

No. 25-417

In the Supreme Court of the United States

FRANCIS NIELSEN, PETITIONER

v.

KEKAI WATANABE

*ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT*

**BRIEF FOR THE UNITED STATES AS
AMICUS CURIAE IN SUPPORT OF PETITIONER**

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QUESTION PRESENTED

In *Carlson v. Green*, 446 U.S. 14 (1980), this Court recognized a cause of action under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), for a claim that federal prison staff had violated the Eighth Amendment through deliberate indifference to a prisoner's (ultimately fatal) asthmatic attack. The question presented is whether *Carlson* permits a prisoner's claim that prison staff violated the Eighth Amendment through deliberate indifference to his chronic pain after a prison fight.

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INTEREST OF THE UNITED STATES

This case concerns the scope and continuing vitality of *Carlson v. Green*, 446 U.S. 14 (1980), a case where this Court created a right of action under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), for certain claims that federal prison officials violated the Eighth Amendment through deliberate indifference to prisoners' serious medical needs. The United States has a substantial interest in the resolution of this case. *Carlson* claims, which are brought against federal officials in their personal capacities, can deter such officials from performing their duties. The Department of Justice often represents defendants in *Carlson* cases, and the United States participates as amicus curiae in many *Carlson* cases where defendants are represented by private counsel.

INTRODUCTION

In *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), this Court created a right of action that enables plaintiffs to seek damages from federal officers for certain Fourth Amendment violations. Then, in *Carlson v. Green*, 446 U.S. 14 (1980), the Court created a right of action for certain claims that federal prison staff violated the Eighth Amendment through deliberate indifference to prisoners’ serious medical needs.

Since *Carlson*, however, this Court has “firmly committed to the view that judicially created causes of action offend the separation of powers in almost every circumstance” and has “virtually eliminated the practice of fashioning them.” *Cisco Systems, Inc. v. Doe*, 146 S. Ct. 1882, 1891 (2026). That practice is especially improper in the context of running prisons, which is a special province of the political branches. See *Goldey v. Fields*, 606 U.S. 942, 944 (2025) (per curiam).

Under this Court’s recent precedents, courts have no authority to provide a damages remedy in this case, where a prisoner claims that a prison nurse exhibited deliberate indifference to injuries he sustained in a gang fight. For a variety of reasons, this case arises in a context different from *Carlson*: It raises separation-of-powers problems that *Carlson* did not discuss, arises against a different statutory backdrop than *Carlson*, involves alternative remedial structures not considered in *Carlson*, and concerns different types of injuries than did *Carlson*. And this Court has consistently declined to extend *Carlson* to new contexts.

In fact, under a proper application of the framework set out in this Court’s recent *Bivens* cases, *Carlson* has become entirely obsolete. Given legal developments

since *Carlson*, such as the enactment of new prison-reform statutes and the creation of new remedies for prisoners, every new prisoner suit will necessarily arise in a context that meaningfully differs from *Carlson*. And given courts' lack of authority and expertise in setting prison policy, courts will always have a reason to pause before extending *Carlson* to that new context. That means that no more *Carlson* claims will be viable, and this Court should recognize as much. It should not, however, accept petitioner's invitation to go further and consider overruling *Bivens* in this case. If the Court wishes to consider that question, it should do so in the context of a Fourth Amendment case that more closely resembles *Bivens* itself.

STATEMENT

1. Respondent Kekai Watanabe was an inmate in a federal prison in Honolulu. Pet. App. 2a. He alleges that, in 2021, he suffered injuries in a prison gang fight after being beaten with a "lock in a sock" (*i.e.*, a sock stuffed with a hard object). *Id.* at 3a-4a.

Days later, respondent was seen by petitioner Francis Nielsen, a prison nurse. Pet. App. 4a. Respondent alleges that he reported severe pain, but that petitioner told him to "stop being a cry baby" and declined to send him to the hospital. *Ibid.* Respondent also alleges that, though he made multiple requests for medical attention, he received only over-the-counter pain medication until seven months after the fight, when prison staff diagnosed respondent with a fractured coccyx and determined that bone chips had entered the surrounding soft tissue. *Ibid.* At that point, prison staff agreed to send respondent to a specialist. *Ibid.*

2. Respondent sued petitioner and other defendants in the United States District Court for the District of

Hawaii. Pet. App. 5a. He claims that petitioner violated the Eighth Amendment’s Cruel and Unusual Punishment Clause through deliberate indifference to his serious medical needs. *Ibid.*; see *Estelle v. Gamble*, 429 U.S. 97, 104 (1976). Invoking *Bivens v. Six Named Unknown Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), and *Carlson v. Green*, 446 U.S. 14 (1980), he asserts a private right of action for damages under the Eighth Amendment. Pet. App. 5a.

The district court dismissed the complaint, holding that respondent lacks a right of action under *Bivens* and *Carlson*. Pet. App. 24a-39a. The court concluded that this case differs from *Carlson* because it involves less severe and less immediate injuries than *Carlson*, *id.* at 33a-35a, and because the Bureau of Prisons has established an Administrative Remedy Program that was not considered in *Carlson*, *id.* at 36a.

3. A divided panel of the Ninth Circuit reversed and remanded. Pet. App. 1a-23a.

The court of appeals concluded that this case arises in the same context as *Carlson* because it involves claims that prison staff violated the Eighth Amendment through deliberate indifference to a prisoner’s serious medical needs. Pet. App. 17a. It rejected respondent’s effort to distinguish *Carlson* based on the nature and severity of respondent’s injuries, reasoning that those distinctions are not “meaningful.” *Id.* at 14a; see *id.* at 10a-14a. The court also discounted the Bureau’s Administrative Remedy Program, stating that “the existence of alternative remedial structures does not render this case a new context.” *Id.* at 15a; see *id.* at 14a-15a.

Judge Milan Smith concurred in part and dissented in part. Pet. App. 18a-23a. He distinguished *Carlson* on the ground it involved more severe injuries and more flagrant mistreatment than this case. *Id.* at 21a-22a.

4. The court of appeals denied petitioner’s petition for rehearing. Pet. App. 76a-77a. Judges Paez and Koh, the members of the panel majority, issued a statement defending the panel’s decision. *Id.* at 77a-89a. Judge Ryan Nelson, joined by nine judges, issued a dissent opining that the nature and severity of petitioner’s injuries and the Bureau’s Administrative Remedy Program suffice to distinguish this case from *Carlson*. *Id.* at 89a-111a. Judge Collins issued a dissent urging this Court to clarify *Carlson*’s continuing vitality. *Id.* at 112a-116a.

