UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

IBRAHIM TURKMEN, et al.,		02 CV 2307 (DLI) (SMG)
	Plaintiffs,	
- against -		**Oral Argument Requested**
JOHN ASHCROFT, et al,		
	Defendants.	

PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF *BIVENS* LIABILITY

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Plaintiffs are non-citizens who were held in immigration detention while awaiting deportation or voluntary departure for violating the terms of their visas. They were placed in a super-maximum security wing of a federal prison, subjected to uniquely harsh restrictions as a matter of policy, and abused for three to eight months. This treatment was not based on evidence that Plaintiffs had committed crimes, or even were dangerous, but rather on their religion, race, immigration status, and ethnicity—as Muslim non-citizens of Arab and South Asian descent. To remedy these constitutional violations, Plaintiffs sued eight individual Defendants seeking damages under *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971).

In *Ziglar v. Abbasi,* 137 S. Ct. 1843 (2017), the Supreme Court held that Plaintiffs' policy-based claims should be dismissed. Although the detention policy might well have violated the Fifth Amendment, "special factors" counselled against extending *Bivens* to allow an implied action for damages which challenged executive policy regarding the nation's response to the September 11 attacks. The Court remanded for consideration of whether one of Plaintiffs' claims—deliberate indifference by Warden Dennis Hasty to abuse beyond that required by policy—should proceed. Notably, every judge who previously has considered the viability of this claim against Defendant Hasty, including every Second Circuit Judge who heard this appeal on its merits, has agreed that it should move forward. For the reasons articulated herein, Plaintiffs maintain that this claim, and similar claims against Defendants Cuciti and LoPresti, are viable under *Bivens* and should proceed.

Plaintiffs' claim against Defendant Hasty centers on allegations that he allowed and facilitated physical and verbal abuse of the detainees entrusted to his care, and that this abuse went far beyond the harsh treatment ordered by the high-level Defendants. While the Supreme

Court found Plaintiffs' allegations to state a plausible claim for a violation of the Constitution, the Court declined to consider whether the claim is viable under *Bivens* doctrine. Nonetheless, the Court provided insight into how to determine whether it is appropriate to accept the "modest extension" of *Bivens* required to proceed with the claim against Defendant Hasty. First, as the Court recognized, Plaintiffs seek only to permit civil detainees, who in general are granted greater constitutional rights, to bring the same kind of claim as convicted criminals. Second, the special factors which the Court found to preclude *Bivens* relief on Plaintiffs' other claims do not apply to this claim—otherwise the Court would simply have disposed of the entire case. Third, as we show in this brief, there are no other grounds for refusing to extend a *Bivens* remedy to Plaintiffs in this context.

I. STATEMENT OF FACTS

The Supreme Court explicitly held that Plaintiffs have stated a plausible claim for deliberate indifference against Defendant Hasty. *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1864 (2017). The relevant factual allegations are set out in detail in the Fourth Amended Complaint ("Complaint"), ECF No. 726, substantially corroborated by two Department of Justice Office of Inspector General Reports,[1] and summarized below. Upon the orders of high-level federal officials, Warden Hasty placed Plaintiffs in an "administrative maximum special housing unit," ("ADMAX SHU") where they were held in solitary confinement, and subjected to significant

[1] *See* "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 Report") available at http:/www.usdoj.gov/oig/special/ 0306/full.pdf; and "The Supplemental Report on September 11 Detainees' Allegations of Abuse at the Metropolitan Detention Center in Brooklyn, New York," ("Suppl. OIG Report") available at http://www.usdoj.gov/oig/special/0312/final.pdf. Both reports were appended as exhibits to earlier complaints, and are incorporated by reference in the Fourth Amended Complaint. *See* Compl. at 3 n.1, 4 n. 2.

restrictions as a matter of policy. Compl. ¶ 24, 76; *see Ziglar,* 137 S. Ct. at 1853. But Plaintiffs' treatment went far beyond the detention policy insulated from review 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 has been well-documented. Compl. ¶ 104-08, 162, 166, 177, 182, 201, 205, 218, 221, 234; Suppl. OIG Report at 10-22 (finding that 16-20 MDC staff members physically or verbally abused 9/11 detainees). During transports throughout the jail, MDC guards slammed the 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. Compl. ¶ 105; Suppl. OIG Report at 10-22. 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." Compl. ¶ 119, 120; Suppl. OIG Report at 35-36. When Anser Mehmood first arrived at the MDC he was dragged from the van by several large guards and thrown against the wall. Compl. ¶ 162. 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*, *id.* ¶ 147 (Abbasi beaten on arrival); ¶ 201 (Khalifa beaten on arrival); ¶ 218 (Hammouda abused on arrival); ¶ 234 (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 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. *Id.* ¶ 122-125. 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. *Id.* ¶ 124; *see also* OIG Report at 152.

