23-6416

IN THE

United States Court of Appeals for the Second Circuit

ANTONIO T. BALLARD,

Plaintiff-Appellee,

v.

L DUTTON, LIEUTENANT,

Defendant-Appellant.

On Appeal from the United States District Court for the Northern District of New York, No. 21−CV−1248

CORRECTED BRIEF OF PLAINTIFF-APPELLEE ANTONIO T. BALLARD

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page(s)**

Statutes

INTRODUCTION

Antonio Ballard was transferred to FCI Ray Brook after being assaulted and stabbed because of his sex offender status. A-2. At FCI Ray Brook, he feared for his safety for the same reason, and explained all of this to Defendant Lucas Dutton. A-7. In response, Dutton admitted that "he was well aware of [Mr. Ballard's] past victimization, and vulnerability," and the likelihood of his "being a victim of further assaults if he was returned to general population." *Id.* Yet Dutton refused to move Mr. Ballard to protective custody because—fearful of being labeled a "snitch"—Mr. Ballard did not identify the names of the individuals who had threatened him. *Id.* Dutton repeated that if Mr. Ballard did not provide him with the names of prisoners who were threatening him, Dutton "would not provide [Mr. Ballard] with the needed protection *no matter how much he . . . required it*." *Id.* (emphasis added).

As the district court correctly concluded, Mr. Ballard stated a claim under *Bivens* by alleging that Dutton failed to protect Mr. Ballard from the known dangers posed by other prisoners. Mr. Ballard's case falls squarely within the *Bivens* context recognized by the Supreme Court in *Farmer v. Brennan*, 511 U.S. 825 (1994), nearly thirty years ago. The Supreme Court has never overruled *Farmer*, and this Court cannot do so, as Dutton urges.

Nor is Dutton entitled to qualified immunity at this early stage in the litigation. The district court correctly held that Mr. Ballard's complaint alleged a classic

failure-to-protect claim under *Farmer*. And no reasonable officer would turn a blind eye to a known and expressly acknowledged danger of assault, as Dutton did here. The Court should affirm.

STATEMENT OF THE CASE

A. Factual Background

Antonio Ballard was transferred to FCI Ray Brook after being subjected to a series of assaults and stabbings at another federal facility, where he was targeted because of his status as a sex offender.[1] A-2. Shortly after Mr. Ballard arrived at FCI Ray Brook, he told an officer ("Officer Doe") that he had concerns about his safety and that without protection from the officers, he did not feel safe walking around the complex, which includes an "Active Yard." *Id*. When Mr. Ballard told Officer Doe what his charges were, Officer Doe told Mr. Ballard he would "most likely be stabbed" while on the compound. A-3.

Mr. Ballard immediately asked Officer Doe to be placed under protective custody, and Officer Doe replied that he would need to speak with a Special Investigative Supervisor ("SIS"). A-2. Mr. Ballard spoke with two SIS officers, explaining that "he was deeply concerned and feared that" he would likely be stabbed, "a concern now enhanced" by what Officer Doe had told him. A-2-3.

[1] Mr. Ballard provided notice to the officers at FCI Ray Brook numerous times about his injuries from these assaults and stabbings. *See* ECF 51-1, Plaintiff's Resp. to Motion for Summary Judgment Exhibits p. 12, 16.

Mr. Ballard again asked to be placed in protective custody, noting that he had been moved from his prior facility precisely "because he had been assaulted and stabbed due to his sex offender status." A-3.

The SIS officers told Mr. Ballard that he could not simply request protective custody services: To receive protection, he would have to quarantine for two weeks, "refuse the compound," thereby receive a disciplinary charge for "Refusing a Direct Order," and be placed in solitary confinement. *Id*. Mr. Ballard would have to repeat that process two more times before the facility would even begin an investigation into any threats to his safety. *Id*. Meanwhile, Mr. Ballard would be punished for receiving the required disciplinary charges, resulting in the denial of all privileges, including ready access to his attorney, for three to six months. A-3.

In other words, Mr. Ballard would have to choose between maintaining access to his attorney (and all other privileges inside the facility) and initiating the uncertain process for seeking protective custody. Because Mr. Ballard was actively working with his criminal attorney to file a direct appeal of his conviction, he opted to "prepare for the wors[t] and hope for the best" by remaining in general population and not pursuing the convoluted protection evaluation process.[2] *Id*.

[2] Indeed, Mr. Ballard continues to litigate his innocence. *See United States v. Ballard*, 727 F. App'x 6, 11-12 (2d Cir. 2018) ("[r]ather, this is one of the "rare" cases in which a defendant has demonstrated that prosecution error resulted in a conviction violative of due process, compelling vacatur and a new trial.").

After completing his initial transition into the facility, Mr. Ballard was introduced to another prisoner who went by the nickname "Chew." *Id*. During their conversation, Chew asked Mr. Ballard if he was an informant. *Id.* Mr. Ballard denied being an informant, but in the course of doing so, he revealed that he had been accused of prostituting minor females. *Id.* Mr. Ballard attempted to clarify that he was innocent because he did not know the victims were minors at the time. *Id*. Hoping to avoid the kind of assaults he suffered at his previous facility, Mr. Ballard provided the judicial opinion in his criminal case, his pre-sentence investigation report, and his sentencing transcript to Chew, which Mr. Ballard said would confirm his innocence. A-3-4.

Chew was not convinced. Later that day, Chew "summon[e]d" Mr. Ballard to his cell and told Mr. Ballard that he "ran his mouth too much and that [Mr. Ballard] knew the females in his case were minors." *Id*. Mr. Ballard immediately denied the allegation and, fearing for his life, told Chew he could produce testimony from the alleged victims to prove it. A-4. Chew responded that if Mr. Ballard could produce such documents he would be safe; otherwise, Chew would "assault, beat and rob [Ballard] of all his personal property and commissary." *Id*. During this interaction, Chew introduced Mr. Ballard to six other men whom Chew referred to as his associates. A-4.

A few days after this interaction, two of Chew's associates approached Mr. Ballard. A-4. They said they knew Mr. Ballard was a sex offender and warned him to "leave the compound before it [is] too late." *Id*. The men flashed shanks at Mr. Ballard and left. *Id*. Mr. Ballard told Chew what happened and Chew instructed Mr. Ballard to work quickly to get the sentencing documents together to prove he did not know the victims were underage. *Id*. After several meetings with Chew and his associates, Mr. Ballard began to believe Chew had nonetheless decided Mr. Ballard was a sex offender and that Chew would soon assault him because of it. A-4. As result he decided to stay away from Chew's associates out of concern for his safety. *Id*.

