NO. 21-1060

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

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**LUIS A. RIOS, JR.**,
PLAINTIFF-APPELLANT,

V.

**FNU REDDING, FNU SIMMS, FNU JONES,**
DEFENDANTS-APPELLEES.

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
HONORABLE MICHAEL E. HEGARTY
D.C. NO. 1:20-CV-01775

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# ANSWER BRIEF FOR APPELLEES

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**ORAL ARGUMENT IS NOT REQUESTED**

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## STATEMENT OF RELATED CASES

None.

## CITATION CONVENTION

This brief cites to Rios's appendix as "Appellant's App." The appendix of Officers Redding, Simms, and Jones is abbreviated as "Appellees' App." The restricted appendix filed by the Appellees is cited as "Restricted App." All page numbers refer to the sequential pagination in the lower right corner of the page.

## STATEMENT OF JURISDICTION

The district court had jurisdiction under 28 U.S.C. § 1331. The court granted the Appellees' motion to dismiss and entered final judgment against Rios on February 3, 2021. *See* Appellant's App. 87. Rios filed a timely notice of appeal on February 22, 2021. *Id.* at 88. This Court has appellate jurisdiction under 28 U.S.C. § 1291.

## STATEMENT OF THE ISSUES

Divinity Rios is a transgender federal inmate who asked to be placed in her prison's Special Housing Unit. The prison agreed and assigned Special Investigative Services Technicians Redding, Simms, and Jones to investigate the concerns that led her to make that request. The officers interviewed Rios, conducted an investigation, and concluded she was not in danger. They recommended her return to the prison's general population.

A few months later, Rios filed a suit for damages against these officers under *Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 388 (1971). Her complaint alleged that she was sexually assaulted at some point after she returned to the general population. Rios asserted that Officers Redding, Simms, and Jones acted with deliberate indifference in violation of her Eighth Amendment rights.

I. Did the district court err in holding that Rios's claim presents a new context for *Bivens* purposes?

II. Did the district court err in declining to create a new *Bivens* action for her claims?

III. Even if a *Bivens* remedy were authorized for Rios's allegations, are the officers entitled to qualified immunity?

## STATEMENT OF THE CASE

### I. Rios requests to be placed in the Special Housing Unit. She tells prison officials that she wants protection because she owes money to certain inmates and stole from others.

Divinity Rios (formerly Luis Rios) is a federal inmate serving a sentence for possessing a firearm as a previously convicted felon.[1] Op. Br. 1; Restricted App. 10. Rios is housed in a men's prison but identifies as a transgender woman. Op. Br. 1. This case focuses on the complaint she filed in federal court in June 2020.

According to her complaint, Rios arrived at the federal correctional institution in Florence, Colorado, in May 2019. Appellant's App. 11. Two months after her arrival, Rios alleges, she told a correctional officer that she was being extorted for sexual favors. Rios asked to be placed in the Special Housing Unit for protection. *Id.* The officer had Rios complete a questionnaire to document her request. *Id.*

[1] The government's pleadings below referred to the plaintiff as Luis Rios and used he/his pronouns because that is how Rios referred to herself in pleadings prior to this appeal. *See* Appellant's App. 8, 11. Because Rios has now stated that she prefers she/her pronouns, the United States has respectfully made that change.

The form Rios filled out is part of the record. *See* Restricted App. 2.[2] The questionnaire asked her to explain why she sought protective custody. *Id.* Rios wrote, "I owe money out 400/500 bucks in tatto[o]s, drugs & food. I also got caught ste[a]ling out of a locker." *Id.* The form asked her to describe the threat. Rios wrote, "I was told that ste[a]l[ing] is a big no-no & The fact that I owe money out to everyone along with being gay I would get beat down, so I should just check in [to the Special Housing Unit]." *Id.* The questionnaire asked whether she had been threatened physically or verbally. Rios wrote, "every[] threat was verbal." *Id.* at 3. The form asked whether she had been physically assaulted. Rios wrote, "no, just poked in the chest." *Id.*

Nowhere on this form did Rios state that other inmates were using the threat of violence to make her perform sex acts. Nor did she

[2] As explained below, Officers Redding, Simms, and Jones attached this document to their Motion to Dismiss because Rios expressly referenced it in her complaint. *See, e.g.*, *Gee v. Pacheco*, 627 F.3d 1178, 1186 (10th Cir. 2010) (court may consider documents referred to in the complaint at motion-to-dismiss stage); *Leonard v. Lincoln Cty. Bd. of Commissioners*, 790 F. App'x 891, 893 (10th Cir. 2019) (approving district court's decision to examine prison records attached as exhibits).

express any concerns about being sexually assaulted or identify herself as a transgender woman. *See id.* at 2-4.

Based on this request, Rios was placed in the Special Housing Unit (SHU) for thirty days. Appellant's App. 11. During this time, she was interviewed by technicians from the prison's Special Investigative Services department. *Id.* Rios alleges that Officers Redding, Simms, and Jones were her interviewers. *Id.* at 11.

Officer Simms's report reflects the same concerns that Rios raised when she initially requested protective custody. *See* Restricted App. 8. "First, I'm bi-sexual," she told her interviewers. "I was borrowing from the store man and I was paying little by little. Then I bought some K2 [synthetic marijuana] and I also bought tattoo[s]." *Id.* "I had a bunch of debt and couldn't pay," Rios continued, "next thing I know my cellies caught me stealing out of one of the lockers." *Id.* "They didn't want to beat me up so they told me as soon as the lockdown was over, I had to check in [to the SHU]. As soon as they let us out to shower, I checked in." *Id.* Rios also alluded to issues with different racial groups. *Id.*

Officer Simms's report included a statement from the correctional officer that Rios originally approached. The officer had asked Rios if

anyone "put hands on [her] or assaulted [her]," and "[her] response was no." Restricted App. 10. Rios told the officer, "I was caught attempt[ing] to steal and lied about it. . . . Everyone in my cell are upset with me and I overheard conversations that I may get[] assaulted. I also owe 400.00 to the other races." *Id.*

Officer Simms also took statements from Rios's cellmates. They insisted they had no issues with Rios and did not believe there was any reason she couldn't return to the general population. Restricted App. 9. One said that Rios was complaining about how frequently the prison was locked down and that she'd announced that she "might as well go to the SHU and be locked down." *Id.*

Officer Simms sent his investigative report to the warden, the associate warden, and the captain. *Id.* at 10-11. He concluded that there was no threat to Rios's safety and recommended her return to the general population. *Id.*

## II. Rios files a *Bivens* claim alleging that Officers Redding, Simms, and Jones violated the Eighth Amendment.

Roughly nine months later, Rios filed a *Bivens* action against Officers Redding, Simms, and Jones for $1.875 million in damages. Appellant's App. 79; *id.* at 23-24. Her complaint alleged that she was

sexually assaulted at some point after her return to the general population. *Id.* at 11.

Rios sought to hold Officers Redding, Simms, and Jones ("the Appellees") responsible, arguing that they were deliberately indifferent to her safety in violation of the Eighth Amendment. *Id.* at 18-19, 23. The complaint also accused the Appellees of violating the Fifth Amendment by failing to conduct a proper investigation under the Prison Rape Elimination Act. *Id.* at 17, 21.

With respect to her Eighth Amendment claims, the specific factual allegations were limited. According to Rios, she "made it abundantly clear" to the Appellees "that [s]he was willingly, albeit involuntary [sic], to commit and perform sexual acts in order to avoid being physically assaulted by various inmates." Appellant's App. 12. She alleged that Officers Redding, Simms, and Jones "openly conspired to omit pertinent and relevant facts concerning [her] sexual orientation as a 'transgender,' and went so far as to laugh and make jokes regarding the contents of the official report." *Id.* at 12-13. She concluded that the Appellees had "neglect[ed] to adequately comprehend and realize the

seriousness of the situation when 'forcing' Plaintiff Rios to go back to the . . . general population." *Id.*

Officers Redding, Simms, and Jones moved to dismiss the complaint pursuant to Fed. R. Civ. P. 12(b)(6). Appellees' App. 1-20.[3] The Appellees attached 1) the original questionnaire Rios submitted and 2) Officer Simms's investigative report, because the complaint expressly referenced both documents. *See, e.g.*, *Gee v. Pacheco*, 627 F.3d 1178, 1186 (10th Cir. 2010) (court may consider documents referred to in the complaint at motion-to-dismiss stage).[4]

The Motion to Dismiss argued that no *Bivens* remedy was available for either of Rios's claims. Appellees' App. 5-13. The Appellees also raised the defense of qualified immunity. *Id.* at 13-18.

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[3] Rios did not follow the 10th Circuit's rules when she failed to include the Appellees' Motion to Dismiss and its attachments in her appendix. *See* 10th Cir. R. 10.4(D)(2) ("When the appeal is from an order disposing of a motion . . . , the motion . . . and other supporting documents . . . filed in connection with that motion . . . must be included in the record or appendix."). This Court may summarily affirm the district court's decision on that basis alone. *See* 10th Cir. R. 10.4(B); *Burnett v. Sw. Bell Tel., L.P.*, 555 F.3d 906, 909-10 (10th Cir. 2009) (summarily affirming on this basis and collecting similar cases).

[4] To the extent Rios may seek to challenge these documents, she has forfeited that argument by failing to raise it below.

