No. 20-15396

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MARCELLAS HOFFMAN,

PLAINTIFF-APPELLANT,

V.

PRESTON,

DEFENDANT-APPELLEE,

AND

D. COYLE ET AL.,

DEFENDANTS.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA
CASE NO. 1:16-CV-01617-LJO (SAB)

OPENING BRIEF OF PLAINTIFF-APPELLANT MARCELLAS HOFFMAN

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INTRODUCTION

Marcellas Hoffman alleges serious misconduct by a rogue prison guard. Officer Timothy Preston offered to pay five other inmates to physically assault Mr. Hoffman and publicly labeled Mr. Hoffman as a "snitch," knowing that other inmates would likely attack Mr. Hoffman in response. Predictably, Mr. Hoffman was brutally beaten in his prison cell. Officer Preston does not and could not deny that these allegations establish deliberate indifference to a substantial risk of harm to Mr. Hoffman, or that he has no qualified immunity for such a clearly established Eighth Amendment violation. The only issue presented in this appeal is whether, under *Bivens v. Six Unknown Federal Narcotics Agents*, a remedy is available for this serious breach of the Constitution. 403 U.S. 388 (1971).

For forty years, courts faced with similar claims have consistently answered "yes." In 1980, the Supreme Court in *Carlson v. Green* recognized a *Bivens* cause of action for a prisoner's claim of deliberate indifference to a substantial risk of harm. 446 U.S. 14 (1980). That same year, this Court in *Gillespie v. Civilleti* held that *Carlson* applied "equally" to a prisoner's claim that his jailers "failed to provide him adequate protection from beatings." 629 F.2d 637, 642 (1980). In 1994, the Supreme Court in *Farmer v. Brennan* directly addressed a *Bivens* claim for prison officials' deliberate indifference to a prisoner facing harm from other inmates, vacating the grant of summary judgment of such a claim. 511 U.S. 825 (1994).

Though the Supreme Court placed limits on the recognition of new *Bivens* claims in *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1856–57 (2017), Mr. Hoffman's claim remains well within the *Bivens* heartland. In 2018, the year after *Abbasi* was decided, the Third Circuit reaffirmed the existence of a *Bivens* remedy for deliberate failures to protect from "prisoner-on-prisoner violence." *Bistrian v. Levi*, 912 F.3d 79, 90 (3d Cir. 2018). Numerous district courts since *Abbasi* have held the same. And just last year, this Court observed that "this circuit has held that a *Bivens* cause of action exists where prison officials 'failed to provide [an inmate] adequate protection from beatings and sexual attacks.'" *Burnam v. Smith*, 787 F. App'x 387, 390 (9th Cir. 2019) (quoting *Gillespie*, 629 F.3d at 642, and citing *Farmer* for the standard for such a claim).

The district court's decision here stands as an outlier from this pre- and post-*Abbasi* consensus. Mr. Hoffman does not seek to challenge the national security decisions of high-ranking Executive officials, *see Abbasi*, 137 S. Ct. at 1860–61, or to extend *Bivens* to a sensitive context involving diplomatic relations or even immigration, *see Hernandez v. Mesa*, 140 S. Ct. 735, 758 (2020). He simply asks for what Congress, the Supreme Court, and countless prisoners and prison officials have long taken for granted—a remedy for an individual prison guard's deliberate indifference to his physical safety. The district court's decision does not reject an *extension* of *Bivens*, but rather effects an unprecedented *contraction* of *Bivens* at its

historical core. If affirmed, the failure to recognize a *Bivens* remedy here would effectively abrogate *Bivens* and *Carlson*, an outcome that *Abbasi* specifically rejected. *See Abbasi*, 137 S. Ct. at 1854–57.

The district court's decision has two fundamental flaws, both of which are sufficient to reverse. *First*, Mr. Hoffman's claim arises in a familiar, well-recognized *Bivens* context. In both *Carlson* and *Farmer*, the Supreme Court recognized that a *Bivens* remedy is available when a federal prison official is deliberately indifferent in failing to protect an inmate from a substantial risk of physical harm. As another circuit recently held, "*Farmer* continues to be the case that most directly deals with whether a *Bivens* remedy is available for a failure-to-protect claim resulting in physical injury." *Bistrian*, 912 F.3d at 91. This Court should hold the same.

Second, even if Mr. Hoffman's claim were viewed as arising in a new *Bivens* context, any extension of *Bivens* would be exceedingly narrow and present no special factors counseling hesitation. No one disputes that a prisoner may bring a *Bivens* claim for deliberate indifference to a substantial risk of harm from denial of medical care. There is no conceivable reason, rooted in the separation of powers or otherwise, why a similar claim should not be available when a prison officer is deliberately indifferent to a substantial risk of harm from physical violence. There is certainly no risk of interfering with Executive Branch policy in recognizing a claim against a rogue prison guard who *intentionally* provokes inmate-on-inmate

attacks. Since *Abbasi*, this Court has recognized a new *Bivens* claim for an "egregious constitutional violation" holding a "low-level federal officer" accountable for "his own actions" related to immigration proceedings. *Lanuza v. Love*, 899 F.3d 1019, 1029, 1034 (9th Cir. 2018). That decision applies with added force in this case, as it arises not in the area of immigration but prisoner safety, for which the availability of *Bivens* claims has been the norm for nearly half a century.

Neither the Supreme Court nor this Court has ever suggested that a federal prisoner can no longer seek judicial relief for damages when a rogue prison officer subjects him to cruel and unusual punishment by actively encouraging other inmates to assault him. To hold otherwise would be a sea-change in the law and run counter to the core purposes of the *Bivens* doctrine—and would result in the gross injustice of denying for Mr. Hoffman his day in court. The district court's dismissal of Mr. Hoffman's claim should be reversed.

JURISDICTIONAL STATEMENT

The district court had jurisdiction over Mr. Hoffman's claims pursuant to 28 U.S.C. § 1331. This Court has jurisdiction over the district court's final judgment dismissing Mr. Hoffman's complaint pursuant to 28 U.S.C. § 1291.

STATEMENT OF ISSUES

1. Whether a clearly established Eighth Amendment violation by a federal prison official who actively encourages the beating of an inmate falls within a recognized *Bivens* context.

2. Whether any special factors counsel hesitation in recognizing a *Bivens* remedy against a rogue, low-level federal prison officer who encourages and promotes the beating of an inmate.

STATEMENT OF THE CASE

A. Mr. Hoffman Was Assaulted Because Officer Preston Offered to Pay Inmates to Harm Mr. Hoffman and Falsely Labeled Mr. Hoffman as a "Snitch."

Because this appeal arises at the motion to dismiss stage, factual allegations in the complaint are accepted as true. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). Marcellas Hoffman is a federal prisoner currently housed at U.S. Penitentiary Lee in Pennington Gap, Virginia. Previously, Mr. Hoffman was housed at U.S. Penitentiary Atwater in Atwater, California. Officer Timothy Preston is a correctional officer at U.S. Penitentiary Atwater. ER 37 (First Amended Complaint ("Compl."), ¶ 3).

While housed at U.S. Penitentiary Atwater, Mr. Hoffman worked as a cook in the kitchen. During that time, Mr. Hoffman drafted a proposal to help prevent waste

in the food service department. ER 39 (Compl. ¶ 13). The warden, food administrator, and food service assistant gave Mr. Hoffman approval to write the proposal, along with a $100 bonus for doing so. *Id.* Despite this encouragement from the prison management team, Officer Preston became upset when he learned Mr. Hoffman received approval to prepare the food waste proposal. Officer Preston accused Mr. Hoffman of reporting that some prison staff members were not paying for their meals from the kitchen. ER 38, 41 (Compl. ¶¶ 7, 26).

Angered by his suspicion that Mr. Hoffman's proposal would reveal that prison staff were not paying for meals, Officer Preston took a series of steps that subjected Mr. Hoffman to a serious risk of physical harm. First, Officer Preston offered to pay other inmates to harm Mr. Hoffman. ER 39–41 (Compl. ¶¶ 10, 14, 17–21, 26). He approached more than five inmates individually, and offered each one a reward if the inmate would physically harm Mr. Hoffman. *Id.* Officer Preston also offered to pay other inmates to have Mr. Hoffman removed from the kitchen. ER 39–40 (Compl. ¶¶ 10, 14, 17–21). Attempting to intimidate the kitchen staff, Officer Preston threatened that he would "not let[] none of [the cook supervisor's] guys out until they get Hoffman out [of] the kitchen." ER 40 (Compl. ¶ 16). Moreover, in an effort to have Mr. Hoffman placed in the Special Housing Unit, Officer Preston made false allegations that Mr. Hoffman threatened him by filing a false incident report and complaining to a lieutenant. ER 39, 41 (Compl. ¶¶ 9–10, 25).

