Nos. 08-1529 and 08-1547

In The Supreme Court of the United States

EUGENE MIGLIACCIO, ET AL.,

Petitioners,

v.

YANIRA CASTANEDA, ET AL.,

Respondents.

CHRIS HENNEFORD,

Petitioner,

v.

YANIRA CASTANEDA, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF FRANCISCO CASTANEDA, ET AL.,

Respondents.

On Petitions For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Does 42 U.S.C. § 233(a)—enacted in 1970 to provide Public Health Service (PHS) medical personnel with immunity from malpractice and negligence actions by making the Federal Tort Claims Act (FTCA) the exclusive remedy for such actions—bar a suit alleging constitutional violations under *Bivens v. Six Unknown Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971), which the FTCA expressly permits against "any employee of the Government" under the Federal Employees Liability Reform and Tort Compensation Act of 1988, 28 U.S.C. §§ 2671-2680?

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STATUTES INVOLVED

The statutes governing the analysis of the question presented provide as follows:

28 U.S.C. § 2679(b):

> (1) The remedy against the United States provided by sections 1346(b) and 2672 of this title for injury or loss of property, or personal injury or death arising or resulting from the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment is exclusive of any other civil action or proceeding for money damages by reason of the same subject matter against the employee whose act or omission gave rise to the claim or against the estate of such employee. Any other civil action or proceeding for money damages arising out of or relating to the same subject matter against the employee or the employee's estate is precluded without regard to when the act or omission occurred.
>
> (2) Paragraph (1) does not extend or apply to a civil action against an employee of the Government –
>
> (A) which is bought for a violation of the Constitution of the United States, or
>
> (B) which is brought for a violation of a statute of the United States under which such action against an individual is otherwise authorized.

Emergency Health Personnel Act of 1970, Pub. L. No. 91-623, § 223(a), 84 Stat. 1868, 1870 (1970), *codified at* 42 U.S.C. § 233(a):[1]

> DEFENSE OF CERTAIN MALPRACTICE AND NEGLIGENCE SUITS
>
> The remedy against the United States provided by sections 1346(b) and 2672 of title 28, or by alternative benefits provided by the United States where the availability of such benefits precludes a remedy under section 1346(b) of title 28, for damage for personal injury, including death, resulting from the performance of medical, surgical, dental, or related functions, including the conduct of clinical studies or investigation, by any commissioned officer or employee of the Public Health Service while acting within the scope of his office or employment, shall be exclusive of any other civil action or proceeding by reason of the same subject-matter against the officer or employee (or his estate) whose act or omission gave rise to the claim.

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[1] This statute was originally numbered "§ 223(a)" in Public Law No. 91-623, but the drafters of the U.S. Code renumbered this section as "§ 233(a)" when it was first published in 1970. *See* 42 U.S.C. § 233(a) (1970). For consistency, this Brief will refer to the statute as "§ 233(a)."

STATEMENT

I. FACTUAL BACKGROUND

Francisco Castaneda was an immigration detainee who had his penis amputated and developed terminal penile cancer because Petitioners and other defendants ignored outside physicians' recommendations and refused to provide him a biopsy during his nearly eleven-month detention by Immigration and Customs Enforcement (ICE).

Castaneda entered the San Diego Correctional Facility (SDCF) under ICE custody on March 27, 2006, and immediately informed SDCF medical personnel that a lesion on his penis was painful, growing, bleeding, and exuding discharge. Pet. App. 3a.[2] The next day, Castaneda met with physician's assistant Lieutenant Anthony Walker, who recommended a urology consult and biopsy "ASAP," noting Castaneda's history of genital warts and his family history of cancer. *Id.* at 3a-4a.

Petitioner Esther Hui was Castaneda's treating physician during his eight-month detention at SDCF. 9th Circuit Supplemental Excerpts of Record (SER) 358, 366-67. Hui recalls seeing Castaneda once, but did not document her examination, has no idea when it occurred, and does not recall if she ever reviewed Castaneda's medical records. *Id.* at 361, 363.

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[2] All citations to "Pet. App." are to the Appendix filed in No. 08-1529.

Castaneda was not provided an outside consult until June 7, 2006, more than two months after he entered ICE custody. On that date, he met with oncologist John Wilkinson, M.D., who agreed that Castaneda's symptoms required urgent diagnosis and treatment, including a biopsy. SER 10-14, 232. Wilkinson offered to admit Castaneda to the hospital and assist in coordinating the biopsy. Pet. App. 4a. Hui determined that the biopsy was an "elective" outpatient procedure and rejected it (*id.*), even though she admitted that a biopsy was medically necessary and the only definitive way to rule out cancer (SER 360-61, 369).

Over the next several months, Castaneda's symptoms worsened, but he did not receive the biopsy. On June 12, he filed a grievance report stating that he was "in a considerable amount of pain and . . . was in desperate need of medical attention." Pet. App. 5. On July 13, a Treatment Authorization Request (TAR) sought emergency room evaluation and treatment for Castaneda, noting that Wilkinson "strongly recommended" a biopsy. *Id.* at 45a-46a. ICE brought Castaneda to the Scripps Mercy Chula Vista emergency room. Urologist Daniel Hunting, M.D., a defendant in this case, briefly examined Castaneda, concluded that the lesion was genital warts, and did not perform the recommended biopsy. *Id.* at 5a-6a.

On August 22, Castaneda was examined by urologist Robert Masters, M.D., who concluded that Castaneda needed a circumcision, which would relieve the "ongoing medical side effects of the lesion"

and provide a biopsy for analysis. *Id.* at 6a. On August 30, Castaneda received a memo from Petitioner Stephen Gonsalves, SDCF's Health Services Administrator, stating that the "surgical intervention" recommended by Masters was "elective in nature," and that the care Castaneda had received was "appropriate and in accordance with our policies." *Id.* at 49a.

