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' OBJECTIONS TO MAGISTRATE JUDGE GOLD'S REPORT AND RECOMMENDATION

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Pursuant to Fed. R. Civ. P. 72 (b)(3) and 28 U.S.C. § 636 (b)(1)(C), Plaintiffs Ahmer Abbasi, Anser Mehmood, Benamar Benatta, Ahmed Khalifa, and Saeed Hammouda submit the within objections to Magistrate Judge Steven M. Gold's Report and Recommendation, dated August 13, 2018. As the Court is aware, Plaintiffs are non-citizens who were held in immigration detention while awaiting deportation or voluntary departure for violating the terms of their visas. Pursuant to a policy created at the highest levels of government, they were placed in a super-maximum security wing of a federal prison and subjected to uniquely harsh conditions of confinement. They were also physically and verbally abused for months, in ways not required by policy. Their 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, but remanded Plaintiffs' claim that Warden Dennis Hasty allowed and encouraged 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. 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 for Plaintiffs' deliberate indifference claim. *Id.* at 1864-65.

Instead, the Supreme Court remanded that question 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.* Magistrate Judge Gold considered both of these features as related to Plaintiffs' claims against the three remaining Defendants in the case: Hasty, the subject of the Supreme Court's remand; and also Defendants Lopresti and Cuciti, and properly concluded that they are not special factors counseling hesitation before allowing a *Bivens* remedy. *See* Report & Recommendation at 13-16, 23-24. Plaintiffs agree with these portions of the Magistrate Judge's Report.

After considering those features of Plaintiffs' case that distinguish it from previous *Bivens* cases, the Magistrate Judge recommended dismissal of Plaintiffs' remaining claims based on two other aspects of the case, one of which the Supreme Court has consistently rejected. *Id.* at 16-22, 27-28. This analysis is incorrect, and should not be adopted by the District Court.

First, the Magistrate Judge speculated that a warden who faces damages for allowing guards to abuse detainees might be inclined to violate Bureau of Prisons (BOP) policy regarding the investigation of guard abuse, and found this potential negative impact on adherence to BOP policy a special factor counseling hesitation, precluding a *Bivens* remedy. No defendant advanced this analysis, perhaps because it violates the longstanding presumption that public officials act properly. It is also logically and doctrinally incoherent. In *Ziglar,* the Supreme Court reiterated that a claim for damages is presumed to deter illegality, not to encourage it; and that in the context of policy violation, a *Bivens* remedy is more compelling, not less. Moreover, the Magistrate Judge ignored the central issue of whether Congress is better suited than the courts to extend *Bivens* in the particular context at hand, where a similar suit on behalf of a convicted

prisoner has already been allowed, and "no congressional enactment ha[d] disapproved of the[] decision[]." *Ziglar,* 137 S. Ct. at 1856.

Second, the Magistrate Judge identified another ground for declining to imply a *Bivens* remedy: he declared that the Federal Tort Claims Act (FTCA) is an available alternative remedy, and this forecloses a *Bivens* action. This analysis ignores binding Supreme Court precedent, precedent lower courts are not permitted to disregard. In *Carlson v. Green,* 446 U.S. 14, 19 (1980), the Supreme Court held that the FTCA is *not* an alternative remedy counseling against *Bivens*. Though the Magistrate Judge accurately identified certain aspects of the Supreme Court's *reasoning* in *Carlson* that are no longer used, *Carlson's* holding remains good law and binds this Court. Moreover, the Court's holding in *Carlson* was premised on "crystal clear" legislative history establishing that Congress meant for the FTCA to complement a *Bivens* remedy. 446 U.S. at 19-20. This history has not changed since *Carlson* and Congress has taken no steps to distance itself from the *Carlson* Court's interpretation of the FTCA.

The Magistrate's identification of BOP policy as a special factor and the FTCA as an alternative remedy should be rejected. Because the Magistrate correctly rejected Defendants' other grounds for denying a *Bivens* remedy, Defendants' motions to dismiss should be denied.

STATEMENT OF FACTS

The Supreme Court explicitly held that Plaintiffs stated 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"), ECF No. 726, substantially corroborated by two Department of Justice Office of Inspector General Reports,[1]

[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

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 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 is 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 through 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

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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.