In addition to offering to reward inmates for harming Mr. Hoffman, Officer Preston also encouraged inmates to harm Mr. Hoffman by openly labeling him a "snitch." Officer Preston was aware that inmates who are known as "snitches" are often assaulted by other inmates. ER 42–43 (Compl. ¶¶ 32, 36); *see generally Valandingham v. Bojorquez*, 866 F.2d 1135, 1138–39 (9th Cir. 1989) (recognizing that prison officials labeling an inmate a "snitch" supports a claim of deliberate indifference to the inmate's safety); *Burns v. Martuscello*, 890 F.3d 77, 91 (2d Cir. 2018) (explaining it is "well understood that inmates known to be snitches are widely reviled within the correctional system"). Officer Preston personally witnessed inmates at U.S. Penitentiary Atwater being assaulted for being "snitches," and had previously broken up fights between inmates over someone being labeled a "snitch." ER 42 (Compl. ¶¶ 33–34). Well aware that labeling an inmate as a "snitch" would likely trigger violent reprisals against Mr. Hoffman, Officer Preston publicly accused Mr. Hoffman of "snitching" on prison staff members who were not paying for their meals. ER 38 (Compl. ¶ 7). In front of other inmates, Officer Preston stated to another officer that "inmates are snitching in the staff dining hall and writing officers' names down who are not paying for meals." *Id.* After Mr. Hoffman inquired whether Officer Preston was referring to him, Officer Preston replied—again in the presence of other inmates—"F*ck you, Hoffman, you ain't nobody in here. I heard about you, you are snitching." *Id.*

Separately, Officer Preston approached inmate Tracy Adams and told him that Mr. Hoffman was a "snitch," and that he "want[ed] [Hoffman] out of here." ER 40 (Compl. ¶ 16). Officer Preston also suggested that he would allow Mr. Adams to take extra food from the kitchen without permission if Mr. Hoffman was removed from his position as cook. *Id.*

As a result of Officer Preston's actions, inmate Emmanuel Ward assaulted Mr. Hoffman in his prison cell. ER 39, 42 (Compl. ¶¶ 11, 31). Mr. Ward punched Mr. Hoffman in the face, causing Mr. Hoffman to fall and hit his head on a metal locker. ER 39, 42 (Compl. ¶¶ 12, 31). Mr. Ward also kicked Mr. Hoffman in the stomach. *Id.*

Even though Mr. Hoffman has been transferred from U.S. Penitentiary Atwater to U.S. Penitentiary Lee, Mr. Hoffman continues to receive threats from both inmates and staff that he will be assaulted if they find out he was "snitching." ER 40 (Compl. ¶ 22).

B. Mr. Hoffman Filed a *Bivens* Lawsuit, But the District Court Held No Remedy Is Available for Officer Preston's Constitutional Violation.

Mr. Hoffman filed this *Bivens* lawsuit *pro se* on October 27, 2016, and with leave of the court filed a first amended complaint on April 11, 2019. ER 45–46. Mr. Hoffman alleges that Officer Preston subjected him to cruel and unusual punishment in violation of his Eighth Amendment rights. To support this claim, Mr. Hoffman

alleges that Officer Preston acted with deliberate indifference to Mr. Hoffman's physical safety when he offered to pay other inmates to harm Mr. Hoffman, and when he falsely labeled Mr. Hoffman a "snitch" in front of other inmates, knowing that doing so put Mr. Hoffman at serious risk of physical attack by other inmates. ER 42–43 (Compl. ¶¶ 29–36). Mr. Hoffman seeks a declaration that Officer Preston violated his constitutional rights and an order that Officer Preston pay compensatory and punitive damages in the amount of $100,000.

Pursuant to the screening procedure under 28 U.S.C. § 1915A, the district court determined that Mr. Hoffman's claim of Cruel and Unusual Punishment under the Eighth Amendment should proceed, while screening out a separate claim under the First Amendment. ER 22, 36. The magistrate judge explained that "conditions which are devoid of legitimate penological purpose or contrary to evolving standards of decency that mark the progress of a maturing society violate the Eighth Amendment," and prison officials have a duty to protect prisoners from violence at the hands of other prisoners. ER 34. The magistrate judge concluded that Mr. Hoffman's allegations that Officer Preston offered to pay other inmates to harm him and that Officer Preston labeled him a snitch in front of other inmates, were each independently sufficient to state a cognizable claim for a violation of the Eighth Amendment. ER 35.

Officer Preston filed a motion to dismiss the amended complaint pursuant to Federal Rule of Civil Procedure 12(b)(6). In his motion to dismiss, Officer Preston did not claim qualified immunity, nor did he dispute that the conduct alleged, if true, would be a violation of Mr. Hoffman's clearly established constitutional rights. Instead, Officer Preston argued that Mr. Hoffman had no judicial remedy for this Eighth Amendment violation under *Bivens*. Mr. Hoffman filed an opposition, arguing that the Supreme Court previously recognized a *Bivens* cause of action when a prison official acted with deliberate indifference to an inmate's safety in *Farmer v. Brennan*, 511 U.S. 825 (1994).

The magistrate judge recommended that the district court grant Officer Preston's motion to dismiss without leave to amend. ER 20. The magistrate judge evaluated Mr. Hoffman's Eighth Amendment claim in light of *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1855 (2017), and concluded that the Supreme Court did not recognize a *Bivens* damages remedy in *Farmer*. ER 16. Mr. Hoffman's Eighth Amendment claim therefore presented a new *Bivens* context, the magistrate judge reasoned, because it did not involve the failure to provide medical care, as *Carlson* did. *Id.* Despite acknowledging that Mr. Hoffman's claim would not cause unwarranted judicial interference with prison administration, the magistrate judge concluded that special factors counseled hesitation before implying a *Bivens* damages remedy. The magistrate judge focused on the supposed availability of alternative remedies and

the fact that Congress did not provide an explicit damages remedy when it passed the Prison Litigation Reform Act of 1995 ("PLRA"). ER 17–19. Therefore, the magistrate judge concluded that Mr. Hoffman failed to state a claim upon which relief may be granted under *Bivens*. ER 20.

The district court issued an order adopting the magistrate judge's recommendations, granting Mr. Preston's motion to dismiss without leave to amend, and dismissing the action with prejudice for failure to state a claim. ER 7–8. The district court reasoned that *Farmer* did not recognize a *Bivens* remedy because the Supreme Court "never explicitly stated in *Farmer* that it was recognizing an implied *Bivens* Eighth Amendment failure to protect claim." ER 6. The district court held that this case presents a new *Bivens* context because Mr. Hoffman's claim differed in a meaningful way from *Bivens*, *Davis*, and *Carlson*, which are the "only" contexts where the Supreme Court has recognized an implied *Bivens* action. *Id.* The district court also agreed with the magistrate judge that special factors counseled hesitation before implying a *Bivens* remedy because Mr. Hoffman "had alternative remedies available," and legislative action suggested that Congress "would not want an implied damages remedy for [Mr. Hoffman]'s Eighth Amendment failure to protect claim." ER 7.

The district court entered a final judgment on January 6, 2020, and Mr. Hoffman timely filed a notice of appeal on March 6, 2020. ER 1–3.

SUMMARY OF ARGUMENT

1. Mr. Hoffman's claim arises in a familiar, well-established *Bivens* context —it does not require recognition of any new *Bivens* claim. The Supreme Court previously recognized a *Bivens* cause of action for claims that a federal prison official violated an inmate's Eighth Amendment rights by acting with deliberate indifference to the inmate's safety in both *Carlson* and *Farmer*. This Circuit has likewise recognized a *Bivens* cause of action for the failure to protect an inmate from physical attack by other inmates. *Gillespie*, 629 F.2d at 641–42. Mr. Hoffman's claim that a federal prison official took deliberate actions that exposed Mr. Hoffman to a substantial risk of serious physical harm falls within this well-recognized *Bivens* context. Nothing in *Abbasi* or *Hernandez* cast doubt on the continued viability of *Bivens* claims in such a context. The reasons provided by the district court for ruling to the contrary have been directly rejected by another circuit, which since *Abbasi* has revisited the precise context of federal prison officials' "failure to protect [an inmate] from prisoner-on-prisoner violence," and held that "*Abbasi* changed the framework of analysis for *Bivens* claims generally, but not the existence of the particular right to *Bivens* relief for prisoner-on-prisoner violence." *Bistrian*, 912 F.3d at 91, 94.

2. Even if Mr. Hoffman's claim arose in a new *Bivens* context, no special factors counsel hesitation before recognizing what would be, at most, an exceedingly

modest extension of *Carlson*. Mr. Hoffman does not seek to alter any policy, but simply to hold an individual officer accountable for his own illegal—indeed, egregious—conduct. A claim against a single, low-level prison officer for committing the criminal act of intentionally soliciting inmate-on-inmate violence could not conceivably burden the Executive Branch nor interfere with prison administration. Mr. Hoffman's claim does not raise sensitive national security or foreign policy concerns. Instead, it is a run-of-the-mill *Bivens* claim that serves the doctrine's core purpose. A *Bivens* remedy is necessary to deter similar misconduct and to redress Mr. Hoffman's injury because no alternative remedies are available. Not only is the Prison Litigation Reform Act not a reason counseling hesitation in this context, but it reflects that Congress *accepted* the availability of a *Bivens* action for a claim such as Mr. Hoffman's, provided the proper procedures are followed.

