

No.

IN THE
Supreme Court of the United States

FRANCIS NIELSEN,
Petitioner,

v.

KEKAI WATANABE,
Respondent.

**On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit**

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

This case concerns the judicially created damages remedy first recognized in *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). In *Carlson v. Green*, 446 U.S. 14 (1980), the Court extended *Bivens* to an Eighth Amendment claim of deliberate indifference to medical needs where prison officials failed to address an inmate’s acute asthma attack and exacerbated it, causing his death on-site within hours.

Since then, this Court has emphasized that the creation of damages actions rests with Congress, not courts. The judicially created *Bivens* remedy thus cannot be extended to any “new *Bivens* context” if any “special factor counsel[s] hesitation” in doing so. *Ziglar v. Abbasi*, 582 U.S. 120, 139-140 (2017). “[T]he new-context inquiry is easily satisfied,” encompassing cases with “‘meaningful[ly]’” different facts, or “‘potential special factors’”—including “‘alternative remedial structures’”—“‘not consider[ed]’” in the Court’s prior cases. *Egbert v. Boule*, 596 U.S. 482, 492-493 (2022). “[A] court may not recognize a *Bivens* remedy” if “there is any reason to think that Congress might be better equipped to create a damages remedy.” *Id.* at 492.

In this case, respondent alleged that he suffered a fractured coccyx in a prison gang fight, causing chronic pain, but was not sent to a hospital. The Ninth Circuit held the suit did not present a “new” context from *Carlson*—notwithstanding an alternative remedial scheme this Court did not consider in *Carlson*, and despite significant factual differences such as the immediacy and severity of the harm alleged. The question presented is:

Whether the Ninth Circuit here erred in recognizing a *Bivens* cause of action.

PARTIES TO THE PROCEEDINGS BELOW

Petitioner Francis Nielsen was the appellee in the court of appeals.

Respondent Kekai Watanabe was the appellant in the court of appeals.

Estela Derr, K. Robl, and Nathan Kwon were defendants in the district court but did not participate in the appeal that is the subject of this petition.

STATEMENT OF RELATED PROCEEDINGS

The following proceedings are directly related to this case within the meaning of Rule 14.1(b)(iii):

- *Watanabe v. Derr*, No. 23-15605 (9th Cir.), judgment entered on September 6, 2024; and
- *Watanabe v. Derr*, No. 22-cv-168 (D. Haw.), judgment entered on March 10, 2023.

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PETITION FOR A WRIT OF CERTIORARI

Francis Nielsen respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The court of appeals' opinion (App., *infra*, 1a-23a) is reported at 115 F.4th 1034. The court of appeals' denial of Nielsen's petition for rehearing and rehearing en banc (App., *infra*, 76a-116a), including opinions respecting and dissenting from that denial, is reported at 139 F.4th 1056. The district court's opinion and order granting petitioner's motion to dismiss (App., *infra*, 24a-39a) is unreported but available at 2023 WL 2500933.

STATEMENT OF JURISDICTION

The court of appeals entered judgment on September 6, 2024, App., *infra*, 1a, and denied rehearing and rehearing en banc on June 5, 2025, *id.* at 76a. On August 21, 2025, Justice Kagan extended the time to file the petition to and including October 3, 2025. 25A208. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

Relevant provisions of U.S. Const. amend. VIII; the Prison Litigation Reform Act, 18 U.S.C. § 3626 and 42 U.S.C. § 1997e; and the Bureau of Prisons’ Administrative Remedy Program, 28 C.F.R. §§ 542.10, 542.13-542.15, are set forth in the Appendix, *infra*, 117a-121a.

PRELIMINARY STATEMENT

The decision below presents “multiple,” openly acknowledged, “deep circuit splits” on whether and when plaintiffs may invoke the implied cause of action first recognized in *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). App., *infra*, 91a (Nelson, J., dissenting from denial). Those conflicts prompted *eleven* judges to dissent from denial of rehearing en banc below. *Id.* at 89a-116a. Circuit after circuit has acknowledged the conflicts. *E.g.*, *Muniz v. United States*, 149 F.4th 256, 264 n.4 (3d Cir. 2025); *Arias v. Herzon*, 150 F.4th 27, 51 & n.11 (1st Cir. 2025) (Lynch, J., concurring in part and dissenting in part); *Watkins v. Mohan*, 144 F.4th 926, 947 & n.* (7th Cir. 2025) (Kirsch, J., concurring in part and dissenting in part). The Court should “resolve the multiple deep circuit splits,” App., *infra*, 91a (Nelson, J., dissenting from denial), and restore “clarity” to the law, *id.* at 116a (Collins, J., dissenting from denial).

Bivens created a damages action against federal officers accused of conducting an unreasonable, warrantless search and seizure inside the plaintiff’s home in violation of the Fourth Amendment. The Court has extended *Bivens* only twice. The last was in *Carlson v. Green*, 446 U.S. 14 (1980), where the Court extended *Bivens* to an action against prison officials accused of violating the detainee’s Eighth Amendment rights, where they not only failed to treat his acute asthma attack, but exacerbated it, causing his on-the-scene death.

This Court, however, has since “come ‘to appreciate more fully the tension between’ judicially created causes of action and ‘the Constitution’s separation of legislative and judicial power.’” *Egbert v. Boule*, 596 U.S. 482, 491 (2022). It has “repeatedly emphasized that ‘recognizing a cause of action under *Bivens* is “a disfavored judicial activity.”’” *Goldey v. Fields*, 606 U.S. 942, 944 (2025) (per curiam). The Court has thus imposed a “two-step test” that must be applied before any *Bivens* action may proceed. *Ibid.* First, courts must consider whether the case presents “‘a new *Bivens* context’—that is, whether the case ‘is different in a meaningful way’ from the cases in which this Court has recognized a *Bivens* remedy.” *Ibid.* If the context is new, courts must ask “whether there are special factors indicating that the Judiciary is at least arguably less equipped than Congress to weigh the costs and benefits of allowing a damages action to proceed.” *Ibid.* (quotation marks omitted). That two-step inquiry “often resolve[s] to a single question: whether there is any reason to think that Congress might be better equipped to create a damages remedy.” *Egbert*, 596 U.S. at 492.

The Ninth Circuit’s decision exacerbates circuit conflicts over those requirements. At the first step, the Ninth Circuit held that this case does not present a “new *Bivens*

context” because here, as in *Carlson*, “prison officials * * * acted with deliberate indifference to an incarcerated individual’s serious medical needs.” App., *infra*, 7a. It thus did not matter to the Ninth Circuit that Congress had provided respondent with “alternative remedial structures” apart from suing under *Bivens*—structures that were “‘not considered by the Court in *Carlson*.’” *Id.* at 14a-15a; see *id.* at 79a (urging that “alternative remedies are generally not relevant at step one”) (respecting denial of rehearing). Nor did it matter that the harm respondent claimed to have suffered here—in terms of cause, impact, and immediacy—differed dramatically from *Carlson*. Respondent here complains that he did not receive sufficiently prompt treatment for a fractured coccyx; the plaintiff in *Carlson* died on the scene as a result of egregious conduct. Because of the suddenness and severity of the harm in *Carlson*, “it [was] damages or nothing.” *Bivens*, 403 U.S. at 410 (Harlan, J., concurring in the judgment). Respondent, by contrast, sought the alternative of injunctive relief in this very lawsuit. The Ninth Circuit dismissed those contrasts as “not a meaningful difference * * * because the underlying harm was still a ‘failure to provide medical attention evidencing deliberate indifference to serious medical needs.’” App., *infra*, 13a.

