No. 24-____

IN THE

Supreme Court of the United States

RAIZEL BLUMBERGER,
Petitioner,

v.

IAN B. TILLEY, M.D., and UNITED STATES OF AMERICA,
Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Federally Supported Health Centers Assistance Act provides federally funded health centers with protections from liability in malpractice actions by "deeming" them to be Public Health Service (PHS) employees under certain circumstances. Where a defendant seeks to take advantage of these protections in a state court proceeding, it must notify the Attorney General of the action, and the Attorney General must, within 15 days, appear in the action and "advise such court whether the Secretary [of Health and Human Services] has determined … that [the defendant] is deemed to be an employee of the Public Health Service … with respect to the actions or omissions that are the subject of such civil action or proceeding," and, if so, to remove the case to district court. 42 U.S.C. § 233(*l*)(1).

The questions presented are:

(1) Whether, as the Ninth Circuit held, but contrary to the views of three other circuits, a defendant who disagrees with the Attorney General's timely state-court filing under section 233(*l*)(1) may remove the action to federal district court to review the correctness of that filing, despite the absence of any statutory basis for removal.

(2) Whether, as the Ninth Circuit held, but in direct conflict with a decision of the Third Circuit, section 233(*l*)(1) requires the Attorney General to remove any state court action against an entity that had prospectively been deemed a PHS employee for some purposes, without consideration as to whether the specific case falls within the scope of any such deeming.

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INTRODUCTION

Federal courts do not have general supervisory authority over the conduct of state-court litigation that allows them to assume jurisdiction over state-court actions. Rather, "[t]he right of removal is entirely a creature of statute and a suit commenced in a state court must remain there until cause is shown for its transfer under some act of Congress." *Syngenta Crop Prot., Inc. v. Henson*, 537 U.S. 28, 32 (2002) (cleaned up).

Despite these well-established principles, the Ninth Circuit held that it had jurisdiction over this case, removed from state court, in the absence of any applicable statutory removal provision. Specifically, the Ninth Circuit held that a litigant may remove an action based on a disagreement with state-court filings made by the Attorney General pursuant to section 233(*l*)(1) of the Public Health Service (PHS) Act. That provision requires the Attorney General to inform the state court whether that litigant has been "deemed" to be a PHS employee with respect to the actions or omissions that gave rise to the suit. The court of appeals ground its finding of removal jurisdiction on the "presumption of reviewability" that applies to federal agency actions—a presumption that this Court has never suggested serves as a basis for federal jurisdiction over actions filed in state court.

In so doing, the Ninth Circuit created two circuit splits. First, the Third, Eleventh, and D.C. Circuits have previously recognized that the two express removal provisions contained in section 233 of the PHS Act, subsections (c) and (*l*)(2)—neither of which applies here—are the exclusive mechanisms for removal under that statute. As these courts, and the

dissent in the Ninth Circuit, recognized, while Congress *could* have also provided for removal by defendants who disagree with the Attorney General's state-court filings to enable federal court resolution of such disagreements—similar to the mechanism it included in the Westfall Act—it did not. And there is no other indication that Congress intended to vest federal courts with the authority to review the correctness of the Attorney General's state court filings under section 233(*l*). To the contrary, by providing for removal in two specific and narrow circumstances, Congress indicated that it did not intend to shift malpractice cases to federal court in a third set of cases based on the potential application of section 233.

Second, even if federal courts had jurisdiction to adjudicate a defendant's disagreement with a section 233(*l*)(1) state-court filing, the Ninth Circuit's resolution of that disagreement was contrary to statute, in direct conflict with a decision of the Third Circuit, and in tension with decisions of other courts of appeals. The Ninth Circuit held that the Attorney General is required to remove *any* medical malpractice case where there was a prospective deeming determination in effect as to a health center or any of its employees, for any purposes, without examining whether the acts or omissions giving rise to the suit were within the scope of that prospective determination. This holding nullifies Congress's direction requiring removal only upon a determination that a defendant is deemed a PHS employee "with respect to the actions or omissions that are the subject of" the particular proceeding. 42 U.S.C. § 233(*l*)(1). Instead, it creates a *per se* removal rule inconsistent with the statutory scheme—a scheme by which

Congress tasked the Attorney General with the primary authority to make determinations as to the applicability of section 233(g) in a given case and as to which federal courts have a limited role.

Because the Ninth Circuit's decision would "herald a potentially enormous shift of traditionally state cases into federal courts," *Grable & Sons Metal Products, Inc. v. Darue Engineering & Manufacturing*, 545 U.S. 308, 319 (2005), this Court's review is warranted. The decision provides a basis for any federally-funded health center or employee to remove any state court action against it to federal district court—regardless of the topic of that action. And it requires the Attorney General to remove cases even where she knows that a defendant is *not* a deemed PHS employee with respect to the acts or omissions, and then immediately move to remand the case back to state court. As Judge Desai noted in her dissent, the decision below will "lead to absurd and impractical results and unduly burden the government," "eras[ing] language from § 233, eliminat[ing] the Attorney General's role under the statute, and giv[ing] a procedural advantage to doctors in malpractice cases that belong in state court." Pet. App. 57a–58a. These consequences are not hypothetical; they have already begun to emerge in the lower courts. Moreover, in finding removal jurisdiction in the "presumption of reviewability," the Ninth Circuit has given state-court litigants a basis for removal in *any* case in which a federal government entity appears—in effect creating an entirely new kind of non-statutory federal removal jurisdiction.

The Court should grant the writ to resolve the circuit split and restore "the state-federal line drawn … by Congress." *Grable*, 545 U.S. at 314.