On September 26, another lesion had formed on Castaneda's penis and "a foul odor was emitting from the uncircumcised area with a mushroomed wart." *Id.* at 6a. Division of Immigration Health Services (DIHS) records on November 14 reflect that Castaneda's "symptoms have worsened," and that Castaneda "feels a constant pinching pain," "has blood and discharge on his shorts," and "complains of a swollen rectum." *Id.* DIHS responded by prescribing Castaneda laxatives and increasing his weekly allotment of boxer shorts. *Id.*

On November 17, Castaneda was transferred to ICE's San Pedro Service Processing Center, but his transfer form listed no current medical problems. *Id.* at 7a. In early December, ACLU attorneys began advocating to get Castaneda the biopsy he had been prescribed nearly a year earlier. *Id.* Urologist Lawrence Greenberg, M.D., saw Castaneda on December 14, describing Castaneda's penis as "a mess" and stating that he required surgery. *Id.* For two months, the ACLU unsuccessfully attempted to secure Castaneda the treatment he required. *Id.* On January 25, 2007, Castaneda was seen by Asghar

Askari, M.D., who also ordered a biopsy after determining that Castaneda "most likely [had] penile cancer." *Id.*

On February 5, instead of providing the biopsy, ICE released Castaneda. *Id.* Castaneda went to the emergency room of Harbor-UCLA Hospital in Los Angeles on February 8, where he was diagnosed with squamous cell carcinoma of the penis. His penis was amputated on February 14. *Id.* The amputation did not occur in time to save Castaneda's life, as the cancer had metastasized and did not respond to numerous rounds of chemotherapy. *Id.* Castaneda died on February 16, 2008. *Id.* at 8a. He was thirty-six. *Id.*

II. PROCEDURAL BACKGROUND

Castaneda's sister and representative of his estate, Yanira Castaneda, and his sole heir, Vanessa Castaneda (collectively, "Respondents"), filed this wrongful death and survival action against the United States and a number of state and federal officials, including Petitioners, who are all PHS personnel. Respondents allege that Petitioners violated Castaneda's constitutional right to adequate medical care under the Fifth and Eighth Amendments by failing to treat his known serious medical condition, acting with deliberate indifference to his serious health needs, and establishing an unconstitutional policy and/or custom for providing medical care to detainees. Respondents also allege

that Petitioners violated Castaneda's constitutional right to equal protection under the Fifth Amendment by failing to treat his known serious medical condition because of his immigration status, and establishing an unconstitutional policy and/or custom for providing medical care to detainees.

The government moved to dismiss the claims against Petitioners, arguing that 42 U.S.C. § 233(a) provides Petitioners with absolute immunity from claims under *Bivens v. Six Unknown Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971). The district court denied the motion, holding that § 233(a)'s plain language dictates that Respondents may assert *Bivens* claims against PHS medical personnel. Pet. App. 54a. The court concluded that § 233(a), through its reference to FTCA provisions, "incorporates the provision of the FTCA [28 U.S.C. § 2679(b)(2)(A)] which *explicitly* preserves a plaintiff's right to bring a *Bivens* action." Pet. App. 59a-61a (emphasis in original).

The district court further stated that the conduct Respondents allege "is beyond cruel and unusual" (Pet. App. 80a), and constitutes "one of the most, if not the most, egregious Eighth Amendment violations the Court has ever encountered" (*id.* at 74a). The court noted, "Defendants' own records bespeak of conduct that transcends negligence by miles. It bespeaks of conduct that, if true, should be taught to every law student as conduct for which the moniker 'cruel' is inadequate." *Id.* at 80a n.16.

Petitioners filed an interlocutory appeal. Shortly thereafter, the government admitted liability and

causation on Respondents' FTCA claim against the United States for medical negligence. Gov't Notice of Admis., No. 07-7241 (C.D. Cal. Apr. 24, 2008).[3]

The court of appeals affirmed. Pet. App. 1a-40a. The court turned to *Carlson v. Green*, 446 U.S. 14 (1980), as "the starting point" for its analysis of whether § 233(a) precludes *Bivens* relief. Pet. App. 10a. The court stated that *Carlson*'s two-factor test for *Bivens* preemption, which places the burden on the party asserting preemption to demonstrate the existence of an "alternative remedy" to a *Bivens* remedy that is "both (a) 'explicitly declared to be a substitute' and (b) is 'viewed as equally effective,'" would guide its analysis. *Id.* (quoting *Carlson*, 446 U.S. at 18-19).

Noting *Carlson*'s conclusion that Congress does not view the FTCA as providing relief that is "equally effective" as *Bivens* relief, the court found "no basis" for distinguishing *Carlson* here. Pet. App. 13a-14a. The court also concluded that § 233(a) does not

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[3] Despite an order directing the government to produce all responsive documents during discovery, the government failed to produce documents revealing a cover-up of Castaneda's complaints about his medical care. *The Washington Post* uncovered an e-mail exchange where physician's assistant David Lusche asked Walker to "patch up" a grievance that Castaneda had submitted, but Walker refused to do so. SER 413-15, 419. Nevertheless, someone altered the grievance to state that it had been "Resolved," even though the grievance was still pending. *Id.* at 425, 437. The government did not produce these e-mails until after the *Post* story broke. *Id.* at 432-35.

contain any "explicit declaration" that Congress intended to provide PHS personnel immunity from *Bivens* actions. *Id.* at 19a. The court found support for this conclusion in § 233(a)'s text (*id.*); the text of the FTCA's remedy provisions, as amended by the Federal Employees Liability Reform and Tort Compensation Act of 1988 (LRTCA), Pub. L. No. 100-694, 102 Stat. 4563 (*id.* at 25a); the historical context in which § 233(a) was enacted (*id.* at 20a-23a); and the legislative histories of § 233(a) and the LRTCA (*id.* at 22a, 26a-28a).

Finally, the court below concluded, in accordance with *Carlson*, that there are no "special factors" precluding a *Bivens* action. *Id.* at 37a-39a (quoting *Carlson*, 446 U.S. at 18).

REASONS FOR DENYING THE WRIT

To create the appearance of an issue worthy of this Court's review, Petitioners reduce the court of appeals' analysis of the immunity conferred by § 233(a) to one proposition. They argue that the court erred by requiring a showing of "magic words" from Congress demonstrating that § 233(a) precludes *Bivens* actions against PHS personnel. Migliaccio Pet. 10; *see also* Henneford Pet. 22. According to Petitioners, the court of appeals created a conflict among the courts because its demand for these "magic words" led it to misinterpret *Carlson*. By

casting the decision below in this light, Petitioners obscure the fact that it is the first—and only—decision to have examined the texts of both § 233(a) and the LRTCA, the historical contexts and legislative histories of these interrelated statutes, and this Court's immunity analyses in both *Carlson* and *United States v. Smith*, 499 U.S. 160 (1991), which all demonstrate that Congress did not intend § 233(a) to preclude *Bivens* actions.

Review is not warranted here for several reasons. First, the decision below is consistent with this Court's jurisprudence. Applying *Carlson*, the court of appeals correctly concluded that the texts, historical contexts, and legislative histories of § 233(a) and the LRTCA demonstrate that Congress did not "explicitly declare" that the FTCA is an "equally effective" substitute for *Bivens* actions against PHS personnel. 446 U.S. at 18-19. Second, there is no meaningful conflict among the courts warranting review because the "split" identified by Petitioners is both shallow and unreasoned. Only the Ninth and Second Circuits have issued binding decisions on the scope of § 233(a)'s immunity and, in any event, the court below is the only appellate court to thoroughly analyze both § 233(a) and the LRTCA to determine Congress's intent. Finally, review is not warranted because Petitioners and their *amici* overstate the impact of the decision below. Contrary to their claims, the practical and legal realities of the circumstances under which federal employees provide medical

services demonstrate that the decision below will not significantly affect the government's ability to recruit and retain PHS personnel. For all of these reasons, the petitions for a writ of certiorari should be denied.

