

No. 08-1529

IN THE
Supreme Court of the United States

ESTHER HUI AND STEPHEN GONSALVES,
Petitioners,

v.

YANIRA CASTANEDA, ET AL.,
Respondents.

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

**BRIEF OF *AMICI CURIAE*
REP. JOHN CONYERS, JR.,
REP. ZOE LOFGREN, AND
REP. JERROLD NADLER
IN SUPPORT OF RESPONDENTS**

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INTEREST OF *AMICI CURIAE*

The question presented is whether any remedy exists against officers of the Public Health Service (PHS) who are deliberately indifferent to the serious medical needs of persons in federal custody – just as such a remedy is available for identical, unconstitutional conduct committed by other, similarly situated federal employees?

This brief is submitted on behalf of Rep. John Conyers, Jr. (D-MI), Chairman of the Committee on the Judiciary, U.S. House of Representatives, Rep. Zoe Lofgren (D-CA), Chairwoman of the Subcommittee on Immigration, Citizenship, Refugees, Border Security, and International Law of the Committee on the Judiciary, and Rep. Jerrold Nadler (D-NY), Chairman of the Subcommittee on the Constitution, Civil Rights, and Civil Liberties of the Committee on the Judiciary.¹

Amici curiae are Members of Congress with an important interest in the question presented by this case. The Subcommittee on Immigration, Citizenship, Refugees, Border Security, and International Law has held hearings on serious problems with the provision of medical care at immigration detention facilities across the country supervised by the U.S. Immigration and Customs Enforcement (ICE), a federal agency within the

¹ This brief has been filed with the written consent of the parties, which is on file with the Clerk of Court. No counsel for a party authored this brief in whole or in part, nor did any person or entity, other than *amici* or their counsel, make a monetary contribution to the preparation or submission of this brief.

Department of Homeland Security.² This deficient care has led to fatalities, including the death of Francisco Castaneda, which forms the basis of the claims in this case. According to the district court below, “Defendants’ own records bespeak of conduct that transcends negligence by miles. It bespeaks of conduct that, if true, should be taught to every law student as conduct for which the moniker ‘cruel’ is inadequate.” *Castaneda v. United States*, 538 F. Supp. 2d 1279, 1298 n.16 (C.D. Cal. 2008). Mr. Castaneda testified before the House Immigration Subcommittee on October 4, 2007, only a few months prior to his death. ICE figures show that 107 persons have died in detention since October 2003.

Numerous internal documents and reports of government whistleblowers confirm that government officers and employees have repeatedly delayed or denied necessary treatment, apparently in an ill-conceived effort to cut costs. The record assembled by the Subcommittee and investigative journalists details denials of treatment for tuberculosis, pneumonia, bone fractures, head trauma, chest pain, and other serious complaints. At one facility in San Pedro, California, the clinical director prohibited

² See *Problems with Immigration Detainee Medical Care: Hearing before the Subcommittee on Immigration, Citizenship, Refugees, Border Security, and International Law of the Committee on the Judiciary, U.S. House of Representatives*, 110th Cong., 2d Sess. (June 4, 2008) (Serial No. 110-117) (“June 4, 2008 Hearing”); *Detention and Removal: Immigration Detainee Medical Care: Hearing before the Subcommittee on Immigration, Citizenship, Refugees, Border Security, and International Law of the Committee on the Judiciary, U.S. House of Representatives*, 110th Cong., 1st Sess. (Oct. 4, 2007) (Serial No. 110-53) (“October 4, 2007 Hearing”).

medical staff from ordering any lab work for detainees no matter what their condition until they had been detained for more than 30 days. An internal Public Health Service document indicates that this policy may have played a role in the death of a detainee with AIDS who was denied proper medication through her period of detention. After reviewing thousands of government records pertaining to detainee deaths, the New York Times recently reported that officials “used their role as overseers to cover up evidence of mistreatment, deflect scrutiny by the news media or prepare exculpatory public statements after gathering facts that pointed to substandard care or abuse.”³

In short, the public record demonstrates the importance of relief for violations of constitutional rights, where appropriate. *Amici* also have an important interest in the proper interpretation of the governing statutory framework. At bottom, this case presents a question of congressional intent regarding the Emergency Health Personnel Act of 1970 and the Westfall Act of 1988. *Amici* are uniquely situated to address this question of congressional intent. Although *amici* submit this brief in their individual capacities, not on behalf of Congress itself, their views are informed by their experiences as Members of Congress.

³ *Officials Obscured Truth Of Migrant Deaths in Jail*, N.Y. Times, Jan. 10, 2010, at 1.

SUMMARY OF ARGUMENT

This brief is filed by the current Chairman of the Committee on the Judiciary, the Chairwoman of the Subcommittee on Immigration, Citizenship, Refugees, Border Security, and International Law of the Committee on the Judiciary, and the Chairman of the Subcommittee on the Constitution, Civil Rights, and Civil Liberties of the Committee on the Judiciary. *Amici* urge the Court to affirm the judgment of the Court of Appeals.

In *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), this Court recognized a right of action for damages against individual federal officials for constitutional violations. In *Carlson v. Green*, 446 U.S. 14 (1980), the Court held that a *Bivens* remedy was available against federal medical personnel who were deliberately indifferent to the serious medical needs of a prisoner in federal custody. There is no basis for creating a new and different rule for PHS officers and employees. Indeed, the facts of this case are remarkably similar to those of *Carlson*. Although the *Carlson* Court did not squarely decide the question presented here, the defendants in *Carlson* included the Assistant Surgeon General of the United States, a member of the PHS.