On August 13, 2021, Mr. Ballard sent the warden of FCI Ray Brook an electronic letter detailing the threats he received from Chew and his associates, as well as Mr. Ballard's previous attempts to get protective custody when he first entered the facility. A-4. In the letter, Mr. Ballard explained that if the transcripts he requested could not be given to him, he needed to be moved away from the compound where Chew and his associates were detained. *Id*.

Several days later, Mr. Ballard was called to the lieutenant warden's office, where a lieutenant warden accused him of lying about the allegations he made in the letter. A-4-5. This lieutenant warden asked Mr. Ballard for the names of the prisoners who were threatening him, but out of fear of being labeled a snitch, Mr. Ballard told

this lieutenant warden he had been off his psychiatric medication and was experiencing paranoia when he sent the letter. *Id.* Recognizing Mr. Ballard's allegations were true, the lieutenant warden again emphasized to Mr. Ballard that if he was being threatened, he would have to provide names if he wanted any protection. *Id*. Because he did not want to face the safety risks that would come from snitching, and because he believed he would be receiving the sentencing transcripts that would exonerate him in the eyes of his fellow prisoners, Mr. Ballard told this lieutenant warden he was safe for the time being and returned to general population. *Id*.

Mr. Ballard soon after received the transcripts, which Mr. Ballard immediately gave to Chew to prove his innocence. A-5. But on Friday, August 26, 2021, Mr. Ballard realized that several pages were missing from the second trial transcript. *Id*. Mr. Ballard explained the situation to one of Chew's associates, and said that he would ask for a new copy of the transcript to be sent in full. A-5. Chew's associates were not convinced and told Mr. Ballard that he "needed to find a new cell by [M]onday." A-5-6.

The day before Chew's deadline, Mr. Ballard went to his unit guard's office with a copy of the letter he sent to the warden earlier in the month, again asking for protective custody because he "was in fear of his life and safety." A-6. During this meeting, Mr. Ballard's request for protective services was denied—all Mr. Ballard

was offered was close watch by his unit officer, Kegle, until the end of his shift that day. A-6.

Later that same day, Mr. Ballard was brought to the Lieutenant's office where he told a different officer he was "fee[]ling suicidal and was thinking about killing himself," after which he was placed under constant observation and stripped of all personal belongings. A-6. While under suicide watch, Mr. Ballard told a staff member, Ms. Maiwald, that "his actual concern [was] for his safety from others and not himself." A-6. He noted that "since his arrival on the Ray Brook compound he did not feel safe," and asked if he could be moved to a different unit. A-6.

Ms. Maiwald contacted Mr. Ballard's unit counselor and unit manager, who said they would not put Mr. Ballard in protective housing despite his repeated requests. *Id*. Ms. Maiwald told Mr. Ballard that if he would provide names, he could be moved to a different facility in about two months. If not, a transfer would take a minimum of six to eight months. *Id*. Mr. Ballard was then taken off of suicide observation and was left unmonitored. *Id.*

After Mr. Ballard was discharged from suicide observation, he met with Lieutenant Dutton, who insisted Mr. Ballard would only be given one opportunity to provide names and receive protective custody. A-6-7. If Mr. Ballard refused to provide names, Dutton would return him to general population with no protection, despite knowing about the threats against him by other prisoners and Officer Doe's

recognition of the danger Mr. Ballard faced. A-7. Dutton "demand[ed] plaintiff provide him" with "the names of prisoners or [else]." *Id*.

Mr. Ballard, "in fear of being assaulted an[d] foreseeing further assaults occurring if he cooperated," pleaded with Dutton for protection, explaining yet again specifically why he was afraid for his safety: because "of his history of being victimized and suffering assaults to his false conviction and sex offender status." A-7. Dutton "assured plaintiff he was well aware of his past victimization, and vulnerability," and the likelihood of his "being a victim of further assaults if he was returned to general population." *Id.* Nonetheless, Dutton repeated that if Mr. Ballard did not provide him with the names of prisoners who were threatening him, "he would not provide plaintiff with the needed protection no matter how much he . . . required it." A-7.

Mr. Ballard "remain[ed] reluctant" to provide the names of individuals he feared, and so Dutton told Mr. Ballard his opportunity to receive any protection from the facility was "now closed," and any further requests would be denied. *Id*. Dutton "then gave plaintiff a [d]irect order to leave his office," and when Mr. Ballard "began to beg" for protection, Dutton picked up a canister of pepper spray and then "yell[ed]" at Mr. Ballard to leave his office, which Mr. Ballard did out of fear of getting sprayed. *Id*.

When Mr. Ballard returned to his unit, he was sent back to his original cell. A-7. Shortly after he returned, Chew entered Mr. Ballard's unit telling Mr. Ballard he was not safe and needed to leave immediately. *Id*. In one final attempt to avoid being assaulted, Mr. Ballard went to Officer Doe to again ask for protective services. A-7. After a short call with "the facility['s] Lieutenant['s] office," Officer Doe told Mr. Ballard he was being denied protective custody. A-7-8. Officer Doe told Mr. Ballard that "Lt. Dutton stated that he gave you an opp[o]rtunity to receive protective services, you denied it then, and he's denying you now." A-8. Officer Doe ordered Mr. Ballard to exit his office and return to his own cell.

Shortly after, Chew assaulted Mr. Ballard, as he had warned he would. A-8. Mr. Ballard was taken to the jail's medical facility, where his injuries were evaluated and documented. *Id*.

B. Procedural History

Mr. Ballard filed this civil rights action *pro se* against Dutton in November 2021. A-50. In relevant part, Mr. Ballard's suit alleged that Dutton failed to protect him from physical assault in violation of the Eighth Amendment. Dutton moved to dismiss, alleging Mr. Ballard had not stated a cognizable cause of action under *Bivens*. A-19; A-53.

