No. 08-1529

IN THE
Supreme Court of the United States

ESTHER HUI AND STEPHEN GONSALVES,
Petitioners,
v.
YANIRA CASTANEDA, ET AL.,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

BRIEF FOR PETITIONER COMMANDER STEPHEN GONSALVES

DAVID P. SHELDON
Counsel of Record
LAW OFFICES OF DAVID P. SHELDON, PLLC
512 8th Street, S.E.
Washington, DC 20003
(202) 546-9575

PAUL M. SMITH
WILLIAM M. HOHENGARTEN
ELAINE J. GOLDENBERG
MATTHEW S. HELLMAN
JENNER & BLOCK LLP
1099 New York Ave., N.W.
Washington, DC 20001
(202) 639-6000

Additional counsel listed on inside cover

JOSHUA A. BLOCK
JENNER & BLOCK LLP
919 Third Avenue
New York, NY 10022
(212) 891-1600

JESSICA R. AMUNSON
JENNER & BLOCK LLP
1099 New York Ave., N.W.
Washington, DC 20001
(202) 639-6000

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?

PARTIES TO THE PROCEEDING

The petitioners here and appellants below are Dr. Esther Hui and Commander Stephen Gonsalves of the United States Public Health Service.

Petitioners and appellants below Eugene Migliaccio, Chris Henneford, and Timothy Shack were dismissed as defendants by plaintiffs and dismissed as petitioners pursuant to stipulation of the parties.

Respondent Yanira Castaneda is the personal representative of the estate of Francisco Castaneda. Respondent Vanessa Castaneda is the beneficiary of the estate, by and through her mother and guardian Lucia Pelayo.

The United States of America, George Molinar, Daniel Hunting, Susan Pasha, and Robert Mekemson are defendants in the district court but were not parties to the appeal. The United States was an *amicus* in the court of appeals and in this Court on petition for certiorari.

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JURISDICTION

The Ninth Circuit's judgment was entered on October 2, 2008. A timely petition for rehearing *en banc* was denied on January 29, 2009. Pet. App. 81a. On April 10, 2009, Justice Kennedy extended the time to file a petition for writ of certiorari to May 29, 2009. On May 19, 2009, he further extended the time to June 12, 2009. The petition was timely filed on June 11, 2009. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

This case involves the scope of the immunity granted by 42 U.S.C. § 233(a), which provides:

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

Additional relevant statutes are reproduced in the statutory appendix to this brief.

STATEMENT OF THE CASE

Petitioners – a commissioned officer, Commander Stephen Gonsalves, and a civilian physician, Esther Hui, M.D., in the federal Public Health Service ("PHS") – are dedicated to providing medical care to underserved populations, including many who might otherwise have no access to health care at all. Where the PHS fails to provide adequate care – as the United States has admitted occurred in this case – the PHS has failed to carry out its mission.

Congress has determined, however, that the best way to ensure that the PHS provides quality care is to block suits against PHS employees in their personal capacities, because the threat of personal liability would prevent the PHS from recruiting and retaining qualified professionals. Therefore, in 42 U.S.C. § 233(a) Congress unequivocally barred all actions – including *Bivens* claims – against PHS employees based on medical or related activities. Congress instead authorized suits for deficient PHS medical care against the United States, which is the entity that can most readily make any needed systemic reforms and is certain to be able to satisfy any judgment. The United States' liability arises whenever the PHS falls short of state law standards of care, which are more stringent than the standards used to determine whether there has been a violation of the Constitution. Individuals who are injured by deficient PHS care are thereby ensured compensation for their injuries commensurate with

the compensatory remedies that other Americans have when they obtain private medical care.

A. The Public Health Service

The PHS is one of the seven uniformed services of the United States. With origins dating back to the 1798 Act for the Relief of Sick and Disabled Seamen, the PHS is today part of the Department of Health and Human Services and the employer of more than 6,000 commissioned officers and nearly 14,000 civilian professionals. PHS commissioned officers are organized along military lines and maintain a military rank equivalent. 42 U.S.C. § 207; *see* Pet. App. 3a-4a n.3.

PHS commissioned officers and civilian employees are generally health care professionals who forgo the financial rewards of private practice in order to provide health care to underserved groups. PHS personnel undertake patient care and medical research in a wide variety of settings. They frequently provide medical care to disadvantaged populations, such as disaster victims and refugees. In times of war or national emergency, PHS commissioned officers may be called into military service. 42 U.S.C. § 217.

B. Factual Background

The United States has admitted negligence in its care of decedent Francisco Castaneda, J.A. 328-29, but as we explain below, the record shows that Petitioners played at most a modest role in Mr. Castaneda's care. The record also demonstrates that PHS personnel arranged for Mr. Castaneda to undergo a biopsy at outside medical facilities on no

fewer than three separate occasions. Despite these efforts, Mr. Castaneda did not receive a timely biopsy. But the suggestions by the lower courts that Petitioners were deliberately indifferent to Mr. Castaneda's condition are not borne out by the record.

Mr. Castaneda was incarcerated by the State of California in December 2005. J.A. 335. Respondents allege that he sought, but was denied, medical treatment for a penile lesion while in state custody. *Id.* Medical records indicate that Mr. Castaneda had the lesion for two to three years prior to his incarceration, but that it worsened around the time he entered state custody. J.A. 109, 119, 134, 137. He had not previously sought treatment for it. J.A. 137.

On March 27, 2006, Mr. Castaneda was transferred to federal custody in the San Diego Correctional Facility operated by the Immigration and Customs Enforcement service ("ICE") of the Department of Homeland Security ("DHS"). Pet. App. 3a. Under an interagency agreement, the PHS's Division of Immigration Health Services ("DIHS") provides health care services to alien detainees in ICE custody in San Diego. J.A. 22-23.

The day after he entered federal custody, Mr. Castaneda was seen by Lt. Daniel Walker, a PHS physician's assistant. J.A. 109-10. Lt. Walker noted that Mr. Castaneda had both severe phimosis (congenital narrowing of the foreskin) and a penile lesion. J.A. 110. He recommended a urology consultation, particularly in light of a family history

of cancer. J.A. 112. A treatment authorization request was submitted to DIHS officials in Washington. After further review by a physician in Washington, officials approved the request on May 31, granting authorization for an outside specialist to excise the lesion for biopsy and provide other treatment. J.A. 92-94, 113-15. The treatment request further indicated "urology unable to see this pt [patient]" and recommended that he see a surgeon for the procedures. J.A. 114.

A week later, Mr. Castaneda was examined by Dr. John Wilkinson, a private oncologist. J.A. 115-25. Dr. Wilkinson agreed that the lesion could be virally based (*e.g.*, a genital wart) or cancerous, but for medical reasons he could not perform the biopsy himself and referred Mr. Castaneda for "urgent urological assessment." J.A. 116, 125. Dr. Wilkinson spoke with Petitioner Hui, a civilian PHS physician at the San Diego Correctional Facility, and offered to admit Mr. Castaneda to Dr. Wilkinson's hospital for the urological consultation and biopsy. J.A. 124, 125. Under DIHS policy, Dr. Hui indicated that the procedures would be arranged on an out-patient basis instead. J.A. 124, 125; *see* J.A. 194-95.[1]

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[1] Although Dr. Hui's notes describe the urological consultation and biopsy as an "elective outpatient procedure," she also wrote that Mr. Castaneda "need[ed] to be seen by a urologist" and that Mr. Castaneda would be referred back to the oncologist Dr. Wilkinson "[i]f the biopsy proves to be cancerous." J.A. 125. As described below, Mr. Castaneda was in fact examined by two separate private urologists with authorization to perform biopsies in the following months.

Less than a week later, on June 12, Mr. Castaneda filed a grievance because he had not yet received treatment. J.A. 127-30. In the meantime, Lt. Walker, the PHS physician's assistant, attempted to arrange an examination by an outside urologist. J.A. 131-32. By June 23, Lt. Walker had located a urologist, Dr. Robert Masters, who was willing to see Mr. Castaneda but wanted to speak with Dr. Wilkinson first. *Id.* Around June 30, Lt. Walker met with Mr. Castaneda and explained that he had not been diagnosed with cancer because no biopsy had yet occurred, and that further direction about his treatment was needed from a urologist. J.A. 133-34.[2]

On July 12, Lt. Walker continued to try to reach the urologist Dr. Masters. J.A. 135-37. Lt. Walker also met with Mr. Castaneda concerning his grievance and again explained that he was not being denied treatment, and that Lt. Walker was in fact trying to arrange such treatment with an outside provider. *Id.*

The next day, a treatment authorization request was approved by DIHS in Washington for Mr. Castaneda to undergo a biopsy and surgery, including possible circumcision. J.A. 139-40. Mr. Castaneda was taken to the emergency room at Scripps Mercy hospital for this evaluation and

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[2] The record of this conversation states "this detainee … DOES NOT have cancer at this time due to not having a biopsy performed and evaluated in a laboratory." J.A. 133. But this and other records indicate that PHS employees were working to obtain an outside urological assessment to determine the course of further treatment, including a biopsy if indicated. J.A. 134; *see also*, *e.g.*, J.A. 125, 131-32, 139-40, 155.

treatment. J.A. 140-48.[3] Mr. Castaneda was examined by several doctors at Scripps Mercy, including a urologist, Dr. Daniel Hunting. *Id.* Based on his examination and consultation with other physicians on the hospital staff, Dr. Hunting found "nothing suspicious for carcinoma" and concluded instead that "this is condyloma" (genital warts). J.A. 145. Dr. Hunting therefore referred Mr. Castaneda "back to his primary treating urologist, who can do the elective program which has been advised. This is not an urgent problem and he should followup [sic] with his prior urologist at ElDorado [sic] and have elective circumcision or condylosis or ALARA cream." *Id.*; *see also* J.A. 147 (Scripps Mercy's record of "Medical Decision Making": "Dr. Hunting feels that this is condyloma and not a cancerous mass that patient has had for quite some time"). As a result, the hospital discharged Mr. Castaneda without the biopsy or surgery that DIHS had authorized. J.A. 146.

Dr. Hunting's conclusions were communicated to Lt. Walker, who noted that Scripps Mercy "had a urologist confirm via exam condylom acuminata, no

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[3] The district court criticized DIHS for sending Mr. Castaneda to see a urologist at Scripps Mercy rather than to "Dr. Wilkinson and/or Dr. Masters, the treating doctors who were familiar with Castaneda's condition." Pet. App. 46a. In fact, because of his schedule, Dr. Masters had not yet been able to examine Mr. Castaneda at all (and thus was not his "treating doctor[]"), J.A. 137, while Dr. Wilkinson, the oncologist, had made clear that Mr. Castaneda should see a *urologist* and should return to Dr. Wilkinson only if a biopsy showed cancer, J.A. 123, 125. DIHS therefore sent Mr. Castaneda to Scripps Mercy where he could be examined by a urologist immediately.

need for biopsy." J.A. 148 (original in all caps). Nonetheless, Mr. Castaneda and Lt. Walker were both upset that the hospital had discharged Mr. Castaneda without the treatment and biopsy DIHS had authorized. J.A. 149-50; *see* J.A. 95. Lt. Walker sought early release for Mr. Castaneda so that he could obtain on his own the treatment that Dr. Hunting had deemed to be non-urgent and elective. J.A. 150; *see also* J.A. 163. Ultimately, however, ICE denied Mr. Castaneda's early release due to his legal status. J.A. 171, 177.

