

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**

REPLY BRIEF FOR PETITIONER

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Watanabe fails to show that this case—or any case—justifies the “disfavored judicial activity” of “recognizing a cause of action under *Bivens*.” *Egbert v. Boule*, 596 U.S. 482, 491 (2022). Conceding that *Bivens*, *Davis*, and *Carlson* cannot be extended to any new context, Watanabe admits he must lose if this context is new—if there is any meaningful difference between this case and *Carlson*. Resp.Br.1. Such differences abound. In *Carlson*, the inmate died and there was no opportunity to pursue administrative or injunctive relief, making it “damages or nothing.” Here, Watanabe alleges a non-life-threatening injury. He could *and did* pursue non-damages relief. And *Carlson* did not consider a host of special factors—including

ing the Administrative Remedy Program, Prison Litigation Reform Act, PATRIOT Act, and Federal Prison Oversight Act—that militate against a judicially created damages remedy. Because Congress could think those differences are meaningful when weighing the costs and benefits of a damages remedy, only Congress can decide whether to provide that remedy; courts may not.

Watanabe’s insistence that this case reflects “precisely” the same context as *Carlson*, Resp.Br.2, is thus untenable. He theorizes that Congress endorsed claims like his in the PLRA or Westfall Act. This Court has held the opposite: The PLRA indicates “Congress does not want a damages remedy,” while the Westfall Act “simply left *Bivens* where it found it”—in the courts’ hands. *Ziglar v. Abbasi*, 582 U.S. 120, 148 (2017); *Hernández v. Mesa*, 589 U.S. 93, 111 n.9 (2020). Neither counsels *Bivens*’s retention, much less its extension here.

Ultimately, Watanabe’s brief confirms that *Bivens* has earned its retirement. Watanabe admits that separation of powers forecloses extending *Bivens*, *Davis*, and *Carlson*. Resp.Br.4. Yet he tries to lock in their encroachments on legislative power, asking the Court to declare, “This far and no further.” Resp.Br.1. That declaration would doom this case, which seeks to push *Carlson* “further.” But it elides a deeper problem: Lower courts cannot agree on where “this far” ends and “further” begins, as rampant conflicts in the circuits and 13 prior cases in this Court make clear. This Court could continue trying to demarcate a “this-far-but-no-further” boundary, as it has for the past 45 years. Or it could lay *Bivens* and its progeny to rest, stop offering plaintiffs false hope, and return responsibility for legislating causes of action to Congress where it belongs. Either way, reversal is warranted.

I. THE NINTH CIRCUIT IMPROPERLY EXTENDED *BIVENS* TO A NEW CONTEXT

Watanabe concedes *Bivens* and *Carlson* cannot be extended to “any new context.” Resp.Br.1. But his contention that this case presents “precisely” the same context as *Carlson*, Resp.Br.2, overlooks basic principles. This Court’s “understanding of a ‘new context’ is broad.” *Hernández*, 589 U.S. at 102. Even “small” differences can be “meaningful” and thus present “a new *Bivens* context.” *Ziglar*, 582 U.S. at 149. The “new-context inquiry” is “easily satisfied.” *Ibid.* Watanabe mentions none of that.

More fundamentally, Watanabe fails to appreciate that the new-context inquiry requires a *legislative* perspective. Pet.Br.22-24. He urges it “is not a legislative task to determine whether a case presents a ‘meaningful’ difference from a prior one.” Resp.Br.46. But recognizing a *Bivens* remedy is a quintessentially “*legislative endeavor*.” *Egbert*, 596 U.S. at 491 (emphasis added). Courts weighing *Bivens* remedies must consider the full “‘range of policy considerations * * * a legislature would consider.’” *Ibid.* They must be mindful that “Congress is ‘far more competent than the Judiciary’ to weigh such policy considerations”; that “the Judiciary’s authority to do so at all is, at best, uncertain”; and that, ultimately, the “only” question is “whether there is *any* rational reason (even one) to think that *Congress* is better suited to ‘weigh the costs and benefits of allowing a damages action.’” *Id.* at 491, 496.

Consequently, a new *Bivens* context arises whenever a case presents any difference from *Bivens*, *Davis*, and *Carlson* that *Congress* could think meaningful as a matter of *legislative policy*. If a difference *could* affect Congress’s view of a damages remedy’s costs and benefits, Congress must make the choice—and courts must refrain from recognizing such a remedy themselves. Treating the

inquiry like an “ordinary judicial exercise,” Resp.Br.46, fails to afford “utmost deference to Congress’ preeminent authority in this area,” *Egbert*, 596 U.S. at 492.

This case differs profoundly from *Carlson* in immediacy and severity; risk of disruption to prison administration; and alternative remedial structures neither considered nor available in *Carlson*. Congress could find each of those differences meaningful.