SUMMARY OF ARGUMENT

A. In *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), this Court fashioned a damages remedy for certain Fourth Amendment violations. This Court then extended *Bivens* in *Carlson v. Green*, 446 U.S. 14 (1980), where it held that a deceased prisoner’s estate could seek damages from prison staff who had allegedly violated the Eighth Amendment through deliberate indifference to the prisoner’s life-threatening asthmatic attack.

Since *Carlson*, however, this Court has recognized that the Constitution vests the power to create rights of action in Congress, not the Judiciary. The Court has therefore consistently declined to extend *Bivens* to new contexts. In particular, it has repeatedly declined to extend *Carlson* to new prisoner claims. See *Goldey v. Fields*, 606 U.S. 942 (2025) (per curiam); *Ziglar v. Abbasi*, 582 U.S. 120 (2017); *Minneci v. Pollard*, 565 U.S. 118 (2012); *Correctional Services Corp. v. Malesko*, 534 U.S. 61 (2001).

B. For four reasons, this case presents a new context to which *Carlson* should not be extended. At least the first three of those reasons will apply to every other

prisoner suit seeking damages for allegedly unconstitutional mistreatment by federal prison officials.

First, prison administration is a special province of the political branches. Federal courts possess neither the authority nor the expertise to determine whether and when prisoners should be allowed to sue prison staff for damages. Those concerns were, of course, present in *Carlson* itself, but the parties did not raise them, and the Court did not discuss them. Under the Court's current *Bivens* framework, the presence of such "special factors that previous *Bivens* cases did not consider" provides a basis for precluding the judicial recognition of a damages remedy. *Abbasi*, 582 U.S. at 140.

Second, in the 46 years since *Carlson*, "Congress has actively legislated in the area of prisoner litigation but has not enacted a statutory cause of action for damages." *Goldey*, 606 U.S. at 944. For instance, 15 years after *Carlson*, Congress enacted the Prison Litigation Reform Act of 1995 (PLRA), 42 U.S.C. 1997e, which "made comprehensive changes to the way prisoner abuse claims must be brought in federal court." *Abbasi*, 582 U.S. at 148. Though Congress "had specific occasion to consider the matter of prisoner abuse and to consider the proper way to remedy those wrongs," it "[d]id not provide for a standalone damages remedy against federal jailers." *Id.* at 148-149. The PLRA and other statutes enacted since *Carlson* provide "reasons to think Congress might doubt the efficacy or necessity of a damages remedy"—which preclude the courts from creating an action for such relief. *Id.* at 137.

Third, Congress and the Executive Branch have provided multiple alternative remedies to prisoners who receive inadequate medical care. Prisoners may file grievances under the Bureau of Prisons' Administrative Remedy Program. They may seek injunctions and declara-

tory judgments requiring prison staff to provide medical care. And they may seek damages from the United States under the Federal Tort Claims Act (FTCA), 28 U.S.C. 1346(b), 2671 *et seq.* Under this Court’s recent cases, the availability of alternative remedies “alone” should foreclose a *Bivens* action. *Egbert v. Boule*, 596 U.S. 482, 493 (2022). To be sure, *Carlson* itself considered the FTCA remedy and found it inadequate, see 446 U.S. at 18-23, but more recent decisions establish that courts have no authority to second-guess the political branches’ judgments about the adequacy of alternative remedies, see *Egbert*, 596 U.S. at 498. And *Carlson* in any event did not consider the subsequent availability of administrative or prospective remedies, which, under later cases, should also independently foreclose *Bivens* claims by prisoners. See *Goldey*, 606 U.S. at 944-945; *Abbasi*, 582 U.S. at 144-145; *Malesko*, 534 U.S. at 74.

Finally, this case involves a different type of injury than did *Carlson*. *Carlson* involved the failure to treat an acute asthmatic attack that ultimately caused the prisoner’s death, while this case involves the alleged failure to treat a prisoner’s chronic pain. A rational lawmaker could choose to provide a wrongful-death-like action when deliberate indifference to a medical emergency causes a prisoner’s death—leaving the prisoner unable to pursue alternative remedies—but not to authorize damages in other cases (such as this one) where the prisoner has time to file suits for prospective relief or to lodge administrative grievances.

C. Given intervening legal developments, *Carlson* has become obsolete. Under this Court’s current *Bivens* framework, every new prisoner suit will, for the reasons discussed above, arise in a new context to which *Carlson* should not be extended. Every such suit will raise separation-of-powers issues that *Carlson* did not confront,

will arise against a different statutory backdrop than *Carlson*, and will involve different alternative remedies than were available in *Carlson*. Indulging “the fiction” that courts may still hear *Carlson* suits would “mislead litigants” while “needlessly expending scarce judicial resources.” *Cisco Systems, Inc. v. Doe*, 146 S. Ct. 1882, 1892 (2026) (brackets, citation, and ellipsis omitted).

D. Respondent’s contrary arguments lack merit. At the certiorari stage, respondent suggested (Br. in Opp. 20-21) that Congress has ratified *Bivens* and *Carlson*, but this Court has already rejected that reading of the statutory provisions he invokes. See *Hernández v. Mesa*, 589 U.S. 93, 111 n.9 (2020); *Abbasi*, 582 U.S. at 148-149. He also sought (Br. in Opp. 22-25) to reconceptualize *Carlson* as a decision rooted in federal common law rather than the Eighth Amendment, but that framing is irreconcilable with the Court’s opinion in *Carlson* and the substance of the right of action that *Carlson* recognized.

ARGUMENT

In *Carlson v. Green*, 446 U.S. 14 (1980), this Court recognized a cause of action for certain Eighth Amendment claims. Since then, however, it has consistently declined to extend that decision to new contexts. Under the Court’s current framework for applying *Carlson*, this case presents a new context to which *Carlson* should not be extended, in light of intervening legal developments and factors that went unconsidered in *Carlson*. The same result will also be inevitable in every other prisoner suit seeking damages for alleged mistreatment by federal prison officials. The Court should therefore reject the *Carlson* claim in this case and make explicit that *Carlson* has become obsolete.

