No. 22-2846

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

TONY FISHER, AKA KELLIE REHANNA,

Plaintiff-Appellant,

v.

JORDAN HOLLINGSWORTH, ET AL.,

Defendants-Appellees.

On Appeal from the United States District Court for the
District of New Jersey, No. 1:18-cv-16793
Before the Hon. Karen M. Williams, District Judge

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TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES iii

INTRODUCTION 1

ARGUMENT 4

I. Ms. Rehanna's Claim Was Timely Under New Jersey's Revival Statute And Equitable Tolling. 4

A. New Jersey's Revival Provision, N.J.S. § 2A:14-2b, Applies Because It Is Part And Parcel Of The State's General Personal Injury Statute Of Limitations. 4

B. Ms. Rehanna's Claim Is Subject To Equitable Tolling 12

i. Ms. Rehanna qualifies for statutory equitable tolling because the extreme trauma of sexual violence prevented her from timely filing. 12

ii. Ms. Rehanna qualifies for common-law equitable tolling because Defendants threatened her if she filed suit instead of waiting for the BOP review. 16

II. A *Bivens* Remedy Is Available For Ms. Rehanna's Failure-To-Protect Claim, As This Court Recognized In *Bistrian* and *Shorter*. 20

A. *Egbert* Does Not Call *Bistrian* or *Shorter* Into Question. 22

B. Under *Bistrian* and *Shorter*, Ms. Rehanna's Claim Does Not Implicate A New *Bivens* Context. 24

C. No Special Factors Counsel Against Permitting Ms. Rehanna's Claim To Proceed. 28

CONCLUSION 31

CERTIFICATE OF COMPLIANCE

CERTIFICATE OF VIRUS SCAN

CERTIFICATE OF COMPLIANCE OF IDENTICAL BRIEFS

CERTIFICATE OF SERVICE

TABLE OF AUTHORITIES

Cases **Page(s)**

Agostini v. Felton,
521 U.S. 203 (1997) 24

Alexander v. Sandoval,
532 U.S. 275 (2001) 31

Bistrian v. Levi,
912 F.3d 79 (3d. Cir. 2018) ..... *passim*

Board of Regents of Univ. of State of N.Y. v. Tomanio,
446 U.S. 478 (1980) 8

Bonneau v. Centennial Sch. Dist. No. 28J,
666 F.3d 577 (9th Cir. 2012) 9

Brown v. New Jersey State Prison,
No. 15-5669, 2015 WL 6122156 (D.N.J. 2015) 19

Bulger v. Hurwitz,
62 F.4th 127 (4th Cir. 2023) 22

Carlson v. Green,
446 U.S. 14 (1980) 11, 29

Chambers v. C. Herrera,
78 F.4th 1100 (9th Cir. 2023) 22

Chardon v. Fumero Soto,
462 U.S. 650 (1983) 8

Doe v. United States,
76 F.4th 64 (2d Cir. 2023) 19

Dunn v. Borough of Mountainside,
693 A.2d 1248 (N.J. App. Div. 1997) 18, 19

Egbert v. Boule,
596 U.S. 482 (2022) 3, 22, 23, 24

Erickson v. Pardus,
551 U.S. 89 (2007) 14

Farmer v. Brennan,
511 U.S. 825 (1994) 23, 24, 26

Gibbs v. Cross,
160 F.3d 962 (3d Cir. 1998) 13

Green v. Postmaster General of U.S.,
437 F. App'x 174 (3d Cir. 2011) 20

Hardin v. Straub,
490 U.S. 536 (1989) 5, 7, 8

Hedges v. United States,
404 F.3d 744 (3d Cir. 2005) 19

Johnson v. Railway Express Agency, Inc.,
421 U.S. 454 (1975) 8

Kach v. Hose,
589 F.3d 626 (3d Cir. 2009) 2, 10

Kane v. Mount Pleasant Cent. Sch. Dist.,
80 F.4th 101 (2d Cir. 2023) 6, 10

King-White v. Humble Indep. Sch. Dist.,
803 F.3d 754 (5th Cir. 2015) 10

Lake v. Arnold,
232 F.3d 360 (3d Cir. 2000) 14, 16

McCarthy v. Madigan,
503 U.S. 140 (1992), ... 29

Miller v. Beneficial Mgmt. Corp.,
977 F.2d 834 (3d Cir. 1992) 18

Owens v. Okure,
488 U.S. 235 (1989) 7, 10

Price v. New Jersey Mfrs. Ins. Co.,
867 A.2d 1181 (N.J. 2005) 16, 18, 19

Shorter v. United States,
12 F.4th 366 (3d Cir. 2021) ..... *passim*

U.S. v. Tann,
577 F.3d 533 (3d Cir. 2009) 24

United States v. Day,
969 F.2d 39 (3d Cir. 1992) 13

Varnell v. Dora Consol. Sch. Dist.,
756 F.3d 1208 (10th Cir. 2015) 6

Wilson v. Garcia,
471 U.S. 261 (1985) ..... *passim*

Woods v. Illinois Dep't of Children & Family Servs.,
710 F.3d 762 (7th Cir. 2013) 9

Xi v. Haugen,
68 F.4th 824 (3d Cir. 2023) 3, 4, 22

Ziglar v. Abbasi,
582 U.S. 120 (2017) 23, 25, 28, 29

Statutes

N.J.S. § 2A:14-2 2

N.J.S. § 2A:14-2b(a) ..... *passim*

Prison Litigation Reform Act of 1995. 110 Stat. 1321-71 29

Prison Rape Elimination Act, 34 U.S.C. § 30301 ..... 30, 31

Other Authorities

U.S. Court of Appeals for the Third Circuit, Internal
Operating Procedures, Chapter 9.1 21

INTRODUCTION

In 2013, Ms. Rehanna suffered incessant sexual harassment and threats of sexual violence from prisoners at FCI Fort Dix, culminating in repeated, violent rapes by a prisoner she only knew as "C." Those attacks occurred because prison officials, including Defendants, failed to take any steps to protect Ms. Rehanna despite knowing of the danger she faced. Then, after Ms. Rehanna was raped, Defendants threatened that if she filed suit before the Bureau of Prisons ("BOP") completed its investigation, she would be harmed—by both the BOP and by her rapist, C, who "would be able to hunt her down through the BOP's online inmate locator" wherever she went. App'x AA077 (Rehanna Decl. at 9 ¶ 75). As a result, Ms. Rehanna did not file suit until 2018, days after learning that the BOP had completed its investigation and substantiated her claim, but denied all relief.

