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

REPLY BRIEF

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When federal prison officials are deliberately indifferent to an inmate's health and safety in violation of the Eighth Amendment, the Supreme Court has held that a *Bivens* remedy is available to hold them accountable. *See Carlson v. Green*, 446 U.S. 14 (1980) (recognizing a *Bivens* deliberate indifference claim based on inadequate medical care); *Farmer v. Brennan*, 511 U.S. 825 (1994) (allowing a *Bivens* deliberate indifference claim based on prison officials' failure to protect an inmate from violence to proceed past summary judgment).

Raymond Tate alleged that federal prison officials were deliberately indifferent to his health and safety in two distinct ways. One, they were deliberately indifferent to his health and safety given the dangerous conditions in which they confined him (conditions-of-confinement claim). Two, the officials were deliberately indifferent to Mr. Tate's health and safety when they spread false rumors about him to spur other inmates to attack him (failure-to-protect claim). The failure-to-protect claim is the exact claim recognized in *Farmer*, and therefore should have been permitted to proceed. And the Supreme Court has declared that a deliberate indifference claim premised on inadequate medical treatment and a claim premised on conditions of confinement are not meaningfully distinct, thus that claim should have been allowed to proceed too. *See Wilson v. Seiter*, 501 U.S. 294, 303 (1991) (there is "no significant distinction between claims alleging inadequate medical care and those

alleging inadequate 'conditions of confinement'"). The district court erred in dismissing Mr. Tate's Eighth Amendment claims.

Defendants do not address Mr. Tate's failure-to-protect claim despite it being argued in his Opening Brief. *See, e.g.*, Opening Br. at 27. Thus, this Court should hold that Defendants waived any argument about this claim. *See Alvarez v. Lynch*, 828 F.3d 288, 295 (4th Cir. 2016) (when an appellee "inexplicably ignore[s]" arguments raised in the opening brief "in its response brief," "such an outright failure to join in the adversarial process would ordinarily result in waiver").

As for the conditions-of-confinement claim, Defendants argue that the claim presents a new *Bivens* context and that special factors counsel against recognizing a *Bivens* action here—namely, that Congress is better suited to create a *Bivens* remedy and the availability of the BOP administrative grievance process forecloses a *Bivens* action. But in so arguing, Defendants ignore the fact that the *Supreme Court* has said that there is no meaningful difference between a deliberate indifference claim based on inadequate medical treatment—the claim recognized in *Carlson*, and a deliberate indifference claim based on conditions of confinement—the claim here. *Wilson*, 501 U.S. at 303. And even if this Court holds that Mr. Tate's Eighth Amendment deliberate indifference claim *does* arise in a new context, no special factors counsel against recognizing a *Bivens* remedy. First, as both the Third and Ninth Circuits have

explained, Congress understood that federal prisoners could bring deliberate indifference claims under *Bivens* when it passed the PLRA in the wake of *Carlson* and *Farmer* and yet did not foreclose such claims. Second, Congress could not have intended the BOP grievance process to foreclose a *Bivens* remedy against federal prison officials as that would contradict a central purpose of the PLRA, which requires prisoners to exhaust the BOP administrative process as a *prerequisite* to filing suit.

In the end, federal courts regularly adjudicate deliberate indifference claims without unduly impinging on prison operations or frustrating executive functioning. This Court should reverse the district court's dismissal of Mr. Tate's Eighth Amendment claims.

I. Mr. Tate's Eighth Amendment Deliberate Indifference *Bivens* Action Does Not Present a New *Bivens* Context

Mr. Tate filed a *Bivens* action alleging Defendants were deliberately indifferent to his health and safety in violation of the Eighth Amendment. There were two distinct aspects to Mr. Tate's Eighth Amendment deliberate indifference claim: a conditions-of-confinement claim, *see, e.g.*, J.A. 17-19; and a failure-to-protect claim, *see, e.g.*, J.A. 26-27.

