

No. 08-1529

In the Supreme Court of the United States

ESTHER HUI, ET AL.,

Petitioners,

v.

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

Respondents.

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

**BRIEF OF THE AMERICAN CIVIL LIBERTIES
UNION AS *AMICUS CURIAE* IN SUPPORT OF
RESPONDENTS**

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES.....	iii
INTEREST OF THE <i>AMICUS CURIAE</i>	1
STATEMENT	2
SUMMARY OF ARGUMENT	7
ARGUMENT	8
I. <i>Bivens</i> Provides A Constitutional Remedy That An Ordinary Tort Claim Does Not Provide.....	10
A. <i>Bivens</i> ' Purpose Is To Deter Unconstitutional Conduct By Individual Government Officers.	10
B. Only A Constitutional Tort Action Under <i>Bivens</i> Can Adequately Compensate Eighth Amendment Violations In Government Detention Facilities.....	13
C. There Is No Basis For Granting PHS Personnel Unique Immunity From Constitutional Claims.	17
D. For Additional Reasons Discussed In <i>Carlson</i> , An FTCA Remedy Is Inadquate To Deter Constitutional Violations By PHS Personnel.....	18
II. Serious Constitutional Violations Documented In Other Cases Further Demonstrate The Need For A <i>Bivens</i> Remedy.	20
III. <i>Bivens</i> Liability Also Will Generate Pressure From Within DIHS To Reform Policies That Unconstitutionally Restrict Detainee Medical Care.	25

TABLE OF CONTENTS—continued

	Page
CONCLUSION	29

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics,</i> 403 U.S. 388 (1971).....	<i>passim</i>
<i>Bryant v. Carleson,</i> 444 F.2d 353 (9th Cir. 1971).....	4
<i>Butz v. Economou,</i> 438 U.S. 478 (1978).....	10
<i>Carlson v. Green,</i> 446 U.S. 14 (1980).....	<i>passim</i>
<i>City of Revere v. Massachusetts Gen. Hosp.,</i> 463 U.S. 239 (1983).....	9
<i>Complete Auto Transit, Inc. v. Reis,</i> 451 U.S. 401 (1981).....	10
<i>Corr. Servs. Corp. v. Malesko,</i> 534 U.S. 61 (2001).....	<i>passim</i>
<i>Custard v. Young,</i> 2008 WL 791954 (D. Colo. 2008).....	18
<i>DeShaney v. Winnebago County Dep't of Soc. Servs.,</i> 489 U.S. 189 (1989).....	11, 25, 26
<i>Estelle v. Gamble,</i> 429 U.S. 97 (1976).....	25, 26
<i>Farmer v. Brennan,</i> 511 U.S. 825 (1994).....	11, 26
<i>FDIC v. Meyer,</i> 510 U.S. 471 (1994).....	10
<i>Freeman v. Inch,</i> 2005 WL 1154407 (M.D. Pa. 2005).....	18

TABLE OF AUTHORITIES—continued

	Page(s)
<i>Helling v. McKinney</i> , 509 U.S. 25 (1993).....	26, 27
<i>Jones v. Blanas</i> , 393 F.3d 918 (9th Cir. 2004).....	9
<i>Jones v. Johnson</i> , 781 F.2d 761 (9th Cir. 1986).....	27
<i>McCarthy v. Madigan</i> , 503 U.S. 140 (1992).....	11
<i>McKenna v. Wright</i> , 386 F.3d 432 (2d Cir. 2004)	27
<i>Monroe v. Pape</i> , 365 U.S. 167 (1961).....	15
<i>Stine v. Fetterhoff</i> , 2008 WL 4330572 (D. Colo. 2008)	17
<i>United States v. Lee</i> , 106 U.S. 196 (1882).....	10
<i>United States v. Smith</i> , 499 U.S. 160 (1991).....	19
 Statutes	
28 U.S.C. § 1346(b)(1)	14
28 U.S.C. § 2402	19
28 U.S.C. § 2674	18
28 U.S.C. § 2679(b)(1)	13
42 U.S.C. § 233(a).....	8, 13, 17, 18
Emergency Health Personnel Act of 1970, Pub. L. No. 91-623, 84 Stat. 1868	8

TABLE OF AUTHORITIES—continued

	Page(s)
Federal Employees Liability Reform and Tort Compensation Act of 1988, Pub. L. No. 100- 694, 102 Stat. 4563	13, 17, 19, 20
 Other Authorities	
Nina Bernstein, <i>New Scrutiny as Immigrants Die in Custody</i> , N.Y. TIMES, June 26, 2007, at A1	21
Nina Bernstein, <i>Officials Hid Truth of Immigrant Deaths in Jail</i> , N.Y. TIMES, Jan. 9, 2010, at A1	21, 28
H.R. Rep. No. 100-700 (1988), 1988 U.S.C.C.A.N. 5945.....	13, 14
Hearings on H.R. 4358 et al. before the Subcommittee on Administrative Law and Governmental Relations of the House Committee on the Judiciary, 100th Cong., 2d Sess. (1988).....	19
Alfred Hill, <i>Constitutional Remedies</i> , 69 COLUM. L. REV. 1109 (1969).....	15, 19
John F. Preis, <i>Alternative State Remedies in Constitutional Torts</i> , 40 CONN. L. REV. 723 (2008).....	16
Dana Priest & Amy Goldstein, <i>System of Neglect</i> , WASH. POST, May 11, 2008, at A1	21, 23, 27, 28

**BRIEF OF THE AMERICAN CIVIL LIBERTIES
UNION AS *AMICUS CURIAE* IN SUPPORT OF
RESPONDENTS**

INTEREST OF THE *AMICUS CURIAE*¹

The American Civil Liberties Union (“ACLU”) is a nationwide, nonprofit, nonpartisan organization with more than 500,000 members dedicated to the principles of liberty and equality embodied in the Constitution and this nation’s civil rights laws. Consistent with that mission, the National Prison Project (“NPP”) of the ACLU Foundation was established in 1972 to protect and promote the civil and constitutional rights of prisoners, including immigration detainees like the subject of this case. The NPP currently is counsel in *Woods v. Myers*, No. 3:07-cv-1078 (S.D. Cal.), a putative class action seeking to remedy alleged unconstitutional conditions at the facility at which the decedent in this matter was detained prior to his release and ultimate death. In addition, the NPP is litigating *American Civil Liberties Union v. United States Department of Homeland Security*, No. 1:08-cv-01100 (D.D.C.), which alleges that the Department of Homeland Security improperly withheld records related to deaths in immigration detention.

