No. 21-6109

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

RAYMOND TATE

Plaintiff-Appellant,

v.

D.J. HARMON, et al.

Defendants-Appelees,

On Appeal from the United States District Court
for the Western District of Virginia
Case No. 7:19-cv-00609-NKM-JCH
Honorable Norman K. Moon

BRIEF AMICI CURIAE OF THE RODERICK AND SOLANGE MACARTHUR JUSTICE CENTER AND RIGHTS BEHIND BARS IN SUPPORT OF PLAINTIFF-APPELLANT

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INTEREST OF AMICI CURIAE[1]

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

Rights Behind Bars (RBB) legally advocates for people in prison to live in humane conditions and contributes to a legal ecosystem in which such advocacy is more effective. RBB seeks to create a world in which people in prison do not face large structural obstacles to effectively advocating for themselves in the courts. RBB helps incarcerated people advocate for their own interests more effectively and through such advocacy push towards a world in which people in prison are treated humanely.

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

SUMMARY OF ARGUMENT

Before the Court is Raymond Tate's appeal of the district court's dismissal of his Eighth Amendment claims against federal prison staff. The district court dismissed Tate's Eighth Amendment conditions-of-confinement claim as failing to state a claim under *Bivens v. Six Unknown Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971). *See Tate v. Harmon*, No. 7:19-cv-00609, 2020 WL 7212578, at *5 (W.D. Va. Dec. 7, 2020). In this brief, we show that *Bivens* encompasses Eighth Amendment claims brought against federal prison officials and staff, including conditions claims.[2]

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

[2] Additionally, the district court dismissed what it construed as an Eighth Amendment excessive force claim for failure to "allege[] adequate facts to state such a claim," declining to decide whether the *Bivens* remedy is available for excessive force claims. *Tate*, 2020 WL 7212578, at *5, *7. Tate clarifies in this informal brief that he did not intend to raise an excessive force claim at all.

Brennan confirmed that *Carlson*'s creation of a *Bivens* remedy for Eighth Amendment violations against prison officials does not depend on the particular facts underlying a given claim. 511 U.S. 825, 843-44 (1994). Thus, the Supreme Court's decisions in *Carlson* and *Farmer* dictate that violations of the Eighth Amendment by prison personnel are subject to *Bivens* remedies regardless of whether the particular facts involve medical care and failure to protect (as in *Carlson* and *Farmer*) or conditions of confinement (as in this case). The *Bivens* remedy already extends to Eighth Amendment claims against federal prison personnel, and there are no meaningful differences between the claims here and those in *Carlson* and *Farmer*.

Nor do federal prisoners like Tate have an alternative remedy—it's *Bivens* or nothing. Neither state tort law, nor the Federal Tort Claims Act ("FTCA"), nor habeas corpus petitions, nor the FBOP grievance process provides an alternative mechanism for redress sufficient to displace the *Bivens* remedy.

ARGUMENT

I. The *Bivens* Remedy Extends to Eighth Amendment Claims Brought by Federal Prisoners Against Prison Staff.

Following *Carlson*, Eighth Amendment violations have long been subject to *Bivens* actions against federal prison staff. Contrary to the district court's ruling, case law does not support limiting Eighth Amendment *Bivens* claims under *Carlson* to just some Eighth Amendment violations by federal prison personnel. The Supreme

Court's recent elaboration of what constitutes a "new context" under *Bivens* in *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1857 (2017), confirms that the facts of this case do not meaningfully differ from previous Eighth Amendment cases in which a *Bivens* remedy has been recognized. Consequently, federal prisoners are entitled to *Bivens* remedies for Eighth Amendment violations by prison staff.

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

A review of Eighth Amendment prisoner cases brought against federal prison officials shows that *Carlson* is not limited to incidents involving medical treatment. Rather, the cases allow a variety of claims against federal prison staff alleging inhumane conditions of confinement under the Eighth Amendment. In this case, the district court incorrectly concluded that the Supreme Court has not recognized a right of action under Bivens outside of failure to provide medical attention. *Tate v. Harmon*, No. 7:19-cv-00609, 2020 WL 7212578, at *4 (W.D. Va. Dec. 7, 2020).

