No. 25-417

IN THE
Supreme Court of the United States

FRANCIS NIELSEN,
Petitioner,

v.

KEKAI WATANABE,
Respondent.

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

BRIEF FOR PETITIONER

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QUESTION PRESENTED

This case concerns the judicially created damages remedy first recognized in *Bivens* v. *Six Unknown Federal Narcotics Agents*, 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 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. *Id.* at 148-149; *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, 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 resulting in the judgment under review.

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

Page(s)

CASES

TABLE OF AUTHORITIES—Continued

Page(s)

TABLE OF AUTHORITIES—Continued

Page(s)

Page(s)

CONSTITUTIONAL PROVISIONS

STATUTES

Page(s)

Page(s)

REGULATIONS

TABLE OF AUTHORITIES—Continued

Page(s)

AGENCY MATERIALS

TABLE OF AUTHORITIES—Continued

Page(s)

OTHER AUTHORITIES

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BRIEF FOR PETITIONER

INTRODUCTION

This Court has repeatedly warned that "recognizing a cause of action under *Bivens* is 'a disfavored judicial activity'" in "'tension'" with—if not outright violation of—"'the Constitution's separation of legislative and judicial power.'" *Egbert* v. *Boule*, 596 U.S. 482, 491 (2022). The Court has refused to extend *Bivens* to any new context for the past 45 years, across 13 cases. This case should be number 14—and perhaps the final installment of the *Bivens* saga.

The decision below authorized a *Bivens* damages action against a federal-prison paramedic who declined to send an inmate to the hospital for what was later diagnosed as a fractured coccyx. The Ninth Circuit insisted it was not extending *Bivens* because this case purportedly arises in the same context as *Carlson* v. *Green*, 446 U.S. 14 (1980). But a case presents a "new *Bivens* context" if it has *any* meaningful difference from past cases where this Court allowed a *Bivens* remedy. *Carlson* allowed a *Bivens* suit against prison staff who exacerbated an inmate's asthma attack, killing him within hours. This case is meaningfully—profoundly—different.

In *Carlson*, the immediacy of the inmate's medical emergency and death made administrative or equitable relief impossible: It was "damages or nothing." Here, respondent could (and did) seek nonmonetary relief. Personal liability in extreme cases like *Carlson* also raises different policy considerations than cases involving less-severe conditions. And this case implicates alternative remedial structures not considered in *Carlson*. Each difference renders this a new *Bivens* context compared to *Carlson*. And no one disputes that, if the context is new, *Carlson*—and thus *Bivens*—cannot be extended here.

The decision below fails to afford "utmost deference to Congress' preeminent authority in this area." *Egbert*, 596 U.S. at 492. Authorizing a cause of action is a "legislative endeavor." *Id.* at 491. Whether a context is "new" thus depends on whether *Congress*, from a *legislative* perspective, could find differences between this case and prior ones that affect the costs and benefits of a damages remedy. Here, the answer is plainly "yes." Congress could find any or all of the differences—from the harm's immediacy, to its severity, to alternative remedies—sufficient to differentiate this case from *Carlson*.

The Court may decide it is finally time to overrule *Bivens* and its progeny. Those cases are relics of the bygone days when federal courts thought it appropriate to create causes of action Congress had not authorized. The

Court has since rejected every stitch of *Bivens*'s reasoning. It has refused to extend *Bivens* time (and time and time and time and time and time and time and time and time and time and time and time) and again. It has indicated that, if "called to decide *Bivens* today, [it] would decline to discover any implied causes of action in the Constitution." *Egbert*, 596 U.S. at 502.

Yet *Bivens* continues to haunt our constitutional jurisprudence. It gives false hope to litigants whose suits are (almost) invariably doomed. It burdens federal employees caught in its crosshairs. It forces this Court to repeatedly remind federal courts of their limited constitutional station. And it gives Congress an excuse not to claim its rightful role in this area. Rather than continually engage in *Bivens* error correction, the Court may wish to recognize that the error is *Bivens* itself.

OPINIONS BELOW

The court of appeals' opinion (Pet.App.1a-23a) is reported at 115 F.4th 1034. That court's denial of rehearing (Pet.App.76a-116a), including accompanying opinions, is reported at 139 F.4th 1056. The district court's opinion granting Nielsen's motion to dismiss (Pet.App.24a-39a) is unreported but available at 2023 WL 2500933.

STATEMENT OF JURISDICTION

The court of appeals entered judgment on September 6, 2024, and denied rehearing on June 5, 2025. Pet.App.1a, 76a. On August 21, 2025, Justice Kagan extended the time to file the petition to October 3, 2025. 25A208. The petition was filed October 3, 2025, and granted June 22, 2026. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

Relevant provisions of the Eighth Amendment; Prison Litigation Reform Act, 18 U.S.C. § 3626, 42 U.S.C. § 1997e; USA PATRIOT Act, Pub. L. No. 107-56, 115 Stat. 391 (2001); Federal Prison Oversight Act, Pub. L. No. 118-71, 138 Stat. 1492 (2024); and Bureau of Prisons Administrative Remedy Program, 28 C.F.R. §§ 542.10-542.19, are set forth in the appendix to this brief.

STATEMENT

I. LEGAL FRAMEWORK

This case involves the scope and propriety of the damages remedy for constitutional violations this Court created in *Bivens* v. *Six Unknown Federal Narcotics Agents*, 403 U.S. 388 (1971), *Davis* v. *Passman*, 442 U.S. 228 (1979), and *Carlson* v. *Green*, 446 U.S. 14 (1980).

A. Historical Background

From the Framing until 1971, "the traditional way in which civil litigation addressed abusive conduct" by federal officials "was by subjecting them to liability for common-law torts." *Hernández* v. *Mesa*, 589 U.S. 93, 110 (2020); see Alfred Hill, *Constitutional Remedies*, 69 Colum. L. Rev. 1109, 1128 & nn.88-89 (1969) (Hill) (collecting cases). In such cases, allegations of constitutional violations would arise only indirectly. An official sued for a common-law tort could assert, as a "defense," that "the conduct complained of was done pursuant to a federally imposed duty." *Wheeldin* v. *Wheeler*, 373 U.S. 647, 652 (1963). But the plaintiff could defeat the defense by showing that the conduct was not federally authorized because it contravened the Constitution or other federal law. Hill 1128-1129; see, *e.g.*, *Mitchell* v. *Harmony*, 54 U.S. (13 How.) 115, 136-137 (1851); *Slocum* v. *Mayberry*, 15 U.S. (2

Wheat.) 1, 12-13 (1817); cf. *Poindexter* v. *Greenhow*, 114 U.S. 270, 282-283 (1885) (similar; state official).

Other remedies existed, too. As now, plaintiffs could invoke federal courts' *equitable* power "to enjoin unconstitutional actions by state and federal officers." *Armstrong* v. *Exceptional Child Ctr., Inc.*, 575 U.S. 320, 327 (2015). That practice "reflects a long history of judicial review of illegal executive action" by "courts of equity," "tracing back to England." *Ibid.*; see *Bell* v. *Hood*, 327 U.S. 678, 684 & nn.4-5 (1946) (collecting cases). For two centuries, there was no similar tradition of federal *damages* suits against individual federal officers for constitutional violations.

In 1871, Congress authorized damages actions against *state* officials who violate the Constitution. 17 Stat. 13 (1871), as amended, 42 U.S.C. § 1983. In the intervening "100 years leading up to *Bivens*, Congress did *not* provide a specific damages remedy for plaintiffs whose constitutional rights were violated by agents of the *Federal* Government." *Ziglar* v. *Abbasi*, 582 U.S. 120, 130 (2017) (emphasis added).

Thus, shortly before *Bivens*, this Court observed that state law ordinarily provided the only damages remedy against federal officials. *Wheeldin*, 373 U.S. at 652. Congress had enacted "no general statute making federal officers liable for acts committed 'under color,' but in violation, of their federal authority." *Ibid.* "Congress could, of course, provide otherwise, but it has not done so." *Ibid.* And, the Court concluded, "it is not for us to fill any *hiatus* Congress has left in this area." *Ibid.*

B. This Court Creates Damages Remedies for Constitutional Violations in *Bivens*, *Davis*, and *Carlson*

In 1971, *Bivens* "broke new ground," *Hernández*, 589 U.S. at 99, recognizing for the first time an implied damages action against federal officials for alleged constitutional violations.

In *Bivens*, the Court allowed a damages suit against Federal Bureau of Narcotics agents for a warrantless search and seizure in violation of the Fourth Amendment. 403 U.S. at 389, 397. The Court, and Justice Harlan's concurrence, found support in the then-common practice of allowing "suits for damages based on violations of federal statutes lacking any express authorization of a damage remedy." *Id.* at 402, 407 (Harlan, J., concurring in judgment) (citing *J.I. Case Co.* v. *Borak*, 377 U.S. 426 (1964)); see *id.* at 397 (opinion of the Court) (same).

Justice Harlan further observed that "damages [was] the only possible remedy for someone in Bivens' alleged position." 403 U.S. at 409-410. Bivens could not, for example, have sought "injunctive relief" while the search and seizure were occurring. *Id.* at 410. "For people in Bivens' shoes, it is damages or nothing." *Ibid.*

This Court has extended *Bivens* only twice. In *Davis*, the Court allowed a former congressional staffer to sue a Congressman for damages based on alleged sex discrimination in violation of the Fifth Amendment. 442 U.S. at 230-231, 248-249. "[E]quitable relief in the form of reinstatement" was unavailable because the Congressman had left office. *Id.* at 245. "For Davis, as for Bivens, 'it [was] damages or nothing.'" *Ibid.* (quoting *Bivens*, 403 U.S. at 410 (Harlan, J., concurring in judgment)).

Finally, in *Carlson*, the Court allowed the mother of a deceased inmate, representing his estate, to seek damages against federal prison officials for an alleged Eighth Amendment violation. 446 U.S. 14. The defendants had failed to treat the inmate's life-threatening asthma attack, and instead exacerbated it with "contraindicated drugs which made his attack more severe" and "a respirator known to be inoperative which further impeded his breathing." *Id.* at 16 n.1. The inmate died within hours. *Ibid.*; *Green* v. *Carlson*, 581 F.2d 669, 671 (7th Cir. 1978). The emergent nature of those events gave the inmate no opportunity to seek injunctive, administrative, or similar relief. As in *Bivens* and *Davis*, it was " 'damages or nothing.' " Pet.App.98a (R. Nelson, J., dissenting from denial).

C. Recognizing the Tension Between *Bivens* and the Separation of Powers, This Court Adopts a Demanding Two-Step *Bivens* Framework

1. After *Carlson*, "the Court changed course." *Hernández*, 589 U.S. at 99. Recognizing that "creating a cause of action is a *legislative* endeavor," the Court has "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) (emphasis added). Permitting judicially created damages remedies, the Court has noted, requires courts to "evaluate a 'range of policy considerations . . . at least as broad as the range . . . a legislature would consider.' " *Ibid.* (quoting *Bivens*, 403 U.S. at 407 (Harlan, J., concurring in judgment)). But "Congress is 'far more competent than the Judiciary' to weigh such policy considerations. And the Judiciary's authority to do so at all is, at best, uncertain." *Ibid.* (citation omitted).

This Court thus 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*). In the 45 years since *Carlson*, the Court has rejected *every* invitation to extend *Bivens*—thirteen times in all. See *Chappell* v. *Wallace*, 462 U.S. 296 (1983); *Bush* v. *Lucas*, 462 U.S. 367 (1983); *United States* v. *Stanley*, 483 U.S. 669 (1987); *Schweiker* v. *Chilicky*, 487

U.S. 412 (1988); *FDIC* v. *Meyer*, 510 U.S. 471 (1994); *Correctional Services Corp.* v. *Malesko*, 534 U.S. 61 (2001); *Wilkie* v. *Robbins*, 551 U.S. 537 (2007); *Hui* v. *Castaneda*, 559 U.S. 799 (2010); *Minneci* v. *Pollard*, 565 U.S. 118 (2012); *Ziglar*, 582 U.S. 120; *Hernández*, 589 U.S. 93; *Egbert*, 596 U.S. 482; *Goldey*, 606 U.S. 942. The Court has indicated that, if "called to decide *Bivens* today, [it] would decline to discover any implied causes of action in the Constitution." *Egbert*, 596 U.S. at 502.

2. Accordingly, *Bivens* claims are now subject to a demanding two-part test.

At step one, courts assess whether the claim "presents a new *Bivens* context"—that is, whether it differs "in a meaningful way" from the three cases (*Bivens*, *Davis*, and *Carlson*) where this Court 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. Even "small" differences from the original *Bivens* trio will present a new context; "a modest extension is still an extension." *Id.* at 147, 149.

Differences in the "right at issue" or "mechanism of injury" suffice to render the context new. *Ziglar*, 582 U.S. at 139. But the new-context inquiry is broader than that. *Ibid.* Other—still non-exhaustive—examples of meaningful differences include:

- "the rank of the officers involved";
- "the generality or specificity of the official action";
- "the extent of judicial guidance as to how an officer should respond to the problem or emergency";
- "the statutory or other legal mandate under which the officer was operating";

- “the risk of disruptive intrusion by the Judiciary into the functioning of other branches”; and
- “the presence of potential special factors that previous *Bivens* cases did not consider.”

