

No. 25-417

IN THE
Supreme Court of the United States

FRANCIS NIELSEN,

Petitioner,

v.

KEKAI WATANABE,

Respondent.

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

**BRIEF OF PROFESSOR STEPHEN I. VLADECK
AS AMICUS CURIAE
IN SUPPORT OF RESPONDENT**

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INTEREST OF AMICUS CURIAE¹

Amicus curiae Stephen I. Vladeck is the Agnes Williams Sesquicentennial Professor of Federal Courts at Georgetown University Law Center. He is one of the nation's leading scholars on federal jurisdiction, the separation of powers, and the role of federal courts in redressing constitutional violations.

Professor Vladeck's scholarly work bears directly on the question presented, including publications examining the historical roots of *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). His scholarship has detailed the interaction between *Bivens* and the Westfall Act, 28 U.S.C. § 2679, as well as related doctrinal developments in *Ziglar v. Abbasi*, 582 U.S. 120 (2017); *Hernández v. Mesa (Hernández II)*, 589 U.S. 93 (2020); and *Egbert v. Boule*, 596 U.S. 482 (2022). Professor Vladeck also was counsel of record for the petitioners in *Hernández II*.

Professor Vladeck submits this brief to explain why *Bivens* and *Carlson v. Green*, 446 U.S. 14 (1980), were proper exercises of the Court's federal common lawmaking authority to provide remedies, including money damages, for violations of a person's constitutional rights. The brief also addresses why neither *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938), nor the Court's later *Bivens* decisions provide a basis for treating *Carlson* as obsolete.

¹ No counsel for a party authored this brief in whole or in part, and no person other than amicus and his counsel made a monetary contribution intended to fund the preparation or submission of this brief.

SUMMARY OF ARGUMENT

As respondent correctly explains, this case presents a straightforward application of *Carlson*. See Watanabe Br. 14-15. Respondent alleges that a federal prison official was deliberately indifferent to his serious medical needs in violation of the Eighth Amendment—the same constitutional claim this Court recognized as actionable under *Bivens* more than four decades ago. The Ninth Circuit correctly held that respondent’s claim does not present a “new context” under *Ziglar v. Abbasi*, 582 U.S. 120 (2017), and the historical and doctrinal foundations of *Carlson* confirm that result. See *Watanabe v. Derr*, 115 F.4th 1034 (9th Cir. 2024).

The Court should not allow *Carlson* to atrophy into irrelevance through the “obsolescence” framework that the United States urges. See Amicus Br. of United States 23-28. *Carlson* rests on a distinct common-law tradition of judge-made remedies for constitutional violations—a tradition most clearly articulated in Justice Harlan’s concurrence in *Bivens* and later confirmed by *Carlson* itself.

Decisions that have cabined *Bivens* remedies often equate them to an implied statutory cause of action, but the analogy is inapt. Unlike a statutory remedy, a constitutional damages action vindicates rights that no other body of law supplies. Eliminating that action would leave many constitutional violations without a remedy, raising serious questions about the constitutionality of the Westfall Act.

Erie does not foreclose the judiciary’s centuries-old authority to award damages for constitutional violations. If *Erie* is not an obstacle to the continued

expansion of qualified immunity—a judicially created doctrine—then it is no obstacle to a federal common-law remedy that holds federal officers accountable for violating a person’s constitutional rights.

Finally, nothing in *Hernández II* or any other post-*Carlson* decision supports treating *Carlson* as obsolete. To the contrary, this Court has repeatedly reaffirmed the three established *Bivens* contexts while declining to extend them further. Following the same path here should lead to a decision affirming the Ninth Circuit’s judgment and allowing respondent’s claim to proceed.

