NO. _____

IN THE

Supreme Court of the United States

CENTERVILLE CLINICS INC.,
Petitioner,

v.

JANE DOE, on behalf of herself and all others similarly situated,
Respondent,

and

UNITED STATES,
Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Jurisdiction under two removal statutes is at issue. A provision of the Public Health Service Act, 42 U.S.C. § 233(*l*), provides for removal of any civil action or proceeding against a defendant the Secretary of the Department of Health and Human Services has deemed to be a Public Health Service employee for purposes of 42 U.S.C. § 233(a) suit immunity. The federal officer removal statute, 28 U.S.C. § 1442(a)(1), affords removal jurisdiction to adjudicate "colorable" federal defenses of "any officer (or any person acting under that officer) of the United States or of any agency thereof" sued "for or relating to" acts taken under color of office.

The questions presented are:

1. Whether 42 U.S.C. § 233(*l*)(1) obligates the Attorney General to appear in state court and report the Secretary's prior grant of federal employee status to effectuate removal to federal court—as the Ninth Circuit determined in *Blumberger v. Tilley*, 115 F.4th 1113 (9th Cir. 2024)—or, as the Third Circuit concluded, merely requires an appearance by the Attorney General, which, if timely, precludes the defendant from removing under § 233(*l*)(2).

2. Whether § 1442(a)(1)'s requirement of a colorable federal defense is satisfied by a deemed Public Health Service employee's claim to 42 U.S.C. § 233(a) immunity—as the Second Circuit concluded in *Agyin v. Razmzan*, 986 F.3d 168 (2d Cir. 2021)—or, as the Third Circuit concluded, is insufficient to establish a colorable federal defense.

PARTIES TO THE PROCEEDING

All parties are listed in the caption. Petitioner Centerville Clinics Inc. was the defendant in Pennsylvania's Washington County Court of Common Pleas and in the United States District Court for the Western District of Pennsylvania and the appellant in the Third Circuit. Respondent Jane Doe was the plaintiff and putative class representative in the state and district courts and the appellee in the Third Circuit. Respondent United States entered a limited appearance in state court but did not participate in the district court proceedings. Before the Third Circuit, the United States appeared as an amicus in support of Appellee Doe.

CORPORATE DISCLOSURE STATEMENT

Petitioner has no parent corporation and no shareholders own ten percent or more of its stock.

RELATED PROCEEDINGS

This case arises from the following proceedings:

Doe v. Centerville Clinics Inc., No. 2023-2922 (Wash. Cnty. Ct. of Common Pleas) (filed May 8, 2023, removed June 15, 2023)

Doe v. Centerville Clinics Inc., No. 23-cv-1107, 2023 WL 5984337 (W.D. Pa. Sept. 14, 2023)

Doe v. Centerville Clinics Inc., No. 23-2738, 2024 WL 3666164 (3d Cir. Aug. 6, 2024)

There are no other proceedings in state or federal trial or appellate courts, or in this Court, directly related to this case within the meaning of this Court's Rule 14.1(b)(iii).

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PETITION FOR WRIT OF CERTIORARI

Centerville Clinics Inc. (Centerville) respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit.

OPINIONS BELOW

The Third Circuit's unpublished decision is reported at 2024 WL 3666164 and reproduced at App. 1a–9a. The district court's unpublished remand order

is available at 2023 WL 5984337 and included at App. 10a–17a.

JURISDICTION

The Third Circuit entered judgment on August 6, 2024 and denied a timely petition for panel and *en banc* rehearing on October 9, 2024. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Pertinent statutory provisions—42 U.S.C. § 233 and 28 U.S.C. § 1442(a)(1)—are reproduced at App. 20a–29a and App. 40a–42a, respectively.

STATEMENT

This case arises from a federally-designated health center's alleged failure to safeguard its patients' confidential information, and a resulting dispute as to who has the final word on the merits of the health center's statutory immunity defense: the Attorney General or the appropriate federal court.

Plaintiff Jane Doe, a patient of Centerville, filed suit in Pennsylvania's Washington County Court of Common Pleas in 2023, alleging harms arising from Centerville's purported use of tracking software on its website and patient portal. App. 3a, 16a. Plaintiff styled her complaint as a proposed class action, defining the class as Centerville patients whose private health care data was disclosed to unauthorized third parties. App. 3a, 10a.