This case involves two federal statutes. Section 233(a) of Title 42 provides that the remedy against the United States provided by the Federal Tort Claims Act (FTCA), 28 U.S.C. § 2672, with respect to personal injuries, including death, resulting from medical care or related functions performed 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.” This language, enacted in 1970 prior to the decision in *Bivens*, was limited to common-law and statutory malpractice claims and did not – and logically could not – include constitutional claims.

In addition, Section 233(a) must be interpreted in the context of the FTCA as amended by Federal Employees Liability Reform and Tort Compensation Act of 1988 (the “Westfall Act”), Pub. L. No. 100-694, 102 Stat. 4563, enacted in response to this Court’s decision in *Westfall v. Erwin*, 484 U.S. 292 (1988). The Westfall Act makes clear that the exclusive remedy provision of the Federal Tort Claims Act “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.” 28 U.S.C. § 2679(b)(2)(A). The Westfall Act thus expressly preserves the right of injured plaintiffs to bring civil actions “for a violation of the Constitution of the United States” – i.e., *Bivens* claims.

Section 233(a) refers expressly to FTCA provisions and relies on them for its operation. Section 233(a) makes the FTCA the exclusive remedy for claims against PHS personnel only to the extent the FTCA so provides. And the FTCA does not include immunity for constitutional claims – in fact, it explicitly preserves *Bivens* claims.

Further, other provisions in Section 233, including Sections 233(c), 233(e), and 233(f), underscore the relationship between the Public Health Service Act and the FTCA. These provisions

confirm Congress' understanding that the scope of the immunity in Section 233(a) must be interpreted according to the scope of the remedy provided in the FTCA. The *Bivens* exception of the FTCA applies to Section 233.

The need for a *Bivens* remedy in this context is clear. Congress has held hearings documenting the serious problems with detainee medical care and the all-too-frequent unsafe and inhumane treatment. Detainees have been denied access to life-saving surgical procedures and medications. Given their confinement, people in ICE facilities have no other health treatment options, and the federal government has a constitutional duty to provide a minimum standard of medical care. Despite that duty, federal officers have sometimes ignored or delayed treatment for health problems up to and including emergencies. Mistreatment or lack of treatment while in ICE facilities has resulted in avoidable suffering and numerous deaths, reports of which might even be understated because of improper reporting.

Amici have no doubts that the vast majority of PHS personnel are dedicated and conscientious public servants. They have nothing to fear from potential *Bivens* liability, which arises only in extraordinary situations involving constitutional violations. Where such tragedies occur, a constitutional tort remedy should be available against PHS personnel, on the same terms and conditions as it is available against other federal officers mandated to provide medical care to persons in custody.

For all these reasons, this Court should affirm the judgment of the Court of Appeals.

ARGUMENT**I. CONGRESS HAS MADE CLEAR ITS INTENT TO PRESERVE A *BIVENS* REMEDY AGAINST PHS PERSONNEL.****A. *Carlson v. Green* Makes Clear That The Availability Of An FTCA Claim Does Not Preclude A *Bivens* Remedy.**

This Court's decision in *Carlson v. Green*, 446 U.S. 14 (1980), provides the analytical framework to resolve the question presented. In *Carlson*, this Court upheld the availability of a *Bivens* remedy against federal medical personnel who allowed a man in federal custody to die, and it compels the recognition of the continued availability of a *Bivens* claim against the PHS personnel who allegedly relegated a man in immigration detention to a similar outcome here.

The facts of *Carlson* bear an uncanny resemblance to those of the instant case. In *Carlson*, the plaintiff was the mother of a deceased federal prisoner, who brought suit against federal officers and employees on behalf of her son's estate, alleging Eighth Amendment violations. She claimed that federal officials' deliberate indifference to his serious medical needs amounted to an Eighth Amendment violation and caused her son, a chronic asthmatic, to die of respiratory failure. 446 U.S. at 16 & n.1. The defendants in *Carlson* included the Assistant Surgeon General of the United States, a member of the PHS, as well as employees of the Bureau of Prisons. The defendants contended that the FTCA provided substitute relief that displaced a *Bivens* remedy.

This Court rejected the defendants' contention. *Id.* at 19. First, the Court held that "the case involve[d] no special factors counseling hesitation." *Id.* Second, the Court found that there was no congressional declaration foreclosing the *Bivens* claim and making the FTCA exclusive. No statute declared the FTCA to be a substitute for *Bivens*, and subsequent legislative history "made it crystal clear that Congress views FTCA and *Bivens* as parallel, complementary causes of action." *Id.* at 20. The Court held that the potential for a recovery of damages from the government pursuant to the Federal Tort Claims Act does not displace a *Bivens* claim against individual officers, because Congress does not view the FTCA as providing "equally effective" relief as *Bivens*. *Id.* at 23. This Court has never revisited this fundamental principle or called it into question in subsequent *Bivens* cases.⁴

