
In The
Supreme Court of the United States

CHRIS HENNEFORD,

Petitioner,

vs.

YANIRA CASTANEDA, as personal representative of
the ESTATE OF FRANCISCO CASTANEDA; VANESSA
CASTANEDA, as heir and beneficiary of the ESTATE, by
and through her mother and guardian, LUCIA PELAYO,

Respondents.

**On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit**

**BRIEF OF AMICUS CURIAE COMMISSIONED
OFFICERS ASSOCIATION OF THE UNITED
STATES PUBLIC HEALTH SERVICE, INC.
IN SUPPORT OF PETITION FOR
WRIT OF CERTIORARI**

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QUESTION PRESENTED

Does 42 U.S.C. § 233(a) make an action against the United States under the Federal Tort Claims Act the exclusive remedy for damage claims arising out of the medical and related care provided by United States Public Health Service officers and employees in the course and scope of their federal employment, precluding the cause of action recognized in *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971)?

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INTEREST OF AMICUS CURIAE

The Commissioned Officers Association of the United States Public Health Service, Inc. (“COAUSPHS”) is a member-based association comprised of approximately 6,500 active duty, inactive reserve and retired commissioned officers of the United States Public Health Service (“USPHS”).¹ Formed in 1950, COAUSPHS is the sole organization that works exclusively for the benefit of officers of the USPHS. COAUSPHS’s mission is to improve and protect the public health of the United States by advocating for the USPHS’s Commissioned Corps and its officers. In furtherance of its mission, COAUSPHS provides comprehensive member services, advocates for the interests of its members, conducts educational and training events, performs studies and research useful to public health professionals, and disseminates public and professional information of interest and use to public health professionals. In addition, COAUSPHS has 82 local branches located throughout the United States, and international branches in Europe and Asia. These local branches provide information, education, training, community service, support, networking and social activity for members.

¹ Counsel of record for all parties received notice at least 10 days prior to the due date of the *amicus curiae*’s intention to file this brief. The parties have consented to the filing of this brief. Pursuant to Rule 37.6, no party authored this brief in whole or in part and no person other than COAUSPHS or its counsel contributed money to the preparation or submission of this brief.

The core of COAUSPHS's members are Commissioned Corps Officers of the USPHS. Led by the Surgeon General, the USPHS Commissioned Corps is one of the seven Uniformed Services, whose officers serve the 10 agencies within the Department of Health and Human Services (including the Centers for Disease Control, the Food and Drug Administration, the Indian Health Service and the National Institutes of Health). *See* 10 U.S.C. § 101(a)(5)(C); 42 U.S.C. § 201(p). USPHS officers also serve other federal agencies, including the Department of Defense, Environmental Protection Agency, U.S. Citizenship and Immigration Services, Federal Bureau of Prisons, Coast Guard and Department of Agriculture.

COAUSPHS closely monitors legal and political issues that affect U.S. public health officers, and often offers its perspective when such issues arise. The issue in this case is especially significant. This case involves an abrupt change, in one part of the country, affecting the exposure of USPHS Officers to personal liability claims arising out of medical services performed for the United States. The outcome of this case will have a profound effect on the ability of the USPHS to recruit and retain medical professionals. In addition, this case will have an impact upon the mobility of public health officers who must be expeditiously deployed throughout the country as local and regional events and circumstances demand. The inconsistent rulings of the Second Circuit and Ninth Circuit create a substantial impediment to recruitment and retention of public

health officers, and create an untenable situation in which expensive malpractice insurance is required for USPHS officers only in certain portions of the country – areas to which other officers, lacking such insurance, cannot quickly be deployed in the event of a public health crisis.

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STATEMENT

This action for damages arose out of health care services Francisco Castaneda received while held as an immigration detainee in California, in the custody of U.S. Immigration and Customs Enforcement. Health care services for such detainees are provided by the Department of Homeland Security's Division of Immigration Health Services, which is led and significantly staffed by USPHS Commissioned Corps officers.