Mr. Ballard filed an amended complaint as well as an opposition to defendant's motion to dismiss. A-1; A-54. The magistrate judge considered the

motion to dismiss in light of Mr. Ballard's amended complaint[3] and recommended granting Dutton's motion to dismiss. A-23. Applying the two-part test announced in *Ziglar v. Abbasi*, 582 U.S. 120, 135-36 (2017), the magistrate judge believed Mr. Ballard's failure-to-protect claim presented a new context with special factors counseling "hesitation with extending *Bivens* to the new claim." A-23-24.

The district court reviewed the magistrate's report *de novo* and rejected the portion of the magistrate's report and recommendation concerning the availability of Mr. Ballard's failure-to-protect claim under *Bivens*. A-45. The district court observed that in *Farmer v. Brennan*, 511 U.S. 825 (1994), "the Supreme Court addressed a failure-to-protect claim brought under the Eighth Amendment pursuant to *Bivens*, which was based on prisoner-on-prisoner violence." A-31. And although the Supreme Court in *Abbasi* did not include *Farmer* on its list of recognized *Bivens* contexts, "in the years prior to and concurrent with the *Farmer* decision, the Supreme Court assiduously focused on the threshold question of whether implied causes of action existed when plaintiffs sought to bring *Bivens* actions under a variety of different constitutional provisions," and so the Supreme Court's decision not to "comment[] on this threshold question" in *Farmer* suggested that it found the

[3] The magistrate judge determined that both due to Mr. Ballard's *pro se* status and the fact that his amended complaint contained no allegations inconsistent with his first complaint, it was proper for the court to consider the amended complaint instead of the original. A-15-16.

existence of such actions uncontroversial. A-33-34. Further, the district court held that modern cases including *Abbasi* and *Egbert v. Boule*, 596 U.S. 482 (2022), do not contradict the reasoning in *Farmer*, nor do they explicitly or implicitly overrule *Farmer*. A-35.

In short, the district court concluded, *Farmer* itself "continues to be the case that most directly deals with whether a *Bivens* remedy is available for a failure-to-protect claim resulting in physical injury." A-35-36. Like *Farmer*, Mr. Ballard presented a case of alleged failure to protect from prisoner-on-prisoner violence, such that his claim is not "different in a meaningful way from previous *Bivens* cases decided by th[e] Supreme Court," and so does not present a "new context" under the first step of the test for recognizing *Bivens* actions. A-36 (citing *Egbert*, 596 U.S. at 509).

The district court also rejected two other bases for Dutton's motion to dismiss. A-36.[4] First, the district court concluded that Mr. Ballard had plausibly alleged all the elements of a failure-to-protect claim under the Eighth Amendment. A-44. The district court concluded that Mr. Ballard's amended complaint met *Farmer*'s objective prong because he was "incarcerated under conditions posing a substantial risk of serious harm." A-39 (quoting *Farmer*, 511 U.S. at 834.). The district court

[4] Like the magistrate judge, the district court evaluated the motion to dismiss in light of the facts alleged in the Amended Complaint. A-38.

also rejected Dutton's argument that Mr. Ballard's "pleadings are devoid of facts indicating that he had faced assaults of the same character and under the same circumstances as the assault at issue [in *Farmer*]," and as such, Mr. Ballard plausibly alleged "that a substantial risk of inmate attacks was longstanding, pervasive, well-documented, or expressly noted by prison officials in the past…" A-41-42 (quoting *Farmer*, 511 U.S. at 842). The district court also held that Mr. Ballard pled facts "plausibly showing" Dutton knew of and disregarded an "excessive risk" to his safety in violation of the Eighth Amendment, meeting *Farmer*'s subjective prong. A-44.

Second, the district court held that Mr. Ballard's allegations sufficiently state a violation of clearly established law. A-44-45. The court explained that Mr. Ballard had adequately alleged a classic "Eighth Amendment failure-to-protect claim pursuant to *Bivens*" in violation of his clearly established rights, and therefore qualified immunity should be decided "on a motion for summary judgment when the details of the alleged deprivations are more fully developed." A-45.

Dutton filed a timely interlocutory appeal from the district court's denial of his motion to dismiss. A-47.

SUMMARY OF ARGUMENT

I.A. Mr. Ballard's claim does not present a new *Bivens* context. To the contrary, his failure-to-protect claim falls squarely within the *Bivens* remedy

recognized nearly thirty years ago in *Farmer v. Brennan*, 511 U.S. 825 (1994). More recent precedent, including *Ziglar v. Abbasi*, 582 U.S. 120 (2017), and *Egbert v. Boule*, 596 U.S. 482 (2022), did not overrule or call into question the precedent established by *Farmer*. The district court correctly concluded that Mr. Ballard's failure-to-protect claim is not "different in a meaningful way from previous *Bivens* cases decided by th[e Supreme] Court," and so does not arise in a new *Bivens* context. A-36; *Egbert*, 596 U.S. at 510.

B. Because Mr. Ballard's case does not present a new *Bivens* context, the inquiry ends there, and this Court has no need to consider special factors that may counsel against extending *Bivens*. However, should this Court perform a special factors analysis, it will find that none exist. For instance, no alternative remedial structure exists, as the Bureau of Prison's administrative remedy program is insufficient to handle Mr. Ballard's claims. In addition, there are no separation of powers concerns, as federal courts have regularly resolved failure-to-protect claims for decades under the parameters outlined by Congress in legislation shortly after *Farmer*. Accordingly, there is no reason to think that Congress is better equipped to create a damages remedy in these well-recognized circumstances.

II. Lieutenant Dutton is not entitled to qualified immunity. Mr. Ballard has provided more-than-sufficient allegations to state a claim under the Eighth Amendment challenging Lieutenant Dutton's violation of Mr. Ballard's clearly

established right to be protected from violence by other prisoners, as established in *Farmer*. And this is particularly the case given Mr. Ballard's status as a *pro se* litigant. Among other things, Mr. Ballard's amended complaint alleged that Lieutenant Dutton had knowledge of a substantial risk of serious harm to Mr. Ballard and that Lieutenant Dutton acted with deliberate indifference by refusing to put Mr. Ballard in protective custody unless he named names. Given those allegations, Lieutenant Dutton is not entitled to qualified immunity at the motion to dismiss stage. This Court should affirm.

ARGUMENT

I. The District Court Correctly Held That Mr. Ballard Has A Cause Of Action Under Bivens, As Recognized In *Farmer v. Brennan*.

