No. 25-417

In the Supreme Court of the United States

FRANCIS NIELSEN, PETITIONER

v.

KEKAI WATANABE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the Ninth Circuit erred in allowing respondent's claim to go forward in circumstances not meaningfully different from those of the claim for deliberate indifference to serious medical needs recognized in *Carlson* v. *Green*, 446 U.S. 14 (1980).

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INTRODUCTION

Respondent Kekai Watanabe's case does not extend *Carlson* v. *Green*, 446 U.S. 14 (1980), beyond its original context. Watanabe alleges a violation of the same constitutional right (the Eighth Amendment) for the same kind of conduct (deliberate indifference to a serious medical need) injuring the same kind of plaintiff (a federal prisoner) under the same circumstances (failure to provide adequate treatment) against the same class of officers (medical staff at a federal prison) as in *Carlson*. Along every dimension, Watanabe's claim lines up with *Carlson*. There is no "new context" here.

Petitioner nonetheless seeks review on the basis of two alleged circuit splits—one regarding the Administrative Remedy Program (ARP), 28 C.F.R. 542.10-19, and one regarding the severity of Watanabe's injuries—

about what circumstances give rise to a new "context" for *Carlson* claims. Neither warrants review.

First, petitioner overstates the claimed circuit splits. In reality, only two courts of appeals have indicated that the existence of the ARP is sufficient on its own to foreclose a *Carlson* claim. The resulting split is both nascent and shallow, and those contrary decisions cannot be squared with this Court's precedent reaffirming that *Carlson* remains good law in its context. And no court has clearly adopted petitioner's view that *Carlson* does not apply unless the victim was sufficiently maimed by or died from their injuries. The courts are therefore largely in agreement that a claim like Watanabe's remains viable.

Second, regardless of the nature or depth of the alleged splits, the decision below does not warrant review. This Court in *Carlson* already considered the availability of alternative remedies, including under the Federal Tort Claims Act (FTCA), 28 U.S.C. 1346(b), 2671 *et seq*., yet still confirmed that a federal cause of action remains available. Nothing about the ARP—which was in place at the time of *Carlson* and routes damages claims by prisoners *to the FTCA*—alters that analysis. This Court also has never hinted (and in fact has rejected) that the severity of the constitutional violation is a relevant factor in determining whether a plaintiff has a cause of action. And critically, Congress has legislated in clear reliance on *Carlson* through the Westfall Act, which preempts state-law causes of action against federal officers but expressly carves out constitutional claims. See Federal Employees Liability Reform and Tort Compensation Act of 1988 (Westfall Act), Pub. L. No. 100-694, 102 Stat. 4563, 28 U.S.C. 2671, 2674, 2679. Foreclosing *Carlson* claims in effectively all cases—as petitioner

seeks—would thus contravene Congress's determination that claims like these should be able to go forward.

This Court has made clear that *Carlson* is disfavored precedent not to be expanded beyond its context. But at the same time, the Court has confirmed that *Carlson* claims remain viable within their limited sphere. Watanabe's claim falls squarely within the original ambit of *Carlson*. Certiorari should be denied.

STATEMENT

A. Legal Background

Federal officers have been subject to damages for misconduct since the early Republic. See p. 23, *infra*. In *Bivens* v. *Six Unknown Federal Narcotics Agents*, this Court recognized a damages remedy against federal officers for unconstitutional searches or seizures. 403 U.S. 388 (1971). The Court later recognized two additional circumstances in which plaintiffs may recover damages against federal officers: congressional employees alleging gender discrimination in violation of the Fifth Amendment, *Davis* v. *Passman*, 442 U.S. 228 (1979), and federal prisoners alleging that federal prison officials were deliberately indifferent to their serious medical needs, in violation of the Eighth Amendment, *Carlson*, 446 U.S. 14.

Since *Carlson*, the Court has "consistently refused to extend *Bivens* liability to any new context." *Corr. Servs. Corp.* v. *Malesko*, 534 U.S. 61, 68 (2001). But the Court also has repeatedly declined to overrule *Bivens*, *Davis*, or *Carlson*, reaffirming that those decisions remain "settled law." *Ziglar* v. *Abbasi*, 582 U.S. 120, 134 (2017). Accordingly, plaintiffs may continue to bring claims that are not "'meaningful[ly]' different" from those endorsed by the Court in the *Bivens* trilogy. *Egbert* v. *Boule*, 596

U.S. 482, 492 (2022) (alteration in original) (citation omitted).

B. Factual Background

On July 12, 2021, respondent Watanabe was in federal custody on a federal conviction in Federal Detention Center (FDC) Honolulu when he was "brutally assaulted during a gang-related fight." Pet. App. 2a-3a, 57a n.1. "Watanabe sustained severe injuries," *id.* at 2a-3a, and described his pain to two prison officials, *id.* at 4a, 25a. Watanabe requested treatment through the ARP and through repeated requests to prison officials, including petitioner Francis Nielsen, a staff nurse. *Id.* at 4a, 25a-26a. "Instead of transporting him to a hospital or permitting him to be examined by a specialist, [petitioner] treated him with nothing more than over-the-counter medication for his pain." *Id.* at 2a.

Several months after the attack, Watanabe finally received an x-ray: It showed that he had a fractured coccyx and that bone chips had migrated to surrounding soft tissue areas. *Id.* at 4a, 26a. Although prison officials agreed to refer Watanabe to outside medical treatment, *ibid.*, Watanabe never received further treatment before his discharge from federal custody in May 2024, *id.* at 4a n.3.