In the meantime, Mr. Castaneda continued to press for treatment and filed a new grievance, but was advised that the outside specialist, Dr. Hunting, had determined he did not have cancer. J.A. 150-54. Nonetheless, in August DIHS again authorized treatment of Mr. Castaneda by an another urologist – this time Dr. Masters – to "[b]iopsy lesion on penis [and for] surgical correction of the glans penis circumcision." J.A. 154-56. Dr. Masters agreed with prior assessments that Mr. Castaneda's condition was probably genital warts (condyloma accuminata), with the parenthetical notation "(rule out malignant neoplasm)," *i.e.*, cancer. J.A. 159. He recommended circumcision to remove the lesion, and also to provide a biopsy. *Id.* However, he did not perform that operation immediately, but advised that it could be done on a "come-and-go outpatient" basis and offered to "arrange for circumcision at a local hospital." *Id.* Thus, once again, although DIHS had authorized a biopsy and treatment for Mr. Castaneda, he was returned by an outside physician to the San Diego

Correctional Facility without receiving the authorized test and treatment.

Dr. Masters spoke to Lt. Walker the same day he examined Mr. Castaneda. J.A. 161. Lt. Walker's record of the conversation notes Dr. Masters's diagnosis of genital warts and recommended treatment of circumcision and describes these as "elective procedures the patient may need in the future." *Id.* There is no mention in this record of the desirability of a biopsy. Therefore, Lt. Walker advised Mr. Castaneda that his treatment was elective and could be pursued after his release, and that Lt. Walker would again seek early release. J.A. 162-63.

Shortly thereafter, a memorandum was written by Petitioner Gonsalves, J.A. 161-68, a Commander in the PHS, in the course of his duties as Health Services Administrator for DIHS at the San Diego Correctional Facility, *see* J.A. 32-33. The memorandum authored by Cmdr. Gonsalves was not a treatment authorization request and did not purport to approve or deny a treatment authorization request, but rather was based on information obtained from unspecified DIHS clinical staff in consultation with outside specialists. J.A. 167-68. The record does not reflect whether Cmdr. Gonsalves relied only on oral reports from the clinical staff in preparing the memorandum or also consulted written records and, if the latter, which records he had before him. Consistent with Dr. Hunting's diagnosis and with Lt. Walker's record of what he was told by Dr. Masters, the administrative memorandum states: "This is to inform that the off-

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

Subsequently, Mr. Castaneda's symptoms grew worse. J.A. 168-73. On October 23, Mr. Castaneda asked to be seen by Lt. Walker because of the latter's familiarity with his condition. J.A. 174. Lt. Walker submitted another treatment authorization request to Washington. J.A. 175-79. The request stated that Mr. Castaneda had "been seen by local urologist and oncologist and both are not impressed of possible cancerous lesion(s), however, there is an elective component to having the circumcision completed." J.A. 177. This treatment authorization request was denied by a DIHS physician in Washington, Dr. Neil Collins, on the ground that "[c]ircumcisions are not a covered benefit." J.A. 177; *see also* J.A. 214 (official DIHS policy).

On November 17, Mr. Castaneda was transferred by ICE to its San Pedro Service Processing Center in the Los Angeles area. J.A. 358. After Mr. Castaneda's transfer, Petitioners' limited involvement with him ended.[4] On December 4,

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[4] An attorney from the American Civil Liberties Union, Tom Jawetz, began contacting ICE and DIHS personnel about Mr. Castaneda's case on December 5, 2006, after his transfer. *See* Decl. of Tom Jawetz in Support of Plaintiff's Opposition to Defendants' Rule 12(b)(1) Motion to Dismiss. Mr. Jawetz's initial letter was addressed to officials at San Pedro, but was

DIHS employees at San Pedro submitted a treatment authorization request to Washington for Mr. Castaneda to receive a urology consultation with Dr. Lawrence Greenberg, which was approved on December 5. J.A. 187-88. Respondents allege that Dr. Greenberg stated Mr. Castaneda's penis was a "mess" and required circumcision, and that Dr. Greenberg would fax a recommendation to the medical officials at San Pedro later that day. J.A. 361. Accordingly, Mr. Castaneda was taken back to San Pedro. *Id.* A treatment authorization request was approved by Dr. Collins of DIHS in Washington to see another urologist, Dr. Asghar Ashkuri, on January 25, 2007. J.A. 191. Dr. Ashkuri determined that Mr. Castaneda "likely [had] penile cancer" and recommended a biopsy on an outpatient basis, which he would schedule when authorization was received. J.A. 193.

Mr. Castaneda was released by ICE on February 5. J.A. 363. Three days after his release, Mr. Castaneda went to the emergency room at Harbor-UCLA Hospital, where he was diagnosed with squamous cell carcinoma. Pet. App. 52a. Six days later, his penis was amputated and he began

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copied by fax to other federal employees, including Petitioner Gonsalves at San Diego. *Id.* Ex. 1. The record does not indicate whether Cmdr. Gonsalves received this letter, but as the DIHS Health Services Administrator at San Diego, he may have been involved in gathering the medical records requested by Mr. Jawetz. Thereafter, Mr. Jawetz had several other communications with officials at San Pedro and in Washington, but not with Petitioners. *Id.* Exs. 2-6.

receiving chemotherapy. *Id.* A year later, on February 16, 2008, Mr. Castaneda died. *Id.*

C. Statutory Background

This case concerns the scope of the immunity provided by 42 U.S.C. § 233(a), which Congress enacted as part of the Emergency Health Personnel Act of 1970 ("Act"), Pub. L. No. 91-623, 84 Stat. 1868. The Act as a whole constituted an effort by Congress to reinvigorate the PHS and its mission of providing medical care to underserved populations. *See id.* § 2. Section 233(a) in particular responded to a concern voiced by the Surgeon General that the PHS was having difficulty retaining high-quality medical personnel because "low pay" prevented PHS personnel from "tak[ing] out the customary liability insurance." 116 Cong. Rec. 42,543 (1970) (Rep. Staggers, House sponsor of the Act); *see also id.* at 42,977 (Sen. Javits).

Congress addressed these liability concerns by immunizing PHS personnel for injuries or death arising out of the performance of their duties and making a Federal Tort Claims Act ("FTCA") action against the United States the "exclusive" remedy for such injuries. Specifically, § 233(a) provides:

> The remedy against the United States provided by [the FTCA] … for damage for personal injury, including death, resulting from the performance of medical … or related function … by any [PHS officer or employee] 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 ….

42 U.S.C. § 233(a). Section 233(a) thus provides a remedy for injured parties against the United States under the FTCA and acts as a categorical bar to "any other civil action … by reason of the same subject-matter" against PHS personnel. *Id.*

Like all other federal employees, PHS personnel are also protected by another immunity that Congress enacted in 1988, known as the Westfall Act, 28 U.S.C. § 2679(b), which overlaps with but is distinct from the immunity provided by § 233(a). The Westfall Act provides:

> (1) The [FTCA] remedy against the United States … for injury or loss of property, or personal injury or death arising or resulting from the negligent or wrongful act … of any employee of the Government … is exclusive of any other civil action or proceeding for money damages by reason of the same subject matter against the employee …. Any other civil action … arising out of or relating to the same subject matter against the employee … is precluded ….
>
> (2) Paragraph (1) does not extend or apply to a civil action …
>
> (A) which is brought for a violation of the Constitution of the United States ….

28 U.S.C. § 2679(b)(1)-(2).

The Westfall Act is thus like § 233(a) in making the FTCA remedy exclusive, but unlike § 233(a) in

that it applies to injuries caused by "any Government employee" for any performance of their duties and, most critically, in that it contains an explicit exception for civil actions "brought for a violation of the Constitution of the United States." *Id.* As this Court has explained, government employees (like PHS personnel) who fall under both the generally applicable Westfall Act and a specific immunity provision (such as § 233(a)) receive protection from *both* statutes. *See United States v. Smith*, 499 U.S. 160, 170-73 (1991).

D. Procedural History

Mr. Castaneda commenced this action on November 2, 2007. Pet. App. 8a. After his death, Mr. Castaneda's personal representative and heir were substituted as Plaintiffs and are Respondents in this Court. *See id.* Respondents' Third Amended Complaint asserts FTCA claims against the United States; *Bivens* claims for inadequate medical care and equal protection violations against several DHS (ICE) and PHS (DIHS) employees, including Petitioners; § 1983 and state law tort claims against certain California state employees for the period Mr. Castaneda was incarcerated by the State; and a state law medical negligence claim against Dr. Hunting, the private urologist who examined Mr. Castaneda at Scripps Mercy, concluded he did not have cancer, and declined to carry out the biopsy and treatment DIHS had authorized. *See* J.A. 339-43, 377-404.[5]

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[5] Respondents filed their Third Amended Complaint after the district court ruled on the PHS defendants' motion to dismiss, but the Ninth Circuit relied on that version of the complaint in

On January 14, 2008, the five PHS defendants, who were at that time represented by Department of Justice attorneys, moved under Fed. R. Civ. P. 12(b)(1) to dismiss the *Bivens* claims against them pursuant to § 233(a). Pet. App. 8a-9a. The motion was supported by declarations showing that the movants were PHS employees and a certification that they were acting within the scope of that employment in connection with the events alleged in the complaint. J.A. 22-23, 32-34. As permitted under Rule 12(b)(1), Respondents also submitted evidence in opposing the motion.

The district court (Pregerson, J.) denied the motion to dismiss, finding that § 233(a) does not provide immunity to constitutional claims. The court opined that § 233(a) is silent about constitutional tort claims for medical care provided by PHS employees within the scope of their employment, but that the "statutory trail" leads to 28 U.S.C. § 2679(b) (*i.e.*, the Westfall Act), which the court read as expressly authorizing such suits. Pet. App. 59a-61a. The court observed that § 233(a) refers to "[t]he remedy against the United States provided by sections 1346(b) and 2672 of title 28," and that § 1346 refers in turn to chapter 171 of title 28, which includes the Westfall Act. *Id.* The court therefore

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its opinion. *See* Pet. App. 2a n.1. Therefore, the Third Amended Complaint has been included in the appellate record, J.A. 330-407, and is cited as Respondents' operative pleading. A claim in the Third Amended Complaint for injunctive and declaratory relief against a number of United States agencies and senior DHS officials has been dismissed by stipulation. D. Ct. Docket No.175.

concluded that the constitutional tort exception to the Westfall Act immunity applies to the § 233(a) immunity as well. Pet. App. 61a. The court rejected the Second Circuit's contrary decision in *Cuoco v. Moritsugu*, 222 F.3d 99 (2d Cir. 2000), as well as the dozens of appellate and district court decisions that are in accord with *Cuoco*. Pet. App. 64a-65a.