Almost all of the detainees were Muslim, and MDC staff frequently interrupted their prayers, screaming and telling them to "shut the fuck up," and mocking the Arabic phrases of the Azan (the call to prayer). Compl. ¶ 136. Plaintiffs were called "camels," "terrorists," and "Fucking Muslims." *Id.* ¶ 110, 147. 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. *Id.* ¶ 115, 116, 203; *see also* Suppl. OIG Report at 28-30. The abuse continued until Plaintiffs were declared "cleared" of any connection to the September 11 attacks (and terrorism in general), and deported. Compl. ¶ 152, 169-70, 189, 211-212, 227, 243-244.

Plaintiffs suffered profoundly from this mistreatment. Benamar Benatta, for example, twice attempted to injure himself by banging his head against his cell wall. *Id.* ¶ 180. In November, after he requested help from the prison psychiatrist 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.* ¶ 179-182. 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. *Id.* ¶ 87. Purna Raj Bajracharya wept constantly, and repeatedly told guards he felt suicidal. *Id.* ¶ 241.

Plaintiffs' abuse and harassment was allowed and even encouraged by Warden Hasty, who referred to the detainees as "terrorists" in MDC memoranda, though they were not even

charged with, much less convicted of, terrorism. *Id.* ¶ 24, 109. Hasty tried to avoid witnessing or learning about the systematic abuse meted out by his subordinates by neglecting to make rounds on the ADMAX SHU, though BOP policy required them. *Id.* He isolated Plaintiffs (*id.* ¶¶ 68, 76), and denied them access to the outside world (*id.* ¶¶ 79-102), as well as the means to file an internal complaint. *Id.* ¶ 140. Despite his attempts to blind himself to the pattern of abuse occurring at his prison, he learned of it nonetheless. *Id.* ¶¶ 24, 77-78, 97, 107, 114, 120, 123, 126, 137. 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. *Id.* ¶107. Knowing of these complaints and investigations, Hasty nevertheless failed to investigate the abuse, punish the abusers, train his staff, or implement any process at MDC to review the videotapes for evidence of abuse. *Id.* Many of these tapes were destroyed, disappeared, or were taped over, and others were withheld from the OIG for years before they were "found" by MDC staff. *Id.*; Suppl. OIG Report at 41.

The culture of abuse was so far-reaching at Hasty's MDC that when a few 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. Compl. ¶ 78. 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 id.* ¶ 110 (counselor who passed on Plaintiff's 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. *Id.* ¶ 27 (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); ¶¶ 28, 104-105 (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* ¶¶ 77, 110, 121, 226. Lopresti and Cuciti failed to correct the abuses they witnessed or learned of. *Id.* ¶¶ 27-28, 77, 97, 114, 121, 126, 137.

II. PROCEDURAL HISTORY

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, Metropolitan Detention Center staff. In 2009, five of these plaintiffs settled their Federal Tort Claims Act claims against the United States for $1.26 million, and as part of that settlement released their *Bivens* claims. *See* ECF No. 687, Ex. A. Six new individuals—the current Plaintiffs—then sought and received leave to intervene in the case.[2] At the same time, the Plaintiffs amended the Complaint to add factual detail sufficient to meet the pleading standard established in *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009). The complaint was also narrowed by limiting claims to class claims, and by eliminating a number of low-ranking MDC defendants.

The Defendants filed motions to dismiss this Fourth Amended Complaint, and in 2013 Judge Gleeson granted those motions as to the high-level Defendants, but denied the MDC Defendants' motions to dismiss in significant part, ruling that five of Plaintiffs' seven claims

[2] The Fourth Amended Complaint 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, which was affirmed by the Court of Appeals. *Turkmen v. Hasty*, 789 F.3d 218, 259, 264, 265 (2d Cir. 2015). Thus they have no claims currently pending before the Court.

could move forward. *See* Memorandum and Order, ECF No. 767. MDC Defendants Hasty, Warden Zenk (Hasty's successor), and Deputy Warden Sherman took an interlocutory appeal from the Court's denial of their motions to dismiss. *See* Notice of Appeal, ECF Nos. 778, 779, 780. Plaintiffs cross-appealed the dismissal of their claims against the high-level Defendants after Judge Gleeson directed entry of judgment pursuant to Federal Rule of Civil Procedure 54(b). *See* Judgment, ECF. No 788; Notice of Appeal, ECF No. 790. Defendant LoPresti filed a notice of appeal, but did not prosecute that appeal, which was dismissed under Federal Rule of Appellate Procedure 31(c). *Turkmen*, 789 F.3d at 224 n.2. Cuciti, defending himself *pro se*, did not appeal. *Id.* Accordingly, Judge Gleeson's 2013 holding, allowing claims against these Defendants to move forward, still stands. *Turkmen v. Ashcroft*, 915 F. Supp. 2d 314, 341-42 (E.D.N.Y. 2013).

