RECORD NO. 18-50977

In The

United States Court of Appeals

for the Fifth Circuit

GERARDO SERRANO, on behalf of himself and all others similarly situated,

Plaintiff-Appellant,

v.

CUSTOMS AND BORDER PATROL, U.S. Customs and Border Protection; UNITED STATES OF AMERICA; JOHN DOE 1- X; JUAN ESPINOZA; KEVIN MCALEENAN,

Defendants-Appellees.

On Appeal from the United States District Court for the Western District of Texas, Del Rio Division, No. 2:17-cv-00048-AM-CW, Honorable Alia Moses, Presiding

OPENING BRIEF FOR PLAINTIFF-APPELLANT

Darpana Sheth
INSTITUTE FOR JUSTICE
901 North Glebe Road, Suite 900
Arlington, VA 22203
(703) 682-9320
Lead Counsel for Plaintiff-Appellant

Anya Bidwell
INSTITUTE FOR JUSTICE
816 Congress Avenue, Suite 960
Austin, TX 78701
(512) 480-5936
Counsel for Plaintiff-Appellant

CERTIFICATE OF INTERESTED PERSONS

(1) Case Number 18-50977: *Gerardo Serrano v. U.S. Customs and Border Protection, et al.*

(2) The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of 5th Cir. R. 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

Plaintiff-Appellant

Gerardo Serrano

Counsel for Plaintiff-Appellant

INSTITUTE FOR JUSTICE
Darpana Sheth
Anya Bidwell

Defendants-Appellees

U.S. Customs and Border Protection;
United States of America;
Kevin McAleenan, Commissioner, U.S. Customs and Border Protection, sued in his official capacity;[1]
Juan Espinoza, Fines, Penalties, and Forfeiture Paralegal Specialist, sued in his individual capacity; and
John Doe 1-X, unknown U.S. Customs and Border Protection agents, sued in their individual capacities.

[1] On April 7, 2019, Commissioner McAleenan was named Acting Secretary for the Department of Homeland Security. Under Federal Rule of Appellate Procedure 43(c)(2), his "successor is automatically substituted as a party."

Counsel for Defendants-Appellees

UNITED STATES ATTORNEY FOR THE WESTERN DISTRICT OF TEXAS
John F. Bash
Noah M. Schottenstein
Sean Bryan O'Connell

U.S. DEPARTMENT OF JUSTICE
Carleen Mary Zubrzycki

/s/ *Darpana M. Sheth*
Lead Counsel for Plaintiff-Appellant

STATEMENT REGARDING ORAL ARGUMENT

Gerardo Serrano, Plaintiff-Appellant, respectfully requests twenty minutes of oral argument for each side. Oral argument would be useful as an opportunity to address three important constitutional issues necessary to deciding this case: (1) whether failing to provide a prompt hearing after seizing vehicles for civil forfeiture violates the Fifth Amendment's guarantee of due process; (2) whether requiring property owners to post a bond in order to seek judicial review of the seizure of their property violates due process; and (3) whether, when law-enforcement officers seize vehicles for civil forfeiture without providing a timely post-seizure hearing, plaintiffs can bring a damages claim under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). Allowing oral argument on these issues would aid in their careful and comprehensive consideration and analysis.

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JURISDICTIONAL STATEMENT

Gerardo Serrano sued U.S. Customs and Border Protection and its officials for violating his rights under the Fourth and Fifth Amendments to the United States Constitution. Gerardo also brought claims for injunctive and declaratory relief on behalf of a class for violating their due-process rights. Accordingly, the district court properly exercised its jurisdiction under 28 U.S.C. § 1331.

On September 28, 2018, the district court dismissed Gerardo's class-wide and individual claims under Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim upon which relief could be granted. ROA.471-511. This Court has appellate jurisdiction under 28 U.S.C. § 1291 because the district court's final judgment disposed of all claims. ROA.510-11. Gerardo filed a timely and sufficient notice of appeal on November 21, 2018. ROA.512-14.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Did the district court err in dismissing, under Rule 12(b)(6), Gerardo's class-wide claim for the violation of due process when it:

   a. deviated from blackletter law requiring prompt hearings after even temporary deprivations of property and instead relied on an inapposite case to hold that Defendants were not, as a matter of law, required to provide a prompt hearing after seizing vehicles for civil forfeiture; and

   b. held that it does not violate due process, as a matter of law, to require property owners to post a bond before they can seek judicial review of the seizure of their vehicle?

2. Whether, when law-enforcement officers seize vehicles for civil forfeiture without providing a prompt, post-seizure hearing and when there is no other way to trigger such a hearing, plaintiffs can bring a claim for damages under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971) to vindicate their Fourth and Fifth Amendment rights?

STATEMENT OF THE CASE

Statement of Facts

Appellant Gerardo Serrano is a U.S. citizen and a resident of Tyner, Kentucky. ROA.11. He is so proud of the U.S. Constitution that he has run for elected office on a platform of respect for Americans' constitutional rights. ROA.14.

On September 21, 2015, Gerardo drove his recently purchased Ford F-250 pick-up truck to the U.S.-Mexico border in Eagle Pass, Texas, with the ultimate destination of Piedras Negras, Mexico, where some of his family still lives. ROA.13. While on the U.S. side of the border, Gerardo took pictures of the border crossing with his iPhone so that he could post them on social media to share with family, friends, and other followers. ROA.13.

Two U.S. border agents objected to Gerardo's taking pictures and, after stopping his truck, physically removed him from it, took possession of his phone, and repeatedly demanded the password to unlock his phone. ROA.13-16. Invoking his constitutional rights, Gerardo refused to provide the password to his phone while politely offering to do so if the officers obtained a valid search warrant. ROA.14, 16. The border agents disagreed,

with one of them telling Gerardo he was "sick of hearing about [ ] rights" and "you have no rights here." ROA.15.

While searching inside Gerardo's truck, the border agents found five .380 caliber bullets and one .380 caliber magazine in the center console, prompting one border agent to call out: "We got him!" and another one to tell Gerardo: "You're in big trouble now." ROA.15. There was no gun in the vehicle. ROA.15. Gerardo explained that he had a valid concealed-carry permit issued by his home state of Kentucky, and on his way to Eagle Pass he passed only through states that grant reciprocity to that firearm permit. ROA.15. He also explained that he had forgotten that the bullets and magazine were in the truck. ROA.15-16. As he had not yet crossed into Mexico, he offered to turn around and leave the border facility or leave the magazine and low-caliber bullets at the border facility. ROA.16.

Instead, CBP agents handcuffed Gerardo and detained him for about three hours, trying to unlock his phone. ROA.14, 17. Subsequently, one of the agents told Gerardo he was free to go but that the government was seizing his truck, in addition to the magazine with the low-caliber bullets. ROA.17. Gerardo left the detention facility on foot. ROA.17.

On October 1, 2015, CBP sent Gerardo a notice of seizure, informing him that the agency intended to use civil forfeiture to take his truck and

magazine with five bullets on the ground that he had attempted to export "munitions of war" from the United States. ROA.17, 18. The notice informed Gerardo he had four options: He could (1) file a remission petition, essentially asking the agency to return the property as a matter of grace; (2) submit an "offer in compromise" and include a check of the proposed settlement amount along with the offer; (3) abandon any interest in the property; or (4) request to have his case referred to the U.S. Attorney to begin judicial forfeiture proceedings. ROA.17-18; ROA.268-70. If he selected this last option, the notice stated that he must post a bond equal to ten percent of the value of the seized property. ROA.18. On October 22, 2015, Gerardo responded demanding immediate return of his truck or a hearing in court (the fourth option). ROA.18. He posted the required bond by sending a check for $3,804.99, which, according to Gerardo's bank records, CBP promptly deposited. ROA.18.

On four separate occasions, Gerardo called Defendant Juan Espinoza, the primary point of contact identified in the notice of seizure, to inquire about the status of his case and ask for his day in court. ROA.18. During one of these calls, Defendant Espinoza told Gerardo that his case was taking so long because he had asked to see a judge. ROA.19.

Defendant Espinoza also informed Gerardo that he would have to wait for his case to be referred to an available Assistant United States Attorney. ROA.19. Not content waiting, Gerardo submitted a Freedom of Information Act request to CBP asking for information about the seizure and forfeiture of his truck. ROA.19. CBP never responded to it. ROA.19. In the meantime, Defendants John Doe 1-X continued to maintain custody over Gerardo's truck, despite the government's failure to provide any kind of post-seizure hearing. ROA.13.

Twenty-three months went by without Defendants providing Gerardo any kind of hearing at which he could challenge the seizure or the continued retention of his vehicle or even beginning judicial proceedings. ROA.19, 20. Meanwhile, the truck continued to sit in an outside parking lot, depreciating in value, with Gerardo continuing to make close to $18,000 in loan, insurance, and registration payments for a truck that he could not drive. *See* ROA.21. Gerardo also spent thousands of dollars on rental cars. ROA.21.

Procedural History

Gerardo filed this lawsuit on September 6, 2017, 23 months after the seizure, alleging four counts. Count I sought the return of Gerardo's "truck and all of its contents, his magazine with five bullets, and the $3,804.99

that he posted as a bond" under Federal Rule of Criminal Procedure 41(g) because the seizure and continued retention of his property violated his Fourth and Fifth Amendment rights. ROA.27-28. Counts II and III sought damages under *Bivens* for violating Gerardo's Fourth and Fifth Amendment rights, respectively. ROA.28-30. Count IV sought injunctive and declaratory relief on behalf of a putative class under Federal Rule of Civil Procedure 23(b)(2), directing the Class Defendants (United States, CBP, and Commissioner McAleenan) to provide prompt, post-seizure hearings when they seize vehicles for civil forfeiture. ROA.30-31. Simultaneously with the filing of the complaint, Gerardo moved to certify a class of "all U.S. citizens whose vehicles are or will be seized by CBP for civil forfeiture and held without a post-seizure hearing." ROA.48.

A little more than a month after Gerardo filed this lawsuit, CBP returned Gerardo's truck. ROA.248. On December 13, 2017, the Class Defendants moved to dismiss on the grounds of mootness and failure to state a claim. ROA.239. Defendant Espinoza also moved to dismiss, arguing that *Bivens* did not apply to Gerardo's individual claims for damages. ROA.274.

After moving to dismiss, the government also returned Gerardo's bond money, as well as his magazine and five bullets, thereby mooting

Count I, Gerardo's individual claim for return of property. ROA.399-401; ROA.402-04. On July 23, 2018, the magistrate judge issued a report recommending that Gerardo's remaining claims were not moot, but that he failed to state any claim upon which relief could be granted. ROA.405-40.[2]

On September 28, 2018, the district court, over Gerardo's objections, adopted the magistrate judge's recommendations, granted the government's motions to dismiss, and denied Gerardo's motion to certify a class. ROA.471-511. The district court held that Gerardo failed to state a claim on behalf of a class because "due process does not require a prompt, post-seizure, pre-forfeiture hearing" and because the bond requirement did not violate due process. ROA.493. The district court also dismissed Gerardo's individual claims for damages, reasoning that *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971) did not apply and there was no other way to demand damages from federal officers based on violations of constitutional rights. ROA.510.

Gerardo noticed an appeal on November 21, 2018. ROA.512. He is now before this Court, asking it to overrule the district court's order

[2] Notably, the government had not moved to dismiss Gerardo's class-wide claim alleging that the bond requirement violated due process and so the parties had not briefed the issue. ROA.239-47.

granting the government's motions to dismiss and send the case back to the district court.

SUMMARY OF THE ARGUMENT

Customs and Border Protection officers took Gerardo's truck and kept it for 23 months, without letting him see a judge, all because the officers found a magazine with five low-caliber bullets, so-called "munitions of war," inside his truck. (Gerardo forgot to remove the magazine and bullets when he decided to keep his legally owned gun at home). Had Gerardo not filed this lawsuit, he would probably still be waiting for his truck, begging to have an opportunity to contest its seizure, despite paying a bond of $3,804.99 for the right to do so. But because Gerardo filed this lawsuit, CBP quickly returned Gerardo's property, including the "munitions of war" and his bond, and asked the district court to dismiss the case, as if the previous two years never happened.

But the United States Constitution does not allow the government to treat people this way. The Fourth Amendment protects individuals from unreasonable seizures and the Fifth Amendment guarantees them due process, both of which were denied to Gerardo.

Yet, the district court dismissed all of Gerardo's claims. This Court should reverse the district court's judgment and allow the case to move

forward for three reasons. First, Gerardo properly stated a class claim that Defendants must provide prompt, post-seizure hearings when they take property for civil forfeiture. After all, it is blackletter law that property owners have a due-process right to a prompt opportunity to challenge even temporary deprivations of property. Consequently, numerous courts have held that government must provide a prompt, post-seizure hearing when it seizes vehicles, including in the context of civil forfeiture. *Smith v. City of Chicago*, 524 F.3d 834, 838 (7th Cir. 2008), *vacated as moot* 558 U.S. 87 (2009); *Krimstock v. Kelly*, 306 F.3d 40, 44 (2d Cir. 2002); *Washington v. Marion Cty. Prosecutor*, 264 F. Supp. 3d 957, 978-79 (S.D. Ind. 2017), *remanded on other grounds*, 916 F.3d 676 (7th Cir. 2019); *Brown v. District of Columbia*, 115 F. Supp. 3d 56, 66-67 (D.D.C. 2015). A faithful application of *Mathews v. Eldridge*, 424 U.S. 319 (1976) reveals that the private interest of being deprived of a car is substantial and, coupled with the risk of erroneous deprivation, significantly outweighs the government's interest, including any burdens imposed by providing property owners a prompt, post-seizure hearing.

Second, Gerardo properly stated a class claim that it is unconstitutional to condition a forfeiture hearing on the property owner posting a bond. As the Supreme Court has held, it violates due process to

require a party to post a bond merely to have his or her suit entertained by a court. *See, e.g.*, *N. Ga. Finishing, Inc. v. Di-Chem Inc.*, 419 U.S. 601, 607 (1975).

Finally, Gerardo has a cause of action for damages under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). The district court incorrectly concluded that Gerardo does not have a claim for damages against individual Defendants. The district court erred in misapplying *Bivens* and finding that Gerardo's claims arose in a new context rather than the established search-and-seizure framework endorsed in *Bivens* itself, as well as in *Davis v. Passman*, 442 U.S. 228 (1979) and *Ziglar v. Abbasi*, 137 S. Ct. 1843 (2017). There are also no factors counselling hesitation in allowing Gerardo's damages claims to move forward, since there is no alternative framework that could redress Gerardo's Fourth and Fifth Amendment claims and provide a right to a prompt, post-seizure hearing or a remedy where such a hearing is denied. In addition, Congressional silence only counsels in favor of recognizing Gerardo's claims, and there is simply no evidence that federal agents must pay for damages out of their own pockets or that providing post-seizure hearings would adversely affect U.S. national security or its foreign policy. The district court's decision erroneously limits the *Bivens* doctrine to its

facts, cutting off many plaintiffs from being able to sue federal officers for violating their constitutional rights. Such a narrow application of *Bivens* would resonate beyond this case and could even affect the constitutionality of the Westfall Act, which made *Bivens* the exclusive means for vindicating constitutional rights through damages.

For these reasons the Court should reverse the district court's judgment and allow Gerardo's case to move forward.

ARGUMENT

Standard of Review

This Court reviews *de novo* the dismissal of a complaint. *Lindquist v. City of Pasadena*, 525 F.3d 383, 386 (5th Cir. 2008). To prevent dismissal under Rule 12(b)(6), civil complaints must set forth "sufficient factual matter" to show that the claim is facially plausible. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009); *Richardson v. Axion Logistics, LLC*, 780 F.3d 304, 306 (5th Cir. 2015). In examining a complaint under Rule 12(b)(6), courts must accept all factual allegations as true, construe the complaint in the light most favorable to the plaintiff, and determine whether, under any reasonable reading of the complaint, the plaintiff may be entitled to relief. *Woodward v. Andrus*, 419 F.3d 348, 351 (5th Cir. 2005). "[A] well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of

those facts is improbable, and 'that a recovery is very remote and unlikely.'" *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556 (2007) (citation omitted). In deciding a motion to dismiss under Rule 12(b)(6), courts are limited to the four corners of the complaint and matters of public record. *Funk v. Stryker Corp.*, 631 F.3d 777, 783 (5th Cir. 2011).

