No. 21-1060

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

LUIS A. RIOS JR.,

Plaintiff-Appellant,

v.

FNU REDDING, FNU SIMMS, AND FNU JONES,

Defendants-Appellees.

On Appeal from the United States District Court
for the District of Colorado, No. 1:20-cv-1775
Hon. Michael E. Hegarty

BRIEF OF AMICUS CURIAE INSTITUTE FOR JUSTICE IN SUPPORT OF PLAINTIFF-APPELLANT

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INTEREST OF AMICUS CURIAE[1]

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SUMMARY OF ARGUMENT

In addition to the reasons in Appellant's Opening Brief, this Court should reverse the district court's dismissal of Divinity Rios's[2] Eighth Amendment *Bivens* claim because:

(1) *Bivens* and its progeny are part of our nation's history and tradition of adjudicating damages claims against federal officials for their unconstitutional conduct (Part I);

[1] Pursuant to Fed. R. App. P. 29, all parties have consented to the filing of this brief. No party or party's counsel for either side authored this brief in whole or in part. No person or entity other than Amicus and its members made a monetary contribution to its preparation or submission.

[2] Amicus refers to Appellant by her chosen name, "Divinity Rios," and her preferred pronouns, she/her.

(2) Ms. Rios's claim arises in the established *Bivens* context of *Carlson v. Green*, which the Supreme Court has held remains necessary and settled law, irrespective of this Court's application of *Farmer v. Brennan* (Part II.A);

(3) *Ziglar v. Abbasi* and *Hernandez v. Mesa* did not abrogate this Court's *Bivens* jurisprudence, which governs run-of-the-mill cases like this one, requires an engaged special-factors inquiry, and makes clear that no special factors warrant refusing to hear Ms. Rios's claim (Part II.B.1);

(4) Congress has codified Eighth Amendment *Bivens* claims, which alone is sufficient for Ms. Rios's claim to proceed (Part II.B.2); and

(5) The district court violated the Supreme Court's admonition against confusing *special* factors with *any* factors counseling hesitation (Part II.B.3).

* * *

Divinity Rios is a transgender woman housed in a men's federal prison. Failing to heed Ms. Rios's warnings about her need for protective housing, prison officials placed her in general population, resulting in her avoidable rape. Ms. Rios sued the responsible officials for their deliberate indifference to her need for protection, grounding her claims in *Bivens v. Six*

Unknown Named Agents, 403 U.S. 388 (1971), and its progeny. But the district court dismissed her claims, incorrectly concluding that *Bivens*—the exclusive remedy for constitutional violations committed by federal officials—offered her no solace.

The *Bivens* remedy is rooted in our nation's history and tradition of holding federal officials accountable for their constitutional harms. Yet some lower courts are eager to close the courthouse doors to injured individuals by misconstruing *Ziglar v. Abbasi*, 137 S. Ct. 1843 (2017), to require that every case be deemed a "new context" that "counsels hesitation." That eagerness stems from the false belief that *Bivens* is divorced from the judicial function under the Constitution—a tale that could not be further from the truth.

A proper understanding of our nation's history of constitutional accountability demonstrates the importance and propriety of the *Bivens* remedy. Under that history and the *Abbasi* framework, the district court here erred in dismissing Ms. Rios's claim. Controlling precedent and congressional approval of the claim make clear that her case does not present

a new context or implicate special factors counseling hesitation against vindicating Ms. Rios's constitutional rights.

ARGUMENT

I. Personal accountability for federal officials is rooted in history, and *Bivens* is part of that lineage.

The power of the federal courts is based on one simple premise: where "there is a legal right, there is also a legal remedy." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803) (quoting 3 William Blackstone, *Commentaries on the Laws of England* 23). Yet some modern courts recoil at the opportunity to provide a remedy to persons whose rights were violated at the hands of federal officials. The reluctance to apply *Bivens*—a reluctance this Court has not adopted, *see* Part II.B.1—is based on the flawed assumption that holding federal officers personally liable for violating constitutional rights is a novel, radical development disconnected from judicial authority, the Constitution, and history. It is not.

A. For decades, courts ensured constitutional accountability through common-law remedies against federal officials.

Suits for damages against federal officials are neither new nor radical. To the contrary, they date back to English common law. Louis L. Jaffe, *Suits*

Against Governments and Officers: Sovereign Immunity, 77 Harv. L. Rev. 1, 1–2 (1963); *see also, e.g.*, *Entick v. Carrington*, 19 How. St. Tr. 1029 (C.P. 1765) (applying damages remedy against the King's Chief Messenger for breaking into person's home and looking through his papers under a general warrant). English courts recognized that such suits were necessary to guarantee accountability and, in turn, protect rights. As Blackstone explained, "if there were no method of recovering and asserting [] rights, when wrongly withheld or invaded," by, for example, "pay[ing] . . . damages for the invasion," then "in vain would rights be declared, in vain directed to be observed." 1 William Blackstone, *Commentaries on the Laws of England* 55–56.