That turns this Court’s precedent “on its head.” App., *infra*, 91a (Nelson, J., dissenting from denial). This Court has already held that one way “a case can present a new context” is “the existence of alternative remedies” not previously considered. *Ziglar v. Abbasi*, 582 U.S. 120, 147-148 (2017). And the Ninth Circuit ignored that claims “may arise in a new context even if [they are] based on the same constitutional provision as a claim in a case in which a damages remedy was previously recognized.” *Hernández v. Mesa*, 589 U.S. 93, 103 (2020). Even the same “mecha-

nism of injury”—here, “failure to provide adequate medical treatment”—is not enough to make contexts “the same.” *Ziglar*, 582 U.S. at 139.

The Ninth Circuit’s contrary holdings exacerbate two deep and acknowledged circuit conflicts. The Third, Fifth, Seventh, Tenth, and Eleventh Circuits have held that the availability of alternative remedies that were not considered in prior cases makes the *Bivens* context “new” and precludes *Bivens*’ extension. See *Kalu v. Spaulding*, 113 F.4th 311, 328 (3d Cir. 2024); *Hernandez v. Causey*, 124 F.4th 325, 334 (5th Cir. 2024), cert. denied, 145 S. Ct. 1930 (2025); *Sargeant v. Barfield*, 87 F.4th 358, 366-369 (7th Cir. 2023), cert. denied, 145 S. Ct. 285 (2024); *Silva v. United States*, 45 F.4th 1134, 1142 (10th Cir. 2022); *Johnson v. Terry*, 119 F.4th 840, 858 (11th Cir. 2024). In the Eleventh Circuit’s words, the “context of [the asserted] claims is different from * * * *Carlson* because [in *Carlson*] the Court did not consider whether there were alternative remedies under the current alternative remedy analysis.” *Johnson*, 119 F.4th at 858. But the Ninth and First Circuits have held the opposite. App., *infra*, 15a; *Arias*, 150 F.4th at 49-50. In addition, the First, Tenth, and Eleventh Circuits have held that allegations of non-lethal injuries, or mistreatment of lesser severity than that in *Carlson*, render the context “new.” See *Waltermeyer v. Hazlewood*, 136 F.4th 361, 366-368 (1st Cir. 2025); *Rowland v. Matevousian*, 121 F.4th 1237, 1243 (10th Cir. 2024); *Johnson*, 119 F.4th at 858-859. By contrast, the Ninth Circuit, along with the Seventh and Third Circuits, have rejected such differences as irrelevant to the new-context inquiry. See App., *infra*, 13a; *Muniz*, 149 F.4th at 262-263; *Brooks v. Richardson*, 131 F.4th 613, 615 (7th Cir. 2025). Those important and recurring conflicts warrant review.

STATEMENT

I. LEGAL FRAMEWORK

A. This Court's Creation of Implied Damages Actions

In 1971, this Court's decision in *Bivens* created, for the first time, an implied damages action against federal agents for constitutional violations. In particular, the Court held that federal officers could be liable for a warrantless search and seizure inside the plaintiff's home in violation of the Fourth Amendment. *Bivens*, 403 U.S. at 389, 397. The Court has "extended [*Bivens*] only twice." *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 70 (2001). In *Davis v. Passman*, the Court allowed a congressional staffer to sue for sex-based discrimination in violation of the Fifth Amendment. 442 U.S. 228, 248-249 (1979). And, in *Carlson*, the Court allowed a suit under the Eighth Amendment where prison officials failed to treat the inmate's acute asthma attack—and exacerbated his condition—causing him to die on the scene. 446 U.S. at 16-25. In each case, the plaintiff had no other remedy against the officials: It was *Bivens* "'damages or nothing.'" *Malesko*, 534 U.S. at 67-68.

This Court, however, has since come to recognize that "creating a cause of action is a legislative endeavor." *Egbert*, 596 U.S. at 491. Thus, "[f]or the past 45 years" since *Carlson*, "this Court has consistently declined to extend *Bivens* to new contexts." *Goldey*, 606 U.S. at 945.

B. This Court's Two-Step *Bivens* Framework

Because judicially created damages actions are "'disfavored,'" this Court requires federal courts to evaluate "proposed *Bivens* claim[s]" using a two-step analysis. *Egbert*, 596 U.S. at 491-492.

First, courts must assess whether the claim “arises in a new *Bivens* context”—that is, whether it differs “in a meaningful way” from the cases where this Court previously recognized *Bivens* actions. *Ziglar*, 582 U.S. at 139. The Court’s “understanding of a ‘new context’ is broad,” *Hernández*, 589 U.S. at 102, and the “new-context inquiry is easily satisfied,” *Ziglar*, 582 U.S. at 149. “[E]xamples” of meaningful differences include factors as diverse as:

the rank of the officers involved; the constitutional right at issue; * * * 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.

Id. at 139-140. That two cases may appear “‘parallel’” at a “superficial” level is insufficient to prevent a context from being “new.” *Egbert*, 596 U.S. at 495-496, 501. What matters is whether Congress, exercising legislative judgment, could determine that some difference alters the policy balance—the “costs and benefits”—involved in deciding whether to create a damages cause of action. *Id.* at 495-496. If the answer is “yes,” the context is new. See *ibid.*

Second, if the context is “new,” courts must ask whether “there are special factors counselling hesitation in the absence of affirmative action by Congress.” *Ziglar*, 582 U.S. at 136 (quotation marks omitted). “If there is a rational reason to think” Congress would be better suited to create the remedy—“as it will be in most every case”—“no *Bivens* action may lie.” *Egbert*, 596 U.S. at 492.

Those two steps “often resolve to a single question: whether there is *any* reason to think that Congress might be better equipped to create a damages remedy.” *Egbert*, 596 U.S. at 492 (emphasis added).

C. Prisoner-Litigation Legislation and the Administrative Remedy Program

In the years since *Carlson*, Congress has passed statutes addressing prisoner litigation.

1. In 1996, Congress enacted the Prison Litigation Reform Act or “PLRA”—the most comprehensive federal legislation concerning prisoner litigation to date. Pub. L. No. 104-134, 110 Stat. 1321 (1996). The PLRA was motivated in part by a desire to keep the “key” to prisons “safely out of reach of overzealous Federal courts.” 141 Cong. Rec. 26,553 (1995) (Sen. Hatch). The PLRA, for example, restricts the scope and availability of injunctive relief. 18 U.S.C. § 3626(a)(1)(A), (b)(1)(A)(i), (e).

The PLRA also includes reforms to stem the proliferation of litigation by state and federal inmates. It requires exhausting administrative remedies before any lawsuit is filed. 42 U.S.C. § 1997e(a). That requirement contemplates the possibility of inmates filing lawsuits against *state* officials, tort suits against employees in privately operated prisons, *Malesko*, 534 U.S. at 72-73, and injunctive actions against federal officials, see 42 U.S.C. § 1997e(a). The Act does not “provide for a standalone damages remedy against federal jailers.” *Ziglar*, 582 U.S. at 149.