OPINIONS AND ORDERS BELOW

The Ninth Circuit's opinion is reported at 115 F.4th 1113 and reproduced at Pet. App. 1a–74a. The Ninth Circuit's denial of rehearing en banc is unreported and reproduced at Pet. App. 97a–98a. The district court's decision granting Petitioner's motion to remand is unreported, but is available at 2022 WL 16698682, and is reproduced at Pet. App. 75a–86a. The district court's decision denying a stay pending appeal is unreported, but is available at 2022 WL 18359101, and is reproduced at Pet. App. 87a–96a.

JURISDICTION

The district court's remand order was appealable under 28 U.S.C. § 1447(d), as the notice of removal was based, in part, on the federal-officer removal statute, 28 U.S.C. § 1442. The Ninth Circuit entered judgment on September 9, 2024, and denied timely petitions for rehearing en banc on December 19, 2024. On February 27, 2025, Justice Kagan granted Ms. Blumberger an extension of time to file this petition. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

42 U.S.C. §§ 233(a) through (*l*) are reproduced at Pet. App. 99a–112a.

STATEMENT OF THE CASE

Statutory Background

In certain circumstances, the Federally Supported Health Centers Assistance Act (FSHCAA) provides federally funded health centers and their employees with the same protections from liability as employees

of the PHS, by "deeming" those health centers and their employees to be PHS employees. *See* 42 U.S.C. § 233(g). In those circumstances, the sole remedy for malpractice by such centers and their employees is a claim against the United States pursuant to the Federal Tort Claims Act. *Id.* §§ 233(g), 233(a).

The process for obtaining the FSHCAA's protections includes both pre- and post-dispute requirements. First, a health center receiving funds pursuant to 42 U.S.C. § 254b must submit an application to the Secretary of Health and Human Services (HHS) for deeming for an upcoming calendar year. 42 U.S.C. § 233(g)(1)(A), (D). If granted, the Secretary's deeming determination applies with respect to services provided to patients of the entity, and to those services provided to non-patients that the Secretary determines meet specific criteria. *Id.* § 233(g)(1)(C).

If an entity or individual who believes that it should be treated as a deemed employee is sued in state court, the person must provide notice of the action to the Attorney General. 42 U.S.C. § 233(b). Within 15 days of receiving such notice, the Attorney General "shall make an appearance in [the state] court and advise such court as to whether the [HHS] Secretary has determined" that the person "is deemed to be an employee of the Public Health Service for purposes of [section 233] with respect to the actions or omissions that are the subject of such civil action or proceeding." *Id.* § 233(*l*)(1). Where the Attorney General advises the Court that the Secretary has made such an affirmative determination, "such advice" serves as the certification required to trigger the Attorney General's ability to, and duty to, remove

the action pursuant to the PHS Act's general removal provision, section 233(c). *Id.* § 233(*l*)(1). That provision requires the Attorney General—and no one else—to remove an action from state court "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." *Id.* § 233(c).

"[T]o protect a covered defendant against a default judgment due to the Attorney General's untimeliness," the statute also contains a safety mechanism—section 233(*l*)(2). *El Rio Santa Cruz Neighborhood Health Ctr., Inc. v. U.S. Dep't of Health & Hum. Servs.*, 396 F.3d 1265, 1272 (D.C. Cir. 2005). That provision specifies that "[i]f the Attorney General fails to appear in State court" within fifteen days of notification, the defendant may itself remove the action to federal district court. *Id.* § 233(*l*)(2). In that circumstance, the state court action is stayed, and the district court is required to "conduct[] a hearing, and make[] a determination, as to the appropriate forum or procedure for the assertion of the claim" at issue. *Id.*

The statute does not provide for removal in any other circumstance.

State court proceedings

Raizel Blumberger gave birth at California Hospital Medical Center on January 3, 2018. Pet. App. 10a. She experienced complications during childbirth, and she alleges that these complications were not properly diagnosed or treated by her physicians, including Respondent Dr. Ian Tilley. *Id.* As a result, in May 2021, she filed this action in Los Angeles County Superior Court against the hospital,

its owners, Dr. Tilley, and other health care providers, alleging medical negligence under California law. *Id.*

California Hospital Medical Center is not a federally funded health center for purposes of section 233(g). *Id.* In addition to his work at California Hospital Medical Center, however, Dr. Tilley purports to be an employee of Eisner Pediatric and Family Center (the Eisner Center), a community health center that receives federal grant funds. *Id.* 9a–10a. In 2017, HHS had issued a notice that deemed the Eisner Center to be a PHS employee for the 2018 calendar year, with respect to some services that the Eisner Center and its employees and affiliates provided. *Id.* 9a.

Dr. Tilley answered Ms. Blumberger's state-court complaint on July 16, 2021. *Id.* 10a. On July 20, 2021, the Eisner Center—who is not a defendant in this action or alleged to have had any role in Ms. Blumberger's delivery—forwarded a copy of the complaint to HHS. *Id.* Two days later, an Assistant United States Attorney appeared in the state court action on behalf of the United States and, pursuant to 42 U.S.C. § 233(*l*)(1), advised the court that "whether Defendant Ian B. Tilley, M.D. is deemed to be an employee of the Public Health Service for purposes of 42 U.S.C. § 233 with respect to the actions or omissions that are the subject of the above captioned action, is under consideration." Pet. App. 10a–11a. The case proceeded in state court for another year.

On July 21, 2022, the United States filed an amended notice stating its conclusion that Dr. Tilley "is *not* deemed to be an employee of the Public Health Service for purposes of 42 U.S.C. § 233 with respect to

the actions or omissions that are the subject of [this] action." *Id.* 11a.