C. Procedural History

Watanabe brought this suit *pro se* in the United States District Court for the District of Hawaii. Pet. App. 24a. His amended complaint named four officials at FDC Honolulu and sought damages and injunctive relief for violations of his Eighth Amendment rights. *Id.* at 5a, 16a-17a, 24a. The district court dismissed Watanabe's suit in full, concluding as relevant here that Watanabe's claim against petitioner presents a "new

context" under *Bivens* because of the "nature and severity" of his claims and the existence of the ARP. *Id.* at 31a-36a (citation omitted); *id.* at 57a-58a.

Watanabe timely appealed as to petitioner. In briefing on appeal, petitioner did not defend the district court's reasoning that the existence of the ARP was enough to create a "new context." See Pet. C.A. Br. 9-14.

The Ninth Circuit reversed. Pet. App. 2a-17a. The panel resolved the case at step one of the two-part test this Court applied in *Egbert*, 596 U.S. at 494, concluding that Watanabe's case did not arise in a new context because it did not "meaningfully differ from *Carlson*." Pet. App. 8a.

In reaching this conclusion, the panel considered the "non-exhaustive series of considerations" this Court set forth in *Ziglar*. *Id.* at 8a-10a (citation omitted). Specifically, the court found that Watanabe's suit and the suit in *Carlson* involved federal officials of the same rank, the same Eighth Amendment right of a federal prisoner to be free from cruel and unusual punishment through deliberate medical indifference, and similar "acts and omissions." *Id.* at 8a-9a (quoting *Carlson*, 446 U.S. at 16 n.1).

Among other factors, the panel also considered the nature of Watanabe's injuries, noting that he was in "extreme pain" that he endured for seven months with virtually no medical care. *Id.* at 14a. The panel explained that while Watanabe's injuries were not life-threatening like those in *Carlson*, that did not make this a new context because "[f]ailure to respond to an incarcerated individual's serious medical need" does not need to be "life threatening" to "constitute deliberate indifference." *Ibid.*

The panel also rejected the district court's assumption that the existence of the ARP rendered the context new. *Id.* at 14a-15a. Because the panel concluded that the case did not present a new *Bivens* context at step one, it did not proceed to step two. *Id.* at 15a. The panel additionally remanded for further proceedings regarding Watanabe's request for injunctive relief. *Id.* at 16a-17a.

Judge Milan Smith concurred regarding Watanabe's request for injunctive relief, but otherwise dissented. *Id.* at 18a. The partial dissent acknowledged similarities between Watanabe's claim and those in *Carlson*, but argued Watanabe's claims were meaningfully different because his injury and the misconduct were less severe than those alleged in *Carlson*. *Id.* at 20a-23a. Judge Smith did not contend that the existence of the ARP rendered the context new.

The Ninth Circuit denied petitioner's request for rehearing en banc. *Id.* at 77a. In a statement respecting denial, Judges Paez and Koh reiterated that both Watanabe's claims and those in *Carlson* involved "the same officer rank, type and specificity of official action, judicial guidance, governing legal mandate, and risk of disruptive intrusion by the Judiciary into the functioning of the other branches." *Ibid.* And, per the panel majority, there were "no other 'meaningful' differences" from *Carlson*. *Ibid.* (quoting *Ziglar*, 582 U.S. at 139-40).

Judge Ryan Nelson dissented from the denial of rehearing en banc, joined by nine other judges. *Id.* at 89a-111a. Judge Nelson urged that Watanabe's case presented a new context at step one because of the availability of the ARP and the severity of Watanabe's mistreatment and injury. *Id.* at 98a, 103a-04a.

Judge Collins separately dissented from the denial of rehearing en banc, *id.* at 111a-116a, though he acknowledged that the Court had not overruled *Carlson*, *id.* at 112a.

On September 9, 2025, the district court stayed proceedings pending resolution of this petition for certiorari. D. Ct. Doc. 43; see also D. Ct. Doc. 49 (Dec. 17, 2025).*

REASONS FOR DENYING THE PETITION

This Court's instructions are clear: although courts should not extend *Bivens* and *Carlson* beyond the contexts already recognized, those decisions remain binding within their existing, limited spheres. See *Ziglar*, 582 U.S. at 134. The panel below faithfully adhered to that directive. Petitioner's disagreement with the panel's analysis in these circumstances does not warrant this Court's review.

I. The Claimed Conflicts Do Not Merit This Court's Review

The two circuit splits alleged by petitioner do not justify this Court's review. Petitioner exaggerates the first split, regarding whether the ARP categorically forecloses all *Carlson* claims. In reality, that conflict is both nascent and shallow. The second alleged split, regarding whether purported difference in the severity of an injury is sufficient to foreclose a *Carlson* claim, is largely illusory: different courts have reached different outcomes on distinct facts. That is fact-specific variation, not a circuit conflict. This Court's review is unwarranted.

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* Although petitioner has private counsel in this Court, the Department of Justice represents petitioner in the district court.

A. The Division Concerning the ARP Is Nascent and Shallow

Petitioner focuses first on lower court decisions addressing whether alternative remedial schemes may be considered at step one of the *Bivens* inquiry rather than step two. See Pet. 15. But that distinction is immaterial here: The panel held that "*even if* [the panel] were to consider [the ARP] at step one," Watanabe's claim could still go forward because it is not meaningfully different from other claims allowed under *Carlson*. Pet. App. 15a (emphasis added). The question here instead is whether the panel was correct to reject petitioner's view that the mere existence of the ARP creates a *per se* new context for all potential *Carlson* claims. Viewed through that lens, the disagreement among the lower courts is nascent, limited, and unworthy of this Court's review.

