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No. 05-593

In the Supreme Court of the United States

PAT OSBORN, PETITIONER

v.

BARRY HALEY, ET AL.

*ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT*

BRIEF FOR RESPONDENT BARRY HALEY

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STATUTORY APPENDIX

Title 28 of the United States Code provides in part:

§ 1346. United States as defendant

* * * * *

(b)(1) Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

* * * * *

§ 1442. Federal officers or agencies sued or prosecuted

(a) A civil action or criminal prosecution commenced in a State court against any of the following may be removed by them to the district court of the United States for the district and division embracing the place wherein it is pending:

(1) The United States or any agency thereof or any officer (or any person acting under that officer) of the United States or of any agency thereof, sued in an official or individual capacity for any act under color of such office or on account of any right, title or authority claimed under

any Act of Congress for the apprehension or punishment of criminals or the collection of the revenue.

* * * * *

§ 1447. Procedure after removal generally

* * * * *

(c) A motion to remand the case on the basis of any defect other than lack of subject matter jurisdiction must be made within 30 days after the filing of the notice of removal under section 1446(a). If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded. An order remanding the case may require payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal. A certified copy of the order of remand shall be mailed by the clerk to the clerk of the State court. The State court may thereupon proceed with such case.

(d) An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise, except that an order remanding a case to the State court from which it was removed pursuant to section 1443 of this title shall be reviewable by appeal or otherwise.

* * * * *

§ 2679. Exclusiveness of remedy

* * * * *

(b)(1) The remedy against the United States provided by sections 1346(b) and 2672 of this title for injury or loss of property, or personal injury or death arising or resulting from the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment is exclusive of any other civil action or proceeding for money damages by reason of the same subject matter against the employee whose act or omission gave rise to the

claim or against the estate of such employee. Any other civil action or proceeding for money damages arising out of or relating to the same subject matter against the employee or the employee's estate is precluded without regard to when the act or omission occurred.

(2) Paragraph (1) does not extend or apply to a civil action against an employee of the Government—

(A) which is brought for a violation of the Constitution of the United States, or

(B) which is brought for a violation of a statute of the United States under which such action against an individual is otherwise authorized.

* * * * *

(d)(1) Upon certification by the Attorney General that the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose, any civil action or proceeding commenced upon such claim in a United States district court shall be deemed an action against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant.

(2) Upon certification by the Attorney General that the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose, any civil action or proceeding commenced upon such claim in a State court shall be removed without bond at any time before trial by the Attorney General to the district court of the United States for the district and division embracing the place in which the action or proceeding is pending. Such action or proceeding shall be deemed to be an action or proceeding brought against the United States under the provisions of this title and all references thereto, and the United States shall be

substituted as the party defendant. This certification of the Attorney General shall conclusively establish scope of office or employment for purposes of removal.

(3) In the event that the Attorney General has refused to certify scope of office or employment under this section, the employee may at any time before trial petition the court to find and certify that the employee was acting within the scope of his office or employment. Upon such certification by the court, such action or proceeding shall be deemed to be an action or proceeding brought against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant. A copy of the petition shall be served upon the United States in accordance with the provisions of Rule 4(d)(4) of the Federal Rules of Civil Procedure. In the event the petition is filed in a civil action or proceeding pending in a State court, the action or proceeding may be removed without bond by the Attorney General to the district court of the United States for the district and division embracing the place in which it is pending. If, in considering the petition, the district court determines that the employee was not acting within the scope of his office or employment, the action or proceeding shall be remanded to the State court.

(4) Upon certification, any action or proceeding subject to paragraph (1), (2), or (3) shall proceed in the same manner as any action against the United States filed pursuant to section 1346(b) of this title and shall be subject to the limitations and exceptions applicable to those actions.

* * * * *

QUESTIONS PRESENTED

1. Whether the Attorney General's decision under the Federal Employees Liability Reform and Tort Compensation Act of 1988 (Westfall Act), 28 U.S.C. 2679(d)(2), to certify that "the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose" (thus permitting the substitution of the United States for the employee as the defendant and the removal of the case to federal court) must accept the truth of the plaintiff's allegations.

2. Whether the Westfall Act's provision that the "certification of the Attorney General shall conclusively establish scope of office or employment for purposes of removal" of the suit from state court, 28 U.S.C. 2679(d)(2), establishes that a district court is to retain jurisdiction over the removed suit, even if the court ultimately overturns the Attorney General's scope-of-employment certification for purposes of substituting the United States as the defendant.

3. Whether the court of appeals had jurisdiction to review the district court's remand order, notwithstanding 28 U.S.C. 1447(d).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-11a) is reported at 422 F.3d 359. The opinions of the district court (Pet. App. 19a-25a, 12a-16a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 8, 2005. The petition for a writ of certiorari was filed on November 7, 2005. The petition for a writ of certiorari was granted on May 15, 2006. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATEMENT

1. In 1946, Congress enacted the Federal Tort Claims Act (FTCA), 28 U.S.C. 1346(b), 2671 *et seq.*, which waives the United States' sovereign immunity and subjects it to liability in federal district court for injuries "caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment," if a private person in like circumstances would be lia-

ble under state law. 28 U.S.C. 1346(b)(1). Before the FTCA's enactment, parties injured by a government employee's actions could seek judicial relief only by suing the employee in his individual capacity, which constituted "a very real attack upon the morale" of government employees. *United States* v. *Gilman*, 347 U.S. 507, 512 n.2 (1954) (quoting testimony of Assistant Attorney General Francis M. Shea).

Although the FTCA permits plaintiffs to sue the United States for the torts of its employees, it did not, as originally enacted, foreclose a plaintiff from suing the employee individually. If the employee was sued, he could, however, assert a defense of common law official immunity. See *Barr* v. *Matteo*, 360 U.S. 564 (1959). In addition, in 1948, Congress extended to all federal employees who were sued in state court for "any act under color of [their] office" the right to remove the suit to federal district court. 28 U.S.C. 1442(a)(1). See *Willingham* v. *Morgan*, 395 U.S. 402, 405 (1969) (tracing history of federal officer removal statutes from 1815).

In 1988, Congress enacted the Federal Employees Liability Reform and Tort Compensation Act of 1988, Pub. L. No. 100-694, 102 Stat. 4563, commonly known as the Westfall Act, which confers a statutory immunity on federal employees for acts within the scope of their employment. The Westfall Act was enacted to override the decision in *Westfall* v. *Erwin*, 484 U.S. 292 (1988). In *Westfall*, the Court held that, in order to obtain personal immunity from suit on a tort claim, a federal employee must show both that he was acting within the scope of his employment and that he was performing a discretionary function. *Id.* at 299. The Westfall Act confers absolute immunity on federal employees from all common-law tort claims arising out of acts taken within the scope of their employment, thereby eliminating the discretionary function requirement for immunity under *Westfall*. See *Gutierrez de Martinez* v. *Lamagno*, 515 U.S. 417, 425-426 (1995); H.R. Rep. No. 700, 100th Cong., 2d Sess. 4 (1988) (H.R. Rep. 700).

The Westfall Act provides that, for injuries due to "the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment," the remedy available against the United States under the FTCA is "exclusive" and bars any damages action against the employee "arising out of or relating to the same subject matter." 28 U.S.C. 2679(b)(1). When a lawsuit is filed against a federal employee, the Westfall Act authorizes the Attorney General to issue a certification that "the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose." 28 U.S.C. 2679(d)(1). If the Attorney General issues such a certification, the suit "shall be deemed an action against the United States" under the FTCA, and "the United States shall be substituted as the party defendant." *Ibid*.

If the suit against the employee was initiated in state court, the Westfall Act further provides that, upon the Attorney General's certification, the action "shall be removed" by the Attorney General to federal district court, where it "shall be deemed" to be an action against the United States, and the United States "shall be substituted" as the party defendant. 28 U.S.C. 2679(d)(2). The Act also expressly provides that the Attorney's General certification "shall conclusively establish scope of office or employment for purposes of removal." *Ibid.* In *Lamagno*, the Court held that the Attorney General's "scope-of-employment certification is reviewable in court" if the plaintiff challenges it. 515 U.S. at 420.

2. Petitioner was an employee of Land Between the Lakes Association (LBLA), a private organization that had a contract with the United States Forest Service to provide services at the Land Between the Lakes National Recreation Area in Kentucky. Luber Br. in Opp. App. 2 (Luber App.) (complaint). Petitioner applied for a job with the Forest Service, but was not hired. *Id*. at 2-3. During a meeting of employees of the Forest Service, LBLA, and another contractor, respondent Barry Haley—a Forest Service manager—an-

nounced that another person had been hired for the position. *Id.* at 3. At that meeting, in front of the whole gathering, petitioner questioned Haley regarding his failure to inform her before the meeting that she had not been hired and "made a joke at [Haley's] expense." *Ibid.*; Pet. App. 20a. Shortly thereafter, petitioner's supervisor told her that she should apologize to Haley. Pet. App. 20a. Petitioner refused. *Ibid.*

Petitioner later filed a complaint with the Department of Labor (DOL), questioning whether the Forest Service's hiring decision had given appropriate consideration to veterans' preference points to which she was entitled. Pet. App. 20a. The DOL investigator, Robert Kuenzli, contacted Haley and found that the decision was handled properly. *Ibid.* On the same day, the executive director of LBLA summoned petitioner and demanded again that she apologize to Haley for "not being a good Forest Service partner." *Id.* at 21a; Luber App. 4. Petitioner again refused, and she was fired by LBLA two days later. Pet. App. 21a.

3. a. Petitioner filed suit in state court asserting claims (1) against LBLA and its executive director, Gaye Luber, alleging that petitioner had been terminated in violation of public policy in retaliation for inquiring with DOL about the handling of her veterans' preference points, (2) against Haley, alleging interference with petitioner's employment relationship with LBLA, and (3) against all the defendants, alleging conspiracy wrongfully to discharge petitioner and conspiracy to interfere with her employment relationship with LBLA. Pet. App. 21a. The complaint alleged that both Haley and Luber had acted "in a malicious, oppressive, and intentional manner in order to injure and damage plaintiff," Luber App. 9, but asserted that such conduct by Luber "was within the scope of her employment duties with defendant LBLA," *ibid*, whereas Haley was "[a]cting outside the scope of his employment," *id.* at 7.

b. The United States Attorney certified, under 28 U.S.C. 2679(d)(2), that Haley "was acting within the scope of his em-

ployment * * * at the time of the conduct alleged in the Complaint." Luber App. 23. The United States then removed the case to the United States District Court for the Western District of Kentucky pursuant to both the general federal officer removal statute, 28 U.S.C. 1442, and the Westfall Act removal provision, 28 U.S.C. 2679(d)(2). See 03-cv-192, Rec. #1, Notice of Removal 3. In federal court, the government filed a notice of proposed substitution and moved to dismiss the claims against the United States for failure to comply with the FTCA's administrative exhaustion requirement. Pet. App. 19a; Luber App. 23-29.

In her response to the government's motion to dismiss (see J.A. 17-20), petitioner urged the district court to "reverse[]" the Attorney General's certification, to resubstitute Haley as defendant, and to lift a stay of discovery. J.A. 20. Petitioner did not seek a remand. She argued that, as a matter of law, Haley's alleged conduct was outside the scope of his employment because the Forest Service and LBLA had a Memorandum of Understanding (MOU) pursuant to which Forest Service employees were not to participate in hiring or firing decisions by LBLA and because Haley's alleged conduct did not further the interests of the Forest Service, his employer. See J.A. 19, 30. In its reply (see J.A. 35-39), the United States argued that petitioner could not overcome the presumption in favor of the Attorney General's certification simply by relying on an unsupported inference that there was a nexus between the complaint she filed with the DOL and her termination. J.A. 38.

The district court held that there was no need for an evidentiary hearing on the scope-of-employment issue because it did not understand the government to "deny any of the factual allegations contained in [petitioner's] complaint." Pet. App. 22a. Applying state law, which governs scope of employment under the FTCA, *Williams* v. *United States*, 350 U.S. 857 (1955), the court concluded that, in light of the MOU, "any interaction Mr. Haley might have had regarding [petitioner's]

employment was out of the scope of his duties with the Forest Service." Pet. App. 23a. Believing that "it must accept [petitioner's] allegations as true," the court concluded that "Haley's alleged actions occurred outside the scope of his employment," and that therefore the Attorney General's certification had to be overturned. *Id.* at 24a.

