No. 25-417

IN THE

Supreme Court of the United States

FRANCIS NIELSEN,

Petitioner,

v.

KEKAI WATANABE,

Respondent.

On Writ of Certiorari to the U.S. Court of Appeals for the Ninth Circuit

BRIEF OF CONSTITUTIONAL ACCOUNTABILITY CENTER AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICUS CURIAE*[1]

Constitutional Accountability Center (CAC) is a think tank and public interest law firm dedicated to fulfilling the progressive promise of the Constitution's text and history. CAC works in our courts, through our government, and with legal scholars to improve understanding of the Constitution and to preserve the rights and freedoms it guarantees. CAC has a strong interest in ensuring meaningful access to the courts, in accordance with constitutional text and history, and accordingly has an interest in this case.

INTRODUCTION AND SUMMARY OF ARGUMENT

Kekai Watanabe was "brutally" attacked in a fight at a Honolulu federal prison and "sustained severe injuries," including a broken coccyx. Pet. App. 2a, 4a. He presented at sick call with "severe back pain" and "known and visible injuries" and requested medical attention. *Id.* at 4a. Francis Nielsen, a federal prison nurse, told him "to stop being a cry baby." *Id.* Nielsen refused to send Watanabe to a hospital or to provide any medical care besides "over-the-counter pain medication." *Id.* When Watanabe finally received an x-ray seven months later, the scan revealed that his coccyx was in fact broken and that pieces of it had "migrated and entered the surrounding soft tissue." *Id.*

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[1] No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund its preparation or submission. No person other than *amicus* or its counsel made a monetary contribution to its preparation or submission.

Watanabe subsequently sued Nielsen seeking money damages to redress Nielsen's deliberate indifference to his serious injuries. The Constitution's text and history make plain that he can bring this suit because individuals can sue in a court of law to hold federal officers accountable for violating their constitutionally guaranteed rights, as this Court held in *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). There, recognizing that "damages have been regarded as the ordinary remedy for an invasion of personal interests in liberty," *id.* at 395, this Court "vindicate[d] the Constitution by allowing some redress for injuries," *Ziglar v. Abbasi*, 582 U.S. 120, 134 (2017); *see Bivens*, 403 U.S. at 395 (holding that "damages may be obtained for injuries consequent upon" federal officials' violation of the Constitution).

The Constitution's text expressly protects fundamental rights but says little about the legal remedies available for their violation. That reflects the fact that the Constitution was "layered on top" of an existing "common law tradition" designed to hold government officers accountable for committing legal wrongs. Stephen E. Sachs, *Constitutional Backdrops*, 80 Geo. Wash. L. Rev. 1813, 1822 (2012). This legal backdrop against which the Constitution was drafted, debated, and ratified ensures that "[n]o man in this country is so high that he is above the law. No officer of the law may set that law at defiance with impunity. All the officers of the government, from the highest to the lowest, are creatures of the law and are bound to obey it." *United States v. Lee*, 106 U.S. 196, 220 (1882).

Because the Constitution was drafted against this background common-law principle of officer accountability, federal officers, including prison officials, "are amenable for their injurious acts to the

judicial tribunals of the country, at the suit of the oppressed." 2 Joseph Story, *Commentaries on the Constitution of the United States* § 1676, at 508 (3d ed. 1858). Such suits for damages against federal officers have been a fundamental part of "our constitutional system since the dawn of the Republic." *Tanzin v. Tanvir*, 592 U.S. 43, 52 (2020). When courts entertain damages suits against federal officers who have allegedly violated the Constitution, they do not intrude upon Congress's legislative power. Instead, they provide an important check on federal-government action and ensure judicial redress for abuse of authority by federal officers as contemplated by the Constitution.

Two precepts embedded in the Constitution's text and history support permitting an action here. First, when the Framers wrote the Constitution, they gave the federal judiciary a critical role in our system of separated powers. As drafted, Article III established a federal judiciary with broad authority to enforce the Constitution's limitations on the power of government in cases and controversies that come before the federal courts. Article III courts thus perform an essential checking function on the political branches of government, ensuring fidelity to the Constitution's structure and its guarantee of individual rights.

The Framers understood that constitutional "[l]imitations . . . can be preserved in practice no other way than through the medium of courts of justice, whose duty it must be to declare all acts contrary to the manifest tenor of the Constitution void. Without this, all the reservations of particular rights or privileges would amount to nothing." *The Federalist No. 78*, at 466 (Alexander Hamilton) (Clinton Rossiter ed., 1961). In the Framers' constitutional design, when other branches transgress the Constitution's

limits, "the judicial department is a constitutional check." 2 *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* 196 (Jonathan Elliot ed., 1836) [hereinafter *Elliot's Debates*].

Second, and related to the first, the Framers wrote Article III to ensure that where there is a legal right, there is also a legal remedy for violation of that right. The Framers drafted the Constitution against the backdrop of English common law, and they understood that legal rights were meaningless without the ability to go to court to obtain a remedy when those rights were violated. As this Court recognized in *Marbury v. Madison*, "it is a general and indisputable rule, that where there is a legal right, there is also a legal remedy[,] by suit or action at law, whenever that right is invaded." 5 U.S. (1 Cranch) 137, 163 (1803) (quoting 3 William Blackstone, *Commentaries* *23). *Marbury* affirmed that "[t]he very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury." *Id*.

