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-Appellees.

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

OPENING BRIEF

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JURISDICTIONAL STATEMENT

The district court had jurisdiction under 28 U.S.C. § 1331. On December 7, 2020, the district court granted Defendants' motion to dismiss. It then denied Mr. Tate's motion for reconsideration on January 3, 2021, Mr. Tate filed a timely notice of appeal on January 15, 2021. This Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUE

In *Carlson v. Green*, the Supreme Court explicitly recognized a *Bivens* action for an Eighth Amendment deliberate indifference claim premised on prison officials' failure to provide adequate medical care. In *Farmer v. Brennan*, the Supreme Court implicitly recognized a *Bivens* action for an Eighth Amendment deliberate indifference claim premised on prison officials' failure to protect an inmate from a known risk of violence.

Can Mr. Tate bring a *Bivens* action for an Eighth Amendment deliberate indifference claim premised on prison officials' failure to provide constitutionally adequate conditions of confinement and for their deliberately exposing him to the risk of physical harm?

STATEMENT OF THE CASE

A. Introduction

Raymond Tate alleged that Defendants—officials at United States Penitentiary (USP) Lee and the Federal Bureau of Prisons (BOP)—harassed and retaliated against him because he sued the United States and a prison official after he was stabbed at another facility. This harassment and retaliation culminated in one Defendant filing a false incident report claiming that Mr. Tate made inappropriate sexual advances towards him. Based on this false allegation, Mr. Tate was sent to live in the punitive Special Housing Unit (SHU) for three months in deplorable conditions. In the SHU, Mr. Tate we was locked in a dirty cell covered in mold around the clock. He was denied exercise. He was deprived cleaning and hygiene products. He lacked access to clean clothes or adequate bedding. And he had to withstand the constant cacophony of SHU staff beating other inmates. Beyond that, Defendants started telling other inmates that Mr. Tate made sexual advances towards male staff members, knowing that such an allegation elevated the risk that Mr. Tate would be targeted for attack.

When Mr. Tate filed a *Bivens*[1] action alleging that Defendants violated his Eighth Amendment rights, the district court dismissed his suit, holding that a *Bivens* action would not lie for an Eighth Amendment "conditions-of-confinement claim."

[1] *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971).

The court reached this conclusion despite the Supreme Court recognizing *Bivens* Eighth Amendment deliberate indifference claims.

This appeal followed.[2]

B. BOP Officials Retaliated Against Mr. Tate After He Sued The United States And A BOP Official.

The events prompting this lawsuit all started after the defendant-officials[3] began to retaliate against Mr. Tate in response to him suing the United States and a BOP official for injuries he sustained at a different BOP facility. *See* J.A. 12. In 2015, Mr. Tate filed suit in the Central District of California against the United States under the Federal Torts Claim Act (and later added a *Bivens* claim) after another inmate stabbed him at USP Victorville. *See Tate v. United States*, No. 15-9323, 2018 WL 8060716 (C.D. Cal. Dec. 11, 2018). Mr. Tate was transferred to USP Lee after the stabbing. It was at USP Lee where Mr. Tate "experienced distinct, identifiable, clear, direct, and indirect acts . . . from prison officials in relation to . . . [his] filing of litigation in court." J.A. 12. While Mr. Tate had to deal with prison officials harassing him about his lawsuit, *see, e.g.*, J.A. 15, 21, one especially bad act of retaliation led to the Eighth Amendment claim at issue in this appeal.

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[2] The facts and arguments in this brief are tailored to Mr. Tate's Eighth Amendment claim.

[3] Other than D.J. Harmon, who was a BOP Regional Director, the other Defendants were officials at USP Lee when Mr. Tate filed his lawsuit. *See* J.A. 10-11. Director Harmon was later substituted with his estate. *See* J.A. 8.

Mr. Tate alleged that Defendant Johnson filed a false incident report asserting an incendiary allegation that risked Mr. Tate not only facing criminal prosecution, but also led to him facing severe disciplinary consequences within the prison and increased the chances of him being attacked by other inmates. *See* J.A. 20. According to the report, Officer Johnson "was conducting a standing bed book count" when Mr. Tate "made threats of bodily harm and sexual threats towards [him] and interfered with [his] taking an official count." J.A. 36. Officer Johnson alleged that when he was conducting the count, Mr. Tate was lying in bed with his head under the covers. *Id.* Johnson ordered Mr. Tate to get out of bed and "approach the cell window"; Mr. Tate uncovered his head in response. *Id.* Johnson repeated his command. *Id.* Jonson alleged that this time in response, Mr. Tate "approached the door[,] blew a kiss at [him], and said 'Give me a kiss, [expletive].'" *Id.* Johnson claimed that Mr. Tate "then licked his lips, grabbed his crotch in a sexual manner," and made a sexually inappropriate comment. *Id.*

Mr. Tate was transferred to the Special Housing Unit (SHU) the next day as punishment for this alleged incident. J.A. 13. And he faced three disciplinary charges based on Officer Johnson's report: (1) threatening bodily harm; (2) making a sexual proposal; and (3) interfering with count. J.A. 38.

Mr. Tate steadfastly maintained that he did not threaten or make any sexual comments towards Officer Johnson. *See, e.g.*, J.A. 13.[4] A subsequent disciplinary hearing vindicated Mr. Tate. A BOP hearing officer found that Mr. Tate only interfered with the bed count, and suspended Mr. Tate's commissary privileges for 180 days as a sanction. J.A. 39. Importantly, the hearing officer did *not* find that Mr. Tate committed the other two charges that Officer Johnson alleged in his report. *See id.* But by then it was too late—Mr. Tate had suffered 92 days in the SHU. J.A. 20.