Id. at 139-140, 148.

When the context is “new,” courts at step two ask “if 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.’ ” *Egbert*, 596 U.S. at 492. “If there is even a single ‘reason to pause before applying *Bivens* in a new context,’ a court may not recognize a *Bivens* remedy.” *Ibid.*

This Court has identified numerous special factors that foreclose extending *Bivens* (and *Carlson*) with respect to prisoner claims. Those factors include:

- damages liability “could have negative systemic consequences for prison officials and the ‘inordinately difficult undertaking’ of running a prison.”
- “ ‘an alternative remedial structure’ already exists for aggrieved federal prisoners”—“even if such ‘procedures are “not as effective as an individual damages remedy.” ’ ”
- “Congress has actively legislated in the area of prisoner litigation but has not enacted a statutory cause of action for money damages.”

Goldey, 606 U.S. at 944-945.

3. The two steps overlap. For example, step two asks whether any “ ‘special factors’ ” counsel against extending *Bivens* to a new context. *Egbert*, 596 U.S. at 492. And step one instructs that “a new context arises when there are ‘potential special factors that previous *Bivens* cases did not consider.’ ” *Ibid.* A previously unconsidered special

factor thus both presents a new context at step one, and forecloses *Bivens*'s extension to that context at step two.

Accordingly, this Court has explained 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. "If there is a rational reason to think" Congress might be better suited—"as it will be in most every case"—"no *Bivens* action may lie." *Ibid.*

D. Remedial Structures for Federal Prisoners

Congress and the Executive have created extensive remedial structures for federal prisoner complaints.

1. In 1979—four years after the inmate's death in *Carlson*—the Bureau of Prisons (BOP) established a grievance process called the Administrative Remedy Program (ARP). See Administrative Remedy Program, 44 Fed. Reg. 62,250 (Oct. 29, 1979); 28 C.F.R. §§ 542.10-542.19. The ARP "allow[s] an inmate to seek formal review of an issue relating to any aspect of his/her own confinement." § 542.10(a)-(b). It requires BOP officials to investigate and respond to inmate complaints. § 542.11(a). If an "emergency" situation "threatens the inmate's immediate health or welfare," BOP must respond within three days. § 542.18.

The ARP has four steps: (1) informal complaint and attempt at informal resolution, § 542.13(a); (2) formal complaint, § 542.14(a); (3) appeal to the regional director, § 542.15(a); and (4) final appeal to BOP's General Counsel, *ibid.* If disclosure would endanger inmate "safety or well-being," an inmate may complain directly to the regional director. § 542.14(d)(1). Inmates may obtain assistance from other inmates, staff, family, or attorneys. § 542.16.

2. Congress has also been active. In 1996, Congress enacted the Prison Litigation Reform Act (PLRA). 110

Stat. 1321–66 (1996), as amended, 18 U.S.C. § 3626, 42 U.S.C. § 1997e. The PLRA seeks "to eliminate unwarranted federal-court interference with the administration of prisons" and "'reduce the quantity and improve the quality of prisoner suits.'" *Woodford* v. *Ngo*, 548 U.S. 81, 93-94 (2006). It requires prisoners to exhaust administrative remedies—such as the ARP—before filing any suit challenging prison conditions. 42 U.S.C. § 1997e(a). The PLRA contemplates § 1983 damages actions against *state* officials. See *ibid.* But Congress chose "not [to] provide for a standalone damages remedy against *federal* jailers." *Ziglar*, 582 U.S. at 149 (emphasis added).

In 2001, Congress directed the Department of Justice's Office of Inspector General (OIG) to "receive complaints alleging abuses of civil rights and civil liberties" by Department (including BOP) personnel. USA PATRIOT Act, Pub. L. No. 107-56, § 1001, 115 Stat. 391 (2001). OIG must report "any abuses" to Congress. *Ibid.*

In 2024, Congress enacted the Federal Prison Oversight Act, Pub. L. No. 118-71, 138 Stat. 1492 (2024), to be codified at 5 U.S.C § 413(e). It provides for an Ombudsman to investigate inmate complaints regarding the "health, safety, welfare, or rights of incarcerated people." *Id.* at 1496 (§ 413(e)(3)(A)). The Ombudsman "shall render a decision on the merits," which may lead to BOP "disciplinary" action. *Id.* at 1497-1498 (§ 413(e)(3)(C), (D)(iii)).

3. Congress has repeatedly declined proposals to create damages remedies for constitutional violations by federal officials. Some proposals would extend § 1983's damages remedy to federal officials.[1] Others would cover only

[1] *E.g.*, Bivens Act of 2025, H.R. 6091, 119th Cong. § 2 (2025); Bivens Act of 2025, S. 3187, 119th Cong. § 2 (2025); Bivens Act of 2021, H.R. 6185, 117th Cong. § 2 (2021); Bivens Act of 2021, S. 3343, 117th Cong. § 2 (2021).

law-enforcement officers.[2] Others would apply to certain rights, such as the First Amendment,[3] Fourth Amendment,[4] or voting.[5] Still others would allow damages actions "directly against the Federal Government."[6] None has been enacted.

II. PROCEEDINGS BELOW

Petitioner Francis Nielsen is a paramedic at the Federal Detention Center in Honolulu.[7] Respondent Kekai Watanabe suffered injuries during a gang riot while an inmate at that facility. Pet.App.3a-4a; see C.A. ER-75-85 (Dkt. 12) (operative first amended complaint).

A. District Court Proceedings

1. In July 2021, Watanabe was attacked by rival gang members. Pet.App.3a-4a. After restoring order, prison officials documented Watanabe's known and visible injuries and placed him on sick call. Pet.App.4a. Watanabe later asked to see medical staff for headaches and pain. *Ibid.*

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[2] *E.g.*, Qualified Immunity Abolition Act, H.R. 7046, 119th Cong. § 3 (2026); Qualified Immunity Abolition Act, S. 3625, 119th Cong. § 3 (2026); Constitutional Accountability Act, H.R. 6092, 119th Cong. § 3 (2025); Constitutional Accountability Act, S. 3186, 119th Cong. § 3 (2025); Constitutional Accountability Act, H.R. 6327, 117th Cong. § 3 (2021); Constitutional Accountability Act, S. 3415, 117th Cong. § 3 (2021).

[3] *E.g.*, Right to Record Act of 2026, H.R. 9189, 119th Cong. § 3(b)(1) (2026); Censorship Accountability Act, H.R. 4848, 118th Cong. § 2 (2023).

[4] *E.g.*, Surveillance Accountability Act, H.R. 8470, 119th Cong. § 3 (2026).

[5] *E.g.*, Protecting American Voters' Rights Act, H.R. 8858, 119th Cong. § 2 (2026).

[6] *Meyer*, 510 U.S. 486 n.11 (collecting examples); see also, *e.g.*, Accountability for Federal Law Enforcement Act, S. 2103, 117th Cong. § 2 (2021); Victims of Immigration Conduct Enforcement Act, S. 4333, 119th Cong. § 2 (2026); ICE and CBP Constitutional Accountability Act, H.R. 7297, 119th Cong. § 3 (2026).

[7] Although the complaint calls Nielsen a "nurse," he is a paramedic. Nothing here turns on the distinction.

Watanabe was seen by Nielsen, who treated Watanabe but declined his request to be taken to the hospital. *Ibid.*[8]

Watanabe does not allege further interaction with Nielsen. Pet.App.26a; see C.A. ER-81-83. Watanabe alleges that, in the months that followed, he made multiple requests to prison staff for medical attention. Pet.App.4a. He alleges he received over-the-counter pain medication but no "'actual treatment.'" Pet.App.4a, 26a. He alleges he filed an ARP complaint, to which the warden allegedly falsely responded that he had received treatment. C.A. ER-83.

Watanabe was eventually diagnosed with a fractured coccyx (tailbone) with bone chips in surrounding tissue. Pet.App.4a. After the diagnosis, prison officials agreed to refer Watanabe to a specialist. *Ibid.*

2. Watanabe filed this *Bivens* action, alleging that Nielsen violated his Eighth Amendment rights by "'denying him proper medical treatment that would have properly diagnosed and treated his injury,'" calling him a "'cry baby,'" and denying his request to go to the hospital. Pet.App.24a-26a; see C.A. ER-81-83. Watanabe sought $3 million in damages. Pet.App.26a; C.A. ER-85. He sought injunctive relief against other defendants. Pet.App.16a-17a; C.A. ER-117 (original complaint).

The district court dismissed, holding Watanabe's claim not cognizable under *Bivens*. Pet.App.24a-25a. At *Bivens* step one, the court held the claim presented a "new con-

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[8] Watanabe's medical records, invoked by the Ninth Circuit, reflect that Watanabe complained of severe back pain. Pet.App.4a. The records show that, after consulting with an on-call physician, Nielsen provided an anti-inflammatory injection (ketorolac/Toradol) and a prescription for pain medication (ibuprofen/Motrin), and encouraged Watanabe to perform "gentle stretching exercises as tolerated" and follow up with sick call. Pet.App.21a, 94a; C.A. SER-7-9 (Dkt. 17).

text" from *Carlson*. Pet.App.31a-36a. "Watanabe's allegations are dissimilar in both their 'nature and severity' from the facts in *Carlson*": Watanabe's fractured coccyx was "not akin to the medical emergency" in *Carlson* that "resulted in that inmate's death." Pet.App.32a-34a. Allowing Watanabe's claim risked transforming district courts into "medical review board[s]" superintending treatment of prison injuries. Pet.App.35a.

Watanabe also had access to an alternative remedy—the ARP. Pet.App.36a. That remedy was a "'special facto[r]'" "not considered by the Court in *Carlson*," and "another reason that Watanabe's claim arises in a new context." Pet.App.36a.

At step two, the district court held that special factors, including the ARP's "alternative remedial program for federal prisoners," foreclosed a *Bivens* remedy. Pet.App.36a-38a.

B. The Ninth Circuit's Decision

A divided Ninth Circuit panel reversed. Watanabe conceded that, if this case presents a new context, special factors foreclose extending *Carlson* at *Bivens* step two. Pet.App.22a-23a, 96a n.1; C.A. Oral Arg. 6:05-6:12 (http://youtu.be/sU-8uFCTxs8). But the panel majority (Paez & Koh, JJ.) held Watanabe's claim did not present a new context at step one, obviating any need to consider step two. Pet.App.16a.

The panel ruled that "Watanabe's claim is identical to *Carlson* in all meaningful respects": He alleged "deliberate medical indifference while incarcerated, in violation of the Eighth Amendment's proscription against cruel and unusual punishment," and "*Carlson* dealt with the exact same issue." Pet.App.3a; accord Pet.App.12a, 17a. The panel acknowledged that, unlike in *Carlson*, Watanabe's injury was neither fatal nor life-threatening. Pet.App.13a. But it declared that difference not "meaningful" because failure to respond to non-life-threatening conditions can "constitute deliberate indifference in violation of the Eighth Amendment." Pet.App.14a. Nor did it matter that, for Watanabe, it was not "damages or nothing." The panel ruled he could seek *Bivens* damages as well as injunctive relief "related to his ongoing medical care." Pet.App.16a-17a.

The panel asserted that "[t]his case does not present a risk of intrusion by the judiciary into the operations of the BOP any more than what *Carlson* already permits." Pet.App.10a. The panel did not address the concern that allowing *Bivens* remedies for lesser harms like Watanabe's would transform district courts into " 'medical review board[s]' " for federal prisons. Pet.App.35a.

The panel did not dispute this Court's statement that "a new context arises when there are 'potential special factors that previous *Bivens* cases did not consider.' " *Egbert*, 596 U.S. at 492. But the panel ruled that "alternative remedial structures can be one 'special factor,' to be considered at the *second* step of the *Bivens* analysis." Pet.App.15a. The panel was "not required to undertake the second step" because it had already determined that Watanabe's claim did not present a new context at step one. *Ibid.* "And even if [it] were to consider" alternative remedial structures "at step one," the panel insisted the ARP "does not present a new *Bivens* context." *Ibid.*

Judge Milan Smith dissented. This suit and *Carlson*, he explained, are "meaningfully different" with respect to severity of the alleged mistreatment and medical need. Pet.App.20a-22a. And " 'alternative remedies' " like the ARP are "special factors counsel[ing] against recognizing a [*Bivens*] remedy." Pet.App.22a-23a.

C. Denial of Rehearing

The Ninth Circuit denied rehearing, with eleven judges dissenting.

1. In a statement respecting denial of rehearing, the panel-majority members urged that "severity of misconduct or injury" was irrelevant because severity concerns only "the merits of the constitutional claim," not whether a claim presents a new context. Pet.App.84a-85a.

