

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 FOR DEE DEIDRE FARMER, NATIONAL
TRANS BAR ASSOCIATION, AND BAY AREA
LAWYERS FOR INDIVIDUAL FREEDOM
AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT**

D Danganan
2515 Dole Street
Honolulu, HI 96822

Mary Kelly Persyn
Counsel of Record
PERSYN LAW & POLICY
912 Cole Street #124
San Francisco, CA 94117
(628) 400-1254
marykelly@persynlaw.com

[Additional Counsel Listed On Inside Cover]

Rafael M. Langer-Osuna
The Law Offices of
Rafael M. Langer-Osuna
524 Montclair Ave.
Oakland, CA 94606

Kristen Prata Browde
Browde Law, P.C.
63 Ridgewood Terrace
Chappaqua, NY 10514

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF <i>AMICI CURIAE</i>	1
SUMMARY OF ARGUMENT	4
ARGUMENT	5
I. THIS COURT ADJUDICATED <i>FARMER</i> AS A <i>BIVENS</i> ACTION.....	5
II. <i>FARMER</i> IS IN THE SAME CONTEXT AS <i>CARLSON</i>	12
III. BECAUSE <i>FARMER</i> IS A CLEAR APPLICATION OF <i>CARLSON</i> , EVEN UNDER THE MODERN <i>BIVENS</i> DOCTRINE, RESPONDENT'S CLAIM IS ALSO AN APPLICATION OF <i>CARLSON</i>	17
IV. THIS COURT'S CONTINUED RECOGNI- TION OF <i>CARLSON</i> CLAIMS PROTECTS PUBLIC INTERESTS.....	27
CONCLUSION.....	30

TABLE OF AUTHORITIES

Cases	Page
<i>Alexander v. Sandoval</i> , 532 U.S. 275 (2001)	18
<i>Bistrrian v. Levi</i> , 912 F.3d 79 (3d Cir. 2018)	11, 16, 22, 26
<i>Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics</i> , 403 U.S. 388 (1971)	1-6, 9-28, 30
<i>Bolling v. Sharpe</i> , 347 U.S. 497 (1954)	27
<i>Bulger v. Hurwitz</i> , 62 F.4th 127 (4th Cir. 2023)	22
<i>Bush v. Lucas</i> , 462 U.S. 367 (1983)	6, 18, 21
<i>Butz v. Economou</i> , 438 U.S. 478 (1978)	27, 28
<i>Carlson v. Green</i> , 446 U.S. 14 (1980)	2-9, 11-20, 22-24, 26-28
<i>Corr. Servs. Corp. v. Malesko</i> , 534 U.S. 61 (2001)	17, 20, 27
<i>Davis v. Passman</i> , 442 U.S. 228 (1979)	5, 6, 11, 17-20, 22
<i>Doe v. McHenry</i> , 763 F. Supp. 3d 81 (D.D.C. 2025)	29
<i>Egbert v. Boule</i> , 596 U.S. 482 (2022)	4, 16, 18, 20-23, 27
<i>Estelle v. Gamble</i> , 429 U.S. 97 (1976)	14

<i>Farmer v. Brennan</i> , 511 U.S. 825 (1994)	1, 3-4, 6, 8-18, 23, 25-28
<i>Fisher v. Hollingsworth</i> , 115 F.4th 197 (3d Cir. 2024)	16, 22
<i>Gillespie v. Civiletti</i> , 629 F.2d 637 (9th Cir. 1980)	13
<i>Goldey v. Fields</i> , 606 U.S. 942 (2025)	13-14
<i>Green v. United States</i> , 283 F.2d 687 (3d Cir. 1960)	23
<i>Helling v. McKinney</i> , 509 U.S. 25 (1993)	15
<i>Hernández v. Mesa</i> , 582 U.S. 548 (2017)	18
<i>Hernández v. Mesa</i> , 589 U.S. 93 (2020)	4, 14, 20-22, 25, 27
<i>Hui v. Castaneda</i> , 559 U.S. 799 (2010)	25
<i>Kalu v. Spaulding</i> , 113 F.4th 311 (3d Cir. 2024)	16, 22
<i>Kingdom v. Trump</i> , No. 25-cv-691, 2026 WL 1746251 (June 17, 2026)	29
<i>Kingdom v. Trump</i> , No. 25-cv-691, 2025 WL 1568238 (D.D.C. June 3, 2025)	29
<i>Lorillard v. Pons</i> , 434 U.S. 575 (1978)	25
<i>Marquez v. Rodriguez</i> , 81 F.4th 1027 (9th Cir. 2023)	22, 27

<i>McCarthy v. Madigan</i> , 503 U.S. 140 (1992)	24
<i>Porter v. Nussle</i> , 534 U.S. 516 (2002)	24
<i>Rhodes v. Chapman</i> , 452 U.S. 337 (1981)	14
<i>Sargeant v. Barfield</i> , 87 F.4th 358 (7th Cir. 2023)	10, 16, 22
<i>Shorter v. United States</i> , 12 F.4th 366 (3d Cir. 2021)	16
<i>Smoake v. Willingham</i> , 359 F.2d 386 (10th Cir. 1966)	23
<i>Tarlton v. United States</i> , 429 F.2d 1297 (5th Cir. 1970)	23
<i>United States v. Standard Oil Co.</i> , 332 U.S. 301 (1947)	5-6
<i>Whitley v. Albers</i> , 475 U.S. 312 (1986)	14
<i>Wilkie v. Robbins</i> , 551 U.S. 537 (2007)	21, 25
<i>Wilson v. Seiter</i> , 501 U.S. 294 (1991)	13
<i>Wood v. Moss</i> , 572 U.S. 744 (2014)	19
<i>Ziglar v. Abbasi</i> , 582 U.S. 120 (2017)	4, 11, 12, 18-22, 25
Statutes and Regulations	
5 U.S.C. § 705.....	29
28 U.S.C. § 1346(B).....	23

28 U.S.C. § 2671 <i>et seq.</i>	23
28 U.S.C. § 2679(b)(2)(A)	25
34 U.S.C. § 30301(13)	26, 27
42 U.S.C. § 1983.....	10, 27
42 U.S.C. § 1997e(a).....	24
42 U.S.C. § 1997e(e).....	24
28 C.F.R. § 542.10(c)	23

Other Authorities

141 Cong. Rec. H14105 (daily ed. Dec. 6, 1995) (statement of Rep. LoBiondo)	24
Allen J. Beck, Bureau of Justice Statistics, U.S. Dep’t of Just., Sexual Victimization in Prisons and Jails Reported by Inmates, 2011-12: Sup- plemental Tables: Prevalence of Sexual Vic- timization Among Transgender Adult Inmates 2 (2014)	28
Jaclyn Diaz, <i>Federal Prisons Prep to Move Trans Inmates as Early as This Week</i> , NPR (Feb. 25, 2025), https://www.npr.org/2025/02/21/nx-s1-5305282/trans-inmates-federal-prison-policy-transfers [https://perma.cc/6CXF-UEDES]... 28-29	
Exec. Order 14168, 90 Fed. Reg. 8615 (Jan. 30, 2025)	28
Dee Deidre Farmer & D Danganan, <i>Farmer at 31: Historicizing Trans Rights in Prison Through Intergenerational Dialogue</i> , 48 N.Y.U. Rev. L. & Soc. Change 321 (2025)	8
Federal Employees Liability Reform and Tort Compensation Act of 1988 (Westfall Act), Pub. L. No. 100-694, 102 Stat. 4563 (1988)...	25, 27

