Nos. 08-1529 and 08-1547

In the Supreme Court of the United States

EUGENE MIGLIACCIO, ET AL., PETITIONERS

v.

YANIRA CASTANEDA, ET AL.

CHRIS HENNEFORD, PETITIONER

v.

YANIRA CASTANEDA, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF FRANCISCO CASTANEDA, ET AL.

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

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

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QUESTION PRESENTED

Whether 42 U.S.C. 233(a), which provides that a suit against the United States under the Federal Tort Claims Act is exclusive of any other action against a commissioned officer or employee of the Public Health Service for injury resulting from the performance of medical functions, bars a suit against such an officer or employee based on *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971).

STATEMENT OF COMPLIANCE WITH SUPREME COURT RULE 37.2(a)

Counsel of record received timely notice of the United States' intent to file this amicus curiae brief ten days before the due date. Pursuant to Rule 37.4, the consent of the parties is not required for the United States to file this brief.

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INTEREST OF THE UNITED STATES

The court of appeals held that 42 U.S.C. 233(a)—which makes an action against the United States under the Federal Tort Claims Act (FTCA) the exclusive remedy for all damage claims arising out of medical care provided by commissioned officers or employees of the federal Public Health Service (PHS) while acting within the scope of their employment—does not bar tort claims premised on *Bivens*

v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). The government has a significant interest in proper resolution of that issue. The government raises Section 233(a) as a bar to suit against individual PHS personnel when they are sued for conduct arising out of medical treatment. Further, the court of appeals' decision will likely have an adverse impact on the government's ability to recruit, hire, and retain medical personnel for the PHS, and may affect other federal entities that have medical missions covered by similar immunity statutes.

STATEMENT

1. The PHS, which is part of the Department of Health and Human Services (HHS), see 42 U.S.C. 201 *et seq.*, employs, among others, over 6,000 commissioned officers as physicians, dentists, nurses, pharmacists, and other medical personnel, and nearly 14,000 civilian employees whose duties involve patient care. PHS personnel are detailed to a number of agencies, including the Department of Homeland Security, Bureau of Prisons, Indian Health Service, and United States Marshals Service. They provide medical care in every State and in numerous foreign countries—often in communities most in need of medical care providers. PHS personnel also staff quarantine stations to limit the introduction of communicable diseases into the United States and to prevent their spread. See 42 U.S.C. 264; 42 C.F.R. 71.32, 71.33.

PHS's Commissioned Corps is one of the seven uniformed services of the United States. 42 U.S.C. 201(p), 204, 207. The Commissioned Corps, which includes the Surgeon General, may be called into military service in times of war or national emergency, at which point its personnel

become subject to the Uniform Code of Military Justice. 42 U.S.C. 217.[1]

2. a. Following a December 2005 conviction, Francisco Castaneda, an alien, was imprisoned by the California Department of Corrections (DOC). During that incarceration, Castaneda met several times with DOC medical personnel regarding a lesion on his penis. Although those personnel recommended a biopsy, Castaneda did not receive one. Pet. App. 2a-3a.[2]

On March 27, 2006, Castaneda was transferred from DOC to Immigration and Customs Enforcement (ICE) custody in San Diego in connection with removal proceedings that had been commenced against him. According to the complaint filed in district court, Castaneda immediately complained to medical staff—consisting of PHS personnel—that a lesion on his penis was growing, becoming painful, and producing a discharge. He was examined by a physician's assistant, who noted both Castaneda's personal history of genital warts and his family history of cancer, and recommended a urology consultation and a biopsy. Although that recommendation was approved, Castaneda did not receive a biopsy. Over the ensuing months, he repeatedly complained that his condition was worsening. He was seen by several different doctors (including urologists) and physician's assistants, some of whom were concerned about the possibility of cancer and recommended a biopsy.

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[1] The Secretary of HHS may also activate the National Disaster Medical System (NDMS) to provide health services to victims of a public-health emergency. 42 U.S.C. 300hh-11(a). The Secretary may appoint individuals to serve as intermittent NDMS personnel; such individuals are considered PHS employees for purposes of 42 U.S.C. 233(a). 42 U.S.C. 300hh-11(c).