I. THE DECISION BELOW IS CONSISTENT WITH THIS COURT'S JURISPRUDENCE.

Petitioners and their *amici* argue that review is warranted on the ground that the decision below conflicts with *Carlson*. However, there is no conflict. The court faithfully applied *Carlson*'s two-part test for *Bivens* preclusion and correctly concluded that Congress did not intend to bar *Bivens* actions against PHS medical personnel. The decision below also comports with *Smith*, which Petitioners and their *amici* ignore. In *Smith*, this Court concluded that the LRTCA—which expressly exempts *Bivens* actions from the FTCA's exclusivity—applies to *all* federal employees, including those subject to pre-LRTCA immunity statutes like § 233(a). 499 U.S. at 172-173. Accordingly, both *Carlson* and *Smith* demonstrate the absence of any conflict between the decision below and prior rulings of this Court.

A. The Decision Below Is Consistent With *Carlson*.

Carlson supports the court of appeals' holding that § 233(a) does not preclude *Bivens* claims. The plaintiff there brought a *Bivens* action on behalf of her son's estate against Bureau of Prisons (BOP) officials alleging that her son died as a result of the officials' deliberate indifference to his serious medical needs while in federal custody, in violation of the Fifth and Eighth Amendments. 446 U.S. at 16-17. The officials argued that the remedy provided by the FTCA preempts any *Bivens* remedy. *Carlson* rejected that argument, holding that it is "crystal clear" in cases involving constitutional violations based on the failure to provide adequate medical care that "Congress views FTCA and *Bivens* as parallel, complementary causes of action." *Id.* at 20. *Carlson* concluded that "victims of constitutional violations by a federal agent have a right to recover damages against the official in federal court" unless the federal defendant: (1) "show[s] that 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"; or (2) shows "special factors counseling hesitation in the absence of affirmative action by Congress." *Id.* at 18-19 (citations omitted) (emphasis in original).

As explained below, the court of appeals applied this test and concluded that Congress neither: (1) explicitly declared that the remedy provided by the FTCA would be a substitute for recovery under

Bivens for constitutional violations committed by PHS personnel; nor (2) viewed the FTCA remedy to be equally effective as the *Bivens* remedy to redress constitutional violations. Pet. App. 10a. As further explained below, the court also concluded that there are no "special factors" precluding *Bivens* relief because this case is functionally identical to *Carlson*, which held that the FTCA's remedial scheme is not a "special factor" precluding *Bivens* actions. *Id.* at 38a.

1. Congress has explicitly declared its intent to preserve—not bar—*Bivens* actions against PHS personnel.

Petitioners argue that the court "misapplied" the "explicit declaration" prong of *Carlson*'s two-part test by requiring them to identify "magic words" from Congress demonstrating that § 233(a) precludes *Bivens* actions. Migliaccio Pet. 10; *see also* Henneford Pet. 22. The court of appeals did no such thing. In accordance with *Carlson*, the court analyzed the plain language of § 233(a) and the LRTCA, the historical context in which Congress enacted § 233(a), and the legislative histories of both statutes in concluding that Congress did not intend § 233(a) to preclude *Bivens* actions.

a. Plain language

The court of appeals examined the text of both § 233(a) and § 5 of the LRTCA, codified at 28 U.S.C. § 2679(b), to conclude that Congress never "explicitly

declare[d]" an intent to have the FTCA substitute for *Bivens* actions against PHS personnel. Pet. App. 35a.

Regarding § 233(a), the court below is the only court to consider that the statute is entitled "Defense of Certain Malpractice and Negligence Suits."[4] The court concluded that this title indicates Congress's "exclusive concern" with extending immunity to common-law malpractice and negligence actions—not actions alleging constitutional violations. Pet. App. 22a-23a (citation omitted). The court also rejected the government's argument that Congress's use of the term "malpractice" includes constitutional violations. Pet. App. 23a n.12.[5]

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[4] The court analyzed § 233(a)'s heading as it appears in the Statutes at Large—not in the U.S. Code—because the two versions of the statute are different. *Compare* Emergency Health Personnel Act of 1970, Pub. L. No. 91-623, § 223(a) ("Defense of Certain Malpractice and Negligence Suits"), *with* 42 U.S.C. § 233(a) (1970), 42 U.S.C. § 233(a) (2003) ("Exclusiveness of remedy"). Where the language of a statute does not appear in the U.S. Code as it was printed in the Statutes at Large, courts defer to the Statutes at Large. *U.S. Nat'l Bank of Or. v. Indep. Ins. Agents of Am., Inc.*, 508 U.S. 439, 448 (1993).

[5] The government's argument that the term "malpractice" includes constitutional violations (U.S. Br. 15) conflicts with this Court's jurisprudence. *See, e.g., Federal Deposit Ins. Corp. v. Meyer*, 510 U.S. 471, 477 (1994) (distinguishing constitutional torts from common-law torts; holding that "because [the plaintiff's] constitutional tort claim is not cognizable under § 1346(b), the FTCA does not constitute his 'exclusive' remedy"); *Estelle v. Gamble*, 429 U.S. 97, 106 (1976) (stressing the difference between malpractice and an Eighth Amendment violation by holding that "a prisoner must allege acts or

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The court below found further support for its reading of § 233(a) in the LRTCA's plain language. *Id.* at 25a. The LRTCA, a 1988 amendment to the FTCA, provides that FTCA exclusivity "does not extend or apply to a civil action against an employee of the Government . . . which is brought for a violation of the Constitution of the United States." 28 U.S.C. § 2679(b)(2)(A). The court reasoned that, by amending the FTCA in this way, "Congress made explicit" what had been implicit at the time Congress enacted § 233(a): that constitutional claims are outside the FTCA's purview. Pet. App. 25a.

