No. ________

In The
Supreme Court of the United States

CHRIS HENNEFORD; EUGENE MIGLIACCIO; TIMOTHY SHACK, M.D.; ESTHER HUI, M.D.; and STEPHEN GONSALVES,

Petitioners,

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

PETITION FOR WRIT OF CERTIORARI

BIRD, MARELLA, BOXER, WOLPERT, NESSIM, DROOKS & LINCENBERG, P.C.
JOHN K. RUBINER
Counsel of Record
THOMAS R. FREEMAN
BENJAMIN D. LICHTMAN
1875 Century Park East, 23rd Floor
Los Angeles, California 90067-2561
Telephone: (310) 201-2100
Facsimile: (310) 201-2110
Attorneys for Petitioner Chris Henneford

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

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 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)? The Second Circuit Court of Appeals in *Cuoco v. Moritsugu*, 222 F.3d 99 (2d Cir. 2000), answered "yes," while the Ninth Circuit Court of Appeals in this action, *Castaneda v. United States*, 546 F.3d 682 (9th Cir. 2008), answered "no."

PARTIES TO THE PROCEEDING

Pursuant to Rule 14.1(b), the following list identifies all of the parties appearing here and before the United States Court of Appeals for the Ninth Circuit.

The petitioners here and appellants below are United States Public Health Service Employees Chris Henneford, Stephen Gonsalves, Esther Hui, Eugene Migliaccio, and Timothy Shack.

The respondents here and appellees below are 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 *Ad Litem* Lucia Pelayo.

Additionally, the United States of America is a defendant in the underlying proceeding and an interested party in this appeal.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
PARTIES TO THE PROCEEDING	ii
TABLE OF AUTHORITIES	vi
PETITION FOR WRIT OF CERTIORARI	1
OPINION BELOW	1
BASIS FOR JURISDICTION IN THIS COURT	1
RELEVANT STATUTORY PROVISION INVOLVED	2
STATEMENT	2
A. Introduction	2
B. Factual Background	5
C. Proceedings Below	7
REASONS FOR GRANTING THE PETITION	8
A. The Ninth Circuit's Ruling Frustrates Clearly-Expressed Congressional Intent To Immunize PHS Medical Personnel From Personal Liability	8
1. Section 233(a) of the Public Health Service Act immunizes PHS medical personnel by expressly stating that the remedy against the United States under the FTCA is the "exclusive" remedy for personal injury due to medical-related conduct by PHS medical personnel	10

TABLE OF CONTENTS – Continued

Page

2. This Court recognized in *Carlson* that Section 233(a) plainly states that the FTCA remedy against the United States is the exclusive remedy for personal injury caused by a PHS officer/employee's medical-related conduct...... 12

B. The Circuit Split Is Based On The Second And Ninth Circuits' Differing Interpretations Of This Court's Decision In *Carlson* 16

1. The Second Circuit properly held that the exclusive-remedy clause in Section 233(a) precludes recognition of a *Bivens* claim.. 16

2. The Ninth Circuit erroneously held that Section 233(a)'s exclusive-remedy clause does not demonstrate Congressional intent to provide an exclusive remedy 20

3. The Ninth Circuit misinterpreted *Carlson* as holding that Congress cannot view FTCA and *Bivens* remedies as "equally effective"...................... 26

C. The Special Nature Of The Public Health Service And The PHS Act's Exclusive-Remedy Clause Constitute "Special Factors" Precluding Recognition Of A *Bivens* Remedy... 29

TABLE OF CONTENTS – Continued

Page

1. Because of the Public Health Service's unique status, it is inappropriate to use a *Bivens* remedy to supplant Section 233(a) 29

2. The PHS Act's carefully-circumscribed remedial scheme also weighs against implication of a *Bivens* remedy 33

CONCLUSION 36

APPENDIX

DISTRICT COURT OPINIONS, ORDERS, AND JUDGMENTS

Contents of Appendix

United States Court of Appeals Opinion (October 2, 2008) .... App. 1

United States District Court Opinion (March 11, 2008) .... App. 45

United States Court of Appeals Order (January 29, 2009) .... App. 90

Constitutional Provision, Federal and State Statutes, and Other Authorities .... App. 91

TABLE OF AUTHORITIES

Page

Federal Cases

Anderson v. Bureau of Prisons, 547 Fed. Appx. 1212 (3d Cir., Apr. 11, 2006) 4

Barr v. Matteo, 360 U.S. 564 (1959)..............11, 28, 33

Bell v. Hood, 327 U.S. 678 (1946) 26

Beverly v. Gluch, 902 F.2d 1568, 1990 WL 67888 (6th Cir., May 23, 1990) 5

Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388 (1971)..*passim*

Brotherhood of R.R. Trainmen v. Baltimore & Ohio R.R., 331 U.S. 519 (1947)...............................18

Bush v. Lucas, 462 U.S. 367 (1983) ... 11, 25, 28, 34, 35

Butler v. Shearin, 279 Fed. Appx. 274 (4th Cir. 2008) 4

Carlson v. Green, 446 U.S. 14 (1980) ....*passim*

Castaneda v. United States, 546 F.3d 382 (9th Cir. 2008)...*passim*

Chappell v. Wallace, 462 U.S. 296 (1983) 30, 31

Cook v. Blair, 82 Fed. Appx. 790 (4th Cir. 2003).........4

Correctional Services Corp. v. Malesko, 534 U.S. 61 (2001)..22, 24, 29

Cuoco v. Moritsugu, 222 F.3d 99 (2d Cir. 2000).....*passim*

FDIC v. Meyers, 510 U.S. 471 (1994).........................11

Gregoire v. Biddle, 177 F.2d 579 (2d Cir. 1949)......3, 28, 33

TABLE OF AUTHORITIES – Continued

Page

Jackson v. United States, 2009 WL 33324 (W.D. Pa., Jan. 5, 2009)..5

Lee v. Guavara, 2007 WL 2792183 (D.S.C., Sept. 24, 2007)..5

Lipscomb v. Hickey, 2009 WL 671308 (S.D. W.Va., Feb. 18, 2009)..5

McMullen v. Herschberger, No. 91-3235, 1993 WL 6219 (S.D.N.Y., Jan. 7, 1993)............................5

Mele v. Hill Health Center, ___ F. Supp. 2d ___, 2009 WL 859081 (D. Conn., Mar. 31, 2009)............5

Miles v. Daniels, 231 Fed. Appx. 591, 2007 WL 1296733 (9th Cir., May 2, 2007)..............................5

Montoya-Ortiz v. Brown, 154 Fed. Appx. 437 (5th Cir., Nov. 22, 2005)..4

Morales v. White, 2008 WL 4585340 (W.D. Tenn., Oct. 10, 2008)..5

Pimentel v. Deboo, 411 F. Supp. 2d 118 (D. Conn. 2006)..5

Schrader v. Sandoval, 1999 WL 1235234 (5th Cir., Nov. 23, 1999)..5

Schweiker v. Chilicky, 487 U.S. 412 (1988) ... 24, 29, 35, 36

Seminario Navarrete v. Vanyur, 110 F. Supp. 2d 605 (N.D. Ohio 2000)...5

Stine v. Fetterhoff, 2008 WL 4330572 (D. Colo., Sept. 19, 2008)..5

United States v. Stanley, 483 U.S. 669 (1987)..........31

TABLE OF AUTHORITIES – Continued

Page

Uribe v. Outlaw, 2009 WL 322952 (E.D. Ark., Feb. 9, 2009) 5

Vinzant v. United States, No. 07-024, 2008 WL 4414630 (C.D. Cal., Sept. 28, 2008) 5

Walls v. Holland, 198 F.3d 248, 1999 WL 993765 (6th Cir., Oct. 18, 1999) 5

Zanzucchi v. Wynberg, 933 F.2d 1018, 1991 WL 83937 (9th Cir., May 21, 1991) 5

FEDERAL STATUTES

10 U.S.C. § 1089 14

28 U.S.C. § 1254(1) 1

28 U.S.C. § 1331 8

28 U.S.C. § 1343 8

28 U.S.C. § 1343(3) 8

28 U.S.C. § 2677 4

38 U.S.C. § 7316(a) 17

42 U.S.C. § 201(p) 32

42 U.S.C. § 207 32

42 U.S.C. § 213a(a) 32

42 U.S.C. § 217 33

42 U.S.C. § 233(a) ....*passim*

42 U.S.C. § 1983 ....7, 8

42 U.S.C. § 2458a 14

TABLE OF AUTHORITIES – Continued

Page

Civil Service Reform Act of 1978, Pub.L. No. 95-454, 94 Stat. 1111 (1978) 34

Federal Tort Claims Act, 28 U.S.C. §§ 1346(b) & 2672 ....*passim*

MISCELLANEOUS

116 Cong. Rec. 42542-43 (1970) 4, 12

Commissioned Corps Personnel Manual, Chapter CC46, Subchapter CC46.4 32

Fed. R. Civ. P. 12(b)(1) 8

Webster's Third New International Dictionary, 1368 (1961)...19

PETITION FOR WRIT OF CERTIORARI

Petitioner Chris Henneford respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINION BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit (Reinhardt, Berzon, M. Smith) is reported at 546 F.3d 382 (9th Cir. 2008), and is reprinted in the Appendix (*App. 1-44*). The opinion of the district court (D. Pregerson) is reported at 538 F. Supp. 2d 1279 (C.D. Cal. 2008), and is reprinted in the Appendix (*App. 45-89*).

BASIS FOR JURISDICTION IN THIS COURT

The judgment of the United States Court of Appeals for the Ninth Circuit was entered on October 2, 2008 and *en banc* review was denied on January 29, 2009 (Appendix (*App. 90*)). On April 10, 2009 Justice Kennedy granted petitioner an extension of time to May 29, 2009 to file a writ of certiorari. Thereafter, on May 19, 2009, Justice Kennedy again extended petitioner's time to file a petition for writ of certiorari to June 12, 2009. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISION INVOLVED

Section 233(a) of the Public Health Services Act (42 U.S.C. § 233(a)) provides in relevant part:

> "The remedy against the United States provided by sections 1346(b) and 2672 of Title 28 [the FTCA] . . . for damages for personal injury, including death, resulting from the performance of medical, surgical, dental, or other 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."

42 U.S.C. § 233(a) (Appendix (*App. 91*)).

STATEMENT

A. Introduction

The question presented implicates the federal government's interest in limiting the scope of litigation risk faced by officers and employees of the United States Public Health Service ("PHS") in performing medical and medical-related tasks in the course and scope of their federal employment. Whether PHS employees are absolutely immune from

personal liability for services provided within the course and scope of their federal service will impact *both* PHS' ability to recruit highly qualified medical providers *and* the morale of those that have been hired. As Judge Learned Hand eloquently recognized, fear of personal liability may "dampen the ardor of all but the most resolute, or most irresponsible, in the unflinching discharge of their duties." *Gregoire v. Biddle*, 177 F.2d 579, 581 (2d Cir. 1949) (L. Hand). Resolution of the question presented by this petition will therefore have an impact on the delivery of healthcare services to those reliant upon PHS officers and employees for their healthcare needs, a category that includes members of our nation's armed forces, immigrant detainees, federal prisoners, Native Americans, and Alaska Natives.

The Ninth Circuit's decision in this case creates a split in the Circuits on an issue of national importance. The Second Circuit Court of Appeals has held that Section 233(a) of the Public Health Services Act "protects commissioned officers or employees of the Public Health Service from being subject to suit while performing medical and similar functions by requiring that such lawsuits be brought against the United States instead." *Cuoco v. Moritsugu*, 222 F.3d 99, 108 (2d Cir. 2000). By doing so, the statute "may well enable the Public Health Service to attract better qualified persons to perform medical, surgical and dental functions in order to better serve, among others, federal prisoners." *Id.* The Second Circuit's interpretation of Section 233(a) is consistent with

Congressional intent to make employment in the PHS more attractive by providing immunity. 116 Cong. Rec. 42542-43 (1970) (Representative Staggers, House sponsor). Immunity is an important benefit "because of the low pay that so many of those who work in the PHS receive." *Id*.

The Ninth Circuit, however, came to the opposite conclusion, holding that PHS officers and employees are not immune from personal liability for conduct within the course and scope of their employment and are therefore subject to litigation and personal liability in a *Bivens* action. *App. 1-44*. The Ninth Circuit came to that conclusion despite the fact that Section 233(a) plainly states that a claim against the United States under the Federal Tort Claims Act ("FTCA"), 28 U.S.C. §§ 2677, *et seq.*, is the "exclusive" remedy for injury resulting from the conduct of PHS officers or employees while performing medical-related functions within the course and scope of their office or employment. In so holding, the Ninth Circuit acknowledged that its decision directly conflicts with the Second Circuit's decision in *Cuoco.*[1]

---

[1] The Third, Fourth, Fifth and Sixth Circuits have also held, in unpublished dispositions, that Section 233(a) preempts the *Bivens* remedy. *Anderson v. Bureau of Prisons*, 176 Fed. Appx. 242, 243 (3d Cir., Apr. 11, 2006), *cert. denied*, 547 U.S. 1212 (2006); *Butler v. Shearin*, 279 Fed. Appx. 274, 275 (4th Cir. 2008) (*per curiam*), *aff'g*, No. 04-2496, 2006 WL 6083567, at *7 (D. Md., Aug. 29, 2006); *Cook v. Blair*, 82 Fed. Appx. 790, 791 (4th Cir. 2003), *aff'g*, No. 02-609, 2003 WL 23857310, at *1 (E.D.N.C., Mar. 21, 2003); *Montoya-Ortiz v. Brown*, 154 Fed. Appx. 437, 439

(Continued on following page)

B. Factual Background

Francisco Castaneda was an immigration detainee transferred to the custody of Immigration and Customs Enforcement ("ICE") from the California Department of Corrections and Rehabilitation in March 2006. While in ICE custody in San Diego, California, Castaneda's medical care was provided or arranged for by the Division of Immigration Health Services, an organization within the PHS.

(5th Cir., Nov. 22, 2005); *Schrader v. Sandoval*, 1999 WL 1235234, at *2 (5th Cir., Nov. 23, 1999); *Walls v. Holland*, 198 F.3d 248, 1999 WL 993765, at *2 (6th Cir., Oct. 18, 1999) (table); *Beverly v. Gluch*, 902 F.2d 1568, 1990 WL 67888, at *1 (6th Cir., May 23, 1990) (table). The Ninth Circuit, in decisions pre-dating this case, also concluded in non-published dispositions that Section 233(a) preempts *Bivens* claims. *Miles v. Daniels*, 231 Fed. Appx. 591, 591-92 (9th Cir., May 2, 2007); *Zanzucchi v. Wynberg*, 933 F.2d 1018, 1991 WL 83937, at *2 (9th Cir., May 21, 1991) (table). The vast majority of district courts have likewise held that Section 233(a) preempts the *Bivens* remedy. See e.g., *Pimentel v. Deboo*, 411 F. Supp. 2d 118, 126 (D. Conn. 2006); see *Seminario Navarrete v. Vanyur*, 110 F. Supp. 2d 605, 606 (N.D. Ohio 2000); *Mele v. Hill Health Center,* ___ F. Supp. 2d ___, 2009 WL 859081 (D. Conn., Mar. 31, 2009); *Lipscomb v. Hickey*, 2009 WL 671308 (S.D. W.Va., Feb. 18, 2009); *Uribe v. Outlaw,* 2009 WL 322952, at *9 (E.D. Ark., Feb. 9, 2009); *Jackson v. United States*, 2009 WL 33324, at *5 (W.D. Pa., Jan. 5, 2009); *Morales v. White*, 2008 WL 4585340 (W.D. Tenn., Oct. 10, 2008); *Stine v. Fetterhoff*, 2008 WL 4330572, at *8 (D. Colo., Sept. 19, 2008); *Lee v. Guavara*, 2007 WL 2792183, at *14 (D.S.C., Sept. 24, 2007). But see *Vinzant v. United States*, No. 07-024, 2008 WL 4414630, at *4, n.3 (C.D. Cal., Sept. 28, 2008) (holding that Section 233(a) does not preempt *Bivens*); *McMullen v. Herschberger*, No. 91-3235, 1993 WL 6219, at *3 (S.D.N.Y., Jan. 7, 1993) (same).

On March 27, 2006, Castaneda claims that he complained to medical staff that a lesion on his penis was growing, becoming painful and producing a discharge. He was examined by a physician's assistant, who requested a urological consultation and a biopsy. Castaneda claims that ICE officials were aware that he had a family history of cancer and therefore it was necessary to rule out cancer as a possible cause of the lesion.

Over the next several months, Castaneda was seen by several doctors and physician's assistants. Some of the doctors were concerned about the lesion and recommended a biopsy and surgery. Other doctors, such as an emergency room doctor at a hospital in San Diego, thought the problem was genital warts and did not believe a biopsy or any immediate intervention was required. Castaneda did not receive a circumcision and biopsy because some of the medical personnel apparently believed that the requested surgical treatment was "elective" for the treatment of the condition they believed Castaneda had.

In late December 2006, Castaneda was transferred to an ICE facility in San Pedro, California, where petitioner, Commander Chris Henneford, was stationed. Commander Henneford is a commissioned PHS officer, assigned to the PHS' Division of Immigration Health Services, who, at the time of Castaneda's transfer, was stationed at the San Pedro facility, serving as its health services administrator. Plaintiffs allege that Commander Henneford was

aware of Castaneda's condition and that he received a letter from the American Civil Liberties Union on January 19, 2007, requesting medical treatment for Castaneda.

Castaneda saw a private urologist in December 2006, the month that he was transferred to the San Pedro facility and, again, on January 25, 2007. That urologist concluded that the lesion on Castaneda's penis was "most likely penile cancer" and recommended a biopsy, which was approved. Thereafter, prior to the scheduled biopsy, on February 5, 2007, Castaneda was released from ICE's custody. Castaneda subsequently went to a hospital and was diagnosed with squamous cell carcinoma. Thereafter, he received both surgical treatment and chemotherapy. Unfortunately, the cancer had metastasized and Castaneda died in February 2008.

C. Proceedings Below

On November 2, 2007, prior to his death, Castaneda filed his complaint in the United States District Court for the Central District of California asserting claims against the United States under the FTCA, against officers of the California Department of Corrections under 42 U.S.C. § 1983, and against various federal officers and employees (including petitioners Henneford) under *Bivens*. Castaneda alleged that the federal defendants violated the Fifth and Eighth Amendments of the United States Constitution by "failing to treat Plaintiff's known

serious medical condition," "purposely den[ying]" treatment and "act[ing] with deliberate indifference to his serious medical needs." *App. 9*. Castaneda asserted jurisdiction in the district court on 28 U.S.C. §§ 1331, 1343, 1343(3), 1346 and 42 U.S.C. § 1983.

On January 14, 2008, Commander Henneford, as well as other defendants who were commissioned officers and employees of the PHS, moved to dismiss the action for lack of subject matter jurisdiction under Fed. R. Civ. P. 12(b)(1). Defendants argued that they had absolute immunity from suit because § 233(a) provides that an FTCA suit against the United States is the exclusive remedy for any tortious acts committed by PHS officers and employees in the course and scope of their medical duties. The district court denied the motion to dismiss, and the Ninth Circuit affirmed. Subsequently, the Ninth Circuit denied a petition for rehearing *en banc*. *App. 90*.

REASONS FOR GRANTING THE PETITION

A. The Ninth Circuit's Ruling Frustrates Clearly-Expressed Congressional Intent To Immunize PHS Medical Personnel From Personal Liability.

Section 233(a) of the Public Health Service Act (the "PHS Act") immunizes PHS officers and employees from civil liability for personal injuries resulting from medical or medical-related conduct within the scope of their office or employment. The

statute provides this immunity by specifying that the *exclusive* remedy for such conduct is an action against the United States under the Federal Tort Claims Act ("FTCA"). Congress, by conferring such immunity on PHS officers and employees, incentivized them to vigorously pursue the agency's statutory mission, without risk of exposure to morale-sapping litigation or liability, and likewise enhanced the PHS's ability to recruit better qualified personnel to provide medical and related services to those dependant on the PHS for medical care.

Recognition of this immunity is compelled by the decision in *Carlson v. Green*, 446 U.S. 14 (1980). In *Carlson*, this Court held that the FTCA did not immunize federal employees from personal liability under *Bivens* because the FTCA, unlike Section 233(a) of the PHS Act, did not *expressly* state that the remedy for conduct violating the statute was exclusive of other remedial schemes and there was no other basis for inferring such exclusivity. The Court emphasized the significance of the absence of an exclusive-remedy provision in the FTCA by contrasting it with the PHS Act, which expressly provides that the FTCA provides the exclusive remedy for conduct by PHS officers and employees made actionable by Section 233(a). The opinion in *Carslon* thereby supports the Second Circuit's determination that Section 233(a) immunizes PHS officers and employees against *Bivens* claims, and rebuts the Ninth Circuit's contrary holding, which purports but fails properly to apply *Carlson*.

1. Section 233(a) of the Public Health Service Act immunizes PHS medical personnel by expressly stating that the remedy against the United States under the FTCA is the "exclusive" remedy for personal injury due to medical-related conduct by PHS medical personnel.

Section 233(a) plainly states that the damages remedy provided by the FTCA for personal injury resulting from medical-related conduct by any PHS officer or employee acting within the scope of his office or employment shall be exclusive of any other civil action or proceeding of the same subject matter:

> "The remedy against the United States provided by sections 1346(b) and 2672 of Title 28 [the FTCA] . . . for damages for personal injury, including death, *resulting from the performance of medical, surgical, dental, or other 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."

42 U.S.C. § 233(a) (emphasis added) *App. 90*. The statute provides *no exception* to the exclusivity of the FTCA remedy. It thereby reflects Congress' unambiguous intent to afford PHS officers and employees

absolute immunity from damages actions arising out of medical care or treatment provided in the course of their office or employment.