As the states debated ratification, concerns emerged that the Constitution did not adequately limit the government's ability to punish, leaving room for federal officials to abuse their power and impose torture and barbarity without accountability. In this context, the Eighth Amendment was drafted and ratified to bar the federal government from inflicting "cruel and unusual punishments." U.S. Const. amend. VIII.

By the time of the Framing, prisons had long been recognized as places where the threat of "cruel and unusual punishments" was especially acute, whether through intolerable conditions, abuse by prison officials, or sheer neglect. English law had responded

to this concern by developing doctrines that emphasized that a "prisoner is not to be punished in gaol, but to be kept safely." *R v. Huggins* (1730) 92 Eng. Rep. 518, 522; 2 Raym. Ld. 1574, 1579 (K.B.). These doctrines recognized that prison officials were obliged to protect the health and safety of prisoners in their care. And they were enforced by English courts, which held officials who abused their power to account through fines, orders to change prison conditions, removal from office, and even criminal prosecution. *See infra* Section II.

Consistent with that history, this Court recognized a half-century ago that prison officials' deliberate indifference to a prisoner's serious medical needs violates the Eighth Amendment's bar on cruel and unusual punishment. *See Estelle v. Gamble*, 429 U.S. 97, 104 (1976). That is because such indifference can cause prisoners "physical 'torture,'" one of the "evils of most immediate concern" to the Eighth Amendment's drafters. *Id.* at 103 (quoting *In re Kemmler*, 136 U.S. 436, 447 (1890)); *see Farmer v. Brennan*, 511 U.S. 825, 828 (1994). Following that recognition, this Court held in *Carlson v. Green* "that the Eighth Amendment Cruel and Unusual Punishments Clause gave [federal prisoners] a damages remedy for failure to provide adequate medical treatment." *Ziglar*, 582 U.S. at 131. *Carlson* confirmed that *Bivens* claims "directly under the Constitution" are available in the prison context to remedy exactly the harm Watanabe experienced—Nielsen's unconstitutional deliberate indifference to his serious bodily injuries. *Carlson v. Green*, 446 U.S. 14, 16-18 (1980).

Thus, although this Court has been reluctant to extend *Bivens* to "any new context or new category of defendants," *Ziglar*, 582 U.S. at 135 (quoting *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 68 (2001)), this

case falls squarely within the context this Court already recognized and approved in *Carlson*: federal prison officials' violation of the Eighth Amendment's ban on deliberate indifference to a serious medical need. Indeed, even as this Court has declined to extend *Bivens* to new contexts, it has continued to acknowledge the existence of liability under *Carlson*. *See Ziglar*, 582 U.S. at 131; *Egbert v. Boule*, 596 U.S. 482, 490-91 (2022). It should do so again in this case.

ARGUMENT

I. Under Article III, Federal Courts Can Grant Relief When Government Officials Violate Constitutional Rights.

A. Article III's Text and History Make Clear that Federal Courts Have Broad Power to Protect Constitutional Rights and Prevent Abuse of Power by the Government.

Article III of the Constitution broadly extends the "judicial Power" to nine categories of cases and controversies, including "all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority." U.S. Const. art. III, § 2, cl. 1. Article III's plain language empowers the "judicial department" to "decide all cases of every description, arising under the constitution or laws of the United States," obliging federal courts to "decid[e] every judicial question which grows out of the constitution and laws." *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 382, 384 (1821).

The Constitution's sweeping grant of judicial power to the newly created federal courts was a direct response to one of the infirmities of the Articles of Confederation, which established a single branch of

the federal government and no independent court system. *See* Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 Yale L.J. 1425, 1443 (1987) (explaining that Confederation courts were "pitiful creatures of Congress, dependent on its pleasure for their place, tenure, salary, and power"). Under the dysfunctional Confederation government, individuals could not go to court to enforce federal legal protections, prompting Alexander Hamilton to observe that "[l]aws are a dead letter without courts to expound and define their true meaning and operation." *The Federalist No. 22*, *supra*, at 150 (Alexander Hamilton).

The Framers recognized that "there ought always to be a constitutional method of giving efficacy to constitutional provisions. What, for instance, would avail restrictions on the authority of the State legislatures, without some constitutional mode of enforcing the observance of them? . . . No man of sense will believe that such prohibitions would be scrupulously regarded without some effectual power in the government to restrain or correct the infractions of them." *The Federalist No. 80*, *supra*, at 475-76 (Alexander Hamilton).

At the Philadelphia Convention, the Framers debated different mechanisms for ensuring compliance with the Constitution. As the Convention unfolded, the Framers chose judicial review as a robust constitutional check designed to preserve liberty and guarantee constitutional accountability. Although the judiciary would not have "the sword or the purse," *The Federalist No. 78*, *supra*, at 465 (Alexander Hamilton), it would retain broad powers to enforce constitutional limitations and to maintain the rule of law by adjudicating cases and controversies.

