Supreme Court, U.S.
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NO.

IN THE

Supreme Court of the United States

EUGENE MIGLIACCIO, TIMOTHY SHACK, ESTHER HUI, AND STEPHEN GONSALVES
Petitioners,

V.

YANIRA CASTANEDA AND VANESSA CASTANEDA,
Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Does 42 U.S.C. § 233(a) make the Federal Tort Claims Act the exclusive remedy for claims arising from medical care and related functions provided by Public Health Service personnel, thus barring *Bivens* actions?

PARTIES TO THE PROCEEDING

In addition to the parties identified in the caption, Chris Henneford was a defendant in the district court and appellant in the court of appeals.

Respondent Yanira Castaneda is the personal representative of Francisco Castaneda's estate. Respondent Vanessa Castaneda is the beneficiary of the estate, by and through her mother and guardian Lucia Pelayo.

The United States, George Molinar, Claudia Mazur, Daniel Hunting, Susan Pasha, and Michael Sheridan were defendants in the district court but were not parties to the appeal. The United States was an *amicus* in the court of appeals.

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PETITION FOR A WRIT OF CERTIORARI

Eugene Migliaccio, Timothy Shack, Esther Hui, and Stephen Gonsalves ("petitioners") respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The opinion below (Pet. App. 1a) is reported at 546 F.3d 682. The decision of the district court (Pet. App. 41a) is reported at 538 F. Supp. 2d 1279.

JURISDICTION

The judgment of the Ninth Circuit was entered on October 2, 2008. A timely petition for rehearing *en banc* was denied on January 29, 2009. Pet. App. 81a. On April 10, 2009, Justice Kennedy extended the time within which to file a petition for a writ of certiorari to May 29, 2009. On May 19, 2009, he further extended the time until June 12, 2009. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

The governing statute is 42 U.S.C. § 233(a):

> (a) Exclusiveness of remedy
>
> The remedy against the United States provided by sections 1346(b) and 2672 of title 28, or by alternative benefits provided by the United States where the availability of such benefits precludes a remedy under section 1346(b) of title 28, for damage for

> personal injury, including death, resulting from the performance of medical, surgical, dental, or related functions, including the conduct of clinical studies or investigation, 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.

STATEMENT

1. This damage action arose from medical care Francisco Castaneda received while in the custody of the California Department of Corrections and thereafter as an immigration detainee in the custody of U.S. Immigration and Customs Enforcement ("ICE"). Within the Public Health Service ("PHS"), the Division of Immigration Health Services ("DIHS") provides health care at ICE Service Processing Centers and contract detention facilities.

Mr. Castaneda sued the United States under the Federal Tort Claims Act ("FTCA"), medical personnel under California law, and state and federal officials in their individual capacity under 42 U.S.C. § 1983 and *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971). He claimed that because PHS personnel[1] acted with de-

[1] These officials range from a physician who had direct contact with Mr. Castaneda (Esther Hui, M.D.), to mid-level health services administrators at ICE detention facilities (Stephen Gonsalves and Chris Henneford), to an Associate

liberate indifference to his health needs and discriminated against him on the basis of his immigration status, they are personally liable under *Bivens*. Respondents were substituted for Mr. Castaneda after he died of metastatic cancer.

2. The United States admitted liability on respondents' FTCA claims for medical negligence. It certified that the PHS personnel were acting "within the course and scope of their employment with the United States at all times material" to the incidents alleged in the complaint. 28 C.F.R. §§ 15.3(a), 15.4(b). The PHS defendants moved to dismiss on the ground that § 233(a) makes the FTCA the exclusive remedy for claims arising out of medical care and related functions provided by PHS personnel, thereby precluding *Bivens* claims premised on the same conduct.[2]

3. The district court denied the motion to dismiss. In its view, § 233(a) explicitly preserves, rather

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Medical Director at DIHS's Washington-based headquarters (Timothy Shack, M.D.), all the way up to the Director of DIHS (Eugene Migliaccio, Dr.P.H.). Respondents allege that petitioners purposefully and improperly denied Mr. Castaneda access to needed medical care. They also allege that Drs. Shack and Migliaccio, among others, promulgated or ratified a policy of providing detainees with constitutionally inadequate care.

