No. 08-1529

In The
Supreme Court of the United States

ESTHER HUI, ET AL.,

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 ESTHER HUI

PATRICK L. HURLEY
MANNING & MARDER, KASS, ELLROD, RAMIREZ LLP
1 California Street
Suite 1100
San Francisco, CA 94111
(415) 217-6990
plh@mmker.com

STEVEN J. RENICK
Counsel of Record
MILDRED K. O'LINN
TIMOTHY J. KRAL
MANNING & MARDER, KASS, ELLROD, RAMIREZ LLP
801 S. Figueroa Street
15th Floor
Los Angeles, CA 90017
(213) 624-6900
sjr@mmker.com

Counsel for Petitioner Esther Hui

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

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 United States Public Health Service Officers or Employees Esther Hui and Commander Stephen Gonsalves.

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.

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

BRIEF FOR PETITIONER ESTHER HUI

Petitioner Esther Hui respectfully requests that this Court reverse the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The opinion below (Pet. App. 1a) is reported at 546 F.3d 682. The decision of the district court (Pet. App. 41a) is reported at 538 F. Supp. 2d 1279.

BASIS FOR JURISDICTION

The judgment of the court of appeals 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 within which to file a petition for a writ of certiorari to May 29, 2009. On May 19, 2009, he further extended the time until June 12, 2009. A timely petition for writ of certiorari was filed on June 11, 2009. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE

Petitioners claim immunity from the *Bivens* action brought by respondents pursuant to 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 . . . 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.

STATEMENT OF THE CASE

Petitioners sought dismissal of the claims brought against them by respondents under *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics,* 403 U.S. 388 (1971) pursuant to section 233(a). The Ninth Circuit, however, held that section 233(a) does not preclude *Bivens* actions against PHS employees. The Ninth Circuit erred and its judgment should be reversed.

1. FACTUAL BACKGROUND

This is a damages action arising out of the medical care provided to decedent Francisco Castaneda. As currently postured before this Court, this matter involves *Bivens* claims of alleged deliberate indifference

to Castaneda's medical needs against petitioners Dr. Hui and Commander Gonsalves.[1]

From December 2005 to March 26, 2006, Castaneda, an alien, was incarcerated in state prison following a December 2005 conviction in California. While in state prison, Castaneda complained to medical staff about a lesion on his penis. The state prison medical staff recommended that Castaneda be referred to a urologist for a biopsy to rule out cancer but the biopsy was not done. J.A. 343-45.

On March 27, 2006, Castaneda was transferred to the custody of Immigration and Customs Enforcement (ICE) in San Diego while removal proceedings were pending against him. J.A. 345. Medical care for detainees at the San Diego facility was provided by the Division of Immigration Health Services (DIHS). J.A. 242. DIHS is part of the United States Public

[1] Petitioners' motion to dismiss was directed to the original complaint. While the motion was pending, Castaneda moved for leave to file a first amended complaint. That motion was granted and the parties stipulated that the motion to dismiss could be deemed petitioners' response to the amended complaint. When the district court issued its order on the motion to dismiss, a motion for leave to file a second amended complaint was pending and was ultimately granted which substituted the current plaintiffs for Castaneda. Another stipulation to deem petitioners' motion to dismiss their response to the second amended complaint was approved by the district court. In its opinion in this case, the Ninth Circuit relied on the factual allegations in the third amended complaint which was filed on May 29, 2008. Pet. App. 3a. The current operative complaint in the district court is the fourth amended complaint.

Health Service (PHS) which is part of the Department of Health and Human Services. J.A. 22. The PHS is one of the seven uniformed services of the United States and its members may be called into military service in times of war or national emergency whereupon they would become subject to the Uniform Code of Military Justice. Pet. App. 4a-5a.

Petitioner Esther Hui, a medical doctor, was a civilian employee of the PHS at all relevant times. J.A. 23. According to plaintiff, Dr. Hui was the only physician providing medical care at the San Diego facility between June and December 2006. J.A. 366.

Upon arrival at the San Diego facility, Castaneda was seen by a physician's assistant, Lt. Anthony Walker. Based on the examination, Castaneda's complaints of a painful lesion on his penis and his family history of cancer, Lt. Walker recommended a urological consultation and a biopsy. J.A. 345-46. According to DIHS policy, non-emergent requests for consultations with outside specialists have to be approved in advance through a Treatment Authorization Request (TAR) which is sent to an off-site Managed Care Coordinator for approval. J.A. 90-92, 364-65. A TAR was submitted for a urology consult and biopsy in March 2006 and approved on May 31, 2006. J.A. 92-93.

On June 7, 2006, Castaneda was seen by Dr. John Wilkinson, an oncologist. After examining Castaneda, Dr. Wilkinson agreed that a biopsy should be done and offered to admit Castaneda to a hospital

for that purpose. According to respondents, Dr. Hui was unable to accept Dr. Wilkinson's offer to admit Castaneda for the biopsy because specific approval for an admission was required in a non-emergent situation. J.A. 367. In a note documenting her conversation with Dr. Wilkinson, Dr. Hui indicated that the biopsy was an "elective outpatient procedure." J.A. 347. According to respondents, the term "elective" is defined by DIHS as "any procedure that we have time to submit a TAR and allow for approval . . . in the sense that it is not an emergency that they will die now." J.A. 365-66. Dr. Wilkinson noted that DIHS physicians "wish to pursue outpatient biopsy which would be more cost effective." Pet. App. 5a.

Over the next few weeks, Castaneda was seen at least twice by Lt. Walker and complained that his condition was worsening. J.A. 347-48. On July 13, 2006, a TAR was submitted seeking an inpatient urology and oncology evaluation of Castaneda at a local emergency room. That TAR was approved and Castaneda was taken to the emergency room at Scripps Mercy Chula Vista where he was examined by a urologist, Dr. Daniel Hunting. Dr. Hunting determined that the lesion on Castaneda's penis was probably genital warts. He did not admit Castaneda for a biopsy but instead referred him back to his "primary treating urologist" at DIHS. Pet. App. 45a-47a.

Returned to the San Diego ICE facility, Castaneda was seen by Lt. Walker and another physician's assistant on July 17, July 26, and August 9, 2006. J.A. 351-53. On August 11, 2006, Lt. Walker submitted

a TAR requesting a biopsy and circumcision by another urologist, Dr. Masters. Castaneda saw Dr. Masters on August 22, 2006. Dr. Masters concluded that Castaneda had genital warts and recommended a circumcision which would both relieve the "ongoing medical side effects of the lesion including infection and bleeding" and provide a biopsy for further evaluation. Dr. Masters offered to admit Castaneda to the hospital to perform the circumcision but Castaneda was not admitted. Pet. App. 48a.

Castaneda was seen by a nurse or physician's assistant on August 26, 28 and September 8, 12, 14, and 26, 2006. During that time, Castaneda's condition continued to worsen with Castaneda reporting pain, discharge, foul odor and blood from the lesions on his penis. J.A. 354-56.

On October 23, 2006, Lt. Walker submitted a TAR requesting circumcision for Castaneda based on Dr. Masters' recommendation. The TAR was denied by a DIHS Staff Physician (not Dr. Hui) who stated that "circumcisions are not a covered benefit." J.A. 357.

On November 17, Castaneda was transferred to an ICE facility in San Pedro, California. J.A. 358-59. While at the San Pedro facility, Castaneda saw a private urologist who concluded that the lesion on Castaneda's penis was "most likely penile cancer" and recommended a biopsy which was approved. On February 5, 2007, prior to the scheduled biopsy,

Castaneda was released from custody. Three days later, he went to a private hospital and was diagnosed with squamous cell carcinoma. His penis was amputated and he began receiving chemotherapy. However, the cancer had metastasized and he died on February 16, 2008. Pet. App. 51a-53a.