Memorandum from Justice Ruth Bader Ginsburg to Justice David H. Souter, <i>Re: Farmer v. Brennan</i> , No. 92-7247 (Mar. 9, 1994), in Papers of Harry A. Blackmun, No. 92-7247, https://clearinghouse.net/doc/136507/ [https://perma.cc/U8QZ-SNZX]	10
Oral Argument at 24:50, <i>Farmer v. Brennan</i> , 511 U.S. 825 (1994) (No. 92-7247), https://www.oyez.org/cases/1993/92-7247 [https://perma.cc/DZ3S-ZSDZ]	9
James E. Pfander, Alexander A. Reinert & Joanna C. Schwartz, <i>The Myth of Personal Liability: Who Pays When Bivens Claims Succeed</i> , 72 Stan. L. Rev. 561 (2020)	6
Pl.’s First Am. Compl. for Damages & Injunctive Relief, <i>Farmer v. Brennan</i> , No. 91-C-716 (W.D. Wis. Dec. 13, 1991) ...	7-8, 13
Pl.’s Proposed Jury Instructions-Damages, <i>Farmer v. Brennan</i> , No. 91-cv-716 (W.D. Wis. Jan. 8, 1997), Dkt. No. 170	10
Pl.’s Proposed Special Verdict-Damages, <i>Farmer v. Brennan</i> , No. 91-cv-716 (W.D. Wis. Jan. 8, 1997)	10
Prison Rape Elimination Act of 2003 (“PREA”), Pub. L. No. 108-79 § 2(13), 117 Stat. 972 (codified at 34 U.S.C. § 30301(13))	26
U.S. Dep’t of Just., Fed. Bureau of Prisons, Program Statement: 5260.01, Management of Inmates with Gender Dysphoria (Feb. 19, 2026)	29

INTEREST OF *AMICI CURIAE*¹

Dee Deidre Farmer is an individual who experienced serious violations of her constitutional rights by federal officers involved in domestic law enforcement. Ms. Farmer was the successful petitioner in *Farmer v. Brennan*, 511 U.S. 825 (1994), where this Court vacated the dismissal of her *Bivens* claim that prison officials were deliberately indifferent in violation of the Eighth Amendment in failing to protect her from sexual assault. Ms. Farmer has since co-authored a law review article discussing her experiences behind bars following this Court's remand. She continues to support incarcerated people through her nonprofit organization, Fight4Justice, and as a consultant to legal organizations that work on issues pertaining to gender equality. She graduated from Georgetown University Law Center's MORCA-Georgetown Paralegal Program.

The National Trans Bar Association ("NTBA") is a bar association formed by and for transgender and gender non-conforming legal professionals, law school students, and allies who care about transgender rights. NTBA's core mission is to support transgender and gender non-conforming people in the legal profession and to increase the community's access to affordable and culturally competent legal services. NTBA also strives to secure formal legal protections for transgender and gender non-conforming people to meaningfully address issues of equity. NTBA has

¹ Pursuant to Rule 37.6, *amici* confirm that no counsel for a party authored this brief in whole or in part and that no person other than *amici* or their counsel made any monetary contributions intended to fund the preparation or submission of this brief.

hosted Ms. Farmer and other formerly incarcerated transgender people at numerous Continuing Legal Education panels and presentations for legal audiences.

Bay Area Lawyers for Individual Freedom (“BALIF”) is a bar association of legal professionals in the San Francisco Bay Area—including judges, lawyers, law students, and legal workers—that envisions a world where lesbian, gay, bisexual, transgender, queer, questioning, and intersex (“LGBTQI+”) people live with dignity and equality under the law. BALIF’s mission is to lead the LGBTQI+ legal community through advocacy, justice, community empowerment, and professional development and represent its members’ interests in the wider San Francisco Bay Area. As the nation’s oldest and largest LGBT bar association, BALIF was founded in 1980 to encourage LGBTQI+ legal professionals to apply to become judges. At the time of BALIF’s founding, there were no openly LGBTQI judges—today there are many. BALIF’s mission has since expanded to take on questions of law and justice that affect the LGBTQI+ community.

In the present case, the Court will decide how its *Bivens* framework applies to claims from incarcerated people who report that prison officials deny necessary medical care with deliberate indifference. Such claims involve constitutional violations by line-level federal officers in ordinary prison administration, which fall squarely within the historical core of the *Bivens* doctrine. The question presented adopts Petitioner’s assertion that this case presented “an alternative remedial scheme this Court did not consider in *Carlson*” and “significant factual differences such as

the immediacy and severity of the harm alleged.” *Amici* present the Court with Ms. Farmer’s case as a standard application of *Carlson* that differed in both the immediacy and severity of harm alleged but nevertheless was treated by this Court as a *Bivens* case. *Farmer* demonstrates an application—not an extension—of *Carlson* that included a different degree of immediacy and severity of harm, so long as the claims are in the same legal context: deliberate indifference to the health or safety of a person held in federal custody. Accepting Petitioner’s view—that the *Carlson* context includes claims in which an incarcerated person died following an acute asthma attack that prison officials not only failed to treat, but exacerbated, Pet’r’s Br. 24–31—would effectively limit *Carlson* to its facts. *Amici* argue that because this Court understood Ms. Farmer’s case to fit in the *Carlson* context, Respondent’s claim fits in it, too. *Accord* Resp’t’s Br. 18–24.

SUMMARY OF ARGUMENT

Mr. Watanabe’s medical claim falls within the existing *Bivens* context established by *Carlson v. Green*, 446 U.S. 14 (1980). *Accord* Resp’t’s Br. 13–17. *Carlson* provides a monetary damages remedy for claims regarding the deliberate indifference of an individual federal prison official to a known, substantial risk to the health or safety of an incarcerated person. The severity of an injury does not create a new *Bivens* context, as this Court’s decision in *Farmer v. Brennan*, 511 U.S. 825 (1994), makes clear.

In *Farmer*, this Court held that ignoring an obvious risk of sexual assault in prison is an Eighth Amendment violation that could be remedied by monetary damages. In reaching the merits of Ms. Farmer’s failure-to-protect claim, the Court unmistakably understood the case as a *Bivens* case. A contrary conclusion finds no support in the text of the opinion, the oral argument transcript, or the memoranda of the Justices. *Farmer* is a *Carlson* case. *Accord* Resp’t’s Br. 28. Courts construe failure-to-protect claims and medical care claims using the same deliberate indifference standard. Threats to the health or safety of an incarcerated person frequently overlap.

Even under modern *Bivens* jurisprudence following *Ziglar v. Abbasi*, 582 U.S. 120 (2017), *Hernández v. Mesa*, 589 U.S. 93 (2020), and *Egbert v. Boule*, 596 U.S. 482 (2022), the *Bivens* question has remained the same. Petitioner argues that a new alternative remedial scheme that *Carlson* did not consider renders this case a new context. Pet’r’s Br. 32–35. *Carlson* was decided after the federal courts had already seen the strong effects of the requirement to

exhaust the Bureau of Prisons’ administrative remedies before filing suit. And the severity of the injury has no bearing on any of the most relevant factors pertaining to the question whether Congress should be the governmental body to make a determination regarding the implied damages.

