

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 RESPONDENT

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QUESTION PRESENTED

Whether the Ninth Circuit erred in allowing respondent's claim to go forward under *Carlson v. Green*, 446 U.S. 14 (1980).

PARTIES TO THE PROCEEDING

Petitioner (defendant-appellee below) is Francis Nielsen.

Respondent (plaintiff-appellant below) is Kekai Watanabe.

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BRIEF FOR THE RESPONDENT

INTRODUCTION

For *Bivens*, this Court has been clear: This far and no further. The Court has consistently refused to extend *Bivens* to any new context. But it also has repeatedly declined calls to overturn the doctrine entirely, choosing instead to preserve it in the three discrete contexts in which it originally arose. Relevant here, since *Carlson v. Green* was decided in 1980, federal prisoners in federally operated prisons have been able to pursue damages claims against individual federal officers for deliberate indifference to a serious medical need in violation of the Eighth Amendment.

Respondent Kekai Watanabe's case arises in this prototypical *Carlson* context. While incarcerated in federal prison, Watanabe suffered a serious injury: a broken

bone that caused months of excruciating pain. Petitioner Francis Nielsen was deliberately indifferent to Watanabe's injury, in violation of his Eighth Amendment rights. Watanabe asserts the same kind of violation of the same constitutional right by the same type of defendant in the same institutional setting pursuant to the same substantive standards as the plaintiff in *Carlson*. This is precisely the kind of claim this Court has long understood *Carlson* to encompass.

It is also the kind of claim Congress has twice acted to preserve and define. In 1988, Congress passed the Westfall Act to eliminate the traditional state common-law remedies that prisoners historically could have pursued against federal officers. But the Act expressly preserved federal constitutional claims like those in *Carlson*. And in 1996, Congress passed the Prison Litigation Reform Act (PLRA), responding in part to this Court's decision in *McCarthy v. Madigan* rejecting an exhaustion requirement for *Carlson* claims. Under the PLRA, prisoners must exhaust administrative remedies before pursuing a *Carlson* claim and may not recover emotional or mental damages unless they suffer a physical injury. Congress has therefore weighed the competing policy interests surrounding *Carlson* and determined that the claims should survive, subject to procedural and substantive limitations.

Nielsen and the United States incorrectly assert that Watanabe's claim arises in a new context. But each of their proposed distinctions either is not a difference at all, is not meaningfully different from the factors analyzed in *Carlson*, or would require contravening Congress's own policy judgments made in reliance on *Carlson*. By their own admission, their position would not

just limit *Carlson* to its context but instead render *Carlson* claims a “null set.” U.S. Br. 25. Such a result would conflict with this Court’s precedent and undermine Congress’s judgment in the Westfall Act and the PLRA as to the viability, scope, and substance of *Carlson* claims. The Court should decline that invitation.

Nielsen argues that Watanabe’s claim is new because he did not die. But the survivorship claim in *Carlson* necessarily depended on the premise that the decedent could have asserted a claim had he survived. And in response to *Carlson*, Congress has not drawn the line at death—the PLRA requires administrative exhaustion for *Carlson* claims (something only a living plaintiff can do) and makes physical injury, not death, the key metric for obtaining damages. Requiring death for a *Carlson* claim also overlooks that the Eighth Amendment is meant to reduce *suffering*, and it would exempt officers from damages liability even if they deliberately engage in heinous conduct that causes extreme pain and injury just short of death.

Nielsen additionally argues that other regulations or statutes—most prominently, the Administrative Remedy Program (ARP) and the PLRA—render Watanabe’s claim new. The ARP, though, is not even new: It was established in 1974, years before *Carlson*. And the ARP introduces no new special factors not already addressed in *Carlson* by the Court’s discussion of the Federal Tort Claims Act (FTCA). The PLRA, for its part, *confirms* that Congress views administrative remedies like the ARP as a prerequisite, not a substitute, for a *Carlson* claim. And if these factors are sufficient to render the context here “new,” they would apply equally to and

foreclose all possible *Carlson* claims, dramatically undercutting Congress's policy choices in the Westfall Act and the PLRA.

Ultimately, Nielsen asks the Court to overrule *Bivens*. But this is a *Carlson* case, and through the Westfall Act and the PLRA, Congress has not just passively accepted *Carlson*—it has repeatedly legislated in reliance on and in response to *Carlson*. This Court has treated comparable congressional action as ratifying other implied private rights of action. The Court should do the same here. Having induced Congress's action, the Court should not eliminate the premise for that legislation nearly 50 years later.

The ordinary *stare decisis* factors also strongly counsel in favor of retaining *Carlson*. Though *Carlson* would likely be decided differently today, it was not egregiously wrong. The case followed a long history of damages claims against federal officers and jailers specifically, arising out of the fact that prisoners are wholly dependent on their jailers for their most basic needs. Congress has relied on *Carlson* and its progeny to eliminate traditional state common-law remedies and to adjust the procedures for *Carlson* claims. And *Carlson* is workable and has worked for decades: It is supported by a robust body of substantive case law and is limited by qualified immunity. By contrast, overruling *Carlson* would create a novel situation, never contemplated by Congress, in which federal prisoners who are subjected to needless suffering in violation of the Eighth Amendment have no recourse against the responsible officers.

Separation of powers means that *Carlson* should not be extended to new contexts. But those same principles favor deference to Congress's judgment in the Westfall

Act and the PLRA about the viability and scope of *Carlson* claims. Redefining *Carlson* to comprise a “null set”—or overruling *Carlson* outright—would subordinate Congress’s policy determinations and undermine the premise upon which Congress has legislated. The decision should be affirmed.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Relevant statutory provisions, as well as a Bureau of Prisons (BOP) administrative policy, are reproduced in the appendix to this brief. App., *infra*, 1a-13a.

STATEMENT

A. Legal Background

1. *Carlson* and constitutional claims for damages

At the Founding, “the traditional way in which civil litigation addressed abusive conduct” by federal officials “was by subjecting them to liability for common-law torts.” *Hernandez v. Mesa*, 589 U.S. 93, 110 (2020); see also Pet. Br. 4. Although federal officers were generally immune from such tort suits, that immunity dissolved if the challenged conduct violated the Constitution. Pet. Br. 4-5; *Butz v. Economou*, 438 U.S. 478, 489-91 (1978).

Beginning with *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), this Court recognized a federal, constitutional analog for those traditional common-law claims in three contexts. In *Bivens*, the Court permitted a plaintiff to seek damages from federal narcotics agents for an unreasonable search in violation of the Fourth Amendment. *Id.* at 397. In *Davis v. Passman*, the Court permitted a congressional staffer to seek damages for sex

discrimination in violation of the Fifth Amendment. 442 U.S. 228, 248-49 (1979).

The following year, in *Carlson v. Green*, the Court recognized a damages remedy for a federal prisoner alleging that prison officials were deliberately indifferent to his serious medical needs in violation of the Eighth Amendment. 446 U.S. 14, 18-23 (1980). *Carlson* concerned allegations that a federal prison nurse and other officials failed to provide medical care to inmate Joseph Jones for his asthma. *Id.* at 16 n.1; *Green v. Carlson*, 581 F.2d 669, 670-71 (7th Cir. 1978). The complaint alleged that this neglect caused Jones's death, and his mother, as administratrix of his estate, sued. *Carlson*, 446 U.S. at 16 & n.1.

The Court held that a damages remedy was available for the alleged violation of Jones's Eighth Amendment rights based on federal prison officials' "deliberate[] indifferen[ce] to [his] serious medical needs." *Id.* at 16 n.1, 18-23. The Court found no "special factors" counseling hesitation, explaining that qualified immunity "provides adequate protection" against any inhibition of the prison officials' "efforts to perform their official duties." *Id.* at 19. The Court further explained that the FTCA, 28 U.S.C. 1346(b) and 2671-2680, did not displace any implied constitutional claim. The Court found "no explicit congressional declaration" that persons injured by federal officers' violations of the Eighth Amendment "may not recover money damages from the agents but must be remitted to another remedy, equally effective in the view of Congress," and further found that the FTCA is an inadequate substitute for a direct damages claim against the individual officer. *Carlson*, 446 U.S. at 19-23.

After recognizing a damages action, the Court separately held that the “action survived Jones’ death.” *Id.* at 23. Because *Bivens* actions are creatures of federal law, the Court adopted a uniform federal rule allowing an action to survive when the defendant’s conduct causes the claimant’s death and state law would otherwise abate the claim. *Id.* at 23-25.

Since *Carlson*, this Court has “consistently refused to extend *Bivens* liability to any new context.” *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 68 (2001). At the same time, though, it has continued to identify *Bivens*, *Davis*, and *Carlson* as “settled law” within their recognized spheres, see *Ziglar v. Abbasi*, 582 U.S. 120, 134 (2017); see, e.g., *Goldey v. Fields*, 606 U.S. 942, 942 (2025) (per curiam) (referring to three “recognized ... contexts” for “implied *Bivens* causes of action”); *Egbert v. Boule*, 596 U.S. 482, 491 (2022) (Court has declined to “dispense with *Bivens*”). In *Abbasi*, the Court emphasized that its modern hesitation against extension of *Bivens* is “not intended to cast doubt on the continued force, or even the necessity, of *Bivens* in the ... context in which it arose.” 582 U.S. at 134.

Thus, “rather than dispense with *Bivens* altogether,” *Egbert*, 596 U.S. at 491, the Court now applies a “two-step test” to determine whether a plaintiff states a claim, *Goldey*, 606 U.S. at 944. At step one, the Court asks whether the claim is different in a “meaningful way” from *Bivens*, *Davis*, or *Carlson* and therefore presents “a new *Bivens* context.” *Abbasi*, 582 U.S. at 139. The non-exhaustive considerations at step one include the officer’s rank, the constitutional right at issue, the generality or specificity of the challenged action, the extent of judicial guidance, the legal mandate under which

the officer acted, the risk of disruptive intrusion into another branch, and potential “special factors” not considered in prior *Bivens* cases. *Id.* at 139-40.

If (and only if) the context is new, the Court proceeds to the second step: whether 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 (quoting *Abbasi*, 582 U.S. at 136). The answer at step two, this Court has clarified, will almost always be that Congress is better equipped to determine whether a plaintiff has a private right of action. See *id.* at 491-92.

2. Legislative developments since *Carlson*

In 1988, Congress enacted the Federal Employees Liability Reform and Tort Compensation Act of 1988 (Westfall Act), Pub. L. No. 100-694, 102 Stat. 4563. The Act generally makes the FTCA remedy “exclusive” for common-law tort claims arising within the scope of federal employment. 28 U.S.C. 2679(b)(1) and (d)(1). But that preemption “does not extend or apply” to a civil action against a federal employee “brought for a violation of the Constitution.” 28 U.S.C. 2679(b)(2)(A). The Court has since described this provision as “[t]he Westfall Act’s explicit exception for *Bivens* claims.” *Hui v. Castaneda*, 559 U.S. 799, 807 (2010).