A. Differences in Nature, Severity, and Immediacy Make This a New Context from *Carlson*

1. Watanabe nowhere denies that in *Carlson*—as in *Bivens* and *Davis*—it was “damages or nothing.” Pet.Br.25. The rapidly unfolding emergency, and the inmate’s resulting death, left no opportunity to seek administrative or injunctive relief. Not so here: Watanabe concedes he could *and did* pursue administrative and injunctive relief for the treatment he seeks. Resp.Br.23. That makes this a new context. “Damages or nothing” is foundational to *Bivens*. Pet.Br.25-27. Congress could readily find cases that are *not* “damages or nothing” meaningfully different.

Watanabe insists “damages or nothing” should be irrelevant to *Carlson* claims. Resp.Br.21. Congress could think otherwise. This Court has held otherwise: *Ziglar* (cited Resp.Br.21-22) held the plaintiffs sought “to extend *Carlson* to a new context” *because* “an injunction” or other non-damages relief might be available. 582 U.S. at 147-148.

Watanabe’s contention that the PLRA “endorsed” *Bivens* damages where other relief is available, Resp.Br.22, lacks merit. The PLRA’s failure to provide a “standalone damages remedy against federal jailers” indicates “Congress *does not want* a damages remedy.” *Ziglar*, 582 U.S. at 148-149 (emphasis added); see pp. 10-11, 21-22, *infra*. It certainly does not support creating *Bivens* remedies where

Bivens’s own logic doesn’t. Nor does the principle that injunctions are “available only where there is no adequate remedy at law,” Resp.Br.22, license courts to *invent* damages remedies where “traditional equitable powers suffice,” *Ziglar*, 582 U.S. at 133.

Watanabe’s case is not “‘damages or nothing.’” Resp.Br.21, 23-24. Watanabe admits he could—and did—seek prospective relief through the ARP and in court. Resp.Br.23. Even if prospective relief would not remedy *past* harm, Resp.Br.21, it does not “matter that ‘existing remedies do not provide complete relief,’” *Egbert*, 596 U.S. at 493. *Ziglar* held the possibility of “an injunction” presented “a new context” from *Carlson* even though the plaintiffs also alleged past pain and suffering. 582 U.S. at 128, 147-148.

Watanabe’s release from prison, Resp.Br.23, does not alter the result. Even if prospective relief (*e.g.*, ordering the government to provide unconstitutionally denied treatment) were no longer possible—a proposition Watanabe does not try to prove—Watanabe still had years to pursue non-monetary relief. The inmate in *Carlson* had no such opportunity. Congress could easily think that difference meaningful.

2. Congress could also find that, even if personal damages liability were appropriate in extreme cases like *Carlson* where death results, cases involving less severe injuries present a different policy balance. Pet.Br.27-31.

Watanabe does not deny that Congress regularly draws such lines, singling out conduct resulting in death. Pet.Br.27-28 & n.10. He objects that “most of those statutes only *enhance* the remedy available if death ensues.” Resp.Br.20. But Watanabe admits Congress has created a “[c]ause of action” available *only* in cases of “death.”

46 U.S.C. § 30302 (cited Resp.Br.20). And he misses the point. *Bivens* is “solely” about imposing enhanced “deter[r[ence]]” beyond other deterrents like agency discipline. *Egbert*, 596 U.S. at 498. The cited statutes show Congress regularly finds differences in severity, including death and life-threatening injury, meaningful when setting appropriate deterrence. Here, too, Congress could conclude that enhanced deterrence should be reserved for cases involving death. Whatever line Congress might draw, “calibrat[ing]” “deterrence” is a “legislative determination that must be left to Congress, not the federal courts.” *Ibid.*

Congress could draw from this Court’s repeated observation that “death is different” because of its “severity.” *Gregg v. Georgia*, 428 U.S. 153, 187-188 (1976) (plurality opinion). While death does not *per se* violate the Eighth Amendment, Resp.Br.20-21, there is a long history of imposing protections unique to cases involving death—and, more importantly, *Congress* could do so as a matter of *policy*. Pet.Br.27-28. Despite Watanabe’s protestation, Resp.Br.21, that is so even if the death involves a “sudden killing” rather than “prolonged physical and mental suffering,” *Kennedy v. Louisiana*, 554 U.S. 407, 435 (2008). The “qualitative difference between death and all other” consequences, *Harmelin v. Michigan*, 501 U.S. 957, 995 (1991), makes this context new.

So does the “risk of disruptive intrusion by the Judiciary into the functioning of other branches.” *Ziglar*, 582 U.S. at 140; Pet.Br.28-29. Watanabe asserts that cases like his involve “the same (or less) risk of disruptive intrusion” as *Carlson*. Resp.Br.15. But Congress could find any disruption risk tolerable only in extreme cases like *Carlson*. And Watanabe has no answer to the heightened disruptions Nielsen identified. Pet.Br.29. Suits based on less severe incidents are far more likely to be used to

harass prison staff than suits based on inmate deaths. They are vastly more common, threatening more disruption and financial impact. And fear of liability can spur costly defensive medicine—such as acquiescing to demands for hospital transfers regardless of medical necessity. Each of those “negative systemic consequences” could affect Congress’s view of the relative costs and benefits of a *Bivens* remedy. *Goldey v. Fields*, 606 U.S. 942, 944 (2025) (*per curiam*). Watanabe addresses none of them.