New Jersey enacted a revival statute that applies to Ms. Rehanna's claim. That statute modifies New Jersey's general personal injury statute of limitations to allow "an action at law for an injury resulting from the commission of a sexual assault" that would "otherwise be barred" by the general statute of limitation to be commenced within two years of the

statute's effective date. *See* N.J.S. § 2A:14-2b(a). Defendants do not dispute that Ms. Rehanna's claim is timely under the revival statute, but they argue that it should be treated as a standalone "tort-specific statute of limitations," and thus does not apply to *Bivens* actions. Br. for Appellee 27. Defendants are incorrect: By its express terms, N.J.S. § 2A:14-2b(a) modifies the *general personal injury* statute of limitations, N.J.S. § 2A:14-2, by providing for revival—an issue that the Supreme Court has recognized is "interrelated" with the statute of limitations and thus must be carried over to *Bivens* actions. *Wilson v. Garcia*, 471 U.S. 261, 269 n.17 (1985); *see Kach v. Hose*, 589 F.3d 626, 640-41 (3d Cir. 2009).

Additionally, Ms. Rehanna's claim is timely under two different types of equitable tolling. First, New Jersey's statutory equitable tolling applies in situations where harms to a person's "mental state" prevent them from timely filing. N.J.S. § 2A:14-2a(b)(2). Those harms include the extreme, enduring trauma of the sexual harassment and rapes perpetrated against Ms. Rehanna. Defendants attempt to minimize the disabling effect of that trauma, but Ms. Rehanna has amply alleged facts supporting equitable tolling in her *pro se* complaint.

Second, New Jersey common law also recognizes equitable tolling in situations where a plaintiff is prevented from timely filing by officials' deception and intimidation. That doctrine applies here, as Defendant Janet Fitzgerald threatened Ms. Rehanna that if she filed suit before the BOP concluded its review, there would be "absolutely no safe housing" for her, and even if she were transferred to a different facility, her rapist and BOP officials would still be able to find and harm her. App'x AA052 (Compl. at 16 ¶ 96 n.24). Defendants again attempt to downplay these threats, but they are more than sufficient to warrant equitable tolling.

Finally, Defendants claim that Ms. Rehanna lacks a *Bivens* remedy, squarely contradicting this Court's decisions in *Bistrian v. Levi*, 912 F.3d 79 (3d. Cir. 2018), and *Shorter v. United States*, 12 F.4th 366 (3d Cir. 2021). Defendants argue that *Egbert v. Boule*, 596 U.S. 482 (2022), cast those decisions into doubt, but this Court has already rejected that overreading of *Egbert*. *See Xi v. Haugen*, 68 F.4th 824, 833 n.7 (3d Cir. 2023). *Bistrian* and *Shorter*, therefore, remain binding Circuit precedent, and they foreclose Defendants' argument. Ms. Rehanna's claim should proceed, and the decision below should be reversed.

ARGUMENT

I. Ms. Rehanna's Claim Was Timely Under New Jersey's Revival Statute And Equitable Tolling.

A. New Jersey's Revival Provision, N.J.S. § 2A:14-2b, Applies Because It Is Part And Parcel Of The State's General Personal Injury Statute Of Limitations.

Defendants do not dispute that, by its plain terms, N.J.S. § 2A:14-2b modifies New Jersey's general personal injury statute of limitations, N.J.S. § 2A:14-2. *See* Br. for Appellee 19-27. Defendants also do not dispute that Ms. Rehanna's claim is timely under New Jersey's general personal injury statute of limitations as modified by N.J.S. § 2A:14-2b. *See id.* Their only response is to mischaracterize N.J.S. § 2A:14-2b as a standalone, "tort-specific statute of limitations," and argue that the statute therefore does not apply to *Bivens* actions. *Id.* at 27. Defendants are incorrect: N.J.S. § 2A:14-2b is part and parcel of New Jersey's general personal injury statute of limitations, which both sides agree governs Ms. Rehanna's claim.

It is black letter law that a *Bivens* action is governed by not just the "chronological length of the limitation period" provided by the forum state's general personal injury statute of limitations, but also the state's accompanying "provisions regarding tolling, revival, and questions of

application." *Hardin v. Straub*, 490 U.S. 536, 539 (1989). In *Wilson v. Garcia*, 471 U.S. 261 (1985), for example, the Court made clear that "the length of the limitations period, and closely related questions of tolling and application, are to be governed by state law." *Id.* at 269. Those "closely related questions" include "tolling, *revival*, and questions of application." *Id.* at 269 n.17 (emphasis added). Courts may not "unravel" these rules from the general statute of limitations, "unless their full application would defeat the goals" of *Bivens*, compensation and deterrence. *Hardin*, 490 U.S. at 539.

N.J.S. § 2A:14-2b is an "interrelated" provision that modifies the general personal injury statute of limitations to provide for revival of claims within a fixed period of time. *Hardin*, 490 U.S. at 539. It applies "[n]otwithstanding the statute of limitations provisions of N.J.S. § 2A:14-2"—the general statute of limitations—and revives causes of action arising from sexual assault that "would otherwise be barred through the application" of that general statute of limitations for a period of two years from the date of enactment. N.J.S. § 2A:14-2b(a) (cleaned up). Applying it here, moreover, would serve, not defeat, *Bivens*'s twin goals of compensation and deterrence. *See* Opening Br. 39; *Hardin*, 490 U.S. at

541 (holding that "provid[ing] prisoners with additional time to assert their legal rights" advances Section 1983's and *Bivens*' shared "compensation goal").