[2] All citations to "Pet. App." are to the appendix to the petition for a writ of certiorari filed in No. 08-1529.

Others considered the problem to be genital warts. Pet. App. 3a-7a, 42a-48a.

In January 2007, Castaneda saw another urologist, who concluded that the lesion was "most likely penile cancer" and ordered a biopsy. On February 5, 2007, before the scheduled biopsy, Castaneda was released from ICE custody. Three days later, he went to a hospital and was diagnosed with penile cancer. A week after that, his penis was amputated, and he began undergoing chemotherapy for the metastasized cancer. He died in February 2008. Pet. App. 7a-8a.

b. Castaneda commenced this action months before his death.[3] He asserted claims against the United States under the FTCA, against state officers and employees under 42 U.S.C. 1983, and against various federal officers and employees of the PHS under *Bivens*. Castaneda alleged that the individual federal defendants violated the Fifth and Eighth Amendments of the Constitution by failing to treat his known serious medical condition, purposefully denying treatment, and acting with deliberate indifference to his serious health needs. Pet. App. 8a.

At all relevant times, the individual federal defendants (petitioners in this Court) were either commissioned officers or civilian employees of the PHS. After certifying that petitioners had acted within the scope of their employment, the government, which then represented petitioners, moved to dismiss the claims against petitioners on the basis of 42 U.S.C. 233(a). Pet. App. 8a-9a. Section 233(a) provides:

> The remedy against the United States provided by sections 1346(b) and 2672 of title 28 [the Federal Tort Claims Act] * * * for damage for personal injury, in-

[3] The representative and heirs of Castaneda's estate have been substituted as plaintiffs. Pet. App. 8a.

> cluding death, resulting from the performance of medical, surgical, dental, or related functions * * * by any commissioned officer or employee of the Public Health Service while acting within the scope of his office or employment, shall be exclusive of any other civil action or proceeding by reason of the same subject-matter against the officer or employee (or his estate) whose act or omission gave rise to the claim.

42 U.S.C. 233(a).

The district court denied petitioners' motion to dismiss. Pet. App. 41a-80a. The court concluded, *inter alia*, that Section 233(a), via its reference to 28 U.S.C. 1346(b) and an ensuing "statutory trail" that the court believed led to Section 2679(b)(2)(A), "incorporates the provision of the FTCA which *explicitly* preserves a plaintiff's right to bring a *Bivens* action." *Id.* at 59a, 61a.

c. The government, on behalf of petitioners, filed an interlocutory appeal. The government also admitted liability on plaintiff's FTCA claim against the United States for medical negligence. Gov't Notice of Admission, CV 07-7241 Docket entry No. 110 (C.D. Cal. Apr. 24, 2008). Shortly thereafter, and before appellate briefing, the government authorized each petitioner to retain private counsel for representation throughout the remainder of the litigation to ensure that each received independent legal advice and that their personal interests were separately considered and represented in the case. Private counsel took over briefing in the court of appeals, and the United States (which remained a party in the underlying district court case) filed an amicus curiae brief in support of petitioners.

The court of appeals affirmed. Pet. App. 1a-40a. The court focused its analysis on *Carlson* v. *Green*, 446 U.S. 14 (1980), in which the Court had held that the availability of an FTCA remedy did not preclude a *Bivens* action against

federal officials. According to the court of appeals, a *Bivens* action is available under *Carlson* unless (1) an alternative remedy is both (a) "explicitly declared to be a substitute" for a *Bivens* remedy and (b) "viewed as equally effective," or (2) there are "special factors" that militate against a *Bivens* remedy. Pet. App. 10a. Applying that test, the court of appeals held that Section 233(a) did not preclude a *Bivens* claim—a result that it acknowledged "conflicts with" the Second Circuit's decision in *Cuoco* v. *Moritsugu*, 222 F.3d 99 (2000). Pet. App. 35a; see *id.* at 10a-40a.

