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APPENDIX A

NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 23-2738

JANE DOE, Individually, and on behalf
of herself and those similarly situated

v.

CENTERVILLE CLINICS INC.,
Appellant

On Appeal from the United States District Court
for the Western District of Pennsylvania
(D.C. No. 2:23-cv-01107)
District Judge: Hon. J. Nicholas Ranjan

Argued June 3, 2024
Before: CHAGARES, *Chief Judge*, CHUNG, and
FISHER, *Circuit Judges*.

(Filed: August 6, 2024)

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OPINION[*]

FISHER, *Circuit Judge*.

Plaintiff Jane Doe, on behalf of herself and a putative class of similarly situated individuals, sued

[*] This disposition is not an opinion of the full Court and pursuant to I.O.P. 5.7 does not constitute binding precedent.

Centerville Clinics in Pennsylvania state court. Doe alleged that Centerville embedded tracking software on its website and patient portal to gather personal data—including personal medical information—from its patients, which it then transmitted to Facebook for use in advertising in violation of Pennsylvania law.[1] Centerville removed the case to federal court, invoking the Federally Supported Health Centers Assistance Act (Health Centers Act), 42 U.S.C. § 233(*l*)(2), and the federal officer removal statute, 28 U.S.C. § 1442(a)(1). The District Court rejected these bases for removal and remanded the case to state court. For the reasons set forth below, we will affirm.[2]

I.

The District Court was required to remand to state court unless Centerville could establish that it was authorized to remove the case under the Health

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[1] The complaint asserted state law causes of action for invasion of privacy; intrusion upon seclusion; breach of implied contract; unjust enrichment; breach of fiduciary duty; violation of the Pennsylvania Unfair Trade Practices and Consumer Protection Law, 73 Pa. Stat. §§ 201-01, *et seq.*; and violation of the Pennsylvania Wiretapping and Electronic Surveillance Control Act, 18 Pa. Cons. Stat. § 5701, *et seq*.

[2] Because Centerville asserted the federal officer removal statute as a basis for removal, we have jurisdiction to review any basis for removal the District Court addressed. *Maglioli v. All. HC Holdings LLC*, 16 F.4th 393, 402–03 (3d Cir. 2021) (citing 28 U.S.C. § 1447(d); *BP P.L.C. v. Mayor of Baltimore*, 141 S. Ct. 1532, 1538 (2021)). We review orders remanding for lack of subject matter jurisdiction de novo. *Maglioli*, 16 F.4th at 403.

Centers Act or the federal officer removal statute.[3]

A. Removal Under the Health Centers Act

Centerville argues that removal was proper under the Health Centers Act because: (1) as a "deemed" federal Public Health Service (PHS) employee,[4] it was entitled to absolute immunity from any civil action related to conduct within the scope of its employment, and (2) the Attorney General's representative appeared in state court but did not make a coverage determination within the fifteen-day statutory period. Neither argument can be squared with the plain text of § 233.

Removal under the Health Centers Act is authorized "in only two circumstances."[5] First, the government may remove a case to federal court at "any time before trial" if the Attorney General appears in the state-court proceeding within fifteen days of being notified and makes an affirmative determination that

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[3] *See Frederico v. Home Depot*, 507 F.3d 188, 193 (3d Cir. 2007) ("[T]he party asserting federal jurisdiction in a removal case bears the burden of showing, at all stages of the litigation, that the case is properly before the federal court.").

[4] Federally funded community health centers and their employees, officers, and individual contractors are eligible for medical malpractice coverage under the Federal Tort Claims Act to the same extent as federal employees of the PHS. 42 U.S.C. § 233(g).

[5] *Allen v. Christenberry*, 327 F.3d 1290, 1294–95 (11th Cir. 2003).

the defendant is entitled to coverage under the Act.[6] Second, the defendant may remove the case itself if the Attorney General fails to appear in the state-court proceeding within fifteen days of being notified.[7]

Centerville argues that because it was a "deemed" PHS employee under § 233 when the events giving rise to this action occurred, it has the right to remove and removal under § 233(*l*)(1) should be automatic upon the Attorney General's appearance. But Centerville misreads the statute, conflating the Attorney General's prior deeming determination with its specific coverage determination.

When she timely appeared in state court, the Assistant United States Attorney (representing the Attorney General) explained that while Centerville had been deemed a PHS employee, the government had not determined under § 233(*l*)(1) whether Centerville's deemed status extends "to the acts or omissions that are the subject of this civil action."[8]

A prior annual determination under § 233(g) that Centerville is deemed a PHS employee—perhaps made well before the conduct related to the suit occurred—cannot satisfy § 233(*l*)(1)'s requirement that the government's coverage determination account for

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[6] 42 U.S.C. §§ 233(c) and (*l*)(1).

[7] *Id.* § 233(*l*)(2).

[8] Appendix ("A") 93–94 (citing 42 U.S.C. § 233(*l*)(1)).

the specifics of the conduct related to the pending lawsuit. We therefore agree with the District Court that "just because Centerville has a prior determination from HHS" does not mean that the government has made its specific coverage determination "for purposes of this action."[9] Centerville cannot remove under § 233(*l*)(1).

Centerville next argues that it had a right to remove the action under § 233(*l*)(2) because the Attorney General appeared in the state-court proceeding, but did not make a specific coverage determination within the fifteen-day statutory period. But this theory ignores the plain text of the statute, which permits a state-court defendant to remove the action only "[i]f the Attorney General fails to appear in State court within the [fifteen-day] time period prescribed."[10] The text of § 233(*l*)(2) is clear: there is no requirement that the Attorney General also make a coverage determination within that period, and we decline to read that extra-textual language into the statute. The Attorney General appeared within the statutory period, and so Centerville's reliance on § 233(*l*)(2) is misplaced.[11]

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[9] A6.