As the district court correctly held, Mr. Ballard may pursue his Eighth Amendment failure-to-protect claim under *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971). The Supreme Court has set out a two-step inquiry that courts must apply when determining whether a *Bivens* suit is available: (1) whether the claim arises in a new *Bivens* context, and if so, (2) whether special factors counsel against recognizing a cause of action. *See Abbasi*, 582 U.S. at 136. Where, as here, a case does not implicate a new *Bivens* context, the inquiry ends. Under that well-established framework, the district court properly allowed Mr. Ballard's suit to proceed.

A. Mr. Ballard's Failure-to-Protect Claim Does Not Present a "New Context" Under *Bivens*.

i. Farmer *Applied* Bivens *In The Context Of Failure-To-Protect Claims Like Mr. Ballard's.*

In *Bivens*, the Supreme Court explained that "where federally protected rights have been invaded, it has been the rule from the beginning that courts will . . . adjust their remedies so as to grant the necessary relief." 403 U.S. at 392. Applying that principle, the Court expressly recognized a *Bivens* action in three circumstances: under *Bivens* itself, a Fourth Amendment claim against federal agents conducting an illegal arrest; under *Davis v. Passman*, 442 U.S. 228 (1979), a Fifth Amendment gender discrimination claim; and under *Carlson v. Green*, 446 U.S. 14 (1980), an Eighth Amendment claim for deliberate indifference to medical needs. *See Egbert v. Boule*, 596 U.S. 482, 490-91 (2022).

In addition, in *Farmer v. Brennan*, 511 U.S. 825 (1994), the Supreme Court applied *Carlson* to permit a *Bivens* action raising an Eighth Amendment failure-to-protect claim like Mr. Ballard's.[5] In *Farmer*, the plaintiff brought suit against federal prison officials, alleging the defendants failed to protect her from physical and

[5] *Farmer*, of course, is the "original" failure-to-protect case, and failure-to-protect claims under *Farmer* are routinely litigated in state and federal courts when prison officials fail to protect a prisoner from violence or harm. *See, e.g.*, *Shorter v. United States*, 12 F. 4th 366, 369 (3d Cir. 2021) (holding a prisoner who was stabbed and sexually assaulted by a fellow prisoner despite warning prison officials she was concerned about being assaulted "falls comfortably" within *Bivens*).

sexual assaults by other prisoners. 511 U.S. at 829-30. The Supreme Court specifically noted that the plaintiff had "filed a *Bivens* complaint," and cited both *Bivens* and *Carlson*. *Id.* at 830. Without questioning whether the plaintiff had a cause of action at all under *Bivens*, the Court proceeded to analyze the merits of his claim, clarifying the proper legal standard for proving "deliberate indifference." *Id.* at 835.

By proceeding to the merits of the claim, the Supreme Court recognized that *Bivens* provides a cause of action for failure-to-protect claims. If *Bivens* did not, the Court's decision would have started and ended there, as whether a *Bivens* claim exists is "'antecedent' to the other questions presented." *Hernandez v. Mesa*, 582 U.S. 548, 553 (2017) ("turn[ing] first to the *Bivens* question"); *see also Bistrian v. Levi*, 912 F.3d 79, 90-91 (3d Cir. 2018) (recognizing that by discussing the "deliberate indifference" standard, the Supreme Court implicitly found a *Bivens* cause of action). In its numerous decisions finding no *Bivens* cause of action, the Supreme Court started and ended its inquiry with whether a *Bivens* cause of action existed in the first place. *See Schweiker v. Chilicky*, 487 U.S. 412, 429 (1988) ("[b]ecause the relief sought by respondents is unavailable as a matter of law, the case must be dismissed"); *Bush v. Lucas*, 462 U.S. 367, 390 (1983) (concluding a First Amendment suit against a federal employer created a new *Bivens* context); *Chappell v. Wallace*, 462 U.S. 296, 297, 304-05 (1983) (holding enlisted military personnel cannot maintain a *Bivens* suit against superior officers for alleged

constitutional violations); *United States v. Stanley*, 483 U.S. 669, 671-72, 683-84 (1987) ("no *Bivens* remedy is available for injuries that 'arise out of or are in the course of activity incident to service") (citing *Feres v. U.S.*, 340 U.S. 135, 146 (1950)); *FDIC v. Meyer*, 510 U.S. 471, 473-74 (1994) (finding extending *Bivens* to procedural due process wrongful termination suit against a federal agency unsupported). As the district court noted, in the years prior to and concurrent with the *Farmer* decision, "the Supreme Court assiduously focused on the threshold question of whether implied causes of action existed when plaintiffs sought to bring *Bivens* actions under a variety of different constitutional provisions." A-33-34. It did not need to do the same in *Farmer* because *Bivens* and *Carlson* provided a cause of action.

This Court followed the same approach in *Walker v. Schult*, 717 F. 3d 119 (2d Cir. 2013). There, this Court held that a federal prisoner who suffered attacks from other prisoners had plausibly alleged a claim under *Farmer* to survive a motion to dismiss. *Id*. at 128-130. In other words, just like in *Farmer*, this Court found it uncontroversial that a *Bivens* cause of action exists, and proceeded to analyze the claim on the merits. Had no *Bivens* cause of action existed, this Court would have had no reason to proceed to the merits and rule in the plaintiff's favor. *Id.* at 129 (reversing the district court's decision "that Walker failed to allege objectively

serious conditions that denied him the minimal civilized measure of life's necessities").

