No. 24-3702

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

IRA BRADFORD,

Plaintiff-Appellee,

v.

ASIAN HEALTH SERVICES,

Defendant-Appellant,

v.

UNITED STATES OF AMERICA,

Movant-Appellee,

On Appeal from the United States District Court
for the Northern District of California
Case No. 24-cv-1060
Hon. Trina L. Thompson, United States District Judge

PLAINTIFF-APPELLEE'S ANSWERING BRIEF

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INTRODUCTION

Plaintiff-Appellee Ira Bradford sued Defendant-Appellant Asian Health Services (AHS) in state court, under state law, for AHS's failures to adequately protect his sensitive data, resulting in the disclosure of that data to unauthorized third parties. Despite a lack of diversity and although the claims arise under state law, AHS asserts that this action belongs in federal court because AHS is a participant in a federal grant program. But neither of the two statutes it invokes—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), and 28 U.S.C. § 1442(a)(1), the federal officer removal statute—support its argument. The district court thus correctly remanded the action to state court.

Section 233 provides limited liability protections for health centers receiving federal grant funds, by authorizing the Secretary of Health and Human Services (HHS) to "deem" those centers to be PHS employees solely for the purposes of the exclusive remedy provision that applies to certain actions against such employees, 42 U.S.C. § 233(a). In invoking section 233 as a basis for jurisdiction, AHS relies on a misreading of this

Court's decision in *Blumberger v. Tilley*, 115 F.4th 1113 (9th Cir. 2024). There, a divided panel of this Court held that there is an implicit right to removal where the Attorney General violated her state-court obligations under section 233—specifically, the obligations to provide the state court with "positive advice" and then remove where a plaintiff seeks to recover for an injury "resulting from the performance of medical, surgical, dental, or related functions" by a deemed entity. 42 U.S.C. § 233(a); *see Blumberger,* 115 F.4th at 1127–35. That decision does not support jurisdiction in cases like this one, which does not arise from the performance of any such function and is thus not a case where the Attorney General had any obligations under section 233. In any event, the *Blumberger* decision conflicts with decisions from three other circuits, was incorrect, and should be revisited by this Court sitting *en banc*.

As to federal-officer removal, the district court correctly rejected AHS's argument both on the merits and as untimely. On appeal, AHS addresses only timeliness, but it forfeited that argument in the district court by failing to raise it in response to the timeliness arguments made by both Mr. Bradford and the United States in their motions to remand. Regardless, the record confirms that AHS's removal pursuant to the

federal officer removal statute was not only untimely, but that there was no objectively reasonable basis to believe otherwise: The federal government filed a notice in state court confirming all of the facts underlying AHS's federal officer removal theory forty days prior to removal. These facts both required remand and justified the district court's exercise of discretion to award Mr. Bradford fees.

The Court should thus affirm the district court's remand order and fee award, and return this case to state court.

STATEMENT OF JURISDICTION

As explained in further detail below, the district court lacked jurisdiction over this removed action under either 42 U.S.C. § 233, or the federal officer removal statute, 28 U.S.C. § 1442.

Under 28 U.S.C. § 1447(d), this Court has appellate jurisdiction to review the district court's remand order. The Court has jurisdiction to review the district court's order awarding attorney's fees pursuant to 28 U.S.C. § 1447(c) under 28 U.S.C. § 1291. *Grancare, LLC v. Thrower by and through Mills*, 889 F.3d 543, 546 (9th Cir. 2018).

STATUTORY PROVISIONS INVOLVED

All applicable statutes are contained in Defendant-Appellant's addendum.

ISSUES PRESENTED

1. Whether 42 U.S.C. § 233 provides jurisdiction over this data-breach action, despite the timely state-court appearance of the Attorney General.

2. Whether AHS properly removed this action pursuant to 42 U.S.C. § 1442(a)(1), forty days after it received a state-court notice confirming all facts underlying its theory of removal.

3. Whether the district court reasonably exercised its discretion to award fees under 28 U.S.C. § 1447(c), given AHS's invocation of the federal officer removal statute as a basis for removal, where AHS had no colorable argument that such removal was timely and failed to offer any such argument in opposing remand.

STATEMENT OF THE CASE

I. Legal background

A. The Federally Supported Health Centers Assistance Act

Based upon concerns that federal grant funds "that otherwise could be used for patient care" were increasingly being used by community health centers to pay malpractice insurance premiums, Congress enacted the FSHCAA in 1995 as an act "to amend the Public Health Service Act 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 funding under § 330 of the PHS Act, 42 U.S.C. § 254b, 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 § 233 immunity applies, the United States is substituted as the defendant and the action proceeds as one brought

under the Federal Torts Claims Act." *Friedenberg v. Lane County*, 68 F.4th 1113, 1118 (9th Cir. 2023).

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 who believes that section 233(a) applies as a result of its deemed status is sued in state court, it 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). 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.* Section 233(c) requires removal of a state court action "by the Attorney General," "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). 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 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 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

"The federal officer removal statute permits removal of actions brought in state court against 'any officer (or any person acting under that officer) of the United States or of any agency thereof ... for or relating to any act under color of such office.'" *Doe v. Cedars-Sinai Health Sys.*, 106 F.4th 907, 916–18 (9th Cir. 2024) (quoting 28 U.S.C. § 1442(a)(1)). To fall within the scope of the statute, a removing entity must show (1) that it is itself a federal officer, or was "acting under" a federal officer, (2) that it was "performing some 'act under color of federal office, and … that such

action is causally connected with the plaintiff's claims against it," and (3) that it "can assert a colorable federal defense.'" *Cnty. of San Mateo v. Chevron Corp.*, 32 F.4th 733, 755 (9th Cir. 2022) (quoting *Riggs v. Airbus Helicopters, Inc.*, 939 F.3d 981, 986–87 (9th Cir. 2019), and *Goncalves ex rel. Goncalves v. Rady Child.'s Hosp. San Diego*, 865 F.3d 1237, 1244–50 (9th Cir. 2017)). The timing requirements of 28 U.S.C. § 1446(b) apply to removals under the federal officer removal statute. *See, e.g.*, *Blumberger*, 115 F.4th at 1121–22.

