UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

DAVID SCOTT, JEREMY CERDA, OSMAN AK, MERUDH PATEL, GREGORY HARDY, and LARRY WILLIAMS, individually and on behalf of all others similarly situated,

Plaintiffs,

v.

FORMER WARDEN HERMAN E. QUAY, FACILITIES MANAGER JOHN MAFFEO, and THE UNITED STATES OF AMERICA,

Defendants.

Civil Action No.: 19-cv-1075

(Brodie, J.)
(Gold, M.J.)

REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF DEFENDANTS' MOTION TO DISMISS THE AMENDED COMPLAINT

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PRELIMINARY STATEMENT

Defendants United States of America, Herman Quay, and John Maffeo ("Defendants") submit this reply memorandum of law in further support of their motion pursuant to Fed. R. Civ. P. 12(b)(1) and 12(b)(6) to dismiss the Amended Complaint for lack of subject matter jurisdiction and failure to state a claim for which relief may be granted.

Plaintiffs' Memorandum of Law in Opposition to Defendants' Motion to Dismiss ("Pl. Mem.") fails to rebut defendants' entitlement to dismissal of their claims brought pursuant to *Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics*, 403 U.S. 388 (1971), for a number of reasons. First, as discussed in defendants' opening memorandum ("Def. Mem."), the Supreme Court's decision in *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1855 (2017), reaffirmed the general *unavailability* of the *Bivens* remedy, except in the three narrow contexts approved by the Court more than 40 years ago in *Bivens*, *Davis v. Passman*, 442 U.S. 228 (1979), and *Carlson v. Green*, 446 U.S. 14 (1980). Thus, plaintiffs' arguments that somehow *Abbasi* worked the opposite result are plainly wrong, and should be rejected. Second, plaintiffs are also incorrect that the Federal Tort Claims Act ("FTCA"), 28 U.S.C. §§ 1346(b), 2671-80, does not constitute an alternative process that, in combination with other factors, precludes a *Bivens* remedy. Third, Congress' persistent refusal to codify a damages remedy against federal officials despite frequent and intense activity in the area of prisoners' rights, is a powerful, independent special factor counseling hesitation here.

As defendants showed, plaintiffs' FTCA claims must be dismissed because the Court lacks jurisdiction over them due to plaintiffs' failure to properly exhaust these claims administratively prior to filing suit, and their argument that the filing of their Amended Complaint cures the jurisdictional defect is at odds with the express language of the statute. In any event, the FTCA's Discretionary Function Exception ("DFE") serves as an independent ground for finding a lack of

subject matter jurisdiction. Plaintiffs' attempt to evade dismissal by framing all of their claims against defendants as based on mere "carelessness" is unavailing.

Accordingly, the Court should dismiss the Amended Complaint in its entirety.

ARGUMENT

A. *Abbasi* Places the *Bivens* Remedy Outside the Reach of Plaintiffs' Claims

The effect of the Supreme Court's *Abbasi* decision on *Bivens* jurisprudence cannot be overstated. Far from "reaffirm[ing] its precedent allowing plaintiffs to recover for constitutional violations" (Pl. Mem. 5), *Abbasi* solidified the Court's uninterrupted, 40-year refusal to extend the *Bivens* remedy beyond the three narrow contexts it previously authorized. Indeed, it declared a rejection of the "*ancien regime*," in which remedies were implied "as a routine matter." 137 S.Ct. at 1856; *see Correctional Servs. Corp. v. Malesko*, 534 U.S. 61, 75, (2001) ("*Bivens* is a relic of the heady days in which this Court assumed common-law powers to create causes of action—decreeing them to be 'implied' by the mere existence of a statutory or constitutional prohibition."). And the Court cautioned that implying a *Bivens* remedy is now a "disfavored judicial activity." 137 S.Ct. at 1857; *see Rivera v. Samilo*, 370 F. Supp. 3d 362, 367 (E.D.N.Y. 2019).

Plaintiffs' discussion of the Supreme Court's test for determining whether a claim presents a new context distorts the Court's holding. Plaintiffs maintain that courts should first ask "if the claim resembles the Supreme Court's precedents . . . or if the claim arises in a new *Bivens* context." Pl. Mem. 5. But plaintiffs get the analysis here precisely backwards. In *Abbasi*, the Court never instructed courts to ask whether a case "resembles" a previously-authorized *Bivens* claim, but rather, whether any meaningful *differences* exist between a case and an authorized *Bivens* context. In answering this question, courts must consider that the new context test is "easily satisfied," and even "small" differences can suffice. 137 S.Ct. at 1860, 1865. A "context is new" when there is an extension, however "modest," of the three claims approved of in *Bivens*, *Davis*, or *Carlson*. *See*

id. at 1859, 1864.