The majority of this Court's sister circuits have interpreted *Farmer* in the same way. *See Bistrian*, 912 F.3d at 91; *Mourad v. Fleming*, 180 F. App'x 523, 524 (5th Cir. 2006) (per curiam) (recognizing *Farmer* as the standard for an Eighth Amendment failure-to-protect claim pursuant to *Bivens*); *Yeadon v. Lappin*, 423 F. App'x 627, 630 (7th Cir. 2011) (addressing an Eighth Amendment failure-to-protect claim pursuant to *Bivens* by citing *Farmer*); *Muick v. Reno*, 83 F. App'x 851, 854 (8th Cir. 2003) (per curiam) (explaining plaintiff did not allege deprivation sufficiently serious under *Farmer* to trigger the Eighth Amendment in a *Bivens* claim); *Skinner v. United States Bureau of Prisons*, 283 F. App'x 598, 599 (10th Cir. 2008) (failing to allege specific knowledge by prison officials defeats Eighth Amendment *Bivens* claim under *Farmer*); *Shorter v. United States*, 12 F.4th 366, 372-73 & n.4 (3d Cir. 2021)) (holding a prisoner who was stabbed and sexually assaulted by a fellow prisoner despite warning prison officials she was concerned about being assaulted "falls comfortably" within *Bivens*); *Sherman v. Lew*, No. 17-12809, 2018 U.S. App. LEXIS 35146, at *7 (11th Cir. 2018) (applying *Farmer* to an Eighth Amendment failure-to-protect claim because federal prison officials "have a specific duty to protect prisoners against violence at the hands of other prisoners" (quoting *Farmer*, 511 U.S. at 832-33)). For example, in *Bistrian*, 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 cooperated with prison officials. 912 F.3d at 84. The Third Circuit recognized that, even though the Supreme Court did not explicitly state it was recognizing a *Bivens* claim in *Farmer*, the Court implicitly did so by proceeding to discuss the deliberate indifference standard on the merits. *Id*. at 90-91.

Contrary to the weight of Circuit authority, including this Court's decision in *Walker*, Dutton argues that *Farmer* did not recognize a *Bivens* action at all. To do so, Dutton attaches talismanic significance to the fact that, in several recent decisions, the Supreme Court listed recognized *Bivens* actions and did not include *Farmer*. Appellant's Br. at 14-15. From this, Dutton assumes that *Farmer* is somehow overruled *sub silentio*. *See also Bulger v. Hurwitz*, 62 F.4th 127, 137-38 (4th Cir. 2023) (recognizing only "*Bivens*, *Davis*, or *Carlson*").

This is a vast overreading of those cases. The Supreme Court has been clear that lower courts "should [not] conclude [its] more recent cases have, by implication, overruled an earlier precedent." *Agostini v. Felton*, 521 U.S. 203, 237 (1997). This Court holds the same. *See U.S. v. Polouizzi*, 564 F. 3d 142, 160 (2d Cir. 2009) (holding if a lower court believes more recent cases would lead the Supreme Court to overrule its earlier precedent, "that is a decision we must leave to the Supreme Court"); *U.S. v. Martinez*, 413 F. 3d 239, 243 (2d Cir. 2005) (Sotomayor, J.) ("[t]hese

cases therefore provide no basis to question prior Supreme Court decisions"); *In re Sokolowski*, 205 F. 3d 532, 534-35 (2d Cir. 2000) (explaining that this Court is bound by the decisions of a prior panel unless overruled by the Supreme Court or this Court *en banc*).

Nothing in *Abbasi* or *Egbert* provides the type of clear statement required to overrule *Farmer*. To the contrary, those decisions "did not address, or otherwise cite to *Farmer*." *Bistrian*, 912 F.3d at 91. And as the Third Circuit observed, "[i]t may be that the [Supreme] Court simply viewed the failure-to-protect claim" under *Farmer* "as not distinct from the Eighth Amendment deliberate indifference claim in the medical context," under *Carlson*—a case that appears on the famous "list" of prior recognized *Bivens* causes of action. *Id*. at 91. Regardless, *Farmer*'s omission from the list of cases the Supreme Court laid out in *Egbert* and *Abbasi* is not enough to treat *Farmer*'s recognition of a *Bivens* cause of action for failure-to-protect claims as overruled.

Dutton also argues that this Court should treat *Farmer* as assuming without deciding that a *Bivens* cause of action existed, as the Supreme Court did in *Hartman v. Moore*, 547 U.S. 250 (2006). *See Egbert*, 596 U.S. at 498 ("assum[ing] that such a damages action might be available"); Appellant's Br. at 16-17. The Court in *Hartman*, however, explicitly clarified it was not addressing whether a *Bivens* cause of action existed. 547 U.S. at 257 n.5 ("[O]ur holding does not go beyond a definition

of an element of the tort."). It needed to do so because the Court has "never held that *Bivens* extends to First Amendment claims." *Egbert*, 596 U.S. at 498. The Court gave no such caveat in *Farmer*, and it did not need to because the Supreme Court had already recognized a *Bivens* remedy for Eighth Amendment claims in *Carlson*. *See* 446 U.S. 14. If *Farmer* had not recognized a *Bivens* cause of action, this Court could not have ruled for the plaintiff in *Walker*.

ii. Mr. Ballard's Claim Arises In The Same Context As Farmer.

Because *Farmer* permitted a *Bivens* suit raising a failure-to-protect claim to proceed, Mr. Ballard's failure-to-protect claim does not implicate a new *Bivens* context. The Supreme Court has recognized that, to arise in a new context, it is not enough for a case to differ in a "trivial" way from existing *Bivens* contexts; the differences must be "meaningful." *Abbasi*, 582 U.S. at 139, 149.

Here, there are no meaningful differences between Mr. Ballard's case and *Farmer*. Ms. Farmer, a transgender woman in a men's prison, suffered attacks from her fellow prisoners after being placed in general population. *Farmer*, 511 U.S. at 830. Mr. Ballard, like Ms. Farmer, was at a high risk of being targeted because of his sex offender status. A-3. Ms. Farmer was placed in general population after being transferred from another facility where she was sexually assaulted because of her gender identity, a fact she alleged the officials at FCI-Oxford knew. *Farmer*, 511 U.S. at 830-31. Again, like Ms. Farmer, Mr. Ballard was transferred from another

federal facility after he suffered beatings and stabbings because of his sex offender status. A-2. Like the officials in *Farmer*, prison guards, including Dutton, knew Mr. Ballard's history of attacks. A-6-7.

The recent out-of-Circuit decisions that Dutton cites are distinguishable because they did implicate new *Bivens* contexts. *See* Appellant's Br. 19 (citing *Tate v. Harmon*, 54 F.4th 839 (4th Cir. 2022), and *Mays v. Smith*, 70 F.4th 198 (4th Cir. 2023)). For example, *Tate* rejected a *Bivens* claim arising from placement in solitary confinement—a context of course different from the failure-to-protect claim in *Farmer* and this case. 54 F. 4th at 842, 846-47 ("We conclude that the 'new context' standard is sufficiently broad that Tate's conditions-of-confinement claim does indeed arise in a 'new context.'").