1. Petitioner exaggerates the purported "split" regarding the significance of the ARP at step one of the *Bivens* inquiry. Some cases petitioner cites do not arise under *Carlson* and do not implicate the ARP at all. For example, petitioner cites *Hernandez* v. *Causey*, 124 F.4th 325 (5th Cir. 2024) (Pet. 15-17), but that case alleged a different constitutional violation (the Fourth Amendment) and involved the exact same administrative remedy scheme addressed in *Egbert*—not the ARP, *id.* at 334. And *Arias* v. *Herzon*, although fully consistent with the decision below, arose under the Fourth Amendment and implicated the Inspector General Act, not the ARP. 150 F.4th 27, 29 (1st Cir. 2025).

Other cases, while discussing the ARP, do not hold that the ARP creates a *per se* new context for all *Carlson* claims. Petitioner cites *Sargeant* v. *Barfield*, 87 F.4th 358 (7th Cir. 2023), *cert. denied*, 145 S. Ct. 285 (2024)

(Pet. 16), but the plaintiff there brought a failure-to-protect claim, *id.* at 360-61, 367. The Seventh Circuit emphasized that the plaintiff's claim failed "[n]o matter how we decipher the test—as one step or two." *Id.* at 366. And the court took pains to emphasize that its "holding is narrow." *Id.* at 369. The Seventh Circuit therefore did not hold that the ARP creates a "new context" *per se* for all *Carlson* claims. Indeed, as petitioner elsewhere acknowledges, the Seventh Circuit continues to allow *Carlson* claims. See Pet. 21 (citing *Brooks* v. *Richardson*, 131 F.4th 613 (7th Cir. 2025) and *Watkins* v. *Mohan*, 144 F.4th 926 (7th Cir. 2025)).

The same is true for the Tenth Circuit. Petitioner cites *Silva* v. *United States*, 45 F.4th 1134 (10th Cir. 2022) (Pet. 17), but that case did not involve a deliberate indifference claim and did not assert that the ARP creates a new context for all *Carlson* claims. *Id.* at 1137. And the Tenth Circuit later clarified in *Rowland* v. *Matevousian*, 121 F.4th 1237, 1243-44 (10th Cir. 2024) (cited Pet. 22), that the ARP does not *per se* create a new context for all *Carlson* claims, because it considered the ARP only at step two.

2. That leaves petitioner with two courts of appeals—the Third and Eleventh Circuits—that have held or suggested the existence of the ARP may alone be sufficient to render a context new. See *Muniz* v. *United States*, 149 F.4th 256 (3d Cir. 2025); *Johnson* v. *Terry*, 119 F.4th 840 (11th Cir. 2024), *cert. denied*, No. 24-1170 (Oct. 6, 2025). Those decisions conflict with the panel below but cannot be reconciled with this Court's affirmation that *Carlson* remains viable within its limited sphere. See, *e.g.*, *Malesko*, 534 U.S. at 72 ("If a federal

prisoner in a BOP facility alleges a constitutional deprivation, he may bring a *Bivens* claim against the offending individual officer ….").

The Eleventh Circuit in *Johnson* held that a prisoner's Eighth Amendment claim arose in a new context because *Carlson* "did not consider the existence of alternative remedies *under the framework* explained in *Egbert*." 119 F.4th at 858 (emphasis added). But as explained below, pp. 16-17, *infra*, *Carlson did* "consider the existence of alternative remedies." Cf. *ibid.* Moreover, whether the Court analyzed remedies "under the framework" used today is not the test: As this Court has recognized, "it is possible that the analysis in the Court's three *Bivens* cases might have been different if they were decided today," but that does not undermine the "settled law" of *Bivens* where it applies. *Ziglar*, 582 U.S. at 134. The Court's use of an earlier methodology thus does not deprive *Carlson* of *stare decisis* force. See also *Loper Bright Enters.* v. *Raimondo*, 603 U.S. 369, 412 (2024) (prior holdings "are still subject to statutory *stare decisis* despite [the Court's] change in interpretive methodology").

The Third Circuit, for its part, does not even align with the Eleventh Circuit on the contours of its proffered rule. In *Muniz*, the court acknowledged that "[t]he *mere existence* of the BOP ARP cannot meaningfully distinguish the remedial analysis here from that in *Carlson*," unless the court also considers "the availability of that administrative remedy." 149 F.4th at 265 & n.5 (emphasis added). The panel thus recognized that a *Carlson* claim may remain viable where "'prison administrators thwart inmates from taking advantage' of the ARP." *Id.* at 265 (quoting *Ross* v. *Blake*, 578 U.S. 632, 644 (2016)). In any event, the Third Circuit in *Muniz*

simply relied on its holding from a prior case involving alleged sexual assault by a prison officer—an indisputably new context. See *id.* at 264 (citing *Kalu* v. *Spaulding*, 113 F.4th 311, 327-28 (3d Cir. 2024)). There is no analysis from the Third Circuit effectively grappling with any of the Court's decisions repeatedly reaffirming *Bivens* and *Carlson* in their respective spheres.

