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' RESPONSE BRIEF
IN SUPPORT OF *BIVENS* LIABILITY

Date of Service: Jan. 19, 2018

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In *Ziglar v. Abbasi,* 137 S. Ct. 1843, 1864 (2017), the Supreme Court explicitly held that Plaintiffs adequately alleged a due process violation against Defendant Dennis Hasty, but that a question remains as to whether a damages remedy exists for such a violation. The Court remanded that question—and that question only—for further consideration. Hasty essentially ignores the Supreme Court's holding, asserting that *Ziglar* all but excludes the damages remedy which the Supreme Court specifically directed lower courts to consider, and devoting most of his opening brief to arguments which rest on the premise that his conduct was proper.

Hasty bases his defense on an alleged conflict between Plaintiffs' claim—that Hasty was deliberately indifferent to and even facilitated guard abuse—and Bureau of Prisons' (BOP) policy, which he says limits a warden's role in addressing abuse. The "anomaly" of imposing personal liability for Hasty's failure to act, when BOP policy requires him to "stay his hand," Hasty argues, "is 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, ("Hasty Op. Br.") at 15. The argument fails on the facts: Hasty relies on BOP policy limiting a warden's role in the *discipline* of federal employees, but completely fails to show that this policy prevents a warden from taking other steps to stop abuse, like reassigning guards, informing his staff that he takes abuse seriously, or telling the guards abuse must stop.

Hasty's argument is shocking in its implications for the safety of federal detainees, but it also rests on a mistaken premise. Plaintiffs' claim against him is not, as Hasty says, for "failure to investigate and discipline abuse by individual prison guards" (Hasty Op. Br. at 4); rather, as the Supreme Court said, Plaintiffs claim "that guards routinely abused [plaintiffs]; that the warden encouraged the abuse by referring to [plaintiffs] as 'terrorists' . . . that he stayed away from the Unit to avoid seeing the abuse; that he was made aware of the abuse via 'inmate

complaints, staff complaints, hunger strikes, and suicide attempts'; that he ignored other 'direct evidence of [the abuse], including logs and other official [records]'; and that he took no action 'to rectify or address the situation.'" *Ziglar*, 137 S. Ct. at 1864. Hasty cannot shield himself from a *Bivens* cause of action by pretending Plaintiffs' claim is something else entirely.

The Court concluded that Plaintiffs' "allegations—assumed here to be true, subject to proof at a later stage—plausibly show the warden's deliberate indifference to the abuse." *Id.* If the same claim had been brought by a convicted prisoner in the next cell, this would end the inquiry, because *Carlson v. Green,* 446 U.S. 14 (1980), establishes the right of prisoners to bring a damages claim against BOP supervisors for deliberate indifference. But because Plaintiffs were detainees, not convicted criminals, the Supreme Court directed the lower courts to consider those aspects of Plaintiffs' claim that are different from the claim approved in *Carlson*, focused specifically on whether some aspect of Plaintiffs' claim suggests that Congress is better suited to provide a damages remedy. Instead of following this instruction, Hasty all but ignores *Carlson*, failing to marshal a single argument against *Bivens* here that would not apply equally to claims by prisoners, and even urging the Court to adopt arguments the Supreme Court explicitly rejected in *Carlson*. We address these, and Defendants' other arguments, below.

I. *ZIGLAR v. ABBASI* ALLOWS A MODEST EXTENSION OF BIVENS.

Hasty misconstrues the standard governing a *Bivens* extension under *Ziglar,* using misleading quotations to the Supreme Court's decision to imply that extending *Bivens* violates separation of powers and is never warranted. He supports this erroneous principle with arguments rejected by the Supreme Court decades ago.

According to Hasty, any "judicial creation of damages remedies . . . usurps Congress's authority and defies separation of powers principles." Hasty Op. Br. at 1 (citing *Ziglar*, 137 S.