The allegations underlying the conditions-of-confinement claim included (among other atrocities) the fact that Mr. Tate was locked in a moldy and filthy cell around the clock with inadequate hygiene or sanitary products and without basic

bedding. *See* Opening Br. at 6-9 (detailing the allegations underlying the claim). And the allegations underlying the failure-to-protect claim included Defendants spreading false rumors that Mr. Tate made sexual advances towards male staff members knowing the risks that such rumors carry to incite violence against him. *See id.* at 9-10 (same).

Mr. Tate's failure-to-protect claim is analogous to the claim that the Supreme Court allowed to proceed in *Farmer*. In *Farmer*, the Court held that "prison officials have a duty to protect prisoners from violence at the hand of other prisoners." 511 U.S. at 833 (cleaned up). The Eighth Amendment claim in *Farmer* stemmed from federal prison officials putting a transgender woman in general population in an all-male prison, where she was beaten and raped. *Id.* at 830. The Supreme Court reversed the district court's grant of summary judgment for the officials on the claim, and remanded the case to lower courts for further proceedings. *Id.* at 851. And while *Farmer* did not dwell on whether a *Bivens* remedy was available, the Supreme Court has held that whether a *Bivens* remedy exists is "antecedent" to whether a viable constitutional claim has been stated. *Hernandez v. Mesa*, 137 S. Ct. 2003, 2006 (2017). It makes little sense that the Court would remand a case for further proceedings when no cause of action existed in the first place. It is "clear . . . that the Supreme

Court has, pursuant to *Bivens*, recognized a failure-to-protect claim under the Eighth Amendment." *Bistrian v. Levi*, 912 F.3d 79, 91 (3d Cir. 2018).[1]

Mr. Tate also alleged that Defendants violated their "duty to protect [him] from violence at the hands of other prisoners," *Farmer*, 511 U.S. at 833, when they deliberately spread the false rumor that he made sexual advances towards male staff members, knowing the risk of violence such rumors carry. He repeatedly made this argument in the district court, even citing *Farmer*, *see, e.g.*, J.A. 16, 27, 246, and yet the district court did not address it. Then in his Opening Brief, Mr. Tate continued to press his failure-to-protect claim, even faulting the district court for not "address[ing] this aspect of [his] Eighth Amendment claim." Opening Br. at 27-28. Yet Defendants similarly do not address whether Mr. Tate's failure-to-protect claim can proceed under *Bivens*, perhaps because the Supreme Court has already recognized this type of *Bivens* claim.[2] In the words of the Third Circuit: while the Supreme

[1] Defendants argue that Mr. Tate's reliance on *Farmer* is "misplace[d]" and that under the Court's recent decision in *Egbert v. Boule*, 142 S. Ct. 1793, 1802 (2022), *Farmer* cannot be considered a case where the Court recognized a *Bivens* remedy. Appellees' Br. at 8. *Egbert* says nothing about *Farmer*, and in the words of one district court: "It would be irrational of [this] Court to assume that the Supreme Court would outline a merits analysis for a cause of action that does not exist and over which it lacked subject-matter jurisdiction." *Doty v. Hollingsworth*, No. CV 15-3016 (NLH), 2018 WL 1509082, at *3 n.2 (D.N.J. Mar. 27, 2018).

[2] In an isolated sentence, Defendants admit that Mr. Tate argued that Defendants "deliberately expos[ed] him to *the risk* of physical harm." Appellees' Br. at 17 (emphasis in original). This shows Defendants were aware of the failure-to-protect claim and yet still chose not to address it anyway, making waiver even clearer.