Similarly, in *Mays*, a federal pre-trial detainee brought a *Bivens* claim for alleged violations of his Fifth Amendment rights after federal officers refused to place him in protective custody. 70 F.4th at 200. Although this plaintiff raised a failure-to-protect claim, he did so under the Fifth Amendment rather than the Eighth, a difference the Fourth Circuit found substantial enough to create a new context. *Id.* at 203; *see also Marquez v. C. Rodriguez*, 81 F. 4th 1027, 1031 (9th Cir. 2023).

The Ninth Circuit's decision in *Chambers v. C. Herrera*, 78 F.4th 1100 (9th Cir. 2023), also arose in a different context. There, the plaintiff brought a failure-to-protect claim against an *officer* who assaulted him. 78 F. 4th at 1105-06. The court

explained that "[t]he alleged threat in *Farmer* was from other inmates, whereas the alleged threat here was from a prison officer," creating a different *Bivens* context. *Id.* at 1105 n.2.

Because Mr. Ballard's claim falls squarely under *Farmer* and *Walker*, and because Dutton does not point to anything to indicate the Supreme Court has overruled *Farmer*, Mr. Ballard's failure-to-protect claim does not create a new *Bivens* context.

B. As the District Court Correctly Held, Consideration of Any "Special Factors" Is Not Necessary, But In Any Case, No Special Factors Exist.

Because Mr. Ballard's claim does not implicate a new *Bivens* context, this Court's inquiry ends, and a *Bivens* remedy is available. *Bistrian*, 912 F.3d at 91. Even if this Court proceeded to the second step of the *Abbasi* framework, moreover, it should find that no special factors counsel against recognizing a *Bivens* cause of action here. *See Abbasi*, 582 U.S. at 135-36. Dutton relies on two alleged special factors: the existence of an alternative remedial structure, and separation-of-powers principles. Appellant's Br. 20. Neither is sufficient to foreclose a *Bivens* claim.

First, no alternative remedies exist. To the extent that any remedial structure exists within FCI Ray Brook, it is insufficient to redress Mr. Ballard's harm and should not preclude his seeking a *Bivens* remedy. Consider the type of harm Mr. Ballard experienced—he suffered physical and psychological injuries as a result of

"individual instances" of official conduct of 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. To this end, Mr. Ballard is seeking money damages for the harm done to him as a result of Lieutenant Dutton's failure to protect him. A-11. Using the prison's grievance system could not lead to Mr. Ballard being awarded any damages; rather, the only remedies available through the prison grievance program are declarations acknowledging harm was done. *See Bistrian*, 912 F.3d at 92.[6]

Dutton points to the passage of the Prison Litigation Reform Act (PLRA) a year after *Farmer* as reason to deny a *Bivens* remedy for Mr. Ballard. Appellant's Br. at 21. In fact the PLRA—if anything—suggests a congressional acquiescence to a *Bivens* actions in *Farmer*-type claims. The PLRA, as the Third Circuit in *Bistrian* explained, was intended to reduce "the quantity and improve the quality of prisoner suits." 912 F.3d at 93. Indeed, the PLRA only dictates the processes by which prisoners may bring *Bivens* suits, but does not suggest a congressional intent to

[6] 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").

foreclose a *Bivens* remedy altogether. *See Abbasi*, 582 U.S. 120, 149 ("[t]his Court has said in dicta that the Act's exhaustion provisions would apply to *Bivens* suits."). As the Third Circuit put it in *Bistrian*, "[t]he very statute that regulates how *Bivens* actions are brought cannot rightly be seen as dictating that a *Bivens* cause of action should not exist at all." 912 F.3d at 93.

Dutton's brief argument that the FTCA is an alternative remedy is also unavailing. Appellant's Br. 21. The Supreme Court made clear in *Carlson* that the FTCA is no substitute for prisoners' Eighth Amendment *Bivens* claims. *Carlson*, 446 U.S. at 19-20. Since then, the Supreme Court has reaffirmed that it is "'crystal clear' that Congress intended the FTCA and *Bivens* to serve as 'parallel' and 'complementary' sources of liability." *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 68 (2001); *see also Bistrian*, 912 F. 3d at 92 ("[T]he prospect of relief under the FTCA is plainly not a special factor counseling hesitation in allowing a *Bivens* remedy.").

Equally important, Dutton cannot even assert that the FTCA would apply to Mr. Ballard's case. Appellant's Br. 21. As Dutton notes, sovereign immunity has not been waived here, Appellant's Br. 21, and Mr. Ballard's claims under the FTCA were dismissed in this very case, because the magistrate judge concluded Mr. Ballard did not allege Dutton was "acting outside of the scope of his employment" to subject him to the FTCA in the first place. A-20; A-45. Because the BOP administrative

grievance process, PLRA, and FTCA all cannot provide damages for Mr. Ballard's injuries, there are no alternative remedies that counsel against awarding a *Bivens* remedy.

Second, there are no separation of powers concerns in allowing Mr. Ballard's *Bivens* claim to go forward. Appellant's Br. 23. For years, federal and state prisons alike have operated under the requirements in *Farmer*, whereby prison officials are only held liable when, "acting with deliberate indifference, [they] exposed a prisoner to a sufficiently substantial risk of serious damage to his health." 511 U.S. at 843. So it would be passing strange for undiscussed separation-of-powers concerns to make a difference three decades later in Mr. Ballard's case.

This is especially true given that Congress passed the PLRA nearly 30 years ago, setting some limits on prisoners' ability to bring suit—but not questioning or criticizing prisoners' ability to sue altogether. *See supra*, at 24-25; *Bistrian*, 912 F.3d at 93. As Dutton points to in *Abbasi*, A-22, the Supreme Court does note that Congressional "silence is notable" when determining congressional authorization, but that separation of powers concerns raised by such silence are lessened where petitioners are requesting damages, unlike where petitioners are requesting injunctive relief when a court is interfering with day-to-day prison operations. 582 U.S. 120, 144 (2017). Mr. Ballard's case is more like that of *Bivens* and *Bistrian*, where a single plaintiff is seeking monetary relief for harm created by a single

federal officer that would not otherwise rise to the level of concern for Congress to take notice. Because Mr. Ballard's case is "damages or nothing," separation of powers concerns are not high enough to warrant hesitation for recognizing a *Bivens* remedy.