Defendants try to twist *Wilson*'s use of the phrase "closely related questions of tolling and application" to exclude revival provisions like N.J.S. § 2A:14-2b, arguing that only provisions that apply to "*all* personal injury actions" are "closely related." Br. for Appellee 21.[1] But *Wilson* did not impose a requirement that tolling or revival provisions be generally applicable in order to apply in Section 1983 or *Bivens* actions. Rather, *Wilson* rejected tort- and claim-specific *statutes of limitations*. The Court held that Section 1983 claims are governed by the forum state's general personal injury statute of limitations, and not any individual statute of limitations that may correspond to "one of the ancient common-law forms of action." 471 U.S. at 272-73; *see id.* at 263-64 (noting and rejecting alternative limitations period provided by state law for non-personal

[1] *See also Kane v. Mount Pleasant Cent. Sch. Dist.*, 80 F.4th 101, 109 (2d Cir. 2023) ("A revival or tolling provision is closely related when it applies to *all claims* contained within a general statute of limitations for personal injury actions."); *Varnell v. Dora Consol. Sch. Dist.*, 756 F.3d 1208, 1213 (10th Cir. 2015) ("Only generally applicable tolling provisions—such as those based on minority, incapacity, and equitable grounds—should be incorporated.").

injury causes of action); *see also Owens v. Okure*, 488 U.S. 235, 249-50 (1989) ("[W]here state law provides multiple statutes of limitations for personal injury actions, courts considering § 1983 claims should borrow the *general or residual statute* for personal injury actions.") (emphasis added).

Once the proper statute of limitations is identified, however, all relevant "provisions regarding tolling, revival, and questions of application" apply, because they are "interrelated" with the limitations period. *Wilson*, 471 U.S. at 269 n.17; *see Hardin*, 490 U.S. at 539 ("In virtually all statutes of limitations the chronological length of the limitation period is interrelated with provisions regarding tolling, revival, and questions of application."). In other words, *Wilson* already determined that "questions of tolling and application" are "closely related questions" that travel with the personal injury statute of limitations. *Wilson*, 471 U.S. at 269. That is true regardless of whether the tolling or revival provisions apply to only certain claims.

For example, in *Hardin*, the Court applied a tolling provision applicable only to "prisoners and others suffering from legal disabilities." 490 U.S. at 540. The Court specifically rejected the defendant's argument

that *Wilson*'s emphasis on uniformity counseled against applying the tolling provision, even though it was not generally applicable in all cases. *See id.* at 544 n.14. To the contrary, the Supreme Court cited a number of cases applying tolling provisions regardless of whether they applied only in certain circumstances. *See Chardon v. Fumero Soto*, 462 U.S. 650, 655 (1983) (applying Puerto Rican tolling rule governing class actions); *Board of Regents of Univ. of State of N.Y. v. Tomanio*, 446 U.S. 478, 488 (1980) (applying a tolling rule applicable only where there is an independent and related cause of action pending); *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 463 (1975) ("Any period of limitations . . . is understood fully only in the context of the various circumstances that suspend it from running against a particular cause of action.").

Here, there is no question that New Jersey's *general* personal injury statute of limitations, N.J.S. § 2A:14-2—and not its separate statute of limitations governing sexual assault, N.J.S. § 2A:14-2a—governs Ms. Rehanna's claim. Nor is there a dispute that the relevant revival statute, N.J.S. § 2A:14-2b(a), modifies the general personal injury statute of limitations; indeed, it does so on its face. *See* N.J.S. § 2A:14-2b(a). Under

Wilson, that revival statute is "interrelated" with the general personal injury statute of limitations, and therefore must be applied as part of the relevant state law. *Wilson*, 471 U.S. at 269 n.17.

The out-of-circuit cases Defendants cite are not to the contrary, as they addressed claim-specific *statutes of limitations*, like *Wilson*, not revival provisions modifying the general personal injury statute of limitations. For example, in *Bonneau v. Centennial Sch. Dist. No. 28J*, 666 F.3d 577 (9th Cir. 2012), the court chose which of "[t]hree provisions of Oregon statute of limitations law" governed a Section 1983 claim: "the general personal injury statute, the minor tolling statute, and the child abuse statute." *Id.* at 579. The court held that, under *Wilson*, the general personal injury statute of limitations applied, not the "child abuse-specific statute." *Id.* Importantly, the court recognized that it was also required to "borrow the 'related' tolling statute" that modified the general personal injury statute. *Id.* at 580. The court simply declined to treat the child abuse statute of limitations "as a tolling provision," concluding that this would recreate the "confusion over the choice among multiple [statutes of limitations]" rejected by *Wilson* and *Owens*. *Id.*; *see also Woods v. Illinois Dep't of Children & Family Servs.*, 710 F.3d 762, 764

(7th Cir. 2013) (rejecting application of "the twenty-year limitations period contained in the Illinois Childhood Sexual Abuse Act"); *King-White v. Humble Indep. Sch. Dist.*, 803 F.3d 754, 761 (5th Cir. 2015) (rejecting "argument that Section 16.0045's specific limitations period for sexual assault claims should apply over the general two-year period"). [2]

As this Court recognized in *Kach v. Hose*, 589 F.3d 626 (3d Cir. 2009), state laws governing questions like tolling and revival apply unless those laws "contradict federal law or federal policy." *Id.* at 639. Defendants identify no such conflict, nor could they. As stated above, the goals of *Bivens* are compensation and deterrence. Opening Br. 25 (citing