The Court of Appeals 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 Defendants, with the exception of those claims brought against Zenk. *Turkmen*, 789 F.3d at 261, 249. The court also found Plaintiffs' deliberate indifference allegations against Sherman too general and conclusory to support the claim. *Id.* at 251. The court contrasted the allegations against Sherman 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 256 (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'" against Hasty could move forward. *Id.* at 295 n. 41.

After the Court of Appeal's ruling, Defendants sought rehearing *en banc*, which 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, 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. 294 (2016).

A divided Supreme Court reversed the Second Circuit, holding that Plaintiffs' substantive due process and equal protection challenge to Defendants' policy of placing Muslim detainees in harsh conditions of confinement without individualized suspicion presented a new *Bivens* context, and special factors counselled hesitation in 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 (*quoting Correctional Services Corp. v. Malesko*, 534 U.S. 61, 74 (2001)), especially national security policy. *Id.* at 1860-63.

The Court placed Plaintiffs' non-policy claim against Defendant Hasty on a different footing. *Id.* at 1864. After 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 those 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 *Bivens*. *Ziglar*, 137 Sup. Ct. at

[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.

1865. The Supreme Court remanded to the Court of Appeals, which in turn remanded to this Court, to perform the "special factors" analysis in the first instance. *Id.* 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.

III. ARGUMENT

Ziglar followed an established path for determining whether a *Bivens* cause of action should be implied. Now, as before, a court begins 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 (implying damage remedy for illegal search and seizure under Fourth Amendment); *Davis v. Passman*, 442 U.S. 228 (1979) (implying damage remedy for gender discrimination under Fifth Amendment); *Carlson v. Green*, 446 U.S. 14 (1980) (implying damage remedy for mistreatment in prison under Eighth Amendment). If the case is different in a meaningful way from these prior *Bivens* cases, it presents a new context. 137 S. Ct. at 1859. Extending *Bivens* remedies to a new context is not warranted if any existing alternative remedy presents a convincing reason for the judiciary to stay its hand. *Id.* at 1858. Even if there are no alternative remedies, before implying a new *Bivens* action 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. 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.

Applying this framework to the instant case begins with *Carlson v. Green,* 446 U.S. 14 (1980). *See Ziglar,* 137 S. Ct. at 1864 (noting that Plaintiffs' "case has significant parallels" to *Carlson,* with allegations "just as compelling"). In *Carlson,* damages were sought for a prison official's deliberate indifference to a federal prisoner's serious medical needs, resulting in his death, in violation of the Eighth Amendment. 446 U.S. at 16 n.1. The case "involve[d] no special factors counselling hesitation," as prison officials "do not enjoy such an 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 Federal Tort Claims Act could provide compensation for plaintiff's suffering, but that law was intended by Congress to supplement the *Bivens* remedy, not supplant it, and did not adequately protect prisoners' constitutional rights. *Id.* at 19-23.

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. In *Ziglar*, the Supreme Court suggested three ways in which Plaintiffs' claim *may be* different from *Carlson:* (1) it involves a different constitutional right—the Fifth Amendment rather than the Eighth—with somewhat less developed legal standards; (2) there "might" have been alternative remedies available here—a writ of habeas corpus or an injunction requiring the warden to bring his prison into compliance with federal regulations; and (3) since *Carlson*, Congress has 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 stand alone damages remedy against federal jailors." *Ziglar*, 137 S. Ct. at 1864-65.

We examine each of these small differences in turn, and show that none counsels against the modest expansion of *Bivens* necessary here to ensure that detainees, who generally enjoy rights equal to or greater than those of convicted prisoners, will have access to comparable remedies.