II. Defendant Dutton Is Not Entitled To Qualified Immunity.

The district court also correctly held that Dutton is not entitled to qualified immunity at this stage. The bulk of his argument on this front relates to the first prong of the qualified immunity analysis—that is, whether Mr. Ballard alleged a constitutional violation. Appellant's Br. 26-30. He did, and the law was clearly-established at the time Dutton violated his rights.

Under *Farmer*, prison officials must "take reasonable measures to guarantee the safety of the [prisoners]." *Farmer*, 511 U.S. at 832. This requirement extends to protecting "prisoners from violence at the hands of other prisoners." *Id*. at 833. Plaintiffs seeking to establish an Eighth Amendment violation for failure-to-protect must prove (1) the plaintiff is "incarcerated under conditions posing a substantial risk of serious harm," and (2) that the defendant had a "sufficiently culpable state of mind" i.e., deliberate indifference. *Morgan v. Dzurenda*, 956 F. 3d 84, 89 (2d Cir. 2020) (citing *Farmer*, 511 U.S. at 834). It has been long established both from the Supreme Court and this Court that failing to provide protection to a prisoner at a serious risk of assault at the hands of another prisoner violates the Eighth

Amendment. *See Farmer*, 511 U.S. at 833 ("[P]rison officials have a duty to protect prisoners from violence at the hands of other prisoners"); *Ayers v. Coughlin*, 780 F. 2d 205, 209 (2d Cir. 1985) ("The failure of custodial officers to employ reasonable measures to protect an inmate from violence by other prison residents has been considered cruel and unusual punishment"); *Walker*, 717 F.3d at 128 (2d Cir. 2013) (plaintiff sufficiently alleged safety concerns posed by fellow prisoners exacerbated other conditions of confinement to create an Eighth Amendment violation).

First, Mr. Ballard alleged that he was incarcerated under conditions posing a substantial risk of serious harm—namely, assault by Chew and his associates. Mr. Ballard also alleged that Dutton was aware of, and deliberately chose to do nothing about, Mr. Ballard's repeated requests for protection from Chew and his associates. A-7. Specifically, Mr. Ballard alleged Dutton "assured [Ballard] he was well aware of [Ballard's] past victimization" and that Dutton would not provide protection "no matter how much he [plaintiff] required it" unless Mr. Ballard provided names. *Id*. Dutton ultimately turned Mr. Ballard away, without protection, which resulted in Mr. Ballard's assault by Chew. A-7-8.

Dutton argues that any injuries resulting from Chews' attack were insufficient to satisfy the objective prong of the deliberate indifference test. Appellant's Br. 28-29. As an initial matter, looking at the actual harm that Mr. Ballard experienced is not the proper inquiry. Instead, as this Court explained in *Lewis v. Siwicki*, 944 F. 3d

427 (2d Cir. 2019),[7] the objective prong turns "solely on whether the facts, or at least those genuinely in dispute . . . show the *risk* of serious harm was substantial." *Id.* at 431-32 (emphasis added). It was, as Dutton himself admitted to Mr. Ballard. A-7 ("[D]efendant assured plaintiff he was well aware of his past victimization, and vulnerability of being a victim of further assaults if he was returned to general population.").[8] Still, Dutton refused to provide Ballard with any protection, "no matter how much he [plaintiff] required it." *Id*.

In any event, even the actual injuries Mr. Ballard suffered constitute "serious harm." The physical injuries Mr. Ballard suffered are alone sufficiently serious under this Court's caselaw to show he was at risk of substantial harm. *See, e.g.*, *Walker*, 717 F. 3d at 129 ("it is at least plausible that housing six men in one cell poses additional, greater risks to the inmates' health and safety"). In addition, focusing only on the assault Mr. Ballard suffered does not represent the whole picture of the harm he experienced. A-40, 41. Where a plaintiff is *pro se*, his complaint must be construed liberally "to raise the strongest arguments [it]

[7] Dutton also cites to this Court's opinion in *Encarnacion v. Dann*, however that case is distinguishable because the plaintiff was never actually physically injured. 80 F. App'x 140, 141 (2d Cir. 2003).

[8] Contrary this statement, Dutton now contends that given the lower security level of FCI Ray Brook, the risk Mr. Ballard faced was not significant. Appellant's Br. 31. He is free to present this argument to the district court at summary judgment. This is a quintessential factual question. *See Lewis*, 944 F.3d at 432 (noting what risk is "substantial depends on the context of the inquiry").

suggest[s].” *Walker*, 717 F.3d at 124. As the district court noted, applying a liberal construction to his complaint, Mr. Ballard alleges he was “stabbed in other facilities of the BOP” before arriving at FCI Ray Brook, that at Ray Brook, he was threatened by Chew and other prisoners in Chew’s gang, and that ultimately these threats were serious enough for Mr. Ballard to inform members of the prison staff he “was feeling suicidal and was thinking about killing himself.” A-39-40; A-2, 4. Combined with his severe, psychological damage and constant fear of harm because of Dutton’s refusal to grant him protective custody, these injuries show Dutton ignored a serious risk of substantial harm. A-40, 41.

Dutton also reprises the same argument he made to Mr. Ballard when denying him protective custody in the first place: that no relief is available “absent sufficiently particularized information about an imminent threat.” Appellant’s Br. 8. In other words, Mr. Ballard needed to name names, or else he is out of luck. That argument was wrong then, and it is still wrong now.

As this Court has recognized, it is irrelevant whether the officer knew the specific prisoner who eventually committed the assault was likely to do so; it just matters whether the complainant’s pleas for help provided facts that show risk of a substantial harm generally. *Lewis*, 944 F. 3d at 431-32. Indeed, Dutton himself acknowledges this by observing “[t]he Supreme Court has recognized that under select circumstances a defendant may be held liable even absent identification of a

specific source of the threat of violence." *See* Appellant's Br. 30 (citing *Farmer*, 511 U.S. at 843-44). Any contention that Mr. Ballard's case does not arise under those circumstances is incorrect.