Then, in 1996, Congress passed the PLRA, Pub. L. No. 104-134, 110 Stat. 1321-66. Responding to this Court’s decision in *McCarthy v. Madigan* holding that *Carlson* plaintiffs need not exhaust administrative remedies, 503 U.S. 140, 156 (1992), the PLRA provides that “[n]o action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law,” until “such administrative remedies as are

available are exhausted.” 42 U.S.C. 1997e(a). The Court has confirmed this provision applies to *Bivens* actions. See *Porter v. Nussle*, 534 U.S. 516, 524 (2002). The PLRA also provides that “[n]o Federal civil action may be brought” by a prisoner “for mental or emotional injury suffered while in custody without a prior showing of physical injury.” 42 U.S.C. 1997e(e).

B. Factual Background¹

On July 12, 2021, while incarcerated at Federal Detention Center (FDC) Honolulu, respondent Kekai Watanabe was “brutally assaulted” by a group of inmates using an improvised weapon known as a “lock in a sock.” Pet. App. 2a-4a, 21a, 25a, 42a, 57a (quotation marks omitted). Federal prison officials documented his “known and visible injuries,” and Watanabe was sent to a solitary confinement unit. *Id.* at 4a. He remained there for more than two months. *Ibid.*

On the evening of the attack, Watanabe asked to see medical staff and reported “severe pain and headaches” to two correctional officers. *Id.* at 4a, 25a, 42a. Several days later, Watanabe was seen by petitioner Francis Nielsen, a staff nurse at FDC Honolulu. *Id.* at 4a. Watanabe informed Nielsen that he was “experiencing severe back pain,” rating that pain as a “10” on a ten-point scale. *Ibid.* When Watanabe requested treatment at a hospital, Nielsen refused, telling him, “[y]ou are not going to” the hospital and to “stop being a cry baby.” *Ibid.*

¹ Because this case arises on a motion to dismiss a *pro se* complaint, the facts alleged in the complaint are assumed to be true and construed liberally in Watanabe’s favor. See *Erickson v. Pardus*, 551 U.S. 89, 94 (2007) (per curiam).

Watanabe repeatedly requested medical attention and filed grievances through administrative channels. *Id.* at 4a, 26a, 43a. During his more than two months in solitary confinement and beyond, Watanabe was not taken to a hospital or examined by a specialist; he received only intermittent and short-term treatment for pain, often over-the-counter medication. *Id.* at 2a, 4a, 26a, 43a.

In February 2022, roughly seven months after the injury, an x-ray revealed that Watanabe had a fractured coccyx and that bone chips had migrated into the surrounding soft tissue. *Id.* at 4a. Although prison officials agreed to allow Watanabe to receive treatment from a specialist, that never happened. *Id.* at 4a & n.3. Watanabe was released from federal custody in 2024. He remains in tremendous pain today.

C. Procedural History

Watanabe commenced this suit *pro se* in the United States District Court for the District of Hawaii on March 31, 2022, seeking monetary damages and injunctive relief against Nielsen and other officials for violation of his Eighth Amendment rights. Pet. App. 5a, 42a-43a. The district court granted Nielsen's motion to dismiss, holding that Watanabe lacked a cause of action under *Carlson* because his claim purportedly arose in a new context. *Id.* at 24a-39a.

The Ninth Circuit reversed and remanded. *Id.* at 7a, 17a. The panel held at step one that the claim does not present a new context because it does not meaningfully differ from *Carlson*. *Id.* at 8a-16a. Applying the “non-exhaustive” considerations identified in *Abbasi*, the panel found Watanabe's claim mirrors the claim in *Carlson* in every material respect. *Id.* at 8a-10a (citation omitted). The panel rejected the district court's finding that the

“nature and severity” of Watanabe’s claim meaningfully differed from *Carlson*. *Id.* at 10a-14a. Noting that Watanabe alleged a failure to respond to a “serious medical need” for seven months, resulting in “extreme pain,” the panel held that “[a] plaintiff need not suffer death or a life-threatening injury” to fall within *Carlson*. *Id.* at 13a-14a. The panel also held that the ARP “does not render this case a new context.” *Id.* at 14a-15a.

The Ninth Circuit denied panel rehearing and rehearing en banc. *Id.* at 77a.

SUMMARY OF ARGUMENT

I. Watanabe’s claim arises in the same context as *Carlson*: It is a damages action against a federal prison officer who was deliberately indifferent to a federal prisoner’s serious medical needs in violation of the Eighth Amendment. Watanabe suffered a broken bone, reported his extreme (ten out of ten) pain to a federal prison officer (Nielsen), was deliberately denied medical care for his condition for months, and endured needless suffering as a result. The claim in *Carlson* concerned the same kind of violation of the same constitutional right by the same kind of defendant in the same kind of federal institution under the same legal framework. Differences in the precise medical condition—inherent in any case—do not create a new context for application of *Carlson*. They are case-specific, factual variations to which that settled rule applies.

Nielsen and the United States resist this conclusion by raising a series of “new context” arguments. But every factor they identify was present in *Carlson*, is not “meaningful[ly]” different from the facts at issue in *Carlson*, or has been considered and weighed by Congress. Indeed, Nielsen and the government largely overlook that Congress has actively legislated to preserve

and define *Carlson* claims, through the Westfall Act and the PLRA. Nielsen’s arguments, if accepted, would subvert Congress’s policy choices and thus undermine, rather than advance, the separation of powers.

Nielsen argues that this case is different because Watanabe survived while the victim in *Carlson* did not. But the Court recognized a survivorship claim in *Carlson* only after determining that the decedent would have had a claim had he survived. And in response to *McCarthy*, Congress determined in the PLRA that *Carlson* plaintiffs must first exhaust administrative remedies (an impossibility for deceased prisoners) and that only physical injury, not death, is required for a prisoner to recover most damages. Nielsen likewise asserts that it is not “damages or nothing” for Watanabe, but that is incorrect—damages are the only remedy Watanabe has for his past pain and suffering.

Nielsen next offers several statutes and regulations, including the ARP, that he says render the context new. But the ARP is not new—it was in place years before *Carlson*. And neither the ARP nor any of the statutes Nielsen cites alters *Carlson*’s analysis of alternative remedies. Moreover, Congress in the PLRA specifically considered the interplay between *Carlson* and the ARP, determining that the ARP should be a prerequisite to a *Carlson* claim, not a complete bar.

II. What Nielsen and the United States really seek is the end of *Carlson*, reducing those claims to a “null set.” But they fail to justify that request under *stare decisis*.

Congress could have overruled *Carlson* at any time—and it in fact has abrogated *Davis* and has limited *Carlson*. But Congress has elected not to overrule *Carlson*. To the contrary, through legislation that “touch[es] upon the implied right of action”—the Westfall Act and

the PLRA—Congress has “ratified the implied right of action after the Court moved away from a broad willingness to imply private rights of action.” *Stoneridge Inv. Partners, LLC v. Sci.-Atlanta, Inc.*, 552 U.S. 148, 164 (2008). It would therefore upset Congress’s judgment to subsequently overrule the precedent that provides the foundation for that legislation.

The traditional *stare decisis* framework confirms as much. *Carlson* was not egregiously wrong. Claims against jailers for breach of their duty to provide for the necessities of life have a long common-law tradition. This Court has also long recognized that federal common law still exists within certain, discrete federal enclaves. The damages liability of a federal officer in a federally operated facility for violating duties arising out of a federal conviction at least arguably fits within such an enclave. The reliance interests here also are significant, because overruling *Carlson* would alter the premise for Congress’s subsequent actions. Finally, *Carlson* has not proven unworkable, and overruling it would eliminate a longstanding remedy for and deterrent against the deliberate imposition of unnecessary suffering on prisoners wholly dependent on federal officers.

This Court should affirm.

ARGUMENT

I. Watanabe’s Claim Arises In The Same Context As *Carlson*

Even as this Court has “consistently refused to extend *Bivens* liability to any new context,” *Malesko*, 534 U.S. at 68, it has reaffirmed that *Bivens* and *Carlson* remain settled law within their respective contexts, *Abasi*, 582 U.S. at 134; *Egbert*, 596 U.S. at 490-92; *Goldey*,

606 U.S. at 944-45. Watanabe’s claim arises in that context.

A. Watanabe’s Claim Tracks *Carlson* In Every Material Respect

This Court in *Abbasi* articulated “[t]he proper test for determining whether a case presents a new *Bivens* context.” 582 U.S. at 139. “If the case is different in a meaningful way from previous *Bivens* cases decided by this Court, then the context is new.” *Ibid.* The Court has never exhaustively identified the factors that may give rise to a new context, but it identified several potentially relevant differences in *Abbasi*, including “the constitutional right at issue” and “the extent of judicial guidance as to how an officer should respond.” *Id.* at 140.

With respect to *Carlson* specifically, this Court has found a difference “meaningful” where a claim involved different rights, different defendants, or new political ramifications. For example, a *Carlson* claim does not lie when it would entail “an inquiry into sensitive issues of national security.” *Id.* at 142, 147-49. Nor can a claim be brought against a privately operated prison or its employees. *Malesko*, 534 U.S. at 71-72; *Minnecci v. Pollard*, 565 U.S. 118, 120 (2012). And entirely different types of Eighth Amendment claims, such as ones based on excessive force, also fall outside *Carlson*’s medical-treatment context. See *Goldey*, 606 U.S. at 943-44.

Watanabe’s claim arises in the same context as *Carlson*. Watanabe was a federal prisoner in a federally operated prison, experienced a serious medical injury (fractured bone with fragments that ultimately migrated into his tissue), was subjected to extreme pain because of a nurse-level officer’s deliberate indifference, and seeks damages for that violation of his Eighth

Amendment rights. The case thus involves the same officer rank; the same constitutional right; the same specificity of the official action; the same extent of judicial guidance; and the same (or less) risk of disruptive intrusion. *Abbasi*, 582 U.S. at 139-40. There are no national security issues, cf. *Egbert*, 596 U.S. at 494-96; *Hernandez*, 589 U.S. at 107-09; *Abbasi*, 582 U.S. at 142-43, and the defendant is a federal officer, not a privately-run prison or employee thereof, cf. *Minnecci*, 565 U.S. at 120; *Malesko*, 534 U.S. at 63.