The court of appeals determined that the FTCA remedy offered by Section 233(a) was not "equally effective" as a *Bivens* remedy for the same reasons an FTCA remedy was not deemed equally effective in *Carlson*: (1) FTCA damages, unlike *Bivens* damages, are not awarded against individual defendants; (2) punitive damages are unavailable under the FTCA; (3) FTCA cases, unlike *Bivens* claims, are not tried before a jury; and (4) FTCA remedies are not governed by uniform nationwide rules. Pet. App. 13a-18a.

The court of appeals also determined that Congress did not "explicitly declare" in Section 233(a) that the FTCA was a substitute for a *Bivens* action. The court pointed out that Section 233(a) does not mention constitutional claims and that it was enacted before *Bivens* was decided. According to the court, Section 233(a) was intended only to preempt a particular set of common-law tort claims related to medical malpractice. The court also noted that other federal medical personnel are not afforded comparable immunity from constitutional claims. Pet. App. 18a-35a.

The court of appeals expressly disagreed with the Second Circuit's conflicting decision in *Cuoco*. The court stated that the Second Circuit misread language in *Carlson* that appeared to confirm that Section 233(a) made the FTCA an exclusive remedy. Further, the court argued that the Sec-

ond Circuit failed to address the prong of *Carlson*'s analysis stating that an alternative statutory remedy must be "equally effective" to a *Bivens* action. Pet. App. 35a-37a.

Finally, the court of appeals held that there were no "special factors" warranting hesitation in creating a cause of action under *Bivens* in this setting. In the court's view, Section 233(a) does not provide a comprehensive remedial scheme precluding *Bivens* relief. Pet. App. 37a-39a.

DISCUSSION

The Court should grant review of the court of appeals' decision holding that 42 U.S.C. 233(a) does not provide PHS personnel with immunity from *Bivens* claims arising out of the provision of medical care. First, that decision directly conflicts with the Second Circuit's decision in *Cuoco* v. *Moritsugu*, 222 F.3d 99 (2000). Second, the scope of Section 233(a)'s grant of immunity presents an important federal question because the court of appeals' ruling may undermine the ability of PHS to fulfill its statutory mandate and may affect the interpretation of immunity provisions governing other federal medical personnel. Third, the court of appeals' decision is contrary to the plain language of Section 233(a) and the Court's interpretation of that language in *Carlson* v. *Green*, 446 U.S. 14 (1980).

A. The Courts Of Appeals Disagree On Whether Section 233(a)'s Grant Of Immunity Covers *Bivens* Claims

As the court of appeals acknowledged (Pet. App. 35a-37a), its decision directly conflicts with the Second Circuit's decision in *Cuoco*. In *Cuoco*, the Second Circuit held that Section 233(a) barred a *Bivens* action brought against individual PHS physicians and other employees working at a federal prison facility for inadequate medical care that allegedly rose to the level of an Eighth Amendment violation. The Second Circuit specifically rejected the plaintiff's argu-

ment "that § 233(a) provides immunity only from medical malpractice claims," because "there is nothing in the language of § 233(a) to support that conclusion." *Cuoco*, 222 F.3d at 108. The Second Circuit thus held that PHS employees are absolutely immune from suits arising out of medical treatment, including suits claiming that such treatment violated federal constitutional norms. *Id.* at 107-109.

A number of other courts of appeals have reached the same conclusion as *Cuoco* in unpublished decisions. See *Anderson* v. *BOP*, 176 Fed. Appx. 242, 243 (3d Cir.) (per curiam), cert. denied, 547 U.S. 1212 (2006); *Butler* v. *Shearin*, 279 Fed. Appx. 274, 275 (4th Cir. 2008) (per curiam), aff'g No. 04-2496, 2006 WL 6083567, at *7 (D. Md. Aug. 29, 2006); *Cook* v. *Blair*, 82 Fed. Appx. 790, 791 (4th Cir. 2003), aff'g No. 02-609, 2003 WL 23857310, at *2 (E.D.N.C. Mar. 21, 2003); *Montoya-Ortiz* v. *Brown*, 154 Fed. Appx. 437, 439 (5th Cir. 2005) (per curiam); *Schrader* v. *Sandoval*, No. 98-51036, 1999 WL 1235234, at *2 (5th Cir. Nov. 23, 1999); *Walls* v. *Holland*, No. 98-6506, 1999 WL 993765, at *2 (6th Cir. Oct. 18, 1999); *Beverly* v. *Gluch*, No. 89-1915, 1990 WL 67888, at *1 (6th Cir. May 23, 1990). Indeed, even the Ninth Circuit had previously so held in unpublished decisions. See *Miles* v. *Daniels*, 231 Fed. Appx. 591, 591-592 (2007); *Zanzucchi* v. *Wynberg*, No. 90-15381, 1991 WL 83937, at *2 (May 21, 1991).[4]

