

FILED

APR 15 2025

No. OFFICE OF THE CLERK
SUPREME COURT, U.S.24 - 7506

IN THE SUPREME COURT OF THE UNITED STATES

ALLAN DOUGLAS WILSON ... PETITIONER

VS.

UNITED STATES OF AMERICA ... RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA
CIRCUIT

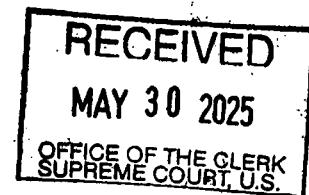
PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a federal district court may dismiss a defamation case for lack of subject matter jurisdiction after removal under the Westfall Act (28 U.S.C. § 2679(d)), rather than remand to state court pursuant to 28 U.S.C. § 1447(c), when:

The Government does not dispute the underlying factual allegations of defamation, unlike the situation in *Osborn v. Haley*, 549 U.S. 225 (2007);

The district court explicitly finds it lacks subject matter jurisdiction due to the Federal Tort Claims Act's exception for defamation claims (28 U.S.C. § 2680(h)); and

The allegedly defamatory statements—unauthorized medical diagnoses and baseless criminal accusations made by a government attorney in a legal filing—are so far outside any legitimate scope of employment that they cannot reasonably be considered within official conduct.

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

RELATED CASES

- Wilson v. United States Department of State and United States Embassy Philippines, No. 1:23-cv-00216-CJN, U.S. District Court for the District of Columbia. Judgment entered September 5, 2024.

- Wilson v. United States Department of State and United States Embassy Philippines, No. 24-5204, U.S. Court of Appeals for the District of Columbia Circuit. Judgment entered December 23, 2024.

- Wilson v. Sergio Sarkany, No. 2023-CAB-006048, U.S. Superior Court for the District of Columbia. Case moved to District of Columbia District Court by Westfall Certification on December 26, 2023.

- Wilson v. Sergio Sarkany No. 24-cv-3826, U.S. District Court for the District of Columbia. Judgment entered September 5, 2024.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Allan Douglas Wilson respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

[X] For cases from federal courts:

The opinion of the United States Court of Appeals appears at Appendix A to the petition and is

[] reported at _____; or,

[] has been designated for publication but is not yet reported; or,

[X] is unpublished.

The opinion of the United States District Court appears at Appendix B to the petition and is

[] reported at _____; or,

[] has been designated for publication but is not yet reported; or,

[X] is unpublished.

JURISDICTION

[X] For cases from federal courts:

The date on which the United States Court of Appeals decided my case was February 7, 2025.

[X] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: April 7, 2025, and a copy of the order denying rehearing appears at Appendix C.

[] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. _____ A _____.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 1447(c):

"If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded."

28 U.S.C. § 2679(d)(2) (Westfall Act):

"Upon certification by the Attorney General that the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose, any civil action or proceeding commenced upon such claim 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 for the district and division embracing the place in which the action or proceeding is pending. Such action or proceeding shall be deemed to be an action or proceeding brought against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant. This certification of the Attorney General shall conclusively establish scope of office or employment for purposes of removal."

28 U.S.C. § 2680(h):

"The provisions of this chapter and section 1346(b) of this title shall not apply to—...

(h) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights..."

U.S. Constitution, Article III, Section 2:

"The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects."

U.S. Constitution, Amendment V:

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

U.S. Constitution, Amendment VII:

"In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be

otherwise re-examined in any Court of the United States, than according to the rules of the common law."

STATEMENT OF THE CASE

This case arises from defamatory statements made about Petitioner Allan Douglas Wilson by a U.S. Department of Justice attorney, Sergio Sarkany, in a motion to dismiss an unrelated civil rights case filed by Petitioner against the U.S. Department of State regarding a claim to U.S. citizenship.

Petitioner filed a defamation lawsuit against Sarkany in the Superior Court of the District of Columbia based on these statements.

Specifically, Petitioner alleges that Sarkany, while representing the government in *Wilson v. Department of State*, No. 23-216 (CJN), made unauthorized medical diagnoses about Petitioner without any medical qualification and without examining him, as well as unfounded criminal accusations that were entirely unrelated to the underlying civil rights complaint. These statements were not supported by evidence and exceeded any legitimate response to a civil rights complaint.