At the outset, Supreme Court precedent itself demonstrates that *Carlson* sweeps beyond failure to provide medical treatment. *Abbasi* stated that three cases—*Bivens*, *Davis v. Passman*, 442 U.S. 228 (1979), and *Carlson*—"represent the only instances in which the Court has approved of an implied damages remedy under the Constitution itself." *Abbasi*, 137 S. Ct. at 1855. That statement has important implications for understanding the scope of *Carlson* in light of a fourth Supreme

Court decision, *Farmer v. Brennan*, 511 U.S. 825 (1994), which also allowed an Eighth Amendment *Bivens* action against prison guards to proceed.

Farmer involved an Eighth Amendment *Bivens* claim brought by a transgender woman alleging deliberate indifference to her safety by federal prison officials after a rape and beating by another prisoner. *Id.* at 830-31. In reaching the conclusion that a *Bivens* remedy is available for a federal prison official's failure to protect in violation of the Eighth Amendment, the Court treated *Carlson* as authorizing the claim. Importantly, there is no question that *Farmer* did not involve failure to provide medical treatment. If the Court's decision in *Farmer* is to be squared with *Abbasi*, it can only be because *Farmer* was not an expansion of *Carlson* to a new context. It was instead a routine application of what *Carlson* already authorized. In turn, that means that *Carlson* is not limited to medical treatment claims at all—it authorizes suits against federal prison officials for a variety of Eighth Amendment claims, including conditions of confinement claims.

Court of appeals decisions confirm the conclusion that *Carlson* and *Farmer*, taken together, signify a general cause of action under *Bivens* for Eighth Amendment violations against prison officials and staff. For instance, this court in *Danser v. Stansberry* already applied *Farmer* and *Carlson* to a *Bivens* claim under the Eighth Amendment against a federal prison guard who allegedly failed to supervise one prisoner who was subsequently beaten by another prisoner. 772 F.3d 340 (4th Cir.

2014). While that particular claim failed on qualified immunity grounds, *id.* at 349-50, this Court clearly recognized that an Eighth Amendment claim under the facts alleged was possible. *See, e.g.*, *id.* at 344 n.6 (citing *Carlson* as "extending *Bivens* to claims for Eighth Amendment violations"). There was no suggestion that *Carlson* was artificially limited to medical claims. *See also Attkisson v. Holder*, 925 F.3d 606, 621 n.6 (4th Cir. 2019) (acknowledging that "the Third Circuit recently held that a prisoner's failure-to-protect claim did not present a new *Bivens* context in light of *Farmer*," but declining to decide that particular question because irrelevant to the question at hand).

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

Courts reviewing Eighth Amendment medical treatment claims have also cited *Carlson's* holding more broadly, recognizing that "federal prison officials are generally subject to Eighth Amendment money damages claims under *Carlson*." *Koprowski v. Baker*, 822 F.3d 248, 255 n.2 (6th Cir. 2016); *see also id.* at 257-58 ("For more than 30 years, the Supreme Court has repeatedly affirmed the holding of *Carlson*: prisoners may bring money-damages actions under the Eighth Amendment against federal prison officials."); *Browning v. Pennerton*, 633 F. Supp. 2d 415, 428 (E.D. Ky. 2009) ("*Bivens* involved Fourth Amendment rights, but its principle was extended to the Eighth Amendment in *Carlson v. Green*."). The key holding in *Carlson* is its expansion of *Bivens* to Eighth Amendment claims against prison staff in general, not to medical treatment claims in particular.

B. Recent Supreme Court Precedent Confirms That This Case Does Not Present a New Context Because the Facts Do Not Meaningfully Differ from Previous Cases.

This case does not constitute a new context or departure from previous Eighth Amendment *Bivens* claims. The Court in *Abbasi* listed a variety of situations that would signal a new context, including "the rank of the officers involved; the constitutional right at issue . . . the statutory or other legal mandate under which the officer was operating; the risk of disruptive intrusion by the Judiciary into the functioning of other branches; or the presence of potential special factors that previous *Bivens* cases did not consider." 137 S. Ct. at 1860.