The five PHS defendants appealed that denial of immunity under the collateral order doctrine. Each PHS defendant also retained counsel in place of the Department of Justice attorneys who had previously represented him or her.[6] Pending appeal on the immunity issues, the PHS defendants moved in the district court for a stay of discovery on the *Bivens* claims against them, but that court denied a stay and issued an order compelling discovery. J.A. 12. The PHS defendants then applied to the Ninth Circuit for a stay of discovery on the *Bivens* claims, which that court granted, and which remains in place pending proceedings in this Court. J.A. 16. But other aspects of the case have moved forward in the district court. Most significantly, the United States has filed a Notice of Admission of Liability for Medical Negligence. J.A. 328-39. This notice admits the United States' liability (negligence and causation) for Respondents' medical negligence claims under the FTCA, but reserves the issues of the nature and extent of damages. *Id.*

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[6] Petitioners obtained separate counsel to ensure that their interests would be represented separately from those of their co-defendant, the United States. The United States has continued to support Petitioners as an *amicus* in the court of appeals and in this Court.

When it ruled on the appeal, the Ninth Circuit panel (Reinhardt, Berzon, and Milan Smith, JJ.) affirmed the denial of immunity, although on a different rationale from the district court's. The court of appeals believed that under *Carlson v. Green*, 446 U.S. 14 (1980), *Bivens* claims are not displaced by § 233(a) because the remedies provided against the United States under the FTCA and the remedies provided by *Bivens* claims are not "equally effective," Pet. App. 13a-18a, and because § 233(a) purportedly does "not explicitly declare § 233(a) to be a substitute for a *Bivens* action," Pet. App. 19a. With respect to the latter point, the Ninth Circuit appeared to treat the absence of words such as "*Bivens*" or "constitutional claims" in § 233(a) as dispositive, notwithstanding Congress's categorical command that the FTCA provides the "exclusive" remedy for claims arising out of medical or related activities by PHS officials. *See id.* The Court also reasoned that because § 233(a) was enacted shortly before *Bivens* was decided, the statute could not bar *Bivens* claims. *Id.*

The Ninth Circuit sought to explain away language in *Carlson* that expressly recognizes § 233(a) as a provision that supplants *Bivens*. *Carlson* emphasized "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) … (malpractice by certain Government health personnel)." 446 U.S. at 20. The Ninth Circuit seized on the parenthetical reference to "malpractice" in that quotation to conclude that *Carlson* viewed § 233(a) as precluding only state law

malpractice claims against PHS employees, not *Bivens* claims. Pet. App. 35a.

The court of appeals also pointed to the original caption of § 233 ("Defense of Certain Malpractice and Negligence Suits") and legislative history indicating congressional concern about the potential "malpractice" liability faced by PHS employees as narrowing the scope of the statute. Pet. App. 22a-23a. And the court engaged in an extensive review of the legislative history of the later-enacted Westfall Act (which the court of appeals referred to as the LRTCA), from which it inferred that Congress wanted all federal employees to enjoy exactly the same level of immunity, even though the Westfall Act has an express constitutional tort exception that is absent from § 233(a). Pet. App. 24a-28a. The court conceded that its decision conflicted with the Second Circuit's *Cuoco* decision, but dismissed *Cuoco* as incorrect. Pet. App. 35a-37a.

Finally, the Ninth Circuit considered whether there are "special factors" precluding *Bivens* claims here. Although the court suggested this argument was not raised in the district court, Pet. App. 37a-38a, it addressed the argument on the merits and concluded that *Carlson*'s rejection of special factors requires the same result here, and also that the existence of an alternative FTCA remedy could not be a special factor because it is non-uniform, Pet. App. 38a-39a. A petition for rehearing *en banc* was denied. Pet. App. 82a.

The PHS defendants sought certiorari review in this case and in a separate petition in No. 08-1547,

supported by the United States as *amicus curiae*. The Court granted the petitions and consolidated the cases for oral argument. Thereafter, two of the petitioners in this case and the sole petitioner in No. 08-1547 were voluntarily dismissed by stipulation. Cmdr. Gonsalves and Dr. Hui remain as Petitioners before the Court.

SUMMARY OF ARGUMENT

No one questions that Respondents should have a legal remedy for the PHS's failure to diagnose and treat Mr. Castaneda's cancer. And they do have one. The United States has admitted liability under the FTCA. The question presented here is whether, in addition, an implied cause of action under *Bivens* may go forward against individual PHS officers and employees in their personal capacities. Congress has answered that question clearly and unambiguously by prohibiting all such personal liability suits in this context.

By its plain terms, 42 U.S.C. § 233(a) bars every private action against PHS personnel for injury or death resulting from the performance of medical or related functions in the scope of their employment. Within that sphere, § 233(a) makes the FTCA remedy against the United States "exclusive of any other civil action or proceeding by reason of the same subject-matter against the officer or employee." A *Bivens* claim is indisputably "any other civil action" and is therefore prohibited. It would be hard to find clearer language in the U.S. Code.

Ignoring the plain statutory text, the Ninth Circuit conjured up a constitutional tort exception to

§ 233(a) through a kind of interpretative alchemy, making use of legislative history and other extratextual matter. Given § 233(a)'s unequivocal command, that entire enterprise was impermissible. But it also fails on its own terms. The scant legislative history shows that § 233(a) was enacted because the threat of personal liability was undermining recruitment and retention of qualified PHS personnel, a rationale that applies with full force to bar *Bivens* liability. In addition, references to "malpractice" in floor statements and the section's caption are entirely consistent with a broad immunity that has no exception for constitutional torts. Nor does the fact that § 233(a) was enacted shortly before *Bivens* was decided mean that the statute's immunity language does not cover *Bivens* claims. Congress's directive to the courts to bar "any other civil action" plainly prohibits courts from creating new causes of action as well as allowing old ones.

The absence of any constitutional tort exception to § 233(a)'s immunity is confirmed by Congress's express inclusion of such an exception to the separate immunity provided in the later-enacted Westfall Act. Congress could have amended § 233(a) to add such an exception when it passed the Westfall Act, but it did not do so – even though it has amended § 233 nearly a dozen times before and after. Contrary to the district court's reasoning, § 233(a) does not "incorporate" the Westfall exception. Nor, as the Ninth Circuit believed, does the Westfall Act's legislative history suggest that Congress intended to strip PHS personnel of the heightened immunity

that § 233(a) plainly provides. The simple fact is that the Westfall Act has a constitutional claim exception and § 233(a) does not. That demonstrates that Congress intended PHS personnel to have a protection from liability that most other federal employees do not have.

The plain language of § 233(a) should have ended this case long ago, because this Court's *Bivens* decisions establish that an exclusive remedy statute must be enforced according to its terms. The Ninth Circuit's contrary conclusion was based on dictum from this Court's decades-old decision in *Carlson v. Green*, 446 U.S. 14 (1980). The court of appeals read *Carlson* to require Congress to jump over particularly high hurdles before it may preclude a *Bivens* claim. That reading cannot be correct given that *Carlson* cites § 233(a) as a prime example of a statute that makes the FTCA remedy exclusive. More fundamentally, in *Carlson* and later cases this Court has made abundantly clear that Congress is entitled to great deference in this area and need not use any magic words to preclude *Bivens* claims or mention such claims explicitly. Indeed, the Court has repeatedly ruled that Congress may bar *Bivens* claims simply by creating an alternative remedy with the intent that it be exclusive. *A fortiori*, Congress may achieve that result when it says outright that an alternative remedy is exclusive, as it has in § 233(a).

Because Congress made an alternative remedy exclusive, that intent governs, regardless whether the alternative remedy is "equally effective" as *Bivens*. The "equally effective" inquiry is a tool for

discerning legislative intent when Congress is silent, not for trumping that intent when Congress has spoken. Accordingly, this Court has made clear time and again that Congress may displace *Bivens* with a remedy that is not "equally effective."

The deference due to Congress in this area is further underscored by the Court's "special factors" cases. Those cases indicate that even where Congress has not created an alternative remedy, the legislature's paramount remedial competence may require the judiciary to stay its hand before creating a common law constitutional remedy. The deference due to Congress's determination of which remedies should be available for any alleged wrong is at its zenith in a situation like one, where Congress has expressly stated that one remedy is exclusive and any other remedy is barred.

Finally, here the alternative remedy provided by Congress is substantial – even if not equally effective as *Bivens*. The FTCA provides a remedy against the United States for deficient PHS medical care, even when that care is merely negligent under state law tort standards. And though it is true that the FTCA does not provide *additional* relief for a constitutional violation as such, this Court has clearly stated that there need not be a separate constitutional remedy, above and beyond the relief for a non-constitutional wrong, in order for relief to be adequate. Moreover, Respondents here may be eligible under the FTCA and California malpractice law to receive enhanced damages against the United States if they can in fact demonstrate a level of fault beyond negligence. In any event, a medical malpractice remedy against the

United States is a robust one that is clearly adequate.

ARGUMENT

I. The Plain Language of § 233(a) Bars Respondents' *Bivens* Claims Against Petitioners.

A. The Text of § 233(a) Makes the FTCA the Exclusive Remedy Available to Respondents.

"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). Section 233(a) provides that:

> The remedy against the United States provided by sections 1346(b) and 2672 of Title 28 [*i.e.*, the FTCA] … for damage for personal injury, including death, resulting from the performance of medical … or related functions … by any commissioned officer or employee of the Public Health Service 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 plain terms, this provision grants complete immunity to PHS officers and employees acting within the scope of their employment from any action claiming damages due

to personal injury or death resulting from medical or related functions.

That immunity encompasses the *Bivens* claims asserted against Petitioners here. Petitioners – a commissioned PHS officer and a civilian PHS employee – were indisputably "acting within the scope of [their] office or employment." And the claims against them clearly allege "personal injury [and] death, resulting from the performance of medical … or related functions." Under the plain language of § 233(a), Respondents' FTCA remedy against the United States is exclusive, and they may not assert "any other" claims against Petitioners "by reason of the same subject-matter."

This language is so plain as not to require further elaboration. Nonetheless, the breadth of the immunity afforded by § 233(a) is emphasized by multiple elements of the statute. The section provides that an FTCA claim against the United States is (1) "exclusive of" (2) "any" (3) "other civil action … by reason of the same subject-matter." Each of these elements underscores that § 233(a) precludes all claims for actions falling within the scope of the statute, including *Bivens* claims.

First, in declaring that an FTCA action against the United States is "exclusive," Congress employed a broad term that rules out implied limitations or exceptions. *See Mississippi v. Louisiana*, 506 U.S. 73, 77-78 (1992) ("[T]he description of our jurisdiction as 'exclusive' necessarily denies jurisdiction of such cases to any other federal court. This follows from the plain meaning of 'exclusive'");

City of Vicksburg v. Vicksburg Waterworks Co., 202 U.S. 453, 470-71 (1906) ("The term 'exclusive' is so plain that little additional light can be gained by resort to the lexicons. If we turn to the Century dictionary we find it defined to mean 'Appertaining to the subject alone; not including, admitting, or pertaining to any other or others; undivided; sole: as, an exclusive right or privilege; exclusive jurisdiction.'"); *Fitzgerald v. Barnstable Sch. Comm.*, 129 S. Ct. 788, 795 (2009) (Congress's intent to make a remedy exclusive bars other remedies, such as 42 U.S.C. § 1983).

