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No. 08-1529

In the Supreme Court of the United States

ESTHER HUI, ET AL., PETITIONERS

v.

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

*ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT*

**BRIEF FOR THE UNITED STATES
AS AMICUS CURIAE SUPPORTING PETITIONERS**

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QUESTION PRESENTED

Whether 42 U.S.C. 233(a), which provides that a suit against the United States under the Federal Tort Claims Act is "exclusive of any other civil action" against a commissioned officer or employee of the Public Health Service for injury resulting from the performance of medical functions, bars an action against such an officer or employee based on *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971).

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INTEREST OF THE UNITED STATES

The question presented in this case is whether 42 U.S.C. 233(a), which provides that a suit against the United States under the Federal Tort Claims Act (FTCA) is "exclusive of any other civil action" against a commissioned officer or employee of the Public Health Service (PHS) for injury resulting from the performance of medical functions, bars an action against a PHS officer or employee based on *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). PHS personnel play a critical role in the provision of medical care in challenging settings, including federal prisons and immigrant detention centers. A holding that Section 233(a) does not bar *Bivens* claims

would have an adverse impact on the government's ability to recruit, hire, and retain medical personnel for the PHS, and could affect other federal entities that have medical missions covered by similar immunity statutes.

STATEMENT

1. The Public Health Service, which is part of the Department of Health and Human Services (HHS), see 42 U.S.C. 201 *et seq.*, employs more than 6000 commissioned officers as physicians, dentists, nurses, pharmacists, and other medical personnel, and nearly 14,000 civilian employees whose duties involve patient care. PHS personnel are detailed to a number of agencies, including the Department of Homeland Security, Bureau of Prisons, Indian Health Service, and United States Marshals Service. They provide medical care in every State and numerous foreign countries—often in communities most in need of medical care providers. PHS personnel also staff quarantine stations to limit the introduction of communicable diseases into the United States and to prevent their spread. See 42 U.S.C. 264; 42 C.F.R. 71.32, 71.33.

PHS's Commissioned Corps is one of the seven uniformed services of the United States. 42 U.S.C. 201(p), 204, 207. The Commissioned Corps, which includes the Surgeon General, may be called into military service in times of war or national emergency, at which point its personnel become subject to the Uniform Code of Military Justice. 42 U.S.C. 217.

2. Following a December 2005 conviction, Francisco Castaneda, an alien, was imprisoned by the California Department of Corrections (DOC). During his incarceration, Castaneda met several times with DOC medical personnel regarding a lesion on his penis. Although

those personnel recommended a biopsy, Castaneda did not receive one. Pet. App. 2a-3a.

On March 27, 2006, Castaneda was transferred from DOC to United States Immigration and Customs Enforcement (ICE) custody in San Diego in connection with removal proceedings that had been commenced against him. According to the complaint filed in district court (J.A. 343-364),[1] Castaneda complained to medical staff—consisting of PHS personnel serving through the Division of Immigration Health Services (DIHS)—that the lesion on his penis was growing, becoming painful, and producing a discharge. He was examined by a physician's assistant, who recommended a urology consultation and a biopsy. Although that recommendation was approved by DIHS, Castaneda did not receive a biopsy. Over the ensuing months, he repeatedly complained that his condition was worsening. He was seen by several PHS medical personnel and private doctors (including urologists), some of whom were concerned about the possibility of cancer and recommended a biopsy. Others considered the problem to be genital warts. Pet. App. 3a-7a, 42a-48a.

In January 2007, Castaneda saw another urologist, who concluded that the lesion was "most likely penile cancer" and recommended a biopsy. On February 5, 2007, before the scheduled biopsy, Castaneda was released from ICE custody pursuant to the 90-day post-removal-order custody review process under 8 U.S.C. 1231(a) and 8 C.F.R. 241.4.[2] Three days later, he went

[1] The government assumes the following factual allegations only for purposes of the present appeal.

[2] An immigration judge had issued a removal order against Castaneda on August 1, 2006, and the Board of Immigration Appeals dismissed his appeal of that order on November 9, 2006, making the removal or-

to a hospital and was diagnosed with penile cancer. A week after that, his penis was amputated, and he began undergoing chemotherapy for the metastasized cancer. He died in February 2008. Pet. App. 7a-8a.

3. Castaneda commenced this action three months before he died.[3] He asserted claims against the United States under the FTCA, against state officers and employees under 42 U.S.C. 1983, and against various federal officers and employees, including petitioners, under *Bivens*. Castaneda alleged that the individual federal defendants violated the Fifth and Eighth Amendments of the Constitution by failing to treat his known serious medical condition, purposefully denying treatment, and acting with deliberate indifference to his serious health needs. Pet. App. 8a.

At all relevant times, petitioner Gonsalves was a commissioned officer and petitioner Hui was a civilian physician of the PHS.[4] After certifying that petitioners had acted within the scope of their employment, the government, which then represented petitioners, moved to dismiss the claims against them on the basis of 42 U.S.C. 233(a). Pet. App. 8a-9a. That section provides that the remedy against the United States under the FTCA for personal injury resulting from the performance of medical functions by any PHS commissioned officer or employee "shall be exclusive of any other civil action or

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der administratively final. Therefore, the 90-day deadline for his required custody determination was February 7, 2007.

[3] The representative and heirs of Castaneda's estate have been substituted as plaintiffs and are respondents in this Court. Pet. App. 8a.

[4] All five PHS defendants then in the case petitioned this Court for a writ of certiorari, but respondents dismissed three of them from their suit after the Court granted review. J.A. 408-409. Petitioners Hui and Gonsalves remain in the case.

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). The district court denied petitioners' motion to dismiss. Pet. App. 41a-80a.

4. The government, on behalf of petitioners, filed an interlocutory appeal. In the meantime, the government admitted liability in the district court on plaintiff's FTCA claim against the United States for medical negligence. J.A. 328-329. Shortly thereafter, and before appellate briefing, the government authorized each petitioner to retain private counsel for representation throughout the remainder of the litigation to ensure that each would receive independent legal advice appropriately focusing on their personal interests in the *Bivens* action.