Over the course of the Convention, the Framers expanded the federal courts' jurisdiction to ensure that

the Article III judiciary would be "competent to the decision of all questions arising out of the constitution," 4 *Elliot's Debates*, *supra*, at 156, and federal laws, giving the federal courts the power to decide "all questions arising upon their construction, and in a judicial manner to carry those laws into execution," Luther Martin, *The Genuine Information, Delivered to the Legislature of the State of Maryland, Relative to the Proceedings of the General Convention* (Nov. 29, 1787), *reprinted in* 3 *The Records of the Federal Convention of 1787*, at 172, 220 (Max Farrand ed., 1911).

In the ensuing debates over ratification, Federalists and Anti-Federalists alike agreed that Article III gave the federal courts broad powers to enforce the Constitution's limits on the power of government. In the states' ratifying conventions, the Constitution's supporters repeatedly argued that the judiciary would provide a critical check on the political branches by guaranteeing individual rights and ensuring compliance with the Constitution's structure.

At the Virginia ratifying convention, John Marshall proclaimed, "[t]o what quarter will you look for protection from an infringement on the Constitution, if you will not give the power to the judiciary? There is no other body that can afford such a protection." 3 *Elliot's Debates*, *supra*, at 554. James Madison explained the Constitution's "new policy" of submitting constitutional questions to the "judiciary of the United States": "[t]hat causes of a federal nature will arise, will be obvious to every gentleman who will recollect that the states are laid under restrictions, and that the rights of the Union are secured by these restrictions." *Id.* at 532. At the North Carolina ratifying convention, Richard Dobbs Spaight insisted that "if any man [i]s injured by an officer of the United

States, he could get redress by a suit at law." 4 *id.* at 37.

Anti-Federalists complained bitterly about Article III's breadth, insisting that "[t]he jurisdiction of all cases arising under the Constitution and the laws of the Union is of stupendous magnitude." 3 *id.* at 565. But those arguments did not carry the day. The state conventions rejected Anti-Federalist claims that the judicial power conferred in Article III was too broad and ratified the Constitution, giving the newly created federal courts sweeping judicial power to ensure that "the Constitution should be carried into effect, that the laws should be executed, justice equally done to all the community, and treaties observed." 4 *id.* at 160. The American people thus recognized that "[t]hese ends can only be accomplished by a general, paramount judiciary." *Id.*

In 1789, when the Bill of Rights was added to the Constitution, the Framers reaffirmed the role of the federal courts in ensuring that the government would respect constitutional limitations. Introducing the Bill of Rights in Congress, James Madison observed that if it were "incorporated into the constitution, independent tribunals of justice will consider themselves in a peculiar manner the guardians of those rights." 1 Annals of Cong. 457 (1789) (Joseph Gales ed., 1834). "[T]hey will be an impenetrable bulwark against every assumption of power in the legislative or executive," he continued, and "they will be naturally led to resist every encroachment upon rights expressly stipulated for in the constitution by the declaration of rights." *Id.*

Madison recognized that "causes of a federal nature" will arise under those provisions of the Constitution in which "states are laid under restrictions," 3 *Elliot's Debates*, *supra*, at 532, and

insisted that the federal courts would be obliged to enforce the rights laid out in the Bill of Rights in cases that came before them. Judicial review was the key to ensuring that the guarantees of the Bill of Rights were not "paper barriers . . . too weak to be worthy of attention," but rather real, enforceable limits on the power of the federal government. 1 Annals of Cong., *supra*, at 455.

In creating an independent federal judiciary with the power to enforce constitutional limitations and maintain the rule of law, the Framers incorporated longstanding common-law principles that allowed courts to vindicate individual rights, as the next Section discusses.

B. The Framers Wrote Article III to Ensure that Where a Legal Right Exists, so Does a Legal Remedy for that Right's Infringement.

The Constitution was written, debated, and ratified against a legal landscape that held federal officers accountable for violating constitutionally guaranteed rights. *See* Andrew Kent, *Lessons for* Bivens *and Qualified Immunity Debates from Nineteenth-Century Damages Litigation Against Federal Officers*, 96 Notre Dame L. Rev. 1755, 1758 (2021) ("[T]he Framers and ratifiers of the Constitution in 1787-88 expected that common law or general law would supply forms of action to contest many kinds of misconduct by federal officers." (footnote omitted)); Richard H. Fallon, Jr., *Bidding Farewell to Constitutional Torts*, 107 Calif. L. Rev. 933, 942-43 (2019). ("When harmed by official misconduct at the dawn of constitutional history, aggrieved parties could normally seek redress by invoking forms of action available at common law and in equity that included suits against governmental officials under ordinary tort law."). The Framers, who

recognized that a legal right is meaningless if individuals lack the ability to go to court and obtain a remedy when it is violated, wrote Article III to ensure that such legal remedies would be available under the new constitutional structure they created.

