No. 18-1202

IN THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MICHAEL LEIBELSON, Administrator of the Estate of Benjamin Leibelson, deceased

Plaintiff-Appellee,

v.

CHRISTOPHER COOK and DOUGLAS MEYER,

Defendants-Appellants.

On Appeal from the United States District Court
for the Southern District of West Virginia

BRIEF FOR APPELLANTS

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INTRODUCTION

After eight months of discovery, nineteen depositions, and thousands of pages of document production, Benjamin Leibelson offered nothing but bald and unsupported allegations against two Bureau of Prisons ("BOP") officials—Christopher Cook and Douglas Meyer—for alleged Eighth Amendment violations under *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971). Accordingly, the district court erred in denying Cook and Meyer qualified immunity at summary judgment, forcing them to face trial, because Leibelson's bare allegations failed to establish any violation of a clearly established constitutional right. The court also erred in expanding the *Bivens* remedy to the novel Eighth Amendment claim against Meyer despite the Supreme Court's decision in *Ziglar v. Abbasi*, 137 S. Ct. 1843 (2017).

STATEMENT OF JURISDICTION

Leibelson invoked jurisdiction under 28 U.S.C. §§ 1331, 1343, and 1367. On December 27, 2017, the district court denied summary-judgment motions from Cook and Meyer asserting qualified immunity, and the unavailability of a *Bivens* remedy against Meyer. JA 548–79. On February 22, 2018, they filed a timely notice of appeal. JA 580–81. This Court has jurisdiction under 28 U.S.C. § 1291. *See Plumhoff v. Rickard*, 134 S. Ct. 2012, 2019 (2014); *Hernandez v. Mesa*, 137 S. Ct. 2003, 2006 (2017) (noting, on interlocutory appeal, that implying a *Bivens* remedy is "antecedent to the other

questions presented") (internal citation omitted); *see also* W*ilkie v. Robbins*, 551 U.S. 537, 549 n.4 (2007).

STATEMENT OF THE ISSUES

1. Whether the district court erred in extending a *Bivens* remedy to Leibelson's Eighth Amendment claim against Meyer in the novel context of separate prison dining hall seating for Gay, Bisexual and Transgender ("GBT") inmates.

2. Whether the court erred in denying qualified immunity to Meyer on Leibelson's Eighth Amendment claim, after Leibelson explicitly abandoned the claim and failed to demonstrate a violation of clearly established law for an allegedly inadequate response to requests for a GBT dining table.

3. Whether the court erred in denying qualified immunity to Cook on Leibelson's Eighth Amendment claim that he touched her rectum for two to three seconds, during an authorized and routine visual search in the Special Housing Unit ("SHU"), because it does not rise to the level of a clearly established constitutional violation, and in any event, her inconsistent, unsupported, counterintuitive, and physically implausible allegations failed to raise a genuine issue of fact.

STATEMENT OF THE CASE

A. Factual Background

Leibelson was incarcerated at the all-male Federal Correctional Institution in Beckley, West Virginia ("Beckley") from November 2013, until her transfer in March 2014. JA 550. She identified as a transgender female, but did not take hormones and

had no plans for reassignment surgery. JA 425, 429, 550. Leibelson admitted her problems with Beckley staff did not begin until February 6, 2014, when she and her cellmate/fiancé, Jonathan Buell, were separated and taken to SHU for not standing at 4 p.m. "count," where all inmates must stand and be visible to officers. JA 443, 551–52. Leibelson conceded they were not standing, but were instead in bed together in the lower bunk with material hanging from the top bunk, shielding them from view. JA 446–49, 551–52. Although Leibelson and Buell denied sexual activity at that time, they both admitted engaging in sexual activity while incarcerated, knowing it was prohibited. JA 551.

1. Allegations Against Cook

This same date, February 6, 2014, after Leibelson and Buell were separated, is when Cook allegedly conducted an "unlawful strip search." JA 51–52, 552. All inmates are visually searched upon entering SHU, which requires inmates to remove all clothing, lift limbs and genitals, and bend and cough to demonstrate they have no concealed contraband. JA 552. At Beckley, these searches are conducted in a room with two holding cells, and, according to Leibelson, she was in the locked cell on the right with Cook outside the cell during the challenged search. JA 455–57. Leibelson claimed Cook reached his arm *through* the tray slot on the cell door, JA 487–91 (photographs), and inserted a finger into her rectum, *for two to three seconds*, before she moved out of reach. JA 463, 552. She alleged no injury until three years later at her deposition when she testified "it hurt" and "felt like it tore." JA 318, 465–66, 552–53.

In fact, Leibelson was seen by medical the day after the alleged "sexual assault," on February 7, 2014, but did not report it and denied having any injuries. JA 315–16. That is the sum total of Leibelson's "sexual assault" claim against Cook.

Leibelson did not report *any* alleged misconduct by Cook until, at the earliest, March 3, 2014—nearly a month later—to the Office of the Inspector General ("OIG").[1] JA 260, 266. The first time she reported the alleged "sexual assault" at Beckley was on March 11, 2014. JA 272–73. On that date, however, she told two different stories. She told psychologist Dr. Lynn Abeita that Cook "patted him down and touch [sic] his asshole," which Dr. Abeita contemporaneously documented in a memorandum to the Warden and in Leibelson's psychology records. JA 304, 317. Leibelson then told Chief Psychologist Dr. AnnElizabeth Card, that Cook instead inserted his finger in her rectum from outside a holding cell in SHU. JA 302–03.

After speaking with Dr. Card on March 11, 2014, Leibelson was placed in protective custody in SHU, and her staff-misconduct allegations, including the alleged "sexual assault," were referred to Special Investigative Agent Hussion. JA 219–20, 272–73, 557, 560–61. Notably, Buell made staff misconduct allegations on the same date and was also sent to SHU, where Buell and Leibelson were able to communicate through vents. JA 557–58. On March 26, 2014, Hussion attempted to take a statement from Leibelson for his investigation, but she refused to provide one. JA 220–22, 247,

[1] Note, the record of this communication to OIG does *not* include allegations of "sexual assault" by Cook. JA 242–43.

497–98. Cook, on the other hand, executed a sworn affidavit denying the allegations. JA 222–23. Both Cook and Hussion explained the conduct, as alleged by Leibelson, would pose a serious risk to officer safety. JA 205–06, 223. Hussion concluded his investigation in July 2014 and determined the allegations could not be sustained. JA 224, 249–50. His findings were reviewed and approved by BOP's Office of Internal Affairs. JA 251.

Although Leibelson would not talk to Hussion, she did speak about alleged mistreatment at Beckley to third-party medical providers after her release from prison. On February 18, 2015, before filing suit, Leibelson executed a sworn affidavit for her then-treating psychiatrist, under penalty of perjury and witnessed by her parents, attributing her "anxiety disorder" to the "brutality of inmates" who would subject her to "physical and sexual abuse." JA 583–85 (under seal). Nowhere in this sworn affidavit did Leibelson mention sexual assault by any Beckley staff member. *Id.* Even more confounding is that in February 2017, during this litigation, Leibelson told Dr. Ghislaine Fougy—her new psychiatrist and designated expert for her alleged PTSD—that she was held down and raped by *multiple* Beckley guards. JA 505–06, 508–09, 516. The first time Dr. Fougy heard a single officer allegedly inserted his finger into Leibelson's rectum for two to three seconds was from counsel for the United States at her deposition. JA 512.

2. Allegations Against Meyer

Meyer served as Captain and Chief Correctional Services Supervisor during Leibelson's incarceration at Beckley. JA 96–97. He supervised 150 officers and staff and was responsible for overall safety and security. *Id.* Leibelson's Complaint contains one specific allegation against Meyer—that he directed unknown persons at Beckley to destroy administrative remedies. JA 51–61. However, Leibelson abandoned this claim after Meyer attached copies of all 35 administrative remedies filed about Beckley to his summary-judgment motion. JA 102–09, 163–202. Leibelson also alleged being deprived of food by inmates who purportedly demanded sexual favors in exchange for a seat in the prison's dining hall. JA 55. The Complaint did not specify any defendant was aware of this alleged inability to eat, but Leibelson testified at deposition she reported to Meyer, the Warden, and her Unit Manager that GBT inmates experienced harassment from inmates in the dining hall. JA 480–84. She also testified with some ambiguity that, at most, she "didn't eat" for a little over two days. JA 478.

According to Leibelson, there were "long stretches of tables" in the dining hall—sixteen rows—and inmates separated themselves along racial and geographic lines. JA 431–32, 472–73. Because Leibelson was from the District of Columbia, she affiliated with other D.C. inmates and sat with them when she first arrived. JA 431–33, 472. Leibelson "got hit on all the time," and believed there was an expectation that

she would enter a sexual relationship with one of them. JA 433, 472. Leibelson, however, was in a relationship with Buell. JA 433, 551.

Leibelson alleged her dining-hall problems began sometime after February 6, 2014, the day she was separated from Buell. *Supra* pg. 3. After they were released from SHU for failing to stand for "count," they were reassigned to different housing units. JA 439–40, 554. Leibelson believed other inmates then viewed her as "available," and claimed that D.C. inmates said she could no longer sit at their table unless she was in a sexual relationship with one of them. *Id.* For a while, Leibelson and Buell sat at another table with inmates from Georgia. JA 440. But another inmate said it would "start a riot or … some type of confrontation" if Leibelson sat anywhere other than with D.C. inmates. JA 440–41.