I. GERARDO PLAUSIBLY STATES A CLAIM FOR VIOLATION OF DUE PROCESS ON BEHALF OF A PUTATIVE CLASS, AND THEREFORE THE MOTION TO CERTIFY IS NOT MOOT.

The district court dismissed Count IV, incorrectly finding that Gerardo failed to state a claim for a due-process violation on behalf of a class. ROA.493. Specifically, Count IV alleges that two CBP practices violated due process: (1) failing to provide a prompt hearing after it seizes vehicles for civil forfeiture; and (2) requiring property owners to post a bond to institute judicial review of forfeitures. ROA.30. Gerardo seeks class-wide injunctive relief enjoining these practices and corresponding declaratory relief. ROA.31.

As explained below, the district court erroneously concluded that neither practice violated due process as a matter of law. ROA.493. Consequently, it erred in both dismissing Count IV for failure to state a claim and denying Gerardo's motion for class certification as moot. ROA.510-11.

A. Due Process Requires a Prompt, Post-Seizure Hearing.

The Supreme Court has consistently recognized "the high value, embedded in our constitutional and political history, that we place on a person's right to enjoy what is his free of government interference." *Fuentes v. Shevin*, 407 U.S. 67, 81 (1972). Allowing the government to seize vehicles without affording owners an adequate opportunity to be heard eviscerates the fundamental guarantee of the Due Process Clause that "[n]o person shall . . . be deprived of life, liberty, or property, without due process of law." U.S. Const. amend. V. A necessary element to due process is the opportunity to be heard, which "must be granted at a meaningful time and in a meaningful manner." *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965).

Here, the district court committed two errors. First, it ignored a long line of authority requiring prompt hearings to contest even temporary deprivations of property. Second, it compounded this error by improperly weighing the *Mathews v. Eldridge* factors for determining what process is due.

1. The district court erred by contravening blackletter law that due process requires a prompt hearing to contest even temporary deprivations of property.

It is well established that the Constitution requires a prompt hearing to contest even temporary deprivations of property. *See, e.g.*, *Sniadach v.*

Family Fin. Corp. of Bay View, 395 U.S. 337 (1969) (holding that prejudgment garnishment procedure, in which wages are frozen in interim before trial of main suit without any opportunity to be heard, denied due process).[3] The district court ignored this blackletter law, instead dismissing Gerardo's class-wide claim on the pleadings after following an inapposite case in a far more advanced procedural posture. ROA.485-88, 490-93.

Due process requires a prompt, post-deprivation hearing to contest the seizure of household goods, furniture, and even appliances. *See, e.g.*, *Mitchell v. W.T. Grant Co.*, 416 U.S. 600, 601, 606-10 (1974) (allowing sequestration of refrigerator, range, stereo, and washing machine because challenged statute afforded debtor the right to an immediate hearing); *Fuentes v. Shevin*, 407 U.S. 67 (1972) (striking down seizure of stove, stereo, table, bed, and other household goods because there was no prompt hearing). Not surprisingly then, a majority of courts have held that due process requires a prompt hearing after the government seizes a person's *vehicle. See, e.g.*, *Coleman v. Watt*, 40 F.3d 255, 260-61 (8th Cir. 1994)

[3] Generally, the Constitution requires a hearing *before* even temporary or partial deprivations of property. *See, e.g.*, *Connecticut v. Doehr*, 501 U.S. 1, 9-10, 16-18 (1991) (holding prejudgment attachment of real estate, without prior notice, hearing, or exigent circumstances, violated due process). There are "some exceptions to the general rule requiring predeprivation notice and hearing, but only in extraordinary situations where some valid government interest is at stake that justifies postponing the hearing." *United States v. James Daniel Good Real Property*, 510 U.S. 43, 53 (1993) (citations omitted).

(due process violation where hearing, held seven days after impoundment of vehicle, was not prompt); *Draper v. Coombs*, 792 F.2d 915, 922-24 (9th Cir. 1986) (due process violation where government failed to provide hearing after seizure of car); *Stypmann v. City & Cty. of San Francisco*, 557 F.2d 1338, 1344 (9th Cir. 1977) (five-day delay in holding hearing to challenge seizure was "clearly excessive" as it "may impose onerous burdens upon a person deprived of his vehicle"); *see also Frier v. City of Vandalia*, 770 F.2d 699, 708 (7th Cir. 1985) (Swygert, J., concurring) ("[T]he deprivation of an automobile is too serious a burden on the individual to allow the government to retain possession in the interim at its [u]nfettered discretion.").

And in the specific context of civil forfeiture, many courts have held that due process requires a prompt hearing to contest both the validity of the initial seizure and the continued retention of the vehicle while forfeiture proceedings are pending. *See, e.g.*, *Krimstock,* 306 F.3d at 69 (Sotomayor, J.); *Lee v. Thornton*, 538 F.2d 27, 33 (2d Cir. 1976); *Washington*, 264 F. Supp. 3d at 978-79;[4] *Simms v. Dist. of Columbia*, 872 F. Supp. 2d 90, 100-07 (D.D.C. 2012) (due process required immediate release of car pending

[4] On appeal, the Seventh Circuit remanded the case for further proceedings because Indiana had amended its vehicle forfeiture statute and the record required further development. *Washington v. Marion Cty. Prosecutor*, 916 F.3d 676, 678-80 (7th Cir. 2019).

forfeiture proceedings); *see also Smith*, 524 F.3d at 838, *vacated as moot*; *Brown*, 115 F. Supp. 3d at 60; *Sourovelis v. City of Philadelphia*, 103 F. Supp. 3d 694, 708 (E.D. Pa. 2015) (holding complaint sufficiently stated a claim that Pennsylvania forfeiture statute did not provide "constitutionally sufficient 'chance to contest the basis for the deprivation at a meaningful time and in a meaningful manner'").

Breaking with this long line of authority, the district court relied on *United States v. One 1971 BMW 4-Door Sedan*, 652 F.2d 817 (9th Cir. 1981), to hold that Gerardo failed to plausibly allege a due-process claim. This was error for three reasons. First, the Ninth Circuit held that due process did not require a probable-cause hearing *within 72 hours* of seizure of a car. *Id.* at 820-21. *One 1971 BMW* does not support the proposition that due process never requires a prompt, post-seizure hearing; it stands for the modest proposition that providing individuals with a hearing within three days of seizing their car is sufficient to satisfy due process. By contrast, the government deprived Gerardo of his vehicle for almost *two years* and never even began forfeiture proceedings. ROA.19-20. Moreover, as alleged in the Complaint, CBP *never* holds pretrial hearings in forfeiture cases, no matter how many days, months, or years might elapse between the seizure and the

property owner's first opportunity to go to court. ROA.31. Thus, the promptness of the hearing is not even an issue.

Second, unlike this case, which was dismissed on the pleadings, *One 1971 BMW* was decided on a full record—only after "[a] judgment and decree of forfeiture in favor of the United States . . . [involving] somewhat lengthy proceedings in which appellant's claims were litigated." 652 F.2d at 819. Thus, *One 1971 BMW* does not support the district court's holding that Gerardo failed to state a due-process claim as a matter of law.

Third, the statutory scheme challenged in *One 1971 BMW* provided greater protection than the one challenged here. Under the forfeiture scheme challenged in *One 1971 BMW*, the federal government could only forfeit property after independent investigation by the U.S. Attorney's Office and only pursuant to a judgment of an Article III court. *Id.* at 819-20 & n.1. These protections do not apply here because they do not apply to property—like Gerardo's truck or the vehicles of putative class members—worth less than $500,000. Instead, Gerardo and putative class members must first wind their way through CBP's administrative forfeiture procedures. *See* 19 U.S.C. §§ 1607, 1610. And to obtain "independent" investigation by the U.S. Attorney and begin judicial proceedings, property owners must pay a substantial bond. 19 U.S.C. § 1608.

By following an inapposite case instead of the long line of cases on all fours with Gerardo's challenge, the district court erred in concluding that due process did not require a prompt, post-seizure opportunity to contest the seizure and continued retention of vehicles seized for civil forfeiture.

2. The district court improperly weighed the *Mathews* factors.

Application of the *Mathews v. Eldridge* framework requires a prompt, post-seizure hearing at which property owners can contest the government's seizure and continued retention of their property. In identifying the "specific dictates of due process," courts must consider three factors: (1) "the private interest that will be affected by the official action;" (2) "the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards;" and (3) "the Government's interest, including the function involved and the fiscal and the administrative burdens that the additional or substitute procedural requirement would entail." *Mathews*, 424 U.S. at 334-35.

The district court found that while the first factor supported Gerardo, the other two supported the government. ROA.485. As discussed below, the district court erred in analyzing each factor.

a. Gerardo and putative class members' interest in the use of their vehicles is significant.

The Supreme Court has consistently held the right to property to be "a private interest of historic and continuing importance," particularly when judging the adequacy of procedures before an individual can be deprived of property. *James Daniel Good*, 510 U.S. at 53-54, 61. Here, the district court properly determined that the "seizure of a vehicle implicates an important private interest in being able to travel and go to work." ROA.490; *see also* ROA.424. However, the district court incorrectly stated "that an individual's private interest in a vehicle may not be as compelling as *Krimstock* suggests, at least in circumstances where the applicable forfeiture procedures provide for ultimate judicial determination." ROA.490. This *dicta* is erroneous.

The Second Circuit in *Krimstock* found that an eventual judicial hearing did not dispense with the need for prompt, post-seizure hearing because of the "the temporal gap that typically exists between seizure of the vehicle and the forfeiture proceeding." 306 F.3d at 53. Under New York's procedures, "forfeiture proceedings were commenced, at the earliest, three weeks after seizure" and the "period between the seizure and the holding of a hearing in the forfeiture action [was] . . . considerably longer." *Id.* at 54.

Here, CBP's forfeiture procedures provide no deadline for the government to begin forfeiture proceedings or hold a trial on the merits.

Moreover, as the Second Circuit and other courts have correctly recognized, the interim deprivation of a vehicle—not yet proven to be involved in criminal activity—itself works a great hardship, especially for people of modest means and those who are innocent owners. The pre-hearing deprivation is particularly devastating where the property owner ultimately prevails at trial, or the vehicle is returned before trial, as it was here. *Id.* at 64, *see also* ROA.248. In those circumstances, a person may be vindicated but their property has been useless for months or even years. Even if the property owner ultimately prevails at trial and the car is returned, the interim deprivation can work a significant, and sometimes irreparable, injury. The Supreme Court has repeatedly cautioned that a final determination, "coming months after the seizure, would not cure the temporary deprivation that an earlier hearing might have prevented." *James Daniel Good*, 510 U.S. at 56; *see also Doehr*, 501 U.S. at 15 ("It is true that a later hearing might negate the presence of probable cause, but this would not cure the temporary deprivation that an earlier hearing might have prevented."); *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 20 (1978) ("Although utility services may be restored ultimately, the

cessation of essential services for any appreciable time works a uniquely final deprivation.").

Thus, both the individual's right to property and the serious interim injury caused by the length of deprivation before trial requires a prompt, post-seizure hearing.

b. CBP's forfeiture procedures create a high risk of erroneous deprivation.

Analyzing the second *Mathews* factor, the district court wrongly concluded that the risk of erroneous deprivation is minimal because of the purported availability of other protections under federal law. Specifically, the district court pointed to the availability of (1) petitions for remission and (2) the opportunity to have the case submitted to the U.S. Attorney for an independent evaluation and, ultimately, judicial review. ROA.486.

The district court was wrong because neither a petition for remission nor review by a prosecutor afford property owners the protection of a neutral decisionmaker, as required by due process. In *James Daniel Good*, the Supreme Court held that due process required a pre-seizure hearing even though a judge had already found, in an *ex parte* proceeding, probable cause that the property was subject to forfeiture. *Good*, 510 U.S. at 47. Here, there is no judicial finding, *ex parte* or otherwise, until the forfeiture trial itself, and only then if the property owner posts the required bond.

Here, the first alternative, a petition for remission, is a completely discretionary plea to the agency for the return of property. *See* 19 U.S.C. § 1618; 19 C.F.R. § 171.1. That a vehicle owner can ask for mercy from the agency responsible for the seizure itself is not a procedural protection that can minimize the risk of an erroneous deprivation.

The second alternative, review by a prosecutor, also is insufficient and does not meaningfully distinguish the line of vehicle forfeiture cases deemed irrelevant by the district court. ROA.483, 491-92 (eschewing cases involving seizures under "state, municipal, or district" forfeiture statutes which did not afford the protections available under federal law).[5] Review by a prosecutor was also available in these cases and the courts found that to be an insufficient protection. *See Smith*, 524 F.3d at 835 (noting statute required law-enforcement agency to notify the state's attorney of the seizure and the circumstances leading to it); *Krimstock*, 306 F.3d at 44-45 (noting claimants could petition for a district attorney for release of property); *Washington*, 264 F. Supp. 3d at 961-63 (noting prosecuting attorney was responsible for bringing a forfeiture action); *Brown*, 115 F. Supp. 3d at 61 (noting Attorney General initiated forfeiture proceedings in

[5] While cases challenging state or municipal vehicle seizures involve the Fourteenth Amendment's Due Process Clause, the scope of that clause is coterminous with that of the Fifth Amendment's Due Process Clause. *See Mathews v. Diaz*, 426 U.S. 67, 77 (1976).

the District of Columbia Superior Court). Additionally, under the challenged federal scheme here, review by the U.S. Attorney's Office (and subsequent judicial review) is only available upon paying a significant bond.

But petitions for remission and review by the U.S. Attorney's Office are also insufficient to satisfy the dictates of due process for another key reason, completely overlooked by the district court. Under the challenged statutory scheme, CBP retains forfeited property or its proceeds to fund its law-enforcement operations, giving the agency and its officers a direct financial stake in seizing and forfeiting property. 19 U.S.C. § 1613b (creating Customs Forfeiture Fund and specifying permissible uses to include purchase of equipment, vessels, vehicles, and aircraft); 31 U.S.C. § 9705 (creating Treasury Forfeiture Fund as successor to Customs Forfeiture Fund). The financial interest is significant: From 2001 to 2014, deposits to the Treasury Forfeiture Fund totaled more than $6.8 billion.[6] *See* Dick M. Carpenter, II, *et al.*, *Policing for Profit: The Abuse of Civil Asset Forfeiture*, 148 (2d ed. Nov. 2015), https://ij.org/pfp-state-pages/policing-profit-federal-government.

[6] These data were compiled from publicly available Treasury Forfeiture Fund Accountability Reports, *available at* https://www.treasury.gov/resource-center/terrorist-illicit-finance/Asset-Forfeiture/Pages/annual-reports.aspx).

Thus, far from providing greater protections, CBP seizures require greater scrutiny by an impartial judicial officer before the forfeiture trial. Giving closer scrutiny to the actions of public officials and agencies when they have a direct financial stake in the outcome of proceedings is nothing new for courts. As the Supreme Court recently noted, civil forfeitures, like other types of fines, "may be employed 'in a measure out of accord with the penal goals of retribution and deterrence,' for 'fines are a source of revenue,' while other forms of punishment 'cost a State money.'" *Timbs v. Indiana*, 139 S. Ct. 682, 689 (2019) (quoting *Harmelin v. Michigan*, 501 U.S. 957, 979 n.9 (1991) (plurality op.) ("[I]t makes sense to scrutinize governmental action more closely when the State stands to benefit.")).

A long line of Supreme Court cases supports the proposition that when government officials have an incentive to act for self-interested reasons, courts must stand guard against unwarranted deprivations of property. *See Ward v. Vill. of Monroeville*, 409 U.S. 57 (1972) (holding where much of the town's revenues came from fines, having the mayor sit as judge violated due process); *Tumey v. Ohio*, 273 U.S. 510 (1927) (overturning fine where mayor also sat as judge and personally received a share of the proceeds). In *Marshall v. Jerrico*, the Supreme Court cautioned about the "possibility that [the official's] judgment will be

distorted by the prospect of institutional gain as a result of zealous enforcement efforts." 446 U.S. 238, 250 (1980); *see id.* at 249-50 ("A scheme injecting a personal interest, financial or otherwise, into the enforcement process may bring irrelevant or impermissible factors into the prosecutorial decision and in some contexts raise serious constitutional questions.").

