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

REPLY BRIEF OF PLAINTIFF-APPELLANT

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ORAL ARGUMENT REQUESTED

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INTRODUCTION

Perhaps celebrating the return of football, defendants try for a Hail Mary pass in this appeal. They ask this Court to ignore its usual rules and decide this case not on *Bivens*, but on qualified immunity. Nevermind that the district court didn't address the issue, or that district courts in this circuit are hopelessly split on the *Bivens* question, or that this case is an ideal vehicle for resolving this important and recurring issue. And deciding qualified immunity wouldn't actually get defendants anywhere, because Ms. Rios pled a straightforward violation of her clearly-established right to be protected from a substantial risk of sexual assault at the hands of other prisoners.

So whichever route this Court chooses—either declining to address qualified immunity in the first instance, or holding that Ms. Rios pled a violation of clearly-established law—it will have to answer the *Bivens* question squarely but wrongly decided by the lower court. This Court should hold that a *Bivens* remedy is still available for failure-to-protect claims, and decline the defendants' invitation to create a circuit split. It can do so in any of three ways. One, it can agree with the Third Circuit and decide that Ms. Rios's claim is not a new *Bivens* context because her

claim is identical to *Farmer*. Two, it can hold that this is not a new *Bivens* context because it does not meaningfully differ from *Carlson*, since both cases involve individual prison officials' deliberate indifference to a substantial risk of serious harm. Three, it can decide that even if this is a new context, no special factors counsel against allowing *Bivens* here; these claims don't imperil the separation of powers, Ms. Rios has no viable alternative remedies, and Congress has repeatedly legislated in a way that anticipates and even explicitly recognizes the availability of *Bivens*. This is the right case and right time for this Court to answer whether *Bivens* is still available for failure-to-protect claims, and the right answer to that question is yes.

ARGUMENT

I. As the Third Circuit Just Reaffirmed, Failure-To-Protect Claims Are Not a New *Bivens* Context.

A. Failure-to-protect claims are not a new *Bivens* remedy because of *Farmer*.

Defendants do not contest that Ms. Rios's case is strikingly similar to *Farmer v. Brennan*, 511 U.S. 825 (1994). *See* Answering Brief (AB) 17 ("To be sure, the claims in this case and *Farmer* are similar."). Nor could they. After all, as the opening brief recounts, Ms. Rios's claim tracks

Farmer on effectively every *Abbasi*[1] new-context criteria. *See* Opening Brief (OB) 14-19. Instead, defendants implore this Court to read *Abbasi*'s silence on *Farmer* to mean that *Farmer* did not actually approve a *Bivens* remedy. But as the opening brief explains, it would defy both precedent and common sense for the Supreme Court to have remanded *Farmer* for possible further discovery and potential trial if no *Bivens* remedy were available. OB 23. Defendants try to explain that away by noting that *Farmer* involved a claim for both damages and injunctive relief, theorizing that a live claim would still exist even if no *Bivens* remedy for damages existed. AB 27-29. But *Farmer* remanded for further advancement of both the injunctive relief claim *and* the damages claim; the opinion closed by addressing arguments specific to each. 511 U.S. at 850-51 (declining to pass on respondents' arguments "[w]ith respect to petitioner's damages claim," noting that respondents "are free to develop this line of argument on remand").

Defendants also ask this Court to speculate that *Farmer* simply silently assumed without deciding that a cause of action existed. AB 21-23. But the Supreme Court generally tells us when it assumes without

[1] *Ziglar v. Abbasi*, 137 S. Ct. 1843 (2017).

deciding that a cause of action exists, particularly with *Bivens* remedies. In *Wood v. Moss*, for example, the Supreme Court noted that the availability of *Bivens* is "an antecedent issue," and explicitly stated it would "assume[] without deciding" that a *Bivens* remedy was available for First Amendment free speech claims. 572 U.S. 744, 757 (2014); *id.* (noting history of doing so in other First Amendment *Bivens* cases). Same in the cases defendants cite. *See Ashcroft v. Iqbal*, 556 U.S. 662, 675 (2009) ("[W]e assume, without deciding, that respondent's First Amendment claim is actionable under *Bivens*."); *cf. Hartman v. Moore*, 547 U.S. 250, 257 n.5 (2006) ("[O]ur holding does not go beyond a definition of an element of the tort.").[2] This is consistent with the Court's normal practice. *See McDonough v. Smith*, 139 S. Ct. 2149, 2155 (2019)

[2] Defendants also argue that because the parties in *Farmer* did not focus on the availability of *Bivens* and it was not presented in the courts below, the Supreme Court *must* have silently assumed without deciding that *Bivens* was available. *See* AB 18. But the same was true in *Iqbal*, and the Court explicitly said it was assuming a remedy there. 556 U.S. at 676 (noting petitioners did "not press [the] argument" that *Bivens* was unavailable). And because the availability of *Bivens* is "antecedent' to the other questions presented," *Hernandez v. Mesa*, 137 S. Ct. 2003, 2006 (2017), courts can address the issue even when not presented below or briefed. *See, e.g.*, *Carlson v. Green*, 446 U.S. 14, 17 n.2 (1980) (addressing issue even though not presented below); *Bistrian*, 912 F.3d at 88-91 nn.17-18 (deciding availability of three *Bivens* claims, even though not presented below and only partially challenged on appeal).