In this case, "the rank of the officers involved," *id.*, does not differ meaningfully from other cases recognizing a *Bivens* remedy. The defendants in this case consist of a FBOP Regional Director, warden, officers, and other facility-level staff. Dkt. 1 at 1; Dkt. 37 at 1. These positons in the chain of command resemble the ranks of officials sued in previous prison conditions cases in which the Supreme Court recognized a *Bivens* remedy. In *Carlson,* the defendants included facility-level staff, a warden, and the FBOP Director. *See Carlson v. Green*, 446 U.S. 14, 16 (1980); Br. for the Pet'rs at 8 & n.3, *Carlson*, 446 U.S. 14 (No. 78-1261), 1979 WL 199269. The defendants in *Farmer* included the the FBOP Director, two wardens, facility-level staff, and an FBOP Regional Director. *Farmer*, 511 U.S. at 830. This case therefore does not "involve[ ] a new category of defendants." *Mesa v. Hernandez,* 140 S. Ct. 735, 743 (2020) (internal quotation marks omitted).

As federal prison officials, the defendants also were acting under the same "statutory or other legal mandate," *Abbasi*, 137 S. Ct. at 1860, under which the defendants were operating in both *Carlson* and *Farmer*—the authority to hold in federal custody individuals who have been convicted of federal crimes and sentenced to federal prison. *See* 18 U.S.C. Pt. III. As already discussed, courts have regularly recognized a *Bivens* remedy for federal prisoners whose Eighth Amendment rights are violated, so there is not a new "constitutional right at issue" in this case. *See Abbasi*, 137 S. Ct. at 1860. Because of the clear similarities between

this case and previous cases already recognized by the courts, a *Bivens* remedy in the circumstances of this case would not constitute a newly "disruptive intrusion by the Judiciary into the functioning of other branches." *Id.*

In sum, this case arises under Eighth Amendment violations already recognized by the Court, not in a "new context" as spelled out by *Abbasi*. Consequently, this Court should decline to put additional, unwarranted restrictions on Eighth Amendment *Bivens* remedies.

II. Congress Has Developed No "Alternative, Existing Process For Protecting the Injured Party's Interest" In This Case.

"[I]f Congress has created any alternative, existing process for protecting the injured party's interest, that itself may amount to a convincing reason for the Judicial Branch to refrain." *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1858 (2017) (internal quotation marks and alterations omitted). Congress has not done so here.

The district court believed that "State tort law also may provide an alternative means of relief to Tate." *Tate v. Harmon*, No. 7:19-cv-00609, 2020 WL 7212578, at *6 (W.D. Va. Dec. 7, 2020). Not true. On the contrary, "the Westfall Act [ ] accords federal employees absolute immunity from common-law tort claims arising out of acts they undertake in the course of their official duties." *Osborn v. Haley*, 549 U.S. 225, 229 (2007) (citing 28 U.S.C. § 2679(b)(1)).

The defendants also argued below that habeas corpus petitions provide an "alternative remedial structure," Dkt. 50 at 19, but it is far from clear that habeas

provides a mechanism for challenging conditions of confinement. Petitions for habeas corpus are "primarily a vehicle for attack by a confined person on the legality of his custody and the traditional remedial scope of the writ has been to secure absolute release—either immediate or conditional—from that custody." *Lee v. Winston*, 717 F.2d 888, 892 (4th Cir. 1983). In fact, this Court has issued "several unpublished decisions" holding "that conditions-of-confinement claims are not cognizable in habeas proceedings." *Wilborn v. Mansukhani*, 795 F. App'x 157, 163 (4th Cir. 2019); *see also Rodriguez v. Ratledge*, 715 F. App'x 261, 265–66 (4th Cir. 2017) (per curiam) (deciding conditions-of confinement claims not cognizable in a § 2241 petition); *Braddy v. Wilson*, 580 F. App'x 172, 173 (4th Cir. 2014) (per curiam) (same). This Court has yet to definitively resolve the issue in a published opinion. *See Wilborn*, 795 F. A'ppx at 163. In any event, the prospective relief offered by writs of habeas corpus cannot redress past harms.