2. PROCEEDINGS BELOW

On November 2, 2007, prior to his death, Castaneda filed a complaint in the United States District Court for the Central District of California asserting claims against the United States under the FTCA, against employees of the California Department of Corrections under 42 U.S.C. § 1983, against Dr. Hunting for negligence and against various federal officers and employees (including petitioners) under *Bivens*. Castaneda alleged that petitioners were deliberately indifferent to his serious medical needs in violation of the Fifth, Eighth, and Fourteenth Amendments to the Constitution by failing to treat his known serious medical condition and delaying or denying him access to outside medical care.

Petitioners moved to dismiss the case for lack of subject matter jurisdiction under Federal Rules of Civil Procedure, Rule 12(b)(1). Petitioners argued that they had absolute immunity from suit because section 233(a) provides that a suit under the FTCA against the United States is the exclusive remedy for any personal injury resulting from the performance of any medical or related function by PHS officers and

employees in the course and scope of their employment.

Castaneda filed a first amended complaint on February 6, 2008. J.A. 35. After his death, respondents moved for leave to file a second amended complaint to substitute Castaneda's sister and daughter as plaintiffs under survival and wrongful death theories respectively. The second amended complaint was filed on March 20, 2008. J.A. 228. The district court approved stipulations deeming the motion to dismiss to apply equally to the first and second amended complaint. The district court denied the motion to dismiss in a published opinion on March 11, 2008. Pet. App. 41a. Petitioners appealed.

On May 29, 2008, respondents filed a third amended complaint. J.A. 330. In June 2009, respondents sought leave to file a fourth amended complaint which was granted. J.A. 13-14.

The United States Court of Appeals for the Ninth Circuit affirmed the decision of the district court in a published opinion filed on October 2, 2008. Pet. App. 1a. Petitioners filed petitions for rehearing en banc on November 14, 2009. The Ninth Circuit denied rehearing en banc on January 29, 2009. Pet. App. 81a.

SUMMARY OF ARGUMENT

1. In the nearly four decades since it decided *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics,* 403 U.S. 388 (1971), this Court has made clear that *Bivens* remedies are to be considered the exception, not the rule. There is no "automatic entitlement" to pursue a *Bivens* claim, "no matter what other means there may be to vindicate a protected interest." *Wilkie v. Robbins,* 551 U.S. 537, 550 (2007). Further, the absence of a separate remedy for alleged constitutional violations is not a sufficient reason to recognize a *Bivens* remedy. *Schweiker v. Chilicky,* 487 U.S. 412, 426-427 (1988).

Despite this clear statement of the law, the district court and Ninth Circuit below approached this case as if respondents had an absolute right to pursue a *Bivens* claim, absent an explicit prohibition by Congress. The correct rule, however, is the opposite. In determining whether a *Bivens* remedy will be recognized, a court must first ask "whether any alternative, existing process for protecting the interest amounts to a convincing reason for the Judicial Branch to refrain from providing a new and freestanding remedy in damages." *Wilkie,* 551 U.S. at 550. Even in the absence of an alternative, a court must still conclude that it is appropriate to "'authoriz[e] a new kind of federal litigation.'" *Id.* (citation omitted).

2. Congress, in 42 U.S.C. § 233(a), has provided that a claim under the FTCA is the exclusive remedy "for damage for personal injury, including death,

resulting from the performance of medical, surgical, dental, or related functions" by PHS officers and employees, precluding "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." Thus, the plain language of the statute precludes the prosecution of *Bivens* claims against PHS personnel related to their performance of medical and related functions. There is no ambiguity in the statute, and so, pursuant to the applicable canons of construction, that should end the analysis.

The only way to conclude otherwise is to read an exception into the statute. Virtually every court that has considered the issue has refused to find such an exception hiding in the plain language of the statute. This Court has reached that same conclusion, at least implicitly. *See Carlson v. Green,* 446 U.S. 14, 16 (1980). Congress appears content with the interpretation provided by the overwhelming majority of the courts that have addressed the issue, since it has declined to amend section 233(a) to specifically authorize *Bivens* actions despite having had eleven different opportunities to do so.

Congress's actions in regard to other legislation confirms this analysis. Congress enacted a similar exclusive remedy statute in 1988, using language almost identical to that found in section 233(a), but added a specific exception permitting the prosecution of *Bivens* claims. If Congress believed such an exception were already implicitly incorporated into the

language of section 233(a), such an explicit exception would have been unnecessary.

3. A key element of the Ninth Circuit's decision below was its conclusion that the FTCA is not as effective a remedy as a *Bivens* action and that therefore section 233(a) could not bar a plaintiff from pursuing a *Bivens* action, notwithstanding the "exclusive remedy" language in that statute. *Castaneda v. United States,* 546 F.3d 682, 689-691 (9th Cir. 2008). But it is the prerogative of Congress to determine what remedies are appropriate for a particular violation and deference to that Congressional prerogative precludes courts from substituting their views as to whether those substitute remedies are as "equally effective" as other potential remedies. Further, the reasons why the Ninth Circuit concluded that the FTCA was not as effective a remedy as a *Bivens* action primarily had to do with the limitations on damages available in a FTCA case. But this Court has repeatedly held that is not a reason to recognize a *Bivens* remedy.

4. The Ninth Circuit erred in relying on legislative history and on the title given by Congress to the statute in attempting to determine the meaning of section 233(a), because the plain language of the statute makes that meaning clear without the need to resort to such aids. Further, the Ninth Circuit misinterpreted the legislative history and the significance of the title of the statute. Contrary to the Ninth Circuit's holding, the title of the statute indicates that Congress intended section 233 to apply

to more than just common law medical negligence claims. This is supported by the legislative history as well, which indicates that Congress intended the statute to apply to any and all claims that might be made against PHS personnel relating to their performance of medical and related functions, not just to garden-variety claims of medical negligence.

5. There are special factors counseling caution against recognizing a *Bivens* remedy against PHS personnel related to their performance of medical and related functions. The low salaries paid to PHS personnel prevent them from purchasing insurance, thus exposing them to personal liability unless section 233(a) is read to preclude the prosecution of *Bivens* actions against them. This will significantly harm recruitment and retention of PHS personnel. Claims of deliberate indifference can easily be alleged even in cases of simple medical negligence, thus allowing plaintiffs in virtually every case to pursue a *Bivens* claim against PHS personnel. This will eviscerate the protection Congress intended to be provided to such individuals by section 233(a).

For all these reasons, this Court should reverse the judgment of the Ninth Circuit and order that court to reverse the decision of the district court denying petitioners' motion to dismiss and to instead order the district court to grant petitioners' motion.

ARGUMENT

1. *BIVENS* ACTIONS ARE AN EXCEPTIONAL REMEDY, NOT A RIGHT

In *Bivens,* this Court held that a direct cause of action existed for violations of the Fourth Amendment by federal agents acting under the color of their authority. 403 U.S. at 389. Both the district court and the Ninth Circuit in the opinions they issued in this action indicated that they understood *Bivens* to have created a remedy that is generally available to most alleged victims of constitutional violations. *Castaneda v. United States,* 538 F. Supp. 2d 1279, 1286 (C.D. Cal. 2008) and *Castaneda v. United States,* 546 F.3d 682, 687 (9th Cir. 2008). This represents a fundamental misunderstanding of this Court's jurisprudence on the issue of the availability of *Bivens* actions.