While plaintiffs criticize defendants' new-context argument as fixated on the "conviction status of certain Plaintiffs," as discussed in defendants' opening brief, Def. Mem. 9-10, it is the "constitutional right at issue," among various other meaningful differences, that drives the new context analysis. 137 S.Ct. at 1864; *Gonzalez v. Hasty*, 269 F. Supp. 3d 45, 60 (E.D.N.Y. 2017), *aff'd*, 755 F. App'x 67 (2d Cir. 2018) ("the Supreme Court has refused to extend *Bivens* contexts beyond the specific clauses of the specific amendments for which a cause of action had been implied"). That plaintiffs are subject to different constitutional protections based on whether they are pre-trial detainees or sentenced inmates is not some meaningless data point. Indeed, it was one of the reasons the Court turned away the plaintiff-detainees' claims in *Abbasi*. 137 S.Ct. at 1864; *accord Gonzalez*, 269 F. Supp. 3d at 60 ("because the claims [in *Abbasi*] were predicated on the Fifth Amendment, that was distinct on its face from the Eighth Amendment claim raised in *Carlson*").[1]

Plaintiffs argue that the context for their claims is not meaningfully different than the one presented in *Carlson* because "the same standard—deliberate indifference—applies to all of them," whether medically-related or not. Pl. Mem. 6-9. Again, plaintiffs urge application of the inverse of the new-context test explained in *Abbasi*; in plaintiffs' view, a context is *not* new so

[1] In an attempt to buttress their argument that the constitutional right at issue should not matter in the new context analysis, plaintiffs again misstate the holdings in *Abbasi*, and cite to other cases that are inapposite. Pl. Mem. 10-11. For instance, they argue "there is no 'sound reason' to permit a convicted person to recover damages, yet deny a remedy to pretrial detainees," purportedly quoting language in *Abbasi*. Pl. Mem. 10 (citing 137 S.Ct. at 1857). Yet that is not what *Abbasi* held, and the cited portion of *Abbasi* contains no such language. Rather, the quoted phrase appears elsewhere in the decision with respect to the *special factors* analysis. *See, e.g., id.* at 1858 ("if there are sound reasons to think Congress might doubt the efficacy or necessity of a damages remedy . . . the courts must refrain from creating the remedy in order to respect the role of Congress"). As discussed in §§ B-C, *infra*, such sound reasons exist here. Plaintiff's reliance on *Darnell v. Pineiro*, 849 F.3d 17, 29 (2d Cir. 2017) is also misplaced. *Darnell* was a § 1983 action, and therefore, is not instructive as to the new context analysis. Finally, Judge Sack's observation in his partial concurrence in *Arar v. Ashcroft*, 585 F.3d 559, 605 (2d Cir. 2009), that it was "odd" that pre-trial detainees could not bring a *Bivens* claim, *see* Pl. Mem. 11, was never binding, and in any event, is moot in light of *Abbasi*.

long as the standard for assessing a defendant's liability is the same. Plaintiffs' argument suffers from two fatal infirmities. First, to be sure, neither the Supreme Court nor the Second Circuit has ever held that the bounds of the new-context test are cabined by the standard for analyzing deliberate indifference claims. Nor does such an artificial limitation make any sense given that the Supreme Court has applied the deliberate indifference standard in an approved *Bivens* case only once – in *Carlson* – and only in the context of serious medical needs. *See Abbasi*, 137 S.Ct. at 1864-65 (citing *Carlson*, 446 U.S. at 16). Second, and relatedly, despite plaintiffs' argument to the contrary, Pl. Mem. 6-7, the Supreme Court has never recognized a non-medical deliberate indifference *Bivens* claim; rather, it *turned away* a generalized conditions-of-confinement claim in *Abbasi* itself. 137 S.Ct. at 1864 (despite "significant parallels" with *Carlson*, the plaintiffs were seeking "to extend *Carlson* to a new context," and "even a modest extension is still an extension"). Plaintiffs, who comprise pre-trial detainees and sentenced inmates, invite the Court to conflate their allegations, which they group *in toto* under the banner of "Eighth Amendment violations," Pl. Mem. 8, despite the fact that claims by pre-trial detainees indisputably are analyzed under the Fifth Amendment. *Abbasi*, 137 S.Ct. 1864; *Bell v. Wolfish*, 441 U.S. 520, 527-28, 535 (1979); *accord Cuoco v. Moritsugu*, 222 F.3d 99, 106 (2d Cir. 2000).

In support of their conditions of confinement claims, plaintiffs cite to a number of unreported cases for the proposition that such claims do not represent an extension from *Carlson*. *See* Pl. Mem. 6, 9. All but two of these cases are extra-Circuit, and none of them are consistent with *Abbasi* or with the weight of authority in this Circuit, holding that conditions claims present a new context. *See, e.g.*, *White v. Hess*, No. 14-CV-03339, 2020 WL 1536379, at *7 (E.D.N.Y. Mar. 31, 2020) (finding all claims arose in new contexts, including non-medical "conditions of confinement" claims); *Ojo v. United States*, No. 16-CV-4112, 2019 WL 3852391, at *11-*12

(E.D.N.Y. Aug. 15, 2019), *report and recommendation adopted*, 2020 WL 828076 (Feb. 20, 2020); *Fernandini v. United States*, No. 15-CV-3843 (GHW) (KNF), 2019 WL 2493758, at *10 (S.D.N.Y. Feb. 14, 2019), *report and recommendation adopted in relevant part*, 2019 WL 1033797 (Mar. 15, 2019) (finding "inhumane" prison conditions to present different context from *Carlson*); *Turkmen v. Ashcroft*, No. 02-cv-2307, 2018 WL 4026734, *11 (E.D.N.Y. Aug. 13, 2018) (on remand from *Abbasi*, noting prisoner-plaintiffs' claims arose in new contexts); *Gonzalez*, 269 F. Supp. 3d at 59-60; *see also Ojo v. United States*, 364 F. Supp. 3d 163, 173 (E.D.N.Y. 2019) (prisoner-plaintiff's Fifth Amendment claims arising from dental care presented new context). The Court should side with the weight of authority and reject plaintiffs' argument.[2]