The U.S. Attorney's Office filed a certification under the Westfall Act, 28 U.S.C. § 2679(d), asserting that Sarkany was acting within the scope of his employment when making the allegedly defamatory statements. Based on this certification, the case was removed from the Superior Court to the U.S. District Court for the District of Columbia

without Petitioner's consent or prior notification, and the United States was substituted as the defendant. Importantly, Petitioner never filed this case in District Court—it was unilaterally moved by the Defense in a manner that constitutes procedural manipulation and what some courts have referred to as judicial "pinballing" of cases between forums to the detriment of plaintiffs.

The United States then moved to dismiss the case. Petitioner responded with a motion to remand, challenging the propriety of the Westfall certification, the legality of failure to remand pursuant to 28 U.S.C. § 1447(c), while arguing that the case should proceed on its merits. Critically, contrary to the District Court judge's characterization, Petitioner's challenge to the Westfall certification did not rely on the defamatory nature of Sarkany's statements but rather on the fact that these statements—unauthorized medical diagnoses and baseless criminal accusations—were so far outside any imaginable scope of employment for a government attorney that they could not possibly be considered official conduct.

On September 5, 2024, the district court (Judge Carl J. Nichols) issued an order denying Petitioner's motion to remand and dismissing the case without prejudice for lack of subject matter jurisdiction. The court determined that the Westfall certification was proper because Sarkany was employed to file briefs on behalf of the Government and did so within his authorization. The court further held that because defamation claims are explicitly excluded from the Federal Tort Claims Act's waiver of sovereign immunity under 28 U.S.C. § 2680(h), it lacked subject matter jurisdiction over the case.

Petitioner appealed to the U.S. Court of Appeals for the District of Columbia Circuit and moved for summary reversal. The government moved for summary affirmance. On February 7, 2025, a panel of the D.C. Circuit (Judges Childs, Pan, and Garcia) granted the government's motion for summary affirmance and denied Petitioner's motion for summary reversal. The panel held that the district court correctly concluded that the United States was the proper defendant under the Westfall Act and correctly denied Petitioner's motion to remand. The panel cited *Osborn v. Haley*, 549 U.S. 225, 243 (2007), for the proposition that a Westfall certification "renders the federal court exclusively competent and categorically precludes a remand to the state court." The panel also concluded that the district court correctly dismissed the case for lack of subject matter jurisdiction because defamation claims fall under an exception to the government's waiver of sovereign immunity in the Federal Tort Claims Act.

On February 19, 2025, Petitioner filed a petition for panel rehearing, arguing that the panel overlooked a crucial factual distinction from *Osborn v. Haley*, misapplied the scope-of-employment analysis under D.C. Circuit precedent, and failed to recognize that the district court's dismissal order created an irreconcilable jurisdictional contradiction.

RECENT PROCEDURAL DEVELOPMENTS

On April 11, 2025, the D.C. Circuit denied both the petition for writ of mandamus and the petition for rehearing in a single order. In denying the mandamus petition, the

court cited *In re al-Nashiri*, 791 F.3d 71, 78 (D.C. Cir. 2015), claiming that Petitioner had "not demonstrated a clear and indisputable right to the relief requested."

This reliance on *al-Nashiri* is fundamentally misplaced. *Al-Nashiri* involved a suspected terrorist seeking recusal of military judges through advisory mandamus in a case of first impression—a context entirely unrelated to the present case involving an undisputed defamation claim. The procedural posture and substantive issues in *al-Nashiri* bear no meaningful relationship to Petitioner's circumstances.

Moreover, the court's analysis of the mandamus petition was procedurally improper. Petitioner requested mandamus solely to compel a timely decision after waiting four months for a ruling on his motion for summary judgment/reversal, with no court-established deadline. The mandamus request was mailed prior to Petitioner receiving notice that the court had finally issued a decision on the same day. Once the court rendered its decision (the summary affirmance), the mandamus request was effectively mooted.

Critically, the court's citation to *al-Nashiri* to deny the petition for rehearing lacks any legal basis. The petition for rehearing was properly and timely filed, and nothing in *al-Nashiri* addresses the standards for denying rehearing petitions. The court's conflation of the mandamus and rehearing requests demonstrates a fundamental misunderstanding of their distinct procedural functions.