> [W]e have . . . held that any freestanding damages remedy for a claimed constitutional violation has to represent a judgment about the best way to implement a constitutional guarantee; it is not an automatic entitlement no matter what other means there may be to vindicate a protected interest, and in most instances we have found a *Bivens* remedy unjustified.

Wilkie, 551 U.S. at 550.

In *Wilkie*, the Court noted that it had recognized *Bivens* remedies in only three instances: for violations of the Fourth Amendment, "for employment discrimination in violation of the *Due Process Clause,* and . . . for an *Eighth Amendment* violation by prison

officials," and had refused to allow such a remedy in a number of other contexts. *Id.* (citations omitted). "Because implied causes of action are disfavored, the Court has been reluctant to extend *Bivens* liability 'to any new context or new category of defendants.'" *Ashcroft v. Iqbal,* 129 S. Ct. 1937, 1948 (2009) (citation omitted).

In *Schweiker*, this Court refused to find that "'a *Bivens* remedy should be implied for alleged due process violations in the denial of social security disability benefits.'" 487 U.S. at 420. The Court noted that, in the three instances where *Bivens* actions were recognized, "there were no 'special factors counseling hesitation in the absence of affirmative action by Congress,' no explicit statutory prohibition against the relief sought, and no exclusive statutory alternative remedy." *Id.* at 421.

> Our more recent decisions have responded cautiously to suggestions that *Bivens* remedies be extended into new contexts. The absence of statutory relief for a constitutional violation, for example, does not by any means necessarily imply that courts should award money damages against the officers responsible for the violation.

Id. at 421-422.

The mere absence of a separate remedy for alleged constitutional violations is not a sufficient reason to permit a *Bivens* remedy. *Id.* at 426-427 (citing *Bush v. Lucas,* 462 U.S. 367, 390 (1983)). "*Bush* thus lends no support to the notion that

statutory violations caused by unconstitutional conduct necessarily require remedies in addition to the remedies provided generally for such statutory violations." *Id.* at 427. To the contrary, this Court concluded that merely because alleged unconstitutional conduct is not separately remedied under the statutory scheme does not imply that the statute has provided "no remedy" for the constitutional wrong at issue. *Id.* at 427-28.

The Court observed that, "[i]n the end, respondents' various arguments are rooted in their insistent and vigorous contention that they simply have not been adequately recompensed for their injuries," but the Court refused to substitute its own ideas for those of Congress as to what might be the best means of remedying the respondents' alleged injuries. *Id.* at 428-29.

This Court reached a similar conclusion in *Correctional Services Corporation v. Malesko,* 534 U.S. 61, 63 (2001), refusing to extend *Bivens* "to allow recovery against a private corporation operating a halfway house under contract with the Bureau of Prisons." The Court rejected the respondent's contention that "the Court must recognize a federal remedy at law wherever there has been an alleged constitutional deprivation, no matter that the victim of the alleged deprivation might have alternative remedies elsewhere, and that the proposed remedy would not significantly deter the principal wrongdoer, an individual private employee." *Id.* at 66. To the contrary, "[s]o long as the plaintiff had an avenue for

some redress, bedrock principles of separation of powers foreclosed judicial imposition of a new substantive liability." *Id.* at 69 (emphasis added).

Despite this Court's clearly-stated reluctance to extend *Bivens* beyond the three specific circumstances authorized by the Court, both the district court and the Ninth Circuit found there to be a *Bivens* remedy available to respondents here. They accomplished this by essentially ignoring the previous twenty-eight years of this Court's *Bivens* jurisprudence and relying entirely on this Court's opinion in *Carlson*. There was a superficial logic to this in that *Carlson*, like the present claim, involved a *Bivens* action arising from a claim of deliberate indifference to a detained individual's medical needs. But both courts chose to interpret and apply the holding in *Carlson* without any effort to analyze that holding in the light of the numerous subsequent decisions of this Court on the availability of *Bivens* remedies. That failure led both courts to misinterpret *Carlson*, thereby leading them to their erroneous conclusion that a *Bivens* action could proceed against petitioners.

Both courts relied on the following language from *Carlson:*

> *Bivens* established that the victims of a constitutional violation by a federal agent have a right to recover damages against the official in federal court despite the absence of any statute conferring such a right. Such a cause of action may be defeated in a

> particular case, however, in two situations. The first is when defendants demonstrate "special factors counselling hesitation in the absence of affirmative action by Congress." The second is when defendants show that Congress has provided an alternative remedy which it explicitly declared to be a substitute for recovery directly under the Constitution and viewed as equally effective.

Id. at 19 (citations omitted). Both the district court and the Ninth Circuit took this language to mean that there is a presumptive right to pursue a *Bivens* action unless one of the two described situations exists. *Castaneda,* 538 F. Supp. 2d at 1286 and *Castaneda,* 546 F.3d at 687. But, as discussed above, subsequent decisions of this Court have made clear that this interpretation of the language in *Carlson* is erroneous.

As this Court stated just two years ago in *Wilkie,* there is no "automatic entitlement" to a "freestanding damages remedy for a claimed constitutional violation . . . no matter what other means there may be to vindicate a protected interest. . . ." 551 U.S. at 550. Thus, the situations described in *Carlson* did not represent the sole circumstances in which a *Bivens* would be rejected, but merely two of those circumstances.

This Court in *Wilkie* explained what the actual rule is:

> [O]ur consideration of a *Bivens* request follows a familiar sequence, and on the assumption that a constitutionally recognized interest is adversely affected by the actions of federal employees, the decision whether to recognize a *Bivens* remedy may require two steps. In the first place, there is the question whether any alternative, existing process for protecting the interest amounts to a convincing reason for the Judicial Branch to refrain from providing a new and freestanding remedy in damages. But even in the absence of an alternative, a *Bivens* remedy is a subject of judgment: "the federal courts must make the kind of remedial determination that is appropriate for a common-law tribunal, paying particular heed, however, to any special factors counselling hesitation before authorizing a new kind of federal litigation."

Id. at 550 (citations omitted). It is thus with this rule in mind that the question presented must be answered.

2. THE TEXT OF SECTION 233(a), AS WELL AS THE ACTIONS OF CONGRESS SUBSEUENT TO ITS ENACTMENT, MAKE CLEAR THAT SECTION 233(a) PRECLUDES A *BIVENS* REMEDY FOR CLAIMS ARISING FROM MEDICAL CARE AND RELATED FUNCTIONS PROVIDED BY PHS PERONNEL

As this Court explained in *Wilkie,* the first step in considering whether a new *Bivens* remedy should be recognized is to ask "whether any alternative, existing process for protecting the interest amounts to a convincing reason for the Judicial Branch to refrain from providing a new and freestanding remedy in damages." 551 U.S. at 550. Respondents will undoubtedly argue that this analysis need not be conducted here because this Court, in *Carlson,* has already recognized the existence of *Bivens* actions where there is an allegation of deliberate indifference to medical needs. Indeed, the Ninth Circuit, in its opinion below, referring to *Carlson*, explicitly stated that its "decision does not extend *Bivens* into a new context." *Castaneda,* 546 F.3d at 701, n.24. But the present case unquestionably does extend *Bivens* into both a new context and to a new category of defendants. *See Iqbal*, 129 S. Ct. at 1948 (citing *Malesko,* 534 U.S. at 66).