The district court concluded that § 233(a) incorporates by reference the LRTCA's express preservation of *Bivens* remedies. *Id.* at 61a. It reasoned that § 233(a) must be read in conjunction with the FTCA provisions to which the statute expressly refers. Section 233(a) provides that, where PHS medical personnel cause certain types of damage, the remedy "against the United States *provided by sections 1346(b) and 2672 of title 28*" shall be the exclusive remedy. 42 U.S.C. § 233(a) (emphasis added). By incorporating "sections 1346(b) and 2672 of title 28"—which refer generally to the FTCA

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omissions sufficiently harmful to evidence deliberate indifference to serious medical needs" to state a claim for relief under the Constitution, which is significantly more difficult to prove than malpractice or negligence).

remedy[6]—into § 233(a)'s text, Congress ensured that § 233(a) makes the FTCA the exclusive remedy only to the extent that the FTCA provides. The FTCA, as amended by the LRTCA, explicitly preserves *Bivens* actions against all federal employees. *See* 28 U.S.C. § 1346(b) (noting that the remedy provided by the FTCA is "[s]ubject to the provisions of chapter 171" of title 28, in which the LRTCA is codified).

This reading of § 233(a) is further supported by the well-established principle that, "[w]hen a statute adopts the general law on a given subject, the reference is construed to mean that the law is as it reads thereafter at any given time including amendments subsequent to the time of adoption." 2B Norman J.

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[6] Indeed, as the government concedes, the FTCA remedy is commonly referred to as "sections 1346(b) and 2672"—not by reference to all the other sections governing the FTCA remedy, including §§ 2671 and 2673-2680. Respondents' App. 31a (Department of Justice attorney Jeffrey Clair states, "we do agree with the Plaintiffs . . . that references to § 1346(b) and § 2672 of Title . . . 28 are a typical statutory shorthand for referring . . . to the Federal Tort Claims Act."). The FTCA itself refers to the "remedy against the United States" as "provided by sections 1346(b) and 2672 of this title . . . ," 28 U.S.C. § 2679(b)(1), and every statute enacted to provide medical personnel immunity from common law torts, including 10 U.S.C. § 1089(a) (armed forces), 22 U.S.C. § 2702 (State Department), and 38 U.S.C. § 4116 (Veterans' Administration), refer *only* to "sections 1346(b) and 2672 of title 28" when describing the scope of the FTCA's exclusive remedy. Moreover, countless courts, including this Court, quote statutes citing the FTCA's remedy provisions ("sections 1346(b) and 2672"), but replace these section numbers with "[the FTCA]," presumably for ease of reading. *See, e.g., Smith*, 499 U.S. at 165-66.

Singer & J.D. Shambie Singer, *Sutherland Statutory Construction* § 51:7 (7th ed. 2009). Because § 233(a) adopts the FTCA's general remedy provisions to define the scope of immunity available to PHS medical personnel, it must be read in conjunction with subsequent amendments to the FTCA's remedy provisions—including the 1988 amendment expressly preserving *Bivens* actions against all government employees.[7]

Nonetheless, the government argues that reading § 233(a) as incorporating the FTCA's amendments embodied in the LRTCA "would amount to an implied repeal of Section 233(a)." U.S. Br. 14.[8] This argument

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[7] The FTCA, as referenced in § 233(a), is a "general" reference because "the general rule [is] that incorporations by reference are designated as general and effect is given to subsequent amendments." Singer, *Sutherland Statutory Construction*, *supra*, at § 51:7; *see, e.g., AFIA/CIGNA Worldwide v. Felkner*, 930 F.2d 1111, 1112-13 (5th Cir. 1991) (statute incorporated all amendments to "the provisions of the Longshoremen['s] . . . Act, approved March 4, 1927 (44 Stat. 1424)" because this language, as it appeared in statute, was a "general reference"); *U.S. v. Rodriquez-Rodriguez*, 863 F.2d 830 (11th Cir. 1989) (statute incorporated all amendments to "the Comprehensive Drug Abuse Prevention and Control Act of 1970 (21 U.S.C. § 960)" because this language, as it appeared in statute, was a "general reference").

[8] The government's related argument, that the alleged "implied repeal" violates the canon of statutory construction that the "specific trumps the general" (U.S. Br. 14), also fails because this canon does not apply where, as here, the "specific" statute involved explicitly references the general one. This case is therefore distinguishable from *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 170 (2007), *cited in* U.S. Br. 14, because

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is unavailing. As the court below noted, subsection (a) of § 233 "remains the lynchpin of the entire balance of the section," as other subsections of § 233 have extended the immunity provided by subsection (a) to individuals "deemed to be an employee of the Public Health Service." Pet. App. 31a (citations omitted). Thus, § 233(a) is not impliedly repealed by the LRTCA because it serves the purpose of extending immunity from malpractice and negligence actions to these other types of individuals and entities that are not "employee[s] of the Government" under the LRTCA.

b. Historical context

In accordance with *Carlson*, the court below supported its reading of § 233(a) by analyzing the historical context in which Congress enacted § 233(a) and found no evidence that Congress intended this immunity to extend to constitutional violations.

As this Court has recognized, "[p]ublic context is especially important in examining Congress's enactment (or re-enactment) of . . . verbatim statutory text,'" *Alexander v. Sandoval*, 532 U.S. 275, 288 (2001), as "[t]he meaning – or ambiguity – of certain words or phrases may only become evident when placed in context," *FDA v. Brown & Williamson*

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the two regulations at issue in *Long Island Care*—which provided conflicting definitions of the same term—did not reference each other in any way. 551 U.S. at 169.

Tobacco Corp., 529 U.S. 120, 132-33 (2000), *quoted in* Pet. App. 20a-21a; *see also Carlson*, 446 U.S. 19-20 (considering historical context in concluding that "Congress views FTCA and *Bivens* as parallel, complementary causes of action").

The court below noted that Congress enacted § 233(a) six months before this Court decided *Bivens*.[9] Pet. App. 21a. Moreover, § 233(a) predates by nearly six years *Estelle v. Gamble*, 429 U.S. 97 (1976), which established a remedy under the Eighth Amendment for "deliberate indifference" to a prisoner's serious medical needs. Pet. App. 19a, 21a. This historical context led the court below to conclude that, because "direct constitutional remedies . . . were not recognized at the time of [§ 233(a)'s] passage," an "ordinary reader . . . would have understood 'any other civil action or proceeding' with respect to 'personal injury, including death, resulting from the performance of medical, surgical, dental, or related functions' to refer . . . to a host of common-law and

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[9] Petitioners' and their *amici*'s argument that Congress must "have been aware . . . of the concept of a constitutional tort" at the time it enacted § 233(a) (Migliaccio Pet. 9 n.5; *see also* U.S. Br. 16 n.8) is meritless. *Bell v. Hood*, 327 U.S. 678 (1946), declined to rule on the appropriateness of a remedy against federal employees for Fourth Amendment violations, and the district court on remand held that no such cause of action existed. *See* 71 F. Supp. 813, 817 (S.D. Cal. 1947). Between *Bell* and *Bivens*, no reported decision had held that a claim against federal officials existed for constitutional violations. Thus, Congress could not "have been aware" of the concept of a constitutional tort claim when it enacted § 233(a).