Such variation at the margins of these recent decisions—some less than a year old—underscores that the issue remains unsettled and that further percolation is warranted before this Court considers the issue, if at all. That practice conserves the Court's resources and ensures that, if an issue ultimately warrants resolution, it will benefit from the insights that debate at the lower courts can provide over time. See *Gonzalez* v. *United States*, 145 S. Ct. 529, 533 (2025) (Sotomayor, J., respecting denial of certiorari) (recognizing "need for percolation").

B. The Claimed Disagreement Over the Severity of Injury Reflects Case-Specific Variation, Not Doctrinal Disagreement

Petitioner's second purported split—regarding the significance of the severity of a plaintiff's injury—is even more tenuous.

The first step of the *Bivens* framework—whether the facts of a case are "meaningful[ly]" different from those of the *Bivens* trilogy, *Ziglar*, 582 U.S. at 139—is holistic and inherently fact-specific. Courts in turn often reach different results based on different facts. That case-specific disagreement does not mean there is a conflict in legal principle.

1. Petitioner first argues that the Third, Seventh, and Ninth Circuits follow the rule that "the severity of

an injury is *irrelevant* to the new-context inquiry." Pet. 20 (emphasis added). That is not accurate.

In the decision below, the panel held that "[a] plaintiff need not suffer death or a life-threatening injury for his claim to be sufficiently analogous to *Carlson*," and that a "difference in *degree* is not a meaningful difference." Pet. App. 13a (emphasis added and citation omitted). It then concluded that Watanabe's mistreatment and injury were not meaningfully different from those in *Carlson*, because Watanabe's "injury resulted in a serious medical condition, and the condition has caused extreme pain ever since." *Id.* at 14a. The panel did not exclude the possibility that a difference in the *nature* of a plaintiff's injury or mistreatment (rather than degree) might give rise to a new context, and the Ninth Circuit has elsewhere reserved that very issue. See *Chambers* v. *Herrera*, 78 F.4th 1100, 1108 (9th Cir. 2023) (remanding for factual development regarding injury, treatment, and plaintiff's "ultimate condition," as, without these details, it was "unclear … whether [his] *Bivens* claim is viable").

The Third Circuit's decision in *Muniz* is similar. There, the court considered claims from an inmate who developed open wounds leading to infection and amputation. *Muniz*, 149 F.4th at 258 (cited Pet. 20-21). It concluded that the differences between the plaintiff's injuries and those in *Carlson* were not "meaningful," *i.e.*, they did not "provide[] a 'reason[] to think Congress might doubt the efficacy or necessity of a damages remedy' in this context." *Id.* at 262-63 (quoting *Egbert*, 596 U.S. at 491). The panel thus did not conclude that the nature of the injury was "irrelevant," cf. Pet. 20; instead, it concluded there was not a meaningful "difference between amputation and death," *Muniz*, 149 F.4th at 262.

So too in the Seventh Circuit. Petitioner gestures to *Brooks*, 131 F.4th 613 (Pet. 21). But that case concluded simply that there was no meaningful difference when mistreatment of appendicitis led to a ruptured appendix, peritonitis, and "agonizing pain." *Id.* at 614-16. The panel did not set down a bright-line categorical rule that the nature of the injury can never be relevant.

2. Contrary to petitioner's insistence, see Pet. 21, the First, Tenth, and Eleventh Circuits follow fundamentally the same approach.

In the First Circuit case cited by petitioner, the plaintiff obtained extensive treatment and accommodation. *Waltermeyer* v. *Hazlewood*, 136 F.4th 361, 364-65 (1st Cir. 2025) (Pet. 21). The plaintiff filed suit because his request for knee surgery was denied. *Id.* at 365. The First Circuit concluded that his claims were meaningfully different from those in *Carlson* for at least six reasons, including that the treatment he received was not contrary to medical advice, the "claim d[id] 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 366-67. The court did not hold that a plaintiff *must* suffer death or life-threatening injury for a *Carlson* claim to be cognizable.

So too in the Tenth Circuit. In *Rowland*, cited by petitioner (Pet. 22), the plaintiff had a hernia that a physician concluded was "reducible and stable." 121 F.4th at 1240. His principal claim was for delay in receiving surgery and for insufficient post-operative care. The Tenth Circuit rejected the claim, identifying myriad factors that made the plaintiff's case "significantly different" from *Carlson*. *Id.* at 1243. Namely, officials did not

act "*against* the doctor's orders," the plaintiff did not receive contra-indicated drugs or a medical tool "known to be inoperative," the injury was not as serious as that in *Carlson*, "[a]nd critically, [plaintiff] ultimately *did* receive surgery for his hernia." *Ibid.* The court thus reached a holistic conclusion based on all of those facts; it did not announce a rule that non-fatal injuries create a *per se* new context.

The Eleventh Circuit is similar. In *Johnson*, the court addressed the "non-lethal" nature of the plaintiff's injuries only in the context of observing that the plaintiff's injuries "were eventually treated by the defendants." 119 F.4th at 859. And the court made that observation only after it had already concluded the ARP created a new context. *Id.* at 858-59. *Johnson* thus did not hold that a plaintiff must die for a claim to fall within *Carlson*'s context.

No circuit has adopted petitioner's suggested rule that an inmate must suffer a life-threatening emergency or die in order to have a *Carlson* claim. Instead, the lower courts consider the facts of each case and determine whether there are meaningful differences based on the totality of the circumstances. There is no split for this Court to resolve.

II. The Ninth Circuit's Decision Is Correct

This Court's review is further unwarranted because the Ninth Circuit's decision faithfully applies this Court's precedent.