Shortly thereafter, they moved for summary judgment on the grounds that Rios failed to exhaust her administrative remedies. *Id.* at 29-47. Rios filed a joint response, and the Appellees replied. *See* Appellant's App. 26-27; Appellees' App. 29-48, 185-98.

Ultimately, the district court concluded that there was no *Bivens* action available for Rios's claims under either the Fifth or Eighth Amendment. *Id.* at 82-86.

The court's order closely tracked the Supreme Court's decision in *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1855 (2017). As the district court explained, the Supreme Court has recognized a *Bivens* claim in only three cases. Appellant's App. 82. They are: 1) *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388 (1971) (Fourth Amendment search and seizure claim); 2) *Davis v. Passman*, 442 U.S. 228 (1979) (Fifth Amendment gender discrimination claim); and 3) *Carlson v. Green*, 446 U.S. 14 (1980) (Eighth Amendment claim for failure to provide medical treatment). *Id.*

Under *Abbasi*, an action presents a new context for *Bivens* purposes if it is "different in a meaningful way" from the claims recognized in *Bivens*, *Davis*, or *Carlson*. *Id.* at 82-83 (quoting 137 S. Ct.

at 1859). The district court noted that Rios's case was closest to *Carlson* but identified significant differences. *Id.* Allowing Rios's action to proceed would thus constitute a "disfavored" extension of *Bivens* into a new context. *Id.* (quoting 137 S. Ct. at 1857).

The district court declined to expand *Bivens* in this manner. Appellant's App. 84. Following *Abbasi*'s framework, the court determined that Rios had other remedies available. These included: injunctive relief, a habeas petition, the Bureau of Prisons' Administrative Remedy Program, and an action under the Federal Tort Claims Act. *Id.* at 84-85.

The court also found special factors that counseled hesitation in extending *Bivens* to Rios's claims. For example, Congress passed the Prison Rape Elimination Act to address prison rape specifically, yet declined to create a damages remedy for inmates in Rios's position. *Id.* at 85. Similarly, Congress enacted the Prison Litigation Reform Act to overhaul prisoner litigation, but did not include a damages action against federal officials. *Id.* at 84. The court also emphasized that expanding *Bivens* to this context would interfere with prison operations and add to the courts' already-heavy docket of prisoner petitions. *Id.*

The district court performed a similar analysis with respect to Rios's Fifth Amendment claim, then dismissed the complaint with prejudice. *See id.* 83-85, 86-87. The court denied the Motion for Summary Judgment as moot. *Id.*

This appeal followed.

## SUMMARY OF ARGUMENT

**I.** Rios first argues that her claims do not present a new *Bivens* context because they are similar to those in *Farmer v. Brennan*, 511 U.S. 825 (1994). But *Farmer* did not, as Rios suggests, tacitly authorize a fourth *Bivens* remedy. To the contrary, that issue was never presented to nor decided by the Supreme Court. Rios's interpretation of *Farmer* thus violates a cardinal rule of judicial construction — that questions "which merely lurk in the record" are not resolved, and no resolution of them can or should be inferred.

That *Farmer* did not recognize a fourth *Bivens* action is confirmed by every *Bivens* case that has followed. As if to dispel any doubt, the Supreme Court has repeatedly stressed that *Bivens*, *Davis*, and *Carlson* represent the *only* cases in which it has implied a damages remedy under the Constitution. Despite Rios's protests, *Farmer*'s conspicuous absence from this list cannot be swept aside as unintentional. Nor is this language dicta. Rather, it reflects a deliberate choice by the Supreme Court to clarify the narrow set of authorized *Bivens* claims.

As a result, the relevant comparison here is to *Carlson v. Green*, 446 U.S. 14 (1980). Because *Carlson* involved the failure to provide

medical treatment, the claims in that case were fundamentally different. Consequently, there are meaningful differences between these two cases, and Rios's action presents a new context for *Bivens* purposes.

**II.** Next, Rios argues that — even if her case represents a new *Bivens* context — the Tenth Circuit should extend *Bivens* to her claims. It should not. As the Supreme Court has made clear, there is now a strong presumption against the creation of any new *Bivens* remedy. Because *Bivens* actions impose significant costs and burdens on the federal government, it is Congress (and not the courts) that is in the best position to make this decision.

To that end, this Court may authorize a *Bivens* action only if (a) the plaintiff has no alternative remedies and (b) no special factors counseling hesitation exist. In this case, there are both. Rios had several other remedies available to her, including a lawsuit seeking injunctive relief or a habeas petition. Through the Bureau of Prisons' Administrative Remedy Program, Rios could (and still can) seek sanctions against the Appellees for their alleged misconduct. And Rios may also file an action for damages under the Federal Tort Claims Act.

Several special factors are present here, too. These include Congress's refusal to create a damages remedy for inmates in Rios's position in either the Prison Rape Elimination Act, the Violence Against Women Reauthorization Act, or the Prison Litigation Reform Act. In addition, Rios's claims present heightened separation-of-powers concerns because Congress has long delegated the operation of federal prisons to the executive branch. This is especially true where, as here, such actions are likely to interfere with prison operations.

**III.** Even if a *Bivens* action were authorized, the Appellees are still entitled to qualified immunity. As a result, the Tenth Circuit may affirm the dismissal of Rios's complaint on this alternative ground.

Even taken as true, the well-pled factual allegations in the complaint do not establish a violation of the Eighth Amendment. At bottom, Rios accuses the Appellees of failing to appreciate the substantial risk to her safety. But under *Farmer*, an official is not deliberately indifferent when he is aware of the underlying facts but believes — even unsoundly — that the risk is insubstantial.

Nor can Rios demonstrate that the law was clearly established at the time of the alleged violation. The number of Eighth Amendment

failure-to-protect claims the Tenth Circuit has heard on the merits is limited. Moreover, none of those cases have involved prison officials, like the Appellees, who are investigators. The Appellees were tasked with the difficult role of attempting to evaluate and make predictions about a reported security threat. Neither the Tenth Circuit nor the Supreme Court has spoken to what might constitute deliberate indifference in the execution of that role. As a result, there is no way that a defendant in the Appellees' position would have known that their conduct clearly violated the Eighth Amendment.

## ARGUMENT

### I. The district court correctly held that Rios's claim presents a new *Bivens* context because it is meaningfully different from *Carlson v. Green*.

**Standard of review:** Whether Rios's claims present a new context for *Bivens* purposes is a legal question that this Court reviews de novo. *See, e.g.*, *United States v. Abouselman*, 976 F.3d 1146, 1153 (10th Cir. 2020); *cf. United States v. Craine*, 995 F.3d 1139, 1151 (10th Cir. 2021).

**Argument:** In *Ziglar v. Abbasi*, the Supreme Court established a two-part framework to determine whether a *Bivens* claim can proceed. 137 S. Ct. 1843. First, the court must consider whether the cause of action presents a "new context." *Id.* at 1859. An action arises in a new context if it differs in any meaningful way from the Supreme Court's three previous *Bivens* cases. *Id.* If the context is new, the court must then decide whether to take the "disfavored" and "significant step" of implying a new cause of action under the Constitution. *Id.* at 1856-57.

Rios contends that the district court erred at the first step. She argues that *Farmer v. Brennan*, 511 U.S. 825 (1994), tacitly authorized a fourth *Bivens* action. Because her case is similar to *Farmer*, Rios says, it does not arise in a new context.

The central flaw in this argument is that the Supreme Court did not recognize a fourth *Bivens* action in *Farmer*, silently or otherwise. That question was never put before the Court, nor is it addressed anywhere in the opinion. As a result, Rios's action must be compared to the only case that has implied a damages remedy under the Eighth Amendment: *Carlson v. Green*, 446 U.S. 14 (1980). Because Rios's allegations are meaningfully different from those in *Carlson*, the district court correctly determined that they represent a new context.

### A. The Supreme Court did not tacitly approve a fourth *Bivens* remedy in *Farmer*. That issue was never presented to or discussed by the Court.

Rios argues that *Farmer v. Brennan* silently created a fourth *Bivens* action for violations of the Eighth Amendment based on an official's failure to protect an inmate. She is mistaken.

To be sure, the claims in this case and *Farmer* are similar. Dee Farmer was a transgender inmate who was sexually assaulted after being transferred to a different prison. 511 U.S. at 831. She sued various BOP officials, alleging that they transferred her to a more dangerous prison despite knowing that she was especially vulnerable.

*Id.* at 830. Like Rios, she claimed they were deliberately indifferent to her safety in violation of the Eighth Amendment. *Id.* at 831.

But the defendants in *Farmer* never argued that there was no *Bivens* remedy for the plaintiff's claims. *See* Brief for the Respondents, *Farmer*, 511 U.S. 825, 1993 WL 657282. Instead, the district court granted summary judgment for the defendants on the grounds that they had no actual knowledge of any threat to Farmer and were therefore not deliberately indifferent. 511 U.S. at 831-32.

Accordingly, the dispute before the Supreme Court focused solely on the deliberate-indifference standard and whether it required objective or subjective knowledge. *Id.* at 835-59. Briefing was dedicated to that issue alone. The defendants did not challenge the viability of Farmer's claim, and Farmer's own briefs failed to cite *Bivens* even once. *See* Brief for the Respondents, *Farmer*, 511 U.S. 825, 1993 WL 657282; Brief of Petitioner, *id.*, 1993 WL 625980; Reply Brief of Petitioner, *id.*, 1994 WL 190959.

