No. 05-593

In the Supreme Court of the United States

PAT OSBORN

Petitioner

v.

BARRY HALEY; GAYE LUBER; AND
LAND BETWEEN THE LAKES ASSOCIATION, INC.

Respondents

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

BRIEF FOR THE PETITIONER

ANDREA M. MILLER
NAGELEY, MEREDITH & MILLER, INC.
Suite 100
8001 Folsom Boulevard
Sacramento, CA 95826
(916) 386-8282

ERIC GRANT
Counsel of Record
ATTORNEY AT LAW
Suite 100
8001 Folsom Boulevard
Sacramento, CA 95826
(916) 388-0833

Counsel for Petitioner

QUESTIONS PRESENTED

When a federal employee is sued in a civil action in a state court, the Westfall Act, 28 U.S.C. § 2679(d)(2), authorizes the Attorney General to remove the action to federal district court—and seek to substitute the United States as the party defendant in place of the employee—by certifying 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." The petition presented the following two questions about the Act:

1. Whether the Westfall Act authorizes the Attorney General to certify that the employee was acting within the scope of his office or employment at the time of the incident solely by denying that such incident occurred at all.

2. Whether the Westfall Act forbids a district court to remand an action to state court upon concluding that the Attorney General's purported certification was not authorized by the Act.

In granting the petition, the Court directed the parties to brief and argue the following additional question:

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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BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the Court of Appeals for the Sixth Circuit (Pet. App. 1a-11a) is reported at 422 F.3d 359. The two opinions of the District Court for the Western District of Kentucky (Pet. App. 12a-16a, 19a-25a) 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; it was granted on May 15, 2006. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

1. This case involves the general remand statute, 28 U.S.C. § 1447, which provides in relevant part:

> (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. . . .
>
> (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.

2. This case also involves a part of the Federal Tort Claims Act ("FTCA"), 28 U.S.C. §§ 1346(b), 2671-2680, formally called the Federal Employees Liability Reform and Tort Compensation Act of 1988, Pub. L. No. 100-694, 102 Stat. 4563, but commonly known and cited as the "Westfall

Act" (Pet. App. 26a-30a). The immediately pertinent part of that Act, codified at 28 U.S.C. § 2679(d)(2), provides:

> 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.

Section 2679 is reproduced in whole in the Appendix hereto (App. 1a-3a).

STATEMENT OF THE CASE

1. On a narrow peninsula in western Kentucky, between Lake Barkley to the east and Kentucky Lake to the west, sits the Land Between the Lakes National Recreation Area ("LBL") operated by the U.S. Forest Service. At all relevant times, respondent Barry Haley was a Forest Service employee at LBL; respondent Gaye Luber was the executive director of respondent Land Between the Lakes Association, Inc. ("LBLA"), a private contractor that provided the Forest Service with staff for gift shops, visitor centers, and interpretive areas at LBL. Until petitioner was terminated in the events that gave rise to this case, she was an employee of LBLA. *See generally* Pet. App. 3a, 20a-21a.

2. Petitioner sued Luber and LBLA in Trigg County (Kentucky) Circuit Court, alleging that she was discharged from her job in violation of public policy. *See* Pet. App. 21a; *cf.* Brief in Opposition for Respondents [Luber and LBLA] ("Luber BIO") App. 1-15 (reproducing complaint). In that action, petitioner also sued Haley for wrongfully interfering with her employment relationship with LBLA, alleging that "Haley influenced LBLA . . . to fire her after she had a run-in with Haley." Pet. App. 3a. As so alleged, Haley's conduct violated "policies [that] prohibited Forest Service employees like Haley from 'participat[ing] in any LBLA decision concerning the relationship of the LBLA to the Forest Service, including but not limited to . . . hiring or firing LBLA employees.'" *Id.* (alterations in original). Indeed, as the court of appeals recognized, the Government (which is representing Haley) has "conceded that if Haley induced [petitioner's] firing, he acted *outside* the scope of his employment." *Id.* (emphasis added); *accord* Brief for Respondent Barry Haley at 14 n.5 (petition stage) (quoting the acknowledgment in the Government's brief in the court of appeals that "if Haley did cause [LBLA] to fire [petitioner], he acted outside the scope of his employment").

Despite this concession, the Attorney General—acting via the local United States Attorney, *see* 28 C.F.R. § 15.4(a)—issued a "certification that Haley had been acting *within* the scope of his employment at the time of the incident giving rise to [petitioner's] allegations." Pet. App. 3a (emphasis added); *cf.* Luber BIO App. 23 (reproducing certificate). Based on that certification, and invoking the Westfall Act, 28 U.S.C. § 2679, the Government removed the state-court action to the District Court for the Western District of Kentucky. *See* Pet. App. 3a. In that court, and again invoking the Act, the Government moved to substitute itself as a defendant in Haley's place and, thereafter, to dismiss the case on the ground that petitioner had failed to exhaust her administrative remedies as required by the FTCA, 28 U.S.C. § 2675(a). *See* Pet. App. 3a, 19a.

3. As the district court then understood it, the Government's motion required the court to "review the United States's certification that the alleged torts occurred within the scope of Mr. Haley's employment." Pet. App. 21a. Acting on the understanding that "the United States does not deny any of the factual allegations contained in [petitioner's] complaint," Pet. App. 22a, the court proceeded to apply the relevant law to the undisputed facts.[1] The court's conclusion: petitioner "has 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. Therefore, "Mr. Haley's alleged actions occurred outside the scope of his employment with the United States Forest Service," and so "the United States's certification is inappropriate and its motion to dismiss should be denied." *Id.*

Having decided that "the United States is not a proper party to this case," the district court then set about to "determine whether or not it has [subject matter] jurisdiction." *Id.* Observing that the "Sixth Circuit has not spoken to this issue and the authority among other circuits is split," the court agreed with a coordinate court in its circuit that "28 U.S.C. § 2679(d)(2) does not bar this Court from remanding an intentional tort action against a federal employee after

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[1] Under Sixth Circuit precedent, the relevant law was the law of Kentucky. *See, e.g., Flechsig v. United States,* 991 F.2d 300, 302 (6th Cir. 1993) (agreeing that "the determination of whether an employee of the United States acted within her scope of employment is a matter of state law"), *cited in* Pet. App. 21a. This apparently uniform rule among the courts of appeals derives from the text of the FTCA, *see* 28 U.S.C. § 1346(b)(1) (referring to "the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment" and to "the law of the place where the act or omission occurred"), and from this Court's terse decision in *Williams v. United States*, 350 U.S. 857 (1955) (per curiam) ("This [FTCA] case is controlled by the California doctrine of respondeat superior.").

it has been determined that the employee was not acting within the scope of her employment." *Id.* (quoting *Allstate Insurance Co. v. Quick*, 254 F. Supp. 2d 706, 729 (S.D. Ohio 2002)). To the contrary, "remand is authorized by the general remand statute, [28 U.S.C.] § 1447(c), which states, in part: 'If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded.'" Pet. App. 24a-25a (quoting *Allstate*, 254 F. Supp. 2d at 725, in turn quoting § 1447(c)). Because the United States was not a party, because the action presented no federal question, and because the remaining private parties were all citizens of Kentucky, the court ruled that it had "no jurisdiction over this case and [so] it must be remanded to the Trigg County [Kentucky] Circuit Court." Pet. App. 25a. The district court simultaneously issued an order that "this case is **REMANDED** to Trigg County Circuit Court." Pet. App. 17a.

4. The Government promptly filed a motion for reconsideration. *Cf.* J.A. 40-54 (reproducing motion, including its exhibits). The motion argued that the court's order was based on a critical mistake: while the court apparently believed that the Government "did not deny [petitioner's] factual allegations," it was actually the case that the Government, "as evidenced by the answer it filed herein and by the attached Declarations, vigorously contests [petitioner's] allegations." J.A. 41. Indeed, the Government adamantly asserted that "Barry Haley has done nothing which can be construed to fall outside the scope of his employment." *Id.*

But this assertion had an interesting twist. The gravamen of the motion was not that Haley's conduct actually fell "within" the scope of his employment, it was that Haley had actually "done nothing." Indeed, the Government relied heavily on a declaration by Haley stating "that he had no advance knowledge of the termination of [petitioner's] employment at LBLA, that he did not advise Gaye Luber regarding the matter, and that he did not attempt to influence her independent decision to fire [petitioner]." J.A. 44

(citing J.A. 52, ¶ 6).[2] As the court of appeals understood it, the Government's motion to reconsider basically "conceded that if Haley induced [petitioner's] firing, he acted outside the scope of his employment," but it adamantly "denied . . . that Haley interfered with Osborn's continued employment" at all. Pet. App. 3a.

5. In ruling on the Government's motion, the district court recognized that the legal terrain had shifted considerably. Rather than a certification that required the court to decide whether petitioner had "adequately alleged conduct on Mr. Haley's part that, if proven, would . . . fall outside the scope of his [federal] employment," Pet. App. 24a, the court now confronted a "Westfall Act certification[] based on an argument that no harm-causing incident ever took place," Pet. App. 14a; *accord* Pet. App. 2a (recognizing that in this action, the Attorney General had issued "a Westfall Act certification that denie[d] the occurrence of any injury-causing event"). As the court of appeals later observed, the district court regarded that certification as demanding "a decision on the merits of [petitioner's] claim, *i.e.*, whether the alleged harm-causing incident occurred at all," rather than "whether the *content* of the communications between LBLA and Haley was within his scope of [his] employment." Pet. App. 3a-4a.

