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, *-against-* FORMER WARDEN HERMAN E. QUAY, FACILITIES MANAGER JOHN MAFFEO, and THE UNITED STATES OF AMERICA, Defendants.	No. 19 Civ. 1075

MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

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PRELIMINARY STATEMENT

From January 27, 2019 to February 3, 2019, amidst a record-breaking cold wave known as the "polar vortex," the Metropolitan Detention Center ("MDC") experienced power and heat failures that left the approximately 1,600 people housed there in dark and freezing cold cells without access to adequate medical care, hot food, or water, and cut off from contact with the outside world (the "Conditions Crisis"). Am. Compl. ¶¶ 2, 4, 16, 47, 308. The Conditions Crisis erupted in January 2019, but it was caused by Defendants' neglect of critical infrastructure needs in the building that had been obvious for years. *Id.*¶ 2. Before and during the Crisis, then-Warden, Defendant Herman Quay, and Facilities Manager, Defendant John Maffeo, failed to take even the most basic steps to safeguard the 1,600 people in their care. *Id.* ¶¶ 2, 7. Plaintiffs David Scott, Jeremy Cerda, Osman Ak, Merudh Patel, Gregory Hardy, and Larry Williams bring this case on behalf of themselves and all others confined at the MDC to obtain redress for the unconstitutional and inhumane conditions caused and exacerbated by Defendants' conduct.

In response, Defendants now try to evade accountability by arguing that Plaintiffs' claims are not cognizable under *Bivens*, that Plaintiffs have not adequately alleged Defendant Maffeo's involvement, and that the Court does not have jurisdiction over Plaintiffs' claim under the Federal Torts Claims Act ("FTCA"). Each of these arguments for dismissal fails.

First, Plaintiffs present allegations of deliberate indifference to the serious needs of people confined in prison—claims the Supreme Court has long recognized are cognizable under *Bivens*. *See Carlson v. Green*, 446 U.S. 14 (1980). Defendants' attempts to manufacture a new context by fixating on Plaintiffs' conviction status and Defendant Maffeo's title are unpersuasive and unsupported. Nor can Defendants point to special factors counseling hesitation; no legitimate alternative exists to Plaintiffs' *Bivens* claim.

Second, contrary to Defendants' half-hearted assertions, the Amended Complaint

adequately alleges Defendant Maffeo's personal involvement. Defendant Maffeo knew of the MDC's infrastructure problems and failed to address them, leading to the predictable heat and power failures, which he failed to swiftly remedy.

Finally, the Court has jurisdiction over Plaintiffs' FTCA claims because Plaintiffs properly exhausted them, and they allege precisely the type of negligence in the prison context that is not subject to the FTCA's Discretionary Function Exception ("DFE"). Defendants' arguments warp Plaintiffs' allegations to portray Defendants' conduct during the Conditions Crisis as run-of-the mill, unreviewable prison management. But Defendants caused the Conditions Crisis through their longstanding inadequate and careless maintenance of the MDC's infrastructure, dragged their feet in fixing the problem, and inexplicably failed to provide for the basic needs of those in their care when the power predictably failed. This is the very definition of negligence and is not shielded by the DFE.

The Amended Complaint describes an avoidable humanitarian crisis unfolding in the heart of New York City while record-breaking temperatures froze the region. Defendants violated the Constitution and the FTCA by creating this crisis and failing to respond to it. Plaintiffs' claims should proceed.

FACTS

Throughout their motion, Defendants seek to introduce evidence outside of the Amended Complaint that contradicts Plaintiffs' factual allegations. This is clearly improper with respect to Defendants' Rule 12(b)(6) motion. And as to Defendants' Rule 12(b)(1) motion, this Court "must accept as true all material factual allegations in the complaint." *J.S. ex rel. N.S. v. Attica Cent. Sch.*, 386 F.3d 107, 110 (2d Cir. 2004). Although a court *may* consider "affidavits and other materials beyond the pleadings" to the extent they are not contradicted by the complaint's factual allegations, the court "may not rely on conclusory or hearsay statements contained in the affidavits." *Id.*

Applying these standards, Defendants' motion should be denied based on the following factual allegations.

On January 27, 2019, the MDC experienced a partial power outage when an electrical panel caught fire in the jail's control room. *Id.* ¶ 45. As a result, the MDC's West Building lost electricity in a range of systems, including overhead lighting and electrical outlets in staff offices and common areas. *Id.* ¶ 46. In addition to the loss of power, the MDC experienced inconsistent and inadequate heat in the cells of the housing units during the Conditions Crisis. *Id.* ¶ 47.

For years leading up to the Conditions Crisis, the MDC had suffered from inadequate heat and a failing infrastructure. *Id.* ¶ 24. The Federal Bureau of Prisons ("BOP") had known of the need to update the MDC's HVAC equipment in the West Building for at least five years. *Id.* In the weeks preceding the Conditions Crisis, Defendant Quay was aware of specific warning signs concerning the jail's electricity and heat, and the MDC experienced three blackouts. *Id.* ¶¶ 26, 28-31. When the MDC experienced heating issues around the week of January 13-20, 2019, Defendant Maffeo refused to let electricians into the related areas to assist him in addressing the problem. *Id.* ¶¶ 32-33. According to Con Edison, the January 27, 2019 power outage was due to the MDC's failure to remedy preexisting problems. *Id.* ¶ 39. Instead of addressing the MDC's obviously deteriorating electrical system, officials put more demands for power on a weaker system. *Id.* The lack of adequate heat available to people confined in the building during the Conditions Crisis was caused by longstanding HVAC problems, MDC staff's failure to properly reset heating controls after heating coils burst on January 21, 2019, the electrical fire, and/or the facility's failure to keep people warm during a period of record-breaking cold. *Id.* ¶¶ 47, 49.

Defendants Quay and Maffeo knew of the infrastructure problems at the MDC, yet failed to take adequate steps to prevent the Conditions Crisis, and, once it began, to maintain basic living

standards for the people housed at the MDC. *See id.* ¶¶ 310, 313, 321-24. Defendant Quay did not activate an emergency plan that addressed the power outage at the facility, despite being asked directly to do so by the corrections officers' Union. *Id.* ¶ 310(a). Defendants Quay and Maffeo failed to take steps toward swift resolution of the electrical problems at the facility. *Id.* ¶¶ 310(d), 323. Defendants did not provide adequate heat to Plaintiffs and did not provide sufficient additional clothing or blankets. *Id.* ¶ 264. Defendant Quay rejected an offer by New York City to supply emergency generators and emergency blankets. *Id.* ¶ 312.

Defendants' conduct left approximately 1,600 men living in dark and freezing conditions for nearly a week, isolated and with limited access to medical care and hot food and water, without attorney or family visitation, and cut off from telephone and email systems. *Id.* ¶¶ 7, 308, 309, 322. Each of the named Plaintiffs—and the entire class—experienced unconstitutional and inhumane conditions of confinement as a result of the heat and power failures and Defendants' inadequate response. *See id.* ¶¶ 57-313.

Lack of adequate medical care was one particularly egregious consequence of Defendants' conduct. People who requested assistance or pressed emergency buttons in their cells were ignored; others were denied medical appointments, treatment for new and ongoing conditions, and mental health services. *Id.* ¶¶ 279, 280. Two people suffered seizures and pressed the emergency button for help, to no avail. *Id.* ¶ 280(g). Defendants did not provide many people with their needed medication because the computer system for requesting prescriptions was not functioning and MDC staff did not inform people of alternative methods for requesting prescriptions. *Id.* ¶¶ 278(d), 279. Although people at the MDC had alerted staff about the risk that Continuous Positive Airway Pressure ("CPAP") machines would be nonoperational in the face of power outages in the winter of 2018 to treat obstructive sleep apnea, Defendant Quay failed to ensure that people who needed

these devices could use them during the power outage. *Id.* ¶¶ 280(a), 310(c). Six days into the Conditions Crisis—after someone communicated this problem to a member of Congress touring the facility—Defendant Quay finally moved some people with CPAP machines to the MDC's functioning East Building. *Id.* ¶ 310(c).

These are but some of the myriad ways Defendants systematically and deliberately ignored, or failed to take reasonable measures to address, the visibly deplorable and unconstitutional conditions at the MDC during the Conditions Crisis. *Id.* ¶ 313.

ARGUMENT

I. PLAINTIFFS' *BIVENS* CLAIMS ARE COGNIZABLE

In *Ziglar v. Abbasi*, the Supreme Court reaffirmed its precedent allowing plaintiffs to recover for constitutional violations pursuant to *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971). 137 S. Ct. 1843, 1855 (2017). Not only did the *Abbasi* court affirm all three cases in which it had approved a *Bivens* remedy, it also allowed for future *Bivens* claims not "different in a meaningful way" from them. *Id*. at 1859.