Watanabe's claim also comports with how this Court has repeatedly described *Carlson*'s scope. In *Carlson*, the Court described the claim as involving federal prison officials who were "deliberately indifferent to [a prisoner's] serious medical needs." 446 U.S. at 16 n.1. In *Abbasi*, the Court likewise characterized *Carlson* as "allow[ing] a *Bivens* claim for prisoner mistreatment—specifically, for failure to provide medical care." 582 U.S. at 147. In *Egbert*, the Court described *Carlson* as recognizing a cause of action "for a federal prisoner's inadequate-care claim under the Eighth Amendment." 596 U.S. at 490-91. In *Minnecci*, the Court described *Carlson* as permitting recovery from "personnel employed by the government" for Eighth Amendment violations involving inadequate medical care. 565 U.S. at 126; see also *Malesko*, 534 U.S. at 72 (when "a federal prisoner in a BOP facility alleges a constitutional deprivation, he may bring a *Bivens* claim against the offending individual officer"). And in *McCarthy*, the Court described the claim as asserting that federal prison officials "had violated [a prisoner's] constitutional rights under the Eighth Amendment by their deliberate indifference to his needs and medical condition." 503 U.S. at 142. This case arises in that same context.

This Court’s past description of *Carlson*’s scope is especially material because Congress has twice legislated in response to *Carlson*. In the Westfall Act, Congress preempted essentially *all* state tort suits for money damages against federal officers for conduct undertaken in their official capacity and made FTCA claims against the United States the exclusive damages remedies for such torts. See 28 U.S.C. 2679(b). But Congress was careful to carve out actions “brought for a violation of the Constitution of the United States.” 28 U.S.C. 2679(b)(2)(A). This Court has understood that provision as “[t]he Westfall Act’s explicit exception for *Bivens* claims.” *Hui*, 559 U.S. at 807.

Congress further built around *Carlson* and its progeny specifically, through the PLRA. In *McCarthy*, the Court held that a federal prisoner pursuing a *Carlson* claim for deliberate indifference to a serious medical condition need not exhaust administrative remedies (*i.e.*, the ARP) before filing a claim in federal court. 503 U.S. at 156. After concluding that no existing exhaustion statute applied, the Court found no “special factors” that would require exhaustion of the ARP before pursuing a *Carlson* claim. *Id.* at 151-52.

Congress thereafter enacted the PLRA, which abrogated *McCarthy* and now requires all prisoners (state or federal) to exhaust “such administrative remedies as are available” before any action may be brought “under section 1983 ... or any other Federal law.” 42 U.S.C. 1997e(a). As this Court has recognized, that is properly understood as a response to *McCarthy*. See *Booth v. Churner*, 532 U.S. 731, 739-41 (2001) (“[T]he fair inference to be drawn is that Congress meant to preclude the *McCarthy* result.”); *Nussle*, 534 U.S. at 527-28. In the PLRA, Congress also limited the availability of mental

or emotional damages to those circumstances in which a prisoner also suffers physical injury. 42 U.S.C. 1997e(e).

The Westfall Act and the PLRA together represent Congress’s measured judgment about the existence and boundaries of *Carlson* claims. Nielsen urges that Congress is best positioned to “balanc[e]” the costs and benefits of a damages action. See Pet. Br. 22, 31, 41. The United States echoes that “Congress possesses the authority and competence to balance the benefits of a damages remedy against the risk of abusive litigation.” U.S. Br. 14. But Congress *has* exercised that authority and indicated its view that *Carlson* claims remain available within their existing context, subject to the procedural and substantive limitations defined in the PLRA.

Nielsen cites this Court’s observation in *Hernandez* that the Westfall Act merely “left *Bivens* where it found it.” 589 U.S. at 111 n.9; Pet. Br. 46-47. Exactly so. And Congress did not, in 1988, find *Bivens* (and *Carlson*) as a “null set.” U.S. Br. 25. Rather, when Congress passed the Westfall Act, this Court had repeatedly described *Carlson* as allowing a claim “under the Eighth Amendment’s proscription against cruel and unusual punishment.” *United States v. Stanley*, 483 U.S. 669, 678 (1987); *Schweiker v. Chilicky*, 487 U.S. 412, 421 (1988) (action permitted “under ... the Cruel and Unusual Punishments Clause”). For purposes of the new context analysis, the passage of the Westfall Act confirms Congress’s view that *Carlson* claims should continue to exist in their original context. This case arises in that context.

B. There Is No New Context

In response, Nielsen and the government point to a combination of factors that (1) existed in *Carlson*, (2) are not “meaningful[ly]” different from those analyzed in

Carlson, and/or (3) have since been considered and legislated on by Congress.

1. Differences in the severity, timing, and outcome of a medical episode do not give rise to a new context

Purported differences in the “nature, severity, and immediacy” between this case and *Carlson* do not give rise to a new context. See Pet. Br. 24.

a. Nielsen does not dispute that Watanabe has alleged a serious medical injury but argues this case presents a new context because Watanabe, unlike the prisoner in *Carlson*, survived the violation of his Eighth Amendment rights. See Pet. Br. 27-29. *Carlson* forecloses that argument, as do the Eighth Amendment and Congress’s policy judgments in the PLRA.

Carlson addressed two distinct, but related, issues. First, the Court determined that a federal prisoner whose Eighth Amendment rights are violated through deliberate indifference to a serious medical need may assert a damages claim for relief against the responsible officer. *Carlson*, 446 U.S. at 16-23. Second, the Court determined that the decedent’s estate could assert that claim under a federal common-law rule of survivorship. *Id.* at 23-25.

The Court’s conclusion that the estate could assert a survivorship claim necessarily depended on the first holding that the decedent had a cause of action before his death. That is because a survivorship claim is “wholly derivative” of the decedent’s own claim—if the victim would not have had a claim had he survived, then the estate has no survivorship claim. Restatement (Third) of Torts § 71 (A.L.I., Tentative Draft No. 3, 2024); see also *Mich. Cent. R.R. Co. v. Vreeland*, 227 U.S. 59, 67-68 (1913) (survival statutes preserve “the

right of action which the injured person might have prosecuted if he had survived”).

Carlson therefore forecloses distinguishing claims based on death or survival. “[I]t is not only the result but also those portions of the opinion necessary to that result by which we are bound.” *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 67 (1996). And “necessary to [the] result” in *Carlson* was the conclusion that the decedent, had he survived, would have had a cause of action. Indeed, the Court stated clearly that “the question whether respondent’s action *survived Jones’ death* is a question of federal law.” *Carlson*, 446 U.S. at 18 (emphasis added).

Nielsen’s proposed rule also is inconsistent with how this Court has since interpreted *Carlson*. The Court held in *Davis* that “[w]hether petitioner has asserted a cause of action ... depends *not on the quality or extent of her injury*, but on whether the class of litigants of which petitioner is a member may use the courts to enforce the right at issue.” *Davis*, 442 U.S. at 239 n.18 (emphasis added). In *Abbasi*, the Court observed that the plaintiffs’ injuries there—which did not result in death—were “just as compelling as those at issue in *Carlson*.” 582 U.S. at 147. And the Court has described *Carlson* as giving the *prisoner*—not his estate—a cause of action for damages. See *Malesko*, 534 U.S. at 72 (“If a federal prisoner in a BOP facility alleges a constitutional deprivation, he may bring a *Bivens* claim against the offending individual officer.”). Nielsen’s contention that “death is different” conflicts with that precedent.

Congress has affirmed this understanding of *Carlson*. In the PLRA, Congress responded to *McCarthy* by requiring exhaustion of administrative remedies like

the ARP before pursuing a *Carlson* claim. Congress necessarily contemplated that living prisoners like McCarthy would be pursuing those claims: The PLRA applies only to actions brought *by* a prisoner, 42 U.S.C. 1997e(a), and only living prisoners or ex-prisoners can use the ARP. Congress also defined the types of injuries for which a prisoner may recover damages—prisoners may not recover damages for an emotional or mental injury absent an underlying physical injury. 42 U.S.C. 1997e(e). It could have instead drawn the line between surviving and deceased plaintiffs—but it did not, even though it was responding to a *Carlson* case in which the plaintiff was alive.

Nielsen and the United States cite various statutes in which Congress has provided for remedies when death results. See Pet. Br. 27-28; U.S. Br. 23 & n.1. But most of those statutes only *enhance* the remedy available if death ensues—they do not make the existence of a remedy dependent on death. See, *e.g.*, 5 U.S.C. 8102 and 8102a; 33 U.S.C. 908 and 909. Nielsen and the United States identify no statute in which there is a substantive violation but no damages unless death occurs. Cf. 46 U.S.C. 30302 (Death on the High Seas Act imposing both liability and damages only for death). In any event, if Congress wanted to choose death as the dividing line for *Carlson* claims, it could have done so in the PLRA—it did not.

Finally, Nielsen’s distinction is fundamentally backward as a matter of Eighth Amendment law. The Eighth Amendment does not protect against death itself—it protects against “tortures and barbarous punishments” that intensify punishment “with a (cruel) superaddition of terror, pain, or disgrace.” *Bucklew v.*

Precythe, 587 U.S. 119, 131, 133 (2019) (alteration, citations, and quotation marks omitted). It is the *suffering*, not death itself, that violates the Eighth Amendment. Correspondingly, damages in a survivorship claim are available only for the suffering incurred *up to the point* of death. See 1 Jacob A. Stein, *Stein on Personal Injury Damages* § 3:53 (3d ed. 2026). That accords with the traditional rule that “by the common law no civil action lies for an injury which results in death.” *Mobile Life Ins. Co. v. Brame*, 95 U.S. 754, 756 (1877). If anything, Nielsen’s rule inverts the Eighth Amendment (and the common law) by imposing liability on officers who (through their deliberate indifference) cause a painful but quick death, while absolving those who deliberately *prolong* suffering.

b. Nielsen also argues that Watanabe’s case arises in a new context because it is not “damages or nothing” for him and he did not suffer an “acute and fatal medical emergency.” Pet. Br. 25-27. Those arguments fail on both the law and the facts.

Only damages can compensate for past pain and suffering—the crux of a *Carlson* claim. See *Carlson*, 446 U.S. at 20-21. “The sole function of an ... injunction is to forestall future violations”; that remedy is “unrelated to ... reparations” for the *past* pain and suffering caused by the violation of Eighth Amendment rights. See *United States v. Or. State Med. Soc’y*, 343 U.S. 326, 333 (1952). In *Abbasi*, the Court distinguished between cases that involved “individual instances of discrimination or law enforcement overreach, which due to their very nature are difficult to address except by way of damages actions after the fact,” and cases challenging “large-scale policy decisions” that affect “hundreds of

prisoners” and are more effectively addressed by injunctive relief. 582 U.S. at 144. Neither in *Carlson* nor any other decision has the Court indicated that a *Carlson* remedy is available only if the plaintiff could not also or alternatively seek injunctive relief.

