No. 21-1060

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

Luis A. Rios, Jr.

Plaintiff-Appellant,

v.

FNU Redding, FNU Simms, FNU Jones,

Defendants-Appellees.

On Appeal from the United States District Court for the District of Colorado
Civil Action No. 1:20-cv-1775
The Honorable Michael E. Hegarty, United States Magistrate Judge

# BRIEF OF *AMICI CURIAE* LAMBDA LEGAL DEFENSE AND EDUCATION FUND, DEE FARMER, BLACK & PINK NATIONAL, CENTER FOR CONSTITUTIONAL RIGHTS, GLBTQ LEGAL ADVOCATES AND DEFENDERS, JUST DETENTION INTERNATIONAL, MUSLIM ALLIANCE FOR SEXUAL AND GENDER DIVERSITY, NATIONAL CENTER FOR LESBIAN RIGHTS, NATIONAL CENTER FOR TRANSGENDER EQUALITY, TRANSGENDER LAW CENTER, AND TRANSGENDER LEGAL DEFENSE & EDUCATION FUND IN SUPPORT OF PLAINTIFF-APPELLANT AND REVERSAL

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# TABLE OF CONTENTS

# TABLE OF AUTHORITIES

## Cases

**Statutes**



**Other Authorities**

**Regulations**

## CORPORATE DISCLOSURE STATEMENT

Pursuant to Rules 26.1 and 29(a)(4)(A) of the Federal Rules of Appellate Procedure, *amicus* Dee Farmer, an individual person, and *amici* Black & Pink National, Center for Constitutional Rights, GLBTQ Legal Advocates and Defenders, Just Detention International, Lambda Legal Defense and Education Fund, Inc., National Center for Lesbian Rights, National Center for Transgender Equality, Transgender Law Center, and Transgender Legal Defense & Education Fund certify they have no parent corporation, are not publicly held corporations, and no person or entity owns 10% or more of their stock. *Amicus* Muslim Alliance for Sexual and Gender Diversity is a fiscally-sponsored project of the National Queer Asian and Pacific Islander Alliance, a 501(c)(3) organization, which has no parent corporation, is not a publicly held corporation, and no person or entity owns 10% or more of its stock.

## FED. R. APP. P. 29(a) STATEMENT

Pursuant to Federal Rule of Appellate Procedure 29(a)(2), *amici* have received Appellant and Appellee's written consent to file this amicus brief. Pursuant to Rule 29(a)(4)(E), no party or party's counsel authored the brief or contributed money that was intended to fund preparation or submission of the brief.

## INTEREST OF *AMICI CURIAE*

**Dee Farmer** is the first openly transgender plaintiff to bring a case before the United States Supreme Court in the landmark case *Farmer v. Brennan*, 511 U.S. 825 (1994). Her case has been relied on in thousands of cases concerning liability of prison officials who acted with deliberate indifference to a substantial risk of serious harm to an incarcerated person and was a major catalyst for the federal Prison Rape Elimination Act ("PREA"), which was signed into law in 2003. Ms. Farmer continues to advocate for incarcerated people and her interest in the case is to ensure the proper application of *Farmer v. Brennan* by the courts.

**Black & Pink National** is a prison abolitionist organization dedicated to abolishing the criminal punishment system and liberating LGBTQIA2S+[1] people and people living with HIV/AIDS who are affected by that system through advocacy, support, and organizing. Founded in 2005, the organization had nearly 150 incarcerated members within a year, and now has over 20,000. Black & Pink National is a 501(c)(3) organization based in Omaha, NE. Black & Pink also has local chapters across the nation, including in Southern Colorado.

[1] LGBTQIA2S+ refers to lesbian, gay, bisexual, transgender, queer/questioning, intersex, asexual, and two spirit individuals. The "plus" is used to signify all of the gender identities and sexual orientations that are not specifically covered by the other letters in the term.

**Center for Constitutional Rights** ("CCR") is a national, not-for-profit legal, educational and advocacy organization dedicated to protecting and advancing rights guaranteed by the United States Constitution and international law. Founded in 1966 to represent civil rights activists in the South, CCR has litigated numerous landmark civil and human rights cases on behalf of individuals impacted by arbitrary and discriminatory criminal justice policies, including policies that disproportionately impact LGBTQI communities of color and policies that violate the Eighth Amendment's prohibition against cruel and unusual punishment and cause significant harm to people in prison. CCR is co-counsel in *Diamond v. Ward*, 5:20-cv-0453-MTT (M.D. Ga. 2020), a lawsuit challenging the Georgia Department of Corrections' failure to protect transgender people in custody or provide them medically necessary care. CCR also mounted a successful challenge to the use of solitary confinement in prisons and jails in its class action *Ashker v. Brown*, No. 4:09-cv-05796-CW (N.D. Cal 2009).

**GLBTQ Legal Advocates and Defenders** ("GLAD") works in New England and nationally, through strategic litigation, public policy advocacy, and education, to create a just society free of discrimination based on gender identity and expression, HIV status, and sexual orientation. GLAD has litigated widely in both state and federal courts in all areas of the law in order to protect and advance

the rights of lesbians, gay men, bisexuals, transgender individuals, and people living with HIV and AIDS.