[2] *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009), explains that "vicarious liability is inapplicable to *Bivens*" actions and that "a plaintiff must plead that each Government-official defendant, through the official's own individual actions, has violated the Constitution." Whether the complaint contains sufficient factual matter to "'state a claim to relief' against each individual petitioner "that is plausible on its face,"' *id.* at 1949 (citing *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)), is not before the Court.

than precludes, *Bivens* claims against PHS personnel. In particular, the district court reasoned that § 233(a) expressly recognizes a cause of action against PHS personnel for constitutional torts because it references the remedy provided by 28 U.S.C. § 1346(b)(1), which, in turn, is "[s]ubject to the provisions of chapter 171 of this title." The court therefore followed what it considered the "statutory trail" to 28 U.S.C. § 2679 (which is in "chapter 171 of this title") to conclude that "[t]he 'exclusive remedy' available to redress damage caused by PHS personnel pursuant to § 233(a) . . . 'does not extend or apply' to suits 'brought for a violation of the Constitution'" under § 2679(b)(2)(A). Pet. App. 58a-62a.

The district court acknowledged that its decision was contrary to, among other cases, *Cuoco v. Moritsugu*, 222 F.3d 99 (2d Cir. 2000). It insisted, however, that the Second Circuit had simply failed to follow "the statutory trail" and "for whatever reason, was not aware of what the FTCA remedy in fact consisted." Pet. App. 64a.

4. The Ninth Circuit affirmed. Pet. App. 1a. In its view, *Carlson v. Green*, 446 U.S. 14 (1980), "compels the conclusion that § 233(a) does not preclude relief under *Bivens*." Pet. App. 18a. *Carlson* held that, absent a contrary expression from Congress, the FTCA is not the exclusive remedy where a constitutional claim is asserted against a prison official. 446 U.S. at 20. It expressly buttressed this conclusion by citing the PHS Act as an example of Congress having "follow[ed] the practice of explicitly stating when it means to make FTCA an exclusive remedy." *Id.* The Ninth Circuit dismissed *Carlson*'s treatment of § 233(a) as dictum, and read the perti-

nent language to mean that although Congress could have declared the FTCA the exclusive remedy when it enacted § 233(a) (thus precluding federal constitutional claims), it had not done so. Pet. App. 35a-36a.

The Ninth Circuit acknowledged that both its holding and its reading of *Carlson* conflict with *Cuoco.* Pet. App. 35a-37a.

REASONS FOR GRANTING THE PETITION

Congress provided in § 233(a) that an FTCA claim "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." Despite its sweep, the Ninth Circuit held that § 233(a) does not bar *Bivens* claims against PHS personnel.

The decision below warrants review because it misapplies *Carlson*, and conflicts with decisions of every other federal court (other than three district courts we are aware of—including the one below) to have addressed the Question Presented. The Second, Third, Fourth, Fifth and Sixth Circuits and, until this case, the Ninth, have all held that § 233(a) precludes *Bivens* relief.[3] The decision below also con-

[3] *Cuoco,* 222 F.3d 99, 109; *Wallace v. Dawson,* No. 07-0864, 302 F. App'x 52, 54 (2d Cir. 2008); *Anderson v. Bureau of Prisons,* 176 F. App'x 242, 243 (3d Cir. 2006) (per curiam), *cert. denied,* 547 U.S. 1212 (2006); *Butler v. Shearin,* 279 F. App'x 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 F. App'x 790, 791 (4th Cir. 2003), *aff'g,* No. 02-609, 2003 WL 23857310, at *1 (E.D.N.C. Mar. 21, 2003); *Montoya-Ortiz v. Brown,* 154 F. App'x 437, 439 (5th Cir. 2005); *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

flicts with numerous district court decisions.[4] The case raises an important and obviously recurring is-

*2 (6th Cir. Oct. 18, 1999); *Beverly v. Gluch*, No. 89-1915, 1990 WL 67888, at *1 (6th Cir. May 23, 1990); *Miles v. Daniels*, 231 F. App'x 591, 591-92 (9th Cir. 2007); *Zanzucchi v. Wynberg*, No. 90-15381, 1991 WL 83937, at *2 (9th Cir. May 21, 1991).

