No. 25-417

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

REPLY FOR PETITIONER

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REPLY FOR PETITIONER

This case presents two entrenched, openly acknowledged circuit conflicts on when putative *Bivens* claims present a "new context." The Ninth Circuit found no meaningful difference between this case and *Carlson* v. *Green*, 446 U.S. 14 (1980). It did so even though this case involves "alternative remedies" *Carlson* "did not consider." *Ziglar* v. *Abbasi*, 582 U.S. 120, 140, 149 (2017). And it did so despite a stark contrast between the nature and severity of the medical condition here—which allowed respondent to seek relief through other avenues—and *Carlson*, where an on-scene death from egregious mistreatment made it "damages or nothing." Had this case arisen in the Third, Fifth, Seventh, Tenth, or Eleventh Circuits, the presence of an alternative remedy *Carlson* did not consider would have rendered the *Bivens* context "new." And in the First,

Tenth, and Eleventh Circuits, the different nature of the alleged injury and mistreatment compared to *Carlson* would have rendered the context "new" as well.

Circuit after circuit has acknowledged those conflicts. Pet.2. Eleven judges dissented from denial of rehearing below, urging this Court to "provide some greater clarity" and resolve the "multiple deep circuit splits over *Carlson*-related *Bivens* actions." Pet.App.91a, Pet.App.116a. Even Watanabe concedes the conflicts. He *admits* the Third and Eleventh Circuits "conflict with the panel below" on whether an alternative remedy here—the "ARP"—may "render a context new." Br.in.Opp.9. And he *admits* the First, Tenth, and Eleventh Circuits have found new contexts where injuries were "not as serious as th[ose] in *Carlson*." Br.in.Opp.13-14.

On the merits, Watanabe practically confesses error. The Ninth Circuit holds courts *may not consider* alternative remedies at *Bivens* step one, Pet.App.15a; they can be considered "only at step two," *Schwartz* v. *Miller*, 153 F.4th 918, 930 (9th Cir. 2025). But Watanabe admits courts *can* consider alternative remedies at step one. Br.in.Opp.16. And he admits that differences are sufficiently "meaningful" to make a context "new" if they "'might alter the policy balance that initially justified'" recognizing a *Bivens* cause of action. Br.in.Opp.16. The Ninth Circuit never addressed that question. Watanabe does not either. He thus ignores a key difference between this case and *Carlson*: There, unlike here, the fast-moving and fatal nature of the circumstances meant the remedy was "damages or nothing." Pet.4, 22. "If that is not a meaningful difference, then it's hard to say what is." Pet.App.98a-99a (Nelson, J., dissenting from denial).

The new-context inquiry should be "easily satisfied" and thus easily applied. *Ziglar*, 582 U.S. at 149. But

Watanabe concedes the Ninth Circuit uses a "holistic," multifactor test to assess *similarities* with *Carlson*, Br.in.Opp.11—not a straightforward test to identify *differences* that might alter "the policy balance."

I. THE CIRCUITS ARE DIVIDED

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

Watanabe does not dispute the circuits are divided over whether alternative remedies can create a new *Bivens* context. Pet.15-19. The panel majority recognized a "split on the role of alternative remedies." Pet.App.78a (respecting denial of rehearing). So did ten dissenting judges. Pet.App.106a-109a. So do other circuits. Pet.15. Watanabe downplays the split by focusing on whether *the ARP specifically* creates a new context. But the conflict goes beyond the ARP. And the conceded split on the ARP is highly consequential and warrants review regardless.

1. Watanabe concedes a conflict on whether the ARP "render[s] a context new." Br.in.Opp.9. In "conflict with the panel below," he admits, the Third and Eleventh Circuits hold "the ARP may alone be sufficient to render a context new." Br.in.Opp.9 (citing *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)). In the Ninth Circuit, however, the ARP does *not* create a new context—it is relevant only "at the *second* step." Pet.App.15a; see *Schwartz*, 153 F.4th at 929-930.

