UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

IBRAHIM TURKMEN, *et al.*, Plaintiffs, v. JOHN ASHCROFT, *et al.*, Defendants.	Case No. 1:02-cv-02307-DLI-SMG

DEFENDANT DENNIS HASTY'S LIMITED OBJECTIONS TO MAGISTRATE JUDGE'S REPORT & RECOMMENDATION

September 10, 2018

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INTRODUCTION

This case is on remand from the Supreme Court and the Second Circuit. *Ziglar v. Abbasi*, 137 S.Ct. 1843 (2017); Mandate, ECF No. 799. It is presently maintained as an ostensible class action by six men arrested after 9/11, designated "of interest" by the FBI and detained in a specially-created Administrative Maximum Special Housing Unit (ADMAX SHU) of the Metropolitan Detention Center (MDC). Plaintiffs' challenges to official policies regarding their detention have been dismissed. Plaintiffs' sole remaining claim is that, while housed in the ADMAX SHU, their Fifth Amendment due process rights were violated by verbal and physical abuse that they suffered at the hands of certain prison guards. They do not assert this claim against the guards that allegedly engaged in abuse. Rather, they assert it against Warden Hasty, alleging that he was deliberately indifferent to that abuse and, consequently, that he must personally pay plaintiffs damages. Plaintiffs rely on *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), which allowed a damages claim against federal law enforcement officials in the circumstances of that case.

In *Ziglar*, the Supreme Court explained that the law has changed dramatically since *Bivens* was decided. Nowadays, courts no longer create or imply damages remedies based on either statutory or constitutional rights. Rather, the creation of a new damages cause of action is ordinarily the responsibility of the legislative, not the judicial branch, and *Bivens* remedies have been authorized only in the three limited contexts recognized under the old regime. Any extension of *Bivens* to a new context must now overcome a presumption against implying causes of action, and requires an inquiry into (1) whether Congress or the Judiciary is the proper branch to decide whether to create a *Bivens* remedy, and (2) whether the existence of alternative remedies should cause the Judiciary to resist any impulse to create a new damages action.

In *Ziglar*, the Supreme Court squarely held that plaintiffs' claims in this case would require extending *Bivens* to a new context. 137 S.Ct. at 1864. Consequently, before proceeding further, it is necessary to determine (a) whether special factors counsel hesitation before the Judiciary creates a damages remedy that would ordinarily be for Congress to decide, and (b) whether the existence of alternative remedies itself militates against judicial creation of a damages remedy against Executive Branch officials. Any such extension of the *Bivens* remedy is now "disfavored." *Ashcroft v. Iqbal*, 556 U.S. 662, 675 (2009). Indeed, the Court observed that the outcome in its three prior "*Bivens* cases might have been different if they were decided today." *Ziglar*, 137 S.Ct. at 1856.

As the Second Circuit has emphasized, once it is determined that plaintiffs' claims ask the court to extend *Bivens* remedies to a new context – as it has been determined here – the threshold for declining to do so is low. *See Arar v. Ashcroft*, 585 F.3d 559, 574 (2d Cir. 2009). There need only be a factor that "counsels hesitation:"

> The only relevant threshold—that a factor "counsels hesitation"—is remarkably low. It is at the opposite end of the continuum from the unflagging duty to exercise jurisdiction. 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.

Id. This low threshold comports with the Supreme Court's decision in *Ziglar*, holding that courts must refrain from creating a *Bivens* remedy in a new context if "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 . . . ." 137 S.Ct. at 1858 (emphasis added). Moreover, the existence of an "alternative remedial structure . . . alone may limit the power of the Judiciary to infer a new *Bivens* cause of action." *Id.*