ARGUMENT

I. *Bivens* And *Carlson* Were Proper Exercises Of The Court’s Federal Common-Law Authority.

A federal court exercising jurisdiction over a constitutional claim has the traditional common-law authority to fashion an appropriate remedy for the violation alleged. *See Bivens*, 403 U.S. at 398-401 (Harlan, J., concurring in the judgment). That authority does not depend on express congressional authorization; courts have long awarded equitable relief without legislative authorization, and there is no sound reason to recognize the propriety of a prospective equitable remedy but not a retrospective damages remedy. *Id.* at 404-05. When equitable relief cannot redress a constitutional injury, damages might be the only appropriate relief. *Id.* at 407-10.

Properly understood, then, *Bivens* did not infer a cause of action from the statutory signals of congressional intent. Rather, *Bivens* is rooted in the federal courts’ traditional common-law authority to

provide an appropriate remedy for when a federal officer violates a person's constitutional rights.

A. Federal Courts Possess Traditional Remedial Authority Over Constitutional Claims.

"[W]here federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief." *Bell v. Hood*, 327 U.S. 678, 684 (1946). The federal judicial power to provide a private damages remedy in a suit alleging constitutional harms "hardly has been doubted for over two hundred years." *Nixon v. Herndon*, 273 U.S. 536, 540 (1927). Since the Founding, "the traditional way" for redressing constitutional harms caused by federal officers "was by subjecting them to liability for common-law torts." *Hernández II*, 589 U.S. at 110.

Under these historical traditions, once a federal court has jurisdiction over a constitutional claim, it also has common-law authority to determine an appropriate remedy—whether equitable or legal. *See Bivens*, 403 U.S. at 405-07 & n.6 (Harlan, J., concurring in the judgment). Congress recognized this traditional judicial authority when granting federal district courts original jurisdiction over "all civil actions arising under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331.

That jurisdictional grant itself does not prescribe a damages remedy. But federal courts are not powerless to award damages for a constitutional violation merely because Congress has not expressly authorized a remedy. *See Bivens*, 403 U.S. at 403-06 (Harlan, J., concurring in the judgment). It would make little sense to conclude that Congress gave

federal courts jurisdiction over a category of claims that the courts are powerless to redress.

Section 1331's jurisdictional grant brings the constitutional claim before federal courts, which in turn have authority to determine whether damages are necessary and appropriate to redress the alleged violation. *See Bivens*, 403 U.S. at 400-01, 405-07 (Harlan, J., concurring in the judgment). The relevant inquiry is not whether Congress intended to create a cause of action but whether awarding damages is "necessary" or "appropriate" to vindicate the constitutional deprivation. *Id.* at 404-07.

The settled availability of equitable relief without express statutory authorization confirms that the judiciary's traditional injury-redressing power does not infringe on the legislative branch or otherwise violate the separation of powers. Federal courts have long exercised equitable authority to restrain unconstitutional federal action without a statute expressly authorizing that relief. *See Bivens*, 403 U.S. at 400, 404-05 (Harlan, J., concurring in the judgment) (citing cases). So the absence of express statutory authorization does not mean federal courts lack authority to provide an appropriate remedy for constitutional violations. *See id.* at 404-06. The historical distinctions between law and equity might affect *which* remedy is appropriate, but they do not speak to the *existence* of traditional judicial authority to award both types of relief. *See id.* at 406; *see also Armstrong v. Exceptional Child Ctr., Inc.*, 575 U.S. 320, 327 (2015) (recognizing the historical availability of equitable relief against unlawful official action); *Osborn v. Bank of United States*, 22 U.S. (9 Wheat.) 738, 838-46, 849-50, 870-71 (1824) (sustaining

nonstatutory relief); *The Apollon*, 22 U.S. (9 Wheat.) 362, 365-67, 372-74, 379 (1824) (sustaining damages against a federal officer); *Little v. Barreme*, 6 U.S. (2 Cranch) 170, 178-79 (1804) (same).