¹ Pursuant to Rule 37.6, *amicus* affirms that no counsel for a party authored this brief in whole or in part and that no person other than *amicus* and its counsel made a monetary contribution to its preparation or submission. The parties’ letters consenting to the filing of this brief have been filed with the Clerk’s office.

STATEMENT

This case concerns a deliberate and unconstitutional denial of medical care so shocking that the district court said it “should be taught to every law student as conduct for which the moniker ‘cruel’ is inadequate.” Pet. App. 88. The case arises from the death of Francisco Castaneda, an immigration detainee who spent almost 11 months in the custody of Immigration and Customs Enforcement (“ICE”). Petitioners are officers of the U.S. Public Health Service (“PHS”) assigned through ICE’s Division of Immigration Health Services (“DIHS”) to provide medical care to detainees at an ICE facility in San Diego. The record demonstrates that petitioners knew Castaneda had a lesion on his penis that was painful, growing in size, and exuding discharge. *Id.* at 47. They also knew Castaneda had a family history of cancer, and that an oncologist had found that the lesion “require[d] urgent urologic assessment of biopsy and definitive treatment.” *Id.* at 47-48. Nonetheless, DIHS officers refused to allow the oncologist to admit Castaneda because it would not be “cost effective.” *Id.* at 48. Petitioner Hui, the PHS physician who was responsible for Castaneda’s care, knew of the oncologist’s recommendation but failed to arrange for an outpatient biopsy because she deemed it an “elective” procedure. *Id.* at 49; J.A. 125.

As Castaneda’s condition worsened—his lesion was described as “exploding,” “macerated,” “bleeding,” and emitting a “malodorous smell,” and Castaneda was in severe distress and had difficulty urinating—DIHS officials still refused to order a biopsy, even though they recognized that Castaneda’s penis had become so damaged that it would eventually require partial surgical removal. Pet. App. 7, 50, 52.

Although DIHS officials in Washington had approved a Treatment Authorization Request for a biopsy, J.A. 114-115, petitioner Gonsalves continued to insist that “any surgical intervention * * * would be elective in nature,” and that the care Castaneda was receiving was “appropriate, and in accordance with our policies.” J.A. 167-168. To downplay the severity of Castaneda’s condition and maintain the fiction that the treatment he required was “elective,” the district court found “compelling evidence” that entries made by DIHS personnel on Castaneda’s chart misrepresented critical information from outside doctors who examined him. Pet. App. 86-88.

The district court found that the allegations in this case, if true, “bespeak of conduct that transcends negligence by miles” and present “one of the most, if not the most, egregious Eighth Amendment violations the Court has ever encountered.” Pet. App. 82. More than 30 exhibits from petitioners’ “own official medical records document[] their knowledge of the fact that several physicians had concluded that [Castaneda]’s lesion was very likely penile cancer, and that he needed a biopsy.” *Ibid.* Respondents have “already produced at this early stage in the litigation [evidence that is] more thorough and compelling than the complete evidence compiled in some meritorious Eighth Amendment actions.” *Id.* at 83.

Additional evidence that became available after the district court’s opinion sheds further light on Castaneda’s plight and the lengths to which DIHS officers allegedly went to cover up their denial of care. The physician’s assistant who cared for Castaneda, Anthony Walker, testified that he was confronted about Castaneda by petitioner Gonsalves. Dep. of Anthony Allen Walker, *Castaneda v. United States*,

No. CV 07-07241 (C.D. Cal. Sept. 5, 2008) (“Walker Dep.”) at 93-94.² The following entry subsequently appeared on Castaneda’s medical chart under Walker’s name, though Walker testified that he entered the note at the direction of Gonsalves:

I have been following this detainee and he DOES NOT have cancer at this time due to not having a biopsy performed and evaluated in a laboratory. There are some concerns that was explained to the patient by Dr. Wilkinson the oncologist but we are awaiting good communication between he and [another urologist] concerning the best direction, if any at all, with this patient. * * * Basically this p[atien]t needs to be patient and wait. [Another official] stated to me that he will tell the detainee to relax and be patient.

J.A. 133-134; Walker Dep. at 93-98.

In a subsequent entry, Walker wrote that Castaneda has been “counseled today concerning [a] grievance” Castaneda had filed against Hui for “not allowing him to be seen for his recent and ongoing complaint of a penile lesion.” J.A. 136-137. Castaneda had become insistent with Hui that he was not receiving proper care. Walker Dep. at 83. The entry asserts that Castaneda “was not denied by Dr. Hui any treatment” and that there had been no “emergent need” for treatment. *Ibid.* Walker testified in his deposition that he wrote the entry on instructions from Hui:

² An appellate court may take judicial notice of relevant developments in a case after the appeal has been filed. *E.g.*, *Bryant v. Carleson*, 444 F.2d 353, 357 (9th Cir. 1971).

[Q.] Why did you then put this entry in the chart if you didn't see him?