Leibelson testified she reported the following to Meyer:

> I told Captain Meyer. I said, can you please see about getting an LGBT table, please? I mean, there is room—there is room in the back of the chow hall where you can put two more tables. I mean, you know, it—you know, we would appreciate it if you did that because we don't have anywhere to eat without, you know, having to submit to doing things that we don't want to do.

JA 483. According to Leibelson, Meyer said he would notify the prison's Special Investigative Service ("SIS") and have them "look into it." JA 484. Dissatisfied with this response, Leibelson "started writing and typing" complaints to prison officials. *Id.* Leibelson emailed the Warden, requesting "a table spicifically [*sic*] for the Gay-Bisexual-Transgender prisoners," so that they could "sit in the dining-hall without fear

of verbal or physical abuse from 'hetrosexual' [*sic*] prisoners." JA 101. Because Meyer believed Leibelson's email might relate to the Prison Rape Elimination Act ("PREA"), he forwarded it to Dr. Card, the prison's PREA Compliance Manager. JA 98–99, 525–29. Leibelson subsequently repeated her request for a GBT dining table in a formal administrative remedy. JA 179–85.

B. Prior Proceedings

Leibelson filed suit in 2015 against sixteen BOP officials under *Bivens* and the United States under the Federal Tort Claims Act ("FTCA"). JA 41–75. The FTCA claims were dismissed on exhaustion grounds, but later refiled in *Leibelson v. United States*, No. 5:15-cv-5440 (S.D.W. Va.) and consolidated for pretrial purposes.[2] Dkt. No. 49. Meanwhile, the *Bivens* defendants moved to dismiss on qualified immunity. Dkt. No. 33. While the motions were pending, they sought interlocutory appeal of the district court's refusal to stay discovery as a *de facto* denial of qualified immunity, which was dismissed for lack of jurisdiction. On December 28, 2016, the district court, ruling on the motions to dismiss, dismissed three high-level BOP defendants and a single equal-protection claim against the other twelve defendants based on "policy and custom."[3] JA 76–95. Extensive discovery commenced on the remaining claims for purported First, Fifth, and Eighth Amendment violations as well as conspiracy.

[2] The FTCA case is stayed pending this appeal.

[3] One defendant, Edwin Cauley, was never served nor appeared.

Leibelson voluntarily dismissed three defendants during discovery. Dkt. Nos. 145, 174.

On October 13, 2017, the remaining *Bivens* defendants moved for summary judgment on all claims, asserting qualified immunity. Dkt. Nos. 179–96. They also filed a consolidated motion arguing that special factors preclude expansion of *Bivens* to Leibelson's claims, save one,[4] based on the Supreme Court's decision in *Abbasi*. Dkt. No. 197. On December 27, 2017, the district court granted in part and denied in part the summary-judgment motions, dismissing all defendants and all claims except for two Eighth Amendment claims against Meyer and Cook. JA 548–79.

Relevant here, the court granted summary judgment for Meyer and Cook on the conspiracy claim and declined to recognize a new *Bivens* remedy for Leibelson's Fifth Amendment equal-protection claims, citing special factors. Although explicitly abandoned in Leibelson's opposition to summary judgment and the parties' proposed pretrial order (filed prior to the decision), Dkt. Nos. 211, 254, the court revived Leibelson's Eighth Amendment dining-hall claim against Meyer. The court acknowledged the claim against Meyer arises in a new *Bivens* context—as defined in *Abbasi*—but, nevertheless, recognized a new *Bivens* remedy, and denied qualified immunity. As to Cook, the court ruled he was not entitled to qualified immunity for the alleged brief "sexual" touching during the routine SHU search.

[4] Cook joined this motion for the equal-protection claims, but did not join on the Eighth Amendment claim against him.

On January 8, 2018, Leibelson passed away from causes unrelated to this case. Michael Leibelson, her father, was substituted as administrator of her estate in this Court on June 25, 2018.[5]

SUMMARY OF ARGUMENT

1. The district court erred by expanding *Bivens* to an Eighth Amendment claim against Meyer for his allegedly inadequate response to Leibelson's generalized complaints about prison dining hall seating. In *Abbasi*, the Supreme Court reaffirmed the significant limits to expanding *Bivens* in new contexts. Nevertheless, while acknowledging the Eighth Amendment claim against Meyer is a new *Bivens* context, the court engaged in the "now [] disfavored judicial activity" of implying a new cause of action. *Abbasi*, 137 S. Ct. at 1857. Though declining to expand *Bivens* to Leibelson's Fifth Amendment equal-protection claims, the court failed to apply the *same special factors* to the Eighth Amendment claim premised on day-to-day prison management, namely, dining-hall seating. Multiple special factors weigh against a *Bivens* expansion, including available alternative processes to protect Leibelson's interests, significant separation-of-powers concerns, system-wide costs associated with creating a damages remedy in the prison context, and practical considerations, like difficulty in creating a workable cause of action. Given these factors, Congress—not the court—is better

[5] A motion to substitute was previously filed in district court, however, the court declined to rule under Federal Rule of Civil Procedure 62.1.

positioned to decide whether to provide a damages remedy and, thus far, has elected not to do so.

2. Even if a *Bivens* claim were implied against Meyer, the district court erred in denying qualified immunity. The record failed to demonstrate a clearly established Eighth Amendment violation. For one, Leibelson failed to carry her burden of demonstrating an Eighth Amendment violation because she expressly *abandoned* that claim in response to Meyer's summary-judgment motion, instead pursuing only a Fifth Amendment equal-protection claim for alleged discrimination. It was improper for the court to *sua sponte* resurrect and advance a claim Leibelson—represented by counsel—expressly put aside.

In any event, Leibelson failed to establish a violation of clearly established law. No Supreme Court or Fourth Circuit precedent recognizes a constitutional right of GBT inmates (or any inmate) to claim special seating in a prison dining hall based on general fears of harassment. Moreover, Leibelson adduced no evidence she was denied "the minimal civilized measure of life's necessities." *Farmer v. Brennan*, 511 U.S. 825, 834 (1994). There was no evidence any specific inmate prevented Leibelson from eating, and no evidence Meyer was aware of any specific or imminent threat to Leibelson's ability to eat. Leibelson approached Meyer in the dining hall and requested a special table for GBT inmates because—as a group—they allegedly experienced harassment from other prisoners. Leibelson's own testimony confirms Meyer did not disregard even this generalized complaint. She testified that Meyer said he would

notify SIS so her concerns might be investigated. Under *Farmer*, Meyer's reasonable response to Leibelson's concerns insulates him from Eighth Amendment liability. *Farmer*, 511 U.S. at 845. Accordingly, the court erred in denying summary judgment.

3. The district court erred in denying Cook's summary-judgment motion on Leibelson's Eighth Amendment claim because the alleged touching of Leibelson's rectum—for, at most, two to three seconds—during an authorized and routine visual search does not give rise to a violation of clearly established law. This failure is further underscored by the record, which is so internally inconsistent, unsupported, counterintuitive, and physically implausible that no reasonable juror could believe her allegations of "sexual assault." The Fourth Circuit has repeatedly stressed that a motion for summary judgment cannot be defeated "where the only issue of fact is to determine which of the two conflicting versions of the plaintiff's testimony is correct." *Barwick v. Celotex Corp.*, 736 F.2d 946, 960 (4th Cir. 1984). This principle follows from the well-established rule that "[t]he mere existence of a scintilla of evidence in support of the plaintiff's position" will not defeat summary judgment. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986). Rather, there must be evidence on which the jury could *reasonably* find for plaintiff. Here, Leibelson presented the court with not two, but *four* different versions of an alleged "sexual assault" at Beckley. Under these circumstances, Leibelson's claim was so fatally at odds with itself that it failed to create a triable issue of fact. It was error for the court to permit it to proceed to trial.

STANDARD OF REVIEW

This Court reviews *de novo* a district court's decision to deny a summary judgment motion asserting qualified immunity. *Danser v. Stansberry*, 772 F.3d 340, 345 (4th Cir. 2014). Summary judgment is appropriate "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a).

ARGUMENT

I. Special Factors Counsel Against Expanding *Bivens* to the Novel Claim Against Meyer

In *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1860 (2017), the Supreme Court reiterated the significant limits to *Bivens*, cautioning courts to consider whether a remedy should be implied at all before reaching the merits of such claims. As the Court unequivocally held, "expanding the *Bivens* remedy is now a 'disfavored' judicial activity." 137 S. Ct. at 1857 (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 675 (2009)); *see also Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 75 (2001) (Scalia, J., concurring) ("*Bivens* is a relic of the heady days in which this Court assumed common-law powers to create causes of action—decreeing them to be 'implied' by the mere existence of a statutory or constitutional prohibition.… [W]e have abandoned that power to invent 'implications' …."); *De La Paz v. Coy*, 786 F.3d 367, 372 (5th Cir. 2015) ("The Supreme Court's later cases have disavowed that a *Bivens* suit is 'an automatic entitlement,' in fact, it is disfavored."), *cert denied*, 137 S. Ct. 2289 (2017). In fact, the Court has only recognized a *Bivens* remedy

three times: (1) *Bivens* itself, a Fourth Amendment claim against federal agents for a warrantless search and seizure in a home, 403 U.S. at 397; (2) *Davis v. Passman*, 442 U.S. 228 (1979), a Fifth Amendment claim against a congressman for firing his female secretary; and (3) *Carlson v. Green*, 446 U.S. 14 (1980), an Eighth Amendment claim against prison officials for their fatal failure to treat an inmate's asthma. *See Abbasi*, 137 S. Ct. at 1855. Significantly, the Court has not expanded *Bivens* in nearly four decades, going so far as to say "the Court's three *Bivens* cases might have been different if they were decided today." 137 S. Ct. at 1856. *Abbasi*, thus, requires courts to look at constitutional claims against federal officials "anew." *Vanderklok v. United States*, 868 F.3d 189, 199 (3d Cir. 2017). Before addressing the merits, courts must determine if the claim arises in a new context that differs "in a meaningful way from previous *Bivens* cases decided by [the Supreme Court]." *Abbasi*, 137 S. Ct. at 1859. If a case arises in a new context, then courts *must* consider whether special factors "counsel[] hesitation" in recognizing a new, non-statutory remedy. *Id.* at 1859–60.