In the second part of its order, the district court held that, because of the court's rejection of the United States' substitution, and the absence of diversity jurisdiction, the court lacked jurisdiction over the suit and that the case must be remanded to state court. Pet. App. 24a-25a.

c. The government sought reconsideration. See J.A. 40-50. The motion pointed out that the court had been under the mistaken impression that the United States did not contest the plaintiff's allegations and that therefore no evidentiary hearing was necessary. J.A. 41. The government noted that its Answer had, in fact, contested all of the plaintiff's factual allegations. J.A. 42-43. In addition, the government submitted declarations from both Haley and Luber, the LBLA director. Haley averred that he had not spoken with Luber between the time of the DOL investigation and petitioner's firing and that he did not "attempt to influence [Luber's] independent decision to fire [petitioner]." J.A. 51-52. Luber similarly averred that petitioner's DOL complaint "was not and could not have been a factor in my decision to terminate [petitioner], because I did not know it had occurred." J.A. 53.[1] The government urged that those affidavits were sufficient, in the absence of contradictory evidence from petitioner, to support the Attorney General's scope-of-employment determination. J.A. 45-46. Alternatively, the government argued that, "[a]ssuming, for the sake of argument only, that Haley and Luber interacted regarding plaintiff's employment," dis-

[1] Neither Haley's or Luber's affidavit said whether they had spoken about petitioner's conduct at the staff meeting or her ability to serve as a Forest Service partner.

covery might reveal that any interaction was within the scope of Haley's employment under Kentucky law. J.A. 47.

The district court denied the motion to reconsider. Pet. App. 12a-16a. The court noted a circuit conflict on the question of how courts should deal with a Westfall Act certification that was "based on an argument that no harm-causing incident ever took place." *Id.* at 14a (citing *Wood* v. *United States*, 995 F.2d 1122, 1124 (1st Cir. 1993) (en banc) (Breyer, C.J.) (holding that the certification "cannot deny the occurrence of the basic incident charged"), and *Kimbro* v. *Velten*, 30 F.3d 1501, 1508-1510 (D.C. Cir. 1994) (holding that the district court must resolve the merits of the underlying dispute in such a circumstance), cert. denied, 515 U.S. 1145 (1995)). Purporting to follow the First Circuit's decision in *Wood*, the district court denied the United States' request for an evidentiary hearing on whether Haley sought petitioner's firing in retaliation for her DOL complaint, *id.* at 15a, and also rejected the United States' request for discovery as to whether, in the alternative, there had been some other interaction between Haley and Luber within the scope of Haley's employment that might have influenced Luber's decision to terminate petitioner, *id.* at 14a. The court would not allow the United States to make an argument concerning possible interaction between Haley and Luber that the court viewed as being inconsistent with Haley's sworn declaration. *Ibid.*

4. The court of appeals reversed. Pet. App. 1a-11a. It analyzed the appeal as presenting the question "whether district courts evaluating a scope certification can resolve material disputes about the facts 'upon which the plaintiff would predicate liability,' or whether instead courts must accept the plaintiff's allegations of such 'merits facts.'" *Id.* at 4a (quoting *Melo* v. *Hafer*, 13 F.3d 736, 742-743 (3d Cir. 1994)). The court "join[ed] the majority of the circuits" on that issue and held that "where the Attorney General's certification 'is based on a different understanding of the facts than is reflected in the complaint,' * * * including a denial of the harm-causing

incident, the district court must resolve the factual dispute." *Id.* at 8a (quoting *Melo*, 13 F.3d at 747). The court cited, among other reasons, the need for the employee's immunity to be decided at the outset of the litigation and the difficulty of administering the First Circuit's distinction in *Wood* between denial by the Attorney General of the alleged harm-causing incident (which the First Circuit held is not permitted in a certification) and disputing the plaintiff's characterization of the incident (which the First Circuit allowed). *Id.* at 5a-7a. The court of appeals therefore remanded to the district court for a hearing to "resolve the factual disputes underlying the scope question, including whether the alleged incident occurred." *Id.* at 11a.

The court of appeals also addressed the question whether, if substitution is ultimately not upheld by the district court, the district court must remand the case to state court. The court held that, in light of the Westfall Act's language stating that the "certification of the Attorney General shall conclusively establish scope of office or employment for purposes of removal," 28 U.S.C. 2679(d)(2), the "clear language of the Act forecloses remand." Pet. App. 10a.

SUMMARY OF ARGUMENT

1. The court of appeals had jurisdiction to review the order of the district court overturning the substitution of the United States for the defendant employee and remanding the case to state court. As the courts of appeals have uniformly recognized, a district court order rejecting the Attorney General's scope-of-employment certification under the Westfall Act constitutes the denial of the employee's absolute statutory immunity from suit and is immediately appealable under the collateral order doctrine. Even if it were not appealable as of right, the district court's order remanding the case to state court, in the face of Congress's mandate that the Attorney General's scope-of-employment certification is conclusive for purposes of removal, could be reviewed by mandamus.

Section 1447(d) does not bar the court of appeals from exercising its jurisdiction to review either the substitution ruling or the remand order. That section, this Court has made clear, precludes review only of orders entered pursuant to one of the grounds specified in the subsection that precedes it, 28 U.S.C. 1447(c). Section 1447(c) authorizes remand if the district court "lacks subject matter jurisdiction" over a removed case or if there is some other "defect" in removal. This case does not involve any defect in removal, and Section 1447(c)'s reference to remands for lack of subject matter jurisdiction is best read as limited to remand orders entered on the ground that the court lacked jurisdiction *at the outset*. That reading is consistent with the historical evolution of Section 1447(c) and the general rule that the court's subject matter jurisdiction is fixed at the time a suit is filed and subsequent events do not deprive the court of that jurisdiction. Here, it is clear that the district court had subject matter jurisdiction upon removal and at the time of its substitution ruling.

The remand order here does not fall within the scope of Section 1447(c) for the independent reason that the Westfall Act itself precludes such a remand order. Under the Westfall Act, once a case is removed to federal court on the basis of the Attorney General's scope-of-employment certification, that certification is "conclusive[] * * * for purposes of removal." 28 U.S.C. 2679(d)(2). By categorically precluding remand in such circumstances, Congress removed any such remand orders from the scope of Section 1447(c) and (d). Although Congress did not cross-reference Section 1447(c) expressly in Section 2679(d)(2), it specifically mandated that review of the Attorney General's scope-of-employment certification is to take place in *federal* court and left no doubt that the district court is without authority under Section 1447(c) to remand a case removed under Section 2679(d)(2) if the court overturns the Attorney General's certification. The Congress that categorically precluded such remand orders could not have in-

tended that an erroneous remand escape correction by a federal appellate court.

Even if Section 1447(d) did bar review of the order remanding the case to state court, it would not preclude review of the separate order of the district court rejecting the Attorney General's scope-of-employment certification. That order is separate from and logically anterior to the district court's erroneous remand order. Indeed, because Section 2679(d)(2) precludes such remand orders, Congress clearly intended the substitution order to be appealable without regard to any bar imposed by Section 1447(d). Section 1447(d) clearly applies only to "remand[]" orders, and does not encompass an order entered while the district court had jurisdiction and that the court of appeals would have authority to review.

2. On the merits, the court of appeals was correct in holding that the Westfall Act does not require the Attorney General, in making his scope-of-employment certification, to accept the truth of the plaintiff's allegations. The Westfall Act was enacted to confer absolute immunity, enforceable in federal court, to protect employees from common law tort suits arising out of matters within the scope of that employment. Under petitioner's construction, that purpose of the Westfall Act would be frustrated, and the Act would afford less protection than the general federal officer removal statute.

It is well established that, under 28 U.S.C. 1442, a federal officer can remove a tort suit brought against him in state court by showing that he has a colorable claim to official immunity and that there is a causal nexus between the suit and his federal employment. In making out those jurisdictional elements, the defendant employee is free to assert facts that are inconsistent with those alleged by the plaintiff and, if there is a dispute, he is entitled to present evidence and have the validity of his position determined in federal court. Likewise, if the Attorney General declines to certify that an employee was acting within the scope of his employment, the employee may petition the court to resolve the merits of his

claim and to find that he was, in fact, acting within the scope of his employment.

Petitioner argues that the Attorney General, in contrast, must accept the truth of the plaintiff's allegations, and cannot certify that the employee was acting within the scope of his employment based on a determination of fact that is inconsistent with the plaintiff's claim. There is no basis in the statutory text or policy to conclude that the Attorney General is more constrained in his ability to assert immunity on behalf of the employee than the employee is himself.

Petitioner's position would permit a plaintiff to deny unilaterally a defendant his Westfall Act immunity simply by pleading her case in a way that is inconsistent with the defendant's having acted within the scope of his employment, for example, by alleging that the defendant acted maliciously or intentionally. Petitioner attempts to avoid that problem by distinguishing between denying that an alleged incident occurred (which petitioner would forbid) and recharacterizing the incident in a way that falls within the scope of employment (which petitioner would permit). The majority of the courts of appeals that have considered that approach have correctly rejected it as both conceptually and practically flawed.

3. As noted above, Congress was clear in Section 2679(d)(2) that the Attorney General's certification that a defendant employee acted within the scope of his employment is "conclusive[] * * * for purposes of removal." 28 U.S.C. 2679(d)(2). All nine Members of this Court in *Gutierrez de Martinez* v. *Lamagno*, 515 U.S. 417 (1995), viewed that language as reflecting Congress's intent that, once a case is removed to federal court on the basis of the Attorney General's certification, it is to remain in federal court, even if the certification is later overturned.

It does not violate Article III for the district court to retain jurisdiction over a case like this, even if the Attorney General's certification is overturned on judicial review. Article

III is satisfied here because, as in the case of general federal officer removal under Section 1442, the Attorney General's certification that the defendant was acting within the scope of his authority establishes a colorable federal defense of immunity under the Westfall Act. The presence of that defense, the fact that the Westfall Act calls for judicial review of that Executive Officer's certification, and the fact that, as a consequence of the Attorney General's certification, the United States is made the defendant and federal substantive and procedural law governs amply satisfy Article III's requirement of a federal element to the case. It does not matter that, after exercising its jurisdiction to decide that federal question, the district court holds the federal immunity defense invalid. The court retains the jurisdiction that was present at the outset of the case, and may proceed, as Congress has directed, to adjudicate the remainder of the case.

ARGUMENT

I. THE COURT OF APPEALS HAD JURISDICTION TO REVIEW THE DISTRICT COURT'S ORDER

In its order granting a writ of certiorari, the Court directed the parties to brief the question "[w]hether the court of appeals had jurisdiction to review the district court's remand order, notwithstanding 28 U.S.C. 1447(d)." 126 S. Ct. 2017 (2006). Petitioner did not challenge the court of appeals' jurisdiction, and that court did not address it. As explained below, both the district court's substitution ruling and its remand order were appealable pursuant to 28 U.S.C. 1291 under the collateral order doctrine, and the latter was reviewable as well by way of mandamus. Section 1447(d) did not bar the court of appeals from exercising that jurisdiction.

