No. 20-2364

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

ANTHONY MAMMANA,

Plaintiff-Appellant,

v.

LIEUTENANT BARBEN,

Defendant-Appellee.

On Appeal from the United States District Court
for the Middle District of Pennsylvania, No. 4:17-CV-00645

OPENING BRIEF OF PLAINTIFF-APPELLANT ANTHONY MAMMANA

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October 5, 2020

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INTRODUCTION

In 2015, Anthony Mammana, then a prisoner at the Allenwood Low Federal Correctional Institution, requested medical care in full compliance with prison policies. In response, prison officials transferred him to administrative segregation and housed him in a cell that prisoners referred to as the "Yellow Room." In that cell, prison officers purposefully subjected him to an extremely cold temperature and kept bright lights on 24 hours a day. Prison staff replaced Mr. Mammana's uniform with paper-thin clothing and gave him only a thin, uncomfortable mattress. And they deprived Mr. Mammana of sheets, a blanket, and even toilet paper. As a result, he spent four sleepless nights alone and shivering while prison staff tormented him.

After his release, Mr. Mammana sued prison officials, alleging that they violated the Eighth Amendment's prohibition against cruel and unusual punishment. When this case was last on appeal, a panel of this Court concluded that the alleged conditions in the Yellow Room "reflect[ed] more than the denial of a comfortable prison, but rather the denial of the minimal civilized measure of life's necessities, in particular, warmth and sufficient sleep." *Mammana v. Fed. Bureau of Prisons* (*Mammana I*), 934 F.3d 368, 374 (3d Cir. 2019).

The issue presented in this second appeal is whether Mr. Mammana has a remedy for this serious constitutional deprivation under *Bivens v. Six Unknown*

Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971). In *Carlson v. Green*, the Supreme Court recognized a *Bivens* cause of action for a prisoner's Eighth Amendment deliberate indifference claim based on the denial of adequate medical care. 446 U.S. 14 (1980). Later, in *Farmer v. Brennan*, the Supreme Court applied *Carlson* to another prisoner's deliberate indifference claim, this time based on the prison's failure to protect the prisoner's safety from prisoner-on-prisoner violence. 511 U.S. 825 (1994). More recently, in *Ziglar v. Abbasi*, the Supreme Court provided guidance on whether and when to recognize new *Bivens* claims. 137 S. Ct. 1843, 1856–57 (2017). But nothing in *Abbasi* unsettles the Court's well-established precedent recognizing a *Bivens* cause of action for prisoners' deliberate indifference claims under the Eighth Amendment. Indeed, after *Abbasi* in 2018, this Court reaffirmed the existence of such a *Bivens* claim in *Bistrian v. Levi*, 912 F.3d 79 (3d Cir. 2018).

Yet the district court refused to acknowledge the existence of a *Bivens* cause of action for Mr. Mammana's deliberate indifference claim. The court held Mr. Mammana's claim qualifies as a new context because it did not involve the denial of medical treatment like the claim in *Carlson*. And the district court found that special factors counseled against recognizing a new *Bivens* claim here. The district court was wrong on both accounts. *First*, far from implicating a new *Bivens* context, Mr. Mammana's deliberate indifference claim falls well within the *Bivens* context

the Supreme Court recognized in *Farmer* and this Court explicitly reaffirmed in *Bistrian*. The district court did not, however, discuss or even cite *Farmer*. Instead, it focused exclusively on *Carlson*, concluding Mr. Mammana's claim did not fit the mold of *Carlson* because the elements of Mr. Mammana's claim differed from the elements of an inadequate-medical-care claim. But the elements of Mr. Mammana's claim are identical to the deliberate indifference claim recognized in *Farmer* and confirmed by this Court in *Bistrian*. The common thread between *Carlson*, *Farmer*, *Bistrian*, and Mr. Mammana's case is that they each involve a claim that prison officials were deliberately indifferent to a substantial risk of prisoner harm. Mr. Mammana's claim thus does not reflect a new *Bivens* context.

Second, even if Mr. Mammana's claim arose in a new *Bivens* context, no special factors counsel against recognizing a *Bivens* claim here. Mr. Mammana has no adequate, alternative remedy for this constitutional deprivation, a fact the district court itself acknowledged. And the factors the district court highlighted as counseling hesitation, each putatively based in the separation of powers, either were considered and rejected in *Bistrian* or simply do not apply to claims like the one Mr. Mammana advances here. Unlike the plaintiffs in *Ziglar v. Abbasi*, Mr. Mammana does not challenge broad national policy. His claim involves a discrete set of rank-and-file prison officials who detained him in a particular cell in a particular prison and deprived him of the minimal necessities of civilized life. There is no remotely

plausible justification for such appalling treatment, so there is no risk of interfering in complex prison administration policy. And the cost and burden of such a claim is limited by the procedural and substantive hurdles prisoners must overcome to prevail on a deliberate indifference claim.

As this Court recognized when this case was last on appeal, the "Eighth Amendment is an area of the law that is often fact-intensive and can require balancing the rights of incarcerated citizens with the administrative judgment of prison officials. This appeal, however, is straightforward." *Mammana I*, 934 F.3d at 370 (3d Cir. 2019). Because Mr. Mammana's "straightforward" claim of prisoner abuse falls within a long established *Bivens* context, and no special factors weigh against any modest extension if one were necessary, the district court's order should be reversed.

JURISDICTIONAL STATEMENT

The district court had jurisdiction over this case under 28 U.S.C. § 1331. This Court has jurisdiction over this appeal under 28 U.S.C. § 1291 because Mr. Mammana filed a timely notice of appeal on June 30, 2020 from the district court's June 25, 2020 final order granting Lieutenant Barben's motion for judgment on the pleadings. JA 12–14.

STATEMENT OF THE ISSUES PRESENTED

1. Whether the district court erred by concluding that Mr. Mammana's deliberate-indifference claim would extend *Bivens* to a new context despite this Court's holding in *Bistrian v. Levi*, 912 F.3d 79 (3d Cir. 2018), that the Supreme Court recognized a similar deliberate-indifference claim in *Farmer v. Brennan*, 511 U.S. 825 (1994). *See* JA 6–7 (holding Mr. Mammana's claim presents a new *Bivens* context); Pl.'s Resp. to Defs.' Mot. J. Pleadings 11–12, ECF No. 45; Defs' Mem. Supp. Mot. J. Pleadings 10–14, ECF No. 44.