Courts apply a two-step inquiry to determine whether a *Bivens* remedy is available. First, the court must ask if the claim resembles the Supreme Court's three precedents, *Bivens*, 403 U.S. 388 (1971) (Fourth Amendment unreasonable search and seizure), *Davis v. Passman*, 442 U.S. 228 (1979) (Fifth Amendment gender discrimination), and *Carlson*, 446 U.S. 14 (Eighth Amendment deliberate indifference); or if the claim arises in a "new *Bivens* context," instead. *Abbasi,* 137 S. Ct. at 1859. Courts must assess if "special factors counsel[] hesitation" before extending *Bivens* into new contexts. *Id*. at 1857 (internal quotation marks and citation omitted). Because Plaintiffs' claims fall within the Supreme Court's recognized *Bivens* context for deliberate indifference, no extension of *Bivens* is necessary. Even if these claims did present a new context, there are neither alternative remedies nor any other special factors counselling hesitation.

A. Plaintiffs State a Valid Claim That Arises Out of Recognized *Bivens* Contexts

Plaintiffs' claims do not require an extension of *Bivens* because they are not meaningfully different from the conditions of confinement claims the Supreme Court authorized in *Carlson*. *McQueen v. United States*, No. 19 Civ. 0998, 2019 WL 4221545, at *4 (N.D.N.Y. Sept. 5, 2019) (finding Eighth Amendment deliberate indifference claim not a new *Bivens* context); *Laurent v. Borecky*, No. 17 Civ. 3300 (PKC) (LB), 2018 WL 2973386, at *5 (E.D.N.Y. June 12, 2018) (recognizing *Bivens* remedy for deliberate indifference claim under *Carlson*); *Doty v. Hollingsworth*, No. 15 Civ. 3016, 2018 WL 1509082, at *3 (D.N.J. Mar. 27, 2018) (finding that *Carlson* governed a failure to protect from assault claim). A *Bivens* claim only presents a new context if it is "different in a meaningful way" from prior *Bivens* precedent. *Abbasi,* 137 S. Ct. at 1859. Like *Carlson*, Plaintiffs' claims concern the failure to provide medical care. And although Plaintiffs bring other claims regarding their conditions of confinement, these are not meaningfully different from *Carlson* because the same standard—deliberate indifference—applies to all of them. *Carlson*, 446 U.S. at 16; *cf. Farmer v. Brennan*, 511 U.S. 825, 832-33 (1994) (recognizing, in a *Bivens* context, that deliberate indifference standard applies to all conditions of confinement claims). Furthermore, neither the conviction status of certain Plaintiffs, nor other distinctions Defendants assert, present meaningful differences that warrant finding a new context.

Plaintiffs' *Bivens* claims arise from the weeklong Conditions Crisis, during which their medical needs went unaddressed as they simultaneously endured other inhumane conditions of confinement. These claims—lack of medical care, mental health attention, and prescription medications—all fall squarely within *Carlson*. Am. Compl. ¶¶ 87, 217-222, 245-251. *Carlson* allows "a *Bivens* claim for prisoner mistreatment—specifically, for failure to provide medical care." *Abbasi*, 137 S. Ct. at 1864. Even though Plaintiffs' claims concern the same failure, Defendants try to distinguish *Carlson*, asserting that Plaintiffs did not have life-threatening

medical conditions and did not seek *emergent* treatment. Defs.' Mem. 12. But neither *Abbasi* nor *Carlson* suggests *Carlson* is so limited. While *Carlson* concerned a death from asthmatic conditions and insufficient medical attention, it was held to govern a claim for failure to treat back pain in *Laurent*, which involved neither a life-threatening situation nor a need for emergency treatment. *Laurent*, 2018 WL 2973386, at *5; *Carlson*, 446 U.S. at 16 n.1.

Carlson also governs Plaintiffs' other related conditions of confinement claims. "Nothing in the text of the *Carlson* opinion suggests that the Supreme Court meant to limit its decision only to medical treatment claims arising under the Eighth Amendment." *Doty*, 2018 WL 1509082, at *3. As discussed *infra*, Plaintiffs' claims and those in *Carlson* are both subject to the deliberate indifference standard because they concern the failure to prevent or mitigate foreseeable threats to safety in prisons. *Carlson*, 446 U.S. at 16 n.1. By contrast, the *Abbasi* Court found the specific allegations in that case—that a Warden unconstitutionally permitted and encouraged guards to abuse people in immigration detention—to present a new context because they are governed by a standard "less clear under the Court's precedents" than deliberate indifference. *Abbasi*, 137 S. Ct. at 1864–1865.

A new context arises only if there are "*meaningful*" differences between claims and Supreme Court precedent. *Id*. at 1859 (emphasis added). "[*Abbasi*] does not require . . . perfect factual symmetry." *Brunoehler v. Tarwater*, 743 F. App'x 740, 744 (9th Cir. 2018); *Abbasi*, 137 S. Ct. at 1865 ("[T]rivial" differences "will not suffice."). All claims contain differences; not all differences are meaningful. *Prado v. Perez*, No. 18 Civ. 9806 (JPO), 2020 WL 1659848 (S.D.N.Y. Apr. 3, 2020) (declining to find new context in case involving arrest and search by ICE officer because constitutional right at stake was the same as in *Bivens*); *Castellanos v. United States*, No. 18 Civ. 2334, 2020 WL 619336, at *6 (S.D. Cal. Feb. 10, 2020) (asking if the case "*fundamentally*

differ[s]" from *Bivens*); *Graber v. Dales*, No. 18 Civ. 3168, 2019 WL 4805241, at *4 (E.D. Pa. Sept. 30, 2019) (same); *Lehal v. Cent. Falls Det. Facility Corp.*, No. 13 Civ. 3923, 2019 WL 1447261, at *12 (S.D.N.Y. Mar. 15, 2019) (finding a "closely analogous" claim governed by *Bivens*).

Plaintiffs' conditions of confinement allegations do not meaningfully differ from *Carlson*. Both concern Eighth Amendment violations by defendants acting with deliberate indifference to plaintiffs' serious needs, despite their knowledge of prison facility inadequacies. *Carlson*, 446 U.S. at 16 n.1. While *Carlson* specifically concerned medical care, the Supreme Court analyzes both medical care claims in the prison context and other conditions of confinement claims using the "deliberate indifference" standard under *Estelle v. Gamble*, 429 U.S. 97, 104 (1976). *Wilson v. Seiter*, 501 U.S. 294, 303 (1991); *Farmer,* 511 U.S. at 834; *Walker v. Schult*, 717 F.3d 119, 125 (2d Cir. 2013). Tellingly, the Supreme Court explicitly rejected the argument for different standards for reasons that resonate here:

> [W]e see *no significant distinction* between claims alleging inadequate medical care and those alleging inadequate 'conditions of confinement.' Indeed, the medical care a prisoner receives is just as much a 'condition' of his confinement as the food he is fed, the clothes he is issued, the temperature he is subjected to in his cell, and the protection he is afforded against other inmates.

Wilson, 501 U.S. at 303 (emphasis added).

Consistent with *Carlson*, Plaintiffs allege Defendants were deliberately indifferent to their safety by failing to take precautionary measures to prevent the Conditions Crisis and failing to mitigate the harm that ensued. *See supra* at 2-5. Because the same standard governs medical and non-medical prison conditions claims, there is no meaningful distinction between Plaintiffs' conditions of confinement claims and those in *Carlson*. *Doty*, 2018 WL 1509082, at *3 (declining to find new context because "[t]he claim in *Carlson* involved deliberate indifference to a prisoner's

medical needs, and the claim here involves deliberate indifference to a prisoner's safety, both of which use the same sort of deliberate indifference analysis"); *Lee v. Matevousian*, No. 18 Civ. 00169, 2018 WL 5603593, at *8 (E.D. Cal. Oct. 26, 2018) (recognizing that *Carlson* governs failure to protect claim); *Fleming v. Reed*, No. 16 Civ. 684, 2019 WL 4196322, at *3 (C.D. Cal. July 23, 2019), *rep. and rec. adopted*, No. 16 Civ.684, 2019 WL 4195890 (C.D. Cal. Sept. 3, 2019) (recognizing that *Carlson* governs deliberate indifference to safety and medical claims); *Pumphrey v. Coakley*, No. 15 Civ. 14430, 2018 WL 1359047, at *5 (S.D.W. Va. Mar. 16, 2018), *vacated on other grounds*, No. 15 Civ. 14430, 2019 WL 5390015 (S.D.W. Va. Oct. 21, 2019) (recognizing that *Carlson* governs excessive force claim).[1]

Finally, the Supreme Court's decision in *Farmer* is instructive, because there the Court expressed no doubt about the availability of a *Bivens* remedy for non-medical deliberate indifference. *Farmer*, 511 U.S. at 825; *Bistrian v. Levi*, 912 F.3d 79, 91 (3d Cir. 2018) (finding a failure to protect claim is not a new context under *Farmer*); *Garraway v. Cuifo*, No. 17 Civ. 00533, 2020 WL 860028, at *2 (E.D. Cal. Feb. 21, 2020) (same); *Rinaldi v. United States*, No. 13 Civ. 450, 2019 WL 1620340, at *12-14 (M.D. Pa. Apr. 16, 2019) (same).

