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 **Oral Argument Requested**

PLAINTIFFS' OBJECTIONS TO REPORT AND RECOMMENDATIONS

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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," more than 1,600 people housed at the Metropolitan Detention Center ("MDC") were left in dark and freezing cold cells without access to adequate medical care, hot food, or water, cut off from contact with the outside world due to power and heat failures in the facility (the "Conditions Crisis"). Am. Compl. ¶¶ 2, 4, 16, 47, 308. Although the Conditions Crisis came to a head in January 2019, 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, the then-Warden, Defendant Herman Quay, and Facilities Manager, Defendant John Maffeo, failed to take even the most basic steps to safeguard the over 1,600 people in their care. *Id.* ¶¶ 2, 7. Plaintiffs David Scott, Jeremy Cerda, Osman Ak, Merudh Patel, Gregory Hardy, and Larry Williams brought this case on behalf of themselves and all others confined at the MDC during the Conditions Crisis to obtain redress for the unconstitutional and inhumane conditions caused and exacerbated by Defendants' conduct.

In a November 16, 2020 Report and Recommendation (the "R&R"), Magistrate Judge Gold recommended that Defendants' Rule 12(b)(1) motion to dismiss Plaintiffs' claim under the Federal Torts Claims Act ("FTCA") should be denied, but recommended granting Defendants' Rule 12(b)(6) motion to dismiss Plaintiffs' constitutional claim, brought under *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971). The Court should reject the Report and Recommendation's conclusion as to Plaintiffs' *Bivens* claims and affirm its conclusion as to Plaintiffs' claims brought under the FTCA. Plaintiffs have plausibly alleged *Bivens* claims of deliberate indifference to the needs of people confined in prison, claims the Supreme Court has long recognized as cognizable under *Bivens*. *See Carlson v. Green*, 446 U.S. 14 (1980); *see also Farmer v. Brennan*, 511 U.S. 825 (1994). *Carlson* governs Plaintiffs' claims,

and neither the pretrial status of some Plaintiffs nor the emergency circumstances of the Conditions Crisis present a meaningful difference that would require extending *Bivens*. But even if the Court were to find that Plaintiffs' claims presented a new context, no special factors counsel hesitation. First, the R&R's suggestion that the FTCA provides an alternative remedy to *Bivens* was rejected by the Supreme Court in *Carlson* and the Court has reaffirmed that holding for the past three decades. Second, the separation-of-powers concern identified in the R&R—the duty of the executive to manage BOP facilities—was considered and rejected in *Carlson* and is so general that it would foreclose *any Bivens* claim involving people held by the BOP. Moreover, it departs from the Supreme Court's overriding focus on whether a judicially created cause of action would interfere with either a duty constitutionally committed to one of the coordinate branches or whether it would contravene Congressional intent. As the Court correctly held, however, Congress's activity in this area, most notably its enactment of the Prison Litigation Reform Act, in no way indicates disapproval of *Bivens* claims in this context. In sum, Plaintiffs' *Bivens* claims should proceed.

FACTUAL BACKGROUND

On January 27, 2019, the MDC experienced a partial power outage when an electrical panel caught fire in the jail's control room. Am. Compl. ¶ 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 this 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 putative 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 in the winter of 2018to the risk that Continuous Positive Airway Pressure ("CPAP") machines, used to treat obstructive sleep apnea, would be nonoperational in the face of power outages , 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.

PROCEDURAL HISTORY

Plaintiffs filed their Complaint on February 22, 2019 and their Amended Complaint on November 15, 2019. Defendants' motion to dismiss was fully briefed on May 8, 2020. On June 6, 2020, this Court referred Defendants' motion to dismiss to Judge Gold for a report and recommendation, which Judge Gold issued on November 16, 2020.

STANDARD OF REVIEW

Review of the Report and Recommendation is de novo. *See* 28 U.S.C. § 636(b)(1)(C); Fed. R. Civ. P. 72(b)(3).

In deciding a motion to dismiss for failure to state a claim, the Court must "accept well pleaded factual assertions as true" and "draw all reasonable factual inferences in favor of the plaintiff." *Lynch v. City of New York*, 952 F.3d 67, 76 (2d Cir. 2020). A complaint need only "contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft* v. *Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). "To be plausible, the complaint need not show a probability of plaintiff's success," but need only "evidence more than a mere possibility of a right to relief." *Nakahata v. N.Y.-Presbyterian Healthcare Sys., Inc.*, 723 F.3d 192, 197 (2d Cir. 2013).

