

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 AMICI CURIAE AMERICAN CIVIL LIBERTIES
UNION, AMERICAN CIVIL LIBERTIES UNION OF THE
DISTRICT OF COLUMBIA, AND AMERICAN CIVIL
LIBERTIES UNION OF HAWAI‘I FOUNDATION IN
SUPPORT OF RESPONDENT**

Priyanka Menon*
Brett Max Kaufman
AMERICAN CIVIL LIBERTIES
UNION FOUNDATION
125 Broad Street, 18th Floor
New York, NY 10004
Carmen Iguina González
Jennifer Wedekind
AMERICAN CIVIL LIBERTIES
UNION FOUNDATION
915 15th Street NW
Washington, DC 20005
Cecillia D. Wang
AMERICAN CIVIL LIBERTIES
UNION FOUNDATION
425 California Street, Suite 700
San Francisco, CA 94104

**admitted only in Maryland*

Scott Michelman
Counsel of Record
AMERICAN CIVIL LIBERTIES
UNION FOUNDATION OF
THE DISTRICT OF COLUMBIA
529 14th Street NW, Suite 420
Washington, DC 20045
(202) 601-4267
smichelman@acludc.org
Jongwook “Wookie” Kim
ACLU OF HAWAI‘I FOUNDATION
P.O. Box 3410
Honolulu, HI 96801

*Counsel for Amici Curiae American Civil Liberties Union,
American Civil Liberties Union of the District of Columbia, and
American Civil Liberties Union of Hawai‘i Foundation*

TABLE OF CONTENTS

	Page(s)
TABLE OF AUTHORITIES	ii
INTRODUCTION AND SUMMARY OF ARGUMENT	1
ARGUMENT	6
I. THE <i>CARLSON</i> “CONTEXT” INCLUDES WHAT CONGRESS ENDORSED IN THE WESTFALL ACT.	6
A. The Prior Construction Canon Applies to the Westfall Act’s Savings Clause.	8
B. Reducing the <i>Carlson</i> “Context” to Its Specific Facts Would Contravene the Text of the Westfall Act, Precedent, and Common Sense.	12
C. The Westfall Act Does Not Permit Construing the Administrative Remedy Program To Destroy the <i>Carlson</i> Context.	16
D. Ignoring the Westfall Act or Subordinating It to More General Statutes Would Contravene Precedent, Statutory Text, and the Separation of Powers.....	19
II. IN 1988, THE COURTS OF APPEALS UNIFORMLY APPLIED <i>BIVENS</i> TO ANY EIGHTH AMENDMENT CLAIM FOR INADEQUATE PRISON MEDICAL CARE.....	23
CONCLUSION.....	28

TABLE OF AUTHORITIES

Cases	Page(s)
<i>Alexander v. Sandoval</i> , 532 U.S. 275 (2001)	11
<i>Atl. Sounding Co., Inc. v. Townsend</i> , 557 U.S. 404 (2009)	8
<i>Bivens v. Six Unknown Named Agents of the Fed. Bur. of Narcotics</i> , 403 U.S. 388 (1971)	1–8, 12, 13, 15, 16, 18–27
<i>Brice v. Day</i> , 604 F.2d 664 (10th Cir. 1979)	26
<i>Bush v. Lucas</i> , 462 U.S. 367 (1983)	24
<i>Cannon v. Univ. of Chicago</i> , 441 U.S. 677 (1979)	10, 11, 14
<i>Carlson v. Green</i> , 446 U.S. 14 (1980) ...	1–8, 11–13, 15–18, 20, 22–27
<i>Carrin v. Strong</i> , 182 F.4th 1351 (11th Cir. 2026).....	18
<i>Chappell v. Wallace</i> , 462 U.S. 296 (1983)	24
<i>Cisco Sys. v. Doe</i> , 146 S. Ct. 1882 (2026)	15
<i>Corr. Servs. Corp. v. Malesko</i> , 534 U.S. 61 (2001)	16

Cases	Page(s)
<i>Davis v. Mich. Dep't of Treasury</i> , 489 U.S. 803 (1989)	8, 15
<i>Dep't of Agric. v. Kirtz</i> , 601 U.S. 42 (2024)	21
<i>Egbert v. Boule</i> , 596 U.S. 482 (2022)	1, 2, 5–8, 16, 20
<i>Epic Sys. Corp. v. Lewis</i> , 584 U.S. 497 (2018)	4, 14, 21–23
<i>Exxon Mobil Corp. v. Allapattah Servs., Inc.</i> , 545 U.S. 546 (2005)	5, 23
<i>FDA v. R.J. Reynolds Vapor Co.</i> , 606 U.S. 226 (2025)	13
<i>FDIC v. Meyer</i> , 510 U.S. 471 (1994)	16
<i>Franklin v. Gwinnett Cnty. Pub. Schs.</i> , 503 U.S. 60 (1992)	3, 10, 11, 14
<i>Gillan v. Edwards</i> , 780 F.2d 1021 (6th Cir. 1985)	27
<i>Gillespie v. Civiletti</i> , 629 F.2d 637 (9th Cir. 1980)	25
<i>Goar v. Civiletti</i> , 688 F.2d 27 (6th Cir. 1982)	25, 26

Cases	Page(s)
<i>Goldey v. Fields</i> , 606 U.S. 942 (2025) (per curiam).....	22
<i>Gomez-Perez v. Potter</i> , 553 U.S. 474 (2008)	9
<i>Hall v. United States</i> , 566 U.S. 506 (2012)	17
<i>Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.</i> , 530 U.S. 1 (2000)	18
<i>Hernández v. Mesa</i> , 589 U.S. 93 (2020)	1–3, 6, 12, 15, 19, 23
<i>Hessbrook v. Lennon</i> , 777 F.2d 999 (5th Cir. 1985)	26
<i>Hui v. Castaneda</i> , 559 U.S. 799 (2010)	2, 16, 19, 22
<i>Jackson v. Birmingham Bd. of Educ.</i> , 544 U.S. 167 (2005)	9
<i>Jama v. ICE</i> , 543 U.S. 335 (2005)	13
<i>Johnson v. Terry</i> , 119 F.4th 840 (11th Cir. 2024)	18