Second, the statute uses the word "any" to introduce the category of actions precluded by Congress. "Read naturally, the word 'any' has an expansive meaning, that is, 'one or some indiscriminately of whatever kind.'" *United States v. Gonzales,* 520 U.S. 1, 5 (1997) (quoting *Webster's Third New International Dictionary* 97 (1976)); *see also, e.g.*, *Harrison v. PPG Industries, Inc.*, 446 U.S. 578, 588-89 (1980) (refusing to limit scope of "any other final action" in construing Clean Air Act); *Salinas v. United States*, 522 U.S. 52, 57 (1997) ("the word 'any' … undercuts the attempt to impose [a] narrowing construction"). Indeed, this Court recently recognized in construing a different provision of the FTCA that "Congress could not have chosen a more all-encompassing phrase than 'any other law enforcement officer'" to express its intent to cover all officers "without limitation." *Ali v. Fed. Bureau of Prisons*, 552 U.S. 214, 221 (2008).

Third, the text makes clear that the precluded actions need not be similar to the FTCA tort remedy

against the United States that § 233(a) permits. The term "other" indicates that the immunity covers something that is "different" or distinct. *American Heritage Dictionary* 1246 (4th ed. 2000). To fall within the immunity granted by § 233(a), an "other" action need only arise "by reason of the same subject-matter" – a reference to the operative facts of a lawsuit, not the theory of liability or cause of action. *See United Mine Workers of Am. v. Gibbs*, 383 U.S. 715, 725 (1966).

In this respect, the immunity provided by § 233(a) has the same breadth as the FTCA's "Judgment as bar" provision, which states that a judgment against the United States on an FTCA claim "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. Consistent with the plain language of that section, the courts of appeals have uniformly concluded that § 2676 precludes a *Bivens* claim against a government employee when a judgment has been entered on a FTCA claim "arising out of the same actions, transactions, or occurrences." *Estate of Trentadue ex rel. Aguilar v. United States*, 397 F.3d 840, 858 (10th Cir. 2005).[7]

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[7] *See also, e.g.*, *Serra v. Pichardo*, 786 F.2d 237, 241 (6th Cir. 1986); *Manning v. United States*, 546 F.3d 430, 433 (7th Cir. 2008), *cert. denied*, 2009 WL 1849812 (U.S. Nov. 9, 2009); *Rodriguez v. Handy*, 873 F.2d 814, 816 (5th Cir. 1989); *Arevalo v. Woods*, 811 F.2d 487, 489-90 (9th Cir. 1987).

The same is true under § 233(a). The phrase "any other civil action or proceeding by reason of the same subject-matter" encompasses a claim of whatever kind, whether constitutional or otherwise. Congress has forbidden all such claims against individual PHS officers and employees where the factual basis of the suit fits within the ambit of § 233(a). In such circumstances, an FTCA claim against the United States is the "exclusive" avenue of recovery.

B. The Purpose and History of § 233(a) Are Consistent with Its Unambiguous Language.

Because the text of § 233(a) "is plain and unambiguous," the statute must be applied "according to its terms." *Carcieri v. Salazar*, 129 S. Ct. 1058, 1063-64 (2009); *see also*, *e.g.*, *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992) ("[C]ourts must presume that a legislature says in a statute what it means and means in a statute what it says there …. When the words of a statute are unambiguous, then, this first canon is also the last: the judicial inquiry is complete") (internal quotation marks omitted). Resort to extratextual interpretative clues is therefore inappropriate here. But even were that not so, the purpose and history of § 233(a) confirm that Congress meant what it said, and intended to bar any claim – including a *Bivens* claim – against PHS personnel in these circumstances.

Congress passed the Emergency Health Personnel Act of 1970 to "alleviate some of the more acute problems arising out of critical shortages of

physicians and other health personnel in certain areas of the United States." H.R. Rep. No. 91-1662, at 2 (1970), *as reprinted in* 1970 U.S.C.C.A.N. 5775, 5776. The House of Representatives added § 233 to the bill at the direct request of the Surgeon General, in order to protect PHS personnel who, in light of their low salaries, could not afford the cost of liability insurance. *See* 116 Cong. Rec. 42,543 (1970) (Statement of Rep. Staggers, House sponsor); *id.* at 42,977 (Sen. Javits) (PHS workers "just could not afford to take out the customary liability insurance"). Congress viewed that immunity from personal liability as a part of the critical effort to "deliver[] health care to areas in dire need of health manpower." *Id.*; *see also Cuoco*, 222 F.3d at 108 (explaining that immunity under § 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"). The statutory purpose of barring personal liability against PHS employees to improve their recruitment applies with full force to all forms of personal liability, including claims under *Bivens*.

In reaching the opposite conclusion, the Ninth Circuit focused on references in the floor debate to "malpractice" liability, and inferred from those that the outer limit of § 233(a)'s immunity is defined by "malpractice" and that immunity for such torts is, in turn, limited to so-called "ordinary medical malpractice actions" or professional negligence. Pet. App. 70a-72a. That is wrong on several counts. Even if "malpractice" was the form of liability

foremost on legislators' minds, that by no means limits the scope of the immunity they enacted. *See Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 79 (1998) ("statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed"); *accord H.J. Inc. v. Nw. Bell Tel. Co.*, 492 U.S. 229, 248 (1989). The overarching purpose of § 233(a) is consistent with immunizing PHS personnel from *any* form of personal liability for injury or death resulting from medical or related functions – and that broad immunity is what Congress actually enacted.

Moreover, even if the scope of the immunity conferred by § 233(a) were limited to "malpractice" – which it plainly is not – it would still cover *Bivens* claims arising from injury or death caused by medical or related functions. While every instance of malpractice does not rise to the level of deliberate indifference under the Constitution, acts of deliberate indifference by medical personnel do constitute malpractice – a term that (in 1970, as today) simply means conduct that amounts to "a dereliction from professional duty, whether intentional, criminal, or merely negligent, by one rendering professional services that result in injury." *Webster's Third New International Dictionary* 1368 (1961); *see also, e.g.*, *Farmer v. Brennan*, 511 U.S. 825, 835-37 (1994) (defining deliberate indifference as "something more than mere negligence" but "something less than acts or omissions for the very purpose of causing harm or with the knowledge that

harm will result," and equating it with "recklessness," where "a person disregards a risk of harm of which he is aware"); *Univ. Med. Ctr., Inc. v. Beglin*, No. 2007-CA-00018-MR, 2009 WL 102800, at *4-*5 (Ky. Ct. App. Jan. 16, 2009) (affirming damages for malpractice claim because of hospital's "indifference to or a reckless disregard of the health and safety of others"); *Graham v. Columbia-Presbyterian Med. Ctr.*, 588 N.Y.S.2d 2, 3 (App. Div. 1992) (allowing damages claim based on allegation that doctor's malpractice was "wanton, intentional, reckless and a departure from accepted medical practice") (internal quotation marks omitted).

The Ninth Circuit's narrow reading of § 233(a) as limited to malpractice actions likewise relied on the caption of § 233, "defense of certain malpractice and negligence suits." 84 Stat. at 1870; *see* Pet. App. 69a-70a n.12.[8] Of course, the broad scope of the immunity in § 233(a) is plain, and the caption, which does no more than "indicate the provision[] in a most general manner," cannot narrow that scope. *Bhd. of R.R. Trainmen v. Baltimore & Ohio R.R. Co.*, 331 U.S. 519, 528-29 (1947); *accord Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241, 256 (2004) ("the caption of a statute … cannot undo or

[8] In Title 42 of the U.S. Code, where the statute is codified, § 233 is titled "Civil actions or proceedings against commissioned officers or employees," and § 233(a) is captioned "Exclusiveness of remedy." But Title 42 has not been enacted into positive law, so this language is not operative. *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).

limit that which the [statute's] text makes plain") (internal quotation marks omitted); *Whitman v. Am. Trucking Ass'ns,* 531 U.S. 457, 482-83 (2001). But, in addition, the Ninth Circuit was mistaken in believing that the provision's caption is inconsistent with its plain language. As explained above, "malpractice" can encompass deliberate indifference in providing or withholding medical care. Indeed, if "malpractice" were necessarily synonymous with professional negligence, then the word "negligence" in the original caption of § 233, preceded by the disjunctive "or," would be entirely superfluous.

It is also significant that the caption of § 233 refers to the "*defense* of certain malpractice and negligence suits." Even under the narrowest meaning of "malpractice," that term describes the exclusive remedy that the Attorney General actually *defends* under § 233 – without narrowing the broader scope of the immunity for PHS personnel. If a PHS officer's or employee's absolute immunity attaches under § 233(a), then the suit is "deemed a tort action against the United States" under the FTCA. 42 U.S.C. § 233(b), (c). The United States "defend[s]" that FTCA suit. *Id.* § 233(b). The only question at that stage is whether the United States is liable under state law tort standards that apply to private persons. 28 U.S.C. § 1346(b); *see also FDIC v. Meyer*, 510 U.S. 471, 477 (1994). Thus, the claims the United States will ultimately have to "defend" under § 233(a) will be state law claims of malpractice or negligence. To the extent the title of the statute could possibly be read as a limitation, it would describe a limit on the plaintiff's exclusive FTCA

remedy, and not a limit on the immunity § 233(a) affords to individual PHS officers.

Nor can a limitation be read into the § 233(a) immunity based on the fact that the statute was enacted six months before *Bivens* itself was decided. *Contra* Pet. App. 19a. Section 233(a) speaks in categorical terms, providing immunity for "any" claim against PHS personnel by reason of the specified subject matter. The immunity is not limited to causes of action "heretofore existing" or "of which Congress is aware," and there is no warrant for reading such limitations into the statutory text. *See, e.g.*, *Bates v. United States*, 522 U.S. 23, 29 (1997) (stating that this Court "ordinarily resist[s] reading words or elements into a statute that do not appear on its face"). Congress's objective of improving recruitment and retention of PHS professionals by shielding them from personal liability applies with full force to all forms of liability, whether or not Congress was aware of the basis of liability or it existed when § 233(a) was enacted. Indeed, it is hard to fathom how Congress could have intended to exclude *Bivens* claims from the scope of the § 233(a) immunity *sub silentio* if Congress was entirely unaware of the possibility of such liability. Regardless, whether Congress was aware of the concept of constitutional torts or not, § 233(a) contains no such limitation. *See TVA v. Hill*, 437 U.S. 153, 185 (1978) ("It is not for us to speculate, much less act, on whether Congress would have altered its stance had the specific events of this

case been anticipated").[9] By making the FTCA remedy "exclusive" and barring "any other civil action," Congress plainly prohibited courts from inferring new remedies in this area, as well as enforcing old ones.