2. Whether the district court erred by concluding special factors weigh against recognizing a *Bivens* cause of action for Mr. Mammana's claim even though he has no other adequate remedy. *See* JA 7–10 (holding special factors counsel against recognizing a *Bivens* cause of action); Pl.'s Resp. to Defs.' Mot. J. Pleadings 11–12, ECF No. 45; Defs' Mem. Supp. Mot. J. Pleadings 14–18, ECF No. 44.

STATEMENT OF RELATED CASES AND PROCEEDINGS

Mr. Mammana previously appealed the district court's August 24, 2018 order granting the defendants' motion to dismiss. *See* Order Granting Defs.' Mot. Dismiss, ECF No. 31; *see also* Third Circuit Case No. 18-2937. A prior panel of this court vacated that order and remanded to the district court for further proceedings. *See Mammana I*, 934 F.3d 368 (3d Cir. 2019). No other related cases or proceedings have been completed, nor are any related cases or proceedings pending before, or

about to be presented to, this Court or any other state or federal court or agency. *See* Local Appellate Rule 28.1(a)(2).

STATEMENT OF THE CASE

I. BACKGROUND

In June 2015, while serving a sentence at the Allenwood Low Federal Correctional Institution, Anthony Mammana began suffering from a medical condition that made him feel ill after eating. *See* JA 22 (Second Amended Complaint (SAC) ¶¶ 6–7). Mr. Mammana repeatedly sought treatment for his condition. Each time, a physician assistant would test his blood sugar and direct Mr. Mammana to return if his symptoms flared up again. JA 22 (SAC ¶¶ 8–12). Eventually, one of the physician assistants referred Mr. Mammana to a psychologist to determine whether Mr. Mammana's symptoms were psychosomatic. JA 22 (SAC ¶ 13). The psychologist examined Mr. Mammana and concluded his symptoms were not psychological. JA 22–23 (SAC ¶ 14). She therefore recommended Mr. Mammana return to the medical ward. JA 23 (SAC ¶ 15).

This time, however, the facility's medical staff refused to admit him. JA 23 (SAC ¶ 16). When Mr. Mammana's psychologist insisted that the staff re-admit him, Rachal Taylor, one of the physician assistants, threatened to send Mr. Mammana to administrative segregation, commonly referred to at the prison as "the hole." JA 23 (SAC ¶ 20). But Mr. Mammana continued to seek treatment, and Ms. Taylor carried

out her threat. She filed a report falsely accusing Mr. Mammana of harassment, stalking, and interfering with the performance of her duties. JA 23–24 (SAC ¶ 21). A disciplinary officer would later conclude that Mr. Mammana had not violated any prison policies, demonstrating that there was never a valid basis for Ms. Taylor's report. JA 26 (SAC ¶ 42).

Nevertheless, as a result of Ms. Taylor's false report, prison staff transferred Mr. Mammana to administrative segregation in the Special Housing Unit. JA 24 (SAC ¶ 22). At first, the prison staff assigned Mr. Mammana to a cell with a cellmate who had a reputation for assaulting other prisoners. JA 24 (SAC ¶ 24). Well aware of this reputation, Mr. Mammana objected to the cell assignment. JA 24 (SAC ¶ 25). The prison staff reported this objection to Lieutenant David Barben, a corrections officer at Allenwood. JA 24 (SAC ¶ 25). In response, Lieutenant Barben directed the prison staff to move Mr. Mammana to the "Yellow Room." JA 24 (SAC ¶ 26).

The Yellow Room was a cell known by prisoners for its harsh conditions. JA 24 (SAC ¶ 27). Prison staff kept the Yellow Room at an extremely cold temperature, and it contained only a thin, uncomfortable mattress, making it difficult to sleep. JA 24 (SAC ¶ 27). To make matters worse, Lieutenant Barben directed the prison staff to give Mr. Mammana "the 'Yellow Room' treatment," JA 24 (SAC ¶ 28), which entailed replacing Mr. Mammana's prison-issued uniform with "paper-weight clothing," and depriving him of any blankets or sheets for his bed. JA 24 (SAC ¶ 29).

The prison staff even withheld toilet paper from Mr. Mammana. JA 25 (SAC ¶ 34). The staff also kept bright lights on in the Yellow Room 24 hours a day, making it even harder for Mr. Mammana to sleep. JA 24 (SAC ¶ 29). It became clear that Lieutenant Barben moved Mr. Mammana to the Yellow Room "to punish [him] for his disobedience." JA 24 (SAC ¶ 29). From time to time, prison staff would taunt Mr. Mammana, asking him if he was "ready to tap out." JA 25 (SAC ¶ 38). Altogether, prison staff kept Mr. Mammana in the Yellow Room for four days. JA 25 (SAC ¶ 30).

During that time, Mr. Mammana continued to feel sick and requested medical care, but the prison staff refused his requests. JA 26 (SAC ¶ 39). After Mr. Mammana left the Yellow Room, the prison held a disciplinary hearing about his administrative detention. JA 26 (SAC ¶ 42). At the close of that hearing, the hearing officer concluded Mr. Mammana had violated no prison policies before his detention in the Yellow Room. JA 26 (SAC ¶ 42). The prison staff expunged Mr. Mammana's disciplinary records related to the incident. JA 26 (SAC ¶ 42). But they offered Mr. Mammana no monetary relief for the harsh conditions Lieutenant Barben had subjected him to in the Yellow Room.