The English practice of imposing monetary damages against the Crown's officials was not lost on the founding generation. As our Supreme Court recounted, "every American statesman, during our revolutionary and formative period as a nation, was undoubtedly familiar with this monument of English freedom, and considered it as the true and ultimate expression of constitutional law." *Boyd v. United States*, 116 U.S. 616, 626 (1886). The

Framers believed so strongly in the need for judicial enforcement of individual rights that some anti-federalists opposed ratification because the Constitution did not guarantee *jury trials* against abusive government officers, which they believed "most essential for our liberty." Luther Martin, The Genuine Information, Delivered to the Legislature of the State of Maryland, Relative to the Proceedings of the General Convention (Nov. 29, 1787), *reprinted in* 3 *The Records of the Federal Convention of 1787* 221, 222 (Max Farrand ed., 1911). And when George Mason expressed similar concerns, John Marshall sought to reassure Virginia delegates that federal officers who violate fundamental rights would be held individually accountable in court. He explained that a person whose rights were violated could "trust to a tribunal in his neighborhood[,] . . . apply for redress, and get it." John Marshall, Statement in the Virginia Ratifying Convention (June 20, 1788), *reprinted in* 3 *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* 554 (Johnathan Elliot ed., 1836).

Against this history, it is unsurprising that, for much of our nation's existence, individuals could hold federal officers accountable for

constitutional violations through common-law tort liability. For instance, a case involving an unlawful seizure by federal officers would begin as an action in trespass. *See* James E. Pfander & David Baltmanis, *Rethinking* Bivens*: Legitimacy and Constitutional Adjudication*, 98 Geo. L. J. 117, 134 (2009). If the seizure was declared unlawful, the officer was required to pay damages for his actions. *See Yearsley v. W.A. Ross Const. Co.*, 309 U.S. 18, 21 (1940). This was because courts strictly observed the principle that the federal government may only invoke powers granted to it by the Constitution. *See* Sina Kian, *The Path of the Constitution: The Original System of Remedies, How it Changed, and How the Court Responded*, 87 N.Y.U. L. Rev. 132, 144 & n.39 (2012). They recognized that if the Constitution did not authorize the official's actions, then he exceeded the bounds of his authority and must be held personally liable. *Id.*

Strict constitutional observance, reinforced through accountability, was of such importance that courts permitted personal-liability suits even against officials who acted pursuant to an order if that order was itself unconstitutional. *See, e.g.*, *Bates v. Clark*, 95 U.S. 204, 205 (1877) (holding

officials personally liable for trespass for seizing whiskey from merchants despite congressional authorization and an order from the U.S. Attorney to do so); *Little v. Barreme*, 6 U.S. (2 Cranch) 170, 179 (1804) (concluding that authority invalidly given cannot "change the nature of the transaction, or legalize an act which without [invalidly given authority] would have been a plain trespass"). Recognizing that this result may seem harsh, Justice Story explained that the legislature could choose to indemnify the individual officers, but that that was not an issue for the courts. Courts, Justice Story reasoned, "can only look to the questions, whether the laws have been violated; and if they were, justice demands that the injured party should receive a suitable redress." *The Apollon*, 22 U.S. (9 Wheat.) 362, 366–67 (1824). That principle carries even greater weight in cases that do not present the issue of an officer acting pursuant to another's orders.

It is axiomatic that "[a]ll the officers of the government, from the highest to the lowest, are creatures of the law and are bound to obey it." *United States v. Lee*, 106 U.S. 196, 220 (1882). As such, any framework in which "courts cannot give remedy when the citizen has been deprived of his

[rights] by force" would "sanction[] a tyranny which has no existence in the monarchies of Europe, nor in any other government which has a just claim to well-regulated liberty and the protection of personal rights." *Id.* at 221.

This is the historical tradition of accountability for federal officials—and the context in which *Bivens* and its progeny should be understood.

B. *Bivens* reinforced the tradition of uniform constitutional accountability for federal officials.

In 1965, Webster Bivens was subjected to an excessive use of force by federal officers. 403 U.S. at 389. Seeking to hold the officers accountable in federal court, Mr. Bivens sought damages directly under the Constitution, instead of in tort, requiring the Court to answer whether existing common-law remedies should be supplemented with a federal one. *Id.* at 390–91. The Court did not need to reconsider whether individuals could recover money damages from federal officials—that, as history shows, they certainly could.

Highlighting that "[a]n agent acting—albeit unconstitutionally—in the name of the United States possesses a far greater capacity for harm than an individual trespasser exercising no authority other than his own," the Court recognized a damages claim against federal officials directly under the

Constitution. *Id.* at 391–92, 395. Its decision was influenced by *Erie Railroad Co. v. Tompkins*, which eliminated general federal common law and required federal courts to follow state precedent when adjudicating common-law cases. 304 U.S. 64, 71–73 (1938). Because this created the risk of states applying divergent remedies for constitutional violations, the *Bivens* Court reasoned that "the Fourth Amendment operates as a limitation upon the exercise of federal power regardless of whether the State in whose jurisdiction that power is exercised would prohibit or penalize the identical act if engaged in by a private citizen." 403 U.S. at 392.

In other words, under our "absolute right to be free from unreasonable searches and seizures carried out by virtue of federal authority," *id.*, "leaving the problem of federal official liability to the vagaries of common-law actions" would be undesirable, particularly as "there is very little to be gained from the standpoint of federalism by preserving different rules of liability for federal officers dependent on the State where the injury occurs," *id.* at 409 (Harlan, J., concurring).