A. A Fifth Amendment Due Process Claim Presents a New Context But Is Not Itself a Special Factor Counselling Hesitation.

Plaintiffs were civil detainees, and thus their claim arises under the due process clause of the Fifth Amendment, rather than the cruel and unusual punishment clause of the Eighth Amendment. *See Bell v. Wolfish,* 441 U.S. 520 (1979). 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) (internal citations omitted); *Bell,* 441 U.S. at 535-37. This means that their rights are "at least as great as the Eighth Amendment protections available to a convicted prisoner." *Id.(quoting City of Revere v. Mass. Gen. Hosp.,* 463 U.S. 239, 244 (1983)); *see also Kingsley v. Hendrickson,* 135 S. Ct. 2466 (2015).

This difference between the constitutional standards is "meaningful," and thus the Supreme Court relied on it to hold that Plaintiffs' claim presents a new context, requiring an extension of *Bivens*. *Ziglar,* 137 S. Ct. at 1864. However, the Supreme Court did not hold, or even suggest, that the difference between the two constitutional rights might *itself* amount to a special factor counselling against a *Bivens* remedy.[4] *Id.* It does not.

Ziglar instructs the court to determine 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. Here the answer is obvious—we

[4] In contrast, the Court did suggest that the other two differences between *Ziglar* and *Carlson*, discussed in sections B and C below, might be relevant to the alternative remedy and special factors analysis. 137 S. Ct. at 1865.

know the Judiciary is well suited to weigh the costs and benefits of a detainee's damage claim for mistreatment in prison, because the Judiciary has already engaged in that weighing for the "significant[ly] parallel[]" claim raised in *Carlson.* It would be anomalous if the Judiciary were competent to imply a damage remedy for convicted prisoners, who may be punished consistent with the Eighth Amendment, but not for civil detainees, who "may not be punished in any manner." *Darnell,* 849 F.3d at 29.

The Supreme Court noted that the "standard for a claim alleging that a warden allowed guards to abuse pre-trial detainees is less clear under the Court's precedents" than the long-established standard for claims alleging failure to provide medical treatment to a prisoner. *Ziglar*, 137 S. Ct. at 1864-65. The Court did not, however, suggest that the potential difference in standards justifies withholding a damages remedy and, in any event, the Second Circuit's standard for Plaintiffs' claim is perfectly clear: Plaintiffs can succeed by showing that Defendants "recklessly failed to act with reasonable care to mitigate the risk the condition posed to the pretrial detainee even though the defendant-official knew, or should have known, that the condition posed an excessive risk to health or safety." *Darnell*, 849 F.3d at 35. This standard is as clear as the Eighth Amendment deliberate indifference standard in *Carlson*, and it applies equally to failure-to-protect claims and unsafe-conditions claims. *Id.* at 17 n.9 (*citing Caiozzo v. Koreman*, 581 F.3d 63, 72 (2d Cir. 2009)). Indeed, to the extent that it differs from the standard which applies to a convicted prisoner's deliberate indifference claim, it is *simpler*. *Id.* at 33-34; *see also Kingsley,* 135 S. Ct. at 2475 (detainee due process claims can be distinguished from Eighth Amendment claims in that a detainee alleging excessive force or irrationally restrictive conditions need not prove force was applied "maliciously and sadistically" or conditions were motivated by an intent to punish).

There is thus no sound reason to believe that a Fifth Amendment challenge to prison mistreatment is any less suited to a judicially implied remedy than an Eighth Amendment challenge to the same.

B. Plaintiffs Have No Meaningful Alternative Remedies

The Supreme Court identified a second way in which this case may be different from *Carlson*: "there might have been alternative remedies here, for example, a writ of habeas corpus . . . [or] an injunction requiring the warden to bring his prison into compliance with the regulations discussed" and "the existence of alternative remedies usually precludes a court from authorizing a *Bivens* action." *Ziglar,* 137 S. Ct. at 1865 (emphasis added). Plaintiffs' allegations and settled precedent provide a definitive response to this question: first, neither a habeas corpus action nor a motion for injunctive relief were actually available to Plaintiffs; and second, even if they were theoretically available, binding Supreme Court precedent makes them irrelevant to the special factors analysis.

1. Plaintiffs Lacked Timely and Meaningful Access to Habeas Actions or Injunctive Relief.

Unlike Plaintiffs' policy claims, Plaintiffs' claim of deliberate indifference to abuse involves "individual instances of . . . law enforcement overreach, which due to their very nature are difficult to address except by way of damages actions after the fact." *See Ziglar*, 137 S. Ct. at 1862. This general difficulty was significantly exacerbated by the severe restrictions placed on Plaintiffs' access to the outside world, including counsel and the courts, rendering injunctive relief and habeas unavailing.