This case illustrates those stakes. Watanabe complains he was not sent to a hospital or specialist for months despite multiple requests to prison administrators. Resp.Br.10. But he alleges only a single encounter with Nielsen, a line-level paramedic who (in consultation with an on-call physician) provided medication and advised follow-up treatment shortly after Watanabe was injured, while declining to send him to the hospital. Pet.Br.12-13 & n.8. For that one event, Watanabe seeks to hold Nielsen personally liable for \$3 million. As Watanabe’s own amici recognize, delays in specialized treatment often result from “institutional,” “system-wide constraints,” including staffing shortages and challenges with secure transportation. Med.Justice.Br.4, 9-13. Congress could conclude that allowing *Bivens* suits in such cases unacceptably exposes prison staff to individual liability for—and may interfere with—fundamentally *institutional* decisions. Congress could readily distinguish such cases from *Carlson*, where an emergency presented prison staff with a straightforward duty to try to save the inmate’s life.

Nor does *Carlson* itself foreclose distinguishing between life and death. Resp.Br.18-19. *Carlson*’s first sentence describes the case as involving “personal injuries *from which [the inmate] died*,” and its “survivorship” holding simply states that death will not bar a “*Bivens*-type action

brought against defendants whose *conduct results in death.*” *Carlson v. Green*, 446 U.S. 14, 16, 23-24 (1980) (emphasis added). Watanabe invokes a supposed “first holding that the decedent had a cause of action before his death.” Resp.Br.18. There is no such holding. The first question presented was whether the FTCA barred a *Bivens* remedy. 446 U.S. at 16-17. And the Court *declined to decide* whether the complaint asserted only “the decedent’s own claim” (Resp.Br.18) or also his mother’s “wrongful-death” claim. 446 U.S. at 17-18 n.4. “Resolution” of that question was “irrelevant” given the Court’s view that *Bivens*’s “deterrence goals” favored a damages remedy where “‘conduct results in death.’” *Id.* at 18 n.4, 24-25. *Carlson* may have assumed the inmate would have had a claim had he lived. But assumptions are not holdings. They certainly do not foreclose Congress’s recognizing a meaningful difference between life and death.

B. Special Factors Not Considered in *Carlson* Make the Context New

This case also implicates “special factors that previous *Bivens* cases did not consider”—including “alternative remedial structure[s]” and post-*Carlson* “legislative action.” *Ziglar*, 582 U.S. at 137, 139-140, 148-149. That, too, renders this *Bivens* context “new.” Pet.Br.32-39.

1. Watanabe cannot deny that this Court has identified the ARP’s “‘alternative remedial structure’” as a “‘special facto[r].’” *Goldey*, 606 U.S. at 944. Nor does he deny the ARP was “not considered” in *Carlson*. *Ziglar*, 582 U.S. at 148. That makes the context “new.” *Ibid.*

Invoking *Carlson*’s conclusion that the Federal Tort Claims Act was an inadequate remedy, Watanabe urges the Court to apply the “same analysis” to the ARP. Resp.Br.25; see Pet.Br.38-39. But *Bivens* plaintiffs must satisfy the *current* “prevailing framework,” including its

treatment of “‘remedial mechanisms’” and “‘special factors.’” *Egbert*, 596 U.S. at 501. Under that framework, it is irrelevant whether alternative remedies are “‘equally effective,’” *ibid.* (quoting *Carlson*, 446 U.S. at 19)—as Watanabe elsewhere concedes, Resp.Br.25. Nor did *Carlson*’s FTCA analysis “necessarily subsum[e] the lesser remedy of the ARP.” Resp.Br.26. The ARP is not a “lesser” remedy—it is a *different* remedy. The FTCA allows only damages, while the ARP offers specific relief, such as medical care. *Carlson* said nothing about the latter remedy, which may offer “a faster and more direct route to relief than a suit for money damages.” *Ziglar*, 582 U.S. at 145. Under the prevailing *Bivens* framework, the ARP makes the context new.

That the ARP “existed” at the time of *Carlson*, Resp.Br.24-25, is irrelevant. Pet.Br.37-38. What matters is that it was “not *considered*.” *Ziglar*, 582 U.S. at 148 (emphasis added). Watanabe does not dispute, moreover, that neither the inmate nor the plaintiff in *Carlson* could have used the ARP. Pet.Br.38; Pet.App.98a. Watanabe says only the remedy’s “*existence*” matters, not its “effectiveness or availability to any particular plaintiff.” Resp.Br.25. That’s true enough *when a remedy is considered*. But it does not defeat finding a *new context* based on a remedy that was neither available nor considered in prior cases. *Ziglar*, for example, found the context “new” based on the possibility of injunctive relief. 582 U.S. at 148. Injunctions existed at the time of *Carlson*. *Ziglar* found they created a “new context” anyway, because they were “not considered” or “available” in *Carlson*. *Ibid.* Same with the ARP (and injunctive relief) here. Pet.Br.38. Watanabe has no response.¹

¹ Watanabe gets nowhere by invoking an uncodified ARP precursor that “existed” when the inmate in *Carlson* died. Resp.Br.24-25. That precursor also was not available, and certainly “not considered,” in

2. Post-*Carlson* legislation—the PLRA, PATRIOT Act, and Federal Prison Oversight Act—also renders the context new. Pet.Br.33-35, 38. Each statute addresses prisoner complaints, yet none provides a damages remedy. They are “legislative action suggesting that Congress does not want a damages remedy”—“a factor counseling hesitation” that both presents a new context and forecloses *Bivens*’s extension. *Ziglar*, 582 U.S. at 148-149; see *Goldey*, 606 U.S. at 944.