A. This Court Has Repeatedly Declined To Extend *Bivens* And *Carlson* To New Contexts

In *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), this Court created a right of action for damages against federal narcotics agents who allegedly violated the Fourth Amendment by using excessive force to effectuate a warrantless arrest in the home. The Court recognized that the Fourth Amendment “does not in so many words provide for its enforcement by an award of money damages” but stated that federal courts should be “‘alert to adjust their remedies so as to grant the necessary relief.’” *Id.* at 392, 396 (citation omitted). The Court then extended *Bivens* in *Davis v. Passman*, 442 U.S. 228 (1979), where it created a right of action for a Fifth Amendment equal-protection claim by a former congressional staffer alleging sex discrimination.

In 1980, this Court extended *Bivens* for the last time in *Carlson*, where it created a right of action for certain claims that prison staff violated the Eighth Amendment through deliberate indifference to a prisoner’s serious medical needs. See 446 U.S. at 18-23. The complaint in that case alleged that prison staff, motivated in part by “racial prejudice,” had not provided the prisoner with “competent medical attention for some eight hours after he had an asthmatic attack,” during which they “administered contraindicated drugs which made his attack more severe, attempted to use a respirator known to be inoperative which further impeded his breathing, and delayed for too long a time his transfer to an outside hospital”—thereby causing the prisoner’s death. *Id.* at 16a n.1. This Court concluded that it was appropriate to infer “a right to recover damages against the official

in federal court” for that violation “despite the absence of any statute conferring such a right.” *Id.* at 18.

Since *Bivens* and *Carlson*, however, this Court has “firmly committed to the view that judicially created causes of action offend the separation of powers” and has “virtually eliminated the practice of fashioning them.” *Cisco Systems, Inc. v. Doe*, 146 S. Ct. 1882, 1892 (2026). The power to determine “who may sue to enforce federal law,” the Court has explained, belongs to “Congress, not the Judiciary.” *FS Credit Opportunities Corp. v. Saba Capital Master Fund Ltd.*, 146 S. Ct. 1546, 1551, 1552 (2026); see, e.g., *Alexander v. Sandoval*, 532 U.S. 275, 286-287 (2001).

Consistent with that understanding, this Court has repeatedly declined to extend *Bivens* and *Carlson*. In the 46 years since *Carlson*, the Court has considered 12 cases where litigants have asked it to recognize rights of action under *Bivens*, and it has rejected the proposed action each time. See *Goldey v. Fields*, 606 U.S. 942 (2025) (per curiam); *Egbert v. Boule*, 596 U.S. 482 (2022); *Hernández v. Mesa*, 589 U.S. 93 (2020); *Ziglar v. Abbasi*, 582 U.S. 120 (2017); *Minnecci v. Pollard*, 565 U.S. 118 (2012); *Wilkie v. Robbins*, 551 U.S. 537 (2007); *Correctional Services Corp. v. Malesko*, 534 U.S. 61 (2001); *FDIC v. Meyer*, 510 U.S. 471 (1994); *Schweiker v. Chilicky*, 487 U.S. 412 (1988); *United States v. Stanley*, 483 U.S. 669 (1987); *Bush v. Lucas*, 462 U.S. 367 (1983); *Chappell v. Wallace*, 462 U.S. 296 (1983).

Four of those 12 cases involved efforts to extend *Carlson*. In *Malesko*, this Court declined to extend *Carlson* to Eighth Amendment deliberate-indifference claims against private companies that operate prisons on behalf of the federal government. 534 U.S. at 68-74. In *Minnecci*, it declined to extend *Carlson* to Eighth Amendment deliberate-indifference claims against staff

members at privately operated prisons. 565 U.S. at 126-131. In *Abbasi*, it held that *Carlson* does not encompass claims challenging the policy governing the detention of aliens after the September 11 terrorist attacks, 582 U.S. at 137-146, or claims that a Bureau of Prisons warden had violated the Fifth Amendment by allowing guards to abuse detainees, *id.* at 146-149. And in *Goldney*, the Court summarily reversed a decision in which a court of appeals had extended *Carlson* to claims that prison staff had violated the Eighth Amendment by using excessive force against a prisoner. 606 U.S. at 944-945.

B. This Case Arises In A New Context To Which *Carlson* Should Not Be Extended

This Court applies a two-step test to decide whether a *Bivens* claim may proceed. See *Egbert*, 596 U.S. at 492. The Court first asks whether the case presents “a new *Bivens* context”—*i.e.*, whether it “meaningfully” differs from the three previous cases recognizing a *Bivens* remedy. *Ibid.* (brackets and citation omitted). If it does, the Court considers whether “‘special factors’” suggest that courts are “at least arguably less equipped” than Congress to weigh the costs and benefits of a damages remedy. *Ibid.* (citation omitted). “If there is even a single ‘reason to pause before applying *Bivens* in a new context,’” the *Bivens* claim may not proceed. *Ibid.* (citation omitted).

Because both of those steps are rooted in separation-of-powers principles, they can overlap. A case arises in a new context (step one) if, for example, it involves “potential special factors that previous *Bivens* cases did not consider” (step two). *Abbasi*, 582 U.S. at 140. And the two steps “often resolve to a single question: whether there is any reason to think that Congress might be bet-

ter equipped to create a damages remedy.” *Egbert*, 596 U.S. at 492.

That two-step test presents a formidable barrier to *Bivens* claims. The Court has explained that “the new-context inquiry is easily satisfied,” that “small” differences suffice to make a context new, and that “even a modest extension is still an extension.” *Abbasi*, 582 U.S. at 147, 149. And it has stated that a *Bivens* claim will fail at the second step 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 (citation omitted).

That framework precludes a *Carlson* claim here. This case meaningfully differs from *Carlson* because it (1) poses distinctive separation-of-powers concerns that *Carlson* did not consider, (2) arises against a different statutory backdrop, (3) involves different alternative remedial schemes, and (4) involves a different type of injury. Each of those points independently establishes that this case arises in a new context and that courts should hesitate before extending *Carlson* to that context. And at least the first three points will apply in every other case in which a federal prisoner seeks damages from individual prison officials for allegedly unconstitutional mistreatment.