How to deal with such a certification? Observing that "[t]here is a dispute among the circuits[,] which the Sixth

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[2] Haley stated categorically: "I had no advance knowledge of the termination of [petitioner's] employment with [LBLA]. I did not advise Gaye Luber regarding the matter, nor did I attempt to influence her independent decision to fire [petitioner]." J.A. 52, ¶ 6.

Interestingly, Luber's contemporaneously filed declaration did *not* contain a similarly categorical statement. Rather, Luber declared: "At the time I terminated [petitioner], I had not discussed *this issue* [i.e., petitioner's "veteran's status"] with Barry Haley, [petitioner], or anyone else, and did not know it existed." J.A. 53, ¶ 4 (emphasis added). Indeed, Luber's declaration pointedly did not specify her reason for terminating petitioner.

Circuit has not yet addressed," Pet. App. 14a, the district court looked first to the en banc decision of the First Circuit in *Wood v. United States,* 995 F.2d 1122 (1st Cir. 1993). In *Wood*, the court had "reviewed federal employee immunity from common law torts, the Westfall Act's text, and its legislative history, and found that 'the [Attorney General's certification] cannot deny the occurrence of the basic incident charged.'" Pet. App. 14a (quoting 995 F.2d at 1124). Thus, as perceived by the district court, *Wood* refused to "permit[] 'a Westfall Act certificate simply to deny that anything occurred.'" *Id.* (quoting 995 F.2d at 1128). On the other side, of the dispute, the "D.C. Circuit rejected the First Circuit's analysis in *Wood* . . . and concluded that the district courts must, if necessary, resolve the merits of the underlying dispute," namely, "whether or not the harm-causing incident took place." Pet. App. 15a (citing *Kimbro v. Velten*, 30 F.3d 1501, 1508-10 (D.C. Cir. 1994), *cert. denied*, 515 U.S. 1145 (1995)).

The district court decided that "the *Wood* majority has the better of the interpretive dispute surrounding Westfall Act certifications." Pet. App. 16a. Thus, it concurred with the First Circuit that the Attorney General "cannot" issue an incident-denying certification, i.e., such a certification is not "permitt[ed]." Pet. App. 15a; *cf.* Pet. App. 4a (observing that the district court concluded that "it lacked authority to decide the scope question," as transformed by the incident-denying certification into a merits question). Therefore, the district court denied the Government's motion to reconsider and confirmed its decision to remand the case to the state courts. *See* Pet. App. 16a ("The United States's motion to stay remand of the case is **DENIED AS MOOT**.").

6. The Government appealed to the Court of Appeals for the Sixth Circuit. That court's opinion began by stating that the court confronted two issues in the appeal: (1) "the procedural ramifications attendant to a Westfall Act certification that denies the occurrence of any injury-causing event"; and (2) "the jurisdictional consequences of a denial

of substitution under the Act." Pet. App. 2a. Despite the seemingly categorical language of 28 U.S.C. § 1447(d), the court of appeals did not consider whether it had jurisdiction to review the district court's "order remanding [the] case to the State court from which it was removed."

As to the first issue, the Sixth Circuit "join[ed] the majority of the circuits . . . in holding 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." Pet. App. 8a (citation omitted). Accordingly, the district court was directed to "resolve the factual disputes underlying the scope [of Haley's employment], including whether the alleged incident occurred" at all. Pet. App. 11a.

As to the second issue, the Sixth Circuit "agree[d] with the majority view that the clear language of the [Westfall] Act forecloses remand" to state court. Pet. App. 10a. Thus, "[e]ven if the district court finds that Haley acted outside the scope of his employment, it must nonetheless retain jurisdiction over this case." Pet. App. 11a.

7. Petitioner timely filed a petition for writ of certiorari, presenting two questions regarding the Westfall Act. In granting the petition, the Court directed the parties also to brief and argue 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)." *Supra* p. i.

SUMMARY OF ARGUMENT

1. Under the terms of § 1447(d)—namely, an "order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise"—the court of appeals lacked jurisdiction to review the district court's remand order. The statute applies to cases removed under specialized removal provisions like § 2679(d)(2), and it applies even (or especially) where a remand order "might be deemed erroneous." The *Thermtron* exception to § 1447(d)

is inapplicable, because the order here was based expressly (and in substance) on "lack of subject matter jurisdiction," one of the grounds enumerated in § 1447(c). The *Waco* exception is likewise inapplicable, because the order reviewed by the court below is undoubtedly a *remand* order that cannot be "disaggregated" from any antecedent decision.

2. On the merits, the Westfall Act does not authorize the Attorney General to issue an "incident-denying" certification. In denying any "incident" (and so denying that the defendant employee was "acting"), such a certification is inconsistent with the text of § 2679(d). By dispensing with a true scope-of-employment inquiry—the sole issue on which Congress wanted employee immunity to turn—an incident-denying certification also contravenes the statutory scheme of the Westfall Act, especially as that scheme is examined in light of the Act's history. Because such a certification entails a purely factbound judicial inquiry that raises no questions of federal law, it cannot be reconciled with the nature and operation of official immunity as revealed in numerous decisions of this Court. For the same reason, interpreting the Westfall Act to permit incident-denying certifications poses a serious risk of transgressing the limits on federal jurisdiction imposed by Article III of the Constitution.

3. Where removal is based upon a certification not authorized by the Westfall Act, the case *must* be remanded to state court. If the Attorney General lacks authority to issue an incident-denying certification, then he also lacks authority to remove a case based on that certification. Such a removal is "improper," and it obliges a remand under the terms of § 1447(c). This obligation is not overcome by language in the Act whereby a certification shall "conclusively establish scope of office or employment for purposes of removal," § 2679(d)(2), for an incident-denying certification is simply not a certification comprehended by that provision.

Therefore, the judgment of the court of appeals should be vacated for lack of jurisdiction. Alternatively, that judgment should be reversed on the merits.

ARGUMENT

We address first the jurisdictional question posed by the Court. We then proceed, in the alternative, to the two merits questions presented by the petition.

I. Under the Plain Terms of 28 U.S.C. § 1447(d), the Court of Appeals Lacked Jurisdiction to Review the District Court's Remand Order.

As this Court recently explained in *Kircher v. Putnam Funds Trust*, Congress has for more than a century "limited the power of federal appellate courts to review orders remanding cases removed by defendants from state to federal court." 126 S. Ct. 2145, 2152 (2006) (citing *United States v. Rice*, 327 U.S. 742, 748-52 (1946); *Thermtron Products, Inc. v. Hermansdorfer*, 423 U.S. 336, 346-48 (1976)). That limitation now appears at 28 U.S.C. § 1447(d), which provides (with an exception for certain civil rights cases) that "[a]n order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise."

As further explained in *Kircher*, the apparently categorical language of § 1447(d) is not actually so. This Court in *Thermtron* "held that the bar of § 1447(d) applies only to remands based on the grounds specified in § 1447(c), that is, a defect in removal procedure or lack of subject matter jurisdiction." *Kircher*, 126 S. Ct. at 2153. Nonetheless, the "*Thermtron* exception" to the bar of § 1447(d) is exceedingly narrow: the Court has "relentlessly repeated that 'any remand order issued on the grounds specified in § 1447(c) [is immunized from all forms of appellate review], whether or not that order might be deemed erroneous by an appellate court.'" *Id.* (alteration in original) (quoting *Thermtron*, 423 U.S. at 351). Consequently, if a district judge "purports to remand a case on the ground that it was removed 'improvidently and without jurisdiction,' his order is not subject to challenge in the court of appeals." *Id.* (quoting *Thermtron*, 423 U.S. at 343 (in turn quoting 1976 edition of § 1447(c))).

Kircher repeated another established precept, namely, the "bar of § 1447(d) applies equally to cases removed under the general removal statute, § 1441, and to those removed under other provisions." *Id.* (citing *Things Remembered, Inc. v. Petrarca*, 516 U.S. 124, 128 (1995)). In *Kircher*, the "other provision" was 15 U.S.C. § 77p(c), part of the Private Securities Litigation Reform Act of 1995. Here, of course, it is 28 U.S.C. § 2679(d)(2), part of the Westfall Act.

Given these precepts, what the Court said in *Kircher* may fairly be said in the present case: "Ostensibly, then, § 1447(d) stands in the way of reviewing the District Court's order[] of remand in the present case[]." 126 S. Ct. at 2153. In the first place, "[t]he District Court said that it was remanding for lack of jurisdiction, an unreviewable ground." *Id.*; *see also* Pet. App. 25a ("[T]his Court *has no jurisdiction over this case* and it must be remanded to the Trigg County Circuit Court." (emphasis added)); Pet. App. 4a (observing that the district court, "*concluding that it lacked jurisdiction*, remanded the action to state court" (emphasis added)). To say the same thing, the remand order was "issued on the grounds specified in § 1447(c)," and thus it is "immunized from all forms of appellate review." *Kircher*, 126 S. Ct. at 2153; *see also* Pet. App. 24a (agreeing with another district court that a "remand is authorized by the general remand statute, [28 U.S.C.] § 1447(c)").