⁴ Petitioners point to dictum in *Carlson* observing that the conclusion that the FTCA complements *Bivens*, rather than replaces it, "is buttressed by the significant fact that Congress follows the practice of explicitly stating when it means to make FTCA an exclusive remedy. *See* 38 U.S.C. § 4116(a), 42 U.S.C. § 233(a), 42 U.S.C. § 2458a, 10 U.S.C. § 1089(a), and 22 U.S.C. § 817(a) (malpractice by certain Government health personnel); 28 U.S.C. § 2679(b) (operation of motor vehicles by federal employees); and 42 U.S.C. § 247b(k) (manufacturers of swine flu vaccine)." 446 U.S. at 20 (emphasis added). But this dictum does not prove what Petitioners claim. It states merely that Section 233(a) precludes actions for "malpractice," not that it bars constitutional claims. Indeed, one of the defendants in *Carlson* was a member of the PHS. The fact that the Court cited Section 233(a) without suggesting that the Assistant Surgeon General was entitled to special *Bivens* immunity supports Respondents in this case, not Petitioners. And it is telling that, although the Solicitor General cited Section 233 in the brief in *Carlson*, he did not seek special *Bivens* immunity for the

Under *Carlson* and related precedent, a wide range of federal officers and employees are currently subject to *Bivens* actions for constitutional violations. There is no principled reason for conferring a special immunity on PHS personnel, when similarly situated federal employees face *Bivens* claims, including Bureau of Prisons doctors treating incarcerated prisoners. Petitioners argue that PHS doctors are public-spirited and have made financial sacrifices as public servants, but the same is true for all categories of federal employees. Congress did not intend to draw an arbitrary distinction between PHS and other kinds of federal personnel with respect to actions that rise to the level of constitutional torts. All categories of federal employees perform important public functions, and there is no basis for singling out PHS personnel for special treatment with respect to *Bivens* claims.

The analytical framework of *Carlson* is fortified by three additional factors militating strongly in favor of a *Bivens* remedy against PHS officers and employees. First, as this Court recognized in *Carlson*, the threat of individual liability for official conduct that violates a person's constitutional rights is a powerful deterrent that Congress would not forego. *Carlson*, 446 U.S. at 21.

Second, under Petitioners' view, there would be no additional relief available from any party for violations of constitutional rights beyond that which is available under the Federal Tort Claims Act for non-constitutional torts. The additional quantum of

Assistant Surgeon General. See 1979 WL 213535, *35 (Brief for the Petitioners) (describing Section 233 in a parenthetical as "rendering FTCA exclusive remedy for medical malpractice by officials of the Public Health Service").

harm arising from the fact of the constitutional violation would go uncompensated or unpunished. In general, this absence of relief would contravene the longstanding and fundamental principle that “a right implies a remedy.” The Federalist No. 43, at 274 (J. Madison); *see also Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803) (describing the right to a remedy as “the very essence of civil liberty”); 3 W. Blackstone, Commentaries 23 (1783) (describing the “general and indisputable rule, that where there is a legal right, there is also a legal remedy, by suit or action at law, whenever that right is invaded”). In the instant case, such a holding would treat no differently a case of simple negligence and a case that the district court described, based on the Government’s own records, as “transcend[ing] negligence by miles.” *Castaneda*, 538 F. Supp. 2d at 1298 n.16. This Court should not lightly presume that Congress has withdrawn a remedy for constitutional claims.

Third, this Court observed in *Carlson* that relief under the FTCA is necessarily contingent on the substantive laws of individual States and that Congress would ordinarily not leave the conduct of federal officials amounting to federal constitutional violations to be redressed solely according to “the vagaries of the laws of the several States.” *Carlson*, 446 U.S. at 23. That observation is particularly salient in the context of federal immigration detainees, who are often transferred around the

country to facilities located in various States.⁵ It would be passing strange if the protection of their federal constitutional rights from violations by federal officials should rest solely on the laws of the States through which they happen to pass in the course of their detention. Certainly, this Court should not readily attribute to Congress the intent to create such a peculiar system.

B. Section 233(a) Does Not Preclude A *Bivens* Claim.

Section 233(a) of Title 42, which is part of the Public Health Service Act and which was enacted as part of the Emergency Health Personnel Act of 1970, 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 ... whose act or omission gave rise to the claim.

⁵ June 4 Hearing at 54, 68, 120; U.S. Department of Homeland Security, Immigration and Customs Enforcement, *Immigration Detention Overview and Recommendations* 6 (Oct. 6, 2009) (available at http://www.ice.gov/doclib/091005_ice_detention_report-final.pdf).

Section 233(a) does not refer expressly to constitutional claims, and the historical context in which it was enacted confirms that it does not bar *Bivens* claims. Section 233(a) was enacted prior to this Court's decision in *Bivens* (at the time of enactment, this Court had granted review in *Bivens*, but it did not issue its decision until the following year) and long before the recognition of Eighth Amendment claims based on the deliberate indifference to a prisoner's serious medical needs. *Estelle v. Gamble*, 429 U.S. 97 (1976). Congress did not preclude constitutional tort suits against PHS employees in 1970 for the simple reason that such claims could not reasonably have been within the contemplation of the legislature. Thus, the reference in § 233(a) to "any other civil action or proceeding" with respect to "personal injury, including death, resulting from the performance of medical, surgical, dental, or related functions," was limited to claims that had previously been recognized to exist (*i.e.*, common-law and statutory malpractice claims).

In fact, the key preemptive phrase in Section 233(a) – "exclusive of any other civil action or proceeding by reason of the same subject matter against the employee" – is identical to language in the Federal Drivers Act, which at the time provided that the FTCA was the exclusive remedy "for personal injury, including death, resulting from the operation by any employee of the Government of any motor vehicle while acting within the scope of his office or employment." 28 U.S.C. § 2679(b) (1970).

