No. 23-15523

IN THE

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Eric Hurst,

Plaintiff-Appellant,

v.

Earl Dayton,

Defendant-Appellee.

On appeal from the United States District Court
for the District of Hawaii
Case No. 1:22-cv-171-DKW-RT
Hon. Derrick K. Watson

APPELLANT ERIC HURST'S OPENING BRIEF

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STATEMENT OF JURISDICTION

Plaintiff Eric Hurst appeals the district court's decision dismissing his claim against defendant Earl Dayton. The district court had jurisdiction over this federal civil-rights action under 28 U.S.C. § 1331. It granted Dayton's motion to dismiss and issued its final judgment on March 15, 2023. ER-17, ER-4. Hurst timely appealed three weeks later. ER-3; Fed. R. App. P. 4(a)(1)(A). This Court has jurisdiction under 28 U.S.C. § 1291.

INTRODUCTION

In *Bivens v. Six Unknown Named Agents*, the Supreme Court recognized a cause of action for victims of a constitutional violation by a federal agent to seek damages against the officer in federal court. For decades, *Bivens* acted as the "federal analog" to 42 U.S.C. § 1983.

In recent years, the Supreme Court has severely restricted new *Bivens* claims. But at the same time, it has also declined—repeatedly—to overrule *Bivens* outright. In case after case, it has continued to hold that courts may hear *Bivens* claims in three recognized contexts. One such context, recognized in *Carlson v. Green*, is a prison official's failure to treat an inmate's medical needs.

Hurst seeks redress for a prison nurse's failure to treat injuries to his head. His claim fits comfortably within *Carlson*. He sues an official of the same rank as in *Carlson*, for a violation of the same constitutional right as in *Carlson*, alleging the same type of misconduct as in *Carlson*, raising the same interplay among the branches of government as in *Carlson*. His claim is not meaningfully different from Carlson's. It does not present a new context. Under *Carlson*, it should proceed.

ISSUE PRESENTED

In *Carlson v. Green*, the Supreme Court recognized a *Bivens* claim by a federal prisoner against a Bureau of Prisons nurse for failure to provide medical care. Hurst, a federal prisoner, brings a *Bivens* claim against a Bureau of Prisons nurse for failure to provide medical care. Does his claim arise in the same context as in *Carlson*?

STATEMENT OF THE CASE

1. Unit 5A of FDC Honolulu is a den of gambling and gang activity. ER-47, 49. Inmates play poker for substantial sums of money. ER-49. The guards know—they treat it as a spectator sport. *Id.* When Hurst arrived at the facility, a counselor told the incoming cohort: "[W]e know you are gambling, just make sure you pay your debts and don't get us involved." *Id.*

Hurst doesn't gamble. ER-47. He's not a member of a gang. *Id.* On the day in question, he was just trying to watch television. *Id.* But when an inmate lost a thousand-dollar bet, it sparked a gang riot that ultimately embroiled over thirty participants. ER-47, 49. Hurst tried to stay at his table and out of the fight. ER-47–48. But he had nowhere to go, and as the fight expanded, three gang members attacked him and beat him with a "lock in a sock." ER-48.

Dayton, a prison nurse, assessed Hurst's injuries. *Id.* Hurst told Dayton he had "severe head pain" and showed him the "obvious" wounds on his head and body. *Id.* Dayton declined to x-ray Hurst or assess him for a concussion. *Id.* Instead, he discharged Hurst without treatment. ER-50. As a result, Hurst continues to suffer "headaches and dizziness" from his injuries. *Id.*[1]

[1] This case comes to the Court on a motion to dismiss, so these facts are from Hurst's complaint. ER-47–50. The district court appears to have considered materials outside the pleadings. ER-7. Whether it found them dispositive is unclear, but if so, it erred. *Lucas v. Dep't of Corr.*, 66

2. Hurst sued Dayton pro se. ER-41. He also sued two other defendants on tangentially related allegations. ER-41, 45, 47. In an initial screening order, the district court dismissed the claims against the other two defendants. ER-33, 37. But it recognized that under *Bivens*[2] and *Carlson v. Green*,[3] Hurst had stated a viable claim against Dayton for deliberate indifference to his serious medical needs. ER-37–38. So it allowed that claim to proceed. *Id.*

A little under a year later, however, it reversed field. It held that after *Egbert v. Boule*,[4] Hurst's claims arose in a new context. ER-14. It reasoned that Hurst suffered acute injuries, while the plaintiff in *Carlson* suffered from asthma; that Hurst had not died, while the plaintiff in *Carlson* had; and—for reasons that are unclear—that Hurst's claim may have been flawed on the merits, even though it had earlier recognized that "Hurst states a plausible denial-of-adequate-medical-care claim . . .