That the timing of § 233(a)'s enactment relative to the *Bivens* decision is irrelevant to the statute's meaning is further confirmed by the passage five years later of the Gonzalez Act, Pub. L. No. 94-464, § 1(a), 90 Stat. 1985 (1976). The Gonzalez Act makes an FTCA action against the United States "exclusive of any other civil action or proceeding by reason of the same subject matter" brought against medical personnel in the armed forces and based on a "negligent or wrongful act or omission." 10 U.S.C. § 1089. Congress borrowed the key exclusionary language of the Gonzalez Act directly from the text of § 233(a). *See* S. Rep. No. 94-1264, at 8 (1976), *as reprinted in* 1976 U.S.C.C.A.N. 4443, 4450 ("legislation having a comparable effect presently exists for … medical personnel of the … Public Health Service"). Despite the intervening decision in *Bivens*, Congress did not include a *Bivens* exception in the Gonzalez Act – let alone amend § 233 to add

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[9] Congress had reason to be aware. Long before *Bivens*, the Court noted that federal employees were subject to injunctive relief for constitutional violations, and stated that whether damages were likewise recoverable was an issue with "sufficient merit to warrant exercise of federal jurisdiction for purposes of adjudicating it." *Bell v. Hood*, 327 U.S. 678, 684 (1946); *see also Jacobs v. United States*, 290 U.S. 13, 16 (1933) (implying a private right of action for damages against United States for constitutional violation and stating that "[s]tatutory recognition was not necessary").

one, even though it contemplated that provision anew.[10] Rather, Congress expressed its intent that the protection of the Gonzalez Act – and its language identical to that of § 233(a) – "cover all potential liability." *Id.* at 2, *as reprinted in* 1976 U.S.C.C.A.N. at 4444. There is thus absolutely no reason to believe that if Congress had only known about *Bivens* it would have written § 233(a) more narrowly. In both statutes, Congress expressed special solicitude for federal medical workers – who are acutely necessary and acutely vulnerable to suit – and shielded them from all claims, whether common law, statutory, or constitutional.[11]

C. The Express Constitutional Claim Exception in the Westfall Act Confirms That No Such Exception Exists in § 233(a).

The Westfall Act, the name commonly used to refer to 28 U.S.C. § 2679(b), further confirms that if Congress had intended the immunity created by

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[10] Notably, Congress has amended § 233 in various ways on numerous occasions since *Bivens* was decided, but has never at any time suggested the existence of a *Bivens* exception to the § 233(a) immunity. *See, e.g.*, Pub. L. No. 102-501, §§ 2 to 4, 106 Stat. 3268, 3268-71 (1992); Pub. L. No. 104-191, Title I, § 194, 110 Stat. 1936, 1988 (1996); Pub. L. No. 107-296, Title III, § 304(c), 116 Stat. 2135, 2165 (2002).

[11] Congress has also accorded analogous protections to other groups. *See, e.g.*, 22 U.S.C. § 2702 (medical or supporting personnel of the Department of State); 38 U.S.C. § 7316 (health care employees of the Department of Veterans Affairs); 42 U.S.C. § 2458a (medical or supporting personnel of NASA); 42 U.S.C. § 5055 (medical or supporting personnel acting as volunteers in various domestic volunteer services programs).

§ 233(a) to have an exception for *Bivens* claims, it would have said so expressly. The Westfall Act was enacted in 1988 to override this Court's decision in *Westfall v. Erwin*, 484 U.S. 292 (1988), which held that federal employees' judge-made absolute immunity to state law tort claims applied in only limited circumstances. *See* H.R. Rep. No. 100-700, at 2 (1988), *as reprinted in* 1988 U.S.C.C.A.N. 5945, 5946. In paragraph (1) of the Westfall Act, Congress provided that the FTCA remedy against the United States for an injury "arising or resulting from [a] negligent or wrongful act or omission" by a federal employee 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." 28 U.S.C. § 2679(b)(1). But Congress then went on in paragraph (2) of the Westfall Act to expressly except *Bivens* claims from the immunity created by paragraph (1). *Id.* § 2679(b)(2) ("Paragraph (1) does not extend or apply to a civil action against an employee of the Government … which is brought for a violation of the Constitution of the United States").

Given the inclusion of an express exception for *Bivens* claims in the Westfall Act, but not in § 233(a), no constitutional tort exception can be read into the latter statute. As this Court has previously observed, when Congress passed the Westfall Act it "clearly was aware of" statutes, including § 233(a), providing special statutory immunity to certain federal employees. *United States v. Smith*, 499 U.S. 160, 173 (1991) (citing H.R. Rep. No. 100-700, at 4). Thus, Congress could have and would have amended

§ 233(a) at that time to include a similar express exception for *Bivens* had it intended such an exception. But Congress pointedly chose to leave § 233(a) untouched. "[W]hen the legislature uses certain language in one part of the statute and different language in another, the court assumes different meanings were intended." *Sosa v. Alvarez Machain*, 542 U.S. 692, 711 n.9 (2004) (internal quotation marks omitted). Congress made it clear that in the absence of an express exemption, constitutional claims fall within the scope of the phrase "any other civil action or proceeding … by reason of the same subject matter" – a phrase that appears in both § 233(a) and the Westfall Act. The courts below erred by reading into § 233(a) the very limitation that Congress declined to adopt.

Section 233(a) and the Westfall Act afford PHS officers and employees two separate immunities from suit, which overlap but are not coextensive. *See Smith*, 499 U.S. at 170-73 (holding that federal employees covered by a specific immunity statute such as § 233(a) are afforded protection *both* by that statute and by the Westfall Act). Section 233(a) provides PHS personnel with immunity from any form of liability for specified subject matter, namely personal injury or death resulting from the performance of medical or related functions in the scope of their employment. In contrast, the Westfall Act gives all federal employees, including PHS personnel, immunity for any kind of function within the scope of their employment, but excepts some particular forms of liability, namely liability based on constitutional or certain statutory claims. *See* 28

U.S.C. § 2679(b)(1), (2). Thus, by enacting and not repealing § 233(a), Congress has chosen to give Public Health officers an extra layer of protection from suit as compared to most other federal employees. *See also supra* at 33-34 & note 11 (citing similar statutes for certain other federal employees).

The district court, asserting that it was following the "statutory trail," Pet. App. 59a, concluded that § 233(a) actually "incorporates the provision of the FTCA which explicitly preserves a plaintiff's right to bring a *Bivens* action," *i.e.*, the Westfall Act exception. Pet. App. 61a. The court reached that surprising conclusion by observing that § 233(a) includes a cross-reference to 28 U.S.C. § 1346(b), which allows FTCA claims against the United States "[s]ubject to the provisions of chapter 171 of this Title." And chapter 171 includes 28 U.S.C. § 2679(b), the Westfall Act. The district court therefore concluded that the constitutional tort exception of paragraph (2) of the Westfall Act applies not just to the immunity created by paragraph (1) of the same Act, but also to the immunity created by § 233(a).[12]

That is a patent misreading of the statutory language. Section 233(a) refers to the FTCA only in describing the scope of a plaintiff's remedy against the United States – not in describing the scope of the immunity afforded to PHS employees. 42 U.S.C. § 233(a) (stating that "[t]he remedy against the United States provided by sections 1346(b) and 2672 of title 28 … shall be exclusive"). The "statutory

[12] The Ninth Circuit declined to address this reasoning by the district court. Pet. App. 40a.

trail" thus simply fails to connect the Westfall Act exception to the language of § 233(a) conferring immunity on individual officers, much less to explicitly carve out *Bivens* claims from the protection those officers are afforded. Moreover, the exception in the Westfall Act, by its own terms, applies *only* to the specific immunity set forth in "Paragraph (1)" of the Westfall Act itself. 28 U.S.C. § 2679(b)(2)(A). It says nothing about the reach of the preexisting grant of immunity set forth in § 233(a), which has different language and a different scope.

Pointing to *United States v. Smith*, Respondents have contended that because the Westfall Act applies to all federal employees, it effectively nullifies the earlier-enacted § 233(a). Pet. Opp. 30-31. But this strained reading of *Smith* bears no resemblance to what the Court actually said in that case. *Smith* held that the FTCA provides statutory immunity for all federal employees acting in the scope of their employment, but explained that this did not constitute an implied repeal of preexisting immunity statutes because the FTCA simply "*add[ed]* to what Congress created" in the earlier statute. *Smith*, 499 U.S. at 172. Nothing in the text of the Westfall Act or this Court's decision in *Smith* suggests that the Act implicitly repealed or subtracted from the special protections previously afforded to certain specific classes of federal employees, such as PHS personnel. *See id.* at 170-73; *cf. Wyeth v. Levine*, 129 S. Ct. 1187, 1202 (2009) (concluding that consumer-safety statute served as a floor but not a ceiling preempting more protective state laws).

Indeed, reading the Westfall Act in that way would contravene the rule that "repeals by implication are not favored and will not be presumed unless the intention of the legislature to repeal [is] clear and manifest." *Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 662 (2007) (internal quotation marks omitted); *see also Morton v. Mancari*, 417 U.S. 535, 550 (1974). That rule has particular force where, as here, the earlier statute is more specific and targeted than the later-enacted one. In such circumstances, "'a statute dealing with a narrow, precise, and specific subject is not submerged by a later enacted statute covering a more generalized spectrum.'" *Nat'l Ass'n of Home Builders*, 551 U.S. at 663 (quoting *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 153, (1976)); *see also Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 170 (2007).

In a variation on the theme of reading the Westfall Act exception into § 233(a), the Ninth Circuit treated the legislative history of the Westfall Act as indirect evidence that § 233(a) itself contains a similar exception (even though it does not say so). It should be clear at the outset that such reasoning is doomed to fail, regardless of what the Westfall Act's legislative history actually says. The Westfall Act includes an express constitutional tort exception, whereas § 233(a) does not. Therefore, there is no such exception to the § 233(a) immunity. Given that textual reality, statements in the legislative history of the later-enacted statute have little (if any) relevance for the meaning of the earlier one. *See Jones v. United States*, 526 U.S. 227, 238 (1999)

("subsequent legislative history is a hazardous basis for inferring the intent of an earlier Congress") (internal quotation marks omitted); *see also Pension Benefit Guaranty Corp. v. LTV Corp.*, 496 U.S. 633, 650 (1990); *Sullivan v. Finkelstein*, 496 U.S. 617, 632 (1990) (Scalia, J., concurring) ("Arguments based on subsequent legislative history … should not be taken seriously, not even in a footnote").

Even if it were entitled to any weight, the Westfall Act's legislative history does not support the Ninth Circuit's reading of § 233(a). The court pointed to generalized statements to the effect that the Westfall Act immunity was intended to be similar to the various more specific statutory grants of immunity that already existed. Pet. App. 26a-28a. But that by no means implies that Congress considered § 233(a) and the Westfall Act to be exactly coextensive, even though the Westfall Act has an express exception permitting *Bivens* claims and § 233(a) does not. Rather, Congress's purpose in enacting the Westfall Act was restore the status quo ante that existed prior to this Court's *Westfall* decision – a state of affairs in which PHS personnel enjoyed a special immunity that most other federal employees did not.

Before the *Westfall* decision, most federal employees were protected only by the judicially created immunity doctrines articulated in *Barr v. Matteo*, 360 U.S. 564 (1959), which was understood as providing absolute immunity from state law tort claims, and *Butz v. Economou*, 438 U.S. 478 (1978), which provided qualified immunity from constitutional claims. Only certain specific groups of

federal employees, including PHS officers and employees, were afforded complete immunity by statute. *See Smith*, 499 U.S. at 170 n.11. Then, in *Westfall*, the Court held that *Barr*'s absolute immunity to state law tort claims extended only to federal employees performing discretionary functions. 484 U.S. at 299. The manifest intent of Congress in the Westfall Act was to undo that decision. H.R. Rep. No. 100-700, at 2, *as reprinted in* 1988 U.S.C.C.A.N. at 5946. Thus, Congress restored federal employees' absolute immunity from state law claims, but did not extend that immunity to preclude constitutional tort claims. After all, under *Butz*, most federal employees had previously enjoyed only qualified immunity to constitutional tort claims, not absolute immunity. But there is no indication that in restoring the prior state of affairs, Congress intended to level all other preexisting statutory immunities to the extent they were broader than the immunity provided by the Westfall Act itself. Indeed, the House Report declared that the Westfall Act would not "expand or diminish rights established under other Federal statutes." H.R. Rep. No. 100-700, at 7, *as reprinted in* 1988 U.S.C.C.A.N. at 5951.