As the district court explained in *Lewis v. Sauvey,* 708 F. Supp. 167, 169 (E.D. Mich. 1989), "[a]lthough the Supreme Court concluded that the plaintiffs in *Carlson* were not limited to an FTCA

remedy, but could pursue a *Bivens* action, the *Carlson* plaintiffs were suing federal prison officials, not medical personnel of the Public Health Service." Further, the present claim of deliberate indifference arises in the context of a detention facility operated by ICE to hold persons against whom removal proceedings are pending, not a federal prison housing convicted felons, a distinctly different context than was presented in *Carlson*. Thus, the analysis described in *Wilkie* does need to be conducted here to determine whether a *Bivens* action can properly be prosecuted against these petitioners.

A. Virtually Every Court That Has Interpreted Section 233(a) Has Held That Its Plain Language Precludes *Bivens* Actions Against PHS Personnel, And Congress Has Approved Of This Judicial Interpretation Of The Statute

In situations arising from the provision of medical care and related functions by PHS personnel, Congress has provided a specific and exclusive remedy for claims of personal injury and death:

> 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.

42 U.S.C. § 233(a).[2]

"Statutory construction always starts with the language of the statute itself. This starting point is the ending point when the statute clearly and unambiguously expresses Congress' intent." *United States v. Derr,* 968 F.2d 943, 945 (9th Cir. 1992) (citing *United States v. Ron Pair Enterprises, Inc.,* 489 U.S. 235, 241 (1989)). The language of this statute is plain and unambiguous. The ***only*** remedy authorized by Congress for damages for personal injury "resulting from the performance of medical, surgical, dental, or related functions . . . by any commissioned officer or employee of the Public Health Service while acting within the scope of his office or employment" is a

[2] The statute was originally added to the Public Health Service Act in 1970 as a second section 223. Public Law 91-623, Section 4. The statute was codified as 42 U.S.C. § 233. The next year clean-up legislation redesignated the statute as section 224 of the Public Health Service Act. Public Law 92-157, Title III, Section 301(c). To avoid confusion, the statute will be referred to as section 233 in this brief.

claim against the United States under the FTCA. No other civil action is permitted against the officer or employee.

To permit a *Bivens* action to be pursued in the circumstances described in the statute requires that this plain language be ignored and that the statute instead be interpreted to actually mean the following:

> 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***, except for claims alleging violations of the United States Constitution***.

To so interpret the statute flies in the face of this Court's admonition that "we ordinarily resist reading words or elements into a statute that do not appear on its face." *Dean v. United States,* 129 S. Ct. 1849, 1853 (2009) (quoting *Bates v. United States,* 522 U.S. 23, 29 (1997)). Virtually every federal court that has

been asked to find such an implied exception within the statute has refused to do so, relying on the plain language to conclude that the statute bars *Bivens* actions against PHS personnel for damages arising from their provision of medical and related services. Of the fifty-five decisions, published and unpublished, found by petitioner's counsel which addressed the issue of whether section 233 permitted the prosecution of *Bivens* actions against PHS personnel, forty-nine concluded that such actions were barred by the statute.[3]

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[3] **Courts of Appeal** (listed by Circuit in reverse chronological order):

Wallace v. Dawson, 302 Fed. Appx. 52, 54 (2d Cir. 2008); *Cuoco v. Moritsugu,* 222 F.3d 99 (2d Cir. 2000); *Anderson v. Bureau of Prisons,* 176 Fed. Appx. 242, 243 (3d Cir. 2006); *Montoya-Ortiz v. Brown,* 154 Fed. Appx. 437, 439 (5th Cir. 2005); *Walls v. Holland,* 1999 U.S. App. LEXIS 26588 (6th Cir. Oct. 18, 1999); *Beverly v. Gluch,* 902 F.2d 1568 (6th Cir. Mich. 1990); *Miles v. Daniels,* 231 Fed. Appx. 591, 592 (9th Cir. 2007); *Zanzucchi v. Wynberg,* 933 F.2d 1018, 1991 U.S. App. LEXIS 10952 (9th Cir. May 21, 1991).

District Courts (listed in reverse chronological order):

Starling v. Kastner, 2009 U.S. Dist. LEXIS 89095 (E.D. Tex. Aug. 21, 2009); *K.R. v. Silverman,* 2009 U.S. Dist. LEXIS 83143 (E.D.N.Y. Aug. 13, 2009); *Golightly v. Kastner,* 2009 U.S. Dist. LEXIS 83390 (E.D. Tex. Aug. 5, 2009); *Luna v. Pearson,* 2009 U.S. Dist. LEXIS 49309 (S.D. Miss. June 11, 2009); *Geralds v. Patel,* 2009 U.S. Dist. LEXIS 14721 (E.D.N.Y. Feb. 20, 2009); *Anson v. Bailey,* 2009 U.S. Dist. LEXIS 12168 (W.D.N.Y. Feb. 18, 2009); *Uribe v. Outlaw,* 2009 U.S. Dist. LEXIS 9176 (E.D. Ark. Feb. 9, 2009); *Morales v. White,* 2008 U.S. Dist. LEXIS 80659 (W.D. Tenn. Oct. 10, 2008); *Stine v. Fetterhoff,* 2008 U.S. Dist. LEXIS 70863 (D. Colo. Sept. 19, 2008); *Hairston v.*

(Continued on following page)

Gonzales, 2008 U.S. Dist. LEXIS 52962 (E.D.N.C. July 11, 2008); *Batey v. Swanson,* 2008 U.S. Dist. LEXIS 12550 (N.D. W. Va. Feb. 19, 2008); *Lyons v. United States,* 2008 U.S. Dist. LEXIS 2260 (N.D. Ohio Jan. 11, 2008); *Lee v. Guavara,* 2007 U.S. Dist. LEXIS 71206 (D.S.C. Sept. 24, 2007); *Fourstar v. Vidrine,* 2007 U.S. Dist. LEXIS 70701 (S.D. Ind. Sept. 21, 2007); *Hodge v. United States,* 2007 U.S. Dist. LEXIS 64644 (M.D. Pa. Aug. 31, 2007); *Coley v. Sulayman,* 2007 U.S. Dist. LEXIS 57639 (D.N.J. Aug. 7, 2007); *Barner v. Williamson,* 2007 U.S. Dist. LEXIS 42942 (M.D. Pa. Mar. 27, 2007); *Wallace v. Dawson,* 2007 U.S. Dist. LEXIS 6279 (N.D.N.Y Jan. 29, 2007); *Salley v. Ellis,* 2006 U.S. Dist. LEXIS 90898 (M.D. Ga. Dec. 14, 2006); *Baez v. Arbuckle,* 2006 U.S. Dist. LEXIS 84013 (M.D. Ga. Nov. 16, 2006); *Davis v. Stine,* 2006 U.S. Dist. LEXIS 79689 (E.D. Ky. Oct. 31, 2006); *Barbaro v. United States ex rel. Fed. Bureau of Prisons FCI Otisville,* 2006 U.S. Dist. LEXIS 79338 (S.D.N.Y. Oct. 27, 2006); *Butler v. Shearin,* 2006 U.S. Dist. LEXIS 97961 (D. Md. Aug. 29, 2006) (aff'd 279 Fed. Appx. 274, 275 (4th Cir. 2008)); *Cuco v. Fed. Med. Center-Lexington,* 2006 U.S. Dist. LEXIS 49711 (E.D. Ky. June 9, 2006); *Arrington v. Inch,* 2006 U.S. Dist. LEXIS 20193 (M.D. Pa. Mar. 30, 2006); *Smith v. Anderson,* 2006 U.S. Dist. LEXIS 23130 (S.D. W. Va. Mar. 27, 2006); *Pimentel v. Deboo,* 411 F. Supp. 2d 118, 127 (D. Conn. 2006); *Ekwere v. Branch,* 2005 U.S. Dist. LEXIS 30483 (D. Ariz. Nov. 28, 2005); *Anderson v. Bureau of Prisons,* 2005 U.S. Dist. LEXIS 41911 (M.D. Pa. Sept. 22, 2005); *Williams v. Stepp,* 2006 U.S. Dist. LEXIS 73239 (S.D. Ill. Sept. 21, 2006); *Whooten v. Bussanich,* 2005 U.S. Dist. LEXIS 37995 (M.D. Pa. Sept. 2, 2005); *Freeman v. Inch,* 2005 U.S. Dist. LEXIS 41915 (M.D. Pa. May 16, 2005); *Dawson v. Williams,* 2005 U.S. Dist. LEXIS 3059 (S.D.N.Y. Feb. 28, 2005); *Lovell v. Cayuga Corr. Facility,* 2004 U.S. Dist. LEXIS 20584 (W.D.N.Y. Sept. 29, 2004); *Tillitz v. Jones,* 2004 U.S. Dist. LEXIS 19401 (D. Or. Sept. 22, 2004); *Miles v. Daniels,* 2004 U.S. Dist. LEXIS 19400 (D. Or. Sept. 21, 2004); *Valdivia v. Hannefed,* 2004 U.S. Dist. LEXIS 16355 (W.D.N.Y. Aug. 10, 2004); *Foreman v. Fed. Corr. Inst.,* 2006 U.S. Dist. LEXIS 96187 (S.D. W. Va. Mar. 29, 2006); *Cook v. Blair,* 2003 U.S. Dist. LEXIS 27806 (E.D.N.C. Mar. 20, 2003) (aff'd 82 Fed. Appx. 790, 791 (4th Cir. 2003)); *Brown v. McElroy,* 160