A. The District Court's Substitution Ruling And Its Remand Order Are Reviewable Under The Collateral Order Doctrine Or By Way Of Mandamus

The courts of appeals have unanimously and correctly held that a district court order overturning the Attorney General's Westfall Act certification and resubstituting the individual employee as the defendant constitutes a denial of absolute immunity and is subject to immediate appeal pursuant to the collateral order doctrine of *Cohen* v. *Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949).[2]

It is well established that "the denial of a substantial claim of absolute immunity is an order appealable before final judgment, for the essence of absolute immunity is its possessor's entitlement not to have to answer for his conduct in a civil damages action." *Mitchell* v. *Forsyth*, 472 U.S. 511, 525 (1985). See *Will* v. *Hallock*, 126 S. Ct. 952, 958 (2006); *Nixon* v. *Fitzgerald*, 457 U.S. 731, 742 (1982). As the Court has explained, and petitioner concedes (Pet. Br. 28-29), the Westfall Act "establishes the absolute immunity for Government employees that the Court declined to recognize under the common law in *Westfall* [v. *Erwin*, 484 U.S. 292 (1988)]." *United States* v. *Smith*, 499 U.S. 160, 163 (1991). See Westfall Act § 2(a), 28 U.S.C. 2671 note (102 Stat. 4563) (statutory findings concerning importance of "immunity" of federal employees from common law torts). "When a policy is embodied in a constitutional or statutory provision entitling a party to immunity

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[2] See *Woodruff* v. *Covington*, 389 F.3d 1117, 1124 (10th Cir. 2004); *Mathis* v. *Henderson*, 243 F.3d 446, 448 (8th Cir. 2001); *Cuoco* v. *Moritsugu*, 222 F.3d 99, 105-106 (2d Cir. 2000); *Borneman* v. *United States*, 213 F.3d 819, 826 (4th Cir. 2000), cert. denied, 531 U.S. 1070 (2001); *Lyons* v. *Brown*, 158 F.3d 605, 607 (1st Cir. 1998); *Taboas* v. *Mlynczak*, 149 F.3d 576, 579 (7th Cir. 1998); *Rodriguez* v. *Sarabyn*, 129 F.3d 760, 764 (5th Cir. 1997); *Coleman* v. *United States*, 91 F.3d 820, 823 (6th Cir. 1996); *Flohr* v. *Mackovjak*, 84 F.3d 386, 390 (11th Cir. 1996); *Kimbro*, 30 F.3d at 1503; *Aliota* v. *Graham*, 984 F.2d 1350, 1354 (3d Cir.) (Alito, J.), cert. denied, 510 U.S. 817 (1993); *Pelletier* v. *Federal Home Loan Bank*, 968 F.2d 865, 873 (9th Cir. 1992).

from suit * * *, there is little room for the judiciary to gainsay its 'importance'" for purposes of the collateral order doctrine. *Digital Equip. Corp.* v. *Desktop Direct, Inc.*, 511 U.S. 863, 879 (1994).

The district court's order resubstituting Haley as the defendant is no less "final" for purposes of the right to an immediate appeal simply because the district court thereafter proceeded to remand the case to state court. This Court rejected such an argument in *Quackenbush* v. *Allstate Insurance Co.*, 517 U.S. 706 (1996). In that case, the Court upheld the appealability of an order remanding the case to state court on abstention grounds. *Id.* at 712-714. The Court rejected an argument that remand orders are categorically nonfinal, even when they would otherwise satisfy the requirements of the collateral order doctrine. *Id.* at 714-715. The court noted that it had previously held, in *Moses H. Cone Memorial Hospital* v. *Mercury Construction Corp.*, 460 U.S. 1, 11 n.11 (1983), that an abstention order is immediately appealable because it "puts the litigants in this case 'effectively out of court,' and its effect is 'precisely to surrender jurisdiction of a federal suit to a state court.'" *Quackenbush*, 517 U.S. at 714 (quoting *Moses H. Cone*, 460 U.S. at 11 n.11, certain internal quotation marks omitted). A remand order based on abstention grounds, the Court further observed, "is clearly more 'final' than a stay order in this sense." *Ibid.*

The same reasoning applies here. The district court's order rejecting, as a matter of law, the Attorney General's certification and denying Haley absolute immunity under the Westfall Act was made even more obviously "final" by the fact that the district court proceeded to rely on that denial of immunity as the basis to deny Haley the neutral federal forum that Congress mandated. See 28 U.S.C. 2679(d)(2) (upon the Attorney General's certification, a state suit "shall be removed" and the certification treated as "conclusive[] * * * for purposes of removal"). Moreover, in state court, Haley could be denied an important aspect of his claim of absolute immu-

nity—the right to take an immediate appeal if immunity is denied by the trial court. See *Johnson* v. *Fankell*, 520 U.S. 911, 922-923 (1997) (holding that state courts are not obligated to permit an interlocutory appeal of the denial of qualified immunity in a suit under 42 U.S.C. 1983). If no appeal were available in federal court, the district court's remand order would effectively deny Haley that important federal right.[3]

Even if the district court's remand order were not final for purposes of Section 1291, it would be subject to review on a petition for a writ of mandamus. In *Thermtron Products, Inc.* v. *Hermansdorfer*, 423 U.S. 336 (1976), the Court held that "[b]ecause the District Judge remanded a properly removed case on grounds that he had no authority to consider, he exceeded his statutorily defined power; and issuance of the writ of mandamus was not barred by § 1447(d)." *Id.* at 351. So too here. Section 2679(d)(2) makes the Attorney General's certification "conclusive[]" with respect to the district court's removal jurisdiction. The district court had no authority to disregard that statutory command. Thus, as in *Thermtron*, the district court "exceeded his statutorily defined power" in remanding the case, and that error is subject to correction by mandamus. See *Aliota* v. *Graham*, 984 F.2d 1350, 1357 (3d Cir.) (Alito, J.), cert. denied, 510 U.S. 817 (1993); *Borneman* v. *United States*, 213 F.3d 819, 825 (4th Cir. 2000), cert. denied, 531 U.S. 1070 (2001); *Nasuti* v. *Scannell*, 906 F.2d 802, 811 (1st Cir. 1990) ("[T]he district court's remand order was

[3] Petitioner argues (Pet. Br. 29-31 (citing *Johnson* v. *Jones*, 515 U.S. 304, 314 (1995)) that a district court's order overturning an "incident-denying certification" cannot qualify as an appealable ruling on a question of immunity because it requires a resolution of disputed facts, and only purely legal determinations can satisfy the collateral order doctrine. Even assuming, *arguendo*, that some category of rulings with respect to a claim of Westfall Act immunity would not satisfy the collateral order doctrine, there can be no serious question that the order under review here, which categorically holds that the Attorney General must accept the plaintiff's allegations in making his scope-of-employment determination, resolves a pure question of law respecting the scope of Westfall Act immunity.

a departure so lacking in statutory basis, and so clearly contrary to Congressional policy as expressed in the Westfall Act, as to require our review by mandamus.”).

B. 28 U.S.C. 1447(d) Did Not Bar The Court Of Appeals From Reviewing The District Court’s Decree

1. Section 1447(d) is not implicated because the district court’s remand order was not among those authorized by Section 1447(c)

It is clear from the text of Section 2679(d)(2) that this case was properly removed to district court as soon as the Attorney General issued the Westfall Act certification, and that the district court was properly vested with subject matter jurisdiction from the outset. See 28 U.S.C. 2679(d)(2) (upon certification, “any civil action or proceeding commenced upon such claim in a State court shall be removed”). Indeed, the district court did not question that it had subject matter jurisdiction at the time of removal. After removal, the court overturned the Attorney General’s certification and resubstituted respondent Haley as the defendant. Pet. App. 24a. That ruling by the district court, on a substantive question of federal law, was immediately appealable in its own right because it denied Haley absolute immunity. See pp. 13-15, *supra*. Because that ruling was logically separate from and anterior to the erroneous determination to remand that followed, Section 1447(d) posed no obstacle to appellate review of the substitution order. See pp. 25-27, *infra*. Indeed, because the Westfall Act *precludes* the possibility of a valid removal order after a substitution ruling, Congress clearly contemplated that such rulings would be reviewable without regard to Section 1447(d).

Only after making its substitution ruling did the district court go on to remand the case to state court, believing that it was without jurisdiction to adjudicate the remaining issues “[b]ecause the United States is not before the court,” Pet. App. at 25a. That remand did not come within either 28 U.S.C. 1447(c) or (d). It did not alter the fact that the court

had subject matter jurisdiction at the time of removal, and it conflicted with 28 U.S.C. 2679(d)(2), which renders the Attorney General's certification "conclusive[] * * * for purposes of removal." Under this Court's decisions, Section 1447(d) poses no bar to appellate review of such a remand order.

a. Section 1447(d) provides that "[a]n order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise." 28 U.S.C. 1447(d). This Court has made clear, however, that Section 1447(d) must be read in *pari materia* with 28 U.S.C. 1447(c). See *Thermtron*, 423 U.S. at 343. "[O]nly remands based on grounds specified in § 1447(c) are immune from review under § 1447(d)." *Things Remembered, Inc.* v. *Petrarca*, 516 U.S. 124, 127 (1995). See *Kircher* v. *Putnam Funds Trust*, 126 S. Ct. 2145, 2153 (2006) (same). Thus, this Court has reviewed a remand order based on a district court's crowded docket, *Thermtron*, 423 U.S. at 340-341, a remand based on abstention, *Quackenbush*, 517 U.S. at 710-712, and the discretionary remand of state law claims after the federal law claims that had supported removal were eliminated from the case, *Carnegie-Mellon Univ.* v. *Cohill*, 484 U.S. 343, 348 (1988). In each of those cases, the case was properly removed to federal district court, the district court was properly vested with jurisdiction from the outset, and the purported ground for the remand was not one authorized or specified in Section 1447(c).[4]

b. One ground for remand provided in Section 1447(c) is lack of subject matter jurisdiction. But that reference has to

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[4] *Cohill* held that "Section[] * * * 1447(c) * * * do[es] not apply to cases over which a federal court has pendent jurisdiction," and that therefore "the remand authority conferred by the removal statute [Section 1447(c)] and the remand authority conferred by the doctrine of pendent jurisdiction overlap not at all." 484 U.S. at 355 n.11. It follows from *Cohill*'s holding that a discretionary remand of pendent claims is not a remand under Section 1447(c) that such a remand is not within Section 1447(d)'s bar to appellate review. See *Kircher*, 126 S. Ct. at 2153. But see *Things Remembered*, 516 U.S. at 130 (Kennedy, J., concurring) (stating that *Cohill* did not decide "whether subsection (d) would bar review" of orders remanding pendent claims as a matter of discretion).

be understood, and has been understood by the courts of appeals, as limited to remand orders for a lack of subject matter jurisdiction at the time of removal.[5] That reading is consistent with the general rule that a court's subject matter jurisdiction is fixed at the time the suit is brought and is not defeated by subsequent acts. See, *e.g.*, *Grupo Dataflux* v. *Atlas Global Group, L.P.*, 541 U.S. 567, 574 (2004); *Freeport-McMoRan, Inc.* v. *KN Energy, Inc.*, 498 U.S. 426 (1991); *St. Paul Mercury Indem. Co.* v. *Red Cab Co.*, 303 U.S. 283, 203 (1938). In *St. Paul Mercury Indemnity*, for example, the Court held that a case that had been properly removed to federal court under diversity jurisdiction could not thereafter be remanded to state court when the plaintiff later reduced the damages claimed to an amount below the jurisdictional minimum. The Court explained that "events occurring subsequent to removal which reduce the amount recoverable * * * do not oust the district court's jurisdiction once it has attached." 303 U.S. at 293, 296. See *Cohill*, 484 U.S. at 356 n.12 (discussing *St. Paul Mercury Indemnity*). More particularly, in the context of suits removed under the federal officer removal statute, 28 U.S.C. 1442, the Court has made clear that the district court's jurisdiction is established by the presence at the threshold of a colorable defense of federal immunity, and the ultimate resolution of that defense is immaterial to the district court's jurisdiction. See pp. 45-48, *infra*.