Defendants' cited authority does not change this new context analysis. In *Gonzalez v. Hasty*, the court did not engage in any extensive "new context" analysis. Instead, the court collapsed the Eighth Amendment merits analysis into the *Bivens* analysis, concluding that the plaintiff's non-medical claims were not viable because they were not as "serious" as the claims in *Carlson*. 269 F. Supp. 3d 45, 64-65 (E.D.N.Y. 2017), *aff'd on other grounds*, 755 F. App'x 67 (2d

[1] Other courts have similarly found that *Carlson* is not limited to medical care claims. *See McDaniels v. United States*, No. 14 Civ. 02594, 2018 WL 7501292, at *5 (C.D. Cal. Dec. 28, 2018), *rep. and rec. adopted*, No. 14 Civ. 02594, 2019 WL 1045132 (C.D. Cal. Mar. 5, 2019); *Lineberry v. Johnson*, No. 17 Civ. 04124, 2018 WL 4232907, at *9 (S.D.W. Va. Aug. 10, 2018), *rep. and rec. adopted sub nom*. *Lineberry v. United States*, No. 17 Civ. 04124, 2018 WL 4224458 (S.D.W. Va. Sept. 5, 2018).

Cir. 2018). Along similar lines, the court rejected plaintiff's medical claims because he had alternative remedies to address his complaints, the claims were not sufficiently serious to constitute an Eighth Amendment violation, and the claims were based on "conclusory" allegations. *Id.* at 65-66. Further, contrary to Defendants' analogy, *Abbasi* concerned a "challenge [to] the confinement conditions imposed on illegal aliens pursuant to a high-level executive policy created in the wake of a major terrorist attack on American soil." *Abbasi*, 137 S. Ct. at 1860. Plaintiffs' claims are like *Carlson*'s and are not a new context.

1. That Some Plaintiffs Were Detained Pretrial During the Conditions Crisis Does Not Present a New Context

All Plaintiffs in this action have valid *Bivens* claims, regardless of their conviction status. While the *Carlson* plaintiff was post-conviction, since *Abbasi*, courts have found pretrial detainees' claims do not present new contexts. *Bistrian*, 912 F.3d at 91 (finding pretrial detainee's claim is not a *Bivens* extension). In *Laurent v. Borecky*, even though the pretrial detainee plaintiff's claim fell under the Fifth Amendment, it "[bore] an extremely strong 'resemblance to [*Carlson*],'" and was not a new *Bivens* context. 2018 WL 2973386, at *5 (quoting *Abbasi*, 137 S. Ct. at 1861).

Defendants' assertion to the contrary lacks merit for several reasons.[2] First, whatever differences exist among the Plaintiffs' conviction statuses, all Plaintiffs seek a remedy for Defendants' deliberate indifference during the Conditions Crisis, under either the Fifth or Eighth Amendment. Second, there is no "sound reason" to permit a convicted person to recover damages, yet deny a remedy to pretrial detainees for the same occurrence. *Abbasi*, 137 S. Ct. at 1857. If anything, pretrial detainees would be entitled to more protection than convicted persons, because they "may not be punished in any manner—neither cruelly and unusually nor otherwise." *Darnell*

[2] The claims of Plaintiffs Ak, Patel, Hardy, and Williams are all governed by the Eighth Amendment. Even if this court were to find that the other Plaintiffs' claims under the Fifth Amendment created a meaningful difference, the Eighth Amendment Plaintiffs could still serve as class representatives.

v. Pineiro, 849 F.3d 17, 29 (2d Cir. 2017) (internal quotation marks and citation omitted); *Bistrian*, 912 F.3d at 91 (finding a pretrial detainee's claim is not a new *Bivens* context because "it is a given that the Fifth Amendment provides the same, if not more, protection for pretrial detainees than the Eighth Amendment does for imprisoned convicts."); *Arar v. Ashcroft*, 585 F.3d 559, 605 (2d Cir. 2009) (Sack, J., concurring in part) (citing *Carlson*, 446 U.S. 14) ("It would be odd if a federal detainee not charged with or convicted of any offense could not bring an analogous [*Bivens*] claim [to a convicted person]."). As discussed *supra*, because Plaintiffs' claims contain significant similarities to *Carlson*, those brought by pretrial detainees do not present a new context based solely on conviction status.

2. Neither Defendant Maffeo's Job Title and Rank, Nor the Emergency Situation at Issue, Present Meaningful Differences that Suggest a New Context

Defendants' remaining arguments for a new context find no support in authority. Defendants do not explain why the difference between Defendant Maffeo's position as Facilities Manager and that of the *Carlson* defendants is meaningful. Defs.' Mem. 13. And they cite no case in which a defendants' job or rank independently justified finding a new context. The Supreme Court has recognized that *Bivens* claims extend to BOP officials at the lowest and highest levels. *See Green v. Carlson*, 581 F.2d 669, 671, 676 (7th Cir. 1978), *aff'd*, 446 U.S. 14 (1980) (concerning claims against the Director of the BOP, the Assistant Surgeon General, and medical staff). If the defendants in *Carlson* did not "enjoy such independent status in our constitutional scheme as to suggest that judicially created remedies against them might be inappropriate," then claims against Maffeo, whose position is *in between* the ranks of the *Carlson* defendants, cannot be considered a new context. *Carlson*, 446 U.S. at 19.

Furthermore, Defendants neither cite authority nor explain how the emergency situation at issue has any bearing on the new context analysis. Defendant Quay's legal mandate was not

affected, as prison officials always have a duty to ensure the "reasonable safety" of pretrial and postconviction detainees. *Farmer*, 511 U.S. at 844 (quoting *Helling v. McKinney*, 509 U.S. 25, 33 (1993)); *Walker*, 717 F.3d 119. "Public safety depends on successful [prison] management . . . both in ordinary times and in times of emergency." *Fed. Defs. of New York, Inc. v. Fed. Bureau of Prisons*, No. 19 Civ. 1778, 2020 WL 1320886, at *12 (2d Cir. Mar. 20, 2020).

B. Even if the Court Finds a New *Bivens* Context, No Special Factors Counsel Hesitation

Even if this Court were to find that Plaintiffs' claims constituted a new *Bivens* context, there are no "special factors counseling hesitation." *Abbasi*, 137 S. Ct at 1857. Defendants do not raise any special factors that preclude Plaintiffs' claims from proceeding.

1. The Supreme Court Has Already Found That the FTCA is Not an Alternative Remedy to *Bivens*

The Supreme Court has explicitly considered and rejected the contention that an FTCA claim against the United States is an alternative remedy to *Bivens*. *Carlson*, 446 U.S. at 19-20. It is "crystal clear that Congress views FTCA and *Bivens* as parallel, complementary causes of action[.]" *Id*. at 20. The *Carlson* Court held that "a remedy [is] available directly under the Constitution," even though "respondent's allegations could also support a suit against the United States under the Federal Tort Claims Act[.]" *Id*. at 16-17. In holding that the FTCA does not preclude a *Bivens* remedy, the Court noted that "[p]lainly FTCA is not a sufficient protector of the citizens' constitutional rights, and . . . we cannot hold that Congress relegated respondent exclusively to the FTCA remedy." *Id*. at 23.

The Supreme Court has adhered to *Carlson*, repeating that an FTCA claim is not "a substitute for a *Bivens* action." *Bush v. Lucas*, 462 U.S. 367, 378 (1983); *Wilkie v. Robbins*, 551 U.S. 537, 553 (2007) (explaining prisoners may bring both FTCA and *Bivens* claims); *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 68 (2001) ("Congress intended the FTCA and *Bivens* to serve as

'parallel' and 'complementary' sources of liability.").[3] Nothing in *Abbasi* overrules this longstanding precedent. *Abbasi* may have narrowed the scope of *Bivens* with respect to new contexts, but it does not disturb *Carlson's* holding that Congress viewed the two remedies as "parallel, complementary causes of action." *Carlson*, 446 U.S. at 20. In fact, when the *Abbasi* Court remanded the remaining claim against the warden for special factors analysis, it excluded the FTCA from its list of alternate remedies to consider. *See* 137 S. Ct. at 1865.

The FTCA itself acknowledges the "complementary existence of *Bivens* actions." *Bistrian*, 912 F.3d at 92. The Westfall Act's amendments to the FTCA contemplate the continued viability of suits against individual federal officers for constitutional violations. *See* 28 U.S.C. § 2679(b)(2)(A); *Bistrian*, 912 F. 3d at 92 (acknowledging that the Westfall Act "notes that a *Bivens* action itself is available.").

Defendants ask this Court to ignore binding precedent and to conclude on its own that *Carlson* has been overruled; however, "only [the Supreme Court] may overrule one of its precedents. Until that occurs, [it] is the law . . . ." *Thurston Motor Lines, Inc. v. Jordan K. Rand, Ltd.*, 460 U.S. 533, 535 (1983). *Carlson's* holding—that the availability of the FTCA does not foreclose a *Bivens* remedy—controls. *See, e.g., Bistrian*, 912 F.3d at 92 (emphasizing that an FTCA remedy does not bar an analogous *Bivens* remedy); *Vanderklok v. United States*, 868 F.3d 189, 201 (3d Cir. 2017) (same); *Bueno Diaz v. Mercurio*, No. 19 Civ. 1319, 2020 WL 1082482, at *6 (S.D.N.Y. Mar. 5, 2020) (same); *Dixon v. Von Blackensee*, No. 17 Civ. 7359, 2019 WL

[3] In *Minneci v. Pollard*, 565 U.S. 118 (2012), the Court held that *Carlson*'s provision of a *Bivens* remedy against federal prison employees did not extend to providing a *Bivens* remedy against employees of a private prison, because individual federal employees could not be sued directly for state law torts, while private prison employees could be sued directly. *Id.* at 126. In so doing, the Court reaffirmed *Carlson*'s holding that the FTCA remedy is not an adequate alternative remedy to *Bivens* because it runs only against the federal government, not the individual employee. *Id.*

2433597, at *14, 15 (S.D.N.Y. June 11, 2019) (finding that the recovery of money damages under *Bivens* is the only avenue for plaintiff to redress constitutional claims against a warden).

