No. 25-2145

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

AMY FAZENBAKER, legal guardian of D.F., et al.,
Plaintiffs-Appellees,

v.

COMMUNITY HEALTH CARE, INC. d/b/a COMPLETECARE HEALTH NETWORK,
Defendant-Appellant.

Appeal from the United States District Court
for the District of New Jersey
Case No. 1:24-cv-11170
Hon. Edward S. Kiel

BRIEF OF PLAINTIFFS-APPELLEES

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INTRODUCTION

This putative state-law class action arises out of a cyberattack on systems maintained by Defendant-Appellant Community Health Care Inc. (CompleteCare). After CompleteCare notified Plaintiffs-Appellees that their personal data had been accessed and viewed by cybercriminals, they sued CompleteCare in New Jersey state court for failing to adequately protect their personal and private information. Nearly a year after the case commenced, and on the eve of the state court's decision on CompleteCare's motion to dismiss, CompleteCare removed this action to federal court on the theory that its status as a participant in the Federal Health Center grant program entitled it to removal. But the "right of removal is statutory," *Phoenix Ins. Co. v. Pechner*, 95 U.S. 183, 185 (1877), and neither of the statutory provisions relied on by CompleteCare authorized it to remove this state-law dispute between non-diverse parties.

Arguing otherwise, CompleteCare primarily relies on 42 U.S.C. § 233, a provision of the Public Health Service (PHS) Act, as amended by the Federally Supported Health Centers Assistance Act (FSHCAA). Section 233 authorizes the Secretary of Health and Human Services

(HHS) to "deem" health centers receiving federal grant funds to be PHS employees for specified purposes, *id.* § 233(g), which in turn creates a legal fiction under which the United States will step in and defend such "deemed" centers against claims "for damage for personal injury, including death, resulting from the performance of medical, surgical, dental, or related functions" as if those entities were themselves actual federal employees, *id.* §§ 233(a), (*l*)(1). Congress specified that, to effectuate this scheme, cases against deemed entities for damages arising out of the performance of the functions enumerated in section 233(a) may be removed from state court in two—and only two—circumstances: (1) by the Attorney General, *id.* § 233(c), and (2) by a defendant deemed entity when the Attorney General has been notified of a pending state court action and failed to appear in that action within fifteen days, *id.* § 233(*l*)(2). Here, the Attorney General *did* timely appear in the state court action and declined to remove—explaining to CompleteCare that this case did *not* arise out of one of the enumerated functions and, therefore, that neither substitution of the United States nor removal was authorized.

CompleteCare insists that the Attorney General was wrong to find that this case does not fall within the scope of § 233(a)—but it offers no argument (and offered none in the district court) as to why that is so. CompleteCare also insists that it must be allowed to remove Plaintiffs' state-court action to challenge the Attorney General's decision—but no statutory provision provides such a right, and no jurisdictional doctrine or canon of statutory interpretation authorizes rewriting of the statutory scheme to include the unqualified removal right that CompleteCare would read into the statute. As recognized by a panel of this court in a nonprecedential decision, as well as the Eleventh and D.C. Circuits, the statute's two removal provisions are exclusive. *See Doe v. Centerville Clinics Inc.*, No. 23-2738, 2024 WL 3666164, at *5 (3d Cir. 2024), *reh'g and reh'g en banc denied* (3d Cir. Oct. 9, 2024), *cert. denied*, 145 S. Ct. 1427 (2025), *reh'g denied*, 145 S. Ct. 2726 (2025); *El Rio Santa Cruz Neighborhood Health Ctr., Inc. v. U.S. Dep't of Health & Hum. Servs.*, 396 F.3d 1265, 1271–72 (D.C. Cir. 2005); *Allen v. Christenberry*, 327 F.3d 1290, 1294–95 (11th Cir. 2003).

To the extent CompleteCare relies on the Ninth Circuit's divided opinion in *Blumberger v. Tilley*, 115 F.4th 1113 (9th Cir. 2024), that case

was wrongly decided. There, the Ninth Circuit majority found an extratextual right to removal based on a "presumption of reviewability." That presumption, however, is a canon of statutory construction for interpreting ambiguous statutes, not a source of federal jurisdiction, and has no application to the unambiguous statutory scheme at issue here.

Even under the Ninth Circuit's approach, though, removal would not have been appropriate here—by CompleteCare *or* the United States. The liability protections and removal mechanisms of section 233 apply only where plaintiffs bring claims for damages arising out of the performance of "medical, surgical, dental, or related functions"—a class of functions that does not encompass cybersecurity functions like those at issue in this case. *See Ford v. Sandhills Med. Found.*, 97 F.4th 252, 258–62 (4th Cir. 2024), *cert. denied*, 145 S. Ct. 1308 (2025).

CompleteCare also invokes the federal-officer removal statute, 28 U.S.C. § 1442(a)(1), arguing that its participation in the Federal Health Center program reflects a delegation of federal authority. To start, CompleteCare did not make that argument in opposing remand in the district court, so the argument is forfeited. In any event, removal under that statute would have been untimely: CompleteCare waited (at least)

seven months after it received notice of all facts relevant to its federal-officer argument to remove this action. Moreover, CompleteCare's reliance on the federal-officer removal statute fails on the merits because Circuit precedent is clear that health care providers' participation in federal grant programs does not convert them into federal officers or individuals acting under such officers, *Mohr v. Trustees of the University of Pennsylvania*, 93 F.4th 100, 105–06 (3d Cir. 2025), and that the "legal construct" of a "deeming" determination under section 233 does not actually convert a health center into a federal officer or one "perform[ing] a traditional government function," *Lomando v. United States*, 667 F.3d 363, 377 (3d Cir. 2011).

The district court thus correctly remanded this action to state court.

STATEMENT OF JURISDICTION

The district court correctly held that it lacked subject-matter jurisdiction over this action under either 42 U.S.C. § 233(*l*)(2) or 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 42 U.S.C. § 233(*l*)(2) provides jurisdiction over this data-breach action, despite the timely state-court appearance of the Attorney General.

2. Whether Complete Care properly removed this action pursuant to 28 U.S.C. § 1442(a)(1).

STATEMENT OF RELATED CASES

Plaintiffs-Appellees are unaware of any other case or proceeding related to this action.