Nor is the FTCA the kind of "alternative remedy" that would suggest a "sound reason[] to think Congress might doubt the efficacy or necessity of a damages remedy." *See Abbasi*, 137 S. Ct. at 1858. The FTCA explicitly states that it is not the exclusive remedy for suits brought against individual federal officers for constitutional violations. *See Bistrian v. Levi*, 912 F.3d 79, 92 (3d Cir. 2018); *see also* 28 U.S.C. § 2679(b)(2)(A). The legislative history of the FTCA "made it crystal clear that Congress views FTCA and *Bivens* as parallel, complementary causes of

action." *Carlson v. Green*, 446 U.S. 14, 19–20 (1980); *see also id.* at 20 (quoting S. REP. NO. 93-588, at 3 (1973)) (FTCA makes federal government "independently liable" for same type of conduct for which *Bivens* "imposes liability upon the individual Government officials involved"). And the Supreme Court squarely held in *Carlson* that the FTCA was not an adequate remedy for a prison conditions claims—whereas *Bivens* is intended to deter individual officers, FTCA provides liability against the federal government, and the FTCA is limited to cases where state law would allow a claim to go forward, a standard that offers scant protection for many constitutional rights. *Id.* at 19–23; *see also Abbasi*, 137 S. Ct. at 1860. Until the Supreme Court itself revisits its own holding in *Carlson* that the FTCA is not an adequate alternative remedial structure, *see* 446 U.S. at 19-20, that holding remains binding law. The Supreme Court does not permit lower courts to hold that its "recent cases have, by implication, overruled an earlier precedent." *Agostini v. Felton*, 521 U.S. 203, 237 (1997).

In addition, an FTCA suit lacks one of the fundamental purposes of litigation because the United States is the only proper defendant, rather than the actual wrongdoers. As the Supreme Court has explained, "'[t]he purpose of *Bivens* is to deter the *officer*.'" *Abbasi*, 137 S. Ct. at 1860 (quoting *FDIC v. Meyer*, 510 U.S. 471, 485 (1994)). Causing the government to pay money for the misconduct of its

employees through an FTCA suit provides none of the deterrence that "a *Bivens* claim . . . brought against the individual officer for his or her own acts" provides. *Id.*

Finally, while the FBOP grievance process (called the "Adminstrative Remedy Program") does not provide an alternative remedy. Though the FBOP grievance process has been in effect for over four decades, *see* 44 Fed. Reg. 62,248-51 (Oct. 29, 1979), the Supreme Court did not so much as mention it in *Carlson*, the case extending *Bivens* to prisoners' Eighth Amendment claims, presumably because the *Bivens* test requires an alternative *statutory* scheme, not just a regulatory one.[3] *Carlson*, 446 U.S. at 19-23; *see also Callahan v. Fed. Bureau of Prisons*, 965 F.3d 520, 534 (6th Cir. 2020) (Moore, J., dissenting). A decade later, the Court discussed the relationship between *Bivens* and federal prisoner suits. *McCarthy v. Madigan*, 503 U.S. 140, 151 (1992). It explained that "Congress did not create the remedial scheme here" and that, as a result, the FBOP process could not be the sort of "equally effective alternative remedy...declared [] be a substitute for recovery under the Constitution." *Id.*

Moreover, Congress has legislated that an inmate must exhaust prison remedies before bringing a *Bivens* action; in doing so, Congress demonstrated that

[3] To be sure, the Supreme Court discussed the FBOP's grievance process in *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 74 (2001). But it did so only *after* concluding that the FTCA—a statute enacted by Congress—provided the requisite alternative remedy. *Id.*; *see also Callahan*, 965 F.3d 520, 532 (7th Cir. 2020) (Moore, J., dissenting).

it did not believe such remedies should *displace* a *Bivens* action. *See* 42 U.S.C. § 1997e(a). In *McCarthy*, the Supreme Court held that a federal prisoner did not need to exhaust the FBOP administrative grievance procedures before bringing a *Bivens* claim. 503 U.S. at 142, 149. Congress legislated in response to this ruling and could have decided that FBOP grievance procedures should displace a *Bivens* remedy; instead, it made the more modest decision to extend the exhaustion requirement to apply to such suits. *See* 42 U.S.C. § 1997e(a); 141 CONG. REC. H14078-02 (daily ed. Dec. 6, 1995) (statement of Rep. Lobiondo). The Supreme Court has interpreted this provision specifically to require exhaustion in *Bivens* actions. *Porter v. Nussle*, 534 U.S. 516, 524 (2002).