Guided by *Ziglar* and Second Circuit precedent, Magistrate Judge Gold determined that *Bivens* cannot properly be extended to this case, and recommended that plaintiffs' remaining claims be dismissed. Report & Recommendation ("R&R"), ECF No. 834 (filed August 13, 2018). He

determined that "extending *Bivens* might negatively impact [the Bureau of Prison's] investigatory procedures and policies, and that Congress is, as a result in the best position to weigh the costs and benefits of allowing a cause of action for damages to proceed." R&R at 11. Moreover, he noted that "the existence of alternative remedies usually precludes a court from authorizing a *Bivens* action." *Id.* at 19 (quoting *Ziglar*, 137 S.Ct. at 1865) (internal quotation m`arks omitted). "Because plaintiffs could have brought their claims under the [Federal Tort Claims Act] and been awarded damages for their injuries if they prevailed, *Ziglar* counsels that their *Bivens* claims should be dismissed." *Id.* at 22.

Defendant Dennis Hasty does *not* object to the principal conclusion and recommendation of the Report and Recommendation, including the two reasons given by Magistrate Judge Gold for recommending dismissal. However, because the Report and Recommendation suggests that a litigant risks waiver if he fails to note an objection to the parts of the report with which he disagrees, *Id.* at 28, out of an abundance of caution, pursuant to 28 U.S.C. § 636(b)(1)(c) and Federal Rule of Civil Procedure 72, Warden Hasty objects to the following two aspects of the Report and Recommendation: (1) that no conclusion can be drawn from congressional silence and inaction on the facts of this case, and (2) that injunctive and habeas relief and administrative remedies are not also alternative remedies.[1]

[1] The Magistrate Judge held that the Federal Tort Claims Act ("FTCA") itself was an alternative remedy that precluded the creation of a new *Bivens* remedy here. R&R at 22. He rejected the possibility of equitable, habeas and administrative relief as alternative remedies. *Id.* at 24. As shown below, that was in error even if these remedies were considered separately. *Infra* at Part II. However, these remedies can also be considered in combination, and along with FTCA remedies. Because the Magistrate Judge did not specifically address this approach in light of finding the FTCA remedies sufficient, it is not the subject of a separate objection here.

ARGUMENT

I. CONGRESS'S SILENCE AND INACTION PRECLUDE THE EXTENSION OF THE *BIVENS* REMEDY TO THIS CASE.

There is no dispute that Congress has not created a damages remedy under the Constitution for persons in plaintiffs' position. The Magistrate Judge was unwilling to allow Congress's silence and inaction to provide an additional reason for holding that no *Bivens* extension should be authorized here. R&R at 16. In so holding, the Magistrate Judge erred. The Magistrate Judge may have been properly skeptical about inferring any sort of intent from congressional silence and inaction under general principles of interpretation. But *Ziglar* has established that the *Bivens* inquiry provides an exception to that general rule.

The Supreme Court was explicit on this point: "[I]n any inquiry respecting the likely or probable intent of Congress, the silence of Congress is relevant." *Ziglar*, 137 S.Ct. at 1862. In *Ziglar*, the Supreme Court emphasized congressional silence in the face of *likely* attention, stating in its discussion of the detention policy claims against the senior Justice Department officials that Congress's failure to act "is notable because it is likely that high-level policies will attract the attention of Congress." *Id.* at 1862. "Thus, when Congress fails to provide a damages remedy in circumstances like these, it is much more difficult to believe that 'congressional inaction' was 'inadvertent.'" *Id.* (quoting *Schweiker v. Chilicky*, 487 U.S. 412, 423 (1988)).

It is not necessary to speculate about whether Congress devoted attention to abuse of terrorism-related detainees generally and guard-level abuse at the MDC following 9/11 – it did. The record is clear that Congress turned its attention squarely to the facts at issue here and also to the general problem of the violation of constitutional rights of terrorism-related prisoners. Because these issues were of congressional concern, it is not appropriate for the Judiciary to step into the fray and create a damages remedy for plaintiffs' claims.