("assum[ing] without deciding" that due process fabricated-evidence cause of action existed); *Dist. Attorney's Off. for Third Jud. Dist. v. Osborne*, 557 U.S. 52, 71-72 (2009); *Burke v. Lasker*, 441 U.S. 471, 475-76 (1979). If *Farmer* were merely assuming without deciding that a *Bivens* remedy were available, it would've said so.

Defendants acknowledge, as they must, that the Third Circuit has held precisely the opposite of what defendants urge. *See* AB 30-31 (citing *Bistrian v. Levi*, 912 F.3d 79 (3d Cir. 2018)). In a scant paragraph, defendants assert that *Bistrian* was wrongly decided, and that the real reason *Bistrian* came out the way it did is because some of the defendants did not properly contest the issue.[3] AB 31. But their primary rejoinder to *Bistrian* is to speculate, based on dicta in an unpublished opinion, that it may soon be overturned. AB 31-32 (citing *Mammana v. Barben*, 856 F. App'x 411 (3d. Cir. 2021)).

Reports of *Bistrian*'s demise, however, have been greatly exaggerated. Indeed, the Third Circuit just reaffirmed *Bistrian* in a

[3] This argument is also unpersuasive because *Bistrian* addressed the availability of *Bivens* for all three claims anyway. *Supra* n.2. And it's simply false that "the defendants in *Bistrian* never challenged" whether failure-to-protect claims were a new *Bivens* context, AB 31—as *Bistrian* noted, two defendants did so. 912 F.3d at 90 n.17.

published opinion. *See Shorter v. United States,* No. 20-2554, __ F.4th __, 2021 WL 3891552, at *3-4 & nn.4-5 (3d Cir. Sept. 1, 2021). The facts of *Shorter* may sound familiar: there, a transgender woman incarcerated in a men's federal prison was raped by a fellow prisoner after repeatedly warning prison officials she feared being attacked. *Id.* at *1.

In *Shorter*, as in *Bistrian* and this case, the government contended that failure-to-protect claims were a new *Bivens* context because *Farmer* did not explicitly address the issue and was not among the three *Bivens* cases mentioned by the Supreme Court in *Abbasi* and *Hernandez*. *Id.* at *4. The Third Circuit again rejected this argument; these claims "fall[] comfortably within one of the few contexts in which the Supreme Court has recognized a *Bivens* remedy." *Id.* at *1. *Shorter* reaffirmed *Bistrian*'s reading of *Farmer*, explaining that "*Farmer* made clear, in circumstances virtually indistinguishable from our case, that an Eighth Amendment *Bivens* remedy is available to a transgender prisoner who has been assaulted by a fellow inmate," even though *Farmer* did not "explicitly state that it was recognizing a *Bivens* claim." *Id.* at *3 n.4, *4. *Shorter* also reiterated what *Bistrian* said about *Farmer*'s absence from the *Bivens* cases named in *Abbasi* (and, post-*Bistrian*, in *Hernandez*): the

Supreme Court simply "neglected to name *Farmer* because it saw that case as falling under the umbrella of *Carlson*." *Id.* at *4 n.5.[4] *Shorter* thus leaves no doubt about the continued vitality of *Bistrian*—or about the circuit split that would ensue if this Court affirms the district court here.

Defendants also rely heavily on *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990). *See* AB 21-22. But *Verdugo* hardly addressed this "exact question," AB 21. Recall that in *Farmer*, the case could only proceed to trial on the damages claim *if* she had a valid *Bivens* remedy. *See supra* 3; OB 23. That is, if a *Bivens* claim were *not* available, the Supreme Court could not have remanded it for trial. *Id.* The availability of *Bivens* was thus part and parcel of the outcome in *Farmer*, so this Court can and must read *Farmer* as approving the remedy. By contrast, in *Verdugo*, the Ninth Circuit relied on an assumed antecedent proposition that the Fourth Amendment extended to undocumented immigrants based on its reading of *I.N.S. v. Lopez-Mendoza*, 468 U.S. 1032 (1984). *See United States v. Verdugo-Urquidez*, 856 F.2d 1214,

[4] The Fourth Circuit, too, has acknowledged that *Farmer* may be an established *Bivens* context despite not being mentioned by *Abbasi*. *Attkisson v. Holder*, 925 F.3d 606, 621 n.6 (4th Cir. 2019).

1223-24 (9th Cir. 1988). But the Supreme Court's holding in *Lopez-Mendoza* was only that the exclusionary rule did not apply to civil deportation proceedings, which does not necessitate an antecedent holding about whether the Fourth Amendment applies to undocumented immigrants. *Verdugo* is thus not instructive here.

