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

# REPLY BRIEF FOR PETITIONER COMMANDER STEPHEN GONSALVES

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## REPLY BRIEF

None of Respondents' arguments succeeds in creating an implied exception to the plain and absolute immunity conferred by 42 U.S.C. § 233(a). The many versions of their Westfall Act argument suffer from the same fundamental error of mischaracterizing that statute's *Bivens* exception as an all-purpose authorization for *Bivens* claims, when it is instead a limited exception only to the specific immunity granted by the Westfall Act itself – and thus inapplicable to the separate § 233(a) immunity. Turning from the Westfall Act to § 233, Respondents ignore the controlling language of § 233(a) and instead try to imply a *Bivens* exception from other subsections of the statute through a series of inferential leaps that the statutory language cannot support. Moreover, their main contention – that § 233(a)'s immunity does not apply when there is no remedy against the United States under the Federal Tort Claims Act ("FTCA") – is irrelevant, because Respondents *do* have an FTCA remedy. Nor can Respondents find support for their implied exception in the Court's *Bivens* case law, for those cases unequivocally require enforcement, not circumvention, of Congress's judgments. Finally, the pleas of Respondents and their *amici* for a policy-based exception to § 233(a) are meritless and, more importantly, are directed to the wrong branch of government. The statute Congress enacted must be applied according to its plain terms.

## I. The Westfall Act Does Not Affect the Scope of § 233(a)'s Absolute Immunity.

1. Woven through virtually every argument in Respondents' brief is the erroneous assertion that § 233(a) is limited in some way by the Westfall Act, which in Respondents' view creates an affirmative right to bring *Bivens* claims against federal employees in every context. *See* Resp. Br. 23-24, 39-48, 56, 63. But the Westfall Act itself conclusively defeats that assertion. By its own terms, the provision on which Respondents rely, Paragraph (2) of the Westfall Act, 28 U.S.C. § 2679(b)(2), does no more than create an exception to the specific immunity provided under Paragraph (1) of the same Act, *id.* § 2679(b)(1). It therefore has no effect on the scope of § 233(a) or any other separate immunity for government employees.

The text of the Westfall Act is crystal clear on this point. Specifically, Paragraph (1) provides an immunity for all federal employees by making an FTCA suit against the United States the exclusive remedy for injury or death "arising or resulting from the negligent or wrongful act or omission of any employee of the Government." *Id.* § 2679(b)(1). Paragraph (2) then carves out an exception to the grant of immunity in Paragraph (1), and *only* to that specific immunity, stating: "*Paragraph (1)* does not extend or apply to a civil action . . . which is brought for a violation of the Constitution." *Id.* § 2679(b)(2) (emphasis added). Therefore, the *Bivens* exception in Paragraph (2) does not apply to any immunity other than the immunity provided in Paragraph (1). And as this Court's decision in *United States v.*

*Smith*, 499 U.S. 160 (1991), confirms, the Westfall Act immunity (with its *Bivens* exception) is separate and distinct from immunities provided by other statutes, such as § 233(a). *Id.* at 172 & n.15 (Westfall Act "adds" to other immunities). PHS officers and employees are entitled to *both* immunities, and an exception to one is not an exception to the other.

Petitioner's opening brief lays out this argument, *see* Gonsalves Br. 37-38, but Respondents simply ignore it. Instead, they assume their conclusion by baldly asserting that Paragraph (2) creates an overarching entitlement to bring *Bivens* actions in every context. *E.g.*, Resp. Br. 44. They even go so far as to repeatedly quote Paragraph (2) while omitting the language that limits the *Bivens* exception to the immunity created by "Paragraph (1)." Thus, in Respondents' version the Westfall Act reads as follows: "'The [exclusive] remedy against the United States provided by [the FTCA] . . . 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.'" *Id.* at 14 (alterations in original); *id.* at 18 (same); *id.* at 22 (same). The first ellipsis in Respondents' quotation removes the dispositive limiting reference to "Paragraph (1)."

With the actual text of the Westfall Act in mind, it is readily apparent that every version of Respondents' argument based on that Act is fatally flawed. Indeed, the existence of the *express Bivens* exception to the Westfall immunity militates against

any reading of § 233(a) as *implicitly* including the same exception. Gonsalves Br. 35-36.

*First*, Respondents contend that § 233(a) "incorporates" by reference "the FTCA provision that expressly preserves a *Bivens* remedy." Resp. Br. 23. But, as just explained, the Westfall Act plainly does not "expressly preserve[] a *Bivens* remedy" in all circumstances; it creates only a limited exception to a particular immunity. Therefore, even if each and every word of the Westfall Act appeared *verbatim* in § 233(a), it would still have no effect on the immunity provided by § 233(a). By its terms, Paragraph (2) of that Act still limits only the Paragraph (1) immunity, not any other immunity that Congress has separately provided. *See Smith*, 499 U.S. at 172 & n.15.