That reading is also consistent with the historical evolution of the removal statutes. Section 1447 traces its roots to

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[5] See, *e.g.*, *Letherer* v. *Alger Group, L.L.C.*, 328 F.3d 262, 265 (6th Cir. 2003) ("appellate review of remand orders is prohibited only where the district court remands because it lacks subject matter jurisdiction at the time of removal"); *Poore* v. *American-Amicable Life Ins. Co.*, 218 F.3d 1287, 1290-1291 (11th Cir. 2000); *Transit Cas. Co.* v. *Certain Underwriters at Lloyd's*, 119 F.3d 619, 623 (8th Cir. 1997), cert. denied, 522 U.S. 1075 (1998); *Trans Penn Wax Corp.* v. *McCandless*, 50 F.3d 217, 223 (3d Cir. 1995); *In re Amoco Petroleum Additives Co.*, 964 F.2d 706, 708-709 (7th Cir. 1992). But see *Linton* v. *Airbus Industrie*, 30 F.3d 592, 599-600 (5th Cir.) ("jurisdictional remands premised on post-removal events are not reviewable"), cert. denied, 513 U.S. 1044 (1994).

the Act of March 3, 1887, ch. 373, 24 Stat. 553. See *Thermtron Prods.*, 423 U.S. at 346-348. When Congress recodified those provisions in 1948 and 1949, it made explicit that a remand was available based only on defects at the time of removal. Section 1447(c) authorized remand "[i]f at any time before final judgment it appears that the case was removed improvidently and without jurisdiction." 28 U.S.C. 1447(c) (1982). In 1988, the day after the Westfall Act was passed, Congress amended Section 1447(c) to specify that a remand motion based on defects in removal procedure must be made within 30 days of removal, while continuing to allow for a motion to remand if "before final judgment it appears that the district court lacks subject matter jurisdiction." Pub. L. No. 100-702, § 1016(c)(1), 102 Stat. 4670. That language remains in the current version of Section 1447(c). As a number of courts of appeals have concluded, after reviewing the change in statutory text and the legislative history, "the proper inquiry is still whether the court had jurisdiction at the time of removal." *Poore* v. *American-Amicable Life Ins. Co.*, 218 F.3d 1287, 1290 (11th Cir. 2000). See *Van Meter* v. *State Farm Fire & Cas. Co.*, 1 F.3d 445, 450 n.2 (6th Cir. 1993); *In re Shell Oil Co.*, 966 F.2d 1130, 1133 (7th Cir. 1992). It is evident that Congress did not intend to depart from the well established rule "that jurisdiction present at the time a suit is filed or removed is unaffected by subsequent acts." *Shell Oil*, 966 F.2d at 1133. Rather, Congress's focus in adopting the textual change was on ensuring that plaintiffs raise promptly any objection to removal on purely procedural grounds. See H.R. Rep. No. 889, 100th Cong., 2d Sess. Pt. 1, at 72 (1988).

Applying that principle here, it is clear that the district court's remand order was not based on a lack of subject matter jurisdiction at the time of removal, and so does not come within Section 1447(c) or trigger the bar to appellate review in Section 1447(d). Under the express terms of Section 2679(d)(2), the Attorney General's certification conferred subject matter jurisdiction on the district court at the time of

removal. That is sufficient to render Section 1447(d) inapplicable.

c. Furthermore, the Westfall Act provides a specific basis for treating the district court's remand order here as falling outside Section 1447(c) and (d). Congress has specifically precluded remand orders of the type here. That determination—whether understood as a special rule for the Westfall Act or a manifestation of the principle that the time of removal is the relevant time for testing subject matter jurisdiction—likewise renders Section 1447(d) inapplicable.

It is axiomatic that the Court will interpret statutory provisions in light of related ones, in an effort to harmonize them. For example, as the Court noted in *Kircher*, Section 1447(d)'s prohibition on appellate review does not apply to remand orders as to which Congress has specified a right to appeal. See 126 S. Ct. at 2153 n.8 (citing, as a situation to which Section 1447(d) does not apply, 12 U.S.C. 1441a(*l*)(3)(C), which provides that the Resolution Trust Corporation "may appeal any order of remand," without cross-referencing Section 1447(d)). Here, rather than specifying that a district court's remand of a suit removed by the Attorney General under the Westfall Act is subject to appeal notwithstanding Section 1447(d), Congress made clear that cases removed by the Attorney General under that mandatory provision of the Westfall Act are not subject to remand *at all*. That determination clearly places an erroneous remand order entered in contravention of 28 U.S.C. 2679(d)(2) outside the scope of Section 1447(c) and (d). The Congress that attempted to preclude the possibility of such a remand order altogether could hardly have intended to render such an order, if nonetheless entered, unreviewable by virtue of Section 1447(d).

Then-Judge Alito made this very point in *Aliota*, explaining that the "subsequently enacted [Section 2679(d)(2)] expresses Congress's intent that subject matter jurisdiction is conclusively established upon the Attorney General's certification. Since subject matter jurisdiction has been conclu-

sively established, there is no jurisdictional question to be resolved by the district court." 984 F.2d at 1357. "Because the District Court remanded a properly removed case *on grounds that he had no authority to consider*, he exceeded his statutorily defined powers," including the remand authority of Section 1447(c) and appellate review "was not barred by § 1447(d)." *Ibid.* (quoting *Thermtron*, 423 U.S. at 351) (emphasis in *Aliota*). See also *Cohill*, 484 U.S. at 356 (*Thermtron* "was a response to a clearly impermissible remand").[6]

d. This Court's recent decision in *Kircher* is not to the contrary and indeed reinforces that conclusion. *Kircher* concerned the Securities Litigation Uniform Standards Act of 1998 (SLUSA), Pub. L. No. 105-353, 112 Stat. 3227, which authorizes removal from state court, under 15 U.S.C. 77p(c), of a "covered class action * * * involving a covered security, as set forth in" 15 U.S.C. 77p(b). Because Section 77p(b) in turn flatly bars a class action suit described by that provision, the district court must dismiss such a case upon removal. The district court in *Kircher* ruled that the class action litigation

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[6] In *Kircher*, Justice Scalia expressed the view that the Court cannot "look[] behind the face of an order to determine its *true* basis," 126 S. Ct. at 2158 (Scalia, J., concurring), an issue that the majority determined was unnecessary to resolve in that case, *id.* at 2153 n.9. That issue is likewise not presented here. It is clear on the face of the district court's opinion that the court based its finding that it lacked jurisdiction on the court's determination, earlier in that order, that the Attorney General's certification should be overturned and Haley resubstituted as the defendant. As we explain above, that is not a jurisdictional holding covered by Section 1447(c). In any event, a reviewing court is not bound to accept the district court's characterization of legal issues on which a question of jurisdiction turns. See *United States* v. *Jorn*, 400 U.S. 470, 478 n.7 (1971) (plurality opinion of Harlan, J.) ("the trial judge's characterization of his own action cannot control the classification of the action for purposes of our appellate jurisdiction"); *United States* v. *Sisson*, 399 U.S. 267, 279 n.7 (1970). The reviewing court must determine its own jurisdiction independently. See *Liberty Mut. Ins. Co.* v. *Wetzel*, 424 U.S. 737, 742 (1976) (court of appeals erred in accepting the district court's "recital" that final judgment had been entered when the record showed the contrary); *Things Remembered*, 516 U.S. at 134 (Ginsburg, J., concurring).

involved in that case was not precluded by Section 77p(b), and remanded the case. 126 S. Ct. at 2151. This Court held that Section 1447(d) barred appeal of the remand order because it was "necessarily based on the trial court's conclusion that jurisdiction under § 77p(c) was wanting." *Id.* at 2153-2154. The Court explained that "[o]nce removal jurisdiction under subsection (c) is understood to be restricted to precluded actions defined by subjection (b), a motion to remand claiming the action is not precluded must be seen as posing a jurisdictional issue." *Id.* at 2155.

Kircher presented the kind of circumstance that falls within Section 1447(c) and (d). The district court made a purely jurisdictional determination concerning jurisdiction *at the time of removal*, and the litigation would continue in state court, where the parties were free to raise any merits arguments, including those the district court had rejected. See 126 S. Ct. at 2156-2157.

Removal under the Westfall Act is fundamentally different in two critical respects. First, unlike SLUSA, which allows a covered case to remain in state court from the outset, see *Kircher*, 126 S. Ct. at 2156, the Westfall Act provides that a case "*shall be removed*" from state court upon the Attorney General's certification. 28 U.S.C. 2679(d)(2) (emphasis added). The Westfall Act thus mandates a federal forum for determination of the critical scope-of-employment question on the merits of the case.

Second, under SLUSA, the district court's removal jurisdiction depends entirely on the defendants having a *successful* defense. *Kircher*, 126 S. Ct. at 2155 ("removal jurisdiction [is] * * * restricted to precluded actions"). By contrast, as petitioner concedes as a general matter (Pet. Br. 37-38), under the Westfall Act the Attorney General's scope-of-employment certification "conclusively" establishes the district court's removal jurisdiction at the outset, even if the district court later overturns the scope-of-employment determination and resubstitutes the employee as defendant. See pp. 41-49, *in-*

fra. Indeed, the Court in *Kircher* specifically contrasted SLUSA to the federal officer removal statute in this respect, noting that a federal officer's federal defense need only be "colorable" in order to sustain removal jurisdiction under Section 1442(a), because that section "reflects a congressional policy that 'federal officers, indeed the Federal Government itself, require the protection of a federal forum.'" 126 S. Ct. at 2155 n.12 (quoting *Willingham*, 395 U.S. at 407). The Westfall Act reflects that same policy.

Given the express statutory mandate for both initial and continuing jurisdiction in federal district court, it follows from the statutory framework that review lies in a federal court of appeals if the district court disregards that mandate.

e. That conclusion is further reinforced by the consequences of the certification question that Congress has required to be decided by the federal courts under 28 U.S.C. 2679(d)(2). Congress made clear in statutory findings set forth in the Westfall Act itself the purpose to establish an "*immunity* of Federal employees from common law tort liability." Westfall Act § 2(a)(5), 28 U.S.C. 2671 note (102 Stat. 4563) (emphasis added). See *Smith*, 499 U.S. at 163. By the time the Westfall Act was passed, this Court had already established that the denial of claims of absolute or qualified official immunity are subject to immediate appeal. *Mitchell*, 472 U.S. at 525. The same is not true, as a matter of federal law, in state court. By mandating a federal forum to litigate the question of the employee's statutory immunity, Congress can reasonably be understood to have preserved the right to immediate appeal to a federal court of appeals that is triggered in a federal forum if a claim of immunity is rejected. If a district court order overturning a certification and remanding to state court were unreviewable, federal employees would be denied that right.

The district court's resubstitution order also has other ramifications for the litigation far beyond merely deciding whether a state court will hear the merits of the plaintiff's

claims—which was the only consequence in *Kircher*. If the Attorney General's scope certification is correct, the FTCA mandates exclusive jurisdiction over the plaintiff's claims in federal court, see 28 U.S.C. 1346(b)(1), and those claims lie against a different defendant—the United States. See 28 U.S.C. 2679(b)(1) (FTCA remedy against the United States is exclusive). As a result, distinct substantive and procedural rules apply, such as an administrative exhaustion requirement, 28 U.S.C. 2675(a), limitations on liability, 28 U.S.C. 2674, and unique federal defenses, 28 U.S.C. 2680.

In light of the numerous jurisdictional and substantive consequences that flow from resolution of the certification issue under the Westfall Act, petitioner's position that the district court's remand order is unreviewable is especially problematic. The United States would be forced to subject itself and its employees to the jurisdiction of the state courts and seek to vindicate the Attorney General's certification there (assuming that the state courts would have authority to reconsider the district court's ruling), with ultimate review in this Court from an adverse state-court decision. If the position of the United States and its employee on the scope-of-employment issue ultimately prevailed, any proceedings in state court against the employee personally would be a nullity, and the entire litigation would have to begin anew against the United States in federal court pursuant to the FTCA. And, in the meantime, the employee would have been improperly subjected to suit when Congress had mandated immunity. Such exposure to suit and waste of resources would be directly contrary to the Westfall Act's goal of shielding federal employees from the "prospect of personal liability and the threat of protracted personal tort litigation" related to their employment, Westfall Act § 2(a)(5), 28 U.S.C. 2671 note (102 Stat. 4563), and to the very policies of affording a federal forum while promoting judicial efficiency that underlie the Westfall Act and removal statutes generally.