In the SHU, Mr. Tate was "locked in his cell for 24 hours a day" with a cellmate J.A. 17, 19. He was regularly denied exercise. J.A. 17. Because SHU staff refused to provide adequate cleaning supplies, Mr. Tate had to use his own personal hygiene products to "clean the walls, floor, shower, sink and toilet." J.A. 18. Moreover, SHU staff did not give Mr. Tate anything to clean his cell with. *Id.* He therefore had to resort to tearing up his towels, blankets, sheets, and clothing to clean his cell, knowing that SHU staff would punish him for this. J.A. 17. Then, because he was in the SHU, Mr. Tate had little access to laundry services, and he therefore had to wash his bedding and clothing in the sink with the same limited hygiene products the SHU staff supplied. J.A. 18. While he was in the SHU, Mr. Tate was not even "given

[4] Mr. Tate also made sure to point out in his complaint the racial aspects to Officer Johnson's false report. *See, e.g.*, J.A.12. Johnson, who is White, claimed in his report that Mr. Tate, who is Black, described himself by using the n-word. *See id.*; *see also* J.A. 36.

normal size toilet paper." J.A. 19. Instead, he was forced to use "napkins that were thin and about 3 square inches" to clean himself. *Id.* Nor was Mr. Tate provided with a regular toothbrush. *Id.* He was only given "a small, plastic thing without a handle that fixes to the tip of the finger" that would not even "stay fixed to the finger when it gets wet." *Id.* And Mr. Tate could do nothing to alleviate these highly unsanitary conditions, as he was forbidden from purchasing any hygiene items from the commissary. J.A. 17.

That Mr. Tate was deprived adequate cleaning and personal hygiene supplies and was forced to stay in his cell around the clock was made worse by the condition of the SHU cells. Mr. Tate did not have a real mattress and never had a pillow. *See* J.A. 18. The "majority of the three months" he was in the SHU, Mr. Tate "slept on about an inch thick piece of cotton that was mildewed, dirty, and full of human hairs." *Id.* And for about one of those months, he "slept on a piece of cotton that was about an inch thick and half the length of [his] body," such that the lower half of his body had to lay directly "on the metal bunk." *Id.* And the cells were freezing over those winter months—so cold, that Mr. Tate could not sleep. *Id.*

Mr. Tate further alleged that the "walls in the cells in the SHU had big blotches of black mold, fungus, and mildew on them." *Id.* "The black mold and mildew was also on the floor" and the windows. *Id.* "Dirt and dust bunnies along with human hair covered the floor in the cell." *Id.* The shower area was no better, as "the

shower walls, floors, and curtains had green mold, mildew, and fungus on them as a result of not being cleaned for a long period of time." *Id.* And it was not as if Mr. Tate had much to do other than stare at the moldy walls of his cell. In the SHU, Mr. Tate was given only a four-inch pencil and was denied reading materials other than "religious books such as a Bible or Quran. No radio or any other leisure activities were allowed." *Id.*

Mr. Tate alleged that the "degenerate" conditions in the SHU were medically dangerous. *See, e.g.*, J.A. 17-18; 31. Inmates had staph and other infections as a result of the unsanitary conditions, and because inmates in the SHU were forced to constantly switch cells, Mr. Tate was persistently at risk of being infected too. J.A. 18. Being in the SHU took a physical toll on Mr. Tate. For days after he was released from the SHU, Mr. Tate's gums bled whenever he brushed or flossed his teeth. J.A. 19. Mr. Tate's muscles were weak because he sat in his cell for three months with no exercise. J.A. 22. And Mr. Tate suffered emotionally and mentally too, as he was forced to withstand the "screams, yells, grunting, and groans of inmates" along with

their cries for help as SHU staff routinely "physically beat and abuse[d]" them. J.A. 16.[5]

Beyond the SHU being a "torture chamber," *id.*, BOP officials targeted Mr. Tate by falsely insinuating that he was gay, knowing the unfortunate risk of inmate-on-inmate violence those allegations would expose him to. *See, e.g.*, J.A. 13; 26-27. Mr. Tate alleged that inmates who were suspected of being gay would "be physically assaulted by other inmates." J.A. 16. The SHU staff knew this, and therefore would insinuate that an inmate is gay, "regardless of whether it [was] true or false," in hope to instigate an attack. *Id.* One defendant in particular, Officer Bates[6], would repeatedly tell other inmates that Mr. Tate made sexual advances towards male staff in an attempt "to incite inmate violence against [him]." J.A. 27. In a particularly disturbing incident, Bates, when distributing hygiene products, "made sexual noises . . . and squirted [Mr. Tate's] body wash on [his] cell floor as if it was ejaculated semen." *Id.*

[5] Compare this to the conditions in general population, where Mr. Tate "had access to television, radio, and [music]"; could "go outside for fresh air, recreation, [and sports]"; had "access [to the] law library to conduct legal research and prepare legal documents"; could "mix and mingle with fellow inmates and read a variety of books, magazines, and newspapers"; and had "adequate cleaning supplies . . . and sufficient quantity of personal hygiene items" along with "pillows, a full mattress and sufficient sheets and blankets." J.A. 19.

[6] In the amended complaint, this official was named John Doe. He was later identified as Matthew Bates. *See* J.A. 6.

Mr. Tate not only had to suffer this embarrassing harassment; that week, he had to go without hygiene products altogether. *Id.*

After complaining to multiple BOP officials and exhausting the BOP grievance process to no avail, *see, e.g.*, J.A. 21-26, Mr. Tate sued.

C. Mr. Tate Filed A *Bivens* Lawsuit, But The District Court Held That No Remedy Was Available For Mr. Tate's Eighth Amendment Claim.

Mr. Tate filed suit in the United States District Court for the Western District of Virginia against various BOP officials alleging that they violated his Eighth Amendment rights.[7] *See* J.A. 32. He sought damages along with injunctive and declaratory relief. J.A. 32-33.

