21-2926

United States Court of Appeals
for the Second Circuit

AHMER ABBASI, ANSER MEHMOOD, BENAMAR BENATTA, SAEED HAMMOUDA, AND PURNA BAJRACHARYA,
Intervenors-Plaintiffs-Appellants,

ASHRAF IBRAHIM,
Plaintiff-Respondent,

IBRAHIM TURKMEN, ASIF-UR-REHMAN SAFFI, SYED AMJAD ALI JAFFRI, on behalf of themselves and all others similarly situated, AKIL SACHVEDA, SHAKIR BALOCH, HANY IBRAHIM, YASSER EBRAHIM, and AKHIL SACHDEVA,
Plaintiffs,

v.

WARDEN DENNIS HASTY,
Defendant-Appellee,

(*continued on inside cover*)

On Appeal from the United States District Court for the Eastern District of New York
Judge Dora L. Irizarry (No. 1:02-cv-02307-DLI-RML)

BRIEF OF INTERVENORS-PLAINTIFFS-APPELLANTS AND SPECIAL APPENDIX

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Defendants-Cross-Claimants,

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Defendants,

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Intervenors.

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INTRODUCTION

This appeal presents the question of whether federal detainees may seek money damages from a federal jail warden and other jail employees who facilitated and were deliberately indifferent to systemic beatings and abuse by guards under their supervision.

Shortly after September 11, 2001, Intervenors-Plaintiffs-Appellants ("Plaintiffs") were detained for civil immigration violations and incarcerated while awaiting deportation or voluntary departure. For no legitimate reason, Plaintiffs were placed in a super-maximum security wing of a federal jail and subjected to uniquely harsh conditions of confinement. While held in isolation, they were also physically and verbally abused for months, again for no legitimate reason. Their treatment was not based on evidence that Plaintiffs had committed crimes, or were dangerous, but rather on their religion, race, immigration status, and ethnicity—as Muslim non-citizens of Arab and South Asian descent who, solely by virtue of these characteristics, were groundlessly suspected of some connection to the 9/11 attacks. To remedy these constitutional violations, in 2002, Plaintiffs sued individual Defendants seeking damages under *Bivens v. Six Unknown*

Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388 (1971). Most relevant to this appeal, Plaintiffs alleged that Defendants-Appellees Dennis Hasty, Joseph Cuciti, and Salvatore LoPresti were deliberately indifferent to the physical abuse suffered by Plaintiffs.

The case wound its way through the courts over the following decades, eventually ending up at the Supreme Court. In *Ziglar v. Abbasi*, 137 S. Ct. 1843 (2017), the Supreme Court held that some of Plaintiffs' claims (seeking damages against high-level policymakers) should be dismissed for lack of a *Bivens* cause of action, but remanded Plaintiffs' claim that Warden Hasty allowed and encouraged physical and verbal abuse of the detainees entrusted to his care, abuse far beyond the harsh treatment ordered by the policymaking Defendants.[1] The Supreme Court found Plaintiffs' allegations to state a plausible claim for a violation of the Constitution, but declined to decide whether to accept the "modest extension" of *Bivens* required to proceed. *Id.* at 1864–65.

[1] For reasons explained below, the claims against Defendants LoPresti and Cuciti were not before the Supreme Court.

Instead, the Supreme Court remanded that question to this Court, which in turn remanded to the District Court, which held that Plaintiffs could not pursue a *Bivens* remedy against Defendants Hasty, LoPresti, and Cuciti. *See* SPA16–22, SPA37–41. This was error. For decades people convicted of federal crimes have been able to bring *Bivens* claims against federal guards and supervisors for deliberate indifference. The Supreme Court itself has approved of such claims. There is no reason to suppose that the same claims would not be available to Plaintiffs, held on civil charges and entitled to even greater protection than convicted people. For the foregoing reasons, Plaintiffs respectfully request that this Court reverse the judgment below.

JURISDICTIONAL STATEMENT

Plaintiffs assert claims against officers and employees of the United States under 28 U.S.C. § 1331 and *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). The District Court entered a final judgment dismissing Plaintiffs' case on September 13, 2021. SPA42. Jurisdiction over Plaintiffs' appeal is based on 28 U.S.C. § 1291. Plaintiffs filed their Notice of Appeal on November 8, 2021. JA196.

STATEMENT OF THE ISSUES PRESENTED ON PLAINTIFFS' APPEAL

Did the District Court err in holding that special factors preclude extending a *Bivens* remedy to Plaintiffs' claim that Defendants Hasty, LoPresti and Cuciti were deliberately indifferent to physical abuse by correctional officers in violation of substantive due process?

STATEMENT OF THE CASE

Turkmen v. Ashcroft was first filed in 2002, and has a lengthy procedural background. We summarize it here for the Court's convenience. The putative class action began with eight plaintiffs, who filed constitutional and statutory claims against the United States, high-level federal officials, and Metropolitan Detention Center ("MDC") staff. In 2009, five of these plaintiffs settled their Federal Tort Claims Act (FTCA) claims against the United States for $1.26 million, and as part of that settlement released their *Bivens* claims. *See* District Court Dkt. No. 687-2, Ex. A. Six other members of the putative class—the current Plaintiffs—then sought and received leave to intervene in the

case, to pursue the class claims.[2] At the same time, Plaintiffs amended the Complaint to add factual detail sufficient to meet the pleading standard established in *Ashcroft v. Iqbal*, 556 U.S. 662 (2009). *See* JA110–195. Plaintiffs also narrowed the Complaint by limiting claims to class claims and eliminating a number of low-ranking MDC defendants. *Id.*

Defendants moved to dismiss this Fourth Amended Complaint, and in 2013 Judge Gleeson granted those motions as to the high-level Defendants, but denied the other Defendants' motions to dismiss in significant part, ruling that five of Plaintiffs' seven claims could move forward. *See* Memorandum and Order, District Court Dkt. No. 767. On appeal and cross-appeal, the panel majority reversed Judge Gleeson's dismissal of Plaintiffs' claims against the high-level Defendants and affirmed the viability of the majority of the claims against the MDC

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[2] The Fourth Amended Complaint, like its predecessor, also included claims by two of the original Plaintiffs, who had been detained in Passaic County Jail in New Jersey and did not settle. The District Court dismissed the Passaic plaintiffs' claims and the Court of Appeals affirmed. *Turkmen v. Hasty*, 789 F.3d 218, 259, 264, 265 (2d Cir. 2015), *rev'd in part, vacated in part by Ziglar v. Abbasi*, 137 S. Ct. 1843 (2017). Thus, they have no claims currently pending before the Court.

Defendants. *Turkmen v. Hasty*, 789 F.3d at 261, 249. Defendant Cuciti did not appeal from Judge Gleeson's ruling, and Defendant LoPresti filed a Notice of Appeal, but did not pay the filing fee or file a brief, thus his appeal was dismissed. *Id.* at 224 n.2. The court found Plaintiffs' deliberate indifference allegations against one MDC-staff member too general and conclusory to support the claim, contrasting the allegations with those regarding Defendant Hasty, against whom Plaintiffs' pleading was "clearly" adequate. *Id.* at 250–51.

Judge Raggi dissented from the majority decision. *Id.* at 265 (Raggi, J. dissenting). She disagreed that a *Bivens* cause of action was available for claims challenging executive policy and would have dismissed all policy-based claims against all Defendants. *Id.* However, she agreed with the panel majority that "plaintiffs' non-policy claims of 'unofficial abuse'"—the claims that remain at issue today—could move forward. *Id.* at 295 n.41.

After the Court of Appeal's ruling, Defendants' motion for rehearing *en banc* was denied by an evenly divided court. *See Turkmen v. Hasty*, 808 F.3d 197 (2d Cir. 2015). Six judges would have reheard the case *en banc*, and adopted Judge Raggi's dissent, including her

distinction between the policy claims—for which they believed there should be no *Bivens* cause of action—and the "unofficial abuse" claim, which could move forward. *Id.* at 199, 203 n.16.

On October 11, 2016, several Defendants' petitions for writs of certiorari were granted. *Ziglar v. Turkmen*, 137 S. Ct. 292 (2016); *Ashcroft v. Turkmen*, 137 S. Ct. 293 (2016); *Hasty v. Turkmen*, 137 S. Ct. 293 (2016). A divided Supreme Court reversed this Court, holding that Plaintiffs' challenge to Defendants' policy of placing Muslim detainees in harsh conditions of confinement without individualized suspicion presented a new *Bivens* context, and that special factors counseled against expanding the *Bivens* remedy to allow such claims. *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1863 (2017).[3] The Court reasoned that *Bivens* is not "a proper vehicle for altering an entity's policy," *id.* at 1860, especially national security policy, *id.* at 1860–63.

The Supreme Court placed Plaintiffs' deliberate indifference claim against Defendant Hasty on a different footing. *Id.* at 1864. After

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[3] Justices Breyer and Ginsberg dissented, and would have allowed all Plaintiffs' claims to move forward. Justices Sotomayor and Kagan recused themselves from participating in the case, and Justice Gorsuch played no part in consideration or decision. 137 S. Ct. at 1851.

finding that Plaintiffs' allegations "state a plausible ground to find a constitutional violation if a *Bivens* remedy is to be implied," the Court turned to the *Bivens* question. *Id.* The Court noted that although the differences between Plaintiffs' claim and that recognized in *Carlson v. Green*, 446 U.S. 14 (1980), are "perhaps small, at least in practical terms," adjudicating the claim requires a "modest extension" of the doctrine, because *Carlson* involved claims under the Eighth Amendment, and Plaintiffs, as civil detainees, must proceed under the Fifth Amendment. *Ziglar*, 137 S. Ct. at 1864–65. The Supreme Court remanded to this Court with clear and specific guidance: the lower court must analyze "certain features that were not considered in the [Supreme] Court's previous *Bivens* cases[,]" which might discourage authorization of a *Bivens* claim. *Ziglar*, 137 S. Ct. at 1865. These features include the possible alternative remedies of an injunction or some other equitable relief, and congressional silence regarding federal prison damage claims when passing the Prison Litigation Reform Act. *Id.*

This Court referred the issue to the District Court, where it was further referred to the Magistrate Judge for report and

recommendation. *See* Case No. 13-981, Doc. 385; District Court Order dated Jan. 22, 2018. On August 13, 2018, the Magistrate Judge recommended that all remaining claims be dismissed against the three remaining Defendants in the case: Hasty, the subject of the Supreme Court's remand; and also Defendants LoPresti and Cuciti. SPA28. The Magistrate Judge found a single special factor counseling against *Biven* liability: that allowing such a remedy might lead Bureau of Prisons ("BOP") officials to violate BOP regulations regarding investigation and reporting of alleged abuse; he also held that the existence of the FTCA as an alternative remedy counsels hesitation in implying a *Bivens* cause of action. SPA18–19, SPA22. Conversely, the Magistrate Judge held that congressional silence when passing the PLRA does not indicate congressional disapproval of a *Bivens* cause of action, and that administrative grievances and injunctive relief were not available to Plaintiffs, and thus were not alternative remedies counseling hesitation. SPA11–16, SPA22–24. Plaintiff and Defendants both objected to different portions of the Magistrate Judge's rulings. District Court Dkt. Nos. 838, 839, 840, 842, 843, 844, 846. The District Court

rejected both parties' objections in full, adopting the Magistrate Judge's reasoning and recommendation. SPA30.

STATEMENT OF FACTS

The Supreme Court has already determined that Plaintiffs state a plausible claim for "deliberate indifference" against Defendant Hasty. *Ziglar*, 137 S. Ct. at 1864. The relevant factual allegations are set out in detail in the Fourth Amended Complaint ("Complaint"), JA110–195, substantially corroborated by two Department of Justice Office of Inspector General Reports,[4] and summarized below.

Upon the orders of high-level federal officials who are no longer defendants in the case, Warden Hasty placed Plaintiffs in an

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[4] *See* Office of the Inspector General, 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* (Apr. 2003), https://oig.justice.gov/sites/default/files/legacy/special/0306/full.pdf ("OIG Report"). Relevant excerpts of the OIG Report appear at JA250–372. *See also* Office of the Inspector General, Dep't of Justice, *Supplemental Report on September 11 Detainees' Allegations of Abuse at the Metropolitan Detention Center in Brooklyn, New York* (Dec. 2003) ("Suppl. OIG Report") (full version reproduced at JA201–249). Both reports were appended as exhibits to earlier complaints, and are incorporated by reference in the Fourth Amended Complaint. *See* JA112 n.1, JA113 n.2.

"administrative maximum special housing unit," ("ADMAX SHU") where they were held in solitary confinement and subjected to significant restrictions as a matter of policy. JA117–118, JA135; *see Ziglar*, 137 S. Ct. at 1853. But Plaintiffs' treatment went far beyond the detention policy insulated from challenge by the Supreme Court. *See Ziglar*, 137 S. Ct. at 1853 (complaint describes pattern of physical and verbal abuse, humiliating sexual comments, and religious insults not imposed pursuant to official policy).

Plaintiffs' abuse is well-documented. JA144–145, JA147–151, JA153, JA159–161, JA164–165, JA170–171, JA174–175, JA178; *see also* JA212–224 (OIG finding that 16–20 MDC staff members physically or verbally abused 9/11 detainees). During transports through the jail, MDC guards slammed handcuffed and shackled detainees against walls, bent and twisted their arms, hands, wrists and fingers, lifted them off the ground by their arms and stepped on their leg chains. JA144, JA212–224. Lights were left on in their cells 24 hours a day as a matter of policy, but MDC guards exacerbated this sleep disruption by banging loudly on the cell doors throughout the night, and yelling "Motherfuckers," "Assholes" and "Welcome to America." JA148–149,

JA237–238. When Anser Mehmood first arrived at the MDC he was dragged from the van by several large guards and thrown against the wall. JA159–160. His left hand was broken during this incident, and he sustained hearing loss. *Id.* After the guards cleaned the blood from his face he was photographed and threated with death if he asked any questions. *Id.*; *see also* JA156 (Abbasi beaten on arrival), JA170 (Khalifa beaten on arrival), JA175–175 (Hammouda abused on arrival), JA178 (Bajracharya pushed forcibly on arrival).

Plaintiffs were locked in their cells for 23 hours a day, with recreation limited to one hour per day in a barren outdoor cage as a matter of policy, and MDC staff exacerbated this deprivation as well—physically abusing the detainees on the way to the recreation cages, and leaving them outside in the cold for hours. JA149–150. Purna Raj Bajracharya, for example, almost always refused recreation, but one of the few times he took it, on December 28th, he was left outside from 8:45 to 11 a.m. in only a thin jacket, despite below freezing temperatures. JA150; *see also* JA347.

Almost all of the detainees were Muslim, and MDC staff frequently interrupted their prayers, shouting "shut the fuck up," and

mocking their Arabic phrases. JA153. Plaintiffs were called "camel[s]," "terrorists," and "Fucking Muslims." JA146, JA156. Frequent strip-searches were required by policy, but the guards made them worse by making humiliating comments about Plaintiffs' bodies while strip-searching them, sometimes in front of female guards, and sometimes on video. JA147–148, JA171; *see also* JA230–232.

This abuse continued until Plaintiffs were cleared of any connection to the September 11 attacks (and terrorism in general), and deported. JA157, JA161–162, JA167–168, JA172–173, JA177, JA181.

Plaintiffs suffered profoundly from this mistreatment. Benamar Benatta, for example, twice attempted to injure himself by banging his head against his cell wall. JA164–165. In November, after he requested help from MDC staff because the guards' loud noises at night kept him from sleeping, Benatta began banging his head against the cell bars so intensely that his cellmate, Ahmed Khalifa, sounded the cell distress alarm. *Id.* Guards entered the cell, beat and kicked Benatta, chipping his tooth, and then brought him to another cell where they tied him to the bed. *Id.* Another detainee attempted suicide by strangling himself

with his bedsheet. JA139. Purna Raj Bajracharya wept constantly and told guards he felt suicidal. JA180.

Plaintiffs' abuse and harassment was allowed and encouraged by Warden Hasty, who referred to the detainees as "terrorists" in MDC memoranda, though they were never even charged with terrorist activity. JA117, JA146. Hasty tried to avoid witnessing the systematic abuse meted out by his subordinates by neglecting to make required rounds on the ADMAX SHU. JA117. He isolated Plaintiffs (JA132, JA135), and denied them access to the outside world (JA136–143), as well as the means to file an internal complaint. JA154. These attempts to avoid evidence of Plaintiffs' abuse were unsuccessful. JA117, JA136, JA142, JA145, JA147, JA149–151, JA153. Numerous complaints of abuse led the BOP to institute a policy of videotaping all 9/11 detainee transports, and resulted in two OIG investigations, as well as investigations by the BOP Office of Internal Affairs and the FBI. JA145. Knowing of these complaints and investigations, Hasty nevertheless failed to take any steps to protect the detainees, train his staff, or implement a process at MDC to review the videotapes for evidence of

abuse. *Id.* Many of these tapes were destroyed, disappeared, or taped over, and others were withheld from the OIG for years. JA145, JA243.