In short, nothing in the historical record supports accepting judicially fashioned prospective equitable relief while disfavoring or rejecting damages. The absence of express statutory authorization does not, by itself, foreclose federal courts from fashioning an appropriate damages remedy for a constitutional violation when prospective equitable relief is inappropriate or inadequate. Damages provide the traditional means of compensating an invasion of a legally protected interest and are available when necessary or appropriate to vindicate a constitutional violation. And in selecting an appropriate remedy for the violation, courts exercise judicial authority; they do not arrogate legislative power. *See Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

These traditional remedial powers are not cabined to the specific Fourth Amendment context of *Bivens*. Individual instances of discrimination, law-enforcement overreach, or other constitutional misconduct are often “difficult to address except by way of damages after the fact.” *Abbasi*, 582 U.S. at 144. Whenever prospective equitable relief cannot undo a constitutional violation, damages might be the only remedy capable of vindicating the right. That holds true when a federal officer’s deliberate indifference has already caused a prisoner’s pain and physical harm: prospective relief may secure adequate medical care going forward, but only damages can compensate the constitutional injury already inflicted. *See Carlson*, 446 U.S. at 16 & n.1,

18-23; *see also* Watanabe Br. 40-41 (citing cases). When those circumstances exist, the practical choice is “damages or nothing.” *Bivens*, 403 U.S. at 410 (Harlan, J., concurring in the judgment).

B. *Davis* And *Carlson* Confirm The Judiciary’s Authority To Redress Constitutional Violations With Damages Awards.

Davis and *Carlson* apply *Bivens*’s remedial framework outside the context of the Fourth Amendment to rights secured by the Fifth and Eighth Amendments. Each decision confirms that damages are an appropriate remedy for a constitutional violation when Congress has not displaced the remedy and no special factors counsel hesitation. *See Davis v. Passman*, 442 U.S. 228, 245-49 (1979); *see also Carlson*, 446 U.S. at 18-23; *Bivens*, 403 U.S. at 396-97 (opinion of the court); *id.* at 404-07 (Harlan, J., concurring in the judgment).

Davis illustrates that framework in action. Shirley Davis alleged that Congressman Otto Passman terminated her employment because she was a woman, thereby violating the equal protection component of the Fifth Amendment’s Due Process Clause. *Davis*, 442 U.S. at 230-31, 234-35. The Court treated the constitutional right and the available remedy as distinct questions. It first asked whether the Fifth Amendment secures the asserted right and then asked whether damages provide an appropriate remedy for the alleged violation. *See id.* at 239-48. Damages were appropriate because (1) courts had substantial experience adjudicating analogous employment-discrimination claims, (2) reinstatement was unavailable because Passman no longer served in

Congress, and (3) no alternative judicial relief could redress Davis’s injury. *Id.* at 245 & n.23. For Davis, as for *Bivens*, the remedial choice was “damages or nothing.” *Id.* at 245 (quoting *Bivens*, 403 U.S. at 410 (Harlan, J., concurring in the judgment)).

Carlson applied the same framework in the Eighth Amendment prison context. The claim alleged that federal prison officials were deliberately indifferent to a prisoner’s serious medical needs. 446 U.S. at 16 & n.1, 17-18. The Court asked whether special factors counseled hesitation or Congress had expressly declared another remedy to be a substitute for constitutional recovery. *Id.* at 18-19. Because neither limitation applied, the Court held that the Federal Tort Claims Act complements, rather than displaces, the *Bivens* remedy against the prison officials. *Id.* at 19-20. The Court added that the *Bivens* remedy provides greater deterrence, permits punitive damages and a jury trial, and supplies a uniform federal rule of liability. *Id.* at 20-23.

Carlson thus treats congressional action as relevant only to whether the judiciary’s traditional remedial authority has been *displaced*—not whether such authority exists in the first instance.

II. Constitutional Remedies Are Not Implied Statutory Causes Of Action.

This Court’s recent decisions limiting the scope of *Bivens* and its progeny often analogize to the rule preventing courts from finding implied causes of action in federal statutes. *See, e.g., Abbasi*, 582 U.S. at 132-35; *Hernández II*, 589 U.S. at 100-01. That analogy is misplaced. It detracts from the traditional

constitutional role of courts and has sown more confusion than clarity.

