No. 20-925

In the Supreme Court of the United States

SEBHAT AFEWORK, PETITIONER

v.

VELANTA MONIQUE BABBITT, ET AL.

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

BRIEF FOR THE FEDERAL RESPONDENT

ELIZABETH B. PRELOGAR
Acting Solicitor General
Counsel of Record
BRIAN M. BOYNTON
Acting Assistant Attorney General
MARK B. STERN
DANA KAERSVANG
Attorneys

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Whether 28 U.S.C. 1447(d) permits a court of appeals to review any issue encompassed in a district court's order remanding a removed case to state court where the removing defendant premised removal in part on the federal-officer removal statute, 28 U.S.C. 1442, but the invocation of 28 U.S.C. 1442 was untimely.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Statutes and regulations:

Statute and regulations—Continued: Page

In the Supreme Court of the United States

No. 20-925

SEBHAT AFEWORK, PETITIONER

v.

VELANTA MONIQUE BABBITT, ET AL.

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

BRIEF FOR THE FEDERAL RESPONDENT

OPINIONS BELOW

The memorandum opinion of the court of appeals (Pet. App. 5a-9a) is not published in the Federal Reporter but is reprinted at 816 F. Appx. 111 (9th Cir. 2020). The order of the district court (Pet. App. 10a-20a) is not published in the Federal Supplement but is available at 2018 WL 6040472.

JURISDICTION

The judgment of the court of appeals was entered on August 10, 2020. The petition for a writ of certiorari was filed on January 7, 2021. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. Under the Public Health Service Act, 42 U.S.C. 201 *et seq.*, the exclusive remedy for medical malpractice committed by Public Health Service employees acting within the scope of their employment is a tort action

against the United States under the Federal Tort Claims Act (FTCA), 28 U.S.C. 1346(b), 2671 *et seq.* See 42 U.S.C. 233(a). Congress has extended that liability protection to "public or non-profit private entit[ies]" that receive certain federal health grant funds, and to the officers, employees, and qualified contractors of such grant recipients, subject to certain conditions. 42 U.S.C. 233(g)(4); see 42 U.S.C. 233(g)(1)(A). To be eligible for this liability protection, the entity must submit an application to the Secretary of Health and Human Services (HHS), meet certain requirements, and obtain annual approval from the Secretary. See 42 U.S.C. 233(g)(1)(A), (g)(1)(D), (g)(4), and (h). If the application is approved, the entity and its officers, employees, and qualified contractors are "deemed" to be employees of the Public Health Service for the upcoming calendar year "[f]or purposes of" Section 233. 42 U.S.C. 233(g)(1)(A).

The Secretary's deeming decision does not conclusively establish that a deemed entity or individual will be covered by FTCA in all malpractice lawsuits. Section 233 distinguishes between coverage for care provided to patients of the entity and coverage for care provided to individuals who are not patients of the entity. 42 U.S.C. 233(g)(1)(B) and (g)(1)(C). Coverage for services provided to individuals who are not patients of a deemed entity is limited. It is available "if the Secretary determines, after reviewing an application * * * , that the provision of the services to such individuals * * * benefits patients of the entity and general populations that could be served by the entity through community-wide intervention efforts within the communities served by such entity," "facilitates the provision of services to patients of the entity," or is "otherwise required under

an employment contract (or similar arrangement) between the entity and an officer, governing board member, employee, or contractor of the entity." 42 U.S.C. 233(g)(1)(C); see 42 U.S.C. 233(g)(1)(B); see also 42 C.F.R. 6.6(c) (providing that "[w]ith respect to covered individuals, only acts and omissions within the scope of their employment * * * are covered," and that "[i]f a covered individual is providing services which are not on behalf of the covered entity, such as * * * on behalf of a third-party * * *, whether for pay or otherwise, acts and omissions which are related to such services are not covered").

b. When a malpractice action is filed against a deemed entity or individual in state court, the Attorney General determines whether the United States should intervene to defend the action. See 42 U.S.C. 233(b) and (*l*). Section 233 provides that, within 15 days of being notified of a state lawsuit, the Attorney General may appear in state court and "advise" the state court whether the Secretary has determined that the defendant is "deemed to be an employee of the Public Health Service for purposes of [Section 233] with respect to the actions or omissions that are the subject of such civil action." 42 U.S.C. 233(*l*)(1). The Attorney General then removes the case to federal district court; the United States is substituted as the defendant; and the suit proceeds against the United States under FTCA. See 42 U.S.C. 233(a) and (c). If the Attorney General does not appear in state court within 15 days "after being notified" of the filing of a complaint, the defendant may remove the case to federal court for a determination "as to the appropriate forum or procedure for the assertion of the claim for damages." 42 U.S.C. 233(*l*)(1)-(2).

Even if the Attorney General does not act within 15 days, he can remove the case to federal court any time before trial if he determines that the defendant was deemed to be an employee and acting within the scope of his deemed employment with respect to the actions out of which the suit arose. 42 U.S.C. 233(c).[1]

c. Section 1447(d) of Title 28 of the United States Code provides that

> [a]n order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise, except that an order remanding a case to the State court from which it was removed pursuant to section 1442 or 1443 of this title shall be reviewable by appeal or otherwise.