This Court recently recognized a new *Bivens* remedy under the *Abbasi* framework when a government immigration attorney intentionally submitted a forged document in an immigration proceeding, explaining that "[f]ailing to provide a narrow remedy for such an egregious constitutional violation would tempt others to do the same and would run afoul of [the Court's] mandate to enforce the Constitution." *Lanuza*, 899 F.3d at 1034. The same is true here. Indeed, Mr. Hoffman's claim is much closer to the *Bivens* heartland than the claim in *Lanuza*. A *Bivens* remedy must be available for Mr. Hoffman's claim that a federal prison guard subjected him

to cruel and unusual punishment when the guard encouraged other inmates to assault Mr. Hoffman, and Mr. Hoffman was brutally beaten as a result.

STANDARD OF REVIEW

An order granting a motion to dismiss for failure to state a claim is reviewed *de novo*. *See Palm v. L.A. Dep't of Water & Power*, 889 F.3d 1081, 1085 (9th Cir. 2018). In reviewing a motion to dismiss, courts must take all factual allegations in a complaint as true, and deny the motion to dismiss if the complaint contains sufficient factual allegations to state a plausible claim for relief. *Iqbal*, 556 U.S. at 678. *Pro se* complaints like Mr. Hoffman's are construed liberally at the motion to dismiss stage and are "held to less stringent standards than formal pleadings drafted by lawyers." *Hebbe v. Pliler*, 627 F.3d 338, 342 (9th Cir. 2010) (quoting *Erickson v. Pardus*, 551 U.S. 89, 94 (2007) (per curiam)).

ARGUMENT

I. Mr. Hoffman's Claim that a Federal Prison Officer Violated the Eighth Amendment by Exposing Him to a Known Risk of Physical Harm Does Not Present a New *Bivens* Context.

There is no question that it is a clearly established violation of the Eighth Amendment for a prison officer to offer to pay inmates to attack another inmate, and to otherwise take actions that the officer knows will provoke prisoner-on-prisoner violence. *See Farmer*, 511 U.S. at 847; *Valandingham*, 866 F.2d at 1137–40. Officer Preston has not argued otherwise, and has not claimed an entitlement to

qualified immunity at this stage. The sole issue before this Court is thus whether a cause of action exists for Mr. Hoffman to seek a remedy for the egregious Eighth Amendment violation he suffered.

In *Ziglar v. Abbasi*, 137 S. Ct. 1843 (2017), the Supreme Court articulated a two-step inquiry for determining whether a federal officer can be sued for damages under *Bivens*. *See Hernandez v. Mesa*, 140 S. Ct. 735, 743 (2020). First, courts must determine whether the claim arises in a "new context" or involves a "new category of defendants" from a previous *Bivens* case decided by the Supreme Court. *Hernandez*, 140 S. Ct. at 743; *Abbasi*, 137 S. Ct. at 1859. If the case presents a new context, courts must consider whether "special factors" counsel hesitation in implying a *Bivens* remedy. *Hernandez*, 140 S. Ct. at 743; *Abbasi*, 137 S. Ct. at 1857 (quoting *Carlson v. Green*, 446 U.S. 14, 18 (1980)).

Here, Officer Preston acted with deliberate indifference to Mr. Hoffman's safety when he encouraged other inmates to physically harm Mr. Hoffman. This is precisely the type of unconstitutional conduct for which the Supreme Court has recognized that a *Bivens* cause of action is available. Mr. Hoffman's claim arises in the same context and against the same category of defendants as the *Bivens* claims previously recognized by the Supreme Court in *Carlson* and *Farmer*. The district court erred in concluding that Mr. Hoffman's Eighth Amendment claim presents a new *Bivens* context.

A. *Carlson* and *Farmer* Recognized a *Bivens* Claim for a Deliberately Indifferent Failure to Protect an Inmate from a Known Risk of Physical Harm.

In both *Carlson* and *Farmer*, the Supreme Court recognized a *Bivens* cause of action for allegations of Eighth Amendment violations against individual prison officials for specific actions taken against an individual inmate that exposed the inmate to a known, serious risk of physical harm. That is precisely the context presented here.

In *Carlson*, the complaint alleged that federal prison officials failed to protect an inmate from a known risk of physical harm, specifically to his physical wellbeing. *See* 446 U.S. at 16–23 & n.1. The prison officials knowingly failed to give the inmate competent medical care and the inmate suffered personal injuries, from which he ultimately died. *Id.* In *Abbasi*, which limits the extension of *Bivens* to new contexts, the Supreme Court made clear that *Carlson* remains good law and that a *Bivens* claim that arises in the same context as *Carlson* remains viable. *Abbasi*, 137 S. Ct. at 1855.

Applying *Carlson*, the Supreme Court also recognized a *Bivens* remedy under the Eighth Amendment in *Farmer*, where a complaint similarly alleged that federal prison officials failed to protect an inmate from a known substantial risk of physical harm. *See* 511 U.S. at 828–30. In *Farmer*, a federal prisoner brought a *Bivens* suit

under the Eighth Amendment against federal prison officials, claiming that the officials showed "deliberate indifference" by placing the prisoner in the general prison population, despite knowing that the prisoner was at a substantial risk of being physically harmed by other inmates. *Id.*

The prisoner was a transgender woman held in a male prison, and was therefore particularly vulnerable to assault by other inmates. *Id.* at 831. When housed in the general population, the prisoner was beaten and raped by other inmates. *Id.* at 830. The prisoner alleged that prison officials violated the Eighth Amendment by their "deliberately indifferent failure to protect [the prisoner's] safety." *Id.* at 831. Both the district court and the court of appeals agreed the prison officials had not acted with deliberate indifference. *Id.* at 831–32. But the Supreme Court vacated that decision, and elaborated on the standard under which prison officials—in that case, federal prison officials—can be held liable for "deliberate indifference." The Court held that a 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 held liable under the Eighth Amendment for denying humane conditions of confinement." *Id.* at 847. In other words, the Court defined the parameters according to which a *Bivens* claim based on a federal prison official's deliberate indifference to an inmate's physical safety can proceed.

Despite the clear import of the Court's holding in *Farmer*, the district court considered it irrelevant, on the basis that "the U.S. Supreme Court never *explicitly* stated in *Farmer* that it was recognizing an implied *Bivens* Eighth Amendment failure to protect claim." ER 6. (emphasis added). Yet the Supreme Court necessarily recognized exactly that. As the Court has recently reiterated, the question of whether a *Bivens* remedy is available is logically "'antecedent'" to the question of whether a viable constitutional claim against a federal officer has been stated. *Hernandez v. Mesa*, 137 S. Ct. 2003, 2006 (2017) (quoting *Wood v. Moss*, 134 S. Ct. 2056, 2066 (2014)). Had no *Bivens* cause of action existed, the Court would not and could not have *vacated* the grant of summary judgment of claims against federal prison officials, and supplied a substantive standard according to which such an officer could be liable for deliberate indifference to an inmate's safety. *See Bistrian*, 912 F.3d at 90 (noting that in *Farmer* the Court "not only vacated the grant of summary judgment in favor of the prison officials but also discussed at length 'deliberate indifference.'"). Indeed, the Supreme Court in *Farmer* made it clear that the federal prison officials before it "*may be held liable* under the Eighth Amendment" if they acted with deliberate indifference to the inmate's physical safety. 511 U.S. at 847 (emphasis added).

The Supreme Court's references to *Bivens* throughout the opinion in *Farmer* confirm that it recognized the existence of such a claim in the context before it. For

example, the Court explicitly acknowledged that petitioner "filed a *Bivens* complaint, alleging a violation of the Eighth Amendment," and that the alleged violation was based on a "deliberately indifferent failure to protect petitioner's safety." *Farmer*, 511 U.S. at 830–31. In making this observation, the Court cited *Carlson*, the case where the Court recognized a *Bivens* claim for an Eighth Amendment violation based on the failure of federal prison officials to protect an inmate's physical safety. *Id.* at 830. Moreover, as part of its reasoning for the deliberate indifference standard it articulated, the Court noted that "*Bivens* actions against federal prison officials (and their 42 U.S.C. § 1983 counterparts against state officials) are civil in character." *Id.* at 839.

Since *Farmer*, the Supreme Court has continued to view that decision as recognizing a *Bivens* claim. In *Minneci v. Pollard*, 565 U.S. 118, 130 (2012), the Court specifically discussed *Farmer* as setting a standard applicable to *Bivens* actions, comparing a *Farmer* deliberate indifference claim to state-law causes of action to note that "*Bivens* actions, even if more generous to plaintiffs in some respects, may be less generous in others." 565 U.S. at 129–30. Likewise, in *Correctional Services Corp. v. Malesko*, 534 U.S. 61, 73 (2001), the Court pointed to *Farmer* as establishing the appropriate "'deliberate indifference' standard of Eighth Amendment liability" for a complaint "raising a *Bivens* claim." Indeed, in *Malesko*, every Justice recognized that *Farmer* reflected an established *Bivens* claim. *See id.* at 76 (Stevens,

J., dissenting) ("We have never . . . qualified our holding that Eighth Amendment violations are actionable under *Bivens*.") (citing *Farmer v. Brennan*, 511 U.S. 825 (1994); *McCarthy v. Madigan*, 503 U.S. 140 (1992)).

