No. 21-1008

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

ANDERSON COUTINHO SILVA,

Plaintiff-Appellant,

v.

UNITED STATES OF AMERICA and BRANDON SHAW,

Defendants-Appellees.

On Appeal from the U.S. District Court
for the District of Colorado,
No. 1:19-CV-02563-CMA-MEH, Hon. Christine M. Arguello

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INTRODUCTION

Shaw suggests that the judiciary should be categorically barred from "critiqu[ing] in hindsight" his "decision[] regarding use of force"—in his case, an unprovoked attack against a restrained prisoner. Answering Br. 17. In essence, his brief amounts to an argument that the use of excessive force, however malicious and sadistic, by a federally employed prison guard should be exempt from judicial scrutiny on the off chance that the judiciary might intrude into issues of prison security in evaluating the claim. And he contends that minor distinctions between this case and the Eighth Amendment claims the Supreme Court previously authorized under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), justify this absolute immunity.

But Shaw never does what Supreme Court precedent requires: explain why any of these purported differences are *meaningful* in evaluating whether Silva has a *Bivens* remedy to challenge Shaw's use of excessive force. And he impermissibly urges this Court to set aside directly controlling Supreme Court precedent, on the theory that this binding case law is part of an "ancien regime" of *Bivens* law, Answering Br. 27-28—even though the Supreme Court recently described the very cases Shaw disparages as "settled law" and declined to "cast doubt on the[ir] continued force." *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1856-57 (2017).

Silva's suit falls well within the *Bivens* claims previously recognized by the Supreme Court and does not differ from them in any meaningful way. Even if this

Court determines that a modest extension of *Bivens* is necessary to authorize Silva's claim, however, none of the "special factors" cautioning against an extension apply. This Court should reject Shaw's invitation to disregard binding precedent and immunize federal prison guards who assault prisoners from judicial scrutiny.

ARGUMENT

I. Silva's Objections to the Report and Recommendation Were Sufficient to Preserve His *Bivens* Claim on Appeal.

A. Under this Court's "firm waiver rule," a party must timely object to the magistrate's report and recommendation before the district court to preserve an issue for appeal. *Key Energy Res. v. Merrill*, 230 F.3d 1197, 1199-1200 (10th Cir. 2000); *see also Thomas v. Arn*, 474 U.S. 140, 147-48 (1985) (firm waiver rule promotes judicial efficiency and avoids "sandbagging" district courts). These objections must be sufficiently specific to "focus the district court's attention on" the "issues that are truly in dispute." *United States v. 2121 E. 30th St.*, 73 F.3d 1057, 1060 (10th Cir. 1996).

That said, the papers of a pro se litigant must be construed "liberally" and held "to a less stringent standard than those drafted by attorneys." *Trackwell v. U.S. Gov't*, 472 F.3d 1242, 1243 (10th Cir. 2007). Indeed, this Court has interpreted the *Trackwell* standard to require overlooking even a pro se plaintiff's "failure to cite proper legal authority" and "confusion of various legal theories." *Hall v. Bellmon*, 935 F.2d 1106, 1110 (10th Cir. 1991).

This Court has also recognized that the rule regarding failure to object to a magistrate's report and recommendation "is not jurisdictional and thus should not be employed to defeat the ends of justice." *Wirsching v. Colorado*, 360 F.3d 1191, 1197 (10th Cir. 2004) (quoting *United States v. Brown*, 79 F.3d 1499, 1504 (7th Cir. 1996)). As a result, it has employed a "flexible approach" that takes into consideration both the objecting party's conduct and the importance of the issues raised. *Id.* at 1197-98; *see also Morales-Fernandez v. INS*, 418 F.3d 1116, 1120 (10th Cir. 2005) (citing as "relevant considerations" to the interests-of-justice analysis "a *pro se* litigant's effort to comply, the force and plausibility of the explanation for his failure to comply, and the importance of the issues raised").

B. Silva's objection was more than sufficient to put the district court on notice of the conclusions of the magistrate being disputed. In the report and recommendation, the magistrate recommended that the district court dismiss Silva's Eighth Amendment excessive force claim solely on the ground that it would require an extension of *Bivens* and that special factors—including the availability of alternative remedies and concerns about interference with prison management—counseled against an extension. App. 55-58.

Proceeding pro se, Silva objected directly to these conclusions. In his objection, Silva explicitly referred to the magistrate's statement that the "Supreme Court [has] only recogniz[ed] three *Bivens* cases" before drawing the district court's attention to a series of Supreme Court and appellate decisions recognizing excessive

force claims and urging the court to allow his case to "continue" to the merits. App. 63-64. He further explained it was "well known" at his facility that Shaw "used his power as officer to dish out punishment to inmates as [he] sees fit" and that despite "numerous grievances," "not once has the B.O.P. disciplined [Shaw]." App. 63. Instead, Shaw had only been emboldened "to disregard the constitutional rights and dignity of inmates." App. 63. Thus, "the institutional grievance process has never worked since guards will not discipline other guards … [and] Defendant's employer will sweep everything under the rug." App. 63. Accordingly, the only "check of power" against Shaw was "the court." App. 63.