Finally, with respect to the medical claims by convicted-inmate-plaintiffs Hardy and Williams,[3] plaintiffs argue that the context for *Carlson* is not as limited as defendants posit, and that plaintiffs need not allege serious medical deprivations such as denial of emergent treatment in order for the claims to arise in the same context as *Carlson*. *See* Pl. Mem. 6. But the Supreme Court and the majority of courts in this district disagree. *See Abbasi*, 137 S.Ct. at 1864 ("The Court has long made clear the standard for claims alleging failure to provide medical treatment to a prisoner—"deliberate indifference to *serious* medical needs.") (citation omitted and emphasis added); *White*, 2020 WL 1536379, at *6-7 (finding new context on ground that medical claims

[2] Plaintiffs cite Judge Chen's unreported decision in *Laurent v. Borecky* in support of their argument that a prisoner's Fifth Amendment conditions of confinement claim does not present a new context from *Carlson*. Pl. Mem. 6 (citing 2018 WL 2973386 (E.D.N.Y. June 12, 2018)). Their argument fails for several reasons. First, contrary to plaintiffs' suggestion, the plaintiff's claims in *Laurent* were not based on generalized conditions claims, but rather, deliberate indifference to *medical* needs. 2018 WL 2973386, at *4. Second, as Judge Ross observed in *Ojo*, 364 F. Supp. 3d at 373, *Laurent* is an outlier in this district – the only case of which the court was aware "in which a non-identical *Bivens* claim was found to arise in the same context." Third, Judge Chen even noted in her decision the "technical merit" of defendants' argument. *Laurent*, 2018 WL 2973386, at *4. For these reasons, the Court should decline to adopt *Laurent* here, and instead follow the clear weight of authority among courts in this Circuit.

[3] As discussed in defendants' initial memorandum, Def. Mem. 12 & n.5, even if the Court were not to find a new context for plaintiff Scott's claims on the ground that he was a pre-trial detainee, the Court still should find a new context because the facts of his non-emergent medical claim are so dissimilar from those presented in *Carlson*.

were not "substantially serious" like those presented in *Carlson*, which "resulted in plaintiff's death"); *Gonzalez*, 269 F. Supp. 3d at 65 (holding that denial of treatment leading to need for surgery and other injuries was insufficiently serious to find that the context was not new, and noting that the context of *Carlson* involved "federal jailers [who] caused the prisoner's death by failing to treat his asthma"); *accord Fernandini*, 2019 WL 2493758, at *10 ("unlike *Carlson*, which involved allegations of 'personal injuries from which [the plaintiff] died' because of prison officials' acts and omissions . . . this case does not involve personal injuries from which the plaintiff died.") (brackets and internal quotation marks in original). For the reasons discussed in defendants' opening brief, plaintiffs' medical claims here are "so dissimilar [from *Carlson*] such that the context is new."[4] *Gonzalez*, 269 F. Supp. 3d at 65.

B. The FTCA, Combined with Other Alternative Processes, Precludes a *Bivens* Remedy

Plaintiffs argue that the FTCA does not constitute an alternative remedial process because the Supreme Court found it to be a parallel remedy in *Carlson*. Pl. Mem. 12.[5] While it is true that, decades ago, in *Carlson*, the Supreme Court rejected the argument that the availability of an FTCA

[4] As defendants showed in their opening memorandum, no approved *Bivens* context could cover plaintiffs' claims against defendant Facilities Manager Maffeo, Def. Mem. 13, and in any event, plaintiffs failed to plead sufficiently his personal involvement in any constitutional violations sufficient to subject him to individual liability, *id.* at 20-21. Plaintiffs' opposition fails to rescue their insufficient pleading. Their claim that Maffeo knew of pre-existing heating disruptions and "did not ensure that people were kept in warm conditions," Pl. Mem. 20, sounds in common-law negligence, at best, and their conclusory allegation that Maffeo was "openly contemptuous" to elected officials during a tour of the MDC, *id.*, is probative of nothing. Equally irrelevant is the allegation that Maffeo made misleading statements *after* the period at issue regarding the extent of the facility's problems. *See id*. To the extent plaintiffs are implying that Maffeo sought to conceal his culpability after the fact, they fail to explain how that evidences a constitutional violation, *i.e.*, how such alleged conduct differs from that a *negligent* tortfeasor might exhibit in order to avoid responsibility. Moreover, because the Amended Complaint was drafted by sophisticated counsel, it should not be afforded a liberal construction.

[5] Plaintiffs spuriously allege that "Defendants suggested plaintiffs pursue" a *Bivens* suit "in the ongoing *Federal Defenders* litigation." Pl. Mem. 17. Even if that were true (and it is not) such a suggestion would have no bearing on the question of whether alternative processes exist here. In any event, in *Federal Defenders*, the Government merely noted in its discussion of third-party standing that the inmates already had brought claims in equity and for damages, were not hindered in the assertion of their own rights in various fora, and need not rely on their attorneys to sue in their place. *Federal Defenders of New York v. Federal Bureau of Prisons*, No. 19-1778 (2d Cir.), Dkt. No. 27 at 26. The Government did not endorse the propriety of a *Bivens* cause of action, and its argument there is in no way inconsistent with the position taken by defendants here.

claim, standing alone, precluded a *Bivens* remedy, *see* 446 U.S. 14, 18-20, the Court's views have evolved significantly in the interim. *See Abbasi*, 137 S. Ct. at 1856, 1858 (features not "considered" in the Court's previous *Bivens* cases might now discourage the authorization of a new *Bivens* remedy). It is now clear that state law remedies, aggregated with other alternative processes, are probative to the special factors question. Indeed, the Supreme Court has consistently held in the 40 years since *Carlson* that a potential state-law remedy (such as the FTCA authorizes) in combination with other factors may preclude a *Bivens* remedy. *See Minneci v. Pollard*, 565 U.S. 118, 120 (2012); *Wilkie v. Robbins*, 551 U.S. 537, 551 (2007); *Malesko*, 534 U.S. at 72–73.