District court proceedings

More than a month after the United States filed its amended notice, Dr. Tilley removed the action to the United States District Court for the Central District of California, citing two statutory provisions. *See* Pet. App. 11a. First, he stated that he was entitled to remove pursuant to 42 U.S.C. § 233(*l*)(2), which he asserted "afford[ed] a federal forum to resolve the question as to whether his federal immunity defense under 42 U.S.C. § 233 *et seq*. extends to this action." Pet. App. 11a. Second, he invoked the federal-officer removal statute, 28 U.S.C. § 1442(a)(1), claiming that removal under that statute was timely because he "became aware of the government's July 21, 2022 denial decision via an electronic state court filing on or about July 21, 2022." Pet. App. 11a.

Ms. Blumberger and the United States both moved to remand. The district court granted their motions on November 2, 2022. *Id*. 75a. The court first rejected Dr. Tilley's section 233(*l*)(2) theory on the ground that the provision applies only when the United States has *not* timely appeared in state court. *Id*. 81a–82a. Because the United States had timely appeared, the court held that section 233(*l*)(2) did not apply. *Id*. 82a. Next, the court rejected Dr. Tilley's argument that section 233(*l*) implicitly provides federal courts "inherent authority to review … the Government's determination denying coverage." *Id*. 82a–83a. Finally, the district court found Dr. Tilley's invocation of the federal-officer removal statute untimely, rejecting his theory that the "30-day removal period under § 1442 must start when a deemed defendant learns of the Government's

adverse coverage decision" and ruling that "the 30-day removal period began when [Dr. Tilley] was served with the state court complaint in 2021." *Id.* 83a–85a.

Court of appeals proceedings

Dr. Tilley appealed. On September 9, 2024, a divided panel issued an opinion vacating the district court's remand order. To start, as to section 1442, the court unanimously found that the relevant event for determining timeliness was "when Dr. Tilley learned of his deemed status in the first place." Pet. App. 18a. Since the record was silent on this point, the court of appeals remanded for the district court to address that question and, if it concluded removal was timely, to decide whether the requirements of section 28 U.S.C. § 1442(a)(1) were satisfied. *Id.*

As to section 233, however, the court was divided. Without addressing removal jurisdiction—and expressly disagreeing with the Third Circuit's nonprecedential decision in *Doe v. Centerville Clinics Inc.*, No. 23-2738, 2024 WL 3666164 (3d Cir. Aug. 6, 2024), *cert. denied*, No. 24-727 (Mar. 24, 2025), and the position of the United States, the majority held that, under sections 233(c) and 233(*l*)(1), the Attorney General is required to certify and remove any malpractice action against an entity that had received an annual deeming notice (or its employees), without determining whether the acts underlying the suit were within the scope of that deeming. Pet. App. 24a–44a. Although the statute requires removal only upon a determination that a defendant is deemed to be a PHS employee "with respect to the actions or omissions that are the subject of such civil action or proceeding," the majority held that the "actions or omissions" limitation "will play almost no role" where

"a plaintiff brings a medical malpractice suit against an employee for actions that occurred during the deemed time period." *Id.* 34a.

Applying this view of the statute, the majority then concluded that both the Attorney General's first notice stating that "Dr. Tilley's deemed status was 'under consideration'" and the later notice that Dr. Tilley was "*not* deemed to be an employee of the Public Health Service for purposes of 42 U.S.C. § 233 with respect to the actions or omissions that are the subject of the above captioned action" were erroneous and "misleading." *Id.* 41a. Under the majority's view, section 233(*l*)(1) "obligated" the Attorney General "to remove the case to federal court" based solely on the 2017 prospective deeming notice issued to the Eisner Center. *Id.* 43a.

Only after concluding that the Attorney General's state-court filings were wrong did the majority address whether and how the court had jurisdiction to review those filings. The court did not identify any relevant statutory provision that provided for removal jurisdiction. Instead, it concluded that such jurisdiction was provided by the "presumption of reviewability" of executive actions. *Id.* 43a–52a. Relying solely on cases filed in the first instance in federal court, the majority reasoned that, because Congress did not explicitly preclude review of the correctness of the Attorney General's state court filings pursuant to section 233(a), the cases in which any such filings were made must be removable to federal court so that a federal court can conduct such a review. *Id.* 48a–49a. It then specified that, as a "remedy" for the Attorney General's failure to remove the action, the

district court should hold a hearing to determine whether section 233 immunity applies. *Id.* 53a–54a.

Dissenting with respect to section 233, Judge Desai explained that "the answer to the only question on appeal concerning § 233—whether Dr. Tilley properly removed the case to federal court—is no," because the requirements for removal were not satisfied under either of the two statutory provisions. *Id.* 56a. Yet, she wrote, the majority "circumvent[ed] this otherwise unavoidable conclusion by addressing an entirely different question: 'Was the Attorney General required under § 233(*l*)(1) to inform the state court of Dr. Tilley's deemed status for 2018, such that the government was obligated to remove the case to federal court?'" *Id.* 56a–57a. In answering this question, she reasoned, the majority impermissibly "rewr[o]te the language of the statute" and reached a holding that "will lead to absurd and impractical results and unduly burden the government," creating a "per se removal rule every time a PHS employee is sued for medical malpractice, even if the employee was acting outside the scope of his employment," "eliminat[ing] the Attorney General's role under the statute, and giv[ing] a procedural advantage to doctors in malpractice cases that belong in state court." *Id.* 57a–58a.

Judge Desai's dissent began with section 233(*l*)(2)—the provision on which Dr. Tilley based removal. That provision, Judge Desai explained, authorizes removal only where the Attorney General "fails to appear" under § 233(*l*)(1). Here, though, the Attorney General had fulfilled the only obligation imposed by section 233(*l*)(1): to "appear in court within fifteen days after being notified of the filing

and advise the court 'whether' the government has made a coverage determination." *Id.* 59a. By allowing removal where the Attorney General had timely appeared and advised a state court that either no determination had been made, or of a negative determination, she explained, the majority created a conflict with decisions of the D.C. and Eleventh Circuits. *Id.* 59a–60a (citing *El Rio Santa Cruz*, 396 F.3d at 1271, and *Allen v. Christenberry*, 327 F.3d 1290, 1293, 1295 (11th Cir. 2003)).