F.3d 245, 248 (9th Cir. 1995). In any event, the additional material corroborates Hurst's allegations. Dayton observed bruises, lacerations, abrasions, and bleeding on Hurst's cheek, lip, nose, back, knee, and "top of scalp." ER-21. He knew Hurst received those injuries from a "[p]hysical altercation with other inmates." ER-20. His only disposition was a suggestion that Hurst be further evaluated at a later date. ER-21.

[2] 403 U.S. 388 (1971).

[3] 446 U.S. 14 (1980).

[4] 142 S. Ct. 1793 (2022).

against Dayton." ER-14, 38. It concluded that special factors displaced *Bivens* relief and dismissed Hurst's final claim. ER-15–17.

Hurst appeals.

STANDARD OF REVIEW

This Court reviews de novo whether a plaintiff has stated a claim. *Benavidez v. Cnty. of San Diego*, 993 F.3d 1134, 1141 (9th Cir. 2021). It accepts as true the plaintiff's well-pleaded allegations of fact and construes them in the light most favorable to him. *Starr v. Baca*, 652 F.3d 1202, 1216 (9th Cir. 2011). When the plaintiff is pro se, especially in civil-rights cases, the Court construes his pleadings liberally and affords him the benefit of "any doubt." *Chambers v. Herrera*, 2023 WL 5211040, at *2 (9th Cir. Aug. 15, 2023). So construed, if the complaint plausibly suggests that the plaintiff is entitled to relief, the motion to dismiss fails to carry the day. *Starr*, 652 F.3d at 1216–17.

SUMMARY OF ARGUMENT

In *Bivens*, the Supreme Court recognized a cause of action for "victims of a constitutional violation by a federal agent . . . to recover damages against the official in federal court." *Carlson*, 446 U.S. at 18. But in the last six years, the Court has significantly restricted that cause of action. After *Egbert v. Boule*, decided last year, the emerging consensus in the courts of appeals is that *Bivens* claims in "new

contexts" are "dead on arrival," but claims that arise in a context recognized by the Supreme Court are still viable.

In *Carlson*, the Supreme Court recognized a federal prisoner's claim for failure to provide adequate medical treatment. Hurst is a federal prisoner. He brings a claim for Dayton's failure to provide him adequate medical treatment. So his claim arises in the same context as Carlson's and he has stated a viable *Bivens* claim.

The district court noted two ways in which Hurst's claim differs from Carlson's. Neither creates a new context. First, Hurst sought treatment for an acute injury while Carlson's condition was chronic. Second, the failure to treat Carlson was fatal, while Hurst lives with ongoing pain. The Supreme Court has not suggested that such factors give rise to a new context. In fact, it has expressly cautioned against such a cramped view: "Some differences, of course, will be so trivial that they will not suffice to create a new *Bivens* context." *Ziglar v. Abbasi*, 582 U.S. 120, 149 (2017).

Perhaps more fundamentally, the district court treated *Bivens* and *Carlson* as overruled in substance if not in form. In so doing, it overstepped its authority. Whether to overrule *Bivens* is a question for the Supreme Court—and for that matter, it is a question that the Court has consistently answered in the negative. As long as that remains true, district courts and courts of appeals must "operate within the current state of the doctrine" and apply the settled law of *Bivens* and *Carlson*

faithfully. *Snowden v. Henning*, 72 F.4th 237, 245 (7th Cir. 2023). The district court strayed from that principle. This Court should reverse and allow Hurst's claim to proceed.

ARGUMENT

Hurst alleges that Dayton violated his right under the Eighth Amendment to adequate medical care while imprisoned. His claim arises in the same context as *Carlson*, so he may seek relief under *Bivens*. The district court's decision to the contrary should be reversed.