Given the strong financial incentive underlying enforcement of federal forfeiture laws, the failure to provide a prompt, post-seizure hearing creates a distinct risk of error. A pretrial evidentiary hearing before a neutral decisionmaker would curb the dangerous incentives underlying the Treasury Forfeiture Program and mitigate the risk of erroneous deprivations.

c. The government's asserted interests do not tip the Mathews scale.

Analyzing the third *Mathews* factor, the district court erred by making factual determinations and improperly concluding that the government's interest in enforcing customs laws and the potential administrative burden of providing prompt hearings outweighed Gerardo's interest. ROA.487. Again, misguidedly relying on *One 1971 BMW*, the district court determined that "the interest of the Plaintiff in the uninterrupted use of his vehicle is not so compelling as to outweigh the

substantial interest of the government in controlling [the illegal exportation of munitions] without being hampered by costly and substantially redundant administrative burdens." ROA.492.

As an initial matter, it is certainly questionable whether *unknowingly* transporting a magazine with five low-caliber bullets (but no gun) even constitutes exporting "munitions of war." *See Rubin v. United States*, 289 F.2d 195, 199 (5th Cir. 1961) ("Further, 22 U.S.C.A. § 401, [ ] cannot properly be construed to authorize forfeiture in the absence of an *actual intent to export* the munitions of war in violation of law.") (emphasis added). The district court inappropriately determined that the straightforward nature of the allegation "that the Plaintiff's vehicle contained the magazine and bullets when he was attempting to enter Mexico" made any "errors unlikely." ROA.491. Gerardo respectfully disagrees.

Even assuming the CBP border agents correctly determined that Gerardo was engaged in illegal activity, it would not, as a matter of law, tip the *Mathews* scale in favor of the government or constitute an exception to the prompt hearing requirement. *See, e.g.*, *James Daniel Good*, 510 U.S. at 56-59 (government's interest in curbing illegal narcotics trade insufficient to eliminate need for pre-seizure hearing). And particularly in the context

of national security, the Supreme Court has cautioned about the great importance of "striking the proper constitutional balance" when applying the *Mathews* framework:

> [I]t is equally vital that our calculus not give short shrift to the values that this country holds dear or to the privilege that is American citizenship. It is during our most challenging and uncertain moments that our Nation's commitment to due process is most severely tested; and it is in those times that we must preserve our commitment at home to the principles for which we fight abroad.

Hamdi v. Rumsfeld, 542 U.S. 507, 532-33 (2004) (plurality op.) (applying *Mathews* to hold that a citizen detained as an enemy combatant had a right to receive a "fair opportunity to rebut the Government's factual assertions before a neutral decisionmaker"); *see also Joint Anti-Facist Refugee Comm. v. McGrath*, 341 U.S. 123, 162 (1951) (Frankfurter, J., concurring) ("The requirement of 'due process' is not a fair-weather or timid assurance. It must be respected in periods of calm and in times of trouble[.]").

When Plaintiff filed this lawsuit, the government had detained his truck "indefinitely—without formal charges or proceedings" against either him or his truck. *Hamdi*, 542 U.S. at 510. Contrary to the district court's reasoning, the government's interest in enforcing customs laws does not, as a matter of law, outweigh Gerardo's interest in avoiding erroneous deprivation of his only vehicle.

Moreover, the legality of the seizure is just one of several issues that might be raised at a prompt, post-seizure hearing. An individual could also raise defenses to forfeiture; for instance, Gerardo could have argued that forfeiture of his vehicle would constitute an excessive fine under the Eighth Amendment. An individual could also argue that retention of the vehicle throughout the forfeiture proceedings would pose a substantial hardship. *See, e.g.*, *Krimstock*, 306 F.3d at 70.

Additionally, the district court erred in finding—without the benefit of any evidence—that it would be too burdensome for the federal government to conduct prompt hearings after every vehicle seizure. ROA.487, 493. But as the court in *Washington* correctly observed, "due process always imposes some burden on governmental actors" and the government already has experience providing such hearings. 264 F. Supp. 3d at 978. The government must and does provide prompt, probable-cause hearings when detaining individuals. *See Gerstein v. Pugh*, 420 U.S. 103, 114 (1975). And since 2000, the same is true when the federal government detains property in forfeiture cases (unlike this one) governed by the Civil Asset Forfeiture Reform Act.[7] 18 U.S.C. § 983(f) (providing prompt, post-seizure hearings

[7] Under the so-called "Customs Carve Out," the greater protections afforded by the Civil Asset Forfeiture Reform Act do not apply to seizures and forfeitures, like the one at bar, conducted under Title 19. 18 U.S.C. § 983(i)(2)(A).

allowing property owners to request immediate release of seized property). In the context of vehicle seizures, most courts have concluded that the *Mathews* scale tips in favor of providing prompt, post-seizure hearings. *See, e.g.*, *Smith*, 524 F.3d at 838; *Krimstock*, 306 F.3d at 69-70; *Washington*, 264 F. Supp. 3d at 979; *Brown*, 115 F. Supp. 3d at 67; *Simms*, 872 F. Supp. 2d at 107.

In sum, the private interests at stake, the risk of error caused by the profit incentive underlying forfeiture combined with the probable value of a pretrial evidentiary hearing, outweigh the government's interests and minimal burdens.

B. Requiring a Bond for the Right to Seek Judicial Review Violates Due Process.

The district court similarly erred in ruling that Gerardo failed to state a class-wide claim that requiring vehicle owners to post a bond merely for the right to receive judicial review violated due process.[8] The challenged provisions require that anyone desiring judicial review of a forfeiture must pay a "bond . . . in the penal sum of $ 5,000 or 10% of the value of the

[8] This Court reviews constitutional questions like the denial of due process *de novo*. *Soadjede v. Ashcroft*, 324 F.3d 830, 831 (5th Cir. 2003). This remains true even though Gerardo did not object to the portion of the magistrate judge's report on the bond requirement because it did not contain any factual findings. *See United States v. Carillo-Morales*, 27 F.3d 1054, 1062 (5th Cir. 1994); *Brue v. Heckler*, 709 F.2d 937, 939 (5th Cir. 1983).

claimed property, whichever is lower, but not less than $250" even though the government has seized their property. 19 U.S.C. § 1608; 19 C.F.R. § 162.47. The district court's holding rested on the flawed understanding that bond requirements are only unconstitutional as applied to indigents because it would deprive them of hearings based solely on their inability to pay. ROA.426. But Supreme Court precedent directly contradicts that narrow reading.

The Supreme Court has invalidated bond requirements, like the one challenged here, as a violation of due process. *See, e.g.*, *N. Ga. Finishing, Inc. v. Di-Chem, Inc.*, 419 U.S. 601, 607 (1975); *Bell v. Burson*, 402 U.S. 535, 539, 540-43 (1971). In *North Georgia Finishing, Inc.* the Supreme Court struck down a law permitting the property to be seized "and, absent a bond, put totally beyond use during the pendency of the litigation . . . without notice or opportunity for an early hearing and without participation by a judicial officer." 419 U.S. at 606. Similarly, Gerardo and putative class members had their vehicles seized without an opportunity for a prompt hearing and without any participation by a judicial officer unless they file the required bond. There is no question that the government will continue to impose the bond requirement on property owners in the future.

Therefore, at the very least, Gerardo plausibly stated a class-wide claim for the violation of due process.

C. Gerardo's Motion for Class Certification Is Not Moot.

Because the district court erroneously dismissed Gerardo's class-wide due-process claim under Rule 12(b)(6), it denied his motion for certification as moot. ROA.493-94 ("No issues remain to base class certification on[.]"). As detailed above, Gerardo plausibly alleged a due-process violation on behalf of a class under two separate theories. Therefore, Gerardo's motion to certify a class under Federal Rule of Civil Procedure 23(b)(2) is not moot and the district court's denial should be reversed.

II. THE DISTRICT COURT WRONGLY DISMISSED GERARDO'S *BIVENS* CLAIMS FOR VIOLATIONS OF HIS FOURTH AND FIFTH AMENDMENT RIGHTS.

In his Complaint, Gerardo alleges that certain individual law-enforcement officers violated his Fourth and Fifth Amendment rights by seizing his truck and keeping it for 23 months without giving him an opportunity to contest the seizure. ROA.22. This is precisely the type of search-and-seizure claim the U.S. Supreme Court has recognized as falling within the core of the *Bivens* remedy. *See Ziglar v. Abbasi,* 137 S. Ct. 1843,

1856 (2017). The District Court was wrong to find that Gerardo should not be allowed to proceed under *Bivens* and its decision should be reversed.

The primary reason for the district court's error is its misinterpretation of *Ziglar*. First, the district court erred in interpreting *Ziglar* to forbid *Bivens* claims even in search-and-seizure cases. *Ziglar* itself did no such thing, endorsing a *Bivens* claim "in this common and recurrent sphere of law enforcement" and describing it as "a fixed principle in the law" with no congressional enactment disapproving of it. *Ziglar*, 137 S. Ct. at 1856-57.

Second, even if this case differs from a traditional law-enforcement context, the court failed to heed *Ziglar*'s teachings on how to perform the special factors analysis in order to determine whether a *Bivens* cause of action should be extended to a new context. The Supreme Court, for example, warned against national security concerns becoming "a talisman used to ward off inconvenient claims," especially "in domestic cases." *Id.* at 1862. Yet, this is precisely what the district court did, simply stating, without providing any further reasoning, that "creating a new remedy would impair the Executive Branch's power to control the borders." ROA.509. In addition, the court wrongly determined that the mere existence of a statutory scheme, codified in Title 19 of the U.S. Code, which

does not address what should happen if the government unreasonably delays initiating a forfeiture action, precludes a *Bivens* remedy. ROA.506-08. This could perhaps be a proper analysis if Gerardo were asking the court to recognize an implied cause of action in a statute. But when the focus is not on the statute, but on the Constitution, the proper inquiry is broader. After all, "there is no single, specific congressional action to consider and interpret." *Ziglar*, 137 S. Ct. at 1856. Moreover, despite its comprehensiveness, neither Title 19—nor Rule 41(g) for that matter—provide Gerardo with a comprehensive remedial framework to address precisely the type of constitutional violation he has suffered.

The district court's order granting the individual officers' motion to dismiss functionally eliminates a *Bivens* claim unless the facts are identical to *Bivens* itself.[9] If this Court affirms the order, the consequences will reverberate beyond Gerardo's case. They will curtail *Bivens*'s value as a deterrent and cast doubt on the constitutionality of the Westfall Act, which preempts suits under state tort law for constitutional violations by federal

[9] Or identical to the other two cases in which the U.S. Supreme Court explicitly recognized a *Bivens* cause of action. *See Carlson v. Green*, 446 U.S. 14 (1980) (permitting plaintiff to bring a *Bivens* cause of action under the Eighth Amendment against federal prison officials who caused grave personal injuries to her son); *Davis v. Passman*, 442 U.S. 228 (1979) (allowing a *Bivens* cause of action under the Fifth Amendment's Due Process Clause against a U.S. Congressman who fired plaintiff so he could hire a man to be his administrative assistant).

officers. 28 U.S.C. §§ 2679(b)(1), (b)(2)(A). Together, the narrow interpretation of *Bivens* and the existence of the Westfall Act would eliminate access to a judicial forum for those whose constitutional rights were violated by individual federal officers, raising due process concerns.

A. Gerardo Properly Seeks Damages Under *Bivens*.

In dismissing Gerardo's damages claims against individual officers, the district court relied primarily on the U.S. Supreme Court's most recent decision interpreting *Bivens* in *Ziglar v. Abbasi*. ROA.497-510. But contrary to the district court's reasoning, *Ziglar* does not prohibit a damages claim here. Quite the opposite: It is one of the strongest statements the U.S. Supreme Court has made in favor of allowing such claims, describing a *Bivens* remedy as "a fixed principle in the law" and plaintiffs' reliance on it as "a powerful reason to retain it" in the law-enforcement sphere.

In *Ziglar*, the U.S. Supreme Court had to grapple with whether to allow a claim for damages against senior government officials for high-level policy decisions they made in the aftermath of September 11 terrorist attacks. *Ziglar*, 137 S. Ct. at 1853-54.[10] The relief petitioners sought was

[10] Another challenge in *Ziglar* involved a *Bivens* claim against a prison warden, who was a supervisor of prison guards and allegedly encouraged the abuse and turned a blind eye on the mistreatment suffered by the detainees. *Id.* at 1864. The Court sent the case back to the Eastern District of New York, to determine whether special factors

under the Fifth Amendment's Equal Protection and Due Process clauses, which was different from constitutional provisions used previously to advance *Bivens* claims, namely the Fourth and the Eighth Amendments. The high-level policy decisions included subjecting undocumented immigrants of Arab and South Asian descent to harsh pretrial conditions while detaining them for several months. *Id.* at 1853. The level of seniority went up as high as the U.S. Attorney General and the FBI director. *Id.* The Court found that under these circumstances a claim against individual officials for damages should not be allowed. *Id.* at 1863.

However, the Court specifically stated that its "opinion is not intended to cast doubt on the continued force, or even the necessity, of *Bivens* in the search-and-seizure context in which it arose." *Id.* at 1856. After all, "[t]he 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. Moreover, "*Bivens* does vindicate the Constitution by allowing some redress for injuries, and it provides instruction and guidance to federal law enforcement officers going forward." *Id.* at 1856-57.

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counseled hesitation in extending *Bivens* to claims against supervisors in this context, under the Fifth Amendment. *Id.* at 1865. According to the Magistrate's Report and Recommendations, they did. The district court has not yet ruled on the report. *Turkmen v. Ashcroft*, No. 02-cv-2307, 2018 WL 4026734, *2 (E.D.N.Y. 2018, August 13, 2018).

1. The *Bivens* framework.

Under *Ziglar*, there is a two-step process for determining whether a *Bivens* claim is allowed in a particular case. First, a court must determine whether the claim arises in a new context. *Id.* at 1859-60. Second, if the context is new, then the court must ask whether "there are 'special factors counselling hesitation in the absence of affirmative action by Congress.'" *Id.* at 1857 (quoting *Carlson*, 446 U.S. at 18). If the context is not new, then, naturally, there is no need to perform the second step of the analysis and *Bivens* applies. *Id.* at 1860.

A claim arises in a new context when it is "different in a meaningful way from previous *Bivens* cases decided by this Court." *Id.* at 1859. "[T]rivial" differences "will not suffice to create a new *Bivens* context." *Id.* at 1865. Examples of non-trivial distinctions include:

> the rank of the officers involved; the constitutional right at issue; the generality or specificity of the official action; the extent of judicial guidance as to how an officer should respond to the problem or emergency to be confronted; the statutory or other legal mandate under which the officer was operating; the risk of disruptive intrusion by the Judiciary into the functioning of other branches; or the presence of potential special factors that previous *Bivens* cases did not consider.

Ziglar, 137 S. Ct. at 1860.

A *Bivens* claim can be brought in a new context when there are no "special factors counselling hesitation in the absence of affirmative action by Congress." *Id.* at 1857 (quotation marks omitted). A special factor is one that causes a court to hesitate when answering 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 1858.

2. Gerardo's *Bivens* claims do not arise in a new context.

According to Gerardo's Complaint, individual defendants violated his Fourth and Fifth Amendment rights by retaining his car for 23 months and failing to provide any kind of judicial process. ROA.22. Unlike *Ziglar*, where defendants were high-level officials who formulated high-level policies in the post-9/11 climate of great uncertainty, this case is about rank-and-file officers engaging in their day-to-day law-enforcement duties in the United States, without calling into question any national policy issues—exactly the type of scenario the Supreme Court went out of its way to protect in *Ziglar*. Thus, Gerardo's claims do not arise in a new context. Finding that they do, as the district court did here, would inappropriately limit the scope of *Bivens* and be contrary to *Ziglar*.

a. Gerardo's Fourth Amendment claim does not arise in a new context.