There was no ambiguity or impermissible generality in this objection. In addition to mentioning *Bivens* by name, Silva cited reasons to reject each prong of the magistrate's analysis: Acknowledging the magistrate's statement that the Supreme Court has recognized only three categories of *Bivens* claims, including claims arising under the Eighth Amendment, Silva situated his excessive force claim within the ambit of recognized Eighth Amendment contexts. And Silva's half-page discussion of the inadequacy of the grievance process and the need for judicial intervention notified the district court of the unavailability of any alternative remedies that might counsel against an extension of *Bivens*. Especially under the liberal standard for pro se litigants, this suffices to "focus the district court's attention on" the "issues that are truly in dispute," *2121 E. 30th St.*, 73 F.3d at 1060. This is especially apparent because the magistrate's conclusion that the district court should not extend a *Bivens* remedy

here was the only basis for the recommended disposition of Silva's Eighth Amendment claim. And there was no "sandbagging" of the district court, *cf. Thomas*, 474 U.S. at 147-48; even if Shaw is correct that the district court concluded that Silva objected only to the first step of the magistrate's *Bivens* analysis, the court nonetheless evaluated both *Bivens* prongs de novo.

Shaw's argument (at 10-14) that Silva did not preserve his objection to the magistrate's report and recommendation is legally and factually erroneous. While Shaw nods to *Trackwell*'s requirement that the papers of a pro se litigant must be construed "liberally," *see* Answering Br. 13, the essence of Shaw's complaint appears to be that Silva is not a lawyer and did not make winning arguments in objecting to the magistrate's report and recommendation. *See, e.g.*, Answering Br. 12-13 (criticizing Silva's objection for relying on cases recognizing excessive force claims under § 1983 rather than *Bivens*). But the firm waiver rule does not require a party—much less an incarcerated plaintiff proceeding pro se—to make the very best legal arguments when objecting to a report and recommendation merely to preserve an issue for appellate review, and Shaw cites nothing to the contrary. *See, e.g.*, *Hall*, 935 F.2d at 1110 (construing a pro se plaintiff's papers liberally includes overlooking "failure to cite proper legal authority" and "confusion of various legal theories").

Shaw's criticism of Silva for failing to cite precisely the same cases Silva's counsel now relies on in this appeal is similarly misplaced. *See, e.g.*, Answering Br. 12 ("He did not argue, as he does on appeal, that his claim fit within the contours of the

Bivens claim recognized in *Carlson*."). Again, the standard here is simply whether the party's objections were sufficient to notify the district court of the disputed issues, *see 2121 E. 30th St.*, 73 F.3d at 1060—not whether those objections would prevail on the merits or perfectly map onto the cases to be cited on appeal. *See Yee v. City of Escondido*, 503 U.S. 519, 534 (1992) ("Once a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below.").

Shaw also misrepresents Silva's objection as a factual matter. He suggests that in objecting to the second prong of the magistrate's *Bivens* analysis Silva made only a "general assertion," "buried in a single sentence of a four-page brief," that "the institution grievance process has never worked since guards will not discipline other guards." Answering Br. 11. But even a cursory review of the objection reveals that this argument was part of a full paragraph—in an objection amounting to only three pages of substantive text—detailing the ways the grievance process is inadequate and explaining why the courts, via *Bivens*, are the only "check of power" against Shaw. App. 63.

The unpublished cases Shaw cites are not to the contrary, because all involved failures to object altogether or objections that entirely failed to call the district court's attention to the basis for the objection. In *Apodaca v. Corizon Health Care*, for instance, the plaintiff did not file any timely objections despite being warned that failure to object would waive appellate review; his eventual untimely objection "merely asserted

that objection was made to preserve the right to further review," without specifying any challenges to the report and recommendation. 752 F. App'x 551, 552-52 (10th Cir. 2018). This fact pattern in no way resembles the circumstances here, where Silva timely objected and identified by name the specific conclusion of the magistrate's to which he was objecting.

Two other cases on which Shaw relies involved attempts to raise on appeal issues that were never referenced in objections. In *Macklin v. Dowling*, the plaintiff stated in the conclusion to his objection that federal review of his actual innocence claim was appropriate because he had "asked the state court for a full, fair hearing to resolve these factual disputes, but[] the state court never held a hearing." *See Macklin v. Dowling*, No. 19-CV-0375, ECF No. 21, at 6-7. On appeal, this Court rejected his attempt to argue for the first time that the lower *federal* courts had erred in not providing an evidentiary hearing, concluding that his general reference to state court hearings did not "alert the district court to an objection based on the *magistrate judge's* failure to conduct such a hearing." 822 F. App'x 720, 724 (10th Cir. 2020).