A. I was told to put it in.

Q. Who told you to put it in?

A. Dr. Hui told me to put it in.

Q. How did that conversation come about?

A. That she wanted something in the note or in the chart to document that she did not refuse him any treatment or any care concerning this complaint.

* * *

Q. Can you describe—can you recall the words that she used when she told you to do this?

A. Just that—if I remember correctly—just that there needs to be something in the chart stating that I, being Dr. Hui, did not refuse him any care, because at this point he was complaining and putting in grievances stating that Dr. Hui has refused him and denied him due and just health care.

Walker Dep. 113-114. Yet Castaneda's condition had worsened well past the point where it should have been clear he needed more serious treatment. Walker recalled how the lesion looked on the same day Hui allegedly instructed him to enter the note:

It was as if you had taken a mushroom, cut the stem off, and set the mushroom down and hit it with a hammer. That's what it looked like at this point, just kind of ballooned up, cracking, and bleeding. The drainage, the

smell, kind of looking a little green now, just didn't look right at all.

Id. at 128-129.

Walker, who had arranged for Castaneda to see the oncologist who recommended "urgent" evaluation and treatment of Castaneda's lesion, also testified that Hui was displeased that he had gone behind her back:

A. She was pretty salty, said that she was surprised in me, that she didn't think that I would do that, you know. But that it's not going to get done. He's not going to get admitted, and at this point it's probably just a wart, and—but if you want to pursue it and manage this patient, then manage him here in the clinic, and that's kind of how that went.

* * *

Q. So, in other words, she told you that he wasn't going to get an outside specialist to see him or perform surgery.

A. Yes, sir.

Q. That if there was anything that was to be done for him, it would have to be done in the clinic by you.

A. Yes, sir.

Q. A physician's assistant.

A. Yes, sir.

Walker Dep. 76-77. But Walker, of course, had no capability to do a biopsy in the clinic. *Id.* at 77-78.

After the ACLU began advocating to DIHS officials on Castaneda's behalf, Castaneda was finally scheduled for a biopsy in February 2007. Pet. App. 7-8. However, a few days before the procedure, he was abruptly released from ICE custody; in effect, ICE washed its hands of any further responsibility for his care. Surgeons amputated Castaneda's penis, and he was diagnosed with squamous cell carcinoma. He endured multiple rounds of chemotherapy but died a year later on February 16, 2008 at the age of 36. *Id.* at 8.

SUMMARY OF ARGUMENT

The proper remedy for the constitutional violations in this case must come from an action under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), not a mere tort claim governed by state law. The purpose of *Bivens* is to deter individual federal officers from violating the Constitution. This Court has explained that ordinary tort principles do not sufficiently protect constitutional rights or deter constitutional violations. Petitioners do not have the unique immunity they claim from *Bivens* actions, and they must be held accountable in the same way as other Government personnel who provide medical care in custodial settings.

This case is not an isolated example of cruelty, as documented by journalistic investigations and other pending cases brought by immigration detainees alleging unconstitutional denials of medical care. In addition to violations by individual officers, the problems plaguing the Nation's immigration detention centers result from policies that restrict care in ways that make them unconstitutional on their face. Thus, the threat of *Bivens* lawsuits also is necessary to

create pressure for reform from within and to force the Government to address a system that not only tolerates but encourages deliberate indifference to serious medical needs.

ARGUMENT

In *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), this Court held that plaintiffs may recover damages for Fourth Amendment violations by Government officers. The Court later extended *Bivens* to Eighth Amendment violations when officers deliberately deny needed medical care to persons held in Government custody. *Carlson v. Green*, 446 U.S. 14, 18-19 (1980). The Court rejected the argument that such claims should be brought against the Government itself under the Federal Tort Claims Act (“FTCA”), rather than against individual officers under *Bivens*, explaining that Congress had not declared the FTCA a substitute for *Bivens* and that the FTCA “is not a sufficient protector of * * * constitutional rights.” *Id.* at 23.

In this case, Castaneda’s estate has sued the Government under the FTCA and individual defendants under *Bivens*. The Government has admitted FTCA liability for medical negligence. J.A. 328-339. But petitioners claim that as PHS personnel, they are uniquely immunized against *Bivens* claims by 42 U.S.C. § 233(a). Section 233(a), which was enacted as part of the Emergency Health Personnel Act of 1970, Pub. L. No. 91-623, 84 Stat. 1868, was added in response to a request by the Surgeon General that PHS personnel receive protection from ordinary malpractice liability. See Resp. Br. at 10 (describing legislative history). The district court and court of appeals, after painstaking statutory analysis, rejected

petitioners' argument that § 233(a) immunizes PHS personnel from *Bivens* actions. The court of appeals found that § 233(a) “stemmed from concerns over liability for unintentional malpractice, *not* from attempts to avoid responsibility for the kind of intentional torts that would support a constitutional violation.” Pet. App. 78. For all the reasons set forth in respondents' brief, the analysis of the courts below was correct.

Amicus ACLU submits this brief to discuss an additional reason why the decisions below should be affirmed: the harm in this case implicates core constitutional principles that can be safeguarded only through a *Bivens* remedy. When PHS personnel violate the Constitution through deliberate indifference to the serious medical needs of detainees—and this case is one of many that indicate that such violations are all too common—they must be held accountable in the same way as other Government personnel who provide medical care in custodial settings.³ Moreover, there is a strong argument that DIHS policy restricts medical care to a degree that makes the policy unconstitutional on its face. Only a *Bivens* remedy can provide the deterrence and incentive for

³ The Eighth Amendment applies to convicted prisoners. Castaneda was a civil, not criminal, detainee, and thus his constitutional rights are governed by the due process clause of the Fifth Amendment. A civil detainee's due process rights are “at least as great as the Eighth Amendment protections available to a convicted prisoner.” *City of Revere v. Massachusetts Gen. Hosp.*, 463 U.S. 239, 244-45 (1983). The Ninth Circuit has held that conditions of confinement for civil detainees must be superior not only to those for convicted prisoners but also pretrial detainees. *Jones v. Blanas*, 393 F.3d 918, 933-34 (9th Cir. 2004).

greater oversight and reform that are necessary to help prevent future tragedies like the pain, suffering, and death of Francisco Castaneda.