Ct. at 1876). But the cited page is Justice Breyer's dissent, and neither Justice Breyer nor the Court says this. What the Supreme Court actually says is, "When a party seeks to assert an implied cause of action under the Constitution itself . . . separation-of-powers principles are or should be central to the analysis. The question is 'who should decide' whether to provide a damages remedy. . . . The answer will *most often* be Congress." 137 S. Ct. at 1857 (emphasis added). Similarly, Hasty quotes the Supreme Court as stating that "[w]hether a damages action should be allowed is a decision for the Congress to make, not the Courts." Hasty Op. Br. at 13 (*quoting Ziglar*, 137 S. Ct. at 1860). But he omits the Supreme Court's language limiting this conclusion to a specific claim, and not the claim at issue here: "*After considering the special factors necessarily implicated by the detention policy claims, the Court now holds that those factors show that* whether a damages action should be allowed is a decision for the Congress to make, not the courts." 137 S. Ct. at 1860 (emphasis added).

Thus, the Court did not say that *any* expansion of *Bivens* "defies separation of powers principles" (Hasty Op. Br. at 1); rather, that happens with an *unwarranted* extension of *Bivens*, into an area where Congress is better suited to decide the issue. Because Congress will frequently be better suited to impose new substantive liability, "the Court has urged 'caution' before 'extending *Bivens* remedies into any new context.'" 137 Sup. Ct. at 1857. Even so, the Supreme Court's decision, and its remand, would make no sense if *Bivens* could never be extended. *Ziglar* expressly leaves open the possibility that a modest extension of *Bivens*, to cover facts just as compelling as long-settled *Bivens* claims, in a context with few practical differences, is appropriate. *Id.* at 1864-65.

This mischaracterization of the Supreme Court's analysis betrays a fundamental weakness in Hasty's position: in order to prevail, he must identify special factors *different* from

those considered and rejected in *Carlson v. Green,* 446 U.S. 14 (1980). Moreover, these factors must suggest that Congress would not want Plaintiffs' claim to go forward, notwithstanding Congressional acquiescence for nearly four decades to the parallel cause of action for convicted prisoners recognized by *Carlson*. *See Ziglar*, 137 S. Ct. at 1856 (noting that Congress has never expressed disapproval of *Carlson*). This Hasty cannot do, so he relies on arguments explicitly rejected by the Supreme Court in *Carlson*, without even acknowledging that this Court's acceptance of his arguments would place it in conflict with the very case the Supreme Court identifies as the proper starting point for this Court's analysis on remand. *Id.* at 1864-85 (*citing Carlson*, 446 U.S. at 14, 16).

For example, Hasty warns that "[s]ubjecting persons in Executive Branch service to potentially grave personal liability on account of their government service will dissuade many from such service, and will affect the way they perform their duties." Hasty Op. Br. at 12 (*citing Harlow v. Fitzgerald*, 457 U.S. 800, 814 (1982)). But the Supreme Court held in *Carlson* that "even if requiring [prison officials] to defend respondent's suit might inhibit their efforts to perform their official duties, the qualified immunity accorded them under *Butz v. Economou*, 438 U.S. 478 (1978), provides adequate protection." 446 U.S. at 19. *Carlson* is governing law. *See Ziglar*, 137 S. Ct. at 1864-65 (analyzing at length *Carlson's* application to this case).

Similarly, Hasty notes that Congress allowed common law tort claims to proceed against the Government and allowed the Government to substitute for federal officials where tort claims are brought against the officers themselves but did not allow Government substitution in actions "brought for a violation of the Constitution," Hasty Op. Br. at 13. Hasty suggests that these amendments to the Federal Tort Claims Act indicate that Congress did not want a damages remedy for Constitutional violations, *id.* at 12-13, but the Supreme Court rejected this argument

long ago, concluding instead that it is "crystal clear" that "Congress views FTCA and *Bivens* as parallel, complementary causes of action." *Carlson*, 446 U.S. at 20 (quoting S. Rep. No. 93-588, at 3 (1973)("[After] the date of enactment of this measure, innocent individuals subjected to raids [like that in *Bivens*] will have a cause of action against the individual federal agents *and* the Federal Government")(emphasis and brackets supplied by Supreme Court).