Moreover, "even if it is permissible to look beyond the [district] court's own label, the [remand order is] unmistakably premised on the view that removal jurisdiction under [the governing statute] is limited to cases" of which this is not one. *Kircher*, 126 S. Ct. at 2153. As recounted above (pp. 6-7), the district court's "view" of removal jurisdiction under the Westfall Act came straight from the interpretation of the statute advanced by the en banc First Circuit in *Wood v. United States*, 995 F.2d 1122 (1st Cir. 1993). That is, having taken account of the "dispute among the circuits . . . about how courts should deal with Westfall Act certifications based on an argument that no harm-causing incident

ever took place," Pet. App. 14a, the district court concluded in its order denying the Government's motion to reconsider that "the *Wood* majority has the better of the interpretive dispute surrounding Westfall Act certifications," Pet. App. 15a.

As set out in detail in the following Part II (pp. 18-34), the view advanced by the *Wood* majority is that the Attorney General's certification under the Westfall Act "cannot deny the occurrence of the basic incident charged." *Wood*, 995 F.2d at 1124, *quoted in* Pet. App. 14a. Thus, *Wood* answered "no" to the question "whether the Attorney General may issue a Westfall Act certificate that simply denies that any injury-causing action occurred." *Id.* at 1123. Because the district court perceived the certification in the present case as denying that any "harm-causing incident ever took place," Pet. App. 14a, the remand order was unmistakably based on the court's conclusion that the Attorney General had tried to do exactly what he was not "permitt[ed]" to do, Pet. App. 15a. To use a formulation from one of this Court's opinions regarding removal jurisdiction, the district court concluded (rightly or wrongly, it remains to be determined) that the Attorney General "lacked authority" to issue the incident-denying certification regarding respondent Haley and, consequently, to remove this action against Haley to federal court. *International Primate Protection League v. Administrators of Tulane Educational Fund*, 500 U.S. 72, 87 (1991) ("*IPPL*").

In these circumstances, the basis for remand is fairly characterized as a "lack[of] subject matter jurisdiction" as that term is used in § 1447(c). As *IPPL* concluded: "Since the district court had no original jurisdiction over this case, . . . a finding that removal was improper [for lack of authority to remove] deprives that court of subject matter jurisdiction and obliges a remand *under the terms of § 1447(c)*." 500 U.S. at 87 (emphasis added). Alternatively, the basis for remand is fairly characterized as a "defect other than lack of subject matter jurisdiction" within the meaning of

§ 1447(c). The Third Circuit has observed that Congress's 1996 amendment of § 1447 "plainly effect[ed] a broadening of the scope of § 1447(c)—expanding its application to not just procedural defects, but any defects"—so that "the plain language of the amended statute now applies broadly to include all removals that are not authorized by law." *Cook v. Wikler*, 320 F.3d 431, 434-35 (3d Cir. 2003). Accordingly, if the district court "remanded this case to state court based upon [a] belief that the removal was 'not authorized by law' . . . such a 'defect' would fall within the 'basis' of § 1447(c) for which Congress has authorized remands to state court." *Id.* at 439.

But it really does not matter which characterization is superior. In either event, the basis for remand in this case was one of "the grounds specified in § 1447(c)." *Kircher*, 126 S. Ct. at 2153. In sum, "the result here is the same whether we look near or far": the remand order is "immunized from all forms of appellate review." *Id.* at 2153 & n.9.

Although the court of appeals below did not consider its own jurisdiction in light of § 1447(d), other courts of appeals have decided that orders remanding cases removed under the Westfall Act are indeed reviewable notwithstanding the bar of § 1447(d). Those decisions are grounded in two "exceptions" to that bar, which we confront in turn.

A. The *Thermtron* Exception Does Not Apply.

As recounted above, *Thermtron* "held that the bar of § 1447(d) applies only to remands based on the grounds specified in § 1447(c)." *Kircher*, 126 S. Ct. at 2153. Therefore, it may be said that the bar itself contains an "exception" for remand orders based on *other grounds*. This Court has consciously invoked the exception only twice in three decades. In *Thermtron* itself, the Court "approved appellate review of a remand expressly based on the District Court's crowded docket." *Id.* More recently, in *Quackenbush v. Allstate Insurance Co.*, 517 U.S. 706, 710-12 (1996), the Court undertook to review a remand order "based on abstention under

Burford v. Sun Oil Co., 319 U.S. 315 (1943)." *Kircher*, 126 S. Ct. at 2153.[3]

The Third and Fourth Circuits have relied on this exception to justify review of orders remanding cases removed under the Westfall Act. Deciding that "§ 1447(c) must be read together with § 2679(d)(2)," the Third Circuit reasoned that because the latter provision "expresses Congress's intent that subject matter jurisdiction is conclusively established upon the Attorney General's certification, . . . there is no jurisdictional question to be resolved by the district court" in a Westfall Act case. *Aliota v. Graham*, 984 F.2d 1350, 1357 (3d Cir.), *cert. denied*, 510 U.S. 817 (1993). For this reason, a court that has remanded such a case has by definition "remanded a properly removed case on grounds that [it] had no authority to consider," and so appellate review is "not barred by § 1447(d)." *Id.* (quoting *Thermtron*, 423 U.S. at 351). Likewise invoking *Thermtron*, the Fourth Circuit adopted the same reasoning: "Because § 2679(d)(2) 'conclusively' vests federal jurisdiction over a suit against a federal employee who[m] the Attorney General has certified 'was acting within the scope of his office or employment,' a district court has no authority to remand a case removed pursuant to that section, and the bar of § 1447(d) does not preclude [appellate courts] from reviewing [such] a remand

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[3] *Carnegie-Mellon University v. Cohill*, 484 U.S. 343 (1988), is arguably another instance, if only a *sub silentio* one. There, without mentioning § 1447(d)—save to note that the court of appeals had dismissed the appeal in favor of a petition for mandamus on the basis that the statute "bars appeals from remands to state courts with a single exception not applicable to this case," *id.* at 617 n.4 —the Court reviewed an order "remand[ing] a properly removed case to state court when all federal-law claims in the action ha[d] been eliminated and only pendent state-law claims remain[ed]." *Id.* at 345. *Cf. Things Remembered*, 516 U.S. at 130 (Kennedy, J., concurring) (observing that *Cohill* "did not find it necessary to decide whether [§ 1447(d)] would bar review of a remand on [specified] grounds, for [this Court] affirmed the denial of mandamus by the Court of Appeals").

order . . . ." *Borneman v. United States*, 213 F.3d 819, 826 (4th Cir. 2000), *cert. denied*, 531 U.S. 1070 (2001).

With due respect to these courts of appeals, this logic does not hold up. In the first place, for an appellate court to say that "subject matter jurisdiction is conclusively established upon the Attorney General's certification" under the Westfall Act, *Aliota*, 984 F.2d at 1357, or to say (what amounts to the same thing) that such certification "conclusively establishes removal jurisdiction in the federal court," *Borneman*, 213 F.3d at 826, is self-evidently to say something about jurisdiction, particularly removal jurisdiction. But having an *unreviewable* say about its own jurisdiction on removal is precisely what § 1447(d) grants to a district court that enters a remand order. As *Kircher* put it, where such an order "is based on one of the [grounds enumerated in 28 U.S.C. § 1447(c)]"—which grounds expressly include that "the district court lacks subject matter jurisdiction"—"review is unavailable no matter how plain the legal error in ordering the remand." 126 S. Ct. at 2154 (alteration in original) (quoting *Briscoe v. Bell*, 432 U.S. 404, 413-14 n.13 (1977)). As the Third Circuit acknowledged (but chose not to heed), if there were an exception to the bar of § 1447(d) such that "anytime the district court misinterprets a jurisdictional statute [appellate courts] have authority to review the remand decision," the "exception would obviously swallow the rule." *Aliota*, 984 F.2d at 1357.

It does not add anything to say, as both the Third and Fourth Circuits did, that a district court has "no authority" to remand a case removed under the Westfall Act. *Aliota*, 984 F.2d at 1356; *Borneman*, 213 F.3d at 826. Even if that proposition were true—and petitioner vigorously disputes its truth, *see infra* Part III (pp. 34-41)—it would provide no basis for distinguishing cases removed under the Westfall Act from cases removed under any other statute. Doubtless it can be said that a district court has "no authority" to remand *any* properly removed case in disregard of Congress's grant of removal jurisdiction over that case. *Cf. Cohens v.*

Virginia, 19 U.S. (6 Wheat.) 264, 404 (1821) ("[Courts] have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given.").

But for purposes of § 1447(d), the pertinent question is not whether a district court had authority to remand the case; it is whether the court of appeals had authority to review the district court's remand order. Not only are these two questions analytically distinct, the answer to the latter does ***not*** depend on the answer to the former. As *Kircher* "relentlessly repeated" yet again, the bar of § 1447(d) operates "whether or not [the remand] order might be deemed erroneous by an appellate court." 126 S. Ct. at 2153 (quoting *Thermtron*, 423 U.S. at 351). Because that bar "applies equally to cases removed under the general removal statute . . . and to those removed under other provisions," *id.*; *see also, e.g., Durham v. Lockheed Martin Corp.*, 445 F.3d 1247, 1250 & n.1 (9th Cir. 2006) (ruling that § 1447(d) barred review of order remanding a case removed under § 1442(a)(1), the federal officer removal statute), the *Thermtron* exception does not apply here *even if* the district court's order of remand "might be deemed" contrary to § 2679(d)(2).