The exclusive damages remedy provided by the FTCA therefore applies, without exception per Section 233(a), to any civil action for damages premised on medical care provided by PHS officers or employees acting within the scope of their office or employment. The exclusivity language in Section 233(a) draws no distinction between claims predicated on common law tort theories and those based on the Constitution and, as a result, there is no basis to infer any such exception.

Statutory restrictions on the scope of available damage remedies generally reflect legislative policy determinations that require Congress to weigh the pros and cons of providing or not providing certain remedies. *Bush v. Lucas*, 462 U.S. 367, 388-389 (1983). The risk of personal liability for federal officers and employees for conduct within their offices or employment may deter misconduct. *FDIC v. Meyers*, 510 U.S. 471, 474 (1994). But the price of such deterrence sometimes comes at too high a price because the risk of personal liability may "inhibit the fearless, vigorous, and effective administration of policies of government." *Barr v. Matteo*, 360 U.S. 564, 571 (1959). Congress struck the balance in favor of immunity from personal liability when it passed the PHS Act. Thus, as the Second Circuit recognized, Section 233(a) reflects the legislative policy judgment that, by insulating PHS officers and employees from

personal liability, Section 233(a) "may well enable the Public Health Service to attract better qualified persons to perform medical, surgical and dental functions in order to better serve, among others, federal prisoners." *Cuoco v. Moritsugu*, 222 F.3d 99, 108 (2d Cir. 2000). The immunity conferred on PHS officers and employees under Section 233(a) was thereby designed to improve the quality of medical services provided to members of the armed forces, immigrant detainees, prisoners, Native Americans, and Alaska Natives. 116 Cong. Rec. 42542-43 (1970) (Representative Staggers, House sponsor).

2. This Court recognized in *Carlson* that Section 233(a) plainly states that the FTCA remedy against the United States is the exclusive remedy for personal injury caused by a PHS officer/employee's medical-related conduct.

This Court's opinion in *Carlson v. Green*, 446 U.S. 14 (1980), compels the conclusion that Section 233(a) immunizes PHS medical personnel from personal liability under *Bivens*, as recognized by the Second Circuit. The Ninth Circuit, however, failed to recognize that *Carlson* mandates such a finding. Indeed, the Ninth Circuit ruling that Section 233(a) does not preclude *Bivens* claims is based on language in *Carlson* that the Ninth Circuit deemed controlling. But the Ninth Circuit failed to recognize that the relied-upon language provides a framework for answering a question *not* raised in this case: Under

what circumstances may the exclusivity of a statutory remedy be *inferred* from a statute that does not expressly provide for remedial exclusivity? That language does *not* apply where, as under Section 233(a), the statute is *not silent* on the issue of whether the FTCA provides the *exclusive remedy* for conduct within its scope. As the Second Circuit recognized, *Carlson* teaches that, because Section 233(a) expressly states that the remedy provided under the FTCA is exclusive, Congressional intent to restrict claimants to the FTCA remedy is manifest, thereby precluding recourse to the *Bivens* remedy.

The Ninth Circuit's misinterpretation of *Carlson* begins with its failure to identify what distinguishes the statute analyzed in *Carlson*, the FTCA, from the statute implicated here, Section 233(a) of the PHS Act: While the FTCA is silent on whether it provides the "exclusive" remedy for conduct actionable under its terms, Section 233(a) of the PHS Act expressly states that the FTCA provides the exclusive remedy. The Court in *Carlson* considered whether Congress intended the damages remedy for personal injury under the FTCA to provide the *exclusive* damages remedy, to the exclusion of a *Bivens* claim, even though the FTCA did not plainly state that the FTCA's remedial scheme was exclusive of other damage remedies for conduct subject to remedy under the FTCA. *Carlson*, 446 U.S. at 16. Thus, the issue in *Carlson* was whether the mere existence of *a* remedy, which was not expressly described as being exclusive, somehow *implied* that Congress intended that

remedy to be exclusive of any other civil damages remedy, including a claim under *Bivens*. This case presents a different question because Section 233(a) of the PHS Act expressly provides that the FTCA remedy shall serve as the exclusive damage remedy for personal injuries caused by the conduct of PHS officers and employees providing medical or medical-related services within the scope of their office or employment.

Although the Court in *Carlson* addressed a statute that did not expressly state that the FTCA remedy was the exclusive damage remedy for conduct within the statute's scope, it explained that its holding that the FTCA did not provide a remedy exclusive of the *Bivens* remedy was supported by the fact that, when Congress wanted to make the FTCA remedy exclusive, it knew how to do so, expressly citing Section 233(a) to illustrate the point. Section 233(a) provides that the FTCA remedy "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." The Court explained that its conclusion that the FTCA's non-exclusive remedial provision compliments rather than replaces *Bivens*

> "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. § 2458(a), 10 U.S.C. § 1089, 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. § 247k (manufacturers of swine flu vaccine)."

Carlson, 446 U.S. at 20 (emphasis added).

This Court thereby recognized in *Carlson* that the inclusion of an exclusive-remedy provision in the PHS Act reflects Congressional intent to make the FTCA remedy the exclusive remedy for injury-causing conduct falling within Section 233(a)'s parameters, thereby precluding a *Bivens* action. Consequently, the Ninth Circuit erred by applying the language articulated in *Carlson*, which was designed to reveal Congressional intent as to a statute's remedial exclusivity when the statute is *silent* on that subject. Where, as under Section 233(a) of the PHS Act, the statute expressly states that the FTCA remedy is exclusive of all others, then that exclusive remedy cannot be deemed to complement the *Bivens* cause of action because the FTCA remedy expressly replaces *all* other remedies, which necessarily includes *Bivens* claims. Any other construction would frustrate Congress' clearly expressed intent to immunize PHS officers and employees from liability for personal injuries caused by their medical and medical-related conduct with the scope of their office or employment.

B. The Circuit Split Is Based On The Second And Ninth Circuits' Differing Interpretations Of This Court's Decision In *Carlson*.

The Second Circuit in *Cuoco v. Moritsugu*, 222 F.3d 99 (2d Cir. 2000), held that Section 233(a) bars *Bivens* claims against PHS officers or employees for claims arising out of the provision of medical-related services within the scope of their office or employment. The Ninth Circuit, however, has now held that Section 233(a) does not bar *Bivens* claims, recognizing that "our holding in this case conflicts with the Second Circuit's decision in *Cuoco.*" *App. 38*. The Second and Ninth Circuits *both* rely on *Carlson* in coming to their diametrically opposed conclusions. This Court should grant *certiorari* to make clear that, as the Second Circuit ruled, Section 233(a) of the PHS Act bars *Bivens* claims against PHS medical personnel by expressly stating that the FTCA provides the exclusive remedy for injury due to medical-related services provided by PHS medical personnel acting within the scope of their office or employment.

1. The Second Circuit properly held that the exclusive-remedy clause in Section 233(a) precludes recognition of a *Bivens* claim.

The Second Circuit's application of *Carlson* is consistent with the plain meaning of Section 233(a). In *Cuoco*, the plaintiff was a preoperative male-to-female transsexual who was incarcerated as a

pre-trial detainee in the Federal Correctional Institution at Otisville, New York. She was allegedly denied estrogen treatment while incarcerated, in violation of her Fifth, Eighth, and Fourteenth Amendment rights. *Cuoco*, 222 F.3d at 103. She filed *Bivens* claims against the PHS employee-defendants, who moved to dismiss on the ground that the *Bivens* claims were barred under Section 233(a). *Id.* at 107. The district court granted the motion to dismiss and the Second Circuit affirmed.

The Second Circuit interpreted Section 233(a) as precluding any claim other than a FTCA claim against the United States for personal injury resulting from the performance of medical-related conduct by PHS officers or employees acting within the course and scope of their office or employment. *Cuoco*, 222 F.3d at 107. While plaintiff Cuoco asserted that Section 233(a) applied only to claims for medical malpractice, not the violation of her constitutional rights, the Second Circuit rejected that contention because "there is nothing in the language of § 233(a) to support that conclusion." *Id*. at 108. Moreover, the Second Circuit noted that when Congress has sought to limit immunity to medical malpractice claims it has done so explicitly, as under 38 U.S.C. § 7316(a)(1), which provides the exclusive remedy "for damages for personal injury . . . allegedly arising from *malpractice or negligence* of a medical care employee" of the Veterans Health administration. *Id*. (emphasis added).

The Second Circuit relied on *Carlson* for the proposition that a *Bivens* action is barred if the defendant shows 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." *Cuoco*, 222 F.3d at 108 (quoting *Carlson*, 446 U.S. at 18-19; emphasis added in *Cuoco*). This is the same language relied upon by the Ninth Circuit in holding that Section 233(a) does not bar a *Bivens* claim. *App. 11.* But the Second Circuit recognized that Section 233(a), which explicitly states that the statutory remedy under the FTCA is the exclusive damages remedy, satisfies the *Carlson* standard. *Cuoco*, 222 F.3d at 108. In so concluding, the Second Circuit emphasized that this Court in *Carlson* cited Section 233(a) "in the *Bivens* action context, as an example of a statutory provision that explicitly designates an action under the Federal Tort Claims Act as the exclusive remedy." *Id*.

The Ninth Circuit in this case criticized the Second Circuit's reliance on the reference to Section 233(a) in *Carlson* because, according to the Ninth Circuit, Section 233(a) applies the exclusive remedy only for malpractice claims – not claims actionable as constitutional torts under *Bivens*. *App. 38-40*. This limitation is, according to the Ninth Circuit, evidenced by the use of the term "malpractice" in the provision's title. *Id.* at 39 n.22.[2] But the term

[2] *Bhd. of R.R. Trainmen v. Baltimore & Ohio R.R.*, 331 U.S. 519, 528-29 (1947) ("For interpretive purposes, [titles of

(Continued on following page)

"malpractice," which is not in the statutory text, does not limit the clearly stated scope of the statute's reach. As the Second Circuit recognized, the plain language of Section 233(a) applies to all conduct by PHS officers or employees that constitutes medical or related services if done within the course and scope of the defendant's office or employment – without restriction as to whether such conduct constitutes "malpractice." *Cuoco*, 222 F.3d at 108.

More fundamentally, Section 233(a) provides that immunity from personal liability flows from whether the injury-causing conduct constitutes *the provision of medical or related services*, without regard to whether the conduct constitutes malpractice or a constitutional tort. Moreover, and contrary to the Ninth Circuit's unstated assumption, the categories comprised of (1) actions constituting *medical malpractice* and (2) actions that violate the Constitution, are not mutually exclusive categories. Conduct that constitutes medical malpractice, and may therefore be actionable under a variety of common-law tort and statutory theories as such, may *also* violate the Constitution and therefore be actionable under *Bivens*. Cf. *Webster's Third New International Dictionary*, 1368 (1961) ("malpractice" is "a dereliction from professional duty, whether intentional, criminal,

---

statutes] are of use only when they shed light on some ambiguous word or phrase. They are but tools available for the resolution of a doubt. But they cannot undo or limit that which the text makes plain").

or merely negligent, by one rendering professional services that result in injury"). Similarly, medical or medical-related services provided by a PHS officer or employee acting within the scope of employment causing personal injury in a manner that violates the Constitution would almost always *also* constitute medical malpractice. Thus, the Ninth Circuit's assumption that immunity for actions amounting to "malpractice" would not encompass constitutional torts is erroneous.

Finally, this Court's reference to Section 233(a) in *Carlson* was, as stated in *Cuoco*, intended to provide an example of federal legislation that barred *Bivens* claims by expressly providing that the FTCA shall provide the exclusive remedy for injury caused by the type of conduct described in the statute. *Cuoco*, 222 F.3d at 108. Thus, under Section 233(a), as long as the alleged conduct constitutes the provision of medical or related services by a PHS officer or employee acting within the course and scope of his office or employment, the FTCA provides the exclusive damages remedy, thereby barring a *Bivens* claim.

2. The Ninth Circuit erroneously held that Section 233(a)'s exclusive-remedy clause does not demonstrate Congressional intent to provide an exclusive remedy.

The Ninth Circuit has not only misinterpreted and misapplied *Carlson*, it has done so in precisely

the manner that the concurring and dissenting Justices in *Carlson* had warned. Its ruling is purportedly based on language in *Carlson* stating that a *Bivens* action is not authorized "when defendants show that Congress provided an alternative remedy which it explicitly declared to be a substitute for recovery directly under the Constitution and viewed as equally effective." *App. 11*, quoting *Carlson*, 446 U.S. at 18-19. This is the first prong of the standard applied in *Carlson* for determining whether the FTCA *implicitly* precluded other remedies, including *Bivens* claims.[3] In applying this language as the standard for determining whether Section 233(a) precludes *Bivens* claims, the Ninth Circuit ignored the caution against an overly-literal interpretation of this language, a point highlighted in the majority, concurring and dissenting opinions in *Carlson*.[4]

---

[3] As described above, this language applies to statutes, unlike Section 233(a), that do *not* expressly state that the FTCA shall provide the *exclusive remedy* for conduct in violation of rights protected by the statute. But the Ninth Circuit ignored that limitation.

[4] The Ninth Circuit also ignored Justice Powell's concurring opinion and Justice Rehnquist's dissenting opinion, demonstrating that the "explicitly declared" language relied upon by the Ninth Circuit as talismanic was merely dicta, unnecessary to the resolution of the case. *Carlson*, 446 U.S. at 25-26 (Powell, J., concurring); *id.* at 32 n.2 (Rehnquist, J., dissenting). The majority found it "crystal clear" that Congress intended the FTCA and *Bivens* to serve as "parallel" and "complementary" sources of liability. *Carlson*, 446 U.S. at 19-20. Thus, there was

(Continued on following page)

The language used to articulate the first prong of the majority's standard in *Carlson* – "an alternative remedy which it explicitly declared to be a substitute for recovery directly under the Constitution" – was the subject of controversy among the Justices. Chief Justice Burger and then-Associate Justice Rehnquist expressed concern that this language would be interpreted as implying that a statutory remedy could only be found to exclude an implied *Bivens* remedy if Congress invoked "magic words" specifically declaring that no *Bivens* action may be filed. *Carlson*, 446 U.S. at 31 & n.2 (Burger, C.J., dissenting); *id*. at 31-33 & n.2 (Rehnquist, J., dissenting) (criticizing the majority's "formalistic procedural approach for inferring private damages remedies"). In response to that criticism, however, the majority clarified that defendants need not show that Congress recited "magic words" by expressly stating that a *Bivens* action may not be implied. *Carlson*, 446 U.S. at 19 & n.5. Rather, the critical inquiry is "whether Congress has indicated that it intends the statutory remedy to replace, rather than to complement, the *Bivens* remedy." *Id.* The majority explained that the petitioners in *Carlson* failed to meet that requirement because they "point[ed] to nothing in the Federal Tort Claims Act ("FTCA") or its legislative history to show that

---

no need to apply the two-part test articulated in the majority opinion. *Carlson* 446 U.S. at 32 n.2 (Rehnquist, J., dissenting); *Correctional Services Corp. v. Malesko*, 534 U.S. 61, 68 (2001) (Rehnquist, C.J.) (describing the Court's finding of congressional intent to preserve *Bivens* liability as dispositive in *Carlson*).

Congress meant to pre-empt a *Bivens* remedy or create an equally effective remedy for constitutional violations." *Carlson*, 446 U.S. at 19.

This standard, however, was not meant to apply to statutes like Section 233(a) that expressly state, in plain statutory language, that the FTCA remedy is exclusive of all other remedies. The majority opinion in *Carlson* makes clear that this type of express statutory language obviates the need to point to statutory language or legislative history supporting an inference that Congress intended the statutory remedy to be exclusive. An inference is not necessary, whether drawn from the statute, its legislative history, or both, because the intent is plainly and directly expressed by the exclusive-remedy clause. Indeed, the majority cited Section 233(a) to illustrate that Congress knew how to plainly state that the FTCA remedy was exclusive when it intended the remedy to be exclusive. The absence of an exclusive-remedy provision in the FTCA, along with the absence of less-direct statutory language or legislative history evidencing an intent to limit claims to the FTCA, indicated congressional intent to preserve the *Bivens* remedy for conduct actionable under the FTCA. *Carlson*, 446 U.S. at 20. Section 233(a), by contrast, contains an unambiguous command that the "remedy against the United States" provided by the FTCA "shall be exclusive of any other civil action or proceeding." The majority in *Carlson* thereby recognized that Section 233(a), with its

exclusive-remedy clause, precluded any other remedy, including the *Bivens* remedy.

The Ninth Circuit, however, concluded that Section 233(a) cannot be interpreted as barring a *Bivens* claim because Section 233 was enacted seven months before the *Bivens* opinion was filed. Congress could not have intended to preempt the *Bivens* remedy, according to the Ninth Circuit, before that remedy was created. *App. 21.* First and foremost, the Ninth Circuit's interpretation is inconsistent with *Carlson*, which expressly recognized that statutes explicitly providing for an "exclusive" FTCA damages remedy, like Section 233(a), must be interpreted as preempting a *Bivens* remedy, without regard for whether the statute was enacted before *Bivens* was decided. *Carlson*, 466 U.S. at 21. Second, this interpretation of the first *Carlson* prong implicates the same "bedrock principles of separation of powers" that have foreclosed all efforts since *Carlson* to extend *Bivens* liability to new contexts or new defendants. *Correctional Services Corp. v. Malesko*, 534 U.S. 61, 69 (2001) (citing *Schweiker v. Chilicky*, 487 U.S. 412, 425-427 (1988)). Under the Ninth Circuit's logic, *no statute* enacted before the *Bivens* opinion was filed could possibly satisfy the first *Carlson* prong because Congress could not have specifically intended to preempt a *Bivens* claim since such a claim was "not recognized at the time of [the statute's] passage." Consequently, no matter how clearly Congress may have expressed its intent to bar any and all claims for damages other than the claim

expressly permitted under the statute, Congress simply could not have barred a yet-to-be-created *Bivens* claim. In that manner, the Ninth Circuit reads *Carlson* as establishing an irrefutable presumption that legislation pre-dating *Bivens* always allows a *Bivens* claim. That interpretation, if accepted, would nullify clearly expressed Congressional intent to immunize federal personnel against personal liability, raising serious separation of powers doubts. Moreover, the Ninth Circuit's irrefutable presumption that pre-*Bivens* statutes cannot immunize federal personnel flouts this Court's caution against recognizing *Bivens* claims under statutes that provide an "exclusive mode of redress." *Bush*, 462 U.S. at 373.

Further, the Ninth Circuit's theory that any statute enacted before June 1971 must be conclusively presumed to permit a *Bivens* claim fails to acknowledge that, at least by December 1970, Congress had reason to believe that a *Bivens*-style claim might be recognized. *First*, this Court granted *certiorari* in *Bivens* in June 1970 – approximately five months *before* Congress passed Section 233. *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 399 U.S. 905 (1970). This put Congress on notice that a *Bivens*-style claim was a distinct possibility before Section 233 was enacted. *Second*, as this Court observed in *Bivens*, the creation of an implied damages action for constitutional torts committed by federal officers or employees "should hardly seem a surprising proposition" since, "[h]istorically, damages have been regarded as the ordinary remedy

for an invasion of personal interests in liberty." *Bivens*, 403 U.S. at 395 (citations omitted). *Third*, this type of claim was recognized as possible almost 25 years before *Bivens* was decided, in *Bell v. Hood*, 327 U.S. 678 (1946), where the Court held that a claim for damages against federal agents alleged to have violated Constitutional rights would "arise under the Constitution or laws of the United States" for the purpose of jurisdiction, although the Court expressed no opinion on whether the complaint stated a viable claim.

3. The Ninth Circuit misinterpreted *Carlson* as holding that Congress cannot view FTCA and *Bivens* remedies as "equally effective."

The Ninth Circuit also misapplied the second element under the relied-upon *Carlson* standard, which states that an alternative remedy provided by statute will not bar a *Bivens* claim unless it is "viewed [by Congress] as equally effective." *App. 11*, quoting *Carlson*, 446 U.S. at 18-19. As described above, this Court has never *held* there to be any such requirement where, as here, the statute explicitly states that it provides the "exclusive" remedy. But even if the "equally effective" requirement applied, it would be satisfied in this case.

The Ninth Circuit misinterpreted *Carlson* as effectively holding that FTCA and *Bivens* remedies are, as an objective matter, not "equally effective"

because FTCA remedies are inferior. Therefore, per the Ninth Circuit's reasoning, Section 233(a) cannot exclude *Bivens* claims because FTCA remedies have already been deemed inferior to and therefore not equally effective as *Bivens* remedies. Contrary to the Ninth Circuit's reasoning, however, this Court did not make an objective determination that FTCA remedies are inferior to *Bivens* remedies. It merely identified factors supportive of *Congress' view* that *Bivens* and FTCA remedies were not equivalent in the context of the Federal Tort Claims Act. *Carlson*, 446 U.S. at 20. The question, as stated in *Carlson*, is whether *Congress views* the remedies as of equal efficacy within the statutory context – not whether, as an objective matter, the *Bivens* and FTCA remedies are equally effective in achieving the statutory goals. Thus, the majority's recognition that Congress, in enacting the FTCA, did not view the remedies as equivalent in light of the FTCA's statutory objectives, does not imply that Congress could not have viewed the remedies as equivalent despite the differences between these remedies. Indeed, the majority explicitly recognized that Congress could limit plaintiffs to the FTCA remedy as long as Congress clearly expressed an intent to do so. *Carlson*, 446 U.S. at 23. When Congress declares a statutory remedy exclusive, it thereby expresses its view that the statutory remedy is equally effective as other remedies, including the *Bivens* remedy.