Steeped in the writings of William Blackstone, the Framers understood that rights and remedies must go hand in hand if courts are to play their essential role in the Constitution's system of separated powers: expounding the law and vindicating individual liberty. *See The Federalist No. 43*, *supra*, at 274 (James Madison) ("[A] right implies a remedy."). As Blackstone had written, it was a "general and indisputable rule, that where there is a legal right there is also a legal remedy, by suit or action at law, whenever that right is invaded." 3 Blackstone, *Commentaries* *23. "[I]n vain would rights be declared, in vain directed to be observed," Blackstone explained, "if there were no method of recovering and asserting those rights, when wrongfully withheld or invaded. This is what we mean properly, when we speak of the protection of the law." 1 *id.* at *56; *see Spokeo, Inc. v. Robins*, 578 U.S. 330, 344 (2016) (Thomas, J., concurring) ("Historically, common-law courts possessed broad power to adjudicate suits involving the alleged violation of private rights, even when plaintiffs alleged only the violation of those rights and nothing more."); *TransUnion LLC v. Ramirez*, 594 U.S. 413, 448 (2021) (Thomas, J., dissenting) ("The principle that the violation of an individual right gives rise to an actionable harm was widespread at the founding.").

These fundamental rule-of-law values were affirmed by Founding-era state constitutions that guaranteed redress for violations of legal rights. The Massachusetts Constitution of 1780, for example,

provided that "[e]very subject . . . ought to find a certain remedy, by having recourse to the laws, for all injuries or wrongs which he may receive in his person, property, or character." Mass. Const. art. XI. It further elaborated on that principle, declaring that "[h]e ought to obtain right and justice freely, and without being obliged to purchase it; completely, and without any denial; promptly, and without delay, conformably to the laws." *Id.* Other state constitutions used similar formulations to protect the right of individuals to seek redress in court for violations of their legal rights. *See, e.g.*, Md. Declaration of Rts. of 1776, art. XVII; N.H. Const. of 1784, pt. 1, art. XIV; Vt. Const. of 1786, ch. 1, art. IV; Pa. Const. of 1790, art. IX, § 11; Del. Const. of 1792, art. I, § 9; Ky. Const. of 1792, art. XII, § 13; Tenn. Const. of 1796, art. XI, § 17.

In *Marbury v. Madison*, Chief Justice Marshall recognized that the federal Constitution also secured these fundamental principles. Under Article III, he explained, the "province of the court is, solely, to decide on the rights of individuals," and he invoked Blackstone's discussion of common-law principles that ensure that "every right, when withheld, must have a remedy, and every injury its proper redress." *Marbury*, 5 U.S. (1 Cranch) at 163, 170 (quoting in part 3 Blackstone, *supra*, at *109). As *Marbury* observed, a broad understanding of the individual's right to go to court to redress violations of personal rights was necessary to secure both "[t]he very essence of civil liberty"—"the right of every individual to claim the protection of the laws, whenever he receives an injury"—and the Constitution's promise of a "government of laws, and not of men." *Id.* at 163.

"From the earliest years of the Republic, th[is] Court has recognized the power of the Judiciary to

award appropriate remedies to redress injuries actionable in federal court." *Franklin v. Gwinnett Cnty. Pub. Schs.*, 503 U.S. 60, 66 (1992). In *Marbury*, it did not matter that federal law did not grant an express right of action to Marbury, nor even that "the mandamus, now moved for, is not for the performance of an act expressly enjoined by statute." *Marbury*, 5 U.S. (1 Cranch) at 172. Because the refusal to deliver Marbury's commission violated his individual right to the office, he had "a right to resort to the laws of his country for a remedy." *Id.* at 166; *see id.* at 167 (explaining that such suits are "examinable in a court"). For more than two centuries since, the "historic judicial authority to award appropriate relief . . . has been thought necessary to provide an important safeguard against abuses of legislative and executive power" and "to ensure an independent Judiciary." *Franklin*, 503 U.S. at 74; *see Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 350 (1816) (rejecting a construction of Article III that "would, in many cases," result in "rights without corresponding remedies"); *Kendall v. United States ex rel. Stokes*, 37 U.S. (12 Pet.) 524, 624 (1838) (explaining that it would be a "monstrous absurdity in a well organized government, that there should be no remedy, although a clear and undeniable right should be shown to exist").

II. The Eighth Amendment Was Adopted to Guard Against a Government that Could Punish Without Limits.

The absence of a Bill of Rights in the original Constitution launched an avalanche of criticism, as many insisted that the Constitution was deficient without guarantees for substantive individual rights essential to liberty. Among the rights that the Founding generation sought to safeguard in a Bill of

Rights was protection against the political branches' power to engage in abusive punishment, including of those in government custody. Indeed, by the time of the Founding, the notion that government had to protect individuals in its custody had deeply established roots in English law.

1. At the time of the Framing, it was commonly accepted that prisons presented a particular risk of abusive punishment. To begin, prisoners were uniquely vulnerable; while in custody, they depended on prison officials because they were in a position where they "cannot help [themselves]." *Huggins*, 92 Eng. Rep. at 522. Prison officials, presented with that vulnerability, were viewed as a "merciless race of men," warranting an "extraordinary anxiety of our law in favour of prisoners." William Eden, *Principles of Penal Law* 47 (1771). And absent "attention" and oversight, prisons inevitably degraded in their ability to "secur[e] the prisoners; and preserv[e] good order, cleanliness." John Howard, *The State of the Prisons in England and Wales* 33 (1777); *see id.* at 34 (noting that prisons outside magistrates' control were "more apt to abuse their prisoners" in "shocking" and "torment[ing]" ways). Prisons were thus viewed as fertile ground for "secret tyranny." Eden, *supra*, at 47.