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, shouting "shut the fuck up," and mocking their Arabic phrases. Compl. ¶ 136. Plaintiffs were called "camel[s]," "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 "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 repeatedly banging his head against his cell wall. *Id.* ¶ 180. 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.* ¶¶ 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 told guards he felt suicidal. *Id.* ¶ 241.

Plaintiffs' abuse and harassment was allowed and encouraged by Warden Hasty, who referred to the detainees as "terrorists" in MDC memoranda, though they were not even charged with terrorist activity. *Id.* ¶¶ 24, 109. Hasty tried to avoid witnessing the systematic abuse meted out by his subordinates by neglecting to make rounds on the ADMAX SHU, though BOP policy required them. *Id.* at ¶ 24. 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. These attempts to avoid evidence of Plaintiffs' abuse were unsuccessful. *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 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. *Id.*; Suppl. OIG Report at 41.

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. 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, 97, 110, 114,121, 137, 226.

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, and MDC 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. 687-2, 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, the Plaintiffs amended the Complaint to add factual detail sufficient to

[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 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.

meet the pleading standard established in *Ashcroft v. Iqbal*, 556 U.S. 662 (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 could move forward. *See* Memorandum and Order, ECF No. 767. On appeal and cross-appeal, Judges Wesley and Pooler, writing for the 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 Defendants. *Turkmen v. Hasty*, 789 F.3d at 261, 249. 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, 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 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 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 Court placed Plaintiffs' non-policy claim against Warden 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 the doctrine, because *Carlson* involved claims under the Eighth Amendment, and Plaintiffs, as detainees, must proceed under the Fifth Amendment. *Ziglar*, 137 S. Ct. at 1864-65. The Supreme Court remanded to the Court of Appeals, which in turn remanded to this Court, to perform the necessary "special factors" analysis in the first instance. *Id.* at 1865.

This Court referred the issue to Magistrate Judge Gold for report and recommendation. *See* Order dated Jan. 22, 2018. Plaintiffs and Defendant Hasty submitted several sets of briefs on

[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.

the issue, and Magistrate Judge Gold allowed a supplemental brief by Defendants Lopresti and Cuciti. Civil Minute Order dated Feb. 6, 2018, ECF No. 815. On August 13, 2018, the Magistrate Judge recommended that all remaining claims be dismissed against all defendants. *See* Report & Recommendation, ECF No. 834. The parties sought and received an extension of time to file Objections. Order dated August 15, 2018 (granting Plaintiffs' request for an extension, ECF No. 836); Order dated August 17, 2018 (granting Defendants' request for same, ECF No. 837). This brief follows.

STANDARD OF REVIEW

Review of the Magistrate Judge's Report and Recommendation is de novo. *See* 28 U.S.C. § 636 (b)(1)(C) ("A judge of the court shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made."); Fed. R. Civ. P. 72 (b)(3) ("The district judge must determine de novo any part of the magistrate judge's disposition that has been properly objected to.")

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 (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 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. 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 prisoners—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 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 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 prisoners' 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 supervisor. *Carlson,* 446 U.S. at 16.[4] District Courts continue to find these deliberate indifference claims viable post-*Ziglar*. *See e.g. 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, 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*).

In *Ziglar*, the Supreme Court suggested certain features of Plaintiffs' claim which 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, and the existence of alternative remedies usually precludes a court from authorizing a *Bivens* action. 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

[4] 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.

court," but did not "provide for a standalone damages remedy against federal jailors." *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 federal prisoners or detainees; rather, it presumes the availability of such actions, and imposes an exhaustion requirement on them. *See* Report & Recommendation at 13-14, 22-24. Plaintiffs do not object to these aspects of the Report & Recommendation.

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 his erroneous determination that (1) the proposed *Bivens* claim might impact officials' adherence to BOP policy regarding the investigation of guard abuse, and that potential impact is a special factor counseling hesitation; and (2) the Federal Tort Claims Act is an alternative remedial scheme counseling against a *Bivens* remedy. We address both these errors below.