The Report and Recommendation erred in its application of the Supreme Court's directive about the significance of Congress's silence and inaction. On the theory that the claim here "does not involve 'high-level policies'" likely to attract Congress's attention, the Magistrate Judge distinguished the abuse claims at issue here from the detention policy claims on which the *Ziglar* already held Congress's silence to be significant. R&R at 15-16 (quoting *Ziglar*, 137 S.Ct. at 1862). Yet the claims of abuse by these and similarly-situated plaintiffs actually produced an extensive record of congressional interest, awareness and attention. Nevertheless, Congress did not create a damages remedy, instead electing to employ alternative methods of investigating, remedying, and preventing such misconduct. If anything, this makes an even stronger argument for inferring the type of congressional attention that the Supreme Court found determinative for the official detention policy claims in *Ziglar*.

Following 9/11, Congress was concerned about, and looked directly at the potential for, constitutional violations in the treatment of terrorism suspects. Thus, immediately after 9/11, as part of the USA PATRIOT Act, it directed the Office of the Inspector General (OIG) of the United States Department of Justice to investigate complaints of constitutional violations at the hands of federal prison and law enforcement officials. *See* Pub. L. No. 107-56, § 1001, 115 Stat. 272 (2001). The OIG had the ability to pursue cases against Bureau of Prison (BOP) employees both administratively and criminally:

> The OIG can pursue an allegation either criminally or administratively. Many OIG investigations begin with allegations of criminal activity but, as is the case for any law enforcement agency, do not end in prosecution. When this occurs, the OIG is able to continue the investigation and treat the matter as a case for potential administrative discipline.

Office of the Inspector General, U.S. Dep't of Justice, *Report to Congress on Implementation of Section 1001 of the USA PATRIOT Act* ("Patriot Act Report"), July 17, 2003, at 5 n.3, available at https://oig.justice.gov/special/0307/index.htm. Congress additionally created a process by which it

would be kept informed of such abuses and the OIG's related investigatory activities. USA PATRIOT Act, Pub. L. No. 107-56, § 1001, 115 Stat. 272 (2001) (requiring semi-annual reports). The reports to Congress on such deprivations of rights have been consistent and continuous. Patriot Act Reps., available at https://oig.justice.gov/reports/patriot.htm (semi-annual reports from 2002-2018).

In other words, early on Congress displayed full awareness that the constitutional rights of those caught up in the terrorism investigations might suffer. Its response was to ensure that any alleged violation of those rights was investigated and brought to light. It put in place a specific set of practices and policies to ensure that this was done. It did not, however, elect to create a special damages remedy for those who may have been deprived of their rights. Rather, it sought to address that problem by investigation and report, which could lead to criminal or disciplinary consequences for the BOP employees that were involved.

Not only was Congress responding to the general risk of unconstitutional treatment of terrorism-related detainees, but Congress was aware of the circumstances at the MDC specifically. The verbal and physical abuse by prison guards at the MDC after 9/11 at issue here was covered in the initial OIG Report. Office of the Inspector General, U.S. Dep't of Justice, *The September 11 Detainees: A Review of the Treatment of Aliens Held on Immigration Charges in Connection with the Investigation of the September 11 Attacks* (April 2003) (OIG Report) at 142-150. And there was follow-up. The topic of guard abuse at the MDC was examined again after an even more thorough investigation—involving more than 100 interviews—in a detailed 80-page Supplemental Report. Office of the Inspector General, U.S. Dep't of Justice, *Supplemental Report on September 11 Detainees' Allegations of Abuse at the Metropolitan Detention Center in Brooklyn, NY* (December 2003) (Supplemental OIG Report). The Supplemental OIG Report concluded that BOP policy had been violated and recommended that administrative disciplinary action be taken against those employees. Supp. OIG

Rep. at 2, 43 & 46. Thus, Congress had at its fingertips these exact issues of verbal and physical abuse at the MDC. *See* July 2003 and January 2004 Patriot Act Reps. (discussing the substance of the OIG Report and Supplemental OIG Report); *Lessons Learned-the Inspector General's Report on the 9/11 Detainees: Hearing Before the S. Comm. on the Judiciary*, 108 Cong. 11-12 (June 25, 2003) (indicating the OIG Report was transmitted to Congress).