This Court's deference to Congress' "view" as to the efficacy of the competing remedies within the

statutory context reflects the legislative nature of the assessment. The determination of a remedy's efficacy implicates policy judgments, requiring a balancing of costs and benefits. *Bush*, 462 at 388-389. While exposing federal officers or employees to the risk of personal liability may deter wrongful actions within the scope of their office or employment, Congress may find that such liability would also deter qualified individuals from seeking federal employment in the PHS and may likewise impair morale among PHS officers and employees, impairing the agency's functioning in achieving its statutory mission. See *Barr*, 360 U.S. at 571-572 (quoting *Gregoire*, 177 F.2d at 581). This type of legislative policy judgment concerning the efficacy of competing remedial schemes falls within Congress' particular institutional competence. The Second Circuit recognized that Congress exercised its policy-making judgment by promulgating the exclusive-remedy clause in Section 233(a) to "enable the Public Health Service to attract better qualified persons to perform medical, surgical and dental functions in order to better serve, among others, federal prisoners." *Cuoco*, 222 F.3d at 108. This Court has indicated that federal courts will respect that type of legislative balancing as long as the exclusivity of the statutory remedy is manifest from the statutory language (*Carlson*, 446 U.S. at 23) – as it is under Section 233(a). *Carlson*, 446 U.S. at 20 (citing Section 233(a)).

C. The Special Nature Of The Public Health Service And The PHS Act's Exclusive-Remedy Clause Constitute "Special Factors" Precluding Recognition Of A *Bivens* Remedy.

The *Bivens* claim is also barred due to "special factors" counseling against its implication in the context of claims arising out of the provision of medical or related services by PHS officers or employees acting within the scope of their employment. The special factors are (1) the special nature of the Public Health Service and its statutory mission, in conjunction with (2) the expressly-restricted scope of relief available under Section 233(a).

1. Because of the Public Health Service's unique status, it is inappropriate to use a *Bivens* remedy to supplant Section 233(a).

This Court has cautioned against extending *Bivens* into new areas or recognizing new rights or claims: "So long as the plaintiff had an avenue for some redress, bedrock principles of separation of powers foreclosed judicial imposition of a new substantive liability." *Malesko*, 534 U.S. at 68-70. Separation of powers concerns that weigh against expanding the *Bivens* remedy also require that the remedy not be extended where "special factors" exist "counseling hesitation in the absence of affirmative action by Congress." *Chilicky*, 487 U.S. 412, 421, citing *Bivens*, 403 U.S. at 396. The special nature of the PHS, like the special nature of the military, in

conjunction with the carefully-crafted limits on legislatively-prescribed remedies, are factors counseling against recognition of a *Bivens* claim against PHS personnel covered by Section 233(a).

Like the military, the PHS has a unique role in our society. The PHS is a cadre of highly trained healthcare professionals who respond to threats, including natural disasters like Hurricane Katrina, and infectious diseases, such as SARS or the recent swine flu pandemic. As is true with the military, the unique nature of the PHS, and its critical mission in support of the nation's health, militate against imposition of *Bivens* liability.

The line of cases precluding application of the *Bivens* remedy in the military context is instructive. In *Chappell v. Wallace*, 462 U.S. 296 (1983), plaintiff Naval officers asserted *Bivens* claims alleging their commanding officers "failed to assign them desirable duties, threatened them, gave them low performance evaluations, and imposed penalties of unusual severity" due to their race. *Id.* at 297. This Court unanimously held that enlisted military personnel would not be allowed to bring a *Bivens* claim to recover damages when a superior officer allegedly violated the Constitution, stating that "*Bivens* and its progeny, has expressly cautioned that . . . a remedy will not be available when 'special factors counseling hesitation are present.'" *Id.* at 298. The Court held that a "special status" exists for the military due to the two systems of justice (military and civilian). *Id.* at 303-304. In order to maintain the military's chain

of command structure, the Court found use of a *Bivens* remedy to be inappropriate.

Subsequently, in *United States v. Stanley*, 483 U.S. 669 (1987), a case that did *not* concern the military justice system, chain-of-command issues, or military discipline, this Court built on its reasoning in *Chappell*. The Court held that a *Bivens* remedy was not available to a former Army sergeant who had been secretly fed the hallucinogen LSD by government agents as part of a drug testing program. Army officials told Stanley that they wanted to involve him in a program testing clothing and equipment designed for chemical warfare, but never let on their true intentions of testing the hallucinogenic effects of LSD. *Id.* at 671-672. Stanley claimed that he "suffered from hallucinations and periods of incoherence and memory loss, was impaired in his military performance, and would on occasion 'awake from sleep at night and, without reason, violently beat his wife and children,' later being unable to recall the entire incident." *Id.* Years later, the Army sent Stanley a letter asking that he cooperate in a study on the long term effects on LSD on volunteers who participated in the study. This was the first time Stanley learned of the Army's secret drug testing program or his involvement in it. *Id.*

The plaintiff in *Stanley* distinguished *Chappell* by arguing that the chain-of-command and military-discipline issues were not present in the context of a secret drug experiment on unsuspecting soldiers. Nevertheless, this Court found that there were

"special factors counseling hesitation" in the creation of a *Bivens* remedy in the military context, despite the absence of chain-of-command or military-discipline issues. *Id.* at 678. The Court held that, absent Congressional authorization, a *Bivens* remedy would create an unwarranted intrusion into military affairs. Here, the "special factor" was not that Congress had afforded an alternate means of relief in this particular case, but instead that "Congressionally uninvited intrusion into military affairs by the judiciary is inappropriate." *Id.* at 683. The military's special position in our society counseled against recognition of the *Bivens* remedy.

The PHS is very much like the military and should be similarly treated. The PHS is, along with the armed service branches, designated as a uniformed service of the United States. 42 U.S.C. § 201(p). The PHS is organized along military lines, each commissioned officer grade having a statutorily stated military rank equivalent. 42 U.S.C. § 207. Commissioned officers of the PHS, or their surviving beneficiaries, are entitled to many of the same statutory rights, benefits, privileges and immunities provided to commissioned officers of the United States Army or their surviving beneficiaries, 42 U.S.C. § 213a(a), and PHS regulations specify that failure to follow the orders of superior officers will result in disciplinary action. Commissioned Corps Personnel Manual, Chapter CC46, Subchapter CC46.4. Importantly, in times of war or national emergency, the President may transform the PHS into a regular

branch of the armed services, subject to the Uniform Code of Military Justice. 42 U.S.C. § 217.

Furthermore, as the front line in our nation's defense of public health, PHS personnel are often required to make decisions for the collective good that may compromise the interests of individuals, such as in making decisions to quarantine in times of emergency. The risk of personal liability for conduct within the scope of their public offices inhibits the type of vigorous action necessary to achieve the agency's nation-health mission, enhance morale, and encourage recruitment. This is no small matter, as Justice Rehnquist emphasized in his *Carlson* dissent, where he quoted Learned Hand's observation that

> the fear of personal liability may dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties. . . . Despite the small odds an employee will actually be held liable in a civil suit, morale within the federal service has suffered as employees have been dragged through drawn-out lawsuits, many of which are frivolous.

Carlson, 446 U.S. at 47 (Rehnquist, J., dissenting) (quoting *Gregoire,* 172 F.2d at 581); *Barr*, 360 U.S. at 571-572 (quoting *Gregoire*, 177 F.2d at 581).

2. The PHS Act's carefully-circumscribed remedial scheme also weighs against implication of a *Bivens* remedy.

The second basis for finding the existence of special factors counseling against implication of a

Bivens remedy is the carefully-circumscribed remedy provided under Section 233(a). The presence of a deliberately-crafted but limited statutory remedy system such as Section 233(a) is another "special factor" that precludes recourse to the *Bivens* remedy. *Bush*, 462 U.S. at 388. Congress' decision to circumscribe the scope of available remedies under Section 233(a), in conjunction with the special nature of the PHS and its mission, counsel against implication of the *Bivens* remedy.

This Court has recognized that *Bivens* remedies may be improper in circumstances where Congress has carefully promulgated statutory remedies for those suffering a violation of rights by officers or employees of the federal government in areas where Congress, not the judiciary, has institutional competence in crafting remedial rights. The first case within this category is *Bush v. Lucas*, 462 U.S. 367, where this Court refused to recognize a *Bivens* remedy for a NASA employee who was fired after making critical public remarks about his employer because Congress provided a statutory remedy. *Bush*, 462 U.S. at 388. This court explained that Congress was in a better position than the judiciary to balance the competing policy concerns of "governmental efficiency and the rights of employees." *Id.* at 389. The existence of a statutory remedy, the Civil Service Reform Act of 1978, Pub.L. No. 95-454, 92 Stat. 1111 (1978) (codified as amended in scattered sections of 5 U.S.C.), which provides review of employment decisions *via* the Merit Systems Protection Board,

was held sufficient to foreclose an implied *Bivens* action for money damages against individual federal employees. *Bush,* 462 U.S. at 388.

In *Chilicky*, 487 U.S. 412, this Court built on the reasoning of *Bush* and held that *even a non-comprehensive statutory remedy* could preclude a *Bivens* claim. There, Social Security disability recipients sued individual federal employees under *Bivens* for alleged violations of their due process rights when their benefits were wrongfully terminated. Though their remedy under the remedial program consisted only of an award of back benefits, the Court held that this was a sufficient remedy to preclude a *Bivens* action: "[T]he presence of alleged unconstitutional conduct that is not separately remedied under the statutory scheme [does not] imply that the statute has provided 'no remedy' for the constitutional wrong at issue." *Id.* at 427-428. The Court further explained that "the concept of 'special factors counseling hesitation in the absence of affirmative action by Congress' has proved to include an appropriate judicial deference to indications that Congressional inaction has not been inadvertent." *Id.* at 423.

Section 233(a), which allows persons to sue for common law tort claims under the FTCA, is similarly sufficient to preclude a *Bivens* claim against PHS employees for providing medical care and related services. In its decision, the Ninth Circuit disparages FTCA remedies as inadequate because they are not co-extensive with those available under *Bivens*. *App. 15-20*. But these differences do not establish that

FTCA remedies are inadequate. The FTCA provides a detailed and comprehensive statutory scheme that is sufficient to remedy any alleged wrongful conduct by PHS officers or employees providing medical or related services, which is all that is required to establish adequacy. *Chilicky*, 487 U.S. at 423.

Because of the PHS's unique role in our society and the fact that Congress has, in Section 233(a), provided an "exclusive" remedy for common law and statutory torts committed by its officers and employees when providing medical care, this Court should reject the Ninth Circuit's expansion of a *Bivens* remedy against PHS officers or employees.

CONCLUSION

The petition for writ of certiorari should be granted.

DATED: June 12, 2009

BIRD, MARELLA, BOXER, WOLPERT,
NESSIM, DROOKS & LINCENBERG, P.C.
JOHN K. RUBINER
Counsel of Record
THOMAS R. FREEMAN
BENJAMIN D. LICHTMAN
1875 Century Park East, 23rd Floor
Los Angeles, California 90067-2561
Telephone: (310) 201-2100
Facsimile: (310) 201-2110
Attorneys for Petitioner
Chris Henneford

Yanira CASTANEDA, as personal representative of Estate of Francisco Castaneda; Vanessa Castaneda, as heir and beneficiary of the Estate, by and through her mother and Guardian Ad Litem Lucia Pelayo, Plaintiffs-Appellees,

v.

UNITED STATES of America; George Molinar, in his individual capacity; Claudia Mazur, in her individual capacity; Daniel Hunting, M.D.; S. Pasha, in his/her individual capacity; M. Sheridan, in his/her individual capacity, Defendants,

and

Chris Henneford, in his individual capacity; Gene Migliaccio, in his individual capacity; Timothy Shack, M.D. in his individual capacity; Esther Hui, M.D., in her individual capacity; Stephen Gonsalves, in his individual capacity, Defendants-Appellants.

No. 08-55684.

United States Court of Appeals,
Ninth Circuit.

Argued and Submitted Aug. 15, 2008.

Filed Oct. 2, 2008.

John K. Rubiner, Bird, Marella, Boxer, Wolpert, Nessim, Drooks & Lincenberg, P.C., Los Angeles, CA; Matthew S. Freedus and Robert Graham, Feldesman

Tucker Leifer Fidell LLP, Washington, D.C., for the defendants-appellants.

Adele P. Kimmel, Public Justice, P.C., Washington, D.C.; Conal Doyle, Willoughby Doyle LLP, Oakland, CA, for the plaintiffs-appellees.

Jeffrey Clair, United States Department of Justice, Civil Division, Washington, D.C., for the amicus.

Appeal from the United States District Court for the Central District of California; Dean D. Pregerson, District Judge, Presiding. D.C. No. 2:07-cv-07241-DDP-JC.

Before: STEPHEN REINHARDT, MARSHA S. BERZON, and MILAN D. SMITH, JR., Circuit Judges.

MILAN D. SMITH, JR., Circuit Judge:

This appeal requires us to decide whether 42 U.S.C. § 233(a) establishes the Federal Tort Claims Act (FTCA) as the exclusive remedy for constitutional violations committed by officers and employees of the Public Health Service (PHS), precluding the cause of action recognized in *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics,* 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971). We hold that it does not.

Factual and Procedural Background[1]

A. Factual Background

Decedent Francisco Castaneda was imprisoned by the State of California following a December 6, 2005 criminal conviction and held in the custody of the California Department of Corrections (DOC) until his early release date, March 26, 2006. Several times during his approximately three-and-a-half-month incarceration, Castaneda met with DOC medical personnel regarding a white-and-yellow raised lesion, then measuring approximately two centimeters square, on the foreskin of his penis. Twice, in late December and late February, DOC medical providers recommended that Castaneda be referred to a urologist, and that he undergo a biopsy to rule out the possibility of squamous cell cancer. This referral never occurred during Castaneda's detention by DOC, and on March 27, Castaneda was transferred to the custody of Immigration and Customs Enforcement (ICE) at the San Diego Correctional Facility (SDCF).

Immediately upon his transfer, Castaneda brought his condition to the attention of the SDCF medical personnel, members of the Division of Immigration

---

[1] All facts, unless otherwise indicated, are drawn from Plaintiffs' Third Amended Complaint. On a motion to dismiss under Federal Rule of Civil Procedure 12(b)(1), we assume the truth of all allegations in the complaint. *Savage v. Glendale Union High Sch., Dist. No. 205,* 343 F.3d 1036, 1039 n. 1 (9th Cir.2003).

Health Services (DIHS).[2] By this time, the lesion on his penis had become painful, growing in size, bleeding, and exuding discharge. Castaneda met with PHS physician's assistant Lieutenant Anthony Walker,[3] who recommended a urology consult and a biopsy "ASAP," noting both Castaneda's history of genital warts and his family history of cancer (his mother died at age 39 of pancreatic cancer). That consultation with an outside urologist, John R. Wilkinson, M.D., did not occur until June 7, 2006. Dr. Wilkinson "agree[d] that" Castaneda's symptoms "require[d]

---

[2] DIHS, a division of the Department of Health and Human Services, "is responsible for provision of direct primary health care at all ICE Service Processing Centers and selected contract detention facilities throughout the Nation." Statement of Organization, Functions and Delegations of Authority, 69 Fed.Reg. 56,433, 56,436 (Sept. 21, 2004).

[3] The Public Health Service is one of the seven uniformed services of the United States. 42 U.S.C. § 201(p). Organized along military lines, the PHS is staffed by commissioned officers who maintain a statutorily defined military rank equivalent. 42 U.S.C. § 207. Although the statute defines PHS rank by equivalent U.S. Army rank (from Second Lieutenant to Major General for the Surgeon General), *id.,* PHS commissioned officers are referred to by their equivalent U.S. Navy rank (from Ensign to Vice Admiral for the Surgeon General), and wear the corresponding Navy uniform and insignia. *See* U.S. Public Health Service Commissioned Corps, U.S. Dep't of Health & Human Serv., *About the Commissioned Corps: Uniforms* (June 24, 2008), http://www.usphs.gov/AboutUs/uniforms.aspx (last accessed August 18, 2008). Although ordinarily a part of the Department of Health and Human Services, the PHS, like the Coast Guard, may be called into military service in times of war or national emergency, whereupon its personnel become subject to the Uniform Code of Military Justice. 42 U.S.C. § 217.

urgent urologic assessment of biopsy and definitive treatment," citing the potential for "considerable morbidity from even benign lesions which are not promptly and appropriately treated." Although Dr. Wilkinson's notes indicate that he "offered to admit [Castaneda] for a urologic consultation and biopsy," DIHS physicians indicated their "wish to pursue outpatient biopsy which would be more cost effective." That biopsy, however, did not occur. Instead, Plaintiffs allege that DIHS officials deemed the biopsy, a standard diagnostic procedure to detect a life-threatening disease,[4] to be an "elective outpatient procedure" and declined to approve it.

Castaneda's symptoms grew worse and worse. On June 12, he filed a grievance report, asking for the surgery recommended by Dr. Wilkinson and stating that he was "in a considerable amount of pain and . . . in desperate need of medical attention." On June 23,

---

[4] In 2008, an estimated 1250 men in the United States will develop penile cancer and 290 men will die of it. Am. Cancer Soc'y, *Cancer Facts & Figures: 2008, available at* http://www.cancer.org/downloads/STT/2008CAFFfinalsecured.pdf. Most penile cancers are, like Castaneda's, "squamous cell carcinomas (cancer that begins in flat cells lining the penis)," Nat'l Cancer Inst., U.S. Nat'l Inst. of Health, *Penile Cancer,* http://www.cancer.gov/cancertopics/types/penile (last accessed August 18, 2008), which are typically diagnosed via one of several types of skin biopsy, Am. Cancer Soc'y, *Skin Cancer—Basal and Squamous Cell: How Is Squamous and Basal Cell Skin Cancer Diagnosed?* (June 10, 2008), http://www.cancer.org/docroot/CRI/content/CRI_2_4_3X_How_is_skin_cancer_diagnosed_51.asp (last accessed August 18, 2008).

he reported to Lt. Walker that his lesion was emitting a foul odor, continued to leak pus, and had increased in size, pressing further on his penis and increasing his discomfort. He complained of increased swelling, bleeding from the foreskin, and difficulty in urination. On July 13, instead of scheduling a biopsy, ICE brought Castaneda to the emergency room at Scripps Mercy Chula Vista. The emergency room physician noted the fungating lesion[5] on Castaneda's penis and referred Castaneda to urologist Daniel Hunting, M.D., who, following a brief examination, determined that the lesion was "probably condyloma," or genital warts. Dr. Hunting referred Castaneda back to his "primary treating urologist" at DIHS. Four days later, Lt. Walker noted that the lesion continued to grow. On July 26, another physician's assistant explained to Castaneda that "while a surgical procedure might be recommended long-term, that does not imply that the federal government is obligated to provide that surgery if the condition is not threatening to life, limb or eyesight."

On August 22, Castaneda saw another urologist, Robert Masters, M.D. Dr. Masters concluded that Castaneda had genital warts and was in need of

---

[5] *See* Nat'l Cancer Inst., U.S. Nat'l Inst. of Health, *Dictionary of Cancer Terms,* http://www.cancer.gov/templates/db_alpha.aspx?CdrID=367427 (last accessed August 18, 2008) (defining "fungating lesion" as a "type of skin lesion that is marked by ulcerations (breaks on the skin or surface of an organ) and necrosis (death of living tissue) and that usually has a bad smell").

circumcision, which would both relieve the "ongoing medical side effects of the lesion including infection and bleeding" and provide a biopsy for further analysis. This treatment was again denied as "elective in nature." The following month, Lt. Walker noticed "another condyloma type lesion [ ] forming and foul odor emitting from uncircumcised area with mushroomed wart." On November 14, DIHS noted that Castaneda's "symptoms have worsened. States he feels a constant pinching pain, especially at night. States he constantly has blood and discharge on his shorts. . . . Also complains of a swollen rectum which he states makes bowel movements hard." Castaneda was prescribed laxatives. The following day, Castaneda complained that the lesion was growing, that he could not stand and urinate because the urine "sprays everywhere," and that the lesion continued to leak blood and pus, continually staining his sheets and underwear. DIHS responded by increasing Castaneda's weekly allotment of boxer shorts.

On November 17, Castaneda was transferred from San Diego to ICE's San Pedro Service Processing Center. The "Medical Summary of Federal Prisoner/Alien in Transit" filed in connection with this transfer listed no "current medical problems." Nevertheless, an examination at the Los Angeles/Santa Ana Staging area noted the presence of "other penile anomalies."

In early December, Castaneda's counsel from the ACLU became involved in his case, sending multiple letters notifying ICE and Health Service Administration officials of Castaneda's medical problems and

urging that he receive the biopsy he had been prescribed almost a year earlier. Apparently in response, Castaneda was sent to yet another urologist, Lawrence S. Greenberg, M.D, on December 14. Dr. Greenberg described Castaneda's penis as a "mess," and stated that he required surgery. The ACLU continued to demand treatment, to no apparent avail. Forty-one days later, January 25, 2007, Castaneda was seen by Asghar Askari, M.D., who diagnosed a fungating penile lesion that was "most likely penile cancer" and, once again, ordered a biopsy.

On February 5, rather than provide the biopsy prescribed by Doctors Wilkinson, Masters, Greenberg, and Askari, ICE instead released Castaneda, who then proceeded on his own to the emergency room of Harbor-UCLA Hospital in Los Angeles. He was scheduled for a biopsy on February 12, which confirmed that Castaneda was suffering from squamous cell carcinoma of the penis. On February 14, Castaneda's penis was amputated, leaving only a two-centimeter stump.

The amputation did not occur in time to save Castaneda's life. In addition to creating a 4.5 centimeter-deep tumor in his penis, the cancer had metastasized to his lymph nodes and throughout his body. Castaneda received chemotherapy throughout 2007, but the treatment was ultimately unsuccessful. Francisco Castaneda died February 16, 2008. He was thirty-six years old.

