

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 *AMICI CURIAE* PROFESSORS
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INTERESTS OF *AMICI CURIAE*

Amici are law professors who study constitutional remedies and federal jurisdiction. They submit this brief to explain why established *Bivens* remedies deserve the protection of statutory stare decisis and must be given fair effect.¹

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SUMMARY OF ARGUMENT

The important thing to understand about *Bivens* and *Carlson* is that they are *statutory* precedents. That fact is too often obscured in discussions about whether and when those precedents should be extended. As statutory precedents, they implicate the principle of stare decisis that governs other statutory precedents, and they trigger this Court's acknowledged obligation not to unduly narrow them and to accord them greater stare decisis respect than constitutional precedents receive. Petitioner asks this Court to ignore this insight and do something that the Court would almost never do to a precedent interpreting a statute: overrule it in all but name. The Court does not do that in statutory cases for a simple reason: When the Court creates a moving target with its precedents it makes it impossible for Congress to legislate

¹ No counsel for a party authored this brief in whole or in part. No party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief, and no person other than *amici* or their counsel made such a monetary contribution. Institutional affiliations are provided for identification purposes only. This brief reflects amici's personal views and not the views, if any, of their institutions.

around the Court’s decisions. And indeed, the Court’s constant revisions to the “extent” and the “scope” of the *Bivens* remedies have had just that effect. Congress has enacted laws in reliance on these precedents only to have the precedents eroded, and with them the careful compromises upon which Congress legislated.

These precedents should be read as this Court reads any other statutory precedent. Under that approach, everyone knows exactly what a *Carlson* claim is: it is an Eighth Amendment claim for deliberate indifference to a serious medical need. It is just like its cousin, the deliberate-indifference claim under 42 U.S.C. § 1983. Its reach is the same. Its damages remedy is the same. Its qualified-immunity regime is the same. *Butz v. Economou*, 438 U.S. 478, 504 (1978); *Wilson v. Layne*, 526 U.S. 603, 609 (1999). It really is that simple.

Applied fairly, *Carlson* governs this case. Courts must assess the defendants’ roles, the challenged conduct, the governing obligations, and any distinct institutional concerns. But *Carlson*’s asthma, inoperative respirator, and death describe the facts of that case; they do not confine its holding to an identical tragedy. A court will have to determine whether respondent can demonstrate deliberate indifference to medical needs, but *Carlson* already established that respondent has a right to sue for that constitutional violation. Here, petitioner’s distinctions concerning diagnosis, severity, and available remedies do not make this medical-care claim meaningfully different from *Carlson*. The Court should apply the rule it established and Congress built upon. The judgment should be affirmed.

ARGUMENT

I. *BIVENS* REMEDIES ARE STATUTORY PRECEDENTS AND SHOULD BE TREATED THAT WAY.

The established *Bivens* remedies enforce constitutional rights through judicially fashioned remedies grounded in statutory authority and subject to congressional revision. Once recognized, those remedies warrant the heightened stare decisis protection afforded statutory precedents for the same reasons that protection attaches to any other statutory precedent. Congress may choose to revise them or it may choose to build on or around them, and absent special justification the Court should step back and allow Congress to make those choices. The Court retains its role in interpreting the Constitution and defining the elements of the constitutional violation. But the question here is whether a damages cause of action exists, not how the underlying constitutional right should be defined. The separation-of-powers principles that counsel against creating new remedies also counsel against dismantling remedies Congress has known about for decades and intentionally preserved.

