No. 22-56032

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RAIZEL BLUMBERGER,
Plaintiff-Appellee,

v.

IAN B. TILLEY, M.D.,
Defendant-Appellant,

and

CALIFORNIA HOSPITAL MEDICAL CENTER; DIGNITY HEALTH; DOES 1 through 6 and 7 through 50,
Defendants,

v.

UNITED STATES OF AMERICA,
Movant-Appellee,

On Appeal from the United States District Court
for the Central District of California
No. 2:22-cv-06066-FLA-JC
Hon. Fernano L. Aenile-Rocha

PLAINTIFF-APPELLEE'S PETITION FOR REHEARING EN BANC

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RULE 35(b)(1) STATEMENT AND INTRODUCTION

The panel majority classified this appeal as a "hard case." Op. 5. As Judge Desai explained in her dissent, however, the case was hard only because the majority skipped over the easy, preliminary jurisdictional question—and in so doing, created a circuit split. En banc rehearing is necessary to bring this Circuit's law in line with that of other courts of appeals as to that jurisdictional question: whether 42 U.S.C. § 233 provides private defendants with a basis for removing a case to federal court where the Attorney General has filed a timely appearance. En banc rehearing is also necessary to eliminate the conflict with Circuit and Supreme Court precedent resulting from the panel's assertion of jurisdiction based on the "presumption of reviewability."

Appellant Dr. Ian Tilley removed this action to federal court in part based on a provision of the Public Health Service (PHS) Act, 42 U.S.C. § 233, which provides immunity to employees of the PHS, and others "deemed" to be such employees, in certain circumstances. That statute includes two provisions relating to removal: one that applies to removal by the Attorney General, *id.* § 233(c), and one authorizing removal by a private defendant where the Attorney General fails to appear within

fifteen days of notification of the action, *id.* § 233(*l*)(2). On review of the district court's remand order, the only relevant question with respect to section 233 should have been whether that statute provides a private defendant the right to remove in a case where the Attorney General *has* appeared in the state-court action and not removed himself. As Judge Desai explained in her dissent, the answer to that question is no. The PHS Act's two express removal provisions are the exclusive mechanisms for removal under that statute. Because neither provision applied here, section 233 did not create removal jurisdiction. On this point, the panel decision conflicts with decisions of the three other courts of appeals to have addressed the issue. *See Doe v. Centerville Clinics Inc.*, No. 23-2738, 2024 WL 3666164, at *1–2 (3d Cir. Aug. 6, 2024) (nonprecedential op.), *pet. for rehear'g denied* (3d Cir. Oct. 9, 2024); *El Rio Santa Cruz Neighborhood Health Ctr., Inc. v. HHS*, 396 F.3d 1265, 1272 (D.C. Cir. 2005); *Allen v. Christenberry*, 327 F.3d 1290, 1294–96 (11th Cir. 2003).

Without directly answering the straightforward jurisdictional question, the panel majority sought to answer the question whether the Attorney General "was obligated to remove the case to federal court," Op. 26, and held that a "presumption of reviewability" of executive action

provided a basis for federal jurisdiction to answer that question. After holding that the Attorney General was obligated to remove (a holding in conflict with *Centerville*), the panel then, in the guise of a "remedy" for the Attorney General's failure to do so, Op. 51, directed the district court to adjudicate whether the section 233 defense is available to Dr. Tilley—despite the longstanding rule that, absent some other basis for subject-matter jurisdiction, federal courts do not have jurisdiction to adjudicate the applicability of federal defenses to state-law claims. *See Merrell Dow Pharms. Inc. v. Thompson*, 478 U.S. 804, 808 (1986). The panel majority's creation of both removal and subject-matter jurisdiction ungrounded in any statutory provision warrants *en banc* review. Its decision is contrary to precedent of this Court and the Supreme Court, both of which make clear that an action cannot be removed from state court to federal court absent congressional authorization. *See, e.g.*, *Syngenta Crop Protection, Inc. v. Henson*, 537 U.S. 28, 32 (2002); *Libhart v. Santa Monica Dairy Co.*, 592 F.2d 1062, 1064 (9th Cir. 1979).

Additionally, the disruption of the balance of federal and state judicial responsibilities that would result from the panel opinion and the panel's conflict with decisions of three sister circuits present an issue of

exceptional importance warranting *en banc* review. Converting the presumption of reviewability into a freestanding basis for removal jurisdiction whenever the federal government participates in state-court litigation would have wide consequences. Even if limited to cases involving section 233, the extra-textual pathway to federal court created by the panel will create a right to removal in *every* case in which an employee of a federally funded health center is sued for malpractice. As a different panel of this Court recognized in interpreting the scope of section 233's removal provision, the language of the statute is clear and, even "good arguments" as to policy cannot provide a basis for departing from it. *Babbitt v. Dignity Health*, No. 18-56576, 2023 WL 1281668, at *2 (9th Cir. Jan. 31, 2023) (mem. op.), *cert. denied sub nom. Afework v. Babbitt*, 144 S. Ct. 184 (2023).