For the first month of their detentions—until mid-October 2001—Plaintiffs were barred from *any* communication with the outside world, including counsel and the court. Compl. ¶ 79; *see also* ¶ 80, 81 (attorneys who sought access to Plaintiffs during this period were lied to, and

told Plaintiffs were not at MDC). After this initial communications blackout, Plaintiffs were theoretically permitted one legal call a week, and non-contact legal visits, but in practice, they were denied even that. Compl. ¶ 83, 84, *see also* ¶ 85 (summarizing each Plaintiff's failed attempts to contact counsel through fall and winter of 2001); ¶ 92 (list of legal organizations provided to Plaintiffs contained outdate and inaccurate information); ¶ 93 (detailing Abbasi's failed attempts to get legal advice); ¶ 98-99 (MDC illegally audio-recorded detainees visits with their lawyers); *see also*, OIG Report at 112-118, 130-35, Suppl. OIG report at 31-33. As a result, Plaintiffs' "ability to obtain, and communicate with, legal counsel" was "severely limited." OIG Report at 130, 134.

These restrictions significantly delayed Plaintiffs' access to the court, such that they were unable to move for injunctive relief until April of 2002. *See* Compl., ECF No. 1 at 38. The Complaint (and the Amended Complaint, filed in July of 2002) sought appointment of a Special Master to fashion remedies and "such further relief as necessary to ensure that Defendants operate the MDC . . . in compliance with the United States Constitution." *Id.*; *see also* Am. Compl., ECF No. 8 at 62. But by the time the court was able to review their complaint Plaintiffs had been released, mooting their plea for injunctive relief.

If injunctive claims cannot be heard before they are moot, injunctive relief is not an alternative remedy. *See Davis v. Passman*, 442 U.S. 228 (1979). Thus, when Ms. Davis was fired for being a woman, she initially sought equitable relief, including reinstatement, but by the time the Supreme Court heard her case the Defendant was no longer a Congressman, rendering this relief "unavailable" and resulting in the Court's analysis that "for Davis, as for Bivens, 'it is damages or nothing.'" *Id.* at 231 n. 4, 245. For Plaintiffs, just as for Ms. Davis, injunctive relief is not an available alternative remedy.

A habeas remedy was also unavailable. Some 9/11 detainees did file habeas claims in the later months of their detentions, but these were challenges to the detention itself, not to conditions of confinement or abuse. OIG Report at 95-96. It is not clear that the latter was even theoretically available, as the Second Circuit did not hold that habeas could be used to challenge conditions of confinement until 2006. *See Levin v. Apker*, 455 F.3d 71, 78 (2d Cir. 2006). The Second Circuit had previously rejected an immigration detainee's habeas petition challenging detention conditions, remanding the case to the district court because it was better characterized as a *Bivens* claim or claim for injunctive relief. *Sanusi v. Immigration Naturalization*, 100 F. App'x 49, 51-52 (2d Cir. 2004). Even today the Circuits are split on the question. *Compare Braddy v. Wilson*, 580 F. App'x 172, 173 (4th Cir. 2014) *with Aamer v. Obama*, 742 F.3d 1023, 1032–38 (D.C. Cir. 2014).

The Supreme Court suggested that injunctive relief or habeas "might have been" available to Plaintiffs, *Ziglar,* 137 S. Ct. at 1865, but it did not review the record to determine whether or not this was so. It was not. Unless Defendants can explain how Plaintiffs—with minimal access to lawyers and the court—could have obtained an injunction or habeas to get relief from prison abuse before their claim was moot—they are left in the same position as Mr. Bivens and Ms. Davis: with damages or nothing. As the Court acknowledged, "if equitable remedies prove insufficient, a damages remedy might be necessary to redress past harms and deter future violations." *Id.*at 1858.

2. Neither Habeas nor Injunctive Relief are "Alternative Remedies" Counselling Against an Extension of *Bivens*.

Moreover, even if Plaintiffs could pursue meaningful injunctive or habeas relief, treating these avenues of relief as alternative remedies excluding *Bivens* relief cannot be squared with Supreme Court precedent.

An administrative scheme that provides "meaningful remedies" counsels against an additional *Bivens* remedy, because Congress, having designed the system, is presumed to have weighed the costs and benefits of possible remedies. *Bush v. Lucas,* 462 U.S. 367, 388 (1983) ("an elaborate remedial system that has been constructed step by step, with careful attention to conflicting policy consideration" should not be augmented by a judicially created remedy); *Schweiker v. Chilicky,* 487 U.S. 412, 423 (1988) ("When the design of a Government program suggests that Congress has provided what it considers adequate remedial mechanisms for constitutional violations . . . we have not created additional *Bivens* remedies").