REASONS FOR GRANTING THE PETITION

I. THE PANEL MISAPPLIED OSBORN V. HALEY BY OVERLOOKING THE CRITICAL DISTINCTION THAT THE GOVERNMENT NEVER CONTESTED THE UNDERLYING FACTUAL ALLEGATIONS

The D.C. Circuit's reliance on *Osborn v. Haley*, 549 U.S. 225 (2007), fundamentally misunderstands the Supreme Court's holding in that case and creates a significant conflict with this Court's jurisprudence. This error warrants this Court's review.

In *Osborn*, this Court held that the Westfall Act "renders the federal court exclusively competent and categorically precludes a remand to the state court." 549 U.S. at 243. However, critically, this holding was explicitly premised on the fact that "the Government disputes the plaintiff's factual allegations." *Id.* at 242. The Court emphasized that this was "not a garden-variety case involving federal and state claims with shared facts," but rather a case where "the state tort litigation must proceed, if at all, as litigation against the United States under the FTCA." *Id.* at 243.

The facts of *Osborn* are instructive. There, the plaintiff alleged that a federal employee had caused her wrongful termination. The federal employee denied any involvement in the termination decision—a factual dispute central to the case. This Court noted that "the United States Attorney and his delegate, the Director of the Torts Branch of the Department of Justice, have denied that [the employee] engaged in the conduct charged by [the plaintiff]; they maintain that the alleged wrongdoing never occurred." *Id.* at 230.

This factual contest was critical to the Court's holding that remand was precluded. As the Court explicitly stated: "The United States moved for reconsideration, urging that, contrary to the District Court's impression, the Government did contest Osborn's factual allegations." *Id.* at 234 (emphasis added). This contest of facts was essential to the Court's reasoning that remand was precluded.

In stark contrast to Osborn, the Government in this case has never contested Wilson's factual allegations regarding the defamatory statements. The Government has not denied that Sarkany made unauthorized medical diagnoses without qualifications or examination, nor has it denied that he made unfounded criminal accusations entirely unrelated to the underlying civil rights complaint. Instead, the Government has relied solely on the Westfall certification's conclusory assertion that Sarkany was acting within the scope of his employment, without disputing any of the underlying factual allegations concerning the defamatory statements themselves.

This crucial distinction renders Osborn's holding inapplicable to the present case. The D.C. Circuit's mechanical application of Osborn without addressing this dispositive difference constitutes a significant misreading of this Court's precedent.

Notably, several circuit and district courts have recognized this critical distinction and have remanded cases where, as here, the government did not contest the underlying factual allegations and the court lacked subject matter jurisdiction. In *Fowler v. United States*, 647 F.3d 1232 (10th Cir. 2011), the Tenth Circuit remanded a case to state court after finding that it lacked subject matter jurisdiction, despite the presence of a

Westfall certification. The court distinguished Osborn on the ground that the government did not contest the plaintiff's factual allegations, making remand appropriate under 28 U.S.C. § 1447(c). Similarly, in Hajdusek v. United States, 895 F.3d 146 (1st Cir. 2018), the First Circuit remanded a case after finding that the FTCA exceptions applied, explicitly noting that Osborn's remand preclusion is limited to cases where the government disputes the plaintiff's factual allegations. And in Rivera v. Rodriguez, 527 F. Supp. 2d 235 (D.P.R. 2007), the district court remanded a case after determining it lacked subject matter jurisdiction under the FTCA, holding that Osborn did not preclude remand where the government accepted the plaintiff's version of events.

These decisions stand in direct conflict with the D.C. Circuit's approach in this case, creating a circuit split that warrants this Court's resolution.

Moreover, this Court's decision in Gutierrez de Martinez v. Lamagno, 515 U.S. 417 (1995), emphasizes that Westfall certifications are subject to meaningful judicial review. In Gutierrez, this Court held that the Attorney General's certification under the Westfall Act "does not conclusively establish as correct the substitution of the United States as defendant in place of the employee." Id. at 434. The Court explained that such certifications are "subject to judicial review" precisely to prevent the kind of procedural manipulation apparent in this case. Id.