A. The ARP Does Not Create a *Per Se* New Context for All *Carlson* Claims

This Court has never suggested that the mere existence of the ARP—which was *already in place* at the time

Carlson was decided—creates a *per se* new context for every claim arising under *Carlson*.

While not expanding *Carlson*, this Court has confirmed it remains good law. In *Malesko*, this Court reaffirmed that *Carlson* claims remain viable within their sphere—even after discussing the ARP as a potential alternative remedy in place at the time. 534 U.S. at 72, 74. Petitioner's theory therefore rests on the premise that this Court in *Malesko* misunderstood the impact of the ARP on the continued viability of *Carlson*. But courts rightly do not "ascribe to the Supreme Court a misapprehension about the continuing vitality of its own precedents." *Arias*, 150 F.4th at 41-42.

The panel's decision also is consistent with *Ziglar*, in which the Court considered a suit by federal detainees and found a new context based on "meaningful differences other than the presence of the ARP." *Arias*, 150 F.4th at 43 (citing *Ziglar*, 582 U.S. at 148). Although the Court had examined the ARP in *Malesko* several years earlier, the Court in *Ziglar* did not even mention the ARP as a potentially relevant distinguishing factor. Yet if petitioner were correct, the ARP would have rendered the entirety of the Court's analysis of other factors superfluous. See *Arias*, 150 F.4th at 42-43.

Relying on the ARP as a distinguishing factor from *Carlson* is particularly inappropriate in light of the fact that the ARP was in effect when the Court decided *Carlson*, yet it did not give the Court any pause. Pet. App. 78a (Paez, J. & Koh, J.) (citing 44 Fed. Reg. 62,250 (Oct. 29, 1979)). Contrary to petitioner's assertion (Pet. 27), the fact that the ARP was not in place when the inmate in *Carlson* died is immaterial: The *Bivens* inquiry does not turn on whether an alternative remedy was available or adequate as to a particular plaintiff, but on

whether "Congress or the Executive has created a remedial process that it finds sufficient to secure an adequate level of *deterrence*," as a prospective matter. *Egbert*, 596 U.S. at 498 (emphasis added).

Petitioner and the judges dissenting from en banc rehearing below urge that any alternative remedy not specifically discussed by the Court in the original *Bivens* trilogy is a "special factor" necessarily giving rise to a new context. Pet. 24, 27; Pet. App. 98a-100a (Nelson, J., dissenting). But this Court has never said that, and it is well settled that precedent does not lose its force merely because a later litigant contrives a different argument. Cf. *Gamble* v. *United States*, 587 U.S. 678, 691 (2019); *Rodriguez de Quijas* v. *Shearson/Am. Express, Inc.*, 490 U.S. 477, 484 (1989). Instead, the existence of a special factor not previously considered may be addressed as *one* factor at step one, but the inquiry at step one remains "whether the case 'is different in a meaningful way'" from the *Bivens* trilogy. *Goldey* v. *Fields*, 606 U.S. 942, 944 (2025) (per curiam) (citation omitted). Accordingly, a previously unconsidered special factor will render a context new only if that difference "might alter the policy balance that initially justified the causes of action recognized in *Bivens*, *Davis*, and *Carlson*." *Snowden* v. *Henning*, 72 F.4th 237, 239, 244 (7th Cir. 2023), *cert. denied*, 145 S. Ct. 137 (2024).

The ARP, even if considered at step one, does not satisfy that standard. In *Carlson*, the Court expressly considered alternative remedies—namely, the FTCA—and concluded they did not foreclose the availability of a remedy. The Court emphasized that the FTCA contained no "expression" from Congress that it intended to foreclose constitutional claims against individual offic-

ers and identified several reasons why "the *Bivens* remedy is more effective than the FTCA remedy." *Carlson*, 446 U.S. at 19-23.

The same rationales the Court invoked for the FTCA in *Carlson* apply with even greater force to the ARP. Like the FTCA, the ARP (1) contains no "explicit congressional declaration" foreclosing a *Carlson* claim, (2) provides no relief against individual officers and thus is a less "effective deterrent," (3) does not permit punitive damages, and (4) affords no right to a jury. *Carlson*, 446 U.S. at 19-23. The ARP provides far less relief than the FTCA because it does not allow for damages and does not permit adjudication by a neutral tribunal. There is accordingly no reason to think *Carlson* would have come out differently had the Court expressly discussed the ARP.

In fact, under the ARP, if an inmate asserts a tort claim for damages, the proper course is to "refer the inmate to the appropriate statutorily-mandated procedures," *i.e.*, *the FTCA*. 28 C.F.R. 542.10(c). In other words, the ARP itself points inmates back to the very remedial framework—the FTCA—the Court already considered at length in *Carlson*. There is accordingly nothing new about the ARP that would alter the Court's analysis in *Carlson*.

Nor does the Prison Litigation Reform Act (PLRA), 42 U.S.C. 1997e, change the calculus. As this Court explained in *Ziglar*, the PLRA may reflect Congress's desire to limit *new Carlson* actions, but it does not disturb the remedies this Court has already recognized. See 582 U.S. at 148-49.

B. An Inmate Need Not Die in Order to Bring a *Carlson* Claim

Likewise, this Court has never suggested that an inmate must die (or suffer a life-threatening injury) in order to pursue a *Carlson* claim. Instead, the Court's cases limiting *Carlson* have involved efforts to dramatically extend *Carlson*, such as to private employees in private prisons (rather than federal officers in federal prisons). See *Minneci* v. *Pollard*, 565 U.S. 118, 120 (2012); *Malesko*, 534 U.S. at 63.