Similarly, in *Laubach v. Scibana*, the magistrate concluded that the plaintiff's claims were either time-barred or unexhausted. 301 F. App'x 832, 834 (10th Cir. 2008). The plaintiff moved for reconsideration, citing the magistrate's failure to address "the specific [i]ssues of: Absolute Immunity, [Q]ualified Immunity, and [Supervisory] Liability." *Id.* at 834-35 (alterations in original). On appeal, this Court declined to review the plaintiff's attempt to challenge, for the first time, the timeliness

and exhaustion holdings, because the plaintiff's objection "made only a general request for factual and legal determinations on all claims" and his reference to "three specific issues … bore no relevance to the magistrate judge's proposed disposition." *Id.* at 835. Both cases involved a party attempting to appeal an issue that was never objected to before the district court while other objections were raised; neither has any bearing here, where Silva's Eighth Amendment claim was rejected on only one basis and he specifically cited that basis in his objection and made arguments going to each prong of the analysis.

Shaw's remaining cases involving the firm waiver rule were Social Security appeals in which the plaintiffs made detailed objections to numerous conclusions in the magistrate's report and recommendation, while burying a single, "conclusory" allusion to another issue in their objections; the district court did not perceive the objection or assess that issue in reviewing the report and recommendation. *See Smith v. Colvin*, 625 F. App'x 896, 901 (10th Cir. 2015); *Segovia v. Astrue*, 226 F. App'x 801, 804-05 (10th Cir. 2007). Those cases have no bearing here, where the magistrate recommended dismissal of Silva's *Bivens* claim on a single ground, Silva's entire objection was dedicated to that recommendation, and the district court perceived the objection and reviewed that recommendation in full.

C. If this Court has any doubt that Silva adequately objected to the magistrate's report and recommendation, it should nonetheless apply its "flexible approach" to the firm waiver rule and review the district court's *Bivens* analysis in the

interests of justice. *Wirsching*, 360 F.3d at 1197-98. Silva timely filed his pro se objection to the magistrate's report and recommendation, in which he made clear that he was disputing only the resolution of his Eighth Amendment claim. He thus made a diligent effort to adequately object and to put the district court on notice of the basis for his objection. *See Morales-Fernandez*, 418 F.3d at 1120 (considering "a *pro se* litigant's effort to comply, the force and plausibility of the explanation for his failure to comply, and the importance of the issues raised"). And the issue presented—whether an incarcerated individual has an Eighth Amendment remedy for the use of malicious and sadistic force by a federal official—is exceptionally important and warrants this Court's consideration. *See, e.g.*, *Casanova v. Ulibarri*, 595 F.3d 1120, 1123-24 (10th Cir. 2010) (refusing to apply firm waiver rule to Eighth Amendment deliberate indifference claim because of the "considerable import" of the violation).

Contrary to Shaw's assertion (at 8, 13-14), this Court has not held that a plaintiff can avoid waiver "only by showing plain error." Rather, "[a]t a minimum," this Court's "'interest of justice' standard for determining whether" to "excuse a [party's] failure to object to a magistrate judge's recommendation includes plain error." *Morales-Fernandez*, 418 F.3d at 1122. That is, plain error review may apply when a party failed altogether to object to a report and recommendation, which is not what happened here: Silva indisputably did timely object, and Shaw's only argument on appeal is that the objection was insufficiently specific. Moreover, *Morales-Fernandez*

made clear that plain error is a "minimum" floor, not a ceiling, to this Court's review even absent timely objection. *Id.*

This Court has repeatedly declined to apply the firm waiver rule, without a showing of plain error, where the interests of justice required. *See, e.g.*, *Casanova,* 595 F.3d at 1124-26; *McGowan v. Huddleston*, 835 F. App'x 314, 315-16 (10th Cir. 2020) (declining to apply firm waiver rule where *Bivens* plaintiff failed to timely object because he received the report and recommendation after the objection deadline passed); *Arocho v. Lappin*, 461 F. App'x 714, 717-18 (10th Cir. 2012) (declining to apply the firm waiver rule where *Bivens* plaintiff filed general objection following confiscation of his property). It has been particularly flexible with pro se plaintiffs and has repeatedly considered "a *pro se* litigant's effort to comply," *Casanova*, 595 at 1123; *Morales-Fernandez,* 418 F.3d at 1120, which is undoubtedly present here.