ARGUMENT

The Court should reject the Report and Recommendation's recommendation that Plaintiffs' *Bivens* claim be dismissed.

In *Ziglar v. Abbasi*, the Supreme Court reaffirmed that plaintiffs may recover for constitutional violations pursuant to *Bivens* and set out a two-step inquiry for determining whether a *Bivens* remedy is available in a particular case. 137 S. Ct. 1843, 1855 (2017). First, the court must ask if the claim resembles the Supreme Court's three precedents, *Bivens*, 403 U.S. 388 (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). If the case differs in a "meaningful" way from those precedents, it presents a new context. *Ziglar*, 137 S. Ct. at 1859. Second, if a new context is presented, courts must assess if "special factors counsel[] hesitation" before extending *Bivens*. *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 presented a new context, there are neither alternative remedies nor any other special factors that counsel hesitation.

I. THE REPORT AND RECOMMENDATION INCORRECTLY FOUND THAT PLAINTIFFS' CLAIMS PRESENT A NEW *BIVENS* CONTEXT

Plaintiffs' claims do not require an extension of *Bivens* because they are not meaningfully different from the conditions of confinement claims authorized by the Supreme Court in *Carlson*, which held that a convicted person harmed by prison officials' deliberate indifference can bring a damages claim directly under the Eighth Amendment, including against a supervisor. *Carlson,* 446 U.S. at 16. Even though *Carlson* involved the failure to provide adequate medical care, the Court has applied *Carlson*'s logic in other conditions of confinement cases governed, like this one, by the deliberate indifference standard. *See Farmer*, 511 U.S. at 834 (recognizing, in a *Bivens* context, that deliberate indifference standard applies to all conditions of confinement claims). Defendants have never substantively addressed the significance of *Farmer* in this case, even though the Court in *Minneci v. Pollard* cited to *Farmer* as establishing the right of federal prisoners to bring general deliberate indifference claims against federal employees. *Minneci*, 565 U.S. 118, 130 (2012). As one court in this Circuit explained, the best way to reconcile *Ziglar*, *Farmer*, and *Carlson* is to recognize "that the conditions of confinement actions under the Eighth Amendment includes [sic] both medical care and safety, and they are not distinct claims." *Walker v. Schult*, No. 11 Civ. 287, 2020 WL 3165177, at *4 (N.D.N.Y. May 29, 2020), *appeal filed*, No. 20-2415 (2d Cir. July 30, 2020).

District Courts continue to find these deliberate indifference claims viable post-*Ziglar*. *See*, *e.g.*, *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); *Cuevas*

v. United States, No. 16 Civ. 00299, 2018 WL 1399910 (D. Colo. Mar. 19, 2018) (*Bivens* remedy for Eighth Amendment claim of deliberate indifference to risk of abuse); *Doty v. Hollingsworth*, No. 15 Civ. 016, 2018 WL 1509082 (D.N.J. Mar. 27, 2018) (*Bivens* remedy for Eighth Amendment claim against warden for deliberate indifference to risk of abuse); *Kirtman v. Helbig*, No. 16 Civ. 2839, 2018 WL 3611344 (D.S.C. July 27, 2018) (*Bivens* remedy for Eighth Amendment claim of deliberate indifference to inadequate medical care); *see also Laurent v. Borecky*, No. 17 Civ. 3300, 2018 WL 2973386, at *4-5 (E.D.N.Y. June 12, 2018) (allowing detainee to bring a Fifth Amendment deliberate indifference medical claim under *Bivens*).

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. Plaintiffs' claims for denial of medical care, mental health attention, and prescription medications all fall squarely within *Carlson*.[1] Am. Compl. ¶¶ 87, 217-222, 245-251. *Carlson* allows "a *Bivens* claim for prisoner mistreatment—specifically, for failure to provide medical care." *Ziglar*, 137 S. Ct. at 1864.

