No. 08-1547

In The
Supreme Court of the United States

CHRIS HENNEFORD,

Petitioner,

vs.

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

Respondents.

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

REPLY BRIEF

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REPLY BRIEF OF PETITIONER CHRIS HENNEFORD

1. Section 233(a) of the Public Health Service Act plainly states that a claim against the Government under the Federal Torts Claims Act ("FTCA") is the exclusive remedy for personal injury, including death, resulting from the performance of medical or related functions by a United States Public Health Service ("PHS") officer or employee while acting within the scope of his or her office or employment. 42 U.S.C. §233(a). The statute's exclusive-remedy provision, which is unburdened by any exceptions, clearly expresses Congressional intent to grant absolute immunity to PHS personnel performing medical or related services within the scope of their employment or office.

In *Carlson v. Green*, 446 U.S. 14 (1980), this Court recognized that Section 233(a) immunizes PHS personnel against personal-injury claims, including *Bivens* claims. In holding that the remedies available against the Government under the FTCA were not exclusive of *Bivens* remedies against individual federal employees, this Court reasoned that when Congress intends to make the FTCA remedy exclusive, its practice is to say so explicitly. *Id.* at 21. The Court illustrated that point by citing statutes, including Section 233(a), where Congress made clear that the FTCA remedy was exclusive of any other remedies by expressly stating in the statutory text that the FTCA remedy was exclusive. *Carlson* thereby recognized that when Congress intends to

make the FTCA remedy exclusive of *Bivens* or other remedies, it utilizes the kind of language provided in Section 233(a) – stating that the FTCA remedy is exclusive. *Id.*

Respondents' first strategy for evading the plain meaning of Section 233(a) is to reinterpret the *Carlson* opinion as saying precisely the opposite of what it says. Respondents contend that this Court, in citing Section 233(a), recognized that the FTCA remedy is exclusive only for common-law malpractice claims, not for constitutional tort claims. Respondents' Brief, 23-24. Respondents assert that this Court implicitly recognized that the scope of Section 233(a) immunity was limited to common-law malpractice claims because the parenthetical attached to the Section 233(a) citation describes the statute's subject matter as "malpractice by certain Government health personnel." *Id.* at 24 (quoting *Carlson*, 446 U.S. at 21). The term "malpractice," according to Respondents, means professional negligence in the performance of medical services as recognized at common law but does *not* encompass conduct in the performance of medical or related services that would violate the Constitution.

The Court's purpose in citing Section 233(a), however, was to demonstrate that when Congress intends to make the FTCA remedy exclusive of all other remedies, including the *Bivens* remedy sought in *Carslon*, its practice is to do just what it did in Section 233(a) – expressly state that the FTCA remedy shall be exclusive. Under Respondents' deconstruction

of the *Carlson* opinion, although the Court cited Section 233(a) to illustrate the manner in which Congress makes clear an intent to immunize Government personnel against *Bivens* claims, the language used in 233(a) is not sufficient to provide such immunity. Rather, according to Respondents, this Court recognized, via its parenthetical reference to malpractice, that the Section 233(a) exclusive-remedy language is insufficient to preclude *Bivens* claims, it only immunizes PHS personnel against common-law malpractice claims. If that were so, then the Court's citation of Section 233(a) to illustrate Congress' "practice of explicitly stating when it means to make FTCA an exclusive remedy" would not have been "significant" to the *Bivens*-immunity issue considered in *Carlson* (*Carlson*, 446 U.S. at 21), it would have been misleading. Respondent's interpretation of the *Carlson* parenthetical would thereby defeat the very purpose of the Court's citation to Section 233(a).

Moreover, the Court's parenthetical describes the *conduct* subject to immunity under Section 233(a) as "malpractice," it does not imply that such immunity is limited to common-law claims of professional negligence, to the exclusion of constitutional tort claims. The term "malpractice" is broadly understood as "a dereliction from professional duty, whether intentional, criminal, or merely negligent, by one rendering professional services that result in injury." Henneford's Petition, 19-20 (quoting *Webster's Third New International Dictionary*, 1368 (1961)). That definition is consistent with Section 233(a), which immunizes PHS

