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REMEDIES FOR DETAINEES: THE IMPACT OF THE NINTH CIRCUIT'S DECISION ON MEDICAL NEGLIGENCE CASES

ARZOO RAJANI*

I. INTRODUCTION

The United States Department of Immigration and Customs Enforcement (hereinafter “ICE”) is one of the largest branches of the Department of Homeland Security and its mission “is to protect the security of the American people and homeland by vigilantly enforcing the nation’s immigration and customs laws.”¹ The Office of Detention and Removal Operations (hereinafter “DRO”) is one of the four operational divisions of ICE whose mission is to “identify and apprehend illegal aliens, fugitive aliens, and criminal aliens, to manage them while in custody and to enforce orders of removal from the United States.”² Prior to the 1980s, it was highly unusual for the Immigration and Naturalization Service (hereinafter “INS”) to hold large scale detention of legal or illegal aliens and the conventional policy was to exclude undocumented aliens seeking residence at the border or deporting those aliens who had crossed into the

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¹ U.S. Immigration & Customs Enforcement, <http://www.ice.gov/about/index.htm> (last visited Dec. 19, 2009). With over 19,000 employees in over 400 offices, ICE plays an integral part in the defense of this nation. *Id.* By using advance technology, ICE serves various law enforcement agencies on federal, state, and local levels. *Id.*

² U.S. Immigration & Customs Enforcement, <http://www.ice.gov/pi/dro> (last visited Dec. 19, 2009). One of the responsibilities of this department is to develop and maintain a system of processing aliens through immigration courts and as well as enforcing their removal. *Id.*

United States illegally.³ Today, many immigrants end up in detention centers because of random raids at worksites, private residences, or stops for civil violations. INS contracts out to various local jails for the care and control of these detainees in their custody, making immigrant detainees one of the “fastest growing segment[s] of the jail population in the United States.”⁴

Even though these detainees have not committed any crimes, INS detention centers treat them like criminals by requiring them to wear prison uniforms, spend time in their cells, transporting them in handcuffs, strip searching them, denying them basic medical services and/or disciplining them brutally for not following prison rules a result of detainees’ poor English comprehension.⁵ Since detainees are granted fewer due process rights than American prisoners, many times these detainees are not even appointed legal counsel unless they can afford it.⁶

Regardless of their legal status, immigrant detainees have certain basic rights in the United States which flow from the U.S. Constitution such as a right to counsel,⁷ a right to due

³ TERESA A. MILLER, *The Impact of Mass Incarceration on Immigration Policy*, in *INVISIBLE PUNISHMENT: THE COLLATERAL CONSEQUENCES OF MASS IMPRISONMENT* 214, 214 (Marc Mauer & Meda Chesney-Lind eds., 2002) (mentioning other alternatives to detention of aliens). Aliens, whether legal or illegal, had options such as bail, “release on one’s own recognizance”, and various other forms of relief other than detention. *Id.* Even “[a]liens who were legally residing in the United States but who had committed acts subjecting them to deportation likewise had options other than detention.” *Id.*

⁴ *Id.* In 1994, there were approximately fifty-five hundred detainees held in the INS custody. *Id.* However, this number tripled to 16,000 in 1997 and rose to approximately 20,000 detainees by 2001. *Id.*

⁵ *Id.* Most detainees’ only crime is that they came into United States without proper documentation. *Id.* at 214. Many times, aliens seeking asylum are detained as well as those immigrants who might have overstayed their visa. *Id.*

⁶ *Id.* at 215. In fact, it has been reported that merely 11 percent of immigrant detainees receive any legal representation. *Id.*

⁷ U.S. CONST. amend. VI.

The Sixth Amendment provides certain protections to defendants in criminal trials. However, the Sixth

process,⁸ a right to equal protection under the law,⁹ and protection from cruel and unusual punishment.¹⁰ However,

Amendment does not apply to deportation proceedings, which are considered civil actions. All *Bivens* actions involving defects in a deportation proceeding should be brought under the Fifth Amendment rather than the Sixth Amendment. Most Sixth Amendment cases in the detainee context pertain to the right of access to the courts.

A.B.A., *A Legal Guide for INS Detainees: Actions Brought Against INS or Other Law Enforcement Officials for Personal Injury or Property Damage or Loss*, III 6-7, <http://www.abanet.org/publicserv/immigration/ftcaandbivens.pdf> (last visited Dec. 20, 2009) (citations omitted).

⁸ U.S. CONST. amend. V (“No person shall be . . . deprived of life, liberty, or property, without due process of law . . .”).

The Supreme Court has also recognized a *Bivens* cause of action arising from the Fifth Amendment’s due process clause. What is due process? Due process generally requires notice and an opportunity to be heard. Therefore, an administrative hearing or a court proceeding may be required before federal officers take some actions against detainees. Also, in some cases, detainees must be provided with an opportunity to complain . . . about an officer’s action. Whether a due process claim will be successful . . . can be answered by asking . . . were the officer’s actions negligent?

If yes: money damages may NOT be collected under *Bivens*. The reason . . . negligent conduct by a government official, even though causing injury, does NOT constitute a deprivation under the Due Process Clause. A detainee may, however, be able to sue the United States, in accordance with state tort law, under the FTCA. If no: the plaintiff may be able to win and recover monetary compensation under *Bivens* even if the actions were random and unauthorized. Administrative situations potentially violating the Due Process Clause: (1) Complaints never resolved; (2) Ineffective procedures for bringing complaints; (3) Improper disciplinary procedures; and if (4) Pay for labor is delayed.

A.B.A., *A Legal Guide for INS Detainees: Actions Brought Against INS or Other Law Enforcement Officials for Personal Injury or Property*

many of these rights are violated regularly within the immigration detention centers and in fact; immigration experts have described the conditions within the detention system as “the worst of all worlds.”¹¹ In particular, medical rights by ICE/DRO standard call for detainees to have access to a broad range of medical services including diagnosis and

Damage or Loss, III 4-5, 33-34

<http://www.abanet.org/publicserv/immigration/ftcaandbivens.pdf> (last visited Dec. 20, 2009) (citations omitted).

The Due Process Clause actions additionally includes claims that revolve around issues of Equal Protection such as:

A plaintiff must allege that he or she was treated differently than other detainees on the basis of some impermissible factor, such as race, sex, or religion.

Equal Protection Clause/Due Process Clause claims require that the plaintiff prove three elements:

1. He was treated differently than other prisoners based on some characteristic.
2. The characteristic was not an acceptable basis for discriminating between inmates, e.g., race, sex, or religion.
3. Because of the differential treatment, he suffered some injury.

Id.

⁹ U.S. CONST. amend. XIV, § 1 (“No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.”).

¹⁰ U.S. CONST. amend. VIII; A.B.A., *A Legal Guide for INS Detainees: Actions Brought Against INS or Other Law Enforcement Officials for Personal Injury or Property Damage or Loss*, III 7, <http://www.abanet.org/publicserv/immigration/ftcaandbivens.pdf> (last visited Dec. 20, 2009) (“A detainee may make an Eighth Amendment claim only if she was convicted of a crime and spent time in prison.”).

¹¹ Julia Preston, *Firm Stance on Illegal Immigrants Remains Policy*, N.Y. TIMES, Aug. 4, 2009, available at <http://www.nytimes.com/2009/08/04/us/politics/04immig.html>. The immigration director of the National Council of La Raza stated “[w]e understand the need for sensible enforcement, but that does not mean expanding programs that often led to civil rights violations.” *Id.* The governor of Arizona, Ms. Napolitano stated that she would not call off worksite or home raids but will continue looking for effective ways to do it. *Id.*

treatment.¹² This standard is violated regularly and many detainees have problems obtaining needed medical care.¹³ Most frequently, detainees' medical concerns include dental problems, not receiving proper medication, or complaints of severe pain are often minimized and dismissed.¹⁴

This comment examines the impact of the Ninth Circuit's holding in medical neglect cases and whether the Second Circuit made an error. To examine this issue, it must first be understood what the factual and legal background is concerning each case, the detainee's medical rights and the types of actions they can bring against government employees. After examining the law, the Second Circuit's holding is then compared with the Ninth Circuit's holding. Finally, this comment argues why the Supreme Court should affirm the Ninth Circuit's holding.

II. FACTUAL BACKGROUND FOR *CASTANEDA* AND *CUOCO* CASES

One such case medical neglect case is that of Francisco Castaneda, an immigrant detainee who developed terminal penile cancer and had his penis amputated because medical personnel refused to provide him with a biopsy during his nearly eleven-month detention by ICE.¹⁵ Castaneda entered

¹² U.S. Immigration & Customs Enforcement, *ICE/DRO Detention Standard: Medical Care*, 1-3 (Dec. 2, 2008), http://www.ice.gov/doclib/PBNDS/pdf/medical_care.pdf.