Unsurprisingly, then, the *Farmer* opinion is devoted exclusively to the deliberate-indifference standard. The decision does not contain a single paragraph discussing implied causes of action or constitutional

torts. In fact, it contains only a passing reference to *Bivens*. *See* 446 U.S. at 830 ("Acting without counsel, petitioner then filed a *Bivens* complaint, alleging a violation of the Eighth Amendment.") (citing *Bivens* and *Carlson*).

Nor does *Farmer* include any discussion of separation of powers, special factors counseling hesitation, or alternative remedies available to the plaintiff. Yet these have been hallmarks of every case in which the Supreme Court has decided whether to authorize a *Bivens* claim. *See, e.g., Correctional Servs. Corp. v. Malesko*, 534 U.S. 61, 72-74 (2001); *F.D.I.C. v. Meyer*, 510 U.S. 471, 486 (1994); *Carlson*, 446 U.S. at 19-23; *Bush v. Lucas*, 462 U.S. 367, 377-390 (1983); *Davis*, 442 U.S. at 245-48; *Bivens*, 403 U.S. at 396, 399. The absence of such analysis makes sense: the *Bivens* question was never decided by the Court.

### B. Interpreting *Farmer* as authorizing a *Bivens* remedy runs contrary to well-settled principles of judicial construction.

Rios acknowledges that *Farmer* "did not expressly grapple with the availability of *Bivens*." Op. Br. 23. But she insists that the Supreme Court tacitly recognized a fourth *Bivens* claim in *Farmer* simply because it heard the case.

That argument violates a cardinal rule of legal interpretation. As the Supreme Court has instructed, "[q]uestions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents." *Cooper Indus., Inc. v. Aviall Servs., Inc.*, 543 U.S. 157, 170 (2004) (quoting *Webster v. Fall*, 266 U.S. 507, 511 (1925)); *accord Illinois State Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 182-83 (1979) ("Questions which merely lurk in the record . . . are not resolved, and no resolution of them may be inferred.").

Put another way, if an issue was "not . . . raised in briefs or argument nor discussed in the opinion of the Court," then that opinion "is not a binding precedent on this point." *United States v. L.A. Tucker Truck Lines*, 344 U.S. 33, 37-38 (1952); *accord Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 557 (2001) (Scalia, J., dissenting) ("Judicial decisions do not stand as binding 'precedent' for points that were not raised, not argued, and hence not analyzed."); *Central Va. Cmty. Coll. v. Katz*, 546 U.S. 356, 363 (2006) ("[W]e are not bound to follow our dicta in a prior case in which the point now at issue was not fully debated."); *see* Bryan A. Garner et al., *The Law of Judicial Precedent* 228-29 (2016).

Were there any doubt, the Supreme Court addressed this exact question in *United States v. Verdugo-Urquidez*, 494 U.S. 259, 272 (1990). In that case, the Ninth Circuit had relied on a recent Supreme Court decision to hold that illegal immigrants had Fourth Amendment rights. *Id.* at 263, 272. The decision was about the application of the exclusionary rule in deportation proceedings. *Id.* But the respondents were illegal immigrants, and the opinion indicated that their Fourth Amendment rights had been violated. *Id.* Consequently, the Ninth Circuit interpreted the decision as implicitly concluding that illegal immigrants have such rights — even though the opinion never actually addressed that issue. *Id.*

The Supreme Court emphatically rejected the Ninth Circuit's logic. As the Justices explained, "The Court often grants certiorari to decide particular legal issues while assuming without deciding the validity of antecedent propositions." 494 U.S. at 272. "[S]uch assumptions — even on jurisdictional issues — are not binding in future cases that directly raise the questions." *Id.* (citing *Hagans v. Lavine*, 415 U.S. 528, 533 n.5 (1974) ("[When questions of jurisdiction have been passed on in prior decisions sub silentio, this Court has never

considered itself bound when a subsequent case finally brings the jurisdictional issue before us."); *see id.* (comparing *Maine v. Thiboutot*, 448 U.S. 1 (1980) (assuming State is a "person" within the meaning of 42 U.S.C. § 1983), with *Will v. Michigan Dept. of State Police*, 491 U.S. 58 (1989) (holding that State is not a "person" under that statute)).

As the Court stressed, "The question presented for decision . . . was limited to whether the Fourth Amendment's exclusionary rule should be extended to civil deportation proceedings." *Id.* Because the decision "did not encompass whether the protections of the Fourth Amendment extend to illegal aliens in this country," those assumptions had no bearing on the issue. *Id.*; *see also Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 91 (1998) (holding that "drive-by . . . rulings of this sort (if [they] can even be called a ruling on the point rather than a dictum) have no precedential effect" where question "had been assumed by the parties, and was assumed without discussion by the Court").

Rios commits the same error as the lower court in *Verdugo*. The *Farmer* decision implies that the petitioner had a *Bivens* remedy; otherwise, she says, why would the Court hear the case? But that was true in *Verdugo*, too. If illegal immigrants have no Fourth Amendment

rights, why would the exclusionary rule apply? Yet *Verdugo* makes clear that nothing should be inferred from these assumptions, no matter how counterintuitive that may seem.

Because the *Bivens* question was never raised in *Farmer*, it was never decided. This Court should therefore reject Rios's interpretation of *Farmer* because it violates that black-letter rule.

### C. The Supreme Court's subsequent decisions confirm that *Farmer v. Brennan* did not approve a new *Bivens* action.

That *Farmer* did not create a new *Bivens* remedy is confirmed by every *Bivens* decision that has followed.

Just a few years after *Farmer*, the Supreme Court declined to recognize a new *Bivens* action in *Correctional Services Corporation v. Malesko*, 534 U.S. 61. The *Malesko* opinion provides a short history of *Bivens* claims, starting with *Bivens* itself, then touching on *Davis* and *Carlson*. *Id.* at 68. "Since *Carlson*," the Court concluded, "we have consistently refused to extend *Bivens* liability to any new context or new category of defendants." *Id.* Given that *Farmer* was decided more than a decade after *Carlson*, it is difficult to reconcile this statement with Rios's position.

More recently, the Supreme Court made the same point in *Ziglar v. Abbasi*, 137 S. Ct. 1843. After describing the same three decisions, the Court emphasized that "[t]hese three cases — *Bivens*, *Davis*, and *Carlson* — represent the *only* instances in which the Court has approved of an implied damages remedy under the Constitution itself." *Id.* at 1855 (emphasis added).

As if to dispel any ambiguity, the *Abbasi* opinion repeatedly stresses the number three. *See, e.g.*, *id.* at 1860 ("Those claims bear little resemblance to the three *Bivens* claims the Court has approved in the past."); *id.* at 1856 ("[I]t is possible that the analysis in the Court's three *Bivens* cases might have been different if they were decided today."); *id.* at 1855 ("To understand *Bivens* and the two other cases implying a damages remedy under the Constitution . . . ."); *see also id.* at 1854 ("In the decade that followed [*Bivens*], the Court recognized what has come to be called an implied cause of action in two cases involving other constitutional violations.").

The analysis in *Abbasi* also demonstrates that, for purposes of the new-context inquiry, these three cases are the only ones that matter.

After describing the plaintiffs' allegations, the Supreme Court concluded:

> These claims bear little resemblance to the three *Bivens* claims the Court has approved in the past: a claim against FBI agents for handcuffing a man in his own home without a warrant; a claim against a Congressman for firing his female secretary; and a claim against prison officials for failure to treat an inmate's asthma. *See Bivens*, 403 U.S. 388; *Davis*, 442 U.S. 228; *Chappell*, 462 U.S. 296 [sic]. The Court of Appeals therefore should have held that this was a new *Bivens* context.

*Id.* at 1860.

The Court reiterated that there are only three such cases last year. *See Hernandez v. Mesa*, 140 S. Ct. 735, 741, 751-52 (2020) ("The Court subsequently extended *Bivens* to cover two additional constitutional claims."); *id.* ("*Bivens*, *Davis*, and *Carlson* were the products of an era when the Court routinely inferred causes of action that were not explicit in the text of the provision that was allegedly violated."); *see id.* at 751-52 (Thomas, J., with Gorsuch, J., concurring) (noting that *Abbasi* "effectively cabined the *Bivens* doctrine to the facts of *Bivens*, *Davis*, and *Carlson*").

The Supreme Court's conspicuous exclusion of *Farmer* from this list cannot be swept aside as unintentional. Nor is it dicta. Rather, it

reflects a deliberate decision by the Court to define the small set of cases that truly authorized a *Bivens* claim.

**D. Rios's arguments to the contrary are unpersuasive.**

That *Farmer* did not approve another *Bivens* claim is demonstrated by the opinion itself, settled rules of judicial construction, and the Supreme Court's subsequent cases.

Nevertheless, Rios argues that the district court's decision should be reversed because it didn't discuss *Farmer*. To explain that omission, she sets up the straw man that the court believed "*Abbasi* silently overruled *Farmer* by omitting it from the list of cases in which the Court has approved of an implied damages remedy." Op. Br. 21.

