No. 23-1924

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

JOHNATHON MOHR, for himself and others similarly situated,
Plaintiff-Appellee,

v.

THE TRUSTEES OF THE UNIVERSITY OF PENNSYLVANIA,
Defendant-Appellant.

Appeal from the United States District Court
for the Eastern District of Pennsylvania
Case No. 2:23-cv-00731
Hon. Chad F. Kenney

BRIEF OF PLAINTIFF-APPELLEE

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INTRODUCTION

As both this Court and the Supreme Court have held, the federal-officer removal statute, 28 U.S.C. § 1442, does not provide private actors with a federal forum for the resolution of state-law claims any time those actors interact with the federal government. Rather, by limiting removal to situations where the defendant was "acting under" a federal officer, *id.* § 1442(a)(1), the statute provides for removal jurisdiction only in cases in which a private actor was acting pursuant to "delegated federal authority" or was "provid[ing] a service that the federal government would otherwise provide." *Maglioli v. Alliance HC Holdings LLC*, 16 F.4th 393, 405 (3d Cir. 2021). "A private firm's compliance (or noncompliance) with federal laws, rules, and regulations does not by itself" meet this standard. *Watson v. Philip Morris Cos.*, 551 U.S. 142, 153 (2007).

Despite this settled law, Appellant Trustees of the University of Pennsylvania argues that federal jurisdiction exists in this case because the Penn Medicine health system (Penn Medicine) was subject to Medicare regulations and guidance as a result of contracts it claims to have entered into with the federal government. Not every contract with

the federal government, however, creates an "acting under" relationship—only those contracts that reflect delegation of a federal duty to a private actor. Here, none of the agreements to which Penn Medicine points meet that standard. The district court thus properly determined that Plaintiff-Appellee Johnathon Mohr's Pennsylvania-law claims arising out of Penn Medicine's use of tracking software that allowed the interception of patients' medical information by third parties without authorization should be remanded to state court.

STATEMENT OF JURISDICTION

The district court correctly held it lacked subject-matter jurisdiction over this action under 28 U.S.C. § 1442(a)(1).

This Court has appellate jurisdiction to review the district court's remand order under 28 U.S.C. § 1447(d).

COUNTER-STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Whether private health care institutions that agree to be subject to Medicare regulations in exchange for reimbursement for services provided are "acting under" federal-officer direction for purposes of 28 U.S.C. § 1442(a)(1), when they provide those services.

2. Whether embedding tracking technology that allows third parties to intercept patients' personal health information without their consent "relates to" any action taken under federal office.

3. Whether Appellant has identified any colorable federal defenses to Mr. Mohr's claim under the Pennsylvania Wiretapping and Electronic Surveillance Control Act (the Pennsylvania Wiretapping Act).

STATEMENT OF RELATED CASES

Plaintiff-Appellee is unaware of any other case or proceeding related to this action.

STATEMENT OF THE CASE AND FACTS

I. Factual Background

The Hospital of the University of Pennsylvania Health System, which is controlled and managed by Defendant the Trustees of the University of Pennsylvania (collectively referred to herein as Penn Medicine), operates acute-care hospitals, multispecialty centers, and outpatient locations throughout Pennsylvania. Compl., A42 ¶¶ 19–20. Penn Medicine operates three websites (collectively, the Websites), and it offers patients a software application for download and use on Android and iPhone devices. *Id.* ¶ 22.

Penn Medicine's Websites include tools for patients to use in connection with their medical care, including a "patient portal." Patients can, for example, use the Websites and patient portal to search for a provider for a specific condition or treatment, to make appointments, to pay bills, and to obtain test results. *Id.*, A39 ¶ 7, A47–48 ¶¶ 37–39. Penn Medicine has operated its patient portal since 2008. Decl. of Anna Schoenbaum, A118 ¶ 5. From 2020 to 2022, Plaintiff Mohr accessed and used one of Penn Medicine's Websites and its patient portal to book medical appointments and access medical results. Compl., A39 ¶ 7. He also has a Facebook account that he has maintained since 2020. *Id.* ¶ 8.

Unbeknownst to Mr. Mohr until shortly before the filing of this action, Penn Medicine has deployed on its website a "Tracking Pixel" offered by Facebook, Inc. (now Meta Platforms, Inc.). *Id.*, A45 ¶ 28, A46 ¶3, A49–51 ¶¶ 40–50. The Tracking Pixel helps companies that advertise on Facebook to target those advertisements to certain users. *Id.*, A43–44 ¶¶ 24–26. When a user accesses a website hosting the Tracking Pixel, Facebook's software script surreptitiously directs the user's browser to send a separate message to Facebook's servers. *Id.*, A45 ¶ 28. This transmission contains whatever request the user originally sent to the

host website, along with additional data that the Tracking Pixel is configured to collect, including a user's "Facebook ID." *Id.*, A45 ¶ 28, A49 ¶ 41.[1] The data collected via the Tracking Pixel is processed, analyzed, and assimilated into datasets that may be used to market products. *Id.*, A46 ¶ 30.