Centerville is a non-profit, community-based "health center" funded in part under 42 U.S.C. § 254b

and deemed by the Secretary of the Department of Health and Human Services (HHS) to be a Public Health Service (PHS) employee under 42 U.S.C. § 233(g) and (h). App. 4a, 5a, 10a, 14a. Deemed equivalent to a true PHS employee, Centerville is likewise entitled to the protections of the Emergency Health Personnel Act of 1970, Pub. L. No. 91-623, 84 Stat. 1868 (Dec. 31, 1970), *codified at* 42 U.S.C. § 233(a) *et seq.*, which immunizes PHS employees from any civil action or proceeding "arising out of the performance of medical or related functions within the scope of their employment by barring all actions against them for such conduct." *Hui v. Castaneda*, 559 U.S. 799, 806 (2010); *accord Blumberger v. Tilley*, 115 F.4th 1113, 1117 (9th Cir. 2024); *Friedenberg v. Lane County*, 68 F.4th 1113, 1125 (9th Cir. 2023); *Agyin v. Razmzan*, 986 F.3d 168, 172 (2d Cir. 2021).

Centerville's status as a "deemed" PHS employee is authorized by the Federally Supported Health Centers Assistance Act (FSHCAA) of 1992, as amended, which extends to § 254b health centers—and their officers, board members, employees, and certain contractors—the "same" absolute immunity 42 U.S.C. § 233(a) has afforded to PHS employees since 1970. 42 U.S.C. § 233(g)(1)(A); *see* Pub. L. No. 102-501, 106 Stat. 3268 (Oct. 24, 1992) (enacting three-year demonstration project); Pub. L. No. 104-73, 109 Stat. 777 (Dec. 26, 1995) (making program permanent and adding procedural protections for health centers and their personnel). The FSHCAA's protections allow health centers "to reallocate desperately needed health care dollars from the coffers of private medical malpractice insurance companies to direct services for hundreds of

thousands more poor and rural Americans." 141 Cong. Rec. H14273–07, 1995 WL 733808 (daily ed. Dec. 12, 1995) (statement of Rep. Wyden). The FSHCAA was passed after Congress determined: (1) private malpractice insurance expenses constituted one of health centers' most significant expenses; (2) over $50 million had been spent on insurance premiums for Fiscal Year 1989; and (3) less than ten percent of money spent on premiums had been "paid out in actual claims payments and related costs." H.R. Rep. No. 104-398 at 4–6 (1995), *reprinted in* 1995 U.S.C.C.A.N. 767, 769.[1] As amended, the statute provides for a prospective application-and-approval process through which health centers request and receive "final and binding" confirmation from HHS that they are deemed to be federal PHS employees for a specified period. 42 U.S.C. § 233(g)(1)(A)–(D); *see also* H.R. Rep. No. 104-398, at 3–4. A deeming determination, when positive, is reflected in an HHS-issued Notice of Deeming Action (essentially, a certificate of insurance) for a "calendar year." 42 U.S.C. § 233(g)(1)(A).

When a deemed PHS employee is sued in state court, the Attorney General must appear within fifteen days of notice "and advise such court as to whether the Secretary has determined under subsections (g) and (h), that such entity . . . is deemed to be an employee of the Public Health Service for

[1] "While Congress's concerns regarding malpractice insurance premiums were the driving force behind the legislation, Congress did not limit § 233 immunity to 'only' malpractice claims when it could have." *Friedenberg*, 68 F.4th at 1128; *see id.* at 1127 n.7 (citing *Cuoco v. Moritsugu*, 222 F.3d 99, 108 (2d Cir. 2000)).

purposes of this section with respect to the actions or omissions that are the subject of such civil action or proceeding." 42 U.S.C. § 233(*l*)(1). Removal is effectuated by the Attorney General's reporting of the defendant's deemed status for the year in which the events giving rise to the suit occurred. *Id.* § 233(*l*)(1). If the Attorney General "fails" to timely fulfill its obligation under § 233(*l*)(1), a deemed defendant may remove the action itself for a judicial determination "as to the appropriate forum or procedure" for the plaintiff's claims. *Id.* § 233(*l*)(2).

Here, fourteen days after receiving notice of plaintiff's action, the Attorney General—through a local Assistant United States Attorney—appeared in state court "for the limited purpose of notifying the Court as to whether the Secretary of the U.S. Department of Health and Human Services. . . has advised that Centerville [] has been 'deemed' to be an 'employee of the Public Health Service' with respect to the actions or omissions that are the subject of this civil action," as required by 42 U.S.C. § 233(*l*)(1). App. 48a. Rather than notify the state court that the Secretary had deemed Centerville to be a PHS employee under 42 U.S.C. § 233(g) and (h) with respect to the period in which the alleged acts or omissions occurred, the Attorney General's designee instead indicated it was awaiting the Secretary's recommended coverage determination, which the Attorney General would then consider in making its own coverage decision. App. 5a, 48a–49a.