**Just Detention International** ("JDI") is the only organization in the world dedicated exclusively to ending sexual abuse behind bars. JDI was one of the key groups that worked to successfully pass the Prison Rape Elimination Act in 2003. JDI works to hold government officials accountable for prisoner rape, promote public attitudes that value the dignity and safety of people in detention, and ensure that survivors of this violence get the help they need. JDI trains staff on sexual abuse prevention and response, educates prisoners about their rights, and creates policies that increase safety for LGBT and other especially vulnerable prisoners.

**Lambda Legal Defense and Education Fund, Inc.** ("Lambda Legal") is the oldest and largest national legal organization committed to achieving full recognition of the civil rights of lesbians, gay men, bisexuals, transgender ("LGBT") people, and everyone living with HIV through impact litigation, education, and public policy work. Lambda Legal seeks to address the particular vulnerability of LGBT people in custody and has appeared as counsel or amicus curiae in numerous federal and state court cases involving the rights of incarcerated LGBT people. *See, e.g.*, *Rosati v. Igbinoso*, 791 F.3d 1037 (9th Cir. 2015) (per curiam) (reinstating transgender prisoner's complaint alleging that denial of gender-confirming surgery violated 8th Amendment); *Zollicoffer v.*

*Livingston*, 169 F. Supp. 3d 687, 697 (S.D. Tex. 2016) (finding that defendants knew of and disregarded a substantial risk of sexual assault to a transgender inmate based on their knowledge of prison sexual assault statistics, including the particular vulnerability of gay and transgender inmates); and *Edmo v. Corizon, Inc.*, 949 F.3d 489, 500-01 (9th Cir. 2020) (concluding that gender confirmation surgery was medically necessary for incarcerated transgender woman with gender dysphoria). Lambda Legal is co-counsel for *Amici*.

**Muslim Alliance for Sexual and Gender Diversity** ("MASGD") supports, connects, and empowers LGBTQ+ Muslims, including those who are incarcerated. MASGD celebrates gender and sexual diversity within Muslim communities and promote an understanding of Islam that is centered on inclusion, justice, and equity. Sexual assault and anti-transgender violence have harmed too many people in LGBTQ+ Muslim communities and run directly counter to Islamic values. Many of MASGD's constituents will be affected by a decision concerning government accountability for sexual violence against incarcerated people.

**National Center for Lesbian Rights** ("NCLR") is a national legal organization committed to protecting and advancing the rights of lesbian, gay, bisexual, and transgender people, including LGBT individuals in prison, through impact litigation, public policy advocacy, public education, direct legal services, and collaboration with other civil rights organizations.

**National Center for Transgender Equality** ("NCTE") is a non-profit legal organization devoted to advancing justice, opportunity, and well-being for transgender people through education and advocacy. Since 2003, NCTE has been engaged in educating policymakers and the public on issues affecting transgender people's lives. NCTE has long worked to protect the safety and dignity of incarcerated transgender people, including through the adoption and implementation of National Standards to Prevent, Detect, and Respond to Prison Rape and guidelines for the clinical care of transgender prisoners.

**Transgender Law Center** ("TLC") is the largest national trans-led organization advocating self-determination for all people. Grounded in legal expertise and committed to racial justice, TLC employs a variety of community driven strategies to keep transgender and gender nonconforming ("TGNC") people alive, thriving, and fighting for liberation. TLC believes that TGNC people hold the resilience, brilliance, and power to transform society at its root, and that the people most impacted by the systems TLC fights must lead this work. TLC builds power within TGNC communities, particularly communities of color and those most marginalized, and lays the groundwork for a society in which all people can live safely, freely, and authentically regardless of gender identity or expression. TLC works to achieve this goal through leadership development and by connecting TGNC people to legal resources. It also pursues impact litigation and policy

advocacy to defend and advance the rights of TGNC people, transform the legal system, minimize immediate threats and harms, and educate the public about issues impacting our communities.

**Transgender Legal Defense & Education Fund** ("TLDEF") is a transgender-led nonprofit organization whose mission is to end discrimination and achieve equality for transgender people throughout the nation, particularly those in our most vulnerable communities. In service of that mission, TLDEF works to eliminate mistreatment of transgender people from the policies and practices of law enforcement, jails, and prisons, through advocacy, negotiation, and litigation. Along with co-counsel, TLDEF recently reached a settlement with the sheriff of Steuben County, New York, which included the adoption of the nation's most adequate policies for safeguarding the rights of transgender inmates in a county jail. TLDEF believes that if a county jail in Western New York is willing and able to align its policies with the laws and the Constitution, there is no reason the federal government cannot do the same.