2. The Bureau of Prisons (“BOP”) operates a grievance process, called the “Administrative Remedy Program” or “ARP,” codified at 28 C.F.R. §§ 542.10-542.19. The ARP’s “purpose” is “to allow an inmate to seek formal review of an issue relating to any aspect of his/her own confinement.” *Id.* § 542.10(a)-(b). The ARP encompasses four steps: (1) an informal complaint, *id.* § 542.13(a); (2) a formal complaint on a standardized federal form, *id.* § 542.14(a), (c); (3) an appeal to the appropriate BOP Regional Director, *id.* § 542.15(a); and (4) a request for final review from the BOP’s General Counsel, *id.* § 542.15(a), (b)(1).

II. PROCEEDINGS BELOW

Petitioner Francis Nielsen is a staff nurse at the Federal Detention Center in Honolulu. Respondent Kekai Watanabe suffered injuries during a gang riot at that facility. App., *infra*, 25a.

A. District Court Proceedings

1. In July 2021, Watanabe was attacked by rival gang members while in detention. App., *infra*, 25a. Once prison officials restored order, they documented Watanabe's known and visible injuries. *Ibid.* They placed him on sick call. *Ibid.* Later that day, Watanabe told correctional officers he was experiencing headaches and pain; he asked to be seen by medical staff. *Ibid.* At "some point" later, Watanabe allegedly "described his medical condition" to petitioner, who allegedly "denied Watanabe's request to be taken to the hospital." *Id.* at 25a-26a. Prison officials "provided Watanabe with over-the-counter pain medication." *Id.* at 26a.

Months later, Watanabe was diagnosed with a fractured coccyx with bone chips in surrounding soft tissue. App., *infra*, 26a. Prison officials agreed to refer Watanabe to a specialist. *Ibid.*

2. Watanabe filed a pro se complaint alleging that petitioner and others violated his Eighth Amendment rights by calling him a "cry baby," denying him "actual treatment," and denying his request to go to the hospital. App., *infra*, 24a & n.1, 26a. Watanabe sought \$3 million in damages and injunctive relief. *Id.* at 54a.

The district court granted petitioner's motion to dismiss. App., *infra*, 24a-25a. Applying this Court's two-step framework for assessing *Bivens* claims, the district court held that Watanabe's claim presented a "new context" that was distinct from *Carlson*. Watanabe, the court held, had

access to an alternative remedy: the ARP. *Id.* at 36a-38a. Because the existence of that remedy is a “[special] factor * * * not considered by the Court in *Carlson*,” the court found it to be “another reason that Watanabe’s claim arises in a new context.” *Id.* at 36a. Watanabe’s injury was also “not akin to” the fatal “medical emergency faced by the inmate in *Carlson*.” *Id.* at 34a. And allowing Watanabe’s *Bivens* claim could transform district courts into “medical review board[s]” supervising treatment of prison injuries. *Id.* at 35a. At *Bivens* step two, the district court held that special factors counseled against recognizing a *Bivens* remedy. *Id.* at 36a-38a.

B. The Ninth Circuit’s Decision

A divided panel of the Ninth Circuit reversed. The panel majority (Paez and Koh, JJ.) held that Watanabe’s access to “alternative remedial structures does not render this case a new context” at step one. App., *infra*, 15a. Instead, alternative remedial schemes like the ARP “can be one ‘special factor,’ to be considered at the *second* step of the *Bivens* analysis.” *Ibid.*; see *id.* at 79a (“alternative remedies are generally not relevant at step one”) (respecting denial of rehearing). In this case, the majority explained, it was “not required to undertake the second step of the analysis.” *Id.* at 15a. “[E]ven if” the court “were to consider” alternative remedial structures “at step one,” the court stated, Watanabe’s claim “does not present a new *Bivens* context notwithstanding the fact that the incarcerated individual had access to” an alternative remedial scheme. *Ibid.*

The panel rejected any distinction based on the conduct or injuries. “*Carlson*,” it asserted, “dealt with the exact same issue” as this case—“deliberate indifference to an inmate’s serious medical needs.” App., *infra*, 3a, 9a. “A plaintiff need not suffer death or a life-threatening injury

for his claim to be sufficiently analogous to *Carlson*.” *Id.* at 13a. If “Watanabe received less deficient care” than in *Carlson*, the majority continued, that was “not a meaningful difference.” *Id.* at 14a. Nor did it matter that, for Watanabe, it was not “damages or nothing.” Watanabe could assert his *Bivens* claim for damages alongside a claim for prospective relief. *Id.* at 16a-17a.

Judge M. Smith dissented in part. He would have held that Watanabe’s claim “is meaningfully different than *Carlson*.” App., *infra*, 20a. The allegations of “mistreatment,” he found, do “not come close to th[ose] in *Carlson*.” *Id.* at 21a. While the personnel in *Carlson* “‘attempted to use a respirator *known* to be inoperative,’” here there is no indication petitioner even “knew, or should have known, the extent of Watanabe’s injury.” *Ibid.* “Watanabe’s medical need,” moreover, “was less severe than that in *Carlson*, which resulted in that inmate’s death.” *Id.* at 22a. That difference in severity “is meaningful”: Even “‘a modest extension’” of *Bivens* “‘is still an extension.’” *Ibid.* (quoting *Ziglar*, 582 U.S. at 147).

C. The Ninth Circuit Denies Rehearing with Eleven Judges Dissenting

The Ninth Circuit denied rehearing and rehearing en banc with eleven judges dissenting.

1. In a statement respecting denial of rehearing, the panel majority acknowledged that “the circuits have split on the role of alternative remedies and the continued viability of *Carlson* actions.” App., *infra*, 78a. But the statement urged that the panel decision had “joined” at least “the Sixth Circuit” in “holding that the ARP does not distinguish *Carlson* actions at step one.” *Id.* at 86a. The statement acknowledged that “[s]pecial factors’ can * * * be considered at both steps” of the *Bivens* inquiry, but insisted that “alternative remedies take on greater signi-

fiance at step two” because “[s]tep one focuses on the alleged violation.” *Id.* at 80a. “[A]lternative remedies * * * unrelated to the official’s conduct, the constitutional right allegedly violated, or the legal framework governing the challenged action * * * bear little significance at step one, which focuses on the context of the violation itself.” *Id.* at 81a. The statement defended the panel’s ruling that “the severity of the injury or misconduct” was irrelevant to the new-context inquiry, invoking decisions of the Fourth, Fifth, and Seventh Circuits. *Id.* at 84a-88a.

2. Judge Nelson dissented, joined by Judges Callahan, M. Smith, Ikuta, Bennett, Bade, Lee, Bress, Bumatay, and VanDyke. App., *infra*, 89a-111a. The Ninth Circuit, he lamented, “has become famous for repeatedly ignoring the Supreme Court on *Bivens* questions.” *Id.* at 90a. This case was another example—and one that implicated “multiple deep circuit splits over *Carlson*-related *Bivens* actions” warranting this Court’s review. *Id.* at 91a.

a. The dissent urged that the existence of an alternative remedial scheme, not considered in *Carlson*, rendered this case a new *Bivens* context. App., *infra*, 98a-99a. The panel’s rejection of that argument “underscores a circuit split”: “At least two other circuits [the Eleventh and Third Circuits] have held that the availability of alternative remedies—specifically the ARP—creates a new *Bivens* context.” *Id.* at 106a. “Still more circuits recognize that special factors—like alternative remedies—‘play a part in both steps of the [*Bivens*] inquiry.’” *Id.* at 107a. This Court’s *Ziglar* decision itself “point[s] to alternative remedies as an indication of a new *Bivens* context.” *Id.* at 98a.