Watanabe says the PLRA supports him because it does not expressly “eliminate *Carlson* claims.” Resp.Br.27. But this Court has already held that, as post-*Carlson* legislation addressing prisoner suits, the PLRA renders the context “new.” *Ziglar*, 582 U.S. at 148. Watanabe’s argument isn’t really that the PLRA doesn’t make the context new; it is, at most, an argument that the difference in context does not counsel against extending *Carlson* to this new context at *Bivens* step two. But Watanabe has conceded his claim cannot survive at step two. Pet.Br.39. And this Court has held that the PLRA forecloses *Bivens*’s extension at step two. *Goldey*, 606 U.S. at 944.

Watanabe overreads the PLRA regardless. Despite Watanabe’s effort to portray it as *Carlson*-specific legislation, Resp.Br.27, the PLRA applies to *all* prisoner suits, including suits authorized by statute (*e.g.*, 42 U.S.C. § 1983 or the Religious Freedom Restoration Act, § 2000bb-1(c)) or seeking injunctive relief. § 1997e(a). Requiring that all prisoners exhaust administrative remedies does not suggest Congress endorsed a judicially created damages claim—especially where the existence of “alternative

Carlson. It is also waived: Watanabe’s brief in opposition conceded “the ARP was not in place when the inmate in *Carlson* died.” Br.in.Opp.15; see this Court’s Rule 15.2.

remedial structures” itself “foreclose[s]” a claim. *Egbert*, 596 U.S. at 493, 497; see *Ziglar*, 582 U.S. at 148-149 (discussing PLRA). Nor does the PLRA’s blanket bar on emotional and mental damages absent physical injury, §1997e(e); Resp.Br.20, suggest a damages remedy is available whenever physical injury occurs, see *Goldey*, 606 U.S. at 943-944.

Watanabe invokes *McCarthy v. Madigan*, 503 U.S. 140 (1992), Resp.Br.16, 22-23, 26-27, but does not argue it requires recognizing a *Bivens* remedy despite the ARP. *McCarthy* concerned exhaustion, not the propriety of a *Bivens* remedy. Cf. *Egbert*, 596 U.S. at 498 (explaining that articulation of requirements for First Amendment *Bivens* claim in *Hartman v. Moore*, 547 U.S. 250 (2006), was not a holding that *Bivens* allows First Amendment claims). In holding that *Bivens* plaintiffs need not pursue ARP remedies, moreover, *McCarthy* emphasized that doing so was not “mandated by Congress.” 503 U.S. at 149. After the PLRA, it is.

Nor was *McCarthy* (or Congress’s response) peculiar to *Bivens* claims. *McCarthy* reasoned by analogy to then-current §1997e(a), which applied only to state prisoners and was largely discretionary. *Booth v. Churner*, 532 U.S. 731, 739-740 (2001) (discussing *McCarthy*). In the PLRA, “Congress replaced the text of the statute as construed in *McCarthy*” to mandate exhaustion for both state and federal prisoners, regardless of relief sought. *Id.* at 740. Thus, while the PLRA’s exhaustion requirement would reach *Bivens* claims (as this Court has observed “in dicta,” *Ziglar*, 582 U.S. at 149), it is a global requirement that applies equally to prisoners suing under §1983 or RFRA. And, as discussed, the PLRA nowhere purports to authorize *Bivens* claims at all, much less ones foreclosed by this Court’s current *Bivens* doctrine.

3. Watanabe barely addresses PATRIOT Act § 1001 and the Federal Prison Oversight Act. He nowhere denies their “investigation” and “grievance process[es]” closely resemble those that foreclosed a *Bivens* remedy in *Egbert*, 596 U.S. at 497-498; see Pet.Br.34-35. His assertion that PATRIOT Act § 1001 does not “concer[n] prisoner claims for deliberate indifference to a serious medical condition,” Resp.Br.28, is incorrect. It broadly covers alleged “abuses of civil rights” by Justice Department employees, including Bureau of Prisons staff. 115 Stat. 391, § 1001(1).

