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 U.S. District Court
for the District of Colorado
No. 1:20-cv-1775
Hon. Michael E. Hegarty

OPENING BRIEF OF PLAINTIFF-APPELLANT

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ORAL ARGUMENT REQUESTED

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STATEMENT OF RELATED CASES

There are no prior or related appeals.

JURISDICTIONAL STATEMENT

The district court had jurisdiction over Ms. Rios's claims under 28 U.S.C. § 1331.[1] The district court granted defendants' motion to dismiss and entered final judgment against Ms. Rios on February 3, 2021. A.78. Ms. Rios timely filed a notice of appeal on February 22, 2021. A.88. This Court has appellate jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

Divinity Rios,[2] a transgender woman housed in a men's prison, repeatedly warned prison officials that other prisoners were forcing her to perform sex acts under threat of bodily injury and even death. Prison officials briefly placed Ms. Rios in segregated housing at her request, but ridiculed her and ignored her pleas to be kept there. After officials forced Ms. Rios back to the general population, her worst fears were realized: she was raped by another prisoner. The issues on appeal are:

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[1] The parties consented to magistrate jurisdiction. D. Ct. Dkt. No. 37.
[2] Ms. Rios uses she/her pronouns and the first name Divinity, although her legal name—as reflected in the case caption—is still Luis.

I. Whether the district court erred in determining that Ms. Rios's Eighth Amendment failure-to-protect claim presents a new *Bivens* context, given the Supreme Court's approval of a *Bivens* remedy in the nearly-identical case of *Farmer v. Brennan*.

II. Whether, even if Ms. Rios's claim does present a new context, special factors counsel against recognizing a *Bivens* remedy here.

STATEMENT OF THE CASE

I. Factual Background

A. Ms. Rios, a transgender woman housed in a men's prison, requests protective custody because other prisoners are assaulting her and forcing her to perform sex acts under threat of bodily injury and death.

Divinity Rios, a transgender woman, was transferred to the men's prison at FCI Florence in the summer of 2019. A.11 (Compl. ¶ 1). Before long, other prisoners learned of Ms. Rios's gender identity. A.34 (D. Ct. Dkt. No. 44 at 9, 13).[3] Once that happened, other prisoners began to

[3] Ms. Rios included a handful of additional details fleshing out what happened to her in her opposition to the motion to dismiss. Because the question on appeal is strictly a legal one—whether *Bivens* is available for failure-to-protect claims—they are mentioned here only for background, particularly in light of Ms. Rios's *pro se* status below. *Cf. Diversey v. Schmidly*, 738 F.3d 1196, 1199 (10th Cir. 2013) (pro se pleadings are liberally construed). If Ms. Rios prevails in this appeal, she may

target Ms. Rios. A.34 (D. Ct. Dkt. No. 44 at 9, 13). They forced her to perform sex acts on them, threatening that if she refused, they would do even worse—beat her, rape her, or even murder her. A.11-12, A.19 (Compl. ¶¶ 1, 2b, 19).[4]

These were no mere empty threats. On the occasions Ms. Rios would refuse to perform sex acts, she was beaten and "forcibly molested." A.32-33 (D. Ct. Dkt. No. 44 at 7-8). After one particularly bad beating, Ms. Rios reported what was happening to her to a correctional officer. A.11 (Compl. ¶ 1). Ms. Rios requested protective custody. A.11 (Compl. ¶ 1). She was given a form to complete and temporarily placed in the special housing unit (SHU). A.11 (Compl. ¶ 1).

B. Defendants fail to take seriously Ms. Rios's fears and history of being assaulted; instead, they force her back to the general population, where she is raped by another prisoner.

After several weeks in the SHU, the defendants—Special Investigative Services Technicians Redding, Simms, and Jones—

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incorporate these details into her complaint on remand if given leave to file a first amended complaint.

[4] Ms. Rios's complaint contains two paragraphs both mistakenly numbered as paragraph 2. *See* A.11-12 (Compl. 4-5). For clarity, this brief refers to the first as paragraph 2a, and the second as paragraph 2b.

interviewed Ms. Rios. A.11-12 (Compl. ¶¶ 2a-3). In that interview, Ms. Rios explained that she is a transgender woman. A.34 (D. Ct. Dkt. No. 44 at 9); A.11-13 (Compl. ¶¶ 2a-4). She shared with defendants what she had endured at the hands of other prisoners: repeated forced sex acts under threat of grave bodily injury or death, and multiple physical assaults. A.11-12 (Compl. ¶ 2a); A.34 (D. Ct. Dkt. No. 44 at 9). She even named one of her attackers, because she was alarmed that he had recently been moved to the SHU cell next to hers. A.35 (D. Ct. Dkt. No. 44 at 10). Ms. Rios made clear to defendants during the interview that she feared being returned to the general population and wanted to remain in the SHU. A.11-12, A.13 (Compl. ¶¶ 2a-2b, 5).