The panel majority did not deny the ARP is a special factor not considered in *Carlson*. But they reiterated their view that "alternative remedies are generally not relevant at step one" because "[s]tep one focuses on the alleged violation," while "[s]tep two" "focuses on remedies." Pet.App.79a-80a. They also urged that the ARP could not present a new context because it was created in October-November 1979, and so "already existed when the Supreme Court decided *Carlson*" in April 1980. Pet.App.78a. They deemed it "irrelevant" that the *Carlson* plaintiff "could not herself use the ARP." Pet.App.82a.

2. Judge Ryan Nelson dissented, joined by nine other judges. Pet.App.89a-111a. The dissent explained that courts "cannot identify a preexisting *Bivens* context by simply pointing to the Eighth Amendment and noting that *Carlson* dealt with the same type of claim." Pet.App.103a. It identified several "meaningful differences" from *Carlson*. *Ibid.* *Carlson* was "a wrongful death case where the remedy [was] 'damages or nothing.'" Pet.App.109a. Watanabe's injury was "meaningfully less severe"—and, unlike *Carlson*, relief was not "'damages or nothing.'" Pet.App.98a, 103a-104a. The ARP is also an "alternative remedy" that "*Carlson* did not consider" and that was "available to Watanabe [but] unavailable to the plaintiff in *Carlson*." Pet.App.98a. "If that is not a meaningful differ-

ence," the dissent concluded, "it's hard to say what is." Pet.App.98a-99a.

The dissent rejected the contention that alternative remedies are generally irrelevant at *Bivens* step one. It explained that, in *Ziglar*, this Court held " 'alternative remedies' " presented a new context at step one. Pet.App.97a-98a. And *Egbert* explained the two steps are "not theoretically distinct." Pet.App.102a.

While the ARP existed when *Carlson* was decided (but not when the conduct occurred), the dissent explained, what mattered was that " ' "previous *Bivens* cases *did not consider*" ' " it. Pet.App.99a-100a (quoting *Egbert*, 596 U.S. at 492). And the plaintiff in *Carlson*—the inmate's mother, suing for his estate—could not have used the ARP anyway. Pet.App.98a, 100a. "[I]f the question is whether there is a single meaningful difference between *Carlson* and this case," the dissent concluded, "the fact that the mother in *Carlson* could not use a remedy that was available to Watanabe easily meets that bar." Pet.App.100a.

3. Judge Collins dissented separately. Lamenting "confusion" over *Bivens*, he expressed hope that this Court would provide "clarity." Pet.App.111a, 116a.

SUMMARY OF ARGUMENT

I. A. Given the grave separation-of-powers concerns *Bivens* creates, this Court subjects *Bivens* claims to a demanding two-step test. Step one asks whether the case presents a "new *Bivens* context"—whether there is *any* difference from earlier *Bivens* cases that Congress could find meaningful. If so, at step two, a *Bivens* suit cannot proceed if any "special factor" indicates Congress is arguably better equipped to weigh the costs and benefits of a damages remedy. Those steps resolve to a single question: whether there is *any* reason to think *Congress* might be better equipped to create a damages remedy.

B. This case meaningfully differs from *Carlson*. The prison staff in *Carlson* exacerbated an inmate's asthma attack, killing him within hours: He could not pursue nonmonetary remedies; it was "damages or nothing." Watanabe could and did pursue nonmonetary remedies.

Congress commonly distinguishes based on severity of injury—and treats death differently. Life-threatening conduct raises meaningfully different policy concerns, including the balance of costs, benefits, and disruption from prisoner lawsuits.

The Ninth Circuit insisted that this case and *Carlson* present the same context because both involve Eighth Amendment deliberate-indifference claims. But cases involving the same right and mechanism of injury still present different contexts if there is *any* difference Congress could find meaningful. That is not arbitrary line-drawing; it reflects that creating causes of action is a legislative endeavor. Differences between life and death, and "damages or nothing," are anything but arbitrary.

C. Special factors, not considered in *Carlson*, also render the context new. The ARP provides an alternative remedial structure for federal prisoners. The PLRA, enacted after *Carlson*, mandates that prisoners exhaust administrative remedies like the ARP. Unlike in *Carlson*, Watanabe could seek an injunction. And post-*Carlson* legislation allows inmate complaints against BOP employees, while declining a damages remedy.

The Ninth Circuit erred in relegating alternative remedies to *Bivens* step two. *Ziglar* held that alternative remedies not considered in *Carlson* render a context "new." Confining a special factor to step two makes no sense; it would allow courts to authorize damages remedies *even though* Congress is better suited to make that call. It is irrelevant that the ARP existed when *Carlson* issued: What matters is that it was not *considered*. The ARP was also unavailable to the inmate and plaintiff in *Carlson*. Nor could *Carlson* consider the ARP in combination with post-*Carlson* legislation. Watanabe's reliance on *Carlson*'s reasoning, meanwhile, fails to apply the prevailing *Bivens* framework.

D. Special factors preclude extending *Bivens* and *Carlson* to a new context at step two, as Watanabe concedes. That concession confirms this case presents a new context at step one. The two steps resolve to the single question whether Congress might be better equipped to create a damages remedy. As one step or two, Watanabe's *Bivens* claim cannot proceed.

II. The Court may wish to overrule *Bivens*. Creating causes of action is a legislative, not judicial, endeavor. Every *stare decisis* factor counsels letting *Bivens* go. The Court has repudiated its reasoning; it is unworkable; and no reliance favors retention. Leaving *Bivens* on the books gives plaintiffs false hope, burdens defendants, and deters Congress from exercising its rightful role.

ARGUMENT

Over the past 45 years, in 13 cases, this Court has refused to extend the *Bivens* damages remedy to any new contexts. *Bivens* and its progeny—*Davis* and *Carlson*—are remnants of "'the heady days in which this Court assumed common-law powers to create causes of action.'" *Egbert* v. *Boule*, 596 U.S. 482, 491 (2022). Those days are "long past." *Ibid.* This Court now recognizes that "creating a cause of action is a *legislative* endeavor," and that *judicial* creation of a damages remedy Congress has not authorized "risks arrogating legislative power" in violation of the separation of powers. *Ibid.* (emphasis added); *Hernández* v. *Mesa*, 589 U.S. 93, 100 (2020).

This Court now approaches *Bivens* claims with "utmost deference to Congress' preeminent authority in this area." *Egbert*, 596 U.S. at 492. Claims present a " 'new *Bivens* context' " if there is *any* reason Congress could find them meaningfully different from *Bivens*, *Davis*, and *Carlson*. *Ibid.* And new *Bivens* claims must be rejected if "there is *any* reason to think that Congress might be better equipped to create a damages remedy." *Ibid.* (emphasis added).

Under those principles, this *Bivens* suit cannot proceed. Watanabe seeks to hold Nielsen, a prison paramedic, personally liable under the Eighth Amendment for not sending him to the hospital for what was later diagnosed as a fractured coccyx. Congress has never created such a damages remedy. And while the Ninth Circuit insisted this case presents the exact same context as *Carlson*—where prison staff exacerbated an inmate's asthma attack, killing him within hours—the differences are myriad and meaningful. Each could affect Congress's view of the costs and benefits of a damages remedy. Each makes this a new context to which *Bivens* and *Carlson* cannot be extended.

"This Court 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*). It has held that the new-context inquiry is easily satisfied. And it has left no doubt that *Bivens*, *Davis*, and *Carlson* cannot be extended to any new context. As a result, this should have been an easy case. But the Ninth Circuit, like too many courts in too many cases over too many years, blessed a *Bivens* remedy nonetheless.

This Court may conclude that enough is enough. Until *Bivens*'s zombie is finally interred, courts will continue to meddle in the "legislative endeavor" of creating causes of action. *Egbert*, 596 U.S. at 491. *Bivens* will continue to offer litigants false hope as they pursue damages claims no legislature has authorized and which almost always fail. Federal agencies and employees will continue to bear the burdens of that litigation. This Court will continue to work cleanup. And Congress will continue to have an excuse not to step into the field itself. That state of affairs could continue. Or the Court could decide it is time to give *Bivens*, *Davis*, and *Carlson* a proper burial, and hand responsibility back to Congress where it belongs.

I. THE NINTH CIRCUIT IMPROPERLY EXTENDED *BIVENS* TO A NEW CONTEXT

Time and again, this Court has "emphasized that 'recognizing a cause of action under *Bivens* is "a disfavored judicial activity."'" *Goldey*, 606 U.S. at 944. In the 45 years since the three original *Bivens* cases—*Bivens* v. *Six Unknown Federal Narcotics Agents*, 403 U.S. 388 (1971), *Davis* v. *Passman*, 442 U.S. 228 (1979), and *Carlson* v. *Green*, 446 U.S. 14 (1980)—this Court has refused *every* invitation to extend *Bivens* to any new context.

This Court's "understanding of a 'new context' is broad." *Hernández*, 589 U.S. at 102. A new context arises if there is *any* difference from *Bivens*, *Davis*, and *Carlson* that Congress could find "meaningful" from a "policy" perspective. *Egbert*, 596 U.S. at 491-492; *Ziglar* v. *Abbasi*, 582 U.S. 120, 139-140, 147-149 (2017). This case self-evidently presents a new context under that "easily satisfied" inquiry. *Ziglar*, 582 U.S. at 149. Unlike *Carlson*, this is not a case of "damages or nothing." The injury differs in nature, severity, and immediacy. And this case presents special factors—including alternative remedial structures—that *Carlson* never considered.

A. The Expansive "New *Bivens* Context" Inquiry Is Satisfied If There Is Any Difference Congress Could Find Meaningful

1. "*Bivens*, *Davis*, and *Carlson* were the products of an era when the Court routinely inferred 'causes of action' that were 'not explicit' in the text of the provision that was allegedly violated." *Hernández*, 589 U.S. at 99. "During this '*ancien regime*,' * * * 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 131-132. "*Bivens* extended this practice to claims based on the Constitution itself," allowing a damages remedy against federal agents for alleged Fourth Amendment violations. *Hernández*, 589 U.S. at 99. *Davis* and *Carlson* soon extended *Bivens* to two other contexts.

Since *Carlson*, however, this Court has come "to appreciate more fully the tension between" judicially created causes of action and "the Constitution's separation of legislative and judicial power." *Hernández*, 589 U.S. at 100. "At bottom, creating a cause of action is a legislative endeavor": It requires "balancing interests," weighing the "costs and benefits" of myriad "policy considerations," and "compromise." *Egbert*, 596 U.S. at 491; *Hernández*, 589 U.S. at 100; *Ziglar*, 582 U.S. at 133-134, 136. As Justice Harlan acknowledged in *Bivens*, recognizing a damages remedy requires courts to "evaluate a 'range of policy considerations . . . at least as broad as the range . . . a legislature would consider.'" *Egbert*, 596 U.S. at 491 (quoting 403 U.S. at 407 (Harlan, J., concurring in judgment)). Such policy-laden decisionmaking fits uneasily—perhaps irreconcilably—with the judicial role. It "risks arrogating legislative power," and "'places great stress on the separation of powers.'" *Hernández*, 589 U.S. at 100; *Egbert*, 596 U.S. at 497 n.3.

In light of those grave separation-of-powers concerns, this Court long ago "abandoned" the practice of fashioning private causes of action to enforce statutes that do not provide them. *Alexander* v. *Sandoval*, 532 U.S. 275, 287 (2001). The Court has correspondingly indicated that, if "called to decide *Bivens* today, [it] would decline to discover any implied causes of action in the Constitution." *Egbert*, 596 U.S. at 502. And while the Court has not yet "dispense[d] with *Bivens* altogether," it warns that "recognizing a cause of action under *Bivens* is 'a disfavored judicial activity'" that may not be undertaken if there is "'[e]ven a single sound reason to defer to Congress.'" *Id.* at 491.

2. This Court accordingly subjects *Bivens* claims to a demanding two-step test. *Egbert*, 596 U.S. at 492. At step one, the Court asks "whether the case presents 'a new *Bivens* context.'" *Ibid.* If so, at step two, "a *Bivens* remedy is unavailable if 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.*; see *Ziglar*, 582 U.S. at 136 (describing such factors as "'"special factors counselling hesitation"'"). A court may not recognize a new *Bivens* claim if "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 496.

Because the Court's "understanding of a 'new context' is broad," the step-one "new-context inquiry" is "easily satisfied." *Hernández*, 589 U.S. at 102; *Ziglar*, 582 U.S. at 149. A case presents a "new" context if it differs from *Bivens*, *Davis*, and *Carlson* in any "'meaningful way.'" *Hernández*, 589 U.S. at 102. Importantly, authorizing a cause of action is a "legislative endeavor." *Egbert*, 596 U.S. at 491. And legislators may consider a near-infinite "'range of policy considerations.'" *Ibid.* A case thus presents a new *Bivens* context if it displays *any* difference from prior *Bivens* cases that might affect the policy considerations legislators could consider when deciding whether to allow, limit, or deny a damages remedy. Put otherwise: A difference is "meaningful" enough to render the context "new" so long as *Congress*, exercising plenary legislative judgment, could think it meaningful.

