

No. 08-1529

IN THE
Supreme Court of the United States

ESTHER HUI, et al.,
Petitioners,
v.

YANIRA CASTANEDA, et al.,
Respondents.

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

**BRIEF FOR AMICI CURIAE
NATIONAL EXPERTS ON HEALTH
SERVICES FOR DETAINED PERSONS
IN SUPPORT OF RESPONDENTS**

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IN SUPPORT OF RESPONDENTS**

INTEREST OF *AMICI CURIAE*

Amici are national experts on health services for detained persons.¹ They have decades of experience working in and overseeing government detention center health services programs. They are all strongly committed to the medical profession and

¹ No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *amici curiae* or their counsel made a monetary contribution to its preparation or submission. The parties have consented to the filing of this brief.

ensuring effective medical care for detained persons. They are well versed in appropriate standards of care and the challenges facing government doctors who serve in prisons, jails, and immigration detention centers throughout the nation.

Amici have carried out their duties as both doctors and government servants in the same circumstances, and under the same conditions, as respondents and other Public Health Service (“PHS”) doctors. *Amici* have provided high level care to prisoners and detainees, even though they did not enjoy the extraordinary immunity sought by respondents in this case. Based on that long experience, *amici* believe that PHS will not be hindered in its mission if its medical personnel are held to the same minimal constitutional standards of care as others who treat detainees. Like *amici*, the overwhelming majority of PHS doctors are dedicated public servants whose decisions to serve their country and the public are not, and should not be, materially affected by such immunity considerations. And *amici* believe that any medical personnel whose decisions would be so affected should not be serving in the first place.

Amici have therefore filed this brief to explain why the absence of this extraordinary immunity will not have the disastrous effects that petitioners and their supporters claim. The brief also seeks to underscore the serious separation-of-powers concerns implicated by petitioners’ position that Congress will be deemed to have abrogated a recognized constitutional remedy without any indication that Congress ever considered that specific issue. Because the claims in this case arise directly under the Constitution, any decision by the legislature to exempt a single category of government doctors (but not others similarly

situated) from constitutional requirements should be stated clearly and explicitly, after consideration of all relevant concerns.

Amicus Robert L. Cohen is a Clinical Assistant Professor at Albert Einstein College of Medicine. He was board certified in internal medicine in 1978. He has served as the Director of the Montefiore Medical Center for Rikers Island Health Services and Vice President for Medical Operations for New York City Health and Hospitals Corporation. He has been a federal and state court appointed monitor for numerous prisons and jails, and he serves on the boards of several organizations related to health care in prisons, including the New York City Board of Correction and the National Commission on Correctional Health Care.

Amicus Joseph L. Goldenson has been the Director/Medical Director for the San Francisco Department of Public Health Jail Health Services since 1993. He appears in his individual capacity and is not representing the views of his employer. Dr. Goldenson has been a federal and state court appointed monitor for numerous prisons and jails, and has also evaluated the health care services in numerous other facilities, including the Los Angeles County Jail, the Dallas County Jail, and the Miami Dade Detention Center. Dr. Goldenson is a member of the California Medical Association's Institute for Medical Quality Corrections and Detentions Health Care Committee, which develops accreditation standards for jails in California. Dr. Goldenson is a Fellow of the Society of Correctional Physicians and has been an Assistant Clinical Professor at the University of California, San Francisco Medical School since 1980.

Amicus Robert B. Greifinger is Professor (Adjunct) of Health and Criminal Justice and Distinguished Research Fellow at John Jay College of Criminal Justice in New York City. He was board certified in pediatrics in 1976. He has managed the medical care at Rikers Island Health Services and served as Deputy Commissioner/Chief Medical Officer for the New York State Department of Correctional Services. Since that time, he has been a federal and state court-appointed monitor for numerous prisons and jails and has consulted widely on prison and jail health care. He has been a Fellow of the Society of Correctional Physicians since 2000 and serves as co-editor of the International Journal of Prison Health.

Amicus Steven K. Hoge is a lecturer at Columbia University College of Physicians and Surgeons. He was board certified in psychiatry in 1987 and in forensic psychiatry in 1994. He was previously the head of forensic psychiatry at Bellevue Hospital in New York City and the prison psychiatry service for seriously mentally ill offenders incarcerated at Rikers Island. Dr. Hoge is a past chair of the American Psychiatric Association Council on Psychiatry and Law. He has provided expert services to the U.S. Department of Justice Special Litigation Branch regarding the quality of psychiatric care in jails and prisons.