There is nothing new about the context of Gerardo's Fourth Amendment claim: His rights were violated by the unreasonably prolonged seizure of his truck. This claim arises in the search-and-seizure context that has long been recognized under the *Bivens* doctrine. In *Bivens* itself, the plaintiff alleged that he was subjected to an illegal search and arrested without probable cause—a classic example of law-enforcement overreach. *Bivens*, 403 U.S. at 389. In allowing a damages claim in *Bivens*, the Court reasoned that the Fourth Amendment "guarantees to citizens of the United States the absolute right to be free from unreasonable searches and seizures carried out by virtue of federal authority" and that damages may be obtained for violations of that guarantee. *Id.* at 392.

Following *Bivens*, the Supreme Court has decided several other law-enforcement-overreach cases that build on this principle and reinforce the Court's commitment to the continued vitality of *Bivens* in the search-and-seizure context. *See, e.g.*, *Groh v. Ramirez*, 540 U.S. 551, 563-64 (2004) (recognizing a *Bivens* claim challenging a search pursuant to a deficient warrant); *Anderson v. Creighton*, 483 U.S. 635, 636-37 (1987) (assuming that *Bivens* applies to a claim challenging a warrantless search of a home for the purposes of finding a robbery suspect). Just like *Bivens*, *Groh*, and

Anderson, Gerardo's case does not arise in a new context. It is about rank-and-file officers behaving in a manner that violates individuals' Fourth Amendment rights against unreasonable searches and seizures. As such, it can only be distinguished in a "trivial" way, discouraged by *Ziglar*. 137 S. Ct. at 1865 (discussing how "trivial" differences "will not suffice to create a new *Bivens* context").

b. Gerardo's Fifth Amendment claim does not arise in a new context.

Gerardo's Fifth Amendment due process claim, challenging the retention of his property without any post-seizure hearing, also falls within the established *Bivens* context. After all, the Supreme Court endorsed this type of claim in *Davis v. Passman*, by approvingly citing a lower-court decision that allowed a Fifth Amendment *Bivens* claim for a prolonged seizure by customs officials. 422 U.S. at 244 & n.22 (citing *States Marine Lines, Inc. v. Shultz*, 498 F.2d 1146 (4th Cir. 1974)).

States Marine Lines is on all fours with the situation at bar. The owner of cargo freight seized by customs agents sued in federal court seeking return of the property and damages under *Bivens*, claiming that detention of the property for approximately seventeen months violated due process. 498 F.2d at 1152-53, 1156. The Fourth Circuit allowed the *Bivens* claim to proceed, holding that "the claim presented is obviously appropriate

for money damages" because "government officers, under the cloak of federal statutory authorization vested in them, have deprived plaintiff of his property in violation of the Constitution resulting in considerable damages." *Id.* at 1157. The fact that the U.S. Supreme Court endorsed this decision in its own Fifth Amendment case recognizing a *Bivens* cause of action, makes Gerardo's claim fall within an established context. After all, courts are "bound to follow both the holding and the reasoning, even if dicta, of the Supreme Court." *Navajo Nation v. Dalley*, 896 F.3d 1196, 2908 n.6 (10th Cir. 2018).

The district court distinguished *State Marine Lines* because it involved "the unlawful seizure of property . . . and, in any event, did not arise in the asset forfeiture context." ROA.500. But *State Marine Lines* did involve forfeiture proceedings. Granted, the proceedings involved seizure under different federal laws, but it was done exactly under the same pretext—"subject to forfeiture for alleged violations of certain statutes of the United States"—and without providing any kind of post-seizure hearing. 498 F.2d at 1147. Furthermore, just like in *State Marine Lines*, there was no proper justification for CBP to continue retaining Gerardo's property. It just happened that in *State Marine Lines*, a district court ordered the government to show cause for the continued retention of property and so

the government had to admit that "there had been no violation of law which would justify forfeiture." *Id*. at 1148. Here, there was never a need to make such an admission, as the government, cleverly, returned the property shortly after Gerardo files this action. In short, these distinctions are exactly the types of trivial distinctions disapproved of in *Ziglar*. The district court's determination that Gerardo's Fifth Amendment claim arises in a new context should be overruled.

c. Gerardo's case is not meaningfully different from other Bivens *cases.*

One explanation for the district court's narrow reading of *Ziglar* is *Ziglar*'s endorsement of the "meaningful difference" test over the "mechanism of injury" test as a roadmap for determining whether claims arise in a new context. ROA.499; *see also Ziglar*, 137 S. Ct. 1859.[11] The district court read the former to be much less permissive than the latter and thus concluded that Gerardo's claim involving the seizure of property was too far removed from a claim, such as in *Bivens*, involving an illegal search and arrest. ROA.499. But a closer examination of the "meaningful difference" inquiry reveals that the distinctions that the Supreme Court is

[11] The "mechanism of injury" test focuses on whether (1) the constitutional right asserted is the same as in a previous *Bivens* case and whether (2) the mechanism of injury is the same mechanism of injury as in a previous *Bivens* case. *Ziglar*, 137 S. Ct. at 1859. If both are answered in the affirmative, then the context is not new. According to *Ziglar*, this test is no longer good law. *Id*. at 1859-60.

concerned about[12] simply do not exist here: The officers involved are lower rank; the constitutional rights at issue are the same; and there is also ample judicial guidance to officers on how to respond to the confronted situation. *See, e.g., United States v. $ 23,407.69*, 715 F.2d 162, 166 (5th Cir. 1983) (finding that a thirteen-month delay in initiating forfeiture proceedings violated due process); *Brewster v. Beck*, 859 F.3d 1194, 1197 (9th Cir. 2017, Kozinski, J.) (finding that a thirty-day impoundment of a vehicle violated the Fourth Amendment even if the initial seizure was valid); *Krimstock*, 306 F.3d at 44 (finding that New York City violated due process by failing to provide a prompt, post-seizure hearing after seizing cars for forfeiture). Importantly, there is also no risk of the Judiciary intruding on the functioning of other branches, since Gerardo's claims do not call into question any national security decisions performed by high-level policy-makers, but is rather about rank-and-file officers violating individuals' constitutional rights.

Given the lack of meaningful differences, the context of Gerardo's case is not new. This Court should overturn the district court's dismissal and allow Gerardo's individual damages claims to proceed under *Bivens*.

[12] *See* Part II.A.1, *supra*.

3. Special factors identified by the district court do not counsel hesitation before recognizing a *Bivens* remedy.

Even if the context in Gerardo's suit were new, a *Bivens* cause of action should still be allowed. The district court identified a panoply of factors that, in its view, counsel hesitation and thus prevent the extension of *Bivens*. But all of them collapse under examination.

a. Unlike the remedial systems in Bush *and* Schweiker*, CBP's forfeiture procedures do not provide a comprehensive alternative framework to address violations of Gerardo's constitutional rights.*

The district court's main argument is that the forfeiture scheme challenged here, similar to the statutory frameworks in *Bush v. Lucas*, 462 U.S. 367 (1983) and *Schweiker v. Chilicky*, 487 U.S. 412 (1988) provides "meaningful safeguards or remedies for the rights of persons situated as the Plaintiff was here." ROA.506. Specifically, according to the court, there are "several alternatives" under existing customs forfeiture law that serve "as sufficient safeguards available to [Gerardo] in order to remedy the alleged wrongful seizure of his property." *Id*. In addition, according to the court, there is a possible availability of the motion for return of property under Federal Rule of Criminal Procedure 41(g), as well as the court's equitable jurisdiction. ROA.506-07.

None of these options redresses Gerardo's Fourth and Fifth Amendment claims, since none provides a right to a prompt, post-seizure hearing or a remedy where such a hearing is denied. As such, these options fall short of the kind of comprehensive remedial scheme—exemplified by *Bush* and *Schweiker*—that the U.S. Supreme Court has agreed prevents application of *Bivens*.

In *Bush*, the *Bivens* claim was that an employment demotion violated the plaintiff's First Amendment rights. 462 U.S. at 385-86. The Court found that a *Bivens* cause of action was not available because the plaintiff could seek redress for *precisely this same constitutional claim* under the Civil Service and Reform Act. *Id.* at 388-90. In *Schweiker*, the *Bivens* claim was that the erroneous termination of disability benefits violated due process. *Id.* at 414. Again, the Court did not recognize a *Bivens* cause of action because the plaintiff could raise *precisely this same constitutional claim* by appealing the benefits denial. *Id.* at 424. Under these cases, the mere existence of a detailed statutory scheme does not preclude a *Bivens* claim. Rather, it does so only when the scheme provides a remedy for the type of violation the plaintiff suffered.

The four "alternatives" provided in CBP's notice of seizure and relied on by the district court do not address the constitutional violations at issue

in this case, as none provides a right to a prompt, post-seizure hearing or a remedy when such a hearing is denied. *See* ROA.506-07. Two options set forth in CBP's notice—to propose a settlement or abandon the seized property—invite acquiescence to the seizure and are not remedies at all. A third option, to file a remission petition, initiates an administrative proceeding in which the government has total discretion to retain or return property under a system of incentives that rewards retaining the property. *See* Part I.A.2.b, *supra*; *see also United States v. Morgan*, 84 F.3d 765, 767 n.3 (5th Cir. 1996) (explaining that a remission petition is "a request for leniency, or an executive pardon"). That discretionary procedure again provides no rights or remedies. Finally, the fourth option allows a property owner to pay a bond and request a hearing, at which point the relevant statute directs the U.S. Attorney for the district to "proceed" to file a forfeiture action. 19 U.S.C. § 1608. The statute does not set a timeline for the U.S. Attorney to file and does not provide a remedy if the U.S. Attorney fails to move quickly. Indeed, while Gerardo chose the fourth option in this case, he nonetheless waited in vain for two years for the government to file a complaint before he filed this action. ROA.19-20. These four options do not provide for the kind of prompt hearing required by the Constitution, and they provide no remedy if such a hearing is denied.

The district court also mistakenly concluded that alternative remedies such as Rule 41(g) motion or the court's equitable jurisdiction were available to Gerardo to redress his injuries. ROA.506-07. But just like the four options provided in the Notice of Seizure, they come woefully short. First, Rule 41(g) motions exercised in a civil context and a court's equitable jurisdiction are one and the same. See *Richey v. Smith*, 515 F.2d 1239, 1245 (5th Cir. 1975) (explaining that the Fifth Circuit construes Rule 41(g) motions filed "prior to any suggestion of criminal proceedings" as initiating a civil action in equity); *see also Bailey v. United States*, 508 F.3d 736, 738 (5th Cir. 2007); *Peña v. United States*, 122 F.3d 3, 4-5 (5th Cir. 1997). They are governed by "equitable principles," and thus, they are within the court's "sound discretion." *Richey*, 515 F.2d at 1243. For this reason, the United States District Court for the District of Columbia rejected the notion that Rule 41(g) provides the kind of prompt, post-seizure hearing that due process requires. *Brown*, 115 F. Supp. 3d at 65 (D.D.C. 2015).

Second, the ability of property owners to file a Rule 41(g) motion does not provide for a prompt hearing and does not afford a meaningful remedy where a prompt hearing is denied. The only relief that can be obtained is the return of property, which is not a sufficient remedy for the constitutional violation. *See Ziglar*, 137 S. Ct. at 1858 (noting that equitable

remedies may not preclude application of *Bivens* where damages are "necessary to redress past harm and deter future violations"). As the Ninth Circuit has observed, the "fast depreciating nature of an automobile" means a prolonged seizure "may impose onerous burdens upon a person deprived of this vehicle," making the ability to seek the return of property "plainly an inadequate substitute for a *Bivens* action." *Senguin v. Eide*, 645 F.2d 804, 809 (9th Cir. 1981) (quotation marks and citations omitted), vacated, 462 U.S. 1101 (1983). As such, asking a court for a grant of equitable jurisdiction in order to ask for a return of property is not a proper alternative to a *Bivens* cause of action.

b. Congressional silence is not a factor counseling hesitation in this case.

The district court also reasoned that a *Bivens* claim should be denied to Gerardo because customs forfeiture laws are utterly silent on the matter and thus do not display an intent to create a private remedy. ROA.504-05, 508. But silence is very rarely an indicator favoring suppression of a *Bivens* cause of action. After all, if Congress's silence were generally a "special factor," then it would be so in every *Bivens* case, since Congress has yet to "provide a specific damages remedy for plaintiffs whose constitutional rights were violated by agents of the Federal Government." *Ziglar*, 137 S.

Ct. at 1854; *see also* Erwin Chemerinsky, Federal Jurisdiction § 9.1.1 (7th Ed. 2016) ("No federal statute authorizes federal courts to hear suits or give relief against federal officers who violate the Constitution of the United States").[13]

At the heart of the district court's reasoning is the following quote from *Ziglar*: "'If the statute does not display an intent to create a private remedy, then a cause of action does not exist and courts may not create one, no matter how desirable that might be as a policy matter, or how compatible with the statute.'" ROA.505 (quoting *Ziglar*, 137 S. Ct. at 1856). But the Court wrote this in *Ziglar* when describing the standard for recognizing a cause of action under a statute, not under the Constitution. *See Ziglar*, 137 S. Ct. at 1855-56 (using "statutory implied cause-of-action cases" as an example of how courts perform an implied-cause-of-action analysis in that setting). The two are obviously different, since, given the procedures involved in enacting a statute "[i]t is logical . . . to assume that Congress will be explicit if it intends to create a private cause of action." *Id.* When it comes to the Constitution, however, "there is no single, specific congressional action to consider and interpret." *Id.* Thus, in deciding

[13] On the flip side, "[n]o congressional enactment has disapproved of" the U.S. Supreme Court decisions permitting damages remedy against federal officers. *Ziglar*, 137 S. Ct. at 1856.

whether to recognize an implied cause of action under the Constitution, courts must engage in "somewhat different considerations." *Id.*

The Supreme Court did find that on *Ziglar*'s facts, congressional silence was telling. "The silence is notable because it is likely that high-level policies will attract the attention of Congress." *Id.* at 1862. After all, "the Federal Government's responses [in the aftermath of 9/11] have been well documented" and Congressional interest on the very issue that was before the Court in *Ziglar* "has been 'frequent and intense.'" *Id.* (citations omitted). But Gerardo's case is very different from *Ziglar*, where defendants were high-level officials who engaged in making of a high-level policy under the watchful eye of Congress. As such, it would not be at all surprising that, far from paying attention to how many prompt hearings are provided after cars are taken for civil forfeiture and pondering the ways to address the situation, Congress has not even considered it. The district court was wrong to find that Congressional silence should be a factor counselling hesitation.

c. Other factors mentioned by the court also do not counsel hesitation.

The district court briefly mentioned several additional factors that caused it to hesitate about allowing a *Bivens* cause of action in Gerardo's case. One such factor is that "recognizing a cause of action here would . . .

have significant consequences on the federal government and its employees," in that "[t]he risk of personal damages liability is more likely to cause an employee to second guess difficult but necessary decisions concerning seizures under the customs laws." ROA.509. But empirical studies show that this risk is not real. According to one recent study, which looked at successful *Bivens* actions against individual agents in the Bureau of Prisons over a ten-year period ending in 2017, in the vast majority of cases (105 out of 108) "individual defendants contributed no personal resources to the resolution of the claims." James E. Pfander, Alexander A. Reinert, & Joanna C. Schwartz, *The Myth of Personal Liability: Who Pays When* Bivens *Claims Succeed*, Stanford L. Rev., forthcoming, 1 (available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3343800##). Nor did the responsible federal agency pay the claims through indemnification. *Id.* at 1, 17, 27. Rather, the matters were resolved under the Judgment Fund, redirecting money from the U.S. Treasury. *Id.* at 15. Putting the issue of deterrence aside for now, this study indicates that individual officers, as well as their agencies, do not face a genuine threat of liability.