The false analogy between implied statutory causes of action and *Bivens* remedies stems most directly from Justice Scalia's concurrence in *Correctional Services Corp. v. Malesko*, 534 U.S. 61 (2001). Justice Scalia described *Bivens* as “a relic of the heady days in which this Court assumed common-law powers to create causes of action—decreeing them to be ‘implied’ by the mere existence of a statutory or constitutional prohibition.” *Id.* at 75 (Scalia, J., concurring) (emphasis added). That seed has since overgrown into a “general reluctance to extend judicially created private rights of action,” *Jesner v. Arab Bank, PLC*, 584 U.S. 241, 264 (2018)—a formulation that wrongly collapses the distinction between statutory and constitutional remedies.

Generally speaking, federal courts should not imply statutory remedies because doing so undermines the rights—and limitations on those rights—created by Congress. *See Alexander v. Sandoval*, 532 U.S. 275, 286-87 (2001); *cf. Abbasi*, 582 U.S. at 135 (explaining that “separation-of-powers principles are or should be central to the analysis”). But *constitutional* rights exist independently of—and sometimes despite—a federal statute. The judiciary does not invade the legislature's purview when it redresses *constitutional* violations. If anything, separation of powers at times requires courts to recognize and provide a constitutional remedy precisely because Congress has not provided one.

Indeed, before *Carlson* in 1980, the Court had become “chary” of reading implied damages remedies

into statutes. *Transamerica Mortg. Advisors v. Lewis*, 444 U.S. 11 (1979). Yet that chariness in the statutory context did not stop the Court one year later from extending the constitutional *Bivens* remedy to the Eighth Amendment context in *Carlson*.

Justice Scalia’s description of *Bivens* as a “relic” of “heady days” is also misplaced. He was referring to the “*ancien regime*” discussed in *Sandoval*, 532 U.S. at 287. That regime involved cases from the 1960s and 1970s in which courts went beyond their constitutional purview and found remedies implied in statutes. Those decisions provide no reason to fear implied *constitutional* remedies, which are consistent with—if not required by—the separation of powers. See Martin H. Redish, *Constitutional Remedies as Constitutional Law*, 62 B.C. L. Rev. 1865, 1920-22 (2021) (explaining why converging statutory and constitutional remedies is improper). Moreover, the origin of *Bivens* is not “heady” but firmly grounded in centuries of federal common law, *see supra* Part I, and the origin of the country itself, *see Bivens*, 403 U.S. at 397 (“The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury.” (quoting *Marbury*, 5 U.S. at 163)).

The consequences of denying a constitutional remedy are far more severe than the consequences of denying a statutory one. When a constitutional remedy is unavailable, a troubling question arises that this Court has sidestepped at least once: If a plaintiff is not entitled to a *Bivens* remedy, is the Westfall Act unconstitutional because its prohibition of state-law tort claims against federal employees eliminates access to the courts? *See* Pet. for Cert. at i,

Hernández v. Mesa (June 15, 2018) (No. 17-1678); *Hernández v. Mesa*, 587 U.S. 1025 (2019) (mem.). The Act preempts essentially all state-tort suits against federal officers for wrongful acts done while acting in their official capacity, but it carved out an “explicit exception for *Bivens* claims.” *Hui v. Castaneda*, 559 U.S. 799, 807 (2010) (discussing 28 U.S.C. § 2676(b)(2)(A)). Eliminating *Bivens* claims would create absolute immunity for federal officers, leaving victims of constitutional wrongs without a legal remedy. *See* Watanabe Br. 29-30, 45-46.

III. *Erie* Does Not Foreclose Federal Common-Law Remedies.

This Court last upheld a *Bivens* claim almost five decades ago in *Carlson*. Later cases characterize *Bivens* as a superseded, “*ancien regime*.” *Abbasi*, 582 U.S. at 131 (quoting *Sandoval*, 532 U.S. at 287); *see also Hernández II*, 589 U.S. at 99. That characterization overlooks the robust common-law tradition for remedying federal officer misconduct. *See supra* Part I; *see also* Br. of Carlos M. Vázquez & Anya Bernstein as Amici Curiae in Supp. of Pet’rs 2, *Hernández II*, 589 U.S. 93 (2020) (No. 17-1678). It also misapplies *Erie*.