B. The *Waco* Exception Does Not Apply.

In justifying their review of orders remanding actions removed under the Westfall Act, the Third and Fourth Circuits also relied on this Court's decision in *Waco v. United States Fidelity & Guaranty Co.*, 293 U.S. 140 (1934). *See Aliota*, 984 F.2d at 1353; *Borneman*, 213 F.3d at 825. In so doing, these courts followed the lead of the Fifth Circuit in *Mitchell v. Carlson*, 896 F.2d 128, 132 (5th Cir. 1990); *see also Kimbro*, 30 F.3d at 1503 (relying on *Waco*, *Aliota*, and *Mitchell* in a Westfall Act case). As before, *Kircher* supplies the framework for evaluating this alleged exception to the governing statutory bar: "Without passing on the continued vitality of [the *Waco*] case in light of § 1447(d), we note that on its own terms it is distinguishable." 126 S. Ct. at 2156 n.13.

First, "[t]he order appealed in *Waco* was not a remand order; the order here is." *Id.*; *see also* Pet. App. 17a ("**IT IS ORDERED** that . . . this case is **REMANDED** to Trigg County Circuit Court"). The Sixth Circuit obviously thought it was reviewing a remand order. *See* Pet. App. 8a ("Defendants additionally argue that . . . the district court . . . erred in remanding the case to state court."); Pet. App. 10a ("We agree with the majority view that the clear language of the [Westfall] Act forecloses remand. We thus also agree with Defendants that the district court lacked authority to remand the action."). *Waco* acknowledged that such an order " 'cannot [be] affect[ed]' notwithstanding any reversal of a separate order." *Kircher*, 126 S. Ct. at 2156 n.13 (quoting *Waco*, 293 U.S. at 143).

Second, and in any event, there is no "separate" order here; as in *Kircher*, the "remand order here cannot be disaggregated as the *Waco* orders could." *Id.* To be sure, the cited decisions of the courts of appeals say otherwise. Thus, the Fifth Circuit relied on *Waco* in finding "appellate jurisdiction to review the portion of the district court's . . . order, *separable from the remand portion*, that vacated its previous order substituting the United States for [the employee] and resubstituted [the employee] as defendant." *Mitchell*, 896 F.2d at 132 (emphasis added). So did the Fourth Circuit in distinguishing the remand order from "antecedent rulings rejecting the United States' certification and its substitution as the defendant." *Borneman*, 213 F.3d at 824.

The distinction proffered by these courts—between an "antecedent" order rejecting the Attorney General's certification (and thereby rejecting the attempted substitution of the United States for the employee) and a subsequent, separable remand order—does not hold up in the present case. As explained in detail above (pp. 11-12), 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). No, the court ultimately rejected

the certification here because the court decided, following the lead of the First Circuit in *Wood v. United States*, that the Attorney General lacked authority to issue an incident-denying certification or (to say the same thing) that such a certification was not authorized by law. In these circumstances, the district court's rejection of the certification (and consequent substitution) and the court's decision to remand were "inextricably linked" to one another. *Aliota*, 984 F.2d at 1353. In other words, the two "cannot be disaggregated," making *Waco* distinguishable, whatever the decision's continuing vitality. *Kircher*, 126 S. Ct. at 2156 n.13.[4]

For all these reasons, 28 U.S.C. § 1447(d) deprived the court of appeals of jurisdiction to review the district court's remand order. Consequently, the judgment of the court of appeals should be vacated for lack of jurisdiction, and the judgment of the district court remanding this case to Trigg County Circuit Court should be reinstated.

II. The Westfall Act Simply Does Not Authorize the Attorney General to Issue an "Incident-Denying" Certification.

In the proceedings below, the Government "conceded that if Haley induced [petitioner's] firing, he acted outside the scope of his employment." Pet. App. 3a. At the same time, however, the Government "denied . . . that Haley interfered with [petitioner's] continued employment." *Id.* In particular, the Government argued in its motion for recon-

[4] For the sake of completeness, we note that "the force of the bar [of § 1447(d)] is not subject to any statutory exception that might cover this case." *Kircher*, 126 S. Ct. at 2153. Any such exception is necessarily grounded in a "'clear statutory command'" whereby Congress can be said to have "expressly made 28 U.S.C. § 1447(d) inapplicable to particular remand orders." *Id.* n.8 (quoting *Things Remembered*, 515 U.S. at 128); *cf., e.g.*, 25 U.S.C. § 487(d) ("*Provided*, That the United States shall have the right to appeal from any order of remand in the case."), *cited in Kircher*, 126 S. Ct. at 2153 n.8. No clear and express command of this kind appears in the Westfall Act.

sideration in the district court that Haley declared under oath "that he had no advance knowledge of the termination of [petitioner's] employment at LBLA, that he did not advise Gaye Luber regarding the matter, and that he did not attempt to influence her independent decision to fire [petitioner]." J.A. 44. In truth, therefore, the Attorney General issued what the court of appeals called a "Westfall Act certification that denie[d] the occurrence of any injury-causing event," Pet. App. 2a, or more tersely, an "incident-denying" certification, Pet. App. 5a.[5]

What exactly does this mean? As the court of appeals noted, "the Attorney General's scope-of-employment certification may be judicially reviewed—a plaintiff may challenge the scope certification and expect resolution of that issue by the district court." Pet. App. 4a (citing *Gutierrez de Martinez v. Lamagno*, 515 U.S. 417, 420 (1995)). Where, as here, "the Attorney General's scope certification amounts to a denial that any wrongdoing occurred," *id.*, the resulting adjudication by the district court would necessarily consist of "deciding whether the employee committed the wrong the plaintiff alleges," Pet. App. 5a. In other words, it would "requir[e] a decision on the merits of [petitioner's] claim, *i.e.*, whether the alleged harm-causing incident occurred at all." Pet. App. 3a-4a; *accord* Pet. App. 11a (remanding to district court to resolve "whether the alleged incident occurred").

Other courts of appeals share the Sixth Circuit's understanding of incident-denying certifications. Thus, the D.C. Circuit has described a class of Westfall Act cases in

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[5] The district court likewise recognized that the Attorney General had certified that "no harm-causing incident ever took place." Pet. App. 14a. In *Gutierrez de Martinez v. Lamagno*, 515 U.S. 417, 421 (1995), the "certification, as is customary, stated no reasons for the U.S. Attorney's scope-of-employment determination." Here, the certification is similarly conclusory. *See* Luber BIO App. 23. Consequently, the "incident-denying" character of the certification does not appear on the face of the document; that character was revealed in the crucible of litigation in the district court.

which the Government, "faced with an allegation of an intentional tort on the part of its employee, if it concludes that the tort did not take place, will understandably assert that the employee was acting within his or her scope of office or employment . . . and deny the tort occurred." *Kimbro*, 30 F.3d at 1505. In such a case, "the scope question and the merits often overlap—sometimes exactly," *id.*—such that "to resolve the disputed factual issue" is "really [to resolve] the whole case." *Id.* at 1507; *see also id.* at 1508 (deciding that the Westfall Act contemplates judicial review "of the *underlying merits*" regardless of "what the certification actually says—*i.e.*, whether it denies or recharacterizes the plaintiff's allegations of the employee defendant's conduct"). The Third Circuit has held that the Attorney General may issue a certification in "cases in which the plaintiff alleges conduct which is beyond the scope of the defendant's employment, but which the Attorney General determines did not occur." *Melo v. Hafer*, 13 F.3d 736, 747 (3d Cir. 1994). In such cases, "the district court will resolve all issues of fact or law relevant to that issue," *id.*, which will necessarily include "find[ing] facts that are part of the plaintiff's case on the merits," *id.* at 748 n.8.

As explained below, however, the Westfall Act does not authorize the Attorney General to issue certifications of the type here described. This is not to argue that the certification in this case was "wrong" in the sense that Haley really *did* interfere with petitioner's employment at LBLA. (As will become evident, petitioner means to prove that point to a jury of her peers in Trigg County Circuit Court.) Rather, it is to argue that in issuing an incident-denying certification (in this case and others), the Attorney General has attempted to do something the Westfall Act categorically does not permit him to do. As the First Circuit put the point in agreeing with the Second Circuit, "the Act does not permit the government to certify that the alleged incident is 'within the scope of employment' simply 'by denying that the acts occurred.'" *Wood v. United States*, 995 F.2d 1122 (1st Cir.

1993) (en banc) (quoting *McHugh v. University of Vermont*, 966 F.2d 67, 74 (2d Cir. 1992)).[6]

Then-Chief Judge Breyer framed the issue in *Wood*:

> This appeal focuses on whether the Attorney General may issue a Westfall Act certificate that simply denies that any injury-causing action occurred. Suppose a plaintiff claims that a federal employee committed acts clearly outside the scope of employment . . . . Can the Attorney General certify that there simply was no such event? To rephrase this question using the statutory terms [from 28 U.S.C. § 2679(d)(1), (2)]: Can the certificate grant immunity simply by denying the occurrence of any "incident out of which the claim arose?" Would such a certificate fall within the scope of the immunity statute?

995 F.2d at 1124. *Wood* held that "the answer is 'no.'" *Id.* *That answer is correct*—and it is compelled by the specific language of § 2679(d), the statutory scheme of the Westfall Act and Federal Tort Claims Act, the history of the Westfall Act, the nature and operation of official immunity, and the Article III problem that a contrary answer would raise.