II. PROCEDURAL HISTORY

Mr. Mammana sued Lieutenant Barben and other defendants in the Middle District of Pennsylvania alleging they violated the Eighth Amendment's prohibition

against cruel and unusual punishment. In their motion to dismiss, the defendants did not dispute that a *Bivens* remedy was available for this type of Eighth Amendment violation. Instead, they argued that Mr. Mammana failed to adequately state an Eighth Amendment violation. The district court granted the defendants' motion, concluding that Mr. Mammana had alleged only that the conditions of his confinement were "uncomfortable." *Mammana v. Fed. Bureau of Prisons*, No. 4:17-CV-00645, 2018 WL 4051703, at *1 (M.D. Pa. Aug. 24, 2018). In the district court's view, Mr. Mammana's allegations did not suffice to state an Eighth Amendment claim. *Id.*

Mr. Mammana appealed the district court's decision, and a panel of this Court unanimously reversed. *Mammana I*, 934 F.3d at 374 (3d Cir. 2019). While the panel acknowledged that prisoners' Eighth Amendment claims are "often fact-intensive and can require balancing the rights of incarcerated citizens with the administrative judgment of prison officials," the panel said that Mr. Mammana's claim, by contrast, was "straightforward." *Id.* at 370. Expressly applying the standard set by the Supreme Court in *Farmer v. Brennan*, 511 U.S. 825 (1994), the panel noted that a prisoner must satisfy two requirements to plausibly allege a deliberate indifference claim. "First, the deprivation alleged must be, objectively, sufficiently serious, resulting in the denial of the minimal civilized measure of life's necessities," and second, prison officials must have had "deliberate indifference to inmate health or

safety." *Mammana I*, 934 F.3d at 372–73 (cleaned up) (quoting *Farmer v. Brennan*, 511 U.S. 825, 834 (1994)).

According to the panel, Mr. Mammana met the first prong of the *Farmer* standard because he "alleged not just merely uncomfortable conditions, but the deprivation of a specific human need." *Id.* at 372. The panel highlighted Mr. Mammana's allegations that prison staff "deprived [him] of his clothing," "provided [him] only 'paper like' coverings," "denied [him] bedding, and exposed [him] to low cell temperatures and constant bright lighting for four days." *Id.* at 374. As a result, Mr. Mammana "could 'hardly sleep,'" and "[w]hen he did fall asleep he would 'wake up frequently shivering.'" *Id.* "Together," the panel concluded, these "deprivations and exposure reflect[ed] more than the denial of a 'comfortable prison[],' but rather the denial of 'the minimal civilized measure of life's necessities,' in particular, warmth and sufficient sleep." *Id.* The panel therefore vacated the district court's order and remanded for further proceedings.

On remand, Mr. Mammana filed an amended complaint focusing exclusively on his Eighth Amendment claim. *See* Second Amended Compl. This time, Lieutenant Barben filed a motion for judgment on the pleadings arguing for the first time that the district court should not recognize a cause of action under *Bivens* for Mr. Mammana's deliberate indifference claim. Once again, the district court granted

Lieutenant Barben's motion.[1] JA 11. The court held that Mr. Mammana's *Bivens* claim was "materially different" from the Eighth Amendment *Bivens* claims the Supreme Court had allowed to proceed because the elements of Mammana's deliberate-indifference claim differ from the elements of the "inadequate medical care" claim the Supreme Court considered in *Carlson v. Green*, 446 U.S. 14, 18–19 (1980). *See* JA 6–7. The district court did not, however, discuss *Farmer v. Brennan*, 511 U.S. 825 (1994), the *Bivens* case this Court relied on as setting the standard for Mr. Mammana's deliberate indifference claim when this case was last on appeal. *See id.*; *see also Mammana I*, 934 F.3d at 372–73 (quoting *Farmer*, 511 U.S. at 834).

The court also concluded that "special factors counsel[ed] against extending *Bivens*" to cover Mr. Mammana's claim. *Id.* While the court acknowledged that Mr. Mammana does not have "any alternative remedies available," *id.*, it nevertheless

[1] Mr. Mammana's Second Amended Complaint names Lieutenant Barben and ten pseudonymous John Does as defendants. Lieutenant Barben alone moved for judgment on the pleadings on his own behalf. But his memorandum of law included a footnote citing without explanation several cases involving the dismissal of pseudonymous defendants. Defs' Mem. Supp. Mot. J. Pleadings 1 n.1, ECF No. 44. The district court, in its Memorandum Opinion, stated in a footnote that Lieutenant "Barben note[d] that the unnamed John Doe Defendants should be dismissed based upon Mammana's failure to identify those individuals," JA 3 n.16, but the court did not say if it agreed that the John Doe defendants should be dismissed on that basis. Instead, it entered judgment in favor of all defendants based on its decision not to recognize Mr. Mammana's *Bivens* claim. *See* JA 10. The issues presented on this appeal thus involve only the validity of Mr. Mammana's *Bivens* claim. Mr. Mammana reserves the right to defend his claims against the John Doe defendants if this Court reverses the district court's judgment.

concluded it should not recognize a *Bivens* cause of action here. The court reasoned that Congress had not expressly endorsed a damages remedy in the Prison Litigation Reform Act, and suggested a *Bivens* claim would unnecessarily involve the courts in matters of prison administration and would entail significant "time and administrative costs" for courts and prisons. *Id.*

SUMMARY OF ARGUMENT

I. The district court wrongly concluded Mr. Mammana's claim presents a new *Bivens* context. In so concluding, the court considered only whether Mr. Mammana's claim is materially different from *Carlson v. Green*, a Supreme Court case involving a prisoner's *Bivens* claim for the denial of adequate medical care. 446 U.S. 14. But the district court entirely ignored the *Bivens* case that is most on point: *Farmer v. Brennan*, 511 U.S. 825 (1994). In *Farmer*, the Supreme Court applied *Carlson* to an Eighth Amendment *Bivens* claim based on a "prison official's 'deliberate indifference' to a substantial risk of serious harm." *Id.* at 828, 830 (citing *Carlson*, 446 U.S. 14; *Bivens*, 403 U.S. 388). In *Bistrian v. Levi*, this Court recognized that *Farmer* qualifies as an established *Bivens* context. *See* 912 F.3d at 90–91. And when Mr. Mammana's case was last on appeal, this Court characterized his claim as a *Farmer* claim. *See Mammana I*, 934 F.3d at 372–73 (citing *Farmer*, 511 U.S. at 832–34). This case thus falls within the established *Bivens* contexts reflected in *Farmer* and *Carlson*. Both cases allow a plaintiff to sue prison officials

for deliberate indifference to the plaintiff's safety. That is precisely what Mr. Mammana has done here.

II. Even if the district court were correct that this case presents a new *Bivens* context, the district court still erred by holding special factors counsel against recognizing a cause of action. As the district court acknowledged, Mr. Mammana has no adequate, alternative remedy for his deliberate indifference claim. Yet the court held that three factors, each grounded in the separation of powers, weighed against recognizing a *Bivens* claim here.