The Court's decision served a primary objective—ensuring uniform constitutional enforcement across the states. And, over the next decade, it furthered this objective by extending *Bivens* to Fifth Amendment gender-discrimination claims, *Davis v. Passman*, 442 U.S. 228 (1979), and Eighth Amendment deliberate-indifference claims, *Carlson v. Green*, 446 U.S. 14 (1980). In these contexts, a person's geography no longer dictated their remedy.

C. The Westfall Act retained accountability and codified *Bivens* claims.

Soon after it was decided, *Bivens* went from *one* path for holding federal officials accountable for their constitutional violations to *the only* path. In 1988, the Westfall Act foreclosed tort suits against federal officers under state common law. 28 U.S.C. § 2679(b). For non-constitutional tort suits, Congress substituted the federal government as the defendant. *Id.* For constitutional tort suits, Congress continued to allow "a civil action against an employee of the government." *Id.* In light of the Act's blanket prohibition on common-law suits, redress against individual officials became viable only under *Bivens* and its progeny. *See Hernandez v. Mesa*, 140 S. Ct. 735, 748

n.9 (2020); *Hui v. Castaneda*, 559 U.S. 799, 807 (2010) (addressing Congress's "explicit" recognition of "*Bivens* claims").

Even though the Westfall Act expressly permits *Bivens* claims, *Bivens*'s critics wrongly denounce the cause of action as judicial usurpation of Congress's powers. *See, e.g., Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 75 (2001) (Scalia, J., concurring). This criticism ignores Congress's intention that the Westfall Act "would not affect the ability of victims of constitutional torts to seek personal redress from federal employees who allegedly violate their Constitutional rights." H.R. Rep. No. 100-700, at 6 (1988). And it has emboldened some courts to limit *Bivens* and its progeny to their exact factual scenarios in a misguided effort to write the remedy out of existence. *See, e.g.*, *Oliva v. Nivar*, 973 F.3d 438 (5th Cir. 2020), *cert. denied*, 2021 WL 2044553 (2021) (denying *Bivens* remedy for not mirroring *Bivens*'s exact facts); *Byrd v. Lamb*, 990 F.3d 879, 883 (5th Cir. 2021) (Willett, J., concurring) ("The *Bivens* doctrine, if not overruled, has certainly been overtaken" in the Fifth Circuit.).

But this result is irreconcilable with our history and with this Court's precedent. As members of this Court have recognized, "if a plaintiff can

establish that state law won't remedy a constitutional injury," such as when a federal official commits a constitutional violation, "the doors of the federal courthouse should remain open to him." *Browder v. City of Albuquerque*, 787 F.3d 1076, 1084 (10th Cir. 2015) (Gorsuch, J., concurring). As explained in Part II below, Ms. Rios's constitutional injury cannot be remedied by state law or federal alternatives. Federal officials violated her rights, and "the doors of the federal courthouse should remain open to [her]." *Id.*

II. Ms. Rios's Eighth Amendment claim arises in the established context of *Carlson*, and, under this Court's *Bivens* jurisprudence, no special factors warrant dismissal, particularly because Congress approves of the claim.

Despite its critics, the Supreme Court has recognized that "*Bivens* does vindicate the Constitution by allowing some redress for injuries, and it provides instruction and guidance to" federal officials. *Abbasi*, 137 S. Ct. at 1856–57. Thus, acknowledging that *Bivens* is "settled law," the "undoubted reliance upon it as a fixed principle," and the fact that "no congressional enactment has disapproved of" *Bivens* or its progeny, the Supreme Court reiterated its "necessity." *Id.*

The Court then set forth a two-part test for lower courts to apply in determining whether a *Bivens* claim should proceed. Courts must ask (1) whether the case "arises in a new context or involves a new category of defendants," and, if it does, (2) whether "any 'special factors . . . counsel hesitation' about granting the extension." *Hernandez*, 140 S. Ct. at 743 (quoting *Abbasi*, 137 S. Ct. at 1857) (cleaned up).

Though the district court here correctly identified this test, it incorrectly applied it at both steps. Ms. Rios's claim does not present a new context; and, even if it did, no special factors counsel against extending her relief.

A. Ms. Rios's claim arises under the established *Bivens* context recognized in *Carlson*, irrespective of this Court's application of *Farmer*.

Though *Farmer v. Brennan*, 511 U.S. 825 (1994), is itself sufficient to support Ms. Rios's claim,[3] this Court does not have to go beyond the three

[3] As Ms. Rios correctly argues in her Opening Brief, *Farmer* demonstrates that she has stated a *Bivens* claim. In *Farmer*, the Supreme Court, citing *Carlson*, permitted a claim against federal officials under facts exactly like Ms. Rios's. 511 U.S. at 829–30. Farmer, like Ms. Rios, was a transgender female prisoner. *Id.* at 829. Farmer, like Ms. Rios, was placed in the general population of a male prison. *Id.* at 830. Farmer, like Ms. Rios, was raped by another prisoner while in general population. *Id.* The only difference between Farmer's

cases named in *Abbasi* as setting forth an established *Bivens* context—*Bivens*, *Davis*, and *Carlson*. *Carlson* is materially indistinguishable.