Cases	Page(s)
<i>Jones v. Bock</i> , 549 U.S. 199 (2007)	21
<i>Lamar, Archer & Cofrin, LLP v. Appling</i> , 584 U.S. 709 (2018)	3, 9
<i>Martin v. Franklin Cap. Corp.</i> , 546 U.S. 132 (2005)	14
<i>McCarthy v. Madigan</i> , 503 U.S. 140 (1992)	24, 27
<i>Medina v. Planned Parenthood S. Atl.</i> , 606 U.S. 357 (2025)	11
<i>Merck & Co. v. Reynolds</i> , 559 U.S. 633 (2010)	8, 9
<i>Merrill Lynch, Pierce, Fenner & Smith, Inc. v.</i> <i>Curran</i> , 456 U.S. 353 (1982)	3, 9, 10
<i>Midlantic Nat’l Bank v. N.J. Dep’t of</i> <i>Environmental Prot.</i> , 474 U.S. 494 (1986)	8
<i>Miles v. Apex Marine Corp.</i> , 498 U.S. 19 (1990)	9, 17
<i>Minneeci v. Pollard</i> , 565 U.S. 118 (2012)	16

Cases	Page(s)
<i>Morton v. Mancari</i> , 417 U.S. 535 (1974)	21
<i>Muhammad v. Carlson</i> , 739 F.2d 122 (3d Cir. 1984).....	25, 26
<i>Muniz v. United States</i> , 149 F.4th 256 (3d Cir. 2025)	18
<i>Ross v. Blake</i> , 578 U.S. 632 (2016)	21
<i>Schweiker v. Chilicky</i> , 487 U.S. 412 (1988)	24
<i>Smith-Bey v. Hosp. Adm’r</i> , 841 F.2d 751 (7th Cir. 1988)	25
<i>Tanzin v. Tanvir</i> , 592 U.S. 43 (2020)	5, 9, 15, 16, 19, 23, 27
<i>Trump v. Cook</i> , 146 S. Ct. 2234 (2026)	9
<i>Unicolors, Inc. v. H&M Hennes & Mauritz, L.P.</i> , 595 U.S. 178 (2022)	8, 9
<i>United States v. Smith</i> , 499 U.S. 160 (1991)	2, 7, 19, 23
<i>United States v. Stanley</i> , 483 U.S. 669 (1987)	24

Cases	Page(s)
<i>Wilkie v. Robbins</i> , 551 U.S. 537 (2007)	16
<i>Woodford v. Ngo</i> , 548 U.S. 81 (2006)	27
<i>Ziglar v. Abbasi</i> , 582 U.S. 120 (2017)	2, 6, 7, 12, 14, 15, 22
Statutes	Page(s)
28 U.S.C. § 2679(b)(1)	7
28 U.S.C. § 2679(b)(2)(A)	2, 7, 13, 17, 27
28 U.S.C. § 2680	13
42 U.S.C. § 1997e(a)	22
42 U.S.C. § 1997e(e)	22
Rules	Page(s)
Sup. Ct. R. 37.6	1

INTEREST OF AMICI CURIAE

The **American Civil Liberties Union (“ACLU”)** is a nationwide, nonprofit organization that has sought to defend and advance civil liberties in the United States since 1920. The **ACLU of the District of Columbia** and the **ACLU of Hawai‘i** are two of the ACLU’s affiliates. The ACLU frequently appears in this Court, as counsel for parties and as amicus curiae, in cases concerning government accountability for violations of individuals’ rights and liberties, including in *Bivens* cases. *See, e.g., Egbert v. Boule*, 596 U.S. 482 (2022) (amicus); *Hernández v. Mesa*, 589 U.S. 93 (2020) (amicus); *Bivens v. Six Unknown Named Agents of the Fed. Bur. of Narcotics*, 403 U.S. 388 (1971) (amicus).¹

INTRODUCTION AND SUMMARY OF ARGUMENT

Kekai Watanabe was brutally attacked in a prison fight and his tailbone was broken. For months, prison staff denied his requests for hospital care, providing him instead with over-the-counter pain medication. Mr. Watanabe now seeks to bring a damages claim for his months of pain and suffering. Doing so is his only way to hold accountable the officials who ignored his repeated requests for care. Under a straightforward

¹ Pursuant to Supreme Court Rule 37.6, counsel for amici certify that no party’s counsel authored this brief in whole or in part; no party or party’s counsel contributed money that was intended to fund the preparation or submission of the brief; and no person other than amici, its members, or its counsel contributed money intended to fund the preparation or submission of the brief.

application of *Carlson v. Green*, 446 U.S. 14 (1980), he states a viable claim.

Carlson relied on *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971), to infer a damages remedy for “a federal prisoner’s inadequate-care claim under the Eighth Amendment.” *Egbert v. Boule*, 596 U.S. 482, 490–91 (2022). Eight years after *Carlson*, Congress passed the Westfall Act, which exempted all civil actions “brought for a violation of the Constitution of the United States” from the Act’s remedial exclusivity provisions. 28 U.S.C. § 2679(b)(2)(A); *see also Hui v. Castaneda*, 559 U.S. 799, 807 (2010). As this Court has repeatedly recognized, that exemption was Congress’s way of “expressly . . . preserving . . . liability for *Bivens* actions,” *United States v. Smith*, 499 U.S. 160, 173 (1991)—ensuring, in other words, that the Westfall Act “left *Bivens* where it found it,” *Hernández v. Mesa*, 589 U.S. 93, 111 n.9 (2020).

Congress’s decision to safeguard *Bivens* liability must be respected. Although inferring causes of action is now “a disfavored judicial activity,” *Ziglar v. Abbasi*, 582 U.S. 120, 135 (2017) (citation modified), the Westfall Act endorsed *Bivens* as it stood in 1988. That endorsement should inform how the Court approaches *Carlson* in this case. At the time of the Westfall Act’s passage, courts applied *Carlson* to any Eighth Amendment claim alleging unconstitutionally deficient prison medical care—not just cases presenting precisely the same facts as *Carlson*. Because Congress relied upon that judicial understanding when it passed the Westfall Act, the Court cannot now reduce *Carlson* to its facts. Instead,

to respect the work of Congress, the “context” inquiry must pay just as much heed to what Congress *has* authorized as to what it *has not*. Concretely, then, just as the Court has declined, in all of its post-1988 *Bivens* cases through the present, to extend *Bivens* to novel circumstances Congress could not have authorized in 1988, the Court should not hesitate to permit *Bivens* applications that were well settled when Congress acted in 1988. Failing to do so would be just as much an “arrogati[on of] legislative power” as extending *Bivens* liability to novel circumstances Congress has left unaddressed. *Hernández*, 589 U.S. at 100.