Court recently has "changed the framework of analysis for *Bivens* claims generally," it has not altered "the existence of the particular right to *Bivens* relief for prisoner-on-prisoner violence." *Bistrian*, 912 F.3d at 94. In any event, by choosing not to respond, Defendants have waived any argument as to this claim. *See Alvarez*, 828 F.3d at 295.[3]

Turning to the conditions-of-confinement aspect of Mr. Tate's deliberate indifference claim, the district court held that this claim presented a new *Bivens* context and that special factors counsel against allowing a *Bivens* action to proceed. Defendants now argue the same. But the Supreme Court has said that for a claim to arise from a new *Bivens* context, it must be *meaningfully* different from the Court's previous *Bivens* cases. *See Ziglar v. Abbasi*, 137 S. Ct. 1843, 1855 (2017). And the Court has already recognized that there is *no* meaningful difference between a deliberate indifference claim premised on inadequate medical care—the *Bivens* claim recognized in *Carlson*, and a deliberate indifference claim premised on conditions of confinement—the claim here. The *Wilson* Court could not have been clearer: "[W]e see *no significant distinction* between claims alleging inadequate medical care

[3] In *Dongarra v. Smith*, 27 F.4th 174 (3d Cir. 2022), the Third Circuit held that a *Bivens* remedy for a failure-to-protect claim does not exist when the federal prisoner is not actually attacked. *Id.* at 180. Defendants do not make this argument, and thus this Court should not consider it. Moreover, *Dongarra*'s physical-attack requirement conflicts with *Farmer*, which made clear that "deliberate indifference does not require a prisoner seeking a remedy for unsafe conditions to await a tragic event such as an actual assault before obtaining relief." *Farmer*, 511 U.S. at 845 (cleaned up).

and those alleging inadequate conditions of confinement." *Wilson*, 501 U.S. at 303 (emphasis added). The Court continued by explaining that "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.* *Wilson* proves that the Court views variations of deliberate indifference claims as essentially synonymous. More proof: *Farmer*, a *Bivens* case involving a failure-to-protect claim, also set the standard for "deliberate indifference [] claims challenging conditions of confinement." *Farmer*, 511 U.S. at 836.

Avoiding *Wilson* and *Farmer*, Defendants argue that Mr. Tate's conditions-of-confinement claim presents a new context from *Carlson* because his "allegations do not involve medical care or any physical injury," but instead "relate to the cleanliness of his cell, the provision of supplies while in the SHU, and the use of recreation time." Appellees' Br. at 10.

These factual differences are a far cry from what the Court has focused on when finding that a case presents a *meaningfully* different context. *Compare Egbert*, 142 S. Ct. at 1804 (emphasizing the context was new given that it arose in "the border-security context"); *Abbasi*, 137 S. Ct. at 1860 (finding a new context given that plaintiffs' claims "challenge[d] the confinement conditions imposed on illegal aliens pursuant to a high-level executive policy created in the wake of a major terrorist

attack"); *Hernandez v. Mesa*, 140 S. Ct. 735, 744 (2020) (finding a "world of difference" between an "unconstitutional arrest and search carried out in New York City" and "petitioners' cross-border shooting claims, where the risk of disruptive intrusion by the Judiciary into the functioning of other branches is significant") (quotation marks omitted)). In fact, in *Abbasi*, the Court set forth certain factors for lower courts to consider when assessing whether a case arises in a *meaningfully* different context, and *no* factor suggests that the small factual differences pointed to by Defendants will suffice to show that a claim arises in a new *Bivens* context. *See Abbasi*, 137 S. Ct. at 1860. This is perhaps why Defendants ignore the *Abbasi* factors.