The district court's dismissal of *Farmer* as a *Bivens* precedent is directly contrary to a post-*Abbasi* decision of another circuit. In *Bistrian v. Levi*, 912 F.3d 79, 90–91 (3d Cir. 2018), the Third Circuit confronted a *Bivens* claim by a federal prisoner who alleged that federal prison officials violated his Eighth Amendment rights by acting with deliberate indifference to a serious risk he would be assaulted by other inmates. There, the inmate, Mr. Bistrian, cooperated with federal prison officials to help with their surveillance of notes that inmates were passing to one another. *Id.* at 84. When other inmates became aware that he had been cooperating with the prison officials, he received multiple threats. *Id.* Even though the federal prison officials were aware of the threats against Mr. Bistrian, they placed him in the recreation yard with other inmates, where three inmates violently attacked him. *Id.* When Mr. Bistrian subsequently brought a *Bivens* action under the Eighth Amendment, the officials argued that no *Bivens* claim was available. Yet the Third Circuit relied on *Farmer* to hold it was "clear" that "the Supreme Court has, pursuant to *Bivens*, recognized a failure-to-protect claim under the Eighth Amendment." *Id.* at 90. The Third Circuit came to this conclusion by applying the *Abbasi* framework, stating that "*Abbasi* changed the framework of analysis for *Bivens* claims generally, but not the

existence of the particular right to *Bivens* relief for prisoner-on-prisoner violence." *Id.* at 94.

While the Third Circuit is the only other circuit to address the continued vitality of this class of *Bivens* claim since *Abbasi*, numerous district courts have considered the issue and reached the same conclusion as the Third Circuit, continuing to recognize a *Bivens* claim for a prison officer's deliberate indifference to inmate safety based on *Farmer*. *See Walker v. Schult*, No. 9:11-CV-287 (DJS), 2020 WL 3165177, at *3 (N.D.N.Y. May 29, 2020) ("This Court is not empowered to presume that simply because *Abbasi* does not reference *Farmer* that the case has been somehow impliedly overruled."); *Garraway v. Cuifo*, No. 1:17-cv-00533-DAD-GSA (PC), 2020 WL 860028, at *2 (E.D. Cal. Feb. 21, 2020) (holding that *Farmer* recognized a *Bivens* cause of action and remains binding authority post-*Abbasi*); *Himmelreich v. Fed. Bureau of Prisons*, No. 4:10-CV-2404, 2019 WL 4694217, at *8 n.9 (N.D. Ohio Sept. 25, 2019) ("Despite its absence from the list in *Abbasi*, the Supreme Court has also recognized a *Bivens* remedy under the Eighth Amendment for failure to protect a plaintiff's safety in the prison setting.") (citing *Farmer*, 511 U.S. 825 (1994)); *Fleming v. Reed*, No. EDCV 16-0684-PSG (AGR), 2019 WL 4196322, at *3 (C.D. Cal. July 23, 2019) ("*Farmer* was a *Bivens* case."), *adopted by* 2019 WL 4195890 (C.D. Cal. Sept. 3, 2019); *Doty v. Hollingsworth*, No. 15-3016 (NLH), 2018 WL 1509082, at *3 (D.N.J. Mar. 27, 2018) (recognizing that

Farmer involved a *Bivens* suit); *Peraza v. Martinez*, No. 14-cv-03056-MJW, 2017 WL 11486456, at *3–4 (D. Colo. Nov. 29, 2017) (holding that *Abbasi* did not change the legal landscape for Eighth Amendment *Bivens* claims of excessive force and failure to protect).

In a decision sharply at odds with the weight of the case law, the district court here held that the Supreme Court did not imply a *Bivens* damages remedy in *Farmer* because in *Abbasi*, the Supreme Court said the "only instances" where it has approved of an implied damages remedy under the Constitution itself are *Bivens*, *Davis*, and *Carlson*. 137 S. Ct. at 1855. That is hardly a basis to conclude that *Farmer* has been overruled by implication. The Supreme Court has directed that "[i]f a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions." *Agostini v. Felton*, 521 U.S. 203, 237 (1997) (quoting *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484 (1989)).

The district court's reasoning is refuted by *Bistrian.* The Third Circuit held that the Supreme Court recognized a *Bivens* remedy in *Farmer*, and so concluded that Mr. Bistrian's Eighth Amendment claim premised on a failure to protect from prisoner-on-prisoner violence did not arise in a new *Bivens* context. 912 F.3d at 90–91. The Third Circuit acknowledged that "*Abbasi* identified three *Bivens* contexts

and did not address, or otherwise cite to, *Farmer*," but the court "decline[d]" to conclude that *Abbasi* overruled *Farmer* by implication. *Id.* at 91; *see also Garraway*, 2020 WL 860028, at *2. After considering the single sentence in *Abbasi* that the district court here found conclusive, the Third Circuit held that "*Farmer* continues to be the case that most directly deals with whether a *Bivens* remedy is available for a failure-to-protect claim resulting in physical injury." *Bistrian*, 912 F.3d at 91.

The more natural explanation for *Farmer*'s omission in *Abbasi* is that the Supreme Court simply understood it as falling within the same context as *Carlson*. *Farmer* itself cited *Carlson* when the Court identified the *Bivens* cause of action that was the basis for the plaintiff's complaint. *See Farmer*, 511 U.S. at 830. And both *Carlson* and *Farmer* involved allegations that a prison official's deliberate indifference to a substantial risk of physical harm to an inmate violated the Eighth Amendment. As the Third Circuit noted, *Farmer*'s omission from *Abbasi* may be because "the Court simply viewed the failure-to-protect claim as not distinct from the Eighth Amendment deliberate indifference claim in the medical context." *Bistrian*, 912 F.3d at 91. The cause of action recognized in *Carlson* readily covers "failure to protect" claims in the prison context based on specific actions taken by individual officials that constitute a deliberately indifferent failure to protect an individual inmate's safety. Given the close relationship between *Farmer* and *Carlson*,

the Supreme Court's reference to *Carlson* alone in a single sentence in *Abbasi* is unremarkable.

The district court's over-reading of that detail would also have surprising implications for other well-settled *Bivens* claims. This Court has recognized that Supreme Court precedent recognizing a *Bivens* cause of action in *Groh v. Ramirez*, 540 U.S. 551 (2004), remains binding after *Abbasi*, even though *Groh* was not explicitly referenced in *Abbasi*. In *Groh*, ranch owners brought a *Bivens* action against a federal officer who searched their home with an invalid search warrant. 540 U.S. at 554–56. Although the Supreme Court did not explicitly discuss whether this claim presented a valid *Bivens* cause of action, the Court held that the search warrant was invalid and that the agent was not entitled to qualified immunity. *Id.* at 557–65. The conduct in *Groh* was slightly different than in *Bivens* itself—reliance on an invalid warrant rather than no warrant at all. *See Bivens*, 403 U.S. at 389; *Groh*, 540 U.S. at 554–56. The officer in *Groh* also belonged to a slightly different category of defendant than *Bivens* itself, as the officer was a Bureau of Alcohol, Tobacco, and Firearms agent rather than an agent of the Federal Bureau of Narcotics. *See Bivens*, 403 U.S. at 389; *Groh*, 540 U.S. at 554. Yet applying the *Abbasi* framework and citing *Groh*, this Court recognized in an unpublished opinion that there is a "*Bivens* cause of action" when an officer obtains a search warrant and arrests an individual without probable cause. *Brunoehler v. Tarwater*, 743 F. App'x 740, 743 & n.4 (9th

Cir. 2018); *see also Ioane v. Hodges*, 939 F.3d 945 (9th Cir. 2018) (holding that a claim did not present a new context on facts slightly different from *Bivens*). The Fifth Circuit has similarly characterized *Groh* as a *Bivens* case. *Evans v. Davis*, 875 F.3d 210, 220 (5th Cir. 2017) ("*Groh* addressed the standard for qualified immunity in a *Bivens* action."). *Groh* merely presented a slight variation on the facts of *Bivens*, just as *Farmer* presented a slight variation on the facts of *Carlson*; it is hardly noteworthy that *Abbasi* mentioned neither, and the consequence of that omission cannot possibly be an implicit overruling.

The history of the Supreme Court's *Bivens* jurisprudence further confirms that the Court viewed the failure-to-protect claim in *Farmer* as a routine application of *Carlson*. The Supreme Court decided *Farmer* during the period when it had already changed its approach to recognizing *Bivens* causes of action and instead "refused" to extend *Bivens* to new contexts. *See Abbasi*, 137 S. Ct. at 1857. As the Court explained in *Abbasi*, it had "consistently refused to extend *Bivens* to any new context or new category of defendants" in cases dating back to 1983. *Id.* (citation omitted). Yet *Farmer* was decided in 1994. Because the Supreme Court was already applying this narrower approach when it confronted the *Bivens* claim in *Farmer*, it is significant that the Court allowed the claim to proceed in *Farmer* and gave substantive content to it, rather than reject it as unfounded. The Supreme Court's cautious approach to *Bivens* claims, already in effect when *Farmer* was decided, thus cannot be

reconciled with any suggestion that the Court did not consider the availability of a *Bivens* cause of action in *Farmer*.

Accordingly, this case is governed by the binding Supreme Court precedent recognizing a *Bivens* cause of action when a federal prison inmate alleges that an individual prison official violated his Eighth Amendment rights by acting with deliberate indifference to expose the inmate to a known substantial risk of physical harm.