Longstanding principles of statutory interpretation support construing the scope of *Carlson* as Congress would have in 1988. When Congress legislates about a well-established legal concept, the prior construction canon presumes that Congress intended to incorporate that established meaning, as reflected both in the decisions of this Court and in any broad consensus among appellate courts. *See, e.g., Lamar, Archer & Cofrin, LLP v. Appling*, 584 U.S. 709, 721 (2018). This rule is rooted in a core separation-of-powers principle: “It is just as much ‘judicial legislation’ for a court to withdraw a remedy which Congress expected to be continued as to improvise one that Congress never had in mind.” *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran*, 456 U.S. 353, 394 n.100 (1982) (citation modified); *see also Franklin v. Gwinnett Cnty. Pub. Schs.*, 503 U.S. 60, 74 (1992) (explaining that failing to enforce a valid cause of action “would harm separation of powers principles . . . by giving judges the power to render

inutile causes of action authorized by Congress through a decision that *no* remedy is available”).

By contrast, Petitioner’s and the United States’ demand for precise factual symmetry between *Carlson* and all subsequent Eighth Amendment damages claims about inadequate prison medical care cannot be squared with the Westfall Act’s text. The provision preserving *Bivens* liability is exception-free: nowhere does it identify or discuss the factual scenarios of the *Bivens* cases the Court decided prior to 1988. To insist now that the provision preserves only claims that duplicate the facts of those cases—rather than the principles on which those cases were decided—is a willful misreading of Congress’s directive. Under Petitioner’s artificial congruence rule, *Carlson* would apply not to “Eighth Amendment prison medical care claims” but only to “Eighth Amendment claims of incarcerated asthmatics who died as a result of deficient medical care.” Neither the Westfall Act nor a logical system of precedent works this way. *See Epic Sys. Corp. v. Lewis*, 584 U.S. 497, 510 (2018).

Petitioner’s argument that the Administrative Remedy Program (“ARP”) renders every prison claim *sui generis*—along with the United States’ corollary admission that “no more *Carlson* claims will be viable” under this approach, Amicus Br. for U.S. 3—invites an even greater usurpation of legislative power. Petitioner and the United States effectively ask this Court to take a red pen to the Westfall Act and scratch out a whole category of *Bivens* applications. But that category indisputably existed when Congress acted to preserve that remedy. To bar such claims today

because of the ARP would “retroactively impose” on Congress a “new presumption” that “did not exist at the time of enactment” of the Westfall Act. *Tanzin v. Tanvir*, 592 U.S. 43, 52 (2020). The separation of powers forbids this outcome.

While minimizing or even rewriting the Westfall Act, Petitioner and the United States urge the Court to focus on more general statutes about procedures for prison claims (chiefly, the Prison Litigation Reform Act). In fact, these laws can easily be harmonized with the Westfall Act, and separation-of-powers principles demand that this Court do so. The Westfall Act preserves the *Bivens* cause of action as Congress found it in 1988 (including well-recognized applications of *Carlson*). Meanwhile, Congress’s other, more general laws impose procedural limitations and provide other safeguards that coexist with—but do not eliminate or diminish—*Carlson* claims. These statutes work together, not against one another. The Court should reject the invitation of Petitioner and the United States to turn statutory interpretation into “an exercise in looking over a crowd and picking out your friends.” *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 568 (2005) (citation modified).

Congress has done the hard work, so the separation of powers makes this case an easy one. When Congress passed the Westfall Act, it endorsed what this Court and the circuits understood *Carlson* to stand for at the time: the general availability of a damages action for a “federal prisoner’s inadequate-care claim under the Eighth Amendment.” *Egbert*, 596 U.S. at 490–91. That availability did not turn on how closely the facts of any given claim resembled those in

Carlson. Abiding by Congress’s decision now means preserving *Carlson* as it stood in 1988. Because Congress blessed the general availability of Eighth Amendment *Bivens* claims for unconstitutionally deficient prison medical care, claims like Mr. Watanabe’s must be allowed to proceed.

The judgment below should be affirmed.

ARGUMENT

I. THE *CARLSON* “CONTEXT” INCLUDES WHAT CONGRESS ENDORSED IN THE WESTFALL ACT.

The Court has prescribed a two-step test for determining when a *Bivens* cause of action is available. First, courts must assess whether the claim arises in a “new context.” *Abbasi*, 582 U.S. at 139. If a claim falls within an existing *Bivens* “context”—that is, if it isn’t “meaningfully different from the three cases in which the Court has implied a damages action”—a *Bivens* action is available and the claim may proceed. *Egbert*, 596 U.S. at 492 (citation modified). If a claim does raise a “new context,” courts continue to the second step, at which they consider any “special factors counselling hesitation in the absence of affirmative action by Congress.” *Abbasi*, 582 U.S. at 136, 139–40; accord *Hernández*, 589 U.S. at 102. “If there is even a single reason to pause before applying *Bivens* in a new context, a court may not recognize a *Bivens* remedy.” *Egbert*, 596 U.S. at 492 (citation modified).

This case turns on the first of the two questions: Is the “context” here a “new” one? More specifically, is

there a “meaningful[] differen[ce]” between *Carlson*, which recognized a *Bivens* action for a “federal prisoner’s inadequate-care claim under the Eighth Amendment” *Egbert*, 596 U.S. at 490–91, based on prison officials’ failure to provide adequate medical care after he suffered an asthma attack, and Mr. Watanabe’s claim, which is about prison officials’ failure to provide adequate medical care for his broken tailbone?

Congress has already answered this question. In the Federal Employees Liability Reform and Tort Compensation Act of 1988 (commonly known as the “Westfall Act”), Congress made the Federal Tort Claims Act (“FTCA”) the “exclusive” remedy for injuries resulting from the conduct of federal employees acting within the scope of their employment. See 28 U.S.C. § 2679(b)(1). The exclusivity provision has, as relevant here, a critical exception: it “does not extend or apply to a civil action against an employee of the Government . . . which is brought for a violation of the Constitution of the United States.” *Id.* § 2679(b)(2)(A). As this Court has explained, Congress inserted this savings clause “expressly” to “preserv[e] employee liability for *Bivens* actions.” *United States v. Smith*, 499 U.S. 160, 173 (1991). In doing so, Congress “reli[ed] upon [*Bivens*] as a fixed principle in the law.” *Abbasi*, 582 U.S. at 134.