The Supreme Court has explained that "a context [is] 'new'" only "if it is 'different in a meaningful way from previous *Bivens* cases decided by [the Supreme] Court.'" *Hernandez*, 140 S. Ct. at 743 (quoting *Abbasi*, 137 S. Ct. at 1859). "[D]ifferences that are meaningful enough to make a given context a new one" include:

> 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 [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.

Abbasi, 137 S. Ct. at 1859–60.

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tragic story and Ms. Rios's is that Ms. Rios expressly informed prison officials of the danger she faced and requested to be moved to the special housing unit, making the already obvious risk of harm all the more known to the officers. *Compare* A.11 (Compl. ¶ 1), *with Farmer*, 511 U.S. at 830 (permitting the claim to proceed even though Farmer "voiced no objection to any prison official"). As the *Farmer* Court observed, the Eighth Amendment provides that "prison officials have a duty . . . to protect prisoners from violence at the hands of other prisoners," 511 U.S. at 833, 848 (internal quotation omitted). And just as the Supreme Court permitted for Farmer, Ms. Rios's *Bivens* claim should continue.

The district court here found a new context though not one of these distinguishing factors exists between *Carlson* and Ms. Rios's claim. Instead, the court relied on a hair-splitting differentiation that both (1) ignores the Supreme Court's requirement that a distinction be *meaningful* to establish a new context and (2) impermissibly abrogates Supreme Court precedent permitting Eighth Amendment *Bivens* claims for deliberate indifference.

In *Carlson*, the Supreme Court extended *Bivens* to a prisoner's Eighth Amendment claim that prison officials were deliberately indifferent to the substantial risk of serious harm posed to him by his medical condition. 446 U.S. at 16–17 & n.1. Here, Ms. Rios has claimed that prison officials violated the Eighth Amendment through their deliberate indifference to the substantial risk of serious harm posed to her by other prisoners. In both situations, prison officials refused to protect a prisoner, who was under their absolute control and custody, from a known risk of harm, resulting in severe injury to the prisoner. *Compare* 446 U.S. at 16 & n.1 (describing factual background of claims), *with* A.11–13, 17–19 (Compl. ¶¶ 1–5, 17–19) (same). Yet the district court held that Ms. Rios's claim presents a new context

because the *exact* action (or inaction) taken by prison officials was different. A.83–84. The district court explained that, in *Carlson*, officials were indifferent to the prisoner's serious *medical* needs, whereas here, officials were indifferent to Ms. Rios's serious *physical safety* needs. *Id.* Based on this distinction alone, the district court found a new context. *Id.*

That conclusion defies *Abbasi*'s clear instruction that "trivial" differences "will not suffice to create a new *Bivens* context." 137 S. Ct. at 1865. This case does not present the *meaningful* distinctions the Court has recognized in other cases—e.g., the implication of a different constitutional right, *id.* at 1864; claims against a policymaking entity rather than an individual, *Malesko*, 534 U.S. at 71–72; or claims against a private employee who was subject to state-law remedies, *Minneci v. Pollard*, 565 U.S. 118, 127 (2012). Rather, *Carlson* and Ms. Rios's case implicate the same constitutional right, down to the specific legal standard of deliberate indifference; both involve facility-level, individual prison officials; and both concern matters upon which there is clear judicial guidance, *see, e.g.*, *Farmer*, 511 U.S. at 835–47.

While the district court attempted to draw a distinction between *Carlson* and this case based on the difference between Carlson's medical risks and Ms. Rios's physical safety risks, the Supreme Court has not parsed the Eighth Amendment at such a level of granularity. Rather, the Court has articulated a single test for both types of risks: "The question under the Eighth Amendment is whether prison officials, acting with deliberate indifference, exposed a prisoner to a sufficiently substantial risk of serious damage to his future health, and it does not matter whether the risk comes from a single source or multiple sources." *Farmer*, 511 U.S. at 843 (internal quotation omitted). If the source of the risk "does not matter" to the Supreme Court, then it cannot be the basis upon which to find a new context.

To accept the district court's trivial distinction as material enough to create a new *Bivens* context would limit *Carlson* to its precise facts—which is not how the Supreme Court has instructed the new-context inquiry to be done. Indeed, in *Carlson* itself, the Court deemed the precise facts of the case only important enough to recount in a footnote. *See* 446 U.S. at 16 n.1. And in *Abbasi*, the Court expressly declined to cabin the *Bivens* trio to their precise

factual scenarios, rejecting the notion that "trivial" distinctions will suffice to find a new context. 137 S. Ct. at 1865.

It is not lower courts' prerogative to restrict Supreme Court precedent in ways the Court itself has not instructed. *See Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484 (1989). Because *Carlson* is not materially distinguishable from this case, this Court should hold that this is not a new context and permit Ms. Rios her day in court.

B. *Abbasi* did not alter this Court's *Bivens* jurisprudence, under which no special factors counsel hesitation in this case, particularly because Congress approves of Ms. Rios's claim.

Because Ms. Rios's case arises in an established *Bivens* context under *Carlson*, this Court should reverse and remand without reaching step two of the *Bivens* analysis. But, if this Court does reach step two, that inquiry also compels revival of Ms. Rios's case.