BACKGROUND

I. Statutory background

` Under the PHS Act, the Secretary of Health and Human Services (HHS) may "deem" federally funded health centers and their employees to be employees of the PHS, thus entitling them to, under certain conditions, the statutory immunities afforded to PHS employees acting

within the scope of their employment. 42 U.S.C. § 233(g). The statute includes provisions as to how that "deeming" process may proceed, as well as provisions as to what happens when individuals who believe they are entitled to section 233 immunity are sued.

Relevant here, the statute provides that an individual who believes they fall within the scope of the Act must inform the Attorney General of any litigation against them in any court. 42 U.S.C. § 233(b). Then, within 15 days after receiving notice, the Attorney General "shall make an appearance in such court and advise such court as to whether the Secretary has determined" that the person "is deemed to be an employee of the Public Health Service for purposes of this section with respect to the actions or omissions that are the subject of such civil action or proceeding." *Id.* § 233(*l*)(1).

The statute also provides two ways in which such litigation can be removed from state to federal court. First, a state court action "shall be removed … by the Attorney General" to federal district court "[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). Second, "if the Attorney General fails to appear

in State court" within fifteen days of being notified of a pending civil action, "any entity or officer, governing board member, employee, or contractor of the entity named" may remove the action. *Id.* § 233(*l*)(2).

II. State court proceedings

On January 3, 2018, Appellee Raizel Blumberger gave birth at California Hospital Medical Center. ER41. A laceration occurred during childbirth which, Ms. Blumberger alleges, was not properly diagnosed or treated by her physicians, including Dr. Tilley. *Id.* On May 20, 2021, Ms. Blumberger commenced this action in Los Angeles County Superior Court against the hospital, its owners, Dr. Tilley, and other health care providers, alleging medical negligence under California law. ER40. Dr. Tilley was served with the complaint on June 1, 2021, PSER18, and answered on July 16, 2021, PSER3.

Although this action concerned events at California Hospital Medical Center, Dr. Tilley purports to be an employee of Eisner Pediatric and Family Center (Eisner). ER24. In August 2017, the Health Resources and Services Administration issued a notice that deemed Eisner to be a PHS employee for purposes of 42 U.S.C. § 233 for the 2018 calendar year. ER29. On July 20, 2021, Eisner forwarded a copy of Ms. Blumberger's

complaint to the HHS Office of General Counsel. ER25. Two days later, an Assistant United States Attorney appeared in the state court action on behalf of the United States, and, pursuant to 42 U.S.C. § 233(*l*)(1), advised the court that "whether Defendant Ian B. Tilley, M.D. is deemed to be an employee of the Public Health Service for purposes of 42 U.S.C. § 233 with respect to the actions or omissions that are the subject of the above captioned action, is under consideration." ER37. The case proceeded in state court for another year.

On July 21, 2022, the United States filed an amended notice stating its conclusion that Dr. Tilley "is *not* deemed to be an employee of the Public Health Service for purposes of 42 U.S.C. § 233 with respect to the actions or omissions that are the subject of [this] action." ER34.

III. District court proceedings

More than a month after the United States filed its amended notice, Dr. Tilley removed the action to federal district court, citing two statutory provisions. ER23. First, he stated that he was entitled to remove pursuant to 42 U.S.C. § 233(*l*)(2), which he asserted "afford[ed] a federal forum to resolve the question as to whether his federal immunity defense under 42 U.S.C. § 233 *et seq.* extends to this action." ER26. Second, he

invoked the federal-officer removal statute, 28 U.S.C. § 1442(a)(1), claiming that removal under that statute was timely because he "became aware of the government's July 21, 2022 denial decision via an electronic state court filing on or about July 21, 2022." ER26.

Ms. Blumberger and the United States both moved to remand. The district court granted their motions on November 20, 2022. ER3. First, the court rejected Dr. Tilley's section 233(*l*)(2) theory on the ground that the provision applies only when the United States has *not* timely appeared in state court. Because the United States had timely appeared, the court held that section 233(*l*)(2) did not apply. ER8. Second, the court found Dr. Tilley's invocation of the federal-officer removal statute untimely, rejecting his theory that the "30-day removal period under § 1442 must start when a deemed defendant learns of the Government's adverse coverage decision," and ruling that "the 30-day removal period began when [Dr. Tilley] was served with the state court complaint in 2021." ER10.