Congress endorsed this view in the PLRA. There, Congress set strict limits on the type and scope of injunctive relief courts could afford prisoners. 18 U.S.C. 3626(a)(1)-(3). And it separately limited the circumstances in which a prisoner may recover for emotional or mental injury. 42 U.S.C. 1997e(e). But nowhere did it suggest that the availability of injunctive relief acts as a bar against damages—the PLRA contemplates *both* forms of relief. And the PLRA did not alter the traditional rule that injunctive relief is the *exception*, available only where there is no adequate remedy at law. See *eBay Inc. v. MercExchange, LLC*, 547 U.S. 388, 391 (2006). So long as the injury is not purely mental or emotional, a prisoner may recover damages.

Nielsen’s “damages or nothing” argument also would render the PLRA’s exhaustion requirement largely meaningless in the precise context in which it was intended to apply. The PLRA requires exhaustion of administrative remedies before a federal prisoner may pursue a *Carlson* claim, which can take months (or longer). But in fleeting emergencies, administrative remedies are not practically available and need not be exhausted. Cf. *Ross v. Blake*, 578 U.S. 632, 643-44, 648 (2016). Thus, under Nielsen’s rule, the only viable *Carlson* claims are those that do not require exhaustion. That would make Congress’s choice to add an administrative exhaustion requirement for *Carlson* claims essentially meaningless and render Congress’s response

to *McCarthy* largely moot. Indeed, the plaintiff in *McCarthy* himself would have no claim.

Nielsen’s related argument distinguishing claims based on whether they are sufficiently “acute” additionally invites courts to make the precise kinds of policy judgments he argues are inappropriate. See Pet. Br. 22-26. That proposed distinction reflects a policy judgment to allow a cause of action for deliberate indifference to only some (but not all) serious medical needs. And whether an injury is “acute” or “chronic” is fluid and ill-defined. For example, the victim in *Carlson* was a “chronic asthmatic” and was denied medical treatment for days before the final episode that led to his death. See *Green*, 581 F.2d at 671. Likewise, a fractured coccyx, like that here, results in both immediate pain and long-term injury. See Gustav Ø. Andersen et al., *Coccydynia—The Efficacy of Available Treatment Options: A Systematic Review*, 12 Glob. Spine J. 1611, 1612 (2022). A court is ill-equipped at the pleading stage to categorize these injuries as “acute” or “chronic.” And once again, Congress has not required an acute injury; it simply requires physical injury. The severity of the injury goes to the merits, not the existence of a cause of action.

Finally, it is, for all intents and purposes, “damages or nothing” for Watanabe. Watanabe was kept in solitary confinement for two months following the injury. Watanabe eventually *did* pursue an administrative remedy and *did* seek injunctive relief. But those requests were stalled for years, and Watanabe has now been released from federal custody. Thus, for Watanabe, it is damages or nothing—if his case is dismissed, he has no redress for his past suffering, and he cannot get an injunction because he was released. That is not unusual

in the *Carlson* context—federal prisoners are often transferred or released before the administrative or judicial process is complete. See, e.g., Joseph Shapiro & Christie Thompson, *‘Rejected’: How Federal Prisons Stonewall Grievances and Deny Care for Years*, NPR (June 17, 2026), <https://www.wlrn.org/npr-breaking-news/2026-06-17/rejected-how-federal-prisons-stonewall-grievances-and-deny-care-for-years> (describing long resolution time for administrative grievances).

2. The ARP and other remedies do not distinguish this case from *Carlson*

Nielsen additionally contends that various alternative statutory or regulatory schemes—primarily the ARP—give rise to a new context here. See Pet. Br. 32-38. They do not.

a. Nielsen relies first on the ARP, a four-step administrative grievance scheme that governs federal prisons. See Pet. Br. 10, 32-33. For several reasons, the ARP does not create a new context.

First, the ARP grievance procedure was in place at the time of *Carlson* and thus is not even a “difference.” Nielsen argues that the ARP was not adopted until 1979, after the underlying injury in *Carlson*. See *id.* at 38; see also U.S. Br. 17 (asserting the BOP “created its [ARP]” in “1979”). That is incorrect: The BOP—under the leadership of Norman Carlson, a named defendant in *Carlson*—created its administrative remedy procedure in 1974, with substantially the same four-step process that exists today. See U.S. Dep’t of Just., Bureau of Prisons, Policy Statement No. 2001.6A (Oct. 18, 1974). In 1976, Chief Justice Burger praised Carlson for developing “simple, workable internal procedures to deal with prisoner complaints.” *Chief Justice Burger Issues Year[-]end Report*, 62 A.B.A.J. 189-90 (Feb. 1976).

In 1979, the BOP formally codified its existing policy as part of a broader project to publicize the policies “presently contained in Policy Statements and Operations Memoranda.” 42 Fed. Reg. 26,334 (May 23, 1977); see also 42 Fed. Reg. 64,082 (Dec. 21, 1977) (notice of proposed rulemaking for the “third installment” of that effort, including the ARP). That codification did not alter the *substance* of the ARP, which already existed and was well known. And regardless whether the victim in *Carlson* or his family could actually have used the ARP, what matters for *Bivens* is the *existence* of the remedy for this type of claim, irrespective of its effectiveness or availability to any particular plaintiff. See *Goldey*, 606 U.S. at 944-45; *Egbert*, 596 U.S. at 493.

Second, the Court’s decision in *Carlson* necessarily forecloses relying on the ARP as a new factor. In *Carlson*, the Court discussed the availability of alternative remedies, including the FTCA, to determine whether the plaintiff had an implied private right of action. 446 U.S. at 19-23. The Court concluded the FTCA does not foreclose a constitutional claim for damages, including because the statute does not provide for liability against individual officers, does not allow for punitive damages, and does not allow for a jury trial. *Ibid.* That same analysis applies to the ARP, which has the same shortcomings as the FTCA and does not allow for damages. Indeed, when Congress enacted the Westfall Act, the ARP did not allow for tort claims. 28 C.F.R. 542.12 (1987). And today, the ARP directs the BOP to “refer the inmate to the appropriate statutorily-mandated procedures”—namely, the FTCA. 28 C.F.R. 542.10(c). The ARP therefore channels those claims into the very statutory scheme that *Carlson* analyzed and found insufficient.

Relying on *Egbert*, Nielsen argues that *Carlson*'s FTCA analysis "carries little weight" under the Court's current approach. Pet. Br. 38-39 (quoting *Egbert*, 596 U.S. at 500-01). But that misses the point. Watanabe does not seek to extend *Carlson*'s analysis to a new context, because the Court's analysis in *Carlson* regarding the FTCA necessarily subsumes the lesser remedy of the ARP and forecloses the arguments Nielsen now raises.

This Court's decisions have also implicitly rejected the notion that the ARP creates a new context. In *Malesko*, the Court expressly acknowledged the ARP as a remedial mechanism available to federal prisoners, 534 U.S. at 74, but also reaffirmed that a prisoner in a BOP facility may sue the offending officer under *Carlson*, *id.* at 72. In *Abbasi*, the Court found a new context based on profound differences involving confinement of noncitizens in the national security context, without so much as mentioning the ARP as a distinguishing factor. 582 U.S. at 140. And in *Goldey*, the Court considered the ARP only at step two, after concluding that the excessive-force claim there arose in a new context. 606 U.S. at 944. The analysis in those cases would be superfluous, incorrect, or both if Nielsen were correct.

Third, Nielsen's argument would subvert Congress's policy choices. When Congress passed the Westfall Act in 1988, it was legislating in light of the analysis in *Carlson*, which concluded that alternative remedies like the FTCA did not displace a constitutional claim. Congress thus would not have reasonably expected that the Court would deem the ARP—already in place at the time of *Carlson*—as prohibitive of a *Carlson* claim.

Later, Congress itself addressed the ARP directly in the PLRA. Responding to *McCarthy*, Congress made the

ARP a prerequisite to a *Carlson* claim rather than a substitute. 42 U.S.C. 1997e(a). Congress therefore has already defined the role the ARP plays vis-à-vis *Carlson* claims and determined it does not bar such claims. Foreclosing *Carlson* claims on the basis of the ARP would upend Congress’s judgment in the PLRA about the significance of the ARP in this exact species of prisoner claims.

b. Nielsen next invokes the PLRA as a new context, see Pet. Br. 33, but the PLRA supports, rather than refutes, the existence of a cognizable *Carlson* claim here. As Nielsen acknowledges, “the PLRA gave Congress ‘specific occasion to consider the matter of prisoner abuse and to consider the proper way to remedy those wrongs.’” *Ibid.* (quoting *Abbasi*, 582 U.S. at 148); see also U.S. Br. 16 (similar). And one of Congress’s express goals was to curb the maintenance of “frivolous” or “malicious” prisoner claims. 42 U.S.C. 1997e(c); see also *Nussle*, 534 U.S. at 524 (PLRA was passed with the intent “to reduce the quantity and improve the quality of prisoner suits”). Yet rather than eliminate *Carlson* claims altogether—a path it largely followed with *Davis* and that surely would have reduced the risk of frivolous or malicious claims—Congress chose instead to define the procedural and substantive limits of *Carlson* claims.

Nielsen points to the omission of an express damages cause of action in the PLRA. Pet. Br. 33. But Congress had no need to create a *Carlson* cause of action in the PLRA, because it already existed. See *Abbasi*, 582 U.S. at 148-49; *McCarthy*, 503 U.S. at 151. Congress likewise had no need to create a cause of action for injunctive relief—which the Court has long recognized—yet the United States cites the PLRA as implicitly codifying such a right. U.S. Br. 18. Instead, Congress legislated in

reliance on *Carlson*, operating on the assumption that such claims existed, but modifying the procedural and substantive limitations on those claims. Treating the PLRA as a new context would defeat Congress’s careful work.

c. Finally, Nielsen and the United States offer a handful of disparate statutes they say create a new context. See Pet. Br. 34-35; U.S. Br. 15-17. But those statutes are far afield.

The USA PATRIOT Act is a national-security statute that generally directs a designated DOJ official to receive and review civil rights complaints against government officials. Pub. L. No. 107-56, § 1001, 115 Stat. 391 (2001). The Prison Rape Elimination Act seeks to “increase the accountability of prison officials who fail to detect, prevent, reduce and punish prison rape.” 34 U.S.C. 30302(6). The statute cites *Farmer v. Brennan*, 511 U.S. 825 (1994)—a *Carlson* case—with approval. See Pub. L. No. 108-79, § 2(13), 117 Stat. 973 (2003). Neither statute concerns prisoner claims for deliberate indifference to a serious medical condition. And the Federal Prison Oversight Act was enacted after Watanabe’s assault, provides no damages remedies, and is not operative unless Congress provides funding—which it has not. See Pub. L. No. 118-71, § 2(b), 138 Stat. 1501 (2024); U.S. Br. 16-17; Pet. Br. 34-35 & n.13. The Act specifies that none of its oversight mechanisms “shall be construed as a necessary administrative remedy required for exhaustion under” the PLRA. § 2(a), 138 Stat. 1501.