Here, notwithstanding the Court's strong pronouncement against any *Bivens* expansion, the district court erred by implying a non-statutory remedy under the Eighth Amendment against Meyer premised on isolated complaints about the prison dining hall. Although acknowledging this claim presents a new context, the court failed to even consider the many special factors raised and, in particular, ignored the clear separation-of-powers concerns stressed in *Abbasi*. *See* 137 S. Ct. at 1858 ("[I]f there are sound reasons to think Congress *might* doubt the efficacy or necessity of a

damages remedy as part of the system for enforcing the law and correcting a wrong, the courts *must refrain* from creating the remedy in order to respect the role of Congress ….") (emphasis added).

A. Any Constitutional Claim Based on Dining Hall Seating is a New Context

Leibelson's Eighth Amendment claim premised on Meyer's allegedly inadequate response to complaints about nowhere to sit in the dining hall is distinguishable from core *Bivens* jurisprudence and, therefore, a new context requiring a special factors analysis. Per *Abbasi*, the proper benchmarks for "new context" are the three decisions—*Bivens*, *Davis*, and *Carlson*—in which the Supreme Court itself has implied a damages remedy against individual officials. *Abbasi*, 137 S. Ct. at 1855. Here, the district court correctly concluded (albeit without significant analysis) the claim against Meyer involved a new context. Although *Carlson* invoked the Eighth Amendment in the broad prison context, "even a modest extension is still an extension," and the constitutional right at issue is not, and cannot be, the only consideration when evaluating new context. *Abbasi*, 137 S. Ct. at 1864; *Vanderklok*, 868 F.3d at 207 n.21. The alleged unconstitutional conduct in *Carlson*—failure to provide life-saving medical care for an inmate's asthma resulting in death—is distinguishable from Leibelson's claim that Meyer inadequately addressed her concerns about dining-hall seating. *See Gonzalez v. Hasty*, 269 F. Supp. 3d 45, 64 (E.D.N.Y. 2017) (finding inmate's Eighth Amendment claims, including for denial of

more routine medical care, are new *Bivens* contexts because the "facts are significantly different" from *Carlson*), *appeal filed*, No. 17-3790 (2d Cir. Nov. 21, 2017); *Winstead v. Matevousian*, 2018 WL 2021040, at *3 (E.D. Cal. May 1, 2018) (distinguishing Eighth Amendment deliberate-indifference claims based on threats from officers and inmates from "failure to provide adequate medical treatment" in *Carlson*); *Stile v. United States*, 2017 WL 4779617, at *4 (D.N.J. Oct. 23, 2017) (explaining Eighth Amendment conditions-of-confinement claim is new *Bivens* context and inviting motion to dismiss based on *Abbasi*). Unlike *Carlson*, Leibelson alleged no identifiable injury resulting from Meyer's purported inadequate response to her dining-hall concerns—much less an injury as predictable, easily prevented, or of the magnitude presented in *Carlson* regarding vital medical care for an asthmatic inmate who could not breathe. Accordingly, as the district court found, the Eighth Amendment claim against Meyer is plainly a new *Bivens* context.

B. Special Factors Counsel Against Expansion of *Bivens*

Despite recognizing the new context, the district court, nevertheless, erred by taking the "significant step under separation-of-powers principles … to create and enforce a cause of action for damages," failing to even consider the many factors counselling hesitation. *Abbasi*, 137 S. Ct. at 1856. Significantly, the court ignored the availability of alternative processes and did not account for Congress' role and activity in regard to prisoners' rights claims. At bottom, "[t]he question is 'who should decide' whether to provide for a damages remedy, Congress or the courts? The answer most

often will be Congress." *Id.* at 1857 (quoting *Bush v. Lucas*, 462 U.S. 367, 380 (1983)). Here, the court erroneously concluded that it, not Congress, should unilaterally create a *Bivens* remedy for a garden variety conditions-of-confinement claim challenging not Meyer's failure to respond to Leibelson's dining-hall concern, but only the way in which he responded.

As *Abbasi* demonstrates, "special factors" must be considered in the *aggregate*. *See id.* at 1857–58, 1860–63; *see also Chappel v. Wallace*, 462 U.S. 296, 304 (1983) (explaining that "[t]aken together, the unique disciplinary structure of the Military Establishment and Congress' activity in the field constitute 'special factors'"). And, taken together, "special factors" need only "cause a court to hesitate" before precluding expansion of *Bivens* to a new context. *Abbasi*, 137 S. Ct. at 1858; *Arar v. Ashcroft*, 585 F.3d 559, 574 (2d Cir. 2009) (*en banc*) ("Hesitation is a pause, not a full stop, or an abstention; and to counsel is not to require. 'Hesitation' is 'counseled' whenever thoughtful discretion would pause even to consider."). In this case, the special factors present meet this "remarkably low" threshold and counsel against extending *Bivens* to the novel claim against Meyer. *Hernandez v. Mesa*, 885 F.3d 811, 823 (5th Cir. 2018).

1. Alternative Processes Preclude a *Bivens* Remedy

When deciding "whether to recognize a *Bivens* remedy," courts first consider "whether any alternative, existing process for protecting the interest amounts to a convincing reason for the Judicial Branch to refrain from providing a new and

freestanding remedy in damages." *Wilkie*, 551 U.S. at 550. *Abbasi* reaffirmed and built upon this principle: "if there is an alternative remedial structure present in a case, that *alone* may limit the power of the Judiciary to infer a new *Bivens* cause of action." 137 S. Ct. at 1858 (emphasis added); *see also id.* at 1863 ("[W]hen alternative methods of relief are available, a *Bivens* remedy usually is not."). Here, at the time of Leibelson's dining-hall concern, she had "some procedure to defend and make good on [her] position." *Wilkie*, 551 U.S. at 552; *see also Malesko*, 534 U.S. at 69 ("So long as the plaintiff had an avenue for *some* redress, bedrock principles of separation of powers foreclosed judicial imposition of a new substantive liability.") (emphasis added); *Vega v. United States*, 881 F.3d 1146, 1154 (9th Cir. 2018) ("'Alternative remedial structures' can take many forms, including administrative, statutory, equitable, and state law remedies.").

The BOP's Administrative Remedy Program is one alternative process that was available to Leibelson at Beckley. In fact, it is undisputed Leibelson pursued administrative remedies regarding much of the conduct alleged in this lawsuit, including her dining-hall complaint. JA 105–06. Under the Administrative Remedy Program, inmates can file grievances about any aspect of confinement, BOP must provide written responses in specified timeframes, and inmates may appeal institution-level responses to BOP's regional and central offices. *See* 28 C.F.R. §§ 542.10–.19. Importantly, this program, though administrative, is a result of congressional action.

Congress first noted its preference for administrative resolution of inmate grievances, rather than judicial intervention, when it enacted the 1980 Civil Rights of

Institutionalized Persons Act ("CRIPA"), which included a "limited exhaustion requirement," *Porter v. Nussle*, 534 U.S. 516, 523–24 (2002), and "authorized district courts to stay actions under [§ 1983] for a limited time while a prisoner exhausted 'such plain, speedy, and effective administrative remedies as are available,'" *Woodford v. Ngo*, 548 U.S. 81, 84 (2006). However, "CRIPA proved inadequate to stem the then-rising tide of prisoner litigation," *Ross v. Blake*, 136 S. Ct. 1850, 1858 (2016), and Congress, frustrated with the litigious inmate population, strengthened the exhaustion requirement by passing the Prisoner Litigation Reform Act of 1995 ("PLRA") to "bring … under control" the "sharp rise in prisoner litigation," *Woodford*, 548 U.S. at 84. Under the PLRA, "all available remedies must now be exhausted," they need not be "plain, speedy, and effective," and "[e]ven when the prisoner seeks relief not available in grievance proceedings, notably money damages, exhaustion is a prerequisite to suit." *Porter*, 534 U.S. at 524 (internal citation omitted); *see also* 42 U.S.C. § 1997e(a). It is "[b]eyond doubt, Congress enacted § 1997e(a) to reduce the quantity and improve the quality of prisoner suits; to this purpose Congress afforded corrections officials time and opportunity to address complaints internally before allowing the initiation of a federal case." *Porter*, 534 U.S. at 524–25; *see also Inmates of Suffolk Cnty. Jail v. Rouse*, 129 F.3d 649, 655 (1st Cir. 1997) (Congress sought to "oust the federal judiciary from day-to-day prison management" under the PLRA). Significantly, this legislation created no individually enforceable rights and Congress chose not to curtail the Attorney General's codified discretion to manage and operate

prisons. *See Abbasi*, 137 S. Ct. at 1865. Rather, by mandating exhaustion, Congress stressed the primacy of prison administrators in resolving problems of day-to-day prison life.