Moreover, the vast majority of courts – including every court in this district – to have considered and decided the issue post-*Abbasi* have found the FTCA to constitute an alternative process. *See* Def. Mem. 14-15 (collecting cases); *see also Sosa v. Bustos*, No. 17 Civ. 417 (ER), 2020 WL 1940550, at *4 (S.D.N.Y. Apr. 22, 2020) ("The FTCA was once considered 'parallel' and 'complementary' to a *Bivens* remedy . . . However, that is no longer the case.") (internal citation omitted); *Butler v. Hesch*, No. 1:16-cv-1540 (MAD/CFH), 2020 WL 1332476, at *12 (N.D.N.Y. Mar. 23, 2020) (finding availability of FTCA claim a special factor counseling hesitation); *Martinez v. D'Agata*, No. 16 CV 44 (VB), 2019 WL 6895436, at *7 (S.D.N.Y. Dec. 18, 2019) (FTCA is "alternative remedial structure[]").[6]

But the Court need not rely exclusively on the availability of the FTCA remedy (or even that plaintiffs bring FTCA claims here) to find that a *Bivens* remedy is precluded. As discussed in defendants' opening memorandum, multiple alternative processes counsel against expanding

[6] On this point, plaintiffs cite two unreported—and inapposite—cases in this Circuit: *Diaz v. Mercurio*, No. 19 Civ. 1319, 2020 WL 1082482 (S.D.N.Y. Mar. 5, 2020); and *Dixon v. Von Blackensee*, No. 17 Civ. 7359, 2019 WL 2433597 (S.D.N.Y. June 11, 2019). The *Diaz* court merely found that the FTCA, standing alone, was insufficient to counsel hesitation. *Id*. at *6. Here, as discussed below, the FTCA is but one of a multitude of alternative processes and other special factors. In *Dixon*, the court found, unlike here, that the plaintiff had no FTCA remedy. *Id*. at *4 & *15.

Bivens to plaintiffs' claims. These include state tort law remedies and various equitable remedies in both administrative and judicial fora. Def. Mem. 15-17.

Plaintiffs argue that the availability of claims under state tort law against government employees is not a "meaningful alternative remedy" because: "[p]risoners ordinarily cannot bring state-law tort actions against employees of the Federal Government;" such claims are only available when those employees exceed the scope of their employment; and plaintiffs' allegations here concern "actions taken within the scope of their employment." Pl. Mem. 14-15. Plaintiffs' arguments miss the point of the alternative process analysis for a number of reasons. First, state tort law remedies, of which the FTCA is one, are an alternative process, regardless of whether the defendant employee acted within the scope of his federal employment. If the officer was within the scope, the United States is substituted as the defendant under the Westfall Act, 28 U.S.C. § 2679(b)(1), and the remedy is one under state tort law against the Government. *See* 28 U.S.C. § 1346(b)(1) (directing application of state tort law). Alternatively, if the officer is outside the scope, he can be sued directly under state tort law. The remedy in either event is still state tort law—it is only the defendant that changes. Second, the fact that state law claims beyond the FTCA may not be successful in this case, as plaintiffs suggest, Pl. Mem. 14-15, is immaterial to the alternative process analysis. *See Rivera*, 370 F. Supp. 3d at 370 (citing *Sanford v. Bruno*, No. 17-cv-5132, 2018 WL 2198759 (E.D.N.Y. May 14, 2018); *Ojo*, 2019 WL 3852391, at *14 ("It matters not whether plaintiff's alternative claims will succeed.") (citation omitted).

Equally unavailing is plaintiffs' argument that the "alternative [equitable] remedies proposed by Defendants provide *no* compensation at all . . ." Pl. Mem. 16 (emphasis in original). "[I]t makes no difference in our *Bivens* inquiry whether the remedy that Congress has provided is complete in the sense that it makes a party whole for the injury asserted." *Liff v. Office of Inspector*

Gen., U.S. Dep't of Labor, 881 F.3d 912, 923 (D.C. Cir. 2018)); *see Gonzalez*, 269 F. Supp. 3d at 61-62 ("[T]here is no precedent suggesting that the unavailability of money is a factor that carries any weight in determining the expansion of a *Bivens* remedy.").

