No. 081547 JUN 12 2009

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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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Does 42 U.S.C. § 233(a) make an action against the United States under the Federal Tort Claims Act the exclusive remedy for damage claims arising out of 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.

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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]

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[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

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

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"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,

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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]

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[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

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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

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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.

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