1. *Bivens* is still "slightly alive": Plaintiffs can bring *Bivens* claims in recognized contexts.

When a state official violates a person's constitutional rights, that person may sue the official for damages under 42 U.S.C. § 1983. For decades, *Bivens* provided the "federal analog" to § 1983: a cause of action for the victim of a constitutional violation by a federal official to sue the official for damages in federal court. *Hartman v. Moore*, 547 U.S. 250, 254 n.2 (2006). Under the banner of *Bivens*, the federal courts routinely recognized claims for everything from retaliation against protected speech, to unlawful searches performed under invalid warrants, to deliberate indifference to a prisoner's safety. *E.g.*, *Parks v. Wren*, 651 F. App'x 597, 599 (9th Cir. 2016); *Ramirez v. Butte-Silver Bow Cnty.*, 298 F.3d 1022, 1028 (9th Cir. 2002), *aff'd sub nom. Groh v.*

Ramirez, 540 U.S. 551 (2004); *Armstead v. Fields*, 638 F. App'x 601, 604 (9th Cir. 2016).

But in a trilogy of cases starting in 2017, the Supreme Court drastically restricted the availability of *Bivens* relief:

- In *Ziglar v. Abbasi*, the Court addressed whether noncitizens suspected of ties to terrorism in the wake of September 11 could pursue *Bivens* claims against high-level federal officials—including the attorney general and the director of the FBI—who had allegedly orchestrated their unconstitutional treatment. 582 U.S. at 129, 137–38. For the most part, the answer was "no." *Id.* at 146.
- In *Hernández v. Mesa*, the Court tackled a *Bivens* claim against a Border Patrol agent who shot and killed a Mexican teenager across the U.S.–Mexico border. 140 S. Ct. 735, 739–40 (2020). Because the case implicated sensitive areas of foreign policy and national security, the Court again rebuffed the claim. *Id.* at 749–50.
- Continuing the theme, in *Egbert v. Boule*, the Court foreclosed *Bivens* claims against Border Patrol agents engaged in "border security" operations. 142 S. Ct. at 1806 (quoting *Hernández*, 140 S. Ct. at 746–47).

At the same time, though, the Court has taken "great care" to confirm that the "core of *Bivens*" remains intact. *Hicks v. Ferreyra*, 64

F.4th 156, 166 (4th Cir. 2023); *Jacobs v. Alam*, 915 F.3d 1028, 1037 (6th Cir. 2019). In *Abbasi*, for instance, it cautioned that its reasoning did not "cast doubt on the continued force, or even the necessity" of long-recognized *Bivens* claims. 582 U.S. at 134. In *Egbert*, the petitioner asked the Court to "reconsider *Bivens*" point-blank, and the Court pointedly denied certiorari on that question. Petition for Writ of Certiorari, *Egbert*, No. 21-147, 2021 WL 3409109 (U.S. 2021); Order, *Egbert*, 142 S. Ct. 457 (2021). And in its opinion, it once again declined to "dispense with *Bivens* altogether." 142 S. Ct. at 1803; *see id.* at 1809 ("[W]e need not reconsider *Bivens* itself.").

In other words, as the Seventh Circuit recently explained, the Court "has left the door open for at least some [*Bivens*] claims to proceed." *Snowden*, 72 F.4th at 239. Following its lead, the courts of appeals have continued to allow *Bivens* claims in contexts recognized by the Supreme Court. In *Snowden*, for instance, the Seventh Circuit allowed a claim for excessive force against a DEA agent because it was "not meaningfully different than *Bivens* itself." *Id.* at 247. In *Hicks*, the Fourth Circuit allowed a suit against Park Police officers for an unlawful traffic stop, explaining that it was "not an extension of *Bivens* so much as a replay." 64 F.4th at 167. And in *Chambers*, this Court allowed that a federal prisoner could still state a *Bivens* claim under the Eighth Amendment for "deliberate medical indifference." 2023 WL 5211040, at *7.

