

No. 08-1529

In The
Supreme Court of the United States

ESTHER HUI AND STEPHEN GONSALVES,
Petitioners,

vs.

YANIRA CASTANEDA, ET AL.,
Respondents.

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

**BRIEF OF *AMICI CURIAE* COMMISSIONED
OFFICERS ASSOCIATION OF THE UNITED
STATES PUBLIC HEALTH SERVICE, INC.,
THE UNIFORMED SERVICES ACADEMY OF
FAMILY PHYSICIANS, INC., AMERICAN
MEDICAL ASSOCIATION, AND AMERICAN
ACADEMY OF FAMILY PHYSICIANS
IN SUPPORT OF PETITIONERS**

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QUESTION PRESENTED

Does 42 U.S.C. § 233(a) make the Federal Tort Claims Act the exclusive remedy for claims arising from medical care and related functions provided by Public Health Service personnel, thus barring *Bivens* actions?

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INTEREST OF *AMICI CURIAE*

Amicus the Commissioned Officers Association of the United States Public Health Service, Inc. (“COAUSPHS”) is a member-based association comprised of approximately 6,500 active duty, inactive reserve and retired commissioned officers of the United States Public Health Service (“USPHS”).¹ Formed in 1950, COAUSPHS is the sole organization that works exclusively for the benefit of commissioned officers of the USPHS. In addition, COAUSPHS has 82 local branches located throughout the United States, and international branches in Europe and Asia. These local branches act as local sources of information, education, training, community service, support, networking and social activity for members. The core of COAUSPHS’s members are Commissioned Corps Officers of the USPHS. Led by the Surgeon General, the USPHS Commissioned Corps is one of the seven Uniformed Services, whose officers serve the 10 agencies within the Department of Health and Human Services (including the Centers for Disease Control, the Food and Drug Administration, the Indian Health Service and the National Institutes of Health). *See* 10 U.S.C. § 101(a)(5)(C); 42 U.S.C. § 201(p). USPHS

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

officers also serve other federal agencies, including the Department of Defense, Environmental Protection Agency, U.S. Citizenship and Immigration Services, Federal Bureau of Prisons, Coast Guard and Department of Agriculture.

Amicus The Uniformed Services Academy of Family Physicians, Inc. (“USAFP”) is a member-based association comprised of approximately 2,400 active duty military personnel, approximately 1,700 of whom are practicing family physicians. The USAFP was formed in 1972 to encourage and better the practice of family medicine in the military and other Uniformed Services.

Amicus the American Medical Association (“AMA”) is a private, voluntary non-profit organization of physicians. The AMA was founded in 1847 to promote the science and art of medicine and the betterment of public health, and these remain its objects today. It is the largest association of physicians and medical students in the United States, and its members practice in every state and in all fields of medical specialization.

Amicus the American Academy of Family Physicians (“AAFP”) is a private, voluntary non-profit organization of physicians, with a membership of 94,600 family physicians and medical students. Included among the AAFP’s objects and purposes are to preserve and promote quality, cost-effective health care, and to provide advocacy for and education of its

members, their patients and the public in all health related matters.

Together, the *amici* aim to improve and protect the public health of the United States through comprehensive member services, advocacy for their respective members and for public health generally, conducting educational and training events, performing studies and research useful to health professionals, and disseminating public and professional information of interest and use to health professionals. In addition, the *amici* closely monitor legal and political issues that affect public health, and often offer their perspective when such issues arise.

The issue presented by the ruling below is of great importance to the many physicians and other health care providers represented by the *amici*, and to the patients they serve. This case will profoundly affect the ability of the USPHS to recruit and retain medical professionals, and impact the mobility of public health officers who must be deployed expeditiously throughout the country as local and regional events and circumstances demand. Accordingly, the *amici* wish to assist the Court properly to resolve the issue presented.



STATEMENT

Amici adopt the statement of the case as set forth by the petitioners in their briefs in this Court.

**SUMMARY OF ARGUMENT**

USPHS commissioned officers and personnel provide health care to underserved communities, immigration detainees, Native Americans, Alaska Natives, and the Coast Guard. They are deployed throughout the country, and internationally, as circumstances and needs dictate. USPHS officers are paid substantially less than equivalent health care providers in the private sector. However, these officers have not, until this case, been burdened with the need for malpractice insurance. The personal immunity that such health care providers have heretofore enjoyed is essential to the recruitment and retention of qualified professionals who provide services in sub-optimal conditions, for relatively low pay.

In addition, the mission of the USPHS depends upon the ability to rapidly deploy its personnel to locations where services may be needed as a result of a natural disaster, outbreak of disease or other emergent circumstances. The potential exposure of such personnel to individual liability arising out of their medical services profoundly affects the mobility of USPHS personnel and their ability to deploy to

areas and facilities where there exists an acute, urgent need for health care services.