Had Defendants addressed the *Abbasi* factors, they would have had to concede that Mr. Tate's conditions-of-confinement claim is not meaningfully different from the inadequate-care claim in *Carlson*. *See Attkisson v. Holder*, 925 F.3d 606, 621 (4th Cir. 2019) (applying the *Abbasi* factors). The "rank of the officers involved" is the same. *Abbasi*, 137 S. Ct. at 1860. The "constitutional right at issue" is the same. *Id.* The Supreme Court and lower courts have given "exten[sive] judicial guidance" on what constitutes constitutional prison conditions. *Id.* "[T]he statutory or other legal mandate under which the officer was operating" is the same. *Id.* "[T]he risk of disruptive intrusion by the Judiciary into the function of other branches" is the same. *Id.* And while the factors listed in *Abbasi* are not exhaustive, Defendants do not point

to any other "special factors" that make this case meaningfully different from *Carlson*. *Id.* Thus, applying the *Abbasi* factors underscores the conclusion reached in *Wilson*: a conditions-of-confinement claim is not meaningfully different from an inadequate-care claim, which was recognized in *Carlson*.[4]

II. Special Factors Do Not Counsel against Allowing Mr. Tate's Eighth Amendment *Bivens* Action to Proceed.

Even if this Court holds that Mr. Tate's conditions-of-confinement claim presents a new *Bivens* context, special factors do not counsel against recognizing a modest extension of *Bivens* here. As the Court recently said, the answer to whether a *Bivens* remedy should be recognized turns on "whether there is any reason to think that Congress might be better equipped to create a damages remedy." *Egbert*, 142 S. Ct. at 1803. Here, there is no reason to think that Congress is better equipped to provide a damages remedy given that Congress itself has legislated in this area with the understanding that federal prisoners could bring deliberate indifference claims under *Bivens*.

[4] Defendants cite an unpublished, nonprecedential, per curiam opinion from the Fifth Circuit, which held that the plaintiff's claim that prison officials failed to provide a safe working environment presented a different context from *Carlson*. *See* Appellees' Br. at 11 (citing *Springer v. United States*, No. 21-11248, 2022 WL 2208516 (5th Cir. June 21, 2022)). This non-binding, five-paragraph opinion also does not engage with the *Abbasi* factors, and thus deserves little weight.

As the Ninth Circuit explained when addressing this very question, "Congress passed the PLRA in 1996, 16 years after the Supreme Court decided *Carlson*." *Hoffman v. Preston*, 26 F.4th 1059, 1070 (9th Cir. 2022). And while the PLRA "did not explicitly create a stand-alone monetary damages remedy against federal correctional officers, [ ] it did not explicitly disallow one either." *Id.* "The PLRA 'attempts to eliminate unwarranted federal-court interference with the administration of prisons' by 'affording correctional officials time and opportunity to address complaints internally *before* allowing the initiation of a federal case.'" *Id.* (quoting *Woodford v. Ngo*, 548 U.S. 81, 93 (2006)) (brackets omitted; emphasis in original). Thus, "the PLRA is best read as reflecting congressional 'intent to make more rigorous the process prisoners must follow' before bringing a federal damages lawsuit, rather than a desire to prevent prisoners from seeking damages in federal court altogether." *Id.* at 1070-71 (quoting *Bistrian*, 912 F.3d at 93).

That Congress did not abolish *Bivens* actions when passing the PLRA, and instead decided to make filing such actions more difficult, is dispositive. *See Porter v. Nussle*, 534 U.S. 516, 524 (2002) (holding that the PLRA's exhaustion requirements apply to *Bivens* suits). Yet Defendants seize on a single sentence in *Abbasi* to argue otherwise. *See* Appellees' Br. at 16. In *Abbasi*, the Court said that "*it could be argued*" (Defendants leave out this part) that Congress's failure to create a federal damages remedy when passing the PLRA "*suggests* Congress chose not to extend

the *Carlson* damages remedy to cases involving other types of prisoner mistreatment." *Abbasi,* 137 S. Ct. at 1865 (emphasis added). But as the Third Circuit retorted, "It is equally, if not more likely however, that Congress simply wanted to reduce the volume of prisoner suits by imposing exhaustion requirements, rather to eliminate whole categories of claims through silence and implication." *Bistrian*, 912 F.3d at 93 n.22.[5]

It is also important to consider the backdrop against which Congress was legislating when it passed the PLRA. *See Midatlantic Nat'l Bank v. N.J. Dep't of Envtl. Prot.*, 474 U.S. 494, 501 (1986) ("The normal rule of statutory construction is that if Congress intends for legislation to change the interpretation of a judicially created concept, it makes that intent specific.").