Amicus Lambert King is Director of Medicine at Queens Hospital Center in Jamaica, New York. He has been board certified in internal medicine since 1977. Dr. King has directed major health programs at Cook County jail in Chicago and Rikers Island in New York City. He has served as a Special Master appointed by the U.S. District Court for the Southern District of Illinois to improve health care at the

Menard Correctional Facility and has testified as an expert on health care in prisons in numerous federal courts. Dr. King has authored or co-authored eight articles concerning health care in prisons and jails in peer reviewed medical journals. In 2008, he received the Bernard Harrison Award from the National Commission on Correctional Health Care.

INTRODUCTION

Amici have decades of experience working in and overseeing government detention center medical services, without the extraordinary immunity that respondents now seek. And while *amici* have confronted many challenges, inability to recruit or function due to potential constitutional liability has not been one of them. In *amici's* view, a ruling that PHS personnel have no special immunity from claims of deliberate indifference to serious medical needs will not adversely affect medical care for detainees, given (1) the minimal nature of the constitutional standard of care, (2) the absence of increased litigation burdens from such additional causes of action, and (3) the availability of insurance and indemnification. Such a ruling also will not impede PHS's ability to recruit competent personnel, just as it has not impeded the ability of the other federal, state and local agencies that treat detainees. By assuming that the absence of immunity will affect recruitment and deployment, petitioners and their *amici* underestimate the professionalism of government doctors who serve the public and their country.

Doctors who serve at detention facilities—whether they are employed by the Bureau of Prisons, the Department of Immigration Health Services (“DIHS”), a state or locality, or PHS—are medical

professionals dedicated to providing high level care that far exceeds the minimal requirements of the Constitution. They have done so, and will continue to do so, notwithstanding the absence of the special immunity now sought by petitioners. That much is clear from the fact that thousands of doctors remain employed by the Bureau of Prisons, DIHS, and state and local governments, yet detention center medical services have not crumbled under the threat of constitutional claims. Quite to the contrary, agencies have no urgent need to seek out or retain those who would not serve unless they are guaranteed immunity from minimal constitutional standards that apply to all other government medical personnel.

Petitioners and the government also ignore that this case is not merely an exercise in statutory construction, but is ultimately about the requirements of the *Constitution*. The question is whether Congress intended to abrogate a recognized constitutional remedy by establishing a statutory scheme it viewed as equally effective. Because of the legislature's special expertise in fashioning remedial schemes, the Court has indicated a willingness to defer to Congress when there is an "explicit congressional declaration" to abrogate a remedy for constitutional violations in favor of "another remedy, equally effective in the view of Congress." *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 397 (1971). But as in other areas implicating the separation of powers, the Court should not hold that a recognized remedy required by the Constitution has been abrogated by legislative action unless Congress has clearly stated its intent to do so, in favor of another remedy that Congress has expressly viewed as equally effective.

Here, there is no clear statement of Congress’s intent to bestow on PHS medical personnel a special immunity from constitutional claims not provided to other government employees performing identical functions. The statute invoked by petitioners, 42 U.S.C. § 233(a), was enacted before *Bivens* was even decided, proving that Congress could not have contemplated that it would provide immunity from such claims. And when Congress did expressly consider the issue after *Bivens* for all federal employees, it expressly determined that the statutory remedy under the Federal Tort Claims Act (“FTCA”) was *not* sufficient to vindicate claims under the Constitution. Thus, when the issue was explicitly considered, the FTCA remedy was found not to be “equally effective in the view of Congress.” *Bivens*, 403 U.S. at 397. If Congress wishes to change that result for the narrow category of PHS personnel—and there is no reason why it should—it must expressly consider the issue and say so clearly. The Court should not defer to Congress’s judgment regarding the appropriate remedies to vindicate recognized constitutional rights unless Congress has actually exercised that judgment.

ARGUMENT

I. CONGRESS DID NOT PROVIDE A CLEAR STATEMENT THAT IT INTENDED TO ABROGATE JUDICIAL REMEDIES FOR CONSTITUTIONAL VIOLATIONS.