Consistent with that understanding, English law recognized a pair of linked principles: "A prisoner is not to be punished in gaol, but to be kept safely." *Huggins*, 92 Eng. Rep. at 522.

First, prisons could not inflict punishment above that imposed by incarceration itself (through, for example, poor conditions or jailer misconduct). Prison officials had to maintain a basic level of health and safety, "lest the necessary miseries of a gaol be aggravated by the unrestrained cruelty of the gaoler." Eden, *supra*, at 46. "The laws of England do not suffer

private executions. No condemned malefactor may be secretly put to death; nor murdered in a prison directly or indirectly: much less ought those to be destroyed there whose sentence does not affect their life." Howard, *supra*, at 38; *see id.* at 17 & n.* (lamenting that more prisoners were "destroyed" by gaol fever "than were put to death by all the public executions in the kingdom").[2] Writing later, physician W.A. Guy recounted the "gaol fever, the small-pox, and other fatal maladies, which decimated our prisons less than a century ago" and imposed "punishment" on eighteenth-century prisoners "beyond that which the law award[ed]." W.A. Guy, *On Some Results of a Recent Census of the Population of the Convict Prisons in England* (1862), *reprinted in* 4 *Nineteenth-Century Crime and Punishment* 101, 114 (Victor Bailey ed., 2022).

Second, prison officials had a duty to protect prisoners. A 1730 case, *R v. Huggins*, concerned prison officials' criminal liability for the death of a prisoner kept in unhygienic conditions directly above the "common sewer." *Huggins*, 92 Eng. Rep. at 519. *Huggins* recognized that prison officials owed prisoners a "duty" of care that is violated when,

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[2] The risk of extralegal punishment was acute. "Outbreaks of gaol fever," another name for typhus, were "common in the 1750s." J.S. Cockburn, *A History of English Assizes 1558-1714*, at 53 n.4 (1972). The disease regularly killed hundreds of people in prisons and beyond, including sitting judges and the Lord Mayor of London. *See* Howard, *supra*, at 17-19; Frederick Willcocks, *The Black Assizes in the West* 1-2 (1884). "Gaol-Distemper" was "a national concern of no small importance," Howard, *supra*, at 20, and Parliament recognized the "fatal Consequences of that Disorder, of which there has been, of late, too much Experience," Health of Prisoners Act 1774, 14 Geo. 3 c. 59.

through their conduct, a prisoner is "brought nearer to death, and farther from life." *Id.* at 522. If an official fails to keep those in their care safe and healthy, "it is a breach . . . of the trust which the law has reposed in him." *Id.* Similarly, the court in *Castell v. Bambridge & Corbet* confirmed that prison officials act improperly by putting prisoners into environments with known and dangerous health risks, like contagious disease. *See Castell v. Bambridge & Corbet* (1730) 93 Eng. Rep. 894, 896; 2 Str. 854, 856 (K.B.) (noting that "appellees would be guilty of murder" for putting a prisoner somewhere "small pox was there," such "that he caught the small pox . . . and died thereof").

When prison officials violated that duty of care, English law intervened. Some courts levied fines directly against offending prison officials, as in *Lady Broughton's Case*, where a prison keeper was found guilty of "hard usage of the prisoners in a most barbarous manner" and ultimately "fined one hundred marks," as well as "removed from her office." *Lady Broughton's Case* (1672) 83 Eng. Rep. 112, 112-13; Raym. T. 216, 216 (K.B.); *see* 4 Blackstone, *supra*, at *140 (noting that "*negligence of public officers*, entrusted with the administration of justice, [such] as sheriffs . . . makes the offender liable to be fined; and in very notorious cases will amount to a forfeiture of his office"). Courts also imposed orders on prison officials to improve conditions. *See Case of the Prison of the King's Bench* (1726) 93 Eng. Rep. 778, 778; 2 Str. 678, 678 (K.B.) (ordering those running a prison "in a ruinous condition" "to put the prison in repair, which [the court] said the proprietors were obliged to do, upon pain of forfeiting their right"). Other courts imposed criminal liability on officials who mistreated prisoners in their care. *See Huggins*, 92 Eng. Rep. at 521 ("If a prisoner by duress of the gaoler comes to an

untimely end, it is murder. It is not necessary, to make it duress, that there should be actual strokes or wounds."); Michael Foster, *Crown Law* 321-22 (Michael Dodson ed., 3d ed. 1792) (explaining that "if [a prisoner's] death was owing to cruel and oppressive usage on the part of the gaoler . . . it will be deemed wilful murder" and describing the facts of *Huggins* and *Castell* as "enormous violations of the trust the law reposeth in its ministers of justice"); Eden, *supra*, at 47 (declaring murder if a prisoner dies from "severities unnecessary to the safe custody").

2. The fact that the Constitution did not protect against government overreach that could result in these and other abuses caused considerable controversy at the Founding. Anti-Federalists lamented that, absent a Bill of Rights, "[t]he officers of Congress may come upon you now, fortified with all the terrors of paramount federal authority." 3 *Elliot's Debates*, *supra*, at 448. Those who fought to add the Bill of Rights to the Constitution emphasized federal courts' role in checking overreach by government officials. Civil damages actions, they understood, were critical to prevent the federal government's abuse of power.

