No. 25A____

IN THE

Supreme Court of the United States

RAIZEL BLUMBERGER,

Applicant,

v.

IAN B. TILLEY, M.D.; CALIFORNIA HOSPITAL MEDICAL CENTER; DIGNITY HEALTH; DOES, 1 through 6 and 7 through 50, and UNITED STATES OF AMERICA,

Respondents.

APPLICATION FOR AN EXTENSION OF TIME WITHIN WHICH TO FILE A PETITION FOR A WRIT OF CERTIORARI

To the Honorable Elena Kagan, Associate Justice of the Supreme Court of the United States and Circuit Justice for the United States Court of Appeals for the Ninth Circuit:

Applicant Raizel Blumberger respectfully seeks a 30-day extension of time within which to file a petition for a writ of certiorari to review the Ninth Circuit's judgment in this case, to and including April 18, 2025. In support of this request, the applicant states as follows:

1. The Ninth Circuit issued its judgment on July 9, 2024, *see* App. 1a, and denied timely petitions for rehearing on December 19, 2024, *see* App. 70a. Absent an extension, the deadline for filing the petition will be March 19, 2025. This application

is being filed more than ten days before a petition is currently due. *See* Sup. Ct. R. 13.5. This Court has jurisdiction under 28 U.S.C. § 1254(1).

2. Raizel Blumberger gave birth at California Hospital Medical Center on January 3, 2018. She experienced complications during childbirth, and she alleges that these complications were not properly diagnosed or treated by her physicians, including Respondent Dr. Ian Tilley. As a result, in May 2021, she filed this action in Los Angeles County Superior Court against the hospital, its owners, Dr. Tilley, and other health care providers, alleging medical negligence under California law.

3. In certain circumstances, the Federally Supported Health Centers Assistance Act provides federally funded health centers and their employees with the same protections from liability as employees of the United States Public Health Service (PHS), by "deeming" those health centers and their employees to be PHS employees. *See* 42 U.S.C. § 233(g). California Hospital Medical Center is not a federally funded health center for purposes of section 233(g). Unbeknownst to Ms. Blumberger, though, in addition to his work at California Hospital Medical Center, Dr. Tilley purports to be an employee of Eisner Pediatric and Family Center (Eisner), a community health center that receives federal grant funds. In 2017, the Department of Health and Human Services (HHS) had issued a notice that "deemed" Eisner to be a PHS employee for the 2018 calendar year, with respect to some services Eisner and its employees and affiliates provided. *See id.* § 233(g)(1).

4. When Eisner learned of the suit against Dr. Tilley in July 2021, it forwarded a copy of the state court complaint to HHS. Two days later, an Assistant

United States Attorney appeared in the state court action on behalf of the United States, and, as required by 42 U.S.C. § 233(*l*)(1), advised the court that "whether Defendant Ian B. Tilley, M.D. is deemed to be an employee of the Public Health Service for purposes of 42 U.S.C. § 233 with respect to the actions or omissions that are the subject of the above captioned action, is under consideration." App. 9a. A year later, the United States filed an amended notice stating its conclusion that Dr. Tilley "is not deemed to be an employee of the Public Health Service for purposes of 42 U.S.C. § 233 with respect to the actions or omissions that are the subject of [this] action." *Id.*

5. Section 233 contains two provisions expressly addressing the removal of state court actions to federal court. First, section 233(c) requires the Attorney General to remove an action to federal district court where she certifies that the PHS employee "defendant was acting in the scope of his employment at the time of the incident out of which the suit arose." 42 U.S.C. § 233(c). Where the defendant is a federally funded health center, this obligation is triggered where HHS determines that the defendant "is deemed to be an employee of the Public Health Service for purposes of this section with respect to the actions or omissions that are the subject of such civil action or proceeding." *Id.* § 233(*l*)(1). Second, section 233(*l*)(2) provides that "[i]f the Attorney General fails to appear in State court" within fifteen days of being notified of a suit, the defendant may itself remove the action to federal district court. *Id.* § 233(*l*)(2).

6. Neither of these two provisions was applicable here. Nonetheless, more than a month after the United States filed its second notice in state court, Respondent Tilley removed this action to the United States District Court for the Central District of California, invoking two statutes. First, he cited section 233(*l*)(2), claiming that that provision "afford[ed] a federal forum to resolve the question as to whether his federal immunity defense under 42 U.S.C. § 233 *et seq*. extends to this action." *Blumberger v. Cal. Hosp. Med. Ctr.*, No. 2:22-cv-06066-FLA (JCx), 2022 WL 16698682, at *2 (C.D. Cal. Nov. 2, 2022). Second, he cited the federal-officer removal statute, 28 U.S.C. § 1442(a)(1), claiming that, despite the length of time since the case was first filed, removal was timely based on the United States' July 2022 determination that he was not entitled to a section 233 immunity defense. *Id.* at *4.