Defendants moved to dismiss Mr. Tate's complaint. *See* J.A. 87. Among other arguments, Defendants asserted that Mr. Tate's allegations were "not cognizable under *Bivens*." J.A. 103. They began by explaining that "*Bivens* provides an implied remedy against federal officials for damages to remedy a constitutional violation," and noted that the Supreme Court "has approved three types of *Bivens* claims, which involved violations of the Fourth, Fifth, and Eighth Amendments." *Id.* But, Defendants continued, if "the present case differs in a meaningful way from previous *Bivens*

[7] Mr. Tate filed his initial complaint on September 9, 2019. *See* J.A. 2. In his complaint, Mr. Tate also alleged violations of his First and Fifth Amendment rights. *See* J.A. 32. He further named the United States as a Defendant for injunctive relief only. *See* J.A. 10. Mr. Tate amended his complaint on April 24, 2020. J.A. 4.

cases," a "court must conduct a special factor analysis" to determine if *Bivens* should be extended to the new context. J.A. 104.

Defendants argued that the most analogous case in which the Court had recognized a *Bivens* remedy was *Carlson v. Green*, 446 U.S. 14 (1980). There, "the Court held the Eighth Amendment provided a damages remedy for a prison who died due to the alleged failure of federal prison staff to treat his asthma." J.A. 105. They maintained that Mr. "Tate's Eighth Amendment allegations . . . cannot be deemed similar to the facts of *Carlson*" given that his allegations "regard[] the conditions of his confinement" and none "involved 'grossly inadequate' medical care and the deliberate failure of prison officials to provide medical attention as it was in *Carlson*." J.A. 105-06. So Defendants asserted that the district needed to "conduct a special factors analysis to determine whether *Bivens* should be extended here." J.A. 106.

Turning to that analysis, Defendants argued that "several special factors weigh against applying *Bivens* in this context." *Id.* First, Defendants argued that "if there are any alternative remedies available other than expanding *Bivens*, the Court should not infer a new *Bivens* context." *Id.* Defendants claimed Mr. Tate had "several alternative remedies," including "the BOP Administrative Remedy Program," "habeas relief" and "State tort law." J.A. 107. Second, Defendants argued that "legislative

action" suggests that Congress did not want to create a damages remedy in this context given that it "did not provide a damage remedy to prisoners for constitutional claims" when enacting "sweeping reform" in the Prison Litigation Reform Act. J.A. 108 (quotation marks omitted). Third, Defendants argued that extending *Bivens* to Mr. Tate's claim would have an "impact on governmental operations system-wide" because it would "subject federal prison employees to civil litigation for any perceived slight." *Id.*[8]

Mr. Tate responded that his claim "does not seek to extend *Bivens* to a new context, and therefore, no special factors analysis [was] required." J.A. 143. Indeed, this case was "[w]ell within the guideline range of previous *Bivens* cases decided by the Supreme Court." J.A. 145. Mr. Tate argued that the "Supreme Court's *Bivens* precedent allows a claim for prisoner mistreatment. It is settled that the treatment a prisoner receives in prison and the conditions under which he is confined are subject to scrutiny under the Eighth Amendment." J.A. 144. More to the point, Mr. Tate

[8] Defendants also argued that Mr. Tate's Eighth Amendment claim failed on its merits because "[a]t most, [Mr.] Tate allege[d] he suffered uncomfortable conditions in the SHU." J.A. 116. Mr. Tate responded that he did in fact allege a plausible Eighth Amendment claim, because "confinement in a prison or in an isolation cell is a form of punishment subject to scrutiny under the Eighth Amendment," and "it is cruel and unusual punishment to hold convicted criminals in unsafe conditions." J.A. 150-51. Defendants also raised several other arguments for why Mr. Tate's complaint should be dismissed. *See* J.A. 233 (district court opinion summarizing the arguments made by Defendants). Because the district court dismissed Mr. Tate's Eighth Amendment conditions-of-confinement claim by holding *Bivens* relief was unavailable, this brief addresses only this argument.

noted that "the Supreme Court allowed *Bivens* cases to proceed against Directors, Wardens, and lower ranking officials in *Farmer v. Brennan*, 511 U.S. 825 (1994) and *Carlson*." *Id.* He therefore concluded that "the Supreme Court has already determined that *Bivens* is necessary to give law enforcement officers instruction and guidance going forward, deter them from abusing their constitutional authority, and to provide redress for those injured when they do so." J.A. 145.

The district court granted Defendants' motion to dismiss.[9] The court first held that Mr. Tate's "Eighth Amendment claims challenging his conditions of confinement . . . arise in a context different than the claims previously recognized [by the Supreme Court]." J.A. 237. The district court reasoned that "*Carlson* involved a prison official's deliberate indifference to an inmate's health in failing to provide medical care." *Id.* And "to the extent *Farmer v. Brennan* was an extension of *Bivens*, the claims in *Farmer* arose from a different context" because the plaintiff "there

[9] The district court also denied Mr. Tate's motion to file a second amended complaint, *see* J.A. 160, because the proposed second amended complaint did not "change the substance of [Mr. Tate's] claims," and only added "allegations regarding his pursuit of administrative remedies . . . about events occurring in May and June 2020, after the initial complaint was filed." J.A. 232. Defendants did not argue that Mr. Tate failed to exhaust his Eighth Amendment claim related to his confinement in the SHU and the officers unreasonably exposing him to the risk of harm at the hands of other prisoners. *See* J.A. 101 (Defendants' motion to dismiss asserting that Mr. Tate failed to exhaust his claims resulting from events that occurred after he filed his initial complaint). Moreover, the grievances that Defendants claimed were unexhausted related to ongoing unlawful conduct that formed the basis of Mr. Tate's initial claims. Thus, exhaustion is not an obstacle here and the district court said nothing indicating otherwise.

alleged deliberate indifference by prison officials in the context of a failure-to-protect claim." *Id.* (internal citation omitted). The district court believed these cases to be "different from [Mr.] Tate's Eighth Amendment claim" because his claim was "premised on conditions in the SHU." *Id.*

The district court then conducted a special factors analysis, and held "that there are special factors counselling hesitation" against extending *Bivens* here. J.A. 239. First, the court explained that "there are alternative remedies available to [Mr.] Tate," including the "remedial mechanisms established by the BOP" and "State tort law." *Id.* (quotation marks omitted). Second, the court noted "Congress's inaction and failure to provide a damages remedy," and reasoned that this "suggest[s] that an extension of a damages remedy . . . should not be judicially created." *Id.* For these reasons, the district court "decline[d] to recognize a new remedy" for "any conditions-of-confinement claim under the Eighth Amendment." J.A. 240-41.[10]