Finally, public policy supports these claims because damages remedies provide crucial safeguards in prisons.

ARGUMENT

I. THIS COURT ADJUDICATED *FARMER* AS A *BIVENS* ACTION.

In *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), this Court “established that the victims of a constitutional violation by a federal agent have a right to recover damages against the official in federal court despite the absence of any statute conferring such a right.” *Carlson v. Green*, 446 U.S. 14, 18 (1980). Today, a *Bivens* claim is shorthand for an implied damages remedy against federal officers who violate the U.S. Constitution. Within a decade following its decision in *Bivens*, this Court found an implied damages remedy in a Fifth Amendment gender discrimination case, *Davis v. Passman*, 442 U.S. 228 (1979), and an Eighth Amendment cruel and unusual punishment case, *Carlson*, 446 U.S. at 14. In those three cases—*Bivens*, *Davis*, and *Carlson*—this Court identified “two situations” that might “defeat [a *Bivens* cause of action] in a particular case.” *Id.* at 18. First, when there are any “special factors counseling hesitation in the absence of affirmative action by Congress,” such as “a question

of ‘federal fiscal policy.’” *Id.*; *Bivens*, 403 U.S. at 396 (quoting *United States v. Standard Oil Co.*, 332 U.S. 301, 311 (1947)); *Davis*, 442 U.S. at 245. Second, “when defendants show that Congress has provided an alternative remedy which it explicitly declared to be a *substitute* for recovery under the Constitution and viewed as equally effective.” *Carlson*, 446 U.S. at 18–19 (emphasis in original); *see also Bivens*, 403 U.S. at 397; *Davis*, 442 U.S. at 245–47.

But very quickly after these cases were decided, the Court began to retreat from finding implied damages remedies in new contexts based on concerns of burdening and “overdeter[ring] federal officials and undermin[ing their] ability to respond in times of crisis.” 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, 563 (2020). The Court’s more hesitant view of the doctrine was articulated in *Bush v. Lucas*, 462 U.S. 367 (1983), in which the Court denied an implied damages remedy in a First Amendment protected speech retaliation claim brought by a federal government employee because of the “elaborate remedial system” that Congress and the Executive Branch had provided for remedying any violations against federal employees. *See id.* at 385–90.

In 1994, after the Court had already indicated its hesitancy with implied damages remedies in *Bush*, this Court issued its decision in *Farmer v. Brennan*, 511 U.S. 825 (1994), which involved a claim seeking damages and equitable relief under the Eighth Amendment. The Court’s majority opinion clearly stated that Ms. Farmer had filed “a *Bivens* complaint.” *Id.* at 830. In her lawsuit, Ms. Farmer alleged,

inter alia, that the Warden of her institution, her case manager, the regional director, and the correctional services administrator were responsible for the conditions and environment where she resided and was transferred to, and were therefore deliberately indifferent to her safety. Pl.’s First Am. Compl. for Damages & Injunctive Relief ¶¶ 1, 10–17, *Farmer v. Brennan*, No. 91-cv-716 (W.D. Wis. Dec. 13, 1991). Specifically, these defendants showed disregard for her safety when they classified and placed her in a federal penitentiary with a violent environment “knowing such [placement] would endanger her life and indeed did result in her being . . . sexually assaulted.” *Id.* ¶ 1.

Ms. Farmer’s experiences that led to her complaint are harrowing. Upon incarceration, a psychologist employed by the federal Bureau of Prisons (“BOP”) wrote a report that “noted that [Ms. Farmer] would likely experience a number of difficulties during her incarceration, including a great deal of sexual pressure because of her youth and feminine appearance.” *Id.* ¶ 39. As she was transferred to various BOP facilities, officials were aware that she was at a risk of harm in general population, so they kept her in segregation for her own protection. *Id.* ¶¶ 43–82, 87. After three years in segregation, BOP officials transferred her to a maximum-security facility—the U.S. Penitentiary at Terre-Haute—where she was released into general population. *Id.* ¶¶ 82, 87, 88. Although the Petitioner and United States argue that prison-administration concerns distinguish recent claims from *Carlson*, Pet’r’s Br. 28–29, 39–40; U.S. Br. 12–15, the violations in *Farmer* involved classification, transfer, protective segregation, institutional security, and placement in general population—all core prison administrative decisions. Notably, *Carlson*

included administrative decisions, as well, given that the decedent direly needed a transfer to a hospital outside of the facility. *Carlson*, 446 U.S. at 16 n.1.

A little over a week after being transferred to Terre-Haute and released into general population, Ms. Farmer was sexually assaulted by another incarcerated person. *First Am. Compl.* ¶ 89, *Farmer*, No. 91-cv-716. Ms. Farmer has since shared in a published law review article that the person who assaulted her was “serving a life sentence for murder.” Dee Deidre Farmer & D Danganan, *Farmer at 31: Historicizing Trans Rights in Prison Through Intergenerational Dialogue*, 48 N.Y.U. Rev. L. & Soc. Change 321, 332 (2025). In that article, Ms. Farmer wrote: “[He] came into my cell, beat me up, and raped me.” *Id.* “[He] had a knife, and I was so fearful that he was going to kill me that I could not tell him to stop.” *Id.*

Based on the BOP officials’ decision to transfer her despite their awareness of the “high probability that she could not [safely] function” in Terre-Haute’s general population, *First Am. Compl.* ¶ 97, *Farmer*, No. 91-cv-716, Ms. Farmer filed suit, arguing that she had been denied “her Eighth Amendment right to be free from deliberate indifference to her [safety] by the Defendants[’] failure to provide for her [safety], protection and safekeeping.” *Id.* ¶ 101. She requested, *inter alia*, compensatory and punitive damages against the aforementioned defendants. *Id.* ¶ 102. The district court granted summary judgment to the defendants for lack of requisite state of mind, finding they had “no knowledge of any potential danger” to Ms. Farmer because she “never expressed any concern for [her] safety to any of [them].” *Farmer*, 511 U.S. at 831–32. The Seventh Circuit summarily affirmed. *Id.* at 832.

Ms. Farmer filed a *pro se* petition for certiorari that essentially advocated for a recklessness standard to the subjective component of her Eighth Amendment claim. Pet. for Writ of Cert. at 10–17, *Farmer v. Brennan*, 511 U.S. 825 (1994) (No. 92-7247).

This Court’s opinion concluded that a plaintiff has a viable Eighth Amendment claim “based on a failure to prevent harm,” even where a plaintiff at obvious risk of harm did not directly notify prison officials of that risk. *Farmer*, 511 U.S. at 842–43, 848–49. The Court adopted a criminal recklessness standard for such cases and remanded to the district court for further findings. *Id.* at 837–40, 848–51.