A. If Congress Intends To Abrogate A Recognized Constitutional Remedy, It Must Clearly State That Intent.

“In traditionally sensitive areas, such as legislation affecting the federal balance, the requirement of

clear statement assures that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision.” *U.S. v. Bass*, 404 U.S. 336, 349 (1971). Such clear statement rules ensure that statutes are not interpreted so as to strain the boundaries of Congress’s constitutional power or impede significant rights unless Congress clearly states an intention to do so. They improve the dialogue between Congress and the courts by ensuring that the courts do not wrongly interpret statutes in ways that impose restrictions on fundamental rights or threaten constitutional checks and balances. *Id.*

The Court has invoked clear statement rules in the context of, among other things, federal criminal jurisdiction, constitutional requirements for state office-holders, regulation of foreign-flagged vessels, and the courts’ habeas corpus jurisdiction.² When the Court invokes the clear statement rule, Congress can subsequently “make an informed legislative choice either to amend the statute or to retain its existing text.” *Boumediene v. Bush*, 128 S. Ct. 2229, 2243 (2008).

² See *Spector v. Norwegian Cruise Line Ltd.*, 545 U.S. 119, 130 (2005) (plurality) (“Absent a clear statement of congressional intent, general statutes may not apply to foreign-flag vessels insofar as they regulate matters that involve only the internal order and discipline of the vessel, rather than the peace of the port.”); *INS v. St. Cyr*, 533 U.S. 289, 299 (2001) (“[i]mplications from statutory text or legislative history are not sufficient to repeal habeas jurisdiction”); *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991) (Age Discrimination in Employment Act does not override state mandatory retirement provision for judges); *Bass*, 404 U.S. at 349 (“we will not be quick to assume that Congress has meant to effect a significant change in the sensitive relation between federal and state criminal jurisdiction”).

Clear statement rules are perhaps most important where, as here, a statute is alleged to abrogate a recognized constitutional claim. “This Court has held that ‘where Congress intends to preclude judicial review of constitutional claims its intent to do so must be clear.’” *Demore v. Kim*, 538 U.S. 510, 517 (2003) (citation omitted); *see also Webster v. Doe*, 486 U.S. 592, 603 (1988) (statutory provision denying judicial review of any claim challenging employment termination decision of Director of the CIA did not apply to constitutional claims because Congress did not clearly state an intention to include them in the prohibition). “[T]he judiciary is clearly discernible as the primary means through which [constitutional] rights may be enforced.” *Davis v. Passman*, 442 U.S. 228, 241 (1979). If Congress is alleged to have supplanted the Court’s primary role in determining the requirements of the Constitution, that action directly implicates separation of powers. And “when a particular interpretation of a statute invokes the outer limits of Congress’ power, we expect a clear indication that Congress intended that result.” *INS v. St. Cyr*, 533 U.S. 289, 299 (2001).

Thus, in *St. Cyr*, the Court held that Congress had not expressed the requisite clear statement of its intent to abrogate the writ of habeas corpus, noting that the writ serves as a critical judicial check on Executive detention powers. *Id.* at 301-05. The Court recently reaffirmed this fundamental separation-of-powers principle, recognizing that, as a check on Executive power, the writ “must not be subject to manipulation by those whose power it is designed to restrain.” *Boumediene*, 128 S. Ct. at 2259.

To *amici’s* knowledge, this Court has *never* held that a statute abrogated a previously-recognized

Bivens remedy for constitutional violations.³ But in *Bivens* itself, the Court explained that any such abrogation would be subject to a clear statement rule. As the Court noted, it would be appropriate to defer to Congress’s establishment of an alternative remedy only where there has been an “*explicit* congressional declaration” to abrogate a *Bivens* remedy in favor of “another remedy, equally effective in the view of Congress.” *Bivens*, 331 U.S. at 397 (emphasis added). For Congress to supplant this Court’s role as the arbiter of constitutional rights, its declaration of an intent to abrogate a *Bivens* remedy must be “explicit” and the alternative remedy must be considered equally effective “in the view of Congress.”