B. Procedural Background

This action began November 2, 2007, as a suit brought by Castaneda against the United States and a number of state and federal officials and medical personnel. Castaneda alleged inadequate medical care while in DOC and ICE custody that amounted to malpractice, and a violation of his constitutional rights. He asserted various malpractice and negligence claims against the United States under the FTCA and against the individual defendants under California law, and asserted constitutional claims (violations of the Fifth, Eighth, and Fourteenth Amendments) against the individual defendants under *Bivens* and 42 U.S.C. § 1983. He sought compensatory and punitive damages and declaratory relief. Following Castaneda's death, Plaintiffs-Appellants Yanira Castaneda, Castaneda's sister and his estate's personal representative, and Vanessa Castaneda, Castaneda's daughter and sole heir, filed an amended complaint, substituting themselves as plaintiffs and adding various claims under California's Wrongful Death Statute, Cal.Code Civ. Proc. § 377.60 *et seq.,* and Survival Statute, Cal. Code Civ. Proc. § 377.20 *et seq.*

On January 14, 2008, Defendants-Appellants Commander Chris Henneford, Captain Eugene A. Migliaccio, and Commander Stephen Gonsalves, all commissioned officers of the PHS, and Defendants-Appellants Timothy Shack, M.D., and Esther Hui, M.D., both civilian employees of PHS (collectively, PHS Defendants), moved to dismiss the case for lack

of subject matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1). The PHS Defendants argued that they had absolute immunity from *Bivens* actions because 42 U.S.C. § 233(a) provides that an FTCA suit against the United States is the exclusive remedy for tortious acts committed by PHS officers and employees in the course of their medical duties.

On March 11, the district court denied the motion to dismiss, holding that the plain language of § 233(a) "express[ly] preserv[es]" plaintiffs' constitutional claims. *Castaneda v. United States,* 538 F.Supp.2d 1279, 1290 (C.D.Cal.2008). Rejecting the reasoning of the Second Circuit's decision in *Cuoco v. Moritsugu,* 222 F.3d 99, 107-09 (2d Cir.2000), the district court held that § 233(a), through its reference to 28 U.S.C. § 1346(b), incorporated by reference the entirety of the FTCA, including the general exclusivity provision of 28 U.S.C. § 2679(b), which expressly exempts constitutional claims from the FTCA exclusivity, 28 U.S.C. § 2679(b)(2)(A). *Castaneda,* 538 F.Supp.2d at 1288-91. It also held that the legislative history of both § 233(a) and § 2679(b) supported the conclusion that § 233(a) was not intended to preempt *Bivens* actions. *Id.* at 1291-95. The PHS Defendants timely appealed.

Jurisdiction and Standard of Review

District court orders denying absolute immunity constitute "final decisions" for the purposes of 28 U.S.C. § 1291, granting us jurisdiction over this

interlocutory appeal. *Mitchell v. Forsyth,* 472 U.S. 511, 524-27, 105 S.Ct. 2806, 86 L.Ed.2d 411 (1985); *Trevino v. Gates,* 23 F.3d 1480, 1481 (9th Cir.1994). We review such decisions *de novo. Trevino,* 23 F.3d at 1482.

Discussion

In *Bivens,* the Supreme Court established that victims of constitutional violations by federal agents have a cause of action under the Constitution to recover damages. As the Supreme Court later clarified, however, this remedy has limits:

> Such a cause of action may be defeated in a particular case, however, in two situations. The first is when defendants demonstrate "special factors counselling hesitation in the absence of affirmative action by Congress." The second is when 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.

Carlson v. Green, 446 U.S. 14, 18-19, 100 S.Ct. 1468, 64 L.Ed.2d 15 (1980) (internal citations omitted) (quoting *Bivens,* 403 U.S. at 396, 91 S.Ct. 1999). Under *Carlson,* then, a *Bivens* remedy will not lie (1) when an alternative remedy is both (a) "explicitly declared to be a substitute" and (b) is "viewed as equally effective," or (2) in the presence of "special factors" which militate against a direct recovery remedy.

Carlson provides the starting point for our analysis in this case. The facts and posture of *Carlson* closely resembled those here: in *Carlson,* the plaintiff, the mother of a deceased federal prisoner, brought suit against federal prison officials on behalf of her son's estate, alleging Eighth Amendment violations. Specifically, she alleged that the federal officials' deliberate indifference to his serious medical needs, amounting to an Eighth Amendment violation, caused the decedent, a chronic asthmatic, to die of respiratory failure. *Id.* at 16 & n. 1, 100 S.Ct. 1468. The defendants argued that the FTCA provided a substitute remedy preempting one under *Bivens.* After noting the two ways in which a *Bivens* remedy can be preempted, the Court held that "[n]either situation obtains in this case." *Id.* at 19, 100 S.Ct. 1468. First, the Court held that "the case involve[d] no special factors counseling hesitation." *Id.* Second, there was no congressional declaration foreclosing the *Bivens* claim and making the FTCA exclusive. No statute declared the FTCA to be a substitute for *Bivens,* and subsequent legislative history "made it crystal clear that Congress views FTCA and *Bivens* as parallel, complementary causes of action." *Id.* at 20, 100 S.Ct. 1468. The Court further noted four ways in which the remedy in the FTCA could not be seen as an "equally effective" substitute for a *Bivens* remedy. *Id.* at 20-23, 100 S.Ct. 1468; *see also infra* pp. 15-17, 100 S.Ct. 1468.

In this case, too, we have an individual who has died, allegedly due to the deliberate indifference of

the federal officials charged with his health and safety. Once again, the decedent's survivors bring a *Bivens* action, alleging Fifth and Eighth Amendment violations.[6] And, once again, the officials argue that the FTCA preempts any *Bivens* remedy. The difference is that this time, they do so on the basis of 42 U.S.C. § 233(a), which provides a remedy under the FTCA, rather than on the basis of the FTCA itself.

---

[6] Unlike the prisoner in *Carlson,* Castaneda was an immigration detainee, not a criminal convict. The argument below framed the issue in terms of a violation of the Eighth Amendment, *Castaneda,* 538 F.Supp.2d at 1286, and the district court therefore ruled accordingly, *id.* at 1295-98. Castaneda's criminal sentence was complete by the time of his transfer to ICE, and his civil detention in SDCF and San Jose was not "punishment." Plaintiffs' claims against the PHS Defendants, strictly speaking, are therefore rooted in the Fifth Amendment's Due Process clause, not the Eighth Amendment's prohibition on cruel and unusual punishment. *See Bell v. Wolfish,* 441 U.S. 520, 536-37 & n. 16, 99 S.Ct. 1861, 60 L.Ed.2d 447 (1979). In this case, however, that formal distinction is irrelevant: "[w]ith regard to medical needs, the due process clause imposes, at a minimum, the same duty the Eighth Amendment imposes." *Gibson v. County of Washoe,* 290 F.3d 1175, 1187 (9th Cir.2002).

Plaintiffs additionally claim a violation of the equal protection component of the Due Process Clause of the Fifth Amendment, alleging that Castaneda was invidiously denied medical care due to his immigration status and without a rational basis. *Carlson,* too, involved an equal protection claim: "that petitioners['] . . . indifference was in part attributable to racial prejudice." 446 U.S. at 16 n. 1, 100 S.Ct. 1468; *see also Davis v. Passman,* 442 U.S. 228, 99 S.Ct. 2264, 60 L.Ed.2d 846 (1979) (*Bivens* relief is available to enforce the equal protection component of the Fifth Amendment's Due Process Clause).

42 U.S.C. § 233(a) provides:

> The remedy against the United States provided by sections 1346(b) and 2672 of Title 28 . . . for damage for personal injury, including death, resulting from the performance of medical, surgical, dental, or related functions . . . 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 . . . whose act or omission gave rise to the claim.

There is no dispute that the PHS Defendants were, during all relevant times, commissioned officers or employees of the Public Health Service, and were acting within the scope of their offices or employment. The PHS Defendants claim that the exclusivity provision in § 233(a) acts either to expressly substitute the FTCA for a *Bivens* remedy, or as a "special factor" that would preclude the *Bivens* remedy. We examine each of these arguments in turn.

A. Does § 233(a) Expressly Establish the FTCA as a Substitute Remedy for *Bivens*?

As noted above, *Carlson* established a two-part test for express *Bivens* preemption: Congress must provide an alternative remedy that is "explicitly declared to be a *substitute* for" *Bivens* (rather than a complement to it) *and* Congress must view that remedy as "equally effective." 446 U.S. at 18-19, 100

S.Ct. 1468. Both these elements must be present for a court to find the *Bivens* remedy expressly displaced. We first address the "equally effective" question discussed in *Carlson.*

1. "Viewed as Equally Effective"

The alternative remedy in *Carlson,* like the remedy here, was the FTCA. In *Carlson,* the Supreme Court held that Congress does not view the FTCA as providing relief that is "equally effective" as *Bivens* relief. There is no basis here on which to distinguish that holding from the case before us; if anything, the FTCA is a *less* effective remedy now than it was when *Carlson* was decided.

Carlson enumerated four factors, "each suggesting that the *Bivens* remedy is more effective than the FTCA remedy." 446 U.S. at 20, 100 S.Ct. 1468. First, *Bivens* damages are awarded against individual defendants, while the FTCA damages are recovered from the United States. "Because the *Bivens* remedy is recoverable against individuals, it is a more effective deterrent than the FTCA remedy against the United States. It is almost axiomatic that the threat of damages has a deterrent effect, particularly so when the individual official faces personal financial liability." *Id.* at 21, 100 S.Ct. 1468 (citations omitted). Second, punitive damages are not available under the FTCA, further undermining its deterrent effect. "Punitive damages are 'a particular remedial mechanism normally available in the federal courts,' and

are especially appropriate to redress the violation by a Government official of a citizen's constitutional rights. . . . But punitive damages in an FTCA suit are statutorily prohibited. 28 U.S.C. § 2674. Thus FTCA is that much less effective than a *Bivens* action as a deterrent to unconstitutional acts." *Id.* at 22, 100 S.Ct. 1468 (quoting *Bivens,* 403 U.S. at 397, 91 S.Ct. 1999) (citations omitted). Third, *Bivens* cases may be tried before a jury; FTCA cases cannot. *Id.* at 22-23, 100 S.Ct. 1468. "Just as suffrage ensures the people's ultimate control in the legislative and executive branches, jury trial is meant to ensure their control in the judiciary." *Blakely v. Washington,* 542 U.S. 296, 306, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004). This is particularly important in the context of constitutional torts, where the actions of the government itself are on trial. Moreover, juries are well-suited to the task of apportioning damages. As Congress noted in explaining the need for jury trials under Title VII, "[j]uries are fully capable of determining whether an award of damages is appropriate and if so, how large it must be to compensate the plaintiff adequately and to deter future repetition of the prohibited conduct." H.R.Rep. No. 102-40(I), at 72 (1991), 1991 U.S.C.C.A.N. 549, 610. Lastly, the FTCA's limitation that the United States may be held liable "in accordance with the law of the place where the act or omission occurred," 28 U.S.C. § 1346(b)(1), would violate the policy "obvious[ly]" motivating *Bivens* "that the liability of federal officials for violations of citizens' constitutional rights should be governed by uniform rules." *Carlson,* 446 U.S. at 23, 100 S.Ct. 1468. This last

factor was especially important to the Supreme Court. In *Carlson,* the plaintiff's action would have failed under the survivorship law of the forum state, Indiana. *Id.* at 17 n. 4, 100 S.Ct. 1468.[7] The Court emphasized that "only a uniform federal rule of survivorship will suffice to redress the constitutional deprivation here alleged and to protect against repetition of such conduct." *Id.* at 23, 100 S.Ct. 1468.

None of the factors listed by the Supreme Court is any less present in the case before us. The FTCA would be no more a deterrent here than it was in *Carlson,* because FTCA damages remain recoverable only against the United States and because punitive damages remain unavailable. 28 U.S.C. § 2674. Likewise, an FTCA plaintiff still cannot demand a jury trial. 28 U.S.C. § 2402. Moreover, the FTCA remedy continues to depend on the "law of the place where the act or omission occurred." 28 U.S.C. § 1346(b)(1).

---

[7] In particular, Indiana law provided that a personal injury claim did not survive where the acts complained of caused the victim's death. Ind.Code § 34-1-1-1 (1976). Moreover, where the decedent was not survived by a spouse or dependent next of kin, Indiana's wrongful death statute limited recovery to those expenses incurred in connection with the death itself. Ind.Code § 34-1-1-2 (1976). Indeed, the district court held that, because of the limitations in those two statutes, the plaintiff (the decedent's mother) could not even meet the amount-in-controversy then required by 28 U.S.C. § 1331(a), and dismissed the case for lack of subject matter jurisdiction. *Carlson,* 446 U.S. at 17-18 & n. 4, 100 S.Ct. 1468.

Nowhere does this reliance on state law present a greater threat to uniformity of remedy than in actions "for damage for personal injury, including death, resulting from the performance of medical, surgical, dental, or related functions." 42 U.S.C. § 233(a). Since *Carlson* was decided in 1980, the United States has witnessed a revolution in state tort law, focusing on medical malpractice in particular. Reacting to a "crisis" in medical malpractice insurance costs and availability, many states began in the mid-1980s to enact legislative changes designed both to deter frivolous lawsuits and to limit the size of damage awards even in meritorious ones. *See generally* Cong. Budget Office, U.S. Cong., *The Effects of Tort Reform: Evidence from the States* 2-3 (2004), *available at* http://www.cbo.gov/ftpdocs/55xx/doc5549/Report.pdf. Twenty-four states, for example, have abolished the collateral-source rule, often permitting collateral-source payments to offset damage awards. Am. Tort Reform Ass'n, *Tort Reform Record* 14-18 (July 1, 2008), *available at* http://www.atra.org/files.cgi/8291_Record_07-08.pdf. Similarly, twenty-three states have placed statutory limits on non-economic damages, many limiting medical malpractice awards in particular. *Id.* at 32-39, 100 S.Ct. 1468. Statutory damage caps for malpractice can range from $250,000, *see, e.g.,* Cal. Civ.Code § 3333.2(b), to $1.25 million, Ind.Code § 34-18-14-3(a); *see also* Haw.Rev.Stat. § 663-8.7 ($375,000); Fla. Stat. § 766.118(2) ($500,000); Kan. Stat. Ann. § 60-3407(a) ($1 million). Other states have introduced procedural innovations to screen out meritless suits and encourage early settlement, such as requiring that plaintiffs, prior to

suit, obtain expert certificates of merits, *e.g.,* Va.Code § 8.01-20.1; W. Va.Code § 55-7B-6, or submit their claims to medical screening panels, *e.g.,* Alaska Stat. § 09.55.536; Haw.Rev.Stat. § 671-12, or participate in other compulsory alternative dispute resolution bodies, *e.g.,* Md.Code, Cts. & Jud. Proc. § 3-2A-04; Wash. Rev.Code § 7.70.100.[8] Were Plaintiffs' sole remedy for the alleged mistreatment and death of Castaneda a common law malpractice suit against the United States, as the PHS Defendants argue, the damages they could recover, and the quasi-substantive procedural hurdles they would have to surmount to bring suit in the first place, would vary from state to state even more now than in 1980.

The Supreme Court has never revisited its conclusion that the FTCA's dependence on "the vagaries of the laws of the several States" prevents it from serving as an equally effective remedy for constitutional violations. *Carlson,* 446 U.S. at 23, 100 S.Ct. 1468. While the Supreme Court has, in subsequent years, found that the congressional institution of *other* remedial schemes that are not fully compensatory may be a "special factor" precluding *Bivens* relief,

[8] We express no opinion here as to whether or how these or similar procedural requirements would apply in an FTCA suit against the United States, although we note that several district courts have found certain of these statutes to apply to FTCA actions. *See, e.g., Stanley v. United States,* 321 F.Supp.2d 805, 807-08 (N.D.W.Va.2004); *Hill v. United States,* 751 F.Supp. 909, 910 (D.Colo.1990); *Oslund v. United States,* 701 F.Supp. 710, 712-14 (D.Minn.1988).

see Schweiker v. Chilicky, 487 U.S. 412, 108 S.Ct. 2460, 101 L.Ed.2d 370 (1988) (Social Security); *Bush v. Lucas,* 462 U.S. 367, 103 S.Ct. 2404, 76 L.Ed.2d 648 (1983) (federal civil service); *see also Adams v. Johnson,* 355 F.3d 1179 (9th Cir.2004) (federal income tax), those cases cannot serve as a basis for distinguishing the Supreme Court's explicit determination in *Carlson* that the very remedy at issue here, the FTCA, is not viewed by Congress as equally effective as *Bivens.* Moreover, every one of those subsequently examined schemes, however otherwise undercompensatory, nonetheless provided a *uniform* remedy across the United States. *Carlson*'s holding that the FTCA, in particular, is not "equally effective" because of its lack of deterrent effect, its absence of a right to a jury trial, and its dependence on variable state law remains binding on this court, and, accordingly, following *Carlson,* we hold that § 233(a) does not preempt *Bivens* relief.

2. "Explicitly Declared To Be a Substitute"

A careful analysis of the first prong of the *Carlson* "explicit [ ] . . . substitute . . . and . . . equally effective [remedy]" standard, *Carlson,* 446 U.S. at 18-19, 100 S.Ct. 1468, also compels the conclusion that § 233(a) does not preclude relief under *Bivens.* The PHS Defendants maintain that, in § 233(a), Congress "explicitly declared [the FTCA] to be a substitute for recovery directly under the Constitution." *Id.* Specifically, the PHS Defendants urge that we read § 233(a)'s command that the FTCA remedy "shall be

exclusive of any other civil action or proceeding" to necessarily include actions or proceedings seeking a *Bivens* remedy. We decline to do so.

a. Text

The plain text alone of § 233 makes it clear that Congress did not explicitly declare § 233(a) to be a substitute for a *Bivens* action. The section does not mention the Constitution or recovery thereunder, let alone "explicitly declare[ ]" itself to be a "substitute for recovery directly under the Constitution." *Carlson,* 446 U.S. at 18-19, 100 S.Ct. 1468.

Moreover, § 233(a) cannot be read as an expression of Congress's desire to substitute the FTCA in place of *Bivens* relief for the simple reason that *Bivens* relief did not exist when § 233(a) was enacted. *See* Emergency Health Personnel Act of 1970, Pub.L. No. 91-623, 84 Stat. 1868 (1970); *Bivens,* 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971). *Carlson* requires an intention to *substitute* one form of relief for another, but substitution does not occur, and is in fact impossible, if the person or thing being "replaced" does not exist. Because *Bivens* relief did not exist at the time of § 233(a)'s enactment, as well as because there is no mention of constitutional torts in its text, we cannot read the text of § 233(a) as a declaration of Congress's intent to substitute the FTCA for *Bivens* relief.

b. History

Our conclusion that § 233(a) does not constitute an explicit declaration that the FTCA is a substitute for *Bivens* actions is supported by the history of the legislation in question. That history demonstrates that the exclusivity provision of § 233(a) was intended to preempt a particular set of tort law claims related to medical malpractice.

Although codification can produce the illusion of a timeless, unitary law, statutes are passed in particular historic and legal contexts and their language must be read and interpreted with that context in mind. "[O]ur evaluation of congressional action in 197[0] must take into account its contemporary legal context."[9] *Cannon v. Univ. of Chicago,* 441 U.S. 677, 698-99, 99 S.Ct. 1946, 60 L.Ed.2d 560 (1979); *see also*

[9] Public context is especially important in examining "Congress's enactment (or reenactment) of . . . verbatim statutory text." *Alexander v. Sandoval,* 532 U.S. 275, 288, 121 S.Ct. 1511, 149 L.Ed.2d 517 (2001). In this case, the key preemptive phrase, "exclusive of any other civil action or proceeding by reason of the same subject matter against the employee," was identical to language in the Federal Drivers Act, which at the time provided that the FTCA was the exclusive remedy "for personal injury, including death, resulting from the operation by any employee of the Government of any motor vehicle while acting within the scope of his office or employment." 28 U.S.C. § 2679(b) (1970). If constitutional tort suits against Public Health Service officers and employees, arising out of performance of their medical duties, seemed like a remote possibility in 1970, they would have seemed positively Dada for suits against drivers of motor vehicles in 1961. *See* Pub.L. No. 87-258, 75 Stat. 539 (1961).

Se. Cmty. Coll. v. Davis, 442 U.S. 397, 411, 99 S.Ct. 2361, 60 L.Ed.2d 980 (1979) (describing courts' "obligation to honor the clear meaning of a statute, as revealed by its language, purpose, *and history*") (emphasis added); *Aldridge v. Williams,* 44 U.S. (3 How.) 9, 24, 11 L.Ed. 469 (1845) (stating that courts interpreting legislation should look, "if necessary, to the public history of the times in which it was passed"). Thus, although the term "any other civil action or proceeding" may appear clear in a historical isolation, "[t]he meaning – or ambiguity – of certain words or phrases may only become evident when placed in context." *FDA v. Brown & Williamson Tobacco Corp.,* 529 U.S. 120, 132-33, 120 S.Ct. 1291, 146 L.Ed.2d 121 (2000).