STATEMENT OF THE CASE AND FACTS

I. Legal background

A. The Federally Supported Health Centers Assistance Act

Section 330 of the Public Health Service Act, 42 U.S.C. § 254b, created the Federal Health Center Program, through which HHS "awards grants to support health centers: outpatient primary care facilities that provide care to primarily low-income individuals." Cong. Res. Serv., Federal Health Centers: An Overview (2017), https://www.congress.gov/crs-product/R43937. In 1995, based upon concerns that federal grant funds "that otherwise could be used for

patient care" were increasingly being used by participating health centers to pay malpractice insurance premiums, Congress enacted the FSHCAA "to permanently extend and clarify malpractice coverage for health centers." H.R. Rep. 104-398, at 1, 5 (1995).

The FSHCAA provides liability protections to health centers that receive section 330 funding by providing that, with respect to the provision of certain services, those centers and their employees may be "deemed" PHS employees for the purpose of the immunity that is granted to PHS employees pursuant to 42 U.S.C. § 233(a). 42 U.S.C. § 233(g). Under section 233(a), the sole remedy "for damage for personal injury, including death, resulting from the performance of medical, surgical, dental, or related functions" by a PHS employee is a claim against the United States. Thus, "[w]hen the FSHCAA applies, the United States substitutes itself in for the defendant, and the action proceeds under the [Federal Tort Claims Act]." *Bray v. Bon Secours Mercy Health, Inc.*, 97 F.4th 403, 407 (6th Cir. 2024); *see also D.J.S.-W. by Stewart v. United States*, 962 F.3d 745, 747 (3d Cir. 2020) (discussing statutory scheme).

The process for obtaining the FSHCAA's protections includes both pre- and post-dispute requirements. First, an eligible health center must

submit an application to the HHS Secretary requesting 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)(B)–(C).

If an entity that believes that section 233(a) applies as a result of its deemed status is sued in state court, the entity must provide notice of the action to the Attorney General. 42 U.S.C. § 233(b). Within 15 days of receiving such notice in an action "for damages described in subsection (a)," *id.* § 233(*l*)(1)—that is, one "for damage for personal injury … resulting from the performance of medical, surgical, dental, or related functions," *id.* § 233(a)—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). If the Attorney General advises the Court that the Secretary has made an affirmative determination, "[s]uch

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*. Section 233(c) requires removal of a state court action "by the Attorney General," "[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). Section 233(c) also provides, though, that, post-removal, if a federal court "determine[s] on a hearing on a motion to remand … that the case so removed is one" as to which the section 233(a) exclusive remedy does *not* apply for some reason, "the case shall be remanded to the State Court." *Id.*

"[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*, 396 F.3d at 1272. That provision specifies that "[i]f the Attorney General fails to appear in State court" within fifteen days of receiving a notification pursuant to § 233(*l*)(1), 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 include any provision providing for federal court review where the Attorney General *has* timely appeared but has not removed the action.

B. The federal-officer removal statute

Section 1442(a)(1) allows both officers of the United States and "'private persons who lawfully assist [a] federal officer in the performance of his official duty' to remove a case to federal court." *Mohr*, 93 F.4th at 104 (quoting *Watson v. Philip Morris Cos.*, 551 U.S. 142, 151 (2007)). "To remove a case under § 1442(a)(1), a defendant must meet four requirements: (1) the defendant must be a 'person' within the meaning of the statute; (2) the plaintiff's claims must be based upon the defendant 'acting under' the United States, its agencies, or its officers; (3) the plaintiff's claims against the defendant must be 'for or relating to' an act under color of federal office; and (4) the defendant must raise a colorable federal defense to the plaintiff's claims." *Maglioli v. All. HC Holdings LLC*, 16 F.4th 393, 404 (3d Cir. 2021) (quoting 28 U.S.C. § 1442(a)(1)). "The defendant bears the burden of establishing that each requirement

is met." *Mohr*, 93 F.4th at 104 (citing *Avenatti v. Fox News Network LLC*, 41 F.4th 125, 130 (3d Cir. 2022)). The timing requirements of 28 U.S.C. § 1446(b) apply to removals under the federal-officer removal statute. *See Papp v. Fore-Kast Sales Co.*, 842 F.3d 805, 816 n.10 (3d Cir. 2016).

II. Factual background and state court proceedings

CompleteCare is a federally qualified health center that provides a range of medical, dental, and mental health care, as well as pharmaceutical services at locations throughout Southern New Jersey. Compl. ¶¶ 37–40, A47–48. CompleteCare requires both patients and employees to provide it with a variety of personal information, including social security numbers, demographic information, banking information, and protected health information, and it stores that information on its computer network. *Id.* ¶¶ 42–44, A48–49.

On or around October 12, 2023, CompleteCare experienced a ransomware attack in which an unauthorized third party accessed this network. *Id.* ¶ 63, A52. CompleteCare did not notify victims of the data breach of the incident until on or around December 15, 2023, when it sent a vague notice about the attack and steps it had taken since the attack to secure its network "and mitigate the risk of a similar incident

occurring in the future." *Id.* ¶¶ 62, 63, 67, A52–53.

Several lawsuits arising out of the October 2023 cyberattack were filed against CompleteCare—including four putative class actions brought by current and former CompleteCare patients in the Cumberland County Superior Court, which were subsequently consolidated by that court into this action. A123–24 (state court docket); A39–115 (consolidated complaint). The first of those cases was filed by Amy Fazenbaker on January 12, 2024. A123.

CompleteCare forwarded three of the state court complaints to HHS on February 29, 2024, and "request[ed] that the United States assume the defense of the lawsuits and issue a certification to effectuate removal" under 42 U.S.C. § 233(c). Notice of Removal ¶ 10, A118 ¶; Ltr. from U.S. Attorney, A136. HHS in turn notified the United States Attorney for the District of New Jersey of these complaints on April 3, 2024. Notice of Removal, A118 ¶ 12. Seven days later, an Assistant United States Attorney appeared and filed notices in each of the four actions pursuant to 42 U.S.C. § 233(*l*)(1), informing the state court that the United States Attorney "has determined that [CompleteCare] is not deemed to be an employee of the Public Health Service with respect to

the alleged acts or omissions giving rise to this case," and that "the United States will not intervene in this case or remove it to federal court under 42 U.S.C. § 233(c)." A126–34. That same day, the United States Attorney sent CompleteCare a letter stating the government's view that these actions were "not 'for damage for personal injury, including death, resulting from the performance of medical, surgical, dental, or related functions,'" and thus that the United States would not assume the defense of the lawsuits or remove them pursuant to section 233(c). A136–37 (quoting 42 U.S.C. § 233(a)).