¹³ Detention Watch Network, *Conditions in Immigration Detention – ICE Detention Standards*, <http://www.detentionwatchnetwork.org/node/2383> (last visited June 20, 2010).

¹⁴ *Id.*

¹⁵ Henry Weinstein, *Feds' actions 'beyond cruel'*, LOS ANGELES TIMES, Mar. 13, 2008, available at <http://articles.latimes.com/2008/mar/13/local/me-cruel13>. The U.S. District Judge allowed Castaneda's family to bring forth a claim and seek financial damages from the government. *Id.* The Judge "blasted public health officials' 'attempt to sidestep responsibility for what appears to be . . . one of the most, if not the most, egregious' violations of the constitutional prohibition against cruel and unusual punishment that 'the court has ever encountered.'" *Id.*

the San Diego Correctional Facility under ICE custody on March 27, 2006 and immediately informed the medical personnel that a lesion on his penis was growing painful, bleeding and exuding discharge.¹⁶ Castaneda thereafter met with the physician's assistant who recommended a urology consultation and biopsy after an examination, noting of Castaneda's medical history of genital warts and family history of cancer.¹⁷

Castaneda was not provided an outside consultation until June 7, 2006, more than two months after he entered ICE custody.¹⁸ On that date Castaneda met with an oncologist who determined that his symptoms required an urgent diagnosis and treatment, including a biopsy.¹⁹ Castaneda's treating physician at the detention center determined that the biopsy was an elective outpatient procedure and rejected it even though she admitted that a biopsy was medically necessary and the only definitive way to rule out cancer.²⁰ Over the next several months, Castaneda's symptoms worsened but he did not receive the biopsy.²¹

The Division of Immigration Health Services' (hereinafter "DIHS") records from November 14, reflect that Castaneda's "symptoms have worsened, . . . he feels a constant pinching pain, . . . has blood and discharge on his shorts, . . . [and] complains of a swollen rectum."²² DIHS responded by prescribing Castaneda laxatives and increasing his weekly allotment of boxer shorts.²³ On January 25, 2007,

¹⁶ Castaneda v. Henneford, 546 F.3d 682, 684-85 (9th Cir. 2008).

¹⁷ *Id.* at 685.

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.* (emphasizing that the condition could worsen if the benign lesion is not promptly and properly treated). Although the notes indicated that Castaneda should have been admitted for a biopsy, the DIHS physicians determined that this would be costly and decided not to pursue an outpatient biopsy. *Id.*

²¹ *Id.*

²² Castaneda v. Henneford, 546 F.3d 682, 685 (9th Cir. 2008).

²³ *Id.* at 686. Castaneda also complained that the lesion had grown and it was hard for him to stand and urinate because it would spray everywhere. *Id.* Additionally, Castaneda complained that the lesion was

Castaneda was seen by another doctor who also ordered a biopsy after determining that Castaneda “most likely [had] penile cancer.”²⁴ However, on February 5, instead of providing the biopsy, ICE released Castaneda, who then went to the emergency room of Harbor-UCLA Hospital in Los Angeles on February 8, where he was diagnosed with squamous cell carcinoma of the penis.²⁵ His penis was amputated on February 14, but the amputation did not occur in time to save Castaneda’s life, as the cancer had metastasized and did not respond to numerous rounds of chemotherapy.²⁶ Castaneda died on February 16, 2008 at the age of thirty-six.²⁷

Castaneda’s story is one of thousands involving detainees who are denied basic medical rights every day. Additionally, ICE detention centers are not the only ones with problems providing adequate medical care to its detainees. Cuoco was a “pre-trial detainee at FCI Otisville” Prison and a “preoperative male to female transsexual.”²⁸ Before she was arrested, she was receiving treatments for her gender transsexualism under a physician’s supervision.²⁹ Once Cuoco entered the prison, she informed the physician’s assistant of her condition and at that time was allowed to keep her medication for self-administration.³⁰

continuously leaking blood and pus, which stained his sheets and his underwear. *Id.*

²⁴ *Id.*

²⁵ *Id.* Most penile cancers are like Castaneda’s, squamous cell carcinomas, which is described as “cancer that begins in flat cells lining the penis.” See U.S. Nat’l Inst. of Health, *Penile Cancer*, <http://www.cancer.gov/cancertopics/types/penile> (last visited Dec. 20, 2009).

²⁶ *Castaneda*, 546 F.3d at 686.

²⁷ *Id.* at 686-87. The cancer not only created “a 4.5 centimeter-deep tumor in his penis”, but it also spread to his lymph nodes and eventually throughout his body. *Id.* at 686. Even though Castaneda received chemotherapy for a year, it was not enough to save his life. *Id.*

²⁸ *Cuoco v. Moritsugu*, 222 F.3d 99, 103 (2d Cir. 2000).

²⁹ *Id.*

³⁰ *Id.* Cuoco at that time also told the physician’s assistant that the dosage of her medicine will be lowered when her operation will take place. *Id.* Based on that information, she was allowed to keep ten tablets of hormones. *Id.*

On September 10, Cuoco met with a physician who called her “the HE/SHE” and told her that he knew nothing about transsexuals and never diagnosed or treated them in his medical career.³¹ Although the physician agreed to renew Cuoco’s prescription, he did only at a quarter the level that is required for her treatment.³² The Bureau of Prisons Health Services Manual states:

It is the policy of the Bureau of Prisons to maintain the transsexual inmate at the level of change existing upon admission to the Bureau. Should responsible medical staff determine that either progressive or regressive treatment changes are indicated, these changes must be approved by the [Bureau of Prisons] Medical Director prior to implementation. The use of hormones to maintain secondary sexual characteristics may be continued at approximately the same levels as prior to incarceration, but such use must be approved by the Medical Director.³³

On September 17, Cuoco met with the same physician who told her that she would not be getting any more medication.³⁴ Since she had not undergone the surgery she was not considered a true transsexual and the Bureau of Prisons policy only applied to true transsexuals.³⁵ In response, Cuoco threatened suicide and “began to suffer psychological and physical withdrawal symptoms resulting from the termination of the estrogen treatment.”³⁶

³¹ *Id.* at 103-04. The physician also asked Cuoco if she was planning to have surgery while in prison and after Cuoco told him that she didn’t have any such plans, the physician decided to renew her medication. *Id.*

³² *Id.* at 104.

³³ *Id.* (citing Fed. Bureau of Prison Health Serv. Manual, § 6803 (2008)).

³⁴ *Cuoco v. Moritsugu*, 222 F.3d 99, 104 (2d Cir. 2000).

³⁵ *Id.* at 104.

³⁶ *Id.* Cuoco made several other suicide threats but instead of getting medical assistance, she was placed in isolation. *Id.* Furthermore, she was

Both the cases discussed above were tried in appellate courts and even though both have similar circumstances of health officials denying the detainees their basic medical care and violating their constitutional rights, they had opposite holdings. In determining the question whether medical personnel can claim absolute immunity under the terms of the Public Health Service Act (hereinafter “PHSA”), the Second Circuit in *Cuoco* held in the affirmative,³⁷ while the Ninth Circuit in *Castaneda* held in the negative.³⁸ In determining whether the Federal Tort Claims Act (hereinafter “FTCA”) is the exclusive remedy for actions against members of the Public Health Service (hereinafter, “PHS”), the Second Circuit held in the affirmative,³⁹ while the Ninth Circuit held in the negative.⁴⁰

III. LAW ON DETAINEES’ RIGHTS

A. Medical Rights Afforded to Detainees

The history of immigration detention centers goes as far back as the 1890s when up until that point immigrants were not detained while awaiting resolution of their legal status.⁴¹

harshly treated by stripping her down to her underwear and being forced to sleep in the cold. *Id.*

³⁷ *Id.* at 107. “We conclude that under its plain meaning, §233(a) covers the conduct of both *Barraco* and *Moritsugu*.” *Id.*

³⁸ *Castaneda v. Henneford*, 546 F.3d 682, 701-02 (9th Cir. 2008) (The court concluded that §233 does not provide absolute immunity to public health service employees from constitutional claims.).

