NO. 08-1529

IN THE

Supreme Court of the United States

EUGENE MIGLIACCIO, ET AL.,
Petitioners,

V.

YANIRA CASTANEDA, ET AL.,
Respondents.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

PETITIONERS' REPLY

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PETITIONERS' REPLY

The Ninth Circuit held that 42 U.S.C. § 233(a) does not provide Public Health Service ("PHS") personnel with immunity from *Bivens* claims arising out of the provision of medical care. That decision warrants review and reversal because it directly conflicts with the Second Circuit's decision in *Cuoco v. Moritsugu*, 222 F.3d 99 (2d Cir. 2000), and decisions of every other circuit court to have addressed the Question Presented, *see, e.g.*, 08-1529 Pet. 5-6 n.3 (collecting cases); is contrary to the plain language of § 233(a) and the Court's interpretation of that language in *Carlson v. Green*, 446 U.S. 14, 20 (1980); misapplies *Carlson*'s test for preemption of *Bivens* remedies; and, finally, raises an important and recurring issue that, because of the nature of the PHS, specially calls for a uniform national rule. If permitted to stand, the decision below will threaten the effectiveness of PHS personnel and their willingness to serve and thereby undermine PHS's ability to fulfill its critical statutory mandate.

Respondents argue that the petition should be denied because the circuit split created by the decision below is too shallow and inconsequential to warrant review. They also argue that the decision below correctly applies *Carlson*, is consistent with the Court's jurisprudence, and properly construed § 233(a). None of these assertions is correct, and none undermines the need for review.

A. The decision below conflicts with *Carlson* and other decisions of this Court

1. Respondents mischaracterize (23-24) *Carlson*'s interpretation of § 233(a) and related statutes. 446 U.S. at 20. *Carlson* expressly contrasts the then-prevailing version of the Federal Tort Claims Act ("FTCA"), which left *Bivens* claims available, with other statutory provisions, which did not. In particular, *Carlson* states that a *Bivens* remedy is unavailable where "Congress has provided an alternative remedy which it explicitly declared to be a substitute for recovery directly under the Constitution and viewed as equally effective." *Carlson*, 446 U.S. at 20. Examining the FTCA, the Court observes that it does not contain an "explicit congressional declaration . . . to preempt a *Bivens* remedy." *Carlson*, therefore, takes the next logical step and concludes that, "[i]n the absence of a contrary expression from Congress," an FTCA and *Bivens* actions may be brought simultaneously for the same alleged wrongdoing. *Id.* Immediately thereafter, the majority expressly "buttressed" this conclusion by citing the PHS Act and the Gonzales Act as examples of where Congress "follow[ed] the practice of explicitly stating when it means to make FTCA an exclusive remedy." *Id.*

The unmistakable meaning of this statement in *Carlson* is that PHS Act immunity precludes *Bivens* relief. *Id.* at 19-20. Moreover, an "exclusive remedy" necessarily precludes all other remedies absent an express congressional exception. This is how *Carlson* used the term "exclusive." *Id.* at 23 ("without a clear congressional mandate, we cannot hold that Congress relegated respondent exclusively to the FTCA

remedy"), 27 (Powell, J., concurring) ("Congress possesses the power to enact adequate alternative remedies that would be exclusive"), 30-31 (Burger, C.J., dissenting) (discussing whether Civil Rights Act of 1964 provides "exclusive remedy" or permits parallel *Bivens* claims).

2. Respondents' reliance (29-31) on *United States v. Smith*, 499 U.S. 160 (1991), is misplaced. *Smith* neither states nor implies that the Westfall Act's exception to its general grant of immunity for *Bivens* claims applies to federal employees whose conduct is covered by a separate, preexisting grant of immunity. Federal Employees Liability Reform and Tort Compensation Act of 1988, Pub. L. No. 100-694, § 5, 102 Stat. 4564. The absence of any such statement is not surprising, as the text of 28 U.S.C. § 2679(b)(2)(A) makes clear that it is the general immunity newly conferred by the Westfall Act itself—and only that immunity—that does not extend to *Bivens* claims.