[4] In addition, all but two of the district court decisions of which the government is aware agree with the Second Circuit's conclusion. See, *e.g.*, *Brown* v. *McElroy*, 160 F. Supp. 2d 699, 703 (S.D.N.Y. 2001); *Teresa T.* v. *Ragaglia*, 154 F. Supp. 2d 290, 299 (D. Conn. 2001); *Seminario Navarrete* v. *Vanyur*, 110 F. Supp. 2d 605 (N.D. Ohio 2000); *Lewis* v. *Sauvey*, 708 F. Supp. 167, 168-169 (E.D. Mich. 1989); see also 08-1529 Pet. 6-7 n.4 (collecting unpublished district court decisions); but see *Vinzant* v. *United States*, No. CV 07-00024, 2008 WL 4414630, at * 4 n.3 (C.D. Cal. Sept. 24, 2008) (unpublished); *McMullen* v. *Herschberger*,

The Court should grant the certiorari petitions to resolve the conflict between the Ninth Circuit's decision in this case and the decisions of the Second Circuit and other courts of appeals.

B. The Scope Of Section 233(a)'s Immunity Presents An Important Federal Question

The Court's review is further warranted because PHS conducts nationwide operations that should be subject to uniform immunity rules. The immunity conferred by Section 233(a) is of material importance to PHS's personnel and operations. As a result of the decision below, PHS medical personnel serving in or deployed to the Ninth Circuit will be denied protection from suit that their colleagues in other parts of the country are afforded. That disparity will cause significant administrative problems, hindering the efforts of the government to recruit physicians and other medical providers to work in a large geographic region that relies heavily on PHS personnel to deliver health care services. The court of appeals' decision, if left standing, could force HHS to indemnify PHS personnel for the costs of defending or resolving *Bivens* claims arising out of performance of their medical duties—a potentially significant drain on limited agency resources. In addition, that court's decision would affect the immunity provided to medical personnel beyond the PHS, because 42 U.S.C. 233(g)-(n) confers on employees, officers, and certain individual contractors of federally funded community health centers the same immunity afforded PHS commissioned officers and employees. The court of appeals' interpretation of the scope of Section 233(a) therefore will create similar problems for the government in supporting these health centers.

No. 91-CIV-3235, 1993 WL 6219 (S.D.N.Y. Jan. 7, 1993) (unpublished; superseded by *Cuoco*).

The Ninth Circuit's interpretation of Section 233(a) also may have implications for medical personnel in other agencies who operate under immunity provisions using similar language. See 38 U.S.C. 7316(a) (making the FTCA the exclusive remedy "for damages * * * allegedly arising from malpractice or negligence of a health care employee" of the Department of Veterans Affairs); 10 U.S.C. 1089(a) (making the FTCA the exclusive remedy "for damages * * * caused by the negligent or wrongful act or omission of any [medical personnel]" in the armed services). Indeed, in *Carlson*, this Court discussed the immunity provisions in 38 U.S.C. 7316(a) (formerly codified as 38 U.S. 4116(a) (1988)), 10 U.S.C. 1089(a), and Section 233(a) in a single breath—all as statutes "explicitly stating when [Congress] means to make FTCA an exclusive remedy." 446 U.S. at 20; see p. 18, *infra*.