Defendants rely on a handful of district court decisions to support their argument that the availability of the FTCA counsels dismissal of the *Bivens* claims. *See* Defs.' Mem. 15. These decisions mistakenly rely on the *Abbasi* court's suggestion that *Carlson* "might have been different if [it] were decided today." *Abbasi*, 137 S. Ct. at 1856. The Supreme Court has *not* revisited *Carlson* since *Abbasi*, but it has since stated that the Westfall Act "left *Bivens* where it found it," leaving *Carlson* untouched as binding precedent. *Hernandez v. Mesa*, 140 S. Ct. 735, 748 n.9 (2020); *Abbasi*, 137 S. Ct. at 1856 ("To be sure, no congressional enactment has disapproved of these decisions."). As one court recently noted, relying on *Abbasi*'s *dicta* "fails to account for the Supreme Court's repeated insistence that the FTCA does not preclude a *Bivens* remedy." *Bueno Diaz*, 2020 WL 1082482 at *7 (declining to follow *Rivera v. Samilo*, 370 F. Supp. 3d 362 (E.D.N.Y. 2019)).

2. State Law Claims Are Not a Meaningful Alternative Because They are Not Available Where Defendants Acted Within the Scope of Employment

State-law tort claims are not a meaningful alternative to *Bivens* because "[p]risoners ordinarily cannot bring state-law tort actions against employees of the Federal Government." *Minneci*, 565 U.S. at 126 (2012) (emphasis omitted); *see also Bivens*, 403 U.S. at 392-95 (rejecting the argument that state tort claims are an adequate alternative for constitutional interests).

In fact, state claims cannot be brought against federal officers unless it is shown that the officers acted outside the scope of their federal employment. *See B & A Marine Co., Inc. v. Am. Foreign Shipping Co., Inc.*, 23 F.3d 709, 713 (2d Cir. 1994).[4] All of Plaintiff's allegations concern

[4] Defendants can point to no authority that cases like this one, involving conditions of confinement, typically involve conduct considered to be outside the scope of an officer's employment. Conduct considered within the scope

prison officials' actions taken within the scope of their employment. Am. Compl., ¶¶ 16, 17, 377; Defs.' Mem. 23–33.[5] Notably, the U.S. Attorney's Office can *only* represent Defendants *because* they acted within the scope of their federal employment. *See* 28 CFR § 50.15(a) (stating that the United States may represent a federal employee who is sued for actions which appear to have been carried out within the scope of employment).

3. The BOP's Administrative Remedies Program, Habeas Corpus, and Injunctive Relief are Not Meaningful Alternative Remedies to *Bivens*

The BOP's Administrative Remedies Program ("ARP"), habeas corpus, and injunctive relief are not *Bivens* alternatives for two reasons. First, none of them could have reasonably provided Plaintiffs with relief during the week-long Conditions Crisis. During the Crisis, Defendants prevented Plaintiffs from pursuing the ARP. Plaintiffs did not have access to Corrlinks or grievance forms. Am. Compl. ¶¶ 124, 293, 309.[6] Further, there was a staff shortage at the MDC, making it harder for Plaintiffs to access this process. *Id.*. ¶¶ 159, 278(b), 304. Additionally, Plaintiffs could not pursue habeas corpus or civil injunctive litigation because they were without access to legal counsel, the courts, and the outside world during the Crisis. *Id*., ¶¶ 5, 46, 293, 294,

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of employment includes acts performed while the employee is doing the work of the employer "'no matter how irregularly, or with what disregard of instruction.'" *Lipkin v. U.S. S.E.C*., 468 F. Supp. 2d 614, 623 (S.D.N.Y. 2006) (quoting *Riviello v. Waldron*, 47 N.Y.2d 297, 302 (1979)). In contrast, only conduct motivated by personal reasons unrelated to the employer's interests is outside the scope of employment. *Adorno v. Corr. Servs. Corp.*, 312 F. Supp. 2d 505, 516-517 (S.D.N.Y. 2004) (finding that BOP officer's rape of incarcerated women falls outside scope of employment).

[5] Defendants' reliance on *Rivera* and *Vega* are misplaced. In *Rivera*, the court found that Plaintiff had "some avenues for redress under New York state law *to the extent he claimed that [Defendant's] actions placed him outside the scope of his federal* employment." *Rivera*, 370 F. Supp. 3d at 370 (emphasis added). In *Vega v. United States*, the court did not find that state law remedies against federal officials were a meaningful alternative, but rather that state law remedies against employees of a private non-profit residential reentry center provided a meaningful alternative to *Bivens*. *Vega v. United States*, 881 F.3d 1146, 1154-55 (9th Cir. 2018). Neither case stands for the proposition that Defendants put forth here—that even where a remedy is completely unavailable it can be considered a "meaningful alternative" to *Bivens*. *Cf. id*. ("*Vega* does not contend that he could not have brought those or other state law claims directly under state law. He merely failed to do so.").

[6] "[I]nmates rely on Corrlinks, the BOP's e-mail system . . . and also use electronic platforms to submit . . . administrative grievances." Compl. ¶17, *Fed. Defs. of N.Y. v. Fed. Bureau of Prisons*, No. 19 Civ. 00660 (E.D.N.Y. Feb 04, 2019), ECF No. 1. "[I]nmates were unable to submit administrative grievances" Id. at ¶ 29(d).

309; *Fed. Defs. of New York, Inc. v. Fed. Bureau of Prisons,* No. 19 Civ. 1778, 2020 WL 1320886, at *1-3 (2d Cir. Mar. 20, 2020). Where incarcerated plaintiffs cannot communicate with the outside world, including with legal counsel, administrative grievances, habeas corpus, and injunctive relief are not sufficiently available remedies so as to constitute an alternative to *Bivens*. *Turkmen v. Ashcroft*, No. 02 Civ. 2307 (DLI) (SMG), 2018 WL 4026734, at *11-12 (E.D.N.Y. Aug. 13, 2018), (rep. and rec.) (finding that because plaintiffs were barred from outside contact, Defendants' proposed alternatives could not remedy Plaintiffs' harms).

Second, treating these as alternative remedies to *Bivens* cannot be squared with Supreme Court precedent. Because the ARP provides no compensation or any deterrent to mistreatment, it is not an alternative to *Bivens*. *McCarthy v. Madigan,* 503 U.S. 140, 151 (1992), *superseded by statute on other grounds as stated in Booth v. Churner,* 532 U.S. 731 (2001) (holding that BOP's grievance procedure "cannot be considered" an alternative remedy sufficient to displace *Bivens*); *Bistrian*, 912 F.3d at 92 (finding that the prison grievance process is not an alternative to *Bivens*). Similarly, because Congress has made no indication of disfavoring a judicially-created damages remedy, the only alternative remedies that can displace a *Bivens* remedy are ones that provide "roughly similar incentives for potential defendants to comply with the Eighth Amendment while also providing roughly similar compensation to victims of violations." *See Minneci,* 565 U.S. at 130; *see also Abbasi*, 137 S. Ct at 1858 (acknowledging that damages remedies may be necessary to redress harm and deter violations where equitable remedies prove insufficient); *Preiser v. Rodriguez*, 411 U.S. 475, 494 (1973) (recognizing that habeas corpus is not an available federal remedy in a damages case). The alternative remedies proposed by Defendants provide *no* compensation at all, making it impossible to view them as providing "roughly similar" compensation to a *Bivens* remedy. *Minneci,* 565 U.S. at 130.

Bivens is the only remaining avenue available for Plaintiffs to remedy the constitutional violations they suffered. Moreover, damages under *Bivens* is the very remedy Defendants suggested plaintiffs pursue in the ongoing Federal Defenders litigation.[7] Defs.' Br. 26, *Fed. Defs. of N.Y. v. Fed. Bureau of Prisons*, No. 19 Civ. 1778 (2d Cir. Jun 19, 2019), ECF No. 27.

