FARMER AT 31: HISTORICIZING TRANS RIGHTS IN PRISON THROUGH INTERGENERATIONAL DIALOGUE*

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ABSTRACT

In 1994, the U.S. Supreme Court held in Farmer v. Brennan *that prison officials can be found deliberately indifferent for failing to protect incarcerated people from a known or obvious risk of harm. Co-author Dee Deidre Farmer litigated that case pro se through the Court's grant of certiorari. The case was groundbreaking: Ms. Farmer is the first known trans plaintiff in the Supreme Court, and her trans rights case set important precedent for all people behind bars.*

Recently, citing the Supreme Court's growing "disfavor" towards expanding Bivens *claims into new contexts, federal courts have ruled that there are no available damages remedies for failure-to-protect claims against federal prison officials. Appellate courts have referenced the Supreme Court's trio of established* Bivens *cases as the only contexts in which such a remedy apply. But the Supreme Court has never overturned* Farmer*, which was explicitly a* Bivens *damages case. Lower courts have therefore eroded the basic premise of* Farmer *and, in doing so, rendered invisible Ms. Farmer's hard-fought success in establishing the failure-to-protect claim.*

In this Article, we argue that Farmer *is still valid as an established* Bivens *remedy for failure-to-protect claims. First, we historicize* Farmer *by reviewing the publicly available record, letters of Justices of the Court, and the decisions on remand—which Ms. Farmer experienced firsthand. Second, we situate* Farmer *in the modern* Bivens *framework to show that it remains an established* Bivens *context. A contrary outcome contributes to the trend of trans erasure across the country.*

∗ Content Warning: This Article contains first-person descriptions of rape and other forms of violence.

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INTRODUCTION

Dee Farmer: This year marks the 31st anniversary of Farmer v. Brennan,[1] *the case I filed, without a lawyer, in the U.S. Supreme Court. The Supreme Court agreed with me that prison officials could be held liable for the rape and beating I endured because they knew that placing me, a young trans woman, in a maximum-security penitentiary, was dangerous.*[2]

D Dangaran: I was enthralled by Dee's case in my first year of law school during a seminar on mass incarceration. What I did not know from listening to the oral argument and reading the case was that Dee came up with the legal theory for failure-to-protect claims on her own. I want to root this Article in that truth before critiquing the federal courts' retreat from the substantive rights Dee won for incarcerated people in the United States.

We are deeply concerned about the state of trans rights across the United States, and especially the rights of incarcerated trans people.[3] Many forces in this

1. 511 U.S. 825 (1994).

2. *Id.* at 842.

3. And, as one legal scholar suggests, their rights are connected. *See* Chinyere Ezie, *Dismantling the Discrimination-to-Incarceration Pipeline for Trans People of Color*, 19 U. ST. THOMAS L.J. 276, 279–301 (2023) (discussing how trans discrimination leads to homelessness and poverty, which in turn force trans people of color into "criminalized economies as a means for survival at significant rates, even though doing so can precipitate their entry into the system of mass incarceration and immigrant detention").

country have sought to erase trans people from books,[4] religious ceremonies,[5] sports,[6] or schools,[7] or have invalidated our legal existence altogether.[8] We believe a similar erasure has occurred in the federal courts' failure to uphold *Farmer* as a case that establishes a *Bivens*[9] remedy for failure-to-protect claims. We will first introduce the *Bivens* doctrine and *Farmer*'s holding before moving on to analyze recent developments in the law.

A. Bivens

The Supreme Court decided *Bivens* in 1971.[10] The plaintiff, Webster Bivens, sued agents of the Federal Bureau of Narcotics for money damages. Bivens asserted that the agents entered and searched his apartment and arrested him without a warrant or probable cause, in violation of the Fourth Amendment of the U.S. Constitution.[11] The defendants argued that the plaintiff could "obtain money damages to redress invasion of these rights only by an action in tort, under state law, in the state courts."[12] The Court rejected this argument.[13] The Court held that "petitioner is entitled to recover money damages for any injuries he has suffered as a result of the agents' violation of the [Fourth] Amendment."[14] The Court determined that Bivens was entitled to damages despite the fact that "the Fourth Amendment does not in so many words provide for its enforcement by an award of money damages for the consequences of its violation."[15] The Court reasoned that, "[h]istorically, damages have been regarded as the ordinary remedy for an

4. *See, e.g.*, Ramona Pierce, *Fighting Book Bans in Kentucky Schools—and Beyond*, NATION (Dec. 19, 2023), https://www.thenation.com/article/activism/book-bans-kentucky-boyle-county-school-district-sb-150/ [https://perma.cc/BXD4-XTD8]; Samantha Laine Perfas, *Who's Getting Hurt Most by Soaring LGBTQ Book Bans? Librarians Say Kids.*, HARV. GAZETTE (June 28, 2023), https://news.harvard.edu/gazette/story/2023/06/lgbtq-book-challenges-are-on-the-rise-heres-why/ [https://perma.cc/RNR2-24W9].

5. *See, e.g.*, Maham Javaid, *N.Y. Archdiocese Condemns a Trans Activist's Funeral After Hosting It*, WASH. POST (Feb. 18, 2024), https://www.washingtonpost.com/religion/2024/02/18/st-patricks-cathedral-cecilia-gentili-funeral/ [https://perma.cc/M8PJ-UTT6].

6. *See, e.g.*, Hecox v. Little, 79 F.4th 1009, 1030–39 (9th Cir. 2023) (upholding a preliminary injunction against Idaho's categorical ban on trans student athletes participating in women's sports).

7. *See, e.g.*, Adams v. Sch. Bd. of St. Johns Cnty., 57 F.4th 791, 800 (11th Cir. 2022) (upholding a Florida school board's policy requiring trans students to use only the bathroom that aligns with their sex assigned at birth).

8. *See, e.g.*, Nico Lang, *Here's How a New Wave of Legislation Aims to 'Legally Erase' Trans People*, THEM (Mar. 29, 2024), https://www.them.us/story/anti-trans-legislation-legally-erase-trans-people [https://perma.cc/5SDK-9TFX].

9. Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388 (1971).

10. *Id.*

11. *Id.* at 389–90.

12. *Id.* at 390.

13. *See id.* at 394.

14. *Id.* at 397.

15. *Id.* at 396.

invasion of personal interests in liberty."[16] Further, Congress did not bar the recovery of money damages for "a federal officer's violation of the Fourth Amendment."[17] The Court concluded that the plaintiff was "entitled to redress his injury through a particular remedial mechanism normally available in the federal courts"—namely, money damages.[18]

Thus, "*Bivens* established that the victims of a constitutional violation by a federal agent have a right to recover damages against the official in federal court despite the absence of any statute conferring such a right."[19] As Justice Harlan said in his concurrence, "[t]he Court . . . simply recognizes what has long been implicit in [its] decisions concerning equitable relief and remedies implied from statutory schemes; i.e., that a court of law vested with jurisdiction over the subject matter of a suit has the power—and therefore the duty—to make principled choices among traditional judicial remedies."[20] Today, a *Bivens* claim is shorthand for such an implied damages remedy against federal officers who violate the U.S. Constitution.[21]

Within a decade, the Supreme Court found an implied damages remedy in a Fifth Amendment gender discrimination case, *Davis v. Passman*,[22] and an Eighth Amendment cruel and unusual punishment case, *Carlson v. Green*.[23] In *Bivens*, *Davis*, and *Carlson*, the Court identified "two situations" that might "defeat [a *Bivens* cause of action] in a particular case."[24] First, when there are any "special factors counseling hesitation in the absence of affirmative action by Congress," such as "a question of 'federal fiscal policy.'"[25] Second, "when defendants show that Congress has provided an alternative remedy which it explicitly declared to be a *substitute* for recovery under the Constitution and viewed as equally effective."[26]

The Supreme Court later "adopted a far more cautious course before finding implied causes of action."[27] This sea change in the Court's view of an expansive *Bivens* doctrine led the Court to create a new two-step analysis in *Ziglar v.*

16. *Id.* at 395.

17. *Id.* at 397.

18. *Id.*

19. Carlson v. Green, 446 U.S. 14, 18 (1980).

20. *Bivens*, 403 U.S. at 408 n.8 (Harlan, J., concurring).

21. Some legal scholars have questioned the viability or necessity of *Bivens* altogether. *See, e.g.*, Ann Woolhandler & Michael G. Collins, *Was* Bivens *Necessary?*, 96 NOTRE DAME L. REV. 1893, 1902 (2021).

22. 442 U.S. 228 (1979).

23. 446 U.S. 14 (1980).

24. *Id.* at 18.

25. *Id.*; *Bivens*, 403 U.S. at 396 (majority opinion) (quoting United States v. Standard Oil Co., 332 U.S. 301, 311 (1947)); *Davis*, 442 U.S. at 245.

26. *Carlson*, 446 U.S. at 18–19 (emphasis in original); *Bivens*, 403 U.S. at 397; *Davis*, 442 U.S. at 245–47.

27. Ziglar v. Abbasi, 582 U.S. 120, 132 (2017).

Abbasi.[28] This two-step test is now commonly known as the "*Bivens* inquiry"[29] or the "*Bivens* question."[30] "[T]he *Bivens* question . . . is 'antecedent' to the other questions presented."[31] That is to say, the *Bivens* question must be addressed before turning to the merits of the claim or any defenses raised such as qualified immunity.

At step one, a court determines whether the case presents a new *Bivens* context.[32] If the case is not meaningfully different from *Bivens*, *Davis*, or *Carlson*, there is a *Bivens* cause of action. Thus, the *Bivens* inquiry is satisfied, and the court can proceed to other issues in the case. If, however, the court decides the case is in a new context, the court turns to step two. At step two, the court assesses whether any special factors counsel hesitation before finding that "the Judiciary is well suited, absent congressional action or instruction, to consider and weigh the costs and benefits of allowing a damages action to proceed."[33]

In *Abbasi*, the Supreme Court provided a non-exhaustive "list of differences that are meaningful enough to make a given context a new one."[34] The *Abbasi* Court also provided some special factors that could be considered at step two, including the separation-of-powers principles (whether the judiciary is well suited to weigh the costs to the government, whether Congress has already acted in that arena, etc.) and whether an alternative remedial structure is available.[35]

B. Farmer v. Brennan

In 1994, the Supreme Court issued its decision in *Farmer v. Brennan*, which involved a claim seeking damages and equitable relief under the Eighth Amendment.[36] Specifically, Ms. Farmer argued that prison officials did not protect her from the obvious harm she would face when being placed in a men's maximum security prison as a transgender woman who had already received breast augmentation surgery before she was incarcerated.[37] This type of claim is

28. *See id.* at 139–140, 144.

29. *See, e.g.*, Sargeant v. Barfield, 87 F.4th 358, 366 (7th Cir. 2023).

30. *See, e.g.*, Hernández v. Mesa, 582 U.S. 548, 553 (2017).

31. *Id.* (quoting Wood v. Moss, 572 U.S. 744, 757 (2014)).

32. *Abbasi*, 582 U.S. at 139.

33. *Id.* at 136.

34. *See id.* at 139–40 (listing "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").

35. *See id.* at 133–37.