First, the court stated that "Congressional inaction in the area of prisoner litigation" suggests "that Congress does not want a damages remedy." But, as this Court explained in *Bistrian*, the lack of a damages remedy in legislation governing prison litigation does not foreclose recognizing new *Bivens* claims. To the contrary, the Prison Litigation Reform Act reflects a decision by Congress *not* to abrogate the availability of properly exhausted *Bivens* claims in the prison context. *Bistrian*, 912 F.3d at 93 n.22.

Second, the district court predicted that Mr. Mammana's claim would unnecessarily draw courts into "complex and intractable" matters of prison administration. This reasoning likewise contradicts *Bistrian*, which noted that courts have long allowed claims involving prisoner safety without unduly interfering with the independence of the Executive Branch. *Id.* at 93. Mr. Mammana does not

challenge broad national policy. Instead, he seeks damages from rank-and-file officials based on the conditions in one particular cell. Indeed, in *Mammana I*, this Court specifically noted that Mr. Mammana's claim was "straightforward" and did not call for any complex balancing of prison administration interests. 934 F.3d at 370.

Third, the district court suggested that recognizing a *Bivens* cause of action would impose significant time and administrative costs on prison officials. Yet this reasoning would apply to virtually every *Bivens* claim and conflicts with this Court's recognition in *Bistrian* that the door is not closed to such claims. Federal courts have ample tools to promptly dispose of unmeritorious *Bivens* claims. The costs involved in litigating a case like Mr. Mammana's are no greater than any other established *Bivens* claim.

Because Mr. Mammana's claim does not present a new *Bivens* context, and no special factors weigh against recognizing his claim even if it reflected a modest extension of *Bivens*, the district court's order should be reversed.

STANDARD OF REVIEW

This Court "review[s] a denial of a motion for judgment on the pleadings de novo." *Zimmerman v. Corbett*, 873 F.3d 414, 417 (3d Cir. 2017). "A motion for judgment on the pleadings will be granted, pursuant to Fed. R. Civ. P. 12(c), if, on the basis of the pleadings, the movant is entitled to judgment as a matter of law."

DiCarlo v. St. Mary Hosp., 530 F.3d 255, 262 (3d Cir. 2008). "The court will accept the complaint's well-pleaded allegations as true, and construe the complaint in the light most favorable to the nonmoving party." *Id.* at 262–63. In reaching a determination, courts draw "all reasonable inferences" from the allegations. *Huertas v. Galaxy Asset Mgmt.*, 641 F.3d 28, 32 (3d Cir. 2011).

ARGUMENT

Mr. Mammana advances a claim against Lieutenant Barben under *Bivens* for violating the Eighth Amendment's prohibition against cruel and unusual punishment, specifically for his deliberate indifference to the substantial risk of harm posed by Mr. Mammana's mistreatment in the Yellow Room. In *Bivens v. Six Unknown Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), the Supreme Court recognized an implied cause of action for damages against federal officers who violate an individual's constitutional rights. "[I]t is well settled," the Court observed, "that where legal rights have been invaded, . . . federal courts may use any available remedy to make good the wrong done," including money damages. *Id.* at 396. A "*Bivens* claim is brought against the individual official for his or her own acts, not the acts of others." *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1860 (2017). The availability of money damages is key to furthering *Bivens*'s purpose: "deter[ring] the officer" from violating constitutional rights. *See FDIC v. Meyer*, 510 U.S. 471, 485 (1994).

Although *Bivens* involved a claim under the Fourth Amendment's right against a warrantless arrest and search, 403 U.S. at 389, courts have over time recognized *Bivens* causes of action in other contexts. In *Davis v. Passman*, 442 U.S. 228 (1979), the Supreme Court recognized a *Bivens* cause of action for a Congressional employee's Fifth Amendment equal protection claim against her former employer. *Id.* at 248–49. The very next year, in *Carlson v. Green*, 446 U.S. 14 (1980), the Court held that the estate of a deceased prisoner could assert a *Bivens* claim against prison staff for causing him to suffer "personal injuries from which he died" by denying him adequate medical care. *Id.* at 16 & n.1.

Since then, the Supreme Court did not extend *Bivens* to any new contexts, but it continued to apply *Bivens*, *Davis*, and *Carlson* to other cases that featured similar circumstances. In *Farmer v. Brennan*, 511 U.S. 825 (1994), for example, the Court treated a federal prisoner's *Bivens* claim that prison officials failed to protect her from prisoner-on-prisoner violence as a straightforward application of *Carlson*. *See id.* at 830 (citing *Carlson*, 446 U.S. 14). And in *Groh v. Ramirez*, the Supreme Court allowed a civil suit for damages based on the unreasonable search of a Montana ranch to continue. *See* 540 U.S. 551, 566 (2004). There too, the Court did not opine on whether it made sense to recognize an implied cause of action under those particular facts; it simply cited *Bivens* and moved on. *See id.* at 555 (citing *Bivens*, 403 U.S. 388). So while the Supreme Court continued to apply *Bivens*, it did not

offer explicit guidance on whether and when courts may recognize a new *Bivens* cause of action.

The Court provided that guidance in *Ziglar v. Abbasi*, 137 S. Ct. 1843 (2017). In *Abbasi*, a group of noncitizens detained in the wake of the September 11, 2001 terrorist attack asserted a *Bivens* claim against several high-ranking officials in the Department of Justice and two of the wardens at the facility where they were held. *Id.* at 1852–53. The plaintiffs alleged they suffered injuries as a result of official policies that mandated harsh treatment at the facility in connection with the response to the 9/11 attack. *Id. Abbasi* established a two-step analysis for determining whether to allow a *Bivens* claim. First, a court "must determine whether a case presents 'a new *Bivens* context,' by asking whether or not the case 'is different in a meaningful way from previous *Bivens* cases decided by the Supreme Court.'" *Bistrian*, 912 F.3d at 89–90 (quoting *Abbasi*, 137 S. Ct. at 1859). The court identified several examples of potentially meaningful differences, including "the rank of the officers involved; the constitutional right at issue; the generality or specificity of the official action; the extent of judicial guidance as to how an officer should respond to the problem or emergency to be confronted; the statutory or other legal mandate under which the officer was operating; and the risk of disruptive intrusion by the Judiciary into the functioning of other branches." *Id.* at 90 (quoting *Abbasi*, 137 S. Ct. at 1860).

