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

REPLY BRIEF FOR PETITIONER ESTHER HUI

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1. RESPONDENTS' ATTEMPT TO SUBORDINATE SECTION 233 TO THE FTCA IS BASED ON A MISREADING OF BOTH

The core argument presented by respondents is that the reference in 42 U.S.C. § 233(a) to sections 1346(b) and 2672 of Title 28 of the United States Code effectively subordinates section 233 to the Federal Tort Claims Act (FTCA). Resp. Br. 22-23. Respondents contend that, because the FTCA "expressly preserved a *Bivens* remedy," then so too must section 233(a). Resp. Br. 23. The fundamental problem with respondents' argument is that it ignores the actual language of the statute.

Section 233(a) provides that "[t]he remedy *against the United States* provided by sections 1346(b) and 2672 of title 28 . . . shall be exclusive of any other civil action or proceeding by reason of the same subject-matter against the [Public Health Service (PHS)] officer or employee (or his estate) whose act or omission gave rise to the claim." (emphasis added). Respondents want – and in fact need – to have the statute interpreted as if it reads that "[t]he remedy *against the PHS officer or employee* provided by sections 1346(b) and 2672 of title 28 . . . shall be exclusive of any other civil action or proceeding by reason of the same subject-matter against the [PHS] officer or employee (or his estate) whose act or omission gave rise to the claim." If the statute were indeed written in that manner, respondents' arguments might have merit, as the statute would be explicitly adopting the FTCA as the means for pursuing claims directly against PHS officials.

But that is not what the statute says or does. Rather, section 233(a) provides that no action can be pursued directly against individual PHS officers or employees. The only remedy available "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" is a claim directly against the United States; specifically, the remedy provided by the FTCA. Section 2679(b)(1) provides a similar immunity to all federal employees. However, section 2679(b)(2) excludes *Bivens* claims from the immunity provided by subsection (b)(1).

The effect of this limitation on the immunity provided by section 2679(b)(1) is that a federal employee cannot obtain immunity from a *Bivens* action by relying on section 2679(b)(1). But that says nothing about whether the federal employee can claim immunity from a *Bivens* action under some other statute or provision of the law. And it clearly must be the case that federal employees can obtain such immunity in other ways. If that were not so, then federal judges and prosecutors – who, after all, are federal employees – would be precluded from asserting absolute judicial and prosecutorial immunity.

As noted above, the reference to the FTCA in section 233(a) relates to "[t]he remedy against the United States. . . ." Section 2679(b)(1) – and thus subsection (b)(2) as well – says nothing about the scope of the remedy available against the United States, and

therefore section 2679(b)(2), with its *Bivens* exception, has no relevance to the interpretation to be given to section 233(a).

This becomes even clearer when it is recognized that the language in section 233(a) is almost identical to that in section 2679(b)(1). Both provide that the "remedy against the United States provided by sections 1346(b) and 2672" is "exclusive of any other civil action or proceeding" "by reason of the same subject matter" against the "employee whose act or omission gave rise to the claim." Subsection (b)(2) provides that the immunity set out in subsection (b)(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." The only reason Congress would have included such a limitation on the scope of the immunity provided by subsection (b)(1) is because without such a qualification, that immunity would extend to civil actions brought against the federal employee for alleged constitutional violations. No such limitation on the scope of the identical immunity provided by section 233(a) has ever been enacted by Congress, so no such limitation exists. That means – to paraphrase respondents – that "this Court need look no further than the plain language of the statute to resolve the question presented in [petitioners'] favor." Resp. Br. 23.

2. THE VARIOUS SUBSECTIONS OF SECTION 233 DO NOT SUPPORT RESPONDENTS' INTERPRETATION OF THE STATUTE

The reliance by respondents on other subsections of section 233 is equally flawed, and those subsections actually support petitioners' analysis of the scope of the immunity provided by section 233(a).

A. Section 233(c)

Respondents argue that section 233 does not contain a "scope certification" procedure applicable "where a PHS official faces a *federal* court action" and that, as a result, personnel must seek scope certification under 28 U.S.C. § 2679(d). Resp. Br. 25-26. According to respondents, this is fatal to petitioners' interpretation of section 233(a) because section 2679(d) "is subject to the FTCA's express preservation of a *Bivens* remedy for all federal employees." Resp. Br. 27. As discussed in Section 1 above, this argument fails because the *Bivens* exception in section 2679(b)(2) cannot apply to section 233(a). Further, the argument fails because it makes incorrect legal and factual assumptions.

Respondents assume that a scope certification statement is necessary for a PHS official to obtain immunity under section 233(a) in cases filed in federal court, and thus the failure of Congress to set out in section 233 a procedure for obtaining such a certification means that it intended PHS personnel to

utilize section 2679(d) to obtain such a certification. But respondents do not offer any explanation or support for their assumption. A far simpler explanation for Congress's decision not to include a federal scope certification procedure in the statute is that no certification is needed.