[2] Several decisions have misconstrued *Owens*'s statement about "confusion" to mean that applying non-generally-applicable tolling or revival provisions would create impermissible confusion. *See, e.g.*, *Kane v. Mount Pleasant Cent. Sch. Dist.*, 80 F.4th 101, 109 (2d Cir. 2023). *Owens* did not address tolling or revival provisions at all: It held that "apply[ing] the state *statute of limitations* governing intentional torts . . . would succeed only in transferring the present confusion over the choice among multiple personal injury provisions to a choice among multiple intentional tort provisions." *Owens*, 488 U.S. at 244 (emphasis added). In other words, the Court rejected differentiating among claim-specific statutes of limitations regardless of whether those statutes governed specific personal injury claims, or specific intentional tort claims. *See id.* at 243. Instead, *Owens* required that the general or residual statute of limitations govern all § 1983 claims. *See id.* at 247-48 ("[T]he very idea of a general or residual statute suggests that each State would have no more than one.").

Carlson v. Green, 446 U.S. 14, 21 (1980)). In Ms. Rehanna's case, this lawsuit is her only chance at compensation. She cannot obtain injunctive relief because she was transferred out of FCI Fort Dix, nor can she obtain damages through the BOP's administrative grievance process. Supp. App'x SA0284 (Ex. C, Def.'s Motion to Dismiss). As a result, Defendants will face no liability—and thus no deterrent effect—for their failure to protect Ms. Rehanna. *Carlson*, 446 U.S. at 21 ("It is almost axiomatic that the threat of damages has a deterrent effect . . . surely particularly so when the individual official faces personal financial liability."). The BOP's treatment of Ms. Rehanna's claim reflects this lack of accountability. Though the investigation substantiated Ms. Rehanna's claim, officials neither notified her nor took any corrective action. Opening Br. 18-19.[3]

Therefore, applying N.J.S. § 2A:14-2b to Ms. Rehanna's claim would further, not defeat, the goals of *Bivens*. Under that statute, which modifies the general personal injury statute of limitations, Ms. Rehanna's claim is timely.

[3] The threat of internal discipline alone has done nothing, perhaps in part because of FCI Fort Dix's long documented insufficient safety measures. Opening Br. 11-12.

B. Ms. Rehanna's Claim Is Subject To Equitable Tolling.

Ms. Rehanna's claim is also timely for two additional, independent reasons: They are subject to both statutory and common-law equitable tolling. *See* Opening Br. 39.

i. *Ms. Rehanna qualifies for statutory equitable tolling because the extreme trauma of sexual violence prevented her from timely filing.*

Under New Jersey's statutory equitable tolling provision, the repeated rapes and sexual harassment that Ms. Rehanna suffered render her claim timely. New Jersey has made clear that courts must engage in a generous equitable tolling analysis, particularly in sexual assault cases, by requiring courts to consider Ms. Rehanna's "mental state, physical or mental disability, duress by the defendant, or any other equitable grounds." N.J.S. § 2A:14-2a(b)(2). Taken in the light most favorable to Ms. Rehanna, especially as a *pro se* litigant below, her allegations and incorporated documents show that she was prevented from filing by incapacitating PTSD, anxiety, and depression, all resulting from "extreme trauma" so severe that it left her in a "perpetual daze, disassociated from her real-life experience—for the first several years after she was raped." Opening Br. 41-42; App'x AA078 (Rehanna Decl. at 10 ¶ 85).

The district court reached the opposite conclusion only by failing to construe Ms. Rehanna's *pro se* allegations liberally and in a light most favorable to her. *See United States v. Day*, 969 F.2d 39, 42 (3d Cir. 1992) ("We must construe the allegations in Day's *pro se* petition liberally, and we may not subject his petition to the standards that we would apply to pleadings drafted by lawyers."); *Gibbs v. Cross*, 160 F.3d 962, 966 (3d Cir. 1998) (requiring district courts to construe "all allegations in favor of the complainant"). The district court acknowledged, for example, that Ms. Rehanna suffered "mental trauma as a result of the July 2013 incidents," but construed scattered references to her trauma in medical appointment notes to mean that she was not "in a completely dissociated state" and therefore could have filed suit. App'x AA013 (District Ct. Op. at 9); *see also* Br. for Appellee 33. The district court also expressly used evidence of her deteriorated condition against her, holding that evidence that her mental health was "worsening" in 2017 showed that she could have filed earlier. App'x AA014 (District Ct. Op. at 10).

That reasoning violates the well-established rule that plaintiffs, especially *pro se* plaintiffs like Ms. Rehanna, are entitled to have all factual allegations credited and receive "the benefit of all reasonable

inferences one can draw from these facts." *Lake v. Arnold*, 232 F.3d 360, 365 (3d Cir. 2000); *see Erickson v. Pardus*, 551 U.S. 89, 94 (2007). Ms. Rehanna's allegations and accompanying documentation demonstrate that the horrific sexual violence she suffered—which was substantiated by the BOP—created severe psychological and mental disabilities that prevented her from filing suit. App'x AA046-47 (Compl. at 22-23 nn.4-6); AA049 (Compl. at 24 n.14); AA079 (Rehanna Decl. at 11 ¶ 99). She describes experiencing "severe anxiety and panic attacks, deep depression," crippling PTSD, and constant fear for her life. App'x AA073 (Rehanna Decl. at 5 ¶ 38); AA077-78 (Rehanna Decl. at 10 ¶¶ 78, 82, 84). Those conditions are more than sufficient to create "equitable grounds" for tolling. *See* N.J.S. § 2A:14-2a(b)(2).