The procedural manipulation is particularly evident here, where Petitioner's case was unilaterally removed from state court without consent or prior notification—a form of

judicial "pinballing" designed to deprive Petitioner of any forum to adjudicate legitimate claims. This procedural gamesmanship, where a case is removed from state court only to be dismissed in federal court for lack of jurisdiction, creates a procedural trap that effectively immunizes government employees from accountability.

The D.C. Circuit's uncritical acceptance of the Westfall certification without examining whether Osborn's factual dispute requirement was satisfied effectively renders Westfall certifications unreviewable in practice, contrary to this Court's clear holding in Gutierrez. This misapplication of precedent creates a circuit split between the D.C. Circuit's categorical approach to Osborn and other circuits that properly limit Osborn to cases where the government actually contests the plaintiff's factual allegations.

This Court should grant certiorari to clarify that Osborn's remand preclusion applies only where the government actually contests the plaintiff's factual allegations—not as a categorical rule whenever a Westfall certification is filed. Allowing the D.C. Circuit's misinterpretation to stand would effectively nullify this Court's careful limitation of Osborn's holding and would enable government attorneys to shield themselves from accountability for clearly defamatory statements by obtaining Westfall certifications even when the underlying facts are undisputed.

The D.C. Circuit's recent order denying both the mandamus petition and the petition for rehearing further demonstrates the court's misapplication of precedent. By citing *In re al-Nashiri*—a terrorism case involving recusal of military judges—the court revealed

a fundamental misunderstanding of both the procedural posture and substantive issues in this case.

Under established mandamus standards, a petitioner must show: (1) "no other adequate means to attain the relief" sought; (2) a "right to issuance of the writ is clear and indisputable"; and (3) the writ is "appropriate under the circumstances." *Cheney v. U.S. Dist. Court for D.C.*, 542 U.S. 367, 381 (2004). Petitioner satisfied all three conditions when requesting mandamus to compel a timely decision on a motion pending for four months—far exceeding the standard 10-day response period in the D.C. Circuit. The court's reliance on *al-Nashiri* to deny the rehearing petition compounds the error.

A petition for rehearing is governed by entirely different standards than a mandamus petition. By failing to distinguish between these procedural mechanisms and applying inappropriate precedent, the D.C. Circuit effectively denied Petitioner meaningful review of his substantive claims—further highlighting the necessity of this Court's intervention.

II. THE DISTRICT COURT'S DISMISSAL ORDER CREATED AN IRRECONCILABLE JURISDICTIONAL CONTRADICTION THAT WARRANTS THIS COURT'S REVIEW

The district court's dismissal order presents a fundamental jurisdictional contradiction that strikes at the heart of federal court authority. The district court explicitly dismissed this case "for lack of subject matter jurisdiction," finding that 28 U.S.C. §

2680(h) precluded jurisdiction over Petitioner's defamation claim. Yet rather than following the mandatory remand requirement of 28 U.S.C. § 1447(c), which states that "[i]f at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded," the court instead exercised jurisdiction by dismissing the case.

This presents an irreconcilable contradiction: the court simultaneously declared it lacked jurisdiction while exercising jurisdiction through dismissal. This Court has long established that "[w]ithout jurisdiction the court cannot proceed at all in any cause." *Ex parte McCardle*, 74 U.S. (7 Wall.) 506, 514 (1869). A court cannot logically dismiss a case over which it has no jurisdiction.

The central principle that a federal court must have jurisdiction to act is fundamental to our constitutional system. As this Court held in *Steel Co. v. Citizens for Better Environment*, 523 U.S. 83, 94 (1998), "jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause." If the court lacks subject matter jurisdiction, it lacks the authority to dismiss on jurisdictional grounds; its only option is to remand to state court where jurisdiction properly lies.

The district court's finding that 28 U.S.C. § 2680(h) bars defamation claims against the United States under the FTCA is correct. However, the proper conclusion from this finding is not dismissal but remand to state court where the original action was filed.

The mandatory language of § 1447(c) uses "shall be remanded" when a federal court lacks subject matter jurisdiction—not "may be dismissed."