Smith rejected the sweeping argument that "the Liability Reform Act was meant to apply solely to those Government employees not already protected from tort liability in some fashion by a pre-existing federal immunity statute." *Smith*, 499 U.S. at 172-73. That limited statement was predicated on the Court's assumption in *Smith* that 10 U.S.C. § 1089(f) did not provide immunity for malpractice committed abroad. *Id.* at 171-172. In that context the Court properly noted that personnel otherwise covered by the Gonzalez Act could still "benefit from the more generous immunity available under the" Westfall Act. *Id.* at 173. But that in no way supports respondents' contention that the Westfall Act strips previ-

ously protected government personnel of immunity they enjoy under § 233(a)'s separate grant of absolute immunity. Indeed, holding otherwise would contradict *Smith*'s recognition that "[w]hen Congress want[s] to limit the scope of immunity . . . it d[oes] so expressly." *Id.*

3. The FTCA and PHS Act immunities are overlapping but not co-extensive. *See also* Gov't Br. 14 (PHS Act provides "distinct (and more expansive) personal immunity" than general grant of immunity provided by FTCA). In other words, the FTCA affords all federal employees (including PHS personnel) immunity from any civil damage action, except for constitutional torts, arising out of the performance of any act within the scope of their employment. 28 U.S.C. § 2679. In contrast, the PHS Act affords immunity from any and all damage actions arising from the performance of specific acts in the course of employment. 42 U.S.C. § 233(a). PHS Act immunity therefore extends beyond FTCA immunity to preclude *Bivens* claims against a subcategory of federal employees for a specific subset of duties—*i.e.*, medical and related functions—within the scope of their employment.

B. The circuit split alone justifies review

1. Respondents admit (32-33) that the decision below directly conflicts with the Second Circuit's decision in *Cuoco*, 222 F.3d 99, as to both its holding and its reading of *Carlson*. They try to minimize the split by characterizing it (32) as "shallow and unreasoned," but neither is correct.

Respondents brush off (32) decisions of the Third, Fourth, Fifth and Sixth Circuits and numerous dis-

trict court cases simply because they are unpublished. Published or not, there is a regular flow of these cases, and they raise a question of federal law that effects an agency with important responsibilities. The fact that many of them are unpublished is a reflection of how utterly uncontroversial the *Cuoco* decision is and makes the decision below all the more suspect.

Cuoco is well reasoned. It squarely addressed the Question Presented, construed the text of § 233(a), considered its legislative purpose, and correctly applied *Carlson* to reach its holding that § 233(a) bars *Bivens* actions against PHS personnel. 222 F.3d at 108-09. *Cuoco* also specifically rejected the argument that the Ninth Circuit accepted below—"that § 233(a) provides immunity only from medical malpractice claims"—finding that "there is nothing in the language of § 233(a) to support that conclusion." *Id.* at 108.

2. In the face of an undeniable circuit split, respondents' claim (32) that the "Court would benefit from the views of other appellate courts" and "[f]urther percolation" rings hollow because numerous circuits have had occasion to confront the Question Presented and the Ninth Circuit has placed itself in conflict with all of them. Moreover, the conflict between the Second and Ninth Circuits—even if it were the only relevant one for purposes of review on certiorari—is not going to resolve itself through "further percolation." *Cuoco* has stood firm for nearly a decade, and there is no reason to assume the Second Circuit will abandon it.

C. The Question Presented warrants review

1. Respondents mistakenly contend (34-35) that "only" PHS personnel serving in Bureau of Prison ("BOP") or Department of Homeland Security ("DHS") facilities are affected by the decision below. Respondents' statistic that 17% of PHS officers serve in such facilities is a significant number in and of itself, which cuts for rather than against certiorari. Given that PHS's Commissioned Corps is a uniformed service, all of its officers are affected because any of them might be assigned to BOP or DHS facilities as part of normal rotation practices. Respondents' statistic also fails to take into account PHS's civilian employees, who represent a significant percentage of its personnel who provide patient care.

2. Respondents erroneously equate (36-37) the possibility of a government-paid defense and indemnification for *Bivens* liability with the guarantee of absolute immunity. But neither representation nor indemnification is a forgone conclusion. Both determinations are purely discretionary and indemnification decisions are not made, "absent exceptional circumstances," until after there is an adverse judgment against a federal employee. 28 C.F.R. § 50.15; 45 C.F.R. §§ 36.1(a), (c). Absolute immunity is not just a protection from eventual liability, but rather an immunity from suit. *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1953 (2009) ("[t]he basic thrust of the [official]-immunity doctrine is to free officials from the concerns of litigation, including 'avoidance of disruptive discovery'") (quoting *Siegert v. Gilley*, 500 U. S. 226, 236 (1991) (Kennedy, J., concurring in the judgment)); *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985) (official immunity is "an entitlement not to stand

trial or face the other burdens of litigation"). The injury of having to endure years of stressful, distracting, burdensome, and time-consuming litigation is not cured by the uncertain prospect of a government-paid defense or indemnification.

Conclusion

For the foregoing reasons and those previously stated, the petition should be granted.

Respectfully submitted.

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