Contrary to the district court's reasoning, Ms. Rehanna's comment that she was "feeling good" on the day of a single examination does not change the fact that she struggled for years with these extreme psychological disorders. App'x AA013 (District Ct. Op. at 9). Indeed, in the same records cited by the district court and Defendants, the examiner reported that Ms. Rehanna was diagnosed with a "Panic Disorder," and "has been struggling with an increase in anxiety symptoms," including

"weekly flashbacks," "sleep disturbance," and "periods of untriggered physical symptoms including tightness in chest, swea[t]ing, and shaking." Supp. App'x SA0058-59 (Compl. Ex. C(2)). Ms. Rehanna specifically noted that she had "lost 15 pounds in the past couple of months." Supp. App'x SA0059 (Compl. Ex. C(3)). As Ms. Rehanna described it, she remained in "a constant break from reality" like she was "in a daze"; to this day, she has "almost no memory of any events or interactions from that time." App'x AA078 (Rehanna Decl. at 10 ¶ 85).

Nor does the fact that Ms. Rehanna's condition worsened in 2017 mean that she was capable of filing earlier. Ms. Rehanna's conditions were exacerbated in 2017 after she found out that the BOP had substantiated her claim of sexual violence. Supp. App'x SA0061 (Compl. Ex. C(5)). But those same records reflect that, prior to 2017, she had also experienced the same kinds of debilitating issues, including "PTSD symptoms secondary to traumatic experiences," such as "recurrent intrusive memories and dreams," "efforts to avoid distressing memories and thoughts and external reminders associated with the trauma," and "significant distress/impairment." *Id.* At this stage, Ms. Rehanna is entitled to "all reasonable inferences one can draw from these facts," *i.e.*,

that these issues precluded her from reliving her horrific trauma by writing out a legal complaint describing the attacks within the statute of limitations. *Lake*, 232 F.3d at 365.

ii. *Ms. Rehanna qualifies for common-law equitable tolling because Defendants threatened her if she filed suit instead of waiting for the BOP review.*

In addition, Ms. Rehanna's claim is timely under New Jersey common law principles of equitable tolling. New Jersey common law has long applied equitable tolling where a plaintiff has been "induced or tricked by [her] adversary's misconduct into allowing the filing deadline to pass." Opening Br. 42 (citing *Dunn v. Borough of Mountainside*, 693 A.2d 1248, 1258 (N.J. App. Div. 1997)). Tolling is appropriate in such cases because the statute of limitations would otherwise "inflict obvious and unnecessary harm upon individual plaintiffs without advancing the legislative purposes." *Price v. New Jersey Mfrs. Ins. Co.*, 867 A.2d 1181, 1185 (N.J. 2005). Here, Ms. Rehanna plausibly alleged that Fitzgerald's threats and intimidation caused her to miss the filing deadline. *See* Opening Br. 43.

The district court denied equitable tolling on the ground that Ms. Rehanna was transferred to a different facility, and therefore Fitzgerald

"had no ability to deter or interfere" with Ms. Rehanna filing suit. App'x AA012 (District Ct. Op. at 8). In doing so, the district court completely ignored Ms. Rehanna's key factual allegations: Fitzgerald's threats were expressly designed to follow her *wherever she went*. For example, Fitzgerald told Ms. Rehanna that if she filed suit she would be labeled a "snitch" and *the BOP* would be unable to protect her. App'x AA077 (Rehanna Decl. at 9 ¶ 75). Fitzgerald also warned Ms. Rehanna if she spoke to anyone about the rapes, C would track her down through the BOP inmate locator, even after she transferred. *Id.*[4] Fitzgerald even specifically threatened Ms. Rehanna *with transfer*: that if Ms. Rehanna "cause[d] problems by speaking out, the BOP would retaliate against her by keeping her from obtaining help from any attorneys and by subjecting her to "diesel therapy," *i.e.*, needlessly shipping her from prison to prison until she stopped complaining. *Id.* ¶ 77.

Fitzgerald's threats succeeded in creating a chilling effect on Ms. Rehanna. Even after her transfer, for example, Ms. Rehanna lived "in constant fear" of C "hunting [her] down." App'x AA077-78 (Rehanna Decl. at 9-10 ¶¶ 75, 81-82, 84). As a result, she did not file suit until she learned

[4] *See* https://www.bop.gov/inmateloc/.

of the completion of the BOP's review—on her own, as Defendants never informed her nor took any corrective actions despite substantiating Ms. Rehanna's claim. Those are classic grounds for equitable tolling. *See Dunn*, 693 A.2d at 1257 (applying equitable tolling because the defendant's "failure to report his criminal actions, in light of his clear duty as a police officer to do so, hindered plaintiff from filing suit"); *Miller v. Beneficial Mgmt. Corp.*, 977 F.2d 834, 845 (3d Cir. 1992) (applying equitable tolling where the defendants conduct "lulled the plaintiff into foregoing prompt attempts to vindicate his rights"); *Price*, 867 A.2d at 1185-86 (applying equitable tolling where the defendants' lengthy review of the plaintiff's documents lulled the plaintiff into not timely filing his claims).

Defendants respond by arguing that Captain Fitzgerald's threats do not qualify as "extraordinary circumstances" as required for federal equitable tolling. *See* Br. for Appellee 36-37 (citing *Frasier-Kane v. City of Philadelphia*, 517 F. App'x 106-07 (3d Cir. 2013)). As an initial matter, New Jersey law governs equitable tolling here, not federal law. And New Jersey law (like federal law) has long recognized that equitable tolling is appropriate when a defendant's "conduct contributed to the expiration of

the statutory period." *See Dunn*, 693 A.2d at 1258; *Price*, 867 A.2d at 1185; *see also Doe v. United States*, 76 F.4th 64, 71-72 (2d Cir. 2023) ("Among the extraordinary reasons that may justify equitable tolling . . . is a defendant's efforts to threaten or retaliate against a plaintiff if she files a claim against him.").[5]

Next, Defendants argue Ms. Rehanna failed to exercise "reasonable diligence" in pursuing her claim, precluding her from equitable tolling. Br. for Appellee 16-17. Ms. Rehanna has satisfied the diligence standard. Fitzgerald's threats not only prevented Ms. Rehanna from filing, the threats also led Ms. Rehanna reasonably to believe she had no obligation to file in the first place. App'x AA078 (Rehanna Decl. 10 at ¶¶ 88-89). And as soon as she learned of the BOP's completed investigation, Ms. Rehanna promptly filed suit. App'x AA078-79 (Rehanna Decl. 10-11 at ¶¶ 91, 93-98).