[4] *E.g., Uribe v. Outlaw*, No. 08-019, 2009 WL 322952, at *5 (E.D. Ark. Feb. 9, 2009); *Jones v. Hammond*, No. 07-6, 2009 WL 277537, at *9 (N.D. W. Va. Feb. 5, 2009); *Jackson v. United States*, No. 06-88, 2009 WL 33324, at *5 (W.D. Pa. Jan. 5, 2009); *Morales v. White*, No. 07-2018, 2008 WL 4585340, at *11 (W.D. Tenn. Oct. 10, 2008); *Walker v. Reese*, No. 06-154, 2008 WL 4426123, at *12-14 (S.D. Miss. Sept. 25, 2008); *Stine v. Fetterhoff*, No. 07-02203, 2008 WL 4330572, at *7-8 (D. Colo. Sept. 19, 2008); *Hairston v. Gonzales*, No. 07-3078, 2008 WL 2761315, at *3 (E.D.N.C. July 11, 2008); *Teague v. Hood*, No. 06-01800, 2008 WL 2228905, at *6 (D. Colo. May 27, 2008); *Cope v. Felts*, No. 05-01175, 2008 WL 759078, at *4 (S.D. W. Va. Mar. 19, 2008); *Muhammad v. Sosa*, No. 06-0763, 2008 WL 762253, at *2 (D. Colo. Mar. 19, 2008); *Pike v. Guia*, No. 207-039, 2008 WL 649228, at *2-3 (S.D. Ga. Mar. 10, 2008); *Batey v. Swanson*, No. 07-12, 2008 WL 467384, at *2 (N.D. W. Va. Feb. 19, 2008); *Anson v. Bailey*, No. 06-0394, 2009 WL 414017, at *1 (W.D.N.Y. Feb. 18, 2009); *Lyons v. United States*, No. 03-1620, 2008 WL 141576, at *12 n.5 (N.D. Ohio Jan. 11, 2008), *abrogated by* 2009 WL 997300, at *11 n.6 (N.D. Ohio Apr. 14, 2009); *Lee v. Guavara*, No. 06-1947, 2007 WL 2792183, at *14 (D.S.C. Sept. 24, 2007); *Fourstar v. Vidrine*, No. 06-916, 2007 WL 2781894, at *4 (S.D. Ind. Sept. 21, 2007); *Hodge v. United States*, No. 06-1622, 2007 WL 2571938, at *4-5 (M.D. Pa. Aug. 31, 2007); *Coley v. Sulayman*, No. 06-3762, 2007 WL 2306726, at *4-5 (D.N.J. Aug. 7, 2007); *Jackson v. Fed. Bureau of Prisons*, No. 06-1347, 2007 WL 843839, at *9 (D. Minn. Mar. 16, 2007); *Salley v. Ellis*, No. 06-138, 2006 WL 3734242, at *1 (M.D. Ga. Dec. 15, 2006); *Baez v. Arbuckle*, No. 06-13, 2006 WL 33449591, at *3-4 (M.D. Ga. Nov. 17, 2006); *Davis v. Stine*, No. 06-156, 2006 WL 3140169, at *6 (E.D. Ky. Oct. 31, 2006); *Barbaro v. United States*, No. 05-6998, 2006 WL 3161647, at *1 (S.D.N.Y. Oct. 30, 2006); *Williams v. Stepp*, No. 03-0824, 2006 WL 2724917, at *3-4 (S.D. Ill. Sept. 21, 2006); *Cuco v. Fed.*

sue that, because of the nature of the PHS, specially calls for a uniform national rule.