Start first with *Bivens*' roots in statutory authority. The Court understood Congress's grant of federal-question jurisdiction in 28 U.S.C. § 1331 to authorize courts to enforce the Constitution through traditional remedies, including damages. That understanding is contestable. But if it was mistaken, the mistake was one of statutory interpretation. See *Bush v. Lucas*, 462 U.S. 367, 378 (1983); *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 405 (1971) (Harlan, J., concurring in the judgment). That common-law method implemented the remedial authority the Court understood Congress to have conferred through § 1331. *Bush*, 462 U.S. at 378. As Pfander and Baltmanis put it, *Bivens* fashioned "a federal common law right of

action to enforce the Fourth Amendment.” James E. Pfander & David Baltmanis, *Rethinking Bivens: Legitimacy and Constitutional Adjudication*, 98 Geo. L.J. 117, 117 (2009). The Court has continued to describe the inquiry in common-law terms even when it declines to recognize a remedy. *Wilkie v. Robbins*, 551 U.S. 537, 554 (2007) (the question calls for “weighing reasons for and against the creation of a new cause of action, the way common law judges have always done”). The upshot is that the Court has grounded its common law *Bivens* doctrine in an understanding of the authority conferred on the judiciary via statute.

These are therefore *statutory* precedents: they settle the scope of a *statutory* grant of remedial authority. Their construction should endure on the same terms as other statutory precedents. A judicial reading of a statute carries a “strong presumption of continued validity.” *Square D Co. v. Niagara Frontier Tariff Bureau, Inc.*, 476 U.S. 409, 424 (1986); accord *Neal v. United States*, 516 U.S. 284, 295 (1996) (“Once we have determined a statute’s meaning, we adhere to our ruling under the doctrine of stare decisis”). Statutory stare decisis protects even judicially developed doctrines implementing a statute, because Congress retains authority to revise them. *Kimble v. Marvel Entertainment, LLC*, 576 U.S. 446, 456 (2015). A later Court’s disagreement with the method that produced the rule does not, by itself, justify undoing it, and that is especially so for statutory law. *Id.* at 455-456. *Franklin v. Gwinnett County Public Schools* applied the same reasoning to remedies under a judicially implied action, reading later legislation as “a validation of *Cannon*’s holding.” 503 U.S. 60, 72 (1992). This Court has already applied that logic to *Bivens* itself, describing “[t]he settled law of *Bivens* in this common and recurrent sphere of law enforcement, and the undoubted reliance upon it as a fixed principle in the law,” as “powerful

reasons to retain it in that sphere.” *Ziglar v. Abbasi*, 582 U.S. 120, 134 (2017).

The government argues that *Carlson* relied on the Constitution rather than federal common law. U.S. Br. 29. That is incorrect. And the premise matters, because once a construction is statutory the Court has ordinarily left its correction to Congress even when the Court thinks the construction wrong. *Ramos v. Louisiana*, 590 U.S. 83, 119 (2020) (Kavanaugh, J., concurring in part); *Allen v. Milligan*, 599 U.S. 1, 39 (2023). *Bush v. Lucas* explained that statutory federal-question jurisdiction supplies authority to award constitutional damages through common-law adjudication, subject to congressional direction and special factors counseling restraint. 462 U.S. at 378. *Carlson v. Green* accordingly recognized Congress’s power to substitute another remedy. 446 U.S. 14, 18-19 (1980). Even *Hernández v. Mesa* describes the Court’s later change in approach as a demand for clearer congressional intent than Justice Harlan had inferred from § 1331. 589 U.S. 93, 101 (2020). The dispute here thus concerns what Congress authorized, and any error lies in this Court’s own construction of that statutory authority in *Bivens* and *Carlson*. Congress can correct that construction; it cannot revise the Constitution. That distinction supplies the reason for heightened statutory stare decisis, and it applies even if the Court would construe the same grant of statutory authority more narrowly today.

Recognizing the statutory ground for *Bivens* remedies carries with it an important corollary: Preserving a precedent requires giving it fair effect. Imagine a federal statute authorizing recovery for deliberate indifference to serious medical needs. Courts could not fairly interpret that statute to cover only asthma, only a particular failure of medical equipment, or only neglect ending in death. Nor could they treat

Congress's imposition of exhaustion requirements as silently eliminating the action those requirements regulate. No rational Congress creates conditions precedent for a legal claim that the legislature intends to eradicate entirely. Those constructions would be recognized for what they are: attempts to defeat an established rule through artificial distinctions, if not outright distortions. They are no more legitimate when the rule originates in statutory common law.