But injunctive relief and habeas are not remedies Congress has created for a specific context. They are generally available to challenge unconstitutional detention, and thus provide no indication that Congress would disfavor a judicially-created damages remedy. Raising no inference of Congressional attention, injunctive relief and habeas could only counsel against *Bivens* if they provided "roughly similar incentives for potential defendants to comply with the [Constitution] while also providing roughly similar compensation to victims of violations." *Minneci v. Pollard,* 565 U.S. 118, 130 (2012); *see also Corr. Servs. Corp. v. Malesko*, 534 U.S. 61,72 (2001) (involving alternative remedies that "are at least as great, and in many respects greater, than anything that could be had under *Bivens*").

Wilkie v. Robbins, 551 U.S. 537 (2007), demonstrates this principle. There, the general availability of a "patchwork" of administrative and judicial processes for vindicating Mr. Robbins' complaints did not counsel against a *Bivens* remedy because it did not raise an inference "that Congress intended the Judiciary to stay its *Bivens* hand," nor was it adequate to both compensate Mr. Robbins *and* deter future abuse. *Id.* at 553-54. The Court declined to extend a remedy to that plaintiff under the *Bivens* special factors analysis, after "weighing

reasons for and against the creation of a new cause of action, the way common law judges have always done." *Id.* at 554-55. If the existence of *any* alternative remedy "precluded" *Bivens*, this inquiry would have been unnecessary.

Far from providing roughly "similar incentives" and "similar compensation," habeas actions and claims for injunction relief provide no incentives for defendants to comply with the Constitution, nor any compensation for individuals whose rights have been violated. Thus it is no surprise that we were unable to locate any Court of Appeals case holding that the prospect of obtaining prospective relief is sufficient to exclude a *Bivens* remedy.

Plaintiffs recognize that the *Ziglar* court suggested that prospective relief, were it available, might be considered an alternative remedy precluding *Bivens*, but this was neither a holding nor even dictum, it was just a suggestion. 137 S. Ct. at 1865. Moreover, it stands in direct contradiction to binding Supreme Court precedent that, as of today, remains good law. Unless or until the Supreme Court holds otherwise, purely prospective remedies like injunctions or habeas actions do not counsel against implying a *Bivens* remedy, as they involve no suggestion that Congress has considered and rejected the appropriateness of a *Bivens* remedy, provide no incentives for Defendants to comply with the Constitution, and provide no compensation for those whose Constitutional rights have been violated.

C. The Prison Litigation Reform Act Confirms, Rather Than Contradicts, the Appropriateness of a *Bivens* Remedy.

The third way in which this case differs from *Carlson* involves Congress' action since *Carlson* was decided. The Supreme Court noted that "[i]t could be argued" that the passage of the Prison Litigation Reform Act ("PLRA") 15 years after *Carlson* was decided "suggests Congress chose not to extend the *Carlson* damages remedy to cases involving other types of

prisoner mistreatment." *Ziglar*, 137 S. Ct. at 1865. Analysis of this argument compels its rejection.

1. The PLRA Does Not Apply to Immigration Detention

First, Congress' passage of the PLRA has no bearing on Plaintiffs' claims, because the PLRA applies only to "prisoners," defined in the act to exclude civil detainees such as Plaintiffs. The statute defines "prisoner" 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." 42 U.S.C. § 1997e(h). Thus a plaintiff must be accused of a crime to fall within the scope of the PLRA. *DeBoe v. Du Bois*, 503 F. App'x 85, 88 (2d Cir. 2012) (remanding case by immigration detainee awaiting deportation to determine whether Mr. De Boe also faced criminal charges and thus was subject to the PLRA); *LaFontant v. INS*, 135 F.3d 158, 165 (D.C. Cir. 1998) ("an incarcerated alien facing deportation is not a prisoner for purposes of the PLRA") (internal quotations omitted).

Thus, by passing the PLRA, which explicitly excludes Plaintiffs from its coverage, Congress could not have meant to indicate any view as to the viability of *Bivens* remedies for civil detainees.

2. The PLRA Accepts *Bivens* Actions by Prisoners and Detainees

Even if the PLRA applied to Plaintiffs, it does not counsel against allowing a *Bivens* remedy, but in fact does the opposite. The Supreme Court noted that it "*could be argued"* that the PLRA's passage without provision of "a standalone damages remedy against federal jailors . . . suggests Congress chose not to extend the *Carlson* damages remedy to cases involving other types of prisoner mistreatment." *Ziglar*, 137 S. Ct. at 1865 (emphasis added). But as laid out below, the PLRA presumes a *Bivens* remedy in prisoner abuse cases, it does not displace it.