The court of appeals affirmed the denial of the motion to dismiss the *Bivens* claims. Pet. App. 1a-40a. The court focused its analysis on *Carlson* v. *Green*, 446 U.S. 14 (1980), in which the Court had held that the availability of an FTCA remedy, without more, did not preclude a *Bivens* action against federal officials. According to the court of appeals, a *Bivens* action is available under *Carlson* unless (1) an alternative remedy is both (a) "explicitly declared to be a substitute" for a *Bivens* remedy and (b) "viewed as equally effective," or (2) there are "special factors" that militate against a *Bivens* remedy. Pet. App. 10a. Applying that test, the court of appeals held that Section 233(a) did not preclude a *Bivens* claim. *Id.* at 35a; see *id.* at 10a-40a.

The court of appeals determined that the FTCA remedy preserved by Section 233(a) was not "equally effective" as a *Bivens* remedy because: (1) FTCA damages, unlike *Bivens* damages, are not awarded against individ-

ual defendants; (2) punitive damages are unavailable under the FTCA; (3) FTCA cases, unlike *Bivens* claims, are not tried before a jury; and (4) FTCA liability turns on state law, not uniform nationwide rules. Pet. App. 13a-18a.

The court of appeals also determined that, although Section 233(a) provides that the FTCA is the "exclusive" remedy, Congress did not "explicitly declare[]" in Section 233(a) that the FTCA was a substitute for a *Bivens* action. The court pointed out that Section 233(a) does not mention constitutional claims and that it was enacted before *Bivens* was decided. According to the court, Section 233(a) was intended only to bar a particular set of common-law tort claims related to medical malpractice. Pet. App. 18a-35a.

The court of appeals expressly disagreed with the Second Circuit's conflicting decision in *Cuoco* v. *Moritsugu*, 222 F.3d 99 (2000). The court believed that the Second Circuit misread language in *Carlson* stating that Section 233(a) made the FTCA an exclusive remedy. The court also observed that the Second Circuit failed to address the aspect of *Carlson*'s analysis stating (in its view) that an alternative statutory remedy must be "equally effective" as a *Bivens* remedy. Pet. App. 35a-37a. Finally, the court of appeals held that there were no "special factors" warranting hesitation in permitting a cause of action under *Bivens* in this setting. *Id.* at 37a-39a.

SUMMARY OF ARGUMENT

Section 233(a), which makes an FTCA suit against the United States the "exclusive" remedy for injury arising out of medical treatment furnished by PHS person-

nel and bars "any other civil action," precludes a *Bivens* action against PHS officers or employees.

A. The plain language of Section 233(a) resolves this case. By its terms, Section 233(a) affords PHS officers and employees immunity from "any" civil action arising out of medical care provided in the course of their employment. It draws no distinction between civil actions predicated on common-law tort theories and those based on the Constitution. Section 233(a) instead makes plain that the "exclusive" remedy for injuries resulting from medical treatment provided by PHS personnel is an action against the United States under the FTCA.

That the title of the provision as enacted refers to "[m]alpractice and [n]egligence [s]uits" does not warrant a contrary conclusion. The title cannot trump the unambiguous command of Section 233(a)'s operative terms. In any event, the term "malpractice" does not refer to a specific legal theory for claim, but instead encompasses all derelictions arising from the doctor-patient relationship, including conduct amounting to a constitutional violation.

B. The legislative history confirms Section 233(a)'s unambiguously broad reach. The provision was specifically designed to protect PHS personnel from damages suits because their low pay made it difficult for them to purchase liability insurance. Although *Bivens* had not yet been decided at the time of Section 233(a)'s enactment, the Court had already granted certiorari in that case. And Congress would have had reason to know that claims arising from medical care may be pleaded in a range of ways, extending well beyond common-law negligence. Congress thus meant precisely what it said in granting PHS personnel absolute immunity from all such claims. Congress acted in recognition of the criti-

cal role absolute immunity plays in this context—to eliminate the burdens of defense and the threat of liability arising from lawsuits, however pleaded, alleging deficient medical care. Those substantial burdens would have an adverse impact on the ability of the PHS to recruit personnel to provide medical care in challenging and underserved settings.

C. The Ninth Circuit's reliance on the Westfall Act and *Carlson* v. *Green*, 446 U.S. 14 (1980), was misplaced. In extending the personal immunity conferred on federal employees generally, the Westfall Act, enacted in 1988, added an explicit carve-out for *Bivens* claims. 28 U.S.C. 2679(b)(1) and (2)(A). But that carve-out applies only to the new immunity Congress conferred in the Westfall Act—not to broader, preexisting grants of immunity in separate statutes like Section 233(a). The Westfall Act does not expressly or impliedly repeal Section 233(a)'s unqualified grant of personal immunity to PHS personnel.

Similarly, *Carlson* indicates that the Ninth Circuit's decision was in error. In rejecting the argument that the FTCA was the exclusive remedy for the conduct alleged there, the Court in *Carlson* explained: "This conclusion is buttressed by the significant fact that Congress follows the practice of explicitly stating when it means to make FTCA an exclusive remedy. See * * * 42 U.S.C. § 233(a)." 446 U.S. at 20. By identifying Section 233(a) as a quintessential example of when Congress has made the FTCA an exclusive remedy, thereby precluding a *Bivens* action against individual federal officers and employees, *Carlson* strongly supports the government's interpretation. And this Court's post-*Carlson* precedents confirm that an alternative remedy need not be "equally effective" in order to foreclose a

Bivens action—especially where, as here, Congress has expressly provided that the alternative remedy is "exclusive" of an action against the individual federal officer or employee.

ARGUMENT

SECTION 233(a) MAKES A CLAIM AGAINST THE UNITED STATES UNDER THE FEDERAL TORT CLAIMS ACT THE "EXCLUSIVE" REMEDY FOR INJURY ARISING OUT OF MEDICAL TREATMENT FURNISHED BY PUBLIC HEALTH SERVICE PERSONNEL AND BARS "ANY OTHER CIVIL ACTION," INCLUDING *BIVENS* CLAIMS

Section 233(a)'s grant of immunity to PHS personnel is unambiguous and unqualified. Unsurprisingly, neither the Ninth Circuit nor respondents provide any reading of the operative terms of Section 233(a) that would permit a *Bivens* action against a PHS officer or employee for injury arising out of the performance of their medical functions. As this Court's precedents recognize, Section 233(a)'s express mandate that the FTCA remedy against the United States is "exclusive" of "any other civil action" resolves this case.