In any case, the federal grievance system has host of practical inadequacies that prevent it from acting as a meaningful alternative to a *Bivens* suit. Prisoners routinely suffer retaliation for filing grievances against prison staff.[4] The threat of retaliation against prisoner for submitting a complaint is exacerbated in federal prisons because the first phase in the grievance system is an informal complaint within the inmate's facility. *See* Priyah Kaul et al., *Prison and Jail Grievance*

[4] *See, e.g.*, *Montalban v. Doe*, 801 F. App'x. 710 (11th Cir. 2020) (per curiam); *Does 8-10 v. Snyder*, 945 F.3d 951 (6th Cir. 2019); *Himmelreich v. Fed. Bureau of Prisons*, 766 F.3d 576, 577-78 (6th Cir. 2014) (per curiam); *Toolasprashad v. Bureau of Prisons*, 286 F.3d 576, 581 (D.C. Cir. 2002); *Lineberry v. Fed. Bureau of Prisons*, 923 F. Supp. 2d 284, 288-89 (D.D.C. Feb. 15, 2013); *West v. Fed. Bureau of Prisons*, No. 1:09CV01277, 2013 WL 1326532, at *2-3 (E.D. Cal. Apr. 2, 2013).

Policies: Lessons from a Fifty-State Survey, MICH. LAW PRISON INFO. PROJECT (Oct. 18, 2015), at 11, https://www.law.umich.edu/special/policyclearinghouse/site%20documents/foiareport10.18.15.2.pdf. In theory an inmate can mark his request "Sensitive" and direct it "to the appropriate Regional Director," 28 C.F.R. § 542.14(d)(1) (2010), but in practice that may just serve to highlight the prisoner's grievance.

In addition, grievance complaints drag on for months before resolution. In theory, if prison officials respond within the given deadlines "[c]omplete exhaustion of [FBOP] administrative remedies may take over five months after the date of initial filing with the warden." *Forde v. Miami Fed. Dep't of Corr.*, 730 F. App'x 794, 798 (11th Cir. 2018) (per curiam). In practice, FBOP officials often miss those deadlines. *See, e.g.*, *Barnes v. Broyles*, No. CV 13-737, 2016 WL 155037, at *5 (D.N.J. Jan. 12, 2016).

Furthermore, the grievance system is unavailable to many prisoners. Prison officials regularly fail to provide prisoners with the forms required to file a grievance.[5] Worse, prison officials also destroy, delay, or lose complaints by

[5] *See, e.g.*, *Dale v. Lappin*, 376 F.3d 652, 655-56 (7th Cir. 2004); *DeBenedetto v. Salas*, No. 13-cv-07604, 2020 WL 2836764, at *4 (N.D. Ill. June 1, 2020); *Hancock v. Rickard*, No. 1:18-00024, 2019 WL 9047228, at *7, (S.D. W. Va. Oct. 25, 2019); *Bamdad v. Gavin*, No. CV 13-0296, 2016 WL 1658657, at *4-5 (C.D. Cal. Feb. 5, 2016); *Coates v. Fed. Bureau of Prisons*, No. 15-CV-01109, 2015 WL 9899139, at *6 (D. Colo. Dec. 31, 2015); *Lineberry*, 923 F. Supp. 2d at 288-89.

prisoners.[6] Prison officials' responses to inmate complaints are often full of errors that make it very difficult for prisoners to obtain a remedy.[7] Or prison officials will not respond at all to an inmate's properly filed complaint.[8]

And the FBOP often does not educate prisoners on how to navigate the "multi-tiered procedural requirements" of the grievance system, which renders any remedy afforded prisoners difficult to obtain. *Johnson v. Fernandez*, No. EDCV 15-71, 2016 WL 10805684, at *8 (C.D. Cal. Dec. 7, 2016); *see also Forde*, 730 F. App'x at 799-800. Even when the prison system does educate prisoners on the grievance system, "simple awareness of the grievance procedure from a facility handbook may not be enough. Incarcerated persons experiencing the trauma of sexual abuse, as well as

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[6] *See, e.g., Pumphrey v. Coakley*, 684 F. App'x 347, 349 (4th Cir. 2017) (per curiam); *Carvalho v. Bledsoe*, No. 3:11-1995, 2019 WL 3801453 at *3 (M.D. Pa. Aug. 13, 2019); *Griffin v. Malatinsky*, No. 17-CV-12204, 2018 WL 3198547, at *2 (E.D. Mich. June 29, 2018); *Doss v. Bureau of Prisons*, No. 1:19-cv-0272, 2020 LEXIS 11795, at *29 (M.D. Pa. Jan. 23, 2020); *Ryncarz v. Thomas*, No. 3:12-CV-01692, 2013 WL 4431322, at *11 (D. Or. Aug. 15, 2013) (finding prisoner submitted appeal even though federal prison had no record of it).