The parties proceeded to litigate the case in state court. The plaintiffs in the four cases filed a consolidated complaint in May 2024, which explicitly referenced CompleteCare's status as a federally qualified health center. A39, A48. CompleteCare moved to dismiss the action in November 2024, and the state court indicated it would rule on the motion on December 20, 2024. A125 (docket entry).

III. District court proceedings

Four days before the state court's scheduled resolution of CompleteCare's motion to dismiss, more than eight months after the United States had informed CompleteCare that it had determined that

section 233(a) was inapplicable and that it would not be removing the four actions, and seven months after the Plaintiffs had filed an amended complaint, CompleteCare removed the consolidated action to federal court. It alleged that removal jurisdiction existed under 42 U.S.C. § 233(*l*)(2) and 28 U.S.C. § 1442. A14. Complete Care asserted that "[s]ection 233(*l*)(2) provides a deemed individual or entity the right to a federal forum for a judicial determination as to the availability of a federal immunity defense." A17. As to the federal-officer removal statute, CompleteCare asserted that its status as a deemed PHS employee meant it was itself a federal officer, A19, and that, in the alternative, it was "acting under a federal officer" as it was "subject to detailed federal requirements, oversight, and control" as a PHS Act grant recipient, A19–21.

While acknowledging that it "ha[d] been aware of the underlying allegations since January 29, 2024," and that it had received the Attorney General's letter denying its immunity claim in April 2024, CompleteCare justified its delayed removal on the fact that "it only recently… discovered" a 2024 New York district court decision, *Krandle v. Refuah Health Center*, No. 22-CV-4977 (KMK), 2024 WL 1075359 (S.D.N.Y Mar.

12, 2024), "holding that § 233(a) immunity covers such data-breach class actions." A29–30.

Plaintiffs and the United States filed separate motions to remand. Both motions explained that (1) CompleteCare could not remove the action pursuant to section 233(*l*)(2) in light of the Attorney General's timely appearance in state court; (2) that claims arising out of the performance of cybersecurity or data protection functions are not within the scope of section 233 at all; (3) that CompleteCare's removal pursuant to the federal-officer removal statute was untimely; and (4) that CompleteCare was not a federal officer or acting under a federal officer. ECF No. 10-1 (Pls.' Br. in Supp of Mot. to Remand) at 12–20; ECF No. 11-2 (U.S. Br. in Supp. Of Mot. to Remand) at 14–26, 27–29. The government also argued that section 233 supplants the federal-officer removal statute for removals regarding federally funded health centers. ECF No. 11-2 at 26–27.

In its consolidated opposition to both motions, CompleteCare offered no argument to support removal under section 233(*l*)(2)—the provision on which it had relied in its notice of removal. Rather, it argued that the *Attorney General* had been obligated to remove the action. ECF

No. 16 (CompleteCare's Br. in Opp'n to Motions to Remand) at 14–18. CompleteCare did not address the United States' or Plaintiffs' arguments that section 233(*l*) did not apply because the action did not arise out of the performance of medical or related functions. As to federal-officer removal, CompleteCare argued that removal was timely, but it did not address the United States' or Plaintiffs' arguments that the substantive requirements of 28 U.S.C. § 1442(a)(1) were not satisfied. *See* ECF No. 16 at 21–27.

At a hearing on the remand motions, the district court ruled that "the two bases for removal were not proper" and that it would remand the action. A164. As to removal under section 233, the court noted its agreement with this Court's nonprecedential *Centerville Clinics* decision, with the district court in *Lockhart v. El Centro del Barrio*, 779 F. Supp. 3d 895 (W.D. Tex. 2025), and with the dissent from the Ninth Circuit's decision in *Blumberger*. A142–43, 163. The court reasoned that, "just as the Third Circuit said [in *Centerville Clinics*], … there's only two circumstances in which removal is proper under 233," neither of which was present in this case. A163. As to federal-officer removal, the court again noted its agreement with *Lockhart* and *Centerville Clinics*, and

concluded that CompleteCare's relationship with the government did not "extend[] beyond a regulator/regulated relationship." A164; *see also* A145 (expressing court's view that CompleteCare's federal-officer removal argument was precluded by this Court's decision in *Mohr*). The court then entered an order to that effect and denied CompleteCare's request for a stay pending appeal, noting that it was "persuaded by" this Court's decision in *Centerville Clinics*. A1 & n.1.

SUMMARY OF ARGUMENT

I. The district court correctly rejected CompleteCare's argument that removal was proper under section 233 of the PHS Act. The two express removal provisions of that statute are exclusive, and neither of those provisions are applicable here. CompleteCare relies upon section 233(*l*)(2), which allows removal where the Attorney General has *not* timely appeared in a state court action, but under its plain text, that provision does not apply. CompleteCare's policy arguments do not support rewriting section 233(*l*)(2) to authorize removal where, as here, the Attorney General has timely appeared. Further, contrary to the decision of a divided panel of the Ninth Circuit in *Blumberger*, the

presumption in favor of judicial review of federal agency actions does not provide a basis for removal jurisdiction.

Not only was CompleteCare unauthorized to remove this action under section 233, but the government could not do so either. Section 233 only authorizes the removal of claims "for damage for personal injury, including death, resulting from the performance of medical, surgical, dental, or related functions." The data security functions like those at issue in this case are not medical, surgical, dental, or related functions. CompleteCare's argument that the Attorney General erred in its notice to the district court and failure to remove this case is thus wrong.

II. The district court correctly held that the federal-officer removal statute does not provide jurisdiction in this case. For one, all of the facts relevant to its invocation of that statute were made apparent, at the latest, by the operative complaint, which explicitly referenced CompleteCare's status as a federally qualified health center—seven months before CompleteCare removed this action. Removal was thus untimely. As to the substantive requirements of the statute, CompleteCare forfeited its arguments by failing to make them in opposing Plaintiffs' and the United States' motions to remand. Further,

the argument it raises for the first time in this Court—that its participation in the Federal Health Center program means it was acting under a federal officer—is barred by circuit precedent. Finally, CompleteCare fails to identify a colorable federal defense, because the immunity provided by section 233(a) is an immunity belonging only to the United States and cannot be raised by a private party.