36. 511 U.S. 825 (1994).

37. *See* Samuel Weiss, *Importing Welfare State Failures Into Prison Law*, 65 ARIZ. L. REV. 741, 762 (2023).

now known as a "failure-to-protect" claim.[38] Under the Eighth Amendment case law, Ms. Farmer's task was to show that the Bureau of Prisons officials' failure to protect her from harm amounted to deliberate indifference.

The Supreme Court first used the term "deliberate indifference" in *Estelle v. Gamble*[39] to "describe[] a state of mind more blameworthy than negligence."[40] Although *Estelle* was a prison medical care case, the Supreme Court "ha[s] since read *Estelle* for the proposition that Eighth Amendment liability requires 'more than ordinary lack of due care for the prisoner's interests or safety.'"[41] These claims go hand in hand because "[t]he question under the Eighth Amendment is whether prison officials, acting with deliberate indifference, exposed a prisoner to a sufficiently substantial 'risk of serious damage to his future health.'"[42] The risk to a person's safety *is* a risk to that person's health.

In *Farmer*, the Supreme Court issued two distinct holdings. First, the Court concluded that a plaintiff at obvious risk of harm has a viable Eighth Amendment claim "based on a failure to prevent harm" even where they did not directly notify prison officials of said risk.[43] The serious risk of harm that could occur if the defendants do not take protective action meets the objective component of the failure-to-protect claim.

Second, the Court decided that plaintiffs would need to show that the defendants had subjective intent that rose to the level of criminal recklessness to prove deliberate indifference.[44] Ms. Farmer advocated for what was effectively a negligence standard,[45] which would have been easier to meet than the one issued by the Court. Ms. Farmer's attorney advocated for the objective deliberate

38. *See, e.g.*, Marjorie Rifkin, Farmer v. Brennan: *Spotlight on an Obvious Risk of Rape in a Hidden World*, 26 COLUM. HUM. RTS. L. REV. 273, 292–94, 300, 303 (1995) (discussing the development, implications, and consequences of failure-to-protect claims).

39. 429 U.S. 97 (1976).

40. *Farmer*, 511 U.S. at 835.

41. *Id.* (quoting Whitley v. Albers, 475 U.S. 312, 319 (1986)).

42. *Id.* at 843 (quoting Helling v. McKinney, 509 U.S. 25, 35 (1993)).

43. *Id.* at 834; *see id.* at 848–49.

44. *See id.* at 837 ("We reject [Farmer's] invitation to adopt an objective test for deliberate indifference."); *see also id.* at 837 n.6 (describing the criminal recklessness standard that the defendants urged the Court to adopt).

45. Ms. Farmer and her counsel (appointed after the Court granted certiorari) argued "that a subjective deliberate indifference test will unjustly require prisoners to suffer physical injury before obtaining court-ordered correction of objectively inhumane prison conditions." *Id.* at 845. But the Court denied that "a subjective approach to deliberate indifference [would] . . . require a prisoner seeking a remedy for unsafe conditions to await a tragic event such as an actual assault before obtaining relief." *See id.* (cleaned up). The Court declined the criminal negligence standard—"an agent neglects a substantial and unjustifiable risk associated with his conduct, and of which he failed to become aware when he should have"—and instead adopted the criminal recklessness standard. *See* Paulo Barrozo, *Reconstructing Constitutional Punishment*, 6 WASH. U. JURIS. REV. 175, 189 (2014).

indifference standard the Court had used in the civil context in *City of Canton v. Harris*.[46]

Thus, *Farmer* held that Ms. Farmer's failure-to-protect claim was viable, in theory, even as it set a heightened deliberate indifference standard. The Supreme Court remanded the case for the district court to conduct the proper subjective intent inquiry.

C. Farmer *as an Established* Bivens *Case*

This Article does not dwell on either of these holdings in *Farmer*. Much has been said about both the criminal recklessness standard and the failure-to-protect claim itself.[47] Rather, this Article marshals all the evidence in the history of Ms. Farmer's case to show that it is a *Bivens* claim. Notably, the Supreme Court did not cast any doubt over whether Ms. Farmer's claim could be remedied by monetary damages. The Court decidedly reached the merits of the Eighth Amendment claim by ruling on which standard of subjective intent should apply. By reaching the merits of failure-to-protect claims, the Court necessarily determined that Ms. Farmer's case presented a viable *Bivens* claim. A contrary conclusion finds no support in the text of the case.

We can logically deduce that the *Farmer* Court viewed Ms. Farmer's claim as invoking the same Eighth Amendment rights that the Supreme Court had already determined to be viable for a *Bivens* claim in *Carlson*. In *Farmer*, the Court concluded that failure-to-protect claims were part of the deliberate-indifference doctrine.[48] The Supreme Court had previously considered failure-to-protect claims in other Eighth Amendment cases challenging conditions of confinement.[49] Thus, failure-to-protect claims were already theorized by the Court as falling under the umbrella of Eighth Amendment deliberate-indifference

46. 489 U.S. 378, 378 (1989); *see* Nicole B. Godfrey, *Institutional Indifference*, 98 OR. L. REV. 151, 172–73 (2020).

47. Many legal scholars have criticized the criminal recklessness standard adopted in *Farmer* and other intent requirements applied to prison conditions cases. *See, e.g.*, Margo Schlanger, *The Constitutional Law of Incarceration, Reconfigured*, 103 CORNELL L. REV. 357, 360–61 (2018); Sharon Dolovich, *Cruelty, Prison Conditions, and the Eighth Amendment*, 84 N.Y.U. L. REV. 881, 895–97 (2009); Alice Ristroph, *State Intentions and the Law of Punishment*, 98 J. CRIM. L. & CRIMINOLOGY 1353, 1380–84 (2008). For a history of Eighth Amendment jurisprudence, see generally Stacy Lancaster Cozad, *Cruel But Not So Unusual:* Farmer v. Brennan *and the Devolving Standards of Decency*, 23 PEPP. L. REV. 175 (1995). For an analysis of the Supreme Court's decision to establish failure-to-protect claims, see Rifkin, *supra* note 38, at 292–94, 300, 303.

48. *See Farmer*, 511 U.S. at 833 ("[A]s the lower courts have uniformly held, and as we have assumed, 'prison officials have a duty . . . to protect prisoners from violence at the hands of other prisoners.'" (quoting Cortes-Quinones v. Jimenez-Nettleship, 842 F.2d 556, 558 (1st Cir. 1988) (alteration in original))).

49. *See, e.g.*, Wilson v. Seiter, 501 U.S. 294, 303 (1976) ("[T]he medical care a prisoner receives is just as much a 'condition' of his confinement as the food he is fed, the clothes he is issued, the temperature he is subjected to in his cell, and *the protection he is afforded against other inmates*." (emphasis added)).

claims.[50] *Farmer* clarified the deliberate indifference standard that would apply to both injunctive relief[51] and damages[52] cases brought under the Eighth Amendment—not only for failure-to-protect claims, but for all deliberate indifference claims.[53] Deliberate indifference claims, in turn, were already considered an established *Bivens* context following the Court's decision in *Carlson*. Thus, as part of step one of the *Bivens* analysis, the claim in *Farmer* should be understood as arising in the same context as *Carlson*—deliberate indifference claims raised under the Eighth Amendment.

The Third Circuit utilized similar reasoning in two recent cases. First, in *Bistrian v. Levi*, the Third Circuit decided that "[a]lthough the *Farmer* Court did not explicitly state that it was recognizing a *Bivens* claim, it not only vacated the grant of summary judgment in favor of the prison officials but also discussed at length 'deliberate indifference' as the legal standard to assess a *Bivens* claim."[54] The Third Circuit was not deterred by the fact that *Abbasi* listed only *Bivens*, *Davis*, and *Carlson* as the established *Bivens* contexts "and did not address, or otherwise cite to, *Farmer*."[55] The Third Circuit "decline[d] to conclude that the Supreme Court's more recent cases have, by implication, overruled [*Farmer*]."[56] Instead, it held that the failure-to-protect claim in *Bistrian* was not a new *Bivens* context because of its similarity to *Farmer* and allowed a damages claim against federal officers to proceed.[57]

The Third Circuit remained steadfast in its analysis three years later in *Shorter v. United States*.[58] There, the court squarely placed *Farmer* in the *Carlson* context

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50. *See id.*

51. We emphasize that the Supreme Court discussed that injunctive relief was only cognizable if Ms. Farmer showed she was in continuous threat of harm due to her continued placement in general population and demonstrates the "continuance" of the prison officials' disregard of that risk. *See Farmer*, 511 U.S. at 845–46. The Court remanded for the district court to make that determination. *See id.* at 846.

52. Although the Supreme Court discussed injunctive relief, *see supra* text accompanying note 51, the Court clearly understood that Ms. Farmer asserted a *Bivens* claim. *See Farmer*, 511 U.S. at 830, 856. The Court would have dismissed the *Bivens* action if it held that *Bivens* was inapplicable to failure-to-protect claims.

53. *See Farmer*, 511 U.S. at 834 ("To violate the Cruel and Unusual Punishments Clause, a prison official must have a sufficiently culpable state of mind. In prison-conditions cases that state of mind is one of deliberate indifference to inmate health or safety, a standard the parties agree governs the claim in this case. The parties disagree, however, on the proper test for deliberate indifference, which we must therefore undertake to define." (cleaned up)).

54. 912 F.3d 79, 90 (3d Cir. 2018).

55. *Id.* at 91.

56. *Id.* (cleaned up).

57. *Id.* at 91–92.

58. 12 F.4th 366, 373 n.5 (3d Cir. 2021) ("[T]he Supreme Court . . . neglected to name *Farmer* because it saw that case as falling under the umbrella of *Carlson* . . . .").

rather than relying on *Farmer* alone.[59] The Third Circuit even said that the Supreme Court had simply "neglected to name *Farmer*" in its recitation of the *Bivens* cases in *Abbasi* "because it saw that case asfalling under the umbrella of *Carlson*."[60]

After *Shorter* was decided, three other federal courts of appeals reached the opposite result, either because they did not agree that *Farmer* extended *Bivens* to failure-to-protect claims or because they did not conclude failure-to-protect claims can be in the same context as *Carlson*, or both.[61] In addition, in 2024, the Third Circuit issued two opinions that overturned its precedent in *Bistrian* and *Shorter* in light of the Supreme Court's recent decision in *Egbert v. Boule*,[62] discussed further below.[63] The Supreme Court recently denied certiorari in a Seventh Circuit case addressing the issue.[64]

The lower courts that have held that *Farmer* presents a new *Bivens* context are wrong. This Article offers a two-part corrective. Part I provides a detailed history of Ms. Farmer's experiences leading up to her filing of *Farmer*, followed by a discussion of her claim, the Supreme Court's decision, and the decisions from the lower courts on remand. With this case history in mind, Part II argues that *Farmer* is a *Bivens* case under the *Carlson* umbrella. Since *Farmer* is part of *Carlson*'s progeny, then *Carlson* would need to be overturned before denying a *Bivens* remedy for failure-to-protect claims.