And the effort did not stop at written reports. Congress held oversight hearings in which it inquired specifically about the alleged abuse at the MDC. *Lessons Learned*, 108 Cong. 11-12 (June 25, 2003); *Oversight Hearing: Law Enforcement and Terrorism: Hearing Before the S. Comm. on the Judiciary*, 108th Cong. 192 (July 23, 2003) (questioning by Senator Patrick Leahy of FBI Director Mueller about allegations of abuse of Muslim and Arab detainees held in federal custody). But Congress assuredly did *not* seek to provide victims of such abuse with a damages remedy.

Plaintiffs argued that Congress's silence on the expansion of a *Bivens* remedy to these circumstances cannot reflect any intention not to create a constitutional damages remedy because the OIG Reports referenced this litigation, which was ongoing at the time. Plaintiffs' Response Memorandum at 12, ECF No. 808-9. That Congress may have been aware of this suit does not vitiate the implication from Congress's failure to create a damages remedy. *See Lebron v. Rumsfeld*, 764 F. Supp. 2d 787, 799 (D.S.C. 2011) ("Congress, fully aware of the body of litigation arising out of the detention of persons following September 11, 2001, has not seen fit to fashion a statutory cause of action to provide for a remedy of money damages under these circumstances."). Indeed, at the time that Congress looked at this issue, this case included as defendants the high-level officials against whom the Supreme Court held in *Ziglar* that no *Bivens* action would lie.[2] Thus, the pendency

[2] The original Complaint, the Amended Complaint, and the Second Amended Complaint each contained as defendants John Ashcroft (U.S. Attorney General), Robert Mueller (Director of the

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of the suit can be no more significant here than it was in connection with the suit against those officials, where it was not given any significance by the Supreme Court at all.

As discussed above and observed by the Supreme Court, "[c]ongressional interest has been 'frequent and intense' and some of that interest has been directed to the conditions of confinement at issue here." *Ziglar*, 137 S.Ct. at 1862 (quoting *Schweiker*, 487 U.S. at 425). In *Ziglar*, the Supreme Court found it "telling" that "at Congress' behest, [the OIG] compiled a 300-page report documenting the conditions in the MDC in great detail." *Id.* at 1862. Indeed, even beyond the Patriot Act inquiries, Congress has shown longstanding interest in prison treatment and remedies, including with passage of the Prison Litigation Reform Act of 1995 (PLRA), which the Supreme Court mentioned in *Ziglar* as itself potentially providing a basis for finding significance in Congress's failure to provide a damages remedy. *Id.* at 1865 (citing 42 U.S.C. § 1997e). Yet "at no point did Congress choose to extend to any person the kind of remedies" that plaintiffs seek here. *Id.* at 1862. What was "telling" for the detention policy claims is far more telling here. The conduct underlying the claims at issue here was triply detailed to Congress: it was covered in the OIG Report; it was the focus of multiple rounds of testimony before a congressional committee; and ultimately it was examined in far greater detail and was the sole focus a Supplemental OIG Report that included conclusions of BOP policy violations and recommendations of administrative disciplinary action against the perpetrators. Yet Congress did not create a damages remedy. Congress's approach has been to subject complaints of unconstitutional abuse to congressional oversight and the light of day – and to use that active investigatory technique and disciplinary procedures to curb abuse and ensure

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(Continued...)

FBI), and James W. Ziglar (Commissioner of Immigration and Naturalization Service) among others. Complaint, ECF No. 1 (filed Apr. 17, 2002); Amended Complaint, ECF No. 8 (filed Jul. 27, 2002); Second Amended Complaint, ECF No. 28 (filed Jun. 18, 2003).

proper punishment for abusers. The absence of a damages remedy as part of that response was "more than 'inadvertent.'" *Id.* at 1862. In view of this congressional attention, Congress's silence and inaction is meaningful to the present inquiry.