Finally, defendants effectively ask this Court to decide that *Farmer*'s countenance of a failure-to-protect *Bivens* claim was nothing more than dicta. That's wrong, but in any case, "[t]his Court considers itself bound by Supreme Court dicta almost as firmly as by the Court's outright holdings." *Gaylor v. United States*, 74 F.3d 214, 217 (10th Cir. 1996). Only the Supreme Court has the power to potentially declare this aspect of *Farmer* nonbinding dicta; this Court does "not second-guess" the Supreme Court. *United States v. Nixon*, 919 F.3d 1265, 1273 (10th Cir. 2019); *see also Navajo Nation v. Dalley*, 896 F.3d 1196, 1208 n.6 (10th Cir. 2018) (arguing that the Supreme Court did not "directly assess" an issue does not "move the ball," because this Court is bound to follow the Supreme Court "even if dicta").

B. Ms. Rios's claim is also not a new context because it does not meaningfully differ from *Carlson*.

Ms. Rios's claim also falls within an established *Bivens* context because it does not meaningfully differ from *Carlson*. *See* OB 23-24; Institute for Justice (IJ) Amicus 13-19. Defendants fail to meaningfully grapple with *Carlson*, impermissibly focusing on "trivial" differences rather than "meaningful" ones. *See Abbasi*, 137 S. Ct. at 1865.

Start with the "constitutional right at issue." *Id*. at 1860. This case and *Carlson* both involve an Eighth Amendment claim that facility-level prison officials were deliberately indifferent to a substantial risk of serious harm. But defendants attempt to transform this into an inquiry about the precise type of "*misconduct* at issue." AB 34 (emphasis added). That's not what the Supreme Court has instructed. *See Abbasi*, 137 S. Ct. at 1860 ("*constitutional right* at issue") (emphasis added).

Ms. Rios does agree that the constitutional *amendment* alone is not dispositive. *See* AB 33-34. After all, markedly different rights (with accompanying markedly different legal standards) can be housed within the same amendment. *Compare Davis v. Passman*, 442 U.S. 228, 230-31 (1979) (Fifth Amendment equal protection claim for sex-based discriminatory termination of congressional staffer), *with Hernandez v.*

Mesa, 140 S. Ct. 735, 739-41 (2020) (Fifth Amendment due process claim for cross-border shooting of Mexican citizen by federal agent), *and Bistrian*, 912 F.3d at 94 (Fifth Amendment claim for "punitive detention"). No wonder those Fifth Amendment claims were found to be different contexts from *Davis*: their similarity began and ended with the constitutional amendment involved. Here, by contrast, *Carlson* doesn't just share the constitutional amendment—the constitutional right and legal standard are the same, too. *See* OB 23; IJ Amicus 16-18; *Bistrian*, 912 F.3d at 91.

Nor does "the extent of judicial guidance" create a meaningful difference between this case and *Carlson*. *Abbasi*, 137 S. Ct. at 1860. Failure-to-protect caselaw abounds; courts have been deciding these claims under § 1983 and *Bivens* for decades now. OB 31; *see Howard v. Waide*, 534 F.3d 1227, 1242 (10th Cir. 2008) ("The Supreme Court and the Tenth Circuit have repeatedly and unequivocally established an inmate's Eighth Amendment right to be protected from substantial risks of sexual assault by fellow prisoners.").

The final purported difference defendants cite is the "special factor" of congressional action: that, in the years following *Carlson*, Congress

passed the Prison Litigation Reform Act (PLRA) and the Prison Rape Elimination Act (PREA), and then amended PREA through the Violence Against Women Reauthorization Act (VAWA). AB 35. But as Part II(B) details, this does not counsel hesitation; if anything, it indicates congressional acquiescence to *Bivens*.

As *amici* explain, to accept these "trivial distinction[s] as material enough to create a new *Bivens* context would limit *Carlson* to its precise facts." IJ Amicus 18. That is not what the Supreme Court has decreed. Instead, the critical question continues to be whether the claim differs in a *meaningful* way from prior *Bivens* cases. Here, the answer to that question is no.

II. Even If Ms. Rios's Claim Presented a New *Bivens* Context, Special Factors Would Not Counsel Against Extension of the Remedy.

The core guarantee of *Bivens* is that where redress for a constitutional violation by a federal officer is "damages or nothing," federal courts are empowered to grant monetary relief even in the absence of a legislatively-enacted remedy. *See Davis*, 442 U.S. at 242, 245. The exception to this rule is where there are "special factors counselling hesitation in the absence of affirmative action by Congress."

Abbasi, 137 S. Ct. at 1856-57. But defendants—much like the district court—"appear to confuse the presence of *special* factors with *any* factors counseling hesitation." *McCarthy v. Madigan*, 503 U.S. 140, 151 (1992), *superseded in part on other grounds by statute*.

A. As a matter of binding precedent, originalism, and common sense, allowing a remedy here does not impermissibly interfere with the separation of powers.