Another special factor that caused the district court to hesitate is national security. According to the court's only sentence on the issue, recognizing a *Bivens* cause of action in Gerardo's case "[w]ould impair the

Executive Branch's power to control the border." ROA.509. But allegations in Gerardo's Complaint do not come close to invoking national security. They are about giving hearings *after* seizures, when any national-security concerns would have dissipated. Invoking national security in this context is exactly what the Court in *Ziglar* cautioned against, especially in "domestic cases" such as this one. *Ziglar*, S. Ct. at 1862 (warning that "national-security concerns must not become a talisman used to ward off inconvenient claims—a 'label' used to 'cover a multitude of sins'").

U.S. relations with Mexico is another factor that, according to the district court, cautions against recognizing a cause of action here. The worry is that by allowing Gerardo to sue federal agents for constitutional violations, the court would "impair the Executive Branch's power to . . . promote our relationship with Mexico by stemming the flow of arms into Mexico." ROA.509. But simply invoking international diplomacy is not enough to trump constitutional rights of individuals. Besides, allowing a claim for an unconstitutionally long seizure of property that deprives individuals of prompt, post-seizure hearing would hardly thrust the court into the thicket of international diplomacy.

Last on its list of factors counselling hesitation is the court's statement that "seizing money and property from criminals allows law

enforcement to preserve evidence throughout its investigation and establish *in rem* jurisdiction during subsequent forfeiture proceedings." ROA.509. This point also misses the mark, since potential benefits of seizing property do not go to whether, in a particular situation, the failure to give a hearing after its seizure violated the Constitution. Consequently, this should not be a factor causing courts to hesitate before allowing Gerardo to proceed with his individual claims.

In sum, the district court wrongly found that there are special factors counseling against allowing Gerardo to proceed against individual defendants. And without any such factors, Gerardo's case falls squarely within the category of search-and-seizure cases right for *Bivens*. His individual claims for constitutional violations should be allowed to proceed.

B. *Bivens* Started as a Supplement to the Common Law, But It Is Now the Only Way to Recover for Constitutional Violations by Federal Agents.

The district court's erroneous holding on *Bivens* is not surprising. A *Bivens* claim is widely perceived as an example of judicial overreach and, to be safe, courts are loath to allow it. As Justice Scalia put it, "*Bivens* is a relic of the heady days in which the Court assumed common-law powers to create causes of action." *Correctional Servs. Corp. v. Malesko*, 534 U.S. 61, 75 (2001) (Scalia, J., joined by Thomas, J., concurring).

Rather than being an example of judicial overreach, however, *Bivens* is simply a continuation of a common-law tradition, not controversial until very recently in the U.S. history, that allowed plaintiffs to recover against federal officers for violations of their individual rights. In *Mitchell v. Harmony*, for example, the Court found that a federal officer was liable for trespass on private rights, even though this trespass took place in the context of the Mexican-American War. 54 U.S. 115, 137 (1851). The Court reasoned that even war could not legalize the taking of private property. The concern of suing government officers for damages was addressed by the practice of indemnification, which was left to the discretion of the Executive Branch. "[I]t is not for the court to say what protection or indemnity is due from the public to an officer who, in his zeal for the honor and interest of his country, and in the excitement of military operations, has trespassed on private rights." *Id.* at 137.

After the Civil War, Congress enacted 42 U.S.C. § 1983, to allow a cause of action against state officers. But this was done to ensure that states, given their past practices, did not protect their state officers even when these officers violated constitutional rights. There was no need to enact a parallel provision against federal officers, since there was not the same worry that states would shield agents of the federal government. In

fact, as *Mitchell v. Harmony* demonstrates, the practice of suing federal officers for constitutional torts was well established, rendering a Section 1983 analogue unnecessary. *See* William Baude, *Is Qualified Immunity Unlawful*, 106 Calif. L. Rev. 45, 51 (2018); Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 Yale L.J. 1425, 1506-07 (1987).

When the Supreme Court recognized a cause of action under *Bivens*, it did so in the context of this common practice, and as a complement to it. Carlos M. Vazquez & Stephen I. Vladeck, *State Law, the Westfall Act, and the Nature of the* Bivens *Question*, 161 Penn. L. Rev. 509, 511 (2013) ("It was common ground among the Justices . . . that, in the absence of a federal cause of action, persons harmed by federal officials' constitutional violations would be able to pursue an action for damages under state law."). By enacting the Westfall Act, however, Congress made *Bivens* into the one and only way to recover from federal agents for their constitutional violations. *See* discussion in Part IIC, *infra*. So now, *Bivens* functions not as a complement to a common-law cause of action but as the only judicial check on potentially unconstitutional behavior by federal officers.

Just like with constitutional violations by *state* officers, constitutional violations by *federal* officers must not go unaddressed. As the U.S. Supreme Court reasoned in *Carlson*, an availability of a *Bivens* remedy

serves both a compensatory and a deterrent purpose. 446 U.S. at 21. And as the Court in *Ziglar* reiterated, there is "the continued force, or even the necessity, of *Bivens*," since it "does vindicate the Constitution by allowing some redress for injuries." *Ziglar*, 137 S. Ct. at 1856-57.

C. Limiting *Bivens* to Its Facts Would Put the Constitutionality of the Westfall Act into Doubt.

It is important that courts continue to allow *Bivens* claims, at least in a context such as Gerardo's, where law-enforcement officers cause constitutional injury that can only be redressed by damages. If they do not, and essentially limit *Bivens* to its facts, they will cut off an ability of individuals to seek an award of damages for federal violations of constitutional rights: a cause of action that has been available since the beginning of the Republic. *See* Part IIB, *supra*.

This is because, since Congress amended the Federal Tort Claims Act ("FTCA") in 1988, it is no longer possible to proceed to judgment against federal officers on the basis of common law. Westfall Act, 28 U.S.C. § 2679(b)(1) (noting that the FTCA is now "exclusive of any other civil action or proceeding for money damages . . . against the employee whose act or omission gave rise to the claim"). In addition, constitutional claims for damages cannot be brought against the federal government itself. After all, the U.S. Supreme Court did not extend a *Bivens* cause of action to

claims against the government and nothing in the FTCA authorizes the assertion of such claims. *See, e.g., FDIC v. Meyer*, 510 U.S. 471, 484-86 (1994) (rejecting *Bivens* claim directly against federal agency); *see also United States v. Nordic Vill., Inc.*, 503 U.S. 30, 33 (1992) ("Waivers of the Government's sovereign immunity, to be effective, must be unequivocally expressed.") (internal quotation marks omitted).

As a result, *Bivens*, which is explicitly exempted from the Westfall Act's exclusivity provision, 28 U.S.C. § 2679(b)(2)(A), is the only way for individuals to seek an award of damages for federal violations of constitutional rights. *See* James E. Pfander & David Baltmanis, *Rethinking* Bivens*: Legitimacy and Constitutional Adjudication*, 98 Georgetown L. J. 117, 135 (2009); *see also Hui v. Castaneda*, 559 U.S. 799, 807 (2010) (noting "[t]he Westfall Act's explicit exception for *Bivens* claims"). If the *Bivens* door is closed, then, the combination of the Westfall Act's exclusivity provision and the inability to bring constitutional claims for damages against the federal government will result in an absence of legal remedies in a myriad of cases involving constitutional violations by federal officers, including in a search-and-seizure context. Such an absence would raise due process concerns with respect to the Westfall Act. After all, the "general and indisputable rule" is that "where there is a legal right, there is

also a legal remedy." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803) (quotations omitted). This Court should not read *Bivens* so narrowly as to allow such a result. It should let Gerardo's individual claims proceed under *Bivens* and send the case back to the trial court.

***

In sum, the district court incorrectly denied Gerardo a *Bivens* claim for violations of his Fourth and Fifth Amendment rights. First, his claims arise in a traditional context of searches and seizures endorsed by the Supreme Court in *Ziglar*. Second, even if the context were new, there are no factors counseling hesitation for courts to step in and provide a remedy. Allowing the district court's decision to stand would mean limiting *Bivens* to its facts, which in turn would shut the courts' door to numerous plaintiffs with claims of constitutional violations by federal officers. But the ability to bring such claims has been a mainstay of this country since the Founding. Allowing them to go unaddressed would raise serious due process concerns, especially with regard to the Westfall Act.

CONCLUSION

For the foregoing reasons, Gerardo Serrano asks this Court to vacate the district court's judgment, deny Defendants' motions to dismiss, and

reverse dismissal of Gerardo's motion for class certification under Federal Rule of Civil Procedure 23(b)(2).

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Respectfully submitted,

/s/ *Darpana M. Sheth*

Darpana M. Sheth
NY Bar No. 4287918
INSTITUTE FOR JUSTICE
901 North Glebe Rd., Suite 900
Arlington, VA 22203
(703) 682-9320
dsheth@ij.org

Anya Bidwell
TX Bar No. 24101516
INSTITUTE FOR JUSTICE
816 Congress Ave., Suite 960
Austin, TX 78701
(512) 480-5936
abidwell@ij.org
Counsel for Plaintiff-Appellant

CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of April, 2019, an electronic copy of the foregoing brief was filed with the Clerk of Court for the United States Court of Appeals for the Fifth Circuit using the appellate CM/ECF system, and that service will be accomplished by the appellate CM/ECF system.

/s/ *Darpana M. Sheth*
Counsel for Plaintiff-Appellant

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1. This brief complies with type-volume limits of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 12,779 words, as determined by the word-count function of Microsoft Word 2016, excluding the parts of the document exempted by Federal Rule of Appellate Procedure 32(f) and Fifth Circuit Rule 32.2.

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/s/ *Darpana M. Sheth*
Counsel for Plaintiff-Appellant

ADDENDUM

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Ibrahim TURKMEN, Akhil Sachdeva, Ahmer Iqbal Abbasi, Anser Mehmood, Benamar Benatta, Ahmed Khalifa, Saeed Hammouda, and Purna Raj Bajracharya on behalf of themselves and all others similarly situated, Plaintiffs,
v.
John ASHCROFT, Robert Mueller, James W. Ziglar, Dennis Hasty, Michael Zenk, James Sherman, Salvatore Lopresti, and Joseph Cuciti, Defendants.

02-CV-2307 (DLI) (SMG)
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Attorneys and Law Firms

Rachel Anne Meeropol, Jennifer M. Green, Matthew D. Strugar, Michael Winger, Shayana Devendra Kadidal, Center for Constitutional Rights, Alexander A. Reinert, C/O Benjamin N. Cardozo School of Law, Joanne Sum-Ping, Kimberly Helene Zelnick, Stephanie Yu, Covington & Burling LLP, New York, NY, for Plaintiffs.

Shari Ross Lahlou, Clifton Elgarten, Justin P. Murphy, Kyler Smart, Matthew Scarlato, Crowell & Moring LLP, Ernesto H. Molina, Armelle Nina VanDorp, Paul David Stern, Stephen E. Handler, U.S. Department of Justice, Washington, DC, William Alden McDaniel, Jr., Ballard Spahr, LLP, Jo C. Bennett, McDaniel, Bennett & Griffin, Baltimore, MD, Hugh Sandler, Nussbaum Law Group, P.C., Joanne Rose Oleksyk, Crowell & Moring LLP, David A. Koenigsberg, Melissa Kelly Driscoll, Menz Bonner Komar & Koenigsberg LLP, Nicholas Gregory Kaizer, Yvonne Shivers, Levitt & Kaizer, Labe M. Richman, Labe M. Richman, Attorney at Law, Kenneth C. Murphy, Simon & Partners LLP, New York, NY, Barry M. Lasky, Lasky & Steinberg PC, James G. Ryan, Cullen and Dykman, LLP, Mehrdad Kohanim, Law Office of Mehrdad Kohanim, James J. Keefe, Garden City, NY, James F. Matthews, Matthews & Matthews, Thomas Gerard Teresky, Huntington, NY, Richard Peter Caro, Richard P. Caro, J.D., Riverside, IL, Linda Cronin, Cronin & Byczek LLP, White Plains, NY, Alan E. Wolin, Wolin & Wolin, Esqs., Jericho, NY, Susan M. D'Ambrosio, Law Offices of Raymond Cash, P.C., Raymond P. Cash, Forest Hills, NY, E. Michael Rosenstock, Law Offices of E. Michael Rosenstock, P.C., Rockville Centre, NY, for Defendants.

William Beck, Hazleton, PA, pro se.

Michael McCabe, Greenacres, FL, pro se.

REPORT & RECOMMENDATION

Steven M. Gold, United States Magistrate Judge

INTRODUCTION

***1** This case arises out of the turbulent days following the September 11, 2001 terrorist attacks. In their Fourth Amended Complaint ("FAC"), Docket Entry 726, plaintiffs ("detainees"), on behalf of themselves and as representatives of a putative class, assert claims under *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971) against various federal officials, including Warden Dennis Hasty ("Hasty" or "Warden Hasty"), the former warden of the Metropolitan Detention Center in Brooklyn, New York ("MDC"), former MDC Captain Salvatore LoPresti ("LoPresti"), and former MDC Lieutenant Joseph Cuciti ("Cuciti"). [1]

The facts underlying plaintiffs' claims are set forth in detail in several prior decisions rendered during the lengthy procedural history of this case, including *Ziglar v. Abbasi*, —— U.S. ——, 137 S.Ct. 1843, 198 L.Ed.2d 290 (2017) and *Turkmen v. Hasty*, 789 F.3d 218 (2d Cir. 2015), *rev'd in part and vacated in part sub nom. Ziglar v. Abbasi*, —— U.S. ——, 137 S.Ct. 1843, 198 L.Ed.2d 290 (2017). Familiarity with those decisions is presumed, and the relevant facts are accordingly recounted here only briefly.

The Fourth Amended Complaint alleges that plaintiffs, each of whom defendants believed to be Arab, South Asian, or Muslim, were arrested on immigration violations following the September 11, 2001 terrorist attacks. FAC ¶ 1. Plaintiffs were then detained pursuant to a "hold-until-cleared" policy promulgated by the Department of Justice and held in the MDC's most restrictive unit, the Administrative Maximum Special Housing Unit ("ADMAX SHU"). *Id.* ¶¶ 2, 4, 53.

While held in the ADMAX SHU, plaintiffs were physically and verbally abused. *Id.* ¶ 5. "Guards allegedly slammed detainees into walls; twisted their arms, wrists, and fingers; broke their bones; referred to them as terrorists; threatened them with violence; subjected them to humiliating sexual comments; and insulted their religion." *Ziglar*, 137 S.Ct. at 1853.

Plaintiffs originally asserted claims against several high-level Executive Branch officials, including the then-Attorney General, Director of the FBI, and Commissioner of the Immigration Naturalization Services, as well as against several Bureau of Prisons ("BOP") officials then holding positions at the MDC, including two Wardens, an Associate Warden, a Captain, and a First Lieutenant ("MDC Officials"). FAC ¶¶ 21-28. Plaintiffs brought what the Supreme Court would later term "detention policy claims" against all of the defendants, alleging that official policies they adopted violated plaintiffs' Fourth and Fifth Amendment rights by holding plaintiffs in restrictive conditions of confinement and subjecting them to frequent strip searches. *Ziglar*, 137 S.Ct. at 1858-59; FAC ¶¶ 276-83; 292-96.

***2** Plaintiffs also brought claims specifically against the MDC Officials for alleged violations of their Fourth and Fifth Amendment rights, alleging in essence that these officials tolerated abuse of detainees, including plaintiffs, by MDC guards. Of particular relevance here, plaintiffs allege that Warden Hasty encouraged lower-level officers to abuse plaintiffs; that he prevented detainees "from using normal grievance procedures"; that he avoided the unit where the detainees were kept; that he ignored evidence of the abuse, even though he was aware of detainee complaints, hunger strikes, and suicide attempts; and that he did not stop or even attempt to stop the abuse. *Ziglar*, 137 S.Ct. at 1864; FAC ¶¶ 77-78; 106-10, 300. In short, in what the Supreme Court would later label their "prisoner abuse claim," a term which this Court adopts for purposes of this Report, plaintiffs allege that Warden Hasty was deliberately indifferent to abuse of the detainees occurring on his watch. *Ziglar*, 137 S.Ct. at 1863.