I. *Bivens* Provides A Constitutional Remedy That An Ordinary Tort Claim Does Not Provide.

A. *Bivens*' Purpose Is To Deter Unconstitutional Conduct By Individual Government Officers.

“The purpose of *Bivens*,” this Court has explained, “is to deter individual federal officers from committing constitutional violations.” *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 70 (2001). Such deterrence is grounded in the principle of individual accountability which is fundamental to our law. “Our system of jurisprudence rests on the assumption that all individuals, whatever their position in government, are subject to federal law[.] * * * ‘All the officers of the government from the highest to the lowest, are creatures of the law, and are bound to obey it.’” *Butz v. Economou*, 438 U.S. 478, 506 (1978) (quoting *United States v. Lee*, 106 U.S. 196, 220 (1882)). See also *Complete Auto Transit, Inc. v. Reis*, 451 U.S. 401, 429 (1981) (Burger, C.J., dissenting) (“Accountability of each individual for individual conduct lies at the core of all law—indeed, of all organized societies.”). Accordingly, this Court has not wavered from the principle that “the threat of litigation and liability will adequately deter federal officers for *Bivens* purposes no matter that they may enjoy qualified immunity, are indemnified by the employing agency or entity, or are acting pursuant to an entity’s policy.” *Malesko*, 534 U.S. at 70 (discussing and citing *FDIC v. Meyer*, 510 U.S. 471 (1994)) (internal citations omitted).

In the context of medical care for persons held in Government custody, the Court has explained that *Bivens* is “a more effective deterrent” against unconstitutional conduct than the FTCA precisely “[b]ecause the *Bivens* remedy is recoverable against individuals. * * * It is almost axiomatic that the threat of damages has a deterrent effect.” *Carlson*, 446 U.S. at 21. *Carlson* rejected the argument that FTCA liability is more likely than a *Bivens* action to cause the Government to “promulgate corrective policies.” *Ibid.* Such an argument suggests “that the superiors would not take the same actions when an employee is found personally liable for violation of a citizen’s constitutional rights. The more reasonable assumption is that responsible superiors are motivated not only by concern for the public fisc but also by concern for the Government’s integrity.” *Ibid.* Since *Carlson*, the Court has consistently upheld individual *Bivens* liability for Eighth Amendment violations. See *Farmer v. Brennan*, 511 U.S. 825 (1994); *McCarthy v. Madigan*, 503 U.S. 140, 150-152 (1992); *Malesko*, 534 U.S. at 76 (Stevens, J., dissenting) (“We have never * * * qualified our holding that Eighth Amendment violations are actionable under *Bivens*.”).

Thus, contrary to petitioners’ suggestion, this case does not involve any extension of *Bivens* into a new context. Federal Bureau of Prisons medical personnel are subject to *Bivens* liability when they deny medical care in violation of the Constitution, and there is no persuasive argument for giving different treatment to PHS personnel who staff the Government’s immigration detention facilities. Both provide care to persons whom the government has taken “into its custody” and who thus have no “freedom to act on [their] own behalf.” *DeShaney v. Winnebago*

County Dep't of Soc. Servs., 489 U.S. 189, 199-200 (1989). And although both may be indemnified or provided insurance at the Government's discretion, that decision properly rests with Congress or the Executive; affirming the decisions below will create no new judicially imposed cost on the Government. In any event, this Court has explained that *Bivens* is intended to deter individual officers from violating constitutional rights "no matter that they * * * are indemnified by the employing agency." *Malesko*, 534 U.S. at 70.

Indeed, the Government agrees that *Bivens* deterrence is necessary to prevent Eighth Amendment violations in custodial settings. As the Government's attorney explained at oral argument in *Malesko*, "there is under *Bivens* no Nuremberg defense." *Malesko*, No. 00-860, Tr. of Oral Arg. at 23. He continued:

[O]ne of the teachings of *Bivens* is that the responsibility for respecting constitutional rights is personal and individual, and therefore, liability for violating constitutional rights is also personal and individual. It ill-serves that notion of personal responsibility to shift the liability from * * * individuals who violate constitutional rights to some other source of money such as * * * the Government.

Id. at 23-24. See also *Malesko*, 534 U.S. at 70 (*Bivens* is intended to deter individuals "no matter that they * * * are acting pursuant to an entity's policy").

In short, "*Bivens* from its inception has been based * * * on the deterrence of individual officers who commit unconstitutional acts," deterrence that

“would be lost” if a *Bivens* remedy is unavailable. *Malesko*, 534 U.S. at 71. Petitioners would have this Court eviscerate that deterrent effect by immunizing PHS officers for constitutional violations, a request that should be rejected.

B. Only A Constitutional Tort Action Under *Bivens* Can Adequately Compensate Eighth Amendment Violations In Government Detention Facilities.

In addition to its deterrent effects, a *Bivens* action is necessary to effectively vindicate the Eighth Amendment’s guarantee against cruel and unusual punishment and the Fifth Amendment’s guarantee against mistreatment of civil detainees. The ordinary tort principles on which the FTCA is based are inadequate.