The reasons for the clear statement rule in this context are readily apparent. The *Bivens* cause of action for deliberate indifference to serious medical needs is the judiciary’s check on the power of the Executive to inflict unconstitutional harm on detained persons. See *Carlson v. Green*, 446 U.S. 14, 25 (1980) (state officials are subject to Section 1983 actions, and “[a] federal official contemplating unconstitutional conduct similarly must be prepared to face the prospect of a *Bivens* action”). The Court has indicated a willingness to defer to Congress’s determination regarding appropriate remedies, but that deference is warranted only because of the legislature’s relative expertise in balancing the relevant policy considerations. Cf. *Bush v. Lucas*, 462 U.S. 367, 389 (1983) (“Congress is in a far better

³ The Court has, on occasion, relied on the existence of statutes, along with other factors, in deciding whether to recognize a new *Bivens* cause of action. But as explained below, this case does not raise that issue because the Court long ago recognized the cause of action asserted by respondents.

position than a court to evaluate the impact of a new species of litigation between federal employees on the efficiency of the civil service” given its familiarity with the policy issues and its ability to “inform itself through factfinding procedures such as hearings”).

Such deference, however, makes sense only if Congress has actually engaged in the relevant analysis as to whether a recognized *Bivens* remedy for constitutional wrongs should be supplanted by an alternative remedy that is “equally effective in the view of Congress.” *Bivens*, 331 U.S. at 397. See *Carlson*, 446 U.S. at 22 n.10 (“the inquiry is whether Congress has created what it views as an equally effective remedial scheme”) (emphasis omitted). Put another way, an alternative remedy such as the FTCA cannot be equally effective to a recognized *Bivens* remedy “in the view of Congress” unless Congress has expressly considered the merits of each and has clearly stated its preference as between the two. Any other resolution devalues this Court’s role as the ultimate arbiter of what the Constitution requires. As Justice Harlan explained in his separate opinion in *Bivens*, “the judiciary has a particular responsibility to assure the vindication of constitutional interests” and while legislatures also safeguard the liberties and welfare of the people, “it must also be recognized that the Bill of Rights is particularly intended to vindicate the interests of the individual in the face of the popular will as expressed in legislative majorities.” *Bivens*, 331 U.S. at 407 (Harlan, J., concurring).

B. Congress Did Not Clearly State An Intent To Abrogate Bivens Liability For PHS Officials In Section 233(a).

Section 233(a) is not the requisite clear statement of Congress’s intent to abrogate the *Bivens* cause of action as to PHS doctors. In order to defer to Congress’s resolution of the issue, there must be clear proof, in the language of the statute, that Congress actually contemplated that Section 233(a) would abrogate the *Bivens* cause of action for deliberate indifference to serious medical needs, or at least *Bivens* causes of action generally. *Cf. Demore*, 538 U.S. at 517 (“Section 1226(e) contains no explicit provision barring habeas review, and we think that its clear text does not bar respondent’s constitutional challenge to the legislation authorizing his detention without bail.”). Neither petitioners nor their *amici* provide any indication that Congress expressly contemplated that the FTCA would supplant a *Bivens* remedy for PHS personnel—but not similarly situated government doctors.

Nor could they. When Section 233(a) was enacted, *Bivens* had not yet been decided. And this Court did not definitively hold that claims like those at issue here are cognizable under *Bivens* until 1980, when *Carlson* was decided. Thus, the Congress that enacted Section 233(a) did not consider, and could not have considered, whether that statute should supplant a *Bivens* remedy that had not yet been recognized. Moreover, when Congress *did* expressly consider the issue for all government employees as a group, it reached the opposite conclusion. When Congress expressly considered the interplay between *Bivens* claims and the FTCA in 1988, it determined that the FTCA remedy would *not* supplant

constitutional claims. *See* 28 U.S.C. § 2679(b)(1), (2) (exclusivity of FTCA remedy “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”).

The Solicitor General settles for speculation that Congress *might* have considered the potential that the Court would rule the way it did in *Bivens* because that case was pending at the time Section 233(a) was passed. *See* U.S. Br. 16 (“Congress may well have been aware of the concept of a constitutional tort when it enacted Section 233(a)”). But this kind of conjecture cannot satisfy the clear statement rule and it provides no basis for this Court to defer to Congress when Congress both failed to consider the issue when Section 233(a) was enacted and resolved against abrogating *Bivens* claims when it did expressly consider the issue.