In short, *Egbert* "does not change" *Bivens*'s "continued force" in its existing contexts. *Greenpoint Tactical Income Fund LLC v. Pettigrew*, 38 F.4th 555, 564 & n.2 (7th Cir. 2022). For new claims, *Bivens* may be "mostly dead," but for claims that the Supreme Court has already recognized, it is still "slightly alive." *Chambers*, 2023 WL 5211040, at *7 (quoting *Princess Bride* (20th Century Fox 1987)).

2. Hurst's claim arises in exactly the same context as *Carlson*, so it is "alive."

Hurst's *Bivens* claim is indistinguishable from the claim the Court recognized in *Carlson*. The district court strained to make out some differences—for example, that Carlson's condition was chronic while Hurst's injuries were acute, or that Carlson died while Hurst has not—but under the analysis prescribed by the Supreme Court, those distinctions are "trivial" and do not give rise to a new context. More to the point, the district court treated *Bivens* and *Carlson* as having been overruled implicitly. They have not been overruled. So declining to apply them here was error.

2.1. In *Carlson*, the Supreme Court recognized a *Bivens* claim for failure to provide medical care.

To evaluate whether a *Bivens* claim can proceed, the Court has prescribed a two-part test. *Egbert*, 142 S. Ct. at 1803. The first question is whether the case presents a "new *Bivens* context"—that is,

whether it differs "in a meaningful way" from previous *Bivens* cases decided by the Supreme Court. *Abbasi*, 582 U.S. at 139–40. If so, the next question is whether "special factors" counsel hesitation before allowing a claim to proceed. *Id.* at 136. Only claims that flunk the first question need be evaluated under the second. If a claim doesn't present a new context, then the inquiry is over and the action "may proceed" on the merits. *Snowden*, 72 F.4th at 242; *e.g.*, *Ioane v. Hodges*, 939 F.3d 945, 952 (9th Cir. 2018); *Shorter v. United States*, 12 F.4th 366, 372–73 (3d Cir. 2021).

Here, Hurst's claim passes at the first step: It arises in the same context as *Carlson*. In *Carlson*, the decedent's mother alleged that prison officials had failed to treat her son's severe asthma, resulting in his death. 446 U.S. at 16 n.1. The Supreme Court held that she could seek relief under *Bivens* for a "violation of the Eighth Amendment's proscription against infliction of cruel and unusual punishment." *Id.* at 16–18, 23. In other words, *Carlson* recognized a claim under the Eighth Amendment for "medical indifference" or "failure to provide adequate medical treatment." *See Chambers*, 2023 WL 5211040, at *1, *4. That describes Hurst's claim to a tee. ER-50.

Hurst's claim also matches up with *Carlson* on a more granular level. The Supreme Court has identified some areas in which differences can be "meaningful," *Abbasi*, 582 U.S. at 139–40, and in each one, Hurst's claim is indistinguishable from Carlson's:

- **Rank.** Hurst sues a prison nurse. ER-50. So did Carlson. *Green v. Carlson*, 581 F.2d 669, 671 (7th Cir. 1978). So the defendant here is of the same "rank" as in *Carlson*. *Cf. Abbasi*, 582 U.S. at 139–40. More importantly, Hurst sues a "line-level" federal officer. *Snowden*, 72 F.4th at 246. *Abbasi* made clear that high-level executive officials are off-limits, and Hurst's suit doesn't cross that line. *See* 582 U.S. at 139–40.
- **Constitutional right.** Hurst sues Dayton for "den[ying] [him] medical attention." ER-50. That is "the same constitutional right [as] in *Carlson*." *Chambers*, 2023 WL 5211040, at *7.
- **Specificity of alleged misconduct.** Hurst seeks relief for Dayton's personal failure to provide medical attention to him. ER-50. So did *Carlson*. 446 U.S. at 16. The "official action" at issue is thus just as "specific[]" as in *Carlson*. *Cf. Abbasi*, 582 U.S. at 140; *cf. also Pettibone v. Russell*, 59 F.4th 449, 455 (9th Cir. 2023) (explaining that "ordering or acquiescing in unconstitutional conduct" is a higher level of generality than performing the violation "personally").
- **Extent of judicial guidance.** Dayton had at least as much "judicial guidance" on his duty to provide medical care to the inmates in his custody as did the defendants in *Carlson*. *Cf. Abbasi*, 582 U.S. at 140. If anything, he had *more* judicial

guidance in 2022 than prison medical personnel in 1975. *See, e.g.*, *Jett v. Penner*, 439 F.3d 1091, 1096–98 (9th Cir. 2006) (holding that a prison doctor had a duty to adequately treat an inmate's fractured thumb).