The defendants did not take this interview seriously, treating it—and what Ms. Rios had endured—as a joke. A.12-13 (Compl. ¶¶ 3-4). They "humiliated, degraded and disparaged" Ms. Rios, mocking her gender identity and other things about her, like her religion. A.12-13 (Compl. ¶¶ 3-4). And they openly discussed whether to leave out key facts from their official investigative report, ultimately deciding to omit two critical points: Ms. Rios's gender identity and her history of being

sexually assaulted by other prisoners while in the general population. A.12-13 (Compl. ¶ 4); A.35 (D. Ct. Dkt. No. 44 at 10).

Ms. Rios learned several days later that she would be forced to return to the general population. A.13 (Compl. ¶ 5); A.35 (D. Ct. Dkt. No. 44 at 10). Ms. Rios adamantly protested being returned and again asked to stay in the SHU for her safety, fearing the worst. A.11-12, A.13 (Compl. ¶¶ 2a-2b, 5); A.35 (D. Ct. Dkt. No. 44 at 10). Undeterred, officials sent her back anyway. A.11-12, A.13 (Compl. ¶¶ 2a-2b, 5); A.35 (D. Ct. Dkt. No. 44 at 10).

Ms. Rios's fears were well-founded. After prison officials returned her to the general population over her pleas, she was raped by another prisoner. A.13 (Compl. ¶ 5).

II. Proceedings Below

Ms. Rios filed suit *pro se*, alleging that Redding, Simms, and Jones violated the Eighth Amendment because they were deliberately indifferent to her substantial risk of serious harm in the form of violence at the hands of other prisoners.[5] As her complaint alleged, Ms. Rios was

[5] Ms. Rios also alleged a due process claim relating to defendants' inadequate investigation of her assaults. That claim is not at issue in this appeal.

raped after prison officials forced her to return to the general population despite a history of being physically and sexually assaulted by other prisoners at that facility. A.11-12, A.13, A.18-19 (Compl. ¶¶ 1-2b, 5, 17-19). Undeterred by Ms. Rios's warnings about the prior assaults she'd endured or her pleas to be kept in the SHU for her safety, defendants disregarded the risk Ms. Rios faced from other prisoners in the general population. A.11-13 (Compl. ¶¶ 2a-5, 17-19).

Defendants moved to dismiss for failure to state a claim.[6] D. Ct. Dkt. No. 31. The district court granted the motion to dismiss, concluding that Ms. Rios lacked a remedy under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). Relying on *Ziglar v. Abbasi*, 137 S. Ct. 1843 (2017), the court first concluded that Ms. Rios's claim would constitute a new *Bivens* context. A.82-84. In its view, the Supreme Court had only recognized a narrow *Bivens* remedy limited to the following contexts: (1) Fourth Amendment search and seizure, in *Bivens* itself; (2) Fifth Amendment gender discrimination by

[6] Defendants also moved to dismiss on qualified immunity grounds and moved for summary judgment on exhaustion grounds. D. Ct. Dkt. Nos. 31 & 33. The district court declined to reach either argument. A.81-82, A.87.

a congressman, in *Davis v. Passman*, 442 U.S. 228 (1979); and (3) Eighth Amendment deliberate indifference to prisoners' medical needs, in *Carlson v. Green*, 446 U.S. 14 (1980). A.82-84. The court noted that while both *Carlson* and this case involve Eighth Amendment deliberate indifference claims, it saw no reason to depart from other District of Colorado cases finding that failure-to-protect claims were a new context. A.83-84. It never mentioned the Supreme Court's decision in *Farmer v. Brennan*, 511 U.S. 825 (1994), despite Ms. Rios's reliance on both *Farmer* and *Carlson* in her opposition to the motion to dismiss. *See* A.49 (D. Ct. Dkt. No. 44 at 24).

The district court next decided that special factors counseled against extending a *Bivens* remedy to Ms. Rios. A.84-86. It viewed the Bureau of Prisons' administrative remedies program, the Federal Tort Claims Act (FTCA), and mandamus as providing adequate alternative remedies to a *Bivens* claim. A.84-85. The district court also concluded that allowing *Bivens* claims in this context would "add to the Court's already heavy burden of prisoner litigation." A.85. The court further opined that applying *Bivens* here would "interfe[re] with prison management." A.85.

SUMMARY OF ARGUMENT

I. A. Ms. Rios's claim does not present a new *Bivens* context. To the contrary, the Supreme Court approved a *Bivens* remedy decades ago in the nearly-identical case of *Farmer v. Brennan*, 511 U.S. 825 (1994). In *Farmer*, as here, a transgender woman who was raped by another prisoner after being placed in the general population of a men's prison brought an Eighth Amendment deliberate indifference claim against federal prison officials for failing to protect her. Ms. Rios's claim is materially indistinguishable from *Farmer*. **B.** The district court did not once mention *Farmer*, despite Ms. Rios's reliance on it in her briefing. To the extent the district court believed that *Abbasi*'s silence on *Farmer* should be read as implicitly overruling *Farmer*, it ran afoul of the Supreme Court's repeated admonitions that lower courts cannot conclude that a more recent Supreme Court case "ha[s], by implication, overruled an earlier precedent." *Agostini v. Felton*, 521 U.S. 203, 237 (1997). The district court was bound to "follow the case which directly controls"—here, *Farmer*—even if the district court believed that *Farmer* "appear[ed] to rest on reasons rejected" in *Abbasi*. *Rodriguez de Quijas v. Shearson/Am. Express*, 490 U.S. 477, 484 (1989). This Court is likewise

so bound. To hold otherwise would defy Supreme Court precedent, require this Court to impermissibly overrule its own controlling caselaw, and create a circuit split with the Third Circuit's decision in *Bistrian v. Levi*, 912 F.3d 79 (3d Cir. 2018).