4. The PLRA Is Not Evidence that Congress Intended to Eradicate *Bivens* Claims About Prison Conditions

Defendants ask this court to conclude that Congress, by passing the Prison Litigation Reform Act ("PLRA"), which imposes certain conditions before an incarcerated person files suit, somehow intended to extinguish *Bivens* claims altogether. 42 U.S.C. § 1997e. However, the PLRA's text and legislative history unambiguously refute this conclusion. In passing the PLRA 16 years after *Carlson* extended *Bivens* to deliberate indifference claims, Congress *presumed* the existence of a *Bivens* remedy for prison conditions claims and intended only to reduce *frivolous* suits by adding an administrative exhaustion requirement. *See* 141 Cong. Rec. H14078–02, H14105 (daily ed. Dec. 6, 1995) (statement of Rep. LoBiondo) (arguing that the exhaustion requirement would deter frivolous *Bivens* claims while *Bivens* "claims with a greater probability/magnitude of success would, presumably, proceed"); *Woodford v. Ngo*, 548 U.S. 81, 93-94 (2006) (recognizing that the PLRA "was intended to reduce the quantity and improve the quality of prisoner suits") (internal quotation marks and citation omitted). When the PLRA was debated and passed, not only had the Supreme Court already recognized a constitutional remedy for prisoner mistreatment claims in *Carlson*, but other circuit courts had routinely done so as well.

[7] During the Crisis, because legal counsel was barred from client contact, the Federal Defenders of New York sought injunctive relief against the Federal Bureau of Prisons. *Fed. Defs. of NY, Inc. v. Fed. Bureau of Prisons*, No. 19 Civ. 00660 (E.D.N.Y. Feb 04, 2019). (Due to the conditions, Plaintiffs were unable to seek injunctive relief themselves.) On appeal, the Second Circuit remanded the case back to the Eastern District, instructing it to reconsider Plaintiff's constitutional claims, especially in light of the current COVID-19 public health emergency. *Fed. Defs. of New York, Inc. v. Fed. Bureau of Prisons*, No. 19 Civ. 1778, 2020 WL 1320886 (2d Cir. Mar. 20, 2020).

See, e.g., *Hernandez v. Lattimore*, 612 F.2d 61, 62 (2d Cir. 1979); *Tellier v. Fields*, 280 F.3d 69 (2d Cir. 2000); *Del Raine v. Williford*, 32 F.3d 1024, 1036 (7th Cir. 1994); *Cale v. Johnson*, 861 F.2d 943, 946-47 (6th Cir. 1988), *overruled on other grounds by Thaddeus-X v. Blatter*, 175 F.3d 378, 388 (6th Cir. 1999); *Gillespie v. Civiletti*, 629 F.2d 637, 642 (9th Cir. 1980).

Instead of barring all future *Bivens* cases by people in prison, the relevant PLRA provision merely imposes an exhaustion requirement, and by its plain language, indicates its intent to reduce claims that are without merit. 42 U.S.C. § 1997e(c)(1). Nothing in the statute indicates Congress intended administrative grievances to replace legitimate constitutional claims. Interpreting Congressional inaction as intent to eliminate *Bivens* would be both speculative and contrary to the PLRA's text. *Bistrian*, 912 F.3d at 93 n.22 (rejecting the conclusion that Congress intended to eliminate future *Bivens* claims by prisoners). Instead of demonstrating blanket hostility toward *Bivens* actions concerning prison conditions, Congress' silence in passing the PLRA indicates tacit approval for these claims, which existed at the time the Act was passed and in the years since.

Nor does *Abbasi* alter this conclusion. There, the Court did not find that the PLRA weighed against permitting the *Bivens* remedy, but only mentioned, in dicta, that this "could be argued." *Abbasi,* 137 S. Ct. at 1865. *Abbasi* also noted that the PLRA's exhaustion provision applies to *Bivens* cases. *Id*. "The very statute that regulates how *Bivens* actions are brought cannot rightly be seen as dictating that a *Bivens* cause of action should not exist at all." *Bistrian*, 912 F.3d at 93. Congress plainly did not intend to limit *Bivens* by passing the PLRA.[8]

5. Defendants Fail to Assert Any Additional Factors that Justifiably Counsel Hesitation Against Permitting this *Bivens* Action

Finally, Defendants fail to articulate (or support) why the court should consider any of its

[8] Not only does the PLRA not weigh against permitting a *Bivens* remedy, it does not even apply to cases like Plaintiffs', in which a plaintiff files *after* their release from prison. *Perez v. Westchester Cty. Dep't of Corr.*, 587 F.3d 143, 155 (2d Cir. 2009) (finding that the PLRA's provisions apply only to those who file while incarcerated).

litany of other factors as counselling hesitation. Defs.' Mem. 20.[9] Defendants provide a list of additional factors, including that this case would require the court to weigh the costs and benefits of litigation concerning how officials should respond to emergency conditions and non-emergent medical requests, that it would provide a damages remedy based on judicial second-guessing of prison officials' decisions in a situation resolved within a week without life-threatening injuries, and that it would require an analysis by courts as to the wisdom of a free-standing damages cause of action, even in the presence of other remedies. *Id*.

Plaintiffs do not ask this court to determine how a prison official *should* respond to an emergency, but instead whether Defendants' actions violated Plaintiffs' constitutional rights. Allegations of constitutional violations are routinely resolved by the judiciary and involve no unique judicial second-guessing of parties' past decisions. Just as in *Carlson*, where the Court found that the director of the BOP could be sued under *Bivens* because he did not "enjoy such independent status in our constitutional scheme as to suggest that judicially created remedies against [him] might be inappropriate," so too here Defendants enjoy no special constitutional status that might problematize judicial examination of their actions during the Conditions Crisis. *Carlson*, 446 U.S. at 19; *see Walker,* 717 F.3d at 127 (recognizing that courts in this circuit routinely find that aspects of prisoners' conditions of confinement violate the Constitution). The timing of the Conditions Crisis' resolution, and the extent of Plaintiffs' injuries, are factual issues regarding the alleged constitutional violations for the factfinder to address. They do not impact whether the court should permit this *Bivens* action to proceed. Further, as discussed *supra*, no valid alternative remedies existed that could redress Plaintiffs' harm. None of Defendants' proposed

[9] Defendants' sole authority stands for the proposition that Congress is in the best position to make policy judgments, and in no way addressed the availability of *Bivens* because it was not a *Bivens* action. *Id*.; *see generally Bell v. Wolfish*, 441 U.S. 520, 531-62 (1979); *U.S. ex rel. Wolfish v. Levi,* 406 F. Supp. 1243, 1244 (S.D.N.Y. 1976).

special factors properly weighs against extending a *Bivens* remedy.

II. PLAINTIFFS SUFFICENTLY ALLEGE DEFENDANT MAFFEO'S PERSONAL INVOLVEMENT

Defendants argue half-heartedly that the Amended Complaint contains insufficient allegations of Defendant Maffeo's personal involvement.[10] But even a cursory examination of the allegations belies the Defendants' position. The Conditions Crisis involved MDC systems that were at the heart of Maffeo's responsibilities: power and heat. Am. Compl. ¶ 17. He knew of the persistent problems with these systems, having worked at the MDC since 2018, during which time the systems had consistent problems and failures. *Id.* ¶¶ 40-44, 322. He knew that a power outage was possible "at any time." *Id.* ¶ 321. After the power failed, precipitating the Conditions Crisis, he did not ensure that people were kept in warm conditions. *Id.* ¶ 50. And when elected officials toured the MDC, Maffeo was "openly contemptuous" when they expressed concerns regarding the conditions. *Id.* ¶ 324. Following the Conditions Crisis, Defendant Maffeo downplayed the impact on the facility, falsely stating that the heating system "was largely unaffected." *Id.* ¶¶ 325-26.

These allegations establish Maffeo's personal involvement in the constitutional violations alleged. Defendants cite the Second Circuit's decision in *Thomas v. Ashcroft*, 470 F.3d 491 (2d Cir. 2006), for its general statements regarding the need to allege personal involvement, but the *Thomas* court's analysis supports Plaintiffs' claims. In *Thomas*, the Second Circuit found

[10] Defendants include a footnote in which they make a passing reference to qualified immunity, Defs.' Mem. 21 n.8, but they make no attempt to shoulder the heavy burden of establishing that affirmative defense at the motion to dismiss stage. *See McKenna v. Wright*, 386 F.3d 432, 436 (2d Cir. 2004) (finding that a qualified immunity defense must appear on the face of the complaint). They make no attempt to argue that the law was not clearly established, nor do they argue that the Defendants acted reasonably in light of clearly established law. As such they have waived any argument regarding qualified immunity at this stage. *See Lawson v. Rubin*, No. 17 Civ. 6404, 2018 WL 7958928, at *1 (E.D.N.Y. June 11, 2018) (noting that to raise an issue, a litigant "must both state the issue and advance an argument"); *Phoenix Light SF Ltd. v. Bank of New York Mellon*, No. 14 Civ. 10104, 2017 WL 3973951, at *20 n.36 (S.D.N.Y. Sept. 7, 2017) (noting that district courts "routinely decline[ ] to consider arguments mentioned only in a footnote on the grounds that those arguments are inadequately raised"); *see also Beechwood Restorative Care Ctr. v. Leeds*, 436 F.3d 147, 154 n.3 (2d Cir. 2006) (finding that defense of absolute immunity is waived on appeal when it appears only in a footnote).