1. Prisoner claims raise special separation-of-powers concerns that *Carlson* did not consider

When a party asks a federal court to create a right of action, “separation-of-powers principles” “should be central to the analysis.” *Abbasi*, 582 U.S. at 135. The “most important question is who should decide whether to provide for a damages remedy, Congress or the courts?” *Egbert*, 596 U.S. at 493 (citation omitted). In “most every case,” the answer will be “‘Congress.’” *Ibid.*

Those principles apply with added force when a case arises in a field where the political branches possess heightened constitutional authority. For instance, this Court has declined to extend *Bivens* to military cases because “[j]udges are not given the task of running the Army,” *Chappell*, 462 U.S. at 301 (citation omitted), and “the Constitution confers authority over the Army, Navy, and militia upon the political branches,” *Stanley*, 483 U.S. at 682. It also has declined to extend *Bivens* to claims challenging “[n]ational-security policy” because such policy “is the prerogative of the Congress and President.” *Abbasi*, 582 U.S. at 142. So too, the Court has declined to extend *Bivens* to cases involving “border security” because the political branches possess preeminent authority “in the field of foreign affairs.” *Hernández*, 589 U.S. at 108, 113; see *Egbert*, 596 U.S. at 494. And outside the *Bivens* context, the Court has explained that judicially created rights of action for violations of international law are “especially” improper because they arise “in an area” “where the Constitution expressly delegates authority to Congress.” *Cisco*, 146 S. Ct. at 1891.

Before and since *Carlson*, this Court has often recognized that “[r]unning a prison” is likewise “peculiarly within the province of the legislative and executive branches.” *Turner v. Safley*, 482 U.S. 78, 84-85 (1987); see, e.g., *Florence v. Board of Chosen Freeholders*, 566 U.S. 318, 325 (2012); *United States v. Comstock*, 560 U.S. 126, 136-137 (2010); *Procunier v. Martinez*, 416 U.S. 396, 404-405 (1974). Courts are “‘ill equipped’” to handle prison administration, and “separation of powers concerns counsel a policy of judicial restraint” in that area. *Turner*, 482 U.S. at 84-85 (citation omitted). Thus, in the context of prison operations, the answer to the “most important question” in a *Bivens* case—“who

should decide whether to provide for a damages remedy, Congress or the courts?”—is particularly clear. *Egbert*, 596 U.S. at 492 (citation omitted).

Reinforcing that point, deciding whether to create a damages remedy for prisoner claims requires making complex policy judgments. For example, prisoner suits pose a heightened risk of abuse. Prisoner suits “account for an outsized share of filings” in federal court, *Woodford v. Ngo*, 548 U.S. 81, 94 n.4 (2006), and this Court has noted that “[m]ost of these cases,” including those “claiming civil rights violations,” “have no merit.” *Jones v. Bock*, 549 U.S. 199, 203 (2007). “Prisoners have ample time on their hands and have demonstrated a proclivity for frivolous suits to harass their accusers, the guards, and others who caused or manage their captivity.” *Lewis v. Sullivan*, 279 F.3d 526, 528-529 (7th Cir. 2002). Congress possesses the authority and competence to balance the benefits of a damages remedy against the risk of abusive litigation.

Relatedly, prisoner litigation risks undermining prison discipline. “Prison life” contains “the ever-present potential for violent confrontation and conflagration,” and “[t]he interest in preserving order and authority in the prisons is self-evident.” *Jones v. North Carolina Prisoners’ Labor Union, Inc.*, 433 U.S. 119, 132 (1977). Allowing prisoners to sue prison officials threatens that interest; prison officials may be deterred from taking necessary but disagreeable actions if they fear that prisoners will retaliate with baseless litigation. At a minimum, courts cannot reliably predict whether a damages remedy would have “negative systemic consequences for prison officials and the ‘inordinately difficult undertaking’ of running a prison.” *Goldey*, 606 U.S. at 944 (citation omitted).

Though the factors discussed above were present in *Carlson* itself, the defendants in that case did not raise them, and the Court did not consider them. Instead, the defendants and the Court focused on whether Congress had foreclosed a *Bivens* action by providing prisoners with an alternative remedy under the Federal Tort Claims Act. See *Carlson*, 446 U.S. at 18-23; Pet. Br. at 15-41, *Carlson*, *supra* (No. 78-1261). As the Court explained in *Abbasi*, the Court’s previous failure to consider the distinctive separation-of-powers issues posed by prisoner claims is a special factor, 582 U.S. at 140, the presence of which establishes both that this case arises in a new context, *id.* at 139-140, and that a damages remedy under *Bivens* should not be extended to that context, *id.* at 140.

2. *Since Carlson, Congress has repeatedly legislated on prisoner rights without creating a damages remedy*

This Court has declined to apply *Bivens* in contexts where Congress has legislated but not created a damages remedy. For instance, the Court declined to extend *Bivens* to military cases in part because of “Congress’ activity in the field” of “military justice.” *Chappell*, 462 U.S. at 300, 304. The Court also declined to extend *Bivens* to federal employees’ First Amendment claims because Congress has enacted a “comprehensive scheme” of civil-service laws without creating a damages remedy for such claims. *Bush*, 462 U.S. at 385. And it declined to extend *Bivens* to Social Security beneficiaries’ due-process claims because Congress has given “frequent and intense” consideration to benefits procedures but has “[a]t no point” chosen to authorize damages. *Chilicky*, 487 U.S. at 425-426.

In three notable instances since *Carlson*, Congress has actively legislated in the field of prisoner rights but

repeatedly declined to provide for damages remedies. Around 15 years after *Carlson*, Congress enacted the Prison Litigation Reform Act, a statute that reformed the way that prisoners' suits are litigated in federal court. See *Abbasi*, 582 U.S. at 148. Though "Congress had specific occasion to consider the matter of prisoner abuse and to consider the proper way to remedy those wrongs," it did not choose to "provide for a standalone damages remedy." *Id.* at 148-149.

Nearly a decade later, Congress enacted the Prison Rape Elimination Act of 2003, 34 U.S.C. 30301 *et seq.*, a statute that sought to "increase the accountability of prison officials" and to "protect the Eighth Amendment rights of Federal, State, and local prisoners." 34 U.S.C. 30302(6) and (7). To that end, Congress provided additional funding for criminal investigations and prosecutions. See 34 U.S.C. 30304, 30305; see also 18 U.S.C. 242 (earlier statute providing for federal criminal prosecution against "[w]hoever, under color of any law, * * * willfully subjects any person * * * to the deprivation of any rights * * * protected by the Constitution"). Yet Congress again declined to provide a private damages remedy.