[10] 42 U.S.C. § 233(*l*)(2); *In re Price*, 370 F.3d 362, 368 (3d Cir. 2004) ("We are to begin with the text of a provision and, if its meaning is clear, end there.").

[11] *See, e.g.*, *Allen*, 327 F.3d at 1295 (holding that § 233(*l*)(2) "does not permit" removal where the "Attorney General did appear" within the statutory period and advised the state court

B. Federal Officer Removal

Centerville argues in the alternative that removal was proper under the federal officer removal statute because it is either a federal officer, or was acting under a federal officer while engaged in the conduct at issue in this lawsuit. Neither assertion is correct.

Section 1442(a)(1) "permits certain officers of the United States to remove actions to federal court."[12] "It also allows 'private persons who lawfully assist [a] federal officer in the performance of his official duty' to remove a case to federal court."[13] The statute's "'central aim' . . . 'is to protect officers of the federal government from interference by litigation in state court while those officers are trying to carry out their duties.'"[14]

Contrary to Centerville's first assertion, it is not a federal officer in its own right. Centerville is a

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"that no [coverage] decision had been made but one was forthcoming").

[12] *Maglioli*, 16 F.4th at 404.

[13] *Mohr v. Trs. of Univ. of Pa.*, 93 F.4th 100, 104 (3d Cir. 2024) (quoting *Watson v. Philip Morris Cos.*, 551 U.S. 142, 151 (2007)).

[14] *Golden v. N.J. Inst. of Tech.*, 934 F.3d 302, 309 (3d Cir. 2019) (alterations omitted) (quoting *Papp v. Fore-Kast Sales Co.*, 842 F.3d 805, 811 (3d Cir. 2016)).

private health center that receives federal grant funding. While Centerville may be deemed a PHS employee, that status is only relevant "[f]or purposes of" the Health Centers Act.[15] The fact that Centerville receives federal funds does not otherwise transform it into a federal officer.[16]

For a private defendant, like Centerville, to remove a case under § 1442(a)(1), it must meet four requirements:

> (1) the defendant must be a "person" within the meaning of the statute; (2) the plaintiff's claims must be based upon the defendant "acting under" the United States, its agencies, or its officers; (3) the plaintiff's claims against the defendant must be "for or relating to" an act under color of federal office; and (4) the defendant must raise a colorable federal defense to the plaintiff's claims.[17]

Centerville, as the party seeking removal, bears the

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[15] 42 U.S.C. § 233(g)(1)(A).

[16] *See Watson*, 551 U.S. at 151 (distinguishing between a "private person" and a "federal officer" for purposes of removal); *Maglioli*, 16 F.4th at 404–05 (distinguishing between "private parties" and "federal actors"), *Mohr*, 93 F.4th at 104–05 (same).

[17] *Maglioli*, 16 F.4th at 404 (quoting 28 U.S.C. § 1442(a)(1)).

burden of establishing that each requirement is met.[18]

The District Court concluded that Centerville did not satisfy the fourth requirement because it failed to raise a colorable federal defense. We agree. As explained above, Centerville could not properly remove this action under § 233. And § 233 immunity was the sole basis Centerville provided to satisfy § 1442(a)(1)'s federal-defense requirement. So Centerville has not met its burden of establishing that it raised a colorable federal defense and therefore is not entitled to removal under § 1442(a)(1).[19]

II.

For these reasons, we will affirm the District Court's order granting Doe's motion to remand.

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[18] *Frederico*, 507 F.3d at 193.

[19] The parties, including the United States as amicus, provided the Court with helpful supplemental briefing addressing whether § 233's removal framework should be read to foreclose Centerville's reliance on § 1442(a)(1) as a separate and independent basis for removal. This Court has not yet spoken to § 233's potential exclusivity as a means of removal. Because Centerville was not entitled to remove under either statutory scheme, however, we need not reach this question to resolve this appeal and therefore decline to do so.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT
OF PENNSYLVANIA

JANE DOE, individually and on
behalf of all others similarly situated,

Plaintiff,

v. 2:23-cv-1107-NR

CENTERVILLE CLINICS INC.,

Defendant.

MEMORANDUM ORDER

Defendant Centerville Clinics is a nonprofit healthcare system that provides medical services to around 40,000 patients in Pennsylvania. ECF 1-2, ¶¶ 32-33. In providing those services, Centerville encouraged patients to use certain "online platforms" to, among other things, find providers, schedule appointments, book procedures, communicate with their doctors, and review their medical histories. *Id.* ¶ 35. Plaintiff Jane Doe brings this class action against Centerville alleging it installed software on its platforms that shared users' private data with third parties, including "medical treatment sought, medical conditions, appointment type and date, physician selected, specific button/menu selections, content (such

as searches for symptoms or treatment options) typed into free text boxes, demographic information, email addresses, phone numbers, and emergency contact information." *Id.* ¶¶ 37-38, 67. She alleges that these disclosures breached HIPAA standards, industry standards, and the purported class members' expectations of privacy. *Id.* ¶¶ 105-127. She brought claims in state court for common law Intrusion Upon Seclusion, Breach of Implied Contract, Unjust Enrichment, Breach of Fiduciary Duty, violation of the Pennsylvania Unfair Trade Practices and Consumer Protection Law, and violation of the Pennsylvania Wiretapping and Electronic Surveillance Control Act. *Id.* ¶ 26.