[5] The federal tolling cases cited by Defendants are not applicable even on their facts. For example, in *Hedges v. United States*, 404 F.3d 744 (3d Cir. 2005), this Court found no evidence that the government had attempted or threatened to prevent the petitioner from seeking legal counsel for his claims. *Id.* at 752. In addition, *Brown v. New Jersey State Prison* concerned equitable tolling in the *habeas* context which employs different rules for tolling. 2015 WL 6122156, at *2 (D.N.J. 2015).

Finally, Defendants' citation to *Green v. Postmaster General of U.S.*, 437 F. App'x 174 (3d Cir. 2011), is not on point. *See* Br. for Appellee 39. There, this Court affirmed the district court's dismissal because the plaintiff's record showed she had filed several other forms and complaints related to her claim, demonstrating she was able to file the complaint at issue within the statute of limitations period. *Green*, 437 F. App'x at 178. Defendants and the district court point to no other legal filings from Ms. Rehanna during the period between her rape and when she learned of Fitzgerald's deceit leading to this lawsuit. That is consistent with the chilling effect created by Fitzgerald's threats. Accordingly, unlike the plaintiff in *Green*, Ms. Rehanna's allegations amply support equitable tolling.

II. A *Bivens* Remedy Is Available For Ms. Rehanna's Failure-To-Protect Claim, As This Court Recognized In *Bistrian* and *Shorter*.

Upon finding that Ms. Rehanna's claim is timely under any of the grounds discussed above, this Court should reverse and remand to the district court for further proceedings. As Defendants now concede, this Court need not address whether a *Bivens* remedy exists for failure-to-protect claims like Ms. Rehanna's. *See* Br. for Appellee 39-40. And the

district court does not need assistance with this particular issue, since multiple published cases from this Court resolve the relevant question. *See* Opening Br. 46.

If the Court were to address the issue, however, it should find that a *Bivens* remedy is available, as it has already recognized in *Bistrian* and *Shorter*. *See* Opening Br. 46 (citing *Bistrian v. Levi*, 912 F.3d 79, 88-89 (3d Cir. 2018), and *Shorter v. United States*, 12 F.4th 366 (3d Cir. 2021)). This Court has twice held that claims that prison officials failed to protect a person like Ms. Rehanna from sexual assault by a fellow prisoner "fall[] comfortably" within an established *Bivens* context. *Shorter*, 12 F. 4th at 369; *see also Bistrian*, 912 F.3d at 91 ("[i]t seems clear, then, that the Supreme Court has, pursuant to *Bivens*, recognized a failure-to-protect claim under the Eighth Amendment."). Defendants' arguments to the contrary are simply an improper effort to relitigate those decisions. *See* Internal Operating Procedures of the Third Circuit Court of Appeals, Chapter 9.1 ("[N]o subsequent panel overrules the holding in a precedential opinion of a previous panel.").

A. *Egbert* Does Not Call *Bistrian* or *Shorter* Into Question.

Defendant's primary argument is that *Bistrian* and *Shorter* are no longer good law following the Supreme Court's decision in *Egbert v. Boule*, 596 U.S. 482, 491 (2022). Not so.

In fact, this Court has expressly affirmed *Bistrian* as good law following *Egbert*. In *Xi v. Haugen*, 68 F.4th 824 (3d Cir. 2023), this Court listed the types of claims which, post-*Egbert*, fall within the recognized *Bivens* contexts, and it listed *Bistrian* as validly "applying a *Bivens* remedy to Fifth Amendment failure-to-protect claim[s]." *Id.* at 833 n.7. Accordingly, Defendants' argument that *Bistrian* and *Shorter* have been called into question by *Egbert* is unavailing. Br. for Appellee 49.[6]

This Court was correct in holding that *Bistrian* and *Shorter* have not been disturbed by *Egbert*. That decision simply reiterated the general two-part test for recognizing a *Bivens* action that the Court set out

[6] Defendants cite out-of-circuit cases that have been decided since *Egbert* that are contrary to *Bistrian* and *Shorter*. Br. for Appellee 18, 49-50 (citing *Marquez v. C. Rodriguez*, 81 F.4th 1027 (9th Cir. 2023); *Bulger v. Hurwitz*, 62 F.4th 127 (4th Cir. 2023); *Chambers v. C. Herrera*, 78 F.4th 1100 (9th Cir. 2023). Those cases are not persuasive because, as this Court has explained, *Egbert* did not overrule or modify any existing *Bivens* context, but rather reiterated that additional *new* contexts should not be recognized lightly. *See Xi*, 68 F.4th at 833-35 & n.7.

several years earlier in *Ziglar v. Abbasi*, 582 U.S. 120 (2017). *See Egbert*, 596 U.S. at 491 (2022); *Abbasi*, 582 U.S. at 135-36. Because the lower court in *Egbert* agreed that the claims presented a new context, moreover, the Supreme Court only addressed the second step of the analysis; *i.e.*, whether "special factors" counsel hesitation. *Id.* at 492. It never made any holding on the question at issue here.