Rios has it backwards. Because *Farmer* never addressed the availability of a *Bivens* remedy, it does not hold that a *Bivens* action exists for such claims. The only legal issue to which that decision speaks is the deliberate-indifference standard. Thus, there was nothing for *Abbasi* to overrule.

Instead, the Justices' decision to omit *Farmer* from that list reflects their understanding of the Supreme Court's precedents in this area. *Cf. Abbasi*, 137 S. Ct. at 1854 ("The first question to be discussed

is whether petitioners can be sued for damages under *Bivens* and the ensuing cases in this Court *defining the reach and the limits of that precedent*.") (emphasis added). Their repeated choice to exclude *Farmer* from this group conclusively resolves any ambiguity about whether that decision approved a fourth *Bivens* claim.

Rios also cites the general principle that, where a Supreme Court decision "has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls." Op. Br. 21-22 (citing *Rodriguez de Quijas v. Shearson/Am. Express*, 490 U.S. 477, 484 (1989)). Simply put, *Farmer* does not "directly control" this case.

Still, Rios maintains that her interpretation of *Farmer* must be correct because, if no *Bivens* remedy were available, "then there would be no live claim and thus no subject matter jurisdiction." Op. Br. 23. Not so. Whether a *Bivens* action exists is not a question of subject-matter jurisdiction. *See, e.g.*, *Smith v. United States*, 561 F.3d 1090, 1100 n.10 (10th Cir. 2009). Moreover, the plaintiff in *Farmer* sought both damages *and* injunctive relief. *See* 511 U.S. at 845-88. Thus, even

if there were no *Bivens* remedy, a federal court would still have subject-matter jurisdiction on that basis alone. *Id.*

But even if Rios were correct, this is beside the point. It is well-established that courts are "not bound by a prior exercise of jurisdiction in a case where it was not questioned and it was passed sub silentio." *L.A. Tucker Truck Lines*, 344 U.S. at 37-38; *accord Verdugo-Urquidez*, 494 U.S. at 272; *Hagans*, 415 U.S. at 533 n.5; *Ayrshire Collieries Corp. v. United States*, 331 U.S. 132, 137 n.2 (1947) ("[I]t [is] the firm policy of this Court not to recognize the exercise of jurisdiction as precedent where the issue was ignored.").

Nor is *Farmer* the only case in which the Supreme Court has addressed the elements of a *Bivens* action without deciding if that action even existed. *Compare Hartman v. Moore*, 547 U.S. 250 (2006) (holding that *Bivens* claim for retaliatory prosecution under First Amendment required absence of probable cause), *with Ashcroft v. Iqbal*, 556 U.S. 662, 675 (2009) (stating that Court has never extended *Bivens* to First Amendment); *Reichle v. Howards*, 566 U.S. 658, 663 n.4 (2012) (same).

Assuming there is no *Bivens* remedy for Rios's claim — and as *Abbasi* makes clear, there is not — this doesn't mean that *Farmer* had no point. The elements of an Eighth Amendment claim are the same under *Bivens* and its state analogue, 42 U.S.C. § 1983. *Farmer* thus served the important function of clarifying the correct standard for parallel § 1983 claims. And, as mentioned already, the plaintiff in *Farmer* also requested injunctive relief. 511 U.S. at 845-88. To that end, the second half of the decision provides important guidance on injunctive relief in this context. *See id.*

Rios goes on to suggest that "[p]erhaps the best explanation for why *Farmer* did not expressly grapple with the availability of *Bivens* is that the Court in *Farmer* thought it obvious that *Carlson* established the remedy." Op. Br. 23. Perhaps. Or perhaps the Court declined to confront this issue because it wasn't raised and didn't need to be decided. There is simply no way to know. That is why the Tenth Circuit should heed the rule that questions merely lurking in the record are not resolved — and no resolution should be inferred.

Nor can this Court assume that Eighth Amendment failure-to-protect claims do not present a new *Bivens* context simply because

*Farmer* skips over that question.[5] After *Abbasi*, the new-context analysis must be performed for any claim that is not directly controlled by *Bivens*, *Davis*, or *Carlson*. *See* 137 S. Ct. at 1855, 1860. Thus, it does not matter *why* the *Farmer* Court didn't discuss this question or what it might have said if it had. Because *Farmer* does not address that issue, this Court must now apply the *Abbasi* framework to determine if Rios's claim can proceed.

Rios also relies heavily on the Third Circuit's decision in *Bistrian v. Levi*, 912 F.3d 79 (3d Cir. 2018). The Appellees respectfully submit that this case was wrongly decided.

In *Bistrian*, the panel acknowledged that "*Abbasi* identified three *Bivens* contexts and did not address, or otherwise cite to, *Farmer*." *Id.* at 91. The court speculated that the Supreme Court "simply viewed the failure-to-protect claim as not distinct from the Eighth Amendment deliberate indifference claim in the medical context." *Id.* Based on this,

[5] That *Farmer* includes a single citation to *Carlson* with no elaboration is plainly not enough. *See McCutcheon v. Federal Election Commission*, 134 S. Ct. 1434, 1447 (2014) ("[T]his case cannot be resolved merely by pointing to three sentences in *Buckley* that were written without the benefit of full briefing or argument on the issue.").

the panel concluded that *Farmer* tacitly endorsed a *Bivens* remedy for failure-to-protect claims under the Eighth Amendment. *Id.*

The Third Circuit's understanding of *Farmer* is incorrect for the same reasons that Rios's arguments also fail. But the panel's mistake is not difficult to explain. The defendants in *Bistrian* never challenged that interpretation of *Farmer*, choosing either to ignore the issue or concede it. *See* 912 F.3d at 91 n.18; *see, e.g.*, Reply Brief of Appellant James Gibson at *13, 2018 WL 4193394, *Bistrian*, 912 F.3d 79.

What is more, the Third Circuit has already expressed doubts about *Bistrian*. In *Mammana v. Barben*, the court remarked that it had previously "characterized *Farmer* as recognizing a failure-to-protect *Bivens* claim under the Eighth Amendment." 2021 WL 2026847, at *3 n.5 (3d Cir. May 21, 2021) (citing *Bistrian*). But it made two observations. First, that the *Farmer* Court "allowed the [plaintiff's] claim to proceed without ever discussing *Bivens* or the availability of an implied cause of action." *Id.* And second, that "the Supreme Court declined to list failure-to-protect, or *Farmer*, as a *Bivens* claim in *Hernandez II*, decided two years post-*Bistrian*." 2021 WL 2026847, at *3. The court concluded that it was not required to confront "that

tension." *Id.* But these remarks indicate that *Bistrian* should be reconsidered, and that any circuit split that might arise from Rios's case would likely resolve itself.

Finally, Rios argues that the Tenth Circuit has already approved a *Bivens* remedy for failure-to-protect claims in *Benefield v. McDowall*, 241 F.3d 1267 (10th Cir. 2001). But *Benefield* — like *Farmer* — simply did not address the threshold question of whether a *Bivens* action existed for the plaintiff's claims.

### E. There are meaningful differences between Rios's claim and the one in *Carlson v. Green*.

The new-context analysis requires the court to compare the action at hand to the three claims approved in *Bivens*, *Davis*, and *Carlson* — or, as the Fifth Circuit has put it, "the *Bivens* trilogy." *Oliva v. Nivar*, 973 F.3d 438, 442 (5th Cir. 2020). For purposes of the new-context question, these are the only decisions that matter. *See* 137 S. Ct. at 1855, 1860 (comparing plaintiff's conditions-of-confinement claims to these three decisions, and only these three decisions).

Because *Farmer* is not part of that trilogy, the relevant comparison here is to *Carlson*, the only case in which the Supreme Court has approved an Eighth Amendment *Bivens* action. *See Oliva*,

973 F.3d at 442 (describing the facts of the claims in the trilogy and stating that "[v]irtually everything else is a 'new context'").

Under *Abbasi*, a claim presents a new context if it "is different in a meaningful way from previous *Bivens* cases decided by this Court." 137 S. Ct. at 1859. Those differences might include:

- The rank of the officers;
- The constitutional right at issue;
- The generality or specificity of the official action;
- The extent of judicial guidance as to how an officer should respond to the problem or emergency to be confronted;
- The risk of disruptive intrusion by the Judiciary into the functioning of other branches; or
- The presence of potential special factors not considered in previous *Bivens* cases.

*Id.* at 1860.

The district court correctly recognized that there are meaningful differences between Rios's case and *Carlson*.

To be sure, both this case and *Carlson* address violations of the Eighth Amendment. But that is far from enough, and the similarities end there. *See Hernandez*, 140 S. Ct. at 743 ("Petitioners contend that their Fourth and Fifth Amendment claims do not involve a new context because *Bivens* and *Davis* involved claims under those same two

amendments, but that argument rests on a basic misunderstanding of what our cases mean by a new context.").

The misconduct at issue in *Carlson* was fundamentally different. The inmate in that case died from an asthma attack in prison. 446 U.S. at 16. There were multiple reasons for his death: he did not receive medical attention for eight hours; no doctor was present, and none was called in; the unlicensed nurse administered a contra-indicated drug; the respirator was broken; and no one knew how to operate the emergency equipment. *See id.* at 16 n.1; *see also Carlson v. Green*, F.2d 669, 671 (7th Cir. 1978).