Moreover, while Leibelson may not have been satisfied with the outcome of the administrative remedies she filed about her incarceration at Beckley, an alternative process need not end favorably, and certainly does not have to result in monetary recovery, to foreclose *Bivens* expansion. *See Bush*, 462 U.S. at 388 (creation of a *Bivens* remedy does not hinge on whether an alternative, existing process offers "complete relief for the plaintiff"). Numerous courts post-*Abbasi* have recognized administrative remedies as an alternative process and special factor foreclosing *Bivens* expansion, including for the sort of routine conditions-of-confinement claims like the dining-hall claim here. *See, e.g.*, *Vega*, 881 F.3d at 1154; *Gonzalez*, 269 F. Supp. 3d at 60; *Andrews v. Miner*, 301 F. Supp. 3d 1128, 1134 (N.D. Ala. Aug. 25, 2017); *Muhammad v. Gehrke*, 2018 WL 1334936, at *4 (S.D. Ind. Mar. 15, 2018); *Howard v. Lackey*, 2018 WL 1157547, at *3 (E.D. Ky. Mar. 5, 2018); *Ashford v. Travesio*, 2018 LEXIS 18500, at *12 (D. Ariz. Feb. 2, 2018); *Buenrostro v. Fajardo*, 2017 WL 6033469 (E.D. Cal. Dec. 5, 2017). Inconsistent with this trend, the district court here did not even consider or mention administrative remedies before taking the "disfavored" and "significant step" of judicially creating a new *Bivens* remedy against Meyer. *Abbasi*, 137 S. Ct. at 1856–57.

Other alternative processes were also available to Leibelson, both during her incarceration and afterwards. For instance, she could have sought injunctive relief

from any ongoing inability to sit in the prison's dining hall—yet another factor counseling against creation of a *Bivens* remedy. *See, e.g.*, *Abbasi*, 137 S. Ct. at 1862–63 (holding the *potential* availability of injunctive or habeas relief for an inmate's conditions-of-confinement claims weighs against *Bivens* expansion); *Simmat v. BOP*, 413 F.3d 1225, 1231 (10th Cir. 2005) (noting availability of official-capacity equitable relief claims for constitutional violations made a *Bivens* remedy unnecessary); *Zavala v. Rios*, 721 F. App'x 720, 721 (9th Cir. 2018) (declining to expand *Bivens* to prisoner's claims because he "may seek injunctive and declaratory relief").

Not only are administrative remedies and/or a claim for equitable relief better-suited to address concerns like the dining-hall issue (remedies notably unavailable to the *Carlson* plaintiff, who died from the failure to provide emergent medical care), but Leibelson also has backward-looking state-law damages claims against the United States on the same alleged facts, actively being pursued in *Leibelson v. United States*, No. 5:15-cv-5440 (S.D.W. Va.). *See Minneci v. Pollard*, 565 U.S. 118, 120 (2012) ("[S]tate tort law authorizes adequate alternative damages actions—actions that provide both significant deterrence and compensation …."); *Wilkie*, 551 U.S. at 551 (noting the plaintiff "had a civil remedy in damages for trespass," and, although he "chose not to pursue a tort remedy, … there is no question that one was available to him if he could prove his allegations"); *Malesko*, 534 U.S. at 72–73 (considering availability of state-tort remedies in refusing to recognize a *Bivens* remedy); *see also Abbasi*, 137 S. Ct. at

1858 (citing *Minneci* and *Malesko* for proposition that "state tort law" may "provide[] alternative means for relief").[6]

Confusingly, in declining to extend *Bivens* to Leibelson's Fifth Amendment equal-protection claims, the district court recognized that the FTCA and potential injunctive relief counseled against implying a remedy. However, it failed to consider this same reasoning on the Eighth Amendment claim against Meyer, offering no explanation why these alternative processes counseled hesitation in the context of one amendment but not the other, despite both claims relying on the same alleged facts and the court finding both claims present new *Bivens* contexts. *Compare* JA 571, *with* JA 574–75. In short, for an inmate in Leibelson's "shoes," alleging dining-hall conditions violated the Eighth Amendment because of GBT status, it was not "damages or nothing." *Bivens*, 403 U.S. at 410 (Harlan, J. concurring).

2. Additional Special Factors Counsel Hesitation

In addition to alternative processes, numerous other factors counsel hesitation in providing a non-statutory remedy for dining-hall conditions. Perhaps most significant, emphasized repeatedly in *Abbasi*, are separation-of-powers concerns. 137 S. Ct. at 1857 ("When a party seeks to assert an implied cause of action under the Constitution itself, … separation-of-powers principles are or should be central to the

[6] While the FTCA alone may not suffice to counsel against a *Bivens* remedy, at least in certain cases, *see Carlson*, 446 U.S. at 19–23, the post-*Carlson* Supreme Court precedent makes clear, a state-law remedy, in combination with other special factors *is* a valid consideration.

analysis."). **First, although Congress' attention to prisoners' rights has been frequent and intense, it has never provided a stand-alone remedy against federal prison officials.** *Abbasi* itself recognized Congress' failure to provide a damages remedy is both "relevant" and "telling" when it regulates extensively in a specific arena and makes policy choices as to how complaints should be resolved. 137 S. Ct. at 1862; *see also De La Paz*, 786 F.3d at 376–77 (rejecting *Bivens* claim, in part, because Immigration and Nationality Act "maintains its own standards of conduct by training individuals in those standards and 'establish[es] an expedited, internal review process for violations of such standards'") (citing 8 U.S.C. § 1357(a)(5)). Here, Congress has legislated extensively regarding prisoners' rights—for example, first enacting CRIPA, then limiting prisoner litigation with the PLRA. *See supra* pgs. 18–20. Despite this frequent attention, and although a statutory cause of action exists against state prison employees under 42 U.S.C. § 1983, "Congress had specific occasion to consider the matter of prisoner abuse and to consider the proper way to remedy those wrongs" but did "not provide for a standalone damages remedy against federal jailers." *Abbasi*, 137 S. Ct. at 1865. The district court took no heed of any of this legislation or its implications. Congress' failure to provide for a personal damages remedy against federal officials, however, is "more than mere oversight" and its "silence might be more than 'inadvertent.'" *Abbasi*, 137 S. Ct. at 1862.

The PLRA and its legislative history offer "sound reasons to think" Congress would *not* "want the Judiciary to entertain a damages suit" against federal jailors for

Leibelson's dining-hall claims. *Id.* at 1858; 141 Cong. Rec. S7525 (daily ed. May 25, 1995) (remarks of Sen. Dole) ("The bottom line is that prisons should be prisons, not law firms.").[7] As this Court has recognized, the PLRA was intended to "limit" prisoner litigation and "remove the federal district courts from the business of supervising the *day-to-day operations* of [] prisons." *McLean v. United States*, 566 F.3d 391, 403 (4th Cir. 2009) (emphasis added). Two provisions particularly relevant are the administrative-exhaustion requirement, discussed *supra*, and the physical-injury requirement. *See* 42 U.S.C. § 1997e(a) & (e). In this case, there is no claim of physical injury or commission of a sexual act as a result of Meyer's purported inadequate response to Leibelson's dining-hall complaint. Rather, such a complaint involves exactly the type of oversight of "day-to-day operations" Congress wanted to curtail. *McLean*, 566 F.3d at 403; *see also, e.g.*, *Abbasi*, 137 S. Ct. at 1865 (absence of damages remedy in PLRA "suggests Congress chose not to extend the *Carlson* damages remedy to cases involving other types of prisoner mistreatment"). Post-*Abbasi*, the trend is clear: the PLRA and related legislation—and Congress's failure to provide the damages remedy sought here—are factors in determining whether to imply a *Bivens* remedy against BOP officials in the first instance. *See, e.g.*, *Gonzalez*, 269 F. Supp. 3d at

[7] In fact, the PLRA's legislative history questions the propriety of *any* judicially implied damages remedy against federal officials. 141 Cong. Rec. H14105 (daily ed. Dec. 6, 1995) (remarks of Rep. Lo Biondo) (noting "many so-called *Bivens* actions that are filed by Federal prisoners in Federal court every year" and pointing out "these suits are not based on any statutory authority from Congress").

61 (exhaustion requirement is special factor because its "scope squarely covers the complaints plaintiff raises"); *Ashford*, 2018 LEXIS 18500, at *11 (physical-injury requirement is indication Congress did not intend damages remedy); *Morgan v. Shivers*, 2018 WL618451, at *6–7 (S.D.N.Y. Jan. 29, 2018) (PLRA "suggest[s] that courts should not extend a damages remedy in this sphere"); *Rager v. Augustine*, 2017 WL 6627416, at *18–19 (N.D. Fla. Nov. 8, 2017) (exhaustion and physical-injury requirements "suggest[] that Congress does not want a damages remedy"), *report and recommendation adopted*, 2017 WL 6627784 (N.D. Fla. Dec. 28, 2017), *appeal docketed*, No. 18-10834 (11th Cir. Mar. 5, 2018).