[10] The district court also held that Mr. Tate did not state an Eighth Amendment excessive force claim because "nowhere in [his] complaint d[id] he allege that any defendant used physical force against him." J.A. 241. In his motion for reconsideration, Mr. Tate asserted that the district court's "characterization of [his] Eighth Amendment claim as an excessive force claim was overreach." J.A. 246. Mr. Tate maintained that his claim was based on Defendants' "deliberate indifference to health and safety, deliberate indifference to a substantial risk of harm, deprivation of minimal civilized measure of life's necessities, unnecessary and wanton infliction of pain, cruel and unusual punishment, conditions of confinement, failure to ensure reasonable safety, and/or failure to ensure adequate clothing and shelter." *Id.*

After the district court denied Mr. Tate's motion for reconsideration, *see* J.A. 260, Mr. Tate timely appealed. J.A. 261. This Court appointed undersigned counsel to address whether "a *Bivens* remedy presently exists for Eighth Amendment claims alleging unlawful conditions of confinement."

SUMMARY OF THE ARGUMENT

Mr. Tate's Eighth Amendment claim arises from a familiar *Bivens* context: where prison officials are deliberately indifferent to an inmate's health and safety. The Supreme Court recognized that a *Bivens* cause of action exists for Eighth Amendment deliberate indifference claims in both *Carlson* and *Farmer*. Mr. Tate's claim that federal prison officials exposed him to conditions that posed a constitutionally unacceptable risk to his health and safety, and took deliberate actions that exposed him to a substantial risk of serious physical harm, fits well within the class of *Bivens* actions acknowledged by the Supreme Court. Nothing in the Court's more recent case law cautioning against the extension of *Bivens* casts doubt on the continued viability of a *Bivens* claim in this context.

But even if this Court holds that Mr. Tate's claim presents a new *Bivens* context, no special factors counsel hesitation against recognizing what would be at most a modest extension of extant *Bivens* actions. First, there is nothing to suggest that Congress would not want a damages remedy to exist in this context. To the contrary, Congress has legislated with the understanding that federal inmates would continue to file *Bivens* suits. Second, there is no adequate alternative remedy for Mr. Tate to hold the line-level prison officials and their supervisors accountable for the harms they have perpetrated against him. Third, allowing Mr. Tate's suit to proceed would

not unduly interfere with prison administration, as courts have long adjudicated claims involving prisoner safety without unduly impinging on facility operations.

Because Mr. Tate's Eighth Amendment claim does not present a new *Bivens* context, and even if it does, because no special factors counsel against recognizing a modest extension of *Bivens* here, the district court's order should be reversed.

STANDARD OF REVIEW

This Court reviews an order granting a motion to dismiss for failure to state a claim de novo. *See Jackson v. Lightsey*, 775 F.3d 170, 177-78 (4th Cir. 2014). "In applying that standard, [this Court must] liberally construe [Mr. Tate]'s pro se complaint, take all facts pleaded as true, and draw all reasonable inferences in [Mr. Tate]'s favor." *Id.* (citations omitted).

ARGUMENT

CONSISTENT WITH ESTABLISHED SUPREME COURT PRECEDENT, THIS COURT SHOULD HOLD THAT A *BIVENS* REMEDY EXISTS FOR MR. TATE'S EIGHTH AMENDMENT DELIBERATE INDIFFERENCE CLAIM.

A. Introduction

In this *Bivens* action, Mr. Tate alleged that Defendants violated the Eighth Amendment's prohibition against cruel and unusual punishment. He claimed that Defendants were deliberately indifferent to the substantial risk of harm posed by the depraved conditions of the SHU. And he claimed that Defendants were deliberately indifferent to the substantial risk of harm that would result from them spreading false rumors around the prison that he had made sexual advances towards male staff members. In *Bivens v. Six Unknown Agents of the Fed. Bureau of Narcotics*, 403 U.S. 388 (1971), the Supreme Court recognized an implied cause of action for damages against federal officers who violate an individual's constitutional rights. As the Court said there, it is "well settled that where legal rights have been invaded, . . . federal courts may use any available remedy to make good the wrong done." *Id.* at 396. And punitive damages are "a particular remedial mechanism normally available in the federal courts," *Id.* at 397.

Although *Bivens* involved a Fourth Amendment claim, in *Carlson v. Green*, 446 U.S. 14 (1980), the Court held that a *Bivens* action was available for an Eighth Amendment claim alleging that federal prison officials "were deliberately indiffer-

ent to [an inmate's] serious medical needs." *Id.* at 16 & n.1. Then in *Farmer v. Brennan*, 511 U.S. 825 (1994), the Court allowed a *Bivens* action alleging that federal prison officers were deliberately indifferent to an inmate's safety to proceed past summary judgment. *See id.* at 831.[11]

In recent years, the Supreme Court has cautioned against extending the availability of a *Bivens* remedy to new contexts. The Court announced that "expanding the *Bivens* remedy is now a disfavored judicial activity." *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1857 (2017) (quotation marks omitted); *see also Hernandez v. Mesa*, 140 S. Ct. 735, 742-43 (2020). But while the Court has urged caution in extending *Bivens*, it has reiterated that *Bivens* actions are still available in contexts where the Court has already recognized a *Bivens* remedy. *See Abbasi*, 137 S. Ct. at 1854-55; *Hernandez*, 140 S. Ct. at 741. Nothing in the Court's more recent case law casts doubt on the continued availability of *Bivens* actions raising Eighth Amendment deliberate indifference claims. In fact, this Court, and others have recognized Eighth Amendment *Bivens* actions post-*Abbasi* and *Hernandez*. *See, e.g.*, *Pledger v. Lynch*, 5 F.4th 511 (4th Cir. 2021); *see also Hoffman v. Preston*, 26 F.4th 1059 (9th Cir. 2022); *Shorter v. United States*, 12 F.4th 366 (3d Cir. 2021).