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Of the remaining six decisions, two were the district court and Ninth Circuit opinions issued in this case: *Castaneda,* 538 F. Supp. 2d 1279 and *Castaneda,* 546 F.3d 682. The third relied entirely on the Ninth Circuit's decision in *Castaneda*: *Starling v. United States,* 2009 U.S. Dist. LEXIS 101275 (D.S.C. May 12, 2009). The fourth was the district court opinion that was reversed by the Second Circuit in *Cuoco,* 222 F.3d 99: *Cuoco v. Quinlan,* 1992 U.S. Dist. LEXIS 17476 (S.D.N.Y. Nov. 12, 1992). The fifth was another New York district court opinion which was effectively overruled by *Cuoco*: *McMullen v. Herschberger,* 1993 U.S. Dist. LEXIS 78 (S.D.N.Y. Jan. 7, 1993). The sixth decision was a Magistrate Judge's report and recommendation: *Black v. Kendig,* 2003 U.S. Dist. LEXIS 4109 (D.D.C. Mar. 18, 2003) (adopted in part by the district court by order dated February 3, 2004).

This Court too has at least implicitly agreed with the conclusion reached by the vast majority of the lower courts that have addressed this issue. In *Carlson*, the issue before this Court was whether the mere fact that a remedy is available under the FTCA was sufficient to bar a parallel *Bivens* remedy. 446 U.S. at 16. The Court rejected such a bar because, in part, "we have here no explicit congressional declaration that persons injured by federal officers'

F. Supp. 2d 699, 703 (S.D.N.Y. 2001); *Navarrete v. Vanyur,* 110 F. Supp. 2d 605 (N.D. Ohio 2000); *Lewis v. Sauvey,* 708 F. Supp. 167, 168 (E.D. Mich. 1989).

violations of the Eighth Amendment may not recover money damages from the agents but must be remitted to another remedy, equally effective in the view of Congress." *Id.* at 19. The Court then explained that its conclusion that the existence of a remedy under the FTCA did not automatically bar a parallel *Bivens* action "is buttressed by the significant fact that Congress follows the practice of explicitly stating when it means to make FTCA an exclusive remedy. See . . . 42 U.S.C. § 233(a). . . ." *Id.* at 20. Thus, this Court has already recognized that the unambiguous language of section 233(a) makes the FTCA the exclusive remedy for claims arising under that statute, barring even parallel *Bivens* actions.

Congress appears to agree that the overwhelming majority of the courts have correctly interpreted section 233(a). Congress has amended section 233 eleven times since it was enacted in 1970.[4] If Congress had believed that the federal courts were misinterpreting the scope of section 233(a), it could have taken the opportunity presented by any one of

[4] Nov. 18, 1971, P.L. 92-157, Title III, § 301(c), 85 Stat. 463; Oct. 24, 1992, P.L. 102-501, §§ 2-4, 106 Stat. 3268; June 10, 1993, P.L. 103-43, Title XX, § 2010(a)(4), 107 Stat. 213; Dec. 14, 1993, P.L. 103-183, Title VII, § 706(a), 107 Stat. 2241; Dec. 26, 1995, P.L. 104-73, §§ 2-4, 5(a), (b), 6-11, 109 Stat. 777, 780; Aug. 21, 1996, P.L. 104-191, Title I, Subtitle C, § 195, 110 Stat. 1988; Oct. 11, 1996, P.L. 104-299, § 4(a), 110 Stat. 3644; Oct. 26, 2002, P.L. 107-251, Title VI, § 601(a), 116 Stat. 1664; Nov. 25, 2002, P.L. 107-296, Title III, § 304(c), 116 Stat. 2165; April 30, 2003, P.L. 108-20, § 3(a)-(I), 117 Stat. 646; Dec. 6, 2003, P.L. 108-163, § 2(m)(1), 117 Stat. 2023.

those eleven occasions to amend the statute to explicitly state that it was not intended to preclude the prosecution of *Bivens* actions against PHS personnel. But it never did, which this Court has previously recognized as being a significant act on the part of Congress.

> Congress in the face of these decisions has permitted the clause as it now appears in paragraph (6) to stand for many years without change in its phraseology, although amending that portion of the Bankruptcy Act in other particulars. This is persuasive evidence of the adoption by that body of the judicial construction.

Missouri v. Ross, 299 U.S. 72, 76 (1936); *see also Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 184-85 (1988) ("We generally presume that Congress is knowledgeable about existing law pertinent to the legislation it enacts.").

B. Congress's Actions In Regard To Other Statutes Indicate That It Interprets Section 233(a) As Precluding *Bivens* Actions Against PHS Personnel

In 1988, Congress passed the Federal Employees Liability Reform and Tort Compensation Act of 1988, generally known as the Westfall Act, which expanded the coverage of the FTCA. Among other things, the Westfall Act replaced the existing subsection (b) of section 2679 of Title 28 of the United States Code with the following:

(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.

Section 2679(b) was intended to expand the immunity from suit available to federal employees. But Congress indicated that it did not intend this legislation to change existing law, "as interpreted by the courts, with respect to the availability of other

recognized causes of action, nor does it either expand or diminish rights established under other Federal statutes." H. Rep. No. 100-700, 100th Cong., 2d Sess. (1988), *reprinted in* 1988 U.S.C.C.A.N. 5951.

The language of section 2679(b)(1) is similar to that found in section 233(a). In particular, section 2679(b)(1) states that the remedy provided under the FTCA against the United States 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." The language of section 233(a) is almost identical, stating that the remedy against the United States provided by the FTCA "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." But unlike section 233(a), Congress added an additional provision to section 2679(b), stating in subsection (b)(2) that, "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," i.e., *Bivens* actions.