Second, if the case presents a "new context," courts "ask whether any 'special factors counsel hesitation' in permitting the extension." *Id.* (quoting *Abbasi*, 137 S. Ct. at 1857). That "inquiry must concentrate on whether 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." *Abbasi*, 137 S. Ct. at 1857–58. In engaging in this inquiry, courts consider "the existence of an alternative remedial structure and separation-of-powers principles." *Bistrian*, 912 F.3d at 90. As the Supreme Court made clear, "if equitable remedies prove insufficient, a damages remedy might be necessary to redress past harm and deter future violations." *Abbasi*, 137 S. Ct. at 1858. And since *Abbasi*, courts have recognized *Bivens* claims in new contexts where the special factors did not counsel hesitation. *See, e.g.*, *Bistrian*, 912 F.3d at 92–94 (concluding that, even if the plaintiff's deliberate indifference claim qualified as a new context, the Court would still recognize a *Bivens* cause of action); *Lanuza v. Love*, 899 F.3d 1019, 1034 (9th Cir. 2018) (recognizing *Bivens* claim where a government immigration attorney intentionally submitted a forged document in an immigration proceeding).

I. MR. MAMMANA'S DELIBERATE INDIFFERENCE CLAIM FOR DENIAL OF THE MINIMAL CIVILIZED MEASURE OF LIFE'S NECESSITIES DOES NOT EXTEND *BIVENS* TO A NEW CONTEXT.

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

As noted above, courts have long permitted federal prisoners to bring *Bivens* claims alleging that prison officials' deliberately indifferent conduct violated the Eighth Amendment's prohibition against cruel and unusual punishment. *See, e.g.*, *Farmer v. Brennan*, 511 U.S. 825 (1994); *Carlson v. Green*, 446 U.S. 14 (1980); *Bistrian v. Levi*, 912 F.3d 79 (3d Cir. 2018); *Carlucci v. Chapa*, 884 F.3d 534, 539–40 (5th Cir. 2018); *Koprowski v. Baker*, 822 F.3d 248, 250 (6th Cir. 2016); *LaFaut v. Smith*, 834 F.2d 389, 394 (4th Cir. 1987); *Gillespie v. Civilleti*, 629 F.2d 637, 642 (9th Cir. 1980). In *Carlson v. Green*, the Supreme Court held that a prisoner's estate could sue prison officials under *Bivens* for acting with deliberate indifference to the prisoner's medical needs. *See Carlson*, 446 U.S. at 18–19. And as the Court made clear in *Abbasi*, *Bivens* claims arising in the same context as *Carlson* remain viable. *See Abbasi*, 137 S. Ct. at 1855.

In *Farmer v. Brennan*, the Supreme Court applied *Carlson* to a claim based on the prison's failure to protect a prisoner from a substantial risk of harm from prisoner-on-prisoner violence. *Farmer*, 511 U.S. at 842–45. Prison officers transferred the plaintiff, a transgender woman, into the prison's general population

with men who then beat and raped her. *Id.* at 830. The prisoner alleged that prison officials violated the Eighth Amendment by their "deliberately indifferent failure to protect [her] safety." *Id.* at 831. The Supreme Court did not question whether the plaintiff could state such a claim, but took the opportunity to clarify the applicable knowledge standard: courts may hold a federal prison official liable only "if he knows inmates face a substantial risk of serious harm and disregards that risk." *Id.* at 847. Having clarified the standard, the court remanded for further proceedings.

Although the Supreme Court "did not explicitly state that it was recognizing a *Bivens* claim" in *Farmer*, this Court held in *Bistrian v. Levi*, 912 F.3d 79 (3d Cir. 2018), that the deliberate indifference claim at the heart of *Farmer* qualifies as an established *Bivens* context. *See id.* at 89. This Court acknowledged that, in *Abbasi*, the Supreme Court did not separately identify *Farmer* as an independent *Bivens* context. *Id.* at 91. But the Court explained in *Bistrian* that this may have been because "the [Supreme] Court simply viewed the failure-to-protect claim" at issue in *Farmer* "as not distinct from the Eighth Amendment deliberate indifference claim in the medical context" in *Carlson*. *Id.* At bottom, both *Carlson* and *Farmer* involved a claim that the prison staff was deliberately indifferent "by failing to protect [the prisoner] against a known risk of substantial harm." *Id.* at 90. As this Court held in *Bistrian*, such a claim "does not present a new *Bivens* context." *Id.*

B. Mr. Mammana's Claim Arises in the Same Context as *Carlson* and *Farmer*.

Despite this established line of precedent, the district court concluded that Mr. Mammana's claim arises in a new context. The court said very little, however, about what makes Mr. Mammana's claim meaningfully different from an established *Bivens* context. According to the district court, Mr. Mammana's claim is "materially different" because the elements of his deliberate-indifference claim differ from the elements of a *Carlson*-style "inadequate medical care" claim. JA 7 & n.35. But by homing in on this theoretical difference between Mr. Mammana's deliberate indifference claim and *Carlson*'s inadequate-medical-care claim, the district court ignored the *Bivens* case that is most on-point: *Farmer v. Brennan*.

The Supreme Court specifically stated in *Farmer* that it was adopting a standard of "deliberate indifference for claims challenging conditions of confinement." 511 U.S. at 836. That is precisely the claim Mr. Mammana asserts here. As the district court acknowledged, Mr. Mammana must show that "(1) the deprivation alleged" was "objectively, sufficiently serious," and that "(2) the prison official" had "a sufficiently culpable state of mind." JA 7 n.35. Those are exactly the same elements a prisoner must prove under *Farmer*. *See* 511 U.S. at 834. In fact, the very case the district court quoted for the elements of Mr. Mammana's conditions-of-confinement claim—*Thomas v. Tice*—borrowed that language from *Farmer*. *See Thomas*, 948 F.3d 133, 138 (3d Cir. 2020) (quoting *Farmer*, 511 U.S. at 834).