One Anti-Federalist essayist explained the constitutional checking function such damages perform. "[N]o remedy has been yet found equal to the task of deter[r]ing and curbing the insolence of office, but a jury" because "[i]t has become an invariable maxim of English juries, to give ruinous damages whenever an officer has deviated from the rigid letter of the law, or been guilty of an unnecessary act of insolence or oppression." *Essays by A Farmer*, Md. Gazette, Feb.-Apr. 1788, *reprinted in* 5 *The Complete Anti-Federalist* 5, 14 (Herbert J. Storing ed., 1981). Likewise, Luther Martin emphasized that "jury

trials"—"the surest barrier against arbitrary power, and the palladium of liberty"—were "most essential for our liberty . . . in every case . . . between government and its officers on the one part, and the subject or citizen on the other." Martin, *supra*, at 221-22 (emphasis omitted). To the Founding generation, "the right to trial by jury" was "'the heart and lungs, the mainspring and the center wheel' of our liberties, without which 'the body must die; the watch must run down; the government must become arbitrary.'" *United States v. Haymond*, 588 U.S. 634, 640-41 (2019) (plurality opinion) (quoting Letter from Clarendon to W. Pym (Jan. 27, 1766), *in* 1 *Papers of John Adams* 169 (R. Taylor ed., 1977)).

In Massachusetts, the Anti-Federalist essayist Hampden insisted that "without [a jury], in civil actions, no relief can be had against the High Officers of State, for abuse of private citizens." *Essays by Hampden*, Mass. Centinel, Jan.-Feb. 1788, *reprinted in* 4 *The Complete Anti-Federalist*, *supra*, at 198, 200. And during debates in Pennsylvania in 1787, another writer argued that if "a constable, having a warrant to search for stolen goods, pulled down the clothes of a bed in which there was a woman, and searched under her shift . . . a trial by jury would be our safest resource" because "heavy damages would at once punish the offender, and deter others from committing the same." *Essay of A Democratic Federalist*, Pa. Herald, Oct. 17, 1787, *reprinted in* 3 *The Complete Anti-Federalist*, *supra*, at 58, 61.

As the states debated ratification, there was grave concern about the possibility of unlimited government power, including the political branches' power to punish. In Massachusetts, Abraham Holmes worried that the Constitution gave Congress full power to decide "what kind of punishments shall be

inflicted on persons convicted of crimes" and "nowhere restrained" the government from "inventing the most cruel and unheard-of punishments, and annexing them to crimes." 2 *Elliot's Debates*, *supra*, at 111. Absent a "constitutional check," "*racks* and *gibbets* may be amongst the most mild instruments" of federal punishment. *Id.*

In Virginia, Patrick Henry emphasized that "no latitude ought to be left" to the federal government in determining appropriate punishments. 3 *id.* at 447. Quoting the Virginia Declaration of Rights' own ban on cruel and unusual punishment, he decried the power to "define punishments without this control," which would "let [federal officials] loose" and "depart from the genius of your country." *Id.* Henry stressed that, absent a bar like Virginia's, the Constitution would "strengthen[] the arm of government" and permit "tortures, or cruel and barbarous punishment," such that federal officials might "punish with still more relentless severity" and leave the American people "lost and undone." *Id.* at 447-48. George Mason agreed, noting that directly limiting the government's power to punish served to "prohibit torture." *See id.* at 452; *cf.* 1 Annals of Cong., *supra*, at 782-83 (Rep. Livermore) (objecting to the proposed amendment on grounds that it would "restrain[]" the infliction of severe punishments like mutilation).

These concerns motivated the adoption of the Eighth Amendment as part of the Bill of Rights, which was added to the Constitution to establish broad protections "indispensable to the full enjoyment of the rights of personal security, personal liberty, and private property." 3 Joseph Story, *Commentaries on the Constitution of the United States* § 1895, at 748 (1833). Drawing on similar restrictions in the 1689 English Bill of Rights, *see* 1 W. & M., Sess. 2, c. 2

(1689); 4 Blackstone, *supra*, at *378, the Virginia Declaration of Rights, *see* Va. Declaration of Rts. of 1776, § 9, and other governing documents, the Amendment barred the government from inflicting "cruel and unusual punishments." U.S. Const. amend. VIII.[3]

The Amendment's text cabins government discretion and forms a bulwark against federal officials "let[ting] . . . loose" and inflicting "barbarous" punishment, 3 *Elliot's Debates*, *supra*, at 447, including neglecting prisoners' serious medical needs, *see Gamble*, 429 U.S. at 103-04; *Farmer*, 511 U.S. at 828. As this Court has recognized, prisoners "must rely on prison authorities to treat [their] medical needs." *Gamble*, 429 U.S. at 103. Indeed, if "authorities fail to do so, those needs will not be met," which can "produce physical 'torture or a lingering death,' the evils of most immediate concern" to the Eighth Amendment's drafters. *Id.* at 103 (quoting *In re Kemmler*, 136 U.S. at 447). This Court has "therefore conclude[d] that deliberate indifference to serious medical needs of prisoners constitutes the 'unnecessary and wanton infliction of pain' proscribed by the Eighth Amendment." *Id.* at 104 (quoting *Gregg v. Georgia*, 428 U.S. 153, 173 (1976) (plurality