2. *The district court's ruling overturning the Attorney General's certification and ordering Haley resubstituted as the defendant is appealable in its own right*

Even if the remand aspect of the district court's decree were not appealable, the resubstitution order still would be. As explained above, the substitution ruling is clearly appealable under the collateral order doctrine. That ruling does not become unreviewable by operation of Section 1447(d) simply because it is accompanied by an erroneous remand order, and the substitution order is logically separate from and anterior to the remand order. The remand order is not the necessary consequence of the substitution order. Indeed, 28 U.S.C. 2679(d)(2) makes clear that the remand order should not have followed the substitution order at all. Congress's scheme clearly provided for a substitution ruling that would be immediately appealable (because it denies absolute immunity), and that immediate appeal could not be defeated by Section 1447(d) because 28 U.S.C. 2679(d)(2) precluded a remand order. In the event of an erroneous remand order in contravention of 28 U.S.C. 2679(d)(2), whatever can be said about the appealability of the remand order itself, it should not operate to render the substitution order unappealable.

This Court confronted a similar situation in *Waco* v. *United States Fidelity & Guaranty Co.*, 293 U.S. 140 (1934). There, the Court held that Section 1447(d) does not bar appeal from an otherwise appealable order that is encompassed within a decree that also contains an order remanding the case to state court. In *Waco*, the district court had "entered a single decree embodying three separate orders." *Id.* at 142. One dismissed the cross-complaint against the only diverse party, and another ordered the case remanded to state court because, "upon that dismissal, there was no diversity of citizenship" and the district court thus "lacked jurisdiction." *Ibid.* This Court held that the order dismissing the cross-complaint could be appealed, even though no appeal had been

taken from the remand order and (the Court stated) "no appeal lies" from that order. *Id.* at 143. The Court explained that "if not reversed or set aside, [the dismissal would be] conclusive upon the petitioner" because "the cross-action will be no part of the case which is remanded to the state court." *Ibid.* If the dismissal order was erroneous, reversal would "remit the entire controversy, with the [respondent] still a party, to the state court for such further proceedings as may be in accordance with law." *Id.* at 143-144.

As in *Waco*, the district court's order of March 10, 2002, had three parts. First, the district court "DENIED" the United States' motion to dismiss the complaint. Pet. App. 17a. Next, the court "OVERRULED" the United States' substitution and reinstated Haley as the defendant in his individual capacity. *Ibid.* Finally, the court "REMANDED" the case to state court. *Ibid.* Thus, here, as in *Waco*, the district court's resubstitution order "preceded that of remand." 293 U.S. at 143. That is true not only in a literal sense that the resubstitution order is listed before the remand order in the district court's decree, see Pet. App. 17a, but also as a matter of substance. The district court's March 10 Memorandum and Order resolved the two issues separately. First, it took up the question of the Attorney General's certification and the United States' substitution. *Id.* at 21a-24a. Only *after* concluding that the certification should be overturned did the court take up the separate question of whether, in light of the resubstitution, the case should be remanded. *Id.* at 24a-25a.

Petitioner errs in contending that *Waco* is distinguishable because "as in *Kircher*, the 'remand order here cannot be disaggregated as the *Waco* orders could.'" Pet. Br. 17 (quoting *Kircher*, 126 S. Ct. at 2156 n.13).[7] As noted above, in

[7] In *Kircher*, the court raised a question as to "the continued vitality of [*Waco*] in light of § 1447(d)." 126 S. Ct. at 2156 n.13. It is unclear in what way the Court thought the enactment of Section 1447(d) might have undermined *Waco*. When Congress enacted 28 U.S.C. 1447(d) in 1949, to cure an oversight in the codification of Title 28 the year before, the House Report that accompa-

Kircher, the question of removal jurisdiction and the question whether the claims were precluded were one and the same. 126 S. Ct. at 2155 ("removal jurisdiction under subsection (c) is * * * restricted to precluded actions defined by subsection (b)"). The district court could not resolve the issue of preclusion without also deciding the issue of its removal jurisdiction. *Ibid*. That is not so here. As this Court made clear in *Lamagno*, when the Attorney General certifies that a federal employee was acting within the scope of employment, the case is properly removed to the federal district court, which then has jurisdiction to decide the federal question whether the Attorney General's scope certification was correct. 515 U.S. at 431-432. There was no suggestion in *Lamagno* that a decision to overturn the certification would render the removal itself improper. There can be little doubt, for example, that, unlike in *Kircher*, the district court in this case could have decided the scope certification question and then asked for briefing on the question of remand. (In fact, petitioner had not requested, and neither party had briefed, the issue of remand.) Had it done so, the government could have immediately appealed the order denying substitution (and thereby denying Haley his statutory immunity) under the collateral order doctrine, as discussed above. The fact that the district court inserted its order remanding the case in the same decree that contained its order on substitution did not shield the substitution order from appellate review.[8]

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nied the amendment explained that it was made "to remove any doubt that *the former law as to the finality of an order of remand to a State court is continued*." H.R. Rep. No. 352, 81st Cong., 1st Sess. 15 (1949) (emphasis added). Thus, whatever the effect of the enactment of Section 1447(d) in its current form, it did not overturn *Waco* by rendering unappealable an order that otherwise satisfies the requirements of finality under Section 1291 and is itself separable from the remand order, especially when the issue is one that must be decided by the federal district court.

[8] Petitioner appears to concede (Pet. Br. 17-18) that district court orders overturning scope certifications would be separate orders under *Waco* in most cases, but asks the Court to adopt a different rule for this case because,

II. UNDER THE WESTFALL ACT, THE ATTORNEY GENERAL NEED NOT ACCEPT THE TRUTH OF THE PLAINTIFF'S ALLEGATIONS IN MAKING A SCOPE-OF-EMPLOYMENT CERTIFICATION

As previously discussed, see p. 2, *supra*, the Westfall Act built upon and expanded the common law official immunity afforded federal employees for acts taken in connection with their employment. Whereas this Court held in *Westfall* that a government employee enjoys official immunity from tort liability if he was acting within the scope of his employment and performing a discretionary function, 484 U.S. at 299, the Westfall Act eliminates the discretionary function requirement, thereby making the scope-of-employment issue dispositive. See *Lamagno*, 515 U.S. at 425-426; H.R. Rep. 700, at 4. Even before the Westfall Act, it was well established that federal officers are entitled, under 28 U.S.C. 1442(a), to remove state tort suits in order to have their federal immunity defense, including the scope-of-employment issue, determined by a federal court, even though its resolution may turn on disputed facts. It follows *a fortiori* that the Attorney General's scope-of-employment certification under the Westfall Act may likewise rest upon the resolution of disputed facts, subject to review by the federal court following removal.

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petitioner maintains, "the district court in the end did not reject the Attorney General's certification because the court thought it 'erroneous' (in the sense that respondent Haley had acted *outside* rather than *within* the scope of his employment)," but because the court concluded "that the Attorney General lacked authority to issue an incident-denying certification." That assertion does not withstand scrutiny. The district court overruled the Attorney General's scope certification because the court found that, accepting all of petitioner's allegations as true, her tort claims against Haley "fall outside the scope of his employment." Pet. App. 24a. The district court's subsequent order denying the government's motion to reconsider did not undo the court's earlier order. It merely added a further legal ruling that the government was not entitled either to test the truthfulness of the petitioner's allegations or to discover what facts relevant to Haley's scope of employment petitioner might rely on in proving her tort claims. *Id.* at 14a-15a.

A. A Federal Employee Is Entitled To A Federal Forum To Determine His Claim Of Official Immunity, Including To Resolve Any Disputed Facts

Section 1442(a)(1) allows any officer of the United States to remove any civil action where the officer is "sued in an official or individual capacity for any act under color of such office," 28 U.S.C. 1442(a)(1), whether or not the suit could originally have been brought in federal court. See *Willingham*, 395 U.S. at 406. The Court made clear in *Willingham* that a removing federal officer is free to deny the allegations against him and, if there are factual disputes relating to whether the defendant was acting within the scope of his employment, the officer is entitled to a hearing in federal court to resolve those disputed facts. *Id.* at 406-409.

Willingham involved a civil suit filed by a federal inmate in state court against two federal prison officials who were alleged to have tortured the inmate "out of malice." *Morgan* v. *Willingham*, 383 F.2d 139, 140 (10th Cir. 1967). Upon removal pursuant to Section 1442(a)(1), the district court held that the federal officers were entitled to immunity, *ibid.*, but the Tenth Circuit reversed. The court of appeals held that a district court's removal jurisdiction under Section 1442(a)(1) was narrower than the scope of common law immunity, *id.* at 142, and that, in order to remove, a defendant "must exclude the possibility that the suit is based on acts or conduct not justified by his federal duty," *id.* at 141.

This Court rejected that view. It held that Section 1442, at the very least, "is broad enough to cover all cases where federal officers can raise a colorable defense arising out of their duty to enforce federal law." *Willingham*, 395 U.S. at 406-407. The Court explained that one of the purposes of Section 1442 was "to have such defenses litigated in the federal courts," and that the position of the court of appeals would create the "anomalous result of allowing removal only when the officers had a clearly sustainable defense. The suit

would be removed only to be dismissed." *Id.* at 407. Such a rule, the Court explained, would be contrary to the statutory purpose of having "the validity of the defense of official immunity tried in a federal court." *Ibid.* "In cases like this one," the Court stressed, "Congress has decided that federal officers, and indeed the Federal Government itself, require the protection of a federal forum." *Ibid.*

Noting that the defendants in *Willingham* had denied the plaintiff's allegations, the Court explained that a federal officer "need not admit that he actually committed the charged offenses," *i.e.*, that the petitioners "actually injured respondent." 395 U.S. at 408. Rather, it was "sufficient" for the federal officers "to have shown that their relationship to respondent derived solely from their official duties." *Id.* at 409. The Court also observed that the plaintiff had alleged that the officials were engaged "on a frolic of their own which had no relevancy to their official duties." *Id.* at 407. With respect to that allegation, the Court held that the officers "should have the opportunity to *present their version of the facts* to a federal, not a state, court." *Id.* at 409 (emphasis added).

The Court has reaffirmed *Willingham* in *Jefferson County* v. *Acker*, 527 U.S. 423 (1999), and *Mesa* v. *California*, 489 U.S. 121 (1989). In *Jefferson County*, the Court held that removal under Section 1442(a)(1) requires a federal officer to "both raise a colorable federal defense," such as official immunity, and show a "'causal connection' between the charged conduct and asserted official authority." 527 U.S. at 431 (quoting *Willingham*, 395 U.S. at 409). In so holding, the Court once again stressed that the claim of immunity need only be "colorable" and that Section 1442(a)(1) "do[es] not require the officer virtually to 'win his case before he can have it removed.'" *Ibid.* (quoting *Willingham*, 395 U.S. at 407). Likewise, the law does not "demand[] an airtight case on the merits in order to show the required causal connection." *Id.* at 432. Recognizing that the parties disagreed as to the nature of the plaintiff's claims, the Court "credit[ed] the [*defen-*

dants'] theory of the case for purposes of both elements of our jurisdictional inquiry." *Ibid*. *Mesa* similarly emphasized that the "validity" of the immunity defense "has no connection whatever with the question of jurisdiction." 489 U.S. at 129 (quoting *Mayor* v. *Cooper*, 73 U.S. (6 Wall.) 247, 254 (1868)). It is, rather, the assertion of such a defense that "*is decisive upon the subject of jurisdiction*." *Ibid.* (quoting *Cooper*, 73 U.S. (6 Wall.) at 252).

Under *Willingham*, *Mesa*, and *Jefferson County*, it is evident that Haley raised a colorable federal defense of official immunity and is entitled, under Section 1442 (wholly apart from Section 2679(d)(2)), to a resolution by the district court of any disputed facts relating to his immunity defense.[9] The complaint makes clear that Haley's "relationship to [petitioner] derived solely from [his] official duties." *Willingham*, 395 U.S. at 409. It alleges that "[a]t all times relevant to this complaint, defendant Barry Haley was employed as Business Manager by USDA Forest Service." Luber App. 2. The only direct contact between Haley and petitioner that is alleged is the staff meeting at which Haley announced that someone other than petitioner had been hired to fill the Forest Service position for which she had applied. The only other actions alleged of Haley, stripped of petitioner's self-serving characterizations, were to respond to an inquiry from the Department of Labor as to the process by which the Forest Service position had been filled, and to raise an objection regarding petitioner with her employer, an independent contractor with the Forest Service. As in *Willingham*, "it was sufficient" to

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[9] The Notice of Removal invoked 28 U.S.C. 1442 in addition to Section 2679. See 03-cv-192 (W.D. Ky.), Rec. #1, Notice of Removal 3. Although, as discussed in the text, petitioner's claims were subject to removal on the basis of Section 1442 alone, the government and Haley did not urge Section 1442 in the court of appeals as a separate ground for reversing the district court. As we explain below, see pp. 32-39 *infra*, the Attorney General's removal authority under Section 2679(d)(2) is certainly no more limited than removal jurisdiction under Section 1442.

satisfy the causal nexus test "for [Haley] to have shown that [his] relationship to [petitioner] derived solely from [his] official duties." 395 U.S. at 409.