In *Blatchford v. Native Vill. of Noatak*, 501 U.S. 775 (1991), this Court considered a statute stating that “[t]he district courts shall have original jurisdiction of *all civil actions*, brought by any Indian tribe * * *, wherein the matter in controversy arises under the Constitution, laws, or treaties of the United States.” *Id.* at 783 (emphasis added). The Court had previously interpreted this provision broadly to give Indians a right to pursue actions against state taxation that were otherwise prohibited by federal statute. *Id.* at 784. Still, the Court held in *Blatchford* that the statute did not abrogate states’ constitutional Eleventh Amendment immunity because Congress had not clearly stated its intent to do so. The clear statement rule controlled because the “obstacle to suit” in *Blatchford* was not statutory; it was constitutional. *Id.* at 785.

And a “willingness to eliminate the former in no way bespeaks a willingness to eliminate the latter.” *Id.*

So too here. Congress did not contemplate eliminating constitutional remedies when it enacted Section 233(a), and its willingness to abrogate statutory causes of action as to PHS personnel provides no indication that it intended to abrogate constitutional claims as well. Indeed, the case for applying the clear statement rule is even stronger here, because this case, unlike *Blatchford*, involves constitutional claims that were not even recognized when the statute was passed. The issue cannot be resolved based on speculation about what Congress *might* have concluded had it expressly considered the issue, because Congress’s intent to abrogate constitutional rights must be “unmistakably clear *in the language of the statute.*” *Id.* at 786 (citation omitted; emphasis added).

Petitioners and their *amici* wrongly contend that this case is a simple matter of reading Section 233(a) and applying its words wholly divorced from the legal context in which they were written. As in *Blatchford* and other clear-statement cases, that is not so. Respondents have convincingly shown that the statutory scheme, considered as a whole, evinces no intent to abrogate *Bivens* actions against PHS personnel. But that dispute ultimately does not matter. Under the clear statement rule, even otherwise unambiguous statutory language will not be construed to abrogate constitutional remedies or defenses unless Congress specifically provides that it will. See *Raygor v. Regents of the Univ. of Minn.*, 534 U.S. 533 (2002) (statute giving district courts jurisdiction over “all civil actions” of a particular type does not apply when a state that has not waived

sovereign immunity is sued). This case is ultimately about what the *Constitution* requires, and separation-of-powers principles dictate that Congress's purported resolution of an issue so as to abrogate constitutional rights will not govern the Court's actions unless Congress actually considers the issue and clearly states its view.

As shown below, there would be no valid policy basis for Congress to grant a special immunity from constitutional claims for PHS personnel performing the same services as other government doctors who treat prisoners and other detainees. But there is plainly no cause for this Court to abrogate a recognized constitutional remedy by deferring to a policy judgment that Congress never made.

C. This Case Does Not Require Recognizing Any New Constitutional Right.

Petitioner Hui argues that this case requires the Court to determine, as an initial matter, whether to recognize the *Bivens* cause of action asserted by petitioners. *See* Hui Br. 19-20. It does not. Under *Carlson*, an applicable *Bivens* cause of action already exists. Four years before *Carlson*, the Court recognized a constitutional right, actionable against state employees under 42 U.S.C. § 1983, to be protected against deliberate indifference to their serious medical needs. *See Estelle v. Gamble*, 429 U.S. 97, 106 (1976). *Carlson* recognized a cause of action under *Bivens* through which federal detainees could also seek redress for violations of that right. *See Carlson*, 446 U.S. at 17 n.3 (“Petitioners do not contest the determination that the allegations satisfy the standards set out in *Estelle*.”). The only question in this case is whether Congress should be deemed, through a pre-existing statute, to have abrogated

that recognized cause of action for PHS employees, but not their similarly situated counterparts employed by other agencies.

Hui claims that the facts here arise in a different context—prison vs. immigration detention—and are applied to a different set of defendants—Bureau of Prisons personnel vs. PHS personnel, Hui Br. 19-20, but she does not explain how those distinctions make a difference. *Carlson* itself involved a PHS defendant, Resp. Br. 49 n.24, and the Court recognized a *Bivens* cause of action against any federal employee who is responsible for the medical care of detained persons. *Carlson*, 446 U.S. at 25. The Court did not distinguish between Bureau of Prisons doctors and PHS doctors, and, as explained below, there is no reason for it to have done so.