Despite recognizing that Plaintiffs' allegations of denial of medical care—which include claims of denial of access to medical treatment, *e.g.* Am. Compl. ¶¶ 86-92, 217-22, 245-51—are "brought pursuant to the same constitutional provision and involve the same type of harsh condition as the claims in *Carlson*," the R&R determined that Plaintiffs' claims presented a new context. R&R at 9. In reaching this conclusion, the R&R erroneously stated that "the legal standards applicable to plaintiffs' claims in this case . . . are less clear than those that governed the claims in *Carlson*," *id.*, despite both involving Eighth Amendment claims of deliberate indifference for failure to provide adequate medical care. The suggestion that the legal standards

[1] The Report and Recommendation specifically notes that, like in *Carlson*, Plaintiffs claims concern a failure to have their medical needs met. Report and Recommendations ("R&R") at 10 n.1.

applicable to Plaintiffs' claims are somehow less clear than those that governed the claims in *Carlson* given the Conditions Crisis's exigent nature is without support. *See* R&R at 9-10. The R&R cites language from *Ziglar* to bolster this contention, but in doing so divorces that language from its context; in *Ziglar*, the Court determined that the "standard for a claim alleging that a warden allowed guards to abuse pre-trial detainees is less clear under the Court's precedents." 137 S. Ct. at 1846-65. That language does not apply to this case for at least two reasons: first, some of the claims in this case relate solely to convicted individuals, not pretrial detainees; and second, all of Plaintiffs' *Bivens* claims involve application of well-established deliberate indifference standards, whether for medical care, *see Estelle v. Gamble*, 429 U.S. 97, 104 (1976), or for general conditions of confinement, *see Farmer*, 511 U.S. at 834; *Rhodes v. Chapman*, 452 U.S. 337, 347 (1981).[2] As the Ninth Circuit recently concluded in an unpublished opinion, "[c]ontinuing to recognize Eighth Amendment *Bivens* claims post-[*Ziglar*] will not require courts to plow new ground because there is extensive case law establishing conditions of confinement claims and the standard for circumstances that constitute cruel and unusual punishment." *Reid v. United States*, 825 F. App'x 442, 444-45 (9th Cir. 2020).

The R&R also cites no authority to explain how the emergency situation at issue has any bearing on the new context analysis. *See* R&R at 11. Defendant Quay's legal mandate was not affected during the Conditions Crisis, 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 v. Schult*, 717 F.3d 119, 125 (2d Cir. 2013). "Public safety depends on successful [prison] management . . . both in ordinary times and in times

[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 Fifth Amendment claims brought by other Plaintiffs created a meaningful difference, the Eighth Amendment Plaintiffs would still have valid *Bivens* claims.

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).

The R&R also wrongly emphasized the length of the Defendants' medical care failures and the less severe harm that Plaintiffs suffered, compared to the death at issue in *Carlson,* to find a new context. R&R at 10. But neither *Ziglar* nor *Carlson* suggests *Carlson* is so limited. While *Carlson* concerned a death from asthmatic conditions and insufficient medical attention, it also has been found to govern less serious claims, including a claim for failure to treat back pain in *Laurent*, which involved neither a life-threatening situation nor a need for emergency treatment. *See Laurent*, 2018 WL 2973386, at *5; *see also Ziglar*, 137 S. Ct. at 1864 ("[In *Carlson*], the Court did allow a *Bivens* claim for prisoner mistreatment—specifically, for failure to provide medical care."); *Carlson*, 446 U.S. at 16 n.1; *Simpson v. Horning*, No. 19 Civ. 78, 2020 WL 5628994, at *6-7 (W.D. Pa. Sept. 21, 2020) (finding no extension of *Carlson* was necessary to permit claims that defendants were deliberately indifferent to plaintiff's inability to eat among large groups of people); *Correa v. Hastings*, No. 13 Civ. 05862, 2014 WL 6468985, at *15 (S.D.N.Y. Nov. 18, 2014) (finding that federal pretrial detainee sufficiently alleged deliberate indifference where officers failed to provide medical care to plaintiff who required stitches after being cut by a razor).

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; *see also Walker*, 2020 WL 3165177, at *4 (permitting *Bivens* claim to proceed for conditions of confinement involving poor ventilation and sanitation, and sleep loss). 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. This stands in contrast to *Ziglar*, where the 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. *Ziglar*, 137 S. Ct. at 1864–1865.

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.[3] *Carlson*, 446 U.S. at 16 n.1. While *Carlson* specifically concerned medical care, the Supreme Court analyzes medical care claims in the prison context and other conditions of confinement claims using the "deliberate indifference" standard under *Estelle*, 429 U.S. at 104. *See Wilson v. Seiter*, 501 U.S. 294, 303 (1991) ("[W]e see *no significant distinction* between claims alleging inadequate medical care and those alleging inadequate 'conditions of confinement.'") (emphasis added); *Farmer,* 511 U.S. at 834; *Walker*, 717 F.3d at 125.