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[6] As an action commenced in federal court, *Wood* was governed by paragraph (1) of § 2679(d); as actions commenced in state court, *McHugh* was, and the present case is, governed by paragraph (2) of that subsection. For present purposes, the relevant portions of the respective paragraphs are virtually identical:

> 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 . . . 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.

The bracketed text appears only in paragraph (2).

A. The Specific Language of 28 U.S.C. § 2679(d).

As *Wood* observed, the "Westfall Act itself says that, to provide immunity, the Attorney General must 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.'" 995 F.2d at 1124 (quoting § 2679(d)(1), (2)). It is quite "natural to read these words as speaking of an action 'at the time of the incident,' thus assuming some kind of 'incident' occurred." *Id.* By definition, however, an incident-*denying* certification controverts this statutory assumption.

The words of the statute also assume that the defendant employee was "acting"—and permit the Attorney General (subject to review in the district court) to characterize that action as "within the scope of [the employee's] office or employment." But an incident-denying certification controverts the assumption of employee action and (as elaborated in the following section) actually dispenses with the "scope" issue altogether.

In the present case, for example, the Government asserted that Haley "has done nothing which can be construed to fall outside the scope of his employment," J.A. 41, and that he "never acted outside the scope of his employment," J.A. 45. Although these assertions make reference to "scope of employment," that reference is a diversion: the Government's essential point was that Haley had "done nothing" and had "never acted" vis-à-vis petitioner. Thus, the Government reasoned: "If, as Mr. Haley and Ms. [Luber] both have stated, they had no communication regarding [petitioner's] veterans preference inquiry or her firing [that is, if Haley *did nothing*], then Haley cannot possibly have acted outside the scope of his employment." J.A. 46.

Therefore, in denying that any "incident" occurred, and in denying that the defendant employee was ever "acting" vis-à-vis the plaintiff, an incident-denying certification is inconsistent with the text of § 2679(d).

B. The Statutory Scheme of the Westfall Act and the Federal Tort Claims Act.

In *Lamagno*, the Court crystallized the relevant statutory scheme: "The certification, removal, and substitution provisions of the Westfall Act, 28 U.S.C. §§ 2679(d)(1)-(3), work together to assure that, when scope of employment is in controversy, that matter, *key to the application of the FTCA*, may be resolved in federal court." 515 U.S. at 430-31 (footnote omitted and emphasis added). The scope of employment is the "critical . . . inquiry" or "key question," *id.* at 426, 430, precisely because "'[s]cope of employment' sets the line." *Id.* at 423. If a federal employee "is inside that line, he is not subject to [civil] suit; if he is outside the line, he is personally answerable." *Id.* (construing § 2679(b)(1)). That is, the Westfall Act establishes "absolute immunity for Government employees . . . for torts committed by [them] *in the scope of their employment*"—and not otherwise. *United States v. Smith*, 499 U.S. 160, 163 (1991) (emphasis added). Thus, "the significance of the scope-of-employment inquiry" is that Congress "wanted the employee's personal immunity to turn on that question alone." *Lamagno*, 515 U.S. at 426.

1. An incident-denying certification, and the attendant review of such a certification in court, would have the employee's personal immunity turn on "whether the alleged harm-causing incident occurred *at all*," Pet. App. 3a-4a (emphasis added), rather than whether such incident occurred "*within* the scope of his office or employment," § 2679(d)(2) (emphasis added). Here, the Sixth Circuit would have the district court decide whether "Haley influenced LBLA . . . to fire [petitioner] after she had a run-in with Haley." Pet. App. 3a. No "scope" inquiry is even contemplated, the Government having "conceded that if Haley induced [petitioner's] firing, he acted outside the scope of his employment." *Id.* Likewise, in *Melo*, the Third Circuit remanded the case for the district court to decide whether in fact the defendant federal employee "had turned over a list of suspected jobbuyers within the Auditor General's Office in order to assist

Barbara Hafer in her political campaign for Auditor General." 13 F.3d at 741. Again, no "scope" inquiry was even contemplated, for the defendant employee conceded that he "would not have been acting within the scope of his employment if" he had done such a thing. *Id.*

These cases illustrate that an incident-denying certification simply does not pose the question on which Congress wanted personal immunity *alone* to turn. That is, the judicial inquiry generated by such a certification is not truly a *scope-of-employment* inquiry; it is an "inquiry into merits facts." *Id.* at 746. As so revealed, an incident-denying certification distorts the above-described statutory scheme of the Westfall Act at the most basic level.

2. To be sure, some judges have conflated these two types of inquiry, or treated the latter as comprehending the former. *See, e.g., id.* at 747 (contemplating that "findings necessary to a determination of the scope of employment issue" would include a "determination as to whether [the employee] supplied Hafer . . . with information concerning the plaintiffs"); *Wood*, 995 F.2d at 1134 (Coffin, Selya, and Boudin, JJ., dissenting) (envisioning a unitary "determination as to what did or did not occur and its relationship to [the defendant's] office or employment"). But the distinction between a true scope-of-employment inquiry and the fundamentally different inquiry entailed by an incident-denying certification emerges clearly when one examines the applicable law, i.e., state agency law. *See supra* note 1 (p. 4).

For example, under Kentucky law as perceived by the district court, a court "must ask four questions to determine whether or not [an employee] acted within the scope of his employment"; those questions concern the typicality, location, timing, purpose, and foreseeability of the employee's "conduct" or "actions." Pet. App. 23a. It should be apparent that evaluating the various characteristics of an employee's actions is decidedly not the same as determining whether those actions were undertaken at all. Yet the Government

devoted its motion to reconsider not to the legal question whether, under Kentucky law, Haley was acting "*within* the scope of his office or employment at the time of the incident out of which the claim arose," § 2679(d)(2) (emphasis added), but instead to the purely factual question whether the incident occurred at all.[7]

Under Virginia law as applied by the Fourth Circuit on remand from this Court in *Lamagno*, a particular act is within the scope of employment if (1) the act "was expressly or impliedly directed by the employer, or is naturally incident to the business," and (2) it "was performed, although mistakenly or ill-advisedly, with the intent to further the employer's interest." *Gutierrez de Martinez v. Drug Enforcement Administration*, 111 F.3d 1148, 1156 (4th Cir.) (quoting *Kensington Associates v. West*, 362 S.E.2d 900, 901 (Va. 1987)), *cert. denied*, 522 U.S. 931 (1997). Again, it should be apparent that evaluating whether an act was "directed by the employer, or is naturally incident to the business," and

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[7] *See* J.A. 41 ("[T]he United States, as evidenced by the answer it filed herein and by the attached Declarations, vigorously contests plaintiff's allegations."); J.A. 42 (arguing that it "denied each and every factual allegation by plaintiff against Barry Haley"); J.A. 43-45 (arguing numerous factual points based on the attached declarations of Haley and Luber); J.A. 46 (arguing that "Plaintiff has put forward no facts sufficient to contest" the Attorney General's certification); J.A. 48 (arguing that its answer "and the additional evidence submitted herewith demonstrate that the United States contests the allegations and that an issue of fact exists").

To be sure, the Government devoted one paragraph to speculating that limited discovery could "reveal evidence supporting an argument that, even if [petitioner's] allegations are true, [Haley's] alleged conduct falls within the relevant Kentucky law on scope [of employment]." J.A. 47. The district court rejected this line of argument, refusing to credit "factual arguments made in the alternative when one version is made under oath subject to perjury, i.e., Mr. Haley's declaration, and the other version merely suggested." Pet. App. 14a. As documented above (p. 3), the Government abandoned this line of argument in the court of appeals.

whether an act was performed "with the intent to further the employer's interest," is an inquiry very different in kind from determining whether the act was performed at all.[8]

3. An incident-denying certification also distorts the statutory scheme in relation to substitution. The Court has explained that "[w]hen the Attorney General has granted certification"—and that certification is upheld on judicial review—"the United States will be substituted as the party defendant" both in cases originally filed in federal court and in those removed from state court. *Lamagno*, 515 U.S. at 431-32. "Ordinarily," such a substitution will "occasion no contest," for although it "relieves the employee of responsibility, plaintiffs will confront instead a financially reliable defendant." *Id.* at 422. To be sure, in some cases (including *Lamagno*) "substitution of the United States would cause the demise of the action." *Id.* But this demise results not from certification and substitution per se but instead from the rule that, upon substitution, "the action 'shall proceed in the same manner as any action against the United States . . . and shall be subject to the limitations and exceptions applicable to those actions.'" *Id.* (quoting § 2679(d)(4)); *cf. id.* (observing that the plaintiffs' "claims 'arose in a foreign country,' FTCA, 28 U.S.C. § 2680(k), and thus fell within an exception to the FTCA's waiver of . . . sovereign immunity").

Yet the substitution that takes place when an incident-denying certification is upheld—i.e., when the district court determines that the alleged harm-causing incident did *not* occur at all—is categorically an idle act. The Government need not even bother to assert the "limitations and exceptions" of the FTCA, because the case will already have been

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[8] In *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998), a Title VII case, the Court conducted a scope-of-employment inquiry and ultimately concluded that "[t]he general rule is that sexual harassment by a supervisor is not conduct within the scope of employment." *Id.* at 757. The inquiry pointedly did not determine whether such harassment had occurred in the pending case, but proceeded "assum[ing] discrimination can be proved." *Id.* at 754.

decided against the plaintiff *on the merits*. *See, e.g.*, Pet. App. 15a (recognizing that to determine "whether or not the harm-causing incident took place" is to "resolve the merits of the underlying dispute"). It makes no sense to permit the kind of certification that will, if upheld, *always* result in the action's being dismissed rather than its proceeding against the Government as the party defendant. As *Wood* reasoned: "Since Congress intended to limit grants of immunity to job-related, respondeat superior, kinds of cases, there is no reason to apply the Westfall Act in cases that concededly do not involve any kind of *potential* respondeat superior liability." 995 F.2d at 1126 (emphasis added).