personnel from liability for injury resulting from the performance of medical or related services within the scope of their office or employment – whether the performance of such services is alleged to be negligent, reckless or willful. Further, Respondents' proposed categorical distinction between "malpractice" and constitutional tort claims erroneously assumes a mutual exclusivity that does not exist. The same conduct may support common-law malpractice and *Bivens* claims. Henneford's Petition, 18-20. The statutory focus is on the *conduct* subject to immunity – the performance of medical or related services – not whether the accompanying mental state lies below a constitutional threshold for *Bivens* liability. If an injury is alleged to have been caused by a PHS officer or employee's performance of medical or related services within the scope of his office or employment, then Section 233(a) immunity applies. Finally, if Congress intended to limit Section 233(a) immunity to common-law claims for medical malpractice it would have expressly stated that restriction in the statutory text, as it has done elsewhere. *Cuoco v. Moritsugu*, 222 F.3d 99, 108 (2d Cir. 2000).

2. Because the plain language of Section 233(a) provides no support for Respondents' contention that "exclusive" does not really mean exclusive, Respondents invoke the incorporation-by-reference doctrine. Respondents construe Section 233(a) to say what it does not say by arguing that it incorporates the remedial provisions of the FTCA. While Section 233(a) does refer to the FTCA, it does so not as a restriction on

the *scope of immunity* conferred on PHS personnel, but to limit the *scope of the Government's potential liability* for the immunized conduct of PHS personnel. Consequently, the plain language of Section 233(a) is inconsistent with Respondents' incorporation-by-reference construction.

Section 233(a) unambiguously expresses Congressional intent to immunize PHS personnel against personal-injury claims arising from the performance of medical or related functions by providing that the "exclusive" remedy for such injuries is a claim against the Government under the FTCA. In that manner, Section 233(a) expresses both **(1)** an intent to immunize PHS officers and employees for personal-injury claims arising from the performance of medical or related services and **(2)** an intent to permit claims against the United States for such immunized conduct to the extent authorized under the FTCA. Section 233(a) thereby confers upon PHS personnel a free-standing, substantive grant of immunity – without any exceptions. Section 233(a) *also* confers a right to sue the Government upon those injured by the immunized conduct of PHS personnel, but that right to sue, unlike the right to immunity, is expressly conditioned by the remedial provisions of the FTCA.

Respondents ignore the plain language by contending that Section 233(a) incorporates not only the FTCA's limitations on the *right to sue the Government* for immunized conduct, but also the FTCA's

limitations on the *scope of official immunity*. The Federal Employees Liability Reform and Tort Compensation Act of 1988 (the "Westfall Act") amended the FTCA by providing official immunity for all Government employees (28 U.S.C. §2679(b)(1)), but restricting the scope of such immunity by allowing personal-injury claims against otherwise-immunized Government employees for Constitutional torts actionable under the *Bivens* doctrine. 28 U.S.C. §2679(b)(2)(A). According to Respondents, "[b]ecause §233(a) adopts the FTCA's general remedy provisions to define the scope of immunity available to PHS medical personnel, it must be read in conjunction with subsequent amendments to the FTCA's remedy provisions – including the 1988 amendment expressly preserving *Bivens* actions against all government employees." Respondents' Brief, 17.

The obvious flaw in Respondents' reasoning is that Section 233(a) does not incorporate the FTCA as a limitation on the *scope of immunity* provided to PHS personnel. The FTCA is incorporated solely for the purpose of delineating the *scope of the Government's liability* for the immunized conduct of PHS personnel. The statutory text clearly provides PHS personnel with a grant of immunity unrestricted by the provisions of the FTCA or any other statute. Section 233(a) references the FTCA for the purpose of defining the scope of the Government's liability, not as a restriction on the scope of immunity. The plain language of Section 233(a) thereby reveals that the statutory reference to the FTCA is wholly unrelated

to the scope of immunity conferred on PHS personnel and, therefore, the *Bivens* exception to Westfall Act immunity is not "incorporated" into the Section 233(a) grant of immunity to PHS personnel.

3. Respondents' next tactic for avoiding the clear exclusivity language in Section 233(a) is to argue that the Westfall Act repealed the statute's exclusive-remedy provision by authorizing *Bivens* claims otherwise prohibited by Section 233(a). Specifically, Respondents argue that the Westfall Act implicitly repealed the Section 233(a) grant of absolute immunity, and all preexisting statutory grants of immunity for any category of federal personnel, by replacing the immunity granted under prior immunity statutes with the immunity granted under the Westfall Act – including limitations on Westfall Act immunity such as the exclusion of *Bivens* claims from the scope of immunity. Respondents' Brief, 29-30.