B. Mr. Hoffman's Claim Arises Within the Same Context as *Carlson* and *Farmer*.

Mr. Hoffman claims that Officer Preston violated the Eighth Amendment through his deliberately indifferent failure to protect Mr. Hoffman's physical safety. Far from breaking any new ground, this case falls squarely within the same context as the *Bivens* claims recognized in *Carlson* and *Farmer*.

A case presents a new *Bivens* context if it is "different in a meaningful way from previous *Bivens* cases decided by [the Supreme] Court." *Abbasi*, 137 S. Ct. at 1859; *see also Hernandez*, 140 S. Ct. at 743. The Supreme Court in *Abbasi* identified several factors that may create a meaningful difference between two cases, including:

> 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.

Abbasi, 137 S. Ct. at 1860.

The factors articulated in *Abbasi* illustrate that Mr. Hoffman's claim is not meaningfully different from the claims presented in *Carlson* and *Farmer*. The claims presented in *Carlson*, *Farmer*, and Mr. Hoffman's case all involve claims against individual federal prison officials who were involved in conduct that specifically targeted the plaintiff—not claims challenging policy decisions of high-ranking officials. Each of the three cases involves an allegation that individual prison officials violated an inmate's Eighth Amendment rights by taking specific actions toward the individual inmate that exposed the inmate to a known risk of physical harm. *See Carlson*, 446 U.S. at 16 & n.1; *Farmer*, 511 U.S. at 829–31. None of these cases presents a risk of disrupting the functioning of the Executive Branch because the claims target specific conduct of federal prison officials, rather than general policies formulated by high-level executives.

All three claims also involve the same, specific constitutional responsibility of federal prison officials to refrain from taking actions with deliberate indifference to a substantial risk that an inmate will suffer physical harm. Similar judicial guidance was available for all three cases about a prison official's duties under the Eighth Amendment. In *Estelle v. Gamble*, 429 U.S. 97, 104–05 (1976), which was decided

before both *Carlson* and *Farmer*, the Supreme Court explained that deliberate indifference to a prisoner's serious illness or injury violates the Eighth Amendment. Even more judicial guidance is available because of *Farmer* itself, which supplies guidance to prison officials in the specific situation of failure to protect an inmate from a known substantial risk of physical attack by other inmates. *See* 511 U.S. at 832–47. *Farmer* made clear that prison officials have a duty "to protect prisoners from violence at the hands of other prisoners." *Id.* at 833 (citation omitted). And since 1989, this Court has made clear that labeling an inmate a "snitch" in the presence of other inmates is sufficient to state a claim for deliberate indifference. *See Valandingham*, 866 F.2d at 1138–39. Indeed, "a number of courts have found an Eighth Amendment violation where a guard publicly labels an inmate a snitch, because of the likelihood that the inmate will suffer great violence at the hands of fellow prisoners." *Burns*, 890 F.3d at 91. Moreover, the judicial guidance factor "is analogous to the question in a qualified immunity analysis of whether the law was 'clearly established' at the time of the officer's actions," *Ioane*, 939 F.3d at 952 n.3, and Officer Preston does not contest that Mr. Hoffman's Eighth Amendment right here was clearly established.

Finally, no special factors are present in Mr. Hoffman's case that were not present in either *Carlson* or *Farmer*. Indeed, the fact that Officer Preston intentionally exposed Mr. Hoffman to serious harm by encouraging inmates to assault him makes this case a particularly egregious example of deliberate indifference.

The district court never doubted that Mr. Hoffman's claim is on all fours with the claim in *Farmer*, instead erroneously discounting *Farmer* as not recognizing a *Bivens* remedy. *See supra* I.A. But even considering *Carlson* alone, the magistrate judge erred in concluding that Mr. Hoffman's claim arises in a meaningfully different context than *Carlson* because Mr. Hoffman's claim does not involve the "failure to provide medical care." ER 16. In reaching this conclusion, the district court took an unduly narrow view of *Carlson*. The fact that the injury was related to medical care played no role in the Supreme Court's analysis in *Carlson*. Indeed, the entire factual description of the prison officials' failure to provide medical care is cabined to a footnote in the opinion. *Carlson*, 446 U.S. at 16 n.1.

Limiting *Carlson* to the extremely narrow area of prisoner medical care would not mean declining to extend *Bivens*—it would be a revolutionary *retrenchment* of *Bivens* and a major disruption of the legal status quo. *Bivens* actions based on a federal prison official's deliberate indifference in failing to protect an inmate's health or safety have been part of the ordinary fabric of prison conditions jurisprudence for decades. It has been the law in this Circuit for *forty years* that "fail[ure]

to provide [a prisoner] adequate protection from beatings" gives rise to a *Bivens* claim. *Gillespie*, 629 F.2d at 641–42. In fact, in reaching that conclusion, this Court specifically held that "[t]he Supreme Court's application of the guidelines [for the availability of a *Bivens* action] to the circumstances in *Carlson* appears to be *equally appropriate*" in the context of failure to protect from beatings. *Id.* at 642 (emphasis added). Since *Abbasi*, this Court has specifically relied on *Gillespie* (albeit in an unpublished opinion) as reflecting the law of this Circuit that "a *Bivens* cause of action exists where prison officials 'failed to provide [an inmate] adequate protection from beatings and sexual attacks.'" *Burnam v. Smith*, 787 F. App'x 387, 390 (9th Cir. 2019) (quoting *Gillespie*, 629 F.2d at 642).

The continued force of this Court's directly-on-point precedent is further confirmed by a recent decision of the Sixth Circuit. *See Jacobs v. Alam*, 915 F.3d 1028, 1036 (6th Cir. 2019). Though the defendants there "ma[d]e much out of factual differences between *Bivens*" and that case, the Sixth Circuit in *Jacobs* reaffirmed its pre-*Abbasi* precedent recognizing *Bivens* claims for excessive force, false arrest, malicious prosecution, fabrication of evidence, and civil conspiracy, which remained at "the core of *Bivens*" that the Supreme Court had not intended to "restrict[]." *Id.* at 1036–39. The failure-to-protect claim recognized by this Court in *Gillespie* falls at least as clearly within "the core of *Bivens*" that *Abbasi* did not restrict. *See id.*

Indeed, *Bivens* claims for failure-to-protect under the Eighth Amendment are "garden-variety *Bivens* claims" that have been recognized for years across the country. *Id.* at 1038–39; *see also Caldwell v. Warden, FCI Talladega*, 748 F.3d 1090, 1099 (11th Cir. 2014) (allowing a *Bivens* claim based on allegations that federal prison officials failed to protect an inmate from attack by another inmate to proceed past summary judgment); *Smith v. United States*, 561 F.3d 1090, 1104–06 (10th Cir. 2009) (holding that an inmate stated a claim under *Bivens* action based on allegations that federal prison officials failed to protect the inmate from a known risk presented by exposure to asbestos during a work assignment); *Benefield v. McDowall*, 241 F.3d 1267, 1272 (10th Cir. 2001) ("There is no question that damages are possible where an inmate has been assaulted due to being labeled as a snitch."); *Bagola v. Kindt*, 131 F.3d 632, 645 (7th Cir. 1997) (holding a *Bivens* cause of action exists for an inmate's allegations that federal prison officials failed to protect him from a work hazard).

Contrary to the district court's reasoning here, other district courts have not misinterpreted *Abbasi*'s mandate not to extend *Bivens* as a mandate to *restrict* previously established *Bivens* claims. Since *Abbasi*, multiple district courts have held that a claim that involves allegations that a prison official failed to protect an inmate from a known substantial risk of physical harm is not meaningfully different from

the claim presented in *Carlson*, because both circumstances involve Eighth Amendment allegations against individual officers for specific actions harming the safety of an individual inmate. In other words, "*Abbasi*'s reference to three types of *Bivens* cases recognized by the Court can . . . be reconciled with the *Farmer* decision by recognizing that the conditions of confinement actions under the Eighth Amendment includes both medical care *and* safety, and they are not distinct claims." *Walker*, 2020 WL 3165177, at *4; *see also Doty*, 2018 WL 1509082, at *3; *McDaniels v. United States*, No. 5:14-cv-02594-VBF-JDE, 2018 WL 7501292, at *5 (C.D. Cal. Dec. 28, 2018) (holding that an Eighth Amendment claim alleging a prison official failed to protect an inmate from assault was not a new context from *Carlson*), *adopted by* 2019 WL 1045132 (C.D. Cal. Mar. 5, 2019); *Lineberry v. Johnson*, No. 5:17-04124, 2018 WL 4232907, at *9 (S.D. W. Va. Aug. 10, 2018) (holding that a claim of excessive force by prison guards does not present a new *Bivens* context from *Carlson* because both involved "direct Eighth Amendment allegations against two individual officers for specific actions taken against an individual inmate"), *adopted by* 2018 WL 4224458 (S.D. W. Va. Sept. 5, 2018); *Lee v. Matevousian*, No. 1:18-cv-00169-GSA-PC, 2018 WL 5603593, at *8 (E.D. Cal. Oct. 26, 2018) (holding that a failure to protect claim did not present a new *Bivens* context under *Carlson*).