allegations of personal involvement sufficient in a *Bivens* action where the complaint alleged that the defendants were "on notice" of the risks to plaintiff and "failed to address the situation." *Id.* at 497. Defendants' citation to *Alfaro Motors, Inc. v. Ward*, 814 F.2d 883 (2d Cir. 1987), is also inapposite because there, although the caption in the plaintiff's complaint named the defendants who moved to dismiss, it was "entirely devoid of any allegations" against them related to the alleged constitutional violation. *Id.* at 886. Not so here. The weakness of Defendants' contrary argument is underscored by their attempt to rebut Plaintiffs' allegations with an unsworn statement—found nowhere in Plaintiffs' Amended Complaint—that "Maffeo, under the supervision of Warden Quay, responded to conditions such as temperature variations in areas where abnormal readings were detected and took steps to remedy them between January 27 and February 3, 2019, when full power was restored." Defs.' Mem. 22. Of course, Defendants can provide evidence of this assertion during discovery and it can be tested at summary judgment and trial, but at this stage, Defendants may not rebut well-pleaded allegations in Plaintiffs' Amended Complaint with their own version of the facts. *Id.* 3-4. Because Plaintiffs' allegations give Defendants "fair notice" of the basis for asserting Defendant Maffeo's personal involvement, they are sufficient under Rule 8. *Swierkiewicz v. Sorema, N.A.*, 534 U.S. 506, 514 (2002). And to the extent that Defendant Maffeo argues that other people caused Plaintiffs' harm, the intervention of other independent causes is usually "a matter of proof at trial and not to be decided on a Rule 12(b)(6) motion to dismiss." *Emergent Capital Inv. Mgmt., LLC v. Stonepath Grp., Inc.*, 343 F.3d 189, 197 (2d Cir. 2003).

III. THE COURT HAS FTCA SUBJECT MATTER JURISDICTION

Defendant United States mounts two attacks on Plaintiffs' FTCA claims (exhaustion and discretion); neither has merit. Scott and Cerda exhausted their FTCA claims and none of the alleged torts involved the kind of discretion that would shield Defendant from liability.

A. Scott and Cerda Administratively Exhausted Under the FTCA

Defendant concedes that Scott and Cerda—the only named plaintiffs who bring FTCA claims—exhausted their administrative remedies prior to filing those claims for the first time in the Amended Complaint. Defs.' Mem. 25.[11] Nonetheless, Defendant urges the Court to adopt the reasoning of outlier courts to find that the FTCA requires a plaintiff to have exhausted his administrative remedies prior to the filing of the *original* complaint, even if the claims were not ripe at the earlier stage and the original complaint does not plead them. This view is wrong.

Where, as here, a plaintiff's original complaint does not include an FTCA claim and the "Plaintiff file[s] his amended complaint alleging FTCA claims . . . only after his related administrative claims were finally denied[,] . . . defendants' motion to dismiss [the FTCA claim] of plaintiff's [] Amended Complaint as unexhausted should be denied." *Corley v. United States Dep't of Justice*, No. 14 Civ. 925 (NGG) (SMG), 2016 WL 11395009, at *5 (E.D.N.Y. Sept. 6, 2016), *rep. and rec. adopted sub nom. Corley v. United States*, No. 14 Civ. 925, 2016 WL 5394705 (E.D.N.Y. Sept. 27, 2016); *see also Vailette v. Rios*, No. 11 Civ. 3610 (NGG) (RLM), 2015 WL 5836021, at *3 (E.D.N.Y. Oct. 2, 2015) (same); *Vitrano v. United States*, No. 06 Civ. 6518, 2008 WL 1752221, at *4 (S.D.N.Y. Apr. 16, 2008) ("When and if [the plaintiff] is able to plead satisfaction of jurisdictional prerequisites [of his FTCA claim], he will be entitled to assert these claims either by amending his complaint here or by filing a new action.").

Defendant's exhaustion theory rests on three cases. The first two are out-of-circuit district court decisions that other courts have rejected.[12] The third is an inapposite case from the Southern

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[11] Defendant also argues that the Court lacks jurisdiction over the FTCA claims of Plaintiffs Patel, Ak, Hardy, and Williams. *See* Defs.' Mem. 25. But these Plaintiffs do not assert FTCA claims. *See* Am. Compl. ¶ 371.

[12] *Boatwright v. Chipi*, No. 07 Civ. 38, 2008 WL 819315, at *15 (S.D. Ga. Mar. 26, 2008), argued *pro se*, has been rejected by almost every court to examine it. *See Mancha v. Immigration & Customs Enforcement*, No. 06 Civ. 2650, 2009 WL 900800, at *2 (N.D. Ga. Mar. 31, 2009) (rejecting *Boatwright*'s holding as inconsistent with the text and purpose of the FTCA); *Dupris v. McDonald*, No. 08 Civ. 8132, 2010 WL 231548, at *5 (D. Ariz. Jan. 13, 2010)

District of New York where the *pro se* plaintiff pleaded an FTCA claim without ever properly exhausting. *McKiver v. Fed. Bureau of Prisons of New York*, No. 17 Civ. 9639, 2019 WL 1369460, at *3 (S.D.N.Y. Mar. 26, 2019), *appeal dismissed* (Oct. 17, 2019) (dismissing an FTCA claim where plaintiff filed administrative claims with district court, not agency, after alleging FTCA claim). Here, of course, Plaintiffs' exhaustion is uncontested. And if Defendant's novel argument were correct, it would have been unnecessary for the Supreme Court in *United States v. Kwai Fun Wong*, 575 U.S. 402 (2015), to reach the more difficult question of whether equitable tolling applied to the FTCA's exhaustion timelines given that there, just as in this case, the plaintiff's FTCA claim was introduced via filing of an amended complaint. *Id.* at 405-06.

B. The Discretionary Function Exception Does Not Shield Defendant's Negligence

The Amended Complaint alleges that Defendant's careless and inadequate maintenance of the MDC's heating and electrical infrastructure caused the Conditions Crisis, and that Defendant failed to take any steps to ameliorate the deplorable conditions that ensued. These allegations do not implicate the policy decisions Congress intended to shield from judicial scrutiny in creating the Discretionary Function Exception ("DFE") to the FTCA. Defendant's arguments to the contrary disregard controlling authority about the DFE, and rest on a mischaracterization of Plaintiffs' allegations that is inappropriate at the pleading stage. The Court therefore has jurisdiction over Plaintiffs' FTCA claims.

The DFE is a limited exception to the FTCA's waiver of sovereign immunity, which "bars

("*Boatwright* is neither binding on this Court nor persuasive."); *Michel v. Fed. Bureau of Prisons FCI*, No. 16 Civ. 00863, 2017 WL 7680337, at *5 (N.D. Ala. Nov. 15, 2017), *rep. and rec. adopted*, No. 16 Civ. 00863, 2018 WL 835101 (N.D. Ala. Feb. 13, 2018) (rejecting the reasoning in *Boatwright*). The only case that favorably cites *Boatwright* is the second case Defendant cites, *Lopez v. Chertoff*, No. 07 Civ. 1566, 2009 WL 395229, at *1-2 (E.D. Cal. Feb. 17, 2009). But the one court that has examined *Lopez* (along with *Boatwright*) rejected it. *See Baires v. United States*, No. 09 Civ. 5171, 2010 WL 3515749, at *9-10 (N.D. Cal. Sept. 8, 2010) (finding *Lopez* and *Boatwright* at odds with the language of the FTCA).

suit only if two conditions are met: (1) the acts alleged to be negligent must be discretionary, in that they involve an element of judgment or choice and are not compelled by statute or regulation and (2) the judgment or choice in question must be grounded in considerations of public policy or susceptible to policy analysis." *Molchatsky v. United States*, 713 F.3d 159, 162 (2d Cir. 2013) (internal citation and quotation marks omitted). To avoid the DFE, "a complaint . . . must allege facts which would support a finding that the challenged actions are not the kind of conduct that can be said to be grounded in the policy of the regulatory regime." *United States v. Gaubert*, 499 U.S. 315, 324-25 (1991). "Once a plaintiff satisfies this pleading requirement, the burden shifts to the government to prove that the exception applies." *Saint-Guillen v. United States*, 657 F. Supp. 2d 376, 387 n.5 (E.D.N.Y. 2009) (emphasis omitted).

The BOP has a statutory duty to "exercise ordinary diligence or reasonable care to keep prisoners safe and free from harm." *Young v. United States*, No. 12 Civ. 2342, 2014 WL 1153911, at *13 (E.D.N.Y. Mar. 20, 2014) (internal citation and quotation marks omitted). By law, the BOP must "provide suitable quarters and provide for the safekeeping, care, and subsistence of all persons charged with or convicted of offenses against the United States." 18 U.S.C. § 4042(a)(2). In addition, the BOP must "provide for the protection, instruction, and discipline of all persons charged with or convicted of offenses against the United States." *Id.* § 4042(a)(3).

While the BOP's statutory framework provides some discretion to BOP decision-makers regarding the ordinary day-to-day management of prisons, Defendant's negligent conduct leading up to and during the Conditions Crisis cannot be said to be grounded in the regulatory regime directing the BOP to provide for the safekeeping and care of Plaintiffs. *See, e.g.*, Am. Compl. ¶¶ 24, 26, 33, 39, 49 (failing to maintain critical building infrastructure); ¶¶ 279, 280 (failing to provide needed medical care); ¶¶ 264, 312 (refusing to provide detainees with extra blankets,

although blankets had been offered by New York City). Defendant knew the electrical and heating infrastructure in a building housing 1,600 people was dangerously deteriorated, failed to repair it, and made no attempt to ameliorate conditions for these 1,600 people when the infrastructure predictably failed. This is the definition of negligence. Defendant has not met its burden of showing that the negligent BOP conduct at issue is protected by the DFE.