IV. Panel proceedings

Dr. Tilley appealed. On September 9, 2024, a partially divided panel issued an opinion vacating the district court's remand order. First,

as to section 1442, the panel held that the 2018 letter that Dr. Tilley included with his notice of removal made "Dr. Tilley's asserted ground for removal unequivocally clear and certain." Op. 19. Because Dr. Tilley had not established when he received that letter or otherwise learned of Eisner's status as a deemed entity, the Court remanded to the district court to resolve that question. *Id.* 20.[1]

As to section 233, the panel was divided. The majority first held that section 233(*l*)(1) required the Attorney General to report to a state court only whether HHS had prospectively "deemed" the relevant entity to be an employee at all, and that the Attorney General had violated that obligation. Op. 35–43. Disagreeing with the Third Circuit in *Centerville*, the panel majority held that "the Attorney General's ultimate coverage decision" with regard to the actions or omissions underlying the suit was

[1] The panel erred in finding that neither the complaint nor either of the Attorney General's state court filings triggered the 30-day clock for federal-officer removal, *see* Op. 17, and Ms. Blumberger would welcome reconsideration of that ruling. Regardless, the panel's section 1446(b) holding does not eliminate the need for rehearing in this case. Ms. Blumberger believes that, on remand, the evidence will demonstrate that Dr. Tilley learned of his deemed status more than 30 days prior to his removal of the action and, therefore, that the panel majority's reliance on section 233 as an independent basis of jurisdiction will be dispositive.

irrelevant to the notification requirement imposed by section 233(*l*)(1). *Id.* 31. The panel then concluded that the Attorney General's actions in state court were subject to federal judicial review, relying on a presumption of reviewability of executive actions. *Id.* 43–51. Finally, the panel held that the remedy for the Attorney General's "violation" of section 233(*l*)(1) was to vacate the district court's remand order, instructing the district court to hold a hearing to determine whether Dr. Tilley is entitled to section 233 immunity. *Id*. 52–53.

Judge Desai dissented from the Court's opinion as to section 233, explaining that "the answer to the only question on appeal concerning § 233—whether Dr. Tilley properly removed the case to federal court—is no." Op. 55. The dissent explained that removal under section 233(*l*)(2) was unavailable because the Attorney General *had* appeared in the case. Op. 57–58. And rejecting the majority's conclusion that the Attorney General had violated his obligation under section 233(*l*)(1), Judge Desai explained that the text requires "the Attorney General to advise the court whether [HHS's] prior deeming decision extends to 'the actions or omissions that are the subject of [the] civil action or proceeding,'" not whether there was a prior deeming decision in the abstract. *Id.* 62

(quoting 42 U.S.C. § 233(*l*)(1)). Finally, the dissent explained that a presumption in favor of judicial review did not allow the Court to "rewrite the statute" to create a removal right beyond that contained in its text, noting that other mechanisms for challenging an unfavorable coverage decision exist, including Administrative Procedure Act review. *Id.* 68–71 (citing *El Rio Santa Cruz*, 396 F.3d at 1271).

ARGUMENT

I. The panel's holdings as to removal under section 233 conflict with the holdings of three courts of appeals.

Both in holding that section 233 authorizes private defendants to remove actions to district court despite a timely appearance by the Attorney General, and in holding the Attorney General has an obligation to remove every case brought against an employee of a deemed entity without considering the relationship between that employment and "the actions or omissions that are the subject of such civil action or proceeding," 42 U.S.C. § 233(*l*)(1), the panel opinion conflicts with decisions of the Third, Eleventh, and D.C. Circuits.

The panel majority acknowledged that its decision conflicted with the Third Circuit's nonprecedential *Centerville* decision. Op. 30. There, the Third Circuit held that a party that "was a 'deemed' PHS employee

under § 233" does not have an "automatic" right to removal. 2024 WL 3666164, at *2. The court explained that section 233(*l*)(1) triggers an obligation for the Attorney General to remove only "where the government has made its specific coverage determination 'for purposes of this action.'" *Id.* (quoting 42 U.S.C. § 233(*l*)(1)). Further, the Third Circuit held that "the plain text of the statute" only permits a state-court defendant to remove the action if the Attorney General does *not* appear within fifteen days—even if that appearance is not accompanied by a coverage determination. 2024 WL 3666164, at *2.