statutory malpractice actions," *not* actions alleging constitutional violations. *Id.* at 21a-22a.

c. Legislative history

In accordance with *Carlson*, the court below also supported its reading of § 233(a) by analyzing the legislative histories of § 233(a) and the LRTCA (Pet. App. 22a, 26a-28a), concluding that Congress intended § 233(a)'s immunity to extend only to common-law malpractice and negligence actions—not *Bivens* actions.[10]

The LRTCA's legislative history in particular compels this conclusion. Congress passed the LRTCA to restore the scope of existing remedies prior to this Court's decision in *Westfall v. Erwin*, 484 U.S. 292 (1988). Specifically, Congress passed the amendment to provide all federal employees—including those covered by pre-LRTCA immunity statutes like § 233(a)—with immunity from common-law torts and to preserve personal liability for constitutional violations. *See, e.g.*, H.R. Rep. No. 100-700, at 4 (1988), *reprinted in* 1988 U.S.C.C.A.N. 5945, 5948 (explaining that the effect of the LRTCA "is to *return* Federal employees to the status they held prior to the Westfall decision," and that "[s]uch an exclusive remedy *has already been enacted* to cover the

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[10] *Carlson* likewise considered legislative history in concluding that the FTCA does not preclude *Bivens* actions. 446 U.S. 19-20.

activities of certain Federal employees") (emphasis added); *id.* at 6 (stating that this law "*would not affect* the ability of victims of constitutional torts to seek personal redress from Federal employees who allegedly violate their Constitutional rights") (citations omitted; emphasis added); 134 Cong. Rec. 29933 (daily ed. Oct. 12, 1988) (statement of Sen. Grassley) (noting that "this bill does not have any effect on the so-called Bivens cases or Constitutional tort claims, . . . *which can continue to be brought against individual Government officials*") (emphasis added). These statements show that Congress never intended § 233(a)'s immunity to extend to *Bivens* actions.[11]

In 1988, the government endorsed the view that the LRTCA's express preservation of *Bivens* remedies was consistent with pre-LRTCA immunity statutes, including § 233(a). *See, e.g., Legislation to Amend the Federal Tort Claims Act: Hearing Before the Subcomm. on Administrative Law and Government Relations of the H. Comm. on the Judiciary*, 100th Cong. 78 (1988) (statement of Robert Willmore, Deputy Assistant Attorney General) ("Persons alleging constitutional torts will, under [the LRTCA] *remain free* to pursue a remedy against the individual employee if they so choose.") (emphasis added); *id.* at 58, 76 (stating that "the exclusive remedy provision adopted by the [LRTCA] is based on" similar

[11] When Congress passed the LRTCA, no court had held that § 233(a)'s immunity extended to *Bivens* actions.

provisions applicable "to drivers of vehicles, to physicians employed by various agencies, and to Department of Defense attorneys" and "would do nothing more than extend the protection now enjoyed by doctors, drivers, and DoD [Department of Defense] attorneys to *all* federal employees. It will ensure *equitable and consistent treatment for persons injured by federal conduct, without regard to the status of the employee whose actions are alleged to have caused the injury*.") (emphasis added).

Moreover, as the court below noted, § 233(a)'s legislative history shows that Congress sought to protect PHS personnel from common-law tort actions only. Pet. App. 22a ("The only two statements on the floor of either house of Congress respecting [§ 233(a)] mentioned only medical malpractice, with nothing being said about constitutional violations."). This is not surprising, given that Congress enacted § 233(a) before this Court recognized remedies for constitutional violations by federal employees.

Thus, the legislative histories of § 233(a) and the LRTCA show that Congress did not intend § 233(a) to bar *Bivens* actions. When Congress enacted the LRTCA, it made explicit what it had intended all along: that victims of constitutional violations would remain free to pursue a remedy against all federal employees, including those covered by pre-LRTCA immunity statutes like § 233(a).

* * *

In short, contrary to Petitioners' claims, the court below never required a showing of "magic words" demonstrating the unavailability of a *Bivens* remedy. Instead, the court's examination of the plain language, historical context, and legislative histories of § 233(a) and the LRTCA followed *Carlson* precisely, and led the court to conclude that § 233(a) does not bar *Bivens* actions. Nonetheless, in one final effort to convince this Court that the decision below conflicts with *Carlson*, Petitioners and their *amici* claim that the court departed from dicta in *Carlson* describing § 233(a) "as an example of an explicit congressional declaration of FTCA exclusivity." Migliaccio Pet. 8; *see also* Henneford Pet. 14-15; U.S. Br. 18. This argument is based on a misreading of the dicta which, in its entirety, states:

> This conclusion [that Congress views FTCA and *Bivens* as parallel, complementary causes of action] is buttressed by the significant fact that Congress follows the practice of explicitly stating when it means to make FTCA an exclusive remedy. See 38 U.S.C. § 4116(a), 42 U.S.C. § 233(a), 42 U.S.C. § 2458a, 10 U.S.C. § 1089(a), and 22 U.S.C. § 817(a) (*malpractice* by certain Government health personnel); 28 U.S.C. § 2679(b) (operation of motor vehicles by federal employees); and 42 U.S.C. § 247b(k) (manufacturers of swine flu vaccine).

Carlson, 446 U.S. at 20 (emphasis added). As the court below recognized, "[i]n the middle of a discussion about *Bivens* preemption, it is easy to skip

over what, buried in a string citation, the Supreme Court actually said was preempted under § 233(a), et al., i.e., actions for 'malpractice.'" Pet. App. 35a. The court emphasized that this dicta listed § 233(a) as an example of a congressional declaration of FTCA exclusivity for actions alleging "*malpractice by certain Government health personnel*" (*id.*), *not* actions alleging constitutional violations. This limitation matters because none of the parties here disputes that § 233(a) makes the FTCA the exclusive remedy for "malpractice by certain Government health personnel." What *is* disputed—and what this dicta does *not* address—is whether § 233(a) immunity extends not only to "malpractice by certain Government health personnel," but to constitutional violations. The court of appeals held that § 233(a) immunity extends *only* to "malpractice by certain Government health personnel," which is consistent with *Carlson*'s description of § 233(a) as an example of when "Congress follows the practice of explicitly stating when it means to make FTCA an exclusive remedy . . . [for] malpractice by certain Government health personnel." 446 U.S. at 20.[12]

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[12] The *Carlson* dicta clearly does not address immunity from *Bivens* actions because the other types of federal employees listed (motor vehicle operators and swine flu vaccine manufacturers) do not perform actions that could rise to the level of a constitutional violation. Those federal employees can only commit common-law torts within the scope of their employment.