A **second**, related separation-of-powers concern is **Congress' repeated and explicit delegation of federal prison management to the Attorney General and BOP**. *See e.g.*, 18 U.S.C. § 4042(a) (charging BOP "under the direction of the Attorney General" with (1) "the management and regulation of all Federal penal and correctional institutions;" (2) "provid[ing] suitable quarters and … the safekeeping, care, and subsistence of" all federal detainees; and (3) "protection, instruction, and discipline of" all federal detainees). In response to this congressional deference, numerous regulations exist to effectuate proper prison management. The Administrative Remedy Program, permitting inmates to seek review of issues relating to all aspects of confinement, is just one example. *See* 28 C.F.R. §§ 542.10–.19. Also relevant here, Congress again deferred to the Attorney General when it sought to "increase the accountability of prison officials" and "protect the Eighth Amendment

rights of … prisoners" under PREA. 34 U.S.C. § 30302; *see also id.* §§ 30301–09. Notably, Congress did so *not* by creating a private right of action against individual officials for failing to prevent inmate sexual abuse, but instead by instructing the Attorney General to promulgate national standards for preventing, investigating, and punishing prison rape. *See Krieg v. Steele*, 599 F. App'x 231, 233 (5th Cir.), *cert. denied*, 136 S. Ct. 238 (2015) ("[A]ny claim raised under the PREA is properly dismissed as frivolous."); 34 U.S.C. § 30307. Congress also decreed these standards should reflect "the independent judgment of the Attorney General" but *not* "impose substantial additional costs compared to the costs presently expended by Federal, State, and local prison authorities." 34 U.S.C. § 30307(a)(2)–(3).

Additional special factors not considered by the district court are **the system-wide costs associated with creating a damages remedy** absent congressional action. As *Abbasi* instructs, "the decision to recognize a damages remedy requires an assessment of its impact on governmental operations systemwide." 137 S. Ct. at 1858. This includes "the burdens on Government employees who are sued personally, as well as the projected costs and consequences to the Government itself …." *Id.* In the prison context, these burdens and costs are particularly high based, in part, on the sheer volume of potential litigation—there are nearly 185,000 federal inmates and more than 36,000 BOP employees. *See* Fed. Bureau of Prisons, *About Our Agency*, https://www.bop.gov/about/agency/ (last visited July 5, 2018). Affirmatively recognizing a federal damages claim to remedy alleged deficiencies in routine aspects

of prison life, like dining-hall seating, would open the floodgates to such litigation, threatening a "cure … worse than the disease." *Wilkie*, 551 U.S. at 561.

Also counseling hesitation is **the difficulty in creating a workable cause of action.** *See Abbasi*, 137 S. Ct. at 1864–65 (discussing lack of clarity for legal standard of deliberate-indifference claim alleging warden allowed staff to abuse detainee); *Vanderklok*, 868 F.3d at 209 (recognizing "inherent uncertainty surrounding" applicable standard as "factor counseling hesitation"). The Eighth Amendment claim against Meyer hinges on an apparent failure to do "enough" or "adequately respond" to Leibelson's dining-hall complaints. But exactly what would have constituted an adequate response—short of providing a special table, which the district court acknowledged was beyond Meyer's authority, JA 575 n.12—is not clear. Similarly, Eighth Amendment claims, like this one, have a subjective component that can make a case more difficult to administer and increase the likelihood that non-meritorious claims survive early dispositive motions. *See Crawford-El v. Britton*, 523 U.S. 574, 584–85 (1998) ("[B]ecause an official's state of mind is easy to allege and hard to disprove, insubstantial claims that turn on improper intent may be less amenable to summary disposition … .").[8]

Assessing Meyer's response to Leibelson's GBT table request also **implicates BOP policy and procedure**, which is beyond the purview of a *Bivens* remedy. *See*

[8] Further complicating workability of a cause of action here is Leibelson's untimely death, implicating issues of proof and Meyer's right to cross-examination.

Malesko, 534 U.S. at 74 (*Bivens* suits have "never" been the "proper vehicle for altering an entity's policy"). Moreover, Congress and the Supreme Court repeatedly defer to the Attorney General and the expertise of prison administrators because "the problems that arise in the day-to-day operation of a corrections facility are not susceptible of easy solutions." *Bell v. Wolfish*, 441 U.S. 520, 547 (1979); *see also* 18 U.S.C. § 4001(b), 4042(a); *Jones v. North Carolina Prisoner's Union*, 433 U.S. 119, 137 (1977) (noting while there is a need to protect "certain basic rights of inmates," prison administration is best left to "those with the most expertise in th[e] field," not the courts). Deciding how and where categories of inmates should be seated in the dining hall, while maintaining order and safety, is precisely the sort of issue warranting deference, not the creation of a stand-alone damages claim.

While the district court found an Eighth Amendment claim against Meyer "well-suited to judicial resolution," relying almost exclusively on *Farmer*, JA 575, this adoption of a general legal standard for Eighth Amendment deliberate-indifference claims as a basis for extending *Bivens* does not comport with the context-specific task the Supreme Court requires. *See Abbasi*, 137 S. Ct. at 1864. The *Farmer* court merely *assumed* without deciding the existence of a *Bivens* remedy, an issue not raised by the parties. *See Texas v. Cobb*, 532 U.S. 162, 169 (2001) ("Constitutional rights are not defined by inferences from opinions which did not address the question at issue."); *United States v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 38 (1952) (issue not "raised in briefs or argument nor discussed in the opinion of the Court" cannot be "binding

precedent on th[e] point"). Thus, whatever application *Farmer* has to the merits of the constitutional question, the decision says nothing about whether a non-statutory remedy should be implied in the first instance. To that question, the Supreme Court has long-since repudiated, on separation-of-powers grounds, the "ancien regime" under which *Bivens* and cases like *Farmer* arose. *See Abbasi*, 137 S. Ct. at 1855 (quoting *Alexander v. Sandoval*, 532 U.S. 275, 287 (2001)). Moreover, *Farmer* adopted only a general standard for Eighth Amendment deliberate-indifference claims, offering no insight into the constitutional contours of a proper response by Meyer to Leibelson's amorphous complaint about dining-hall seating. In fact, while remanding for additional discovery, the *Farmer* court acknowledged that "[i]t is not [] every injury suffered by one prisoner at the hands of another that translates into constitutional liability for prison officials responsible for the victim's safety." 511 U.S. at 834, 849.

Lastly, the district court did not weigh the **harmful effect creation of a *Bivens* remedy would have on the discharge of official duties**, yet another special factor. Officials "who face personal liability for damages might refrain from taking urgent and lawful action in a time of crisis." *Abbasi*, 137 S. Ct. at 1863; *see also Vanderklok*, 868 F.3d at 207 ("The threat of damages liability could [] increase the probability that a TSA agent would hesitate in making split-second decisions about suspicious passengers."). In the prison-conditions context, where safety and security is paramount, courts "must accord substantial deference to the professional judgment of prison administrators, who bear a significant responsibility for defining the legitimate

goals of a corrections system and for determining the most appropriate means to accomplish them." *Overton v. Bazzetta*, 539 U.S. 126, 132 (2003). Officials like Meyer need to balance the needs of a diverse inmate population without fear that every decision or interaction could land them in court with their personal assets on the line. *See Morgan*, 2018 WL 618451, at *6 (recognizing prisoner claims "present a plethora of policy-related considerations" that must be balanced against "challenges prison administrators and officers face in maintaining prison security"); *cf. Vennes v. An Unknown No. of Unidentified Agents of U.S.*, 26 F.3d 1448, 1452 (8th Cir. 1994) (noting "chilling effect on law enforcement" of "[e]xpanding *Bivens*").

In the aggregate, multiple special factors counsel hesitation, and the district court erred by implying a *Bivens* remedy in the novel context of the dining-hall claim against Meyer.

II. Meyer and Cook Are Entitled to Qualified Immunity

A. Applicable Legal Standards

1. Qualified Immunity

Qualified immunity shields officials "insofar as their conduct does not violate clearly established … constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). It asks: (1) whether plaintiff established a particular defendant personally engaged in conduct that violated a constitutional right, and (2) whether that right was clearly established, in other words, whether "it would be clear to a reasonable officer that his conduct was unlawful."

Saucier v. Katz, 533 U.S. 194, 201–02 (2001); *West v. Murphy*, 771 F.3d 209, 213 (4th Cir. 2014). Qualified immunity protects officials from "bad guesses in gray areas," *Wilson v. Collins*, 141 F.3d 111, 114 (4th Cir. 1998) (internal citation omitted), and applies to "all but the plainly incompetent or those who knowingly violate the law," *Malley v. Briggs*, 475 U.S. 335, 341 (1986).

2. Eighth Amendment Claims

Where an inmate claims unconstitutional conditions of confinement, she "must satisfy the Supreme Court's two-pronged test set forth in [*Farmer*]." *Scinto v. Stansberry*, 841 F.3d 219, 225 (4th Cir. 2016). *Farmer*'s objective component requires proof the inmate was "incarcerated under conditions posing a substantial risk of serious harm." 511 U.S. at 834. Only "extreme" deprivations meet this requirement. *Scinto*, 841 F.3d at 225; *see also De'lonta v. Johnson*, 708 F.3d 520, 525 (4th Cir. 2013). *Farmer's* subjective component tests whether the official acted with a "sufficiently culpable state of mind." 511 U.S. at 834. The requisite state of mind is "deliberate indifference," an official must "know[] of and disregard[] an excessive risk to inmate health or safety." *Id.* at 837. As *Farmer* stressed, "[t]he Eighth Amendment does not outlaw cruel and unusual conditions; it outlaws cruel and unusual *punishments*." *Id.* at 837 (emphasis added) (internal quotations omitted). Accordingly, the purpose of the subjective element is to "isolate[] those who inflict punishment." *Id.* at 839. Even if an officer knew of a "substantial risk to inmate health or safety," he "may be found free from

liability if [he] responded reasonably to the risk, even if the harm ultimately was not averted." *Id.* at 844; *see also Short v. Smoot*, 436 F.3d 422, 427 (4th Cir. 2006).