With respect to the merits of Haley's immunity defense, he was no more required to accept the truth of petitioner's allegation that he "maliciously induced" her dismissal from LBLA "in retaliation for plaintiff filing a veterans' preference inquiry," Luber App. 7, than the defendants in *Willingham* were required to accept the plaintiff's allegation that they were on a "frolic of their own" and had tortured plaintiff "out of malice." 395 U.S. at 407; 383 F.2d at 140. As in *Willingham*, Haley was entitled "to present [his] version of the facts to a federal, not a state, court" to determine "the validity of [his] defense[]" of immunity. 395 U.S. at 409.

B. The Attorney General Is No More Constrained To Accept The Plaintiff's Version Of The Facts In Making A Scope-Of-Employment Certification Under The Westfall Act Than The Federal Officer And The Federal District Court Are Under Section 1442

The district court held in this case that, "[a]t [the removal] stage, this Court must accept [petitioner's] allegations as true," and that it was therefore sufficient to defeat removal under the Westfall Act that petitioner had "adequately alleged conduct on Mr. Haley's part that, if proven, would give rise to tort claims under Kentucky state law and that fall outside the scope of his employment with the United States Forest Service." Pet. App. 24a. That reasoning is the same as the rejected analysis of the Tenth Circuit in *Willingham*: that in order to remove under Section 1442(a)(1), a defendant "must exclude the possibility that the suit is based on acts or conduct not justified by his federal duty," 383 F.2d at 141.

There is no basis for construing the Attorney General's authority to remove an action under 28 U.S.C. 2679(d)(2) as any narrower than a federal officer's ability to remove a case under Section 1442(a). Indeed, petitioner recognizes that the

two statutes are "fairly analogized." Pet. Br. 40. Nonetheless, without discussing *Willingham* (see *id.* at 27-28 (discussing pre-Westfall Act immunity cases, without reference to *Willingham*)), petitioner contends that the Attorney General cannot certify that a federal employee was acting within the scope of employment if "the resulting adjudication by the district court would necessarily consist of 'deciding whether the employee committed the wrong the plaintiff alleges.'" *Id.* at 19 (quoting Pet. App. 5a). As discussed above, that contention cannot be squared with this Court's construction of Section 1442(a) in *Willingham*, and nothing in Section 2679(d) suggests a different result here. Neither the Attorney General, nor the District Court post-certification, needs to credit the plaintiff's version of events.

1. Petitioner notes that Section 2679(d) allows the Attorney General to certify that the defendant was "acting within the scope of his office or employment at the time of the incident out of which the claim arose." Pet. Br. 22 (quoting *Wood*, 995 F.2d at 1124 (Breyer, C.J.) (quoting 28 U.S.C. 2679(d)(1)). Contary to the reasoning in *Wood*, nothing in that language requires the Attorney General to accept the truth of the plaintiff's allegations regarding the "incident" that gave rise to her claim or the federal official's connection with it.

As the several courts of appeals that have rejected the rule of *Wood* have noted, placing critical weight on the "time of the incident" language, as the *Wood* court's analysis does, would create an anomaly when the language of Section 2679(d)(1) and (2) is compared with that of Section 2679(d)(3), which the *Wood* majority did not discuss. See *Melo*, 13 F.3d at 746-747; *Kimbro*, 30 F.3d at 1508; *Heuton* v. *Anderson*, 75 F.3d 357, 360 (8th Cir. 1996); Pet. App. 6a-7a. Section 2679(d)(3), which authorizes a district court to make a scope-of-employment determination at the request of the defendant employee (when the Attorney General has refused to certify that the defendant was acting within the scope of employment), does not have the "time of the incident" language re-

lied upon by *Wood* with respect to Section 2679(d)(1). Section 2679(d)(3) states, without limitation, that the employee may "petition the court to *find and certify* that the employee *was acting within the scope of his office or employment*." 28 U.S.C. 2679(d)(3) (emphasis added). Section 2679(d)(3) provides no basis for having the district court evaluate the scope-of-employment question based only on the allegations of the plaintiff. There is no basis for concluding that Congress intended the Attorney General to be more circumscribed by the plaintiff's allegations in making a certification under Section 2679(d)(1) and (2) that the employee was acting within the scope of employment than the district court is when reviewing the Attorney General's denial of such a certification.

The "time of the incident" language in Section 2679(d)(1) and (2) necessarily refers to the "incident" described in the plaintiff's claim. Nothing in that reference lays down a requirement that the plaintiff's allegation be accepted as true, especially against the contrary background rule of *Willingham* and similar cases. The reference most naturally is read to make clear that the scope of employment is to be considered in conjunction with the claims at issue, not in the abstract. At most, the "time of the incident" language serves a function similar to that of the nexus test under Section 1442, which permits removal only of a claim "for any act under color of such office." 28 U.S.C. 1442(a)(1). The Court has construed that language to require simply a "causal connection" between the claim and the officer's employment, *Jefferson County*, 527 U.S. at 431 (quoting *Willingham*, 395 U.S. at 409).

The Court need not decide in this case what the minimal requirements would be under the "at the time of the incident" language in Section 2679(d)(1) and (2) for the relationship between the claim and the defendant's employment. It is enough for present purposes for the Court to conclude that Section 2679(d)(1) and (2) would impose no *greater* a nexus requirement than Section 1442. Because "it was sufficient" to

satisfy the causal nexus test of Section 1442(a)(1) "for [Haley] to have shown that [his] relationship to [petitioner] derived solely from [his] official duties," *Willingham*, 395 U.S. at 409, see pp. 29-32, *supra*, it was equally sufficient to satisfy any nexus requirement under Section 2679(d)(2).

2. Petitioner also urges (Pet. Br. 23-27) that allowing the Attorney General to certify under the Westfall Act based on a determination that the employee did not act as the plaintiff alleges would be inconsistent with the broader framework of the Westfall Act and the FTCA because it impermissibly "conflate[s]" the "fundamentally different" inquiries regarding scope of employment and the underlying merits. Pet. Br. 24. But the overlap between those inquiries is, in some cases, unavoidable, and it is no more problematic in the Westfall Act context than in the context of other forms of official immunity, which can serve as the basis for removal under Section 1442(a). In *Anderson* v. *Creighton*, 483 U.S. 635 (1987), for example, the Court explained that the court should first try to resolve the defendant's claim of immunity on the purely legal question whether the law was clearly established. *Id.* at 646 n.6. If it could not be resolved on that basis, then, "if the actions Anderson claims he took are different from those the Creightons allege (and are actions that a reasonable officer could have believed lawful), * * * *discovery may be necessary before Anderson's motion for summary judgment on qualified immunity grounds can be resolved*." *Id.* at 646-647 n.6 (emphasis added).

Similarly, under the Westfall Act, the question whether the employee was acting within the scope of his employment can usually be made as a matter of law, but will occasionally require limited discovery and the determination of facts. Under Kentucky law, as understood by the district court, the scope-of-employment determination turns on four factors: whether the "conduct [was] similar to [the employee's] ordinary course of duties," whether the employee's actions "occur[red] within the 'spacial and temporal limits' of his

work," whether the actions were "taken to further the [employer's] goals," and whether the conduct was foreseeable. Pet. App. 23a. Any one of those factors, in a particular case, could turn on disputed facts that also relate to the merits of the plaintiff's claim. Evidence regarding the third—whether the acts were taken to further the employer's goals—is especially likely to overlap with the merits when, as here, the plaintiff's claim depends on showing a particular intent. There is nothing problematic about the court's resolving those overlapping issues as part of its review of the Attorney General's scope-of-employment certification. Indeed, in *Lamagno*, the plurality opinion recognized that, in the course of its review, "the court inevitably will confront facts relevant to the alleged misconduct." 515 U.S. at 435 (opinion of Ginsburg, J.). See also *id.* at 443 (Souter, J., dissenting) (noting the "overlap of jurisdictional evidence and liability evidence"). A plaintiff cannot, simply by asserting a fact or mental state that would be inconsistent with the defendant's scope of employment, preclude the Attorney General from concluding that the defendant was acting within the scope of employment.

The First Circuit's decision in *Nasuti*, is instructive. In that case, the plaintiff alleged that a National Park Service employee had committed an intentional battery by driving his government car in a fashion that hurt the plaintiff. The magistrate judge recognized that "if the plaintiff's version of the events * * * were believed, there was sufficient evidence for a jury to find that the [defendant] had acted intentionally * * * in a manner which amounted to the commission of an assault and battery," and that "these intentional acts would necessarily fall outside the scope of [the defendant's] employment." 906 F.2d at 805. The magistrate believed, along the lines advocated by petitioner, that because he could not decide the scope-of-employment question "without also deciding the merits of [the plaintiff's] case, *i.e.*, whether [the defendant] had committed an assault and battery," the case was not properly removed to federal court. *Ibid.* The First Circuit re-

jected that analysis, holding that the district court "should have decided the scope question," *id.* at 814, including whether, contrary to the plaintiff's allegations, the defendant "was blameless or merely negligent, and was acting within the scope of his authority," *id.* at 812.

As in *Nasuti*, there are (at least) three possible scenarios regarding what took place in connection with petitioner's termination from LBLA: (1) Haley was "blameless," *i.e.*, his interactions with petitioner and LBLA in the context of his employment at the Forest Service had nothing to do with petitioner being fired; (2) Haley did have some connection to petitioner's dismissal, but his actions were intended to further the interests of the Forest Service, such as objecting to petitioner's conduct at the joint staff meeting and raising questions about whether she was a good person for the LBLA-Forest Service team, and were therefore within the scope of his employment; or (3) Haley did, as alleged by plaintiff, bring about petitioner's firing through actions that were outside the scope of his employment. Like the magistrate judge in *Nasuti*, the district court here believed that, at the removal stage, the Attorney General "must accept [petitioner's] allegations as true." Pet. App. 24a. The court would not allow the Attorney General to assert, in the alternative, that Haley had not brought about petitioner's dismissal, but that, if he had some role, that role was within the scope of his employment. *Id.* at 13a-14a. But *Willingham* allows a removing official to do just that under Section 1442(a). 395 U.S. at 408-409. That kind of pleading in the alternative is no more unworkable in the Westfall Act context than it is in the context of Section 1442.

3. Petitioner relies heavily (Pet. Br. 3, 18, 23, 25 n.7) on the supposed "concession" in the court of appeals that, "if Haley induced [petitioner's] firing, he acted outside the scope of his employment." Pet. App. 3a. As we noted in our brief at the petition stage (at 14 n.5), the statement in Haley's appellate brief on which petitioner relies—that "the Memorandum

of Understanding only showed that, if Haley did cause the Contractor to fire [petitioner], he acted outside the scope of his employment," Haley C.A. Br. 21—was intended, in context, only to acknowledge that it would have been outside the scope of Haley's employment for him to orchestrate petitioner's firing with the sole intent of retaliating against her for having filed a DOL inquiry, as the complaint alleges. To the extent petitioner reads that statement as conceding that it would necessarily have been outside the scope of Haley's employment for him to influence petitioner's termination in any way, petitioner is also mistaken as a legal matter.[10] In any event, it is clear that the statement in an appellate brief could have had no influence on the district court's assessment of the Attorney General's certification. In the district court, the government specifically disputed that it would necessarily have been outside the scope of Haley's employment for him to influence petitioner's firing by, for example, raising concerns about her ability to be a good partner to the Forest Service. J.A. 47.[11]

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[10] Even assuming (which the United States and Haley dispute) that Haley would have violated the Memorandum of Understanding by raising a concern about petitioner's fitness for the LBLA-Forest Service team, it is beyond question that an employee can violate the law (or, in this case, a contract) while still acting within the scope of his employment. See, *e.g.*, *Patterson* v. *Blair*, 172 S.W.3d 361, 372 (Ky. 2005) (upholding jury verdict of vicarious liability of employer because, "although the act [of shooting out a truck's tires] was criminal, it was not so outrageous to indicate that the motive was a personal one"); *Heuton*, 75 F.3d at 361 ("It is true that * * * posting the picture was unquestionably prohibited by the USDA, but that does not mean that the act was necessarily outside of the scope of Anderson's employment.").

