IN THE SUPREME COURT OF THE UNITED STATES

No. 25A___

FRANCIS NIELSEN,

Applicant,

v.

KEKAI WATANABE,

Respondent.

APPLICATION FOR AN EXTENSION OF TIME
IN WHICH TO FILE A PETITION FOR A WRIT OF CERTIORARI
TO THE U.S. COURT OF APPEALS FOR THE NINTH CIRCUIT

To the Honorable Elena Kagan, Associate Justice of the United States Supreme Court and Circuit Justice for the Ninth Circuit:

Pursuant to 28 U.S.C. §2101(c) and this Court's Rule 13.5, Applicant Francis Nielsen respectfully requests a 30-day extension of time, to and including October 3, 2025, within which to file a petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this matter. The court of appeals entered its judgment on September 6, 2024, and denied Nielsen's timely rehearing petition on June 5, 2025. The petition for a writ of certiorari is currently due September 3, 2025. See this Court's Rule 13.3. Under this Court's Rule 13.5, this application is being filed at least 10 days before that deadline. This Court has jurisdiction under 28 U.S.C. §1254(1). A copy of the court of appeals' opinion is

attached as Exhibit A, and a copy of the order denying rehearing and opinions respecting and dissenting from that denial are attached as Exhibit B.

There is good cause for the extension because the undersigned counsel has been heavily engaged with the press of other matters and requires additional time to prepare the petition.

1. This case arises out of a federal detention center's response to injuries Kekai Watanabe allegedly suffered during a gang riot. In July 2021, Watanabe was attacked by rival gang members in Honolulu's federal detention center, where he was being held pending sentencing. Ex. A at 6. During an evaluation that involved staff-nurse and applicant Francis Nielsen, Watanabe asked to be taken to a hospital to be treated for back pain. *Ibid.* Nielsen examined Watanabe and concluded that, although Watanabe was in significant pain, his injuries did not call for transfer to a hospital. *Ibid.* After consulting another medical provider, Nielsen tried to alleviate Watanabe's pain with painkillers and anti-inflammatory drugs and encouraged gentle stretching. Ex. A at 24-25 (Smith, J., dissenting); Ex. B at 22 (Smith, J., dissenting from denial in part). Several months later, Watanabe was diagnosed with a fractured coccyx. Ex. A at 7.

2. Watanabe filed a *pro se* complaint against Nielsen and other detention-center officials, asserting an Eighth Amendment claim for failure to provide adequate medical treatment under *Bivens* v. *Six Unknown Named Agents of*

Federal Bureau of Narcotics, 403 U.S. 388 (1971). Ex. A at 7. Nielsen moved to dismiss because Watanabe did not have a cause of action under *Bivens*.[1]

The district court dismissed Watanabe's claims, applying the test this Court set out in *Egbert* v. *Boule*, 596 U.S. 482, 492 (2022). Under *Egbert*, courts cannot recognize a *Bivens* cause of action without first asking "whether the case presents 'a new *Bivens* context.'" *Ibid.* The context is new if it is "'meaningfully' different from the three cases in which the Court has implied a damages action," *ibid.*—namely, *Bivens* itself, *Davis* v. *Passman*, 442 U.S. 228 (1979), and (most relevant here) *Carlson* v. *Green*, 446 U.S. 14 (1980). Second, if the context is new, courts must ask whether there is even a single "rational reason to think that" Congress is better positioned than courts to weigh the costs and benefits of a damages remedy. *Egbert*, 596 U.S. at 492. "If there is even a single 'reason to pause'" at this second step, courts "may not recognize a *Bivens* remedy." *Ibid.*

The district court concluded that "Watanabe's claim arises in a new context." Ex. A at 17-18. The most closely analogous *Bivens* case to Watanabe's was *Carlson*, which adopted a *Bivens* remedy for a starkly deficient response to a life-threatening medical emergency—one that resulted in an inmate's on-the-scene death. The district court here found Watanabe's claim arose in a "new" *Bivens* context for two reasons. First, there was an available, alternative remedy not considered in *Carlson*:

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[1] Upon screening Watanabe's *pro se* complaint under 28 U.S.C. §1915, the district court dismissed the three other defendants. Ex. A at 7.

Watanabe had access to the Bureau of Prison's Administrative Remedy Program ("ARP"). Second, the nature and severity of Watanabe's claimed injury were distinct from (and less extreme than) the claims for the life-ending injuries in *Carlson*. Under step two, the district court held Congress was better situated to address whether to extend *Bivens* to that new context.