A precedent governs more than cases with identical facts. A holding of this Court reaches beyond the particular events that produced it; otherwise, this Court could not ensure the like treatment of like cases. That is why *Carlson* claims extend to all cases of medical neglect that are not *meaningfully* different from a standard-issue deliberate-indifference-to-medical-need claim. Merely cataloguing factual differences does not—cannot—suffice to make a difference meaningful or genuine. The view that the Court was wrong to set a precedent is not a good and sufficient reason to refuse to apply it to a case it plainly reaches.

The government, for its part, disagrees. But whether its position stems from a genuine commitment to separation-of-powers principles rather than a bare desire to escape accountability is open to question. It has after all been hostile to accountability for its misconduct since before *Bivens* and seemingly will remain so for the foreseeable future—even in the face of clear statutory language to the contrary. *See, e.g., Thacker v. TVA*, 587 U.S. 218, 223-226 (2019) (rejecting the Government's request to read a discretionary-function exception into the TVA's sue-and-be-sued clause); *United States v. Kwai Fun Wong*, 575 U.S. 402, 417-420 (2015) (rejecting the argument that the Federal Tort Claims Act's time limits are jurisdictional because they condition a waiver of sovereign immunity). Thus, the government says the

Court can simply declare *Carlson* “moribund” while insisting that this requires no change to existing doctrine. U.S. Br. 24-25. That is overruling in substance, and it should not be lightly undertaken. It requires the justification due a decision to overrule a statutory precedent Congress has built upon.

There is a difference in law and life between a refusal to extend a precedent and a refusal to erase it. Perhaps the Court would decline to recognize the cause of action announced in *Carlson* today. But that is not a good reason to deny that decision its effect while professing to retain it.

II. THE COURT SHOULD RESPECT CONGRESS’ CHOICE TO BUILD ON THESE STATUTORY PRECEDENTS.

The reasons to afford *Bivens* and *Carlson* special stare decisis respect are stronger even than they are for ordinary statutory precedents because Congress built later statutes on them. As explained above, the Court understood § 1331’s grant of federal-question jurisdiction to authorize judicial enforcement of the Constitution through damages. Congress then legislated around the actions the Court recognized in the 1974 intentional-tort amendments to the Federal Tort Claims Act (FTCA), the 1988 Westfall Act, and the 1996 Prison Litigation Reform Act (PLRA). Erasing *Carlson* now not only unwinds a statutory precedent, it unwinds the operation of Congress’s later laws that were built on it.

The legislative record is not ambiguous. Congress has legislated against the backdrop of *Bivens* and *Carlson* over and over again.

The 1974 FTCA amendments. When Congress extended the FTCA to intentional torts by federal law-enforcement officers, the Senate Report called the provision “a counterpart to the *Bivens* case and its progen[y], in that it waives the defense of sovereign

immunity so as to make the Government independently liable in damages for the same type of conduct that is alleged to have occurred in *Bivens*.” S. Rep. No. 93-588, at 3 (1973), *quoted in Carlson*, 446 U.S. at 20 (emphasis supplied). Victims of such raids, the Report explained, “will have a cause of action against the individual Federal agents *and* the Federal Government.” *Id.* Congress placed a remedy alongside *Bivens*; it did not substitute one for it.

The Westfall Act. In 1988, Congress expressly preserved constitutional damages actions when it displaced overlapping common-law tort suits against federal employees. The Westfall Act substituted the United States as the defendant for common-law tort claims made actionable under the FTCA and arising from employees’ conduct within the scope of their employment. Its declared purpose was “to protect Federal employees from personal liability for common law torts committed within the scope of their employment.” Pub. L. No. 100-694, § 2(b), 102 Stat. 4563, 4564. Congress accomplished that purpose by making the FTCA remedy against the United States exclusive of claims against the employee by reason of the same subject matter and precluding other related civil actions against the employee, but expressly excepted actions “brought for a violation of the Constitution of the United States.” *Id.* § 5; 28 U.S.C. § 2679(b)(2)(A). The distinction was deliberate. As the House Report explained, “[c]ourts have drawn a sharp distinction between common law torts and constitutional or *Bivens* torts,” and the Act’s exclusive remedy “expressly does not extend” to the latter. H.R. Rep. No. 100-700, at 6 (1988).