A. The decision below conflicts with decisions of this Court

1. The Ninth Circuit misapplied *Carlson*

Despite the Ninth Circuit's claim to have relied on *Carlson*, its decision is plainly at odds with that case and its progeny. *Carlson* identified two situations in which a *Bivens* action may be defeated:

> The first is when defendants demonstrate special factors counseling hesita-

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Med. Ctr.-Lexington, No. 05-232, 2006 WL 1635668, at *20 (E.D. Ky. June 9, 2006); *Arrington v. Inch*, No. 05-0245, 2006 WL 860961, at *5 (M.D. Pa. Mar. 30, 2006); *Foreman v. Fed. Corr. Inst.*, No. 504-01260 2006 WL 4537211, at *8 (S.D. W. Va. Mar. 29, 2006); *Smith v. Anderson*, No. 05-0407, 2006 WL 771929, at *2-3 (S.D. W. Va. Mar. 27, 2006); *Pimentel v. Deboo*, 411 F. Supp. 2d 118, 126-27 (D. Conn. 2006); *Baskette v. United States*, No. 605-00034, 2006 WL 148752, at *1 (W.D. Va. Jan. 19, 2006); *Whooten v. Bussanich*, No. 04-223, 2005 WL 2130016, at *3 (M.D. Pa. Sept. 2, 2005); *Freeman v. Inch*, No. 04-1546, 2005 WL 1154407, at *2 (M.D. Pa. May 16, 2005); *Dawson v. Williams*, No. 04-1834, 2005 WL 475587, at *8 (S.D.N.Y. Feb. 28, 2005); *Lovell v. Cayuga Corr. Facility*, No. 02-6640, 2004 WL 2202624, at *2 (W.D.N.Y. Sept. 29, 2004); *Tillitz v. Jones*, No. 03-742, 2004 WL 2110709, at *3 (D. Or. Sept. 22, 2004); *Valdivia v. Hannefed*, No. 02-0424, 2004 WL 1811398, at *4 (W.D.N.Y. Aug. 10, 2004); *Brown v. McElroy*, 160 F. Supp. 2d 699, 703 (S.D.N.Y. 2001); *Navarrete v. Vanyur*, 110 F. Supp. 2d 605, 606-07 (N.D. Ohio 2000); *Lewis v. Sauvey*, 708 F. Supp. 167, 169 (E.D. Mich. 1989).

The only contrary district court authorities of which we are aware, aside from the decision in the instant case, are *Vinzant v. United States*, No. 07-024, 2008 WL 4414630, at *4 n.3 (C.D. Cal. Sept. 28, 2008), and *McMullen v. Herschberger*, No. 91-3235, 1993 WL 6219, at *3 (S.D.N.Y. Jan. 7, 1993).

> tion in the absence of affirmative action by Congress. The second is when defendants show that 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.

446 U.S. at 18-19 (internal quotation and citation omitted).

The *Carlson* petitioners argued that, by amending 28 U.S.C. § 2680(h) to allow a cause of action against the United States for intentional torts, Congress expressed its intent to preclude *Bivens* actions arising out of the same conduct. *Carlson* rejected that contention. 446 U.S. at 19-20. First, it found no special factors counseling hesitation in the absence of affirmative action by Congress. Second, it examined the FTCA and observed that it does not contain an "explicit congressional declaration . . . to preempt a *Bivens* remedy . . ." *Id.* at 19. The Court therefore concluded that, "[i]n the absence of a contrary expression from Congress," FTCA and *Bivens* actions may be brought simultaneously for the same alleged wrongdoing. *Id.* at 20. *Carlson* buttressed this conclusion by citing the PHS Act as an example of an explicit congressional declaration of FTCA exclusivity. *Id.*

The Ninth Circuit reached the opposite conclusion. It passed over § 233(a)'s plain language by misreading and misapplying *Carlson*'s test for preemption:

> *Carlson* established a two-part test for express *Bivens* preemption: Congress

> must provide an alternative remedy that is "explicitly declared to be a substitute for" *Bivens* (rather than a complement to it) and Congress must view that remedy as "equally effective." 446 U.S. at 18-19. Both of these elements must be present for a court to find the *Bivens* remedy expressly displaced.