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

Bureau of Prisons policy specifies certain investigatory and disciplinary procedures that wardens must follow when guards are alleged to have abused prisoners or detainees. *See* Report & Recommendation at 17-18 (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.* According to the Magistrate Judge, "[i]t is reasonable to think" that allowing a cause of action for damages against a warden who is deliberately indifferent to guard abuse of prisoners would "impede, or at least affect" the efficacy of these procedures, because—fearing liability—the warden might fail to report abuse to the OIA, conduct his own investigation contrary to policy, or neglect to retain evidence of abuse. *Id.* at 18. This speculation that a government official would violate federal policy in order to avoid federal liability is improper, contrary to Supreme Court precedent, and was not suggested by any defendant as counseling against a *Bivens* remedy. 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 modestly extend *Bivens* to cover deliberate indifference claims by 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—that the prospect of damages would encourage misconduct by the warden, can be brought by convicted prisoners.

A. The Magistrate Judge's Reasoning Violates the Longstanding Presumption that Public Officials Act Lawfully, and it is Logically and Doctrinally Incoherent

"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 Magistrate Judge's proposed 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. Chemical Foundation, Inc.*, 272 U.S. 1, 14 (1926), the Magistrate Judge assumes that federal employees will violate their own regulations to escape potential liability. This makes no sense. 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 Magistrate Judge's distrust of federal officials is wholly unsupported. 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. 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, ECF 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,* Plaintiffs' Response Br. in Support of *Bivens* Liability, ECF No. 808-9 at 6-9. The Magistrate Judge failed to address (or even acknowledge) Hasty's actual argument or Plaintiffs' response.

The Magistrate Judge's unfounded assumption that future wardens will violate policy is also flawed as a matter of logic and precedent. 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.[5] 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 may be necessary to redress harm and deter future violations); *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 70-71 (2001) (noting the deterrent effect of a *Bivens* remedy against individual officers). The Magistrate Judge's speculation that a *Bivens* remedy will have the *opposite* effect on prison wardens finds no support in the law.

Moreover, 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). In effect, the Magistrate Judge transforms what made Plaintiffs' claim compelling to the Supreme Court into an argument against a *Bivens* remedy. 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.[6]

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[5] Strangely, the Magistrate Judge later seems to come to this contrary conclusion himself, without acknowledging the internal contradiction. *See* Report & Recommendation at 18 (". . . 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."). Adopting additional supervisory practices is presumably a good thing; the Magistrate Judge does not explain how it might counsel against a *Bivens* remedy.

[6] 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 of *Bivens*, noting that

B. The Continued Viability of Deliberate Indifference *Bivens* Claims by Convicted Prisoners Impacts the Special Factors Analysis

The Magistrate Judge'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, especially here, where convicted prisoners in the cells next to Plaintiffs, left unprotected by prison officials subject to the very same BOP policy, can bring a comparable *Bivens* claim.

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.

Plaintiffs' claim presents a "modest extension" of *Bivens* (*Ziglar,* 137 S. Ct. at 1864) and must be treated accordingly. 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 prisoners. The Magistrate Judge approached this history by asking the parties whether the "strength and number" of applicable special factors need be greater to warrant hesitation in cases involving a modest extension of *Bivens* as opposed to a more substantial one, and reported the parties were in agreement that "the magnitude of a potential extension of *Bivens* does not

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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.*

affect the 'special factors analysis.'" Report & Recommendation at 10. This omits points central to Plaintiffs' position on the matter. *See generally* Letter from Rachel Meeropol dated March 13, 2018 at 1-2, ECF No. 827. Rather, as we argued to the Magistrate Judge, while the special factors *standard* is no different for a modest extension, the analysis will differ in practice.

First, in a modest extension the court will have already considered and rejected some potential special factors. For example, 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.

Second, whether there are sound reasons to think Congress might doubt the necessity of a damages remedy may 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.

Moreover, 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 a damages remedy for civil detainees whom a warden has failed to protect, while identical claims by convicted prisoners in the same institution

would still be honored. *See supra at* 12 (collecting cases). 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 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 prisoners—who generally have less protection under the law.

This reality underscores the defect in the Magistrate Judge's analysis. The BOP policy in question applies to investigations of guard abuse of detainees and convicted prisoners alike. What reason is there to think that Congress is better suited to consider the appropriateness of a *Bivens* remedy for the former, when the Judiciary has, for decades, allowed a remedy for the later and will continue to do so? There is no reason to assume Congress would want to deny detainees the remedy it has left undisturbed for prisoners.