Moreover, as explained in Petitioner's opening brief, the language of § 233(a) independently defeats the incorporation argument, because § 233(a) refers to the FTCA only in describing the "remedy against the United States" that is a claimant's "exclusive" means of redress. 42 U.S.C. § 233(a); *see* Gonsalves Br. 37-38; U.S. Br. 21-22. The Westfall Act immunity and its *Bivens* exception do not define the scope of any remedy against the United States. And when § 233(a) turns from describing the remedy against the United States to limning, in a separate clause, the scope of the immunity provided to PHS officers and employees, it does not cross-reference the FTCA at all. Rather, it makes that immunity categorically applicable to preclude "any other civil action or proceeding by reason of the same subject matter." 42 U.S.C. § 233(a). Respondents provide no

response to this argument, except the conclusory assertion that it is a "strained parsing of § 233(a)[]" and "lacks merit." Resp. Br. 24. As set forth in detail here and in Petitioner's opening brief, the plain language of both § 233(a) and the Westfall Act proves otherwise.

*Second*, Respondents argue that even if the Westfall Act is not actually incorporated into § 233(a), it nonetheless trumps § 233(a) because "Congress's express preservation of *Bivens* remedies in § 2679(b)(2) applies on its terms to all federal employees – including PHS personnel." Resp. Br. 44; *see also id.* at 39. This argument also plainly fails because the so-called "express preservation of *Bivens* remedies in § 2679(b)(2)" is an exception *only* to Paragraph (1) of the same subsection, and therefore "preserves" nothing from the scope of the categorical immunity provided by § 233(a).[1]

When the two statutes are properly understood as setting forth two separate immunities, only one of which has a *Bivens* exception, then both have independent significance. Thus, there are some situations in which PHS workers are entitled to either immunity (a state-law claim based on a medical function); some situations in which only § 233(a) applies (a *Bivens* claim based on a medical

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[1] Respondents are also wrong that the Westfall Act is more specific than § 233(a). Resp. Br. 47-48. It is in § 233(a) that Congress decided which suits should be permitted against the specific group of federal employees of which Petitioners are members. *See Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 662-63 (2007).

function); some situations in which only § 2679(b) applies (a state-law claim based on a non-medical function, such as negligence in building maintenance); and some situations in which neither provision applies (a claim based on actions taken outside the scope of employment).[2]

2. Since the Westfall Act itself has no effect on the § 233(a) immunity, Respondents are forced to fall back on the legislative history of that Act, asserting that it "confirms that Congress viewed § 233(a) as providing immunity for common-law tort actions only, not *Bivens* actions." Resp. Br. 41. Respondents make no attempt to explain why Congress's view in 1988 has any bearing on the interpretation of a separate statute enacted nearly two decades earlier. *See* Gonsalves Br. 39-40. In any event, they cannot point to anything in the Westfall Act's legislative history expressing the view they espouse.

Here, once again, Respondents tangle together the two separate immunities conferred by § 233(a) and the Westfall Act. As explained in Petitioner's opening brief, Congress's purpose in enacting the Westfall Act was to undo this Court's *Westfall*

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[2] Respondents claim that § 233(a) "continues to reach 'distinct cases'" under their reading, Resp. Br. 44 – but they do not successfully identify any. They claim that *other* subsections of § 233 would continue to operate – but that is irrelevant. *See, e.g.*, *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 252-53 (1992). They also suggest that § 233(a) would still have the function of providing immunity for private contractors as defined in § 233(g)-(p). Resp. Br. 45. That is incorrect, since those subsections contain their own operative immunity language. *See, e.g.*, 42 U.S.C. § 233(p)(3).

decision and reinstate for all federal employees the general immunities they had previously enjoyed by judicial decision: absolute immunity from common-law claims, and qualified immunity from constitutional claims. Gonsalves Br. 40-41. The statements of various legislators to the effect that the Westfall Act would restore the pre-*Westfall* status quo as to "Federal employees" and "individual Government officials," Resp. Br. 41-42 (quoting House Rep. at 6 and 134 Cong. Rec. 29933 (daily ed. Oct. 12, 1988)), must be understood in that context. They thus have no bearing on pre-existing statutory immunities for particular federal workers set forth in § 233(a) and similar statutes.

Further, Respondents have not identified a single statement from any legislator, committee report, or witness opining on whether § 233(a) applies to *Bivens* actions. Respondents assert that "[e]ach time Congress mentioned the[] pre-Westfall Act immunity statutes, it described them as providing immunity from common-law torts only." Resp. Br. 42. But careful examination of Respondents' citations shows this assertion is unfounded. Respondents misquote or mischaracterize several of the stray statements they cite.[3] In addition, Respondents' argument

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[3] Respondents misquote a witness at the House hearings as stating that "'most federally employed physicians have *only* been protected from personal liability for claims alleging medical malpractice.'" Resp. Br. 42-43 (emphasis added). In fact, the witness actually stated that such physicians had "*long* been protected" from such liability, *Legislation to Amend the Federal Tort Claims Act: Hearing Before the Subcomm. on Administrative Law and Gov't Relations of the H. Comm. on the Judiciary*, 100th Cong. 75 (1988) (emphasis added) – which,

assumes that "malpractice" is always limited to negligence, a proposition that is demonstrably wrong. *See infra* pp. 17-19.