"While it is true that the federal officer removal statute should be 'liberally construed,' that guidance must be understood in the broader context of the United States' dual sovereign court system, where federal courts of limited jurisdiction must 'scrupulously confine their own jurisdiction to the precise limits which the statute authorizing removal jurisdiction has defined.'" *California ex rel. Harrison v. Express Scripts, Inc.*, 139 F.4th 763, 770 (9th Cir. 2025) (quoting *Watson v. Philip Morris Cos.*, 551 U.S. 142, 147 (2007), and *Healy v. Ratta*, 292 U.S. 263, 270 (1934)).

C. The *Blumberger* decision

In *Blumberger*, a patient sued a doctor for medical malpractice arising out of care she received at a hospital. 115 F.4th at 1120. Unbeknownst to her, that doctor was employed both by the hospital and by a federally supported—and deemed—health center. *Id.* After receiving notice of the lawsuit, the Department of Justice appeared on behalf of the United States and informed the state court that whether or not the doctor was "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, [was] under consideration." *Id.* Later, it informed the court that the doctor was *not* so deemed. *Id.* The doctor then removed the action to federal district court, invoking section 233(*l*)(2) and the federal officer removal statute. *Id.* The district court held section 233(*l*)(2) was inapplicable in light of the government's timely appearance and notice. *Id.* at 1121. It also found removal under the federal officer removal statute untimely. *Id.*

On appeal, over the partial dissent of Judge Desai, this Court vacated the district court's remand order. With respect to section 233, the majority held that section 233(*l*)(1) requires the Attorney General to

advise the state court only "whether the defendant was deemed during the relevant time period and whether the complaint arises out of the performance of services listed in § 233(a)." *Id.* at 1128–31. Such advice is to be made, the Court held, irrespective of any questions as to whether the challenged conduct was within the scope of a deemed employee's employment as is necessary for the defendant to be considered a "covered" employee for purposes of section 233(a). *Id.* at 1131–35. So long as there was a deeming determination in effect, and the complaint arose out of one of the "enumerated categories of medical conduct," the Court held, the Attorney General is required to provide "positive notice" to the state court, and remove pursuant to 233(c). *Id.* at 1129. Even if the government concludes a deemed individual is being sued for the provision of medical services outside the scope of his deeming, the Court held, the government must remove the action—and then promptly move to remand it. *Id.* at 1134.

Applying this standard to the specifics in the case—a medical malpractice action against a physician who, for at least *some* purposes, was an employee of a deemed entity in the relevant time period—the Court held that the government had failed to comply with its obligations

under section 233(*l*)(1) and section 233(c): Both of the prerequisites for positive notice and removal were satisfied, as the doctor "had been deemed a PHS employee during [the relevant time period] and was providing medical services of the type for which he might enjoy immunity from malpractice liability as an employee of a deemed entity." *Id.* at 1134. It then held that the "presumption of reviewability" allowed a defendant to challenge the government's notice and non-removal in federal court, despite the absence of an explicit statutory mechanism for doing so. *Id.* at 1135–39. The Court did not say what would happen in a case where such a challenge lacked merit. The Court simply concluded that the appropriate "remedy" for what it concluded was the government's failure to remove was for the district court to itself determine whether the actions at issue were within the scope of the deemed employment, and thus whether section 233(a) immunity provision applied, and, if not, remand the action to state court. *Id.* at 1139–40. The Court explicitly did not decide whether removal by the defendant was appropriate under section 233(*l*)(2). *Id.* at 1140.

As to federal officer removal, the Court held that the filing of the initial complaint did not trigger the 30-day clock under 28 U.S.C.

§ 1446(b)(1) because there was no indication that the removing doctor was aware of the relationship between the health center and the federal government at that time. *Id.* at 1122. Rather, the Court held that, under section 1446(b)(3), the doctor had 30 days to remove from the date he "learned of his deemed status in the first place." *Id.* at 1123. Because the timing of when the doctor had learned of his deemed status was not clear from the record, the Court remanded for further fact-finding. *Id.* at 1123–24.

Judge Desai dissented as to the majority's section 233 holdings. She reasoned that the only question before the Court regarding § 233 was "whether [the defendant] properly removed the case" and explained that she "would hold that he did not" because "§ 233 allows a defendant to remove in only one circumstance—when the Attorney General fails to appear." *Id.* at 1141–42. "A presumption favoring judicial review of judicial decisions," she explained, was irrelevant, as courts "may not rewrite the statute to allow removal based on a general policy favoring judicial review." *Id.* at 1147. She also criticized the majority for "invent[ing] a solution for [the doctor's] improper removal by concluding that the Attorney General should have removed the case." *Id.* at 1143.

That conclusion, she explained "distorts the statute's text, renders much of the statute superfluous, assumes facts not before [the Court], and is impractical." *Id.*

II. Factual background and state-court proceedings

AHS is a nonprofit medical services organization based in Oakland, California. Compl., ER-61 ¶ 25. On August 23, 2022, AHS received a notice from HHS stating that it was deemed to be an employee of the PHS for the 2023 calendar year for purposes of section 233. ER-90–91.

In February 2023, one or more unauthorized persons obtained access to highly sensitive personal health information (PHI) and personally identifiable information (PII) retained by AHS in its computer systems, including PHI and PII provided to AHS by Mr. Bradford. Compl., ER-57 ¶ 2; ER-60 ¶ 15; ER-65 ¶ 37–39. AHS learned of this data breach at that time, but it waited nearly three months before informing individuals whose PHI and PII had been accessed in the breach. Compl., ER-58 ¶4; ER-60 ¶ 19; ER-65 ¶ 39.