[11] The Supreme Court also recognized a Fifth Amendment due process *Bivens* action in *Davis v. Passman*, 442 U.S. 228 (1979).

Still, the district court held that a *Bivens* remedy was unavailable for Mr. Tate's Eighth Amendment claim. First, the district court held that Mr. Tate's Eighth Amendment claim arose from a different context than the *Bivens* actions recognized by the Supreme Court given that *Carlson* involved a claim of constitutionally deficient medical care, and *Farmer* involved a failure-to-protect claim. Then, the district court held that special factors counseled against extending a *Bivens* remedy here. The district court focused on two factors: (1) the fact that there purportedly were alternative remedies available to Mr. Tate in the form of BOP's grievance process and state tort law, and (2) the fact that Congress has failed to provide an explicit damages remedy for this type of claim. As explained below, this Court should reverse the district court's decision.

To begin, Mr. Tate's claim does not present a "new context." *Carlson* involved an Eighth Amendment deliberate indifference claim premised on inadequate medical care. Mr. Tate's Eighth Amendment deliberate indifference claim turns on unconstitutional living conditions and a failure to protect him from (or worse, consciously exposing him to) the risk of violence. The latter half of his claim was the exact claim recognized in *Farmer*. And in the end, the claims in *Carlson*, *Farmer*, and here all involve exactly the same misconduct: where a prison official "knows of and disregards an excessive risk to inmate health or safety." *Farmer*, 511 U.S. at 837. Indeed, the Supreme Court has made this very point, explaining that there is

"no significant distinction between claims alleging inadequate medical care and those alleging 'conditions of confinement.'" *Wilson v. Seiter*, 501 U.S. 294, 303 (1991). As the Court explained, "the medical care a prisoner receives is just as much a 'condition' of his confinement as the food he is fed, the clothes he is issued, the temperature he is subjected to in his cell, and the protection he is afforded against other inmates." *Id.*

But even if Mr. Tate's Eighth Amendment claim *does* present a new context, there are no special factors counseling against what would be an extremely modest extension of *Bivens*. First, an administrative grievance process does not (and cannot) supplant a damages action. This is especially true here, where the genesis of Mr. Tate's claim is BOP officials retaliating against him for his resorting to formal complaint processes to vindicate his rights. *See, e.g.*, *Reid v. United States*, 825 F. App'x 442, 445 (9th Cir. 2020) (unpublished). Second, Mr. Tate likely could *not* sue the prison officials under state tort law given the immunity provided to federal officials by the Westfall Act. *See, e.g.*, *Hoffman*, 26 F. 4th at 1066. Third, the fact that Congress was legislating against the backdrop of *Carlson* and *Farmer* when it passed the Prison Litigation Reform Act (PLRA), which made the *process* for inmates seeking to file civil rights lawsuits more onerous, shows that Congress did not intend to eliminate Eighth Amendment *Bivens* actions altogether. *See, e.g.*, *Bistrian v. Levi*,

912 F.3d 79, 92-93 (3d Cir. 2018). Finally, there are no broader administrative concerns about recognizing a *Bivens* action here that should worry this Court, given that Mr. Tate's claim is the kind of claim courts have been adjudicating for decades. Reversal is required.

B. Mr. Tate's Eighth Amendment Deliberate Indifference Claim Does Not Present A New *Bivens* Context.

The Supreme Court has crafted a two-part inquiry to determine whether federal officers can be sued for their constitutional violations under *Bivens*. Courts must first determine whether the claim arises from a "new *Bivens* context," meaning that it is "different in a *meaningful* way from previous *Bivens* cases." *Abbasi*, 137 S. Ct. at 1859 (emphasis added). If the claim presents a "new context," a court must ask whether any "special factors counsel[] hesitation" before extending *Bivens*. *Id.* at 1857 (quotation marks omitted).

> Turning to the first part of the inquiry, a case may present a "new context" because of the rank of the officers involved; the constitutional right at issue; the generality or specificity of the official action; the extent of judicial guidance as to how an officer should respond to the problem or emergency to be confronted; the 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.

Id. at 1860. Comparing the claim here to the *Bivens* actions recognized in *Carlson* and *Farmer*, Mr. Tate's Eighth Amendment claim is not "different in a meaningfully way." *Id.* at 1859.

Start with *Carlson*. There the complaint alleged that prison officials violated "the Eighth Amendment's proscription against infliction of cruel and unusual punishment." *Carlson*, 446 U.S. at 17. Specifically, it alleged that the officials, "being fully apprised of the gross inadequacy of medical facilities and staff [at the prison], and the seriousness of [the prisoner]'s chronic asthmatic condition, nonetheless kept him in that facility . . . [and] failed to give him competent medical attention." *Id.* at 16 & n.1. "The complaint further allege[d] that [the prisoner's] death resulted from these acts and omissions, [and] that [the prison officials] were deliberately indifferent to [the prisoner]'s medical needs." *Id. Carlson* held that this Eighth Amendment deliberate indifference claim could be pursued under *Bivens*.

The Court then applied *Carlson* in *Farmer*. *See Farmer*, 511 U.S. at 830 (citing *Carlson*). There, a transgender woman incarcerated in a male prison brought a *Bivens* suit alleging an Eighth Amendment violation after the prison officials placed her in "general population despite knowledge" that a transgender prisoner "would be particularly vulnerable to sexual attack by [other] inmates." *Id.* at 831. The prisoner alleged that the officials' actions "amounted to a deliberately indifferent failure to protect [her] safety, and thus a violation of [the prisoner's] Eighth Amendment rights." *Id.* The district court and the court of appeals held that the prison officials had not acted with deliberate indifference. *Id.* at 831-32.

The Supreme Court reversed. The Court held that the prisoner's *Bivens* action could proceed, declaring that a federal prison official who "knows that inmates face a substantial risk of serious harm and disregards that risk by failing to take reasonable measures to abate it" may be liable under the Eighth Amendment. *Id.* at 847. *Farmer* was unequivocal: federal prison officials are constitutionally required "to provide humane conditions of confinement." *Id.* at 832.