II. Even if Ms. Rios's claim presented a new context, special factors do not counsel against recognizing a *Bivens* remedy here. **A.** There is no viable alternative remedial scheme available to Ms. Rios. Ms. Rios suffered physical and psychological injuries after "individual instances" of official misconduct, "which due to their very nature are difficult to address except by way of damages actions after the fact." *Abbasi*, 137 S. Ct. at 1862. In any event, Ms. Rios did not request injunctive relief, nor would she have standing to seek it—she is no longer housed at FCI Florence, so any such claims would be moot. *See Jordan v. Sosa*, 654 F.3d 1012, 1027-28 (10th Cir. 2011). For Ms. Rios, then, it is "damages or nothing." *Abbasi*, 137 S. Ct. at 1862. This renders the BOP administrative grievance process and mandamus useless to her. As for the FTCA, the Supreme Court has made clear that it is no substitute for prisoners' Eighth Amendment claims. *See Carlson v. Green*, 446 U.S. 14, 19-20 (1980). Nor could Ms. Rios even bring her claim under the

FTCA, which does not permit liability for federal constitutional torts. *FDIC v. Meyer*, 510 U.S. 471, 478 (1994). **B.** The district court's speculation about potential undue interference with prison management is unwarranted. Allowing a *Bivens* claim here would not imperil prison administration any more than the *Bivens* claims *Farmer* and *Carlson* have authorized for decades now. After all, "no legitimate penological objectives" are served by "gratuitously allowing the beating or rape of one prisoner by another." *Farmer*, 511 U.S. at 833-34 (cleaned up). The district court's concern about a deluge of failure-to-protect claims is similarly misplaced. These claims have been available to prisoners since at least 1994, when the Supreme Court decided *Farmer*, with no evidence of an accompanying flood of litigation over the last quarter-century. And a host of other procedural and practical barriers to litigation—including qualified immunity and the Prison Litigation Reform Act's exhaustion requirement—underscore how unlikely a tidal wave of litigation would be.

STANDARD OF REVIEW

This Court reviews de novo a district court's Rule 12(b)(6) dismissal. *Nat. Res. Def. Council v. McCarthy*, 993 F.3d 1243, 1250 (10th Cir. 2021).

The Court accepts the factual allegations in the complaint as true, resolves all reasonable inferences in Ms. Rios's favor, and liberally construes Ms. Rios's pro se pleadings. *Diversey v. Schmidly*, 738 F.3d 1196, 1199 (10th Cir. 2013).

ARGUMENT

I. Because *Farmer v. Brennan* Approved a *Bivens* Remedy in a Nearly-Identical Case, the District Court Erred in Holding That Ms. Rios's Claim Presented a New *Bivens* Context.

A. The *Bivens* remedy: *Bivens*, *Farmer*, and the *Abbasi* test.

The Supreme Court first recognized an implied right of action for damages against federal officials in *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). Explaining that "where federally protected rights have been invaded, it has been the rule from the beginning that courts will . . . adjust their remedies so as to grant the necessary relief," *Bivens* held that damages were recoverable from the federal officers who violated Webster Bivens's Fourth Amendment rights by entering his home, arresting, and strip-searching him, all without a warrant or probable cause. *Id.* at 391-97.

In the ten years following *Bivens*, the Supreme Court explicitly approved a *Bivens* cause of action in two more contexts: Fifth

Amendment gender discrimination, in *Davis v. Passman*, 442 U.S. 228 (1979), and Eighth Amendment deliberate indifference to prisoners' medical needs, in *Carlson v. Green*, 446 U.S. 14 (1980). But then the tide began to shift: between 1983 and 1994, the Supreme Court declined to authorize a *Bivens* action in five other contexts. *See Ziglar v. Abbasi*, 137 S. Ct. 1843, 1857 (2017) (recounting development of *Bivens* jurisprudence).

Despite those five rejections in the decade leading up to *Farmer v. Brennan*, in 1994 the Supreme Court once again recognized the availability of *Bivens*. *Farmer*, 511 U.S. at 830. *Farmer* had much in common with Ms. Rios's suit here. Like Ms. Rios, Dee Farmer was a transgender woman incarcerated at a men's federal prison. *Id.* at 829-30. Like Ms. Rios, Ms. Farmer was raped by another prisoner after being placed in the general population of the prison. *Id.* And like Ms. Rios, Ms. Farmer brought a *Bivens* Eighth Amendment deliberate indifference claim against prison officials based on their failure to protect her. *Id.* at 830-31. Erroneously believing that Ms. Farmer's failure to notify prison officials about her risk of harm defeated her deliberate indifference claim, the district court had granted summary judgment to the prison officials

and denied Ms. Farmer's motion for more discovery. *Id.* at 848-49. After outlining the proper legal standard for deliberate indifference claims, the Supreme Court vacated the grant of summary judgment and instructed the district court to reconsider Ms. Farmer's claim and her motion for further discovery. *Id.* at 835-47, 849.