Mr. Castaneda sued the United States under the Federal Tort Claims Act ("FTCA"), various health care providers under California state law, and state and federal officials in their individual capacities under 42 U.S.C. § 1983 and *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971). Mr. Castaneda alleged that the USPHS officers were indifferent to his health care needs and discriminated against him on the basis of his immigration status. The respondents were substituted in the underlying action after Mr. Castaneda died.

The United States conceded liability of the FTCA claims for medical negligence. In doing so, the United States certified, pursuant to 28 C.F.R. §§ 15.3(a) and 15.4(b), that the USPHS officers were acting “within the course and scope of their employment with the United States at all times material” to the matters alleged in the complaint. The USPHS defendants then moved to dismiss, as 42 U.S.C. § 233(a) provides that the FTCA is the sole remedy available for claims arising out of medical care performed by USPHS officers within the scope of their employment.

The district court denied the motion to dismiss. The Ninth Circuit affirmed, holding, contrary to numerous authorities elsewhere,² that § 233(a) does not preclude *Bivens* relief. Resolving this inconsistency is of monumental importance, as it will have a real and negative impact on the abilities of the USPHS to recruit and retain health professionals, and to deploy personnel to areas in need of medical services.

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SUMMARY OF ARGUMENT

USPHS commissioned officers provide health care to underserved communities, immigration detainees, Native Americans, Alaska Natives, and the

² These authorities are cited at length in the petition for writ of certiorari in Docket No. 08-1529, nn. 3, 4.

Coast Guard. They are deployed throughout the country, and internationally, as circumstances and needs dictate. USPHS officers are paid substantially less than equivalent health care providers in the private sector. However, these officers have not, until this case, been burdened with the need for malpractice insurance. The immunity that USPHS officers have heretofore enjoyed facilitates recruitment and retention of qualified professionals to provide services in less than optimal conditions, for relatively low pay.

In addition, critical to the mission of the USPHS is the ability to assign these uniformed officers quickly to locations where services may be needed as a result of a natural disaster or emergent circumstances. Differing regional standards as to whether such officers can be subjected to individual liability arising out of their medical services will profoundly hinder the mobility of USPHS officers and their ability to deploy to areas with an acute need for health care services.



ARGUMENT**I. THE PETITION SHOULD BE GRANTED BECAUSE THE ISSUE PRESENTED IS CRUCIAL TO THE ABILITY OF THE USPHS TO FULFILL ITS MANDATE AND TO RECRUIT AND RETAIN QUALIFIED PERSONNEL TO PROVIDE HEALTH CARE SERVICES**

The legislation containing § 233(a) sought to permit the USPHS to provide health care to underserved communities and areas. *See* Emergency Health Personnel Act of 1970, Pub. L. 91-623, 84 Stat. 1868, 1870 (1970); *see also*, H. Rep. No. 91-1662, 91st Cong., 2d Sess. at 1, reprinted in 1970 U.S.C.C.A.N. 5775. However, because USPHS officers were not paid enough to afford individual malpractice insurance, the Surgeon General requested an amendment to protect USPHS officers from suits for damages arising out of the health care they provide. *See* 116 Cong. Rec. 42542 (1970) (Rep. Staggers, the bill's sponsor); *see also*, 116 Cong. Rec. 42977 (1970) (Sen. Javits). Congress' purpose in enacting § 233(a) was to provide immunity from liability and the burdens of defending lawsuits to practitioners who provide healthcare services to underserved communities and receive substantially less financial remuneration than their private-sector counterparts.³

³ While the legislative history of § 233(a) supports the petitioner's position, resort to such history is arguably unnecessary, as the plain language of the statute requires a
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The Surgeon General's and Congress' concerns regarding the "pay gap" between the Uniformed Services and the private sector were well founded. *See Military Pay Comparability Act of 2003*, H.R. 1885, 108th Cong., 1st Sess., § 2 (citing a pay gap of 13.5% between uniformed personnel and private sector employees in 1999). This differential makes it difficult for medical professionals in the Uniformed Services to afford malpractice insurance, and was the very reason Congress enacted § 233(a). The effect of the Ninth Circuit's ruling below is to subject USPHS personnel to medical malpractice actions couched as *Bivens* claims. The attendant need for malpractice insurance, at great cost, together with the ever-present threat of being subjected to litigation, will undoubtedly have negative consequences for the USPHS's recruitment and retention of qualified medical personnel. In the end, underserved communities, those with the greatest need for medical care and services, will suffer.

determination that the Ninth Circuit erred. "[W]hen the statute's language is plain, the sole function of the courts – at least where the disposition required by the text is not absurd – is to enforce it according to its terms." *Lamie v. United States Trustee*, 540 U.S. 526, 534 (2004) (citing *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 6 (2000)).