Most crucially, in no respect do any of these statutes undermine or alter Congress’s judgment in the Westfall Act or the PLRA that *Carlson* claims remain cognizable within their own sphere. The government cites this Court’s statement in *Goldey* that “Congress has actively

legislated in the area of prisoner litigation but has not enacted a statutory cause of action for money damages.” 606 U.S. at 944; U.S. Br. 17. But that statement was made in the context of a claim for *excessive force*. The Court had no occasion to consider the existing cause of action for deliberate indifference to a serious medical need.

C. Nielsen’s Rule Would Effectively Overrule *Carlson*

Ultimately, Nielsen and the United States do not seek to limit *Carlson* to its context, but rather to eliminate the *Carlson* remedy while purporting to retain the precedent in name only. They each invoke this Court’s statement in *Abbasi* that “a case can present a new context ... if there are potential special factors that were not considered in previous *Bivens* cases.” 582 U.S. at 148. They contend that a case arises in a new context if it involves a factor the Court did not specifically “consider” in the *Bivens* trilogy—even if the factor was present in the cases, was analyzed in the cases, or has subsequently been addressed by Congress. See, *e.g.*, Pet. Br. 18-19, 24, 32-35; U.S. Br. 15. As the United States concedes, this approach would render *Carlson* cases a “null set.” U.S. Br. 24-25.

This application of the two-step framework would effectively overrule *Carlson* and thereby contravene Congress’s judgment in the Westfall Act to allow constitutional claims against federal officers within their existing context, notwithstanding the elimination of preexisting state common-law claims. It would transform that statute from one that channels constitutional claims through federal law into one that extinguishes those claims altogether. Likewise, redefining the two-step framework to eliminate all possible *Carlson* claims

would disrupt the infrastructure for *Carlson* claims established through the PLRA.

That understanding of the Westfall Act and the PLRA fully comports with *Abbasi*. Materially different facts may lead to different outcomes. See, e.g., *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 399-400 (1821) (controlling portion of the opinion is that which resolves “[t]he question actually before the Court”). That is what happened in *Abbasi*—the Court distinguished the case before it from *Carlson* on the ground that the case entailed a “different constitutional right” with “less developed” “guidance available to” the defendants. *Abbasi*, 582 U.S. at 148. It did not permit parties to avoid binding precedent simply by coming up with an argument a previous litigant did not raise or by identifying an immaterial factual difference.

Indeed, to read *Abbasi* as Nielsen and the United States propose would render *Abbasi* internally incoherent. See *Holland v. Jackson*, 542 U.S. 649, 654 (2004) (per curiam) (rejecting a reading of a judicial opinion that “would needlessly create internal inconsistency in the opinion”). That is because even while the Court in *Abbasi* determined that the claims before it raised a new context, 582 U.S. at 147, it also reaffirmed that *Carlson* (and *Bivens*) remain good law within their respective spheres, *id.* at 131, 134. But if any new argument not expressly discussed in *Carlson* gives rise to a new context, then *every* case is a new context—including the exact facts of *Carlson*—and *Carlson* in fact is not good law. Put otherwise, Nielsen and the United States purport to apply *Abbasi* at the same time they imply *Abbasi* was wrong to suggest any *Bivens* claims remain. That is an untenable reading of the precedent.

The extreme consequences of Nielsen’s and the government’s approach are apparent from their attempted application of it. Nielsen argues that the ARP and the PLRA establish a new context, but both are implicated in every possible claim that could arise under *Carlson*. See, e.g., *Carrin v. Strong*, 182 F.4th 1351, 1362-63 (11th Cir. 2026) (finding a new context given the existence of the ARP notwithstanding that the inmate died from his injury). The United States urges that the fact that Watanabe was incarcerated at the time of his injury gives rise to a new context. Of course, *Carlson* also arose in prison—the decedent’s conviction and imprisonment were the only reasons the Eighth Amendment applied at all. See *Ingraham v. Wright*, 430 U.S. 651, 671 n.40 (1977). And the Court did consider the effect a damages claim could have on officials’ “efforts to perform their official duties.” *Carlson*, 446 U.S. at 19. The United States’ arguments are therefore no different from saying that *Carlson* should be overruled.

Nielsen takes this argument one step further by urging that there is now only *one* step in the framework and that a *Carlson* claim is foreclosed if there is any “rational reason to think’ Congress might be better suited” to create a damages remedy—regardless of the similarities to *Carlson*. Pet. Br. 10 (quoting *Egbert*, 596 U.S. at 492). But that approach is inconsistent with the two-step framework, as it would eliminate the first step entirely, no longer requiring *any* difference (meaningful or otherwise) from *Carlson*. The Court’s comment in *Egbert* that the two steps may sometimes resolve into one, 596 U.S. at 492, is better understood as observing that if a case implicates a meaningful, new factor at step one, then that same factor will likely foreclose extension of *Carlson* at step two. But the Court confirmed in *Egbert*

that the two-step framework remains operative, *id.* at 494, 498-99, and it reaffirmed as much in *Goldey*, 606 U.S. at 944.

A decision that *Carlson* can never apply, even on its own facts, is no different from overruling *Carlson*. See, e.g., *FEC v. Wisconsin Right to Life*, 551 U.S. 449, 463 (2007) (it “would effectively overrule” a prior decision to make its rule “unavailable for virtually all” relevant plaintiffs). But this Court “does not normally overturn, or so dramatically limit, earlier authority *sub silentio*.” *Shalala v. Ill. Council on Long Term Care, Inc.*, 529 U.S. 1, 18 (2000). Even in cases where the Court has deemed its prior precedent “so undermined” by intervening developments “that it is no longer good law,” it still applied the *stare decisis* framework before overruling the precedent. *Agostini v. Felton*, 521 U.S. 203, 217-18, 235-36 (1997); see also *Nat’l Republican Senatorial Comm. v. FEC*, 146 S. Ct. 2404, 2424 (2026) (NRSC) (“[W]e will proceed to apply the ordinary *stare decisis* factors.”). And unlike those other cases, this Court has repeatedly reaffirmed the continuing viability of *Carlson* within its defined sphere, see, e.g., *Abbasi*, 582 U.S. at 134 (*Bivens* is “settled law” with “powerful reasons to retain it.”); *Egbert*, 596 U.S. at 491 (Court has not “dispense[d] with *Bivens*”). Nor have *Carlson* claims historically been a “null set,” cf. *Edwards v. Vannoy*, 593 U.S. 255, 271 (2021) (overruling hypothetical exception that had never actually applied); plaintiffs have actually been pursuing *Carlson* claims for decades, as this Court well knows, e.g., *McCarthy*, 503 U.S. at 141. The Court should decline Nielsen’s and the government’s invitation to implicitly overrule *Carlson* without engaging with *stare decisis*.

II. The Court Should Not Overrule *Carlson*

Although their arguments would effectively overrule *Carlson*, neither Nielsen nor the United States can justify that extraordinary request. Indeed, Nielsen does not even ask to overrule *Carlson*: He focuses only on whether *Bivens* should be overruled, Pet. Br. 42-48, but as the government notes, this case is about *Carlson*, not *Bivens*, U.S. Br. 23-28.

Stare decisis carries “special force” here, where Congress could displace *Carlson* if it chose. See *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 799, 801-03 & n.12 (2014) (citation omitted); see also *Kimble v. Marvel Ent., LLC*, 576 U.S. 446, 455 (2015). Overruling *Carlson* would upend Congress’s careful judgment about the types of remedies available to victims of constitutional violations in federal prison and result in a scheme never sanctioned or contemplated by Congress. And regardless of whether *Carlson* would be decided differently today, it was not “egregiously wrong.” *NRSC*, 146 S. Ct. at 2424 (citation omitted). *Carlson* claims arise in a federal enclave and align with centuries of common-law precedent allowing private rights of action against jailers for mistreatment.

The Court should instead reaffirm what it has said for many years: *Carlson* is still good law within its own context but should not be extended further. The Court’s decision in *Cisco Systems, Inc. v. Doe I* provides an unusually close parallel. 146 S. Ct. 1882 (2026). After rejecting any power to define new torts under the Alien Tort Statute, the Court reaffirmed that plaintiffs could still proceed under the three torts long recognized at common law. See *id.* at 1892 n.3. “[T]o the extent there has been reliance on the availability of those three actions, we see no need to revisit them.” *Ibid.* “[W]e say ‘this far

and no further.” *Ibid.* That is all the Court need do here to rebuff Nielsen’s arguments.

A. Overruling *Carlson* Would Defy Separation of Powers and Subvert Congressional Design

In the intervening decades since *Carlson*, Congress has twice legislated to preserve, ratify, and provide infrastructure for *Carlson* claims. Overruling *Carlson* now would subvert Congress’s intent and violate the very separation-of-powers principles Nielsen advances.

1. Congress has ratified *Carlson*

When Congress enacted the Westfall Act, it extinguished the traditional remedy of using state common law to hold individual federal officers liable in damages for unconstitutional conduct undertaken in the course of their duties. 28 U.S.C. 2679(b)(1). That remedy had existed all the way back to the Founding. See p. 5, *supra*. But Congress eliminated that remedy only on the understanding that the constitutional claims recognized in *Bivens* and *Carlson* would remain available. See 28 U.S.C. 2679(b)(2)(A); see also *United States v. Smith*, 499 U.S. 160, 173 (1991) (Westfall Act “preserv[ed] employee liability for *Bivens* actions”). The House Report explained that “the courts have identified” torts that “violat[e] ... one or more fundamental rights embraced in the Constitution” as “a more serious intrusion of the rights of an individual that merits special attention,” and that a “major feature” of the Westfall Act “is that the exclusive remedy expressly does not extend to so-called constitutional torts. See *Bivens v. Six Unknown Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971).” H.R. Rep. No. 100-700, 100th Cong., 2d Sess. 6 (1988).

In 1996, Congress passed the PLRA in further reliance on *Carlson*. As detailed above, the PLRA requires exhaustion of administrative remedies for prisoner claims, 42 U.S.C. 1997e(a), a change that was made in direct response to the decision in *McCarthy*. The PLRA also expressly contemplates the existence of money damages—no less so than the injunctive relief the government touts. See U.S. Br. 18-19.