Shortly after receiving notice of the data breach from AHS, Mr. Bradford commenced this action on behalf of himself and a putative class in the Superior Court of the State of California in and for the County of

Alameda. *Id.* ER-56. He alleged that the February 2023 data breach was the preventable result of AHS's failure to properly secure class members' PHI and PII, and that AHS further violated its duties to promptly notify class members of the breach. *Id.* ER-57–59 ¶¶ 2–9; ER-69–70 ¶¶ 62–69. The complaint contained seven state-law claims: for negligence; negligence per se; breach of implied contract; breach of the covenant of good faith and fair dealing; violation of the California Confidentiality of Medical Information Act, Cal. Civ. Code §§ 56, *et seq.*; violation of the California Customer Records Act, Cal. Civ. Code §§ 1798.80, *et seq.*; and violation of the California Unfair Competition Law, Cal. Bus. & Prof. Code §§ 17200, *et seq*. *Id.* ER-75–87.

AHS was served on or about August 22, 2023. ER-48. The parties litigated the case in state court over the next several months.

On January 5, 2024, AHS notified the United States Attorney of this action, asserting that it was a deemed PHS employee, that section 233(a) applied, and that the action should be removed. ER-96. On January 12, 2024, the United States Attorney appeared in the state court action on behalf of the United States and filed a notice with that court pursuant to 42 U.S.C. § 233(*l*)(1). ER-98. That notice stated:

(1) that AHS was "an entity described in 42 U.S.C. § 233(g)(4) (a public or non-profit private entity receiving federal funds under section 254b of Title 42 pursuant to the [FSHCAA]";

(2) "that Asian Health Services has been 'deemed' to be an 'employee of the Public Health Service'";

(3) that "HHS has not yet provided its report as to whether the deemed of status of Asian Health Services under 42 U.S.C. §§ 233(g) and (h) extends to the acts or omissions that are the subject of this civil action"; and

(4) that "[t]he United States Attorney ha[d] not yet been provided with sufficient information to" "determine whether the acts alleged fall within the scope of 42 U.S.C. § 233(a) … and were otherwise within the scope of Asian Health Services' 'deemed' employment," and thus had not yet determined whether to remove the action pursuant to § 233(c).

ER-98–99.

III. District court proceedings

Forty days later, on February 21, 2024, AHS itself removed the action to the United States District Court for the Northern District of California. ER-38. Its notice of removal invoked two bases of jurisdiction: 42 U.S.C. § 233(*l*)(2), the FSHCAA provision that authorizes removal "[i]f the Attorney General fails to appear in State court" within fifteen days of receiving notification, and 28 U.S.C. § 1442(a)(1), the federal officer removal statute.

As to the FSHCAA, AHS asserted that section 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 defense." ER-41. As to section 1442(a)(1), AHS asserted two theories. First, it claimed that HHS's deeming notice alone made it a federal officer entitled to remove. ER-42. "Alternatively," it asserted that it was acting under the direction of HHS when it provided health care services due to its receipt of a grant, and/or as a result of statutory and regulatory requirements related to patient records and confidentiality. ER-43–44.

On March 6, 2024, the government issued its coverage decision, informing AHS that it "w[ould] not be seeking to substitute for Asian Health Services in the case." ER-27. Shortly thereafter, both Mr. Bradford and the United States moved to remand the action to state court, arguing that neither of the two cited statutes provided removal jurisdiction. SER-97 (Pl.'s Mot.); SER-71 (U.S. Mot.). Both motions argued that section 233(*l*)(2) cannot be invoked where the United States has timely appeared. SER-105–06; SER-81–84. Mr. Bradford also argued that even if the statute *did* provide a mechanism for removal in such a circumstance, it would not apply here, since Mr. Bradford's claims are

not for "damage for personal injury … resulting from the performance of medical, surgical, dental, or related functions," as is necessary for section 233(a) to apply. SER-106–113. As to federal-officer removal, both motions argued that removal was untimely, SER-115; SER-86, and that AHS was not being sued for actions taken in the capacity of, or under the direction of, a federal officer. SER-113–15; SER-86–90. The United States also argued that "section 233 supplants section 1442 for removals," SER-85–86 (capitalization altered), and that AHS lacked a colorable federal defense as is necessary for removal under section 1442, since "§ 233(a) does not cover data-breach claims," SER-90–92. Mr. Bradford also sought an award of fees under 28 U.S.C. § 1447(c). SER-115–16.

In May 2024, the parties jointly asked the district court to stay the pending remand motions until the Ninth Circuit's resolution of *Blumberger*, while acknowledging that the impact of any decision issued in that case on this one was "uncertain." ER-18–19.

On June 7, 2024, the district court issued an order granting the motions to remand. ER-3. The court held that section 233(*l*)(2)—the sole section of section 233 that AHS relied on for jurisdiction—was inapplicable in light of the United States' timely appearance, ER-1, and

thus did not address whether section 233(a) applied to Mr. Bradford's claims, ER-12. As to federal officer removal, the district court held that neither AHS's participation in the "health center program" nor the HHS deeming determination was alone sufficient to satisfy the requirements of section 1442(a)(1), as neither "address[ed] the circumstances regarding the actions or omissions that are the subject of this civil action." ER-13. Further, the court held that AHS's removal under section 1442(a)(1) was untimely. ER-14. Emphasizing the untimeliness of removal, the district court then held that AHS lacked an objectively reasonable basis for removal and awarded fees. ER-15. Finally, the court denied the request for a stay pending *Blumberger*, emphasizing the differences between that case and this one—including that *Blumberger* unquestionably involved the performance of medical functions. ER-15–16.

SUMMARY OF ARGUMENT

The district court properly remanded this case because neither section 233 nor the federal officer removal statute provide a basis for jurisdiction. Because removal was objectively unreasonable under the federal officer removal statute, the district court's fee award was not an abuse of discretion.

I. AHS's argument as to section 233 rests entirely on *Blumberger*. *Blumberger* was incorrectly decided and should be overruled. But even under *Blumberger*, the district court lacked jurisdiction, as district courts throughout this circuit applying *Blumberger* have recognized.

Contrary to AHS's repeated statements, *Blumberger* explicitly did *not* hold that section 233(*l*)(2) provides removal jurisdiction where, like here, the Attorney General *has* timely appeared in state court. And under the plain text of that provision, it does not.