The legislative history of the Westfall Act unequivocally states that Congress did not intend to "expand or diminish the rights established under other Federal statutes." H.R. Rep. No. 100-700, at 7 (1988), *as reprinted in* 1988 U.S.C.C.A.N. 5945, 5951. That Act plainly does not diminish the scope of the categorical immunity that § 233(a) confers.

## II. Nothing in § 233 Itself or Its Historical Context Implies a *Bivens* Exception.

Aside from their erroneous "incorporation" argument, Respondents never address the actual language of § 233(a) itself, even though it is the provision at issue here. The reason is obvious: § 233(a) unambiguously immunizes PHS officers and employees from "*any* . . . civil action or proceeding" – and thus from *Bivens* claims – arising out of medical or related functions within the scope of their

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unlike "only," obviously does not exclude a broader immunity. Respondents also assert that the House Report was describing pre-*Westfall* immunity statutes such as § 233(a) when it stated that "the general rule applicable to Federal employees was that they were absolutely immune from personal liability in State common law tort actions." Resp. Br. 42 (quoting H.R. Rep. No. 100-700, at 2 (1988), *as reprinted in* 1988 U.S.C.C.A.N. 5945, 5946) (quotation marks omitted). That is incorrect. The House Report was not describing statutory immunities like § 233(a), but the judge-made immunity doctrine of *Barr v. Matteo*, 360 U.S. 564 (1959), which Congress perceived to have been altered by the *Westfall* decision. *See* H.R. Rep. No. 100-700, at 2, *as reprinted in* 1988 U.S.C.C.A.N. at 5946.

employment. 42 U.S.C. § 233(a) (emphasis added). Because Respondents cannot find any basis for their would-be *Bivens* exception in § 233(a), they cast about in the other subsections of § 233 in the hope of creating some ambiguity or doubt about the mechanics of the statute's operation in particular circumstances. But none of their arguments comes close to disturbing § 233(a)'s pellucid clarity, or to depriving Petitioners of their statutory immunity.

1. Respondents first seek to limit § 233(a)'s scope by pointing to § 233(c), which provides that the Attorney General may file a certification in state court that a PHS employee was acting within the scope of his or her employment. Because § 233(c) provides for such certification only in actions commenced in state court, Respondents contend that Petitioners could obtain immunity under § 233(a) only if the Attorney General certified that they were acting within the scope of their employment pursuant to the Westfall Act, which has a certification provision (28 U.S.C. § 2679(d)) that covers both federal-court and state-court actions. Respondents therefore conclude that Petitioners are "subject to the FTCA's express preservation of a *Bivens* remedy for all federal employees." Resp. Br. 26-27.[4]

[4] Respondents note that the U.S. Attorney cited § 2679(d) when certifying that Petitioners were acting within the scope of their employment here. But Respondents neglect to mention that the certification *also* cited § 233(a), consistent with Petitioners invoking both of their two immunities. J.A. 34 (certification that Petitioners were acting within the scope of their employment made "[p]ursuant to the provisions of 28 U.S.C. [§]

This argument incorrectly assumes that certification is a prerequisite for immunity under § 233(a). But § 233(a) makes no reference to such a prerequisite. Instead, its immunity expressly turns on the *fact* that a PHS employee was performing medical or related functions within the scope of his or her employment. 42 U.S.C. § 233(a). A certification from the Attorney General is merely one, non-exclusive way to provide prima facie evidence of that fact. With or without any special statutory provision, ordinary rules of evidence and procedure allow the Attorney General to submit a statement certifying that the employee was acting within the scope of his employment, and the employee may, of course, submit his own evidence showing the same thing. *Cf. Gutierrez de Martinez v. Lamagno*, 515 U.S. 417, 431-32 (1995) (certification by the Attorney General under Westfall Act is "the first, but not the final word").

The reason § 233(c) provides for certification in state-court actions is that in that context certification has an important procedural function: providing what may be the sole means by which the case may be removed to federal court. 42 U.S.C. § 233(c). That procedure is unnecessary in cases

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2679(d)(1) and 42 U.S.C. § 233(a)"); *see* Defs.' Notice of Mot. and Mot. to Dismiss for Lack of Jurisdiction, Mem. of P. & A. in Support Thereof 1-11, *Castaneda v. United States*, No. CV 07-07241 DDP (C.D. Cal. Jan. 11, 2008); *compare* Resp. Br. 26-27 & n.14. In any event, a citation in a district court filing has no bearing on the correct interpretation of an Act of Congress.

initiated in federal court, and so the statute makes no provision for it.[5]

Respondents' contrary position would have absurd results. If there could be no § 233(a) immunity in situations where the statute does not expressly provide for certification, then § 233(a) would not have immunized *any* conduct – even garden-variety negligence – in federal courts until 1988, when the Westfall Act's express certification procedure for federal court actions was first enacted. But even Respondents must concede that § 233(a) provided immunity against *some* tort claims in federal court before there was an express federal-court certification procedure. Therefore, such a procedure is obviously unnecessary for immunity.[6]

2. Respondents' argument based on § 233(f) is equally meritless. Section 233(f) provides that the Government may, in its discretion,

> hold harmless or provide liability insurance for any officer or employee of

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[5] The Westfall Act certification provision extends to federal court as well, *see* 28 U.S.C. § 2679(d), but that additional procedure, while perhaps useful in providing a way to add the United States as a defendant, is not necessary, and it in no way alters the scope of the immunity under § 233(a), which does not turn on certification.