2. Overruling *Carlson* would contravene Congress’s ratification

The Court has consistently treated comparable legislative action as ratification of the underlying decision—even when that decision recognized an implied right of action that conflicts with modern jurisprudence.

a. Decades ago, the Court implied a private right of action under Section 10(b) of the Securities Exchange Act of 1934. See *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 730 (1975). Congress has never amended the statute to expressly provide for such a right of action, but in the Private Securities Litigation Reform Act, Congress added heightened pleading requirements and a loss causation requirement for any “private action” arising under the statute. 15 U.S.C. 78u-4(b). In *Stoneridge*, this Court observed that even though it is now “settled that there is an implied cause of action only if the underlying statute can be interpreted to disclose the intent to create one,” the amendments by Congress plainly “touch upon the implied right of action” and therefore “*ratified the implied right of action* after the Court moved away from a broad willingness to imply private rights of action.” 552 U.S. at 164-65 (emphasis added).

The Court offered a similar analysis in *Alexander v. Sandoval*. There, the Court concluded that Congress

had “ratified” the Court’s creation in *Cannon v. University of Chicago*, 441 U.S. 677 (1979), of a private right of action to enforce Title VI of the Civil Rights Act of 1964 and Title IX of the Education Amendments of 1972. *Alexander v. Sandoval*, 532 U.S. 275, 280 (2001). Congress did not explicitly endorse *Cannon*, but the Court understood subsequent enactments—those that “abrogated States’ sovereign immunity against suits brought in federal court to enforce” Titles VI and IX, for example—to “validat[e]” *Cannon*. *Id.* at 280 (citation omitted).

Still again, in *Bay Mills*, the Court declined to abrogate precedent affording Native American tribes sovereign immunity for certain commercial activity because Congress had “made an initial ... decision to retain that form of tribal immunity.” 572 U.S. at 801. But Congress had not actually *codified* that immunity—it simply had rejected proposed legislation modifying tribal immunity in the commercial context and “chose to enact a far more modest alternative.” *Id.* at 802. To overrule its prior precedent following such congressional action, the Court concluded, “would replace Congress’s considered judgment with our contrary opinion.” *Id.* at 803.

Carlson is on even firmer footing. Just as it did with other implied private rights of action, Congress legislated around *Carlson* to define the procedural framework that governs such claims. See 42 U.S.C. 1997e. And just as it did with tribal immunity, Congress has rejected efforts to overturn *Carlson*, see S. 1775, 97th Cong. (1981); H.R. 7034, 97th Cong. (1982), and enacted substantive limitations on *Carlson* claims, see 42 U.S.C. 1997e(e), but did not eliminate those claims entirely. Congress has therefore “already reflected on an issue of”

federal officer liability and “declined to change settled law.” *Bay Mills*, 572 U.S. at 803.²

The Westfall Act goes even further: It preempts virtually all state common-law tort claims against federal employees for conduct undertaken in the scope of their duties, but Congress *went out of its way* to preserve *Carlson* claims. The exclusivity provision in the Westfall Act applies on its face to *Bivens* claims—to preserve *Bivens* claims, Congress had to take the affirmative step of excepting *Bivens* claims from the statutory bar that would otherwise apply. To overturn *Carlson* now would “replace Congress’s considered judgment with [the Court’s] contrary opinion.” *Ibid.*

b. Nielsen does not address the ratification effect of the PLRA and urges only briefly that the Westfall Act left *Bivens* “in the hands of courts.” Pet. Br. 47. That is an overstatement. Congress indeed “left *Bivens* where it found it,” *Hernandez*, 589 U.S. at 111 n.9, but not by leaving its ultimate fate to the Court. At the time of the Westfall Act, *Carlson* claims were not a “null set,” U.S. Br. 25, but rather a material and real means for prisoners to obtain monetary relief for Eighth Amendment violations. The Westfall Act represents a judgment by Congress to preserve *Carlson*. That is not passive indifference—it is affirmative action ratifying this Court’s decision. And the PLRA further ratifies *Carlson* by erecting a procedural and substantive framework.

² Nielsen notes that Congress has declined to pass *different* bills that would create a sweeping analogue to Section 1983 for federal officers. Pet. Br. 11-12, 47. That is weak evidence of congressional intent. See *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 187 (1994) (failed proposals “deserve little weight in the interpretive process”).

Nielsen suggests, in a footnote, that perhaps Congress has not overruled *Carlson* because it mistakenly believes it cannot do so. Pet. Br. 47 n.15. That is baseless. A principal question in *Carlson* was whether Congress had displaced a constitutional claim through the FTCA. See 446 U.S. at 19-20. Then-Justice Rehnquist, in dissent, made it a point to remind Congress that it could overrule *Carlson* (and *Bivens*). *Id.* at 51-53 (Rehnquist, J., dissenting). And Congress took note—it *has* legislated to overrule *Bivens* cases, in whole or in part. In 1995, Congress abrogated *Davis* in substantial part by creating an exclusive statutory remedy for congressional-employment rights and protections through the Congressional Accountability Act of 1995, Pub. L. No. 104-1, § 225(d)(1), 109 Stat. 22. See 2 U.S.C. 1361(d)(1). Congress knows it could overrule *Carlson*, but it has chosen to do the opposite.

Overruling *Carlson* or declaring it inapplicable in every circumstance would intrude on Congress’s legislative judgment and “scale the heights of presumption.” *Bay Mills*, 572 U.S. at 803. Whatever the foundations of *Carlson*, it now bears the imprimatur of Congress.

B. The Ordinary *Stare Decisis* Factors Favor *Carlson*

The ordinary *stare decisis* factors further justify retaining *Carlson*. Those factors require the Court to assess “the egregiousness of the precedent’s error,” “any cognizable reliance interests,” and “the jurisprudential and real-world effects of the decision.” *NRSC*, 146 S. Ct. at 2424.

1. *Carlson* was not egregiously wrong

Carlson would likely come out differently if decided today. But “it is not alone sufficient that [the Court] would decide a case differently now than [it] did then.”

Kimble, 576 U.S. at 455. “Indeed, *stare decisis* has consequence only to the extent it sustains incorrect decisions.” *Ibid.* And even a “good argument” that the Court “got [it] wrong” “cannot by itself justify scrapping settled precedent.” *Ibid.* Instead, the Court “consider[s] the egregiousness of the precedent’s error.” *NRSC*, 146 S. Ct. at 2424.

a. Whatever might be said of *Bivens*, *Carlson* was not egregiously wrong. Even after the Court eliminated general federal common law in *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938), it retains common-law-making authority in certain limited “enclaves” where uniquely federal interests are at stake, *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 426 (1964); see also *Boyle v. United Techs. Corp.*, 487 U.S. 500, 504 (1988) (noting that federal courts may still formulate federal common law in certain areas implicating “uniquely federal interests” (citation omitted)). One such enclave involves “the civil liability of federal officials for actions taken in the course of their duty.” *Boyle*, 487 U.S. at 505 & n.1 (“[T]he liability of federal officials ... is an area of uniquely federal interest.”).

Carlson claims at least arguably fall within a federal enclave. In addition to affecting “the civil liability of federal officials for actions taken in the course of their duty,” *id.* at 505, *Carlson* claims concern the conduct of federal officers in a *physical* federal enclave. The plaintiff is in prison only because of a federal conviction before a federal court for violating a federal statute. These circumstances give rise to corollary duties: Because of the nature of prisons, “[a]n inmate must rely on prison authorities to treat his medical needs,” and thus “[i]t is but just that the public be required to care for the pris-

oner, who cannot by reason of the deprivation of his liberty, care for himself.” *Estelle v. Gamble*, 429 U.S. 97, 103-04 (1976) (citation omitted).

This application of federal common law to apportion liability is not novel. In *Boyle*, the Court invoked federal common law to justify immunity for government contractors from liability for design defects. 487 U.S. at 504-06. In *Harlow v. Fitzgerald*, the Court again relied on federal common law to define the qualified-immunity standard for federal officers. 457 U.S. 800, 806, 818 (1982). And even *McCarthy* arguably rested on federal common law regarding prudential exhaustion of administrative remedies for a *Carlson* claim. See 503 U.S. at 152-56. These uses of federal common law are no less significant than *Carlson* in terms of allocating liability between aggrieved individuals and federal officers.

Carlson follows a long tradition of damages claims against prison officers who violate their duties to prisoners. Anglo-American law regularly tested the legality of official conduct through damages actions against the responsible officer. See *Tanzin v. Tanvir*, 592 U.S. 43, 49 (2020); *Little v. Barreme*, 6 U.S. (2 Cranch) 170 (1804); *Elliott v. Swartwout*, 35 U.S. (10 Pet.) 137 (1836); *Mitchell v. Harmony*, 54 U.S. (13 How.) 115, 137 (1851); *Buck v. Colbath*, 70 U.S. (3 Wall.) 334, 344 (1865); *Belknap v. Schild*, 161 U.S. 10, 18 (1896). Such cases predate the Founding. See, e.g., *Huckle v. Money*, (1763) 95 Eng. Rep. 768 (C.P.) (action for false imprisonment).

The historical foundation for *Carlson* claims is especially strong, because the common law imposed on the jailer a duty to provide (or allow others to provide) a prisoner with the necessities of life. At common law, an imprisoned debtor could maintain a civil action against

a gaoler, who, acting out of “[m]alice ... keep[s] his [v]ictuals from him, by reason whereof he is so spent, that he becomes lame, or hath other [i]nfirmitie.” 1 Anthony Fitz-Herbert, *The New Natura Brevium* 212 (8th ed. 1755). Courts also recognized the availability of a civil action by a prisoner against the sheriff as supervisor of an officer who left the prisoner exposed to the cold. See, e.g., *Rex v. Huggins* (1730) 92 Eng. Rep. 518, 522 (K.B.) (“It has been settled, that ... a sheriff must answer for the offences of his gaoler civilly.”); cf. William Style, *Narrationes Modernae* 432 (London, 1658) (dismissing habeas claim for “us[ing] [the prisoner] hardly,” but observing that the prisoner could “bring an [a]ction against him” at law).

After the Founding, courts in the United States adhered to that tradition, recognizing that “[i]t is the duty of all keepers of jails and prisons to treat their prisoners humanely.” *City of Topeka v. Boutwell*, 35 P. 819, 822 (Kan. 1894). “For all needless sufferings and indignities which they impose they are accountable in damages to the party injured.” *Ibid.*; see also *Tennessee ex rel. Morris v. Nat’l Sur. Co.*, 39 S.W.2d 581, 583 (Tenn. 1931) (overruling demurrer to claim alleging the failure of the sheriff and deputy, “knowing [the prisoner’s] urgent need of medical and surgical attention” to obtain “prompt and proper medical and surgical attention and services” (quotation marks omitted)).