In *Ziglar*, the Supreme Court considered whether causes of action for plaintiffs' detention policy and prisoner abuse claims could properly be brought pursuant to its holding in *Bivens*. While the Court held that plaintiffs' detention policy claims could not proceed under *Bivens*, it did not decide whether *Bivens* provided a proper basis for plaintiffs' prisoner abuse claim. Instead, noting that the question had not been fully developed by the parties before it, the Supreme Court remanded and directed the lower courts to determine the availability of a cause of action under *Bivens*. 137 S.Ct. at 1863, 1865. Accordingly, today, after multiple appeals to the Second Circuit and the Supreme Court of the United States, this case now hinges on a narrow legal question: whether a *Bivens*-type cause of action may properly be implied under the Fifth Amendment as the basis for plaintiffs' prisoner abuse claim against former Warden Hasty—and, as discussed below, former MDC Captain LoPresti and Lieutenant Cuciti, the only other remaining MDC Official defendants—for their deliberate indifference to the abuse of plaintiffs by MDC guards. *Id.* at 1864-65.

The Supreme Court remanded this question to the Second Circuit, which in turn issued a mandate directing this Court to "consider what remains of all claims in light of the *Ziglar* decision," and "emphasiz[ing] in particular that the Supreme Court left open the question as to whether a *Bivens* claim may be brought under the Fifth Amendment against the warden of the Metropolitan Detention Center." Mandate at 2, Docket Entry 799.

As a result, there is now pending before this Court Warden Hasty's renewed motion to dismiss in light of the Supreme Court's decision in *Ziglar*. Defendant's Memorandum in Support ("Def.'s Mem."), Docket Entry 808. Additionally, although defendants LoPresti and Cuciti did not appeal to the Second Circuit, *see Turkmen*, 789 F.3d at 224 n.2, plaintiffs' claims against those defendants are also before the Court. Plaintiffs acknowledge that the legal viability of their claims against defendants LoPresti and Cuciti depends upon this Court's decision with respect to defendant Hasty's motion. *See* Plaintiffs' Memorandum of Law in Support of *Bivens* Liability ("Pls.' Mem.") at 9, Docket Entry 808-7 ("Plaintiffs accept that the Court's determination of the scope of *Bivens* liability will apply to their claims against the non-appealing Defendants—LoPresti and Cuciti—as well.").

Chief United States District Judge Dora L. Irizarry has referred defendant Hasty's motion to me to issue a Report and Recommendation. Order dated January 22, 2018. I heard oral argument on the motion on March 15, 2018. Transcript of Oral Argument ("Tr."), Docket Entry 829. The parties then submitted supplemental authorities

for the Court's review. Docket Entries 830-833. Having considered the Supreme Court's decision in *Ziglar* and the arguments presented by the parties, and for the reasons stated below, I respectfully recommend that defendant Hasty's motion be granted, and that plaintiffs' claims against the remaining defendants be dismissed.

BACKGROUND

I. From *Bivens* to *Ziglar*

***3** In *Bivens*, decided in 1971, the Supreme Court recognized a damages remedy for violations of the Fourth Amendment's prohibition on unreasonable searches and seizures by federal law enforcement officers. *Bivens*, 403 U.S. at 391-97, 91 S.Ct. 1999. For the *Bivens* Court, implying a cause of action for violations of the Fourth Amendment was simply a natural extension of its view that a Court should ensure that every violation of a federally protected right has a remedy. *Ziglar*, 137 S.Ct. at 1855.

After *Bivens*, the Court held that a plaintiff could assert an implied cause of action for damages directly under the Constitution in only two other cases: *Davis v. Passman*, 442 U.S. 228, 99 S.Ct. 2264, 60 L.Ed.2d 846 (1979) and *Carlson v. Green*, 446 U.S. 14, 100 S.Ct. 1468, 64 L.Ed.2d 15 (1980). *Ziglar*, 137 S.Ct. at 1854-55. Of particular relevance here is *Carlson*, where the Court recognized a *Bivens*-type action brought under the Eighth Amendment.[2] *Carlson*, 446 U.S. at 18-23, 100 S.Ct. 1468. In *Carlson*, the plaintiff sought damages on behalf of her deceased son, a federal inmate. *Id.* at 16, 100 S.Ct. 1468. The plaintiff alleged that federal officials' deliberate indifference to her son's need for medical care for his asthma led to his death. *Id.* at 16, 100 S.Ct. 1468 n.1. These allegations were considered sufficient under Supreme Court precedent to state an Eighth Amendment violation. *Id.* at 17-18, 17, 100 S.Ct. 1468 n.3; *see also Estelle v. Gamble*, 429 U.S. 97, 97 S.Ct. 285, 50 L.Ed.2d 251 (1976). In *Carlson*, the Court examined whether there were either "special factors" counseling hesitation or alternative remedies that would preclude extending *Bivens* to the plaintiff's Eighth Amendment deliberate indifference claim. *Carlson*, 446 U.S. at 18-19, 100 S.Ct. 1468. Finding neither, the Court extended *Bivens* and implied a cause of action for damages. *Id.* at 18-23, 100 S.Ct. 1468. As noted above, it has not done so again in the nearly forty years since *Carlson* was decided.

Since *Carlson*, in fact, the Court has altered its perspective on implied rights of action under the Constitution, and noted that its "recent precedents cast doubt on the authority of courts to extend or create private causes of action." *Jesner v. Arab Bank, PLC*, —— U.S. ——, 138 S.Ct. 1386, 1402, 200 L.Ed.2d 612 (2018). In *Ziglar*, the Supreme Court acknowledged the marked change in its approach to implying causes of action:

> In the mid-20th century, the Court followed a different approach to recognizing implied causes of action than it follows now. During this "*ancien regime*," the Court assumed it to be a proper judicial function to provide such remedies as are necessary to make effective a statute's purpose.
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> Later, the arguments for recognizing implied causes of action for damages began to lose their force.
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> Given the notable change in the Court's approach to recognizing implied causes of action ... the Court has made clear that expanding the *Bivens* remedy is now a "disfavored" judicial activity.

137 S.Ct. at 1855, 1857 (citations and internal quotation marks omitted). The Court in *Ziglar* went so far as to say that, were *Bivens, Davis*, and *Carlson* being decided today, the analysis—and, presumably, the outcome—might be different. *Id.* at 1856.

II. Determining Whether to Extend *Bivens* After *Ziglar*

The Supreme Court emphasized in *Ziglar* that the central inquiry when faced with a potential expansion of *Bivens* is " 'who should decide' whether to provide for a damages remedy, Congress or the courts," and that the answer to that question "most often will be Congress." *Id.* at 1857 (quoting *Bush v. Lucas*, 462 U.S. 367, 380, 103 S.Ct. 2404, 76 L.Ed.2d 648 (1983)). "[S]eparation-of-powers principles are or should be central to the analysis." *Id.*

***4** *Ziglar* instructs that the analysis of whether a *Bivens* remedy is available proceeds in two steps. First, a court must determine whether the plaintiff's claims are different from those asserted in previous *Bivens* cases, such that the case presents a "new *Bivens* context." *Id.* at 1859-60.

A case presents a "new context" if it is "different in a meaningful way from previous *Bivens* cases decided by [the Supreme Court]." *Id.* at 1859. The Court listed some relevant measures of difference, including the rank of the officers involved, the constitutional right asserted, the level of generality of the official action in question, the extent of the judicial guidance available to the officer in question, whether the officer was operating under specific statutory or other legal mandates, and whether there is a risk that the Judiciary would be interfering with the functioning of another branch of the government. *Id.* at 1860.

Second, if a case does present a "new *Bivens* context," a court must then consider whether "there are 'special factors counselling hesitation in the absence of affirmative action by Congress.' " *Id.* at 1857 (quoting *Carlson*, 446 U.S. at 18, 100 S.Ct. 1468). The Supreme Court has not announced a definitive list of those "special factors" that "counsel[ ] hesitation." *Id.* The Court has stressed, though, that the question to ask is "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 1858. A "special factor" is one that "cause[s] a court to hesitate before answering that question in the affirmative." *Id.*

In *Ziglar*, the Court did identify some criteria for considering whether hesitation is warranted. First, it noted that "the decision to recognize a damages remedy requires an assessment of its impact on governmental operations systemwide," which entails examining the "burdens on Government employees who are sued personally, as well as the projected costs and consequences to the Government itself when ... the legal system [is] used to bring about the proper formulation and implementation of public policies." *Id.* Second, some cases will arise "in a context in which Congress has designed its regulatory authority in a guarded way, making it less likely that Congress would want the Judiciary to interfere." *Id.* It may also be that "feature[s] of [the] case—difficult to predict in advance—cause[ ] a court to pause before acting without express congressional authorization." *Id.* The Court concluded this aspect of its discussion by noting that, "if there are sound reasons to think Congress might doubt the efficacy or necessity of a damages remedy as part of the system for enforcing the law and correcting a wrong, the courts must refrain from creating the remedy[;]" to do otherwise would fail "to respect the role of Congress in determining the nature and extent of federal-court jurisdiction under Article III." *Id.*

Finally, when a plaintiff seeks to extend *Bivens* to a new context, a court should consider whether alternative remedies are already available. *Id.* The existence of an "alternative remedial structure ... alone may limit the power of the Judiciary to infer a new *Bivens* cause of action." *Id.*

III. The *Ziglar* Court's Decision Regarding Warden Hasty and Plaintiffs' "Prisoner Abuse" Claim

The first step in the analysis of plaintiffs' prisoner abuse claim has already been taken. In *Ziglar*, the Supreme Court held that, although the prisoner abuse claim has "significant parallels" to the claims asserted in *Carlson*, "this case does seek to extend *Carlson* to a new context." *Id.* at 1864.

The Court went on to note that "[t]his case also has certain features that were not considered in the Court's previous *Bivens* cases and that might discourage a court from authorizing a *Bivens* remedy." *Id.* at 1865. First, the Court suggested that plaintiffs may have had access to alternative remedies, such as a writ of habeas corpus or an injunction, that would preclude extending *Bivens*. *Id.* Second, noting that "legislative action suggesting that Congress does not want a damages remedy" is a special factor counseling hesitation, the Court pointed out that, since *Carlson* was decided, Congress passed the Prison Litigation Reform Act of 1995 ("PLRA"), "which made comprehensive changes to the way prisoner abuse claims must be brought in federal court," but without "provid[ing] for a standalone damages remedy against federal jailers." *Id.* In short, the Court concluded that the differences between this case and *Carlson* "are at the very least meaningful ones." *Id.* Reasoning that "even a modest extension is still an extension," the Court vacated the Second Circuit's decision that plaintiffs' prisoner abuse claim could proceed, and remanded the case so that a "special factors" analysis could be conducted. *Id.* at 1864-65.

DISCUSSION

***5** As noted above, the motion now pending before the Court is defendant Hasty's renewed motion to dismiss

pursuant to Rule 12(b)(6). When deciding a motion brought under Rule 12(b)(6), a court may consider "(1) facts alleged in the complaint and documents attached to it or incorporated in it by reference, (2) documents 'integral' to the complaint and relied upon in it, even if not attached or incorporated by reference, (3) documents or information contained in defendant's motion papers if plaintiff has knowledge or possession of the material and relied on it in framing the complaint, ... and (5) facts of which judicial notice may properly be taken under Rule 201 of the Federal Rules of Evidence." *Abiuso v. Donahoe*, 2015 WL 3487130, at *3 (E.D.N.Y. June 3, 2015) (quoting *In re Merrill Lynch & Co.*, 273 F.Supp.2d 351, 356-57 (S.D.N.Y. 2003)). Here, the complaint incorporates by reference two reports: the Office of the Inspector General ("OIG") report entitled "The September 11 Detainees: A Review of the Treatment of Aliens held on Immigration Charges in Connection with the Investigation of the September 11 Attacks" ("OIG Rep."), FAC ¶ 3 n.1, and a supplemental report entitled "Supplemental Report on September 11 Detainees' Allegations of Abuse at the Metropolitan Detention Center in Brooklyn, New York" ("Supp. OIG Rep."). *Id.* ¶ 5 n.2. Therefore, the facts contained in both reports may be considered when deciding Hasty's motion. The facts alleged in the complaint, moreover, must be taken as true at this stage of the case. *Ziglar*, 137 S.Ct. at 1852.

The gravamen of plaintiffs' claim against Hasty is that he was deliberately indifferent to the abuse of plaintiffs by MDC guards. *Ziglar*, 137 S.Ct. at 1864; FAC ¶¶ 77-78; 106-10. The Supreme Court has already held that "the prisoner abuse allegations against Warden Hasty state a plausible ground to find a constitutional violation *if* a *Bivens* remedy is to be implied." *Ziglar*, 137 S.Ct. at 1864 (emphasis added). Moreover, as noted above, the Court has also already held that plaintiffs' prisoner abuse claim seeks to extend *Bivens* and *Carlson* to a new context. Accordingly, the only remaining issue is whether there are "special factors counselling hesitation" or alternative remedies that would preclude the extension of *Bivens* required for plaintiffs' claims to proceed.

Before considering whether special factors or alternative remedies are present here, I note that the parties agree that the strength and number of applicable special factors need not be greater before hesitation is warranted in cases involving so-called "modest" extensions as opposed to more substantial ones. In other words, the magnitude of a potential extension of *Bivens* does not affect the "special factors analysis." *See* Letter from Clifton Elgarten dated March 13, 2018 ("Elgarten Letter") at 1-2, Docket Entry 826; Letter from Rachel Meeropol dated March 13, 2018 ("Meeropol Letter") at 1-2, Docket Entry 827. Accordingly, although the extension here may be a modest one, that has no direct bearing on the analysis of special factors and alternative remedies.

I. Warden Hasty

A. Special Factors

Hasty argues that this case presents "special factors" that counsel hesitation before extending *Bivens*. The special factors identified by Hasty include Congress's failure to enact a law providing a direct cause of action under the Constitution and the disruption to BOP policies and practices that a direct cause of action for money damages would cause. Def.'s Mem. at 14. Having considered these factors, I reject the contentions of both parties that Congress has either endorsed, rejected, or is neutral towards *Bivens* and its progeny. I further find, though, that this case presents a "special factor" counseling hesitation: that extending *Bivens* might negatively impact BOP's investigatory procedures and policies, and that Congress is as a result in the best position to weigh the costs and benefits of allowing a cause of action for damages to proceed.

1. Congress's Silence is Ambiguous

Hasty argues that Congress's failure to codify *Bivens* and enact a damages remedy for violations of constitutional rights is a special factor suggesting that the Court should hesitate before implying a cause of action. Def.'s Mem. at 19; *see also Ziglar*, 137 S.Ct. at 1865 ("[L]egislative action suggesting that Congress does not want a damages remedy is itself a factor counseling hesitation."). Hasty offers three examples of congressional silence that he contends counsel hesitation.

***6** First, Hasty points to Congress's decision to include in the USA Patriot Act a requirement that OIG investigate potential constitutional violations by BOP officials and provide semiannual reports to Congress. Def.'s Mem. at 19-20; *see also* USA Patriot Act, Pub. L. No. 107-56, § 1001, 115 Stat. 272, 391 (2001).[3] Hasty argues that

Congress, while considering this provision, could have provided for a private right of action against federal officials for deprivations of constitutional rights, but chose not to do so. Def.'s Mem. at 20. In fact, OIG continues to report to Congress, and Congress has still not enacted legislation providing for a *Bivens*-like cause of action. *See* Tr. 8-11.

Second, Hasty argues that Congress, as a result of the original and supplemental OIG reports, was aware of the allegations of abuse at issue in this very case, yet chose not to create a damages remedy. Def.'s Mem. at 20; *see also Ziglar*, 137 S.Ct. at 1862 ("[A]t Congress' behest, [OIG] compiled a 300-page report documenting the conditions in the MDC in great detail."). The Court in *Ziglar* referred to Congress's failure to provide a damages remedy in the wake of the OIG Report as one reason for dismissing plaintiffs' detention policy claims. *Ziglar*, 137 S.Ct. at 1862.