Hasty is correct that *Ziglar* continued the Supreme Court's 37-year refusal to significantly extend *Bivens*, but no case during that 37-year period involved an extension as modest as the one at issue here. Contrary to Hasty's argument, under *Ziglar* extensions are not foreclosed; courts may consider extending *Bivens* so long as they proceed with caution. 137 S. Ct. at 1865. *See, e.g., Leibelson v. Collins*, No. 15-cv-12863, 2017 WL 6614102, at *12-13 (S.D. W.Va. Dec. 27, 2017) (allowing modest extension of *Bivens* for prisoner claim "quite analogous" to *Carlson*); *Linlor v. Polson*, 263 F. Supp. 3d 613, 625 (E.D. Va. 2017) (allowing modest extension of *Bivens* in Fourth Amendment challenge to TSA search).[1]

Accepting the need for caution, Plaintiffs seek a modest extension in a case closely parallel to a settled *Bivens* context, distinguished only by the fact that Plaintiffs are civil detainees ordinarily entitled to *greater* protections than the convicted criminals allowed a remedy in *Carlson.* As shown below, Hasty provides no compelling arguments otherwise.

II. HASTY FAILS TO IDENTIFY ANY SPECIAL FACTORS OR ALTERNATIVE REMEDIES COUNSELLING THE COURT TO STAY ITS HAND.

Hasty identifies five purported "special factors" which he claims counsel against recognition of a *Bivens* action here: (a) that BOP policies are inconsistent with holding a prison

[1] Strangely, Hasty also implies that Plaintiffs' claim is unfit for a damages remedy because a federal officer "can only be held responsible if his or her own actions (or perhaps inactions) violated the Constitution." Hasty Op. Br. at 11 (*citing Ashcroft v. Iqbal*, 556 U.S. 662, 676 (2009)). This is an accurate enough statement of the law, but it does not help Hasty, given that the Supreme Court explicitly held that Hasty's own alleged actions and inactions state a Constitution violation. *Ziglar*, 137 S. Ct. at 1864.

warden accountable for allowing detainees to be abused; (b) that Hasty had no responsibility to do anything about the abuse because his superiors were taking steps to prevent it; (c) that Congress has not created a damages remedy for Plaintiffs; (d) that it is difficult to "construct[] a workable cause of action" based on a warden's deliberate indifference to guard abuse; and (e) that alternative remedies serve as deterrents and provide relief. Hasty Op. Br. at 14. Even if these arguments had legal or factual support—they do not—none suggest that Congress is better suited than the Court to create the cause of action asserted here, nor do they distinguish Plaintiffs' claim from the cause of action allowed in *Carlson*. We address each argument in turn, but before we do, it is worth noting that arguments (a) and (b) are specific to a *warden's* role in addressing prisoner abuse, and thus do not even arguably apply to Defendants LoPresti and Cuciti, who have failed to file briefs, and thus have waived any individual arguments.

A. Hasty's Insistence That He Followed BOP Protocols for the Discipline of Federal Employees Is Irrelevant to the Present Issue.

According to Hasty, BOP policy prohibits a warden who is confronted with evidence of detainee abuse from doing anything other than sending a complaint to the Office of Internal Affairs. Hasty Op. Br. at 15. Thus, Hasty argues, allowing detainees to sue a warden who facilitates and allows abuse would conflict with the "limited" role vis-à-vis abuse that BOP policy requires a warden to play. *Id.* at 17. If this were true, the Court might have to consider whether it counsels against creation of a *Bivens* cause of action, but happily, that inquiry is not required.[2] Hasty cannot hide behind the BOP's system for disciplining federal employees, as

[2] It is doubtful that it would. The BOP is not Congress, and as the Supreme Court previously explained with regard to the BOP's administrative remedy process, since "Congress did not create the remedial scheme" and it "cannot be considered equally effective with respect to a claim for money damages" it is not a special factor counselling hesitation. *McCarthy v. Madigan,* 53 U.S. 140, 151 (1992) (*superseded by statute on other grds.*).

these protocols neither limit nor describe a warden's supervisory duties, including his obligations to ensure a detainee's safety where information indicates a risk that abuse will continue.

As a threshold matter, it is hard to see how Hasty's argument is not foreclosed by the Supreme Court's explicit holding that Plaintiffs alleged a plausible claim of deliberate indifference. That holding rests on two critical premises: (1) that the Constitution imposes an obligation on someone in Hasty's position who learns of abuse; and (2) that Plaintiffs have sufficiently alleged that Hasty failed to adequately meet his constitutionally imposed responsibilities. Hasty asks this Court to reject these premises based on unsworn and unsupported assertions about how the BOP works. The argument is made for the purposes of dissuading the court from implying a *Bivens* remedy, but if accepted, it could not be harmonized with the plausibility finding made by the Supreme Court and "every judge in this case to have considered the question, including the dissenters in the Court of Appeals," (137 S. Ct. at 1864), who all agreed that Plaintiffs' allegations state a Constitutional violation.