C. The Ninth Circuit Erred In Holding That Section 233(a) Does Not Bar *Bivens* Claims Against PHS Personnel Based On Medical Treatment

1. a. The court of appeal's holding is contrary to the plain language of Section 233(a). Section 233(a) states:

> The remedy against the United States provided by sections 1346(b) and 2672 of title 28 [the FTCA] * * * for damage for personal injury, including death, resulting from the performance of medical, surgical, dental, or related functions * * * by any commissioned officer or employee of the Public Health Service while acting within the scope of his office or employment, shall be exclusive of any other civil action or proceeding by reason of the same subject-matter against the officer or employee (or his estate) whose act or omission gave rise to the claim.

42 U.S.C. 233(a).

The text unequivocally provides that the "remedy against the United States" under the FTCA 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*" arising out of the same subject matter. 42 U.S.C. 233(a) (emphasis added). The statute draws no distinction between "other civil action[s]" predicated on common-law tort theories and those based on the Constitution. It instead makes plain that the "exclusive" remedy for injuries resulting from medical treatment provided by PHS personnel is an action against the United States under the FTCA. The statute's text could not be clearer: it reflects Congress's intent to afford PHS officers and employees absolute immunity from "any" damages actions arising out of medical care provided in the course of their employment.

The limited legislative history concerning Section 233(a) confirms that statutory purpose. The overarching objective of the Emergency Health Personnel Act of 1970, Pub. L. No. 91-623, 84 Stat. 1868 (of which Section 233(a) was a part) was to facilitate PHS's provision of medical care in underserved areas. See § 2, 84 Stat. 1868; H.R. Rep. No. 1662, 91st Cong., 2d Sess. 1 (1970). Because PHS personnel were not paid enough to afford malpractice insurance, the Surgeon General requested an amendment—Section 233(a)—to protect employees from damage suits arising out of the medical care they provided. See, *e.g.*, 116 Cong. Rec. 42,543 (1970) (Rep. Staggers, the sponsor in the House of Representatives) (PHS physicians "cannot afford to take out the customary liability insurance as most doctors do," "because of the low pay that so many of those who work in the [PHS] receive."); *id.* at 42,977 (Sen. Javits) (PHS per-

sonnel "just could not afford to take out the customary liability insurance."); see also *Cuoco*, 222 F.3d at 108 ("[Section 233(a)] may well enable the Public Health Service to attract better qualified persons to perform medical, surgical and dental functions in order to better serve, among others, federal prisoners."). Allowing a *Bivens* claim would thus undermine Section 233(a)'s grant of immunity to protect PHS personnel from personal financial liability arising out of their medical duties. And in doing so, it would undermine as well PHS's ability to recruit qualified medical personnel to furnish critically needed services.

b. Notwithstanding Section 233(a)'s plain language, the court of appeals held that the provision does not foreclose a *Bivens* actions. The court reached that conclusion based in part on the 1988 amendments to the FTCA. Pet. App. 24a-25a. Those amendments extended the personal immunity provided by 28 U.S.C. 2679(b) (originally enacted in 1961, see Act of Sept. 21, 1961, Pub. L. No. 87-258, 75 Stat. 539) to a broader class of injuries while carving out *Bivens* claims from that enhanced scope. See Federal Employees Liability Reform and Tort Compensation Act of 1988 (Westfall Act), Pub. L. No. 100-694, § 5, 102 Stat. 4564. Prior to the 1988 amendments, Section 2679(b) made the FTCA the exclusive remedy only for injury resulting from a federal employee's operation of a motor vehicle.[5] The

[5] The pre-Westfall Act provision read as follows:

> The remedy against the United States provided by sections 1346(b) and 2672 of this title for injury or loss of property or personal injury or death, resulting from the operation by any employee of the Government of any motor vehicle while acting within the scope of his office or employment, shall hereafter be exclusive of any other civil action or proceeding by reason of the same subject matter against the employee or his estate whose act or omission gave rise to the claim.