That conceded split warrants review. In a circuit covering nine States, prisoners have a judicially created damages action despite the ARP; in another broad swath of the Nation, they do not. While Watanabe urges the Third and Eleventh Circuits are wrong, Br.in.Opp.9-11, that is a merits response (an erroneous one, pp. 7-10, *infra*)—not an

argument against resolving an admitted conflict. Watanabe asks for "percolation," Br.in.Opp.11, but identifies nothing that would further illuminate the issue.

2. Watanabe understates the conflict regardless. The Seventh and Tenth Circuits have *also* addressed the ARP *specifically*. Pet.16-17. The Seventh Circuit held "[t]he PLRA and the Bureau of Prisons' [ARP] grievance program satisfy th[e] low bar" of showing "a new context" "at step one." *Sargeant* v. *Barfield*, 87 F.4th 358, 366, 368-369 (7th Cir. 2023), cert. denied, 145 S. Ct. 285 (2024). The Tenth Circuit holds *Carlson* claims independently "foreclosed by the availability of the BOP Administrative Remedy Program." *Silva* v. *United States*, 45 F.4th 1134, 1142 (10th Cir. 2022).

Watanabe protests that other cases in those circuits "allow[ed] *Carlson* claims" or considered the ARP at step two. Br.in.Opp.8-9. But the parties in those other cases never invoked the ARP at step one.[1] Parties, not courts, "frame the issues for decision." *United States* v. *Sineneng-Smith*, 590 U.S. 371, 375 (2020). When actually presented with the issue, the Seventh and Tenth Circuits—unlike the Ninth—held the ARP forecloses *Bivens* relief.

3. The conflict runs deeper still. The Fifth Circuit agrees with the Third, Seventh, Tenth, and Eleventh Circuits that "an alternative remedial structure" "indeed present[s] a new context" at step one. *Hernandez* v. *Causey*, 124 F.4th 325, 334 (5th Cir. 2024), cert. denied, 145 S. Ct.

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[1] See Brief of Defendants-Appellees, *Brooks* v. *Richardson*, No. 24-1651, Dkt. 17 (7th Cir. Sept. 6, 2024); Brief of Defendants-Appellees, *Watkins* v. *Mohan*, No. 24-1151, Dkt. 27 (7th Cir. Aug. 30, 2024); Brief of Defendants-Appellees, *Rowland* v. *Matevousian*, No. 23-1343, Dkt. 30 (10th Cir. Apr. 8, 2024).

1930 (2025). But the First Circuit sides with the Ninth in finding no "'"new *Bivens* context"'" despite new administrative remedies. *Arias* v. *Herzon*, 150 F.4th 27, 45, 49 (1st Cir. 2025). That 5-2 conflict is anything but "shallow." Br.in.Opp.7.

Watanabe complains *Causey* and *Arias* did not "arise under *Carlson*" or "implicate the ARP." Br.in.Opp.8. But he cannot say why that matters. This Court has discussed the role of "alternative remedial structures" *generally* in analyzing "*Bivens*" claims *generally*. *Egbert* v. *Boule*, 596 U.S. 482, 493 (2022). Neither *Causey* nor *Arias* invokes any such distinction. Nor does the Ninth Circuit: It holds "the existence of alternative remedial structures" cannot be considered at step one of "the *Bivens* analysis"—period. Pet.App.15a.

B. The Circuits Are Divided on Whether the Nature and Seriousness of the Injury or Mistreatment Can Render the Context "New"

Watanabe admits circuits have reached "different results" over whether the severity of harm or mistreatment makes a context "new" compared to *Carlson*. Br.in.Opp.11. He concedes the Third, Seventh, and Ninth Circuits deem such differences "'not * * * meaningful.'" Br.in.Opp.12-13. And he concedes the First, Tenth, and Eleventh Circuits have found new contexts where (as here) "the injury was not as serious as that in *Carlson*." Br.in.Opp.13-14.