Judge Desai next explained that the majority's decision that section 233 required the Attorney General to remove, and thus that the Attorney General's state court filings were flawed, "distorts the statute's text, renders much of the statute superfluous, assumes facts not before us, and is impractical." *Id.* 61a. In particular, the majority's interpretation would render section 233(*l*)(1)'s language regarding "*the actions or omissions*" underlying the case meaningless. *Id.* 64a. Citing the Third Circuit's decision in *Centerville*, Judge Desai explained that the plain language of the statute requires the Attorney General to report as to the status of "a case-specific coverage decision" in her section 233(*l*)(1) filing. *Id.* 65a. The HHS Secretary's prospective deeming decision cannot alone resolve this question, as "[t]he Secretary cannot make a deeming decision 'with respect to the acts or omissions that are the subject of such civil action or proceeding' before the lawsuit is even filed." *Id.* 68a (quoting 42 U.S.C. § 233(*l*)(1)). The majority's contrary view, Judge Desai stated, was impractical, as it "would compel the Attorney General to replace a defendant and remove a case even when the defendant obviously is not covered (*e.g.*, the hypothetical health

center dentist moonlighting as a plastic surgeon for private clients)." *Id.* 69a.

Finally, Judge Desai explained that the "presumption favoring judicial review of agency actions" did not permit the court to "rewrite the statute to allow removal based on a general policy favoring judicial review." *Id.* 70a–71a. She explained that "[i]f Congress intended to grant defendants broad removal rights to seek federal court review of coverage determinations, it would have said so," as it did in the Westfall Act. *Id.* 71a (citing 28 U.S.C. § 2679(d)(3)). Moreover, she explained, removal is not necessary to ensure the reviewability of a negative deeming determination, pointing to the remedy under the APA that has been recognized by the D.C. Circuit. *Id.* 73a (citing *El Rio Santa Cruz*, 396 F.3d at 1271).

Both Ms. Blumberger and the United States filed petitions for rehearing en banc. The petitions were denied. *Id.* 97a–98a.

REASONS FOR GRANTING THE WRIT

I. This Court should grant review of the Ninth Circuit's holding that section 233 provides an implicit basis for removal jurisdiction.

The Ninth Circuit's conclusion that a litigant who disagrees with the Attorney General's filings under section 233(*l*)(1) may remove the action on the basis of such disagreement is contrary to the decisions of other courts of appeals, the decisions of this Court, and Congress's carefully crafted statutory scheme.

A. By holding removal was proper, the decision below conflicts with decisions of three other courts of appeals.

As both the majority and the dissenting opinions in the Ninth Circuit acknowledged, this case creates a conflict among the circuits.

Each of the three other courts of appeals to consider the circumstances under which a private defendant can remove an action based on section 233 of the PHS Act have reached the same conclusion: The only bases for removing a case from state to federal court pursuant to section 233 are the statute's two explicit removal provisions. And an action may not be removed to challenge the adequacy or correctness of the Attorney General's timely section 233(*l*)(1) filings. The Ninth Circuit's decision in this case is irreconcilable with those decisions.[1]

To start, both the majority and dissent in the Ninth Circuit agree that the decision in this case conflicts with the Third Circuit's nonprecedential decision in *Centerville*. *See* Pet. App. 29a, 65a. There, a health center was sued in state court. When the Attorney General timely appeared, he advised the Court "that while Centerville had been [prospectively] deemed a PHS employee, the government had not determined under § 233(*l*)(1) whether Centerville's

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[1] Prior to its decision in this case, the Ninth Circuit had issued a nonprecedential opinion consistent with the views expressed by sister circuits—holding that irrespective of "good arguments" grounded in policy, "the language of the statute" "compel[s]" the conclusion that section 233 only allows a defendant to remove if "the Attorney General fails to appear within fifteen days of receiving notice." *Babbitt v. Dignity Health*, No. 18-56576, 2023 WL 1281668, at *2 (9th Cir. Jan. 31, 2023), *cert. denied sub nom. Afework v. Babbitt*, 144 S. Ct. 184 (2023).

deemed status extends 'to the acts or omissions that are the subject of this civil action.'" 2024 WL 3666164, at *2 (3d Cir. Aug. 6, 2024). The health center nonetheless removed the action, arguing that it had a right to remove because the Attorney General failed to do so. *Id.* at *2.

The Third Circuit rejected this argument, recognizing that the statute authorizes removal "in only two circumstances": by the Attorney General or by a defendant if the Attorney General fails to appear within fifteen days. *Id.* at *1. The health center's contrary argument, the court held, "ignore[d] the plain text of the statute." *Id.* (quoting 42 U.S.C. § 233(*l*)(2)). Finding the statutory language "clear," the Third Circuit "decline[d] to read … extra-textual language into the statute." *Id.* The Ninth Circuit's decision is irreconcilable with this decision.

The decision below also conflicts with the Eleventh Circuit's opinion in *Allen v. Christenberry*, on which the Third Circuit relied in *Centerville*. In *Allen*, as in this case, the United States responded to a health center's notice of a state-court action by advising the state court that it remained "under consideration" whether the defendant doctors were deemed PHS employees with respect to the conduct underlying the suit, and later informed the doctors "that they were not going to be deemed employees of PHS." 327 F.3d at 1293. And as in this case, the doctors nonetheless removed the action to federal court, invoking § 233, and asked the federal district court to make a "de novo determination" as to whether they were deemed PHS employees. *Id.* The district court denied the plaintiff's motion to remand, and, on a certified interlocutory appeal, the Eleventh Circuit reversed.