Nor is the location of detention relevant to whether a cause of action exists under *Bivens*. *Carlson* certainly did not limit itself solely to prisons. A prisoner “must rely on prison authorities to treat his medical needs; if the authorities fail to do so, those needs will not be met.” *Estelle*, 429 U.S. at 103. Similarly, an immigration detainee cannot simply leave and pursue medical attention on his own. *Castaneda*, for example, was completely reliant on authorities at the detention center for a year; yet he did not receive appropriate medical care until he was released, and by then it was too late. Thus, both the context giving rise to a *Bivens* cause of action and the role of the defendants are exactly the same in all relevant respects in *Carlson* and this case.

Since *Bivens* was decided, the Court has shown restraint in recognizing additional constitutional causes of action, based on its desire not “to create a new substantive legal liability.” *Schweiker v.*

Chilicky, 487 U.S. 412, 427-28 (1988) (citation omitted). See also *Correctional Svcs. Corp. v. Malesko*, 534 U.S. 61, 66 (2001). But those considerations are immaterial in this case, because the Court already weighed them in *Carlson*. The applicable cause of action here has been firmly established for three decades. Castaneda has colorable claims under *Carlson* unless Section 233(a) abrogates them. Cf. *St. Cyr*, 533 U.S. at 308 (analyzing issue as exception to *habeas* jurisdiction because “under the pre-1996 statutory scheme * * * it is clear that *St. Cyr* could have brought his challenge * * * in a *habeas corpus* petition”).

Thus, the question presented here is whether the applicable *Bivens* claim stated in *Carlson* is abrogated as to PHS employees by Section 233(a), even though it exists for other government employees, including those performing indistinguishable functions. Discussion of “special factors” and other standards for declaring a new *Bivens* remedy is irrelevant because this Court already addressed and resolved those issues in *Carlson*.

II. DECLINING TO AFFORD PHS PERSONNEL EXTRAORDINARY IMMUNITY WILL NOT ADVERSELY AFFECT PHS OR DETAINEE MEDICAL CARE.

Allowing *Bivens* actions against PHS personnel for deliberate indifference to the serious medical needs of detained persons would not undermine PHS’s ability to execute its mission. It would not even place a minor hardship on PHS or its personnel. The Commissioned Officers Association of the United States Public Health Service speculates that allowing *Bivens* actions will (1) impede PHS’s ability to recruit and retain personnel and (2) destroy its

ability quickly respond to medical emergencies. Association Br. 5-10. Neither is true. As *amici* can attest, federal, state and local agencies that treat detainees are able to recruit competent personnel notwithstanding the absence of the extraordinary immunity sought by petitioners here.

1. There is no support for the Association's claim that the added risk of constitutional lawsuits will deter competent personnel from joining PHS's ranks. Indeed, it would demean the medical profession to suggest otherwise. To be found liable on a *Bivens* claim, a doctor must shirk his or her duties in a way that violates the most basic principles guiding every doctor—regardless of the doctor's experience or capabilities. "Deliberate indifference to serious medical needs" requires a failure of medical care so fundamental that PHS would do better to avoid employing anyone concerned that his or her care will be viewed as that deficient.

As experts in medical care for prisoners and other detainees, *amici* can attest that the small risk of constitutional lawsuits does not materially affect the willingness of medical personnel to provide such services. *Amici* and tens of thousands of other dedicated medical personnel have provided high quality care to detainees for decades while being employed by federal, state, and local agencies that do not enjoy the special immunity now being sought by petitioners. Indeed, it is not uncommon for PHS and non-PHS personnel to serve side-by-side, treating the same detainees in the same institutions.⁴ Yet state

⁴ See, e.g., U.S. Dep't of Justice, *The Federal Bureau of Prison's Efforts to Manage Inmate Health Care* 4 (2008) (www.justice.gov/oig/reports/BOP/a0808/final.pdf) (the Bureau of Prisons' Health Services Units "are staffed by a combination

prisons have competent medical staffs, and the Bureau of Prisons and DIHS are able to recruit and retain competent doctors.