[6] In addition, Respondents' § 233(c) argument suffers from the same flawed logic that infects their other "incorporation" arguments discussed above: even if the Westfall Act were somehow incorporated into § 233(a) via the certification procedure, the Westfall Act's *Bivens* exception still applies by its express terms only to the immunity bestowed by Paragraph (1) of that Act, not § 233(a).

> the Public Health Service for damage … negligently caused … while acting within the scope of his office or employment and as a result of the performance of medical … or related functions … 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 [under the FTCA] . . . .

42 U.S.C. § 233(f).

Because this provision permits indemnification of PHS employees in a narrow swath of cases involving foreign countries or state details, Respondents appear to infer that it affirmatively authorizes suit against the employees in these circumstances. Respondents next generalize that inference into a rule that *in every case* "when an injured party does not have a remedy against the United States under the FTCA, he may sue a PHS official individually." Resp. Br. 29. Then, springing from that suspect generalization, Respondents make a further leap by arguing that there can be no immunity for *Bivens* actions because "there has never been a remedy against the United States . . . for *Bivens* actions" as such (as opposed to remedies for the same injury but based on a different cause of action). *Id.* at 31.

Even assuming *arguendo* that the first steps in Respondents' syllogism were correct, and that

§ 233(f) could be read as eliminating the immunity of PHS employees in cases where there is no FTCA remedy (which it cannot), that would not help Respondents. An FTCA remedy *is* unquestionably available here. Indeed, Respondents have sued the United States under the FTCA based on the same factual allegations they make against Petitioners, and the United States has admitted liability. J.A. 328-29. Thus, even if the availability of an FTCA remedy were a precondition for § 233(a) immunity, that precondition is amply satisfied in this case.

To reach the opposite conclusion, Respondents contend that the FTCA remedy against the United States must be *identical* to the cause of action asserted against the PHS employees. But, as demonstrated in Petitioner's opening brief, the plain language of § 233(a) conclusively refutes any requirement of identity in the causes of action involved. It expressly provides that an FTCA remedy is exclusive of "any other civil action or proceeding *by reason of the same subject matter*" against the employees as individuals. 42 U.S.C. § 233(a) (emphasis added). Respondents do not dispute that "by reason of the same subject matter" refers "to the operative facts of a lawsuit, not the theory of liability or cause of action," Gonsalves Br. 26 – indeed, they never even mention this key language. But § 233(a) thereby states in the clearest possible terms that it *is not relevant* for purposes of an immunity determination whether the FTCA claim and the claim against the PHS employees are based on the same legal theory. All that matters is that the

claims arise out of the same underlying factual occurrences.[7]

Here, Respondents have an FTCA remedy arising out of the same operative facts that undergird the claims they assert against Petitioners. That precludes a suit against Petitioners, even if immunity under § 233(a) were somehow limited to situations in which an FCTA remedy is available.

Further, the underlying premise that there is no immunity when there is no FTCA remedy is incorrect. Section 233(a)'s broad and unqualified immunity does not depend on the existence of an FTCA remedy.[8] The language of § 233(a) itself conditions the immunity on the underlying facts – that a PHS employee was performing medical or

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[7] Indeed, it is hard to conceive of any situation – including state-law medical negligence – in which a cause of action against the United States under the FTCA would be *identical* to a cause of action against PHS employees arising out of the same subject matter. FTCA liability is generally vicarious, resting on the fact of employment and *respondeat superior*, and therefore has different elements from claims directly against an employee.

[8] The Court declined to reach the analogous issue under 10 U.S.C. § 1089 in *Smith*, despite the existence of a circuit split. *See* 499 U.S. at 171-72 & nn.13-14. Indeed, Respondents embrace one side of the very split over § 1089 discussed in *Smith*. Resp. Br. 31-32. Respondents claim the United States has changed its position since *Smith*, Resp. Br. 33, but that is incorrect. At the *Smith* argument, the United States made clear that for purposes of that case it took no position on the scope of the immunity under § 1089(a). *See* Oral Arg. Tr. at *16, *United States v. Smith*, 499 U.S. 160 (1991), *available at* 1990 WL 601363.

related functions within the scope of his employment. Under those facts, the employee is immune, and the FTCA remedy is the only or "exclusive" one – even if that exclusive remedy is ultimately precluded by an FTCA exception. Indeed, the Court interpreted virtually identical "exclusive of" language in Paragraph (1) of the Westfall Act as providing immunity whether or not an FTCA claim is barred by the statutory FTCA exceptions. *See Smith*, 499 U.S. at 165-66. The contrary reading would have anomalous effects here, such as eliminating immunity for PHS workers for injury resulting from a government quarantine, *see* 28 U.S.C. § 2680(f), and allowing a plaintiff to circumvent the § 233(a) immunity simply by letting the clock run out on an FTCA claim, *see* 28 U.S.C. §§ 2401(b), 2675 (providing that FTCA claim is forfeited unless brought within six months of agency denial).