Our effort to historicize trans rights in prison is twofold. We are first solidifying the history of trans rights on the inside by correcting the record of what *Farmer* signified for the Court that decided it. Our jump to the modern-day *Bivens* doctrine is a lament and an appeal to the federal courts to change course. The

59. *Id.* at 371 ("In *Farmer* . . . the Supreme Court applied *Carlson* in recognizing an Eighth Amendment damages claim.").

60. *Id.* at 373 n.5. For more moves the Third Circuit made in the *Bivens* inquiry, such as resolving the distinction between the Fifth Amendment and Eighth Amendment and addressing the Federal Torts Claims Act, see Jessica Marder-Spiro, *Special Factors Counselling Action: Why Courts Should Allow People Detained Pretrial to Bring Fifth Amendment Bivens Claims*, 120 COLUM. L. REV. 1295, 1318–19 (2020).

61. Bulger v. Hurwitz, 62 F.4th 127, 139 (4th Cir. 2023); Sargeant v. Barfield, 87 F.4th 358, 364–65 (7th Cir. 2023), *cert. denied*, —- S. Ct. ——, 2024 WL 4427254, at *1 (Oct. 7, 2024); Marquez v. Rodriguez, 81 F.4th 1027, 1030–31 (9th Cir. 2023).

62. 596 U.S. 482 (2022).

63. *See* Fisher v. Hollingsworth, 115 F.4th 197, 204 (3d Cir. 2024) ("Defendants respond that *Bistrian* and *Shorter* have been abrogated by the Supreme Court's later decision in *Egbert v. Boule*. We agree." (citation omitted)); *see also* Kalu v. Spaulding, 113 F.4th 311, 329–31 (3d Cir. 2024).

64. *See Sargeant*, 2024 WL 4427254, at *1.

federal courts have attempted to make *Farmer* part of an "*ancien regime*"[65] from a time before extending the *Bivens* remedy became a "disfavored judicial activity."[66] These courts ignore that *Farmer* was decided *after* the Supreme Court signaled the end of extending *Bivens* to new arenas.[67]

The stakes for trans people have never been higher. For trans people in prison especially, for whom sexual assault is about ten times more likely than for the general prison population,[68] a damages remedy is a significant tool to ensure federal officers meet the constitutional minimum requirements for safety. Protecting *Bivens* remedies for failure-to-protect claims *is* protecting trans rights.

I.
HISTORICIZING *FARMER*

Historicizing[69] *Farmer is* historicizing trans rights in prison because of the significance of that case in the broader struggle of trans rights on the inside across the past thirty-one years.[70] We begin by offering Ms. Farmer's experiences in the Bureau of Prisons, which emblematize the experiences of other trans people in

65. Ziglar v. Abbasi, 582 U.S. 120, 131–32 (2017) (discussing the bygone era of *Bivens* expansion when "as a routine matter with respect to statutes, the Court would imply causes of action not explicit in the statutory text itself") (quoting Alexander v. Sandoval, 532 U.S. 275, 287 (2001)); *see also* Carlos M. Vázquez, *Bivens and the Ancien Regime*, 96 NOTRE DAME L. REV. 1923, 1936–37 (2021) (explaining the ancien regime and situating it within the Westfall Act). Others have lamented the Supreme Court's turn from *Bivens*, specifically the narrow reading the Court gave *Bivens* itself in *Abbasi* and *Hernández v. Mesa*, 589 U.S. 93 (2020). *See* Alexander J. Lindvall, *Gutting* Bivens*: How the Supreme Court Shielded Federal Officials from Constitutional Litigation*, 85 MO. L. REV. 1013, 1027 (2020); Stephen I. Vladeck, *The Disingenuous Demise and Death of* Bivens, 2019 CATO SUP. CT. REV. 263, 265 (2020).

66. *Egbert*, 596 U.S. at 491 (quoting *Abbasi*, 582 U.S. at 135).

67. Professor Stephen Vladeck has argued that the Supreme Court's *Bivens* doctrine is inconsistent and has no basis in an originalist interpretation of constitutional remedies. *See* Stephen I. Vladeck, *The Inconsistent Originalism of Judge-Made Remedies Against Federal Officers*, 96 NOTRE DAME L. REV. 1869, 1891 (2021).

68. ALLEN J. BECK, U.S. DEP'T OF JUST., SEXUAL VICTIMIZATION IN PRISONS AND JAILS REPORTED BY INMATES, 2011-12: SUPPLEMENTAL TABLES: PREVALENCE OF SEXUAL VICTIMIZATION AMONG TRANSGENDER ADULT INMATES 2 (2014).

69. By historicizing, we mean contextualizing the *Farmer* decision within its case history, as well as viewing the life of the doctrine that followed. Ms. Farmer's lived experiences show what else was happening before and after the complaint was filed. Her story fills missing gaps in the decisions on Westlaw and paint a picture of life in the U.S. Penitentiary at Terre-Haute ("Terre Haute"), making the significance of the decision for her and others even clearer. We view *Farmer* as the first trans rights case decided by the U.S. Supreme Court. *See* D Dangaran, *Abolition as Lodestar: Rethinking Prison Reform from a Trans Perspective*, 44 HARV. J.L. & GENDER 161, 164 (2021). It has been horrifying to watch the federal courts pick *Farmer* apart by foreclosing the damages remedy for plaintiffs raising failure-to-protect claims.

70. For a summary of the law before *Farmer*, see Christine Peek, *Breaking out of the Prison Hierarchy: Transgender Prisoners, Rape, and the Eighth Amendment*, 44 SANTA CLARA L. REV. 1211, 1230–33 (2004).

prison and set the scene for her initial complaint in *Farmer*.[71] We then describe how Ms. Farmer conceived of, and how the Supreme Court understood, the contours of the failure-to-protect claim by looking at Ms. Farmer's complaint, the oral argument transcript, the Supreme Court's internal memoranda, and the Supreme Court's published opinion. We end this Part by detailing what happened after remand—a stage too often ignored by scholars and litigators who focus solely on the Supreme Court's decision. The case history supports our conclusion that the Supreme Court and the Seventh Circuit understood that Ms. Farmer brought a damages action under *Bivens*. The courts had jurisdiction to grant that remedy if Ms. Farmer met the Supreme Court's new standard for deliberate indifference. By remanding for lower courts to reach that question, the Supreme Court necessarily allowed a *Bivens* remedy for Ms. Farmer's failure-to-protect claim. *Farmer* is therefore an established *Bivens* context.

A. Ms. Farmer's Experiences Behind Bars

Farmer: When I was nineteen years old, I was given a fifty-year sentence for credit card fraud and writing bad checks. Some have said I got twenty-five and twenty-five: twenty-five for being Black and twenty-five for being transgender.

I do not know what I expected entering prison, but it was not being ordered into a room with a bunch of men and told to strip—like everybody else—and just stand there until it was my turn. My turn to stand in front of a guard and shake and run my fingers through my hair, lift my arms, open my mouth, and stick out my tongue. Then turn my head from side to side and pull my ears forward, expose my genitals for inspection, turn around, show them the bottom of my feet and bend over and spread it. I am sure I did this hundreds of times during my thirty-three years of incarceration, but I never stop feeling humiliated by it.

I first went to a prison hospital, and I do not know if that was to confirm, evaluate, or treat me, because the prison officials did not. I thought I was going to get my hormones restarted at the hospital, but that did not happen. So, I filed a number of lawsuits for myself and convinced every trans person I met to allow me to help them file one, too.

I spent my prison time reading, studying, and trying the law. I say trying because if I had a legal theory, I would find a case in which I could test it. Because of my advocacy, personal litigation, and legal assistance to others, I became

71. Many articles and reports present other examples of lived experiences of trans people on the inside. *See, e.g.*, KELSIE CHESNUT & JENNIFER PEIRCE, ADVANCING TRANSGENDER JUSTICE: ILLUMINATING TRANS LIVES BEHIND AND BEYOND BARS (2024), https://www.vera.org/downloads/publications/advancing-transgender-justice.pdf [https://perma.cc/CA6D-A8WA]; SOMJEN FRAZER, RICHARD SAENZ, ANDREW ALEMAN, & LAURA LADERMAN, PROTECTED AND SERVED? 2022 COMMUNITY SURVEY OF LGBTQ+ PEOPLE AND PEOPLE LIVING WITH HIV'S EXPERIENCES WITH THE CRIMINAL LEGAL SYSTEM (2023); D. MORGAN BASSICHIS, SYLVIA RIVERA LAW PROJECT, "IT'S WAR IN HERE": A REPORT ON THE TREATMENT OF TRANSGENDER AND INTERSEX PEOPLE IN NEW YORK STATE MEN'S PRISONS (2007).

disliked by prison officials, who retaliated against me in several ways, including having me transferred to a maximum-security penitentiary. Penitentiaries house people with extremely long sentences, including life sentences. Those people often commit seemingly senseless and reckless acts because of an expressed belief of having nothing to lose. The exact Warden against whom I had filed complaints and sued, as well as questioned on the witness stand, ordered me transferred to a penitentiary. I had to pay the price for being a serial litigator.

I was in the general population at the U.S. Penitentiary at Terre-Haute ("Terre Haute") for about a week when another incarcerated person, serving a life sentence for murder, came into my cell, beat me up, and raped me. Because of the rape, I was placed in protective custody, which is just another name for segregation.[72]

It is important to note that when I was in segregation, I really *got to see the plight of LGBTQ+ people in prison. I met queer and trans brothers and sisters who were in segregation because they had been beat up or stabbed, or they were tired of being pimped out or taken advantage of. I witnessed a trans woman be violently assaulted in the penitentiary gymnasium. I saw her get punched and then battered with a milk crate until she was unconscious. I could not believe no one intervened. I later learned that in the penitentiary, you cannot get involved in other people's affairs otherwise you place yourself at risk of becoming a target for retaliation. I saw fights, stabbings, and numerous sexual assaults. I saw someone die from suicide and saw another person get severely burned after setting his cell on fire while in it. A friend's blood splashed into my face when she was stabbed while we were talking.*

After the rape, I was segregated for a year before being transferred. Despite being transferred, I could not stop thinking about how those I left behind were suffering, so I decided to file a lawsuit. I did not know if it would succeed or fail. I was just trying out another one of my legal theories, which I have sometimes called "my great ideas." I was raped by a guy who had a knife, and I was so fearful that he was going to kill me that I could not tell him to stop. I reasoned that this paired with the deliberate indifference described in Estelle v. Gamble,[73] Wilson v. Seiter,[74] *and* Hudson v. McMillian.[75] *In each of those cases, like mine, there was an unnecessary infliction of pain and suffering caused by prison officials being deliberately indifferent to the basic human considerations for those*

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72. *See, e.g.*, Federica Coppola, *Gender Identity in the Era of Mass Incarceration: The Cruel and Unusual Segregation of Trans People in the United States*, 21 Int'l J. Const. L. 649, 656–58 (2023) (detailing the far-too-common experiences of trans people who suffer in general population, only to suffer further in solitary confinement when put into segregation ostensibly for "protective" purposes); *see also id.* at 661 (discussing Farmer v. Moritsugu, 163 F.3d 610 (D.C. Cir. 1998), a case Ms. Farmer brought challenging the use of protective custody given the deleterious effects it had on her).