The culture of abuse was so far-reaching at Hasty's MDC that when MDC staff members brought allegations of abuse to Hasty's attention they were called "snitches," and threatened and harassed by other staff at the facility. JA136. One MDC employee estimated that half the staff at MDC stopped talking to him after he wrote a confidential memo to the Warden detailing detainees' complaints, which somehow made its way to staff members guarding Plaintiffs. *Id.* This harassment went unpunished. *Id.*; *see also* JA146 (counselor who passed on Plaintiffs' allegations of verbal harassment and assault was ostracized and harassed).

Other MDC Defendants also played a role in this deliberate indifference to guard abuse. Unlike Hasty, Defendants LoPresti and Cuciti made regular rounds on the ADMAX unit, thus hearing directly Plaintiffs' complaints of mistreatment. JA118 (LoPresti, MDC Captain, had responsibility for supervising all MDC officers, and overseeing the ADMAX unit; he was frequently present on the ADMAX, received numerous complaints of abuse from 9/11 detainees, and failed to correct

these abuses), JA119 (Cuciti, First Lieutenant at MDC, was responsible for escorts of 9/11 detainees, during which much abuse occurred; he made rounds on the ADMAX and heard complaints from Plaintiffs of abuse, yet failed to rectify that abuse); *see also* JA136, JA142, JA144–147, JA149, JA153; District Court Dkt. No. 767 at 33 ("No one questions that the abuse constituted a grave risk to plaintiffs' reasonable safety, and the Complaint plausibly alleges that all of the defendants were deliberately indifferent to – that is, subjectively aware of – that risk and yet did nothing to mitigate it.").

SUMMARY OF THE ARGUMENT

The District Court identified two grounds to dismiss Plaintiffs' claims. First, the Court found one special factor counseling against a *Bivens* remedy—that a warden who faces damages for allowing guards to abuse detainees might be inclined to violate BOP policy requiring him to report all allegations of guard abuse for outside investigation. SPA37–39, SPA16–19. This speculation contradicts the Supreme Courts' consistent reasoning that damage claims *deter* illegality. *See Ziglar*, 137 S. Ct. at 1860. It also contradicts the broadly-applied

presumption that government agents will act lawfully, absent evidence to the contrary. *See Bracy v. Gramley*, 520 U.S. 899, 909 (1997).

Second, the District Court held that the FTCA is an available alternative remedy that forecloses a *Bivens* action. SPA39–40, SPA19–22. This ignores binding Supreme Court precedent to the contrary. *Carlson v. Green*, 446 U.S. 14, 19 (1980).

Third, the District Court's decision would create an unworkable anomaly. The *Bivens* inquiry focuses on whether Congress is better suited than the courts to allow a damages remedy in a particular context; but *Bivens* claims by convicted people—including deliberate indifference claims—have existed for decades, without any indication of Congressional disapproval. There is no reason to believe Congress would expect civil detainees to have fewer rights to relief than convicted persons.

STANDARD OF REVIEW

Plaintiffs' appeal is to be reviewed *de novo*. *Allaire Corp. v. Okumus*, 433 F.3d 248, 249–50 (2d Cir. 2006), *McGarry v. Pallito*, 687 F.3d 505, 510, 514 (2d Cir. 2012). The Court must "draw[] all

reasonable inferences in the plaintiff's favor." *Harris v. Mills*, 572 F.3d 66, 71 (2d Cir. 2009).

ARGUMENT

In *Ziglar*, the Supreme Court set forth a roadmap for *Bivens* litigation in general and this case in particular. A court must begin by determining whether a case presents a new *Bivens* context, *see* 137 S. Ct. at 1859, or fits within one of three *Bivens* contexts approved by the Supreme Court: *Bivens*, 403 U.S. at 392 (allowing a damages remedy for illegal search and seizure under Fourth Amendment); *Davis v. Passman*, 442 U.S. 228 (1979) (allowing a damages remedy for gender discrimination under Fifth Amendment); *Carlson v. Green*, 446 U.S. 14 (1980) (allowing a damages remedy for deliberate indifference in prison under Eighth Amendment). If the case is different in a meaningful way from these prior *Bivens* cases, it presents a new context. *Ziglar*, 137 S. Ct. at 1859. Here the Supreme Court has resolved this threshold question: "this case does seek to extend *Carlson* to a new context." SPA35 (quoting *Ziglar*, 137 S. Ct. at 1864). Thus, the only issue before this Court is whether that modest extension is permitted. *Ziglar*, 137 S. Ct. at 1859.

Extending *Bivens* remedies to a new context is not warranted if an existing alternative remedy presents a convincing reason for the judiciary to stay its hand. *Id.* at 1858. If there are no alternative remedies, a court "must make the kind of remedial determination that is appropriate for a common-law tribunal, paying particular heed, however, to any special factors counselling hesitation before authorizing a new kind of federal litigation." *Wilkie v. Robbins*, 551 U.S. 537, 550 (2007); *see also Ziglar*, 137 S. Ct. at 1857.

The special factors inquiry "must concentrate on whether the Judiciary is well suited, absent congressional action or instruction, to consider and weigh the costs and benefits of allowing a damages action to proceed." *Ziglar*, 137 S. Ct at 1857–58. It may be less probable that Congress would want the Judiciary to allow for damages when the case "arises in a context in which Congress has designed its regulatory authority in a guarded way." *Id.* at 1858.

Ziglar makes it clear that the special factors analysis required by Plaintiffs' proposed modest extension of *Bivens*—to allow deliberate indifference claims by detainees as well as convicted people—must begin with an analysis of what was allowed in *Carlson*. *See* 137 S. Ct. at

1864. There, damages were sought for prison officials' deliberate indifference to a federal prisoner's serious medical needs, in violation of the Eighth Amendment. *Carlson*, 446 U.S. at 16 n.1. The case "involve[d] no special factors counselling hesitation," as prison officials "do not enjoy such independent status in our constitutional scheme as to suggest that judicially created remedies against them might be inappropriate," and any inhibition on their abilities to perform their jobs posed by the suit would be adequately addressed by the protection of qualified immunity. *Id.* at 19. The Supreme Court acknowledged that the FTCA could provide compensation for plaintiff's suffering, but concluded that Congress intended the FTCA to supplement the *Bivens* remedy, not supplant it, and that the FTCA did not adequately protect constitutional rights. *Id.* at 19–23. Indeed, the Court found that it was "crystal clear that Congress views FTCA and *Bivens* as parallel, complementary causes of action." *Id.* at 20.

Thus, under the settled law of *Carlson*, a convicted person harmed by prison officials' deliberate indifference can bring a damages claim directly under the Eighth Amendment, including against a high-level

supervisor. *Id.* at 16.[5] Courts continue to find these deliberate indifference claims viable post-*Ziglar*. *See, e.g.*, *Shorter v. United States*,12 F.4th 366 (3d Cir. 2021) (*Bivens* remedy for transgender woman's Eighth Amendment claim of deliberate indifference to risk of assault by another prisoner); *Reid v. United States*, 825 F. App'x 442 (9th Cir. 2020) (*Bivens* remedy for Eighth Amendment claim for deliberate indifference to unsafe conditions of confinement); *Walker v. Schult*, 463 F. Supp. 3d 323 (N.D.N.Y. 2020) (same); *Cuevas v. United States*, No. 16-cv-00299, 2018 WL 1399910 (D. Colo. Mar. 19, 2018) (*Bivens* remedy for Eighth Amendment claim of deliberate indifference to risk of abuse); *Doty v. Hollingsworth*, No. 15-cv-3016, 2018 WL 1509082 (D.N.J. Mar. 27, 2018) (*Bivens* remedy for Eighth Amendment claim against warden for deliberate indifference to risk of abuse); *Kirtman v. Helbig*, No. 16-cv-2839, 2018 WL 3611344 (D.S.C. July 27,

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[5] In *Carlson* the mother of Joseph Jones, Jr., who died of asthma in the Terre Haute prison infirmary, sued not only the prison doctor (Benjamin DeGracias) but also the Medical Director of the Bureau of Prisons (Robert Brutsche) and the Director of the Bureau of Prisons (Norman Carlson). *See Green v. Carlson*, 826 F.2d 647, 649 (7th Cir. 1987) (detailing each defendant's identity). The Supreme Court allowed the plaintiffs to proceed against all of those defendants. *Carlson*, 446 U.S. at 16, 19.

2018) (*Bivens* remedy for Eighth Amendment claim of deliberate indifference to inadequate medical care); *see also Laurent v. Borecky*, No. 17-cv-3300, 2018 WL 2973386, at *4–5 (E.D.N.Y. June 12, 2018) (allowing detainee to bring a Fifth Amendment deliberate indifference medical claim under *Bivens*); *accord Geritano v. AUSA Office for E.D.N.Y.*, No. 20 Civ. 0781, 2020 WL 2192559 (S.D.N.Y. May 5, 2020) (citing *Laurent* with approval and allowing Fifth Amendment claim for deliberate indifference to serious medical needs).

In *Ziglar*, the Supreme Court suggested certain features of Plaintiffs' claim that are different from *Carlson*, or simply were not considered in that case, which *might* discourage a court from authorizing a *Bivens* remedy and thus require close analysis: First, there "might" have been alternative remedies available to Plaintiffs—a writ of habeas corpus or an injunction requiring the warden to bring his prison into compliance with federal regulations. *Ziglar*, 137 S. Ct. at 1865. Second, since *Carlson* was decided, Congress passed the Prison Litigation Reform Act, which made "changes to the way prisoner abuse claims must be brought in federal court," but did not "provide for a standalone damages remedy against federal jailers." *Id.* It "could be

argued" that this suggests that Congress chose not to extend *Carlson* to other types of prison mistreatment. *Id.*

The Magistrate Judge considered both of these features, and correctly determined that (1) injunctive relief was not an available alternative remedy, since Plaintiffs were blocked from contacting counsel and the court for a considerable portion of their detention; and (2) the Prison Litigation Reform Act cannot be taken as an indication of congressional intent to limit *Bivens* actions by incarcerated people; rather, it presumes the availability of such actions, and imposes an exhaustion requirement on them. *See* SPA11–16, SPA22–23. The District Court reviewed the Magistrate Judge's analysis of congressional silence for clear error, and agreed that "congressional intent here is too ambiguous to provide meaningful support" for claims of congressional approval or disapproval for extending *Bivens* to prisoner abuse claims. SPA35–36. As for injunctive relief, the District Court found consideration of the availability of administrative grievances, injunctive relief or habeas "moot in light of the Court's adoption of the magistrate judge's conclusion that the FTCA is an available alternative remedy." SPA41. The District Court did not

explicitly adopt or reject the Magistrate Judge's determination that neither prison grievances, injunctive relief nor habeas was *actually* available Plaintiffs. SPA23–24, SPA41.

Despite correctly determining that the differences between Plaintiffs' claim and Carlson—which the Supreme Court identified as relevant, and remanded for consideration—do not caution against extending *Bivens*, the Magistrate Judge recommended that Plaintiffs' claims be dismissed nonetheless. This was based on the Magistrate Judge's erroneous speculation that (1) the proposed *Bivens* claim might impact officials' adherence to BOP policy regarding the investigation of guard abuse, and that this potential impact is a special factor counseling hesitation; and (2) the FTCA is an alternative remedial scheme counseling against a *Bivens* remedy. SPA16–22. The District Court reviewed this first determination *de novo*, as it had not been briefed to the Magistrate Judge, but again adopted the Magistrate Judge's reasoning and conclusion. SPA37–39. The District Court reviewed the Magistrate's Judges' recommendation regarding the FTCA for clear error only, and found none. SPA39–40. As explained below,

both these holdings violate settled Supreme Court doctrine, and must be reversed.

I. SPECULATION THAT FEDERAL OFFICALS MIGHT SEEK TO AVOID LIABILITY BY VIOLATING FEDERAL POLICY IS NOT A SPECIAL FACTOR COUNSELING AGAINST A BIVENS REMEDY

As explained above, the special factors inquiry "must concentrate on whether the Judiciary is well suited, absent congressional action or instruction, to consider and weigh the costs and benefits of allowing a damages action to proceed." *Ziglar*, 137 S. Ct at 1857–58. The District Court erroneously identified as a special factor the possibility that imposing liability on a warden for deliberate indifference to guard abuse might "potentially" lead a warden to disregard federal regulations governing the reporting of such abuse. SPA38.

BOP policy specifies certain investigatory and disciplinary procedures that wardens must follow when guards are alleged to have abused incarcerated people. *See* SPA16–17 (summarizing policy). Under that policy, when a warden receives allegations of physical abuse by guards he is obligated to report those allegations to the Office of Internal Affairs (OIA), rather than undertake his own investigation. *Id.*; *see also* JA452–454. According to the Magistrate Judge, recognizing a

Bivens action against a warden who has allowed and even facilitated abuse of detainees by guards under his supervision might "impede, or at least affect" these policies, for example leading a warden to fail to report abuse to the OIA, conduct his own investigation contrary to policy, or neglect to retain evidence of abuse. SPA18; *see also* SPA38–39 (District Court adopting this analysis). This speculation that a government official would violate federal policy regarding reporting allegations of abuse in order to avoid federal liability for allowing such abuse is improper, illogical, and contrary to Supreme Court precedent. Moreover, even if it were a fair assumption, it is not a special factor counseling against implication of a *Bivens* remedy, as it does not suggest that Congress, rather than the courts, is better suited to provide a remedy for deliberate indifference to the abuse of detainees, when the same claims, subject to the same policy and under the same warden, and with the same risk—if there is any such risk—can be brought by convicted people. Nor does the Court's reasoning apply to Defendants LoPresti and Cuciti. *See* SPA28 (noting that the existence of a special factor "is less clear with respect to Lopresti and Cuciti" but

finding the "impact on investigatory procedures and policies" such a factor regardless, without any specific analysis).

A. The District Court's Reasoning Violates the Longstanding Presumption that Public Officials Act Lawfully

In substance, the District Court thought that BOP supervisors might try to shield themselves from liability for deliberate indifference, not by avoiding indifference, but by declining to follow regulations that could possibly reveal their indifference.

Would a supervisor really take this course? What is the basis for thinking so? Neither the District Court nor the Magistrate Judge cited to any empirical evidence for this analysis, and it runs directly contrary to fundamental rule of law principles. It is a premise of our legal system that the threat of liability deters misconduct rather than encourages it. Indeed, as discussed below, this is the rationale of *Bivens* itself.

Moreover, the District Court's reasoning contravenes basic assumptions about public officials' conformance with the law. "Ordinarily, we presume that public officials . . . properly discharge[] their official duties." *Bracy v. Gramley*, 520 U.S. 899, 909 (1997) (internal punctuation and quotation marks omitted) (quoting *United*

States v. Armstrong, 517 U.S. 456, 464 (1996)). The factual premise of the District Court's special factor does just the opposite. Ignoring the Supreme Court's longstanding admonition that "[t]he presumption of regularity supports the official acts of public officers," *United States v. Chem. Found., Inc.*, 272 U.S. 1, 14 (1926), the Magistrate Judge and District Court assume that federal employees will violate their own regulations to escape potential liability. This is unprecedented. Indeed, the courts have warned against assumptions of continuing official illegality even where there is evidence that some officials have already violated the law in a particular way. *See, e.g.*, *City of Los Angeles v. Lyons*, 461 U.S. 95, 108 (1983) (finding it "no more than conjecture to suggest" that police will systematically act unconstitutionally and inflict injury without provocation or legal excuse).

The District Court's assumption that federal officials would avoid their legal obligations has no support in law or experience. Certainly, Warden Hasty made no such argument. Rather, Hasty based his defense on an alleged conflict between Plaintiffs' claim—that Hasty was deliberately indifferent to guard abuse—and the BOP policy in question, which he said limits a warden from doing *anything* to address

guard abuse. SPA16. The "anomaly" of imposing personal liability for Hasty's failure to act, when BOP policy requires him to "stay his hand," Hasty argued, was "an extraordinarily strong reason for not extending *Bivens*." *See* Def. Dennis Hasty's Mem. Addressing the *Bivens* Question Remanded by the Supreme Court of the United States, District Court Dkt. No. 808, at 15. That argument failed on its face, as BOP policy limits a warden's role in the *investigation* and *discipline* of federal employees, but does not prevent a warden from taking other steps to stop abuse, like making rounds, reassigning guards, informing his staff that he takes abuse seriously, or reminded guards that the detainees had not even been charged—much less convicted—of involvement in 9/11. *See generally* JA439–462. The Magistrate Judge and District Court failed to address Hasty's actual argument or Plaintiffs' response.