## SUMMARY OF ARGUMENT

When a person suffers sexual violence while incarcerated, it is imperative that they have access to the courts to enforce their constitutional and statutory rights. As the Supreme Court held over twenty-five years ago, "gratuitously allowing the beating or rape of one prisoner by another serves no 'legitimate penological

objective,' any more than it squares with 'evolving standards of decency.'" *Farmer v. Brennan*, 511 U.S. 825, 833 (1994) (internal citations omitted). Prison officials have an obligation under the Eighth Amendment to the U.S. Constitution to protect people they incarcerate from sexual violence by assessing the particular risks facing individual prisoners and taking reasonable steps to keep them safe. *Id.* at 843-45. This duty extends to transgender prisoners. *Id*. at 834 (observing in a case about the rape of a transgender woman in prison that "[b]eing violently assaulted in prison is simply not part of the penalty") (internal citation and quotation marks omitted). For incarcerated transgender women, including Appellant Divinity Rios[2], when courts fail to consider their Eighth Amendment rights as defined by *Farmer*, the courthouse doors are effectively closed to them, and prison officials are allowed to escape liability. This creates an intolerable risk of harm to lesbian, gay, bisexual, transgender, and queer people, along with others who do not identify as heterosexual or cisgender[3] (LGBTQ+ people).

Incarcerated LGBTQ+ people face not only a generally heightened risk of violence and harm but also a disproportionate risk of sexual violence. Recognizing

[2] *Amici* refer to Plaintiff-Appellant by her chosen name, "Divinity Rios," and female pronouns.

[3] Cisgender refers to someone whose gender identity matches their assigned gender at birth. *What do transgender and cisgender mean?*, Planned Parenthood, https://www.plannedparenthood.org/learn/teens/all-about-sex-gender-and-gender-identity/what-do-transgender-and-cisgender-mean.

that sexual violence causes trauma and harm to anyone who experiences it, including incarcerated LGBTQ+ people, Congress passed the Prison Rape Elimination Act of 2003, Pub. L. No. 108-79, 117 Stat. 972 (codified at 34 U.S.C. § 30301 *et seq.*) ("PREA"). PREA recognized that transgender individuals like Ms. Rios are at heightened risk for sexual assault. PREA's goal of eliminating sexual violence in prisons cannot be realized when prison officials who fail to take steps to protect those in custody are not held accountable for their unconstitutional conduct by the judiciary.

In dismissing Ms. Rios's complaint with prejudice for lack of a *Bivens*[4] claim, the district court erred in failing to consider the availability of her claim under *Farmer v. Brennan*. Since it was decided, *Farmer* has been relied on in thousands of cases for its rule that the Eighth Amendment imposes upon prison officials a duty to provide prisoners with "reasonable safety" from a substantial risk of serious harm, including violence at the hands of other prisoners. *See e.g. Howard v. Waide*, 534 F.3d 1227, 1239 (10th Cir. 2008) (quoting *Farmer*, 511 U.S. at 833); *Requena v. Roberts*, 893 F.3d 1195, 1214 (10th Cir. 2018). Without the availability of a *Bivens* claim in these circumstances, other LGBTQ+ victims of sexual violence in federal custody will be deprived of a clearly established right to hold prison officials accountable for Eighth Amendment violations.

[4] *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388 (1971). A.81-82.

## ARGUMENT

### I. *FARMER V. BRENNAN* ESTABLISHED A CONSTITUTIONAL DUTY OF PRISON OFFICIALS TO PROTECT VULNERABLE PEOPLE, LIKE MS. RIOS, FROM SEXUAL VIOLENCE.

Sexual assault of LGBTQ+ people is a pervasive problem in prison settings, so much so that the Supreme Court has specifically articulated the constitutional duty on prison officials to protect vulnerable people from unnecessary risks of harm from sexual violence in prison. In 1989, the Federal Bureau of Prisons ("BOP") incarcerated Dee Farmer, a Black transgender woman, in a men's penitentiary in Terre Haute, Indiana known to be particularly violent, despite Ms. Farmer's well-known vulnerability to violence and sexual abuse. *Farmer*, 511 U.S. at 825, 829-31.[5] After she was brutally raped and beaten while housed in the prison's general population, Ms. Farmer filed an Eighth Amendment suit under *Bivens*. *Id.* at 830. She sought compensatory and punitive damages against prison officials for "mental anguish, psychological damage, humil[i]ation, a swollen face, cuts and bruises to her mouth and lips and a cut on her back, [as] well as some bleeding."[6] While locked in a cell, Ms. Farmer initiated a powerful constitutional argument that would ensure the

[5] *See also* Ezra Ishmael Young, *What the Supreme Court Could Have Heard in* R.G. & G.R. Harris Funeral Homes v. EEOC and Aimee Stephens, 11 CAL. L. REV. 9, 32 (2020).

[6] Pls.' First Am. Compl. for Damages and Injunctive Relief at 64-65, *Farmer v. Brennan*, No. 91-C-716-S (W.D. Wis. Dec. 13, 1991), ECF No. 27, available at https://clearinghouse.net/chDocs/public/PC-WI-0021-0001.pdf.