Carlson is therefore best understood as an application of the Court’s federal common-law power to recognize that the common law “apparently authorized prisoner lawsuits to recover damages” in this narrow context. *Richardson v. McKnight*, 521 U.S. 399, 407 (1997) (citing 2 C. Addison, *A Treatise on the Law of Torts* § 1016, pp. 224-25 (1876)). Unlike *Bivens* claims—which

arise inside the home—*Carlson* claims concern the conduct of federal officers in a federal prison overseeing federal prisoners incarcerated pursuant to a federal conviction. The liability *Carlson* imposes flows from a long tradition of common-law causes of action in the prison context specifically. There is nothing “egregiously wrong” about using the Court’s common-law authority to continue that tradition in this context.

b. Nielsen argues that *Bivens* (and by extension *Carlson*) cannot be justified as “the work of a common-law court” because of “the demise of federal general common law.” Pet. Br. 44 (quoting *Hernandez*, 589 U.S. at 100-01). But that ignores that at least for *Carlson*, there is substantial basis in the law for the creation of common law in such a discrete federal enclave. The United States likewise urges that this analysis would justify all *Bivens* claims (which are necessarily brought against federal officers), U.S. Br. 29-30, but that overlooks the additional, unique federal dimensions of a *Carlson* claim, such as the existence of a federal conviction and a federally administered institution. *Bivens* claims, by contrast, arise in the home and concern the rights of wholly private individuals not subject to constant federal supervision or dependent on federal officials for the necessities of life.

Whether the Court today agrees with the use of federal common law to justify the creation of a *Carlson* action, see Pet. Br. 42-44, it was at least not “egregiously wrong” for *Carlson* to exercise that power in this narrow context. *NRSC*, 146 S. Ct. at 2424. Unlike other decisions this Court has recently repudiated, *Carlson* is not divorced from “text, history, or precedent.” *Dobbs v. Jackson Women’s Health Org.*, 597 U.S. 215, 270 (2022). Nor has *Carlson* “been difficult to make sense of from

the start,” creating artificial categories by “blind feats of definition.” *Trump v. Slaughter*, 146 S. Ct. 2283, 2302 (2026) (citation omitted). Even if wrong under today’s jurisprudence, *Carlson* finds ample footing in the law.³

2. Reliance on *Carlson* is concrete and unusually weighty

The second *stare decisis* factor—reliance—is powerful here. As set forth above, the Westfall Act and the PLRA are best understood as ratifying *Carlson*, foreclosing Nielsen’s and the government’s arguments for overruling *Carlson*. But at the very least, those statutes show that Congress has relied on *Carlson* and its progeny, weighing heavily against overruling *Carlson*.

The reliance inquiry “focuses on the legitimate expectations of those who have reasonably relied on the precedent” and may account for “the age of the precedent.” *Ramos v. Louisiana*, 590 U.S. 83, 122 (2020) (Kavanaugh, J., concurring in part). And reliance interests carry significant weight when they emanate from the legislature. See *Hilton v. S.C. Pub. Rys. Comm’n*, 502 U.S. 197, 202 (1991).

In *Hilton*, the Court declined to overrule its previous decision permitting damages actions against state agencies under the Federal Employers’ Liability Act (FELA). 502 U.S. at 201-02. The Court’s decision rested largely on States’ legislative reliance. *Ibid.* The Court observed

³ Nielsen urges that *Bivens* was premised on the view that “courts should create damages remedies to effectuate the perceived purposes of statutes lacking such remedies,” Pet. Br. 42, but he overlooks that this Court had repudiated that view by the time *Carlson* was decided in 1980, see *Transamerica Mortg. Advisors Inc. v. Lewis*, 444 U.S. 11 (1979).

that many States had passed laws exempting certain employees from workers' compensation laws on the belief that those employees could file FELA suits against their state employers. *Id.* at 202-03. The Court explained that “[s]tare decisis has added force when the legislature, in the public sphere, ... ha[s] acted in reliance on a previous decision,” and that the Court should avoid a decision that “would ... require an extensive legislative response.” *Id.* at 202.

The circumstances here are remarkably similar to *Hilton*. When Congress passed the Westfall Act and eliminated state-law remedies for a constitutional violation, it did so on the understanding that *Bivens* and *Carlson* claims could continue to be brought. See H.R. Rep. No. 100-700, at 6 (1988). As in *Hilton*, the legislature relied on this Court's recognition of a private right of action to take away a preexisting right of action that provided the same remedy. Indeed, the legislative history confirms Congress's reliance, expressing the view that *Bivens* and *Carlson* cases concern “a more serious intrusion of the rights of an individual that merits special attention.” *Ibid.* To eliminate *Carlson* claims now, decades after Congress passed the Westfall Act, would upend that reliance.

Nielsen asserts that if Congress has in fact relied on *Bivens* or *Carlson*, “that is precisely the problem,” because Congress has “less incentive to legislate (or an excuse not to).” Pet. Br. 47 (quoting *Slaughter*, 146 S. Ct. at 2303). But Congress *has* legislated, undertaking precisely the kind of “weigh[ing] [of] policy considerations” the Court has long said is Congress's duty. *Egbert*, 596 U.S. at 491. And unlike in *Slaughter*—where Congress had relied on the existing precedent only to arrogate power properly belonging to the Executive, see 146

S. Ct. at 2310—here, Congress had every incentive to expressly eliminate *Carlson* claims altogether if it had intended to do so. Instead, it preserved those claims and devised nuanced requirements for bringing them. That is legislative reliance, just like in *Hilton*.

3. The jurisprudential and real-world effects of *Carlson* favor its preservation

The final *stare decisis* factor—the practical and real-world consequences of overturning *Carlson*—also weighs in favor of retaining *Carlson*.

The practical effect of overruling *Carlson* would be stark. As this Court has recognized, prisoners are wholly dependent on prison officials for access to medical care. See *Estelle*, 429 U.S. at 103-04. Overruling *Carlson* would leave federal prisoners without a damages remedy against the responsible officer for completed constitutional injuries. Federal prisoners could be subject to cruel and prolonged agony with no remedy at all. Even Nielsen acknowledges—and history shows—that such remedies have long existed and have never before been foreclosed entirely. The judiciary would thus fail to act as an “impenetrable bulwark ... naturally led to resist every encroachment upon [constitutionally enumerated] rights.” 1 Annals of Cong. 439 (1789) (statement of Rep. James Madison).

Overruling *Carlson* would also have the anomalous effect of making injunctive relief the primary mechanism for enforcement of constitutional rights in prison, as Nielsen repeatedly urges. See Pet. Br. 18, 25-26, 34, 38. That is the inverse of the longstanding rule that injunctive relief is available only if “remedies available at law, such as monetary damages, are inadequate.” *eBay*, 547 U.S. at 391; *Watson v. Sutherland*, 72 U.S. (5 Wall.)

74, 79 (1866) (“The absence of a plain and adequate remedy at law affords the only test of equity jurisdiction.”). Several provisions of the PLRA are intended specifically to limit the injunctive relief available to prisoners, see 18 U.S.C. 3626(a)(1)(A)-(C), (a)(2) and (b)(1)-(3), reaffirming Congress’s judgment that damages are the ordinary remedy. Eliminating a damages remedy to make way for injunctive relief flips equity on its head.

Nielsen contends that *Bivens*—and presumably *Carlson*—is unworkable, citing lower-court disagreements that have arisen since *Egbert*. Pet. Br. 45. But this Court’s decision in this case will resolve those disagreements. And applying *Carlson*’s settled context is straightforward: It provides a federal prisoner with an individual-capacity Eighth Amendment action against federal prison personnel responsible for deliberate indifference to an objectively serious medical need. See 446 U.S. at 16-17 & n.1. The standard for such claims was articulated in *Estelle*, 429 U.S. 97, and lower courts in both the *Carlson* context and the Section 1983 context have developed a robust body of law for assessing such claims. Qualified immunity and the PLRA protect officers from frivolous or burdensome litigation that could interfere with their duties. See *Carlson*, 446 U.S. at 19.

Finally, Nielsen argues that determining whether *Carlson* applies in a particular case requires the exercise of legislative judgment. Pet. Br. 31. It is not a legislative task to determine whether a case presents a “meaningful” difference from a prior one. *Abbasi*, 582 U.S. at 139-40. That is an ordinary judicial exercise. Applying *Carlson* in its existing context does not require anything other than the application of precedent called for in every case.

* * *

This Court can and should resolve this case by following the path articulated in *Cisco Systems*: “[T]his far and no further.” 146 S. Ct. at 1892 n.3. Watanabe’s claim falls in the heartland of *Carlson*. And the very separation of powers principles that Nielsen and the United States invoke favor deference to Congress’s legislation relying on and ratifying *Carlson*. The Court should affirm.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted.

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APPENDIX

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APPENDIX A

28 U.S.C. 2679. Exclusiveness of remedy

(a) The authority of any federal agency to sue and be sued in its own name shall not be construed to authorize suits against such federal agency on claims which are cognizable under section 1346(b) of this title, and the remedies provided by this title in such cases shall be exclusive.

(b)(1) The remedy against the United States provided by sections 1346(b) and 2672 of this title for injury or loss of property, or personal injury or death arising or resulting from the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment is exclusive of any other civil action or proceeding for money damages by reason of the same subject matter against the employee whose act or omission gave rise to the claim or against the estate of such employee. Any other civil action or proceeding for money damages arising out of or relating to the same subject matter against the employee or the employee's estate is precluded without regard to when the act or omission occurred.

(2) Paragraph (1) does not extend or apply to a civil action against an employee of the Government—

(A) which is brought for a violation of the Constitution of the United States, or

(B) which is brought for a violation of a statute of the United States under which such action against an individual is otherwise authorized.

(c) The Attorney General shall defend any civil action or proceeding brought in any court against any employee of the Government or his estate for any such

(1a)

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damage or injury. The employee against whom such civil action or proceeding is brought shall deliver within such time after date of service or knowledge of service as determined by the Attorney General, all process served upon him or an attested true copy thereof to his immediate superior or to whomever was designated by the head of his department to receive such papers and such person shall promptly furnish copies of the pleadings and process therein to the United States attorney for the district embracing the place wherein the proceeding is brought, to the Attorney General, and to the head of his employing Federal agency.

(d)(1) Upon certification by the Attorney General that the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose, any civil action or proceeding commenced upon such claim in a United States district court shall be deemed an action against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant.

* * *

APPENDIX B

42 U.S.C. 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.

(b) FAILURE OF STATE TO ADOPT OR ADHERE TO ADMINISTRATIVE GRIEVANCE PROCEDURE

The failure of a State to adopt or adhere to an administrative grievance procedure shall not constitute the basis for an action under section 1997a or 1997c of this title.

(c) DISMISSAL

(1) The court shall on its own motion or on the motion of a party dismiss any action 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 if the court is satisfied that the action is frivolous, malicious, fails to state a claim upon which relief can be granted, or seeks monetary relief from a defendant who is immune from such relief.

