

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**

SUPPLEMENTAL BRIEF FOR PETITIONER

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The petition in this case was filed on October 3, 2025. The reply was filed on January 20, 2026, and a supplemental brief, addressing the Solicitor General’s recommendation that the petition be granted, was filed on February 13, 2026. Petitioner Francis Nielsen respectfully submits this supplemental brief to notify the Court of the Fourth Circuit’s decision in *Spivey v. Breckon*, No. 24-6490, — F.4th —, 2026 WL 1060429 (4th Cir. Apr. 20, 2026) (published). That decision deepens both circuit conflicts identified in the petition and underscores the need for this Court’s review.

In *Spivey*, the Fourth Circuit affirmed dismissal of a *Bivens* action, against Bureau of Prisons employees, alleging inadequate medical treatment under the Eighth Amendment. At step one, the court held that the case presented a “new context” from *Carlson v. Green*, 446 U.S. 14 (1980), on two grounds. 2026 WL 1060429, at *4-6.

1. The Fourth Circuit first held that *Spivey* presented a new context from *Carlson* because—although both cases involved Eighth Amendment claims for inadequate medical treatment—the claims in *Spivey* were “different in kind, severity, and results” from those in *Carlson*. 2026 WL 1060429, at *4. Spivey alleged delayed or inadequate care for tooth decay and inflammation, rectal bleeding, and depression. *Ibid.* Those allegations were not “even close to the severity of those in *Carlson*,” where “discrete acts of malfeasance”—such as administering “contraindicated” drugs and “us[ing] a respirator that was known to be inoperative”—“worsened” an inmate’s asthma attack and “led to the inmate’s death.” *Ibid.* The Fourth Circuit had “little difficulty in recognizing that Spivey’s claims for inadequate medical treatment present[ed] a materially different context than the inadequate medical treatment claim presented in *Carlson*.” *Ibid.*

That ruling deepens the acknowledged circuit conflict over whether a case presents a new context where the alleged harm is less severe or urgent, and the consequences less immediate or profound, than in *Carlson*. See Pet.20-22; Reply 5-6. Four circuits—the First, Tenth, Eleventh, and now the Fourth—hold that it does. Three circuits—the Third, Seventh, and Ninth—hold the opposite. And it is clear that conflict makes a difference. Here, Watanabe alleges delayed and inadequate treatment for a fractured coccyx resulting in chronic pain. Pet.9, 20. That alleged harm closely resembles the delayed and inadequate treatment for tooth pain, rectal bleeding, and depression alleged in *Spivey*. But it is not “even close to the severity of [the harm] in *Carlson*,” which resulted in the inmate’s death. 2026 WL 1060429, at *4. There can be little doubt this case would have been decided differently in the Fourth Circuit.

2. The Fourth Circuit also held that an alternative remedial scheme not considered by *Carlson* presents a new context at *Bivens* step one. 2026 WL 1060429, at *5. In particular, the Fourth Circuit considered Congress’s post-*Carlson* enactment of the Prison Litigation Reform Act. The court held that the “failure of the PLRA to provide for a ‘standalone damages remedy against federal jailers [is] a silence that speaks volumes and counsels strongly against judicial usurpation of the legislative function to create one.’” *Ibid.* (alteration in original). “Congress’s ‘conspicuous[] silen[ce] about creating a remedy for prisoners to obtain damages from individual officers’ in the aftermath of *Carlson*, along with an ‘expressed legislative desire to prevent courts from interfering with [Bureau of Prisons] decisions,’” the court held, “implicate separation-of-powers considerations that also render Spivey’s claims a new context” at *Bivens* step one. *Ibid.* (alterations in original). The PLRA likewise presents a new context here. Pet.23, 27, 30; Reply 9-10. Judicial creation of an implied damages action always strains separation-of-powers principles, but especially where “courts do so despite the legislature’s intervention through statutes like the PLRA.” Pet.23.