The Federal Drivers Act was enacted in 1961. *See* Pub. L. No. 87-258, 75 Stat. 539 (1961). In 1961, Congress could scarcely have imagined that federal

employees operating automobiles would face constitutional claims, and it would be fanciful to argue that the language in the Federal Drivers Act encompassed constitutional torts. Accordingly, when Congress borrowed this language in 1970, there is no reason to think that Congress believed it was addressing constitutional claims.

The title of Section 233(a) in the Statutes at Large confirms as much. The title states: “Defense of Certain Malpractice and Negligence Suits.” Emergency Health Personnel Act of 1970, Pub. L. No. 91-623, 84 Stat. 1868, 1870 (1970). As this Court has explained, “the title of a statute and the heading of a section are tools available for a resolution of a doubt about the meaning of a statute.” *Almendarez-Torres v. United States*, 523 U.S. 224, 234 (1998). Here, the title confirms that Congress’ exclusive concern was extending immunity to common-law malpractice and negligence actions, rather than to constitutional claims.

The legislative history of Section 233(a) similarly suggests that Congress was concerned with common-law malpractice liability. Floor statements cited only medical malpractice; there was no mention of possible constitutional violations. *See* 91 Cong. Rec. H42,543 (1970) (statement of Rep. Staggers) (“So they have asked, if in the event there is a suit against a PHS doctor alleging malpractice, the Attorney General of the United States would defend them in whatever suit may arise.”); 91 Cong. Rec. S42,977 (1970) (statement of Sen. Javits) (“I am pleased to support ... the provision for the defense of certain malpractice and negligence suits by the Attorney General.”). 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. The comparison with doctors in private practice (who of course do not face the possibility of *Bivens* claims) underscores that Congress was focused on ordinary malpractice liability.

Petitioners suggest that the term medical “malpractice” encompasses constitutional torts. That suggestion is misplaced. The concept of *malpractice* certainly meant no such thing in 1961 or 1970, when the relevant statutory language was crafted. Even today, “malpractice” denotes negligence or incompetence in the performance of a professional duty,⁶ rather than deliberate indifference to serious medical needs under conditions of government confinement that rises to the level of a Fifth or Eighth Amendment violation. Petitioners’ argument is further foreclosed by the sharp distinction that this Court drew between malpractice and an Eighth Amendment violation in *Estelle v. Gamble*: “Medical malpractice does not become a constitutional violation merely because the victim is a prisoner. In order to state a cognizable claim, a prisoner must allege acts or omissions sufficiently harmful to evidence deliberate indifference to serious medical needs.” 429 U.S. at 106. Similarly, in *Bivens*, this Court rejected a view of “the relationship between a

⁶ See *Black’s Law Dictionary* 978 (8th ed. 2004) (defining “malpractice” as synonymous with “professional negligence” and “medical malpractice” as a “doctor’s failure to exercise the degree of care and skill that a physician or surgeon of the same medical specialty would use under similar circumstances”).

citizen and a federal agent unconstitutionally exercising his authority as no different from the relationship between two private citizens,” noting that an “agent acting-albeit unconstitutionally-in the name of the United States possesses a far greater capacity for harm than an individual trespasser exercising no authority other than his own.” 403 U.S. at 391-92. And the House Report accompanying the 1988 Westfall Act noted a “sharp distinction between common law torts and constitutional or *Bivens* torts” and suggested that a constitutional tort involves “a more serious intrusion of the rights of an individual that merits special attention.” H.R. Rep. No. 100-700, at 6 (1988), 1988 U.S.C.C.A.N. at 5950. Hence, there is no basis for equating “malpractice” with constitutional torts.

C. The Westfall Act Confirms The Availability Of A *Bivens* Claim.

The availability of a *Bivens* remedy in this case is confirmed by the Westfall Act, Pub. L. No. 100-694, 102 Stat. 4563 (1988). The Westfall Act provides in relevant part:

(1) The [FTCA] remedy against the United States ... for injury or loss of property, or personal injury or death arising or resulting from the negligent or wrongful act ... of any employee of the Government ... is exclusive of any other civil action or proceeding for money damages by reason of the same subject matter against the employee Any other civil action ... arising out of or relating to the same subject matter against the employee ... is precluded

(2) Paragraph (1) does not extend or apply to a civil action ...

(A) which is brought for a violation of the Constitution of the United States

28 U.S.C. § 2679(b)(1)-(2).

By amending the FTCA in this way, Congress made explicit what had been implicit at the time Congress enacted Section 233(a): that constitutional claims are outside the FTCA's purview. Constitutional torts have never been cognizable under the FTCA, and it would be illogical to construe Section 233(a) – enacted 18 years *prior to* the Westfall Act – as bringing constitutional claims against PHS employees back within the scope of the FTCA. There is no reason to think that before *Bivens* was even decided, Congress singled out PHS employees for a special *Bivens* immunity.

In fact, Congress sought to do the opposite in the Westfall Act. It sought to create a uniform rule for federal employees, including those covered by pre-Westfall Act immunity statutes like § 233(a). As this Court has observed, “[t]he Liability Reform Act’s plain language makes no distinction between employees who are covered under pre-Act immunity statutes and those who are not.” *United States v. Smith*, 499 U.S. 160, 172-73 (1991).