[5] Or as the Ninth Circuit said in response to the same stray sentence from *Abbasi*: "We do not dispute that this argument could be made, but we find it unpersuasive." *Hoffman*, 26 F.4th at 1070. Defendants do not address either *Bistrian* or *Hoffman*. Adopting their position would require this Court to explicitly reject the reasoning of its sister circuits, and this Court loathes creating circuit splits. *See United States v. Hashime*, 722 F.3d 572, 573 (4th Cir. 2013).

By the time Congress passed the PLRA, federal prisoners regularly brought Eighth Amendment conditions-of-confinement claims under *Bivens*.[6] This is unsurprising given that *Farmer* articulated the standard for deliberate indifference conditions-of-confinement claims. *See Howard v. Grinage*, 82 F.3d 1343, 1351 (6th Cir. 1996) (describing *Farmer* as "a *Bivens* suit wherein the plaintiff alleged violations of his Eighth Amendment rights, claiming that prison officials denied him humane conditions of confinement"). Thus, when Congress passed the PLRA, it would have known that federal prisoners were not only bringing inadequate-care claims based on *Carlson*, but were also bringing conditions-of-confinement claims based on *Farmer*. Congress's decision not to disturb these claims when overhauling the prison litigation process is clear indication that Congress purposefully left this *Bivens* damages remedy in place.[7]

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[6] *See, e.g.*, *Bagola v. Kindt*, 39 F.3d 779, 779 (7th Cir. 1994) (reversing the district court's dismissal of an inmate's "*Bivens* action against prison officials concerning his conditions of confinement"); *Del Raine v. Williford*, 32 F.3d 1024, 1029 (7th Cir. 1994) (reversing the district court's dismissal of the inmate's "Eighth Amendment conditions-of-confinement claim"); *Young v. Quinlan*, 960 F.2d 351, 363 (3d Cir. 1992) (resolving on the merits a conditions-of-confinement *Bivens* claim); *see also Paine v. Ruffennach*, 28 F.3d 107, 1994 WL 247115 (9th Cir. 1994) ("claims affecting the conditions of confinement are cognizable under *Bivens*").

[7] Defendants cite 42 U.S.C. § 1997e(e) and the fact that the PLRA requires physical injury to file a civil suit, and claim this is strong indication that Congress did not want to allow *Bivens* actions like Mr. Tate's to exist. *See* Appellees' Br. at 16-17. The opposite is true. 42 U.S.C. § 1997e(e)'s physical injury requirement does not apply to constitutional claims. *See King v. Zamiara*, 788 F.3d 207, 213 (6th Cir. 2015) ("[T]he plain language of [§ 1997e(e)] does not bar claims for constitutional

Then, Defendants argue that this Court should wait until Congress explicitly recognizes a federal action (despite Congress implicitly recognizing such an action) because "this case implicates the field of prison administration and, therefore, relates to a matter that is rarely the proper subject for judicial intervention." Appellees' Br. at 12 (cleaned up). Defendants continue that Mr. "Tate's allegations concern BOP's decisions regarding SHU housing policies and conditions, which implicates two pillars of prison administration—housing and security of a federal facility." Appellees' Br. at 13. Finally, Defendants maintain that allowing Mr. Tate's claim here would have "system wide consequences" because any "inmate who is in the SHU could survive a motion to dismiss . . . by merely alleging that his conditions in segregated housing are inadequate." Appellees' Br. at 17. Defendants concerns are necessarily overblown.