Eighth Amendment's protections extend to survivors of prison rape and pave the way for transgender victims to recover damages under *Bivens*.[7]

On June 6, 1994, the Supreme Court held—in the context of Ms. Farmer's *Bivens* claim—that individuals who are raped while incarcerated due to the "deliberate indifference" of prison officials suffer cruel and unusual punishment under the Eighth Amendment. *Id.* at 832-33. In the words of Justice Blackmun, *Farmer* "sends a clear message to prison officials that their affirmative duty under the Constitution to provide for the safety of [incarcerated people] is not to be taken lightly" and acknowledges the torture of prison rape, which is "offensive to any modern standard of human dignity." *Id*. at 852-53 (Blackmun, J., concurring). Where vulnerable populations in carceral settings face an obvious and substantial risk of violence, "prison officials must fulfill their affirmative duty . . . to prevent inmate assault including prison rape, or otherwise face a serious risk of being held liable for damages." *Id.* at 858. As a result of Ms. Farmer's bravery nearly three decades ago, the public dialogue about prison rape and the legal landscape for prison assault cases transformed dramatically. Her lawsuit helped to remedy the injustice she suffered,

[7] Brief for Petitioner at 13, *Farmer v. Brennan*, 511 U.S. 825 (1994) (No. 92-7247), 1993 WL 625980. *See also Farmer*, 511 U.S. at 830 (stating that "according to petitioner's allegations, petitioner was beaten and raped by another [prisoner] in petitioner's cell. . . . [P]etitioner then filed a *Bivens* complaint, alleging a violation of the Eighth Amendment").

and also paved the way for historic changes in the way prisons and jails treat transgender people.[8]

In 2003, nine years after the *Farmer* decision, Congress passed the Prison Rape Elimination Act ("PREA") to further combat sexual abuse in correctional settings. 34 U.S.C. § 30301 *et seq*. By passing PREA, Congress took steps to ensure that prison officials adopt measures to protect vulnerable people, like Ms. Rios, from unnecessary risks of sexual violence. PREA illuminated the pressing national importance of combatting prison rape and specifically recognized that sexual assault in prisons can constitute an Eighth Amendment violation. Indeed, Congress underscored the significance of *Farmer* by expressly acknowledging it in PREA. *See* 34 U.S.C. § 30301 (13) ("In *Farmer v. Brennan*, the Supreme Court ruled that deliberate indifference to the substantial risk of sexual assault violates prisoners' rights under the … Eighth Amendment." (internal citation omitted).

### A. *Farmer* Places An Affirmative Duty on Prison Officials to Protect People from Sexual Violence and Safeguard Their Constitutional Right To Be Free From Cruel and Unusual Punishment.

[8] Alison Flowers, *Dee Farmer Won a Landmark Supreme Court Case on Inmate Rights. But That's Not the Half of It*, THE VILLAGE VOICE (Jan. 29, 2014), https://www.villagevoice.com/2014/01/29/dee-farmer-won-a-landmark-supreme-court-case-on-inmate-rights-but-thats-not-the-half-of-it/ ("I would like for my legacy to be that I changed injustices for a multitude of people who were or would have suffered unjustly.").

The Constitution imposes on prison officials an affirmative duty "to protect prisoners from violence at the hands of other prisoners," including sexual violence. *Farmer*, 511 U.S. at 833. This Court has repeatedly recognized that duty, observing that "[t]he Supreme Court and the Tenth Circuit have repeatedly and unequivocally established [a prisoner's] Eighth Amendment right to be protected from substantial risks of sexual assault by fellow prisoners." *Howard*, 534 F.3d at 1242. *See, e.g.*, *Farmer*, 511 U.S. at 833–34; *Gonzales v. Martinez*, 403 F.3d 1179, 1186 (10th Cir. 2005) ("[A] plaintiff's uncontroverted claim of deprivations resulting from sexual assault [is] sufficiently serious to constitute a violation under the Eighth Amendment."); *Ramos v. Lamm*, 639 F.2d 559, 572 (10th Cir. 1980) ("[A]n inmate does have a right to be reasonably protected from constant threats of violence and sexual assaults from other inmates."). In dismissing Ms. Rios's claim, the district court failed to consider binding Supreme Court precedent in *Farmer* and the body of Tenth Circuit caselaw, effectively overruling *Farmer*.

Prison officials must "take reasonable measures to guarantee the safety" of incarcerated people, including those who are vulnerable to sexual violence in prison. *Farmer*, 511 U.S. at 832. Rape is a deprivation of rights "'serious' enough to have Eighth Amendment implications." *Howard*, 534 F.3d at 1237. The Supreme Court recognized as much in *Farmer*, stating that "[b]eing violently assaulted in prison is simply not 'part of the penalty that criminal offenders pay for their offenses against

society.'" 511 U.S. at 834 (citation omitted). A prison official acts with deliberate indifference when the official "knows of and disregards an excessive risk to inmate health or safety . . ." *Id*. at 837. A court may conclude that "a prison official knew of a substantial risk from the very fact that the risk was obvious." *Id*. at 842.