Repeal by implication, however, is disfavored and will not be indulged unless "the intention of the legislature to repeal was clear and manifest." *Watt v. Alaska*, 451 U.S. 259, 267 (1981). Under that exacting standard, a repeal by implication will not be inferred "unless the later statute 'expressly contradict[s] the original act'" or unless such a construction "is absolutely necessary . . . in order that [the] words [of the later statute] shall have any meaning at all." *Traynor v. Turnage,* 485 U.S. 535, 548 (1988) (citations omitted). Outside these limited circumstances, "a statute dealing with a narrow, precise, and specific

subject is not submerged by a later enacted statute covering a more generalized spectrum." *National Assoc. of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 662-663 (2007). Under this standard, the Westfall Act cannot be deemed to have implicitly repealed the immunity granted under Section 233(a).

The Westfall Act was enacted in response to this Court's ruling in *Westfall v. Erwin*, 484 U.S. 292 (1988), which held that the judicially-created doctrine of official immunity does not provide absolute immunity to Government employees for torts committed in the scope of their employment. Rather, the common law doctrine must be applied on a case-by-case basis whereby the court must consider whether "the contribution to effective government in particular contexts" from granting immunity "outweighs the potential harm to individual citizens." *Id.* at 299. Congress, not satisfied with the limited scope of official immunity under the common law as described in the *Westfall* opinion, acted to expand the scope of official immunity by statute, making an FTCA action against the Government the exclusive remedy for torts committed within the scope of federal employment. *United States v. Smith*, 499 U.S. 160, 163 (1991), citing 28 U.S.C. §2679(b)(1). In enacting this general rule of official immunity, however, Congress chose to exclude *Bivens* claims from the scope of such immunity. 28 U.S.C. §2679(b)(2)(A).

The Westfall Act, in recognizing a generally-applicable rule of official immunity for all federal employees, does not refer to, much less does it purport

to curtail the scope of statutory immunity for federal personnel under other, preexisting statutes. 28 U.S.C. §2679(b)(1). Both the statute's plain language and the context of its enactment reveal that Congress intended merely to enact a general rule of official immunity, not to repeal or otherwise limit specific, pre-existing statutory immunities. Similarly, the Westfall Act provision that excludes *Bivens* claims from the scope of Westfall Act immunity plainly refers only to the grant of immunity under the Westfall Act, not to other, preexisting statutory grants of immunity: "Paragraph (1) [which is the Westfall Act's general grant of official immunity] 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(b)(2)(A).

The repeal-by-implication standard is not even close to satisfied by Congressional enactment of Westfall Act immunity. The grant of official immunity to all Government employees, and its exception for *Bivens* claims, does not clearly and manifestly evidence Congressional intent to replace preexisting grants of statutory immunity that are not otherwise subject to an exception for *Bivens* claims, nor is such a repeal-by-implication construction "absolutely necessary . . . in order that [the] words [of the Westfall Act and its *Bivens* exception] shall have any meaning at all," nor is such a construction necessary to avoid a contradiction between the preexisting and later statutes. The grant of immunity under Section

233(a) cannot therefore be construed as having been replaced by the grant of immunity under the Westfall Act and its exception for *Bivens* claims.

4. Respondents' contention that the Westfall Act repeals by implication the broad scope of Section 233(a) immunity is also based on a misapplication of this Court's opinion in *United States v. Smith*, 499 U.S. 160 (1991). Respondents' Brief, 29.

The plaintiff in *Smith* argued that the Westfall Act was meant to confer official immunity only upon Government employees who were not already protected by a preexisting immunity statute. The defendant military physician in *Smith* was covered by such an immunity statute, the Gonzales Act, which plaintiff argued and the court assumed did not immunize covered personnel against claims arising on foreign soil.[1] The question of whether Government personnel protected by the Gonzales Act were also entitled to immunity under the Westfall Act was therefore significant in *Smith* because the Westfall Act covered claims arising on foreign soil, which the Gonzales Act presumably did not. Plaintiff therefore argued that "military medical personnel and other Government employees who were already protected by other statutes, cannot now benefit from the more generous immunity available under the [Westfall

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[1] The Court assumed for purposes of analysis, but did not decide, that the Gonzales Act provides immunity only for conduct within the United States. *Smith*, 499 U.S. at 172.