While all deliberate indifference claims implicate prison policy in some sense, *Carlson* and *Farmer* make clear that "that alone cannot be a complete barrier to *Bivens* liability." *Bistrian*, 912 F.3d at 93. For instance, the prisoner in *Carlson* challenged the "gross inadequacy of medical facilities" at the prison and then complained that the officials "kept him in that facility against the advice of doctors" and "failed to give him competent medical treatment." *Carlson*, 446 U.S. at 16 n.2. Thus, part

injury that do not also involve physical injury."); *Wilcox v. Brown*, 877 F.3d 161, 169-70 (4th Cir. 2017). Thus, 42 U.S.C. § 1997e(e) *confirms* Congress's choice *not* to disturb the standard for raising constitutional claims.

of the prisoner's claim implicated prison operations—the adequacy of the facility, but it also implicated the conduct of the officials. Same with *Farmer*. There, the prisoner alleged that the prison had a policy of placing "preoperative" transgender prisoners "with prisoners of like biological sex," and the officials placed her in general population "despite knowledge that [she] . . . would be particularly vulnerable to sexual attack." *Farmer*, 511 U.S. at 829-31. Thus, part of the prisoner's claim implicated prison policy, but it also implicated the conduct of officials.

The same is true here. Defendants complain that *some* aspects of Mr. Tate's Eighth Amendment claim are "rooted in USP Lee and/or BOP policy. For example, the type of toothbrush and pencil inmates are permitted to have in the SHU." Appellees' Br. at 19. Assuming this is true, there are clearly other aspects of the claim that are directly tied to *Defendants'* specific actions and inactions unrelated to prison policy and administration. For instance, Mr. Tate alleged Defendants would purposefully deny him recreation and exercise time outside of his cell for no reason other than spite. *See* J.A. 17. Surely, Defendants were not acting pursuant to prison policy when they confined Mr. Tate to a cell covered in "black mold, fungus, and mildew." *Id.* Defendants were presumably not acting pursuant to prison policy when they specifically denied Mr. Tate supplies to clean his cell so that he could at least attempt to make it safe to live in given that he was locked in there 24 hours a day. *See id.* And certainly, Defendant Bates was not acting under any prison policy when,

rather than give Mr. Tate his already limited hygiene products, he "squirted" the soap on the floor "as if it was ejaculated semen." J.A. 27.

"This Court has repeatedly stated that when reviewing Eighth Amendment claims, courts must consider the totality of the circumstances." *Mitchell v. Rice*, 954 F.2d 187, 191 (4th Cir. 1992). While some of the circumstances that give rise to Mr. Tate's conditions-of-confinement claim may flow from prison policy, much of it involves unique actions that Defendants took towards him in retaliation for his filing a federal lawsuit against other prison officials. As a result, allowing Mr. Tate's claim to proceed would not *unduly* implicate prison policy or lead to a flood of litigation.[8] *See, e.g.*, *Bistrian*, 912 F.3d at 93. Mr. Tate's claim, just as *Bivens* intended, is designed to hold the *officials* responsible for their constitutional violations. *Abbasi*, 137 S. Ct. at 1860; *see also Turner v. Safley*, 428 U.S. 78, 84 (1987) ("[F]ederal courts must take cognizance of the valid constitutional claims of inmates.").

Defendants also argue that Mr. Tate's *Bivens* claims fail because "there are several alternative remedial structures available, most notably BOP's administrative process." Appellees' Br. at 20. They additionally assert that Federal Tort Claims Act (FTCA) claims, Administrative Procedure Act (APA) claims, and state-law tort

[8] While Defendants worry about an "influx of manufactured claims," Appellees' Br. at 15, as the Opening Brief points out, there are various legal mechanism to weed out such suits. *See* Opening Br. at 34. Defendants do not contest this point.

claims provide alternative means of relief. *See id.* at 22 & n.10. These purported alternative avenues do not foreclose a *Bivens* remedy here.

First, again, as the Third and Ninth Circuits have explained, it makes little sense to view BOP's administrative process as supplanting a *Bivens* action, when Congress expressly contemplated exhaustion of the grievance process as a prerequisite to prisoners filing a lawsuit, including a *Bivens* action. "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; *see also Bistrian*, 912 F.3d at 92.