**1. Prison Officials Know There Is Obvious and Substantial Risk of Sexual Violence to Incarcerated Transgender Women Like Ms. Rios.**

Sexual assault against LGBTQ+ people in prison is a longstanding problem,[9] and the rate of sexual assault against this population, especially transgender people, is much higher than the national average for prison assaults.[10] This rate is about three times higher for incarcerated LGB people, and about ten times higher for incarcerated transgender people.[11]

Beyond its sheer prevalence, other factors establish that the risk of sexual violence to incarcerated LGBTQ+ people, particularly transgender women, is obvious. First, contrary to PREA and its implementing regulations, prisons and jails almost always house transgender women based on their anatomy, not their gender

[9] *National Prison Rape Elimination Commission Report*, NAT'L CRIMINAL JUSTICE REFERENCE SERV., 7 (2009), https://www.ncjrs.gov/pdffiles1/226680.pdf ("*Commission Report*").
[10] *See* Nat'l Ctr. for Transgender Equal., *LGBTQ People Behind Bars: A Guide to Understanding the Issues Facing Transgender Prisoners and Their Legal Rights* (2018), 6, https://transequality.org/transpeoplebehindbars.
[11] *Id.*

identity.[12] Therefore, "they often have to shower and change their clothes in front of male inmates and staff,"[13] they are often prevented from presenting as women, and they are placed at significant risk for violence.[14] Second, "sexual abuse thrives in prisons and jails in which staff allow, or participate in, the degradation of inmates on the basis of their gender identity."[15] Third, those who present "stereotypically feminine characteristics are especially vulnerable to sexual abuse."[16] The obvious gender nonconformity of assigning a transgender woman to a men's facility makes transgender women vulnerable targets for sexual assault.[17] Courts have recognized the generalized risk that transgender incarcerated people face as part of an analysis of deliberate indifference to serious risks of harm. *See, e.g., Greene v. Bowles,* 361 F.3d 290, 292, 294 (6th Cir. 2004) (stating that to defeat summary judgment, a

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[12] *See, e.g., Transgender Offender Manual*, U.S. DEP'T OF JUSTICE, FED. BUREAU OF PRISONS, 2 (May 11, 2018). "The [Transgender Executive Council] will use biological sex as the initial determination for designation... The designation to a facility of the inmate's identified gender would be appropriate only in rare cases..." *Id*.

[13] Kate Sosin, *Trans, imprisoned – and trapped*, NBC News, Feb. 26, 2020, https://www.nbcnews.com/feature/nbc-out/transgender-women-are-nearly-always-incarcerated-men-s-putting-many-n1142436; *see also Targets for Abuse: Transgender Inmates and Prison Rape*, JUST DETENTION INT'L, 2 (2013), https://justdetention.org/wp-content/uploads/2015/10/FS-Targets-For-Abuse-Transgender-Inmates-And-Prisoner-Rape.pdf.

[14] Sosin, *supra* n. 13.

[15] JUST DETENTION INT'L, *supra* n. 13.

[16] Human Rights Watch, *No Escape: Male Rape in U.S. Prisons* (2001), https://www.hrw.org/report/2001/04/01/no-escape-male-rape-us-prisons (internal quotations omitted).

[17] Sosin, *supra* n. 13.

transgender woman "need only point to evidence from which a finder of fact could conclude her vulnerability made her placement ... a substantial risk to her safety ...," and including the plaintiff's "feminine demeanor" and appearance in the vulnerability analysis).

Ms. Rios, a transgender woman who suffered multiple sexual assaults while incarcerated at a men's prison, proved no exception. A.8-25. In addition to Ms. Rios's specific reports that she was being extorted for sexual favors, prison officials also knew of the obvious risks that a transgender woman, like Ms. Rios, faces while incarcerated in a men's prison. In fact, the National Standards to Prevent, Detect, and Respond to Prison Rape ("PREA Standards") require BOP officials to document identity-based attacks, which further illustrate that prison officials knew Ms. Rios was more vulnerable to sexual assault because of who she is. 28 C.F.R. § 115.87.

Congressionally-mandated research and data collection also document the risk. 34 U.S.C. § 30303(a)(1). "Research on sexual abuse in correctional facilities consistently documents the vulnerability of men and women with non-heterosexual orientations and transgender individuals."[18] In 2007, the Bureau of Justice Statistics ("BJS") "launched a groundbreaking effort to produce national incidence rates of sexual abuse by directly surveying prisoners."[19] And before that, in 2005, the BJS

[18] *Commission Report*, *supra* n. 9, at 7.
[19] *Id*. at 3.

conducted a survey of records from 2004 to compile the number of reported allegations of sexual violence in correctional facilities, and the basic characteristics of victims and perpetrators.[20] The BJS has also documented rates of sexual victimization among the incarcerated LGBTQ+ population.[21] In a 2013 report, the BJS noted that "all of the BJS victim self-report surveys conducted under PREA have found that inmates with the highest rates of sexual victimization are those who reported their sexual orientation as gay, lesbian, bisexual, or other."[22]

The data supporting a finding of significantly heightened incidences of sexual assault for LGBTQ+ people in prison align with numerous other surveys on transgender experiences.[23] The U.S. Transgender Survey respondents who interacted with the criminal system reported alarming rates of sexual assault.[24] Of the 5,543 respondents incarcerated in the preceding year, one in five (20%) reported being

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[20] Allen J. Beck & Timothy A. Hughes, *Sexual Violence Reported by Correctional Authorities, 2004*, BUREAU OF JUSTICE STATISTICS, 9 (July 2005), http://www.ncdsv.org/images/BJS_SV-reported-by-correctional-authorities-2004_7-2005.pdf.