Congress’s decision to preserve *Bivens* liability dictates how far the *Carlson* “context” now extends. When Congress passed the Westfall Act, courts would have found no meaningful difference between *Carlson* and claims like Mr. Watanabe’s: Courts construed *Carlson* to cover Eighth Amendment claims for

inadequate prison medical care generally. That understanding matters today because where Congress incorporates “a judicially defined concept” such as *Bivens* into legislation, courts should “presume[], absent an express statement to the contrary, that Congress intended to adopt the interpretation placed on that concept by the courts.” *Davis v. Mich. Dep’t of Treasury*, 489 U.S. 803, 813 (1989). When Congress ensured *Bivens* liability survived via the Westfall Act, it “adopt[ed]” courts’ understanding of *Carlson* at the time. Congress’s choice to endorse courts’ broad view of *Carlson* as of 1988 determines when a claim “meaningfully differ[s]” from *Carlson* now. *Egbert*, 596 U.S. at 492.

A. The Prior Construction Canon Applies to the Westfall Act’s Savings Clause.

The prior construction canon directs courts to “assume that, when Congress enacts statutes, it is aware of relevant judicial precedent.” *Merck & Co. v. Reynolds*, 559 U.S. 633, 648 (2010); *accord, e.g., Atl. Sounding Co., Inc. v. Townsend*, 557 U.S. 404, 422 (2009). More specifically, “The normal rule of statutory construction is that if Congress intends for legislation to change the interpretation of a judicially created concept, it makes that intent specific.” *Midlantic Nat’l Bank v. N.J. Dep’t of Environmental Prot.*, 474 U.S. 494, 501 (1986); *accord, e.g., Unicolors, Inc. v. H&M Hennes & Mauritz, L.P.*, 595 U.S. 178, 186 (2022); *Davis*, 489 U.S. at 813 (1989).

Applying this principle, the Court has repeatedly held that Congress legislates against the backdrop of relevant precedent and incorporates the

understandings of those cases it does not overrule. *See, e.g., Tanzin*, 592 U.S. at 48–50; *Merck*, 559 U.S. at 648; *Gomez-Perez v. Potter*, 553 U.S. 474, 484–85 (2008); *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 176–77 (2005); *Miles v. Apex Marine Corp.*, 498 U.S. 19, 32 (1990).

Lower court decisions, in addition to those of this Court, matter for the prior construction canon. How the “Courts of Appeals [have] consistently construed” the relevant concepts can form part of the settled judicial understanding that the principle recognizes, *Lamar, Archer & Cofrin, LLP v. Appling*, 584 U.S. 709, 721 (2018), so long as there is a “broad and unquestioned consensus” among the lower courts, *Trump v. Cook*, 146 S. Ct. 2234, 2253 (2026) (citation modified). Thus, this Court has repeatedly interpreted statutes by reference to the consensus of appellate case law at the time of the statute’s passage. *See, e.g., Unicolors*, 595 U.S. at 186; *Lamar, Archer*, 584 U.S. at 721–22 & n.3; *Merck*, 559 U.S. at 646–48.

The Court has applied the prior construction principle in cases like this one—namely, those concerning the congressional endorsement of judicially recognized causes of action. In *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran*, 456 U.S. 353 (1982), the Court held that Congress, in the 1974 amendments to the Commodity Exchange Act, preserved an “implied private cause of action” that “the federal courts routinely and consistently had recognized” at that time. *Id.* at 379. The Court reasoned that Congress’s enactment of a “saving clause . . . provide[d] direct evidence of legislative intent to preserve the implied private remedy federal

courts had recognized under the [Act].” *Id.* at 386. As the Court stated the interpretive rule in *Merrill Lynch*: “Congress need not have intended to create a new remedy, since one already existed; the question is whether Congress intended to preserve the pre-existing remedy.” *Id.* at 378–79.

Moreover, the Court has applied the prior construction canon to interpret congressional directives as to the *scope*, not just the existence, of a judicially inferred cause of action. And the Court has done so even where it might have approached the issue differently had it been writing on a blank slate. In *Franklin v. Gwinnett County Public Schools*, 503 U.S. 60 (1992), the Court considered whether a plaintiff asserting the implied right of action for sex discrimination that the Court recognized in *Cannon v. University of Chicago*, 441 U.S. 677 (1979), could seek damages. The Court unanimously held that she could, in significant part because Congress, after *Cannon*, enacted a statute clearly indicating that damages should be available. *See Franklin*, 503 U.S. at 72–73 (discussing the Rehabilitation Act Amendments of 1986). The Court concluded that Congress had endorsed the judicially created remedy and recognized the availability of damages, even though it had not explicitly codified the right of action that the Court had inferred or explicitly provided for damages. *See id.*

Even Justices who questioned the propriety of judicially inferred causes of action nonetheless concluded that Congress’s ratification of the remedy was dispositive. In a concurrence joined by Chief Justice Rehnquist and Justice Thomas, Justice Scalia noted:

Because of legislation enacted subsequent to *Cannon*, it is too late in the day to address whether a judicially implied exclusion of damages under Title IX would be appropriate. The Rehabilitation Act Amendments of 1986 must be read, in my view, not only “as a validation of *Cannon*’s holding,” but also as an implicit acknowledgment that damages are available.

Id. at 78 (Scalia, J., concurring in judgment) (citation modified); accord *Alexander v. Sandoval*, 532 U.S. 275, 280 (2001) (citing this analysis approvingly). And more recently this Court has reaffirmed *Franklin*’s recognition that Congress ratified the holding of *Cannon*, despite the Court’s “retreat[]” from other aspects of *Cannon*’s reasoning. *Medina v. Planned Parenthood S. Atl.*, 606 U.S. 357, 369 n.1 (2025) (citation modified).

Petitioner says very little about the Westfall Act and nothing at all about the prior construction canon. On the Westfall Act, Petitioner claims that Congress’s reliance on *Carlson* in 1988 “is precisely the problem.” Pet’r’s Br. 47 (citation modified). According to Petitioner, Congress’s decision to endorse *Carlson* in the Westfall Act is an example of courts providing Congress with “an excuse not to” “legislate.” *Id.*

But Congress’s preservation of *Carlson* in the Westfall Act is not a “problem” for this Court to solve. To the contrary, it is a choice that must be respected. The separation of powers forbids this Court to override what its co-equal branch has done. As this Court recognized in *Franklin*, to go Petitioner’s route would

“harm [the] separation of powers . . . by giving judges the power to render inutile causes of action authorized by Congress through a decision that *no* remedy is available.” 503 U.S. at 74.