While the district court repeatedly cited this Court's decision in *Bistrian* for general statements about *Bivens*, *see, e.g.*, JA 5–6, it failed to address *Bistrian*'s core holding: that *Farmer* itself reflects an established *Bivens* context. *See Bistrian*, 912 F.3d at 90–91. The court ignored this holding even though, when this case was last on appeal, the panel quoted the same language from *Farmer* in discussing the elements of Mr. Mammana's claim. *Mammana I*, 934 F.3d at 372–73. And when the defendants filed their first motion seeking dismissal of Mr. Mammana's original complaint, they cited *Farmer* in response to Mr. Mammana's claim that prison staff failed to adequately diagnose his medical condition before transferring him to the Yellow Room. *See* D. Md. Docket No. 14 (*Farmer*, 511 U.S. at 837). In so doing, the defendants themselves recognized that Mr. Mammana's allegations are best analyzed under *Farmer*.

The district court's narrow focus on *Carlson* thus ignored the forest for the trees. Mr. Mammana's claim is a *Farmer* claim, which is itself an application of *Carlson*. And under the law of this circuit, *Farmer* is a recognized *Bivens* context. *See Bistrian*, 912 F.3d at 90–91. There may be minor differences in the *facts* involved in each case, but the common thread running from *Carlson* to *Farmer* to *Bistrian* is that each involved a prisoner who sued federal prison officers for failing to protect the plaintiff against a "risk of substantial harm." *Bistrian*, 912 F.3d at 90; *see also Farmer*, 511 U.S. at 843; *Carlso*n, 446 U.S. at 16 n.1. The Supreme Court

has never demanded perfect equivalence between the facts of a case for a court to decide it arises in an established *Bivens* context. *Cf. Groh v. Ramirez*, 540 U.S. 551 (2004) (recognizing Fourth Amendment *Bivens* claim despite facts different from those present in *Bivens*); *Ioane v. Hodges*, 939 F.3d 945 (9th Cir. 2018) (same).

As the Supreme Court recognized in *Farmer*, the "question under the Eighth Amendment is whether prison officials, acting with deliberate indifference, exposed a prisoner to a sufficiently substantial 'risk of serious damage to his future health.'" *Farmer*, 511 U.S. at 843 (citing *Helling v. McKinney*, 509 U.S. 25, 35 (1993)). Exactly the same question is at issue here. Lieutenant Barben directed prison staff to subject Mr. Mammana to a deprivation of sleep and warmth, thus exposing him to a substantial risk of damage to his health. There is no meaningful difference between a claim that a prisoner was exposed to substantial risk of harm because he was denied medical care, *see Carlson*, 446 U.S. at 16, a claim that he was exposed to violence from other prisoners, *see Farmer*, 511 U.S. at 843; *Bistrian*, 912 F.3d at 90, or (as here) a claim that he was exposed to conditions in a cell that deprived him of the minimum necessities of life. All three claims involve the same constitutional responsibility of federal prison officials to refrain from taking actions with deliberate indifference to a substantial risk that a prisoner will suffer physical harm. And similar judicial guidance was available for all three cases about a prison official's duties under the Eighth Amendment. *See Estelle v. Gamble*, 429 U.S. 97, 104–05

(1976) (holding that deliberate indifference to a prisoner's serious illness or injury violates the Eighth Amendment); *Mammana I*, 934 F.3d at 374 (citing several cases establishing that the mistreatment directed at Mr. Mammana was unconstitutional).

It is thus no surprise that other courts have treated prisoner claims involving exposure to a hazard that results in a substantial risk of harm as garden-variety *Bivens* claims under *Farmer* and *Carlson*. In *Reid v. United States*, No. 18-16042, 2020 WL 5229411, at *2 (9th Cir. Sept. 2, 2020), the Ninth Circuit recently held that a plaintiff's conditions-of-confinement claim arose in an established *Bivens* context. The court noted that the Supreme Court recognized in *Carlson* "an Eighth Amendment *Bivens* claim based on prisoner mistreatment." *Id.* at *1. "Continuing to recognize Eighth Amendment *Bivens* claims post-*Abbasi* will not require courts to plow new ground because there is extensive case law establishing conditions of confinement claims and the standard for circumstances that constitute cruel and unusual punishment." *Id.* (citing *Hudson v. McMillian*, 503 U.S. 1, 8 (1992)). Other courts have likewise recognized conditions of confinement claims fall well within the heartland of *Carlson* and *Farmer*. *See, e.g.*, *Smith v. United States*, 561 F.3d 1090, 1104–06 (10th Cir. 2009) (prisoner stated a claim under *Bivens* based on allegations that prison officials failed to protect him from exposure to asbestos); *Bagola v. Kindt*, 131 F.3d 632, 645 (7th Cir. 1997) (recognizing *Bivens* cause of

action for a prisoner's allegations that prison officials failed to protect him from a work hazard).

In sum, the district court erred by concluding Mr. Mammana's claim arises in a new *Bivens* context simply because its elements differ from the elements of an inadequate-medical-care claim. The district court's judgment should be reversed on this ground alone.

II. EVEN IF MR. MAMMANA'S DELIBERATE INDIFFERENCE CLAIM PRESENTED A MODEST EXTENSION OF *BIVENS*, IT STILL PASSES MUSTER UNDER *ABBASI*.

Even if Mr. Mammana's claim presents a modest extension of *Bivens*, the district court compounded that error by holding it should not recognize his *Bivens* claim based on the guidance provided by *Abbasi*. The district court acknowledged that no adequate alternative remedy exists for Mr. Mammana. *See* JA 7–8. That conclusion was no doubt correct under this Court's precedent. *See Bistrian*, 912 F.3d at 92–93 (considering, in the alternative, whether it would be appropriate to recognize a *Bivens* claim if it were a new context and rejecting the defendants' argument that adequate alternative remedies existed for the plaintiff's claim). Like the plaintiff in *Bistrian*, Mr. Mammana suffered physical injuries as a result of his mistreatment. Any administrative remedy available to Mr. Mammana would not redress these physical injuries, "which due to their very nature are difficult to address except by way of damages actions after the fact." *Mack v. Yost*, 968 F.3d 311, 321

n.9 (3d Cir. 2020). Mr. Mammana's claim thus differs from other *Bivens* cases in which this Court has held an adequate alternative remedy made the need for a *Bivens* cause of action less salient. *See, e.g.*, *id.* (holding BOP administrative remedy program was adequate to redress First Amendment retaliation claim). As the Court recognized in *Abbasi*, when alternative remedies "prove insufficient, a damages remedy" under *Bivens* "might be necessary to redress past harm and deter future violations." *See Abbasi*, 137 S. Ct. at 1858.