[21] Allen J. Beck, Marcus Berzofsky, Rachel Caspar, & Christopher Krebs, *Sexual Victimization in Prisons and Jails Reported by Inmates, 2011-12*, BUREAU OF JUSTICE STATISTICS, 30 (May 2013), https://bjs.ojp.gov/content/pub/pdf/svpjri1112.pdf.

[22] *Id.*

[23] Sandy E. James, *et al.*, Nat'l Ctr. for Transgender Equal., *Report of the 2015 U.S. Transgender Survey*, at 5,6 (2016), https://transequality.org/sites/default/files/docs/usts/USTS-Full-Report-Dec17.pdf.

[24] *Id*. at 190-91.

sexually assaulted by staff or other incarcerated people.[25] This rate is five to six times higher than the non-LGBTQ+ population in prisons and jails.[26]

Due to the well-known victimization rates of the transgender community, prisons are required to create tools to monitor and protect transgender people. Classification and screening are two such correctional tools used to protect vulnerable prison populations like transgender women who were previously sexually assaulted.[27] Classification determines an incarcerated person's housing and requisite resources based on past experiences, vulnerabilities, and special needs.[28] It includes a careful screening for risk of sexual abuse and risk of perpetrating abuse to ensure that perpetrators and victims are not housed together.[29] Prison officials often know who has been a victim of sexual assault and who are perpetrators of sexual assault. When officials knowingly place transgender victims of sexual assault back in general population, they put them at substantial risk of future sexual assault because the risks are "very likely to cause needless suffering" and "give rise to sufficiently imminent dangers." *Helling v. McKinney*, 509 U.S. 25, 33-34 (1993). A transgender woman like Ms. Rios—whom prison officials placed in protective custody for

[25] *Id.* at 191.
[26] *Id.* at 191-92.
[27] Nat'l Ctr. for Transgender Equal., *LGBT People and the Prison Rape Elimination Act*, 1-2 (July 2012), https://transequality.org/sites/default/files/docs/resources/PREA_July2012.pdf.
[28] *Id.*
[29] *Id.*

twenty-five days after she informed officers that she was extorted for sexual favors but then forced to return to general population without reclassification, and who was predictably sexually assaulted again—provides a horrific, yet all-too-common example of prison officials knowingly placing a sexual assault victim into a high-risk situation that led to avoidable suffering. A.8-9, A.12.

Despite the well-documented knowledge of the risk to LGBTQ people in prison and the abundance of resources available to prison officials, officials still fail to report sexual assaults, provide resources to address trauma, and intervene to ensure a person's future safety. *Id.*

**2. The Trauma and Harm of Sexual Assault on LGBTQ+ People Is Exacerbated Through Inadequate Staff Response.**

Incarceration for an LGBTQ+ person is often a sentence to suffer sexual assault. Historically, the public viewed prison rape as inevitable.[30] But prison rape devastates the human spirit and serves no penological purpose. *See Farmer*, 511 U.S. at 853 (Blackmun, J., concurring) ("Prison rape … is potentially devastating to the human spirit. Shame, depression, and a shattering loss of self-esteem accompany the perpetual terror the victim thereafter must endure.").

[30] *See Commission Report*, *supra* n. 9, at 1. "Until recently, the public viewed sexual abuse as an inevitable feature of confinement. Even as courts and human rights standards increasingly confirmed that prisoners have the same fundamental rights to safety, dignity, and justice as individuals living at liberty in the community, vulnerable men, women, and children continued to be sexually victimized by other prisoners and corrections staff." *Id.*

An inadequate staff response to a sexual assault report can lead to future trauma or additional sexual assaults, and the Eighth Amendment protects against the risk of such future harms. *Helling*, 509 U.S. at 33 ("That the Eighth Amendment protects against future harm to inmates is not a novel proposition."). And sexual assault survivors are at an increased risk of further victimization over others.[31] Survivors of sexual assault are often branded as easy targets and made vulnerable to future rapes.[32] Therefore, prison officials must take reasonable measures to guarantee the safety of incarcerated people, including transgender women, who are uniquely vulnerable to sexual violence.

### B. PREA and Corresponding National Standards and Regulations Require BOP Officials to Protect LGBTQ+ People in Federal Custody from Sexual Violence.

Recognizing that sexual assault should never be part of any prisoner's sentence in light of *Farmer v. Brennan*, Congress passed PREA to further expose and combat the "epidemic character of prison rape and the day-to-day horror experienced by victimized [prisoners]." 34 U.S.C. § 30301(12). PREA's purpose is to "make the prevention of prison rape a top priority in each prison system[,] develop and implement national standards for the detection, prevention, reduction, and

[31] *Id.* at 71.
[32] *Id.*

punishment of prison rape[, and] protect the Eighth Amendment rights of Federal, State, and local prisoners." 34 U.S.C. §§ 30302(2), (3), (7).

In passing PREA, Congress recognized the Supreme Court's holding in *Farmer* that prison officials can be liable for failing to protect a transgender woman from a known risk of sexual assault.

> The high incidence of sexual assault within prisons involves actual and potential violations of the United States Constitution. In *Farmer v. Brennan*, the Supreme Court ruled that deliberate indifference to the substantial risk of sexual assault violates prisoners' rights under the Cruel and Unusual Punishments Clause of the Eighth Amendment.