"It is a cardinal principle of statutory construction that a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant." *TRW Inc. v. Andrews,* 534 U.S. 19, 31 (2001) (citation and quotation omitted). Clearly then, Congress felt it was necessary to include subsection

(b)(2) to prevent subsection (b)(1) from being understood to preclude *Bivens* actions against federal employees.

This Court has similarly concluded that this was Congress's intention. In *United States v. Smith,* 499 U.S. 160, 165-66 (1991), the Court noted that section 2679(b)(1) "states that 'the remedy' against the Government under the FTCA 'is exclusive of any other civil action or proceeding for money damages . . . against the employee' and then reemphasizes that 'any other civil action or proceeding for money damages . . . against the employee . . . is precluded.'" The Court then described section 2679(b)(2) as preserving some tort liability of Government employees when suit would otherwise be barred by creating two "exceptions" to that immunity, including in the case of *Bivens* actions.

All of this clarifies the scope of the protection provided by section 233(a):

> [I]t is a well established principle that courts may look to subsequent legislation as an aid in the interpretation of prior legislation dealing with the same or similar subject matter. Indeed, Chief Justice Marshall stated the principle that, if it can be gathered from a subsequent statute [i]n pari materia what meaning the legislature attached to the words of a former statute, this will amount to a legislative declaration of its meaning,

> and will govern the construction of the first statute.

Jordan v. United States DOJ, 591 F.2d 753, 770 (D.C. Cir. 1978) (en banc) (citing *Alexander v. Alexandria,* 9 U.S. (5 Cranch) 1, 7-8, 3 L. Ed. 19 (1809)); *see also United States v. Rodriguez,* 60 F.3d 193, 196 (5th Cir. 1995) (citing *United States v. Freeman,* 44 U.S. (3 How.) 556, 564, 11 L. Ed. 724 (1845)).

Since Congress, by adding subsection (b)(2) to section 2679, clearly interpreted the language of subsection (b)(1) as otherwise preventing the prosecution of *Bivens* actions, it must be presumed that Congress similarly interpreted the almost identical language of section 233(a). In other words, Congress's action in adding subsection (b)(2) to section 2679 effectively "amounted to a legislative declaration of [the] meaning" of section 233(a); to wit, that its scope precluded the prosecution of *Bivens* actions against PHS personnel.

This can further be seen in the enactment in 2000 of the Public Health Improvement Act, 106 P.L. 505; 114 Stat. 2314. Title IV of the Act addressed the placement of automated external defibrillator devices in Federal buildings. Section 404 of the Act added section 248 to the Public Health Service Act, codified as 42 U.S.C. § 238q, which limited the liability of persons utilizing the defibrillator devices. Subsection (c)(1)(C) of section 238q provides that:

> This section does not waive any protection from liability for Federal officers or employees under –
>
> (i) section 233 of this title; or
>
> (ii) sections 1346(b), 2672, and 2679 of title 28, United States Code, or under alternative benefits provided by the United States where the availability of such benefits precludes a remedy under section 1346(b) of title 28.

Thus, Congress explicitly distinguished the liability protection offered by section 233 from that offered by section 2679. As discussed above, statutory analysis indicates that the distinction between the protection offered by the two statutes is that section 2679, by its explicit terms, does not offer any protection from liability through *Bivens* actions (per section 2679(b)(2)), while section 233 does offer such protection.

Significantly, Public Law 106-505 was enacted on November 13, 2000. This was three-and-a-half months after the Second Circuit had issued its opinion in *Cuoco,* holding that section 233(a) barred *Bivens* actions against PHS personnel. At the time Congress enacted Public Law 106-505, *Cuoco* was the only published court of appeals decision addressing the question of whether section 233(a) barred *Bivens* actions against PHS personnel.

> [W]here, as here, Congress adopts a new law incorporating sections of a prior law, Congress normally can be presumed to have had knowledge of the interpretation given to the incorporated law, at least insofar as it affects the new statute.

Lorillard, Div. of Loew's Theatres, Inc. v. Pons, 434 U.S. 575, 581 (1978).

Thus, when Congress made reference to section 233 in the newly-enacted section 238q, it presumably was aware of the Second Circuit's interpretation of the scope of the protection provided by section 233(a) to PHS personnel. Therefore, when Congress referred in section 238q(c)(1)(C) to the "protection from liability for Federal officers or employees under . . . section 233," it was presumably including in the scope of that protection immunity from *Bivens* actions, as stated by the Second Circuit in *Cuoco*. If that had not been Congress's intent, it certainly would have said so.

Congress has thus clearly – and repeatedly – indicated its satisfaction with an interpretation of section 233(a) that precludes the prosecution of *Bivens* actions against PHS personnel.

3. IT IS IRRELEVANT WHETHER THE FTCA PROVIDES WHAT A COURT MIGHT CONCLUDE IS AS EFFECTIVE A REMEDY AS A *BIVENS* ACTION

A key element of the Ninth Circuit's decision below was its conclusion that the FTCA is not as effective a remedy as a *Bivens* action, and that therefore section 233(a) could not bar a plaintiff from pursuing a *Bivens* action, notwithstanding the "exclusive remedy" language in that statute. *Castaneda,* 546 F.3d at 689-91. This conclusion derived from the Ninth Circuit's interpretation of *Carlson* as having "established a two-part test for express *Bivens* preemption: Congress must provide an alternative remedy that is 'explicitly declared to be a substitute for' *Bivens* (rather than a complement to it) and Congress must view that remedy as 'equally effective.' 446 U.S. at 18-19." *Id.* at 689. But the Ninth Circuit was misinterpreting this language from *Carlson*.

Carlson did not establish a two-part test for express *Bivens* preemption. Rather, the actual language in *Carlson* states that a *Bivens* action will be 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." 446 U.S. at 19. The only relevant portion of this statement is the requirement that Congress has provided an alternative remedy. As this Court has repeatedly held (see discussion in Section 1 above), it is the prerogative of Congress to determine what remedies are appropriate

for a particular violation, and deference to that Congressional prerogative precludes courts from substituting their views as to whether those substitute remedies are "equally effective" as other potential remedies.

Not only is the very question of whether the FTCA is as "equally effective" as a *Bivens* action irrelevant, the Ninth Circuit's analysis of that question ignored the relevant holdings of this Court's various *Bivens* opinions issued since *Carlson* was decided. The Ninth Circuit concluded that the FTCA was not as equally effective a remedy as a *Bivens* action because of the procedural requirements and limitations on damages associated with FTCA actions: that damages are not available against individual defendants, that punitive damages are not permitted, that there is no right to a jury trial, and that the United States's liability under the FTCA is limited "in accordance with the law of the place where the act or omission occurred" (28 U.S.C. § 1346(b)(1)), rather than being national in scope. *Castaneda,* 546 F.3d at 689-690. But, as discussed above, this Court has held in cases decided after *Carlson* that it is not necessary that an alternative remedy provide the same processes and damages as a *Bivens* action for the existence of that remedy to be sufficient to bar a *Bivens* action.

For example, in *Bush*, the Court refused to create a *Bivens* remedy for an employee of the National Aeronautics and Space Administration who was fired after making critical public remarks about his

employer, explaining that Congress was in a better position to balance the competing policy concerns of "governmental efficiency and the rights of employees" even if the "existing remedies do not provide complete relief for the plaintiff." 462 U.S. at 388-89. "[W]e decline to create a new substantive legal liability without legislative aid and as at the common law because we are convinced that Congress is in a better position to decide whether or not the public interest would be served by creating it." *Id.* at 390 (citation and quotation marks omitted).