Section 233(f)'s indemnity provision, applicable to just a few factual scenarios, thus cannot support the far-reaching inferences Respondents draw from it. Section 233(f) should be read not as *limiting* protection for PHS employees by authorizing individual suits against them in the factual settings in which it applies (much less all situations in which there may not ultimately be an FTCA recovery), but as providing *extra* protection for PHS workers in particular settings where Congress feared that they might be exposed to suit despite § 233(a). An employee "assigned to a foreign country" might well be sued in a foreign court, which might well decline to apply United States law generally or § 233(a) in particular. *See Smith*, 499 U.S. at 172 n.15. And an

employee detailed to a State or a non-profit institution might not be considered to be acting within the scope of his or her federal employment within the meaning of § 233(a). Indeed, by statute PHS workers detailed to a State or non-profit "may be placed on leave without pay and paid by the State, subdivision, or institution to which they are detailed." 42 U.S.C. § 215(d); *see also* 42 C.F.R. § 22.5 (same); *Denton v. Yazoo & M.V.R. Co.*, 284 U.S. 305, 308 (1931) (discussing "borrowed servant" doctrine, under which "[w]hen one person puts his servant at the disposal and under the control of another for the performance of a particular service for the latter, the servant, in respect of his acts in that service, is to be dealt with as the servant of the latter and not of the former"). Thus, in keeping with Congress's expressed purpose of protecting PHS workers so as to encourage their recruitment and retention, § 233(f) fills a potential gap by providing for indemnification in cases where the § 233(a) immunity might be disregarded.[9]

3. Lacking any purchase in the language of § 233 itself, Respondents next try to imply a *Bivens* exception from the title of the provision and the "historical context" in which it was enacted. Resp.

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[9] In a footnote, Respondents also contend that § 233(e) supports their position. Resp. Br. 34 n.18. It does not. Section 233(e) simply broadens the FTCA remedy against the United States in certain cases, but has no effect on the immunity afforded PHS employees. *See* 42 U.S.C. § 233(e) (removing "assault or battery arising out of negligence in the performance of medical . . . or related functions" from the scope of the FTCA exception in 28 U.S.C. § 2680(h)).

Br. 35-40. Of course, neither the statute's title nor its context can vary Congress's clear command. *See, e.g.*, *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992). But even were it appropriate to consider such interpretive tools in this case, they do not aid Respondents. *See* Gonsalves Br. 29-34.

Pointing to the title ("Defense of Certain Malpractice and Negligence Suits"), Respondents argue that deliberate indifference, which involves a heightened mens rea of recklessness, is neither "malpractice" nor "negligence." As an initial matter, Respondents do not respond to Petitioner's point, Gonsalves Br. 31, that the title would not refer to *both* "malpractice" *and* "negligence" if malpractice were nothing more than negligence in a professional context, as they contend.

In support of their position, Respondents assert that the proper reading of "malpractice" in § 233(a)'s title can be derived only from *Black's Law Dictionary* or the common law. Resp. Br. 37-38. That premise is incorrect. *See, e.g.*, *United States v. Rodgers*, 466 U.S. 475, 480-81 (1984) (adopting "most natural, nontechnical reading of the statutory language" provided by *Webster's* instead of the "narrower, more technical meanings of the term" in *Black's Law*). In any event, however, the sources favored by Respondents refute their argument.

Respondents quote the 2004 edition of *Black's Law*, which defines malpractice as "negligence or incompetence" – a definition that by no means excludes reckless actions. But more relevant to

§ 233(a), which was enacted in 1970, is the 1968 edition of *Black's Law*, which defines malpractice as:

> Any professional misconduct, unreasonable lack of skill or fidelity in professional or fiduciary duties, evil practice, or illegal or immoral conduct. … In a more specific sense, it means bad, wrong, or injudicious treatment of a patient … resulting in injury, unnecessary suffering, or death … and proceeding from ignorance, carelessness, want of proper professional skill, disregard of established rules or principles, neglect, or a malicious or criminal intent.

*Black's Law Dictionary* 1111 (rev. 4th ed. 1968); *see also* Gonsalves Br. 29 (quoting 1961 edition of *Webster's*). That definition speaks for itself. And the common law in 1970 defined malpractice in the same broad way. *See Black's Law Dictionary* 1111 (rev. 4th ed. 1968) (citing cases); *see also, e.g.*, *Allison v. Blewett*, 348 S.W.2d 182, 184 (Tex. Civ. App. 1961) (citing *Bakewell v. Kahle*, 232 P.2d 127, 129 (Mont. 1951)); *Camposano v. Claiborn*, 196 A.2d 129, 129-30 (Conn. Cir. Ct. 1963).