II. THE PETITION SHOULD BE GRANTED BECAUSE THE NINTH CIRCUIT'S RULING WILL SEVERELY UNDERMINE THE ABILITY OF THE USPHS TO PROVIDE HEALTH CARE SERVICES TO THOSE IN NEED IN THE EVENT OF A NATURAL DISASTER OR OTHER EMERGENT CIRCUMSTANCES

Public health threats and medical emergencies can ensue from many causes, including natural epidemics of infectious disease; terrorist acts involving explosives, biological agents, toxic chemicals, radiological or nuclear devices; industrial or transportation accidents; and weather-related catastrophes. *See* U.S. Dep't of Health & Human Svcs. Concept of Operations Plan (CONOPS) for Public Health & Medical Emergencies, at 9 (May 2004). In these emergent circumstances, USPHS officers are deployed to areas in need of services, which may be deemed "health professional shortage areas." *See* 42 U.S.C. § 254e(a).

By way of example, in 2005, Hurricanes Katrina and Rita devastated the Gulf Coast. On August 29, Hurricane Katrina made landfall in Louisiana as a Category 3 storm, causing an estimated \$81 billion in damage and 1,833 deaths. National Hurricane Center, "Tropical Cyclone Report, Hurricane Katrina, 23-30 August 2005" (available at http://www.nhc.noaa.gov/pdf/TCR-AL122005_Katrina.pdf) (last accessed July 14, 2009). On September 24, Hurricane Rita made landfall between Texas and Louisiana, also as a Category 3 storm, causing estimated total damage of

\$10 billion and at least 62 deaths. National Hurricane Center, “Tropical Cyclone Report, Hurricane Rita, 18-26 September 2005” (available at http://www.nhc.noaa.gov/pdf/TCR-AL182005_Rita.pdf) (last accessed July 14, 2009).

In response to health care and public health needs in the areas affected by the hurricanes, the Commissioned Corps of the USPHS carried out the largest deployment in its history. See Dep’t of Health & Human Svcs., Office of the Inspector General, “The Commissioned Corps’ Response to Hurricanes Katrina and Rita” (February 2007). In this deployment, 2,119 of the 6,122 Corps officers (35%) on active duty between August 26 and November 7, 2005, deployed at least once in response to the hurricanes. *Id.* These officers served a total of 2,372 missions, with some officers deploying more than once. *Id.* The USPHS Commissioned Corps were instrumental in delivering needed health services in the wake of these natural disasters. To provide these services, the USPHS had to rapidly deploy officers to locations where the population most needed them.

The disagreement among the Circuit Courts of Appeals as to whether § 233(a) precludes *Bivens* relief against USPHS officers has a real and substantial impact upon the USPHS’s ability to rapidly deploy officers when natural or other disasters, like the Gulf Coast hurricanes, strike. Officers stationed in one region of the country (for instance, within the Second Circuit) need not have medical malpractice insurance, while those located in another region (within the

Ninth Circuit) now need medical malpractice insurance. This regional disparity, created by the decision below, impairs the ability of uninsured USPHS officers to promptly deploy to areas in which they would be exposed to personal liability. For instance, should a catastrophic earthquake strike California, USPHS officers located elsewhere, lacking medical malpractice insurance, would understandably and justifiably be hesitant to deploy to the disaster area, given the personal liability risks they might incur.

The conflict among the Circuit Courts of Appeals creates an untenable situation which undermines the ability of the USPHS Commissioned Corps to serve communities in need throughout the nation, particularly in circumstances where rapid, large scale deployment of officers is required, as with natural disasters or a major terrorism incident. A uniform national rule is needed to allow the Commissioned Corps to fulfill its mission of providing health care to those most in need.



CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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