In short, both before and after the Westfall Act, Congress provided Public Health Service officers and employees with an additional statutory immunity that does not extend to the bulk of the federal workforce. The Ninth Circuit viewed that distinction as "arbitrary," Pet. App. 34a, but Congress certainly did not think it was an arbitrary distinction when it enacted § 233(a) in 1970, or declined to amend that provision in a limiting fashion in later years.

Congress can always revise its judgment in the future. But it is not the role of the courts to enact a judicial repeal based on a policy disagreement with Congress's decision to "immuniz[e] one set of doctors … and leav[e] the rest on the hook." Pet. App. 34a.

II. The Court's *Bivens* Jurisprudence Requires Adherence To The Plain Language of § 233(a).

As demonstrated in Part I, in § 233(a) Congress expressly and unambiguously barred *Bivens* claims against Petitioners and declared that FTCA claims against the United States are the sole and exclusive remedy available here. This Court's decisions require adherence to that congressional command. First, the Court has consistently recognized that *Bivens* claims may not proceed where Congress has expressly declared another remedy to be exclusive. Second, such an express congressional declaration must be given effect, whether or not a court deems the alternative statutory remedy to be "equally effective" as a judicially created *Bivens* action. Third, the Court's "special factors" cases drive home that Congress, not the judiciary, has the primary competence to determine the kind of remedy that is most appropriate for any alleged wrong. Fourth, though not equivalent to a *Bivens* remedy against individual PHS personnel, the alternative FTCA remedy mandated by Congress provides robust relief, which obviates any need to decide the question whether Congress could foreclose *all* relief for an alleged constitutional violation in this context.

A. Congress May Bar *Bivens* Actions by Declaring Another Remedy Exclusive.

For as long as the *Bivens* doctrine has existed, this Court has recognized that the availability of a *Bivens* remedy is first and foremost a question of Congress's intent. As Justice Stevens explained for a unanimous Court more than 25 years ago, when Congress "provides an alternative remedy" and has "indicated its intent" that the remedy be exclusive, "the Court's power [to create a *Bivens* remedy] should not be exercised." *Bush v. Lucas*, 462 U.S. 367, 378 (1983); *see also Wilkie v Robbins*, 551 U.S. 537, 554 (2007) (describing threshold inquiry as whether "Congress expected the Judiciary to stay its *Bivens* hand"). Thus, the Court has consistently recognized that a *Bivens* action will be foreclosed by an "explicit congressional declaration that persons injured by a federal officer's violation of the [Constitution] may not recover money damages from the [officer], but must instead be remitted to another remedy." *Bivens v. Six Unknown Named Agents*, 403 U.S. 388, 397 (1971); *see also*, *e.g.*, *Bush*, 462 U.S at 373 (recognizing that Congress may "expressly preclude[] the creation of [a *Bivens*] remedy by declaring that existing statutes provide the exclusive mode of redress"); *Schweiker v. Chilicky*, 487 U.S. 412, 421 (1988) (emphasizing that *Bivens* claims have been allowed only where there was "no explicit statutory prohibition against the relief sought, and no exclusive statutory alternative remedy").

Although this congressional power has consistently been recognized, in no prior *Bivens* case

has this Court been met with any kind of express congressional declaration that another remedy is exclusive. Thus, until now, the Court has always had to decide whether to exercise its "power to grant relief that is not expressly authorized by statute," mindful "that such power is to be exercised in the light of relevant policy determinations made by the Congress," *Bush*, 462 U.S. at 373, but without the guidance of an express declaration by Congress.

By these lights, § 233(a) presents an easier case than any other *Bivens* question this Court has previously considered, because Congress has expressly and unambiguously declared the FTCA remedy "exclusive" and barred "any other civil action" against the federal officers "by reason of the same subject-matter." Congress has spoken directly to the issue, and there is nothing more for the courts to do but enforce Congress's determination.

Yet, astonishingly, the Ninth Circuit found Congress's express statement not to be express enough. It focused on a stray dictum from this Court's nearly 30-year-old decision in *Carlson v. Green*, 446 U.S. 14 (1980), asking whether Congress had "explicitly declared [the FTCA] to be a *substitute* for recovery directly under the Constitution." *Id.* at 18-19. The court of appeals seemed to believe that this formulation in *Carlson* permitted it to disregard the plain language of § 233(a), on the grounds that the statute does not specifically mention constitutional claims, was enacted before *Bivens* was decided, has legislative history indicating that some members of Congress were particularly concerned with "malpractice" liability, and resulted in a special

immunity for PHS personnel that the court found "arbitrary." Pet. App. 18a-35a.

As demonstrated in Part I, none of these considerations remotely undermines the plain language of § 233(a) that makes the FTCA remedy exclusive in this context, and neither *Carlson* nor any other *Bivens* case warrants departure from that plain statutory text. Indeed, *Carlson* took pains to emphasize that Congress did not need to "recite[] any specific 'magic words'" to bar *Bivens* actions. 446 U.S. at 19 n.5. In this sphere, as in others, the "policy determinations made by the Congress" are paramount. *Bush*, 462 U.S. at 373. That requires adherence to the plain meaning of an exclusive remedy statute.

Thus, *Carlson* does not and could not stand for the proposition that an exclusive remedy statute will bar *Bivens* claims only if the statute was enacted after *Bivens* and specifically refers to constitutional claims. There is no need, however, to surmise what the *Carlson* Court would have thought about § 233(a), because it expressly cited that section as an example of a statute that explicitly states an exclusive remedy, *in contrast to* the FTCA's general provisions. As the Court explained, its "conclusion" that "Congress views FTCA and *Bivens* as parallel, complementary causes of action" under the circumstances there was "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) … (malpractice by certain Government health personnel)." *Carlson*, 446 U.S. at 19. In short,

Carlson held up § 233(a) as a paragon of a statute that forecloses *Bivens* relief.[13] By declaring that the FTCA excludes all personal liability in this context, § 233(a) provides an explicit statement that the FTCA is a "substitute" for constitutional claims. It does not matter whether Congress specifically mentioned such claims, or even thought about them. It is enough that Congress expressly foreclosed "any other" claim, aside from the FTCA remedy.

Post-*Carlson* decisions drive the point home. In *Bush*, the Court emphasized that Congress can "expressly preclude[] the creation of [a *Bivens*] remedy by declaring that existing statutes provide the *exclusive* mode of redress." 462 U.S. at 373 (emphasis added); *id.* at 377-78 (observing that in *Carlson*, "there was no congressional determination foreclosing the damages claim and making the Federal Tort Claims Act exclusive"). Similarly, in *Schweiker*, the Court indicated that a *Bivens* action is permissible only when there is "no *exclusive* statutory alternative remedy." 487 U.S. at 421 (emphasis added). Section 233(a) is just such an exclusive remedy statute.

Indeed, post-*Carlson* cases have recognized that Congress may indicate its intent to provide an exclusive remedy without making any express

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[13] According to the Ninth Circuit, *Carlson*'s parenthetical reference to "malpractice" in connection with § 233(a) shows that *Carlson* regarded § 233(a) as precluding only medical malpractice claims. Pet. App. 35a-36a. That is a plain misreading of the passage in *Carlson*. In any event, "malpractice" also covers constitutional claims in this context. *See supra* at 28-32.

statement at all. For example, in *Bush*, handed down just three years after *Carlson*, the Court thought it "clear" that Congress may "indicate its intent [to make a remedy exclusive] by statutory language, by clear legislative history, or perhaps even by the statutory remedy itself." 462 U.S. at 378. And in *Wilkie*, the Court pointed to *Bush* and *Schweiker* as cases where Congress's intent to preclude *Bivens* remedies was clear from the mere fact that it had created "an elaborate remedial scheme" or had "chose[n] specific forms and levels of protection" through an alternative remedy. 551 U.S. at 554 (citing *Bush*, 462 U.S. at 388, and *Schweiker*, 487 U.S. at 426) (internal quotation marks omitted). If Congress can displace *Bivens* simply by enacting an alternative remedy, it can certainly do so by enacting an express statement that a remedy is "exclusive."

B. Congress May Bar *Bivens* Actions Through an Exclusive Remedy That Is Not "Equally Effective."

The Ninth Circuit also believed that § 233(a) does not bar *Bivens* claims because the exclusive FTCA remedy against the United States allowed by § 233(a) is not "equally effective" as a *Bivens* suit against individual federal employees. Pet. App. 10a. That was error because where, as here, Congress has expressly precluded *Bivens* actions in favor of an alternative remedy, Congress's command must be given effect whether or not the alternative remedy is "equally effective."

Here again, the Ninth Circuit derived its test from the language in *Carlson* stating that *Bivens* actions are precluded when "Congress has provided an alternative remedy which it explicitly declared to be a substitute for recovery directly under the Constitution *and viewed as equally effective*." *Carlson*, 446 U.S. at 18-19 (emphasis added); *see also Bivens*, 403 U.S. at 397; Pet. App. 10a. Notwithstanding that formulation, there is no "equally effective" test that an express exclusivity statute must satisfy before it will be given effect. As explained above, in this field Congress's policy judgments are paramount. Accordingly, this Court has held time and again that Congress may supplant *Bivens* with an alternative remedy that is *less* effective – even in the absence of an express exclusivity provision. *A fortiori*, courts must defer to Congress's expressly stated judgment to substitute a less effective remedy for *Bivens*.[14]

As previously observed, in *Carlson* there was no explicit statutory statement making the FTCA remedy exclusive. The Court has therefore recognized that the language in *Carlson* relied on by the court below (and similar language in *Bivens*) is "dictum." *United States v. Stanley*, 483 U.S. 669, 678-79 (1987). Despite its phrasing, that dictum cannot be understood as imposing a conjunctive two-pronged test for explicit exclusivity provisions, as the

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[14] As discussed below, the FTCA is clearly a substantial remedy, so this case does not present the question whether Congress could choose to bar all meaningful remedies for an alleged constitutional violation in this context. *See infra* at 54-57.

Ninth Circuit believed. Rather, *Carlson* was identifying two disjunctive means of discerning Congress's intent to supplant *Bivens* with another remedy, either of which is sufficient: either an express exclusivity statement, *or* the creation of an alternative remedy that Congress viewed as equally effective as *Bivens*. That much is clear from how *Carlson* described its own side-by-side comparison of the effectiveness of the two remedies: "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." 446 U.S. at 20-21 (emphasis added).

In other words, the "equally effective" inquiry is a means of ascertaining and effectuating Congress's intent – not overriding that intent. Where, as here, Congress has expressly declared a remedy to be exclusive, no further evidence of intent is needed. Not surprisingly, then, *Bush* made clear that the *Carlson* language should be read as a disjunctive test of congressional intent: "Congress has not resolved the question presented by this case by expressly denying petitioner the judicial remedy he seeks *or* by providing him with an equally effective substitute." 462 U.S. at 378 (emphasis added); *see also Carlson*, 446 U.S. at 27 (Powell, J., concurring in the judgment) ("The Court does implicitly acknowledge that Congress possesses the power to enact *adequate* alternative remedies that would be exclusive").