³⁹ *Cuoco v. Moritsugu*, 222 F.3d 99, 108 (2d Cir. 2000) (quoting *Carlson v. Green*, 446 U.S. 14, 18 (7th Cir. 1980)) (“[W]hen 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’ the plaintiff is barred from bringing a *Bivens* action.”). The court found that FTCA is that alternative remedy. *Id.*

⁴⁰ *Castaneda v. Henneford*, 546 F.3d 682, 699 (9th Cir. 2008) (holding “§233(a) does not explicitly declare the FTCA to be a substitute remedy for *Bivens* actions against the PHS officers and employees”).

⁴¹ Detention Watch Network, *The History of Immigration Detention in the U.S.*, <http://www.detentionwatchnetwork.org/node/2381> (last visited Oct. 21, 2009) (“The detention system is vast, ever-changing, and shrouded in secrecy.”).

This changed in the 1890s with the opening of Ellis Island and the first immigration detention center.⁴² Ellis Island was closed in 1952 after Congress passed the Immigration and Nationality Act (hereinafter “INA”) which mandated that immigrants be detained only in cases where they posed a serious risk to security.⁴³ In the 1990s, there was a major shift

Detention places extreme financial and emotional burdens on families by separating children, parents, siblings, and spouses from one another. One in five American families is of “mixed” status with U.S. citizens, legal permanent residents and undocumented family members in one household. When someone is detained it leaves a considerable impact on families and local communities – children become parentless, families lose their breadwinners, and jobs and community responsibilities become vacant. International law requires that the United States protect the family as the natural and fundamental group unit of society.

Id.

⁴² *Id.* (Detention is seen as the only way to ensure that immigrants appear for their court proceedings.). International law prohibits arbitrary detention.

The International Covenant on Civil and Political Rights, art. 9, requires that anyone who is deprived of liberty by arrest or detention should be entitled to take proceedings before a court, in order that court may decide without delay on the lawfulness of the detention and order release if the detention is not lawful. This right is guaranteed regardless of national origin. International law also requires that anyone deprived of liberty must be treated with humanity and respect for the inherent dignity of the person.

Id.

⁴³ *Id.* (According to the government, those immigrants who have criminal records pose serious security risks.).

However, many times “[t]he harshness of the detention and deportation system may force immigrants in the U.S. to go into hiding and live in fear. Undocumented persons often do not seek help in emergencies or report crimes for fear of exposing themselves to immigration

in immigration policy because detention centers were used as a primary means of enforcement regardless of whether the detainee posed any security threat.⁴⁴ In 1994, the average daily population of a detention center was approximately 5,000 detainees, but after September 11, 2001, the average daily population went up to 19,000 detainees and currently approximately 32,000 people are detained every day.⁴⁵

Even though the average daily population of detainees has tripled throughout the years, the amount of funds that the government spends on immigrant detainees' care, especially health care, has not even doubled.⁴⁶ As a result, many detainees either suffer from injuries or die because of diseases.⁴⁷ The ICE/DRO's Operations Manual regarding detainee's health care states:

authorities, making communities more unsafe. Those escaping persecution in their home countries may also be deterred from applying for asylum, putting them at grave risk.”

Id.

⁴⁴ *Id.* (Detention is known to be used as means to deter people from immigrating to the United States.).

⁴⁵ *Id.* (“The detention and deportation of immigrants is a multi-billion dollar industry.”). ICE’s goal is to deport as many aliens as possible by the year 2012. *Id.*

⁴⁶ Detention Watch Network, *The History of Immigration Detention in the U.S.*, <http://www.detentionwatchnetwork.org/node/2381> (last visited Oct. 21, 2009) (addressing the small amount of funds spent on immigration detention center). Many times detention is contracted out to private corporations who profit from detention by cutting corners. *Id.*

⁴⁷ Detention Watch Network, *The History of Immigration Detention in the U.S.*, <http://www.detentionwatchnetwork.org/node/2381> (last visited Oct. 21, 2009) (addressing the lack of resources for immigrant detainees and the poor conditions along with abuses that have been reported in detention centers throughout the country); *Problems with Immigration Detainee Medical Care: Hearing Before the Subcomm. on Immigration, Citizenship, Refugees, Border Security, and International Law of the Comm. On the Judiciary House of Rep.*, 110th Cong. 1-2 (2008) (statement of Rep. Zoe Lofgren, Chairwoman, S. Comm. on Immigration, Citizenship, Refugees, Border Security, and International Law), available at http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=110_house_hearings&docid=f:42722.pdf (There have been many reports by news agencies such as THE WASHINGTON POST or 60 MINUTES regarding medical care that is provided to detainees

Detainees will have access to a continuum of health care services, including prevention, health education, diagnosis, and treatment. Health care needs will be met in a timely and efficient manner. Newly admitted detainees will be informed, orally and in writing, about how to access health services. . . . A transportation system will be available that ensures timely access to health care services that are only available outside the facility, including: prioritization of medical need, urgency (such as the use of ambulance instead of standard transportation) and transfer of medical information. A detainee who requires close, chronic or convalescent medical supervision will be treated in accordance with a written plan approved by licensed physician, dentist, or mental health practitioner that includes directions to health care providers and other involved medical personnel. Detainees will have access to specified 24-hour emergency medical, dental, and mental health services Detainees with chronic conditions will receive care and treatment for conditions where non-treatment would result in negative outcomes or permanent disability as determined by the clinical medical authority.⁴⁸

at ICE immigration centers.). Many of these reports include actual documents and interviews with government employees who have revealed all the information that the government tries to hide. *Id.* For example, at the San Pedro facility “the clinical director prohibited medical staff from doing any lab work for detainees no matter what their condition until they had been detained for more than 30 days.” *Id.*

⁴⁸ U.S. Immigration & Customs Enforcement, *ICE/DRO Detention Standard: Medical Care*, 1-3, (Dec. 2, 2008), http://www.ice.gov/doclib/PBNDS/pdf/medical_care.pdf; Detention Watch Network, *The History of Immigration Detention in the U.S.*, <http://www.detentionwatchnetwork.org/node/2381> (last visited Oct. 21,

Even with the above guidelines, sick immigrant detainees are “locked in a world of slow care, poor care and no care, with panic and cover-ups among employees watching it happen, according to a [Washington] Post investigation.”⁴⁹ As a result, many immigrant detainees and their families have brought civil actions against the United States government and its employees.

B. Actions against Government Employees in Medical Neglect Cases

The FTCA, passed by Congress in 1948, gave American citizens the right to sue the federal government.⁵⁰ The FTCA allows a civil action to be brought against the United States government for money damages as a result of the loss of personal property, personal injury or death caused by the negligent or wrongful act or omission by a government employee acting within the scope of their employment.⁵¹ The FTCA also allows civil claims to be brought against the federal government “under circumstances where the United States, if acting as a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.”⁵²

2009) (ICE standards are not strictly enforced in a majority of the detention centers, resulting in various human rights abuses.).

⁴⁹ Dana Priest & Amy Goldstein, *Careless Detention: System of Neglect*, WASH. POST, May 11, 2008, at A1, available at http://www.washingtonpost.com/wp-srv/nation/specials/immigration/cwc_d1p1.html (Many of the detainees who are physically sick or even mentally ill are denied basic medical treatment which they are entitled to by law.).

⁵⁰ Federal Tort Claims Act, 28 U.S.C.A § 1346(b) (2006).

⁵¹ *Id.*

⁵² *Id.* (The FTCA allows claims to be brought forward for wrongful conduct of negligence, assault, battery, false imprisonment, abuse of process, and malicious prosecution.); See American Bar Association, *A Legal Guide for INS Detainees: Actions Brought Against INS or Other Law Enforcement Officials for Personal Injury or Property Damage or Loss*, II 1-2, <http://www.abanet.org/publicserv/immigration/ftcaandbivens.pdf> (last

In 1971, Congress passed the PHSA, which provides absolute immunity from suit for PHS employees.⁵³ The PHSA states that the remedy against the United States provided in the Act precludes a remedy for damage of personal injury or death from the performance of medical or related functions by a commissioned officer or employee of the Public Health Service while acting within the scope of his office or employment.⁵⁴ Even though there were no remedies available for constitutional violations committed by federal agents, the Supreme Court had long held that federal courts had the power to grant relief not expressly authorized by statute as well as the power to adjust remedies to grant relief made necessary by the particular circumstances of the case at hand.⁵⁵ In *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, a violation of a specific constitutional amendment by a federal employee was recognized as a cause of action for monetary damages and the victim of such a deprivation could sue for the violation of the Amendment itself, despite the lack of any federal statute authorizing such a suit.⁵⁶ The existence of a remedy for the violation was implied from the importance of the right violated and without *Bivens* actions, the right to hold federal employees personally liable for malicious, vicious and even depraved actions is severely limited under the Civil Rights Act of 1964 and subsequent revisions.⁵⁷

visited Dec. 20, 2009) (Additionally, FTCA is usually interpreted as all claims are mainly resolved in the favor of the government of the U.S.).