28 U.S.C. 1447(d). Section 1442 of Title 28 is the federal officer removal statute and provides that "[a] civil action * * * that is commenced in a State court and that is against or directed to" "[t]he United States or any agency thereof or any officer (or any person acting under that officer) of the United States or of any agency thereof, in an official or individual capacity, for or relating to any act under color of such office or on account of any right" "may be removed" by the officer to federal district court. 28 U.S.C. 1442(a)(1).

2. a. Petitioner Sebhat Afework is a doctor who was employed by Eisner Pediatric and Family Medical Center, a federally funded health center that, along with its employees, was "deemed" to be a Public Health Service employee pursuant to 42 U.S.C. 233(g)(1)(A). Pet. App. 7a. Eisner had a contract with a hospital, California

---

[1] The Attorney General has delegated his authority to determine whether a deemed entity or individual is entitled to FTCA coverage to the United States Attorneys. 28 C.F.R. 15.4(b).

Hospital Medical Center, under which the hospital paid Eisner to have Eisner employees staff the hospital's obstetrics and gynecology department full time. C.A. Supp. E.R. 4. Pursuant to the agreement, Eisner doctors treated hospital patients regardless of whether they were patients of Eisner. *Ibid.* California Hospital was not a deemed entity, and the contract categorized Eisner doctors as independent contractors when performing services at the hospital and required Eisner to maintain liability insurance covering its doctors for services rendered at the hospital. *Ibid.*

b. On February 16, 2016, respondent Velanta Babbitt filed this medical malpractice suit in California state court against petitioner, alleging that he committed malpractice when delivering her child at California Hospital, where petitioner was working pursuant to the contract between Eisner and the hospital. See Pet. App. 11a; C.A. Supp. E.R. 4. Respondent Babbitt filed proofs of service of the summons and the complaint on March 27, 2018, which indicated that petitioner was served with these documents on March 26, 2018. Pet. App. 11a, 13a-14a. Petitioner did not provide HHS with a copy of the complaint until July 16, 2018. *Id.* at 17a. On July 27—11 days later after providing HHS with a copy of the complaint—petitioner unilaterally removed the case to federal court, invoking 42 U.S.C. 233(*l*)(2) and 28 U.S.C. 1442. Pet. App. 11a, 17a.

On July 30, 2018, petitioner notified the Attorney General of the existence of the lawsuit by mailing a copy of his notice of removal to the Attorney General and United States Attorney's Office. C.A. Supp. E.R. 1-2. Fifteen days after petitioner mailed the notice, the United States Attorney for the Central District of California informed the state court that the government was

considering whether petitioner was acting within the scope of his deeming coverage with respect to the allegations in the complaint. C.A. E.R. 105-106; see C.A. Supp. E.R. 1-2.[2]

c. The government filed a motion to remand in federal district court, which the court granted, concluding that petitioner did not demonstrate that removal was proper under either 42 U.S.C. 233(*l*)(2) or 28 U.S.C. 1442. Pet. App. 13a; see *id.* at 10a-20a.

The district court explained that Section 233(*l*) permits a defendant to remove a case to federal court only if the government fails to appear in state court within 15 days of being notified of the filing of the complaint. Pet. App. 16a-18a. The court noted that petitioner filed his removal notice only 11 days after providing a copy of the complaint to HHS and concluded that removal under Section 233(*l*) had been premature and thus ineffectual. *Id.* at 17a.

The district court also found that petitioner's invocation of the federal officer removal statute, 28 U.S.C. 1442, was untimely. Pet. App. 16a; see *id.* at 13a-16a. The court noted that, in order to properly effectuate removal under Section 1442, a litigant must remove within 30 days of service of the summons and complaint. *Id.* at

---

[2] The government later informed petitioner by letter that it had determined that he was not entitled to FTCA coverage in defending respondent Babbitt's malpractice claim. C.A. Supp. E.R. 3-6. The letter noted that "the care received from [petitioner] that is the subject of the Complaint was in his role as an independent contractor providing inpatient care staffing to [California] Hospital pursuant to a private contract" and that California Hospital "is not a deemed [Public Health Service] employee." *Id.* at 4. "Accordingly, the care [petitioner] provided is not covered under the FTCA," the letter concluded. *Ibid.* (citing 42 U.S.C. 233(a) and (g)-(n), along with 42 C.F.R. 6.6(c)).

12a (citing 28 U.S.C. 1446(b)(1)). The court also noted that while the proof of service indicated that petitioner received the summons and complaint on March 26, 2018, petitioner did not remove the action until four months later, on July 27, 2018, *id.* at 13a, 17a, and thus concluded that removal under this provision was untimely, *id.* at 16a. Because of its finding of untimeliness, the court did not address whether petitioner was a federal officer under Section 1442. *Id.* at 16a n.4.