34 U.S.C. § 30301(13) (citation omitted).

PREA did not purport to limit the remedies of or undermine constitutional rights for vulnerable prisoners subjected to sexual assault. The legislative history of PREA indicates Congress intended for the statute to advance the rights of federal prisoners under the Eighth Amendment, not limit them.[33]

As required by PREA, the Attorney General published the PREA Standards in 2012. The PREA Standards are binding on the BOP and require that BOP facilities

[33] "Today's systematic indifference to prison rape not only represents grievous and unacceptable penal and social policy; Congressional action is further in order because the Supreme Court's *Farmer v. Brennan* decision makes deliberate indifference to prison rape a direct violation of the 8th Amendment of the Constitution." 149 CONG. REC. H1707 (Apr. 29, 2003) (statement of Michael J. Horowitz). "Prison rape is a crime with constitutional implications . . . Fighting prison rape is also affirmatively mandated by the Constitution." 149 CONG. REC. H7765 (daily ed. July 25, 2003) (statement of Rep. Robert C. Scott).

adopt a "policy mandating zero tolerance toward all forms of sexual abuse and sexual harassment." 28 C.F.R. § 115.11(a); 34 U.S.C. § 30307(b).[34] In order to ensure the reasonable safety of all incarcerated people, the PREA Standards require prison officials to screen everyone to assess their risk of being sexually abused by, or sexually abusive toward, other prisoners upon their initial intake screening and any transfer to another facility. 28 C.F.R. § 115.41(a). Among the criteria prison officials must use to assess an incarcerated person's risk of sexual victimization are: "[w]hether the inmate is or is perceived to be gay, lesbian, bisexual, transgender, intersex, or gender nonconforming; [w]hether the inmate has previously experienced sexual victimization …; [and] [t]he inmate's own perception of vulnerability." 28 C.F.R. § 115.41(d). The PREA Standards also recognize that incarcerated transgender people have "particular vulnerabilities" to sexual abuse and sexual harassment.[35]

Additionally, the Department of Justice funds the PREA Resource Center, created in 2010 to "[serve] the corrections field by assisting state, local, and tribal agencies in implementing the PREA Standards."[36] The PREA Standards mandate

[34] *See* U.S. Dep't of Justice, *Sexually Abusive Behavior Prevention and Intervention Program*, FED. BUREAU OF PRISONS (June 4, 2015), https://www.bop.gov/policy/progstat/5324_012.pdf (incorporating standards).
[35] *See* National Standards to Prevent, Detect, and Respond to Prison Rape, 77 Fed. Reg. 37109 (June 20, 2012) (explanatory text) ("National Standards").
[36] National PREA Resource Center, https://www.prearesourcecenter.org/about/prea-resource-center (last visited May 30, 2021).

staff training on the "zero-tolerance policy for sexual abuse and sexual harassment." 28 C.F.R. § 115.31(a). In fact, the BOP included BJS-documented trends of "who may be vulnerable in confinement settings" into trainings. The BJS findings explain that people "who may be viewed as vulnerable or physically small or weak, gay, transgender or effeminate may be more vulnerable" to rape and sexual assault.[37]

Further, the Department of Justice recognized: "The [PREA] standards are not intended to define the contours of constitutionally required conditions of confinement. Accordingly, compliance with the standards does not establish a safe harbor with regard to otherwise constitutionally deficient conditions involving inmate sexual abuse."[38] But knowledge of, and failure to comply with, the PREA Standards can serve as further evidence of subjective recklessness to prisoner safety. *Farmer*, 511 U.S. at 842-43; *Sconiers v. Lockhart*, 946 F.3d 1256, 1270-72 (11th Cir. 2020) (Rosenbaum, J., concurring) (finding PREA and other state legislative enactments to be reliable evidence of contemporary standards of decency) (citing *Crawford v. Cuomo*, 796 F.3d 252, 260 (2d Cir. 2015)). Thus, while compliance with PREA Standards does not insulate prison officials from responsibility for constitutional violations, failure to comply with PREA can evidence deliberate

[37] PREA Employee Training, *Unit 3, Part 1: Prevention and Detection of Sexual Abuse and Sexual Harassment*, National PREA Resource Center, 40 (2014), https://www.prearesource center.org/sites/default/files/content/unit_3.1_lesson_plan.pdf.
[38] National Standards, *supra* n. 35.

indifference. Accordingly, prison officials can *and should* be held liable for injuries resulting from their deliberate indifference in failing to protect an incarcerated transgender woman from sexual assault.

## II. BY IGNORING *FARMER*, THE DISTRICT COURT DENIED SURVIVORS OF SEXUAL ASSAULT A *BIVENS* REMEDY FOR VIOLATIONS OF THEIR CLEARLY ESTABLISHED RIGHTS.