Then, in 2024, Congress enacted the Federal Prison Oversight Act, Pub. L. No. 118-71, 138 Stat. 1492. That statute establishes an Ombudsman responsible for receiving and investigating prisoner complaints, including complaints concerning "the health, safety, welfare, or rights of incarcerated people," their "abuse or neglect," and the "availability of health care." § 2(a), 138 Stat. 1496 (to be codified at 5 U.S.C. 413(e)(3)(A)(i)(I)-(II)). Those provisions will not take effect until Congress provides certain appropriated funds, see § 2(b), 138 Stat. 1501, but they show that Congress has continued to ad-

dress prisoner abuse through mechanisms other than damages suits against individual officers.

All three of those statutes—which post-date *Carlson* and reflect the political branches’ special interests in prison administration and prisoner litigation—establish that this case arises in a new context and counsel against extending *Carlson* to that context. See *Goldey*, 606 U.S. at 944; *Abbasi*, 582 U.S. at 148-149. They show 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. That pattern “suggest[s] that Congress does not want a damages remedy” in the context of “prisoner abuse.” *Abbasi*, 582 U.S. at 148. Where, as here, “there are sound reasons to think Congress might doubt the efficacy or necessity of a damages remedy,” “courts must refrain from creating the remedy.” *Id.* at 137.

3. The political branches have provided prisoners with alternative remedies

If Congress has created, or authorized the Executive Branch to create, an “alternative remedial structure,” “that alone” should preclude the courts from fashioning a right of action. *Egbert*, 596 U.S. at 493 (citation omitted); see *Cisco*, 146 S. Ct. at 1891. Here, rather than providing federal prisoners with a private damages remedy, the political branches have made three sets of alternative remedies available to prisoners who allege inadequate medical care.

First, federal prisoners may seek administrative remedies. In 1979—more than four years after the prisoner in *Carlson* had died but before this Court issued its decision—the Bureau of Prisons created its Administrative Remedy Program, which allows a prisoner “to seek formal review of an issue relating to any aspect of

his/her own confinement.” 28 C.F.R. 542.10(a); see 44 Fed. Reg. 62,250 (Oct. 29, 1979); Pet. Br. at 7-8, *Carlson*, *supra* (discussing the circumstances leading up to the prisoner’s death on August 14, 1975). In 1995, as part of the PLRA, Congress signaled its approval that program by requiring federal and state prisoners to exhaust administrative remedies before suing “with respect to prison conditions.” 42 U.S.C. 1997e(a). And in 2024, Congress established an Ombudsman responsible for addressing prisoner complaints. See Federal Prison Oversight Act, § 2(a), 138 Stat. 1496. This Court did not consider such administrative remedies in *Carlson*, but it has since cited the existence of the Bureau’s Administrative Remedy Program as a reason not to permit *Bivens* claims by prisoners. See *Goldey*, 606 U.S. at 944; *Malesko*, 534 U.S. at 74. More broadly, it has also explained that the availability of an administrative grievance procedure “independently foreclose[s] a *Bivens* action.” *Egbert*, 596 U.S. at 497.

Second, prisoners who raise constitutional claims may seek prospective remedies such as injunctions and declaratory judgments, see 18 U.S.C. 3626—remedies that this Court did not discuss in *Carlson*. Though the Court deemed prospective relief inadequate for Fourth Amendment violations in *Bivens*, see 403 U.S. at 410, cases since *Carlson* have cited the availability of such relief as a reason not to create a damages remedy for violations of other constitutional rights. In *Malesko*, the Court declined to recognize a damages remedy for Eighth Amendment deliberate-indifference claims against private prisons in part because prisoners could seek “injunctive relief.” 543 U.S. at 74. And in *Abbasi*, the Court cited the availability of “injunction[s]” and “other form[s] of equitable relief” as a reason not to recognize a damages remedy for a Fifth Amendment claim

concerning the alleged abuse of detainees held by the Bureau of Prisons after September 11. 582 U.S. at 148.

Third, federal prisoners may seek damages from the United States under the FTCA, which waives the government’s sovereign immunity for certain tort claims, including prisoners’ claims of medical malpractice by prison staff. See *United States v. Muniz*, 374 U.S. 150, 150 (1963). Though this Court concluded in *Carlson* that the FTCA did not preclude the recognition of a *Bivens* remedy for Eighth Amendment deliberate-indifference claims, the Court’s later cases have “rejected all of the premises on which *Carlson* was based.” Pet. App. 116a (Collins, J., dissenting). Thus:

- In *Carlson*, the Court emphasized that the FTCA lacks an “explicit congressional declaration” that prisoners “may not recover money damages” from prison staff. 446 U.S. at 19. But the Court has since explained that, even without such an “explicit” declaration, an alternative remedial scheme forecloses *Bivens* relief. *Egbert*, 596 U.S. at 501 (alteration and citation omitted).
- In *Carlson*, the Court concluded that “the *Bivens* remedy is more effective than the FTCA remedy.” 446 U.S. at 20. But the Court has since recognized that policy judgments about the adequacy of a remedy “must be left to Congress,” that courts may not “second-guess” those judgments, and that Congress’s creation of an alternative remedy precludes relief even if a court believes that it is “‘not as effective’” as a *Bivens* action. *Egbert*, 596 U.S. at 498 (citation omitted).
- In *Carlson*, the Court emphasized that the FTCA does not allow plaintiffs to sue individual wrongdoers, to seek punitive damages, or to demand jury trials.

See 446 U.S. at 20-23. But the Court has since concluded, repeatedly, that alternative remedies lacking those features (such as administrative remedies) nonetheless preclude recognition of a *Bivens* action. See *Goldey*, 606 U.S. at 944-945; *Egbert*, 596 U.S. at 497-498; *Malesko*, 534 U.S. at 74; *Chilicky*, 487 U.S. at 424-429; *Bush*, 462 U.S. at 372 n.8, 380-390.

- In *Carlson*, the Court discounted the FTCA in part because it incorporates state tort law. See 446 U.S. at 23. In later cases, however, the Court has explained that prisoners’ claims of “improper medical care” fall “within the scope of traditional state tort law,” *Minneeci*, 565 U.S. at 131; that tort law is “capable of protecting” prisoners’ Eighth Amendment rights, *id.* at 125; and that it is easier for a prisoner to prevail on “a theory of ordinary negligence” than under “the heightened ‘deliberate indifference’ standard of Eighth Amendment liability,” *Malesko*, 534 U.S. at 73 (citation omitted).