(2) In the event that a claim is, on its face, frivolous, malicious, fails to state a claim upon which relief can be granted, or seeks monetary relief from a defendant who is immune from such relief, the court may dismiss the underlying claim without first requiring the exhaustion of administrative remedies.

(d) ATTORNEY'S FEES

(1) In any action brought by a prisoner who is confined to any jail, prison, or other correctional facility, in which attorney's fees are authorized under section 1988 of this title, such fees shall not be awarded, except to the extent that—

(A) the fee was directly and reasonably incurred in proving an actual violation of the plaintiff's rights protected by a statute pursuant to which a fee may be awarded under section 1988 of this title; and

(B)

(i) the amount of the fee is proportionately related to the court ordered relief for the violation; or

(ii) the fee was directly and reasonably incurred in enforcing the relief ordered for the violation.

(2) Whenever a monetary judgment is awarded in an action described in paragraph (1), a portion of the judgment (not to exceed 25 percent) shall be applied to satisfy the amount of attorney's fees awarded against the defendant. If the award of attorney's fees is not greater than 150 percent of the judgment, the excess shall be paid by the defendant.

(3) No award of attorney's fees in an action described in paragraph (1) shall be based on an hourly rate greater than 150 percent of the hourly rate established under section 3006A of title 18 for payment of court-appointed counsel.

(4) Nothing in this subsection shall prohibit a prisoner from entering into an agreement to pay an attorney's fee in an amount greater than the amount authorized under this subsection, if the fee is paid

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by the individual rather than by the defendant pursuant to section 1988 of this title.

(e) LIMITATION ON RECOVERY

No Federal civil action may be brought by a prisoner confined in a jail, prison, or other correctional facility, for mental or emotional injury suffered while in custody without a prior showing of physical injury or the commission of a sexual act (as defined in section 2246 of title 18).

(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.

(g) WAIVER OF REPLY

(1) Any defendant may waive the right to reply to any action brought by a prisoner confined in any jail, prison, or other correctional facility under section 1983 of this title or any other Federal law.

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Notwithstanding any other law or rule of procedure, such waiver shall not constitute an admission of the allegations contained in the complaint. No relief shall be granted to the plaintiff unless a reply has been filed.

(2) The court may require any defendant to reply to a complaint brought under this section if it finds that the plaintiff has a reasonable opportunity to prevail on the merits.

(h) "PRISONER" DEFINED

As used in this section, the term "prisoner" means any person incarcerated or detained in any facility who is accused of, convicted of, sentenced for, or adjudicated delinquent for, violations of criminal law or the terms and conditions of parole, probation, pretrial release, or diversionary program.

APPENDIX C

BUREAU OF PRISONS WASHINGTON, D.C. 20537

Policy Statement

2001.6A

10-18-74

SUBJECT: ADMINISTRATIVE REMEDY OF
COMPLAINTS INITIATED BY
OFFENDERS IN BUREAU OF
PRISONS FACILITIES

1. *PURPOSE.* This Policy Statement authorizes procedures by which offenders may seek formal review of complaints which relate to their imprisonment if informal procedures have not resolved the matter. It establishes the Regional Office as the initial level of appeal from institution determinations.

2. *DIRECTIVES AFFECTED.* Policy Statement 2001.6 and Operations Memorandum 2001.11 on this subject are superseded.

3. *DISCUSSION.* Most complaints can be resolved quickly and efficiently through direct contact with staff who are responsible in the particular area of the problem. This is the preferred course of action. Staff awareness of the importance of prompt attention and reply to these routine requests will minimize the use of formal complaint procedures.

A viable complaint procedure will serve the offenders, the administration, and the courts. It will provide the offenders with a systematic procedure whereby issues raised relating to their confinement will receive attention and a written, signed response within a short period of time from the local administration, and from the Regional Office and the Central Office, if appealed.

Such a procedure assists the administration by providing an additional vehicle for internal solution of problems at the level having most direct contact with the offender. It also provides a means for continuous review of administrative decisions and policies. Further, it provides a written record in the event of subsequent judicial or administrative review. A viable Administrative Remedy Procedure should reduce the volume of suits filed in court and will develop an undisputed record of facts which will enable the courts to make more speedy dispositions.

Use of the Administrative Remedy Procedure is the proper avenue of appeal from dispositions of the Institution Discipline Committee or from minor disciplinary actions (Policy Statement 7400.5C).

If the offender cannot resolve his complaint informally, and wishes to utilize this Administrative Remedy Procedure, he shall file his complaint with the Warden or his designee. If not satisfied with the institution's reply, he may appeal to the Regional Director. If he is not satisfied with the Regional Director's response, he may appeal to the Assistant Director, General Counsel and Review.

An offender may, if he chooses, forward his complaint through the Prisoners' Mail Box or he may file his law suit directly with the appropriate court. However, courts frequently require evidence that administrative remedies have been exhausted before ruling on a complaint, and offenders should be so advised.

4. *ACTION*. The Chief Executive Officer of each Bureau of Prisons facility is responsible for the establishment and monitoring of an Administrative Remedy Procedure which is compatible with the

provisions of this Policy Statement. The operation of the program will be the responsibility of the Warden or the Associate Warden. The investigation of complaints and the drafting of the reply should ordinarily be done by department heads or their representatives, subject to review of the Warden or Associate Warden. The final response shall be signed by both the department head or his representative, and the reviewer. Responses to complaints regarding dispositions of the Institution Disciplinary Committee must be signed by the Chief Executive Officer of the institution.

Each Regional Director is responsible for establishing in the Regional Office a procedure for review and response to appeals submitted under this procedure. While the investigation of the complaint may be conducted by the appropriate Regional Office staff member designated by the Regional Director, the typed response (Part B) of form BP-DIR-10 must be signed by the Regional Director.

5. *PROCEDURES*. All offenders should be advised of this Administrative Remedy Procedure. This can be accomplished, among other means, by posting the local Policy Statement on inmate bulletin boards, through inmate publications and by including it in the admission-orientation program. Where appropriate, the local Policy Statement should be translated into Spanish.

It is suggested that the forms be maintained by the Correctional Counselors wherever practicable. Experience has demonstrated that complaints can frequently be resolved by the counselor.

Institutions shall maintain a monthly log of complaints filed under this procedure. The attached

institution log sheet should be locally reproduced and used for this purpose. At the beginning of each month, a copy of the completed log for the two previous months should be sent to the Regional Director and to the Central Office, Office of General Counsel and Review.

Regional Offices shall maintain a monthly log of appeals filed under this procedure. The attached regional log should be reproduced locally and used for this purpose. At the beginning of each month, a copy of the Regional Office log for the previous two months should be forwarded to the Central Office, Office of General Counsel and Review.

The following Subject Codes will be used in the logs to describe the subject of the complaint. If more than one subject is raised, use the single code which best describes the principal complaint.

SUBJECT CODES

1. *Transfer* – excluding CTCs
2. *Institutional Program Assignment* – generally, including custody, MSA
3. *Community Communications* – including mail, visits, phone
4. *Community Programs* – including CTCs, furloughs
5. *Disciplinary Matters* – generally, including segregation, loss of good time
6. *Institution Operations* – generally, including food, clothing, sanitation, personal property. Does not include subjects described better in categories 2, 3, or 5.
7. *Medical*

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8. *Legal* – generally, including jail time, detainers, sentence computation
9. *Parole* – generally, including parole reports, release plans
10. *Complaints Against Staff*
11. *Other* – specify

6. USE OF THE COMPLAINT FORM. If an offender cannot resolve his complaint through informal contact with staff, and wishes to file a formal complaint for administrative remedy, he should secure a copy of form BP-DIR-9 and write his complaint in the space provided. He may obtain assistance from other offenders or from staff to help him complete the form. The offender should then give the completed form to the designated staff member who in turn will provide a signed receipt for him. Distribution of the copies of each form is noted on each page.

The complaint ordinarily must be filed within 30 days from the date on which the basis of the complaint occurred unless it was not feasible to file within such period. Institution staff have up to 15 days from receipt of the complaint, excluding week-ends and holidays, to act upon the matter and provide a written response to the offender. When the complaint is of an emergency nature and threatens the offender's immediate health or welfare, reply must be made as soon as possible, and within 48 hours from receipt of the complaint. The institution duty officer may be utilized in such instances.

When the proper course of action is determined, the "Response" (Part B) should be completed and signed. One copy should go to his central file, and original and other two copies given to the offender. Responses

should be made as quickly as possible, should be based upon facts which pertain specifically to the issue, and should deal only with the issue raised, and not include extraneous material.

If an offender is not satisfied with the institution's response, he may file an appeal to the Regional Director, Bureau of Prisons, through the Prisoners' Mail Box within 30 days of receipt of the Warden's response. This should be done on form BP-DIR-10 and must include a completed copy of BP-DIR-9 (the initial complaint) with the institution's response. A receipt for his appeal will be sent to the offender by the Regional Director, who will then reply within 20 days from receipt of the appeal, excluding week-ends and holidays.

If the offender is not satisfied with the reply from the Regional Director, he may file a further appeal to the Assistant Director, Office of General Counsel and Review, Bureau of Prisons, through the Prisoners' Mail Box within 30 days of receipt of the Regional Director's response. This should be done on form BP-DIR-11, and must include a completed copy of both the form BP-DIR-9 (the original complaint) and the form BP-DIR-10 (appeal to the Regional Director). A receipt for this appeal will be sent to the offender and within 20 days from that date, excluding week-ends and holidays, a reply will be made.

If an offenders' complaint is of a sensitive nature, and he reasonably believes he would be adversely affected if it is known at the institution that he is making the complaint, he may file it directly with the Regional Director, Bureau of Prisons through the Prisoners' Mail Box. In such cases, he must clearly explain the reason for not filing in the institution. The

Regional Office will send the offender a receipt, and reply in 20 days, excluding week-ends and holidays.

If the time limit expires without a reply, it will be deemed to be a denial of the request. If dissatisfied with the response to his complaint and appeals, the offender is free to file suit in an appropriate court and attach documentary proof that he exhausted his administrative remedy.

7. *EXCEPTIONS*. Nothing in this Policy Statement should be construed to affect in any way, the separate procedure established pursuant to the Federal Tort Claims Act, or the Claims for Inmate Injury Compensation under 18, USC, 4126.

The period of time referred to for action by the reviewing officials may be extended for a like period upon a finding that the circumstances are such that the initial period is insufficient to make an appropriate decision. This must be communicated in writing to the offender.

8. *LOCAL ISSUANCE*. The head of each Bureau of Prisons facility will revise his local Policy Statement on this subject to incorporate these changes, and forward a completed copy to his respective Regional Office and to the Office of General Counsel and Review.

9. *THIS POLICY IS EFFECTIVE NOVEMBER 1, 1974.*

/s/ Norman A. Carlson
NORMAN A. CARLSON
Director, Bureau of Prisons