Petitioners and their *amici* provide no reason why PHS doctors cannot provide the same high quality care as their non-immunized counterparts. They do not identify any PHS doctors who claim they would not have joined PHS if they had known they would be subject to the same potential *Bivens* liability as doctors employed by other agencies. Nor could they. There is no reason to believe that the doctors that PHS recruits are any less dedicated than the doctors serving state prison systems, the Bureau of Prisons, and DIHS. And there is no reason to believe that the remote possibility of *Bivens* liability will deter any doctor or other medical professional from choosing a career in public service with PHS. But to the extent any people would be so deterred, public agencies have no need to employ them.

The only relevant deterrent effect is that the possibility of constitutional claims may assist in preventing medical personnel from deliberately withholding life-saving treatment. *See Carlson*, 446 U.S. at 21. That kind of deterrence, however, should be encouraged, not eliminated.

of BOP health care employees and PHS personnel consisting of physicians, dentists, physician assistants * * *"); *Problems With Immigration Detainee Medical Care: Hearing Before H. Subcomm. on Immigration, Citizenship, Refugees, Border Security, and Int'l Law*, 110th Cong. 4 (June 4, 2008) ("we have historically relied on the independent medical judgment of the professionals within DIHS, which include doctors, clinical support professionals and support staff (some of whom are detailed to DHS from the U.S Public Health Service (PHS))") (statement of Julie L. Myers, Asst. Sec'y, U.S. Immigration and Customs Enforcement).

2. There is also no support for the Association's claim that extraordinary immunity from constitutional claims is needed for PHS personnel (but not their similarly situated counterparts in other agencies) because of a purported pay gap between PHS and private sector doctors. The Association's claim of a 13.5% pay differential between PHS and private sector employees, Association Br. 6, is speculative at best.⁵ But even if there is a gap, PHS doctors receive benefits in addition to compensation that "often exceed those found in the private sector." PHS, *Comp. and Benefits at Commissioned Corps* (www.usphs.gov/questionsanswers/compensation.aspx) ("PHS Compensation and Benefits"). For instance, PHS personnel are eligible for retirement benefits after 20 years of service. *Id.* Doctors in private practice generally do not have a pension waiting for them when they turn 50. Additionally, PHS doctors are entitled to free medical and dental care, low cost health care for their families, shopping privileges at lower-cost stores on military bases, Veterans Affairs benefits, and a host of other valuable benefits. *Id.* But more importantly, any gap in compensation between public and private employment would exist not just in PHS, but also in the dozens of other federal, state and local agencies that treat prisoners

⁵ The Association cites a House of Representatives bill that was not passed, but the bill does not purport to make any findings about any PHS pay gap. Military Pay Comparability Act of 2003, H.R. 1885, 108th Cong. § 2(4) (2003). It discusses a pay gap for military personnel in general, and notes that the gap had *shrunk* an unspecified amount from a peak of 13.5%. *Id.* And the Association's argument is belied by the PHS itself, which states that PHS doctors receive "competitive starting pay." PHS, *Comp. and Benefits at Commissioned Corps* (www.usphs.gov/questionsanswers/compensation.aspx).

and other detainees. Just as those other agencies are able to attract competent personnel and provide quality care notwithstanding the lack of immunity for constitutional claims, so can PHS.

Nor is there any basis for the Association's claim that a lack of immunity from *Bivens* claims will subject them to additional, intolerable litigation burdens. *Amici* share a concern regarding frivolous and unfounded malpractice claims. But in any conceivable *Bivens* case based on deliberate indifference by PHS medical personnel, the purported victim also has a right to sue the United States for medical malpractice under the FTCA. See 42 U.S.C. § 233(a). Accordingly, the litigation burdens will be substantially the same if *Bivens* claims are also allowed to proceed. The parties will engage in virtually the same discovery and litigation as they otherwise would have if PHS personnel were immune to *Bivens* claims. The PHS doctors would have to engage in witness interviews and depositions regardless. And they do not need counsel because the Department of Justice will represent their interests or, as here, pay for separate counsel in the event of a conflict. See 28 C.F.R. §§ 50.15(a), 50.16.