Centerville then removed the case to federal court, citing two bases for federal jurisdiction in its notice of removal. First, Centerville asserts that the Secretary of Health and Human Services has deemed Centerville a United States Public Health Service employee, so it could remove the case pursuant to 42 U.S.C. § 233 *et seq*. ECF 1, ¶¶ 1-2, 6. In the alternative, it argues that removal is proper under the federal-officer removal statute at 28 U.S.C. § 1442(a)(1), as Centerville is either a federal officer or a person acting under a federal officer through its status as a PHS employee. *Id.* ¶¶ 7-12. Plaintiff opposes removal and has moved to remand the case to state court. ECF 20. Having reviewed the relevant law and the parties' briefs and exhibits, the Court agrees with Plaintiff and grants her motion to remand.

DISCUSSION & ANALYSIS

"Section 233(a) grants absolute immunity to [Public Health Service] officers and employees for actions 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). It also requires the Attorney General to defend those employees—and remove any state-court actions against them to federal court—where two conditions are met: (1) the Secretary of HHS has "deemed" the defendant to be an employee of PHS, and (2) the Attorney General certifies that the defendant "was acting in the scope of his employment at the time of the incident out of which the suit arose." *Est. of Campbell by Campbell v. S. Jersey Med. Ctr.*, 732 F. App'x 113, 116 (3d Cir. 2018); *Young v. Temple Univ. Hosp.*, No. 18-2803, 2019 WL 109388, at *2 (E.D. Pa. Jan. 3, 2019) (citing 42 U.S.C. §§ 233(c), (g)(1)(A)).

Under the statute, within 15 days of receiving notice of a state-court action against a defendant, the Attorney General must "make an appearance" in state court and "advise such court as to whether the [HHS] Secretary" has deemed the defendant to be an employee of PHS. 42 U.S.C. §§ 233(l)(1). But where the Attorney General "fails to [timely] appear" in state court, the state-court defendant can remove the action itself so the district court can make the appropriate determination on the proper forum for the action. 42 U.S.C. §§ 233(l)(2).

Centerville (not the Attorney General) removed this action pursuant to § 233(l)(2), arguing that though the Attorney General appeared in state court within 15

days of receiving notice, it did not "advise" on the scope determination, thereby triggering Centerville's removal right. ECF 23, p. 13. But that isn't the proper procedure.

Courts "are to begin with the text of a provision and, if its meaning is clear, end there," and § 233(l) is clear. *In re Price*, 370 F.3d 362, 368 (3d Cir. 2004). A state-court defendant can only remove "[i]f the Attorney General fails to appear." But the Attorney General timely appeared in state court, so § 233(l)(2) wasn't triggered. *Accord Blumberger v. California Hosp. Med. Ctr.*, No. 22-6066, 2022 WL 16698682, at *3 (C.D. Cal. Nov. 2, 2022) ("Removal is improper under the plain text of § 233(l)(2) [where, as here,] the Attorney General appeared within 15 days after being notified of the state court action, even if that appearance was only to advise the court that no determination had yet been made."); *Allen v. Christenberry*, 327 F.3d 1290, 1294-95 (11th Cir. 2003) (removal by defendants improper where "the Attorney General did appear in the state court proceeding within 15 days of being notified of the lawsuit, but he did not advise the court of any determination by HHS, because none had been made as of that time"); *Sherman by & through Sherman v. Sinha*, 843 F. App'x 870, 873 (9th Cir. 2021) (removal by defendant where Attorney General appeared within 15 days but did not advise as to status is "contrary to the statutory scheme and unworkable as a practical matter"); *Young*, 2019 WL 109388, at *3 (removal improper where"[a]t the time of removal, the United States had not yet deemed Dr. Shrivatsa a federal employee acting within the scope of her employment during the relevant time period,

nor had Dr. Shrivatsa herself removed the case to federal court after a failure by the Attorney General to make an appearance in the case within fifteen days of the filing in state court").

Centerville cites some cases in response, but they are distinguishable or inapposite. Those cases concerned suits that didn't address removal, or where the Attorney General never appeared in state court (not, as here, where he appeared but hadn't yet "advised" on the certification). *E.g.*, *Hui*, 559 U.S. at 811 (addressing whether defendant was immune under FTCA, not removal under § 233*); Booker v. United States*, No. 13-1099, 2015 WL 3884813, at *1 (E.D. Pa. June 24, 2015) (addressing defendant's failure to exhaust administrative remedies and refusing to substitute United States for defendant); *Est. of Campbell*, 732 F. App'x at 115 (Attorney General did not appear); *Friedenberg v. Lane Cnty.*, No. 18-177, 2018 WL 11352363, at *3 (D. Or. May 23, 2018) (Attorney General did not appear).

Centerville also points out that HHS already determined that "Centerville is deemed to be a PHS employee for the relevant periods," and so that "determination controls the Court's removal jurisdiction under § 233(l)(2)." ECF 23, p. 12 n.1. It appears Centerville is arguing that a prior deeming determination counts here. But it doesn't. Section 233(l)(1) says that the Secretary must make the scope determination "with respect to the actions or omissions that are the subject of such civil action or proceeding." 42 U.S.C. § 233(l)(1). So just because Centerville has a prior determination from HHS, that doesn't mean

HHS has deemed it an employee of PHS for purposes of this action.

Once the Attorney General had made a timely appearance, Centerville needed to wait for the appropriate authorities to make the relevant determinations as stated in § 233, rather than take matters into its own hands. Indeed, "a final determination of whether the federal government should represent a particular defendant in a civil action may take more than two weeks." *Sinha*, 843 F. App'x at 873. If HHS and the Attorney General conclude that Centerville was a deemed employee acting within the scope of its employment for the actions underlying Plaintiff's suit, then the Attorney General may remove this case at that time, as he is empowered to do. 42 U.S.C. § 233(c) (Attorney General must remove state-court action "at any time before trial" after making the requisite scope determination).