But even if it did not conflict with the Supreme Court's holding, the argument fails on its own account. Complex laws and regulations govern the discipline of federal employees accused of misconduct. *See* Dep't of Justice Office of the Inspector General, "Review of the Federal Bureau of Prisons' Disciplinary System," at 1 (Sept. 2004).[3] These laws are implemented pursuant to a framework created by the BOP, under which the Office of Internal Affairs plays a major role in investigating allegations of guard abuse for the purposes of initiating formal and informal discipline. *Id.* at 1-6. The program statements attached to Hasty's brief outline the warden's role in that process, indicating that when a warden receives complaints of detainee abuse by guards he is required to promptly forward the allegations to the Office of Internal Affairs, after which his role in investigating and punishing the offending guard is circumscribed.

[3] Available at https://oig.justice.gov/reports/BOP/e0408/final.pdf

Hasty Op. Br. at 15. These policies say nothing about how a warden supervises his subordinates or protects detainee safety in the face of a known threat, and they certainly do not instruct him to "stay his hand" (*id.*) upon learning that detainees are being abused.

Whether Hasty processed complaints of abuse in accordance with BOP guidelines is an issue of fact, not suitable to resolution at this time. Plaintiffs have not yet had any discovery from Hasty, and anticipate that we will have many questions about how he handled such complaints, including, for example, how and why the few conscientious staff members who brought him complaints of abuse (including confidential complaints) ended up being harassed and ridiculed by up to half of the institution. *See* Compl. ¶ 78.[4]

But even if Hasty can eventually prove that he followed Bureau of Prisons' protocol by forwarding allegations of abuse to the OIA for investigation and potential discipline, this says *nothing* about whether he was *also* obligated to do something more to protect Plaintiffs from continuing abuse—like make rounds on the unit, reassign abusive guards, tell his guards that he takes allegations of abuse seriously, clarify that Plaintiffs were charged with violating immigration law not the 9/11 terrorist attacks, or address the harassment of staff who reported abuse. Neither does it say anything about whether he can be held liable for encouraging abuse.

That Hasty urges the Court to view BOP policy that limits a warden's role with respect to employee discipline as defining the extent of his responsibilities to protect detainees and prisoners under his care is frankly shocking. Certainly Hasty identifies no precedent suggesting that the substance of a warden's duty to protect a detainee under the Constitution is coterminous with the steps a warden must take to initiate employee discipline. Logic and precedent suggest it is not. *See e.g., Curry v. Scott*, 249 F.3d 493, 508-09 (6th Cir. 2001) (denying summary

[4] According to Hasty "the Complaint (and OIG Reports) do not identify any prisoner complaints of guard misconduct not processed in accordance with the controlling BOP Program Statement. . . ". Hasty Op. Br. at 6. This is incorrect. *See infra* p. 10.

judgment because supervisory defendants' argument that they dealt with each individual complaint of abusive guard's misconduct appropriately under collective bargaining agreement "ignored the vast *number* of complaints and grievances" and the pattern of harassment); *see also Kirkelie v. Thissell*, No. 11-cv-00735, 2017 WL 469347, at *8, 12 (E.D. Cal. Mar. 29, 2017) (undisputed that OIA found insufficient evidence to support allegation that guard sexually assaulted prisoner, but court denied summary judgment on prisoner's *Bivens* failure to protect claim, as there was some evidence that defendant had knowledge of assailant's continued presence on the victim's housing unit, and could have placed victim in protective custody); *Williams v. Smith*, No. 7-cv-1382, 2010 WL 3923164, at *8 (M.D. Pa. Oct. 1, 2010) (undisputed that OIA found insufficient evidence that defendant failed to protect prisoner, but court denied summary judgment on prisoner's deliberate indifference *Bivens* claim). How could it be otherwise, as OIA investigations will presumably unfold over a period of months, and detainees who are repeatedly being assaulted by guards need prompt protection?