Section 233(a) provides that PHS personnel are immune from suit for claims of personal injury resulting from their performance of medical or related functions while acting in the course and scope of her employment. Subsection (b) provides that "[t]he Attorney General shall defend any civil action or proceeding brought in any court against any person referred to in subsection (a) of this section." The only persons "referred to in subsection (a)" are PHS officials "acting within the scope of" her employment. Thus, if the government chooses to defend the employee, that decision confirms that the Attorney General agrees that the PHS official was acting within the scope of her employment. If no defense is provided, then the Attorney General has concluded that the PHS official was not acting within the scope of her employment. Thus, no formal certification is necessary.

The necessity for certification is different in actions filed in state court, as certification is the means by which the jurisdiction of the federal courts is invoked. Without such certification, there may be nothing on the face of the complaint that would permit the action to be removed. Thus, Congress

made the point of including a "scope certification" procedure in section 233 in regard to such cases.

This is in fact how cases involving PHS personnel filed in federal court generally are handled. In at least thirty-five of the fifty-five cases cited in footnote 3 at page 23 of Dr. Hui's opening brief, the court granted motions to dismiss or motions for summary judgment in favor of PHS employees based on section 233(a) without any certification pursuant to section 2679(d).[1] Instead, immunity was granted based on a

[1] *Starling v. United States*, 2009 U.S. Dist. LEXIS 101275 (D.S.C. May 12, 2009); *Black v. Kendig*, 2003 U.S. Dist. LEXIS 4109 (D.D.C. Mar. 18, 2003); *Wallace v. Dawson*, 302 Fed. Appx. 52 (2d Cir. 2008); *Anderson v. Bureau of Prisons*, 176 Fed. Appx. 242, 243 (3d Cir. 2006); *Beverly v. Gluch*, 902 F.2d 1568 (6th Cir. 1990); *Starling v. Kastner*, 2009 U.S. Dist. LEXIS 89095 (E.D. Tex. 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. 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); *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); *Coley v. Sulayman*, 2007 U.S. Dist. LEXIS 57639 (D.N.J. Aug. 7, 2007); *Hodge v. United States*, 2007 U.S. Dist. LEXIS 64644 (M.D. Pa. Aug. 31, 2007); *Wallace v. Dawson*, 2007 U.S. Dist. LEXIS 6279 (N.D.N.Y Jan. 29, 2007); *Barner v. Williamson*, 2007 U.S. Dist. LEXIS 42942 (M.D. Pa. Mar. 27, 2007); *Davis v. Stine*, 2006 U.S. Dist. LEXIS 79689 (E.D. Ky.

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declaration affirming that the defendant at issue was a PHS official during the relevant time period. Certification pursuant to section 2679(d) was used in just seven of those cases.[2] Petitioner was unable to determine whether certification was used in the remaining cases.[3]

Oct. 31, 2006); *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); *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); *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); *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); *Navarrete v. Vanyur*, 110 F. Supp. 2d 605 (N.D. Ohio 2000); *Lewis v. Sauvey*, 708 F. Supp. 167, 168 (E.D. Mich. 1989).

[2] *Castaneda v. United States*, 538 F. Supp. 2d 1279 (C.D. Cal. 2008); *K.R. v. Silverman*, 2009 U.S. Dist. LEXIS 83143 (E.D.N.Y. Aug. 13, 2009); *Lyons v. United States*, 2008 U.S. Dist. LEXIS 2260 (N.D. Ohio Jan. 11, 2008); *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); *Ekwere v. Branch*, 2005 U.S. Dist. LEXIS 30483 (D. Ariz. Nov. 28, 2005); *Brown v. McElroy*, 160 F. Supp. 2d 699 (S.D.N.Y. 2001).

[3] *Walls v. Holland*, 1999 U.S. App. LEXIS 26588; *Miles v. Daniels*, 231 Fed. Appx. 591 (9th Cir. 2007); *Zanzucchi v. Wynberg*, 1991 U.S. App. LEXIS 10952 (9th Cir. May 21, 1991); *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);

(Continued on following page)

The very fact that Congress did not include a federal scope certification procedure in section 233 confirms that this analysis is correct. Respondents argue that, when faced with a lawsuit filed in federal court, PHS officials must seek scope certification under section 2679(d). Resp. Br. 26. But section 2679(d)(1), which provides the entire basis for respondents' argument, was not enacted until 1988. In 1971, when section 233 became law, section 2679(d) did not provide for scope certification in cases initially filed in federal court; only in those cases initially filed in state court. Clearly, Congress did not enact this immunity only to make it impossible to invoke it in federal court.

Thus, nothing in the certification procedures set out in section 233(c) supports respondents' interpretation of the scope of the immunity provided by section 233(a), and the fact that certification was used in the district court in this case is meaningless because it was not required.