A new context arises only if there are "*meaningful*" differences between claims and Supreme Court precedent. *Ziglar,* 137 S. Ct. at 1859 (emphasis added). "*Ziglar* does not require . . . perfect factual symmetry." *Brunoehler v. Tarwater*, 743 F. App'x 740, 744 (9th Cir. 2018); *Ziglar*, 137 S. Ct. at 1865 ("[T]rivial" differences "will not suffice."). All claims contain differences; not all differences are meaningful. *See Prado v. Perez*, 451 F.Supp. 3d 306, 314-16 (S.D.N.Y. Apr. 3, 2020) (declining to find new context in case involving arrest and search by ICE

[3] The cases cited by the R&R for the proposition that *Carlson* does not govern Plaintiffs' conditions-of-confinement claims are inapposite to Plaintiff's claims. The first concerned *pro se* claims regarding non-medical conditions caused by a correctional officer's alleged personal animus, *see White v. Hess*, No. 14 Civ. 3339, 2020 WL 1536379, at *1 (E.D.N.Y. Mar. 31, 2020), and the second concerned non-medical conditions of confinement claims without "identifiable injuries," *see Fernandini v. United States*, No. 15 Civ 3843, 2019 WL 2493758, at *10 (S.D.N.Y. Feb. 14, 2019), *report and recommendation adopted in relevant part*, No. 15 Civ. 3842, 2019 WL 1033797 (S.D.N.Y. Mar. 5, 2019).

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*). The R&R ignored this precedent when it stated that a new context existed simply because this case and *Carlson* presented different facts and then concluded without explanation that these different facts "will alter the deliberate indifference analysis." R&R at 11. Where, as here, the cases are governed by the same legal standard, and where the R&R offered no explanation for how the different factual context will affect the deliberate indifference analysis, the R&R failed to identify any *meaningful* difference between this case and *Carlson*.[4]

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 1-3. 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.

[4] Indeed, many courts have concluded that excessive force claims, which are governed by an entirely different standard than deliberate indifference claims, nonetheless do not require an extension of *Carlson*. *See, e.g.*, *McDaniels v. United States*, No. 14 Civ. 02594, 2018 WL 7501292, at *5 (C.D. Cal. Dec. 28, 2018), *report and recommendation adopted*, No. 14 Civ. 02594, 2019 WL 1045132 (C.D. Cal. Mar. 5, 2019); *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); *Lineberry v. Johnson*, No. 17 Civ. 04124, 2018 WL 4232907, at *9 (S.D.W. Va. Aug. 10, 2018), *report and recommendation adopted sub nom. Lineberry v. United States*, No. 17 Civ. 04124, 2018 WL 4224458 (S.D.W. Va. Sept. 5, 2018).

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), *report and recommendation. 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*, 2018 WL 1359047, at *5 (recognizing that *Carlson* governs excessive force claim). Neither the conviction status of certain Plaintiffs nor the exigent circumstances presented by the Conditions Crisis create meaningful differences that warrant finding a new context.[5] Plaintiffs' claims thus fall squarely within the parameters of established *Bivens* precedent.

II. EVEN IF THE COURT FINDS A NEW *BIVENS* CONTEXT, NO SPECIAL FACTORS COUNSEL HESITATION

Even if the Court concludes that Plaintiffs' claims present a new context, no special factors counsel hesitation. The special factors inquiry "must concentrate on whether the Judiciary is well suited, absent congressional action or instruction, to consider and weigh the costs and benefits of allowing a damages action to proceed." *Ziglar*, 137 S. Ct at 1857-58. It may be less probable that Congress would want the Judiciary to allow for damages when the case "arises in a context in which Congress has designed its regulatory authority in a guarded way." *Id.* at 1858.

[5] Although the R&R did not reach Defendants' argument that a *Bivens* remedy does not exist for pre-trial plaintiffs or plaintiffs who have been convicted but not yet sentenced, *see* R&R at 11 n.2, this argument fails. All Plaintiffs in this action have valid *Bivens* claims, regardless of their conviction status. Since *Ziglar*, courts have found pretrial detainees' claims do not present new contexts. *See, e.g.*, *Bistrian v. Levi*, 912 F.3d 79, 91 (3d Cir. 2018) (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 *Ziglar*, 137 S. Ct. at 1861); *see also Geritano v. AUSA Office for E.D.N.Y.*, No. 20 Civ. 0781, 2020 WL 2192559 (S.D.N.Y. May 5, 2020) (permitting pretrial plaintiff to amend complaint to allege *Bivens* claims for violation of Fifth Amendment). Further, 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. As discussed *infra*, there is no "sound reason" to permit a convicted person to recover damages yet deny a remedy to pretrial detainees for the same occurrence. *Ziglar*, 137 S. Ct. at 1857. Because Plaintiffs' claims contain significant similarities to *Carlson*, those brought by pretrial detainees do not present a new context based solely on conviction status.