Blumberger found jurisdiction where the Attorney General had an obligation to provide "positive notice" under section 233(*l*)(1) and thus remove under section 233(c). That holding has no relevance here, where the Attorney General had no such obligations. Section 233(*l*)(1) imposes obligations on the Attorney General only in actions seeking to recover for injuries resulting from the performance of medical, surgical, dental, or related functions. Mr. Bradford's injuries, however, did not result from the performance of health care functions, but from the performance or nonperformance of administrative data-security functions. For that same

reason, remand is required under section 233(c), because this case is not one as to which the exclusive remedy provision of section 233(a) applies.

II. AHS's removal under the federal officer removal statute was both substantively and procedurally improper, and AHS has forfeited any contrary arguments. The Court should not consider the timeliness argument that AHS raises for the first time in this Court, given AHS's ample opportunity to do so in response to two separate motions to remand. Regardless, that argument fails on the merits, as the record shows that the facts upon which AHS bases its federal officer removal theory were made ascertainable to it no later than the government's state court filing forty days before removal. Further, whether or not removal was timely is irrelevant since AHS has forfeited any challenge to the district court's correct conclusion that neither its deemed status nor its participation in a federal grant program established it was a federal officer or was acting under a federal officer with respect to the acts and omissions giving rise to this suit.

III. The district court did not abuse its discretion in awarding fees as removal under section 1442(a)(1) was objectively unreasonable because it was so plainly untimely that AHS did not even defend

timeliness below. For that reason, it seems likely that the untimely theory was included to create the possibility of appellate review.

STANDARD OF REVIEW

This Court "review[s] remand orders de novo, and their accompanying awards of attorneys' fees for an abuse of discretion." *Dietrich v. Boeing Co.*, 14 F.4th 1089, 1093 (9th Cir. 2021) (citation omitted). As to a remand order, "[t]he defendant has the burden of proving by a preponderance of the evidence that the requirements for removal jurisdiction have been met." *San Mateo*, 32 F.4th at 746 (citing *Leite v. Crane Co.*, 749 F.3d 1117, 1122 (9th Cir. 2015)).

ARGUMENT

I. Section 233 does not provide a basis for jurisdiction.

Neither section 233(*l*)(2) nor the section 233(*l*)(1)-based jurisdiction recognized in *Blumberger* provided removal jurisdiction in this case.

A. Section 233(*l*)(2) does not provide 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 "if the Attorney General fails to appear in State court" within fifteen days of receiving notice of the action. 42 U.S.C. § 233(*l*)(2). This provision—which confers

jurisdiction to determine whether jurisdiction exists over the merits of the dispute—is inapplicable here, because the Attorney General appeared in the action within seven days of being notified by AHS. *See* AHS Br. 9.

Despite the plain text, AHS maintains that section 233(*l*)(2) confers a "broad right to remove" whenever the Attorney General does not remove an action. AHS Br. 21. But the one and only "condition precedent" of section 233(*l*)(2) is the Attorney General's failure to appear within fifteen days. *Babbitt v. Dignity Health*, No. 18-56576, 2023 WL 1281668, at *2 (9th Cir. Jan. 31, 2023). That is, the statute says "If the Attorney General fails to appear in State court"—not "If the Attorney General fails to appear in State court and remove the action." And there is no basis to read the former as actually meaning the latter: the term "failure to appear in court" refers to a "nonappearance," or "[a] party's unexplained and unexcused absence from a proceeding before a tribunal despite being summoned." Nonappearance, Black's Law Dictionary (12th ed. 2024). A party that has filed an appearance and documents in the proceeding cannot be said to have "failed to appear."

AHS offers no textual analysis to support its reading. While AHS asserts that *Blumberger* held that section 233(*l*)(2) authorizes removal whenever the Attorney General fails to do so, *see*, *e.g.*, AHS Br. 15, 21, that is not correct. Although *Blumberger* found a limited right to federal judicial review of "the Attorney General's deeming advice to the state court," 115 F.4th at 1135, it did *not* find that right within section 233(*l*)(2). In fact, the court expressly "decline[d] to consider whether [the defendant]'s removal under 233(*l*)(2) was improper." *Id.* at 1140. And the courts of appeals that *have* addressed section 233(*l*)(2) have given it its plain meaning and "decline[d] to read … extra-textual language into" that provision. *Doe v. Centerville Clinics Inc.*, No. 23-2738, 2024 WL 3666164, at *2 (3d Cir. Aug. 6, 2024); *see El Rio Santa Cruz*, 396 F.3d at 1272; *Allen v. Christenberrry*, 327 F.3d 1290, 1295 (11th Cir. 2003). This Court should as well.

B. The section 233(*l*)(1) hook for jurisdiction relied on in *Blumberger* does not apply here.

Blumberger did suggest that a defendant may remove an action where the Attorney General did not comply with her state-court obligations under section 233(*l*)(1). This finding of implicit removal jurisdiction was incorrect and should be overruled, largely for the reasons

stated by Judge Desai in her dissent. *See generally* 115 F.4th at 1140–48. Regardless, it does not provide a basis for jurisdiction here, where the Attorney General had no section 233(*l*)(1) obligations.

1. *Blumberger* was incorrectly decided and should be overruled.

"The 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); *see also Phoenix Ins. Co. v. Pechner*, 95 U.S. 183, 185 (1877) (recognizing that the "right of removal is statutory"). Section 233 contains two explicit removal provisions, but the Court in *Blumberger* created a third, nontextual pathway to federal court: allowing defendants to remove a state-court action to federal district court to obtain review of the Attorney General's non-removal, based on the presumption of judicial review. As Judge Desai explained in her *Blumberger* dissent, though, courts "may not rewrite the statute to allow removal based on a general policy favoring judicial review." 115 F.4th at 1147.