The District Court's unfounded assumption that future wardens will violate policy is also flawed as a matter of logic. The claim against Hasty is that he allowed Plaintiffs to be abused. Violating BOP policy regarding the investigation of abuse allegations would compound (rather than conceal) this claim of deliberate indifference. Logically, a warden seeking to avoid liability for allowing abuse would follow

relevant policy about investigating abuse scrupulously, and take all necessary steps to make it appear he was properly supervising guards prone to abuse.[6]

This is consistent with how the Supreme Court has always conceived of the function of *Bivens* claims—they have value because they *deter* individual wrongdoing. *See Ziglar*, 137 S. Ct. at 1858 (when equitable remedies are insufficient, "damages remedy might be necessary to redress past harm and deter future violations"); *Minneci*, 565 U.S. at 130 (the only alternative remedies that can displace a *Bivens* remedy are ones that provide "roughly similar incentives for potential defendants to comply with the Eighth Amendment while also providing roughly similar compensation to victims of violations."); *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 70–71 (2001) (noting the deterrent

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[6] Strangely, the Magistrate Judge later seems to come to this contrary conclusion himself, without acknowledging the internal contradiction. *See* SPA18 ("[T]he possibility of being called to account for failing to monitor and control the actions of officers under their command might lead wardens to adopt supervisory practices and procedures they might otherwise not."). Adopting additional supervisory practices is presumably a good thing; the Magistrate Judge does not explain how it might counsel against a *Bivens* remedy.

effect of a *Bivens* remedy against individual officers). The District Court's speculation that a *Bivens* remedy will have the *opposite* effect on prison wardens finds no support in the law.

Finally, if a warden were motivated to violate BOP policy (out of fear of liability, or some other reason), according to the Supreme Court this makes the argument for a *Bivens* action more compelling, not less. *See Ziglar*, 137 S. Ct. at 1864 (Plaintiffs' allegations are "just as compelling as those at issue in *Carlson*[,] . . . especially . . . given that the complaint alleges serious violations of Bureau of Prisons policy" including BOP policy requiring investigation of prisoner abuse). Normally, courts do not consider the possibility of further improper action by one who has violated another's constitutional rights as a reason *against* compensating the victim of the initial illegality.[7]

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[7] For instance, in *Lanuza v. Love*, No. 15-35408, 2018 WL 3848507, at *11 (9th Cir. Aug. 14, 2018) the Ninth Circuit allowed a *Bivens* remedy against an immigration officer who forged a pivotal document in violation of procedural due process. The Court rejected the potential for a "deluge" of new *Bivens* claims as an argument against this extension, noting that widespread litigation could only be expected if ICE attorneys regularly submit falsified evidence, and "if this problem is indeed widespread, it demonstrates a dire need for deterrence, validating *Bivens*' purpose." *Id.*

B. A Warden's Incentives to Follow or Violate BOP Regulations Do Not Implicate Separation of Powers

The District Court's special factors analysis also fails for a second, independent reason. Even if it were proper to rely on the entirely speculative possibility that the prospect of individual liability would make a federal official likely to violate federal policy, there is no precedent for considering this as a special factor counseling hesitation.

The purpose of considering whether "special factors" exist is to determine whether the Judiciary should "stay its *Bivens* hand." *Wilkie v. Robbins*, 551 U.S. 537, 554 (2007). *Ziglar* instructs that "[w]hen 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 analysis." 137 S. Ct. at 1857. The "inquiry must concentrate on whether the Judiciary is well suited, absent congressional action or instruction, to consider and weigh the costs and benefits of allowing a damages action to proceed" (*id.* at 1857–58), and whether there are "sound reasons to think Congress might doubt the efficacy or necessity of a damages remedy." *Id.* at 1865.

It may be less probable that Congress would want the Judiciary to allow for damages when the case "arises in a context in which Congress

has designed its regulatory authority in a guarded way." *Id.* at 1858. Thus, when extension of a *Bivens* remedy is found inappropriate, this is "to respect the role of Congress in determining the nature and extent of federal-court jurisdiction under Article III." 137 S. Ct. at 1858. This is one of the reasons that the alternative remedies analysis focuses on whether Congress has created a process that "itself may amoun[t] to a convincing reason for the Judicial Branch to refrain from providing a new and freestanding remedy in damages." *Id.* at 1843 (internal quotation marks omitted).

This case, however, does not raise the separation of powers concerns that have been identified by the Supreme Court when it has found a "special factor" barring a *Bivens* remedy in the past. Plaintiffs do not seek to intrude into military affairs, over which Congress exercises distinct authority, one "special factor" identified by the Supreme Court. *See United States v. Stanley*, 483 U.S. 669, 683–84 (1987); *Chappell v. Wallace*, 462 U.S. 296, 304 (1983). Nor do Plaintiffs seek to extend *Bivens* to claims brought against federal agencies rather than federal employees, which would implicate the special factor of federal fiscal policy. *See F.D.I.C. v. Meyer*, 510 U.S. 471, 486 (1994).

Finally, none of the special factors recognized by the Second Circuit apply here. *Arar v. Ashcroft*, 585 F.3d 559, 573 (2d Cir. 2009) (en banc) (identifying "military concerns; separation of powers; the comprehensiveness of available statutory schemes; national security concerns; and foreign policy considerations" as special factors (citations omitted)).

Simply put, the District Court's invocation of BOP regulations has nothing to do with protecting the powers of Congress. Regulations regarding the obligations of wardens do not have constitutional salience, nor do they reflect any special congressional concern, or skepticism of *Bivens* remedies. *Williams v. Baker*, 487 F. Supp. 3d 918, 925 (E.D. Ca. 2020) (finding no separation of powers concerns implicated by fact that "Congress has delegated to BOP the responsibility for operating safe and orderly prisons."). If they did, then *Bivens* claims could never be appropriate in the prison context.

Ziglar distills the special factors inquiry to one final question: are there "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. That Plaintiffs' claim

presents a "modest extension" of *Bivens* (*Ziglar*, 137 S. Ct. at 1864) is highly probative of the correct response. *Carlson* confirms that the prison context itself presents no special factors counseling hesitation against creation of a *Bivens* action. 446 U.S. at 19. This means that the question of judicial competence to consider whether a detainee should have a cause of action for deliberate indifference cannot be divorced from the judiciary's long experience with allowing deliberate indifference *Bivens* claims by convicted people.

In *Carlson*, the Supreme Court considered whether correctional officials (including the Director of the Bureau of Prisons) enjoy "such independent status in our constitutional scheme as to suggest that judicially created remedies against them might be inappropriate" and whether defending against a *Bivens* action would "inhibit their efforts to perform their official duties." 446 U.S. at 19. The Supreme Court held they do not, and it will not. *Id.* The same or similar potential special factors should be no more convincing in a subsequent case; here, since the Director of the BOP's status did not counsel hesitation, it follows that the Warden's status will not either. (The District Court simply ignores this precedent, reasoning that imposing liability for deliberate

indifference could distract a warden from their management responsibilities. SPA38.)

Additionally, whether there are sound reasons to think Congress might doubt the efficacy or necessity of a damages remedy must be informed by congressional reaction to the similar, previously recognized, *Bivens* claim. *See Ziglar*, 137 S. Ct. at 1856 (with respect to the three *Bivens* cases allowed by the Supreme Court, noting that "no congressional enactment has disapproved of these decisions"). It is difficult to identify a sound reason to think Congress would disapprove of a modest extension in situations where it has left parallel causes of action undisturbed.

Finally, any "sound reason" would need to account for the fact that the similar, previously-recognized claims will continue. Here, for example, there would have to be a sound reason to believe Congress would disapprove of the "efficacy and necessity" of a damages remedy for civil detainees whom a warden has failed to protect, when "the system for enforcing the law and correcting a wrong" allows convicted people in the same institution to bring identical claims in court. 137 S. Ct. at 1858. Detainees "have not been convicted of a crime and thus may

not be punished in any manner—neither cruelly and unusually nor otherwise." *Darnell v. Pineiro*, 849 F.3d 17, 29 (2d Cir. 2017) (citations omitted); *Bell v. Wolfish*, 441 U.S. 520, 535–37 (1979). This means that their rights are "at least as great as the Eighth Amendment protections available to a convicted prisoner." *Darnell*, 849 F.3d at 29 (quoting *City of Revere v. Mass. Gen. Hosp.*, 463 U.S. 239, 244 (1983)); *see also Kingsley v. Hendrickson*, 135 S. Ct. 2466 (2015). It seems far more likely that Congress would see a negative impact to barring *Carlson*-type remedies for civil detainees, but permitting them for convicted people—who generally have less protection under the law. *Cf. Bistrian v. Levi*, 912 F.3d 79, 91 (3d Cir. 2018) (finding a pretrial detainee's claim is not a new *Bivens* context because "[i]t is a given that the Fifth Amendment provides the same, if not more, protection for pretrial detainees than the Eighth Amendment does for imprisoned convicts.").

The District Court characterized such logical considerations as a "bald[] assert[tion] that the special factors analysis must differ in this case." SPA38–39. But Plaintiffs make no such argument. Rather, it is a practical reality that BOP policy applies to investigations of guard abuse of all incarcerated people, whether convicted, pretrial or held on

immigration violations. For decades, Congress has left undisturbed the Judiciary's provision of a remedy for convicted people when officials are deliberately indifferent, notwithstanding the BOP policy relied upon by the District Court. There is no reason to assume Congress would want to deny detainees the same remedy.

II. THE SUPREME COURT HAS ALREADY RULED THAT THE FTCA IS NOT AN ALTERNATIVE REMEDIAL SCHEME COUNSELING AGAINST A *BIVENS* REMEDY

The Magistrate Judge and District Court's second ground for denying a *Bivens* remedy is also erroneous. The court reasoned that Plaintiffs could have sought compensation for their injuries through filing FTCA claims, and this alternative, existing process for protecting Plaintiffs' interests counsels against creating a *Bivens* remedy. SPA19–22, SPA40. But exactly this argument was rejected by the Supreme Court in *Carlson*, 446 U.S at 19–23, and the *Ziglar* Court did not even mention the FTCA as an alternative remedy for Plaintiffs' claims to be considered on remand. 137 S. Ct. at 1865.

In 1974, three years after *Bivens* was decided, Congress amended the FTCA to allow individuals to sue the federal government for certain law enforcement torts. *See* Act of Mar. 16, 1974, Pub. L. No. 93-253, 88

Stat. 50; *see also generally* James E. Pfander & David Baltmanis, *Rethinking Bivens: Legitimacy and Constitutional Adjudication*, 98 Geo. L. J. 117 (2009). The amendment was a response to congressional concerns that *Bivens* was not enough to deter unlawful drug enforcement home raids. *Id.* at 132–33.

The main issue in *Carlson* was whether a *Bivens* remedy was available, "given that respondent's allegations could also support a suit against the United States under the Federal Tort Claims Act." 446 U.S at 16–17. The Court found that "the congressional comments accompanying [the 1974] amendment made it crystal clear that Congress views FTCA and *Bivens* as parallel, complementary causes of action." *Id.* at 19–20 ("[T]his provision [of the FTCA] should be viewed as a *counterpart* to the *Bivens* case and its progenty [*sic*]." (quoting S. Rep. No. 93-588, at 3 (1973) (emphasis added by the Supreme Court)). This type of statutory interpretation is entitled to "enhanced" stare decisis respect, because Congress would need only to amend the statute to alter the Court's interpretation. *See, e.g.*, *Kimble v. Marvel Entm't, LLC*, 135 S. Ct. 2401, 2409 (2015) ("[U]nlike in a constitutional case,

critics of our ruling can take their objections across the street, and Congress can correct any mistake it sees.").

The *Carlson* Court also canvassed four factors making *Bivens* a more effective remedy than the FTCA, and supporting its conclusion that Congress did not intend for the FTCA to supplant *Bivens*. 446 U.S. at 20–23. (1) Damages against individuals are a more effective deterrent than damages against the United States; (2) *Bivens* allows punitive damages; (3) *Bivens* allows a plaintiff to opt for a jury; and (4) an FTCA claim leaves plaintiffs subject to "the vagaries" of state tort law. *Id.*

Carlson's holding that the FTCA is not a relevant remedial scheme bearing on *Bivens* availability has been repeatedly reaffirmed by the Supreme Court, including in recent years. In *Minneci v. Pollard*, 565 U.S. 118, 126 (2012), for example, the Court distinguished the situation of a federal prisoner, who cannot bring state-law tort claims against a federal employee (thus necessitating a *Bivens* remedy), and convicted people in private prisons who can sue their private jailors directly in tort. The distinction drawn by the Court would make no sense if FTCA claims—available to the former but not the latter—were

to be considered in the equation. The Court drew a similar distinction in *Malesko*, 534 U.S. at 72, and both cases explain *Carlson's* reasoning and holding with respect to the FTCA without any reservation as to its continuing vitality. *Id.* at 68; *Minneci*, 565 U.S. at 124; *see also Wilkie v. Robbins*, 551 U.S. 537, 553 (2007); *Hernandez v. Mesa*, 140 S. Ct. 735, 748 n.9 (2020) (acknowledging that the FTCA "permits" *Bivens* claims and that "[b]y enacting this provision, Congress made clear that it was not attempting to abrogate *Bivens*").

In line with these decades of precedent, *Ziglar* does not alter *Carlson's* conclusion about the relationship between the FTCA and *Bivens*. To the contrary, *Ziglar* reiterates that the special factors and alternative remedy question both stem from separation of powers concerns: when extension of a *Bivens* remedy is found inappropriate, this is "to respect the role of Congress in determining the nature and extent of federal-court jurisdiction under Article III." 137 S. Ct. at 1858. In *Carlson* the Supreme Court held that *Congress meant* the FTCA and *Bivens* actions to work alongside each other. To now identify the FTCA as a reason why Congress would not want the Judiciary to imply a

Bivens remedy not only fails to respect controlling precedent, it ignores congressional intent in the name of respecting it.

Finally, were there any doubt about the continued vitality of *Carlson's* holding, *Ziglar* sets it to rest by listing potential alternative remedies to be explored on remand, and not including the FTCA as one of those remedies. 137 S. Ct. at 1865. Plainly, the Supreme Court continues to consider the impact of an available FTCA claim on the judiciary's role in creating a *Bivens* remedy resolved by *Carlson*.

Against all this clear precedent, the District Court opines that "the legal landscape has changed since *Carlson*." SPA40. But "only [the Supreme Court] may overrule one of its precedents. Until that occurs [it] is the law . . . ." *Thurston Motor Lines, Inc. v. Jordan K. Rand, Ltd.*, 460 U.S. 533, 535 (1983); *see also Bistrian v. Levi*, 912 F.3d 79, 92 (3d Cir. 2018) ("prospect of relief under the FTCA is plainly not a special factor counseling hesitation in allowing a *Bivens* remedy").[8]

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[8] The circuits are split on the continued vitality of *Carlson*'s reasoning (as opposed to its holding) when considering the FTCA as an alternative remedial scheme supplanting Bivens *outside* the prison context. *Compare Quintero Perez v. United States*, 8 F.4th 1095 (9th Cir. 2021) (applying *Carlson*'s reasoning regarding primacy of *Bivens* deterrent function compared to FTCA in border shooting case), *with Olivia v.*

III. THE DISTRICT COURT'S ANALYSIS WOULD MEAN NO *BIVENS* EXTENSION IS EVER APPROPRIATE, CONTRARY TO *ZIGLAR*'S INSTRUCTION

Plaintiffs' case has "significant parallels" to one of the only three cases in which the Supreme Court has allowed a *Bivens* remedy, with "allegations of injury . . . just as compelling as those at issue in *Carlson*," especially because the complaint "alleges serious violations of Bureau of Prisons policy." *Ziglar*, 137 S. Ct. at 1864. The principal difference between Plaintiffs' claim and that recognized by the Supreme Court in *Carlson* is that Plaintiffs were not convicted, and thus are protected from all punishments, not just cruel and unusual ones. But why would Congress would want to deny detainees the remedy it has accepted for convicted people?