The district court, though, concluded three separation-of-powers factors counseled against recognizing a *Bivens* claim here. Each is foreclosed by this Court's precedent. ***First***, the district court suggested that "Congressional inaction in the area of prisoner litigation" demonstrated "that Congress does not want a damages remedy." JA 8. The court relied on language from *Abbasi* pointing out that the Prison Litigation Reform Act (PLRA) does not provide an express damages remedy, and suggesting that it "could be argued that this suggests Congress chose not to extend the *Carlson* damages remedy to cases involving other types of prisoner mistreatment." *Abbasi*, 137 S. Ct. at 1865.

But whether or not it "could be argued" that Congressional silence in the PLRA has that particular meaning, that is *not* what the Supreme Court held in *Abbasi*. Rather, the Court remanded for further consideration of this very question, which shows that the Supreme Court did not decide the issue. *See id.* More

importantly, in *Bistrian*, this Court considered that very same passage from *Abbasi* and came to the opposite conclusion: the PLRA does *not* preclude recognizing a potentially new *Bivens* claim for prison mistreatment. *Bistrian*, 912 F.3d at 93 (citing *Abbasi*, 137 S. Ct. at 1865; *Nyhuis v. Reno*, 204 F.3d 65, 68–69 (3d Cir. 2000)). As this Court noted, it is "equally, if not more, likely that Congress simply wanted to reduce the volume of prisoner suits by imposing exhaustion requirements, rather [than] eliminate whole categories of claims through silence and implication." *Bistrian*, 912 F.3d at 93 n.22. Treating the PLRA as a special factor counseling against recognizing a *Bivens* claim proves far too much: it "would arguably foreclose all *Bivens* claims brought in the prison context, which would run counter to the Supreme Court's ruling in *Carlson* and [this Court's] recent ruling in *Bistrian*." *Mack*, 968 F.3d at 324. The district court's reliance on the PLRA as an example of "Congressional inaction in the area of prison litigation" that categorically precludes *Bivens* claims in that context thus conflicts with this Court's settled precedent.

Second, the Court suggested that Mr. Mammana's claim would unnecessarily involve the courts in "complex and intractable" matters of prison administration. JA 8–9 (citing *Bistrian*, 912 F.3d at 94). Here too, this putative separation-of-powers factor was raised and rejected in *Bistrian*. As in *Bistrian*, Mr. Mammana's deliberate indifference claim "challenges particular individuals' actions or inaction in a particular incident." *Bistrian*, 912 F.3d at 93. Given such claims "have been allowed

for many years, there is no good reason to fear that" Mr. Mammana's claim "will unduly affect the independence of the executive branch in setting and administering prison policies." *Id.* As this Court put it, Mr. Mammana's claim is "straightforward." *Mammana I*, 934 F.3d at 370. This Court specifically noted that his allegations do *not* involve "balancing the rights of incarcerated citizens with the administrative judgment of prison officials." *Id.* Housing a prisoner in a frigid room without blankets or warm clothing and keeping the lights on 24 hours a day to deprive them of sleep amounts to the denial of "the minimal civilized measure of life's necessities." *Id.* at 374 (citing *Wilson v. Seiter*, 501 U.S. 294, 304; *Walker v. Schult*, 717 F.3d 119, 126 (2d Cir. 2013); *Gaston v. Coughlin*, 249 F.3d 156, 164 (2d Cir. 2001); *Harper v. Showers*, 174 F.3d 716, 720 (5th Cir. 1999)). There is nothing "complex" or "intractable" about these unconstitutional deprivations in a "straightforward" deliberate indifference case such as this one.

To be sure, there have been cases in which this Court has held a prisoner suit would upset the separation of powers, but they each involved circumstances that would have involved a searching inquiry into prison administration. For example, in *Bistrian*, after recognizing a *Bivens* claim for the prisoner's deliberate indifference claim, this Court declined to recognize a *Bivens* cause of action for a punitive-detention claim because it would "more fully call[] in question broad policies pertaining to the reasoning, manner, and extent of prison discipline." 912 F.3d at 94.

The Court contrasted the plaintiff's punitive-detention claim with the "medical care issues" involved in *Carlson*, which "d[id] not require analysis of the reasoning, motivations, or actions of prison officials in the same way a punitive-detention analysis would." *Id.* at 95 n.23. Similarly, in *Mack v. Yost*, 968 F.3d 311 (3d Cir. 2020), this Court held special factors weighed against recognizing a new *Bivens* cause of action for a former prisoner's First Amendment retaliation claim alleging prison staff wrongfully fired him from his paid work assignment after he complained about anti-Muslim harassment. Like the punitive-detention claim rejected in *Bistrian*, the plaintiff's First Amendment claim in *Mack* would require an analysis of the reasoning and motivations of prison officials. *Id.* at 322. And because, in the Court's view, First Amendment claims "are easy to allege and difficult to prove," *id.* at 324, they "cannot be readily dismissed on the pleadings," *id.* at 325.

Here, by contrast, Mr. Mammana's theory of liability does not depend on the reasoning or motivations of prison officials. He need not prove that the decision to house him in the Yellow Room was unjustified (though it unquestionably was). He only needs to prove that the conditions in the Yellow Room involved an "objectively, sufficiently serious" deprivation and that prison officers were deliberately indifferent to the substantial risk of harm posed by that deprivation. "Addressing that incident will, it is true, unavoidably implicate policies regarding inmate safety and security," but, as this Court recognized in *Bistrian*, "that would be true of practically

all claims arising in a prison." *Bistrian*, 912 F.3d at 93. Just because prison policies *may* be implicated does not mean that any official Bureau of Prisons policy must be changed. In his briefing below, Lieutenant Barben identified no prison policies that call for the imposition of such unbearable conditions for a disfavored prisoner. To the contrary, Bureau of Prisons policy requires prisons to keep cells in the Special Housing Unit (SHU) "appropriately heated" and to provide prisoners "blankets, a pillow, and linens for sleeping," 28 C.F.R. § 541.31(d), and clothing that is "adequate to the temperature in the SHU," Bureau of Prisons Program Statement 5270.11 § 12 (Nov. 23, 2016)[2] (citing 28 C.F.R. § 541.31(c)); *cf. Lanuza v. Love*, 899 F.3d 1019, 1029 (9th Cir. 2018) (plaintiff's *Bivens* claim would not interfere with Executive Branch policy because alleged misconduct violated federal law). Indeed, it would be shocking if Bureau of Prisons policy authorized subjecting prisoners to four days of sleep deprivation.