Multiple federal courts have recognized this principle and have remanded cases despite Westfall certifications when they determined they lacked subject matter jurisdiction. In *Gonzalez v. United States*, 284 F.3d 281 (1st Cir. 2002), the First Circuit held that remand was required after determining that it lacked subject matter jurisdiction under the FTCA, despite the presence of a Westfall certification. Similarly, in *Garcia v. United States*, 88 F.3d 318 (5th Cir. 1996), the Fifth Circuit remanded a case to state court after finding that the FTCA exceptions applied, holding that § 1447(c)'s mandate overcame the Westfall Act's removal provisions when the court lacked jurisdiction.

This contradiction creates a troubling procedural trap for litigants like Petitioner. The government removes a case to federal court based on a Westfall certification, the federal court then determines it lacks jurisdiction over the transformed claim, but instead of returning the case to state court where it originated, the court dismisses it—leaving the plaintiff with no forum to adjudicate their claims. This procedural maneuver effectively immunizes federal employees from accountability for their tortious conduct, contrary to Congress's intent in enacting the Westfall Act.

The procedural manipulation is especially apparent in this case, where Petitioner never consented to the removal of his case to federal court and was not even notified prior to the removal. This unilateral action by the Defense, followed by dismissal rather than remand, represents a form of judicial "pinballing" that deprives Petitioner of any forum

to adjudicate his claims—a result that cannot be reconciled with basic principles of due process and access to justice.

The D.C. Circuit's reliance on *Osborn v. Haley* compounds this error. While *Osborn* held that remand is precluded when the government disputes factual allegations, it did not authorize dismissal in the absence of jurisdiction. Indeed, *Osborn*'s holding that "the Westfall Act renders a district court powerless to remand a removed action to state court" presupposes that the federal court retains jurisdiction over the claim. 549 U.S. at 231. It does not address the situation presented here—where the court explicitly finds it lacks such jurisdiction.

This case presents a clean vehicle for this Court to resolve this jurisdictional contradiction, which affects numerous cases involving federal employees. The question presents a pure issue of law: can a federal court simultaneously declare it lacks subject matter jurisdiction while exercising that same jurisdiction to dismiss rather than remand? The answer directly impacts the substantive rights of individuals seeking redress for torts committed by federal employees.

The implications of allowing this contradiction to stand are significant. It would create a jurisdictional black hole where certain classes of tort claims against federal employees effectively disappear—removed from state court but then dismissed from federal court—leaving plaintiffs with no forum to adjudicate their claims. This cannot be what Congress intended in enacting the Westfall Act, which was designed to protect federal employees while ensuring that plaintiffs retain a forum for legitimate claims.

The D.C. Circuit's recent order denying the petition for rehearing based on al-Nashiri further illustrates the jurisdictional confusion permeating this case. The court's inability to properly distinguish between mandamus standards and rehearing standards reveals a fundamental misunderstanding of basic jurisdictional principles.

This jurisdictional confusion extends beyond mere procedural errors. By denying rehearing based on mandamus standards from an inapposite terrorism case, the court effectively deprived Petitioner of meaningful review of the substantive jurisdictional contradiction at the heart of this case—where the district court simultaneously declared it lacked jurisdiction while exercising jurisdiction through dismissal.

The court's order thus represents not merely an erroneous application of precedent, but a compounding of the jurisdictional errors that have characterized this litigation from its removal from state court. This pattern of jurisdictional confusion further underscores the need for this Court's intervention to provide clarity and ensure access to justice.

III. THE WESTFALL CERTIFICATION PROCEDURES WERE FUNDAMENTALLY FLAWED, AND THE COURTS BELOW FAILED TO PROPERLY ANALYZE WHETHER THE DEFAMATORY STATEMENTS FELL OUTSIDE THE SCOPE OF EMPLOYMENT

The Westfall certification in this case suffers from multiple fatal deficiencies that the courts below failed to adequately address. This Court's review is necessary to ensure that Westfall certifications receive the meaningful judicial scrutiny this Court mandated in *Gutierrez de Martinez v. Lamagno*, 515 U.S. 417 (1995).

First, the courts below misapplied the standard for evaluating Westfall certifications. While the D.C. Circuit has correctly held that certification "constitute[s] *prima facie* evidence that the employee was acting within the scope of his employment," *Council on Am. Islamic Rels. v. Ballenger*, 444 F.3d 659, 662 (D.C. Cir. 2006), this *prima facie* evidence can be rebutted by specific facts showing the employee's actions fell outside any legitimate scope of employment. The burden-shifting framework requires courts to carefully examine the plaintiff's factual allegations when they challenge the certification.