The Fourth Circuit’s consideration of the PLRA accords with the Third, Fifth, Seventh, Tenth, and Eleventh Circuits—all of which agree that alternative remedial schemes are properly considered in the “new context” inquiry at *Bivens* step one. See Pet.15-17; Reply 3-5. But it conflicts with the decision below. The Ninth Circuit insisted that “alternative remedial structures can be one ‘special factor,’ to be considered at the *second* step of the *Bivens* analysis.” Pet.App.15a. As the Ninth Circuit has explained: “Our cases * * * trea[t] the PLRA” and other alternative remedial structures “as a special factor *only* at

step two.” *Schwartz v. Miller*, 153 F.4th 918, 928 (9th Cir. 2025) (emphasis added); see *id.* at 930 (“[O]ur cases are also uniform in treating the ARP as a special factor only at step two.”). Thus, in the Ninth Circuit, “the PLRA may be relevant in determining whether to extend *Bivens* to a new context at step two, but it is *not a special factor at step one.*” *Id.* at 927-928 (emphasis added). That is directly contrary to the Fourth Circuit’s decision in *Spivey*, which held “the PLRA” “render[ed] Spivey’s claims a new context” at *Bivens* step one. 2026 WL 1060429, at *5.

In so holding, moreover, *Spivey* relied on earlier decisions that held the PLRA was a special factor that foreclosed *Bivens*’s extension at step two. 2026 WL 1060429, at *5 (citing *Bulger v. Hurwitz*, 62 F.4th 127, 141 (4th Cir. 2023); *Mays v. Smith*, 70 F.4th 198, 206 (4th Cir. 2023)). The Fourth Circuit thus rejects the Ninth Circuit’s view that certain factors relevant to *Bivens* step two (such as the PLRA and alternative remedial schemes) cannot also be considered at *Bivens* step one. The Fourth Circuit’s approach reflects this Court’s instruction that 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 v. Abbasi*, 582 U.S. 120, 139-140 (2017); see Pet.24. The Ninth Circuit’s contrary approach does not.

Again, it is clear this case would have come out differently in the Fourth Circuit. The PLRA—as well as the BOP’s Administrative Remedies Program (ARP)—is a special factor that *Carlson* did not consider. Pet.23-28, 30; Reply 7-10. Under this Court’s precedents—and the

Fourth Circuit’s decision in *Spivey*—that renders the context “new.” Pet.24.¹

3. In addition to deepening the circuit conflicts here, *Spivey* reinforces the importance of the issues at stake. As the Fourth Circuit explained, allowing damages actions against federal prison employees based on “dissatisfaction with the prison system’s institutional decisions regarding the proper treatment of particular medical conditions” implicates “broader systemic issues”—such as “staffing levels”—that “relate directly to the prison system’s institutional management of medical care, a domain that Congress has statutorily assigned to the Executive.” 2026 WL 1060429, at *4 (citing 18 U.S.C. § 3621(i)(1)). Permitting inmates to sue for damages based on allegations of inadequate treatment for chronic conditions—conditions miles away from the acute, fatal medical emergency in *Carlson*—risks “converting district courts into ‘medical review boards’ supervising prisoner medical treatment.” Pet.30 (quoting Pet.App.35a) (brackets omitted). A preponderance of circuits now properly rejects such an approach. But the decision below threatens precisely that sort of judicial micromanagement throughout our Nation’s largest circuit. This Court’s review is warranted.

¹ After finding a new context at step one, the Fourth Circuit held the ARP foreclosed extending *Carlson* at *Bivens* step two. 2026 WL 1060429, at *5-6. Because the government invoked the ARP only at step two, see Dkt. 25 at 19-32, No. 24-6490 (4th Cir. Jan. 30, 2025), the Fourth Circuit did not consider whether it may also be considered at step one. The court’s analysis of the PLRA, however, makes clear it would not bar the ARP’s consideration at step one. In all events, *Spivey* makes clear that this case presents a new context even apart from the ARP, and that the ARP forecloses *Carlson*’s extension regardless. Watanabe concedes his case cannot survive step two if his claims present “a new *Bivens* context” at step one. Pet.App.96a n.1. *Spivey*’s analysis confirms the wisdom of that concession.

6

CONCLUSION

The petition should be granted.

Respectfully submitted.

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