Plaintiffs take aim at the BOP's Administrative Remedy Program (ARP), in particular, because it does not provide monetary compensation or "any deterrent to mistreatment." Pl. Mem. 15. But that consideration is irrelevant; the Supreme Court's post-*Carlson* decisions make clear that what matters is that there is an avenue for *some* redress. *See Malesko*, 534 U.S. at 69; *Schweiker v. Chilicky*, 487 U.S. 412, 425 (1988) (alternative processes need not provide "complete relief" so long as they provide "adequate remedial mechanisms"); *accord Vega v. United States*, 881 F.3d 1146, 1154 (9th Cir. 2018) ("'[a]lternative remedial structures' can take many forms, including administrative, statutory, equitable, and state law remedies"). Plaintiff's argument that the ARP could not have provided *immediate* relief here because plaintiffs allegedly were prevented from contacting their attorneys for the week of the power outage, Pl. Mem. 15, fails for the same reason. The ARP is an adequate, alternative process despite the fact that, by its nature, it only permits redress of past deprivations. *See Buenrostro v. Fajardo*, 770 F. App'x 807, 808 (9th Cir. 2019); *Widi v. Hudson*, No. 9:16-CV-1042 (FJS/DJS), 2019 WL 3491250, at *3-*4 (N.D.N.Y. Aug. 1, 2019) ("federal inmates have alternative remedies on which they can rely, including the [BOP's ARP] and a writ of *habeas corpus*"); *Ojo*, 2019 WL 3852391, at *14 ("the availability of alternative relief by way of the BOP administrative grievance process" and "*habeas* relief" constitute special factors); *Gonzalez*, 269 F. Supp. 3d at 60.

Moreover, plaintiffs have not alleged that they were thwarted from filing their administrative remedy requests at any point following the cessation of the power outage. Thus, their reliance on *Turkmen* is misplaced. *See* Pl. Mem. 16. In *Turkmen*, the plaintiff-detainees

specifically alleged that they were deliberately prevented from making social or legal calls for over six months. 2018 WL 4026734, at *11. Here, even accepting as true plaintiffs' allegations that they had no way of obtaining equitable relief or contacting their attorneys during the week at issue,[7] they could have submitted grievances through the ARP, or made other equitable claims, when power was restored. Any grievances would have been timely under the ARP even if they pertained to the first day on which communications were disrupted. *See* 28 C.F.R. § 542.14(a) (permitting aggrieved prisoners 20 days from the event at issue in which to file their remedy request).

C. Other Special Factors Counsel Hesitation

Plaintiffs advance a strawman, urging the Court to reject defendants' request that the Court conclude that Congress "somehow intended to extinguish *Bivens* claims altogether" in passing the PLRA, 42 U.S.C. § 1997e. Pl. Mem. 17. Defendants made no such argument. *See* Def. Mem. 18-19. Rather, defendants provided substantial support, which they amplify below, for this Court to find that Congress' refusal to codify a damages remedy for constitutional violations by federal jailers, despite its "frequent and intense" activity in the area of prisoners' rights, *Abbasi*, 137 S.Ct. at 1862, is a special factor counseling hesitation. *Id.*[8]

The Civil Rights Act of 1871, 42 U.S.C. § 1983, "entitles an injured person to money damages if a *state* official violates his or her constitutional rights." *Abbasi*, 137 S. Ct. at 1854

[7] The Court should reject the factual premise for plaintiffs' argument. MDC inmates had access to dedicated attorney telephone lines, which they used during the power outage. Plaintiffs admit as much in their Amended Complaint. *See id*. at ¶ 54. Additionally, the inmates brought contemporaneous, equitable claims regarding the outage and prison conditions to their attorneys and the courts. As this Court noted in *Federal Defenders of New York v. Federal Bureau of Prisons*, to which plaintiffs cite repeatedly in their brief, during the interruptions in attorney visitation at MDC, inmates still "were coming to court" for their criminal proceedings, "and Federal Defenders were meeting with their clients and that is how they were learning about what was going on[;] that's how the Court was learning what was going on. . . . Court proceedings did not stop. . . ." No. 19-cv-660 (E.D.N.Y.), Tr. of Mar. 1, 2019 H'rg. at 21-22.

[8] Plaintiffs also make a cursory argument, in a footnote, that the PLRA "does not even apply to cases like plaintiffs', in which a plaintiff files *after* their release from prison." Pl. Mem. 18 n.8. Plaintiffs confuse the issue. Defendants have not argued that the PLRA's exhaustion requirements apply here, only that the existence of the PLRA and other congressional action is a special factor in the *Abbasi* analysis. Def. Mem. 19.

(emphasis added). And at no time in the ensuing 150 years did "Congress [] create an analogous statute for federal officials." *Id.* Indeed, Congress has steadfastly refused to enshrine such a remedy despite its frequent legislation in this area.

When Congress passed the 1980 Civil Rights of Institutionalized Persons Act, it did not create any new, individually enforceable rights for prisoners. *See Rudd v. Polsner*, 229 F.3d 1153 (6th Cir. 2000). Congress instead entrusted the Attorney General to "redress serious and pervasive patterns of institutional abuses" in *state* facilities, and stopped short of curtailing the Attorney General's discretion in managing federal prisons. S. REP. 96-416, pgs. 1-3, 26-27, 40 (1979), as reprinted in 1980 U.S.C.C.A.N. 787-90, 802, 808-09, 822. In 1995, "[s]ome 15 years after *Carlson* was decided, Congress passed the [PLRA], which made comprehensive changes to the way prisoner abuse claims must be brought in federal court" but "does *not provide for a standalone damages remedy against federal jailers*." *Abbasi*, 137 S. Ct. at 1865 (emphasis added). In 2003, Congress enacted The Prison Rape Elimination Act (PREA), 34 U.S.C. §§ 30301-09, which sought to "increase the accountability of prison officials" and "protect the Eighth Amendment rights of" prisoners, *id.* § 30302. PREA, like its predecessors, created no private right of action against prison officials. *Krieg v. Steele*, 599 F. App'x 231, 233 (5th Cir. 2015). This Court, therefore, should hesitate before accepting plaintiffs' invitation to take the extraordinary step of implying a constitutional damages remedy here. As the Court in *Abbasi* noted, "in any inquiry respecting the likely or probable intent of Congress, the silence of Congress is relevant; and here that silence is telling." *Id.* at 1862 & 1865.