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

The Magistrate Judge's second ground for denying a *Bivens* remedy is also flawed. He reasons 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. Report & Recommendation at 20. This outcome was rejected by the Supreme Court in *Carlson*, a holding that remains good law; thus in *Ziglar* the Court did not even mention the FTCA as an alternative remedy for Plaintiffs' claims to be considered on remand.

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. Prior to 1974, the FTCA only allowed damage actions against the United States for negligent or wrongful acts by government employees; it expressly exempted intentional torts. *See 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, *quoting* S. Rep. No. 93-588, p. 3 (1973) ("this provision [of the FTCA] should be viewed as a *counterpart* to the *Bivens* case and its progenty [sic]")(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 canvassed four additional factors suggesting that *Bivens* is more effective than an FTCA remedy, 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 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 federal prisoner, who cannot bring state-law tort claims against a federal employee (thus necessitating a *Bivens* remedy), and prisoners 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) (same).

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 available to Plaintiffs to be explored on

remand and *not including an FTCA claim.* 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*.

Lower court decisions cited by the Magistrate Judge as "question[ing] the continued validity of *Carlson's* holding" miss the point. S*ee* Report & Recommendation at 21. Regardless of how many courts ask this question, it is for the Supreme Court alone to answer. "Needless to say, only [the Supreme Court] may overrule one of its precedent. Until that occurs [it] is the law . . ." *Thurston Motor Lines, Inc. v. Jordan K. Rand, Ltd.*, 460 U.S. 533, 534 (1983); *see also, Rodriguez v. Swartz*, 899 F.3d 719 (9th Cir. 2018) (Supreme Court has not overruled *Carlson* "implicitly or explicitly"); *Jerra v. United States,* 12-cv-01907, 2018 WL 1605563, at *5 (C.D. Cal. Mar. 29, 2018) (relying on *Carlson* to reject FTCA as alternative remedial scheme bearing on availability of *Bivens* Eighth Amendment physical abuse claim); *Linlor v. Polson,* 263 F. Supp. 3d 613, 621 (E.D. Va. 2017) ("[T]he Supreme Court has squarely held that the FTCA does not provide an alternative remedial process bearing on the availability of a *Bivens* remedy."). For this reason, the Magistrate Judge's alternate ground for denying a *Bivens* remedy must be rejected.

III. 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 several ways in which Plaintiffs' claim is different from *Carlson*, but as the Magistrate Judge agrees, none of those differences present a "sound reason" to suppose that Congress would disapprove of today's modest extension.

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.

The Magistrate Judge's Report & Recommendation 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, any potential concern a judge can think of will satisfy it. *See* Report & Recommendation at 6, 19, 28. 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. *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."); *Rodriguez v. Swartz*, 899 F.3d 719, 738 (9th Cir. 2018) (Noting that the Supreme Court's remand in *Ziglar* would have been superfluous if extension were not still permissible. In the "right case, [the court] may extend *Bivens* into a new context.").

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 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.

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 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 (excluding the Magistrate 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), *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. 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. *Ziglar*, 137 S. Ct. at 1857.

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

IV. THE CLAIMS AGAINST DEFENDANTS LOPRESTI AND CUCITI

As noted by the Magistrate Judge, Plaintiffs accept that the Court's determination of the scope of *Bivens* liability will apply to their claims against Defendants Lopresti and Cuciti, despite those Defendants' failure to appeal from the District Court's 2013 ruling. *See* Report & Recommendation at 27. Thus, Plaintiffs object to that portion of the Magistrate Judge's ruling dismissing claims against Lopresti and Cuciti on the same grounds as described above.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court adopt only those portions of the Magistrate Judge's Report & Recommendation which find that injunctive relief is not an available alternative remedy, and Congressional intent is too ambiguous to amount to a special factor counseling against a *Bivens* remedy, and thus deny Defendants' renewed Motions to Dismiss and allow Plaintiffs' deliberate indifference claim to proceed against Defendants Hasty, Lopresti, and Cuciti.

Dated: September 10, 2018

Respectfully submitted,

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Certificate of Service

I certify that on September 10, 2018, I caused Plaintiffs' Objections to Magistrate Judge Gold's Report & Recommendation to be served via ECF and email on the counsel listed below.

Dated: September 10, 2018

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