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

I. The FSHCAA does not provide removal jurisdiction over this action.

As a panel of this court held in *Centerville Clinics*, a nonprecedential decision involving materially indistinguishable facts, "[r]emoval under the [FSHCAA] is authorized 'in only two circumstances.'" *Centerville Clinics*, 2024 WL 3666164, at *5 (quoting *Allen*, 327 F.3d at 1294–95). Although this decision is non-precedential, it is both persuasive and correct.[1]

[1] As CompleteCare notes, Applt. Br. 31, this Court does not usually cite its nonprecedential decisions as authority. Nonetheless, this Court

Pursuant to sections 233(c) and 233(*l*)(1), the Attorney General may remove an action for damages within the scope of section 233(a) upon a determination that the defendant is deemed to be a PHS employee "with respect to the actions or omissions that are the subject of such civil action." 42 U.S.C. § 233(*l*)(1). Alternatively, section 233(*l*)(2) authorizes removal by the defendant itself if the Attorney General fails to appear in state court within fifteen days of being notified. CompleteCare argues that this latter provision applies here. By its plain text, it does not. Nor

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considers and cites such decisions for their persuasive value in cases involving similar (or identical) factual and procedural scenarios. *See, e.g., In re Johnson & Johnson Talcum Powder Prods. Mktg., Sales Pracs. & Liab. Litig.*, 903 F.3d 278, 290 n.15 (3d Cir. 2018) (recognizing as persuasive unpublished opinion involving facts "nearly identical to the operative facts" on appeal); *Drinker by Drinker v. Colonial Sch. Dist.*, 78 F.3d 859, 864 n.12 (3d Cir. 1996) (recognizing unpublished nature of prior decision, but looking to it "as a paradigm of the legal analysis we should follow" "because of the case's factual similarity to that before us"); *City of Newark v. U.S. Dep't of Lab.*, 2 F.3d 31, 33 n.3 (3d Cir. 1993) (finding unpublished opinion's "evaluation of a factual scenario virtually identical to the one before us in this case" to be persuasive). The district court's express reliance on and adoption of the reasoning of *Centerville Clinics*, A1, A162–64, makes consideration of its reasoning particularly appropriate. *See Const. Party of Pa. v. Aichele*, 757 F.3d 347, 360 n.16 (3d Cir. 2014) (recognizing citation and reference to non-precedential opinion appropriate where it served as "the foundation of the District Court's opinion").

is there any implicit right to remove to challenge the Attorney General's compliance with section 233(*l*)(1).

A. The plain text of section 233(*l*)(2) does not provide removal jurisdiction.

Section 233(*l*)(2) authorizes a defendant to remove a case from state court only for the purposes of a determination "as to the appropriate forum or procedure for the assertion of the claim" at issue "[i]f the Attorney General fails to appear in State court" within fifteen days after receiving notice of a filing. 42 U.S.C. § 233(*l*)(2). This provision is inapplicable here, as the Attorney General *did* appear in the underlying actions, seven days after being notified of the complaints.

CompleteCare asks this Court to "construe[] [section 233(*l*)(2)] broadly in favor of a federal forum," Applt. Br. 21, but even a "broad" construction must have some basis in statutory text. And here, it is not possible to read section 233(*l*)(2) to authorize removal where the Attorney General *has* timely appeared but has determined that the defendant is *not* deemed a PHS employee with respect to the subject of the suit. *See Allen*, 327 F.3d at 1296 (stating that reading statute to allow removal where Attorney General has appeared would require "rewrit[ing] the statute"). While CompleteCare asserts that, under section 233(*l*)(2), "the

core requirement for removal … is the defendant's deemed federal status for the period in which the events giving rise to the claim occurred," *id.*, the statute indicates otherwise: the "core requirement for removal" is the Attorney General's failure to appear. As the D.C. Circuit recognized, section 233(*l*)(2) was designed to remedy "a void" under then-current law "such that if the Attorney General's response was not timely, a default judgment could be filed against the covered Center or covered individual." *El Rio Santa Cruz*, 396 F.3d at 1271 (citing H.R. Rep. No. 104-398, at 11–12). Section 233(*l*)(2) thus cannot provide a basis for removal here.

B. The "presumption of reviewability" does not create implied removal jurisdiction to review the Attorney General's compliance with section 233(*l*)(1).

To the extent that CompleteCare addresses the statutory text at all, it focuses on the text of section 233(*l*)(1)—arguing that the Attorney General misread that provision and erred by failing to provide the district court with "positive advice" and not removing the action. *See* Applt. Br. 25–31. But like the decision in *Blumberger*, CompleteCare errs by failing to first identify a basis for removal jurisdiction that would allow a federal court to adjudicate that question. No such basis exists.

In *Blumberger*, a medical malpractice case, the Ninth Circuit majority held that the Attorney General had erred by failing to inform the state court that the defendant was a deemed employee during the relevant year "and was providing medical services of the type for which he might enjoy immunity from malpractice liability." 115 F.4th at 1134. Only *after* reaching that conclusion did the court consider whether it had jurisdiction—reasoning that removal jurisdiction to challenge the government's state court action must exist based upon the presumption of reviewability, and asserting that removal jurisdiction must be available to ensure "a meaningful forum in which to challenge the government's failure to certify scope of employment." *Id.* at 1135. The court expressly did *not* find that section 233(*l*)(2) authorized removal in such circumstances, 115 F.4th at 1140, but rather found an implied, nonstatutory right of removal to challenge the Attorney General's compliance with section 233(*l*)(1). As the *Blumberger* dissent pointed out, though, this reasoning created "a per se removal rule every time a PHS employee is sued for medical malpractice," and "erases language from § 233" to "circumvent[] th[e] otherwise unavoidable conclusion" that

neither of the statutory removal provisions applied. *Id.* at 1141 (Desai, J., dissenting).

The majority in *Blumberger* ignored a fundamental principle of federal jurisdiction: that removal jurisdiction can only be conferred by an act of Congress. *See Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100, 108–09 (1941) ("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."). 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 Crop Protection, Inc. v. Henson*, 537 U.S. 28, 34 (2002) (recognizing that "[r]emoval is governed by statute" and holding that neither the All Writs Act nor the doctrine of ancillary jurisdiction may serve as basis for removal jurisdiction).