Based on its deemed federal status and the United States's failure to remove, Centerville removed plaintiff's suit to the United States District

Court for the Western District of Pennsylvania, pursuant to 42 U.S.C. § 233(*l*)(2) and 28 U.S.C. § 1442(a)(1), seeking adjudication of its federal immunity defense and substitution of the United States in its place in accordance with 42 U.S.C. § 233(a). App. 3a, 11a. Plaintiff moved to remand within thirty days.

Without argument, the district court granted plaintiff's remand motion, concluding: (1) Centerville was precluded from removing the case under § 233 because "the Attorney General had made a timely appearance" in state court; and (2) Centerville was not entitled to remove under § 1442 because "[t]o permit Centerville to raise § 233 [as its colorable federal defense] for purposes of § 1442, when it didn't abide by the removal procedures of § 233 would sidestep the framework of § 233." App. 15a. The district court remanded "without prejudice to the United States Attorney General removing the action upon making the requisite scope certification." App. 16a. Five days later, the Attorney General notified the state court of its negative coverage determination, providing: "the United States Attorney for the Western District of Pennsylvania has determined that Defendant Centerville Clinics, Inc. is not deemed to be an employee of the Public Health Service with respect to the alleged acts or omissions giving rise to this case," and that the "United States will not intervene in this case or remove it to federal court." App. 44a.

The Third Circuit affirmed the district court's remand order, concluding that Centerville, despite its final and binding deemed federal status for the

relevant period, had no removal right under either 42 U.S.C. § 233(*l*)(2) or 28 U.S.C. § 1442(a)(1). App. 6a–7a, 9a. In the Third Circuit's estimation, the Attorney General's initial, "limited purpose," App. 48a, appearance cut off Centerville's access to a federal forum under both removal statutes, making the Attorney General the final arbiter of Centerville's immunity defense. App. 3a. The Third Circuit read § 233(*l*) of the PHS Act, as amended by the FSHCAA, as authorizing the Attorney General to preclude federal jurisdiction merely by appearing in state court. App. 6a. As to federal officer removal, the Third Circuit held that because "§ 233 immunity was the sole basis Centerville provided to satisfy § 1442(a)(1)'s federal-defense requirement . . . . Centerville ha[d] not met its burden of establishing that it raised a colorable federal defense." App. 9a.

The underlying state court proceedings and the Third Circuit's mandate are both stayed pending resolution of this petition. No court has reached the merits of Centerville's § 233(a) immunity defense.

REASONS FOR GRANTING THE PETITION

This case, in the context of two officer removal statutes, presents a fundamental "who decides" question—that is, who determines whether a deemed federal employee is immune under § 233(a) in any given lawsuit: the Attorney General, unreviewably, or, when that executive branch decision is contested, the appropriate federal court.

In its answer to that fundamental question, the decision below is in direct conflict with the Ninth

Circuit's intervening decision in *Blumberger v. Tilley*, 115 F.4th 1113 (9th Cir. 2024), *petitions for reh'g en banc denied*, No. 22-56032, Dkt. 83 (9th Cir. Dec. 19, 2024) and with the Second Circuit's decision in *Agyin v. Razmzan*, 986 F.3d 168 (2d Cir. 2021), and is at odds with the authorities on which each relies, including this Court's longstanding precedent.

Certiorari is warranted to resolve the conflict, preserve Article III adjudication of official immunity defenses, and ensure that federal courts exercise their "virtually unflagging obligation" to exercise their jurisdiction. *Colo. River Water Conservation Dist. v. U.S.*, 424 U.S. 800, 817 (1976); *see also Cohens v. Virginia*, 19 U.S. 264, 404 (1821) (Marshall, C.J.) ("We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given.").

I. The Third Circuit's Construction of 42 U.S.C. § 233(*l*) Conflicts with a Decision of the Ninth Circuit and Cannot be Squared with this Court's Precedents

Review is warranted to resolve a conflict between the decision below and a subsequent decision of the Ninth Circuit in construing the meaning and jurisdictional import of 42 U.S.C. § 233(*l*). A month after the Third Circuit issued the decision below, its construction of § 233(*l*)—as permitting the Attorney General to misreport a defendant's deemed federal status and thereby preclude jurisdiction and judicial review—was outright rejected by the Ninth Circuit. *Blumberger*, 68 F.4th at 1128–29. The Ninth Circuit's majority opinion, unlike the decision below, is in

accord with this Court's decisions addressing judicial review of executive action and removal jurisdiction to assess a federal defense.