The Westfall Act provided all federal employees with immunity from common-law torts and simultaneously preserved personal liability for constitutional violations, which it assumed had existed prior to the *Westfall* decision. *See, e.g.*, H.R. Rep. No. 100-700, at 4 (1988), *reprinted in* 1988 U.S.C.C.A.N. 5945, 5948 (explaining that the effect of

the Westfall Act “is to *return* Federal employees to the status they held prior to the *Westfall* decision,” and that “[s]uch an exclusive remedy *has already been enacted* to cover the activities of certain Federal employees” (emphasis added); *id.* at 6 (stating that this law “*would not affect* the ability of victims of constitutional torts to seek personal redress from Federal employees who allegedly violate their Constitutional rights”) (citations omitted; emphasis added); 134 Cong. Rec. 29933 (daily ed. Oct. 12, 1988) (statement of Sen. Grassley) (noting that “this bill does not have any effect on the so-called Bivens cases or Constitutional tort claims, . . . *which can continue to be brought against individual Government officials*”) (emphasis added).

In light of its reference to the FTCA, the scope of immunity in the Public Health Service Act must be construed according to the scope of the remedy available against the United States in the Westfall Act and therefore must include the *Bivens* exception. In fact, the Westfall Act is directly relevant because it was the vehicle under which the immunity defense was introduced in the instant case. The Westfall Act was the basis for the certification by the U.S. attorney that Petitioners were acting within the scope of their employment, which triggered the exclusive remedy provision of the FTCA and led to the substitution of the United States as a defendant with respect to certain claims. In this case, the scope certification was made pursuant to 28 U.S.C.

§ 2679(d)(1)⁷ and Section 233(a). The defendants' motion to dismiss cited the Westfall Act and 28 U.S.C. § 2679 as well. Thus, the defendants in this action – and those in other suits involving PHS employees and federal officers – rely on the provisions of Section 2679 to invoke the exclusive remedy statute and substitute the United States as a defendant. There is no basis for ignoring the Westfall Act's express preservation of *Bivens* claims against individual federal officers.

D. The Structure of Section 233 Confirms The Availability of a *Bivens* Remedy.

The structure of Section 233 further underscores the relationship between the Public Health Service Act and the FTCA and confirms that the *Bivens* exception of the FTCA (made clear in the Westfall Act) applies to Section 233.

For example, Section 233(c) is the scope certification provision of the Public Health Service Act. Unlike the Westfall Act, which has two different provisions that address scope certification depending whether the action is filed against the employee in federal district court (28 U.S.C. § 2679(d)(1)) or in state court (28 U.S.C. § 2679(d)(2)), the Public Health

⁷ 28 U.S.C. § 2679(d)(1) provides:

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

Service Act has only one scope certification provision.⁸ Section 233(c) provides for certification and removal from state court. There is no “federal” scope determination provision in the Public Health Service Act. While the Westfall Act recognizes that federal employees could be sued in federal court on a

⁸ Section 233(c) provides:

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

Upon a certification by the Attorney General that the defendant was acting in the scope of his employment at the time of the incident out of which the suit arose, any such civil action or proceeding commenced in a State court shall be removed without bond at any time before trial by the Attorney General to the district court of the United States of the district and division embracing the place wherein it is pending and the proceeding deemed a tort action brought against the United States under the provisions of Title 28 and all references thereto. *Should a United States district court determine on a hearing on a motion to remand held before a trial on the merit that the case so removed is one in which a remedy by suit within the meaning of subsection (a) of this section is not available against the United States, the case shall be remanded to the State Court: Provided, That where such a remedy is precluded because of the availability of a remedy through proceedings for compensation or other benefits from the United States as provided by any other law, the case shall be dismissed, but in the event the running of any limitation of time for commencing, or filing an application or claim in, such proceedings for compensation or other benefits shall be deemed to have been suspended during the pendency of the civil action or proceeding under this section. (emphasis added).*

federal cause of action (*Bivens* or statutory), as well as in state court under a state common law theory, Congress could not have contemplated constitutional torts against individual PHS officers in federal court at the time of the passage of the Emergency Health Personnel Act in 1970, prior to the decision in *Bivens*. Section 233(c) provides further evidence that the phrase “any other civil action or proceeding” does not include constitutional claims.

Moreover, another portion of Section 233 confirms that the scope of the immunity in the Public Health Service Act has always been defined by the nature of the FTCA remedy. Section 233(e) extends the United States’ liability for intentional torts committed by PHS personnel – and thus ensures that PHS personnel cannot be sued personally for such torts under state malpractice law. Section 233(e) provides:

(e) Assault or battery

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

This provision avoids the risk that a federal officer committing an intentional tort might otherwise face malpractice liability under state law, in light of the FTCA’s intentional tort exception. 28 U.S.C. § 2680(h). Congress took the same steps in other statutes, including 22 U.S.C. § 817(a) (enacted as part of Pub. L. No. 94-350) (1976), which addresses State Department medical personnel; 22 U.S.C. § 2702 (enacted as part of Pub. L. No. 96-465) (1980),

also addressing State Department medical personnel; 42 U.S.C. § 247b(k) (Pub. L. No. 94-380) (1976), governing Swine flu administrators; and 10 U.S.C. § 1054 (Pub. L. No. 99-661) (1986), regarding Defense Department attorneys. All of these statutes demonstrate the linkage between the FTCA and immunity statutes such as the Public Health Service Act. The scope of the immunity in Section 233(a) must be interpreted according to the scope of the remedy provided in the FTCA.