- **Legal mandate.** Dayton is a Bureau of Prisons official. ER-48. So were the defendants in *Carlson*. 446 U.S. at 14. The "statutory or other legal mandate" under which Dayton and the *Carlson* defendants were operating is thus the same. *Cf. Abbasi*, 582 U.S. at 140; *cf. also Mejia v. Miller*, 61 F.4th 663, 668 (9th Cir. 2023) (explaining that officials working for different agencies may have different legal mandates); *Harper v. Nedd*, 71 F.4th 1181, 1187 (9th Cir. 2023) (likewise for officials working in different branches of government).
- **Risk of disruptive intrusion.** Because Hurst's claim is identical to Carlson's, the risk that Hurst's claim will trench on federal prison operation is no greater than "what [*Carlson*] itself already approved." *See Snowden*, 72 F.4th at 246.
- **Other factors.** For the same reason, no other "contextual factor" calls for moving to the second step of the *Abbasi* inquiry. *See id.* Hurst's claim doesn't raise issues of national security (*Abbasi*), foreign relations (*Hernández*), border policy (*Egbert*), or any other unusual concerns that might propel it out of the familiar context recognized in *Carlson*.

The Seventh Circuit recently offered another way to think about the "new context" question. "A difference is 'meaningful,'" the court wrote, "when it involves a factual distinction or new legal issue that might alter the *policy balance* that initially justified the implied damages remedies in the *Bivens* trilogy." *Snowden*, 72 F.4th at 239 (emphasis added). In other words, if a claim involves facts or legal issues that require "reweighing the costs and benefits of a damages remedy against federal officials"—which the Supreme Court has explained is a "legislative" endeavor—then it presents a new context and must be scrutinized for special factors. *Id.* at 244; *Egbert*, 142 S. Ct. at 1802–03. But if a claim simply requires "applying controlling Supreme Court precedent," then lower courts do not "risk arrogating a legislative function" by allowing it to proceed. *Snowden*, 72 F.4th at 244, 246.

For all the reasons above, Hurst's claim does not require reweighing the costs and benefits of a damages action. The Supreme Court did that in 1980 when it decided *Carlson*. Hurst does not ask the Court to "extend" or "expand[]" *Carlson*. *Cf. Harper*, 71 F.4th at 1185. He asks only that the Court apply *Carlson* to his claim. That case "directly controls" here, so to do otherwise would be to arrogate not legislative power but the Supreme Court's power. *See Rodriguez de Quijas v. Shearson/Am. Exp., Inc.*, 490 U.S. 477, 484 (1989); *Thurston Motor Lines, Inc. v. Jordan K. Rand, Ltd.*, 460 U.S. 533, 535 (1983) ("Needless to say, only [the Supreme] Court may overrule one of its

precedents."). That's what the district court did, and in so doing it erred.

2.2. Hurst's claim for failure to provide medical care is indistinguishable from the claim in *Carlson*.

To recap, Hurst's claim involves the same constitutional right as in *Carlson*; an officer of the same rank and agency as in *Carlson*; the same extensive judicial guidance as in *Carlson*—or better; and the same interplay among the branches of government as in *Carlson*. It's not meaningfully different from *Carlson*. It does not present a new context. Yet the district court dismissed it anyway.

The district court erred in at least four ways. It identified distinctions that were trivial rather than meaningful; it seemingly assessed the merits rather than the factors prescribed in *Abbasi*; it misread *Egbert* as modifying the new-context analysis; and it misread *Egbert* again as overruling *Abbasi*'s two-step test. In the end, it treated *Carlson* as effectively overruled. All of these are reasons to reverse.