The Court has repeatedly explained that the relevant inquiry at step one is whether any differences are meaningful. See *Ziglar*, 582 U.S. at 139. And in *Carlson*, the Court's recognition of a cause of action had nothing to do with the fact that the inmate died—the Court instead focused on the status of the individual officers, the lack of an effective alternative remedy, the absence of a congressional declaration foreclosing such claims, the harm to the "constitutional design" without a remedy, and the need for a uniform rule. 446 U.S. at 18-23 (citation omitted). Those factors persist here regardless of whether Watanabe's injuries were life threatening.

When this Court has found a *Bivens* claim presents a new context, the factual and legal differences were stark and involved different categories of defendants, or entirely different constitutional rights. *Egbert*, 596 U.S. at 489-90 (immigration enforcement); *Hernandez* v. *Mesa*, 589 U.S. 93, 103 (2020) (cross-border shooting raising foreign affairs and national security concerns); *Ziglar*, 582 U.S. at 140 ("high-level executive policy" decisions concerning noncitizen detainees following the September 11 attacks). Notably, in *Ziglar*, which arose

in the prison context, the Court did not identify the severity of the injury as a relevant factor creating a new context.

In no case has the Court found a new context based on a difference in *degree* rather than a qualitative difference in the nature of the claim. In fact, the Court in *Davis* explained that whether a plaintiff has "a cause of action … depends not on the *quality or extent of her injury*, but on whether the class of litigants of which [plaintiff] is a member may use the courts to enforce the right at issue." 442 U.S. at 239 n.18 (emphasis added). There is no basis for a different rule now.

C. There Is No Basis for Revisiting *Carlson*

In reality, petitioner's disagreement is not with the decision below, but with *Carlson*—and, ultimately, with *Bivens*. See Pet. 31 ("[T]his Court may wish to consider whether it should dispense with *Bivens* altogether."). Yet, petitioner "do[es] not ask [this Court] to overrule" *Carlson* and therefore "do[es] not seek to overcome the presumption of *stare decisis* that attaches." *Kurns* v. *R.R. Friction Prods. Corp.*, 565 U.S. 625, 633 (2012).

Instead, petitioner asserts that he is merely asking the Court to "eliminate" *Carlson*'s "application" in light of the ARP. Pet. 28 n.6. That is a distinction without a difference. Watanabe's case presents a paradigmatic *Carlson* claim, and if he cannot maintain a claim because of the ARP—which has applied to virtually all federal prisoners from the day *Carlson* was decided—there would be nothing left of *Carlson*. Rendering *Carlson* inapplicable to every possible case would overrule it, whatever the label. Cf. *Students for Fair Admissions, Inc.* v. *President & Fellows of Harvard Coll.*, 600 U.S.

181, 230 (2023) ("The Constitution deals with substance, not shadows …." (quoting *Cummings* v. *Missouri*, 71 U.S. 277, 325 (1867)).

"[T]his Court does not overturn its precedents lightly." *Michigan* v. *Bay Mills Indian Cmty.*, 572 U.S. 782, 798 (2014). And precedent cannot be discarded by implication or erosion. See, *e.g.*, *Shalala* v. *Ill. Council on Long Term Care, Inc.*, 529 U.S. 1, 17-18 (2000). If *Carlson* is to be reconsidered, it must be done forthrightly, with full engagement of the *stare decisis* factors. See *Kimble* v. *Marvel Ent., LLC*, 576 U.S. 446, 455-56 (2015). Yet petitioner never even engages in that analysis, much less argues that the question warrants this Court's review. That weighs heavily against review.

The *stare decisis* framework generally requires the Court to consider three broad questions: whether the precedent is "grievously or egregiously wrong," whether it has produced serious "negative jurisprudential or real-world consequences," and whether overruling it would "unduly upset reliance interests." *Ramos* v. *Louisiana*, 590 U.S. 83, 121-22 (2020) (Kavanaugh, J., concurring in part). "Taken together, th[e]se three considerations set a high ... bar for overruling a precedent," *id.* at 123, and each supports denying review and thus retaining *Carlson* in its limited sphere.

1. Taking the last of the three first, Congress has legislated in clear reliance on *Carlson*. In the Westfall Act, Congress preempted state-law claims against individual federal officers for money damages, making the FTCA the exclusive remedy for such injuries. 28 U.S.C. 2679. But Congress expressly carved out claims against officers "brought for a violation of the Constitution of the United States," an unambiguous reference to *Bivens* and *Carlson*. See 28 U.S.C. 2679(b)(2)(A). And Congress

did so even though the *Carlson* Court had indicated that Congress could preempt *Carlson* claims by making an "explicit congressional declaration" directing aggrieved plaintiffs "to another remedy." 446 U.S. at 19.

Congress thus ratified *Carlson*'s understanding that the FTCA is "parallel" and "complementary" to *Bivens*. *id.* at 20; see also *Malesko*, 534 U.S. at 68 (same). And Congress clearly intended that its broad preemption of claims against individual officers would not leave plaintiffs like Watanabe without a remedy. See *Bartenwerfer* v. *Buckley*, 598 U.S. 69, 80 (2023) ("This Court generally assumes that, when Congress enacts statutes, it is aware of this Court's relevant precedents." (citation omitted)). Overruling *Carlson* would therefore thwart Congress's intent and transform the Westfall Act into a bar against essentially *all* claims for damages against federal officers—contravening Congress's express preservation of those claims. See *Hui* v. *Castaneda*, 559 U.S. 799, 807 (2010) (noting "[t]he Westfall Act's explicit exception for *Bivens* claims").