The district court's perfunctory special-factors analysis defies this Court's requirement for an engaged inquiry into whether *Bivens* should be extended. It also ignores the Supreme Court's and this Court's emphasis on the importance of congressional action (or inaction) in determining whether

a *Bivens* claim should proceed—an inquiry that reveals congressional approval of Ms. Rios's claim. The district court further failed to address (let alone present special factors that overcome) the reality that the judiciary has been adjudicating claims exactly like Ms. Rios's for decades, under an established legal standard, without disruptions to the separation of powers or prison operations.

1. This Court's precedent requires an engaged special-factors inquiry.

If a *Bivens* claim arises in a new context, the court asks whether special factors counsel against recognizing it—i.e., whether good reasons exist for the judiciary to abdicate its historic constitutional role, *see* Part I, and close the courthouse doors to victims of unconstitutional conduct.

Abbasi made waves by formalizing this two-step test and for its dicta that extending *Bivens* is a "'disfavored' judicial activity." 137 S. Ct. at 1857. But it was not a sea change; courts have been assessing "alternative remedies" and other "special factors counseling hesitation" for the extension of *Bivens* remedies since the 1980s. *See, e.g.*, *Schweiker v. Chilicky*, 487 U.S. 412, 421 (1988); *Lombardi v. Small Bus. Admin.*, 889 F.2d 959, 960–61 (10th Cir.

1989). Indeed, those considerations are as old as *Bivens* itself. 403 U.S. at 396; *id.* at 399 (Harlan, J., concurring). *Abbasi*, and *Hernandez* after it, were applications of those established inquiries, not the source. And they require compelling reasons before foreclosing a *Bivens* remedy, including in the prison setting.

Critically, *Abbasi* and *Hernandez* were applications of the *Bivens* analysis in extreme circumstances: post-9/11 national security, high-level executive policies related to the same, and the cross-border murder of a foreign national. *See Hernandez*, 140 S. Ct. at 749 (recognizing reasons to "hesitate about extending *Bivens in this case*") (emphasis added); *Abbasi*, 137 S. Ct. at 1860–61 (emphasizing the special factors "necessarily implicated" by the unique concerns for "sensitive functions of the Executive Branch" and "sensitive issues of national security").

In cases without such sensitive and unique considerations, pre-*Abbasi* precedent regarding alternative remedies and other special factors remains not only binding, but also more informative. And in no *Bivens* case does this

Court's precedent treat the special-factors inquiry as a perfunctory step on the road to dismissal of adequately pleaded constitutional claims.

Two cases illustrate as much. First, in *Smith v. United States*, this Court rejected the Inmate Accident Compensation Act as an alternative remedy sufficient to displace *Bivens* claims in the prison setting—even though the statute provided monetary compensation—because the Act did not have the same deterrent value as *Bivens*. 561 F.3d 1090, 1102–03 (10th Cir. 2009).

Later, in *Big Cats of Serenity Springs, Inc. v. Rhodes*, this Court reaffirmed *Smith*'s analysis and the importance of individual accountability and deterrence in the alternative-remedy inquiry. 843 F.3d 853, 863 (10th Cir. 2016); *see also FDIC v. Meyer*, 510 U.S. 471, 485 (1994) (guarding against "the evisceration of the *Bivens* remedy" so that its personal "deterrent effects . . . would [not] be lost"). *Big Cats* explained that "in analyzing whether a *Bivens* claim is precluded by an alternative remedy, courts must consider the nature and extent of the statutory scheme created by Congress[] and assess the significance of that scheme in light of the factual background of the case at hand." *Id.* at 860–61.

Defying *Smith* and *Big Cats*, some district courts in this circuit, including the court below, now treat step two as "a very low bar for a defendant to clear." *Medina v. Danaher*, 445 F. Supp. 3d 1367, 1372 (D. Colo. 2020). It is important for this Court to reaffirm that its precedent requires an engaged special-factors inquiry—not one that assumes the conclusion of dismissal and works backwards to get there. *Cf. Byrd v. Lamb*, 990 F.3d 879, 883 (5th Cir. 2021) (Willett, J., concurring) (lamenting that, in the Fifth Circuit, "new context = no *Bivens* claim").

Other circuit courts have recognized that *Abbasi* and *Hernandez* presented unusual circumstances. For instance, the Ninth Circuit has explained that "[r]un-of-the-mill" *Bivens* claims do not implicate the same concerns as those exceptional cases and that for an alternative remedy to warrant dismissal, it should be "sufficient to protect a plaintiff's interests" in remedying individual officials' unconstitutional conduct. *Boule v. Egbert*, 980 F.3d 1309 (9th Cir. 2020), *reh'g denied and amended by* 2021 WL 2171832, at *15–16 (9th Cir. May 20, 2021). Similarly, the Third Circuit recognized that the prison "administrative grievance process is not an alternative because it does

not redress [the] harm" caused by individual instances of unconstitutional conduct. *Bistrian v. Levi*, 912 F.3d 79, 92–94 (3d Cir. 2018). The simple fact that an alternative process implicates prison conditions and safety "cannot be a complete barrier to *Bivens* liability," the court continued, because "that would be true of practically all claims arising in a prison." *Id.*