Pet. App. 13a.

The Ninth Circuit concluded that the PHS Act does not satisfy this test for preemption because it "does not mention the Constitution or recovery thereunder, let alone 'explicitly declare[]' itself to be a 'substitute for recovery directly under the Constitution,'" *Id.* at 19a (quoting *Carlson*, 446 U.S. at 18-19), and *Carlson* "held that Congress does not view the FTCA as providing relief that is 'equally effective' as *Bivens* relief." *Id.* at 13a.[5]

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[5] The Ninth Circuit mistakenly concluded that § 233(a)'s express language of exclusivity "cannot be read as an expression of Congress's desire" to preempt *Bivens* relief "for the simple reason that *Bivens* relief did not exist when § 233(a) was enacted." Pet. App. 19a. History and the familiar rule as to what Congress is presumed to know foreclose this analysis. The jurisprudential sources for a private cause of action for damages arising under the Constitution had taken root long before either *Bivens* or § 233(a). *E.g.*, 42 U.S.C. § 1983 (codifying Civil Rights Act of 1871 and providing for damage actions against state officials who violate constitutional rights); *Bivens*, 403 U.S. at 395 (damage claim for constitutional violations "should hardly seem a surprising proposition" since, "[h]istorically, damages have been regarded as the ordinary remedy for an invasion of personal interests in liberty") (citations omitted); *id.* at 429 (Black, J., dissenting) (§ 1983 creates "strong inference" that Congress knew how but chose not to permit damages rem-

The Ninth Circuit's reading of *Carlson*'s test for preemption not only led it to the wrong conclusion but is the kind of construction the Court rejected in *Carlson. See* 446 U.S. at 19 n.5. The Court there made clear that a party asserting preemption "need not show that Congress recited any specific 'magic words'" in order to "satisfy this test" and enact an exclusive remedy. *Id.* This clarification responded to Chief Justice Burger's dissent, which pointed out that, taken literally, *Carlson* "seems to require" the use of "magic words" to provide an exclusive remedy. *Id.* at 31 & n.2 (Burger, C.J., dissenting); *see also id.* at 26-27 (Powell, J., concurring) (describing as dicta the very language the Ninth Circuit converted into "elements" of *Carlson*'s preemption test and cautioning against reading that very language as "prescribed linguistic garb"); *id.* at 31-33 & n.2 (Rehnquist, J., dissenting) (criticizing majority's "formalistic procedural approach for inferring private damages remedies" and agreeing with Justice Powell that language in majority's opinion is "properly viewed as dicta").

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edy against individual federal agents for constitutional violations); *Bell v. Hood*, 327 U.S. 678 (1946) (holding that damage action against federal agents for constitutional violations stated claim arising under Constitution for purpose of federal question jurisdiction, although reserving judgment on whether, as pled, plaintiff there had stated cause of action); *Bivens*, 403 U.S. at 389 (noting that *Bell* had reserved decision on the question).

Congress must therefore be presumed to have been aware of not only the *Bivens* litigation, including the lower court decisions and the grant of certiorari, but also the concept of a constitutional tort prior to enacting § 233(a). Pet. App. 22a n.10 (acknowledging that this Court had already granted certiorari in *Bivens* when Congress enacted § 233(a)).