More to the point, the Supreme Court has recognized federal prisoners' ability to file *Bivens* claims even given BOP's administrative process. In *Correctional Services Corp. v. Malesko*, the Court recognized that if a "federal prisoner in a BOP facility alleges a constitutional deprivation, he may bring a *Bivens* claim against the offending individual officer." 534 U.S. 61, 72 (2001). In that same opinion, the Court held that a *Bivens* claim could not be brought by residents of a halfway house against a private corporation because they have "access to remedial mechanisms established by the BOP, including . . . grievances filed through the BOP's Administrative Remedy Program." *Id.* at 74. Thus, while the Court thought the BOP administrative process was a sign that people *other* than federal prisoners should not have a *Bivens* remedy available to them, the Court anticipated federal prisoners would continue to

bring *Bivens* actions even with the availability of the BOP administrative process. Of course, this makes sense, as Congress did not disturb the ability of federal prisoners to bring *Bivens* claims when passing the PLRA, instead just requiring that they exhaust its procedural requirements, including the BOP administrative process, before suing.

There is yet another reason why the BOP administrative process cannot supplant a *Bivens* remedy here—such a ruling would effectively overrule *Carlson*. If the availability of the BOP administrative process was sufficient to foreclose *Bivens* claims brought by federal prisoners, then that would also clearly foreclose the deliberate indifference *Bivens* claim recognized in *Carlson*. Yet the Court, even in cautioning against the extension of *Bivens*, has never called *Carlson* into question.

Finally, the BOP administrative process was not, as a factual matter, "available" to Mr. Tate. As the Supreme Court has explained, a prison's "administrative procedure is unavailable when (despite what regulations or guidance materials may promise) it operates as a simple dead end—with officers unable or consistently unwilling to provide any relief to aggrieved inmates." *Ross v. Blake*, 578 U.S. 632, 643 (2016). Likewise, a prison administrative process is unavailable "when prison administrators thwart inmates from taking advantage of a grievance process through machination, misrepresentation, or intimidation." *Id.* at 644. Here, the reason Mr. Tate was sent to the SHU, and why Defendants denied him basic life necessities,

was that Mr. Tate used formal legal mechanisms to complain about prison officials' misconduct. In other words, Defendants engaged in the alleged unconstitutional conduct precisely because Mr. Tate asserted his legal rights. And the reason Mr. Tate had to sue was that his administrative grievances went unacted upon. 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 abuse by a prison guard through the prison's internal grievance process." *Reid v. United States*, 825 F. App'x 442, 445 (9th Cir. 2020) (unpublished).

The other avenues of purported relief pointed to by Defendants can be easily dispatched.

Defendants first say that the availability of an FTCA claim forecloses a *Bivens* remedy. As Defendants concede, the Supreme Court has already recognized the "FTCA and *Bivens* [to be] parallel, complementary causes of action." Appellees' Br. at 22 (quoting *Carlson*). But Defendants suggest that this clear statement from *Carlson* "carries little weight because it predates [the Court's] current approach to implied causes of action." *Id.* (quoting *Egbert*). Contrary to what Defendants suggest, the Court has never revisited *Carlson*'s statement that the FTCA and *Bivens* are parallel causes of action and that FTCA claims do not supplant *Bivens* claims. In fact, since *Carlson*, the Court has reiterated that the FTCA does not supplant *Bivens*

claims. *See Malesko*, 534 U.S. at 68 ("We also found it crystal clear that Congress intended the FTCA and *Bivens* to serve as parallel and complementary sources of liability."(quotation marks omitted)).[9] Despite what Defendants say, *Egbert* does not call this clear statement of law into question.