In addition, there are similar intentional torts provisions in the Veterans Administration (VA) immunity statute, 38 U.S.C. § 7316, Pub. L. No. 102-40 (1991), and in the Gonzalez Act, 10 U.S.C. § 1089, Pub. L. No. 94-464 (1976), which covers Armed Forces medical personnel. Both of these examples confirm yet again the relationship between immunity statutes and the FTCA, and their history is instructive. Before the VA statute was amended to include a provision exempting medical personnel from the intentional tort exception under Section 2680(h) of the FTCA, courts found that VA medical personnel could be sued for intentional torts under state law, despite the broad “exclusivity” language in subsection (a) of the statute.⁹ *See, e.g., Franklin v.*

⁹ Former 38 U.S.C. § 4116(a)(1) (current version at 38 U.S.C. § 7316(a)(1))

The remedy-- (A) against the United States provided by sections 1346(b) and 2672 of title 28, or (B) through proceedings for compensation or other benefits from the United States as provided by any other law, where the availability of such benefits precludes a remedy under section 1346(b) or 2672 of title 28, for damages for personal injury, including death, allegedly arising from malpractice or negligence of a health care

United States, 992 F.2d 1492, 1500 (10th Cir. 1993) (intentional tort claim); *Lojuk v. Quandt*, 706 F.2d 1456, 1463 (7th Cir. 1983) (permitting both an intentional tort claim and a *Bivens* claim against a VA doctor: “there is no official immunity from battery, because there is no alternative remedy available against the United States,” and citing 42 U.S.C. § 233 as example of immunity statute); H.Rep. No. 93-368, 93d Cong., 1st Sess., reprinted in 1973 U.S.C.C.A.N. 1688, 1710 (noting “cases where Federal Tort claims actions would not lie, but actions could still be brought against the VA employee personally for actions arising in the exercise of his duties”).

In response to this situation, Congress amended the VA Act in 1988 to add a provision virtually identical to Section 233(e) of the PHS Act. The legislative history explains that VA personnel had been protected from personal liability in medical malpractice actions arising from negligence, but that their immunity did not extend to intentional torts. The House Report reflects an understanding that the

employee of the Administration in furnishing health care or treatment while in the exercise of that employee's duties in or for the Administration shall be exclusive of any other civil action or proceeding by reason of the same subject matter against the health care employee (or employee's estate) whose act or omission gave rise to such claim.

extensions of VA personal immunity were contingent on the government's assumption of FTCA liability.¹⁰

Another provision demonstrating the relationship between the Public Health Service Act and the FTCA is Section 233(f), which authorizes the federal government to indemnify or provide insurance for PHS employees who negligently cause injury or death while assigned to work abroad and in circumstances "likely to preclude the remedies of third persons

¹⁰ H.R. Rep. No. 191, 100th Cong., 1st Sess. 17 (1987), 1988 U.S.C.C.A.N. 432, 450

For many years, VA medical personnel have been protected from personal liability in medical malpractice actions arising out of allegedly negligent conduct in the furnishing of medical care or treatment to veterans. However, the Government does not extend this immunity to actions arising out of intentional conduct—so-called 'intentional torts'. In some instances, State law characterizes an act of medical malpractice as an intentional tort, leaving VA medical personnel potentially liable for an action for which the law intends the Government to assume liability. As an example, if a patient consents to an operation on his left elbow, but the physician mistakenly operates on the right elbow, responsibility for this action would lie with the United States. However, if the suit was based on a theory that a battery occurred, which is defined as any contact with a person without that person's consent, the Government is not allowed to assume the employee's liability. In essence, State law, which controls the character of the action brought against VA medical personnel, could defeat the intent of the Federal law to provide such employees with immunity. Therefore, the reported bill (section 301) would extend the same degree of protection to VA health care personnel as is currently afforded similar personnel in other Federal agencies.

against the United States” under the FTCA. 42 U.S.C. § 233(f). “The purpose of this section ... is to avoid liability being assessed against an individual medical personnel in a situation where the Federal Tort Claims Act would not be applicable.” S. Rep. No. 1264, 94th Cong., 2d Sess. 2, *reprinted in* 1976 U.S.C.C.A.N. 4443, 4450-51. In other words, Section 233(f) reflects congressional understanding that notwithstanding Section 233(a), there are circumstances in which PHS officers assigned to foreign countries would face individual liability in connection with injuries or deaths caused by their negligence. Because it is congressional intent to protect such employees from personal liability, Section 233(f) provides the indemnification or insurance required. It is significant that Congress referred to injuries or deaths resulting from *negligent* conduct, because it was just such conduct that Congress intended to be brought against the United States pursuant to the FTCA, rather than against the individual. But if a Public Health Service officer stationed abroad were to cause injury or death in violation of the Constitution, Section 233(f) would not provide indemnification precisely because no PHS employee, whether stationed at home or abroad, receives protection under the Public Health Service Act for such individual liability.

Several provisions in Section 233 thus confirm that the scope of immunity for an individual officer or employee has always depended on the scope of the remedy provided in the FTCA. Because the FTCA has never included constitutional torts, Congress could never have intended that individual officer

immunity under Section 233(a) would extend to *Bivens* claims.