Because the alternative remedies in place today (administrative remedies, prospective remedies, and FTCA remedies) differ from those that the Court considered in *Carlson* (only FTCA remedies), this case arises in a new context. Those alternative remedies “alone” preclude courts from recognizing a *Bivens* action in that context. *Egbert*, 596 U.S. at 493 (citation omitted).

In the decision below, the court of appeals stated that alternative remedies are relevant only “at the *second* step” (special factors), not the first step (new context). Pet. App. 15a. But the *Bivens* framework’s two steps “often resolve to a single question.” *Egbert*, 596 U.S. at 492. In particular, “the context is new” if a case involves “special factors”—such as alternative remedies—“that previous *Bivens* cases did not consider.” *Abbasi*, 582

U.S. at 139-140. In *Abbasi*, for example, this Court found that a case arose in a new context in part because of the availability of “equitable relief.” *Id.* at 148. In fixating on the two steps, the court of appeals lost sight of the critical point: Where Congress “has created a remedial process that it finds sufficient,” “the courts cannot second-guess that calibration by superimposing a *Bivens* remedy.” *Egbert*, 596 U.S. at 498.

4. *This case involves a meaningfully different type of injury than Carlson*

The injury in this case meaningfully differs from the injury in *Carlson* in multiple ways. Those differences, too, establish that this case arises in a new context to which *Carlson* should not be extended.

To start, unlike respondent, who complains about the alleged mistreatment of chronic pain for seven months, the prisoner in *Carlson* died within hours as a result of his mistreatment. See 446 U.S. at 16 n.1. That fact was relevant to the availability of relief under the FTCA, which incorporates state tort law. At common law, “the right of action for an injury to the person [wa]s extinguished by the death of the party injured.” *Michigan Central Railroad Co. v. Vreeland*, 227 U.S. 59, 67 (1913). Though States have generally displaced that harsh rule by statute, it was disputed in *Carlson* whether the relevant state statute would have allowed recovery by the prisoner’s estate. See 446 U.S. at 17 n.4. And this Court expressed concern that applying state survivorship rules would frustrate “the goals of *Bivens* actions” by preventing prisoners from obtaining redress. *Id.* at 25. That concern about the “vagaries” of state survivorship laws, *id.* at 23, does not arise in cases where the prisoner remains alive.

Further, *Carlson* involved an acute, life-threatening asthmatic attack, see 446 U.S. at 16 n.1, while this case involves chronic pain caused by a fractured coccyx, see Pet. App. 13a. That too is relevant to the remedial calculus. “Because prison medical facilities are generally designed to treat occasional, acute illnesses, the long-term management of chronic conditions necessarily involves substantial non-medical considerations beyond those incident to emergency treatment.” *Watkins v. Mohan*, 144 F.4th 926, 949 (7th Cir. 2025) (Kirsch, J., concurring in the judgment in part and dissenting in part). “For example, because prisons do not traditionally house specialists or diagnostic testing equipment, chronically ill prisoners in need of these services frequently must be seen by offsite providers.” *Ibid.* “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.* When arranging such visits, moreover, prison officials must make decisions about how to allocate limited resources among prisoners with differing medical needs. At the same time, a complaint about longer-term medical care (like the seven months at issue here) is more amenable to resolution in a suit for prospective relief, or in an administrative grievance, than is a complaint about care in a medical emergency (like the one that caused death within hours in *Carlson*).

Those differences, too, establish that this case arises in a new context and that *Bivens* and *Carlson* should not be extended to that context. A factual or legal distinction forecloses a *Bivens* claim if it “might alter the policy balance that initially justified the causes of action recognized in *Bivens*, *Davis*, and *Carlson*.” *Snowden v. Henning*, 72 F.4th 237, 244 (7th Cir. 2023), cert. denied,

145 S. Ct. 137 (2024). Here, Congress could rationally decide to provide a wrongful-death-like action when prisoners die but not a damages remedy when they survive. Congress has, in fact, often distinguished between wrongful death and lesser injuries when crafting civil remedies.¹ Or Congress could decide to provide a damages remedy to prisoners who (as in *Carlson*) need urgent medical care to save their lives but not to prisoners who (as in this case) have time to file suits for prospective relief or to lodge administrative grievances. Because “there are sound reasons to think that Congress might doubt the efficacy or necessity of a damages remedy, the courts must refrain from creating it.” *Egbert*, 596 U.S. at 491 (brackets and citation omitted).

The court of appeals reasoned that the differences between this case and *Carlson* are not “meaningful” enough to give rise to a new context. Pet. App. 8a. But this Court has explained that “the new-context inquiry is easily satisfied” and that “even a modest extension” of *Bivens* “is still an extension.” *Abbasi*, 582 U.S. at 147, 149. The Court also has explained that even “close” “factual parallels” with an earlier case can be insufficient to support a *Bivens* remedy, *Egbert*, 596 U.S. at 500, and that a prisoner’s claim can arise in a new context despite “significant parallels” with *Carlson*, *Abbasi*, 582 U.S. at 147.

C. This Court Should Clarify That *Carlson* Has Become Obsolete

In two recent cases, this Court abrogated precedents that had provided a hope of relief in theory that proved

¹ See, e.g., 28 U.S.C. 1606 (deaths caused by foreign sovereign); 29 U.S.C. 666(e) (workplace deaths); 46 U.S.C. 30302 (deaths on the high seas).

to be illusory in practice. In *Edwards v. Vannoy*, 593 U.S. 255 (2021), the Court repudiated its earlier suggestion that new rules of criminal procedure could apply retroactively on collateral review if they qualify as “watershed rules.” *Teague v. Lane*, 489 U.S. 288, 311 (1989) (plurality opinion). The Court observed that, “for decades,” it had “rejected watershed status for new procedural rule after new procedural rule, amply demonstrating that the purported exception ha[d] become an empty promise.” *Edwards*, 593 U.S. at 272. The Court therefore “ma[d]e explicit” that the “watershed exception is moribund” and “must ‘be regarded as retaining no vitality.’” *Ibid.* (citation omitted).