73. 429 U.S. 97 (1976).

74. 501 U.S. 294 (1976).

75. 503 U.S. 1 (1992).

committed to their custody. It just made sense to me that allowing a person to be raped and possibly killed is the type of deliberate indifference prohibited by the Eighth Amendment.

Justice is slow coming. So, by the time the case was in the Supreme Court, my list of legal theories to try had grown, and I had moved on to other cases with other legal propositions. For me it was about getting justice where I could. There were so many people who needed help. I knew most people would never get justice, such as a trans person I saw stabbed to death as part of a gang initiation, those people I saw (and the ones I did not see) commit suicide, or the trans woman now serving a life sentence for stabbing and unintentionally killing the person that was raping her and pimping her in the general population. Every day there is a person who has died or is about to die. Fighting for justice is my response to that.

B. Ms. Farmer Filed a Bivens *Failure-to-Protect Claim*

The Supreme Court clearly stated that Ms. Farmer filed "a *Bivens* complaint."[76] In her lawsuit, Ms. Farmer alleged, *inter alia*, that the Warden of her institution, her case manager, the regional director, and the correctional services administrator were responsible for the conditions and environment where she resided and was transferred to, and were therefore deliberately indifferent to her safety.[77] Specifically, these defendants showed disregard for her safety when they classified and placed her in a penitentiary with a violent environment "knowing such [placement] would endanger her life and indeed did result in her being . . . sexually assaulted."[78] The complaint discussed her access to feminizing hormone treatment and breast augmentation surgery before incarceration.[79] Upon incarceration, her "transsexualism"[80] was documented by a psychologist employed by the Bureau of Prisons ("BOP"). The psychologist's report "noted that [Ms. Farmer] would likely experience a number of difficulties during her

76. Farmer v. Brennan, 511 U.S. 825, 830 (1994).

77. Plaintiffs' First Amended Complaint for Damages and Injunctive Relief at ¶¶ 1, 10–17, Farmer v. Brennan, No. 91-C-716-S (W.D. Wis. Dec. 13, 1991) [hereinafter First Amended Complaint].

78. *Id.* ¶ 1.

79. *Id.* ¶ 21.

80. This diagnosis is from a bygone era of understanding transgender identity as a disorder. The American Psychiatric Association previously grouped transsexualism and other "gender identity disorders" in the Diagnostic and Statistical Manual of Mental Disorders, known as the "DSM." *See* AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 261–64 (3d ed., 1980). Transsexualism was removed from the DSM in its 1994 revision and replaced with "gender identity disorder." AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 532 (4th ed. 1994). Finally, in 2013, gender identity disorder was removed and replaced with gender dysphoria. AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 451–59 (5th ed. 2013). For a history of these changes in the DSM and an analysis of their significance, see D Dangaran, *Bending Gender: Disability Justice, Abolitionist Queer Theory, and Claims for Gender Dysphoria*, 137 HARV. L. REV. F. 237, 247–52 (2024).

incarceration, including a great deal of sexual pressure because of her youth and feminine appearance."[81] She was housed in various BOP facilities from August 1986 through February 1989.[82] BOP officials were aware that she was at risk of harm in general population, so they kept her in segregation.[83]

Nevertheless, BOP administrative staff recommended that she be transferred to a maximum-security penitentiary, Terre Haute,[84] where she was released into general population.[85] Little over a week after being transferred, she was sexually assaulted, as described in the vignette above.[86]

Ms. Farmer's complaint alleges that the Warden "was personally aware of her transsexuality as well as the high probability she could not [safely] function" in Terre Haute's general population.[87] Based on the Warden's decision to transfer her, Ms. Farmer argued that she had been denied "her Eighth Amendment right to be free from deliberate indifference to her [safety] by the Defendants[']' failure to provide for her [safety], protection and safekeeping."[88] She requested, *inter alia*, compensatory and punitive damages against the aforementioned defendants.[89] The district court granted summary judgment for the defendants, finding they "had no knowledge of any potential danger" to Ms. Farmer because she "never expressed any concern for [her] safety to any of [them,]" and so "they were not deliberately indifferent to [her] safety."[90] The Seventh Circuit summarily affirmed.[91]

Ms. Farmer filed a *pro se* petition for certiorari with the Supreme Court.[92] As Ms. Farmer wrote in her petition, the Seventh Circuit upheld the decision "that placing Farmer, a transsexual prisoner, in a violent maximum security penitentiary environment resulting in her being brutally beaten and raped, did not expose prison officials to liability, because they had no 'actual knowledge' that Farmer was going to be raped."[93] She argued that this holding "ignores the fact [that] the risk of Farmer being raped was so substantial that prison officials 'should have known,' as it would have been apparent to a reasonable person in their position—even a lay person."[94] The petition detailed the Supreme Court's Eighth

81. First Amended Complaint, *supra* note 77, ¶ 39.
82. *Id.* ¶¶ 43–82.
83. *See*, *e.g.*, *id.* ¶ 49.
84. *Id.* ¶ 82, 87.
85. *Id.* ¶ 88.
86. *See id.* ¶ 89; *see supra* section I.A.
87. First Amended Complaint, *supra* note 77, ¶ 97.
88. *Id.* ¶ 101.
89. *Id.* ¶ 102.
90. Farmer v. Brennan, 511 U.S. 825, 831–32 (1994) (citation omitted).
91. *Id.* at 832; *see* Farmer v. Brennan, 11 F.3d 668 (7th Cir. 1992).
92. Petition for a Writ of Certiorari, *Farmer*, 511 U.S. 825 (No. 92-7247).
93. *Id.* at 12.
94. *Id.*

Amendment case law and the circuit court cases it had referred to favorably.[95] Ms. Farmer argued that the Supreme Court "should grant certiorari here to explicitly rule that the culpable state of mind or subjective component of an Eighth Amendment claim is satisfied when prison officials disregard a substantial risk of danger that was known to them or should have been known; or would have been readily apparent to a reasonable person in their position."[96] Ms. Farmer's self-advocacy led the Court to grant certiorari.

C. The Supreme Court Agreed that Ms. Farmer Alleged a Bivens *Claim*

The Supreme Court's opinion traced the same cases that Ms. Farmer's petition did. The Court extrapolated from *Estelle*,[97] which held that "deliberate indifference to serious medical needs of prisoners constitutes the 'unnecessary and wanton infliction of pain' proscribed by the Eighth Amendment."[98] "This is true whether the indifference is manifested by prison doctors in their response to the prisoner's needs or by prison guards in intentionally denying or delaying access to medical care or intentionally interfering with the treatment once prescribed."[99] *Estelle* is a critical case in prison condition jurisprudence because it determined that "acts or omissions sufficiently harmful to evidence deliberate indifference to serious medical needs . . . can offend 'evolving standards of decency' in violation of the Eighth Amendment."[100]

The *Farmer* Court also discussed *Hudson v. Palmer*, which opined that the prison officials must "take reasonable measures to guarantee the safety" of those in its custody.[101] The *Farmer* Court solidified this idea by stating that the Eighth Amendment "imposes duties on [prison] officials, who must provide humane conditions of confinement" and "ensure that inmates receive adequate food, clothing, shelter, and medical care," alongside the requirement to "take reasonable measures to guarantee the safety of the inmates."[102] The Court also stated that prison officials "may not . . . use excessive physical force against prisoners."[103] Throughout its opinion in *Farmer*, the Court cited *Helling v. McKinney*, which held that involuntary exposure to tobacco smoke could be the basis of an Eighth Amendment claim.[104] In *Helling*, the Supreme Court wrote: "It would be odd to

95. *Id.* at 10–16.

96. *Id.* at 17.

97. *See* Farmer v. Brennan, 511 U.S. 825, 835 (1994).

98. Estelle v. Gamble, 429 U.S. 97, 104 (1976) (quoting Gregg v. Georgia, 428 U.S. 153, 173 (1976)).

99. *Id.* at 104–05.

100. *Id.* at 106. For more details on the significance of *Estelle*, see Cozad, *supra* note 47, at 180–82.

101. 468 U.S. 517, 526–27 (1984).

102. *Farmer*, 511 U.S. at 832.

103. *Id.* (citing Hudson v. McMillian, 503 U.S. 1 (1992)).

104. 509 U.S. 25, 30 (1993).

deny an injunction to inmates who plainly proved an unsafe, life-threatening condition in their prison on the ground that nothing yet had happened to them."[105]

Analyzing these cases together, the Supreme Court concluded that a plaintiff has a viable Eighth Amendment claim "based on a failure to prevent harm,"[106] even where a plaintiff at obvious risk of harm did not directly notify prison officials of said risk.[107] To establish this claim, a plaintiff must show that she "is incarcerated under conditions posing a substantial risk of serious harm" and that prison officials are deliberately indifferent "to inmate health or safety."[108]

Ms. Farmer's argument won on some grounds but lost on others. In her petition for certiorari, Ms. Farmer asked the Supreme Court to adopt a negligence standard.[109] Instead, the Court decided to adopt the "subjective recklessness [standard] as used in the criminal law . . . as the test for 'deliberate indifference' under the Eighth Amendment."[110] Under this criminal recklessness standard, plaintiffs did not need to directly notify defendants of their substantial risk of harm if there was other evidence that would make them aware of that risk.[111] The Supreme Court remanded to allow the district court to determine whether such evidence existed.

Importantly, the Supreme Court had no doubt that Ms. Farmer was seeking damages, and did not limit its holding to only her requests for declaratory and injunctive relief.[112] The only way Ms. Farmer would have been able to allege damages against the federal defendants in their individual capacity was through *Bivens*. And again, the Court was undoubtedly aware of the fact that they were discussing a *Bivens* action while deciding the standard for deliberate indifference.[113] On its face, then, the Supreme Court's decision in *Farmer* answered a question related to a *Bivens* case without going into a discussion about

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105. *Id.* at 33.

106. *Farmer*, 511 U.S. at 834.

107. *See id.* at 848–49.

108. *Id.* at 834; *see* Wilson v. Seiter, 501 U.S. 294, 303 (1976) ("[T]he medical care a prisoner receives is just as much a 'condition' of his confinement as the food he is fed, the clothes he is issued, the temperature he is subjected to in his cell, and the protection he is afforded against other inmates.").

109. *See Farmer*, 511 U.S. at 860 (Thomas, J., concurring).

110. *Id.* at 839–40 (majority opinion); *see* Sharon Dolovich, *The Coherence of Prison Law*, 135 HARV. L. REV. F. 302, 310 (2022).

111. *See Farmer*, 511 U.S. at 842 ("Under the test we adopt today, an Eighth Amendment claimant need not show that a prison official acted or failed to act believing that harm *actually would befall* an inmate; it is enough that the official acted or failed to act despite his knowledge of a *substantial risk* of serious harm.") (emphasis added).

112. *See id.* at 848 ("But with respect to each of petitioner's claims, for damages and for injunctive relief, the failure to give advance notice is not dispositive."); *id.* at 850 ("With respect to petitioner's damages claim . . . .").

113. *See id.* at 839 ("*Bivens* actions against federal prison officials . . . are civil in character . . . .").

whether there was a valid *Bivens* cause of action at all. The Court simply took Ms. Farmer's *Bivens* action as viable.