Nivar, 973 F.3d 438 (5th Cir. 2020) (FTCA counsels against *Bivens* remedy for claim of excessive force against Veterans Affairs police); *Cantu v. Moody*, 933 F.3d 414 (5th Cir. 2019) (same regarding claims against FBI agents); *Williams v. Keller*, No. 21-4022, 2021 WL 4486392 (10th Cir. Oct. 1, 2021) (same regarding malicious prosecution claim). *See also Watkins v. Carter*, No. 20-40234, 2021 WL 4533206, at *2 (5th Cir. Oct. 4, 2021) (reasoning that "[t]he existence of the Federal Tort Claims Act weighs against inferring a new cause of action" in the context of a prison case without considering impact of *Carlson* or engaging in any reasoning.)

The District Court overstates the degree to which an extension of *Bivens* is now a disfavored judicial exercise, seeming to conclude that the bar for a special factor is so low that any conceivable concern a judge can think of will satisfy it. SPA39. But if extension were never appropriate, the Supreme Court would have said so, resting upon the finding that Plaintiffs' claim presents a new context, and no remand would have been necessary.[9] *See Lanuza v. Love*, No. 15-35408, 2018 WL 3848507, at *7 (9th Cir. Aug. 14, 2018) (*Ziglar* "makes clear that, though disfavored, [extending] *Bivens* may still be available in a case against an individual federal officer who violates a person's constitutional rights while acting in his official capacity").

Ziglar presented the Supreme Court with an opportunity to overrule *Bivens* altogether, to limit the three prior *Bivens* cases to their

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[9] Notably, the Supreme Court has recently declined an invitation to reconsider *Bivens*—in *Egbert v. Boule*, No. 21-147 (2021) the Court granted certiorari to review the Ninth Circuit's extension of *Bivens* to allow for a First Amendment retaliation claim. *See* Order List, 595 U.S. ___ (Nov. 5, 2021), https://www.supremecourt.gov/orders/courtorders/110521zr_9ol1.pdf. The Court granted certiorari on only the first two questions presented, declining to grant on question 3: "Whether the Court should reconsider *Bivens*." *See* Questions Presented, *Egbert v. Boule*, No. 21-147, *available at* https://www.supremecourt.gov/docket/docketfiles/html/qp/21-00147qp.pdf.

facts, or to dismiss *all* of Plaintiffs' claims as requiring an unwarranted extension of the doctrine. Instead, the Court limited the *Bivens* doctrine significantly as respects challenges to high-level executive policy in the realm of national security, but it did so while noting "the continued force, or even the necessity" of *Bivens* in the context in which it arose. 137 S. Ct. at 1856. "The settled law of *Bivens* in this common and recurrent sphere of law enforcement, and the undoubted reliance upon it as a fixed principle in the law, are powerful reasons to retain it in that sphere." *Id.* at 1857; *see also Jacobs v. Alam*, 915 F.3d 1028, 1037 (6th Cir. 2019) (*Ziglar* "is not about restricting the core of *Bivens*," but rather "continues the Supreme Court's trend of cautioning against expanding its outer reaches.")

For decades now, *Bivens* has also been a settled means for detainees, mistreated in detention, to seek relief. *See Thomas v. Ashcroft*, 470 F.3d 491 (2d Cir. 2006); *Tellier v. Fields*, 280 F.3d 69 (2d Cir. 2000); *Riley v. Kolitwenzew*, 526 F. App'x 653 (7th Cir. 2013); *Bistrian v. Levi*, 696 F.3d 352 (3d Cir. 2012); *Magluta v. Samples*, 375 F.3d 1269 (11th Cir. 2004); *Kwai Fun Wong v. United States*, 373 F.3d 952 (9th Cir. 2004); *Papa v. United States*, 281 F.3d 1004 (9th Cir.

2002); *Humphries v. Various Fed. USINS Emps.*, 164 F.3d 936 (5th Cir. 1999); *Wilkins v. May*, 872 F.2d 190 (7th Cir. 1989); *Cale v. Johnson*, 861 F.2d 943 (6th Cir. 1988), *abrogated on other grounds by Thaddeus-X v. Blatter*, 175 F.3d 378 (6th Cir. 1999) (en banc); *Lyons v. U.S. Marshals*, 840 F.2d 202 (3d Cir. 1988). Prior to *Ziglar*, few courts thought it necessary to even consider whether special factors counseled against allowing such claims, just as every single judge (prior to the Supreme Court's remand) who considered Plaintiffs' complex case *agreed on one thing*–that Plaintiffs' claims against Warden Hasty, for allowing and encouraging physical, verbal and religious abuse, should not be dismissed. *See Ziglar*, 137 S. Ct. at 1864; *Turkmen v. Hasty*, 808 F.3d 197, 199, 203 n.16 (2d Cir. 2015); *Turkmen v. Hasty*, 789 F.3d 218, 261, 250–51, 295 n.41 (2d Cir. 2015), *rev'd in part, vacated in part by Ziglar v. Abbasi*, 137 S. Ct. 1843 (2017).

The Supreme Court has now clarified what is required, instructing that even a modest extension of *Bivens* requires analysis and care, but it did not decide the outcome. Careful analysis shows that Plaintiffs' claims present no reason to depart from the "settled law of *Bivens"* in the recurrent sphere of detainee abuse. *Ziglar*, 137 S. Ct. at

1857. Just as convicted people can bring a *Bivens* action seeking compensation for deliberate indifference, so too can detainees—not convicted of anything—seek compensation for comparable abuse.

CONCLUSION

For these reasons, Plaintiffs respectfully request that this Court reverse the District Court, and reinstate Plaintiffs' claims against Defendants Hasty, LoPresti and Cuciti.

Dated: New York, New York
February 16, 2022

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that:

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(b)(i) because it contains 9,196 words, excluding the items exempted by Fed. R. App. P. 32(f).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared using 14-point Century Schoolbook font in Microsoft Word 2016.

Dated: February 16, 2022

s/Rachel Meeropol
Rachel Meeropol

CERTIFICATE OF SERVICE

I hereby certify that:

1. On February 16, 2022, I electronically filed the Brief of Intervenors-Plaintiffs-Appellants and Special Appendix with the Clerk of the United States Court of Appeals for the Second Circuit by using the appellate CM/ECF system.

2. Electronic service was accomplished by the appellate CM/ECF system on all case participants who are registered CM/ECF users.

3. I caused an electronic and paper copy of same to be served on pro se defendant Joseph Cuciti via e-mail and FedEx Priority Overnight.

s/Rachel Meeropol
Rachel Meeropol

SPECIAL APPENDIX

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

IBRAHIM TURKMEN, AKHIL SACHDEVA, AHMER IQBAL ABBASI, ANSER MEHMOOD, BENAMAR BENATTA, AHMED KHALIFA, SAEED HAMMOUDA, and PURNA RAJ BAJRACHARYA on behalf of themselves and all others similarly situated,	REPORT & RECOMMENDATION 02-CV-2307 (DLI) (SMG)
Plaintiffs,	
-against-	
JOHN ASHCROFT, ROBERT MUELLER, JAMES W. ZIGLAR, DENNIS HASTY, MICHAEL ZENK, JAMES SHERMAN, SALVATORE LOPRESTI, and JOSEPH CUCITI,	
Defendants.	

GOLD, STEVEN M., U.S.M.J.:

INTRODUCTION

This case arises out of the turbulent days following the September 11, 2001 terrorist attacks. In their Fourth Amended Complaint ("FAC"), Docket Entry 726, plaintiffs ("detainees"), on behalf of themselves and as representatives of a putative class, assert claims under *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388 (1971) against various federal officials, including Warden Dennis Hasty ("Hasty" or "Warden Hasty"), the former warden of the Metropolitan Detention Center in Brooklyn, New York ("MDC"), former MDC Captain Salvatore LoPresti ("LoPresti"), and former MDC Lieutenant Joseph Cuciti ("Cuciti").[1]

[1] The caption of this Report mirrors the one in the Fourth Amended Complaint. At this point in the litigation, though, only the following plaintiffs have claims pending before the Court: Ahmer Abbasi, Anser Mehmood, Benamar Benatta, Ahmed Khalifa, Saeed Hammouda, and Purna Bajracharya. Letter from Rachel Meeropol dated February 20, 2018 at 1, Docket Entry 820. These plaintiffs' remaining claims are asserted only against defendants Hasty, LoPresti, and Cuciti. *Id.*

The facts underlying plaintiffs' claims are set forth in detail in several prior decisions rendered during the lengthy procedural history of this case, including *Ziglar v. Abbasi*, 137 S. Ct. 1843 (2017) and *Turkmen v. Hasty*, 789 F.3d 218 (2d Cir. 2015), *rev'd in part and vacated in part sub nom. Ziglar v. Abbasi*, 137 S. Ct. 1843 (2017). Familiarity with those decisions is presumed, and the relevant facts are accordingly recounted here only briefly.

The Fourth Amended Complaint alleges that plaintiffs, each of whom defendants believed to be Arab, South Asian, or Muslim, were arrested on immigration violations following the September 11, 2001 terrorist attacks. FAC ¶ 1. Plaintiffs were then detained pursuant to a "hold-until-cleared" policy promulgated by the Department of Justice and held in the MDC's most restrictive unit, the Administrative Maximum Special Housing Unit ("ADMAX SHU"). *Id.* ¶¶ 2, 4, 53. While held in the ADMAX SHU, plaintiffs were physically and verbally abused. *Id.* ¶ 5. "Guards allegedly slammed detainees into walls; twisted their arms, wrists, and fingers; broke their bones; referred to them as terrorists; threatened them with violence; subjected them to humiliating sexual comments; and insulted their religion." *Ziglar*, 137 S. Ct. at 1853.

Plaintiffs originally asserted claims against several high-level Executive Branch officials, including the then-Attorney General, Director of the FBI, and Commissioner of the Immigration Naturalization Services, as well as against several Bureau of Prisons ("BOP") officials then holding positions at the MDC, including two Wardens, an Associate Warden, a Captain, and a First Lieutenant ("MDC Officials"). FAC ¶¶ 21-28. Plaintiffs brought what the Supreme Court would later term "detention policy claims" against all of the defendants, alleging that official policies they adopted violated plaintiffs' Fourth and Fifth Amendment rights by holding plaintiffs in restrictive conditions of confinement and subjecting them to frequent strip searches. *Ziglar*, 137 S. Ct. at 1858-59; FAC ¶¶ 276-83; 292-96.

Plaintiffs also brought claims specifically against the MDC Officials for alleged violations of their Fourth and Fifth Amendment rights, alleging in essence that these officials tolerated abuse of detainees, including plaintiffs, by MDC guards. Of particular relevance here, plaintiffs allege that Warden Hasty encouraged lower-level officers to abuse plaintiffs; that he prevented detainees "from using normal grievance procedures"; that he avoided the unit where the detainees were kept; that he ignored evidence of the abuse, even though he was aware of detainee complaints, hunger strikes, and suicide attempts; and that he did not stop or even attempt to stop the abuse. *Ziglar*, 137 S. Ct. at 1864; FAC ¶¶ 77-78; 106-10, 300. In short, in what the Supreme Court would later label their "prisoner abuse claim," a term which this Court adopts for purposes of this Report, plaintiffs allege that Warden Hasty was deliberately indifferent to abuse of the detainees occurring on his watch. *Ziglar*, 137 S. Ct. at 1863.

In *Ziglar*, the Supreme Court considered whether causes of action for plaintiffs' detention policy and prisoner abuse claims could properly be brought pursuant to its holding in *Bivens*. While the Court held that plaintiffs' detention policy claims could not proceed under *Bivens*, it did not decide whether *Bivens* provided a proper basis for plaintiffs' prisoner abuse claim. Instead, noting that the question had not been fully developed by the parties before it, the Supreme Court remanded and directed the lower courts to determine the availability of a cause of action under *Bivens*. 137 S. Ct. at 1863, 1865. Accordingly, today, after multiple appeals to the Second Circuit and the Supreme Court of the United States, this case now hinges on a narrow legal question: whether a *Bivens*-type cause of action may properly be implied under the Fifth Amendment as the basis for plaintiffs' prisoner abuse claim against former Warden Hasty—and, as discussed below, former MDC Captain LoPresti and Lieutenant Cuciti, the only other

remaining MDC Official defendants—for their deliberate indifference to the abuse of plaintiffs by MDC guards. *Id.* at 1864-65.

The Supreme Court remanded this question to the Second Circuit, which in turn issued a mandate directing this Court to "consider what remains of all claims in light of the *Ziglar* decision," and "emphasiz[ing] in particular that the Supreme Court left open the question as to whether a *Bivens* claim may be brought under the Fifth Amendment against the warden of the Metropolitan Detention Center." Mandate at 2, Docket Entry 799.

As a result, there is now pending before this Court Warden Hasty's renewed motion to dismiss in light of the Supreme Court's decision in *Ziglar*. Defendant's Memorandum in Support ("Def.'s Mem."), Docket Entry 808. Additionally, although defendants LoPresti and Cuciti did not appeal to the Second Circuit, *see Turkmen*, 789 F.3d at 224 n.2, plaintiffs' claims against those defendants are also before the Court. Plaintiffs acknowledge that the legal viability of their claims against defendants LoPresti and Cuciti depends upon this Court's decision with respect to defendant Hasty's motion. *See* Plaintiffs' Memorandum of Law in Support of *Bivens* Liability ("Pls.' Mem.") at 9, Docket Entry 808-7 ("Plaintiffs accept that the Court's determination of the scope of *Bivens* liability will apply to their claims against the non-appealing Defendants—LoPresti and Cuciti—as well.").

Chief United States District Judge Dora L. Irizarry has referred defendant Hasty's motion to me to issue a Report and Recommendation. Order dated January 22, 2018. I heard oral argument on the motion on March 15, 2018. Transcript of Oral Argument ("Tr."), Docket Entry 829. The parties then submitted supplemental authorities for the Court's review. Docket Entries 830-833. Having considered the Supreme Court's decision in *Ziglar* and the arguments presented by the parties, and for the reasons stated below, I respectfully recommend that

defendant Hasty's motion be granted, and that plaintiffs' claims against the remaining defendants be dismissed.

BACKGROUND

I. From *Bivens* to *Ziglar*

In *Bivens*, decided in 1971, the Supreme Court recognized a damages remedy for violations of the Fourth Amendment's prohibition on unreasonable searches and seizures by federal law enforcement officers. *Bivens*, 403 U.S. at 391-97. For the *Bivens* Court, implying a cause of action for violations of the Fourth Amendment was simply a natural extension of its view that a Court should ensure that every violation of a federally protected right has a remedy. *Ziglar*, 137 S. Ct. at 1855.

After *Bivens*, the Court held that a plaintiff could assert an implied cause of action for damages directly under the Constitution in only two other cases: *Davis v. Passman*, 442 U.S. 228 (1979) and *Carlson v. Green*, 446 U.S. 14 (1980). *Ziglar*, 137 S. Ct. at 1854-55. Of particular relevance here is *Carlson*, where the Court recognized a *Bivens*-type action brought under the Eighth Amendment.[2] *Carlson*, 446 U.S. at 18-23. In *Carlson*, the plaintiff sought damages on behalf of her deceased son, a federal inmate. *Id.* at 16. The plaintiff alleged that federal officials' deliberate indifference to her son's need for medical care for his asthma led to his death. *Id.* at 16 n.1. These allegations were considered sufficient under Supreme Court precedent to state an Eighth Amendment violation. *Id.* at 17-18, 17 n.3; *see also Estelle v. Gamble*, 429 U.S. 97 (1976). In *Carlson*, the Court examined whether there were either "special factors" counseling hesitation or alternative remedies that would preclude extending *Bivens* to the plaintiff's Eighth Amendment deliberate indifference claim. *Carlson*, 446 U.S. at 18-19.

[2] *Davis v. Passman* involved a claim of employment discrimination brought by an administrative assistant to a Congressman who contended she was fired because she was a woman. *Ziglar*, 137 S. Ct. at 1854.

Finding neither, the Court extended *Bivens* and implied a cause of action for damages. *Id.* at 18-23. As noted above, it has not done so again in the nearly forty years since *Carlson* was decided.

Since *Carlson*, in fact, the Court has altered its perspective on implied rights of action under the Constitution, and noted that its "recent precedents cast doubt on the authority of courts to extend or create private causes of action." *Jesner v. Arab Bank, PLC*, 138 S. Ct. 1386, 1402 (2018). In *Ziglar*, the Supreme Court acknowledged the marked change in its approach to implying causes of action:

> In the mid-20th century, the Court followed a different approach to recognizing implied causes of action than it follows now. During this "*ancien regime*," the Court assumed it to be a proper judicial function to provide such remedies as are necessary to make effective a statute's purpose.
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> * * *
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> Later, the arguments for recognizing implied causes of action for damages began to lose their force.
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> * * *
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> Given the notable change in the Court's approach to recognizing implied causes of action . . . the Court has made clear that expanding the *Bivens* remedy is now a "disfavored" judicial activity.