By contrast, Rios's Eighth Amendment claims are not based on the failure to provide medical treatment. Instead, she alleges that the Appellees negligently failed to appreciate the threat to her safety. *See* Appellant's App. 12. She argues that the Appellees' report made the wrong recommendation, and as a result, they were indirectly responsible for her later assault by another inmate. *Id.* at 12-13. Thus, Rios's claims focus on the duty that prison officials have to protect inmates from their peers, the scope of this duty, and when failure to satisfy that duty constitutes cruel and unusual punishment.

This case also includes several special factors that did not exist at the time *Carlson* was decided. These factors, which are discussed in more depth in Part II.B., include the passage of the Prison Litigation Reform Act in 1996, the Prison Rape Elimination Act in 2003, and the Violence Against Women Reauthorization Act in 2013.

In addition, judicial precedent provides limited guidance to defendants in the Appellees' position. The failure-to-protect claims the Tenth Circuit has entertained (primarily under 42 U.S.C. § 1983) bear little resemblance to the facts here. *See, e.g.*, *Barney v. Pulsipher*, 143 F.3d 1299 (10th Cir. 1998) (prison employee was the assailant); *Benefield v. McDowall*, 241 F.3d 1267 (10th Cir. 2001) (defendant purposefully told other inmates plaintiff was a snitch).

The Appellees in this case are technicians in the BOP's Special Investigative Services department. They are tasked with the difficult role of attempting to make predictions about security threats in an inherently violent, unstable environment. To do so, they must often depend on unreliable narrators. The allegation that a technician failed to correctly assess a reported threat is thus clearly different than the

claim in *Carlson*. And neither the Supreme Court nor the Tenth Circuit has said what constitutes deliberate indifference in that role.

While Rios may argue that these differences are trivial, they are not. *Abbasi* demonstrates that "the new-context inquiry is easily satisfied" even by "small" differences "[g]iven this Court's expressed caution about extending the *Bivens* remedy." 137 S. Ct. at 1865. As that opinion teaches, "Even a modest extension is still an extension." *Id.* at 1864. Because the differences identified above "are at the very least meaningful ones," *id.*, Rios's claim presents a new context.

## II. This Court should not authorize a new *Bivens* action for Rios's claims.

**Standard of review:** Whether to expand *Bivens* to a new context is a question of law and therefore reviewed de novo. *See, e.g.*, *Abouselman*, 976 F.3d at 1153.

**Argument:** Next, Rios argues that even if no *Bivens* remedy currently exists for her claims, this Court should authorize one. The Tenth Circuit should decline that invitation.

### A. There is a strong presumption against new *Bivens* actions.

The Supreme Court has been clear that "expanding the *Bivens* remedy is now a disfavored judicial activity." 137 S. Ct. at 1857; *accord*

*Hernandez*, 140 S. Ct. at 737 ("[I]f the Court's three *Bivens* cases had been . . . decided today, it is doubtful that we would have reached the same result. And for almost 40 years, we have consistently rebuffed requests to add to the claims allowed under *Bivens*.").

To that end, there is a strong presumption against the creation of any new *Bivens* actions. *See, e.g., Farah v. Weyker*, 926 F.3d 492, 500 (8th Cir. 2019) ("[W]e have adopted a presumption against judicial recognition of direct actions for violations of the Constitution by federal officials."). That presumption comes from the Constitution itself. Under that document, after all, it is Congress that controls the scope of federal jurisdiction. *See Bush v. Lucas*, 462 U.S. 367, 373 (1983) ("We might start from the premise that federal courts are courts of limited jurisdiction whose remedial powers do not extend beyond the granting of relief expressly authorized by Congress."). It is therefore "a significant step under separation-of-powers principles for a court to determine that it has the authority . . . to create and enforce a cause of action." *Abbasi*, 137 S. Ct. at 1856.

Accordingly, the question before this Court is not whether there *should* be a *Bivens* remedy for inmates in Rios's position. The question is *who* should make that decision: Congress or the courts?

As the Supreme Court has stressed, "the answer most often will be Congress." *Id.* at 1875. This is because the legislature "is in the better position to consider if the public interest would be served by imposing a new substantive legal liability." *Id.* at 1858. A new *Bivens* claim imposes significant burdens on the federal government and its agencies. Among other things, such litigation forces the government to spend substantial amounts of time, money, and other resources to defend and indemnify its employees. *Id.* at 1856.

Because of this, the decision to create a new damages action "requires an assessment of its impact on governmental operations systemwide." *Id.* at 1858. Where, as here, the issue "involves a host of considerations that must be weighed and appraised, it should be committed to those who write the laws, rather than those who interpret them." *Id.*

### B. Rios had, and continues to have, several alternative remedies: injunctive relief or a habeas petition, the BOP's Administrative Remedy Program, and the FTCA.

The decision to authorize a *Bivens* action requires the Court to determine (a) whether alternative remedies exist and (b) whether special factors counseling hesitation are present. *See, e.g.*, *Abbasi*, 137 S. Ct. at 1857-88; *Wilkie*, 551 U.S. at 550. A new cause of action may be justified only if the plaintiff can demonstrate the absence of *both*. *Id.*

The first inquiry asks whether there is "*any* alternative, existing process for protecting the injured party's interest." 137 S. Ct. at 1858 (emphasis added). If there is, that alone "limit[s] the power of the Judiciary to infer a new *Bivens* cause of action." *Id.* Alternative remedies may take many forms, including administrative, statutory, equitable, and state law remedies. *See id.* (collecting cases).

In her brief, Rios assumes that the only remedies that matter for this analysis are the ones available to her now. She is incorrect. As *Abbasi* demonstrates, the alternative-remedies inquiry begins when the individual becomes aware of the constitutional violation at issue.

The plaintiffs in *Abbasi* were foreign detainees who alleged they were subject to harsh conditions and abuse. *Id.* at 1853. They were

released long before they filed their *Bivens* claim. *Id.* Like Rios, the plaintiffs in *Abbasi* insisted that no alternative remedies could redress their past injuries; only damages would do.

The Supreme Court rejected that argument. The plaintiffs, the Justices concluded, had at least two other remedies. *While they were still detained*, they could have filed an injunction against the warden or even a habeas petition. *Id.* at 1862-63, 1865. As the Court emphasized, "the habeas remedy . . . would have provided a faster and more direct route to relief than a suit for money damages." *Id.* at 1863. Indeed, "a successful habeas petition would have required officials to place [the plaintiffs] in less-restrictive conditions immediately," while their *Bivens* action had been pending for fifteen years. *Id.*; *compare also id.* at 1879-80 (Breyer, J., dissenting) ("Neither a prospective injunction nor a writ of habeas corpus, however, will normally provide plaintiffs with redress for harms they have *already* suffered."), *with id.* at 1862-63 (nevertheless endorsing these ex-ante options as alternative remedies).

As this analysis proves, courts must consider the other remedies available *both* at the time the inmate became aware of the alleged constitutional violation, *as well as* those available now. Rios thus had

several non-*Bivens* remedies at her disposal: injunctive relief, the BOP's Administrative Remedy Program, and the Federal Tort Claims Act.

Rios alleges that the Appellees acted with deliberate indifference when they recommended her return to the general population. Accordingly, that is when she first became aware of the alleged constitutional violation. *See, e.g.*, Appellant's App. 12 ("Defendants Redding, Simms, and Jones persisted in returning Plaintiff Rios to the general population, against [her] adamant protests."); *see generally Benefield*, 241 F.3d at 1272 (holding that Eighth Amendment violation does not require actual injury to be complete).

At that point, Rios had several options. First, she could have sought an injunction that required prison officials to keep her in the SHU. Rios could also have filed a habeas petition to the same end. The fact that she failed to pursue these remedies and they are now moot is — as *Abbasi* demonstrates — irrelevant to this analysis. *See generally Farah*, 926 F.3d at 502 ("[E]ven remedies that provide no compensation for victims and little deterrence for violators, such as injunctions and writs of habeas corpus, trigger the general rule that, when alternative methods of relief are available, a *Bivens* remedy usually is not.").

Rios had a third option, too: she could have challenged her return to the general population through the BOP's Administrative Remedy Program. By regulation, the BOP has established an administrative process that "allow[s] an inmate to seek formal review of an issue relating to any aspect of his/her own confinement." 28 C.F.R. § 542.10(a). The program is substantial. There is an appeals process, and prisoners may seek help from other sources, including outside attorneys. *See generally id.* §§ 542.10-19.

Moreover, the BOP's program has a special process for this exact situation. When an inmate believes he or she is "subject to a substantial risk of imminent sexual abuse," the program provides for expedited processing of complaints. *See* Appellees' App. 76-77 (containing U.S. Dept. of Justice, BOP Program Statement No. 1330.18, *Administrative Remedy Program*, at 15-16 (Jan. 6, 2014) (implementing 28 C.F.R. 115(f))). A response must be provided within 48 hours, and a final decision must be made within five days. *Id.*

Rios argues that the BOP's program can't be considered an alternative remedy because it is "an executive-made administrative process, rather than a congressionally enacted scheme." Op. Br. 27 n.7.