Importantly, this Court understood that Ms. Farmer was seeking damages under a *Bivens* theory. *See id.* at 830–31; 839. It made no difference that there may have been injunctive relief available to Ms. Farmer; the Court still treated her Complaint as a *Bivens* action. *But see* Pet’r’s Br. 25–26, 30–31, 34 (arguing that *Bivens* should only apply in a case of “damages or nothing”); U.S. Br. 18, 21–23 (same). The same logic should apply to Mr. Watanabe’s case. *See* Resp’t’s Br. 21–24. The *Farmer* opinion discussed Ms. Farmer’s damages claim explicitly. *See Farmer*, 511 U.S. at 848, 850. The Court cited both *Bivens* and *Carlson* when reciting Ms. Farmer’s allegations. *See id.* at 830. This unequivocal understanding of the case as a *Bivens* case aligns with the consensus at oral argument, where Justice Ginsburg clarified that this case is “a *Bivens* case.” *See* Oral Argument at 24:50, *Farmer v. Brennan*, 511 U.S. 825 (1994) (No. 92-7247), <https://www.oyez.org/cases/1993/92-7247> [<https://perma.cc/DZ3S-ZSDZ>] (“But this was . . . this was . . . it’s a *Bivens* case, isn’t it?”). Finally, during

deliberations, in a letter from Justice Ginsburg to Justice Souter and copied in a memorandum to the Conference, Justice Ginsburg wrote: “Although *Bivens* provides the cause of action here, in many cases prisoners will be suing state officials under §1983 and alleging Eighth Amendment violations.” Memorandum from Justice Ruth Bader Ginsburg to Justice David H. Souter, *Re: Farmer v. Brennan*, No. 92-7247 (Mar. 9, 1994), in Papers of Harry A. Blackmun, No. 92-7247, <https://clearinghouse.net/doc/136507/> [<https://perma.cc/U8QZ-SNZX>].

The Court’s express identification of the complaint as a *Bivens* action, its discussion of damages liability, and its order vacating and remanding the damages action are difficult to reconcile with treating the claim as outside an established *Bivens* context. *Farmer*, 511 U.S. at 830–31, 848, and 850–51. Indeed, when the case was eventually tried before a jury, the only claim remaining was the *Bivens* damages claim. See Pl.’s Proposed Jury Instructions-Damages, *Farmer v. Brennan*, No. 91-cv-716 (W.D. Wis. Jan. 8, 1997), Dkt. No. 170; Pl.’s Proposed Special Verdict-Damages, *Farmer v. Brennan*, No. 91-cv-716 (W.D. Wis. Jan. 8, 1997), Dkt. No. 172.

Yet, lower courts that have rejected *Farmer* as a *Bivens* context have stated—with no support—that this Court in *Farmer* merely assumed without deciding that Ms. Farmer’s claim was a valid *Bivens* action before proceeding to discuss the deliberate indifference standard. See, e.g., *Sargeant v. Barfield*, 87 F.4th 358, 365 (7th Cir. 2023). But a close read of *Farmer* shows that the Court never states that it merely assumes that it is reviewing a *Bivens* claim. This Court has not listed *Farmer* alongside the three existing

Bivens contexts, but it also has never stated that *Farmer* is not a *Bivens* context. Indeed, in *Abbasi*, this Court left *Farmer* out of two lists collecting cases—first, the trio of canonical *Bivens* cases, and second, an extensive list of cases in which the Court had “declined to create an implied damages remedy.” *Abbasi*, 582 U.S. at 131–32, 135. But this Court has not decided *sub silentio* that *Farmer* is not a *Bivens* case. *Farmer* was a groundbreaking case that the Court clearly understood as a *Bivens* case. The Court reached the merits of the Eighth Amendment failure-to-protect claim to discuss the deliberate indifference standard only because it believed Ms. Farmer’s claim was a viable *Bivens* action.

A Third Circuit opinion agreed with this reasoning. In *Bistrrian v. Levi*, 912 F.3d 79 (3d Cir. 2018), the Third Circuit stated that “[a]lthough the *Farmer* Court did not explicitly state that it was recognizing a *Bivens* claim, it not only vacated the grant of summary judgment in favor of the prison officials but also discussed at length ‘deliberate indifference’ as the legal standard to assess a *Bivens* claim.” *Id.* at 90–91. The Third Circuit was not deterred by the fact that *Abbasi* listed only *Bivens*, *Davis*, and *Carlson* as the established *Bivens* contexts “and did not address, or otherwise cite to, *Farmer*.” *Id.* at 91. It “decline[d] to conclude that the Supreme Court’s more recent cases have, by implication, overruled [*Farmer*].” *Id.* Instead, it held that the failure-to-protect claim at issue in *Bistrrian* did not present a new context because of its similarity to *Farmer*, allowing the damages claim to proceed. *Id.* at 90–92. Notably, *Bistrrian* was decided after this Court issued *Abbasi*, which stated that *Bivens*, *Davis*, and *Carlson* “represent the only instances in which the Court has approved of an implied damages

remedy under the Constitution itself.” *Abbasi*, 582 U.S. at 131. This language did not persuade the Third Circuit to reject failure-to-protect claims as *Bivens* claims at the first step of the *Bivens* analysis—where the canonical trio come into play.

II. *FARMER* IS IN THE SAME CONTEXT AS *CARLSON*.

The Supreme Court reached the merits of Ms. Farmer’s *Bivens* claim without discussing whether there was a valid *Bivens* cause of action because it had already conducted that analysis in *Carlson*. There, the Court framed the right at issue as “a violation of the Eighth Amendment’s proscription against infliction of cruel and unusual punishment, giving rise to a cause of action for damages under *Bivens*.” *Carlson*, 446 U.S. at 17, 18–23. The specific allegations were narrower than that formulation—though they contain far more than simply exacerbating an asthma attack that caused death. *But see* Pet’r’s Br. 25–31 (characterizing *Carlson*’s context as an acute, fatal medical emergency); U.S. Br. 21–23 (same); States Br. 5 (same). The plaintiff claimed that the defendants knew that the decedent had chronic asthma but nevertheless

kept him in [Terre Haute] against the advice of doctors, failed to give him competent medical attention for some eight hours after he had an asthmatic attack, administered contra-indicated drugs which made his attack more severe, attempted to use a respirator known to be inoperative which further impeded his

breathing, and delayed for too long a time his transfer to an outside hospital.

Carlson, 446 U.S. at 16 n.1. Like the plaintiff in *Carlson*, Ms. Farmer was placed in Terre Haute’s general population against the advice of a doctor. First Am. Compl. ¶ 39, *Farmer*, No. 91-cv-716. Unlike the plaintiff in *Carlson*, her case did not involve an acute medical event, but this Court nevertheless treated her claim as a *Bivens* action. Thus, based on the Supreme Court’s broad language stating the context of the case, the remedy in *Carlson* should not be limited to *medical* deliberate indifference claims—and certainly not only those arising from fatal medical emergencies—but establishes damages action against federal officers for the deliberate indifference to health or safety, more broadly. *Accord* Resp’t’s Br. 18–23. *Farmer* therefore reaffirms a reading of *Carlson* that the case extends beyond instances of death; *cf.* Pet’r’s Br. 18, 24–31; U.S. Br. 21–23; States Br. 5.