In so doing, the Eleventh Circuit explained that "the removal by [the doctors] was improper" because "the statute authorizes removal in only two circumstances, and neither occurred here." 327 F.3d at 1294–95. "The statute does not provide for removal upon notification that no decision has been reached yet," it explained, and "HHS's determination … that [the doctors] were not to be deemed employees did not create federal question jurisdiction under 28 U.S.C. § 1331." *Id.* at 1295–96. To the contrary, "in the FSHCAA Congress left the determination of the defendants' employment status to the Secretary of HHS and predicated removal upon either an affirmative deeming by the Secretary or the Attorney General's failure to appear and advise the court within a prescribed period of time." *Id.* at 1296 (citing 42 U.S.C. § 233(g)–(h), (*l*)). Because neither of those situations was present, and recognizing that it "may not rewrite the statute," the Eleventh Circuit held that the case was properly remanded to state court. *Id.*

Although the Ninth Circuit majority attempted to distinguish *Allen* on the ground that it "involved a unique set of circumstances not present here," Pet. App. 38a, no such distinction exists. In both cases, the government responded to notice of the state court suit within fifteen days by filing a notification that the defendants' deeming status was under consideration, and, in both cases, the government later reached a negative determination. The Eleventh Circuit was clear that section 233 provided no basis for removal where the initial filing was timely. 327 F.3d at 1294–95. That holding is irreconcilable with the Ninth Circuit's determination that removal is available to challenge a similar filing. *See also* Pet. App. 59a–60a

(Desai, J., dissenting) (explaining why the majority opinion is irreconcilable with *Allen*).

Finally, the decision below is also irreconcilable with the reasoning of the D.C. Circuit's decision in *El Rio Santa Cruz*. There, a health center was sued in Arizona state court. After receiving notice, the Attorney General advised the state court that the defendant was not deemed a PHS employee for purposes of the suit. 396 F.3d at 1268. The health center's attempt to remove the action was rejected by the Arizona federal district court, *id*., and the center then filed in the U.S. District Court for the District of Columbia a separate action challenging HHS's negative deeming determination under the Administrative Procedure Act. *Id*. at 1269. The district court granted summary judgment for the health center and remanded to the agency. *Id*.

On appeal, the D.C. Circuit affirmed. Relevant here, the court held that section 233 itself did not provide an adequate remedy that precluded an APA claim under 5 U.S.C. § 704. Rather, the court held, "the FSHCAA text and legislative history show that the removal remedy under § 233(*l*)(2) was not designed to afford independent district court review of the Secretary's negative coverage determinations," but only "to protect a covered defendant against a default judgment due to the Attorney General's untimeliness." *Id*. at 1272. "[T]o afford the physicians a remedy for negative deeming determinations in § 233(*l*)(2)," the court explained, "would require some recrafting of the removal section." *Id*. at 1274. The statute's "silence on judicial review" of negative deeming determinations weighed in favor of finding

judicial review *under the APA*, the court explained, not an expansion of removal jurisdiction. *Id.*

Centerville, *Allen*, and *El Rio Santa Cruz* each recognize that the explicit removal provisions of section 233 are the exclusive means by which that statute authorizes removal, and that there is no removal jurisdiction to review the correctness of the government's section 233(*l*)(1) filing. The Ninth Circuit's departure from that consensus warrants review.

B. The recognition of a nonstatutory removal mechanism is contrary to this Court's decisions.

'For more than 200 years, this Court has recognized that the "right of removal is statutory." *Phoenix Ins. Co. v. Pechner*, 95 U.S. 183, 185 (1877). "The power reserved to the states under the Constitution to provide for the determination of controversies in their courts, may be restricted only by the action of Congress in conformity to the Judiciary Articles of the Constitution." *Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100, 108–09 (1941). Accordingly, "a suit commenced in a state court must remain there until cause is shown for its transfer under some act of Congress." *Great N. Ry. Co. v. Alexander*, 246 U.S. 276, 280 (1918); *see also Syngenta*, 537 U.S. at 31.

Consistent with this longstanding precedent, the Court has never recognized any form of "implicit" removal jurisdiction. To the contrary, in *Syngenta*, the Court rejected the argument that the "All Writs Act, alone or in combination with the existence of ancillary jurisdiction" could be used to provide the basis for removal jurisdiction—declining to allow defendants to

invoke that statute's broad general language to "avoid complying with the statutory requirements for removal." 537 U.S. at 32–33.

Here, the Ninth Circuit's decision, holding that this case was properly removed despite the lack of any statutory authorization, runs contrary to this Court's precedent. Indeed, the Ninth Circuit went even further than the removing defendants in *Syngenta*. Whereas in that case the defendants relied on a statute to "avoid complying with the statutory requirements for removal," here the Ninth Circuit majority relied on a "presumption of reviewability" that applies to executive actions. Like the All Writs Act at issue in *Syngenta*, that interpretive canon is not a source of removal jurisdiction.

The "well-settled" "presumption favoring judicial review of administrative action" is a "familiar principle of statutory construction." *Guerrero-Lasprilla v. Barr*, 589 U.S. 221, 229 (2020) (citations omitted). That presumption counsels that, "when a statutory provision is reasonably susceptible to divergent interpretation, we adopt the reading that accords with traditional understandings and basic principles: that executive determinations generally are subject to judicial review." *Id.* Unlike removal doctrines, the reviewability presumption is rooted in the separation of powers between the executive and judicial branches of the federal government—not between the state and federal courts. *See Kucana v. Holder*, 558 U.S. 233, 237 (2010).