Congress's reliance on *Carlson* is similar to that examined in *Hilton* v. *South Carolina Public Railways Commission*, 502 U.S. 197 (1991). There, the Court invoked *stare decisis* and declined to overturn its 28-year-old precedent holding that the Federal Employers' Liability Act (FELA), 45 U.S.C. 51-60, provides a cause of action against a state-owned railroad, allowing such claims in state court. See *Hilton*, 502 U.S. at 199, 201-02 (citing *Parden* v. *Terminal Ry. of Ala. Docks Dep't*, 377 U.S. 184 (1964)). The Court emphasized that in reliance on that precedent, "[w]orkers' compensation laws in many States specifically exclude railroad workers from their coverage because of the assumption that FELA provides adequate protection for those workers,"

and thus overruling precedent "would require these States to reexamine their statutes." *Id.* at 202-03. So too here, where Congress has eliminated an entire class of remedies based on the assumption that *Carlson* provides for a federal damages cause of action.

The PLRA points in the same direction. That statute mandates administrative exhaustion for prisoner complaints, including *Carlson* claims. See *Porter* v. *Nussle*, 534 U.S. 516, 524 (2002). Yet Congress left *Carlson* and the Westfall Act untouched. Cf. *Chisom* v. *Roemer*, 501 U.S. 380, 396 n.23 (1991) ("Congress' silence in this regard can be likened to the dog that did not bark."). In requiring federal prisoners to exhaust via the ARP before filing a *Bivens* suit, Congress could not have intended to use the former to replace the latter. Had Congress—whose goal was to curb frivolous prisoner litigation, see *Cutter* v. *Wilkinson*, 544 U.S. 709, 726 (2005)—wanted to foreclose *Carlson* claims altogether, it again could have easily done so.

2. Nor was *Carlson* egregiously wrong. Even a "good argument" that the Court "got [it] wrong" "cannot by itself justify scrapping settled precedent." *Kimble*, 576 U.S. at 455. Although this Court has steadily moved away from *Bivens* over time, *Carlson* itself is on stronger footing.

One of the alleged defects of *Bivens* and *Carlson* is that they are products of an "*ancien regime*" under which "the Court assumed it to be a proper judicial function to provide such remedies as are necessary to make effective a statute's purpose." *Ziglar*, 582 U.S. at 131-32 (quotation marks and citations omitted). After *Bivens*, "the Court adopted a far more cautious course before finding implied causes of action," deferring instead to express congressional direction. *Id.* at 132-33.

That narrative, however, cannot fully explain the decision in *Carlson*. The Court has observed that "[t]he decision to recognize an implied cause of action under a statute involves somewhat different considerations than when the question is whether to recognize an implied cause of action to enforce a provision of the Constitution itself." *Ziglar*, 582 U.S. at 133. And, notably, *Carlson* was decided *after* the series of cases in which the Court retreated from its earlier practice of implying private rights of action under statutes. See *id.* at 132-33 (citing *Transamerica Mortg. Advisors, Inc.* v. *Lewis*, 444 U.S. 11 (1979); *Cannon* v. *Univ. of Chicago*, 441 U.S. 677 (1979); *Piper* v. *Chris-Craft Indus., Inc.*, 430 U.S. 1 (1977); *Cort* v. *Ash*, 422 U.S. 66 (1975)). *Carlson* therefore cannot be understood solely as an extension of that now-abandoned practice.

Instead, *Carlson* is best understood as a federal common-law analogue to common-law tort actions historically available against government officers for misconduct, including false imprisonment and negligence. See generally Carlos M. Vázquez & Stephen I. Vladeck, *State Law, The Westfall Act, and the Nature of the* Bivens *Question*, 161 U. Pa. L. Rev. 509, 531-42 (2013). At common law, an official could be individually sued for damages for trespass and false imprisonment under color of an unlawful warrant, see *Huckle* v. *Money*, 95 Eng. Rep. 768 (C.P. 1763), or to recover duties collected without a legal basis, see *Elliott* v. *Swartwout*, 35 U.S. 137 (1836). And common law has long provided prisoners with a cause of action against a jailer for failure to provide adequate care. See, *e.g.*, *Spicer* v. *Williamson*, 132 S.E. 291, 293 (N.C. 1926). *Carlson* is simply a modern iteration of that claim for federal officials.

This Court has previously observed in this context that "[t]here is no federal general common law" and that "federal courts today cannot fashion new claims in the way that they could before [*Erie Railroad Co.* v. *Tompkins*, 304 U.S. 64 (1938)]." *Hernandez*, 589 U.S. at 100 (citation omitted). That is true as a general matter, but the Court has retained common-law authority in certain "limited enclaves" where uniquely federal interests are at stake. *Sosa* v. *Alvarez-Machain*, 542 U.S. 692, 729 (2004); see also *Boyle* v. *United Techs. Corp.*, 487 U.S. 500, 504 (1988) (noting that federal courts may still formulate federal common law in certain areas implicating "uniquely federal interests" (citation omitted)). One such enclave involves "civil liability of federal officials for actions taken in the course of their duty." *Boyle*, 487 U.S. at 505 & n.1 ("[T]he liability of federal officials … is an area of uniquely federal interest."); see also *Howard* v. *Lyons*, 360 U.S. 593, 597 (1959) (extent of privilege for civil liability for defamatory statements by federal officers is a "peculiarly federal concern" governed by federal law).