In sum, Mr. Hoffman's case is not meaningfully different from either *Carlson* or *Farmer*. The claims presented in *Carlson*, *Farmer*, and Mr. Hoffman's complaint all involve violations of the same constitutional right by the same type of defendant that resulted in the same type of injury. All involve allegations with a high level of specificity that a prison official failed to take an action that put an inmate at serious risk of physical harm in violation of the Cruel and Unusual Punishment Clause of the Eighth Amendment. All three also involve suits against individual federal prisoner officials based on serious physical harm that an inmate suffered. Therefore, Mr. Hoffman's claim does not present a new *Bivens* context.

II. Even if this Case Presents a Modest Extension of *Bivens*, No Special Factors Counsel Hesitation Before Recognizing a Remedy for a Rogue Prison Guard's Encouragement of Physical Violence Against an Inmate.

Because Mr. Hoffman's claim does not present a new *Bivens* context, there is no need to address the second step of the *Abbasi* framework and consider whether there are special factors counseling hesitation. *See Hernandez*, 140 S. Ct. at 743; *Abbasi*, 137 S. Ct. at 1860. However, even if Mr. Hoffman's claim did present a new *Bivens* context, no such factors are present. There is no sound basis for denying a *Bivens* remedy to the victim of the egregious and intentional endangerment of a prison inmate alleged here.

The Supreme Court's recent *Bivens* decisions demand caution, but nowhere do they foreclose the recognition of new *Bivens* causes of action in narrow and appropriate settings. To the contrary, since *Abbasi*, this Court has held that it was appropriate to extend a *Bivens* remedy to a new context in *Lanuza v. Love*, 899 F.3d 1019 (9th Cir. 2018). Likewise, the Third Circuit in *Bistrian* held in the alternative that, even if the claim of failure to protect from prisoner-on-prisoner violence did present a new *Bivens* context, it would be appropriate to recognize a new *Bivens* remedy, *see Bistrian*, 912 F.3d at 92. To the extent a narrow extension of *Carlson* is necessary to reach the precise facts alleged here, such an extension falls well within the bounds of the type of *Bivens* claim that this Court and others continue to treat as viable.

To determine whether a *Bivens* remedy is appropriate in a new context, courts must consider whether any special factors counsel hesitation before recognizing a *Bivens* remedy. Although the Supreme Court has not created an exhaustive list of special factors, the analysis focuses on separation-of-powers principles. *Hernandez*, 140 S. Ct. at 743; *Abbasi*, 137 S. Ct. at 1857. The Court explained in *Abbasi* that although a damages remedy is "necessary to redress past harm and deter future violations" in some situations, the decision to recognize a *Bivens* remedy "requires an assessment of its impact on governmental operations systemwide." *Abbasi*, 137 S.

Ct. at 1858. As part of this inquiry, courts should refrain from recognizing an implied *Bivens* remedy "if there are sound reasons to think Congress might doubt the efficacy or necessity of a damages remedy." *Id.*; *see also Hernandez*, 140 S. Ct. at 743.

Mr. Hoffman's case does not implicate any separation-of-powers concerns. A claim against a rogue prison guard for intentionally soliciting inmate-on-inmate violence would obviously have no negative "impact on governmental operations systemwide." *Abbasi*, 137 S. Ct. at 1858. A damages remedy is necessary to remedy past harm and to deter future similar misconduct. Far from there being reason to think Congress might doubt the efficacy or necessity of such a remedy, Congress has in fact legislated in this area in the Prison Litigation Reform Act ("PLRA") and *declined* to disturb a *Bivens* remedy that at the time was widely understood to be available. Consequently, no special factors counsel hesitation, and a *Bivens* remedy is appropriate in the circumstances of Mr. Hoffman's claim.

A. Applying a *Bivens* Remedy when an Individual Prison Guard Encourages Violence Against an Inmate Would Not Cause Unwarranted Interference with Government Operations.

Mr. Hoffman's case could not possibly impact government operations on a systemwide level—he simply seeks to hold an individual officer liable for a specific, egregious instance of misconduct with no conceivable legitimate justification. This is precisely the type of situation for which this Court has held a new *Bivens* remedy

should be recognized, even after *Abbasi*. *See Lanuza*, 899 F.3d at 1033–34. In *Lanuza*, a government immigration attorney forged a government document and submitted it in an immigration proceeding that precluded the plaintiff from obtaining lawful permanent resident status. *Id.* at 1021. Although the Court concluded that the case arose in a new *Bivens* context, it held that "the special factors articulated in *Abbasi* do not counsel against extending a *Bivens* remedy to the narrow claim here." *Id.* at 1028. Providing a *Bivens* remedy would not "risk improper intrusion by the judiciary into the functioning of other branches." *Id.* at 1033. The same is true here for several reasons.

First, Mr. Hoffman is suing Officer Preston for his own egregious misconduct directed at Mr. Hoffman individually. In *Abbasi*, the Supreme Court emphasized that because the purpose of *Bivens* is to deter officers from unconstitutional behavior, *Bivens* claims should be "brought against the individual official for his or her own acts, not the acts of others." 137 S. Ct. at 1860. The plaintiffs in *Abbasi* brought suit against high-level executive officials, challenging the formulation and implementation of general federal detention policies. *Id.* The concerns raised in that situation are not present here, as Mr. Hoffman does not challenge high-level executive action. Instead, he challenges specific conduct targeted at him individually. Like the plaintiff in *Lanuza*, Mr. Hoffman is suing "a low-level federal officer" for

"his own actions." 899 F.3d at 1029. He "does not seek to hold anyone else, including high-level officials, accountable." *Id.* Therefore, Mr. Hoffman's claim falls within the core purpose of the *Bivens* doctrine. *See Abbasi*, 137 S. Ct. at 1860; *see also Malesko*, 534 U.S. at 67 (explaining that the "core holding of *Bivens*[] recogniz[ed] in limited circumstances a claim for money damages against federal officers who abuse their constitutional authority"). Indeed, the Third Circuit has recognized that a claim that a federal prison official's deliberate indifference to a threat of prisoner-on-prisoner violence "fits squarely within *Bivens*' purpose of deterring misconduct by prison officials." *Bistrian*, 912 F.3d at 93.

Second, Mr. Hoffman does not challenge or seek to alter executive policy. The *Abbasi* Court emphasized that "a *Bivens* action is not 'a proper vehicle for altering an entity's policy.'" 137 S. Ct. at 1860 (quoting *Malesko*, 534 U.S. at 74). The district court acknowledged that Mr. Hoffman "is not bringing suit to change prison policy" and "applying a *Bivens* remedy in this case would not cause unwarranted judicial interference with prison administration." ER 19. Similar to the claim in *Lanuza*, where no one argued the federal government had a policy of allowing federal officers to submit forged documents in immigration proceedings, there is no suggestion that federal prisons have a policy of allowing prison officials to encourage inmates to physically harm one another. *See Lanuza*, 899 F.3d at 1029. To the contrary, Officer Preston violated federal law when he offered to pay other inmates

to assault Mr. Hoffman. *See* 18 U.S.C. §§ 113, 373. His intentional, criminal conduct bears no relationship to the legitimate execution of prison policies. Nor does deliberate indifference to a known threat of prisoner-on-prisoner violence serve any legitimate punishment purpose that a prison may be trying to achieve. The Supreme Court has made clear that "gratuitously allowing the beating or rape of one prisoner by another serves no legitimate penological objective." *Farmer*, 511 U.S. at 833 (quotation omitted). Mr. Hoffman's claim therefore does not target policy decisions made by the Executive Branch, but rather targets the obviously illegal conduct of one individual.

Third, litigation in Mr. Hoffman's case will not unduly burden the Executive Branch. In *Abbasi*, the Supreme Court expressed concern about the "burden and demand of litigation" that might flow from allowing suit against high-level executive officials. 137 S. Ct. at 1860. The Court noted that such litigation may prevent executive officials "from devoting the time and effort required for the proper discharge of their duties." *Id.* Mr. Hoffman's case raises none of these concerns. His claim is again similar to the one in *Lanuza*, which involved "a straightforward case against a single low-level federal officer." 899 F.3d at 1029. In that situation, this Court stated it was "not concerned that this litigation will burden the Executive Branch to an unacceptable degree." *Id.* Because Mr. Hoffman's claim revolves around one individual's misconduct that is unrelated to any legitimate prison policy—indeed, it

undoubtedly *violates* prison policy—the lawsuit "will not require unnecessary inquiry or discovery into government deliberations or policy making." *See id.* Mr. Hoffman's lawsuit will solely involve inquiry into Officer Preston's illegal actions.

Any concern that recognizing such a claim would open the litigation floodgates is refuted by the legal safeguards Congress has enacted. The PLRA limits a plaintiff's ability to bring a *Bivens* suit until after the plaintiffs has exhausted administrative remedies, and courts then must screen complaints brought by prisoners seeking relief against a government officer. *See* 28 U.S.C. § 1915A. And even when a plaintiff meets the procedural prerequisites to bring a *Bivens* suit, *Farmer*'s deliberate indifference standard is demanding, requiring that a prison official subjectively disregarded a serious risk of harm to an inmate, and defendants further have the protection of qualified immunity. *See Farmer*, 511 U.S. at 847. These hurdles are more than sufficient to prevent undue disruption from litigation, without categorically leaving prisoners like Mr. Hoffman without a remedy for an egregious constitutional violation.