Attempting to reconcile the cases as "fundamentally" consistent, Watanabe urges they apply the same "holistic" approach to "different facts." Br.in.Opp.11, 13. But Watanabe never reconciles the facts or results.[2] And the cases

[2] The facts in this case, for example, track the First, Tenth, and Eleventh Circuit cases finding the context new: Each case—unlike *Carl-*

apply "fundamentally" conflicting *rules*. In the Third, Seventh, and Ninth Circuits, a difference in degree or urgency of injury is *categorically* "'not a meaningful difference.'" *Muniz*, 149 F.4th at 262-263; Pet.App.13a; see *Brooks* v. *Richardson*, 131 F.4th 613, 615 (7th Cir. 2025). But the First, Tenth, and Eleventh Circuits consider such differences. Pet.21-22. The conflict between circuits that take a "permissive stance on the nature and extent of the injury for *Carlson* claims," and those that do not, is widely recognized. *Watkins* v. *Mohan*, 144 F.4th 926, 947 & n.* (7th Cir. 2025) (Kirsch, J., concurring in part and dissenting in part); see Pet.App.103a (Nelson, J., dissenting from denial). Invoking that "conflict," the United States has urged the Seventh Circuit to go en banc to realign its precedents with the First, Tenth, and Eleventh Circuits'. Rehearing Pet. 22-23, *Watkins* v. *Mohan*, No. 24-1151, Dkt. 56 (7th Cir. Oct. 16, 2025), reh'g denied, 2025 WL 3074657 (Nov. 3, 2025).

If the circuits *were* applying Watanabe's "holistic" balancing test, that would cement the need for review. That would transform this Court's "easily satisfied" inquiry asking whether cases "differ in a[ny] meaningful way," *Ziglar*, 582 U.S. at 139-140, 149, into an anything-goes, totality-of-the-circumstances gumbo that contravenes precedent and expands the judicial role.

II. THE ISSUES ARE IMPORTANT AND RECURRING

The issues are important and recurring. They concern the rights of 150,000 federal inmates, the officers responsible for them, and separation-of-powers concerns that

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son—involved non-lethal injuries resulting from less extreme conduct that could be redressed by other means. Pet.App.3a-4a; *Waltermeyer* v. *Hazlewood*, 136 F.4th 361, 366-367 (1st Cir. 2025); *Rowland* v. *Matevousian*, 121 F.4th 1237, 1243 (10th Cir. 2024); *Johnson*, 119 F.4th at 859. But this case came out the opposite way.

should not vary by geography. Pet.22-23. The issues arise frequently. Pet.23; Pet.App.122a-131a. Watanabe nowhere contends otherwise.

Watanabe insists courts "overwhelmingly" get the analysis right, "rejecting" *Bivens* claims. Br.in.Opp.26. But the Ninth Circuit—the largest circuit—has endorsed *Carlson* claims despite alternative remedies not previously considered and despite differences in the nature of the misconduct and harm. Pet.App.13a-15a; *Schwartz*, 153 F.4th at 929-931. Others have joined it. Pet.18-21; pp. 5-6, *supra*. The resulting conflicts will persist, affecting case after case, until this Court intervenes. That is why court of appeals judges have pleaded for this Court to "provide some greater clarity" and stem the "flood of inconsistent case law" by "resolv[ing] the multiple deep circuit splits over *Carlson*-related *Bivens* actions." Pet.App.116a (Collins, J., dissenting from denial), *Watkins*, 144 F.4th at 951 & n.* (Kirsch, J., concurring in part and dissenting in part), Pet.App.91a (Nelson, J., dissenting from denial); see *Arias*, 150 F.4th at 51 & n.11 (Lynch, J., concurring in part and dissenting in part).

III. THE DECISION BELOW IS WRONG

A. Watanabe never defends the Ninth Circuit's holding that "alternative remedial structures" may only "be considered at the *second* step." Pet.App.15a. He concedes error: "[T]he existence of a special factor not previously considered," he admits, "*may* be addressed as one factor at step one." Br.in.Opp.16 (emphasis altered). That concession is unsurprising: *Ziglar*, *Egbert*, and *Goldey* all considered alternative remedies at step one. Pet.24-26.