In *Egbert*, the plaintiff argued *Davis v. Passman*, 442 U.S. 228 (1979) supported the recognition of a *Bivens* retaliation claim because in *Passman*, "the Court permitted a congressional staffer to sue a congressman for sex discrimination under the Fifth Amendment"; thus *Passman* "permitted a damages action to proceed even though it required the factfinder to probe a federal officials' motives for taking an adverse action against the plaintiff." *Egbert*, 142 S. Ct. at 1808. It was in this context that the *Egbert* Court said, *"**Passman*** carries little weight because it predates our current approach to implied causes of action." *Id.* (emphasis added). *Egbert* does not discuss the FTCA and its relationship to *Bivens*. Thus, the statement in *Carlson*, which was reiterated in *Malesko*, that "Congress views FTCA and *Bivens* as parallel, complementary causes of action," is still good law. *Carlson*, 446 U.S. at 20. In fact, because *Congress* views FTCA claims and *Bivens* actions as parallel remedies, FTCA claims *cannot* be indication that Congress wanted FTCA claims to *supplant*

[9] The out-of-circuit cases cited by Defendants are not on point. *Williams v. Keller*, 2021 WL 4486392 (10th Cir. 2021) involved a malicious prosecution claim brought by an Air Force Base contractor. *Olivia v. Nivar*, 973 F.3d 438 (5th Cir. 2020), involved a claim brought by a Veterans Affairs hospital visitor after an incident with VA police officers.

a *Bivens* action. Nothing about the Court's more recent case law changes that. *Cf Agostini v. Felton*, 521 U.S. 203, 237 (1997) ("We do not acknowledge, and we do not hold, that other courts should conclude our more recent cases have, by implication, overruled an earlier precedent."). Beyond that, the "FTCA does not allow actions against individual guards, so it does not offer a means for deterring future misconduct." *Reid*, 825 F. App'x at 445.

Defendants then assert that "the APA would be the proper mechanism through which [Mr.] Tate could challenge BOP policies and regulations." Appellees' Br. at 22-23. But Mr. Tate is not challenging any BOP policy or regulation, and thus the APA has no relevance here. Indeed, deliberate indifference claims necessarily focus on an official's conduct, not general policy. *See, e.g.*, *Farmer*, 511 U.S. at 836.

Finally, in a footnote, Defendants assert that "State tort law also provides an alternative means for relief." Appellees' Br. at 22 n.10. Defendants do not address the fact that the Westfall Act generally immunizes federal officials from state-law tort claims. *See* Opening Br. at 31. If Defendants are waiving their immunity, they should say so explicitly, because as the Ninth Circuit reasoned, state-law tort claims are not an alternative avenue for relief given federal officials' immunity. *Hoffman*, 26 F.4th at 1066.

At bottom, this "case does not impact national security or raise cross-border concerns that clearly counsel against a *Bivens* remedy," as was the case in *Abbasi*,

Hernandez, and *Egbert*. *Hoffman*, 26 F.4th at 1072. And Mr. Tate does not wish to "challenge prison administration or policies." *Id.* Instead, Mr. Tate seeks to hold Defendants accountable for creating incarceration conditions that were inhumane and unconstitutional. The allegations here are not about any single prison policy. The allegations focus on a group of federal prison officials who purposefully denied Mr. Tate basic life necessities and consciously chose to confine him in conditions that seriously jeopardized his health. *Bivens* was designed to address and deter the very type of conduct at issue. *See F.D.I.C. v. Meyer*, 510 U.S. 471, 485 (1994) ("The purpose of *Bivens* is to deter the *officer*."). "[I]f the principles animating *Bivens* stand at all, they must provide a remedy on these narrow and egregious set of facts." *Launza v. Love*, 899 F.3d 1019, 1021 (9th Cir. 2018).

CONCLUSION

This Court should reverse the district court's dismissal of Mr. Tate's Eighth Amendment *Bivens* claims.

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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 6,500 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 5,188 words.

Daniel S. Harawa

CERTIFICATE OF SERVICE

I hereby certify that on August 16, 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