⁵³ Public Health Service Act, 42 U.S.C. §233(a) (2006).

⁵⁴ *Id.*

⁵⁵ Adele P. Kimmel, Conal Doyle & Thomas M. Dempsey, *Litigating Medical Neglect Cases on Behalf of Immigrant Detainees: The Impact of the Ninth Circuit's Decision in Castaneda v. Henneford*, <http://www.publicjustice.net/Repository/Files/Litigating%20Medical%20Neglect%20Cases%20on%20Behalf%20of%20Immigrant%20Detainees.pdf>.

⁵⁶ *Id.* at 2.

⁵⁷ *Id.* (asserting that *Bivens* created a civil rights cause of action against constitutional violations); A.B.A., *A Legal Guide for INS Detainees: Actions Brought Against INS or Other Law Enforcement Officials for Personal Injury or Property Damage or Loss*, I, <http://www.abanet.org/publicserv/immigration/ftcaandbivens.pdf> (last

In 1976, *Estelle v. Gamble* established three basic rights of prisoners to bring medical neglect claims under the Eighth Amendment's Cruel and Unusual Punishment Clause: (1) the right to access to care, (2) the right to care that is ordered, and (3) the right to a professional medical judgment.⁵⁸ "The right to access to care—emergency and routine, as well as specialists and hospitals when needed—is fundamental. When access is denied or delayed, the health staff does not know which patients need immediate attention and which need care that can wait. 'A well-monitored and well-run access system is the best way to protect prisoners from unnecessary harm and suffering and, concomitantly, to protect prison officials from liability for denying access to needed medical care.'"⁵⁹

In 1980, *Carlson v. Green* established a federal prisoner's right to bring a *Bivens* claim for medical neglect under the Eighth Amendment in addition to a suit under the FTCA.⁶⁰ *Carlson* also created an exception to this rule: a *Bivens* remedy will not be available when an alternative remedy is both declared as a substitute and is equally effective or in the presence of special factors which militate against a direct recovery remedy. But in the case of *Carlson*, the Court held that there was nothing stated in the FTCA or its legislative history to show that Congress meant to pre-empt a *Bivens*

visited Dec. 20, 2009) ("INS detainees who have been injured due to the actions of federal officers before or during their stay in a federal, state, or local detention center may file BOTH a FTCA complaint against the United States and a *Bivens* complaint against individual officers at the same time in order to obtain monetary compensation for their injuries.").

⁵⁸ *Estelle v. Gamble*, 429 U.S. 97, 104-05 (1976) (emphasizing that deliberate indifference to a person's medical needs is an Eighth Amendment violation).

⁵⁹ William J. Rold, *30 Years After Estelle v. Gamble: A Legal Retrospective*, National Commission on Correctional Health Care, http://www.ncchc.org/pubs/CC/legal_30years.html (last visited Oct. 20, 2009) (citing E. Winner, *An Introduction to the Constitutional Law of Prison Medical Care*, 1 J. OF PRISON HEALTH 67 (1981)).

⁶⁰ *Carlson v. Green*, 446 U.S. 14, 18-23 (1980) (asserting the various remedies available for medical rights violation).

remedy or create an equally effective remedy for constitutional violations.⁶¹

In 1988, Congress passed the Federal Employees Liability Reform and Tort Compensation Act (hereinafter, “LRTCA”), which states:

(b)(1) 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 arising or resulting from the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment is exclusive of any other civil action or proceeding for money damages by reason of the same subject matter against the employee whose act or omission gave rise to the claim or against the estate of such employee. Any other civil action or proceeding for money damages arising out of or relating to the same subject matter against the employee or the employee's estate is precluded without regard to when the act or omission occurred.

(b)(2) Paragraph (1) does not extend or apply to a civil action against an employee of the Government—

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

(B) which is brought for a violation of a statute of the United States under which such action against an individual is otherwise authorized.⁶²

The LRTCA amended the FTCA to provide for the substitution of the United States as a defendant in any action

⁶¹ *Id.* (arguing how there is an exception but the burden would fall on the defendant to meet the requirements).

⁶² Fed. Employees Liability Reform and Tort Compensation Act, 28 U.S.C. § 2679(b) (1988).

where one of its employees is sued for damages as a result of an alleged common law tort committed within the scope of his or her employment.⁶³ Congress enacted the LRTCA to respond to the United States Supreme Court's decision in *Westfall v. Erwin*, which limited a federal official's absolute immunity from tort claims to situations where the official's actions were "within the outer perimeter of an official's duties and . . . discretionary in nature."⁶⁴ Congress saw the *Westfall* decision as an erosion of the common law tort immunity formerly available to federal employees and even though it acts as a general grant of immunity to government employees for all official acts, it clarifies that the general immunity does not extend or apply to a civil action against an employee of the government.⁶⁵

In *Cuoco*, the Court of Appeals for the Second Circuit reversed the District Court's dismissal of the action.⁶⁶ The Second Circuit found that the prison medical director and chief medical officer were absolutely immune under the PHSA.⁶⁷ Further, the Court held that a "government official is entitled to qualified immunity from suit for actions taken as a government official if: (1) the conduct attributed to the official is not prohibited by federal law, constitutional or otherwise, (2) the plaintiff's right not to be subjected to such conduct by the official was not clearly established at the time of the conduct, or (3) the official's action was objectively legally reasonable in light of the legal rules that were clearly established at the time it was taken."⁶⁸ The Second Circuit,

⁶³ Fed. Employees Liability Reform and Tort Compensation Act, 28 U.S.C. § 2679 (1988).

⁶⁴ *Westfall v. Erwin*, 484 U.S. 292, 300 (1988).

⁶⁵ Fed. Employees Liability Reform and Tort Compensation Act, 28 U.S.C. § 2679(b) (1988).

⁶⁶ *Cuoco v. Moritsugu*, 222 F.3d 99, 103 (2d Cir. 2000).

⁶⁷ *Id.* at 109.

⁶⁸ *Id.* at 107, 109, 112 (stating new exceptions to the claim against individual employees); See American Bar Association, *A Legal Guide for INS Detainees: Actions Brought Against INS or Other Law Enforcement Officials for Personal Injury or Property Damage or Loss*, II-6, <http://www.abanet.org/publicserv/immigration/ftcaandbivens.pdf> (last visited Dec. 20, 2009) (The FTCA provides different definitions of

however, incorrectly applied the *Carlson* exception to a *Bivens* remedy and rejected the *Bivens* claim against the PHS officials.⁶⁹

In contrast, the Ninth Circuit in *Castaneda* held that PHS officials can be sued for violating an immigrant detainee's constitutional right to adequate medical care.⁷⁰ After applying the two part test of *Carlson*, the Court held that the PHS was not an alternative remedy to *Bivens* and was not equally effective to preempt *Bivens*.⁷¹ The Court also rejected the argument that FTCA is the exclusive remedy for unconstitutional conduct by government doctors and other PHS officials and keeping with its analysis, the Court permitted a *Bivens* claim against PHS employees.⁷²

IV. LEGAL ANALYSIS

“[n]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”⁷³

A. *The Second Circuit Erred in Rejecting the Bivens Claim*

In *Cuoco*, the Appellate Court denied *Cuoco*'s “cruel and unusual punishment” claim because at the time the claim was filed, *Cuoco* was a pre-trial detainee and was not being punished.⁷⁴ The Court however, did affirm the District

federal and local employees versus government contractors and which one can be brought a claim against.).

⁶⁹ *Cuoco*, 222 F.3d 99 at 108.

⁷⁰ *Castaneda v. Henneford*, 546 F.3d 682 (9th Cir. 2008).

⁷¹ *Id.* at 688.

⁷² *Id.*

⁷³ U.S. CONST. amend. XIV, § 1 (asserting that the constitution specifically uses the word person). The constitution does not address the rights of citizens versus the rights of aliens. *Id.*

⁷⁴ *Id.* at 104 (justifying the reasons for the court's decisions); *Weyant v. Okst*, 101 F.3d 845, 856 (2d Cir. 1996) (“In the context of a convicted prisoner, who has a right under the Eighth Amendment to be free from cruel and unusual punishments, ‘[a] prison official’s ‘deliberate indifference’ to a substantial risk of serious harm to an inmate violates the Eighth Amendment.’”).