The "central" focus of the special factors analysis is the separation of powers. *Hernandez*, 140 S. Ct. at 743. It is not enough to say that allowing a *Bivens* remedy for a particular claim might have *any* impact on the other two branches of government. *See Carlson v. Green*, 446 U.S. 14, 19 (1980). Instead, this question concerns itself only with "*disruptive* intrusion by the Judiciary into the functioning of other branches," most significantly in areas that are "the prerogative of the Congress and President." *Abbasi*, 137 S. Ct. at 1860-61 (emphasis added).

Defendants attempt to place prison administration on level footing with the military and national security operations, two spheres where courts have been reluctant to allow *Bivens* remedies. *See* AB 52. Hardly. Indeed, *Carlson* squarely rejected the argument that interference with prison operations was a "special factor." 446 U.S. at 19. Prison officials

"do not enjoy such independent status in our constitutional scheme as to suggest that judicially created remedies against them might be inappropriate." *Id.* And even if allowing a *Bivens* remedy "might inhibit their efforts to perform their official duties," qualified immunity "provides adequate protection." *Id.* Unable to overcome this controlling precedent, defendants simply ignore it.

Any minimal interference with prison operations from allowing a *Bivens* remedy here would look nothing like the major interference with sensitive areas of legislative and executive policy in cases where the Court has rejected the availability of *Bivens*. *See* OB 31; *Abbasi*, 137 S. Ct. at 1861-62 ("large-scale policy decisions" involving "sensitive issues of national security"); *Hernandez*, 140 S. Ct. at 744-46 (foreign relations and national security); *Chappell v. Wallace*, 462 U.S. 296, 303-04 (1983) (military). At most, these claims might impact individual low-ranking officials' own decisions as to "standard [prison] operations," *Abbasi*, 137 S. Ct. at 1861; *cf. Lanuza v. Love*, 899 F.3d 1019, 1029 (9th Cir. 2018) (because suit against low-level ICE attorney sought to hold him accountable only for his own actions, extending a *Bivens* remedy would not unduly interfere with other branches). This is not the sort of

"disruptive intrusion" required to counsel hesitation. *See Carlson*, 446 U.S. at 19. *Amici* confirm this. *See* Former Corrections Officials Amicus 13 (allowing failure-to-protect *Bivens* claims will "not interfere with the proper use of [officials'] discretion" and "will only require officials to conform to their clearly stated job responsibilities").

Lost in defendants' separation-of-powers analysis is the Framers' belief in the importance of judicial remedies as an "impenetrable bulwark against every assumption of power in the Legislative or Executive." James Madison, 1 Annals of Cong. 439 (1789). Courts, Madison explained, were to be "the guardians" of the rights found in the Bill of Rights; they would be "naturally led to resist every encroachment upon rights expressly stipulated for in the Constitution." *Id.* Safeguarding the separation of powers does not and should not mean that the judiciary continually and needlessly cedes authority away from itself and to the political branches, until constitutional rights are "merely precatory." *Davis*, 442 U.S. at 242. It should instead mean that the judiciary serves as a bulwark against "the most flagrant abuses of official power." *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 410 (1971) (Harlan, J., concurring). That is what the Founders both

desired and expected. *See* 1 Annals of Cong. 439; IJ Amicus 5-8. The one-way usurpation of power and concomitant extinguishing of accountability urged by defendants is not.

B. Congressional enactments over the last several decades do not counsel hesitation; to the contrary, Congress has explicitly recognized *Bivens* claims.

According to defendants, three pieces of federal legislation passed over the last several decades—PREA, VAWA, and the PLRA—counsel hesitation here. *See* AB 48-50. This argument does not carry water.

Westfall Act. As an initial matter, defendants conspicuously omit a more significant congressional enactment: the Westfall Act. Passed in 1988, the Westfall Act made the FTCA the exclusive remedy for redressing torts committed by federal employees, with one key exception: *constitutional* tort claims. 28 U.S.C. § 2679(b). The Act thus "explicit[ly]" recognizes *Bivens* claims. *Hui v. Castaneda*, 559 U.S. 799, 807 (2010).

Indeed, a contemporaneous House Report explained that because *Bivens* "constitutional tort" claims involve "a more serious intrusion of the rights of an individual" than common law torts, they "merit[] special attention." H.R. Rep. No. 100-700, at 6 (1988). Congress therefore excluded such claims from the exclusive-remedy provision that otherwise

funnels federal tort claims into the FTCA regime, so as not to "affect the ability of victims of constitutional torts to seek personal redress from Federal employees who allegedly violate their Constitutional rights." *Id.*

PREA. PREA does not indicate that Congress wished to displace *Bivens* remedies in this space. For one, PREA cited *Farmer* with approval in its preamble—hardly a sign that Congress intended to eradicate such claims against federal officers. 34 U.S.C. § 30301(13); *see also Shorter*, 2021 WL 3891552, at *4 n.7 (citing PREA's inclusion of *Farmer* in rejecting government's argument that PREA carries significance in the *Bivens*-availability analysis). For another, PREA's implementing regulations reveal DOJ's expectation that *Bivens* actions would be available against federal officials for sexual abuse-related claims. *See* 77 Fed. Reg. 37106, 37159 n.35 (June 20, 2012) (mentioning *Bivens* actions in discussing statutes of limitation for prison sexual-abuse claims).