Defendants harp on *Egbert*'s categorization of recognized *Bivens* contexts. *See* Br. for Appellee 42. But that, too, was not new: The Supreme Court made the same categorization in *Abbasi*, which was decided well before *Bistrian* and *Shorter*. *Compare Egbert*, 596 U.S. at 491, *with Abbasi*, 582 U.S. at 131. In other words, *Egbert* did not add anything to the analysis that this Court already undertook in *Bistrian* and *Shorter*. *Bistrian*, 912 F.3d at 91 (recognizing that "[i]t may be that the [Supreme] Court simply viewed the failure-to-protect claim" under *Farmer v. Brennan*, 511 U.S. 825 (1994), "as not distinct from the Eighth Amendment deliberate indifference claim in the medical context" under *Carlson*).[7]

[7] Defendants' interpretation of *Egbert* would also effectively overrule the Supreme Court's decision in *Farmer*. There, the Supreme Court applied

As a result, *Egbert* falls far short of the standard required for an intervening decision of the Supreme Court to call into question a prior panel's decision. That standard is met only when a prior decision of this Court, like *Bistrian* or *Shorter*, "is *patently inconsistent* with the Supreme Court's pronouncements." *U.S. v. Tann*, 577 F.3d 533, 541 (3d Cir. 2009) (emphasis added). Here, *Egbert* is consistent with *Bistrian* and *Shorter*, as this Court recognized in *Xi*. *Egbert* simply reinforced what *Abbasi* already made plain: Expanding *Bivens* to a new context is a "disfavored judicial activity," especially in cases involving foreign policy and national security. *Egbert*, 596 U.S. at 491. No such extension is required here.

B. Under *Bistrian* and *Shorter*, Ms. Rehanna's Claim Does Not Implicate A New *Bivens* Context.

Bistrian and *Shorter* show that Ms. Rehanna's claim falls squarely within an established *Bivens* context. In *Bistrian*, for example, a pre-trial detainee brought a failure-to-protect claim under the Fifth Amendment, alleging he was physically assaulted by other prisoners because he had

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Carlson to recognize an Eighth Amendment claim against prison officials who failed to protect a transgender prisoner from sexual assault. *Farmer*, 511 U.S. at 830. The Supreme Court has expressly warned lower courts against assuming that a recent decision "by implication, overruled an earlier precedent," as Defendants suggest. *Agostini v. Felton*, 521 U.S. 203, 207 (1997).

cooperated with prison officials. 912 F.3d at 84. This Court recognized that the plaintiff's claim arose in the same *Bivens* context as *Farmer*, and thus did not require "any extension of *Bivens*" to a new context. *Id.* at 91; *see also Shorter*, 12 F.4th at 373 ("*Farmer* made clear . . . that an Eighth Amendment *Bivens* remedy is available to a transgender prisoner who has been assaulted by a fellow inmate."). So too here.

Defendants try to distinguish *Bistrian* and *Shorter* by picking out immaterial differences between the facts of those cases. Br. for Appellee 50-52. As explained in Ms. Rehanna's opening brief, however, this Court need only consider *meaningful* differences, not "trivial" ones, to determine whether a claim arises in a new *Bivens* context. Opening Br. 48; *Abbasi*, 582 U.S. at 149. For example, it is irrelevant for multiple reasons whether Ms. Rehanna was openly transgender at the time she was raped. *See* Br. for Appellee 50. To start, that fact does not distinguish Ms. Rehanna from the plaintiff in *Bistrian*, who was not targeted on the basis of his gender identity or presentation. *See* Opening Br. 51; *Bistrian*, 912 F.3d at 84. Even if it were a difference, moreover, it would not change the nature of Ms. Rehanna's claim such that a new *Bivens* context would be required. Rather, just "[a]s in *Farmer*, [Ms. Rehanna] seeks a remedy

against prison officials for their failure to protect [her] from prisoner-on-prisoner violence." *Bistrian*, 912 F.3d at 91. *Farmer*, as well as this Court's decisions in *Bistrian* and *Shorter*, "practically dictate[]" the same outcome in this case. *Id.*

It is also irrelevant that Ms. Rehanna notified one officer, as opposed to multiple officers, about the threats made against her. Br. for Appellee 52. In *Farmer*, the Supreme Court held that prison officials must respond when they are on notice of a serious risk of harm; the Court never created a requirement that a certain number of officers must separately receive notice from the plaintiff. *See Farmer v. Brennan*, 511 U.S. 825, 830 (1994); Opening Br. 52. Indeed, the plaintiff in *Farmer* did not allege that she told *anyone* about her risk of harm specifically—the allegations were about defendants' knowledge of the prison's violent environment and history of prisoner assaults, and of plaintiff's particular vulnerability due to her gender identity. 511 U.S. at 830-31. Ms. Rehanna, in contrast, notified Fitzgerald—a captain at the prison—of the incessant sexual harassment and threats that ultimately led to her being repeatedly raped. App'x AA036 (Compl. at 12 ¶ 59); App'x AA071 (Rehanna Decl. at 3 ¶¶ 21-23); App'x AA034-037 (Compl. at 12-13 ¶ 61).

As a result, Defendants were obligated to respond to the risk and protect Ms. Rehanna.

Finally, Defendants attempt to argue that Ms. Rehanna's case is meaningfully different from *Shorter* because of the length of time for which officials failed to protect Ms. Rehanna. Br. for Appellee 52. But the type of official action at issue here is the same as the actions at issue in *Bistrian* and *Shorter*. As this Court explained, "[U]nder our case law and the Supreme Court's longstanding precedent in *Farmer*, a federal prisoner ha[s] a clearly established constitutional right to have prison officials protect him from inmate violence and has a damages remedy when officials violate that right." *Shorter*, 12 F.4th at 373. Defendants cannot distinguish *Bistrian* and *Shorter* simply by dissecting the length of time at issue in each case.[8] What matters is that Defendants ignored Ms. Rehanna's need for protection, including her explicit requests to be moved away from her attacker, on the basis of protected characteristics which led to her being sexually assaulted. That puts Ms. Rehanna's case

[8] Indeed, if anything, the shorter length of time at issue here illustrates that Ms. Rehanna was in even more acute danger than the plaintiffs in *Bistrian* or *Shorter*—and in more dire need of protection.

squarely within the *Bivens* context recognized by *Farmer*, *Bistrian*, and *Shorter*.