II. *BIVENS* CLAIMS AGAINST PHS PERSONNEL PLAY A VITAL ROLE IN PROTECTING CONSTITUTIONAL RIGHTS.

The hearings conducted by Congress on the issue of immigration detainee medical care have given it a unique perspective on the question presented by this case. The Subcommittee on Immigration, Citizenship, Refugees, Border Security, and International Law heard personal testimony from Mr. Castaneda, whose sister and daughter are Respondents here, shortly before his death.

The public record establishes the need for a *Bivens* remedy against PHS officers and employees in appropriate cases to address deliberate indifference to serious medical needs that rises to the level of a constitutional violation. According to the Government Accountability Office, in 2006 nearly 300,000 men, women and children were detained by U.S. Immigration and Customs Enforcement (ICE), tripling the number of 2001, when fewer than 100,000 were detained.¹¹ In the year ending September 30, 2008, more than 407,000 persons spent time in custody.¹² A significant number of detainees spend more than 200 days in confinement.¹³

¹¹ October 4, 2007 Hearing at 1 (statement of Rep. Lofgren).

¹² "In-Custody Deaths," available at http://topics.nytimes.com/top/reference/timestopics/subjects/i/immigration_detention_us/incustody_deaths/index.html.

¹³ June 4, 2008 Hearing at 89 (statement of Mary McCarthy, National Immigrant Justice Center).

As the Washington Post concluded in its four-part investigative series on the subject, detainees typically “have less access to lawyers than convicted murderers in maximum-security prisons and some have fewer comforts than al-Qaeda terrorism suspects held at Guantanamo Bay, Cuba.”¹⁴ Yet they are not terrorists or enemy combatants. Many have legal claims to U.S. residency and are not here unlawfully.¹⁵ Some are legal U.S. residents accused of offenses including misdemeanors. Others are lawful immigrants seeking political asylum from danger in their own countries.¹⁶ Still others are United States citizens who have been detained mistakenly.¹⁷ The common thread is that all detainees in custody are completely dependent on governmental officers for access to necessary medical care, and the government has a clear, undisputed obligation to provide such care. Those with serious medical needs are at grave risk unless their conditions receive appropriate treatment.

The evidence assembled by Congress, as well as material collected through FOIA requests and other

¹⁴ *System of Neglect: As Tighter Immigration Policies Strain Federal Agencies, The Detainees in Their Care Often Pay a Heavy Cost*, Wash. Post, May 11, 2008, p. A1.

¹⁵ June 4, 2008 Hearing at 89 (statement of Mary McCarthy, National Immigrant Justice Center).

¹⁶ *Id.*

¹⁷ *See Problems with ICE Integration, Detention, and Removal Procedures: Hearing before the Subcommittee on Immigration, Citizenship, Refugees, Border Security, and International Law of the Committee on the Judiciary, U.S. House of Representatives, 110th Cong., 2d Sess. (Feb. 13, 2008) (Serial No. 110-80).*

means by The New York Times, Washington Post, CBS News, and other independent media outlets, reveals tragedy after tragedy in which detainees have been denied safe and humane medical care.¹⁸ One report concluded that detainees “are locked in a world of slow care, poor care and no care, with panic and cover-ups among employees watching it happen.”¹⁹ The Washington Post’s investigation exposed “a hidden world of flawed medical judgments, faulty administrative practices, neglectful guards, ill-trained technicians, sloppy record-keeping, lost medical files and dangerous staff shortages.”²⁰ Reports by the U.S. Government Accountability

¹⁸ See, e.g., 60 Minutes, *Detention in America*, available at <http://www.cbsnews.com/stories/2008/05/09/60minutes/main4083279.shtml>; *Hurdles Shown In Detention Reform*, N.Y. Times, Aug. 20, 2009; *System of Neglect: As Tighter Immigration Policies Strain Federal Agencies, The Detainees in Their Care Often Pay a Heavy Cost*, Wash. Post, May 11, 2008, at A1; *In Custody, In Pain: Beset by Medical Problems as She Fights Deportation, A U.S. Resident Struggles to Get the Treatment She Needs*, Wash. Post, May 12, 2008, at A1; *Suicides Point to Gaps in Treatment: Errors in Psychiatric Diagnoses and Drugs Plague Strained Immigration System*, Wash. Post, May 13, 2008, at A1; *Some Detainees Are Drugged For Deportation: Immigrants Sedated Without Medical Reason*, Wash. Post, May 14, 2008, at A1; *U.S. Admits Negligence in Detainee’s Death*, San Francisco Chronicle, Apr. 29, 2008, at B-3; *Immigrant Dead of Drug Combination*, Providence Journal, Sept. 20, 2007; see also *Health Care for Immigration Detainees: What Should Be The Standard?*, ABA Commission on Immigration (February 13, 2009).

¹⁹ *System of Neglect: As Tighter Immigration Policies Strain Federal Agencies, The Detainees in Their Care Often Pay a Heavy Cost*, Wash. Post, May 11, 2008, at A1.