As the Court noted in *Carlson,* the FTCA was enacted long before *Bivens* recognized a right of action under the Constitution. 446 U.S. at 19, 100 S.Ct. 1468. Section 233(a), too, predated *Bivens:* it was passed December 31, 1970, almost six months before *Bivens* was decided the following June, and almost six years before the Supreme Court's decision in *Estelle v. Gamble,* 429 U.S. 97, 97 S.Ct. 285, 50 L.Ed.2d 251 (1976), established the "deliberate indifference" standard for prisoner medical care under the Eighth Amendment. Emergency Health Personnel Act of 1970, Pub.L. No. 91-623, 84 Stat. 1868 (1970). It is therefore unsurprising that § 233(a) says nothing about preempting direct constitutional remedies – such remedies were not recognized at the time of its passage. An ordinary reader, at the time of § 233(a)'s

passage, 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 instead to a host of common-law and statutory malpractice actions.[10]

This understanding is borne out by the legislative history of § 233(a), which reveals that Congress's exclusive concern was with common law malpractice liability. The only two statements on the floor of either house of Congress respecting the bill mentioned only medical malpractice, with nothing being said about constitutional violations. *See* 91 Cong. Rec. H42,543 (1970) (statement of Rep. Staggers) ("So they have asked, if in the event there is a suit against a PHS doctor alleging malpractice, the Attorney General of the United States would defend them in whatever suit may arise."); 91 Cong. Rec. S42,977 (1970) (statement of Sen. Javits) ("I am pleased to support . . . the provision for the defense of certain malpractice and negligence suits by the Attorney General."). Representative Staggers noted that the Surgeon General had requested the amendment because PHS physicians "just cannot afford to take

[10] At oral argument, *amicus* the United States noted that while the Supreme Court had not decided *Bivens* when § 233(a) was passed, it had already granted *certiorari* in the case the previous June. *See* 399 U.S. 905, 90 S.Ct. 2203, 26 L.Ed.2d 559 (1970). This does not make the directive more "explicit"; at best, it introduces a further element of ambiguity as to whether § 233(a) was intended to preempt constitutional claims.

out the customary liability insurance as most doctors do." 91 Cong. Rec. H42,543. The section itself was titled in the Statutes at Large[11] "Defense of Certain Malpractice and Negligence Suits." 84 Stat. at 1870; *see Almendarez-Torres v. United States,* 523 U.S. 224, 234, 118 S.Ct. 1219, 140 L.Ed.2d 350 (1998) ("[T]he title of a statute and the heading of a section are tools available for a resolution of a doubt about the meaning of a statute.") (internal quotation marks omitted). Thus, not only is the authoritative text of the statute silent as to constitutional torts in particular, but the title and legislative history, if anything, indicate an exclusive concern with state malpractice claims.[12]

---

[11] When § 233 was codified in the United States Code, it was given the title "Exclusiveness of Remedy." *See* 42 U.S.C. § 233. Title 42 of the U.S.C., however, has not been enacted into positive law. *See* 1 U.S.C. § 204 note. To the extent title or heading can affect our reading of otherwise ambiguous statutory language, then, it is the Statutes at Large that provide us with the "legal evidence of [the] law [ ]." *U.S. Nat'l Bank of Oreg. v. Indep. Ins. Agents of Am., Inc.,* 508 U.S. 439, 448 & n. 3, 113 S.Ct. 2173, 124 L.Ed.2d 402 (1993).

[12] We disagree with PHS Defendants' and *amicus* the United States' contention that "malpractice" here encompasses cruel and unusual punishment or violations of due process under the Eighth or Fifth Amendments, respectively. As we have noted, it certainly did not in 1970. The term *malpractice,* in ordinary speech, even now connotes negligence or incompetence in performing one's professional duties. *See Black's Law Dictionary* 978 (8th ed.2004) (defining "malpractice" as synonymous with "professional negligence" and "medical malpractice" as a "doctor's failure to exercise the degree of care and skill that a physician or surgeon of the same medical specialty would use under similar circumstances"). In *Estelle v. Gamble,* the Supreme

(Continued on following page)

Subsequent congressional action has revealed no inclination to make the FTCA a substitute remedy for

---

Court stressed the difference between malpractice and an Eighth Amendment violation: "Medical malpractice does not become a constitutional violation merely because the victim is a prisoner. In order to state a cognizable claim, a prisoner must allege acts or omissions sufficiently harmful to evidence deliberate indifference to serious medical needs." 429 U.S. at 106, 97 S.Ct. 285.

While the acts giving rise to a constitutional action might also give rise to one for malpractice, the two are nonetheless quite distinct. In *Bivens,* the Supreme Court rejected a view of "the relationship between a citizen and a federal agent unconstitutionally exercising his authority as no different from the relationship between two private citizens," noting that an "agent acting – albeit unconstitutionally – in the name of the United States possesses a far greater capacity for harm than an individual trespasser exercising no authority other than his own." 403 U.S. at 391-92, 91 S.Ct. 1999.

That observation is particularly relevant here. To describe the allegations in the complaint as averring mere "malpractice" is to miss the point. Castaneda was not a walk-in patient at Defendants' clinic; neither are Defendants merely alleged to have misread a chart or fumbled a scalpel. The ordinary doctor, no matter how careless, does not hold her patients under lock and key, affirmatively preventing them from receiving the medical care they need and demand. Even when denying his requests for a biopsy in the fall of 2006, DIHS officials were aware that Castaneda "is not able to be released to seek further care due to mandatory hold and[,] according to ICE authorities, may be with this facility for a while." The Kafkaesque nightmare recounted in Plaintiffs' complaint, which we assume here to be true, draws its force not only from Defendants' alleged deliberate indifference, but also from Castaneda's *state-imposed helplessness* in the face of that indifference. The element of state coercion transforms this into a species of action categorically different from anything Congress would likely term "malpractice."

Bivens actions. *See Brown & Williamson,* 529 U.S. at 143, 120 S.Ct. 1291 ("At the time a statute is enacted, it may have a range of plausible meanings. Over time, however, subsequent acts can shape or focus those meanings."). The FTCA itself has been modified to add an express exclusivity provision and to provide that the provision does not bar actions for constitutional torts. In response to the Supreme Court's decision in *Westfall v. Erwin,* 484 U.S. 292, 299, 108 S.Ct. 580, 98 L.Ed.2d 619 (1988),[13] Congress passed the Federal Employees Liability Reform and Tort Compensation Act of 1988 (LRTCA), Pub.L. No. 100-694 (1988). The LRTCA expanded 28 U.S.C. § 2679(b), which previously made the FTCA the exclusive remedy for injury resulting from a federal employee's operation of a motor vehicle, to encompass *any* "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." 28 U.S.C. § 2679(b)(1). Because, under the FTCA, the United States is substituted as the defendant in place of employees acting within the scope of their official duties, the LRTCA acts as a general grant of immunity to government employees for all such acts. The amendment went on to clarify that general immunity

---

[13] In *Westfall,* the Supreme Court held that "absolute immunity does not shield official functions from state-law tort liability unless the challenged conduct is within the outer perimeter of an official's duties and is discretionary in nature." 484 U.S. at 300, 108 S.Ct. 580.

"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." *Id.* § 2679(b)(2)(A). In so doing, Congress made explicit what, when *Carlson* was decided, had previously been implicit: that "constitutional claims are outside the purview of the Federal Tort Claims Act." *Billings v. United States,* 57 F.3d 797, 800 (9th Cir.1995). It would defy logic to suppose that § 233(a) must be read, despite the lack of any statutory language or legislative history counseling such a reading, to smuggle them back in again for this one subset of defendants.

What is more, the legislative history of the LRTCA makes it clear that Congress viewed the general grant of immunity it was extending to all employees, which expressly exempted constitutional claims, to be identical to the immunity it had already extended to PHS officers and employees sixteen years earlier.[14] The House Report, in discussing the effect of the LRTCA, noted:

> There is substantial precedent for providing an exclusive remedy against the United States for the actions of Federal employees. Such an exclusive remedy has already been

---

[14] *Cf. Carlson,* 446 U.S. at 19-20, 100 S.Ct. 1468 (examining legislative history of subsequent amendments to the FTCA to determine whether Congress viewed it as a substitute or complementary remedy).

> enacted to cover the activities of certain Federal employees, including . . .
>
> . . .
>
> 3. Medical Personnel. – The FTCA is the exclusive remedy for medical or dental malpractice on the part of the medical personnel of most federal employees.

H.R.Rep. No. 100-700, at 4 (1988), *reprinted in* 1988 U.S.C.C.A.N. 5945, 5948 (citing 42 U.S.C. § 233). The same Report noted the "sharp distinction between common law torts and constitutional or *Bivens* torts" and suggested that a constitutional tort involves "a more serious intrusion of the rights of an individual that merits special attention." *Id.* at 6, 1988 U.S.C.C.A.N. at 5950. The Report emphasized that the "'exclusive remedy' provision . . . [was] intended to substitute the United States as the sole[ ] permissible defendant in all *common law* tort actions," *id.,* but declared that the provision "expressly does not extend to . . . constitutional torts," *id.* at 5949.

Testifying before the House Committee on the Judiciary, a senior Justice Department official stated:

> [T]he exclusive remedy provision [of § 2679(b)(1)] is based on a very well-established precedent. Seven such exclusive remedy provisions already exist. They apply to drivers of vehicles, to physicians employed by various agencies, and to Department of Defense attorneys.

> [The LRTCA] simply extends those provisions to all Federal employees. Because of this precedent, we have considerable experience with such exclusive remedy provisions. They work well and fairly, have been widely accepted, and are not controversial.

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. 58 (1988) (testimony of Robert L. Willmore, Deputy Assistant Attorney General) (hereinafter Willmore Testimony). In the very next breath, however, the Deputy Assistant Attorney General agreed that "we want to avoid the constitutional torts issue." *Id.*; *see also id.* at 76 (statement of Willmore) ("H.R. 4358 would do nothing more than extend the protection now enjoyed by doctors, drivers, and [Defense Department] attorneys to all federal employees."), 78-79 (describing legislation to make the FTCA exclusive of *Bivens* claims as "controversial").

The PHS Defendants argue that to construe § 233(a) to preempt only common law and statutory tort actions would render it superfluous, since, post-LRTCA, PHS officers and employees are already immune from those actions under § 2679(b)(1). Even if § 233 were now superfluous because of the subsequent enactment of the LRTCA some 18 years later, it unquestionably was not superfluous at the time it was enacted.

We would certainly hesitate to read a statute in a manner that would leave an entire subsection superfluous, and we do not do so here. *See Christensen v. Comm'r,* 523 F.3d 957, 961 (9th Cir.2008) ("We should avoid an interpretation that would render [entire] subsections redundant."). The canon against redundancy is rooted in the notion (perhaps aspirational) that Congress would not do anything as preposterous as to pass a statute that was, in part or in whole, a nullity *ab initio. Cf. Int'l Ass'n of Machinists & Aerospace Workers v. BF Goodrich Aerospace Aerostructures Group,* 387 F.3d 1046, 1057 (9th Cir.2004) ("'[A]bsent clear congressional intent to the contrary, the legislature did not intend to pass vain or meaningless legislation.'") (quoting *Coyne & Delany Co. v. Blue Cross & Blue Shield of Va., Inc.,* 102 F.3d 712, 715 (4th Cir.1996)) (alterations omitted). The presumption applies more weakly in situations, like this one, in which the provision is potentially rendered superfluous by language contained in a separate, later statute. *Boise Cascade Corp. v. U.S. E.P.A.,* 942 F.2d 1427, 1432 (9th Cir.1991) (we must "mak[e] every effort not to interpret a provision in a manner that renders other provisions *of the same statute* inconsistent, meaningless or superfluous.") (emphasis added). Indeed, "[r]edundancies across statutes are not unusual events in drafting," *Conn. Nat'l Bank v. Germain,* 503 U.S. 249, 253, 112 S.Ct. 1146, 117 L.Ed.2d 391 (1992), and it would not be surprising to a frequent reader of federal statutes that Congress might pass a later, more comprehensive statute that has the effect of rendering an earlier statute

redundant, at least in part.[15] The Supreme Court has already held that § 2679(b) applies to all federal employees, regardless of whether they were covered by pre-LRTCA immunities. *See United States v. Smith,* 499 U.S. 160, 172-73, 111 S.Ct. 1180, 113 L.Ed.2d 134 (1991) ("The Liability Reform Act's plain language makes no distinction between employees who are covered under pre-Act immunity statutes and those who are not.").[16]

---

[15] *See Germain,* 503 U.S. at 256, 112 S.Ct. 1146 (O'Connor, J., concurring in the judgment) ("I think it far more likely that Congress inadvertently created a redundancy than that Congress intended to withdraw appellate jurisdiction over interlocutory bankruptcy appeals by the roundabout method of reconferring jurisdiction over appeals from final bankruptcy orders."); *Zorich v. Long Beach Fire Dep't & Ambulance Serv., Inc.,* 118 F.3d 682, 686 (9th Cir.1997) (holding that a later, more general statute did not render a prior one superfluous because they provide "two separate means of qualifying for coverage"); *cf.* 2B Normal J. Singer, Sutherland Statutes and Statutory Construction § 51:5 (7th ed. 2007) ("A later general act may be held to supercede a prior narrower one where the later act purports to deal comprehensively with the subject to which it pertains.").

[16] In *Smith,* the pre-LRTCA immunity in question was the Gonzalez Act, 10 U.S.C. § 1089(a), which, like § 233(a), provides that the FTCA is the exclusive remedy for personal injury caused by armed forces physicians. Below, this court, joining the Eleventh Circuit, held that § 1089(a) granted immunity only for torts occurring in the United States. *See Smith v. Marshall,* 885 F.2d 650, 652-54 (9th Cir.1989); *Newman v. Soballe,* 871 F.2d 969, 974 (11th Cir.1989). The Supreme Court reversed, holding that, regardless of whether the Gonzalez Act would immunize foreign conduct, the LRTCA did, and the individual defendants were therefore immune. *United States v. Smith,* 499 U.S. at 172, 111 S.Ct. 1180.

(Continued on following page)

In any event, we disagree that our reading makes the text of § 233(a) superfluous, post-LRTCA. A review of the rest of § 233 reveals why: subsection (a) remains the lynchpin of the entire balance of the section. *See Dolan v. United States Postal Serv.,* 546 U.S. 481, 486, 126 S.Ct. 1252, 163 L.Ed.2d 1079 (2006) ("Interpretation of a word or phrase depends upon reading the whole statutory text, considering the purpose and context of the statute, and consulting any precedents or authorities that inform the analysis."). Other subsections of § 233 have extended subsection (a) protection to private persons and entities (who are not otherwise "employees" covered by FTCA) by stating that they are to be "deemed to be an employee of the Public Health Service."[17] Still other subsections involve the administration and

---

Smith thus presented the opposite question from that posed here: in *Smith,* the pre-LRTCA immunity statute purportedly contained an exception to immunity not present in the LRTCA; in our case, PHS Defendants argue that the LRTCA contains an exception to immunity not in the pre-LRTCA immunity statute. Because we hold that § 233(a) does not provide an immunity for *Bivens* torts, *Smith* is of little relevance to us here beyond the proposition for which we cite it in the text above.

[17] *See* § 233(g) (operators of health centers receiving federal funds under 42 U.S.C. § 254(b), (j)) (officers, employees, or contractors of health center operators), (m) (managed care plans entering into contracts with health centers), (*o*) (health professionals volunteering at free clinics), (p) (professionals carrying out smallpox countermeasures in the event of "bioterrorist incident" or other emergency).

limitation of this preemption.[18] Section 233(a), by defining the scope of immunity granted uniquely to PHS employees (respecting only "the performance of medical, surgical, dental, or related functions"), allows PHS and the Attorney General to provide a limited grant of immunity to volunteers and recipients of federal funds. After the LRTCA, then, the ongoing function of § 233, read as a whole, is to extend the FTCA exclusivity to private entities, much like many other statutes scattered throughout the U.S.Code. *See, e.g.,* 23 U.S.C. § 510(g)(1) (immunizing official acts by employees of National Academy of Sciences carrying out the future strategic highway research program); 42 U.S.C. § 5055(f)(1)(A) (volunteers of the Domestic Volunteer Services); 42 U.S.C. § 247d-6a(d)(2)(A) (Health and Human Services contractors involved in research and development activities related to "qualified countermeasures" against certain weapons of mass destruction); 50 U.S.C. § 2783(b)(1) (government contractors under Atomic Testing Liability Act). It would, indeed, be superfluous to add an explicit exemption for such "deemed" employees from *Bivens* actions because such private actors are not subject to *Bivens* actions. *Corr. Serv. Corp. v. Malesko,* 534 U.S. 61, 122 S.Ct. 515, 151 L.Ed.2d 456 (2001).

---

[18] *See, e.g.,* § 233(h) (qualifications for designation under subsection (g)), (k) (estimation of annual claims and establishment of fund), (n) (reports to Congress detailing United States' risk exposure by virtue of deemed employees).

c. Context

In addition to historical context, individual statutes are located within a greater statutory and remedial context. We must "find that interpretation which can most fairly be said to be imbedded in the statute, in the sense of being most harmonious with its scheme and with the general purposes that Congress manifested." *United States v. Alghazouli,* 517 F.3d 1179, 1184 (9th Cir.2008) (quoting *Comm'r v. Engle,* 464 U.S. 206, 217, 104 S.Ct. 597, 78 L.Ed.2d 420 (1984)). As we have noted, § 233(a) is not the only statute that makes the FTCA the exclusive remedy for injuries committed by certain classes of federal employees (although their meaning is not before us here). Most, like § 233(a), concern federal medical personnel. Some expressly limit themselves to actions involving "malpractice or negligence." 22 U.S.C. § 2702(a)(1) (State Department medical personnel); 38 U.S.C. § 7316(a)(1)(A) (Veterans Health Administration). Others specify in the text only a "negligent or wrongful act or omission." 10 U.S.C. § 1089(a) (Department of Defense, Armed Forces Retirement Home, and Central Intelligence Agency medical personnel); 42 U.S.C.A. § 2458a (NASA). Additionally, Department of Defense lawyers are given immunity for any "negligent or wrongful act or omission" connected with their provision of legal services. 10 U.S.C. § 1054(a). All, like § 233(a), mention "malpractice" in their title. All of these classes of employee

might, absent § 2679(b)(1), face substantial common law and statutory malpractice liability.[19] Granting these individuals, along with all federal employees driving motor vehicles (the former function of § 2679(b)), immunity from state negligence actions served a very real, obvious common purpose.[20]

PHS Defendants and *amicus* the United States, however, have provided no explanation for why Congress would want to provide these persons with the privilege, shared with no other federal employees, to *violate the Constitution* without consequence. *See Malesko,* 534 U.S. at 76, 122 S.Ct. 515 (Stevens, J., dissenting) ("Nor have we ever suggested that a category of federal agents can commit Eighth Amendment violations with impunity."). Why should the physicians who treat our soldiers' families[21] be immune

---

[19] Notably, all the above statutes were passed well before the LRTCA gave a general grant of immunity to federal employees, with the exception of 38 U.S.C. § 7316, which was added in 1991. *Department of Veterans Affairs Health-Care Personnel Act of 1991,* Pub.L. No. 102-40, 105 Stat. 187 (1991).

[20] *See* Willmore Testimony at 76 (describing pre-LRTCA immunities as allowing "the United States . . . to develop a consistent and uniform approach to medical malpractice and automobile tort litigation-two of the most common types of common law torts").

[21] Military personnel themselves are generally unable to bring *Bivens* actions for injuries that " 'arise out of or are in the course of activity incident to service.' " *United States v. Stanley,* 483 U.S. 669, 683, 107 S.Ct. 3054, 97 L.Ed.2d 550 (1987) (quoting *Feres v. United States,* 340 U.S. 135, 146, 71 S.Ct. 153, 95 L.Ed. 152 (1950)). Notably, although it was ultimately disposed of on other grounds, at no point in the *Stanley* litigation, which

(Continued on following page)

from constitutional torts while the physicians who treat our veterans are not? Why distinguish the Bureau of Prisons medical personnel who allowed a man in federal custody to die in *Carlson* from the PHS personnel who allegedly relegated a man in immigration detention to a similar outcome here? What is it about Department of Defense attorneys, alone among our government's legions of legal personnel, that they deserve such solicitude?

The LRTCA was passed to abolish such arbitrary distinctions. In his written statement to Congress, the Deputy Assistant Attorney General noted the absurdity of treating doctors, drivers, and Defense Department lawyers differently from all other federal employees. "For example, lawyers involved in Department of Commerce contracting should be protected from personal liability for their professional advice, just like their counterparts in the Department of Defense." Willmore Testimony at 76. Yet twenty years later, his successors at the Justice Department would have us re-introduce the exact same disparity in miniature, immunizing one set of doctors and lawyers from *Bivens* liability, and leaving the rest on the hook.

Had Congress intended this result, it surely would have said so – in the statute itself, in its title,

---

involved U.S. Army physicians' secret experimentation with LSD on unsuspecting soldiers, does it appear that it occurred to anyone to invoke 10 U.S.C. § 1089.

or in the legislative history. Instead, the statute is silent as to the Constitution, and both the title and contemporary and subsequent legislative history suggest that Congress intended to preclude only common law malpractice claims. This cannot be what the Supreme Court meant by an explicitly declared substitute. We therefore hold that § 233(a) does not explicitly declare the FTCA to be a substitute remedy for *Bivens* actions against PHS officers and employees.

3. *Cuoco v. Moritsugu*

We recognize that our holding in this case conflicts with the Second Circuit's decision in *Cuoco v. Moritsugu,* 222 F.3d 99. In *Cuoco,* the court relied on dicta in *Carlson* which it read to imply that § 233(a) was an expressly declared substitute for *Bivens. Id.* at 108. In *Carlson,* the Supreme Court wrote that its conclusion that the FTCA complements *Bivens,* rather than replaces it,

> 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).

446 U.S. at 20, 100 S.Ct. 1468 (emphasis added). In 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." Indeed, the Court also cited 38 U.S.C. § 4116(a) (1980), which by its terms expressly limited Veterans Health Administration medical personnel's immunity to actions "allegedly arising from malpractice or negligence."[22] Moreover, before the passage of the LRTCA's general "exclusive remedy" provision, the enumerated statutes were the *only* statutes that provided that the FTCA to be exclusive of *any* remedy. We believe that the better reading of the Court's dictum in *Carlson* is that just as Congress, through certain statutes, made the FTCA a substitute remedy

---

[22] *Cuoco* found this express limitation in § 4116(a)'s modern successor, 38 U.S.C. § 7316(a)(1), to be meaningful for interpreting § 233(a).