The Ninth and Third Circuits' analyses are consonant with this Court's *Bivens* precedent; a thumb-on-the-scales approach is not. Therefore, consistent with *Smith* and *Big Cats*, this Court should reaffirm that it is the judiciary's "job to judge when the facts in the record indicate that the line separating uncomfortable from [unconstitutional prison conditions] has been crossed," *Chapman v. Santini*, 805 F. App'x 548, 560–61 (10th Cir. 2020) (unpublished), and that "[w]hether a *Bivens* action exists for a given constitutional violation must be decided on a case-by-case basis," *Burton-Bey v. United States*, 1996 WL 654457, at *1 (10th Cir. Nov. 12, 1996) (citing *Beattie v. Boeing Co.*, 43 F.3d 559, 564 (10th Cir. 1994)). Here, that case-specific inquiry reveals that Congress approves of *Carlson* claims and that no good reason exists to ignore that approval.

2. Congress approves of *Carlson*'s and *Farmer*'s application against federal prison officials.

"Had Congress wished to limit [constitutional claims against individual prison officials,] . . . it knew how to do so," *Tanzin v. Tanvir*, 141 S. Ct. 486, 492 (2020), but it chose not to. It would, therefore, be "odd" for this Court to now construe the law "in a manner that prevents courts from awarding such relief." *Id.*

A key special-factors consideration is "whether there are sound reasons to think Congress might doubt the efficacy or necessity of a damages remedy." *Hernandez*, 140 S. Ct. at 743 (cleaned up). When Congress has been active in the context at issue, its "inaction" is generally not deemed "inadvertent." *Smith*, 561 F.3d at 1101 (quoting *Schweiker*, 487 U.S. at 423). Where "an implied private remedy has already been recognized by the courts, . . . the question is whether Congress intended to preserve the pre-existing remedy." *Ind. Nat'l Corp. v. Rich*, 712 F.2d 1180, 1182 (7th Cir. 1983) (quoting *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran*, 456 U.S. 353, 378–79 (1982)). And "Congress is presumed to enact legislation with knowledge of the law," so that "a newly-enacted statute is presumed to be

harmonious with existing law and judicial concepts." *Garcia v. DHS*, 437 F.3d 1322, 1335–36 (Fed. Cir. 2006) (collecting Supreme Court cases). A legislative enactment that does not disturb *Bivens* precedent means that Congress "left *Bivens* [precedent] where it found it." *Hernandez*, 140 S. Ct. at 748 n.9.

In this case, the upshot of these rules is simple: Congress, aware of *Carlson* and *Farmer*, has acted at least four times in statutes relevant to that existing law, but has never purported to restrict (let alone eliminate) the damages remedies authorized by those cases. So there are no "reasons to think Congress might doubt the efficacy or necessity of a damages remedy" in those contexts. *Hernandez*, 140 S. Ct. at 743 (cleaned up). In fact, Congress's conduct strongly suggests the opposite. It intended to preserve the pre-existing *Carlson* and *Farmer* remedy by codifying it and treating it the same as Section 1983 claims:

- In 1995, "Congress passed the Prison Litigation Reform Act [PLRA] . . ., which made comprehensive changes to the way prisoner abuse claims must be brought in federal court." *Abbasi*, 137 S. Ct. at 1865. This was "[s]ome 15 years after *Carlson* was decided" and one year after *Farmer* was decided, and Congress chose not to statutorily restrict either type of claim. *Id.*

- In 1996, Congress amended PLRA, 42 U.S.C. § 1997e, to add an exhaustion-of-administrative-remedies requirement not only to Section 1983 claims, but also claims brought under "any other Federal law." *See Garrett v. Hawk*, 127 F.3d 1263, 1265 (10th Cir. 1997), *abrogated in part on other grounds by Booth v. Churner*, 532 U.S. 731 (2001).

- In 2003, Congress enacted the Prison Rape Elimination Act (PREA), 34 U.S.C. §§ 30301–30309, which concerns sexual assault in prison—the same issue for which the Supreme Court recognized a failure-to-protect legal standard and a damages remedy against federal prison officials nine years earlier in *Farmer*. PREA is hardly comprehensive. It "does not grant prisoners any specific rights," *Chinnici v. Edwards*, 2008 WL 3851294, at *3 (D. Vt. Aug. 12, 2008), or "establish a private cause of action for allegations of prison rape," *Fulks v. Watson*, 2021 WL 1225922, at *6 (S.D. Ind. Mar. 31, 2021). But "PREA's very existence suggests a congressional commitment to holding prison officials to a high standard in the context of sexual abuse, with the help of the court system." *Peterson v. Martinez*, 2020 WL 999832, at *10 (N.D. Cal. Mar. 2, 2020).

- In 2013, Congress again amended PLRA to explicitly account for (and place a physical-injury limitation on) sexual-assault claims. *See* 42 U.S.C. § 1997e(e). Again, it chose not to limit claims against federal prison officials in any additional way. By doing so, Congress further codified *Bivens*, *Carlson*, and *Farmer* claims. *See Williams v. Baker*, 487 F. Supp. 3d 918, 927 (E.D. Cal. 2020) (PLRA's references to federal laws other than Section 1983 are codifications of *Bivens* claims); *id.* ("The fact the PLRA contemplates *Bivens* actions and limits [their availability] in cases of 'mental or emotional injury' supports a reasonable negative inference that Congress did not intend to make deeper cuts to the remedy.").