VAWA. Defendants point to VAWA's amendment of PREA in 2013 as evidence of continued congressional silence—and therefore congressional disapproval—as to *Bivens*. AB 49-50. In particular, defendants note that Congress "made emotional distress damages

available for victims of sexual acts in prison." *Id.* at 50. But as it turns out, this supports Ms. Rios, not defendants. One of the provisions VAWA amended was 28 U.S.C. § 1346(b)(2), which bars prisoners from filing a civil suit "against the United States *or an* agency*, officer, or employee of the Government*, for mental or emotional injury suffered while in custody without a prior showing of physical injury *or the commission of a sexual act*." (emphasis added).

Why is that significant? First, recall that the only way for prisoners to sue *individual* federal employees "for mental or emotional injury" is via *Bivens*, because the Westfall Act foreclosed common law tort claims against federal officers. 28 U.S.C. § 2679(b); OB 29. So when 28 U.S.C. § 1346(b)(2) talks about civil suits brought against "officer[s] or employee[s] of the Government" for "mental or emotional injury," the statute can *only* be referring to *Bivens* claims. Second, the statute only permits such claims if they involve "a prior showing of physical injury" or "the commission of a sexual act." *Id.* Prisoner claims involving "the commission of a sexual act" involve either deliberate-indifference failure-to-protect claims, like Ms. Rios's, or claims that a prison official themselves sexually assaulted a prisoner. Put the two together, and it

becomes apparent that this statute was amended with the availability of *Bivens* for such claims in mind.

PLRA. Defendants, selectively quoting from *Abbasi*, argue that the PLRA's silence on *Bivens* amounts to a special factor. AB 50. In reality, *Abbasi* used uncertain, tentative language in discussing the issue: "It *could be argued* that [the PLRA's silence] *suggests* Congress chose not to extend the *Carlson* damages remedy." *Abbasi*, 137 S. Ct. at 1865 (emphasis added). Then again, as the Third Circuit observed, "[i]t is equally, if not more, likely" that "Congress simply wanted to reduce the volume of prisoner suits by imposing exhaustion requirements," and did not intend "to eliminate whole categories of claims through silence and implication." *Bistrian*, 912 F.3d at 93 n.22; *see also Louisiana Health Serv. & Indem. Co. v. Rapides Healthcare Sys.*, 461 F.3d 529, 537 (5th Cir. 2006) ("As is often the case, congressional silence whispers sweet nothings in the ears of both parties."). And the PLRA's text, as interpreted by the Supreme Court, recognizes the availability of *Bivens*. It applies to actions brought under § 1983 "or any other Federal law," 42 U.S.C. § 1997e(a)—a phrase the Supreme Court has held to mean *Bivens*. *Porter v. Nussle*, 534 U.S. 516, 524 (2002) (because of PLRA's "or any

other Federal law" phrase, "federal prisoners suing under *Bivens* [] must first exhaust inmate grievance procedures").

C. Defendants' reliance on convenience and judicial workload is unsupported and unsound.

Without belaboring the points made in the opening brief or by *amici*, *see* OB 31-32; IJ Amicus 32-33, defendants' reliance on judicial inconvenience is unpersuasive. Indeed, the Supreme Court already rejected this argument: "current limitations upon the effective functioning of the courts arising from budgetary inadequacies should not be permitted to stand in the way of the recognition of otherwise sound constitutional principles." *Davis*, 442 U.S. at 248 (citation omitted). And these claims have already been available to prisoners for decades, with no evidence to support the idea that failure-to-protect claims are particularly voluminous or frivolous. *See* OB 31-32.

D. Ms. Rios has no alternative remedies, because damages are the only means of remedying her harm.

Defendants contend that Ms. Rios had several available alternative remedies: injunctive relief, habeas, BOP's administrative remedies program, and the FTCA. *See* AB 40-47. None of these indicate that the availability of *Bivens* should be foreclosed.