In the Federal Employees Liability Reform and Tort Compensation Act of 1988 (“LRTCA”), Pub. L. No. 100-694, 102 Stat. 4563, Congress made the FTCA the exclusive remedy for personal injury or death “arising or resulting from the negligent or wrongful act or omission” of Government employees acting within the scope of their employment. See 28 U.S.C. § 2679(b)(1). In other words, in ordinary tort claims, the United States is substituted for the employee as the defendant. The LRTCA was intended to address liability for “common law torts.” H.R. Rep. No. 100-700 (1988), 1988 U.S.C.C.A.N. 5945, 5947. As the courts below concluded after careful analysis, the LRTCA built upon the malpractice immunity Congress had previously given PHS personnel in § 233(a). But it is clear from the statutory text and legislative history that Congress never intended, either in § 233(a) or the LRTCA, to immunize PHS or other Government personnel for violations of consti-

tutional rights. Pet. App. 74-81. To the contrary, Congress acknowledged the “sharp distinction between common law torts and constitutional or *Bivens* torts,” because the latter involves “a more serious intrusion of the rights of an individual that merits special attention.” H.R. Rep. No. 100-700 (1988), 1988 U.S.C.C.A.N. 5945, 5950.

Under the FTCA, the Government may be held liable only “in accordance with the law of the place where the act or omission occurred.” 28 U.S.C. § 1346(b)(1). Thus, were the FTCA the sole remedy in this case, it would mean as a practical matter that Castaneda’s estate would be limited to a common-law malpractice action against the United States, an action that would be governed by the laws of California. See Pet. App. 18-19. (California, like many states, has been part of a tort-reform “revolution” in malpractice law; it caps such awards at \$250,000. *Id.* at 18.) The action by the Castaneda estate for the cruel and unusual punishment he suffered in violation of the Constitution would simply fall away.

Such an outcome would flout Congressional intent, because a Government immigration detention facility obviously bears no resemblance to the typical doctor-patient setting. As the court of appeals observed, it would be outrageous to characterize Castaneda’s suffering and death as a case of mere malpractice:

Castaneda was not a walk-in patient at Defendants’ clinic; neither are Defendants merely alleged to have misread a chart or fumbled a scalpel. The ordinary doctor, no matter how careless, does not hold her patients under lock and key, affirmatively preventing them from receiving the medical care

they need and demand. * * * The Kafkaesque nightmare recounted in Plaintiffs' complaint, which we assume here to be true, draws its force not only from Defendants' alleged deliberate indifference, but also from Castaneda's *state-imposed helplessness* in the face of that indifference. The element of state coercion transforms this into a species of action categorically different from anything Congress would likely term "malpractice."

Pet. App. 26.

Indeed, at the core of *Bivens* is the principle that where a "federal agent unconstitutionally exercis[es] his authority," his relationship to the victim of that conduct is fundamentally different than the relationship between two private parties with which ordinary tort law is concerned. 403 U.S. at 391-392. "An agent acting—albeit unconstitutionally—in the name of the United States possesses a far greater capacity for harm than an individual [tortfeasor] exercising no authority other than his own." *Id.* at 392.

Accordingly, *Bivens* rejected the argument that that the plaintiff's remedy for a Fourth Amendment violation arises from state tort law rather than the Constitution. 403 U.S. at 394 (noting that state tort law might be "inconsistent or even hostile" to federal civil rights). See also Alfred Hill, *Constitutional Remedies*, 69 COLUM. L. REV. 1109, 1151 (1969) (state-law remedies "do[] not adequately protect the federal interest against possibly aberrational state policies that limit or defeat the cause of action, such as a restrictive measure of damages"). The *Bivens* holding was consistent with the Court's view that where a constitutional violation is concerned, "[i]t is no answer that the State has a law which if enforced

would give relief.” *Monroe v. Pape*, 365 U.S. 167, 183 (1961). The “limitations on state remedies for violation of common-law rights by private citizens,” such as caps on damage awards and other restrictions embodied in state malpractice law, “argue in favor of a federal damages remedy” under the Constitution, because “[t]he injuries inflicted by officials acting under color of law, while no less compensable in damages than those inflicted by private parties, are substantially different in kind.” *Bivens*, 403 U.S. at 409 (Harlan, J., concurring in the judgment).

Thus, contrary to petitioners’ argument, a victim of unconstitutional behavior “for which the moniker ‘cruel’ is inadequate,” Pet. App. 88, should not be relegated to an FTCA claim that is governed by ordinary tort law. Federal courts hearing cases like *Castaneda’s* should not be required to “search[] for a state cause of action into which they can shoehorn a constitutional claim.” John F. Preis, *Alternative State Remedies in Constitutional Torts*, 40 CONN. L. REV. 723, 759-760 (2008). Just as “the Fourth Amendment is not tied to the niceties of local trespass laws,” *Bivens*, 403 U.S. at 393-394, remedies for violation of the Eighth Amendment’s prohibition against cruel and unusual punishment must not be left to the niceties of state malpractice law. As the Court said in *Carlson*, “The question whether [an] action for violations by federal officials of federal constitutional rights should be left to the vagaries of the laws of the several States admits of only a negative answer in the absence of a contrary congressional resolution.” 446 U.S. at 23. The “liability of federal officials for violations of citizens’ constitutional rights should be governed by uniform rules” and “should not depend upon where the violation occurred.” *Id.* at 23-24.

C. There Is No Basis For Granting PHS Personnel Unique Immunity From Constitutional Claims.

Because other Government medical personnel are immunized only for negligent acts, immunizing PHS personnel from constitutional torts would give them “the privilege, shared with no other federal employees, to violate the Constitution without consequence.” Pet. App. 36. This anomaly further demonstrates why petitioners’ interpretation of § 233(a) is erroneous and must be rejected. As the court of appeals asked, “Why distinguish the Bureau of Prisons medical personnel who allowed a man in federal custody to die in *Carlson* from the PHS personnel who allegedly relegated a man in immigration detention to a similar outcome here?” *Id.* at 37. Congress could not have intended such a result, because “the LRTCA was passed to abolish such arbitrary distinctions.” *Ibid.*

The concern about differing liability for different Government personnel is not merely speculative. Several district courts, relying on the same erroneous interpretation of § 233(a) that petitioners advance here, have dismissed claims against PHS officers while letting them proceed against non-PHS defendants, even though the PHS and non-PHS personnel worked side-by-side and were part of the same alleged unconstitutional conduct.