Here, the alternative remedial structure created by the ARP was a “‘potential special factor[] that [was] not considered in’” *Carlson*. App., *infra*, 97a. That rendered the context “new.” *Ibid.* Indeed, the ARP was not available

to the “mother suing on behalf of her deceased son’s estate” in *Carlson*. *Id.* at 100a. That was “easily” a “meaningful difference.” *Ibid.*

b. In finding no meaningful factual difference between this case and *Carlson*, moreover, the panel majority had “simply point[ed] to the Eighth Amendment and not[ed] that *Carlson* dealt with the same type of claim.” App., *infra*, 103a. That “did violence to” this Court’s precedents. *Id.* at 102a-103a (citing *Hernández*, 589 U.S. at 103). It was error to “latch[] onto superficial similarities,” and to “downplay[]” key factual differences—like the fact that, in *Carlson*, the inmate died. *Id.* at 103a-106a. “Taking the Supreme Court at its word, *Carlson* * * * support[s] a *Bivens* claim on its facts: a wrongful death case where the remedy is ‘damages or nothing.’” *Id.* at 109a.

In concluding otherwise, the panel majority had split with the First, Tenth, and Eleventh Circuits. App., *infra*, 103a-106a. Those courts, the dissent explained, consider differences in severity and treatment; they “reject the majority’s conclusion that ‘receiving less deficient care’” than the inmate in *Carlson* “‘is not a meaningful difference.’” *Id.* at 106a (brackets omitted).

3. Judge Collins dissented separately, urging that the Ninth Circuit should have gone en banc to render “our *Bivens* precedent * * * more faithful to the Supreme Court’s caselaw.” App., *infra*, 112a. Failing that, however, the dissent urged this Court to take the opportunity “to provide a greater degree of clarity than we could ever have done in this area.” *Ibid.*

REASONS FOR GRANTING THE PETITION

This Court has repeatedly reminded lower courts that “‘the heady days in which [courts] assumed common-law powers to create causes of action’” are “long past.” *Eg-*

bert, 596 U.S. at 491; see *Hernández*, 589 U.S. at 99-101; *Ziglar*, 582 U.S. at 138-140. Congress—not the judicial branch—is charged with creating causes of action. *Egbert*, 596 U.S. at 491. To that end, *Egbert* limits *Bivens* to the three circumstances in which the Court previously recognized *Bivens* actions. *Id.* at 492. Under *Egbert*, federal courts must inquire whether the case before them presents a “new context” compared to those cases. *Ibid.*

The courts of appeals, however, have openly divided in *Egbert*’s wake. First, as court after court has recognized, “the circuits have split on the role of alternative remedies.” App., *infra*, 78a (respecting denial of rehearing). Like this Court in *Ziglar*, many courts hold that “the existence of alternative remedies” not previously considered in this Court’s cases is a potential “special factor[]” that raises “a new context,” *Ziglar*, 582 U.S. at 147-148, or otherwise “independently” forecloses a *Bivens* remedy, *Egbert*, 596 U.S. at 497. The decision below, now joined by the First Circuit, holds the opposite.

Second, the circuits have divided over whether the extent or nature of the mistreatment, the resulting harm, and its immediacy can render the context “new.” App., *infra*, 103a-106a, 108a-109a (Nelson, J., dissenting from denial). Four circuits agree that such distinctions matter. But the Ninth Circuit has joined two others in holding that those distinctions are not “meaningful.”

Those divisions “deserve the Court’s attention.” App., *infra*, 108a-109a (Nelson, J., dissenting from denial of rehearing en banc); see *id.* at 112a (Collins, J., dissenting from denial); accord *Arias*, 150 F.4th at 51 n.11 (Lynch, J., concurring in part and dissenting in part) (urging that this Court “may wish to address these circuit splits” given “the need for additional guidance”). The proper scope of *Bivens* implicates fundamental separation-of-powers con-

cerns. The questions are important and recurring. And neither federal detainees nor federal officers should confront different standards of federal law based on the happenstance of the circuit in which their case arises.

I. THE COURTS OF APPEALS ARE DEEPLY AND OPENLY DIVIDED ON HOW TO CONDUCT THE “NEW CONTEXT” INQUIRY

The decision below creates or exacerbates openly acknowledged circuit conflicts on two different issues.

A. The Circuits Are Divided Over Whether Alternative Remedies Create a New *Bivens* Context

The courts have openly “split on the role of alternative remedies” in the *Bivens* new-context analysis at step one. App., *infra*, 78a (respecting denial of rehearing). The panel majority acknowledged that “split.” *Ibid*. The eleven judges that dissented from denial of rehearing en banc noted the split as well: “The majority’s alternative remedies holding,” they urged, “underscores a circuit split.” *Id.* at 106a (Nelson, J., dissenting from denial); *id.* at 112a (Collins, J., dissenting from denial). Other courts too have acknowledged a “circuit split” on that issue. *Arias*, 150 F.4th at 51, 54 (Lynch, J., concurring in part and dissenting in part) (decision “exacerbates the existing splits among the circuits and introduces a new split”); *Muniz*, 149 F.4th at 264 n.4 (“a circuit split has arisen on this issue” with “[a]t least one circuit agree[ing] with our first-step analysis” and “others * * * com[ing] to differing conclusions”). That division is open, entrenched, and ripe for this Court’s review.

1. Circuit after circuit has held that an alternative remedial scheme, not considered in prior cases, gives rise to a “new *Bivens* context” at step one. Four have so held in the specific context of *Carlson* cases under the Eighth

Amendment. That includes the Third Circuit, *Kalu*, 113 F.4th at 328; the Seventh Circuit, *Sargeant*, 87 F.4th at 366-369; the Tenth Circuit, *Silva*, 45 F.4th at 1142; and the Eleventh Circuit, *Johnson*, 119 F.4th at 858-859. The Fifth Circuit has so held in the Fourth Amendment context. *Causey*, 124 F.4th at 334.¹

In *Johnson*, for example, the Eleventh Circuit addressed whether the Eighth Amendment claims before it reflected a “new context” despite “‘significant parallels’ to *Carlson*’s.” 119 F.4th at 857. Invoking the ARP, the court held the context new. The “context of these claims is different from * * * the claim in *Carlson* because [in *Carlson*] the [Supreme] Court did not consider whether there were alternative remedies under the current alternative remedy analysis.” *Id.* at 858.

The Third Circuit reached the same conclusion in *Kalu*. “Because the PLRA and the BOP’s remedy program are ‘features that were not considered’ by the Supreme Court when it decided *Carlson*,” the Third Circuit explained, “they present an additional reason to conclude that *Kalu*’s claim arises in a new context.” 113 F.4th at 328. Reaffirming that holding in *Muniz*, the Third Circuit again held that, because “the BOP ARP did not factor into the Supreme Court’s remedial analysis in *Carlson*, the availability of that mechanism to *Muniz* creates a new context at the first step.” 149 F.4th at 264. The Seventh Circuit agrees. *Sargeant*, 87 F.4th at 368-369. And the Fifth Circuit has held that a Fourth Amendment claim presented a new context where, among other things, the plaintiff had “an

¹ District courts in the Second and Fourth Circuits have reached the same conclusion, again in the context of Eighth Amendment claims under *Carlson*. *E.g.*, *Carter v. United States*, No. 22-cv-6715, 2024 WL 1345313, at *12-13 (E.D.N.Y. Mar. 29, 2024); *Waldron v. Streeval*, 7:24-cv-324, 2025 WL 2233684, at *7 (W.D. Va. Aug. 5, 2025).

alternative remedial structure provided by Congress.” *Causey*, 124 F.4th at 334.