Centerville's alternative ground for removal (federal-officer removal) fails for similar reasons. To invoke removal under § 1442, Centerville must show, among other things, that its removal "raises a colorable federal defense to the plaintiff's claims." *Doe I v. UPMC*, No. 20-359, 2020 WL 4381675, at *3 (W.D. Pa. July 31, 2020) (Horan, J.) (citation omitted). But the only defense Centerville raises is the absolute immunity afforded by § 233. ECF 1, ¶ 12. To permit Centerville to raise § 233 as a defense for purposes of § 1442, when it didn't abide by the removal procedures of § 233, would sidestep the framework of § 233. *See Nye v. Hilo Med. Ctr.*, No. 09-220, 2010 WL 931926, at *3 (D. Haw. Mar. 11, 2010) (remanding action to state

court where defendant invoked FTCA coverage under § 233 as its defense for § 1442 removal because "but for § 233 and Hilo Bay Clinic's designation as a federal entity under that law, Hilo Bay Clinic could not have removed the action to this court"). This isn't a procedural nitpick—the removal provisions are part-and-parcel with substantive determinations about § 233's applicability to Centerville. *See* 42 U.S.C. § 233(a) (remedy under § 233 is "exclusive" for an "employee of the Public Health Service . . . acting within the scope of his office or employment"). In other words, § 233 immunity may apply and could serve as a colorable defense, but only if the threshold requirements of that section are first met.

Finally, the Court denies Plaintiff's request for fees and costs because it concludes that Centerville's removal notice was not frivolous or objectively unreasonable. *First Am. Title Ins. Corp. v. JP Morgan Chase & Co.*, 384 F. App'x 64, 66 (3d Cir. 2010) ("[A]bsent unusual circumstances, courts may award attorney's fees under § 1447(c) only where the removing party lacked an objectively reasonable basis for seeking removal." (cleaned up)).

* * *

AND NOW, this 14th day of September, 2023, it is hereby **ORDERED** that Plaintiff's motion to remand (ECF 20) is **GRANTED**. The Court **REMANDS** this case **FORTHWITH** to the Court of Common Pleas of Washington County for further proceedings. This Order is without prejudice to the United States Attorney General removing the action

upon making the requisite scope certification. It is **FURTHER ORDERED** that Plaintiff's request for fees and costs is **DENIED**. The Clerk of this Court shall mark this case as **CLOSED**.

BY THE COURT:

/s/ *J. Nicholas Ranjan*
United States District Judge

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 23-2738

JANE DOE, Individually, and on behalf of all others similarly situated

v.

CENTERVILLE CLINICS INC.,
Appellant

(W.D. Pa. No. 2-23-cv-01107)

SUR PETITION FOR REHEARING WITH SUGGESTION FOR REHEARING EN BANC

Present: CHAGARES, *Chief Judge*, JORDAN, HARDIMAN, SHWARTZ, KRAUSE, RESTREPO, BIBAS, PORTER, MATEY, PHIPPS, FREEMAN, MONTGOMERY-REEVES, CHUNG and FISHER[*], *Circuit Judges*

The petition for rehearing filed by Appellant, Centerville Clinics Inc. in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other

[*] Judge Fisher's vote is limited to panel rehearing only.

available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the judges of the circuit in regular service not having voted for rehearing, the petition for rehearing by the panel and the Court en banc, is denied.

BY THE COURT:

s/ D. Michael Fisher
Circuit Judge

Dated: October 9, 2024
CJG/cc: Michael C. Iadevaia, Esq.
James Gerald Stranch, IV, Esq.
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APPENDIX D

42 U.S.C. § 233

Civil actions or proceedings against commissioned officers or employees

(a) Exclusiveness of remedy

The remedy against the United States provided by sections 1346(b) and 2672 of Title 28, or by alternative benefits provided by the United States where the availability of such benefits precludes a remedy under section 1346(b) of Title 28, for damage for personal injury, including death, resulting from the performance of medical, surgical, dental, or related functions, including the conduct of clinical studies or investigation, by any commissioned officer or employee of the Public Health Service while acting within the scope of his office or employment, shall be exclusive of any other civil action or proceeding by reason of the same subject-matter against the officer or employee (or his estate) whose act or omission gave rise to the claim.

(b) Attorney General to defend action or proceeding; delivery of process to designated official; furnishing of copies of pleading and process to United States attorney, Attorney General, and Secretary

The Attorney General shall defend any civil action or proceeding brought in any court against any person

referred to in subsection (a) of this section (or his estate) for any such damage or injury. Any such person against whom such civil action or proceeding is brought shall deliver within such time after date of service or knowledge of service as determined by the Attorney General, all process served upon him or an attested true copy thereof to his immediate superior or to whomever was designated by the Secretary to receive such papers and such person shall promptly furnish copies of the pleading and process therein to the United States attorney for the district embracing the place wherein the proceeding is brought, to the Attorney General, and to the Secretary.

(c) Removal to United States district court; procedure; proceeding upon removal deemed a tort action against United States; hearing on motion to remand to determine availability of remedy against United States; remand to State court or dismissal

Upon a certification by the Attorney General that the defendant was acting in the scope of his employment at the time of the incident out of which the suit arose, any such civil action or proceeding commenced in a State court shall be removed without bond at any time before trial by the Attorney General to the district court of the United States of the district and division embracing the place wherein it is pending and the proceeding deemed a tort action brought against the United States under the provisions of Title 28 and all references thereto. Should a United States district court determine on a hearing on a motion to remand held before a trial on the merit that the case so

removed is one in which a remedy by suit within the meaning of subsection (a) of this section is not available against the United States, the case shall be remanded to the State Court: *Provided*, That where such a remedy is precluded because of the availability of a remedy through proceedings for compensation or other benefits from the United States as provided by any other law, the case shall be dismissed, but in the event the running of any limitation of time for commencing, or filing an application or claim in, such proceedings for compensation or other benefits shall be deemed to have been suspended during the pendency of the civil action or proceeding under this section.