Blumberger's recognition of an implied right of removal to assess the correctness of the Attorney General's actions in state court created a

split with the Third, Eleventh, and D.C. Circuits—each of which had previously recognized that the two express removal provisions contained in section 233 of the PHS Act are the exclusive mechanisms for removal under that statute. *See Centerville*, 2024 WL 3666164, at *1; *El Rio Santa Cruz.*, 396 F.3d at 1274; *Allen*, 327 F.3d at 1293–95. It also departed from two memorandum opinions from this Court. *See Babbitt*, 2023 WL 1281668, at *2; *Sherman v. Sinha*, 843 F. App'x 870, 873 (9th Cir. 2021); As those courts, and the dissent in *Blumberger*, 115 F.4th at 1147, recognized, while Congress *could* have also provided for removal by defendants who disagree with the Attorney General's section 233(*l*)(1) filings to remove to enable federal court resolution of such disagreements—similar to the mechanism it included in the Westfall Act—it did not. The recognition of an implied mechanism for moving state-court actions to federal courts, even for limited purposes, runs afoul of basic principles of the cooperative system of judicial federalism.

While Mr. Bradford recognizes *Blumberger* is the binding law of the Circuit, that decision was in error, and it should be revisited by this Court sitting *en banc*.

2. Section 233(*l*)(1) did not require the Attorney General to remove this action.

In *Blumberger*, the court suggested jurisdiction existed based on the fact that, had the Attorney General properly provided "positive notice" pursuant to section 233(*l*)(1), she "would have been obligated to remove the case to federal court" pursuant to section 233(c). 115 F.4th at 1135; *see also id*. at 1139. Here, the Attorney General had no obligations under section 233(*l*)(1) at all, though, since Mr. Bradford does not seek to recover for injuries resulting from the performance of medical, surgical, dental, or related functions, and section 233(*l*)(1) only imposes obligations in actions that do.

Section 233(*l*)(1) applies 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). In such actions, upon notification, the HHS Secretary is required to provide notice as to whether 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" the particular action. *Id*. § 233(*l*)(1).

In *Blumberger*, this Court held that section 233(*l*)(1) does not require an assessment of whether the actions or omissions that are the subject of the action were within the scope of the defendant's deemed employment—one of the requirements to be "covered" by section 233(a) immunity. 115 F.4th at 1127–35. Rather, the Court held that the only relevant questions for purposes of section 233(*l*)(1) are "whether the defendant was deemed during the relevant time period and whether the complaint arises out of the performance of services listed in § 233(a)." *Id.* at 1130.

Here, Mr. Bradford does not dispute that AHS satisfies the first requirement, i.e., that AHS was deemed during the relevant time period. The injuries he seeks to remedy, however, did not result from "the performance of medical, surgical, dental, or related functions, including the conduct of clinical studies or investigation." 42 U.S.C. § 233(a). Rather, they arise out of AHS's "failure to properly secure and safeguard" data "stored within [AHS]'s information network," Compl. ¶ 1, ER-57, and the failure to adequately respond upon its discovery of a data breach,

id. ¶ 4, ER-58; *see also id.* ¶ 9, ER-59 (listing actions and omissions that give rise to Mr. Bradford's claims). These actions and omissions do not constitute the performance of medical, dental, or surgical functions. Thus, they can fall within section 233(a) only if they entailed the performance of "related" functions. As the Fourth Circuit and several district courts have held in similar cases, they do not. *See Ford v. Sandhills Medical Foundation, Inc.*, 97 F.4th 252, 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 Community Clinic of Maui Data Breach Litig.*, Civ. No. 24-00431-MWJS-WRP, 2025 WL 1863106, at *10–11 (D. Haw. July 7, 2025); *Lockhart v. El Centro del Barrio*, 779 F. Supp. 3d 895, 907 (W.D. Tex. 2025); *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. 28, 2024); *Marshall v. Lamoille Health Partners, Inc.*, No. 2:22-CV-166, 2023 WL 2931823, at *3–54 (D. Vt. Apr. 13, 2023).

The statute does not define the term "related functions." In the sole case where this Court has considered whether particular acts or omissions constituted the performance of "related functions," the Court

suggested that the relevant question is whether the activities at issue are intrinsically "intertwined with" the "provision of medical services." *Friedenberg*, 68 F.4th at 1130. That standard is not met here.

In *Friedenberg*, the Court held that a health center's failure to report a patient's "refusal to comply with the medical terms of his probation" entailed the (non-)performance of a "related function." 68 F.4th at 1129. In coming to that conclusion, the Court relied on the fact that the legal duty allegedly violated was based solely on the defendants' "status as medical health professionals," and that "the conduct in question had a distinct connection to the provision of medical, surgical, or dental services." *Id.* at 1130. Indeed, the act or omission at issue was the failure to report that an individual had "miss[ed] medical appointments without reason," i.e., that medical services were not provided. *Id.* at 1119.

Although the *Friedenberg* court did not suggest these factors are exclusive, applying them here illustrates that the functions at issue were not "related" as that term is used in the statute. Here, the alleged acts and omissions were separate and apart from any health care services that were provided (or not provided) to Mr. Bradford. *See Mixon v. WellSpace*

Health, No. 2:24-CV-02290-DJC-CSK, 2025 WL 1860282, at *4 (E.D. Cal. July 7, 2025) (applying *Friedenberg* to hold that claims arising out of health center's use of data-tracking software did not arise out of the performance of a "related" function and remanding action); *Community Clinic of Maui*, 2025 WL 1863106, at *10–11 (applying *Friedenberg* to conclude data-breach claims did not arise out of performance of a related function and remanding); *Hale*, 2024 WL 1016361, at *3 (distinguishing *Friedenberg* and remanding data-breach claims on grounds that they did not arise out of performance of a related function). The duties to keep data secure and respond to data breaches do not arise from any AHS employee's status as a health care practitioner, but rather apply to AHS'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 Mr. Bradford cites in the complaint—tied to actions he has had to take to minimize the risk of identity theft, ER-60, are no different from those that "could have resulted from a data breach at a host of businesses to which [he] likely discloses PII, 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 AHS patients, but AHS employees. ER-65. And it likely affected *former* AHS patients as much as it did those who were currently receiving medical care; the damage associated with AHS's failure to keep former patients' data secure certainly did not result from the provision of "medical … or related" services to those patients.

That data security is not a related function is further confirmed by the text and structure of the statute, as recognized by the Fourth Circuit in *Ford*. 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 *noscitur a sociis*, "'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.* Under this definition of "related function," the statute extends to care provided to patients by, for example, pharmacists, optometrists, clinical social workers, and physical therapists—none of whom perform "medical," "surgical," or "dental" functions.