II. Silva's Eighth Amendment Claim Is Not an Extension of *Bivens*.

Silva's Eighth Amendment claim fits squarely within *Bivens* cases previously recognized by the Supreme Court. The Court has made clear that a *Bivens* claim arises in a "new context" only if it "is different in a meaningful way from previous *Bivens* cases." *Abbasi*, 137 S. Ct. at 1859. And it has offered a list of factors for determining whether the differences are "meaningful enough to make a given context" "new": "the rank of the officers involved," "the constitutional right at issue," "the extent of judicial guidance" governing the claim, "the generality or specificity of the official

action," the "legal mandate under which the officer was operating," and "the risk of disruptive intrusion by the Judiciary into … other branches." *Id.* at 1859-60.

Silva's *Bivens* claim follows directly from the Eighth Amendment claims authorized in *Carlson v. Green*, 446 U.S. 14 (1980), and *Farmer v. Brennan*, 511 U.S. 825 (1994). *See, e.g.*, *Abbasi*, 137 S. Ct. at 1864 (describing *Carlson* as "allow[ing] a *Bivens* claim for prisoner mistreatment"). And Silva showed that not a single *Abbasi* factor for identifying a "new *Bivens* context" has been met. Opening Br. 10, 12-14. He explained, for instance, that the Eighth Amendment prohibition on cruel and unusual punishment was the source of *Bivens* claims recognized in *Carlson* and *Farmer*; that well-established judicial precedent provided an even more meaningful guide to official conduct in the excessive force context than was available for deliberate indifference claims when *Carlson* was decided; that the rank of the defendant prison official is actually lower in this case than it was in *Carlson* or *Farmer*; and that there is an even smaller "risk of disruptive intrusion by the Judiciary" in authorizing an excessive force claim against a single rogue prison guard than a challenge to the mismanagement of an incarcerated patient's medical care in *Carlson*. Opening Br. 12-14.

To be sure, the facts of this case are not precisely the same as either *Carlson* or *Farmer*. Shaw identifies distinctions between this case and the prior *Bivens* suits and argues that these narrow differences are sufficient to treat Silva's claim as arising in a "new *Bivens* context." Answering Br. 15-19. But under *Abbasi*, the inquiry is not whether *any* differences can be identified between a case and a previously authorized

Bivens context; if that were the test, every new *Bivens* suit would arise in a new context, regardless of how closely related the claims were. Instead, the proper inquiry is whether the distinctions between the two claims are "meaningful," as defined by the Supreme Court. And despite paying lip service to the *Abbasi* factors for making that determination, Shaw ignores Silva's application of those factors. *See, e.g.*, Answering Br. 14-15, 18-19 (representing Silva's argument as suggesting that his claim does not represent a new *Bivens* context only because it is "based on the same constitutional provision as one of the three Supreme Court *Bivens* cases").

Shaw also misconstrues the section of *Abbasi* evaluating whether a *Bivens* claim should be extended to the pretrial detainee plaintiffs' Fifth Amendment failure-to-protect and prisoner abuse claims against the warden. Answering Br. 19. While acknowledging "significant parallels" to *Carlson* in that both cases involved "claim[s] for prisoner mistreatment," the Supreme Court concluded that the claim against the *Abbasi* warden fell into a new *Bivens* context because the constitutional right implicated was different (the Fifth Amendment, compared to *Carlson*'s Eighth Amendment) and "the judicial guidance available to th[e] warden, with respect to his supervisory duties, was less developed" than the "standard for claims alleging failure to provide medical treatment to a prisoner." *Abbasi*, 137 S. Ct. at 1864-65. Neither distinction is implicated here. *See supra* at 10-12; *see also* Opening Br. 12-14.

That the Supreme Court in *Farmer* did not separately analyze whether a *Bivens* claim was available also does not help Shaw. Although Shaw argues that "*Farmer* did

not decide" the availability of a *Bivens* remedy, Answering Br. 20, that conclusion was necessary to *Farmer*'s ultimate holding addressing the plaintiff's *Bivens* claim. *See Hernandez v. Mesa*, 137 S. Ct. 2003, 2006 (2017) (noting that "the *Bivens* question" is "antecedent" to "other questions presented"). As the Third Circuit recognized, *Farmer*'s lack of analysis on the antecedent question of the availability of a *Bivens* remedy shows that the Supreme Court viewed the plaintiff's failure-to-protect Eighth Amendment claim to be a straightforward application of *Carlson*'s authorization of a *Bivens* claim for a deliberate-indifference-to-medical-need Eighth Amendment claim. *See Bistrian v. Levi*, 912 F.3d 79, 90-91 (3d Cir. 2018); *see also Farmer*, 511 U.S. at 830 (citing *Carlson*, 446 U.S. 14). Silva's Eighth Amendment excessive force claim is likewise a straightforward application of the Eighth Amendment *Bivens* remedies authorized by *Carlson* and *Farmer*.

