SUPREME COURT
OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

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FRANCIS NIELSEN,)

Petitioner,)

v.) No. 25-417

KEKAI WATANABE,)

Respondent.)

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Washington, D.C.

Monday, November 9, 2026

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:05 a.m.

APPEARANCES:

LUCAS M. WALKER, ESQUIRE, Washington, D.C.; on behalf of the Petitioner.

VIVEK SURI, Assistant to the Solicitor General, Department of Justice, Washington, D.C.; for the United States, as amicus curiae, supporting the Petitioner.

JOSHUA M. WESNESKI, ESQUIRE, Washington D.C.; on behalf of the Respondent.

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P R O C E E D I N G S

(10:05 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument first this morning in Case 25-417, Nielsen versus Watanabe.

Mr. Walker.

ORAL ARGUMENT OF LUCAS M. WALKER

ON BEHALF OF THE PETITIONER

MR. WALKER: Mr. Chief Justice, and may it please the Court:

The power to create damages remedies belongs to Congress, not federal courts. Bivens, Davis, and Carlson departed from that principle, and this Court has spent the last 45 years trying to set things straight. It has repeatedly explained that Bivens claims are disfavored, that they strain the separation of powers, and that they cannot proceed if there is any reason to think that Congress might be better suited to weigh the costs and benefits of a damages remedy. The Court has rejected Bivens claim after Bivens claim after Bivens claim.

But the Ninth Circuit allowed a Bivens remedy here anyway. The Court may conclude

that it's time to end the Bivens experiment and hand accountability for providing damages remedies back to Congress, where it belongs.

But the claim here also fails under a straightforward application of this Court's Bivens framework, as Watanabe concedes his claim cannot proceed if it presents a new context, that is, if there is any meaningful difference between his case and Carlson.

There are at least three. First, unlike Carlson and Bivens and Davis, this case is not damages or nothing. Watanabe not only could but did pursue administrative and injunctive relief.

Second, Congress could see a meaningful difference between the inmate's rapid death in Carlson and the less severe injury Watanabe alleges here both in terms of proper deterrence and in the risk of disruption that would be posed by extending Carlson to less severe but far more common conditions like that alleged here.

Third, this case implicates special factors not considered in Carlson, including alternative remedial structures and

post-Carlson legislation, where Congress has declined to provide a damages remedy for federal prisoners.

Those are exactly the kinds of differences this Court has repeatedly held to present a new context and to foreclose a Bivens remedy as recently as last year's summary reversal in Goldey. Reversal should follow here too.

I welcome the Court's questions.

JUSTICE THOMAS: Well, give me an example of a case that actually could be brought under Bivens now.

MR. WALKER: I -- I think the -- the answer is, under a proper application of the framework, close to nothing because there's always going to be some alter -- some alternative remedy that exists, and, certainly, that's the case in the prison context here.

JUSTICE THOMAS: So your first and second arguments are basically the same?

MR. WALKER: There -- there's a slight difference.

JUSTICE THOMAS: Well, if nothing can be brought, then I don't see what the

difference is.

MR. WALKER: Yeah, that -- that is the -- that is the bottom line. And, certainly, the fact that there are alternative remedial structures that Carlson didn't consider and that Congress has legislated in this area since, that is going to, under the framework, mean that Carlson claims are no longer viable.

JUSTICE SOTOMAYOR: One of your reasons in your brief for -- perhaps it was the SG's -- for differentiating this case from Carlson is that death ensued and not mere injury.

MR. WALKER: Mm-hmm.

JUSTICE SOTOMAYOR: You are then saying, but I thought that one of Carlson's reasons for doing this is that it wanted to deter individuals from taking unlawful action in this area.

MR. WALKER: That is true. And --

JUSTICE SOTOMAYOR: And there's nothing in the alternatives you're suggesting that's going to address that deterrence aspect, correct?

MR. WALKER: So what Congress -- what this Court has now said under Egbert, that when we're considering alternative remedial structures, whether they provide proper deterrence is something that Congress, rather than federal courts, needs to calibrate.

JUSTICE SOTOMAYOR: Except, in the Westfall Act, Congress looked at Bivens and explicitly reserved those constitutional claims the Court had recognized, and in the two areas in which it had done it was, first, under Bivens itself for unlawful entry and into -- without probable cause into private citizens' homes when there was malfeasance in doing so, and in Carlson itself, which was a Fourth Amendment medical malpractice claim.

So Congress itself ratified it. We've said that in our own cases.

MR. WALKER: So, respectfully, I don't think the Court has ever gone so far as to say that the Westfall Act ratified Bivens or Carlson. But what the Court has said is that it does not provide any reason to extend those cases further.

JUSTICE SOTOMAYOR: I under -- that's

exactly right.

MR. WALKER: And --

JUSTICE SOTOMAYOR: Not to extend them further, but that doesn't mean there was an intent to overrule them.

MR. WALKER: Well, so I -- I think, on the Westfall Act, you see a studied neutrality by Congress there. It was dealing with the immediate crisis -- that's the words that Congress used in the statute -- caused by a Supreme Court decision that only addressed -- affected common-law tort liability, and it responded with a statute that only affected common-law tort liability.

And it decided not to do anything about the far more controversial question of constitutional torts.

JUSTICE SOTOMAYOR: What do we do with the ARP, which was one of the legislations you were talking about?

MR. WALKER: Mm-hmm.

JUSTICE SOTOMAYOR: Respondents show a lot of evidence that the ARP was adopted before Carlson was and that the BOP in 1979 simply published it in the registry.

But tell me, if Carlson -- if ARP existed at the time of Carlson, why is it new?

MR. WALKER: It is something that Carlson did not consider. That is the test --

JUSTICE SOTOMAYOR: Well, why would it? What it considered -- it didn't provide a cause of action. It's not a cause of action at all. Carlson expressly discussed the cause of action that was available, the FTCA, and it said that the ARP itself says exhaust what you need to do in the prison, but then go through the FTCA.

MR. WALKER: So --

JUSTICE SOTOMAYOR: So it had no need to discuss the ARP.

MR. WALKER: So what the -- so -- so the ARP that existed at the time of the -- the incident, Carlson was an un- -- a -- a uncodified precursor policy statement, and -- and it also could not have been used because of the rapid death and because the inmate's mother, as a non-inmate, could not have used it.

JUSTICE SOTOMAYOR: Well, that -- that goes to differentiating this situation from

Carlson.

MR. WALKER: Yeah.

JUSTICE SOTOMAYOR: It doesn't go to the fact that you say Congress has looked at things. The PLRA itself is just an administrative procedure that does not pretend or insist that any prisoner be precluded from following -- following any causes of action that are recognized.

And, in fact, we ourselves have said that you need to exhaust before a Bivens claim.

MR. WALKER: Mm-hmm. So what -- the message this Court has taken from the PLRA in Ziglar and most recently in Goldey is that this is Congress actively legislating in the area of prisoner claims --

JUSTICE SOTOMAYOR: Except Ziglar says apply it in a new context. It didn't say those should be applied and looked at in a new context, not in an existing context. Carlson is an existing context.

MR. WALKER: Yeah. So I -- I think best view, the PLRA is -- itself creates a new legal context because it is a new signal from Congress.

JUSTICE SOTOMAYOR: It's not a new set --

JUSTICE KAGAN: So does that --

JUSTICE SOTOMAYOR: I'm sorry.

JUSTICE KAGAN: I'm sorry. No, please.

JUSTICE SOTOMAYOR: No, no. Go ahead.

JUSTICE KAGAN: Does that mean, Mr. Walker, that even if a case that was identical to Carlson arose today, we should say that it -- it -- there would be no action?

MR. WALKER: I -- I think that's right given that the -- the ARP exists, the PLRA exists, the -- the Federal Prison Oversight Act exists. Those are all post-Carlson developments.

JUSTICE KAGAN: So exact same factual circumstances?

MR. WALKER: I -- I think that's right under a proper application of the framework. That creates a new context because those are special factors Carlson didn't, largely could not have, considered.

And Goldey makes clear that they are all reasons not to allow a Bivens claim.

JUSTICE KAGAN: And if we put the ARP and the PLRA aside for the minute -- for the moment and -- and focus on some of your other proposed distinctions, I guess I'm curious as to what you think would not count as a meaningful distinction.

MR. WALKER: So, if it were a heart attack rather than a asthma attack that led to an immediate on-the-scene death, like in Carlson, I think that particular distinction would not be a meaningful difference.

If it was on a Thursday instead of a Friday, I think we can all agree that would not be a meaningful difference.

If the difference were something Congress could not legitimately consider, like the race of the inmate at issue, that would not be a meaningful difference because a rational legislature could not think that that legitimately affects the policy balance.

But the kinds of differences that we're talking about, I mean, life and death --

JUSTICE KAGAN: Right. So, if I -- if I hear you, you -- you properly -- it's like something that you couldn't legally consider or

something that everybody would understand to be a complete irrelevancy, like whether the nurse's uniform was white or green.

But, other than that, I mean, pretty much anything goes?

MR. WALKER: Pretty close to it. And the reason is that we need to view this with utmost deference to Congress. That's what Egbert tells us.

And so something that Congress, a reasonable legislator, could think is meaningful when weighing the costs and benefits of a damages remedy, that should be considered a meaningful difference.