Butler v. Shearin, 2006 U.S. Dist. LEXIS 97961 (D. Md. Aug. 29, 2006); *Dawson v. Williams*, 2005 U.S. Dist. LEXIS 3059 (S.D.N.Y. Feb. 28, 2005); *Miles v. Daniels*, 2004 U.S. Dist. LEXIS 19400 (D. Or. Sept. 21, 2004); *Valdivia v. [Henneford]*, 2004 U.S. Dist. LEXIS 16355 (W.D.N.Y. Aug. 10, 2004); *Cuoco v. Quinlan*, 1992 U.S. Dist. LEXIS 17476 (S.D.N.Y. Nov. 12, 1992); *McMullen v. Herschberger*, 1993 U.S. Dist. LEXIS 78 (S.D.N.Y. Jan. 7, 1993).

B. Section 233(f)

Respondents argue that "[s]ection 233(f)'s 'insure-or-indemnify' clause further confirms that § 233(a)'s exclusivity language does not bar all actions against PHS officials and, indeed, permits *Bivens* actions." Resp. Br. 28. Respondents reach this conclusion because, as they construe subsection (f), it "anticipates that, when an injured party does not have a remedy against the United States under the FTCA, he may sue a PHS official individually. The PHS official's protection in those circumstances is not immunity from suit; rather, it is indemnification or insurance, at the federal agency's discretion." Resp. Br. 29. In essence, respondents are interpreting section 233(a) to contain an implied limitation on its scope; specifically, that, if no remedy is available against the United States under the FTCA, then the individual PHS official does not have immunity. Respondents are misinterpreting the statute. The purpose of subsection (f) is not to protect PHS officials from an implied limitation on the scope of subsection (a) that respondents believe exists. The purpose of the subsection is to provide protection to PHS officials in particular cases that are outside the explicit limitations of the statute.

Contrary to respondents' assertion, petitioner has never claimed that by enacting section 233, Congress "intended to immunize PHS officers from all liability." Resp. Br. 29. The immunity created by section 233 is explicitly limited on its face. It only applies to claims made (1) "for damage for personal injury, including

death," (2) "resulting from the performance of medical, surgical, dental, or related functions," (3) "by any commissioned officer or employee of the Public Health Service," (4) "while acting within the scope of his office or employment." 42 U.S.C. § 233(a). If any one of these four elements is missing, there is no immunity. However, there is nothing in those four elements that in any way limits the immunity based on the legal theory underlying the claim, be it negligence, intentional tort, or constitutional tort.

Section 233(f) – and similar "insure or indemnify" provisions in other statutes – reflect Congress's recognition that there are situations where PHS officials should have immunity, but in which one of the four elements is unavoidably missing. Specifically, the subsection addresses two of those situations. The first is where the employee "is assigned to a foreign country." 42 U.S.C. § 233(f). An immunity provided by U.S. law is useless to a PHS official sued in a foreign court. So, to protect the official, Congress empowered the Secretary to provide insurance or indemnification for such officials. *See United States v. Smith*, 499 U.S. 160, 172 n.15 (1991) ("§ 1089(f) still serves to protect foreign-based military personnel against malpractice suits in *foreign* courts.").

The second situation is where the PHS official is "detailed to a State or political subdivision thereof or to a non-profit institution." 42 U.S.C. § 233(f). In these situations, it could be argued that the PHS official is no longer "acting within the scope of his office or employment" – since the official is not working

directly for the federal government – and thus the immunity provided by subsection (a) does not apply. But Congress determined that such officials should still be protected, since their work outside "the scope of [their] office or employment" was the result of the employee having been officially directed by the federal government to engage in this non-federal government work.

The Sixth Circuit has analyzed a statute similar to section 233 in just this way:

> The purpose of Section 1089(f) is not to create an exception to the immunity from malpractice actions created by Section 1089(a). The purpose of subsection (f) is to enhance protection against malpractice actions in circumstances where local law allows recovery against military doctors. The subsection mentions two such circumstances: when a military physician is (1) assigned to a foreign country or (2) assigned to other than a federal department, e.g. a private hospital. In such circumstances the doctor may not be covered by the Federal Tort Claims Act and the Secretary of Defense is authorized to provide indemnification or insurance. Subsection (f) is not designed to create liability in malpractice actions for federal employees.

Baker v. Barber, 673 F.2d 147, 149-150 (6th Cir. 1982) (citations omitted).

The presence of subsection (f) in section 233 thus provides no support for the contention that subsection

(a) does not immunize PHS officials against *Bivens* actions. Section 233(a) may not be all-encompassing, but so long as the claim against the PHS official meets the four foundational elements – as this case does – the immunity applies, regardless of the legal theory underlying the claim.