The Supreme Court likely did not feel the need to walk through the *Bivens* analysis—asking whether "special factors counsel[] hesitation in the absence of affirmative action by Congress" or whether "Congress has provided an alternative remedy"[114]—because it had already conducted this analysis in *Carlson*.[115] There, the Supreme Court had framed the right at issue as "a violation of the Eighth Amendment's proscription against infliction of cruel and unusual punishment, giving rise to a cause of action for damages under *Bivens*."[116] The Court affirmed the Seventh Circuit's decision, which had agreed with the district court that "an Eighth Amendment violation was pleaded under *Estelle* and that a cause of action was stated under *Bivens*."[117] Thus, Ms. Farmer's claim under the Eighth Amendment was not new. The Supreme Court had already allowed damages claims to proceed against federal officials who enacted cruel and unusual punishment.

If there is any remaining shred of doubt that the Supreme Court accepted *Farmer* as a *Bivens* case, the discussions of the Justices at oral argument and in internal memoranda provide further clarity. Due to *Farmer*'s potential precedential impact on the fate of hundreds of other *Bivens* damages actions for failure-to-protect claims, it makes sense to look to Justice Blackmun's papers as evidence of the *Farmer* Court's reasoning. Legal scholars have previously looked to Justice Blackmun's papers when considering important Supreme Court deliberations.[118] Advocates have pointed to Justice Blackmun's papers in Supreme Court briefings.[119] Again, we think the *Farmer* opinion is clear enough, but this internal judicial history ought to also be utilized, if for no other reason than to understand the compromises that were made to reach the final conclusions in the opinion.[120]

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114. Carlson v. Green, 446 U.S. 14, 18 (1980) (citations and internal quotation marks omitted).

115. *See id.*

116. *Id.* at 17.

117. *Id.*

118. *See, e.g.*, Adrian Vermeule, *Neo-?*, 133 HARV. L. REV. F. 103, 110 (2020).

119. *See, e.g.*, Brief of the Catholic Medical Association, The National Association of Catholic Nurses-USA, Idaho Chooses Life and Texas Alliance for Life as Amici Curiae in Support of Petitioners at 6, 6 n.3, Dobbs v. Jackson Women's Health Org., 597 U.S. 215 (2022) (No. 19-1392) (describing draft opinions of *Roe v. Wade*, 410 U.S. 113 (1973), and internal memoranda from Justice Blackmun's papers).

120. Other scholars have relied on the Blackmun Papers to make similar analyses. *See* Jonathan Band & Tara Weinstein, *The Blackmun Papers: A Peek Behind the Scenes of a Quarter Century of Supreme Court Copyright Jurisprudence*, 28 COLUM. J.L. & ARTS 315, 315 (2005) (discussing the compromises the Court made to reach conclusions in copyright law as exhibited in the Blackmun papers); *see also* Sarah Primrose, *An Unlikely Feminist Icon?: Justice Harry A. Blackmun's Continuing Influence on Reproductive Rights Jurisprudence*, 19 CARDOZO J.L. & GENDER 393, 410 (2013) (considering memoranda from Justice Blackmun's papers in analyzing the judicial impact of *Roe v. Wade*).

In a letter from Justice Ginsburg to Justice Souter and copied in a memorandum to the Conference, Justice Ginsburg wrote: "Although *Bivens* provides the cause of action here, in many cases prisoners will be suing state officials under §1983 and alleging Eighth Amendment violations."[121] This unequivocal statement of the cause of action mirrors Justice Ginsburg's understanding at oral argument that this is "a *Bivens* case."[122] As discussed above, the Court's majority opinion discussed the *Bivens* damages claims at hand numerous times.[123] If the Court *did not* accept *Farmer* as a *Bivens* case, then the Court would have lacked jurisdiction to opine on the damages decision.

D. Farmer *Remained a* Bivens *Action on Remand*

The Supreme Court remanded all of Ms. Farmer's claims—for injunctive, declaratory, and damages relief—for further findings by the district court.[124] "On remand, the district court promptly dismissed the case again, ruling 92 days after the case returned to it."[125] The Seventh Circuit vacated and remanded once more—the last decision on written record.[126]

The Seventh Circuit's decision focused on discovery issues. The court held that the district court "abused its discretion when it denied all efforts by Farmer's new lawyer to obtain enough time to formulate a responsible Rule 56(f) motion and corresponding set of discovery requests that were properly tailored to the Eighth Amendment standards established in the Supreme Court's opinion."[127] After the Seventh Circuit's second remand, the case was eventually tried before a jury *solely* on damages.[128] Ms. Farmer lost the case at a warped trial.[129]

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121. Memorandum from Justice Ruth Bader Ginsburg to Justice David H. Souter, *Re: Farmer v. Brennan, No. 92-7247* (Mar. 9, 1994), *in* Papers of Harry A. Blackmun, No. 92-7247, https://clearinghouse.net/doc/136507/ [https://perma.cc/U8QZ-SNZX].

122. *See* Oral Argument at 24:50, Farmer v. Brennan, 511 U.S. 825 (1994) (No. 92-7247), https://www.oyez.org/cases/1993/92-7247 [https://perma.cc/DZ3S-ZSDZ] ("But this was . . . this was . . . it's a *Bivens* case, isn't it?").

123. *See supra*, text accompanying note 112.

124. Farmer v. Brennan, 511 U.S. 825, 850–51 (1994).

125. Farmer v. Brennan, 81 F.3d 1444, 1445 (7th Cir. 1996).

126. *Id.*

127. *See id.* at 1450–51.

128. *See* Plaintiff's Proposed Jury Instructions-Damages, *Farmer v. Brennan*, No. 3:91-cv-716 (W.D. Wis. Jan. 8, 1997), ECF No. 170; Plaintiff's Proposed Special Verdict-Damages, *Farmer*, No. 3:91-cv-716, ECF No. 172.

129. *See Farmer Loses at Jury Trial*, PRISON LEGAL NEWS (Sept. 15, 1997), https://www.prisonlegalnews.org/news/1997/sep/15/farmer-loses-at-jury-trial/ [https://perma.cc/7SE6-E28G] ("The trial, from jury selection through final decision, was over in two days. Jury deliberation took only about an hour. Farmer lost. The jury failed to believe Farmer's assertion that a sexual assault actually occurred.").

It strains credulity to cast this case as anything but a *Bivens* action. The Supreme Court said so. The Seventh Circuit's second remand order said so.[130] The Seventh Circuit underscored that the Supreme Court "left the defendants free to develop arguments relating to Farmer's damages claims against them based on their alleged lack of responsibility for conditions at Terre Haute and their lack of control over placements there."[131] As stated above, damages could not be at issue *unless* the Court in *Farmer* accepted the *Bivens* claim at issue.

* * *

The upshot of the history of *Farmer* is that the Supreme Court clearly ruled on the standards of deliberate indifference with the understanding that it was reaching the merits of a *Bivens* action. As discussed below, this reality *must* be part of the federal courts' discussion when applying the *Bivens* doctrine to other failure-to-protect claims. The Supreme Court's silence as to *Farmer* in its recent decisions limiting the scope of *Bivens* claims is frustrating, but more importantly, ambiguous. Until the Supreme Court actually overturns *Farmer* or *Bivens*, the cases remain good law.[132] The principles of *stare decisis* apply.[133] Nevertheless, as we discuss in Part II, in the thirty-one years since *Farmer* was decided, and specifically in the past two years since *Egbert* was decided, some federal courts have ignored the most logical reading of *Farmer*. This historical context should help to stem the tide.

II.
FARMER IS A *BIVENS* CONTEXT

D Dangaran: I argued in the Ninth Circuit that Farmer *is an established* Bivens *context, and that, alternatively, failure-to-protect claims arise in the same context as the deliberate indifference claim in* Carlson v. Green. *My organization, Rights Behind Bars, successfully litigated two cases where the Third Circuit agreed with our position.*[134] *The Fourth Circuit disagreed,*[135] *and the Ninth Circuit panel joined the Fourth Circuit by deciding against us.*[136] *The Seventh*

130. *See Farmer*, 81 F.3d at 1445.

131. *Id.* at 1448.

132. *Cf.* Agostini v. Felton, 521 U.S. 203, 237 (1997) (directing lower courts to "follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions" (quoting Rodriguez de Quijas v. Shearson/Am. Express, Inc., 490 U.S. 477, 484 (1989))).

133. This is the case despite Justice Thomas's thoughts on the matter. *See* Hernández v. Mesa, 589 U.S. 93, 114–15 (2020) (Thomas, J., concurring) (suggesting the Court "should reevaluate [its] continued recognition of even a limited form of the *Bivens* doctrine").

134. *See* Shorter v. United States, 12 F.4th 366, 371 (3d Cir. 2021) ("In *Farmer* . . . the Supreme Court applied *Carlson* in recognizing an Eighth Amendment damages claim."); Bistrian v. Levi, 912 F.3d 79, 91 (3d Cir. 2018).

135. Bulger v. Hurwitz, 62 F.4th 127, 139 (4th Cir. 2023).

136. *See* Marquez v. Rodriguez, 81 F.4th 1027, 1030–31 (9th Cir. 2023) (deciding "*Farmer* is not a recognized *Bivens* context").

Circuit has since widened the burgeoning circuit split,[137] *joining the Fourth and Ninth Circuits. And now, most recently, even the Third Circuit has abandoned its previous position.*[138]

After our loss in the Ninth Circuit, I have learned more about Dee's case from hearing her talk about the life of the case, particularly after the Supreme Court's decision. Dee recalled that the Seventh Circuit discussed her damages claim on remand, and she found the language, prompting me to research the Supreme Court Justices' memoranda on the case through Justice Blackmun's papers discussed above. Dee and I hope that other circuits and the Supreme Court will revisit this history and correct their understanding on the Bivens *doctrine as it pertains to* Farmer.

A. The Modern Bivens *Doctrine*

As stated in the introduction, the Supreme Court in *Bivens* allowed a damages remedy against federal officials who conducted an unlawful search.[139] The Court inferred this remedy despite a lack of explicit statutory authority. Within a decade, the Supreme Court found an implied damages remedy in a Fifth Amendment gender discrimination case[140] and an Eighth Amendment cruel and unusual punishment case.[141] "For several years after *Bivens* was announced, it appeared that the Supreme Court, like many lower courts, was prepared to treat the cause of action as similar to [42 U.S.C.] section 1983."[142] But the Supreme Court later "adopted a far more cautious course before finding implied causes of action."[143] The Court decided, after creating damages remedies for certain constitutional violations, that it was no longer in the business of doing so, opting to leave that determination to Congress.[144] The Court balked at the "*ancien regime*" during which the preceding Court had "assumed it to be a function to 'provide such remedies as are necessary to make effective' a statute's purpose."[145] Justice Scalia did not mince words on the matter in a concurrence: "*Bivens* is a relic of the heady

137. *See* Sargeant v. Barfield, 87 F.4th 358, 364–65 (7th Cir. 2023).

138. *See* Fisher v. Hollingsworth, 115 F.4th 197, 203 (3d Cir. 2024); Kalu v. Spaulding, 113 F.4th 311, 330 n.10 (3d Cir. 2024).