JUSTICE KAGAN: I will go back to -- to Justice Thomas's question then. It seems pretty clear to your answers to those questions, both with respect to the factual differences and with respect to the relevance of the ARP and the PLRA, that you're basically saying to us -- I mean, either one of them and certainly both -- you're basically saying to us overrule Carlson without saying you're overruling Carlson?

MR. WALKER: Well, I -- I think the

effect is --

JUSTICE KAGAN: I mean, you are saying to us also, say you overrule Carlson --

MR. WALKER: So the --

JUSTICE KAGAN: -- but the supposed more minor -- your -- your -- your -- your lesser theory is -- is -- is the same thing?

MR. WALKER: It -- it ends up in -- with essentially that result. And the reason is, if special factors not considered in previous Bivens cases create a new context, and we all agree you can't extend these cases to new contexts anymore, then these developments are -- are special factors and they weren't considered. So the --

JUSTICE KAVANAUGH: What do we do with --

MR. WALKER: -- frankly, context doesn't arise anymore.

JUSTICE KAVANAUGH: What do we do with the fact, in thinking about your overrule Carlson, overrule Bivens argument or de facto doing so, that Congress has had 55 years since Bivens and 46 years since Carlson to do so and has not done so?

MR. WALKER: So I think this --

JUSTICE KAVANAUGH: It seems like Congress, in fact, has left Bivens and Carlson where they stood, as we said in the footnote in one of the cases, and Congress has operated against that backdrop. And then your argument would pull that out from under Congress and disrupt their understanding of where the law stood when they did things like the FTCA.

So how do we think about that?

MR. WALKER: So a few points on that.

One is I -- I -- this Court has not hesitated to overrule past decisions, especially those where courts had overstepped the proper judicial role, like in Loper Bright, overruling Chevron, that Congress could have legislatively abrogate, but the Court recognized that it was up to the Court to correct that mistake.

Here, I think it's even more appropriate for the -- the Court to -- to take that step itself because there's this constitutional overlay and uncertainty certainly in the past, although I think we now all agree now, over whether Congress could

eliminate Bivens liability.

Justice Scalia said in two separate concurrences 10 years apart, presumably, Congress can't do that because this purports to arise directly under the Constitution.

And I --

JUSTICE KAVANAUGH: So you -- you actually think Congress couldn't displace Bivens?

MR. WALKER: No, I think we all agree now that the framework has -- has made clear that that is the case. But, for a long time and especially at the time of the Westfall Act, which seems to be the -- the main focus of any congressional reliance argument, there was a lot of doubt over whether the -- the Congress could take that step.

And speaking of the Westfall Act --

JUSTICE KAVANAUGH: Congress did do that with Davis v. Passman in essence, don't you think, and has not done that with Bivens and Carlson --

MR. WALKER: So --

JUSTICE KAVANAUGH: -- by contrast? Or what's your response to that argument?

MR. WALKER: So, with -- with Davis and Passman, what it essentially did was create an equivalent remedy that just ran against the United States that provided a full panoply of the things you might be able to get. There was probably a little bit of self-interest there so that you don't have individual suits against legislatures. But the fact that they created a full-blown remedy that abrogates Davis I don't think shows you that they would want a full-blown remedy necessarily in the Bivens or the -- the Carlson context.

JUSTICE JACKSON: Well, if we --

JUSTICE BARRETT: Counsel, you --

CHIEF JUSTICE ROBERTS: Counsel --

JUSTICE JACKSON: -- if we were going to --

CHIEF JUSTICE ROBERTS: -- the Solicitor General expressly does not ask us to overrule Bivens, and, of course, they have broad experience in this context. And I -- I -- I -- I wonder if you have any insight into why or at least why shouldn't we, on that question, defer to their expertise and experience on that question?

MR. WALKER: Well, certainly, they have their reasons. I'm not sure from their brief precisely what they are, but I think the answer is that this has been an area wrought with confusion where the lower courts have really called out for guidance. And I think a decision that says that Carlson isn't viable anymore, but stay tuned to see what happens with Bivens is going to just continue to generate confusion. And the --

CHIEF JUSTICE ROBERTS: Well, I mean, on the other hand, it could be viewed as a cautious, incremental approach to such a fundamental question.

MR. WALKER: And that -- it is certainly something that the -- the Court could do. I -- I do think that under that a straightforward application of the existing framework, the result is that this Carlson claim cannot go forward, and, in fact, no Carlson claims are going to -- to be able to. So that is certainly an approach the Court could take.

But I think the separation-of-powers problem is the same, and the reliance interests

or lack thereof are the same. The FTCA allows tort suits against the United States, very deep pockets, both for the kind of medical negligence-type things at issue in Carlson and for the intentional torts by law enforcement officers at issue in Bivens itself. So I don't think you're going to have a rug-pulling of that.

JUSTICE JACKSON: So, Mr. Walker --

JUSTICE BARRETT: Counsel, can you --

JUSTICE JACKSON: -- it seems like part of --

JUSTICE BARRETT: Excuse me.

Counsel, can you tell me what is your best case for the availability of injunctive relief against a federal officer? Let's say that I don't think Armstrong is directly on point.

MR. WALKER: Mm-hmm.

JUSTICE BARRETT: I want to make sure that, in your position, there's no doubt that someone in a prisoner's position like this would be able to get injunctive relief against a federal officer. What's your best case?

MR. WALKER: I -- I think, in CASA,

the Court identified the -- the Judiciary Act of 1789 as providing that authority, provided it was something --

JUSTICE BARRETT: The cause of action as well as the ability to enter remedial relief?

MR. WALKER: Well, it described it in terms of providing equitable remedies, and it was an equitable remedy alleging a violation of the Constitution there.

There was a -- a footnote toward the end of the decision that said that Ex parte Young had built on a long history of cases allowing that kind of injunctive relief.

And I think the -- the government has also -- reads the PLRA's provisions detailing precisely what kind of prospective injunctive relief are available in prisoner suits as --

JUSTICE BARRETT: Though it doesn't -- the PLRA doesn't grant a cause of action for --

MR. WALKER: I -- the -- not -- not in as many terms but -- but in recognition that that power exists. But I think -- I think Armstrong recognized that that has far deeper historical roots than the Bivens remedy, which

no court had allowed a constitutional cause of action or a claim under the Constitution until 1971.

JUSTICE BARRETT: Thanks.

JUSTICE JACKSON: Counsel, I think that part of the confusion that you mention that the lower courts are having is because of arguments like the one you're making here today, which seem to collapse the two separate Bivens steps.

As I understood it, Bivens, at step 1, says that the court is supposed to be asking whether the claim is different in a meaningful way, and then, in the second step, we look at whether there are special factors.

And the way that you've articulated the standard, you're now saying that it's not a new context if -- or, excuse me, it is a new context if there are special factors. So I'm a little worried about that collapsing.

But posit for a minute that I'm correct that new context is about whether this case is different in a meaningful way. I'm still not sure that I understand your answer to that question.

Mr. Chief Justice, can I continue?

CHIEF JUSTICE ROBERTS: Of course.

MR. WALKER: Thank you. So --

JUSTICE JACKSON: Yes.

MR. WALKER: Yeah, so I just take the fact that in Carlson, there was a death in -- rather, that -- that rapidly unfolded, and, here, there was a non-fatal, non-life-threatening injury.

JUSTICE JACKSON: But --

MR. WALKER: That affects whether damages is the only available remedy versus administrative or injunctive relief, and damages or nothing was the foundation of Bivens itself.

JUSTICE JACKSON: What do we do with the fact that in Carlson, we specifically said that the question was whether the respondent's actions survived the prisoner's death, suggesting that we believed there was an action before even though he had -- even -- even before he died?

MR. WALKER: Yeah.

JUSTICE JACKSON: We separated those two.

MR. WALKER: So there may have been an assumption there, but I think that wouldn't foreclose Congress from thinking that the death there versus less severe conditions are a meaningful difference, in part because, as in Carlson, when there is a death, state survival statutes might foreclose any kind of damages relief, which is not the case when there is no death at issue.

And I -- I think the word "survival" also doesn't necessarily reflect that it would be the -- the inmate's own individual remedy. Wrongful death statutes are, you know, brought by next of kin, but they're also described as survival statutes. The Michigan Central Railroad case cited in Respondent's brief talks about that.

And so the -- and Carlson was not very specific about what exactly it viewed as the -- the character of the -- of the cause of action there.

CHIEF JUSTICE ROBERTS: Thank you, counsel.

Justice Thomas?

Justice Alito?

Justice Sotomayor?

JUSTICE SOTOMAYOR: It was very clear. It was a Fourth Amendment infliction of pain and suffering. It wasn't a wrongful death action. It's what the recovery is for, the -- not for the death but for the pain and suffering the individual experienced.

MR. WALKER: Well, I mean, death was certainly part of that. That was the very first --

JUSTICE SOTOMAYOR: Well, I mean, but it's not death qua death. It's the quantum of what occurs from it. It's the result.

MR. WALKER: Well -- well, death was cert --

JUSTICE SOTOMAYOR: What you're -- what you're -- what you're trying to do in an Eighth Amendment situation is avoid pain and suffering.

MR. WALKER: Well, and -- and death --

JUSTICE SOTOMAYOR: And, here, you didn't do it. For two years, this man did not receive the X-ray that he needed to diagnose a fracture. He experienced pain for two years. He experienced prison officials ignoring his

pleas. And I think -- I'm not even sure that he finally got to see an expert before he was released from prison.