In *Ziglar*, the Supreme Court suggested certain features of the *Ziglar* Plaintiffs' claims different from *Carlson,* or simply not considered in that case, *might* discourage a court from authorizing a *Bivens* remedy and thus require close analysis: In *Carlson*, there "might" have been alternative remedies available to Plaintiffs—a writ of habeas corpus or an injunction requiring the warden to bring his prison into compliance with federal regulations—and the existence of alternative remedies usually precludes a court from authorizing a *Bivens* action.[6] 137 S. Ct. at 1865. But here, there are no alternative remedies available to Plaintiffs, as the Supreme Court has held that the FTCA is not an alternative remedy to *Bivens*, and the available evidence of Congressional intent as to *Bivens* is not ambiguous. Furthermore, separation of powers principles are not a special factor counseling hesitation. A *Bivens* remedy is thus available to Plaintiffs.

A. Under Settled Supreme Court Precedent, the FTCA Is Not an Alternative Remedy to *Bivens*

The R&R's second ground for denying a *Bivens* remedy, that the FTCA provides a sufficient alternative remedy, was rejected by the Supreme Court in *Carlson*, a holding that remains good law.

In 1974, three years after *Bivens* was decided, Congress amended the FTCA to allow individuals to sue the federal government for certain law enforcement torts. *See* Act of Mar. 16, 1974, Pub. L. No. 93-253, 88 Stat. 50. Prior to 1974, the FTCA only allowed damage actions against the United States for negligent or wrongful acts by government employees; it expressly exempted intentional torts. *See generally,* James E. Pfander & David Baltmanis, *Rethinking Bivens: Legitimacy and Constitutional Adjudication*, 98 Geo. L. J. 117 (2009). The amendment

[6] In addition, the Supreme Court acknowledged that the FTCA could provide compensation for the *Carlson* plaintiff's suffering but concluded that Congress intended the FTCA to supplement the *Bivens* remedy, not supplant it, and that the FTCA did not adequately protect prisoners' constitutional rights. *Ziglar*, 446 U.S. at 19-23.

was a response to congressional concerns that *Bivens* was not enough to deter unlawful drug enforcement home raids. *Id.* at 132-33.

The main issue in *Carlson* was whether a *Bivens* remedy was available "given that respondent's allegations could also support a suit against the United States under the Federal Tort Claims Act." 446 U.S at 16-17. The Court found that "the congressional comments accompanying [the 1974] amendment made it crystal clear that Congress views FTCA and *Bivens* as parallel, complementary causes of action." *Id.* at 19-20 (quoting S. Rep. No. 93-588, p. 3 (1973) ("this provision [of the FTCA] should be viewed as a *counterpart* to the *Bivens* case and its progenty [sic]") (emphasis added by the Supreme Court)). This type of statutory interpretation is entitled to "enhanced" stare decisis respect, because Congress would need only to amend the statute to alter the Court's interpretation. *See*, *e.g.*, *Kimble v. Marvel Entm't, LLC*, 576 U.S. 446, 456 (2015) ("[U]nlike in a constitutional case, critics of our ruling can take their objections across the street, and Congress can correct any mistake it sees.").

The *Carlson* Court canvassed four additional factors suggesting that *Bivens* is more effective than an FTCA remedy and supporting its conclusion that Congress did not intend for the FTCA to supplant *Bivens.* 446 U.S. at 20-23. (1) Damages against individuals are a more effective deterrent than damages against the United States; (2) *Bivens* allows punitive damages; (3) *Bivens* allows a plaintiff to opt for a jury; and (4) an FTCA claim leaves plaintiffs to "the vagaries" of state tort law. *Id.*

Carlson's holding—that the FTCA is not a relevant remedial scheme bearing on *Bivens* availability—has been repeatedly reaffirmed by the Supreme Court, including in recent years. In *Minneci*, for example, the Court distinguished the situation of federal prisoners, who cannot bring state-law tort claims against a federal employee (thus necessitating a *Bivens* remedy), and prisoners

in private prisons who can sue their private jailors directly in tort. 565 U.S. at 126. The distinction drawn by the Court would make no sense if FTCA claims—available to the former but not the latter—were to be considered in the equation. The Court drew a similar distinction in *Corr. Servs. Corp. v. Malesko,* 534 U.S. 61, 72 (2001), and both cases explain *Carlson's* reasoning and holding with respect to the FTCA without any reservation as to its continuing vitality. *Id.* at 68; *Minneci*, 565 U.S. at 124; *see also Wilkie v. Robbins*, 551 U.S. 537, 553 (2007) (same).