As a threshold matter, defendants contend that *Abbasi* overruled *Carlson*'s explicit alternative-remedy holdings. AB 45. But *Abbasi* never proclaimed to do anything of the sort. Inferring this kind of implicit overruling would run afoul of a bedrock principle of *stare decisis*: that the Supreme Court "does not normally overturn, or so dramatically limit, earlier authority *sub silentio*." *Shalala v. Ill. Council on Long Term Care, Inc.*, 529 U.S. 1, 18 (2000). This Court should—and indeed must—decline the invitation to read *Abbasi* this way. *See Agostini v. Felton*, 521 U.S. 203, 237 (1997) (lower courts are not permitted to conclude that a more recent Supreme Court case "ha[s], by implication, overruled an earlier precedent").[5]

A related threshold question has to do with how effective an alternative remedy must be to displace *Bivens*. Defendants contend that the answer is not effective at all—that even *nonexistent* remedies might suffice. AB 45 n.6. This Court should not countenance such absurdity, which would entirely foreclose new *Bivens* remedies. To be sure,

[5] This is also why defendants' principal alternative-remedy authority—*Farah v. Weyker*, 926 F.3d 492, 502 (8th Cir. 2019)—is wrongly decided; the Eighth Circuit was not empowered to hold that *Abbasi* overruled prior Supreme Court precedent on alternative remedies.

alternative remedies need not be "perfectly congruent." *Minneci v. Pollard*, 565 U.S. 118, 129 (2012). But they must provide both "roughly similar compensation to victims," and "roughly similar incentives for potential defendants to comply with the Eighth Amendment." *Id.* at 130.

Take first the FTCA. As the opening brief explains, the Supreme Court has already rejected this as a viable *Bivens* alternative—period. OB 28-29. As for the BOP's administrative remedy program, it does not pass the *Minneci* test for the reasons explained in the opening brief and by *amici*. OB 26-28; IJ Amicus 29-30. Again, for Ms. Rios, it is "damages or nothing." OB 26-28. But because courts have held that money damages are unavailable under the BOP's program, *id.*, it fails to provide "roughly similar compensation" to Ms. Rios, *Minneci*, 565 U.S. at 130.

So too with the potential for habeas or injunctive relief claims. Indeed, despite defendants' arguments to the contrary, AB 40-41, *Abbasi* took pains to emphasize that injunctive relief claims and habeas petitions were only potential alternatives in that case because the plaintiffs did *not* "challenge individual instances" of misconduct, "which due to their very nature are difficult to address except by way of damages actions after the fact." 137 S. Ct. at 1862. That's what this case is about. *See*

OB 26-27. By contrast, habeas or injunctive relief claims *could* potentially address "large-scale policy decisions concerning the conditions of confinement imposed on hundreds of prisoners." That's what *Abbasi* was about.[6] 137 S. Ct. at 1862. In any event, injunctive relief fails to provide the requisite "roughly similar" deterrent effect, *see Minneci*, 565 U.S. at 126-27, and habeas is unavailable for deliberate-indifference claims, *Standifier v. Ledezma*, 653 F.3d 1276, 1280 (10th Cir. 2011) ("It is well-settled law that prisoners who wish to challenge only the conditions of their confinement, as opposed to its fact or duration, must do so through civil rights lawsuits . . . not through federal habeas proceedings.").

III. Defendants Are Not Entitled to Qualified Immunity.

A. This Court need not address the qualified immunity question.

Defendants boldly urge this Court to avoid addressing the important and unsettled question of law squarely before it. AB 54-55. Instead, defendants say, this Court should decide the case on qualified

[6] Unsurprisingly, defendants cite no authority for the harsh and unworkable proposition they advocate—that a pro se prisoner must have both known she had a ripe constitutional claim *and* sought equitable relief *before* being raped, or else she has permanently lost the ability to redress her harm.

immunity grounds, even though the district court did not pass on it, and even though doing so would run against this Court's typical practice on several fronts, and even though district courts in this circuit are split on the *Bivens* question and require this Court's guidance. This Court should decline defendants' invitation.

1. The "prudent and appropriate" course of action is to stick to this Court's general rule of declining to address issues not passed on below.

First, deciding this case on an issue not addressed by the district court runs against this Court's longstanding "general rule" that it "do[es] not consider issues not passed on below" and that the "appropriate" step is "to remand the case to the district court to address an issue first." *See, e.g.*, *N. Texas Prod. Credit Ass'n v. McCurtain Cty. Nat. Bank*, 222 F.3d 800, 812 (10th Cir. 2000); *In re R. Eric Peterson Const. Co., Inc.*, 951 F.2d 1175, 1182 (10th Cir. 1991).

This Court hews especially closely to this rule where the unaddressed issue is qualified immunity. "If a defendant adequately raises qualified immunity and the district court declines to rule on the defense, then we typically remand and direct the district court to decide." *Tillmon v. Douglas Cty.*, 817 F. App'x 586, 589 (10th Cir. 2020) (citing

Workman v. Jordan, 958 F.2d 332, 335-36 (10th Cir. 1992)); *see also, e.g.*, *Lowe v. Town of Fairland,* 143 F.3d 1378, 1381 (10th Cir. 1998) ("declin[ing] to decide the issue of qualified immunity" because district court failed to address it); *Stanley v. Gallegos*, 852 F.3d 1210, 1219 (10th Cir. 2017) (same). In fact, even if a district court *does* decide qualified immunity, this Court will still remand the issue rather than decide it in the first instance if the district court fails to articulate its reasoning. *See Quinn v. Young*, 780 F.3d 998, 1017 (10th Cir. 2015) (remanding under those circumstances is both "prudent and appropriate").