Accordingly, this Court has never suggested that the presumption independently serves as a basis for federal court jurisdiction. Rather, it has applied the presumption only in two scenarios—scenarios in

which federal jurisdiction expressly exists pursuant to statute. First, and most commonly, the Court has looked to the presumption in determining whether a particular action is one that may be reviewed under a statutory cause of action providing for judicial review. *See, e.g.*, *Salinas v. U.S. R.R. Ret. Bd.*, 592 U.S. 188, 197 (2021) (considering presumption in addressing whether plaintiff could invoke judicial review provision of Railroad Retirement Act); *Guerrero-Lasprilla*, 589 U.S. at 227 (same re: judicial review provision of Immigration and Nationality Act); *Smith v. Berryhill,* 587 U.S. 471, 483 (2019) (same re: judicial review provision of Social Security Act); *Cuozzo Speed Techs., LLC v. Lee*, 579 U.S. 261, 274 (2016) (same re: inter partes review provision of America Invents Act). Thus, the presumption may be relevant to the question of whether, as the D.C. Circuit held in *El Rio Santa Cruz*, 396 F.3d at 1271–72, judicial review of determinations under 42 U.S.C. § 233(*l*) is available under the APA.

Second, the Court has also invoked the presumption in determining whether, in a suit brought in federal court, the court could assess an agency's action in assessing a federal defense. *See, e.g.*, *Mach Mining, LLC v. EEOC*, 575 U.S. 480, 486 (2015) (action brought under Title VII). The one case concerning the presumption of reviewability on which the court of appeals relied, Pet. App. 45a–49a, *De Martinez v. Lamagno*, 515 U.S. 417 (1995), falls into this category. There, the Court noted that there was "not even the specter" of a jurisdictional problem, because the case was properly "initially instituted in federal court" and "[t]he parties' diverse citizenship gave petitioners an entirely secure basis for filing in federal court." *Id.* at 435. And the presumption in

favor of review arose in determining whether federal courts must defer to the Attorney General's conclusion that the federal defense applied, *id.* at 424—not in determining the federal court's jurisdiction to hear the case.

Here, unlike in these two categories of cases, no statute provides jurisdiction. To the contrary, section 233's removal provisions plainly *do not* authorize removal here. Again, they authorize removal (1) by the Attorney General, pursuant to section 233(c), or (2) by a defendant pursuant to section 233(*l*)(2) where "the Attorney General fails to appear in State court" within fifteen days of being noticed of the action. As the Eleventh Circuit recognized in *Allen*, to find section 233 to authorize removal in a third set of cases—where the Attorney General *does* appear in State court within fifteen days and either states no determination has been met or makes a negative determination—would require "rewrit[ing] the statute." 327 F.3d at 1296.[2]

The Ninth Circuit's suggestion that the presence of these two removal provisions means that the statute must *also* allow removal for a defendant to obtain "a federal hearing to determine his status," Pet. App. 44a, runs counter to basic principles of statutory

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[2] The Ninth Circuit cited 28 U.S.C. § 2106 as authority for the "remedy" it prescribed after reviewing the Attorney General's state court actions and finding them deficient. Pet. App. 54a. But it did not suggest that that statute provided removal or subject-matter jurisdiction, nor could it, as that statute simply "enumerates the extensive remedial authority available to a court of appeals." *Sexual Minorities Uganda v. Lively*, 899 F.3d 24, 31 (1st Cir. 2018); *see Acheson Hotels, LLC v. Laufer*, 601 U.S. 1, 15 n.1 (2023) (Jackson, J., concurring) (recognizing that § 2106 is not a source of Article III jurisdiction).

interpretation. As this Court has made clear, "[a]textual judicial supplementation is particularly inappropriate when … Congress has shown that it knows how to adopt the omitted language or provision." *Rotkiske v. Klemm*, 589 U.S. 8, 14 (2019). Here, by including in section 233 provisions authorizing removal in two circumstances, Congress showed that it knows how to do so. This conclusion is even stronger given that, under the Westfall Act, Congress *did* provide a removal mechanism where a defendant seeks to challenge the Attorney General's "refusal to certify scope of office or employment." 28 U.S.C. § 2679(d)(3). Congress's decision not to provide a similar provision here is consistent with the greater scheme of the FSHCAA, which makes the Secretary's deeming decision "final and binding upon the Secretary and the Attorney General and other parties to any civil action or proceeding," with a limited role for the judiciary. 42 U.S.C. § 233(g)(1)(F).

II. This Court should grant review of the Ninth Circuit's holding that the Attorney General must remove every case involving deemed entities, without consideration of the acts or omissions underlying the case.

After erroneously concluding that the statute implicitly provides for removal jurisdiction, the Ninth Circuit exercised that jurisdiction to hold that the Attorney General misinterpreted her obligation under section 233(*l*)(1). That ruling was also erroneous and inconsistent with the decisions of other courts of appeals. Review is warranted to address this aspect of the court's decision as well.

The Ninth Circuit held that section 233(*l*)(1) requires the Attorney General "to provide positive

advice to the state court" and to remove, if there is an applicable deeming notice in place for the time at issue and the defendant is alleged to have engaged in one of the broad categories of functions contained in section 233(a). Pet. 26a; 34a. As Judge Desai explained in her dissent, under the majority's reading, the Attorney General would be required to remove a case against "a dentist employed by a deemed health center who 'moonlights' as a plastic surgeon for private clients on the weekends" for cases arising out of that plastic surgery, even though the "acts or omissions" underlying the suit have nothing to do with the deemed health center. *Id.* 62a–63a. Reading section 233(*l*) to require the Attorney General to assess some, but not all, of the requirements for coverage under section 233(a) prior to removal, is inconsistent with the text and structure of the statute, as well as the decisions of other courts of appeals.

A. The removal requirement that the Ninth Circuit imposed on the Attorney General conflicts with the views of other circuits.