Mr. Mohr alleges that, through the Tracking Pixel, Penn Medicine procured Facebook to intercept the identities and online activity of Penn Medicine's patients, including information and search results related to its patients' medical treatment. *Id.* ¶ 31. Whenever a Penn Medicine patient, like Mr. Mohr, conducts a search for a medical treatment or condition, or schedules an appointment, Facebook intercepts that information, along with the patient's unique Facebook ID and other personally identifiable information. *Id.*, A49–50 ¶¶ 40–50. As a result, Mr. Mohr alleges that his protected health information was intercepted, without his consent and even without any notice that such interception would occur. *Id.*, A51 ¶51.

[1] A Facebook ID is a unique and persistent identifier that Facebook assigns to each user. Compl., A49 ¶ 41. For example, to find an individual's public Facebook profile, a person can attach the Facebook ID to the end of the URL for Facebook, typing in Facebook.com/[Facebook ID]. *Id.*

II. The Meaningful Use Program

In 2009, Congress enacted the Health Information Technology for Economic and Clinical Health Act (HITECH Act). Pub. L. No. 111-5, §§ 13001–13424, 123 Stat. 115, 226–79. The HITECH Act added provisions to the statutes governing Medicare, directing the United States Department of Health and Human Services (HHS) to make incentive payments to participating providers that were "meaningful EHR [(electronic health records)] user[s]." 42 U.S.C. §§ 1395w-4(o), 1395ww(n). Health care providers who used "certified EHR technology" in accordance with certain parameters would receive incentive payments for up to four or five years. *Id.* §§ 1395w-4(o) (five years of payments for qualifying individual practitioners), 1395ww(n)(2) (four years of payments for qualifying hospitals). Beginning in fiscal year 2015, the statute provided for reduced Medicare payments to any hospital that was "not a meaningful EHR user." *Id.* §§ 1395w-4(a)(7), 1395ww(b)(3)(B)(ix).

The Centers for Medicare and Medicaid Services (CMS) subsequently promulgated regulations to implement the HITECH Act, establishing the Meaningful Use Program (now called the Promoting

Interoperability Program).[2] 42 C.F.R. §§ 495.2–495.110. In addition, CMS publishes annual guidance as to the objectives and measures and the technological capabilities that determine providers' eligibility for incentives. *See, e.g.*, CMS, Medicare Promoting Interoperability Program Eligible Hospitals, Critical Access Hospitals, and Dual-Eligible Hospitals Attesting to CMS Objectives and Measures for 2020 (2020 Guidance), A122.

CMS structured the Meaningful Use Program in three successive stages, with each stage incentivizing the accomplishment of additional or enhanced objectives. 42 C.F.R. §§ 495.20–495.24. During each stage, providers' progress toward certain objectives, as reflected by specified measures, has determined whether providers' use of EHR qualifies as "meaningful use." *Id.* The first stage, which lasted until 2015, encouraged providers to meet basic requirements for entering and recording clinical data electronically. *See Id.* § 495.20. The second stage, in effect from 2015 through 2018, encouraged providers to electronically exchange and engage with patient information. *See Id.* § 495.22. The final stage, which

[2] For simplicity, this brief refers to the program by its initial name.

began in 2019, included mainly the same objectives and measures as the second stage. *See id.* § 495.24.

CMS has also promulgated regulations establishing criteria for technology to qualify as certified EHR technology that can be used by providers participating in the Meaningful Use Program. 45 C.F.R. § 170.315; 42 U.S.C. § 1395ww(n). These criteria speak to the "capabilities and standards" technology must possess to qualify as certified EHR technology, but do not mandate the adoption of any specific technology. *See* 45 C.F.R. § 170.315; 2020 Guidance at A125 (advising that qualifying technology must "possess the capabilities and standards" published in regulations). Additionally, CMS publishes a "Certified Health IT Product List" "of all certified health information technology that have been successfully tested and certified" by the Office of the National Coordinator.[3] Hospitals may provide patients access to their health information "using any application of [the hospital's] choice that is configured to meet the technical specifications of the application

[3] https://chpl.healthit.gov/#/search.

programming interfaces (API) in the [hospital]'s certified electronic health record technology (CEHRT)." 2020 Guidance at A173.

Each year, providers attest to CMS that they have complied with the applicable regulatory requirements and objectives to remain eligible for incentive payments or to avoid a reduction in reimbursements. 42 C.F.R. § 495.40. In 2018, CMS observed that more than 96% of the 4,600 eligible hospitals were meaningful users—that is, deemed to be in compliance with the requirements set out in the statute and regulations. *See* CMS, 2019 Medicare Electronic Health Record (EHR) Incentive Program Payment Adjustment Fact Sheet for Hospitals (Nov. 16, 2018).[4]

Penn Medicine's Vice President of Clinical Applications avers that Penn Medicine has participated in the Meaningful Use Program since 2011 and has received financial incentives and/or avoided payment reductions from CMS since that time. Schoenbaum Decl., A119 ¶¶ 7–8. She states that "[t]he Patient Portal is the platform through which Penn Providers have met certain criteria set forth by CMS" as part of the Meaningful Use Program. *Id.* ¶ 9.

[4] https://www.cms.gov/newsroom/fact-sheets/2019-medicare-electronic-health-record-ehr-incentive-program-payment-adjustment-fact-sheet-hospitals.