Going further, the Tenth Circuit has ruled that Eighth Amendment *Bivens* claims are “foreclosed by the availability of the BOP Administrative Remedy Program,” wholly apart from *Egbert*’s two-step inquiry. *Silva*, 45 F.4th at 1141-1142. *Egbert*, that court held, made clear that alternative remedial schemes “‘independently’” foreclose *Bivens* remedies. *Id.* at 1140; see *Noe v. United States*, No. 23-1025, 2023 WL 8868491, at *3 (10th Cir. Dec. 22, 2023) (“availability of the ARP is sufficient to foreclose a *Bivens* claim despite any factual similarity” with *Carlson*), cert. denied, *Noe v. Berkley*, 144 S. Ct. 2562 (2024). Under *Egbert*, “an alternative remedial scheme ‘alone’ is a ‘special factor’ under the Supreme Court’s *Bivens* jurisprudence that terminates the action.” *Sigalovskaya v. Braden*, 149 F.4th 226, 236 (2d Cir. 2025) (Pérez, J., concurring) (quoting *Egbert*, 596 U.S. at 493).

2. Two courts of appeals, however, have reached the opposite conclusion. An alternative remedial scheme, they have held, does not render the context “new” at the first step under *Egbert*. The panel decision below so held in a single paragraph:

In *Egbert*, the Supreme Court clarified that the existence of alternative remedial structures can be one “special factor,” to be considered at the *second* step of the *Bivens* analysis. Here, we are not required to undertake the second step of the analysis, because we conclude that Watanabe’s case is not meaningfully different from *Carlson*, and thus does not present a new context.

App., *infra*, 15a (citation omitted). The panel majority expanded on that in its statement on rehearing. While

“‘[s]pecial factors’” generally are “considered at both steps” of the *Bivens* inquiry, the panel majority urged “*alternative remedies*” generally should be considered at “step two” rather than in step one’s new-context inquiry, because “[s]tep one focuses *on the alleged violation*, including the nature of the right violated * * *.” *Id.* at 80a (emphasis added) (respecting denial of rehearing). “[W]hen *alternative remedies* are unrelated to the official’s conduct, the constitutional right allegedly violated, or the legal framework governing the challenged action, *they bear little significance at step one*, which focuses on the context of the violation itself.” *Id.* at 81a (emphasis added). As the Ninth Circuit later described its rule: “Step one focuses on the alleged violation * * *. Step two, by contrast, focuses on remedies. * * * When the alleged violation can be established and analyzed without reference to the alternative remedial structure at issue, that structure has little import at step one.” *Schwartz v. Miller*, — F.4th —, 2025 WL 2473008, at *6 (9th Cir. 2025). Consequently, Ninth Circuit “cases are * * * uniform in treating the ARP as a special factor *only* at step two.” *Id.* at *7 (emphasis added).

In so holding, the Ninth Circuit “struck out on its own, deriving” a “one-of-a-kind rule from *Egbert*.” App., *infra*, 111a (Nelson, J., dissenting from denial).² But the First

² On rehearing, the panel majority insisted its decision followed “the Fourth, Fifth, Sixth, and Seventh Circuits.” App., *infra*, 89a. If true, that would only underscore the conflict’s depth and the resulting need for this Court’s review. But the cited Fourth and Seventh Circuit decisions do not address whether or how alternative remedies are considered in the new-context inquiry. See *id.* at 87a-88a. Of the two cited Fifth Circuit decisions, one is unpublished, *Vaughn v. Bassett*, No. 22-10962, 2024 WL 2891897 (5th Cir. June 10, 2024), and the other predates *Egbert* and contains no *Bivens* analysis, *Carlucci v. Chapa*, 884

Circuit soon followed. In *Arias*, the First Circuit held that an excessive-force claim against Drug Enforcement Administration agents did not present a “new *Bivens* context” despite the availability of a new administrative grievance process. *Arias*, 150 F.4th at 45, 49 (quotation marks omitted). The First Circuit acknowledged that *Ziglar* “make[s] clear that previously unconsidered alternative remedies may be relevant at the first step” of the *Bivens* inquiry. *Id.* at 42. The court nonetheless concluded that the “mere existence of a previously unconsidered administrative mechanism” does not make a context “new.” *Ibid.*

A more open and clear conflict is hard to imagine. It has repeatedly been noted by multiple circuits. See pp. 2, 15, *supra*. And the courts are in conflict not merely on the proper treatment of alternative remedial schemes in the step-one new-context inquiry generally. Their decisions directly conflict on whether the Bureau of Prisons’ ARP in particular gives rise to a “new *Bivens* context.” Four circuits—the Third Circuit, *Kalu*, 113 F.4th at 328; *Muniz*, 149 F.4th at 264; the Seventh Circuit, *Sargeant*, 87 F.4th at 368; the Tenth Circuit, *Silva*, 45 F.4th at 1141; and the Eleventh Circuit, *Johnson*, 119 F.4th at 857, agree that it does, or that it independently forecloses a *Bivens* action. The decision below expressly holds that it does not. App., *infra*, 15a; see *Schwartz*, 2025 WL 2473008, at *6-7.

F.3d 534, 537-540 (5th Cir. 2018). The Sixth Circuit decision, *Koprowski v. Baker*, 822 F.3d 248 (6th Cir. 2016), pre-dates *Ziglar*. App., *infra*, 87a. The Sixth Circuit did not “confirm[] its holding,” *ibid.*, in *Callahan v. Federal Bureau of Prisons*, 965 F.3d 520 (6th Cir. 2020). *Callahan* distinguished *Koprowski* and rejected an extension of *Bivens*. 965 F.3d at 525.

B. The Circuits Are Divided on Whether Lesser or Less Immediate Injury and Mistreatment Can Render the Context “New”

The courts of appeals likewise disagree on whether “differences in severity between * * * the claim in *Carlson*” are relevant “to the cognizability of a *Bivens* remedy.” App., *infra*, 103a (Nelson, J., dissenting from denial). That conflict over whether to take a “permissive stance on the nature and extent of the injury for *Carlson* claims” is part of a “flood of inconsistent case law” on how to conduct the “‘new context’ analysis.” *Watkins*, 144 F.4th at 951 & n.* (Kirsch, J., concurring in part and dissenting in part).

1. Three courts of appeals—the Third, Seventh, and Ninth Circuits—have concluded that the severity of an injury is irrelevant to the new-context inquiry for *Carlson* claims. App., *infra*, 14a; *Muniz*, 149 F.4th at 262-263; *Brooks*, 131 F.4th at 615.³

Respondent here, for example, alleged chronic pain related to a fractured coccyx, not an acute medical emergency resulting in death, as in *Carlson*. App., *infra*, 13a. The panel held, however, that “[a] plaintiff need not suffer death or a life-threatening injury for his claim to be sufficiently analogous to *Carlson*.” App., *infra*, 13a. The Third Circuit in *Muniz* recently found that view “persuasive”—a painful

³ Unpublished Fourth and Fifth Circuit decisions have reached similar conclusions. *Masias v. Hodges*, No. 21-6591, 2023 WL 2610230, at *2 (4th Cir. Mar. 23, 2023) (“ankle injury”); *Vaughn*, 2024 WL 2891897, at *1, 4 (“facial fractures”). Both rely on published decisions that did not conduct the “new context” analysis. See *Langford v. Joyner*, 62 F.4th 122 (4th Cir. 2023); *Carlucci v. Chapa*, 884 F.3d 534 (5th Cir. 2018). District courts in the Sixth Circuit have also held that cases do not raise new “contexts” even where they do not involve emergencies or wrongful-death-type claims. *E.g.*, *Mattox v. United States*, No. 7:24-cv-74, 2025 WL 2524845, at *8-10 (E.D. Ky. Sept. 2, 2025).

toe infection could suffice—but the court found a new context existed for other reasons. 149 F.4th at 262-264.