None of that has anything to do with the immediate -- with death.

MR. WALKER: So I -- I think --

JUSTICE SOTOMAYOR: I agree with you it doesn't have anything to do with death, but it has nothing to do with the pain and suffering that resulted in the death of Carlson.

MR. WALKER: So I think two points. One is I think Congress could still think that death is a meaningful difference that warrants additional deterrence. And the difference of death in kind under Eighth Amendment jurisprudence has been a mainstay of this Court's law.

But also speaking to the facts of this case, the -- the Bivens suit, the Carlson suit against my client is based on a single encounter between him and Mr. Watanabe, and --

JUSTICE SOTOMAYOR: That just means each encounter is creating its own separate measure of relief.

MR. WALKER: Well, and -- and --

JUSTICE SOTOMAYOR: But can I go back to Justice Barrett's question on injunctive relief?

MR. WALKER: Mm-hmm.

JUSTICE SOTOMAYOR: I too am not sure how it's a remedy. You don't have a cause of action for failure to follow the -- for -- the PLRA or the ARP. So you still need an independent cause of action to get the relief you need.

MR. WALKER: Yeah. So this -- this Court in Armstrong -- and I recognize that maybe it could be read a little differently, but the Court in Armstrong recognized that the -- the general understanding that one can bring a -- a suit for injunctive relief to enjoin federal or state officials from unconstitutional action is well-established, it has long historical roots.

JUSTICE SOTOMAYOR: That -- we recently had a case involving whether courts have the ability to order the transfer of prisoners to another facility, and the Court said no, that was seeking injunctive relief for

a failure to follow a court order.

MR. WALKER: Mm-hmm. So there may sometimes --

JUSTICE SOTOMAYOR: Why would we have the power to grant that kind of injunctive relief to order the prisoner to be taken to an expert?

MR. WALKER: So sometimes there are restrictions on the scope of injunctive relief, but even apart from injunctive relief, which is a clear --

JUSTICE SOTOMAYOR: If there is none.

MR. WALKER: Well, I mean, the immediate -- the -- the --

JUSTICE SOTOMAYOR: Assume there is none.

MR. WALKER: -- the -- the Administrative Remedy Program is something that can provide specific relief. And Ziglar recognized that that's the sort of thing that --

JUSTICE SOTOMAYOR: But, if it's failing, there's nothing to be done about it.

I have one final question for you, which is, if we follow your argument that we

should rule that it is the existence of the ARP, the PLRA here that provides -- provides a new context, that reasoning would apply to Bivens itself, correct?

MR. WALKER: Well, I -- I think --

JUSTICE SOTOMAYOR: So we're effectively overruling Bivens directly?

MR. WALKER: Well, Bivens suits do not typically arise in a prison context, so those two particular remedies would not exist.

There may be other kinds of remedies of the sort that were at issue in Egbert, investigations and discipline. But those two --

JUSTICE SOTOMAYOR: Exactly.

MR. WALKER: -- specific ones would not apply in Bivens.

CHIEF JUSTICE ROBERTS: Justice Kagan?

Justice Gorsuch?

JUSTICE GORSUCH: Mr. Walker, you mentioned that there would have been an FTCA claim here, and I -- I just want to understand how that works given the discretionary function exception, and --

MR. WALKER: Yeah.

JUSTICE GORSUCH: -- my understanding is some lower courts disagree over how that applies -- excuse me -- to medical negligence claims.

MR. WALKER: Yeah. So medical negligence -- so the -- the discretionary act or discretionary function exception generally applies to things in the nature of policy. It's very unlikely and I don't think there's any argument here that ordinary allegations of medical negligence, malpractice, are going to arise to that level.

Muniz, which the Solicitor General cites, allowed an FTA -- FTCA suit for a prisoner's medical malpractice negligence claim and indicated that it was unlikely the discretionary exception was going to apply there. And many circuits have said, well, the discretionary function exception doesn't apply if the act was unconstitutional because you never have discretion to violate the Constitution. That's a question that's been reserved, but that's certainly out there as well.

JUSTICE GORSUCH: Is there a circuit

split on that question?

MR. WALKER: There is. I think the -- the majority of them, though, have held that unconstitutional acts do not fall within the discretionary function exception.

JUSTICE GORSUCH: Do you think that's right?

MR. WALKER: I don't think the government has discretion to violate the Constitution.

JUSTICE GORSUCH: And then, on the ARP, you know, do -- does it go to the -- the existence of the ARP here, unlike in Carlson, that administrative review process, go to step 1 or step 2, or can anybody tell anymore?

MR. WALKER: It -- it goes to both, as Ziglar and Egbert recognized. Those two overlap a lot, which is -- makes sense because this is all geared toward the separation of powers and making sure the right decisionmaker is making these choices.

But we say at step 2, if there's special factors that counsel hesitation, we cannot allow a -- a remedy to proceed. And at step 1, we ask, are there special factors that

were not considered in prior cases? So, if you've got a special factor, as everyone concedes here that at step 2 would foreclose relief, it's necessarily a meaningful difference.

JUSTICE GORSUCH: It used to be, though, you know, that step 1, whether it's a different context, was kind of easily satisfied, and you -- you ticked that box and you moved on to step 2.

MR. WALKER: Mm-hmm.

JUSTICE GORSUCH: But we seem to have conflated the two, do you think, and -- and created some lower court confusion on that score?

MR. WALKER: I -- I think the confusion largely stems from the -- some lower courts not appreciating how broad and easily satisfied the new context inquiry is supposed to be and trying to kind of hermetically seal it off in an artificial way from step 2. But these two are supposed to work together.

And if there's a reason to think that Congress would be better suited to decide whether a damage remedy should be allowed and

that wasn't considered in a prior case, it's hard to see how that could not be a meaningful difference from a prior prudence decision.

JUSTICE GORSUCH: And you cite a whole bunch of lower court decisions saying that -- that there's a massive amount of confusion and a flood of inconsistent case law about step 1 and step 2 and how they interact. What do we do about that?

MR. WALKER: Well, one way would simply to say Bivens, Davis, and Carlson overstepped the separation of powers. This is something that courts shouldn't have gotten into and that we're now going to get out of. I think that's going to be the most straightforward way of solving that.

I think, in the -- the Carlson context, you also have the option of saying, well, given that we have the ARP, the PLRA, the Federal Prison Oversight Act, Carlson claims at least no longer can go forward and we can now reserve all of our circuit splits just for Bivens itself.

JUSTICE GORSUCH: Last question.

You and the government do disagree, as

the Chief pointed out, about how far you would go. The government would like us to address just Carlson, and you would have us address Bivens while we're at it. Why do you think we should take that next step?

MR. WALKER: So I think that with the Court's appreciation that this really is an overstep of the separation of powers, leaving lower courts and litigants in suspense is a little bit unfair.

I think the fairest thing is to clear up the confusion and hand the accountability for all of this back to Congress, where it belongs.

The -- the -- the issues in terms of stare decisis are exactly the same. There's a separation-of-powers problem that's identical in both of them.

The reliance interests are the same because there's going to be an FTCA remedy, damages remedy, in both of these situations.

And I think, given those -- those considerations, as well as the fact -- there are circuit splits even in the Bivens context over whether it matters whether there was a

warrant or not or whether it was in the home or not.

And if we can't figure out in Fourth Amendment cases whether those are meaningful differences, I think it just shows that we're kind of in a lot of trouble. But this Court certainly has a menu of options.

JUSTICE GORSUCH: Thank you.

CHIEF JUSTICE ROBERTS: Justice Kavanaugh?

JUSTICE KAVANAUGH: Well, isn't another way to provide clarity to simply say that courts should apply Bivens and Carlson but not extend them?

MR. WALKER: I think the difficulty is that courts -- the lower courts have had a lot of difficulty figuring out, you know, what is this far and what is further.

JUSTICE KAVANAUGH: Well, there's always going to be line-drawing, and maybe some of that's because of what Justice Gorsuch was just talking about about step 2 and step 1.

But, if you keep the alternative remedies a separate question and focus on new context, that would simply mean apply Bivens

and Carlson where they apply: Fourth Amendment excessive force, Fourth Amendment unreasonable search or seizure, these kinds of claims, Carlson claims, but don't extend them to new contexts that -- and don't create new rights.

That seems to be what we've done with Alien Tort Statute, things like 10b-5, where we've had results or decisions under a methodology we wouldn't use anymore, but we have not overruled the original three and the ATS, for example. We just haven't extended them.

Why isn't that the better way to go with this kind of situation as well?

MR. WALKER: Yeah.

JUSTICE KAVANAUGH: Because, otherwise, it's going to be -- talk about confusion. We're really undermining or pulling the rug out, as I said before, from Congress, who I think has assumed that we apply those, but don't extend them to -- to new constitutional rights or new areas.

MR. WALKER: Yes. So take that last point first. In the Westfall Act, I think especially if you read the -- the congressional

findings that are part of the enacted text itself, it makes very clear that what Congress was doing was neutrality with respect to Bivens. It did not want to touch that very controversial issue because it was dealing with a crisis that it perceived in light of the Westfall versus Erwin decision limited to common-law tort liability.

And for those who consider legislative history, it's very clear that they were not trying to give an advantage to one side or the other.