The Magistrate Judge, however, failed to import significance to Congress's silence and inaction regarding an expansion of the *Bivens* remedy to these circumstances. In so doing, he misunderstood the inquiry. The Magistrate Judge is correct that it is ordinarily difficult to infer congressional intent from silence or failure to act. Thus, from silence alone, it might be difficult to infer whether Congress did or did not, want a constitutional damages remedy. But finding this specific intent is not the focus of the inquiry. Rather, the ultimate inquiry in a case like this focuses simply on whether the job of creating damages remedies more properly belongs to Congress or to the Judiciary. *Id.* at 1857 ("The question is 'who should decide' whether to provide for a damages remedy, Congress or the courts?" (quoting *Bush v. Lucas*, 462 U.S. 367, 380 (1983))).

Where Congress has shown active and material interest in a set of issues and concerns – as it did here with respect to the treatment of those incarcerated in connection with terrorism investigations generally, and with the post-9/11 conditions at the MDC specifically – Congress has demonstrated that this is properly an area of congressional interest and inquiry. It is a matter that Congress has placed within its own bailiwick; and it is therefore not one into which the Judiciary ought lightly intrude. Where, as here, the claim at issue arises in an area of clear, active congressional inquiry and interest, Congress's failure to create a damages remedy itself speaks volumes, and the Judiciary should not attempt to fill a perceived void by creating a cause of action that Congress itself did not create. If this is a debatable point, hesitation is warranted. Consequently, Congress's active interest in this field and failure to create a damages remedy satisfies the "remarkably low" threshold of prompting hesitation before creating a damages remedy in this case, which in turn precludes the creation of a *Bivens* remedy here. *See Arar* 585 F.3d at 574.

II. EQUITABLE RELIEF AND ADMINISTRATIVE REMEDIES WERE ALTERNATIVE REMEDIES PRECLUDING EXTENSION OF THE *BIVENS* REMEDY TO THIS CASE.

The Supreme Court observed that "the existence of alternative remedies usually precludes a court from authorizing a *Bivens* action," and there "might have been alternative remedies available here, for example, a writ of habeas corpus [or] an injunction requiring the warden to bring his prison into compliance with the regulations" prohibiting abuse. *Ziglar*, 137 S.Ct. at 1865. Indeed, after noting how long this damages case has been pending without any apparent benefit to plaintiffs, the Supreme Court commended habeas relief as "provid[ing] a faster and more direct route to relief than a suit for money damages" for the plaintiffs. *Id.* at 1863. However, the Magistrate Judge, without identifying particular deciding factors, found that neither injunctive nor habeas relief, nor administrative remedies constituted alternative remedies. R&R at 24. This was in error.

The Supreme Court specifically highlighted habeas and injunctive relief because this case involved allegations of continuing abuse and physical harm, both to the named plaintiffs and the purported class. That factor readily distinguishes this case from the classic *Bivens* case, which typically involves a single incident of misconduct and injury, precluding any form of equitable relief. As the Supreme Court has repeatedly noted, for those injured in a classic *Bivens* context – where the Court has been willing to create a remedy in some instances – it is "damages or nothing." *Ziglar*, 137 S.Ct. at 1862. Not so here. An equitable or habeas action to halt misconduct – including, as appropriate, show cause orders, temporary restraining orders, and preliminary injunctions – could protect the detainees and their constitutional interests far more effectively than an after-the-fact damages action ever could. It is unimaginable that any judge in this district would allow credible claims of systematic physical abuse of prisoners, in violation of prison regulations, to go unaddressed. This is particularly clear given that it would not be necessary for the Court to reach

any constitutional question because, as the Supreme Court recognized, the abuse here involved clear violations of prison regulations. *Id.* at 1865.