"The words immediately following 'related functions' also 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 as *Blumberger* correctly recognized, 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. 115 F.4th at 1129–31.

As the Fourth Circuit held, "data protection is not an activity the medical field … is 'particularly fitted to execute' nor is any 'related' field of health care." *Ford*, 97 F.4th at 261. Nonetheless, below, AHS argued that the fact that it *collected* some of the data at issue here as part of its

provision of medical care is enough to bring this action within the scope of section 233(a). Whether its collection of data from Mr. Bradford was tangentially related to the performance of a medical or related function, however, is immaterial. 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 ("the focus is on the function that caused the injury"); *Friedenberg*, 68 F.4th at 1126 (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 Mr. Bradford's injury are "security-related work by information technology and compliance"—not the initial collection of data from Mr. Bradford. *Marshall*, 2023 WL 2931823, at *5.

In addressing the propriety of fees, AHS includes a string cite to a handful of district court cases that reached contrary conclusions. AHS Br. 40–41. Those cases, which represent the minority view, however, focus on whether a given act or omission is "related to" the performance

of health care functions, as opposed to whether the injury giving rise to the suit resulted from the performance of such a function. *See Ford*, 97 F.4th at 262 & n.5 (reversing one of the decisions AHS cites and rejecting two other district court decisions cited by AHS as unpersuasive). Further, *Doe v. Neighborhood Healthcare*, No. 3:21-CV-01587-BEN-RBB, 2022 WL 17663520, at *7 (S.D. Cal. Sept. 8, 2022), cited by AHS below, predates this Court's decision in *Friedenberg*, and thus lacked this Court's guidance as to what constitutes a "related function." Its reasoning was also based almost entirely on two related district court decisions from within the Fourth Circuit that were later reversed and abrogated, respectively, by *Ford*. *Id.* at *6–7 (discussing *Ford v. Sandhills Med. Fdn., Inc.*, No. 4:21-CV-02307-RBH, 2022 WL 1810614 (D.S.C. June 2, 2022), and *Mixon v. CareSouth Carolina, Inc.*, No. 4:22-CV-00269-RBH, 2022 WL 1810615, (D.S.C. June 2, 2022)).

C. Remand was also required under section 233(c).

Section 233 does not itself confer district courts with subject-matter jurisdiction over any category of cases. Rather, 28 U.S.C. § 1346(b)(1) provides district courts with jurisdiction over actions "when § 233 immunity applies, [because] the United States is substituted as the

defendant and the action proceeds as one brought under the FTCA." *Friedenberg*, 68 F.4th at 1118. Thus, even where the removal provisions of section 233(c) or section 233(*l*)(2) have been properly procedurally invoked, a court is required to remand an action "so removed" if the action is not one within the scope of the section 233(a) exclusive remedy provision. 42 U.S.C. § 233(c).

Accordingly, as *Blumberger* recognized, even where the Attorney General *is* required to provide positive advice and remove pursuant to sections 233(*l*)(1) and 233(c), remand is required if the removed action "is one in which a remedy by suit within the meaning of subsection (a) ... is not available against the United States." 115 F.4th at 1140 (quoting 42 U.S.C. § 233(c)); *see also Cromer v. Dignity Health*, No. 2:24-CV-04731-WLH-SK, 2025 WL 1153808, at *6 (C.D. Cal. Apr. 18, 2025), *appeal pending*, No. 25-4154 (holding that, although the Attorney General should have removed the action, remand was appropriate because there was no FTCA coverage and thus no subject-matter jurisdiction). For the reasons explained above, this action does not arise out of the performance of medical or related functions, and thus is not one in which the section

233(a) remedy is available. Regardless of whether the Attorney General was required to remove, remand is therefore required.

II. The federal officer removal statute does not provide a basis for jurisdiction.

Below, AHS also asserted that it was entitled to remove because "it is a federal officer under § 1442 and acting under a federal officer under § 1442(a)(1)." ER-13. The district court correctly rejected this argument on both timeliness grounds and the merits. ER-13–14. AHS forfeited any argument as to the former by failing to contest it in the district court, and it forfeited any argument as to the latter by failing to raise it in its opening brief on appeal. Moreover, the district court's conclusions were correct.

A. AHS's timeliness argument is forfeited and wrong.

Agreeing with Mr. Bradford and the United States, the district court held that AHS's removal under section 1442, the federal officer removal statute, was untimely because "the facts alleged in its initial pleading are the basis for its claim that it is a 'federal officer' or 'acting under a federal officer,'" and AHS did not remove "within 30 days of the receipt of that initial pleading as required under [28 U.S.C.] § 1446(b)(1)." ER-14. On appeal, AHS challenges this conclusion, arguing that 28

U.S.C. § 1446(b)(3), not 28 U.S.C. § 1446(b)(1), applies, and that its removal was timely under this provision. AHS Br. 27–30. In the district court, however, AHS made neither this argument nor any other argument as to timeliness.

"Absent exceptional circumstances, [this Court] generally will not consider arguments raised for the first time on appeal." *Melendres v. Skinner*, 113 F.4th 1126, 1134 (9th Cir. 2024). No such exceptional circumstances exist here. *Both* motions to remand explicitly argued that AHS's removal under section 1442 was untimely under § 1446(b)(1). SER-86; SER-115. AHS thus had two opportunities to respond and chose not to do so. *See* SER-25–47 (Opp'n to Plaintiff's motion); SER-48–70 (Opp'n to United States' motion). AHS has thus forfeited this argument, which should not be considered by the Court.

Even putting aside that AHS forfeited the point, AHS's arguments as to timeliness lack merit. Where it applies, section 1446(b)(3) allows a defendant 30 days from receipt of a "paper from which it may first be ascertained that the case is one which is or has become removable." 28 U.S.C. § 1446(b)(3). In its notice of removal, AHS asserted that the case was removable under section 1442 due to (1) its status as a deemed

employee, and (2) its receipt of grant funds pursuant to section 42 U.S.C. § 254b. ER-42–44. AHS received a paper from which these facts can be ascertained on January 12, 2024, when the United States filed a notice in state court that stated "Asian Health Services has been 'deemed' to be an 'employee of the Public Health Service'" and that AHS was an entity "receiving federal funds under section 254b of Title 42." ER-98–99. AHS did not remove until 40 days later. That removal was thus, at the least, ten days too late.