Court's decision of accepting the claim under the Due Process Clause of the Fifth Amendment.⁷⁵ The Court applied the Fourteenth Amendment test developed in *Weyant*⁷⁶ to the *Bivens* action under the Fifth Amendment.⁷⁷ The Court concluded that Cuoco's action lied in the fact that because the medical staff denied her, "an unconvicted detainee, 'treatment that [she] needed to remedy a serious medical condition and [they] did so because of their deliberate indifference to that need.'" ⁷⁸ Deliberate indifference is defined as "something more than mere negligence" and proof of intent is not a requirement because the standard is "satisfied by something less than acts or omissions for the very purpose of causing harm or with knowledge that harm will result."⁷⁹ Although medical malpractice is not ordinarily

⁷⁵ *Id.* at 106 (explaining how the court applied the *Bivens* remedy to this claim); *San Francisco Arts & Athletics, Inc. v. United States Olympic Comm.*, 483 U.S. 522, 542 n.21 (1987) (quoting *Weinberger v. Wiesenfeld*, 420 U.S. 636, 638, n.2 (1975)) (stating that the equal protection analysis is the same as under the Due Process Clause of the Fifth Amendment and the Equal Protection Clause of the Fourteenth Amendment).

⁷⁶ *Weyant v. Okst*, 101 F.3d 845 (2d Cir. 1996) (referring to the medical portion of the test). "Now, as far as the medical care is concerned, the plaintiff must show that the deprivation was sufficiently serious and it was unnecessary and wanton infliction of pain." *Id.* at 851.

⁷⁷ *Cuoco v. Moritsugu*, 222 F.3d 99, 106 (2d Cir. 2000) (quoting *Weyant v. Okst*, 101 F.3d 845, 856 (2d Cir. 1996) (Since the defendants were federal rather than state officers, a *Bivens* remedy under Fifth Amendment is more appropriate.).

⁷⁸ *Id.*; *Meriwether v. Faulkner*, 821 F.2d 408, 413 (7th Cir. 1987) ("Courts have repeatedly held that treatment of a psychiatric or psychological condition may present a 'serious medical need' There is no reason to treat transsexualism differently than any other psychiatric disorder. Thus . . . plaintiff's complaint does state a 'serious medical need.'"); *Powell v. Schriver*, 175 F.3d 107, 111 (2d Cir. 1999) (citing *Maggert v. Hanks*, 131 F.3d 670, 671 (7th Cir. 1997) (approving the description of transsexualism as a psychiatric disorder)).

⁷⁹ *Farmer v. Brennan*, 511 U.S. 825, 835 (1994) (defining what constitutes deliberate indifference); *Chance v. Armstrong*, 143 F.3d 698, 702 (2d Cir. 1998) (quoting *Farmer v. Brennan*, 511 U.S. 825, 837 (1994)) ("An official acts with the requisite deliberate indifference when the official "knows of and disregards an excessive risk to inmate health or safety; the official must both be aware of facts from which the inference

deliberate indifference, it can be if it involves recklessness, for example an officer's conscious act or failure to act which leads to a substantial risk of harm.⁸⁰

However, the Second Circuit granted the defendant's motion for summary judgment based on their analysis of the PHSA.⁸¹ The Court looked at the plain meaning of the Act and concluded that "[t]he complained behavior of these defendants thus occurred within the scope of their offices or employment and during the course of their 'performance of medical . . . or related functions'" and as such are absolutely immune from any claims against them.⁸² In addition, the Court stated that Cuoco's exclusive remedy for injuries caused by the defendant's behavior is against the United States under the FTCA.⁸³ To reach this conclusion, the Court relied on dicta in *Carlson* stating that "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' the plaintiff is then barred from bringing a *Bivens* action."⁸⁴ The

could be drawn that a substantial risk of serious harm exists, and he must also draw the inference.'").

⁸⁰ *Hathaway v. Coughlin*, 99 F.3d 550, 553 (2d Cir. 1996) (citing *Estelle v. Gamble*, 429 U.S. 97, 106 n.14 (1976)).

⁸¹ *Cuoco v. Moritsugu*, 222 F.3d 99, 105-12 (2d Cir. 2000) (addressing the court's decision in granting summary judgment). The court has often applied the Eighth Amendments' indifference test to pre-trial detainees bringing action under the Due Process Clause of the Fourteenth Amendment. *Id.* at 106.

⁸² *Id.* at 107 (quoting 42 U.S.C. § 233(a)) (analyzing the court's reasons for granting immunity because they are acting within their capacity as government officers); *id.* (quoting *Cheung v. United States*, 213 F.3d 82, 89 (2d Cir. 2000)) ("In construing the terms of a statute, we look first to its language to ascertain its plain meaning.').

⁸³ *Cuoco v. Moritsugu*, 222 F.3d 99, 107 (2d Cir. 2000) (addressing the court's decision to discount *Bivens* remedy); *Id.* (quoting *Mitchell v. Forsyth*, 472 U.S. 511, 525 (1985)) ("[T]he denial of a substantial claim of absolute immunity is an order appealable before final judgment, for the essence of absolute immunity is its possessor's entitlement not to have to answer for his conduct in civil damages action.'").

⁸⁴ *Id.* at 108 (quoting *Carlson v. Green*, 446 U.S. 14, 18-19 (1980)); *Cheung v. United States*, 213 F.3d 82, 89 (2d Cir. 2000) ("In construing the terms of a statute, we look first to its language to ascertain its plain meaning.'").

Court read this to imply that the PHSa created FTCA as an expressly declared substitute for *Bivens*.⁸⁵ In *Carlson*, the Supreme Court wrote that its conclusion that the FTCA complements *Bivens*, rather than replaces it, is supported by the “significant fact that Congress follows the practice of explicitly stating what it means to make the FTCA an exclusive remedy.”⁸⁶

Even though Cuoco argued that the FTCA is an inadequate remedy because it only provides for declaratory relief and not injunctive relief, the Court disregarded that argument.⁸⁷ Further, since Cuoco was no longer a pre-trial detainee, no longer incarcerated at the prison, her estrogen problem was resolved, and she made no claims that the defendants would deny her necessary treatments in the future, the Court decided that Cuoco’s argument was moot.⁸⁸ In fact, the Court stated that if Cuoco could prove that either of the defendants violated her constitutional rights in the course of something other than the performance of medical or related functions, or while acting outside of the scope of their employment, they would not be provided with absolute immunity.⁸⁹ To defend this argument, the Court applied several principles of immunity, one of which is that: “[a] government official is entitled to qualified immunity from suit for actions taken as a government official if (1) the conduct attributed to the official is not prohibited by the federal law, constitutional or otherwise; (2) the plaintiff’s right not be subjected to such conduct by the official was not clearly established at the time of the conduct; or (3) the official’s action was objectively legally reasonable in light of

⁸⁵ *Id.*

⁸⁶ *Carlson v. Green*, 466 U.S. 14, 20 (1980).

⁸⁷ *Cuoco v. Moritsugu*, 222 F.3d 99, 108 (2d Cir. 2000).

⁸⁸ *Id.* Cuoco also alleged that Barraco and Moritsugu were inexperienced doctors and that’s why they prescribed the wrong course of treatment. *Id.* at 107.

⁸⁹ *Id.* at 109. “Public Health Service officers or employees are protected from suits that sound in medical malpractice.” *Id.* at 108 (quoting *Mendez v. Belton*, 739 F.2d 15, 19 (1st Cir. 1984)).

the legal rules that were clearly established at the time it was taken.”⁹⁰

In addition, when Cuoco tried to raise the defense that the defendants should have interjected when she was denied her medication, the Court held that “the absence of a factual predicate for the allegations against defendants . . . leads to the conclusion that these defendants are named in the action solely because of their supervisory positions. In a *Bivens* action, such a *respondeat superior* theory will not suffice.”⁹¹ Cuoco also tried to raise awareness to the fact that the health officials were indifferent when they made inappropriate statements such as calling her a “HE/SHE”, but the Court held that rudeness and name calling is not a violation of constitutional rights.⁹² Cuoco tried to appeal the decision by claiming that these defendants were not just named for their supervisory capacity but that they actually were in a position to intervene when Cuoco was denied her medicine and instead treated her with deliberate indifference.⁹³ Even though Cuoco’s “failure to intervene” claim should have survived the defendant’s motion to dismiss, the Court nonetheless affirmed the judgment in favor of the defendants because they were entitled to qualified immunity.⁹⁴

Furthermore, the District Court in Cuoco’s case stated that even though Cuoco had tried to raise a claim against the federal prison’s policy maker, she was unsuccessful even though a policy maker in its supervisory capacity has the authority to declare which rules should be followed and if that person “created a policy or custom under which unconstitutional practices occurred, or allowed such a policy or custom to continue, [or] . . . if he or she was grossly negligent in managing subordinates who caused the unlawful condition or event,” then that person would be held liable, but

⁹⁰ *Id.* at 109.