The Eleventh Circuit too has held that section 233 only authorizes removal in the two specific circumstances identified in the statute and does not allow a private defendant to remove once the Attorney General has timely appeared. *See Christenberry*, 327 F.3d at 1294–95. Likewise, the D.C. Circuit has held that the two removal provisions of section 233 are exclusive, and that the statute does *not* "afford independent district court review of the Secretary's negative coverage determinations." *El Rio Santa Cruz*, 396 F.3d at 1271–72. *See also Babbitt*, 2023 WL 1281668, at *2 (nonprecedential Ninth Circuit panel decision declining to expand

situations where removal is available under section 233 given "the language of the statute").[2]

The majority opinion is contrary to these three circuits' decisions and "substantially affects a rule of national application in which there is an overriding need for national uniformity." 9th Cir. R. 35-1. *En banc* review is warranted to eliminate this conflict.

II. Basing removal jurisdiction on a "presumption of reviewability" is contrary to long-established precedent.

Without identifying any applicable removal statute or other basis for federal jurisdiction, the panel opinion allows removal to federal court based on a "presumption of reviewability" of the Attorney General's actions. Op. 43–51. But "[t]he right of removal is entirely a creature of statute and a suit commenced in a state court must remain there until cause is shown for its transfer under some act of Congress." *Syngenta*, 537 U.S. at 32 (cleaned up); *see also Libhart*, 592 F.2d at 1064 ("The removal jurisdiction of the federal courts is derived entirely from the statutory authorization of Congress."). As recognized by the Supreme Court in *Syngenta*, federal courts do not have a general supervisory

[2] Invoking the panel opinion in this case, a provider defendant has now removed *Babbitt* again. *See* Notice of Removal at 5, *Babbitt v. Dignity Health*, No. 24-cv-9145 (C.D. Cal. Oct. 25, 2024).

authority over state court litigation that authorizes removal absent a specific statutory removal mechanism. *See* 537 U.S. at 32–34 (rejecting arguments that the "All Writs Act, alone or in combination with the existence of ancillary jurisdiction" could provide basis for removal given existence of separate removal statutes).[3]

This Court has long recognized that the question whether an action is reviewable is distinct from the question whether a federal court has jurisdiction to review it. *See Allen v. Milas*, 896 F.3d 1094, 1101 (9th Cir. 2018) (holding that nonreviewability of consular decisions does not go to subject-matter jurisdiction); *Khalsa v. Weinberger*, 779 F.2d 1393, 1396 (9th Cir. 1985) (recognizing that the distinction between reviewability and subject-matter jurisdiction "is an important one"). "In contrast to subject-matter jurisdiction, the question of reviewability relates to whether a cause of action exists and whether review has been foreclosed

[3] The panel majority cited 28 U.S.C. § 2106 as authority for the "remedy" it prescribed after reviewing the Attorney General's state court actions and finding them deficient. Op. 52. But it did not suggest that that statute provided removal or subject-matter jurisdiction, nor could it, as that statute simply "enumerates the extensive remedial authority available to a court of appeals." *Sexual Minorities Uganda v. Lively*, 899 F.3d 24, 31 (1st Cir. 2018); *see Acheson Hotels, LLC v. Laufer*, 601 U.S. 1, 15 n.1 (2023) (Jackson, J., concurring) (recognizing section 2106 is not a source of Article III jurisdiction).

by a statute or other type of law." *Duncan v. Muzyn*, 833 F.3d 567, 576 (6th Cir. 2016). Reviewability doctrines thus provide "rule[s] of decision" that go to a federal court's "*willingness*, not [its] *power*, to hear [a class of] cases." *Milas*, 896 F.3d at 1101. Where a particular executive action is not reviewable, then, "[a]lthough subject matter jurisdiction may indeed exist, the claim may prove unsuitable for review by a court acting in its traditional judicial role." *Khalsa*, 779 F.2d at 1395. In such cases, where a court holds that an executive action is deemed *not* reviewable, the outcome is a dismissal on the merits—not one based on jurisdiction. *See Milas*, 896 F.3d at 1101; *Khalsa*, 779 F.2d at 1396.

The panel majority's holding that the presumption of judicial review created an extra-statutory pathway for removal is inconsistent with these precedents. The sole case cited by the panel majority for its contrary conclusion, *De Martinez v. Lamagno*, 515 U.S. 417 (1995) (cited in Op. 44–48), does not suggest otherwise. There, the Supreme Court explicitly noted that the case, involving the Westfall Act, "present[ed] not even the specter of an Article III problem" because it was initially filed in federal court on the basis of diversity jurisdiction. *Id.* at 435. Thus, the conclusion in *De Martinez* that a court can review the Attorney General's

scope-of-employment certification in cases where there *is* federal court jurisdiction does not support the panel's decision that reviewability itself provides a basis for removal jurisdiction.