[7] *See, e.g.*, *Hardy v. Shaikh*, 959 F.3d 578, 583, 587 (3d Cir. 2020) (prison counselor misled prisoner in believing his grievance had been rejected and he needed to file a new one rather than appeal); *Nunez v. Duncan*, 591 F.3d 1217, 1226 (9th Cir. 2010) (prison ignored prisoner's claim of constitutional violation and cited to incorrect prison policy in response to complaint, causing prisoner to miss deadline for appealing decision and sending him on an "almost ten-month wild goose chase").

[8] *See, e.g.*, *Miller v. Norris*, 247 F.3d 736, 738, 740 (8th Cir 2001); *Hill v. O'Brien*, 387 F. App'x 396, 400-01 (4th Cir. 2010); *West*, 2013 WL 1326532, at *2-3.

those with vulnerabilities such as mental illness or developmental disadvantages, may have extreme difficulty filling out the correct forms and meeting the strict deadlines." NAT'L PRISON RAPE ELIMINATION COMM'N, REPORT 94 (June 2009), *available at* https://www.prisonlegalnews.org/media/publications/nprec_final_report_prison_sexual_assault_2009.pdf.

In sum, while the grievance system exists in theory as a vehicle for prisoners to seek redress for abuse by federal prison officials, in practice, it fails to provide prisoners a viable remedy for such abuse. The FBOP's grievance system is thus a far cry from the kinds of alternative remedial schemes that this Court and the Supreme Court have found indicate a congressional intent to preclude a *Bivens* remedy. Those alternative remedial schemes included judicial review,[9] monetary compensation, [10] or both. [11] They were comprehensive, considered, and

[9] *See Abbasi*, 137 S. Ct. at 1865 (habeas or injunctive relief); *Schweiker v. Chilicky*, 487 U.S. 412, 424-25 (1988) (Social Security system allowed for judicial review); *Tun-Cos v. Perrotte*, 922 F.3d 514, 526-27 (4th Cir. 2019) (immigration system allowed for judicial review of removal orders); *Atkisson*, 925 F.3d at 621-22 (various surveillance statutes, including FISA, SCA, and CFAA, allow claims in federal court).

[10] *See Pinar v. Dole*, 747 F.2d 899, 910-11 (4th Cir. 1984) (Civil Service Reform Act allowed back pay).

[11] *See Chappell v. Wallace*, 462 U.S. 296, 302-03 (1983) (Uniform Code of Military Justice and Board for the Correction of Naval Records allowed for backpay and judicial review); *Minneci v. Pollard*, 565 U.S. 118, 126-31 (2012) (state tort law provided for judicial review and damages); *Meyer*, 510 U.S. at 484-85 (*Bivens* itself provided alternative remedy to suing federal agencies); *Wilkie v. Robbins*, 551 U.S. 537, 551-54 (2007) (state tort law and Administrative Procedures Act provided

congressionally created.[12] And each either operated to provide relief in practice or, if not, had received repeated congressional attention to iron out whatever issues precluded relief.[13] This Court thus should not treat the FBOP's grievance process as the sort of "alternative remedial structure...that alone may limit the power of the Judiciary to infer a new *Bivens* cause of action." *Abbasi*, 137 S. Ct. at 1858.

III. No "Special Factors Counsel[] Hesitation"

Finally, *Ziglar v. Abbasi* explained that a *Bivens* remedy is not available where there are "special factors counselling hesitation"—that is, "sound reasons to think Congress might doubt the efficacy or necessity of a damages remedy." 137 S. Ct. 1843, 1857-58 (2017). No special factors are present in this case.

First, this case has no "natural tendency to affect diplomacy, foreign policy, and the security of the nation." *See Tun-Cos v. Perrotte*, 922 F.3d 514, 526 (4th Cir. 2019). Nor is this a case where "Congress has designed its regulatory authority in a

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damages and judicial review); *Bush v. Lucas*, 462 U.S. 367, 382-89 (1983) (Civil Service Commission system provides compensatory damages, back pay, and judicial review); *Malesko*, 534 U.S. at 72-73 (state tort law); *Doe v. Meron*, 929 F.3d 153, 169-70 (4th Cir. 2019) (Military Claims Act provides for damages suits in federal court); *Judicial Watch, Inc. v. Rossotti*, 317 F.3d 401, 410-12 (4th Cir. 2003) ("Taxpayer Bill of Rights" provides damages action and various administrative deficiency processes that culminate in judicial review).