Erie’s holding that “[t]here is no federal general common law,” 304 U.S. at 78, was directed at a specific issue—the practice by which federal courts sitting in diversity applied “general common law” that varied from state law. *Hernández II*, 589 U.S. at 100 (quoting *Erie*, 304 U.S. at 78); *see also* Carlos M. Vázquez, *Bivens and the Ancien Régime*, 96 Notre Dame L. Rev. 1923, 1924, 1931-32 (2021). Before *Erie*, this general common law “was neither federal

law nor state law” but “had features of both.” Vázquez, *supra*, at 1931. In finding that this “in-between status no longer existed,” *id.*, *Erie* did not hold that federal courts lack common lawmaking authority or the authority to fashion remedies for when federal officials violate a person’s constitutional rights. Instead, *Erie* required federal courts to decide whether the applicable law would be “upgrade[d]” to federal law or “downgrade[d]” to state law. *Id.*

Recognizing that federal common law remained very much viable, on the same day the Court decided *Erie*, it also held that “federal common law” would govern disputes between states. *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92, 110 (1938). And as the Court has explained many times since *Erie*, federal common law has continued to govern in areas of “peculiarly federal concern.” *Boyle v. United Techs. Corp.*, 487 U.S. 500, 504-05 (1988) (identifying areas of “uniquely federal interests” warranting displacement of state law by “federal common law”); *Clearfield Tr. Co. v. United States*, 318 U.S. 363, 366-67 (1943) (recognizing federal common law for commercial paper issued by the United States); *Texas Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 641 (1981) (identifying “areas where federal common law applies” such that “the creation of a right to contribution may fall within the power of the federal courts”); *Collins v. Virginia*, 584 U.S. 586, 607 (2018) (Thomas, J., concurring) (noting the contexts in which the Court has continued to fashion federal common law after *Erie*).

The question in *Bivens* was whether the traditional common-law right to sue federal officers for official misconduct, which held “in-between

status” before *Erie*, Vázquez, *supra*, at 1931, was available as a federal cause of action for damages. In adopting what became known as the *Bivens* remedy, the Court regarded the remedy as “hardly . . . a surprising proposition” because “[h]istorically, damages have been regarded as the ordinary remedy for an invasion of personal interests in liberty.” *Bivens*, 403 U.S. at 395 (citations omitted). “In the context of suits against Government officials, damages have long been awarded as appropriate relief” stretching back to the “early Republic,” and “damages against federal officials remain an appropriate form of relief today.” *Tanzin v. Tanvir*, 592 U.S. 43, 49 (2020); *see also* Richard H. Fallon, Jr., *Constitutional Remedies: In One Era and Out the Other*, 136 Harvard L. Rev. 1300, 1308 (2023) (“[S]haping the right-remedy relationship is a crucial lawmaking function that has historically been shared between Congress and the courts, especially the Supreme Court.”). Thus, “*Bivens* can be best understood as providing a federal right to sue that builds on the common past and tailors the common law suit for use in a post-*Erie* world.” Vázquez & Bernstein Amicus Br. 22.

But as “this Court’s general reluctance to extend judicially created private rights of action” increased in the modern era, *Jesner v. Arab Bank, PLC*, 584 U.S. 241, 264 (2018), the Court has largely gutted *Bivens*. In *Hernández II*, the Court acknowledged the historical tradition of judge-made damages remedies but, for the first time, relied on *Erie* to dismiss the relevance of that tradition. 589 U.S. at 99-100. Because of *Erie* and “the demise of federal general common law,” Justice Alito wrote for the majority,

“federal courts today cannot fashion new claims in the way they could before 1938;” rather, “a federal court’s authority to recognize a damages remedy must rest at bottom on a statute enacted by Congress . . . and no statute expressly creates a *Bivens* remedy.” *Id.* at 100-01 (citations omitted). The lone justification offered for that proposition was the rejection of implied statutory causes of action in *Sandoval*. *See id.* (citing *Sandoval*, 532 U.S. at 286-87). But as explained above, that justification rests on an inapt analogy. *See supra* Part II.