In line with these decades of precedent, *Ziglar* does not alter *Carlson's* conclusion about the relationship between the FTCA and *Bivens*. To the contrary, *Ziglar* reiterates that the special factors and alternative remedy question both stem from separation of powers concerns: when extension of a *Bivens* remedy is found inappropriate, this is "to respect the role of Congress in determining the nature and extent of federal-court jurisdiction under Article III." 137 S. Ct. at 1858. In *Carlson* the Supreme Court held that *Congress meant* the FTCA and *Bivens* actions to work alongside each other. 446 U.S at 19-20. To now identify the FTCA as a reason why Congress would not want the Judiciary to imply a *Bivens* remedy not only fails to respect controlling precedent, it ignores congressional intent in the name of respecting it. In fact, when the *Ziglar* Court remanded the remaining claim against the warden for special factors analysis, it excluded the FTCA from its list of alternate remedial structures to consider. *See* 137 S. Ct. at 1865.

Moreover, were there any doubt of *Carlson*'s continued vitality, the Supreme Court's decision in *Hernandez v. Mesa*, 140 S. Ct. 735 (2020), resolves it. In that decision, in rejecting the argument that the Westfall Act, which amended the FTCA in 1988, specifically *codified Bivens*, the Court nonetheless acknowledged that the Act "permits" *Bivens* claims and that "[b]y enacting this provision, Congress made clear that it was not attempting to abrogate *Bivens*." *Id.* at 748 n.9; *Williams v. Baker*, No. 16 Civ. 1540, 2020 WL 5814109, at *7 (E.D. Cal. Sept. 14, 2020) (relying

on *Hernandez* for proposition that "[t]he Westfall Act thus contemplates the continued application of *Bivens*."). The R&R did not address this binding language from *Hernandez*, instead focusing on the different, and irrelevant to this case, role that the FTCA's foreign country exception played in *Hernandez*. *See* R&R at 18.

The lower court decisions cited by the R&R in support of the conclusion that *Carlson*'s analysis of adequate alternative remedies does not survive *Ziglar* misconceive the issue. R&R at 16. This question is for the Supreme Court alone to answer. "Needless to say, only [the Supreme Court] may overrule one of its precedent. Until that occurs [it] is the law . . ." *Thurston Motor Lines, Inc. v. Jordan K. Rand, Ltd.*, 460 U.S. 533, 535 (1983); *see also Rodriguez v. Swartz*, 899 F.3d 719, 738 (9th Cir. 2018) (Supreme Court has not overruled *Carlson* "implicitly or explicitly"); *Williams*, 2020 WL 5814109, at *8 ("The Supreme Court has not repudiated its holding that the FTCA 'is not a sufficient protector of the citizens' constitutional rights,' [*Carlson*, 446 U.S. at 23], and this court remains bound by it."); *Powell v. United States*, No. 19 Civ. 11351, 2020 WL 5126392, at *10 (S.D.N.Y. Aug. 31, 2020) ("The Supreme Court has not been bashful in signaling its skepticism of the *Bivens* remedy—if the Court intended to overrule *Carlson*, I am quite sure it would simply do so."); *Jerra v. United States*, No. 12 Civ. 01907, 2018 WL 1605563, at *5 (C.D. Cal. Mar. 29, 2018) (relying on *Carlson* to reject FTCA as alternative remedial scheme bearing on availability of *Bivens* Eighth Amendment physical abuse claim); *Linlor v. Polson*, 263 F. Supp. 3d 613, 621 (E.D. Va. 2017) ("[T]he Supreme Court has squarely held that the FTCA does not provide an alternative remedial process bearing on the availability of a *Bivens* remedy."). And in one of the out-of-circuit cases cited by the R&R, *Oliva v. Nivar*, 973 F.3d 438, 444 (5th Cir. 2020), no one—not the parties in their briefing or the court in its decision—even addressed *Carlson*, perhaps because the case did not arise in the prison context. As such, its persuasiveness is significantly

limited, as it does not reflect a reasoned consideration of whether a lower court is positioned to consider a Supreme Court decision to be overruled *sub silentio*.