Plaintiffs also dismiss defendants' argument that implying a remedy here would require second-guessing by the Judiciary of decisions vested in the Executive regarding the management of prisons because "Plaintiffs do not ask this court to determine how a prison official *should*

respond to an emergency." Pl. Mem. 19. But that is of no moment; the Supreme Court has made clear that what matters for the special factors inquiry is whether implying a remedy may *implicate* the functions of other branches, as it does here. *See Hernandez v. Mesa*, 140 S.Ct. 735, 746-47 (2020) (finding no *Bivens* remedy where national security interests were "implicate[d]"); *Haig v. Agee*, 453 U.S. 280, 292 (1981) (interference with province of "political branches" is a special factor).

Congress has delegated the management of federal prisons to the Executive since 1891, when the federal prison system was created. Three Prisons Act, ch. 529, 26 Stat. 839 (1891). Since the creation of the BOP in 1930,[9] Congress has delegated to the Attorney General and BOP the management of federal prisons *See* 18 U.S.C. §§ 3621, 4001(b), 4042(a). As is underscored by the breadth of legislative action in the area, and Congress' decision to delegate prison operations to the Executive Branch, "[r]unning a prison is an inordinately difficult undertaking that requires expertise, planning, and the commitment of resources, all of which are peculiarly within the province of the legislative and executive branches." *Turner v. Safley*, 482 U.S. 78, 84-86 (1987). "[C]ourts are ill equipped to deal with . . . prison administration." *Id.* at 84. Instead, it is a "task that *has been committed to the responsibility of [the Legislative and Executive] branches, and separation of powers concerns counsel a policy of judicial restraint*." *Id.* at 85 (emphasis added). Here, separation-of-powers principles inherent in Congress' delegation of the running federal prisons to the Executive should cause the Court hesitation before implying a *Bivens* remedy. Recognizing these separation-of-powers concerns, numerous courts since *Abbasi* have refrained from expanding a *Bivens* remedy in the federal prison context.[10]

[9] Federal Bureau of Prisons Act, ch. 274, Pub. L. No. 71-218, 46 Stat. 325 (1930).

[10] *See, e.g., Buenrostro v. Fajardo*, No. 1:14-cv-00075, 2017 WL 6033469, at *4 (E.D. Cal. Dec. 5, 2017); *Attkisson v. Holder*, No. 1:17-CV-364, 2017 WL 5013230, at *7 (E.D. Va. Nov. 1, 2017); *Ochoa v. Bratton*, No. 16-CV-2852,

D. Plaintiffs' Claims against the United States Were Brought in Clear Violation of the FTCA's Jurisdictional Exhaustion Requirements

It is undisputed that plaintiffs failed to exhaust their FTCA claims prior to instituting this action on February 22, 2019. *Compare* Dkt. No. 1 *with* Dkt. No. 29, ¶¶ 95, 133; *see* Pl. Mem. 22. As a result, they failed to comply with the FTCA's jurisdictional command that "an action shall not be instituted until the presentation and exhaustion requirements of the FTCA have been met. *See* 28 U.S.C. § 2675(a). Plaintiff argues that compliance with the statute is not required because the "original complaint [did] not include an FTCA claim." Pl. Mem. 22. Plaintiffs' argument fails for two reasons. First, it grafts onto the statute jurisdictional exceptions that do not exist. Because the terms of the Government's waiver of sovereign immunity must be strictly construed in favor of the Government, *Dep't of the Army v. Blue Fox, Inc.*, 525 U.S. 255, 261, (1999), and any action brought under the FTCA must strictly comply with the terms and conditions of its limited waiver, *Cooke v. United States*, 918 F.3d 77, 81, 82 (2d Cir. 2019), any action *instituted* prior to exhaustion fails for lack of jurisdiction. Though plaintiffs' FTCA claim was not *pleaded* until the filing of the Amended Complaint, the action was instituted when it was filed. *See United States ex rel. Wood v. Allergan, Inc.*, 899 F.3d 163, 172 (2d Cir. 1986) ("[l]egal proceedings are *instituted* by the origination of formal proceedings, such as the filing of an initial complaint.") (emphasis added) (internal citations omitted). As the Third Circuit held with respect to an FTCA claim, "the amended complaint cannot serve as the date the federal suit was 'instituted.'" *Hoffenberg v. Provost*, 154 F. App'x. 307, 310 (3d Cir. 2005); *see also Duplan v. Harper*, 188 F.3d 1195, 1199 (10th Cir. 1999) ("[a]llowing claimants . . . to bring suit under the FTCA before exhausting their administrative remedies and to cure the jurisdictional defect by filing an amended complaint would render the

2017 WL 5900552, at *7 (S.D.N.Y. Nov. 28, 2017); *Rager v. Augustine*, 5:15-cv-35, Doc. 178, (N.D. Fl. Nov. 8, 2017); *Hall v. Oliver*, No. 15-CV-01949, 2017 WL 3723250, at *7 (D. Colo. Aug. 29, 2017).

exhaustion requirement meaningless"). Plaintiffs' citation to a handful of unreported district court cases, Pl. Mem. 22-23, does not alter the FTCA's jurisdictional command, nor does it allow the Court to avoid the inescapable conclusion that sovereign immunity has not been waived here.