By the time *Farmer* was decided, this Court had described medical care and protection from violence from other incarcerated people as related conditions of confinement. *See Wilson v. Seiter*, 501 U.S. 294, 303 (1991) (“[T]he medical care a prisoner receives is just as much a ‘condition’ of his confinement as the food he is fed, the clothes he is issued, the temperature he is subjected to in his cell, and *the protection he is afforded against other inmates.*” (emphasis added)). And at least one court of appeals had decided, as early as 1980, that failure-to-protect claims were in the same context as *Carlson* and thus were afforded a *Bivens* remedy. *Gillespie v. Civiletti*, 629 F.2d 637, 642 (9th Cir. 1980).

Such claims can be differentiated from another category of Eighth Amendment claims: claims regarding the excessive use of force by prison officials. See *Goldey v. Fields*, 606 U.S. 942, 943–45 (2025) (per curiam) (holding that excessive force claims in prison fall outside *Carlson*’s context); cf. Pet’r’s Br. 28, 32, 39–40 (discussing precedent holding that excessive force claims in prison are not *Bivens* claims); U.S. Br. 10–18, 20, 26–27 (same). Excessive use of force claims do not apply the deliberate-indifference standard, but instead require plaintiffs to show that an officer’s force was applied “maliciously and sadistically for the very purpose of causing harm.” *Whitley v. Albers*, 475 U.S. 312, 320–21 (1986) (citation omitted). This Court has discussed the conditions-of-confinement claims in a separate category juxtaposed to excessive use of force claims. See *id.* at 319–21. Thus, the “deliberate indifference to a prisoner’s serious illness or injury,” *id.* at 320 (quoting *Estelle v. Gamble*, 429 U.S. 97, 105 (1976)), as well as deliberate indifference to “harsh ‘conditions of confinement,’” *id.* at 319 (quoting *Rhodes v. Chapman*, 452 U.S. 337, 347 (1981)), have been viewed differently from a “setting” in which “competing obligations” of the prison officials caused this Court to hesitate “to critique in hindsight decisions necessarily made in haste, under pressure, and frequently without the luxury of second chance,” such as the use of force applied “to resolve a disturbance” in the facility, *id.* at 320. *Accord* Resp’t’s Br. 14, 29.

For these reasons, *Farmer* does not arise in the same context as *Carlson* merely because the two cases are “based on the same constitutional provision.” *Hernández v. Mesa*, 589 U.S. 93, 103 (2020) (“*Hernández II*”); cf. Pet’r’s Br. 22–24, 30–31; U.S. Br. 11–12. There are other claims based on the same constitutional

provision that do not receive the same legal treatment whatsoever. Instead, as this Court stated in *Farmer*, the two cases are both “prison-conditions cases,” in which the Court must determine whether the defendants exhibited “deliberate indifference to inmate health or safety.” *Farmer*, 511 U.S. at 834. The two cases are brought by plaintiffs incarcerated in federal prison against individual federal prison officials. They raise claims regarding a known substantial risk to health or safety that ordinary prison operations should have remedied, seeking retrospective damages to remedy harms that could not be undone—exacerbated physical conditions and the associated pain and suffering. These claims go hand in hand because “[t]he question under the Eighth Amendment is whether prison officials, acting with deliberate indifference, exposed a prisoner to a sufficiently substantial ‘risk of serious damage to his future health.’” *Id.* at 843 (quoting *Helling v. McKinney*, 509 U.S. 25, 35 (1993)). Any risk to a person’s safety is a risk to that person’s health.

Thus, as part of step one of the *Bivens* analysis, the claim in *Farmer* should be understood as arising in the same context as *Carlson*—deliberate indifference to a known, substantial risk to the health or safety of a person in federal custody raised under the Eighth Amendment. The context stated in this level of generality—which was accepted by this Court—rebutts any narrower framing of *Carlson* to its facts. See Pet’r’s Br. 22–24; States Br. 6–9. Although *Farmer* involved different official conduct, a different form of injury, a plaintiff who survived, and some prospective relief raised alongside damages claims, the Court acknowledged it as a *Bivens* case. *Farmer* undoubtedly falls under *Carlson*’s umbrella. As one Judge put

it: “the universal assumption in *Farmer* that a *Bivens* remedy was available shows that the Court was treating failure-to-protect claims as fitting comfortably within the reasoning of *Carlson*. That conclusion was so obvious in *Farmer* that it did not need to be questioned or explained.” *Sargeant*, 87 F.4th at 371 (Hamilton, J., dissenting).

Here, too, the Third Circuit previously agreed with this reasoning. In *Shorter v. United States*, the Third Circuit squarely placed *Farmer* in the *Carlson* context rather than relying on *Farmer* as a standalone *Bivens* context like the *Bistrrian* court did. 12 F.4th 366, 373 n.5 (3d Cir. 2021) (“[T]he Supreme Court . . . neglected to name *Farmer* because it saw that case as falling under the umbrella of *Carlson*”); *see also id.* at 371 (“In *Farmer* . . . the Supreme Court applied *Carlson* in recognizing an Eighth Amendment damages claim.”).

In 2024, however, the Third Circuit held that *Egbert v. Boule*, 596 U.S. 482 (2022), abrogated its precedents in *Bistrrian* and *Shorter*. *See Fisher v. Hollingsworth*, 115 F.4th 197, 204 (3d Cir. 2024) (“Defendants respond that *Bistrrian* and *Shorter* have been abrogated by the Supreme Court’s later decision in *Egbert v. Boule*. We agree.” (citation omitted)); *see also Kalu v. Spaulding*, 113 F.4th 311, 329–31 (3d Cir. 2024). Those decisions do not alter the historical point demonstrated by *Farmer* itself: this Court understood Ms. Farmer’s suit as a *Bivens* action and adjudicated the governing Eighth Amendment standard on that basis. The opinion, disposition, and contemporaneous record therefore support treating *Farmer* as an application of *Carlson*’s established context, not an extension of *Bivens* into a new one.

III. BECAUSE *FARMER* IS A CLEAR APPLICATION OF *CARLSON*, EVEN UNDER THE MODERN *BIVENS* DOCTRINE, RESPONDENT'S CLAIM IS ALSO AN APPLICATION OF *CARLSON*.

Differences in severity, immediacy, or ultimate outcome of the delay or denial of serious medical needs do not make Mr. Watanabe's claim meaningfully different from *Carlson*, particularly in light of *Farmer*. *But see* Pet'r's Br. 22–23, 40–48. When Mr. Watanabe suffered a fractured coccyx, prison medical officials delayed his access to medical professionals who could examine his pain as expert specialists. Resp't's Br. 10. Delay was a core part of the facts in *Carlson*. 446 U.S. at 16 n.1. Though Mr. Watanabe did not die because of the delay, he did suffer immense pain. Resp't's Br. 14, 23. These instances arise in the same context—particularly because, from the defendant's perspective, it is challenging to know what medical issue is actually capable of causing death. *But see* Pet'r's Br. 24–32 (emphasizing that the prisoner in *Carlson* died, creating a difference in the nature, severity, and immediacy of the injury there and in this case); U.S. Br. 21–23 (arguing for a meaningful difference between a fatal asthma attack and Mr. Watanabe's nonfatal injury).