More recently, in *Abbasi*, the Supreme Court explained that "expanding the *Bivens* remedy is now a disfavored judicial activity." 137 S. Ct. at 1857 (internal quotation marks omitted). But *Abbasi* also recognized that a *Bivens* remedy is still available in appropriate cases, including in the contexts the Court had previously explicitly approved: Fourth Amendment search and seizure (*Bivens*), Fifth Amendment gender discrimination (*Davis*), and Eighth Amendment deliberate indifference (*Carlson*). *Id.* at 1854-55. With that in mind, *Abbasi* gave courts a two-step test when confronted with a *Bivens* case. *Id.* at 1858-60. First, does the claim arise in a new *Bivens* context? *Id.* at 1859-60. And if the case does present a new context, do any "special factors" counsel hesitation in extending the *Bivens* remedy? *Id.* at 1857-58.

B. The striking factual and legal similarities between *Farmer* and Ms. Rios's case dictate that this is not a new *Bivens* context.

Ms. Rios has a valid *Bivens* remedy because her case does not arise in a "new context." To the contrary, the striking similarities between this case and *Farmer* make clear that a *Bivens* remedy is available to Ms. Rios. The only court of appeals to consider this question post-*Abbasi* agrees: *Farmer* "practically dictates" that failure-to-protect claims are not a new *Bivens* context. *See Bistrian v. Levi*, 912 F.3d 79, 91 (3d Cir. 2018).

In determining whether a claim presents a new *Bivens* context, *Abbasi* instructed courts to ask whether it differs in a "meaningful way" from prior *Bivens* claims. 137 S. Ct. at 1859. Mere "trivial" differences will not suffice. *Id.* at 1865. A case may be a new context if "it implicates a different constitutional right." *Id.* at 1864. Or it may present a new context if "judicial precedents provide a less meaningful guide for official conduct." *Id.* Other examples of potentially meaningful differences include the "legal mandate under which the officer was operating," the level of "generality or specificity," the rank of the officers at issue, the "risk of disruptive intrusion" into other branches of government, and "the

presence of potential special factors that previous *Bivens* cases did not consider." *Id.* at 1860.

Ms. Rios's claim does not differ in a "meaningful way" from *Farmer*; in fact, it hardly differs at all. Indeed, Ms. Rios's case should ring a bell for anyone familiar with *Farmer*: a transgender woman raped by another prisoner after being placed in the general population of a men's federal prison brings a *Bivens* Eighth Amendment deliberate indifference claim against prison officials based on their failure to protect her. *See Farmer*, 511 U.S. at 829-31; A.11-12, A.13, A.18-19 (Compl. ¶¶ 1-2b, 5, 17-19).

Take first the constitutional right at issue. *See Abbasi*, 137 S. Ct. at 1860. Like Dee Farmer, Ms. Rios brings an Eighth Amendment claim for prison officials' deliberate indifference in failing to protect her, a transgender woman, from assault and rape at the hands of other prisoners in the general population. *See* A.11-12, A.13, A.18-19 (Compl. ¶¶ 1-2b, 5, 17-19); *Farmer*, 511 U.S. at 829-31. Down to a granular level, the constitutional right at issue is the same. *Cf. Abbasi*, 137 S. Ct. at 1864 (holding that detainees' claim was a new context in part because it arose under the Fifth Amendment, as opposed to the Eighth Amendment claim in *Carlson*).

Next, consider whether "judicial precedents provide a less meaningful guide for official conduct." *Abbasi*, 137 S. Ct. at 1864. They do not. *Farmer* and its progeny have long provided relevant guidance about prison officials' need to act in response to knowledge that a prisoner faces a substantial risk of serious harm in the form of prisoner-on-prisoner violence. *See, e.g.*, *Farmer*, 511 U.S. at 835-47; *Balsewicz v. Pawlyk*, 963 F.3d 650, 652-53 (7th Cir. 2020) (failure-to-protect claim brought by trans prisoner after being assaulted by fellow prisoner); *Greene v. Bowles*, 361 F.3d 290, 292-95 (6th Cir. 2004) (failure-to-protect claim brought by trans prisoner after assault by fellow prisoner); *Benefield v. McDowall*, 241 F.3d 1267, 1269-71 (10th Cir. 2001) (*Bivens* failure-to-protect claim brought by prisoner labeled as a "snitch" by correctional officer); *Robinson v. Prunty*, 249 F.3d 862, 866 (9th Cir. 2001) (failure-to-protect claim brought by prisoner attacked by other prisoners in yard); *Fischl v. Armitage*, 128 F.3d 50, 51-53 (2d Cir. 1997) (failure-to-protect claim by prisoner attacked by other prisoners); *Erickson v. Holloway*, 77 F.3d 1078, 1079-81 (8th Cir. 1996) (failure-to-protect claim brought after prisoner was assaulted by fellow prisoner).