Nor do Respondents succeed in finding support in federal cases – all decided in the wake of *Estelle v. Gamble*, 429 U.S. 97 (1976), and thus after § 233(a)'s enactment – about what constitutes deliberate indifference. *Estelle* itself recognized that, while a mere allegation that "a physician has been negligent … does not state a valid claim of medical

mistreatment" violating the Constitution, "[m]edical malpractice" can "become a constitutional violation" if the physician is deliberately indifferent. *Id.* at 107. And while the courts of appeals do sometimes use "malpractice" as a shorthand for a state-law negligence claim, they are not thereby purporting to give an exclusive definition of that term, as one of the very cases on which Respondents rely explains: "[C]ertain instances of medical malpractice may rise to the level of deliberate indifference; namely, when the malpractice involves culpable recklessness . . . . Accordingly, not every instance of medical malpractice is, a priori, precluded from constituting deliberate indifference." *Hathaway v. Coughlin*, 99 F.3d 550, 553 (2d Cir. 1996), *cited in* Resp. Br. 37.[10]

Respondents fare no better in their argument based on "historical context," by which they mean the fact that *Bivens* was not decided until six months after § 233 was enacted. Resp. Br. 38-40. It simply does not matter whether Congress specifically contemplated the possibility of a constitutional tort claim again PHS officers and employees. In choosing broad immunity language covering "any" claim, Congress surely did envision that new causes of action might be created in the future – and it

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[10] Respondents also argue that the word "certain" in the statute's title "demonstrates that Congress intended to provide PHS personnel with immunity from some – but not all – malpractice and negligence suits." Resp. Br. 37. But that word indicates nothing more than that the statute covers only suits against PHS personnel performing medical or related functions within the scope of their employment, and not every kind of malpractice and negligence suit under the sun.

expressed an intent to bar them all, regardless of their nature. *See J.E.M. Ag Supply, Inc. v. Pioneer Hi-Bred Int'l, Inc.*, 534 U.S. 124, 133-35 (2001), *cited in* Resp. Br. 39; *PGA Tour, Inc. v. Martin,* 532 U.S. 661, 689 (2001). If Respondents' position were accepted, Congress would have to amend a statute every time there was a relevant new development, no matter how sweeping the language it chose in the first instance.[11]

Congress's purposes in enacting § 233(a) – to revitalize the public health service and encourage recruitment and retention of its medical personnel, *see* Gonsalves Br. 27-28 – are well served by immunizing PHS workers against *Bivens* claims as well as common law claims. Respondents and their *amici* claim that the purposes that motivated Congress in 1970 are no longer applicable on the ground that those workers can now obtain protection from suit elsewhere. *See, e.g.*, Resp. Br. 61 & n.34. Even if that were true, it would not permit this

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[11] In addition, under Respondents' theory, § 233(a) and the Gonzalez Act, 10 U.S.C. § 1089, which have virtually identical immunity-conferring language, would offer different protection merely because § 233 was enacted just before *Bivens* and the Gonzalez Act was enacted a few years later. *See* Gonsalves Br. 33. In addition, the FTCA judgment bar, enacted decades prior to the *Bivens* decision, could not be interpreted to apply to *Bivens* claims – even though every court of appeals to have addressed the issue has concluded that it does. *See id.* at 26 & n.7; 28 U.S.C. § 2676.

Court to override the statute Congress enacted. Such contentions must be addressed to Congress.[12]

## III. Respondents Misread *Carlson* and Ignore the Plain Import of Post-*Carlson* Cases.

1. Like the Ninth Circuit below, Respondents also misread this Court's *Bivens* case law. Their lead contention in this regard is that this case and *Carlson* are "[f]unctionally [e]quivalent." Resp. Br. 49. But that ignores the dispositive difference: § 233(a). In *Carlson*, the question was whether the FTCA itself barred a *Bivens* claim, but there was no "explicit congressional declaration" making the FTCA remedy exclusive. *Carlson v. Green*, 446 U.S. 14, 19 (1980). Here, § 233(a) is just such an "explicit congressional declaration." *Id.* As *Carlson* and a host of this Court's subsequent *Bivens* cases have explained, there can be no *Bivens* action where Congress has declared a statutory remedy to be exclusive. *See* Gonsalves Br. 43-44. No more is

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[12] In any event, however, there is no reason to believe that § 233(a) is now unnecessary. *See* Commissioned Officers' Br. 6-7. The statement on the PHS website that the agency provides insurance, *see* Nat'l Immigrant Justice Ctr. Br. 20-21, is a reference to § 233(a) itself. As for outside insurance, Respondents have not established that PHS medical workers can actually obtain affordable insurance that would provide them with adequate protection against claims like Respondents'. *See* Resp. Br. 61 n.34 (citing insurance company website stating coverage limit of $1 million). And as for indemnification by the United States, *see* Resp. Br. 61, it is not automatic, is virtually never offered until the end of a case, and does not provide protection from the difficult and time-consuming burdens of litigation. *See* U.S. Br. 19 n.9 (citing 45 C.F.R. § 36.1).

necessary to demonstrate that *Carlson* concerns a statutory regime that is the opposite of, not equivalent to, that here.