And I think, especially when the situation is this Court now realizes there's a separation-of-powers problem with -- with Bivens and Carlson, you'd bet- -- you'd better be -- the -- an argument that the Court is prevented from correcting that mistake because Congress has somehow relied on it, it should be really clear that Congress has done that.

And I don't think it's clear at all. And I think the -- all the evidence actually tends to show that that's not what Congress has done. It's been differeing --

JUSTICE KAVANAUGH: But, even in a

38-year sense, Congress could have done something and hasn't done it.

MR. WALKER: Congress could have done something. But, in Loper Bright and other decisions, this Court --

JUSTICE KAVANAUGH: Well, Loper Bright's about an interpretive methodology. That's a little different than things like 10b-5 and Alien Tort Statute and the like.

MR. WALKER: And I think the difference with those stat -- is that they are statutes. And this has a constitutional overlay where the Court purported to derive these causes of action directly under the Constitution itself, and that creates uncertainty as to whether -- what Congress really could have done.

JUSTICE KAVANAUGH: So your view is that, even in this case, we should say Fourth Amendment excessive-force claims under Bivens are out?

MR. WALKER: Well --

JUSTICE KAVANAUGH: And this seems like an odd case to -- to do that, and either we should say that explicitly or the inevitable

effect of what you're asking us to do would be to do that. It seems like an unusual step to take in this case.

MR. WALKER: So I think what it would be was the -- it would be the broader principle at stake, which is separation of powers means that courts should not be creating damages remedies directly under the Constitution. And that would apply to Bivens as well.

But the Court, of course, does have other options. It could follow the existing framework and say: Well, under that framework, Carlson claims are no longer viable, or it could even say that under the particular facts of this particular case, there is at least one meaningful difference that creates a new context.

JUSTICE KAVANAUGH: Thank you.

CHIEF JUSTICE ROBERTS: Justice Barrett?

JUSTICE BARRETT: Counsel, you point out that in Carlson, it was damages or nothing because the prisoner had died. And, here, there were other options like the ARP or injunctive relief available to the prisoner.

You also invite us to overrule Carlson. So walk me through what happens in a case where a prisoner dies as a result of medical negligence and let's say really horrific medical negligence.

What recourse does that prisoner have? Is it the FTCA?

MR. WALKER: So, in -- in that situation, as long as state survival law allowed the claim to proceed under the FTCA, yes, that would be available.

JUSTICE BARRETT: So overruling Carlson wouldn't leave future prisoners like Green without remedy?

MR. WALKER: I don't believe so. There may be some instances where state law, which Congress has allowed to govern under the FTCA, may limit the amount of recovery, but, for the most part, state survival statutes allow these kind of torts to survive death.

JUSTICE BARRETT: Should it bother us that maybe state tort statutes would not provide for the survival of the cause of action and such prisoners might be left without relief?

MR. WALKER: I think, if it bothers anyone, it should bother Congress and the people who could ask Congress to change that. I don't think that it would be a -- provide a -- a warrant for this Court to recognize a damages remedy that properly isn't within the judicial function.

JUSTICE BARRETT: Thank you.

CHIEF JUSTICE ROBERTS: Justice Jackson?

JUSTICE JACKSON: So it sounds to me like your answer to every question is there is no remaining Carlson claim because I don't understand why it matters that state survival statutes would allow for this if your underlying theory is that, you know, we have a separation-of-powers problem whenever the federal courts recognize a -- a implied cause of action, whether that's based on state survival theory or -- survival statutes or not.

So why -- why can't you just say that your -- your bottom line, your through-line, is that there will be no more kind of Carlson claim as a result of your rule?

MR. WALKER: So -- so, if the Court

overrules Carlson and Bivens, yes, we agree with that. I think, if the Court applies the existing framework and finds that the existence of alternative remedial structures in post-Carlson legislation creates a new context from Carlson, that will also be the effect that Carlson claims don't come.

But there are some of the other distinctions that we have, like that the death in Carlson is different from --

JUSTICE JACKSON: Right. I understand you have those distinctions.

MR. WALKER: Yeah.

JUSTICE JACKSON: So let me just -- let me ask you about -- going back to Justice Kavanaugh's question: What is the overstep here in this case? We have the same kind of alleged violation as in Carlson. We have the same constitutional right brought under the same legal framework by the same kind of defendant who's housed in the same kind of federal institution.

So, with respect to all major indicia of sameness, this case is Carlson. This person is bringing an Eighth Amendment deliberate

indifference claim for what he says is abuse in prison.

I appreciate that a death occurred in Carlson and not here, but why do you say it would be an extension of the judicial power from a separation-of-powers standpoint in this case but not in Carlson?

MR. WALKER: Yeah. So the Court in Ziglar said we don't just look -- it's the same right, it's the same method, mechanism of injury, and so we have to look for not just what similarities can we tote up but also what differences are there? And, here, there is --

JUSTICE JACKSON: All of them have to be relative to your argument that this would be an extension of the separation of powers. So whatever sameness and difference, it has to relate to your concern that in one case, you'd be improperly extending the judicial authority and in another case, you wouldn't.

And so that's what I don't understand --

MR. WALKER: Yeah. And so the question --

JUSTICE JACKSON: -- the distinction

is in this case.

MR. WALKER: And so the question there is, is this something that Congress could think meaningful from a policy legislative perspective when weighing the costs and benefits of affording a damages remedy?

And if it could adjust that balance, then courts should let Congress make the call rather than asserting that the cause of action is available in that situation.

And, here, Congress has created statutes that provide additional deterrence where death results. And Carl- -- Bivens is supposed to be all about deterrence. And -- and Egbert held that deterrence is properly for Congress to calibrate.

And so, if Carlson presented a stronger case for deterrence than this case does because there was a death there and not here, that is something a rational legislature could consider, and that's the kind of meaning --

JUSTICE JACKSON: Notwithstanding that the in-depth -- in -- in -- excuse me -- in the deliberate indifference factors don't turn on

death, deliberate -- you -- you have a claim for deliberate indifference based on the actions or inactions of the prison officials in both cases.

MR. WALKER: Yeah. So I don't think it goes by the strict -- you know, the elements of the cause of action. I don't think an excessive-force claim has an element that it's not a national security case like in Egbert or in Hernandez. It really is: Are there circumstances involved where Congress could think that this is a pol- -- different from a policy --

JUSTICE JACKSON: Can I just ask one last thing, which is, if we do what you would like us to do in this case, my concern is that we would be not actually taking into account the factors that we ordinarily look at when we are overruling a case. You're essentially asking us to implicitly overrule Carlson if not explicitly.

So what about things like whether this was egregiously wrong when it was initially determined, whether there are reliance interests? You've spoken a little bit, I

guess, on the workability, but that depends on whether or not we agree with you that the two factors -- the -- the two steps should be collapsed.

So can you -- can you speak to us as though you are making a case for overruling under our traditional factors?

MR. WALKER: Certainly. And that's -- that's our kind of alternative argument, that the Court could overrule Bivens and with it Carlson. You know, it created a damages remedy directly under the Constitution that no court had recognized for two centuries after the Bill of Rights' enactment. And the Court has now come to appreciate that that offends the separation of powers because Congress is properly the -- the right body to be making the policy considerations that go into creating a damages remedy.

JUSTICE JACKSON: What about reliance? Fifty years we've had Carlson.

MR. WALKER: Yeah. And there has been precious few Carlson and Bivens claims that have actually led to relief. We --

JUSTICE JACKSON: Does that help you

or hurt you?

MR. WALKER: Hmm?

JUSTICE JACKSON: Does that help you or hurt you?

MR. WALKER: Well, I -- I think there's been a lot more litigation. So I think the -- the toll that those -- that litigation in those cases take has been quite great. But, in terms of the -- the payoff for the beneficiaries, the plaintiffs, the -- the Mason and Smith article cited in the last footnote of our reply says, in last 20 years, only one Bivens claim was actually upheld after judgment on appeal.

But there are other remedies that are available. And, in fact, Bivens, search and seizure, excessive force by law enforcement officers, the FTCA allows a claim for that. Congress amended the statute after Bivens to allow it. Carlson allows claims for medical negligence of the sort that were at issue in Carlson.

JUSTICE JACKSON: Thank you.

MR. WALKER: So there are remedies that exist.

CHIEF JUSTICE ROBERTS: Thank you, counsel.

MR. WALKER: Thank you.

CHIEF JUSTICE ROBERTS: Mr. Suri.

ORAL ARGUMENT OF VIVEK SURI

FOR THE UNITED STATES, AS AMICUS CURIAE, SUPPORTING THE PETITIONER

MR. SURI: Mr. Chief Justice, and may it please the Court:

Our brief has offered three ways in which this Court could resolve the case. First, it could apply its existing standards and recognize that Carlson is now obsolete. Second, it could apply the usual stare decisis factors and explicitly overrule Carlson. And, third, it could distinguish Carlson on its facts.

We stand by all three of those arguments, but we would respectfully urge that the Court adopt one of the first two options, either of which would abrogate Carlson, fully resolve the circuit conflicts that it has created, and end the severe practical problems that it creates for prison administration.

If I might, I'd like to address one of

Justice Kavanaugh's questions, which is why can't we just say that Carlson is to be not extended any further but applied in the domain that it currently has.