III. Proceedings Below

Mr. Mohr commenced this action in the Philadelphia County Court of Common Pleas on January 23, 2023, on behalf of himself and a putative class of all Pennsylvania residents whose personal information was collected via the Tracking Pixel on Penn Medicine's websites. A38. The complaint alleges a single cause of action for violation of the Pennsylvania Wiretapping Act, 18 Pa. Cons. Stat. §§ 5701, *et seq.*, A58–59 ¶¶ 77–84, and seeks compensatory and punitive damages, declaratory, equitable, and injunctive relief, A59–60 ¶¶ a–k.

On February 24, 2023, Penn Medicine removed the action to the United States District Court for the Eastern District of Pennsylvania, invoking the federal-officer removal statute, 28 U.S.C. § 1442(a)(1), as the basis for federal jurisdiction. A20. Mr. Mohr timely filed a motion to remand the action to state court, arguing that Penn Medicine failed to satisfy the requirements of the federal-officer removal statute. The district court granted Mr. Mohr's motion on April 20, 2023. A14.

In remanding the case to state court, the court held that Penn Medicine had not established the requisite "special relationship" between the government and Penn Medicine necessary to meet section

1442(a)(1)'s "acting under" requirement. A10. The court rejected Penn Medicine's argument that the incentives created by the Meaningful Use Program and Penn Medicine's agreement to participate in that program created such a relationship. A9–10.

While recognizing that "complying with CMS's priorities is financially beneficial to Defendant," the court held that financial incentives alone do not create an unusually close relationship of "subjection, guidance, or control" necessary to satisfy section 1442(a)(1). A11 (quoting *Watson*, 551 U.S. at 151). Being "induced to comply" or "incentivized to comply" with CMS's requirements, it explained, "is not enough" to trigger the federal-officer removal statute. A11. Further, the court noted that, "like in *Watson*," there was "no evidence of any delegation of legal authority from a federal agency to Defendant to undertake actions on the government's behalf," and Mr. Mohr's complaint did "not in any way seek to interfere with the federal government's operations or the enforcement of federal law." A12 (quoting 551 U.S. at 156). Because Penn Medicine failed to satisfy the "acting under" requirement for federal-officer removal, the court held that it

lacked federal jurisdiction and remanded the action without addressing the other statutory requirements. A12–13.

SUMMARY OF ARGUMENT

Penn Medicine "is simply a private entity that voluntarily elects to engage in a federal incentive program for financial gain." A12. That engagement "does not fall within even the broadest interpretation of the federal offic[er] removal statute." *Id.*

The federal-officer removal statute applies only to private entities that are acting as or on behalf of the federal government, in aid of the performance of a governmental duty, and subject to close government control. Penn Medicine's suggestion that any contract between the federal government and a private actor establishes the requisite relationship is incorrect. As reflected in this Court's precedent, whether a relationship between a private actor and a federal officer derives from contract, statute, or some other arrangement, the ultimate question is the same: whether the private entity has been delegated responsibility to perform a basic governmental task and made subservient to the strict control of the federal government.

Penn Medicine has not been delegated such responsibility or otherwise made subservient to the federal government via either its voluntary participation in the Medicare program, generally, or its voluntary participation in the Meaningful Use Program, specifically. In providing health care services, and in creating and implementing an electronic records system for consumers of those services, Penn Medicine serves classic private functions. The federal government's use of financial incentives to encourage the performance of those private functions in compliance with broad policy goals does not deputize private health care providers to perform the work of the federal government. And Penn Medicine retains a broad degree of discretion in providing healthcare, and in its electronic health records programs, subject to its compliance with federal regulatory requirements. Compliance with such requirements, even if imposed on Penn Medicine as a result of contracts it has entered into with the federal government, does not create an "acting under" relationship.

Given the absence of such a relationship, the Court need not consider the other requirements for federal-officer removal jurisdiction. In any event, two of those other requirements are not satisfied here.

First, Penn Medicine has not established that the conduct it is being sued for—collecting and sharing personal health information without consent to aid in marketing and advertising—"relates to" any action taken under federal office. Penn Medicine is alleged to have deployed the Tracking Pixel as to *all* of its patients—not simply those whose care is reimbursed by the federal government. And it began using the patient portal in 2008—years before the Meaningful Use Program began. Second, Penn Medicine has not set forth any colorable federal defense. Of the three identified "defenses" in its notice of removal, one is not a "defense" at all, and the other two have no relevance to the claims in this case.

STANDARD OF REVIEW

This Court reviews a district court's decision to remand for lack of jurisdiction *de novo*. *Maglioli*, 16 F.4th at 403.

ARGUMENT

The federal-officer removal statute provides for removal from state to federal court of cases brought against "[t]he United States or any agency thereof or any officer (or any person acting under that officer) of the United States or of any agency thereof, in an official or individual capacity, for or relating to any act under color of such office." 28 U.S.C.

§ 1442(a)(1). Removal under § 1442(a)(1) is proper only where four requirements are satisfied: (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." *Maglioli*, 16 F.4th at 404. As the proponent of jurisdiction, the removing defendant bears the burden of establishing each of these requirements. *See Avenatti v. Fox News Network*, 41 F.4th 125 (3d Cir. 2022); *Box v. PetroTel, Inc.*, 33 F.4th 195, 199 (5th Cir. 2022).

Here, Penn Medicine fails to satisfy its burden as to three of the four elements: It was not "acting under" any federal officer. Its deployment of nonconsensual tracking software on its Websites for marketing and advertising purposes is not to "related to" any act it performed under federal office. And it has not identified a colorable

federal defense to the state-law claim against it.[5] The Court should thus affirm the district court's remand order.