The Seventh Circuit similarly has permitted *Carlson*-like claims to proceed based on non-lethal conditions like a bout with “appendicitis” that “lasted ten days * * * before [the plaintiff] was sent to a hospital.” *Brooks*, 131 F.4th at 615-616. Differences in the “duration of the poor care or the gravity of the condition” compared to *Carlson*, the Seventh Circuit held, did not render the context “new.” *Ibid.*; see *Watkins*, 144 F.4th at 931, 934 (hernia surgery).

2. By contrast, three courts of appeals—the First, Tenth, and Eleventh Circuits—have found that a “new context” exists when the severity of the alleged injury or mistreatment differs from that in *Carlson*. *Waltermeyer*, 136 F.4th at 366-368; *Rowland*, 121 F.4th at 1243; *Johnson*, 119 F.4th at 858-859.⁴

In *Waltermeyer*, for example, the First Circuit rejected a *Bivens* claim for inadequate medical attention related to a chronic knee condition. 136 F.4th at 366-368. The inmate’s claim was meaningfully different from *Carlson* because, among other reasons, “[t]he medical procedures administered by the medical staff * * * were not contrary to medically advised procedures,” and because “[t]he claim does not involve a wrongful death-like action and at no time did the alleged failure to adequately treat concern either a life-threatening condition or extreme pain.” *Id.* at 366-367. The Tenth and Eleventh Circuits hold that “se-

⁴ District courts in the Second, Fourth, Fifth, and Eighth Circuits have reached the same conclusion. *E.g.*, *Bravo v. U.S. Marshals Serv.*, 684 F. Supp. 3d 112, 125 (S.D.N.Y. 2023); *Waldron*, 2025 WL 2233684, at *6; *Brooks v. Foreman*, No. 3:20-cv-599, 2023 WL 11228264, at *3-4 (S.D. Miss. Aug. 24, 2023); *Skinner v. Obi-Okoye*, No. 2:23-cv-34, 2025 WL 850149, at *7 (E.D. Ark. Feb. 19, 2025), report and recommendation adopted, 2025 WL 849187 (Mar. 18, 2025).

vere but ultimately non-lethal” injuries that are “eventually treated” are sufficiently different from those in *Carlson*. *Johnson*, 119 F.4th at 858-859; see *Rowland*, 121 F.4th at 1243 (plaintiff had not “died as a result,” unlike *Carlson*).

That division goes to the fundamental rationale underlying *Bivens*. In *Bivens*, *Davis*, and *Carlson*, it was critical that the plaintiffs’ options were “damages or nothing.” *Bivens*, 403 U.S. at 410 (Harlan, J., concurring in the judgment); see *id.* at 390 (majority opinion) (petitioner should not be “entirely without remedy”); *Davis*, 442 U.S. at 245 (“For Davis, as for Bivens, ‘it is damages or nothing.’”); see *Malesko*, 534 U.S. at 67-68, 72 (declining to extend *Bivens* where, unlike in prior *Bivens* cases, the plaintiff could seek other remedies). In *Carlson*, too, it was damages or nothing. The inmate there died within hours of a serious asthma attack that federal officials “made * * * more severe.” 446 U.S. at 16 n.1. Yet the Third, Seventh, and Ninth Circuits have ruled that months-long failures to treat, App., *infra*, 4a (fractured coccyx); *Muniz*, 149 F.4th at 258 (chronic diabetes, leading to acute infection), or a ten-day wait before treatment occurred, *Brooks*, 131 F.4th at 615, arise in the *same context*. Far from “lack[ing] effective remedies” due to the severity and immediacy of harm, inmates in those circumstances can seek injunctive or other relief requiring treatment; it is not “‘damages or nothing.’” *Malesko*, 534 U.S. at 72. That makes the context not just “new” but fundamentally different.

II. THE ISSUES ARE IMPORTANT AND RECURRING

The issues are important and recurring. *Bivens*’ scope implicates fundamental principles. It is “a significant step under separation of powers principles” for courts to exercise “the judicial power[] to create and enforce a cause of action for damages against federal officials.” *Ziglar*, 582

U.S. at 133. This Court regularly grants review (and reverses) *Bivens* extensions, including a summary reversal last Term. See *Goldey*, 606 U.S. at 945; *Egbert*, 596 U.S. at 501; *Hernández*, 589 U.S. at 100-102; *Ziglar*, 582 U.S. at 135. The judicial creation and enforcement of a damages action is particularly significant where, as here, courts do so despite the legislature’s intervention through statutes like the PLRA; where Congress has regulated with the specific goal of limiting judicial intervention; and Congress has authorized, and the Executive adopted, mandatory administrative grievance processes. By expanding *Carlson* to the full range of injuries judicially deemed “serious,” App., *infra*, 7a, 13a, the decision below threatens to convert the judiciary into an “*ad hoc* medical review board,” *id.* at 35a.

The issues are recurring. There has been a veritable “flood of inconsistent case law.” *Watkins*, 144 F.4th at 951 (Kirsch, J., concurring in part and dissenting in part). Since *Egbert* was decided, at least 18 court of appeals opinions have addressed whether alternative remedies render the context “new”; 14 have expressly addressed whether non-fatal injuries raise a new context compared to *Carlson*. App., *infra*, 122a-124a. Thirteen of those were decided in *the last year alone*. *Id.* at 122a. And the district courts confront these issues regularly. *Id.* at 124a-131a. The issue is likewise important to the 150,000 federal inmates now in detention. Fed. Bureau of Prisons, Population Statistics, https://www.bop.gov/about/statistics/population_statistics.jsp (last visited Oct. 1, 2025). Their rights and the legal exposure of federal agents should not depend on the happenstance of litigation geography.

Court of appeals judges have expressed the fervent “hope[]” that this Court will “resolve the multiple deep circuit splits,” App., *infra*, 91a (Nelson, J., dissenting from

denial), and “provide some greater clarity,” *id.* at 116a (Collins, J., dissenting from denial). This Court, they have observed, “may wish to address these circuit splits” and provide necessary “additional guidance to lower court judges.” *Arias*, 150 F.4th at 51 n.11 (Lynch, J., concurring in part and dissenting in part). Review is warranted.

III. THE DECISION BELOW IS WRONG

The decision below does not merely exacerbate a pair of circuit conflicts. It is wrong.