Although *Hernández II* was correct in recognizing that *Erie* changed the framework for federal common law, its use of *Erie* to restrict “a federal court’s authority to recognize a damages remedy” to cases in which a “statute expressly creates a *Bivens* remedy” is materially overstated. 589 U.S. at 101. *Erie* required courts to justify applying federal rather than state common law; the decision did not require courts to abandon their common-law power to redress constitutional violations. *Bivens*, 403 U.S. at 400-02 (Harlan, J., concurring in the judgment); *see also* Vázquez & Bernstein Amicus Br. 22 (“In the pre-*Erie* era, courts . . . had not been particularly careful about pinning down the locus of common law rights to sue federal officers for official misconduct.”).

Hernández II and other post-*Bivens* cases also fail to explain why the Court would take decades to acknowledge such a monumental implication of *Erie*. Even the Solicitor General, on behalf of the *Bivens* respondents, when arguing against a judicially created federal damages remedy, did not read *Erie* to foreclose the power of federal courts to fashion common law. *See* Br. of Resp’ts 19-20, *Bivens v. Six*

Unknown Named Agents of the Fed. Bureau of Narcotics, 403 U.S. 388 (1971) (No. 301), 1970 WL 122211, at *19-20 (noting that “the creation by the federal courts of common-law rights” are “few and restricted” because “we are not in the free-wheeling days antedating” *Erie* (citation omitted)).

Even if *Erie* had the impact the majority claimed in *Hernández II*, neither decision explains why foreclosing federal judicial power to fashion remedies would be limited to damages suits but not equitable suits. *See, e.g., Armstrong v. Exceptional Child Ctr., Inc.*, 575 U.S. 320, 327 (2015) (“The ability to sue to enjoin unconstitutional actions by state and federal officers is the creation of courts of equity, and reflects a long history of judicial review of illegal executive action, tracing back to England.”). What justification does *Erie* provide for reconfiguring federal judge-made remedies so that they are available in cases seeking prospective relief but (almost) nonexistent when plaintiffs seek retrospective relief?

The Court’s modern *Bivens* jurisprudence provides no answer to that question. Instead, although the Court has scaled back *Bivens* actions as a “disfavored” judicial activity, *Abbasi*, 582 U.S. at 135 (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 675 (2009)), it has continued to identify circumstances in which judicially made remedies are permissible and even necessary.

The qualified-immunity doctrine is one of the most evident examples. The Court has fashioned modern qualified-immunity doctrine with no suggestion that doing so runs afoul of *Erie*. In *Pierson v. Ray*, 386 U.S. 547 (1967), the Court assumed Section 1983

incorporated “common-law immunities” and held that officials acting in “good faith” can raise qualified immunity as a defense. *Id.* at 554, 557 (discussing 42 U.S.C. § 1983); *see also Imbler v. Pachtman*, 424 U.S. 409, 418 (1976) (reasoning that Section 1983 “is to be read in harmony with general principles of tort immunities and defenses rather than in derogation of them”). Likewise, in *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), the Court held that federal executive officials enjoy immunity from damages liability unless their actions violate clearly established constitutional rights that “a reasonable person would have known.” *Id.* at 818. That standard had no statutory basis; Congress did not create it. *See* William Baude, *Is Qualified Immunity Unlawful?*, 106 Calif. L. Rev. 45, 47, 51-77 (2018).