C. Section 233(e)

28 U.S.C. § 2680(h) prevents plaintiffs from pursuing claims under the FTCA against the United States arising out of assault or battery. But in section 233(e), Congress provided that section 2680(h) would not "apply to assault or battery arising out of negligence in the performance of medical, surgical, dental, or related functions. . . ." Respondents argue that "§ 233(e) shows that § 233(a) does not provide PHS officials with immunity from all civil actions." Resp. Br. 34, n.18. Respondents contend that "[t]he majority of courts construing § 233 and similar statutes have held that subsection (e) provides medical personnel with immunity from assault and battery that they would not enjoy under subsection (a) alone." Resp. Br. 34, n.18 (citing, *inter alia, Lojuk v. Quandt*, 706 F.2d 1456, 1463 (7th Cir. 1983) ("in 10 U.S.C. § 1089, 42 U.S.C. § 233, and 42 U.S.C. § 2458a, it is the presence of subsection (e) waiving the immunity of the United States for battery under Section 2680(h) that provides immunity for individual defendants in medical treatment cases.")).

That contention is based on the same flawed conclusion that respondents offered in regard to section 233(f): the assumption that there is an implied limitation on the scope of the immunity provided by statutes such as section 233(a) if no remedy is available against the United States under the FTCA. *See Lojuk*, 706 F.2d at 1463 ("[w]ithout a comparable subsection in Section 4116, there is no official immunity from battery, because there is no alternative remedy available against the United States.") (footnote omitted).

Respondents' assumption flies in the face of the explicit language of section 233(e). The statute says nothing about expanding the immunity provided to PHS officials by subsection (a). Rather, it explicitly limits the immunity otherwise provided to the United States by 28 U.S.C. § 2680(h). Thus, the purpose of subsection (e) is not to provide additional protection to PHS officials. Rather, its purpose is to ensure that the combination of the immunity provided by section 233(a) and the immunities provided to the government by the FTCA does not result in third parties having no remedy at all.

So, as with subsection (f), there is nothing in the language of section 233(e) that supports an argument that there is an implied limitation on the immunity provided to PHS officials by section 233(a).

3. CONGRESS INTENDED SECTION 233 TO PROVIDE COMPREHENSIVE IMMUNITY TO PHS EMPLOYEES FROM *ALL* LAWSUITS, NOT JUST THOSE SOUNDING IN NEGLIGENCE

Respondents argue that the title given by Congress to section 233 – "Defense of Certain Malpractice and Negligence Suits" – indicates that it was only intended to provide immunity to actions sounding in negligence. Resp. Br. 35-36. But the reverse is actually true.

In their opening briefs, petitioners argued that the term "malpractice" encompassed more than just medical negligence. Respondents' answer was to assert that "Petitioners' reliance on *Webster's Dictionary* in support of their contention . . . is singularly unpersuasive" and that "the common law is the proper source for determining the meaning of an undefined term." Resp. Br. 37-38. But instead of citing to the common law, respondents cited to a different dictionary, one whose definition they found more to their liking. Resp. Br. 38.

Contrary to respondents' assertion, Dr. Hui did not rely on – or even cite to – a dictionary definition to support her contention that "malpractice means more than just medical negligence." Hui Br. 40. Instead, Dr. Hui cited to the common law to show that in 1970, when Congress enacted section 233, there were published cases noting that the term "malpractice" covered more than just medical negligence,

and could even encompass criminal acts. Hui Br. 39 (citing *Sommer v. New Amsterdam Casualty Co.,* 171 F. Supp. 84 (D. Mo. 1959); *Bakewell v. Kahle,* 125 Mont. 89, 93 (Mont. 1951)).

Thus, in 1970, the "customary liability insurance" that section 233(a) was intended to replace (see 116 Cong. Rec. 42,543 (1970)) could cover claims that, like deliberate indifference, went beyond garden-variety medical negligence. *See also Zipkin v. Freeman*, 436 S.W.2d 753 (Mo. 1968) (professional liability policy covered psychiatrist's mishandling of transference phenomenon, including sexual misconduct with patient); *Cramer v. Price*, 84 Ohio App. 255, 258, 82 N.E.2d 874 (Ohio 1948) ("malpractice . . . is defined as negligent or unlawful wilful acts committed by a physician in treating his patient"); *Physicians' & Dentists' Business Bureau v. Dray*, 8 Wn.2d 38, 41, 11 P. 2d 568 (Wash. 1941) ("'Malpractice . . . 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.'"). So petitioners have met the very standard proposed by respondents for showing that the term "malpractice" as used in the title of section 233 meant more than just medical negligence. When Congress decided to provide broad immunity to PHS employees for claims arising out of medical or related functions, it intended that immunity to cover allegations of misconduct that went beyond medical negligence, including conduct that could be described as deliberate indifference.

Respondents also argue that, by including the word "certain" in the statute's title, Congress "never even intended for § 233(a) to provide immunity from all types of common-law tort actions, let alone constitutional tort actions." Resp. Br. 37. Respondents' argument ignores the far simpler, and more obvious explanation. The statute did not immunize PHS personnel from *all* lawsuits. It only immunized those officials from suits arising out of medical or related functions while acting in the course and scope of their employment. Thus, by its terms, the statute only applies to "certain" lawsuits, but that limitation applies to the status of the PHS official at the time of the incident at issue, not the nature of the claim being made.