A case thus may present a new context even if "the right at issue" and "the mechanism of injury" are the "same" as a prior *Bivens* case. *Ziglar*, 582 U.S. at 139. This Court's cases catalogue a host of meaningful differences, from officer rank to "risk of disruptive intrusion by the Judiciary into the functioning of other branches." *Id.* at 139-140; pp. 8-9, *supra*. And a case "present[s] a new context * * * if there are potential special factors that were not considered in previous *Bivens* cases." *Ziglar*, 582 U.S. at 148. That makes sense. A "special factor" is any reason to defer to Congress's authority to grant or deny a damages remedy. *Egbert*, 596 U.S. at 492-493. A special factor earlier *Bivens* cases did not consider is thus necessarily a difference Congress could find meaningful.

While this Court has described the *Bivens* inquiry as two steps, "those 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. The answer here—as in "most every case," *ibid.*—is "yes."

B. Differences in Nature, Severity, and Immediacy Make This a New Context from *Carlson*

The Ninth Circuit found no new *Bivens* context at step one because, in its view, there is no meaningful difference between this case and *Carlson*. Pet.App.8a-14a. But the cases differ markedly in nature, severity, and immediacy.

Those differences are meaningful—and Congress certainly could so find—for a host of reasons.

1. *For Watanabe, It Is Not "Damages or Nothing"*

This Court and its members have repeatedly identified one critical feature of cases where it has allowed a *Bivens* remedy: For the plaintiffs in those cases, it was "damages or nothing." In *Bivens* itself, federal agents conducted a warrantless search and seizure. As Justice Harlan explained, "damages [was] the only possible remedy for someone in Bivens' alleged position." 403 U.S. at 409-410 (concurring in judgment). Bivens could not, for example, have sought "injunctive relief" while the alleged search and seizure were occurring. *Id.* at 410. "For people in Bivens' shoes, it is damages or nothing." *Ibid.* Likewise, the plaintiff in *Davis* could not obtain injunctive or administrative relief. "For Davis, as for Bivens, 'it [wa]s damages or nothing.'" *Davis*, 442 U.S. at 245.

That was true in *Carlson*, too. The inmate there suffered an acute and fatal medical emergency: an asthma attack that prison staff exacerbated with contraindicated drugs and a broken respirator, causing the inmate's death within hours. 446 U.S. at 16 n.1; *Green* v. *Carlson*, 581 F.2d 669, 671 (7th Cir. 1978). That rapidly unfolding emergency left no opportunity for the inmate (or his estate) to seek nonmonetary relief to address the constitutional violation. The inmate could not have sought an injunction while suffering his attack; nor could his estate have obtained injunctive relief after his death. *Carlson*, like *Bivens* and *Davis*, "was a case of 'damages or nothing.'" Pet.App.98a (R. Nelson, J., dissenting from denial) (quoting *Bivens*, 403 U.S. at 410 (Harlan, J., concurring in judgment)).

Here, by contrast, Watanabe alleges he was not adequately treated or sent to a hospital for back pain that was diagnosed as a fractured coccyx months later. Pet.App.4a; pp. 12-13 & n.8, *supra*. That is a far cry from the dire and fatal emergency in *Carlson*. Unlike the inmate there, Watanabe *could* pursue non-damages remedies. He could file an administrative complaint requesting a hospital transfer or other treatment believed necessary. 28 C.F.R. §§ 542.10, 542.13-542.15. Failing that, he could go to court for an appropriate injunction. 18 U.S.C. § 3626; *Ziglar*, 582 U.S. at 144, 148 (noting possibility of injunctive or habeas relief). Indeed, a suit for injunctive relief could be "a faster and more direct route to relief than a suit for money damages." *Id.* at 145. "A successful [injunction request] would have required officials" to send Watanabe to a hospital, or provide other treatment found necessary, "immediately." *Ibid.* But "this damages suit remains unresolved" years later. *Ibid.* Watanabe *did* pursue administrative and injunctive relief, and the Ninth Circuit held he could pursue injunctive relief "related to his ongoing medical care." Pet.App.16a-17a.[9]

The Court regularly consults whether *Bivens* plaintiffs could invoke "traditional equitable powers." *Ziglar*, 582 U.S. at 133, 148. More important, whether the case is "damages or nothing" is something *Congress* could believe relevant when deciding whether to create a private cause of action. That makes this "a new context." *Id.* at 148. Simply put, *Carlson* was "damages or nothing." This case is not. "If that is not a meaningful difference, then it's hard

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[9] Watanabe alleges he filed an "Administrative Remedy (BP-9)" complaint under the ARP, and that the warden responded by "stat[ing] that the Plaintiff has received treatment which he has not." C.A. ER-83. Watanabe's original district-court complaint requested an injunction concerning prison housing policy, and the Ninth Circuit construed his filings as also seeking injunctive relief for "his ongoing medical care." Pet.App.5a, 16a; C.A. ER-117.

to say what is." Pet. App. 98a-99a (R. Nelson, J., dissenting from denial).

2. *Differences in Severity Make the Context New*

This case differs from *Carlson* not merely in the harm's immediacy, but also its severity. The inmate in *Carlson* died. Watanabe's injury was neither fatal nor life-threatening. There are few differences more meaningful than that between life and death.

Congress regularly singles out conduct resulting in death for both deterrence and compensation. Criminal statutes often allow or mandate heightened penalties where offending conduct "causes the death of any person."[10] Statutes also specifically address compensation in event of death. *E.g.*, 5 U.S.C. § 8102a(a); § 8133; 33 U.S.C. § 909; 46 U.S.C. § 30302. Congress could draw the same distinction between fatal and non-fatal harm when evaluating whether to impose civil deterrence and afford compensation through individual officer liability. This Court has described *Bivens* as "'concerned solely with *deterring* the unconstitutional acts of individual officers.'" *Egbert*, 596 U.S. at 498 (emphasis added). And deciding "adequate level[s] of deterrence" is "a legislative determination that must be left to Congress, not the federal courts." *Ibid.* Because differences in severity—including death—could affect Congress's view of appropriate deterrence, that difference is meaningful for *Bivens* purposes.

The recognition that "death is different" has also long informed this Court's approach to the Eighth Amendment's ban on cruel and unusual punishments—the basis for suit both here and in *Carlson*. *Gregg* v. *Georgia*, 428 U.S. 153, 188 (1976). If death is a "differen[ce]" that can

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[10] 18 U.S.C. § 844(f)(3); see, *e.g.*, § 1365(a)(2); § 1864(b)(1); § 1952(a)(B); § 1992(a); § 2113(e); § 2119(3); § 2251(e); § 2261(b)(1); § 2262(b)(1).

justify special Eighth Amendment safeguards, *ibid.*, it likewise is a difference Congress could find meaningful in assessing possible Eighth Amendment remedies, such as damages liability. And even if "death-is-different" were *jurisprudentially* unsound, *Atkins* v. *Virginia*, 536 U.S. 304, 337 (2002) (Scalia, J., dissenting), it remains a meaningful "policy" distinction in the "*legislative* endeavor" of creating causes of action, *Egbert*, 596 U.S. at 491 (emphasis added).

Congress could draw different lines. It might think the deterrent of damages liability is warranted where offenses cause "serious bodily injury." Cf. 18 U.S.C. § 1365(a)(3); § 2119(2). Or it could distinguish among "bodily injury," "serious bodily injury," and "life threatening bodily injury." Cf. § 1864(b)(2)-(3), § 2261(b)(2)-(3). It could make other distinctions. Cf. 5 U.S.C. §§ 8105-8107 (compensation for, *e.g.*, total and partial disability, disfigurement, and dismemberment). It could think constitutional violations by federal employees warrant personal liability *always*—or *never*, given other means of deterrence. What matters is that legislators weighing the costs and benefits of a damages remedy could see a meaningful difference between the injury in *Carlson* and the less-severe injury alleged here. That renders this *Bivens* context "new."

The potential for increased "risk of disruptive intrusion by the Judiciary into the functioning of other branches" likewise makes this a new context. *Ziglar*, 582 U.S. at 140. The "operation of our correctional facilities is peculiarly the province of the Legislative and Executive Branches of our Government, not the Judicial." *Bell* v. *Wolfish*, 441 U.S. 520, 548 (1979). Exposing prison staff to personal damages liability makes "the 'inordinately difficult undertaking' of running a prison" harder. *Goldey*, 606 U.S. at 944. Congress could readily think that, even if such disruption might be acceptable for extreme cases like *Carlson*, extending it to less-severe injuries would have intolerable "negative systemic consequences." *Ibid.*

For example, damages actions based on inmate deaths are far less likely to be used as a tool of harassment against prison staff. See *Egbert*, 596 U.S. at 499. And non-life-threatening situations are far more "common" than those resulting in death. *Id.* at 500. Extending *Carlson* to less-severe injuries is thus "likely to impose 'a significant expansion of Government liability.' " *Ibid.*

Medical decisionmaking driven by fear of liability—"defensive medicine"—can lead to unnecessary and costly treatments. See Daniel Kessler & Mark McClellan, *Do Doctors Practice Defensive Medicine?*, 111 Q.J. Econ. 353 (1996). Prison medical professionals faced with patients like Watanabe, for example, may be tempted to reduce personal liability risk by acquiescing to demands to visit the hospital or order additional tests, even if an inmate's condition does not otherwise counsel such steps. That imposes serious costs. Prisons do not "traditionally house specialists or diagnostic and testing equipment." *Watkins* v. *Mohan*, 144 F.4th 926, 949 (7th Cir. 2025) (Kirsch, J., concurring in judgment in part and dissenting in part). "And because prisoners must be transported and monitored by armed guards at all times, these visits generate significant costs and risks on top of the need to schedule and pay for the care itself." *Ibid.*

Congress is attuned to that risk of disruption. Cf. 42 U.S.C. § 1997e(f)(1) (providing for prisoner-suit hearings "without removing the prisoner from the facility in which the prisoner is confined"). It could readily weigh the risk differently where, as here, an injury is less severe than in *Carlson*. That renders the context new.

3. *Contrary Arguments Lack Merit*

The decision below declared that "Watanabe's claim is identical to *Carlson* in all meaningful respects" because "Watanabe alleges he suffered deliberate medical indifference while incarcerated, in violation of the Eighth Amendment's proscription against cruel and unusual punishment," and "*Carlson* dealt with the exact same issue." Pet.App.3a; accord Pet.App.12a, 17a. It urged differences in severity were irrelevant because less-severe conduct could still "constitute deliberate indifference in violation of the Eighth Amendment." Pet.App.14a.

That misunderstands the test. A case may present a new context *even if* "the right at issue" and "mechanism of injury" are "the same" as a prior *Bivens* case. *Ziglar*, 582 U.S. at 139. The Court has so held with respect to *Carlson* specifically: In *Malesko*, "the Court held that the contexts were different" "[e]ven though the right and the mechanism of injury were the same as they were in *Carlson*." *Ibid.* (citing 534 U.S. at 70 & n.4). The proper test is instead whether Congress could find any *differences* between the cases meaningful when weighing the costs and benefits of a damages remedy. It plainly could here. The differences in nature, severity, and immediacy are the difference between life and death, and between "damages or nothing."

The Ninth Circuit insisted this "case does not present a risk of intrusion by the judiciary into the operations of the BOP any more than what *Carlson* already permits." Pet.App.10a. But there is a vast difference between imposing damages liability in rare cases like *Carlson*, where the inmate dies and cannot pursue other relief, and doing so in the many more cases involving less-severe injuries. Congress could think the disruption tolerable there but intolerable here. Even a "modest extension is still an extension." *Ziglar*, 582 U.S. at 147.

The panel majority suggested that "severity" should inform only "the merits of the constitutional claim." Pet.App.84a. This Court has rejected the argument that considerations cannot establish a new *Bivens* context simply because they are also relevant to "whether a constitutional violation exists." *Ziglar*, 582 U.S. at 176-178 (Breyer, J., dissenting). Properly so: Even if a violation is established, differences in severity or other particulars can inform legislative judgments regarding whether deterrence, disruption, and other considerations weigh for or against a damages remedy.

Nor does recognizing such differences require "arbitrary line-drawing." Pet.App.85a. The "legislative endeavor" of creating causes of action inevitably involves drawing lines that balance competing interests. *Egbert*, 596 U.S. at 491; see *Hernández*, 589 U.S. at 100. The question is not whether *courts* exercising *judicial* judgment would themselves draw a particular line, but whether *Congress* exercising *legislative* judgment could. Any other approach would fail to afford "utmost deference to Congress' preeminent authority in this area." *Egbert*, 596 U.S. at 492. Besides, the lines here are hardly "arbitrary." The law has long drawn distinctions based on the severity of injury, including death. And distinguishing suits based on whether relief is "damages or nothing" is foundational to *Bivens* itself.