139. Bivens v. Six Unknown Fed. Narcotics Agents, 403 U.S. 388, 397 (1971).

140. Davis v. Passman, 442 U.S. 228 (1979).

141. Carlson v. Green, 446 U.S. 14 (1980).

142. Alexander A. Reinert, *Measuring the Success of* Bivens *Litigation and Its Consequences for the Individual Liability Model*, 62 STAN. L. REV. 809, 822 (2010).

143. Ziglar v. Abbasi, 582 U.S. 120, 132 (2017).

144. *See* Gilbert Paul Carrasco, Bivens *in the End Zone: The Court Punts to Congress to Make the Right (of Action) Play*, 11 U. MIAMI RACE & SOC. JUST. L. REV. 56, 65–74 (2021) (describing in great detail the impact of the Court's cases in this retreat from *Bivens*).

145. *Abbasi*, 582 U.S. at 131–32. Scholars have storied this "[m]odern [r]ejection of Bivens." *See, e.g.*, Elizabeth Earle Beske, *The Court and the Private Plaintiff*, 58 WAKE FOREST L. REV. 1, 11–13 (2023) (explaining the Court's reliance on alternative remedies then special factors to exempt *Bivens* contexts).

days in which this Court assumed common-law powers to create causes of action—decreeing them to be 'implied' by the mere existence of a statutory of constitutional prohibition."[146] In 2001, Justice Scalia called on the Court to limit *Bivens*, *Davis*, and *Carlson* "to the precise circumstances that they involved."[147]

This sea change led the Supreme Court in *Abbasi* to create a new two-step analysis when *Bivens* claims were raised by a plaintiff.[148] At step one, a court determines whether the case presents a new *Bivens* context.[149] Given that no two cases are identical, the Supreme Court provided lower courts with guidance on how to determine whether a case falls into an existing *Bivens* context or "differ[s] in a meaningful way from previous *Bivens* questions decided by th[e] Court."[150] If the case is not meaningfully different from an existing *Bivens* context, the *Bivens* cause of action is available to the plaintiff. If the case does arise in a new context, the court proceeds to step two.

At step two, the court assesses whether any special factors counsel hesitation before finding that "the Judiciary is well suited, absent congressional action or instruction, to consider and weigh the costs and benefits of allowing a damages action to proceed."[151] The Supreme Court emphasized that the extension of *Bivens* remedies to new contexts is "a disfavored judicial activity."[152] As previously stated, the *Abbasi* Court provided examples of special factors, including the separation-of-powers principles (whether the judiciary is well suited to weigh the costs to the government, whether Congress has already acted in that arena, etc.) and whether an alternative remedial structure is available.[153]

After *Abbasi*, the Court issued *Hernández v. Mesa*, a cross-border shooting case alleging Fourth and Fifth Amendment violations.[154] Though the plaintiffs raised Fourth Amendment and Fifth Amendment claims, which invoked the same constitutional rights as in *Bivens* and *Davis*, the Supreme Court "look[ed] beyond the constitutional provisions invoked" because there were meaningful differences between a cross-border shooting and an unconstitutional search or sex discrimination case.[155] The Court then moved to *Bivens* step two, listing

146. *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 75 (2001) (Scalia, J., concurring).

147. *Id.*

148. *Abbasi*, 582 U.S. at 140, 144. As one scholar writes, the *Abbasi* Court "shut down *Bivens* claims in all but mirror-images of the factual contexts presented in *Bivens*, *Carlson*, and *Davis*." Beske, *supra* note 145, at 13. Other scholars point to the *Abbasi* test as "an abnormally restrictive doctrinal test that nominally keeps [the *Bivens*] principle alive, but that leaves virtually no room for operation in new factual settings." Daniel B. Rice & Jack Boeglin, *Confining Cases to Their Facts*, 105 VA. L. REV. 865, 882 (2019).

149. *Abbasi*, 582 U.S. at 136.

150. *Id.* at 139–40.

151. *Id.* at 136.

152. *Id.* at 135 (quotation marks omitted).

153. *See id.* at 133–37.

154. Hernández v. Mesa, 589 U.S. 93, 97–98 (2020).

155. *Id.* at 103.

"multiple, related factors that raise warning flags"—nearly all of which related to separation-of-powers principles—and prevented the Court from finding a damages remedy in this context.[156]

The Supreme Court recently issued a decision that added a further gloss on the *Bivens* doctrine. In *Egbert v. Boule*, an individual who lived at the Canadian border, Mr. Boule, had his property searched by United States Border Patrol agents, including Agent Egbert, who threw Mr. Boule to the ground during the search.[157] Mr. "Boule lodged a grievance with Agent Egbert's supervisors" and "filed an administrative claim with Border Patrol pursuant to the Federal Tort Claims Act" alleging that Agent Egbert had used excessive force against him.[158] Mr. Boule's home was "aptly named 'Smuggler's Inn'" because "[t]he area surrounding the Inn 'is a hotspot for cross-border smuggling of people, drugs, illicit money, and items of significance to criminal organizations.'"[159] After Mr. Boule reported Agent Egbert, Agent Egbert allegedly "retaliated against [Mr. Boule] while those claims were pending by reporting" the license plate on Boule's SUV, which read "SMUGLER," "to the Washington Department of Licensing for referencing illegal conduct, and by contacting the Internal Revenue Service and prompting an audit of Boule's tax returns."[160] After his FTCA claim was denied, Mr. Boule filed a lawsuit against Agent Egbert alleging that Agent Egbert used excessive force against him in violation of his Fourth Amendment rights and that Agent Boule unlawfully retaliated against him in violation of his First Amendment rights.[161]

The district court held that the claims did not arise in an established *Bivens* context and refused to "extend" *Bivens* to new contexts.[162] The Ninth Circuit reversed,[163] holding that while the Fourth Amendment excessive force claim and the First Amendment retaliation claim were extensions of *Bivens*, no special factors counseled hesitation such that finding a *Bivens* action in the new context would be foreclosed.[164] In other words, the Ninth Circuit held that the plaintiff won at *Bivens* step two.[165]

156. *See id.* at 103–10.

157. 596 U.S. 482, 486–89 (2022).

158. *Id.* at 489.

159. *Id.* at 487.

160. *Id.* at 489–90.

161. *Id.* at 490.

162. *See id.*; *see also* Boule v. Egbert, 998 F.3d 370, 386 (9th Cir. 2021).

163. *Boule*, 998 F.3d at 385, 392.

164. *See id.* at 389–91.

165. *See Egbert v. Boule*, 596 U.S. 482, 494 (2022) (stating the Ninth Circuit "conceded that Boule's Fourth Amendment claim presented a new context for *Bivens* purposes, yet . . . concluded there was no reason to hesitate before recognizing a cause of action against Agent Egbert").

The Supreme Court overturned the Ninth Circuit's decision.[166] The Court began by providing an overview of the *Bivens* doctrine and the Court's recent decisions that called for "caution" before courts found a *Bivens* action.[167] The Supreme Court recited the "two steps" of the inquiry as framed by those cases.[168] Then the Court stated a view of the doctrine that has caused much confusion: "While our cases describe two steps, those steps often resolve to a single question: whether there is any reason to think that Congress might be better equipped to create a damages remedy."[169] The Court proceeded to describe some of the factors that might counsel hesitation, which would be assessed at step two, including whether Congress has provided an alternative remedial structure.[170] The Court's reversal was made entirely in the second step of *Bivens* because the Court, like the Ninth Circuit, noted that the claims at issue presented a new context.[171]

Egbert underscores the stringency of the modern *Bivens* framework, but it does not alter the test announced in *Abbasi*. Although the Supreme Court indicated that the previously articulated two-step inquiry may "often resolve to a single question,"[172] the Court applied the two discrete steps of the *Abbasi* framework.[173] Everything the *Egbert* Court emphasized as central to the *Bivens* inquiry has been part of the doctrine for decades.[174] For instance, *Egbert*'s inquiry into whether the Judiciary or Congress is "better equipped to create a damages remedy"[175] has been a central part of the doctrine from the start of *Bivens* jurisprudence.[176] This "single question" is useful for understanding the "principles" at play,[177] but it has not

166. *Id.*

167. *Id.* at 491 (quoting Hernández v. Mesa, 589 U.S. 93, 101 (2020)).

168. *Id.* at 492.

169. *Id.*

170. *Id.* at 492–93.

171. *See id.* at 494, 498–99.

172. *Egbert*, 596 U.S. at 492.

173. *See id.* at 494–501.

174. One of the core rationales of the retreat from *Bivens* cases is a fear of burdening and "overdeter[ring] federal officials and undermin[ing their] ability to respond in times of crisis." James E. Pfander, Alexander A. Reinert, & Joanna C. Schwartz, *The Myth of Personal Liability: Who Pays When* Bivens *Claims Succeed*, 72 STAN. L. REV. 561, 563 (2020); *see also id.* at 563 n.3 (collecting cases). In the *Bivens* context, these concerns have been articulated by the Supreme Court since at least *Bush v. Lucas*, 462 U.S. 367 (1983).

175. *Egbert*, 596 U.S. at 493.

176. *See Bush*, 462 U.S. at 380 ("The special factors counselling hesitation in the creation of a new remedy . . . related to the question of who should decide whether such a remedy should be provided."); *see also* Ziglar v. Abbasi, 582 U.S. 120, 135 (2017) ("When a party seeks to assert an implied cause of action under the Constitution itself, . . . separation-of-powers principles are or should be central to the analysis. The question is 'who should decide' whether to provide for a damages remedy, Congress or the courts?" (quoting *Bush*, 462 U.S. at 380).

177. *Egbert*, 596 U.S. at 493.

replaced the well-worn two-step inquiry. Most importantly, the Supreme Court has declined to "dispense with *Bivens* altogether."[178]

Dissenting, Justice Sotomayor wrote that *Egbert* made an unprecedented change in the doctrine by determining that it is "categorically impermissible" for courts to weigh the costs and benefits of allowing a damages action to proceed.[179] But that is not what the majority opinion held; Justice Sotomayor attempts to disprove too much. "*Egbert* now requires [courts] to ask whether 'the Judiciary *is at least arguably less equipped* than Congress' to weigh the costs and benefits of a damages action. If there is '*any* reason' to think this '*might'* be so, [a court] cannot imply a *Bivens* remedy."[180] This is not a major evolution in the doctrine. The special-factors analysis in *Bivens* step two has always been to assess if there is "even a single 'reason to pause before applying *Bivens* in a new context.'"[181] The *Bivens* inquiry investigates whether any factors counsel courts to defer to Congress, not whether the factors weigh for or against finding an implied damages claim.[182] *Abbasi* held that the "proper balance is one for the Congress, not the Judiciary, to undertake."[183] *Egbert* did not diverge from *Abbasi* by holding that courts cannot "independently assess the costs and benefits of implying a cause of action."[184]

Egbert sent shock waves across the circuit courts. The Third, Fourth, Seventh, and Ninth Circuit courts of appeals have been persuaded that *Egbert* created a more stringent test to determine whether a case is "meaningfully different" from an established *Bivens* context.[185] These courts are wrong. Any supposed

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178. *Id.* at 491.