Since *Carlson*, this Court has emphasized that a *Bivens* remedy is not available every time "a federal right has been violated and Congress has provided a

less than complete remedy for the wrong." *Bush*, 462 U.S. at 373; *see also Schweiker*, 487 U.S. at 421-22 (recognizing that 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"). Accordingly, the Court has repeatedly found *Bivens* remedies precluded even where a statutory remedy was concededly not as effective as *Bivens*. For example, *Bush* denied a *Bivens* remedy, but recognized that the remedies provided by the civil service statutes and regulations "were not as effective as an individual damages remedy" and "did not fully compensate [the plaintiff] for the harm he suffered." *Id.* at 372; *see also Schweiker*, 487 U.S. at 425 (declining to imply a *Bivens* remedy despite finding that "Congress ha[d] failed to provide for 'complete relief'" to plaintiffs); *Wilkie*, 551 U.S. at 576 (recognizing that plaintiff's "piecemeal" remedy would not afford relief equivalent to *Bivens* action). Given that none of these cases involved a statute that expressly declared a remedy to be exclusive, it would make little to sense to say that Congress may preclude a *Bivens* remedy with a lesser one where it fails to state that the alternative remedy is exclusive, but not where it does make such a statement.[15]

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[15] The Ninth Circuit distinguished the holdings in *Schweiker* and *Bush* on the ground that "those subsequently examined schemes, however otherwise undercompensatory, nonetheless provided a uniform remedy across the United States." Pet. App. 18a. *Carlson* itself, however, readily conceded that Congress's remedy need not be "uniform" across the States where a "contrary congressional resolution" exists. 446 U.S. at 23.

In short, the "equally effective" analysis is, at most, a means of determining Congress's intent. It cannot be used to override an intent that, as here, is plainly stated in the statutory text.

C. The Court's "Special Factors" Cases Also Underscore the Deference Due to Congress.

The deference due to Congress in determining the remedies and relief available for any given injury is also emphasized by this Court's "special factors" decisions. When Congress's intent concerning the availability of a *Bivens* remedy is unclear, the Court looks to "special factors counseling hesitation before authorizing a new type of federal litigation." *Wilkie*, 551 U.S. at 550 (internal quotation marks omitted); *accord Schweiker*, 487 U.S. at 421; *Bush*, 462 U.S. at 378. In this context, the Court has frequently emphasized the need to "'respond[] cautiously to suggestions that *Bivens* remedies be extended into new contexts'" where it is unclear that Congress intended a judicially created remedy to be tacked on to the statutory one it created. *Meyer*, 510 U.S. at 484 (quoting *Schweiker*, 487 U.S. at 421).

Because Congress expressly made the FTCA remedy against the United States exclusive in the circumstances presented here, there is no need to consult such "special factors" in this case. Nonetheless, the Court's decisions addressing such special factors confirm that the exclusive remedy mandated in § 233(a) must be enforced according to its terms to bar *Bivens* claims against Petitioners. This Court has in the past found that the following

are "special factors" that operate to preclude a *Bivens* remedy: (1) "Congress' institutional competence in crafting appropriate relief," *Correctional Services Corp. v. Malesko*, 534 U.S. 61, 68 (2001); (2) "allowing Congress to prescribe the scope of relief," *Bush*, 462 U.S. at 380; and (3) "[w]hen 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," *Schweiker*, 487 U.S. at 423. Each of these factors reflects a recognition that Congress is in a better position to make these remedial decisions than courts. *A fortiori*, the Court's decisions require adherence to statutory provisions like § 233(a) that expressly make an alternative remedy exclusive.

That could not be more clear in the present case. Congress passed a statute to solve a problem: how to reinvigorate the PHS and attract professionals to work for the Service in underserved areas. In doing so, it made a congressional determination that these individuals should be personally immune from suit arising from their service, lest the threat of liability undermine recruitment and retention. And Congress was explicit about the remedy it meant to provide. This Court must "allow[] Congress to prescribe the scope of relief," *Bush*, 462 U.S. at 380, defer to "Congress' institutional competence in crafting appropriate relief," *Malesko*, 534 U.S. at 68, and recognize that "Congress has provided what it considers adequate remedial mechanisms for constitutional violations that may occur in the course

of" medical and related functions performed by PHS personnel, *Schweiker*, 487 U.S. at 423. Every one of these special factors precludes the imposition of a *Bivens* remedy here.

In addition, the Court has previously recognized the imperative to defer to precisely the kind of judgment Congress made here when it barred personal liability to enhance recruitment and retention of qualified PHS officers and employees. As the Court stated in *Schweiker*, "[t]he prospect of personal liability for official acts … would undoubtedly lead to new difficulties and expense in recruiting administrators for the programs Congress has established." 487 U.S. at 425.

The Ninth Circuit rejected the existence of special factors because *Carlson* held that there were no such factors in the circumstances presented in that case. Pet. App. 38a. But that ignores the key and dispositive difference between this case and *Carlson*: § 233(a) mandates that the FTCA remedy is exclusive, whereas no statute made the FTCA remedy exclusive for the subject matter at issue in *Carlson*. In addition, the Ninth Circuit ruled out special factors here because the FTCA incorporates state law remedies, and opined that "a remedial scheme that is entirely parasitic on state law" cannot "be a substitute for a *Bivens* remedy." Pet. App. 39a. But § 233(a) shows that Congress reached the opposite conclusion. The Court's special factors cases teach that Congress's judgment, not the Ninth Circuit's, is controlling here.

D. The FTCA Provides a Robust Remedy for Injury or Death Resulting from PHS Care.

In § 233(a), Congress did not merely preclude *Bivens* and other actions against PHS personnel in their individual capacities. It also offered an alternative and substantial remedy: an FTCA suit against the United States. Thus, this case does not present the question whether Congress may eliminate all remedies for alleged unconstitutional conduct in this context. It has not done so.

As demonstrated above, this Court has firmly rejected the notion that the judge-made *Bivens* remedy must be available unless Congress creates an alternative that is "equally effective." Some decisions have suggested, however, that any alternative remedy should be "meaningful" or "adequate," even if it is decidedly less generous than *Bivens*. *See Bush*, 462 U.S. at 372, 378 n.14; *Schweiker*, 487 U.S. at 423-24; *Wilkie*, 551 U.S. at 553; *cf. Malesko*, 534 U.S. at 69 ("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").

On the other hand, the Court has rejected the notion that there must be a remedy for every constitutional violation in every context. In *Stanley*, the Court stated that "it is irrelevant to a 'special factors' analysis whether the laws currently on the books afford Stanley, or any other particular serviceman, an 'adequate' federal remedy for his injuries." 483 U.S. at 683; *see also Malesko*, 534 U.S.

at 69 (observing that the Court has "rejected the claim that a *Bivens* remedy should be implied simply for want of any other means for challenging a constitutional deprivation in federal court").

The Court need not address that issue in this case because the FTCA remedy provided by Congress is plainly adequate and meaningful. Through the FTCA, the United States has assumed liability for tortious conduct by its employees within the scope of their employment on the same basis as a private person under state law. 28 U.S.C. §§ 1346(b), 2674. For the medical and related functions within the ambit of § 233(a), that means the United States affords a remedy to any person injured by care that falls below the stringent standards imposed by state professional malpractice laws, which would typically allow recovery against the United States for mere negligence by PHS personnel. Thus, in most cases, the alternative remedy provided by Congress will be far more generous than remedies limited to constitutional violations, which in this context would require proof of deliberate indifference. Indeed, in this case the United States has conceded liability by admitting negligence and causation. J.A. 328-29. Moreover, the United States is certain to be able to satisfy judgments against it, which ensures that injured parties will obtain real relief. In contrast, personal liability claims against federal employees might afford no relief in practice if modestly remunerated employees are judgment-proof.

Thus, the remedy available to Respondents affords them the same compensatory relief as is available to any other person in the State of

California, guaranteed by the Untied States.[16] That is necessarily adequate and meaningful.[17]

Given the availability of the FTCA remedy, it is irrelevant that the law provides no additional or separate relief for alleged constitutional violations, above and beyond what is afforded under state tort law. In *Schweiker*, this Court rejected the idea that a *Bivens* remedy must be available in order to provide "compensation for the constitutional violation itself, while these respondents have merely received that to which they would have been entitled had there been no constitutional violation." 487 U.S. at 427; *see also id.* (observing that *Bush* found alternative remedy adequate even though "civil service employees would get 'precisely the same thing whether or not they were victims of constitutional deprivation'"). Hence, "the presence of

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[16] In contrast to compensatory relief, punitive damages are not available against the United States under the FTCA. 28 U.S.C. § 2674.

[17] Under California law, non-economic damages of up to $250,000 are available for claims alleging wrongful death or injury from medical negligence. *See* Cal. Civ. Code § 3333.2. This $250,000 cap does not apply to economic damages. *Fein v. Permanente Med. Group*, 695 P.2d 665, 680 (Cal. 1985). Moreover, even with respect to non-economic harm, California courts have held that the cap is inapplicable when the medical malfeasance is based on more than mere negligence, at least in certain circumstances. *See Perry v. Shaw*, 106 Cal. Rptr. 2d 70, 77-78 (Cal. Ct. App. 2001). Thus, even under the state law remedies incorporated by the FTCA, Respondents might be entitled to additional non-economic damages if they prove that the tortious conduct here was not merely negligent, but rose to the level of "deliberate indifference."

alleged unconstitutional conduct that is not *separately* remedied under" the FTCA does not "imply that the statute has provided 'no remedy' for the constitutional wrong at issue." *Schweiker*, 487 U.S. at 427-28 (emphasis in original).

In short, this Court does not face a situation as in *Bivens* itself or *Davis v. Passman*, 442 U.S. 228 (1979), where the failure to imply a remedy for a constitutional wrong would leave the plaintiff with no redress at all. Rather, the Court faces a situation in which there is an adequate remedy that Congress has explicitly declared to be "exclusive of any other." The Court's summation in *Schweiker* applies with equal force here:

> Nor would we care to "trivialize" the nature of the wrongs alleged in this case. Congress, however, has addressed the problems created by [deficient PHS medical care]. Whether or not we believe that its response was the best response, Congress is the body charged with making the inevitable compromises required in the design of a [public health program]. Congress has discharged that responsibility to the extent that it affects the case before us, and we see no legal basis that would allow us to revise its decision.

487 U.S. at 429 (citation omitted).

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed, and the case remanded with directions to dismiss the claims against Petitioners.

Respectfully submitted,

DAVID P. SHELDON
Counsel of Record
LAW OFFICES OF DAVID P. SHELDON, PLLC
512 8th Street, S.E.
Washington, DC 20003
(202) 546-9575

PAUL M. SMITH
WILLIAM M. HOHENGARTEN
ELAINE J. GOLDENBERG
MATTHEW S. HELLMAN
JESSICA R. AMUNSON
JENNER & BLOCK LLP
1099 New York Ave., N.W.
Washington, DC 20001
(202) 639-6000

JOSHUA A. BLOCK
JENNER & BLOCK LLP
919 Third Avenue
New York, NY 10022
(212) 891-1600

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APPENDIX

10 U.S.C. § 1089

§ 1089. Defense of certain suits arising out of medical malpractice

(a) The remedy against the United States provided by sections 1346(b) and 2672 of title 28 for damages for personal injury, including death, caused by the negligent or wrongful act or omission of any physician, dentist, nurse, pharmacist, or paramedical or other supporting personnel (including medical and dental technicians, nursing assistants, and therapists) of the armed forces, the National Guard while engaged in training or duty 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.