In short, "no congressional enactment has disapproved of" *Carlson* or *Farmer*. *Abbasi*, 137 S. Ct. at 1856. Any concerns about extending *Bivens* claims to "*other* types of prisoner mistreatment" do not apply to *Carlson* or *Farmer* claims—against the backdrop of which Congress has legislated without disapproval several times. *Id.* at 1865 (emphasis added). To the contrary, Congress codified those claims and repeatedly chose not to place limitations on them (beyond those applicable to state prison officials under Section 1983).

Congress's approval not only obviates any separation-of-powers concerns with Ms. Rios's claim, it signals to the judiciary that Congress *wants* such claims adjudicated against federal prison officials. *Accord Freedland v. Fanelli*, 2019 WL 2448810, at *4 (E.D. Pa. June 10, 2019) ("Congress already proscribed, through [PLRA], suits brought by federal prisoners absent allegations of physical harm. If there is a compelling need to frame new rules, Congress will respond through legislation."). That congressional approval is reason enough for Ms. Rios's claim to proceed.

3. The district court's special-factors analysis misconstrues binding precedent and the judicial role.

For the reasons in Ms. Rios's Opening Brief and the additional reasons below, the district court improperly "confuse[d] the presence of *special* factors with *any* factors counseling hesitation." *McCarthy v. Madigan*, 503 U.S. 140, 151 (1992), *superseded by statute on other grounds*. Courts should not lightly abdicate their judicial role, but that is exactly what the district court did here.

i. The Bureau of Prisons' Administrative Remedy Program is not an alternative remedy.

Malesko does not support the district court's holding that "access to the [BOP] Administrative Remedy Program [ARP]" provides an alternative remedy. A.84. The *Malesko* defendant was a private prison (not an individual officer), which was central to the Court's holding. 534 U.S. at 63. Only because the plaintiff sued a policymaking entity was the ARP an alternative "remedial mechanism." 534 U.S. at 74. As the Supreme Court recognized, an ARP grievance can convince the prison to alter its policy; it cannot remedy an individual officer's past misconduct or adequately deter unforeseeable misconduct that is not policy-based. *See id.* at 70.

Malesko, therefore, "suggested an Eighth Amendment *Bivens* claim would be permitted . . . for harms caused by a federal prison officer's unconstitutional conduct." *Big Cats*, 843 F.3d at 861 n.1 (citing *Malesko*, 534 U.S. at 70). Tellingly, when the Court rejected a *Bivens* remedy against an individual private-prison officer, it did not mention the ARP. *See Minneci*, 565 U.S. 118. It instead relied on the availability of state tort law—which, under the Westfall Act, is not available to prisoners who, like Ms. Rios, sue federal-government officials. *Id.* at 126.

In short, "the ARP, which has been in effect for nearly four decades, . . . did not affect the Supreme Court's conclusion in *Carlson*, nor the decisions of the Seventh, Ninth, and Tenth Circuits" to permit *Bivens* claims by federal prisoners. *Koprowski v. Baker*, 822 F.3d 248, 256–57 (6th Cir. 2016). These decisions accord with *Smith* and *Big Cats*, in which this Court rejected purported alternative remedies that, like the ARP, did not vindicate *Bivens*'s "purpose": "to deter individual federal officers from committing constitutional violations." *Big Cats*, 843 F.3d at 865 (quoting *Malesko*, 534 U.S. at 70).

ii. PREA does not foreclose Ms. Rios's claim.

The district court erred to the extent it deemed PREA relevant to its Eighth Amendment special-factors analysis. *See* A.85–86 (discussing PREA only with respect to due process claim, but considering "totality of the factors" to dismiss Eighth Amendment claim). As discussed, *see* Part II.B.2, PREA signals Congress's approval of *Carlson* and *Farmer* claims, not its disapproval.

The Supreme Court has found that a statute displaces *Bivens* claims where it contains express language, such as, "[t]he remedy against the United States . . . shall be exclusive of any other civil action or proceeding by reason of the same subject-matter against the officer or employee." *Hui*, 559 U.S. at 805 (cleaned up). Accordingly, a statute is not an alternative remedy or special factor counseling hesitation just because it concerns the same subject matter as a *Bivens* claim. Rather, "the appropriate consideration is whether an alternate, existing process demonstrates Congress's *intent* to exclude a damages remedy. Evidence of that intent would be a scheme that provides adequate deterrence of constitutional violations and at least some

form of relief for the harm." *Big Cats*, 843 F.3d at 862. PREA does none of that.

iii. Recognizing Ms. Rios's constitutional remedy is not inconvenient, inappropriate, or unnecessary.

Finally, this Court should reject the district court's conclusory assertions that a *Bivens* remedy for Ms. Rios's sexual assault would "add to the Court's already heavy burden of prison litigation," "interfer[e] with prison management," and be "superfluous." A.85.

Even if convenience were a reason to abdicate the judicial role of vindicating constitutional rights (which it is not), the district court's conclusion ignores that the Supreme Court has required district courts to adjudicate *Farmer* claims for over two decades, and *Carlson* claims for over four, and that this Court has consistently reaffirmed that obligation. *See, e.g.*, *Benefield v. McDowall*, 241 F.3d 1267 (10th Cir. 2001); *Brown v. Narvais*, 265 F. App'x 734 (10th Cir. 2008) (unpublished).