Proper application of the prior construction canon here requires examination of the state of *Bivens* law as of 1988, including any broad and unquestioned consensus in the courts of appeals. Only by adhering to the scope of *Bivens* when Congress legislated can the Court do justice to the decision Congress made when it passed the Westfall Act. Absent careful attention to the scope of what Congress chose to preserve, judges risk substituting their own judgments for Congress’s and thereby “arrogating legislative power.” *Hernández*, 589 U.S. at 100.

B. Reducing the *Carlson* “Context” to Its Specific Facts Would Contravene the Text of the Westfall Act, Precedent, and Common Sense.

According to Petitioner, Mr. Watanabe’s claim falls within a “new context” because his complaint is about unconstitutionally deficient medical care for a broken tailbone, not an asthma attack. Pet’r’s Br. 24–29. *But see Abbasi*, 582 U.S. at 149 (“Some differences . . . will be so trivial that they will not suffice to create a new *Bivens* context.”). That position cannot be reconciled with either the text of the Westfall Act or the precedent of this Court.

Petitioner’s theory that Congress legislated to preserve *Bivens* actions in just three highly specific factual scenarios is at odds with the broad statutory language of the Westfall Act. The text of

§ 2679(b)(2)(A) preserves an “action . . . brought for a violation of the Constitution.” It contains no exceptions. If Congress meant for the savings clause to cover only the fact patterns of three Supreme Court cases, it would have inserted that limitation into the statute’s text. *Cf. FDA v. R.J. Reynolds Vapor Co.*, 606 U.S. 226, 228 (2025) (“Congress knows how to limit the scope of a cause of action.”).

In fact, Congress *did* put these kinds of liability limits into the statute—just not in the provision concerning *Bivens*. The very next section of the FTCA spells out thirteen exceptions to governmental liability, including bars on claims regarding federal employees’ discretionary functions, combatant activities, Treasury functions, mail delivery, customs functions, conduct occurring abroad, certain intentional torts, and more. *See* 28 U.S.C. § 2680. Congress could have limited the savings clause for claims “brought for a violation of the Constitution” to only those claims about incarcerated individuals who died following unconstitutionally deficient care for their asthma (or to other fact patterns in this Court’s cases). But it did not. *See id.* at § 2679(b)(2)(A). Congress’s choice must now be respected. *See Jama v. ICE*, 543 U.S. 335, 341 (2005) (“We do not lightly assume that Congress has omitted from its adopted text requirements that it nonetheless intends to apply, and our reluctance is even greater when Congress has shown elsewhere in the same statute that it knows how to make such a requirement manifest.”).

When it legislated on a foundation of this Court’s precedents including *Carlson*, Congress understood

the “context” not to concern only cases about asthma deaths in prison. Congress, and the public, did not believe that there was an arbitrary regime in which the availability of a remedy turns on whether a case sufficiently resembles the facts of the three cases that the Supreme Court happened to choose to resolve between 1971 and 1980. Legal rules do not work like that, and for good reason: it is a “basic principle of justice that like cases should be decided alike.” *Martin v. Franklin Cap. Corp.*, 546 U.S. 132, 139 (2005); see also *Epic Sys. Corp. v. Lewis*, 584 U.S. 497, 510 (2018) (“The law of precedent teaches that like cases should generally be treated alike[.]”). And, as for whether two cases are “like,” no one in Congress, or the public, has ever understood that question to turn on something as arbitrary as whether officials deprived a person of medical care for asthma versus a broken bone.

Petitioner’s position is also at odds with *Franklin*, discussed above. In *Franklin*, no Justice suggested that when Congress endorsed the Title IX cause of action that *Cannon* had previously inferred, it did so only as to *Cannon*’s specific fact pattern (a claim of discrimination in medical school admissions). See 441 U.S. at 680. On the contrary, *Franklin* had no trouble concluding that Congress’s decision to permit the recovery of damages under the previously recognized cause of action extended to very different circumstances: a middle school student who had been sexually assaulted by a teacher. See 503 U.S. at 63. *Franklin* shows that when Congress endorses courts’ handiwork, it does not focus on “trivial” differences between individual fact patterns. Cf. *Abbasi*, 582 U.S. at 149. Instead, Congress adopts the underlying

principle—the “judicially defined concept”—that courts have articulated. *Davis*, 489 U.S. at 813; cf. *Cisco Sys. v. Doe*, 146 S. Ct. 1882, 1888, 1892 (2026) (recognizing that Congress, in passing the Alien Tort Statute, expected it to be applied in three cabined, but general, *categories* of tort claims identified by Blackstone—violation of safe conducts, infringement of the rights of ambassadors, and piracy).

Restricting Congress’s work to three specific fact patterns would be an “arrogati[on of] legislative power,” *Hernández*, 589 U.S. at 100, in another way, too: it would retroactively impose presumptions on a Congress that could not have known about them when it acted. “Although background presumptions can inform the understanding of a word or phrase, those presumptions must exist at the time of enactment. We cannot manufacture a new presumption now and retroactively impose it on a Congress that acted [more than a quarter century] ago.” *Tanzin*, 592 U.S. at 52. No court in 1988 required precise factual congruence with *Carlson*’s facts as a prerequisite for applying *Carlson*’s principle. As Part II demonstrates, the broad and unquestioned consensus in the courts of appeals was that *Carlson* did not create a special rule for incarcerated asthmatics who died for lack of medical care, but instead authorized Eighth Amendment prison medical care claims as a category.

Today, the “context” inquiry of modern *Bivens* jurisprudence upholds the separation of powers by preventing extensions of *Bivens* to novel circumstances Congress could not have authorized in 1988. See, e.g., *Abbasi*, 582 U.S. at 125, 146 (investigation of terror attacks); *Hernández*, 589 U.S.

at 96 (incidents at the international border); *Egbert*, 596 U.S. at 494 (same). Other post-1988 *Bivens* cases likewise have rejected claims that were unsupported by a broad and uniform consensus in 1988, including cases against federal agencies directly, *FDIC v. Meyer*, 510 U.S. 471, 484 (1994); against private corporations, *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 71 (2001); against private contractors, *Minneeci v. Pollard*, 565 U.S. 118, 120 (2012); based on a novel theory of “retaliation for exercising [plaintiff’s] property right,” *Wilkie v. Robbins*, 551 U.S. 537, 550 (2007); and where Congress explicitly foreclosed liability, *Hui*, 559 U.S. at 802. Never, however, has the Court announced that the scope of a *Bivens* “context” contracts *Bivens* to less than what Congress preserved in the Westfall Act.