But this Court has refused to limit *Bivens*, *Davis*, and *Carlson* “to the precise circumstances that they involved.” *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 75 (2001) (Scalia, J., concurring). But more to the point, *Farmer* is a clear example that a *Bivens* case in the *Carlson* context that evidences a seriously injurious harm that did not result in death could still be grounds for a viable claim.

Farmer is not part of an “ancient regime” from a time before extending the *Bivens* remedy became a “disfavored judicial activity.” *Abbasi*, 582 U.S. at 131–32 (discussing the bygone era of *Bivens* expansion when “as a routine matter with respect to statutes, the Court would imply causes of action not explicit in the statutory text itself”) (quoting *Alexander v. Sandoval*, 532 U.S. 275, 287 (2001))); *Egbert*, 596 U.S. at 491 (quoting *Abbasi*, 582 U.S. at 135). Despite Petitioner’s framing that *Carlson* belongs to an earlier, more permissive era of implied causes of action, Pet’r’s Br. 19–24, *Farmer* was decided after the Court had already adopted a substantially more cautious approach to implied remedies.

Ever since *Bush v. Lucas* was decided in 1983, the Court had indicated its hesitation to step into legislative territory regarding the creation of implied damages remedies. *See* 462 U.S. at 378–80, 388–90. It’s true that the Supreme Court has “adopted a far more cautious course before finding implied causes of action” compared to the Court in *Bivens*, *Davis*, and *Carlson*. *Abbasi*, 582 U.S. at 132. But that cautious approach was already in effect during the Court’s *Farmer* deliberations. Because *Bush* predates *Farmer* by eleven years, *Farmer* cannot simply be characterized as a product of the bygone era of *Bivens* expansion. Petitioner’s account of post-*Carlson* retrenchment fails to rebut the Court’s treatment of *Farmer* as a *Carlson*-type *Bivens* claim; *cf.* Pet’r’s Br. 19–24; U.S. Br. 23–28.

The modern “*Bivens* question . . . is ‘antecedent’ to the other questions presented,” *Hernández v. Mesa*, 582 U.S. 548, 553 (2017) (“*Hernández I*”)

(quoting *Wood v. Moss*, 572 U.S. 744, 757 (2014)), and therefore must be addressed before turning to the merits of the claim. The Court has framed that inquiry in two steps. At step one, a court determines whether the case presents a new *Bivens* context. *Abbasi*, 582 U.S. at 139. If the case is not meaningfully different from *Bivens*, *Davis*, or *Carlson*, it does not present a new context, and no extension of *Bivens* is required. If, however, the court determines that the case presents a new context, the court turns to step two. At step two, the court assesses whether any special factors counsel hesitation before finding that “the Judiciary is well suited, absent congressional action or instruction, to consider and weigh the costs and benefits of allowing a damages action to proceed.” *Id.* at 136.

In *Abbasi*, the Supreme Court provided a non-exhaustive “list of differences that are meaningful enough to make a given context a new one:”

the rank of the officers involved; the constitutional right at issue; the generality or specificity of the official action; the extent of judicial guidance as to how an officer should respond to the problem or emergency to be confronted; the statutory or other legal mandate under which the officer was operating; the risk of disruptive intrusion by the Judiciary into the functioning of other branches; or the presence of potential special factors that previous *Bivens* cases did not consider.

Id. at 139–40. The *Abbasi* Court also identified special factors relevant to the second step, including

separation-of-powers principles (whether the judiciary is well suited to weigh the costs to the government, whether Congress has already acted in that arena, etc.) and—of particular importance here—the availability of alternative remedial structures. *See id.* at 133–37. Petitioner and the United States argue that the Ninth Circuit erred by relegating alternative remedial structures to step two. *See* Pet’r’s Br. 35–37; U.S. Br. 11–12. But *Abbasi* principally addressed alternative remedial structures as part of the special-factors inquiry, and *Egbert* retained the two-step framework while recognizing that the two inquiries may overlap.

Egbert—the case that caused the Third Circuit to reconsider its precedent—did not abandon the *Abbasi* framework. Nor did it limit *Bivens*, *Davis*, and *Carlson* “to the precise circumstances that they involved.” *Malesko*, 534 U.S. at 75 (Scalia, J., concurring). Instead, *Egbert* emphasized the rigor of the *Bivens* inquiry. The *Egbert* Court emphasized the judicial “caution” before recognizing a *Bivens* action. 596 U.S. at 491 (quoting *Hernández II*, 589 U.S. at 101). This Court recited the “two steps” framed by precedent. *Id.* at 492. Then the Court stated: “While our cases describe two steps, those steps often resolve to a single question: whether there is any reason to think that Congress might be better equipped to create a damages remedy.” *Id.* The Court further identified alternative remedial structures as a special factor that can foreclose a *Bivens* remedy. *Id.* at 492–93.

Although the *Egbert* Court indicated that the two-step inquiry may “often resolve to a single question,” *id.* at 492–93, the Court applied the two discrete steps of the *Abbasi* framework, *see id.* at 494–501.

Petitioner relies on *Egbert* to argue that the framework has collapsed into a single inquiry. Pet’r’s Br. 22–24, 35–39. But as Respondent argues, *Egbert* did not abolish the threshold new-context inquiry, and Petitioner’s approach would “eliminate the first step entirely.” Resp’t’s Br. 31–32. The core separation-of-powers concern emphasized in *Egbert* has been part of the doctrine for decades. *See Bush*, 462 U.S. at 371–72, 381–90. For instance, *Egbert*’s inquiry into whether the Judiciary or Congress is “better equipped to create a damages remedy,” *Egbert*, 596 U.S. at 493, has been a central part of the doctrine from before *Carlson* was decided. *See Bush*, 462 U.S. at 380 (“The special factors counselling hesitation in the creation of a new remedy . . . related to the question of who should decide whether such a remedy should be provided.”); *see also* Abbasi, 582 U.S. at 135 (“When a party seeks to assert an implied cause of action under the Constitution itself, . . . separation-of-powers principles are or should be central to the analysis. The question is ‘who should decide’ whether to provide for a damages remedy, Congress or the courts?” (quoting *Bush*, 462 U.S. at 380)). This “single question” is useful for understanding the “principles” at play, *Egbert*, 596 U.S. at 493, but it has not replaced the well-worn two-step inquiry. Most importantly, the Supreme Court has declined to “dispense with *Bivens* altogether.” *Id.* at 491. The special-factors analysis in *Bivens* step two has always been to assess if there is “even a single ‘reason to pause before applying *Bivens* in a new context.’” *Id.* at 492 (quoting *Hernández II*, 589 U.S. at 102). The *Bivens* inquiry investigates whether any factors counsel courts to defer to Congress, not whether the factors weigh for or against finding an implied damages claim. *See Wilkie v. Robbins*, 551 U.S. 537, 562 (2007); *Bush*, 462 U.S. at 389–90.

Abbasi held that the “proper balance is one for the Congress, not the Judiciary, to undertake.” 582 U.S. at 146. Thus, *Egbert* did not diverge from *Abbasi* at all by holding that courts cannot “independently assess the costs and benefits of implying a cause of action.” See *Egbert*, 596 U.S. at 495 (reversing a decision that (1) weighed the costs of the new *Bivens* claim and the compelling interests and (2) determined a damages remedy was implied).