The Supreme Court has never recognized "implicit" removal jurisdiction, as the Ninth Circuit did, and the presumption of reviewability does not allow a court to infer Congress has silently taken such action here. The "well-settled" "presumption favoring judicial

review of administrative action" is simply 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.*

That presumption is irrelevant here for several reasons. For one, as a canon of statutory interpretation, it has no relevance absent ambiguous statutory text. And as explained above, the statutory text of section 233's removal provisions is clear. More fundamentally, the presumption of reviewability is not a doctrine relevant to the question whether a private plaintiff's dispute with a private defendant may be removed from state court. The 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). Most commonly, it has been invoked in determining whether an agency action is one that may be reviewed under a statutory judicial review provision. *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). It is not itself a fount of federal jurisdiction.

For this reason, CompleteCare's assertion that the district court erred by "mak[ing] no effort to identify a clear statement in § 233(*l*) of Congress's desire to preclude judicial review," Applt. Br. 23, misses the mark. The relevant question is not whether Congress precluded judicial review, but whether it authorized transfer of this action from state to federal court. In answering that question, the presumption is *against* removal, and the burden is on CompleteCare to show that Congress has authorized removal of this action. *See A.S. ex rel. Miller v. SmithKline Beecham Corp.*, 769 F.3d 204, 208 (3d Cir. 2014) ("Removal statutes are to be strictly construed against removal and all doubts should be resolved in favor of remand." (cleaned up)).

Whether there is some mechanism for CompleteCare to seek review of the government's action at all is a different question from whether

Congress authorized removal of plaintiffs' claims. And as to that question, the choice is not between removal and unreviewability. Rather, CompleteCare "could seek review in state court, or … could file an [Administrative Procedure Act] action in federal court challenging the government's negative coverage determination." *Blumberger*, 115 F.4th at 1148 (Desai, J., dissenting). Indeed, in *El Rio Santa Cruz*, the D.C. Circuit expressly held that the judicial review provisions of the Administrative Procedure Act are available for that purpose, "[g]iven that § 233 does not provide for judicial review." 396 F.3d at 1275. *Cf. Syngenta*, 537 U.S. at 34 n.* (rejecting argument that non-statutory removal was necessary where defendant could have asked state court to rule on issue, or ask federal court to do so in a separate action).

De Martinez v. Lamagno, 515 U.S. 417 (1995), relied upon by CompleteCare, Applt. Br. 23–24, and the *Blumberger* majority, does not suggest otherwise. In *De Martinez*, the Supreme Court held that plaintiffs may challenge the Attorney General's certification under the Westfall Act that a federal employee was acting within the scope of its employment. *See* 515 U.S. at 420. In that case, however, 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. *De Martinez* does not say anything about removal jurisdiction—the question that necessarily precedes any question as to reviewability.

To the extent that the Westfall Act is relevant at all, that statute cuts *against* finding an implicit right to remove under section 233. In enacting the Westfall Act in 1988, Congress expressly provided a mechanism by which a defendant may obtain federal court review of the Attorney General's "refus[al] to certify scope of office or employment." Pub. L. 100-694, § 6, 102 Stat 4563 (1988), *codified at* 28 U.S.C. § 2679(d)(3). Congress's failure to include a similar provision in the FSHCAA just seven years later "is telling." *Hui v. Castaneda*, 559 U.S. 799, 807 (2010) (noting the significance of differences between section 233 and the Westfall Act).

To the extent that the Ninth Circuit located within section 233 an implicit right to removal based upon the presumption of reviewability, its

decision in *Blumberger* was incorrect.[2] Moreover, this Court should not, as CompleteCare suggests, adopt the *Blumberger* majority's reasoning simply to avoid creating a circuit split. For one, a circuit split already exists, because *Blumberger*'s conclusion that the explicit removal provisions of section 233 are *not* exclusive conflicts with decisions of the D.C. Circuit and Eleventh Circuit. *See El Rio Santa Cruz*, 396 F.3d at 1271; *Allen*, 327 F.3d at 1295; *see also Blumberger*, 115 F.4th at 1141 (Desai, J., dissenting) (explaining inconsistency between majority decision and *Allen*). Moreover, that the Ninth Circuit found removal jurisdiction untethered to any statutory removal provision presents a "compelling basis" to depart from its holding. *See Parker v. Montgomery Cnty. Corr. Facility*, 870 F.3d 144, 152 (3d Cir. 2017) ("respectfully

[2] Contrary to CompleteCare's suggestion, that decision is not entitled to extra weight on the basis of the Ninth Circuit's denial of rehearing en banc or the Supreme Court's denial of certiorari. Applt. Br. 30 n.5. Beyond "the well established rule that a denial of certiorari does not prove anything except that certiorari was denied," *In re One2One Commc'ns, LLC*, 805 F.3d 428, 448 n.18 (3d Cir. 2015), the denial of en banc rehearing and certiorari in *Blumberger* are no more noteworthy than the analogous subsequent history of this Court's decision in *Centerville Clinics*. In that case, too, this Court denied en banc rehearing, and the Supreme Court denied both a petition for certiorari and a motion for rehearing of the denial of that petition, without calling for the views of the Solicitor General.

reject[ing] the view espoused by the Ninth Circuit" in light of "the apparent intent of Congress as embodied" by statute).

C. Because this action does not fall within the scope of section 233(a), the provisions of section 233(*l*) do not apply.

Beyond the lack of a statutory mechanism by which CompleteCare was authorized to remove this action under section 233, the action was not removable for an additional reason: Both sections 233(*l*)(1) and 233(*l*)(2) apply only in actions against deemed entities or their employees "for damages described in subsection (a)," which refers to remedies "for damage for personal injury, including death, resulting from the performance of medical, surgical, dental, or related functions … by any commissioned officer or employee of the Public Health Service while acting within the scope of his office or employment." 42 U.S.C. § 233(a). Thus, the Attorney General's removal and "positive notice" obligations under section 233(*l*)(1) exist only where a defendant is being sued for damages arising out of one of these "enumerated categories of medical conduct." *Blumberger*, 115 F.4th at 1129–31. As the United States noted in its April 2024 letter to CompleteCare, this is not such a case because this data-breach action does not seek remedies for damages for injury

resulting from the performance of one of the specified categories of functions. *See* A137 (citing *Ford v. Sandhills Med. Found., Inc.*, 97 F.4th 252 (4th Cir. 2024)). Accordingly, and contrary to CompleteCare's argument, Applt. Br. 29–30, CompleteCare could not invoke section 233(*l*)(2), and the Attorney General could not do so under section 233(*l*)(1) and (c).[3]

