on the grievance system, “simple awareness of the grievance procedure from a facility handbook may not be enough. Incarcerated persons experiencing the trauma of sexual abuse, as well as those with vulnerabilities such as mental illness or developmental disadvantages, may have extreme difficulty filling out the correct forms and meeting the strict deadlines.” *National Prison Rape Elimination Commission, supra*, at 94.

Finally, the grievance system does not address what remedies are available to inmates who file complaints. *See* MICH. LAW PRISON INFORMATION PROJECT, *supra*, at 10. Thus, inmates and staff who respond to complaints have no idea what kind of

remedies the prison system can provide inmates as redress. *See id.* This lack of definition of available remedies robs inmates of a “meaningful outcome” in the grievance system. *Id.* (recommending that prison grievance systems expressly address available remedies).

In sum, while the grievance system exists in theory as a vehicle for inmates to seek redress for abuse by federal prison officials, in practice, it fails to provide inmates a viable remedy for such abuse. The Court should preserve *Bivens* actions for inmates abused by federal prison officials as an effective avenue for relief.

CONCLUSION

The Court should affirm the District Court.

Respectfully submitted,

Dated: September 5, 2018

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) and Fed. R. App. P. 32(a)(7) because it contains 6,286 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f), as counted using the word-count function on Microsoft Word 2010 software.

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point Times New Roman font.

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CERTIFICATE OF SERVICE

I hereby certify that on this 5th day of August, 2015, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system. The CM/ECF system will serve all registered users.

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