Here, Petitioner presented specific factual allegations demonstrating that Sarkany's statements were so far outside any imaginable scope of employment that they could not possibly be considered official conduct. Critically, contrary to the District Court judge's characterization, Petitioner's challenge to the Westfall certification did not rely on the defamatory nature of Sarkany's statements but rather on the fact that: (1) Sarkany made unauthorized medical diagnoses without any medical qualifications and without examining Petitioner; and (2) Sarkany made unfounded criminal accusations entirely unrelated to the underlying civil rights complaint, with no evidence to support these serious allegations. These specific factual allegations directly challenge the Westfall certification's conclusion that Sarkany was acting within the scope of his employment.

The district court's analysis of these allegations was cursory at best. The court simply concluded that because Sarkany is "employed in part to file briefs on behalf of the Government," his actions "plainly meet" the test for scope of employment. This analysis ignores the substance of Petitioner's allegations—that the specific statements within those briefs far exceeded any legitimate governmental purpose.

The district court's overly broad criteria for determining scope of employment is particularly troubling because, if followed to its logical conclusion, it would encompass virtually any statement made by a government attorney in any filing, no matter how extreme or inappropriate. Under the district court's reasoning, even statements constituting sedition, incitement to violence, or death threats would fall within the scope of employment so long as they appeared in a government brief. This absurd result cannot be what Congress intended when it enacted the Westfall Act. As the Ninth Circuit recognized in *Kashin v. Kent*, 457 F.3d 1033, 1043 (9th Cir. 2006), "the scope of employment does not include acts that are manifestly or palpably beyond the employee's authority" or that are "clearly inappropriate to the performance of the employee's duties."

The district court's reliance on *Wilson v. Libby*, 535 F.3d 697 (D.C. Cir. 2008), further obscures the proper analysis. The court cited *Wilson* for the proposition that defamation can be within the scope of a lawyer's employment, but *Wilson* requires examination of the actual content of allegedly defamatory statements—an analysis conspicuously absent from the district court's dismissal order.

The D.C. Circuit compounded this error by citing *Smith v. Clinton*, 886 F.3d 122, 126-27 (D.C. Cir. 2018), for the proposition that "specific allegations of defamation" by a federal employee "do[] not take [the employee's] conduct outside the scope of employment." But *Smith* is readily distinguishable. There, plaintiffs failed to provide "specific facts" showing how the statements fell outside the scope of employment. Here, by contrast, Petitioner provided concrete evidence demonstrating how Sarkany's statements—unauthorized medical diagnoses and baseless criminal accusations—exceeded legitimate governmental functions.

Second, the courts below failed to consider whether these particular statements could possibly serve any legitimate governmental purpose. No legitimate governmental function encompasses making medical diagnoses without proper qualifications or issuing unfounded criminal accusations in response to a civil rights complaint. These statements serve no legitimate governmental purpose and cannot reasonably be considered within any scope of employment for a government attorney responding to a civil rights complaint.

The D.C. Circuit's analysis of scope of employment in *Wuterich v. Murtha*, 562 F.3d 375 (D.C. Cir. 2009), requires examining whether the employee's conduct was "of the kind he is employed to perform," "occurs substantially within the authorized time and space limits," and "is actuated, at least in part, by a purpose to serve the master." *Id.* at 384. Making unauthorized medical diagnoses and baseless criminal accusations fails this test, particularly the third prong—such statements serve no legitimate governmental

purpose and therefore cannot be "actuated, at least in part, by a purpose to serve the master."

The certification itself appears facially deficient, containing materially incomplete language as cited in Petitioner's original filings. Moreover, the certification was issued by counsel with an apparent conflict of interest, as they were tasked with evaluating whether their colleague's conduct fell within the scope of employment. The certification critically failed to evaluate whether admittedly false statements could fall within any legitimate scope of employment.