A. The Plain Language Of Section 233(a) Bars Respondents' Claims Against Individual PHS Personnel

"As in any case of statutory construction, [this Court's] analysis begins with the language of the statute." *Hughes Aircraft Co.* v. *Jacobson*, 525 U.S. 432, 438 (1999) (internal quotation marks omitted). "And where the statutory language provides a clear answer, it ends there as well." *Ibid.* This is such a case.

1. Section 233(a) of Title 42 provides:

> The remedy against the United States provided by sections 1346(b) and 2672 of title 28 [the FTCA]

> * * * 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 (or his estate) whose act or omission gave rise to the claim.

42 U.S.C. 233(a).

By its terms, Section 233(a) affords PHS officers and employees immunity from "any" civil action arising out of medical care provided in the course of their employment. The text is broad and unqualified. See *Ali* v. *Federal Bureau of Prisons*, 552 U.S. 214, 219 (2008) ("any" has an "expansive meaning" (internal quotation marks omitted)). It categorically bars "any other civil action" based on "the same subject-matter" for which the FTCA provides a remedy, drawing no distinction between actions predicated on common-law tort theories and those based on the Constitution. Section 233(a) therefore makes plain that the "exclusive" remedy for any injuries resulting from medical treatment provided by PHS personnel is an action against the United States under the FTCA.

This Court itself has recognized Section 233(a)'s express command. In *Carlson* v. *Green*, 446 U.S. 14 (1980), the Court identified Section 233(a) as a statutory provision making the FTCA an exclusive remedy, in lieu of individual—including *Bivens*—liability. Indeed, the Court rejected the contention that the FTCA, standing alone, afforded an exclusive remedy and therefore barred a *Bivens* action by a federal prisoner in part because "Congress follows the practice of explicitly stating

when it means to make FTCA an exclusive remedy. See * * * 42 U.S.C. § 233(a)." *Id.* at 20; see pp. 25-28, *infra* (discussing *Carlson*). Consistent with the Court's recognition in *Carlson*, every court of appeals that has considered the issue other than the Ninth Circuit in this case has held that Section 233(a)'s grant of immunity bars *Bivens* claims.[5] In fact, even the Ninth Circuit had previously so held in unpublished decisions. See *Miles* v. *Daniels*, 231 Fed. Appx. 591, 591-592 (2007); *Zanzucchi* v. *Wynberg*, No. 90-15381, 1991 WL 83937, at *2 (May 21, 1991).

The correctness of that conclusion is reinforced by the uniform interpretation of the similar language in the FTCA's judgment-bar provision, which states: "The judgment in an action under [the FTCA] shall constitute a complete bar to any action by the claimant, by reason of the same subject matter, against the employee of the government whose act or omission gave rise to the claim." 28 U.S.C. 2676. Every court of appeals to have considered the question has correctly held that Section 2676's judgment bar applies to *Bivens* actions in the same manner that it applies to other suits against fed-

[5] See *Cuoco* v. *Moritsugu*, 222 F.3d 99 (2d Cir. 2000); *Anderson* v. *BOP*, 176 Fed. Appx. 242, 243 (3d Cir.) (per curiam), 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) (per curiam), aff'g No. 02-609, 2003 WL 23857310, at *2 (E.D.N.C. Mar. 21, 2003); *Montoya-Ortiz* v. *Brown*, 154 Fed. Appx. 437, 439 (5th Cir. 2005) (per curiam); *Schrader* v. *Sandoval*, No. 98-51036, 1999 WL 1235234, at *2 (5th Cir. Nov. 23, 1999); *Walls* v. *Holland*, No. 98-6506, 1999 WL 993765, at *2 (6th Cir. Oct. 18, 1999); *Beverly* v. *Gluch*, No. 89-1915, 1990 WL 67888, at *1 (6th Cir. May 23, 1990).

eral employees that arise out of the same subject matter as the FTCA action.[6]

2. Rather than focusing on the operative text of Section 233(a), the court of appeals relied on its title ("Defense of Certain Malpractice and Negligence Suits") as appearing in the public law in which it was enacted, reading that title to exclude suits based on the Constitution. Pet. App. 22a-23a & n.11; see Br. in Opp. 14.[7] The title of a statutory provision, however, cannot trump the unambiguous language of the provision's operative terms. See *Pennsylvania Dep't of Corr.* v. *Yeskey*, 524 U.S. 206, 212 (1998) ("[T]he title of a statute * * * [is] of use only when [it] shed[s] light on some ambiguous word or phrase.") (internal quotation marks and citation omitted; brackets in original). As discussed above, there is nothing ambiguous about the terms of Section 233(a).

In any event, Section 233(a)'s title does not refer solely to actions based on the common law or sounding

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[6] See, *e.g.*, *Unus* v. *Kane*, 565 F.3d 103, 122 (4th Cir. 2009), petition for cert. pending (filed Sept. 3, 2009) (No. 09-294); *Hallock* v. *Bonner*, 387 F.3d 147, 154-155 (2d Cir. 2004), vacated on other grounds, 546 U.S. 345 (2006); *Farmer* v. *Perrill*, 275 F.3d 958, 963 (10th Cir. 2001); *Hoosier Bancorp of Ind., Inc.* v. *Rasmussen*, 90 F.3d 180, 184-185 (7th Cir. 1996); *Gasho* v. *United States*, 39 F.3d 1420, 1437-1438 (9th Cir. 1994), cert. denied, 515 U.S. 1144 (1995); *Rodriguez* v. *Handy*, 873 F.2d 814, 816 (5th Cir. 1989); *Serra* v. *Pichardo*, 786 F.2d 237, 241 (6th Cir.), cert. denied, 479 U.S. 826 (1986).