137 S. Ct. at 1855, 1857 (citations and internal quotation marks omitted). The Court in *Ziglar* went so far as to say that, were *Bivens*, *Davis*, and *Carlson* being decided today, the analysis—and, presumably, the outcome—might be different. *Id*. at 1856.

II. Determining Whether to Extend *Bivens* After *Ziglar*

The Supreme Court emphasized in *Ziglar* that the central inquiry when faced with a potential expansion of *Bivens* is "'who should decide' whether to provide for a damages remedy, Congress or the courts," and that the answer to that question "most often will be Congress." *Id.* at 1857 (quoting *Bush v. Lucas*, 462 U.S. 367, 380 (1983)). "[S]eparation-of-powers principles are or should be central to the analysis." *Id.*

Ziglar instructs that the analysis of whether a *Bivens* remedy is available proceeds in two steps. First, a court must determine whether the plaintiff's claims are different from those asserted in previous *Bivens* cases, such that the case presents a "new *Bivens* context." *Id.* at 1859-60. A case presents a "new context" if it is "different in a meaningful way from previous *Bivens* cases decided by [the Supreme Court]." *Id.* at 1859. The Court listed some relevant measures of difference, including the rank of the officers involved, the constitutional right asserted, the level of generality of the official action in question, the extent of the judicial guidance available to the officer in question, whether the officer was operating under specific statutory or other legal mandates, and whether there is a risk that the Judiciary would be interfering with the functioning of another branch of the government. *Id.* at 1860.

Second, if a case does present a "new *Bivens* context," a court must then consider whether "there are 'special factors counselling hesitation in the absence of affirmative action by Congress.'" *Id.* at 1857 (quoting *Carlson*, 446 U.S. at 18). The Supreme Court has not announced a definitive list of those "special factors" that "counsel[] hesitation." *Id.* The Court has stressed, though, that the question to ask is "whether the Judiciary is well suited, absent congressional action or instruction, to consider and weigh the costs and benefits of allowing a damages action to proceed." *Id.* at 1858. A "special factor" is one that "cause[s] a court to hesitate before answering that question in the affirmative." *Id.*

In *Ziglar*, the Court did identify some criteria for considering whether hesitation is warranted. First, it noted that "the decision to recognize a damages remedy requires an assessment of its impact on governmental operations systemwide," which entails examining the "burdens on Government employees who are sued personally, as well as the projected costs and consequences to the Government itself when . . . the legal system [is] used to bring about the

proper formulation and implementation of public policies." *Id.* Second, some cases will arise "in a context in which Congress has designed its regulatory authority in a guarded way, making it less likely that Congress would want the Judiciary to interfere." *Id.* It may also be that "feature[s] of [the] case—difficult to predict in advance—cause[] a court to pause before acting without express congressional authorization." *Id.* The Court concluded this aspect of its discussion by noting that, "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, the courts must refrain from creating the remedy[;]" to do otherwise would fail "to respect the role of Congress in determining the nature and extent of federal-court jurisdiction under Article III." *Id.*

Finally, when a plaintiff seeks to extend *Bivens* to a new context, a court should consider whether alternative remedies are already available. *Id*. The existence of an "alternative remedial structure . . . alone may limit the power of the Judiciary to infer a new *Bivens* cause of action." *Id.*

III. The *Ziglar* Court's Decision Regarding Warden Hasty and Plaintiffs' "Prisoner Abuse" Claim

The first step in the analysis of plaintiffs' prisoner abuse claim has already been taken. In *Ziglar*, the Supreme Court held that, although the prisoner abuse claim has "significant parallels" to the claims asserted in *Carlson*, "this case does seek to extend *Carlson* to a new context." *Id.* at 1864.

The Court went on to note that "[t]his case also has certain features that were not considered in the Court's previous *Bivens* cases and that might discourage a court from authorizing a *Bivens* remedy." *Id.* at 1865. First, the Court suggested that plaintiffs may have had access to alternative remedies, such as a writ of habeas corpus or an injunction, that would

preclude extending *Bivens*. *Id.* Second, noting that "legislative action suggesting that Congress does not want a damages remedy" is a special factor counseling hesitation, the Court pointed out that, since *Carlson* was decided, Congress passed the Prison Litigation Reform Act of 1995 ("PLRA"), "which made comprehensive changes to the way prisoner abuse claims must be brought in federal court," but without "provid[ing] for a standalone damages remedy against federal jailers." *Id.* In short, the Court concluded that the differences between this case and *Carlson* "are at the very least meaningful ones." *Id*. Reasoning that "even a modest extension is still an extension," the Court vacated the Second Circuit's decision that plaintiffs' prisoner abuse claim could proceed, and remanded the case so that a "special factors" analysis could be conducted. *Id.* at 1864-65.

DISCUSSION

As noted above, the motion now pending before the Court is defendant Hasty's renewed motion to dismiss pursuant to Rule 12(b)(6). When deciding a motion brought under Rule 12(b)(6), a court may consider "(1) facts alleged in the complaint and documents attached to it or incorporated in it by reference, (2) documents 'integral' to the complaint and relied upon in it, even if not attached or incorporated by reference, (3) documents or information contained in defendant's motion papers if plaintiff has knowledge or possession of the material and relied on it in framing the complaint, . . . and (5) facts of which judicial notice may properly be taken under Rule 201 of the Federal Rules of Evidence." *Abiuso v. Donahoe*, 2015 WL 3487130, at *3 (E.D.N.Y. June 3, 2015) (quoting *In re Merrill Lynch & Co.*, 273 F. Supp. 2d 351, 356-57 (S.D.N.Y. 2003)). Here, the complaint incorporates by reference two reports: the Office of the Inspector General ("OIG") report entitled "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" ("OIG Rep."), FAC ¶ 3 n.1, and a supplemental report entitled "Supplemental Report on September 11 Detainees' Allegations of Abuse at the Metropolitan Detention Center in Brooklyn, New York" ("Supp. OIG Rep."). *Id.* ¶ 5 n.2. Therefore, the facts contained in both reports may be considered when deciding Hasty's motion. The facts alleged in the complaint, moreover, must be taken as true at this stage of the case. *Ziglar*, 137 S. Ct. at 1852.

The gravamen of plaintiffs' claim against Hasty is that he was deliberately indifferent to the abuse of plaintiffs by MDC guards. *Ziglar*, 137 S. Ct. at 1864; FAC ¶¶ 77-78; 106-10. The Supreme Court has already held that "the prisoner abuse allegations against Warden Hasty state a plausible ground to find a constitutional violation *if* a *Bivens* remedy is to be implied." *Ziglar*, 137 S. Ct. at 1864 (emphasis added). Moreover, as noted above, the Court has also already held that plaintiffs' prisoner abuse claim seeks to extend *Bivens* and *Carlson* to a new context. Accordingly, the only remaining issue is whether there are "special factors counselling hesitation" or alternative remedies that would preclude the extension of *Bivens* required for plaintiffs' claims to proceed.

Before considering whether special factors or alternative remedies are present here, I note that the parties agree that the strength and number of applicable special factors need not be greater before hesitation is warranted in cases involving so-called "modest" extensions as opposed to more substantial ones. In other words, the magnitude of a potential extension of *Bivens* does not affect the "special factors analysis." *See* Letter from Clifton Elgarten dated March 13, 2018 ("Elgarten Letter") at 1-2, Docket Entry 826; Letter from Rachel Meeropol dated March 13, 2018 ("Meeropol Letter") at 1-2, Docket Entry 827. Accordingly, although the

extension here may be a modest one, that has no direct bearing on the analysis of special factors and alternative remedies.

I. Warden Hasty

A. Special Factors

Hasty argues that this case presents "special factors" that counsel hesitation before extending *Bivens*. The special factors identified by Hasty include Congress's failure to enact a law providing a direct cause of action under the Constitution and the disruption to BOP policies and practices that a direct cause of action for money damages would cause. Def.'s Mem. at 14. Having considered these factors, I reject the contentions of both parties that Congress has either endorsed, rejected, or is neutral towards *Bivens* and its progeny. I further find, though, that this case presents a "special factor" counseling hesitation: that extending *Bivens* might negatively impact BOP'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.

1. Congress's Silence is Ambiguous

Hasty argues that Congress's failure to codify *Bivens* and enact a damages remedy for violations of constitutional rights is a special factor suggesting that the Court should hesitate before implying a cause of action. Def.'s Mem. at 19; *see also Ziglar*, 137 S. Ct. at 1865 ("[L]egislative action suggesting that Congress does not want a damages remedy is itself a factor counseling hesitation."). Hasty offers three examples of congressional silence that he contends counsel hesitation.

First, Hasty points to Congress's decision to include in the USA Patriot Act a requirement that OIG investigate potential constitutional violations by BOP officials and provide semiannual reports to Congress. Def.'s Mem. at 19-20; *see also* USA Patriot Act, Pub. L. No.

107-56, § 1001, 115 Stat. 272, 391 (2001).[3] Hasty argues that Congress, while considering this provision, could have provided for a private right of action against federal officials for deprivations of constitutional rights, but chose not to do so. Def.'s Mem. at 20. In fact, OIG continues to report to Congress, and Congress has still not enacted legislation providing for a *Bivens*-like cause of action. *See* Tr. 8-11.

Second, Hasty argues that Congress, as a result of the original and supplemental OIG reports, was aware of the allegations of abuse at issue in this very case, yet chose not to create a damages remedy. Def.'s Mem. at 20; *see also Ziglar*, 137 S. Ct. at 1862 ("[A]t Congress' behest, [OIG] compiled a 300-page report documenting the conditions in the MDC in great detail."). The Court in *Ziglar* referred to Congress's failure to provide a damages remedy in the wake of the OIG Report as one reason for dismissing plaintiffs' detention policy claims. *Ziglar*, 137 S. Ct. at 1862.

Plaintiffs counter by arguing that Congress's silence in the face of these reports in fact suggests its tacit approval of extending *Bivens* and allowing plaintiffs to proceed with their claims. Plaintiffs point out that the OIG reports specifically refer to this litigation, and that Congress was therefore aware of plaintiffs' pending prisoner abuse claim. Plaintiffs' Response Memorandum ("Pls.' Reply") at 12, Docket Entry 808-9; *see also* OIG Rep. at 2-3, 3 n.4; 92 (referring to this lawsuit and noting that the litigation is pending). Because of the ongoing litigation, plaintiffs contend, Congress had no reason to step in and provide a damages remedy. Pls.' Reply at 12. Moreover, although made aware of plaintiffs' pending case and its reliance on

[3] The statute cited in the text provides that "[t]he Inspector General of the Department of Justice shall designate one official who shall – (1) review information and receive complaints alleging abuses of civil rights and civil liberties by employees and officials of the Department of Justice; . . . and (3) submit to the Committee on the Judiciary of the House of Representatives and the Committee on the Judiciary of the Senate on a semi-annual basis a report on the implementation of this subsection and detailing any abuses described in paragraph (1)."

the availability of an implied *Bivens*-type remedy, Congress passed no legislation narrowing the scope of *Bivens* or the authority of courts to extend *Bivens* to new contexts.

Finally, Hasty, echoing the Court in *Ziglar*, argues that Congress "had specific occasion to consider the matter of prisoner abuse and to consider the proper way to remedy those wrongs" when it passed the PLRA, fifteen years after *Carlson*. Def.'s Mem. at 21 (quoting *Ziglar*, 137 S. Ct. at 1865). Though Hasty concedes that the PLRA does not apply to detainees who, like plaintiffs, are held as undocumented aliens, he argues that Congress, by passing the PLRA without enacting a corresponding *Bivens*-type cause of action for prisoner abuse claims, has indicated its reluctance to extend *Bivens* to new contexts. *Id.*; *see also* 42 U.S.C. § 1997e(h) (defining "prisoner" for the purposes of the PLRA as "any person incarcerated or detained in any facility who is accused of, convicted of, sentenced for, or adjudicated delinquent for, violations of criminal law or the terms and conditions of parole, probation, pretrial release, or diversionary program").

Plaintiffs argue in response that, because the PLRA does not apply to immigration detainees, Congress's silence with respect to *Bivens* when it passed the PLRA has no bearing on whether *Bivens* should be expanded to allow plaintiffs' prisoner abuse claim. Pls.' Mem. at 18. Plaintiffs note as well that the Court in *Ziglar* did not affirmatively conclude that Congress's silence suggested its reluctance to expand *Bivens*; plaintiffs correctly point out that the Court merely stated that "[i]t could be argued" from the fact that the PLRA "does not provide for a standalone damages remedy against federal jailers" that "Congress chose not to extend the *Carlson* damages remedy to cases involving other types of prisoner mistreatment." *Ziglar*, 137 S. Ct. at 1865.

Furthermore, and in this Court's view more persuasively, plaintiffs argue that, when Congress passed the PLRA, it presumed the existence of a *Bivens* cause of action for prisoner abuse. Though at the time the PLRA was passed the Supreme Court had recognized a *Bivens* cause of action for prisoners only in *Carlson*, many Circuit courts had recognized a variety of prisoner and detainee abuse claims under *Bivens*. Pls.' Mem. at 20 (listing cases in which *Bivens* was recognized as a vehicle for asserting prisoner and detainee abuse claims). Yet, as plaintiffs point out, the PLRA merely imposed an exhaustion requirement on prison condition lawsuits brought under federal law; the statute in no way otherwise limits the scope of *Bivens*-type claims. *See* 42 U.S.C. § 1997e.

Finally, plaintiffs argue that Congress signaled its approval of *Bivens* when it amended the Federal Tort Claims Act ("FTCA") by passing the Westfall Act in 1988. Meeropol Letter at 3-4. The Westfall Act provides that a claim against the United States under the FTCA is the exclusive civil remedy for negligent or wrongful acts or omissions by employees of the federal government. 28 U.S.C. § 2679(b)(1). The Act also provides, however, that this limitation does not apply to "a civil action against an employee of the Government which is brought for a violation of the Constitution of the United States." 28 U.S.C. § 2679(b)(2)(A). Arguably, by enacting legislation specifically discussing civil actions against government employees for violations of constitutional rights—but declining to eliminate or narrow them—Congress implicitly approved of such actions. *See* Meeropol Letter at 3; *see also Ziglar*, 137 S. Ct. at 1880-81 (Breyer, J., dissenting) (arguing that the exception for lawsuits claiming constitutional violations in the Westfall Act makes it clear that Congress views the FTCA and *Bivens* as providing "parallel, complementary causes of action" (quoting *Carlson*, 446 U.S. at 20)); James E. Pfander & David Baltmanis, *Rethinking* Bivens*: Legitimacy and Constitutional Adjudication*,

98 Geo. L.J. 117, 135-36 (2009) (arguing that "[in] the Westfall Act, Congress again chose to retain the *Bivens* action . . . [and that] [b]y accepting *Bivens* and making it the exclusive mode for vindicating constitutional rights, Congress has joined the Court in recognizing the importance of the *Bivens* remedy in our scheme of governmental accountability law").

The problem with plaintiffs' Westfall Act argument is that it failed to persuade the *Ziglar* majority. Plaintiffs candidly acknowledge that they argued before the Supreme Court that the Westfall Act essentially ratified *Bivens*, but that the *Ziglar* majority did not accept their argument. Meeropol Letter at 3. In his dissent, Justice Breyer likewise invoked passage of the Westfall Act as an indication of Congress's "accept[ance of] *Bivens* actions as part of the law." *Ziglar*, 137 S. Ct. at 1880 (Breyer, J., dissenting). The *Ziglar* majority, though, while making explicit reference to the Westfall Act, nevertheless held, largely on separation-of-powers grounds, that extending *Bivens* to new contexts is now a "disfavored" judicial activity." *Id.* at 1856-57 (majority opinion). In reaching that conclusion, the Court observed that Congress has failed to enact a *Bivens*-like damages remedy, and that Congress's "silence is telling." *Id*. at 1862. Clearly, then, the majority in *Ziglar*—though plainly aware of plaintiffs' and Justice Breyer's arguments to the contrary—rejected the notion that, by passing the Westfall Act, Congress suggested its support for *Bivens* actions.

The *Ziglar* Court relied on Congress's silence, among other things, to hold that plaintiffs' detention policy claims could not proceed under *Bivens* and should be dismissed. This holding at least arguably suggests the same result here; Congress was just as silent with respect to plaintiffs' prisoner abuse claim as it was with respect to their detention policy claims. However, in dismissing plaintiffs' detention policy claims in *Ziglar*, the Court pointed out that Congress's "silence is notable because it is likely that high-level policies will attract the attention of

Congress." *Id.* Because plaintiffs' prisoner abuse claim does not involve "high-level policies," this aspect of *Ziglar*'s holding is not controlling here.