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[3] This and similar language appeared in governing charters well before the ratification of the Eighth Amendment. *See, e.g.*, Mass. Body of Liberties of 1641, para. 46 ("For bodilie punishments we allow amongst us none that are inhumane Barbarous or cruell."); *see also* Anthony F. Granucci, *"Nor Cruel and Unusual Punishments Inflicted:" The Original Meaning*, 57 Calif. L. Rev. 839, 840 (1969) ("Following its inclusion in the Virginia constitution, eight other states adopted the clause, the federal government inserted it into the Northwest Ordinance of 1787, and it became the eighth amendment to the United States Constitution in 1791.").

opinion)). According to the Court, this conclusion was grounded in the "common-law view that '[i]t is but just that the public be required to care for the prisoner, who cannot[,] by reason of the deprivation of his liberty, care for himself.'" *Id.* at 103-04 (quoting *Spicer v. Williamson*, 132 S.E. 291, 293 (N.C. 1926)); *see South v. Maryland ex rel. Pottle*, 59 U.S. (18 How.) 396, 402 (1855) (explaining that a sheriff, in his "ministerial capacity," "is keeper of the county jail, and answerable for the safe-keeping of prisoners"); *cf. Logan v. United States*, 144 U.S. 263, 284 (1892) (describing the federal government's "duty to protect [pretrial prisoners], while so held, against assault or injury from any quarter").

III. *Bivens* and *Carlson* Properly Reflect Longstanding Judicial Practice.

A. Courts in the Founding Generation Vindicated Core Rights by Granting Damages in Common-Law Tort Suits.

Early Americans courts vindicated constitutional rights through common-law tort actions for damages. "In the early Republic, 'an array of writs . . . allowed individuals to test the legality of government conduct by filing suit against government officials' for money damages 'payable by the officer.' These common-law causes of action remained available through the 19th century and into the 20th." *Tanzin*, 592 U.S. at 49 (alteration in original) (quoting James E. Pfander & Jonathan L. Hunt, *Public Wrongs and Private Bills: Indemnification and Government Accountability in the Early Republic*, 85 N.Y.U. L. Rev. 1862, 1871-75 (2010)); *see* Ann Woolhandler, *Patterns of Official Immunity and Accountability*, 37 Case W. Rsrv. L. Rev. 396, 399 (1987) ("The predominant method of suing officers in the early nineteenth century was an allegation of common law harm, particularly a

physical trespass. The issue of whether the action was authorized by existing statutory or constitutional law was introduced by way of defense and reply when the officer pleaded justification."). Congress might choose to indemnify the officer after the fact, but it was the responsibility of courts in the first instance to uphold the rule of law by holding a federal officer accountable for violating the plaintiff's rights. *See* Pfander & Hunt, *supra*, at 1868.

"[T]his exact remedy has coexisted with our constitutional system since the dawn of the Republic," *Tanzin*, 592 U.S. at 52, without requiring an express legislative cause of action. Indeed, from the Founding on, this Court has permitted damages awards against federal officers under nonstatutory common-law claims. *See, e.g.*, *Little v. Barreme*, 6 U.S. (2 Cranch) 170, 179 (1804) (holding that a federal officer who seized a Danish vessel "must be answerable in damages"); *Wise v. Withers*, 7 U.S. (3 Cranch) 331, 332, 337 (1806) (permitting damages for an illegal intrusion and seizure where the offending "court and the officer are all trespassers"); *Mitchell v. Harmony*, 54 U.S. (13 How.) 115, 129-30, 137 (1852) (affirming a jury verdict against a U.S. army officer for an "illegal act"). Thus, "[a]t the Founding, and for much of American history, there was no question as to whether federal courts had the power to provide judge-made damages remedies against individual federal officers. Not only did federal courts routinely provide such relief, but the Supreme Court repeatedly blessed the practice." Stephen I. Vladeck, *The Disingenuous Demise and Death of* Bivens, 2019-2020 Cato Sup. Ct. Rev. 263, 267 (2020).

In short, Petitioner's insistence that judge-made remedies have no place in our constitutional system is belied by constitutional history. Founding-era

principles establishing that "[n]o officer of the law may set that law at defiance with impunity," *Lee*, 106 U.S. at 220, are deeply rooted in this Court's case law, *see, e.g.*, *Bates v. Clark*, 95 U.S. 204, 209 (1877); *Belknap v. Schild*, 161 U.S. 10, 19 (1896); *Phila. Co. v. Stimson*, 223 U.S. 605, 619-20 (1912) ("The exemption of the United States from suit does not protect its officers from personal liability to persons whose rights . . . they have wrongfully invaded."); *Butz v. Economou*, 438 U.S. 478, 489-90 (1978) ("[A] federal official was protected for action tortious under state law only if his acts were authorized by controlling federal law."), and form the backdrop for this Court's decisions permitting relief in *Bivens* and *Carlson*.