[7] When Section 233 was codified, its title was changed to "Civil actions or proceedings against commissioned officers or employees," and the subtitle "Exclusiveness of remedy" was added to subsection (a). Compare Emergency Health Personnel Act of 1970, Pub. L. No. 91-623, § 4, 84 Stat. 1870, with 42 U.S.C. 233 (1970). Title 42 has not, however, been enacted into positive law. See 1 U.S.C. 204(a) & note; *United States Nat'l Bank* v. *Independent Ins. Agents of Am., Inc.*, 508 U.S. 439, 448 & n.3 (1993).

in negligence. The term "malpractice," in particular, refers not to a specific type of legal theory or claim, but rather to underlying conduct—*i.e.*, the professional misfeasance that may give rise to a cause of action. See, *e.g.*, *Webster's Third New International Dictionary* 1368 (1993) ("malpractice" is "a dereliction from professional duty whether intentional, criminal, or merely negligent by one rendering professional services that results in injury"); 1 David W. Louisell & Harold Williams, *Medical Malpractice* § 8.10, at 8-151 (2006) (*Medical Malpractice*) ("'malpractice' is a broad term including all derelictions of physicians committed in the course of the physician-patient relationship"). In addition, the title's reference to both "malpractice" and "negligence" suits suggests that "malpractice" refers to tortious conduct going beyond "negligence" and covering as well "deliberate indifference to serious medical needs"—the constitutional standard for deficient medical care. *Estelle* v. *Gamble*, 429 U.S. 97, 106 (1976). The Court's opinion in *Estelle* similarly implies that suits alleging deliberate indifference, in violation of the Constitution, are a subset of suits based on malpractice, rather than a wholly distinct category. See *ibid.* ("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 medical needs.").

B. Section 233(a)'s Legislative History Confirms The Broad Nature And Purpose Of Congress's Grant Of Immunity

As discussed above, Section 233(a)'s text provides an unequivocal expression of Congress's intent to shield PHS personnel from all suits arising out of their medical

functions. Section 233(a)'s limited legislative history, informed by the realities of practicing medicine as part of the PHS, confirms that statutory purpose.

1. The overarching objective of the Emergency Health Personnel Act of 1970, Pub. L. No. 91-623, 84 Stat. 1868, of which Section 233(a) was a part, was to facilitate PHS's provision of medical care in underserved areas. See § 2, 84 Stat. 1868; H.R. Rep. No. 1662, 91st Cong., 2d Sess. 1 (1970). Because PHS personnel could not afford professional liability insurance, the Surgeon General requested an amendment—Section 233(a)—to protect them from damage suits arising out of the medical care they provided. See, *e.g.*, 116 Cong. Rec. 42,543 (1970) (Rep. Staggers, the sponsor in the House of Representatives) (PHS physicians "cannot afford to take out the customary liability insurance as most doctors do," "because of the low pay that so many of those who work in the [PHS] receive."); *id.* at 42,977 (Sen. Javits) (PHS personnel "just could not afford to take out the customary liability insurance.").

To allow a suit against a PHS officer or employee, whether based on a *Bivens* theory or any other, would undermine Section 233(a)'s purpose of protecting PHS personnel from personal financial liability arising out of their medical duties. And that, in turn, would undermine PHS's ability to recruit qualified medical personnel to furnish critically needed services. See *Cuoco* v. *Moritsugu*, 222 F.3d 99, 108 (2d Cir. 2000) ("[Section 233(a)] may well enable the Public Health Service to attract better qualified persons to perform medical, surgical and dental functions in order better to serve, among others, federal prisoners."); cf., *e.g.*, *Bogan* v. *Scott-Harris*, 523 U.S. 44, 52 (1998) ("[T]he threat of liability may significantly deter service in local government, where

prestige and pecuniary rewards may pale in comparison to the threat of civil liability."); *Schweiker* v. *Chilicky*, 487 U.S. 412, 425 (1988) ("The prospect of personal liability for official acts * * * would undoubtedly lead to new difficulties and expense in recruiting [personnel] for the programs Congress has established.").

2. In reaching a contrary result, the Ninth Circuit reasoned that this Court had not rendered its decision in *Bivens* at the time of Section 233(a)'s enactment, and that Congress therefore could not have had constitutional claims in mind. Pet. App. 21a; see Br. in Opp. 19-20. Even if true (a dubious assertion for reasons explained below), there is no reason to believe that Congress would have wanted PHS personnel to be subject to such claims—especially given the unqualified nature of Section 233(a)'s preclusion of "any other civil action." Under the court of appeals' reasoning, no pre-*Bivens* statute—no matter how absolute its text or how clear and categorical its intent—could create an exclusive remedy. But as this Court has repeatedly recognized, "the fact that a statute can be 'applied in situations not expressly anticipated by Congress does not demonstrate ambiguity. It demonstrates breadth.'" *Yeskey*, 524 U.S. at 212 (quoting *Sedima, S.P.R.L.* v. *Imrex Co.*, 473 U.S. 479, 499 (1985)).[8]

Moreover, five years after *Bivens* was decided, Congress passed the Gonzalez Act, Pub. L. No. 94-464, § 1(a), 90 Stat. 1985, which affords immunity to medical personnel in the Armed Forces and which, like Section 233(a), makes the FTCA remedy "exclusive of any other

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[8] The FTCA's judgment bar, 28 U.S.C. 2676, was enacted as part of the original FTCA in 1948. Act of June 25, 1948, ch. 646, 62 Stat. 984. Yet, as noted previously (p. 11, *supra*), every court of appeals to have addressed the issue has agreed that it covers *Bivens* claims.

civil action or proceeding by reason of the same subject matter." 10 U.S.C. 1089(a). Congress relied on Section 233(a) as a model for that provision. See S. Rep. No. 1264, 94th Cong., 2d Sess. 8 (1976) ("legislation having a comparable effect presently exists for * * * medical personnel of the * * * Public Health Service"). As the accompanying Senate Report stated, "[t]his protection is designed to cover *all* potential financial liability." *Id.* at 2 (emphasis added). Thus, after *Bivens*, Congress reaffirmed the completeness of Section 233(a)'s immunity.

In any event, Congress may well have been aware of the concept of a constitutional tort when it enacted Section 233(a) in December 1970. See *Bell* v. *Hood*, 327 U.S. 678, 684-685 (1946) (holding that the issue of the availability of damages in actions against federal agents for constitutional violations warranted the exercise of federal-question jurisdiction, while reserving judgment on whether the plaintiff had successfully stated a cause of action). Indeed, the Court had granted certiorari in *Bivens* six months before Congress enacted Section 233(a). 399 U.S. 905 (1970).