In *Blumberger*, the Ninth Circuit reversed a district court's conclusion—nearly identical to the one affirmed below—"that the Attorney General's . . . notice to the state that [the defendant's] deeming status was 'under consideration' satisfied the advice requirement of § 233(*l*)(1)." *Id.* at 1117, 1140.[2] There, the Ninth Circuit construed § 233(*l*)(1) to obligate the Attorney General to advise the state court of the HHS Secretary's "ex-ante" conferral of deemed federal status within fifteen days of notice, and, on that timely report, to mandate removal, regardless of the Attorney General's separate, "ex-post" coverage decision. *Id.* at 1129 ("§ 233(*l*)(1) obligates the Attorney General to report on the Secretary's deeming decision, not to report the Attorney General's ultimate coverage decision.").

As the Ninth Circuit explained, the "key to unlocking" the meaning of § 233(*l*) is in understanding the distinction Congress drew between the "different determinations made by different department heads." *Id.* at 1127–29. The FSHCAA provides the Secretary, who has "expertise in administering healthcare policies and services,"

[2] The district court below (at App.13a–15a)—in concluding that the Attorney General's timely appearance alone precluded removal under § 233(*l*)(1) and (2)—relied primarily on decisions the Ninth Circuit either reversed (*i.e.*, *Blumberger v. California Hosp. Med. Ctr.*, No. 22-cv-6066, 2022 WL 16698682 (C.D. Cal. Nov. 2, 2022)), abrogated (*i.e.*, *Sherman v. Sinha*, 843 F. App'x 870 (9th Cir. 2021)), or distinguished (*i.e.*, *Allen v. Christenberry*, 327 F.3d 1290 (11th Cir. 2003)).

exclusive authority to designate health centers and their personnel as federal employees for purposes of § 233(a) immunity. *Id.* at 1128. To carry out that responsibility, the Secretary must "prescribe" an "application," § 233(g)(1)(D), to ensure, among other things, that each health center "has implemented appropriate policies and procedures to reduce the risk of malpractice and the risk of lawsuits arising out of any health or health related functions performed by the entity." § 233(h)(1). The Secretary's approval of that application—its deeming determination—prospectively applies to a specified calendar year and affords the health center applicant (and its personnel) a federal-employee status that is "final and binding" on the Attorney General in any subsequent litigation. § 233(g)(1)(F). In contrast, the Attorney General, with expertise in representing the interests of the United States and defending the public fisc, is tasked with making a "litigation-specific" coverage decision and defending individuals or entities covered by § 233(a). § 233(b), (c). *Blumberger*, 68 F.4th at 1128–29.[3]

Given the Act's clear "division of labor," it makes sense, as the *Blumberger* court observed, for the Secretary's deeming determination—the only determination referenced in § 233(*l*)(1)—to confer federal jurisdiction and obligate the Attorney General to remove the action. *Id.* at 1128. As the Ninth Circuit made pellucid—"it is an employee's deemed status,"

[3] As the Ninth Circuit noted, the existence of federal jurisdiction—to adjudicate the immunity defense—neither diminishes nor alters the government's ability to represent its interests. *Id.* at 1135, 1140 (noting Attorney General "is free to contest" a deemed defendant's claimed immunity in a "hearing") (citing § 233(c)).

determined by the Secretary under § 233(g) and (h), "not *covered* status," determined by the Attorney General under § 233(c), "that triggers the removal provisions of § 233(*l*)(1)." *Id.* at 1134 (emphasis added). Thus, "[a]ny advice the Attorney General may give to the state court about its ultimate coverage decision has no legal consequence—one way or another—under § 233(*l*)(1)." *Id.* The Attorney General's ex-post coverage determination, in other words, can neither retroactively strip a health center's deemed federal status nor deprive the court of its jurisdiction over the immunity defense.

Underscoring the circuit split, the Ninth Circuit asserts pointblank: "*Doe v. Centerville Clinics Inc.* . . . illustrates the dangers of eliding th[e] distinction" between deeming and coverage determinations. *Id.* at 1128. The Third Circuit's "insulat[ion of] the Attorney General's deeming advice to the state court—and the ultimate decision not to certify scope of employment—from judicial review" is indeed dangerous. *Id.* at 1135. The decision yields at least two foreseeable and highly disfavored consequences. First, the deemed federal employee is left with "no meaningful forum in which to challenge the government's failure to certify scope of employment." *Id.*; *see also id.* at 1138 (rejecting notion "judicial review remains available to Dr. Tilley in state court or an APA action"). Second, Article III judges are reduced to "petty functionaries . . . required to rubber-stamp the decision of a scarcely disinterested executive officer, but stripped of capacity to evaluate independently whether that decision is correct." *De Martinez v. Lamagno*, 515 U.S. 417, 426 (1995). Such a "strange course becomes all

the more surreal when [as here] one adds to the scene the absence of an obligation on the part of the Attorney General's delegate to conduct a fair proceeding, indeed, any proceeding." *Id.* at 429 (rejecting outcome in which "courts could do no more, and no less, than convert the executive's scarcely disinterested decision into a court judgment").