Defendants do not acknowledge this Court's normal rule, offering only a vague argument about "constitutional avoidance" in support of their aggressive ask. AB 55. But the one case cited by defendants does precisely the *opposite* of what defendants urge: faced with a district court decision that addressed the first qualified immunity question (constitutional violation) but left the second (clearly-established law) unanswered, this Court remanded to the district court to decide the second prong of qualified immunity in the first instance. AB 55 (citing *Kerns v. Bader*, 663 F.3d 1173, 1181-82 (10th Cir. 2011)).

Ironically enough, *Kerns* perfectly summarizes why this Court should *not* address the qualified immunity issue here. As *Kerns* explained, if it addressed the clearly-established question in the first instance, it risked "confronting difficult constitutional questions without the benefit of a full analysis from the district court" and creating "an improvident governing appellate decision from this court." *Kerns*, 663 F.3d at 1182. Remand had "the advantage of allowing the adversarial process to work through the problem and culminate in a considered district court decision." *Id.* *Kerns*' reasoning applies with equal force here. The "prudent" course of action, then, is to stick to this Court's usual rule of not addressing issues—especially qualified immunity—left unanswered by the district court.

2. There is a clear need for guidance from this Court on the *Bivens* question, and this case is an ideal vehicle for doing so.

Another sound reason for this Court to decide the case on *Bivens* instead of qualified immunity is the clear need for guidance in the district courts of this circuit, which are split on the *Bivens* question. Some, like the district court here, hold that failure-to-protect claims are a new context and refuse to extend the remedy. *See* A.82-86; *Ajaj v. United*

States, No. 15-CV-02849-RM-KLM, 2020 WL 747013, at *13 (D. Colo. Feb. 13, 2020), *report and recommendation adopted in relevant part*, 2020 WL 5758521 (D. Colo. Sept. 28, 2020) (failure-to-protect claim is new context and special factors counsel against extension of remedy). Others conclude that these claims are not a new *Bivens* context. *See, e.g.*, *Shaw v. Humphries*, No. 120CV00327RBJKMT, 2021 WL 4149626, at *5 (D. Colo. Sept. 13, 2021); *Peraza v. Martinez*, No. 14-CV-03056-MJW, 2017 WL 11486456, at *4 (D. Colo. Nov. 29, 2017). Still others hold that they *are* new, but that it's permissible to extend the remedy. *Cuevas v. United States*, No. 16-CV-00299-MSK-KMT, 2018 WL 1399910, at *4 (D. Colo. Mar. 19, 2018). This Court need not and should not let chaos reign any longer.

This is also an ideal vehicle for deciding the question. Unlike most prisoner cases, Ms. Rios is represented by counsel. This Court also has the benefit of a diverse group of *amici* here. The issue is fully preserved and was thoroughly addressed by the district court. And unlike many similar cases, the district court dismissed this case on a 12(b)(6) motion rather than at screening under 28 U.S.C. § 1915A, so there was full adversarial briefing below and on appeal. These cases will continue to

arise with unfortunate frequency, but very few will present such an optimal set of circumstances. This Court should not pass up this opportunity for addressing this important, recurring, and unsettled issue.

B. Defendants are not entitled to qualified immunity in any event.

1. Ms. Rios pled a straightforward Eighth Amendment failure-to-protect claim.

Prison officials violate the Eighth Amendment when they are deliberately indifferent to a prisoner's substantial risk of serious harm, including harm inflicted by other prisoners. *Farmer*, 511 U.S. at 828, 833. These claims have both an objective and subjective component. *Id.* at 834. The objective component asks whether Ms. Rios was "incarcerated under conditions posing a substantial risk of serious harm." *Id.* Defendants do not contest the objective prong in their briefing on appeal, nor did they below. Appellees' A.15. Nor could they have reasonably done so, because "deprivations resulting from sexual assault are sufficiently serious." *Gonzales v. Martinez*, 403 F.3d 1179, 1186 (10th Cir. 2005) (cleaned up).

Ms. Rios also adequately pled the subjective prong of her deliberate-indifference claim. *See Farmer*, 511 U.S. at 837 (plaintiff must

allege defendants were "aware of facts from which the inference could be drawn that a substantial risk of serious harm existed" and "drew the inference") (cleaned up). Most significantly, Ms. Rios personally informed defendants during the interview that (1) she had endured repeated forced sex acts under threat of severe harm or death, as well as multiple physical assaults; and (2) she wanted to remain in the SHU, because she feared further and even more severe assaults if she were returned to the general population. OB 3-5; *see also, e.g.*, A.18 (pattern of sexual assaults was "known, realized, and documented"); A.19 (defendants were "properly notified"); A.22 (defendants "nefariously disregard[ed]" the risk to Ms. Rios). Ms. Rios also told defendants that she is transgender. A.12-13. As *Farmer*, its progeny, and *amici* here have explained, it is well-known that transgender prisoners are especially vulnerable to assaults by other prisoners. *See Farmer*, 511 U.S. at 831; Former Corrections Officials Amicus 4-11; Lambda Legal Amicus 13-17.