The bill’s proponents repeatedly confirmed that existing *Bivens* actions would survive. On passage, Senator Grassley emphasized that it “does not have any effect on the so-called *Bivens* cases or constitutional tort

claims,” which “can continue to be brought against individual Government officials.” 134 Cong. Rec. 29,933 (1988). He made substantially the same statement when he introduced the Senate bill. *Id.* at 14,266. The Department of Justice likewise told the Senate that the Westfall “fix” “in no way addresses the question of *Bivens* Constitutional actions; those remain a separate subject to be addressed separately.” *Department of Justice Authorization for Fiscal Year 1989 (Civil, Criminal, and Civil Rights Divisions): Hearings Before the S. Comm. on the Judiciary*, 100th Cong., pt. 2, at 4 (1988) (statement of John R. Bolton, Ass’t Att’y Gen., Civil Div.). Congress thus did more than leave *Bivens* unaddressed: it expressly preserved the established constitutional actions as part of the remedial scheme it enacted.

The PLRA. Congress likewise legislated on the understanding that federal prisoners could bring *Bivens* actions when it enacted the PLRA, imposing an exhaustion requirement on that existing remedy. Representative LoBiondo, who sponsored the federal-prisoner exhaustion proposal in H.R. 2468, expressly identified the decision Congress sought to change: *McCarthy v. Madigan*, which held that a federal prisoner seeking only money damages could bring a *Bivens* action without first exhausting administrative remedies. 141 Cong. Rec. 35,623 (1995). He explained that *McCarthy* had been decided “without the benefit of any legislative guidance,” with the Court “almost to the point of asking that Congress do something.” *Id.* His bill supplied that guidance by making clear “that administrative exhaustion be imposed in all actions arising under the *Bivens* case.” *Id.* Discussing the conference proposal, he further confirmed that he had worked with the conferees “to ensure that the prison litigation reform measures address the *Bivens* issue.” *Id.*

The provision's stated rationale presupposed that meritorious *Bivens* claims would continue. LoBiondo quoted former Attorney General Thornburgh's explanation that exhaustion would filter out frivolous claims, so that "only those claims with a greater probability/magnitude of success would, presumably, proceed." *Id.* at 35,624. Congress thus imposed a procedural prerequisite on an established cause of action, making prisoners exhaust administrative remedies before pursuing the remedy Congress understood they already possessed.

Treaty obligations. The Senate also relied on *Bivens* and *Carlson* in determining that existing federal law supplied the remedies required by international treaties. In recommending consent to the Convention Against Torture, the Senate Foreign Relations Committee's report reproduced the Executive Branch's explanation that no new compensation legislation was necessary because "[e]xisting U.S. law already establishes private rights of suit sufficient to implement Article 14," including "a suit for constitutional tort." S. Exec. Rep. No. 101-30, at 11, 24 (1990). It specifically cited *Bivens* and *Carlson*. *Id.* The Committee's report on the Racial Discrimination Convention reproduced the same understanding: that "[f]ederal officials may be sued for damages directly under provisions of the Constitution," followed by a citation to *Bivens*. S. Exec. Rep. No. 103-29, at 9, 17-18 (1994). The Senate thus treated these remedies as an existing means of satisfying the Nation's treaty obligations—the very remedies petitioner now asks this Court to render ineffective. *See* James E. Pfander, *Constitutional Torts and the War on Terror* 107-11 (2017) (discussing implementation of Convention Against Torture).