The panel majority's assertion that "the wrongful conduct and injuries Watanabe suffered were not meaningfully less severe" than the fatal mistreatment in *Carlson*, Pet.App.86a n.4, thus blinks reality. Congress could surely see things differently.[11]

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[11] While immaterial to the legal issue here, the panel majority was mistaken in suggesting that Nielsen "provided no meaningful treatment

C. Special Factors Not Considered in *Carlson* Present a New *Bivens* Context

Cases also present a "new context" if they implicate "potential special factors that previous *Bivens* cases did not consider." *Ziglar*, 582 U.S. at 139-140, 148. One "special factor" is the existence of "alternative remedial structures." *Egbert*, 596 U.S. at 492-493, 498; see *Ziglar*, 582 U.S. at 137, 145, 148 (collecting cases); *Goldey*, 606 U.S. at 944-945. Such structures pervade this case.

1. *This Case Is Replete with Alternative Remedial Structures* Carlson *Never Considered*

This case implicates a host of alternative remedial structures *Carlson* did not consider.

<u>BOP's Administrative Remedy Program</u>. The ARP provides "'an alternative remedial structure' * * * for aggrieved federal prisoners" to challenge allegedly unconstitutional conduct. *Goldey*, 606 U.S. at 944 (citing *Malesko*, 534 U.S. at 74); see 28 C.F.R. § 542.10(a); p. 10, *supra*. That makes the ARP a "special factor." *Egbert*, 596 U.S. at 493, 497-498. This Court so held in *Goldey*. 606 U.S. at 944. And *Carlson* undisputedly did not consider the ARP, which was established years after the inmate's death in that case. The presence of that previously unconsidered special factor is a difference "meaningful enough to make [this] context a new one." *Ziglar*, 582 U.S. at 139-140. Court after court has so held. Pet.15-17.

Ziglar makes that conclusion especially clear. There, the Court considered prisoner-mistreatment claims with "significant parallels" to *Carlson*, including "allegations of

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despite Watanabe's repeated pleas over several months." Pet.App.86a n.4. Watanabe alleges multiple requests to other prison staff, but only one encounter with Nielsen (who provided anti-inflammatory and pain medication). See pp. 12-13 & n.8, *supra*.

injury * * * just as compelling as those at issue in *Carlson*." 582 U.S. at 147. The Court nonetheless held the case sought "to extend *Carlson* to a new context." *Ibid.* The Court explained that "a case can present a new context for *Bivens* purposes * * * if there are potential special factors that were not considered in previous *Bivens* cases." *Id.* at 148. It then identified "the existence of alternative remedies" as a special factor "not considered in the Court's previous *Bivens* cases," and declared that difference sufficiently "meaningful" to present a new context from *Carlson*. *Id.* at 148-149. So, too, here with the ARP's alternative remedy.

<u>Prison Litigation Reform Act</u>. "Some 15 years after *Carlson* was decided, Congress passed the Prison Litigation Reform Act of 1995, which made comprehensive changes to the way prisoner abuse claims must be brought in federal court." *Ziglar*, 582 U.S. at 148. The PLRA mandated that prisoners exhaust administrative remedies, 42 U.S.C. § 1997e(a)—cementing the ARP's role as an alternative remedial structure for federal prisoners.

More fundamentally, the PLRA gave Congress "specific occasion to consider the matter of prisoner abuse and to consider the proper way to remedy those wrongs." *Ziglar*, 582 U.S. at 148. Yet Congress chose "*not* [to] provide for a standalone damages remedy against federal jailers." *Id.* at 149 (emphasis added). That "Congress has actively legislated in the area of prisoner litigation but has not enacted a statutory cause of action for money damages" "suggest[s] that Congress does not want a damages remedy." *Goldey*, 606 U.S. at 944; *Ziglar*, 582 U.S. at 148. That post-*Carlson* "legislative action" is "itself a [special] factor counseling hesitation" that *Carlson* did not consider. *Ziglar*, 582 U.S. at 148. It, too, presents a new context.

Injunctive Relief. *Carlson* had no occasion to consider injunctive relief, given the immediacy of the inmate's death. *Ziglar* thus identified "an injunction" as an "alternative remed[y]" "not considered in the Court's previous *Bivens* cases" that presented a new context from *Carlson*. 582 U.S. at 147-149. Similarly here, Watanabe could—and did—seek an injunction ordering a hospital transfer or other treatment. Pet.App.16a; p. 26 & n.9, *supra*. That not-previously-considered remedy renders the context new.

Investigation and Discipline. *Egbert* held that agency "investigation[s]" and "grievance process[es]" are "alternative remedies" that constitute special factors foreclosing a *Bivens* remedy. 596 U.S. at 497-498. Such structures exist here, even beyond the ARP.

Since 2001, Congress has required the Justice Department's OIG to "receive complaints alleging abuses of civil rights and civil liberties" by Department (including BOP) personnel. USA PATRIOT Act, Pub. L. No. 107-56, § 1001, 115 Stat. 391 (2001). Prisoner complaints can lead to investigation by OIG or BOP's Office of Internal Affairs, reports to Congress, and discipline.[12]

Enacted in 2024, the Federal Prison Oversight Act, Pub. L. No. 118-71, 138 Stat. 1492 (2024), to be codified at

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[12] § 1001(3); U.S. Gov't Accountability Office, GAO-25-107339, *Bureau of Prisons: Strategic Approach Needed to Prevent and Address Employee Misconduct* 7-12, 40-42 (Sept. 29, 2025), https://www.gao.gov/products/gao-25-107339; U.S. Dep't of Justice, Office of Inspector Gen., Evaluation & Inspections Div. Rep. 23-065, *Limited-Scope Review of the Federal Bureau of Prisons' Strategies to Identify, Communicate, and Remedy Operational Issues* 15-18 (May 2023), https://oig.justice.gov/reports/limited-scope-review-federal-bureau-prisons-strategies-identify-communicate-and-remedy; U.S. Dep't of Justice, Fed. Bureau of Prisons, Program Statement No. 3711.01, Employee and Labor Management Relations 11-14 (Jun. 28, 2017), https://www.bop.gov/policy/progstat/3711.01.pdf (discipline procedures).

5 U.S.C. § 413(e), directs OIG to inspect federal-prison medical care. *Id.* at 1496-1497 (§ 413(e)(2)(B)(viii)). It also provides for an Ombudsman to investigate inmate "complaint[s]" regarding the "health, safety, welfare, or rights of incarcerated people"—including "denial or delay of necessary medical treatment"—and recommend action. *Id.* at 1496-1497, 1499 (§ 413(e)(3)(A)(i), (3)(C), (4)(C)(ii)(II)). BOP may pursue "disciplinary" or other corrective measures. *Id.* at 1497-1498 (§ 413(e)(3)(D)(i), (iii)). The Ombudsman must report uncorrected problems to Congress and the Attorney General. *Id.* at 1497 (§ 413(e)(3)(D)(ii)).[13]

Those statutorily prescribed investigatory and grievance processes—all postdating *Carlson*—are special factors that militate against a *Bivens* remedy. *Egbert*, 596 U.S. at 493, 497-498. It is no answer that such remedies may seem less effective than damages actions. *Ibid.* And Congress's choice to address prisoner rights and health through agency and congressional oversight—rather than "a statutory cause of action for money damages"—is itself a special factor. *Goldey*, 606 U.S. at 944. Those special factors, too, render the context new.

2. *The Ninth Circuit Erred in Relegating Alternative Remedial Structures to* Bivens *Step Two*

The Ninth Circuit did not deny that *Carlson* never considered the ARP's alternative remedial structure. But it dismissed the ARP as irrelevant. Such "alternative remedial structures," it declared, "can be one 'special factor,' to be considered at the *second* step of the *Bivens* analysis." Pet.App.15a; see *Schwartz* v. *Miller*, 153 F.4th 918, 930 (9th Cir. 2025) (Ninth Circuit "treat[s] the ARP as a spe-

[13] The Oversight Act takes effect following appropriations, § 2(b), 138 Stat. 1501, which have not yet been enacted. That underscores Congress's reticulated, resource-attentive approach in this field.

cial factor only at step two"). Alternative remedies "bear little significance at step one," the panel majority urged, because "[s]tep one focuses on the alleged violation" while "[s]tep two * * * focuses on remedies." Pet.App.80a-81a.

That defies precedent and logic alike. *Ziglar* held that "potential special factors that were not considered in previous *Bivens* cases" "present a new context for *Bivens* purposes." 582 U.S. at 148; *id.* at 139-140. *Ziglar* then specifically held that "alternative remedies" "not considered in the Court's previous *Bivens* cases" were a "meaningful" difference that meant the case before it sought "to extend *Carlson* to a new context." *Id.* at 147-149. *Ziglar* could not be clearer that previously unconsidered alternative remedies render the context "new." It also forecloses any suggestion that alternative remedies are insufficiently "meaningfu[l]" at step one. Pet.App.15a. Indeed, "alternative remedies" "independently foreclose a *Bivens* action." *Egbert*, 596 U.S. at 497.

Ziglar's "uncertainty regarding the available alternative remedies," Pet.App.81a n.2, underscores the point. *Ziglar* held that even "*potential* special factors" present "a new context" at step one; step two then considers whether those factors *actually* exist and foreclose a *Bivens* remedy. 582 U.S. at 148-149 (emphasis added). That nuance is immaterial here, because alternative remedial structures plainly exist (and foreclose a *Bivens* remedy). But it reinforces just how "easily satisfied" the new-context inquiry is. *Id.* at 149.

Nor did *Egbert* "clarif[y]" that alternative remedial structures should be relegated to step two. Pet.App.15a. Quite the contrary: *Egbert* explained that the two steps "often resolve to a single question" *because* "a new context arises when there are 'potential special factors that previous *Bivens* cases did not consider.'" 596 U.S. at 492.

That forecloses the panel majority's purported sharp "difference between step one and step two." Pet.App.80a. The theory fails regardless. Step one is *not* limited to considering "the alleged violation" while disregarding "remedies." Pet.App.80a. Step one considers "the risk of disruptive intrusion" on other branches, *Ziglar*, 582 U.S. at 140—*i.e.*, the impact of judicial *remedies*. And, of course, step one considers "potential special factors that previous *Bivens* cases did not consider," *ibid.*—and "alternative remedial structures" are a quintessential "special factor," *Egbert*, 596 U.S. at 493.

Confining a special factor to step two makes no sense. Special factors are reasons to think *Congress* may be better equipped to weigh the costs and benefits of a damages remedy—and, consequently, why a *judicially* created damages remedy is unavailable. *Egbert*, 596 U.S. at 492. Refusing to consider a special factor, based on some artificial distinction between steps one and two, would allow courts to authorize a damages remedy *even though* Congress is better equipped to make that call. That is irreconcilable with affording "utmost deference to Congress' preeminent authority in this area." *Ibid.*

3. *The ARP Cannot Be Dismissed Based on Its Date of Creation*

The panel majority's protest that the ARP "existed when the Supreme Court decided *Carlson*," Pet.App.78a-79a, likewise fails. The question is whether the ARP was "considered" in *Carlson. Ziglar*, 582 U.S. at 148. It was not. No party raised it. The Court never mentioned it. "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).

The ARP, moreover, became effective in late 1979—mere months before *Carlson* issued and *four years* after the inmate there died. See 44 Fed. Reg. 62,250; *Green*, 581 F.2d at 671. Neither he nor the *Carlson* plaintiff (the decedent's mother) could have used it. Pet.App.98a. The availability here of a remedy unavailable in *Carlson* is a meaningful difference. *Ziglar* makes that clear: It held the possibility of "an injunction"—a remedy extant at the time of *Carlson* but unavailable there—presented a new context from *Carlson*. 582 U.S. at 148.

Finally, *Carlson* did not consider the relevance of the ARP in combination with later-enacted legislation like the PLRA, PATRIOT Act, and Oversight Act. See pp. 33-35, *supra*. Such post-*Carlson* "legislative action suggesting that Congress does not want a damages remedy is *itself* a factor counseling hesitation" that *Carlson* never considered. *Ziglar*, 582 U.S. at 148 (emphasis added).

4. *Watanabe's Reliance on* Carlson*'s Reasoning Fails*

Watanabe invokes *Carlson*'s discussion of a *different* remedy, the Federal Tort Claims Act (FTCA). Br.in.Opp.16-17. *Carlson* concluded the FTCA should not foreclose a *Bivens* remedy because Congress had not "explicitly declared" it an "equally effective" "*substitute* for recovery directly under the Constitution." 446 U.S. at 18-19; *id.* at 19-23. Watanabe urges the "same rationales * * * apply with even greater force to the ARP." Br.in.Opp.17.

But the two are quite different, not least because the ARP offers prospective relief while the FTCA allows only damages. Besides, *Carlson*'s FTCA analysis "carries little weight because it predates [this Court's] current approach to implied causes of action and diverges from the prevailing framework." *Egbert*, 596 U.S. at 500-501. Plaintiffs seeking *Bivens* remedies must "satisf[y] the 'analytic framework' prescribed by the last four decades of intervening case law." *Id.* at 501. Under that framework, an express congressional declaration is unnecessary, and it does not "matter that 'existing remedies do not provide complete relief.'" *Id.* at 493, 501. Instead, the existence of "'an alternative remedial structure'" for "aggrieved federal prisoners" is a special factor barring a *Bivens* remedy "even if such 'procedures are "not as effective as an individual damages remedy."'" *Goldey*, 606 U.S. at 944-945.

