

How High Court Bivens Prison Case May Shape Defense Tools

By **Albert Zakarian** (September 25, 2026)

On June 22, the U.S. Supreme Court agreed to decide *Nielsen v. Watanabe* — a case asking whether someone in federal prison can sue federal officials for money damages, directly under the U.S. Constitution, for deliberate indifference to his medical needs.[1]

Kekai Watanabe alleges that prison staff ignored a fractured coccyx and the chronic pain that followed. In September 2024, the U.S. Court of Appeals for the Ninth Circuit let his claim proceed as a Bivens action.[2]



Albert Zakarian

The Supreme Court will now decide whether it should have, with oral arguments set for Nov. 9. The answer will shape the defense's tools at the first stage of these cases — the motion to dismiss — and the litigation atmosphere well beyond these parties.

How We Got Here

Congress has never passed a statute authorizing monetary damages against federal officers who violate the Constitution.

In *Bivens v. Six Unknown Named Agents*, the Supreme Court in 1971 held that such a remedy could be implied directly from the Constitution even though no statute provided one — a right the judiciary inferred, not one the legislature created.[3]

In its 1979 decision in *Davis v. Passman*, the Supreme Court recognized a second implied damages remedy, this time under the Fifth Amendment's due process clause, for a congressional staffer who alleged that the representative who employed her had fired her because she was a woman.[4]

And in 1980, the court extended that judge-made remedy to a federal prisoner's Eighth Amendment medical claim in *Carlson v. Green*, where jailers allegedly failed to treat a prisoner's fatal asthma attack.[5]

That expansion did not last. Beginning with *Ziglar v. Abbasi* in 2017, the court recast Bivens as "a 'disfavored' judicial activity" and built a two-step gate that a plaintiff must clear before a court will let a Bivens damages claim proceed: First, does the case present a new context meaningfully different from the three cases in which the court itself recognized a remedy, and second, if so, do special factors counsel hesitation?[6]

The Supreme Court's 2022 decision in *Egbert v. Boule* made both steps harder for plaintiffs to satisfy. It "explained that a new context arises when there are 'potential special factors that previous Bivens cases did not consider,'" and that the two "steps often resolve to a single question: whether there is any reason to think that Congress might be better equipped to create a damages remedy."

If "there is any rational reason (even one) to think" so — as there will be, the court said, "in most every case" — no Bivens claim may proceed.[7]

Last term, in *Goldey v. Fields*, the Supreme Court summarily reversed a U.S. Court of Appeals for the Fourth Circuit decision that had allowed a prisoner's excessive-force Bivens claim — without argument.[8]

The Two Fault Lines

Nielsen turns on two questions. The first is alternative remedies. The petitioners are the warden and several medical staff members at a federal detention center. They argue that Carlson never weighed the modern architecture Congress has since built — the Federal Bureau of Prisons' Administrative Remedy Program, the Prison Litigation Reform Act[9] and the Federal Tort Claims Act — so this is a new context, and those structures are themselves a special factor counseling against a judge-made remedy.

Watanabe answers that his claim is materially identical to Carlson and presents no new context at all.

The second question is the severity of the injury. Carlson involved an acute failure that killed the prisoner within hours; Watanabe alleges a fractured coccyx and chronic pain. Nielsen argues that this difference matters; Watanabe argues that deliberate indifference is deliberate indifference, whatever the diagnosis.

How the court treats that distinction will tell defense counsel how much daylight Carlson still gives plaintiffs. If the court holds that a less serious injury or a less flagrant lapse in care is a meaningful difference, Carlson would effectively be confined to extreme facts like its own — a medical emergency that ends in death — and most federal medical care claims would fall into the new-context analysis, where the court has not approved a new Bivens claim in more than four decades.

If the court instead agrees with the Ninth Circuit that a difference in the degree of care is not a meaningful difference, people in federal prison who plausibly allege deliberate indifference to a serious medical need will keep a path to damages, even when the injury is not life-threatening.

Notice what Watanabe does not argue: He does not ask the court to overrule *Abbasi* or *Egbert*, or to recognize a new remedy. By insisting his case is the same as Carlson, he accepts the two-step framework and tries to win at Step 1. Even the plaintiff now litigates inside the *Abbasi* cage; the framework itself is no longer contested ground.

What It Means for the Defense

For federal defendants, a ruling for Nielsen would hand defense counsel two sharpened pleading-stage arguments: that an incarcerated person's access to the Administrative Remedy Program, the PLRA and the FTCA makes the claim a new context warranting dismissal, and that an injury short of the catastrophic harm in Carlson falls outside it.

Those arguments sit atop an already favorable foundation. The Supreme Court's 2012 decision in *Minneeci v. Pollard* bars Bivens claims against individual employees of privately run federal prisons where state tort law supplies an adequate remedy,[10] and its 2001 decision in *Correctional Services Corp. v. Malesko* bars them against the private corporate entity.[11]

Much correctional healthcare exposure thus already sits outside Bivens. A ruling for Nielsen would sharpen the tools for what remains, while a ruling for Watanabe would confirm only

that core medical indifference claims by federal inmates survive — which would be meaningful but narrow, leaving Abbasi and Egbert intact for every other context.