> Because § 7316(a)(1) mentions "malpractice or negligence," and § 233(a) does not, the Second Circuit held that § 233(a)'s reach extended to constitutional torts as well. 222 F.3d at 108. The Second Circuit did not mention the presence of the term "malpractice" in § 233(a)'s title, perhaps over-looked, since that title does not appear in the United States Code. At any rate, we believe that Supreme Court did not find that omission to be a critical difference in *Carlson,* citing the two statutes, one right after the other, as both standing for the proposition that the FTCA is the exclusive remedy for "malpractice by certain Government health personnel." 446 U.S. at 20, 100 S.Ct. 1468.

for medical malpractice actions, so it could – but did not – declare the FTCA to be a substitute remedy for federal constitutional claims.

Cuoco also failed to discuss whether Congress viewed the remedies provided under the FTCA as "equally effective" as those provided under *Bivens,* a question that the *Carlson* Court explicitly answered in the negative. Because, under *Carlson,* compliance with its "equally effective" prong is a necessary precondition for holding a statutory remedy to be a substitute for a *Bivens* cause of action, *Cuoco*'s failure to address that prong or the answer provided by *Carlson* is contrary to governing Supreme Court precedent. Accordingly, we cannot agree with the Second Circuit's analysis or application of *Carlson.*

B. Do "Special Factors" Exist Here Warranting a Finding of Implicit Preemption?

Both the Supreme Court and this court have recognized that even where Congress fails to explicitly declare a remedy to be a substitute for recovery directly under the Constitution or to provide a remedy that is as effective a remedy for a constitutional tort, a *Bivens* action may still be precluded. As *Carlson* noted, a *Bivens* action will not lie "when defendants demonstrate 'special factors counselling hesitation in the absence of affirmative action by Congress.'" 446 U.S. at 18, 100 S.Ct. 1468 (quoting *Bivens,* 403 U.S. at 396, 91 S.Ct. 1999). "The presence of a deliberately crafted statutory remedial system is

one 'special factor' that precludes a *Bivens* remedy." *Moore v. Glickman,* 113 F.3d 988, 991 (9th Cir.1997). PHS Defendant Cmdr. Henneford and the United States contend that, even if § 233(a) is not an explicit substitution of the FTCA for *Bivens,* it nonetheless constitutes a "deliberately crafted statutory remedial system," *id.,* [Henneford Br. at 31] such that we ought to find that the FTCA impliedly displaces *Bivens* for suits against PHS officers and employees.

Neither Cmdr. Henneford nor any other PHS Defendant appears to have raised any argument based on the presence of "special factors" before the district court. "Generally, in order for an argument to be considered on appeal, the argument must have been raised sufficiently for the trial court to rule on it." *A-1 Ambulance Serv., Inc. v. County of Monterey,* 90 F.3d 333, 338 (9th Cir.1996).[23]

In any case, we reject this argument as well. First, while the Supreme Court and this court have subsequently found various other remedial schemes to be "special factors" precluding *Bivens* relief, *see, e.g., Chilicky,* 487 U.S. at 425, 108 S.Ct. 2460; *Kotarski v. Cooper,* 866 F.2d 311 (9th Cir.1989), those decisions have not overruled *Carlson*'s square holding that there are no special factors that preclude a

[23] For this reason, we will not pass on Cmdr. Henneford's assertion in his opening brief that the complaint does not aver sufficient facts to establish his personal involvement in the alleged constitutional deprivation.

Bivens action in a case whose facts and posture mirror this one. 446 U.S. at 19, 100 S.Ct. 1468 (holding that "the case involves no special factors counseling hesitation in the absence of affirmative action by Congress"). As noted earlier, here, as in *Carlson,* we have an individual who has died, allegedly due to the deliberate indifference of the federal officials charged with his health and safety. As in *Carlson,* the decedent's survivors bring a *Bivens* action premised on violations of the Fifth and Eighth Amendments, and the officials argue that no *Bivens* remedy is available. Because the present case is functionally identical to *Carlson, Carlson*'s holding that no special factors preclude *Bivens* relief is binding on this court.[24]

Second, "*Chilicky* and *Kotarski* hold that courts should not create a *Bivens* remedy where the complexity of a federal program, including a comprehensive remedial scheme, shows that Congress has considered the universe of harms that could be committed in the program's administration and has provided what Congress believes to be adequate remedies." *Adams,* 355 F.3d at 1185. The FTCA is not such a scheme, for the simple reason that it does not provide remedies that Congress believes to be adequate: It provides the remedies that individual *states* believe to be adequate remedies for common law

---

[24] For the same reason, our decision does not extend *Bivens* into a new context. *Cf. Correctional Serv. Corp. v. Malesko,* 534 U.S. 61, 68, 122 S.Ct. 515, 151 L.Ed.2d 456 (2001).

torts. Congress did not "deliberately craft" "a comprehensive remedial scheme" when it adopted the FTCA's remedies; rather, it delegated the underlying remedies to state legislatures and courts. We do not believe that Congress intended to delegate to the states the mechanism by which violations of federally established rights are remedied. As noted above, the remedies we and the Supreme Court have held to preclude *Bivens* were deliberately crafted by Congress and applied uniformly throughout the republic. We are aware of no case holding a remedial scheme that is entirely parasitic on state law to be a substitute for a *Bivens* remedy. Instead, the Supreme Court has announced its skepticism regarding any such remedial scheme: "The question whether[an] action for violations by federal officials of federal constitutional rights should be left to the vagaries of the laws of the several States admits of only a negative answer in the absence of a contrary congressional resolution." *Carlson,* 446 U.S. at 23, 100 S.Ct. 1468. Accordingly, the statutory remedies provided in the FTCA do not constitute a comprehensive remedial scheme and cannot serve as a "special factor" precluding Bivens relief.[25]

---

[25] Defendants point to no other special factors counseling hesitation in the present case. This is to be expected, because Castaneda "seek[s] a cause of action against an individual officer, otherwise lacking, as in *Carlson.*" *Malesko,* 534 U.S. at 74, 122 S.Ct. 515. The case does not involve any of the other special factors that the Supreme Court has held preclude *Bivens* relief: a lawsuit against a federal agency or private corporation, *see*

(Continued on following page)

Conclusion

We agree with the district court that § 233(a) does not entitle the PHS Defendants to absolute immunity from constitutional torts.[26]

AFFIRMED.

Malesko, 534 U.S. 61, 122 S.Ct. 515, 151 L.Ed.2d 456; *FDIC v. Meyer,* 510 U.S. 471, 114 S.Ct. 996, 127 L.Ed.2d 308 (1994); the "unique disciplinary structure of the Military Establishment," *United States v. Stanley,* 483 U.S. 669, 107 S.Ct. 3054, 97 L.Ed.2d 550 (1987); *Chappell v. Wallace,* 462 U.S. 296, 103 S.Ct. 2362, 76 L.Ed.2d 586 (1983); or a constitutional claim that cannot be defined into "a workable cause of action," *Wilkie v. Robbins,* ___ U.S. ___, 127 S.Ct. 2588, 168 L.Ed.2d 389 (2007). Defendants simply ask us to revisit *Carlson*'s holding that the FTCA is not a "special factor." This we decline to do.

[26] Because *Carlson* requires us to affirm, as discussed throughout this opinion, we need not reach the issues of statutory construction which underlie the district court's opinion.

Francisco CASTANEDA, Plaintiff,

v.

The UNITED STATES of America, George Molinar, in his individual capacity, Chris Henneford, in his individual capacity, Gene Migliaccio, in his individual capacity, Timothy Shack, M.D., in his individual capacity, Esther Hui, M.D., et al., Defendants.

Case No. CV 07-07241 DDP (JCx).

United States District Court,
C.D. California.

March 11, 2008.

Adele P. Kimmel, Public Justice, Washington, DC, Conal F. Doyle, Willoughby Doyle, Oakland, CA, for Plaintiff.

Anoiel Khorshid, Keith M. Staub, AUSA – Office of U.S. Attorney, Deborah C. Saxe, Jones Day, Los Angeles, CA, Laura R. Anderson, Jones Day, Cleveland, OH, James A. Creason, Creason & Aarvig, Riverside, CA, Larry A. Dunlap, Creason & Aarvig, Newport Beach, CA, for Defendants.

AMENDED ORDER DENYING MOTION TO DISMISS

[Motion filed on January 14, 2008]

DEAN D. PREGERSON, District Judge.

This matter comes before the Court upon the individual Public Health Service Defendants' motion to dismiss for lack of subject matter jurisdiction. After reviewing the materials submitted by the parties and reviewing the arguments therein, the Court DENIES the motion.[1]

I. LEGAL STANDARD

When reviewing a motion to dismiss, the Court "assum[es] all facts and inferences in favor of the nonmoving party." *Libas Ltd. v. Carillo,* 329 F.3d 1128, 1130 (9th Cir.2003). In addition, where, as here, the motion to dismiss is based upon an alleged lack of subject matter jurisdiction pursuant to Federal Rule of Civil Procedure 12(b)(1), "the trial court may rely on affidavits and other evidence submitted in connection with the motion." *Berardinelli v. Castle & Cooke Inc.,* 587 F.2d 37, 39 (9th Cir.1978).

---

[1] The initial order was issued with the Plaintiff's name spelled incorrectly. Other than that adjustment, this amended order is identical to the initial order.

II. BACKGROUND

On March 27, 2006, Plaintiff Francisco Castaneda – an immigration detainee – informed the Immigration and Customs Enforcement ("ICE") medical staff at the San Diego Correctional Facility that a lesion on his penis was becoming painful, growing in size, and exuding discharge. The next day, Castaneda was examined by Anthony Walker, an ICE Physician's Assistant. Walker's treatment plan called for a urology consult "ASAP" and a request for a biopsy. (Amended Compl. ¶ 37[2]; Doyle Decl. Ex. 1.)

On April 11, 2006, ICE documented that because of Castaneda's family history – his mother died of pancreatic cancer at age 39 – penile cancer needed to be ruled out. (Doyle Decl. Ex. 2.) A Treatment Authorization Request ("TAR") was filed with the Division of Immigration Health Services ("DIHS"), requesting approval for a biopsy and circumcision. The TAR noted that Castaneda's penile lesion had grown, that he was experiencing pain at a level 8 on a scale of 10, and that the lesion had a "foul odor." (*Id.* Ex. 3.) By this time, DIHS had determined that certain "possible infections" were not causing the lesion. (*Id.*) The TAR further urged that, "[d]ue to family history and pt [patient] discomfort," a biopsy and "pertinent

---

[2] Defendants' motion to dismiss was filed before the Complaint was amended. However, the Amended Complaint contains no new allegations against the individual federal defendants and the parties have stipulated that Defendants' motion is responsive to the Amended Complaint.

surgical f/u [follow up]" should be performed the "sooner the better." (*Id.*) DIHS approved the TAR, authorizing the biopsy, urology consult, and "pertinent surgical f/u," on May 31. (*Id.*)

On June 7, 2006, ICE sent Castaneda for a consult with oncologist John Wilkinson, M.D. Castaneda presented with a history of a fungating lesion[3] on his foreskin. (*Id.* Ex. 4.) Dr. Wilkinson

> agree[d] with the physicians at the [M]etropolitan [C]orrectional Center that this may represent either a penile cancer or a progressive viral based lesion. I *strongly agree* that it requires *urgent urologic assessment of biopsy and definitive treatment.* In this extremely delicate area and [sic] there can be considerable morbidity from even benign lesions which are not promptly and appropriately treated. . . . I spoke with the physicians at the correctional facility. *I have offered to admit patient for a urologic consultation and biopsy. Physicians there wish to pursue outpatient biopsy which would be more cost effective. They understand the need for urgent diagnosis and treatment.*

---

[3] The National Cancer Institute defines a "fungating lesion" as: "A type of skin lesion that is marked by ulcerations (breaks on the skin or surface of an organ) and necrosis (death of living tissue) and that usually has a bad smell. This kind of lesion may occur in many types of cancer, including breast cancer, melanoma, and squamous cell carcinoma, and especially in advanced disease." *See* http://www.cancer.gov/Templates/dbalpha.aspx?print=1&cdrid=367427 (last accessed February 17, 2008).

Id. (emphasis added).) On the same day, Defendant Esther Hui, M.D., spoke to Dr. Wilkinson. She noted that she was aware that Mr. Castaneda "has a penile lesion that needs to be biopsied," and that Dr. Wilkinson had offered to admit Castaneda and perform this procedure. (*Id.* Ex. 5.) However, Dr. Hui explained that DIHS would not admit him to a hospital because DIHS considered a biopsy to be "an *elective* outpatient procedure." (*Id.* (emphasis added).) Dr. Hui never made arrangements for the outpatient biopsy.

On June 12, 2006, Castaneda filed a grievance asking for the surgery recommended by Dr. Wilkinson, stating that he was "in a considerable amount of pain and I am in desperate need of medical attention." (*Id.* Ex. 6.) This grievance was denied. DIHS records from June 23 document that Castaneda's penis was "getting worse, more swelling to the area, foul odo[r], drainage, more difficult to urinate, bleeding from the foreskin." (*Id.* Ex. 7.) DIHS records from June 30, 2006 state that because Castaneda had not yet had "a biopsy performed and evaluated in a laboratory," the agency considered him to "NOT have cancer at this time." (*Id.* Ex. 8.) DIHS acknowledged that "the past few months of the lesion [had been] looking and acting a bit more angry," yet dismissed Castaneda's concerns: "Basically, this pt needs to be patient and wait." (*Id.*)

DIHS records from one month later document that the "lesion on his penis is draining clear, foul malodorous smell, culture[s] before were negative for growth, negative RPR, negative HIV. [F]oreskin is

bleeding at this time and pt states his colon feels swollen, previous rectal exam showed slightly swollen prostate, deferred today." (*Id.* Ex. 9.) Despite Dr. Wilkinson's emphasis over a month earlier on the need for a biopsy due to the considerable likelihood of cancer, DIHS claimed to have no idea what could be causing Castaneda's ailment, noting the "unk[nown] etiology of [his] penile lesion." (*Id.* Ex. 9.)

On the same day, a report by Anthony Walker claims that Castaneda "was not denied by Dr. Hui any treatment, albeit there was no active Treatment Authorization Request (TAR) placed for approval by DIHS headquarters in Washington, DC, *nor was there an emergent need.*" (*Id.* Ex. 10 (emphasis added).) Despite the alleged lack of "emergent need," the next day a TAR was submitted seeking Emergency Room ("ER") evaluation and in-patient treatment for Castaneda. There is no explanation for why ICE did not schedule him for the circumcision and biopsy ordered by Dr. Wilkinson the month before. However, the TAR did note that Dr. Wilkinson and Dr. Masters, an outside urologist,

> both *strongly recommended* admission, urology consultation, surgical intervention via biopsy/exploration under anesthesia to include circumcision if non-malignant, return f/u with oncology depending upon findings, and potential treatment or surgery of any malignant findings. . . . There is now bleeding, drainage, malodorous smell and the lesion now appears to be "exploding" for lack of better words, definitely macerated. Request

> for urology and oncology *inpatient* eval[uation] and treatment with outpatient follow-up.

(*Id.* Ex. 11 (emphasis added).) The TAR was approved. (*Id.*)

Inexplicably, DIHS failed to arrange for an evaluation with Dr. Wilkinson and/or Dr. Masters, the treating doctors who were familiar with Castaneda's condition and who, indeed, had offered to continue treating him. Instead, DIHS brought Castaneda to the ER at Scripps Mercy Chula Vista on July 13, 2006. There, Dr. Juan Tovar, M.D., who examined Castaneda, documented the existence of a 1.5cm by 2cm "fungating lesion with slight clearish discharge." (*Id.* Ex. 12.) Dr. Tovar made arrangements for Castaneda to be admitted to the hospital; his impression was that Castaneda had a "penile mass" and that there was a need to "rule out cancer, versus infectious etiology." (*Id.*)

Once admitted, yet another doctor unfamiliar with Castaneda's history, Dr. Daniel Hunting, M.D., performed a brief examination the same day, but *did not* do the biopsy needed to rule out cancer. Instead, Dr. Hunting guessed that the problem was condyloma, commonly known as genital warts. (*Id.* Ex. 13.) There is no evidence from his report that Dr. Hunting asked about or was aware of Castaneda's family history of cancer. Dr. Hunting then referred Castaneda back to his "primary treating urologist," dismissed his symptoms as "not an urgent problem," and discharged him from the hospital. (*Id.*)

Four days later, Castaneda's condition was worsening. DIHS documented that the lesion was still "growing," and that Castaneda had "severe phimosis,[4] bleeding, and clear drainage for lesion area with foul odor." (*Id.* Ex. 14.) The DIHS record notes that both Dr. Masters and Dr. Wilkinson "strongly recommended" admission to a hospital, biopsy, and circumcision. (*Id.*) Instead, DIHS followed the suggestion of Dr. Hunting – who had only briefly examined Castaneda in the ER – and assumed Castaneda had genital warts. DIHS therefore declined to order a biopsy, although it nonetheless noted Castaneda would "need a resection[5] of the penis" due to the severity of his condition. (*Id.*)

On July 26, 2006, DIHS acknowledged that Castaneda "complains that he is being denied a needed surgery to his foreskin." (*Id.* Ex. 16.) ICE told Castaneda, however, that "while a surgical procedure might be recommended long-term, that does not imply that the Federal Government is obligated to provide that surgery if the condition is not threatening to life, limb or eyesight." (*Id.*) On August 9,

---

[4] Phimosis is medically defined as a "tightness or construction of the orifice of the prepuce arising either congenitally or from inflammation, congestion, or other postnatal causes and making it impossible to bare the glans." *Merriam Webster's Medical Desk Dictionary* 613 (1996). In other words, the foreskin is so tight it cannot be pulled back completely to reveal the glans.

[5] Resection means the surgical removal of part of an organ. *Webster's Medical Desk Dictionary* at 697.

DIHS again noted Plaintiff's "inflamed foreskin," but denied his request for a circumcision, claiming that "surgical removal, at the current time, would be considered elective surgery; that as such the Federal Government will not provide for such surgery." (*Id.* Ex. 17.)

On August 11, 2006, Walker submitted a TAR requesting a biopsy and circumcision by Dr. Masters, the outside urologist. (*Id.* Ex. 18.) Dr. Masters examined Castaneda on August 22. Dr. Masters thought Castaneda might have genital warts, but noted Castaneda's family history of cancer and that Dr. Wilkinson had recommended a "diagnostic biopsy" to rule out cancer. (*Id.* Ex. 19.) Therefore, Dr. Masters recommended circumcision, which would at once relieve the "ongoing medical side effects of the lesion including infection and bleeding" and "provide a biopsy." (*Id.*) Dr. Masters told DIHS that "we will arrange for admission for circumcision at a local hospital. My principal hospital is Sharp Memorial." (*Id.*)

In spite of this unequivocal recommendation, Walker characterized Dr. Masters as stating that "elective procedures this patient may need in the future are cytoscopy and circumcision." (*Id.* Ex. 20.) The word "elective" does not appear in Dr. Masters's report. DIHS denied the request for a circumcision. (*Id.*) On August 24, 2006, DIHS told Castaneda that, "according to policy," surgery was denied because it was "elective." (*Id.* Ex. 21.) On August 26 and 28, Castaneda was seen by medical staff because of

"complaints of stressful situation regarding medical status, unable to sleep at night; states that ICE won't allow surgical operation for lesion on penis." (*Id.* Ex. 22.) ICE was thus aware that Castaneda's "stress is due to a chronic medical problem which the CCA has refused to have corrected as it is considered to be elective surgery." (*Id.*) Castaneda was prescribed an antihistamine as treatment. (*Id.*)

On August 30, 2006, ICE sent Castaneda a letter:

> This is to inform that the off-site specialist you were referred to for your medical condition reports that any surgical intervention for the condition would be elective in nature. An independent review by our medical team is in agreement with the specialist's assessment. The care you are currently receiving is necessary, appropriate, and in accordance with our policies.

(*Id.* Ex. 23.) As noted, Dr. Wilkinson's and Dr. Masters's reports do not in fact state that the recommended biopsy and circumcision would be elective. On the contrary, Castaneda's treating doctors, as discussed, both noted the urgency of the situation and made efforts to see Castaneda treated as quickly as possible.

On September 8, 2006, Castaneda complained: "I have a lot [sic] pain and I'm having discharge." (*Id.* Ex. 24.) ICE noted that Castaneda's current treatment was Ibuprofen (800mg), which was having "no effect" on his pain; Castaneda was having "white discharge at night," and he worried that "It's getting

worse. It's like genital warts, but they're getting bigger." (*Id.*) By October 17, 2006, ICE medical staff was aware that Castaneda was bleeding from his penis; one officer "saw some dried blood on his boxers." (*Id.* Ex. 26.) On October 23, Walker submitted a TAR for surgery, but it was denied on October 26 because "circumcisions are not a covered benefit." (*Id.* Ex. 27-28.)

In the October 26 denial report, Defendant Claudia Mazur, a DIHS nurse, stated that "Pt has been seen by local urologist and oncologist and both are not impressed of possible cancerous lesion(s), however, there is an elective component to having the circumcision completed." (*Id.* Ex. 28.) This conclusion directly contradicts the July 13 TAR, which documented that Drs. Wilkinson and Masters both "strongly recommended . . . surgical intervention via biopsy/exploration" to rule out cancer. (*Id.* Ex. 4, 11, 19.) The TAR also documented that Castaneda "is not able to be released to seek further care due to mandatory hold and according to ICE authorities, may be with this facility for quite awhile." (*Id.* Ex. 28.) This document thus suggests ICE officials *knew* that Castaneda would be unable to receive treatment in the foreseeable future.

DIHS noted that Castaneda's symptoms "have worsened" on November 9. (*Id.* Ex. 29.) Castaneda reported "a constant pinching pain, especially at night. States he constantly has blood and discharge on his shorts. [Castaneda stated] it's getting worse, and I don't even have any meds – nothing for pain and no

antibiotics." (*Id.*) Castaneda also "complains of a swollen rectum which he states make bowel movements hard." (*Id.*) Castaneda was told that the "TAR was in place for surgery and is pending approval." (*Id.*) Yet the surgery was not provided.