Regardless, the Oversight Act expressly addresses prisoner medical complaints. Pet.Br.34-35. That it “was not in place when [Watanabe was injured] is immaterial” by Watanabe’s own admission: “The *Bivens* inquiry does not turn on whether an alternative remedy was available or adequate as to a particular plaintiff, but on whether ‘Congress or the Executive has created a remedial process that it finds sufficient to secure an adequate level of deterrence,’ as a *prospective* matter.” Br.in.Opp.16 (quoting *Egbert*, 596 U.S. at 498) (emphasis altered). The Oversight Act’s dependence on appropriations reinforces Congress’s cautious, resource-conscious approach in this area. Pet.Br.35 n.13. That Congress provided “no damages remedies,” Resp.Br.28, is precisely the point: It indicates “Congress does not want a damages remedy,” and that courts should not “superimpos[e]” one themselves. *Ziglar*, 582 U.S. at 148-149; *Egbert*, 596 U.S. at 498.

4. Finding this context “new” does not “effectively overrule *Carlson*.” Resp.Br.29-32. It respects the limits of *Carlson*’s context under existing precedent. For example, recognizing a new context based on differences in immediacy or severity would not foreclose applying *Carlson* in cases that are damages or nothing, or where death results.

It may be that “the ARP and the PLRA” (and PATRIOT and Oversight Acts) are now “implicated in every possible claim that could arise under *Carlson*,” rendering *Carlson* “moribund.” Resp.Br.31; Gov’t.Br.23-25. Acknowledging that reality does not mean *Carlson* doesn’t apply “even on its own facts.” Resp.Br.32. It means *Carlson*’s “own facts” no longer arise because of developments *Carlson* did not (and largely could not) consider. That is the natural consequence of the principle that “special factors that were not considered in previous *Bivens* cases”—including “alternative remedies” and “legislative action”—render succeeding contexts “new.” *Ziglar*, 582 U.S. at 148. Recognizing that has happened here is an application of precedent, not its overruling.

There are ample reasons to overrule *Bivens* and *Carlson*. Pet.Br.40-48; pp. 16-23, *infra*. But precedent dooms Watanabe’s claim regardless.

C. Watanabe’s Invocation of the Westfall Act Is Misplaced

Watanabe’s theory that the Westfall Act’s passage “in 1988” compels an expansive view of *Carlson*’s “context,” Resp.Br.17, is unfounded. As discussed below, pp. 19-21, *infra*, the Westfall Act was not a “response to *Carlson*” or *Bivens*, Resp.Br.16. It responded to “*Westfall v. Erwin*,” 484 U.S. 292 (1988), which Congress characterized as “seriously erod[ing] the *common law tort* immunity previously available to Federal employees.” Pub. L. No. 100-694, 102 Stat. 4563, §2(a)(3)-(5), (b) (1988) (emphasis added). The Westfall Act sought to restore the FTCA “as the sole means for compensating persons injured by” federal employees’ “common law torts.” *Ibid*. Congress deliberately *avoided* addressing *Bivens* claims, to which the Act “‘does not extend or apply.’” §5 (codified at 28 U.S.C. §2679(b)(2)(A)).

Accordingly, this Court has held that the Westfall Act “certainly does not suggest” that “Congress ‘intended for a robust enforcement of *Bivens* remedies.’” *Hernández*, 589 U.S. at 111 n.9. It is “not a license to create a new *Bivens* remedy in a [new] context,” or grounds for taking a capacious view of prior *Bivens* contexts. *Ibid.* The Act “simply left *Bivens* where it found it,” *ibid.*—in the hands of this Court.

Watanabe’s theory thus fails on its own terms. *Carlson*’s context was the same in 1988 as it is today: A case where an inmate had died in emergent circumstances; it was “damages or nothing”; and the Court did not consider the ARP or succeeding legislation. By 1988, moreover, this Court had adopted its “cautiou[s]” approach “to suggestions that *Bivens* remedies be extended into new contexts.” *Schweiker v. Chilicky*, 487 U.S. 412, 421 (1988). It had recognized the significance of “congressional unwillingness to provide * * * damages for unconstitutional deprivations.” *Id.* at 426. It had emphasized the risk of “disruption” from judicial “intrusion” into other branches’ operations. *United States v. Stanley*, 483 U.S. 669, 682–683 (1987). And it had made clear that alternative remedial structures can bar a *Bivens* remedy even if they “do not provide complete relief” or are “‘not as effective as an individual damages remedy.’” *Egbert*, 596 U.S. at 493, 498 (quoting *Bush v. Lucas*, 462 U.S. 367, 372, 388 (1983); citing *Schweiker*, 487 U.S. at 425–426). The Westfall Act did not disturb those principles, which make this context new.

Watanabe cites pre-Westfall Act dicta describing *Carlson* as involving a claim “‘under the Eighth Amendment’s proscription against cruel and unusual punishment.’” Resp.Br.17 (quoting *Stanley*, 483 U.S. at 678; citing *Schweiker*, 487 U.S. at 421). He overlooks that *Carlson* itself specified that the inmate “died” within “hours.” 446

U.S. at 16 & n.1. And his theory proves too much. If *Carlson*’s “context” were simply “‘cruel and unusual punishment’” claims, Resp.Br.17, then *Malesko*, *Minneci*, and *Goldery* would be wrongly decided. Under Watanabe’s logic, *Bivens*’s context would encompass any “Fourth Amendment violation by federal officers,” *Schweiker*, 487 U.S. at 421—contrary to *Ziglar*, *Hernández*, and *Egbert*. This Court rejects framing the new-context inquiry at such a high level of abstraction. A “new *Bivens* context” can arise even if the “right” and “mechanism of injury” are “the same” as in prior cases. *Ziglar*, 582 U.S. at 139; Pet.Br.30. So, too, here.