Moreover, as a prophylactic and preventive matter, physical abuse is prohibited by BOP policies, which are enforced through complaint, investigative and disciplinary processes that can result in criminal prosecution or severe employment sanctions for any officer found guilty. July 17, 2003 Patriot Act Rep. at 5 n.3 ("The OIG can pursue an allegation either criminally or . . . treat the matter as a case for potential administrative discipline."); *see also* OIG Rep. at 143 n.121. Indeed, the MDC guards involved in physical abuse following 9/11 were referred for disciplinary action. Supp. OIG Rep. at 2 (recommending "disciplinary action against ten current BOP employees, counseling two current MDC employees, and informing employers of four former staff members about our findings against them"); January 27, 2004 Patriot Act Rep. at 12 ("The OIG . . . concluded that the DOJ has taken significant and responsible steps to implement the OIG's recommendations."). BOP's administrative processes have themselves been deemed adequate alternative remedies. *Gonzalez v. Hasty*, 269 F. Supp. 3d 45, 60 (E.D.N.Y. 2017) (finding administrative complaints filed by plaintiff to constitute alternative remedies).

Plaintiffs argued, and the Magistrate Judge restated, that injunctions provide only prospective relief, and this would not provide them with a damages remedy for abuse they suffered at intake. Pls. Memorandum, ECF No. 808-7 at 15; R&R at 23. But the decisive point here is that it would also take time to develop their damages claim against the Warden. The only claim at issue here is for alleged deliberate indifference; namely, that over time Warden Hasty learned of allegations of abuse, realized they were accurate, and could have taken steps to halt the misconduct but failed to do so. R&R at 10; Pls. Memorandum, ECF No. 808-7 at 1; Fourth Amended Complaint, ECF No. 726, at ¶¶ 77-78 (filed Sep. 13, 2010). Such a claim would take time to ripen.

In other words, neither the *Bivens* damages claim against Warden Hasty nor injunctive relief would address the earliest instances of guard misconduct.

Plaintiffs also argued that the official detention policies, including those policies that limited access to attorneys—among the claims that were dismissed—thwarted their access to the alternative remedies of habeas and injunctive relief. Pls. Memorandum, ECF No. 808-7 at 13; R&R at 23. Although the Magistrate Judge correctly noted that plaintiffs' factual allegations in their complaint must be taken as true at the motion to dismiss stage, he erred in concluding that plaintiffs' allegations supported their argument that they could not have filed any action until April 2002. R&R at 24; *see Mason v. Am. Tobacco Co.*, 346 F.3d 36, 39 (2d Cir. 2003) ("[L]egal conclusions, deductions or opinions couched as factual allegations are not given a presumption of truthfulness.") (internal quotation omitted).

First, plaintiffs alleged only that the "communications blackout" lasted until mid-October. Fourth Amended Complaint, ECF No. 726 at ¶ 79. As explained above, the alternative remedies cannot be required to address the earliest days of abuse where the damages claim brought by plaintiffs based on Warden Hasty's alleged deliberate indifference likewise would not address abuse occurring shortly after 9/11. Second, the Complaint's allegations of interference with access to counsel—which list several calls with counsel between October 2001 and January 2002—do not support the conclusion that it was impossible to file an action for equitable relief prior to April 2002. *Id.* ¶ 85. The time that it took this particular plaintiffs group to get the Complaint in this action together is not pertinent to whether injunctive relief would be available to put a halt to alleged systematic physical abuse of prisoners by prison guards. That is a very different case – and a much simpler case – than the case that plaintiffs required several months to put together. The case plaintiffs filed sought bigger fish to fry. It named senior level government officials and complained of a range of broad policies and confinement practices and the reasons why they were confined at

all. Complaint, ECF No. 1 (filed Apr. 17, 2002) (pursuing claims against various senior Executive Branch officials, including Attorney General Ashcroft, and FBI Director Mueller, and seeking to challenge the very fact of their confinement and a wide range of conditions of that confinement, as opposed to only instances of physical abuse). Plaintiffs' case was a difficult one to pursue. A case seeking safety from physical abuse is far, far simpler and more suitable to expeditious injunctive relief.