AHS notes that, in *Blumberger*, the Court held that the government's state-court notice did not start the 30-day clock. AHS Br. 28–29. But the facts here are meaningfully different from those in *Blumberger*. There, the removing defendant was not the deemed entity, but a doctor that worked for the deemed entity. The Court concluded that the government's notice did not trigger section 1446(b)(3) because "the government's notice did not say that [the doctor] was a deemed PHS employee." *Id.* at 1123. And the Court stated that a paper that *had* made the removing defendant aware of his status as an employee of a deemed entity would have triggered section 1446(b)(3). *Id*. By contrast, here, AHS is the removing defendant, and the notice explicitly stated that AHS was

a deemed PHS employee and that AHS was a recipient of section 254b funds. ER-98–99. At the latest, then, the government's January 12 filing made AHS's "asserted ground for removal unequivocally clear and certain." *Blumberger*, 115 F.4th at 1123.

B. The district court correctly rejected AHS's federal-officer theory on the merits.

In the district court, AHS raised two theories as to the applicability of the federal officer removal statute: that AHS was itself a federal officer given its receipt of a deeming determination pursuant to section 233(g)(1), and that it was "acting under" a federal officer given its participation in a federal grant program, receipt of a deeming notice, and operation "subject to extensive federal requirements," SER-39–43. The district court rejected both theories, holding that neither a deeming certification nor participation in the federal grant program "necessarily, or automatically, mean that removal is proper under § 1442(a)(1)," because neither "address[es] the circumstances regarding the actions or omissions that are the subject of the civil action." ER-13.

In its opening brief, AHS raised no argument as to this holding of the district court. It therefore forfeited any argument that the holding was in error. *See Hartzell v. Marana Unified Sch. Dist.*, 130 F.4th 722,

736 (9th Cir. 2025). And because this holding provided a sufficient basis to reject removal jurisdiction under section 1442, the Court may affirm on this ground alone. *See, e.g.*, *Rodriguez v. Hayes*, 591 F.3d 1105, 1118 (9th Cir. 2010) ("We have previously held that the failure of a party in its opening brief to challenge an alternate ground for a district court's ruling *given by the district court* waives that challenge."), *abrogated on other grounds by Jennings v. Rodriguez*, 583 U.S. 281 (2018); *Askew v. County of Clark*, No. 21-15310, 2022 WL 3585714, at *1 (9th Cir. Aug. 22, 2022) (holding that party forfeited challenge to district court's entry of judgment on a claim by failing to address one of the district court's alternative holdings).

In any event, the district court's holding was correct. For one, AHS's deeming status did not make AHS itself a federal officer. An "officer of the United States" as that term is used in the statute only applies "to federal officers who 'exercise[] significant authority.'" *San Mateo*, 32 F.4th at 756 (quoting *Int'l Primate Prot. League v. Admins. of Tulane Educ. Fund*, 500 U.S. 72, 81 (1991)). It is only Congress's extension of section 1442(a)(1) to "persons acting under" such officers that has been "understood as extending the section to apply to employees, as well as

officers." *Id.* (citing *Int'l Primate Prot. League*, 500 U.S. at 84). AHS has no colorable argument that its deeming certification meant it itself exercised significant authority of the federal government such that it would qualify as a federal officer. Nor does its receipt of a deeming determination mean that it was "acting under" such an officer in taking the actions and omissions at issue.

A defendant "cannot rely on its PHS employee status to show that it acted under the color of federal office for removal purposes because the statute expressly provides that such a determination is only '[f]or purposes of this section.'" *Ramos v. San Diego Am. Ind. Health Ctr.*, No. 23-CV-570-MMA-AHG, 2024 WL 1117093, at *9 (S.D. Cal. Mar. 14, 2024) (quoting 42 U.S.C. § 233(g)(1)(A)); *see also Centerville*, 2024 WL 3666164, at *3 (rejecting argument that deeming determination makes entity a federal officer). That section 233 refers to a deemed entity as one "deemed to be an employee" of the PHS does not indicate otherwise; 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.* A grant of federal immunity is not the extension of "subjection, guidance, or control" emblematic of an "acting under" relationship for purposes of section 1442. *Watson*, 551 U.S. at 152; *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").

Notably, a finding that all PHS Act grant recipients were themselves federal officers would make the removal provisions of section 233 redundant. Courts "presume that 'Congress is aware of existing law when it passes legislation.'" *Mississippi ex rel. Hood v. AU Optronics Corp.*, 571 U.S. 161, 169–70 (2014) (quoting *Hall v. United States*, 566 U.S. 506, 516 (2012)). In the FHSCAA, Congress created particular mechanisms for the removal of claims against deemed entities—limited to specific circumstances. If all deemed entities were actually federal

officers (or acting under federal officers), these provisions would have been superfluous.

Additionally, AHS's provision of health care services pursuant to a grant program and being subject to extensive regulation does not suffice to show that it was "acting under" a federal officer. *See Cedars-Sinai*, 106 F.4th at 916–18 (holding that health system's participation in electronic health records program tied to Medicare funding did not mean it was acting under a federal officer); *Saldana v. Glenhaven Healthcare LLC*, 27 F.4th 679, 685–86 (9th Cir. 2022) (holding that extensive regulation of nursing home and federal government's recognition of it as critical infrastructure did not mean it was acting under a federal officer); *see also Community Clinic of Maui*, 2025 WL 1863106, at *12–13 (rejecting same theory as raised here under *Cedars-Sinai*); *Johnson*, 2025 WL 1539853, at *6 (same). And even where a defendant *was* acting under a federal officer, it is required to "show how [its] challenged actions occurred 'because of what [it] w[as] asked to do by the Government." *Childs v. San Diego Family Housing, LLC*, __ F.4th __, No. 24-1256, 2025 WL 2473003, at *7 (9th Cir. Aug. 28, 2025) (quoting *Goncalves*, 865 F.3d at 1245). AHS did not, nor could it, show that its failure to keep data secure or properly

respond when it learned of the data breach was because of what AHS was required to do by a federal officer, and thus the district court properly rejected its reliance on section 1442(a)(1).