Petitioner would have this Court do exactly that. In Petitioner’s hands, the “context” inquiry becomes a hatchet to lop off whole swaths of *Bivens* applications that Congress (and the public) have relied upon. That flips the separation of powers on its head. Narrowing the “context” inquiry post-hoc and superimposing it on the Westfall Act is exactly the type of retrofitting this Court has unanimously disapproved. *Tanzin*, 592 U.S. at 52.

C. The Westfall Act Does Not Permit Construing the Administrative Remedy Program To Destroy the *Carlson* Context.

Petitioner and the United States are not content to limit *Bivens* to the facts of this Court’s three original *Bivens* cases. With their argument that the Administrative Remedy Program (“ARP”) now

renders *every Carlson* claim new, they would go further and effectively eliminate the entire *Carlson* “context.” The United States says the quiet part out loud, urging this Court to declare that “the class of viable *Carlson* claims has become a null set.” Amicus Br. for U.S. 25; *accord*, e.g., *id.* at 3 (“no more *Carlson* claims will be viable”).

This position is anathema to the separation of powers: The government asks the Court to take a red pen to the text of the Westfall Act, writing into the text a broad exception that Congress did not enact. Again, Congress preserved, without exception, “action[s] . . . brought for a violation of the Constitution,” 28 U.S.C. § 2679(b)(2)(A); it did not say, “except for claims arising in federal prison.” Respecting Congress means respecting what Congress said, not what the government wishes it had said.

Because the dispositive inquiry is what Congress directed, Petitioner’s focus on the absence of the ARP from the *Carlson* decision, *see* Pet’r’s Br. 37–38, is misplaced. Even if the Court did not mention the ARP in *Carlson*, Congress certainly knew of the ARP when it endorsed *Carlson* in 1988. *See Hall v. United States*, 566 U.S. 506, 516 (2012) (“Congress is aware of existing law when it passes legislation.” (quoting *Miles v. Apex Marine Corp.*, 498 U.S. 19, 32 (1990))). And nothing in the text of the Westfall Act suggests that Congress intended the existence of the ARP to preclude the availability of the *Carlson* remedy—indeed, the text says the opposite. Petitioner (like the government) asks the Court to read the Westfall Act against itself and construe the savings clause as silently excluding all *Carlson* claims. The Court

should refuse to engage in such a creative reimagining of what Congress said. The statute's text provides the Court with all it needs. See *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 6 (2000) ("Congress says in a statute what it means and means in a statute what it says there." (citation modified)).

Rarely has giving accurate meaning to what Congress said mattered more. Where lower courts have ignored Congress and relied on the ARP to hollow out *Carlson*, the toll of these decisions is measured by life and limb. For instance, the Eleventh Circuit recently relied on the ARP to reject a *Bivens* claim for fatally inadequate medical treatment of Hepatitis C in prison "even though [the plaintiff's] estate could not use the ARP after his death." *Carrin v. Strong*, 182 F.4th 1351, 1354 (11th Cir. 2026). The Third Circuit relied on the ARP to reject a *Bivens* claim for the failure to treat diabetic blisters that ultimately required the amputation of the plaintiff's toe, even though the "effectiveness" of the ARP was "dubious." *Muniz v. United States*, 149 F.4th 256, 258, 264 (3d Cir. 2025). And the Eleventh Circuit relied on the ARP in rejecting a *Bivens* claim for failure to treat an incarcerated plaintiff's "severe but ultimately non-lethal physical injuries" even though "the district court found that he was denied access to the [ARP]." *Johnson v. Terry*, 119 F.4th 840, 858–60 (11th Cir. 2024). None of these outcomes accurately reflects congressional will.

D. Ignoring the Westfall Act or Subordinating It to More General Statutes Would Contravene Precedent, Statutory Text, and the Separation of Powers.

No doubt aware that Congress's preservation of *Bivens* actions as they existed in 1988 presents an obstacle to their desired outcome in this case, Petitioner and the United States urge this Court to either ignore or nullify the Westfall Act. Their arguments should be rejected because they are contrary to this Court's precedents, unmoored from text, and an invitation for this Court to engage in judicial legislation.

The United States first contends that the Westfall Act did not "ratify" *Bivens* but is merely "neutral" toward it. Amicus Br. for U.S. 28. If the government means that the Westfall Act took no action regarding *Bivens*, it is profoundly mistaken. As this Court has explained on four separate occasions, Congress *did* act on *Bivens* via the Westfall Act: Through its "explicit" statutory text, *Hui*, 559 U.S. at 807, Congress "left open claims for constitutional violations," *Tanzen*, 592 U.S. at 49, "expressly . . . preserving" some *Bivens* claims, *Smith*, 499 U.S. at 173, by "[leaving] *Bivens* where it found it," *Hernández*, 589 U.S. at 111 n.9. If, instead, the government simply means that Congress did not expand *Bivens* beyond its 1988 contours, that is a settled point. *See id.* Ultimately, what is clear from this Court's repeated discussions is that Congress did affirmatively act to preserve *Bivens*. In keeping with the "utmost deference" owed "to Congress' preeminent authority" in determining what

causes of action should exist, *Egbert*, 596 U.S. at 492, Congress’s enactment of statutory language preserving *Bivens* as of 1988 cannot simply be ignored because the government wishes Congress had done something else or done nothing at all.

Petitioner and the United States then attempt to minimize the Westfall Act by embracing other, more general congressional enactments regarding prison litigation (mainly the PLRA) and asking the Court to infer from these that Congress would not have wanted *Bivens* to persist in the prison context. See Pet’r’s Br. 33–35; Amicus Br. for U.S. 16–17. But far from undercutting such claims, the PLRA *confirms* Congress’s understanding that *Carlson* claims would continue to exist. As Petitioner admits, the PLRA requires exhaustion via the ARP, and therefore PLRA exhaustion applies to “federal prisoners,” Pet’r’s Br. 18, 33—the very people whose remedy in federal court is a *Carlson* claim. It would make no sense for Congress to enact an exhaustion requirement in the PLRA that was applicable to *Carlson* claims if it, in fact, intended to abolish such claims altogether.