Indeed, Warden Hasty provided an example of a 9/11 detainee who *had* brought a petition for habeas relief in this district in December 2001, four months before plaintiffs filed their first complaint. Complaint, *Baloch v. Ashcroft*, No. 01-cv-8515, Verified Complaint (E.D.N.Y. filed Dec. 21, 2001). The *Baloch* filing demonstrates that habeas relief could have been pursued within months of 9/11. The Magistrate Judge, however, declined to credit *Baloch* as providing an indication that injunctive relief could have been effective. R&R at 24. In addition to noting the passage of time prior to its filing, a concern addressed above, the Magistrate Judge observed that *Baloch* was dismissed as moot before it could be finally adjudicated because the prisoner was released before the claim could be finally resolved. *Id.* at 24. The Magistrate Judge's concern over mootness is misplaced. First, it is clear that the success of a particular alternative remedy is not determinative of its availability. *Gonzalez*, 269 F. Supp. 3d at 60-61 (finding "unsuccessful" administrative complaints filed by plaintiff to constitute alternative remedies). But more specifically to this case, plaintiffs filed a class action. If they had come to court as a class, claiming a pervasive pattern of physical abuse of the kind documented in the OIG Reports, there is no reason to believe that this Court would not have taken prompt and appropriate action to vindicate the constitutional interest at issue by putting a halt to abuse by prison guards.

In judging the adequacy of alternative remedies, the Supreme Court emphasized not whether they were perfect substitutes for a damages remedy, but rather whether they would serve to protect

the constitutional interest involved. *Ziglar*, 137 S.Ct. at 1862-63. Here it is clear that injunctive and habeas relief would have been effective in ensuring that any abuse by the guards was quickly halted.[3] We reiterate: If any judge in this district were provided with evidence of any sort of systematic, widespread physical abuse by prison guards of the kind alleged here, that judge would enter appropriate orders to get to the heart of it, and put a stop to it.

Therefore, for the type of interest and injury at issue here, injunctive and habeas relief provided an effective remedy. This is especially clear where viewed in combination with the administrative complaint system, which poses the very real threat of criminal or disciplinary action against abusive guards, adding a substantial element of deterrence. That a remedy is imperfect, or might not function perfectly in a particular instance, is not a bar to its consideration as an available alternative remedy. *Doe v. Meron,* No. CV PX-17-812, 2018 WL 3619538, at *13 (D. Md. July 30, 2018) ("To preclude a *Bivens* action, the available 'alternative, existing process' need not provide complete relief.") (internal citation omitted). This Court should therefore find that injunctive and habeas relief, in addition to administrative remedies, constitute alternative remedies precluding the extension of *Bivens* to this case.

CONCLUSION

For the foregoing reasons, we respectfully request that the Court adopt the ultimate conclusion of the Magistrate Judge's Report and Recommendation that plaintiffs' claims be dismissed, but that the Court also find that Congress's silence on damages remedies and the

[3] At the time, either an injunction or a writ of habeas corpus would have provided an equivalent alternative remedy for plaintiffs' conditions of confinement claims. *See Gonzalez v. Hasty*, 269 F. Supp. 3d at 60 (quoting *Carmona v. U.S. Bureau of Prisons*, 243 F.3d 629, 632 (2d Cir. 2001) ("A writ of habeas corpus under § 2241 is available to a federal prisoner who does not challenge the legality of his sentence, but challenges instead its execution subsequent to his conviction.")).

availability of injunctive and habeas relief and administrative remedies provide additional grounds for dismissal.

Respectfully submitted

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CERTIFICATE OF SERVICE

I hereby certify that on September 10, 2018, the foregoing document was electronically filed with the Clerk of Court and served in accordance with the Federal Rules of Civil Procedure, and/or the Eastern District's Local Rules, and/or the Eastern District's Rules on Electronic Service via the CM/ECF system, which will send notification of such filing to all counsel of record, including the following parties and participants:

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