The only relevant difference is that *Bivens* claims are significantly harder, not easier, to bring than ordinary malpractice claims. Under such claims, PHS doctors will only be liable for deliberate indifference to a detainee's serious medical needs. To establish deliberate indifference, the detainee must prove that the doctor's care offended contemporary standards of decency or "constitute[d] 'an unnecessary and wanton infliction of pain.'" *Estelle*, 429 U.S. at 105. That is a very high standard that few claims can meet. *Brewster v. Dretke*, 587 F.3d

764, 770 (5th Cir. 2009) (“Deliberate indifference is an ‘extremely high’ standard to meet.”) (citation omitted). And PHS personnel possess qualified immunity from many of these constitutional claims. See *Butz v. Economou*, 438 U.S. 478, 507 (1978).

The Association expresses a concern that if PHS doctors are not excepted from *Bivens* liability, they will be forced to buy “prohibitively expensive” medical malpractice insurance. Association Br. 6. That is untrue. PHS provides malpractice insurance for its personnel. See PHS Compensation and Benefits, *supra*. And the Federal government routinely indemnifies its employees from any liability for actions performed in their official duties. Cornelia T.L. Pillard, *Taking Fiction Seriously: The Strange Results of Public Officials’ Individual Liability Under Bivens*, 88 Georgetown L.J. 65, 77 (1999). But in the event that a PHS doctor still wishes to purchase additional insurance for *Bivens* claims, such coverage—reflecting how difficult it is to successfully assert such claims—is quite inexpensive. Federal employees can purchase \$1 million of personal liability insurance coverage covering *Bivens* claims, among other things, for only \$270 per year. See Federal Employee Defense Services, *Professional Liability for Federal Employees—Real Scenario DHS Agent* (www.fedsprotection.com/services.asp). And for some federal employees, the agency covers half of the cost. *Id.* This insurance also does far more than cover *Bivens* claims. It provides counsel for administrative investigations, disciplinary proceedings, and criminal actions, and to monitor civil actions when the Department of Justice is representing the insured’s interests. *Id.* In 2001, average annual medical malpractice insurance

premiums often ranged from \$10,000 to \$173,000, depending on specialty and location.⁶ Compared to that, \$270 is hardly “prohibitively expensive.” Association Br. 6.

3. The Association’s claim that potential *Bivens* liability will impede PHS operations also lacks merit. There is no basis to believe that PHS doctors will shirk their rapid response duties if this Court does not except them from otherwise-applicable *Bivens* liability. The Association claims that potential *Bivens* liability would hinder PHS’s ability to respond to “terrorist acts * * *; industrial or transportation accidents; and weather-related catastrophes.” Association Br. 8. But there is no recognized *Bivens* remedy available under these circumstances, and no reason to believe that the Court will recognize one. *Carlson* identified a narrow cause of action for deliberate indifference to the serious medical needs of detainees. Neither *Carlson* nor any other precedent of this Court recognizes a *Bivens* cause of action for non-custodial medical care, or care in an emergency, mass-casualty incident.⁷

The four “Core Values” of PHS are “Leadership,” “Service,” “Integrity,” and “Excellence.” PHS, *Commissioned Corps Core Values* (www.usphs.gov/aboutus/corevalues.aspx). PHS describes an officer with integrity as one who “[e]xemplifies uncompromising ethical conduct and maintains the highest standards [of] responsibility and accountability.” *Id.*

⁶ Robert P. Hartwig, *Medical Malpractice Insurance*, Insurance Information Institute 13 (June 2003) (http://server.iii.org/yy_obj_data/binary/729103_1_0/Medmal.pdf).

⁷ Even if a *Bivens* claim existed in these circumstances, qualified immunity would likely protect PHS medical personnel in a case involving “exigent circumstances.” Association Br. 8.

Yet the petitioners claim that PHS employees should be less accountable and less responsible than similarly situated doctors employed by the Bureau of Prisons, DIHS, and state and local governments. There is no reason to assume that Congress intended to provide PHS with an extraordinary immunity from constitutional violations that is not enjoyed by other government employees doing the same work. And under this Court's precedents, the Court should not defer to any such decision unless Congress has clearly stated its intent to abrogate constitutional remedies after consideration of all relevant concerns.

CONCLUSION

For these reasons, and those set forth by respondents, the judgment below should be affirmed.

Respectfully submitted,

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