In any event, basic principles of statutory interpretation show that, at the very least, the statutes on which Petitioner and the United States focus did not *displace* the Westfall Act’s preservation of *Bivens* as it existed in 1988. To start, none of these later statutes said anything about *Bivens* or otherwise suggested that damages actions against federal prison officers should not or did not exist. And Petitioner’s and the United States’ argument that the PLRA and other general federal statutes *impliedly* displaced the Westfall Act’s savings clause cannot come close to

demonstrating a “clearly expressed congressional intention that such a result should follow.” *Epic Sys. Corp. v. Lewis*, 584 U.S. 497, 510 (2018) (citation modified). This Court has long maintained a “strong presumption that repeals by implication are disfavored and that Congress will specifically address preexisting law when it wishes to suspend its normal operations in a later statute.” *Id.* (citation modified); accord, e.g., *Dep’t of Agric. v. Kirtz*, 601 U.S. 42, 63 (2024). Petitioner and the United States seem to forget that “these rules exist for good reasons”: Respect for Congress and respect for the separation of powers. *Epic Sys. Corp.*, 584 U.S. at 511 (citation modified). “The courts are not at liberty to pick and choose among congressional enactments.” *Morton v. Mancari*, 417 U.S. 535, 551 (1974).

What is more, this Court “[t]ime and again . . . has rejected every attempt to deviate from the PLRA’s textual mandate.” *Ross v. Blake*, 578 U.S. 632, 633 (2016) (citing examples). The Court’s “adherence to the PLRA’s text . . . applies regardless of whether it benefits the inmate or the prison,” *id.* at 640 n.1, and is required by the separation of powers, because where “rules are not required by the PLRA, . . . crafting and imposing them exceeds the proper limits on the judicial role.” *Jones v. Bock*, 549 U.S. 199, 203 (2007); accord *Ross*, 578 U.S. at 640 n.1. Petitioner’s and the United States’ implied-displacement argument urges the Court to violate the separation of powers twice over—first by ignoring the express preservation of *Bivens* remedies in the Westfall Act and then by reading into the PLRA an implied displacement of

Carlson remedies that appears nowhere in the PLRA’s text.

Harmonizing the Westfall Act and the other statutes cited by Petitioner and the United States is not difficult: The Westfall Act preserves *Bivens* as it existed in 1988, including *Carlson*. Where such claims are brought, they are subject to the procedural and substantive limitations of the PLRA, such as the exhaustion requirement, 42 U.S.C. § 1997e(a), and the restriction on recovery for certain types of injuries, *id.* § 1997e(e). And the other statutes Petitioner and the United States cite provide additional avenues for oversight without adding to or subtracting from the *Bivens* cause of action that the Westfall Act preserves. “Because [the Court] can easily read Congress’s statutes to work in harmony, that is where [its] duty lies.” *Epic Sys. Corp.*, 584 U.S. at 525.

The Court’s previous references to the PLRA when deciding *Bivens* cases do not counsel a different result. *Abbasi* contrasted Congress’s failure to provide a damages remedy for Fifth Amendment detention claims with Congress’s related activity in the field of prison litigation. *See* 582 U.S. at 148–49. But the Court’s consideration of the PLRA there concerned a circumstance where Congress had been *silent* regarding the cause of action, not a circumstance where Congress had acted to preserve what had already been established. And *Goldney v. Fields*, 606 U.S. 942, 944 (2025) (per curiam), briefly cited that passage from *Abbasi* without elaboration. The Court has never considered whether the PLRA displaces the Westfall Act’s “explicit” statutory text, *Hui*, 559 U.S. at 807—text that “left open claims for constitutional

violations,” *Tanzen*, 592 U.S. at 49, and thereby “expressly . . . preserv[ed]” some *Bivens* claims, *Smith*, 499 U.S. at 173.

Statutory interpretation is not a choose-your-own-adventure novel or “an exercise in looking over a crowd and picking out your friends.” *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 568 (2005) (citation modified). Petitioner provides no basis to disregard the Westfall Act or to abandon the Court’s previous understanding that Congress “left *Bivens* where it found it” in 1988, *Hernández*, 589 U.S. at 111 n.9. Like the PLRA, the Westfall Act must be respected, not ignored. To do otherwise would be to flout the clear limits of the judicial role. “Allowing judges to pick and choose between statutes risks transforming them from expounders of what the law *is* into policymakers choosing what the law *should be*.” *Epic Sys. Corp.*, 584 U.S. at 511.

II. IN 1988, THE COURTS OF APPEALS UNIFORMLY APPLIED *BIVENS* TO ANY EIGHTH AMENDMENT CLAIM FOR INADEQUATE PRISON MEDICAL CARE.

As established above, the task before the Court is to determine the scope of the *Bivens* cause of action that Congress preserved in 1988 via the Westfall Act. Under the prior construction canon, Mr. Watanabe’s claim should be allowed, because it unquestionably would have been allowed in 1988. At that time, *Carlson* was well-understood to apply generally to prisoners’ claims under the Eighth Amendment for inadequate prison medical care.

In 1988, this Court’s *Bivens* inquiry did not rely on precise factual congruence with prior *Bivens* cases. Instead, to determine whether a *Bivens* cause of action was available, the Court looked to whether there were “special factors counselling hesitation in the absence of affirmative action by Congress” and whether “Congress has provided an alternative remedy.” *Carlson*, 446 U.S. at 18 (citation modified); *accord McCarthy v. Madigan*, 503 U.S. 140, 151 (1992) (“We have recognized that a *Bivens* remedy does not lie in two situations: (1) where Congress has provided an equally effective alternative remedy and declared it to be a substitute for recovery under the Constitution, and (2) where, in the absence of affirmative action by Congress, special factors counsel hesitation.”); *United States v. Stanley*, 483 U.S. 669, 678 (1987) (explaining that “‘special factors counselling hesitation’ or an ‘explicit congressional declaration’ that another remedy is exclusive would bar” a *Bivens* action); *see also Schweiker v. Chilicky*, 487 U.S. 412, 423 (1988) (Court considers “special factors,” including “[w]hen the design of a Government program suggests that Congress has provided what it considers adequate remedial mechanisms for constitutional violations”); *Chappell v. Wallace*, 462 U.S. 296, 304 (1983) (presence of “special factors” doomed claim); *Bush v. Lucas*, 462 U.S. 367, 378 (1983) (Court considers congressional intent reflected in any “alternative remedy” it provided, along with “special factors”). Where an existing category of *Bivens* claims had been recognized, in no case did the Court compare the precise facts of a proposed *Bivens* claim to the precise facts of its prior cases and reject that proposed claim if there was not a close match.