Fourth, Mr. Hoffman's claim about an isolated incident of misconduct by Officer Preston is far from raising sensitive issues of national security and foreign policy of the sort that concerned the Supreme Court in *Abbasi* and *Hernandez*. The plaintiffs in *Abbasi* challenged "major elements of the Government's whole response" to a significant terrorist attack. 137 S. Ct. at 1861. Those claims would

require "an inquiry into sensitive issues of national security" that would "assume dimensions far greater than those present in *Bivens* itself, or in either of its two follow-on cases, or indeed in any putative *Bivens* case yet to come before the Court." *Id.* Similarly, in *Hernandez*, the plaintiffs challenged a cross-border shooting that killed a 15-year-old on Mexican soil. 140 S. Ct. at 740. The issue implicated foreign relations, and the Executive Branch had already taken a public position that the U.S. Border Patrol agent should not face charges in the United States nor be extradited to stand trial in Mexico. *Id.* at 744. Moreover, "regulating the conduct of agents at the border unquestionably has national security implications." *Id.* at 747. Mr. Hoffman's claim, by contrast, is an ordinary *Bivens* action that is unrelated to any national security or foreign policy decision. His case presents no separation-of-powers concerns that are greater than those that were present in *Bivens*—or the almost-exactly-analogous *Carlson*.

Accordingly, Mr. Hoffman's claim does not implicate any separation-of-powers principles that may counsel hesitation before recognizing a *Bivens* remedy. Mr. Hoffman's allegations that an individual prison official intentionally encouraged other inmates to assault Mr. Hoffman will not cause unwarranted interference with government operations overall. Rather, here, where a federal prison officer actively encouraged inmates to assault an individual inmate, and the inmate was violently attacked as a result, a *Bivens* remedy remains a necessary tool to redress the inmate's

injury and to deter similar constitutional violations in the future. *See Abbasi*, 137 S. Ct. at 1856–57, 1861. If anything, reaffirmation of a *Bivens* remedy for failure to protect an inmate from physical harm—the type of run-of-the-mill *Bivens* claim that this Court and others have long recognized is appropriate—should be even less controversial than this Court's extension of *Bivens* in an immigration context in *Lanuza*. *See Gillespie*, 629 F.3d at 641–42; *see also Jacobs*, 915 F.3d at 1038 (holding that "run-of-the-mill challenges to 'standard law enforcement operations' that fall well within *Bivens* itself" remain viable after *Abbasi*) (quoting *Abbasi*, 137 S. Ct. at 1861).

B. Recognizing a *Bivens* Remedy Is Necessary to Deter Individual Prison Officers from Encouraging Prisoner-on-Prisoner Violence in Violation of the Eighth Amendment.

A *Bivens* remedy is needed to redress Mr. Hoffman's injury and to deter future constitutional violations for the same reasons that a *Bivens* remedy is still needed for cases like *Bivens* and *Carlson* themselves. The Supreme Court reiterated in *Abbasi* the "continued force" and "necessity" of a *Bivens* remedy in the context of those cases to "vindicate the Constitution by allowing some redress for injuries" and to "provide[] instruction and guidance to federal law enforcement officers going forward." 137 S. Ct. at 1856–57. Just as was the case in *Bivens*, where the plaintiff alleged harm from police officer misconduct during an unconstitutional search and

arrest, Mr. Hoffman's case is one where it is "damages or nothing." *Bivens*, 403 U.S. at 410 (Harlan, J., concurring in the judgment).

Mr. Hoffman challenges an "individual instance" of prison officer misconduct "which due to [its] very nature [is] difficult to address except by way of [a] damages action[] after the fact." *Abbasi*, 137 S. Ct. at 1862. The harm Mr. Hoffman suffered when he was brutally attacked in his prison cell because of the deliberate indifference—indeed, the intentional malice—of Officer Preston can only be redressed through damages. Moreover, the harm that Mr. Hoffman has suffered from being labeled a snitch cannot be undone by a remedial process. Damages are the only remedy for the harm Mr. Hoffman suffered and continues to suffer from Officer Preston's past misconduct. *See* ER 40 (Compl. ¶ 22). Recognizing a *Bivens* remedy in this context is necessary to deter this type of unconstitutional conduct because there is no alternative remedy to hold an individual officer liable for a constitutional violation that consists of past conduct that harmed an inmate.

The magistrate judge and the district court erroneously concluded that alternative remedies are available, identifying the Federal Bureau of Prisons ("BOP") administrative grievance process, a suit for declaratory and injunctive relief, or a Federal Tort Claims Act ("FTCA") action. ER 7, 17–18. None of these remedies presents an adequate, alternative remedy to the physical harm Mr. Hoffman suffered

when he was violently beaten in his cell and the harm he continues to suffer from being labeled a "snitch."

First, the availability of a BOP administrative grievance process cannot preclude a *Bivens* remedy. Any such suggestion is foreclosed by Congress's recognition, in passing the PLRA, that an inmate could still bring a *Bivens* claim *after* following BOP administrative grievance procedures. *See* 42 U.S.C. § 1997e(a). In *McCarthy v. Madigan*, 503 U.S. 140 (1992), the Supreme Court held that a federal prisoner did not need to exhaust the BOP administrative grievance procedures before bringing a *Bivens* claim that alleged that prison employees' deliberate indifference violated his Eighth Amendment rights. *Id.* at 142. Congress legislated in response to this ruling, and could have decided that BOP grievance procedures should displace a *Bivens* remedy; instead it made the more modest decision to extend the exhaustion requirement to apply to any suit "under section 1983 of this title, *or any other Federal law,*" *see* 42 U.S.C. § 1997e (1998) (emphasis added); *see also* 141 Cong. Rec. H14078, H14105 (daily ed. Dec. 6, 1995) (statement of Rep. Lobiondo) (citing *McCarthy v. Madigan*, 503 U.S. 140 (1992) as the reason the amendment to the exhaustion requirement was needed). The Supreme Court has interpreted this provision specifically to require that "federal prisoners suing under *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388 (1971), must first exhaust inmate grievance procedures." *Porter v. Nussle*, 534 U.S. 516,

524 (2002). In legislating on whether an inmate must exhaust prison remedies *before* bringing a *Bivens* action, Congress cannot possibly have intended such remedies to *displace* a *Bivens* action.[1]

The BOP administrative grievance process is a particularly inadequate remedy here because it cannot redress Mr. Hoffman's injury. While a grievance might be able to stop an ongoing violation, money damages are the only remedy that would redress the harm Mr. Hoffman suffered from Officer Preston's *past* misconduct, and no such relief is available under the BOP grievance process. *See Bistrian*, 912 F.3d at 92 ("The administrative grievance process is not an alternative because it does not redress Bistrian's harm, which could only be remedied by money damages."). Therefore, the existence of the BOP administrative grievance process does not displace Mr. Hoffman's ability to bring a *Bivens* action seeking money damages to remedy past harm caused by Officer Preston's unconstitutional imposition of cruel and unusual punishment on Mr. Hoffman.

Second, prospective relief will not provide a remedy for harm suffered from past misconduct. *See Bistrian*, 912 F.3d at 92. Injunctive relief would not remedy the harm that Mr. Hoffman has suffered and continues to suffer from Officer Preston's past actions. Mr. Hoffman is no longer housed at U.S. Penitentiary Atwater.

[1] Whether Mr. Hoffman has exhausted his administrative remedies is not at issue on this appeal and would be addressed on remand.

He does not allege ongoing harmful conduct by Officer Preston, but instead, he alleges past and ongoing harm he suffers from Officer Preston's past conduct. In this situation, prospective relief would not remedy Mr. Hoffman's claim.

Indeed, Mr. Hoffman would not even have standing to bring a claim for prospective relief. This Court has held that the transfer of an incarcerated plaintiff from one prison to another moots any injunctive claims against officials at his former prisons. *See Dilley v. Gunn*, 64 F.3d 1365, 1368 (9th Cir. 1995). There is a narrow exception if the plaintiff can demonstrate an unusual likelihood that he will be transferred back to his former prison, but that is not the situation here. This rule follows the Supreme Court's instruction in *Los Angeles v. Lyons* that past exposure to illegal conduct does not establish standing for injunctive relief if there is not a real and immediate threat that the conduct will occur again in the future. 461 U.S. 95, 102 (1983). Officer Preston's conduct of offering to pay other inmates to harm Mr. Hoffman and labeling him as a "snitch" affords Mr. Hoffman standing to claim damages against Officer Preston, but it does not establish a real and immediate threat that Officer Preston, or any other officer, will offer to pay other inmates at an entirely different facility to harm Mr. Hoffman and falsely label him as a "snitch" at that facility in the future. *See id.* at 105–13. The at-best theoretical availability of suit for prospective relief does not provide an adequate remedy for Officer Preston's violation of Mr. Hoffman's constitutional rights.