The Third Circuit's reading of § 233(*l*) is irreconcilable with "'the strong presumption that Congress intends judicial review.'" *Blumberger*, 114 F.4th at 1137–38 (*citing De Martinez*, 515 U.S. at 424, in turn citing precedent spanning from 1835 to 1986).[4] This Court has consistently stated that judicial review of dispositive executive branch actions "will not be cut off unless there is persuasive reason to believe that such was the purpose of Congress." *De Martinez*, 515 U.S. at 424–25 (citation omitted). As *Blumberger* notes, the PHS Act contains no "clear statutory command" that "could alter fundamentally the answer to the 'who decides' question." *Blumberger*, 115 F.4th at 1137 (citing *De Martinez*, 515 U.S. at 426).[5]

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[4] The decision below, despite the parties' extensive briefing on the issue, ignores altogether this Court's approach to judicial review.

[5] Significantly, § 233(*l*)—by mandating removal, a stay of proceedings, and an Article III adjudication of the immunity defense—comports with, if not codifies, much of this Court's longstanding immunity jurisprudence. *See*, *e.g.*, *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985) (official immunity is "an entitlement not to stand trial or face the other burdens of litigation"); *Hunter v. Bryant*, 502 U.S. 224, 227 (1991) (per curiam) (hence, the Court has "repeatedly [] stressed the importance of resolving immunity questions at the earliest possible stage in litigation").

Finally, despite the Third Circuit's purported reliance on the Eleventh Circuit's decision in *Allen v. Christenberry*, 327 F.3d 1290 (11th Cir. 2003), the decision below stands alone in its erroneous interpretation of § 233(*l*). The decision cites *Allen* as purportedly holding that § 233(*l*)(2) "does not permit" removal where the "Attorney General did appear" within the statutory period and advised the state court "that no [coverage] decision had been made but one was forthcoming." App.7a, n.11 (citing and quoting, with alteration, *Allen*, 327 F.3d at 1295). But the Third Circuit's alteration—*i.e.*, its insertion of the word "coverage" into the quoted language—completely changes the meaning of the "decision" to which *Allen* referred. The "decision" in *Allen*—which "had not been made but . . . was forthcoming"—was the ex-ante "HHS determination" under § 233(g) and (h), not (as the Third Circuit would have it) the Attorney General's coverage determination under § 233(c). *Compare id.*, with *Allen*, 327 F.3d at 1295; *see Blumberger*, 115 F.4th at 1132–33.[6]

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[6] As the Ninth Circuit noted, "*Allen* involved a unique set of circumstances." *Blumberger*, 115 F.4th at 1132. When *Allen* was decided, more than twenty years ago, HHS "[did] not maintain any database of individual providers" of deemed health centers, so both deeming and coverage determinations were made *after*, and only in response to, a lawsuit. *El Rio Santa Cruz Neighborhood Health Ctr. v. U.S. Dep't of Health & Hum. Servs.*, 396 F.3d 1265, 1273 (D.C. Cir. 2005) (finding Secretary was violating 42 U.S.C. § 233(g)(1)(A)—(E) requirements by not making "advance" deeming determinations); *see Blumberger*, 115 F.4th at 1139 n.10 (noting *El Rio* "says nothing about the availability of the APA to challenge the Attorney General's failure to certify scope of employment once litigation . . . has begun").

Properly read, *Allen* is discordant with the Third Circuit's decision and in harmony with *Blumberger*. The *Allen* court expressly recognized that "Congress left the determination of the defendants' employment status to the Secretary of HHS and predicated removal upon either an *affirmative deeming by the Secretary* or the Attorney General's failure to appear and advise the court within a prescribed period of time." *Allen*, 327 F.3d at 1296 (emphasis added). *Allen* further acknowledges that if the Attorney General's notice to the state court had confirmed the Secretary's positive, ex-ante deeming determination as to the relevant period—as the Attorney General's notice did here (App. 48a, ¶ 3)—such advice would have required removal under § 233(*l*)(1). *Id.* at 1294 ("If [the Attorney General] advises the court that HHS has determined that the employee is deemed an employee of PHS . . . the Attorney General must remove the case to federal court"); *accord Celestine v. Mount Vernon Neighborhood Health Ctr.*, 403 F.3d 76, 82 (2d Cir. 2005) ("§ 233(*l*)(1) itself says that compliance with its terms also serves to 'satisfy the provisions of subsection (c).'").