The Supreme Court's cases refute that claim. *See, e.g.*, *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 74 (2001) (discussing the BOP's Administrative Remedy Program as an alternative remedy); *Wilkie*, 551 U.S. at 553 ("Robbins has an administrative, and ultimately a judicial, process for vindicating virtually all of his complaint."); *cf. Bush*, 462 U.S. at 385-88 (recognizing civil-service regulations as providing alternative means of relief); *see also Callahan v. Fed. Bureau of Prisons*, 965 F.3d 520, 524 (6th Cir. 2020) (holding that BOP program provides alternative remedy for *Bivens* purposes).

Rios has at least two remedies now, as well. First, she may use the BOP's Administrative Remedy Program to complain about the Appellees. Under that program, Rios is entitled to an investigation of this incident. *See* Appellees' App. 63-64. She could demand that the Appellees be disciplined or terminated pursuant to federal regulations. *See* 28 U.S.C. § 115.76(a)-(c); *see also* U.S. Dept. of Justice, BOP Program Statement No. 3420.11, *Standards of Employee Conduct*, at 23-25 (Dec. 6, 2013).

Rios may also file a lawsuit for damages against the United States under the Federal Tort Claims Act, or the FTCA. The FTCA is designed

to compensate individuals who have been injured by the negligent or wrongful acts or omissions of federal employees. *See* 28 U.S.C. § 1346(b)(1), §§ 2671-2680.

As Rios notes, constitutional tort claims are not cognizable under the FTCA; instead, the statute only allows claims sounding in state law. But Rios could sue on a theory of negligence. In Colorado (as in most states), negligence requires the plaintiff to show that the defendants owed her a legal duty of care; that the defendants breached that duty; that the plaintiff was injured; and that the defendants' breach caused her injury. *See, e.g.*, *Wagner v. Planned Parenthood Fed'n of Am., Inc.*, 471 P.3d 1089, 1092 (Colo. App. 2019) (discussing negligence claims based on failure to act where parties had special relationship).

Rios does not explain why she can't satisfy the elements of negligence — a much lower standard than deliberate indifference. *See* Appellant's App. 31-32 (accusing Appellees of negligence and "failing to exercise 'reasonable' or 'ordinary' care," and failing "to take reasonable precautions"). But even if some obstacle does exist, the remedy need not be "perfectly congruent" to *Bivens* or "provide complete relief." *Minneci*, 565 U.S. at 130; *Bush*, 462 U.S. at 388; *see Oliva*, 973 F.3d at

444 (holding that FTCA provided alternative remedy even though it wouldn't cover plaintiff's claim). After all, "federal law as well as state law contains limitations." 565 U.S. at 130.[6]

Rios also cites *Carlson* for the proposition that the FTCA is a parallel remedy, not an alternative one. *See* Op. Br. 28-29. But *Abbasi* has changed the alternative-remedy analysis. When *Carlson* was decided — more than four decades ago now — another remedy precluded a *Bivens* action only if Congress had "explicitly declared [it] to be a *substitute* for recovery directly under the Constitution and viewed [it] as equally effective." *Carlson*, 446 U.S. at 18-19. After *Abbasi*, however, "*any* alternative, existing process for protecting the injured party's interest" is sufficient to defeat a *Bivens* claim. 137 S. Ct. at 1858 (emphasis added). This is a much lower standard, and one that the FTCA easily meets.

Nevertheless, Rios maintains that the FTCA is not an adequate remedy because damages are paid by the government, not the officers,

[6] Indeed, *Abbasi* suggests that an alternative remedy will suffice even if it is unclear whether that remedy *exists*. *See* 137 S. Ct. at 1843 (discussing habeas petition as an alternative remedy while noting that it is an open question whether such petitions can be used this way).

and as such cannot deter unconstitutional conduct. This claim ignores the realities of FTCA litigation. An FTCA claim immediately places an individual employee under harsh scrutiny from both his agency and government attorneys. He may be deposed, and his actions may be placed on trial, where a federal court will make written, public findings about whether his conduct was wrongful. He can lose his job. Even if the damages aren't from his own pocket, the prospect of such litigation creates a strong deterrent to unconstitutional conduct.[7]

Still, Rios finds these remedies lacking. She insists that her case is one of damages or nothing. But Rios overlooks the remedies that were available to her while she remained in the SHU. Moreover, between the BOP's Administrative Remedy Program and the FTCA, Rios has the power to (1) demand that the Appellees be held accountable for their alleged misconduct, and (2) seek money damages

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[7] Furthermore, a recent study indicates that less than 5% of BOP defendants contribute any personal funds toward a settlement or judgment arising from a successful *Bivens* claims. *See* James Pfander et al., *The Myth of Personal Liability*: *Who Pays When* Bivens *Claims Succeed*, 72 Stan. L. Rev. 561 (2020). The study also showed that these settlements or judgments are typically paid from the same government fund as FTCA claims. *Id.* Given this, there is little if any practical difference between the deterrent effects of a *Bivens* claim and one under the FTCA.

for her injuries from the United States — a defendant with much deeper pockets. As the Supreme Court has emphasized, "So long as the plaintiff had an avenue for some redress, bedrock principles of separation of powers foreclose[] judicial imposition of a new substantive liability." *Malesko*, 534 U.S. at 74.

These remedies may not be perfect. But under controlling law, they are enough to stop this Court from taking the "significant step" of creating a new cause of action. *Abbasi,* 137 S. Ct. at 1856.

### C. There are special factors counseling hesitation in extending *Bivens* to Rios's claims.

This Court should not authorize a new *Bivens* action even if Rios had no alternative remedies. Where, as here, "there are special factors counselling hesitation in the absence of affirmative action by Congress," "a *Bivens* remedy will not be available." *Abbasi*, 137 S. Ct. at 1857.

A "special factor" is any sound reason to believe that "Congress might doubt the efficacy or necessity of a damages remedy as part of the system for enforcing the law and correcting a wrong." *Id.* at 1858. Special factors include (1) relevant legislative action or inaction on available remedies, *see, e.g.*, 137 S. Ct. at 1862, 1865; and (2) areas that present heightened separation-of-powers concerns, *see, e.g.*, *id.* at 1861-

62 (national security); *Chappell v. Wallace*, 462 U.S. 296, 300 (1983) (military). When special factors are present, "courts must refrain from creating the remedy in order to respect the role of Congress in determining the nature and extent of federal-court jurisdiction under Article III." *Id.* at 1858.

Multiple special factors, alone or in combination, counsel against expanding the *Bivens* remedy to Rios's claims.

The first factor is the Prison Rape Elimination Act, or PREA. Passed in 2003, Congress enacted this statute specifically to address the problem of prison rape. Its express purposes included "increas[ing] the accountability of prison officials who fail to detect, prevent, reduce, and punish prison rape," and "protect[ing] the Eighth Amendment rights of Federal, State, and local prisoners." *Id.* § 30302 (6), (7).

PREA does not, however, accomplish these goals by creating a private right of action against BOP officials. Instead, Congress instructed the Attorney General to develop "national standards for the detection, prevention, reduction, and punishment of prison rape." § 30307(a)(1). Under this directive, the Department of Justice has promulgated regulations on how prisons must prevent, investigate, and

punish sexual assault. *See* 28 C.F.R. § 115.5-.501. These regulations include sanctions for official misconduct that occurs during the investigation of prison rapes. *See id.* § 115.76. They also create an express remedy, through the Office of the Inspector General and outside agencies, for prisoners to seek sanctions against individual BOP staff members for mishandling a report of sexual assault. *See id.* § 155.51; BOP Program Statement No. 5324.12, *Sexually Abusive Behavior Prevention and Intervention Program*, at 35-36 (June 4, 2015).

In crafting PREA, the legislature had "specific occasion to consider the matter . . . and to consider the proper way to remedy those wrongs." 137 S. Ct. at 1865. Congress weighed and appraised a range of competing considerations, yet it opted not to include a private claim for damages. This type of legislative action is a special factor counseling hesitation. *Id.* at 1865. Or, as *Abbasi* put it, "The silence of Congress is relevant; and here that silence is telling." *Id.* at 1843.

Notably, Congress considered the problem of prison rape again in the Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, 127 Stat. 55. Part of this law amends PREA. *See id.* § 1101 ("Sexual Abuse in Custodial Settings"). Among other things, the

legislature made emotional distress damages available for victims of sexual acts in prison. *Id.* But in reviewing this issue again, Congress still chose not to create a damages remedy against individual officers.

The second special factor is the Prison Litigation Reform Act, or the PLRA. Passed sixteen years after the *Carlson* decision (and just two after *Farmer*), the PLRA made significant changes to the way prisoner abuse claims may be brought in federal courts. *Id.* at 1865. Yet it does not provide a stand-alone remedy against federal correctional officers. As the Supreme Court has observed, "this suggests Congress chose not to extend the *Carlson* damages remedy to cases involving other types of prisoner mistreatment." *Id.* In other words, the PLRA gave Congress an opportunity to create a damages remedy for all Eighth Amendment violations. That it did not provides "sound reasons to think Congress might doubt the efficacy or necessity of a damages remedy." *Id.*; *see also Buenorostro v. Fajardo*, 770 F. App'x 807, 808 (9th Cir. 2019) (noting, as a special factor counseling against extending the *Bivens* remedy, that Congress "has addressed the question of prisoners' remedies in the" PLRA).