For example, in *Stine v. Fetterhoff*, a federal penitentiary inmate brought a *Bivens* action after medical personnel failed to properly treat an exposed jawbone that eventually became infected and caused severe pain. 2008 WL 4330572, *4-*5 (D. Colo. 2008). Based on its interpretation of § 233(a), the district court dismissed a PHS dentist from the suit but al-

lowed claims to proceed against the clinic director and warden. *Id.* at *8, *12. See also *Custard v. Young*, 2008 WL 791954 (D. Colo. 2008) (dismissing PHS employee but allowing suit to go forward against other defendants); *Freeman v. Inch*, 2005 WL 1154407 (M.D. Pa. 2005) (dismissing claim against PHS physician’s assistant).

This Court has “[n]ever suggested that a category of federal agents can commit Eighth Amendment violations with impunity.” *Malesko*, 534 U.S. at 76 (Stevens, J., dissenting). Accordingly, it should end, not endorse, such absurd and unfair distinctions among Government personnel who provide the same care in the same custodial settings.

D. For Additional Reasons Discussed In *Carlson*, An FTCA Remedy Is Inadquate To Deter Constitutional Violations By PHS Personnel.

In addition to the fact that a *Bivens* remedy provides a more powerful deterrent effect because it is grounded in constitutional principles and is directed to individuals, *Carlson* enumerated other reasons why an FTCA claim against the Government is not an effective remedy for constitutional violations. See 446 U.S. at 20. Those considerations apply to this case with full force.

For example, an FTCA plaintiff, unlike a *Bivens* plaintiff, cannot seek punitive damages, which are statutorily prohibited under the FTCA. 28 U.S.C. § 2674. Yet punitive damages “are especially appropriate to redress the violation by a Government official of a citizen’s constitutional rights.” *Carlson*, 446 U.S. at 22. Moreover, punitive damages are available in § 1983 actions against state officials, and “the

‘constitutional design’ would be stood on its head if federal officials did not face at least the same liability as state officials guilty of the same constitutional transgression.” *Ibid.* See also Hill, *Constitutional Remedies*, at 1153 (“[T]he protective provisions of the Constitution, insofar as they apply both to the federal and state governments, are entitled to equally effective implementation on the federal and state levels.”). Punitive damages are especially warranted in this case, which involves conduct the district court said “transcends negligence by miles” and presents “one of the most, if not the most, egregious Eighth Amendment violations the Court has ever encountered.” Pet. App. 82.

An FTCA plaintiff also may not seek a jury trial, 28 U.S.C. § 2402, as he may in a *Bivens* suit. Yet a person alleging violation of constitutional rights must “retain the choice” to have his case heard by a jury. *Carlson*, 446 U.S. at 23. A jury should be allowed to determine the just compensation for Castaneda’s unconstitutional suffering and wrongful death.⁴

⁴ The FTCA also includes certain exceptions that prevent recovery for the Government’s torts, such as where an injury is sustained abroad, and this Court has held that in such circumstances officials retain individual immunity under the LRTCA as well. *United States v. Smith*, 499 U.S. 160, 165 (1991). This means that without a *Bivens* action, some plaintiffs suing PHS personnel might have no possibility of recovery at all. Indeed, in *Smith* (which involved a suit against a military physician), the Court noted that *Bivens* actions allowed the possibility of recovery even where no FTCA suit was available against either the Government or the individual official. *Id.* at 166-167. Accord Hearings on H.R. 4358 et al. before the

In summary, only a constitutional remedy can adequately deter unconstitutional conduct and properly compensate victims like Francisco Castaneda. The FTCA “is not a sufficient protector of * * * constitutional rights,” *Carlson*, 446 U.S. at 23. This Court should reject petitioners’ claim to unique immunity from constitutional violations that would leave victims like Castaneda and their families with nothing more than an ordinary malpractice suit.

II. Serious Constitutional Violations Documented In Other Cases Further Demonstrate The Need For A *Bivens* Remedy.

Castaneda’s mistreatment was not an isolated example of deliberate indifference by DIHS personnel. Other cases currently pending in federal courts, including a class action brought by the ACLU (see Statement of Interest at 1, *supra*), allege clear constitutional violations that cannot be adequately deterred or remedied with simple negligence-based tort actions. They further illustrate why this Court should reject petitioners’ arguments for unique immunity from *Bivens* claims.

The grave problems plaguing immigration detention centers have begun to draw public scrutiny. An extensive investigation by the *Washington Post* found that immigration detainees too often suffer “shabby medical care within an

Subcommittee on Administrative Law and Governmental Relations of the House Committee on the Judiciary, 100th Cong., 2d Sess., 78 (1988) (“Persons alleging constitutional torts will, under [the LRTCA], remain free to pursue a remedy against the individual employee if they so choose.”).

unseen network of special prisons” where they are “locked in a world of slow care, poor care and no care, with panic and coverups among employees watching it happen.” Dana Priest & Amy Goldstein, *System of Neglect*, WASH. POST, May 11, 2008, at A1. According to the *Post*, in the five years preceding its investigation 83 detainees had “died in, or soon after, custody.” *Ibid.* “Actions taken—or not taken—by medical staff members may have contributed to 30 of those deaths.” *Ibid.* A similar report in the *New York Times* revealed that “[n]o government body is charged with accounting for deaths in immigration detention,” which is “the United States’ fastest-growing form of incarceration.” Nina Bernstein, *New Scrutiny as Immigrants Die in Custody*, N.Y. TIMES, June 26, 2007, at A1.