Watanabe invokes the panel's dictum that, "'*even if* [it] were to consider [the ARP] at step one,'" the context would not be new. Br.in.Opp.8, 16. But he ignores that the Ninth Circuit *held*—and has since confirmed—it "treat[s]

the ARP as a special factor *only* at step two." *Schwartz*, 153 F.4th at 930 (emphasis added); see Pet.18, 25. And Watanabe nowhere defends the panel's sole justification for its "even if" dictum: that the ARP does not create a "new context" because remedial schemes supposedly have at most "little significance" at step one. Pet.App.15a, 80a-81a. That's a slightly diluted version of the court's rationale for entirely refusing to consider alternative remedies—that alternative remedies shouldn't matter at step one. *Either* formulation ("no" significance or "little" significance) defies this Court's instruction that "alternative remedial structures" "'alone'" create a new context and foreclose a *Bivens* action. *Egbert*, 596 U.S. at 492-493; Pet.26-27. Far from rendering the error here "immaterial," Br.in.Opp.8, the panel's dictum doubles down on it. And the conflict over whether the ARP ultimately renders the context "new" exists regardless.

Watanabe says "this Court has never said" that "any alternative remedy not specifically discussed * * * in the original *Bivens* trilogy is a 'special factor' necessarily giving rise to a new context." Br.in.Opp.16. But *Ziglar* says one "example" of a "differenc[e] that [is] meaningful enough to make a given context a new one" is "the presence of potential special factors"—including "alternative remedies"—that "previous *Bivens* cases did not consider." 582 U.S. at 139, 148-149; see Pet.27. *Egbert* held the existence of "alternative remedial structures" not previously considered "'alone'" forecloses a *Bivens* action. 596 U.S. at 492-493, 497; see Pet.27. And *Goldey* ruled that, because *the ARP* was "'an alternative remedial structure,'" the case arose "in a new context [at step one], and 'special factors' counsel[ed]" hesitation at step two. *Goldey* v. *Fields*, 606 U.S. 942, 944 (2025) (per curiam). There is no dispute the ARP is a potential special factor, and that

Carlson did not consider it. Under this Court's precedents, that renders the context "new." Pet.24.

That the ARP was "in effect" when *Carlson* issued is irrelevant. Br.in.Opp.15. The question is whether the ARP was "consider[ed]." *Ziglar*, 582 U.S. at 140. It was not—nor even *raised*. Pet.27. "Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided * * * ." *Webster* v. *Fall*, 266 U.S. 507, 511 (1925). Watanabe offers no answer.[3] Stray language from *Correctional Services Corp.* v. *Malesko*, 534 U.S. 61, 72 (2001), see Br.in.Opp.9-10, 15, cannot change the result. Such "general expressions" are "seldom completely investigated" and thus not "control[ling]." *Cohens* v. *Virginia*, 19 U.S. (6 Wheat.) 264, 399-400 (1821) (Marshall, C.J.); see *Brown* v. *Davenport*, 596 U.S. 118, 141 (2022). Under *Ziglar*, *Egbert*, and *Goldey*—all postdating *Malesko*—the ARP renders the context "new."

So Watanabe extolls *Carlson*'s reasoning. But *Carlson* carries "little weight because it predates [this Court's] current approach to implied causes of action." *Egbert*, 596 U.S. at 500. *Carlson* addressed a *different* alternative remedy, the Federal Tort Claims Act. But that says nothing about whether *the ARP* (which *Carlson* never considered) renders the context different here. The ARP plainly could affect Congress's preferred "'policy balance.'" Br.in.Opp.2, 16-17. Indeed, the ARP's administrative remedies may offer swifter, more specific relief than FTCA damages suits.

Carlson also says nothing about the effect of the Prison Litigation Reform Act along with the ARP. Pet.30. The

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[3] The ARP also did not exist when the conduct in *Carlson* occurred and was unavailable to the *Carlson* plaintiff (the decedent's mother). Pet.27-28. Congress could think those differences meaningful, too.

PLRA concededly presents a "meaningful" "differenc[e]" from *Carlson*. *Ziglar*, 582 U.S. at 149; see Pet.24-25 & n.5; Br.in.Opp.17. While Watanabe insists the PLRA bars only "*new Carlson* actions," Br.in.Opp.17, that begs the question. Actions present "new" contexts where they implicate alternative remedial structures *Carlson* "did not consider." *Ziglar*, 582 U.S. at 140. *Carlson* considered neither the PLRA nor the ARP.