[11] This alternative set of facts would not, contrary to the district court's understanding, necessarily contradict the assertions in Haley's affidavit. Haley stated that he "had no communication with Ms. Luber *regarding the Department of Labor inquiry to my office*," that he "had no advance knowledge of the termination of [petitioner's] employment with LBLA," and that he "did not advise Gaye Luber regarding the matter, nor * * * attempt to influence her independent decision to fire [petitioner]." J.A. 51-52 (emphasis added). It would be consistent with those statements for Haley to have complained to

Even if petitioner's characterization of the supposed concession were accurate and the Court were inclined to rely on it, Haley would still be entitled under *Willingham* to "present [his] version of the facts to a federal, not a state, court." 395 U.S. at 409. The Court in *Willingham* did not determine that (indeed, it did not even ask whether) it would have been within the scope of employment if, as alleged, the defendant prison officials had tortured the prisoner plaintiff out of malice. Rather, the Court allowed the removing defendants to deny "that they actually injured respondent," *id.* at 408, while maintaining at the same time that any interaction they in fact had with the plaintiff, was "in the performance of [the defendant's] official duties," *ibid.*, and insisting that any factual dispute with respect to the plaintiff's allegation that "they were engaged in some kind of 'frolic of their own'" be resolved by "a federal, not a state, court," *id.* at 409. Haley was similarly entitled to a federal forum to determine the facts relating to his defense of federal officer immunity.

C. Petitioner's Construction Of Section 2679(d)(1) Would Allow Plaintiffs To Deny Federal Employees The Benefits Of The Westfall Act Through Artful Pleading

The First Circuit decision in *Wood*, upon which petitioner relies heavily, acknowledged that its approach carried a risk that "through artful pleading," a plaintiff could "transform a job-related tort into a non-job-related tort" by alleging in her complaint that the defendant employee "acted with a state of mind that, under traditional *respondeat superior* doctrine, would place the action outside the 'scope of employment,' say, an 'intentional' or 'deliberate' state of mind," or by alleging facts "indicating that, at the time, the employee was on a 'frolic of his own.'" 995 F.2d at 1129. To address that criticism, the court emphasized that "the Attorney General's certificate may contest a plaintiff's incident-describing and inci-

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Luber about petitioner's unacceptable behavior at the all-staff meeting, but without discussing whether petitioner should be fired.

dent-characterizing facts," such as whether the defendant had acted "intentionally," and that the district court "may resolve any such factual conflicts, relevant to immunity, prior to trial." *Ibid*. The court recognized the potential difficulties in drawing the line "between denying facts that amount to a 'characterization' or 'description' and denying that any harm-causing incident occurred at all," but left it to later cases to resolve that "administrative problem." *Ibid*.

Decisions by other courts of appeals have emphasized the practical, as well as theoretical, difficulty in drawing the kind of distinctions "between *characterization* of an incident and *denial* of an incident" that the *Wood* majority envisioned. Pet. App. 6a; *Kimbro*, 30 F.3d at 1507; *Melo*, 13 F.3d at 743, 746. That difficulty is fully evident on the facts of this case.

The Attorney General's certification did not depend on denying many of the allegations of petitioner's complaint: that she applied for a position with the Forest Service, but was not hired; that Haley was the official responsible for that hiring determination; that petitioner and Haley had an exchange in front of other LBLA and Forest Service employees at the all staff meeting; or that petitioner was fired from her position with LBLA after she refused to apologize to Haley for her conduct at the meeting. Indeed, as explained above, see, note 11, *supra*, the Attorney General's certification was not even necessarily inconsistent with Haley having played some role in events leading to petitioner's termination.

What the Attorney General's scope certification did deny was that Haley caused petitioner's termination out of personal "enmity" in "retaliation for plaintiff filing a preference inquiry." Luber App. 7. As we understand the *Wood* decision, the First Circuit would classify that certification as one that "den[ies] facts that amount to a 'characterization' or 'description,'" rather than one that "denies the existence of any harm-causing incident at all." 995 F.2d at 1129. However, the fine parsing of allegations and evidence necessary in an attempt to apply the *Wood* distinctions to this case illustrates the er-

ror in adding further limitations and complications on the Attorney General's certification authority that have no basis in the statutory text.

The Attorney General made a determination that Haley was acting within the scope of his employment "at the time of the incident out of which [petitioner's] claim arose." 28 U.S.C. 2679(d)(1). Under this Court's decision in *Lamagno*, petitioner was free to request judicial review of that determination. 515 U.S. at 420. But it should be equally clear that, like the defendants in *Willingham*, Haley had the right to "present [his] version of the facts," and to have "the validity of [his federal] defense[]" of Westfall Act immunity "determined in the federal courts." 395 U.S. at 409 (emphasis added).

III. BECAUSE CONGRESS SPECIFIED THAT THE ATTORNEY GENERAL'S CERTIFICATION IS CONCLUSIVE FOR PURPOSES OF REMOVAL, THE DISTRICT COURT WAS WITHOUT AUTHORITY TO REMAND THE CASE TO STATE COURT

Section 2679(d)(2) provides that the "certification of the Attorney General shall conclusively establish scope of office or employment for purposes of removal." 28 U.S.C. 2679(d)(2). Despite that language, the district court remanded the case to state court once it had determined that petitioner had "adequately alleged conduct on Mr. Haley's part that, if proven, would give rise to tort claims * * * and fall outside the scope of his employment." Pet. App. 24a. The plain language of Section 2679(d)(2) precludes such a remand. Moreover, contrary to petitioner's contentions (Pet. Br. 32-34, 39-40), giving effect to the clear statutory text does not violate Article III of the Constitution.

A. The Language of the Westfall Act Gives The Attorney General's Certification "Conclusive" Effect For Purposes Of Removal Jurisdiction

A district court lacks authority to remand to state court an action that the Attorney General has removed after certifying

that the employee was acting within the scope of his employment, even if the court later determines that the employee was not acting within the scope of his employment. That conclusion is compelled by the plain language of Section 2679(d)(2) itself. See *United States* v. *Ron Pair Enters., Inc.*, 489 U.S. 235, 241 (1989) (in matters of statutory interpretation the "inquiries must begin[] with the language of the statute itself"). By emphasizing that the Attorney General's certification "shall *conclusively* establish scope of office or employment for purposes of removal," 28 U.S.C. 2679(d)(2) (emphasis added), Congress made clear that the certification establishes the district court's removal jurisdiction once and for all. Petitioner's construction would deprive the Attorney General's certification of its "conclusive[]" character.

In *Lamagno*, all nine Justices agreed that Congress intended the Attorney General's certification to establish "conclusively" the district court's removal jurisdiction. See also *Aliota*, 984 F.2d at 1356 (Alito, J.) (holding that the conclusion that "the district court has no authority to remand the case on the ground that the Attorney General's certification was erroneous" is "dictated by the plain language of 28 U.S.C. § 2679(d)(2)").

A plurality of four Justices in *Lamagno*—Justice Ginsburg, joined by Justices Stevens, Kennedy, and Breyer—rejected an objection that "[t]reating the Attorney General's certification as conclusive for purposes of removal but not for purposes of substitution" raised a potential Article III problem because, if the certification were overturned, the federal court might "be left with a case without a federal question to support the court's subject-matter jurisdiction." 515 U.S. at 434-435. The plurality found that argument unpersuasive, concluding that the scope-of-employment issue under the Westfall Act "is a significant federal question" and that removal by the Attorney General on his certification therefore "raises [a] questio[n] of substantive federal law at the very outset" of the litigation. *Id.* at 435 (quoting *Verlinden B.V.* v.

Central Bank of Nigeria, 461 U.S. 480, 493 (1983)). The plurality reasoned that "'[c]onsiderations of judicial economy, convenience and fairness to litigants' * * * make it reasonable and proper for the federal forum to proceed beyond the federal question to final judgment once it has invested time and resources on the initial scope-of-employment contest." *Id.* at 436 (quoting *United Mine Workers* v. *Gibbs*, 383 U.S. 715, 726 (1966)). Footnote 10 of the majority opinion, which Justice O'Connor joined, also recognized that the "conclusiv[e] . . . for purposes of removal" language of Section 2679(d)(2) reflected Congress's decision "to foreclose needless shuttling of a case from one court to another." *Id.* at 433 n.10. In her separate concurring opinion, however, Justice O'Connor specifically declined to decide the Article III question because it was "not presented in this case." *Id.* at 437.

In Justice Souter's dissenting opinion—in which Chief Justice Rehnquist and Justices Scalia and Thomas joined—he agreed that "there is nothing equivocal about the Act's provision that once a state tort action has been removed to a federal court after a certification by the Attorney General, it may never be remanded to the state system." *Lamagno*, 515 U.S. at 440 (citing 28 U.S.C. 2679(d)(2)). The dissent expressed the view, however, that, for this reason, judicial review of the Attorney General's scope-of-employment certification would raise a serious question whether the retention of jurisdiction if the district court rejected the United States' substitution would "cross the line" of the courts' Article III jurisdiction. *Id.* at 441.

That Congress intended the text to be given the plain meaning attributed it by the Court is further supported by the notable contrast between Section 2679(d)(2) and Section 2679(d)(3), which governs judicial review of the Attorney General's refusal to certify scope of office or employment. If the employee petitions for review of the Attorney General's refusal to certify in a case that is pending in state court, the Attorney General may remove the case to federal district

court, which must then resolve the scope-of-employment dispute. 28 U.S.C. 2679(d)(3). In contrast to removal after the Attorney General has certified that the employee was acting within the scope of his employment—in which case, that certification is "conclusive[] * * * for purposes of removal," 28 U.S.C. 2679(d)(2)—Section 2679(d)(3) provides that when the Attorney General removes a case to defend against an employee's petition for judicial certification over the Attorney General's objection, and the district court rejects the employee's petition, "the action or proceeding *shall be remanded* to the State court." 28 U.S.C. 2679(d)(3) (emphasis added).

This pointed contrast confirms that Congress did not envision remand in cases removed pursuant to the Attorney General's certification, but intended, consistent with the plain language of 28 U.S.C. 2679(d)(2), that such cases remain in federal court. See *Russello* v. *United States*, 464 U.S. 16, 23 (1984) ("[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion."); *Field* v. *Mans*, 516 U.S. 59, 67 (1995) (quoting *Russello*, 464 U.S. at 23); *United States* v. *Naftalin*, 441 U.S. 768, 773-774 (1979)). Indeed, if, as the district court believed, the Attorney General's certification is conclusive neither of the scope-of-employment issue itself (as the Court held in *Lamagno*), nor of the court's removal jurisdiction, the term "conclusive" would be deprived of all meaning. The certification has to be "conclusive" as to something, and the text makes clear it is conclusive "for purposes of removal."

Petitioner in fact concedes that, in other Westfall Act cases, the term "conclusively" has the import described above, and thus "foreclose[s] needless shuttling of a case from one court to another." Pet. Br. 38 (quoting *Lamagno*, 515 U.S. at 433 n.10). Petitioner contends, however, that the Attorney General's certification in this case was not entitled to be treated as "conclusive" for purposes of removal jurisdiction

because, in petitioner's view, it was not the type of "certification" authorized by Section 2679(d)(2) and was therefore a legal nullity. See *ibid.* ("an incident-denying certification cannot establish *anything* for purposes of removal, much less establish it conclusively"). We have already explained that the Attorney General need not accept the truth of the plaintiff's allegations in rendering his scope-of-employment determination and has a right to have any disputes relating to scope of employment resolved in a federal forum. See, pp. 28-41, *supra*. It follows, for the same reasons, that the Attorney General's certification was not a nullity and should have been treated as conclusive for purposes of the district court's removal jurisdiction.