The enactment of 42 U.S.C. § 238q in 2000 makes clear that Congress has recognized that the scope of the immunity provided by section 233 is greater than mere medical negligence (immunity for which could be obtained by PHS personnel under section 2679(b)(1)). In section 238q, Congress distinguished the immunity offered by section 233 from that offered by section 2679. See Hui Br. 31-33. The primary difference in that immunity was that section 233, unlike section 2679, provides PHS personnel with immunity from *Bivens* actions.

Respondents dispute that analysis, contending that "[a] far more plausible reading of this statute is that Congress wanted to ensure that § 238q did not waive any other immunity provided by any other statute applicable to health care professionals; as

explained above, § 233 reaches a distinct set of cases that § 2679 does not. See § 233(g), (j), (m), (o), and (p).” Resp. Br. 45, n.22. Respondents’ analysis ignores the actual wording of section 238q.

The relevant provision of section 238q provides that it “does not waive any protection from liability for *Federal* officers or employees under . . . section 233 of this title; or . . . sections 1346(b), 2672, and 2679 of title 28, United States Code . . . ” 42 U.S.C. § 238q(c)(1)(C) (emphasis added).

Subsections (g), (j), (m), (o), and (p) of section 233 apply the immunity created by section 233(a) to certain persons who are not officers or employees of the PHS. Thus, the subsections identified by respondents do not provide “any protection from liability for *Federal* officers or employees.” Congress, in mentioning in the body of section 238q the protection from liability provided by section 233 to federal officials, could not possibly have been referring to subsections (g), (j), (m), (o), and (p) of section 233.

Instead, it is far more likely that Congress was recognizing the *Bivens* immunity incorporated into section 233. This conclusion is supported by the fact that section 238q was enacted several months after the Second Circuit issued its opinion in *Cuoco v. Moritsugu*, 222 F.3d 99 (2d Cir. 2000), explicitly holding that section 233(a) barred *Bivens* actions against PHS personnel. *See Lorillard, Div. of Loew’s Theatres, Inc. v. Pons,* 434 U.S. 575, 581 (1978) (“Congress

normally can be presumed to have had knowledge of the interpretation given to the incorporated law").

4. RESPONDENTS OFFERED NO JUSTIFICATION FOR EXPANDING *BIVENS* TO THIS NEW CLASS OF DEFENDANTS IN THIS NEW CONTEXT

Just last year, this Court explained that, "[b]ecause 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,* ___ U.S. ___, 129 S. Ct. 1937, 1948 (2009) (citation omitted). Respondents have failed to show why *Bivens* liability should be expanded to cover this new context or this new class of defendants.

Respondents justify this failure by asserting that "this case is functionally equivalent to *Carlson* [*v. Green,* 446 U.S. 14 (1980)]," Resp. Br. 49, and thus, presumably, does not involve either a new context or a new category of defendants. Respondents support this assertion by pointing out that one of the defendants in *Carlson* was a PHS officer (Assistant Surgeon General Robert T. Brutshe). Resp. Br. 49, n.24. But that fact, standing alone, is meaningless because the issue simply never came up in that case. The fact that one of the defendants was a PHS officer is never mentioned in either this Court's opinion or in the underlying Court of Appeals opinion. *See Green v. Carlson,* 581 F.2d 669 (7th Cir. 1978). Nor is there

any indication in either opinion that defendant Brutshe made a claim of immunity under section 233(a). Section 233(a) is not mentioned at all in the Court of Appeal's opinion and is only mentioned in this Court's opinion as an example of Congress creating a truly exclusive remedy.[4] *Carlson,* 446 U.S. at 20.

Contrary to respondents' claim, *Carlson* is not "on all fours" with this case. Resp. Br. 52. *Carlson* permitted a *Bivens* claim to be prosecuted against "federal prison officials" (446 U.S. at 16) for alleged deliberate indifference to the medical needs of a convicted prisoner housed in a federal prison in violation of the Eighth Amendment. The present case involves an attempt to prosecute federal *medical* officials for alleged deliberate indifference in the manner in which they provided medical care to a civil detainee in an immigration holding facility in violation of the Fifth Amendment. While there may be similarities between the two cases, the class of defendants is clearly different, as is the overall context.[5]

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[4] In fact, *amicus* American Civil Liberties Union ("ACLU"), in its *amicus* brief in support of the plaintiff in *Carlson*, cited section 233 as an example of Congress's explicit declaration of an exclusive remedy. *Carlson v. Green*, 1978 U.S. Briefs 1261 at *30 (U.S. Nov. 15, 1979) ("Congress has explicitly declared, in other types of cases, that the victims of federal employees' *wrongful acts* must be remitted to the FTCA.) (emphasis added).

[5] In fact, the class of defendants in this case, PHS employees, is even further removed from that at issue in *Carlson*. Respondents attempt to meld PHS officials with BOP officials

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The mere fact that a *Bivens* action was authorized in *Carlson* is not sufficient to automatically permit a *Bivens* action here. And such an action should not be permitted in this context.