In *Schweiker*, this Court held that a non-comprehensive statutory remedy could preclude a *Bivens* claim. In that case, social security disability recipients sued individual federal employees under *Bivens* for alleged violations of their due process rights when their benefits were wrongfully terminated. 487 U.S. at 414. Although the plaintiffs' remedy under the remedial program consisted only of an award of back benefits, this Court held that this was a sufficient remedy to preclude a *Bivens* action. *Id.* at 428-429; *see also 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.") (emphasis added).

Thus, the very factors that were so essential to the Ninth Circuit's analysis of why section 233(a) does not bar *Bivens* actions against PHS personnel have been found by this Court not to be relevant to

such an analysis. The foundation of the Ninth Circuit's opinion turns out to be non-existent.

4. THE NINTH CIRCUIT'S RELIANCE ON THE LEGISLATIVE HISTORY AND THE STATUTE'S TITLE IN CONCLUDING THAT SECTION 233(a) DOES NOT PRECLUDE A *BIVENS* ACTION AGAINST PHS PERSONNEL WAS MISPLACED

To get around the plain language of the statute, the Ninth Circuit relied on the legislative history related to the enactment of section 233(a) and the title given to the statute in the enacting legislation. But that reliance was misplaced.

"[A]ppeals to statutory history are well taken only to resolve 'statutory ambiguity.'" *Barnhill v. Johnson,* 503 U.S. 393, 402 (1992) (citation omitted). "[I]n interpreting a statute a court should always turn first to one, cardinal canon before all others. We have stated time and again that courts 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: 'judicial inquiry is complete.'" *Connecticut Nat'l Bank v. Germain,* 503 U.S. 249, 253-54 (1992) (citations omitted). Similarly, "'[t]he title of a statute . . . cannot limit the plain meaning of the text. For interpretive purposes, [it is] of use only when [it] sheds light on some ambiguous word or phrase.'" *Pennsylvania Department of Corrections v. Yeskey,* 524 U.S. 206, 212 (1998) (citation omitted).

As discussed in Section 2 above, there is nothing ambiguous about section 233(a). The meaning of the statute is plain on its face: the ***only*** remedy available for a claim of personal injury or death "resulting from the performance of medical, surgical, dental, or related functions . . . by any commissioned officer or employee of the Public Health Service while acting within the scope of his office or employment" is a claim against the United States under the FTCA. Given that, there is no need to review the legislative history or to consider the title of the act in interpreting the statute. But even if the legislative history and the statute's title are considered, they do not change the conclusion that the plain language of section 233(a) bars *Bivens* actions against PHS personnel.

In describing the legislative history of the statute, the Ninth Circuit asserted that "the legislative history of § 233(a) . . . reveals that Congress's exclusive concern was with common law malpractice liability," noting that "[t]he only two statements on the floor of either house of Congress respecting the bill mentioned only medical malpractice, with nothing being said about constitutional violations." *Castaneda,* 546 F.3d at 693. The Ninth Circuit further explained "that the Surgeon General had requested the amendment because PHS physicians 'just cannot afford to take out the customary liability insurance as most doctors do'" and that "[t]he section itself was titled in the Statutes at Large 'Defense of Certain Malpractice and Negligence Suits.'" *Id.* The

Ninth Circuit concluded that "[t]hus, not only is the authoritative text of the statute silent as to constitutional torts in particular, but the title and legislative history, if anything, indicate an exclusive concern with state malpractice claims." *Id.* at 694.

The Ninth Circuit misinterpreted the significance of the title in the Statutes at Large. The appellate court focused on the word "malpractice," which it apparently understood simply to mean medical negligence. *Id.* at 694, n.12. But the statute's title refers not just to "malpractice" but also to "negligence suits." There would have been no need to separately refer to a specific sub-class of negligence suits – medical negligence – if all that Congress intended to be encompassed by the phrase "Defense of Certain Malpractice and Negligence Suits" were negligence suits. But malpractice means more than just medical negligence, which thus makes understandable Congress's decision to make reference in the statute's title to both malpractice and negligence suits.

In 1970, when section 233(a) was enacted, there were published cases that expanded the definition of malpractice well beyond the narrow confines of medical negligence. For example, in *Sommer v. New Amsterdam Casualty Co.,* 171 F. Supp. 84 (D. Mo. 1959), the plaintiff, a psychiatrist, sued his malpractice insurance carrier for failing to defend him in a lawsuit which accused him of "making an assault upon [a patient] by placing him in a sanatorium for the mentally ill." *Id.* at 85. The carrier denied coverage "because [the patient] alleged an assault,

and because the word 'assault' connotes a crime, we did not owe the insured either the duty to defend or to pay." *Id.* at 86. The district court denied the insurer's motion for summary judgment because "[t]he word 'malpractice' includes the performance of criminal acts." *Id.* In *Bakewell v. Kahle,* 125 Mont. 89, 93 (1951), the Montana Supreme Court explained that "malpractice . . . means bad or unskillful practice, resulting in injury to the patient, and comprises all acts and omissions of a physician or surgeon as such to a patient as such, which may make the physician or surgeon either civilly or criminally liable." (citation and quotation marks omitted).

By entitling the statute "Defense of Certain Malpractice and Negligence Suits," Congress was making clear that it was not limiting the coverage of the statute to just claims of medical negligence, but to any claim that might be labeled "malpractice," i.e. to claims relating to "all acts and omissions of a physician or surgeon as such to a patient as such, which may make the physician or surgeon either civilly or criminally liable." *Bakewell,* 125 Mont. at 93. Congress used similarly expansive language in section 233(a):

> 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 . . . 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. (emphasis added).

This interpretation of the title attached to section 233 in the Statutes at Large is consistent with the purpose of the statute as described in the legislative history. Specifically, as the Ninth Circuit itself stated, "Representative Staggers noted that the Surgeon General had requested the amendment because PHS physicians 'just cannot afford to take out the customary liability insurance as most doctors do.' 91 Cong. Rec. H42,543." *Castaneda,* 546 F.3d at 694. But if, as the district court in *Sommer* held, malpractice could include even criminal acts, and if such "malpractice" was potentially covered by "customary liability insurance," then the concern of the Surgeon General referenced by Rep. Staggers would necessarily not be limited simply to claims of medical negligence. It would encompass all lawsuits arising from the work of the officers and employees of the PHS for which they could not afford to obtain insurance due to their low salaries. As this Court noted in *Oncale v. Sundowner Offshore Services,* 523 U.S. 75, 80 (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."

In summary, because the statute has a plain meaning, it is not necessary to analyze its legislative history or its title. But if such analysis were to be conducted, it would lead to the same result: section 233(a) precludes *Bivens* actions against PHS personnel.

5. THERE ARE SPECIAL FACTORS PRESENT THAT COUNSEL CAUTION BEFORE RECOGNIZING A *BIVENS* REMEDY AGAINST PHS PERSONNEL

As discussed above, this Court in *Wilkie,* explained that "the decision whether to recognize a *Bivens* remedy may require two steps." 551 U.S. at 550. The first, addressed at length above, is whether an alternative remedy exists.

> But even in the absence of an alternative, a *Bivens* remedy is a subject of judgment: "the federal courts must make the kind of remedial determination that is appropriate for a common-law tribunal, paying particular heed, however, to any special factors counselling hesitation before authorizing a new kind of federal litigation."

Id. (quoting *Bush*, 462 U.S. at 378). Petitioner contends that, through section 233(a), Congress has provided an alternative remedy – a FTCA claim

against the United States – and on that basis a *Bivens* action should not be recognized against PHS personnel related to their performance of medical, surgical, dental, or related functions. But even if this Court were to disagree on that point, it would then have to move to the second step of the analysis as described in *Wilkie*. And there are special factors present here which counsel hesitation before recognizing a *Bivens* action.