At the very least, Congress must have been aware when it enacted Section 233(a) that suits seeking damages for allegedly tortious conduct in connection with the provision of medical care may be pleaded in different ways. Lack of informed consent, for example, can be alleged as negligence, battery, or both. See *Medical Malpractice* § 8.06, at 8-100 to 8-101 ("Historically, the law did not make clear whether the doctrine of informed consent was rooted in assault and battery or in negligence."). Other tort claims arising out of malpractice include abandonment, fraud, willful misconduct, false imprisonment, defamation, invasion of privacy, and infliction of emotional distress (negligent and intentional).

Id. § 8.10, at 8-145 to 8-158. Given the difficult settings in which they practice, PHS officers and employees face a heightened risk of such claims (often lacking merit) beyond common-law negligence. Accordingly, Congress would have understood the insufficiency of protection against negligence suits alone and intended Section 233(a), through its preclusion of "*any* other civil action" by reason of the same subject matter, to bar such suits categorically, regardless of the legal theory.

Applying Section 233(a) by its terms to bar *Bivens* claims is not tantamount to licensing unconstitutional conduct by PHS personnel, any more than it is to licensing negligent or intentional common-law torts. Nor does this bar prevent compensation for injuries, given the availability of the FTCA. Rather, Section 233(a) simply reflects Congress's recognition of the critical role of absolute personal immunity from suit in this context. As this Court has recognized for other government actors, absolute immunity—even from suits alleging constitutional violations—is justified when it advances important societal values. See, *e.g.*, *Van de Kamp* v. *Goldstein*, 129 S. Ct. 855, 859 (2009) ("absolute immunity reflects 'a balance' of 'evils'") (quoting *Gregoire* v. *Biddle*, 177 F.2d 579, 581 (2d Cir. 1949) (Hand, J.), cert. denied, 339 U.S. 949 (1950)). In enacting Section 233(a), Congress struck that balance in the manner it deemed appropriate: it determined that facilitating the provision of medical care in challenging, underserved settings necessitates affording those who furnish that care with immunity from personal liability, while still ensuring the availability of compensation under the FTCA for any injuries sustained. That balance makes sense both because the FTCA furnishes what Congress views as the appropriate set of substantive and procedural provisions for tort

suits based on the acts of government employees generally and because in the particular context of personal damage actions against PHS personnel, "allegations of government misconduct are 'easy to allege and hard to disprove.'" *Hartman* v. *Moore*, 547 U.S. 250, 257 (2006) (quoting *National Archives & Records Admin.* v. *Favish*, 541 U.S. 157, 175 (2004)). Section 233(a)'s protection would mean little if plaintiffs could sue PHS personnel for malpractice, subjecting them to the burdens of defending against a lawsuit and the threat of ruinous liability, through the mechanism of a *Bivens* suit alleging that the malpractice violated the Constitution.

Other means exist to ensure the punishment and deterrence of bad conduct. See, *e.g.*, *Barr* v. *Matteo*, 360 U.S. 564, 576 (1959) (Harlan, J.) ("[T]here are of course other sanctions than civil tort suits available to deter the executive official who may be prone to exercise his functions in an unworthy and irresponsible manner."). Individual PHS officers or employees may face sanctions in the form of adverse personnel action by the government, professional discipline by medical licensing boards, and even prosecution for criminal violations. And, of course, the grant of immunity does not extend to conduct not "resulting from the performance of medical, surgical, dental, or related functions * * * while acting within the scope of [PHS] office or employment" (42 U.S.C. 233(a))—*e.g.*, sexual assault of a patient unrelated to treatment.

3. The government's experience in the relatively short period since the Ninth Circuit's decision—the first court of appeals' decision to permit PHS personnel to be sued for *Bivens* claims—confirms that the interests at stake are not hypothetical. As of the submission of this brief, approximately 75 PHS officers and employees

working for DIHS and the Bureau of Prisons alone are named in suits alleging *Bivens* claims—the majority of which were filed after the Ninth Circuit issued its decision below. A decision by this Court in favor of respondents, applying the Ninth Circuit's unprecedented rule to the rest of the country, would further encourage such suits by prisoners, alien detainees, and others. The great majority of these suits lack merit, but that often can be established only after litigation and its attendant burdens have taken their toll on individual PHS officers and employees. The result would be to undermine the ability of the PHS to recruit qualified personnel to serve in some of the nation's most challenging and underserved settings. See 08-1547 Commissioned PHS Officers Ass'n Amicus Br. 2 ("The outcome of this case will have a profound effect on the ability of the USPHS to recruit and retain medical professionals."); p. 14, *supra*.[9]

C. Neither The Westfall Act Nor This Court's *Bivens* Jurisprudence Supports The Ninth Circuit's Decision

1. a. Instead of focusing on Section 233(a)'s text and legislative history, the court of appeals relied in signifi-

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[9] Contrary to respondents' suggestion (Br. in Opp. 36-37), the burdens of litigation on PHS personnel are substantial. Indemnification determinations by the government are discretionary. See 45 C.F.R. 36.1(a) and (c). Absent "exceptional circumstances," these determinations are made on a case-by-case base *after* there is an adverse judgment against the employee. 45 C.F.R. 36.1(a) and (c). Even assuming indemnity is ultimately provided, it protects the individual only from liability for the damages judgment, rather than relieving the individual of the burdens and stresses of the litigation process. See, *e.g.*, *Osborn* v. *Haley*, 549 U.S. 225, 238 (2007) (immunity exempts defendants "not simply from liability, but from suit"); *Tenney* v. *Brandhove*, 341 U.S. 367, 377 (1951) (referring to the "inconvenience and distractions of a trial").

cant part on the text and legislative history of a separate statute—the 1988 amendments to the FTCA, known as the Westfall Act—that nowhere purports to diminish the unqualified immunity conferred on PHS personnel by Section 233(a). See Pet. App. 24a-32a. The Westfall Act extended the personal immunity provided by 28 U.S.C. 2679(b) (originally enacted in 1961, see Act of Sept. 21, 1961, Pub. L. No. 87-258, 75 Stat. 539) to a broader class of injuries, while carving out *Bivens* claims from that enhanced scope. See Federal Employees Liability Reform and Tort Compensation Act of 1988, Pub. L. No. 100-694, § 5, 102 Stat. 4564. But a review of the Act and its background shows that it has no effect on the scope of personal immunity (including as to *Bivens* claims) conferred by other, preexisting statutes such as Section 233(a).