Inferring intention from inaction necessarily involves speculation. The degree of speculation involved increases greatly when an inference about intent is based upon the inaction of a legislative body with hundreds of members, each of whom may have his or her own reasons for not acting. Having considered the parties' arguments, I conclude that the evidence of congressional intent here is too ambiguous to provide meaningful support for either side's position. *See Wilkie v. Robbins*, 551 U.S. 537, 554 (2007) ("It would be hard to infer that Congress expected the Judiciary to stay its *Bivens* hand, but equally hard to extract any clear lesson that *Bivens* ought to spawn a new claim."). I therefore decline to infer what views Congress may have with respect to extending *Bivens* from its failure to pass a law that either provides or precludes a *Bivens*-type remedy for violations of constitutional rights.

2. The Potential Impact on BOP's Investigatory Procedures and Policies is a Special Factor Counseling Hesitation

Hasty argues that a second factor that should counsel hesitation is the impact that recognizing a *Bivens* cause of action in this case would have on BOP's procedures for investigating and addressing prisoner and detainee abuse claims. *See Ziglar*, 137 S. Ct. at 1858; Def.'s Mem. at 15. More specifically, Hasty points to procedures in place both before and after the September 11 terrorist attacks that purposely limited a warden's role in investigating allegations of abuse by correctional officers. Def.'s Mem. at 15. *See generally* Def.'s Mem., Ex. C, PS 1210.22, Office of Internal Affairs ("OIA") Memorandum dated October 1, 2001 ("Ex. C."), Docket Entry 808-4; Def.'s Mem., Ex. D, PS 1210.17, OIA Memorandum dated August 4, 1997 ("Ex. D."), Docket Entry 808-5.

Under the procedures cited by Hasty, physical abuse of a detainee by a correctional officer is a "significant incident" (1997 Memorandum) or Classification 1 case (2001 Memorandum), and threatening assault is a Classification 2 case (2001 Memorandum). Ex. C § 7.a-7.b; Ex. D § 6. Under the regulations in effect in 1997, a warden who learned of an allegation of physical abuse was required to make a report to OIA, which would then "advise how to proceed." Ex. D § 6.a. Incidents deemed "significant" were referred to OIG for review, and the warden would be precluded from taking further action if OIG accepted the case. *Id.* § 6.f.

New procedures announced on October 1, 2001 require wardens to notify OIA of Classification 1 and 2 cases within twenty-four hours of learning about them. Ex. C § 8.b.1. These procedures also prohibit wardens or others under their supervision from interviewing or questioning the subject of allegations without prior approval from OIG and OIA. *Id.* § 8.b.3. The procedures designate OIA as responsible for overseeing all staff investigations. *Id.* § 9. When presented with allegations in Classification 1 or 2, OIA is required to refer the allegations to OIG for review and may refer criminal matters, explicitly including allegations of physical abuse, to the Civil Rights Division of the Department of Justice. *Id.* § 8.c.

The Bureau of Prisons also directed that certain practices be implemented specifically with respect to the September 11 detainees. Def.'s Mem. at 18. Shortly after the attacks, BOP directed that video cameras be installed in the cells of each September 11 detainee. Supp. OIG Rep. at 39. At least at the MDC, the movements of the September 11 detainees were also videotaped beginning on October 5, 2001. *Id.* As a result of these measures, "incidents and allegations of physical and verbal abuse significantly decreased." *Id.* at 45 ¶ 5. Finally, as Hasty

points out, after October 2001, OIG investigators were present at MDC looking into allegations of abuse. OIG Rep. at 144.

It is reasonable to think that imposing personal liability on a warden who is indifferent to abuse by correctional officers under his or her command might impede, or at least affect, the efficacy of these practices and procedures. For example, a warden subject to personal liability for the acts of correctional officers might fail to report those acts to OIA, or decide to do so only after conducting the sort of preliminary inquiry that might influence how an investigation unfolds and that BOP procedures—no doubt for that reason—explicitly prohibit. Similarly, a warden facing the possibility of personal liability might be less likely to enforce procedures requiring video recording of detainee movements, or might neglect to retain and catalogue recordings that memorialize abuse.

The costs to the government of imposing personal liability on wardens for deliberate indifference go beyond possible adverse effects on investigations of correctional officer abuse of detainees. "Claims against federal officials often create substantial costs, in the form of defense and indemnification." *Ziglar*, 137 S. Ct. at 1856. Moreover, the time and attention required to participate in a litigation as a party may distract supervisory officials, such as wardens, from their management responsibilities. *Id*. Finally, the possibility of being called to account for failing to monitor and control the actions of officers under their command might lead wardens to adopt supervisory practices and procedures they might otherwise not.

The threshold for concluding that a factor counsels hesitation "is remarkably low. . . . 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." *Arar v. Ashcroft*, 585 F.3d 559, 574 (2d Cir. 2009). Measured against this "remarkably low" bar, the

concerns discussed above—and, in particular, the question of who should decide how those concerns should be balanced against affording detainees a cause of action against a supervisory official who is deliberately indifferent to abuse—rises to the level of a special factor counseling hesitation.

B. Alternative Remedies

The Supreme Court has held that "the existence of alternative remedies usually precludes a court from authorizing a *Bivens* action." *Ziglar*, 137 S. Ct. at 1858, 1865. Alternative remedies were available to plaintiffs in this case, and dismissal is accordingly warranted on this ground as well.

1. The FTCA Provides a Sufficient Alternative Remedy

It is clear that plaintiffs could have asserted their claims for abuse pursuant to the Federal Torts Claims Act and, if they were successful, recovered compensation. Indeed, the Third Amended Complaint in this very case included claims based upon the conduct of MDC officials, including Hasty, for assault and battery, sleep deprivation, and intentional infliction of emotional distress, all brought pursuant to the FTCA. Third Amended Complaint ¶¶ 426-40, Docket Entry 109.[4] Five plaintiffs reached settlements with the United States on these FTCA claims. Letter from Rachel Meeropol dated November 16, 2009, Ex. A, Docket Entry 687-2 (stipulations settling the FTCA claims of five plaintiffs for amounts ranging from $181,250 to $356,250 per plaintiff). There does not appear to be any reason why the current plaintiffs could not have brought similar claims on their own behalf.[5]

[4] Generally, the FTCA's waiver of sovereign immunity does not apply to claims for assault and battery and certain other torts. 28 U.S.C. § 2680(h). This limitation does not apply, however, to law enforcement officers. *Id*. Bureau of Prisons officials are considered law enforcement officers for purposes of this statute. *See, e.g., Ali v. Federal Bureau of Prisons*, 552 U.S. 214, 218-224 (2008); *Chapa v. United States Dep't. of Justice*, 339 F.3d 388, 390 (5th Cir. 2003); *Lewis v. United States*, 2005 WL 589583, at *3 (W.D.N.Y. Mar. 8, 2005).

[5] The record is silent as to why the current plaintiffs did not bring claims under the FTCA. I note, however, that the FTCA requires that a plaintiff exhaust administrative remedies within two years after a claim accrues. *See* 28

Plaintiffs' argument that the FTCA should not be considered an alternative remedy precluding a *Bivens*-type claim rests on language from the holding in *Carlson*. The Supreme Court did state in *Carlson* that,

> when Congress amended [the] FTCA in 1974 to create a cause of action against the United States for intentional torts committed by federal law enforcement officers, 28 U.S.C. § 2680(h), the congressional comments accompanying that amendment made it crystal clear that Congress views [the] FTCA and *Bivens* as parallel, complementary causes of action.

Carlson, 446 U.S. at 19-20.

The analysis in *Carlson*, though, cannot survive *Ziglar*. In *Carlson*, the Court held that a *Bivens* claim is precluded

> when defendants show that Congress has provided an alternative remedy which it explicitly declared to be a *substitute* for recovery directly under the Constitution and viewed as equally effective.

Carlson, 446 U.S. at 18-19 (emphasis in original). In contrast, *Ziglar* takes a far broader view of those alternative remedies that foreclose assertion of a claim under *Bivens*:

> [I]f Congress has created any alternative, existing process for protecting the injured party's interest that itself may amount to a convincing reason for the Judicial Branch to refrain from providing a new and freestanding remedy in damages.

Ziglar, 137 S. Ct. at 1858 (internal alterations and quotation marks omitted). Thus, while the absence of an explicit declaration by Congress that the FTCA is intended to be a substitute for *Bivens* may have been dispositive to the Court that decided *Carlson*, that absence is of little significance after *Ziglar*. No doubt this is among the reasons the Court in *Ziglar* declared that, "in light of the changes to the Court's general approach to recognizing implied damages

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U.S.C. §§ 2401, 2675. The exhaustion requirement is jurisdictional and cannot be waived. *Celestine v. Mount Vernon Neighborhood Health Ctr.*, 403 F.3d 76, 82 (2d Cir. 2005).

remedies, it is possible that the analysis in the Court's three *Bivens* cases might have been different if they were decided today." *Ziglar*, 137 S. Ct. at 1856.

Since *Ziglar*, other courts have questioned the continued vitality of *Carlson*'s holding that FTCA and *Bivens* claims may proceed as parallel, complementary causes of action, and have declined to permit *Bivens* claims to proceed because the FTCA provides an adequate alternative remedy. *See, e.g.*, *Huckaby v. Bradley*, 2018 WL 2002790, at *6 (D.N.J. Apr. 30, 2018) (finding that "the availability of a remedy against the United States on a claim of negligence under the FTCA, in light of *Ziglar*, is a factor weighing against . . . recognizing a *Bivens* remedy"), *appeal filed*, No. 18-2204 (3d Cir. June 1, 2018); *Abdoulaye v. Cimaglia*, 2018 WL 1890488, at *7 (S.D.N.Y. Mar. 30, 2018) (questioning whether the analysis of the FTCA as an alternative remedy in *Carlson* survives *Ziglar* and finding that "the existence of the FTCA as a potential remedy counsels hesitation in extending a *Bivens* remedy"); *Free v. Peikar*, 2018 WL 905388, at *5-6 (E.D. Cal. Feb. 15, 2018) (declining to extend *Bivens* to a First Amendment claim because the FTCA provides an adequate alternative remedy), *report and recommendation adopted by* 2018 WL 1569030 (E.D. Cal. Mar. 30, 2018); *Morgan v. Shivers*, 2018 WL 618451, at *5-6 (S.D.N.Y. Jan. 29, 2018) (declining to extend *Bivens* to pre-trial detainee's Fifth Amendment excessive force and sexual assault claims because the FTCA provides an alternative remedy).

Plaintiffs have submitted a letter positing that the Ninth Circuit's recent decision in *Rodriguez v. Swartz*, 2018 WL3733428 (9th Cir. Aug. 7, 2018), supports their contention that the FTCA does not preclude extensions of *Bivens* to new contexts. Pls.' Letter Dated August 10, 2018, Docket Entry 833. *Rodriguez* involved a claim that a U.S. Border Patrol agent stationed on the American side of our border with Mexico fired between fourteen and thirty bullets across the border at a sixteen-year-old boy, striking the boy with about ten bullets and killing him. *Id.*

at *1. As plaintiffs suggest, the majority in *Rodriguez* did opine that Congress did not intend for the FTCA, and in particular the Westfall Act, to preclude victims of constitutional torts from suing government employees who allegedly violated their constitutional rights. *Id.* at *11. The reasoning in *Rodriguez* is at least arguably *dicta*, though, because the majority first concluded that the FTCA was not an available alternative remedy because it "specifically provides that the United States cannot be sued for claims 'arising in a foreign country.'" *Id.* (quoting 28 U.S.C. § 2680(k)). To the extent *Rodriguez* holds that the FTCA does not as a general matter provide an alternative remedy to a *Bivens* claim, I respectfully disagree with that holding for the reasons stated above.

Because plaintiffs could have brought their claims under the FTCA and been awarded damages for their injuries if they prevailed, *Ziglar* counsels that their *Bivens* claims should be dismissed.

2. Other Alternative Remedies

Although I conclude that the availability of a remedy pursuant to the FTCA is sufficient to preclude plaintiffs' *Bivens* claims, I note that plaintiffs might have invoked other remedies as well. For example, at least two courts have taken into account BOP's administrative grievance process when concluding that alternative remedies preclude *Bivens* claims. *Free*, 2018 WL 905388, at *6; *Gonzalez v. Hasty*, 269 F. Supp. 3d 45, 60 (E.D.N.Y. 2017), *appeal filed*, No. 17-3790 (2d Cir. Nov. 21, 2017). Plaintiffs might also have sought injunctive or habeas relief. Indeed, the Supreme Court's opinion in *Ziglar* suggests as much. 137 S. Ct. at 1865.

Plaintiffs raise serious questions about whether the administrative grievance process, or the possibility of injunctive or habeas relief, provided them with sufficiently meaningful alternative remedies to warrant precluding their *Bivens* claims. Plaintiffs first argue that equitable relief, when compared to a *Bivens* claim, would not afford them "roughly similar

compensation" for their injuries or provide defendants with "roughly similar incentives" to respect their constitutional rights. Pls.' Mem. at 15; *see Minneci v. Pollard*, 565 U.S. 118, 130 (2012). *But see Gonzalez*, 269 F. Supp. 3d at 62 (noting that "there is no precedent suggesting that the unavailability of money is a factor that carries any weight in determining the expansion of a *Bivens* remedy. Rather, the emphasis is simply on the existence of an avenue to protect the right."). Plaintiffs are plainly correct that an award of equitable relief would not provide them with monetary compensation for violations of their rights that had already occurred, and likely would not provide defendants with as strong an incentive to avoid violating constitutional rights as would money judgments entered against them personally.

Plaintiffs also argue that their conditions of confinement precluded them, as a practical matter, from filing a grievance or pursuing either injunctive or habeas relief. Pls.' Mem. at 13. Plaintiffs allege that they were not provided with the handbooks that explain to detainees how to file an administrative complaint about mistreatment until long after they were taken into custody. FAC ¶ 140. Plaintiffs further contend that, until mid-October 2001, they were subjected to a "communications blackout," which denied them social or legal visits or telephone calls. *Id.* ¶¶ 79-81. Plaintiffs further allege that MDC staff "repeatedly turned away any relative or lawyer who came to the MDC in search of a detainee by falsely stating that the detainee was not there." *Id.* ¶ 81. Even after the blackout was lifted, plaintiffs' ability to make legal and social calls was at best severely limited and, in reality, virtually nonexistent. *Id.* ¶¶ 83-85. As a result, plaintiffs argue, they were not able to seek an injunction until April 2002. By that time, plaintiffs had been released and their application for injunctive relief was moot. Pls.' Mem. at 14.

Defendants dispute plaintiffs' claim of inability to seek relief prior to April 2002, noting that a case based on allegations of abuse similar to those plaintiffs raise here was filed in

December of 2001. Defendants' Reply ("Def.'s Reply") at 11-12, Docket Entry 808-8; *see* Complaint ¶¶ 14-18, Baloch v. Ashcroft, No. 01-cv-8515 (E.D.N.Y. Dec. 21, 2001), Docket Entry 1. The complaint in *Baloch*, though, largely corroborates plaintiffs' claims, in that it alleges that Baloch was unable to communicate with an attorney, despite his efforts to do so, from September 22, 2001, the day he was detained, until some time in November, 2001. Complaint ¶¶ 12-15, Baloch v. Ashcroft, No. 01-cv-8515 (E.D.N.Y. Dec. 21, 2001). Baloch's complaint, moreover, was not filed until December 21, 2001, by which time Baloch had been detained for three months, and was ultimately dismissed as moot before the Court could decide whether relief was warranted. Order Dismissing Case as Moot, Baloch v. Ashcroft, No. 01-cv-8515 (E.D.N.Y. June 27, 2002), Docket Entry 4. Finally, the motion pending before the Court is one to dismiss, and the factual allegations of plaintiffs' complaint must therefore be accepted as true for purposes of deciding the motion.

Because I conclude that the FTCA provided plaintiffs with an alternative remedy precluding their *Bivens* claims, I need not decide whether injunctive or habeas relief, or an administrative grievance, did as well. Nevertheless, the District Court may not agree that the FTCA provides an alternative remedy. I therefore note my conclusion that, for the reasons stated above and in light of the particular facts of this case, neither an administrative grievance, a motion for injunctive relief, nor a petition for a writ of habeas corpus were sufficiently available to plaintiffs to provide them with alternative remedies warranting preclusion of their *Bivens* claims.