Ms. Rios's claim and *Farmer* also share the same level of specificity. *See Abbasi*, 137 S. Ct. at 1860. As in *Farmer*, Ms. Rios's claim is specific to her own unique situation and level of risk she faced as a transgender woman at the particular federal correctional institution where she was housed. *See Farmer*, 511 U.S. at 831 (alleging that defendants were deliberately indifferent in placing Ms. Farmer in the general population despite knowing that the prison had a violent environment and that as a transgender woman, Ms. Farmer would be particularly vulnerable to sexual assault by other prisoners); A.18-19 (Compl. ¶¶ 17-19) (alleging that defendants were deliberately indifferent in forcing Ms. Rios back to the general population despite knowing that she had previously been forced to perform sex acts and threatened by other prisoners at that facility, and that as a transgender woman, she was at "particular risk for sexual assault"). This case is therefore unlike *Abbasi*'s far more generalized challenge to "large-scale policy decisions concerning the conditions of confinement imposed on hundreds of prisoners," *Abbasi*, 137 S. Ct. at 1862, which differentiated that case from the single-prisoner deliberate indifference claim in *Carlson*.

And because Ms. Rios's claim bears such striking factual and legal resemblance to *Farmer*, other new-context concerns melt away. For example, because both Ms. Rios and Ms. Farmer sued federal prison officials in the BOP system, the "legal mandate," *Abbasi*, 137 S. Ct. at 1860, under which defendants in both cases operated is the same. Likewise, the "risk of disruptive intrusion," *id.*, into other branches of government is no greater here than in *Farmer*; Ms. Rios's claim requires nothing more of prison officials than what *Farmer* has already required for the last 25 years. In any event, *Carlson* made clear that federal prison officials "do not enjoy such independent status in our constitutional scheme as to suggest that [*Bivens*] remedies against them might be inappropriate." 446 U.S. at 19. Finally, since both cases involve transgender prisoners suing federal prison officials for the failure to protect them from physical and sexual violence at the hands of other prisoners, it's hard to conceive of any "special factors" in this case different from those in *Farmer*.

What little daylight exists, if any, between *Farmer* and this case has to do with the rank of some of the defendants. In *Farmer*, the defendants ranged from low-ranking facility-level staff all the way up to

the BOP director. *Farmer*, 511 U.S. at 830. Here, the only defendants are low-ranking facility-level staff. *See* A.9-10, A.12 (Compl. 2-3, ¶ 2a). But this is not a "meaningful" difference and, if anything, cuts in *favor* of a remedy here. As *Abbasi* explained, with *Bivens*, the concern is that plaintiffs will name defendants who are too far up the food chain—not the other way around. *See Abbasi*, 137 S. Ct. at 1860. That's why *Abbasi* was so troubled that the plaintiffs there had named the former Attorney General, former FBI director, and former INS commissioner as defendants. *Id.* at 1853, 1860-61. After all, the Supreme Court has repeatedly made clear that the "purpose of *Bivens* is to deter the *officer*." *Id.* at 1860 (quoting *FDIC v. Meyer*, 510 U.S. 471, 485 (1994)). It is not a vehicle for changing "an entity's policy," nor for holding "officers responsible for the acts of their subordinates." *Id.* (citations omitted). Here, however, Ms. Rios has named the appropriate level of officer under *Bivens*: the low-ranking officials directly involved in her forced return to the general population and subsequent rape.

The Third Circuit's decision in *Bistrian*—the first circuit to consider the availability of failure-to-protect *Bivens* claims post-*Abbasi*—confirms that Ms. Rios's claim does not present a new *Bivens* context. 912 F.3d at

90-94. There, a pretrial detainee brought a deliberate indifference claim against a host of defendants under the Fifth Amendment, alleging they failed to protect him from being assaulted after placing him in a yard with detainees who had previously threatened him for cooperating with prison officials. *Id.* at 84. Following *Abbasi*'s mandate, the Third Circuit meticulously considered whether Mr. Bistrian's Fifth Amendment failure-to-protect claim constituted a new *Bivens* context. *Id.* at 90-92. *Bistrian* did not quite share this case's striking similarity to *Farmer*—different constitutional amendment, different type of incarcerated person (pretrial detainee vs. prisoner), different reason for being at risk of violence. *Id.* Yet the Third Circuit still concluded that none of the differences between *Farmer* and *Bistrian* were "meaningful" for purposes of the new context inquiry. *Id.* at 91. Instead, *Bistrian* held that *Farmer* "practically dictate[d]" its ruling that a *Bivens* remedy was available. *Id.*

Ms. Rios's case is even more factually and legally aligned with *Farmer* than *Bistrian*. It is similar in every way that matters. Far from presenting a new context, then, Ms. Rios's claim falls neatly within the *Bivens* remedy *Farmer* established a quarter-century ago.

C. *Farmer* remains good law, and this Court may not infer otherwise.

Farmer is directly on point. Even Ms. Rios's *pro se* opposition to defendants' motion to dismiss cited *Farmer* as the basis for her *Bivens* remedy. *See* A.49 (citing *Farmer* and *Carlson* as the authority for a *Bivens* claim in this context). Yet the district court, puzzlingly, did not once mention *Farmer*. Perhaps the district court believed that *Abbasi* silently overruled *Farmer*, by omitting it from the list of cases "in which the Court has approved of an implied damages remedy under the Constitution." *Abbasi*, 137 S. Ct. at 1854-55. If so, that was error. *Abbasi*'s silence on *Farmer* does not permit the district court—or this Court—to infer that *Abbasi* overruled *Farmer*'s approval of *Bivens* remedies for failure-to-protect claims.