Below, the district court noted that "the parties in *Farmer* apparently did not raise—and *Farmer* did not directly address—whether *Bivens* extended to the claim before it." J.A. 260. Yet *Farmer* necessarily recognized that a *Bivens* remedy *was* available because the availability of a *Bivens* remedy is an "antecedent" question to whether a viable constitutional claim has been stated. *Hernandez v. Mesa*, 137 S. Ct. 2003, 2006 (2017). Had no *Bivens* cause of action existed, the Court would not have vacated the grant of summary judgment for the federal officials and allowed the prisoner's Eighth Amendment claim against them to proceed. *See Bistrian*, 912 F.3d at 91 ("It seems clear . . . that the Supreme Court [in *Farmer*] has, pursuant to *Bivens*, recognized a failure-to-protect claim under the Eighth Amendment.").

It makes sense that the Court would not have felt the need to luxuriate over whether a *Bivens* cause of action existed in *Farmer*, given that the claim in *Farmer* was not meaningfully different from that in *Carlson*. "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." *Id.* The Eighth Amendment claims in both cases alleged prison officials' "deliberate indifference to a substantial risk of serious harm to a prisoner." *Farmer*, 511 U.S. at 828. The only difference between the two cases is that in *Carlson*, the harm resulted from inadequate medical treatment, while in *Farmer*, it emanated from other prisoners.

In fact, in the § 1983 context, the Court made clear that it does not view Eighth Amendment deliberate indifference claims as meaningfully different from one another. As the Court said in *Wilson v. Seiter*, there is

> no significant distinction between claims alleging inadequate medical care and those alleging inadequate 'conditions of confinement.' Indeed, the medical care a prisoner receives is just as much a 'condition' of his confinement as the food he is fed, the clothes he is issued, the temperature he is subjected to in his cell, and the protection he is afforded against other inmates. There is no indication that, as a general matter, the actions of prison officials with respect to these nonmedical conditions are taken under materially different constrains than their actions with respect to medical conditions.

Wilson, 501 U.S. at 303.

This same logic applies here. There is "no significant distinction" between a deliberate indifference claim based on inadequate medical treatment—as in *Carlson*, a failure to protect—as in *Farmer*, or conditions of confinement—the case here. All involve prison officials knowingly disregarding a serious risk to the health or safety of a prisoner. The only distinction being that the prison officials were deliberately

indifferent to different risks. Mr. Tate's claim hinges on the same wrong that was focus of *Carlson* and *Farmer*.[12] His claim is within a class of *Bivens* actions that the Supreme Court has recognized.

Applying the factors set forth in *Abbasi* to determine whether a claim arises from a new context confirms this conclusion. First the "rank[s] of the officers involved" here are the same as in *Carlson* and *Farmer*. *See Abbasi*, 137 S. Ct. at 1860. In *Farmer*, the federal officers named in the suit included the BOP Director, a Regional Director, wardens, and a case manager. *Farmer*, 511 U.S. at 830. In *Carlson*, the federal officials included the BOP Director, and various other prison-level officials. *See* Petition for Writ of Certiorari, *Carlson v. Green*, No. 78-1261, 1979 WL 199269, at *8 (U.S. Sept. 12, 1979). Here, Mr. Tate sued a BOP Regional Director and other prison-level officials. Second, not only is the same constitutional right at issue here that was at issue in *Carlson* and *Farmer*—the Eighth Amendment prohibition against cruel and unusual punishment; it is also the same claim—deliberate indifference. Third, Mr. Tate is not challenging general policies. He is protesting

[12] Courts have construed *Carlson* as applying broadly to all Eighth Amendment claims. *See, e.g.*, *Koprowski v. Baker*, 822 F.3d 248, 257–58 (6th Cir. 2016) ("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."); *Bagola v. Kindt*, 131 F.3d 632, 637–38 (7th Cir. 1997) ("In *Carlson* . . ., the Supreme Court extended this right to federal prisoners seeking compensation for cruel and unusual punishments inflicted by prison officials in violation of the Eighth Amendment.").

specific actions and inactions that rendered his living conditions unconstitutional. Fourth, conditions-of-confinement claims have been routinely adjudicated for decades. *See, e.g.*, *Taylor v. Riojas*, 141 S. Ct. 52 (2020); *Helling v. McKinney*, 509 U.S. 25 (1993); *Rhodes v. Chapman*, 452 U.S. 337 (1981).[13] Prison officials should understand when prison conditions are so inhumane that they violate the Eighth Amendment. Finally, the intrusion that would result from allowing Mr. Tate's claim to proceed would be no different from the intrusion that was permitted by *Carlson* and *Farmer*, and these types of claims are regularly brought against state prison officials. Applying the factors outlined in *Abbasi*, Mr. Tate's Eighth Amendment claim does not present a new *Bivens* context.

Moreover, Mr. Tate's claim was not limited to just his conditions of confinement. He also alleged Defendants violated his Eighth Amendment rights by falsely spreading the rumor that he made sexual advances towards male staff members, knowingly disregarding the fact that such allegations would increase the chances of him suffering violence at the hands of other prisoners. This is analogous to the failure-to-protect claim recognized in *Farmer*. And following the logic of *Farmer*, courts have recognized that labeling a prisoner as gay, a "snitch," or a sex offender can give rise to an Eighth Amendment claim given the risk of violence those labels

[13] *See also Porter v. Clarke*, 923 F.3d 348 (4th Cir. 2019), *Shakka v. Smith*, 71 F.3d 162 (4th Cir. 1995); *Sweet v. S.C. Dep't of Corr.*, 529 F.2d 854 (4th Cir. 1975) (en banc).

carry. *See, e.g.*, *Moore v. Mann*, 823 F. App'x 92, 96 (3d Cir. 2020) (unpublished) (collecting cases from around the country). The district court did not even address this aspect of Mr. Tate's Eighth Amendment claim.