In this case, the court of appeals held that the Attorney General is required to remove a case based solely on the existence of a prospective deeming notice, without an assessment of whether the conduct at issue falls within the scope of that deeming. That holding diverges from the recognition of other courts of appeals that the statute requires a case-specific determination before any removal by the Attorney General.

The Ninth Circuit acknowledged that its view of the Attorney General's duty was directly contrary to that expressed by the Third Circuit in *Centerville*.

There, the Third Circuit recognized that "[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 the specifics of the conduct related to the pending lawsuit." 2024 WL 3666164, at *2. Thus, that a health center was "a 'deemed' PHS employee under § 233 when the events giving rise to th[e] action occurred," did not make "removal under § 233(*l*)(1) … automatic." *Id*. Under the majority's view in this case, however, removal would be automatic: the Attorney General would be required to remove just because Dr. Tilley was an employee of Eisner, without examining whether that employment had anything to do with this case.

In this way, the Ninth Circuit's decision—which suggests that the only relevant deeming determination occurs prospectively—is also at odds with decisions of other courts of appeals, which recognize that a prospective deeming notice is not dispositive as to whether an individual is "deemed" a PHS employee for purposes of a particular case. *See Kelley v. Richford Health Ctr., Inc.*, 115 F.4th 132, 139 (2d Cir. 2024) ("The FSHCAA makes clear that the scope of HHS's deeming decision depends on the patient's status."); *O'Brien v. United States*, 56 F.4th 139, 148 (1st Cir. 2022) (drawing a distinction between deeming "generally and for purposes of a specific lawsuit").[3]

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[3] The Ninth Circuit's decision is also inconsistent with prior Ninth Circuit nonprecedential cases, which recognized that the

(footnote continued)

B. The Ninth Circuit's reading is inconsistent with the statutory text.

The statutory structure and text make clear that the Attorney General must remove only where the HHS Secretary has determined that the defendant has been deemed a PHS employee "with respect to the acts or omissions that are the subject of such civil action or proceeding." 42 U.S.C. § 233(*l*)(1); *see Centerville*, 2024 WL 3666164 at *2. That determination involves an assessment of whether the alleged conduct arose in the scope of the defendant's employment with a deemed entity.

Section 233 begins with a provision setting up an exclusive remedy for claims arising out of specific categories of conduct, for PHS employees acting within the scope of their employment. *See* 42 U.S.C. § 233(a). Where that remedy applies, the statute then provides a mechanism for the Attorney General to remove cases, "[u]pon 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." *Id.* § 233(c). The statute then sets out the circumstances in which federally funded health centers may be eligible to take advantage of the subsection 233(a) exclusive remedy, including a process for obtaining a prospective deeming determination, *id.* §§ 233(g)–(h), and specific procedures as to how defendants trigger the section 233(a) remedy, *id.* § 233(*l*).

Attorney General must assess far more than the presence of a deeming notice and the general category of services implicated as part of its assessment pursuant to section 233(*l*)(1). *See*, *e.g.*, *Sherman ex rel. Sherman v. Sinha*, 843 F. App'x 870, 873 (9th Cir. 2021).

Section 233(*l*)(1) provides how section 233(c) applies to federal health centers, asking the Attorney General to advise whether the Secretary's pre-dispute deeming applies "with respect to the actions or omissions that are the subject of" the case, and specifying that a positive advice under that section is "deemed to satisfy the provisions of subsection (c) that the Attorney General certify that" the defendant "was acting within the scope of their employment or responsibility." *Id.* § 233(*l*)(1). *See Ford v. Sandhills Med. Fdn.*, 97 F.4th 252, 255 n.2 (4th Cir. 2024), *cert. denied*, 2025 WL 663698 (Mar. 3, 2025) (recognizing that a section 233(*l*)(1) advice "operates as the Attorney General certifying that the PHS defendant was acting in scope of employment"); *Wilson v. Big Sandy Health Care, Inc.*, 576 F.3d 329, 334 (6th Cir. 2009) (similar).

Under this scheme, as Judge Desai explained in her dissent, while "the Secretary makes a prospective decision deeming PHS employees eligible for § 233 coverage, subsection (*l*)(1) asks the Attorney General to advise the court whether that prior deeming decision extends to 'the actions or omissions that are the subject of [the] civil action or proceeding.'" Pet. App. 64a. The most natural reading of this requirement is that "the Attorney General must review the facts in the complaint and decide whether the alleged conduct falls within the scope of the Secretary's decision deeming the defendant eligible for § 233 coverage." *Id.* 65a.

Requiring removal based solely on the *ex ante* deeming determination effectively reads the "actions or omissions" clause out of the statute. According to the majority, the only function that provision serves is

to require the Attorney General to advise the court whether the allegations against the defendant (1) occurred at a time when there was a deeming notice in effect, and (2) involve the "specific categories of services" within the scope of the section 233(a) exclusive remedy provision. Pet. App. 34a. But as the United States explained in its petition for rehearing, "[t]hose are necessary, but not sufficient" requirements to be "deemed to be a PHS employee for purposes of the particular lawsuit." 9th Cir. Dkt. 82 at 17–18. The statutory text provides no basis for incorporating the categories of services requirement of section 233(a) into the "acts or omissions" analysis required by section 233(*l*)(1), but not incorporating into it the other requirements—including the provision of section 233(a) that limits the remedy to PHS employees "acting within the scope of [their] office or employment." *Id.* As Judge Desai explained, "The statute broadly asks whether the defendant is deemed an employee 'with respect to the acts or omissions' giving rise to the complaint. It does not parse out a small subset of coverage criteria." Pet. App. 66a–67a.