For that reason, Defendant's citation to *Morgan* is not on point here. In *Morgan*, this Court addressed a failure-to-protect claim against two groups of prison officers. The first, a pair of officers who received a vague, verbal report that the prisoner-plaintiff "feared for [his] safety" and was "specifically concerned about recreation time" while the officers were on shift in the prisoner-plaintiff's cell-block, and the second, a pair of officers who received a written report detailing the prisoner-plaintiff's specific safety concerns because he had been labeled a "snitch" for cooperating with an investigation at his prior facility. *Morgan v. Dzurenda*, 956 F. 3d 84, 87-90 (2d Cir. 2020). This Court found the first set of officers did not receive sufficient detail to notify them to "a substantial risk of serious harm," but that the second set of officers were fairly on notice to support a claim of deliberate indifference. *Id*.

Here, Dutton received repeated, specific notice about serious threats of violence. First, when Mr. Ballard was released from suicide watch, he spoke to Dutton and asked for protection from other prisoners because he was afraid of being assaulted based on his sex offender status. A-7. Next, after Mr. Ballard was sent back to his cell in general population, he asked his unit guard to call Dutton, again

requesting protective custody. A-7-8. Dutton again denied Mr. Ballard protection, almost immediately after which he was assaulted by Chew. A-8. Thus, the notice Dutton received is more like the notice the second set of officers received in *Morgan*, supporting a claim of deliberate indifference.

Second, Mr. Ballard alleged that Dutton acted with deliberate indifference. In his complaint, Mr. Ballard specifically detailed several conversations he had with Dutton about his safety concerns in the complaint. To start, "defendant assured plaintiff he was well aware of his past victimization, and vulnerability of being a victim of further assaults [] if he was returned to the general population." A-7. Dutton also threatened that "if plaintiff did not provide [defendant] the requested information he sought, he would not provide plaintiff with *the needed protection* no matter how much he [plaintiff] required it." *See Id.* (emphasis added).[9]

Mr. Ballard's written letter to Dutton, coupled with his face to face conversation where Dutton explained he "was well aware of his past victimization, and vulnerability of being a victim of further assaults," demonstrate that Dutton knew about a specific threat to Mr. Ballard's safety. A-7. That knowledge was more than enough to survive a motion to dismiss. A-44. At a minimum, the evidence

[9] Dutton also asserts notice of assaults and stabbings by prisoners at Mr. Ballard's prior facility is not enough to have put him on notice of any risk of substantial harm at FCI Ray Brook. Appellant's Br. 28. Again, this is contrary to the plausible allegations in the complaint.

presented in Mr. Ballard's amended complaint shows that needing to protect him from violence from other prisoners would have been "obvious" to every reasonable officer. *See Taylor v. Riojas*, 141 S. Ct. 52, 54 (2020); *Hope v. Pelzer*, 536 U.S. 730, 738 (2002) ("[w]e may infer the existence of this subjective state of mind from the fact that the risk of harm is obvious.").

Finally, the facts as Mr. Ballard alleged are sufficient to establish a violation of clearly established law. As this Court has clarified in the deliberate indifference context, "a case directly on point" is not required, "but existing precedent must have placed the statutory or constitutional question beyond debate." *Walker*, 717 F.3d at 125-26. As already discussed, several of this court's cases pre-dating the conduct at issue provided ample notice that Dutton's conduct was unconstitutional. For example, in *Lewis*, a prisoner sought protection against gang attacks he knew were imminent. 944 F.3d at 430. Though the defendant guards knew about this credible threat, both from the prisoner-plaintiff's own warnings and an intercepted note from the gang, they declined to provide the prisoner-plaintiff with any protection and, as predicted, he was stabbed. *Id*. at 431-32. Although the facility took protective measures for all prisoners by handcuffing them before recreation time, this Court found that action was insufficient in light of the prisoner-plaintiff's specific, credible safety concerns. *Id*. at 433. *See also*, *Farmer*, 511 U.S. at 845 ("a subjective approach to deliberate indifference does not require a prisoner seeking 'a remedy for

unsafe conditions [to] await a tragic event [such as an] actua[l] assaul[t] before obtaining relief'") (quoting *Helling v. McKinney*, 509 U.S. 25, 33-34 (1923)); *Morgan*, 956 F. 3d at 87-90 (receiving particularized, repeated requests for protection is sufficient to put an officer on notice for purposes of establishing deliberate indifference regardless of whether officer knew the identity of the threats).

Based on these decisions, it would have been clear to a reasonable officer in Dutton's position that he cannot just turn a blind eye to what he recognized as Mr. Ballard's request for "needed protection," A-7, due to his "past victimization, and vulnerability of being a victim of further assaults . . . if he was returned to the general population," *Id*.[10]

Because Mr. Ballard "'plausibly alleged' an Eighth Amendment failure-to-protect claim" under clearly established precedent, "further facts are required to decide the question of qualified immunity" in Dutton's favor. A-45. Accordingly, as the district court recognized, Dutton must re-raise the defense at summary judgment. *See Walker v. Schult*, 717 F. 3d 119, 130 (2d Cir. 2013); *Castro v. United States*, 34 F. 3d 106, 112 (2d Cir. 1994); *Warren v. Dwyer*, 906 F. 2d 70, 76 (2d Cir. 1990)

[10] Dutton misconstrues Mr. Ballard's position as requiring that a prison official "must grant protective custody to *any* inmate" regardless of history of prior assaults or specificity of request to the officer. Appellant's Br. 33. That is incorrect. Protective custody is required where, as here, the plaintiff has repeatedly notified officials of specific and credible threats of serious bodily harm—and that requirement has been clearly established for years in this Circuit.

("The better rule, we believe, is for the court to decide the issue of qualified immunity as a matter of law, preferably on a pretrial motion for summary judgment when possible.").

CONCLUSION

For the foregoing reasons, the Court should affirm the judgment below and remand for further proceedings.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(g)(1), I hereby certify that this Brief complies with the type-volume limitation of L.R. 32.1(a)(4)(A) because this brief contains 8,536 words, excluding the parts of the Brief exempted by Fed. R. App. P. 32(f).

I further certify that this Brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because the Brief has been prepared in the proportionally spaced typeface Times New Roman, 14-point font, using Microsoft Word 2016.

Date: November 2, 2023 *s/ Devi M. Rao*

CERTIFICATE OF SERVICE

I hereby certify that on December 27, 2023, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Second Circuit by using the appellate CM/ECF system.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

Date: December 27, 2023 *s/ Devi M. Rao*