(d) Compromise or settlement of claim by Attorney General

The Attorney General may compromise or settle any claim asserted in such civil action or proceeding in the manner provided in section 2677 of Title 28 and with the same effect.

(e) Assault or battery

For purposes of this section, the provisions of section 2680(h) of Title 28 shall not apply to assault or battery arising out of negligence in the performance of medical, surgical, dental, or related functions, including the conduct of clinical studies or investigations.

(f) Authority of Secretary or designee to hold harmless or provide liability insurance for assigned or detailed employees

The Secretary or his designee may, to the extent that he deems appropriate, hold harmless or provide liability insurance for any officer or employee of the Public Health Service for damage for personal injury, including death, negligently caused by such officer or employee while acting within the scope of his office or employment and as a result of the performance of medical, surgical, dental, or related functions, including the conduct of clinical studies or investigations, if such employee is assigned to a foreign country or detailed to a State or political subdivision thereof or to a non-profit institution, and if the circumstances are such as are likely to preclude the remedies of third persons against the United States described in section 2679(b) of Title 28, for such damage or injury.

(g) Exclusivity of remedy against United States for entities deemed Public Health Service employees; coverage for services furnished to individuals other than center patients; application process; subrogation of medical malpractice claims; applicable period; entity and contractor defined

(1)

(A) For purposes of this section and subject to the approval by the Secretary of an application under subparagraph (D), an entity described in paragraph (4), and any officer, governing board member, or employee of such an entity, and any contractor of such an entity who is a physician or other licensed or certified health

care practitioner (subject to paragraph (5)), shall be deemed to be an employee of the Public Health Service for a calendar year that begins during a fiscal year for which a transfer was made under subsection (k)(3) (subject to paragraph (3)). The remedy against the United States for an entity described in paragraph (4) and any officer, governing board member, employee, or contractor (subject to paragraph (5)) of such an entity who is deemed to be an employee of the Public Health Service pursuant to this paragraph shall be exclusive of any other civil action or proceeding to the same extent as the remedy against the United States is exclusive pursuant to subsection (a).

(B) The deeming of any entity or officer, governing board member, employee, or contractor of the entity to be an employee of the Public Health Service for purposes of this section shall apply with respect to services provided–

(i) to all patients of the entity, and

(ii) subject to subparagraph (C), to individuals who are not patients of the entity.

(C) Subparagraph (B)(ii) applies to services provided to individuals who are not patients of an entity if the Secretary determines, after reviewing an application submitted under subparagraph (D), that the provision of the

services to such individuals–

> **(i)** 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;
>
> **(ii)** facilitates the provision of services to patients of the entity; or
>
> **(iii)** are otherwise required under an employment contract (or similar arrangement) between the entity and an officer, governing board member, employee, or contractor of the entity.

(D) The Secretary may not under subparagraph (A) deem an entity or an officer, governing board member, employee, or contractor of the entity to be an employee of the Public Health Service for purposes of this section, and may not apply such deeming to services described in subparagraph (B)(ii), unless the entity has submitted an application for such deeming to the Secretary in such form and such manner as the Secretary shall prescribe. The application shall contain detailed information, along with supporting documentation, to verify that the entity, and the officer, governing board member, employee, or contractor of the entity, as the case may be, meets the requirements of subparagraphs (B) and (C) of this paragraph

and that the entity meets the requirements of paragraphs (1) through (4) of subsection (h).

(E) The Secretary shall make a determination of whether an entity or an officer, governing board member, employee, or contractor of the entity is deemed to be an employee of the Public Health Service for purposes of this section within 30 days after the receipt of an application under subparagraph (D). The determination of the Secretary that an entity or an officer, governing board member, employee, or contractor of the entity is deemed to be an employee of the Public Health Service for purposes of this section shall apply for the period specified by the Secretary under subparagraph (A).

(F) Once the Secretary makes a determination that an entity or an officer, governing board member, employee, or contractor of an entity is deemed to be an employee of the Public Health Service for purposes of this section, the determination shall be final and binding upon the Secretary and the Attorney General and other parties to any civil action or proceeding. Except as provided in subsection (i), the Secretary and the Attorney General may not determine that the provision of services which are the subject of such a determination are not covered under this section.

(G) In the case of an entity described in paragraph (4) that has not submitted an

application under subparagraph (D):

(i) The Secretary may not consider the entity in making estimates under subsection (k)(1).

(ii) This section does not affect any authority of the entity to purchase medical malpractice liability insurance coverage with Federal funds provided to the entity under section 254b, 254b, or 256a of this title.

(H) In the case of an entity described in paragraph (4) for which an application under subparagraph (D) is in effect, the entity may, through notifying the Secretary in writing, elect to terminate the applicability of this subsection to the entity. With respect to such election by the entity:

(i) The election is effective upon the expiration of the 30-day period beginning on the date on which the entity submits such notification.

(ii) Upon taking effect, the election terminates the applicability of this subsection to the entity and each officer, governing board member, employee, and contractor of the entity.

(iii) Upon the effective date for the election, clauses (i) and (ii) of

subparagraph (G) apply to the entity to the same extent and in the same manner as such clauses apply to an entity that has not submitted an application under subparagraph (D).

(iv) If after making the election the entity submits an application under subparagraph (D), the election does not preclude the Secretary from approving the application (and thereby restoring the applicability of this subsection to the entity and each officer, governing board member, employee, and contractor of the entity, subject to the provisions of this subsection and the subsequent provisions of this section).