Prior to the Westfall Act, Section 2679(b) made the FTCA the exclusive remedy only for injury resulting from a federal employee's operation of a motor vehicle.[10] The Westfall Act, via new Section 2679(b)(1), extended the exclusivity of the FTCA remedy to any injury "resulting from the negligent or wrongful act or omission" of any federal employee. 28 U.S.C. 2679(b)(1). At the same time, however, the Westfall Act added Section 2679(b)(2)(A), which states that Section 2679(b)(1)'s pro-

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[10] The pre-Westfall Act provision read as follows:

> 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, resulting from the operation by any employee of the Government of any motor vehicle while acting within the scope of his office or employment, shall hereafter be exclusive of any other civil action or proceeding by reason of the same subject matter against the employee or his estate whose act or omission gave rise to the claim.

28 U.S.C. 2679(b) (1982).

vision of an exclusive FTCA remedy "does not extend or apply to a civil action against an employee of the Government * * * brought for a violation of the Constitution." 28 U.S.C. 2679(b)(2)(A); see App., *infra*, 3a.

Based on Section 2679(b)(2)(A), the court of appeals read the Westfall Act to reinforce its view that Section 233(a)—though enacted long before the Westfall Act and in legislation separate from the FTCA (see p. 14, *supra*)—does not bar a claim based on the Constitution. Pet. App. 25a-26a. The district court went even further. That court read Section 233(a)'s reference to "[t]he remedy against the United States" provided by 28 U.S.C. 1346(b) to incorporate Section 1346(b)(1)'s statement that the FTCA remedy is "[s]ubject to the provisions of chapter 171 of this title"; from that premise, the court then read Section 2679(b)(2)(A)—a provision found in chapter 171—to limit Section 233(a)'s exclusivity. Pet. App. 59a-62a; see Br. in Opp. 15-18.[11]

Both courts erred in attaching such significance to 28 U.S.C. 2679(b)(2)(A). First, Section 233(a) does not somehow cross-reference Section 2679 via Section 1346, as the district court suggested. Section 233(a) refers to the "remedy against the United States provided by sec-

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[11] Section 1346(b)(1), part of the FTCA, provides in relevant part:

> Subject to the provisions of chapter 171 of this title, the district courts * * * shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages * * * 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)(1).

tions 1346(b) and 2672" (the FTCA) only for the purpose of specifying which remedy against the United States is "exclusive" of any civil action against the PHS officer or employee. Section 2679(b)(2)(A) is not part of that remedy against the United States; indeed, it does not provide, alter, or affect a remedy "*against the United States*" at all. And once the remedy against the United States is so identified, Section 233(a) itself (without further reference to Section 1346 or any other provision of the FTCA) makes that remedy "exclusive" of "any other civil action" against the PHS officer or employee. Section 233(a)'s reference to the FTCA therefore does not limit the unrestricted scope of personal immunity provided to PHS personnel.

Second, nothing in Section 2679(b)(2)(A) itself repeals Section 233(a)'s preexisting grant of immunity to PHS personnel, as the court of appeals suggested. Section 2679(b)(2)(A) was added in 1988, 18 years after Section 233(a)'s enactment. Section 2679(b)(2)(A) excludes constitutional torts only from the personal immunity that those same 1988 amendments to the FTCA had just conferred. See 28 U.S.C. 2679(b)(2)(A) (providing that Section 2679(b)(1), as added by the Westfall Act § 5, 102 Stat. 4564, "does not extend or apply to" a *Bivens* action). Nothing in the Westfall Act or its legislative history purported to limit the distinct (and more expansive) personal immunity previously conferred in separate statutes like Section 233(a). To the contrary, as the House Report noted, the Westfall Act did "not change the law, as interpreted by the courts, with respect to the availability of other recognized causes of action, nor does it either expand or diminish rights established under other Federal statutes." H.R. Rep. No. 700, 100th Cong., 2d Sess. 7 (1988); see *Gutierrez* v. *Ada*, 528 U.S.

250, 257-258 (2000) ("[L]ater laws that 'do not seek to clarify an earlier enacted general term' and 'do not depend for their effectiveness upon clarification, or a change in the meaning of an earlier statute,' are 'beside the point' in reading the first enactment.") (quoting *Almendarez-Torres* v. *United States*, 523 U.S. 224, 237 (1998)).[12]

Had Congress not enacted Section 2679(b)(2)(A), the immunity conferred by Section 2679(b)(1) would bar a *Bivens* action. Likewise, the absence of a carve-out for *Bivens* claims from the immunity conferred by Section 233(a)—either in Section 233 itself or in any other provision—has the same import. Cf. *Andrus* v. *Glover Constr. Co.*, 446 U.S. 608, 616-617 (1980) ("Where Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied, in the absence of evidence of a contrary legislative intent.").

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[12] Both the court of appeals (Pet. App. 26a-28a) and respondents (Br. in Opp. 21-22) rely on the Westfall Act's legislative history to argue that Congress viewed the immunity conferred by that Act as identical in scope to the immunity conferred by Section 233(a). In particular, they cite the statement of a Justice Department official that "the exclusive remedy provision adopted by the bill" "simply extends * * * to all Federal employees" the "exclusive remedy provisions [that] already * * * apply to * * * physicians employed by various agencies." *Legislation to Amend the Federal Tort Claims Act: Hearing Before the Subcomm. on Administrative Law and Gov't Relations of the House Comm. on the Judiciary*, 100th Cong., 2d Sess. 58 (1988) (testimony of Robert L. Willmore, Deputy Assistant Attorney General, Civil Division). But that statement is unremarkable: the exclusive remedy provision of the Westfall Act is Section 2679(b)(1), and it did just what Mr. Willmore described. What distinguishes the immunity conferred by the Westfall Act from that conferred by Section 233(a) is not this exclusive remedy provision, but the carve-out of *Bivens* claims found in Section 2679(b)(2)(A), which Mr. Willmore did not mention.