Congress passed the PLRA to curtail a perceived tidal wave of frivolous prisoner lawsuits, including non-meritorious *Bivens* claims. *See* 141 Cong. Rec. S7524-7525 (daily ed. May 25, 1995) (statement of Sen. Dole). The legislation erected various procedural barriers to filing such lawsuits, including requirements that plaintiffs exhaust administrative remedies before filing in federal court and pay full fees and court costs. *See* 42 U.S.C. § 1997e; 28 U.S.C. § 1915. Not a word of the PLRA bars legitimate *Bivens* claims as such, rather, it presumes the existence of *Bivens* claims regarding prisoner mistreatment and establishes a procedure to be followed in presenting such claims to federal courts.

The Supreme Court ruling which Congress sought to modify with the PLRA was not *Bivens* or *Carlson*, but *McCarthy v. Madigan*, 503 U.S. 140 (1992), holding that a federal prisoner need not exhaust the Bureau of Prison's administrative remedy program prior to bringing a *Bivens* claim for damages resulting from inadequate medical care. Congress superseded this ruling when it passed the PLRA, amending its previous discretionary exhaustion requirement, which explicitly only applied to "any action brought pursuant to section 1983," *see* 42 U.S.C. § 1997e (1994), to mandate that "[n]o action shall be brought with respect to prison conditions under section 1983 of this title, *or any other Federal law*, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted." 42 U.S.C. § 1997e (1998) (emphasis added). Through this amendment, "Congress now plainly requires federal prisoners to exhaust available administrative remedies prior to bringing *Bivens* claims." *Whitley v. Hunt*, 158 F.3d 882, 886 (5th Cir. 1998), *abrogated by Booth v. Churner*, 532 U.S. 731 (2001). *See also Porter v. Nussle*, 534 U. S. 516, 524 (2002) (noting that the PLRA adds an exhaustion requirement prior to bringing a *Bivens* suit).

The legislative history makes Congress' intent abundantly clear: there was no discussion of eliminating *Bivens* actions, or maintaining *Carlson*-style *Bivens* actions but not others. Rather, statements by sponsors of the bill emphasized congressional intent to deter frivolous—but not meritorious—*Bivens* claims. *See* 141 Cong. Rec. H14078–02, H14105 (daily ed. Dec. 6, 1995) (statement of Rep. Lobiondo) ("An exhaustion requirement [as imposed by the PLRA] would aid in deterring frivolous claims: by raising the cost, in time/money terms, of pursuing a *Bivens* action, only those claims with a greater probability/magnitude of success would, presumably, proceed.").

When Congress passed the PLRA, the Supreme Court had only explicitly recognized one *Bivens* claim for prison abuse, but the appropriateness of diverse prisoner and detainee *Bivens* claims was widely, indeed universally, assumed. *See Cleavinger v. Saxner*, 474 U.S. 193 (1985) (Due Process *Bivens* claim arising from prison disciplinary proceedings); *Farmer v. Brennan*, 511 U.S. 825 (1994) (Eighth Amendment *Bivens* claim for failure to protect prisoner from harm); *Cale v. Johnson*, 861 F.2d 943, 947 (6th Cir. 1988) *abrogated on other grounds by Thaddeus—X v. Blatter*, 175 F.3d 378 (6th Cir. 1999) (en banc) (due process *Bivens* claim by prisoner); *Wilkins v. May*, 872 F.2d 190, 195 (7th Cir. 1989) (due process *Bivens* claim by arrestee); *Lyons v. U.S. Marshalls*, 840 F.2d 202, 203 (3d Cir. 1988) (due process challenge to pretrial detainee's conditions of detention). Congress' failure to create an explicit cause of action for these types of claims does not indicate disapproval, as established by standard canons of statutory construction. Congress is presumed to know the background law upon which it regulates—and when the PLRA was enacted, the background law recognized the existence of *Bivens* causes of action for prisoners and detainees involving medical and non-medical claims. Had Congress wanted to preclude such plaintiffs from bringing non-medical *Bivens* claims, the obvious approach would

have been to prohibit them. Failing to explicitly create something that already exists by implication doesn't send a message of disapproval. To the contrary, Congressional silence in this context suggests consent.

