

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*

SUPPLEMENTAL BRIEF FOR RESPONDENT

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Respondent Kekai Watanabe respectfully submits this supplemental brief in response to petitioner’s submission regarding *Spivey v. Breckon*, 173 F.4th 174 (4th Cir. 2026). *Spivey* does not support certiorari in this case. Although petitioner asserts that the opinion in *Spivey* “deepens” two circuit conflicts, Supp. Br. 1, the Fourth Circuit does not share this view. It did not mention a split, did not purport to make new law, and noted it was following years of circuit precedent. See *Spivey*, 173 F.4th at 178-81.

1. *Spivey* did not create or deepen a split regarding the significance of the severity of a plaintiff’s injury. Cf. Br. in Opp. 11-14. In particular, the Fourth Circuit did not adopt petitioner’s rule that a plaintiff must suffer death or life-threatening injury to have a cognizable *Carlson* claim. See Pet. 20-22; see also Gov’t Br. at 31,

Spivey v. Breckon, 173 F.4th 174 (4th Cir. 2026) (No. 24-6490) (disclaiming any such position). Instead, the panel indicated that “a *Bivens* claim for inadequate medical treatment in violation of the Eighth Amendment” is permitted for claims of “egregious” mistreatment. *Spivey*, 173 F.4th at 179. Indeed, petitioner previously identified the Fourth Circuit as being on *the Ninth Circuit’s* side of the purported split. Pet. 20 & n.3 (discussing *Masias v. Hodges*, No. 21-6591, 2023 WL 2610230 (4th Cir. Mar. 23, 2023) (per curiam), and *Langford v. Joyner*, 62 F.4th 122 (4th Cir. 2023)).

Spivey did not purport to depart from that precedent. Instead, the same circuit, following the same legal framework, reached a different outcome when presented with different facts. The plaintiff in *Spivey* alleged he suffered temporary dental issues (for which he was treated), experienced bleeding (for which he was tested), and was denied access to a prerelease psychology class. 173 F.4th at 179. The *Spivey* panel considered a variety of factors in determining that the claim was “different in kind, severity, and results” from *Carlson*, including the “temporary” nature of the plaintiff’s injuries, the medical treatment and testing the plaintiff received, and the fact that the plaintiff’s request to attend a “psychology class” was potentially “not even ... a medical issue, but an educational one.” *Ibid.* That kind of holistic and inherently fact-specific analysis is the same framework followed by the panel below, which reached a different result based on markedly different facts. See Pet. App. 14a (Watanabe’s “injury resulted in a serious medical condition, and the condition has caused extreme pain ever since”); see also Br. in Opp. 5, 11-12.

Spivey’s policy discussion confirms the fact-specific nature of the inquiry. Contra Supp. Br. 5. The Fourth

Circuit observed that whereas the claims in *Carlson* “involved the deliberate indifference of prison officials to an inmate’s health and their discrete acts of malfeasance,” the claims in *Spivey* “implicate broader systemic issues,” such as “staffing levels,” standard “treatment care,” and “inmate eligibility for prerelease psychology classes.” 173 F.4th at 180. Those characteristics introduce new issues that “might alter the policy balance that initially justified the cause[] of action recognized in ... *Carlson*” and therefore present a new context. *Snowden v. Henning*, 72 F.4th 237, 239, 244 (7th Cir. 2023), cert. denied, 145 S. Ct. 137 (2024). Conversely, claims like Watanabe’s—which track the claims in *Carlson*—do not present the same policy concerns. See *Spivey*, 173 F.4th at 180.

2. Nor does *Spivey* meaningfully contribute to a circuit disagreement regarding remedial schemes. As petitioner concedes, Supp. Br. 5 n.1, the Fourth Circuit in *Spivey* considered the ARP only at step two of the *Bivens* analysis, not at step one. *Spivey*, 173 F.4th at 181. That is consistent with how the Fourth Circuit has previously analyzed alternative remedies under *Bivens*. See *Mays v. Smith*, 70 F.4th 198, 205-06 (4th Cir. 2023). Nothing in *Spivey* announced a new rule on this point.

To the extent *Spivey* could be read to hold that all cases covered by the PLRA necessarily arise in a new context, that is simply incorrect. The PLRA may suggest that “Congress chose not to *extend*” *Carlson* to new contexts, *Ziglar v. Abbasi*, 582 U.S. 120, 148-49 (2017) (emphasis added), but it left the existing *Carlson* remedy where it found it. See Br. in Opp. 17; see, e.g., *Mays*, 70 F.4th at 206 (considering PLRA at step two). *Spivey* does not grapple with the fact that this Court has continued to acknowledge the availability of a remedy for

Carlson claims since the passage of the PLRA, or the fact that Congress has elsewhere legislated in clear reliance on the continued availability of *Carlson* claims against federal officers, including through the Westfall Act. See Br. in Opp. 15, 17, 20-22. Given these unaddressed questions, further percolation is appropriate before this Court's intervention.

* * *

Spivey is a fact-bound decision that breaks no new ground, and the panel there did not suggest otherwise. The application of settled legal rules to different factual scenarios does not justify certiorari.

Respectfully submitted.

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