Accordingly, to read Section 2679(b)(2)(A) to strip PHS officers and employees of immunity from suit in any civil action, despite Section 233(a)'s unqualified grant of individual immunity to PHS personnel, would amount to an implied repeal of Section 233(a), a more specific statute. "[N]ormally the specific governs the general." *Long Island Care at Home, Ltd.* v. *Coke*, 551 U.S. 158, 170 (2007). And "repeals by implication are not favored and will not be presumed unless the intention of the legislature to repeal [is] clear and manifest." *National Ass'n of Homebuilders* v. *Defenders of Wildlife*, 551 U.S. 644, 662 (2007) (internal quotation marks omitted; brackets in original). Because the Westfall Act neither reflects a "clear and manifest" intent to repeal Section 233(a)'s conferral of immunity (*ibid.*) nor "expressly contradict[s]" the grant of immunity (*Radzanower* v. *Touche Ross & Co.*, 426 U.S. 148, 153 (1976)), the Westfall Act cannot be deemed to have implicitly repealed Section 233(a).

b. Respondents contend that *United States* v. *Smith*, 499 U.S. 160 (1991), supports their position. Br. in Opp. 29-31. *Smith*, however, neither states nor implies that the Westfall Act's exclusion of *Bivens* claims from its general grant of immunity overrides any broader, preexisting grant of immunity to specified officers and employees under other statutes. The Court in *Smith* addressed the different argument that federal employees who were protected by preexisting immunity statutes could not *benefit* from Westfall Act immunity to the extent certain conduct was not previously covered. See *Smith*, 499 U.S. at 172-173. That issue arose on the Court's assumption that 10 U.S.C. 1089(a) did not provide immunity for malpractice committed abroad. *Smith*, 499 U.S. at 171-172. In that context, the Court

properly held that personnel otherwise covered by Section 1089 could still "benefit from the more generous immunity available under the" Westfall Act. *Id.* at 173. But that conclusion in no way supports respondents' contention that the Westfall Act strips PHS personnel of the protection accorded to them under the separate grant of immunity in Section 233(a). Even the court of appeals in this case concluded that *Smith* had "little relevance" in supporting respondents' position. Pet. App. 30a n.16. As *Smith* itself recognized, "[w]hen Congress want[s] to limit the scope of immunity * * * it d[oes] so expressly." 499 U.S. at 173. Section 2679(b)(2)(A) provides no such express limitation on the immunity conferred by Section 233(a). To the contrary, Section 2679(b)(2)(A)'s text makes clear that it is the immunity newly conferred by the Westfall Act itself—and only that immunity—that does not extend to *Bivens* claims.

2. The Ninth Circuit's decision is also inconsistent with this Court's *Bivens* jurisprudence.

a. In *Carlson*, the Court held that the FTCA standing alone did not bar a *Bivens* claim against federal officials. 446 U.S. at 18-23. The Court stated that, under governing principles at the time, a *Bivens* claim would lie in that case unless (1) there were "special factors counselling hesitation in the absence of affirmative action by Congress," or (2) "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." *Id.* at 18-19. The Court in *Carlson* found neither condition satisfied there. In particular, the Court found nothing in the FTCA itself indicating that Congress meant to preclude *Bivens* actions; to the contrary, it stated that the legislative history of a post-*Bivens* 1974 amendment to the FTCA

made it "crystal clear" that Congress viewed the FTCA and *Bivens* as complementary. *Id.* at 19-20.[13]

But *Carlson* did not involve Section 233(a)—an immunity statute separate and apart from the FTCA that expressly makes the FTCA remedy against the United States the "exclusive" remedy available for the type of injury asserted (personal injury arising from the provision of medical care by PHS personnel). As the Court in *Carlson* itself recognized, that distinction is dispositive. In rejecting the argument that the FTCA was the exclusive remedy for the injuries alleged there, the Court in *Carlson* explained:

> This conclusion 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).

446 U.S. at 20 (emphasis added). By identifying Section 233(a) as a quintessential example of a statute in which Congress has made the FTCA an exclusive remedy, thereby precluding a *Bivens* action against individual federal officers and employees, *Carlson* confirms the government's interpretation of Section 233(a) here. That reading is also consistent with *Carlson*'s caution

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[13] The text of the 1974 amendment to the FTCA did not expressly preserve *Bivens* claims. As explained above (p. 20, *supra*), when Congress subsequently amended the FTCA in 1988 to make the FTCA remedy against the United States the exclusive remedy for injuries based on the conduct of federal employees generally, it expressly carved out *Bivens* claim from that grant of immunity. See 28 U.S.C. 2679(b)(2)(A).

that Congress does not have to recite any specific "magic words" in order to designate an alternative remedy as exclusive, and thus a substitute for any *Bivens* cause of action. *Id.* at 19 n.5.

Relying on the use of the term "malpractice" in the Court's parenthetical quote above, respondents argue that *Carlson*'s reference to Section 233(a) was no more than a recognition that Section 233(a) made the FTCA the exclusive remedy for negligent provision of medical care by PHS personnel. Br. in Opp. 23-24. But, as previously explained (pp. 12-13, *supra*), the term "malpractice" describes conduct that can be pleaded not just as common-law negligence but also as a constitutional violation. More significantly, the whole point of *Carlson*'s reference to Section 233(a) and similarly worded statutes was to underscore the contrast between those statutes that precluded a *Bivens* cause of action and the FTCA itself, which did not. The only question before the Court in *Carlson* was the availability of a *Bivens* action, and Section 233(a) was "significant" in resolving that question only because it showed how Congress could bar such actions by explicitly providing that the FTCA remedy would be exclusive. If Section 233(a) was like the FTCA in *not* barring *Bivens* claims, it is hard to understand what point the Court could have been making in contrasting the two.

