

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 OF THE STATE OF MISSOURI
AND EIGHTEEN OTHER STATES AS
AMICUS CURIAE
IN SUPPORT OF PETITIONER**

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August 21, 2026

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INTEREST OF *AMICUS CURIAE* & SUMMARY OF ARGUMENT

Amici States have a strong interest in maintaining the Constitution’s two divisions of governmental power. First, the Constitution divides power between the States and the national government. Second, it takes the powers enumerated to the national government and assigns them to the Legislative, Executive, and Judicial branches. The Framers considered these structural restraints to be the most important protectors of individual freedom. *See Nat’l Fed’n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 707 (2012) (Scalia, Kennedy, Thomas, and Alito, JJ., dissenting).

Under this structure, “substantive federal law,” including “private rights of action to enforce federal law[,] must be created by Congress.” *Alexander v. Sandoval*, 532 U.S. 275, 286 (2001). Any deviation from this structure must find its basis in the Constitution or through congressional authorization. *See, e.g., The Dutra Grp. v. Batterton*, 588 U.S. 358, 360 (2019) (“By granting federal courts jurisdiction over maritime and admiralty cases, the Constitution implicitly directs federal courts sitting in admiralty to proceed in the manner of a common law court.” (internal quotation omitted)). Departing from this rule, this Court previously invoked the Constitution to fashion three implied causes of action for damages. *See Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971); *Davis v. Passman*, 442 U.S. 228 (1979); *Carlson v. Green*, 446 U.S. 14 (1980).

This Court has now “virtually eliminated the practice of fashioning” implied constitutional causes of action. *Cisco Sys., Inc. v. Doe I*, 146 S. Ct. 1882, 1891 (2026). In *Egbert v. Boule*, this Court strongly hinted that it would *never* be appropriate to recognize a new cause of action. *See* 596 U.S. 482, 500–02 (2022); *id.* at 503 (Gorsuch, J., concurring).

As this case helps prove, lower courts are not taking the hint—as they continue to recognize new implied causes of actions. *See, e.g., Goldey v. Fields*, 606 U.S. 942, 942–43 (2025) (per curiam). It would therefore be prudent for this Court to use this case to clarify that *Bivens*, *Davis*, and *Carlson* are limited to their facts—and that it is *never* appropriate to recognize an implied right of action differing from those three cases.

Notably, this Court has recently taken a similar step in other contexts. In *Edwards v. Vannoy*, this Court ended a longstanding inquiry into whether new types of rules could be retroactively applied in habeas proceedings. *See* 593 U.S. 255, 274 (2021) (no watershed procedural rules under *Teague*). And in *Cisco*, this Court foreclosed the possibility of creating new causes of action under the Alien Tort Statute. 146 S. Ct. at 1892. As in those cases, saying “never”—rather than “probably never”—to new implied constitutional causes of action would help clarify the law.

ARGUMENT

The Ninth Circuit erred in allowing Watanabe’s *Bivens* claim to move forward. First, this case represents a new context from the three cases where the Court has allowed implied constitutional causes of action to exist. Second, the power to recognize new

causes of action for damages is repugnant to the separation of powers and this Court should finally renounce that venture. The Court should reverse.

A. This case is a new *Bivens* context.

In *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), this Court recognized the existence of an implied cause of action for damages under the Fourth Amendment based on an illegal home search. 403 U.S. at 389–91. It determined that, absent any affirmative action from Congress, no special factors counseled against recognizing a damages remedy. *Id.* at 396. To overcome this, the Court required an “explicit congressional declaration” that it would provide “another remedy, equally effective” to redress the constitutional injury. *Id.* at 397. Under this logic, the Court recognized similar implied causes of action for gender discrimination against a congressional staffer under the Fifth Amendment, *see Davis v. Passman*, 442 U.S. 228 (1979), and for deliberate indifference to a prisoner’s medical needs under the Eighth Amendment, *see Carlson v. Green*, 446 U.S. 14 (1980).

In the years after *Carlson*, this Court has recognized the constitutional problems inherent in federal courts creating new causes of action. It now employs a two-part test when evaluating a *Bivens* claim. First, the Court asks if a given case is a “new” context; “[i]f the case is different in a meaningful way from previous *Bivens* cases decided by this Court, then the context is new.” *Ziglar v. Abbasi*, 582 U.S. 120, 139 (2017). A “new context arises when there are ‘potential special factors that previous *Bivens* cases did not consider.’” *Egbert v. Boule*, 596 U.S. 482, 492 (2022) (quoting *Ziglar*, 582 U.S. at 140). These factors can

include differences such as “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 . . . ; [and] the statutory or other legal mandate under which the officer was operating . . .” *Ziglar*, 582 U.S. at 140.