Indeed, the *Harlow* standard “conferred a broader immunity from damages than most officials had ever received in suits at common law.” Fallon, *supra*, at 1331. And the Court has continued to expand qualified immunity for federal officials without legislative action, imposing a standard of ever-greater specificity in the “clearly established” inquiry, *see Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011), and raising pleading standards in *Iqbal*, 556 U.S. at 678—all without addressing how this expansion rests on statutory interpretation rather than judicial common lawmaking. *See Kisela v. Hughes*, 584 U.S. 100, 121 (2018) (Sotomayor, J., dissenting) (criticizing the Court’s “one-sided approach to qualified immunity” in recent decisions); *Abbasi*, 582 U.S. at 157 (Thomas, J., concurring in part and concurring in the judgment) (noting “growing concern” with the Court’s “qualified immunity jurisprudence”).

If *Erie* does not forbid federal courts from creating a judge-made immunity doctrine that shields federal officers from liability, it also does not forbid federal courts from fashioning remedies to hold such officers accountable. Although the Court has voiced disdain for “creat[ing] new federal common law,” *Sosa v. Alvarez-Machain*, 542 U.S. 692, 746 (2004) (Scalia, J., concurring in part and concurring in the judgment), it exercises precisely that authority when developing qualified-immunity doctrines. See *Crawford-El v. Britton*, 523 U.S. 574, 611-12 (1998) (Scalia, J., dissenting) (“We find ourselves engaged, therefore, in the essentially legislative activity of crafting a sensible scheme of qualified immunities for the statute we have invented—rather than applying the common law embodied in the statute that Congress wrote.”). The only difference is directional: qualified immunity protects the federal officer; a *Bivens* action protects the victim of a federal officer’s misconduct.

As Justice Scalia wrote for the Court in *Boyle*, “civil liability of federal officials for actions taken in the course of their duty” is an area of “peculiarly federal concern” such that “the scope of that liability is controlled by federal law” and “warrant[s] the [judicial] displacement of state law.” 487 U.S. at 505. If that is so, then the power to shape the terms of such liability necessarily includes the cause of action, the defenses to it, and the remedies for it. See Fallon, *supra*, at 1360 (“If taken at face value, the modern Supreme Court’s separation of powers rationale for rejecting *Bivens* actions would also condemn other forms of federal common lawmaking . . . including the recognition of federal common law defenses against state law causes of action.”).

IV. *Hernández II* Provides No Basis For Rendering *Carlson* Obsolete.

Nothing in *Hernández II* supports treating *Carlson* as obsolete. *Hernández II* did not reconsider, much less overrule, any established application of *Bivens*—nor of *Davis* or *Carlson*.

In *Hernández II*, a U.S. Border Patrol agent standing in the United States fired across the international border and killed a Mexican national standing in Mexico. 589 U.S. at 96-97. The Court described the case as a request “to extend *Bivens*” to a cross-border shooting. *Id.* at 96. It held that the claim arose in a new context because it differed in meaningful respects from the claims previously recognized under *Bivens*. *See id.* at 102-03. Looking beyond the constitutional provisions invoked, the Court considered it “glaringly obvious” that the cross-border setting presented a new context. *Id.* at 103.

The Court’s reasons for declining to recognize a remedy were specific to that international setting. It emphasized that the cross-border shooting was “by definition an international incident” affecting the interests of the United States and Mexico. *Hernández II*, 589 U.S. at 104-06. It separately concluded that the conduct of the Border Patrol agents stationed at the border bears a “clear and strong connection to national security” and that the risk of undermining border security counseled hesitation. *Id.* at 107-09. The Court also relied on Congress’s treatment of claims arising from injuries inflicted outside the United States. *Id.* at 109-13. Taken together, those considerations led the Court to

leave to the political branches the task of recognizing a remedy for cross-border claims.

Those context-specific grounds do not reach *Carlson*. An Eighth Amendment claim against federal prison officials for deliberate indifference to a federal prisoner's serious medical needs implicates none of the foreign relations, national security, border security, or extraterritorial concerns on which *Hernández II* relied. Nothing in *Hernández II* suggests that a damages remedy would be unavailable if the facts of *Bivens* recurred without any asserted interference with national security.

So *Carlson* remains on solid footing, and respondent here pursues the same type of remedy for the same type of misconduct: federal prison officials' deliberate indifference to a federal prisoner's serious medical needs. *See* Watanabe Br. 14-15. The constitutional right asserted, the alleged misconduct, the custodial setting, and the category of defendants all place respondent's claim comfortably within *Carlson*'s established context.