28 U.S.C. 2679(b) (1982).

Westfall Act, via new Section 2679(b)(1), extended the exclusivity of the FTCA remedy to *any* injury "resulting from the negligent or wrongful act or omission" of any federal employee. 28 U.S.C. 2679(b)(1). At the same time, however, the Westfall Act added Section 2679(b)(2)(A), which states that Section 2679(b)(1)'s provision of an exclusive FTCA remedy "does not extend or apply to a civil action against an employee of the Government * * * brought for a violation of the Constitution." 28 U.S.C. 2679(b)(2)(A).

Based on Section 2679(b)(2)(A), the court of appeals read the Westfall Act to reinforce its view that Section 233(a)—though enacted long before the Westfall Act and in legislation separate from the FTCA more generally (see pp. 11-12, *supra*)—does not bar a claim based on the Constitution. Pet. App. 25a-26a. The district court went even further. That court stated that Section 233(a)'s reference to "the remedy against the United States" provided by 28 U.S.C. 1346(b) of the FTCA incorporates Section 1346(b)(1)'s statement that the FTCA remedy is "[s]ubject to the provisions of chapter 171 of this title," and that, therefore, Section 2679(b)(2)(A)—a provision found in chapter 171—directly limits Section 233(a)'s exclusivity. Pet. App. 59a-62a.[6]

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[6] Section 1346(b), part of the FTCA, provides in relevant part:

> Subject to the provisions of chapter 171 of this title, the district courts * * * shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages * * * for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

28 U.S.C. 1346(b)(1).

Both courts erred in attaching such significance to 28 U.S.C. 2679(b)(2)(A). Section 2679(b)(2)(A) was added in 1988, eighteen years after Section 233(a)'s passage. It excluded constitutional torts only from the personal immunity that those same 1988 amendments to the FTCA newly conferred. See 28 U.S.C. 2679(b)(1) (as amended by Westfall Act, Pub. L. No. 100-694, § 5, 102 Stat. 4564). Nothing in the 1988 amendments to the FTCA or their legislative history purported to limit or otherwise have a bearing on the distinct (and more expansive) personal immunity conferred in separate statutes like Section 233(a). To the contrary, as the House Judiciary Committee Report noted, the 1988 amendments did "not change the law, as interpreted by the courts, with respect to the availability of other recognized causes of action, nor does it either expand or diminish rights established under other Federal statutes." H.R. Rep. No. 700, 100th Cong., 2d Sess. 7 (1988). Indeed, the absence in Section 233(a) of an exception for *Bivens* actions similar to that in Section 2679(b)(2)(A) seriously undermines the interpretation of the courts below.

To give operative legal effect here to Section 2679(b)(2)(A), a statute of general applicability, despite Section 233(a)'s unqualified mandate of exclusivity, would amount to an implied repeal of Section 233(a), a more specific statute. See *Long Island Care at Home, Ltd.* v. *Coke*, 551 U.S. 158, 170 (2007) ("normally the specific governs the general"). As this Court has noted, "repeals by implication are not favored." *Randall* v. *Loftsgaarden*, 478 U.S. 647, 661 (1986) (citation omitted).

The court of appeals also concluded that its decision was supported by Section 233's title in the public law ("Defense

of certain malpractice and negligence suits"),[7] on the ground that this title excludes constitutional torts. Pet. App. 22a-23a & n.11. The title of a statutory provision, however, cannot trump the unambiguous language of the statute's operative terms. See *Pennsylvania Dep't of Corr.* v. *Yeskey*, 524 U.S. 206, 212 (1998) ("[T]he title of a statute * * * [is] of use only when [it] shed[s] light on some ambiguous word or phrase.") (internal quotation marks and citation omitted; brackets in original). As discussed above, there is nothing ambiguous about Section 233(a). In any event, Section 233(a)'s title does not refer solely to actions sounding in common law or negligence. The term "malpractice," in particular, does not refer to a specific type of legal proceeding or claim but rather to the underlying conduct—*i.e.*, the professional misfeasance that may give rise to a cause of action. See, *e.g.*, *Webster's Third New International Dictionary* 1368 (1993) ("malpractice" is "a dereliction from professional duty whether intentional, criminal, or merely negligent by one rendering professional services that results in injury"). In addition, the title's reference to both "malpractice" and "negligence" suits strongly suggests that "malpractice" refers to a species of tort beyond "negligence" and covers as well reckless or intentional conduct—including deliberate indifference, the constitutional standard for deficient medical care (*Estelle* v. *Gamble*, 429 U.S. 97, 106 (1976)).