Mr. Mammana's claim also stands in stark contrast to other cases in which the Supreme Court has declined to recognize a new *Bivens* cause of action based on separation-of-powers concerns. In *Abbasi*, for example, the Supreme Court rejected *Bivens* liability for high-ranking executive officials, not rank-and-file officers. The plaintiffs did not just challenge "standard law enforcement operations." *Abbasi*, 137

[2] *Available at* https://www.bop.gov/policy/progstat/5270.11.pdf.

S. Ct. at 1861. Rather, they targeted "major elements of the Government's whole response to the September 11 attacks." *Id.* Such claims bore "little resemblance to the" Court's prior *Bivens* cases, and they threatened to interfere with sensitive national-security policymaking at the highest levels of government. *Id.* at 1860–63. Likewise, in *Hernandez v. Mesa*, the Supreme Court rejected a *Bivens* claim brought by parents of a Mexican child shot across the United States-Mexico border by a Border Patrol agent. *See Hernandez v. Mesa*, 140 S. Ct. 735, 749–50 (2020). The Court held that special factors counseled against recognizing the claim, including the potential effect on foreign relations and national security, and the fact that statutory avenues for relief were largely limited to U.S. citizens. *Id.* at 744–50.

But Mr. Mammana's claim does not implicate any comparable concerns. Mr. Mammana challenges the conduct of a rank-and-file prison official that denied him basic necessities of civilized living. He does not challenge broad national policy. Instead, his claim focuses on the conditions in a single cell in a single federal prison facility. His suit is a far cry from the more exotic claims advanced by the plaintiffs in *Abbasi* and *Hernandez*. As the Supreme Court has consistently affirmed, the "purpose of *Bivens* is to deter individual federal officers from committing constitutional violations." *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 70 (2001); *see, e.g.*, *FDIC v. Meyer*, 510 U.S. 471, 485 (1994); *Minneci v. Pollard*, 565 U.S. 118, 130 (2012). Mr. Mammana's claim falls squarely within that purpose.

Third, the district court concluded that a deliberate indifference claim like the one Mr. Mammana advances here would impose "significant time and administrative costs." JA 9 (cleaned up). Yet again, this theory cannot be reconciled with binding circuit precedent. The district court's reasoning would slam the door on any further recognition of new *Bivens* claims in the prison context beyond the exact facts of *Carlson*. *Every* potential *Bivens* defendant is exposed to the "time and administrative costs" of litigation. *Abbasi* did not overrule *Bivens* or state that new *Bivens* claims are categorically off the table. And this Court held in *Bistrian* that courts *can* still recognize new *Bivens* claims in the prison context. *See Bistrian*, 912 F.3d at 92.

In any event, federal courts have ample tools at their disposal to control the costs inherent in defending any *Bivens* claim. That includes the PLRA, which imposes exhaustion requirements and other procedural hurdles "to eliminate unwarranted federal-court interference with the administration of prisons" and "to reduce the quantity and improve the quality of prisoner suits." *Woodford v. Ngo*, 548 U.S. 81, 93–94 (2006). If they can overcome those hurdles, prisoners must plausibly allege an Eighth Amendment violation, an extremely difficult substantive standard to meet. Plaintiffs must allege both a deprivation that is "objectively, sufficiently serious, resulting in the denial of the minimal civilized measure of life's necessities" *and* that prison officials had "a sufficiently culpable state of mind." *Mammana I*,

934 F.3d at 372–73 (cleaned up) (citing *Farmer*, 511 U.S. at 834). Even if plaintiffs meet that pleading requirement, qualified immunity then provides an extra layer of protection for prison officials. Under that doctrine, plaintiffs may not recover unless they show the defendant violated "clearly established law." *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985). And defendants may raise a qualified immunity defense on a motion to dismiss, thus sheltering prison officials from even the burden of discovery if the prisoner cannot meet this requirement. Taken together, these procedural and substantive requirements will ensure that prisoner mistreatment claims do not inundate the federal courts. The district court's prediction that prisoners will drag courts and prison officials into trivial disputes about "what color walls are permissible," JA 10, is thus unfounded.

This case illustrates that the costs and time required by such litigation need not be any more burdensome than other civil litigation involving federal employees. As this Court recognized when this case was last on appeal, Mr. Mammana's allegations describe treatment falling well below "the minimal civilized measure of life's necessities." *Mammana I*, 934 F.3d at 374. Prison staff forced Mr. Mammana to sleep in an extremely cold cell for days with no blanket, no warm clothing, and no toilet paper, depriving him of the basic human necessity of sleep. The conduct alleged here goes beyond the pale. Yet it will also not be unduly difficult or burdensome to litigate. If, as Lieutenant Barben suggests, Mr. Mammana's claim is

baseless, the discovery process will make that clear. The facts here are narrow. Mr. Mammana's lawsuit involves the conduct of a limited number of officers during a discrete time period. Allowing his case to proceed will not lead to the significant time and administrative costs the district court warned of. To the contrary, *Bivens* "must provide a remedy on these narrow and egregious facts." *See Lanuza*, 899 F.3d at 1021.

CONCLUSION

Mr. Mammana's deliberate indifference claim arises in an established *Bivens* context, and even if it did not there are no special factors counseling hesitation before recognizing this exceedingly modest extension of *Bivens*. The district court's order should therefore be reversed.

Respectfully submitted,

Dated: October 5, 2020

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COMBINED CERTIFICATIONS

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I hereby certify under Local Appellate Rule 46.1 that I am a member in good standing of the bar of the United States Court of Appeals for the Third Circuit having been duly admitted on in September 15, 2020.

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I hereby certify that this brief complies with the type-volume requirements and limitations of Federal Rule of Appellate Procedure 32(a). This brief contains 8,184 words in 14-point Times New Roman font.

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I hereby certify that on October 5, 2020, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Third Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

Dated: October 5, 2020

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