A more recent report in the *Times*, based on documents obtained by that paper and the ACLU, found that 107 detainees have died in ICE custody since October 2003. Nina Bernstein, *Officials Hid Truth of Immigrant Deaths in Jail*, N.Y. TIMES, Jan. 9, 2010, at A1. According to the *Times*, “the documents show how officials—some still in key positions—used their role as overseers to cover up evidence of mistreatment, deflect scrutiny by the news media or prepare exculpatory public statements after gathering facts that pointed to substandard care or abuse.” *Ibid.*

The following examples show that Castaneda’s plight, although extreme, was by no means an isolated case.

Martin Hernandez-Banderas

Martin Hernandez-Banderas arrived at the ICE San Diego facility as an immigration detainee in October 2006. In December 2006, he was brought to the

facility's medical center in a wheelchair, complaining of severe pain in his right ankle. A nurse documented that his ankle was red, hot, swollen, and tender. Physician assistant Walker (the same physician assistant who treated Castaneda) documented that the foot and ankle were oozing pus, the ankle was painful, and the foot was numb. Compl., *Hernandez-Banderas v. United States, et al.*, No. CV 08-06594 (C.D. Cal. Oct. 7, 2008) ("*Hernandez-Banderas* Compl."), ¶¶ 16-17.

Hernandez-Banderas was then seen by petitioner Hui, who documented that an ulcer on his toe had spread to his ankle and burst. Hui recommended that dead skin tissue be removed; the area was incised with a scalpel, pus was removed, and the wound was bandaged. *Hernandez-Banderas* Compl. ¶ 18. Walker diagnosed Hernandez-Banderas with cellulitis (a spreading inflammation of human tissue), diabetes mellitus, and mild gangrene to the big toe. On December 12, Hernandez-Banderas's blood sugar level was 298 mg/dl, an extremely high and abnormal reading, and DIHS administered insulin. *Id.* ¶¶ 19-20.

On December 13, DIHS documented that Hernandez-Banderas had swelling, pain, and tenderness on his right foot, abnormally high blood sugar, and a 103-degree fever. On the same day, Hui documented that he had poor pulses in his right foot, drainage of the wound, and pain. She removed more dead tissue from his leg. *Hernandez-Banderas* Compl. ¶ 21. Hui examined him again on December 26 and documented that the dead skin tissue had extended from a 1 cm. area on the ankle to "mid shin" and was swollen. She also noted that he had an open bloody wound with some layers of soft dead tissue. Another

record from December 26 documented that Hernandez-Banderas's blood sugar level was 303 mg/dl, an extremely high and abnormal level. Insulin was ordered again. *Id.* ¶ 38.

Despite the fact that Hui had actual knowledge that Hernandez-Banderas was a newly diagnosed diabetic, his blood sugar levels were abnormally high and uncontrolled by insulin, he could no longer walk and was confined to a wheelchair, and his leg was deteriorating and dying, Hui failed to refer him to a diabetic wound specialist to treat his obviously serious condition. *Hernandez-Banderas Compl.* ¶ 39.

Ultimately Hernandez-Banderas was taken to an offsite hospital, where he remained for over a month, at which point he was released from ICE custody, thus ending the Government's responsibility to pay for his care. *Hernandez-Banderas Compl.* ¶ 59. He suffered permanent physical deformity and impairment, including a recommendation to amputate his leg due to severe tissue death. *Id.* ¶ 1. Hernandez-Banderas alleges that Hui intentionally misrepresented his condition and treatment in medical records to downplay its seriousness and protect herself from liability. *Id.* ¶ 54. The *Washington Post* investigation revealed that an internal review had concluded that DIHS medical personnel "did not appreciate the severity of [Hernandez-Banderas's] diabetic foot wounds, did not properly treat them or prescribe the correct course of antibiotics, and did not bring in a qualified surgeon to evaluate the problem." Priest & Goldstein, *System of Neglect*.

Winston Carcamo

Prior to his detention at the ICE San Diego facility, Winston Carcamo suffered an injury that re-

quired removal of his right eye. At the time of the surgery, he was told he needed a prosthetic eye implant both to preserve the physical integrity of the eye socket and to prevent the spread of infection. Upon arriving at the ICE facility, Carcamo asked for an eye prosthesis and offered to have his family pay for the procedure. The procedure was delayed for more than six months, purportedly because the injury “didn’t happen here” and DIHS policy did not cover “elective or pre-existing conditions.” By the time the procedure finally occurred, it caused Carcamo severe pain because his bones had shifted and the eye socket had already begun to close. Compl., *Woods v. Myers*, No. 3:07-cv-1078 (S.D. Cal. June 13, 2007) (“*Woods Compl.*”), ¶¶ 91-94.

Jose Arias Forero

Jose Arias Forero suffered a serious shoulder injury and complained of severe pain in his right arm and shoulder, but medical personnel at the San Diego ICE facility told him there was nothing wrong and that he was faking the pain. When Forero finally received an MRI, it revealed a complete tear of his right rotator cuff. Forero did not receive surgery for the injury until approximately eight months after his arrival. Doctors’ orders that Forero receive follow-up care and physical therapy were ignored, and he suffered a complete reinjury when an officer used excessive force. Forero did not receive an MRI of the new injury for approximately four months, and at one point was turned away because no prescription for the MRI contrast medication had been ordered. *Woods Compl.* ¶¶ 80-83.

These cases and others demonstrate that the deliberate indifference and unconstitutional suffering that Castaneda endured were not an isolated prob-

lem. The allegations in these cases go far beyond the sort of negligent malpractice that the FTCA was intended to compensate. Without a *Bivens* remedy, victims and their families will have no cause of action available to address such cruel conduct.