This points to a broader issue requiring this Court's attention: the need for clear standards governing Westfall certifications to prevent them from becoming manufactured evidence that effectively railroads cases contrary to due process principles. As Judge Edwards noted in his concurrence in *Bancoult v. McNamara*, 445 F.3d 427, 438 (D.C. Cir. 2006), without meaningful judicial review, Westfall certifications risk becoming "a vehicle for executive branch officials to escape liability for egregious misconduct." This Court recognized in *Gutierrez* that unchecked Westfall certifications could create "perverse incentives" and lead to "bizarre results," 515 U.S. at 427—precisely what has occurred in this case.

Several circuits have established more rigorous standards for evaluating Westfall certifications. In *Maron v. United States*, 126 F.3d 317, 323 (4th Cir. 1997), the Fourth Circuit held that courts must conduct a "searching review" of the certification when the plaintiff challenges it with specific factual allegations. Similarly, in *Rasul v. Rumsfeld*,

414 F. Supp. 2d 26 (D.D.C. 2006), the court emphasized that "where the plaintiff has adduced facts which, if true, would establish that the certification is erroneous," the court must "embark on a factual inquiry."

The procedural irregularities in this case further undermine the validity of the Westfall certification. Petitioner never filed this case in District Court—it was unilaterally moved by the Defense without Petitioner's consent or prior notification. This "pinballing" of the case between forums, coupled with the cursory review of the Westfall certification, represents a form of procedural manipulation that deprives Petitioner of any forum to adjudicate his claims.

This Court's guidance is necessary to ensure that lower courts properly scrutinize Westfall certifications, particularly when plaintiffs present specific factual allegations demonstrating that the employee's actions fell well outside any legitimate scope of employment. Without such scrutiny, the Westfall Act becomes a mechanism for immunizing federal employees from accountability for clearly tortious conduct, contrary to Congress's intent in enacting the statute.

This case presents an ideal vehicle for this Court to clarify the standards for evaluating Westfall certifications. The specific factual allegations regarding unauthorized medical diagnoses and baseless criminal accusations provide concrete examples of conduct that cannot reasonably be considered within any legitimate scope of employment, allowing this Court to provide guidance that will benefit lower courts in future cases.

Furthermore, this case illustrates the dangers of an overly deferential approach to Westfall certifications. If making unauthorized medical diagnoses and baseless criminal accusations in legal filings falls within the scope of a government attorney's employment, it is difficult to imagine what conduct would fall outside that scope. This Court should grant certiorari to ensure that the Westfall Act's protections are properly confined to conduct that actually serves legitimate governmental purposes.

IV. THIS CASE PRESENTS SIGNIFICANT ISSUES OF FEDERAL LAW THAT HAVE NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT

This case presents several significant issues of federal law that have not been, but should be, settled by this Court.

First, this Court has never definitively addressed the precise question of what happens when a case is removed under the Westfall Act but the federal court then determines it lacks subject matter jurisdiction due to the FTCA's exceptions. While Osborn addressed remand preclusion when the government disputes factual allegations, it did not squarely address the situation where the court finds it lacks subject matter jurisdiction over the transformed claim.

This gap in the Court's jurisprudence has led to conflicting approaches among lower courts. Some courts, like the district court here, dismiss such cases despite finding they lack jurisdiction. Others remand to state court pursuant to 28 U.S.C. § 1447(c). For example, in *Braud v. Transport Service Co.*, 445 F.3d 801 (5th Cir. 2006), the Fifth

Circuit held that § 1447(c) compels remand when the court lacks subject matter jurisdiction, regardless of how the case reached federal court. Similarly, in *Carlson v. Arrowhead Concrete Works, Inc.*, 445 F.3d 1046 (8th Cir. 2006), the Eighth Circuit held that "a lack of subject matter jurisdiction requires remand to the state court under § 1447(c)." Still others have developed hybrid approaches. This lack of uniformity creates uncertainty for litigants and undermines the consistent application of federal law.

Second, this Court has not provided clear standards for determining when Westfall certifications function as manufactured evidence that railroads cases contrary to due process principles. The potential for abuse in the Westfall certification process is significant, as illustrated by this case, where the certification appears to have been issued by colleagues of the accused attorney with minimal scrutiny of whether the specific statements fell within any legitimate scope of employment.