[12] *See Chappell*, 462 U.S. at 301-03; *Bush*, 462 U.S. at 382-89; *Hall v. Clinton*, 235 F.3d 202, 204-05 (4th Cir. 2000); *Judicial Watch, Inc.*, 317 F.3d at 410-12.

[13] *See Minneci*, 565 U.S. at 128-29; *Wilkie*, 551 U.S. at 551-54; *Schweiker*, 487 U.S. at 425-26.

guarded way," as in cases involving immigration or the military. *Id.* Congress has no particular "greater competence"—as it does, for instance, in the civil service or social security contexts—to evaluate conditons of confinement claims. *See Dunbar Corp. v. Lindsey*, 905 F.2d 754, 761 (4th Cir. 1990).

Second, while the *Abbasi* Court noted it "could be argued" that the PLRA suggests Congress chose not to extend the *Carlson* damages remedy to all inmate claims, *Abbasi*, 137 S. Ct. at 1865, enactment of the PLRA suggests the opposite—that Congress has at the very least acquiesced in the extension of the *Bivens* remedy to Eighth Amendment claims brought by prisoners. The PLRA expressly accepted the availability of a *Bivens* remedy. The Supreme Court reaffirmed the availability of *Bivens* remedies to prisoners in *Farmer v. Brennan*, 511 U.S. 825, 847 (1994), just two years before Congress enacted the PLRA. Nothing in the PLRA suggested Congress was intending to foreclose that remedy. By regulating the procedures for bringing a *Bivens* claim in federal court, the PLRA necessarily presumed that *Bivens* actions would be available when an inmate followed the proper procedures. *Bistrian v. Levi*, 912 F.3d 79, 92-93 (3d Cir. 2018). The purpose of the PLRA was to decrease frivolous lawsuits, not to preclude legitimate *Bivens* claims altogether; otherwise, it would have made no sense to add an exhaustion requirement prior to filing a *Bivens* lawsuit. *See* 42 U.S.C. §1997e(a); *see also* 141 CONG. REC. H14078-02 (daily ed. Dec. 6, 1995) (statement of Rep. Lobiondo) ("An exhaustion requirement [as

imposed by the PLRA] would aid in deterring frivolous claims: by raising the cost, in time/money terms, of pursuing a *Bivens* action, only those claims with a greater probability/magnitude of success, would, presumably, proceed."). The very statute that regulates how *Bivens* actions are brought cannot simultaneously dictate that no *Bivens* action should exist in the first place.

The legislative history confirms that Congress was well aware of the availability of *Bivens* actions for legitimate claims of prisoner mistreatment. There was no discussion of eliminating *Bivens* actions or limiting their availability. Congress thought the "real problem" was the Supreme Court's holding "that an inmate need not exhaust the administrative remedies available prior to proceeding with a *Bivens* action for money damages only." 141 CONG. REC. H14078-02 (daily ed. Dec. 6, 1995) (statement of Rep. Lobiondo). In other words, Congress specifically set out to respond to *Bivens* claims for prison rights violations and addressed only its procedural prerequisites, not the validity of the claim itself. If there were any doubt, consider the Supreme Court's statement in *Corr. Servs. Corp. v. Malesko,* a post-PLRA decision, that a federal prisoner in a FBOP facility "may bring a *Bivens* claim against the offending individual officer." 534 U.S. 61, 72 (2001); *see also Callahan v. Fed. Bureau of Prisons*, 965 F.3d 520, 534 (6th Cir. 2020) (Moore, J., dissenting).

CONCLUSION

The Court should hold that the *Bivens* remedy encompasses the type of Eighth Amendment claims asserted in this case.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) and Fed. R. App. P. 32(a)(7) because it contains 4,901 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f), as counted using the word-count function on Microsoft Word 2010 software.

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Dated: March 16, 2021

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CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of March, 2021, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system. The CM/ECF system will serve all registered users.

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