Because it misunderstood what constitutes an "explicit declaration" under *Carlson*, the Ninth Circuit failed to give effect to § 233(a)'s command that the "remedy against the United States" provided by the FTCA "shall be exclusive of any other civil action or proceeding" without exception. Section 233(a) easily satisfies *Carlson*'s test for preemption because it is all-encompassing. There is therefore no need for it to "mention the Constitution or recovery thereunder," as the Ninth Circuit suggested, Pet. App. 19a, or to define what "other actions" are preempted. An "exclusive remedy" by definition precludes all other remedies absent an express congressional exception. That is how *Carlson* uses the term. 446 U.S. at 19 ("[W]ithout a clear congressional mandate, we cannot hold that Congress relegated respondent exclusively to the FTCA remedy."); *id.* at 27 (Powell, J., concurring) ("Congress possesses the power to enact adequate alternative remedies that would be exclusive"); *id.* at 30-31 (Burger, C.J., dissenting) (discussing whether Civil Rights Act of 1964 provides "exclusive remedy" or permits parallel *Bivens* claims).[6]

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[6] Having determined that § 233(a) has a plain meaning, there was no occasion for the Ninth Circuit to rely on legislative history. Pet. App. 20a-32a. Legislative history is not determinative where, as here, the language of the statute is clear and does not lead to an absurd result. *Connecticut Nat. Bank v. Germain*, 503 U.S. 249, 253-54 (1992) ("We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there. When the words of a statute are unambiguous, then, this first canon is also the last: the judicial inquiry is complete.") (citations and internal quotation marks omitted). The parties agreed below that § 233(a) is clear on its face, but differ as to its meaning.

2. *Carlson* does not hold that the FTCA can never be a substitute for *Bivens* relief

The Ninth Circuit claimed that § 233(a) fails an "equally effective" prong that it discerned in *Carlson*'s preemption test. It did so on the notion that *Carlson* "held that Congress does not view the FTCA as providing relief that is 'equally effective' as *Bivens* relief." Pet. App. 13a. But that claim rests on another misreading of *Carlson*. In fact, there is no "equally effective" prong.

Carlson does not hold that the FTCA is a categorically inadequate alternative to *Bivens*. Rather, it holds that, "[i]n the absence of a contrary expression from Congress," FTCA and *Bivens* actions may be brought simultaneously for the same alleged wrongdoing. *Carlson*, 446 U.S. at 20. In other words, the inquiry is whether Congress explicitly declared a remedy to be exclusive. If it has, as in § 233(a), that declaration is the congressional expression that the remedy is sufficient. While *Carlson* cites factors suggesting that "the *Bivens* remedy is more effective than the FTCA remedy," it does so only as "support" for its "conclusion that Congress did not intend to limit respondent to an FTCA action." *Id.* at 20-21.

As the Court explained in *Carlson*, no "magic words" are required for Congress to declare a statutory remedy "equally effective" in order for that remedy to be exclusive and preemptive. *Id.* at 19 n.5. When Congress provides such a remedy, it may express its intent "by statutory language," as it did here ("shall be exclusive of any other remedy," § 233(a)), or in legislative history, or simply by fashioning a comprehensive scheme, whether or not it

explicitly labels the remedy "exclusive." *Bush v. Lucas*, 462 U.S. 367, 378 (1983).

Since *Carlson*, the Court has confirmed that where, as here, Congress provides an adequate alternative remedy that it has declared to be exclusive, that is the end of the inquiry and there is no occasion to examine the efficacy of the remedy. *Bush v. Lucas*, 462 U.S. at 373 (establishing as a threshold matter that "Congress has not expressly precluded the creation of such a [*Bivens*] remedy by declaring that existing statutes provide the exclusive mode of redress"); *see also Bivens*, 403 U.S. at 397 (finding implied damage action only in absence of "explicit congressional declaration" that plaintiff is relegated to other remedy). Indeed, "[b]ecause implied causes of action are disfavored, the Court has been reluctant to extend *Bivens* liability 'to any new context or new category of defendants.'" *Iqbal*, 129 S. Ct. at 1948 (quoting *Correctional Servs. Corp. v. Malesko*, 534 U.S. 61, 68 (2001)). *Bivens* remedies should be recognized only where a plaintiff "lack[s] *any alternative remedy* for harms caused by an individual officer's unconstitutional conduct." *Malesko*, 534 U.S. at 70 (emphasis in original).