In sum, by dispensing with a true scope-of-employment inquiry and by creating a class of cases in which substitution would be an idle act, an incident-denying certification contravenes the statutory scheme of the Westfall Act and the Federal Tort Claims Act.

C. The History of the Westfall Act.

As this Court has observed, when "Congress wrote the Westfall Act, . . . the legislators had one purpose firmly in mind," namely, "to override *Westfall v. Erwin*, 484 U.S. 292 (1988)." *Lamagno*, 515 U.S. at 425. *Westfall* had held that in order "to gain immunity from suit for a common-law tort, a federal employee would have to show (1) that he was acting within the scope of his employment, and (2) that he was performing a discretionary function." *Id.* at 425-26 (citing *Westfall*, 484 U.S. at 299). In the wake of that ruling, "Congress reacted quickly to delete the 'discretionary function' requirement, finding it an unwarranted judicial imposition." *Id.* at 426. But Congress did not give federal employees an overriding, blanket immunity from *all* civil actions. Rather, Congress concentrated on "the scope-of-employment inquiry —that is, it wanted the employee's personal immunity to turn on that question alone." *Id.* As the Act itself declares, its purpose is "to protect Federal employees from personal liability for common law torts committed within the scope of their employment, while providing persons injured by the

common law torts of Federal employees with an appropriate remedy against the United States." Westfall Act, § 2(b), 102 Stat. at 4564, *reproduced in* Pet. App. 27a.

In this light of this history, *Wood* "examined the pre-Westfall Act cases" and found that the "leading immunity cases all involved 'incidents' that defendants conceded to have occurred." 995 F.2d at 1127 (citing *Westfall* itself; *Barr v. Matteo*, 360 U.S. 564 (1959); and *Gregoire v. Biddle*, 177 F.2d 579 (2d Cir. 1949), *cert. denied*, 339 U.S. 949 (1950)). Moreover, "in every other case [the court] found, the parties conceded or assumed for immunity-conferring purposes the occurrence of some kind of harm-causing 'act or omission,'" and the court "could find no contrary example of either an ordinary or a 'constitutional' tort case in which a claim of immunity rested on a denial that any incident occurred." *Id.*; *cf. Melo*, 13 F.3d at 745 (noting that "in the pre-Westfall era, [the defendant employee] was not entitled to have the judge resolve any material disputes of fact presented by the summary judgment record"). Given the statute's important but narrow focus—"delet[ing] the 'discretionary function' requirement" imposed by the *Westfall* decision, *Lamagno*, 515 U.S. at 426—*Wood* correctly concluded that nothing in the Act's history "suggests that Congress wanted to change the pre-existing practice" by permitting immunity to rest on a denial that any incident occurred. 995 F.2d at 1127.[9]

D. The Nature and Operation of Official Immunity.

It is evident from the foregoing that the Westfall Act creates a species of *official immunity*, specifically "absolute

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[9] *Wood* also observed that cases arising under the Westfall Act's predecessor—the Federal Drivers Act, Pub. L. No. 87-258, § 1, 75 Stat. 539, 539 (1966) (formerly codified at 28 U.S.C. § 2679(d))—likewise "turned on whether the 'incident' (essentially an auto accident) fell within the 'scope of employment,' not on whether any basic incident occurred." 995 F.2d at 1128. While noting the differences between the two statutes, *Lamagno* relied on the Drivers Act as an aid to construing the Westfall Act. *See* 515 U.S. at 425.

immunity for Government employees . . . for torts committed by [those] employees in the scope of their employment." *United States v. Smith*, 499 U.S. at 163. The Government has previously argued that this absolute immunity "closely resembles the qualified immunity from constitutional torts addressed in" *Hunter v. Bryant*, 502 U.S. 224 (1991), and many other decisions. Proof Brief for Defendant-Appellee Barry Haley at 16; *see also id.* (referring to "the closely related area of qualified immunity in suits for constitutional torts"). The Government's point is a sound one, especially given this Court's holding that "qualified immunity shares [an] essential attribute of absolute immunity"—that each is "in fact an entitlement not to stand trial under certain circumstances." *Mitchell v. Forsyth*, 472 U.S. 511, 525 (1985).

In this light, it is worthwhile to consider the pending question through the lens of this Court's rich jurisprudence of official immunity, both absolute and qualified. In three respects, that jurisprudence buttresses the conclusion that the Westfall Act does not authorize the Attorney General to issue an incident-denying certification.

1. *Mitchell* taught that "a claim of immunity is conceptually distinct from the merits of the plaintiff's claim." *Id.* at 527, *quoted in Johnson v. Jones*, 515 U.S. 304, 314 (1995); *accord, e.g., Wyatt v. Cole*, 504 U.S. 158, 166 (1992) (distinguishing "immunity from suit" from "a mere defense to liability"); *Behrens v. Pelletier*, 516 U.S. 299, 306 (1996) (observing that immunity is an entitlement that is "distinct from the merits"); *Richardson v. McKnight*, 521 U.S. 399, 403 (1997) (pointing out that "a distinction exists between an 'immunity from suit' and other kinds of legal defenses"). As the Fifth Circuit has recognized, the import of this conceptual distinction is that "[a] public official who attacks a plaintiff's ability to prove her case is *not* raising a qualified immunity defense." *Hare v. City of Corinth*, 135 F.3d 320, 328 (5th Cir. 1998) (emphasis added). In the same vein, the Seventh Circuit has recognized that "the immunity defense is unavailable" regarding "whether the defendants did the

deeds alleged." *Elliott v. Thomas*, 937 F.2d 338, 341 (7th Cir. 1991), *cert. denied*, 502 U.S. 1074, 1121 (1992).[10]

As documented above, however, attacking a plaintiff's ability to prove her case is precisely the function (indeed, the only function) of an incident-denying certification. *See supra* pp. 19-20. Moreover, because it raises the question (indeed, only the question) whether the defendants did the deeds alleged, an incident-denying certification simply does not raise an immunity defense.

2. *Mitchell* also established that "a district court's denial of a claim of qualified immunity, to the extent that it turns on an issue of law, is an appealable 'final decision' within the meaning of 28 U.S.C. § 1291 notwithstanding the absence of a final judgment." 472 U.S. at 530. The Court returned to this issue in *Johnson v. Jones*, considering "the appealability of a portion of a district court's summary judgment order that, though entered in a 'qualified immunity' case, determines only a question of 'evidence sufficiency,' *i.e.*, which facts a party may, or may not, be able to prove at trial." 515 U.S. at 313. The Court unanimously ruled that this kind of order is *not* appealable. The Court's first reason for this ruling goes to the nature of the immunity determination: "a qualified immunity ruling . . . is . . . a legal issue that can be decided with reference only to undisputed facts and in isolation from the remaining issues of the case." *Id.* (alterations in *Johnson*) (quoting *Mitchell*, 472 U.S. at

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[10] *See also, e.g., Stephenson v. Doe*, 332 F.3d 68, 78 (2d Cir. 2003) (distinguishing between "the question of whether the plaintiff's constitutional rights were violated" and "the question of whether the officer was entitled to qualified immunity"); *Dolson v. Village of Washingtonville*, 382 F. Supp. 2d 598, 601-02 (S.D.N.Y. 2005) ("A defendant's assertion that the plaintiff's constitutional rights were not violated, or that [plaintiff's] version of events is wrong, does not go to the question of whether the officer was entitled to qualified immunity. . . . If plaintiff's version of the facts is wrong and defendant's is correct, then the defendant will prevail, not because of qualified immunity, but because he did nothing wrong.").

530 n.10). Accordingly, "an appellate court reviewing the denial of the defendant's claim of immunity need not consider the correctness of the plaintiff's version of the facts." *Id.* (quoting *Mitchell*, 472 U.S. at 528).

By contrast, an incident-denying certification necessarily requires the district court to "resolve the factual dispute" about the merits of the plaintiff's claims in order to grant or deny the protection of the Westfall Act. Pet. App. 8a; *see also* Proof Brief for Defendant-Appellant Barry Haley at 22 (contending that "the district court had to address"—at the *immunity* stage (and without discovery)—"whether Haley committed the acts alleged in the complaint"). Such a requirement cannot be squared with *Mitchell*'s and *Johnson*'s precepts that immunity is "a legal issue that can be decided with reference only to undisputed facts" and that the court considering immunity "need not consider the correctness of the plaintiff's version of the facts."