B. Meyer Is Entitled to Qualified Immunity

1. The District Court Erred in *Sua Sponte* Reviving Leibelson's Abandoned Claim against Meyer.

"Once the defendant raises a qualified immunity defense, the plaintiff carries the burden of showing that the defendant's alleged conduct violated the law." *Bryant v. Muth*, 994 F.2d 1082, 1086 (4th Cir. 1993). Leibelson failed to carry her burden on her Eighth Amendment claim against Meyer because she explicitly *abandoned* it, deciding instead to pursue only a Fifth Amendment equal-protection claim for discrimination based on sexual orientation and gender identity. This was not a situation in which Leibelson merely failed to address arguments raised at summary judgment, as the district court suggests. To the contrary, after Meyer moved for summary judgment, Leibelson expressly stated in her opposition brief *and* in the parties' joint pretrial order that she was only pursuing an equal-protection claim against him. Dkt. No. 211, at 41–42 ("Plaintiff Leibelson is asserting a single equal protection claim against Defendant MEYER: namely, that he refused to arrange for her to sit and eat at the prison chow hall without risk of assault by another inmate because of her transgender status."); Dkt. No. 254, at 24–25, 41, 55 (joint pretrial order in which plaintiff lists one remaining claim against Meyer—Fifth Amendment equal-protection). Leibelson had counsel at all times in this litigation, was the master of her own complaint, and was

entitled to decide for herself which claims to pursue. Plainly, Leibelson did not carry her burden of demonstrating a constitutional violation for a claim she expressly abandoned.

In evaluating Meyer's qualified immunity defense, it was improper for the district court to *sua sponte* revive and advance a claim Leibelson herself chose to put aside. A court may not act as a party's lawyer, advancing legal theories and resurrecting claims the party—particularly one represented by counsel—knowingly conceded. *See Hensley on behalf of N. Carolina v. Price*, 876 F.3d 573, 581 (4th Cir. 2017), *cert. denied sub nom. Price v. Hensley*, 138 S. Ct. 1595 (2018) ("[I]t is not our job to wade through the record and make arguments for either party.") (internal citation omitted); *Reaves v. Sec'y, Florida Dep't of Corrs.*, 872 F.3d 1137, 1149 (11th Cir. 2017) (courts in our adversarial system "cannot concoct or resurrect arguments neither made nor advanced by the parties"); *In re Antrobus*, 563 F.3d 1092, 1099-1100 (10th Cir. 2009) ("Under our rules we are not permitted to invent arguments even for *pro se* litigants; certainly, we cannot revive ones foregone … by such well-counseled litigants."); *Yeomalakis v. F.D.I.C.*, 562 F.3d 56, 61 (1st Cir. 2009) ("It is not our job, especially in a counseled civil case, to create arguments for someone who has not made them[.]"). Once Leibelson unequivocally stated she was not pursuing an Eighth Amendment claim against Meyer, the decision to revive and "independently evaluate" the claim had real consequences. JA 575. If Leibelson had not abandoned her Eighth Amendment claim, Meyer would have further explained in his reply brief why the

claim lacks merit. The court's surprise decision to resurrect the Eighth Amendment claim, despite Leibelson's concession, prevented that.

2. Leibelson Did Not Identify Any Clearly Established Eighth Amendment Right to Special Dining Hall Seating, or Otherwise Establish an Eighth Amendment Violation

Even assuming it was proper to consider Leibelson's abandoned claim, Meyer was nonetheless entitled to qualified immunity. "[C]ourts may grant qualified immunity on the ground that a purported right was not 'clearly established' by prior case law, without resolving the often more difficult question whether the purported right exists at all." *Reichle v. Howards*, 566 U.S. 658, 664 (2012). In this case, the district court did not meaningfully consider the second prong of the qualified-immunity inquiry—specifically, whether Leibelson's amorphous "dining hall" right was clearly established at the time of Meyer's alleged misconduct. The court simply declared, citing no authority, that "case law regarding deliberate indifference to inhumane conditions was well-established at the time Captain Meyer allegedly failed to address Ms. Leibelson's inability to eat in the dining hall[.]" JA 576. In so reasoning, the court committed the classic error of defining the right in question at too high a level of generality. *See Ashcroft v. al–Kidd*, 563 U.S. 731, 742 (2011) ("We have repeatedly told courts ... not to define clearly established law at a high level of generality."). Courts must "focus upon the right not at its most general or abstract level, but at the level of its application to the specific conduct being challenged." *Trulock v. Freeh*, 275 F.3d 391, 400 (4th Cir. 2001) (internal quotations and citation omitted). A plaintiff must

"identify a case where an [official] acting under similar circumstances … was held to have violated [the Constitution]." *White v. Pauly*, 137 S. Ct. 548, 552 (2017) (per curiam).

Here, the purported right is properly defined as an inmate's right to special seating in a prison dining facility in light of general complaints about harassment from other inmates. Neither the Supreme Court nor the Fourth Circuit has ever recognized such a constitutional right. To the contrary, nothing in the Constitution guaranteed Leibelson a special dining hall table for GBT inmates. *See Sandin v. Conner*, 515 U.S. 472, 485 (1995) ("[L]awful incarceration brings about the necessary withdrawal or limitation of many privileges and rights") (internal citation omitted); *cf. Guzman-Martinez v. Corr. Corp. of Am.*, 2012 WL 2873835, at *9 (D. Ariz. July 13, 2012) ("Plaintiff does not have a clearly established constitutional right to be housed in a women's detention facility or in a single-occupancy cell in a men's detention facility or to be released from detention based solely on her status as a transgender woman").

Even if the right were defined more generally as a right to safely access food in the prison's dining facility, no reasonable official in Meyer's position would have understood that his response violated such a right. *al–Kidd*, 563 U.S. at 741 (constitutional right is not clearly established unless "every reasonable official would have understood that what he is doing violates that right") (internal citation omitted). Leibelson's herself testified Meyer did not simply ignore her complaints about dining-

hall seating. Rather, he notified the appropriate prison officials, so her concerns might be investigated. JA 98–99, 484, 525–29.

While the court acknowledged Meyer had no authority to ignore BOP policy and create a special GBT table, it nevertheless felt Meyer could have taken unspecified "other actions" to respond to Leibelson's dining-hall seating concern. JA 575. But it is unclear exactly what else Meyer should or could have done beyond notifying appropriate officials at the prison in order to have Leibelson's concern investigated and, in any event, the court cited no case law constitutionally requiring such actions. Certainly Meyer's response to the information Leibelson provided cannot be fairly characterized as the wanton "inflict[ion] [of] punishment." *Farmer*, 511 U.S. at 839.

Moreover, with regard to *Farmer's* subjective component, Leibelson failed to adduce evidence on which a reasonable jury could find Meyer was actually aware of and consciously disregarded any excessive risk to her ability to eat.[9] First, there was no evidence Meyer knew any specific inmate prevented Leibelson from eating. According to Leibelson's own testimony, she approached Meyer and requested a special table for GBT inmates because these inmates—as a group—allegedly experienced harassment

[9] In fact, regarding *Farmer's* objective component, Meyer's inability to honor Leibelson's request for a GBT table also did not constitute the kind of "extreme" deprivation necessary to impose Eighth Amendment liability. *Scinto*, 841 F.3d at 225. Certainly, the denial of special seating did not deprive Leibelson "the minimal civilized measure of life's necessities." *Farmer*, 511 U.S. at 834 (internal citation omitted). Leibelson offered no objective indication—like complaints of particular threats or harassment, or sign of illness or weight loss—to support her bare allegation of food deprivation.

from other prisoners. JA 483. This sort of generalized complaint is far different from a specific report to Meyer that a specific inmate or group of inmates were demanding sexual favors from Leibelson in exchange for a dining hall seat. On the contrary, as a matter of law, an inmate's vague and nonspecific fear of harm cannot establish an Eighth Amendment violation. *See Ruefly v. Landon*, 825 F.2d 792, 794 (4th Cir. 1987) (deliberate indifference required proof defendants were aware of a "specific known risk of harm to [plaintiff]"); *Robinson v. Cavanaugh*, 20 F.3d 892, 895 (8th Cir. 1994) (defendants were not deliberately indifferent where plaintiff reported "general fear for his safety … and declined to identify the inmate he feared would attack him"). Leibelson's generalized complaint to Meyer fails as a matter of law to trigger Eighth Amendment scrutiny.[10] In fact, Meyer testified that if Leibelson reported to him that any inmate was threatening or harassing her in the dining hall, he would have notified SIS to investigate. JA 98–99. The district court did not consider these particulars and that evidence remains uncontradicted.

Finally, Leibelson herself admitted Meyer did not simply disregard an excessive risk to her ability to eat safely in the dining hall. Leibelson testified that, in response to

[10] Similarly, Leibelson's email to the Warden requesting "the Administration" provide a GBT table did not put Meyer on notice anyone was preventing Leibelson from eating. The email repeats the claim, on behalf of GBT inmates generally: "we have the RIGHT to sit in the dining-hall without fear of verbal or physical abuse from 'hetrosexual' [*sic*] prisoners." JA 101. It reports no specific threat of harm to Leibelson. Notably, the one prisoner (not Leibelson herself) who Leibelson claimed in her email was harmed was allegedly assaulted "for sitting at the 'white table,'" not because of any refusal to provide sexual favors. *Id.*

her complaints, Meyer "said he would bring it up with SIS" and have them "look into it." JA 475–76, 484. Likewise, as to her email to the Warden, Meyer testified that he forwarded it to the prison's Chief Psychologist and PREA Compliance Manager for follow-up, as that individual was the subject-matter expert on these issues. JA 98–99, 525–29. Accordingly, it is undisputed that even Leibelson's non-specific complaints about verbal and physical harassment in the dining hall were not ignored. To the extent Leibelson alleged she received no follow-up from SIS or the PREA Compliance Manager, this is inapposite in terms of her claim against *Meyer* because it is well-established that the doctrine of respondeat superior has no place in a *Bivens* action. *Danser*, 772 F.3d at 349. Instead, liability "is personal, based upon each defendant's own constitutional violations." *Trulock*, 275 F.3d 391, 402 (4th Cir. 2001). At every turn, the undisputed record in this case demonstrates a complete failure to establish the elements of Leibelson's Eighth Amendment claim, such that she failed to establish a clearly established constitutional violation. Meyer was entitled to qualified immunity, and the district court erred in denying him summary judgment.