A. The Ninth Circuit Erred in Disregarding Previously Unconsidered Alternative Remedial Structures When Determining Whether the Context Is “New”

This Court’s decisions are clear: The “presence of potential special factors that previous *Bivens* cases did not consider” is one of the “differences that are meaningful enough to make a given context a new one.” *Ziglar*, 582 U.S. at 139. No one contends otherwise. And this Court has held that the existence of “alternative remedial structures” like the ARP is a “special factor.” *Egbert*, 596 U.S. at 493; see *Ziglar*, 582 U.S. at 148; *Goldney*, 606 U.S. at 944-945. The outcome here thus should have been obvious: The existence of an alternative remedial structure like the ARP, which previous *Bivens* cases did not consider, is sufficient to make the *Bivens* context “new.”

In *Ziglar* itself, this Court held that one of the claims at issue would have “extend[ed] *Carlson* to a new context” because it involved potentially available “alternative remedies.” 582 U.S. at 147-149. “[C]ertain features” of the claim “were not considered in the Court’s previous *Bivens* cases”—including the fact that “there might have been alternative remedies available here.” *Id.* at 148. The enactment of the “Prison Litigation Reform Act of 1995,” *Ziglar*

continued, “suggests Congress chose not to extend the *Carlson* damages remedy” to prisoner-abuse claims. *Id.* at 148-149; see *Goldey*, 606 U.S. at 944. Because of such “differences,” *Ziglar* held the “new-context inquiry” satisfied. 582 U.S. at 149.

The panel decision below nonetheless held, in a single paragraph, that alternative remedial schemes like the ARP “can be one ‘special factor,’ to be considered at the *second* step of the *Bivens* analysis.” App., *infra*, 15a. On rehearing, the panel majority urged that the “new context” inquiry at “[s]tep one focuses *on the alleged violation*” such as “the nature of the right violated” or “the mechanism of harm.” *Id.* at 80a-81a (emphasis added). “[W]hen alternative remedies are unrelated to the official’s conduct, the constitutional right allegedly violated, or the legal framework governing the challenged action,” the panel majority declared, alternative remedies “bear little significance at step one, which focuses on the context of the violation itself.” *Id.* at 81a. Thus, in *Schwartz*, the Ninth Circuit reiterated that court’s rule that “alternative remedial structure[s] * * * ha[ve] little import at step one,” and that the ARP thus is a “special factor *only* at step two.” 2025 WL 2473008, at *6-7 (emphasis added).

That analysis defies this Court’s decision in *Ziglar*. In listing various differences that can render the context “new,” *Ziglar* listed “special factors” that were not previously considered. 582 U.S. at 139-140. And it found one of the claims there raised a new context precisely because of such alternative remedial schemes. *Id.* at 148-149.⁵ The

⁵ The panel majority thus erred in asserting *Ziglar*’s discussion of alternative remedies was dictum to guide the “Court of Appeals” in performing the step-two analysis on remand. App., *infra*, 81a n.2. *Ziglar* itself addressed alternative remedies when deciding whether the

Ninth Circuit’s effort to relegate remedial schemes primarily to the second step of the analysis also defies this Court’s explanation that the two steps “often resolve to a *single question*: whether there is any reason to think that Congress might be better equipped to create a damages remedy.” *Egbert*, 596 U.S. at 492 (emphasis added). The Ninth Circuit’s distinction—confining certain special factors to step one or two—cannot be reconciled with the singular nature of that inquiry. Courts must ask whether Congress, in its legislative capacity, could identify any factual or legal difference that might alter the policy balance that previously led this Court to create a cause of action. *Ibid.*; *Snowden v. Henning*, 72 F.4th 237, 239 (7th Cir. 2023), cert. denied, 145 S. Ct. 137 (2024). They cannot evade that inquiry by giving alternative remedial schemes—a critical consideration in any policy balance—so little weight that they cannot render the context “new” (thereby dispensing with any need to consider them at step two as well).

The panel’s statement that it would not deem the alternative scheme to be a “meaningful” difference at step one repeats the mistake. See App., *infra*, 15a-16a. The Ninth Circuit rejected the alternative scheme as insufficiently meaningful in the step-one, new-context inquiry precisely because it viewed remedial schemes as primarily relevant at step two and of “little significance” at step one. *Id.* at 15a, 80a-81a; see *Schwartz*, 2025 WL 2473008, at *7 (ARP

claim arose in a “new context” and then “*decline[d] to perform*” step two. 582 U.S. at 148-149 (emphasis added); see *Arias*, 150 F.4th at 42. The opinion first identifies alternative remedies and the PLRA as the “meaningful” “differences identified above” that “satisf[y]” “the new-context inquiry.” 582 U.S. at 148-149. The opinion then begins an *entirely new subsection* addressing—and “declin[ing] to perform”—step two of the inquiry, leaving it for the court of appeals instead. *Id.* at 149.

not “appropriately considered at the first step”); pp. 17-19, *supra*. But claims implicating “potential special factors”—including alternative remedies—are prototypical “examples” of those arising in a context that is “new.” *Ziglar*, 582 U.S. at 139-140, 148-149. Indeed, this Court has held that “alternative remedial structures” “‘alone’” foreclose a *Bivens* cause of action. *Egbert*, 596 U.S. at 492-493 (emphasis added); see *id.* at 497 (existence of “alternative remedies * * * independently foreclose[s] a *Bivens* action”). The “new-context inquiry” is “easily satisfied.” *Ziglar*, 582 U.S. at 149; see *Hernández*, 589 U.S. at 102. A special factor so central to the *Bivens* inquiry—and to whether it is “damages or nothing,” p. 22, *supra*—surely suffices. “If that is not a meaningful difference, then it’s hard to say what is.” App., *infra*, 98a-99a (Nelson, J., dissenting from denial).

Finally, the eleventh-hour theory that the “ARP was in place when *Carlson* was decided”—first raised in a statement respecting rehearing, App., *infra*, 78a—is meritless. A special factor can render the context new if it is one the prior *Bivens* case “*did not consider*.” *Ziglar*, 582 U.S. at 140 (emphasis added). *Carlson* *did not* consider the ARP (or the PLRA). No party brought the ARP to the Court’s attention; the Court did not address it. That is a complete answer. And there was a reason the ARP was not considered. The inmate in *Carlson* died in August 1975, years before the first version of the ARP existed. See Control, Custody, Care, Treatment, and Instruction of Inmates, 44 Fed. Reg. 62250 (Oct. 29, 1979). Moreover, “the *Carlson* plaintiff”—the *mother* of the inmate who died—concededly could not have invoked “the ARP” in any event. App., *infra*, 82a. “[I]f the question is whether there is a single meaningful difference between *Carlson* and this case, the fact that the mother in *Carlson* could not use a remedy

that was available to Watanabe easily meets that bar.” App., *infra*, 100a (Nelson, J., dissenting from denial).⁶

B. The Ninth Circuit Erred in Extending *Carlson* Despite Differences in Severity and Immediacy of Harm

The Ninth Circuit likewise erred in excluding the extremely different harms—in terms of cause, severity, and immediacy—from the new-context inquiry. In *Carlson*, federal prison officials not only failed to treat the inmate’s acute asthma attack but exacerbated it—effectively killing him. They “administered contraindicated drugs which made his attack more severe, attempted to use a respirator known to be inoperative which further impeded his breathing, and delayed for too long a time his transfer to an outside hospital.” *Carlson*, 446 U.S. at 16 n.1. The inmate died in the prison, then and there.