⁹¹ *Id.* at 110.

⁹² *Id.* at 109; *Purcell v. Coughlin*, 790 F.2d 263, 265 (2d Cir. 1986) (stating what is not considered constitutional violation).

⁹³ *Id.* at 110.

⁹⁴ *Cuoco v. Moritsugu*, 222 F.3d 99, 111 (2d Cir. 2000).

in this case there was not sufficient evidence to hold that policy maker liable.⁹⁵

The Court in *Cuoco* also failed to discuss whether Congress viewed the remedies provided under the FTCA as "equally effective" as those provided under *Bivens*, a question that the *Carlson* Court explicitly answered in the negative.⁹⁶ Under *Carlson*, compliance with its "equally effective" prong is a necessary pre-condition for holding a statutory remedy to be a substitute for a *Bivens* cause of action and thus, *Cuoco's* failure to address that prong or the answer provided by *Carlson* is contrary to governing Supreme Court precedent.

B. The Ninth Circuit was Correct in its Rulings Regarding a Bivens Claim.

The scope of the PHSA's immunity presents an important federal question. Although the Second Circuit in *Cuoco* concluded that this Act makes the FTCA the exclusive remedy for damage claims arising out of medical related care provided by federal PHS officers,⁹⁷ they erred in their holding. In contrast, the Ninth Circuit's analysis and application of the *Carlson* test in *Castaneda* led to the conclusion that the PHSA does not make FTCA the exclusive remedy and it certainly does not preclude an action under *Bivens*.⁹⁸

In *Castaneda*, a constitutional rights violation and medical malpractice action was brought against the United States government under the FTCA and against several federal officials and medical personnel under *Bivens*.⁹⁹ After *Castaneda's* death, his sister and daughter, substituting

⁹⁵ *Id.* at 109 (quoting *Williams v. Smith*, 781 F.2d 319, 323-24 (2d Cir. 1986)).

⁹⁶ *Carlson v. Green*, 446 U.S. 14, 19 (1980) (stressing how court disregarded the comparison of *Bivens* and FTCA).

⁹⁷ *Cuoco v. Moritsugu*, 222 F.3d 99, 108 (2d Cir. 2000).

⁹⁸ *Castaneda v. Henneford*, 546 F.3d 682, 684 (9th Cir. 2008) (asserting that *Carlson* was correct in its conclusion).

⁹⁹ *Id.* at 687; BLACK'S LAW DICTIONARY 978 (8th ed. 2004) (The term *malpractice* means negligence or incompetence in performing one's professional duties.).

themselves as plaintiffs, brought additional claims under the California Wrongful Death Statute seeking compensatory and punitive damages.¹⁰⁰

When addressing the question of whether the PHS really did make the FTCA an exclusive remedy and precluded a *Bivens* claim, the U.S. Supreme Court considered precedent.¹⁰¹ In *Carlson*, the Supreme Court stated the situations in which a *Bivens* claim can be defeated.¹⁰² First, if a defendant shows “special factors counseling hesitation in the absence of affirmative action by Congress.”¹⁰³ Second, if the defendant demonstrates that “Congress has provided an alternative remedy which is explicitly declared to be a substitute for recovery directly under the Constitution and viewed as equally effective” as a *Bivens* claim.¹⁰⁴

The facts of the *Carlson* case closely resemble the facts of *Castaneda*. In *Carlson*, a deceased federal prisoner’s mother brought suit on behalf of her son against the prison officials whose deliberate indifference to her son’s serious medical condition caused his death, thus, violating his Eighth Amendment right to be free from cruel and unusual punishment.¹⁰⁵ The defendants in that case argued that the FTCA provided a substitute remedy to *Bivens* and the Court rejected that argument by stating that no statute declared the FTCA to be a substitute for *Bivens* and the legislative history confirms that Congress views the FTCA and *Bivens* as complimentary causes of action.¹⁰⁶ Similarly, in *Castaneda*, Castaneda died due to deliberate indifference on the part of the PHS officials in regards to his medical condition and once again, a cause of action alleging Fifth and Eighth Amendment

¹⁰⁰ *Id.* at 687.

¹⁰¹ *Carlson v. Green*, 446 U.S. 14, 18 (1980).

¹⁰² *Id.*

¹⁰³ *Carlson*, 446 U.S. at 18 (quoting *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 396 (1971)).

¹⁰⁴ *Carlson*, 446 U.S. at 18 (citing *Bivens*, 403 U.S. at 397).

¹⁰⁵ *Carlson*, 446 U.S. at 16.

¹⁰⁶ *Id.* at 19-20; *id.* at 16 n.1 (This case involved an equal protection claim stating that petitioner’s “indifference was in part attributable to racial prejudice.”).

violations was brought and the defendants argued that the FTCA substitutes any *Bivens* remedy.¹⁰⁷

To reach its decision, the Court in *Castaneda* first looked at whether the PHSA really establishes the “FTCA as a substitute remedy for *Bivens*.”¹⁰⁸ As mentioned above, the Court in *Carlson* established a two part test that can preempt a *Bivens* remedy: first, Congress must provide an alternative remedy which is to be a substitute for a *Bivens* remedy; second, Congress must view that alternate remedy as equally effective as the *Bivens* remedy.¹⁰⁹

When analyzing the first part of the *Carlson* test, the *Castaneda* Court looked to the text of the PHSA, which by its plain language does not declare the FTCA to be a substitute for *Bivens* actions against PHS personnel.¹¹⁰ Moreover, the statute’s title, “Defense of Certain Malpractice and Negligence Suits” indicates that Congress wanted to extend immunity to common law malpractice and negligence actions and not to actions alleging constitutional violations, thereby leading the U.S. Supreme Court to reject the defendant’s argument that the language in the statute extended toward actions claiming constitutional violations.¹¹¹ In addition, the PHSA was enacted by Congress six months before *Bivens* was decided and furthermore, it predates *Estelle v. Gamble* by six years, where a remedy under the Eighth Amendment for deliberate indifference to prisoner’s serious medical needs was established.¹¹² Therefore, the Court concluded that Congress did not have the desire to substitute *Bivens* with the FTCA when the thing being substituted did not exist at the time.¹¹³

Moreover, the Court analyzed the legislative history of the PHSA and concluded that Congress only intended for the

¹⁰⁷ *Castaneda v. Henneford*, 546 F.3d 682, 688-89 (9th Cir. 2008); *id.* at 688 n.6 (The only difference is that unlike the Plaintiff in *Carlson* who was a criminal convict, *Castaneda* was an immigrant detainee.).

¹⁰⁸ *Id.* at 689.

¹⁰⁹ *Carlson v. Green*, 446 U.S. 14, 18-19 (1980).

¹¹⁰ *Castaneda v. Henneford*, 546 F.3d 682, 683 (9th Cir. 2008).

¹¹¹ *Id.* at 693-4.

¹¹² *Id.* at 693.

¹¹³ *Id.* at 692.

immunity to extend to common law malpractice and negligence actions and not *Bivens* actions.¹¹⁴ This conclusion that Congress views the FTCA as parallel and not a substitute to a *Bivens* remedy is signified by the fact that Congress would have explicitly stated if it meant to make FTCA claims a substitute for *Bivens* actions. “An ordinary reader, at the time of [the PHSA’s] passage, would have understood ‘any other civil action or proceeding’ with respect to ‘personal injury, including death, resulting from the performance of medical, surgical, dental or related functions’ to refer instead to a host of common law and statutory malpractice actions.”¹¹⁵ In fact, the Supreme Court in *Estelle* differentiated between a malpractice suit and an Eighth Amendment violation suit.¹¹⁶ The Court in *Estelle* found that “[m]edical malpractice does not become a constitutional violation merely because the victim is a prisoner. In order to state a cognizable claim, a prisoner must allege acts or omissions sufficiently harmful to evidence deliberate indifference to serious medical needs.”¹¹⁷ Although a claim arising from a constitutional violation might be appropriate for malpractice, the two are still very different from each other.

In fact, when Congress passed the LRTCA in 1988, it extended the FTCA’s immunity to government employees for all acts whether within the scope of their official duties or not and it specifically clarified that the general immunity “does not extend or apply to a civil action against an employee of the Government which is brought for a violation of the Constitution of the United States.”¹¹⁸ Through this Act, Congress confirmed the Court’s holding in *Carlson*, that

¹¹⁴ *Castaneda v. United States*, 546 F.3d 682, 692-93 (9th Cir. 2008).