It is simply too easy to plead ordinary medical malpractice as a *Bivens* claim. In her opening brief, petitioner pointed out that, in the fifty-five cases her counsel identified in which the issue of the applicability of the section 233(a) immunity to *Bivens* claims was raised, the facts alleged in the bulk of those cases did not seem to support anything beyond a claim of ordinary medical negligence. Hui Br. 44-45.

A review of the end results of those cases confirms this observation. In at least thirty-six of those cases, the court ultimately found in favor of the defendants on the merits, finding, either through motions to dismiss or motions for summary judgment, that the defendants had not been deliberately

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and claim, without support, that the only PHS officials who could possibly be subject to *Bivens* claims are those that work in BOP or ICE facilities. Resp. Br. 59. This claim is meritless. PHS employees work in a variety of agencies, in quarantine stations and can be called into military service if necessary. U.S. Br. 2. They are thus susceptible to suit for alleged constitutional violations outside of custodial settings. *See*, *e.g.*, *K.R. v. Silverman*, 2009 U.S. Dist. LEXIS 83143 (E.D.N.Y. Aug. 13, 2009) (minor public school student sought leave to amend complaint to include claims for constitutional violations against two PHS employees who were working at school through federally-funded health clinic. The magistrate judge recommended that leave to amend be denied based on section 233(a) immunity).

indifferent to the plaintiff's medical needs.[6] In only two cases could petitioner's counsel confirm that there had been a result in favor of the plaintiff through apparent settlements. *Pimentel v. Deboo,* 411 F. Supp. 2d 118 (D. Conn. 2006); *Geralds v. Patel*, 2009 U.S. Dist. LEXIS 14721 (E.D.N.Y. Feb. 20, 2009). As to the remaining cases, ten were dismissed on procedural grounds, one is still pending, and petitioner was unable to determine the grounds on which one case was resolved.

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[6] **Courts of Appeals** (listed in reverse chronological order):

Wallace, 302 Fed. Appx. 54; *Anderson,* 176 Fed.Appx. 242; *Montoya-Ortiz,* 154 Fed. Appx. 437; *Walls,* 1999 U.S. App. LEXIS 26588; *Miles,* 231 Fed. Appx. 591; *Zanzucchi,* 1991 U.S. App. LEXIS 10952.

District Courts (listed in reverse chronological order):

Starling, 2009 U.S. Dist. LEXIS 89095; *Golightly,* 2009 U.S. Dist. LEXIS 83390; *Luna,* 2009 U.S. Dist. LEXIS 49309; *Uribe,* 2009 U.S. Dist. LEXIS 9176; *Morales,* 2008 U.S. Dist. LEXIS 80659; *Hairston,* 2008 U.S. Dist. LEXIS 52962; *Batey,* 2008 U.S. Dist. LEXIS 12550; *Lyons v. United States*, 2008 U.S. Dist. LEXIS 2260 (N.D. Ohio Jan. 11, 2008); *Lee,* 2007 U.S. Dist. LEXIS 71206; *Fourstar,* 2007 U.S. Dist. LEXIS 70701; *Coley,* 2007 U.S. Dist. LEXIS 57639; *Hodge*, 2007 U.S. Dist. LEXIS 64644; *Barner,* 2007 U.S. Dist. LEXIS 42942; *Wallace,* 2007 U.S. Dist. LEXIS 6279; *Salley*, 2006 U.S. Dist. LEXIS 90898; *Davis,* 2006 U.S. Dist. LEXIS 79689; *Butler,* 2006 U.S. Dist. LEXIS 97961; *Cuco,* 2006 U.S. Dist. LEXIS 49711; *Arrington,* 2006 U.S. Dist. LEXIS 20193; *Anderson,* 2005 U.S. Dist. LEXIS 41911; *Whooten*, 2005 U.S. Dist. LEXIS 37995; *Freeman,* 2005 U.S. Dist. LEXIS 41915; *Dawson,* 2005 U.S. Dist. LEXIS 3059; *Tillitz v. Jones,* 2004 U.S. Dist. LEXIS 19401; *Miles,* 2004 U.S. Dist. LEXIS 19400; *Valdivia,* 2004 U.S. Dist. LEXIS 16355; *Foreman,* 2006 U.S. Dist. LEXIS 96187; *Brown,* 160 F. Supp. 2d 699; Navarrete, 110 F. Supp. 2d 605; *Lewis,* 708 F. Supp. 167.