Moreover, "the presumption favoring judicial review of administrative action," even when relevant, is a canon of "statutory construction" that may be deployed "when a statutory provision is reasonably susceptible to divergent interpretation." *Guerrero-Lasprilla v. Barr*, 589 U.S. 221, 229 (2020) (cleaned up). Putting aside the rule of construction that "[r]emoval statutes are strictly construed" against removal, *Casola v. Dexcom, Inc.*, 98 F.4th 947, 954 (9th Cir. 2024), no ambiguous statutory provision is at issue here, as recognized by the Third, Eleventh, and D.C. Circuit decisions discussed above. Indeed, a panel of this Court has recognized, albeit in a nonprecedential decision, that where the Attorney General has filed an appearance in state court within fifteen days of service—regardless of whether he has "definitively advised the court" of a defendant's status—section 233(*l*)(2) does not provide a basis for removal. *Sherman by and through Sherman v. Sinha*, 843 F. App'x 870, 873 (9th Cir. 2021).

To the extent that the panel majority grounded its decision in section 233(*l*)(1), *see* Op. 51, nothing in that provision says anything about removal or federal courts. There is no plausible interpretation of that statutory provision that creates removal jurisdiction, particularly given Congress's inclusion of express removal language in the provision that immediately succeeds it, 42 U.S.C. § 233(*l*)(2). *See United States v. Terence*, 132 F.3d 1291, 1294 (9th Cir. 1997) ("[W]hen a statute limits a thing to be done in a particular mode, it includes a negative of any other mode.").

III. In light of the consequences of the panel's holdings, this case presents issues of exceptional importance.

The issues presented in this case have arisen frequently and, until now, have been resolved uniformly based on the clear language of section 233's removal provisions. *See, e.g.*, *Centerville*, 2024 WL 3666164, at *2; *Babbitt*, 2023 WL 1281668 at *2; *Sherman*, 843 F. App'x at 873; *Christenberry*, 327 F.3d at 1294–96; *Bradford v. Asian Health Servs.*, 2024 WL 2883672, at *5–6 (N.D. Cal. June 7, 2024); *Krandle v. Refuah Health Ctr., Inc.*, 2023 WL 2662811, at *3–8 (S.D.N.Y. Mar. 28, 2023); *Barnes v. Sea Mar Cmty. Health Ctrs.*, 2022 WL 1541927, at *6 (W.D. Wash. Apr. 17, 2022), *report and recommendation adopted*, 2022 WL

1540462 (May 16, 2022); *Young v. Temple Univ. Hosp.*, 2019 WL 109388, at *2–3 (E.D. Pa. Jan. 3, 2019); *K.C. v. Cal. Hosp. Med. Ctr.*, 2018 WL 5906057, at *4 (C.D. Cal. Nov. 8, 2018); *Q. v. Cal. Hosp. Med. Ctr.*, 2018 WL 1136568, at *2 (C.D. Cal. Mar. 1, 2018). The issues continue to arise, and at least one district court has already relied on the panel's opinion in denying a remand. *L.J.C. v. Dignity Health*, 2024 WL 4648147, at *1–*4 (C.D. Cal. Oct. 31, 2024).

The consequences of the panel's creation of "a per se removal rule for all PHS employees going forward, regardless of whether they were acting in the scope of their employment," Op. 71 (Judge Desai, dissenting), will be significant. *Any* time that an employee of a federally funded health center is sued in state court, the employee will have a basis to remove—even if the case is entirely unrelated to their employment. Such a massive shift of malpractice actions to federal courts would "disrupt[] the federal-state balance approved by Congress." *Gunn v. Minton*, 568 U.S. 251, 258, 268 (2013) (rejecting expansion of federal jurisdiction over state-law malpractice claims based on potential federal issue). The exceptional importance of the issue warrants *en banc* review.

CONCLUSION

For the foregoing reasons, the Court should grant rehearing en banc.

Respectfully submitted,

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November 22, 2024

CERTIFICATE OF COMPLIANCE

This petition complies with the type-volume limitations of Federal Rule of Appellate Procedure 35(b)(2)(A) and Ninth Circuit Rules 35-4(a) and 40-1(a) because, excluding the parts of the petition exempted by Federal Rule of Appellate Procedure 32(f) and the Rules of this Court, it contains 3,818 words.

This petition also complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and 32(c)(2) and Ninth Circuit Rules 35-4(a) and 40-1(a) because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Century Schoolbook.

/s/ Adam R. Pulver
Adam R. Pulver

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing Petition for Rehearing En Banc with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit on November 22, 2024, using the CM/ECF system. I certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

/s/ Adam R. Pulver
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