As the district court's discussion of the legislative history of section 233 indicates, the motivation for the enactment of subsection (a) was the low pay received by the officers and employees of the PHS.

> Representative Staggers, who introduced the amendment, . . . emphasized that the amendment was "needed because of the low salaries that [PHS doctors] receive and in view of their low salaries, they cannot afford to take out the insurance to cover them in the ordinary course of their practice of medicine."

Castaneda, 538 F. Supp. 2d at 1294 (citation omitted).

The Second Circuit, in its decision finding that *Bivens* actions were precluded by section 233(a), explained that by limiting the potential personal liability of PHS personnel, "[t]he statute may well enable the Public Health Service to attract better qualified persons to perform medical, surgical and dental functions in order better to serve, among others, federal prisoners." *Cuoco,* 222 F.3d at 108.

In its *amicus curiae* brief submitted in support of the petitions for writ of certiorari filed herein, the Commissioned Officers Association of the United States Public Health Service, Inc. expressed concern that, if this Court affirms the interpretation of section 233(a) adopted by the Ninth Circuit below, "[t]he attendant need for malpractice insurance, at great cost, together with the ever-present threat of being subjected to litigation, will undoubtedly have negative consequences for the USPHS's recruitment and retention of qualified medical personnel." USPHS *Amicus* Brief at 7.

All of this counsels hesitation before authorizing the prosecution of *Bivens* actions against PHS personnel. An additional factor counseling hesitation is the likely flood of *Bivens* claims that would ensue if this Court authorizes them. *Bivens* allegations of deliberate indifference can easily be added to most lawsuits arising from the performance by PHS personnel of medical, surgical, dental, or related functions. This is not a theoretical concern.

In Section 2.A. above, petitioner identified fifty-five published and unpublished decisions which addressed the issue of whether section 233(a) permitted the prosecution of *Bivens* actions against PHS personnel. A review of the facts described in those opinions reveals that in at least fifteen of those cases, nothing more than standard claims of medical

negligence were alleged.[5] In twenty other cases, the allegation was a delay in treatment or a failure to treat, both of which claims often reflect nothing more than a disagreement between the patient and the doctor as to the nature and extent of the treatment that should be provided for a particular condition.[6]

Since inherent in any medical negligence claim is an assertion that the physician or other health care professional fell below the standard of care, there is no reason why almost every litigant pursuing a claim arising from medical care or treatment provided by PHS personnel could not make a claim of deliberate

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[5] *Wallace,* 302 Fed. Appx. at 54; *Anderson,* 176 Fed.Appx. at 243; *Beverly,* 902 F.2d 1568; *Uribe,* 2009 U.S. Dist. LEXIS 9176; *Morales,* 2008 U.S. Dist. LEXIS 80659; *Hairston,* 2008 U.S. Dist. LEXIS 52962; *Hodge,* 2007 U.S. Dist. LEXIS 64644; *Coley,* 2007 U.S. Dist. LEXIS 57639; *Wallace v. Dawson,* 2007 U.S. Dist. LEXIS 6279; *Barbaro,* 2006 U.S. Dist. LEXIS 79338; *Cuco,* 2006 U.S. Dist. LEXIS 49711; *Arrington,* 2006 U.S. Dist. LEXIS 20193; *Smith,* 2006 U.S. Dist. LEXIS 23130; *Whooten,* 2005 U.S. Dist. LEXIS 37995; and *Valdivia,* 2004 U.S. Dist. LEXIS 16355.

[6] *Miles,* 231 Fed. Appx. at 592; *Zanzucchi,* 933 F.2d 1018; *Luna,* 2009 U.S. Dist. LEXIS 49309; *Geralds,* 2009 U.S. Dist. LEXIS 14721; *Anson,* 2009 U.S. Dist. LEXIS 12168; *Stine,* 2008 U.S. Dist. LEXIS 70863; *Batey,* 2008 U.S. Dist. LEXIS 12550; *Fourstar,* 2007 U.S. Dist. LEXIS 70701; *Salley,* 2006 U.S. Dist. LEXIS 90898; *Baez,* 2006 U.S. Dist. LEXIS 84013; *Davis,* 2006 U.S. Dist. LEXIS 79689; *Butler,* 2006 U.S. Dist. LEXIS 97961; *Pimentel,* 411 F. Supp. 2d at 127; *Ekwere,* 2005 U.S. Dist. LEXIS 30483; *Anderson,* 2005 U.S. Dist. LEXIS 41911; *Freeman,* 2005 U.S. Dist. LEXIS 41915; *Lovell,* 2004 U.S. Dist. LEXIS 20584; *Tillitz,* 2004 U.S. Dist. LEXIS 19401; *Cook,* 2003 U.S. Dist. LEXIS 27806; *Lewis,* 708 F. Supp. at 168.

indifference, thereby opening the flood gates of litigation.

So claims of deliberate indifference can be easily made, but they are not so easily disposed of. Few will be amenable to dismissal at the pleading stage, and many may not be susceptible to resolution even by way of summary judgment, especially when they turn on expert testimony. The question of whether a physician's actions in caring for a patient fell below the applicable standard of care is one that must be answered by experts, and the presence of conflicting expert declarations at summary judgment will usually result in the denial of such a motion. This may be sufficient to defeat a defense of qualified immunity as well because disputed issues of material fact will defeat a motion for summary judgment based on qualified immunity. *See Johnson v. Jones*, 515 U.S. 304, 313 (1995).

If this Court affirms the Ninth Circuit and holds that section 233(a) permits *Bivens* claims against individual officers and employees of the PHS, any meaningful benefit to PHS personnel from the exclusive remedy provision of section 233(a) will be eliminated. The ability of plaintiffs to easily re-state their medical negligence causes of action as *Bivens* claims alleging deliberate indifference will mean that, in the vast majority of the lawsuits arising from the provision of medical, surgical, dental, or related functions by personnel of the PHS, it will be all but impossible for the United States to invoke section 233 to fully substitute itself in place of the named PHS officers and employees, thereby forcing those

individuals to remain as active defendants in the action.

Earlier this year this Court found a similar concern to be of importance when it addressed the question of whether supervising prosecutors were entitled to the same absolute immunity as line prosecutors. The Court concluded that the supervisors were entitled to such immunity, commenting that, "[m]ost important, the ease with which a plaintiff could restyle a complaint charging a trial failure so that it becomes a complaint charging a failure of training or supervision would eviscerate *Imbler*." *Van de Kamp v. Goldstein,* 129 S. Ct. 855, 864 (2009). A similar situation would likely arise here, resulting in the evisceration of section 233(a).

Given all this, petitioner contends that the second step of the required *Wilkie* analysis also indicates that a *Bivens* action should not be permitted as to PHS personnel.

CONCLUSION

This Court should reverse the judgment of the Ninth Circuit and order that court to reverse the decision of the district court denying the petitioners' motion to dismiss and to order that court to grant petitioners' motion.

Respectfully submitted,

PATRICK L. HURLEY
MANNING & MARDER, KASS, ELLROD, RAMIREZ LLP
1 California Street
Suite 1100
San Francisco, CA 94111
(415) 217-6990
plh@mmker.com

STEVEN J. RENICK
Counsel of Record
MILDRED K. O'LINN
TIMOTHY J. KRAL
MANNING & MARDER, KASS, ELLROD, RAMIREZ LLP
801 S. Figueroa Street
15th Floor
Los Angeles, CA 90017
(213) 624-6900
sjr@mmker.com

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