A right without a remedy is no right at all. "Where a specific duty is assigned by law, and individual rights depend upon the performance of that duty, … the individual who considers himself injured has a right to resort to the laws of his country for a remedy." *Marbury v. Madison*, 5 U.S. 137, 166 (1803). In finding that there is no *Bivens* claim for LGBTQ+ people who are subjected to sexual violence in prisons due to the deliberate indifference of federal officials, the district court ignored decades-long Supreme Court precedent. If allowed to stand, that order would effectively overrule *Farmer* without even an acknowledgement, much less an analysis, of the principal case impacting Ms. Rios's suit.

The federal judiciary occupies a critical role in addressing and remedying severe abuses of basic human rights by prison systems. *See Brown v. Plata*, 563 U.S. 493, 510-12 (2011). The National Prison Rape Elimination Commission has emphasized that "if prisoners are sexually abused because the correctional facility failed to protect them, they have a right to seek justice in court."[39] Access to the

[39] *Commission Report*, *supra* n. 9, at 92.

courts is essential to uphold the rights of incarcerated LGBTQ+ people to be free from sexual violence in prisons and to spur the systemic change necessary to reform a culture in which rape has been too long accepted as an ordinary part of a criminal sentence. In the words of the National Prison Rape Elimination Commission, "court orders have had an enormous impact on the Nation's jails and prisons. Beyond the reforms courts usher in, their scrutiny of abuses elicits attention from the public and reaction from lawmakers in a way that almost no other form of oversight can accomplish."[40]

By refusing to recognize a *Bivens* remedy despite binding Supreme Court precedent in *Farmer* that deliberate indifference to prison rape is a violation of the Eighth Amendment, 511 U.S. at 833, the district court has effectively closed the courthouse doors on survivors of sexual assault. Here, the Federal Tort Claims Act ("FTCA") is not a viable alternative remedy for Ms. Rios.

Indeed, there are myriad reasons why a litigant would opt for a constitutional claim over, or perhaps in addition to, an FTCA claim. For example, the FTCA prohibits punitive damages awards that are available under both *Bivens* actions and, for incarcerated people in state prisons, under 42 U.S.C. § 1983 ("Section 1983"). 28 U.S.C. § 2674 (no punitive damages under FTCA); *Carlson v. Green*, 446 U.S. 14, 21-22 (1980) (indicating punitive damages available under *Bivens*); *Smith v.*

[40] *Id.* at 91.

*Wade*, 461 U.S. 30, 35 (1983) (recognizing punitive damages in Section 1983 action).

Additionally, the FTCA does not allow plaintiffs to have their claims tried to a jury and does not allow government employees to be held liable in their individual capacities, in contrast to both *Bivens* and Section 1983. 28 U.S.C. § 2402 ("Any action against the United States... shall be tried by the court without a jury."); 28 U.S.C. § 2679 ("The United States shall be liable..."). The Supreme Court recognizes that *Bivens* creates a stronger deterrent for unconstitutional acts by holding officials personally liable and accountable. *Carlson*, 446 U.S. at 21.

Perhaps most important, Congress never intended that the FTCA would replace the availability of *Bivens* remedies for the kinds of constitutional harms Ms. Rios and other incarcerated people experience. *Id.* at 19. The FTCA is a separate cause of action for harms that occur within prison walls, complementary to *Bivens*. S. REP. NO. 93-588 (1974), *as reprinted in* 1974 U.S.C.C.A.N. 2789, 2789 ("[T]his provision should be viewed as a counterpart to the *Bivens* case…").

LGBTQ+ victims of sexual violence in prisons should have access to the courts, regardless of the systems that confine them. If conduct that occurs within prison walls is unconstitutional, it should make no difference whether that prison is operated by federal or state actors. Holding otherwise goes against the Court's mandate in *Farmer*: "[H]aving stripped [incarcerated people] of virtually every

means of self-protection and foreclosed their access to outside aid, the government and its officials are not free to let the state of nature take its course." 511 U.S. at 833. In short, the district court's opinion improperly overrules decades-long Supreme Court and Tenth Circuit precedent, undoing *Farmer's* holding that incarcerated people, including incarcerated people in federal prisons, have an Eighth Amendment right to be free from cruel and unusual punishment in the context of sexual violence.

## CONCLUSION

"The Constitution 'does not mandate comfortable prisons', but neither does it permit inhumane ones." *Id.* at 832 (quoting *Rhodes v. Chapman*, 452 U.S. 337, 349 (1981)). *Farmer* made clear that prison officials have a constitutional duty to protect incarcerated people entrusted to their custody from obvious and substantial risks of harm. This duty especially applies to incarcerated LGBTQ+ people because prison officials know these individuals are subject to an extreme risk of physical and sexual violence. The prevalence of violence towards LGBTQ+ people makes clear that an Eighth Amendment claim is necessary to provide redress for survivors and to hold prison officials accountable for their deliberate indifference to the serious, known risks of sexual violence to incarcerated LGBTQ+ people. Ms. Rios's *Bivens* claim should be reinstated and allowed to proceed before the district court.

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 29(a)(5) because it contains 5,994 words, excluding the parts of the brief exempt by Federal Rule of Appellate Procedure 32(f).

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Date: June 3, 2021

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## CERTIFICATE OF SERVICE

I hereby certify that on June 3, 2021, I electronically filed the foregoing using the court's CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

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I hereby certify that with respect to the foregoing:

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