Second, if the context is “new,” a *Bivens* remedy is unavailable if any special factors indicate “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 (quoting *Ziglar*, 582 U.S. at 136)). The answer to that question is—at least arguably—that Congress is *always* better equipped to make such a judgment. *Id.* at 503 (Gorsuch, J., concurring).

Under that test, the Ninth Circuit should have rejected Watanabe’s argument that his damages cause of action is recognized by *Carlson*. In *Carlson*, this Court allowed a *Bivens* claim where prison officials kept a prisoner with chronic asthma in the correctional facility despite “being fully apprised of the gross inadequacy of [the prison’s] medical facilities and staff” and against the advice of the prisoner’s doctors. 446 U.S. at 16 n.1. The prisoner then died after prison officials “failed to give him competent medical attention for some eight hours after he had an asthmatic attack,” affirmatively gave him medical care that only exacerbated his condition, “and delayed for too long a time his transfer to an outside hospital.” *Id.* The Court held this sufficient to state a cause of action under *Estelle v. Gamble*, 429 U.S. 97 (1976), which gave rise to a *Bivens* claim against federal officials under the Eighth Amendment. *Id.* at 17–18.

Watanabe’s case is different enough than *Carlson* to be a “new context.” See *Ziglar*, 582 U.S. at 147–48. First, Watanabe’s injuries are less severe than those in *Carlson*. While both cases involve the “fail[ure] to give [the plaintiff] competent medical attention,” *Carlson*, 446 U.S. at 16 n.1, the similarities are only skin deep. The prisoner in *Carlson* suffered from a true medical emergency, making his situation akin to prison officials ignoring a heart attack, stroke, or prisoner suicide attempt. But Watanabe did not have this. Watanabe suffered from a fractured coccyx received during a gang fight. Pet. App. at 3a–4a. He requested medical treatment but was not sent to the hospital and received only over-the-counter pain medication. Pet. App. at 3a–4a. Prison officials later diagnosed him with the fracture and agreed to send him to a specialist. Pet. App. at 3a–4a. This is a far cry from *Carlson*—no true medical emergency threatened Watanabe’s life. Watanabe’s claim is different enough from *Carlson* to be a new context.

Second, the standard of care Nielsen provided exceeds that of *Carlson*. In *Carlson*, prison officials not only failed to provide medical care for the prisoner’s asthma attack but also affirmatively worsened the prisoner’s condition, causing his death. *Carlson*, 446 U.S. at 16 n.1. But here, Watanabe received a form of medical care for his chronic pain, despite his allegations that it was inadequate. Pet. App. at 3a–4a. There was no risk of Watanabe dying from his injuries; nor did prison officials do anything to worsen his condition or ignore the advice of other medical professionals. Compare Pet. App. at 3a–4a with *Carlson*, 446 U.S. at 16 n.1. Once again, these differences are enough to make this a new *Bivens* context.

B. This Court should limit *Bivens*, *Davis*, and *Carlson* to their facts.

For decades, this Court has used increasingly strident language to hint that lower courts should not recognize implied constitutional causes of action beyond the precise facts present in *Bivens*, *Davis*, and *Carlson*. See, e.g., *Egbert*, 596 U.S. at 491–92. Nevertheless, this Court’s decision to maintain the theoretical possibility of expanding those decisions has encouraged lower courts to miss the hint and create new implied rights of action. See, e.g., *Goldey*, 606 U.S. at 942–43.

This Court’s precedent highlights the prudence of explicitly closing the door on *Bivens*, *Davis*, and *Carlson*. “Continuing to articulate a theoretical exception that never actually applies in practice offers false hope to [plaintiffs], distorts the law, misleads judges, and wastes the resources of [parties] and courts.” *Edwards v. Vannoy*, 593 U.S. 255, 272 (2021). This Court recently heeded that wisdom and limited past cases to their facts in two related contexts.

First, this Court previously allowed new criminal decisions to apply retroactively to cases on collateral review where they announced new “watershed rules of criminal procedure.” *Teague v. Lane*, 489 U.S. 288, 311–12 (1989) (plurality opinion) (quoting *Mackey v. United States*, 401 U.S. 667, 693–94 (1971) (Harlan, J., concurring)). A new rule satisfied this requirement “when, among other things, it altered ‘our understanding of the bedrock procedural elements essential to the fairness of a proceeding.’” *Edwards*, 593 U.S. at 267 (quoting *Whorton v. Bockting*, 549 U.S. 406, 417–18 (2007)). *Teague* itself found it “unlikely” that many such rules remained undiscovered, recalling the

historic bases for the issuance of a writ of habeas corpus. 489 U.S. at 313–14 (quoting *Rose v. Lundy*, 455 U.S. 509, 544 (1982) (Stevens, J., dissenting)).