D. Watanabe’s *Bivens* Claim Cannot Proceed

Watanabe concedes that, if his case presents a new context at *Bivens* step one, special factors foreclose his claim at step two. Pet.Br.39-40; see Resp.Br.33 (agreeing “*Carlson* * * * should not be extended”). That concession also cements that this case *does* present a new context. The two 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.” *Egbert*, 596 U.S. at 492. If special factors suffice to foreclose a *Bivens* claim at step two, and were not considered in prior *Bivens* cases, they necessarily are meaningful enough to present a new context at step one.

That analysis does not “eliminate the first step entirely,” Resp.Br.31; it honors the integral connection between the two steps. It is Watanabe’s (and the Ninth Circuit’s) blinkered approach to step one that does violence to the established *Bivens* framework: It would allow *Bivens* claims to proceed despite powerful reasons—never considered by this Court—indicating Congress is better suited to make the call.

II. *BIVENS* SHOULD BE OVERRULED

Since *Bivens*, the Judiciary has relinquished much of its incursion into Congress’s power to create damages remedies. But *Bivens*, *Davis*, and *Carlson* remain conspicuous outposts on that terrain. So long as they stand, they strain the separation of powers and deter Congress from reclaiming and reforming the zone itself. Rather than perpetuate the empty—yet costly—false hope of *Bivens* and its progeny, this Court should return the issue to the legislative branch once and for all. Forty-five years spent reining in *Bivens*’s mischief is more than enough.

Watanabe cannot defend *Bivens* and *Carlson* on the merits, and his contention that the Westfall Act or PLRA “ratified” them defies statutory text, history, and precedent. So Watanabe offers a *Bivens* compromise: “This far and no further.” Resp.Br.1, 33-34, 47. But that cannot salvage Watanabe’s claim, which would take *Carlson* “further.” See pp. 3-15, *supra*. And it does not resolve the fundamental conflict dividing lower courts: What is “this far” or “further”? Despite the Court’s repeated efforts to explain how “easily satisfied” the “new-context inquiry” is, *Ziglar*, 582 U.S. at 149; see *Hernández*, 589 U.S. at 102; *Egbert*, 596 U.S. at 491-492, that issue continues to generate “multiple deep circuit splits,” Pet.Br.44-45. Another decision trying to confine *Bivens*, *Davis*, and *Carlson* to their “own context[s],” Resp.Br.33, is unlikely to foreclose dispute over *what those contexts are*. Nor does it cure the basic separation-of-powers problem: Whatever contexts those cases occupy, that territory—creating damages remedies—properly belongs to Congress.

A. The Court Has Repudiated *Bivens* and Its Progeny

This Court has repeatedly rejected *Bivens*’s premises as inconsistent with the separation of powers. Because creating damages remedies is a quintessentially legisla-

tive endeavor, this Court has sworn off creating damages remedies itself. And it has rejected the notion that a bare grant of jurisdiction authorizes federal courts to create causes of action that Congress has not. Pet.Br.40-44. Watanabe denies none of that.

Watanabe protests that “this case is about *Carlson*, not *Bivens*.” Resp.Br.33. But *Carlson* bears *Bivens*’s defects, and then some. The only authority *Carlson* cited for creating a damages remedy was *Bivens*. 446 U.S. at 18. *Carlson*, moreover, justified a “*Bivens* remedy” based on Congress’s failure to explicitly prohibit it and the perceived inadequacy of a remedy Congress did create, 446 U.S. at 19-23—rationales this Court has since rejected, Pet.Br.43-44. *Carlson* even announced *ipse dixit* that *Bivens* allows “punitive damages” because the Court thought that would provide a better “deterrent.” 446 U.S. at 21-22. But this Court has rejected that, too, holding that “calibration” of “deterrence” “must be left to Congress, not the federal courts.” *Egbert*, 596 U.S. at 498. Nothing remains of *Carlson*’s (or *Bivens*’s, or *Davis*’s) foundation. That this Court had already “repudiated” inferring damages remedies under *statutes* when *Carlson* was decided, Resp.Br.43 n.3, shows that *Carlson* was out of step with precedent from the outset.

Watanabe’s effort to analogize *Carlson* to common-law actions against jailers and other officials, Resp.Br.40-42, fails. *Carlson* invoked no such history. There is “no basis for the Court to give precedential sway to reasoning that it has never accepted” to salvage “a conclusion reached on different grounds that have since been abandoned or discredited.” *Citizens United v. FEC*, 558 U.S. 310, 384 (2010) (Roberts, C.J., concurring). And this Court has already rejected “[a]nalogizing *Bivens* to the work of a common-law court.” *Hernández*, 589 U.S. at 100. “With

the demise of federal general common law, a federal court's authority to recognize a damages remedy must rest at bottom on a statute enacted by Congress." *Id.* at 101.