¹¹⁵ *Id.* at 693 (citing oral argument).

¹¹⁶ *Estelle v. Gamble*, 429 U.S. 97, 106 (1976).

¹¹⁷ *Id.*

¹¹⁸ Fed. Employees Liability Reform and Tort Compensation Act, 28 U.S.C. § 2679(b)(2)(A) (1988).

constitutional claims are outside the scope of the FTCA and it certainly does not preempt a *Bivens* remedy.¹¹⁹

The second part of *Carlson's* two-part test provides that Congress must view the alternate remedy as “equally effective” as a *Bivens* remedy and although the defendants in *Castaneda* argued that the FTCA is that alternate remedy, the Court looked at the preceding Supreme Court case of *Carlson*, in which the Court held the opposite: Congress did not view FTCA as an alternate remedy and certainly not as effective as *Bivens* remedy.¹²⁰ In fact, *Carlson* stated four reasons for the FTCA not being as effective as the *Bivens* remedy.¹²¹ First, damages under *Bivens* are awarded against individual federal employees while damages under FTCA are awarded against the United States government and in this manner *Bivens* is more effective because the threat of financial liability has a deterrent effect on individual employees.¹²² Second, punitive damages are not awarded under FTCA, while *Bivens* allows for punitive damages thereby further deterring employees from violating individual’s constitutional rights.¹²³

Third, unlike the FTCA, a *Bivens* remedy permits a plaintiff to request a jury trial.¹²⁴ Fourth, liability under the FTCA is limited by “the law of the place where the act or omission occurred” and in fact, the *Carlson* Court stated that this last factor is an important one because under the FTCA, a plaintiff’s action can fail depending on the law of the forum

¹¹⁹ *Carlson v. Green*, 446 U.S. 14, 23 (1980) (examining legislative history to determine whether Congress viewed it as a substitute or complementary remedy).

¹²⁰ *Id.* at 18-20.

¹²¹ *Id.* at 21.

¹²² *Id.* at n.7 (“Indeed, underlying the qualified immunity which public officials enjoy for actions taken in good faith is the fear that exposure to personal liability would otherwise deter them from acting at all.”).

¹²³ *Id.* at 21-22; *Carey v. Piphus*, 435 U.S. 247, 257 n.11 (1978) (However, there have been times where courts have not awarded punitive damages because it found that the defendants “did not act with a malicious intention to deprive respondents of their rights or to do them other injury.”).

¹²⁴ *Carlson*, 446 U.S. at 22.

state thus motivating a *Bivens* remedy.¹²⁵ The Court emphasized that “only a uniform federal rule of survivorship will suffice to redress the constitutional deprivation here alleged and to protect against repetition of such conduct.”¹²⁶ Keeping the above in mind, the Court in *Castaneda* emphasized that if *Castaneda*’s remedy was available only under the FTCA, then *Castaneda* would have to face many hurdles depending on state law to bring a suit in the first place and based on *Carlson*’s holding, specifically that the FTCA is not “equally effective” as *Bivens*, the *Castaneda* Court held that the PHSA does not preempt *Bivens* remedy.¹²⁷

¹²⁵ *Carlson v. Green*, 446 U. S. 14, 23 (1980) (quoting 28 U.S.C. § 1346(b) (1997)); *id.* at 17-18 n.4 (Depending on the state law, certain personal injury claims would not survive and especially if a decedent was not survived by a spouse or a dependent next of kin.); A.B.A., *A Legal Guide for INS Detainees: Actions Brought Against INS or Other Law Enforcement Officials for Personal Injury or Property Damage or Loss*, II 3, <http://www.abanet.org/publicserv/immigration/ftcaandbivens.pdf> (last visited Dec. 20, 2009) (Additionally, monetary damages which are controlled by state law are limited to money damages and that “include reasonable compensation for personal injury or loss of property.”).

The Supreme Court has held that plaintiffs may be entitled to monetary compensation for “loss of enjoyment of life.” These damages must be based solely on a government employee’s simple negligence, NOT on the government employee’s intentional or egregious conduct. However, state law determines how much money may be recovered and whether the loss of enjoyment of life claim fits within the state’s definition of compensatory damages.

Id. (citing *Molzof v. United States*, 502 U.S. 301, 303-4 (1992)).

¹²⁶ *Carlson v. Green*, 446 U. S. 14, 23 (1980).

¹²⁷ *Castaneda v. Henneford*, 546 F.3d 682, 691 (9th Cir. 2008); American Bar Association, *A Legal Guide for INS Detainees: Actions Brought Against INS or Other Law Enforcement Officials for Personal Injury or Property Damage or Loss*, II 4, <http://www.abanet.org/publicserv/immigration/ftcaandbivens.pdf> (last visited Dec. 20, 2009).

Additionally, FTCA has many exceptions and if any exception applies to the situation the case will be automatically dismissed for lacking jurisdiction. Following are exceptions and exclusions in FTCA:

Since the defendant failed to meet *Carlson*'s two part test, the Court in *Castaneda* then looked for any "special factors" precluding a *Bivens* remedy by stating that "where Congress fails to explicitly declare a remedy to be a substitute for recovery directly under the Constitution or to provide a remedy that is as effective a remedy for constitutional tort, a *Bivens* action may still be precluded."¹²⁸ The Court in *Carlson* noted that a *Bivens* action can be defeated if the

Foreign Country Exception: If a detainee's injuries occurred outside the United States, no FTCA claim may be made.

Intentional Torts Exception: Only investigative or law enforcement officers may be sued for intentional torts like "assault, battery, false imprisonment, malicious prosecution, and abuse of process. FTCA suits for intentional torts against individuals who are NOT law enforcement INS employees are prohibited.

Other Torts Excluded from the FTCA: Libel (publication of something that injures the reputation of another person); slander (saying something that injures the reputation of another person); misrepresentation (telling you something untrue); deceit; or interference with contracts.

Detention of Goods Exclusion: Any claim arising from the detention of any goods, merchandise, or other property by any customs or tax officer or any law enforcement officer is excluded.

Discretionary Function Exception: Precludes suits "based upon an act or omission of any employee of the Government, exercising due care in the execution of a statute or regulation, or based upon the performance or the failure to exercise or perform a discretionary duty." Detention decisions that are not directly mandated by statute are discretionary and fit within the exception. For example, a detention facility's policy decision to require sick or injured detainees to go to hospitals rather than to receive in-house treatment is discretionary.

Id. at II 4-5 (citing 28 U.S.C. § 2680(a) (2006)).

¹²⁸ *Castaneda v. Henneford*, 546 F.3d 682, 700 (9th Cir. 2008).

defendant shows any “special factors’ counseling hesitation in the absence of affirmative action by Congress.”¹²⁹

Although the *Castaneda* Court recognized that after *Carlson*, the Supreme Court has found other remedial schemes to be “special factors” precluding *Bivens* relief, the Court noted that none of those decisions has “overruled *Carlson*’s square holding that there are no special factors that preclude a *Bivens* action in a case whose facts and posture mirror this one.”¹³⁰ Therefore, *Carlson*’s holding that the FTCA is not a “special factor” precluding *Bivens* relief remains good law and compelled the Court in *Castaneda* to reject the defendant’s arguments.¹³¹ In any event, Congress has taken “affirmative action” with respect to the point argued by the defendants in *Castaneda* by expressly preserving a *Bivens* action against all federal employees under the LRTCA and thus, there is no “absence of affirmative action from Congress” that would warrant examining the “special factors” test.¹³²

For all the reasons stated above, *Castaneda*’s holding is consistent with that of *Carlson*’s. *Carlson* places the burden on defendants to show an explicit declaration from Congress that the PHS precludes *Bivens* claims.¹³³ The Court in *Castaneda* followed that directive and conducted an extensive analysis of the language, the historical context, and legislative history of both the PHS and the LRTCA, concluding that Congress did not intend the PHS to bar the *Bivens* action against PHS medical personnel.¹³⁴

V. CONCLUSION

¹²⁹ *Carlson v. Green*, 446 U.S. 14, 18 (1980) (quoting *Bivens*, 403 U.S. at 396).

¹³⁰ *Castaneda v. United States*, 546 F.3d 682, 700-01 (9th Cir. 2008) (quoting *Moore v. Glickman*, 113 F.3d 988, 991 (9th Cir. 1997)) (“The presence of a deliberately crafted statutory remedial system is one ‘special factor’ that precludes a *Bivens* remedy.”).

¹³¹ *Id.* at 701.

¹³² *Carlson v. Green*, 446 U.S. 14, 18 (1980).