ARGUMENT

I. SUBJECTING USPHS PERSONNEL TO *BIVENS* ACTIONS WILL ADVERSELY AFFECT THE ABILITY OF THE USPHS TO FULFILL ITS MANDATE AND TO RECRUIT AND RETAIN QUALIFIED PERSONNEL TO PROVIDE HEALTH CARE SERVICES

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

and receive substantially less financial remuneration than their private-sector counterparts.²

The Surgeon General's and Congress' concerns regarding the "pay gap" between the Uniformed Services and the private sector were well-founded. *See* Military Pay Comparability Act of 2003, H.R. 1885, 108th Cong., 1st Sess., § 2 (citing a pay gap of 13.5% between uniformed personnel and private sector employees in 1999). This differential makes personal malpractice insurance prohibitively expensive for medical professionals in the Uniformed Services, and was one of the principal reasons Congress enacted § 233(a). The ruling below, however, would subject USPHS personnel to medical malpractice actions couched as *Bivens* claims. The attendant need for malpractice insurance, at great cost, together with the ever-present threat of being subjected to litigation, will undoubtedly harm the USPHS's ability to recruit and retain qualified medical personnel.

Equally troubling is that USPHS personnel, unlike their private sector counterparts, are exposed to constitutional tort claims. Obtaining insurance

² While the legislative history of § 233(a) supports the petitioner's position, resort to such history is unnecessary, as the plain language of the statute requires a determination that the Ninth Circuit erred. "[W]hen the statute's language is plain, the sole function of the courts – at least where the disposition required by the text is not absurd – is to enforce it according to its terms." *Lamie v. United States Trustee*, 540 U.S. 526, 534 (2004) (citing *Hartford Underwriters Ins. Co. v. Union Planters Bank, N. A.*, 530 U.S. 1, 6 (2000)).

coverage that extends beyond the ordinary scope of professional liability policies – to include protection against constitutional tort claims – would necessarily be more expensive than standard coverage, if it could be obtained at all. Thus, the net effect of the ruling below is to cause the lowest-paid physicians and medical personnel, who are engaged in public service, to incur the highest costs to protect themselves against professional liability claims. The ruling below also provides a back-door route for plaintiffs to press malpractice claims, and creates an uninsurable constitutional tort liability for services provided under emergent conditions – circumstances of already-heightened stress. The ruling below creates multiple liability traps for services delivered in theaters most likely to give rise to risk, and imposes them upon health care providers who can least afford to insure against them. Perversely, it risks degrading the ability of the USPHS to respond in times and circumstances when it is most desperately needed. As a result, underserved communities, those with the greatest need for medical care and services, will suffer.

II. THE RULING BELOW WILL SEVERELY UNDERMINE THE ABILITY OF THE USPHS TO PROVIDE HEALTH CARE SERVICES TO THOSE IN NEED IN THE EVENT OF A NATURAL DISASTER OR OTHER EMERGENT CIRCUMSTANCES

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

By way of example, in 2005, Hurricanes Katrina and Rita devastated the Gulf Coast. On August 29, Hurricane Katrina made landfall in Louisiana as a Category 3 storm, causing an estimated \$81 billion in damage and 1,833 deaths. National Hurricane Center, "Tropical Cyclone Report, Hurricane Katrina, 23-30 August 2005" (available at http://www.nhc.noaa.gov/pdf/TCR-AL122005_Katrina.pdf) (last accessed December 4, 2009). On September 24, Hurricane Rita made landfall between Texas and Louisiana, also as a Category 3 storm, causing estimated total damage of \$10 billion and at least 62 deaths. National Hurricane Center, "Tropical Cyclone Report, Hurricane

Rita, 18-26 September 2005” (available at http://www.nhc.noaa.gov/pdf/TCR-AL182005_Rita.pdf) (last accessed December 4, 2009).

In response to health care and public health needs in the areas affected by the hurricanes, the USPHS carried out the largest deployment in its history. See Dep’t of Health & Human Svcs., Office of the Inspector General, “The Commissioned Corps’ Response to Hurricanes Katrina and Rita,” (February 2007). Of the 6,122 Corps officers on active duty between August 26 and November 7, 2005, 2,199 (or 35%) deployed at least once in response to the hurricanes. *Id.* These officers served a total of 2,372 missions, with some officers deploying more than once. *Id.* The USPHS Commissioned Corps was instrumental in delivering needed health services in the wake of these natural disasters. To provide these services, the USPHS had to rapidly deploy officers and other personnel to locations where the population most needed them.

The threat of being subjected to *Bivens* claims against USPHS personnel has a real and substantial impact upon the USPHS’s ability to rapidly deploy officers when natural or other disasters, like the Gulf Coast hurricanes, strike. This threat will also discourage USPHS personnel from agreeing to work in the facilities in which their work is critical – immigration detention facilities, federal prisons and the like – but where they are more likely to face constitutional tort claims. The ruling below therefore impairs the ability of uninsured USPHS personnel to rapidly deploy to areas and facilities where insurance

against constitutional tort claims would be prudent, if not necessary. For instance, should a large influenza outbreak occur in a detention facility, USPHS officers located elsewhere, in non-custodial settings, would understandably and justifiably be hesitant to deploy to the detention facility, given the personal liability risks they might incur.

The ruling below creates an untenable situation which undermines the ability of USPHS personnel to serve communities and facilities in need throughout the nation, particularly in circumstances where rapid, large scale deployment of officers is required, as with infectious disease pandemics, natural disasters or a major terrorism incident. The ruling below impairs the ability of the USPHS to fulfill its mission of providing health care to those most in need.

◆

CONCLUSION

The judgment of the Court of Appeals should be reversed.

Respectfully submitted,

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