III. Bivens Liability Also Will Generate Pressure From Within DIHS To Reform Policies That Unconstitutionally Restrict Detainee Medical Care.

In addition to unconstitutional denials of treatment committed by individual officers, the serious problems of immigration detainee medical care also result from DIHS policies that restrict diagnosis and treatment in ways that make them unconstitutional on their face. Indeed, in this case petitioners repeatedly blamed their failure to properly treat Castaneda on DIHS policy against paying for “elective” care. See, e.g., Pet. App. 6; J.A. 125. This Court has made clear that *Bivens* is intended to deter Government officers from violating the Constitution “no matter that they * * * are acting pursuant to an entity’s policy.” *Malesko*, 534 U.S. at 70. But to the extent that DIHS policy encourages constitutional violations, the threat of *Bivens* lawsuits against individual officials is necessary to create pressure for reform from within DIHS, as well as to spur appropriate Government officials to address the matter.

“[W]hen the State takes a person into its custody and holds him there against his will,” this Court has explained, “the Constitution imposes upon it a corresponding duty to assume some responsibility for his safety and general well-being.” *DeShaney*, 489 U.S. at 199-200. “An inmate must rely on prison authorities to treat his medical needs; if the authorities fail to do so, those needs will not be met.” *Estelle v.*

Gamble, 429 U.S. 97, 103 (1976). This “affirmative duty to protect arises not from the State’s knowledge of the individual’s predicament or from its expressions of intent to help him, but from the limitation which it has imposed on his freedom to act on his own behalf.” *DeShaney*, 489 U.S. at 200.

For prison inmates, the Constitution is violated when officials manifest “deliberate indifference to serious medical needs.” *Estelle*, 429 U.S. at 104. Specifically, officials are liable if they ignore an “excessive risk to inmate health or safety” or a “risk of serious damage to his future health.” *Farmer*, 511 U.S. at 837, 843.

Immigration detainees held by ICE are no less in the Government’s custody than federal prison inmates, and they have no greater ability to arrange their own medical care or “act on [their] own behalf.” *DeShaney*, 489 U.S. at 200. Yet under DIHS policy, medical treatment is restricted to “emergency care” and medical conditions that “would cause deterioration of the detainee’s health or uncontrolled suffering *affecting his/her deportation status.*” DIHS Covered Services Package, J.A. 194 (emphasis added). In other words, DIHS only recognizes a need to keep a detainee minimally healthy enough to be deported or otherwise released.

This policy cannot be reconciled with this Court’s holdings that Government officials must treat *any* medical condition that poses “excessive risk to inmate health or safety.” *Farmer*, 511 U.S. at 837. The Eighth Amendment applies not just to immediate health problems but also to the “*future harm*” a detainee may suffer from his condition. *Helling v. McKinney*, 509 U.S. 25, 33 (1993) (emphasis added). “We have great difficulty agreeing that prison au-

thorities may not be deliberately indifferent to an inmate's current health problems but may ignore" a medical problem "that is sure or very likely to cause serious illness and needless suffering the next week or month or year." *Ibid.* A "life-threatening condition * * * need not await a tragic event." *Ibid.* See also *McKenna v. Wright*, 386 F.3d 432, 437 (2d Cir. 2004) (no qualified immunity for defendants who were claimed to have denied treatment for Hepatitis C because prisoner might be released within a year). Nor can a desire to limit the cost of medical care justify failure to address a serious medical need. *Jones v. Johnson*, 781 F.2d 761, 771 (9th Cir. 1986). In short, the standard of care imposed by the Eighth Amendment is not limited to emergency care or to treatment that merely keeps a detainee alive until he is no longer the Government's problem.

Bivens liability is necessary in this context because, in addition to deterring individual constitutional violations, it will spur PHS personnel to apply pressure within the system to reform DIHS's unconstitutional policy. As the *Washington Post* documented, petitioner Hui in 2008 "sent a memo to DIHS medical director Timothy T. Shack, saying her colleagues were worried that they might be sued because of the substandard care they were giving detainees." Priest & Goldstein, *System of Neglect*. "The agency's mission of 'keeping the detainee medically ready for deportation' often conflicts with the standards of care in the wider medical community, Hui wrote." *Ibid.* Hui confirmed in a deposition taken for the *Banderas* case that the DIHS policy was "a concern of some physicians working at DIHS." Dep. of Esther Hui, *Banderas v. United States*, No. CV 08-06594 (C.D. Cal. June 10, 2009), at 21-22. The *Post* investigation also revealed that in an internal review

of another detainee death, when asked whether the patient had received “appropriate and adequate health care consistent with community standards,” Hui checked “No.” Priest & Goldstein, *System of Neglect*.

PHS personnel typically are indemnified by the Government when they are sued in their individual capacities under *Bivens* (a choice that is entirely within the Government’s discretion) and damage awards in *Bivens* cases can be substantially larger than awards under the FTCA. The pressure of increased monetary judgments, along with the adverse publicity generated by constitutional lawsuits, will help force reform in a system that is plagued by “flawed medical judgments, faulty administrative practices, neglectful guards, ill-trained technicians, sloppy record-keeping, lost medical files and dangerous staff shortages.” Priest & Goldstein, *System of Neglect*. Indeed, the *New York Times* recently reported that the Government “has vowed to overhaul immigration detention” and is “mov[ing] to increase oversight” of ICE. Bernstein, *Officials Hid Truth of Immigrant Deaths in Jail*.

In summary, the responsibility to prevent constitutional violations and reform the shocking conditions in our Nation’s immigration detention facilities lies both with the individual personnel who work in those facilities and with the Government officials charged with making policy. The continued availability of *Bivens* actions will encourage the execution of that responsibility in ways that are entirely consistent with this Court’s decisions.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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JANUARY 2010