C. Cook is Entitled to Qualified Immunity

When a constitutional challenge is to a visual or body-cavity search in prison, "[c]ourts must consider the scope of the particular intrusion, the manner in which it is conducted, the justification for initiating it, and the place [where] it is conducted." *Bell*, 441 U.S. at 559; *King v. Rubenstein*, 825 F.3d 206, 214–15 (4th Cir. 2016). The claim against Cook in this case must be viewed against the backdrop that visual and even

body-cavity searches in prison are routinely upheld as constitutional in light of obvious security concerns. *See, e.g.*, *Florence v. Bd. of Chosen Freeholders of Cnty. of Burlington*, 132 S. Ct. 1510, 1517 (2012) (upholding visual strip search of all arriving jail detainees); *Snider v. Hughes*, 59 F.3d 167 (4th Cir. 1995) (per curiam) ("Body cavity searches are often necessary and are not violative of the Fourth or Eighth Amendments if reasonable and not motivated by punitive intent.").

The district court erred in denying Cook qualified immunity at summary judgment on Leibelson's Eighth Amendment claim which, even according to the version of her story adopted for this lawsuit, occurred during an authorized and routine visual (aka "strip") search in SHU and lasted no more than two to three seconds. In so doing, the court required Cook to face trial despite the absence of clearly established law on a brief touching of the sort alleged in the context of an otherwise lawful strip search, and in the face of Leibelson's inconsistent, unsupported, counterintuitive, and physically implausible allegations, directly contradicting the Supreme Court's "admonition" that "insubstantial claims should not proceed to trial." *Harlow*, 457 U.S. at 815–16; *see also id.* at 817–18 ("[W]e conclude today that bare allegations of malice should not suffice to subject government officials either to the costs of trial or to the burdens of broad-reaching discovery.").

First, even accepting as true the story adopted by Leibelson for litigation, the alleged conduct—touching her rectum for two to three seconds allegedly though the tray slot of a cell door during an authorized and routine visual search resulting in *de*

minimis (at worst) physical injury—does not give rise to a clearly established Eighth Amendment violation. *See Wilkins v. Gaddy*, 559 U.S. 34, 37–38 (2010) ("[N]ot 'every malevolent touch by a prison guard gives rise to a federal cause of action.'") (quoting *Hudson v. McMillian*, 503 U.S. 1, 9 (1992)). The district court rejected this argument at the motion-to-dismiss stage (and noted the same at summary judgment) citing the broad proposition that "sexual assault, whether committed by guards or inmates, can constitute an Eighth Amendment violation." JA 85. But the Supreme Court has repeatedly emphasized "courts must not define clearly established law at a high level of generality, since doing so avoids the crucial question whether the official acted reasonably in the particular circumstances …." *District of Columbia v. Wesby*, 138 S. Ct. 577, 590 (2018). Similar to the allegations here, a number of courts have found incidental touching during the course of an authorized strip search does not give rise to a constitutional violation. *See Gallagher v. Codfeller*, 2012 WL 5361005, at *4 (E.D. Va. Oct. 31, 2012) (finding no constitutional violation where inmate suffered no physical injury from the touching of his anus during a strip search despite alleging emotional distress and humiliation), *aff'd*, 508 F. App'x 198 (4th Cir. 2013); *Morales v. Paynter*, 2014 WL 1057010, at *4 (E.D.N.C. Mar. 18, 2014) (dismissing claims brought by inmate who alleged corrections officer conducted an "illegal strip search … without penological interests"); *Morrison v. Cortright*, 397 F. Supp. 2d 424, 425 (W.D.N.Y. 2005) (finding isolated incident where officer ran finger between inmate's buttocks and rubbed his body against inmate's buttocks did not violate Eighth

Amendment); *Omar v. Casterline*, 288 F. Supp. 2d 775, 779–80 (W.D. La. 2003) (deferring to prison administrators' security concerns in finding body-cavity search that included rectal probing of an immigration detainee did not violate Constitution despite allegations other officers laughed during the search). Although Leibelson referred to the alleged conduct as "sexual assault" and "digital anal rape," these are merely "labels and conclusions" about an otherwise described two to three second contact, and they are legally insufficient to overcome Cook's entitlement to qualified immunity. *Iqbal*, 556 U.S. at 678; *see also Francis v. Giacomelli*, 588 F.3d 186, 193 (4th Cir. 2009) ("'[N]aked assertions' of wrongdoing necessitate some 'factual enhancement' … to cross 'the line between possibility and plausibility of entitlement to relief.'") (internal citation omitted).

Moreover, approximately eight months of discovery, nineteen depositions, and thousands of pages of document production uncovered *at least* four different versions of alleged sexual abuse Leibelson suffered (and by whom) and she proffered no witness or documentary evidence in support of the version adopted for this lawsuit. Nor did Leibelson offer any common-sense explanation for the obvious safety concerns and sheer physical implausibility of her claim that an officer reached his arm through a cell's tray slot while conducting a routine search and touched Leibelson in the manner alleged. Rather than acknowledge this dearth of evidence entitling Cook to qualified immunity, the district court mischaracterized key portions of the record and summarily concluded the issues raised at summary judgment amounted to a

"credibility" determination. JA 576–77. However, appellate courts and even the Supreme Court are clear: where qualified immunity is at stake and "opposing parties tell two different stories, one of which is blatantly contradicted by the record, so that no reasonable jury could believe it, a court should not adopt that version of the facts for purposes of ruling on a motion for summary judgment." *Scott v. Harris*, 550 U.S. 372, 380 (2007); *cf. Anderson v. City of Bessemer City, N.C.*, 470 U.S. 564, 575 (1985) (noting trial court cannot "insulate [her] findings from review by denominating them credibility determinations" and "[d]ocuments or objective evidence may contradict the witness' story; or the story itself may be so internally inconsistent or implausible on its face that a reasonable factfinder would not credit it.").

The extensive record reflects *at least* four different versions of purported "sexual assault" at FCI Beckley—all from Leibelson's own statements, made both before and during this litigation:

- Version one: Leibelson alleged at her deposition that, during a routine visual search in SHU, Cook inserted his finger in Leibelson's rectum, for just two to three seconds, by reaching his arm through the tray slot of a locked cell door. JA 456–58, 461–63.

- Version two: Leibelson told Dr. Abeita, a prison psychologist, on March 11, 2014, that rather than a visual search in a locked cell with Cook outside, Cook "patted him down and touch [sic] his 'asshole.'" Dr. Abeita contemporaneously documented this account, on March 11, 2014, in a memorandum to the Warden and in an entry into Leibelson's psychology records. JA 304, 317.

- Version three: Leibelson told a third-party medical provider, in a *sworn statement*, on February 18, 2015, after her release from prison and before

filing suit, that her "anxiety disorder" was attributable, not to a sexual assault by any Beckley staff member, but rather to the "brutality" of *other inmates* who subjected her to "physical and sexual abuse." Significantly, this statement was executed by Leibelson *under penalty of perjury* and witnessed by her parents. JA 583–85 (under seal).

- Version four: Leibelson told her treating psychiatrist and designated expert, in February 2017 (during this litigation), that she was held down by *multiple* guards and raped at Beckley over a period of four and a half months. JA 505–06, 508–09, 516. Dr. Fougy did not even hear the allegation a single correctional officer inserted his finger into Leibelson's rectum—for two to three seconds on one occasion—until her deposition. JA 512.

The Fourth Circuit has repeatedly explained "[a] genuine issue of material fact is not created where the only issue of fact is to determine which of the two conflicting versions of the plaintiff's testimony is correct." *Barwick v. Celotex Corp.*, 736 F.2d 946, 960 (4th Cir. 1984); *see also Stevenson v. City of Seat Pleasant, Md.*, 743 F.3d 411, 422 (4th Cir. 2014) (affirming summary judgment for police officers in excessive-force case where inconsistencies existed in plaintiff's account); *Miller v. F.D.I.C.*, 906 F.2d 972, 975–76 (4th Cir. 1990) (upholding summary judgment because "any uncertainties" giving rise to a dispute of fact "stem solely from the differences between [plaintiff's] own deposition testimony, his testimony during the administrative hearing, his correspondence …, and other documentary statements"); *Burwick v. Pilkerton*, 700 F. App'x 214, 217 (4th Cir. 2017) (noting plaintiff's "own inconsistent statements" were "insufficient to survive [the officer's] summary judgment motion" in excessive force case); *Wilson v. Gaston Cnty., N.C.*, 685 F. App'x 193, 199 (4th Cir. 2017) (explaining "[t]here is a limit to how much law can allow a party to switch or distinguish earlier

statements that prove problematic later in litigation"). Other courts, including federal courts of appeal, adopt this same reasoning. *See, e.g.*, *Jeffreys v. City of New York*, 426 F.3d 549, 554 (2d Cir. 2005); *Seshadri v. Kasraian*, 130 F.3d 798, 804 (7th Cir. 1997); *Church v. Maryland*, 180 F. Supp. 2d 708, 739 (D. Md. 2002), *aff'd* 53 F. App'x 673 (4th Cir. 2002); *Shabazz v. Pico*, 994 F. Supp. 460, 470 (S.D.N.Y. 1998). Nevertheless, in denying Cook qualified immunity, the district court essentially relied on Leibelson's own inconsistent versions of a purported "sexual assault" in a vacuum and found it entitled her to trial.