Similarly, in *Cisco*, the Court repudiated its earlier suggestion that “the door is still ajar” to the “independent judicial recognition” of rights of action for violations of international law that would have been unknown to the First Congress when it enacted the Alien Tort Statute, 28 U.S.C. 1350. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 729 (2004). The Court observed that “subsequent legal developments” had made it “impossible” to satisfy the *Sosa* test for recognizing such rights of action, *Cisco*, 146 S. Ct. at 1891, and that the “class of cases in which courts may create [such] actions without infringing on the prerogatives of the political branches” is “[i]n truth” “a null set,” *id.* at 1892.

This Court should likewise make explicit that *Carlson* is now moribund. Subsequent developments have made it clear that there are no cases in which *Bivens* would allow a federal prisoner to seek damages from individual officers for violations of the Eighth Amendment. Every prisoner case going forward will arise in a new context because it will raise separation-of-powers problems that *Carlson* did not confront, will arise against a different statutory backdrop than *Carlson*,

and will involve a different set of alternative remedies than *Carlson*. See pp. 12-21, *supra*. And in every such case, there will be a “rational reason” “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 (citation omitted). As a result, the class of viable *Carlson* claims has become a null set.

This Court should say as much. In the last 25 years, the Court has already decided four cases that rejected prisoners’ efforts to seek damages under *Carlson*. See *Goldey*, 606 U.S. at 944-945; *Abbasi*, 582 U.S. at 137-149; *Minnecci*, 565 U.S. at 126-131; *Malesko*, 534 U.S. at 68-74. The Court’s current *Bivens* framework, properly applied, would lead to the same outcome in every other prisoner case. “Continuing to articulate a theoretical [right of action] that never actually applies in practice offers false hope to [prisoners], distorts the law, misleads judges, and wastes the resources of [litigants] and courts.” *Edwards*, 593 U.S. at 272; see *Cisco*, 146 S. Ct. at 1892.

In that context, *stare decisis* poses no obstacle to “acknowledging reality and stating the obvious.” *Edwards*, 593 U.S. at 275. Acknowledging *Carlson*’s obsolescence does not require changing existing doctrine or reaching results that contravene existing precedent. Instead, the Court need recognize only that its “*current standards*,” “if faithfully applied,” would “finish off *Carlson* entirely.” Pet. App. 116a (Collins, J., dissenting).

In any event, the usual *stare decisis* factors support recognizing that *Carlson* is moribund. Decisions since *Carlson* reveal that its holding is “egregiously wrong.” *NRSC v. FEC*, 146 S. Ct. 2404, 2424 (2026) (citation omitted). *Carlson* reasoned that courts could create “a right to recover damages” for a constitutional violation “despite the absence of any statute conferring such a

right”; that “no special factors” counsel against creating a right of action for prisoners to sue prison staff; and that courts could create a damages remedy based on their judgment that it is “more effective * * * than the FTCA remedy.” 446 U.S. at 18-19, 21. This Court has since rejected each of those rationales, recognizing that “Congress is better positioned than courts to evaluate the policy tradeoffs of creating liability,” *Cisco*, 146 S. Ct. at 1891; that allowing damages claims by prisoners “could have negative systemic consequences for prison officials and the ‘inordinately difficult undertaking’ of running a prison,” *Goldey*, 606 U.S. at 944 (citation omitted); and that the adequacy of alternative remedies “is a legislative determination,” *Egbert*, 596 U.S. at 498. In short, *Carlson* “is akin to a three-legged stool where all three legs have already been knocked out.” *NRSC*, 146 S. Ct. at 2424.

Carlson has also had harmful “jurisprudential and real-world effects.” *NRSC*, 146 S. Ct. at 2424. As a jurisprudential matter, *Carlson* is now unworkable. Given the “wholesale evisceration of *Carlson*’s reasoning” in this Court’s later cases, discerning what remains of the “largely gutted decision” has proved “challenging.” Pet. App. 115a-116a (Collins, J., dissenting). That challenge has generated “multiple deep circuit splits.” *Id.* at 91a (R. Nelson, J., dissenting). Just since 2024, one court of appeals has effectively foreclosed further *Carlson* claims²; one has stated that *Carlson* claims may proceed only when prison staff thwart a prisoner’s access to administrative remedies³; three have confined

² *Johnson v. Terry*, 119 F.4th 840, 857-861 (11th Cir. 2024), cert. denied, 146 S. Ct. 101 (2025).

³ *Muniz v. United States*, 149 F.4th 256, 264-265 (3d Cir. 2025).

Carlson closely to its facts⁴; and two have concluded that *Carlson* continues to allow prisoners to bring a range of deliberate-indifference claims.⁵ Such “unpredictability” undermines “the very ‘rule of law’ values that *stare decisis* exists to secure.” *Trump v. Slaughter*, 146 S. Ct. 2283, 2303 (2026) (citations omitted).

Adding to *Carlson*’s jurisprudential costs, retaining the precedent would produce significant real-world anomalies. This Court’s cases would provide a potential damages remedy to inmates in ordinary federal prisons but not in privately operated prisons, see *Minnecci*, 565 U.S. at 120-121; to convicts claiming violations of their Eighth Amendment rights but not to un-convicted detainees claiming violations of their Fifth Amendment rights, see *Abbasi*, 582 U.S. at 146-149; and to inmates claiming deliberate indifference to their serious medical needs but not to inmates claiming excessive force, see *Goldey*, 606 U.S. at 944-945. Retaining *Carlson* would thus disserve one of the core purposes of *stare decisis*: promoting “the evenhanded, predictable, and consistent development of legal principles.” *Johnson v. United States*, 576 U.S. 591, 606 (2015) (citation omitted).

On a practical level, retaining *Carlson* would prolong the Judiciary’s congressionally unauthorized intrusion

⁴ *Spivey v. Breckon*, 173 F.4th 174, 179-180 (4th Cir. 2026) (Congress enacted the PLRA after *Carlson* and the injuries in *Carlson* were more severe); *Waltermeyer v. Hazlewood*, 136 F.4th 361, 366-367 (1st Cir. 2025) (“The claim does not involve a wrongful death-like action and at no time did the alleged failure to adequately treat concern either a life-threatening condition or extreme pain.”); *Rowland v. Matevousian*, 121 F.4th 1237, 1243 (10th Cir. 2024) (“The prisoner [in *Carlson*] died as a result [of the mistreatment].”).