Third, Rios's claims arise in an area in which Congress has delegated broad discretion to the Attorney General and the BOP — and thus, in which heightened separation-of-powers concerns are present.

A federal prison is a "unique place fraught with serious security dangers." *Bell v. Wolfish*, 441 U.S. 520, 559 (1979). "Running a prison is an inordinately difficult undertaking that requires expertise, planning, and the commitment of resources." *Turner v. Safley*, 482 U.S. 78, 84-85 (1987). To that end, the Supreme Court has long emphasized that "courts are ill-equipped to deal with these problems." *Bell*, 441 U.S. at 520 n.29.

That is why the management of federal prisons has largely been "confided to the Executive and Legislative Branches, not to the Judicial Branch." *Id.* Congress has directed that "[t]he control and management of Federal penal and correctional institutions . . . shall be vested in the Attorney General, who shall promulgate rules for the government thereof." 18 U.S.C. § 4001(b)(1). It has further delegated broad authority to the BOP, under the direction of the Attorney General, to "provide for the protection, instruction, and discipline of all persons charged with or convicted of offenses against the United

States." *Id.* § 4042(a)(3). In short, "[p]rison administration is . . . a task that has been committed to the responsibility of those branches, and separation of powers concerns counsel a policy of judicial restraint." 482 U.S. at 85; *see Bell*, 441 U.S. at 562 (cautioning courts against "becom[ing] increasingly enmeshed in the minutiae of prison operations . . . in the name of the Constitution.").

At their core, Eighth Amendment claims present a strong risk of interference with prison administration. Much like military officers and national security officials, prison officials must make difficult decisions that affect the lives and safety of many people. *See Abbasi*, 137 S. Ct. at 1861-62 ("The risk of personal damages liability is more likely to cause an official to second-guess difficult but necessary decisions concerning national-security policy."); *Chappell*, 462 U.S. at 300 (refusing to extend *Bivens* to military based on similar concerns).

The looming threat of personal liability changes how those decisions are made. Often, those changes come at the expense of institutional security and other prison operations. Nor is it clear that such changes would benefit inmates in this context. The risk-averse approach — and thus, the easiest way to avoid personal liability — is

for prison officials to place every inmate who voices a safety concern into the SHU. But this unit is typically the most restrictive environment in a federal prison. *See* U.S. Dept. of Justice, BOP Program Statement No. 5270.10, *Special Housing Units* (Aug. 1, 2011). The SHU also functions as a place to discipline inmates who can't follow the rules. *See id.* at 4-5. Because of these restrictive conditions, the SHU is itself often the subject of constitutional challenges. *See, e.g.*, *Watson v. Hollingsworth*, 741 F. App'x 545, 553 (10th Cir. 2018).

Finally, the district court correctly identified the impact on courts as a special factor. Prisoners file more than 50,000 cases in the federal court system each year. These lawsuits make up nearly 20% of the federal civil docket.[8] To put this in perspective, the average district court judge will receive *ninety* new prisoner petitions every year that he or she is on the bench.[9] Authorizing a new *Bivens* claim may not lead to

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[8] U.S. Courts, *Table C-2: Civil Federal Judicial Caseload Statistics* (March 31, 2020), *available at* https://www.uscourts.gov/statistics/table/c-2/federal-judicial-caseload-statistics/2020/03/31.

[9] There are 677 federal district court seats. The number of vacancies generally varies between 70 and 130. *See Judicial Vacancies in Federal Courts*, https://ballotpedia.org/Judicial_vacancies_in_federal_courts#Previously_published_reports. Dividing 54,066 cases between approximately 600 judges leaves 90 petitions for each.

a "tidal wave of litigation," *see* Op. Br. 32, but it will increase the burden on already-overwhelmed district courts.

## III. Even assuming a *Bivens* remedy exists here, the Appellees are entitled to qualified immunity. Consequently, this Court may affirm on the alternative ground that the complaint fails to state a claim for relief.

Ultimately, this Court need not decide whether a *Bivens* remedy exists for Rios's claims. Even assuming one does, the Appellees are entitled to qualified immunity. The complaint thus fails to state a claim for relief under Fed. R. Civ. P. 12(b)(6).

Once a defendant asserts qualified immunity, the burden shifts to the plaintiff to establish both (1) that the defendant violated a constitutional right, and (2) that the right was clearly established at the time of the violation. *Patel v. Hall*, 849 F.3d 970, 980 (10th Cir. 2017). Rios's complaint fails on both prongs. First, the specific, well-pled factual allegations do not give rise to a plausible inference that the Appellees violated her Eighth Amendment rights. Even if they did, Rios cannot show that this right was clearly established at the time.

Though the district court did not dismiss Rios's complaint on this ground, the Appellees raised this argument below. Appellees' App. 12-18. The Tenth Circuit is "free to affirm a district court decision on any

grounds for which there is a record sufficient to permit conclusions of law." *United States v. Rodriguez*, 945 F.3d 1245, 1250 (10th Cir. 2019).

As the Supreme Court has observed, "This approach — disposing of a *Bivens* claim by resolving the constitutional question, while assuming the existence of a *Bivens* remedy — is appropriate in many cases." *Hernandez v. Mesa*, 137 S. Ct. 2003, 2007 (2017); *see, e.g.*, *Wood v. Moss*, 572 U.S. 744, 757 (2014) (assuming existence of *Bivens* claim but deciding case on qualified-immunity grounds); *Iqbal*, 556 U.S. at 675 (same). Moreover, "constitutional avoidance considerations trump[,] and 'courts should think hard, and then think hard again, before turning small cases into large ones.'" *Kerns v. Bader*, 663 F.3d 1173, 1181 (10th Cir. 2011) (quoting *Camreta v. Greene*, 563 U.S. 692, 707 (2011)).

### A. The well-pled facts in Rios's complaint do not give rise to a plausible inference that an Eighth Amendment violation occurred.

**Standard of review:** This Court reviews de novo a district court's decision to grant a motion to dismiss under Fed. Rule Civ. P. 12(b)(6). *See, e.g.*, *Acosta v. Jani-King of Oklahoma, Inc.*, 905 F.3d 1156, 1158

(10th Cir. 2018). The Court accepts all well-pled factual allegations as true and views them in the light most favorable to the plaintiff. *Id.*

To survive a motion to dismiss, the complaint "must state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). A complaint is "plausible on its face" only if it includes specific factual allegations that allow the court "to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678. These allegations must be "enough to raise a right to relief above the speculative level," nudging the plaintiff's claims "across the line from conceivable to plausible." *Twombly*, 550 U.S. at 555. Determining whether a complaint states a plausible claim will be a "context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Iqbal*, 556 U.S. at 679.

**Argument:** Even taking all of her well-pled allegations as true, Rios's complaint does not indicate that the Appellees acted with deliberate indifference. As a result, she has failed to allege a violation of the Eighth Amendment.

As an initial matter, Rios's Statement of Facts includes allegations from both her complaint *and* her motion for summary

judgment (as Rios correctly acknowledges). The Appellees urge the Court to parse Rios's complaint carefully and in isolation — and to ignore any later allegations designed to shore up the original pleading. *See, e.g.*, *Smith v. United States*, 561 F.3d 1090, 1096 (10th Cir. 2009) (courts may not supply additional factual allegations to round out the complaint, even for pro se plaintiffs).

Ultimately, the specific factual allegations against the Appellees are limited to the following:

- That Officers Redding, Simms, and Jones interviewed Rios when she was in the SHU, *see* Appellant's App. 11-12;
- That Rios "made it abundantly clear when being interviewed . . . that [s]he was willingly, albeit involuntary, [sic] to commit and perform sexual acts in order to avoid being physically assaulted by various inmates," *id.* at 12;
- That the officers "failed . . . when neglecting to adequately comprehend and realize the seriousness of the situation," *id.*;
- That the Appellees "humiliated, degraded and disparaged Plaintiff for being a transgender inmate, a Muslim and for having tattoos" during the interview, *id.*; and
- That the officers "openly conspired to omit pertinent and relevant facts concerning Plaintiff Rios' sexual orientation as a 'transgender' and went so far as to laugh and make jokes

> regarding the contents of the official report submitted to federal Bureau of Prisons supervisors," *see id.* at 12-13.[10]

Accepting these allegations as true, they are certainly troubling. But they do not state a violation of the Eighth Amendment.

"The Eighth Amendment does not outlaw cruel and unusual 'conditions'; it outlaws cruel and unusual 'punishments.'" *Farmer*, 511 U.S. at 837. Accordingly, a prison official does not violate that amendment unless he acts with "deliberate indifference" — a standard akin to criminal recklessness, and one designed to isolate those who inflict *punishment*. *Id.* The defendant's "state of mind is measured by a subjective, rather than an objective, standard." *Id.*

As the Tenth Circuit has explained, this means that a prison official must "actually be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists." *Tafoya v. Salazar*, 516 F.3d 912, 916 (10th Cir. 2008). Importantly, the official must also *draw* that inference. *Id.*

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[10] The complaint also includes a handful of conclusory statements about the Appellees' failure "to initiate and conduct a timely, rational, plausible, and legitimate PREA investigation." Appellant's App. 17. These belong to Rios's Fifth Amendment claim, which is not at issue on appeal. Op. Br. 5 n.5.