The "tradition" Watanabe invokes, Resp.Br.40, involved *state common-law* claims against federal officials, where the alleged unconstitutionality of their actions served to defeat a defense of federal authorization. *Hernández*, 589 U.S. at 110-111; Pet.Br.4-5, 44. (Such suits are now channeled through the FTCA.) *Bivens* and *Carlson* spurned reliance on state-law damages claims in favor of a new federal damages claim of the Court's own making. *Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 388, 394-395 (1971); *Carlson*, 446 U.S. at 23-25; cf. Resp.Br.21 (*Carlson* contravened "traditional" common-law rule that "no civil action lies for an injury which results in death"). Just 8 years before *Bivens*, this Court had refused to create such a remedy. *Wheeldin v. Wheeler*, 373 U.S. 647, 652 (1963); Pet.Br.44. By inventing a federal damages remedy for alleged constitutional violations, *Bivens* and *Carlson* did not follow tradition—they "broke" it. *Hernández*, 589 U.S. at 99.

Watanabe urges that "uniquely federal interests" justify federal common-lawmaking in the "enclave" of "civil liability of federal officials for actions taken in the course of their duty.'" Resp.Br.39 (quoting *Boyle v. United Technologies Corp.*, 487 U.S. 500, 505 (1988)). But federal common law applies where "displacement of state law" is "necessary" to protect federal interests—such as by *limiting* officials' liability under state law. *Boyle*, 487 U.S. at 504-505. Watanabe cites no instance where the Court invoked federal common law to create a damages remedy *against* federal officials. Doing so is especially inappropriate in the "federal enclave" of running a "prison," Resp.Br.39, a matter "peculiarly within the province of the

legislative and executive branches,” *Turner v. Safley*, 482 U.S. 78, 84-85 (1987).

B. Nothing Justifies Retaining *Bivens*

Bivens, *Davis*, and *Carlson* lost their analytical foundation long ago. Any practical justification for their retention has evaporated, too. They offer plaintiffs only “false hope,” yet inflict a heavy toll on targeted federal employees. Pet.Br.47-48. They have also proved unworkable, creating conflict after conflict. Pet.Br.44-45. While Watanabe insists *this* case will make applying *Bivens* “straightforward,” Resp.Br.46, the Court presumably had the same aspiration in *Ziglar*, *Hernández*, *Egbert*, and *Goldey*. But lower-court confusion continues to require this Court’s intervention. *Bivens* will be straightforward only when it is gone.

1. Reliance interests cannot save *Bivens*. Pet.Br.45-47. Watanabe does not assert reliance by “future plaintiffs.” *Cisco Systems, Inc. v. Doe*, 609 U.S. 141, 154 (2026). And his protest that overruling *Carlson* would leave federal prisoners “with no remedy at all,” Resp.Br.45, is incorrect. *Carlson*-like injuries can be asserted as medical negligence claims under the FTCA. Pet.Br.46. Likewise with *Bivens*-like torts by law-enforcement agents. *Ibid.* Watanabe’s real complaint is that damages would run against the deep-pocketed United States, not “against the responsible officer.” Resp.Br.45. But individual liability is already unavailable for countless constitutional violations—including cruel-and-unusual “excessive force” by “federal prison officials.” *Goldey*, 606 U.S. at 943-944. Non-damages remedies remain. See pp. 8-12, *supra*. And Congress can create any other remedies it deems desirable.

2. Watanabe’s contention that Congress “relied on” and “ratified” *Carlson* through the Westfall Act, Resp.Br.34, 37, 43-44, is fiction. In Watanabe’s telling, the Westfall Act

“extinguished the traditional remedy of using state common law to hold individual federal officers liable in damages” “only on the understanding that the constitutional claims recognized in *Bivens* and *Carlson* would remain available.” Resp.Br.34. The Act’s text refutes that story. It explains Congress’s understanding that federal employees had long been “*protected from personal common law tort liability* by a broad based immunity.” 102 Stat. 4563, §2(a)(3) (emphasis added). “For more than 40 years”—since the FTCA’s 1946 enactment—“the Federal Tort Claims Act ha[d] served as the sole means for compensating persons injured by” federal employees’ common-law torts. §2(a)(1), (3).

Congress believed, however, that “*Westfall v. Erwin*” had “seriously eroded the common law tort immunity *previously available* to Federal employees” by limiting it to discretionary acts. §2(a)(4) (emphasis added); see *Westfall*, 484 U.S. at 300. The Westfall Act responded to that “immediate crisis” by (in Congress’s view) *restoring* the common-law-tort immunity federal employees had enjoyed and reinstating the FTCA as the “‘exclusive’” remedy for federal employees’ “common law torts.” §2(a)(3), (b); §5 (codified at 28 U.S.C. §2679(b)(1)). The Westfall Act thus did not “extinguis[h]” existing common-law remedies against federal employees because (much less “only” because) *Bivens* remained a backstop. Resp.Br.34. The Act was a targeted effort to *restore* an immunity from common-law-tort liability that predated *Bivens*—while providing a damages remedy against the government.²

² While *Westfall* viewed traditional common-law-tort immunity more narrowly, 484 U.S. at 297-298 & n.4, what matters is that *Congress understood* the Westfall Act as restoring preexisting immunity from common-law-tort liability, not “tak[ing] away a preexisting right of action,” Resp.Br.44.