Egbert sent shock waves across the circuit courts. The Third, Fourth, Seventh, and Ninth Circuit courts of appeals have read *Egbert* as materially modifying the *Bivens* inquiry. See *Fisher*, 115 F.4th at 204 (“*Egbert* tightened the *Ziglar* test and, in doing so, made a strong statement that lower courts should not extend *Bivens* beyond the contexts recognized in *Bivens*, *Davis*, and *Carlson*.”); *Kalu*, 113 F.4th at 330 n.10 (“*Hernández [II]* and *Egbert* evince the Court’s new appreciation of ‘the tension between judicially created causes of action and the Constitution’s separation of legislative and judicial power.’” (quoting *Egbert*, 596 U.S. at 491) (internal quotation marks omitted)); *Bulger v. Hurwitz*, 62 F.4th 127, 139 (4th Cir. 2023) (“[T]he Third Circuit did not have the benefit of the Court’s more recent *Bivens* guidance, as *Bistrain* was decided before the Court’s decisions in *Hernández* and *Egbert*, both of which also list *Bivens*, *Carlson*, and *Davis* as the *only* three cases in which the Court has implied a *Bivens* action.”) (emphasis in original); *Sargeant*, 87 F.4th at 364 (calling *Egbert* “most significant to this appeal” and holding it “modified the *Abbasi* approach”); *Marquez v. Rodriguez*, 81 F.4th 1027, 1030 (9th Cir. 2023) (“In practice, the Supreme Court’s stringent test will foreclose relief in all but the most extraordinary cases.”). These courts read too

much into *Egbert*, which emphasized the restrictiveness of the *Bivens* inquiry but did not eliminate the two-step framework. 596 U.S. at 492. Any additional stringency is merely dicta. The two-step inquiry is still binding.

Nor did *Egbert* overrule *Farmer*, which remains good law. *Amici* contend that the Court’s adjudication of the *Bivens* claim in *Farmer* demonstrates that an Eighth Amendment failure-to-protect claim falls within, rather than extends, the *Carlson* context.

Petitioner argues that alternative remedies available in Respondent’s case were not considered in *Carlson*. Pet’r’s Br. 32–39. But administrative remedies for individuals in federal custody existed in the BOP’s rules and regulations well before the death at issue in *Carlson*. See, e.g., *Green v. United States*, 283 F.2d 687, 688–89 (3d Cir. 1960) (describing BOP regulations permitting plaintiffs to seek review of local prison officials’ actions directly from the Director of the BOP through the “Prisoner’s Mail Box”)); *Smoake v. Willingham*, 359 F.2d 386, 388 (10th Cir. 1966) (same); *Tarlton v. United States*, 429 F.2d 1297, 1298 (5th Cir. 1970) (remanding to determine whether petitioner exhausted administrative remedies by writing to the Surgeon General, the Attorney General, and the Director of the BOP regarding the denial of medical care). Moreover, as Respondent argues, *Carlson* considered the Federal Tort Claims Act (“FTCA”), 28 U.S.C. §§ 1346(B), 2671 *et seq.*, and held that it did not displace the constitutional damages remedy. 446 U.S. at 18–23; Resp’t’s Br. 6. The Administrative Remedy Program (“ARP”) does not itself provide damages; it merely channels tort claims into the FTCA’s procedures. See 28 C.F.R. § 542.10(c); Resp’t’s Br. 25–

26. Thus, the availability of administrative recourse for incarcerated plaintiffs is not a post-*Carlson* development, contrary to the United States’s argument here. *See* U.S. Br. 17–21.

When Congress enacted the Prison Litigation Reform Act (PLRA) in 1996, it did not abrogate *Bivens* claims. *See* 42 U.S.C. § 1997e(e) (permitting prisoners to bring civil actions for physical injury or the commission of a sexual act and resulting harms); *McCarthy v. Madigan*, 503 U.S. 140, 149–56 (1992) (holding that a federal prisoner pursuing a *Carlson* claim was not required to exhaust the BOP’s administrative grievance procedure before seeking monetary damages); *accord* Resp’t’s Br. 16. Rather, the PLRA creates procedural limitations such as the “exhaustion requirement”—the rule that incarcerated plaintiffs must utilize the full internal grievance procedure of their prison system, including appealing any denials in the first instance, before they can bring a lawsuit in federal court—to deter *frivolous* claims, including frivolous *Bivens* actions, not prevent those claims altogether. *See* 141 Cong. Rec. H14105 (daily ed. Dec. 6, 1995) (statement of Rep. LoBiondo) (discussing the continued validity of *Bivens* claims but advocating for an administrative exhaustion requirement in the PLRA to deter frivolous *Bivens* actions); 42 U.S.C. § 1997e(a) (PLRA’s exhaustion provision); *see also* *Porter v. Nussle*, 534 U.S. 516, 524–25 (2002) (holding the ARP is an exhaustion requirement for a *Bivens* claim rather than a substitute for one). This legislative history demonstrates that Congress specifically regulated the relationship between prison litigation and administrative remedies rather than replacing federal constitutional damages actions or statutory tort

actions with the administrative remedial program. *See* Resp’t’s Br. 16.

The Petitioner’s argument seems to simply apply the alternative remedies factor from the case law without taking the larger context or goals of the factors into consideration. *See Abbasi*, 582 U.S. at 148. But one of the key goals of the step two analysis is to ensure deference to congressional intent. *See id.* at 137; *see also Wilkie*, 551 U.S. at 550, 562. All evidence points to the conclusion that Congress did not close off *Bivens* claims in this context. *See* Federal Employees Liability Reform and Tort Compensation Act of 1988 (Westfall Act), Pub. L. No. 100-694, 102 Stat. 4563, 4564 (1988) (codified as amended at 28 U.S.C. § 2679(b)(2)(A)) (noting that while the FTCA would be the exclusive remedy for common-law tort claims against federal employees, those actions brought against a federal employee “for a violation of the Constitution of the United States” would not be barred); *Hernández II*, 589 U.S. at 111 n.9 (explaining the Westfall Act “left *Bivens* where it found it); *Hui v. Castaneda*, 559 U.S. 799, 807 (2010) (discussing “[t]he Westfall Act’s explicit exception for *Bivens* claims). Taken together, the PLRA and the Westfall Act provide substantial evidence that Congress did not intend for the BOP’s administrative grievance process to displace *Bivens* remedies in this context.

Further, Congress passed the PLRA less than two years after *Farmer* was decided, and thus it understood that federal prisoners might bring failure-to-protect *Bivens* claims. *See Lorillard v. Pons*, 434 U.S. 575, 580–81 (1978) (holding Congress is presumed to legislate with knowledge of Supreme Court decisions); *accord* Resp’t’s Br. 28 (noting that PREA cited *Farmer*

and stating that *Farmer* “is a *Carlson* case”). *Farmer*’s acceptance and use by Congress’s express invocation of *Farmer* in the Prison Rape Elimination Act (“PREA”) demonstrates Congress’s understanding that the Court had created constitutional damages remedies for incarcerated people, which the PLRA sought to structure procedurally, rather than limit substantially. Prison Rape Elimination Act of 2003 (“PREA”), Pub. L. No. 108-79, § 2(13), 117 Stat. 972, 973 (codified at 34 U.S.C. § 30301(13)); *accord* Resp. Br. 28 (noting that PREA cited *Farmer* and stating that *Farmer* “is a *Carlson* case”).