D. Watanabe's *Bivens* Claim Cannot Proceed

Watanabe correctly concedes that, if his claim presents a new context, it fails at *Bivens* step two. Pet.App.96a n.1; C.A. Oral Arg. 6:05-6:12 (http://youtu.be/sU-8uFCTxs8). This Court thus need go no further. But the step-two analysis underscores the Ninth Circuit's error.

At step two, "a *Bivens* remedy is unavailable if 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.'" *Egbert*, 596 U.S. at 492. Multiple special factors preclude *Bivens*'s extension here. As the Court has recognized, "'an alternative remedial structure' already exists for aggrieved federal prisoners." *Goldey*, 606 U.S. at 944-945; pp. 32-35, *supra*. "'[T]hat alone,' like any special factor," "foreclose[s] a *Bivens* action here." *Egbert*, 596 U.S. at 493, 497. So does the fact that "Congress has actively legislated in the area of prisoner litigation but has not enacted a statutory cause of action for money damages." *Goldey*, 606 U.S. at 944; pp. 33-35, *supra*. And so does the risk that applying *Bivens* here "could have negative systemic consequences for prison officials and the 'inordinately difficult undertaking' of running a prison." *Goldey*, 606 U.S. at 944; pp. 28-29, *supra*.

Watanabe's concession that special factors defeat his claim at step two confirms that this case presents a new context at step one. 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). Here, alternative remedial structures, Congress's activity in the field, and systemic impacts are all reasons to think Congress is better suited to the task. *Carlson* considered none of them. Whether viewed as one step or two, the bottom line is clear: Watanabe seeks to extend *Bivens* to a new context, and that he cannot do.

II. *BIVENS* SHOULD BE OVERRULED

The Ninth Circuit erred in recognizing a *Bivens* cause of action here for a more fundamental reason. Appreciating the grave conflict between *Bivens* and the separation of powers, this Court has condemned recognition of *Bivens* remedies as "'a disfavored judicial activity.'" *Egbert*, 596 U.S. at 491. It has repudiated *Bivens*'s reasoning. It has consistently rejected *Bivens* suits, in 13 cases over 45 years. And it has explained that, if "called to decide *Bivens* today, we would decline to discover any implied causes of action in the Constitution." *Id.* at 502. That this Court is now called upon to reject a *Bivens* suit for a 14th time—doubtless to be followed by numbers 15, 16, 17, and more—suggests it is finally time to retire *Bivens* once and for all.

A. Congress, Not the Judiciary, Creates Causes of Action

"[C]reating a cause of action is a legislative endeavor," *Egbert*, 596 U.S. at 491, and the Constitution vests "[a]ll legislative Powers" in "Congress," U.S. Const. art. I, § 1. Accordingly, "a federal court's authority to recognize a damages remedy must rest at bottom on a statute enacted by Congress." *Hernández*, 589 U.S. at 101. But "no statute expressly creates a *Bivens* remedy." *Ibid.* That forecloses judicial recognition of such a remedy.

Bivens, *Davis*, and *Carlson* saw things differently. They saw the absence of a congressionally authorized damages remedy not as an obstacle, but an invitation. They embraced judicial creation of damages remedies that, in their view, would effectuate the purposes of the provisions at issue. *Bivens*, 403 U.S. at 396. And they candidly acknowledged that, in doing so, courts would consider a "range of policy considerations" "at least as broad as * * * a legislature would consider." *Id.* at 407 (Harlan, J., concurring in judgment).

Since then, however, the Court has come "to appreciate more fully the tension between this practice and the Constitution's separation of legislative and judicial power." *Hernández*, 589 U.S. at 100. Creating a damages remedy assigns new private rights and liabilities, and requires balancing myriad policy considerations. It is an exercise of legislative power, not judicial. See *ibid.*; *Egbert*, 596 U.S. at 491; *id.* at 502-503 (Gorsuch, J., concurring in judgment). It is, at the very least, a task "Congress is 'far more competent than the Judiciary'" to perform. *Id.* at 491 (opinion of the Court).

This Court's test at bottom asks "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 answer is *always* "yes." Congress is *always* better equipped for the "legislative endeavor" of creating a damages remedy, because it is a *legislature*. *Id.* at 491. It may be time for the Court to forthrightly recognize that fact. Federal courts' putative "narrow authority" to recognize implied damages remedies under the Constitution "is more accurately described as nonexistent." *Cisco Systems, Inc.* v. *Doe*, 146 S. Ct. 1882, 1886 (2026). Here, as elsewhere, "the power to create causes of action belongs to Congress." *Id.* at 1890.

Bivens has been gutted by later precedent. Leaving its husk on the books serves no one. It offers false hope for plaintiffs who almost never prevail. It imposes burdens on defendants and courts. And it absolves Congress of its responsibility for addressing the issue. See *Mohamed* v. *Jones*, 100 F.4th 1214, 1239-1240 (10th Cir. 2024) (Tymkovich, J., dissenting). So long as the zombie of *Bivens* wanders this Court's jurisprudence, Congress has little reason to consider the issue in earnest. *Ibid.*

B. *Bivens* Has Earned Its Retirement

Every *stare decisis* factor—quality of reasoning and consistency with other cases; workability; and reliance—"counsels in favor of letting [*Bivens*] go." *Trump* v. *Slaughter*, 146 S. Ct. 2283, 2302 (2026).

1. This Court has "repudiated the foundation of the *Bivens* doctrine." *Hernández*, 589 U.S. at 117 (Thomas, J., concurring); see Pet.App.112a-116a (Collins, J., dissenting from denial) (describing "wholesale evisceration of *Carlson*'s reasoning"). Their "premises" fatally "undermined * * * at every turn," *Bivens*, *Davis*, and *Carlson* are "far out of step with [the Court's] cases." *Slaughter*, 146 S. Ct. at 2302-2303.

Bivens and its progeny drew from the view, exemplified by *J.I. Case Co.* v. *Borak*, 377 U.S. 426 (1964), that courts should create damages remedies to effectuate the perceived purposes of statutes lacking such remedies. *Bivens*, 403 U.S. at 397 (citing *Borak*); *id.* at 402 & n.4 (Harlan, J., concurring in judgment) (citing *Borak*); *Ziglar*, 582 U.S. at 131-132. But the Court has now "abandoned" that practice as inconsistent with the separation of powers. *Sandoval*, 532 U.S. at 287 (repudiating *Borak*); see *Her-*

nández, 589 U.S. at 100; *id.* at 115-117 (Thomas, J., concurring). Just last Term, the Court "close[d] the door" on judicially created causes of action under the Alien Tort Statute, because "the power to create causes of action belongs to Congress." *Cisco*, 146 S. Ct. at 1886, 1890-1892.

Bivens also assumed the "general grant of [federal-question] jurisdiction" authorized federal courts to create remedies "to make good the wrong done." 403 U.S. at 396 (opinion of the Court), 405 (Harlan, J., concurring in judgment). But the Court now holds "[t]he vesting of jurisdiction in the federal courts does not * * * give rise to authority to formulate federal common law," including "to create * * * a cause of action." *Texas Industries, Inc.* v. *Radcliff Materials, Inc.*, 451 U.S. 630, 638, 640-641 (1981); see *Hernández*, 589 U.S. at 101; *Cisco*, 146 S. Ct. at 1889.

Bivens saw the absence of an "explicit congressional declaration" that plaintiffs "may not recover money damages" as justifying judicially created remedies. 403 U.S. at 397; see *Davis*, 442 U.S. at 246-247; *Carlson*, 446 U.S. at 19. But the Court now holds that "'congressional inaction,'" including "fail[ure] to provide a damages remedy," militates *against* judicially created remedies. *Egbert*, 596 U.S. at 501 (quoting *Schweiker*, 487 U.S. at 423); *Ziglar*, 582 U.S. at 143-144.

Bivens insisted only an "equally effective" statutory remedy could foreclose a judicially created one. 403 U.S. at 397; see *Davis*, 442 U.S. at 248; *Carlson*, 446 U.S. at 19-23. *Carlson* even declared the FTCA's damages remedy "not a sufficient protector of the citizens' constitutional rights" because it lacks adornments like "punitive damages." 446 U.S. at 22-23. But the Court now holds that alternative remedies foreclose a *Bivens* remedy "even if" they are "'not as effective as an individual damages remedy.'" *Egbert*, 596 U.S. at 498 (quoting *Bush*, 462 U.S. at 372); see *Hernández*, 589 U.S. at 113-114.

Watanabe defends *Carlson* as a "federal common-law analogue to common-law tort actions." Br.in.Opp.23. But the Court has rejected attempts to "[a]nalogiz[e] *Bivens*" and its progeny "to the work of a common-law court." *Hernández*, 589 U.S. at 100. "With the demise of federal general common law, a federal court's authority to recognize a damages remedy must rest at bottom on a statute"—which is absent here. *Id.* at 101.

From the Framing until 1971, courts did not infer damages remedies from the Constitution. See pp. 4-5, *supra*. The Court recounted that history just a few years before *Bivens* in *Wheeldin* v. *Wheeler*, and concluded it was "not for [the Court] to fill any *hiatus* Congress has left in this area." 373 U.S. 647, 652 (1963). But eight years later *Bivens* did precisely that, scarcely mentioning *Wheeldin*. 403 U.S. at 396-397.

Since then, *Bivens*'s foundations—never sound—have crumbled. "To persist in [*Bivens*] would require [the Court] to depart from almost every case on the subject [it has] decided [before and] since." *Slaughter*, 146 S. Ct. at 2303.

2. *Bivens* has proved unworkable. While the Court's current framework reins in some of *Bivens*'s mischief, separation-of-powers problems remain. Most fundamentally, the framework contemplates that courts might create damages remedies Congress has not authorized, when in fact courts cannot (and certainly should not) do so.

The Court's *Bivens* tests still require courts to undertake legislative judgments foreign to the judicial role. Courts must decide whether cases are "meaningfully" different from *Bivens*, *Davis*, and *Carlson* and whether there is reason to think Congress might be better suited to weigh the costs and benefits of a damages remedy. Both questions require courts to evaluate myriad "policy considerations": economic, fiscal, operational, even moral. *Egbert*, 596 U.S. at 491. But that is something "'a legislature would'"—and should—do. *Ibid.* While those questions are asked from Congress's perspective (*e.g.*, whether *Congress* could think a difference meaningful), that still puts courts to imagine a legislative view. And the necessity of doing so reinforces that all these questions should be *answered by Congress*—not speculating courts. "To atone for *Bivens*, it seems [courts] continue repeating its most basic mistake." *Id.* at 504 (Gorsuch, J., concurring in judgment).

Lower courts have struggled. For example, the "new-context inquiry" is supposed to be "easily satisfied." *Ziglar*, 582 U.S. at 149. Yet "multiple deep circuit splits" have arisen over how the test applies to such basic things as alternative remedies and a claim's nature and severity. Pet.App.91a, 103a-109a (R. Nelson, J., dissenting from denial); Pet.App.86a-89a (Paez & Koh, JJ., respecting denial); Pet.15-22. The result is "confusion," Pet.App.111a (Collins, J., dissenting from denial), and a "flood of inconsistent case law across and within circuits." *Watkins*, 144 F.4th at 951 (opinion of Kirsch, J.).

That confusion drives home *Bivens*'s unworkability: While the Court has tried to confine *Bivens*, *Davis*, and *Carlson* to their respective contexts, jurists cannot agree *what those contexts are*. As a result, this Court has repeatedly had to put newly summoned *Bivens* genies back in the bottle. Rather than try still further refinement in still further cases, the Court may wish to stopper the *Bivens* bottle for good.

3. No reliance interests justify *Bivens*'s retention. "Any such interests would belong to future plaintiffs—

who surely are not relying on the remote possibility that U.S. courts would" allow a *Bivens* remedy "if they were someday injured and sought one." *Cisco*, 146 S. Ct. at 1891-1892. Nor would reliance be justified. Repeated disclaimers that *Bivens* remedies are a disfavored judicial activity have put plaintiffs "on notice for years regarding this Court's misgivings about" *Bivens*. *Janus* v. *AFSCME*, 585 U.S. 878, 927 (2018).

Besides, other remedies exist. The FTCA allows recovery "against the United States" for property harm, "personal injury," and "death" caused by federal employees' "negligent or wrongful" conduct. 28 U.S.C. §§ 1346(b)(1), 2674. That includes "medical malpractice" negligence like in *Carlson*. *Levin* v. *United States*, 568 U.S. 503, 512-513 (2013); see also *Minneci* v. *Pollard*, 565 U.S. 118, 128-130 (2012) (discussing relevant tort law). It also includes intentional torts by law-enforcement officers like in *Bivens*—indeed, Congress amended the FTCA to reach such conduct shortly after *Bivens*. See Pub. L. No. 93-253, § 2, 88 Stat. 50 (1974), codified at 28 U.S.C. § 2680(h).[14] Congress has provided congressional staffers remedies for discrimination like in *Davis*. See Congressional Accountability Act of 1995, Pub. L. No. 104-1, 109 Stat. 3, codified at 2 U.S.C. §§ 1302(a), 1311(a)-(b). And injunctions (which enjoy a "long history" that *Bivens* remedies lack, *Armstrong* v. *Exceptional Child Ctr., Inc.*, 575 U.S. 320, 327 (2015)) may be available in many cases.