The new-context inquiry asks whether a claim differs "in a meaningful way" from the claims this Court has recognized in prior cases. *Abbasi*, 582 U.S. at 139. It does not require the later claim to reproduce every factual detail of the prior case. Rather, the Court focuses on differences relevant to the propriety of a judicial remedy, including the constitutional right at issue, the officers' legal mandate, the extent of judicial guidance, and the risk of intrusion into the function of the political branches. *Id.* at 139-40. Variations in the severity of the injury, the course of

treatment, or the precise medical condition do not alter that remedial context. Those matters bear on whether respondent can factually establish deliberate indifference to a serious medical need, not on whether his claim extends *Bivens* beyond *Carlson*. See *Farmer v. Brennan*, 511 U.S. 825, 834, 837 (1994).

Hernández II confirms that distinction. Although the Court described its understanding of a new context as “broad,” it still required a meaningful difference from the context of claims in which a damages remedy has been recognized. *Hernández II*, 589 U.S. at 102-03. Respondent’s claim presents no such meaningful difference with *Carlson*.

Treating every factual variation as a new context would confine *Carlson* to its precise facts and deprive it of precedential force. But the governing inquiry asks whether the differences are meaningful, not whether the facts are identical. See *Abbasi*, 582 U.S. at 139-40; *Hernández II*, 589 U.S. at 102-03. Because respondent’s claim falls within the remedial context *Carlson* established, applying *Carlson* here follows this Court’s precedent. It does not extend *Bivens*.

Hernández II declined to extend *Bivens*, but it did not overrule any of its established applications. The majority applied the new-context and special-factors framework and refused to recognize a remedy for the distinct cross-border claim before it. *Hernández II*, 589 U.S. at 102-14. Justice Thomas, joined by Justice Gorsuch, wrote separately to urge the Court to consider “discarding the *Bivens* doctrine altogether.” *Id.* at 114 (Thomas, J., concurring). The majority did not take that step. Declining to recognize a remedy in a new context leaves existing precedent in place;

treating an established application as obsolete eliminates the precedent itself. Thus, *Hernández II*, a decision declining to extend *Bivens*, cannot and did not do the work of overruling *Carlson*.

The Court has continued to identify *Carlson* as one of the three cases in which it recognized a damages remedy under the Constitution. *See Hernández II*, 589 U.S. at 99; *Abbasi*, 582 U.S. at 131. Although later decisions have declined to extend those precedents to new contexts, the Court has identified “powerful reasons” to retain *Bivens*. *Abbasi*, 582 U.S. at 134-35. *Hernández II* followed that same structure. It identified the three established contexts before asking whether the cross-border claim was meaningfully different from them. *See Hernández II*, 589 U.S. at 102.

This Court does not discard a directly controlling precedent merely because later decisions have questioned its reasoning or limited its reach. *See Halliburton Co. v. Erica P. John Fund, Inc.*, 573 U.S. 258, 266 (2014) (“Before overturning a long-settled precedent, . . . we require ‘special justification,’ not just an argument that the precedent was wrongly decided.” (quoting *Dickerson v. United States*, 530 U.S. 428, 443 (2000))). If *Carlson* no longer governs the Eighth Amendment context that it recognized, it governs nothing. That result would overrule *Carlson* in substance while avoiding the discipline of doing so expressly. *See Watanabe Br.* 31-32.

Applying *Carlson* to respondent’s claim, by contrast, respects both decisions and principles of stare decisis. It preserves the established remedy recognized in *Carlson* without extending *Bivens*

beyond that context. And it correctly acknowledges that, just as *Erie* left in place the power of federal courts to fashion federal common-law *defenses* in suits against federal officers, it likewise preserved the power of federal courts to fashion federal common-law *remedies* in those same cases.

CONCLUSION

The Court should affirm the judgment of the Ninth Circuit.

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