Accordingly, the court below correctly applied *Carlson* in concluding that Petitioners failed to identify any congressional declaration that the FTCA remedy would be a substitute for recovery under *Bivens* for constitutional violations committed by PHS personnel.

2. Congress does not view the FTCA as providing relief that is "equally effective" as *Bivens* relief.

In accordance with *Carlson*'s conclusion that Congress does not view the FTCA as providing relief that is "equally effective" as *Bivens* relief, the court below found "no basis" for distinguishing *Carlson* here. Pet. App. 13a-14a. The court explained that, in both cases: (a) "FTCA damages remain recoverable only against the United States and . . . punitive damages remain unavailable"; (b) "an FTCA plaintiff still cannot demand a jury trial"; and (c) the "FTCA remedy continues to depend on the 'law of the place where the act or omission occurred,'" which poses a threat to national uniformity. *Id.* at 16a (citations omitted).

Petitioners and their *amici* claim that the decision below misapplied *Carlson* on the ground that "there is no 'equally effective' prong" to the *Carlson* test. Migliaccio Pet. 12; *see also* Henneford Pet. 13-14; U.S. Br. 19. This is incorrect. *Carlson* states that *Bivens* remedies are unavailable only when federal defendants show "that 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*." 446 U.S. at 18-19 (emphasis added); *see also McCarthy v. Madigan*, 503 U.S. 140, 151 (1992) ("We have recognized that a *Bivens* remedy does not lie . . . where Congress has provided an equally effective alternative remedy *and* declared it to be a substitute for recovery under the Constitution. . . .") (emphasis added).

The cases Petitioners and the government cite in support of their argument are inapposite. For example, *Wilkie v. Robbins*, 551 U.S. 537 (2007), considered only whether to create a *Bivens* remedy in a new context for a landowner alleging harassment against the Bureau of Land Management. *Wilkie* does not address *Carlson*'s holding that a *Bivens* remedy is available unless Congress has provided an "equally effective" alternative remedy explicitly declared to be a substitute for recovery directly under the Constitution.[13]

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[13] The same is true of the other cases cited by Petitioners and the government. *See Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1948 (2009) (noting, with no mention of *Carlson*, that the Court "has been reluctant" to extend *Bivens* liability to new contexts); *Correctional Services Corp. v. Malesko*, 534 U.S. 61 (2001) (declining to extend *Bivens* remedies to claims against a corporate entity on the ground that the defendant was not a federal officer); *Schweiker v. Chilicky*, 487 U.S. 412 (1988) (declining to extend *Bivens* remedies to redress mishandling of Social Security applications); *Bush v. Lucas*, 462 U.S. 367 (1983)

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3. There are no "special factors" that preclude *Bivens* relief here.

Finally, the court below analyzed whether a *Bivens* action would be precluded due to "special factors counseling hesitation in the absence of affirmative action by Congress." Pet. App. 37a-39a (quoting *Carlson*, 446 U.S. at 18). The court concluded that "the statutory remedies provided in the FTCA do not constitute a comprehensive remedial scheme and cannot serve as a 'special factor' precluding *Bivens* relief." Pet. App. 39a.

Petitioners and their *amici* argue that "special factors" exist here because, after *Carlson*, this Court has declined to extend *Bivens* liability to new contexts. Henneford Pet. 24; Migliaccio Pet. 14; U.S. Br. 18-19. To support this claim, they cite the same cases that they cited to support their argument that there is no "equally effective" prong to the *Carlson* test. *Id.* These cases are inapposite because, as explained above, they only address whether *Bivens* remedies may be recognized in new contexts. However, Respondents' *Bivens* claims for deliberate indifference to serious medical needs and denial of equal protection are well established.[14]

(declining to extend *Bivens* remedies to redress First Amendment violation).

[14] *See Carlson*, 446 U.S. at 20 (recognizing *Bivens* remedy for deliberate indifference to prisoner's serious medical needs); *Davis v. Passman*, 442 U.S. 228, 235, 248-49 (1979) (recognizing

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Although the court below recognized that, after *Carlson*, this Court has found other remedial schemes to be "special factors" precluding *Bivens* relief, the court noted that none of those decisions has "overruled *Carlson*'s square holding that there are no special factors that preclude a *Bivens* action in a case whose facts and posture mirror this one." Pet. App. 38a. *Carlson*'s holding that the FTCA is not a "special factor" precluding *Bivens* relief remains good law and compelled the court below to reject Petitioners' "special factors" argument.[15]

* * *

For all of these reasons, the decision below is consistent with *Carlson*. *Carlson* places the burden on Petitioners to show an "explicit declaration" from Congress that § 233(a) precludes *Bivens* claims. The court below followed that directive and conducted an extensive analysis of the language, historical context, and legislative history of § 233(a) and the LRTCA, concluding that Congress did not intend § 233(a) to bar *Bivens* actions against PHS medical personnel.

Bivens remedy for violation of equal protection component of Fifth Amendment Due Process Clause).

[15] In any event, Congress has taken "affirmative action" with respect to the question presented here by expressly preserving *Bivens* actions against all federal employees under the LRTCA. Thus, there is no "absence of affirmative action from Congress" that would warrant examining the "special factors" test. *See Carlson*, 446 U.S. at 18.

B. The Decision Below Is Consistent With *Smith*.

The decision below also comports with this Court's immunity analysis in *Smith*, 499 U.S. 160, *cited in* Pet. App. 29a-30a, a case that Petitioners and their *amici* ignore. *Smith* presented the question of whether the LRTCA immunizes government employees from suit even when the FTCA foreign-country exception precludes recovery against the United States. In concluding that the LRTCA conferred immunity on a defendant military physician, *Smith* analyzed the relationship between the LRTCA and the Gonzalez Act, 10 U.S.C. § 1089(a), an immunity statute virtually identical to § 233(a). 499 U.S. at 170. The Court explained that the Gonzalez Act was "one in a series of immunity statutes . . . designed to protect certain classes of Government employees from the threat of personal liability."[16] *Id.* The other statutes in that series include 22 U.S.C. § 2702 (State Department medical personnel), 38 U.S.C. § 4116 (Veterans' Administration medical personnel), and § 233(a) (PHS medical personnel). *Id.* at 170 n.11. The Court concluded that when Congress passed the LRTCA, it was well aware of these pre-LRTCA immunity statutes and intended no distinction between

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[16] The Court also stated that the "Gonzalez Act functions *solely* to protect military personnel from *malpractice* liability." 499 U.S. at 172 (emphasis added). This is exactly how the court below interpreted the virtually identical provision of § 233(a).