Watanabe insists the "rationales" *Carlson* "invoked for the FTCA" apply to the ARP and PLRA. Br.in.Opp.17. But any remedies *Carlson* did not consider must be assessed under the Court's *current* "'analytic framework.'" *Egbert*, 596 U.S. at 500-501. "*[S]tare decisis*" does not require applying *Carlson*'s outmoded "methodology" here. Br.in.Opp.10; see *Alexander* v. *Sandoval*, 532 U.S. 275, 287 (2001).

B. The Ninth Circuit erred in holding that differences in the harm's severity or immediacy cannot render the context "new." Watanabe concedes that differences that "'might alter the policy balance that initially justified'" a *Bivens* remedy can make the context new. Br.in.Opp.16. Congress rationally could conclude that wrongful death (as in *Carlson*) presents weightier concerns than a still-treatable fractured coccyx (as here). And Congress rationally could conclude that, even if a damages remedy were appropriate for on-the-scene death (making it damages-or-nothing, as in *Carlson*), a damages remedy is unwarranted where (as here) prisoners can pursue administrative or injunctive remedies for chronic conditions. Pet.29-30.

Watanabe's argument that *the Court's* reasoning in *Carlson* didn't turn on "the fact that the inmate died," Br.in.Opp.18, is misplaced. The question is whether "*Congress*" could "weigh such policy considerations" when as-

sessing "'the efficacy or necessity of a damages remedy.'" *Egbert*, 596 U.S. at 491, 496, 501. Plainly it could.

C. Especially given Watanabe's refusal to defend much of the decision below, this Court may wish to consider summary reversal. Pet.31. If the Court grants plenary review, however, it may consider whether *Bivens* should be overruled. Pet. 31-32. Experience suggests that efforts to cabin *Bivens* and its progeny have proved unworkable. Disarray has prevailed. And the Court has repeatedly had to reverse decisions that misapprehend its instructions. Pet.23. "In fairness to future litigants and [the] lower court[s]," the Court may wish to clean the slate and "return the power to create new causes of actions" solely to "Congress." *Egbert*, 596 U.S. at 504 (Gorsuch, J., concurring); see Mary Mason, *Reckoning With Bivens*, Lawfare (Nov. 12, 2025), https://www.lawfaremedia.org/article/reckoning-with-bivens.

That course is squarely within the question presented. If *Bivens* is not good law, then "the Ninth Circuit here erred in recognizing a *Bivens* cause of action." Pet. i. Watanabe tries to defend *Carlson* as a "federal common-law analogue to common-law tort actions." Br.in.Opp.23. But this Court has rejected attempts to "[a]nalogiz[e] *Bivens* to the work of a common-law court." *Hernández* v. *Mesa*, 589 U.S. 93, 100 (2020). "[A]uthority to recognize a damages remedy must rest at bottom on a statute," *id.* at 101—not on whether plaintiffs can use the word "federal" eight times in one sentence, Br.in.Opp.24.[4]

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[4] The Westfall Act's "carve[-]out" for *Bivens*, Br.in.Opp.20, means Congress left *Bivens*' fate to the courts. And the FTCA "remedy against the United States" the statute recognizes, 28 U.S.C. § 2679(b)(1) (citing §§ 1346(b), 2672), refutes the assertion that overruling *Bivens* would "leave plaintiffs * * * without a remedy" Congress wanted to provide, Br.in.Opp.21.

IV. This Case Presents An Ideal Vehicle

This case cleanly presents both circuit splits; all issues were preserved and passed upon; and reversal would be case-dispositive. Nor is the case "interlocutory" in any meaningful sense. Br.in.Opp.27. The district court granted judgment on the pleadings, holding the context "new"; the Ninth Circuit reversed, holding the opposite. Burdensome "discovery" and potentially trial, *ibid.*, would not inform the issues. If anything, those burdens underscore the need for intervention. *Ziglar*, 582 U.S. at 134. This Court has reviewed other *Bivens* cases in similar postures. *Id.* at 130; *Goldey*, 606 U.S. at 945.

CONCLUSION

The petition should be granted.

Respectfully submitted.

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