7. Both Ms. Blumberger and the United States moved to remand. Rejecting both of Dr. Tilley's theories, the district court granted those motions. *Id.*

8. Dr. Tilley appealed, and a partially divided panel of the Ninth Circuit reversed in part and vacated in part. As to the federal-officer removal statute, the court unanimously found that the relevant event for purposes of timeliness was "when Dr. Tilley learned of his deemed status in the first place." App. 16a. Since the record was silent on this point, the court of appeals remanded for the district court to address that question, and, if it concluded removal was timely, to decide whether the requirements of section 28 U.S.C. § 1442(a)(1) were satisfied. *Id.*

9. As to section 233, the court was divided. Expressly disagreeing with the Third Circuit's nonprecedential decision in *Doe v. Centerville Clinics Inc.*, No. 23-

2738, 2024 WL 3666164 (3d Cir. Aug. 6, 2024), *cert. pending*, No. 24-727 (filed Jan. 7, 2025), and contrary to the position of the United States, the majority held that, under sections 233(c) and 233(*l*)(1), the Attorney General is required to certify and remove any action against an entity that had received an annual deeming notice, without consideration as to whether the acts underlying the suit were within the scope of that deeming. App. 23a–40a. Although the statute requires the Attorney General to remove only upon a determination that a defendant is deemed to be a PHS employee "with respect to the actions or omissions that are the subject of such civil action or proceeding," the majority held that this "actions or omissions" limitation "will play almost no role" where "a plaintiff brings a medical malpractice suit against an employee for actions that occurred during the deemed time period." *Id.* at 32a. Simply by virtue of the fact that Eisner had received a deeming notice in 2017, the majority reasoned, the Attorney General's notices filed in state court were inconsistent with section 233(*l*)(1), and the Attorney General actually was required to remove the action. *Id.* at 37a–40a.

10. Only after concluding that the Attorney General's state court filings were wrong did the majority address whether and how those filings provided a basis for Dr. Tilley to have removed the action to federal court. The court did not identify any relevant statutory provision that provided for removal jurisdiction. Instead, it concluded that such jurisdiction was provided by the presumption of reviewability of executive actions. *Id.* at 41a–49a. Relying solely on cases filed in the first instance in federal court, the majority reasoned that, because Congress did not explicitly

preclude review of the correctness of the Attorney General's state court filings pursuant to section 233(a), the cases in which any such filings were made must be removable to federal court so that a federal court can conduct such a review. *Id.* It then specified that, as a "remedy" for the Attorney General's failure to remove the action, the district court should hold a hearing to determine whether section 233 immunity applies. *Id.* at 51a.

11. Dissenting with respect to section 233, Judge Desai explained that "the answer to the only question on appeal concerning § 233—whether Dr. Tilley properly removed the case to federal court—is no," since the requirements for neither of the two statutory removal provisions were satisfied. *Id.* at 53a. She further explained that the majority "circumvent[ed] this otherwise unavoidable conclusion by addressing an entirely different question: 'Was the Attorney General required under § 233(*l*)(1) to inform the state court of Dr. Tilley's deemed status for 2018, such that the government was obligated to remove the case to federal court?'" *Id.* In answering this question, she reasoned, the majority impermissibly "rewr[o]te the language of the statute" and reached a holding that "will lead to absurd and impractical results and unduly burden the government," creating a "per se removal rule every time a PHS employee is sued for medical malpractice, even if the employee was acting outside the scope of his employment," "eliminat[ing] the Attorney General's role under the statute, and giv[ing] a procedural advantage to doctors in malpractice cases that belong in state court." *Id.* at 54a. In her dissent, she noted that by allowing removal where neither of the removal provisions of section 233 were satisfied, the

majority created a conflict with decisions of the D.C. and Eleventh Circuits. *Id.* at 55a–56a (citing *El Rio Santa Cruz Neighborhood Health Ctr., Inc. v. U.S. Dep't of Health & Hum. Servs.*, 396 F.3d 1265, 1271 (D.C. Cir. 2005), and *Allen v. Christenberry*, 327 F.3d 1290, 1293, 1295 (11th Cir. 2003)). She also explained that the majority's decision that section 233 required the Attorney General to remove, and thus that the Attorney General's state court filings were flawed, "distorts the statute's text, renders much of the statute superfluous, assumes facts not before us, and is impractical." *Id.* at 57a. Finally, she concluded that the "presumption favoring judicial review of agency actions" did not permit the court to "rewrite the statute to allow removal based on a general policy favoring judicial review." *Id.* at 66a.

12. As both the majority and dissent noted, the Ninth Circuit's decision creates a conflict with decisions of the Third, Eleventh, and D.C. Circuits, all of which have previously held that section 233 only authorizes removal where the requirements of one of its two removal provisions are satisfied.

13. And, chiefly for the reasons explained by Judge Desai in her dissent, the Ninth Circuit's decision is incorrect; the "presumption of judicial review" does not provide federal courts with a free-ranging supervisory role of conduct by federal employees in state court litigation. Applicant intends to seek review to correct this broad expansion of federal removal jurisdiction.

14. Counsel for Applicant recently has been and will be occupied with briefing deadlines and oral argument in a variety of matters. These include oral argument in *Long v. Foster Wheeler Energy Corp.*, No. 24-1557 (9th Cir.) on February

4, 2025, and proceedings for preliminary relief in *University of California Students Association v. Carter*, No. 25-cv-354 (D.D.C.), and *National Treasury Employees Union v. Vought*, No. 25-cv-381 (D.D.C.). Counsel also has a long pre-scheduled two-week overseas vacation in the coming weeks.

15. Applicant thus requests a 30-day extension of time to permit counsel to research the relevant legal and factual issues and to prepare a petition that fully addresses the important questions raised by the proceedings below.

16. Counsel for Respondent Tilley has advised that he does not oppose Applicant's request. Counsel for the United States has advised that it does not believe its position need be included with this application. No other parties participated or appeared in the Ninth Circuit.

17. For these reasons, Applicant respectfully requests that an order be entered extending the time to file a petition for certiorari to and including April 18, 2025.

Respectfully submitted,

ADAM R. PULVER
Counsel of Record
PUBLIC CITIZEN LITIGATION GROUP
1600 20th Street NW
Washington, DC 20009
202-588-1000
Apulver@citizen.org

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Counsel for Applicant