III. Even If It Arises in a "New Context," Silva's Eighth Amendment Claim May Properly Be Brought Under *Bivens*.

A. The judiciary is well suited to consider the benefits and costs of permitting a damages action here.

One consideration in determining whether an extension of *Bivens* is warranted is whether the judiciary is "well suited" to "weigh the costs and benefits of allowing a damages action." *Abbasi*, 137 S. Ct. at 1857-58. Silva demonstrated (at 16-17) that the well-established benefits of authorizing a damages action against rank-and-file prison officials who assault the individuals they are meant to guard include "redress[ing] past harm" and "deter[ring] future violations." *Abbasi*, 137 S. Ct. at 1858. And he showed

(at 17-18) that the corresponding costs of allowing such claims are minor and will have almost no "impact on governmental operations systemwide," particularly because they do not "call into question the formulation and implementation of" a policy but target rogue instances of abuse. *Abbasi*, 137 S. Ct. at 1858, 1860.

Shaw essentially refuses to engage with these arguments. Despite acknowledging that there is "an assessment to be made" about whether "the deterrent benefits of such a remedy exceed the costs," Shaw insists that the assessment is not "a judicial function" but is "best suited" for Congress." Answering Br. 32. He ignores that the Supreme Court has stated that this precise balancing is an essential part of the *Bivens* analysis. *Abbasi*, 137 S. Ct. at 1857-58.

Where Shaw does acknowledge the need for this balancing, it is to make arguments that have already been rejected by the Supreme Court. For instance, Shaw cites "the potential impact on institutional security," the risk of a "disruptive intrusion into the functions of the executive branch," and the "substantial burdens upon both the government employees who are individually sued and the government itself." Answering Br. 29-32. But the Court has made it quite clear that line-level prison officials who abuse prisoners "do not enjoy such independent status in our constitutional scheme as to suggest that judicially created remedies against them might be inappropriate," even where "requiring [prison officials] to defend [a damages] suit might inhibit their efforts to perform their official duties." *Carlson*, 446 U.S. at 19; *see*

also McCarthy v. Madigan, 503 U.S. 140, 151 (1992) (same), *superseded on other grounds by statute as recognized by Woodford v. Ngo*, 548 U.S. 81, 84-85 (2006).

Shaw's arguments about institutional security (at 17, 29-30) also go to the merits of an excessive force claim rather than to the threshold question whether the judiciary is equipped to weigh the costs and benefits of such a claim, an inquiry the Supreme Court has already resolved. Shaw relies on *Whitley v. Albers* for the proposition that "balancing competing institutional concerns for the safety of prison staff or other inmates" is "at the core of an excessive force claim" and that "courts should be more hesitant to 'critique in hindsight' prison officials' decisions regarding use of force." Answering Br. 17 (quoting *Whitley*, 475 U.S. 312, 320 (1986)). But that was a case evaluating an excessive force claim on the merits and concluding that the appropriate legal standard should be "whether force was applied in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm." *Whitley*, 475 U.S. at 320-21. *Whitley* demonstrates that Shaw's purported concerns about institutional security—which are not present in Silva's claim of an unprovoked assault him while restrained—are baked into the excessive force standard itself and need not be double counted in evaluating the antecedent question whether an abused prisoner has a cause of action.

Despite Shaw's attempts to analogize this case to *Abbasi* and *Hernandez*, Answering Br. 17-19, 22-24, Silva's routine prison excessive force claim is nothing like either of those cases. *Abbasi* and *Hernandez* both involved high-level national security

and foreign relations matters, which the Supreme Court recognized are firmly the prerogative of the Executive Branch. *See, e.g.*, *Hernandez v. Mesa*, 140 S. Ct. 735, 739 (2020) ("Unlike any previously recognized *Bivens* claim, a cross-border shooting claim has foreign relations and national security implications."); *Abbasi*, 137 S. Ct. at 1861 ("Judicial inquiry into the national-security realm raises 'concerns for the separation of powers in trenching on matters committed to the other branches.'"). And *Abbasi* in particular involved policy-related challenges implicating every level of the U.S. national security apparatus. *Abbasi* and *Hernandez* do not foreclose "run-of-the-mill challenges to 'standard law enforcement operations'" like those at issue here. *Jacobs v. Alam*, 915 F.3d 1028, 1038 (6th Cir. 2019). Rather, *Abbasi* made clear that such claims have continued viability. *See Abbasi*, 137 S. Ct. at 1862 (describing "individual instances of ... law enforcement overreach" as "due to their very nature" being "difficult to address except by way of damages actions after the fact").