Even absent a congressional declaration that an existing statute provides the exclusive mode of redress, the Court has found that the mere existence of an alternative process for protecting a constitutionally recognized interest may be "a convincing reason for the Judicial Branch to refrain from providing a new and freestanding remedy in damages." *Wilkie v. Robbins*, 551 U.S. 537, ___, 127 S. Ct. 2588, 2598 (2007); *see also Schweiker v. Chilicky*, 487 U.S. 412, 423 (1988) ("When the design of a Government pro-

gram suggests that Congress has provided what it considers adequate remedial mechanisms for constitutional violations that may occur in the course of its administration, we have not created additional *Bivens* remedies."); *Bush v. Lucas*, 462 U.S. at 388 (refusing to create *Bivens* action for federal employees challenging personnel actions even though "existing remedies [did] not provide complete relief").[7]

B. The lower courts are divided over whether § 233(a) precludes *Bivens* actions

Until this case, no Circuit had ever held that § 233(a) preserves rather than precludes *Bivens* relief.

In *Cuoco*, the Second Circuit squarely addressed the question and held that § 233(a) barred a *Bivens* action against individual PHS physicians and other employees working at a federal prison. 222 F.3d at 108-09. Ms. Cuoco, like Mr. Castaneda, had sued PHS medical personnel for violations of her Eighth Amendment rights. The Second Circuit rejected the argument "that § 233(a) provides immunity only from medical malpractice claims," finding that "there is nothing in the language of § 233(a) to support that conclusion." *Id.* at 108. It correctly observed that § 233(a) "protects commissioned officers or employees

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[7] Because the decision below should be reversed on other grounds, the Court has no occasion to determine whether there are "special factors counseling hesitation in the absence of affirmative action by Congress." *Carlson*, 446 U.S. at 18-19. If the Court were to reach that level of the *Carlson* analysis, reversal would still be required given the nature and function of the PHS. *Cf. United States v. Stanley*, 483 U.S. 669, 683-84 (1987) (unique nature of military service is special factor counseling against *Bivens* action despite U.S. Army physicians' secret experimentation with LSD on unsuspecting soldiers).

of the Public Health Service from being subject to suit while performing medical and similar functions by requiring that such lawsuits be brought against the United States instead." *Id.* It therefore held that PHS employees are absolutely immune from suits arising out of medical treatment and decisions related to medical treatment, including suits claiming violations of the Constitution. *Id.* at 107-09.

Cuoco applied *Carlson* to support its conclusion that § 233(a) is an example of "'Congress ha[ving] provided an alternative remedy which it explicitly declared to be a *substitute* for recovery directly under the Constitution and viewed as equally effective.'" *Id.* at 108 (quoting *Carlson,* 446 U.S. at 18-19). Purporting to apply the same precedent, the Ninth Circuit reached precisely the opposite conclusion. The two decisions cannot both be right. No purpose is served by further percolation in the lower courts.

C. The Question Presented warrants review

The issue is important and, as the decisions cited above demonstrate, recurring. The Court has long recognized that questions of immunity go to the heart of government activity. Left unresolved, they threaten both the effectiveness of federal personnel and their willingness to serve.

PHS personnel provide medical care to underserved areas, immigration detainees, federal prisoners, Native Americans, Alaska Natives, and the Coast Guard. They serve throughout the United States (and even in foreign countries such as Iraq and Afghanistan). PHS's Commissioned Corps is a uniformed service organized along military lines and staffed by officers with military rank equivalents. 42

U.S.C. §§ 201(p), 207. Its members must go where they are ordered.

The already strong interest in a single national rule for federal agencies is at its apogee when dealing with a uniformed service. PHS personnel are detailed to federal agencies such as ICE, the Bureau of Prisons, and the U.S. Marshals Service, whose activities may give rise to patient tort claims. For such an agency, a disparity across circuit lines on an issue as central to sound public administration as immunity for official acts is especially intolerable.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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