Proposals to replace or codify the remedy. Members of Congress have repeatedly proposed

legislation to change the constitutional damages remedy, treating its scope and availability as matters within Congress’s control. Beginning in the 1970s, Members introduced bills to replace the action against individual officers with a remedy against the United States. Senator Grassley’s S. 1775, for example, would have amended title 28 “to provide for an exclusive remedy against the United States in suits based upon acts or omissions of U.S. employees, [and] to provide a remedy against the United States with respect to constitutional torts.” 127 Cong. Rec. 25,341 (1981). He described the bill as “a continuation of efforts made in the previous two Congresses,” prompted by the “exponential increase” in suits following *Bivens*. *Id.* Those proposals did not become law. When Congress enacted the Westfall Act seven years later, it expressly excepted constitutional claims, and Senator Grassley confirmed that the Act left *Bivens* untouched. More recent proposals would expressly codify a damages action against federal officials. The *Bivens* Act would amend 42 U.S.C. § 1983 to reach persons acting under the authority “of the United States or” of any State. H.R. 6091, 119th Cong. § 2 (2025); *see also* S. 3187, 119th Cong. (2025). Those proposals likewise have not become law. Their significance is limited but consistent: Members have sought both to replace the judicially recognized remedy and to place it on an express statutory footing, invoking Congress’s authority to make either choice. This Court has drawn the same inference from the same kind of record. After *Kiowa Tribe of Okla. v. Manufacturing Technologies, Inc.*, 523 U.S. 751 (1998), Congress considered bills broadly curtailing tribal sovereign immunity, declined to adopt them, and enacted “a far more modest alternative” instead; the Court treated that choice as an “initial . . . decision to retain” the immunity, and declined to overrule. *Michigan v. Bay Mills Indian Community*, 572 U.S. 782, 801, 803 (2014). The inference is strongest, the Court explained, where Congress took up

the question “partly at our urging.” *Id.* at 803. Congress took up this one at the Court’s urging as well. *See Carlson*, 446 U.S. at 52-53 (Rehnquist, J., dissenting) (Congress is “free to devise whatever remedy it sees fit” and to have it “altogether displace” the action recognized that day). The Court should respect the choices Congress actually enacted in the meantime.

That history answers the government’s effort to characterize *Carlson* as a constitutional rather than statutory precedent. U.S. Br. 29. For half a century, Congress has proceeded on the understanding that the *Bivens* remedy is subject to legislative control. Members have proposed replacing it or expressly codifying it; Congress has enacted laws supplementing, preserving, and regulating it. Three statutes, enacted by three different Congresses, reflect the same premise: the action exists, Congress may prescribe its operation, and Congress has chosen to build on it. That is the ordinary life of a statutory precedent—and a powerful reason to afford it the stability statutory *stare decisis* protects.

The Westfall Act makes the point concrete. Congress made the FTCA remedy “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,” then expressly excepted actions “brought for a violation of the Constitution of the United States.” 28 U.S.C. § 2679(b)(1), (2)(A); *see* James E. Pfander & Rex N. Alley, *Federal Tort Liability After Egbert v. Boule: The Case for Restoring the Officer Suit at Common Law*, 138 Harv. L. Rev. 985, 1036-38 (2025). That exception reflects a legislative choice to preserve constitutional damages actions within a remedial system Congress had authority to reshape. If the Constitution itself compelled those actions, their survival would not depend on Congress’s exception. Congress instead legislated around the continued availability of *Bivens* and

Carlson, expressly preserving them while displacing other officer suits. The Court should not erase by construction the precedents on which that statutory arrangement rests.

Erasing *Carlson* would undo one part of that legislative arrangement while leaving the other intact. As Pfander, Reinert, and Schwartz explain, Congress displaced the ordinary common-law action against the employee while preserving any government liability under the FTCA and constitutional liability under *Bivens*. James E. Pfander, Alexander A. Reinert & Joanna C. Schwartz, *The Myth of Personal Liability: Who Pays When Bivens Claims Succeed*, 72 Stan. L. Rev. 561, 574 (2020). Eliminating *Carlson* would withdraw the constitutional remedy Congress preserved without restoring any officer suits Congress displaced. The result would alter Congress’s chosen remedial scheme: the statutory restriction on officer liability would remain, but an established action Congress expressly left available would disappear.²

To be sure, *Hernández*, 589 U.S. at 111 n.9, rejected using that exception to authorize an *extension* of *Bivens*. The exception “simply left *Bivens* where it found it.” But this case is not *Hernández*. Unlike *Hernández*, this is not a case about extending anything, this is a case about where, exactly Congress “found” *Bivens* when it enacted the Westfall Act. Leaving an established remedy where Congress found it is different from extending it to new claims altogether. Reinert and Mulligan identify the separation-of-powers problem with disregarding Congress’s recognition of the remedy when deciding whether a claim invokes an existing action. Alexander A.