By contrast, Silva challenges no prison policy—nor even a pattern of behavior that could be construed as a policy. *Cf. Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 74 (2001) ("[W]e have never considered [*Bivens*] a proper vehicle for altering an entity's policy…."). His claim challenges a single instance of unprovoked excessive force against him when he was restrained. The cost–benefit analysis thus has almost nothing on the costs side of the ledger beyond the general tradeoffs present in every *Bivens* case. *See, e.g.*, *McCarthy*, 503 U.S. at 151 (admonishing defendants not to "confuse the presence of *special* factors with *any* factors counseling hesitation").

B. Congressional action strongly supports recognizing a *Bivens* claim here.

As Silva illustrated, neither of the purported alternative remedies on which the district court relied is a basis for refusing a modest extension of *Bivens* to his excessive force claim. *See* Opening Br. 18-24. Shaw's arguments to the contrary would require this Court to set aside directly controlling Supreme Court precedent. *Cf. Agostini v. Felton*, 521 U.S. 203, 237 (1997) (prohibiting lower courts from determining whether the Court's "more recent cases have, by implication, overruled an earlier precedent").

1. Shaw's reliance on the FTCA as an available alternative remedy runs flatly contrary to statements from the Supreme Court that it is "crystal clear" that "Congress views FTCA and *Bivens* as parallel, complementary causes of action," including in the context of "intentional torts committed by federal law enforcement officers." *Carlson*, 446 U.S. at 19-20 (noting that "Congress follows the practice of explicitly stating when it means to make FTCA an exclusive remedy," which it did not do for law enforcement misconduct); *see also Smith v. United States*, 561 F.3d 1090, 1101 (10th Cir. 2009) ("Congress did not intend the FTCA to preclude a prisoner's *Bivens* claim….").[1] Indeed, the Supreme Court has emphasized that an FTCA claim is not "a substitute for a *Bivens* action." *Bush v. Lucas*, 462 U.S. 367, 378 (1983); *see also*

[1] Shaw erroneously states that "Silva acknowledges that he could have brought his claims under the FTCA." Answering Br. 27. Silva never made any such acknowledgment and takes no position on whether he would have had a viable FTCA claim under Colorado law against the United States.

Hernandez, 140 S. Ct. at 748 n.9 (2020) (in amending the FTCA, Congress "made clear that it was not attempting to abrogate *Bivens*"); *Wilkie v. Robbins*, 551 U.S. 537, 553 (2007) (noting "FTCA and *Bivens* remedies were 'parallel, complementary causes of action'" and "the availability of the former did not preempt the latter" (quoting *Carlson*, 446 U.S. at 20)).

Among other reasons, this is because a *Bivens* claim "is a more effective deterrent" to individual officer misconduct "than the FTCA remedy against the United States," which is "not a sufficient protector of the citizens' constitutional rights." *Carlson*, 446 U.S. at 19-23; *see also Malesko*, 534 U.S. at 70-71 (2001) ("[T]he threat of suit against the United States [i]s insufficient to deter the unconstitutional acts of individuals."). The Supreme Court has never repudiated this holding.

Other than describing *Carlson* as part of an "ancien regime" of *Bivens* law that in his view this Court should feel free to disregard, Answering Br. 27-28, Shaw offers no way of distinguishing *Carlson*'s express holding that the FTCA does not preclude a *Bivens* remedy for the same harm. Shaw's argument that this Court should conclude that *Abbasi* implicitly overruled *Carlson* is foreclosed by *Abbasi* itself and by Supreme Court precedent prohibiting lower courts from engaging in such reasoning. *Abbasi* stated that it was not "cast[ing] doubt on the continued force, or even the necessity," of its cases authorizing a *Bivens* remedy, and it described *Bivens* and its progeny, including *Carlson*, as "settled law." *Abbasi*, 137 S. Ct. at 1856-57. In analyzing whether a *Bivens* remedy was available against the warden, the Court did not mention

the FTCA as potential alternative relief—despite citing other forms of relief, such as habeas and injunctive relief, that might have been relevant in the supervisory liability context. *Id.* at 1865.

Moreover, the Supreme Court has instructed lower courts not to engage in speculation that one of its decisions "appear[ed] to rest on reasons" later "rejected in some other … decision[]," reserving for itself the "prerogative of overruling its own decisions." *Agostini*, 521 U.S. at 237. This Court must "follow the case which directly controls," here *Carlson*. *Id.*

2. As Silva showed (at 22-23), the BOP grievance process is not the kind of alternative remedial scheme that can preclude an extension of *Bivens* because it is a product of the administrative state, not Congress. *See, e.g.*, *Abbasi*, 137 S. Ct. at 1857-58 (because "separation-of-powers principles" are "central," lower courts must consider whether "Congress has created 'any alternative, existing process for protecting the [injury party's] interest' that itself may 'amoun[t] to a convincing reason for the Judicial Branch to refrain from providing a new and freestanding remedy in damages" (alterations in original) (quoting *Wilkie*, 551 U.S. at 550)). Since the core question is whether "Congress or the courts" should decide "whether to provide for a damages remedy," a regulatory program not provided by Congress is irrelevant to the analysis. *Id.*