At bottom, the Ninth Circuit fully embraced the very argument rejected below: "'because [Centerville] was a 'deemed' PHS employee under § 233 when the events giving rise to this action occurred, it ha[d] the right to remove and removal under § 233(*l*)(1) should be automatic upon the Attorney General's appearance." *Blumberger*, 115 F.4th at 1128–29 (quoting decision below at App. 5a). This Court should grant review to resolve the conflict, correct the Third Circuit's departure from the

accepted role of Article III courts in reviewing executive branch action, and ensure uniformity in the application of statutory procedures designed to safeguard deemed PHS defendants.

II. The Third Circuit's Interpretation of 28 U.S.C. § 1442(a)(1) Misapplies this Court's Precedents and Conflicts with Decisions of the Second and Ninth Circuits

Review of the Third Circuit's decision is warranted for a second and independent reason. The decision flouts this Court's precedents construing the federal officer removal statute, 28 U.S.C. § 1442(a)(1), and creates a direct conflict with the Second Circuit's decision in *Agyin v. Razmzan*, 986 F.3d 168 (2d Cir. 2021), and the Ninth Circuit's decision in *Blumberger*, as to whether a deemed PHS employee's claimed § 233(a) immunity is a colorable federal defense.

In holding that an HHS-designated PHS employee fails to raise a colorable federal defense absent the Attorney General's certification, App. 9a, the decision below impermissibly obligates deemed federal employees to "virtually" "'win [their] case before [they] can have it removed.'" *Jefferson Cnty., Ala. v. Acker*, 527 U.S. 423, 431 (1999) (quoting *Willingham v. Morgan,* 395 U.S. 402, 407 (1969)). In the context of § 233(a) immunity, the Attorney General's litigation-specific certification "transforms an action against an individual federal employee into one against the United States." *Hui*, 559 U.S. at 810. Once secured, certification presumptively validates the federal defense, virtually securing the "win" a deemed PHS employee seeks. *Cf. Osborn v. Haley*, 549

U.S. 225, 252 (2007) ("Upon certification, the action is 'deemed to be . . . brought against the United States,' unless and until the district court determines that the federal officer . . . was acting outside the scope of his employment.") (construing 28 U.S.C. § 2679(d)(1)–(3)). But the Third Circuit ignores a fundamental principle of officer removals: the ultimate validity of the federal defense "is a distinct subject . . . . involv[ing] wholly different inquiries. . . . [with] no connection whatever with the question of jurisdiction." *Mesa v. California*, 489 U.S. 121, 129 (1989) (quoting *Mayor & Aldermen of City of Nashville v. Cooper*, 73 U.S. 247, 254 (1867)).

Even at the merits stage, as this Court observed more than a decade ago, "there is no reason to think that scope certification by the Attorney General is a prerequisite to immunity under § 233(a)." *Hui*, 559 U.S. at 811. Where the Attorney General's certification is unnecessary to secure official immunity, his failure or refusal to certify cannot, as the Third Circuit concluded, strip an asserted immunity defense of its federal color for jurisdictional purposes.

To be sufficiently "colorable" to confer Article III jurisdiction, a federal defense need simply be "plausible [and] reasonably [] asserted, given the facts presented and the current law." *Colorable Claim*, Black's Law Dictionary (12th ed. 2024). The "raising of a federal question in the officer's removal petition . . . constitutes the federal law under which the action . . . arises for Art. III purposes." *Mesa*, 489 U.S. at 136. HHS's "final and binding" determination conferring federal employee status, which neither the

Secretary nor the Attorney General can retroactively revoke, § 233(g)(1)(F), is more than sufficient to meet that test. *Cf. Tennessee v. Davis*, 100 U.S. 257, 262 (1879) (permitting federal officer removal as long as "a Federal question or a claim to a Federal right is raised in the case, and must be decided therein"); *Mayor & Aldermen*, 73 U.S. at 252 (concluding removal jurisdiction exists so long as "there [is] a single . . . ingredient" "of a Federal character").