Why Section 1983 Is a Different Animal

Here is the limiting principle that keeps all of this in perspective: Bivens binds only federal defendants, and the reason it is so vulnerable is the very reason its state court cousin is not.

A claim under Title 42 of the U.S. Code, Section 1983 — the vehicle for suing state and county actors — rests on a real statute, one that Congress enacted in 1871 to create a damages remedy against those who violate constitutional rights under color of state law.

Because Congress itself authorized that remedy, the separation-of-powers concerns driving the Bivens pullback have no purchase. There is no judge-made remedy to second guess, and therefore no new-context inquiry, no special-factors consideration and no gate to clear. The Abbasi-Egbert machinery is a Bivens-only apparatus; it does not travel to Section 1983.

So for the far larger universe of state and county providers, Nielsen is persuasive atmosphere, not binding law. There, the deliberate-indifference standard established by the Supreme Court in its 1976 *Estelle v. Gamble* decision continues to govern, and the everyday defenses do the real work: that a disagreement over treatment is not indifference, and that negligence or malpractice is not a constitutional violation.[12]

Those defenses flow from the standard itself. Under *Estelle*, "an inadvertent failure to provide adequate medical care" does not violate the Eighth Amendment. The plaintiff must show "deliberate indifference to serious medical needs."

And in its 1994 decision in *Farmer v. Brennan*, the Supreme Court held that, for people incarcerated in prison, the test is subjective: The defendant must actually "know[] of and disregard[] an excessive risk to inmate health or safety." [13]

A Bivens ruling, whichever way it goes, will not change that line.

A Note for Private-Provider Counsel

Even so, private-provider counsel should not file this under "federal problem, not mine." Minneci and Malesko keep the corporate client off the Bivens hook directly, but contracts can put you back in the fight.

Correctional healthcare agreements frequently contain defense and indemnity provisions running toward the government and its personnel. Depending on the contract, a private contractor or its insurer may be obligated to defend and indemnify the individual federal employees named alongside it — the very defendants who remain squarely exposed under Bivens.

If that is your client's deal, the scope of the Bivens remedy directly drives the cost and exposure your client has agreed to carry.

Practical Takeaways

So what should defense counsel do while we wait? In federal matters, preserve the alternative-remedies and injury-severity arguments now, and plead them at the motion to

dismiss stage.

In state and county matters, keep building on Estelle and its progeny, and treat any prodefense language in Nielsen as useful rhetoric rather than controlling authority.

And if you defend private contractors, pull the relevant service agreements now and map exactly whose defense and indemnity your client has promised. Even a ruling for Watanabe would not revive Bivens as a broad remedy; the stakes are real but bounded.

A Prediction

Offered as a forecast, not a guarantee: We expect the court to reverse the Ninth Circuit and rule for Nielsen, holding that Watanabe's claim arises in a new Bivens context and that Congress' alternative remedial structures counsel against an implied damages action.

Since Carlson, the court has declined to extend Bivens more than 10 times, and Goldey — a summary reversal of a prison Bivens claim — signals that the court has little appetite to bless the Ninth Circuit's revival of one. The likeliest route would confine Carlson to its facts rather than overruling it outright.

The chief risks are an affirmance treating Watanabe as indistinguishable from Carlson or a procedural disposition.

Either way, the limiting principle survives: This is Bivens law, binding only federal defendants, and for state and county providers under Section 1983, Estelle still governs.

Albert A. Zakarian is trial counsel at Blackstone Trial Group PLLC.

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[1] Nielsen v. Watanabe, No. 25-417.

[2] Watanabe v. Derr, 115 F.4th 1034, 1043-1044 (9th Cir. 2024) (reversing dismissal of "Watanabe's Bivens claim").

[3] Bivens v. Six Unknown Named Agents, 403 U.S. 388 (1971).

[4] Davis v. Passman, 442 U.S. 228 (1979).

[5] Carlson v. Green, 446 U.S. 14 (1980).

[6] Ziglar v. Abbasi, 582 U.S. 120 (2017).

[7] Egbert v. Boule, 596 U.S. 482, 492, 496 (2022).

[8] *Goldey v. Fields*, 606 U.S. 942 (2025).

[9] See 42 U.S.C. § 1997e; 18 U.S.C. § 3626.

[10] *Minneeci v. Pollard*, 565 U.S. 118 (2012).

[11] *Correctional Services Corp. v. Malesko*, 534 U.S. 61 (2001).

[12] *Estelle v. Gamble*, 429 U.S. 97 (1976).

[13] *Estelle*, 429 U.S. at 104–05; *Farmer v. Brennan*, 511 U.S. 825, 837 (1994).