This lack of success by plaintiffs when they accuse PHS personnel of deliberate indifference undermines respondents' complaint that Dr. Hui is still working as a government doctor. Resp. Br. 54, n.28. Just because a PHS official is accused of wrongdoing does not make it so, as can be seen by the endless litigation forced on Physician's Assistant Lieutenant Commander Diane Inch, a commissioned officer in the PHS working at the Federal Correctional Institution at Allenwood, Pennsylvania. In the past six years, twelve different lawsuits have been filed by prisoners accusing her of deliberate indifference to medical needs.[7] Despite these repeated accusations of wrongdoing, in none of those twelve cases has there been a finding of deliberate indifference against Lt. Cmdr. Inch or any of the other medical personnel at the prison. In eight of the cases, the court ruled in favor of defendants on the merits, finding no deliberate indifference. Two cases were dismissed based on plaintiff's failure to exhaust

[7] *Hodge v. United States,* 2007 U.S. Dist. LEXIS 64644 (M.D. Pa. Aug. 31, 2007); *Arrington v. Inch,* 2006 U.S. Dist. LEXIS 20193 (M.D. Pa. Mar. 30, 2006); *Freeman v. Inch,* 2005 U.S. Dist. LEXIS 41915 (M.D. Pa. May 16, 2005); *Sankey v. Federal Bureau of Prisons,* Case No. 07cv1223 (M.D. Pa.); *Gordon v. Inch,* Case No. 06cv0295 (M.D. Pa.); *McGlory v. Vermiere,* Case No. 06cv2279 (M.D. Pa.); *Spencer v. Laino,* Case No. 04cv2501 (M.D. Pa.); *Tilden v. Laino*, Case No. 03cv757 (M.D. Pa.); *Foulks v. Inch,* Case No. 04cv1305 (M.D. Pa.); *Cossey v. Inch,* Case No. 04cv1136 (M.D. Pa.); *Robinson v. USA,* Case No. 08cv932 (M.D. Pa.); *Stutley v. Potope,* Case No. 09cv2168 (M.D. Pa.)

administrative remedies. The remaining two cases currently remain active with a motion for summary judgment pending in one.

Given the repeated lawsuits filed against Lt. Cmdr. Inch, there can be no doubt that eliminating the immunity to *Bivens* actions provided by section 233(a) will lead to a flood of groundless *Bivens* claims against PHS officials.[8] This factor clearly counsels hesitation in extending *Bivens* to this new class of defendants and belies the suggestion of respondents and their *amici* that recognizing the applicability of section 233(a) immunity to *Bivens* claims will foreclose numerous meritorious claims. If one looks beyond bare allegations in a complaint or sensational exposés in newspapers, the reality is that the vast majority of the claims of deliberate indifference are utterly meritless.

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[8] Respondents attempt to show that there is no danger of a flood of *Bivens* claims by pointing out that, out of 20,000 members of PHS, only 75 currently face *Bivens* actions. Resp. Br. 59. However, the 75 defendants cited in the government's brief are from a sample set limited to PHS personnel working at DIHS or BOP facilities, of which there are only a total of 1086. The fact that 1 of every 15 PHS officials working in a custodial setting is already having to defend him or herself against what are likely groundless *Bivens* claims is the tip of the litigation iceberg that will emerge if this Court officially authorizes *Bivens* claims to be prosecuted against PHS officials.

5. THE FACTUAL PICTURE PRESENTED BY RESPONDENTS AND THEIR *AMICI* IS MISLEADING

The specific facts of this case are not material to the Question Presented because petitioners, for the purposes of the appeal of the denial of the motion to dismiss, did not dispute that respondents had alleged facts sufficient to constitute a claim for deliberate indifference. The only material issue is whether section 233(a) allows *Bivens* claims against PHS officials based on alleged deliberate indifference to serious medical needs. However, in an effort to sway the Court based on sympathy for Castaneda and enmity toward petitioners, the briefs of respondents and their *amici* rely heavily on the facts as alleged by respondents, as well as allegations made outside the pleadings in depositions, other lawsuits, and newspaper articles. Petitioner feels compelled to briefly address some of these factual contentions.

- *"Hui . . . declined an outside physician's offer to arrange for the biopsy." Resp. Br. 3 (citing J.A. 125; SER 372, 379).*

This statement is incomplete and misleading. Dr. Hui only declined Dr. Wilkinson's offer to admit Castaneda to the hospital to perform the biopsy. It was the hospital admission that Dr. Hui declined, not the biopsy. Instead, because the biopsy was an outpatient procedure and there was no authorization for an inpatient admission, the decision was made to have "Castaneda seen by a urologist first." J.A. 125, 124 ["Physicians [at SDCF] wish to pursue outpatient

biopsy"]. The fact that the May 2006 TAR did not authorize an inpatient admission was confirmed by Lt. Walker at his deposition:[9]

> Q: The May 2006 TAR that we talked about that authorized Mr. Castaneda to be seen by Dr. Wilkinson, do you remember that?
>
> A: Yes.
>
> Q: That TAR did not include approval for an in-patient admission into a hospital; correct?
>
> A: Correct.

Walker Dep. at 211-12.

Lt. Walker, who was Castaneda's "primary care provider," then contacted a urologist, Dr. Masters, who "did not stress immediate urgency" in seeing Castaneda and, in any event, was unable to see Castaneda until August 2006 because of an extended vacation. J.A. 137; Walker Dep. at 92.