²⁰ *Id.*

Office noted similar concerns.²¹ DHS's own inspections also showed noncompliance with medical standards in facilities where deaths occurred.²²

ICE figures show that 107 persons have died in detention since October 2003, a number that could well be understated.²³ Reports have indicated that the agency undercounts the number of detention deaths and discharges some detainees shortly before they die.²⁴ A review of medical records by the Washington Post determined that actions or omissions by medical staff members may have contributed to at least thirty (30) of those deaths.²⁵

In the case of Victoria Arellano, who suffered from advanced AIDS, a Public Health Service case

²¹ U.S. Government Accountability Office, "DHS: Organizational Structure and Resources for Providing Health Care to Immigration Detainees" (Feb. 2009); U.S. Government Accountability Office, "Alien Detention Standards: Observations on the Adherence to ICE's Medical Standards in Detention Facilities," in June 4, 2008 Hearing at 34-43.

²² Department of Homeland Security, Office of the Inspector General, "ICE Policies Related to Detainee Deaths and the Oversight of Immigration Detention Facilities" (June 2008).

²³ In August 2009, ICE revealed that it had omitted ten in-custody deaths from an official list produced to Congress and the public. The omission was identified only after records pertaining to one of the previously uncounted and unreported deaths was produced in response to a Freedom of Information Act request. *See Officials Say Fatalities Of Detainees Were Missed*, N.Y. Times, Aug. 18, 2009.

²⁴ *Officials Obscured Truth Of Migrant Deaths in Jail*, N.Y. Times, Jan. 10, 2010, p. 22.

²⁵ *System of Neglect: As Tighter Immigration Policies Strain Federal Agencies, The Detainees in Their Care Often Pay a Heavy Cost*, Wash. Post, May 11, 2008, p. A1.

summary following her death concluded that the PHS staff at all levels failed to recognize symptoms of meningitis, failed to rule out various types of infections, delayed necessary lab work pursuant to a facility policy described as “dangerous,” and ultimately provided incorrect medication.²⁶

Boubacar Bah suffered a skull fracture and intracranial bleeding while detained at an ICE facility. Once he was taken to the detention health unit, Public Health Service personnel misdiagnosed his behavior as a disciplinary matter, had him restrained, and approved his placement in a segregation cell. For hours, guards repeatedly requested medical attention for Bah, as he began foaming at the mouth, lost consciousness, and became unresponsive, but they received no response. Bah later died after undergoing emergency surgery at the hospital.²⁷

The hearings before Congress detail additional shortcomings, including failure to provide medication for mental illness and other serious medical conditions, dispensing improper drugs that triggered severe adverse reactions, and inadequate screening that failed to detect advanced stages of pregnancy, kidney stones, suicidal tendencies, and infectious disease.²⁸ In the 110th Congress, the Subcommittee

²⁶ October 4, 2007 Hearing at 1, 54; *System of Neglect: As Tighter Immigration Policies Strain Federal Agencies, The Detainees in Their Care Often Pay a Heavy Cost*, Wash. Post, May 11, 2008, at http://media.washingtonpost.com/wp-srv/nation/specials/immigration/documents/day1_arellano.pdf.

²⁷ *What Really Happened to Boubacar Bah*, N.Y. Times, Jan. 10, 2010.

²⁸ See, e.g., June 4, 2008 Hearing at 83-99, 143-46, 161-204.

received testimony from an attorney who provided pro bono representation to an asylum seeker suffering from post-traumatic stress disorder. According to her testimony, Public Health Service personnel grossly misdiagnosed the detainee's condition and provided her with increasing doses of powerful antipsychotic medication, notwithstanding the appearance of dangerous side effects.²⁹ In response to requests for medical attention, guards threatened to move the detainee to segregation; she was housed at the same facility where Boubacar Bah had been placed for hours in segregation without medical attention until he was rushed to the hospital.

Moreover, evidence indicates that officials have sometimes engaged in cover-ups and outright falsification of medical reports and other documents to hide mistreatment.³⁰ A recent New York Times investigation showed, for example, that a detainee's medical chart was altered by facility health personnel after his death to indicate that he had been given a painkiller that was not actually administered. In another matter, a spokesman for the ICE told a reporter that she could learn nothing about the Bah case from government authorities, when in fact records show that the spokesman had already alerted officials to the reporter's inquiry, and they conferred at length about sending the man back to Africa to avoid embarrassing publicity and high costs for long-term care. Documents show that "[w]hile he lay in the hospital in a coma after emergency brain surgery, 10 agency managers in Washington and Newark

²⁹ *Id.* at 97-98.

³⁰ *Officials Obscured Truth Of Migrant Deaths in Jail*, N.Y. Times, Jan. 10, 2010, p. 1.

conferred by telephone and e-mail about how to avoid the cost of his care and the likelihood of ‘increased scrutiny and/or media exposure.’”³¹ Ultimately, in an apparent effort to avoid paying \$10,000 a month for nursing home care, officials decided to pursue “humanitarian release” to cousins in New York, despite the family’s protest that they had no way to care for him. Days before the planned release, Bah died.³²

Amici are well aware that the vast majority of PHS employees are dedicated public servants. They have nothing to fear from *Bivens* actions, in which plaintiffs must meet the stringent requirements of proving constitutional violations. The “deliberate indifference” test for medical care, for example, demands a far more exacting showing than mere negligence. Recognizing the exposure of PHS employees to *Bivens* liability simply places them in the same position as other federal employees who perform identical functions and are similarly subject to *Bivens* liability. It provides a manageable remedy that poses no danger to federal programs and in fact helps ensure proper administration of the government.

³¹ *Id.* at 1.

³² *Id.*

CONCLUSION

The judgment below should be affirmed.

Respectfully submitted,

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