B. Giving Conclusive Effect To The Attorney General's Certification Is Not Contrary To Article III

Because the meaning of the statutory language is clear, the only basis for not giving conclusive effect to the Attorney General's certification for purposes of removal would be a determination that the statute violates Article III's "arising under" requirement. As explained below, Congress did not violate Article III by directing the district court to retain jurisdiction of a case removed from state court on the Attorney General's certification of statutory immunity after the court has resolved that threshhold federal question.

1. Although the "well-pleaded complaint" rule generally holds that a "defense that raises a federal question is inadequate to confer federal jurisdiction," *Merrell Dow Pharms. Inc.* v. *Thompson*, 478 U.S. 804, 808 (1986), that rule is not compelled by Article III. The "Article III 'arising under' jurisdiction is broader than federal question jurisdiction under § 1331." *Verlinden*, 461 U.S. at 495. It is a "broad conception" under which "Congress may confer on the federal courts jurisdiction over any case or controversy that might call for the application of federal law." *Id.* at 492 (discussing *Osborn* v. *Bank of the United States*, 22 U.S. (9 Wheat.) 738 (1824)).

In *Mesa*, the Court observed that Congress is free to specify that "the raising of a federal question" in a federal officer's removal petition under Section 1442(a) "constitutes the federal law under which the action * * * arises for Art. III purposes." 489 U.S. at 136. Moreover, the Court stressed that Article III is satisfied if the defendant "allege[s] a *colorable* defense under federal law." *Id.* at 129 (emphasis added).[12] The ultimate "validity of the defense" is not essential to "the question of jurisdiction." *Ibid.* (quoting *Cooper*, 73 U.S. (6 Wall.) at 254). See *Jefferson County*, 527 U.S. at 431 ("We * * * do not require the officer virtually to 'win his case before he can have it removed.'") (quoting *Willingham*, 395 U.S. at 407).

In *Verlinden*, the Court similarly rejected an Article III challenge to the Foreign Sovereign Immunities Act of 1976 (FSIA), 28 U.S.C. 1330, which confers federal jurisdiction over any suit against a foreign state, *ibid.*, even though the substantive claim is usually one that arises under state law, see 28 U.S.C. 1606. The Court found it unnecessary to "decide the precise boundaries of Art. III jurisdiction * * *, since the present case does not involve a mere speculative possibility that a federal question may arise at some point in the proceeding," but, rather, "necessarily raises questions of substantive federal law"—the immunity of a foreign state from suit—"at the very outset, and hence clearly 'arises under' federal law, as that term is used in Art. III." *Verlinden*, 461 U.S. at 493.

2. Under the Westfall Act, the Attorney General's certification that the employee acted within the scope of his employment and is therefore entitled to immunity satisfies any requirement that the case present a "colorable" claim of immu-

[12] The Court did not decide whether Article III would permit Congress to vest federal courts with a protective removal jurisdiction over all claims against a federal officer, or whether Article III requires at least the assertion of a colorable defense where the suit does not otherwise fall within diversity or federal-question jurisdiction. See *Mesa*, 489 U.S. at 136-138.

nity. Under the statutory scheme, once the Attorney General makes that certification, substitution of the United States and removal to federal court are automatic. See 28 U.S.C. 2679(d)(2). In *Lamagno*, this Court held that the Attorney General's determination regarding the scope of employment is "subject to judicial review." 515 U.S. at 434. That is not the same, however, as stating that the Attorney General's certification is meaningless. To the contrary, it stands as "a Government official's determination of a fact or circumstance" that is subject to the presumption of "judicial review of executive action." *Id.* at 424. It can hardly be doubted that "judicial review of executive action" presents a federal question sufficient to sustain Article III jurisdiction.

Moreover, the Westfall Act is far more than a "pure jurisdictional" statute, such as Section 1442, that purports simply to accord jurisdiction over a defined class of claims or persons. See *Mesa*, 489 U.S. at 136. Rather, the Westfall Act, like the FSIA, is a "comprehensive scheme" comprising both pure jurisdictional provisions (removal) and further provisions of federal law (immunity and other procedural and substantive limitations on liability) capable of supporting Article III "arising under" jurisdiction. See *Verlinden*, 461 U.S. at 496-497. See also *Republic of Austria* v. *Altmann*, 541 U.S. 677 (2004).

Specifically, like the FSIA, the Westfall Act does not merely govern access to federal court, but governs as well the type of cases that may be removed (tort cases certified by the Attorney General under Section 2679(d)(2) or denied certification but challenged by the employee under Section 2679(d)(3)), the standard for assessing the propriety of the substitution of the United States for the employee (scope of employment), and the consequences of such substitution of the United States (immunity from suit for the employee and applicability of all the defenses available to the United States under the FTCA). Thus, just as the FSIA "comprehensively regulat[es] the amenability" of foreign sovereigns "to suit in

the United States," the Westfall Act "comprehensively regulat[es] the amenability" of federal employees to suit in both federal and state courts, *Verlinden*, 461 U.S. at 493, and the amenability of the United States to suit in substitution for its employees. As *Verlinden* holds, the presence of such a comprehensive regulatory scheme is alone sufficient for Article III purposes.

The parallel to *Verlinden* is especially close in that under both the Westfall Act and FSIA "the rule of decision may be provided by state law." 461 U.S. at 491. Nonetheless, just as there was a strong federal interest in *Verlinden* in the question of what types of suits may be brought against foreign sovereigns, *id.* at 493, there is a similar undeniable federal interest in allowing federal courts to adjudicate tort actions involving federal employees who have been certified by the Attorney General as having acted within the scope of their employment. See *Lamagno*, 515 U.S. at 426.

Even in a case in which the employee is ultimately held to have acted outside the scope of his employment, the district court's substantive review of the Attorney General's scope certification and resolution of the availability of federal immunity is sufficient to confer jurisdiction over the whole of the case, including the state claims that remain against the employee individually. As the Court has held in the Section 1442 context, as long as the claim of immunity is colorable, "the validity of the defense" "has no connection whatever to the question of jurisdiction." *Mesa*, 489 U.S. at 129 (quoting *Cooper*, 73 U.S. (6 Wall.) at 254). Rather, "if there be a single [federal] ingredient in the mass, it is sufficient. *That element is decisive upon the subject of jurisdiction*." *Ibid.* (quoting *Cooper*, 73 U.S. (6 Wall.) at 252). That conclusion is consistent with the long-settled rule, discussed above, that once the stat-

utory jurisdiction of an Article III case attaches at the outset of a case, subsequent events do not destroy it.[13]

In *Gibbs*, the Court held that, as long as the federal question that supports the district court's jurisdiction and any related state claims "derive from a common nucleus of operative fact," then "there is *power* in federal courts to hear the whole," 383 U.S. at 725. The power to adjudicate the state claims continues, even after the federal claim has been dismissed. See *Rosado* v. *Wyman*, 397 U.S. 397, 403-405 (1970). And the Court has recognized that "the argument for exercise of pendent jurisdiction is particularly strong" when "the state claim is * * * closely tied to questions of federal policy," including when there is an issue of federal preemption, though not one that supports statutory federal question jurisdiction. *Gibbs*, 383 U.S. at 727. Plainly, if the courts have discretion to exercise such pendent jurisdiction, Congress has the power to direct them to do so. The text of the Westfall Act demonstrates that Congress believes that "'[c]onsiderations of judicial economy, convenience and fairness to litigants' * * * make it reasonable and proper for the federal forum to proceed beyond the federal question to final judgment once it has invested time and resources on the initial scope-of-employment contest." *Lamagno*, 515 U.S.. at 436 (plurality opinion of Ginsburg, J.) (quoting *Gibbs*, 383 U.S. at 726). By making the Attorney General's scope certification "conclusiv[e] * * * for purposes of removal," 28 U.S.C. 2679(d)(2), Congress "de-

[13] We note that, if the Court were to adopt the district court's approach to the question discussed in Point II, *supra*, remand to the state court would be particularly inappropriate. If a scope-of-employment certification is overturned for the sole reason that it is unsupported by the particular facts alleged up to that point by the plaintiff in support of her claims, it is entirely possible that discovery would reveal evidence that purportedly tortious acts *were* within the scope of the defendant's employment. Thus, under the district court's approach, the federal question of Haley's statutory immunity would be present throughout the litigation, and the factual question would subsist.

cided to foreclose needless shuttling of a case from one court to another." *Lamagno*, 515 U.S. at 433 n.10.

CONCLUSION

The judgment below should be affirmed.

Respectfully submitted.

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STATUTORY APPENDIX

Title 28 of the United States Code provides in part:

§ 1346. United States as defendant

* * * * *

(b)(1) Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

* * * * *

§ 1442. Federal officers or agencies sued or prosecuted

(a) A civil action or criminal prosecution commenced in a State court against any of the following may be removed by them to the district court of the United States for the district and division embracing the place wherein it is pending:

(1) The United States or any agency thereof or any officer (or any person acting under that officer) of the United States or of any agency thereof, sued in an official or individual capacity for any act under color of such office or on account of any right, title or authority claimed under

any Act of Congress for the apprehension or punishment of criminals or the collection of the revenue.

* * * * *

§ 1447. Procedure after removal generally

* * * * *

(c) A motion to remand the case on the basis of any defect other than lack of subject matter jurisdiction must be made within 30 days after the filing of the notice of removal under section 1446(a). If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded. An order remanding the case may require payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal. A certified copy of the order of remand shall be mailed by the clerk to the clerk of the State court. The State court may thereupon proceed with such case.

(d) An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise, except that an order remanding a case to the State court from which it was removed pursuant to section 1443 of this title shall be reviewable by appeal or otherwise.

* * * * *

§ 2679. Exclusiveness of remedy

* * * * *

(b)(1) The remedy against the United States provided by sections 1346(b) and 2672 of this title for injury or loss of property, or personal injury or death arising or resulting from the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment is exclusive of any other civil action or proceeding for money damages by reason of the same subject matter against the employee whose act or omission gave rise to the

claim or against the estate of such employee. Any other civil action or proceeding for money damages arising out of or relating to the same subject matter against the employee or the employee's estate is precluded without regard to when the act or omission occurred.

(2) Paragraph (1) does not extend or apply to a civil action against an employee of the Government—

(A) which is brought for a violation of the Constitution of the United States, or

(B) which is brought for a violation of a statute of the United States under which such action against an individual is otherwise authorized.

* * * * *

(d)(1) Upon certification by the Attorney General that the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose, any civil action or proceeding commenced upon such claim in a United States district court shall be deemed an action against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant.

(2) Upon certification by the Attorney General that the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose, any civil action or proceeding commenced upon such claim in a State court shall be removed without bond at any time before trial by the Attorney General to the district court of the United States for the district and division embracing the place in which the action or proceeding is pending. Such action or proceeding shall be deemed to be an action or proceeding brought against the United States under the provisions of this title and all references thereto, and the United States shall be

substituted as the party defendant. This certification of the Attorney General shall conclusively establish scope of office or employment for purposes of removal.

(3) In the event that the Attorney General has refused to certify scope of office or employment under this section, the employee may at any time before trial petition the court to find and certify that the employee was acting within the scope of his office or employment. Upon such certification by the court, such action or proceeding shall be deemed to be an action or proceeding brought against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant. A copy of the petition shall be served upon the United States in accordance with the provisions of Rule 4(d)(4) of the Federal Rules of Civil Procedure. In the event the petition is filed in a civil action or proceeding pending in a State court, the action or proceeding may be removed without bond by the Attorney General to the district court of the United States for the district and division embracing the place in which it is pending. If, in considering the petition, the district court determines that the employee was not acting within the scope of his office or employment, the action or proceeding shall be remanded to the State court.

(4) Upon certification, any action or proceeding subject to paragraph (1), (2), or (3) shall proceed in the same manner as any action against the United States filed pursuant to section 1346(b) of this title and shall be subject to the limitations and exceptions applicable to those actions.

* * * * *