The injuries that Plaintiffs seek to remedy arise out of CompleteCare's "failure to properly secure, safeguard, encrypt, and/or timely adequately destroy" their personal information, and "to secure and monitor its network." Compl. ¶ 3, A4. These are not allegations of a failure to perform medical, dental, or surgical functions. Thus, they can fall within section 233(a) only if they entailed the non-performance of "related" functions. As the Fourth Circuit and numerous district courts

[3] Both Plaintiffs and the United States made this argument in the district court, but CompleteCare chose not to respond to it. In this court, CompleteCare refers to the United States' citation to *Ford* as "perplexing[]," suggesting that the case is irrelevant because it was not a case about removal jurisdiction. Applt. Br. 30 n.4. But because only claims "for damages described in subsection (a)" may be removed under section 233(*l*)(2)—the provision that CompleteCare argues allowed it to remove this action—*Ford*'s holding that data-breach claims indistinguishable from those in this case are not claims for damages described in subsection (a) is plainly relevant.

have held in similar cases, they do not. *See Ford*, 97 F.4th at 258–63 (4th Cir. 2024); *Moser v. E. Cent. Mo. Behavioral Health Servs.*, No. 2:25-CV-20-HEA, 2025 WL 2606549, at *3 (E.D. Mo. Sept. 9, 2025); *In re Cmty. Clinic of Maui Data Breach Litig.*, Civ. No. 24-00431-MWJS-WRP, 2025 WL 1863106, at *10–11 (D. Haw. July 7, 2025); *Mixon v. WellSpace Health*, No. 2:24-CV-02290-DJC-CSK, 2025 WL 1860282, at *4 (E.D. Cal. July 7, 2025); *Lockhart*, 779 F. Supp. 3d at 907; *Church v. United States*, 772 F. Supp. 3d 223, 230–31 (D. Mass. 2025); *Hale v. ARcare, Inc.*, No. 3:22-CV-00117-BSM, 2024 WL 1016361, at *3 (E.D. Ark. Mar. 8, 2024); *Marshall v. Lamoille Health Partners, Inc.*, No. 2:22-CV-166, 2023 WL 2931823, at *3–5 (D. Vt. Apr. 13, 2023).

The statute does not define the term "related functions." But the statute's text, structure, and purpose indicate that the word "related" refers to "a field of health care outside of medicine, surgery, or dentistry." *Ford*, 97 F.4th at 259; *see United States v. Brow,* 62 F.4th 114, 120 (3d Cir. 2023) (in determining meaning of an undefined term, looking to "the whole statutory text, the purpose, and context of the statute, and relevant precedent"). Such a definition brings within the scope of section 233(a) actions for damages arising out of care provided to patients by, for

example, pharmacists, optometrists, clinical social workers, and physical therapists—none of whom perform "medical," "surgical," or "dental" functions.

While the word "related" can have a broad meaning, "a general phrase can be given a more focused meaning by the terms linked to it." *Fischer v. United States,* 603 U.S. 480, 488 (2024). Notably, the statute does not refer to acts or omissions "related to" "medical, surgical, [or] dental" functions. Rather, it refers to damages that result from the performance of "medical, surgical, dental, or related functions." And under the canon of *ejusdem generis*, "'a general or collective term at the end of a list of specific items' is typically 'controlled and defined by reference to the specific classes ... that precede it.'" *Id.* at 487 (quoting *Sw. Airlines Co. v. Saxon*, 596 U.S. 450, 458 (2022)). The terms "medical," "surgical," and "dental," "all fit into one category—they are adjectives that describe various fields of health care." *Ford*, 97 F.4th at 259. Thus, the term "related' function" is best read "as fitting within that category, or in other words, a field of health care outside of medicine, surgery, or dentistry." *Id.*

This definition of related function is supported by other aspects of statute. "The words immediately following 'related functions'… cabin its contextual reading." *Id.* at 260. The statute provides that the term "related functions" "includ[es] the conduct of clinical studies or investigation." 42 U.S.C. § 233(a). This inclusion makes sense, as it could otherwise be debated whether health care services with the primary goal of research are covered within the statute. But as the Fourth Circuit has explained, the inclusion of clinical studies provides "little support for the notion that data security, which is more akin to an administrative function, should be included within the meaning of § 233(a)." *Ford*, 97 F.4th at 260.

Further, a broad construction of the term "related"—as applying to any activity that a PHS employee, deemed or otherwise, performs that is tangentially related to the provision of health care—would render the "medical, surgical, dental, or related function" term redundant. A separate clause of section 233(a) limits immunity to claims within the scope of an individual's employment. It is hard to imagine a claim that would be within the scope of an individual's employment that could not, in the broad sense, be described as "related to" health care. But the two

clauses of section 233(a) get at different things, and the question whether a particular act or omission falls within "enumerated categories of medical conduct" is an entirely different question from whether the act was within the scope of employment. *Blumberger*, 115 F.4th at 1129–31.

The duties to keep data secure and respond to data breaches, which Plaintiffs allege CompleteCare breached, did not arise from any CompleteCare employee's status as a health care practitioner. Rather, those duties apply to CompleteCare's non-medical professional, administrative, and information technology staff. Moreover, the allegedly wrongful conduct—failing to protect personal information from cyberattacks—does not have a distinct connection to the provision of medical, surgical, or dental services. The injuries that the Plaintiffs cite in the complaint—including "a heightened and imminent risk of fraud and identity theft," Compl. ¶ 18, A44—are no different from those that "could have resulted from a data breach at a host of businesses to which [they] likely disclose[] [personally identifying information], none of which are involved in the provision of health care, including an employer, an entity involved in a banking, financial, or real estate transaction, or an insurance company." *Ford*, 97 F.4th at 261. Indeed, the complaint

specifically alleges that the data breach affected not only CompleteCare patients but also CompleteCare employees. *See, e.g.*, Compl. ¶ 56, A51. And CompleteCare's failures affected *former* patients as much as they did those who were currently receiving medical care; several of the named plaintiffs are themselves former patients who have not received health care services from CompleteCare in years. *See, e.g.*, Compl. ¶ 137, A71 (noting plaintiff D.F. was a patient of CompleteCare "over ten years ago"). The damage associated with CompleteCare's failure to keep these former patients' data secure certainly did not result from the provision of "medical … or related" services to those patients.