Because Hasty's exhibits fail to demonstrate that a warden's obligation to "stay his hand" with respect to the discipline of federal employees also means he should "stay his hand" and allow his staff to continue to abuse detainees in his facility until the OIA intervenes, there is no conflict with Plaintiffs' *Bivens* claim.

B. That Others in the BOP Took Some Steps to Prevent and Address Detainee Abuse Does Not Mean Hasty Could Ignore Abuse.

Hasty's second purported "special factor" is even more factually and legally flawed than the first. He says that others in government—the OIG, his superiors in the BOP—were attempting to prevent and investigate abuse of the 9/11 detainees and "there was no allegation that he failed to implement BOP's policies and directives"; thus, he says, allowing a *Bivens* claim against him would wrongfully imply that he, too, had "certain responsibilities" in the face

of ongoing abuse. Hasty Op. Br. at 17-19. Actually, Plaintiffs do allege that Hasty failed to follow BOP policy, we describe these allegations below. But more fundamentally, this argument also attempts to re-litigate the Supreme Court's holding that Plaintiffs allege a plausible claim against Hasty. *Ziglar,* 137 S. Ct. at 1864. Hasty's self-serving, unsworn, and implausible insistence that he had no personal responsibility to protect Plaintiffs cannot be countenanced.

First, contrary to Hasty's assertion, Plaintiffs allege that he failed to follow BOP policy in several ways. BOP policy required him to make rounds on Plaintiffs' housing unit. Compl. ¶ 24; *see also* Bureau of Prisons Program Statement 5509.04 "Informal Contact Between Institution Administrators and Inmates,"[5] (requiring warden and other executive staff to "regularly visit all areas of the institution," including housing units). Instead, he "avoided the [ ] unit." Compl. ¶ 77. BOP policy requires a warden to immediately provide any corroborating evidence of abuse to the OIA (Hasty Op. Br. Exhibit C at 6), yet Hasty failed to implement any process to review videotapes that might have evidence of abuse. Compl. ¶ 107. When physical abuse is alleged, BOP policy requires the warden to arrange "an immediate, confidential medical examination," (Hasty Op. Br. Exhibit C at 6), but Plaintiffs "were never given an opportunity to speak to medical personnel outside the hearing of the correctional officers who abused them." Compl. ¶ 108. BOP policy allows wardens to investigate allegations of verbal abuse locally, (Hasty Op. Br. Exhibit C at 4-5), but when Hammouda reported verbal abuse to the counselor, who reported it to the warden, "no action was taken," except that the counselor was ostracized and harassed. Compl. ¶ 110. BOP policy prohibits use of abusive language, (*see* Bureau of Prison's Program Statement 3420.11 "Standards of Employee Conduct," at 8),[6] yet in the emotionally charged

[5] Available at https://www.bop.gov/policy/progstat/5509_004.pdf
[6] Available at https://www.bop.gov/policy/progstat/3420_011.pdf

period following the 9/11 attacks, Hasty described civil immigration detainees—not charged, much less convicted of terrorism—as "terrorists" in official MDC memoranda. Compl. ¶ 77, 109.

Moreover, even if the court were somehow allowed to *not* take Plaintiffs' allegations as true (*but see Ziglar,* 137 S. Ct. at 1864), Hasty cannot legitimately argue that there should be no *Bivens* cause of action based on his counsel's unsworn, unsubstantiated assertion that Hasty did all he was required to do to prevent abuse, because the Supreme Court held that Plaintiffs plausibly alleged Hasty's deliberate indifference to abuse. *Id.*[7] Whether Hasty actually did all that he was required (or allowed) to do under Bureau policy and the Constitution is a *factual* question, completely inappropriate before discovery against the Warden has even begun. *See id.* ("These allegations—*assumed here to be true, subject to proof at a later stage*—plausibly show the warden's deliberate indifference to the abuse.") (emphasis added).