I. Penn Medicine was not "acting under" a federal officer.

Penn Medicine's argument that it was "acting under" a federal officer is grounded on the assertion that it, like every other healthcare provider that participates in the Medicare program, has a contract with the federal government. At bottom, it assumes that *any* contract with the federal government creates a sufficiently close relationship to support federal-officer removal. As established by precedent of this Court and the Supreme Court, however, it is not the legal source of the relationship between the federal government and a private actor that determines whether an entity is "acting under" a federal officer, but the nature of that relationship—*i.e.*, whether the private actor is in a subservient role

[5] Despite its burden, Penn Medicine has failed to make any argument in its principal brief as to the latter two requirements. It attempts to "incorporate[] by reference" arguments made in the district court, Appellant's Br. 14, but such an attempt does not satisfy Federal Rule of Appellate Procedure 28(a)(8) (formerly, Rule 28(a)(9)). *Eddy v. Corbett*, 381 F. App'x 237, 239 (3d Cir. 2010) (citing *Sw. Pa. Growth All. v. Browner*, 121 F.3d 106, 122 (3d Cir. 1997)); *see also Lin v. Att'y Gen. of U.S.*, 127 F. App'x 36, 39 (3d Cir. 2005) (collecting, and agreeing with, cases from other circuits that "have rejected the practice of 'incorporating by reference' arguments made in proceedings below" as a violation of former Rule 28(a)(9)).

with a federal officer, assisting the officer in performing her governmental duty. The relationships Penn Medicine has with CMS do not satisfy this standard. Accordingly, consistent with precedent of this Court and the Supreme Court, and with decisions of the vast majority of district courts to consider the issue,[6] the district court properly held that Penn Medicine was not "acting under" any federal officer.

A. Private entities "act under" federal officers only when they act as or on behalf of the federal government.

Recognizing that the federal government "can act only through its officers and agents, and [that] they must act within the States,"

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[6] *See, e.g.*, *Horton v. Willis-Knighton Med. Ctr.*, 2023 WL 5346133 (W.D. La. July 27, 2023), *report and recommendation adopted*, 2023 WL 5337455 (W.D. La. Aug. 18, 2023); *Doe v. Christ Hosp.*, 2023 WL 4757598 (S.D. Ohio July 26, 2023); *Doe v. Mosaic Health Sys.*, 2023 WL 5125078 (W.D. Mo. July 20, 2023); *Progin v. UMass Mem'l Health Care, Inc.*, 2023 WL 4535129 (D. Mass. July 13, 2023); *Martin v. LCMC Health Holdings, Inc.*, 2023 WL 4540547 (E.D. La. July 5, 2023); *Beauford v. Johns Hopkins Health Sys. Corp.*, --- F. Supp. 3d ---, 2023 WL 4237373 (D. Md. Jun. 28, 2023); *Valladolid v. Mem'l Health Servs.*, 2023 WL 4236179 (C.D. Cal. June 27, 2023); *Doe v. Hoag Mem'l Presbyterian Hosp.*, 2023 WL 3197716 (C.D. Cal. May 2, 2023); *Crouch v. Saint Agnes Med. Ctr.*, 2023 WL 3007408 (E.D. Cal. Apr. 19, 2023); *Doe v. Torrance Mem'l Med. Ctr.*, 2023 WL 2916548 (C.D. Cal. Apr. 12, 2023); *Quinto v. Regents of Univ. of Cal.*, 2023 WL 1448050 (N.D. Cal. Feb. 1, 2023); *Doe, I v. BJC Health Sys.*, 2023 WL 369427 (E.D. Mo. Jan. 10, 2023). *But see Doe v. ProMedica Health Sys., Inc.,* 2020 WL 7705627 (N.D. Ohio Oct. 30, 2020) (reaching opposite conclusion); *Doe I v. UPMC*, 2020 WL 4381675, at *1 (W.D. Pa. July 31, 2020) (same).

Tennessee v. Davis, 100 U.S. 257, 263 (1880), section 1442(a) provides federal officers and agents with a federal forum to "protect the Federal Government from the interference with its operations that would ensue were a State able, for example, to arrest and bring to trial in a State court for an alleged offense against the law of the State, officers and agents of the Government acting within the scope of their authority." *Watson*, 551 U.S. at 1342 (quoting *Willingham v. Morgan*, 395 U.S. 402, 406 (1969)) (cleaned up).

The statute applies both to federal officers themselves and to "any person acting under that officer," 28 U.S.C. § 1442(a)(1)—that is, to "[p]rivate persons 'who lawfully assist' the federal officer 'in the performance of his official duty.'" *Watson*, 551 U.S. at 151 (quoting *Davis v. South Carolina*, 107 U.S. 597, 600 (1883)). The "acting under" provision supports the statute's predominant concern: protecting vulnerable officers and employees of the federal government against prosecution or suit in state courts for the performance of their official duties. The paradigmatic application of the statute to a private person is *Maryland v. Soper (No. 1)*, 270 U.S. 9 (1926), where the Court pointed out that a private individual hired to drive and assist federal revenue officers in

busting up a still "had 'the same right to the benefit of' the removal provision as did the federal agents." *Watson*, 551 U.S. at 150 (quoting *Soper (No. 1)*, 270 U.S. at 30).