III. The district court did not abuse its discretion in awarding fees.

In granting a motion to remand, district courts may "require payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal." 28 U.S.C. § 1447(c). Section 1447(c) reflects Congress's "desire to deter removals sought for the purpose of prolonging litigation and imposing costs on the opposing party." *Martin v. Franklin Cap. Corp.*, 546 U.S. 132, 140 (2005). In *Martin*, the Supreme Court held that district courts may exercise their discretion to award fees under section 1447(c) "where the removing party lacked an objectively reasonable basis for seeking removal," or where an award of fees is otherwise consistent with "the purposes of awarding fees under 1447(c)" based on "unusual circumstances." 546 U.S. at 141.

Here, the district court was within its discretion to award fees given AHS's objectively unreasonable removal pursuant to the federal officer removal statute. In challenging the fee award, AHS fails to acknowledge the basis on which the district court awarded fees: the fact that, "[e]ven

if the Court agreed" that AHS was qualified to remove under section 1442(a)(1), that removal would plainly have been untimely. ER-15. As discussed above, all of the facts that AHS pointed to as supporting its theory of removal were ascertainable, at the latest, forty days before it removed. As such, AHS's removal based on section 1442(a)(1) was objectively unreasonable. *See, e.g.*, *Decatur Hosp. Auth. v. Aetna Health, Inc.*, 854 F.3d 292, 298 (5th Cir. 2017) (affirming award of fees under section 1447(c) where untimeliness made removal objectively unreasonable); *Garrett v. Cook*, 652 F.3d 1249, 1254 (10th Cir. 2011) (same). AHS's failure to respond to the timeliness arguments made in two separate remand motions further supports the district court's exercise of its discretion. *See Ragland v. WorkSTEPS, Inc.*, __ F. Supp. 3d __, No. 1:25-CV-0075-PAB, 2025 WL 1446381, at *6 (N.D. Ohio May 20, 2025) (awarding fees where removing defendant "failed to cite any authorities that its removal was timely or make any attempt at a response to [plaintiff's] timeliness argument").

The award of fees is particularly justified by the fact that AHS's plainly untimely invocation of section 1442 is the only reason this Court has appellate jurisdiction. Section 1447(d) generally bars review of a

remand order unless the case was "removed pursuant to section 1442 or 1443." 28 U.S.C. § 1447(d). Until 2021, this Court took the view that, where section 1442 or 1443 was one of several grounds upon which a case was removed, section 1447(d) "provided authority to review only the portion of the district court's remand order that addressed" removal under 1442 or 1443, and not to review "portions of the remand order that considered … other bases for subject matter jurisdiction." *San Mateo*, 32 F.4th at 745 (discussing pre-2021 precedent). The Supreme Court abrogated that line of precedent in *BP P.L.C. v. Mayor and City Council of Baltimore*, 593 U.S. 230 (2021), though, and held that, in such scenarios, the entire remand order—not just the part addressing section 1442 or 1443—was reviewable on appeal.

In so doing, the Supreme Court recognized the possibility that defendants might "frivolously add § 1442 or § 1443 to their other grounds for removal, all with an eye to ensuring appellate review down the line if the case is remanded." *Id.* at 1542. In such cases, the Court observed that section 1447(c) would provide a basis for the award of attorney's fees. *Id.*; *see also Blumberger*, 115 F.4th at 1126 (recognizing that section 1447(c) serves as a "deterrent[] to frivolous invocations of § 1442"); *Roberts v.*

Smith & Wesson Brands, Inc., 98 F.4th 810, 815–16 (7th Cir. 2024) (citing *BP* and directing district court to consider whether unjustified inclusion of section 1442 as basis for removal warranted fees under section 1447(c)); *U.S. Bank, Nat'l Ass'n v. Taveras*, No. 23-13384, 2025 WL 1355512, at *5 (11th Cir. May 9, 2025) (affirming fee award based on meritless addition of section 1443 as a basis for removal, as it "implicate[d] the type of 'gamesmanship' for which the Supreme Court explicitly endorsed awarding costs and fees pursuant to § 1447(c)" in *BP*). AHS's inclusion of a patently untimely section 1442 theory in a notice of removal that otherwise focuses on a different removal statute fits precisely the circumstance in which the Supreme Court suggested section 1447(c) fees could be properly levied. The district court properly exercised discretion to award fees here.

CONCLUSION

For the foregoing reasons, the district court's remand and fee order should be affirmed.

Respectfully submitted,

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September 22, 2025

STATEMENT OF RELATED CASES

Appellee is aware of the following related cases within the meaning of Ninth Circuit Rule 28-2.6 currently pending in this Court, each of which are appeals from orders remanding actions involving data breaches and/or unauthorized access to private information at federally supported health centers, and in which the district courts rejected arguments that either 42 U.S.C. § 233 or 28 U.S.C. § 1442 supported jurisdiction:

25-4088- *Johnson v. Petaluma Health Center*
- consolidated with 25-4090 - *Gerson v. Petaluma Health Center*

25-4992 - *Curimao v. Community Clinic of Maui*

25-4993 - *Jackson v. Community Clinic of Maui*

25-4994 - *Jones v. Community Clinic of Maui*

25-4997 - *Parry v. Community Clinic of Maui*

September 22, 2025

/s/ Adam R. Pulver
Adam R. Pulver

CERTIFICATE OF COMPLIANCE

1. This brief contains 9,944 words, including 0 words manually counted in any visual images, and excluding the items exempted by FRAP 32(f). The brief's type size and typeface comply with FRAP 32(a)(5) and (6).

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September 22, 2025

/s/ Adam R. Pulver
Adam R. Pulver

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit using the Appellate Case Management System.

I certify that all participants in this case are registered ACMS users and that service will be accomplished by the ACMS system.

/s/ Adam R. Pulver
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