² The government’s FTCA liability would remain only for intentional torts committed by law enforcement officers. *See* 28 U.S.C. § 2680(h).

Reinert & Lumen N. Mulligan, *Asking the First Question: Reframing Bivens after Minneci*, 90 Wash. U. L. Rev. 1473, 1496-1497 (2013). Respect for Congress's later statute strengthens the case for retaining the actions Congress relied on when it enacted it.

The PLRA expanded the exhaustion requirement from actions under § 1983 to actions under “any other Federal law,” thereby bringing federal prisoners’ *Carlson* suits within its scope. 42 U.S.C. § 1997e(a); *Porter v. Nussle*, 534 U.S. 516, 524 (2002). Congress also regulated claims for monetary relief, requiring dismissal of claims against immune defendants and restricting recovery for mental or emotional injury. § 1997e(c)(1), (e). Those provisions govern other kinds of suits as well, but Congress enacted them against the backdrop of *Carlson*, imposing conditions on an existing remedy without eliminating it. Although *Ziglar v. Abbasi*, 582 U.S. 120, 149 (2017), characterized *Porter*’s statement as dictum, it suggested merely that Congress’s failure to create a standalone damages remedy might counsel against extending *Carlson* to other forms of prisoner mistreatment. That concern about extending *Carlson* does not undermine the inference that Congress tacitly recognized the remedy *Carlson* already supplied when it expanded the PLRA’s exhaustion scheme to regulate it.³

The government argues that the Westfall Act is neutral toward *Bivens* and that the PLRA never names *Carlson*. U.S. Br. 28-29. But leaving an existing remedy intact while rejecting extensions is a legislative choice following a statutory interpretation decision by this

³ Once again, it is unclear how the government can square its claim that *Carlson* claims are constitutional in nature (U.S. Br. 29) with Congress’s decision to impose an exhaustion requirement as a precondition to such claims. Congress, plainly, has always viewed these claims as subconstitutional law capable of regulation by statute.

Court, and here Congress did better than that. The PLRA’s exhaustion requirement answered *McCarthy v. Madigan*, 503 U.S. 140 (1992), which held that a federal prisoner need not exhaust administrative remedies before bringing a *Bivens* action seeking only money damages. 503 U.S. at 149. The sponsor of the exhaustion provision said so on the floor. 141 Cong. Rec. 35,623 (1995) (statement of Rep. LoBiondo). Congress need not say “this statute is designed to regulate *Carlson* claims” to have intentionally done exactly that.

Along similar lines, the Court has treated congressional acceptance of the settled Rule 10b-5 action as a reason to retain it while leaving its expansion to Congress. *Stoneridge Investment Partners, LLC v. Scientific-Atlanta, Inc.*, 552 U.S. 148, 165-166 (2008). Congress should be able to legislate on the understanding that, absent special justification, settled statutory constructions will remain law until Congress decides to change them. *Kimble*, 576 U.S. at 456. Otherwise, the Court can unintentionally undermine a later legislative choice by erasing an earlier rule on which Congress relied.