In this regard, the court significantly mischaracterized two key parts of the record. The court referred to the February 18, 2015 sworn affidavit *executed by Leibelson under penalty of perjury*, and witnessed by her parents, as merely a declaration from a medical provider as opposed to a statement attributable to Leibelson herself. *Compare* JA 576–77, *with* 583–85 (under seal). The court also mischaracterized Dr. Abeita's *contemporaneously* written memorandum and psychology notes from March 11, 2014, as a declaration submitted in support of summary judgment. *Compare* JA 304, 317, *with* 576–77. Then, having inaccurately reviewed the record, the court suggested only a complete denial by Leibelson under oath of the exact conduct alleged against Cook in the Complaint could preclude trial: "Unlike cases in which courts disregard a litigant's statements, Ms. Leibelson has not submitted an affidavit or testimony denying digital penetration by Officer Cook, and there is no evidence that she ever denied that

Officer Cook sexually assaulted her." JA 577. This conclusion misreads the precedent on inconsistencies in the summary judgment record.

Although *Barwick* involved inconsistent statements between deposition testimony and a subsequent affidavit, 736 F.2d at 959–60, courts following this reasoning have noted inconsistencies in statements made outside of litigation and not necessarily under oath. *See, e.g.*, *Miller*, 906 F.2d at 975–76 (inconsistencies in "correspondence" and "other documentary statements"); *Jeffreys*, 426 F.3d at 552 (inconsistencies from statements to medical providers, a police sergeant, and risk screening personnel at the department of corrections); *Seshadri*, 130 F.3d at 802–03 (inconsistencies in correspondence and documents "composed before the litigation" which "carry more conviction than a deposition, even though a deposition is given under oath"); *Church*, 180 F. Supp. 2d at 741–43 (inconsistencies in a "sworn statement" submitted to the EEOC prior to the litigation); *Shabazz*, 994 F. Supp. at 469 (inconsistencies in statements to medical providers). Moreover, notwithstanding the district court's conclusion otherwise, there *is* evidence that Leibelson denied Cook sexually assaulted her because she attributed sexual abuse at Beckley to *other alleged perpetrators*—namely, other inmates—in her February 18, 2015 sworn statement. JA 583–85 (under seal).

The district court's decision also lost sight of general principles governing summary judgment. "The mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could

reasonably find for the plaintiff." *Anderson*, 477 U.S. at 252. Here, the issue was not whether Leibelson directly contradicted her deposition testimony, but whether her "version of events is so utterly discredited by the record that no reasonable jury could have believed [her]." *Scott*, 550 U.S. at 380; *see also Jeffreys*, 426 F.3d at 554 ("[I]n the rare circumstance where the plaintiff relies almost exclusively on his own testimony, much of which is contradictory and incomplete, it will be impossible … to determine whether 'the jury could reasonably find for the plaintiff,' and thus whether there are any 'genuine' issues of material fact, without making some assessment of the plaintiff's account.") (quoting *Anderson*, 477 U.S. at 252); *Seshadri*, 130 F.3d at 804 ("It is not our competence to find facts. But a motion for summary judgment should be granted when the record is such that if it were the record of a trial no reasonable jury could find for the party opposing the motion."). Significantly, the court ignored the fact that Leibelson's allegations were not only inconsistent but entirely unsupported by any other record evidence. *See Felty v. Graves-Humphreys Co.*, 818 F.2d 1126, 1128 (4th Cir. 1987) ("[T]he Supreme Court ha[s] made increasingly clear [] the affirmative obligation of the trial judge to prevent 'factually unsupported claims and defenses' from proceeding to trial.") (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 323–24 (1986)).

At summary judgment, Leibelson offered nothing but her deposition testimony to support her claim. However, the record overwhelmingly favored Cook's entitlement to qualified immunity. For example, there is no medical or other objective

evidence to support any alleged "digital penetration" by Cook. In fact, Leibelson's medical records belie her claims because she was seen by health services the day after the alleged assault—an opportunity to report the assault in a confidential manner—yet reported no injuries and executed a treatment refusal form. JA 315–16. And, although Leibelson claimed a "sexual assault" occurred February 6, 2014, she waited until *at the earliest* March 3, 2014 to report it.[11] JA 260, 266, 467. Any purported fear in reporting is also undermined by Leibelson's many other complaints to prison staff, which she began sending via prison email *before* reporting any "sexual assault." JA 272, 279–301. An internal investigation into her allegations against Cook was also conducted—despite Leibelson's inexplicable refusal to participate—and concluded the allegations could not be substantiated. JA 224, 249–51. Moreover, in opposing summary judgment, Leibelson did not even offer an affidavit or declaration to attempt an explanation of the multiple inconsistencies in her claim against Cook, and the record as a whole, including her own prior statements. *See Felty*, 818 F.2d at 1130 ("When an inference can be supported by evidence to save it from the status of speculation, we think a non-moving party should present that evidence.").

The wholly unsupported allegations here are similar to those in *Jeffreys*, where the Second Circuit held summary judgment was appropriate in an excessive-force

[11] Cook contends it was actually a week later, because Leibelson's March 3, 2014 email to OIG does not mention a "sexual assault" by Cook. JA 242–43. However, Leibelson disputed the email contents at deposition and in her responses to requests for admission.

case. 426 F.3d at 554–55. In *Jeffreys*, plaintiff alleged being beaten by police and thrown out a window, *id.* at 550–51; however, he contradicted this story on at least three occasions, the medical evidence did not support his story, and he delayed reporting the alleged beating despite repeated opportunities. *Id.* at 552–53. Here, like in *Jeffreys*, Leibelson's story was contradicted by her own statements on at least three occasions, there is no medical evidence to support her allegations, and not only did she delay reporting the alleged assault but she refused to participate in an investigation to substantiate her claims. As the Second Circuit held, "[a]t the summary judgment stage, a nonmoving party 'must offer some *hard evidence* showing that its version of the events is not wholly fanciful.'" *Id.* at 554 (quoting *D'Amico v. City of N.Y.*, 132 F.3d 145, 149 (2d Cir. 1998)) (emphasis added).

Finally, Leibelson's allegations of what occurred through the tray slot of a locked cell door are so counterintuitive and physically implausible "no reasonable person would undertake the suspension of disbelief necessary to give credit to [them]." *Jeffreys*, 426 F.3d at 555; *see also Iqbal*, 556 U.S. at 679 (explaining courts must "draw on [] judicial experience and common sense" in determining a claim's plausibility); *Matsushita v. Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986) (noting non-moving party must offer more than "some metaphysical doubt as to the material facts"). Leibelson alleged Cook reached his arm through the tray slot of a cell door during a routine visual search, digitally penetrating her, but that conduct is counterintuitive to officer safety. JA 205–06, 223. An inmate could grab the officer's

arm, even break it, or if the inmate were concealing a weapon, she could use it, defeating the whole purpose of the search and protocol of placing the inmate in a locked cell with the officer outside. *Id.* Leibelson's allegations also defy physical plausibility. *See Iqbal*, 556 U.S. at 678 ("The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully."). Photos of the SHU's visual search room (Leibelson alleged being in the cell on the right) are illustrative. JA 487–91. Against the backdrop of the record evidence, no reasonable juror could believe that Leibelson, at 6 feet 7 inches tall, bent over and squatted at the tray slot on the locked cell door, without objection or threat, while Cook somehow maneuvered in a way to actually reach his arm through the tray slot to penetrate her rectum. *See Matsushita*, 475 U.S. at 587 ("[I]f the factual context renders respondents' claim implausible—if the claim is one that simply makes no [] sense—respondents must come forward with more persuasive evidence to support their claim than would otherwise be necessary."); *see also Church*, 180 F. Supp. 2d at 743 ("Documents and objective evidence contradict [plaintiff's] testimony, and [his] story is 'internally inconsistent' and 'implausible' on its face so that a reasonable factfinder would not credit it.").

The district court cannot ignore the patent deficiencies of the record—the allegations of which, even if true, do not violate clearly established law—and deny Cook qualified immunity under the guise of a "credibility" finding. To subject Cook to the "harmful distraction" of trial based on Leibelson's inconsistent, unsupported,

counterintuitive, and physically implausible allegations would undermine the very purpose of qualified immunity. *Filarsky v. Delia*, 566 U.S. 377, 389–90 (2012); *Harlow*, 457 U.S. at 814 ("[I]t cannot be disputed seriously that claims frequently run against the innocent as well as the guilty—at a cost not only to the defendant officials, but to society as a whole … In identifying qualified immunity as the best attainable accommodation of competing values, … we relied on the assumption that this standard would permit insubstantial lawsuits to be quickly terminated.") (internal quotations and citation omitted). He is entitled to judgment here.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be reversed.

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limit of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 12,934 words. This brief also complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5)-(6) because it was prepared using Microsoft Word 2013 in Garamond 14-point font, a proportionally spaced typeface.

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CERTIFICATE OF SERVICE

I hereby certify that on July 9, 2018, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Fourth Circuit by using the appellate CM/ECF system. Participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

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