179. *Id.* at 518 (Sotomayor, J., dissenting).

180. *Fisher v. Hollingsworth*, 115 F.4th 197, 205 (3d Cir. 2024) (emphases in original) (citations omitted).

181. *Egbert*, 596 U.S. at 492 (majority opinion) (quoting Hernández v. Mesa, 589 U.S. 93, 102 (2020)).

182. *See* Wilkie v. Robbins, 551 U.S. 537, 562 (2007); *Bush*, 462 U.S. at 389–90.

183. Ziglar v. Abbasi, 582 U.S. 120, 146 (2017).

184. *Egbert*, 596 U.S. at 495 (reversing a decision that (1) weighed the costs of the new *Bivens* claim and the compelling interests and (2) determined a damages remedy was implied).

185. *See Fisher*, 115 F.4th at 203 ("*Egbert* tightened the *Ziglar* test and, in doing so, made a strong statement that lower courts should not extend *Bivens* beyond the contexts recognized in *Bivens*, *Davis*, and *Carlson*."); Kalu v. Spaulding, 113 F.4th 311, 330 n.10 (3d Cir. 2024) ("*Hernandez* and *Egbert* evince the Court's new appreciation of 'the tension between judicially created causes of action and the Constitution's separation of legislative and judicial power.'" (quoting *Egbert*, 596 U.S. at 491) (internal quotation marks omitted)); Bulger v. Hurwitz, 62 F.4th 127, 139 (4th Cir. 2023) ("[T]he Third Circuit did not have the benefit of the Court's more recent *Bivens* guidance, as *Bistrian* was decided before the Court's decisions in *Hernández* and *Egbert*, both of which also list *Bivens*, *Carlson*, and *Davis* as the *only* three cases in which the Court has implied a *Bivens* action.") (emphasis in original); Sargeant v. Barfield, 87 F.4th 358, 364 (7th Cir. 2023) (calling *Egbert* "most significant to this appeal" and holding it "modified the *Abbasi* approach"); Marquez v. Rodriguez, 81 F.4th 1027, 1030 (9th Cir. 2023) ("In practice, the Supreme Court's stringent test will foreclose relief in all but the most extraordinary cases.").

additional stringency is merely dicta. The two-step inquiry is still binding. Additionally, *Farmer* is still good law. Thus, the lower courts have erred in holding that *Farmer* is not an established *Bivens* context.

B. Farmer *Is a Sub-Context of* Carlson

The historical context presented in Part I supports the primary claim of this Article, which we suggest litigants should continue to make: *Farmer* is a *Bivens* context because it is a sub-context of *Carlson*. In other words, *Farmer* falls under *Carlson*'s umbrella. The *Carlson* Court described the petitioner's claim as a "violation of the Eighth Amendment's proscription against infliction of cruel and unusual punishment."[186] The facts of *Carlson* are notably much narrower than this legal principle. The plaintiff claimed that the defendants, including the Director of the Bureau of Prisons, knew he had chronic asthma but nevertheless

> kept him in [Terre Haute] against the advice of doctors, failed to give him competent medical attention for some eight hours after he had an asthmatic attack, administered contra-indicated drugs which made his attack more severe, attempted to use a respirator known to be inoperative which further impeded his breathing, and delayed for too long a time his transfer to an outside hospital.[187]

Based on the Supreme Court's broad language, the remedy in *Carlson* is not limited to medical deliberate indifference claims but establishes a damages action against federal officers for cruel and unusual punishment more broadly. *Farmer* reaffirms this reading of *Carlson* and is the controlling example of an application of *Carlson* that extends beyond medical deliberate indifference.

As we explained above, throughout its opinion in *Farmer*, the Supreme Court referred to the claim at hand as a *Bivens* action.[188] The Court even cited *Bivens* and *Carlson* when reciting Ms. Farmer's allegations.[189] Nevertheless, in rejecting *Farmer* as a *Bivens* context, lower courts have reasoned with essentially no support that the Supreme Court only assumed without deciding that Ms. Farmer's claim was a valid *Bivens* action then proceeded to discuss the deliberate indifference standard.[190] But a close read of the Court's opinion in *Farmer* shows that the Court never states that it merely assumes that it is reviewing a *Bivens* claim. The Supreme Court has discouraged lower courts from renouncing its

186. Carlson v. Green, 446 U.S. 14, 17 (1980).

187. *Id.* at 16 n.1.

188. *See, e.g.*, Farmer v. Brennan, 511 U.S. 825, 839 (1994) ("*Bivens* actions against federal prison officials . . . are civil in character . . . .").

189. *See id.* at 830.

190. *See, e.g.*, *Sargeant*, 87 F.4th at 365 ("The Court never held—just assumed—that a *Bivens* remedy was available to the plaintiff.").

precedent on the belief that such cases were overruled by implication.[191] Thus, there is no reason why circuit courts or district courts should hold that failure-to-protect claims present a new *Bivens* context.

Nevertheless, the Third, Fourth, Seventh, and Ninth Circuit Courts of Appeals relied on the fact that *Farmer* has not been mentioned in the list of three *Bivens* cases recited by the Supreme Court in recent years—namely, in *Abbasi*, *Hernández*, or *Egbert*.[192] In this way, the courts misapply the canon of statutory interpretation *expressio unius*,[193] even if they did not state the canon explicitly. These courts ignore the Third Circuit's conclusion in *Bistrian v. Levi* and *Shorter v. United States* that *Farmer* is part of the *Carlson* context and thus presented a valid *Bivens* claim.[194] Notably, *Bistrian* was decided after the Supreme Court issued *Abbasi*, and *Shorter* was decided after the Supreme Court issued *Hernández*. In *Abbasi*, the Supreme Court stated that *Bivens*, *Davis*, and *Carlson* "represent the only instances in which the Court has approved of an implied damages remedy under the Constitution itself."[195] This language did not persuade the Third Circuit to reject failure-to-protect claims as *Bivens* claims at the first step of the *Bivens* analysis—where the canonical trio come into play. Indeed, the Supreme Court consistently listed out the three *Bivens* cases long before *Abbasi* was decided.[196] Because neither *Egbert* nor *Hernández* changed the step-one analysis, as described above, the Third Circuit's reasoning in *Bistrian* and *Shorter* should have withstood any argument that the *Bivens* trio boxed out *Farmer* from creating a valid *Bivens* context.

Expressio unius should not apply to any cases the Supreme Court lists in the text of its opinions. *Expressio unius* is a canon of statutory interpretation to derive legislative intent, not jurisprudential interpretation to derive judicial intent. It would be improper for this canon to play a dispositive part in a court's reading of

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191. *See* Bosse v. Oklahoma, 580 U.S. 1, 3 (2016) ("Our decisions remain binding precedent until we see fit to reconsider them, regardless of whether subsequent cases have raised doubts about their continuing vitality." (quoting Hohn v. United States, 524 U.S. 236, 252–53 (1998))).

192. *See* Kalu v. Spaulding, 113 F.4th 311, 330 n.10 (3d Cir. 2024) ("Given . . . *Abbasi*, *Hernandez*, and *Egbert*'s continued omission of *Farmer* from the list of Supreme Court cases recognizing a cause of action under the Constitution, we believe that *Farmer* is not an appropriate benchmark in the new context inquiry."); Bulger v. Hurwitz, 62 F.4th 127, 139 (4th Cir. 2023); Marquez v. Rodriguez, 81 F.4th 1027, 1030 (9th Cir. 2023); *Sargeant*, 87 F.4th at 365.

193. The "interpretive canon, *expressio unius exclusio alterius* [means] 'expressing one item of [an] associated group or series excludes another left unmentioned.'" Chevron U.S.A. Inc. v. Echazabal, 536 U.S. 73, 80 (2002) (quoting United States v. Vonn, 535 U.S. 55, 56 (2002)).

194. Bistrian v. Levi, 912 F.3d 79, 91 (3d Cir. 2018) ("It may be that the Court simply viewed the failure-to-protect claim as not distinct from the Eighth Amendment deliberate indifference claim in the medical context."); Shorter v. United States, 12 F.4th 366, 373 n.5 (3d Cir. 2021) ("[T]he Supreme Court . . . neglected to name *Farmer* because it saw that case as falling under the umbrella of *Carlson* . . . .").

195. Ziglar v. Abbasi, 582 U.S. 120, 131 (2017).

196. *See* Corr. Servs. Corp. v. Malesko, 534 U.S. 61, 67, 74 (2001) (listing the three cases and cautioning any extension into new contexts).

its own precedent. Lower courts who simply rule out *Farmer* because it is not listed in the *Bivens* trio are not taking into account the contradicting evidence found in *Farmer*'s history and the Supreme Court's opinion. In *Abbasi*, the Supreme Court left *Farmer* out of *both* the trio of canonical *Bivens* cases as well as an extensive list of cases the Court provided in which it "declined to create an implied damages remedy."[197] The logic undergirding *expressio unius* applies to both lists. So which list should prevail?

We believe the erasure of *Farmer* from the trio of *Bivens* cases cannot be merely an oversight.[198] To agree with the Third, Fourth, Seventh, and Ninth Circuits, one would need to accept that the Supreme Court has simply erased *Farmer* from its *Bivens* doctrine. It would be quite appalling to make such a decision *sub silentio* given the importance of the doctrine. The only reason this would even be *conceivable* is because of the low level of importance these federal courts have given people in prison—and trans people in prison, particularly. *Farmer* was a groundbreaking case. It was a *Bivens* case. It was a *decisive* case. The Supreme Court reached the merits of the Eighth Amendment failure-to-protect claim to discuss the deliberate indifference standard. Therefore, as the Third Circuit discussed in *Bistrian*, it necessarily determined that the case was a viable *Bivens* action.[199]

The simplest correction would be for the Supreme Court to start listing *Farmer* in its canonical *Bivens* cases to resolve the ambiguity created by its recent decisions. But there is no actual need for the Court to do so because *Farmer* is actually in the same context as *Carlson*—a conditions of confinement claim brought under the Eighth Amendment.[200] By this logic, *Farmer* is a precedential application of *Carlson*.

In any event, it would be disingenuous to say that the Supreme Court needed to include any more language than it did to show that it understood *Farmer* as a

197. *See Abbasi*, 582 U.S. at 135.

198. *But see* Carrasco, *supra* note 144, at 64 (claiming *Farmer* recognized a *Bivens* claim but "slips through the cracks of the opinions of the various Justices on the Supreme Court who have emphasized the desuetude of *Bivens*").

199. *See Bistrian*, 912 F.3d at 90 ("Although the *Farmer* Court did not explicitly state that it was recognizing a *Bivens* claim, it not only vacated the grant of summary judgment in favor of the prison officials but also discussed at length 'deliberate indifference' as the legal standard to assess a *Bivens* claim.").

200. *See id.* at 91; Shorter v. United States, 12 F.4th 366, 371 (3d Cir. 2021); Gillespie v. Civiletti, 629 F.2d 637, 639, 642 (9th Cir. 1980) (deciding as early as 1980 that failure-to-protect claims were in the same context as *Carlson* and thus were afforded a *Bivens* remedy).