Consistent with this Court's approach, every circuit court that considered, prior to the Westfall Act's passage, whether *Bivens* applied to an Eighth Amendment prison medical-care claim, concluded that it did, notwithstanding differences from the specific facts of *Carlson* (a failure to treat asthma resulting in the plaintiff's death). See *Smith-Bey v. Hosp. Adm'r*, 841 F.2d 751, 759–60 (7th Cir. 1988) (reversing dismissal of Eighth Amendment *Bivens* claim where plaintiff was given ice packs “for a wound that was bleeding ‘profusely’” and “for a broken nose that apparently had a piece of cartilage protruding from the skin”); *Muhammad v. Carlson*, 739 F.2d 122, 123, 126 (3d Cir. 1984) (vacating dismissal of Eighth Amendment *Bivens* claim regarding prison physician's treatment of back injury); *Goar v. Civiletti*, 688 F.2d 27, 28–29 (6th Cir. 1982) (reversing dismissal of Eighth Amendment *Bivens* claim where plaintiff “suffered loss of blood from a head wound, a neck and jaw injury, for which he received inadequate medical treatment”); *Gillespie v. Civiletti*, 629 F.2d 637, 639, 642 (9th Cir. 1980) (reversing dismissal of Eighth Amendment *Bivens* claim regarding months-long denial of medical care that led to “a severe skin disease, mental depression, abnormal emotional behavior, and severe emotional distress”). It did not matter in these cases that plaintiffs did not face “damages or nothing” situations, *contra* Pet'r's Br. 18 (seeking to distinguish *Carlson* on this basis); indeed, the plaintiff in *Goar* did seek injunctive relief, see 688 F.2d at 28, and given that none of the plaintiffs in these cases died, they all could have sought injunctive relief during the period of deficient medical care.

The appellate consensus also reveals that, at the time Congress passed the Westfall Act, the Bureau of Prisons' ARP was not a viable basis to defeat an Eighth Amendment *Bivens* claim for inadequate medical care in prison. No court prior to the Westfall Act's passage denied the existence of an Eighth Amendment prison medical care claim under *Bivens* based on the availability of an internal grievance process. Indeed, up to that point, the only precedential federal appellate decisions to discuss the ARP in connection with *Bivens* did so to address the then-ongoing debate over whether *Bivens* plaintiffs were required to exhaust administrative remedies before proceeding with their *Bivens* claims—not to foreclose the existence of a *Bivens* claim entirely. Compare *Hessbrook v. Lennon*, 777 F.2d 999, 1003–04, 1007 (5th Cir. 1985) (discussing ARP in holding that FTCA exhaustion was required but noting that district court could stay *Bivens* claim pending exhaustion), and *Brice v. Day*, 604 F.2d 664, 667–68 (10th Cir. 1979) (requiring exhaustion but indicating that that courts “may order [such cases] referred to the prison officials for an administrative review *before the trial court considers them further*” (emphasis added)), with *Muhammad*, 739 F.2d at 124–25 (concluding that BOP grievance process did not license courts to create exhaustion requirement where Congress had not), and *Goar*, 688 F.2d at 28–29 (citing limitations on ARP as reason that no exhaustion was required).²

² The ARP was also mentioned in one unpublished appellate decision about a *Bivens* claim for obstructing access to the ARP itself. *Gillan v. Edwards*, 780 F.2d 1021 (6th Cir.

As this history demonstrates, the notion that a prison grievance process negated the existence of a *Bivens* claim would have been entirely foreign to Congress when it enacted the Westfall Act. Thus, to conclude that the Westfall Act somehow incorporated the thoroughly modern contention that the ARP defeats *Bivens* claims—without any statutory text or then-extant precedent saying so—would require the Court to take the inappropriate step of “retroactively impos[ing]” a new presumption “on a Congress that acted [more than a quarter-century] ago.” *Tanzin*, 592 U.S. at 52.

In sum, there is no question that when Congress explicitly preserved an action “brought for a violation of the Constitution of the United States,” 28 U.S.C. § 2679(b)(2)(A), that phrase would have been well understood to encompass Eighth Amendment *Bivens* claims for unconstitutionally deficient prison medical care generally, not just claims about a prison’s fatal failure to treat asthma. Nor would the ARP have posed a bar to such claims. The separation of powers requires that the “new context” test be applied to conform to the expectations of Congress, not the other way around. The Court should affirm the Ninth Circuit’s holding and conclude that Mr. Watanabe’s claim falls easily within the *Carlson* “context.”

1985) (unpublished table decision). Four years after the Westfall Act passed, this Court resolved the circuit split over exhaustion, holding that it was not required. *McCarthy*, 503 U.S. at 149–52. Congress effectively overruled *McCarthy* via the PLRA’s imposition of a stricter exhaustion requirement. *See Woodford v. Ngo*, 548 U.S. 81, 85 (2006).

CONCLUSION

For these reasons, and for those advanced by Respondent, the judgment below should be affirmed.

Respectfully submitted,

Priyanka Menon*

Brett Max Kaufman

AMERICAN CIVIL LIBERTIES

UNION FOUNDATION

125 Broad Street

18th Floor

New York, NY 10004

Carmen Iguina González

Jennifer Wedekind

AMERICAN CIVIL LIBERTIES

UNION FOUNDATION

915 15th Street NW

Washington, DC 20005

Cecillia D. Wang

AMERICAN CIVIL LIBERTIES

UNION FOUNDATION

425 California Street

Suite 700

San Francisco, CA 94104

Scott Michelman

Counsel of Record

AMERICAN CIVIL LIBERTIES

UNION FOUNDATION OF

THE DISTRICT OF

COLUMBIA

529 14th Street NW

Suite 420

Washington, DC 20045

(202) 601-4267

smichelman@acludc.org

Jongwook “Wookie” Kim

ACLU OF HAWAI‘I

FOUNDATION

P.O. Box 3410

Honolulu, HI 96801

**admitted only in Maryland*

Counsel for Amici Curiae American Civil Liberties Union, American Civil Liberties Union of the District of Columbia, and American Civil Liberties Union of Hawai‘i Foundation

Dated: September 30, 2026