Although the federal-officer removal statute is "liberally construed," *Colorado v. Symes*, 286 U.S. 510, 517 (1932), section 1442(a)(1)'s authorization of removal by those "acting under" federal officials is "not limitless." *Watson*, 551 U.S. at 147. Accordingly, when defendants have attempted to stretch the scope of the "acting under" provision, the Supreme Court has rejected those efforts. *See id.* at 152–57; *Int'l Primate Prot. League v. Adm'rs of Tulane Educ. Fund*, 500 U.S. 72, 79–87 (1991); *Mesa v. California*, 489 U.S. 121, 129–39 (1989).

For example, in *Watson*, two plaintiffs sued cigarette manufacturers for fraudulently marketing cigarettes as "light" to deceive smokers into believing that smoking them would deliver lower levels of tar and nicotine than other cigarettes and present less danger of disease. The manufacturers, citing section 1442(a)(1), removed the action on the ground that they were "acting under" a federal officer because (they claimed) the federal government regulated the way in which they tested the tar and nicotine levels of their cigarettes. *See* 551 U.S. at 154–56.

They pointed to "comprehensive, detailed regulation" by the Federal Trade Commission (FTC), its "ongoing monitoring," and use of its "coercive power" to persuade the tobacco industry to enter into a voluntary agreement regarding advertising disclosures, as well as a record "filled with FTC announcements of its policy as well as communications between the FTC and the cigarette industry." *Watson v. Philip Morris Cos.*, 420 F.3d 852, 859–61 (8th Cir. 2005).

The Supreme Court disagreed. In a unanimous opinion, the Court explained that, as used in section 1442(a)(1), the term "under" refers to a relationship of subservience, and, therefore, that the statute applies only where a private person undertakes "an effort to *assist*, or to help *carry out*, the duties or tasks of the federal superior." 551 U.S. at 151–52. Even where federal "regulation is highly detailed and even if the private firm's activities are highly supervised and monitored," "simply *complying* with the law" does not constitute "the help or assistance necessary to bring a private person within the scope of the statute." *Id.* at 152–53.

In rejecting the notion that Philip Morris's interactions with the FTC constituted an "acting under" relationship, the Court distinguished the example of defense contractors, who had been held to "fall within the

terms of the federal officer removal statute, at least when the relationship between the contractor and the Government is an unusually close one involving detailed regulation, monitoring, or supervision." *Id.* at 153 (citing *Winters v. Diamond Shamrock Chem. Co.*, 149 F.3d 387 (5th Cir. 1998)). First, unlike a defense contractor that "provid[ed] the Government with a product that it used to help conduct a war," Phillip Morris was not "help[ing] officers fulfill other basic governmental tasks," by "perform[ing] a job that, in the absence of a contract with a private firm, the Government itself would have had to perform." 551 U.S. at 153–54. Second, the various letters and agreements that Philip Morris pointed to did not reflect that the FTC had delegated federal authority "to undertake testing on the Government's behalf." *Id.* at 156. Rather, they demonstrated "detailed rules about advertising, specifications for testing, requirements about reporting results, and the like." *Id.* at 157. These rules, according to the Supreme Court, sounded in "regulation" "not delegation," and thus did not satisfy the "acting under" requirement. *Id.*

Notably, the Supreme Court's distinction between defense contractors and Philip Morris was not that the former had a "contract" with the government, whereas the relationship between the latter and

the FTC was governed by statute and regulation. Indeed, the relevant duties were imposed by an agreement between Philip Morris and the FTC. Under *Watson*, a contractual relationship with the federal government is neither necessary nor sufficient to establish an "acting under" relationship. Rather, the relevant question does not inquire into the legal source of the relationship between the federal government and a private actor, but rather the *nature* of that relationship—that is, whether the private actor is in a subservient role with a federal officer, assisting the officer in performing her governmental duty.

This Court's post-*Watson* precedents reflect that, in determining whether a private actor is "acting under" a federal officer, the inquiry is the same for private actors who have a contract with the federal government and those who do not. Thus, in *Papp v. Fore-Kast Sales, Inc.*, 842 F.3d 805 (3d Cir. 2016), the Court explained that federal contractors satisfy the "acting under" requirement where "the federal government uses a private corporation to achieve an end it would have otherwise used its own agents to complete." *Id.* at 813. In that case, because the plaintiff's claims involved actions taken by Boeing while it was "working under a federal contract to produce an item the government needed, to wit, a

military aircraft, and that the government otherwise would have been forced to produce on its own," the "acting under" requirement was satisfied. *Id.*

By contrast, in *Maglioli*, the Court rejected nursing homes' arguments that their regulation by CMS—which applied to them solely as a result of their contractual participation in the Medicare and Medicaid programs—triggered section 1442(a). The Court held that, unlike the defense contractors discussed in *Watson*, nursing homes "do not assist or help carry out the duties of a federal superior, … are not delegated federal authority, nor do they provide a service that the federal government would otherwise provide." 16 F.4th at 405. More recently, the Court rejected oil companies' arguments that their oil leases with the federal government triggered the federal-officer removal statute, holding that those contracts did not "impose close federal control." *City of Hoboken v. Chevron Corp.*, 45 F.4th 699, 713 (3d Cir. 2022).