The grievance process is also inadequate because—with its focus on preventing "unconstitutional actions and policies" from "recurring," Answering Br. 26 (quoting

Malesko, 534 U.S. at 74)—it provides no remedy for a prior malicious and sadistic use of force. Opening Br. 23; *see also, e.g.*, *Bistrian*, 912 F.3d at 92 (explaining that the beating of a plaintiff that "was allegedly the result of 'individual instances of [official misconduct]'" was not remediable by the BOP administrative grievance process because that process could not address the harm (alteration in original)). Rather, an excessive force claim against the prison guard responsible is a quintessential example of a challenge to an "individual instance[]" of "law enforcement overreach," which is "difficult to address except by way of [a] damages action[] after the fact." *Abbasi*, 137 S. Ct. at 1862.

Shaw's contention that the grievance process is an alternative remedy precluding *Bivens* relief, *see* Answering Br. 24-27, fails for essentially the same reasons as his arguments about the FTCA: It requires setting aside dispositive Supreme Court precedent. In *McCarthy*, the Supreme Court explained that the BOP "grievance procedure was neither enacted nor mandated by Congress"; accordingly, Congress could not "be said to have spoken to the particular issue whether prisoners in the custody of the Bureau should have direct access to the federal courts." 503 U.S. at 149. In rejecting the argument that *Bivens* relief in that case should "give[] way" to "articulated congressional policy," the Court reiterated that "Congress did not create the remedial scheme at issue here," meaning that the BOP grievance process did not reflect a circumstance in which "Congress has provided an equally effective alternative remedy and declared it to be a substitute for recovery." *Id.* at 151.

Attempting to distinguish *McCarthy*, Shaw argues that the question in that case was "whether the administrative exhaustion requirement could 'displace'" a *Carlson* claim and that this case is different because "there is no existing *Bivens* remedy for Congress to displace." Answering Br. 25. This misperceives the relevance of *McCarthy* in several ways. For one thing, it assumes Shaw's preferred conclusion by stating baldly that there is no *Bivens* remedy to "displace" here when that is the basis of the dispute between the parties. Moreover, Shaw's framing misstates the question at issue in *McCarthy*, which was whether, prior to the enactment of the Prison Litigation Reform Act of 1996 (PLRA), prisoners asserting constitutional claims were required to exhaust administrative remedies like the BOP grievance process. 503 U.S. at 141. The only time the Court referred to the "displace[ment]" of a *Bivens* remedy was in observing that it might occur where "Congress had legislated an elaborate and comprehensive remedial scheme," whereas with the BOP grievance process, "Congress has enacted nothing." *Id.* at 151-52. The same analysis applies to that grievance process here.

Shaw's other attempt to distinguish *McCarthy* is to frame it as "inconsistent with the modern presumption against extending the *Bivens* remedy." Answering Br. 25-26 (arguing that the Court has "rejected [a] distinction" between remedies "created by regulation" versus "by statute"). Once again, this amounts to impermissibly asking this Court to set aside "directly control[ling]" Supreme Court precedent on the theory that more recent case law is trending in a different direction. *Agostini*, 521 U.S. at 237.

Moreover, this argument is simply incorrect: In *Abbasi* itself, the Court reiterated that the relevant inquiry for this part of the *Bivens* analysis is "whether there were alternative remedies available or other sound reasons to think *Congress* might doubt the efficacy or necessity of a damages remedy." 137 S. Ct. at 1865 (emphasis added). The Court paired this statement with pages of analysis about the separation-of-powers principles underlying the special status awarded to congressionally created remedies. The BOP grievance process is simply not the kind of alternative remedy the Court has held precludes an extension of *Bivens*.

Malesko does not alter this analysis. There, the Supreme Court identified the BOP grievance process as a mechanism by which "allegedly unconstitutional actions and policies can be brought to the attention of the BOP and prevented from recurring." 534 U.S. at 74. But *Malesko* involved a former federal prisoner suing a private company that had contracted with the BOP to operate detention facilities; the parties agreed that "the question whether a *Bivens* action might lie against a private individual [wa]s not presented," because the plaintiff's claims against individual defendants had been dismissed on limitations period grounds. *Id.* at 65.