"employees who are covered under pre-Act immunity statutes [such as the Gonzalez Act and § 233(a)] and those who are not." *Id.* at 173. Instead, the Court noted that Congress sought to have the same scope of immunity extend to *all* government employees. *Id.*

The respondents in *Smith* had argued, as the government argues here (U.S. Br. 14), that the LRTCA was meant to apply only to those government employees not already protected from liability by a pre-existing federal immunity statute. 499 U.S. at 172-73. Specifically, the respondents in *Smith* argued that military medical personnel and other government employees who were protected by pre-LRTCA immunity statutes—like § 233(a) and the Gonzalez Act—cannot benefit from the immunity available under the LRTCA. *Id.* The Court rejected this construction as "inconsistent with Congress' purpose in enacting the [LRTCA]." *Id.* at 173. The Court noted that no language in § 2679(b) of the LRTCA or elsewhere "purports to restrict the phrase 'any employee of the Government' . . . to reach only employees not protected from liability by another statute." *Id.*[17] In reaching this conclusion, the Court

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[17] The LRTCA defines "[e]mployee of the government" to include "officers or employees of any federal agency, members of the military or naval forces of the United States, members of the National Guard, . . . and persons acting on behalf of a federal agency in an official capacity." 28 U.S.C. § 2671. In *Smith*, the government conceded that the "language [of the LRTCA] leaves no leeway for an unstated exception to the [LRTCA]" for members of the military, and that the term "employee of the

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explained, "[w]hen Congress wanted to limit the scope of immunity available under the [LRTCA], it did so expressly, as it did in preserving employee liability for *Bivens* actions. . . . We must conclude that if Congress had intended to limit the protection under the Act to employees not covered under the pre-[LRTCA] statutes, it would have said as much." *Id.*

Similarly, if Congress had intended to limit the LRTCA's express preservation of *Bivens* actions to "employees not covered under the pre-[LRTCA] statutes," it would have said as much. There is no language in the LRTCA suggesting that Congress intended to exempt some federal employees from its limitations on immunity while allowing them to enjoy the benefits of the LRTCA's protections.

Thus, *Smith* further supports the decision below and demonstrates that review is not warranted based on any conflict with this Court's jurisprudence.

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government" "unquestionably encompasses all members of the military," notwithstanding pre-LRTCA immunity statutes applicable to military members. Brief of Petitioner United States, *United States v. Smith*, No. 89-1646, 1990 WL 505624, at *10, *34 (July 26, 1990). Here, the government argues that the LRTCA does not "limit or otherwise have a bearing on the distinct . . . personal immunity conferred in separate statutes like Section 233(a)." U.S. Br. 14. This position conflicts with both the government's position in *Smith*, and with *Smith* itself, which rejected the argument that the LRTCA has no bearing on the immunity conferred by pre-LRTCA immunity statutes like § 233(a). 499 U.S. at 172-73.

II. THERE IS NO MEANINGFUL CIRCUIT SPLIT HERE.

Petitioners and their *amici* also argue that review is warranted based on a split between the Second and Ninth Circuits. Henneford Pet. 14-15; Migliaccio Pet. 16; U.S. Br. 7. However, the "split" here does not warrant review because it is both shallow and unreasoned.

First, in the thirty-eight years since *Bivens* was decided, only two published appellate decisions have addressed the question presented: the decision below and *Cuoco v. Moritsugu*, 222 F.3d 99 (2d Cir. 2000). The other appellate decisions cited by Petitioners and their *amici* (Henneford Pet. 4 n.1; Migliaccio Pet. 5 n.3; U.S. Br. 8 n.4) are unpublished and have no precedential authority in the circuits where they were decided.[18] Moreover, the vast majority of the district court cases to which Petitioners and their *amici* cite (Henneford Pet. 4 n.1; Migliaccio Pet. 6 n.4; U.S. Br. 8 n.4) are unreported, *pro se*, and are mere affirmnces of *Cuoco* that conduct no independent analysis. This Court would benefit from the views of other appellate courts that, when faced with this issue, will undoubtedly turn to the Ninth Circuit's analysis for guidance. Further percolation among the courts may lead to an appellate consensus in favor of

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[18] *See Pressley v. Tupperware Long Term Disability Plan*, 553 F.3d 334, 339 (4th Cir. 2009); *U.S. v. Weatherton*, 567 F.3d 149, 154 (5th Cir. 2009); *U.S. v. Keith*, 559 F.3d 499, 505 (6th Cir. 2009); *U.S. v. Jasin*, 280 F.3d 355, 367 (3d Cir. 2002).

the Ninth Circuit's view, and would—at a minimum—provide this Court the benefit of a thorough discussion of the question presented.

Second, review is not warranted because the conflict between the decision below and *Cuoco* is unreasoned at best. The court below, unlike the Second Circuit, reached its holding after considering § 233(a)'s and the LRTCA's texts, historical contexts, and legislative histories, as well as this Court's immunity analyses in both *Carlson* and *Smith*. *Cuoco* based its holding upon a cursory reading of § 233(a) and the same misinterpretation advocated by Petitioners of the *Carlson* dicta discussed above, which it erroneously read to imply that § 233(a) was an expressly declared *Bivens* substitute. 222 F.3d at 108. Had *Cuoco* examined the factors considered by the court below to reach its holding, then its ruling might present a meaningful conflict. Given the shallow, unreasoned split here, review would be premature.

III. PETITIONERS AND THEIR *AMICI* OVERSTATE THE IMPACT OF THE DECISION BELOW.

Petitioners and their *amici* further claim that review is warranted on the ground that the decision below will affect the ability of PHS and similar agencies to operate effectively by hindering these agencies' ability to recruit, hire, and retain medical personnel. *See* Henneford Pet. 30; Migliaccio Pet. 15;

U.S. Br. 9-10; Commissioned Officers Association of the U.S. Public Health Service, Inc. Br. (C.O.A. Br.) 6, 8. However, the practical and legal realities of the circumstances under which federal employees provide medical services, including the fact that the government routinely defends and indemnifies the medical personnel providing those services, demonstrate that the impact of the decision below will be far less significant than claimed and will promote—not undermine—national uniformity.

A. The Decision Below Will Affect Only A Small Subset Of PHS Personnel.

The decision below will affect only a small subset of PHS personnel and, even as to those individuals, exposure to *Bivens* liability will be insignificant given the reality that the government defends and indemnifies its personnel as a matter of course.