Instead, on November 14 and 15, DIHS documented that Castaneda "complains of new, 2nd penile lesion on underside, distal penis." (*Id.* Ex. 30.) ICE noted that Castaneda was concerned "that his lesion 'is growing'" and that it is "moist," that "he cannot stand and urinate because the urine 'sprays everywhere' and he cannot direct the stream." (*Id.*) DIHS treated this condition by making a request for seven pairs of clean boxer shorts weekly. (*Id.*)

In early December, Castaneda was transferred to the San Pedro Service Processing Center. (Jawetz Decl. Ex. 1.) ACLU lawyers began to advocate on his behalf. On December 5, 2006, the ACLU sent a letter to multiple ICE officials, including Defendants Chris Henneford, Stephen Gonsalves, and George Molinar. The letter stated, in part, that "Mr. Castaneda, who has a strong family history of cancer, legitimately fears that his long term health is being jeopardized by the lack of appropriate medical care he continues to receive in ICE custody. In the short term, Mr. Castaneda continues to experience severe pain, bleeding, and discharge." (*Id.*) The letter requested medical treatment for Castaneda.

Also on December 5, a TAR was filed seeking consultation with Lawrence Greenburg, M.D.,

because of a "history of severe HPV infection causing large, painful, penile warts, has bleeding and pain from the lesions. May also have an underlying structural deformity of penis." (Doyle Decl. Ex. 31.) Dr. Greenberg "also recommended a circumcision and biopsy." (Jawetz Decl. Ex. 5.) On January 19, an ACLU attorney faxed another letter to ICE, requesting medical treatment for Castaneda. (*Id.*) On January 24, a TAR for a urology consult with Asghar Askari, M.D. was approved. (Doyle Decl. Ex. 32.) The next day, Castaneda was seen by Dr. Askari, who diagnosed a fungating penile lesion that was "most likely penile cancer" and ordered a biopsy. (*Id.* Ex. 33.)

On January 29, 2007, the ACLU faxed yet another letter to ICE, urging the agency to provide Castaneda the care that had been ordered for the past ten months. (Jawetz Decl. Ex. 6.) According to Plaintiff's complaint, a biopsy was finally scheduled for early February. However, a few days before the procedure, Castaneda was abruptly released from ICE custody. Castaneda then went to the ER of Harbor-UCLA Hospital in Los Angeles on February 8, 2007, where he was diagnosed with squamous cell carcinoma. His penis was amputated on Valentines Day, 2007. According to the complaint, Harbor-UCLA confirmed that Castaneda had metastatic cancer. Castaneda began undergoing chemotherapy at Harbor-UCLA. (Amended Compl. ¶¶ 104-09.) However, the treatment

was not successful, and on February 16, 2008, Mr. Castaneda died.[6]

Plaintiff Castaneda brings this lawsuit against, *inter alia,* the United States and individual federal officials, arguing that the refusal to provide Castaneda with a biopsy despite numerous medical orders to do so violated the United States Constitution.[7] Plaintiff brings state tort claims against the United States under the Federal Torts Claims Act ("FTCA"),[8] and alleges federal constitutional violations against the individuals pursuant to *Bivens v. Six Unknown Agents of Fed. Bureau of Narcotics,* 403 U.S. 388, 389, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971) (establishing that victims of a constitutional violation by a federal agent may recover damages against that federal official in federal court).

The individual Public Health Service ("PHS") Defendants now bring this motion to dismiss for lack

---

[6] A motion to substitute the representative and heirs of his estate as the proper parties, as well as to permit the filing of a second amended complaint, is currently pending before the Court. However, this motion does not affect the instant motion to dismiss, and the individual federal defendants – the moving parties in the instant motion – do not oppose the substitution.

[7] Plaintiff also brings claims against California state officials. These claims are not at issue in the instant motion.

[8] The FTCA makes the federal government liable to the same extent as a private party for certain torts committed by federal employees acting within the scope of their employment. 28 U.S.C. § 1346(b)(1).

of subject matter jurisdiction.[9] They argue that the PHS Defendants are absolutely immune from suit, that Plaintiff must instead bring this claim as an FTCA action against the United States, and that because the United States has not waived sovereign immunity for claims of constitutional violations, this action must be dismissed.

III. DISCUSSION

This case presents an unresolved legal question in the Ninth Circuit: whether § 233(a) of the Public Health Service Act allows Castaneda to assert *Bivens* claims against the individual Public Health Service Defendants. The Court finds that the plain language of the statute dictates that it does.[10]

---

[9] These Defendants are Chris Henneford, Eugene Migliaccio, Timothy Shack, M.D., Esther Hui, M.D., and Stephen Gonsalves.

[10] Plaintiff brings a *Bivens* claim alleging a violation of the Fifth Amendment's Equal Protection Clause as well as his Eighth Amendment claim for inadequate medical care. Because Defendants do not specifically argue that Plaintiff's Fifth Amendment claim is also preempted by § 233(a), the Court does not address the issue, except to note that its conclusion that § 233(a) allows an Eighth Amendment *Bivens* claim applies equally to any other *Bivens* claim.

A. *Bivens* Claims are Generally Available to Remedy Eighth Amendment Violations, and the FTCA is Intended as a Parallel, Rather Than a Substitute Remedy

A victim of a constitutional violation by a federal agent may bring a *Bivens* action to recover damages against the individual in his personal capacity unless "defendants demonstrate special factors counseling hesitation in the absence of affirmative action by Congress" or unless "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." *Carlson v. Green,* 446 U.S. 14, 18-19, 100 S.Ct. 1468, 64 L.Ed.2d 15 (1980) (internal quotation marks omitted). The only question before the Court is whether Congress has explicitly provided for a substitute remedy under the circumstances in this case, so as to preclude a *Bivens* claim.

The United States Supreme Court has made "crystal clear" that in cases involving Eighth Amendment claims based on an alleged failure to provide proper medical care, "Congress views FTCA and *Bivens* as parallel, complementary causes of action." *Id.* at 20, 100 S.Ct. 1468. In *Carlson,* the Court rejected defendants' argument that the FTCA was intended by Congress to be an adequate substitute:

> [W]e have here no explicit congressional declaration that persons injured by federal officers' violations of the Eighth Amendment

> may not recover money damages from the agents but must be remitted to another remedy, equally effective in the view of Congress. Petitioners point to nothing in the Federal Tort Claims Act (FTCA) or its legislative history to show that Congress meant to pre-empt a *Bivens* remedy or to create an equally effective remedy for constitutional violations.

Id. at 19, 100 S.Ct. 1468.

According to the Court, "[f]our additional factors, each suggesting that the *Bivens* remedy is more effective than the FTCA remedy, also support our conclusion that Congress did not intend to limit [the aggrieved individual] to an FTCA action." *Id.* at 20-21, 100 S.Ct. 1468. First, the threat of a *Bivens* claim provides stronger deterrence against future constitutional violations than an FTCA action because only the former remedy "is recoverable against individuals," and "[i]t is almost axiomatic that the threat of damages has a deterrent effect, surely particularly so when the individual official faces personal financial liability." *Id.* at 21, 100 S.Ct. 1468 (internal citations omitted).

Second, and relatedly, punitive damages are available in a *Bivens* action, but are "statutorily prohibited" in an FTCA suit, *see* 28 U.S.C. § 2674, so the "FTCA is that much less effective than a *Bivens* action as a deterrent to unconstitutional acts." *Id.* at 22, 100 S.Ct. 1468. Moreover, because 42 U.S.C. § 1983 – the counterpart to *Bivens* actions for

constitutional violations by state officials – allows for punitive damages, "the constitutional design would be stood on its head if federal officials did not face at least the same liability as state officials guilty of the same constitutional transgression." *Id.* (internal quotation marks omitted).

Third, *Bivens* actions are more effective in this context because FTCA actions do not allow for jury trials. The Court found "significant[ ]" that plaintiffs should be able to retain the choice between courts and juries. *Id.* Fourth, and finally,

> an action under FTCA exists only if the State in which the alleged misconduct occurred would permit a cause of action for that misconduct to go forward. 28 U.S.C. § 1346(b) (United States liable "in accordance with the law of the place where the act or omission occurred"). Yet it is obvious that the liability of federal officials for violations of citizens' constitutional rights should be governed by uniform rules. . . . The question whether respondent's action for violations by federal officials of federal constitutional rights should be left to the vagaries of the laws of the several States admits of only a negative answer in the absence of a contrary congressional resolution.

Id. at 23, 100 S.Ct. 1468. For all of the above reasons, the Court held that "[p]lainly FTCA is not a sufficient protector of the citizens' constitutional rights, and without a clear congressional mandate we cannot

hold that Congress relegated respondent exclusively to the FTCA remedy." *Id.*

Since the Court's opinion in *Carlson,* Congress has amended the FTCA to expressly preserve parallel *Bivens* actions against federal employees. In 1988, it passed the Federal Employees Liability and Tort Compensation Act, which, *inter alia,* provided the FTCA will be the "exclusive" remedy "of any other civil action or proceeding for money damages . . . against [a federal] employee." 28 U.S.C. § 2679(b)(1). However, the Act then explains that this 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." *Id.* § 2679(b)(2)(A).

B. Both the Plain Language and the Legislative History of § 233(a) Evince a Congressional Intent to Preserve *Bivens* Actions

Defendants acknowledge that in general, victims of constitutional violations may proceed with both FTCA and *Bivens* claims. They nonetheless urge that as to the Public Health Service Defendants specifically, Congress has expressed an explicit intent, through the Public Health Service Act, to limit plaintiffs to an FTCA remedy. The Court disagrees.

Whether the Public Health Service Act evinces an intent to limit Mr. Castaneda's remedies against PHS Defendants for any constitutional violations to

an FTCA claim is a question of statutory interpretation. When interpreting a statute, courts "look first to the plain language of the statute, construing the provisions of the entire law." *Nw. Forest Resource Council v. Glickman,* 82 F.3d 825, 831 (9th Cir. 1996) (internal quotation marks omitted). After that, "if the language of the statute is unclear, we look to the legislative history." *Id.* (internal quotation marks omitted). In this case, both the text and legislative history reveal an explicit intent to allow *Bivens* claims.

1. Plain Language

The pertinent provision of the Public Health Service Act, § 233(a),[11] reads in its entirety as follows:

> DEFENSE OF CERTAIN MALPRACTICE AND NEGLIGENCE ACTS
>
> Sec. 223. (a) The remedy against the United States provided by sections 1346(b) and 2672 of title 28 [the FTCA], 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

[11] The language of Public Law No. 91-623 has not been amended since enacted on December 31, 1970. However, the 1970 edition of the United States Code (where this statute first appeared in the Code) renumbered this section as "§ 233(a)." Although the accurate version is § 223(a) of the Public Health Service Act in the Statutes at Large, the Court will refer to the section as § 233(a) for ease of reference.

> 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.

Emergency Health Personnel Act of 1970, Pub.L. No. 91-623, § 223(a), 84 Stat. 1868, 1870 (1970). From this provision, it is clear that Congress intended *some* medical injuries caused by PHS employees to be redressable solely through the FTCA. The question is whether the provision applies to allegations of constitutional violations. Congress has expressly indicated that it does not.

At first glance, it may appear that § 233(a) does not address one way or another whether Congress intended constitutional claims to come under its rubric. Upon following the statutory trail, however, it turns out that Congress has in fact explicitly answered the question presented by this case.

Subsection 233(a) declares that "[t]he remedy against the United States provided by sections 1346(b) and 2672 of title 28, . . . shall be exclusive." The two sections mentioned – 1346(b) and 2672 – are part of the FTCA. The latter – entitled "Administrative

Adjustment of Claims" – deals with how a federal agency may manage the claims against it, and is not relevant for our purposes. Subsection 1346(b), however, is more instructive:

> **(b)(1)** *Subject to the provisions of chapter 171 of this title,* the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

28 U.S.C. § 1346(b) (emphasis added).

One little clause, almost invisible, should attract our attention: "Subject to the provisions of chapter 171 of this title." This is the kind of clause that is often ignored, on the assumption that it is probably not relevant. But let us see what chapter 171 says, just in case:

CHAPTER 171 – TORT CLAIMS PROCEDURE

28 USCA Pt. VI, Ch. 171, Refs & Annos

§ 2671. Definitions

§ 2672. Administrative adjustment of claims

§ 2673. Reports to Congress

§ 2674. Liability of United States

§ 2675. Disposition by federal agency as prerequisite; evidence

§ 2676. Judgement as bar

§ 2677. Compromise

§ 2678. Attorney fees; penalty

§ 2679. Exclusiveness of remedy

§ 2680. Exceptions

The statutory provision that is the central focus of this motion to dismiss – § 233(a) – thus explicitly incorporates by reference 28 U.S.C. § 2679. Subsection 2679(b) is dispositive here:

> **(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 brought for a violation of the Constitution of the United States.*

28 U.S.C. § 2679 (emphasis added). Therefore, § 233(a) incorporates the provision of the FTCA which *explicitly* preserves a plaintiff's right to bring a *Bivens* action. Stated differently, far from evincing the explicit intent required by *Carlson* that Congress intended to preclude *Bivens* claims, the plain language of § 233(a) unambiguously states the opposite:

> The [exclusive] remedy against the United States provided by sections 1346(b) and 2672 of title 28 . . . for damage for personal injury, including death, resulting from the performance of medical . . . or related functions . . . by any commissioned officer or employee of the Public Health Service . . . does not extend or apply to a civil action . . . which is brought for a violation of the Constitution of the United States.

42 U.S.C. § 233(a); 28 U.S.C. § 2679(b).

The United States Supreme Court, in interpreting a provision similar to § 233(a), has confirmed that the "the FTCA is not the exclusive remedy for torts committed by Government employees in the scope of their employment when an injured plaintiff brings: (1) a *Bivens* action." *United States v. Smith,* 499 U.S. 160, 166-67, 111 S.Ct. 1180, 113 L.Ed.2d 134 (1991); *see also Billings v. United States,* 57 F.3d 797, 800 (9th Cir.1995) (noting that "constitutional claims are outside the purview of the Federal Tort Claims Act"). *Smith* dealt with the Gonzales Act, which has a provision worded almost identically to § 233(a):

> **§ 1089. Defense of certain suits arising out of medical malpractice**
>
> **(a)** The remedy against the United States provided by sections 1346(b) and 2672 of title 28 for damages for personal injury, including death, caused by the negligent or wrongful act or omission of any physician, dentist, nurse, pharmacist, or paramedical or other supporting personnel (including medical and dental technicians, nursing assistants, and therapists) of the armed forces, the National Guard while engaged in training or duty . . . , the Department of Defense, the Armed Forces Retirement Home, or the Central Intelligence Agency in the performance of medical, dental, or related health care functions (including clinical studies and investigations) while acting within the scope of his duties or employment therein or therefor shall hereafter be exclusive of any other civil action or proceeding by reason of the same

> subject matter against such physician, dentist, nurse, pharmacist, or paramedical or other supporting personnel (or the estate of such person) whose act or omission gave rise to such action or proceeding. This subsection shall also apply if the physician, dentist, nurse, pharmacist, or paramedical or other supporting personnel (or the estate of such person) involved is serving under a personal services contract entered into under section 1091 of this title.

10 U.S.C. § 1089(a). Both § 1089(a) and § 233(a) address claims for "damage for personal injury, including death" which result from certain federal officials involved in the "performance of medical, dental, or related health functions." Both subsections incorporate by reference 28 U.S.C. §§ 1346 and 2672 of the FTCA, and explain that the remedy provided by those subsections "shall be exclusive of any other civil action or proceeding by reason of the same subject matter." The Supreme Court has acknowledged the FTCA's "express preservation of employee liability" for *Bivens* claims in the context of 10 U.S.C. § 1089. *Smith,* 499 U.S. at 166-67, 111 S.Ct. 1180. Like 10 U.S.C. § 1089, § 233(a) of the Public Health Service Act incorporates the FTCA as an exclusive remedy, and like 10 U.S.C. § 1089, § 233(a) incorporates that remedy's express preservation of employee liability for *Bivens* claims.

Defendants rely heavily upon the Second Circuit's opinion in *Cuoco v. Moritsugu,* 222 F.3d 99, 107 (2d Cir.2000), which held that the plain language of

§ 233(a) precluded *Bivens* actions. Although *Cuoco* cites § 233(a), and its incorporation of the FTCA remedy, it appears that the court, for whatever reason, was not aware of what the FTCA remedy in fact consisted. If the Second Circuit had followed the statutory trail back to 28 U.S.C. § 2679, this Court can only opine that *Cuoco* would have adhered to the statutory mandate preserving *Bivens* claims. This Court therefore respectfully requests that the Second Circuit, as well as the several other courts that have followed *Cuoco,* reconsider their holdings. *See, e.g., Anderson v. Bureau of Prisons,* 176 Fed.Appx. 242, 243 (3d Cir.2006) (unpublished); *Lyons v. United States,* No. 4:03CV1620, 2008 WL 141576, at *12 n. 5 (Jan. 11, 2008) (unpublished); *Lee v. Guavara,* C/A/ No. 9:06-1947, 2007 WL 2792183, at *14 (D.S.C. Sept. 24, 2007) (unpublished); *Fourstar v. Vidrine,* No. 1:06-cv-916, 2007 WL 2781894, at *4 (S.D.Ind. Sept. 21, 2007); *Hodge v. United States,* No. 3:06cv1622, 2007 WL 2571938, at *4-5 (M.D.Pa. Aug. 31, 2007) (unpublished); *Coley v. Sulayman,* Civ. Action No. 06-3762, 2007 WL 2306726, at *4-5 (D.N.J. Aug. 7, 2007) (unpublished); *Wallace v. Dawson,* No. 9:05CV1086, 2007 WL 274757, at *4 (N.D.N.Y. Jan. 29, 2007) (unpublished); *Barbaro v. U.S.A.,* No. 05 Civ. 6998, 2006 WL 3161647, at *1 (S.D.N.Y. Oct. 30, 2006) (unpublished); *Williams v. Stepp,* No. 03-cv-0824, 2006 WL 2724917, at *3-4 (S.D.Ill. Sept. 21, 2006) (unpublished); *Cuco v. Fed. Medical Center-Lexington,* No. 05-CV-232, 2006 WL 1635668, at *20 (E.D.Ky. June 9, 2006) (unpublished); *Arrington v. Inch,* No. 1:05-CV-0245, 2006 WL

860961, at *5 (M.D.Pa. March 30, 2006) (unpublished); *Foreman v. Fed. Corr. Inst.,* No. CIV A 504-CV-01260, 2006 WL 4537211, at *8 (S.D.W.Va. March 29, 2006) (unpublished); *Pimentel v. Deboo,* 411 F.Supp.2d 118, 126-27 (D.Conn.2006); *Whooten v. Bussanich,* No. Civ. 4:CV-04-223, 2005 WL 2130016, at *3 (M.D.Pa. Sept. 2, 2005) (unpublished); *Freeman v. Inch,* No. 3:04-CV-1546, 2005 WL 1154407, at *2 (M.D.Pa. May 16, 2005) (unpublished); *Dawson v. Williams,* No. 04 Civ. 1834, 2005 WL 475587, at *8 (S.D.N.Y. Feb. 28, 2005) (unpublished); *Lovell v. Cayuga Corr. Facility,* No. 02-CV-6640L, 2004 WL 2202624, at *2 (W.D.N.Y. Sept. 29, 2004) (unpublished); *Valdivia v. Hannefed,* No. 02-CV-0424, 2004 WL 1811398, at *4 (W.D.N.Y. Aug. 10, 2004) (unpublished); *Cook v. Blair,* No. 5:02-CT-609, 2003 WL 23857310, at *1 (E.D.N.C. March 21, 2003) (unpublished); *Brown v. McElroy,* 160 F.Supp.2d 699, 703 (S.D.N.Y.2001).

The Supreme Court did not rely in *Carlson* on the express FTCA language preserving *Bivens* remedies because that language was added to the FTCA in 1988 – eight years after *Carlson* – as part of the Federal Employees Liability Reform and Tort Compensation Act. In effect, the 1988 amendment codified the holding in *Carlson* and made explicit the fact that Congress did not intend for the FTCA to preempt *Bivens* claims. Therefore, any ambiguity that may have existed prior to the 1988 amendment has long been extinguished. Frankly, the Court is surprised that neither the parties in this case, nor the Second

Circuit in *Cuoco,* nor the many courts that have followed *Cuoco* without analysis, have noticed that the FTCA explicitly preserves the right to bring *Bivens* claims. Therefore, according to the plain text of § 233(a), Public Health Service officials are immune from suit under the circumstances provided by the FTCA, which does not include claims for constitutional violations; the PHS Defendants are therefore not entitled to immunity in this case.