Because controlling Supreme Court precedent clearly states that the FTCA is not an alternative remedy to *Bivens*, the R&R's conclusions to the contrary must be rejected.

B. Separation of Powers Principles Are Not a Special Factor Counseling Hesitation in This Instance

Plaintiffs' allegations do not implicate any separation of powers principles counseling hesitation. As discussed *supra*, *Ziglar* instructs that, "[w]hen a party seeks to assert an implied cause of action under the Constitution itself . . .[,] separation-of-powers principles are or should be central to the analysis." 137 S. Ct. at 1857. The "inquiry must concentrate on whether the Judiciary is well suited, absent congressional action or instruction, to consider and weigh the costs and benefits of allowing a damages action to proceed," *id.* at 1857-58, and whether there are "sound reasons to think Congress might doubt the efficacy or necessity of a damages remedy." *Id.* at 1865. The focus is, accordingly, on making sure that courts "respect the role of *Congress* in determining the nature and extent of federal-court jurisdiction under Article III." *Id.* at 1843 (emphasis added). This is one of the reasons that the alternative remedies analysis focuses on whether Congress has created a process that "itself may amoun[t] to a convincing reason for the Judicial Branch to refrain from providing a new and freestanding remedy in damages." *Id.* (internal quotation marks and citation omitted) (alteration in original).

The R&R's analysis does not sufficiently take account of the Court's instruction. The R&R correctly concluded that the Prison Litigation Reform Act ("PLRA") does not amount to a convincing reason to refrain from creating a *Bivens* action in a case like this. R&R at 14. 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). 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 Congress's intent to reduce claims that are without merit. 42 U.S.C. § 1997e(c)(1). And *Ziglar* does not change this analysis. 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." *Ziglar,* 137 S. Ct. at 1865. *Ziglar* also noted that the PLRA's exhaustion provision applies to *Bivens* cases. *Id*. The Third Circuit has thus held that "[t]he 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 v. Levi*, 912 F.3d 79, 93 (3d Cir. 2018). As the R&R properly concluded, Congress plainly did not intend to limit *Bivens* by passing the PLRA. *See also Williams*, 2020 WL 5814109, at *5 ("[T]he better view is that the PLRA assumed the continued existence of the *Bivens* remedy in federal prison litigation. The PLRA thus gives no cause for hesitation.").

However, the R&R incorrectly identified separation of powers concerns having nothing to do with Congress when it identified the presence of discretion within the BOP as a special factor counseling hesitation in this case. R&R at 12-13. But the BOP's delegated authority has no constitutional salience, nor does it reflect any Congressional skepticism of *Bivens* remedies. *Williams*, 2020 WL 5814109, at *4 (finding no separation of powers concerns implicated by fact

that "Congress has delegated to BOP the responsibility for operating safe and orderly prisons." (quotation marks omitted)). If it did, then it would mean that *Bivens* claims could never be appropriate in the prison context. *Carlson* confirms that the prison context presents no special factors counseling hesitation against creation of a *Bivens* action. 446 U.S. at 19 (holding that defendants, including the director of the BOP, "do not enjoy such independent status in our constitutional scheme as to suggest that judicially created remedies against them might be inappropriate").

The R&R's invocation of *Turner v. Safley*, 482 U.S. 78 (1987), a Section 1983 case, is inapposite. That case concerned the constitutionality of regulations issued by the Missouri Division of Corrections, a state correctional system. *See* 482 U.S. at 96-97 (holding that the right of incarcerated people to marry is protected by the Constitution and that a marriage regulation prohibiting incarcerated people from marrying unless approved by the prison superintendent was not reasonably related to any legitimate penological objective). At most, it establishes that, because of the discretion afforded prison administrators, the content of some constitutional rights is altered by incarceration. But the Eighth and Fifth Amendment rights at issue here are not altered or filtered by the fact of incarceration but are created by the fact of incarceration. *Johnson v. California*, 543 U.S. 499, 510-11 (2005). The right to medical care, adequate food and water, and adequate shelter are affirmative rights that flow from the Government's decision to hold people against their will. *See, e.g.*, *Farmer*, 511 U.S. at 834; *Rhodes*, 452 U.S. at 346-47; *Estelle*, 429 U.S. at 103; *Phelps v. Kaplonas*, 308 F.3d 180, 185 (2d Cir. 2002).