Far from cementing *Bivens* in place, the Westfall Act steered clear, declaring it “‘does not extend or apply to’” constitutional claims. 102 Stat. 4564, § 5 (codified at 28 U.S.C. § 2679(b)(2)(A)). The Act “simply left *Bivens* where it found it”—in the hands of courts. *Hernández*, 589 U.S. at 111 n.9; see pp. 13-15, *supra*.

While Watanabe invokes generic legislative history, Resp.Br.34, he overlooks on-point history demonstrating Congress’s deliberate choice to take *no position* on *Bivens*. As House sponsor Barney Frank explained, there was “general agreement on a quick and easy reversal of *Westfall*.” *Legislation to Amend the Federal Tort Claims Act: Hearing Before Subcomm. on Admin. Law & Gov’t Relations of H. Comm. on the Judiciary*, 100th Cong. 194-195 (1988). But “constitutional torts” presented “a separate and much more controversial issue” that could make a “non-controversial vote” a “more controversial” one. *Id.* at 40, 195. Consequently, “all sides agree[d]” they “*d[id] not want to do anything*” regarding *Bivens* that might “impinge *one way or the other* in that controversy.” *Id.* at 40 (emphasis added); see 134 Cong. Rec. 29,933 (1988) (sponsor Sen. Grassley: “this bill does not have any effect on the so-called *Bivens* cases”). That’s why Congress specified that the Act “‘does not extend or apply’” to constitutional claims. 102 Stat. 4564, § 5 (codified at 28 U.S.C. § 2679(b)(2)(A)). That disclaimer cannot be rewritten into an *endorsement* of *Bivens*.

Nor did the PLRA ratify *Carlson*. Resp.Br.35. While the PLRA creates a “procedural framework” for such claims, Resp.Br.36, that’s because it governs *all* prisoner suits under “section 1983 * * * or any other Federal law,” 42 U.S.C. § 1997e(a); see pp. 10-11, *supra*. That it “contemplates the existence of money damages,” Resp.Br.35, is unremarkable given that § 1983 and other statutes auth-

orize damages. The PLRA itself does not provide a damages remedy. *Goldney*, 606 U.S. at 944. That “suggest[s] that Congress does not want a damages remedy”—the opposite of ratifying *Carlson*. *Ziglar*, 582 U.S. at 148.

At most, the Westfall Act and PLRA show that Congress has not affirmatively eliminated *Bivens* and *Carlson*. But this “Court has jettisoned many precedents that Congress likewise could have legislatively overruled”—especially where, as here, those precedents involve “judicial invention” beyond the Judiciary’s proper role. *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369, 411 (2024). Here, moreover, Congress confronted uncertainty over whether it *could* eliminate *Bivens*. Pet.Br.47 n.15. While Watanabe properly agrees Congress *can* do so, Resp.Br.38, Justice Scalia observed that “an ‘implication’ imagined in the Constitution can presumably not even be repudiated by Congress,” *Correctional Services Corp. v. Malesko*, 534 U.S. 61, 75 (2001) (Scalia, J., concurring); accord *Minneeci v. Pollard*, 565 U.S. 118, 131 (2012) (Scalia, J., concurring). Even today, Watanabe’s amicus insists Congress cannot eliminate *Bivens* without constitutional “amendment.” Cato.Br.4.

3. Because “judicially created causes of action offend the separation of powers in almost every circumstance,” *Cisco* “close[d] the door” on judicially created Alien Tort Statute liability. 609 U.S. at 153, 155. For the same reason, the Court should close the door on judicially created *Bivens* liability. Pet.Br.41-43. Watanabe observes (Resp.Br.33) that *Cisco* did not foreclose ATS suits for the so-called “Blackstone three” torts recognized at common law. 609 U.S. at 155. But those torts are “not * * * evidence” that federal “courts [have] authority to *create* causes of action”—they predated the ATS and the Framing. *Id.* at 155 n.3. The “*Bivens* three” have no such pedigree. This

Court invented them starting in 1971, two centuries after the Bill of Rights’ adoption in 1791. Their legitimacy rests entirely on federal courts’ power to create damages remedies—a power “mo[st] accurately described as nonexistent.” *Id.* at 145.³

CONCLUSION

The judgment should be reversed.

Respectfully submitted.

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³ The government asks the Court to declare *Carlson* moribund, while (nominally) leaving *Bivens*’s fate for another day. Gov’t.Br.31. The government identifies no good reason for continued suspense. See Mary Mason & Laura Smith, *Will the Supreme Court Finally Dismantle Bivens’s House of Cards?*, Lawfare (Oct. 20, 2026), <https://www.lawfaremedia.org/article/will-the-supreme-court-finally-dismantle-bivens-s-house-of-cards>.