Following this Court’s approach in *Stoneridge*, then, Congress can be seen as having accepted a judge-made private cause of action “as then defined” and having chosen to “extend it no further.” 552 U.S. at 166. Such a conclusion appears to have informed this Court’s approach in *Ziglar v. Abbasi*, which established the current two-step framework for the analysis of the viability of a suit under *Bivens*. As *Ziglar* explained, following the approach in *Stoneridge*, the *Bivens* doctrine was to be understood as extending only to the contexts previously settled by decisions of this Court. The *Ziglar* Court therefore affirmed the viability of the *Bivens* doctrine in what this Court called the “common and recurrent sphere of law enforcement.” 582 U.S. at 134. But in new contexts—those that Congress had not

implicitly reaffirmed in the Westfall Act and the PLRA—*Bivens* actions were subject to a searching special factors analysis. Recognizing that Congress was to take the lead in expanding the right to sue and had failed to do so in the PLRA, the same reasoning applies here: Congress accepted the settled rights to sue and went no further. Or, as the Court put it in an echo of *Stoneridge*, it “could be argued” that the PLRA “suggests Congress chose not to extend the *Carlson* damages remedy to cases involving other types of prisoner mistreatment.” 582 U.S. at 149.

Widespread reliance on *Bivens* and *Carlson* is not an abstract matter. Congress supplemented the *Bivens* remedy in 1974 without displacing it, extending the FTCA to intentional torts by federal law-enforcement officers. Pub. L. No. 93-253, 88 Stat. 50 (codified at 28 U.S.C. § 2680(h)). The Senate Report called that provision “a counterpart to the *Bivens* case and its progen[y],” and this Court quoted it. *Carlson*, 446 U.S. at 20. *Abbasi* recognized that *Bivens* guides officers and supplies a fixed legal principle on which others rely. 582 U.S. at 134. Its express assurance concerned *Bivens*’s search-and-seizure context, but the institutional reasoning applies to *Carlson* too. Congress, courts, officers, and prisoners have operated within a remedial system that includes the medical-care action. Petitioner attacks *Bivens*’s original reasoning, Pet. Br. 40-48, and answers the reliance point by asserting that congressional reliance is “precisely the problem,” Pet. Br. 47. That answer has it backwards. The separation-of-powers objection to judicially created remedies is that they displace Congress’s judgment; withdrawing this remedy would displace the statutes Congress actually enacted around it. The separation of powers supplies a reason *both* to preserve the remedy and not to expand it. There is no contradiction there.

III. *CARLSON* SHOULD BE FAIRLY APPLIED, NOT DISTINGUISHED INTO OBLIVION.

Eliminating an action Congress recognized, accepted, and built on requires more than pointing out that the Court would not create it today. But the government asks exactly that: it argues that the Court should declare *Carlson* moribund while reserving broader reconsideration of *Bivens*. U.S. Br. 3, 23-28. Its position is categorical: no future prisoner case can invoke *Carlson*. U.S. Br. 24-25. How is that not overruling *Carlson*? The government first insists that recognizing *Carlson*'s obsolescence requires no change in doctrine, then offers an alternative stare decisis analysis. U.S. Br. 25-28. Neither route answers the statutory stare decisis argument.

To give statutory precedents appropriate stare decisis effect, the meaningful-difference inquiry must preserve an established remedy's fair scope. Lower courts must follow directly applicable precedent even when later decisions appear to undermine its reasoning, leaving overruling to this Court. *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989). Restrictions on extensions must be applied together with the holdings that remain binding.

Abbasi asks whether a case differs from an established context in a meaningful way. 582 U.S. at 139-140. Its comparison includes the constitutional right, officers' roles, challenged conduct, legal obligations, judicial guidance, institutional disruption, and previously unconsidered special factors. Even a modest extension is an extension. *Id.* at 147. But some differences are too trivial to create a new context. *Id.* at 149. Courts must explain why the identified difference changes the remedial question.

Petitioner says every single case must consider anew whether Congress could imagine a difference relevant to

authorizing liability. Pet. Br. 23-24. That of course is tantamount to saying that merely applying *Carlson* is the same thing as extending it, because Congress could distinguish virtually any two injuries or encounters. That legislative freedom does not mean that applying a precedent to nonidentical facts automatically creates a new action. The question is whether the identified difference places the claim outside the medical-care context *Carlson* recognized.