⁵ *Watkins v. Mohan*, 144 F.4th 926, 935-938 (7th Cir. 2025), petition for cert. pending, No. 25-952 (filed Feb. 10, 2026); Pet. App. 3a (9th Cir.).

into the field of prison administration, expose prison staff to harassing litigation, inhibit prison officials in the discharge of their duties, and make it more difficult for prisons to hire and retain medical staff. See p. 14, *supra*. It would also offer false hope to prisoners and waste the resources of both courts and litigants.

Finally, recognizing *Carlson*'s obsolescence would not upset reliance interests. Prisoners cannot be said to have relied on *Carlson* in "order[ing] their affairs"; they are not in prison by choice. *Kimble v. Marvel Entertainment, LLC*, 576 U.S. 446, 457 (2015). Further, viable *Carlson* claims have already become "non-existent" under a proper application of the *Bivens* framework; "no reliance interests can be affected by forthrightly acknowledging reality." *Edwards*, 593 U.S. at 272. And prisoners who receive inadequate medical care will still retain the ability to seek damages from the United States under the FTCA.

D. Respondent's Counter-Arguments Do Not Justify Continuing To Recognize *Carlson* Actions

At the certiorari stage, respondent advanced several arguments for continuing to recognize *Carlson* actions. None is sound.

Respondent suggested (Br. in Opp. 21) that Congress "ratified" *Bivens* in the Westfall Act, Pub. L. No. 100-694, 102 Stat. 4563 (28 U.S.C. 2679), which generally bars tort claims against individual federal employees for their official conduct, but which contains an exception for claims "brought for a violation of the Constitution." 28 U.S.C. 2679(b)(2)(A). That statute, however, is neutral toward *Bivens*. Instead of ratifying or abrogating *Bivens*, Congress simply "left *Bivens* where it found it." *Hernández*, 589 U.S. at 111 n.9. The statute does not affect this Court's usual framework for decid-

ing whether to allow a *Bivens* claim to proceed, see *ibid.*, and under that framework, *Carlson* claims are no longer viable.

Respondent further suggested (Br. in Opp. 22) that Congress ratified *Carlson* in the PLRA, but that, too, is wrong. The PLRA provision cited by respondent (*ibid.*) requires prisoners to exhaust administrative remedies before suing “with respect to prison conditions under [42 U.S.C. 1983] or any other Federal law.” 42 U.S.C. 1997e(a). The provision does not specifically refer to *Carlson* actions. Requiring administrative exhaustion for prisoner suits in general (and omitting any “stand-alone damages remedy against federal jailors”) does not somehow ratify *Carlson* suits in particular. See *Abbasi*, 582 U.S. at 148-149.

Respondent also contended (Br. in Opp. 22-25) that *Carlson* is best viewed as recognizing a right of action under federal common law rather than an implied right of action under the Constitution. But *Carlson* relied on the Constitution, not federal common law, when finding “a remedy available directly under the Constitution.” 446 U.S. at 16. It created a remedy for violations of the Eighth Amendment, not for common-law torts such as negligence. Its only discussion of the common law came when it addressed the rule for survivorship of such claims. *Id.* at 23-24. If *Carlson* claims *were* understood to be ordinary common-law tort claims, they would be barred by the Westfall Act, which “accords federal employees absolute immunity from common-law tort claims arising out of acts they undertake in the course of their official duties.” *Osborn v. Haley*, 549 U.S. 225, 229 (2007); see 28 U.S.C. 2679(b)(2)(A).

Respondent emphasized (Br. in Opp. 24) that federal prisoners’ claims against prison staff implicate “uniquely federal interests.” But this Court has refused to create

damages remedies for constitutional violations in other cases that similarly involve uniquely federal interests—for instance, cases brought by federal civil servants, see *Bush*, 462 U.S. at 368; federal military personnel, see *Chappell*, 462 U.S. at 304; or federal prisoners alleging that prison staff used excessive force, see *Goldey*, 606 U.S. at 944-945. In fact, because *Bivens* claims are brought against federal officials, every such claim could be said to involve the “uniquely federal interest” in the “civil liability of federal officials for actions taken in the course of their duty.” Br. in Opp. 24 (citation omitted). If that were enough to justify judicial creation of a right of action, *Bivens* actions could always proceed, contrary to the Court’s admonition that such actions are “disfavored.” *Egbert*, 596 U.S. at 491 (citation omitted).

At bottom, each of respondent’s attempted reinventions of *Carlson* fails to solve the decision’s core problem: Article I entrusts Congress, not federal courts, with the power to create rights of action, especially in the field of prison administration. Here, Congress has authorized suits for prospective relief, but not for damages. Courts may not fill that supposed gap, whether they label the action one under *Bivens*, *Carlson*, federal common law, or something else.

Nor should the Court, as respondent suggested (Br. in Opp. 25), decline to repudiate *Carlson* on the ground that Congress retains the ability to eliminate *Carlson* claims by statute. That would be backwards. Federal courts should refrain from providing damages remedies until Congress authorizes them to do so, not provide such remedies until Congress tells them to stop. And when the Judiciary usurps authority that Article I grants to Congress, the Judiciary has an independent responsibility to correct the encroachment. In *Cisco*, the Court repudiated the practice of recognizing rights of action for

violations of international law, see 146 S. Ct. at 1892, even though Congress could have eliminated that practice by statute, see *id.* at 1905 (Sotomayor, J., dissenting). The Court should follow the same approach for *Carlson* actions here.

Finally, petitioner invites (Br. 40-48) this Court to go further by overruling *Bivens*. The government maintains the position it advanced when expressing its support for a grant of certiorari in this case. See Pet. at 25 n.2, *Mohan v. Watkins* (No. 25-952) (filed Feb. 10, 2026). The Court should clarify that *Carlson* is now moribund, but (as in *Egbert* and *Goldey*) the Court “need not reconsider *Bivens* itself” in order to decide the question presented. *Egbert*, 596 U.S. at 502; see *Goldey*, 606 U.S. at 945 (summarily reversing the court of appeals’ recognition of a *Carlson* action without considering the petitioners’ express contention that the Court should reconsider *Bivens*). To the extent the Court wishes to consider whether to overrule *Bivens* altogether, it should do so in the context of a Fourth Amendment case that more closely resembles *Bivens* itself.

CONCLUSION

This Court should reverse the judgment of the court of appeals.

Respectfully submitted.

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