The problem for that argument as I see it, Justice Kavanaugh, is the Court's decision in Abbasi. In Abbasi, the Court said the PLRA itself gives rise to a new context. It also said the availability of injunctive relief, which was theoretically possible in Carlson but was not considered, gives rise to a new context.

So, if you're going to honor that precedent, then this is a new context and you're at step 2. And we think clearly Bivens should not be extended further -- or Carlson further -- at step 2.

JUSTICE THOMAS: If we did that with respect to Carlson, either limit it or overruled it, what would be left of Bivens?

MR. SURI: We have not taken a position on what would be left of Bivens. It may be that Bivens, likewise, could be obsolete. It may be that there is some core left of Bivens that the Court could consider in

another case. But I could explain the effect of each of our various arguments.

JUSTICE THOMAS: Well, before you do that, could you give me an example of a viable Carlson claim now?

MR. SURI: No, Justice Thomas. In our view, there are no viable Carlson claims anymore. But I could explain, if it's helpful to the Court, what the effect of our various arguments are on Bivens.

Our first argument is that Carlson did not consider the separation-of-powers problems that arise in the prison context. That would not carry over to Bivens at all. That's a special problem for Carlson.

Our second argument is that there are new statutory developments that have occurred since Carlson. Now there may be statutes that people could point to in the Fourth Amendment area, but that would be something that would have to be litigated. The specific statutes we've pointed to don't carry over to the Bivens context.

And, finally, with respect to alternative remedies, Bivens itself said that

injunctions and such prospective remedies aren't good enough for Fourth Amendment claims. So that's a distinction between the Fourth Amendment there and the Eighth Amendment here.

JUSTICE JACKSON: So I have a statistic I came across that said something like 75 percent of all Bivens actions are Carlson claims. Do you have information to that effect?

MR. SURI: Our rough estimate is somewhere in the range of two thirds to three quarters. So that statistic's --

JUSTICE JACKSON: So that would have a pretty significant impact if -- if we agreed that there -- that they no longer exist on -- on the universe of Bivens claims?

MR. SURI: On the universe of claims that are raised, not necessarily on the universe that are successful because, in a lot of these cases, the prisoners' claims fail.

In addition, it's important to remember the prisoner still can bring a claim under the FTCA, so we're not leaving people without redress.

JUSTICE GORSUCH: I'd like to -- I'd

like -- sorry -- to pick up on that. Sorry to interrupt. Do you think that there's an FTCA claim that can survive the discretionary function exception? Do you agree with Mr. Walker, in other words, that when we come to that circuit split, that an unconstitutional action isn't protected under the discretionary function exception?

MR. SURI: Not on that particular ground, but we think medical malpractice cases will generally survive the discretionary function exception. That is because, as this Court said in Gaubert, the discretionary function exception applies to exercises of governmental discretion. And we don't think the types of decisions that doctors or nurses are making are covered within that exception. That is --

JUSTICE GORSUCH: Categorically?

MR. SURI: We can envision some unusual cases where, for instance, a BOP warden makes a policy decision, a regulation about medical care. That might fall within the scope of the discretionary function exception.

JUSTICE GORSUCH: But otherwise?

MR. SURI: But otherwise no.

JUSTICE GORSUCH: So, generally speaking, there is an FTCA claim here?

MR. SURI: Yes, that's correct.

JUSTICE GORSUCH: And -- and how many of these Carlson-type claims are brought under the FTCA versus under Carlson?

MR. SURI: In almost all the cases that I've encountered -- and this is just anecdotal -- there is an FTCA claim brought in parallel. And that makes sense because, in the FTCA context, you just have to show ordinary negligence. You don't have to deal with the heightened deliberate indifference standard under the Eighth Amendment. You don't have to worry about qualified immunity. You have a defendant who's able to pay, the United States.

JUSTICE GORSUCH: Right. I mean, that's a really good advantage when you're a plaintiffs' lawyer. I used to be one and I always liked to have a deep-pocket defendant.

MR. SURI: Absolutely. And one of the practical concerns that we see is that sometimes prisoners bring Carlson claims not because they have a desire to obtain relief but

to harass particular individuals.

JUSTICE GORSUCH: Well, and that was my question, is why are there cases where litigants aren't bringing the FTCA claim and are only bringing a Carlson claim? And it can't be -- I don't think it's necessarily to harass people. I wonder. Maybe it's -- it's confusion about how to -- how to proceed.

MR. SURI: One potential reason that's very real in the prison context is harassment, but another reason might be that the prisoners are pro se and are confused about how to proceed. If this Court says there are no more Carlson claims, then I think it's more likely that they will bring FTCA claims in these cases.

JUSTICE ALITO: Just so the situation is clear, could you just address the question whether Bivens in this context provides anything that is anything of value that is not available based on other remedies?

MR. SURI: Carlson's main reason for saying the FTCA was insufficient is that the FTCA does not provide for punitive damages. And that, we think, illustrates how Carlson is

an even more egregious error than other implied right of action cases than Bivens itself because, in those contexts, it was Bivens or nothing, damages or nothing. Here, you're already getting damages. And the Carlson Court was saying that's not good enough; we think you need punitive damages as well.

JUSTICE SOTOMAYOR: I'm sorry. You were getting in the past state law damages against federal officers, and what the FTCA did was eliminate that. And before Westfall, you could go to state court if you were an individual and get individual damages, correct?

MR. SURI: The logic of Bivens was that the Fourth Amendment at that point no longer mapped on to state trespass law, and, therefore, you were not necessarily guaranteed damages under the state torts you refer to.

JUSTICE SOTOMAYOR: But the point is you still had the right under some state laws?

MR. SURI: You could in some circumstances --

JUSTICE SOTOMAYOR: Right.

MR. SURI: -- seek that relief.

JUSTICE SOTOMAYOR: So, when the --

the FTCA was passed and the Westfall was passed, that eliminated state law tort claims, correct?

MR. SURI: In --

JUSTICE SOTOMAYOR: Against individuals?

MR. SURI: Yes.

JUSTICE SOTOMAYOR: And so maybe I misunderstood your colleague when he answered Justice Barrett's question about this issue. There are no individual claims against federal officers --

MR. SURI: The --

JUSTICE SOTOMAYOR: -- left once we overrule Carlson?

MR. SURI: That's right. But there would be claims against the United States --

JUSTICE SOTOMAYOR: Against the United States.

MR. SURI: -- being compensated.

JUSTICE SOTOMAYOR: Now you mentioned that the discretionary policy rule could protect a decision by wardens on medical issues.

That's a lot of these cases, isn't it?

Many wardens are establishing policies that you can't leave the prison except for once a week. That doesn't help the prisoner who's in the middle of a heart attack, right?

MR. SURI: Well, neither would Carlson because the policy-level decision-making would create a new context under Abbasi. That's one of the factors about what creates a new context.

JUSTICE SOTOMAYOR: Well, no, because it would still be a claim against the individual who didn't give adequate treatment.

MR. SURI: Nevertheless, Abbasi says that if there is a policy-level decision, that's a new context.

JUSTICE BARRETT: Mr. Suri, do you agree that Mr. Watanabe could have brought relief -- an action for injunctive relief?

MR. SURI: Yes. We think the best case for that is Abbasi itself, which recognizes a possibility of injunctions for abuse in prisons or detention facilities.

JUSTICE BARRETT: Thank you.

JUSTICE JACKSON: As a practical matter, how is that going to happen? I mean,

he's out now, so, certainly, he doesn't have injunctive relief today.

And in the middle of this two-year period of asking for additional medical treatment, is it your point that he could have tried to seek injunctive relief as a pro se prisoner in that context?

MR. SURI: He did seek injunctive relief. That's one point.

Second point, he could have sought administrative remedies, and he did seek those.

JUSTICE JACKSON: Sorry. Did --

MR. SURI: Third point --

JUSTICE JACKSON: But neither -- none of those worked, right? I mean, he didn't get the treatment as a result of any of those things.

MR. SURI: He didn't complete the administrative remedy program. And I would note for the Court that these are just allegations in the complaint, so you shouldn't draw conclusions about how the program, in fact, works based on allegations in a complaint.

And, finally, if he wants damages, he

can get them under the FTCA. We're not saying he gets no redress at all. He gets them from the United States.

JUSTICE JACKSON: Do you agree with Mr. Walker that Congress could respond to whatever we do here to reinstate the Carlson remedy if we decide that it shouldn't be there?

MR. SURI: Yes, of course.

JUSTICE GORSUCH: Mr. Suri, how about the Bivens context, the search and seizure under the FTCA? Mr. Walker indicated that that would be available too. Is that -- is that your understanding?

MR. SURI: One of the reasons we've asked the Court not to reach that is that the FTCA raises greater complications in the context of Fourth Amendment claims.

First of all, under the Court's decisions separating the Fourth Amendment from traditional trespass law, there might be some Fourth Amendment violations for which there's no corresponding tort violation that you could assert under the FTCA.

In addition, the FTCA has changed since Bivens. There was no law enforcement

proviso to the intentional torts exception at the time of Bivens, but there now is. That's an issue that you might want to consider before deciding what steps to take with respect to the Fourth Amendment.

And, finally, the discretionary function exception, at least in the government's view, might work differently because the actions of police officers are -- involve the exercise of governmental discretion at least in some cases in the ways that actions of doctors and nurses might not.

CHIEF JUSTICE ROBERTS: Thank you, counsel.

Justice Thomas?

Justice Alito?