Indeed, by creating requirements for *Bivens* claims rather than disavowing them, Congress validated the *Bivens* remedy. *See Franklin v. Gwinnett*, 503 U.S. 60 (1992)(using analogous reasoning to hold that Congressional amendments to Title IX validated the Supreme Court's prior finding of an implied right of action under the statute). In *Cannon v. University of Chicago*, 441 U.S. 677 (1979), the Court recognized an implied right of action for injunctive relief under Title IX. After *Cannon* was decided, Congress amended Title IX twice, "ma[king] no effort to restrict the right of action recognized in *Cannon." Franklin*, 503 U.S. at 72-73. The Court found this a *validation* of *Cannon's* creation of a right of action. *Id.* at 72*, see also id.* at 78 (Scalia, J., concurring). Under *Franklin*, when Congress legislates against the backdrop of a Supreme Court decision implying a remedy and alters the reach of that remedy, it is implicitly endorsing the decision and codifying its holding.[5] Thus, to the extent the PLRA has any relevance to *Bivens* claims, it demonstrates Congress' acquiescence to such claims.

Only one court has adopted the Supreme Court's reference in *Ziglar* to the PLRA. A recent decision in *Gonzalez v. Hasty* denied a *Bivens* remedy to a federal prisoner alleging violations of his Fifth and Eighth Amendment rights. 2017 WL 4158491 (E.D.N.Y. Sept. 18, 2017). The plaintiff in *Gonzalez* was imprisoned on a felony conviction, and so, unlike Plaintiffs here, was subject to the PLRA. In holding that the PLRA was a special factor precluding *Bivens*,

[5] If the *Franklin* court has applied the Supreme Court's suggestion here, the outcome in *Franklin* would have been the opposite of what the unanimous Court decided. Namely, the *Franklin* court would have held that the lack of express ratification of court precedent in intervening legislation evinces Congressional intent to *preclude* a damages remedy for implied right of action cases under Title IX.

the court offered no analysis and cited no authority except *Ziglar*, which noted the issue but conspicuously reached no conclusion. *Gonzalez* provides no guidance here.

D. Denying Plaintiffs a *Bivens* Remedy Would Be Anomalous

Ziglar instructs the lower courts not to extend *Bivens* blindly. As a judicially implied remedy, extension is disfavored, 137 S. Ct. at 1857, thus before even a "modest" extension, a court must determine whether there are "sound reasons to think Congress might doubt the efficacy or necessity of a damages remedy." *Id.* at 1865. The Supreme Court identified three ways in which Plaintiffs' claim is different from *Carlson*, but as we have shown above, none of these differences present a "sound reason" to suppose that Congress would disapprove of today's modest extension. Indeed, Congress' passage of the PLRA suggests its acquiescence to prison *Bivens* claims.

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 biggest difference between *Carlson* and Plaintiffs' case is that Plaintiffs were not prisoners, and thus are protected from all punishments, not just cruel and unusual ones. But there is no reason to assume Congress would want to deny detainees the remedy it has accepted for prisoners.

Ziglar presented the Supreme Court with an opportunity to overrule *Bivens* altogether, to limit the three prior *Bivens* cases to their 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 executive policy in the realm of national security, but it did so while noting "the continued force, or even 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.*

For decades now, *Bivens* has also been a settled means for detainees, mistreated in detention, to seek relief. *See Riley v. Kolitwenzew,* 526 F. App'x 653 (7th Cir. 2013); *Bistrian v. Levi*, 696 F.3d 352 (3d Cir. 2012); *Thomas v. Ashcroft*, 470 F.3d 491(2d Cir. 2006)*; 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 USINS Fed. 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. Marshalls*, 840 F.2d 202 (3d Cir. 1988). Prior to *Ziglar,* few courts thought it necessary to even consider whether special factors counselled against allowing such claims, just as every single judge 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).

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. Having now undertaken that careful analysis, it is clear that Plaintiffs' claims present no reason to depart from the "settled law of *Bivens"* in the recurrent sphere of detainee abuse. Just as convicted prisoners can bring a *Bivens* action seeking compensation for their abuse by prison guards, so too can detainees—not convicted of anything—seek compensation for comparable abuse.

IV. CONCLUSION

For the reasons set forth above, the Court should imply a *Bivens* cause of action for Plaintiffs' claims against Defendants Hasty, LoPresti, and Cuciti for deliberate indifference to abuse, and allow the parties to proceed to discovery.

Dated: December 22, 2017

Respectfully submitted,

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Certificate of Service

I certify that on December 22, 2017, I caused Plaintiffs' Memorandum of Law In Support of *Bivens* Liability of to be served via email on the counsel listed below. The *pro se* defendant has been served by email and first class mail.

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