(2) If, with respect to an entity or person deemed to be an employee for purposes of paragraph (1), a cause of action is instituted against the United States pursuant to this section, any claim of the entity or person for benefits under an insurance policy with respect to medical malpractice relating to such cause of action shall be subrogated to the United States.

(3) This subsection shall apply with respect to a cause of action arising from an act or omission which occurs on or after January 1, 1993.

(4) An entity described in this paragraph is a public or non-profit private entity receiving Federal funds under section 254b of this title.

(5) For purposes of paragraph (1), an individual may be considered a contractor of an entity described in paragraph (4) only if–

(A) the individual normally performs on average at least 32 ½ hours of service per week for the entity for the period of the contract; or

(B) in the case of an individual who normally performs an average of less than 32 ½ hours of services per week for the entity for the period of the contract, the individual is a licensed or certified provider of services in the fields of family practice, general internal medicine, general pediatrics, or obstetrics and gynecology.

(h) Qualifications for designation as Public Health Service employee

The Secretary may not approve an application under subsection (g)(1)(D) unless the Secretary determines that the entity–

(1) 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;

(2) has reviewed and verified the professional credentials, references, claims history, fitness, professional review organization findings, and license status of its physicians and other licensed

or certified health care practitioners, and, where necessary, has obtained the permission from these individuals to gain access to this information;

(3) has no history of claims having been filed against the United States as a result of the application of this section to the entity or its officers, employees, or contractors as provided for under this section, or, if such a history exists, has fully cooperated with the Attorney General in defending against any such claims and either has taken, or will take, any necessary corrective steps to assure against such claims in the future; and

(4) will fully cooperate with the Attorney General in providing information relating to an estimate described under subsection (k).

(i) Authority of Attorney General to exclude health care professionals from coverage

(1) Notwithstanding subsection (g)(1), the Attorney General, in consultation with the Secretary, may on the record determine, after notice and opportunity for a full and fair hearing, that an individual physician or other licensed or certified health care practitioner who is an officer, employee, or contractor of an entity described in subsection (g)(4) shall not be deemed to be an employee of the Public Health Service for purposes of this section, if treating such individual as such an employee would expose the Government to an unreasonably high degree of risk of loss because such individual–

(A) does not comply with the policies and procedures that the entity has implemented pursuant to subsection (h)(1);

(B) has a history of claims filed against him or her as provided for under this section that is outside the norm for licensed or certified health care practitioners within the same specialty;

(C) refused to reasonably cooperate with the Attorney General in defending against any such claim;

(D) provided false information relevant to the individual's performance of his or her duties to the Secretary, the Attorney General, or an applicant for or recipient of funds under this chapter; or

(E) was the subject of disciplinary action taken by a State medical licensing authority or a State or national professional society.

(2) A final determination by the Attorney General under this subsection that an individual physician or other licensed or certified health care professional shall not be deemed to be an employee of the Public Health Service shall be effective upon receipt by the entity employing such individual of notice of such determination, and shall apply only to acts or omissions occurring after the date such notice is received.

(j) Remedy for denial of hospital admitting privileges to certain health care providers

In the case of a health care provider who is an officer, employee, or contractor of an entity described in subsection (g)(4), section 254h(e) of this title shall apply with respect to the provider to the same extent and in the same manner as such section applies to any member of the National Health Service Corps.

(k) Estimate of annual claims by Attorney General; criteria; establishment of fund; transfer of funds to Treasury accounts

(1)

(A) For each fiscal year, the Attorney General, in consultation with the Secretary, shall estimate by the beginning of the year the amount of all claims which are expected to arise under this section (together with related fees and expenses of witnesses) for which payment is expected to be made in accordance with section 1346 and chapter 171 of Title 28 from the acts or omissions, during the calendar year that begins during that fiscal year, of entities described in subsection (g)(4) and of officers, employees, or contractors (subject to subsection (g)(5)) of such entities.

(B) The estimate under subparagraph (A) shall take into account–

(i) the value and frequency of all claims

for damage for personal injury, including death, resulting from the performance of medical, surgical, dental, or related functions by entities described in subsection (g)(4) or by officers, employees, or contractors (subject to subsection (g)(5)) of such entities who are deemed to be employees of the Public Health Service under subsection (g)(1) that, during the preceding 5-year period, are filed under this section or, with respect to years occurring before this subsection takes effect, are filed against persons other than the United States,

(ii) the amounts paid during that 5-year period on all claims described in clause (i), regardless of when such claims were filed, adjusted to reflect payments which would not be permitted under section 1346 and chapter 171 of Title 28, and

(iii) amounts in the fund established under paragraph (2) but unspent from prior fiscal years.

(2) Subject to appropriations, for each fiscal year, the Secretary shall establish a fund of an amount equal to the amount estimated under paragraph (1) that is attributable to entities receiving funds under each of the grant programs described in paragraph (4) of subsection (g), but not to exceed a total of $10,000,000 for each such fiscal year. Appropriations for purposes of this paragraph

shall be made separate from appropriations made for purposes of sections 254b, 254b and 256a of this title.

(3) In order for payments to be made for judgments against the United States (together with related fees and expenses of witnesses) pursuant to this section arising from the acts or omissions of entities described in subsection (g)(4) and of officers, governing board members, employees, or contractors (subject to subsection (g)(5)) of such entities, the total amount contained within the fund established by the Secretary under paragraph (2) for a fiscal year shall be transferred not later than the December 31 that occurs during the fiscal year to the appropriate accounts in the Treasury.