By conflating the Secretary's ex-ante deeming determination and the Attorney General's ex-post coverage decision, the Third Circuit impermissibly merges the necessary jurisdictional and merits inquiries, yielding the sort of "narrow, grudging interpretation" of § 1442(a)(1) this Court has long and steadfastly rejected. *Willingham*, 395 U.S. at 407; *accord Arizona v. Manypenny*, 451 U.S. 232, 242 (1981); *Acker*, 527 U.S. at 431. The decision is incongruous with the Court's rule—which "scarcely need be said"—that the federal officer removal statute is "liberally construed" to protect federal interests. *See Colorado v. Symes*, 286 U.S. 510, 517 (1932); *accord Watson v. Philip Morris Cos.*, 551 U.S. 142, 147 (2007). The decision below likewise cannot be squared with the Court's repeated recognition that a removing defendant's assertion of federal immunity fulfills the statute's colorable defense requirement. Indeed, trying "the validity of the defense of official immunity . . . in a federal court" is "one of the most important reasons for removal." *Willingham*, 395 U.S. at 407 (rejecting "anomalous result of allowing removal only when the officers had a clearly sustainable defense").

The "test for removal," in other words, "should be broader, not narrower, than the test for official immunity." *Id.* at 405. *Acker* illustrates the point: there, the Court concluded the defendant's inter-governmental tax immunity defense was colorable for removal purposes, then rejected it on its merits. *Acker*, 527 U.S. at 431. Concurring in the result, Justice Scalia reiterated that the provision of "a federal forum in which to litigate the merits of the immunity defenses" is "the main point" of § 1442(a)(1). *Id.* at 447 (Scalia, J., concurring in part and dissenting in part).

The Third Circuit's narrow construction of § 1442(a)(1) not only defies this Court's longstanding precedent, but also creates a direct conflict with the Second Circuit's 2021 application of the statute to a deemed PHS employee's removal where, as here, the defendant claimed § 233(a) immunity as a federal defense. *See Agyin*, 986 F.3d at 174. Faithful to this Court's instruction that federal officer removals "must be liberally construed," and that courts must "credit [the d]efendants' theory of the case" in assessing jurisdiction, the *Agyin* court held that a deemed PHS defendant raises a colorable federal defense in asserting § 233(a) immunity and otherwise meets criteria to remove under § 1442(a)(1) as a person acting under federal officers. *Id.* at 174–75 (citing *Acker*, 527 U.S. at 432); *see id.* at 185, 187 (endorsing deemed PHS defendant's immunity defense on the merits by ordering United States's substitution over its steadfast opposition).

The *Blumberger* court—likewise tasked with assessing whether a deemed PHS defendant's assertion of § 233(a) immunity was sufficient to

satisfy § 1442(a)(1)'s colorable federal defense requirement—reiterated its alignment with the Second Circuit on the issue. *See Blumberger*, 115 F.4th at 1123. There, in direct conflict with the decision below, the Ninth Circuit concluded that "HHS's [deeming] notice provides *unequivocally clear and certain support* for [the deemed physician]'s contention that he was acting 'pursuant to a federal officer's directions' when treating [the plaintiff] and that there is a 'colorable federal defense' pertaining to the medical malpractice claims." *Id.* (emphasis added); *see also Friedenberg*, 68 F.4th at 1124.

III. The Third Circuit's Decision Must be Corrected

This Court should grant review to resolve the conflict between the courts of appeals and to reject the Third Circuit's purpose-defeating construction of two officer removal statutes. The questions presented are important and recurring, calling for prompt resolution and a uniform national rule.

The interpretation of the relevant removal statutes implicates the United States's pecuniary interest and impacts more than 1,300 federally-funded, safety-net health care providers that collectively serve more than 30 million individuals annually. *See* Akash Pillai *et al.*, Kaiser Family Foundation, *Recent Trends in Community Health Center Patients, Services, and Financing* (Apr. 19, 2024), https://www.kff.org/medicaid/issue-brief/recent-trends-in-community-healthcenter-patients-services-and-financing/. The United States itself recognizes that the jurisdictional issues are of

"exceptional importance," having asserted as much in petitioning the Ninth Circuit to rehear *Blumberger en banc*. *See* United States's Pet. for Reh'g En Banc, *Blumberger v. Tilley*, No. 22-56032, Dkt. No. 82 (9th Cir., filed Nov. 25, 2024) (requesting Ninth Circuit conform its construction of § 233(*l*) to that of the decision below).