Plaintiffs counter by arguing that Congress's silence in the face of these reports in fact suggests its tacit approval of extending *Bivens* and allowing plaintiffs to proceed with their claims. Plaintiffs point out that the OIG reports specifically refer to this litigation, and that Congress was therefore aware of plaintiffs' pending prisoner abuse claim. Plaintiffs' Response Memorandum ("Pls.' Reply") at 12, Docket Entry 808-9; *see also* OIG Rep. at 2-3, 3 n.4; 92 (referring to this lawsuit and noting that the litigation is pending). Because of the ongoing litigation, plaintiffs contend, Congress had no reason to step in and provide a damages remedy. Pls.' Reply at 12. Moreover, although made aware of plaintiffs' pending case and its reliance on the availability of an implied *Bivens*-type remedy, Congress passed no legislation narrowing the scope of *Bivens* or the authority of courts to extend *Bivens* to new contexts.

Finally, Hasty, echoing the Court in *Ziglar*, argues that Congress "had specific occasion to consider the matter of prisoner abuse and to consider the proper way to remedy those wrongs" when it passed the PLRA, fifteen years after *Carlson*. Def.'s Mem. at 21 (quoting *Ziglar*, 137 S.Ct. at 1865). Though Hasty concedes that the PLRA does not apply to detainees who, like plaintiffs, are held as undocumented aliens, he argues that Congress, by passing the PLRA without enacting a corresponding *Bivens*-type cause of action for prisoner abuse claims, has indicated its reluctance to extend *Bivens* to new contexts. *Id.*; *see also* 42 U.S.C. § 1997e(h) (defining "prisoner" for the purposes of the PLRA as "any person incarcerated or detained in any facility who is accused of, convicted of, sentenced for, or adjudicated delinquent for, violations of criminal law or the terms and conditions of parole, probation, pretrial release, or diversionary program").

***7** Plaintiffs argue in response that, because the PLRA does not apply to immigration detainees, Congress's silence with respect to *Bivens* when it passed the PLRA has no bearing on whether *Bivens* should be expanded to allow plaintiffs' prisoner abuse claim. Pls.' Mem. at 18. Plaintiffs note as well that the Court in *Ziglar* did not affirmatively conclude that Congress's silence suggested its reluctance to expand *Bivens*; plaintiffs correctly point out that the Court merely stated that "[i]t could be argued" from the fact that the PLRA "does not provide for a standalone damages remedy against federal jailers" that "Congress chose not to extend the *Carlson* damages remedy to cases involving other types of prisoner mistreatment." *Ziglar*, 137 S.Ct. at 1865.

Furthermore, and in this Court's view more persuasively, plaintiffs argue that, when Congress passed the PLRA, it presumed the existence of a *Bivens* cause of action for prisoner abuse. Though at the time the PLRA was passed the Supreme Court had recognized a *Bivens* cause of action for prisoners only in *Carlson*, many Circuit courts had recognized a variety of prisoner and detainee abuse claims under *Bivens*. Pls.' Mem. at 20 (listing cases in which *Bivens* was recognized as a vehicle for asserting prisoner and detainee abuse claims). Yet, as plaintiffs point out, the PLRA merely imposed an exhaustion requirement on prison condition lawsuits brought under federal law; the statute in no way otherwise limits the scope of *Bivens*-type claims. *See* 42 U.S.C. § 1997e.

Finally, plaintiffs argue that Congress signaled its approval of *Bivens* when it amended the Federal Tort Claims Act ("FTCA") by passing the Westfall Act in 1988. Meeropol Letter at 3-4. The Westfall Act provides that a claim against the United States under the FTCA is the exclusive civil remedy for negligent or wrongful acts or omissions by employees of the federal government. 28 U.S.C. § 2679(b)(1). The Act also provides, however, that this limitation does not apply to "a civil action against an employee of the Government which is brought for a violation of the Constitution of the United States." 28 U.S.C. § 2679(b)

(2)(A). Arguably, by enacting legislation specifically discussing civil actions against government employees for violations of constitutional rights—but declining to eliminate or narrow them—Congress implicitly approved of such actions. *See* Meeropol Letter at 3; *see also Ziglar*, 137 S.Ct. at 1880-81 (Breyer, J., dissenting) (arguing that the exception for lawsuits claiming constitutional violations in the Westfall Act makes it clear that Congress views the FTCA and *Bivens* as providing "parallel, complementary causes of action" (quoting *Carlson*, 446 U.S. at 20, 100 S.Ct. 1468)); James E. Pfander & David Baltmanis, *Rethinking Bivens: Legitimacy and Constitutional Adjudication*, 98 Geo. L.J. 117, 135-36 (2009) (arguing that "[in] the Westfall Act, Congress again chose to retain the *Bivens* action ... [and that] [b]y accepting *Bivens* and making it the exclusive mode for vindicating constitutional rights, Congress has joined the Court in recognizing the importance of the *Bivens* remedy in our scheme of governmental accountability law").

The problem with plaintiffs' Westfall Act argument is that it failed to persuade the *Ziglar* majority. Plaintiffs candidly acknowledge that they argued before the Supreme Court that the Westfall Act essentially ratified *Bivens*, but that the *Ziglar* majority did not accept their argument. Meeropol Letter at 3. In his dissent, Justice Breyer likewise invoked passage of the Westfall Act as an indication of Congress's "accept[ance of] *Bivens* actions as part of the law." *Ziglar*, 137 S.Ct. at 1880 (Breyer, J., dissenting). The *Ziglar* majority, though, while making explicit reference to the Westfall Act, nevertheless held, largely on separation-of-powers grounds, that extending *Bivens* to new contexts is now a "disfavored" judicial activity." *Id.* at 1856-57 (majority opinion). In reaching that conclusion, the Court observed that Congress has failed to enact a *Bivens*-like damages remedy, and that Congress's "silence is telling." *Id.* at 1862. Clearly, then, the majority in *Ziglar*—though plainly aware of plaintiffs' and Justice Breyer's arguments to the contrary—rejected the notion that, by passing the Westfall Act, Congress suggested its support for *Bivens* actions.

***8** The *Ziglar* Court relied on Congress's silence, among other things, to hold that plaintiffs' detention policy claims could not proceed under *Bivens* and should be dismissed. This holding at least arguably suggests the same result here; Congress was just as silent with respect to plaintiffs' prisoner abuse claim as it was with respect to their detention policy claims. However, in dismissing plaintiffs' detention policy claims in *Ziglar*, the Court pointed out that Congress's "silence is notable because it is likely that high-level policies will attract the attention of Congress." *Id.* Because plaintiffs' prisoner abuse claim does not involve "high-level policies," this aspect of *Ziglar*'s holding is not controlling here.

Inferring intention from inaction necessarily involves speculation. The degree of speculation involved increases greatly when an inference about intent is based upon the inaction of a legislative body with hundreds of members, each of whom may have his or her own reasons for not acting. Having considered the parties' arguments, I conclude that the evidence of congressional intent here is too ambiguous to provide meaningful support for either side's position. *See Wilkie v. Robbins*, 551 U.S. 537, 554, 127 S.Ct. 2588, 168 L.Ed.2d 389 (2007) ("It would be hard to infer that Congress expected the Judiciary to stay its *Bivens* hand, but equally hard to extract any clear lesson that *Bivens* ought to spawn a new claim."). I therefore decline to infer what views Congress may have with respect to extending *Bivens* from its failure to pass a law that either provides or precludes a *Bivens*-type remedy for violations of constitutional rights.

2. The Potential Impact on BOP's Investigatory Procedures and Policies is a Special Factor Counseling Hesitation

Hasty argues that a second factor that should counsel hesitation is the impact that recognizing a *Bivens* cause of action in this case would have on BOP's procedures for investigating and addressing prisoner and detainee abuse claims. *See Ziglar*, 137 S.Ct. at 1858; Def.'s Mem. at 15. More specifically, Hasty points to procedures in place both before and after the September 11 terrorist attacks that purposely limited a warden's role in investigating allegations of abuse by correctional officers. Def.'s Mem. at 15. *See generally* Def.'s Mem., Ex. C, PS 1210.22, Office of Internal Affairs ("OIA") Memorandum dated October 1, 2001 ("Ex. C."), Docket Entry 808-4; Def.'s Mem., Ex. D, PS 1210.17, OIA Memorandum dated August 4, 1997 ("Ex. D."), Docket Entry 808-5.

Under the procedures cited by Hasty, physical abuse of a detainee by a correctional officer is a "significant incident" (1997 Memorandum) or Classification 1 case (2001 Memorandum), and threatening assault is a

Classification 2 case (2001 Memorandum). Ex. C § 7.a-7.b; Ex. D § 6. Under the regulations in effect in 1997, a warden who learned of an allegation of physical abuse was required to make a report to OIA, which would then "advise how to proceed." Ex. D § 6.a. Incidents deemed "significant" were referred to OIG for review, and the warden would be precluded from taking further action if OIG accepted the case. *Id.* § 6.f.

New procedures announced on October 1, 2001 require wardens to notify OIA of Classification 1 and 2 cases within twenty-four hours of learning about them. Ex. C § 8.b.1. These procedures also prohibit wardens or others under their supervision from interviewing or questioning the subject of allegations without prior approval from OIG and OIA. *Id.* § 8.b.3. The procedures designate OIA as responsible for overseeing all staff investigations. *Id.* § 9. When presented with allegations in Classification 1 or 2, OIA is required to refer the allegations to OIG for review and may refer criminal matters, explicitly including allegations of physical abuse, to the Civil Rights Division of the Department of Justice. *Id.* § 8.c.

***9** The Bureau of Prisons also directed that certain practices be implemented specifically with respect to the September 11 detainees. Def.'s Mem. at 18. Shortly after the attacks, BOP directed that video cameras be installed in the cells of each September 11 detainee. Supp. OIG Rep. at 39. At least at the MDC, the movements of the September 11 detainees were also videotaped beginning on October 5, 2001. *Id.* As a result of these measures, "incidents and allegations of physical and verbal abuse significantly decreased." *Id.* at 45 ¶, 100 S.Ct. 1468 5. Finally, as Hasty points out, after October 2001, OIG investigators were present at MDC looking into allegations of abuse. OIG Rep. at 144.

It is reasonable to think that imposing personal liability on a warden who is indifferent to abuse by correctional officers under his or her command might impede, or at least affect, the efficacy of these practices and procedures. For example, a warden subject to personal liability for the acts of correctional officers might fail to report those acts to OIA, or decide to do so only after conducting the sort of preliminary inquiry that might influence how an investigation unfolds and that BOP procedures—no doubt for that reason—explicitly prohibit. Similarly, a warden facing the possibility of personal liability might be less likely to enforce procedures requiring video recording of detainee movements, or might neglect to retain and catalogue recordings that memorialize abuse.

The costs to the government of imposing personal liability on wardens for deliberate indifference go beyond possible adverse effects on investigations of correctional officer abuse of detainees. "Claims against federal officials often create substantial costs, in the form of defense and indemnification." *Ziglar*, 137 S.Ct. at 1856. Moreover, the time and attention required to participate in a litigation as a party may distract supervisory officials, such as wardens, from their management responsibilities. *Id.* Finally, the possibility of being called to account for failing to monitor and control the actions of officers under their command might lead wardens to adopt supervisory practices and procedures they might otherwise not.

The threshold for concluding that a factor counsels hesitation "is remarkably low.... Hesitation is a pause, not a full stop, or an abstention; and to counsel is not to require. 'Hesitation' is 'counseled' whenever thoughtful discretion would pause even to consider." *Arar v. Ashcroft*, 585 F.3d 559, 574 (2d Cir. 2009). Measured against this "remarkably low" bar, the concerns discussed above—and, in particular, the question of who should decide how those concerns should be balanced against affording detainees a cause of action against a supervisory official who is deliberately indifferent to abuse—rises to the level of a special factor counseling hesitation.

B. Alternative Remedies

The Supreme Court has held that "the existence of alternative remedies usually precludes a court from authorizing a *Bivens* action." *Ziglar*, 137 S.Ct. at 1858, 1865. Alternative remedies were available to plaintiffs in this case, and dismissal is accordingly warranted on this ground as well.

1. The FTCA Provides a Sufficient Alternative Remedy

It is clear that plaintiffs could have asserted their claims for abuse pursuant to the Federal Torts Claims Act and, if they were successful, recovered compensation. Indeed, the Third Amended Complaint in this very case included claims based upon the conduct of MDC officials, including Hasty, for assault and battery, sleep deprivation, and intentional infliction of emotional

distress, all brought pursuant to the FTCA. Third Amended Complaint ¶¶ 426-40, Docket Entry 109.[4] Five plaintiffs reached settlements with the United States on these FTCA claims. Letter from Rachel Meeropol dated November 16, 2009, Ex. A, Docket Entry 687-2 (stipulations settling the FTCA claims of five plaintiffs for amounts ranging from $181,250 to $356,250 per plaintiff). There does not appear to be any reason why the current plaintiffs could not have brought similar claims on their own behalf.[5]

***10** Plaintiffs' argument that the FTCA should not be considered an alternative remedy precluding a *Bivens*-type claim rests on language from the holding in *Carlson*. The Supreme Court did state in *Carlson* that,

> when Congress amended [the] FTCA in 1974 to create a cause of action against the United States for intentional torts committed by federal law enforcement officers, 28 U.S.C. § 2680(h), the congressional comments accompanying that amendment made it crystal clear that Congress views [the] FTCA and *Bivens* as parallel, complementary causes of action.

Carlson, 446 U.S. at 19-20, 100 S.Ct. 1468.

The analysis in *Carlson*, though, cannot survive *Ziglar*. In *Carlson*, the Court held that a *Bivens* claim is precluded

> when defendants show that Congress has provided an alternative remedy which it explicitly declared to be a *substitute* for recovery directly under the Constitution and viewed as equally effective.

Carlson, 446 U.S. at 18-19, 100 S.Ct. 1468 (emphasis in original). In contrast, *Ziglar* takes a far broader view of those alternative remedies that foreclose assertion of a claim under *Bivens*:

> [I]f Congress has created any alternative, existing process for protecting the injured party's interest that itself may amount to a convincing reason for the Judicial Branch to refrain from providing a new and freestanding remedy in damages.

Ziglar, 137 S.Ct. at 1858 (internal alterations and quotation marks omitted). Thus, while the absence of an explicit declaration by Congress that the FTCA is intended to be a substitute for *Bivens* may have been dispositive to the Court that decided *Carlson*, that absence is of little significance after *Ziglar*. No doubt this is among the reasons the Court in *Ziglar* declared that, "in light of the changes to the Court's general approach to recognizing implied damages remedies, it is possible that the analysis in the Court's three *Bivens* cases might have been different if they were decided today." *Ziglar*, 137 S.Ct. at 1856.

Since *Ziglar*, other courts have questioned the continued vitality of *Carlson*'s holding that FTCA and *Bivens* claims may proceed as parallel, complementary causes of action, and have declined to permit *Bivens* claims to proceed because the FTCA provides an adequate alternative remedy. *See, e.g., Huckaby v. Bradley*, 2018 WL 2002790, at *6 (D.N.J. Apr. 30, 2018) (finding that "the availability of a remedy against the United States on a claim of negligence under the FTCA, in light of *Ziglar*, is a factor weighing against ... recognizing a *Bivens* remedy"), *appeal filed*, No. 18-2204 (3d Cir. June 1, 2018); *Abdoulaye v. Cimaglia*, 2018 WL 1890488, at *7 (S.D.N.Y. Mar. 30, 2018) (questioning whether the analysis of the FTCA as an alternative remedy in *Carlson* survives *Ziglar* and finding that "the existence of the FTCA as a potential remedy counsels hesitation in extending a *Bivens* remedy"); *Free v. Peikar*, 2018 WL 905388, at *5-6 (E.D. Cal. Feb. 15, 2018) (declining to extend *Bivens* to a First Amendment claim because the FTCA provides an adequate alternative remedy), *report and recommendation adopted by* 2018 WL 1569030 (E.D. Cal. Mar. 30, 2018); *Morgan v. Shivers*, 2018 WL 618451, at *5-6 (S.D.N.Y. Jan. 29, 2018)

(declining to extend *Bivens* to pre-trial detainee's Fifth Amendment excessive force and sexual assault claims because the FTCA provides an alternative remedy).