Here the question whether this is a heartland *Carlson* claim is not a close one. *Carlson* concerned officials' alleged deliberate indifference to a federal prisoner's serious medical needs: hours of inadequate attention, contraindicated drugs, a broken respirator, and delayed hospital transfer, followed by death. 446 U.S. at 16 n.1. In this case, on review of a pleading-stage dismissal, the court of appeals described allegations that Nielsen refused hospital treatment despite Watanabe's reports of severe pain after an assault by other inmates; a fractured coccyx was diagnosed seven months later. Pet. App. 3a-5a.

Petitioner seizes on the single encounter with Nielsen and the absence of a life-threatening emergency as distinctions between *Carlson* and this case; he adds (while calling the points immaterial) that Nielsen is a paramedic and did provide some treatment. Pet. Br. 12 n.7, 13, 29-32 & n.11. Those matters bear on whether he was deliberately indifferent. They do not by themselves change this from a case at *Carlson*'s core: a claim against an individual federal prison medical provider for deliberately disregarding a prisoner's serious medical need.

Death is not an element of the *Carlson* action. Petitioner emphasizes that the estate in *Carlson* could not seek prospective relief, and the government invokes the Court's concern with state survivorship rules. Pet. Br. 25-

26, 38; U.S. Br. 21. Those remedial features deserve consideration, but they do not make death an element of the action. *Carlson*'s concern that state law might defeat the estate's recovery led the Court to adopt a uniform federal rule of survivorship. 446 U.S. at 23-25. It did not hold that a prisoner's survival defeats the otherwise established medical-care action.

Alternative remedies require the same discipline. They can bear on context: *Abbasi* expressly considered potential special factors, alternative relief, and the PLRA. 582 U.S. at 139-140, 148-149. *Egbert v. Boule* holds that an alternative structure can foreclose a new action even without judicial review or equivalent relief. 596 U.S. 482, 497-498 (2022). But deciding whether to create an action remains different from applying one already recognized. The FTCA cannot supply a basis for narrowing *Carlson* when *Carlson* itself held that the FTCA and the constitutional damages action could coexist. 446 U.S. at 19-23.

Petitioner admits that the Bureau of Prisons' Administrative Remedy Program existed when *Carlson* was decided, but stresses that the Court did not consider it and that neither the inmate nor his estate could use it. Pet. Br. 18-19, 37-38. But so what? Treating the grievance process and the PLRA as reasons every medical-care claim is new would eliminate the action across the board, thereby undermining the judgment of the political branches that enacted and signed the PLRA. The exhaustion provision would become a reason to void the very relief that exhaustion provision was supposed to regulate. That counterintuitive consequence does not follow from the statute's command to exhaust.

The Court's own formulation points against petitioner's argument. *Abbasi* said that "[i]t could be argued" that the PLRA suggests Congress chose not to extend *Carlson* to "other types of prisoner

mistreatment.” 582 U.S. at 149. And *Goldley v. Fields*, 606 U.S. 942, 943-945 (2025) (per curiam) declined to recognize a new prisoner excessive-force action in light of congressional legislation, administrative remedies, and institutional concerns. But, though they certainly could have, neither decision abrogated the established medical-care action for Eighth Amendment deliberate indifference to serious medical needs. Restricting new kinds of claims gives those decisions effect; narrowing *Carlson* to the point of extinguishing it does far more.

The government’s reliance on *Cisco Systems, Inc. v. Doe I*, 146 S. Ct. 1882 (2026), is misplaced. U.S. Br. 24-25. In rejecting new Alien Tort Statute actions, *Cisco* emphasized that this Court had never itself created one. 146 S. Ct. at 1892. Yet it left undisturbed the assumed availability of actions for three historical torts, expressly considering possible litigant reliance. *Id.* at 1892 & n.3. *Carlson* is an *actual* decision recognizing an action. Holding that no new claims should be recognized under the ATS is not a reason to overrule statutory precedents upholding the right to pursue claims in what this Court has described as “settled contexts.”

The Court should apply *Carlson*’s established medical-care action, leaving the merits and defenses for adjudication. If it chooses to consider the view that *Carlson* should be overruled, it should confront overruling it under the standard that governs overruling a statutory precedent that Congress has built upon. Giving effect to Congress’s power to make the laws requires respecting the fixed constructions on which they rest.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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