Bivens action.[201] The Court did not need to conduct any further analysis because that *Bivens* context had already been established in *Carlson*.[202]

C. A Failure-to-Protect Claim Should Surpass Bivens *Step Two*

Turning to *Bivens* step two is unnecessary if a court finds that a *Bivens* claim is not meaningfully different from an established context. For all the reasons discussed in this Article, failure-to-protect claims should be resolved at *Bivens* step one. But even if a court were to conclude that a failure-to-protect claim was a new *Bivens* context, the claim would still survive step two of the *Abbasi* analysis because no special factors counsel hesitation before recognizing a cause of action.

Step two, known as the special-factor analysis, can be "condensed to one concern—respect for the separation of powers."[203] A key element of this analysis is whether "Congress has created 'any alternative, existing process for protecting the [injured party's] interest' that may 'amount[] to a convincing reason for the Judicial Branch to refrain from providing a new and freestanding remedy in damages.'"[204]

Those advocating against the validity of *Bivens* claims in the prison context will assert that Congress has enacted laws governing prison litigation, and therefore the Supreme Court should not find any other implied damages remedies for constitutional violations in prison. But when Congress passed the Prison Litigation Reform Act (PLRA) in 1996, it did not abrogate *Bivens* claims.[205] Rather, the PLRA creates procedural limitations such as the "exhaustion requirement"—the rule that incarcerated plaintiffs must utilize the full internal grievance procedure of their prison system, including appealing any denials in the first instance, before they can bring a lawsuit in federal court—to deter *frivolous* claims, including frivolous *Bivens* actions, not prevent those claims altogether.[206] Advocates against *Bivens* claims seek to simply apply the alternative remedies

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201. Farmer v. Brennan, 511 U.S. 825, 839 (1994).

202. *See* Sargeant v. Barfield, 87 F.4th 358, 371 (7th Cir. 2024) (Hamilton, J., dissenting) ("The majority's theory turns *Farmer*, with hindsight, into a misguided waste of everyone's time. The better view is that the universal assumption in *Farmer* that a *Bivens* remedy was available shows that the Court was treating failure-to-protect claims as fitting comfortably within the reasoning of Carlson. That conclusion was so obvious in *Farmer* that it did not need to be questioned or explained. *Farmer* has not been overruled by the Supreme Court, and we have no authority to do so.").

203. Hernández v. Mesa, 589 U.S. 93, 113.

204. *See* Ziglar v. Abbasi, 582 U.S. 120, 137 (2017) (quoting Wilkie v. Robbins, 551 U.S. 537, 550 (2007)).

205. *See* 42 U.S.C. § 1997e(e) (permitting prisoners to bring civil actions for physical injury and resulting harms).

206. *See* 141 CONG. REC. H14105 (daily ed. Dec. 6, 1995) (statement of Rep. Lobiondo) (discussing the continued validity of *Bivens* claims but advocating for an administrative exhaustion requirement in the PLRA to deter frivolous *Bivens* actions); *see also* Porter v. Nussle, 534 U.S. 516, 524 (2002) (holding the administrative remedy program is an exhaustion requirement for a *Bivens* claim rather than a substitute for one).

factor from the case law without taking the larger context or goals of the factors into consideration.[207] But one of the key goals of the step two analysis is to ensure deference to congressional intent. All evidence points to the conclusion that Congress did not close off *Bivens* claims in this context. Thus, there is good reason to conclude that Congress did not intend for the Bureau of Prison's administrative grievance process to displace *Bivens* remedies in this context.

Further, Congress passed the PLRA a year after *Farmer* was decided, and thus it understood that federal prisoners might bring failure-to-protect *Bivens* claims.[208] Such claims have been available for over forty years and have been understood by Congress and the courts[209] to be a necessary deterrent to harmful actions of individual federal officers. "[C]ongressional silence in the PLRA about the availability of *Bivens* remedies does not suggest that Congress intended to make such remedies unavailable."[210] The *Bivens* landscape Congress would have surveyed when it passed the PLRA in 1996 already included *Farmer*. If Congress somehow froze the bounds of permissible *Bivens* claims brought by people in federal custody, those limits would still encompass failure-to-protect claims. Similarly, when Congress amended the Federal Torts Claims Act to cover law-enforcement torts in 1973, it rejected a proposal to eliminate *Bivens* actions in favor of suits against the federal government and expressly articulated that these causes of action should operate in parallel.[211] In *Carlson*, the Supreme Court held that Bureau of Prisons' administrative remedy program did not displace the *Bivens* cause of action because the program did not provide monetary damages.[212]

There is no other special factor counselling hesitation in failure-to-protect claims. *Egbert* and *Hernández* arose in the national security context, which the Supreme Court held counseled significant hesitation because of the foreign policy implications of a cross-border shooting or criminal activity.[213] Such concerns are simply not at play in the domestic prison context.

CONCLUSION

Dee Farmer: Years and cases after the Supreme Court decided Farmer v. Brennan*, the consequences of my litigation came to a head. The government proposed a settlement to dismiss all my cases in exchange for parole, which would*

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207. *See Abbasi*, 582 U.S. at 148.

208. *See* Lorillard v. Pons, 434 U.S. 575, 580–81 (1978) (holding Congress is presumed to legislate with knowledge of Supreme Court decisions).

209. *See* Corr. Servs. Corp. v. Malesko, 534 U.S. 61, 70 (2001) ("The purpose of *Bivens* is to deter individual federal officers from committing constitutional violations.").

210. Bistrian v. Levi, 912 F.3d 79, 92–93 (3d Cir. 2018).

211. *See* Carlson v. Green, 446 U.S. 14, 19–20 (1980).

212. *See id.* The Supreme Court reaffirmed this holding in 1992. *See* McCarthy v. Madigan, 503 U.S. 140 (1992).

213. Egbert v. Boule, 596 U.S. 482, 494–97 (2022); Hernández v. Mesa, 589 U.S. 93, 103–09 (2020).

have been to another system. They told me if I did not agree, they would commit me to segregation indefinitely. I was not eligible for parole, and I had not done anything justifying an indefinite commitment to segregation. I rejected the settlement offer that attorneys from the government flew across the country to give me to sign. I did not sign, and I was indefinitely committed to segregation. It was the first recorded case of an inmate being indefinitely committed to segregation based solely on the word of another inmate. I could not believe the crookedness. Beat up, now set up, I thought.

As with my previous stints in segregation, I developed a routine of spending the day in the segregation unit's law library. At night, I thought about the inhumanity of prison and my existence in it, including the things I had seen and the horror stories told to me by other inmates. Even though it seemed as though I had seen it all, I had not. While I was in segregation, I witnessed a man hang himself.

I was thinking one night, and it came to me that a life sentence was indefinite and I was committed to segregation indefinitely. I just did not see why I needed to make my bed in the morning, so I stopped doing that. Similarly, I was unable to sleep because of the constant bright light in my cell, so I broke the enclosure around it and turned it off. When officials came to talk to me about something I did not want to talk about, I would simply say that I had resigned myself to segregation and doing whatever I had to do to survive, including taking an ever-increasing dosage of antidepressants.

After I had been in segregation for about two and a half years, I recognized I was losing interest in things and staying in bed. I talked to the psychologist about this, and he arranged for me to get a tape player and religious tapes, which he knew would be calming for me. An officer in the unit brought his boombox to work and played gospel CDs for me.

After I was in segregation for four and a half years, the law library, antidepressants, religious tapes, and CDs were no longer enough. I began seeing things that were not there and feeling movement inside my thin plastic mattress. When I told the doctor about it, he did not do anything. The guards laughed at me. It was not until I started having severe panic attacks that they took notice, although they did not do anything. I do not remember making a conscious decision to do it, but there I was, trying to commit suicide.

I was moved to a psychiatric unit, where I told doctors that it was obvious that keeping me segregated for years would result in mental deterioration. About three weeks later, I was removed from segregation. After that, my mission was to help as many other incarcerated people as I could, because I was sure I was not the first and would not be the last to be singled out and set up. But I became so busy helping others that I did not take the time to help myself heal. I think it was because of faith that I survived. It was essential for me to define my relationship with God. I continued to go to therapy as well as to the law library. I had a near-death experience. My vitals were normal, but I had no sense of who I was or where

I was. The chief doctor examined me and predicted that my death was imminent. I refused to go to the hospital, so I was placed in a hospice unit. I was placed in a cell to die, wearing a diaper and hooked to a heart monitor. I kept trying to get out of bed, but I would fall, then fall asleep as soon as I was placed back in my bed. They eventually placed a locked mesh tent on the bed. I felt myself getting better when I became acutely aware of the moans and screams from others in the hospice unit. I then began to stand up and go into the hallway, where I would see a white sheet over one of the cell doors, which meant the person had passed. Being so close to death, I finally decided I had to move out of the hospice unit. I felt like I had miraculously survived this near-death experience.

Months later, I could say with conviction that God allowed me to live because He has a purpose for me. I was in a jail, struggling without medicine, soap, or toothpaste. I fell asleep on a dirty and rickety bed, hungry and hopeless. While sleeping, I dreamed that I was walking next to the water at the harbor. I was wearing an elegant gown, and the ladies with me were telling me how beautiful I looked. I then fell into the water and began to drown. I was sinking deeper and deeper. The water was going up my nose, and I was choking. I was trying to scream and then I began to pray for God to help me, and while dreaming I could feel someone, a powerful force, pulling me out of the water. My life has never been the same. My faith is now unwavering. I know that God loves me and has a purpose for me. I strive every day to be a better person—better than I was yesterday. To achieve something new. To help one more person. To serve God one more day.

Upon this 31st anniversary of the Supreme Court's decision in my case, I would like to raise awareness to the fact that LGBTQ+ people in prisons continue to experience discrimination and violence of the sort that I did.

Ms. Farmer's story is far too common. Severe psychiatric damage is the *expected* result of prolonged solitary confinement, which is too often the end result of trans people in prison speaking out about their housing or safety needs. Deliberate indifference to the unnecessary pain and suffering of such conditions is prohibited by the Eighth Amendment. Federal officials need to be held accountable when they fail to protect litigants from a substantial risk of serious harm. Money damages are sometimes the only way for people subject to this type of constitutional violation to have their rights vindicated.[214] In the prison context, protecting trans rights looks like empowering trans people to pursue as many avenues as they can to improve their lives.

Advocates need to protect the *Bivens* damages remedy to protect trans people on the inside, who direly need all the support we can give them. The federal courts have silently attempted to erase the impact and minimize the significance of Ms. Farmer's case. The *Bivens* doctrine may be dizzying, but one thing should be clear: the Supreme Court decided *Farmer without* merely assuming it was a *Bivens* case.

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214. *See* Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 410 (1971) (Harlan, J. concurring) ("For people in Bivens' shoes, it is damages or nothing.").

Farmer is a *Bivens* a case on its own terms, rooted in the same Eighth Amendment deliberate-indifference cases as *Carlson*. Trans rights advocates and prison rights advocates cannot allow *Farmer* to be erased. As Justice Ginsburg stated at oral argument, "it's a *Bivens* case, isn't it?"[215]

215. *See supra* note 122.