(l) Timely response to filing of action or proceeding

(1) If a civil action or proceeding is filed in a State court against any entity described in subsection (g)(4) or any officer, governing board member, employee, or any contractor of such an entity for damages described in subsection (a), the Attorney General, within 15 days after being notified of such filing, shall make an appearance in such court and advise such court as to whether the Secretary has determined under subsections (g) and (h), that such entity, officer, governing board member, employee, or contractor of the entity is deemed to be an employee of the Public Health Service for purposes of this section with respect to the actions

or omissions that are the subject of such civil action or proceeding. Such advice shall be deemed to satisfy the provisions of subsection (c) that the Attorney General certify that an entity, officer, governing board member, employee, or contractor of the entity was acting within the scope of their employment or responsibility.

(2) If the Attorney General fails to appear in State court within the time period prescribed under paragraph (1), upon petition of any entity or officer, governing board member, employee, or contractor of the entity named, the civil action or proceeding shall be removed to the appropriate United States district court. The civil action or proceeding shall be stayed in such court until such court conducts a hearing, and makes a determination, as to the appropriate forum or procedure for the assertion of the claim for damages described in subsection (a) and issues an order consistent with such determination.

(m) Application of coverage to managed care plans

(1) An entity or officer, governing board member, employee, or contractor of an entity described in subsection (g)(1) shall, for purposes of this section, be deemed to be an employee of the Public Health Service with respect to services provided to individuals who are enrollees of a managed care plan if the entity contracts with such managed care plan for the provision of services.

(2) Each managed care plan which enters into a contract with an entity described in subsection (g)(4) shall deem the entity and any officer, governing board member, employee, or contractor of the entity as meeting whatever malpractice coverage requirements such plan may require of contracting providers for a calendar year if such entity or officer, governing board member, employee, or contractor of the entity has been deemed to be an employee of the Public Health Service for purposes of this section for such calendar year. Any plan which is found by the Secretary on the record, after notice and an opportunity for a full and fair hearing, to have violated this subsection shall upon such finding cease, for a period to be determined by the Secretary, to receive and to be eligible to receive any Federal funds under titles XVIII or XIX of the Social Security Act.

(3) For purposes of this subsection, the term "managed care plan" shall mean health maintenance organizations and similar entities that contract at-risk with payors for the provision of health services or plan enrollees and which contract with providers (such as entities described in subsection (g)(4)) for the delivery of such services to plan enrollees.

(n) Report on risk exposure of covered entities

(1) Not later than one year after December 26, 1995, the Comptroller General of the United States shall submit to the Congress a report on the

following:

(A) The medical malpractice liability claims experience of entities that have been deemed to be employees for purposes of this section.

(B) The risk exposure of such entities.

(C) The value of private sector risk-management services, and the value of risk-management services and procedures required as a condition of receiving a grant under section 254b, 254b, or 256a of this title.

(D) A comparison of the costs and the benefits to taxpayers of maintaining medical malpractice liability coverage for such entities pursuant to this section, taking into account–

(i) a comparison of the costs of premiums paid by such entities for private medical malpractice liability insurance with the cost of coverage pursuant to this section; and

(ii) an analysis of whether the cost of premiums for private medical malpractice liability insurance coverage is consistent with the liability claims experience of such entities.

(2) The report under paragraph (1) shall include the following:

(A) A comparison of–

(i) an estimate of the aggregate amounts that such entities (together with the officers, governing board members, employees, and contractors of such entities who have been deemed to be employees for purposes of this section) would have directly or indirectly paid in premiums to obtain medical malpractice liability insurance coverage if this section were not in effect; with

(ii) the aggregate amounts by which the grants received by such entities under this chapter were reduced pursuant to subsection (k)(2).

(B) A comparison of–

(i) an estimate of the amount of privately offered such insurance that such entities (together with the officers, governing board members, employees, and contractors of such entities who have been deemed to be employees for purposes of this section) purchased during the three-year period beginning on January 1, 1993; with

(ii) an estimate of the amount of such insurance that such entities (together with the officers, governing board members, employees, and contractors of such entities

who have been deemed to be employees for purposes of this section) will purchase after December 26, 1995.

(C) An estimate of the medical malpractice liability loss history of such entities for the 10-year period preceding October 1, 1996, including but not limited to the following:

(i) Claims that have been paid and that are estimated to be paid, and legal expenses to handle such claims that have been paid and that are estimated to be paid, by the Federal Government pursuant to deeming entities as employees for purposes of this section.

(ii) Claims that have been paid and that are estimated to be paid, and legal expenses to handle such claims that have been paid and that are estimated to be paid, by private medical malpractice liability insurance.

(D) An analysis of whether the cost of premiums for private medical malpractice liability insurance coverage is consistent with the liability claims experience of entities that have been deemed as employees for purposes of this section.

(3) In preparing the report under paragraph (1), the Comptroller General of the United States shall consult with public and private entities with

expertise on the matters with which the report is concerned.

28 U.S.C. § 1442

Federal Officers Or Agencies Sued Or Prosecuted

(a) A civil action or criminal prosecution that is commenced in a State court and that is against or directed to any of the following may be removed by them to the district court of the United States for the district and division embracing the place wherein it is pending:

> **(1)** The 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, title or authority claimed under any Act of Congress for the apprehension or punishment of criminals or the collection of the revenue.
>
> **(2)** A property holder whose title is derived from any such officer, where such action or prosecution affects the validity of any law of the United States.
>
> **(3)** Any officer of the courts of the United States, for or relating to any act under color of office or in the performance of his duties;
>
> **(4)** Any officer of either House of Congress, for or relating to any act in the discharge of his official duty under an order of such House.

(b) A personal action commenced in any State court by

an alien against any citizen of a State who is, or at the time the alleged action accrued was, a civil officer of the United States and is a nonresident of such State, wherein jurisdiction is obtained by the State court by personal service of process, may be removed by the defendant to the district court of the United States for the district and division in which the defendant was served with process.