Unsurprisingly, this Court “rejected *every* claim that a new procedural rule qualifie[d] as a watershed rule.” *Edwards*, 593 U.S. at 267–68 (emphasis in original). And it did so despite the candidates including landmark cases: *Mapp*, *Miranda*, *Duncan*, *Crawford*, *Batson*, and *Ramos*. *Id.* at 271. *Teague*’s exception therefore became “an empty promise” that was “non-existent in practice.” *Id.* at 272. Nevertheless, lower courts still occasionally recognized new watershed rules. *See id.* at 267–68 (collecting cases). That led this Court—in *Edwards*—to recognize it was “probably long past time” to explicitly prohibit the retroactive application of procedural cases on collateral review. *Id.* at 272.

Second, this Court previously left open the possibility that judges could create substantive causes of action under the Alien Tort Statute (“ATS”). The ATS, passed as part of the Judiciary Act of 1789, vested district courts with jurisdiction to hear cases “where an alien sues for a tort only in violation of the law of nations or a treaty of the United States.” *Sosa v. Alvarez-Machain*, 542 U.S. 692, 712–13 (2004) (citation omitted); *see* 28 U.S.C. § 1350 (current codification). Chief among the class of “tort[s] in violation of the law of nations” were Blackstone’s three primary offenses: “violation of safe conducts, infringement of the rights of ambassadors, and piracy.” *Sosa*, 542 U.S. at 724.

A dispute quickly arose over the ATS’s proper scope. This Court noted that the ATS “is a jurisdictional statute creating no new causes of action,” *id.* at

724, and that it did not “grant . . . power to mold substantive law,” *id.* at 713. Despite this, the Court recognized implied causes of action under the ATS for violations of Blackstone’s three primary offenses and other international law norms with equivalently clear definition. *Id.* at 724, 732. A plaintiff would then need to show that this new cause of action should be recognized without deferring to Congress. *Nestlé USA, Inc. v. Doe*, 593 U.S. 628, 636 (2021). This test was “consciously designed” so that it “would be extremely difficult to meet.” *Cisco Sys., Inc. v. Doe I*, 146 S. Ct. 1882, 1891 (2026).

What was designed to be difficult proved impossible. In the twenty years after *Sosa*, this Court made it exceedingly clear that judicially created causes of action under the ATS would always offend the separation of powers. *Id.* After lower courts failed to take the hint, this Court recently “close[d] the door that *Sosa* cracked to judicially created ATS liability.” *Id.* at 1892.

The Court should take the same step and close the door on expanding *Bivens*, *Davis*, or *Carlson*. Expanding the *Bivens* remedy has been a “disfavored” judicial activity for almost twenty years. *Ashcroft v. Iqbal*, 556 U.S. 662, 675 (2009). “This is in accord with the Court’s observation that it has ‘consistently refused to extend *Bivens* to any new context or new category of defendants.’” *Ziglar*, 582 U.S. at 135 (quoting *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 68 (2001)); see also *Egbert*, 596 U.S. at 486 (declining to recognize 11 new *Bivens* causes of action in the 42 years after *Carlson*). This Court even cited its consistent refusal to recognize new *Bivens* actions as supporting its decision eliminating new ATS actions. See *Cisco*, 146 S.

Ct. at 1891 (citing *Egbert*, 596 U.S. at 491 and *Ziglar*, 582 U.S. at 137).

Creating new causes of action is no longer the role of the federal judiciary. “If exercising that sort of authority may once have been a “proper function for common-law courts” in England, it is no longer generally appropriate “for federal tribunals” in a republic where the people elect representatives to make the rules that govern them.” *Egbert*, 596 U.S. at 503 (Gorsuch, J., concurring) (quoting *Alexander v. Sandoval*, 532 U.S. 275, 287 (2001)). This is not a context such as admiralty or the Sherman Act, where Congress has authorized the use of common-law-lawmaking by the Courts. See *The Dutra Grp. v. Batterton*, 588 U.S. 358, 360 (2019) (admiralty); see *Nat’l Soc. of Prof. Eng’rs v. United States*, 435 U.S. 679, 688–89 (1978) (Sherman Act). The decision of whether to create monetary damages remedies, like all matters of “substantive federal law,” is for Congress. *Sandoval*, 532 U.S. at 286. The faithful application of precedent leads to the inescapable conclusion that no new *Bivens* action can ever be recognized.

* * *

“It is time—probably long past time—to make explicit what has become increasingly apparent to bench and bar . . .” *Edwards*, 593 U.S. at 272. This Court will not allow *Bivens*, *Davis*, or *Carlson* to be expanded beyond their particular facts. Saying so will bring clarity to the law and ensure the continued health of the separation of powers.

CONCLUSION

The judgment of the Ninth Circuit should be reversed.

Respectfully submitted,

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