Act]." *Smith*, 499 U.S. at 172 (internal citation omitted).

The question raised in *Smith* was therefore *not* whether the Westfall Act implicitly repealed the Gonzales Act, but whether Government employees protected by the Gonzales Act and other preexisting immunity statutes were *also* protected by the Westfall Act. *Smith*, 499 U.S. at 173. The Court observed that Westfall Act immunity applies, on its face, to "any employee of the Government" without restriction. *Id.* (quoting 28 U.S.C. §2679(b)(1)). Given that Congress was aware that many immunity statutes existed before it passed the Westfall Act, this Court held that it must be assumed that had Congress intended to restrict the scope of immunity conferred upon Government employees under the Westfall Act to those who were not covered by preexisting immunity statutes, it would have said so. *Smith*, 499 U.S. at 173.

Respondents mix apples and oranges by arguing that the extension of Westfall Act immunity to all Government employees implies the repeal of pre-existing immunity statutes not subject to the same restrictions as Westfall Act immunity. According to Respondents, because all Government employees are *protected* by the Westfall Act, as confirmed in *Smith*, they are likewise subject to the limitations of Westfall Act immunity, even if preexisting statutes like Section 233(a) would provide a broader scope of immunity. In that manner, Respondents argue that *Smith* supports its repeal-by-implication statutory

construction. But *Smith* says nothing of the sort. It addresses only the question of whether Westfall Act immunity protects Government personnel also subject to preexisting immunity statutes – not whether immunity rights conferred under those preexisting statutes were repealed by passage of the Westfall Act. Respondents' argument to the contrary would effectuate a repeal by implication, for which *Smith* provides no support. And, as described above, there is no basis to infer that the Westfall Act immunity provision implicitly repealed Section 233(a) immunity.

5. Respondents minimize the significance of immunity by arguing that the Government will indemnify PHS personnel. Indemnification, however, is not automatic and certain, it is offered or not as a matter of discretion. And such determinations are usually deferred until *after* judgment. 45 C.F.R. §36.1(a), (c). The possibility of indemnification therefore does not alleviate the fear of liability and stress of litigation, which tend to "dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties." *Barr v. Matteo*, 360 U.S. 564, 571-572 (1959) (quoting *Gregoire v. Biddle*, 177 F.2d 579, 581 (2d Cir. 1949)). The possibility of indemnification is therefore a pale replacement for absolute immunity, which insulates against the burdens of the litigation process. *Osborn v. Haley*, 549 U.S. 225 (2007).

6. Respondents also seek to minimize the systemic impact of the Ninth Circuit's decision on

PHS by contending that it would affect only PHS personnel assigned to custodial settings. But PHS's Commissioned Corps is a uniformed service, so any PHS officer might be deployed to a custodial facility at any time. And Respondents' calculus likewise fails to consider the many civilian employees assigned to custodial settings. Respondents also ignore the vulnerability of PHS personnel who provide care in non-custodial settings at risk of *Bivens* liability. United States' Brief, 2-3. Finally, immunity loopholes like that established by the Ninth Circuit are often exploited to conjure *Bivens* claims in new settings, and new settings often arise given the unique role PHS serves in protecting public health. Henneford's Petition, 30-33. With each assignment in response to new public health risks would come new contexts for raising *Bivens* claims.

7. Finally, Respondents characterize the Circuit split as "shallow" because only the Ninth Circuit has focused on the Westfall Act and its legislative history in construing Section 233(a). But that criticism is circular. The Ninth Circuit's consideration of extra-textual sources in construing Section 233(a) is "deep" only if one assumes the propriety of its contra-textual construction. By the Second Circuit's very different light, the Westfall Act is an immaterial distraction from the primacy of the statutory text. The Circuits' disparate constructions and rationales therefore reflect a deep – not shallow – split of authority.

CONCLUSION

Petitioner Chris Henneford respectfully urges the Court to grant certiorari.

Respectfully submitted,

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