Thus, in *Noguera v. Hasty*, No. 99-civ-8786, 2000 WL 1011563, at *18-19 (S.D.N.Y. July 21, 2000), the court rejected a summary judgment motion by Hasty himself regarding an MDC detainee's *Bivens* claim of deliberate indifference to sexual assault by a guard, because "a jury could conclude that unit manager Haas warned Hasty that Lt. Smith was having sex with women in his custody and Hasty nevertheless did not take appropriate steps to reduce Lt. Smith's unfettered access to the female unit." As the court explained "prison officials have a constitutional duty to act reasonably to ensure a safe environment for a prisoner . . . . [S]ince precisely what the wardens knew, what steps they took to protect [the plaintiff], what risk of

[7] Hasty's disregard for this holding is blatant. He complains, for example, that the Complaint "does not connect some particularized knowledge of misconduct by the warden at some specific time, to some specific proposed intervention by him that would have prevented a certain instance of subsequent abuse" and "proceeds as if mere knowledge of *complaints* of abuse can be equated with knowledge of abuse." Hasty Op. Br. at 10. Hasty presented these arguments to the Supreme Court, almost verbatim, in the section of his reply brief urging the Court to find Plaintiffs' claims not plausibly pled. *See* Reply Br. for Petitioners Dennis Hasty and James Sherman, No. 15-1363 (Sup. Ct.) at 19-23. The Court rejected them. 137 S. Ct. at 1864. That Hasty attempts to repackage them here as arguments against implying a *Bivens* cause of action fails to respect the terms of the Supreme Court's remand.

harm [she] suffered, and, as to qualified immunity, whether it was objectively reasonable for the wardens to take (or fail to take) the action that they did, *all remain in dispute, material issues of fact preclude summary judgment.*" *Id.* at *19 (emphasis added, internal citations omitted).

Hasty's argument that his only obligation as a warden with respect to detainee safety was to pass allegations of abuse on to a third party and to stay out of the way of his superiors as they tried to prevent abuse is foreclosed by the Supreme Court, and has nothing to do with the legal question of whether a *Bivens* cause of action is appropriate. Hasty will have the opportunity to attempt to defend his conduct. Now is not that time.

C. Since Congress Understood That Federal Detainees Already Had a Damages Remedy, It Naturally Did Not Affirmatively Create One.

Next, Hasty argues that Congress's failure to create a damages action, given its attention to Plaintiffs' abuse through its study of the OIG reports, indicates that Congress did not think a damages remedy necessary, so that implying one here would subvert Congressional intent. Hasty Op. Br. at 19-20. But those same OIG reports informed Congress that *Bivens* actions were already pending to challenge the 9/11 detentions and abuse. *See* OIG Report at 3, n.4, 92; *see also* U.S. Senate Judiciary Committee Hearing on the Inspector General's Report on the 9/11 Detainees, 2003 WL 21470415 (June 25, 2003) (Glenn Fine testifying as to existence of ongoing litigation about unconstitutional policies and physical abuse at MDC). Congress had no reason to create a damages remedy—one was already moving forward. In this circumstance, silence suggests consent, not disapproval.

In the distinct context of Plaintiffs' policy claims, the Supreme Court weighed Congressional silence, along with other factors, as counseling against the creation of a *Bivens* cause of action. 137 S. Ct. at 1862. But there Congressional silence was notable because "high-level policies will [likely] attract the attention of Congress." *Id.* The Supreme Court said nothing

to imply that it would also expect Congress to consider the creation of a damages action when notified of a warden's individual failure to protect detainees; and indeed, this seems implausible on its face. Importantly, the Supreme Court did not identify Congressional silence as a potential special factor for the court to explore on remand. *Id*. at 1865.

Finally, even if Congressional silence were relevant to the non-policy abuse claim, it is important to recall that the Supreme Court did not deny Plaintiffs a *Bivens* remedy for their policy claims on that basis alone. *See id.* at 1860-63 (Congressional silence one of four reason which, all taken together, counsel against *Bivens* action). Indeed, in denying Plaintiffs' policy-based *Bivens* claim, the Court found it "of central importance" that "this is not a case like *Bivens* or *Davis* in which 'it is damages or nothing,'" because policy can be altered through a claim for injunctive relief. *Id.* at 1862. "[I]ndividual instances of discrimination or law enforcement overreach," however, cannot. *Id.* As demonstrated in Plaintiffs' opening brief, there is no other remedy for Hasty's non-policy based allowance of abuse.

Hasty makes passing reference to the PLRA as another indication of Congressional opposition to a damages remedy (Hasty Op. Br. at 21), but this argument is fully addressed in Plaintiffs' opening brief, at 18-22. Moreover, since Hasty concedes that the PLRA does not apply to Plaintiffs (*id.*), the fact that Congress "looked squarely at the issue of prisoner abuse claims" is irrelevant. *Id.* Congress did not "look squarely" at claims by immigration detainees.