Malesko thus analyzed ways the institution itself might be held responsible for the actions of its employees and noted that one available mechanism was through a change in policy via the grievance process. *Id.* at 74. The Court said nothing about using the grievance process to obtain alternative relief from the individuals responsible for the harm. When *Malesko* did evaluate the "alternative remedies" a

federal prisoner might have against individuals employed by a BOP contractor, the Court stated only that such prisoners would "enjoy a parallel tort remedy that is unavailable to prisoners housed in Government facilities" and did not mention the grievance process. *Id.* at 72-73. And when the Court directly confronted the question whether a *Bivens* action might lie against a private individual, it held that state tort actions constituted an adequate alternative remedy without mentioning the BOP grievance process. *Minneci v. Pollard*, 565 U.S. 118, 120 (2012).

In addition to showing why the BOP grievance process is not the kind of alternative remedy that can preclude a *Bivens* claim, Silva also demonstrated that the process was not an "available" form of relief to him. Opening Br. 23-24. Shaw ignores this point, misrepresenting Silva's argument as simply a complaint that Silva's "past grievances have been denied." Answering Br. 26-27. But that is not what Silva said or the reason the grievance process is unavailable to him as a practical matter. Rather, it is because Shaw and other officials at U.S.P. Florence have assaulted and threatened Silva for using the grievance process to report Shaw's attack on him. Opening Br. 24. Shaw does not explain how the grievance process is functionally available to Silva as an "alternative remedy" to *Bivens*, when he and his colleagues have abused Silva for his attempts to use it to report Shaw for the very conduct at issue. *See, e.g.*, *Reid v. United States*, 825 F. App'x 442, 445 (9th Cir. 2020) (concluding that the BOP grievance process was not "available" under *Bivens* because "allegedly

unconstitutional treatment … was inflicted in retaliation for [the plaintiff's] earlier attempt to report abuse by a prison guard through" the same process).

Silva further explained that it is "well known" throughout U.S.P. Florence that Shaw "has used his power as officer to dish out punishment to inmates as [he] sees fit" and that numerous prisoners had filed grievances against Shaw, App. 63, without deterring his misconduct in any way. This belies Shaw's argument that the grievance process offers an avenue for "preventing" unconstitutional conduct "from recurring," Answering Br. 26.

3. As Silva demonstrated, the only relevant congressional enactments support extending *Bivens* to prison excessive force claims. Both the PLRA and the Westfall Act of 1988, which amended the FTCA, imposed procedural limitations on *Bivens* claims, including in the prison context, without eliminating them; this indicates a legislative determination to ensure the continued viability of such claims while cabining them procedurally. Opening Br. 24-26. And neither statute contains any provision that could be read to abrogate *Bivens*.

Shaw suggests that the PLRA's procedural limitations on prisoner claims shows only that Congress did not intend to abrogate "[t]he three [*Bivens*] claims previously recognized by the Supreme Court." Answering Br. 30-31. But the PLRA gives no indication that its provisions apply only to deliberate indifference or failure-to-protect

claims.[2] In fact, at least one provision of the PLRA contemplates the continued availability of *Bivens* remedies in a wide variety of prisoner cases not limited to *Carlson* and *Farmer*. *See* 42 U.S.C. § 1997e(e) (providing that an incarcerated individual bringing a "Federal civil action … for mental or emotional injury suffered while in custody" must show "physical injury or the commission of a sexual act"). Even if this Court is not persuaded that the Westfall Act and the PLRA affirmatively support an extension of *Bivens*, it should hesitate before reading any disapproval of *Bivens* into those enactments. *See, e.g.*, *Midlantic Nat'l Bank v. N.J. Dep't of Envtl. Prot.*, 474 U.S. 494, 501 (1986) ("The normal rule of statutory construction is that if Congress intends for legislation to change the interpretation of a judicially created concept, it makes that intent specific.").

CONCLUSION

For the foregoing reasons, the district court decision should be reversed and the case should be remanded.

[2] Shaw repeatedly asserts that the Supreme Court's 2017 opinion in *Abbasi* changed the *Bivens* landscape for prison civil rights claims and cites it as the source of his argument that only three narrow *Bivens* contexts are not "new." Answering Br. 22. Shaw then presents this post-*Abbasi* framework as though it were the doctrinal background to the PLRA, enacted decades earlier.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume, typeface, and type-style requirements of Rule 32(a) of the Federal Rules of Appellate Procedure and Rule 32 of the 10th Circuit Rules. This brief contains 6,445 words, excluding the parts of the document exempted by Fed. R. App. 32(f), as calculated in Version 15.26 of Microsoft Word for Mac 2016. It was prepared in 14-point font using Garamond, a proportionally spaced typeface.

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CERTIFICATE OF SERVICE

I certify that on November 15, 2021, I electronically transmitted the foregoing brief to the Clerk of the Court using the appellate CM/ECF System, causing it to be served on counsel of record, who are all registered CM/ECF users.

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