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[7] Section 233's title was changed to "Civil actions or proceedings against commissioned officers or employees" and the subtitle "Exclusiveness of remedy" was added to subsection (a) when the provision was codified in title 42. Compare Emergency Health Personnel Act of 1970, Pub. L. No. 91-623, § 4, 84 Stat. 1870 (Dec. 31, 1970), with 42 U.S.C. 233 (1970). Title 42 has not, however, been enacted into positive law. See 1 U.S.C. 204(a) & note; *United States Nat'l Bank* v. *Independent Ins. Agents of Am., Inc.*, 508 U.S. 439, 448 & n.3 (1993).

The court of appeals also reasoned that, because Section 233 was enacted in 1970, one year before the Court's decision in *Bivens*, Congress could not have had constitutional claims in mind. Pet. App. 21a. But that fact is irrelevant in light of Section 233(a)'s unqualified text stating that the FTCA remedy against the United States shall be the "exclusive" remedy for injuries arising out of medical care provided by PHS personnel. Under the court of appeals' reasoning, no pre-*Bivens* statute—no matter how absolute its text or how categorical its intent—could create an exclusive remedy. Moreover, five years after *Bivens*, Congress passed the Gonzalez Act, Pub. L. No. 94-464, § 1(a), 90 Stat. 1985, which affords immunity to medical personnel in the armed forces and which, like Section 233(a), makes the FTCA remedy "exclusive of any other civil action or proceeding by reason of the same subject matter." 10 U.S.C. 1089(a). Congress relied on Section 233(a) as a model for that provision. See S. Rep. No. 1264, 94th Cong., 2d Sess. 8 (1976) ("legislation having a comparable effect presently exists for * * * medical personnel of the * * * Public Health Service"). As the accompanying Senate Report indicated, "[t]his protection is designed to cover *all* potential financial liability." *Id.* at 2 (emphasis added). Thus, after *Bivens*, Congress reaffirmed the completeness of Section 233(a)'s immunity.[8]

[8] In any event, Congress would have been well aware of the concept of a constitutional tort when it enacted Section 233(a) in December 1970. See *Bivens*, 403 U.S. at 389 (noting that the Court's decision in *Bell* v. *Hood*, 327 U.S. 678 (1946), had held that a damage action against federal agents for constitutional violations stated a claim arising under the Constitution for purpose of federal question jurisdiction, but that *Bell* v. *Hood* had reserved judgment on whether the plaintiff had successfully stated a cause of action). Indeed, the Court had granted certiorari in *Bivens* itself six months before Congress enacted Section 233(a). 399 U.S. 905 (1970).

2. The court of appeals' decision is also inconsistent with this Court's precedents. In *Carlson*, the Court held that the FTCA standing alone did not bar a *Bivens* claim against federal officials. 446 U.S. at 18-23. *Carlson* involved the situation in which the relevant statute (the FTCA, as then written) was *silent* on the question whether remedies beyond an action against the United States were excluded.[9] The Court stated that a *Bivens* claim is generally available unless (1) "special factors counsel[] hesitation in the absence of affirmative action by Congress;" or (2) "Congress has provided an alternative remedy which it explicitly declared to be a *substitute* for recovery directly under the Constitution and viewed as equally effective."[10] *Id.* at 18-19. The Court in *Carlson* found neither condition satisfied there. In particular, the Court found nothing in the FTCA itself indicating that Congress meant to preclude *Bivens* actions; to the contrary, it stated that a post-*Bivens* amendment to the FTCA made it "crystal clear" that Congress viewed the FTCA and *Bivens* as complementary. *Id.* at 19-20.