As this Court reiterated just last month, "[v]ertical stare decisis is absolute." *United States v. Guillen*, 995 F.3d 1095, 1114 (10th Cir. 2021). It requires this Court "to follow applicable Supreme Court precedent in every case." *Id.* This is true both as to the result in a Supreme Court opinion and "'those portions of the opinion necessary to that result.'" *Id.* (quoting *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 67 (1996)). Similarly absolute is the tenet that the "prerogative of overruling"

Supreme Court decisions belongs to the Supreme Court, and the Supreme Court alone. *Rodriguez de Quijas v. Shearson/Am. Express*, 490 U.S. 477, 484 (1989). Thus, as the Supreme Court has repeatedly explained, if one of its precedents "has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, [lower courts] should follow the case which directly controls." *Id.* This Court recently reaffirmed this principle. *Little v. Budd Co.*, 955 F.3d 816, 824 (10th Cir. 2020) (to assume that the Supreme Court had, in later cases, implicitly overruled a prior directly controlling case would be to "undertake an analysis the Supreme Court has indicated is forbidden").

Here, these principles mean that neither the district court nor this Court may conclude that a later decision by the Supreme Court (*Abbasi*) "has, by implication, overruled an earlier precedent" (*Farmer*). *Agostini v. Felton*, 521 U.S. 203, 237 (1997) (cleaned up). As *Bistrian* recognized, *Farmer* "continues to be the case that most directly deals with whether a *Bivens* remedy is available for a failure-to-protect claim." *Bistrian*, 912 F.3d at 91. And because reading *Abbasi* to implicitly overrule *Farmer* would be verboten, *Bistrian* concluded that *Abbasi* did not affect *Farmer*'s viability. *Id.* (citing *Agostini*, 521 U.S. at 237). This is the only

permissible result. No matter *Abbasi*'s silence, as the Supreme Court precedent with "direct application" in this case, *Farmer* still controls.

And all of this is putting aside *Carlson*. Perhaps 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. *See Farmer*, 511 U.S. at 830 (citing *Bivens* and *Carlson* after recounting that Ms. Farmer had filed an Eighth Amendment *Bivens* claim). After all, both cases arose under the Eighth Amendment's Cruel and Unusual Punishments Clause and involved the same legal inquiry: were the defendants deliberately indifferent to the prisoner's substantial risk of serious harm? *See Farmer*, 511 U.S. at 835-47; *Carlson*, 446 U.S. at 16-17 & n.1. Moreover, it would be passing strange to assume that *Farmer* somehow did not approve of a *Bivens* remedy in this context, given that the Supreme Court remanded the case for potential further discovery and possible trial—an action compatible only with the existence of a *Bivens* claim. *See Farmer*, 511 U.S. at 848-49. If a *Bivens* remedy were *not* available to Dee Farmer, then there would be no live claim and thus no subject matter jurisdiction.

The shared legal inquiry between *Carlson* and *Farmer* may also explain *Abbasi*'s silence on *Farmer*. The Third Circuit in *Bistrian* surmised as much: "It may be that the Court simply viewed the failure-to-protect claim as not distinct from the Eighth Amendment deliberate indifference claim in the medical context." *Bistrian*, 912 F.3d at 91. And for those same reasons, although Ms. Rios's claim is most identical to *Farmer*, it is also not a "new context" because *Carlson* established the availability of *Bivens* for Eighth Amendment deliberate indifference claims against federal prison officials. *See Carlson*, 446 U.S. at 16-23.

Finally, to hold that *Bivens* is not available for failure-to-protect claims would require this Court to impermissibly overrule not only *Farmer*, but also this Court's own precedent. In *Benefield*, 241 F.3d at 1269-71, this Court relied on *Farmer* in allowing a failure-to-protect *Bivens* claim to proceed for a federal prisoner who alleged that a correctional officer labeled him a snitch and thus exposed him to a risk of harm at the hands of other prisoners. And because *Benefield* and *Farmer* are still good law, they remain binding on this Court. *See Agostini*, 521 U.S. at 237; *United States v. White*, 782 F.3d 1118, 1126-27 (10th Cir. 2015).

II. Even If Ms. Rios's Claim Presented a New *Bivens* Context, Special Factors Do Not Counsel Hesitation Against Recognizing a *Bivens* Remedy Here.