The district court did not explain how continuing to litigate these long-recognized claims would suddenly "interfere with prison management" or be "superfluous." Nor could it. *Bivens* claims do not seek to alter prison

policy, and *Carlson* rejected the risk of such claims interfering with officers' duties. 446 U.S. at 19. Most importantly, "gratuitously allowing the beating or rape of one prisoner by another serves no legitimate penological objectiv[e]." *Farmer*, 511 U.S. at 833–34 (internal quotation omitted).

This Court should reverse.

CONCLUSION

Ms. Rios's Eighth Amendment rights were violated just as they were in *Carlson*, and she should be able to hold the federal offenders liable, just as plaintiffs have before her.

Dated: June 3, 2021

Respectfully submitted,

INSTITUTE FOR JUSTICE

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CERTIFICATE OF COMPLIANCE

I hereby certify that:

1. This brief complies with the word limit of Fed. R. App. P. 29(a)(5) because, excluding the parts of the document exempted by Fed. R. App. P. 32(f), this brief contains 6,359 words.

2. This brief complies with the typeface, type-style, and type-volume requirements of Fed. R. App. P. 32(a)(5)–(7) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 365 in Palatino Linotype 14-point font.

Dated: June 3, 2021

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CERTIFICATE OF SERVICE

I hereby certify that on June 3, 2021, I electronically filed the foregoing using the Court's CM/ECF system, which will send notification of such filing to all registered participants.

Dated: June 3, 2021

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Counsel for Amicus Curiae

From: Devi Rao
To: Jaba Tsitsuashvili; Lisa Bixby
Cc: Alexa Gervasi
Subject: RE: Rios v. Redding, No. 21-1060
Date: Thursday, May 20, 2021 2:20:26 PM

Yes, we consent. Thank you.

From: Jaba Tsitsuashvili <jtsitsuashvili@ij.org>
Sent: Thursday, May 20, 2021 3:10 PM
To: Devi Rao <devi.rao@macarthurjustice.org>; Lisa Bixby <Lisa.Bixby@macarthurjustice.org>
Cc: Alexa Gervasi <agervasi@ij.org>
Subject: Rios v. Redding, No. 21-1060

Dear Counsel – Can you please provide written consent for the Institute for Justice to file an amicus brief in support of Ms. Rios in *Rios v. Redding*?

Thank you,

Jaba Tsitsuashvili
Attorney
Admitted in California and D.C.

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From: Miller, Marissa (USACO)
To: Jaba Tsitsuashvili
Subject: RE: Rios v. Redding, Tenth Circuit No. 21-1060
Date: Tuesday, May 25, 2021 12:56:01 PM

Just heard from our ethics people! I am staying on the case and you have our consent to file an amicus brief. Let me know if you need anything else,

Marissa

From: Jaba Tsitsuashvili <jtsitsuashvili@ij.org>
Sent: Tuesday, May 25, 2021 12:23 PM
To: Miller, Marissa (USACO) <mmiller6@usa.doj.gov>
Cc: Alexa Gervasi <agervasi@ij.org>
Subject: RE: Rios v. Redding, Tenth Circuit No. 21-1060

That's awesome! And no worries, we'll be on the lookout for your follow-up.

Thanks,
Jaba

Jaba Tsitsuashvili
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Admitted in California and D.C.

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From: Miller, Marissa (USACO) <Marissa.Miller@usdoj.gov>
Sent: Tuesday, May 25, 2021 01:19 PM
To: Jaba Tsitsuashvili <jtsitsuashvili@ij.org>
Subject: RE: Rios v. Redding, Tenth Circuit No. 21-1060

Hi Jaba,

Apologies for the slow response! Our general practice is to automatically consent to these, but I am still waiting to hear back from our ethics folks on whether this would mean I have to step off the case (fun fact: I interned with IJ for a summer when I was in college). I assume that won't matter, but if it's OK, would you mind giving us a few more days?

Thanks!

Marissa

From: Jaba Tsitsuashvili <jtsitsuashvili@ij.org>
Sent: Thursday, May 20, 2021 1:18 PM
To: Miller, Marissa (USACO) <mmiller6@usa.doj.gov>; Prose, Susan (USACO) <SProse@usa.doj.gov>
Cc: Alexa Gervasi <agervasi@ij.org>
Subject: Rios v. Redding, Tenth Circuit No. 21-1060

Dear Counsel – I write on behalf of the Institute for Justice regarding the above-captioned case, currently on appeal at the Tenth Circuit. Pursuant to FRAP 29(a)(2), we respectfully request your consent to file an amicus brief in the case. Our brief would be in support of Plaintiff-Appellant Rios, and it would be on the Institute for Justice's own behalf. Ms. Rios's counsel has already consented.

The Institute for Justice is a nationwide non-profit public interest law firm. We litigate *Bivens* and government accountability cases around the country—hence our interest in this case.

Please let me know by Monday May 31 whether your client consents to our filing of an amicus brief, or whether we will need to seek leave of the Court.

Thank you,

Jaba Tsitsuashvili
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Admitted in California and D.C.

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