3. The Ninth Circuit reversed, finding no relevant difference between this case and *Carlson* at step one of the *Egbert* analysis. Ex. A at 11. The court of appeals concluded that the existence of "alternative remedial structures" cannot be considered when deciding whether the context is "new"; such schemes, it held, are "to be considered at the *second* step of the *Bivens* analysis." Ex. A at 18. The panel did not reach that second step, because it concluded the context was not new. The panel further ruled that differences in the degree of a plaintiff's injury and mistreatment by prison officials are not "meaningful" in the new context inquiry. Ex. A at 13-17.

The Ninth Circuit denied Nielsen's petition for rehearing and rehearing en banc. Ex. B. Two judges issued a statement concerning the denial that acknowledged that "the circuits have split on the role of alternative remedies and the continued viability of *Carlson* actions[.]" *Id.* at 5, 14. Eleven judges dissented from the denial of rehearing, "hop[ing]" that, although the Ninth Circuit declined to take the case en banc, the Supreme Court would "resolve the multiple deep circuit splits over *Carlson*-related *Bivens* actions" implicated by this case. *Id.* at 19

(Nelson, J., dissenting); see *id.* at 41, 45 (Collins, J., dissenting) (noting that this case may "provide a suitable opportunity for the [Supreme] Court" to clarify the law). The courts of appeals are divided, the dissenting judges observed, on whether the existence of an alternative remedial scheme, not present in prior cases, may be considered when deciding whether the context is "new"—at *Egbert*'s first step—or whether it is only "to be considered at the *second* step of the *Bivens* analysis" when deciding whether courts should extend *Bivens* to a context already found to be new. Ex. B. at 35-36 (Nelson, J., dissenting from denial); see Ex. A at 18. The courts are further divided, the dissenting judges explained, on whether the nature and severity of the injury compared to *Carlson* can be a meaningful difference giving rise to a new *Bivens* context. See Ex. B at 31-34 (Nelson, J., dissenting).

4. Nielsen seeks a 30-day extension of time within which to file a petition for a writ of certiorari seeking review of the Ninth Circuit's decision, to and including October 3, 2025. An extension is warranted for the following reasons:

Nielsen's counsel of record in this Court, Jeffrey A. Lamken, was retained by petitioner at the rehearing stage below. The requested extension will provide sufficient time for counsel to conduct additional research, prepare a concise petition directed to the considerations of value to this Court, and see to its printing and submission. Mr. Lamken also has been, and will remain, heavily engaged with the

press of other matters before this Court and other courts in the time since the rehearing petition was denied.[2]

In view of those considerations, Nielsen respectfully requests an extension of 30 days, to and including October 3, 2025, within which to file a petition for a writ of certiorari.

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[2] Those matters include: oral argument in *Global Tubing LLC* v. *Tenaris Coiled Tubes LLC*, Nos. 23-1882, 23-1883 (Fed. Cir.), on June 6, 2025; an opening brief in *Vir2us, Inc.* v. *Sophos Inc.*, No. 25-1158 (4th Cir.), filed on June 17, 2025; oral argument in *Finesse Wireless LLC* v. *AT&T Mobility LLC*, No. 24-1039 (Fed. Cir.), on July 10, 2025; a reply brief in *Netlist, Inc.* v. *Samsung Electronics Co., Ltd.*, No. 24-2304 (Fed. Cir.), filed on July 21, 2025; a combined response and reply brief in *UMB Bank, N.A.* v. *Bristol-Myers Squibb Co.*, Nos. 24-2865, 24-2928 (2d Cir.), filed on August 11, 2025; a combined response and reply brief in *In re National Football League's Sunday Ticket Antitrust Litigation*, Nos. 24-5493, 24-5691 (9th Cir.), filed on August 11, 2025; a combined response and reply brief in *VLSI Technology LLC* v. *OpenSky Industries, LLC*, Nos. 23-2158, 23-2159 (Fed. Cir.), due on September 2, 2025; a petition for a writ of certiorari in *Lynk Labs, Inc.* v. *Samsung Electronics Co., Ltd.*, No. 25A14 (U.S.), due on September 12, 2025; a petition for panel rehearing and/or rehearing en banc in *FMC Corporation* v. *Sharda USA, LLC*, No. 24-2335 (Fed. Cir.), due on September 16, 2025; a petition for panel rehearing and/or rehearing en banc in *Colibri Heart Valve LLC* v. *Medtronic CoreValve, LLC*, No. 23-2153 (Fed. Cir.), due on September 17, 2025; and an opening brief in *VideoShare, LLC* v. *Google LLC*, Nos. 25-1842, 25-1876 (Fed. Cir.), due on October 7, 2025.

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Respectfully submitted.

Jeffrey A. Lamken
Counsel of Record
MOLOLAMKEN LLP
The Watergate, Suite 500
600 New Hampshire Ave., N.W.
Washington, D.C. 20037
(202) 556-2000
jlamken@mololamken.com

Counsel for Applicant