Digging into the lower court record in *Carlson*, Respondents note that one of the defendants there, Robert T. Brutshe, was alleged to be the Assistant Surgeon General and a PHS employee, and claim that "[i]f the Court truly thought § 233(a) barred *Bivens* actions, it would not have … permitted a *Bivens* claim against the Assistant Surgeon General." Resp. Br. 58. That inference is patently meritless. Nothing in this Court's decision in *Carlson* even mentioned, let alone turned on, Mr. Brutshe's status as a PHS employee. *See Carlson*, 446 U.S. at 16 (identifying defendants as "federal prison officials"). There is no indication that Mr. Brutshe invoked an immunity from suit under § 233(a) in the court of appeals or in this Court. And the *Carlson* briefs and oral argument never so much as identified Mr. Brutsche as a PHS employee, let alone mentioned any issue with respect to Mr. Brutshe's immunity under § 233(a). The passing, undeveloped reference to the PHS in a single line of the underlying complaint, *see* Resp. App. 74a, does not remotely establish that *Carlson* concluded that § 233(a) permits *Bivens* actions. "Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not considered as having been … decided." *Harper v. Virginia Dep't of Taxation*, 509 U.S. 86, 118 (1993) (internal quotation marks omitted).

In fact, although § 233(a)'s scope did not surface in *Carlson* with respect to Mr. Brutshe's individual

immunity, the Court *did* invoke the provision as an example of a statute in which "Congress follow[ed] the practice of explicitly stating when it means to make FTCA an exclusive remedy." 446 U.S. at 20. Respondents contend that *Carlson* understood § 233(a) to bar only non-constitutional malpractice claims, but that interpretation does not bear scrutiny. *Carlson* described § 233(a) as incorporating the type of "contrary expression" that showed Congress did not intend to permit "an action under the FTCA … as well as a *Bivens* action." *Id.* Thus, *Carlson* was not citing random provisions from the U.S. Code that displaced state law torts. It was citing provisions that showed that Congress knew how to displace *Bivens* remedies with a "contrary expression" when it wished to do so.

In light of § 233(a)'s clear statement of exclusivity, Respondents miss the point when they contend that "[t]here is no principled basis for distinguishing" between the medical personnel in *Carlson* and Cmdr. Gonsalves. Resp. Br. 52. Congress enacted a statute providing additional protection to PHS employees at the request of the Surgeon General in light of a perceived need to revitalize the PHS. *See* 116 Cong. Rec. 42,543 (1970); *id.* at 42,977. Some other federal doctors received similar protections. *See* Gonsalves Br. 34 n.11. Other federal medical personnel, like those employed by the Bureau of Prisons, may never have asked for such protections, or may have asked and been refused. Whatever the reason for these distinctions, Congress's decision to provide PHS officials with additional immunity "is not within [this

Court's] province to second-guess." *Eldred v. Ashcroft*, 537 U.S. 186, 222 (2003).

2. Respondents also suggest that Congress simply lacks the power to make the FTCA an exclusive remedy because *Bivens* provides some relief that the FTCA does not. *See* Resp. Br. 52-55. But this position is irreconcilable with the Court's *Bivens* jurisprudence regarding "equally effective" remedies. Once Congress has decided to provide an exclusive statutory remedy, this Court will not supplement Congress's chosen remedial scheme out of a belief that *Bivens* would be more effective.[13]

*Carlson* itself recognized this point. Its discussion of the efficacy of the FTCA remedy was simply a tool it used to gauge *Congress's intent* in the *absence* of an express statement of exclusivity. Gonsalves Br. 49. And in every *Bivens* case since *Carlson*, this Court has declined to authorize *Bivens* claims even where an alternative remedy was not equally effective, concluding that Congress did not intend to allow them. *See* Gonsalves Br. 50-51 (citing *Wilkie*, *Schweiker*, and *Bush*); *see also United States v. Stanley*, 483 U.S. 669, 683 (1987); *Chappell v. Wallace*, 462 U.S. 296, 303 (1983). With

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[13] As explained in Petitioner's opening brief, the FTCA plainly provides constitutionally adequate relief to Respondents here. Gonsalves Br. 54-57. Notably, Respondents do not meaningfully dispute the fact that California law, as incorporated by the FTCA, allows unlimited economic damages, and may allow enhanced non-economic damages for injury that is the product of more than mere negligence. Gonsalves Br. 56 n.17; Resp. Br. 55 n.29.

Congress's intent so plain here, the same result must follow.