Other courts of appeals have similarly rejected the notion that any contract with the federal government creates a federal-officer relationship. As the Fourth Circuit has explained, general contracts for the sale of goods and services generally will not satisfy the statute, "even

when a contract specifies the details of the sales and authorizes the government to supervise the details of the sale and delivery." *W. Va. State Univ. Bd. of Governors v. Dow Chem. Co.*, 23 F.4th 288, 300 (4th Cir. 2022).

The Ninth Circuit reached the same conclusion in holding that a contract with a federal agency for the disposal of fireworks did not demonstrate an acting under relationship, as there was "no evidence of federal control or supervision over the planned destruction of the fireworks." *Cabalce v. Thomas E. Blanchard & Assocs.*, 797 F.3d 720, 730 (9th Cir. 2015); *see also City & Cnty. of Honolulu v. Sunoco LP*, 39 F.4th 1101, 1108 (9th Cir. 2022) (holding that payment under a federal contract "does not involve close supervision or control and does not equal 'acting under' a federal officer"). Courts of appeals have also rejected the notion that ordinary provider reimbursement contracts under Medicare and Medicaid satisfy the statute. *See Ohio State Chiropractic Ass'n v. Humana Health Plan Inc.*, 647 F. App'x 619, 622 (6th Cir. 2016) (rejecting federal-officer removal based on Medicare contract, which did not require private actor to take on "a job that the government would otherwise have to do"); *Veneruso v. Mount Vernon Neighborhood Health Ctr.*, 586 F.

App'x 604, 607–08 (2d Cir. 2014) (holding that disbursements pursuant to Medicaid contract did not evidence "acting under" relationship).

B. Participation in Medicare does not reflect an "acting under" relationship.

Penn Medicine argues that, by agreeing to participate in the Medicare program, it entered into an "acting under" relationship with federal officers. *See, e.g.*, Appellant's Br. 18–19. Under this theory, not only has Penn Medicine itself been "acting under" federal-officer direction "since the early days of Medicare," Appellants' Br. 19, but so are the nearly 400,000 other Medicare providers. *See* CMS Program Statistics – Medicare Providers, MDCR Providers 1. Medicare Providers: Number of Medicare Certified Institutional Providers, Yearly Trend (Mar. 6, 2023), https://data.cms.gov/summary-statistics-on-provider-enrollment/medicare-provider-type-reports/cms-program-statistics-medicare-providers (2021 data); Appellants' Br. 22 (asserting that third parties that receive, collectively, $848 billion in funding from CMS all "are acting under federal officers").

To state the argument reveals its implausibility. *Cf. Watson*, 551 U.S. at 153 (rejecting argument that would "expand the scope of the [federal-officer removal] statute considerably"). In creating Medicare,

"Congress did not deputize [private-sector health care workers] as federal officers." *Maglioli*, 16 F.4th at 406. The 400,000 Medicare providers are not in a subservient relationship with the federal government; the only federal control to which they are subject is, in Penn Medicine's own words, "laws, regulations, and program instructions." Appellants' Br. 19. But as this has Court held, that a health care institution is "subject to intense regulation" by CMS "does not mean [it] [was] 'acting under' federal officers." *Maglioli*, 16 F.4th at 405; *accord Martin v. Petersen Health Ops., LLC*, 37 F.4th 1210, 1212–13 (7th Cir. 2022) (rejecting nursing home's argument that it "acts under" CMS because it "is subject to extensive federal regulation (especially if it hopes to be reimbursed under the Medicare or Medicaid program)").

Like the nursing homes at issue in *Maglioli*, Penn Medicine has not been "delegated federal authority" by CMS's agreement to reimburse it for health care services, and it does not "provide a service that the federal government would otherwise provide." 16 F.4th at 405. Unlike indigent defense for federal defendants, at issue in *In re Commonwealth's Motion to Appoint Counsel Against or Directed to Defender Ass'n of Philadelphia*, 790 F.3d 457, 469 (3d Cir. 2015), or the development of weapons, at issue

in *Papp*, 842 F.3d at 805, health care is a function largely left to private industry. For sure, as a result of its participation in the Medicare program, Penn Medicine "may be subject to federal regulations and guidance governing the care [it] provide[s] …, but that does not mean that [it] 'act[s] under' a federal officer." *Solomon v. St. Joseph Hosp.*, 62 F.4th 54, 63 (2d Cir. 2023).

C. Participation in the Meaningful Use Program does not reflect an "acting under" relationship.

Penn Medicine's argument that its participation in Medicare's Meaningful Use Program constitutes action under a federal officer fares no better. The federal government frequently uses financial incentives to encourage private actors to perform private tasks in accordance with broad policy goals. But "the receipt of federal funding alone [does not] establish a delegation of legal authority" to a private actor, nor does it evince strict governmental control over the performance of those tasks such that the work of those private actors is essentially that of the government. *Mays v. City of Flint*, 871 F.3d 437, 444 (6th Cir. 2017). If it did, "the federal officer removal statute would sweep into the federal courts countless cases involving private entities' receipt of incentive payments or incorporation of practices consistent with a policy promoted

by the federal government as socially desirable." *Progin*, 2023 WL 4535129, at *4 (quotation marks omitted).