Justice Sotomayor?

Justice Kagan?

JUSTICE KAGAN: Mr. Suri, I just want to make sure I understand the full panoply of your arguments.

What you're saying is, regardless of whether we explicitly reverse Carlson, do a typical stare decisis analysis and reverse it, regardless of whether we do that, there are no

viable Carlson claims on your view because there are new special factors -- the PLRA, the ARP -- that have come into play since Carlson that make Carlson obsolete so that we can kind of bypass the traditional stare decisis inquiry and just say, because of the passage of the PLRA, et cetera, Carlson is obsolete anyway, good-bye, no Carlson claims. Is that correct?

MR. SURI: Yes.

JUSTICE KAGAN: Okay. If we put all of that aside and we say, no, we really are looking for meaningful differences, what principally or what in the entirety do you think is a meaningful difference?

MR. SURI: I think there are a variety of things that could count as meaningful differences, but the basic test is --

JUSTICE KAGAN: Well, I mean here. I mean here.

MR. SURI: Okay. The most important is that the prisoner died in Carlson but didn't die here. That is relevant, first, because death is different under the Court's Eighth Amendment cases.

Second, because whether someone dies

affects the ability of the individual to seek administrative remedies or injunctive relief.

Third, the --

JUSTICE KAGAN: It's a very harsh rule, right? If you say to somebody, well, if he dies, that's one thing, but, if there's a life-long, extremely severe disability, that's in a different box entirely, and Congress would treat it as such or at least potentially would treat it as such?

MR. SURI: Not if you remember that the person in the second box still can obtain monetary redress through the FTCA, and that's the third reason I was going to give.

Part of what might have been motivating the Carlson Court was that states had different survivorship action rules or wrongful-death rules. And that might have created difficulties in cases where individuals die.

But you don't run into those difficulties if the prisoner is still living. He can just obtain redress through the FTCA.

JUSTICE KAGAN: You were asked whether Congress could change anything we did, and you

said yes.

I know the Justice Department, you know, would typically think of something -- a question to the effect of, is -- is what we're asking the Court to do essentially a dare to Congress to change it? Have you thought about that?

MR. SURI: I can't get into our internal deliberations about what we think Congress might or might not do, but I will say the fact that Congress could change the Bivens rules is not a sufficient justification under stare decisis principles for the Court not to act here, and that's because this is not the interpretation of a specific statute where statutory stare decisis applies.

This is more like, say, the Dormant Commerce Clause or Section 1 of the Sherman Act or an interpretive methodology decision like Loper Bright.

It's an area of judge-made law. The Court has the responsibility for making sure that that law is developed in an orderly way.

JUSTICE KAGAN: Thank you.

CHIEF JUSTICE ROBERTS: Justice

Gorsuch?

Justice Kavanaugh?

JUSTICE KAVANAUGH: On the Bivens/Carlson claims and the statistics, do -- how many result in settlements? Do you have any sense of that?

MR. SURI: In the Carlson context -- this is not a government statistic, this is a study that's been published by Professor Pfander -- something like 15 percent of claims result in some form of monetary relief.

But that study concludes that in virtually all of those cases, if not all of those cases, there is a parallel FTCA claim and, therefore, that seems to be what is driving the settlement. It's not clear that Carlson is actually adding anything other than additional litigation and potentially confusing some prisoners.

JUSTICE KAVANAUGH: Do you have any theory on why Congress has not acted with respect to Bivens or Carlson?

MR. SURI: Yes. One possibility is that Congress was unsure of its authority to abrogate those decisions. At least until 2013,

that was an open question that the -- that this Court's precedents left unresolved.

Another might be that Congress just hasn't mustered the votes in order to act one way or the other. And I respectfully suggest that that is the problem rather than the solution. Congress has a responsibility to make the tough choices about what types of damages actions are to be available both in prisons and in other contexts.

And if Congress is abdicating that responsibility to the judiciary, that's a reason for the Court to course-correct.

JUSTICE KAVANAUGH: Thank you.

CHIEF JUSTICE ROBERTS: Justice Barrett?

Justice Jackson?

Thank you, counsel.

Mr. Wesneski.

ORAL ARGUMENT OF JOSHUA M. WESNESKI

ON BEHALF OF THE RESPONDENT

MR. WESNESKI: Mr. Chief Justice, and may it please the Court:

"This far and no further" has been the Court's consistent message for Bivens and

Carlson over the past decade. "No further" means we should not extend those precedents. But "this far" means also that Carlson remains settled law within its core context and should not be reduced to a null set. We ask only that the Court adhere to that approach.

For more than four decades, Carlson has empowered federal prisoners to vindicate their constitutional rights against prison officers who wantonly inflict pain and suffering, and Congress has twice validated that remedy.

First, in the Westfall Act, it eliminated the traditional state-law remedy against federal officers that had existed since the founding, but, at the same time, it expressly preserved claims brought for violations of the Constitution.

And then, second, through the PLRA, Congress imposed an administrative exhaustion requirement on Carlson claims in direct response to this Court's decision in McCarthy.

My friend and the United States nonetheless asks this Court to reinterpret its precedent and have now conceded that their

approach would render Carlson claims -- or foreclose Carlson claims in all possible circumstances, even those arising under the precise same facts as Carlson itself.

That is nothing less than a request to overrule precedent, and it is unjustifiable in view of the decades-long interbranch dialogue on this issue. Indeed, to overrule Carlson now would disregard Congress's measured judgment in this area and eliminate a crucial bulwark against the encroachment on the constitutional rights of some of society's most vulnerable members.

We do not ask this Court to extend Carlson beyond its context, to reassess its criticism of that precedent, or to alter the new context framework.

We ask only that the Court reaffirm what it has said: "This far and no further."

I welcome the Court's questions.

JUSTICE THOMAS: You suggest in your brief that -- that Congress has ratified this line of cases, Bivens, Carlson, Davis. Precisely how did they do that?

MR. WESNESKI: I think our argument is

more specific to Carlson.

JUSTICE THOMAS: Mm-hmm.

MR. WESNESKI: I think it is in two ways. And it's first through the Westfall Act, which I would characterize more as a form of reliance, rather than ratification, because Congress, as we have discussed, was taking something away that had existed since the founding but was doing so only with the express understanding that the constitutional claims recognized under Bivens and Carlson would -- would remain.

But the PLRA, I think, is where we have real validation and ratification of the Carlson remedy. And it bears going back to the dialogue between the Court and Congress that led up to that.

Before McCarthy, before the PLRA, the administrative exhaustion provision requirement applied only to Section 1983 claims. This Court in McCarthy construed that narrowly and declined to impose a similar exhaustion requirement for Carlson claims as a matter of federal common law.

Congress then responded with -- with

the PLRA, which this Court has three times recognized was a direct response to McCarthy, and extended that administrative exhaustion requirement to all federal claims brought by prisoners.

Now, my friend has argued that that is not validation of a ratification because the PLRA applies more broadly, not just to Carlson claims. But the problem is that it's also true of the PSLRA, which this Court held in Stoneridge ratified and validated the 10(b) implied private right of action under the Exchange Act. That statute also applies to Section 9 claims and Section 18 claims, which are express private rights of action.

But this Court still said that the PSLRA was best understood was ratifying what the Court had said about 10(b) at the same time that Congress was expressing its view that this Court should not go further and expand that implied private right of action.

And we think, consistent with Abbasi and Stoneridge, that's the white -- right way to understand the PLRA as well.

JUSTICE SOTOMAYOR: What is your best

response to the Solicitor General's -- Assistant Solicitor General's point that this case is a new context because of death?

MR. WESNESKI: I think there's a few responses there. Maybe the best response is that, as we've discussed, Carlson itself depended on the conclusion that the individual himself, Mr. Jones, had a personal injury claim. That's the only reason the survivorship analysis even arose, was because it first had to conclude that there was a claim and then determine what the federal rule was going to be for survivorship of that claim.

The other response I would offer is that Congress, through the PLRA, clearly contemplated that Carlson claims other than those resulting in death would be allowed, because, as Mr. Suri mentioned, it is only those claims that don't result in death that administrative remedies are even accessible to the plaintiff.

So if -- if it is correct that Carlson claims do not exist outside of the death context, then Congress's response to McCarthy in the PLRA is essentially rendered moot

because that administrative exhaustion requirement will never apply to a Carlson claim.

JUSTICE KAVANAUGH: I think a big theme of what you heard from counsel on the other side was that you don't need Carlson or Bivens, they said, at least Mr. Walker, because the FTCA provides a remedy in meritorious cases that would otherwise merit recovery under Carlson or Bivens.

So what's your response to that? Because if that's true, that does seem to negate the need.

MR. WESNESKI: The first thing I would say is that Congress has already told us through the Westfall Act that it views the FTCA and constitutional came -- claims as complementary and not mutually exclusive.

JUSTICE KAVANAUGH: Well, that's a -- I get that response. But -- but as a practical matter, I think they were saying --

MR. WESNESKI: Yes.

JUSTICE KAVANAUGH: -- meritorious Carlson or Bivens claims would prevail under the FTCA in some form to provide some remedy in

meritorious cases. So I think you need to respond to that.