In sum, a plain reading of *Carlson* and *Farmer*, and an application of the *Abbasi* factors, reveal that there is no meaningful difference between Mr. Tate's Eighth Amendment claim and the Eighth Amendment *Bivens* actions the Supreme Court has already sanctioned. The district court erred in concluding otherwise.

C. Even If Mr. Tate's Deliberate Indifference Claim Represents A Modest Extension Of *Bivens*, His Claim Should Be Allowed To Proceed.

Even if this Court disagrees and finds that Mr. Tate's Eighth Amendment claim does present a new *Bivens* context, that does not end the analysis. This Court must determine whether there are "special factors" that counsel against recognizing a new *Bivens* action. *Abbasi*, 137 S. Ct. 1857. This special factors analysis requires this Court to ask whether "there are sound reasons to think Congress might doubt the efficacy or necessity of a damages remedy," and "whether the Judiciary is well suited, absent congressional action or instruction, to consider and weigh the costs and benefits of allowing a damages action to proceed." *Id.* at 1858. Conducting that analysis here, there are no special factors that should stop this Court from recognizing what would be an exceedingly modest extension of the *Bivens* remedy.

Below, in finding that special factors counseled hesitation, the district court first reasoned that "there [were] alternative remedies available to [Mr.] Tate," pointing to the "remedial mechanisms established by the BOP" and "State tort law." J.A. 239 (quotation marks omitted). The district court was wrong on both fronts.[14]

First, the grievance process established by the BOP is not an adequate alternative remedy as both a legal and factual matter. *Abbasi* explained that "if *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 from providing a new and freestanding remedy in damages." *Abbasi*, 137 S. Ct. at 1858 (cleaned up; emphasis added). The BOP grievance process was not created by Congress, and therefore Congress could not have contemplated that it would stand in place of a damages remedy for constitutional violations. In fact, the opposite is true.

[14] Defendants also argued that "habeas relief [was] an alternative remedy." J.A. 107. But as this Court explained, "courts have generally held that a § 1983 suit or a *Bivens* action is the appropriate means of challenging conditions of confinement whereas § 2241 petitions are not." *Rodriguez v. Ratledge*, 715 F. App'x 261, 266 (4th Cir. 2017) (unpublished). Thus, this Court has "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) (unpublished). Moreover, "[s]even of the ten circuits that have addressed the issue in a published opinion have concluded that claims challenging the conditions of confinement cannot be brought in a habeas petition." *Id.* (collecting cases). These courts based their decisions on the Supreme Court's statement that habeas petitions are appropriate to challenge "the very fact or duration of confinement." *Preiser v. Rodriguez*, 411 U.S. 475, 500 (1973). Thus, contrary to what Defendants argued below, habeas was not an alternative remedy for Mr. Tate.

As the Ninth Circuit explained, "On its face, the [BOP] grievance process is not intended as a substitute for a federal suit: the PLRA makes clear that a prisoner may bring a federal action after he exhausts the grievance process." *Hoffman*, 26 F.4th at 1069-70. Further, "the Supreme Court has acknowledged that 'federal prisoners suing under *Bivens* must first exhaust inmate grievance procedures.'" *Id.* at 1070 (quoting *Porter v. Nussle*, 534 U.S. 516, 524 (2002)) (brackets omitted). Thus, Congress believed navigating the BOP grievance process to be a *prerequisite* to a damages action, not a *substitute* for one. Indeed, "[t]his makes sense: where a prisoner is physically injured due to an officer's unconstitutional actions, the harm can 'only be remedied by money damages,' which are not available through the BOP grievance process." *Id.* (quoting *Bistrian*, 912 F.3d at 92). "The administrative grievance process is not an alternative because it [could] not redress [Mr. Tate]'s harm, which could only be remedied by money damages." *Bistrian*, 912 F.3d at 92.

Moreover, the facts here show why the BOP grievance process is not an adequate substitute for a damages action. The whole reason Mr. Tate had to file suit was because BOP officials did nothing in the face of him filing multiple grievances. And the reason Defendants engaged in the alleged unconstitutional action here was in retaliation for Mr. Tate filing grievances and a lawsuit. Thus, "[t]he prison's internal administrative process [was] not available to [Mr. Tate] because the allegedly unconstitutional treatment described in his complaint was inflicted in retaliation for his

earlier attempt to report." *Reid*, 825 F. App'x at 445. Considering these facts, it cannot be the case that the BOP grievance process is an adequate alternative remedy so as to preclude a damages action.

Second, contrary to what the district court said, a state-law tort remedy was *not* available to Mr. Tate. The Ninth Circuit made this point too. It explained that the "Supreme Court has already recognized that in suits against federal officers, state-law tort actions do not generally provide an alternative remedy, because under the Westfall Act, 'prisoners ordinarily *cannot* bring state-law tort actions against employees of the Federal Government.'" *Hoffman*, 26 F.4th at 1066 (quoting *Minneci v. Pollard*, 565 U.S. 118, 126 (2012)) (brackets omitted). "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.'" *Id.* (quoting *Osborn v. Haley*, 549 U.S. 225, 229 (2007)). Thus, the district court was wrong to conclude that state tort law was an alternative avenue for Mr. Tate to redress his constitutional grievances.[15]

[15] Because federal officials are immune from state tort claims, plaintiffs alleging that federal officials violated state tort law must bring suit under the Federal Torts Claim Act (FTCA), where the "United States is substituted as the defendant and the claim must be processed in federal court." *Hoffman*, 26 F.4th at 1066. The Supreme Court already held in *Carlson* that an FTCA action does not replace a *Bivens* claim. Rather, "Congress view[ed] [the] FTCA and *Bivens* as parallel, complementary causes of action." *Carlson*, 446 U.S. at 20.