This case could not be more different. Respondent here alleges chronic pain from an untreated fractured coccyx. App., *infra*, 4a. His complaint does not assert that his condition was immediately life threatening. As the district court found, respondent’s pain “is not akin to the medical emergency faced by the inmate in *Carlson* that ultimately resulted in that inmate’s death.” *Id.* at 34a. Respondent had ample time to seek redress through non-damages av-

⁶ The panel majority also urged that considering “the ARP” at step one could “effectively overrule” *Carlson*. App., *infra*, 89a. But that would not overrule *Carlson*, even if it restricted *Carlson*’s range of application. For example, years after *Davis* created a damages remedy in favor of a congressional staffer alleging sex discrimination, 442 U.S. at 230, 242-249, Congress created “special statutory remedies” for congressional employees, George Rutherglen, *Major Issues in the Federal Law of Employment Discrimination* 106 (5th ed. 2012), <https://www.fjc.gov/sites/default/files/2012/EmplDis5.pdf>. Those remedies do not overrule *Davis*. They limit (or eliminate) *Davis*’s application.

enues. In his original complaint, he sought injunctive relief (and the Ninth Circuit later remanded his injunctive-relief claim). See *id.* at 16a-17a. Respondent could invoke the BOP Administrative Remedy Program.⁷ By contrast, the inmate in *Carlson* had none of those options. He could not have run to court for an injunction or followed a grievance procedure in the middle of an acute asthma attack to protest the use of an inoperative respirator or contraindicated medications. And after the attack, it was too late; he had passed.

Those differences make this context “new.” “A difference is ‘meaningful’ when it involves a factual distinction or new legal issue that might alter the policy balance that initially justified the implied damages remedies in the *Bivens* trilogy.” *Snowden*, 72 F.4th at 239. The extent and immediacy of harm surely could affect that balance. Congress could rationally determine that inmates with chronic concerns, who can file grievances or seek injunctive relief, should not have the option of costly and potentially harassing damages actions—but still afford such actions when (as in *Carlson*) an inmate in urgent need of medical care dies. A “‘wrongful death-like action’” is appropriate in those latter cases, Congress might determine, because “the remedy” there is “‘damages or nothing.’” App., *infra*, 109a (Nelson, J., dissenting from denial). Congress could reasonably find that, with greater misconduct and

⁷ Watanabe also could have sought relief under the “Federal Tort Claims Act,” App., *infra*, 38a, or through DOJ’s Office of Inspector General (“OIG”), which can “review information and receive complaints alleging abuses of civil rights and civil liberties by employees and officials of the Department of Justice,” Pub. L. No. 107-56, 115 Stat. 391, § 1001 (2001).

the gravest of harms, damages are appropriate as a deterrent—but not for lesser misconduct and lesser harms.⁸

Indeed, allowing damages actions for the full range of harms could risk “disruptive intrusion by the Judiciary into the functioning of other branches,” *Ziglar*, 582 U.S. at 140, potentially converting district courts into “medical review board[s]” supervising prisoner medical treatment, App., *infra*, 35a. *Bivens* claims could “arise every time a prison refuses to send an inmate for outside treatment.” *Id.* at 22a. That is especially problematic given Congress’s enactment of legislation—the PLRA—to limit court interference with the operation of federal prisons. See p. 8, *supra*.

The Ninth Circuit nowhere disputed that a rational legislature could draw those distinctions. It nowhere denied there are “rational reason[s]” to think Congress is “better suited” to examine the costs and benefits of extending *Bivens* beyond the extreme and immediate harm in *Carlson*. *Egbert*, 596 U.S. at 495-496. It never even cited *Egbert*’s “rational reason” formulation. Instead, the court proclaimed this case “identical to *Carlson* in all meaningful respects,” because the inmate in *Carlson* and the inmate in this case allegedly both “suffered deliberate medical indifference while incarcerated, in violation of the Eighth Amendment’s proscription against cruel and unusual punishment.” App., *infra*, 3a. But this Court has held that claims “may arise in a new context even if [they are] based on the same constitutional provision as a claim in a case in which a damages remedy was previously recognized.” *Hernández*, 589 U.S. at 103. And alleging “almost paral-

⁸ Here, for example, “the record does not indicate, nor does Watanabe allege, that Nielsen knew, or should have known, the extent of Watanabe’s injury.” App., *infra*, 21a (Smith, J., concurring in part and dissenting in part).

lel circumstances’ or a similar ‘mechanism of injury’” is not enough to show a context is the same. *Egbert*, 596 U.S. at 495; see *Hernández*, 589 U.S. at 103. Such “superficial similarities” obscure the “only * * * question” federal courts must answer: “whether there is *any* rational reason (even one) to think that *Congress* is better suited to ‘weigh the costs and benefits of allowing a damages action to proceed.’” *Egbert*, 596 U.S. at 495-496.

* * * * *

Last Term, this Court summarily reversed another court of appeals for failing to appreciate how an “‘alternative remedial structure’ * * * for aggrieved federal prisoners” showed *both* that the case “arises in a new context, *and* [how] ‘special factors’ counsel against recognizing an implied *Bivens* cause of action.” *Goldey*, 606 U.S. at 944 (emphasis added). Given the clarity of the Ninth Circuit’s errors, this Court may wish to summarily reverse again here.

Insofar as plenary review is warranted, this Court may wish to consider whether it should dispense with *Bivens* altogether. This Court has repeatedly attempted to confine *Bivens* and thereby limit judicial intrusion into a fundamentally legislative function. *E.g.*, *Ziglar*, 582 U.S. at 139-140, 148-149; *Hernández*, 589 U.S. at 103, 113-114; *Egbert*, 596 U.S. at 495-496; *Goldey*, 606 U.S. at 944. But the federal courts have repeatedly fallen into disarray. Preserving what remains of *Bivens* does little good. *Bivens* is now little more than a “zombie.” *Mohamed v. Jones*, 100 F.4th 1214, 1239-1240 (10th Cir. 2024) (Tymkovich, J., dissenting). It offers only “false hope, * * * invit[ing] still more ‘protracted litigation destined to yield nothing.’” *Egbert*, 596 U.S. at 504 (Gorsuch, J., concurring). And it disserves the interests of civil rights and “the public writ large because, absent [*Bivens*] *formal* abrogation, Con-

gress has no incentive to legislate in the space.” *Mohamed*, 100 F.4th at 1240 (Tymkovich, J., dissenting). A federal version of § 1983 may well be desirable. But with *Bivens*’ zombie still roaming the jurisprudence, no Congress has sufficient incentive to do the work of considering that option.

This Court, of course, need not go that far. But so long as *Bivens* remains good law, this Court must police its bounds and provide needed guidance. Review is warranted for that reason alone.

IV. THIS CASE PRESENTS AN IDEAL VEHICLE

This case is an ideal vehicle for addressing both circuit conflicts. The case was resolved on the pleadings, leaving no factual disputes to impede review. The arguments were preserved and passed upon below. App., *infra*, 6a-16a (panel majority), 20a-23a (panel dissent), 31a-39a (district court decision). Arguments on both sides of both issues were well aired by members of the Ninth Circuit. *Id.* at 77a-116a. Other courts have weighed in as well. See pp. 15-22, *supra*. While this Court has rejected *Bivens*’ expansion for multiple “independent reasons” before, *Egbert*, 596 U.S. at 494—and can do so again here—reversal in any form would likely be case dispositive: Watanabe conceded below that his case cannot survive step two if his claims present a “new *Bivens* context” at step one. App., *infra*, 96a n.1.

CONCLUSION

The petition should be granted.

Respectfully submitted.

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