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[9] Lt. Walker's deposition testimony, which was taken a month before the Ninth Circuit issued its opinion, is not appropriately before the Court. However, in its brief, *amicus* ACLU relied on the deposition testimony of Lt. Walker who, despite being primarily responsible for Castaneda's care, was not named as a defendant. ACLU Br. 4. The ACLU, like respondents, hopes to shift the focus of this case away from the clear language of section 233(a) and onto the alleged facts of the case. While petitioner disagrees with this approach, she has no choice but to cite to the same evidence to make sure the facts are not distorted.

- *"According to Hui, any medical condition where death is not immediately imminent is 'elective.'" Resp. Br. 5 (citing SER 369-70).*

This statement is misleading as it suggests Dr. Hui had her own definition of the term "elective." However, in the third amended complaint, respondents alleged that "*DIHS*'s medical definition of 'elective' is: '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 (emphasis added).

- *"Petitioners suggest that DIHS policy required Hui to arrange the biopsy on an out-patient basis. Gonsalves Br. 5; Hui Br. 5. This assertion is unsupported by the record." Resp. Br. 5, n.5.*

Respondents make this identical allegation in their third amended complaint. J.A. 367, ¶ 124 ("HUI did not authorize CASTANEDA's hospital admission for a biopsy on June 7 because she needed a specific approval for a patient to be admitted in a non-emergent situation."). It was that allegation to which petitioner cited in the opening brief.

- *"Instead, DIHS's records falsely characterized Masters as stating that the 'elective procedures this patient may need in the future are cytoscopy and circumcision.'" Resp. Br. 7 (citing J.A. 161).*

Respondents suggest that petitioners wrote the medical records they characterize as false and, using the district court's factually inaccurate order, that the medical record at page 161 of the Joint Appendix proves that petitioners "may have lied about" doctor Masters's recommendations. Resp. Br. 7, n.6. Respondents fail to mention that it was Lt. Walker, not Dr. Hui or Commander Gonsalves, who authored the medical record at issue. J.A. 161.

- *Amicus ACLU contends that Dr. Hui told Lt. Walker not to pursue an outpatient biopsy of Castaneda. ACLU Br. 6 (citing Walker Dep. 76-77).*

This contention is misleading because the ACLU failed to include testimony by Lt. Walker just one page later that directly contradicts its accusation. Relating a conversation that he had with Dr. Hui after Castaneda was seen by Dr. Wilkinson on June 7, 2006, Walker testified as follows:

> Q: Did Dr. Hui ever tell you that, "Well, we're going to try to do [the biopsy] on an outpatient basis"?
>
> A: Yes. Yes, she did.
>
> Q: What did she say about that?
>
> A: Just basically, you know, "If you're going to pursue this, do it on an outpatient. We're not going to admit him."

Walker Dep. 78-79.

Thus, Dr. Hui authorized Lt. Walker to pursue a biopsy for Castaneda on an outpatient basis. This conclusion is supported by the fact that, between June 7 and July 12, 2006, Lt. Walker called Dr. Masters' office four to six times to arrange for a biopsy for Castaneda on an outpatient basis. J.A. 137. Unfortunately, because of his vacation schedule, Dr. Masters did not have an appointment available until August. Lt. Walker then made arrangements for Castaneda to go to the emergency room in July 2006 where he was seen by a urologist who diagnosed him with genital warts. J.A. 139-40, 145. The ACLU's suggestion that Dr. Hui prevented Lt. Walker from getting a biopsy for Castaneda is spurious.

CONCLUSION

Respondents argue that adopting "Petitioners' position would create a double standard that undermines uniformity by leaving BOP personnel liable under *Bivens,* while PHS personnel who work alongside their BOP counterparts, performing functionally equivalent duties, would be immune." Resp. Br. 60-61.

The problem with this argument is that the difference in treatment between PHS personnel and other federal officials is the result of a deliberate choice by Congress, which choice was indisputably within its power to make. Even if one were to accept the contention that the immunity provided by section

233(a) does not extend to *Bivens* actions, one cannot dispute that when Congress enacted section 233 in 1970, it was rejecting the ideal of uniformity and instead providing PHS personnel with immunity that was not available to the vast majority of federal employees.

Since it is an indisputable fact that Congress, in enacting section 233, singled out PHS personnel for special protection, it is hardly unreasonable to believe that Congress intended the scope of that special protection to be all-encompassing, i.e. to apply to *all* potential lawsuits that might be brought against PHS personnel for their actions in providing medical care within the scope of their employment, whatever legal theory might underlie the claims set out in those lawsuits, including theories not yet recognized when section 233 was enacted.

The language of section 233 and all of the surrounding circumstances support the conclusion that section 233(a) precludes the prosecution of *Bivens* actions against PHS officers and employees, including the claims against petitioners in this case. Accordingly, this Court should reverse the judgment of the Ninth Circuit.

Respectfully submitted,

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