3. The court of appeals affirmed the determination that removal was untimely under Section 1442 and dismissed the remainder of the appeal, which sought to challenge the determination that removal under Section 233(*l*) was premature, for lack of appellate jurisdiction. Pet. App. 5a-9a. Beginning with the Section 1442 issue, the court of appeals concluded that "[e]ven assuming [petitioner] could qualify as [a] federal officer[]," the remand order was "proper because the removal[] [was] untimely." *Id.* at 8a. And, consistent with circuit precedent, the court found that it could not consider whether removal was permitted under Section 233(*l*), because 28 U.S.C. 1447(d) barred the court from exercising appellate jurisdiction over that issue. *Id.* at 8a-9a (citing *County of San Mateo* v. *Chevron Corp.*, 960 F.3d 586 (9th Cir.), petition for cert. pending, No. 20-884 (filed Dec. 20, 2020)).

DISCUSSION

1. Petitioner contends (Pet. 5-6) that the court of appeals erred in addressing only his attempt to remove pursuant to Section 1442 because the court concluded that, under Section 1447(d), it lacked appellate jurisdiction to consider petitioner's alternative argument that removal was appropriate under Section 233(*l*). Petitioner also asserts (Pet. 5, 7) that this case should be

held for *BP p.l.c. et al.* v. *Mayor & City Council of Baltimore*, No. 19-1189 (argued Jan. 19, 2021). This Court granted certiorari in *BP* to resolve the question whether Section 1447(d) permits a court of appeals to review any issue encompassed in a district court's order remanding a removed case to state court where the removing defendant premised removal in part on Section 1442 or Section 1443. Because the Court's disposition in *BP* may affect the proper disposition of the petition for a writ of certiorari in this case, the petition in this case should be held pending the decision in *BP* and then disposed of as appropriate in light of that decision.

If the Court holds in *BP* that Section 1447(d) permits a court of appeals to review any issue encompassed in a district court's order remanding a removed case to state court where removal was premised in part on Section 1442 or 1443, petitioner still may not be entitled to appellate review of the asserted basis for removal under Section 233(*l*). In *BP*, the Section 1442 removal was timely. See *Mayor & City Council of Baltimore* v. *BP P.L.C.*, 952 F.3d 452, 457 (4th Cir.), cert. granted, 141 S. Ct. 222 (2020). In the absence of *timely* removal under Section 1442 or 1443, there may be no basis for reviewing other asserted grounds for removal. While the brief of the United States as amicus curiae in this Court in *BP* argued that "[t]he entire 'order' remanding this case" is "reviewable by appeal" because the defendant relied on Section 1442, U.S. Br. at 8, *BP*, *supra* (No. 19-1189), it also noted that "an assertion of federal-officer or civil-rights removal may be insufficient to sustain the court of appeals' own jurisdiction if that assertion 'clearly appears to be immaterial and made solely for the purpose of obtaining jurisdiction' or 'is wholly insubstantial and frivolous,'" *id.* at 30 (quoting *Bell* v.

Hood, 327 U.S. 678, 682-683 (1946)). Such an approach would be analogous to this Court's conclusion that a wholly insubstantial and frivolous constitutional claim would not trigger a mandatory referral to a three-judge district court under 28 U.S.C. 2284(a). *Shapiro* v. *McManus*, 577 U.S. 39, 45-46 (2015). But because the Court in *BP* will address the scope of appellate jurisdiction under Section 1447(d), it is appropriate for the Court to hold this petition pending its resolution of that case.

2. In any event, the courts below correctly found that petitioner did not properly remove this case under either Section 1442 or Section 233(*l*). It is well established that a notice of removal under Section 1442 "shall be filed within 30 days after the receipt by the defendant, through service or otherwise, of a copy of the initial pleading." 28 U.S.C. 1446(b); see *Murphy Bros.* v. *Michetti Pipe Stringing, Inc.*, 526 U.S. 344, 347-348 (1999). Petitioner was served with the summons and complaint on March 26, 2018, but did not remove the action until four months later. Pet. App. 11a, 13a-14a, 17a. The court of appeals thus correctly found that petitioner's attempt to remove the suit pursuant to Section 1442 was untimely.

While the court of appeals did not reach the district court's determination that removal under Section 233(*l*) was premature, the district court's resolution of that issue was correct. Section 233(*l*) provides that the named defendant may remove the case only "*[i]f* the Attorney General fails to appear in State court within" 15 days. 42 U.S.C. 233(*l*)(2) (emphasis added); see 42 U.S.C. 233(*l*)(1). Petitioner filed his removal notice 11 days after providing HHS with a copy of the complaint and three days before providing notice of the lawsuit to the

Attorney General. See Pet. App. 17a; C.A. Supp. E.R. 1-2. The court therefore correctly found that removal under Section 233(*l*) was premature.

CONCLUSION

For the foregoing reasons, the petition should be held pending this Court's decision in *BP p.l.c. et al.* v. *Mayor & City Council of Baltimore*, No. 19-1189 (argued Jan. 19, 2021), and then disposed of as appropriate in light of that decision.

Respectfully submitted.

ELIZABETH B. PRELOGAR
Acting Solicitor General
BRIAN M. BOYNTON
Acting Assistant Attorney General
MARK B. STERN
DANA KAERSVANG
Attorneys

MAY 2021