Even if Ms. Rios's claim presented a new *Bivens* context—and it does not—special factors do not counsel hesitation in recognizing the remedy here. Under the two-step *Abbasi* framework, if a claim presents a new *Bivens* context, the court then must ask whether "special factors counsel hesitation" in extending *Bivens* to that context. *See Abbasi*, 137 S. Ct. at 1857-58 (cleaned up). At this step of the inquiry, two factors are especially weighty: the existence of an alternative remedial structure, and separation-of-powers principles. *Id.*

The district court offered three special factors it viewed as counseling hesitation in extending *Bivens* to failure-to-protect claims. First, it surmised that Ms. Rios had three alternative remedial schemes available: (1) the BOP administrative remedies program; (2) mandamus; and (3) the FTCA. A.84-85. Second, it expressed concern that allowing a "superfluous way for prisoners to gain relief by suing prison employees" would "interfe[re] with prison management." A.85. Third, the court decried the potential effect on its docket, explaining it would "add to [its]

already heavy burden of prisoner litigation." A.85. None of these reasons withstand scrutiny.

A. There is no alternative remedial scheme capable of redressing Ms. Rios's harm.

The Supreme Court reaffirmed in *Abbasi* that if Congress has created an "alternative, existing process for protecting the injured party's interest," the existence of that alternative remedial scheme may "amount to a convincing reason" not to extend *Bivens*. *Abbasi*, 137 S. Ct. at 1858 (cleaned up). But Congress has not done so here. None of the three purported alternative remedial schemes put forward by the district court—BOP administrative remedies, mandamus, and the FTCA—can provide Ms. Rios any relief to redress her harm.

Consider first the type of harm Ms. Rios experienced. Ms. Rios suffered physical and psychological injuries as a result of "individual instances" of official misconduct, "which due to their very nature are difficult to address except by way of damages actions after the fact." *Abbasi*, 137 S. Ct. at 1862; *accord Bistrian*, 912 F.3d at 92. And damages are in fact the *only* type of remedy Ms. Rios may seek here. Ms. Rios did not request injunctive relief in her complaint, but even if she had, any such requests would now be moot by virtue of her transfer to a different

correctional facility. *See Jordan v. Sosa*, 654 F.3d 1012, 1027-28 (10th Cir. 2011) (facility-specific injunctive relief claims that name only facility-level employees as defendants—like Ms. Rios's claim here—become constitutionally moot if the plaintiff is transferred). So for Ms. Rios, as with Mr. Bivens and Mr. Bistrian, "it is damages or nothing." *Abbasi*, 137 S. Ct. at 1862; *Bistrian*, 912 F.3d at 92.

That rules out the BOP grievance process and mandamus as alternative remedial schemes for Ms. Rios. Mandamus, of course, is essentially a form of equitable relief. *See generally Simmat v. Bureau of Prisons*, 413 F.3d 1225, 1234-36 (10th Cir. 2005) (explaining history and context of mandamus actions, noting that "in many cases, [injunctions and mandamus] may be interchangeable"). And courts have held that money damages are unavailable through the BOP's administrative grievance process.[7] *See, e.g.*, *Bistrian*, 912 F.3d at 92 (rejecting BOP

[7] The BOP process also is not an alternative to *Bivens* because it is an executive-made administrative process—not a congressionally-enacted statutory scheme, as is required to displace *Bivens*. *See Abbasi*, 137 S. Ct. at 1858 (explaining that the question is whether "*Congress* has created" an alternative process (emphasis added)); *McCarthy v. Madigan*, 503 U.S. 140, 151 (1992), *superseded in part on other grounds by statute*, Prison Litigation Reform Act of 1995, 110 Stat. 1321-71 ("Congress did not create the remedial scheme at issue here [the BOP process]," and thus

process as an alternative remedial scheme due to unavailability of money damages); *Mack v. Yost*, 968 F.3d 311, 321 (3d Cir. 2020) (noting unavailability of money damages in BOP process); *Koprowski v. Baker*, 822 F.3d 248, 256-57 (6th Cir. 2016) (same).

The alleged FTCA alternative fares no better. Although the FTCA does allow for money damages, the proposition that it could serve as an alternative remedial scheme for Ms. Rios's claim suffers from two fatal defects. First, the Supreme Court made clear in *Carlson* that the FTCA is no substitute for prisoners' Eighth Amendment *Bivens* claims. *Carlson*, 446 U.S. at 19-20. The FTCA is "plainly [] not a sufficient protector of the citizens' constitutional rights." *Id.* at 23. And the Supreme Court has since reaffirmed that far from the FTCA being the exclusive remedy for constitutional violations, it is "'crystal clear' that Congress intended the FTCA and *Bivens* to serve as 'parallel' and 'complementary' sources of liability." *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 68 (2001). *Bistrian* reiterated this logic. 912 F.3d at 92 ("[T]he

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the BOP process is not the sort of "equally effective alternative remedy" that can be "a substitute for recovery under the Constitution").

prospect of relief under the FTCA is plainly not a special factor counseling hesitation in allowing a *Bivens* remedy.").

Second, constitutional tort claims—like Ms. Rios's Eighth Amendment claim—are not cognizable under the FTCA. *FDIC v. Meyer*, 510 U.S. 471, 477-78 (1994) ("[T]he United States simply has not rendered itself liable under [the FTCA] for constitutional tort claims."). Instead, the FTCA only allows claims sounding in state tort law—but neither defendants nor the district court pointed to any possible cause of action available to Ms. Rios under Colorado tort law. And, of course, Ms. Rios cannot sue these defendants under the FTCA, because the Westfall Act gives federal employees absolute immunity from tort claims arising out of their official duties. 28 U.S.C. § 2679(b)(2)(A).