Defendant's attempts to evade liability fail for three reasons: (a) the Second Circuit has recognized that this type of negligence in the prison context falls outside the DFE; (b) as alleged, the allegations do not involve the type of discretion shielded by the DFE; and (c) even accepting Defendant's mis-categorization of the allegations, the DFE does not apply.

1. This Court Has Jurisdiction Over Negligence in the Prison Context

Courts retain jurisdiction over cases involving a prison employee's "lazy or careless failure to perform his or her discretionary duties with due care." *Coulthurst v. United States*, 214 F.3d 106, 110 (2d Cir. 2000); *see also Young*, 2014 WL 1153911, at *15. Such claims, often described under a "negligent guard theory," do not fall under the DFE "because such negligent acts neither involve an element of judgment or choice within the meaning of *Gaubert* nor are grounded in considerations of governmental policy." *Triestman v. Fed. Bureau of Prisons*, 470 F.3d 471, 476 (2d Cir. 2006) (per curiam) (internal quotation marks, alteration, and citation omitted).

The myriad ways in which Defendant negligently carried out its duty to safeguard the MDC detainees, or blatantly failed to take any steps to do so, are akin to other cases where courts have held that the DFE does not insulate BOP conduct from suit. For example, in *Coulthurst*, the Second Circuit reversed the district court's grant of a motion to dismiss allegations that BOP employees had been lazy or inattentive in inspecting prison gym equipment, causing plaintiff's injury. 214 F.3d at 109-10. In *Triestman*, the Second Circuit refused to apply the DFE where the complaint alleged that a BOP official "failed to institute and enforce proper staffing and patrolling for each

wing of the housing units during lockdown, and thus did not provide due diligence and emergency response [] when such emergency occurred." 470 F.3d at 475 (internal quotation marks and emphasis omitted). And in *Hartman v. Holder*, the court found that a BOP employee's alleged "failure to observe for at least a quarter hour a noisy, violent altercation occurring within a room containing all of the inmates under her supervision" made out a claim that the officer was "distracted or inattentive to her duties," and thus that the alleged conduct fell outside the DFE. No. 00 Civ. 6107, 2009 WL 792185, at *10 (E.D.N.Y. Mar. 23, 2009).

Like these cases, the negligence alleged here also falls outside the DFE. Defendant's conduct leading up to the Conditions Crisis and in responding to the crisis was careless, inattentive, and not grounded in "the policy of the regulatory regime" requiring the BOP to provide for the safekeeping and care of individuals in its custody. *Gaubert*, 499 U.S. at 325. Defendant "systematically and deliberately ignored, or failed to take reasonable measures to address, the visibly deplorable and unconstitutional conditions at the MDC during the Conditions Crisis." Am Compl. ¶ 313; *id*. ¶ ¶ 24, 26, 33, 39, 49 (failing to address heating and electrical problems that the MDC knew about for years); ¶ 312 (rejecting an offer for municipal aid); ¶ 279, 280 (failing to provide medical care and rejecting detainee requests for aid).

2. Plaintiffs Allege Widespread Negligence that Cannot Be Cabined into Narrow Categories of Discretionary Conduct

Defendant's rhetorical gambit of framing Plaintiffs' allegations into four narrow categories does not fit the allegations in the Amended Complaint. To the contrary, the Amended Complaint presents a jail replete with myriad forms of negligence. Where, as here, a "complaint is susceptible to various readings" and there "are numerous potential ways in which a[] [defendant's] 'carelessness' may have triggered" the injuries alleged, a district court "err[s] in assuming that the negligence alleged in the complaint involved only discretionary functions." *Coulthurst*, 214 F.3d

at 109, 110; *see also Molchatsky v. United States*, 778 F. Supp. 2d 421, 431 (S.D.N.Y. 2011), *aff'd*, 713 F.3d 159 (2d Cir. 2013) (recognizing that a plaintiff need only "demonstrate that there is a plausible case for . . . non-policy action in order to defeat dismissal" on a Rule 12 motion). Accordingly, the Court should reject Defendant's mis-categorization of the allegations into four inaccurate DFE boxes.

The DFE does not shield Defendant merely because some discretion was involved. Where, as here, Defendant's alleged conduct could be construed as requiring "some modicum of discretion" but plainly "involves negligence unrelated to any plausible policy objectives," the DFE does not apply. *Coulthurst*, 214 F.3d at 110, 111.[13] The Second Circuit has rejected Defendant's theory that the DFE bars suit even "where an employee abused his discretion or was negligent in the performance of a discretionary function." Defs.' Mem. 28-29. "Reading the statute in this fashion . . . would lead to absurd results" and "would effectively shield almost all government negligence from suit, because almost every act involves some modicum of discretion regarding the manner in which one carries it out." *Coulthurst*, 214 F.3d at 110.[14]

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[13] Defendant's reliance on *Stanford v. United States*, 992 F. Supp. 2d 764, 771 (E.D. Ky. 2014), for the proposition that "negligence is irrelevant to the DFE" is misplaced. That case appears to misapply the Sixth Circuit's pronouncement in *Rosebush v. United States* that negligence is irrelevant to determining whether a statute or policy specifically required certain conduct that was not in fact undertaken, which, if true, would mean the DFE does not apply. *See* 119 F.3d 438, 442 (6th Cir. 1997) ("Negligence, however, is irrelevant to our inquiry at this point. It is the governing administrative policy, not the Forest Service's knowledge of danger, that determines whether certain conduct is mandatory for purposes of the discretionary function exception." (internal citation omitted)).

[14] Nor do Defendant's cited cases, in which carefully planned Government action was shielded by the DFE, refute this conclusion. Here, Plaintiffs allege careless failures to address "repeated problems with heat and light at the MDC . . . leading up to the Conditions Crisis" and the subsequent inexcusable "fail[ure] to take any steps to maintain basic living standards for the people in [the Government's] charge." Am. Compl. ¶¶ 303, 308. In contrast, in *In re: Agent Orange Liab'y Litig.,* the court barred plaintiffs' "vague and irrelevant allegations of negligent labeling, shipping, handling, etc." under the DFE where the alleged conduct involved a planned decision by Government actors to "enter[] into a contract with the University of Hawaii to perform field tests with [an] herbicide." 818 F.2d 210, 215 (2d Cir. 1987). Similarly, this is not a case, like *Dalehite v. United States*, involving decisions "responsibly made at a planning rather than operational level" to institute agency policy, high-level decisions regarding necessary implementation, and lower-level acts made "in accordance with, and done under, specifications and directions" of a plan drafted prior to the beginning of production. 346 U.S. 15, 38, 42 (1953). Nor is it analogous to decisions as to how to design and construct a guardrail. *Baum v. United States*, 986 F.2d 716, 723

Plaintiffs' allegations concerning the Government's unplanned and irresponsible failures to exercise ordinary care in maintaining infrastructure and to take any steps to remedy and ameliorate the situation can only be characterized as carelessness, which is not condoned by any applicable operating procedures. Am. Compl. ¶ 42. As a result, the Government's reliance on *Taveras v. Hasty* is misplaced. There, the court found that the DFE barred the plaintiff's FTCA claim for damages arising out of a prison guard's decision to wait for backup before intervening in a fight because, in doing so, the guard followed standard BOP operating procedure. No. 02 Civ. 1307, 2005 WL 1594330, at *4 (E.D.N.Y. July 7, 2005). Critically, however, the court acknowledged that the DFE would be inapplicable in the circumstances alleged here, where the plaintiff "could show that the actions of prison personnel were a result of laziness or carelessness." *Id.*

3. Even Under Defendant's Improper Framing, the DFE Does Not Apply

For the reasons above, the Court should reject Defendant's four misleading negligence "categories." But even accepting Defendant's mis-framing, the DFE does not apply.

a. Defendant's Careless Maintenance of the MDC

Plaintiffs allege that the BOP had known for at least five years prior to the Conditions Crisis that the MDC's HVAC equipment in the West Building needed to be updated and that Warden Quay "was aware of specific warning signs concerning the jail's electricity and heat during the weeks leading up to the Conditions Crisis." Am. Compl. ¶¶ 24, 26. Yet, Defendant's responses to these known weaknesses and failures were careless, lazy, and irrational. For example, Defendant Maffeo "refused to let electricians into" an area of the building where heating issues arose earlier in the month "and refused to let anyone else assist him," *id.* ¶ 33; instead of fixing "preexisting

n.3 (4th Cir. 1993) (holding that despite alleged negligent maintenance of guardrail, there was "really no question as to maintenance, the fault, if any, was in design and construction").

problems" with the jail's electrical system, "the MDC had put more demands for more power on a weaker system," *id.* ¶ 39; and "when repairing or adjusting [] heating coils that burst on January 21, 2019, MDC staff either did not properly reset certain heating controls or mistakenly turned off the air handler, causing low temperatures during the Conditions Crisis," *id.* ¶ 49.