MR. WESNESKI: Yes, Your Honor. So the first thing I would say is that the FTCA, as the Court recognized not just in Carlson but has held also in FDIC v. Meyer and then again in Malesko, the virtue of a Carlson claim, its principal virtue, is the deterrent effect on the individual officer. And this Court in FDIC declined to extend Bivens to allow a claim against a federal agency precisely because doing so would eviscerate that deterrent effect.

So that's not simply Carlson's rationale. That's the rationale that this Court has offered for why Carlson and Bivens claims are necessary in the first place.

More specifically, on whether or not a plaintiff would have an FTCA claim here, there are, I think, a couple of problems with relying on the FTCA in this respect. The first is that we know the plaintiff in Carlson v. Green would not have had a cause of action under the FTCA because of Indiana's survivorship statute. So that case itself would have come out

differently.

But there are also other differences in state law. For example, the doctrine of contributory or comparative negligence could apply and, in some states, requires only 1 percent negligence on the part of the plaintiff to bar a remedy in its entirety, notwithstanding that the defendant there in those cases might have violated and intentionally violated their constitutional rights.

And I think that all goes back to what this Court said in Carlson, that there is an inherent virtue in having a uniform body of federal law. This Court recognized it again in Abbasi, the reliance interest that follows not just for individual plaintiffs but for officers themselves who know what they're going to be held accountable for and in what circumstances.

And that, I think, is all reason why the FTCA, while it might provide a remedy in some circumstances, it provides a qualitatively different remedy and may not even provide that remedy in all cases.

JUSTICE GORSUCH: Mr. --

JUSTICE KAGAN: Mr. Wesneski --

JUSTICE GORSUCH: No, please.

JUSTICE KAGAN: I'm wondering, Mr. Wesneski, whether you think there might be other factual differences besides the death versus all other injuries one that you've been asked about. So I can think of a couple if I look at the facts of Carlson and I look at the facts here.

In Carlson, there was a view that the prison officials had actively contributed to the injury, and there was also a view that the prison officials knew what was happening while it was happening. So knowledge and contribution seem actually the kinds of factual circumstances which Congress might be interested in, if it's thinking about what kind of tort remedy to create.

Why isn't that the case?

MR. WESNESKI: So I think we actually agree that there are factual distinctions here that a hypothetical legislator could -- could take into account. The problem is the Court has never articulated the new context test in that way. It's never applied it in that way.

And as my friends have now conceded today, the United States conceded in its brief, that approach would render every claim a new context claim. There are always going to be some factual distinctions. There are always going to be some differences --

JUSTICE KAGAN: But the -- the ones that I just gave you is not like, you know, what color uniform was the official wearing. These are meaningful things with respect to the proper scope of a tort remedy, knowledge, contribution. These are the kinds of things courts think about and Congress, you know, anybody that creates a remedy would think about when it decides how far the remedy goes.

And I guess one other -- a different way of saying the same thing is that this looks like a pretty standard medical malpractice case, bad, but standard, where -- where the -- the factual circumstances in Carlson look like something a good deal more than that.

MR. WESNESKI: So I think as we -- the way we understand the Court's new context test is this: Which is we're looking for a difference that's meaningful in the way in

which it raises new separation of powers questions. Not simply that it raises new facts that -- that Congress could consider, but that it actually qualitatively changes the separation of powers analysis.

That was what happened in Abbasi, where the claim there was being used to challenge executive-level policy following a historic terrorist attack, and the Court was understandably uncomfortable with the idea of using a damages claim in that way, because you would be intruding on the executive's prerogative there to determine that policy.

So the -- the factual distinctions that Your Honor has raised, I think they are things that Congress could care about, but they're not qualitatively different from Carlson in terms of the separation of powers question of who was best equipped to actually make --

JUSTICE KAGAN: Yeah. I mean, I think there really is a question here as to how far we've suggested these factual -- these differences go. I mean, one way to understand these differences is to say is it a different

claim, based on a different constitutional provision? Is it a different set, category of defendants? Is it even, like, something that is just so obviously a different context, like, we're dealing with national security issues, we're dealing with border issues? You know, but -- but we also have suggested in a couple of these recent cases, it's anything Congress could reasonably be concerned about when thinking about fashioning a remedy.

And, again, you're fashioning a tort remedy here. Like, what's -- what -- I feel like I'm asking the same question again, but it would be entirely natural to say, do we want this tort remedy to apply? What's our knowledge standard? What's our contribution standard? Exactly the kinds of differences that exist between this case and Carlson.

MR. WESNESKI: So I think a couple of things there, Your Honor. First off, I -- I read Abbasi a little bit differently. I don't think it's suggesting that a new context arises anytime there's a factual distinction that Congress could think is -- is relevant.

And the reason why I think that's the

case is because Abbasi says very clearly that nothing in the opinion is intended to cast doubt on the force or necessity of Bivens within its context.

So, if -- if the test that the Court was laying out in Abbasi allows us to find a new context anytime there's any factual distinction -- and there's always going to be some factual distinction that could be relevant. I mean, Congress sets statute of limitations, right.

JUSTICE ALITO: Well, Justice Kagan is not talking about just any old distinction. She is talking about specific differences. One to which reference has been made is death versus other types of injuries, lesser injuries. Another is affirmative misconduct as opposed to the failure to provide -- to provide treatment. And she mentioned some others.

So these are not just any old differences. And you began by saying that you are not asking us to extend Carlson. You just want us to apply Carlson as it now stands.

But why are the things that I've mentioned and that Justice Kagan has mentioned

not features of where Carlson -- of Carlson's contours at the present time?

MR. WESNESKI: So I think, in -- in large part, the questions, for example, about knowledge, affirmative conduct, they actually factor into the substantive standard, the Eighth Amendment standard for whether or not a claim can be brought here at all and then, again, perhaps in the qualified-immunity analysis of asking whether there's a clearly established precedent here.

So understanding or evaluating whether someone has acted deliberately or negligently is already a part of the analysis, but it's not at the Carlson step. It's at the substantive Eighth Amendment step. And so, when this Court in Carlson recognized an Eighth Amendment claim, it was necessarily incorporating into that standard all those considerations about what level of recklessness versus knowledge versus deliberate indifference is required for a claim to be asserted.

JUSTICE JACKSON: And I think consistent with what you're --

JUSTICE SOTOMAYOR: I -- I can --

JUSTICE JACKSON: I think consistent with what you're saying is the way in which we in other cases have described Carlson.

I mean, we didn't describe Carlson when we talked about it relative to the death being in a particular factor. We said things like -- and this is from Ziglar in 2017 -- that Carlson "allows a Bivens claim for prisoner mistreatment, specifically for failure to provide medical care."

In Egbert, we said the same thing. In McCarthy, we said the same thing.

We seem to be conceptualizing the Carlson level of inquiry at this higher state of generality, which is what you just said in response to Justice Alito.

MR. WESNESKI: I agree with that, Your Honor. And it's particularly significant, again, because Congress has legislated in response, right?

At the time Congress is passing the PLRA, it knows that McCarthy was a Carlson case where there was no death, where there was no acute emergency, and this Court was declining to impose an administrative exhaustion

requirement.

So Congress, in passing the PLRA, understood the class of Carlson claims that were being brought yet, instead of overruling it, erected a procedural structure around it. Same at the time of the Westfall Act.

Again, for the vast better part of four decades, there's never been any question among the lower courts that a claim like Mr. Watanabe's arose in the prototypical Carlson context. That dispute came about only over the past few years after some courts, we believe, have started to misinterpret this Court's decision in Egbert as essentially foreclosing all of these claims.

So this has not proven, actually, to be an unworkable or challenging exercise up until recently.

JUSTICE SOTOMAYOR: I wanted to follow up on Justice Kagan and Justice Alito's question about why is death different.

You explained why reckless -- negligent -- medical negligence is the very essence of an Eighth Amendment substantive issue. Was someone intentionally and

deliberately inflicting pain and suffering or -- or non-treatment on a prisoner? And so that's going to get addressed in -- in that prong of the question, correct?

MR. WESNESKI: Yes, Your Honor.

JUSTICE SOTOMAYOR: But, on the -- death is different. Why don't -- isn't that the same thing?

MR. WESNESKI: I think it is also the case that there's a conceptual mismatch between using "death is different" as a distinguishing factor and the substantive Eighth Amendment claim that is being brought here because the remedy or -- excuse me -- the injury that's being remedied there is the pain and suffering attendant to the deliberate indifference, not the ultimate consequence, right? It is the actual suffering that has occurred.

And it also runs into the deterrence problem.

JUSTICE SOTOMAYOR: So what does it matter -- I think Justice Kagan asked earlier -- if you ignore systems -- systems for a period of time and somebody suffers a heart attack and is permanently disabled, what does

it matter to them if they died or are permanently disabled? The indifference was the same, correct?

MR. WESNESKI: And I think, actually, for Eighth Amendment purposes, we would describe that violation as more egregious, not less, because it extends the pain and suffering even further, and --

JUSTICE ALITO: Well, wouldn't it -- I'm sorry, finish your --

MR. WESNESKI: No, please.

JUSTICE ALITO: No, I didn't mean to interrupt.

MR. WESNESKI: Just that that is another way, I think, in which there's a mismatch between the substantive standard and the distinction that they've offered here.

JUSTICE ALITO: What do you think it would --

CHIEF JUSTICE ROBERTS: I -- I --

JUSTICE ALITO: Oh, I'm sorry, go ahead.

CHIEF JUSTICE ROBERTS: I was just going to say I -- I wanted to make sure I got that right.