(b) The Attorney General shall defend any civil action or proceeding brought in any court against

any person referred to in subsection (a) of this section (or the estate of such person) for any such injury. Any such person against whom such civil action or proceeding is brought shall deliver within such time after date of service or knowledge of service as determined by the Attorney General, all process served upon such person or an attested true copy thereof to such person's immediate superior or to whomever was designated by the head of the agency concerned to receive such papers and such person shall promptly furnish copies of the pleading and process therein to the United States attorney for the district embracing the place wherein the action or proceeding is brought, to the Attorney General and to the head of the agency concerned.

(c) Upon a certification by the Attorney General that any person described in subsection (a) was acting in the scope of such person's duties or employment at the time of the incident out of which the suit arose, any such civil action or proceeding commenced in a State court shall be removed without bond at any time before trial by the Attorney General to the district court of the United States of the district and division embracing the place wherein it is pending and the proceeding deemed a tort action brought against the United States under the provisions of title 28 and all references thereto. Should a United States district court determine on a hearing on a motion to remand held before a trial on the merits that the case so removed is one in which a remedy by suit within the meaning of subsection (a) of this section is not available against the United States, the case shall be remanded to the State court.

(d) The Attorney General may compromise or settle any claim asserted in such civil action or proceeding in the manner provided in section 2677 of title 28, and with the same effect.

(e) For purposes of this section, the provisions of section 2680(h) of title 28 shall not apply to any cause of action arising out of a negligent or wrongful act or omission in the performance of medical, dental, or related health care functions (including clinical studies and investigations).

(f)(1) The head of the agency concerned may, to the extent that the head of the agency concerned considers appropriate, hold harmless or provide liability insurance for any person described in subsection (a) for damages for personal injury, including death, caused by such person's negligent or wrongful act or omission in the performance of medical, dental, or related health care functions (including clinical studies and investigations) while acting within the scope of such person's duties if such person is assigned to a foreign country or detailed for service with other than a Federal department, agency, or instrumentality or if the circumstances are such as are likely to preclude the remedies of third persons against the United States described in section 1346(b) of title 28, for such damage or injury.

(2) With respect to the Secretary of Defense and the Armed Forces Retirement Home Board, the authority provided by paragraph (1) also includes the authority to provide for reasonable attorney's

fees for persons described in subsection (a), as determined necessary pursuant to regulations prescribed by the head of the agency concerned.

(g) In this section, the term "head of the agency concerned" means--

(1) the Director of the Central Intelligence Agency, in the case of an employee of the Central Intelligence Agency;

(2) the Secretary of Homeland Security, in the case of a member or employee of the Coast Guard when it is not operating as a service in the Navy;

(3) the Armed Forces Retirement Home Board, in the case of an employee of the Armed Forces Retirement Home; and

(4) the Secretary of Defense, in all other cases.

28 U.S.C. § 1346

§ 1346. 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.

(2) No person convicted of a felony who is incarcerated while awaiting sentencing or while serving a sentence may bring a civil action against the United States or an agency, officer, or employee of the Government, for mental or emotional injury suffered while in custody without a prior showing of physical injury.

* * * *

28 U.S.C. § 2672

§ 2672. Administrative adjustment of claims

The head of each Federal agency or his designee, in accordance with regulations prescribed by the Attorney General, may consider, ascertain, adjust, determine, compromise, and settle any claim for money damages against the United States 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 agency 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: Provided, That any award, compromise, or settlement in excess of $25,000 shall be effected only with the prior written approval of the Attorney General or his designee. Notwithstanding the proviso contained in the preceding sentence, any award, compromise, or settlement may be effected without the prior written approval of the Attorney General or his or her designee, to the extent that the Attorney General delegates to the head of the agency the authority to make such award, compromise, or settlement. Such delegations may not exceed the authority delegated by the Attorney General to the United States attorneys to settle claims for money damages against the United States. Each Federal agency may use arbitration, or other alternative means of dispute resolution under the provisions of subchapter IV of chapter 5 of title 5, to settle any tort claim against the United States, to the extent of the agency's authority to award, compromise, or settle such claim without the prior written approval of the Attorney General or his or her designee.

Subject to the provisions of this title relating to civil actions on tort claims against the United States, any such award, compromise, settlement, or determination shall be final and conclusive on all officers of the Government, except when procured by means of fraud.

Any award, compromise, or settlement in an amount of $2,500 or less made pursuant to this section shall be paid by the head of the Federal agency concerned out of appropriations available to that agency.

Payment of any award, compromise, or settlement in an amount in excess of $2,500 made pursuant to this section or made by the Attorney General in any amount pursuant to section 2677 of this title shall be paid in a manner similar to judgments and compromises in like causes and appropriations or funds available for the payment of such judgments and compromises are hereby made available for the payment of awards, compromises, or settlements under this chapter.

The acceptance by the claimant of any such award, compromise, or settlement shall be final and conclusive on the claimant, and shall constitute a complete release of any claim against the United States and against the employee of the government whose act or omission gave rise to the claim, by reason of the same subject matter.

28 U.S.C. § 2676

§ 2676. 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.

28 U.S.C. § 2679

§ 2679. Exclusiveness of remedy

(a) The authority of any federal agency to sue and be sued in its own name shall not be construed to authorize suits against such federal agency on claims which are cognizable under section 1346(b) of this title, and the remedies provided by this title in such cases shall be exclusive.

(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.

(c) The Attorney General shall defend any civil action or proceeding brought in any court against any employee of the Government or his estate for any such damage or injury. The employee against whom such civil action or proceeding is brought shall deliver within such time after date of service or knowledge of service as determined by the Attorney General, all process served upon him or an attested true copy thereof to his immediate superior or to whomever was designated by the head of his department to receive such papers and such person shall promptly furnish copies of the pleadings and process therein to the United States attorney for the district embracing the place wherein the proceeding is brought, to the Attorney General, and to the head of his employing Federal agency.

(d)(1) Upon certification by the Attorney General that the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose, any civil action or proceeding commenced upon such claim in a United States district court shall be deemed an action against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant.

(2) Upon certification by the Attorney General that the defendant employee was acting within

the scope of his office or employment at the time of the incident out of which the claim arose, any civil action or proceeding commenced upon such claim in a State court shall be removed without bond at any time before trial by the Attorney General to the district court of the United States for the district and division embracing the place in which the action or proceeding is pending. Such action or proceeding shall be deemed to be an action or proceeding brought against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant. This certification of the Attorney General shall conclusively establish scope of office or employment for purposes of removal.

(3) In the event that the Attorney General has refused to certify scope of office or employment under this section, the employee may at any time before trial petition the court to find and certify that the employee was acting within the scope of his office or employment. Upon such certification by the court, such action or proceeding shall be deemed to be an action or proceeding brought against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant. A copy of the petition shall be served upon the United States in accordance with the provisions of Rule 4(d)(4) of the Federal Rules of Civil Procedure. In the event the petition is filed in a civil action or proceeding pending in a State court, the action or proceeding may be removed

without bond by the Attorney General to the district court of the United States for the district and division embracing the place in which it is pending. If, in considering the petition, the district court determines that the employee was not acting within the scope of his office or employment, the action or proceeding shall be remanded to the State court.

(4) Upon certification, any action or proceeding subject to paragraph (1), (2), or (3) shall proceed in the same manner as any action against the United States filed pursuant to section 1346(b) of this title and shall be subject to the limitations and exceptions applicable to those actions.

(5) Whenever an action or proceeding in which the United States is substituted as the party defendant under this subsection is dismissed for failure first to present a claim pursuant to section 2675(a) of this title, such a claim shall be deemed to be timely presented under section 2401(b) of this title if--

(A) the claim would have been timely had it been filed on the date the underlying civil action was commenced, and

(B) the claim is presented to the appropriate Federal agency within 60 days after dismissal of the civil action.

(e) The Attorney General may compromise or settle any claim asserted in such civil action or proceeding

in the manner provided in section 2677, and with the same effect.

42 U.S.C. § 233

§ 233. 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.

(b) Attorney General to defend action or proceeding; delivery of process to designated official; furnishing of copies of pleading and process to United States attorney, Attorney General, and Secretary

The Attorney General shall defend any civil action or proceeding brought in any court against any person

referred to in subsection (a) of this section (or his estate) for any such damage or injury. Any such person against whom such civil action or proceeding is brought shall deliver within such time after date of service or knowledge of service as determined by the Attorney General, all process served upon him or an attested true copy thereof to his immediate superior or to whomever was designated by the Secretary to receive such papers and such person shall promptly furnish copies of the pleading and process therein to the United States attorney for the district embracing the place wherein the proceeding is brought, to the Attorney General, and to the Secretary.

(c) Removal to United States district court; procedure; proceeding upon removal deemed a tort action against United States; hearing on motion to remand to determine availability of remedy against United States; remand to State court or dismissal

Upon a certification by the Attorney General that the defendant was acting in the scope of his employment at the time of the incident out of which the suit arose, any such civil action or proceeding commenced in a State court shall be removed without bond at any time before trial by the Attorney General to the district court of the United States of the district and division embracing the place wherein it is pending and the proceeding deemed a tort action brought against the United States under the provisions of Title 28 and all references thereto. Should a United States district court determine on a hearing on a motion to remand held before a trial on the merit that the case so removed is one in which a remedy by

suit within the meaning of subsection (a) of this section is not available against the United States, the case shall be remanded to the State Court: Provided, That where such a remedy is precluded because of the availability of a remedy through proceedings for compensation or other benefits from the United States as provided by any other law, the case shall be dismissed, but in the event the running of any limitation of time for commencing, or filing an application or claim in, such proceedings for compensation or other benefits shall be deemed to have been suspended during the pendency of the civil action or proceeding under this section.

(d) Compromise or settlement of claim by Attorney General

The Attorney General may compromise or settle any claim asserted in such civil action or proceeding in the manner provided in section 2677 of Title 28 and with the same effect.

(e) Assault or battery

For purposes of this section, the provisions of section 2680(h) of Title 28 shall not apply to assault or battery arising out of negligence in the performance of medical, surgical, dental, or related functions, including the conduct of clinical studies or investigations.

(f) Authority of Secretary or designee to hold harmless or provide liability insurance for assigned or detailed employees

The Secretary or his designee may, to the extent that he deems appropriate, hold harmless or provide liability insurance for any officer or employee of the Public Health Service for damage for personal injury, including death, negligently caused by such officer or employee while acting within the scope of his office or employment and as a result of the performance of medical, surgical, dental, or related functions, including the conduct of clinical studies or investigations, if such employee is assigned to a foreign country or detailed to a State or political subdivision thereof or to a non-profit institution, and if the circumstances are such as are likely to preclude the remedies of third persons against the United States described in section 2679(b) of Title 28, for such damage or injury.

* * * *

[Subsections (g) through (p) of Section 233 are omitted. These subsections relate to Section 233's applicability to individuals and entities neither directly employed by nor part of the PHS, but nonetheless deemed PHS employees for purposes of Section 233.]