The defendant's response to the situation is equally important. "Whether one puts it in terms of duty or deliberate indifference, prison officials who act reasonably cannot be found liable under the Cruel and Unusual Punishments Clause." *Farmer*, 511 U.S. at 845. Thus, an official does not violate the Eighth Amendment if he "knew the underlying facts but believed (albeit unsoundly) that the risk to which the facts gave rise was insubstantial or nonexistent." *Id.* Similarly, "prison officials who actually knew of a substantial risk to inmate health or safety may be found free from liability if they responded reasonably to the risk, even if the harm ultimately was not averted." *Id.*; *accord Tafoya*, 516 F.3d at 916.

The factual allegations in the complaint do not meet this standard. To the contrary, Rios's allegations are inconsistent with an Eighth Amendment claim.

Construed liberally, Rios asserts that she informed Officers Redding, Simms, and Jones of the underlying situation. *See* Appellant's App. 12. But Rios doesn't allege that the Appellees actually understood the danger she was in; in fact, she says the opposite. Rios faults the

officials for "neglecting to adequately comprehend and realize the seriousness of the situation." *Id.*

In other words, Rios claims that she shared the facts with the Appellees, but they believed her fears were unfounded. *Farmer* makes clear that this is not enough. *See* 511 U.S. at 845.

At most, these allegations are consistent with negligence — that the officers should have, but did not, appreciate the risk of harm. *See* Appellant's App. 31 (accusing Appellees of negligence and "failing to exercise 'reasonable' or 'ordinary' care," and failing "to take reasonable precautions"). But even that is questionable. It was the Appellees' job to predict, one way or another, whether Rios could return to the general population safely. Even if they were incorrect, that does not prove they were negligent, let alone deliberately indifferent.

The Opening Brief also hints at an alternative theory of liability. Rios seems to imply that the Appellees believed she faced a substantial risk, but nonetheless chose to write a report that concluded the opposite and recommend her return to the general population. The problem is, the complaint doesn't actually make those allegations.

The closest Rios comes is to accusing her investigators of "conspiring to omit pertinent and relevant facts." Appellant's App. 12-13. Conclusory claims of conspiracies are not entitled to the presumption of truth when they are "devoid of further factual enhancement." *Iqbal*, 556 S. Ct. at 678; *see Twombly*, 550 U.S. at 564.

The lone fact that Rios accuses the Appellees of omitting is that she is transgender. She is correct that the official report only identifies her as bisexual.[11] But it bears noting that Rios herself did not mention that she was transgender when she asked to be placed in the SHU, only that she was gay. *See* Restricted App. 2-4. Rios thus faults the Appellees for excluding a fact that she, too, did not consider relevant.

At best, Rios's allegations are consistent with the possibility that the Appellees violated the Eighth Amendment. But as the Supreme Court has explained, "Where a complaint pleads facts that are *merely consistent with* a defendant's liability, it stops short of the line between possibility and plausibility of entitlement to relief." *Iqbal*, 556 U.S. at 678 (emphasis added).

[11] More accurately, the official report notes that Rios referred to herself as bisexual during her interview. Restricted App. 8.

In the end, all that Rios alleges is: (1) the Appellees made the wrong recommendation because they failed to appreciate the dangers of her situation, and (2) they omitted the fact that she is transgender from the report. Where, as here, the allegations "encompass a wide swath of conduct, much of it innocent, then the plaintiffs have not nudged their claims across the line from conceivable to plausible." *Kansas Penn Gaming*, 656 F.3d at 1215.

**B. The law was not clearly established.**

Even if Rios has alleged a violation of the Eighth Amendment, that right was not clearly established at the time it occurred.

A right is clearly established if, "at the time of the conduct, existing precedent has placed the statutory or constitutional question beyond debate." *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011). This standard generally requires a Supreme Court or Tenth Circuit decision on point. *Patel*, 849 F.3d at 980. In addition, the Supreme Court has "repeatedly told courts . . . not to define clearly established law at a high level of generality." *Mullenix v. Luna*, 577 U.S. 7, 12 (2015). The dispositive question is "whether the violative nature of *particular* conduct is clearly established." *Id.*

The number of Eighth Amendment claims this Court has addressed on their merits is limited. Many of those decisions involve significantly different facts, focusing on defendants who were accused of intentionally harming an inmate or failing to hire or supervise other employees properly. *See, e.g.*, *Barney*, 143 F.3d 1299 (prison employee was the assailant); *Benefield*, 241 F.3d 1267 (defendant purposefully told other inmates plaintiff was a snitch). Thus, they offer no relevant guidance.

Garden variety failure-to-protect cases cannot help Rios satisfy her burden, either. For purposes of qualified immunity, the most important fact in this case is that the Appellees are technicians in the BOP's Special Investigative Services department. In plain English, they are investigators. As a result, the constitutional calculus is fundamentally different.

In a generic failure-to-protect claim, the inmate tells a guard or the warden that he is in danger, and the official does little or nothing. *See, e.g.*, *Balsewicz v. Pawlyk*, 963 F.3d 650, 652 (7th Cir. 2020); *Requena v. Roberts*, 893 F.3d 1195 (10th Cir. 2018). Here, by contrast, Rios told an official that she was in danger, and the prison responded

appropriately: they placed her in the SHU, asked her to document the reasons for that request, and assigned the Appellees to investigate.

There is no dispute that the Appellees did their job. They interviewed Rios, interviewed other inmates, made an assessment, and sent their recommendation to higher-level officials. What Rios takes issue with is the conclusion they reached (and, of course, the offensive manner in which she says they conducted her interview).

The Appellees are unaware of any decision that says that a prison investigator who reaches the wrong conclusion has been deliberately indifferent per se. Nor would that make sense. Even the most competent, thorough investigator can be wrong. Something more is required for negligence; something even *more* is required for deliberate indifference under the Eighth Amendment.

One can certainly speculate about what that might entail. An investigator might be deliberately indifferent if he fails to interview the complainant, or the alleged assailants, or perform any investigation at all. *But see United States v. Belcher*, 216 F. App'x 821, 822-23 (10th Cir. 2007) (investigator who discarded inmate's complaint did not have culpable mental state because the form did not express a direct threat

to inmate's safety). Perhaps an investigator violates the Constitution if he concludes there is no danger in the face of overwhelming, irrefutable evidence to the contrary. But there is no way the Appellees could have known if their conduct was unconstitutional, because neither the Tenth Circuit nor the Supreme Court has addressed this scenario.

To the extent *Farmer* speaks to this issue, it indicates that the Appellees did not violate the Constitution. *Farmer* establishes that prison officials who respond reasonably to a risk are not liable, even if the injury is not averted. 511 U.S. at 844; *see also Wilson v. Falk*, 877 F.3d 1204, 1210 (10th Cir. 2017) (warden who simply told inmate to speak to his case manager was not deliberately indifferent, because this was "good advice"). *Farmer* is also clear that no violation occurs when officials inaccurately assess a threat to an inmate's safety — even if the basis for their conclusion was unsound. 511 U.S. at 844.

The closest decision Appellees has found from the Tenth Circuit is *Verdecia v. Adams*, 327 F.3d 1171 (10th Cir. 2003). One of the defendants in that case had investigated a previous fight between the plaintiff and a member of a specific gang. He concluded the fight was an "isolated one-on-one fight between two inmates and was not gang-

related." *Id.* at 1176. The plaintiff was later placed in a cell with a different member of that gang and attacked. *Id.*

To the extent *Verdecia* is relevant, it supports the Appellees. The opinion takes pains to emphasize that the investigator did not violate the Eighth Amendment simply because his earlier investigation reached the wrong conclusion, even if that conclusion was unreasonable. *See id.* at 1176-77. As this Court explained, "A finding of unreasonableness is merely a finding of negligence and not deliberate indifference." *Id.* at 1177.[12]

Ultimately, Rios cannot point to any existing precedent that "placed . . . the constitutional question beyond debate." *White v. Pauly*, 137 S. Ct. 548, 551 (2017). Qualified immunity is designed to give "government officials breathing room to make reasonable but mistaken judgments about open legal questions." *al-Kidd*, 563 U.S. at 743. In

[12] The Tenth Circuit did suggest that the investigator could have been liable if he "subjectively drew an inference that was contrary to the findings and conclusion of [his] prior investigation." *Id.* at 1176. In other words, an investigator may violate the Eighth Amendment if he decides that his original conclusion was wrong, recognizes the inmate is in fact in danger, and still doesn't act. But there is no argument that happened here.

this case, it cannot be said that any reasonable person in the Appellees' position would have known their conduct violated the Eighth Amendment. *White*, 137 S. Ct. at 551. The Appellees are therefore protected by qualified immunity, and the Court may affirm the dismissal of Rios's complaint on this ground.

## CONCLUSION

The Court should affirm the decision below.

DATED this 27th day of August, 2021.

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE

As required by Fed. R. App. P. 32(a)(7)(B)(i), I certify that the attached brief contains 12,975 words.

DATED: August 27, 2021

/s/ Marissa R. Miller
MARISSA R. MILLER
Assistant United States Attorney

## CERTIFICATE OF SERVICE

I hereby certify that on August 27, 2021, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Tenth Circuit, using the appellate CM/ECF system.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

/s/ Ma-Linda La-Follette
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