Neither providing health care nor maintaining electronic health records for privately provided health care are governmental tasks. *Progin*, 2023 WL 4535129, at *4 ("The federal government does not have an obligation to create a health information infrastructure and, if hospital systems like Defendant chose not to maintain patient portals, … the government would not be required to create its own."). Thus, Penn Medicine "is not assisting or helping a federal officer carry out her duties or tasks by creating a website and patient portal to allow patients online access to medical information (and allegedly transmitting their private data to third parties without their knowledge or consent)." *BJC*, 2023 WL 369427, at *4. "[T]he Program is principally designed to encourage the *private* sector to establish *private* health interfaces." *Christ Hosp.*, 2023 WL 4757598, at *8.

Further, the Meaningful Use Program does not place Penn Medicine into a role subservient to the federal government or otherwise create an "unusually close" relationship between Penn Medicine and the federal government. *Maglioli*, 15 F.4th at 405. To be sure, Penn Medicine

must comply with "criteria set forth by CMS" and "requirements and government guidance relating to the federal 21st Century Cures Act." Schoenbaum Decl., A119 ¶¶ 9–11. But, like other Medicare requirements, these requirements do not differ in kind from the regulatory directives deemed insufficient to satisfy the statute in *Watson* and *Maglioli*.[7] Indeed, Penn Medicine retains far more discretion in designing and operating its Websites than Philip Morris did in testing for tar in its products. If the close supervision of Philip Morris's testing by federal regulators was not "the help or assistance necessary to bring a private person within the scope of the statute," neither are the requirements and criteria of the Meaningful Use Program. *Watson*, 551 U.S. at 152.

[7] Penn Medicine points out that the district court in *UPMC*, 2020 WL 4381675, at *5, summarily concluded otherwise. Appellant's Br. 32–33. The decision in *UPMC* was erroneous for the reasons given by multiple district courts. *See, e.g.*, *Beauford*, 2023 WL 4237373, at *4 n.3 (rejecting *UPMC* as not persuasive); *Quinto*, 2023 WL 1448050, at *3 (declining to follow *UPMC* as it reflects an "overly broad interpretation of what it means to assist a federal superior with its tasks or duties, which would permit removal to federal court in circumstances far beyond anything Congress intended" (quotation marks omitted)); *BJC*, 2023 WL 369427, at *4 (disagreeing with the court's suggestion in *UPMC* that "voluntary participation in a government program somehow brings [a defendant] closer to 'acting under' a federal officer than other private entities subject to mandatory regulation by the government").

Although Penn Medicine is "assist[ing] the federal government in achieving a broad goal," *Progin*, 2023 WL 4535129, at *5, the test for federal-officer removal is not, as Penn Medicine suggests, whether a private actor is "[f]urthering the execution of federal government policy." Appellant's Br. 20. *See, e.g.*, *Glenn v. Tyson Foods, Inc.*, 40 F.4th 230, 235–37 (5th Cir. 2022) (holding that government recognition of meatpacking plants as "critical" and encouragement of plants to stay open during COVID-19 pandemic did not create "acting under" relationship), *cert. denied*, 143 S. Ct. 776 (2023); *Buljic v. Tyson Foods, Inc.*, 22 F.4th 730, 739–42 (8th Cir. 2021) (same), *cert. denied*, 143 S. Ct. 773 (2023). The test is whether the private actor is assisting in the performance of a governmental task and thus exercising delegated governmental authority. And "receiving incentive payments for acting in a way that promotes a broad federal interest—in an area outside the traditional responsibility of the federal government—is not the same as being contracted to carry out, or assist with, a basic governmental duty." *Quinto*, 2023 WL 1448050, at *2. In incentivizing institutions like Penn Medicine to meet the goals of expanded access to electronic health care

records, the federal government "did not deputize all of these private-sector [institutions] as federal officers." *Maglioli*, 16 F.4th at 406.

II. There is no association between Penn Medicine's use of the Tracking Pixel and a federal office.

To satisfy the third requirement of 28 U.S.C. § 1442(a)(1), the defendant must show "a 'connection' or 'association' between the act in question and the federal office." *In re Commonwealth's Motion*, 790 F.3d at 471. Penn Medicine has failed to even attempt to establish that this requirement is satisfied, and it is not.

First, there is no indication that the Tracking Pixel relates to Penn Medicine's participation in Medicare generally. The Tracking Pixel is a feature of Penn Medicine's general Websites and patient portal, and is deployed to allow Facebook to intercept personal information of all of its patients—not only those whose care is paid for in whole or in part by the Medicare program. That both Medicare reimbursement and the Tracking Pixel may relate to Penn Medicine's bottom line does not make the two themselves "related." *Cf. Minnesota v. Am. Petroleum Inst.*, 63 F.4th 703, 715–16 (8th Cir. 2023) (finding claims based on deceptive marketing of oil to general public was not sufficiently related to production of oil for the federal government); *Mayor & City Council of Balt. v. BP P.L.C.*, 31

F.4th 178, 233 (4th Cir. 2022) (similar); *City of Hoboken v. Exxon Mobil Corp.*, 558 F. Supp. 3d 191, 207–09 (D.N.J. 2021), *aff'd sub nom. City of Hoboken v. Chevron Corp.*, 45 F.4th 699 (3d Cir. 2022). The decision to deploy tracking software no more "relates" to Penn Medicine's participation in Medicare than decisions as to, for example, what color chairs to purchase for its waiting rooms or what kinds of coffee to provide in its break rooms—none of these are connected to an exercise of federal official authority, as required by the statute.