Respondents offer no answer to this unbroken line of case law – indeed, they essentially ignore the Court's post-*Carlson* cases on point. Their discussion of those cases is essentially limited to the brief assertion that this Court affirmed a requirement of equal effectiveness in *Wilkie* and *Stanley*. Resp. Br. 56 n.30. Yet those are both cases in which application of such a requirement would have led to a different result. *Wilkie* acknowledged the "inadequacy of [existing] discrete" remedies, but concluded that "any damages remedy … may come better, if at all, through legislation." *Wilkie v. Robbins*, 551 U.S. 537, 554, 562 (2007). And *Stanley* refused to imply a *Bivens* remedy even though that left the plaintiff with *no* remedy at all. 483 U.S. at 682-83.[14]

Finally, Respondents contend that the "'special factors' test does not apply" here "[g]iven that Congress took 'affirmative action' in this case." Resp. Br. 58-59. But Respondents point to the wrong "affirmative action." It is § 233(a), and not the Westfall Act, that is the relevant congressional action here. Gonsalves Br. 51-52.

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[14] Respondent's contention that "*Bush* and *Chilicky* are inapposite," Resp. Br. 63, is likewise erroneous, as those cases confirm that there is no "equally effective remedy" requirement. Gonsalves Br. 47-50.

## IV. Nothing About Respondents' Factual Allegations Changes the Result in This Case.

In addition to their general "policy" arguments, Respondents and their *amici* also make a case-specific plea for disregarding § 233(a) here. They posit that a *Bivens* remedy against Petitioners in this case, which Respondents view as a particularly egregious example of deliberate indifference, would send a message that might lead to improvements in the overall system for treating immigrant detainees, which they believe is badly broken. *See* Resp. Br. 63-64; ACLU Br. 20-28; Nat'l Immigrant Justice Ctr. Br. 11-20.

But, as this Court has recognized, a *Bivens* action has never been "considered a proper vehicle for altering an entity's policy." *Correctional Servs. Corp. v. Malesko*, 534 U.S. 61, 72-74 (2001); *see also id.* (stating that in contrast to *Bivens* actions, "injunctive relief has long been recognized as the proper means for preventing entities from acting unconstitutionally"); ACLU Br. 24-25 (describing detainees' suit for injunctive and declaratory relief currently proceeding in district court (citing *Woods v. Myers*, No. 3:07-cv-1078 (S.D. Cal.))). Certainly, Petitioners have no control over such policy determinations. Such matters are properly addressed to Congress, which is apparently already well aware of the issues that Respondents and their *amici* identify, and which has paramount institutional competency to determine the best approach. *See* Reps. Conyers, Lofgren, & Nadler Br. 25; *see also* Resp. Br. 62-63.

With respect to this specific case, without trivializing what happened to Mr. Castaneda, Petitioner takes strong exception to the charge of deliberate indifference. The record does not remotely support the serious public allegations concerning the role of Cmdr. Gonsalves leveled by Respondents and their *amici*. Respondents do not and cannot dispute that Cmdr. Gonsalves acted only as an administrator with no role in the diagnosis or treatment of Mr. Castaneda, and played no part in preparing, submitting, reviewing, approving, or denying any treatment authorization request, or in arranging for (or impeding) visits to outside medical providers. There is thus no basis at all for Respondents' sweeping and undifferentiated assertion that "Petitioners refused to provide [Mr. Castaneda] with a simple skin biopsy they knew was necessary" or engaged in "abject cruelty." Resp. Br. 2, 64.

Indeed, the only conduct by Cmdr. Gonsalves mentioned in Respondents' brief, or suggested in the record, is that he authored a single administrative memorandum stating that an outside specialist and the in-house medical team had determined that any treatment would be elective. Resp. Br. 8; J.A. 167-68. That memorandum accurately reflected the information available to Cmdr. Gonsalves and does not evince deliberate indifference, let alone "abject cruelty," even though crucial information in Mr. Castaneda's records proved to be erroneous. *See* Gonsalves Br. 7, 9.[15]

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[15] The ACLU's *amicus* brief goes outside the record by quoting at length from the deposition of Lt. Walker. ACLU Br. 3-4. The

Ultimately, none of these facts has any bearing on the legal question before this Court. But there is no basis here for concluding that Cmdr. Gonsalves acted with deliberate indifference – or, indeed, that he played any role in Mr. Castaneda's treatment at all. Nor is there any basis for stripping Petitioners of immunity in this case in an attempt to change federal policy.

## 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.

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ACLU's selective and misleading quotation of that deposition is manifestly improper, because the transcript has *never* been made a part of the record in the courts below; because the deposition was taken after the Ninth Circuit stayed discovery on the *Bivens* claims against Petitioners; and because Cmdr. Gonsalves has never been afforded an opportunity to respond to the factual assertions therein. *See, e.g.*, *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 235 (1990); S. Ct. R. 32.3. Petitioner will not respond to this improper use of non-record discovery material except to state unequivocally that Cmdr. Gonsalves denies the only portion of the quoted deposition testimony that relates to him, which concerns a June 30 entry in Mr. Castaneda's file as to which Cmdr. Gonsalves played no role whatsoever. *See* ACLU Br. 4; J.A. 133-34; Gonsalves Br. 6 & n.2.

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