Second, plaintiffs err in relying on *Corley v. United States Dep't of Justice*, No. 14-CV-925, 2016 WL 11395009 (E.D.N.Y. Sept. 6, 2016) for the proposition that filing an amended complaint may cure the jurisdictional defect. There, Judge Gold reasoned that the amended complaint could be deemed to "institute" a new action because the claims were entirely different from the claims asserted in the original complaint. "Plaintiff made no claims or allegations in his original complaint about his treatment at the MCC. Plaintiff filed his amended complaint alleging FTCA claims about his treatment at the MCC only after his related administrative claims were finally denied." *Id*. at *4-*5. Here, the alleged conduct that underlies the claims in the Amended Complaint is identical to that in the original Complaint; unlike *Corley* and the cases on which it relied, both pleadings here concern plaintiffs Scott and Cerda's treatment at the MDC during the period at issue. *Compare* Dkt. No. 1 *with* Dkt. No. 29. Thus, this action was *instituted* on February 22, 2019, before the FTCA claims were exhausted.

E. The DFE Bars Plaintiffs' FTCA Claims, and Plaintiffs Cannot Evade Dismissal Merely by Casting All Conduct at Issue as "Carelessness"

The Amended Complaint is replete with allegations that defendants failed to take actions that are, by their nature, grounded in policy considerations or at least susceptible to policy analysis, including: whether and how to make infrastructure upgrades to the MDC's core systems; how to balance inmate concerns with the safety and security of the inmates, staff and public during an emergency; and how best to manage the electrical repair process. *See generally* Dkt. No. 29. Yet, in an effort to avoid application of the DFE, plaintiffs urge the Court at length to construe all the conduct alleged as the product of "carelessness," and therefore, subject to the "lazy guard"

exception to the DFE. Pl. Mem. 25-33. Plaintiffs' overgeneralized and inaccurate casting of their own allegations does not survive scrutiny.

As an initial matter, to the extent plaintiff Scott and Cerda's *negligence* claims are based on the "failure to provide needed medical care," Pl. Mem. 24, such a claim must be pleaded, if at all, as a claim for medical malpractice. *See Hogan v. Russ*, 890 F. Supp. 146, 149 (N.D.N.Y. 1995) (distinguishing constitutional deprivations of care from medical malpractice). Because plaintiffs have not satisfied the pleading requirements for medical malpractice, *e.g.*, that the United States breached any applicable standards of care, *see Milano by Milano v. Freed*, 64 F.3d 91, 95 (2d Cir. 1995), nor proffered any expert support for a claim that any breach led to any injury, *e.g.*, by way of a Certificate of Merit (*see Sitts v. United States*, 811 F.2d 736, 740 (2d Cir. 1986)), merely framing defendants' actions as "carelessness" cannot save these claims.[11]

In respect of all their claims, plaintiffs repeatedly and baselessly argue that defendants' actions in the lead up, and in response, to the emergency were solely the product of carelessness and laziness.[12] But defendants' submissions, demonstrating Quay and Maffeo's decision-making, show these allegations to be spurious. Specifically, despite the challenges imposed by the longest-ever federal government shutdown that began in December 2018, defendants operated the MDC until the period at issue without disruption save for one instance on January 4, 2019, when a circuit

[11] But even if plaintiffs' medical claims were not so construed, they still fail to state a plausible claim for relief. *See Jiminez v. United States*, No. 11-CV-4593, 2013 WL 1455267, at *6 (S.D.N.Y. Mar. 25, 2013) (dismissing FTCA claim for inadequate medical care where inmate-plaintiff failed to allege sufficient facts regarding defendants' breach or his injury, relying on legal conclusions such as "pain and suffering . . . as a result of inadequate medical treatment"). Plaintiff Scott merely claims that he requested medical evaluation, Am. Compl., ¶ 87, but claims no injury other than impermissibly conclusory allegations of "pain and suffering," *id*., ¶ 380, and admits he was seen by medical staff within days, *id*., ¶ 92. Similarly, Cerda–the only other plaintiff to bring an FTCA claim–claims only that he was "not offered" mental health treatment during the period at issue, *id*, ¶ 129, but does not even allege he requested it.

[12] *E.g.*, Pl. Mem. 28 (failure to "remedy and ameliorate the situation can only be characterized as carelessness"); *id*. at 29 (MDC employees were "laz[y] or carelessly inattentive"), *id*. at 30 ("Quay's decision not to partially or fully evacuate . . . was the result of laziness").

breaker tripped and power was reduced for less than one day. Maffeo Decl., ¶¶ 6-8. Contrary to plaintiffs' claim that defendants' responses to the power supply issue were "careless, lazy and irrational," Maffeo "activat[ed] three backup generators," engaged a contractor to "troubleshoot" the electrical system, and then engaged a separate contractor to conduct broader generator repairs, ultimately restoring full power within 24 hours. *Id*. For his part, Quay decided, on the advice of his maintenance experts, to briefly modify operations until the situation was resolved, and except for one day, building operations continued unimpeded. Quay Decl., ¶¶ 12-17.

Similarly, when the fire occurred on January 27, Quay assessed the operational and security challenges on a day to day basis, took specific actions to address the building issues, and considered alternative arrangements to meet inmates' needs, in the exercise of his discretion, based on consultation with his staff. *See* Quay Decl. ¶¶ 18-28. All the while, Maffeo worked to get power restored; he met with an electrical contractor and set up a repair plan, rerouted and repurposed working circuits to provide interim solutions, and prioritized repairs to areas providing essential services. Maffeo Decl. ¶¶ 15, 17, 19. Put simply, defendants' actions and decisions cannot represent the "lazy guard" scenario in which a guard idly sits by while inmates are injured because defendants "took steps to ensure the safety and security of the facility during the power outage." OIG Report, p.22, *available at*, https://oig.justice.gov/reports/2019/e1904.pdf (last visited Apr. 30, 2020). And those steps were grounded in policy considerations.