Second, while some aspects of Penn Medicine's Websites and patient portal could conceivably relate to the Meaningful Use Program, Penn Medicine has made no effort to explain how the conduct being alleged here so relates and thus has not met its burden. Indeed, Penn Medicine concedes its "Patient Portal has been in operation for ambulatory practices since 2008"—three years *before* it started participating in the Meaningful Use Program. Schoenbaum Decl., A118 ¶ 5, A119 ¶ 7. Moreover, the Tracking Pixel has no connection with any of the purposes of the Meaningful Use Program—it functions to allow Penn Medicine to gather information about patients to more effectively market its services. Finally, Penn Medicine offers no evidence that any

federal officer directed Penn Medicine to use tracking software like the Tracking Pixel or otherwise use Facebook to intercept patients' health information without their consent.

III. Penn Medicine lacks a colorable federal defense.

Finally, Penn Medicine has not established the fourth requirement for removal under section 1442(a)(1): a colorable federal defense to the state-law claim alleged against it.[8] Although a removing defendant need not identify a "clearly sustainable" federal defense to satisfy this requirement, it must at least identify a "plausible" one. *See Caver v. Cent. Ala. Elec. Coop.*, 845 F.3d 1135, 1145 (11th Cir. 2017); *Ruppel v. CBS Corp.*, 701 F.3d 1176, 1182 (7th Cir. 2012). Here, none of the three federal defenses Penn Medicine identified in its notice of removal meets even this low bar.

The first "defense" Penn Medicine invokes is "that it did not violate HIPAA." Notice of Removal, A31 ¶ 48. This statement, whether or not

[8] Mr. Mohr did not raise this issue in his remand motion. However, "[a]s with any other question of subject-matter jurisdiction," a removing defendant's failure to meet one of the requirements of section 1442(a)(1) "can be raised at any time and thus cannot be waived or forfeited." *Gillette v. Warden Golden Grove Adult Corr. Facility*, 75 F.4th 191, 195 (3d Cir. 2023).

correct, is not a federal defense to the violation of the Pennsylvania Wiretapping Act alleged in the case. "HIPAA provides a floor of privacy protections for a person's individually identifiable health information and does not preempt state privacy laws that provide greater protection than HIPAA." *Hidalgo-Semlek v. Hansa Med., Inc.*, 498 F. Supp. 3d 236, 258 (D.N.H. 2020). And while HIPAA (like most other federal statutes) preempts state-law requirements that are *contrary* to federal requirements, *see, e.g.*, 42 U.S.C. § 1320d-7(a)(1); 45 C.F.R. § 160.203, Penn Medicine has not suggested any conflict between HIPAA's requirements and those of the Pennsylvania Wiretapping Act.

Second, Penn Medicine invokes the Dormant Commerce Clause, citing *Healy v. Beer Institute*, 491 U.S. 324, 332 (1989), for the proposition that any law that touches on "commerce occurring wholly outside" a state's borders is unconstitutional. Notice of Removal, A31 ¶ 49. This case, though, is a dispute between two Pennsylvania citizens, arising out of health care services provided in Pennsylvania.

Moreover, Penn Medicine's reading of *Healy* is incompatible with the Supreme Court's recent decision in *National Pork Producers Council v. Ross*, 143 S. Ct. 1142 (2023). There, the Court rejected the view that

Healy and other cases reflect "an 'almost per se' rule against state laws with 'extraterritorial effects.'" *Id.* at 1155. Recognizing that "virtually all state laws create ripple effects beyond their borders," the Court held that the Dormant Commerce Clause's concern is "discriminatory state legislation." *Id.* at 1165. For good reason, Penn Medicine correctly does not suggest that the Pennsylvania Wiretapping Act constitutes such discriminatory legislation.

Finally, Penn Medicine argues that Mr. Mohr's claims are preempted under *Buckman Co. v. Plaintiffs' Legal Committee*, 531 U.S. 341, 347 (2001), which held that a state-law claim for "fraud on the FDA" was barred by principles of conflict preemption. The plaintiffs' theory in that case was that the defendant had violated a duty owed to the FDA by committing a fraud on the agency in the course of obtaining approval to market a product and that, "[h]ad the representations not been made, the FDA would not have approved the [product], and plaintiffs would not have been injured." *Id*. at 343. This Court has found a colorable *Buckman* defense where a plaintiff's claim was based on the Federal Community Defender's alleged non-compliance with the terms of a federal grant from the Administrative Office of the U.S. Courts. *In re Commonwealth's*

Motion, 790 F.3d at 474. By contrast this case involves no allegation that Penn Medicine violated any duties owed *to the federal government* at all. Mr. Mohn's claim is based purely on duties Penn Medicine owed *to him*: *his* right not to have his electronic communications intercepted without consent. *Buckman* is wholly inapposite here.

In sum, none of Penn Medicine's asserted federal defenses meets the colorability standard. Penn Medicine has not met the final requirement for federal-officer removal.

CONCLUSION

The district court's remand order should be affirmed.

August 30, 2023

Respectfully submitted,

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August 30, 2023

/s/ Adam R. Pulver
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I hereby certify that on August 30, 2023, the foregoing brief has been served through this Court's electronic filing system upon counsel of record for all parties.

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