D. Deliberate Indifference Claims Against Supervisors Are Well Established.

Hasty's fourth purported special factor is hard to parse. He acknowledges that the Supreme Court allowed a *Bivens* deliberate indifference Eighth Amendment claim in *Carlson v. Green,* but posits that a challenge to a warden's deliberate indifference to "intermittent incidents of abuse . . . not directly observed by Mr. Hasty" would require "the pinpointing of when

someone in authority should have realized that *additional,* but still unspecified, steps should have been taken" (Hasty Op. Br. at 23), as if this were substantively different than what was required in *Carlson*, or uniquely difficult. In fact, it is the sort of issue that courts, and often juries, deal with routinely. "Deliberate indifference claims . . . are frequently litigated and well-suited to judicial resolution." *Leibelson*, 2017 WL 6614102 at *12. *See also Valdes v. Crosby*, 450 F.3d 1231, 1237 (11th Cir. 2006) (warden's discontinuing the use of cameras while knowing that officers were suspected of assaults upon inmates could have sent a message that he would permit further abuse; this, along with evidence that warden did not read abuse complaints, but merely passed them on for others to deal with, was adequate to allow jury to consider whether warden was deliberately indifferent to widespread guard abuse); *Green v. Branson*, 108 F.3d 1296, 1303 (10th Cir. 1997) (evidence that warden did nothing after learning of brutal attack on prisoner by guard prohibited summary judgement for warden); *Meriwether v. Coughlin*, 879 F.2d 1037, 1048 (2d Cir. 1989) (evidence that supervisors took no precautions to prevent abuse, knowing that prisoners' reputation would expose them to extreme hostility, was adequate for jury to find deliberate indifference); *Bolin v. Black*, 875 F.2d 1343, 1347 (8th Cir. 1989) (evidence that associate warden chose not to supervise prisoner transport bus and took no steps to prevent retaliation against prisoner despite knowing about flaring tempers among guards supports finding of deliberate indifference); *Slaken v. Porter*, 737 F.2d 368, 373 (4th Cir. 1984) ("A supervisor's continued inaction in the face of documented widespread abuses . . . provides an independent basis for finding he either was deliberately indifferent or acquiesced in the constitutionally offensive conduct of his subordinates"); *see also Murray v. Koehler*, 734 F. Supp. 605 (S.D.N.Y. 1990) (stating claim of deliberate indifference against warden for beating by officers).

The Supreme Court (like Judge Gleeson and every judge in the Second Circuit) had no trouble determining that Plaintiffs adequately alleged unconstitutional deliberate indifference by Hasty. *Ziglar,* 137 S. Ct. at 1864. As with all the cases cited above, this is sufficient to allow Plaintiffs an opportunity to prove their allegations. Their claim is not unworkable.

E. Hasty Fails to Demonstrate the Existence of Alternative Remedies.

Hasty's final argument is that the availability of "administrative remedies," tort claims, and injunctive relief precludes a *Bivens* remedy. Hasty Op. Br. at 24-25. Surprisingly (given the parties' familiarity with the relevant and controlling case law), Hasty fails to note that the Supreme Court has explicitly held that neither administrative remedies nor federal tort claims present special factors precluding *Bivens* relief. *See McCarthy v. Madigan,* 53 U.S. 140, 151 (1992) (BOP's administrative remedy program is not an effective alternative scheme or a *Bivens* special factor) (*superseded by statute on other grds*); *Carlson*, 446 U.S at 23 (availability of Federal Tort Claims Act claim not a special factor counselling against *Bivens* remedy).

As for injunctive relief, Hasty does not claim that it *was* actually available to Plaintiffs, only that it "may well have been available and effective." Hasty Op. Br. at 25. As explained in Plaintiffs' opening brief (at 13-15), it was not.

CONCLUSION

For the above reasons, and those set forth in Plaintiffs' opening brief, 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: January 19, 2018

Respectfully submitted,

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Certificate of Service

I certify that on January 19, 2018, I caused Plaintiffs' Response Brief in Support of *Bivens* Liability to be served via email on the counsel listed below. The *pro se* defendant has been served by email and first class mail.

Dated: January 19, 2018

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