The only federal employees who will be affected by this case are those who perform medical or related functions for PHS in a custodial setting such as a prison or detention center. Constitutional rights are not implicated when the recipient of the medical services is not in custody. *See Estelle*, 429 U.S. at 104 (holding that "deliberate indifference to serious medical needs of prisoners" constitutes a violation of the Eighth Amendment proscription against "unnecessary and wanton infliction of pain"); *see also Carlson*, 446 U.S. at 23 (recognizing a *Bivens* remedy for Eighth Amendment violations alleging deliberate

indifference to the serious medical needs of prisoners).

Thus, the government's argument that the decision below may affect Department of Veterans' Affairs and Department of Armed Services' medical personnel (U.S. Br. 9) lacks merit because these individuals do not provide medical care in custodial settings. Likewise, the argument that employees of "federally funded community health centers" will face *Bivens* liability (*id.*) fails because "community health center" personnel provide medical services in non-custodial settings, where constitutional rights are not implicated. The same is true for medical personnel who respond to national emergencies and terrorist attacks. *See* C.O.A. Br. 8-10. Thus, the reality is that only a small subset of PHS personnel who work in custodial settings will be subject to *Bivens* actions,[19]

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[19] According to available statistics, PHS employs 6,000 commissioned officers. U.S. Pub. Health Serv. Commissioned Corps., *About the Commissioned Corps. Questions*, http://www.usphs.gov/aboutus/questions.aspx#whatis (last visited July 21, 2009). Of those, 750 are deployed to the BOP, *see* Federal Bureau of Prisons, *Central Office: Health Services Division*, http://www.bop.gov/about/co/health_services.jsp (last visited July 21, 2009), and 315 are deployed to the DIHS, *see* U.S. Immigration and Customs Enforcement, DRO: Detainee Health Care (Nov. 19, 2008), *available at* http://www.ice.gov/pi/news/factsheets/detaineehealthcare.htm (noting that DIHS employs 684 medical professionals); Alicia Puente Cackley, Government Accountability Office, *DHS: Organizations Structure and Resources for Providing Health Care to Immigration Detainees* at 21 (Feb. 23, 2009), *available at* http://purl.access.gpo.gov/GOP/LPS113214 (noting that 46% of DIHS medical professionals are

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which explains why there are no decisions addressing *Bivens* liability in the context of other pre-LRTCA immunity statutes.

Moreover, even as to this limited subset of PHS personnel, the practical implications of this case are not as great as Petitioners and their *amici* claim. First, the decision below does not affect the immunity conferred on PHS medical providers from malpractice and negligence actions under § 233(a).[20] Rather, only those medical providers who are deliberately indifferent to the constitutional rights of prisoners and detainees will be subject to *Bivens* liability. Neither Petitioners nor their *amici* offer evidence suggesting that the remote possibility of a PHS medical provider violating the Constitution, and then being held liable under *Bivens*, will affect the efficient operations of PHS or its medical personnel. In fact, the practical realities suggest otherwise, as medical personnel employed by the BOP are already subject

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PHS commissioned officers). Thus, out of 6,000 PHS commissioned officers, only 1,065 (or 17%) might provide medical services in custodial settings where they could be subject to *Bivens* claims. Moreover, the number of PHS officers affected by the decision below is smaller still, given that the decision applies in only one circuit.

[20] Nor does it affect PHS medical providers' right to raise a qualified immunity defense, which enables them to obtain dismissal of meritless constitutional claims at an early stage of litigation and a stay of discovery through interlocutory appeal, *Harlow v. Fitzgerald*, 457 U.S. 800, 817 (1982), and enables courts to manage such claims with minimal disruption to the government.

to *Bivens* actions under *Carlson*, 446 U.S. at 23, yet there is no evidence in the record showing that this potential for liability has prevented the BOP from effectively providing medical care to prisoners.

Second, this case will have little effect on PHS's ability to recruit and retain medical personnel because the government defends and indemnifies these individuals from *Bivens* actions as a matter of course. The United States routinely provides representation to constitutional tortfeasors, 28 C.F.R. § 50.15 (2008), and "virtually without exception" indemnifies its officers and employees against adverse *Bivens* judgments. Cornelia Pillard, *Taking Fiction Seriously: The Strange Results of Public Officials' Individual Liability Under Bivens*, 88 GEO. L.J. 65, 67 (1999) (citing Memorandum for Heads of Department Components from Stephen R. Colgate, Assistant Attorney General for Administration (June 15, 1998)); *see also* 45 C.F.R. § 36.1 (2009) (authorizing indemnification of Department of Health and Human Services employees). As such, the threat of *Bivens* actions will not dissuade physicians or other medical providers from working for PHS in *any* jurisdiction, which explains why neither Petitioners nor their *amici* have offered any evidence to support their speculation to the contrary.

B. The Decision Below Promotes National Uniformity.

The United States also argues that holding PHS personnel liable for constitutional violations

frustrates national uniformity because it "may have implications" for medical personnel employed by other agencies. U.S. Br. 10. This argument is premised on the faulty assumption that these other federal employees are immune from *Bivens* actions. As explained above, however, BOP medical personnel are already subject to *Bivens* actions under *Carlson*. Thus, the decision below actually *advances* a nationally uniform rule because, just as other federal employees are subject to *Bivens* actions by virtue of the LRTCA, so too are PHS personnel. Pet. App. 34a (noting that the "LRTCA was passed to abolish . . . arbitrary distinctions" between the immunity afforded different types of federal employees). In reality, the position taken by Petitioners and their *amici*—that PHS personnel should be granted immunity from *Bivens* actions while, under the LRTCA, all other employees are not—would undermine national uniformity.

The court below therefore properly rejected the argument that Congress sought to provide PHS personnel "with the privilege, shared with no other federal employees, to *violate the Constitution* without consequence." *Id.* (emphasis in original) (citing *Malesko*, 534 U.S. at 76 for the proposition that, "we [never] suggested that a category of federal agents can commit Eighth Amendment violations with impunity"). This double-standard cannot be the result Congress intended, and would likely create

significant administrative problems for the government.[21] Because the decision below promotes, rather than undermines, national uniformity, this case will not adversely impact the real-world operations of PHS or other agencies that provide medical services.

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[21] Another consequence of this double-standard would be that PHS doctors could perform another Tuskegee Syphilis experiment without facing any personal liability for such egregious constitutional violations. At oral argument, Judge Milan Smith, Jr., asked counsel for the United States, "Is it the Government's position that were the PHS to engage in a Tuskegee Syphilis experiment today that there would be no Constitutional claim against the PHS because of § 233(a)?" Respondents' App. 19a. Counsel for the United States admitted, "It is, Your Honor, even for . . . the most egregious misconduct such as that. . . ." *Id.*

CONCLUSION

For the foregoing reasons, the petitions for a writ of certiorari should be denied.

Respectfully submitted,

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