But *Carlson* did not involve Section 233(a)—an immunity statute separate and apart from the FTCA that expressly made the FTCA remedy against the United States the "exclusive" remedy available for the type of injury asserted (personal injury arising from the provision of medical care by PHS personnel). As the Court in *Carlson* itself

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[9] As noted previously, Congress amended the FTCA in 1988 to exempt *Bivens* actions from the newly conferred exclusive FTCA remedy against the United States for suits arising out of the conduct of federal employees in certain contexts. See 28 U.S.C. 2679(b)(2)(A); see also pp. 12-13, *supra* (discussing the Westfall Act).

[10] The Court clarified that Congress did not have to recite any specific "magic words" to satisfy the alternative-remedy requirement. See *Carlson*, 446 U.S. at 19 n.5.

recognized, that distinction is dispositive. In rejecting the argument that the FTCA was the exclusive remedy for the constitutional tort alleged there, the Court in *Carlson* explained:

> This conclusion 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).

446 U.S. at 20 (emphasis added). By identifying Section 233(a) as a quintessential example of when Congress has made the FTCA an exclusive remedy, which precludes a *Bivens* action against individual federal officers and employees, *Carlson* strongly supports the government's interpretation.[11]

Since *Carlson*, the Court has consistently expressed a strong reluctance to expand the availability of a *Bivens* cause of action. See, *e.g.*, *Ashcroft* v. *Iqbal*, 129 S. Ct. 1937, 1948 (2009) ("Because implied causes of action are disfavored, the Court has been reluctant to extend *Bivens* liability 'to any new context or new category of defendants.'") (quoting *Correctional Servs. Corp.* v. *Malesko*, 534 U.S. 61, 68 (2001)); *Wilkie* v. *Robbins*, 127 S. Ct. 2588, 2597 (2007) (*Bivens* remedy "is not an automatic entitlement no matter what other means there may be to vindicate a protected

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[11] Although Congress's affirmative statement in Section 233(a) of the exclusivity of the FTCA remedy should resolve the matter, PHS's status as a uniformed service (pp. 2-3, *supra*) and the important purpose of protecting PHS personnel in lieu of liability insurance (pp. 11-12, *supra*), combined with the FTCA's reticulated remedial scheme, constitute "special factors counseling hesitation" against judicial creation of a cause of action under *Bivens* in this context.

interest, and in most instances we have found a *Bivens* remedy unjustified."); *Malesko*, 534 U.S. at 68-69 ("Since *Carlson*, we have consistently refused to extend *Bivens* liability to any new context or new category of defendants. * * * So long as the plaintiff had an avenue for some redress, bedrock principles of separation of powers foreclosed judicial imposition of a new substantive liability."); *Schweiker* v. *Chilicky*, 487 U.S. 412, 421-423 (1988) ("Our more recent decisions have responded cautiously to suggestions that *Bivens* remedies be extended into new contexts. The absence of statutory relief for a constitutional violation, for example, does not by any means necessarily imply that courts should award money damages against the officers responsible for the violation."); *Bush* v. *Lucas*, 462 U.S. 367, 374-390 (1983) (refusing to provide *Bivens*-type remedy given alternative remedial scheme created by Congress).

Thus, as the D.C. Circuit has noted, "subsequent to *Carlson*, the Court clarified that there does not need to be an equally effective alternate remedy" in order to bar the fashioning of a cause of action under *Bivens*. *Wilson* v. *Libby*, 535 F.3d 697, 708 (2008), cert. denied, No. 08-1043 (June 22, 2009); see *Spagnola* v. *Mathis,* 859 F.2d 223, 228 (D.C. Cir. 1988) (en banc) ("As we read *Chilicky* and *Bush* together, then, courts must withhold their power to fashion damages remedies when Congress has put in place a comprehensive system to administer public rights, has 'not inadvertently' omitted damages remedies for certain claimants, and has not plainly expressed an intention that the courts preserve *Bivens* remedies."). Accordingly, the Court's precedents support the government's plain-text interpretation of Section 233(a) as precluding a *Bivens* remedy against individual PHS personnel, above and beyond the FTCA remedy against the United States that Congress expressly declared to be "exclusive."

CONCLUSION

The petitions for a writ of certiorari should be granted.

Respectfully submitted.

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