3. This Court returned to the relationship between an immunity defense and the merits of the plaintiff's claim in *Crawford-El v. Britton*, 523 U.S. 574 (1998). The Court distinguished between the "plaintiff's showing of improper intent (a pure issue of fact)" and "the separate qualified immunity question whether the official's alleged conduct violated clearly established law, which is an 'essentially legal question.' " *Id.* at 589 (quoting *Mitchell*, 472 U.S. at 526). Moreover, the Court observed that it "has never indicated that qualified immunity is relevant to the existence of the plaintiff's cause of action." *Id.* (quoting *Gomez v. Toledo*, 446 U.S. 635, 640 (1980)). The Court also reiterated that in order to resolve an immunity defense, a district court "must determine whether, *assuming the truth of the plaintiff's allegations*, the official's conduct violated clearly established law." *Id.* at 598 (emphasis added); *accord, e.g., Saucier v. Katz*, 533 U.S. 194, 201 (2001) (ruling that a "court required to rule upon the qualified immunity issue must consider" the facts "in the light most favorable to the party asserting the injury").

By definition, an incident-denying certification takes just the opposite tack. Rather than assuming the truth of the plaintiff's allegations—and asserting that the alleged conduct occurred *within* the defendant employee's scope of employment—such a certification necessarily denies the allegations. Moreover, when the matter reaches the district court, an incident-denying certification steers the judicial inquiry toward the "pure issue[s] of fact" that underlie the plaintiff's claim and away from the "essentially legal question[s]" that are the hallmark of immunity defenses. *See, e.g., Kimbro*, 30 F.3d at 1502 (forcing the district court to decide between (1) the plaintiff's allegation that the defendant "without provocation . . . viciously struck [her] on the right arm," and (2) the employee's "sworn declaration claiming that she did not recall ever touching" the plaintiff).[11]

The Westfall Act creates a species of official immunity for federal employees. Yet an incident-denying certification cannot be squared with the nature and operation of official immunity as explicated by this Court.

E. The Article III Problem.

In *Lamagno*, a four-Justice plurality confronted what the amicus curiae called "a potentially serious Article III problem." 515 U.S. at 434. The amicus argued that if the Attorney General's certification is rejected on judicial review, and if there is no diversity of citizenship among the parties, "then the federal court will be left with a case without a federal question to support the court's subject-matter jurisdiction." *Id.* at 434-35. The plurality denied the gravity of the alleged problem, reasoning as follows:

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[11] As *Wood* recognized, the judicial factfinding resulting from an incident-denying certification "impos[es] a major restraint upon the plaintiff's right to a jury trial." 995 F.2d at 1130. By contrast, the structure and history of the Westfall Act give us no reason to conclude that Congress intended to "tak[e] from the jury its traditional job of deciding whether an egregious tort (well outside the 'scope of employment'), in fact, occurred." *Id.* at 1126.

> Whether the [defendant] employee was acting within the scope of his federal employment is a significant federal question—and the Westfall Act was designed to assure that this question could be aired in a federal forum. Because a case under the Westfall Act thus "raises [a] question of substantive federal law at the very outset," it "clearly 'arises under' federal law, as that term is used in Art. III."

Id. at 435 (citation omitted) (quoting *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 493 (1983)).

Of course, judicial review of the Attorney General's certification cannot raise a "question of substantive federal law" if it raises no question of *law* at all. Yet an incident-denying certification necessarily entails a purely *factbound* determination by the district court. We have already given some examples. *See* Pet. App. 3a (whether Haley influenced LBLA to fire petitioner); *Melo*, 13 F.3d at 747 (whether the defendant supplied a candidate with information about the plaintiffs); *Kimbro*, 30 F.3d at 1502 (whether the defendant assaulted the plaintiff). Other such factbound determinations are easily supplied. *See, e.g., Wood*, 995 F.2d at 1124 (whether defendant "spoke in a sexually suggestive manner to plaintiff" and whether he did "proposition or otherwise make any sexual advances towards plaintiff"); *Heuton v. Anderson*, 75 F.3d 357, 359 (8th Cir. 1996) (whether defendant "posted a picture depicting [one plaintiff] as a momma pig and the other plaintiffs as suckling piglets").

It is difficult to see how any of these factual issues is a "nonfrivolous federal question" or a "question of substantive federal law" as those terms were used by the *Lamagno* plurality. 515 U.S. at 435. Accordingly, an incident-denying certification in a case (like this one) where there is no other basis for federal jurisdiction does indeed raise the Article III problem. *See also id.* at 437 (O'Connor, J., concurring) (finding a "difficult question of federal jurisdiction"); *id.* at 441 (Souter, J., dissenting) (finding a "serious problem" that

"approach[es] the limit [of Article III 'Arising Under' jurisdiction], if it does not cross the line"). Reading the Westfall Act—in accord with the text of § 2679(d), the Act's history and structure, and the jurisprudence of official immunity—*not* to authorize the Attorney General to issue an incident-denying certification avoids this problem.

For these reasons, the Attorney General lacks authority under the Westfall Act to issue an incident-denying certification like the one he issued in this case.

III. Where Removal Is Based upon a Certification Not Authorized by the Westfall Act, the Case Must Be Remanded to State Court.

If the certification issued in this case is not authorized by the Westfall Act, what is the consequence? As explained below, the consequence is straightforward: the case *must* be remanded to state court. This result is compelled by the general remand statute, 28 U.S.C. § 1447(c), and nothing in the Westfall Act itself requires otherwise.

A. Removal Based upon an Unauthorized Certification Is Improper and Obliges a Remand under the Terms of § 1447(c).

1. In *Lamagno*, the Court generally described the removal provision of the Westfall Act: "When the Attorney General has granted certification, if . . . the case was initiated by the tort plaintiff in state court, the Attorney General is to remove it to the federal court, where, as in a case that originated in the federal forum, the United States will be substituted as the party defendant." 515 U.S. at 431-32 (citing § 2679(d)(2)). The specific statutory language providing for removal is as follows:

> 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.

§ 2679(d)(2) (emphasis added).

We think it obvious that the emphasized language specifies a particular kind or type of certification upon which removal must be based. That is, the statute does not authorize removal based upon, for example, a certification by the Attorney General *that the defendant employee was acting in good faith*, or a certification by the Attorney General *that the plaintiff's claim is without merit*. Again, only 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* will satisfy the statutory prerequisite for removal under the Westfall Act of a state-court civil action against that employee.

As the preceding Part II has demonstrated, however, an incident-denying certification is *anything but* the certification described in § 2679(d)(2). To conclude that the Westfall Act does not authorize the Attorney General to issue an incident-denying certification is necessarily to conclude that such a certification is *not* what the Act comprehends when it refers to (we quote again) a "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." § 2679(d)(1), (2); *cf.* Part II.A *supra* (p. 22) (showing that "an incident-denying certification is inconsistent with the text of § 2679(d)"). Therefore, a removal based upon an incident-denying certification is a removal that is simply not authorized by the Westfall Act. To say the same thing using terms from this Court's opinions, such a removal is "improper," *IPPL*, 500 U.S. at 77, 78 n.4, 87; "unwarranted," *Caterpillar Inc. v. Lewis*, 519 U.S. 61, 77 (1996); or (echoing § 1447(c)'s use of the word *defect*) "defective," *Wisconsin Department of Corrections v. Schacht*, 524 U.S. 381, 392 (1998).

2. How does a federal court respond to such a removal? To answer that question, we must return to 28 U.S.C. § 1447(c), which encompasses both "removals that are defective because of lack of subject matter jurisdiction and removals that are defective for some other reason." *Wisconsin Department of Corrections*, 524 U.S. at 392. The former category is distinctive in that a jurisdictional defect compels a remand "at any time before final judgment," § 1447(c), but in every case the expected "outcome of an unwarranted removal" is a "swift and nonreviewable remand order" at the start. *Caterpillar Inc.*, 519 U.S. at 77 (citing § 1447(c), (d)). More succinctly: "If removal was improper, the case must be remanded to state court." *IPPL*, 500 U.S. at 78 n.4.

IPPL is illustrative. The principal issue in that case was whether 28 U.S.C. § 1442(a)(1), as it then read, permitted federal *agencies* (like federal officers) to remove cases. *See* 500 U.S. at 79. The Court had "little trouble concluding that the statutory language excludes agencies from the removal power." *Id.*; *but cf.* Federal Courts Improvement Act of 1996, Pub. L. No. 104-317, § 206(a), 110 Stat. 3487, 3850 (amending the statute to *in*clude agencies). The Court then confronted the question of remand:

> Having concluded that [the federal agency] lacked authority to remove petitioners' suit to federal court, we must determine whether the case should be remanded to state court. Section 1447(c) of Title 28 provides that, "if at any time before final judgment it appears that the district court lacks subject matter jurisdiction [over a case removed from state court], the case shall be remanded." Since the district court had no original jurisdiction over this case, a finding that removal was improper deprives that court of subject matter jurisdiction and obliges a remand under the terms of § 1447(c).

500 U.S. at 87 (alteration in original and citation omitted).

Applying these precepts to the present case is straightforward. As previously demonstrated, the Attorney General "lacked authority" to remove petitioner's lawsuit to federal court. Moreover, the district court "had no original jurisdiction over this case" because petitioner has asserted only tort claims under Kentucky law, *see* Pet. App. 24a, and all of the parties are citizens of Kentucky, *see* Pet. App. 25a. Accordingly, the conclusion that "removal was improper deprives [the district] court of subject matter jurisdiction and *obliges a remand under the terms of § 1447(c)*."[12]

It remains to examine whether anything in the Westfall Act overcomes this obligation.