(c) Solely for purposes of determining the propriety of removal under subsection (a), a law enforcement officer, who is the defendant in a criminal prosecution, shall be deemed to have been acting under the color of his office if the officer--

> **(1)** protected an individual in the presence of the officer from a crime of violence;
>
> **(2)** provided immediate assistance to an individual who suffered, or who was threatened with, bodily harm; or
>
> **(3)** prevented the escape of any individual who the officer reasonably believed to have committed, or was about to commit, in the presence of the officer, a crime of violence that resulted in, or was likely to result in, death or serious bodily injury.

(d) In this section, the following definitions apply:

> **(1)** The terms "civil action" and "criminal prosecution" include any proceeding (whether or not ancillary to another proceeding) to the extent that in such proceeding a judicial order, including

a subpoena for testimony or documents, is sought or issued. If removal is sought for a proceeding described in the previous sentence, and there is no other basis for removal, only that proceeding may be removed to the district court.

(2) The term "crime of violence" has the meaning given that term in section 16 of title 18.

(3) The term "law enforcement officer" means any employee described in subparagraph (A), (B), or (C) of section 8401(17) of title 5 and any special agent in the Diplomatic Security Service of the Department of State.

(4) The term "serious bodily injury" has the meaning given that term in section 1365 of title 18.

(5) The term "State" includes the District of Columbia, United States territories and insular possessions, and Indian country (as defined in section 1151 of title 18).

(6) The term "State court" includes the Superior Court of the District of Columbia, a court of a United States territory or insular possession, and a tribal court.

APPENDIX E

IN THE WASHINGTON COUNTY COURT OF COMMON PLEAS

JANE DOE, Individually, and on behalf of all others similarly situated,
Plaintiff,

v. Case No. 2023-2922

CENTERVILLE CLINICS, INC.
1070 Old National Pike Road
Fredericktown, Pennsylvania 15333,
Defendant.

NOTICE TO STATE COURT

PLEASE TAKE NOTICE that, pursuant to 42 U.S.C. § 233(l)(1), 42 U.S.C. § 233(c), and 28 C.F.R. § 15.4(b), 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. Accordingly, the United States will not intervene in this case or remove it to federal court.

Respectfully submitted this 19th day of September, 2023.

Respectfully submitted,

ERIC G. OLSHAN
United States Attorney

KEZIA TAYLOR
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KEZIA TAYLOR
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KEZIA 0. L. TAYLOR (PA 203759)
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CERTIFICATE OF SERVICE

The undersigned Assistant United States Attorney hereby certifies that the foregoing Notice to State Court was sent by first-class mail on September 19, 2023, to the following:

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KEZIA O.L. TAYLOR
Assistant U.S. Attorney

APPENDIX F

IN THE WASHINGTON COUNTY COURT OF COMMON PLEAS

JANE DOE, Individually, and on behalf of all others similarly situated,
Plaintiff,

v.

CENTERVILLE CLINICS, INC.
1070 Old National Pike Road
Fredericktown, Pennsylvania 15333,
Defendant.

[DATE STAMP]
FILED 2023 JUN - 1 AM 11:05
PROTHONOTARY
WASHINGTON CO, PA

NOTICE OF THE UNITED STATES UNDER 42 U.S.C. § 233(l)(1)

The United States of America, by its attorneys, Troy Rivetti, Acting United States Attorney for the Western District of Pennsylvania, and Kezia O.L. Taylor, Assistant United States Attorney for said District, provides the following notice pursuant to 42 U.S.C. § 233(l)(1):

1. Centerville Clinics, Inc. notified this office on or about May 19, 2023, of this state court action

against defendant Centerville Clinics, Inc., an entity described in 42 U.S.C. § 233(g)(4) (a public or non-profit private entity receiving federal funds under section 254b of Title 42 pursuant to the Federally Supported Health Centers Assistance Act, 42 U.S.C. § 233(g)-(n) (FSHCAA)).

2. Pursuant to 42 U.S.C. § 233(l)(1), the United States is appearing for the limited purpose of notifying the Court as to whether the Secretary of the U.S. Department of Health and Human Services (HHS) has advised that Centerville Clinics, Inc. 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.

3. At present, HHS has advised only that Centerville Clinics, Inc. has been "deemed" to be an "employee of the Public Health Service." HHS has not yet provided its report as to whether the deemed status of Centerville Clinics, Inc. under 42 U.S.C. §§ 233(g) and (h) extends to the acts or omissions that are the subject of this civil action. *See* 42 U.S.C. § 233(l)(1). *See* 28 C.F.R. § 15.3; *see also* 60 Fed. Reg. 22,530, 22,531 (May 8, 1995).

4. Once HHS has completed its review and provided its report, the United States Attorney, as the U.S. Attorney General's delegate, will determine whether the acts alleged fall within the scope of 42 U.S.C. § 233(a), the applicable provisions of the FSHCAA, and were otherwise within the scope of Centerville Clinics, Inc.'s "deemed" employment. *See* 42 U.S.C. § 233(c); 28 C.F.R. § 15.4(b); 60 Fed. Reg. at

22,531. The United States Attorney has not yet been provided with sufficient information to make that determination. If the above-named Defendant is so determined to have been deemed employees of the Public Health Service for purposes of the acts or omissions giving rise to this suit, and that they were acting within the scope of their deemed employment, it is anticipated that this action will be removed to Federal Court pursuant to 28 U.S.C. § 233(c).

Respectfully submitted,

TROY RIVETTI
Acting United States Attorney

/s/
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Counsel for Defendant

CERTIFICATE OF SERVICE

The undersigned Assistant United States Attorney hereby certifies that the foregoing Notice of the United States Under 42 U.S.C. § 233(l)(1) was sent

by first-class mail on May 31, 2023, to the following:

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/s/
KEZIA O.L. TAYLOR
Assistant U.S. Attorney