On the contrary, the question of judicial competence to consider whether a detainee should have a cause of action for deliberate indifference cannot be divorced from the judiciary's long experience with allowing deliberate indifference *Bivens* claims by convicted prisoners. Whether

there are sound reasons to think Congress might doubt the necessity of a damages remedy may be informed by congressional reaction to similar, previously recognized, *Bivens* claims. *See Ziglar*, 137 S. Ct. at 1856 (with respect to the three *Bivens* cases allowed by the Supreme Court, noting that "no congressional enactment has disapproved of these decisions"). It is difficult to identify a sound reason to think Congress would disapprove of Plaintiffs' cause of action in situations where it has left parallel causes of action undisturbed. Moreover, any "sound reason" would need to account for the fact that the similar, previously recognized, claims will continue.

Here, as discussed *supra*, there would have to be a sound reason to believe Congress would disapprove of a damages remedy for pretrial detainees whom a warden has failed to protect, while identical claims by convicted prisoners in the same institution would still be honored. *See supra* at 7 (collecting cases). Detainees "have not been convicted of a crime and thus may not be punished in any manner—neither cruelly and unusually nor otherwise." *Darnell v. Pineiro,* 849 F.3d 17, 29 (2d Cir. 2017) (quotation marks and citations omitted); *Bell v. Wolfish,* 441 U.S. 520, 535-37 (1979). This means that their rights are "'at least as great as the Eighth Amendment protections available to a convicted prisoner.'" *Darnell*, 849 F.3d at 29 (quoting *City of Revere v. Mass. Gen. Hosp.,* 463 U.S. 239, 244 (1983)); *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"); *see also Kingsley v. Hendrickson*, 576 U.S. 389 (2015). It seems far more likely that Congress would see a negative impact to barring *Carlson*- type remedies for civil detainees but permitting them for convicted prisoners—who generally have less protection under the law.

Ziglar presented the Supreme Court with an opportunity to overrule *Bivens* altogether, to limit the three prior *Bivens* cases to their facts, or to dismiss *all* of Plaintiffs' claims as requiring

an unwarranted extension of the doctrine. Instead, the Court limited the *Bivens* doctrine significantly as respects challenges to executive policy in the realm of national security, but it did so while noting "the continued force, or even the necessity" of *Bivens* in the context in which it arose. 137 S. Ct. at 1856. "The settled law of *Bivens* in this common and recurrent sphere of law enforcement, and the undoubted reliance upon it as a fixed principle in the law, are powerful reasons to retain it in that sphere." *Id.* at 1857.

For decades now, *Bivens* has also been a settled means for detainees, mistreated in detention, to seek relief. *See Riley v. Kolitwenzew,* 526 F. App'x 653 (7th Cir. 2013); *Bistrian v. Levi*, 696 F.3d 352 (3d Cir. 2012); *Thomas v. Ashcroft*, 470 F.3d 491 (2d Cir. 2006); *Magluta v. Samples*, 375 F.3d 1269 (11th Cir. 2004); *Kwai Fun Wong v. United States*, 373 F.3d 952 (9th Cir. 2004); *Papa v. United States*, 281 F.3d 1004 (9th Cir. 2002); *Humphries v. Various Fed. USINS Emps.*, 164 F.3d 936 (5th Cir. 1999); *Wilkins v. May*, 872 F.2d 190 (7th Cir. 1989); *Cale v. Johnson*, 861 F.2d 943 (6th Cir. 1988), *abrogated on other grounds by Thaddeus-X v. Blatter*, 175 F.3d 378 (6th Cir. 1999) (en banc); *Lyons v. U.S. Marshals*, 840 F.2d 202 (3d Cir. 1988). In *Ziglar*, the Supreme Court clarified what is required for a *Bivens* remedy, instructing that even modest extensions of *Bivens* require analysis and care. Having undertaken that careful analysis, Plaintiffs' claims present no reason to depart from the "settled law of *Bivens*" in the context of conditions of confinement in a federal prison. *Ziglar*, 137 S. Ct. at 1857.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully object to the Report and Recommendation as to the dismissal of Plaintiffs' *Bivens* claims and request that Defendants' motion to dismiss be denied in full.

Dated: New York, New York
December 7, 2020

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