C. District Court Decisions Rendered After Ziglar

Plaintiffs contend that *Ziglar* does not restrict *Bivens* claims as narrowly as the discussion above suggests, and should not be read to preclude their abuse claim from proceeding. As support, plaintiffs point to three post-*Ziglar* cases that permitted *Bivens* claims arising in new

contexts to go forward. *See generally Cuevas v. United States*, 2018 WL 1399910 (D. Colo. Mar. 19, 2018), *appeal filed* No. 18-1219 (10th Cir. May 18, 2018); *Leibelson v. Collins*, 2017 WL 6614102 (S.D. W. Va. Dec. 27, 2017), *appeal filed sub nom. Leibelson v. Cook* No. 18-1202 (4th Cir. Feb. 23, 2018); *Linlor v. Polson*, 263 F. Supp. 3d 613 (E.D. Va. 2017).

The cases cited by plaintiffs are distinguishable because they involve relatively low-level individual officers and do not implicate or touch upon prison policy. *See Cuevas*, 2018 WL 1399910, at *1-4 (allowing an inmate's *Bivens* claim to proceed against BOP correctional officers who allegedly relayed sensitive information to other inmates with the intention that they retaliate violently against the plaintiff, after finding that "[t]he challenged actions are ordinary incidences of day-to-day prison operations, for which there is law clearly establishing that the practice is unconstitutional, such that there is no risk that this litigation will tread on complex matters of BOP policymaking"); *Leibelson*, 2017 WL 6614102, at *12-13 (denying summary judgment and permitting a *Bivens* claim to proceed against a BOP captain for alleged indifference to the ability of a transgender inmate plaintiff to eat in the prison cafeteria without risk of assault); *Linlor*, 263 F. Supp. 3d at 625 (allowing a *Bivens* claim to proceed against a TSA officer for allegedly using excessive force because the case "present[ed] a relatively simple, discrete question of whether a federal officer applied excessive force during a Fourth Amendment search").

The holdings in two of the cases cited by plaintiffs are distinguishable on other grounds as well. In *Cuevas*, the Court expressly declined to consider whether the FTCA provided plaintiff with an alternative remedy because defendants did not argue that it did. *Cuevas*, 2018 WL 1399910, at *4 n.4. Similarly, while the Court in *Leibelson* permitted one of plaintiff's *Bivens* claims to proceed, it dismissed several others, including one dismissed at least in part

because plaintiff was simultaneously pursuing a cause of action under the FTCA based upon overlapping allegations. *Leibelson*, 2017 WL 6614102, at *11.

There are, moreover, several lower courts decisions dismissing *Bivens* claims in the wake of *Ziglar* on grounds comparable to those discussed in this Report. In *Abdoulaye*, for example, the Court declined to extend Bivens to a claim against a deputy U.S. Marshal who allegedly pushed a wheelchair-bound detainee into a wall, exacerbating the detainee's back injury. *Abdoulaye*, 2018 WL 1890488, at *1, *7. The Court held that the availability of an alternative remedy under the FTCA, and the decision of Congress not to include a stand-alone remedy for damages in the PLRA, counseled hesitation and warranted dismissal of the plaintiff's *Bivens* claim. *Id.* at *7; *see also Free*, 2018 WL 905388, at *6 (declining to extend *Bivens* to an inmate's First Amendment retaliation claim because the FTCA, BOP's administrative grievance process, and habeas corpus are adequate alternative remedies and because congressional silence counsels hesitation); *Morgan*, 2018 WL 618451, at *6-7 (declining to extend *Bivens* to an inmate's claim of abusive conduct in connection with a search of his rectum because the FTCA provides an adequate alternative remedy, because Congress failed to establish a private right of action even when legislating in the area of prisoners' rights, and because "balanc[ing] the challenges prison administrators and officers face in maintaining prison security against the expansion of [a] private right of action for damages . . . is more appropriately suited for Congress, not the Judiciary"); *Gonzalez*, 269 F. Supp. 3d at 59-62, 65 (declining to extend *Bivens* to an inmate's Fifth and Eighth Amendment claims with respect to his confinement in MDC's ADMAX SHU because BOP's administrative grievance process and habeas corpus provided adequate alternative remedies, and because Congress has not established a private right of action despite being active in the area of prisoners' rights). These post-*Ziglar* cases suggest that courts

are resistant to efforts to expand *Bivens*, even when considering claims that do not implicate high-level policy concerns, and particularly when those claims arise in prisons or jails.

II. Defendants LoPresti and Cuciti

As noted above, plaintiffs "accept that the Court's determination of the scope of *Bivens* liability will apply to their claims against the non-appealing defendants—LoPresti and Cuciti—as well." Pls.' Mem. at 9.

Insofar as is relevant here, LoPresti was the Captain of the MDC and was responsible for supervising all MDC correctional officers, including those assigned to the ADMAX SHU. FAC ¶ 27. Plaintiffs allege that LoPresti was frequently present in the ADMAX SHU, reviewed logs, and received complaints from plaintiffs and other detainees about ongoing abuse and conditions on the unit, yet did nothing to stop the abuse or address the misconduct of officers under his supervision. *Id.* Cuciti was a First Lieutenant at the MDC, where he was responsible for processing detainees, escorting them, and overseeing their legal and social visits. *Id.* ¶ 28. Like LoPresti, Cuciti made rounds in the ADMAX SHU, reviewed logs, and received complaints from plaintiffs and other detainees about ongoing abuse and adverse conditions on the unit, but did nothing to rectify the abuse of which he was aware. *Id.* In short, plaintiffs claim that LoPresti and Cuciti were deliberately indifferent to the abuse of the plaintiffs by other MDC officers. Plaintiffs' Supplemental Brief in Support of *Bivens* Liability ("Pls.' Supp.") at 4-5, Docket Entry 823.

LoPresti and Cuciti adopt Hasty's arguments. Defendant LoPresti's Memorandum in Support of the Motion to Dismiss ("LoPresti Mem.") at 2, Docket Entry 818.[6] They argue that,

[6] Counsel for LoPresti submitted the memorandum cited in the text on behalf of defendants LoPresti and Cuciti, subject to obtaining authorization to appear on Cuciti's behalf. LoPresti Mem. at 2 n.1. Counsel subsequently filed a notice of appearance as attorney for defendant Cuciti. Docket Entry 821.

even though LoPresti and Cuciti held ranks lower than Warden, plaintiffs' allegations against them are similar to those made against Warden Hasty. *Id.* at 4. LoPresti and Cuciti contend that, while they were closer in rank to the line officers who are alleged to have abused plaintiffs, they did not themselves commit the acts of abuse that underlie plaintiffs' claims. *Id.* at 5.

The discussion above with respect to the availability of the FTCA as an alternative remedy forecloses plaintiffs' *Bivens* claims against LoPresti and Cuciti. Moreover, the threshold for finding a special factor that counsels hesitation is so low that—while the result is less clear with respect to LoPresti and Cuciti than it is with respect to Hasty—I conclude that the impact on BOP's investigatory procedures and policies is such a factor. I accordingly recommend that plaintiffs' *Bivens* claims against defendants LoPresti and Cuciti, like those against defendant Hasty, be dismissed.

CONCLUSION

The Supreme Court in *Ziglar* confined *Bivens* to an extremely narrow space. That space is too narrow to accommodate plaintiffs' remaining abuse claim. Therefore, and for the reasons stated above, I respectfully recommend that plaintiffs' remaining claims be dismissed.

Any objections to the recommendations made in this Report must be submitted within fourteen days after filing of the Report and, in any event, no later than August 27, 2018. *See* 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72(b)(2). Failure to file timely objections may waive the right to appeal the District Court's order. *See Small v. Sec'y of Health & Human Servs.*, 892 F.2d 15, 16 (2d Cir. 1989) (discussing waiver under the former ten-day limit).

/s/
Steven M. Gold
United States Magistrate Judge

Brooklyn, New York
August 13, 2018

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

IBRAHIM TURKMEN, AKHIL SACHDEVA, AHMER IQBAL ABBASI, ANSER MEHMOOD, BENAMAR BENATTA, AHMED KHALIFA, SAEED HAMMOUDA, and PURNA RAJ BAJRACHARYA on behalf of themselves and all others similarly situated, Plaintiffs, -against- JOHN ASHCROFT, ROBERT MUELLER, JAMES W. ZIGLAR, DENNIS HASTY, MICHAEL ZENK, JAMES SHERMAN, SALVATORE LOPRESTI, and JOSEPH CUCITI, Defendants.	**MEMORANDUM AND ORDER ADOPTING REPORT AND RECOMMENDATIONS** 02-cv-02307 (DLI) (SMG)

DORA L. IRIZARRY, United States District Judge:

This case arises out of alleged abuse suffered by Plaintiffs Ahmer Abbasi, Anser Mehmood, Benamar Benatta, Ahmed Khalifa, Saeed Hammouda, and Purna Bajracharya (collectively, "Plaintiffs") as detainees at the Metropolitan Detention Center ("MDC") in Brooklyn, New York following the September 11, 2011 terrorist attacks.[1] The Fourth Amended Complaint ("FAC") asserts claims under *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388 (1971) against Defendants Dennis Hasty ("Hasty"), Salvatore LoPresti ("LoPresti"), and Joseph Cuciti ("Cuciti") (collectively, "Defendants"). *See*, FAC, Dkt. Entry No. 726. In light of the Supreme Court's decision in *Ziglar v. Abbasi*, 137 S.Ct. 1843 (2017), which dismissed all of

[1] This Memorandum and Order's caption mirrors that of Plaintiffs' Fourth Amended Complaint. However, only Ahmer Abbasi, Anser Mehmood, Benamar Benatta, Ahmed Khalifa, Saeed Hammouda, and Purna Bajracharya have claims pending. *See*, Letter from Rachel Meeropol dated February 20, 2018, Dkt. Entry No. 820, at 1. Plaintiffs assert their sole remaining cause of action only against Defendants Dennis Hasty, Salvatore LoPresti, and Joseph Cuciti. *See*, Consent Judgment dated February 27, 2018, Dkt. Entry No. 825 (dismissing the claims against John Ashcroft, Robert Mueller, James Ziglar, James Sherman, and Michael Zenk).

Plaintiffs' claims except for the *Bivens* claim against Hasty, Hasty moved to dismiss the remaining claim against him. *See*, Fully Briefed Hasty Mot. to Dismiss ("Mot. to Dismiss"), Dkt. Entry No. 808. Hasty's motion also is applicable to Plaintiffs' *Bivens* claim against LoPresti and Cuciti as the viability of the claim depends on the outcome of the motion. *See*, Pls.' Mem. of Law in Supp. of *Bivens* Liability, Dkt. Entry No. 808-7, at 9; *See also*, LoPresti's Mem. in Supp. of Hasty's Mot. to Dismiss ("LoPresti Mem."), Dkt. Entry No. 818. This Court referred the motion to the Honorable Steven M. Gold, then U.S. Magistrate Judge of this Court (ret.), for a Report and Recommendations ("R&R").[2] *See*, Electronic Referral Order dated January 22, 2018.

On August 13, 2018, the magistrate judge issued the R&R, recommending that this Court grant the motion and dismiss this action in its entirety. *See*, R&R, Dkt. Entry No. 834. Plaintiffs and Defendants timely objected to the R&R. *See*, Pls.' Obj. to the R&R ("Pls. Obj."), Dkt. Entry No. 838; Hasty's Obj. to the R&R ("Hasty Obj."), Dkt. Entry No. 839; LoPresti's and Cuciti's Obj. to the R&R ("LoPresti and Cuciti Obj."), Dkt. Entry No. 840. Plaintiffs and Defendants responded to each other's objections.[3] *See*, Pls.' Resp. to Hasty's Limited Obj. to the R&R ("Pls. Resp."), Dkt. Entry No. 842; Hasty's Resp. to Pls.' Obj. to the R&R ("Hasty Resp."), Dkt. Entry No. 843; LoPresti's and Cuciti's Resp. to Pls.' Obj. to the R&R ("LoPresti and Cuciti Resp."), Dkt. Entry No. 844. Additionally, the parties discussed alleged misrepresentations that Hasty made in his response to Plaintiffs' objection to the R&R and a Third Circuit case from 2019 that Plaintiffs provided as supplemental authority. *See*, Dkt. Entry Nos. 845-47. For the reasons set forth below, the R&R is adopted in its entirety and the motion to dismiss is granted.

[2] As of January 7, 2021, upon his retirement, Judge Gold no longer is assigned to this case. The case has been reassigned to the Honorable Robert M. Levy, U.S. Magistrate Judge.

[3] For both the objection to the R&R and response to Plaintiffs' objection to the R&R, LoPresti and Cuciti joined in the memoranda submitted by Hasty and did not file any substantive memoranda of their own. *See*, LoPresti and Cuciti Obj.; LoPresti and Cuciti Resp.

BACKGROUND

The Court presumes the parties' familiarity with the R&R and *Ziglar*, which thoroughly described the facts and the extensive procedural history of this case. Thus, only the facts relevant to the issues before the Court are set forth herein. In the aftermath of September 11, 2001, hundreds of people unlawfully present in the United States were arrested and remained in custody pending determination of their connection to the terrorist acts. *See*, R&R at 2. Plaintiffs, men of Arab, South Asian, or Muslim descent, were detained in Brooklyn, New York federal Metropolitan Detention Center's ("MDC") most restrictive unit, the Administrative Maximum Special Housing Unit ("ADMAX SHU"). *Id*. At the MDC, guards allegedly abused Plaintiffs physically and verbally. *Id*. In the FAC, Plaintiffs assert, *inter alia*, that Hasty, LoPresti, and Cuciti, as the warden, captain, and lieutenant at the MDC, respectively, knowingly allowed the guards to abuse Defendants in violation of the Fifth Amendment (the "prisoner abuse claim"). *Id*. at 3; *See also*, *Ziglar*, 137 S.Ct. at 1854.

In *Ziglar*, the Supreme Court dismissed all of Plaintiffs' claims except for the prisoner abuse claim. *See*, *Ziglar*, 137 S. Ct. at 1863-65, 1869. The Supreme Court remanded the prisoner abuse claim to the Second Circuit to determine the propriety of extending a *Bivens* remedy. *Id.* at 1869. In turn, the Second Circuit mandated this Court to address the matter. *See*, Second Circuit Mandate dated December 1, 2017, Dkt. Entry No. 799 ("emphasiz[ing] in particular that the Supreme Court left open the question as to whether a *Bivens* claim may be brought under the Fifth Amendment against the warden of the Metropolitan Detention Center").

Upon this Court's referral of the motion to dismiss, the magistrate judge considered the mandated issue and concluded that a *Bivens* remedy cannot extend to Plaintiffs' prisoner abuse claim. *See*, R&R at 11. The magistrate judge determined that the potential impact on the Bureau

of Prisons' ("BOP") investigatory procedures is a special factor counseling hesitation to extending *Bivens* remedy. *Id.* at 11-18. The magistrate judge also determined that Plaintiffs are precluded from pursuing a *Bivens* claim because Plaintiffs have an alternative remedy under the Federal Torts Claims Act ("FTCA"). *Id*. at 19-22. Accordingly, the magistrate judge recommended that this Court grant the motion to dismiss. *Id.* at 28.

Plaintiffs object to the R&R contending that: (1) the magistrate judge's special factors analysis was "logically and doctrinally incoherent" because he erroneously "speculated" that a warden facing damages under a *Bivens* action would violate BOP policy; and (2) the magistrate judge erred by concluding that the FTCA is an alternative remedy. *See*, Pls. Obj. at 2-3. Defendants also object to the R&R arguing that: (1) the magistrate judge erred by declining to infer congressional intent with respect to extending *Bivens* based on Congress' silence and inaction on the matter; and (2) the magistrate judge erred by finding that injunctive, *habeas*, or administrative relief is not an alternative remedy. *See*, Hasty Obj. at 3.

LEGAL STANDARD

When a party objects to an R&R, a district judge must make a *de novo* determination as to those portions of the R&R to which a party objects. *See*, Fed. R. Civ. P. 72(b)(3); *United States v. Male Juvenile*, 121 F.3d 34, 38 (2d Cir. 1997). Pursuant to the standard often articulated by the district courts of this Circuit, "[i]f a party . . . simply relitigates his original arguments, the Court reviews the Report and Recommendation only for clear error." *Antrobus v. N.Y. City Dep't of Sanitation*, 2016 WL 5390120, at *1 (E.D.N.Y. Sept. 26, 2016) (internal citations and quotation marks omitted); *See also, Rolle v. Educ. Bus Transp., Inc.*, 2014 WL 4662267, at *1 (E.D.N.Y. Sept. 17, 2014) ("[A] rehashing of the same arguments set forth in the original papers . . . would reduce the magistrate's work to something akin to a meaningless dress rehearsal.") (internal

citations and quotation marks omitted).