Moreover, contrary to the Ninth Circuit's reading (Pet. App. 10a), *Carlson* did not impose an independent requirement that an alternative remedy must be "equally effective" in order to foreclose a *Bivens* action. Rather, as the Court emphasized, what mattered was Congress's intent. See *Carlson*, 446 U.S. at 23 ("[W]ithout a clear congressional mandate we cannot hold that Congress relegated respondent exclusively to the FTCA

remedy."). In *Carlson*, the Court read the legislative history accompanying a 1974 amendment to the FTCA as indicating that Congress did not regard the FTCA as providing an exclusive remedy in that context. *Id.* at 19-20. The Court's discussion of the relative effectiveness of the FTCA remedy and a *Bivens* claim served as supporting evidence of Congress's intent. See *id.* at 20-21 ("Four 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 respondent to an FTCA action."). Thus, the *Carlson* Court assessed the effectiveness of an alternative remedy only as part of an inquiry into Congress's intent, not as an independent factor. *Id.* at 18-19 (no *Bivens* cause of action where "*Congress* has provided an alternative remedy which *it* * * * viewed as equally effective") (emphases added); *id.* at 19 (asking whether Congress has identified another remedy, "equally effective *in the view of Congress*") (emphasis added). In a case like this one, where the statutory text makes clear Congress's mandate that the FTCA is "exclusive" of "any other civil action" against the individual officer or employee, no further inquiry is necessary.[14]

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[14] The FTCA provides for the recovery of compensatory damages for injuries caused by the negligent or wrongful acts of government employees. Congress therefore assured the availability of a meaningful remedy when it enacted Section 233(a). *Carlson* noted the differences between *Bivens* suits and FTCA suits—most notably, the unavailability of punitive damages and jury trials in FTCA suits. 446 U.S. at 21-23. Those differences reflect Congress's judgment in enacting the FTCA that these additional features are not necessary for a fair system of compensation for persons injured by the acts of government employees. It therefore is not surprising that Congress found the FTCA to be an adequate alternative remedy when it enacted Section 233(a).

b. This Court's post-*Carlson* precedents make clear that a *Bivens* cause of action is unavailable here. Since *Carlson*, the Court has consistently expressed a strong reluctance to recognize the availability of a *Bivens* cause of action in new contexts—even in the absence of an express preclusive provision in an Act of Congress, and without an inquiry into whether an alternative remedy is "equally effective." See, *e.g.*, *Ashcroft* v. *Iqbal*, 129 S. Ct. 1937, 1948 (2009) ("Because implied causes of action are disfavored, the Court has been reluctant to extend *Bivens* liability."); *Wilkie* v. *Robbins*, 551 U.S. 537, 550 (2007) (*Bivens* remedy "is not an automatic entitlement no matter what other means there may be to vindicate a protected interest, and in most instances we have found a *Bivens* remedy unjustified."); *Correctional Servs. Corp.* v. *Malesko*, 534 U.S. 61, 68-69 (2001) ("Since *Carlson* we have consistently refused to extend *Bivens* liability to any new context or new category of defendants. * * * 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."); *Chilicky*, 487 U.S. at 421-422, 423 ("The absence of statutory relief for a constitutional violation * * * does not by any means necessarily imply that courts should award money damages against the officers responsible for the violation. * * * When the design of a Government program suggests that Congress has provided what it considers adequate remedial mechanisms for constitutional violations that may occur in the course of its administration, we have not created additional *Bivens* remedies."); *Bush* v. *Lucas*, 462 U.S. 367, 378, 388 (1983) ("When Congress provides an alternative remedy, it may, of course, indicate its intent, by statutory language, by clear legislative history, or per-

haps even by the statutory remedy itself, that the courts' power should not be exercised. * * * That question [as to availability of a *Bivens* cause of action] obviously cannot be answered simply by noting that existing remedies do not provide complete relief for the plaintiff.").

Thus, as the D.C. Circuit has noted, "subsequent to *Carlson*, the Court clarified that there does not need to be an equally effective alternate remedy" or an explicit congressional repudiation in order to bar a *Bivens* action. *Wilson* v. *Libby*, 535 F.3d 697, 708 (2008), cert. denied, 129 S. Ct. 2825 (2009); see *Spagnola* v. *Mathis*, 859 F.2d 223, 228 (D.C. Cir. 1988) (en banc) (per curiam) ("As we read *Chilicky* and *Bush* together, then, courts must withhold their power to fashion damages remedies when Congress has put in place a comprehensive system to administer public rights, has 'not inadvertently' omitted damages remedies for certain claimants, and has not plainly expressed an intention that the courts preserve *Bivens* remedies.").

Here, the plain text of Section 233(a) precludes a *Bivens* action against PHS personnel. Respondents must instead seek relief in their FTCA action against the United States, which Congress expressly declared to be "exclusive."[15]

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[15] Although Congress's affirmative statement in Section 233(a) of the exclusivity of the FTCA remedy is sufficient to resolve the matter, PHS's status as a uniformed service (p. 2, *supra*), the important purposes associated with protecting PHS personnel from the burdens of litigation and liability (pp. 14-19, *supra*), and the FTCA's reticulated remedial scheme, constitute—along with Section 233(a)—"special factors counselling hesitation" against judicial creation of a cause of action under *Bivens*. *Carlson*, 446 U.S. at 18 (citation omitted); see, *e.g.*, *Arar* v. *Ashcroft*, 585 F.3d 559, 574 (2d Cir. 2009) (en banc) ("'Hesitation' is 'counseled' whenever thoughtful discretion would pause even to con-

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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sider."). Moreover, PHS Commissioned Corps personnel may be called into military duty, including in areas of emergency or conflict that demand custodial care, which makes the case for their immunity from *Bivens* suits particularly strong. See, *e.g.*, *United States* v. *Stanley*, 483 U.S. 669 (1987) (no *Bivens* remedy for injuries that arise out of activity incident to military service); *Chappell* v. *Wallace*, 462 U.S. 296 (1983) (no *Bivens* remedy for alleged racial discrimination in military assignments and evaluations).

APPENDIX

1. 10 U.S.C. 1089 provides in pertinent part:

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 under section 316, 502, 503, 504, or 505 of title 32, 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.

* * * * *

2. 28 U.S.C. 1346 provides in pertinent part:

United States as defendant

* * * * *

(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.

* * * * *

3. 28 U.S.C. 2676 provides:

Judgment as bar

The judgment in an action under section 1346(b) of this title shall constitute a complete bar to any action by the claimant, by reason of the same subject matter, against the employee of the government whose act or omission gave rise to the claim.

4. 28 U.S.C. 2679 provides in pertinent part:

Exclusiveness of remedy

* * * * *

(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, or

(B) which is brought for a violation of a statute of the United States under which such action against an individual is otherwise authorized.

* * * * *

5. 42 U.S.C. 233 provides in pertinent part:

Civil actions or proceedings against commissioned officers or employees

(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.

* * * * *