The district court then held that Congress's failure to create an express damages remedy was a special factor that counseled against recognizing a *Bivens* claim here. *See* J.A. 239. Defendants made a similar argument below, asserting that the "PLRA enacted a variety of reforms. Despite the PLRA's sweeping reform, Congress did not provide a damage remedy to prisoners for constitutional claims. This inaction by Congress is a special factor counseling hesitation in recognizing a new implied cause of action under *Bivens*." J.A. 108. The district court and Defendants misunderstood the import of the PLRA.

When Congress enacted the PLRA in 1995, it created a set of procedural requirements that prisoners must exhaust before filing a federal lawsuit. *See* 42 U.S.C. § 1997e. Congress legislated against the backdrop of federal prisoners filing Eighth Amendment *Bivens* actions, as *Carlson* had long been decided. Yet Congress did not suggest that it intended to curtail those *Bivens* actions. As the Third Circuit reasoned: "[T]he PLRA reflects Congress's intent to make more rigorous the process prisoners must follow to bring suit in federal court. And, of dispositive note, the PLRA has been interpreted to govern the process by which federal prisoners bring *Bivens* claims." *Bistrian*, 912 F.3d at 93. It is "equally, if not more, likely that Congress simply wanted to reduce the volume of prisoner suits by imposing exhaustion requirements, rather [than] eliminate whole categories of claims through silence and implication." *Id.* at n.22. The Third Circuit commonsensically concluded that the

"very statute that regulates how *Bivens* actions are brought cannot rightly be seen as dictating that a *Bivens* cause of action should not exist at all." *Id.* at 93. Indeed, if the PLRA, *a law governing procedure*, were read to foreclose *Bivens* claims in the federal prison litigation context, *Carlson* would no longer be good law. Yet the Court has reaffirmed the continued availability of a *Bivens* remedy under *Carlson*. *See Hernandez*, 140 S. Ct. at 741; *Abbasi*, 137 S. Ct. at 1864.

Third, although the district court did not adopt this argument, Defendants asserted below that "the impact on governmental operations system-wide would be significant in expanding *Bivens* to the allegations here." J.A. 108. But Mr. Tate "does not seek to change BOP policy; he alleges individualized injuries and fears of retaliation unique to him, not the inmate population as a whole." *Reid*, 825 F. App'x at 445. While redressing the wrongs here could possibly "implicate policies regarding inmate safety and security, [ ] that would be true of practically all claims arising in a prison." *Bistrian*, 912 F.3d at 93 (cleaned up). Yet Eighth Amendment claims against prison officials have long been allowed.

Moreover, Defendants' assertions of doom were necessarily overblown. State prisons continue to function despite inmates bringing Eighth Amendment conditions-of-confinement claims under § 1983. And federal courts adjudicate these claims without superintending state prisons and despite the federalism concerns im-

plicated in those cases (which are absent here). Further, federal prison officials already must face Eighth Amendment deliberate indifference medical care claims under *Carlson*, and there "is no indication that, as a general matter, the actions of prison officials with respect to these nonmedical conditions are taken under materially different constraints than their actions with respect to medical conditions." *Wilson*, 501 U.S. at 303.[16]

It is also not true, as Defendants asserted, that allowing Mr. Tate's claim to proceed "would subject federal prison employees to civil litigation for any perceived slight." J.A. 108. There are several mechanisms in place that shield federal officials from civil suits. These include the exhaustion requirements of the PLRA, complaint screening under 28 U.S.C. § 1915A, the three-strikes provision of the PLRA, *see* 28 U.S.C. § 1915(g), the heightened pleading requirements in *Iqbal* and *Twombly*, and the availability of qualified immunity. It is easy to weed out frivolous lawsuits. This is not a reason to foreclose damages actions altogether.

In the end, "[t]he purpose of *Bivens* is to deter the *officer*." *Abbasi*, 137 S. Ct. at 1860 (quotation marks omitted). And if Mr. Tate's allegations prove true, than

[16] This case is a far cry from *Hernandez* and *Abbasi*, which implicated national security and foreign policy concerns. *See Hernandez*, 140 S. Ct. at 747-48; *Abbasi*, 137 S. Ct. at 1861; *see also Tun-Cos v. Perrotte*, 922 F.3d 514, 526 (4th Cir. 2019) (declining to extend *Bivens* to an action against Immigration and Customs Enforcement agents because of the national security and foreign policy concerns involved in immigration enforcement.).

allowing a *Bivens* action to proceed here would align perfectly with this purpose given the alleged misconduct. Thus, even if this Court finds that Mr. Tate's Eighth Amendment claim arises from a new *Bivens* context, it should hold that no special factors counsel hesitation in allowing his *Bivens* suit to proceed.

CONCLUSION

For these reasons, this Court should reverse the district court's order and remand for further proceedings.[17]

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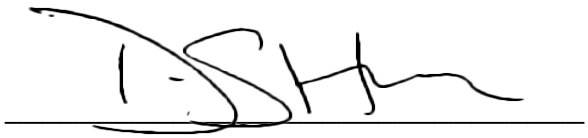
[17] Moreover, because Mr. Tate was pro se below, and he is no longer incarcerated in the facility from which his Eighth Amendment claim arose, this Court should order the district court to appoint him counsel.

REQUEST FOR ORAL ARGUMENT

Mr. Tate respectfully requests that oral argument be granted in this case, pursuant to Rule 34(a) of the Federal and Local Rules of Appellate Procedure. The factual and legal issues presented are sufficiently complex that oral argument would aid this Court in its decisional process.

CERTIFICATE OF COMPLIANCE

In accordance with Rule 32(a) of the Federal Rules of Appellate Procedure, undersigned counsel for appellant certifies that the accompanying brief is printed in Times New Roman 14-point font, and including footnotes, contains no more than 13,000 words. According to the word-processing system used to prepare the brief, Microsoft Word, the relevant sections of the brief under Rule 32(f) contain 8,199 words.



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CERTIFICATE OF SERVICE

I hereby certify that on May 18, 2022, I electronically filed the foregoing brief with the Clerk of the Court of the United States Court of Appeals for the Fourth Circuit using the CM/ECF system. All participants are registered CM/ECF users and will be served by the appellate CM/ECF system.

Daniel S. Harawa