First, the district court contended that Hurst's claim was meaningfully different from Carlson's because his injuries were "acute" rather than "chronic" and because they didn't kill him. ER-14. These are not "meaningful" differences. *Cf. Abbasi*, 582 U.S. at 139–40. The claims *Abbasi* rejected presented a new context because they challenged a "high-level executive policy created in the wake of a major terrorist attack on American soil." *Id.* at 140. Similarly, *Hernández* involved an

"international incident"—a gunshot fired by a federal agent across the U.S.–Mexico border. 140 S. Ct. at 740, 744. And *Egbert* involved Border Patrol operations within feet of the U.S.–Canada border. 142 S. Ct. at 1800, 1804. In contrast, the distinctions drawn by the district court are "trivial": They do not "suffice to create a new *Bivens* context." *See Abbasi*, 582 U.S. at 149.

Second, the district court stated that "a violation of the standard of care was evident in *Carlson*, whereas it is unclear whether even negligence is in play with respect to Hurst." ER-14. It did not explain its reasoning, cite any authority, or point to anything in the record. *See id.* Hurst's complaint states a straightforward claim for failure to provide adequate medical treatment. ER-47–48, 50. The district court held as much in its initial screening order, and nothing about the merits changed in the intervening year. *See* ER-37–38. And in any event, the Supreme Court has not suggested that weakness on the merits creates a new context. *Cf. Abbasi*, 582 U.S. at 139–40 (listing new-context factors). The district court's unexplained, unsupported assertion is both mistaken and beside the point.

Third, the district court suggested that *Egbert* had changed the new-context "landscape" and thus commanded a different result. ER-14–15. But *Egbert* didn't affect the new-context analysis in the slightest. It expounded only on the analysis of special factors, because this Court had *already* held that the context was new. 142 S. Ct. at 1804, 1807.

The Supreme Court agreed and didn't discuss the context further. *See id.* It didn't hold or even hint that the difference between acute and chronic injuries—or fatal and merely painful ones—would make a context "new."

Finally, as the district court saw it, *Egbert* instructs "that the second-step analysis should occur in *every case*, not only those whose circumstances were otherwise meaningfully different from one of the *Bivens* trio." ER-12. Not so. The Court did say that the two-step analysis prescribed in *Abbasi* will "often" turn entirely on the second step. *Egbert*, 142 S. Ct. at 1803. But that should come as no surprise: The Bill of Rights protects individual liberty in dozens of ways, and the Court has allowed damages actions against federal agents for only three very narrow infringements of those protections. So most cases will present a new context on their face and the analysis will proceed swiftly to the second step. But *Egbert* did not purport to overrule *Abbasi*'s two-step analysis. To the contrary, it reiterated it. 142 S. Ct. at 1803 ("[O]ur cases have framed the inquiry as proceeding in two steps.").

This Court has also recently confirmed that when a claim arises in the same context as one of the three recognized *Bivens* claims, the analysis ends there. In *Chambers*, it held that a prisoner's failure-to-protect claim raised a host of special factors that counseled denying relief. 2023 WL 5211040, at *5–6. But when it came to the prisoner's denial-of-medical-care claim, the Court remanded for further analysis of

the context. *Id.* at *7. It held that if that claim arose in the same context as *Carlson*, it could proceed. *Id.* In other words, when a claim arises in a recognized context, special factors don't come into play. So in rejecting Hurst's claim on the basis of special factors, the district court erred.

* * *

All these legal errors spring from an attitudinal one. The district court acknowledged that the Supreme Court has not "explicitly overrule[d] *Bivens*," but still it opined that "in virtually every case," *Bivens* claims must be dismissed. ER-13. In its view, "the writing is on the wall." *Id.*

The Supreme Court has had many opportunities to overrule *Bivens* and *Carlson*. It was invited to do so in *Egbert* itself. *See supra* p.10. It has each time refused. As the Seventh Circuit observed, courts of appeals and district courts do not "[write] on a blank slate." *Snowden*, 72 F.4th at 245. They must "operate within the current state of the doctrine." *Id.* They "cannot decline to apply 'the settled law of *Bivens*'" unless a case is meaningfully different—and Hurst's is not. *See id.* at 247 (quoting *Abbasi*, 582 U.S. at 134, 139–40). In straying from these basic principles of orderly judicial administration, the district court erred.

CONCLUSION

For all these reasons, the judgment of the district court should be reversed.

Dated: September 9, 2023

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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