¹³³ *Id.* at 18-9.

¹³⁴ *Castaneda v. United States*, 546 F.3d 682, 700-02 (9th Cir. 2008).

Although Francisco Castaneda's story is tragic, it is not unique.¹³⁵ Every day, there are thousands of immigrants placed in privately run ICE detention facilities around the country who are unable to access appropriate medical and mental health support or services.¹³⁶ In fact, the "most common complaints from detainees in the United States is 'severe and widespread problems' with access to medical care."¹³⁷ The fact that necessary medical treatments have been denied to detainees is supported by documents specifically stating "the amount of money ICE saved by denying requests for treatment" such as "requests which were all submitted by on-site medical personnel . . . for such things as tuberculosis, pneumonia, bone fractures, head trauma, chest pain, and other serious complaints" and it is

¹³⁵ Francisco Castaneda, *Presentation on Medical Care and Deaths in ICE Custody*, http://www.aclu.org/files/images/asset_upload_file841_32062.pdf (2007).

I had to be here today because I am not the only one who didn't get the medical care I needed. It was a routine for detainees to have to wait weeks or months to get even basic care. Who knows how many tragic endings can be avoided if ICE will only remember that, regardless of why a person is in detention and regardless of where they will end up, they are still human and deserve basic, humane medical care.

Id.

¹³⁶ Paul Wayner, *Prisoners without Convicts: Why Similar Protections As Those Offered to Prison Inmates By the Constitution Should be Extended to Immigrant Detainees*, available at http://works.bepress.com/cgi/viewcontent.cgi?article=1000&context=paul_wayner (Apr. 13, 2009).

¹³⁷ *Id.* (arguing the reasons for extending constitutional rights to immigrant detainees). There are many problems that occur in regards to medical attention that detainees need such as no sick forms to inform the medical personnel, late response to sometimes no response at all to medical requests, etc. *Id.* These types of problems lead to "delay in detection or treatment of medical conditions." *Id.* Many times, mental health patients are not given medical attention or even if they are given medication, it has been changed to a generic form or different dosage of medicine or a different type of medicine altogether. *Id.* This leads to many problems and "adversely affect the mental stability of the detainee and the institution and can inhibit effective legal representation." *Id.*

absurd “[h]ow an off-site bureaucrat can deny a request to treat tuberculosis or a bone fracture....”¹³⁸

Although the United States Constitution does not give an immigrant a constitutional right to enter the country, it does provide immigrants with certain basic rights when they are within the borders of this country.¹³⁹ Among these rights are the right to counsel,¹⁴⁰ a right to due process,¹⁴¹ a right to equal protection under the law,¹⁴² and protection from cruel and unusual punishment.¹⁴³ When these rights have been violated, there are remedies that are afforded to these immigrants.¹⁴⁴

The federal government has created national guidelines that “intend to set a standard of consistent care and fair treatment for detainees in immigrant custody.”¹⁴⁵ In fact,

¹³⁸ *Problems with Immigration Detainee Medical Care: Hearing Before the Subcomm. on Immigration, Citizenship, Refugees, Border Security, and International Law of the Comm. on the Judiciary House of Rep.*, 110th Cong. 2 (2008) (statement of Rep. Zoe Lofgren, Chairwoman, S. Comm. on Immigration, Citizenship, Refugees, Border Security, and International Law), available at http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=110_house_hearings&docid=f:42722.pdf; Detention Watch Network, *The History of Immigration Detention in the U.S.*, <http://www.detentionwatchnetwork.org/node/2381> (last visited Oct. 21, 2009) (“Detention and deportation are extreme and punitive measures for individuals going through a civil administrative process. The very act of detention attaches a stigma of criminalization to immigrants and enmeshes them in the U.S. criminal justice system.”).

¹³⁹ A.C.L.U., *The Rights of Immigrants*, American Civil Liberties Union, *The Rights of Immigrants*, available at <http://www.aclu.org/immigrants-rights/rights-immigrants-aclu-position-paper> (2000) (Laws punishing immigrants without just cause violate their right to fair and equal treatment.).

¹⁴⁰ U.S. CONST. amend. VI.

¹⁴¹ U.S. CONST. amend. V.

¹⁴² U.S. CONST. amend. XIV, § 1; see A.C.L.U., *The Rights of Immigrants*, available at <http://www.aclu.org/immigrants-rights/rights-immigrants-aclu-position-paper> (2000) (Constitutional rights apply to every person within the U.S. border including Aliens.).

¹⁴³ U.S. CONST. amend. VIII.

¹⁴⁴ A.C.L.U., *The Rights of Immigrants*, available at <http://www.aclu.org/immigrants-rights/rights-immigrants-aclu-position-paper> (2000).

¹⁴⁵ U.S. Immigration & Customs Enforcement, *ICE Performance Based National Detention Standards*, <http://www.ice.gov/about/index.htm>

there are forty-two detailed standards that outline specific directions relating to things such as dietary needs, medical access, telephone use, etc.¹⁴⁶ However, since ICE guidelines are not codified, the law does not enforce them, and the lack of binding guidelines curtails the agency's accountability in protecting immigrant detainees' rights. Nevertheless, throughout the years there have been remedies made available to immigrants who bring forth claims of violation of their rights.

Since the Supreme Court has granted certiorari in the *Castaneda* case, it should consider the two compelling arguments of the Ninth Circuit and affirm and recognize Congress's desire to preserve a *Bivens* claim against PHS employees. In particular, the Supreme Court should consider the fact that contrary to the Second Circuits holding in *Cuoco*, the Ninth Circuit in *Castaneda* affirmed that the PHS does not provide immunity to PHS employees based on an analysis of the plain language of the Act.¹⁴⁷ The Ninth Circuit applied the *Carlson* test to the PHS and considered whether Congress had provided an alternative remedy to *Bivens* that it declared to be a substitute for rather than complimentary to *Bivens*; and if it had, whether Congress had viewed that remedy as equally effective to a *Bivens*

(2008) ("ICE's mission is to protect the security of the American people and homeland by vigilantly enforcing the nation's immigration and customs laws."); *Problems with Immigration Detainee Medical Care: Hearing Before the Subcomm. on Immigration, Citizenship, Refugees, Border Security, and International Law of the Comm. on the Judiciary House of Rep.*, 110th Cong. 2 (2008) (statement of Rep. Zoe Lofgren, Chairwoman, S. Comm. on Immigration, Citizenship, Refugees, Border Security, and International Law), available at http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=110_house_hearings&docid=f:42722.pdf. (Documents tell us that employees complained of certain policies that appear to be in violation of ICE's detention standards . . . [d]ocuments show that ICE's policy may be designed to deny care and save money rather than to provide care and save lives.").

¹⁴⁶ U.S. Immigration & Customs Enforcement, *ICE Performance Based National Detention Standards*, <http://www.ice.gov/about/index.htm> (2008).

¹⁴⁷ *Castaneda v. United States*, 546 F.3d 682, 692 (9th Cir. 2008).

remedy.¹⁴⁸ The Ninth Circuit, after its detailed analysis, held in the negative to both questions considered above.¹⁴⁹ It also considered the historical context of the statute and the legislative history to support its conclusion.¹⁵⁰

The Supreme Court has two compelling reasons for affirming the Ninth Circuit's holding and recognizing Congress's intent to preserve the *Bivens* remedy against PHS employees. It should consider and appreciate the Ninth Circuit's analysis and the PHSA's legislative history and historical context. In addition, the Ninth Circuit's analysis of the *Carlson* test is far more compelling than the contrary analysis of the Second Circuit. The Second Circuit did not even perform a proper analysis because it did not recognize the difference between a medical negligence claim and a constitutional violation claim. Furthermore, the Second Circuit did not address how the LRTCA exempts *Bivens* claims from the FTCA's exclusion provision.

Therefore, the Supreme Court has strong reasons for affirming the Ninth Circuit's holding. This will not only encourage immigrant detainees to bring forth claims of their constitutional violations but will in fact hold accountable the PHS employees who are deliberately indifferent to the constitutional rights of these immigrant detainees. In fact, since there is a split in the Circuit Courts on this issue, the Supreme Court decision will promote national uniformity because just as other federal employees are subject to *Bivens* actions so too are the PHS employees.

¹⁴⁸ *Id.* at 688.

¹⁴⁹ *Id.* at 692-99; *id.* at 700 (quoting *Moore v. Glickman*, 113 F.3d 988, 991 (9th Cir. 1997)) (“The presence of a deliberately crafted statutory remedial system is one ‘special factor’ that precludes a *Bivens* remedy.”).

¹⁵⁰ *Id.*