You're saying it was more serious if the person didn't die?

MR. WESNESKI: For -- not more serious, but for purposes of the Eighth Amendment, what the -- what the Eighth Amendment is concerned with is the pain and suffering that leads up to the death, not the death itself.

And so for them to draw the line in this way I actually think is kind of backwards as a matter of Eighth Amendment law.

CHIEF JUSTICE ROBERTS: So -- but I guess my question's the same: You think it's a more serious violation if the person doesn't die?

MR. WESNESKI: It's a more serious constitutional violation, but -- but -- but --

CHIEF JUSTICE ROBERTS: Still, death is a little --

MR. WESNESKI: Yeah, yeah, I mean, as a -- as a matter of sort of common sense and tort law, yes, I would say death is very significant.

But the problem is the mismatch between the Eighth Amendment and the

distinction that they're drawing.

JUSTICE ALITO: Do you think it would be irrational for Congress to think, on the one hand, we want to provide a remedy for really egregious instances of medical malpractice perpetrated on prisoners, but, on the other hand, we understand that prisoners are very litigious and may have all sorts of complaints against the doctors and the nurses who provide them with care.

So we're going to draw a distinction between situations where the prisoner actually dies and other situations. As Justice Kagan said, it's a hard line, but do you think it's an irrational line when they're potentially balancing competing objectives?

MR. WESNESKI: I don't think it would be an irrational line for a hypothetical Congress to do that. But I think we should start by asking ourselves: What has Congress actually done here, right?

When it passed the Westfall Act, there was no notion that Carlson was limited to claims in which the prisoner died. And yet Congress still took the additional step, after

enacting an extensive and sweeping preemption provision, to then except from that Carlson claims and Bivens claims.

And then, in the PLRA, again, Congress set up an administrative exhaustion scheme that only makes sense for Carlson claims if claims can be pursued by prisoners who did not die from their injury.

So, yes, I understand that -- that that is a possible route that Congress could go, but I think we should be focusing on what is it that Congress has actually done and told us in this area about what types of claims it thinks are sustainable.

JUSTICE GORSUCH: Counsel, you -- you indicated that up until Egbert, you thought the lower courts were pretty clear about how to apply this two-step regime, but since then, there's been a fair amount of confusion, is that right?

MR. WESNESKI: I think, with -- with respect to Mr. Watanabe's claim, I mean that it has not seriously been disputed that a claim like this arises in the prototypical Carlson --

JUSTICE GORSUCH: But now there is a

fair amount of confusion because we said in Egbert to ask whether there's any reason to think Congress may be better equipped. You think that standard has proven difficult for lower courts to deal with?

MR. WESNESKI: I think it has. And I think also the Court's statement that the two steps sometimes collapse into each other, which I believe is correct but for a different reason than my -- than my friend does.

JUSTICE GORSUCH: But you think that's generated confusion in the lower courts?

MR. WESNESKI: I -- I do, Your Honor, yes.

JUSTICE GORSUCH: Okay. And then I'm just curious: Your client, I understand, was proceeding pro se --

MR. WESNESKI: Yes.

JUSTICE GORSUCH: -- and did not bring an FTCA claim if I --

MR. WESNESKI: That is correct.

JUSTICE GORSUCH: And do you think part of that might be because -- because of confusion about which is the best route and how to proceed in these cases, that the pro se

litigants sometimes don't know about FTCA claims?

MR. WESNESKI: I think a large problem is the -- the pro se litigants not knowing about the FTCA claims and also not knowing how to navigate the administrative procedures that you have to go through in order to assert an FTCA claim.

There are obviously administrative exhaustion requirements for a Carlson claim, but those are within the walls of the prison. Everybody understands how those work at a general level.

And I think there are practical challenges with pursuing an FTCA claim on a pro se basis.

JUSTICE GORSUCH: Thank you.

JUSTICE BARRETT: Counsel, you agree that Congress could eliminate Bivens actions tomorrow if it wanted?

MR. WESNESKI: That is our understanding of the precedent. And, yes, we agree with that.

JUSTICE BARRETT: Okay. One other question. Your friends on the other side point

to the Patriot Act as a subsequent legislative development. And I confess, on the question of whether that's an alternative remedy in a cause of action, I don't find the existence of that statute really neither -- I think it's neither here nor there. But you were emphasizing deterrence before and the importance of Bivens actions in deterring unconstitutional conduct by prison officials.

The Patriot Act, as I understand it, does tighten up prison regulations and provide for discipline of officials that do violate regulations in federal law. Would that bear on whether it's appropriate to have a Carlson remedy here, given that there are other mechanisms Congress has put in place for purposes of deterrence?

MR. WESNESKI: Well, so two things. First off, I think I understand the Patriot Act to apply simply to all Department of Justice divisions, which include the Bureau of Prisons, but is not specifically narrowed to that.

But I -- I do think this Court has recognized over time that there is something uniquely powerful about the threat of

individual liability that serves an important and additional deterrence purposes.

We're not suggesting that Carlson is the only thing out there that prevents officers from acting unconstitutionally. Of course, there is many other motivations for doing that. But this Court has consistently recognized that this type of claim has a special role in that place.

And I -- I think it's an especially important for a plaintiff of this type. Prisoners have been long understood as uniquely vulnerable within our common-law tradition. And there's unique responsibilities and obligations of the jailer that flow from that.

And so if we're going to hold deterrence up in any place, I think it has to be in this context, where we know these individuals are uniquely susceptible to constitutional violations.

JUSTICE JACKSON: I also think the other mechanisms analysis sort of proceeds on the assumption that Congress only wanted there to be one way to go about this.

And I'm just wondering how viable or

justified is that assumption?

MR. WESNESKI: I don't think it's -- I think it's actually contradicted by the Westfall Act, because Congress is clearly contemplating there that there's going to be two remedies. There's going to be the FTCA and there's going to be the constitutional claim. So I wouldn't just say it's unsupported. I think it's actually foreclosed by what Congress has done.

And -- and I would add also to that the PLRA, which describes administrative remedies as a prerequisite to and not a substitute for other claims such as a Carlson claim or a 1983 claim.

CHIEF JUSTICE ROBERTS: Justice Thomas?

Justice Alito, anything?

Justice Sotomayor?

Justice Kagan?

Justice Kavanaugh?

Justice Barrett?

Thank you, counsel.

MR. WESNESKI: Thank you.

CHIEF JUSTICE ROBERTS: Rebuttal,

Mr. Walker.

REBUTTAL ARGUMENT OF LUCAS M. WALKER

ON BEHALF OF THE PETITIONER

MR. WALKER: Thank you. So my friend challenged the idea that this should be looked at from a legislative perspective, that a difference is meaningful if Congress could think that it's meaningful from a policy perspective. But I think that's exactly the principles this Court articulated in Egbert and all those other cases preceding it.

This is a legislative endeavor that has to be performed with the utmost deference to Congress. It requires considering policy considerations that Congress is far better suited to weigh and the judiciary has questionable authority at best to weigh. Those are paraphrases or quotes from Egbert itself.

And if a court is a saying we're not going to get to the question of whether Congress might be better suited because there's a difference here, Congress might think that it's meaningful but we don't think it's meaningful, I think that just sets up the exact separation of powers problem that the framework

this Court has set up is trying to avoid.

Yes, it may be a bit of a patchwork, but that's because the Court has been trying to get back and back and back to the proper approach, which is that Congress is really supposed to be making all of these damages remedies decisions.

I believe my -- my -- my friend admitted that if the test is whether Congress could find a meaningful difference, that those exist here. "Damages or nothing" is something this Court has found meaningful. Alternative remedial structures and other signs that Congress has been active in this area without arriving at a remedy, those exist. This Court has already found them meaningful.

The suggestion that it's just -- it's the same right and it's the same mechanism, therefore, it's the same context, is something the Court rejected emphatically in Ziglar, specifically in the context of Carlson claims. I think it's page 147 of that decision.

Here we've got all sorts of differences. The question of whether death is a meaningful difference, deterrence is supposed

to be the sole concern of Bivens. But Egbert tells us that deterrence is something that Congress is supposed to calibrate. And we've seen in statute after statute that when it calibrates appropriate deterrence, the fact that death resulted or didn't result is very often something that results in enhanced deterrence or not. That is a meaningful difference, and I think that alone -- in addition to the other ones that we have here.

How the Court has previously described Carlson, Carlson's first sentence says that the inmate died. In Minneci, the Court described Carlson as one where he had died as a result of a violation, and as a result, there was no state damages remedy. So the Court has described it in those more granular terms as well.

The Westfall Act, it doesn't affect the new context inquiry at all. That's what Hernandez said. And so all those meaningful differences are proper to find that this is new context.

But as the question as to whether it would prevent overruling Carlson and Bivens, I

believe my -- my friend abandoned any argument that it constitutes a ratification. He's relying just now on a reliance argument. But that rests on the -- on the -- the premise that Congress thought it was taking away something, a common-law tort liability against individual officers. The findings enacted in the text of the statute say Congress thought there was no liability. There was already a remedy in place that this Court's Westfall decision had eliminated. And all Congress was doing was restoring that law and sharing a damages remedy against the United States.

CHIEF JUSTICE ROBERTS: Thank you, counsel.

The case is submitted.

(Whereupon, at 11:28 a.m., the case was submitted.)

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