These allegations—that Defendant characterizes as failing "to prioritize needed infrastructure maintenance ahead of the January 27 fire"—are properly understood as allegations that MDC employees "failed to perform [] diligent inspection[s] out of laziness or w[ere] carelessly inattentive" in their maintenance of the MDC's electrical and heating systems in the lead-up to the Conditions Crisis. *Coulthurst*, 214 F.3d at 110. Where, as here, "the Government is aware of a specific risk and responding to that risk would only require the Government to take garden-variety remedial steps, the discretionary function exception does not apply." *S.R.P. ex rel. Abunabba v. United States*, 676 F.3d 329, 338 (3d Cir. 2012); *see also Indian Towing Co. v. United States*, 350 U.S. 61, 68-69 (1955) (finding that inadequate maintenance of a lighthouse triggers liability under the FTCA); *ARA Leisure Servs. v. United States*, 831 F.2d 193 (9th Cir.1987) (finding that the Park Service's failure to maintain a road was not subject to the DFE).

Defendants' invocation of *Fernandini v. United States* does not lead to a different result. There, the plaintiff alleged that while at the Metropolitan Correction Center, he was exposed to poor plumbing, over-crowding, and was bitten by a rat, and that these conditions gave rise to a claim under the FTCA. No. 15 Civ. 3843, 2019 WL 1033797, at *1 (S.D.N.Y. Mar. 5, 2019). The court found that the facility maintenance decisions challenged by the plaintiff were "day-to-day decisions" that "'require[d] judgment as to which of a range of permissible courses is wisest,'" and thus were shielded by the DFE. *Id.* at *5 (*quoting Fazi v. United States*, 935 F.2d 535, 538 (2d Cir. 1991)). Here, in contrast, Defendant's dangerous and lazy failure to maintain essential

infrastructure cannot be said to be among such "permissible courses" of action.

b. Warden Quay's Failure to Relocate Detainees

Defendant Quay's failure to implement a partial or complete evacuation of the West Building is but one of myriad ways in which the Government negligently responded to the Conditions Crisis. Defendant's contention that failure to evacuate—which appears in only one paragraph of Plaintiffs' 50-page complaint—is one of only four of Plaintiff's negligence claims underlines its improperly narrow view. But even this decision is not shielded by the DFE.

While a decision not to evacuate a BOP facility, may, in certain circumstances, be a reasoned policy choice, here, the Amended Complaint is properly read to allege that Warden Quay's decision not to partially or fully evacuate the West Tower was the result of "laziness, carelessness, or inattentiveness," and thus falls outside the DFE. *Young*, 2014 WL 1153911, at *15. For example, Plaintiffs allege that the electricity in the neighboring East Building was working and that, on the sixth day of the Conditions Crisis, Warden Quay finally moved some detainees there who required CPAP machines, but only after a member of Congress expressed outrage about the situation. *See* Am. Compl. ¶ 310(c).[15] Warden Quay's failure to relocate more detainees from the MDC's West Building to the functioning East Building earlier in the Crisis appears to lack any rhyme or reason, let alone be grounded in "public policy . . . motivated by considerations of economy, efficiency, and safety." *Coulthurst*, 214 F.3d at 109.

Contrary to Defendant's assertions, Plaintiffs' FTCA allegations are not analogous to those

[15] Defendants rely on the OIG report's finding that "MDC[] management followed relevant protocols defined in the MDC['s] Fire Contingency Plan." OIG Report, pp. 22-23; Defs.' Mem. 30. As an initial matter, whether Defendants properly followed the Fire Contingency Plan has no bearing on Plaintiffs' allegation that Defendant Quay "did not activate an emergency plan that addressed the power outage at the facility," despite being asked to do so. Am. Compl. ¶ 310(a). Because Defendants have not, up until this point, provided Plaintiffs with full discovery of the documents relied upon by the OIG in their investigation, Plaintiffs are unable to assess what relevance the OIG's invocation of the Fire Contingency Plan has for their allegations regarding Defendant Quay's failure to relocate detainees.

at issue in *Spotts v. United States*, 613 F.3d 559 (5th Cir. 2010). There, the court found that the BOP's management of the Federal Correctional Complex in Beaumont, Texas ("Beaumont") in the lead-up to and aftermath of Hurricane Rita fell within the DFE. The situation facing the BOP in *Spotts* was nothing like the Conditions Crisis. In *Spotts*, the conditions at Beaumont were created by a Category 3 storm that left Beaumont in a declared "nine-county disaster area" and prompted the Texas Commission on Environmental Quality to temporarily suspend its rules and regulations for the entire state. *Id.* at 563, 570. In contrast, the Conditions Crisis was caused by Defendant's longstanding negligence in maintaining the building's infrastructure, affected only one of two buildings at the MDC, and had no impact on the surrounding neighborhoods or the functioning of New York City. Further, in *Spotts*, the BOP made significant ameliorative efforts, including evacuating low- and medium-security units in Beaumont prior to Hurricane Rita's landfall and, following its decimation of Beaumont, "attempt[ing] early on to establish a temporary power grid," and having "[e]mergency generators [] delivered to the Penitentiary shortly after the storm." *Id.* at 563. The same cannot be said of the Defendant, who "rejected an offer by New York City to supply emergency generators and emergency blankets" and moved a handful of at-risk people to the functioning East Building only six days into the crisis and only once public officials intervened. Am. Compl. ¶ 310(c), 312. While *Spotts* involved the kind of "decisions regarding the feasibility, safety, and benefit of mobilizing federal resources in the aftermath of a national disaster [that] are grounded in social, economic and public policy," Defendant's handling of the Conditions Crisis did not. *Spotts*, 613 F.3d at 572 (internal citation and quotation marks omitted).

c. Wide-Ranging Negligent Handling of the Conditions Crisis

Defendant's wide-ranging negligence—what it terms "improper management"—in caring for the people in the MDC is also not entitled to the DFE. Defs.' Mem. 29. Plaintiffs allege Warden Quay "failed to take any steps to maintain basic living standards for the people in his charge," Am.

Compl. ¶ 308, and failed to address "the visibly deplorable and unconstitutional conditions at the MDC during the Conditions Crisis," *id.* ¶ 313. Defendant's negligent actions range from: "not provid[ing detainees] with sufficient additional blankets or with warm clothes" despite blankets being provided to the MDC by New York City, *id.* ¶¶ 264, 312; "not inform[ing detainees] about any alternative methods for requesting prescriptions," resulting in countless detainees being deprived of medication, *id.* ¶¶ 278(d),280(i); ignoring verbal requests for urgent medical care and ignoring emergency button use, *id.* ¶ 279, 280(f -h, k, s); failing to implement an emergency plan that addressed the power outage, despite requests from the correction officers' union to do so, *id.* ¶ 310(a); failing to "take steps toward swift resolution of the electrical problems," *id.* ¶ 310(d); to lying to the public about the conditions at the MDC, *id.* ¶ 314.

While "[o]n the broadest level, any action taken by a prison official concerning the supervision of inmates is susceptible to policy analysis[,] . . . [a]t the motion to dismiss stage, . . . [Plaintiffs] need only show that there is a set of facts consistent with" actions that "implicate negligence 'unrelated to any plausible policy objectives.'" *Hartman v. Holder*, No. 00 Civ. 6107 (JG), 2005 WL 2002455, at *10 (E.D.N.Y. Aug. 21, 2005).[16] Defendant's vague unsworn assertion of "important policy and security challenges related to the safe operation of the institution" does not insulate the BOP's negligence from scrutiny, particularly at the pleading stage. Such an "argument cuts too broad a swath. Its attempt to sweep all of [Defendant's] acts and omissions under the rug of broad [BOP] policy would effectively insulate virtually all actions by a government agent from liability." *Andrulonis v. United States*, 952 F.2d 652, 655 (2d Cir. 1991).

[16] While in *Hartman*, the court found that the Warden's failure to implement a policy securing razors distributed to inmates fell within the DFE, the same reasoning is not applicable here. *Id.* at *12. Here, Plaintiffs do not allege a failure to adopt a particular policy for the day-to-day functioning of the MDC. Rather, they allege an abject failure to exercise minimum due care in preventing and ameliorating unnecessarily deplorable conditions of confinement.

d. Defendants' Careless Supervision of Contractors

Finally, Defendant's attempt to construe Plaintiffs' allegations that MDC staff, including Defendants Quay and Maffeo, were careless and lazy in responding to the electrical and heating problems during the Conditions Crisis as a claim of negligent hiring, training, supervision, and retention fares no better. *See* Defs.' Mem. 33. Setting aside its underinclusiveness, even Defendant's construction does not fall within the DFE. As the Second Circuit has recognized, where a "staffing policy f[alls] so far outside the range of appropriate judgment that it can no longer be viewed as an exercise of 'discretion,'" the DFE will not apply. *Triestman*, 470 F.3d at 475. As with all government decisions, hiring and supervision choices that cannot be said to be grounded in considerations of public policy will not be protected. Here, Plaintiffs allege that the 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. Am. Compl. ¶ 310(d). Such negligent governmental acts are squarely within this Court's jurisdiction.

CONCLUSION

For the foregoing reasons, Defendants' motion to dismiss should be denied.

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