Third, the Federal Tort Claims Act also does not provide an adequate alternative remedy. The FTCA provides liability against the federal government, not individual federal officers. The availability of such a claim would do little to deter constitutional violations because it does not give individual officers an incentive to follow the law. *See Carlson*, 446 U.S. at 20–21; *Bush v. Lucas*, 462 U.S. 367, 378 (1983); *Bistrian*, 912 F.3d at 92. Whatever the import of the FTCA might be in a more exotic extension of *Bivens* much further afield from the doctrine's historical core, Congress clearly expected that prison inmates would still be able to bring constitutional claims against individual prison officials despite the existence of the FTCA. The legislative history of the FTCA "made it crystal clear that Congress views FTCA and *Bivens* as parallel, complementary causes of action." *Carlson*, 446 U.S. at 19–20; *see also Bistrian*, 912 F.3d at 92. The Senate Report accompanying the FTCA stated that "this provision should be viewed as a *counterpart* to the *Bivens* case and its progen[y]" as it waives sovereign immunity to make the federal government "independently liable" for the same type of conduct that *Bivens* "imposes liability upon the individual Government officials involved." *Carlson*, 446 U.S. at 20 (quoting S. Rep. No. 93-588 p. 3 (1973)).

Moreover, the FTCA explicitly states it is not the exclusive remedy for suits brought against individual federal officers for constitutional violations, signaling a clear intent that inmates would still be able to bring suit if individual prison officers

violated their constitutional rights. *See Bistrian*, 912 F.3d at 92; *see also* 28 U.S.C. § 2679(b)(2)(A). Indeed, the Supreme Court squarely held in *Carlson* that the FTCA is not an adequate alternative remedy for a *Bivens* Eighth Amendment claim based on a prison official's deliberate indifference to an inmate's physical safety. *See* 446 U.S. at 19–23. This Court cannot treat that firm holding as overruled by implication. *See Agostini*, 521 U.S. at 237.

Recognizing a *Bivens* remedy is thus necessary because neither the BOP administrative grievance process, an action for prospective relief, nor a FTCA action provides an adequate remedy in this context. The Supreme Court has acknowledged that the absence of a remedy does not necessarily require courts to recognize a *Bivens* remedy when special factors counsel hesitation, such as foreign relations and national security concerns that implicate separation-of-powers issues. *See Hernandez*, 140 S. Ct. at 750. However, Mr. Hoffman's claim does not implicate any separation-of-powers concerns that counsel hesitation. *See supra* II.A. Similar to the plaintiff in *Bivens*, he seeks to hold an individual officer accountable for a specific instance of past egregious misconduct. Mr. Hoffman's claim arises in the classic context where there are "powerful reasons" for courts to allow a *Bivens* action to remedy past harm and to deter future constitutional violations. *See Abbasi*, 137 S. Ct. at 1857. Such run-of-the-mill *Bivens* claims can, and should, still be recognized.

C. Congress Has Confirmed the Availability of a *Bivens* Remedy in this Context.

There are no other sound reasons to suggest that Congress would doubt the efficacy or necessity of a *Bivens* remedy to redress Mr. Hoffman's claim. In fact the opposite is true: Congress has legislated with the understanding that a *Bivens* remedy *is* available in this context. The district court had it backwards in concluding that the PLRA indicated that Congress would not approve of a damages remedy for the claim presented here. ER 18.

The district court observed that in *Abbasi*, the Supreme Court referred to the PLRA's controls on prisoner suits designed to reduce the quantity of inmate suits, and the court here extrapolated that Congress did not want to expand the availability of prisoner suits. Therefore, the district court reasoned that Congress had the occasion to consider the matter of prisoner abuse and the appropriate way to remedy those wrongs, and it did not provide for a standalone damages remedy against federal prison officers for cases involving prisoner mistreatment. *Id.*; *see also Abbasi*, 137 S. Ct. at 1865.

This conclusion does not follow from *Abbasi*. Far from holding that the PLRA forecloses even the most modest extension of *Bivens*, the Court simply noted it "could be argued" that the PLRA suggests Congress chose not to extend the *Carlson* damages remedy to claims alleging that a *warden* allowed guards to abuse pre-trial detainees in violation of the Fifth Amendment. *Abbasi*, 137 S. Ct. at 1865. This

does not suggest that the PLRA counsels hesitation in recognizing a *Bivens* remedy for a claim that a low-level prison guard abused an inmate in violation of the Eighth Amendment. In fact, the PLRA *accepted* the availability of a *Bivens* remedy for prisoners alleging that a prison official acted with deliberate indifference to a prisoner's health and safety in violation of the Eighth Amendment. *See Carlson*, 446 U.S. at 17–23; *Farmer*, 511 U.S. at 847. The Supreme Court made this constitutional cause of action clear in *Carlson* in 1980 and reaffirmed—or at a bare minimum assumed—the availability of such a remedy in *Farmer* in 1994, just two years before the PLRA was enacted. In regulating the procedures for bringing such a claim in federal court, the PLRA at least presumed that *Bivens* actions would be available when an inmate followed the proper procedures. *See supra* Part II.B; *Bistrian*, 912 F.3d at 92–93. The purpose of the PLRA was to decrease frivolous lawsuits, not to preclude legitimate *Bivens* claims altogether; otherwise, it would have made no sense to add an exhaustion requirement *prior to filing a* Bivens *lawsuit*. *See* 42 U.S.C. § 1997e(a); *see also* 141 Cong. Rec. H14078, H14105 (daily ed. Dec. 6, 1995) (statement of Rep. Lobiondo) ("An exhaustion requirement [as imposed by the PLRA] would aid in deterring frivolous claims: by raising the cost, in time/money terms, of pursuing a *Bivens* action, only those claims with a greater probability/magnitude of success, would, presumably, proceed.") Congress thus

necessarily recognized that an Eighth Amendment claim that a prison official exposed an inmate to a known substantial risk of physical harm could bring a *Bivens* suit, provided the inmate followed the procedural requirements set out in the PLRA.

The legislative history confirms that Congress was well aware of the availability of *Bivens* actions for legitimate claims of prisoner mistreatment, including in the context of *Carlson* and *Farmer*. During the debate when the bill was passed, Senator John Schmidt observed that prison conditions that "have been found to violate the Eighth Amendment are excessive violence, whether inflicted by guards or by inmates under the supervision of indifferent guards, preventable rape, deliberate indifference to serious medical needs, and lack of sanitation that jeopardizes health." 142 Cong. Rec. S2298 (daily ed. Mar. 19, 1996). He then emphasized that inmates "must retain access to meaningful redress when such violations occur." *Id.* at S2299. There was no discussion of eliminating *Bivens* actions or limiting the availability of claims in the context of *Carlson* and *Farmer*. To the contrary, when Representative Lobiondo discussed the Supreme Court's decision in *McCarthy*, which also involved an Eighth Amendment deliberate indifference claim, he stated that the "real problem" was the Supreme Court's decision "that an inmate need not exhaust the administrative remedies available prior to proceeding with a *Bivens* action for money damages only." 141 Cong. Rec. H14078, H14105 (daily ed. Dec. 6, 1995) (statement of Rep. Lobiondo). In other words, Congress specifically set out to respond to

a deliberate indifference *Bivens* case, and addressed *only* its procedural prerequisites, not the validity of the claim itself.

Moreover, in the PLRA, Congress prohibited inmates convicted of a felony from bringing suits against the federal government "or an agency, officer, or employee of the Government" based on purely mental or emotional injury suffered while in custody unless they had a prior showing of physical injury. *See* 28 U.S.C. § 1346(b)(2); *see also* 42 U.S.C. § 1997e(e). This provision reinforces Congress's intent to preserve the availability of *Bivens* claims against federal prison officers for inmates who suffered physical injuries.

In sum, there are no sound reasons to suggest that Congress would doubt the necessity or efficacy of a *Bivens* remedy for Mr. Hoffman's claim. A suit brought against an individual prison officer for specific, past conduct, targeted at an individual inmate and in flagrant violation not only of the Constitution but of the prison's own policies, does not raise separation-of-powers concerns. Mr. Hoffman's claim is much closer to the claims raised in *Bivens*, *Carlson*, and *Davis*, which all involved allegations of specific instances of misconduct by federal officials, than to the claims raised in *Abbasi* and *Hernandez*, which implicated Executive Branch policymaking on national security and foreign relations issues. Just as in *Lanuza*, Mr. Hoffman alleges that a single, low-level federal officer violated his constitutional rights by taking illegal actions that were unrelated to any legitimate executive policy. *See* 899

F.3d at 1028–30. No special factors counsel hesitation in recognizing a *Bivens* remedy for Mr. Hoffman's claim that Officer Preston violated his Eighth Amendment rights by encouraging other inmates to attack Mr. Hoffman.

Mr. Hoffman alleges not just that Officer Preston exposed him to a known risk of harm by labeling him a "snitch," but that Officer Preston *intentionally* encouraged other inmates to hurt Mr. Hoffman by offering to pay other inmates to assault him. Under this Circuit's binding, post-*Abbasi* case law, *Bivens* "must provide a remedy on these narrow and egregious facts." *See Lanuza*, 899 F.3d at 1021.

CONCLUSION

For the foregoing reasons, the district court's decision should be reversed.

Respectfully submitted,

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1. This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 12,492 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f).

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s/ Laura E. Dolbow

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I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on July 6, 2020.

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