Petitioner’s argument, repeated by the United States, that the PLRA and other post-*Carlson* legislation are special factors is thus unfounded. *See* Pet’r’s Br. 33–35; U.S. Br. 15–17. *Carlson* remedies have existed for more than forty-five years and have been understood by Congress and the courts to be a necessary deterrent to harmful actions of individual federal officers. “[C]ongressional silence in the PLRA about the availability of *Bivens* remedies does not suggest that Congress intended to make such remedies unavailable.” *Bistrain*, 912 F.3d at 92–93. The *Bivens* landscape against which Congress enacted the PLRA in 1996 already included *Farmer*. If Congress’s legislation fixed the permissible scope of *Bivens* claims brought by people in federal custody, *amici* contend that those limits would still encompass failure-to-protect claims.

Similarly, when Congress amended the FTCA to cover law-enforcement torts in 1974, it rejected a proposal to eliminate *Bivens* actions in favor of suits against the federal government and expressly articulated that these causes of action should operate in

parallel. *See Carlson*, 446 U.S. at 19–20. Congress subsequently legislated against the backdrop of the *Bivens* framework, particularly in the prison context, preserving constitutional claims in the Westfall Act and imposing procedural limitations through the PLRA. *See* Resp’t’s Br. 16–17 (providing legislative history of the Westfall Act, the FTCA, and the PLRA). Congress later expressly cited *Farmer* in PREA when describing the Eighth Amendment protections available to incarcerated people. *See* Resp’t’s Br. 28; 34 U.S.C § 30301(13).

IV. THIS COURT’S CONTINUED RECOGNITION OF *CARLSON* CLAIMS PROTECTS PUBLIC INTERESTS.

On a structural level, it is “unthinkable” that the U.S. Constitution would hold states to a higher standard than the federal government. *Bolling v. Sharpe*, 347 U.S. 497, 500 (1954). But that is precisely what this Court’s recent precedent requires. *See Hernández II*, 589 U.S. at 102–05; *Malesko*, 534 U.S. at 68–74, *Egbert*, 596 U.S. 491–93; 498. Due to this Court’s *Bivens* doctrine, state officials can be held accountable for constitutional violations brought in actions under 42 U.S.C. § 1983 even if those very same violations would not give rise to an equivalent remedy against a federal official. *See Marquez*, 81 F.4th at 1035–36 (Fletcher, J., concurring). One judge has called this reality “a miscarriage of justice.” *Id.* at 1036. This Court does not need to do the “unthinkable.” *Bolling*, 347 U.S. at 500. For far too long, “the Bill of Rights [has] monitor[ed] more closely the conduct of state officials than it does that of federal officials.” *Butz v. Economou*, 438 U.S. 478, 504 (1978). To do so “is to stand the constitutional design on its

head.” *Id.* This Court need not perpetuate that remedial asymmetry here. Acknowledging *Farmer* and upholding *Carlson* is a much less drastic approach than overruling *Bivens*. *Cf.* Pet’r’s. Br. 40; Mittleman Br. 9–10. *Amici* and the Respondent ask only to continue to apply *Carlson* within the established *Bivens* context, not to extend *Bivens* to a new context. *See* Resp’t’s Br. 13–17, 33.

And on a personal level, the stakes for incarcerated transgender people have never been higher. According to a report from the Bureau of Justice Statistics that measured the prevalence of sexual victimization in prisons via surveys conducted in 2007, 2008–09, and 2011–12, more than 34% of transgender adults incarcerated in state and federal prison suffered sexual victimization, and 16.7% have been subject to staff sexual misconduct. Allen J. Beck, Bureau of Justice Statistics, U.S. Dep’t of Just., *Sexual Victimization in Prisons and Jails Reported by Inmates, 2011-12: Supplemental Tables: Prevalence of Sexual Victimization Among Transgender Adult Inmates 2*, tbls. 1– 2 (2014). In 2025, President Trump issued an Executive Order setting a federal government agenda to end any discussion of gender, gender identity, or sex that differed from the view that there are only two biologically determined sexes: male and female. *See* Exec. Order 14168, 90 Fed. Reg. 8615, 8615–17 (Jan. 30, 2025). The BOP complied with the order early on—before passing any regulations that would execute the Executive Order—by preventing transgender people from being housed according to their gender identity, requiring them instead to be housed according to their sex assigned at birth, and quickly ending access to gender-affirming care such as hormone therapy. Jaclyn Diaz, *Federal Prisons*

Prep to Move Trans Inmates as Early as This Week, NPR (Feb. 25, 2025), <https://www.npr.org/2025/02/21/nx-s1-5305282/trans-inmates-federal-prison-policy-transfers> [<https://perma.cc/6CXF-UEDES>]. Litigators challenged these early administrative actions as unconstitutional violations of the Eighth Amendment, *see Doe v. McHenry*, 763 F. Supp. 3d 81, 87–89 (D.D.C. 2025), and as violations of the Administrative Procedure Act, *see Kingdom v. Trump*, No. 25-cv-691, 2025 WL 1568238, at *8–11 (D.D.C. June 3, 2025).

While injunctions against BOP’s earlier implementation measures remained in place, BOP issued a new policy in February 2026 that substantially preserved the same near total ban of gender-affirming care and effectively eliminated safe placement accommodations or transgender people in federal custody. U.S. Dep’t of Just., Fed. Bureau of Prisons, *Program Statement: 5260.01, Management of Inmates with Gender Dysphoria* 7–8 (Feb. 19, 2026). A district court subsequently enjoined enforcement of this policy and stayed its implementation under 5 U.S.C. § 705. *See Kingdom v. Trump*, No. 25-cv-691, 2026 WL 1746251, at *13–14 (June 17, 2026). The injunctive relief granted by the district courts in this ongoing litigation may prevent future harm, but it cannot compensate for constitutional injuries that we have already suffered from. For those incarcerated transgender people who have already suffered harm—akin to the harms Ms. Farmer suffered—damages may be the only remedy capable of redressing the completed injuries. Damages are a significant tool for ensuring federal officers meet the constitutional minimum requirements for safety and health. Indeed, for some transgender people subjected to completed constitutional

violations, “it is damages or nothing.” *Bivens*, 403 U.S. at 410 (Harlan, J., concurring).

CONCLUSION

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

Respectfully submitted,

D Dangaran
2515 Dole Street
Honolulu, HI 96822

Mary Kelly Persyn
Counsel of Record
PERSYN LAW & POLICY
912 Cole Street #124
San Francisco, CA 94117
(628) 400-1254
marykelly@persynlaw.com

Rafael M. Langer-Osuna
The Law Offices of
Rafael M. Langer-Osuna
524 Montclair Ave.
Oakland, CA 94606

Kristen Prata Browde
Browde Law, P.C.
63 Ridgewood Terrace
Chappaqua, NY 10514

September 30, 2026