Despite Ms. Rios alleging direct knowledge, defendants argue that her complaint fails to use the right magic words, impermissibly sprinkles in some negligence-esque words, and is too conclusory. AB 59-61. That

is, Defendants ask this Court to do the *opposite* of what it must do when reviewing pro se complaints. If this Court "can reasonably read the pleadings to state a valid claim on which the plaintiff could prevail," it "should do so despite the plaintiff's confusion of various legal theories, her poor syntax and sentence construction, or her unfamiliarity with pleading requirements." *Diversey v. Schmidly*, 738 F.3d 1196, 1199 (10th Cir. 2013) (cleaned up). At any rate, Ms. Rios could clear up any potentially confusing language in an amended complaint on remand.

Defendants' arguments are plainly not persuasive in light of the generous leeway granted to pro se complaints. *See Diversey*, 738 F.3d at 1199. This is all the more true given the "more challenging standard" defendants signed themselves up for by seeking qualified immunity at this early stage. *Truman v. Orem City*, 1 F.4th 1227, 1235 (10th Cir. 2021).

2. The law was clearly established.

This Court has not minced words when it comes to the clearly established inquiry for failure-to-protect claims: "The Supreme Court and the Tenth Circuit have repeatedly and unequivocally established an inmate's Eighth Amendment right to be protected from substantial risks

of sexual assault by fellow prisoners." *Howard*, 534 F.3d at 1242. Defendants grasp at straws in their attempt to get around this longstanding clearly established right. First, they contend that because they're investigative technicians, rather than guards or wardens, the right was not clearly established because the "constitutional calculus" is different. AB 63. But that argument fails under *Farmer* and its progeny, which have applied the exact same deliberate-indifference standard to all levels of prison staff.[7] *See, e.g.*, *Farmer*, 511 U.S. at 830-31, 847 (setting single constitutional standard even though defendants ranged from facility-level case manager all the way up to BOP director). Defendants thus cannot seriously argue that, under the facts alleged, the law did not clearly put them on notice.

Second, defendants argue, in effect, that qualified immunity is available because they "did their job," even if they did it poorly, since prison officials who act "reasonably" are not liable under the Eighth Amendment. *See* AB 64-66. That's both factually and legally wrong.

[7] Of course, the higher-ranking the official, the more challenging it may be to demonstrate actual knowledge. But that is not at issue here.

As a factual matter, defendants' claim that "[t]here is no dispute that the Appellees did their job," AB 64, could not be more wrong. A central focus of Ms. Rios's complaint is that defendants "deliberately failed" to do their job. A.23. She alleged defendants were "intentional, . . . malicious, and willful" in "purposefully failing to conduct an appropriate . . . requisite, and necessary investigation," A.14, and that they engaged in a "concerted . . . cover-up," A.22. In other words, Ms. Rios alleged that defendants very much did *not* do their job, and that their failures were willful and malicious, not merely negligent. And defendants are stuck with the "more challenging standard of review," which requires this Court to "analyze the defendant's conduct *as alleged in the complaint*." *Truman*, 1 F.4th at 1235 (cleaned up).

As a legal matter, contrary to defendants' portrayal, this Court has repeatedly found deliberate indifference satisfied even where a defendant has undertaken some degree of investigation. In *Gonzales*, for example, a former female prisoner sued a county sheriff for deliberate indifference to the substantial risk of sexual and physical harm inflicted by facility staff at his jail. 403 F.3d at 1181-83. The sheriff had interviewed several complaining women and had appointed one of his sergeants to investigate

further. *Id.* at 1181-84. This Court certainly did not indicate that merely doing *some* investigation sufficed to entitle the sheriff to qualified immunity; it reversed the grant of summary judgment and sent the claims to a jury. *Id.* at 1188. Likewise, in *Howard*, the defendants interviewed the plaintiff, attempted some investigation, and held meetings to discuss the plaintiff's security situation. 534 F.3d at 1241. *Howard* did not say that this somehow took things out of clearly-established territory; quite the contrary. *See id.* at 1242 (emphatically holding that the right was clearly established). Moreover, whether defendants acted reasonably is a "fact-intensive question." *Shorter,* 2021 WL 3891552, at *6. That defendants attempt to hang their hat on such a fact-bound question further highlights why this Court should decline to address qualified immunity in the first instance here.

CONCLUSION

This Court should reverse and remand for further proceedings.

Dated: September 29, 2021

Respectfully submitted,

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CERTIFICATES OF COMPLIANCE

I hereby certify that:

1. This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7) because it contains 6,484 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: September 29, 2021

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CERTIFICATE OF DIGITAL SUBMISSION

Pursuant to this Court's guidelines on the use of the CM/ECF system, I hereby certify that:

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Dated: September 29, 2021

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CERTIFICATE OF SERVICE

I certify that on September 29, 2021, I filed a true, correct, and complete copy of the foregoing Reply 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 the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

Dated: September 29, 2021

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