In *Gutierrez*, this Court recognized that Westfall certifications are subject to judicial review, but it has not elaborated on the specific standards courts should apply to prevent certifications from becoming a procedural rubber stamp that deprives plaintiffs of legitimate claims. Clear standards are needed to ensure that Westfall certifications cannot be used to shield conduct that is manifestly beyond any legitimate scope of employment—a concern raised by multiple circuit courts. As the Seventh Circuit observed in *Taboas v. Mlynaczak*, 149 F.3d 576, 582 (7th Cir. 1998), courts must conduct an "adequate review" of Westfall certifications to prevent them from becoming "a conclusive determination for the purpose of substituting the United States as defendant."

Third, this Court has not provided clear guidance on how to evaluate Westfall certifications when the plaintiff alleges that specific statements or actions—rather than the general category of conduct—fall outside the scope of employment. In Gutierrez, this Court established that Westfall certifications are subject to judicial review, but it has not elaborated on the specific standards courts should apply when evaluating whether particular statements or actions within broadly authorized conduct exceed an employee's scope of employment.

This lack of guidance has allowed lower courts to adopt overly deferential approaches to Westfall certifications, effectively treating them as unreviewable in practice despite this Court's holding in Gutierrez. Clear standards are needed to ensure that Westfall certifications receive the meaningful judicial scrutiny this Court intended.

Fourth, this case presents an opportunity for this Court to address the problem of procedural manipulation through unilateral removal and subsequent dismissal—what some courts have termed judicial "pinballing." The practice of removing a case from state court without the plaintiff's consent or notification, only to then dismiss it for lack of jurisdiction rather than remanding it, effectively deprives plaintiffs of any forum to adjudicate their claims. This Court should clarify whether such procedural maneuvering is consistent with the Westfall Act's purposes and with basic principles of due process and access to justice.

Fifth, this case presents an opportunity for this Court to clarify the relationship between the Westfall Act's removal provisions and the mandatory remand requirement of 28 U.S.C. § 1447(c). While Osborn held that the Westfall Act "renders a district court powerless to remand a removed action to state court" in certain circumstances, 549 U.S. at 231, it did not address how this interacts with § 1447(c)'s mandate that cases "shall be remanded" when the district court lacks subject matter jurisdiction.

This case presents a clear occasion to address these important issues of federal law. The facts are straightforward, the legal questions are clearly presented, and the case does not involve complex procedural complications that would obscure the core legal issues.

Moreover, the resolution of these issues would have far-reaching implications for cases involving federal employees. Clarifying the proper procedure when a case is removed under the Westfall Act but the federal court lacks jurisdiction would ensure that plaintiffs have access to an appropriate forum for their claims. Establishing clear standards for evaluating whether specific statements fall outside the scope of employment would ensure that federal employees are properly held accountable for clearly tortious conduct while still receiving the protections Congress intended in the Westfall Act.

The D.C. Circuit's recent order provides additional evidence of the significant issues of federal law requiring this Court's resolution. The court's misapplication of al-Nashiri—a terrorism case involving military commission proceedings—to an ordinary defamation

case highlights the confusion in lower courts regarding the proper standards for mandamus relief and rehearing petitions in the context of Westfall Act removals.

This confusion is particularly troubling given the procedural context. Petitioner sought mandamus only after waiting four months for a decision on his motion—far exceeding the standard 10-day response period in the D.C. Circuit—and the request became moot once the court finally issued its decision. The court's subsequent denial of rehearing based on mandamus standards from an inapposite terrorism case illustrates the procedural confusion that can result when Westfall Act cases follow convoluted procedural paths.

This Court should grant certiorari to provide clear guidance not only on the substantive questions regarding Westfall Act removal and jurisdiction, but also on the proper procedural mechanisms available to litigants when such cases encounter unusual delays or procedural obstacles.

The questions presented are recurring ones that affect numerous cases involving federal employees. With the federal workforce on last count exceeding two million employees, disputes over the scope of employment and the proper forum for tort claims against federal employees arise frequently. Clear guidance from this Court would promote uniformity and predictability in this important area of federal law while seeking to conserve the resources of the courts.

This Court should grant certiorari to resolve these significant issues of federal law and provide much-needed guidance to lower courts and litigants.

CONCLUSION

For the foregoing reasons, including the D.C. Circuit's recent misapplication of al-Nashiri to deny rehearing in this completely unrelated defamation case, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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Date: April 15th, 2025