2. Legislative History

The plain text ends the inquiry. The Court is compelled to follow the direct expression of intent in § 233(a). Period. *Cf. U.S. ex rel. Lujan v. Hughes Aircraft Co.,* 243 F.3d 1181, 1187 (9th Cir.2001) ("If the statute is ambiguous, we consider the legislative history."). It is useful nevertheless to note that the legislative history in this case is equally direct. The relevant materials provide context for what Congress envisioned by preserving *Bivens* claims, and make clear that not only did Congress intend to preserve the *Bivens* remedy, but it intended to do so specifically in the context of § 233(a).

a. Congress Intended to Preserve *Bivens* Because of the Difference Between Claims for Malpractice and Claims for Constitutional Violations

A 1988 House Committee Report of the 1988 amendment to the FTCA stated the following:

> The second major feature of section 5 [codified at 28 U.S.C. § 2679(b)(2)(A)] is that the exclusive remedy expressly does not extend to so-called constitutional torts. See *Bivens v. Six Unknown Agents of the Federal Bureau of Narcotics,* 403 U.S. 388 [91 S.Ct. 1999, 29 L.Ed.2d 619] (1971). Courts have drawn a sharp distinction between common law torts and constitutional or *Bivens* torts. Common law torts are the routine acts or omissions which occur daily in the course of business and which have been redressed in an evolving manner by courts for, at least, the last 800 years. . . . As used in H.R. 4612, the term 'common law tort' embraces not only those state law causes of action predicated on the 'common' or case law of the various states, but also encompasses traditional tort causes of action codified in state statutes that permit recovery for acts of negligence. A good example of such codification or tort causes of action are state wrongful death actions which are predominantly found upon state wrongful death statutes. It is well established that the FTCA applies to such codified torts. See, e.g., *Richards v. United States,* 369 U.S. 1, 6-7 [82

> S.Ct. 585, 7 L.Ed.2d 492] (1962); *Proud v. United States,* 723 F.2d 705, 706-07 (9th Cir.1984), cert. denied, 467 U.S. 1252 [104 S.Ct. 3536, 82 L.Ed.2d 841] (1984) applicability of recreational use statute). A constitutional tort action, on the other hand, is a vehicle by which an individual may redress an alleged violation of one or more fundamental rights embraced in the Constitution. Since the Supreme Court's decision in *Bivens, supra,* the courts have identified this type of tort as a more serious intrusion of the rights of an individual that merits special attention. Consequently, H.R. 4612 *would not affect the ability of victims of constitutional torts to seek personal redress from Federal employees who allegedly violate their Constitutional rights.*

H.R. Rep. 100-700 (1988), *as reprinted in* 1988 U.S.C.C.A.N. 5945, 5950 (emphasis added). Thus, Congress could not have been clearer that 28 U.S.C. § 2679, which is incorporated by reference into § 233(a), was intended to *preserve,* not preclude, *Bivens* actions to redress constitutional violations. This congressional statement is particularly persuasive because, as legislative history goes, committee reports are given great weight. *See Abrego Abrego v. The Dow Chemical Co.,* 443 F.3d 676, 687 (9th Cir.2006).

It is not surprising that Congress, in preserving *Bivens* liability, emphasized the difference between constitutional torts and garden-variety malpractice

claims, for the distinction is longstanding and important. To establish an Eighth Amendment violation for inadequate medical care a plaintiff must show "deliberate indifference to [his] serious medical needs." *Estelle v. Gamble,* 429 U.S. 97, 104, 97 S.Ct. 285, 50 L.Ed.2d 251 (1976). Such deliberate indifference may "manifest[ ]" itself through the intentional denial or delay of care or an intentional interference "with the treatment once prescribed." *Id.* at 104-05, 97 S.Ct. 285. However, neither an accident, an "inadvertent failure to provide adequate medical care," nor "negligen[ce] in diagnosing or treating a medical condition," though each may be medical malpractice, is cognizable as a federal constitutional claim. *Id.* at 105-06, 97 S.Ct. 285. In short, a constitutional violation is an intentional tort – a higher standard than a negligence suit for medical malpractice based on a personal injury.

Even the legislative history from § 233(a) itself – expressed eighteen years before Congress would amend the FTCA to explicitly preserve *Bivens* claims – reveals that Congress intended by § 233(a) to immunize PHS employees from garden-variety malpractice claims, not from constitutional violations.[12]

---

[12] To the extent that § 233(a) is at all ambiguous (which it is not) as to whether it immunizes PHS employees from constitutional as well as malpractice claims, the title of the statutory subsection supports the Court's conclusion. *See Bhd. of R.R. Trainmen v. Baltimore & Ohio R.R. Co.,* 331 U.S. 519, 528-29, 67 S.Ct. 1387, 91 L.Ed. 1646 (1947) (noting that "the title of a

(Continued on following page)

statute and the heading of a section" may be used "[f]or interpretive purposes . . . when they shed light on some ambiguous word or phrase"). In this case, the title of the relevant section, "DEFENSE OF CERTAIN MALPRACTICE AND NEGLIGENCE ACTS," clearly indicates that Congress, even before it amended the FTCA expressly to preserve *Bivens* claims, intended § 233(a) to apply to malpractice and negligence actions specifically. Far from suggesting that the subsection covers constitutional claims, then, the title shows that Congress meant by this section to offer immunity for certain specific claims, and that those claims did not include intentional (constitutional) torts.

When the statute was codified in the United States Code at 42 U.S.C. § 233(a), the title of the subsection was changed – without any congressional amendment – from "DEFENSE OF CERTAIN MALPRACTICE AND NEGLIGENCE ACTS" to "Exclusiveness of Remedy." *Compare* Emergency Health Personnel Act of 1970, Pub.L. No. 91-623, § 223(a), 84 Stat. 1868, 1870 (1970) *with* 42 U.S.C. § 233(a)(1970). To the extent that the subsection is ambiguous, its title affects its meaning. In the context of "DEFENSE OF CERTAIN MALPRACTICE AND NEGLIGENCE ACTS," the grant of immunity obviously refers to malpractice and negligence actions; by contrast, in the context of "Exclusiveness of Remedy," the text could apply in a much broader fashion.

Nevertheless, there is no doubt about which version the Court must follow. "Though the appearance of a provision in the current edition of the United States Code is 'prima facie' evidence that the provision has the force of law, . . . it is the Statutes at Large that provides the 'legal evidence of laws.'" *U.S. Nat'l Bank of Or. v. Indep. Ins. Agents of Am., Inc.,* 508 U.S. 439, 449, 113 S.Ct. 2173, 124 L.Ed.2d 402 (1993). As "the Code cannot prevail over the Statutes at Large when the two are inconsistent," *United States v. Welden,* 377 U.S. 95, 98 n. 4, 84 S.Ct. 1082, 12 L.Ed.2d 152 (1964), the Court will consider only the original version entitled "DEFENSE OF CERTAIN MALPRACTICE AND NEGLIGENCE ACTS," and with it that title's effect on the scope of the provision.

The provision in question was not a part of the original Public Health Service Act; rather, it was introduced as an amendment in the House during a congressional debate on December 18, 1970. Representative Staggers, who introduced the amendment, stated that the House "ought to" adopt the amendment so that, "in the event there is a suit against a PHS doctor *alleging malpractice,* the Attorney General of the United States would defend them in whatever suit may arise." 91 Cong. Rec. H42542-32 (daily ed. Dec. 18, 1970) (emphasis added). Representative Staggers emphasized that the amendment was "needed because of the low salaries that [PHS doctors] receive and in view of their low salaries, they cannot afford to take out the insurance to cover them in the *ordinary course of their practice of medicine.*" *Id.* (emphasis added). Representative Hall supported the amendment but urged the committee to "look[ ] into the general problem in the United States of malpractice insurance." *Id.* The House approved the amendment. In context, then, the amendment obviously stemmed from concerns over liability for unintentional malpractice, *not* from attempts to avoid responsibility for the kind of intentional torts that would support a constitutional violation.

The only mention of the amendment in the Senate occurred three days later, when Senator Javitz expressed his support for "the provision for the defense of certain malpractice and negligence suits" which would protect doctors "in the event there is a suit against a PHS doctor alleging malpractice." 91

Cong. Rec. S42977 (daily ed. Dec. 21, 1970). Aside from these instances, the amendment, as far as the Court can tell, was never mentioned. Thus, even before the 1988 FTCA amendment, far from revealing an intent to immunize PHS doctors from intentional torts, the legislative history of § 233(a) shows that the amendment was clearly intended to protect PHS doctors from ordinary medical malpractice actions.[13]

b. Congress Intended to Preserve *Bivens* in the Specific Context of § 233(a)

The legislative history of the 1988 amendment to the FTCA reveals not only that Congress intended to preserve *Bivens* claims, but that it so intended specifically with respect to § 233(a). Some statutory context is in order.

This 1988 FTCA amendment – 28 U.S.C. § 2679 – renders the FTCA the exclusive remedy for all civil actions (except, *inter alia, Bivens* claims) against all federal employees. The legislative history to 28

[13] Such a distinction makes sense. Protecting low-paid Public Health Service doctors from astronomical malpractice insurance premiums due to run-of-the-mill personal injury claims is a reasonable, practical endeavor. Protecting individuals who intentionally inflict cruel and unusual punishment just because they happen to work for the Public Health Service is not. Would an individual who purposefully subjected a patient to surgery without anesthesia deserve immunity? A civilized society can answer this question only in the negative.

U.S.C. § 2679 explains that the intention of the provision was to "remove the potential personal liability of Federal employees for common law torts committed within the scope of their employment, and would instead provide that the exclusive remedy for such torts is through an action against the United States under the Federal Tort Claims Act." H.R. Rep. 100-700, 1988 U.S.C.C.A.N., at 5947. In the same House Report in which it articulated its reasons for preserving *Bivens* actions, Congress explained that it felt comfortable awarding such a broad swath of immunity because

> "[t]here is substantial precedent for providing an exclusive remedy against the United States for actions of Federal employees. Such an exclusive remedy has already been enacted to cover the activities of certain Federal employees, including: . . . 42 U.S.C. 233 regarding Public Health Service Physicians."

Id. at 5948. In other words, 28 U.S.C. § 2679 provided the same immunity as § 233(a), but extended that immunity to all federal employees. After the 1988 passage of 28 U.S.C. § 2679, all federal employees – not just certain specified federal employees such as PHS officials – are covered. *See Smith,* 499 U.S. at 172-73, 111 S.Ct. 1180 (holding that the Federal Employees Liability Reform and Tort Compensation Act, including § 2679, applies both to "employees who are covered under pre-Act immunity statutes [such as § 233(a)] and those who are not," and noting that this

immunity is limited by the "preserv[ation] of employee liability for *Bivens* actions").

Congress was aware of § 233(a) when it expanded immunity to all federal employees. Indeed, provisions like § 233(a) provided the example and incentive to so broaden that immunity. At the same time, Congress made clear that this immunity was intended to cover "routine" torts, and that a plaintiff whose constitutional rights had been violated remained free to pursue a *Bivens* claim against the individual federal employee in question. H.R. Rep. 100-700, 1988 U.S.C.C.A.N., at 5947. In light of the explicit statutory text and legislative history, there can be no doubt that the FTCA – and § 233(a), which incorporates the FTCA's remedies by reference – expressly allows for the *Bivens* claim that Mr. Castaneda seeks to bring in this case.

C. Plaintiff's Allegations and Evidence, if True, Prove Constitutional Violations

Ultimately, Defendants concede that an Eighth Amendment claim for unconstitutionally-inadequate medical care is not subsumed by a claim for medical malpractice; instead, they urge that Plaintiff's claims just don't make the constitutional cut, so to speak. As Defendants put it, "[t]he bottom line is that Plaintiff's claims form the basis for a medical malpractice action (a non-constitutional tort claim) against the United States, and not a *Bivens* claim against each Public Health Service Defendant." (Mot. 8.) Defendants

acknowledge that Plaintiff's complaint alleges that the Public Health Service Defendants "'purposefully denied him basic and humane medical care for illegal and improper reasons,'" but posit that "[t]his vague and conclusory allegation fails to state any civil rights violation." (*Id.* 6. (quoting Compl.).) The Court rejects Defendants' attempt to sidestep responsibility for what appears to be, if the evidence holds up, one of the most, if not the most, egregious Eighth Amendment violations the Court has ever encountered.

There simply can be no dispute that Plaintiff has stated a cognizable claim for an Eighth Amendment violation. Mr. Castaneda quite obviously suffered from a serious medical condition – terminal penile cancer. The only question is whether his allegations, if true, show that Defendants were deliberately indifferent to his condition. The Court finds that they do.

Indeed, the Court finds perplexing the fact that Defendants would try to argue that Plaintiff's allegations are conclusory, given that Plaintiff has submitted thirty-three exhibits of Defendants' own official medical records documenting their knowledge of the fact that several physicians had concluded that Plaintiff's lesion was very likely penile cancer, and that he needed a biopsy – a straightforward procedure – to rule cancer out. These documents show that nevertheless, Defendants refused to grant Plaintiff this simple procedure for almost eleven months, even while they noted that his pain and suffering were severe and increasing, that his penis was emitting

blood and discharge, and that a second growth had developed.

Therefore, if Plaintiff's evidence proves true, from the first time Castaneda presented with a suspicious lesion in March 2006 through his release in February 2007, the care afforded him by Defendants can be characterized by one word: nothing. The evidence that Plaintiff has already produced at this early stage in the litigation is more thorough and compelling than the complete evidence compiled in some meritorious Eighth Amendment actions. Defendants will surely have an opportunity to contest or refute the evidence presented. But their assertion that Plaintiff's claim is not even cognizable is, frankly, frivolous.

D. FTCA Remedy is Not Equally Effective as a *Bivens* Action

The circumstances of this case illustrate why, as the Supreme Court concluded in *Carlson,* FTCA claims against the United States are not as effective a remedy as a *Bivens* claim against individual federal officials. First, and most importantly, as Defendants acknowledge, Plaintiff Castaneda may not bring his constitutional claims for inadequate medical care against the United States under the FTCA because the United States has not waived sovereign immunity to be sued for constitutional torts. *See F.D.I.C. v. Meyer,* 510 U.S. 471, 478-480, 114 S.Ct. 996, 127 L.Ed.2d 308 (1994). It would turn logic on its head to

hold that the FTCA is an "equally effective" remedy for constitutional violations as a *Bivens* action, *Carlson,* 446 U.S. at 19, 100 S.Ct. 1468, when suits under the FTCA do not even *allow* for constitutional claims. *See Vaccaro v. Dobre,* 81 F.3d 854, 857 (9th Cir.1996) (holding that prisoner plaintiff did not have to serve the United States as a defendant in his *Bivens* claim for inadequate medical care "[b]ecause [plaintiff] did not and could not have sued the United States or its officers in their official capacity upon a *Bivens* claim").[14]

---

[14] Defendants rely primarily on the Second Circuit's decision in *Cuoco v. Moritsugu,* 222 F.3d 99 (2d Cir.2000), for the proposition that § 233(a) was intended by Congress to preclude *Bivens* actions. For several reasons, the Court does not find this non-binding authority persuasive. First, and most importantly, the court in *Cuoco* did not recognize that § 233(a) explicitly incorporates by reference the FTCA remedy codified at 28 U.S.C. § 2679, which, as discussed, expressly preserves the right to bring *Bivens* claims. Second, and relatedly, *Cuoco* does not address whether Congress viewed the FTCA as being equally effective as a *Bivens* action. The Supreme Court has held that this threshold issue must be established before declaring the FTCA an exclusive remedy at the expense of a *Bivens* claim. *See Carlson,* 446 U.S. at 18-19, 100 S.Ct. 1468. Yet, *Cuoco* never makes this finding, nor does the opinion analyze the four factors set forth in *Carlson* that explain why remedies under the FTCA and *Bivens* are not equally effective. 222 F.3d at 107-09. Third, *Cuoco* does not adequately examine the differences between a state law medical negligence claim under the FTCA and a constitutional claim under *Bivens.* On the one hand, *Cuoco* states: "Of course Congress could not, by the simple expedient of enacting a statute, deprive Cuoco of her constitutional due process rights, but that is not what § 233(a) does." *Id.* at 108. In the next sentence, however, *Cuoco* asserts that § 233(a) "protects

(Continued on following page)

Indeed, Defendants' contorted reasoning is revealed by its request for relief in this motion: Defendants ask this Court to hold that Congress, through § 233(a), intended the FTCA to be the exclusive cause of action for Castaneda's constitutional claims, and then, having thus converted the claim to an FTCA action against the United States, Defendants seek dismissal on the grounds that the United States may not be sued for constitutional torts under the FTCA. The Court will not indulge this backwards argument.

Second, an FTCA action is only allowed to the extent it would be allowed under state law. 28 U.S.C. § 1346(b). California caps non-economic damages in medical malpractice actions at $250,000. *See* Cal. Civ. Code § 3333.2. In contrast, there is no cap on damages in *Bivens* actions. Plaintiff has a strong argument that $250,000 would be inadequate to compensate his "ten months of pain, bleeding, anxiety, loss of sleep, and humiliation while in ICE's custody, the amputation of his penis, and nearly a year of grueling chemotherapy," not to mention his eventual death. (Opp'n 19.)

---

commissioned officers or employees of the Public Health Service from being subject to suit while performing medical and similar functions by requiring that such lawsuits be brought against the United States instead." *Id.* This analysis overlooks the important fact that, as discussed, the United States cannot be sued for constitutional violations. Therefore, *Cuoco*'s construction of § 233(a) does exactly what it claims it cannot do: deprive a plaintiff of a constitutional claim by relegating him to an action under the FTCA.

Third, FTCA actions, unlike *Bivens* claims, preclude punitive damages. Yet the evidence that Plaintiff has presented thus far – through Defendants' own records – suggests a strong case for punitive damages because it shows that Defendants' behavior was both callous and misleading. The evidence suggests that they refused Castaneda's request for a biopsy despite their knowledge that several medical specialists suspected cancer and "strongly recommended" a biopsy to rule out that possibility. (Doyle Decl. Ex. 11.) Worse, the evidence suggests that not only did the individual Public Health Service Defendants ignore doctor recommendations to provide Castaneda with a simple procedure, they may also have lied about those recommendations.

For example, Defendant Esther Hui, M.D. stated in an official report that Dr. Wilkinson considered a biopsy or circumcision for Mr. Castaneda to be "elective." (*Id.* Ex. 5) ("Dr. Wilkinson called" and recommended a biopsy, which is "an elective outpatient procedure"). Similarly, another official DIHS report, written by Anthony Walker, claimed that "Dr. Masters stated that elective procedures this patient may need in the future are cytoscopy and circumcision." (*Id.* Ex. 20.) Yet the reports of Dr. Masters and Dr. Wilkinson never mention the word "elective." On the contrary, Dr. Wilkinson worried that the lesion "may represent . . . a penile cancer" and "require[d] urgent urologic assessment of biopsy" because "even benign lesions" in that area can be deadly. (*Id.* Ex. 4.) Dr. Masters stated the need to "rule out malignant

neoplasm" and that "appropriate treatment would be circumcision [and] . . . a biopsy." (*Id.* Ex. 19.)

Further, Dr. Hui and the DIHS included this false characterization in official reports despite the fact that a TAR recognized that both doctors "strongly recommend admission, urology consultation, surgical intervention via biopsy," and despite that fact that Dr. Wilkinson reported that he had spoken to "the physicians at the correctional facility" and "[t]hey understand the need for urgent diagnosis and treatment." (*Id.* Ex. 11, 4.) Indeed, Dr. Hui herself recognized in a report that Castaneda might have cancer but "[s]ince this is an elective outpatient procedure, we decided that we would not admit him [to the hospital to have the procedure] at this time." (*Id.* Ex. 5.)

Plaintiff's evidence also suggests why Dr. Hui was so interested in characterizing the surgery as elective; "as such the Federal Government will not provide for such surgery."[15] (*Id.* Ex. 17.) Plaintiff has

[15] The Court has serious questions as to the constitutionality of a policy of refusing to pay for all medical treatment that can be characterized as "elective" because, as evidenced by this case, the label fails to identify accurately who needs care. *See, e.g., Brock v. Wright,* 315 F.3d 158, 164 n. 3 (2d Cir.2003) ("Merely because a condition might be characterized as 'cosmetic' does not mean that its seriousness should not be analyzed using the kind of factors" employed in normal Eighth Amendment jurisprudence). DIHS labeled the treatment in this case "elective" even while acknowledging that Castaneda's condition was so "severe" that he would need a "resection" – full or partial removal of the penis. (Doyle Decl. Ex. 14.) Indeed, Plaintiff's

(Continued on following page)

thus submitted compelling evidence that Defendants purposefully mischaracterized Plaintiff's medical conditions as elective in order to refuse him care. Dr. Wilkinson reported that Defendants refused to admit Castaneda to the hospital for a biopsy because they wanted a "more cost effective" treatment. (*Id.* Ex. 4.) Official records document Defendants' circular logic that because they would not allow him to have the biopsy, "he DOES NOT have cancer at this time"; because he does not have cancer, he therefore does not need a biopsy. (*Id.* Ex. 8.) In other words, as long as they could label Castaneda's condition elective, Defendants could remain willfully blind about his lesion and avoid having to pay for its treatment. If Plaintiff's evidence holds up, the conduct that he has established on the part of Defendants is beyond cruel and unusual.[16]

---

evidence suggests that Dr. Hui defined "elective" so broadly that she believes the term to encompass life-saving treatment.

[16] After all, Plaintiff has submitted powerful evidence that Defendants knew Castaneda needed a biopsy to rule out cancer, falsely stated that his doctors called the biopsy "elective", and let him suffer in extreme pain for almost one year while telling him to be "patient" and treating him with Ibuprofen, antihistamines, and extra pairs of boxer shorts. Everyone knows cancer is often deadly. Everyone knows that early diagnosis and treatment often saves lives. Everyone knows that if you deny someone the opportunity for an early diagnosis and treatment, you may be – literally – killing the person. 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.

IV. CONCLUSION

Based on the foregoing analysis, motion to dismiss is DENIED.

IT IS SO ORDERED.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

YANIRA CASTANEDA, as personal representative of Estate of Francisco Castaneda; et al., Plaintiffs-Appellees, v. UNITED STATES OF AMERICA; et al., Defendants, and, CHRIS HENNEFORD, in his individual capacity; et al., Defendants-Appellants.	No. 08-55684 D.C. No. 2:07-cv-07241-DDP-JC Central District of California, Los Angeles ORDER (Filed Jan. 29, 2009)

Before: REINHARDT, BERZON, and M. SMITH, Circuit Judges.

The panel has unanimously voted to deny the petition for rehearing en banc.

The full court has been advised of the petition for rehearing en banc, and no judge of the court has requested a vote on it. FED. R. APP. P. 35.

The petition for rehearing en banc is DENIED.

42 U.S.C. § 233(a) states:

(a) Exclusiveness of remedy

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.