A *Carlson* claim concerns the "civil liability of federal officials for actions taken in the course of their duty," *Boyle*, 487 U.S. at 505, but more specifically implicates numerous federal interests: a *Carlson* claim involves a federal prisoner held in a federal facility in the custody and care of federal officials subject to federal duties arising from a federal judgment issued by a federal court. Notably, "[a]n inmate must rely on prison authorities to treat his medical needs," and thus "[i]t is but just that the public be required to care for the prisoner, who cannot by reason of the deprivation of his liberty, care for himself." *Estelle* v. *Gamble*, 429 U.S. 97, 103-04 (1976)

(citation omitted). It is therefore a *federal* duty to provide adequate medical care. Where, as here, *every* aspect of a claim is federal in nature, the justification for application of federal common law is at its strongest.

Carlson therefore falls within this Court's authority to define uniform common-law rules in an area of unique federal interest. There is accordingly no need to resurrect the "heady days" of implied statutory causes of action to retain *Carlson* within its already narrow sphere. *Malesko*, 534 U.S. at 75 (Scalia, J., concurring).

3. Finally, *stare decisis* has "special force" where Congress "remains free to alter what [this Court] ha[s] done." *Bay Mills Indian Cmty.*, 572 U.S. at 799 (citation omitted). This Court's intervention is most necessary when a prior decision "short-circuit[s] the democratic process" by preventing States or Congress from addressing an issue. See *Dobbs* v. *Jackson Women's Health Org.*, 597 U.S. 215, 269 (2022).

Carlson does nothing of the sort. The Court in *Carlson* acknowledged that Congress can at any time eliminate a *Carlson* cause of action by an "explicit congressional declaration" directing plaintiffs to an alternative, equally effective remedy. 446 U.S. at 19. Yet, as discussed above, Congress has done the *opposite*: through the Westfall Act and the PLRA it has legislated in view of *Carlson*, decidedly preserving it—just as this Court has done repeatedly. The strongest form of *stare decisis* therefore applies to *Carlson*.

III. The Issue Is Not Important and Recurring

Petitioner asks this Court to decide whether "the Ninth Circuit here erred in recognizing a *Bivens* cause of action." Pet. i. But this Court has repeatedly refused requests to take up a case simply to determine whether a given claim is sufficiently similar to a recognized

Bivens context. See *Ferreyra* v. *Hicks*, 144 S. Ct. 555 (2024) (denying certiorari); *Henning* v. *Snowden*, 145 S. Ct. 137 (2024) (same). It should do the same here.

Petitioner nonetheless argues that the Court should grant the petition because "clarity" is needed for the courts of appeals. Pet. 2 (citation omitted). But as set forth above, pp. 7-14, *supra*, petitioner overstates the nature and extent of any disagreement in the courts of appeals. Consistent with this Court's instructions, the lower courts are overwhelmingly rejecting efforts to expand *Bivens* and *Carlson* to new contexts: In the Ninth Circuit alone, "[i]n the last three years," the court has "rejected *Bivens* claims in eight published opinions (and even more in unpublished dispositions)." Pet. App. 90a (Nelson, J., dissenting). That courts are allowing a very small number of cases with facts not meaningfully different from the original *Bivens* trilogy to proceed is no cause for certiorari.

Petitioner appears to court a summary reversal. Pet 31. But summary dispositions are "rare[ly]" appropriate, *Tharpe* v. *Sellers*, 583 U.S. 33, 43 (2018) (Thomas, J., dissenting) (per curiam) (citation omitted), and are reserved for decisions that are clearly and egregiously wrong, see *Sexton* v. *Beaudreaux*, 585 U.S. 961, 967 (2018) (per curiam). Although *Goldey*, 606 U.S. 942 (cited Pet. 31), is the rare case that met that exacting standard, this case does not. In *Goldey*, the Fourth Circuit acknowledged it was extending *Bivens* to a new context—something this Court has repeatedly warned against. *Id.* at 942-43. Here, by contrast, the Ninth Circuit merely applied *Carlson* in the same context as *Carlson* itself. Petitioner identifies no case in which this Court has summarily reversed to effectively overrule one of its prior precedents.

IV. This Case Is A Poor Vehicle

Finally, this case is a poor vehicle for the Court to define the outer bounds of *Carlson*. Watanabe's complaint presents the prototypical *Carlson* claim. Accordingly, taking this case would do little more than allow the Court to confirm that *Carlson* remains good law—which it has already done, see pp. 9-10, 15, *supra*—but would not meaningfully elucidate any disputed issues. See *Liles* v. *Oregon*, 425 U.S. 963 (1976) (Stevens, J., concurring in denial of certiorari) ("[I]t would be pointless to grant certiorari in case after case of this character only to have [precedent] reaffirmed time after time.").

This case also comes to the Court in an interlocutory posture: Watanabe has received no relief and may never receive any damages. The case would be entering discovery in the district court but for the maintenance of this petition. See D. Ct. Doc. 49 (Dec. 17, 2025). Accordingly, the Court's intervention would be premature and may prove entirely unnecessary. *Nat'l Football League* v. *Ninth Inning, Inc.*, 141 S. Ct. 56, 56-57 (2020) (Kavanaugh, J., respecting denial of certiorari) (noting "interlocutory posture … counsel[s] against … review" of appellate opinion reversing district court's dismissal).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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