On the other hand, the Court of Appeals for the Second Circuit has suggested that a clear error review may not be appropriate "where arguably 'the only way for [a party] to raise . . . arguments [is] to reiterate them.'" *Moss v. Colvin*, 845 F.3d 516, 519 n.2 (2d Cir. 2017) (quoting *Watson v. Geithner*, 2013 WL 5441748, at *2 (S.D.N.Y. Sept. 27, 2013)). Nonetheless, a court will not "ordinarily . . . consider arguments, case law and/or evidentiary material which could have been, but [were] not, presented to the magistrate judge in the first instance." *Santiago v. City of N.Y.*, 2016 WL 5395837, at *1 (E.D.N.Y. Sept. 27, 2016) (internal citation and quotation marks omitted).

After its review, the district court may then "accept, reject, or modify the recommended disposition; receive further evidence; or return the matter to the magistrate judge with instructions." Fed. R. Civ. P. 72(b)(3); *See also*, 28 U.S.C. § 636(b)(1).

DISCUSSION

In *Bivens*, the Supreme Court recognized "an implied private action for damages against federal officers alleged to have violated a citizen's constitutional rights." *McGowan v. United States*, 825 F.3d 118, 123 (2d Cir. 2016) (quoting *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 66 (2001)). The *Bivens* Court implied a private right of action under the Fourth Amendment for an unreasonable search and seizure claim against Federal Bureau of Investigation agents for handcuffing a man in his own home without a warrant. *Bivens*, 403 U.S. at 389, 397. Since then, the Supreme Court has recognized *Bivens* claims in only two other circumstances: (1) under the Fifth Amendment's Due Process Clause for gender discrimination against a congressman for firing his female secretary, *Davis v. Passman*, 442 U.S. 228 (1979); and (2) under the Eighth

Amendment's prohibition on cruel and unusual punishment against prison officials for failure to treat an inmate's asthma which led to his death, *Carlson v. Green*, 446 U.S. 14 (1980).

In *Ziglar*, the Supreme Court made it clear that the only recognized implied rights of action are the narrow situations presented in *Bivens*, *Davis*, and *Carlson*. *See*, *Ziglar*, 137 S.Ct. at 1855-57. The Supreme Court emphasized that, "[g]iven the notable change in the [Supreme] Court's approach to recognizing implied causes of action, . . . the Court has made clear that expanding the *Bivens* remedy is now a 'disfavored' judicial activity." *Id.* at 1857 (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 675 (2009)).

The Supreme Court has set out a rigorous two-step inquiry in order for courts to determine whether a *Bivens* cause of action applies in a new context or against a new category of defendants. First, the court must determine whether a plaintiff's claims arise in a new *Bivens* context. "If the case is different in a meaningful way from previous *Bivens* cases decided by [the Supreme Court], then the context is new." *Id*. at 1859. If the case presents a new factual context for a *Bivens* claim, then the court proceeds to the second step and asks, "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 v. Robbins*, 551 U.S. 537, 550 (2007).

Irrespective of whether an alternative remedy exists, a federal court also must conduct a specific analysis, "paying particular heed . . . to any special factors counselling hesitation before authorizing a new kind of federal litigation." *Id.* (internal quotation marks omitted). This second step often is referred to as the special factors analysis. "The Court's precedents now make clear that a *Bivens* remedy will not be available if there are special factors counselling hesitation in the absence of affirmative action by Congress." *Ziglar*, 137 S.Ct. at 1857 (internal quotation marks

omitted). Although the Supreme Court "has not defined the phrase 'special factors counselling hesitation,'" the Court has observed that "[t]he necessary inference, though, is that the inquiry must concentrate on whether the Judiciary is well suited, absent congressional action or instruction, to consider and weigh the costs and benefits of allowing a damages action to proceed." *Id.* at 1857-58. Put more simply, "to be a 'special factor counselling hesitation,' a factor must cause a court to hesitate before answering that question in the affirmative." *Id.* at 1858.

As the magistrate judge properly noted, the Supreme Court already has analyzed the first step and held that "this case does seek to extend *Carlson* to a new context" as this case implicates a different constitutional right than that in *Carlson*. *Id*. at 1864; *See also*, R&R at 8. Accordingly, as the Supreme Court has directed, and the magistrate judge correctly has stated, "the only remaining issue is whether there are 'special factors counseling hesitation' or alternative remedies that would preclude the extension of *Bivens* required for [P]laintiffs' claims to proceed." R&R at 10; *See also*, *Ziglar*, 137 S.Ct. at 1865.

I. Special Factors Analysis

A. Defendants' Objection

The magistrate judge determined that Congress' silence and inaction in enacting a *Bivens* type remedy is a not a special factor because "congressional intent here is too ambiguous." *Id.* at 16. Defendants object to the magistrate judge's determination on three grounds: (1) rather than enacting a damages remedy statute, Congress sought to address complaints of detainee abuse with an investigation by the Office of Inspector General ("OIG") of the U.S. Department of Justice as part of the USA PATRIOT Act; (2) Congress chose not to enact a damages remedy even though it was aware of the detainee abuse allegations specifically at the MDC through a supplemental OIG report and hearings; and (3) by passing the Prison Litigation Reform Act of 1995 ("PLRA")

without enacting a corresponding *Bivens* type remedy, Congress indicated its reluctance to create a damages remedy. *See*, Hasty Obj. at 5-9. Defendants contend that Congress' inaction despite its "active interest in this field" demonstrates that "this is properly an area of congressional interest and inquiry" and "not one into which the Judiciary ought lightly intrude." *Id.* at 9. The objected portion of the R&R is reviewed for clear error because the magistrate judge addressed these same arguments in the R&R. *See*, R&R at 11-16.

In reaching his conclusion, the magistrate judge not only considered Defendants' arguments but also Plaintiffs' counterarguments. Plaintiffs argued that Congress' silence "in the face of [the OIG] reports in fact suggests its tacit approval of extending *Bivens* and allowing [P]laintiffs to proceed with their claims," especially given that the reports specifically referred to the present litigation. *Id.* at 12. Moreover, with respect to the PLRA, Plaintiffs contended that the PLRA does not apply to undocumented alien detainees like Plaintiffs and, thus, has no bearing on whether a *Bivens* remedy should extend to Plaintiffs' prisoner abuse claim. *Id.* at 13. Plaintiffs further contended that, when Congress passed the PLRA, it presumed the existence of a *Bivens* cause of action for prisoner abuse. *Id.* at 14.

The Court finds that the magistrate judge did not commit any clear error in considering the parties' arguments and finding that the congressional intent here is "too ambiguous to provide meaningful support for either side's position." *Id.* at 16 (citing *Wilkie*, 551 U.S. at 554). As the magistrate judge properly found, inferring congressional intent in this context requires a level of speculation and such speculation is difficult and inconclusive when it involves deciphering "the inaction of a legislative body with hundreds of members, each of whom may have his or her own reasons for not acting." *Id.* Therefore, Defendants' objection is overruled.

B. Plaintiffs' Objection

The magistrate judge concluded that the potential impact on the BOP's investigatory procedures and policies is a special factor counseling hesitation against extending a *Bivens* remedy to Plaintiffs' prisoner abuse claim. *Id.* at 16. In reaching this conclusion, the magistrate judge considered procedures promulgated by the Office of Internal Affairs ("OIA") and BOP for investigating and handling allegations of abuse by correctional officers. *Id.* at 16-18. The magistrate judge found that imposing personal liability on a warden who is indifferent to abuse by correctional officers under his or her supervision "might impede, or at least affect, the efficacy of these practices and procedures" in order to avoid liability under a *Bivens* type remedy. *Id*. at 18.

Plaintiffs argue that the magistrate judge erroneously "assumes that federal employees will violate their own regulations to escape potential liability." Pls. Obj. at 14. Plaintiffs contend that the magistrate judge's "distrust of federal officials is wholly unsupported" as Hasty did not make such an argument. *Id.* at 15. Plaintiffs also contend that the magistrate judge's finding is "flawed as a matter of logic and precedent" because a warden seeking to avoid liability is more likely to follow the relevant investigatory procedures rather than violating them. *Id.* at 15-16. Relying on the Supreme Court's remark in *Ziglar* that Plaintiffs' allegations here are "just as compelling as those at issue in *Carlson*[,]" Plaintiffs assert that the magistrate judge "transforms what made Plaintiffs' claim compelling to the Supreme Court into an argument against a *Bivens* remedy." *Id.* at 16 (citing *Ziglar*, 137 S.Ct. at 1864). Lastly, Plaintiffs assert that a different special factors analysis must be applied in this case because Plaintiffs seek only "a modest extension" of a *Bivens* remedy. *Id*. at 17-18.

Reviewing the magistrate judge's findings and recommendations on this issue *de novo*, the Court finds no merit to Plaintiffs' arguments. As an initial matter, contrary to Plaintiff's assertion,

the magistrate judge was not limited to the parties' arguments in conducting his analysis. Indeed, the magistrate judge properly analyzed the very factors that the Supreme Court set forth in *Ziglar*. In *Ziglar*, the Supreme Court stated that:

> [T]he decision to recognize a damages remedy requires an assessment of its impact on governmental operations systemwide. Those matters include the burdens on Government employees who are sued personally, as well as the projected costs and consequences to the Government itself when the tort and monetary liability mechanisms of the legal system are used to bring about the proper formulation and implementation of public policies. These and other considerations may make it less probable that Congress would want the Judiciary to entertain a damages suit in a given case.

Ziglar, 137 S.Ct. at 1858.

Accordingly, the magistrate judge considered the following potential impacts: a warden choosing not to report abusive acts by correctional officers to OIA; a warden deciding to report abusive acts only after conducting his or her own preliminary inquiry; and a warden not enforcing BOP requirements of recording detainee movements or abuse in order to avoid liability. *See*, R&R at 17-18. The magistrate judge further considered the costs to the government in the form of defense and indemnification, resources and time required for litigations, the disruptive impact litigations will have on wardens and supervisory officials from performing their duties, and the possibility of wardens adopting supervisory practices they otherwise might not because they may be accountable for failing to monitor and control the actions of officers under their command. *Id.* at 18.

In addition, Plaintiffs' reliance on the Supreme Court's comparison of their claims to the claims in *Carlson* is misplaced. In *Ziglar*, while recognizing that this case "has significant parallels" to *Carlson*, the Supreme Court nonetheless emphasized the necessity for a special factors analysis because this case "seeks to extend *Carlson* to a new context." *Ziglar*, 137 S.Ct. at 1864. Moreover, without citing to support, Plaintiffs baldly assert that the special factors analysis must

differ in this case. As the magistrate judge properly and thoroughly explained, whether a case seeks "a modest extension" of a *Bivens* remedy is immaterial to applying the special factors analysis and standard. *See*, R&R at 10-11. The Supreme Court emphasized that "even a modest extension is still an extension" and directed the lower courts to conduct a special factors analysis without distinguishing between an extension and a modest extension. *See*, *Ziglar*, 137 S.Ct. at 1864-65.

Furthermore, as the magistrate judge correctly stated, the threshold for finding a special factor that counsels hesitation "is remarkably low. . . . 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." R&R at 18 (quoting *Arar v. Ashcroft*, 585 F.3d 559, 574 (2d Cir. 2009) (internal quotation marks omitted)). The magistrate judge appropriately applied this standard to conclude that a special factor exists in this case that counsels hesitation against extending a *Bivens* remedy. *Id.* at 18-19. Accordingly, Plaintiffs' objection here is overruled.

II. Alternative Remedies

A. Plaintiffs' Objection

Plaintiffs object to the magistrate judge's finding that the FTCA provides a sufficient alternative remedy that precludes authorizing a *Bivens* action. *See*, Pls. Obj. 19-22. Plaintiffs' entire objection relies on the *Carlson* holding that the FTCA is "not a relevant remedial scheme bearing on *Bivens* availability." *Id.* at 21. Plaintiffs contend that the magistrate judge erred by ignoring this precedent set in *Carlson*. *Id.* at 19. Since the magistrate judge already has addressed this contention in the R&R, the Court reviews this portion of the R&R for clear error. *See*, R&R at 20.

As the magistrate judge correctly pointed out, the FTCA analysis in *Carlson* "cannot survive *Ziglar*." *Id.* In *Ziglar*, the Supreme Court made it clear that the legal landscape has changed since *Carlson*. As the Supreme Court noted, "expanding the *Bivens* remedy is now considered a 'disfavored' judicial activity." *Ziglar*, 137 S.Ct. at 1857 (quoting *Iqbal*, 556 U.S. at 675). Accordingly, the Supreme Court has urged "caution" before "extending *Bivens* remedies into any new context. . . . The Court's precedents now make clear that a *Bivens* remedy will not be available if there are special factors counselling hesitation in the absence of affirmative action by Congress." *Id.* at 1857 (internal quotation marks and citations omitted). Indeed, the Supreme Court stated that *Bivens*, *Carlson* and *Davis* are a relic of an "*ancien regime*" and "might have been different if they were decided today." *Id.* at 1855-66 (citing *Alexander v. Sandoval*, 532 U.S. 275, 287 (2001)). As such, Plaintiffs' reliance on *Carlson* or any other pre-*Ziglar* case to object to the R&R is misplaced. *See*, Pls. Obj. at 19-24.

"[W]hen alternative methods of relief are available, a *Bivens* remedy usually is not." *Ziglar*, 137 S.Ct. at 1863 (citing cases). In determining that the FTCA is an available alternative remedy to preclude a *Bivens* remedy, the magistrate judge properly compared *Carlson* and *Ziglar* and found that "*Ziglar* takes a far broader view of" alternative remedies that preclude a *Bivens* remedy. R&R at 20. The magistrate judge accurately relied on the Supreme Court's finding that, "if Congress has created any alternative, existing process for protecting the [injured party's] interest that itself may amount to a convincing reason for the Judicial Branch to refrain from providing a remedy." *Ziglar*, 137 S.Ct. at 1858 (internal quotation marks and citations omitted). The magistrate judge further considered relevant district court cases, as well as a Ninth Circuit case offered by Plaintiffs, to conclude that the *Carlson* holding concerning FTCA no longer has "vitality" in light of *Ziglar*. *Id.* at 21-22. Thus, Plaintiffs' objection here is overruled.

B. Defendants' Objection

Defendants object to the magistrate judge's finding that "neither injunctive nor *habeas* relief, nor administrative remedies constituted alternative remedies." Hasty Obj. at 10. However, this contention is moot in light of the Court's adoption of the magistrate judge's conclusion that the FTCA is an available alternative remedy. *See*, discussion *supra* Section II.A. As the magistrate judge found, since the FTCA provides Plaintiffs with an alternative remedy precluding their *Bivens* claim, this Court "need not decide whether injunctive or *habeas* relief, or an administrative grievance, did as well." R&R at 24. Accordingly, Defendants' objection here is overruled.

It is clear from a review of the magistrate judge's exceptionally detailed, thorough, and well reasoned R&R that the magistrate judge disposed of Plaintiffs' prisoner abuse claim appropriately, abundantly supporting his findings with facts from the record and legal precedent. As set forth above, the parties' objections are overruled, and the R&R is adopted in its entirety. Thus, the motion to dismiss is granted and Plaintiffs' claim against Defendants is dismissed.

CONCLUSION

The parties' objections are overruled, and the R&R is adopted in its entirety. Accordingly, the motion to dismiss this action is granted.

SO ORDERED.

Dated: Brooklyn, New York
September 9, 2021

/s/
DORA L. IRIZARRY
United States District Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
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IBRAHIM TURKMEN, AKHIL SACHDEVA, AHMER IQBAL ABBASI, ANSER MEHMOOD, BENAMAR BENATTA, AHMED KHALIFA, SAEED HAMMOUDA, and PURNA RAJ B AJRACHARYA on behalf of themselves and all others similarly situated,

Plaintiffs,

-against-

JUDGMENT
02-cv-02307 (DLI) (SMG)

JOHN ASHCROFT, ROBERT MUELLER, JAMES W. ZIGLAR, DENNIS HASTY, MICHAEL ZENK, JAMES SHERMAN, SALVATORE LOPRESTI, and JOSEPH CUCITI,

Defendants.
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A Memorandum and Order of the Honorable Dora L. Irizarry, United States District Judge, having been filed on September 9, 2021, adopting the Report and Recommendation of Magistrate Judge Steven M. Gold, dated August 13, 2018, granting the motion to dismiss; it is

ORDERED and ADJUDGED that the motion to dismiss is granted; and that this action is dismissed.

Dated: Brooklyn, New York
September 13, 2021

Douglas C. Palmer
Clerk of Court

By: */s/Jalitza Poveda*
Deputy Clerk