The facts of this case highlight that the two factors deemed dispositive by the Ninth Circuit are not adequate to determine whether a defendant has been deemed a PHS employee "with respect to the actions or omissions that are the subject of such civil action or proceeding." A prospective deeming application is granted for a *health center*, not a particular center employee. Thus, here, Eisner received a deeming determination—not Dr. Tilley. This makes sense because the statute "limits HHS's deeming decision to 'patients of the *entity*,' not patients of the entity's employees." *Kelley,* 115 F.4th at 140 (quoting 42

U.S.C. § 233(g)(1)(B)). The complaint did not allege that Ms. Blumberger was a patient of Eisner and did not in any way indicate that the acts or omissions that are the subject of the case fall within any of the limited exceptions for services to nonpatients as to which HHS may extend deeming pursuant to § 233(g)(1)(C). That Eisner had a deeming notice, that Dr. Tilley worked for Eisner (in addition to the hospital where the events at issue occurred), and that the case involves alleged medical malpractice were not enough to conclude, as the Ninth Circuit majority did, that the deeming determination applied to the acts or omissions at issue. *See* Pet. App. 68a (Desai, J., dissenting) (explaining that record was insufficient to conclude that deeming applied).

Further, the procedural two-step that all three judges of the Ninth Circuit panel agreed would follow from the majority's holding in the case of the hypothetical health center-employed dentist moonlighting as a plastic surgeon, Pet. App. 42a, 62a, highlights the flaws in that holding. First, the Attorney General would be required to remove the action to federal court—since the case would entail malpractice and there was a deeming notice in effect for the health center at the relevant time. Then, the Attorney General would promptly file a motion to remand the case pursuant to section 233(c), on the ground that the case is one in which the section 233(a) remedy is not available. This illogical outcome further highlights the flaw in the Ninth Circuit's atextual reading. *See also* Pet. App. 69a–70a (Desai, J., dissenting) (noting "absurdity" of this approach).

III. The questions presented are exceptionally important and warrant review in this case.

By providing all federally funded health centers and their employees with a per se right to remove to federal court any and all actions filed against them in state court, the decision below radically alters the division of labor between state and federal courts, and between the Attorney General and the courts, as to which both courts of appeals and district courts had previously been in agreement. Such an expansion of federal court jurisdiction over cases traditionally reserved to the jurisdiction of state courts warrants this Court's review.

The impact of the Ninth Circuit's decision is not speculative. In the short time since the decision below, it has been invoked by litigants and courts in the Ninth Circuit as a basis for removal jurisdiction in numerous cases where the Attorney General *did* appear within fifteen days of receiving notice. *See*, *e.g.*, Opp'n to U.S. Motion to Remand, ECF 64, *Johnson v. Petaluma Health Ctr., Inc.*, No. 23-cv-3777, at 16 (N.D. Cal. Mar. 14, 2025); *Mixon v. Wellspace Health*, No. 2:24-CV-02290, 2025 WL 517676, at *1 (E.D. Cal. Feb. 18, 2025); Notice of Removal, ECF 1 at 4–5, *Curimao v. Cmty. Clinic of Maui, Inc.*, No. 25-cv-0030 (D. Haw. Jan. 24, 2025); *L.J.C. by & through Cromer v. Dignity Health*, No. 2:24-CV-04731, 2024 WL 4648147, at *2–4 (C.D. Cal. Oct. 31, 2024); Notice of Removal, ECF 1 at 5, *Babbitt v. Dignity Health*, No. 24-cv-9145 (C.D. Cal. Oct. 25, 2024); Notice of Removal, ECF 1 at 3–5, *Aguilar v. Jacobs*, No. 2:24-cv-08715 (C.D. Cal. Oct. 9, 2024). And litigants outside the Ninth Circuit have similarly relied on the decision below, although the courts to have addressed

the argument so far have rejected the Ninth Circuit's reasoning. *See Gonzalez v. El Centro del Barrio*, No. SA-25-CV-00852-OLG, 2025 WL 542249, at *2–3, (W.D. Tex. Feb. 6, 2025), *appeal pending* No. 25-50092 (5th Cir.): *Lockhart v. El Centro Del Barrio*, No. 5:23-CV-1156-JKP-ESC, 2024 WL 4601059, at *3 (W.D. Tex. Oct. 25, 2024); *see also* Br. in Opp'n to Motions to Remand, ECF 16 at 9–16, *Fazenbaker v. Cmty. Health Care, Inc.*, No. 24-cv-1170 (D.N.J. Feb. 11, 2025) (relying on decision below).

As the health center in *Centerville* argued in its recent petition for certiorari, given the clear divide amongst the circuits, "[n]o purpose is served by allowing the questions presented to further percolate in the lower courts." Pet. for Cert. 21, *Centerville Clinics Inc. v. Doe*, No. 24-727 (Jan. 7, 2025). And this case likely presents the best opportunity to review the Ninth Circuit's decision. Absent reversal, Ninth Circuit district courts are bound to apply the decision below and deny motions to remand arguing that § 233 does not implicitly authorize removal. Such denials of remand motions will not be appealable until the end of a case, if ever, *see Caterpillar Inc. v. Lewis*, 519 U.S. 61, 74 (1996), making them unlikely to make their way to this Court.

Further, the court of appeals' remand for factfinding as to the possible application of the federal-officer removal statute, *see* Pet. App. 18a, does not eliminate the need for review. The Ninth Circuit, in the guise of a "remedy," and regardless of the (non)existence of federal jurisdiction, directed the district court to determine whether the immunity provision of 42 U.S.C. § 233(a) bars Ms. Blumberger's suit. *See* Pet. App. 54a. Thus, on remand, irrespective

of whether section 1442 applies, the Ninth Circuit directed the district court to exercise jurisdiction to decide the merits of the state-law claim. Review is warranted to correct this improper expansion of federal jurisdiction.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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