To the extent plaintiffs' claims are based on an alleged failure to "update the HVAC equipment," Pl. Mem. 3, and how best to remedy "longstanding HVAC problems" at the MDC, *id*. at 31, the DFE bars any such claim because no statute or BOP regulation mandates the course of action for the warden to take (and plaintiffs cite none), and decisions regarding whether to overhaul the infrastructure of a facility the size of the MDC are inherently grounded in budgetary,

and therefore policy, considerations. *See Smith v. Washington Metro. Area Tr. Auth.*, 290 F.3d 201, 209-10 (4th Cir. 2002) (decision not to reassemble malfunctioning metro escalator shielded by DFE because it implicated budgetary policy); *Cope v. Scott*, 45 F.3d 445, 451 (D.C.Cir.1995) (decisions about whether and when to improve road shielded by DFE); *Hsieh v. Consolidated Eng. Servs., Inc*., 698 F. Supp. 2d 122, 133 (D.D.C. 2010) (where statute requires repairs but does not "specifically prescribe what repairs," DFE bars claim). Plaintiffs' claim that "Defendant carelessly failed to ensure swift resolution of the power failure at the MDC, including by not engaging contractors to work on an expedited schedule," Pl. Mem. 33, fails for the same reason: no mandatory regulation prescribed defendants' course of conduct, and decisions regarding the selection and retention of contractors are laden with policy considerations. *Sellers v. United States*, 792 F. App'x 495, 497 (9th Cir. 2020).

Quay's decision not to evacuate the MDC or move 1,600 inmates from the affected West Building to the unaffected East Building is the same type of discretionary decision-making. Plaintiffs' claim that his decision "lack[ed] any rhyme or reason," Pl. Mem. 30 & n.15, is belied by the factual record, *see, e.g.*, Quay Decl., ¶¶ 24-27, as well as the nature of the decision, which implicated a variety of mission-critical policies, *see* OIG Report, pp. 26-27. These facts are fatal to plaintiffs' claim because, contrary to their argument that defendants are unable to show they are "entitled to the DFE," Pl. Mem. 31, it is *plaintiffs'* burden to establish that jurisdiction exists and that the DFE does *not* apply. *Loughlin v. United States*, 393 F.3d 155, 162 (D.C. Cir. 2004).

Plaintiffs attempt to distinguish *Fernandini*, 2019 WL 1033797, at *5 (in which the court *rejected* the magistrate judge's denial of defendant's motion based on DFE and found that the exception applied), arguing that "the facility maintenance decisions challenged by the plaintiff [there] were 'day-to-day decisions." Pl. Mem. 29. But the illogic of plaintiffs' argument is clear:

if DFE applies in the context of "day-to-day" maintenance decisions, it makes no intuitive sense why decisions on a much larger scale, such as the facility infrastructure planning and emergency responses at issue here, would *not* implicate the DFE. As the court noted, "in general, decisions regarding the best way to comply with th[e] [BOP's] broad statutory mandate [regarding maintenance of BOP facilities and safekeeping of prisoners] are discretionary in nature." *Id*. at *4 (citing 18 U.S.C. § 4042(a)(2) and collecting cases). Plaintiffs' effort to distinguish *Spotts v. United States*, 613 F.3d 559 (5th Cir. 2010), Pl. Mem. 31, is similarly unavailing because it focuses on the *merits* of the wardens' decisions when faced with emergencies potentially requiring an evacuation rather than the *discretionary* nature of those decisions. *See United States v. Gaubert*, 499 U.S. 315, 324 (1991).[13]

At bottom, plaintiffs' FTCA claims rests on a theory that defendants should have taken *different* actions to safeguard the security and wellbeing of inmates, or that the decisions defendants made about which actions to take were negligent. Neither of these theories suffices to confer jurisdiction here. As Judge Ross reasoned in *Chen v. United States*:

> Plaintiff may be correct that, if [the defendant] had taken different actions . . . he could have prevented [the injury] . . . In selecting a different course of action, [he] may have misjudged the situation and acted imprudently, or even negligently . . . But . . . faced with a difficult and rapidly escalating situation, [he] "exercised his judgment as to which of a range of permissible courses [was] the wisest." Such decisions, even if negligent, are shielded by the discretionary function exception.

Id., No. 09–CV–2306, 2011 WL 2039433, at *10 (E.D.N.Y. May 24, 2011) (internal citations omitted). "Under the FTCA, this court may not, through hindsight, second-guess [the defendant's] decisions." *Id*.; *see also Fernandini*, 2019 WL 103379, at *5. This Court likewise should decline such second-guessing here.

[13] While plaintiffs also suggest that *Spotts* is inapposite because the emergency there resulted from a hurricane, and here, plaintiffs claim that it was the result of the Government's negligence, Pl. Mem. 31, they provide no support for the novel idea that the application of DFE is contingent upon the provenance of the emergency.

CONCLUSION

For the foregoing reasons and those discussed in defendants' opening memorandum of law, the Court should grant defendants' motion to dismiss and grant such other and further relief as the Court may deem just and proper.

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