Although unpublished, the lower court's decision will no doubt "have a lingering effect in the Circuit" and beyond. *Smith v. United States*, 502 U.S. 1017, 1020 (1991) (Blackmun, J., dissenting from denial of certiorari); *cf. C.I.R. v. McCoy*, 484 U.S. 3, 7 (1987) ("[T]hat the Court of Appeals[] order under challenge here is unpublished carries no weight in [this Court's] decision to review the case."). That effect is to undo the purpose of both § 233(*l*) and § 1442(a)(1): to ensure prompt access to a federal forum to assess claimed immunity. By treating the Attorney General's coverage decision as the jurisdictional linchpin for both statutes, the Third Circuit transforms procedural safeguards into mechanisms by which the executive branch may preclude federal jurisdiction and prevent judicial review of its own "scarcely disinterested" decisions. *De Martinez*, 515 U.S. at 432. Litigants, including the United States, have already urged district and appeals courts in the second, fourth, and ninth circuits to adopt the Third Circuit's rule.[7]

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[7] *See, e.g.*, United States's Pet. for Reh'g En Banc at 10–11, *Blumberger v. Tilley*, No. 22-56032 (9th Cir. Nov. 25, 2024), ECF No. 82 (citing decision below); U.S.'s Reply in Support of Mot. to Remand at 5, *L.J.C. v. Dignity Health*, No. 24-4731 (C.D. Cal. Aug. 9, 2024), ECF No. 24, 2024 WL 4143762 (same); *see also,*

No purpose is served by allowing the questions presented to further percolate in the lower courts. As to the first, *Blumberger* "implement[s] Congress's choices rather than remake[s] them," *Health and Hosp. Corp. of Marion Cnty. v. Talevski*, 599 U.S. 166, 178 (2023), in keeping with § 233(*l*)'s language and purpose and this Court's longstanding approach to judicial review. On the second question, the *Agyin* court's application of § 1442(a)(1) to deemed health centers and their personnel, and its conclusion that § 233(a) immunity is a colorable federal defense, is consistent with this Court's longstanding federal officer removal jurisprudence. Geographic divergence and inconsistency in access to a federal forum—and thus to official immunity—in a nationwide, federally-funded program is untenable. *Hui*, 559 U.S. at 805 (resolving two-circuit conflict on scope of § 233(a)

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e.g., Br. of Defendants-Appellees and Defendant-Cross-Claimant-Appellee at 10 n.3, *Kelley v. Richford Health Ctr.*, No. 23-344 (2d Cir. Sept. 25, 2023), ECF No. 90, 2023 WL 6388135 (citing district court decision); U.S.'s Reply Br. in Support of Mot. to Remand at 2, *Gerson v. Petaluma Health Ctr., Inc.*, No. 23-3870 (N.D. Cal. Sept. 30, 2023), ECF No. 23, 2023 WL 10448616 (same); U.S.'s Mot. to Remand at 12, *L.J.C. v. Dignity Health*, No. 24-4731 (C.D. Cal. June 21, 2024), ECF No. 13, 2024 WL 4143764 (same); U.S.'s Mot. to Remand at 8, *Bradford v. Asian Health Services*, No. 24-1060 (N.D. Cal. Mar. 22, 2024), ECF No. 17, 2024 WL 1828851 (same); U.S.'s Mot. to Remand at 7, *Margolies v. Lifelong Med. Care*, No. 24-340 (N.D. Cal. Feb. 22, 2024), ECF No. 16, 2024 WL 1960835 (citing district court decision); U.S.'s Mot. to Remand at 7, *Scott v. Lifelong Med. Care*, No. 24-341 (N.D. Cal. Feb. 22, 2024), ECF No. 12, 2024 WL 2880242 (same); Mem. of Law in Support of Plaintiff's Mot. to Remand at 8, *Doe v. Three Lower Cnties. Cmy. Servs., Inc.*, No. 23-2811 (D. Md. Nov. 17, 2023), ECF No. 20-1, 2023 WL 9839926 (same).

immunity). The current circuit conflict has subjected, and will subject, health centers engaged in identical, federally-approved activity to vastly different outcomes in vindicating their statutory rights, based purely on location.

Finally, the question presented is recurring, and delay in correcting the Third Circuit's error and definitively resolving the issue will irreparably harm health centers and their patients. Permitting further litigation in the lower courts over threshold jurisdictional questions erodes absolute immunity, which, more than a "mere defense to liability" is a right not to be a party to litigation, "effectively lost if a case is erroneously permitted to go to trial." *See Mitchell*, 472 U.S. at 526. Curtailing official immunity, in turn, diverts resources, time, and attention away from scores of vulnerable health center patients. The Third Circuit's rule frustrates the overarching purpose of § 233(a) immunity: the efficient and effective advancement of public health. *See Three Lower Cnties. Cmty. Health Servs., Inc. v. Maryland*, 498 F.3d 294, 303 (4th Cir. 2007) (health centers serve "vital function in delivering healthcare to underserved populations" nationwide); H.R. Rep. No. 104-398 at 6 (recognizing "significant savings . . . redirected to patient care" through FSHCAA enactment). The Third Circuit's decision forces health centers to do precisely what Congress sought to prevent: spend their scarce resources on costly private liability insurance. *See* H.R. Rep. No. 104-398 at 5–7.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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