***11** Plaintiffs have submitted a letter positing that the Ninth Circuit's recent decision in *Rodriguez v. Swartz*, 899 F.3d 719 (9th Cir. 2018), supports their contention that the FTCA does not preclude extensions of *Bivens* to new contexts. Pls.' Letter Dated August 10, 2018, Docket Entry 833. *Rodriguez* involved a claim that a U.S. Border Patrol agent stationed on the American side of our border with Mexico fired between fourteen and thirty bullets across the border at a sixteen-year-old boy, striking the boy with about ten bullets and killing him. *Id.* at 726. As plaintiffs suggest, the majority in *Rodriguez* did opine that Congress did not intend for the FTCA, and in particular the Westfall Act, to preclude victims of constitutional torts from suing government employees who allegedly violated their constitutional rights. *Id.* at 740–41. The reasoning in *Rodriguez* is at least arguably *dicta*, though, because the majority first concluded that the FTCA was not an available alternative remedy because it "specifically provides that the United States cannot be sued for claims 'arising in a foreign country.' " *Id.* (quoting 28 U.S.C. § 2680(k)). To the extent *Rodriguez* holds that the FTCA does not as a general matter provide an alternative remedy to a *Bivens* claim, I respectfully disagree with that holding for the reasons stated above.

Because plaintiffs could have brought their claims under the FTCA and been awarded damages for their injuries if they prevailed, *Ziglar* counsels that their *Bivens* claims should be dismissed.

2. Other Alternative Remedies

Although I conclude that the availability of a remedy pursuant to the FTCA is sufficient to preclude plaintiffs' *Bivens* claims, I note that plaintiffs might have invoked other remedies as well. For example, at least two courts have taken into account BOP's administrative grievance process when concluding that alternative remedies preclude *Bivens* claims. *Free*, 2018 WL 905388, at *6; *Gonzalez v. Hasty*, 269 F.Supp.3d 45, 60 (E.D.N.Y. 2017), *appeal filed*, No. 17-3790 (2d Cir. Nov. 21, 2017). Plaintiffs might also have sought injunctive or habeas relief. Indeed, the Supreme Court's opinion in *Ziglar* suggests as much. 137 S.Ct. at 1865.

Plaintiffs raise serious questions about whether the administrative grievance process, or the possibility of injunctive or habeas relief, provided them with sufficiently meaningful alternative remedies to warrant precluding their *Bivens* claims. Plaintiffs first argue that equitable relief, when compared to a *Bivens* claim, would not afford them "roughly similar compensation" for their injuries or provide defendants with "roughly similar incentives" to respect their constitutional rights. Pls.' Mem. at 15; *see Minneci v. Pollard*, 565 U.S. 118, 130, 132 S.Ct. 617, 181 L.Ed.2d 606 (2012). *But see Gonzalez*, 269 F.Supp.3d at 62 (noting that "there is no precedent suggesting that the unavailability of money is a factor that carries any weight in determining the expansion of a *Bivens* remedy. Rather, the emphasis is simply on the existence of an avenue to protect the right."). Plaintiffs are plainly correct that an award of equitable relief would not provide them with monetary compensation for violations of their rights that had already occurred, and likely would not provide defendants with as strong an incentive to avoid violating constitutional rights as would money judgments entered against them personally.

Plaintiffs also argue that their conditions of confinement precluded them, as a practical matter, from filing a grievance or pursuing either injunctive or habeas relief. Pls.' Mem. at 13. Plaintiffs allege that they were not provided with the handbooks that explain to detainees how to file an administrative complaint about mistreatment until long after they were taken into custody. FAC ¶ 140. Plaintiffs further contend that, until mid-October 2001, they were subjected to a "communications blackout," which denied them social or legal visits or telephone calls. *Id.* ¶¶ 79-81. Plaintiffs further allege that MDC staff "repeatedly turned away any relative or lawyer who came to the MDC in search of a detainee by falsely stating that the detainee was not there." *Id.* ¶ 81. Even after the blackout was lifted, plaintiffs' ability to make legal and social calls was at best severely limited and, in reality, virtually nonexistent. *Id.* ¶¶ 83-85. As a result, plaintiffs argue, they were not able to seek an injunction until April 2002. By that time, plaintiffs had been released and their application for injunctive relief was moot. Pls.' Mem. at 14.

***12** Defendants dispute plaintiffs' claim of inability to seek relief prior to April 2002, noting that a case based on allegations of abuse similar to those plaintiffs

raise here was filed in December of 2001. Defendants' Reply ("Def.'s Reply") at 11-12, Docket Entry 808-8; *see* Complaint ¶¶ 14-18, Baloch v. Ashcroft, No. 01-cv-8515 (E.D.N.Y. Dec. 21, 2001), Docket Entry 1. The complaint in *Baloch*, though, largely corroborates plaintiffs' claims, in that it alleges that Baloch was unable to communicate with an attorney, despite his efforts to do so, from September 22, 2001, the day he was detained, until some time in November, 2001. Complaint ¶¶ 12-15, Baloch v. Ashcroft, No. 01-cv-8515 (E.D.N.Y. Dec. 21, 2001). Baloch's complaint, moreover, was not filed until December 21, 2001, by which time Baloch had been detained for three months, and was ultimately dismissed as moot before the Court could decide whether relief was warranted. Order Dismissing Case as Moot, Baloch v. Ashcroft, No. 01-cv-8515 (E.D.N.Y. June 27, 2002), Docket Entry 4. Finally, the motion pending before the Court is one to dismiss, and the factual allegations of plaintiffs' complaint must therefore be accepted as true for purposes of deciding the motion.

Because I conclude that the FTCA provided plaintiffs with an alternative remedy precluding their *Bivens* claims, I need not decide whether injunctive or habeas relief, or an administrative grievance, did as well. Nevertheless, the District Court may not agree that the FTCA provides an alternative remedy. I therefore note my conclusion that, for the reasons stated above and in light of the particular facts of this case, neither an administrative grievance, a motion for injunctive relief, nor a petition for a writ of habeas corpus were sufficiently available to plaintiffs to provide them with alternative remedies warranting preclusion of their *Bivens* claims.

C. District Court Decisions Rendered After Ziglar

Plaintiffs contend that *Ziglar* does not restrict *Bivens* claims as narrowly as the discussion above suggests, and should not be read to preclude their abuse claim from proceeding. As support, plaintiffs point to three post-*Ziglar* cases that permitted *Bivens* claims arising in new contexts to go forward. *See generally Cuevas v. United States*, 2018 WL 1399910 (D. Colo. Mar. 19, 2018), *appeal filed* No. 18-1219 (10th Cir. May 18, 2018); *Leibelson v. Collins*, 2017 WL 6614102 (S.D. W. Va. Dec. 27, 2017), *appeal filed sub nom. Leibelson v. Cook* No. 18-1202 (4th Cir. Feb. 23, 2018); *Linlor v. Polson*, 263 F.Supp.3d 613 (E.D. Va. 2017).

The cases cited by plaintiffs are distinguishable because they involve relatively low-level individual officers and do not implicate or touch upon prison policy. *See Cuevas*, 2018 WL 1399910, at *1-4 (allowing an inmate's *Bivens* claim to proceed against BOP correctional officers who allegedly relayed sensitive information to other inmates with the intention that they retaliate violently against the plaintiff, after finding that "[t]he challenged actions are ordinary incidences of day-to-day prison operations, for which there is law clearly establishing that the practice is unconstitutional, such that there is no risk that this litigation will tread on complex matters of BOP policymaking"); *Leibelson*, 2017 WL 6614102, at *12-13 (denying summary judgment and permitting a *Bivens* claim to proceed against a BOP captain for alleged indifference to the ability of a transgender inmate plaintiff to eat in the prison cafeteria without risk of assault); *Linlor*, 263 F.Supp.3d at 625 (allowing a *Bivens* claim to proceed against a TSA officer for allegedly using excessive force because the case "present[ed] a relatively simple, discrete question of whether a federal officer applied excessive force during a Fourth Amendment search").

The holdings in two of the cases cited by plaintiffs are distinguishable on other grounds as well. In *Cuevas*, the Court expressly declined to consider whether the FTCA provided plaintiff with an alternative remedy because defendants did not argue that it did. *Cuevas*, 2018 WL 1399910, at *4 n.4. Similarly, while the Court in *Leibelson* permitted one of plaintiff's *Bivens* claims to proceed, it dismissed several others, including one dismissed at least in part because plaintiff was simultaneously pursuing a cause of action under the FTCA based upon overlapping allegations. *Leibelson*, 2017 WL 6614102, at *11.

***13** There are, moreover, several lower courts decisions dismissing *Bivens* claims in the wake of *Ziglar* on grounds comparable to those discussed in this Report. In *Abdoulaye*, for example, the Court declined to extend Bivens to a claim against a deputy U.S. Marshal who allegedly pushed a wheelchair-bound detainee into a wall, exacerbating the detainee's back injury. *Abdoulaye*, 2018 WL 1890488, at *1, *7. The Court held that the availability of an alternative remedy under the FTCA, and the decision of Congress not to include a stand-alone remedy for damages in the PLRA, counseled hesitation and warranted dismissal of the plaintiff's *Bivens* claim. *Id.* at *7; *see also Free*, 2018 WL 905388, at *6 (declining to extend *Bivens* to an inmate's First Amendment retaliation

claim because the FTCA, BOP's administrative grievance process, and habeas corpus are adequate alternative remedies and because congressional silence counsels hesitation); *Morgan*, 2018 WL 618451, at *6-7 (declining to extend *Bivens* to an inmate's claim of abusive conduct in connection with a search of his rectum because the FTCA provides an adequate alternative remedy, because Congress failed to establish a private right of action even when legislating in the area of prisoners' rights, and because "balanc[ing] the challenges prison administrators and officers face in maintaining prison security against the expansion of [a] private right of action for damages ... is more appropriately suited for Congress, not the Judiciary"); *Gonzalez*, 269 F.Supp.3d at 59-62, 65 (declining to extend *Bivens* to an inmate's Fifth and Eighth Amendment claims with respect to his confinement in MDC's ADMAX SHU because BOP's administrative grievance process and habeas corpus provided adequate alternative remedies, and because Congress has not established a private right of action despite being active in the area of prisoners' rights). These post-*Ziglar* cases suggest that courts are resistant to efforts to expand *Bivens*, even when considering claims that do not implicate high-level policy concerns, and particularly when those claims arise in prisons or jails.

II. Defendants LoPresti and Cuciti

As noted above, plaintiffs "accept that the Court's determination of the scope of *Bivens* liability will apply to their claims against the non-appealing defendants—LoPresti and Cuciti—as well." Pls.' Mem. at 9.

Insofar as is relevant here, LoPresti was the Captain of the MDC and was responsible for supervising all MDC correctional officers, including those assigned to the ADMAX SHU. FAC ¶ 27. Plaintiffs allege that LoPresti was frequently present in the ADMAX SHU, reviewed logs, and received complaints from plaintiffs and other detainees about ongoing abuse and conditions on the unit, yet did nothing to stop the abuse or address the misconduct of officers under his supervision. *Id.* Cuciti was a First Lieutenant at the MDC, where he was responsible for processing detainees, escorting them, and overseeing their legal and social visits. *Id.* ¶ 28. Like LoPresti, Cuciti made rounds in the ADMAX SHU, reviewed logs, and received complaints from plaintiffs and other detainees about ongoing abuse and adverse conditions on the unit, but did nothing to rectify the abuse of which he was aware. *Id.* In short, plaintiffs claim that LoPresti and Cuciti were deliberately indifferent to the abuse of the plaintiffs by other MDC officers. Plaintiffs' Supplemental Brief in Support of *Bivens* Liability ("Pls.' Supp.") at 4-5, Docket Entry 823.

LoPresti and Cuciti adopt Hasty's arguments. Defendant LoPresti's Memorandum in Support of the Motion to Dismiss ("LoPresti Mem.") at 2, Docket Entry 818.[6] They argue that, even though LoPresti and Cuciti held ranks lower than Warden, plaintiffs' allegations against them are similar to those made against Warden Hasty. *Id.* at 4. LoPresti and Cuciti contend that, while they were closer in rank to the line officers who are alleged to have abused plaintiffs, they did not themselves commit the acts of abuse that underlie plaintiffs' claims. *Id.* at 5.

The discussion above with respect to the availability of the FTCA as an alternative remedy forecloses plaintiffs' *Bivens* claims against LoPresti and Cuciti. Moreover, the threshold for finding a special factor that counsels hesitation is so low that—while the result is less clear with respect to LoPresti and Cuciti than it is with respect to Hasty—I conclude that the impact on BOP's investigatory procedures and policies is such a factor. I accordingly recommend that plaintiffs' *Bivens* claims against defendants LoPresti and Cuciti, like those against defendant Hasty, be dismissed.

CONCLUSION

***14** The Supreme Court in *Ziglar* confined *Bivens* to an extremely narrow space. That space is too narrow to accommodate plaintiffs' remaining abuse claim. Therefore, and for the reasons stated above, I respectfully recommend that plaintiffs' remaining claims be dismissed.

Any objections to the recommendations made in this Report must be submitted within fourteen days after filing of the Report and, in any event, no later than August 27, 2018. *See* 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72(b)(2). Failure to file timely objections may waive the right to appeal the District Court's order. *See Small v. Sec'y of Health & Human Servs.*, 892 F.2d 15, 16 (2d Cir. 1989) (discussing waiver under the former ten-day limit).

All Citations

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Footnotes

1 The caption of this Report mirrors the one in the Fourth Amended Complaint. At this point in the litigation, though, only the following plaintiffs have claims pending before the Court: Ahmer Abbasi, Anser Mehmood, Benamar Benatta, Ahmed Khalifa, Saeed Hammouda, and Purna Bajracharya. Letter from Rachel Meeropol dated February 20, 2018 at 1, Docket Entry 820. These plaintiffs' remaining claims are asserted only against defendants Hasty, LoPresti, and Cuciti. *Id.*

2 *Davis v. Passman* involved a claim of employment discrimination brought by an administrative assistant to a Congressman who contended she was fired because she was a woman. *Ziglar*, 137 S.Ct. at 1854.

3 The statute cited in the text provides that "[t]he Inspector General of the Department of Justice shall designate one official who shall—(1) review information and receive complaints alleging abuses of civil rights and civil liberties by employees and officials of the Department of Justice; ... and (3) submit to the Committee on the Judiciary of the House of Representatives and the Committee on the Judiciary of the Senate on a semi-annual basis a report on the implementation of this subsection and detailing any abuses described in paragraph (1)."

4 Generally, the FTCA's waiver of sovereign immunity does not apply to claims for assault and battery and certain other torts. 28 U.S.C. § 2680(h). This limitation does not apply, however, to law enforcement officers. *Id.* Bureau of Prisons officials are considered law enforcement officers for purposes of this statute. *See, e.g., Ali v. Federal Bureau of Prisons*, 552 U.S. 214, 218-224, 128 S.Ct. 831, 169 L.Ed.2d 680 (2008); *Chapa v. United States Dep't. of Justice*, 339 F.3d 388, 390 (5th Cir. 2003); *Lewis v. United States*, 2005 WL 589583, at *3 (W.D.N.Y. Mar. 8, 2005).

5 The record is silent as to why the current plaintiffs did not bring claims under the FTCA. I note, however, that the FTCA requires that a plaintiff exhaust administrative remedies within two years after a claim accrues. *See* 28 U.S.C. §§ 2401, 2675. The exhaustion requirement is jurisdictional and cannot be waived. *Celestine v. Mount Vernon Neighborhood Health Ctr.*, 403 F.3d 76, 82 (2d Cir. 2005).

6 Counsel for LoPresti submitted the memorandum cited in the text on behalf of defendants LoPresti and Cuciti, subject to obtaining authorization to appear on Cuciti's behalf. LoPresti Mem. at 2 n.1. Counsel subsequently filed a notice of appearance as attorney for defendant Cuciti. Docket Entry 821.