B. Nothing in the Westfall Act Overcomes the Statutory Obligation to Remand.

In the court below, respondents argued that "even if the district court correctly denied the United States' motion to substitute, it erred in remanding the case to state court." Pet. App. 8a. The court of appeals agreed with respondents and "with the majority view that the clear language of the [Westfall] Act forecloses remand," so that "the district court lacked authority to remand the [present] action." Pet. App. 10a. The "clear language" on which the court relied is the final sentence of § 2679(d)(2): "This certification of the Attorney General shall *conclusively* establish scope of office or employment for purposes of removal" (emphasis added). In earlier reaching the same conclusion as the court below, the Third, Fourth, and Fifth Circuits relied on the same statutory provision, particularly the same adverb. *See Aliota*, 984 F.2d at 1356; *Borneman*, 213 F.3d at 825-26; *Garcia v. United States*, 88 F.3d 318, 323-25 (5th Cir. 1996).

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[12] As discussed above (pp. 12-13), the mandated result is the same even if the improper removal falls into the category of "removals that are defective for some other reason" than lack of subject matter jurisdiction. *Wisconsin Department of Corrections*, 524 U.S. at 392. Section 1447(c) "now applies broadly to include all removals that are not authorized by law." *Cook*, 320 F.3d at 434-35.

With respect to certifications that are authorized by the Westfall Act and thus satisfy the statutory prerequisite for removal, this interpretation of § 2679(d)(2)'s final sentence is eminently reasonable. It gives effect to the adverb *conclusively*, and it "foreclose[s] needless shuttling of a case from one court to another." *Lamagno*, 515 U.S. at 433 n.10. As explained below, however, this interpretation is plainly wrong with respect to an incident-denying certification.

1. Consider the text itself. Precisely what is it that "conclusively establish[es] scope of office or employment for purposes of removal"? The subject of the sentence is "This certification of the Attorney General." And "*This* certification," of course, is that oft-quoted certification specified in the *first* sentence of § 2679(d)(2), namely the "certification by the Attorney General that the defendant employee was acting within the scope of his office or employment." Yet as demonstrated repeatedly, and most recently in Part III.A.1 above (p. 35), an incident-denying certification is *anything but* the certification described in § 2679(d)(2). Accordingly, an incident-denying certification cannot establish *anything* for purposes of removal, much less establish it conclusively.

Moreover, an incident-denying certification cannot be said to establish "scope of office or employment." As documented in Part II.B above (pp. 23-26), such a certification actually dispenses with a true scope-of-employment inquiry in favor of an inquiry solely into merits facts. Although the former implicates federal law (and so serves as a basis for removal jurisdiction), the latter does not. For both of these reasons, the final sentence of § 2679(d)(2) does not foreclose remand of a case (like the present one) improperly removed on the basis of an incident-denying certification.[13]

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[13] That the term "conclusively" does not override every other consideration should not be surprising. Would an otherwise proper Westfall Act certification foreclose remand if the Attorney General relied on it to remove a *criminal* case, a case commenced in *tribal* court, or a case in which *trial had already begun*? We think not.

2. Constitutional considerations affirm this conclusion. Although *Lamagno* itself was a case originally filed in federal court under the diversity jurisdiction, a four-Justice plurality (in Part IV of its opinion) nevertheless considered the propriety of "[t]reating the Attorney General's certification as conclusive for purposes of removal." 515 U.S. at 434. The plurality found 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. The four dissenting Justices, on the other hand, found "a serious problem . . . in requiring a federal district court, after rejecting the Attorney General's certification, to retain jurisdiction over a claim that does not implicate federal law in any way." *Id.* at 441 (Souter, J., dissenting). That is, retaining jurisdiction in these circumstances "invite[d] a difficult and wholly unnecessary constitutional adjudication about the limits of Article III jurisdiction." *Id.* at 443-44.

We have previously quoted the plurality's response to the constitutional problem raised by the dissent. *See supra* p. 33. That response makes sense in the context of a certification that properly invokes the Act and properly removes the case to federal court, where a true scope-of-employment question is subject to judicial review and determination. In such a case, it is reasonable to say that while "[t]here may no longer be a federal question once the federal employee is resubstituted as defendant, . . . there *was* a nonfrivolous federal question . . . when the case was removed to federal court." *Lamagno*, 515 U.S. at 435 (plurality opinion). It is also reasonable to say that such a case "raises [a] question of substantive federal law at the very outset," and it therefore "clearly 'arises under' federal law, as that term is used in Art. III." *Id.* (quoting *Verlinden B.V.*, 461 U.S. at 493).

But consider a case where (as here) removal is based upon an incident-denying certification. The only dispute for the district court to resolve is "whether the alleged incident occurred," Pet. App. 11a, which is necessarily a "pure issue

of fact," *Crawford-El*, 523 U.S. at 589; *see also supra* p. 33 (cataloging factbound determinations entailed by incident-denying certifications). Again, it is difficult to see how any of these factual issues is a "nonfrivolous federal question" or a "question of substantive federal law" as those terms were used by the *Lamagno* plurality. 515 U.S. at 435. Accordingly, unless this case and others of its kind are remanded to state court, Westfall Act litigation will "cross the line" of Article III jurisdiction, as the *Lamagno* dissent warned. *Cf. Mesa v. California*, 489 U.S. 121, 137 (1989) ("Adopting the Government's view would eliminate the substantive Art. III foundation of [the statute] and unnecessarily present grave constitutional problems.").

3. Finally, we think the construction of § 2679(d)(2) proffered here is supported by an analogy to the federal officer removal statute, 28 U.S.C. § 1442(a). As the Court reiterated in *Jefferson County v. Acker*, 527 U.S. 423 (1999), in order to qualify for removal under § 1442(a), the federal officer must "raise a colorable federal defense." *Id.* at 431 (citing *Mesa*, 489 U.S. at 139). In enforcing this mandate, the Court does "not require the officer virtually to 'win his case before he can have it removed.'" *Id.* (quoting *Willingham v. Morgan*, 395 U.S. 402, 407 (1969)). For example, in *Jefferson County* itself, the Court opined that the officers' intergovernmental tax immunity "argument, although we ultimately reject it, presents a colorable federal defense," *id.*, and thus the Court held that "the case was *properly* removed under the federal officer removal statute," *id.* at 427 (emphasis added). In *Mesa*, by contrast, the removing defendants "raise[d] no colorable claim of federal immunity or other federal defense," and the Court therefore affirmed a judgment remanding the defendants' cases to state court. 489 U.S. at 124.

The Attorney General's certification under § 2679(d)(2) that the defendant employee was acting within the scope of his employment is fairly analogized to the assertion of a colorable federal defense under § 1442(a). That certification,

like the federal defense, need not be "right"—in the sense of being resolved in the federal defendant's favor on judicial review—to make removal "proper." Indeed, such a certification would be "conclusive[] . . . for purposes of removal," § 2679(d)(2), in the same way that assertion of a colorable federal defense is conclusive for those purposes. *See, e.g., Arizona v. Manypenny*, 451 U.S. 232, 241-42 (1981) (noting that removal under § 1442(a) contemplates that all issues, federal and state, will be resolved in the federal forum). On the other hand, just like a federal defense that is not even colorable, a certification that is not authorized by the Westfall Act—to wit, an incident-denying certification—cannot sustain a removal. As in *Mesa*, such an action must be remanded to state court.

For these reasons, a removal based upon an incident-denying certification is improper and obliges a remand to state court under § 1447(c), and nothing in the Westfall Act overcomes that obligation. Therefore, remand of this case is not foreclosed; it is compelled.

CONCLUSION

The judgment of the court of appeals should be vacated for lack of jurisdiction. Alternatively, that judgment should be reversed on the merits. In either event, the judgment of the district court remanding this action to the Trigg County (Kentucky) Circuit Court should be reinstated.

Respectfully submitted.

ERIC GRANT
Counsel of Record
ATTORNEY AT LAW
Suite 100
8001 Folsom Boulevard
Sacramento, CA 95826
(916) 388-0833

ANDREA M. MILLER
NAGELEY, MEREDITH & MILLER, INC.
Suite 100
8001 Folsom Boulevard
Sacramento, CA 95826
(916) 386-8282

Counsel for Petitioner

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APPENDIX

28 U.S.C. § 2679

Sec. 2679. Exclusiveness of remedy

(a) The authority of any federal agency to sue and be sued in its own name shall not be construed to authorize suits against such federal agency on claims which are cognizable under section 1346(b) of this title, and the remedies provided by this title in such cases shall be exclusive.

(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.

(c) The Attorney General shall defend any civil action or proceeding brought in any court against any employee of the Government or his estate for any such damage or injury. The employee against whom such civil action or proceeding is brought shall deliver within such time after date of service or knowledge of service as determined by the Attorney General, all process served upon him or an attested true

copy thereof to his immediate superior or to whomever was designated by the head of his department to receive such papers and such person shall promptly furnish copies of the pleadings and process therein to the United States attorney for the district embracing the place wherein the proceeding is brought, to the Attorney General, and to the head of his employing Federal agency.

(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.

(5) Whenever an action or proceeding in which the United States is substituted as the party defendant under this subsection is dismissed for failure first to present a claim pursuant to section 2675(a) of this title, such a claim shall be deemed to be timely presented under section 2401(b) of this title if—

(A) the claim would have been timely had it been filed on the date the underlying civil action was commenced, and

(B) the claim is presented to the appropriate Federal agency within 60 days after dismissal of the civil action.

(e) The Attorney General may compromise or settle any claim asserted in such civil action or proceeding in the manner provided in section 2677, and with the same effect.