C. No Special Factors Counsel Against Permitting Ms. Rehanna's Claim To Proceed.

Because Ms. Rehanna's claim does not implicate a new *Bivens* context, the *Bivens* inquiry ends there. Opening Br. 53. Even if this Court were to perform a special factors analysis, no factors counsel against permitting Ms. Rehanna's *Bivens* claim to proceed. Indeed, in *Shorter*, this Court "summarily rejected the presence of such special factors." 12 F.4th at 373 & n.7.

To start, no alternative remedies exist—Ms. Rehanna must seek damages through a federal action, or she will have no recourse for the egregious harms done to her. Ms. Rehanna suffered physical and psychological injuries as a result of "individual instances" of official officer misconduct, "which due to their very nature are difficult to address except by way of damages actions after the fact." *Abbasi*, 582 U.S. at 144. Other forms of relief, like injunctive relief, are not available, because Ms. Rehanna is no longer placed at FCI Fort Dix. Ms. Rehanna's only avenue to meaningful relief is a *Bivens* action.

Defendants point to the grievance procedures at FCI Fort Dix as an alternative remedial structure, Br. for Appellee 55-56, but those procedures are inadequate for several reasons. First, using the prison's grievance system could not lead to Ms. Rehanna being awarded any damages, as the BOP told Ms. Rehanna. *See* Supp. App'x SA0284 (Ex. C, Def.'s Motion to Dismiss) (grievance response stating, "[w]ith respect to your request for monetary damages, be advised that monetary relief is not available under the Administrative Remedy process"); *see also Carlson*, 446 U.S. at 22 (recognizing a proposed alternative remedy as "much less effective" where it did not permit punitive damages). Rather, the only remedies available through the prison grievance program are declarations acknowledging harm was done. Supp. App'x SA0284 (Ex. C, Def.'s Motion to Dismiss); *Bistrian*, 912 F.3d at 92.[9]

[9] The BOP process also is not an alternative to *Bivens* because it is an executive made administrative process—not a congressionally-enacted statutory scheme, as is required to displace *Bivens*. *See Abbasi*, 582 U.S. at 137 (explaining that the question is whether "*Congress* has created" an alternative process (emphasis added)); *McCarthy v. Madigan*, 503 U.S. 140, 151 (1992), *superseded in part on other grounds by statute*, Prison Litigation Reform Act of 1995. 110 Stat. 1321-71 ("Congress did not create the remedial scheme at issue here [the BOP process]," and thus the BOP process is not the sort of "equally effective alternative remedy" that can be "a substitute for recovery under the Constitution.").

Second, by BOP's own admission, no alternative remedy for Ms. Rehanna existed. Once Ms. Rehanna found out on her own that her rape claim had been substantiated, she filed for an Administrative Remedy, which was denied. App'x AA079 (Rehanna Decl. at 11 ¶¶ 94-97. On appeal, Ms. Rehanna was given permission by the BOP to file a federal lawsuit as her *only option for redress*.); Supp. App'x SA0284 (Ex. C, Def.'s Motion to Dismiss) ("If you feel you have suffered a loss from this assault and are entitled to compensation, you may consider filing a tort claim.").

Like the officials in *Shorter*, Defendants also point to the passage of Prison Rape Elimination Act ("PREA") as an alternative remedial scheme. Br. for Appellee 54-55. But as this Court explained, when Congress passed PREA in 2003, well after the Supreme Court began limiting the availability of *Bivens* claims, Congress explicitly cited *Farmer* favorably in its preamble, indicating congressional acquiescence to that category of recognized *Bivens* actions. *Shorter*, 12 F.4th at 373 n.7; 34 U.S.C. § 30301(13). As a result, PREA only confirms that a *Bivens* action is available here. And in any event, PREA has no private right of action, and so cannot provide Ms. Rehanna with any remedy. *See*

34 U.S.C. §§ 30301-30309; *see also Alexander v. Sandoval*, 532 U.S. 275, 286-87 (2001).

Finally, contrary to Defendants' contention, allowing a *Bivens* action to proceed here, as this Court has already done for substantially similar failure-to-protect claims, would not create unpredictable outcomes for the BOP. Br. for Appellee 57-58. Federal prisoners already bring failure-to-protect claims under *Farmer* and have done so for decades, as this Court recognized in *Bistrian* and *Shorter*. Ms. Rehanna's action is no different. If this Court reaches the *Bivens* issue, it should hold that Ms. Rehanna's claim can proceed.

CONCLUSION

For the foregoing reasons, the Court should reverse the district court's dismissal and remand for further proceedings.

Respectfully submitted,

Dated: December 21, 2023 */s/Elena S. Meth*

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a), I certify that this brief complies with the type-volume limitation set forth in Federal Rule of Appellate Procedure 32(a)(7)(B) because this brief contains 6,419 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f). This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Century Schoolbook font.

Dated: December 21, 2023

/s/ Elena S. Meth

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Pursuant to the Third Circuit Local Appellate Rule 31.1(c), I hereby certify that a virus detection program was performed on this electronic brief/file using Sophos, version 2023.1.3.6, last updated December 21, 2023 and that no virus was detected.

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Pursuant to the Third Circuit Local Appellate Rule 31.1(c), I hereby certify that the text of the electronic brief is identical to the text in the hard, paper copies of the brief.

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CERTIFICATE OF SERVICE

I hereby certify that on December 21, 2023, I electronically filed the foregoing *Reply Brief of Appellant* with the Clerk of the Court for the United States Court of Appeals for the Third Circuit by using the appellate CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Dated: December 21, 2023

/s/ Elena S. Meth