In short, it is damages or nothing for Ms. Rios, so it is also *Bivens* or nothing.

B. Allowing a *Bivens* remedy here would not unduly interfere with prison management or besiege the federal courts.

The final two considerations offered by the district court for why it refused to recognize a *Bivens* remedy here are equal parts unwarranted and unpersuasive. First, the district court mused that applying *Bivens*

here would "interfe[re] with prison management." A.85. Second, the district court opined that extending *Bivens* would "add to the Court's already heavy burden of prisoner litigation." A.85.

As to the first concern, it is hard to parse what, specifically, troubled the district court. After all, "no legitimate penological objectiv[es]" are served by "gratuitously allowing the beating or rape of one prisoner by another." *Farmer*, 511 U.S. at 833-34. But to the extent the district court was concerned about the separation of powers between the judicial and executive branches, it need not have been. Allowing a *Bivens* remedy here would not intrude on the executive branch's ability to run prisons any more than the *Bivens* claims the Supreme Court approved decades ago in *Farmer* and *Carlson*. Indeed, *Carlson* explicitly rejected such concerns. *Carlson* first pointed out that federal prison officials "do not enjoy such independent status in our constitutional scheme as to suggest that [*Bivens*] remedies against them might be inappropriate." *Carlson*, 446 U.S at 19. And, *Carlson* added, the potent protection provided by qualified immunity "provides adequate protection" from any inhibition of "their efforts to perform their official duties." *Id.* *Bistrian* came to the same conclusion: "since failure-to-protect claims have been allowed for

many years, there is no good reason to fear that allowing Bistrian's claim will unduly affect the independence of the executive branch in setting and administering prison policies." 912 F.3d at 93. And on this front, Ms. Rios's claim bears no resemblance to the claims in *Abbasi*, which would have intruded on high-level anti-terrorism policies and required inquiry "into sensitive issues of national security"—an area in which the judiciary is especially deferential to the executive. *Abbasi*, 137 S. Ct. at 1861-62.

The district court's concern about a deluge of failure-to-protect claims, A.85, is similarly misplaced. These claims have been unquestionably available under 42 U.S.C. § 1983 to those incarcerated in state and local facilities—who make up around 90% of all incarcerated people in the United States[8]—since at least the Supreme Court decided *Farmer* in 1994.[9] And this Court has explicitly recognized such claims for federal prisoners for the last 20 years, since this Court's decision in

[8] *See* Wendy Sawyer and Peter Wagner, *Mass Incarceration: The Whole Pie 2020*, Prison Policy Initiative (Mar. 24, 2020), https://www.prisonpolicy.org/reports/pie2020.html.

[9] Some circuits allowed such claims even earlier. In the Third Circuit, for example, these claims have been available since 1973, nearly a half-century ago. *See Curtis v. Everette*, 489 F.2d 516, 518-19 (3d Cir. 1973).

Benefield. 241 F.3d at 1269-71. There is no evidence that federal courts have been flooded with failure-to-protect claims over the last quarter-century, and there is no good reason to believe that merely reaffirming the continued vitality of *Farmer* and *Benefield* will somehow invite a tidal wave of litigation. This is particularly true given the plethora of procedural and practical barriers to prisoner litigation, including qualified immunity, the Prison Litigation Reform Act's exhaustion requirement, lack of access to legal counsel or materials, and retaliation or threats of retaliation by correctional staff. *See generally* David Shapiro & Charles Hogle, *The Horror Chamber: Unqualified Impunity in Prison*, 93 Notre Dame L. Rev. 2021 (2018).

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In short, Ms. Rios's claim is functionally identical to the *Bivens* claim the Supreme Court approved in *Farmer*, and so does not present a new *Bivens* context. Even if it somehow did, special factors do not counsel against recognizing a *Bivens* remedy in this case.

CONCLUSION

For these reasons, this Court should reverse the district court's order dismissing Ms. Rios's Eighth Amendment claim and remand for further proceedings.

Dated: May 27, 2021

Respectfully submitted,

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STATEMENT REGARDING ORAL ARGUMENT

Ms. Rios respectfully requests oral argument because this case presents an important issue of first impression in this circuit: whether, following the Supreme Court's decision in *Ziglar v. Abbasi*, 137 S. Ct. 1843 (2017), failure-to-protect claims constitute a new *Bivens* context.

CERTIFICATES OF COMPLIANCE

I hereby certify that:

1. This brief complies with the type-volume limitations of Fed. R. App. P. 32(g)(1) because it contains 6,536 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in Century Schoolbook 14-point font.

Dated: May 27, 2021

/s/ Devi M. Rao
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Counsel for Plaintiff-Appellant

CERTIFICATE OF SERVICE

I certify that on May 27, 2021, I filed a true, correct, and complete copy of the foregoing Brief of Appellant with the Clerk of the Court for the United States Court of Appeals for the Tenth Circuit by using the appellate CM/ECF System.

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

Dated: May 27, 2021

/s/ Devi M. Rao
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10th CIR. R. 28.2(A) ATTACHMENT TO BRIEF