B. *Bivens-Carlson* Actions Are Proper Where Federal Prison Officials Violate Prisoners' Constitutional Rights.

Consistent with both the Constitution's text and history and the tradition of common-law actions for unlawful conduct by federal officers, this Court held in *Bivens* that "damages may be obtained for injuries consequent upon a violation of the [Constitution] by federal officials." *Bivens*, 403 U.S. at 395. As this Court explained, "damages have been regarded as the ordinary remedy for an invasion of personal interests in liberty." *Id.*; *see Bush v. Lucas*, 462 U.S. 367, 378 (1983) (observing that, under *Bivens*, "[t]he federal courts' statutory jurisdiction to decide federal questions confers adequate power to award damages to the victim of a constitutional violation"). Under these Founding-era principles, "the judiciary has a particular responsibility to assure the vindication of constitutional interests," *Bivens*, 403 U.S. at 407 (Harlan, J., concurring in the judgment), and "'rights' and 'remedies'" are "link[ed]" in "a 1:1 correlation," *id.* at 400 n.3 (citing *Marbury*, 5 U.S. (1 Cranch) at 163).

Under *Bivens*, when federal law supplies a basis for jurisdiction and "some form of damages is the only possible remedy," *id.* at 409, "a traditional judicial remedy such as damages is appropriate to the vindication of the personal interests protected" by the Constitution, *id.* at 399. Such claims are entirely compatible with this Court's decision in *Erie Railroad Co. v. Tompkins*, which excluded "matters governed by the Federal Constitution" from its landmark rejection of "federal general common law." 304 U.S. 64, 78 (1938); *see* Henry J. Friendly, *In Praise of* Erie—*and the New Federal Common Law*, 39 N.Y.U. L. Rev. 383, 405 (1964) (arguing that *Erie* permits the development of a uniform "*specialized* federal common law" in "areas of national concern" (emphasis added)). In *Carlson v. Green*, this Court applied *Bivens* in the federal-prison context, rejecting suggestions that "judicially created remedies" against federal prison staff were "inappropriate" under "our constitutional scheme" and expressly recognizing that such remedies "directly under the Constitution" are available when prison officials violate the Eighth Amendment. *Carlson*, 446 U.S. at 16 & n.1, 19.

Bivens's recognition of a freestanding federal claim against federal officers coheres with the long tradition of accountability for government overreach that was in place when the Constitution was drafted and ratified. Under that tradition, legal remedies were available for abuse of power by federal law-enforcement officers. *Bivens* (and, later, *Carlson*) ensured that tradition's continued existence by recognizing a federal claim against federal officers who violate the Constitution. In so doing, they also protected federal officers from being subjected to the vagaries of fifty different state common-law regimes. In any event, today a state common-law suit is no longer available because the

1988 Westfall Act forecloses common-law tort suits against federal officers. *See* 28 U.S.C. § 2679(b)(1); *Minneci v. Pollard*, 565 U.S. 118, 126 (2012). Tellingly, the Westfall Act does permit suits against federal employees for violation of constitutional rights, *see* 28 U.S.C. § 2679(b)(2)(A), which this Court has recognized as an "explicit exception for *Bivens* claims," *Hui v. Castaneda*, 559 U.S. 799, 807 (2010)—powerful evidence that Congress has put its imprimatur behind the *Bivens* cause of action.

Bivens reflects the Framers' view that a civil remedy is necessary to prevent individuals, including prisoners, from being subjected to "all the terrors of paramount federal authority." 3 *Elliot's Debates*, *supra*, at 448. Otherwise, federal correctional officers would have the untrammeled authority to subject prisoners in federal custody to all manner of cruel and unusual punishment, including deprivations of necessary medical care. Prisoners are uniquely vulnerable, and this Court has affirmed that "[w]hen a prison regulation or practice offends a fundamental constitutional guarantee, federal courts will discharge their duty to protect constitutional rights." *Procunier v. Martinez*, 416 U.S. 396, 405-06 (1974); *see Valentine v. Collier*, 590 U.S. 935, 940 (2020) (Sotomayor, J., statement respecting the denial of application to vacate stay) (noting that prisoners are "often powerless to protect themselves from harm"); *cf. Daniels v. Williams*, 474 U.S. 327, 335 (1986) ("Jailers may owe a special duty of care to those in their custody under state tort law.").

Such rights enforcement effectuates the judiciary's longstanding role in maintaining the rule of law and the separation of powers, and "[c]ourts may not allow constitutional violations to continue simply because a remedy would involve intrusion into the realm of

prison administration." *Brown v. Plata*, 563 U.S. 493, 511 (2011); *see id.* ("Courts nevertheless must not shrink from their obligation to 'enforce the constitutional rights of all "persons," including prisoners.'" (quoting *Cruz v. Beto*, 405 U.S. 319, 321 (1972) (*per curiam*)).

Watanabe's suit against Nielsen falls squarely within the core of *Bivens* as applied in *Carlson*. Nielsen was deliberately indifferent to Watanabe's serious medical needs, refusing to send him to a hospital or provide any treatment for his "severe" injuries beyond "over-the-counter pain medication." Pet. App. 2a, 4a. Permitting this suit to proceed under *Carlson* would neither fashion a new cause of action nor break new *Bivens* ground, but simply confirm that federal prison officials can be held accountable for violating constitutionally guaranteed rights, as constitutional text and history require.

CONCLUSION

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

Respectfully submitted,

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