Watanabe urges that "Congress" relied on *Bivens* in enacting the Westfall Act. Br.in.Opp.20-21. That Act

[14] *Carlson* dismissed the FTCA based on legislative history and a view that it was not "equally effective." 446 U.S. at 19-23. Neither can justify a damages remedy Congress has not authorized. *Egbert*, 596 U.S. at 498; *FS Credit Opportunities Corp.* v. *Saba Capital Master Fund, Ltd.*, 146 S. Ct. 1546, 1557 (2026).

generally makes the FTCA's "remedy against the United States" "exclusive" of suits against federal employees (substituting the United States as defendant), without extending that exclusivity to constitutional claims. 28 U.S.C. § 2679(b)(1), (2)(A), (d). But "the provision simply left *Bivens* where it found it"—in the hands of courts. *Hernández*, 589 U.S. at 111 n.9.[15]

Insofar as "Congress has relied upon" *Bivens*, "that is precisely the problem." *Slaughter*, 146 S. Ct. at 2303. When courts assert legislative power, that gives Congress less incentive to legislate (or an excuse not to). That may explain the many failed bills proposing damages remedies akin (or not) to *Bivens*. See pp. 11-12, nn.1-6, *supra*. Getting courts out of the *Bivens* business will return full responsibility—and accountability—where it belongs: Congress.

As long as *Bivens* survives, its distortions will persist. While most *Bivens* claims fail, lower courts erroneously allow some—as this Court's repeated reversals illustrate. *E.g.*, *Ziglar*, 582 U.S. 120; *Egbert*, 596 U.S. 482; *Goldey*, 606 U.S. 942. Even ultimately-unsuccessful *Bivens* suits have "stark and personal" consequences for "line federal employees and their families": They threaten college funds and mortgage applications; impose years of litigation burdens; and inflict reputational harm. Mary Mason, *Reckoning with Bivens*, Lawfare (Nov. 12, 2025), https://www.lawfaremedia.org/article/reckoning-with-bivens. While indemnification is common, it is not guaranteed. *Ibid.*; see 28 C.F.R. § 50.15(c). If indemnification does

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[15] The Westfall Act may reflect a (mistaken) concern that Congress could not bar individual liability for constitutional violations, given the Court's suggestion that the Constitution itself imposes such liability. See *Carlson*, 446 U.S. at 33 n.2 (Rehnquist, J., dissenting); *Minneci*, 565 U.S. at 131 (Scalia, J., concurring). If so, that underscores the distortion *Bivens* has wrought.

occur, it presumably lessens the "deterrent" of "personal financial liability." *Carlson*, 446 U.S. at 21. And if indemnification is denied, even successful plaintiffs may receive nothing from judgment-proof defendants. No one is well-served.

* * *

Bivens has become an "empty promise"—a disavowed doctrine that haunts the casebooks. *Edwards* v. *Vannoy*, 593 U.S. 255, 272 (2021). Its retention "perpetuat[es] what has become an illusory" remedy that "misleads litigants and judges, and needlessly expends the scarce resources of [counsel] and courts." *Id.* at 275. "In fairness to future litigants and [the] lower court[s]," it may be time to stop holding out the "false hope" of *Bivens* and have Congress reassume its rightful role in this field. *Egbert*, 596 U.S. at 504 (Gorsuch, J., concurring in judgment).

CONCLUSION

The judgment should be reversed.

Respectfully submitted.

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August 2026

APPENDIX

RELEVANT CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS

APPENDIX – TABLE OF CONTENTS

1. The Eighth Amendment to United States Constitution provides:

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

2. 18 U.S.C. § 3626 provides in relevant part as follows:

Appropriate remedies with respect to prison conditions

(a) REQUIREMENTS FOR RELIEF.—

(1) PROSPECTIVE RELIEF.—(A) Prospective relief in any civil action with respect to prison conditions shall extend no further than necessary to correct the violation of the Federal right of a particular plaintiff or plaintiffs. The court shall not grant or approve any prospective relief unless the court finds that such relief is narrowly drawn, extends no further than necessary to correct the violation of the Federal right, and is the least intrusive means necessary to correct the violation of the Federal right. The court shall give substantial weight to any adverse impact on public safety or the operation of a criminal justice system caused by the relief.

* * * * *

(b) TERMINATION OF RELIEF.—

(1) TERMINATION OF PROSPECTIVE RELIEF.—(A) In any civil action with respect to prison conditions in which prospective relief is ordered, such relief shall be terminable upon the motion of any party or intervener—

(i) 2 years after the date the court granted or approved the prospective relief;

(ii) 1 year after the date the court has entered an order denying termination of prospective relief under this paragraph; or

(iii) in the case of an order issued on or before the date of enactment of the Prison Litigation Reform Act, 2 years after such date of enactment.

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(e) PROCEDURE FOR MOTIONS AFFECTING PROSPECTIVE RELIEF.—

(1) GENERALLY.—The court shall promptly rule on any motion to modify or terminate prospective relief in a civil action with respect to prison conditions. Mandamus shall lie to remedy any failure to issue a prompt ruling on such a motion.

(2) AUTOMATIC STAY.—Any motion to modify or terminate prospective relief made under subsection (b) shall operate as a stay during the period—

(A)(i) beginning on the 30th day after such motion is filed, in the case of a motion made under paragraph (1) or (2) of subsection (b); or

(ii) beginning on the 180th day after such motion is filed, in the case of a motion made under any other law; and

(B) ending on the date the court enters a final order ruling on the motion.

(3) POSTPONEMENT OF AUTOMATIC STAY.—The court may postpone the effective date of an automatic stay specified in subsection (e)(2)(A) for not more than 60 days for good cause. No postponement shall be permissible because of general congestion of the court's calendar.

(4) ORDER BLOCKING THE AUTOMATIC STAY.—Any order staying, suspending, delaying, or barring the op-

eration of the automatic stay described in paragraph (2) (other than an order to postpone the effective date of the automatic stay under paragraph (3)) shall be treated as an order refusing to dissolve or modify an injunction and shall be appealable pursuant to section 1292(a)(1) of title 28, United States Code, regardless of how the order is styled or whether the order is termed a preliminary or a final ruling.

* * * * *

3. 42 U.S.C. § 1997e provides in relevant part as follows:

§ 1997e. Suits by prisoners

(a) Applicability of administrative remedies

No action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted.

* * * * *

(f) Hearings

(1) To the extent practicable, in any action brought with respect to prison conditions in Federal court pursuant to section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility, pretrial proceedings in which the prisoner's participation is required or permitted shall be conducted by telephone, video conference, or other telecommunications technology without removing the prisoner from the facility in which the prisoner is confined.

(2) Subject to the agreement of the official of the Federal, State, or local unit of government with custody over

the prisoner, hearings may be conducted at the facility in which the prisoner is confined. To the extent practicable, the court shall allow counsel to participate by telephone, video conference, or other communications technology in any hearing held at the facility.

* * * * *

4. The Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT ACT) Act of 2001, Pub. L. No. 107-56, § 1001, 115 Stat. 391 (2001), provides:

Sec. 1001. Review of the Department of Justice.

The Inspector General of the Department of Justice shall designate one official who shall—

(1) review information and receive complaints alleging abuses of civil rights and civil liberties by employees and officials of the Department of Justice;

(2) make public through the Internet, radio, television, and newspaper advertisements information on the responsibilities and functions of, and how to contact, the official; and

(3) submit to the Committee on the Judiciary of the House of Representatives and the Committee on the Judiciary of the Senate on a semi-annual basis a report on the implementation of this subsection and detailing any abuses described in paragraph (1), including a description of the use of funds appropriations used to carry out this subsection.

5. The Federal Prison Oversight Act, Pub. L. No. 118-71, § 2, 138 Stat. 1492 (2024), to be codified at 5 U.S.C. § 413(e), provides in relevant part as follows:

Sec. 2. Creation of an Inspections Regime for the Bureau of Prisons.

(a) IN GENERAL.—Section 413 of title 5, United States Code, is amended by adding at the end the following:

"(e) INSPECTIONS REGIME.—

"(1) DEFINITIONS.—In this subsection:

* * * * *

"(C) COVERED FACILITY.—The term 'covered facility'—

"(i) means a correctional facility operated by the Bureau; and

"(ii) does not include a post-incarceration residential re-entry center.

* * * * *

"(2) INSPECTIONS OF COVERED FACILITIES BY THE INSPECTOR GENERAL.—

"(A) ESTABLISHMENT OF INSPECTIONS REGIME.—

"(i) IN GENERAL.—The Inspector General shall conduct periodic inspections of covered facilities pursuant to the requirements of this subsection.

"(ii) ACCESS TO COVERED FACILITIES.—The Attorney General shall ensure that the Inspector General has access to—

"(I) any covered facility (including the incarcerated people, detainees, staff, bargaining unit representative organization) in accordance with paragraph (4); and

"(II) any other information that the Inspector General determines is necessary to carry out the provisions of this subsection.

"(iii) NOTICE OF INSPECTIONS.—An inspection of a covered facility under this subsection may be announced or unannounced.

"(iv) COMMUNITY INPUT.—In developing the inspections regime under this subsection, the Inspector General is encouraged to consult formerly incarcerated people, family or representatives of incarcerated people, and community advocates.

"(B) INSPECTION CRITERIA.—An inspection of a covered facility under this subsection may include an assessment of the following:

"(i) The policies, procedures, and administrative guidance of the facility.

"(ii) The conditions of confinement.

"(iii) Working conditions for staff.

"(iv) The availability of evidence-based recidivism reduction programs and productive activities, as such terms are defined in section 3635 of title 18, and the application of earned time credits pursuant to section 3632 of title 18.

"(v) The policies and procedures relating to visitation.

"(vi) The policies and practices relating to classification and housing.

"(vii) The policies and practices relating to the use of single-cell confinement, administrative segregation, and other forms of restrictive housing.

"(viii) The medical facilities and medical and mental health care, programs, procedures, and policies, including the number and qualifications of medical and mental health staff and the availability of sex-specific and trauma-responsive care for incarcerated people.

"(ix) Medical services and mental health resources for staff.

"(x) Lockdowns at the facility.

"(xi) Credible allegations of incidents involving excessive use of force, completed, attempted, or threatened violence, including sexual abuse, or misconduct committed against incarcerated people.

"(xii) Credible allegations of incidents involving completed, attempted, or threatened violence, including sexual violence or sexual abuse, committed against staff.

"(xiii) Adequacy of staffing at the covered facility, including the number and job assignments of staff, the ratio of staff to inmates at the facility, the staff position vacancy rate at the facility, and the use of overtime, mandatory overtime, and augmentation.

"(xiv) Deaths or serious injuries of incarcerated people or staff that occurred at the facility.

"(xv) The existence of contraband that jeopardizes the health or safety of incarcerated people or staff, including incident reports, referrals for criminal prosecution, and confirmed prosecutions.

"(xvi) Access of incarcerated people to—

"(I) legal counsel, including confidential meetings and communications;

"(II) discovery and other case-related legal materials; and

"(III) the law library at the covered facility.

"(xvii) Any aspect of the operation of the covered facility that the Inspector General determines to be necessary over the course of an inspection.

* * * * *

"(D) REPORT.—

"(i) IN GENERAL.—Not later than 6 months after the completion of an inspection of a covered facility under this subsection, or a group of inspections that assess the same or similar issues at more than 1 facility, the Inspector General shall submit a final copy of the report to the Attorney General, the appropriate congressional committees, employee representative organizations, and the public, that addresses 1 or more of the following topics:

"(I) A characterization of the conditions of confinement and working conditions, including a summary of the inspection criteria reviewed under clauses (ii) and (iii) of subparagraph (B).

"(II) Recommendations made to the covered facility to improve safety and conditions within the facility, including recommendations regarding staffing.

"(III) A recommended timeline for the next inspection and assessment, which shall not limit the authority of the Inspector General to perform additional inspections and assessments, announced or unannounced.

"(IV) Any other issues or matters identified during the inspection of the facility or facilities.

* * * * *

"(F) BUREAU RESPONSE TO REPORT.—

"(i) IN GENERAL.—Not later than 60 days after the date on which the Inspector General issues a report under subparagraph (D), the Bureau shall respond in writing to the inspection report, which shall include a corrective action plan.

"(ii) PUBLIC AVAILABILITY.—Each response and action plan described in clause (i) shall be made available to the public on the website of the Inspector General.