Even if CompleteCare *collected* the data at issue as part of its provision of medical care, that is not enough to bring this action within the scope of section 233(a). The statute asks whether the injuries underlying the action "result[ed] from" the performance of such a function; thus, the question is whether the acts or omissions that caused the injury themselves constituted the performance of such a function—not whether, at some other point in time, another act or omission did. *See Ford*, 97 F.4th at 261 (recognizing that "the focus is on the function that caused the injury"); *Friedenberg v. Lane Cnty.*, 68 F.4th 1113, 1126 (9th

Cir. 2023) (holding that section 233 immunity turns on "whether the conduct giving rise to the claim arose out of the Defendants' performance of" one of the specified functions). And the acts and omissions that gave rise to the Plaintiffs' injuries occurred in the course of "security-related work by information technology and compliance personnel"—not the initial collection of data from Plaintiffs. *Marshall*, 2023 WL 2931823, at *5.

II. The federal-officer removal statute does not provide jurisdiction over this action.

CompleteCare argues that by "fulfilling its federally-supported health center project," it was acting under the direction of a federal officer, and thus entitled to remove under section 28 U.S.C. § 1442(a)(1). But because the facts that underlie this theory of removal were made apparent, at the latest, by Plaintiffs' amended complaint, CompleteCare's removal was untimely. Additionally, CompleteCare's theory fails on the merits.

A. CompleteCare's removal was untimely.

"Two thirty-day clocks limit the time within which a defendant may remove a case." *McLaren v. UPS Store Inc*, 32 F.4th 232, 236 (3d Cir. 2022). First, a defendant may remove within thirty days of receipt "of a

copy of the initial pleading setting forth the claim for relief." 28 U.S.C. § 1446(b)(1). "[I]f the initial pleading did not give defendant notice of removability," "a case may be removed within thirty days 'after receipt by the defendant, through service or otherwise, of a copy of an amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable.'" *McLaren*, 32 F.4th at 236 (quoting 28 U.S.C. § 1446(b)(3)).

Here, CompleteCare makes no argument that its removal was timely under section 1446(b)(1), nor could it, because it waited nearly a year into litigation to remove. But its argument that "neither of section 1446(b)'s two removal clocks were ever triggered," Applt. Br. 39, is based on a factually incorrect statement of the record. Specifically, CompleteCare states that Plaintiffs' complaint "made no mention of Complete Care's federal status under 42 U.S.C. § 233(g) and (h) or of its relationship to HHS." *Id.* (citing A46–47, ¶¶ 33, 36). But citing CompleteCare's own website, the May 2024 consolidated complaint explicitly stated that CompleteCare was "one of the largest Federally Qualified Health Centers in New Jersey." Compl. ¶39, A48. Since CompleteCare's federal-officer removal theory is that its status as a

federally qualified health center entitled it to remove this case, *see* Notice of Removal ¶¶ 10–11, that May 2024 document, at the latest, commenced CompleteCare's time to remove. Its December 2024 removal was thus untimely.

B. CompleteCare does not satisfy the requirements of section 1442(a)(1).

Beyond its procedural noncompliance, CompleteCare has not satisfied three of the four requirements for removal under section 1442(a)(1)—(1) that CompleteCare was itself a federal officer or acting under a federal officer, (2) that Plaintiffs' claims are ones "'for or relating to' an act under color of federal office," and (3) that CompleteCare has a colorable federal defense to the claims raised. *See Maglioli*, 16 F.4th at 404 (quoting 28 U.S.C. § 1442(a)(1)).

1. CompleteCare forfeited its arguments by failing to raise them in the district court.

In their motions to remand, both Plaintiffs and the United States argued that this suit does not relate to actions taken by CompleteCare as a federal officer, or while it was acting under a federal officer. ECF No. 10-1 (Pls.' Mem. in Supp. of Mot. to Remand) at 14–16; ECF No. 11-2 (U.S. Br. in Supp. of Mot. to Remand) at 20–24. CompleteCare failed to respond to these arguments, instead addressing only the timeliness of its

invocation of the federal-officer removal statute. *See* ECF No. 13 (CompleteCare Opp'n to Mot. to Remand); *see also* ECF No. 18 (U.S. Reply Br.) at 7 (noting CompleteCare's failure to respond).

Given the well-established principle that "[t]heories not raised squarely [in the district court] cannot be surfaced for the first time on appeal," the arguments that CompleteCare seeks to raise for the first time in this Court are forfeited. *Doe v. Mercy Cath. Med. Ctr.*, 850 F.3d 545, 558 (3d Cir. 2017); *see also Louque v. Allstate Ins. Co.,* 314 F.3d 776, 779 n.1 (5th Cir. 2002) (holding that reference to argument in removal notice was not sufficient to preserve argument absent raising it in opposing remand).

2. CompleteCare did not "act under" a federal officer within the meaning of § 1442(a)(1).

As to the forfeited arguments, CompleteCare is also incorrect. Neither CompleteCare's participation in the federal Health Center Program, nor its receipt of a "deeming" designation pursuant to the FSHCAA are "indicia of 'close federal control' or a close relationship" with the federal government, as is necessary to demonstrate that it was "acting under" a federal officer for purposes of section 1442(a)(1). *Att'y Gen. of N.J. v. Dow Chem. Co.*, 140 F.4th 115, 122 (3d Cir. 2025). To the

extent the Second Circuit's decision in *Agyin v. Razmzan*, 986 F.3d 168 (2d Cir. 2021), suggested otherwise, that decision is irreconcilable with Third Circuit and Supreme Court precedent—including this Court's recent decisions in *Maglioli* and *Mohr*, both of which rejected the notion that health care providers receiving substantial federal funding and subject to extensive government regulation act under federal officer direction. *See Mohr*, 93 F.4th at 105–06; *Maglioli*, 16 F.4th at 404–06. In providing healthcare services, CompleteCare is no more acting under federal officer direction than was the hospital in *Mohr* or the nursing home in *Maglioli*.

While "[t]he 'acting under' requirement is to be liberally applied in favor of removal, … it 'is not boundless.'" *Mohr*, 93 F.4th at 105 (quoting *Maglioli*, 16 F.4th at 404) (alterations omitted). It requires a "special relationship" in which "the federal government 'delegates legal authority' to the private party to 'undertake' a duty or task 'on the Government's behalf.'" *Id.* (quoting *Watson*, 551 U.S. at 156–57) (alterations omitted). A private party's compliance with federal laws and regulations, even those that are detailed, or subjection to close supervision and monitoring,

does not suffice to meet the acting under requirement. *Maglioli*, 16 F.4th at 404.

CompleteCare's relationship with the federal government "sounds merely in 'regulation, not delegation.'" *Mohr*, 93 F.4th at 105 (quoting *Watson*, 551 U.S. at 157). While its opening brief repeatedly asserts otherwise, CompleteCare points to no evidence beyond the vague assertion as to "the level of federal involvement in CompleteCare's administration and day-to-day operations" and the citation to a single statutory provision regarding Federal Health Center Program grantees' use of non-grant funds. Applt. Br. 43 (citing 42 U.S.C. § 254b(e)(5)(D)). But even the most "administratively burdensome" regulatory requirements, Applt. Br. 43, reflect a relationship of regulation, not one of delegation. *See Watson*, 551 U.S. at 153 (holding that an entity's subjection to legal requirements, "even if the regulation is highly detailed and even if the private firm's activities are highly supervised and monitored," does not show an "acting under" relationship); *Maglioli*, 16 F.4th at 405 ("Even assuming the nursing homes are subject to intense regulation, that alone does not mean they were 'acting under' federal officers.").

CompleteCare also argues that it was carrying out "the duties of the federal government to provide medical care to the indigent," and thus that it was performing a traditional government function. Applt. Br. 44 (quoting *Agyin*, 986 F.3d at 176). But this Court has already (twice) recognized that participants in the Federal Health Centers Program "do not perform a traditional government function." *Santos ex rel. Beato v. United States*, 559 F.3d 189, 200 (3d Cir. 2009); *Lomando*, 667 F.3d at 377 (quoting *Santos*). In creating the Federal Health Center Program, Congress recognized that the provision of medical care to the indigent is important and thus worthy of supporting with extensive federal funds. But "[a]dvancing governmental policy while operating one's own business," as CompleteCare does here, "is not the same as executing a delegated governmental duty." *Mohr*, 93 F.4th at 105. 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.

Finally, CompleteCare argues that the mere act of "deeming" shows that it was actually delegated governmental authority. Applt. Br. 45–46. But this Court has already explained that deeming is simply "a legal construct effective only for the purposes of section 233." *Lomando*, 667 F.3d at 377; *see Centerville Clinics*, 2024 WL 3666164, at *3 (recognizing that deemed status is not relevant to federal-officer determination inquiry). That section 233 refers to an entity that may take advantage of the liability protections of section 233(g) as one "deemed to be an employee" of the PHS does not make them indistinguishable from actual federal employee for all purposes; rather, it is simply "a poorly chosen phrase in a poorly worded statute that is designed to confer upon medical providers who receive federal funding something much more modest than actual 'employee' status." *Johnson v. Petaluma Health Center*, No. 23-CV-03777-VC, 2025 WL 1539853, at *5 (N.D. Cal. May 30, 2025). Specifically, the term is "meant to convey the idea that recipients of these funds can, in the performance of their medical, surgical, dental, and related functions, enjoy the same legal protections with respect to alleged misconduct that an actual federal employee enjoys." *Id.* Grants of immunity or preemption determinations differ in nature from the

assertions of "subjection, guidance, or control" emblematic of an "acting under" relationship for purposes of section 1442. *Watson*, 551 U.S. at 151–52; *see Massamore v. RBRC, Inc.*, No. 22-5381, 2023 WL 4505074, at *4 (6th Cir. July 6, 2023) (holding that conferral of federal immunity "does not place a person or entity in a subservient relationship with a federal officer or agency"). Congress's decision that the United States will assume health centers' liability in certain situations is not the same as a deputization of those health centers.

3. Plaintiffs' claims are not associated with acts taken under color of federal law.

Even if a defendant acts under a federal officer for some purposes, that does not allow it to remove *every* suit against it. Rather, 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. Thus, in addition to showing that it acts under a federal officer when providing clinical services to patients, CompleteCare must also show that the inadequate data security at issue in this case is connected or associated with a federal office. It has made no effort to do so. That Plaintiffs' claims arise out of inadequate data security thus distinguishes this case from the Second

Circuit's decision in *Agyin*—a medical malpractice action. *See Moser*, 2025 WL 2606549, at *4–5 (distinguishing *Agyin* on these grounds and collecting cases); *Cmty. Clinic of Maui*, 2025 WL 1863106, at *12 (similar). Like the defendant in this Court's decision in *Mohr*, it cannot be said that CompleteCare was maintaining its data records system "*on behalf of* the government." 93 F.4th at 105.

4. Section 233 does not provide CompleteCare with a colorable federal defense.

Finally, CompleteCare lacks a colorable federal defense to claims raised against it. While CompleteCare asserts section 233(a) provides such a defense, Applt. Br. 40, as this court recognized in *Centerville Clinics*, a defendant that "could not properly remove [an] action under § 233" cannot then rely on section 233 as a federal defense. 2024 WL 3666164, at *3; *see also Moser*, 2025 WL 2606549, at *4 (reaching same conclusion); *Lockhart*, 779 F. Supp. 3d at 909 (same); *Wilson v. Haque*, Civ. No, 24-2653-KSM, 2024 WL 5082330, at *6 (E.D. Pa. Dec. 11, 2024) (same). This is because, as the district court in that case explained, the substitution and removal provisions of section 233 "are part-and-parcel with substantive determinations about § 233's applicability." *Doe v. Centerville Clinics Inc.*, No. 2:23-CV-1107-NR, 2023 WL 5984337, at *3

(W.D. Pa. Sept. 14, 2023). Notably, by its text, section 233(a) is a defense only to claims against *the United States*. But the United States has opined (correctly) that this case is not one as to which section 233(a) applies and that it will thus not substitute itself as defendant; the district court lacks the ability to compel the United States to do so. A defense that can only be raised as to claims against the United States is not a colorable defense as to claims against CompleteCare.

CONCLUSION

The district court's remand order should be affirmed.

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Respectfully submitted,

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November 10, 2025 /s/ Adam R. Pulver
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I hereby certify that on November 10, 2025, the foregoing brief has been served through this Court's electronic filing system upon counsel of record for all parties.

/s/ Adam R. Pulver
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