"(iii) COMPLIANCE WITH CORRECTIVE ACTION PLAN.—The Inspector General may conduct additional inspections or investigations, announced or unannounced, to monitor the compliance of the Bureau with a corrective action plan described in clause (i).

* * * * *

"(3) OMBUDSMAN.—

"(A) IN GENERAL.—Not later than 1 year after the date of enactment of the Federal Prison Oversight Act, the Attorney General shall establish in the Department of Justice an Ombudsman who may—

"(i) receive a complaint from an incarcerated person, a family advocate, a representative of an incarcerated person, staff, a representative of staff, a Member of Congress, or a member of the judicial branch of the Federal Government regarding issues that may adversely affect the health, safety, welfare, or rights of incarcerated people or staff, including—

"(I) abuse or neglect;

"(II) the conditions of confinement, including the availability of health care;

"(III) working conditions of staff;

"(IV) decisions, administrative actions, or guidance of the Bureau, including those relating to prison staffing;

"(V) inaction or omissions by the Bureau, including failure to consider or respond to complaints or grievances by incarcerated people or staff promptly or appropriately;

"(VI) policies, rules, or procedures of the Bureau, including gross mismanagement; and

"(VII) alleged violations of non-criminal law by staff or incarcerated people that may adversely affect the health, safety, welfare, or rights of any person;

"(ii) refer a complainant and others to appropriate resources or Federal agencies;

"(iii) make inquiries and recommend actions to appropriate entities on behalf of a complainant, the Ombudsman, or others; and

"(iv) decline to investigate or take any action with respect to any complaint and, in any case in which the Ombudsman declines to investigate or take any action, shall notify the complainant in writing of the decision not to investigate or take any action and the reasons for the decision.

* * * * *

"(C) DECISION ON THE MERITS OF A COMPLAINT.—At the conclusion of an investigation of a complaint, the Ombudsman shall—

"(i) render a decision on the merits of each complaint;

"(ii) communicate the decision to the complainant, if any, and to the Bureau; and

"(iii) state the recommendations and reasoning of the Ombudsman if, in the opinion of the Ombudsman, the Bureau or any employee thereof should—

"(I) consider the matter further;

"(II) modify or cancel any action;

"(III) alter a rule, practice, or ruling;

"(IV) explain in detail the administrative action in question; or

"(V) rectify an omission.

"(D) ACTIONS FOLLOWING A DECISION BY THE OMBUDSMAN.—

"(i) REQUEST FOR INFORMATION ABOUT ACTIONS TAKEN.—If the Ombudsman so requests, the Bureau shall, within the time specified, respond to any inquiry or request for information from the Ombudsman and inform the Ombudsman about any action taken on the recommendations provided by the Ombudsman or the reasons for not complying with any request for information or recommendations.

"(ii) REPORTING OF CONTINUING ISSUES.—If the Ombudsman believes, based on an investigation conducted by the Ombudsman, that there has been or continues to be a significant health, safety, welfare, working conditions, or rehabilitation issue, the Ombudsman shall report the finding to the Attorney General and the appropriate congressional committees.

"(iii) MONITORING OF INTERNAL DISCIPLINARY ACTIONS OF THE BUREAU.—In the event that the Bureau conducts an internal disciplinary investigation or review of 1 or more staff members of the Bureau as a result of an investigation by the Ombudsman, the Ombudsman may monitor the internal disciplinary action to ensure a fair and objective process.

"(4) INSPECTOR GENERAL AND OMBUDSMAN ACCESS TO BUREAU OF PRISONS FACILITIES.—

"(A) IN GENERAL.—

"(i) ACCESS TO BUREAU FACILITIES.—Except as provided in clause (ii), upon demand, in person or in writing and with or without prior notice, the Inspector General and the Ombudsman shall be granted access to all Bureau facilities, which shall include—

"(I) all areas that are used by incarcerated people, all areas that are accessible to incarcerated people, and access to programs for incarcerated people at any time of day; and

"(II) the opportunity to—

"(aa) conduct private and confidential interviews with any incarcerated person, staff, employee representative organization, or other person; and

"(bb) communicate privately and confidentially, both formally and informally, with incarcerated people or staff by telephone, mail, electronic communication, and in person, which shall not be monitored or recorded by or conducted in the presence of staff.

"(ii) EXCEPTION.—Clause (i) shall not apply in situations where the head of the covered facility provides evidence to the Inspector General or the Ombudsman that there is risk of serious and immediate physical harm to visitors due to an ongoing event that requires restricting access to the facility.

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"(C) ACCESS TO DOCUMENTS.—

"(i) IN GENERAL.—The Inspector General and the Ombudsman have the right to access, inspect, and copy all relevant information, records, or documents in the possession or control of the Bureau that either the Inspector General or the Ombudsman considers necessary in an inspection, investigation, or other activity, and the Bureau shall assist the Inspector General and the Ombudsman in obtaining the necessary releases for those documents that are specifically restricted or privileged for use by the Bureau.

"(ii) PRODUCTION OF RECORDS.—Following notification from the Inspector General or the Ombudsman with a written demand for access to Bureau records, the Bureau shall provide access to the requested documentation in a manner consistent with section 552a (commonly known as the 'Privacy Act of 1974')—

"(I) not later than 30 business days after receipt of the written request; or

"(II) in the case of records pertaining to the death of an incarcerated person or staff, threats of bodily harm including sexual or physical assaults, or the denial or delay of necessary medical treatment, not later than 10 business days after receipt of the written request, unless the Inspector

General or the Ombudsman consents to an extension of that time frame.

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"(6) FILING COMPLAINTS.—

"(A) FILING COMPLAINTS ON BEHALF OF AN INCARCERATED INDIVIDUAL.—

"(i) ONLINE FORM.—The Ombudsman shall create a secure online form to be made available on the website of the Ombudsman where the family advocates and representatives of incarcerated people can submit complaints and inquiries on issues identified in paragraph (3)(A)(i) on behalf of an individual incarcerated at a covered facility.

"(ii) TELEPHONE HOTLINE.—The Ombudsman shall create a telephone hotline through which family advocates and representatives of incarcerated people can call to file complaints and inquiries on issues identified in paragraph (3)(A)(i) on behalf of an individual incarcerated at a covered facility.

"(B) FILING COMPLAINTS BY AN INCARCERATED INDIVIDUAL.—

"(i) INTERNAL PRIVATE SUBMISSION.—The Bureau shall provide multiple internal ways for incarcerated individuals in covered facilities to privately submit to the Ombudsman complaints and inquiries on issues identified in paragraph (3)(A)(i).

"(ii) SUBMISSION VIA INDEPENDENT ENTITY.—The Bureau shall also provide not less than 1 process for incarcerated individuals in covered facilities to submit complaints and inquiries on issues identified in paragraph (3)(A)(i) to a public or private entity or office that is not part of the Bureau and that is able to receive and immediately forward complaints and inquiries to the Ombudsman, allowing the incarcerated individual to remain anonymous upon request.

"(C) DETERMINATION.—

"(i) CONFIRMATION OF RECEIPT.—Not later than 5 business days after submission of a complaint or inquiry under subparagraph (A) or (B), the Ombudsman shall confirm receipt.

"(ii) DETERMINATION.—Not later than 15 business days after issuing the confirmation under clause (i), the Ombudsman shall make a determination as to whether any action is warranted and notify the complainant of the determination.

"(iii) STATEMENT REGARDING DECISION.—If the Ombudsman has determined action is unwarranted under clause (ii), the Ombudsman shall provide a written statement explaining the decision to the complainant.

"(D) PUBLIC EDUCATION.—The Ombudsman shall coordinate with the Bureau to educate incarcerated people, representatives of incarcerated people, and the public about the existence and functions of the Ombudsman.

"(E) ADMINISTRATIVE EXHAUSTION.—Nothing in this paragraph shall be construed as a necessary administrative remedy required for exhaustion under section 7(a) of the Civil Rights of Institutionalized Persons Act (42 U.S.C. 1997e(a)).

* * * * *

(b) EFFECTIVE DATE.—This Act, and the amendments made by this Act, shall take effect on the date that is 90 days after the date on which appropriations are made available to the Inspector General of the Department of Justice and the Department of Justice for the specific purpose of carrying out the provisions of this Act and the amendments made by this Act.

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6. The Bureau of Prisons' Administrative Remedy Program, 28 C.F.R. §§ 542.10-542.19, provides in relevant part as follows:

§ 542.10 Purpose and scope.

(a) *Purpose*. The purpose of the Administrative Remedy Program is to allow an inmate to seek formal review of an issue relating to any aspect of his/her own confinement. An inmate may not submit a Request or Appeal on behalf of another inmate.

(b) *Scope*. This Program applies to all inmates in institutions operated by the Bureau of Prisons, to inmates designated to contract Community Corrections Centers (CCCs) under Bureau of Prisons responsibility, and to former inmates for issues that arose during their confinement. This Program does not apply to inmates confined in other non-federal facilities.

* * * * *

§ 542.11 Responsibility.

(a) The Community Corrections Manager (CCM), Warden, Regional Director, and General Counsel are responsible for the implementation and operation of the Administrative Remedy Program at the Community Corrections Center (CCC), institution, regional and Central Office levels, respectively, and shall:

(1) Establish procedures for receiving, recording, reviewing, investigating, and responding to Administrative Remedy Requests (Requests) or Appeals (Appeals) submitted by an inmate;

(2) Acknowledge receipt of a Request or Appeal by returning a receipt to the inmate;

(3) Conduct an investigation into each Request or Appeal;

(4) Respond to and sign all Requests or Appeals filed at their levels. At the regional level, signatory authority may be delegated to the Deputy Regional Director. At the Central Office level, signatory authority may be delegated to the National Inmate Appeals Administrator. Signatory authority extends to staff designated as acting in the capacities specified in this § 542.11, but may not be further delegated without the written approval of the General Counsel.

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§ 542.13 Informal resolution.

(a) *Informal resolution.* Except as provided in § 542.13(b), an inmate shall first present an issue of concern informally to staff, and staff shall attempt to informally resolve the issue before an inmate submits a Request for Administrative Remedy. Each Warden shall establish procedures to allow for the informal resolution of inmate complaints.

* * * * *

§ 542.14 Initial filing.

(a) *Submission.* The deadline for completion of informal resolution and submission of a formal written Administrative Remedy Request, on the appropriate form (BP–9), is 20 calendar days following the date on which the basis for the Request occurred.

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(d) *Exceptions to initial filing at institution*—(1) *Sensitive issues.* If the inmate reasonably believes the issue is sensitive and the inmate's safety or wellbeing would be placed in danger if the Request became known at the institution, the inmate may submit the Request directly to the appropriate Regional Director. The inmate shall clearly mark "Sensitive" upon the Request and explain, in writing, the reason for not submitting the Request at the institution. If the Regional Administrative Remedy Coordinator agrees that the Request is sensitive, the Request shall be accepted. Otherwise, the Request will not be accepted, and the inmate shall be advised in writing of that determination, without a return of the Request. The inmate may pursue the matter by submitting an Administrative Remedy Request locally to the Warden. The Warden shall allow a reasonable extension of time for such a resubmission.

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§ 542.15 Appeals.

(a) *Submission.* An inmate who is not satisfied with the Warden's response may submit an Appeal on the appropriate form (BP–10) to the appropriate Regional Director within 20 calendar days of the date the Warden signed the response. An inmate who is not satisfied with the Regional Director's response may submit an Appeal on the appropriate form (BP–11) to the General Counsel within 30 calendar days of the date the Regional Director signed the response. When the inmate demonstrates a valid reason for delay, these time limits may be extended. Valid reasons for delay include those situations described in § 542.14(b) of this part. Appeal to the General Counsel is the final administrative appeal.

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§ 542.16 Assistance.

(a) An inmate may obtain assistance from another inmate or from institution staff in preparing a Request or an Appeal. An inmate may also obtain assistance from outside sources, such as family members or attorneys. However, no person may submit a Request or Appeal on the inmate's behalf, and obtaining assistance will not be considered a valid reason for exceeding a time limit for submission unless the delay was caused by staff.

(b) Wardens shall ensure that assistance is available for inmates who are illiterate, disabled, or who are not functionally literate in English. Such assistance includes provision of reasonable accommodation in order for an inmate with a disability to prepare and process a Request or an Appeal.

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§ 542.18 Response Time.

If accepted, a Request or Appeal is considered filed on the date it is logged into the Administrative Remedy Index as received. Once filed, response shall be made by the Warden or CCM within 20 calendar days; by the Regional Director within 30 calendar days; and by the General Counsel within 40 calendar days. If the Request is determined to be of an emergency nature which threatens the inmate's immediate health or welfare, the Warden shall respond not later than the third calendar day after filing.

If the time period for response to a Request or Appeal is insufficient to make an appropriate decision, the time for response may be extended once by 20 days at the institution level, 30 days at the regional level, or 20 days at the Central Office level. Staff shall inform the inmate of this extension in writing. Staff shall respond in writing to all filed Requests or Appeals. If the inmate does not receive a response within the time allotted for reply, including extension, the inmate may consider the absence of a response to be a denial at that level.